



NAVAL POSTGRADUATE SCHOOL

MONTEREY, CALIFORNIA

MBA PROFESSIONAL REPORT

**Achieving Better Acquisition through ADR and other
Best Practices for Resolving Bid Protests**

**By: Paul R. Benishek, and
Benjamin L. Sheinman
December 2009**

**Advisors: Max V. Kidalov,
Raymond E. Franck**

Approved for public release; distribution is unlimited

REPORT DOCUMENTATION PAGE			<i>Form Approved OMB No. 0704-0188</i>	
Public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instruction, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302, and to the Office of Management and Budget, Paperwork Reduction Project (0704-0188) Washington DC 20503.				
1. AGENCY USE ONLY (Leave blank)		2. REPORT DATE December 2009	3. REPORT TYPE AND DATES COVERED MBA Professional Report	
4. TITLE AND SUBTITLE Achieving Better Acquisition through ADR and other Best Practices for Resolving Bid Protests			5. FUNDING NUMBERS	
6. AUTHOR(S) Paul R. Benishek; Benjamin L. Sheinman			QDR15	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) Naval Postgraduate School Monterey, CA 93943-5000			8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING /MONITORING AGENCY NAME(S) AND ADDRESS(ES) Assistant Secretary of the Air Force for Acquisition, Washington, D.C Attn: Major Brett Kayes SAF/AQC 1060 Air Force Pentagon Washington, DC 20330-1060			10. SPONSORING/MONITORING AGENCY REPORT NUMBER	
11. SUPPLEMENTARY NOTES The views expressed in this thesis are those of the author and do not reflect the official policy or position of the Department of Defense or the U.S. Government.				
12a. DISTRIBUTION / AVAILABILITY STATEMENT Approved for public release; distribution unlimited			12b. DISTRIBUTION CODE A	
13. ABSTRACT (maximum 200 words) This project examines bid protest prevention and resolution strategies to shed light on ways to save the government money and time. Successful resolutions of protests depends on a number of factors, including government and private sector protest management and litigation strategies; Alternate Dispute Resolution (ADR) policies of federal agencies; legal and regulatory requirements; and remedies available to contractors. Our research identifies and analyzes best ADR practices and other remedies and preventions for resolving bid protests. Areas examined include processes and remedies utilized by selected federal agencies and obstacles to fomenting improved cooperation between industry and government, which may preclude win-win resolutions to bid protests. Insights regarding the validity of our entering hypotheses about ADR are obtained from a survey of acquisition and legal professionals regarding their perceptions, opinions, and recommendations on bid protest practices and the use of ADR procedures. Our objectives are to identify ADR and other process improvement recommendations that are crucial to effective contracting and support the government's efforts to improve adjudicative forums for resolution of contract disputes and bid protests. Our research suggests that agencies can mitigate protest expenses and interruptions by managing the protest process in a systematic, business-like way. At the present time, agencies rarely use most procedural tools that are required or authorized under Federal laws and regulations to reduce time delays and costs from bid protests. Among other things, we recommend energetic agency approaches to preventing disputes (e.g., quality debriefings), and dealing with disputes (e.g., formal cost-benefit analysis of agency defense strategies, strong defense of agency actions, and full use of ADR methods). We also recommend ADR as the default method for settling bid protests.				
14. SUBJECT TERMS Bid Protests, Acquisition Process, Best Practices, Alternative Dispute Resolution, Federal Agencies, Defense Contracting			15. NUMBER OF PAGES 105	
			16. PRICE CODE	
17. SECURITY CLASSIFICATION OF REPORT Unclassified	18. SECURITY CLASSIFICATION OF THIS PAGE Unclassified	19. SECURITY CLASSIFICATION OF ABSTRACT Unclassified	20. LIMITATION OF ABSTRACT UU	

THIS PAGE INTENTIONALLY LEFT BLANK

Approved for public release; distribution is unlimited

**ACHIEVING BETTER ACQUISITION THROUGH ADR AND OTHER
BEST PRACTICES FOR RESOLVING BID PROTESTS**

Paul Benishek, Lieutenant Commander, Supply Corps, United States Navy
Benjamin Sheinman, Lieutenant Commander, Supply Corps, United States Navy

Submitted in partial fulfillment of the requirements for the degree of

MASTER OF BUSINESS ADMINISTRATION

from the

**NAVAL POSTGRADUATE SCHOOL
December 2009**

Authors:

Paul R. Benishek

Benjamin L. Sheinman

Approved by:

Max V. Kidalov, JD, Lead Advisor

Raymond E. Franck, PhD, Support Advisor

William Gates, PhD, Dean
Graduate School of Business and Public Policy

THIS PAGE INTENTIONALLY LEFT BLANK

ACHIEVING BETTER ACQUISITION THROUGH ADR AND OTHER BEST PRACTICES FOR RESOLVING BID PROTESTS

ABSTRACT

This project examines bid protest prevention and resolution strategies to shed light on ways to save the government money and time. Successful resolutions of protests depends on a number of factors, including government and private sector protest management and litigation strategies; Alternate Dispute Resolution (ADR) policies of federal agencies; legal and regulatory requirements; and remedies available to contractors. Our research identifies and analyzes best ADR practices and other remedies and preventions for resolving bid protests. Areas examined include processes and remedies utilized by selected federal agencies and obstacles to fomenting improved cooperation between industry and government, which may preclude win-win resolutions to bid protests. Insights regarding the validity of our entering hypotheses about ADR are obtained from a survey of acquisition and legal professionals regarding their perceptions, opinions, and recommendations on bid protest practices and the use of ADR procedures. Our objectives are to identify ADR and other process improvement recommendations that are crucial to effective contracting and support the government's efforts to improve adjudicative forums for resolution of contract disputes and bid protests. Our research suggests that agencies can mitigate protest expenses and interruptions by managing the protest process in a systematic, business-like way. At the present time, agencies rarely use most procedural tools that are required or authorized under federal laws and regulations to reduce time delays and costs from bid protests. Among other things, we recommend energetic agency approaches to preventing disputes (e.g., quality debriefings), and dealing with disputes (e.g., formal cost-benefit analysis of agency defense strategies, strong defense of agency actions, and full use of ADR methods). We also recommend ADR as the default method for settling bid protests.

THIS PAGE INTENTIONALLY LEFT BLANK

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
A.	PURPOSE.....	1
B.	BACKGROUND.....	1
C.	RESEARCH OBJECTIVE.....	3
D.	RESEARCH QUESTIONS.....	3
E.	METHODOLOGY.....	4
F.	THESIS ORGANIZATION.....	4
II.	BACKGROUND.....	5
A.	INTRODUCTION.....	5
B.	IMPACT ON ACQUISITION PROCESS.....	7
C.	AGENCY MANAGEMENT OF THE PROTEST PROCESS TO MITIGATE TIME DELAYS AND COSTS.....	10
1.	USE OF STAY OVERRIDES TO MINIMIZE TIME DELAYS	10
2.	USE OF DEFENSIVE STRATEGIES TO MINIMIZE TIME DELAYS AND COSTS.....	14
3.	USE OF ADR TO MINIMIZE TIME DELAYS AND COSTS.....	16
D.	BENEFITS OF ADR IN RESOLVING PROTESTS.....	17
III.	SURVEY METHODOLOGY.....	19
A.	SURVEY GOALS.....	19
B.	SURVEY DESIGN.....	19
C.	SURVEY SCORING.....	20
D.	SURVEY SUBJECTS.....	20
E.	SURVEY LIMITATIONS.....	20
IV.	SURVEY RESULTS AND ANALYSIS.....	23
A.	RESPONSE RATE AND BACKGROUND RESULTS.....	23
B.	STRATEGIES AND PRACTICES TO MINIMIZE BID PROTEST IMPACT.....	24
1.	Most Frequently Cited Strategies and Practices.....	24
2.	Least Frequently Cited Strategies and Practices.....	26
C.	USE OF ADR PROCEDURES TO RESOLVE BID PROTESTS.....	28
D.	ASPECTS OF CURRENT POLICIES, PRACTICES, LAWS, OR REGULATIONS THAT PRECLUDE EFFECTIVE RESOLUTION OF PROTESTS.....	30
1.	Most Frequently Cited Policies, Practices, Laws, or Regulations.....	30
2.	Least Frequently Cited Policies, Practices, Laws, or Regulations.....	31
E.	FURTHER ANALYSIS OF RESULTS.....	33
1.	Introduction.....	33
2.	Civilian vs. Military Perspective.....	33
3.	Acquisition vs. Legal Perspective.....	37

4.	Additional Considerations.....	44
F.	FURTHER IMPLICATIONS.....	47
G.	RESPONDENT COMMENTS AND OPINIONS.....	50
V.	ANALYSIS OF FEDERAL AVIATION ADMINISTRATION AND ARMY MATERIAL COMMAND AGENCY PRACTICES.....	55
A.	INTRODUCTION TO THE FAA’S ODRA PROCESS	55
B.	KEY DIFFERENCES BETWEEN FAA AND GAO’S BID PROTEST PROCESS	56
C.	THE U.S. ARMY MATERIEL COMMAND’S AGENCY LEVEL PROTEST PROGRAM.....	58
D.	KEY DIFFERENCES BETWEEN AMC AND GAO’S BID PROTEST PROCESS	60
VI.	SUMMARY AND ANALYSIS	63
A.	ANSWERS TO RESEARCH QUESTIONS	63
1.	Strategies and Practices Employed	63
2.	Barriers to Effective Resolution	64
3.	Obstacles to Effective Cooperation	64
VII.	RECOMMENDATIONS AND AREAS FOR FURTHER RESEARCH	67
A.	RECOMMENDATIONS.....	67
1.	Case for Fiscal Disincentives beyond Truly Frivolous is not Demonstrated	67
2.	Agencies must Vigorously Object to Protests when Appropriate	68
3.	Provide Quality Debriefs to Prevent or Limit Strategic Protests..	68
4.	Require Parties to Document Decision not to use ADR and other Similar Tools	69
B.	AREAS FOR FURTHER RESEARCH.....	70
	APPENDIX A. ADR DEFINITIONS.....	71
	APPENDIX B. RESEARCH SURVEY.....	73
	APPENDIX C. LIST OF FEDERAL AGENCIES SOLICITED	85
	LIST OF REFERENCES.....	87
	INITIAL DISTRIBUTION LIST	89

LIST OF FIGURES

Figure 1.	Competing Interests in a Protest System	6
Figure 2.	Number of Protests Filed at the GAO since 1989.....	7
Figure 3.	GAO Bid Protest Statistics FY2001-FY2008	8
Figure 4.	Bid Protests at the United States Court of Federal Claims FY2000-FY2007....	8
Figure 5.	GAO Protest Process (Planning / Request for Information).....	12
Figure 6.	GAO Protests Process (Request for Proposal/Invitation for Bid).....	13
Figure 7.	GAO Protest Process (Post Award)	14
Figure 8.	Protest Response	16
Figure 9.	Survey Respondent’s Professional Background	23
Figure 10.	Survey Respondents by Agency	24
Figure 11.	Top Ten Defensive/Preventive Strategies and Practices Identified.....	26
Figure 12.	Ten Least Cited Defensive/Preventive Strategies and Practices.....	28
Figure 13.	The Use of ADR Procedures to Resolve Bid Protests	30
Figure 14.	Top Ten Policies, Practices or Laws that Preclude Effective Avoidance or Resolution of Protests	31
Figure 15.	Ten Least Utilized Factors Precluding Effective Avoidance or Resolution of Bid Protests.....	32
Figure 16.	Top Ten Civilian Agency Strategies Compared to Military Agencies.....	33
Figure 17.	Comparison of Civilian Agency use of ADR Procedures with Military Agencies.....	35
Figure 18.	Comparison of Ten Most Frequently Identified Civilian and Military Agency Perception of Processes, Laws, Policies, or Regulations.	36
Figure 19.	Comparison of Ten Least Frequently Identified Civilian and Military Agency Perception of Processes, Laws, Policies, or Regulations vs. Military Agencies.....	37
Figure 20.	Comparison of Ten Most Frequently Identified Strategies and Practices Identified by Legal Professionals with those of Acquisition Professionals.....	39
Figure 21.	Comparison of Ten Least Frequently Identified Strategies and Practices Identified by Legal Professionals with those of Acquisition Professionals.....	40
Figure 22.	Comparison of Legal and Acquisition Perspective on the use of ADR Procedures to resolve Bid Protests.....	41
Figure 23.	Comparison of Ten Most Frequently Identified Acquisition and Legal Professionals Views on Factors that Preclude Effective Resolution or Avoidance of Bid Protests.	43
Figure 24.	Comparison of Ten Least Frequently Identified Acquisition and Legal Professionals Views on Factors that Preclude Effective Resolution or Avoidance of Bid Protests.	44
Figure 25.	Comparison of Agency Defensive Strategies and Processes that Preclude Effective Resolution of Protests.....	45
Figure 26.	Relative Identification of Defensive Strategies used to Counteract Delays Caused by Bid Protests	48

Figure 27.	Relative Identification of Defensive Strategies used to Reduce Costs Associated with Bid Protests	49
Figure 28.	Relative Identification of Defensive Strategies used to Reduce Protestor's Inclination to Protest for Strategic Business Reasons.....	50
Figure 29.	Respondent Comments on Factors that Motivate or Constrain a Protestor to Utilize Agency Protest Procedures	52
Figure 30.	Respondent Comments on the Lack of Disincentives to Protest	53
Figure 31.	Comparison of GAO vs. FAA Timeline of Key Protest Milestones.	58
Figure 32.	Comparison of GAO vs. AMC Timeline of Key Protest Milestones	61

LIST OF ACRONYMS AND ABBREVIATIONS

ADR	Alternative Dispute Resolution
AMC	Army Materiel Command
AMS	Acquisition Management Systems
C.F.R.	Code of Federal Regulations
CICA	Completion in Contracting Act
CO	Contracting Officer
CRS	Congressional Research Service
DLA	Defense Logistics Agency
DoD	Department of Defense
DOT	Department of Transportation
DRO	Dispute Resolution Officer
E.O.	Executive Order
FAA	Federal Aviation Administration
FAR	Federal Acquisition Regulation
FOIA	Freedom of Information Act
FY	Fiscal Year
GAO	United States Government Accountability Office
GSBCA	General Services Board of Contract Appeals

NLT	Not Later Than
ODRA	Office of Dispute Resolution for Acquisition
RFP	Request for Proposals
SAP	Simplified Acquisition Procedures
USAF	United States Air Force
USC	United States Code
USD AT&L	Under Secretary of Defense for Acquisition, Technology, and Logistics

ACKNOWLEDGMENTS

We would like to express our deepest gratitude to our generous advisor, Professor Max Kidalov, for his remarkable support and rich professional guidance. Your time, patience, and ample good humor were invaluable throughout this project. You're a great running partner as well.

Professor Raymond Franck, thank you for the thoroughness and care you provided during the review of our report. It is clear why so many students seek out your project and thesis guidance.

Additional appreciation is extended to Dean William Gates, and professors Diana Angelis and Francois Melese. Your assistance and direction were invaluable in the synthesis and development of this professional report.

We would also like to express our gratefulness to our families for their continued and unwavering love and support during our time here at the Naval Postgraduate School.

THIS PAGE INTENTIONALLY LEFT BLANK

I. INTRODUCTION

A. PURPOSE

The Office of Assistant Secretary for Acquisition, U.S. Department of the Air Force, requested the Naval Postgraduate School to study strategies to minimize time delays and costs borne by defense acquisition programs as a result of bid protests. Bid protests are defined by the Competition in Contracting Act of 1984 (CICA) as:

Written objection by an interested party to any of the following: a solicitation by an agency for offers for a contract for the procurement of property or services, the cancellation of the solicitation, an award or proposed award of the contract, and the termination of an award of the contract if the written objection contains an allegation that the termination is based in part, on the improprieties concerning the award of the contract.¹

The successful resolutions of protests depends on a number of factors, including government and private sector litigation strategies, the Alternative Dispute Resolution (ADR) policies of federal agencies, legal and regulatory requirements, and remedies available to contractors. In the report that follows, we conclude that better ADR practices and other prevention and resolution strategies need to be identified and implemented. The purpose of this project is to evaluate bid protest prevention and resolutions strategies and identify best practices in order to save the government money and time.

B. BACKGROUND

In any bid protest system, there are four principal parties: the disappointed offeror denied a contract award or potential offeror excluded from competition, the acquiring agency, the public at large and their elected representatives, and possibly, an intervening offeror or successful awardee. Each principal has a distinct interest in the resolution of the protest. The unsuccessful offerors seek a forum to air their complaints and to learn as much information as possible about denial or exclusion, and ultimately obtain some type

¹ United States Code, 31 § 3551(1).

of meaningful relief. The acquiring agency seeks a resolution to the protest in a manner that does not hinder the effectiveness or efficiency of the acquisition process. The public seeks a resolution that promotes the integrity and effectiveness of the acquisition system while holding government officials accountable for their actions.² The intervening offeror seeks resolution that supports the original award or favorable terms for award.

There are a number of fora where a protestor can seek relief. Protests can be filed with the procuring agency,³ with the Government Accountability Office (GAO)⁴, or the U.S. Court of Federal Claims.⁵ The Comptroller General, head of the GAO, is mandated by CICA to provide “for the inexpensive and expeditious resolution of protests.”⁶ In 1995, President William J. Clinton signed Executive Order No. 12979 mandating that agencies “to the maximum extent practicable, provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests, including, where appropriate and as permitted by law, the use of alternative resolution techniques.” In that Order, President Clinton stated that these measures were intended “to ensure effective and efficient expenditure of public funds and fair and expeditious resolution of protests to the award of Federal procurement contracts.” The Federal Acquisition Regulation also incorporates the tenets of CICA and E.O. 12979 in Subpart 33.1, Protests. Implementation of ADR practices is a major means by which the GAO and federal agencies can put into practice these legal obligations.

During Fiscal Year 2008, 1,652 bid protests were filed with the GAO. GAO issued formal decisions in 291 cases, sustaining 60 protests (more detailed statistics are provided in Chapter II). In the same year, GAO utilized self-described ADR practices to resolve 78 cases, citing a 78% success rate. Success in these instances is defined as resolution absent a formal GAO decision.⁷ In general, the GAO utilizes two types of

² Daniel I. Gordon, “Constructing a Bid Protest Process: Choices Every Procurement Challenge System Must Make,” *Public Contract Law Journal* 3 (2006): 4.

³ Code of Federal Regulations, 48 § 33.103(c).

⁴ United States Code, 31 § 3551 et. seq.

⁵ United States Code, 28 § 1491(b).

⁶ United States Code, 31 § 3554 (a)(1).

⁷ U.S. Government Accountability Office, 09-251R.

ADR, negotiation assistance at the beginning and outcome prediction at the end of litigation (where the majority of costs and delays have already been incurred).⁸ The only substantial difference between outcome prediction and a formal decision is the issuance of a written decision by GAO. In terms of time, effort, and cost, the processes are nearly identical.

C. RESEARCH OBJECTIVE

The objective of this project is to specifically identify, analyze, and develop better ADR practices and other prevention and resolution strategies to control protest costs and delays. Such practices and strategies must, at a minimum, provide an interested party the opportunity for meaningful relief, promote the efficiency and effectiveness of the acquisition system, and preserve the public's trust in the fairness of the acquisition process.

D. RESEARCH QUESTIONS

Since this project will consist of the identification and analysis of best ADR practices for resolving bid protests, the main focus will revolve around the primary research question of: What ADR strategies, remedies, or practices exist, that, if adopted by the Department of Defense (DoD), would lessen the systemic impact of bid protests on the acquisition process in terms of delays and costs?

Specific areas addressed consist of processes and remedies utilized by selected federal agencies and the barriers to more effective cooperation between industry and government that may prohibit give-and-take compromises resulting in acceptable bid protests resolutions. Our analysis will also answer the following research questions:

- What strategies or practices are currently being used to minimize the impact of bid protest delays and costs on the acquisition process while maintaining integrity, economy, and efficiency?
- What current processes or regulations preclude effective avoidance or resolution of bid protests in a manner that minimizes adverse impacts on the acquisition system?

⁸ U.S. Government Accountability Office, *09-4715P*.

- What are the obstacles that impede effective cooperation in resolving bid protests?

This research will provide decision makers with a usable analysis of current “best practice” examples along with recommendations.

E. METHODOLOGY

This project is based on a general literature review, including federal agency reports from the General Accounting Office, Department of Defense and Service component regulations, reports, journal articles, written texts, web searches, and surveys conducted with General Counsel and Acquisition leadership personnel within the military services and select federal/DoD agencies. The research methodologies for this project include the following:

- A survey of Legal and Acquisition leadership within the military services and select federal/DoD agencies.
- A review of academic literature, government reports, government regulations and statutes, and other professional papers.
- An analysis and comparison of bid protest practices within the Army Materiel Command (AMC), the GAO, and the Federal Aviation Administration (FAA).

F. THESIS ORGANIZATION

This project is organized into seven chapters. Chapter II provides an overview of the current bid protest process along with background information. Chapter III provides an analysis of FAA and AMC bid protest procedures compared with those of the GAO. Chapter IV describes our survey goals, design, methodology, and scoring. Chapter V discusses our survey results and provides an in depth analysis of the results. Chapter VI is our conclusion, summarizing the results of our project. Chapter VII details our recommendations and discusses areas for further research.

II. BACKGROUND

A. INTRODUCTION

In a 2006 paper entitled “Constructing a Bid Protest Process: Choices Every Procurement Challenge System Must Make,” current Administrator for Federal Procurement Policy and then-GAO Associate General Counsel Daniel Gordon, described a protest as an action that is “always between the agency and a vendor that wants but does not have a contract.”⁹ A protester is typically a party aggrieved by the actions of a government agency that resulted or could result in the award of a contract to an offeror viewed by the protester as non-deserving for various reasons. Both the Competition and Contracting Act and the Federal Acquisition Regulation Part 33 permits protests to be resolved through judicial or administrative litigation, but informal procedures are encouraged.¹⁰ One of the key requirements to prevail in a bid protest is a showing that the protester has been prejudiced by improper agency activities. The mere presence of mistake or illegal action does not necessarily imply a protest has merit unless the protestor can show they were in some way prejudiced by the agency’s mistake or illegal activity. In other words, the mistake or illegality must affect acquisition planning or award decision. A protester who prevails is entitled to a remedy, usually in the form of corrections in the bidding process or monetary reimbursement of bid and proposal costs and/or legal consultation fees.

The Comptroller General of the Government Accountability Office is mandated by CICA to provide “for the inexpensive and expeditious resolution of protests.”¹¹ With this legal mandate comes a necessary duty to serve the public interest. As noted by the GAO’s General Counsel, Mr. Gary Kepplinger, the GAO seeks:

...to balance the competing interests and goals of the procurement process...the presence of an independent forum for disappointed bidders

⁹ Gordon, “Constructing a Bid Protest Process: Choices Every Procurement Challenge System Must Make,” 2.

¹⁰ Federal Acquisition Regulation, Subpart 33.1.

