



Acquisition Research Program: Creating Synergy for Informed Change

Better Acquisition Management Through ADR and Other Best Practices for Preventing and Resolving Bid Protests

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The Complaint: Fed/DOD Acquisition System Under Siege by Unfair, Frivolous, Costly, Dilatory Protests



The Research Question: Are Federal Procurement Agencies Using Every Tool In the Legal Toolbox to Reduce Costs and Delays from Bid Protests?



In Other Words, Who's Got the Blinds On in the Bid Protest Process?



The NPS Bid Protest Study

- Stood up with funding from the Office of Assistant Secretary of the Air Force for Acquisition and NPS Acquisition Research Program
- Includes Defense Resource Management Institute (DRMI) and Graduate School of Business & Public Policy (GSBPP)
- Multi-disciplinary perspective (students, faculty, procurement law, engineering, economics, management, contracting)
- Study Output Includes:
 - Analytical Papers;
 - Literature Reviews;
 - Guidance Charts on Most Effective Prevention and Resolution Strategies;
 - Survey of Top Legal and Acquisition Professionals in Civilian and Defense Agencies



The Legal Toolbox for Bid Protest Prevention & Resolution:



- Pre-Protest: Pro-Competition Acquisition Strategies, Thorough Debriefings
- Protests at the Agency Level
- Protests at the GAO: Mandatory Stay Overrides; Bridge Contracts; Motions to Dismiss as Frivolous/Meritless, Early Corrective Action, ADR, Express Option Requests; Declaratory Relief, Protest Costs, Refusal to Exercise Options
- Protests at the COFC: Motions to Dismiss, Opposition to TRO/PI/Perm I; Bonds; Judgment on Administrative Record; National Security Considerations Statute; ADR; Rule 11 Sanctions



ADR: The Requirements

- The Competition in Contracting Act ,31 U.S.C. § 3554 (a)(1) required the GAO to provide “for the inexpensive and expeditious resolution of protests.”
- Executive Order No. 12979 (1995) mandates 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.”
- E.O. also states 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.”
- Federal Acquisition Regulation incorporates the tenets of CICA and E.O. 12979 in Subpart 33.1, Protests (including agency-level protests).



Common Objections to ADR and Other Prevention/Resolution Strategies and Flexibilities

- Mandatory Stay overrides are difficult to obtain
- All Potential Offerors Must Concur on ADR
- Source Selection/Protected Information Required for ADR
- Agency Would Like to Obtain Definitive Outside Seal of Approval for its Acquisition from the GAO
- Agencies Must Follow GAO Recommendations Due to Likely Congressional Sanctions
 - Sources: Construction Law Handbook, Congressional Research Service, Schaengold, et al. “Protest Choice of Forum”



Responses to Common Objections on Use of ADR and Other Prevention/Resolution Strategies and Flexibilities

- Mandatory Stay overrides are difficult to obtain
- A: Court of Federal Claims statute, 28 U.S.C. 1491, requires due regard for interests of national defense and national security. 2010 CRS Report No.R40228 shows this statute does not guarantee victory for DOD, but often helps avoid interruptions for defense procurements
- All Potential Offerors Must Concur on ADR
- A: Pre-award, choose the most pro-competitive acquisition strategy that meets gov't needs. Post-award, only offerors with standing (direct economic interest and substantial chance of award) matter



Responses to Common Objections on Use of ADR and Other Prevention/Resolution Strategies and Flexibilities

- Agency Would Like to Obtain Definitive Outside Seal of Approval for its Acquisition from the GAO
- A: GAO decisions are legally non-binding on anyone
- A: GAO review focuses on better procedure, not legal procedure
- A: Agency leaders must be confident in their decisions and agency needs. COFC will hold agencies in violation of the Administrative Procedure Act for following wrong GAO opinions! *See Geo-Seis Helicopters v. United States (2007) and Grunley Walsh International, LLC v. United States (2007)*
- A: GAO decision is time-consuming (up to 100 days mandatory stay without override to wait for decision)
- A: GAO decision is costly in agency time and \$\$\$\$ fees (can award protester legal fees of \$750 per hour, e.g. *Public Communications Services, Inc. – Costs*, B-400058.4 (2009)). In the Boeing tanker protest, legal fees about \$1 million estimated.



Responses to Common Objections on Use of ADR and Other Prevention/Resolution Strategies and Flexibilities

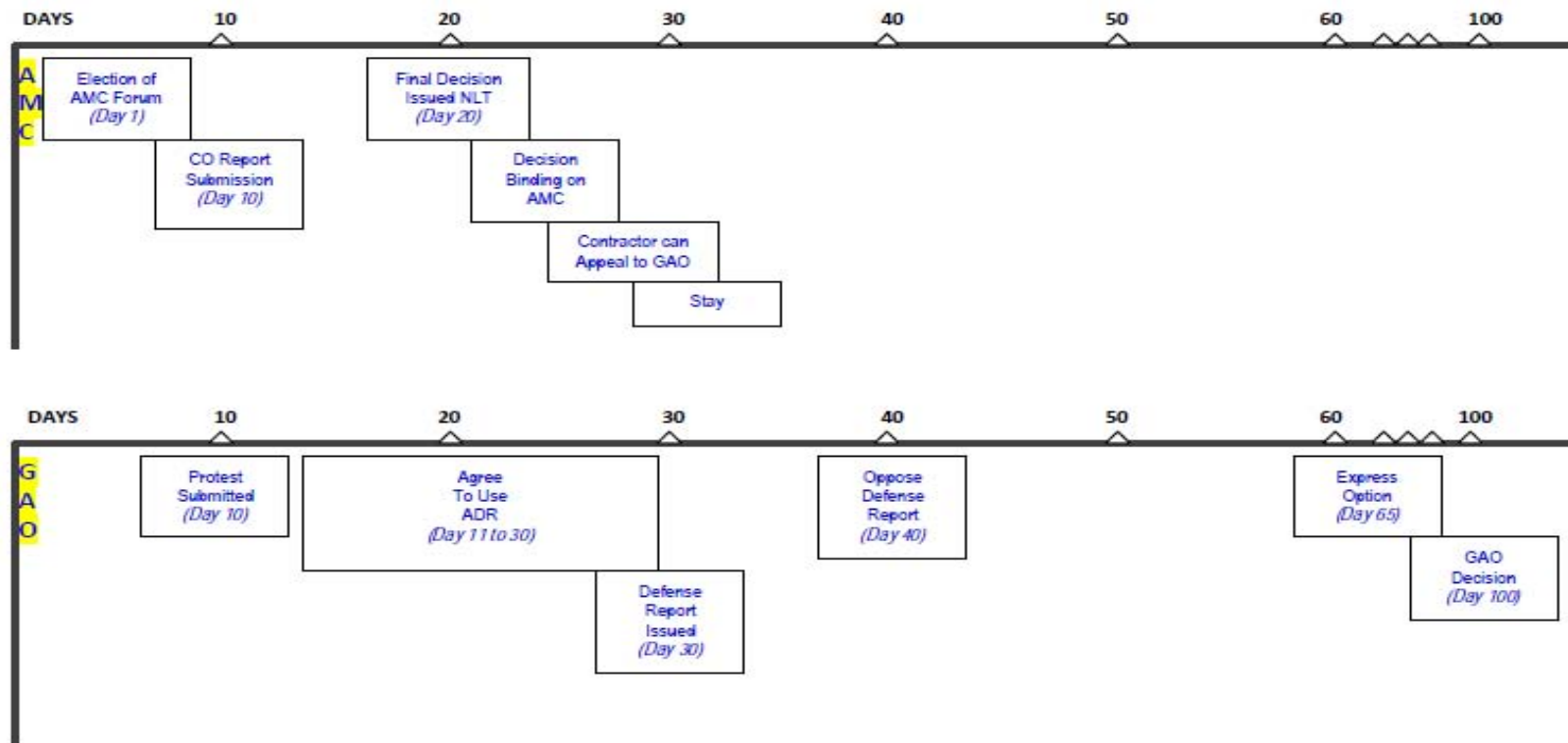
- Agencies Must Follow GAO Recommendations Due to Likely Congressional Sanctions
- A: GAO/CRS data since 1995 shows no sanctions against DOD
- In FY 1995-2009, only 2 civilian and 4 military procurements where agency declined to follow GAO
- All procurements were relatively low-dollar service contracts (base logistics, base/plant operations, IT, competitive sourcing)
- Interestingly, no record of DOD refusing to follow in protests involving warfighter equipment or MDAPs
- CRS No. R40228 reports only one threatened Congressional sanction (against Office of Personnel Management); in one other case, Army was supported by Congressional leaders, OMB/OFPP, and DOJ against GAO