¹¹ United States Code, 31 § 3554 (a)(1).

enhances the accountability of procurement officials and agencies, opens a window of transparency into how the procurement system operates, and protects the integrity and legitimacy of a competitive and robust federal procurement process.¹²

At the center of any bid protest is a certain inherent conflict between the needs of the agency concerned and the rights of the disappointed bidder. An efficient bid protest process must ensure protests are handled expeditiously, thereby minimizing the disruption to the acquisition process. An effective system must ensure disappointed bidders are given a forum to air their grievances and agency officials are held accountable for their actions.¹³ Figure 1 illustrates this concept.



Figure 1. Competing Interests in a Protest System

¹² Gary Kepplinger, “Commentary: GAO’s Bid Protest Role,” *Federal Times* (January 19, 2009): 1.

¹³ Margaret M. Worthington and Louis P. Goldsman, *Contracting with the Federal Government* (New York: John Wiley, 1998), 472.

B. IMPACT ON ACQUISITION PROCESS

The number of protests filed has increased by 37% between FY 2001 and FY 2008.¹⁴ Bid protests continue to have a systemic impact on the acquisition system. Figure 2, illustrates the trend in protests at the GAO over the last twenty years.

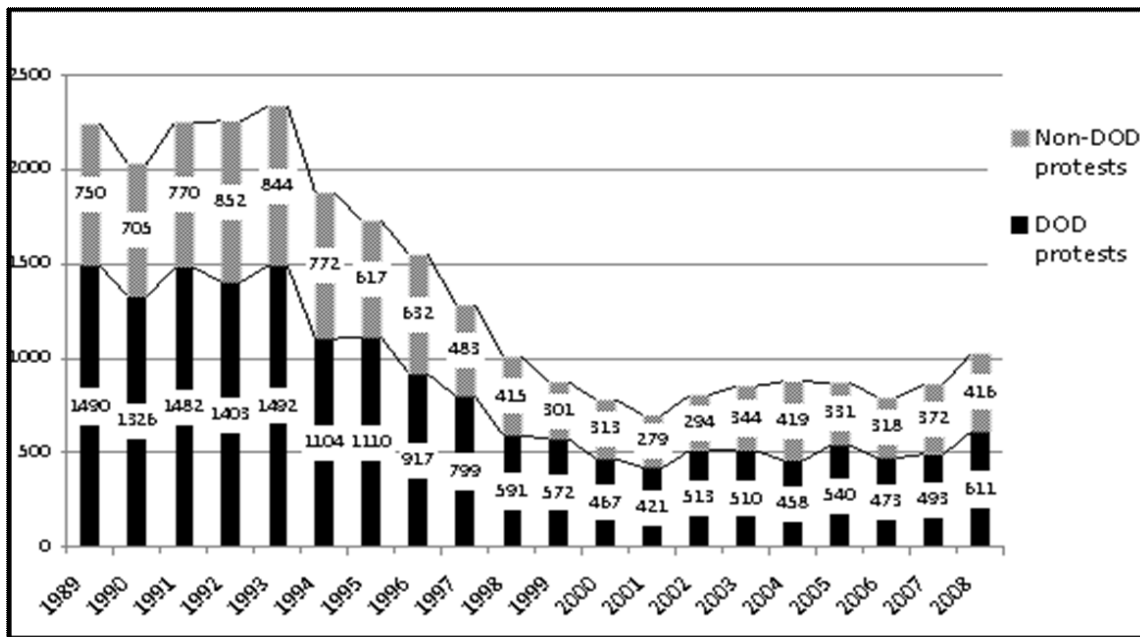


Figure 2. Number of Protests Filed at the GAO since 1989¹⁵

Though the number of protests has declined in historical terms, it is worth noting the increase in protests starting in FY 2001. The number of protests filed at the GAO has increased by 37% between FY 2001 and FY 2008.¹⁶ Figure 3 contains detailed GAO bid protest statistics for FY's 2001 through 2008. Data from the Federal Procurement Data System shows that over the same period the number of federal contract actions fell by 26.79% from 11,410,869 to 8,354,648, while total federal procurement dollars jumped by 128.69% from \$234,879,065,000 to \$537,155,101,194.

¹⁴ Moshe Schwartz and Kate M. Manuel. United States. *GAO Bid Protests: Trends, Analysis, and Options for Congress*. Cong. Doc. CRS R40227. 2009, 2.

¹⁵ U.S. Government Accountability Office, B-401197, 7.

¹⁶ Moshe Schwartz and Kate M. Manuel. United States. *GAO Bid Protests: Trends, Analysis, and Options for Congress*. Cong. Doc. CRS R40227. 2009, 2.

FY	2001	2002	2003	2004	2005	2006	2007	2008
Protests Filed	1,146	1,204	1,352	1,485	1,356	1,327	1,411	1,652
Protests Closed	1098	1133	1244	1405	1341	1274	1393	1581
Closed Protests Resolved on their Merit	311	256	290	365	306	249	335	291
Sustained in Whole or Part	66(21%)	41(16%)	50(17%)	75(21%)	71(23%)	72(29%)	91(27%)	60(21%)
Effectiveness Rate	33%	33%	33%	34%	37%	39%	38%	42%
Cases Resolved Through ADR	150(84%)	145(84%)	120(92%)	123(91%)	103(91%)	91(96%)	62(85%)	78(78%)
GAO Hearings for Fully Developed Decisions	63(12%)	23(5%)	74(13%)	56(9%)	41(8%)	51(11%)	41(8%)	32(6%)

Figure 3. GAO Bid Protest Statistics FY2001-FY2008¹⁷

The number of bid protests filed with the United States Court of Federal Claims is presented in Figure 4.

FY	2000	2001	2002	2003	2004	2005	2006	2007
Number of Cases Involving Bid Protests	54	57	39	55	69	61	73	70
Percentage of Cases Involving Bid Protests	6.8%	7.3%	2.6%	1.8%	2.9%	3.6%	6.8%	6.4%

Figure 4. Bid Protests at the United States Court of Federal Claims FY2000-FY2007¹⁸

Bid protests continue to have a systemic impact on the acquisition system. No federal agency is more acutely aware of this trend than the Department of Defense. As noted in 2007, by then Undersecretary of Defense for Acquisition, Technology, and Logistics (USD AT&L), the Honorable John J. Young:

Protests are extremely detrimental to the warfighter and the taxpayer, [they] consume vast amounts of the time of acquisition, legal, and requirements team members; delay program initiation and the delivery of

¹⁷ Michael J. Schaengold, T. Michael Guiffre, Elizabeth M. Gill, "Choice of Forum for Federal Government Contract Bid Protests," 18 *Federal Bar Circuit Journal* (2009): 255.

¹⁸ Schanegold, Guiffre, and Gill, "Choice of Forum for Federal Government Contract Bid Protests," 255.

capability; strain relations with our industry partners and stakeholders; and create misperceptions among American citizens.¹⁹

In general, all protests can potentially involve a delay in contract award or performance as well as internal and out-of-pocket costs. The much-publicized case of the U.S. Air Force's KC-X Air Refueling Tanker clearly demonstrates the impact protests can have on the acquisition system. In January 2007, the Air Force issued a Request for Proposals (RFP).²⁰ On February 29, 2008, the Air Force selected Northrop Grumman for contract award. On March 11, 2008, Boeing filed a protest with the GAO, which the GAO sustained in a written decision on June 18, 2008.²¹ During the lengthy protest litigation, the Air Force paid the salaries of its nineteen-lawyer defense team, and the GAO decision recommended that the Air Force pay the fees of fifteen attorneys of record representing Boeing. By October of 2009, the Air Force once again issued a "new" draft RFP for the KC-X tanker.²² To date, no award has been made. Despite the merit the GAO found in Boeing's protest (i.e. lack of discipline in the USAF source selection), there was a countervailing deleterious impact on the acquisition process. For a period of over two years, the Air Force has been unable to award a contract for an air refueling tanker. In fact, during 2008, bid protests delayed three major defense acquisition programs, valued at over \$70 million.²³ Such situations clearly underscore the point made by Undersecretary Young.

Although the GAO has consistently resolved all protests within their required statutory time frame of 100 days,²⁴ the systemic impact of protests still remain. Both industry and government should welcome the implementation of a policy that could reduce this impact. Alternative Dispute Resolution is one such policy that if used effectively, has such potential. Additionally, ADR has the potential to preserve the

¹⁹ RDML Sean Crean, Deputy Assistant Secretary of the Navy, Acquisition and Logistics Management, "Improving Communication during Competitive Source Selections," Letter to Heads of Contracting Activities, January 8, 2008, 3.

²⁰ U.S. Government Accountability Office, *B-311344*, 5.

²¹ U.S. Government Accountability Office, *08-991T*, 3.

²² U.S. Air Force FA8625-10-R-6600, 1.

²³ Schwartz, *GAO Bid Protests: Trends, Analysis, and Options for Congress*, 10.

²⁴ Schwartz, *GAO Bid Protests: Trends, Analysis, and Options for Congress*, 9.

delicate balance between the competing interests of the bid protest process and to empower military and civilian agencies to reduce protests costs and delays. In order to understand this fully, one must have a basic understanding of how and when bid protests arise, the path they follow on their way to resolution, the defensive strategies that can be used to prevent protests and control their resolution path, and the cost and benefit trade-offs agencies face from various protest defense strategies.

C. AGENCY MANAGEMENT OF THE PROTEST PROCESS TO MITIGATE TIME DELAYS AND COSTS

1. USE OF STAY OVERRIDES TO MINIMIZE TIME DELAYS

As FAR Subpart 33.1 indicates, a protest timely filed at the GAO or agency results in a mandatory stay of the procurement or proposed procurement. Agencies can also impose discretionary stays. The government can override a mandatory stay only based on “urgent and compelling circumstances which significantly affect the interest of the United States [that] will not permit waiting for the GAO’s decision” or based on “best interests of the United States.”²⁵ In general, a protest may occur at any one of five stages in the acquisition process.

- Prior to solicitation (e.g., Requests for Information, FAR Part 5 Synopsis).
- During the solicitation (e.g., Requests for Proposals, Invitation for Bids), Requests for Quotation).
- During the evaluation (at creation of the competitive range)
- Post Award
- After agency-level protest

At the agency level, a stay override is available on both grounds during the first four procurement stages. If the agency-level resolution is not satisfactory to the protester and a GAO protests is filed, a stay override may be available at that time as well. At the GAO, mandatory stays at two first pre-award stages can be overridden only for urgent and compelling circumstances if the award is likely within thirty days. During the second and third stages, the 30-day requirement is not applicable and stays can be overridden for best interests. If the protester is an incumbent denied new award, the agency may be

²⁵ Federal Acquisition Regulation, Part 33.104.

required to issue a bridge contract in lieu of override. A protester may go to the Court of Federal Claims to challenge the override of stay at the GAO or agency level. However, successful stay overrides are also risky. If an agency ultimately loses the protest after obtaining a stay override, and performance has been substantially completed, the agency's total contract cost would increase because the GAO would likely recommend the agency to pay the protester its legal fees as well as its bid and proposal costs. The flow charts contained in Figures 5, 6, and 7 depict each of these instances for all protests instances at the GAO, as well as the decision points. Protests filed at the Court of Federal Claims do not trigger automatic stays. The Court may impose a stay through a Temporary Restraining Order or a Preliminary Injunction, or the government may agree to a voluntary stay in lieu of injunction. They may avoid a stay by arguing that the protester is unlikely to succeed on the merits, the harm to the agency outweighs the harm to the protester, the public interest is served by allowing the procurement to continue, and the protester will not suffer irreparable injury without remedy.

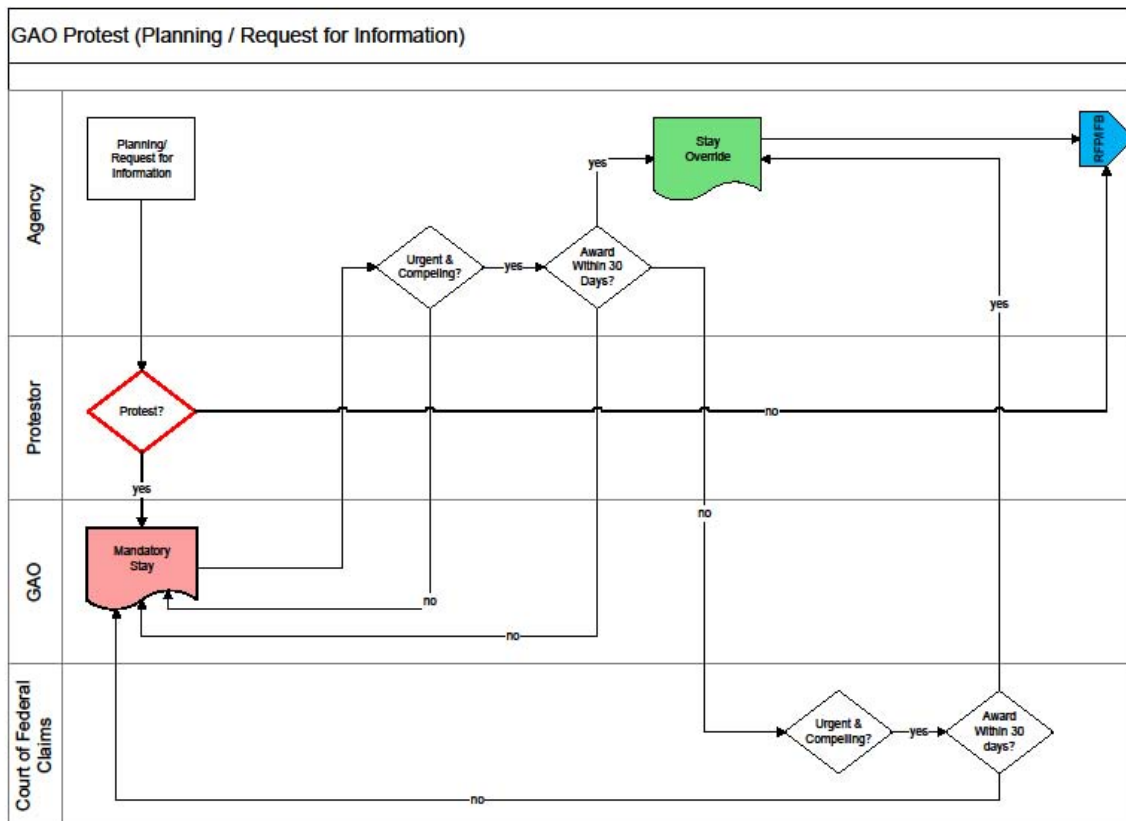


Figure 5. GAO Protest Process (Planning / Request for Information)²⁶

²⁶ Max V. Kidalov and Diana Angelis, Naval Postgraduate School, Work Paper, “GAO Protest Process Flow Charts and Guide to Managing Costs and Time Delays in Bid Protests” (2009).

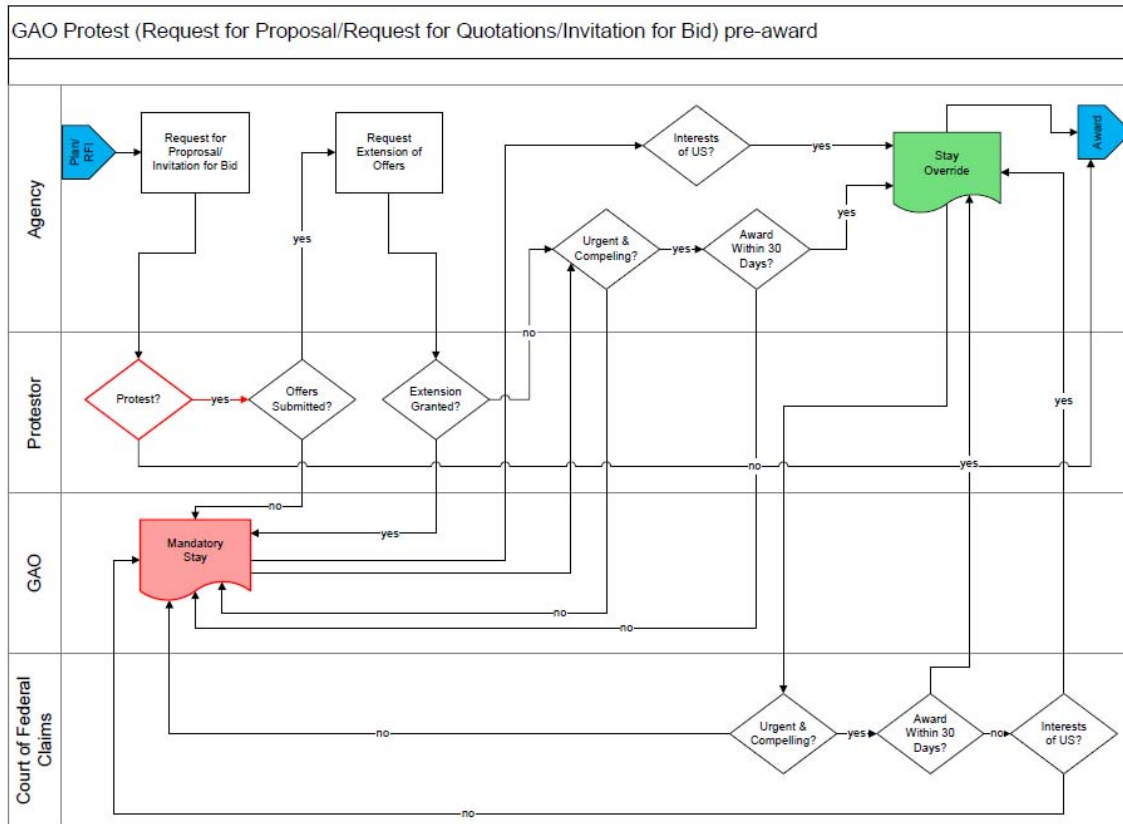


Figure 6. GAO Protests Process (Request for Proposal/Invitation for Bid)²⁷

²⁷ Max V. Kidalov and Diana Angelis, “GAO Protest Process Flow Charts and Guide to Managing Costs and Time Delays in Bid Protests”.

- The agency opts for a formal litigation before the GAO by filing an agency report. The GAO may issue a written opinion or conduct one of two special kinds of GAO ADR (negotiation assistance or outcome prediction).
- The agency opts for expedited litigation by seeking an express option.

The first three options enable agencies to achieve full resolution at less than 30 days and avoid paying protester legal fees. Litigation under the fourth strategy can last one-hundred (100) days, and under the fifth strategy, sixty-five (65) days. The last two strategies allow the agency to secure GAO validation of agency's procurement decisions in the form of a favorable GAO opinion, but at the risk of having to pay protester its legal fees in the event of loss. Upon receipt of a protest, the agency must determine how to defend against the protest. If the agency believes that the protest is indeed frivolous, meritless, or jurisdiction, then it can seek summary dismissal from the GAO. Barring such a dismissal from GAO, the agency must then prepare to defend its procurement action before the GAO (possibly utilizing the express option), take voluntary corrective action, or utilize ADR.

Figure 8 depicts this process, as well as the decision points.

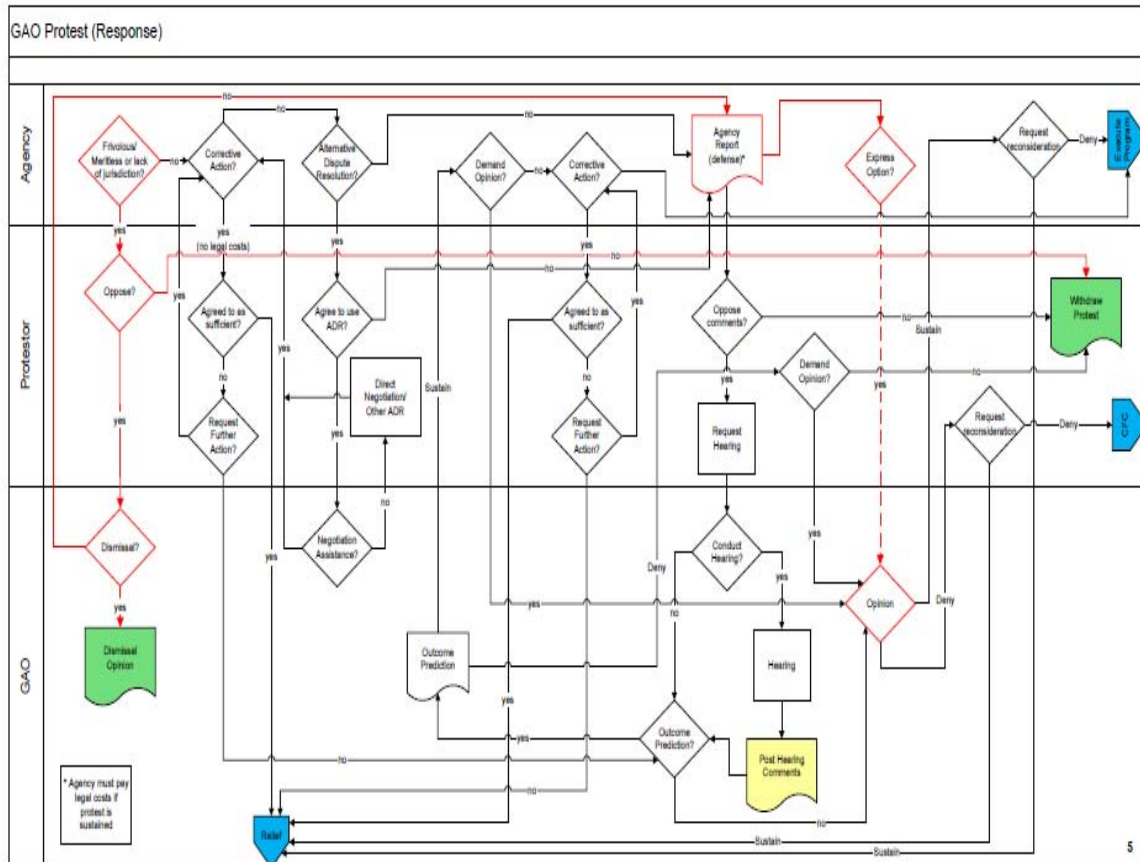


Figure 8. Protest Response²⁹

3. USE OF ADR TO MINIMIZE TIME DELAYS AND COSTS

As shown in Figure 8, there are essentially five decision points where an agency can influence the process. As discussed earlier, an agency may seek dismissal from GAO on grounds that the protest is either meritless, frivolous, or lacks jurisdiction, an agency may take voluntary corrective action, or an agency may pursue ADR. Should an agency attempt to litigate a protest and lose, the agency may be responsible for paying “the successful protestor” the cost for “filing and pursuing the protest, including attorney’s fees and counsel and expert witness fees.”³⁰ While the exact costs a protestor may incur in filing a protest varies, in the past GAO has recommended agencies pay successful

²⁹ Kidalov and Angelis, “GAO Protest Process Flow Chart.”

³⁰ 4 C.F.R. § 21.8(d)(1).

protestors payment in excess of \$300,000.³¹ Any government strategy or practice short of adjudication may result in the government not having to reimburse a successful protestor for the costs associated with filing the protests. As a result, in addition to time, ADR has the potential to save the government money.

ADR is far from a new concept. In 1995, President Clinton issued Executive Order No. 12979 mandating that agencies use “to the maximum extent practicable...the use of alternative dispute resolution techniques.” Within GAO, there are two “ADR options” available, negotiation assistance and outcome prediction.³² Outcome prediction is the most common form of ADR employed by GAO.³³ However, since negotiation assistance can occur prior to submission of the agency report, it offers the greatest potential to reduce the delay a protest has on a particular acquisition. Conversely, outcome prediction takes place only after all issues have been raised and an evidentiary hearing has taken place,³⁴ at which point the GAO attorney will advise the parties of the “likely outcome of the case.”³⁵

Thus, the substantial difference between outcome prediction and the formal adjudication of a protest is merely the absence of written decision by GAO in the former. In terms of minimizing delays to the acquisition process, it does not seem that outcome prediction is very a useful mechanism. Outcome prediction serves to minimize the reputational damage to an agency or its official responsible for the procurement at issue, but does not prevent the same problem that led to the protest from occurring in the future.

D. BENEFITS OF ADR IN RESOLVING PROTESTS

As noted previously, protests usually involve a delay in either contract award or performance which can adversely impact the mission of the agency concerned. A goal of ADR should be to minimize this delay. Best ADR practices need to be identified and

³¹ U.S. Government Accountability Office, *B-400058.4*

³² U.S. Government Accountability Office, *09-471SP*, 27.

³³ William J. Spriggs and Max V. Kidalov, “No Way to Protest,” *Legal Times* (March 17, 2003): 2.

³⁴ Spriggs and Kidalov, “No Way to Protest,” 2.

³⁵ U.S. Government Accountability Office, *09-471SP*, 27.

implemented by federal agencies. One need not look further than the federal government itself to find numerous examples of successful ADR programs.

Statutorily exempt from the federal acquisition system under the 1996 Department of Transportation (DOT) Appropriations Act³⁶, the Federal Aviation Administration has developed its own set of procurement policies that include the use of ADR. Similarly, in an effort to reduce the impact of protests, the United States Army Materiel Command, implemented a comprehensive ADR program of its own including agency level protest under the agency level protest authority. A comparison of the FAA's and AMC's practices compared to those of the GAO process is presented in Chapter V.

In order to gain insight into these practices, their use within various agencies, and to discover potential areas for improvement a comprehensive survey of federal government acquisition and legal professionals was conducted. The methodology employed and the corresponding results and analysis are reported in Chapters III and IV, respectively.

³⁶ Public Law 104-50.

III. SURVEY METHODOLOGY

A. SURVEY GOALS

In order to identify best practices, input was sought from top level acquisition and legal leaders and experts within the military departments and all major federal buying agencies. Fifty-one individuals were asked to complete an online survey. A copy of the survey protocol is contained in Appendix B. The aim of the survey was to document the perceptions, opinions, and recommendations of those individuals involved in the acquisition process. With this information, it is then possible to identify trends, best practices, and deficient areas that need improvement. Through this process, we were able to develop recommendations that if adopted, could possibly reduce the systemic impact of bid protests on the acquisition cycle by empowering agencies to better manage protest costs and time disruptions.

B. SURVEY DESIGN

The survey focuses on three main research questions:

- What strategies or practices are used by agencies to prevent/minimize the impact of bid protests?
- To what extent are alternative dispute resolution procedures utilized as a means to prevent/minimize the impact of bid protests?
- What aspects of statute, policy, or regulation preclude the effective resolution of protests in a manner that minimizes their systemic impact?

Within each of these three areas of focus, respondents were asked to rate their agency's use of specific strategies, practices, and policies pertaining to bid protests and ADR. Respondents were also asked to identify what they believe to be the relevant factors that either constrain or encourage an aggrieved offeror to protest. Lastly, respondents were asked to describe possible improvements to law, policy, or regulation, that would increase the effectiveness of the protest system, while at the same time, would ensure transparency, integrity, compliance, economy and efficiency.

C. SURVEY SCORING

Respondents were asked to rate specific aspects of policy, strategy, and procedure on a four-point version of Likert's eponymous rating scale (shown below).

- 4—Always or With Great Frequency
- 3—With Moderate Frequency
- 2—In Exceptional Cases or With Rare Frequency
- 1—Never

Respondents were also given the option of choosing, “Don’t Know or Information Unavailable.” If a respondent chose this option, the response was not included in the scoring. With respect to the relevant factors, *that constrain our encourage protests and possible improvements to law, policy, or regulation*, respondents were given the opportunity to post comments in a free form text box.

D. SURVEY SUBJECTS

Major federal procurement agencies were asked to participate in the survey. A complete list of agencies solicited is contained in Appendix C. Agency points of contact were obtained from publicly available information posted on agency websites or from personal contacts of this project's lead advisor. Each point of contact was sent an e-mail with a request to participate in the survey and a link to the SurveyMonkey website where the on-line survey was posted. Point of contacts may have assigned additional respondents within their agency. Respondents were asked to identify both their agency and their professional background (legal or acquisition) in the survey. Respondents' names and actual position within their agency were not collected and therefore remain anonymous.

E. SURVEY LIMITATIONS

It should be noted that this particular survey was not intended as a “hard data” appraisal of agency practices. The results of the survey have not been measured against a specific set of objective criteria (e.g., number of protests per agency). Rather, the survey was intended as a means to identify perceptions, opinions, and trends from those individuals who possess significant professional legal or acquisition expertise. Further, it

should be noted that the data contained in the survey represent the individual opinions and impressions of the respondents, and should in no way be construed as reflecting an official agency position, policy, or opinion.

THIS PAGE INTENTIONALLY LEFT BLANK

IV. SURVEY RESULTS AND ANALYSIS

A. RESPONSE RATE AND BACKGROUND RESULTS

Fifty-one acquisition and legal professionals, across twenty-two federal agencies were asked to participate in the survey. Twenty-one personnel, representing ten federal agencies, ultimately participated in the survey, yielding an overall response rate of 41%. Fourteen respondents (67%) identified themselves as acquisition professionals, while seven respondents (33%) identified themselves as legal professionals. These results are summarized in Figures 9 and 10.

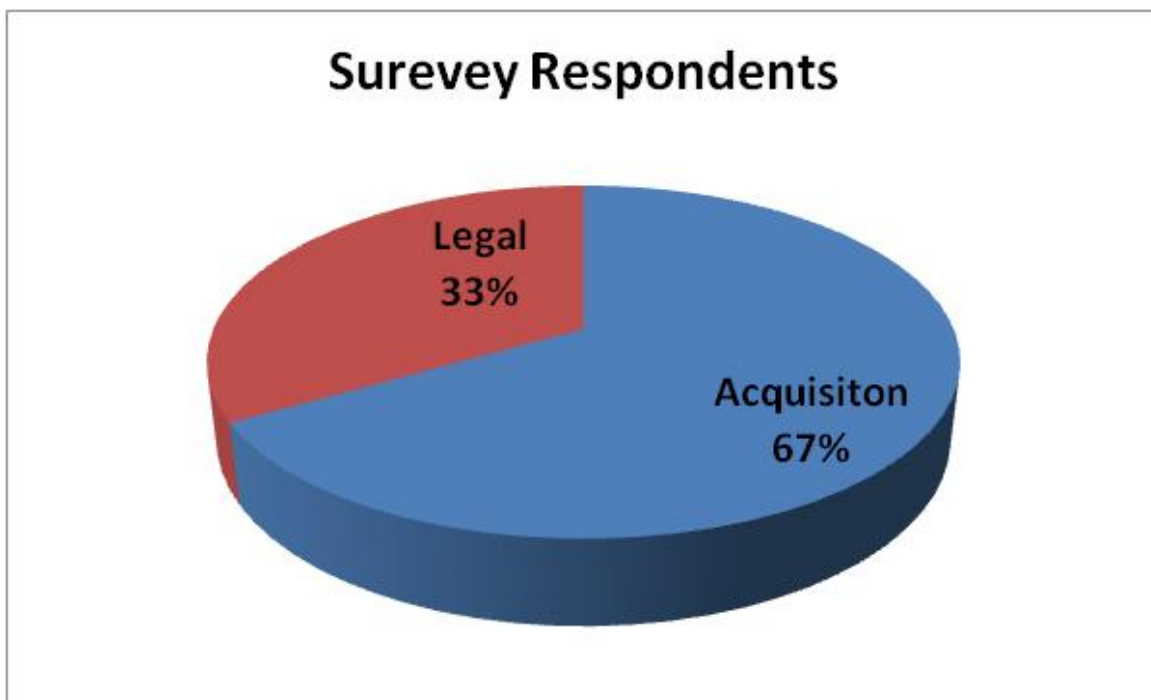


Figure 9. Survey Respondent's Professional Background

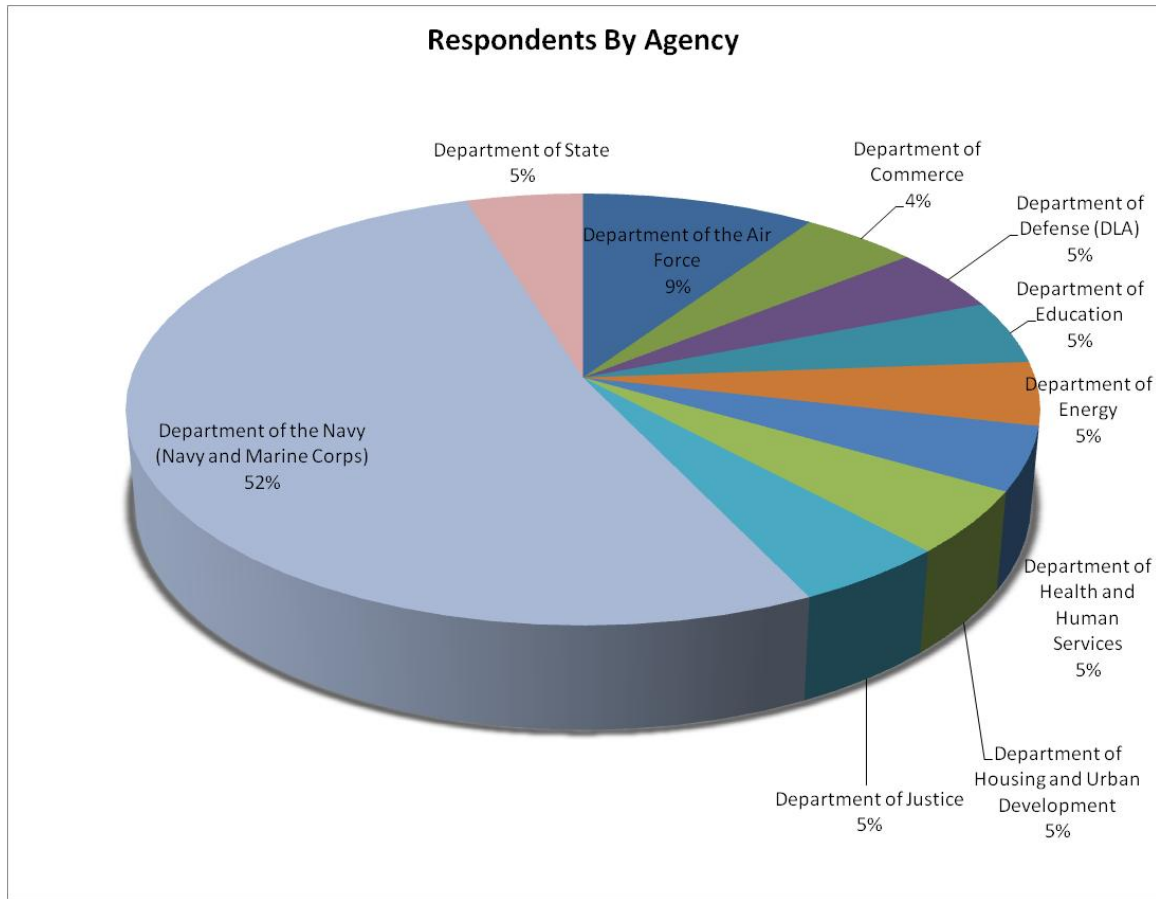


Figure 10. Survey Respondents by Agency

B. STRATEGIES AND PRACTICES TO MINIMIZE BID PROTEST IMPACT

1. Most Frequently Cited Strategies and Practices

Given a list of thirty different strategies and practices designed to minimize the impact of protests on the acquisition system, respondents were asked to rank their agency's use of the strategy or practice. Amongst all respondents, the most widely identified strategy and practice was to *Set in advance clear and publicly disclosed evaluation criteria and adhering to those criteria during source selection*, with a mean score of 3.48. The second most cited strategy or practice was *Advanced Acquisition Planning*, with a mean score of 3.38. *Agency Procedures to prevent fraud, providing mandatory quality debriefings, market and research and engagement with industry, agency level protests procedures, and taking early corrective actions*, are also highly

identified strategies and practices, each of which had a mean score at or above 3.0. The overwhelming majority of respondents cited these practices with either moderate or great frequency. The remaining three strategies have a score above 2.7 and below 3.0, and include *independent expert reviews by task order ombudsmen or competition advocates*, *independent expert reviews by federal small business advocates*, and *greater training for acquisition workforce*. Only one strategy, *taking early corrective action*, can be characterized as a defensive strategy; the rest are preventive. Further, almost all preventive strategies involve only the buying agency's personnel, which can reinforce agency errors or violations instead of correcting them. Overall, this data suggests that agencies may not be doing all they can or should to actively minimize protest costs and delays once a protest is filed. The top ten defensive/preventive strategies and practices identified are summarized in Figure 11.

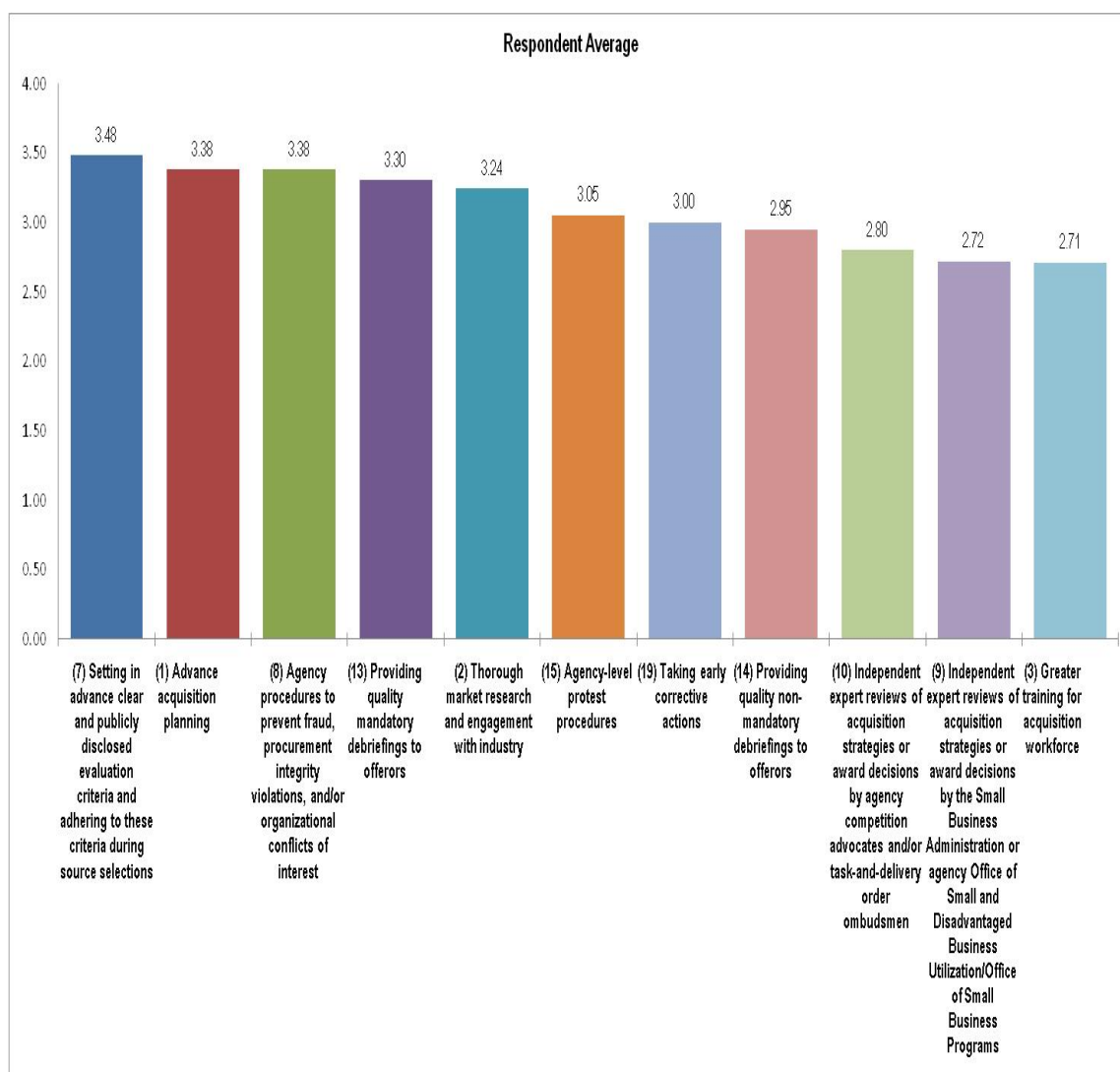


Figure 11. Top Ten Defensive/Preventive Strategies and Practices Identified

2. Least Frequently Cited Strategies and Practices

Strategies and practices, such as *refusing to follow GAO advisory opinions where the GAO sustains the protest on apparently wrong grounds, vigorous objections and request for sanctions in response to frivolous protests, and taking corrective actions involving direct awards to protesters, instead of re-competitions or re-evaluations, taking express option requests under GAO procedures* are the least identified amongst respondents, with a mean score of less than or equal to 1.7. *Independent expert reviews by the GAO* which Executive Branch agencies may request concerning matters of government spending under Title 31, Section 3529 of the United States Code, *other*

strategies (to be defined), ADR with assistance from the Court of Federal Claims or the GAO (such as GAO outcome prediction or negotiation assistance), corrective actions involving declaratory-type relief/changes to agency policies, ADR without assistance from the GAO or the Court of Federal Claims, and overrides based on best interests of the United States (which apply only to post-award and competitive range protests) all have mean scores above 1.7 and at or below 2.0. The majority of respondents cite these strategies or practices as being used rarely, if ever. These results suggest that agencies would rather insulate their procurement decisions from outside reviews than avoid protests. Contrary to Executive Order 12979, agencies are reluctant to engage in ADR (and, therefore, conduct cost-benefit analysis, reconsider, or bargain over their procurement decisions). Agencies are reluctant to expedite protest litigation and cut short the protest time from 100 days to less than 65 days. At the same time, agencies are reluctant to risk disputes with Congress over GAO's views on the merits of the agency procurement decision and with the Court of Federal Claims over the need to keep moving the acquisition programs free from mandatory stays. However, agencies are also reluctant to end protests by rewarding protesters with direct contract awards. This provides a disincentive to protesters seeking an easy contract through litigation. Figure 12 summarizes the ten least identified practices and strategies.

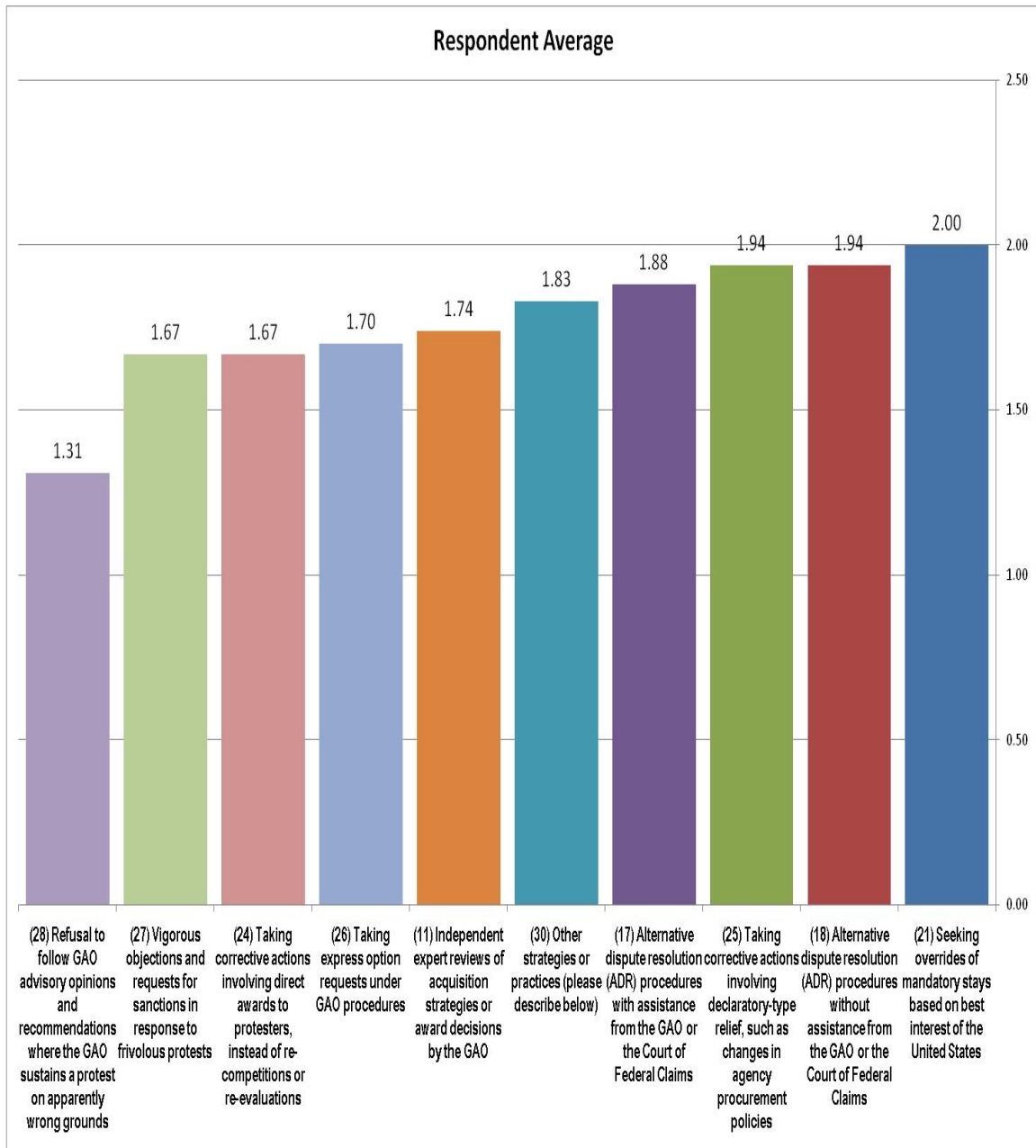


Figure 12. Ten Least Cited Defensive/Preventive Strategies and Practices

C. USE OF ADR PROCEDURES TO RESOLVE BID PROTESTS

In general, survey respondents seem to believe that ADR procedures are infrequently used to resolve bid protests within their agencies. This appears to contradict Executive Order No. 12979, which directs agencies to use them to the maximum extent practicable. The mean score of the eleven ADR procedures respondents were able to

choose from was 1.55, indicating that respondents believe their agency rarely, if ever, utilize ADR procedures to resolve bid protests. The highest rated ADR procedure was *negotiation*, with a mean score of 2.24, implying that the majority of respondents believe their agency utilized this procedure to at least some extent. All other ADR procedures scored at or below 1.87. Other ADR procedures between the highest and the least used, in descending order, include: *GAO outcome prediction*, *conciliation*, *GAO negotiation assistance*, *hybrid techniques*, *ADR with the assistance of the Court of Federal Claims*, *mediation*, *summary trial by a Board of Contract Appeals*, *mini-trial*, and *arbitration*. The least identified named ADR procedure was *evaluation by third-party neutrals*, with a mean score of 1.29, implying that respondents believe this procedure is almost never utilized by their agency. *Other* (to be defined) techniques had the score of 1.20. These findings are somewhat surprising. Intuitively, ADR should be favored by agencies concerned over costs or delays because engaging in ADR would enable the agency to conduct a cost-benefit analysis of its alternatives in the face of a protest and to bargain with the protester over these costs, benefits, and alternatives. Further, new processes of re-evaluation and reconsideration of procurement decisions are inherent in the very nature of ADR. This is because, as recommended by the U.S. Department of Justice *Electronic Guide to Federal Procurement ADR*, effective protest ADR requires an agency to conduct some fact-finding and a risk assessment involving strengths and weaknesses of agency position. This process may be guided or refereed by a neutral person. Survey data above on the most and least cited defensive/preventive strategies and practices shows that directed awards to protesters are rare - implying that new process is what the protester are most likely to get as relief. Logically, as a matter of sound business management, agencies should make frequent, formal decisions to pursue ADRs of all types as their most frequently used defensive strategies. Instead, the two most favored ADR measures are the least structured (negotiation) and the least ADR-like in terms of time and cost impact (GAO outcome prediction). Figure 13 summarizes respondents' beliefs of their agency's use of ADR procedures to resolve bid protests.