Federal Best Practices: AMC Agency-Level Protest Timeline v. GAO

Key Protest Milestones

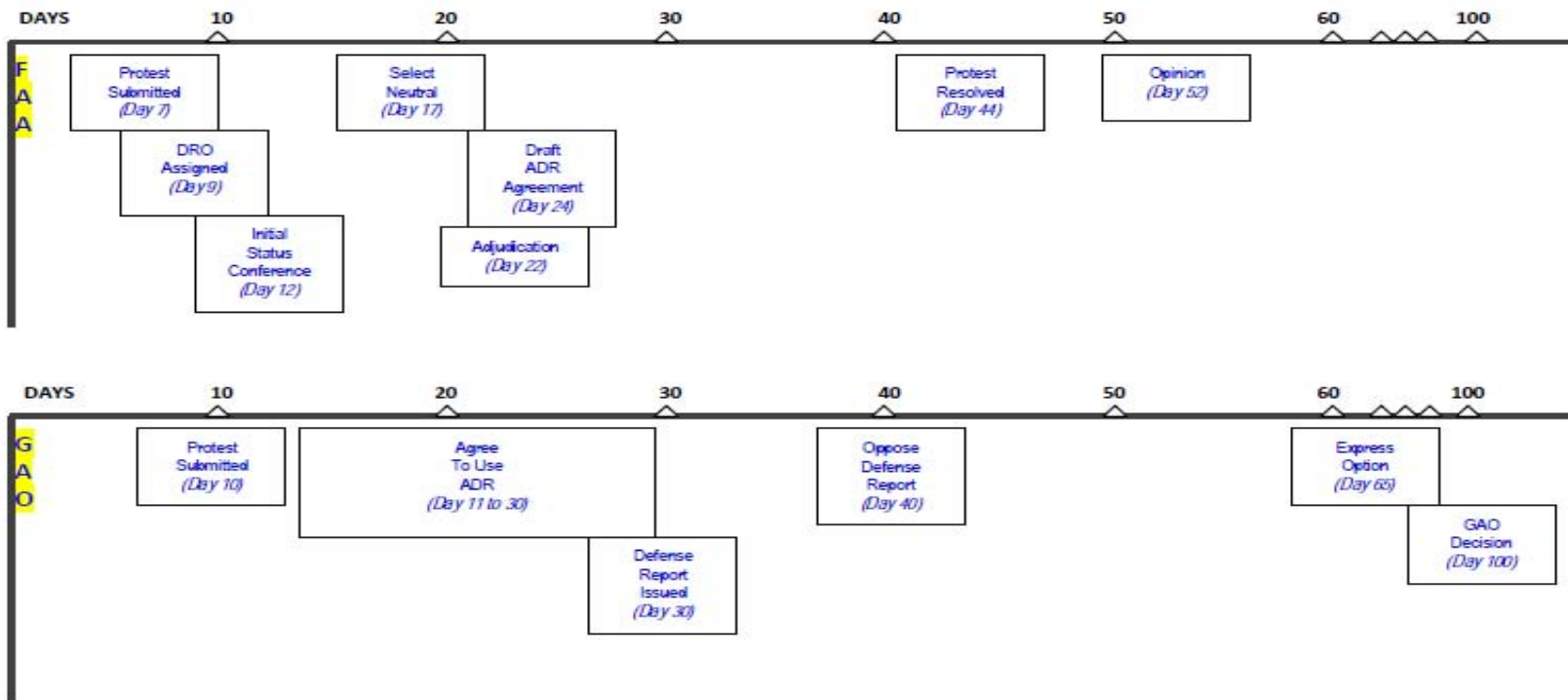
Time limits calculated in business days.



Federal Best Practices: FAA Bid Protest Timeline v. GAO

Key Protest Milestones

Time limits calculated in business days.

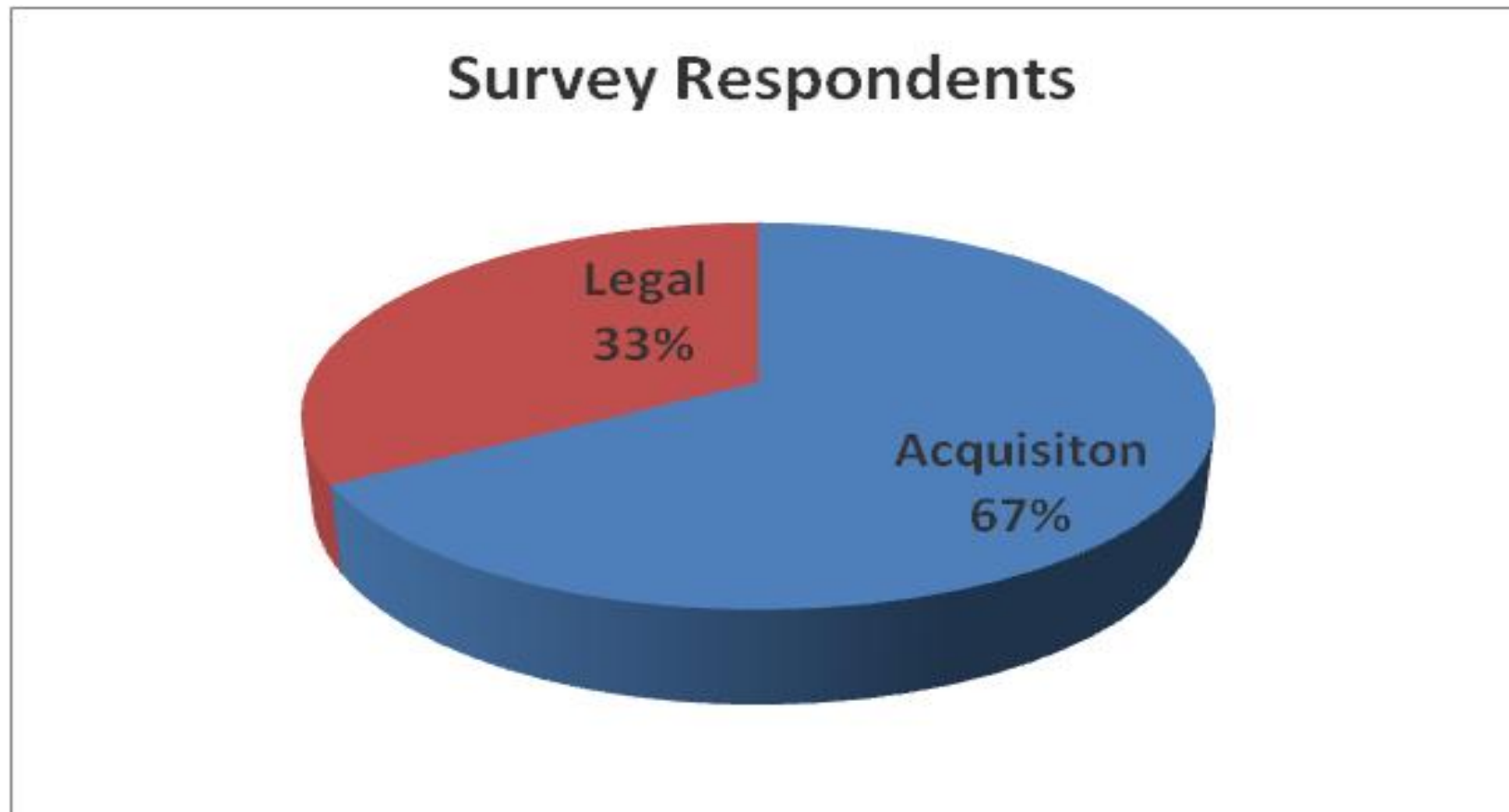


The Survey: Perspective of Top Procurement Law & Acquisition Management Leaders/Experts