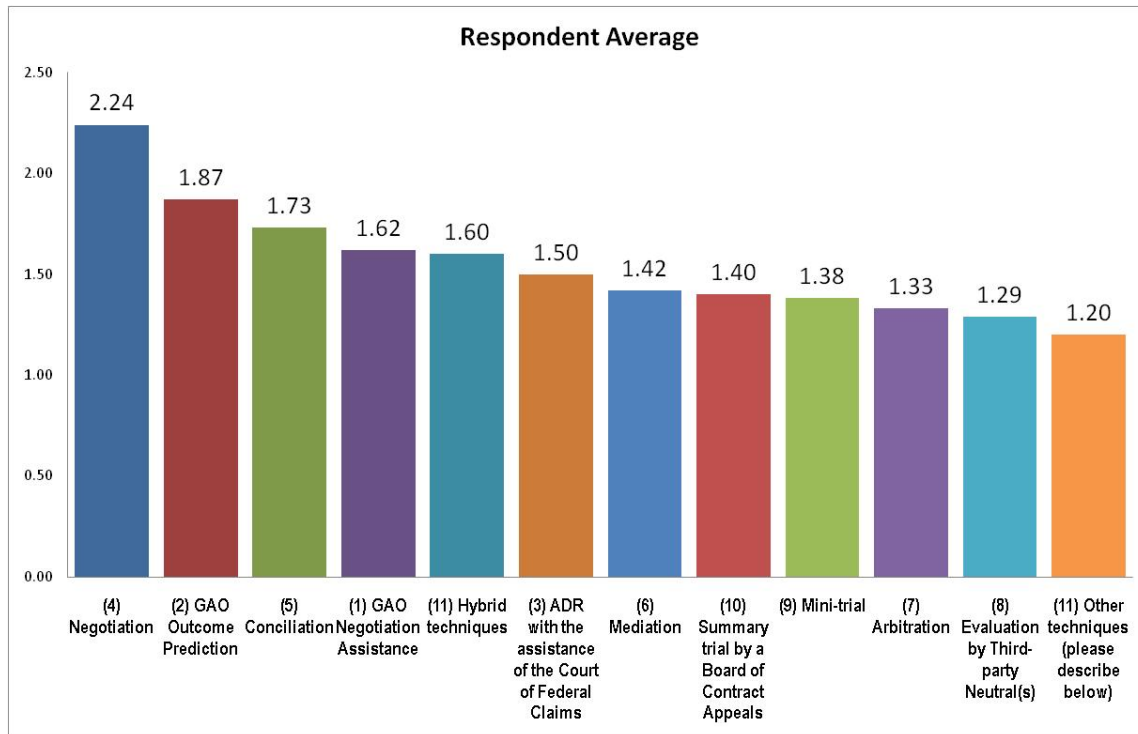


Figure 13. The Use of ADR Procedures to Resolve Bid Protests

D. ASPECTS OF CURRENT POLICIES, PRACTICES, LAWS, OR REGULATIONS THAT PRECLUDE EFFECTIVE RESOLUTION OF PROTESTS

1. Most Frequently Cited Policies, Practices, Laws, or Regulations

When asked to rate a list of twenty policies, practices, and laws, respondents overwhelmingly noted the *lack of fiscal disincentives for unjustified protests* as the predominant policy factor that they believe precludes or prevents the effective resolution of bid protests. With a mean score of 3.20, the majority of respondents feel this policy precludes effective resolution to at least a moderate extent. Similar responses were found for factors, such as *poor acquisition planning* and *lack of properly trained acquisition workforce*, with mean scores of 3.10 and 3.0, respectively. *Lack of formal sanctions at the GAO for frivolous protests, strategic behavior by disappointed bidders seeking to recover bid and proposal costs without basis for award, frivolous protest filings, failure to maintain adequate documentation of procurement decisions, failure to assure adherence to stated evaluation criteria, delay-seeking strategies by incumbents without*

basis for new awards, and poorly designed or implemented cost estimates all had mean scores from 2.88 to 2.39, respectfully. Presently, the GAO does not impose monetary or other sanctions for frivolous protests such as those imposed under Rule 11 of the Court of Federal Claims. However, as previously shown in Figure 8, the GAO does dismiss frivolous protests. Figure 14 lists the respondents’ top ten policies, practices, or laws that they believe preclude effective avoidance or resolution of protests.

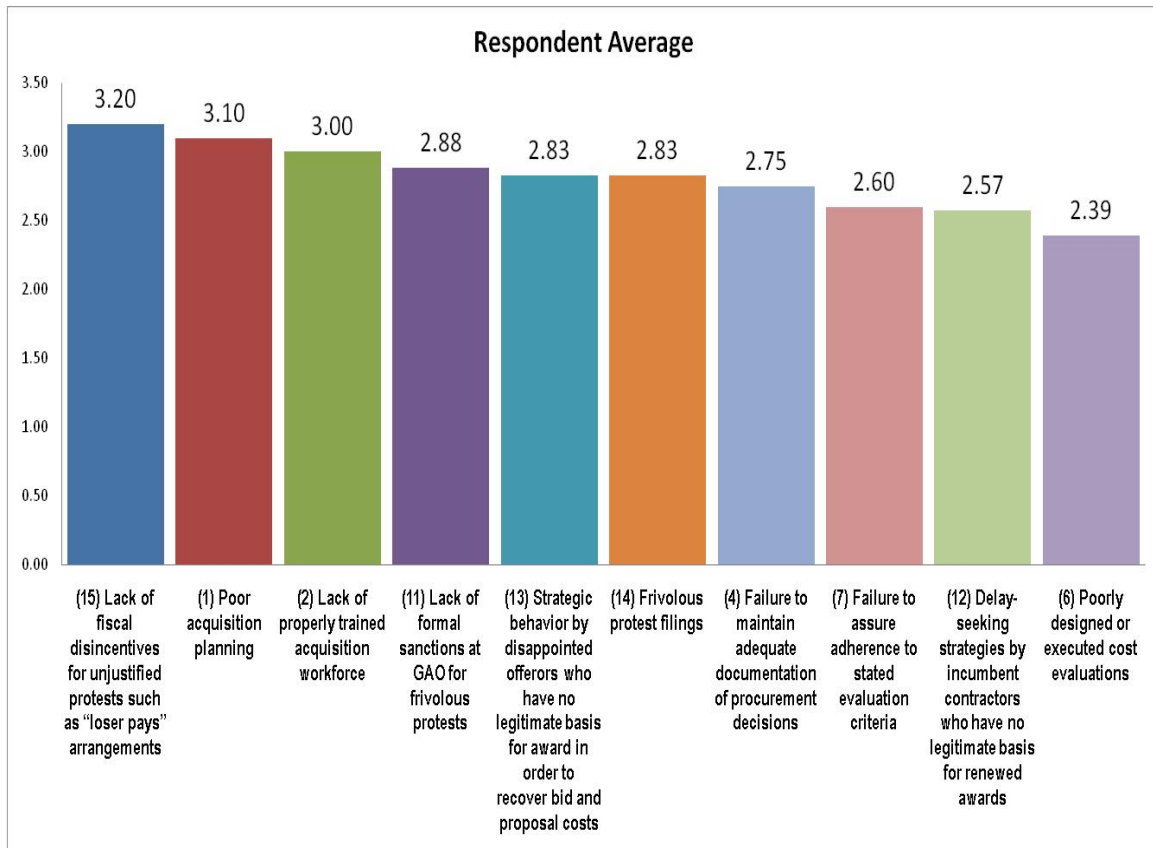


Figure 14. Top Ten Policies, Practices or Laws that Preclude Effective Avoidance or Resolution of Protests

2. Least Frequently Cited Policies, Practices, Laws, or Regulations

Factors, such as a *lack of, or deficiencies in, agency-level bid protest procedures, regulatory or statutory provisions discouraging ADR, and other deficiencies in ADR procedures*, were the lowest rated factors with mean scores of less than 1.5, implying that respondents believe these factors rarely, if ever, preclude effective avoidance or resolution of bid protests. A possible conclusion from this data is that there exists an

institutional lack of will to utilize ADR procedures. Other least cited factors, with mean scores between 1.71 and 2.35, include *agency reluctance or failure to seek stay overrides*, *agency reluctance to seek express option*, *agency reluctance to deviate from GAO recommendation*, *other aspects* (to be defined), *failure to assure fair discussions with offerors*, and *poor debriefings*. This suggests that respondents do not regard unfair, unequal, or incomplete communications with offerors or agencies' failure to use available tools to expedite programs during protests as making significant contributions to protest burdens experienced by agencies. Figure 15 displays the ten least prevalent factors identified by survey respondents that preclude effective avoidance or resolution of protests.

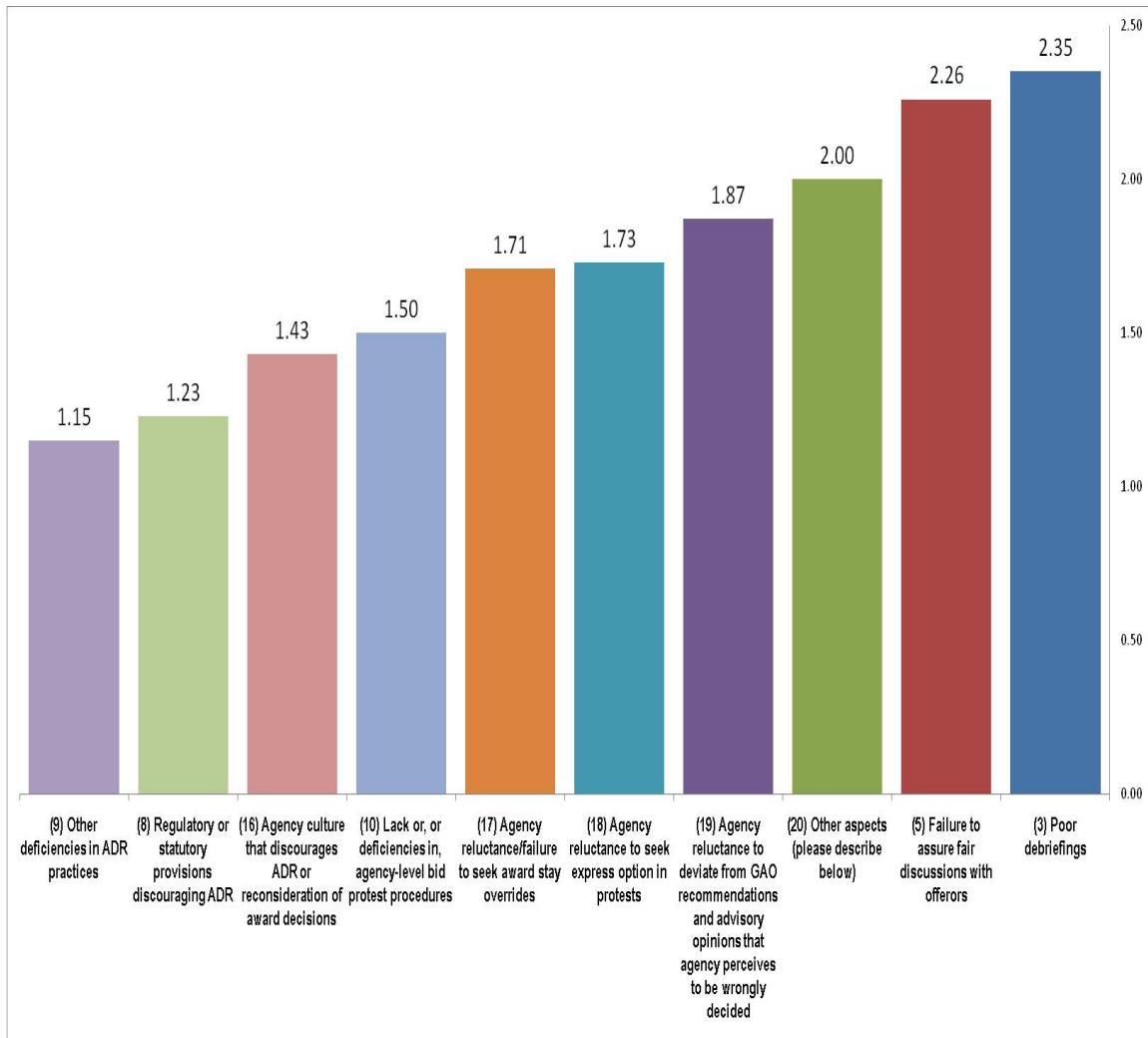


Figure 15. Ten Least Utilized Factors Precluding Effective Avoidance or Resolution of Bid Protests

E. FURTHER ANALYSIS OF RESULTS

1. Introduction

Thus far, results have been presented in terms of mean results and overall trends from all respondents. However, survey respondents represent a diverse set of agencies, and have differing professional responsibilities. Both military and civilian agencies are represented in the survey sample, as are both legal and acquisition professionals. It is, therefore, worthwhile to consider how, or if, these factors in anyway influence survey results. The following paragraphs compare civilian versus military perspectives and acquisition versus legal perspectives.

2. Civilian vs. Military Perspective

In general, respondents representing both civilian and military agencies believe their agencies, utilize with at least moderate frequency, a number of preventive or defensive strategies and practices to minimize the possible negative impacts of bid protests on the acquisition system. Further, there is a striking similarity between the most frequently identified practices and strategies employed by respondents representing both civilian and military agencies. Figure 16 compares the top ten strategies identified by respondents representing civilian agencies with the corresponding military agency score.

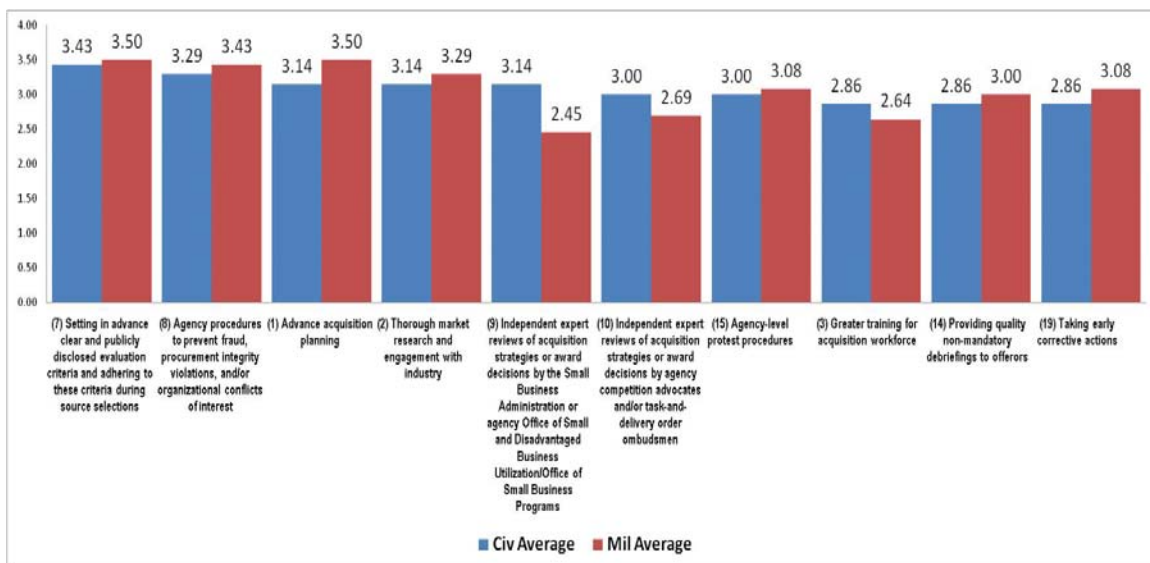


Figure 16. Top Ten Civilian Agency Strategies Compared to Military Agencies

With respect to the utilization of ADR practices to minimize the effect of bid protests, both groups of respondents indicated similar beliefs about the utilization of various ADR practices within their agency. In general, respondents seem to believe that neither civilian nor military agencies utilize ADR practices to a great extent. Nonetheless, it appears respondents representing civilian agencies generally cite their agency's use of negotiation to a greater extent than their military counterparts, with mean scores for this technique of 2.57 and 2.00, respectively. This finding is inconsistent with the tenets of E.O. 12979, the FAR requirement for all parties to "use their best efforts to resolve concerns raised by an interested party at the contracting officer level through open and frank discussions,"³⁷ and the direction of then-Undersecretary of Defense John Young and then-Deputy Assistant Secretary of the Navy for Acquisition and Logistics Management RDML Sean Crean for greater government-industry communications as a way to avoid bid protests. Civilian agencies also topped their military counterparts in utilizing *GAO outcome prediction*, *ADR with the assistance of the Court of Federal Claims*, and, barely, with respect to *mini-trials*. On the other hand, military agencies topped civilian agencies in the use of *GAO negotiation assistance*, *conciliation*, *mediation*, *summary trials by the Board of Contract Appeals*, *hybrid techniques*, *other techniques* (to be defined), and, barely, *evaluation by third-party neutrals*. On *arbitration*, the civilian and military agencies were equal. This suggests that, when military agencies actually use ADR, they are much more creative with their ADR approaches than civilian agencies. However, *negotiation* was the only ADR technique was cited by the military with a mean score of equal or over 2.0. This suggests that overall use of ADR in military agencies is very low. Figure 17 compares the civilian agency respondent's identification of ADR procedures with those of respondents representing military agencies.

³⁷ Federal Acquisition Regulation 33.103(b).

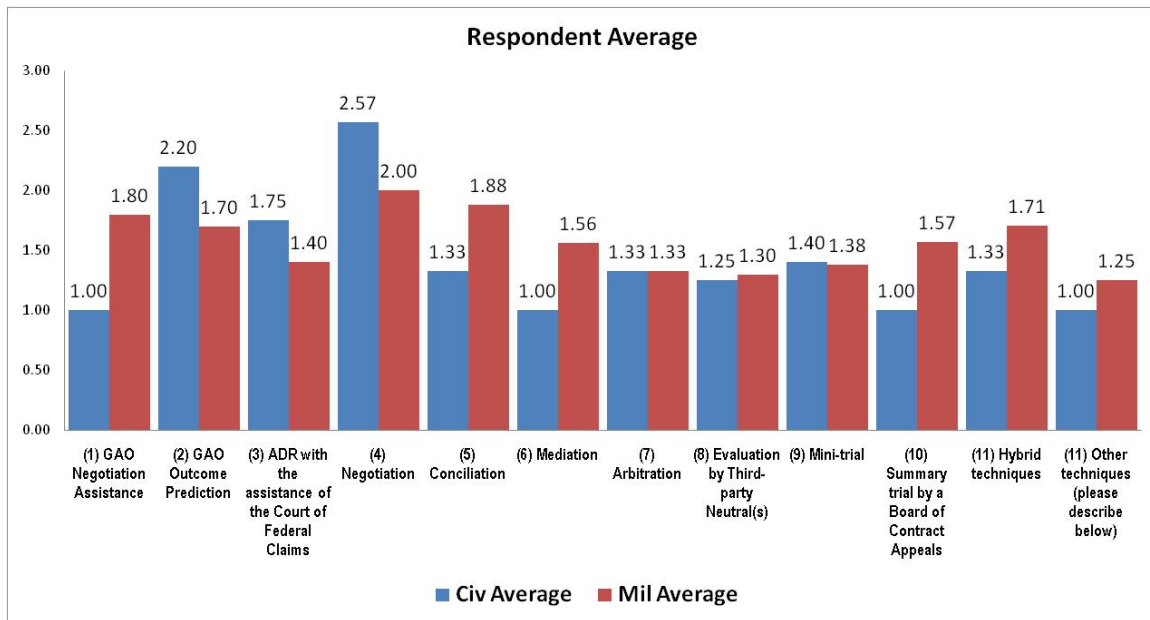


Figure 17. Comparison of Civilian Agency use of ADR Procedures with Military Agencies

Amongst both groups of respondents there seems to be a strong similarity between their view of policies, practices, laws, and regulations that preclude effective avoidance or resolution of bid protests. Both groups of respondents cite the *lack of fiscal disincentives for unsuccessful protests* as the most prevalent factor precluding effective resolution or avoidance of protests. Both groups also cite *poor acquisition planning* and the *lack of adequately trained acquisition personnel* as significant factors in precluding the effective resolution or avoidance of protests. However, there is a strong difference regarding the frequency with which respondents believe *agency reluctance to seek award stay overrides* precludes effective resolution or avoidance of bid protests. Amongst military respondents, the mean score for this factor is 2.13 compared to 1.17 for civilian respondents. Although the military score is still low, indicating respondents' belief that this factor prevents effective avoidance or resolution of protests relatively infrequently, it nonetheless raises a number of possible implications. It is possible that military agencies are less inclined to seek overrides of mandatory procurement stays than their civilian counterparts. If time delays associated with a bid protest are in fact impeding mission accomplishments, then agencies should seek overrides in the best interests of the United States, consistent with FAR Part 33.104(c). In terms of the most frequently cited reasons

precluding effective protest resolution, factors such as *lack of properly trained acquisition workforce*, *strategic behavior by disappointed offerors with no legitimate basis for award in order to recover bid and proposal costs*, *lack of formal sanctions at the GAO for frivolous protests*, *frivolous protest filings*, and *failure to assure adherence to stated evaluation criteria* are comparatively greater problems for military agencies. For civilian agencies, comparatively greater problems include *lack of fiscal disincentives for unjustified protests such as “loser pays” arrangements*, *poor acquisition planning*, *delay-seeking strategies by incumbent contractors who have no legitimate basis for renewed award*, and *poor debriefings*. Figure 18 compares the ten most frequently identified responses of civilian agency respondents with those from military agencies.