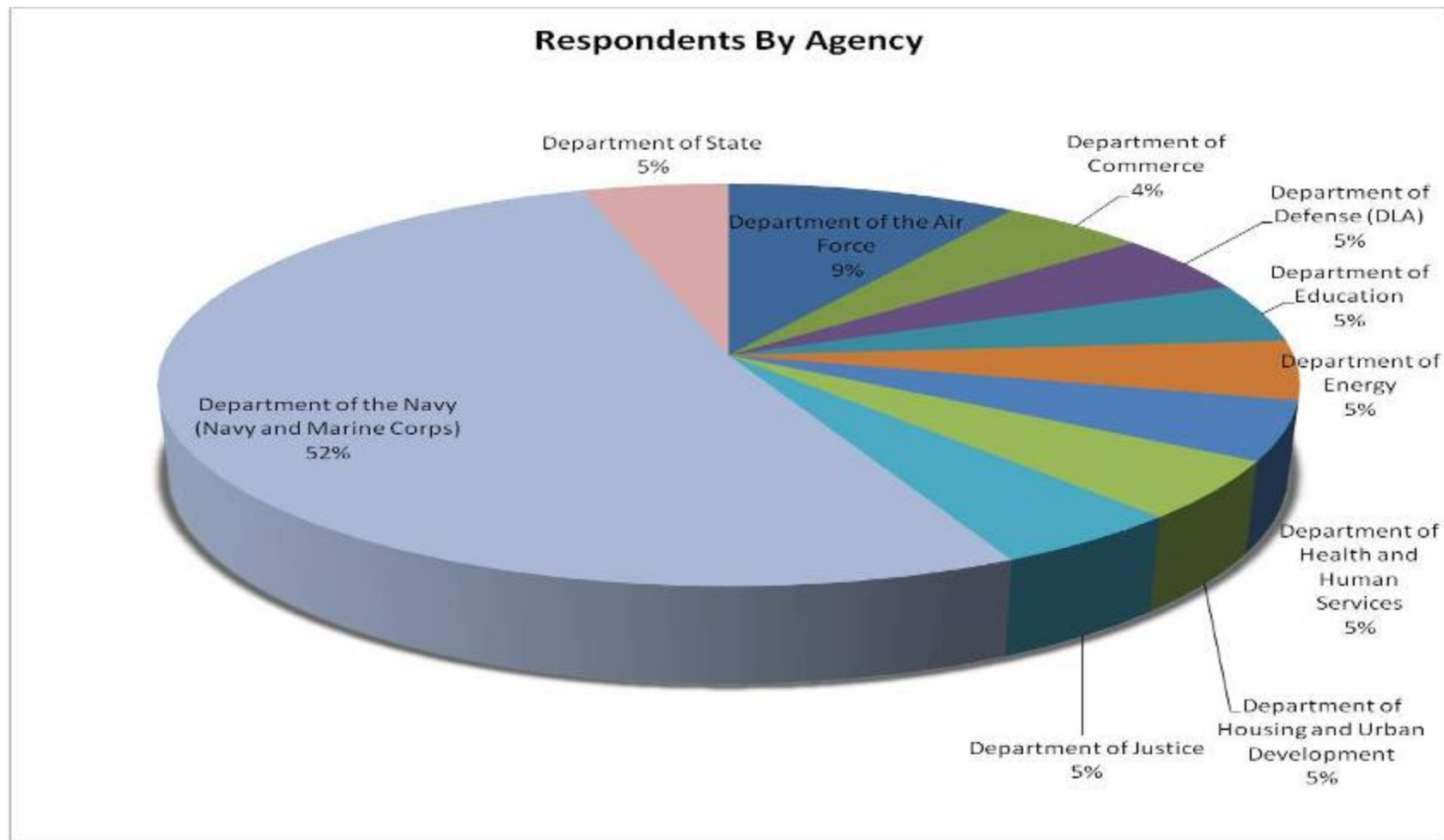
- 51 individuals in 22 agencies asked to complete; 21 completed
- Key issues:
 - What strategies or practices are used by agencies to prevent/minimize the impact of bid protests?
 - To what extent are alternative dispute resolution procedures utilized as a means to prevent/minimize the impact of bid protests?
 - What aspects of statute, policy, or regulation preclude the effective resolution of protests in a manner that minimizes their systemic impact?
- Likert scale:
 - 4—Always or With Great Frequency; 3—With Moderate Frequency; 2—In Exceptional Cases or With Rare Frequency; 1—Never
- Mean score of 2.00 commonly used as cut-off for groupings of data
- Survey dealt with leadership understanding or perception of agency practices/policies, not with case management data



Survey Respondents by Professional Community



Survey Respondents By Agency

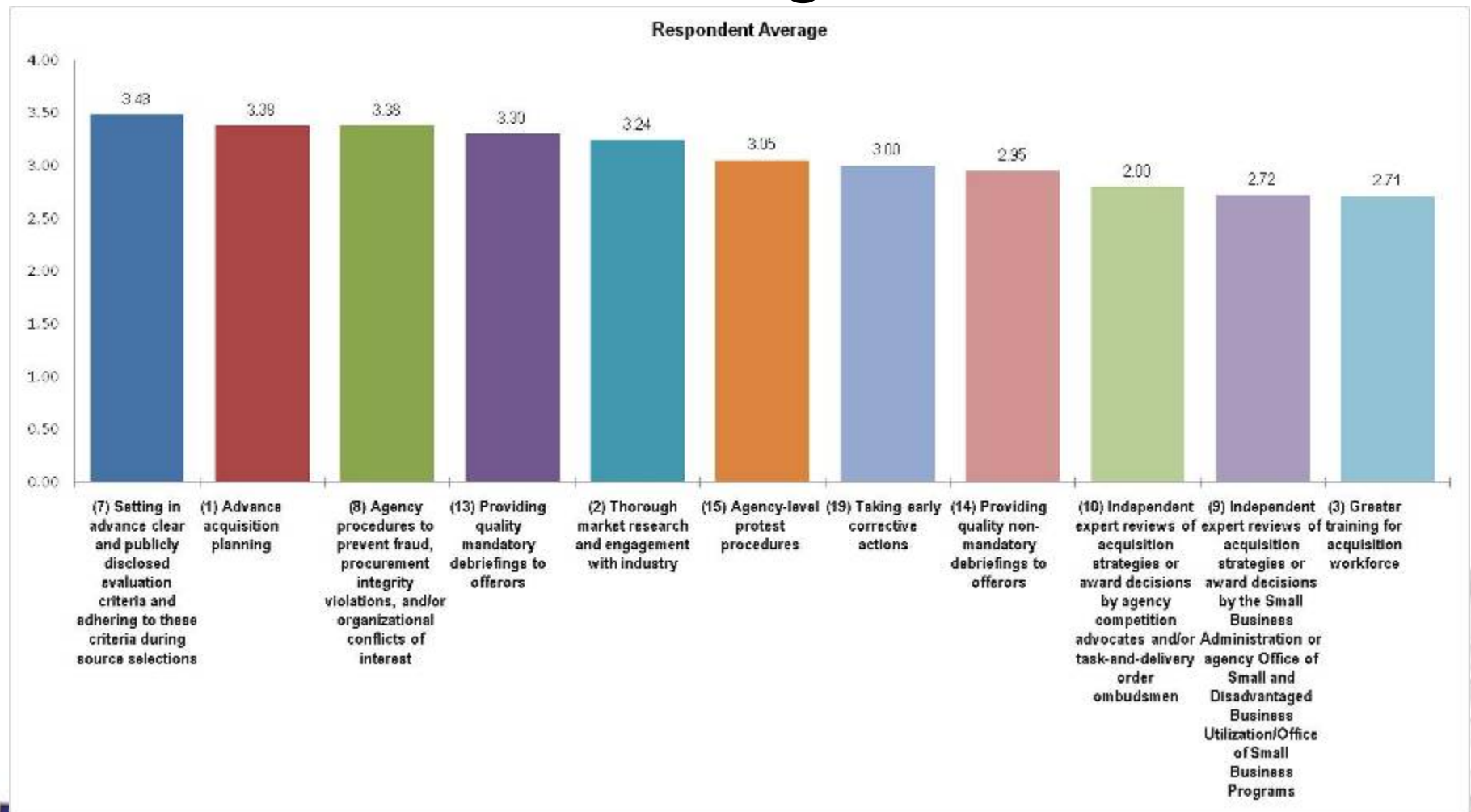


SURVEY PARTS:

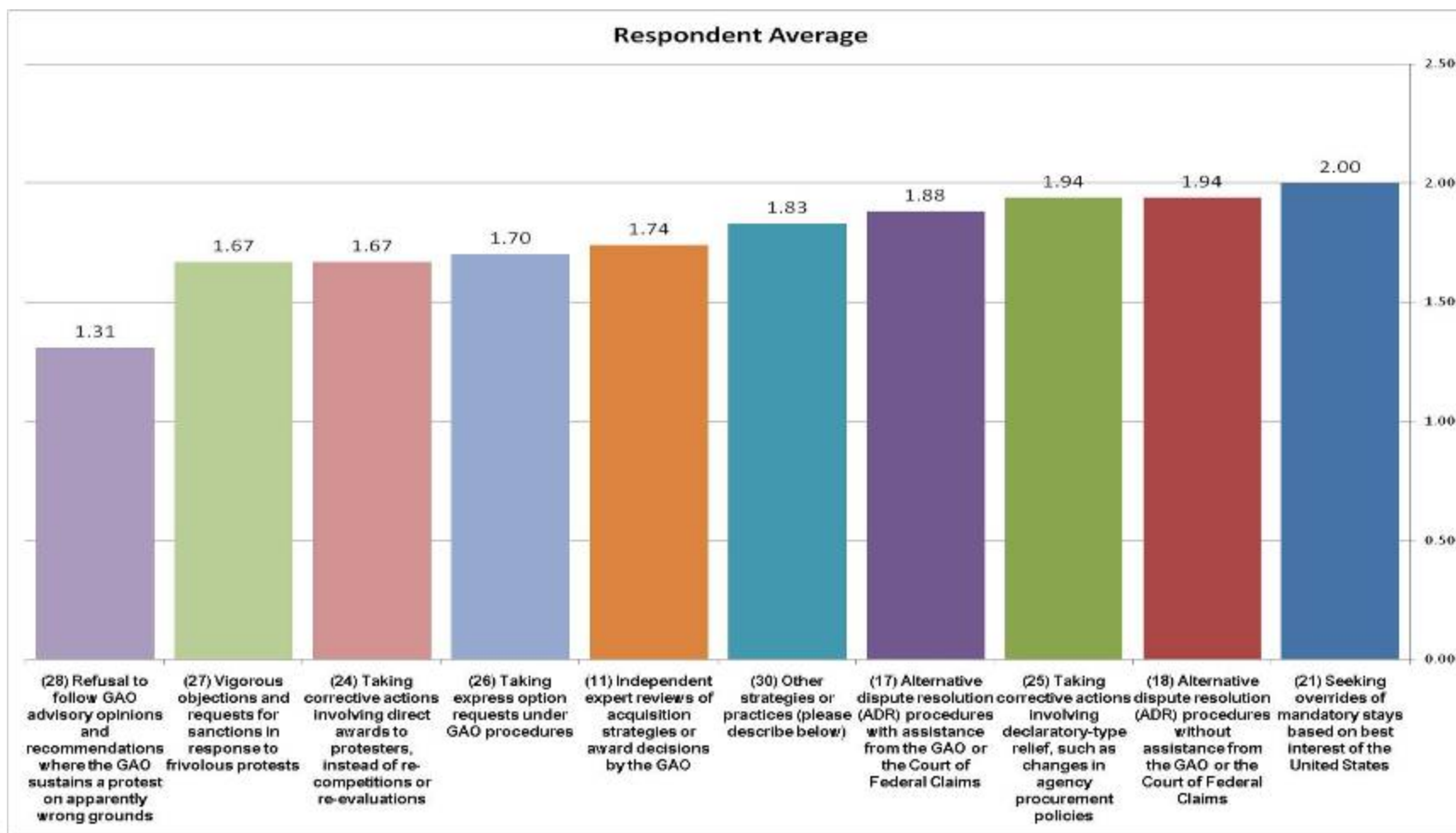
- PART I: Use of Prevention and Resolution Strategies; Use of ADR; Obstacles to Effective Prevention and Resolution
- PART II: Civilian v. Military Perspective
- PART III: Legal v. Acquisition Perspective
- PART IV: Comparative Pairings of Data on Problems and Solutions



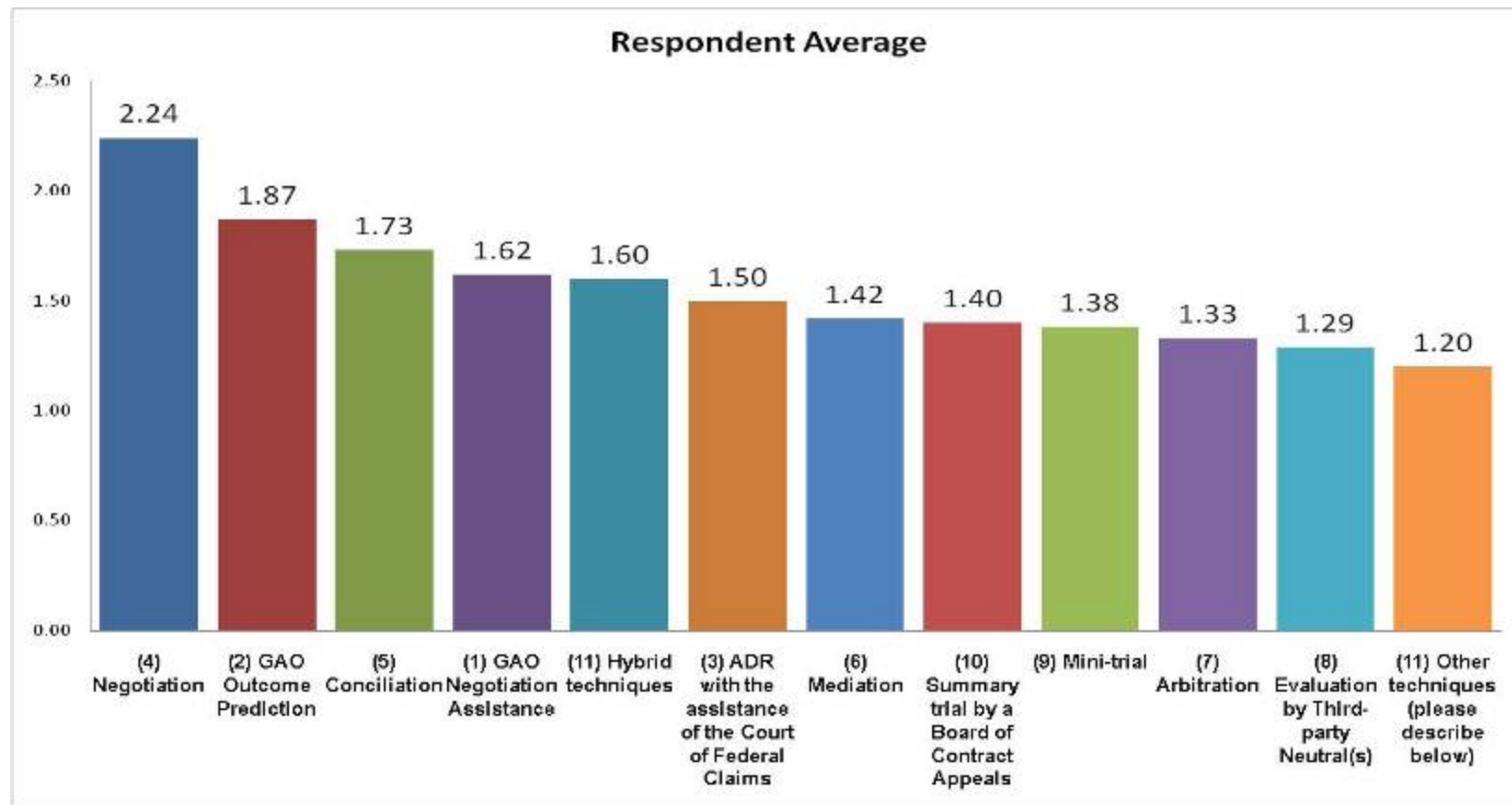
Part I: Top 10 Defensive and Preventive Strategies Identified



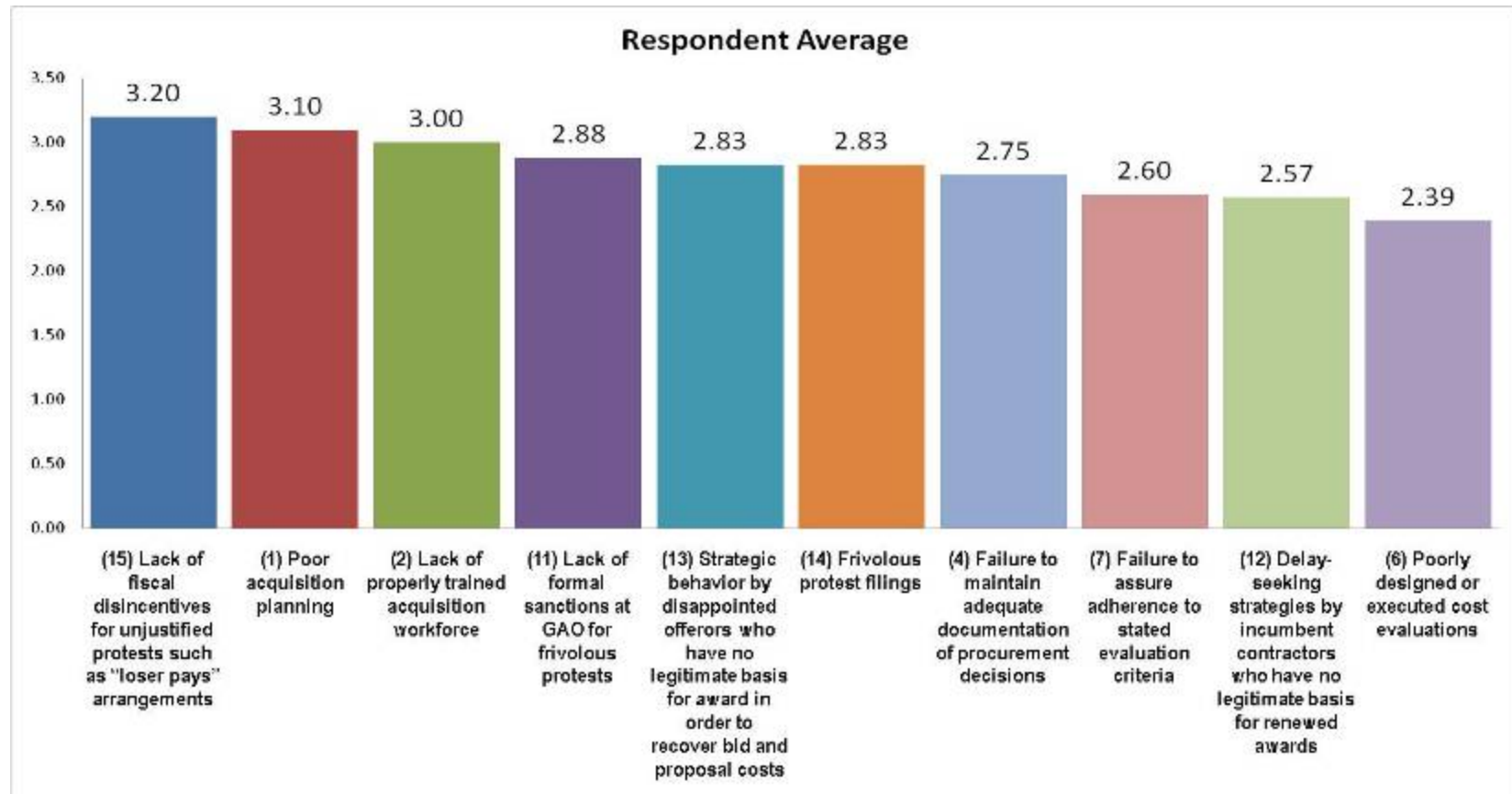
Part II: Top 10 Least Cited Defensive Strategies and Practices



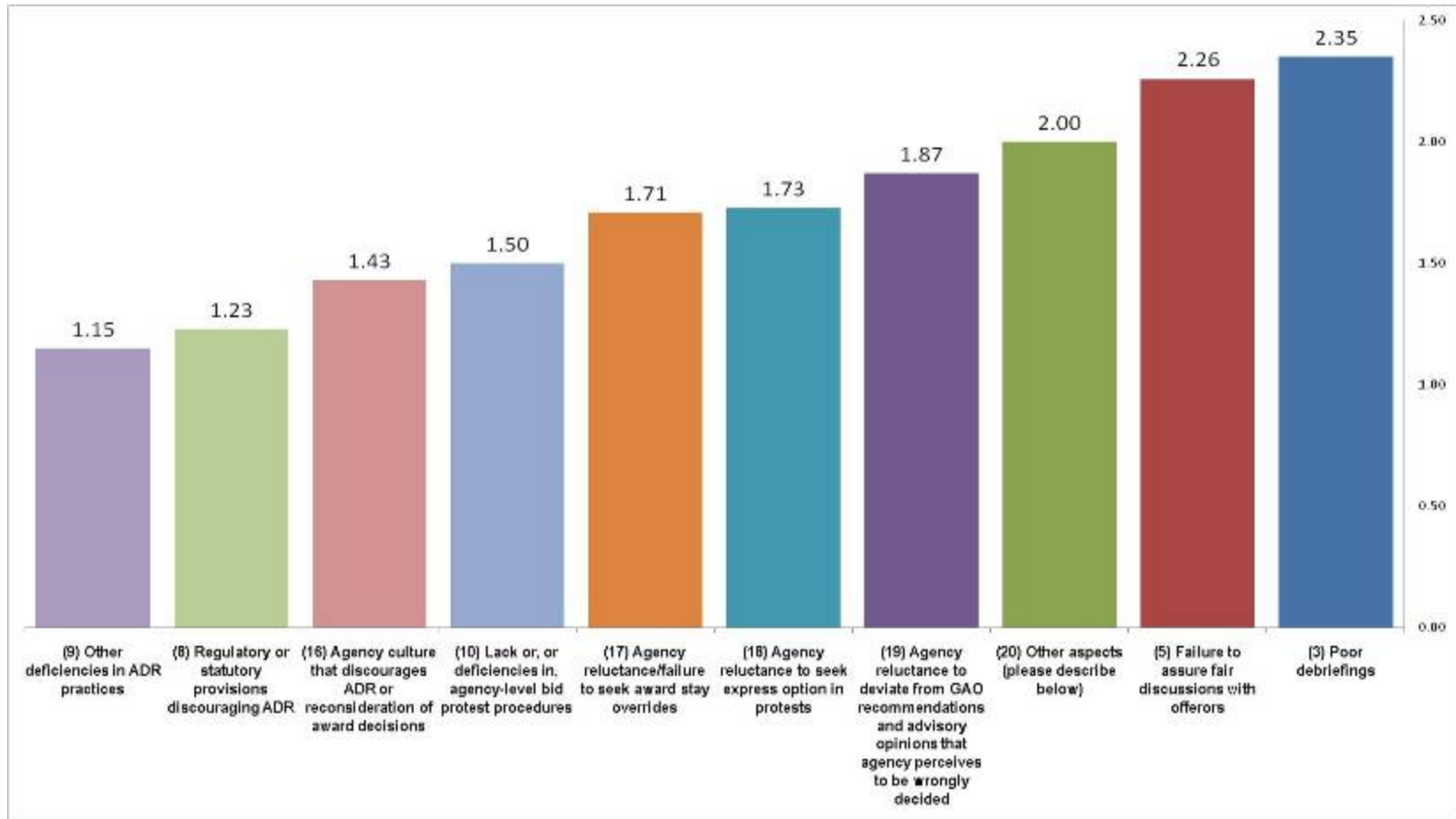
Part I: The View from Inside the Agencies: Use of ADR to Resolve Bid Protests