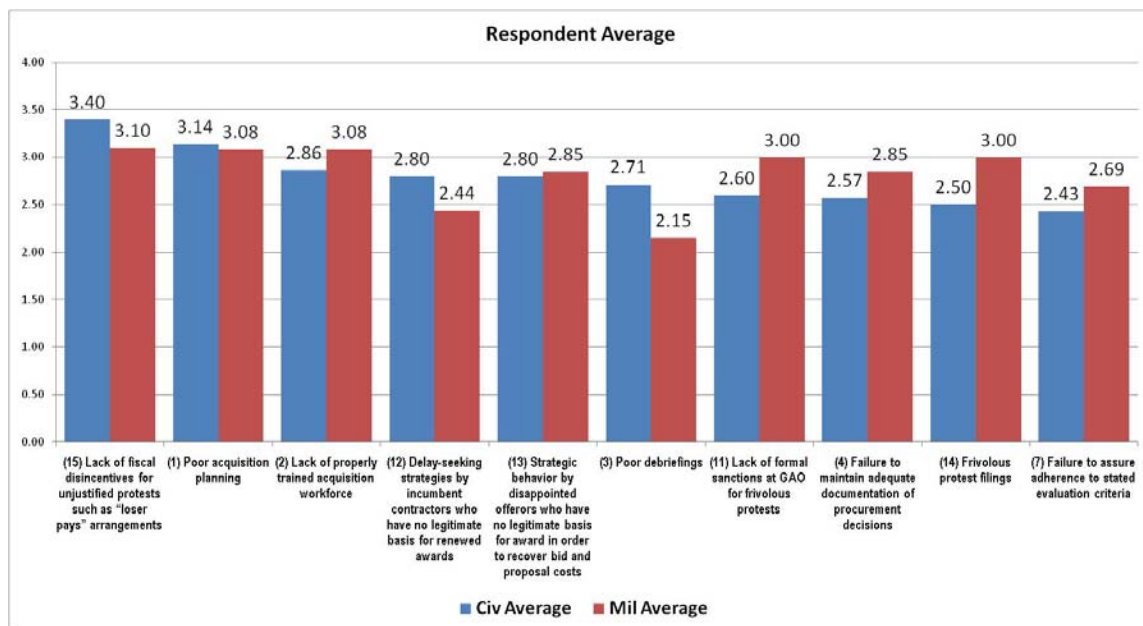


Figure 18. Comparison of Ten Most Frequently Identified Civilian and Military Agency Perception of Processes, Laws, Policies, or Regulations.

Military agencies cite comparatively lower problems with *failure to assure fair discussions with offerors*. On the other hand, civilian agencies cite comparatively lower problems with all other categories, including *regulatory or statutory provisions discouraging ADR*, *other aspects (to be defined)*, *other deficiencies in the ADR process*, *agency reluctance/failure to seek award stay overrides*, *lack of, or deficiencies, in agency level protest procedures*, *agency reluctance to seek express options in protests*, *agency reluctance to deviate from GAO recommendations*, and *properly designed or executed*

cost evaluations. For the military agencies, *agency reluctance/failure to seek award stay overrides*, *agency culture that discourages ADR or reconsideration of award decisions*, *lack of, or deficiencies in, agency-level bid protest procedures*, and *agency reluctance to deviate from GAO recommendations* seem to be much more prevalent or significant than for civilian agencies. Figure 19 compares the ten least frequently identified responses of civilian agency respondents with those from military agencies.

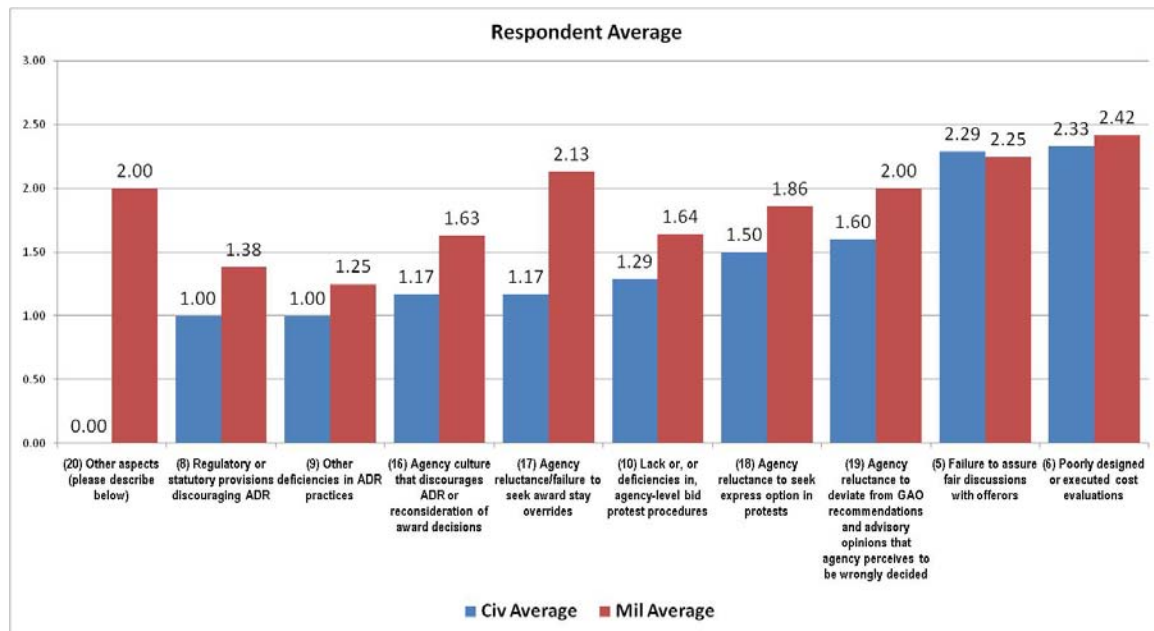


Figure 19. Comparison of Ten Least Frequently Identified Civilian and Military Agency Perception of Processes, Laws, Policies, or Regulations vs. Military Agencies.

3. Acquisition vs. Legal Perspective

When comparing the perspective of respondents employed as legal professionals with that of respondents employed as acquisition professionals, there is much similarity in opinion with regard to their beliefs about the use of preventive or defensive strategies designed to minimize the negative impacts of bid protests on the acquisition process. Despite this strong similarity in response, there are a few notable exceptions that bear mentioning. Acquisition professionals cite a higher instance of using non-mandatory debriefings to unsuccessful offerors. The mean score for this factor amongst acquisition professionals was 3.14, compared to a mean score of 2.40 for legal professionals. Similarly, acquisition professional respondents indicate that they believe their agencies

tend to take corrective action to include involving the protestor as a subcontractor or member of the winning team(s) to a greater extent than legal professionals would seem to indicate. The mean score for this factor was 2.50 for acquisition professionals, while it was only 1.83 for legal professionals. Legal professionals identified *advance acquisition planning, thorough market research and engagement with industry, greater training for acquisition workforce, hiring or assigning additional acquisition workforce and awarding extensions or bridge contractors to incumbents protesting re-competitions* more often than acquisition professionals. The opposite relationship was for factors including *setting in advance clear and publicly disclosed evaluation criteria and adhering to these criteria during evaluation, providing quality mandatory debriefings to offerors, agency procedures to prevent fraud, procurement integrity, or organizational conflict of interest violations, and agency-level protest procedures*. Both groups cited *taking early corrective action* with the same frequency. Figure 20 compares the ten most frequently identified practices of legal professionals with those of acquisition professionals.

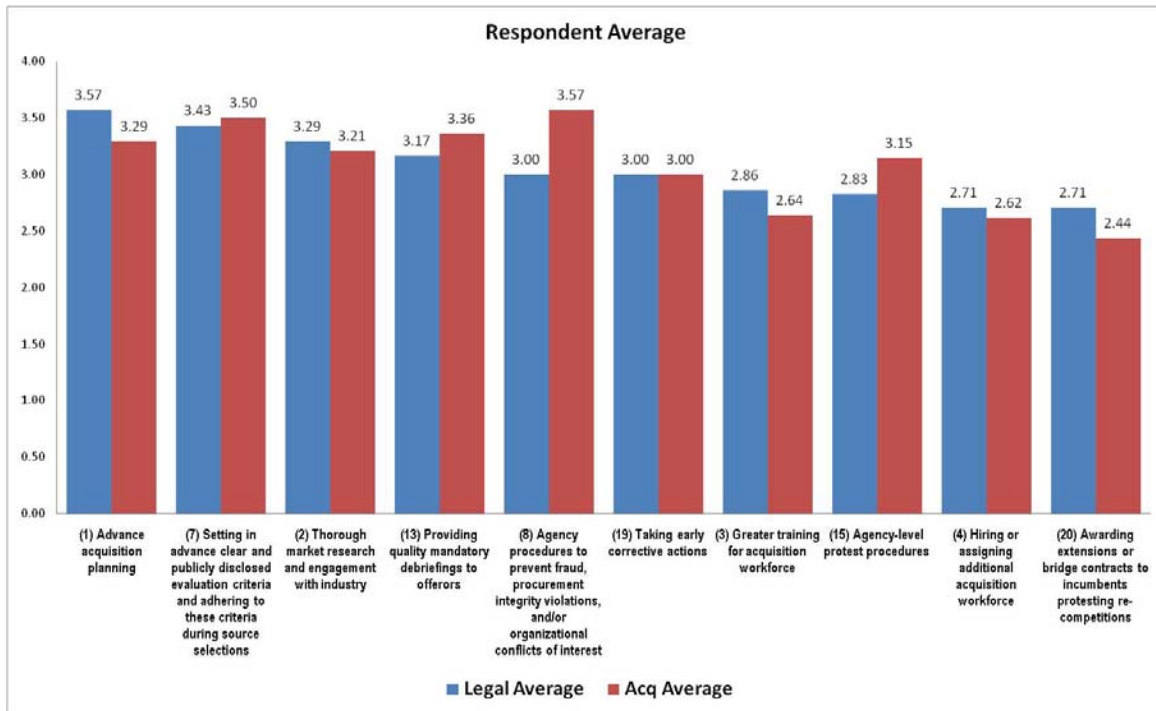


Figure 20. Comparison of Ten Most Frequently Identified Strategies and Practices Identified by Legal Professionals with those of Acquisition Professionals.

Legal professionals identified strategies and practices such as *acquisition strategies involving shorter-term contracts, taking corrective actions involving declaratory-type relief such as changes to agency policies, seeking best interest overrides, taking corrective actions involving inclusion of protesters as subcontractors or members of winning teams, independent expert reviews by the GAO, and other strategies (to be defined) less often than acquisition professionals. The relationship was reversed for strategies such as refusal to follow erroneous GAO views, vigorous objections and requests for sanctions with respect to frivolous protests, and express options. Both sides were equally low on corrective actions involving direct awards to protesters.*

Figure 21 compares the ten least identified strategies and practices of legal professionals with those of acquisition professionals.

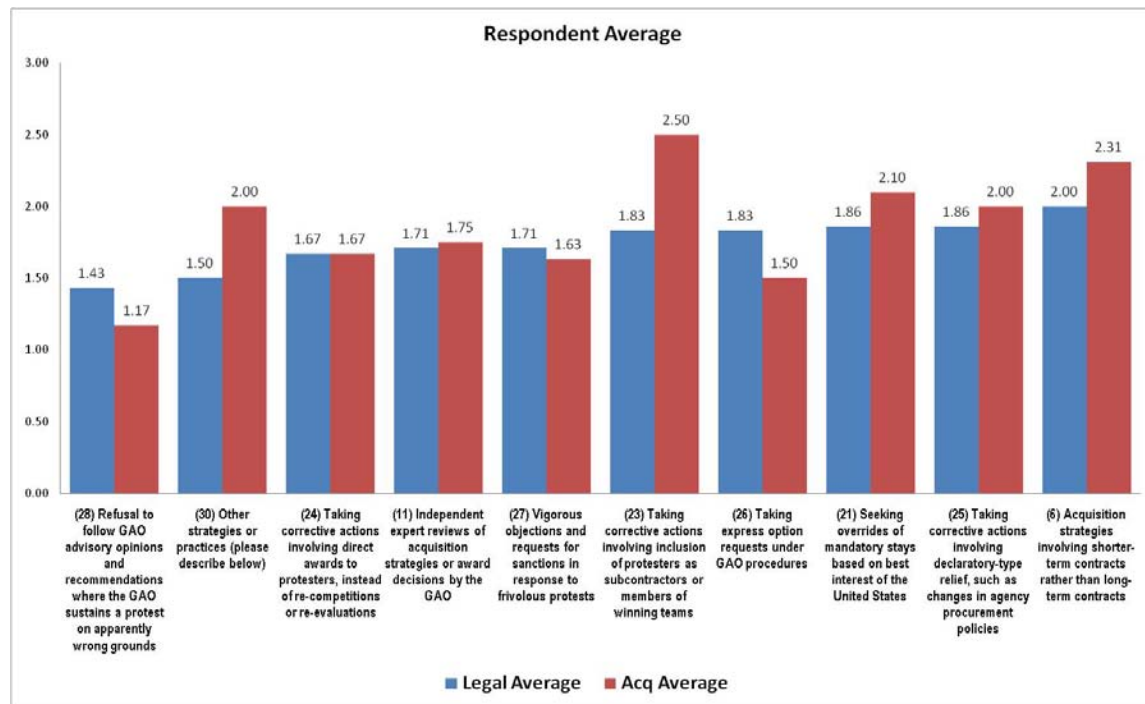


Figure 21. Comparison of Ten Least Frequently Identified Strategies and Practices Identified by Legal Professionals with those of Acquisition Professionals.

Amongst legal and acquisition respondents, the most divergent opinions on ADR related to the use of ADR procedures to resolve bid protests. When asked to rate their agency's use of eleven different ADR procedures, the mean score amongst legal respondents was 1.78, whereas the mean score amongst acquisition respondents was 1.39. This data indicates that ADR is not being employed to great effect to reduce costs and program delays. Since ADR begins at the agency level, its lack of use is surprising. Acquisition managers have a desire to minimize cost and time delays, yet they are under-utilizing a valuable tool to help them in that regard. While these results indicate that ADR procedures are not employed with great frequency to resolve protests, a few specific areas are worth noting. When asked to rate their agency's use of *negotiation* as a technique to resolve bid protests, legal respondents had a mean score of 2.70 compared to a mean score of 2.0 for acquisition respondents. Similarly, when asked to rate their agency's use of *conciliation* as a technique to resolve bid protests, legal respondents had

a mean score of 2.20 compared to a mean score of 1.33 for acquisition respondents. These scores reflect the opinions of the respondents and are not necessarily reflective of actual agency behavior. Nonetheless, the scores provide significant insight into how various personnel within an agency perceive the use of ADR techniques. Lawyers also seem to participate more often in *GAO outcome prediction*, *GAO negotiation assistance*, *ADR with the assistance of the Court of Federal Claims*, *hybrid techniques*, *summary trials at the Board of Contract Appeals*, *evaluation by third-party neutrals*, *mini-trials*, *other ADR* (to be defined), and *arbitrations* than acquisition officials. Only for *mediation* is the frequency reversed. It appears that, in contrast to lawyers, agency acquisition officials rarely become involved in ADR in resolving bid protests. Figure 22 compares the survey results of respondents with a legal background to those of respondents with an acquisition background.

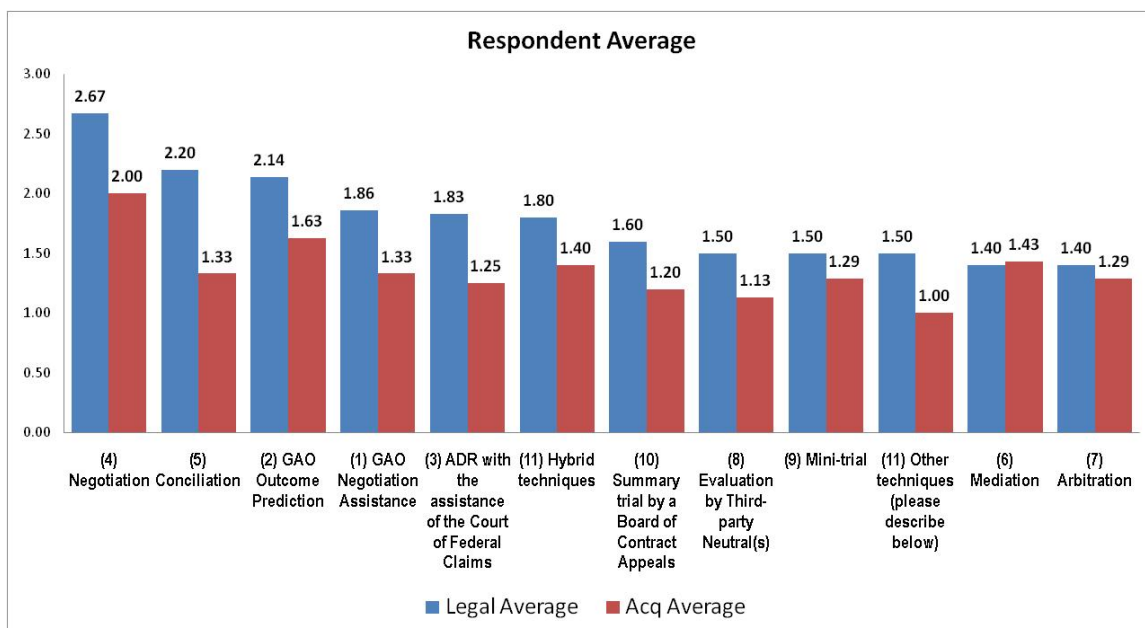


Figure 22. Comparison of Legal and Acquisition Perspective on the use of ADR Procedures to resolve Bid Protests.

In general, both acquisition and legal respondents seem to have similar perceptions regarding the aspects of processes policies, practices, laws, or regulations that preclude effective avoidance or resolution of bid protests. Yet despite the similarity of opinion, the data provides some insight into the attitudes and perception of both parties.

Overwhelmingly, legal respondents cite *poor acquisition planning* as the aspect or policy that most often precludes effective avoidance or resolution. The mean score of legal respondents for this particular factor was 3.29, indicating that they believe this factor precludes effective avoidance or resolution of protests with at least moderate frequency. Comparatively, respondents with an acquisition background also cite this factor as precluding effective resolution or avoidance of bid protests, albeit to a lesser extent, with a mean score amongst respondents of 3.00. The factor identified as precluding effective avoidance or resolution of protests to the greatest extent by respondents with an acquisition background was the *lack of fiscal disincentives for unjustified protests*, with a mean score of 3.50. However, respondents with a legal background scored this factor slightly lower, with a mean score of 2.83. Lawyers also cited in with greater frequency than acquisition professionals such aspects or policies such as *lack of properly trained acquisition workforce*, *failure to maintain adequate documentation of procurement decisions*, and *strategic behavior by disappointed offerors with no basis for award seeking to recover bid and proposal costs*. On the other hand, acquisition professionals also cited *lack of formal sanctions at the GAO for frivolous protests*, *frivolous protest filings*, and *delay-seeking strategies by incumbents who have no legitimate basis for renewed award*. This comparison suggests that agency lawyers generally do not share the view of agency acquisition officials concerning the extent of compliance of agency procurement practices with procurement laws and regulations. Figure 23 compares the ten most frequently identified factors that preclude effective resolution or avoidance of bid protests between acquisition and legal respondents.

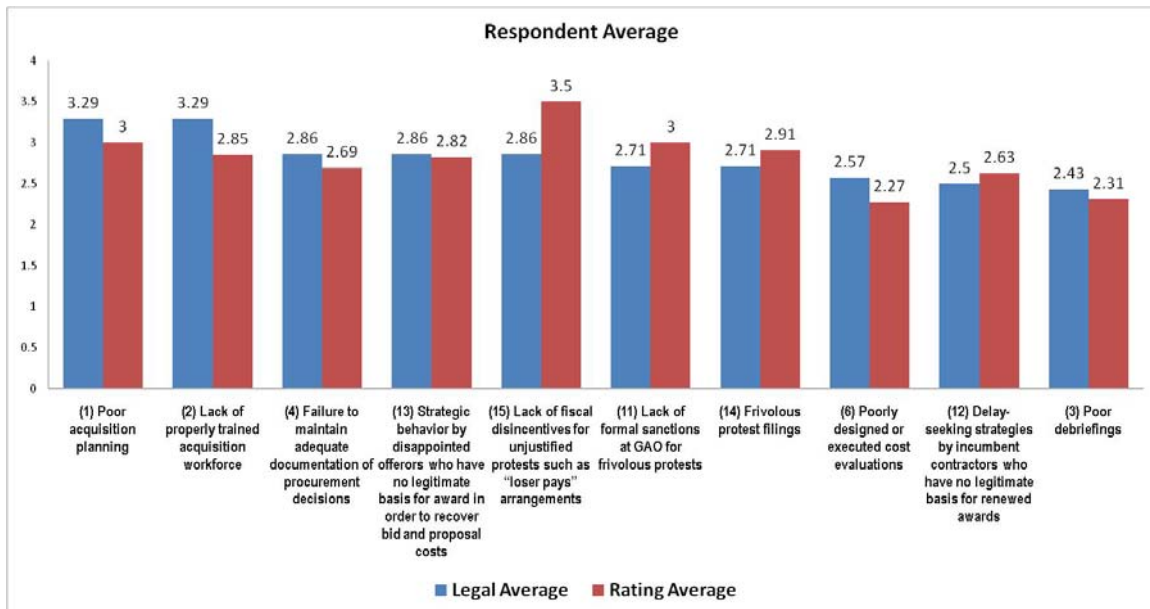


Figure 23. Comparison of Ten Most Frequently Identified Acquisition and Legal Professionals Views on Factors that Preclude Effective Resolution or Avoidance of Bid Protests.

Across the board, legal professionals seem to believe more than acquisition professionals that all least-cited factors except for *other deficiencies in ADR process* (to be defined) can have greater detrimental impact on effective resolution of bid protests. For lawyers, the least cited factors range from the lowest of *other deficiencies in ADR* (to be defined) and *regulatory/statutory provisions discouraging ADR*, to *agency culture that discourages ADR or reconsideration of decisions*, to *agency reluctance to seek express option*, to *lack/deficiencies in agency-level protests*, to *agency reluctance to deviate from GAO recommendations*, to *agency reluctance to seek stay overrides*, to *failure to assure timely discussion with offerors*, to *poor debriefings*. For acquisition professionals, these factors range from the lowest of *other deficiencies in ADR* (to be defined), to *regulatory or statutory provisions discouraging ADR*, to *agency culture discouraging ADR*, to *agency reluctance to seek express options*, to *lack/deficiencies in agency-level protests*, to *agency reluctance to deviate from GAO recommendations*, to *agency reluctance to seek stay overrides*, to *failure to assure fair discussions*, to *poor debriefings*. Figure 24 compares the ten least frequently identified factors that preclude effective resolution or avoidance of bid protests between acquisition and legal respondents.

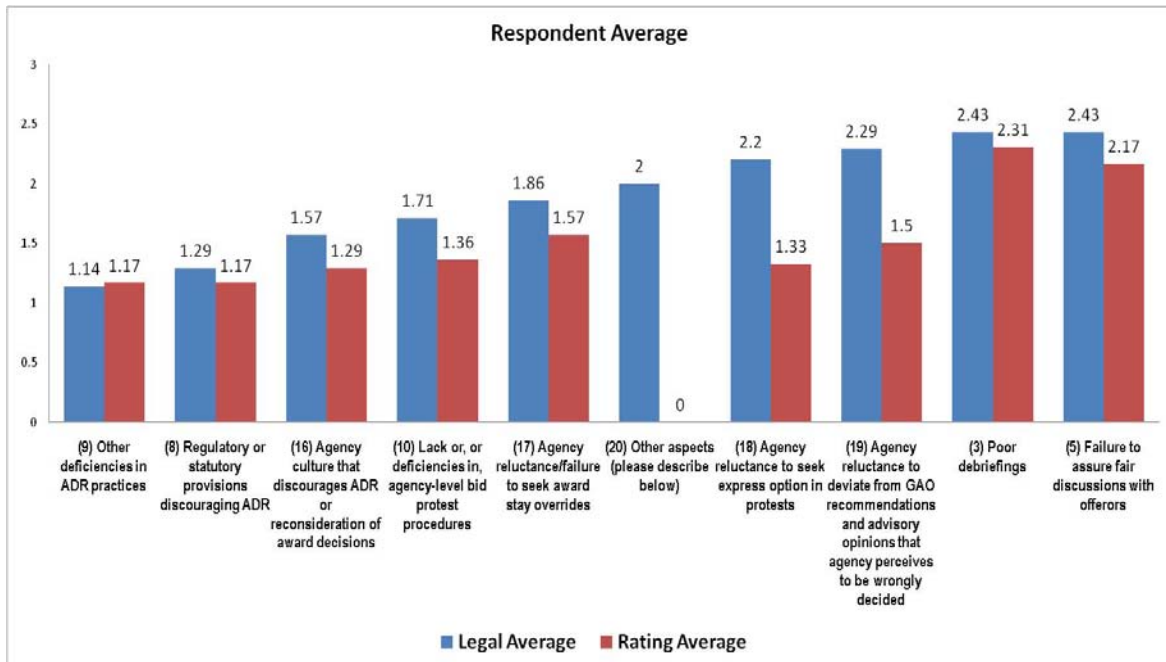


Figure 24. Comparison of Ten Least Frequently Identified Acquisition and Legal Professionals Views on Factors that Preclude Effective Resolution or Avoidance of Bid Protests.

4. Additional Considerations

In addition to the inherent value of the perceptions, views, and opinions offered by respondents, there is additional value in analyzing the nature of their responses. The first survey question asked respondents to identify to what they believe to be the frequency of their agency's use of various preventive and defensive strategies to minimize the negative impact of bid protests. The third question asked respondents to identify the frequency with which they believe aspects of current policies, practices, laws, or regulations preclude effective resolution or avoidance of protests. Conceptually, these two questions can be viewed as trying to identify two distinct ideas. First, what do agencies do to minimize the impact of bid protests, and secondly what factors prevent effective resolution of protests?

Intuitively, one expects that the some of the responses to these questions are in at least some way related. If, respondents believe that *poor acquisition planning* is the factor that most frequently prevents the effective resolution of bid protests within their agency then it stands to reason that respondents should also believe that the preventive

strategy or practice of *advanced acquisition planning* is employed infrequently within their agency. Conversely, if respondents believe *advanced acquisition planning* is almost always used as a preventive strategy or practice within their agency, then one should believe *poor acquisition planning* rarely, if ever, is a factor that precludes effective resolution or avoidance of bid protests in their agency. Other factors, specifically those that relate to frivolous protests, acquisition workforce training, debriefings, and agency level protest procedures have logical relationships as well. Figure 25 displays the mean respondent answer to the question about a specific strategy or practice and compares that result to the mean respondent answer to the corresponding question about a process or policy that precludes effective resolution or practice.

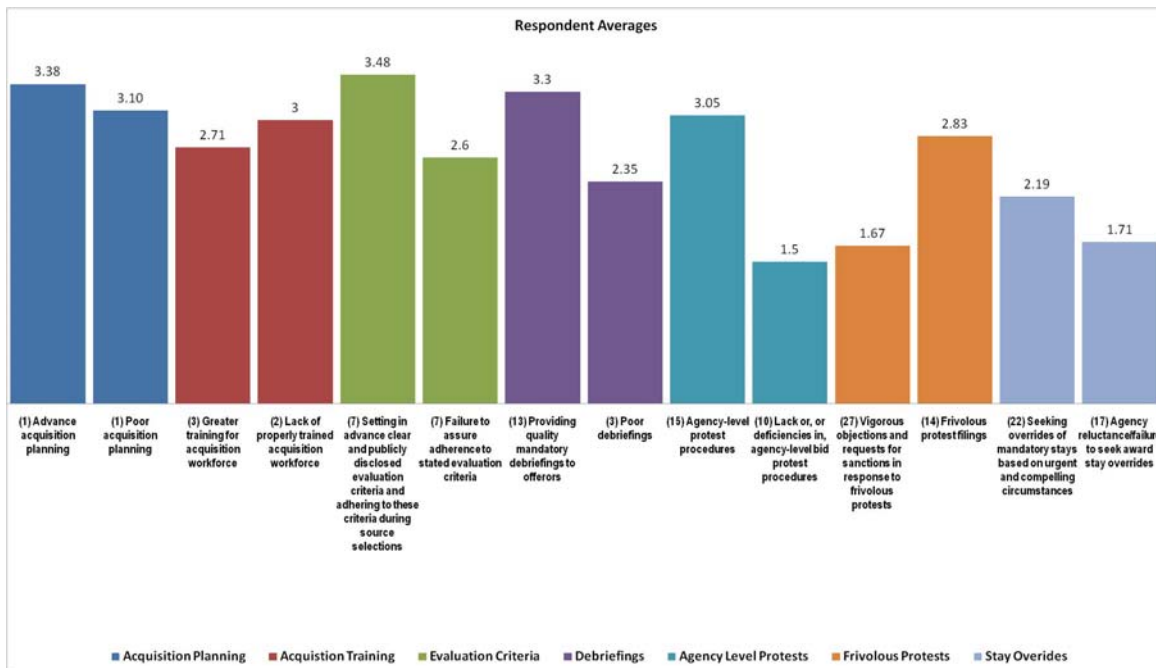


Figure 25. Comparison of Agency Defensive Strategies and Processes that Preclude Effective Resolution of Protests

The results of this comparison are varied. Some of the results are quite intuitive, while others are not so intuitive, and may require further research. When asked to evaluate the extent to which frivolous protest preclude effective resolution or avoidance of protests at their agency, the mean respondent score was 2.83. This indicates that they believe frivolous protests may preclude effective resolution or avoidance of protests to a moderate extent. A natural strategy for an agency wishing to counteract a frivolous

protest would be to vigorously object to the protest and request sanctions in response to the protest. However, amongst survey respondents, this strategy had a mean score of 1.67. Indicating that respondents believe their agencies only uses this particular strategy in rare instances. It is certainly possible that if respondent agencies utilized a more vigorous approach in objecting to bid protests that the effect frivolous protests have on precluding effective resolution would decrease.

Similarly, respondents indicated on average, that they believe their agencies utilize *quality mandatory debriefings* with a fairly high degree of frequency. The mean score amongst respondents for this strategy was 3.3. In comparison, on average, respondents indicated that they believe *poor debriefings* prevent effective resolution or avoidance of protests rarely. The mean score for this practice was 2.35. If in fact, agencies are providing quality debriefings to unsuccessful offerors, then there should be very few instances where a poor debriefing has prevented or precluded the effective resolution or avoidance of a protest. Respondent answers to the survey seem to support this conclusion.

On average, respondents indicated that they believe *greater training for the acquisition workforce* is a strategy employed by their agency to minimize the impact of a bid protest with somewhat less than moderate frequency. The mean score for this factor was 2.71. Similarly, respondents indicated that they believe the *lack of a properly trained acquisition workforce* is a practice that precludes effective protest resolution with moderate frequency. The mean score amongst respondents for this factor was 3.0. The implication here is somewhat obvious, nonetheless it bears stating explicitly. Greater training for the acquisition workforce could likely result in fewer instances where a poorly trained workforce is a factor that precludes effective resolution of protests.

Other results of this comparison were not so consistently logical. *Advance acquisition planning* was cited with extremely high frequency by survey respondents. This indicates that they believe their agency employs this particular strategy quite often as a means to prevent or avoid a bid protest. The mean score amongst respondents for this factor was 3.38. However, respondents also cited *poor acquisition planning* with relatively high frequency. The mean score amongst respondents for this factor was 3.10,

indicating that respondents believe, in many instances, their agency is precluded from effectively resolving or avoiding protests because of *poor acquisition planning*. In this regard the results are counterintuitive. If in fact, good *advanced acquisition planning* is happening on a regular basis, then it would seem difficult to conclude that *poor acquisition planning* is one of the most frequent practices that precludes effective resolution or avoidance of protests. This may actually be a case of perception, rather than reality. Quite possibly, respondents feel that acquisition planning is a consistently employed practice within their agency, when in fact it is not. Or conversely, respondents may feel that poor acquisition planning is the most common practice that precludes effective protest resolution when in fact there are other factors that preclude effective protest resolution to a greater extent.

F. FURTHER IMPLICATIONS

In general, the two negative externalities (from the agency perspective) associated with a bid protest are program delay and increased costs. In order to counteract each of these two negative externalities, there are a number of strategies an agency can employ. Such strategies as utilizing GAO's express option, agency override of mandatory GAO stays, early corrective action, and vigorous objection to frivolous or meritless protests are a number of strategies that if effectively employed, could potentially reduce the delays associated with a bid protest. Figure 26 compares the relative frequency with which respondents believe their agencies use a number of these strategies to counteract delays caused by bid protests.

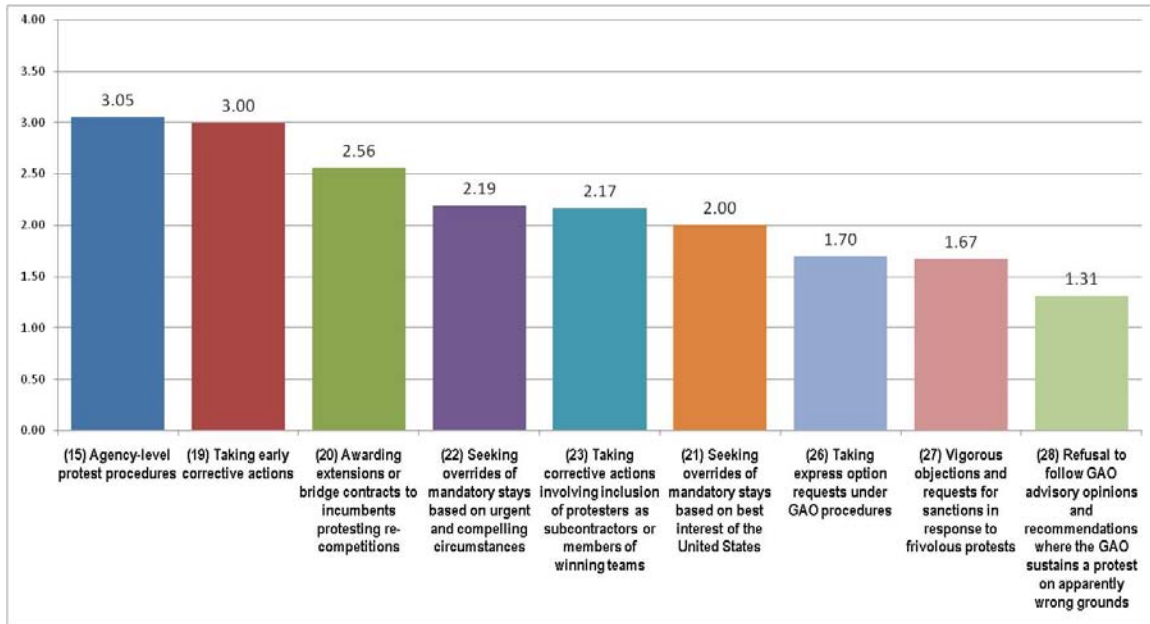


Figure 26. Relative Identification of Defensive Strategies used to Counteract Delays Caused by Bid Protests

The data clearly shows that respondents believe their agencies utilize strategies such as *agency-level bid protest procedures* and *taking early corrective action* with fairly high frequency. However strategies such as *taking express requests under GAO procedures*, *vigorous objections and requests for sanctions in response to frivolous protests*, and *refusal to follow GAO advisory opinions and recommendations (where the GAO sustains a protest on apparently wrong grounds)* are identified infrequently. This implies that agencies may be under-utilizing some of the tools they possess to counteract the delays associated with bid protests.

Similarly, agencies have a number of strategies they can employ to reduce the costs associated with bid protests. Actions such as negotiation, use of ADR procedures, early corrective action, and vigorous objections to frivolous protests, are but a number of strategies, that if effectively employed have the potential to reduce costs. Each of these processes potentially results in a resolution of the protest prior to formal adjudication. As a result, agencies may be able to avoid paying bid/proposal costs and legal fees to a

protestor. Figure 27 compares the relative frequency with which respondents believe their agencies use a number of these strategies to reduce costs associated with by bid protests.

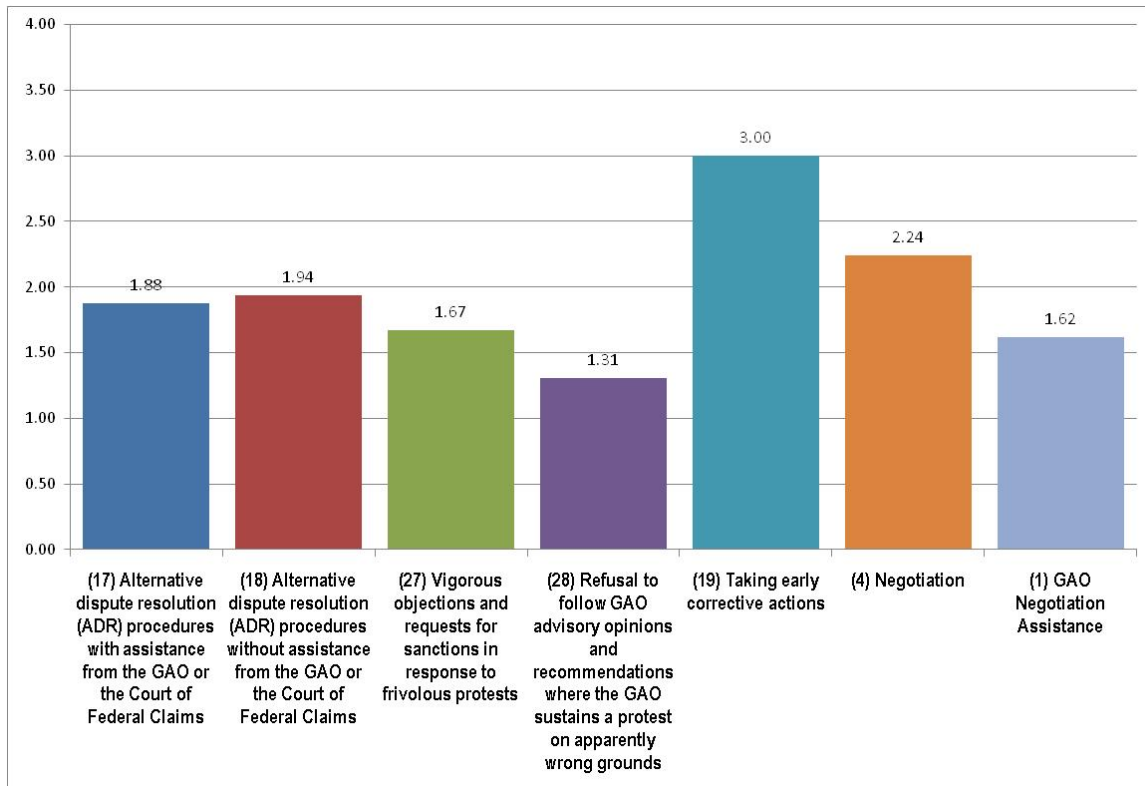


Figure 27. Relative Identification of Defensive Strategies used to Reduce Costs Associated with Bid Protests

From this data, it appears that beyond *taking early corrective action*, respondents do not believe their agencies use any of the aforementioned strategies with great frequency. The implication here is quite the same as with program delays. It appears that agencies may not be effectively utilizing all the tools they have to reduce the costs associated with a bid protest.

Beyond strategies to reduce costs and delays, agencies may also employ strategies to reduce or eliminate a disappointed or unsuccessful offerors inclination to protest for strategic business reasons (e.g. to gain greater insight into agency selection decisions or greater access to agency information). Quality debriefings and acquisition strategies that involve multiple awards have the potential to reduce the number of protests filed, that are

motivated in part on strategic business decisions. Figure 28 compares the relative frequency with which respondents believe their agencies use these strategies and practices.

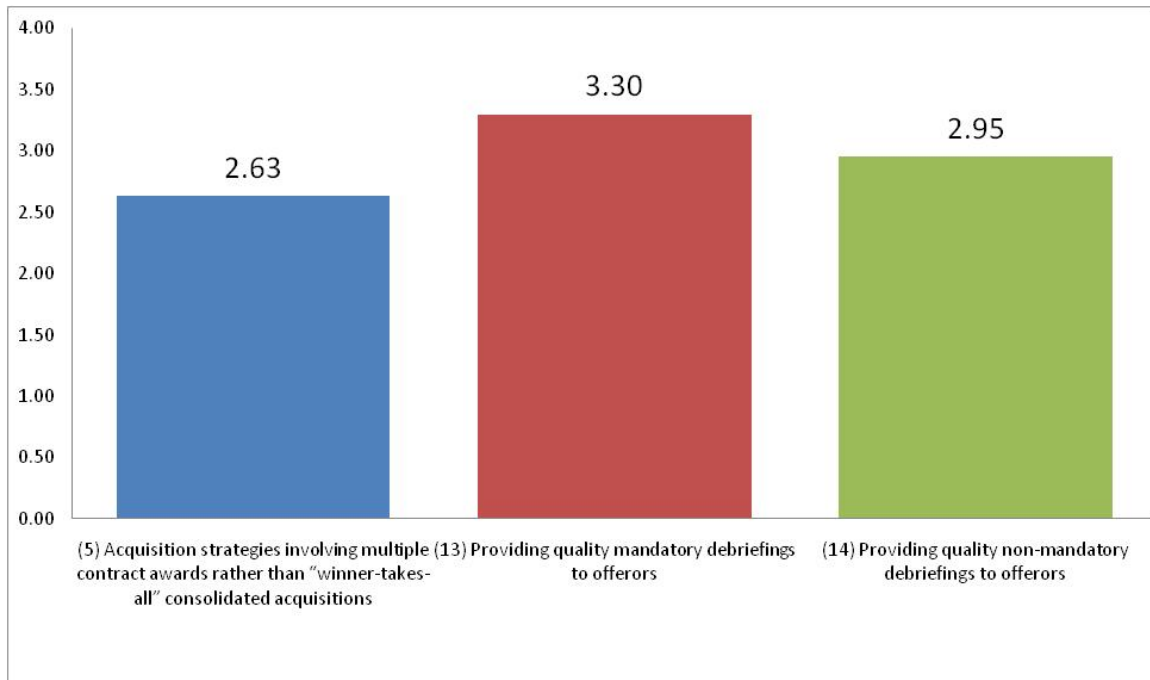


Figure 28. Relative Identification of Defensive Strategies used to Reduce Protestor's Inclination to Protest for Strategic Business Reasons

This data shows that respondents believe their agencies utilize both *mandatory* and *non-mandatory debriefings to offerors* with fairly high frequency. However, respondents seem to believe that *acquisition strategies involving multiple contract awards rather than "winner-takes-all" consolidated acquisitions* are employed less frequently. To the extent that further employment of such an acquisition strategy is practicable, it may represent an opportunity for agencies to reduce the strategic business reasons behind a protestors filing.

G. RESPONDENT COMMENTS AND OPINIONS

Survey respondents were given the opportunity to provide comments regarding contractor motivation: to initiate protests in general, to file protests at the GAO, under agency level programs, at the Court of Federal Claims, to challenge an agency's decision to override an automatic stay at the Court of Federal Claims, and to resolve protests

through ADR procedures. Respondents were also offered the opportunity to provide suggestions for improvements to policies, processes, practices, laws or regulation. The range of comments provided was quite diverse. The following paragraphs summarize some of the common themes. Additional comments of particular note or interest are included as well.

Respondent comments largely fell into one of two categories: comments, that involve a strategy or practice, and comments that involve a policy, regulation, or aspect of law. In regards to strategies and practices, that could potentially reduce the negative impact of bid protests, respondents noted issues related to training and communication, including the benefits of a quality debriefing. One respondent in particular noted the need for “improvements in the quality, content, and context of information given in award debriefings [as a means] to prevent protests that are filed as ‘fishing expeditions’.”

A number of respondents indicated that peer reviews were practices employed by their agency to minimize the negative impact of bid protests. Typical responses included comments, such as “Peer reviews at all levels...my division has incorporated peer reviews for all new procurements...above Simplified Acquisition Procedures (SAP) threshold.” Another respondent noted,

Each acquisition office has a ‘peer’ type of contract review board, which considers planned solicitations and contract awards over specific thresholds. Senior Procurement Executive reviews all acquisition plans exceeding \$10M and a formal Investment Review Board, including acquisition representation, review planned acquisitions over \$75M.

Respondents cite protestor familiarity with GAO processes, protestor’s belief in GAO’s independence, and the relative inexpensiveness of filing and litigating at GAO, as primary reasons why protestors elect to file protests with the GAO. Respondents also made a number of comments regarding agency level protest procedures. The majority of comments seem to indicate that trust is a major factor in the success of an agency level protest forum. Namely, protestors must trust that agencies will be able to set aside any agency bias and issue decisions in a fair, impartial, and equitable manner. Comments contained in Figure 29 seem to indicate that respondents believe protestors do not have sufficient trust in agency level protest forums.