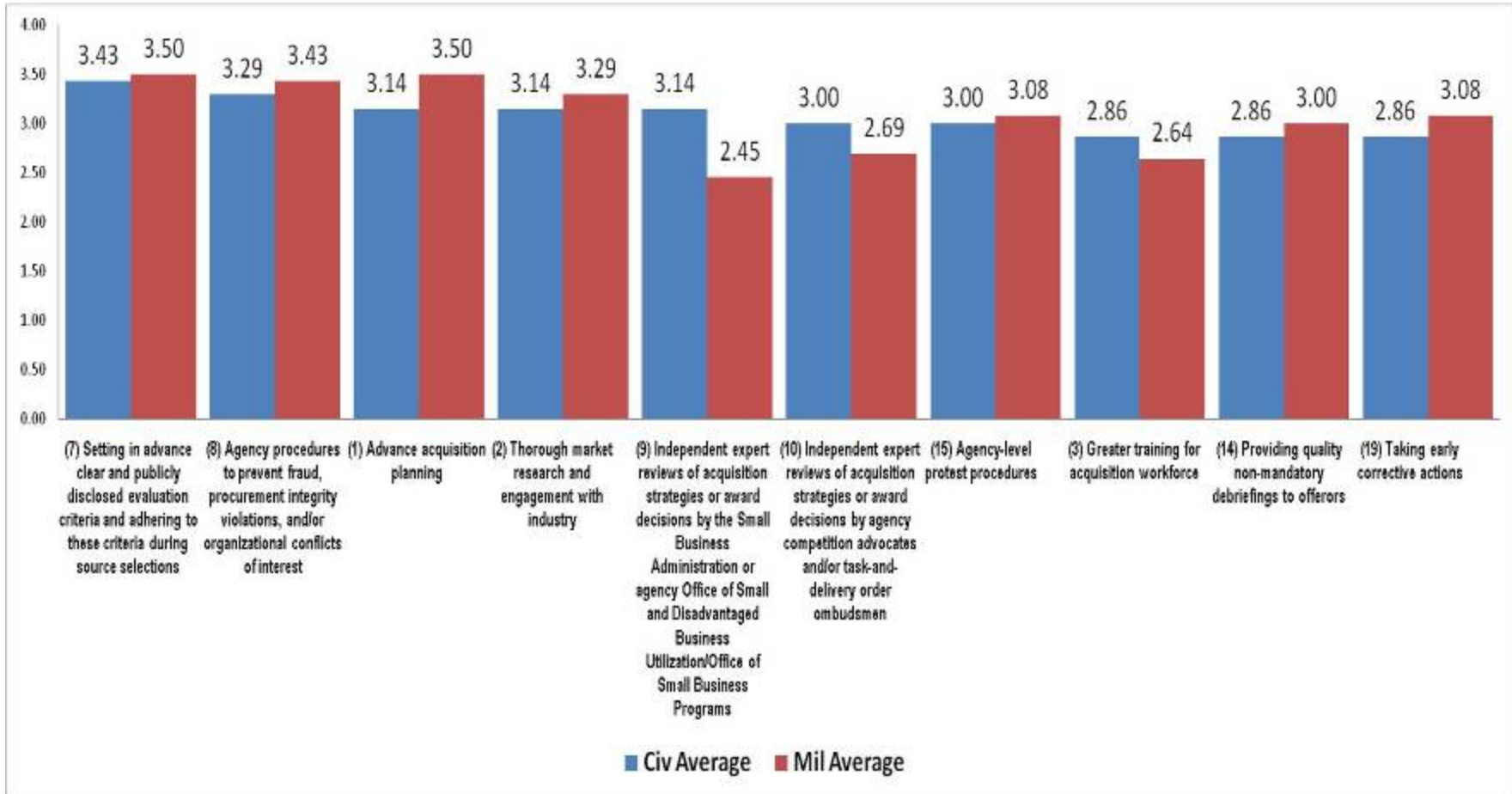
Part I: Most Frequently Cited Obstacles to Effective Protest Prevention & Resolution



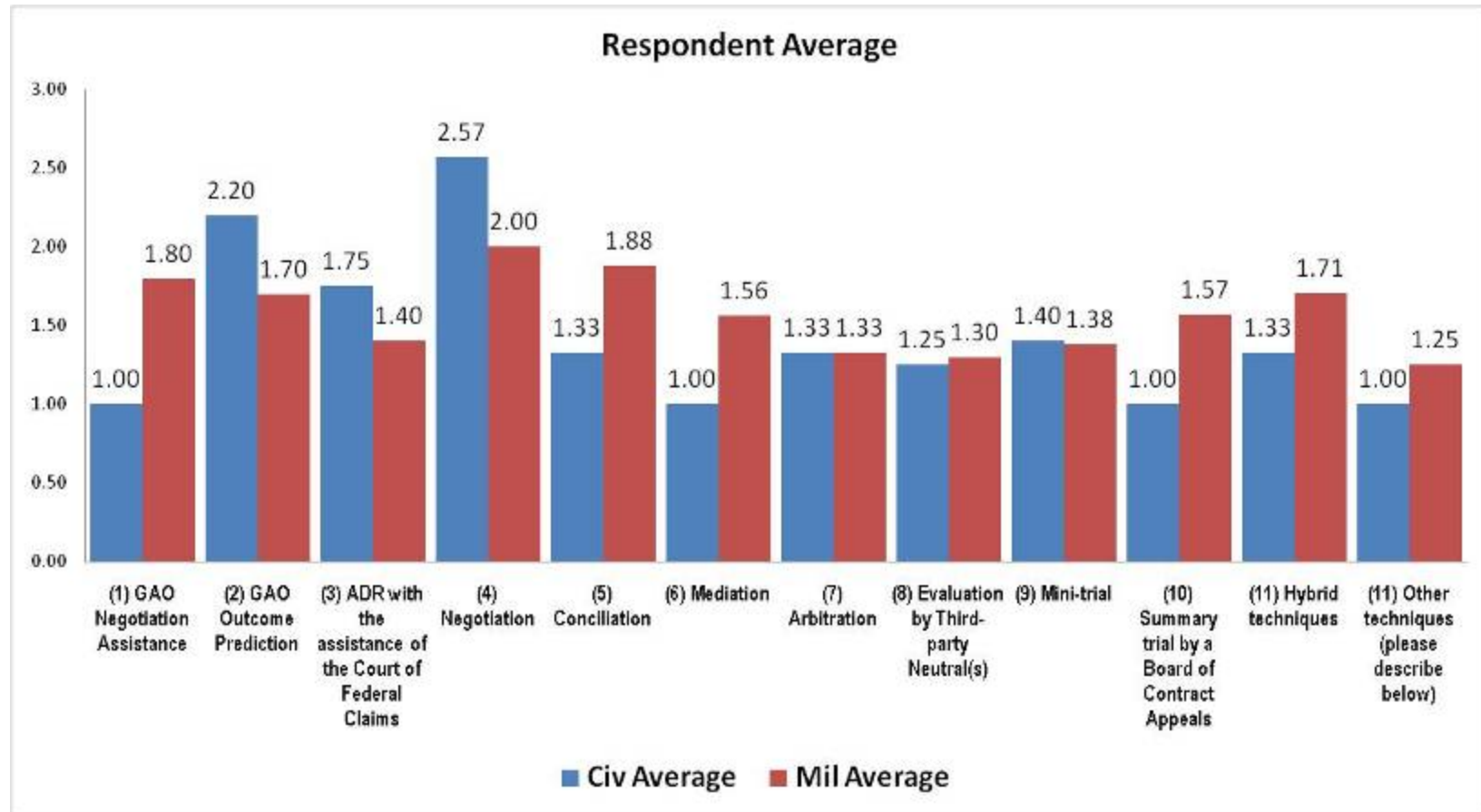
Part I: Least Frequently Cited Obstacles to Effective Protest Prevention & Resolution



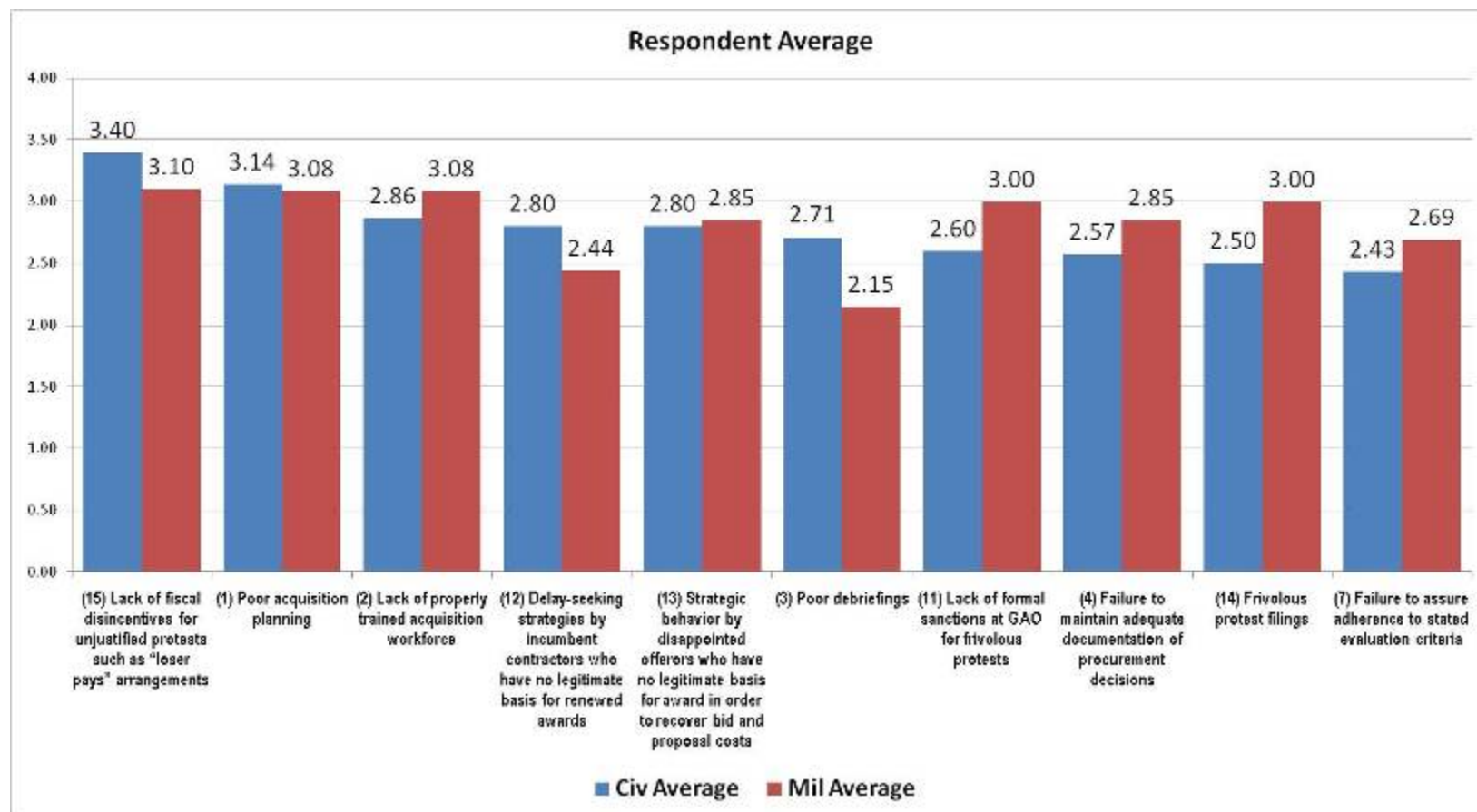
PART II. Civilian v. Military Perspective: Top Prevention & Resolution Strategies