Please briefly describe any factors that, in your experience, motivate or constrain a contractors' decisions to:
protest under your agency's agency-level protest procedures:
Most agency protests are filed pro se by a vendor who thinks a mistake has been made but doesn't want to involve itself in a more formal process. Though many agency protests contain intemperate language, protestors to the agency generally see themselves as in a less adverse position to the agency than those who go to GAO or the Court of Federal Claims.
Distrust that Agency will reverse itself prevents some contractors from using agency procedures.
Lack of confidence on the part of industry that the agency will provide (be able to provide) appropriate relief.
We encourage agency protests. We would prefer to educate disappointed offerors through this process rather than GAO.
Contractors are reluctant to issue agency level protests fearing the agency doesn't fairly consider their protest.
likelihood of greater payout/success and greater familiarity with GAO

Figure 29. Respondent Comments on Factors that Motivate or Constrain a Protestor to Utilize Agency Protest Procedures

These comments are consistent with other academic studies which note “contractors and attorneys have voiced doubts about the general ability of procuring agency personnel to render fair and impartial protest decisions.”³⁸

In terms of policy, the lack of a financial disincentive for protestors filing a protest that is ultimately denied or dismissed was consistently noted by respondents. Figure 30 lists some of the most common comments regarding the lack of disincentives for filing frivolous or meritless protests.

³⁸ Erik A. Troff, “The United States Agency-Level Bid Protest Mechanism: A Model for Bid Challenge Procedures in Developing Nations,” *15 Air Force Law Review* (2005): 148.

<i>Lack of Disincentives for Protestors</i>
Loser pays litigation costs to winner. If Gov wins, loser pays reasonable FTE salaries of CO, legal advisor, technical evaluator etc. expended in processing the protest.
Loser pays. Industry must be held accountable for frivolous protests that delay procurements when they have no chance of winning.
There should be some potential penalty for the filing of a clearly frivolous or groundless protest...
There should be some penalties for wasting everyone's time and effort defending frivolous lawsuits or lawsuits with little or no merit, especially considering most protests are denied. Also, maybe more training and publicizing of alternative means of resolving disputes between contractors and the Government. There should be a "quick look" on a protest to determine if it has any merit before expending the resources needed for a full review. Keep metrics on "repeat offenders" and those that have a bad track record of filing frivolous protests or those without merit should be penalized.
Drop the "government pays" aspect of sustainment. Alternately, make contractors pay for government costs if the protest is dismissed or denied.
There is no penalty for filing a frivolous protest, and usually causes a tremendous burden on gov manpower.
Very easy to file protest. Contractor has nothing to lose by filing protest.

Figure 30. Respondent Comments on the Lack of Disincentives to Protest

THIS PAGE INTENTIONALLY LEFT BLANK

V. ANALYSIS OF FEDERAL AVIATION ADMINISTRATION AND ARMY MATERIAL COMMAND AGENCY PRACTICES

A. INTRODUCTION TO THE FAA’S ODRA PROCESS

In an effort to transform the National Airspace System, Congress specifically exempted the FAA from all procurement laws and acquisition regulations when it passed the 1996 Department of Transportation Authorization Act.³⁹ Congress mandated that the FAA develop a new and distinct acquisition system. Utilizing advice and opinions from public and private sector experts, the FAA created the Acquisition Management System (AMS). AMS became the system used by the FAA to procure the material, resources, and services it would need to carry out its mission.

With the implementation of AMS, it became clear that the FAA and its contracting partners would no longer have access to the GAO as a forum to resolve bid protests. As a result, in 1997 the FAA created a new office, known as the Office of Dispute Resolution for Acquisition (ODRA). The ODRA is the statutorily designated forum for all contract disputes and bid protests arising under the FAA’s AMS.⁴⁰ At the core of the ODRA dispute resolution process is a belief that it is in the interests of both the FAA and its private sector partners to work together to voluntarily resolve procurement related disagreements in a timely and equitable manner.

Congress directed the Administrator of the FAA to ensure that at a minimum, the AMS resolved “bid protests and contract disputes related thereto, using consensual alternative dispute resolution techniques to the maximum extent practicable.”⁴¹ Under this system, formal litigation should only be employed as a last resort to resolve a bid protest. As noted in the Vision 100-Century of Aviation Reauthorization Act of 2003,

The resolution of bid protest and contract disputes related thereto, using consensual alternative dispute resolution techniques to the maximum extent practicable...a bid protest or contract dispute that is not addressed

³⁹ United States Code, 49 § 40110(d)2.

⁴⁰ United States Code, 49 § 40110(d)3.

⁴¹ United States Code, 49 § 40110(d)1(B).

or resolved through alternative dispute resolution shall be adjudicated by the Administrator through Dispute Resolution Officers or Special Masters of the FAA ODRA.⁴²

ADR produces a faster and less costly outcome when compared to litigation.⁴³ The FAA has successfully used ADR to resolve most of the protests brought before the ODRA. Additionally, through ADR, the parties themselves maintain control over the process and usually end up structuring a settlement that produces a “win-win” situation for those involved. Unlike litigation, ADR helps the parties involved preserve a mutually beneficial and amicable business relationship with one and other. In the simplest of terms, the ODRA process was designed with the goal of providing a fair, fast, and efficient resolution to disputes and protests under adjudication standards outlined in the Administrative Procedures Act.⁴⁴

Because the ODRA expects both parties to attempt ADR, most cases, almost universally are resolved through ADR. Further, the decision to use ADR is not left up to the discretion of the parties involved, but rather it is immediately discussed during the initial status conference, which is normally held within the first five (5) business days after a protest filing.⁴⁵

B. KEY DIFFERENCES BETWEEN FAA AND GAO’S BID PROTEST PROCESS

In terms of volume, the caseload at GAO is significantly larger than at ODRA. In an average year ODRA handles about fifty-five (55) protests, compared to the more than 1,400 protests filed at GAO.⁴⁶ The GAO however has a larger staff, and has been issuing decisions on bid protests since the 1920s.⁴⁷ On average, the GAO issues a decision between day seventy-five (75) and day one-hundred (100). In certain circumstances,

⁴² Public Law 108-176, section 224b(1).

⁴³ Worthington and Goldsman, *Contracting with the Federal Government*, 472.

⁴⁴ United States Code, 5 § 551-559.

⁴⁵ Code of Federal Regulations, 14 § 17.17 (b).

⁴⁶ Federal Procurement Institute.

⁴⁷ Kepplinger, “Commentary: GAO's Bid Protest Role,” 2.

whether on the request of a party, or on its own initiative, GAO may utilize an express option, wherein a decision is made within sixty-five (65) days.⁴⁸

In comparison, the process at ODRA is normally concluded at the fifty-two (52) day mark.⁴⁹ Since ODRA is part of the FAA, there is greater cooperative interaction between ODRA officers, FAA program offices, and contractors in pursuing mutually agreeable ADR efforts at early stages of the acquisition process, often times prior to the filing of a formal protest with ODRA. Comparatively, the GAO, as an agency in the Legislative Branch, rarely makes recommendations or influences agency action prior to receipt of a protest by an aggrieved party.

A key difference between ODRA and GAO is that ODRA uses ADR as the primary method of protest resolution, whereas the GAO tends to promote ADR only if the parties concerned are willing. Within the ODRA, there is a presumption that parties will utilize ADR. In fact, within five (5) days of the initial status conference, parties must elect to use ADR or submit “joint or separate explanations as to why ADR proceedings will not be used and the Default Adjudicative Process will be needed.”⁵⁰ In addition, even if the parties are unable to utilize ADR, the FAA may nonetheless utilize “informal ADR techniques...concurrently with and in parallel to adjudication.”⁵¹ However, the greatest distinction between the two protest forums is in the character of the forum itself. The GAO process is extremely formal and adversarial in nature. Agency reports must be produced and defended by the agency, and the aggrieved offeror has the ability to offer comments on the agency report.

In comparing the notional timeframes of a bid protest under the GAO system and the FAA system, one can clearly see the benefits of the FAA system. As shown in Figure 31, the FAA system, with its emphasis on ADR usually results in an earlier resolution of protest than compared to GAO procedures.

⁴⁸ Code of Federal Regulations 4 § 21.10

⁴⁹ Richard D. Lieberman and Jason D. Morgan, *The 100 Worst Mistakes in Government Contracting* (Ashburn: National Contract Management Association, 2008), 29.

⁵⁰ Code of Federal Regulations, 14 § 17.17 (b)1(c).

⁵¹ Code of Federal Regulations, 14 § 17.31 (c).

Key Protest Milestones

Time limits calculated in business days.

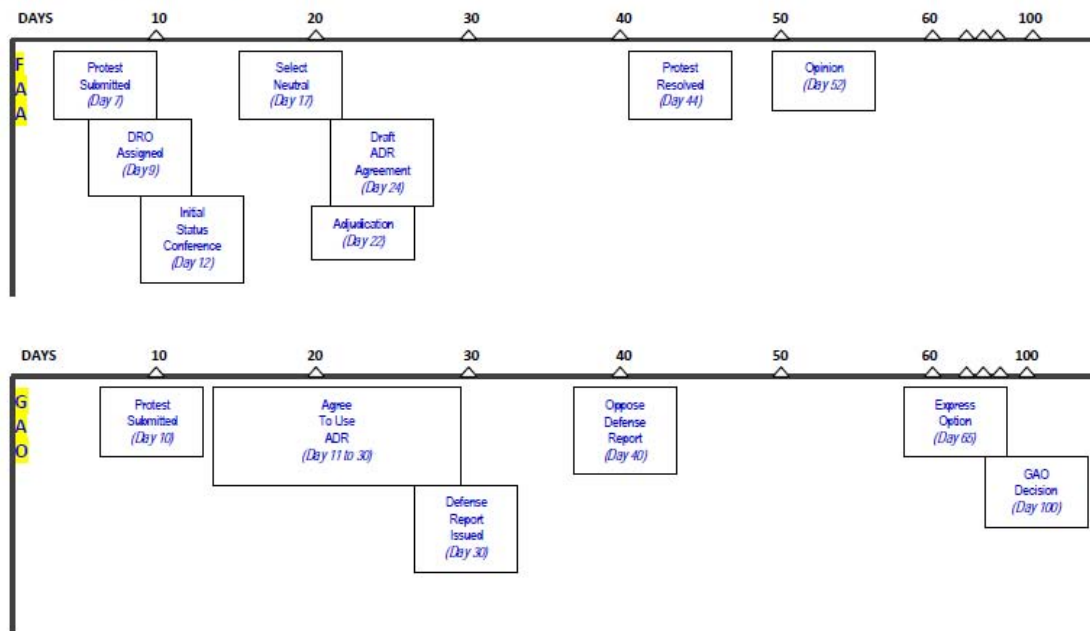


Figure 31. Comparison of GAO⁵² vs. FAA⁵³ Timeline of Key Protest Milestones.

C. THE U.S. ARMY MATERIEL COMMAND'S AGENCY LEVEL PROTEST PROGRAM.

Under the authority of FAR part 33.103(c), AMC attempts to use a progressive approach, coupled with creative initiatives in an effort to meet its litigation challenges. The objectives of the AMC ADR program are to utilize an interdisciplinary approach to address conflict resolution and to design processes that enable the parties to foster creative, acceptable solutions. The result are expeditious decisions that require fewer resources than formal litigation.⁵⁴

The primary steps in AMC's ADR process include negotiation, mediation, fact-finding, arbitration, and mini-trial. Commonly used definitions of these terms and other ADR terms applicable to procurement related ADR are contained in Appendix A. In 1991, this process was developed and within four years the AMC-Level Protest Program

⁵² Code of Federal Regulations 4 § 21.0, et seq.

⁵³ Code of Federal Regulations 14 § 17.0, et seq.

⁵⁴ Alternative Dispute Resolution Program, passim.

was designated as one of the “Ten Best Government Procurement Practices” by the Office of Federal Procurement Policy. The 1995, Executive Order 12979 directing federal agencies to allow protests to be filed at an agency level above the CO was a process modeled after the AMC-Level Protest Program.⁵⁵

Some of the remedies offered by AMC’s Level Protest Program include the following:

- Contract termination
- Recompetition of requirement
- Solicitation revision
- Direction to not exercise an option
- Contract award
- A combination of the above

Using these remedies, AMC has resolved hundreds of protests in-house, avoiding the cost of litigation associated with a protest at GAO. In order to reduce the number of protests, AMC places a strong emphasis on conducting meaningful debriefings. This strategy supports the agency’s ADR initiative. AMC encourages its activities and contractors to “partner.” This is a philosophy and process that emphasizes open communication and early identification of potential problems. The partnering parties work together to develop a charter that identifies common goals and objectives that the parties are committed to achieving together. The non-adversarial nature of this technique seems to have improved the nature of the relationship between AMC and its contractors.

Consistent with President Clinton’s Executive Order, which still remains in effect, AMC has developed an iterative strategic planning process to better coordinate ADR programs. The goal of this effort is to better leverage ADR resources and to create greater knowledge about ADR processes throughout the Army.

AMC is working to expand ADR training opportunities for lawyers and non-lawyers alike. In an effort to identify conflicts likely to benefit from ADR, but for which there exists no well established ADR program, AMC has increased its focus on

⁵⁵ U.S. Army Materiel Command, 5.

information collection from the field. AMC's Office of Command Counsel is pooling the resources and knowledge available at field installations, with an eye towards expanding the use of ADR in areas, such as Equal Employment Opportunity, labor-management relations, and environmental stewardship.⁵⁶

D. KEY DIFFERENCES BETWEEN AMC AND GAO'S BID PROTEST PROCESS

Like the FAA, the number of protests filed with AMC is significantly smaller than the number of protests filed with GAO. AMC handles about seventy-five (75) protests per year compared to the over 1,400 protests filed with GAO in a given year. Average decision times however are shorter at AMC. AMC is able to issue its decisions within fifteen (15) days, far in advance of the thirty-five (35) day requirement of Far Part 33.⁵⁷ Comparatively, under the express option decisions at GAO are issued within sixty-five (65) days at GAO or between seventy-five (75) and one-hundred (100) days under GAO's normal adjudicative process. Figure 32 compares the AMC's protest timeline to that of the GAO.

⁵⁶ Recent Army ADR Achievements, 1.

⁵⁷ Federal Acquisition Regulations Part 33(103(c)).

Key Protest Milestones

Time limits calculated in business days.

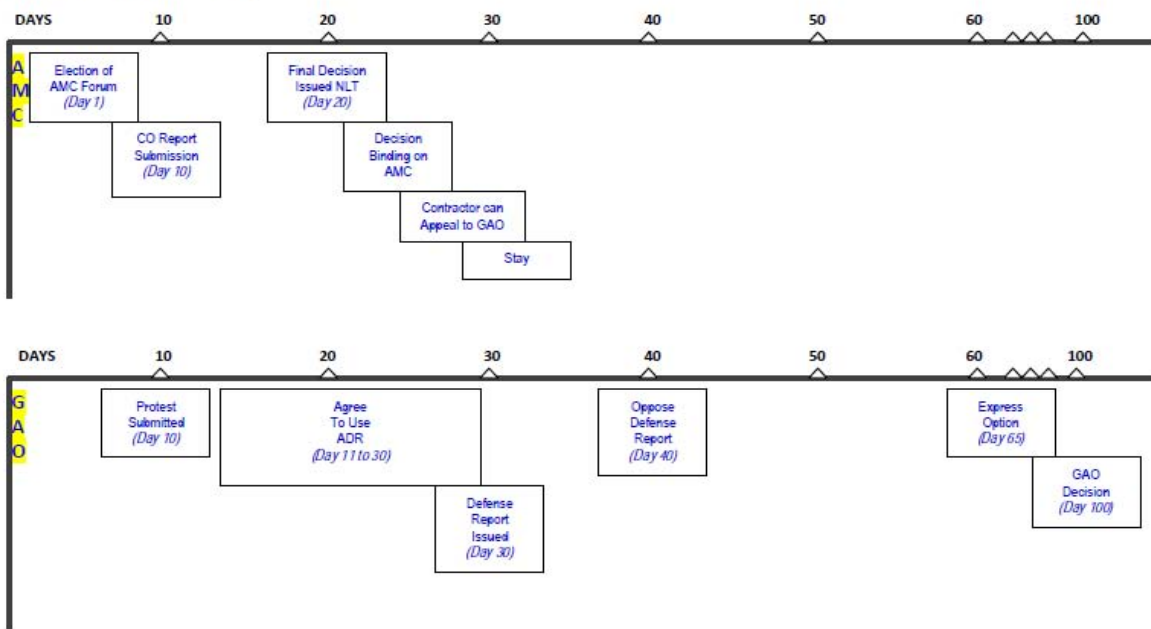


Figure 32. Comparison of GAO⁵⁸ vs. AMC⁵⁹ Timeline of Key Protest Milestones

⁵⁸ Code of Federal Regulations 4 § 21.0, et seq.

⁵⁹ Alternative Dispute Resolution Program, passim.

THIS PAGE INTENTIONALLY LEFT BLANK

VI. SUMMARY AND ANALYSIS

Clearly, best practices exist within the federal government. The FAA and AMC programs represent two leading edge programs, designed from the outset to create a harmonious business relationship between government and private industry. The professional men and women who staff the acquisition and legal offices in the federal government are another clear source of best practices. Their tremendous professional knowledge, significant expertise, and practical experience were the basis for our research survey.

Acquisition managers are no doubt interested in reducing program costs and time delays. Some of the more effective ways to do so are to employ ADR processes to the maximum extent practicable, seek overrides of mandatory stays when in the best interests of the government, to take voluntary corrective action when appropriate, and to raise objections to protests that are frivolous or otherwise lack merit. From our research, it seems that in many instances such practices are often under-utilized or not employed at all. We are left with a number of answers to the research questions considered at the beginning of this project.

A. ANSWERS TO RESEARCH QUESTIONS

1. Strategies and Practices Employed

- What strategies or practices are currently being used to minimize the impact of bid protests on the acquisition process while maintaining integrity, economy, and efficiency?

Our research has shown that there are numerous strategies and practices currently being used to minimize the impact of bid protests on the acquisition process, while maintaining the ideals of integrity, economy, and efficiency. From review of procedures at the FAA and AMC, we see that ADR is being utilized as an effective tool to minimize the impact of protests. What characterizes the ADR programs of both FAA and AMC as so successful is the presumption that all protest will be resolved through ADR, unless there are countervailing reasons to the contrary.

From our survey of acquisition and legal professionals, a number of these practices have been identified:

- Setting in advance clear and publicly disclosed evaluation criteria and adhering to these criteria during source selection.
- Advanced acquisition planning.
- Agency procedures to prevent fraud, procurement integrity violations, and/or organizational conflicts of interests.
- Providing quality mandatory debriefings.
- Thorough market research and engagement with industry.
- Agency level protest procedures.

Some of the comments we received from survey respondents also demonstrate that institutional peer reviews are practiced by many federal agencies. Peer reviews may go beyond just merely reviewing a CO's technical documentation. Peer reviews can encompass a review of overall acquisition strategies.

2. Barriers to Effective Resolution

- What current processes or regulations preclude effective avoidance or resolution of bid protests in a manner that minimizes adverse impact on the acquisition system?

Our survey identified a number of process and regulations that preclude effective resolution or avoidance of bid protests. Some of the most common processes, regulations, and policies include:

- The lack of fiscal disincentives for unjustified protests such as "loser pays" arrangements.
- Poor acquisition planning.
- Lack of properly trained acquisition workforce.
- Frivolous protest filings.
- Lack of formal sanctions at the GAO for frivolous protests.

3. Obstacles to Effective Cooperation

- What are the obstacles that impede effective cooperation in resolving bid protest?

Most legal and acquisition professionals surveyed indicate that they believe that their agencies do not use ADR to a great extent to resolve protests. However, the research we conducted regarding the FAA and AMC, show the clear benefit of utilizing ADR. At both the FAA and AMC bid protests are resolved earlier than they are at GAO. It appears that for most agencies, a reluctance to utilize ADR as a means to resolve protests is an obstacle that impedes effective cooperation.

Our research survey also indicates that there may be other reasons, beyond agency cooperation, that create obstacles to more effective cooperation between industry and government. Numerous survey respondents cited the fact that they believe agency level protest procedures could be more effective, if unsuccessful offerors had greater trust in the agency. In this regard, trust seems to be a major obstacle in more effective cooperation. If protestors do not trust agencies to take remedial action when appropriate, then effective cooperation between the two parties is impaired.

THIS PAGE INTENTIONALLY LEFT BLANK

VII. RECOMMENDATIONS AND AREAS FOR FURTHER RESEARCH

A. RECOMMENDATIONS

1. Case for Fiscal Disincentives beyond Truly Frivolous is not Demonstrated

Our research has revealed that agency personnel have strong opinions regarding the need for some type of disincentives for unsuccessful protestors. The opinions range from “loser pays” scenarios, where the losing party to the protest must reimburse the other for the cost of the unsuccessful litigation, to more reserved opinions, where penalties are only assessed for those protests that are deemed to be truly frivolous.

There is no doubt that the lack of disincentives for filing an unsuccessful protest may contribute to the litigious desires of a would-be protestor. Nonetheless, we are not convinced that such disincentives are prudent. While such a procedure may very well reduce the negative impact frivolous protests have on the acquisition system, it may do so at the expense of legitimate protests. Such disincentives may actually discourage participation in the federal contracting process and as a result competition may decrease.⁶⁰ Further, in order to determine whether or not a protest is indeed frivolous, it would require additional action on the part of the GAO. Currently, GAO determines initially whether or not a protest meets the requirements for filing a protest (timely, an interested party, etc...) and subsequently determines the merit of the protest. In order to determine that a protest is sanctionable as frivolous, GAO would have to make a separate determination. Under Rule 11 of the Rules of the Court of Federal Claims, a protester can be sanctioned only if the protest:

(1) is being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

⁶⁰ U.S. Government Accountability Office, 09-401197, 13.

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Necessarily, a protestor would have some right to due process in order to “avoid punishing a company for filing a good-faith but unmeritorious protest.”⁶¹ This process may actually make the overall protest process longer, which could have potential negative impacts on the acquisition system.

2. Agencies must Vigorously Object to Protests when Appropriate

Related to the matter of frivolous protests are agency actions designed to properly document their objections to a protest. The GAO “dismisses protests, where appropriate, without the need to resolve whether the protest was frivolous.”⁶² It is incumbent on agencies however, to object to protests when appropriate. Our research revealed that many acquisition and legal professionals believe frivolous protests frequently preclude effective resolution of bid protests. Yet the very same individuals indicated that they believe their agencies infrequently raise vigorous objections in response to frivolous protests. Since the GAO will dismiss protests that are without merit, it is incumbent upon agency officials to raise objections to protests they deem to be frivolous or otherwise without merit.

3. Provide Quality Debriefs to Prevent or Limit Strategic Protests

Numerous survey respondents provided comments regarding the strategic reasons that may induce an unsuccessful offeror to file a protest. One respondent called such

⁶¹ U.S. Government Accountability Office, 09-401197, 13.

⁶² U.S. Government Accountability Office, 09-401197, 12.

protests “fishing expeditions” while another stated it was a means to “circumvent FOIA.” Respondents’ rationale is that by filing a protest, even if ultimately unsuccessful, the protestor may obtain some information that he can later use to his advantage. One means by which agencies can prevent such behavior is to provide a high quality debriefing. If an unsuccessful offeror has been thoroughly debriefed as to why he was not selected for award, he may not feel he needs any additional information, and as a result he may be less inclined to file a protest. A thorough debrief may also convince an unsuccessful offeror that he was in fact not prejudiced by the agency’s decision and therefore has no need to file a protest.