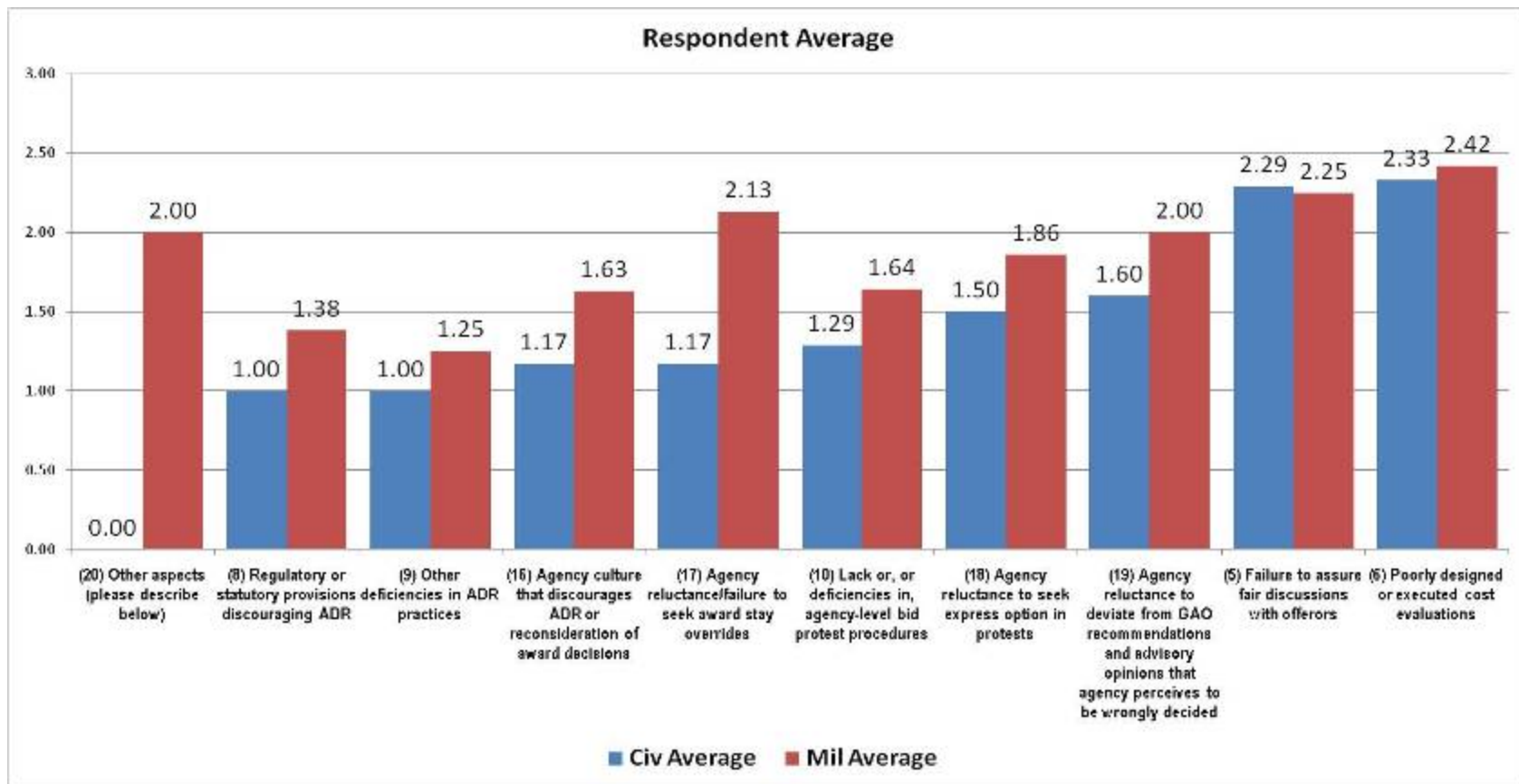
Part II. Civilian v. Military Perspective: Use of ADR Techniques



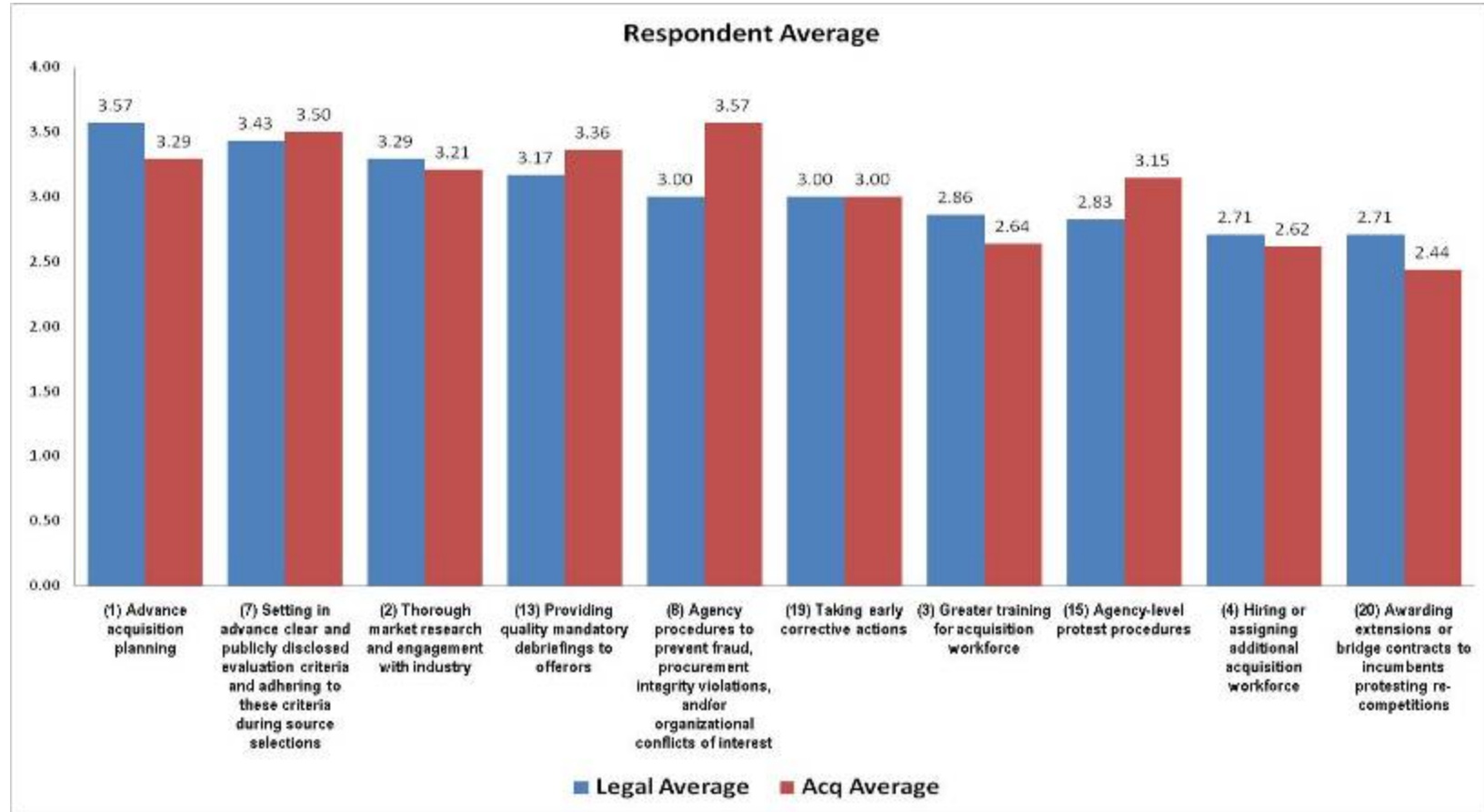
Part II. Civilian v. Military Perspective: Top Obstacles to Effective Prevention & Resolution