Even with complete and thorough debriefs; some protestors will want to file a protest in order to seek information not otherwise available to them. A change in agency policy could prevent this occurrence. The information asymmetry that exists between the government and unsuccessful offerors may very well influence an offeror’s decision to protest. Government agencies can prevent this from occurring by eliminating or reducing the asymmetry. Information that is normally made available to an unsuccessful offeror only after having filed a protest should be made available to the offeror absent a formal protest filing. This may eliminate one incentive that an unsuccessful offeror has in filing a protest.

4. Require Parties to Document Decision not to use ADR and other Similar Tools

Our review of ODRA procedures highlighted the primary use of ADR to resolve protests. We noted the fact that ODRA was able to resolve protests more quickly than when compared to the GAO’s bid protest process. Within ODRA, there is an overriding presumption that parties will resolve protests through ADR. If unable to utilize ADR, both parties must submit explanatory statements to the Dispute Resolution Officer. The presumption that parties will utilize ADR, unless there is a countervailing reason to the contrary, is a primary driver behind ODRA’s processes. The GAO in its regulations and the Executive Branch through the Federal Acquisition Regulation should adopt a similar procedural policy, and require each party to conduct cost-benefit analysis and affirmatively demonstrate why ADR cannot be utilized to resolve the protest. Such a

policy would likely reduce the time delays and costs an agency must endure during a bid protest. Agencies can also be required to formally demonstrate why it does not seek dismissal, early corrective action, or stay overrides.

B. AREAS FOR FURTHER RESEARCH

Our research has revealed a number of further areas of study that warrant additional research. Specific areas of study include:

- Analyze and document contractor motivation to file a protest. Such research should include a thorough understanding of the business decisions that either constrain or enhance a contractor's motivation to file a protest.
- Conduct further analysis into debriefing procedures. Best practices for conducting a successful debriefing need to be researched and documented.
- Research into areas of strategy and practices that survey respondents cited with minimal frequency. A number of these strategies and practices appear useful in mitigating the negative effect of reducing the impact of bid protests, yet they are underreported in our research. Further study into this area should be conducted.
- Acquisition planning is cited the most commonly cited strategy or practice to minimize the impact of bid protests on the acquisition process. Best practices for all facets of acquisition planning should be researched and documented.
- The lack of financial disincentives for unsuccessful offerors was a highly cited policy that precludes the effective resolution or avoidance of bid protests. Although we have previously stated our recommendation on this policy, we nonetheless feel that further research is warranted. Specifically, research must be conducted into the negative externalities that may be associated with financial disincentives.

APPENDIX A. ADR DEFINITIONS

U.S. DEPARTMENT OF JUSTICE ELECTRONIC GUIDE TO FEDERAL PROCUREMENT ADR

ADR Definitions

The following are some commonly used definitions of ADR terms applicable to procurement-related ADR. Agencies may differ in the manner in which they define such terms. Also, some of these terms may be used differently in other contexts.

Arbitration - A dispute resolution process whereby a neutral third-party is empowered by agreement of the parties to issue a decision on the controversy, following the conduct of a trial-like hearing. An arbitrator's decision is generally binding and not reversible, absent fraud or misconduct on the part of the arbitrator. Arbitrators often are asked to attempt to mediate (see below) a settlement first, and to impose a decision on the parties only as a last resort. This hybrid process is frequently referred to as "**Med/Arb**".

Conciliation - Efforts by a neutral third party to assist in the resolution of an issue in controversy, including holding meetings with individual parties to discuss the controversy and potential solutions; contacting individual parties by telephone or mail, and serving as a conduit for information between them.

Early Neutral Evaluation - The process by which an neutral third party imparts to the parties his/her views as to the strengths and weaknesses of their respective positions relating to an issue in controversy. This process frequently is combined with conciliation or mediation.

Fact Finding - A process in which a neutral third party assists the parties to determine in an objective manner the facts relating to an issue in controversy. Frequently, fact finding will be engaged in as a prelude to mediation.

Mediation - An effort by a neutral third party to resolve an issue in controversy through the conduct of face-to-face meetings between the disputing parties. The third party is not authorized to impose a settlement upon the parties, but rather seeks to assist the parties in fashioning a mutually satisfactory solution to the issue in controversy. Mediation can take two forms: (1) **facilitative mediation** -- in which the mediator simply facilitates discussions between or among the parties and does not provide any form of evaluation of the merits of their respective positions; and (2) **evaluative mediation** -- in which the mediator provides the parties, either individually or jointly, with **early neutral evaluation** (see above), i.e., his/her views as to the strengths and weaknesses of their respective positions, in conjunction with the mediator's efforts to help the parties fashion an amicable resolution to their controversy.

Mini-Trial - A procedure where the parties make abbreviated presentations to a neutral third party who sits with the parties' designated principal representatives as a mini-trial panel to hear and evaluate evidence relating to an issue in controversy. The neutral may thereafter meet with the principal representatives to attempt to mediate a settlement. The mini-trial process may also be a prelude to the neutral's issuance of either a formal written non-binding advisory opinion or to the neutral's rendering of a binding arbitration award.

Ombuds - An individual who has been designated as a confidential and informal information resource, communications channel, complaint-handler and dispute-resolver. The ombuds role was intended to be an antidote to abuses of governmental and bureaucratic authority and administration, and ombuds may serve as effective intervenors in cases of arbitrary decision making.

Summary Trial With Binding Decision - A binding ADR procedure utilized by Boards of Contract Appeals wherein the parties make abbreviated evidentiary presentations concerning an issue in controversy, and the Board judge renders a summary binding and non-appealable decision. The decision, frequently rendered from the bench, may not be used as precedent in the future.

APPENDIX B. RESEARCH SURVEY

Achieving Better Acquisition Outcomes in Bid Protests: ADR and

1. Consent to participate in research

Naval Postgraduate School
Consent to Participate in Research

Introduction. You are invited to participate in a research study entitled "Achieving Better Acquisition Outcomes in Bid Protests: ADR and Other Best Practices for Prevention and Resolution." The Naval Postgraduate School (NPS) is conducting a study on behalf of the Office of Assistant Secretary of the Air Force for Acquisition concerning the bid protest process. Among other things, our study examines possible ways to minimize negative time and cost impacts of bid protests, to reduce frivolous or meritless protests, and to assess the efficacy of Alternative Dispute Resolution (ADR) in bid protests.

Procedures. An agency point of contact within legal and/or acquisition leadership office is contracted by e-mail with request to participate in an anonymous survey. The survey will be conducted electronically using SurveyMonkey.com. Estimated length of each subject's participation: up to 1 hour responding to survey. Secondary data will be collected to the extent it was already made public, or to the extent participating agency leaders/experts find it appropriate. Examples of data include public data on bid protests available on the Government Accountability Office website, or data on use of ADR in bid protests from agency records.

Voluntary Nature of the Study. Your participation in this study is strictly voluntary. If you choose to participate you can change your mind at any time and withdraw from the study. You will not be penalized in any way or lose any benefits to which you would otherwise be entitled if you choose not to participate in this study or to withdraw.

Potential Risks and Discomforts. This study does not request official agency positions on laws, regulations, or specific cases, and does not seek information that may be subject to protective orders in procurement protests. Participants adhering to these limitations should not be subject to any risks or discomforts. Risks for participants breaching these limitations may include embarrassment or penalties as may be imposed by law.

Anticipated Benefits. Anticipated benefits from this study include improvements to the procurement protest process throughout the Department of Defense and at other Executive Branch agencies. Study results are expected to reduce program disruptions and costs from protests to Federal acquisition programs.

Compensation for Participation. No tangible compensation will be given. Final research report will be available to your agency at the conclusion of the study.

Confidentiality & Privacy Act. Any information that is obtained during this study will be kept confidential to the full extent permitted by law. No personally identifying information will be collected as part of the survey. Further, all reasonable efforts will be made to keep personal information for agency points of contract confidential. No names or titles will be published in the study report. Records will be stored in the paper and electronic files of the research team and on related electronic accounts in the NPS networks. However, it is possible that the researcher may be required to divulge information obtained in the course of this research to the subject's chain of command or other legal body. Therefore, total confidentiality cannot be guaranteed.

Points of Contact. If you have any questions or comments about the research, or you experience an injury or have questions about any discomforts that you experience while taking part in this study please contact the Principal Investigator, Dr. Max Kidalov, 831-656-3254, mkidalov@nps.navy.mil. Questions about your rights as a research subject or any other concerns may be addressed to the Navy Postgraduate School IRB Chair, Dr. Angela O'Dea, 831-656-3966, alodea@nps.edu.

Achieving Better Acquisition Outcomes in Bid Protests: ADR and

*** 1. Statement of Consent. I have read the information provided above. I have been given the opportunity to ask questions and all the questions have been answered to my satisfaction. I have been provided a copy of this form for my records and I agree to participate in this study. I understand that by agreeing to participate in this research and signing this form, I do not waive any of my legal rights.**

☐ I agree

Achieving Better Acquisition Outcomes in Bid Protests: ADR and

2. Background Information

*** 2. Please select your agency:**

Agency

My agency:

Other (please specify)

*** 3. Please choose your office:**

Select One

Acquisition ☐

Legal ☐

Achieving Better Acquisition Outcomes in Bid Protests: ADR and

3. Strategy or Practice

4. (a) How often does your agency engage in the following defensive or preventive strategies or practices to minimize possible negative impacts of bid protests on the acquisition process?

	Always or With Great Frequency	With Moderate Frequency	In Exceptional Cases or With Rare Frequency	Never	Don't know or information unavailable
(1) Advance acquisition planning	☐	☐	☐	☐	☐
(2) Thorough market research and engagement with industry	☐	☐	☐	☐	☐
(3) Greater training for acquisition workforce	☐	☐	☐	☐	☐
(4) Hiring or assigning additional acquisition workforce	☐	☐	☐	☐	☐
(5) Acquisition strategies involving multiple contract awards rather than "winner-takes-all" consolidated acquisitions	☐	☐	☐	☐	☐
(6) Acquisition strategies involving shorter-term contracts rather than long-term contracts	☐	☐	☐	☐	☐
(7) Setting in advance clear and publicly disclosed evaluation criteria and adhering to these criteria during source selections	☐	☐	☐	☐	☐
(8) Agency procedures to prevent fraud, procurement integrity violations, and/or organizational conflicts of interest	☐	☐	☐	☐	☐
(9) Independent expert reviews of acquisition strategies or award decisions by the Small Business Administration or agency Office of Small and Disadvantaged Business Utilization/Office of Small Business Programs	☐	☐	☐	☐	☐
(10) Independent expert reviews of acquisition strategies or award decisions by agency competition advocates and/or task-and-delivery order ombudsmen	☐	☐	☐	☐	☐
(11) Independent expert reviews of acquisition strategies or award decisions by the GAO	☐	☐	☐	☐	☐
(12) Independent expert reviews of award decisions by other experts (please describe below)	☐	☐	☐	☐	☐
(13) Providing quality mandatory debriefings to offerors	☐	☐	☐	☐	☐
(14) Providing quality non-mandatory debriefings to offerors	☐	☐	☐	☐	☐
(15) Agency-level protest procedures	☐	☐	☐	☐	☐
(16) Imposition of voluntary/discretionary stays on protested procurements	☐	☐	☐	☐	☐
(17) Alternative dispute resolution (ADR) procedures with assistance from the GAO or the Court of Federal Claims	☐	☐	☐	☐	☐

Achieving Better Acquisition Outcomes in Bid Protests: ADR and

(18) Alternative dispute resolution (ADR) procedures without assistance from the GAO or the Court of Federal Claims	☐	☐	☐	☐	☐
(19) Taking early corrective actions	☐	☐	☐	☐	☐
(20) Awarding extensions or bridge contracts to incumbents protesting re-competitions	☐	☐	☐	☐	☐
(21) Seeking overrides of mandatory stays based on best interest of the United States	☐	☐	☐	☐	☐
(22) Seeking overrides of mandatory stays based on urgent and compelling circumstances	☐	☐	☐	☐	☐
(23) Taking corrective actions involving inclusion of protesters as subcontractors or members of winning teams	☐	☐	☐	☐	☐
(24) Taking corrective actions involving direct awards to protesters, instead of re-competitions or re-evaluations	☐	☐	☐	☐	☐
(25) Taking corrective actions involving declaratory-type relief, such as changes in agency procurement policies	☐	☐	☐	☐	☐
(26) Taking express option requests under GAO procedures	☐	☐	☐	☐	☐
(27) Vigorous objections and requests for sanctions in response to frivolous protests	☐	☐	☐	☐	☐
(28) Refusal to follow GAO advisory opinions and recommendations where the GAO sustains a protest on apparently wrong grounds	☐	☐	☐	☐	☐
(29) Greater oversight, including inspections, audits, and civil or criminal prosecutions	☐	☐	☐	☐	☐
(30) Other strategies or practices (please describe below)	☐	☐	☐	☐	☐

(b) Please feel free to comment on and/or briefly explain your answers above, including reasons for use or non-use of any strategies or practices described above:

Achieving Better Acquisition Outcomes in Bid Protests: ADR and

4. Types of Alternative Dispute Resolution (ADR) Procedures

5. a) How often does your agency use the following alternative dispute resolution (ADR) procedures to resolve bid protests?

	Always or To a Great Extent	To a Moderate Extent	Rarely or To Some Extent	Never	Don't Know or Information Unavailable
(1) GAO Negotiation Assistance	☐	☐	☐	☐	☐
(2) GAO Outcome Prediction	☐	☐	☐	☐	☐
(3) ADR with the assistance of the Court of Federal Claims	☐	☐	☐	☐	☐
(4) Negotiation	☐	☐	☐	☐	☐
(5) Conciliation	☐	☐	☐	☐	☐
(6) Mediation	☐	☐	☐	☐	☐
(7) Arbitration	☐	☐	☐	☐	☐
(8) Evaluation by Third-party Neutral(s)	☐	☐	☐	☐	☐
(9) Mini-trial	☐	☐	☐	☐	☐
(10) Summary trial by a Board of Contract Appeals	☐	☐	☐	☐	☐
(11) Hybrid techniques	☐	☐	☐	☐	☐
(11) Other techniques (please describe below)	☐	☐	☐	☐	☐

o (b) Please feel free to comment on and/or briefly explain your answers above, including reasons for use or non-use of ADR procedures:

Achieving Better Acquisition Outcomes in Bid Protests: ADR and

5. Aspect of Processes, Laws, or Regulations

6. (a) In your experience, what aspects of current processes, policies, practices, laws, or regulations preclude effective avoidance or resolution of bid protest in a manner that minimizes adverse impact on the acquisition system?

	Always or To a Great Extent	To a Moderate Extent	Rarely or To Some Extent	Never	Don't Know or Information Unavailable
(1) Poor acquisition planning	☐	☐	☐	☐	☐
(2) Lack of properly trained acquisition workforce	☐	☐	☐	☐	☐
(3) Poor debriefings	☐	☐	☐	☐	☐
(4) Failure to maintain adequate documentation of procurement decisions	☐	☐	☐	☐	☐
(5) Failure to assure fair discussions with offerors	☐	☐	☐	☐	☐
(6) Poorly designed or executed cost evaluations	☐	☐	☐	☐	☐
(7) Failure to assure adherence to stated evaluation criteria	☐	☐	☐	☐	☐
(8) Regulatory or statutory provisions discouraging ADR	☐	☐	☐	☐	☐
(9) Other deficiencies in ADR practices	☐	☐	☐	☐	☐
(10) Lack or, or deficiencies in, agency-level bid protest procedures	☐	☐	☐	☐	☐
(11) Lack of formal sanctions at GAO for frivolous protests	☐	☐	☐	☐	☐
(12) Delay-seeking strategies by incumbent contractors who have no legitimate basis for renewed awards	☐	☐	☐	☐	☐
(13) Strategic behavior by disappointed offerors who have no legitimate basis for award in order to recover bid and proposal costs	☐	☐	☐	☐	☐
(14) Frivolous protest filings	☐	☐	☐	☐	☐
(15) Lack of fiscal disincentives for unjustified protests such as "loser pays" arrangements	☐	☐	☐	☐	☐
(16) Agency culture that discourages ADR or reconsideration of award decisions	☐	☐	☐	☐	☐
(17) Agency reluctance/failure to seek award stay overrides	☐	☐	☐	☐	☐
(18) Agency reluctance to seek express option in protests	☐	☐	☐	☐	☐
(19) Agency reluctance to deviate from GAO recommendations and advisory opinions that agency perceives to be wrongly decided	☐	☐	☐	☐	☐
(20) Other aspects (please describe below)	☐	☐	☐	☐	☐

o (b) Please feel free to comment and/or briefly explain your answers above and to identify other specific processes, policies, laws, or regulations that preclude effective avoidance or

Achieving Better Acquisition Outcomes in Bid Protests: ADR and

resolution of bid protests in whole or in part.



Achieving Better Acquisition Outcomes in Bid Protests: ADR and

6. Contractor's Motivation

Please briefly describe any factors that, in your experience, motivate or constrain a contractors' decisions to:

7. initiate protests:

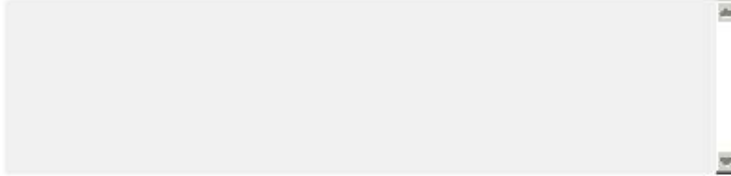
8. protest under your agency's agency-level protest procedures:

9. protest at the GAO:

10. protest at the Court of Federal Claims:

Achieving Better Acquisition Outcomes in Bid Protests: ADR and

11. challenge agency overrides of automatic stays at the Court of Federal Claims:



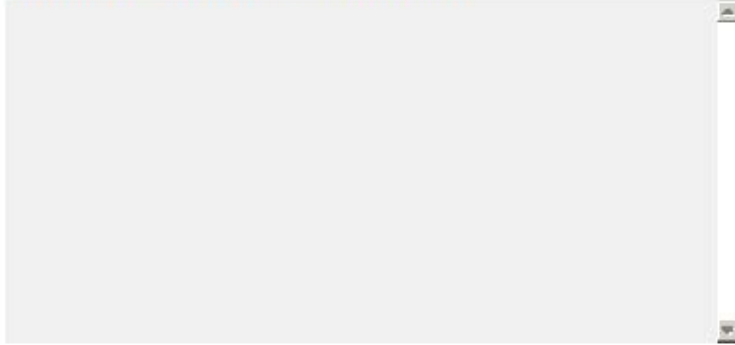
12. resolve protests through alternative dispute resolution (ADR) procedures:



Achieving Better Acquisition Outcomes in Bid Protests: ADR and

7. Areas for Improvement

13. Based on your experience, what improvements to policies, processes, practices, laws, or regulations would encourage effective avoidance or resolution of bid protests in ways that minimize any negative impact of protests on the acquisition system while maintaining transparency, integrity, compliance, economy, and efficiency?



THIS PAGE INTENTIONALLY LEFT BLANK

APPENDIX C. LIST OF FEDERAL AGENCIES SOLICITED

Department of Agriculture
Department of Commerce
Department of Defense (DLA)
Department of Education
Department of Energy
Department of Health and Human Services
Department of Homeland Security (Coast Guard)
Department of Housing and Urban Development
Department of Interior
Department of Justice
Department of Labor
Department of State
Department of the Air Force
Department of the Army
Department of the Navy (Navy and Marine Corps)
Department of Transportation
Department of Treasury
Department of Veterans Affairs
General Services Administration
National Aeronautics and Space Administration
U.S. Agency for International Development

THIS PAGE INTENTIONALLY LEFT BLANK

LIST OF REFERENCES

- Code of Federal Regulations. 14 § 17.0 et seq.
- Code of Federal Regulations. 4 § 21.0 et seq.
- Code of Federal Regulations. 48 § 33.0 et seq.
- Crean, Sean. “Improving Communication during Competitive Source Selections.” Letter to Heads of Contracting Activities. January 8, 2008.
- Gordon, Daniel I. “Constructing a Bid Protest Process: Choices Every Procurement Challenge System Must Make.” *Public Contract Law Journal* 3 (2006): 1–18.
- Kepplinger, Gary. “Commentary: GAO's Bid Protest Role.” *Federal Times* (January 19, 2009).
- Kidalov, Max, and Diana Angelis. Naval Postgraduate School, Work Paper, “GAO Protest Process Flow Charts and Guide to Managing Costs and Time Delays in Bid Protests” (2009).
- Lieberman, Richard D., and Jason D. Morgan. *The 100 Worst Mistakes in Government Contracting*. Ashburn: National Contract Management Association, 2008.
- “Recent Army ADR Achievements.” *Headquarters, Department of the Army*. Web. December 14, 2009.
- Schaengold Michael J., T. Michael Guiffre, and Elizabeth M. Gill. “Choice of Forum for Federal Government Contract Bid Protests.” *18 Federal Circuit Bar Journal* (2006).
- Schwartz, Moshe, and Kate M. Manuel. United States. *GAO Bid Protests: Trends, Analysis, and Options for Congress*. Cong. Doc. CRS R40227. 2009.
- Spriggs, William J., and Max V. Kidalov. “No Way to Protest.” *Legal Times* (March 17, 2003).
- Troff, Erik A., “The United States Agency-Level Bid Protest Mechanism: A Model for Bid Challenge Procedures in Developing Nations.” *15 Air Force Law Review* (2005).
- The Vision 100-Century of Aviation Reauthorization Act of 2003, Pub. L. No. 08–176, § 224 (b)(2)(4).
- U.S. Air Force. Aeronautical Systems Center. Solicitation, Offer and Award. Print. FA8625-10-R-6600.

- U.S. Army Materiel Command. *The AMC Alternative Dispute Resolution Program*. Alexandria: U.S. Army Materiel Command, 1997.
- U.S. Government Accountability Office. *B-311344*.
- U.S. Government Accountability Office. *GAO-08-991T*.
- U.S. Government Accountability Office. General Counsel. *B-401197*. By Gary L. Kepplinger.
- U.S. Government Accountability Office. General Counsel. *GAO-09-251R*. By Gary L. Kepplinger.
- U.S. Government Accountability Office. General Counsel. *GAO-09-471SP*. By Gary L. Kepplinger.
- United States Code, 31§ 3554 (a) (1).
- United States Code, 5 § 51-559.
- Worthington, Margaret M., and Louis P. Goldsman. *Contracting with the Federal Government*. New York: John Wiley, 1998.

INITIAL DISTRIBUTION LIST

1. Defense Technical Information Center
Ft. Belvoir, Virginia
2. Dudley Knox Library
Naval Postgraduate School
Monterey, California
3. Assistant Secretary of the Air Force for Acquisition, Washington, D.C
Attn: Major Brett Kayes
SAF/AQC
Washington, DC
4. Office of the Assistant Secretary of the Navy
Research, Development & Acquisition
Washington, DC
5. Defense Procurement and Acquisition Policy
Washington, DC
6. The Honorable Daniel I. Gordon
Administrator for Federal Procurement Policy
Executive Office of the President
The White House
Washington, DC