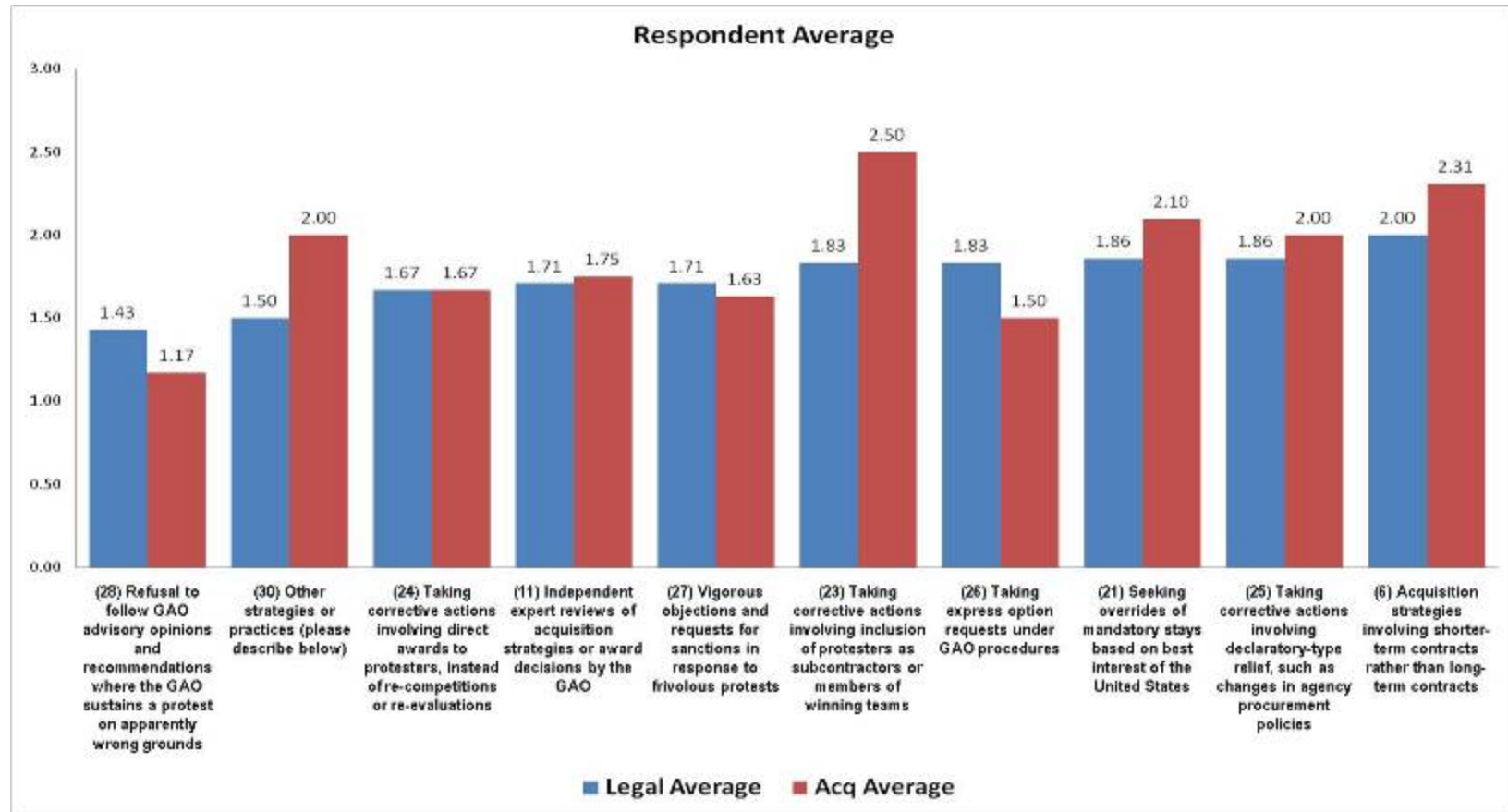
Part II. Civilian v. Military Perspective: Least Frequent Obstacles to Effective Prevention & Resolution



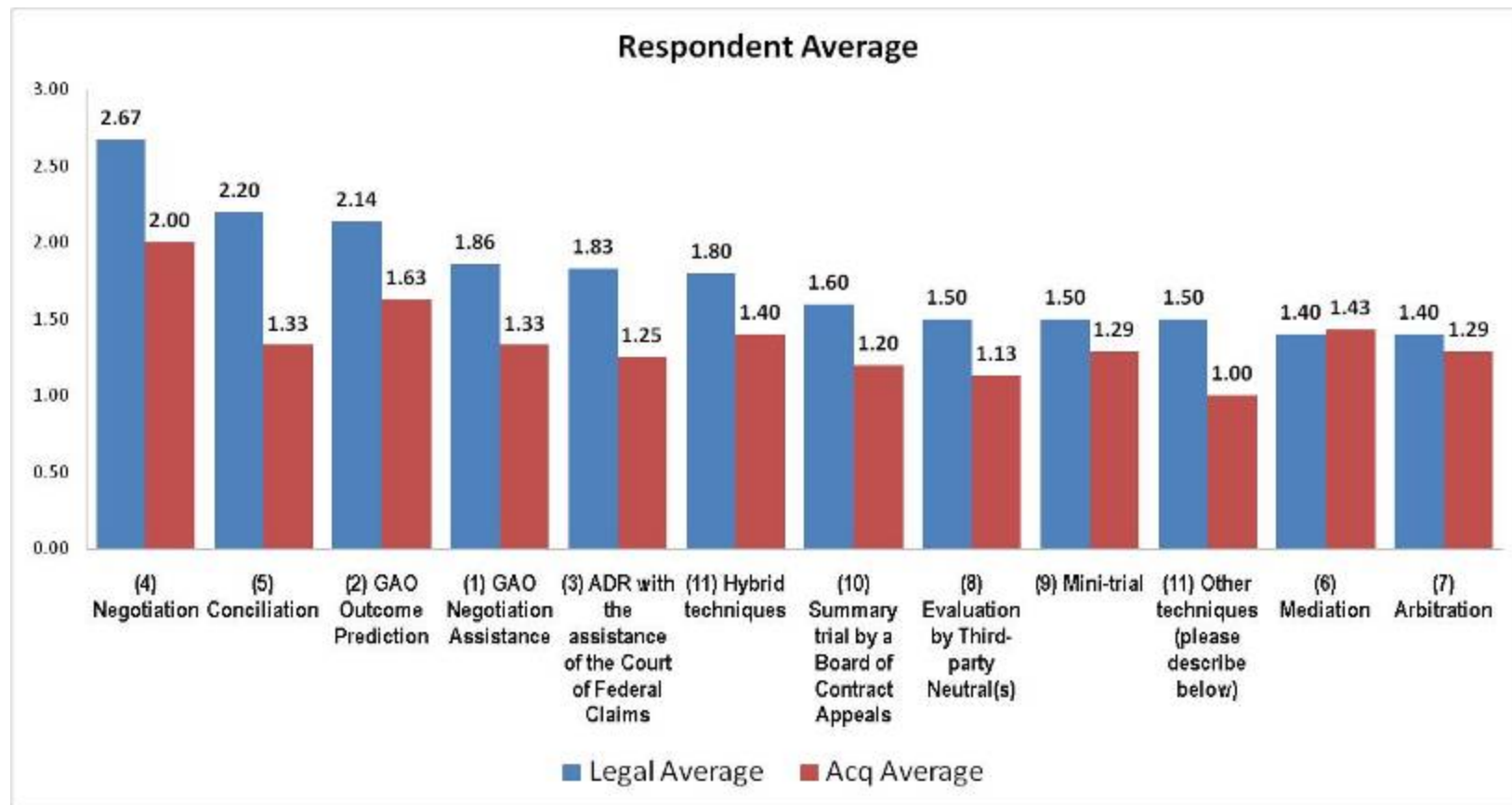
Part III. Legal v. Acquisition Perspective: Top Prevention & Resolution Strategies



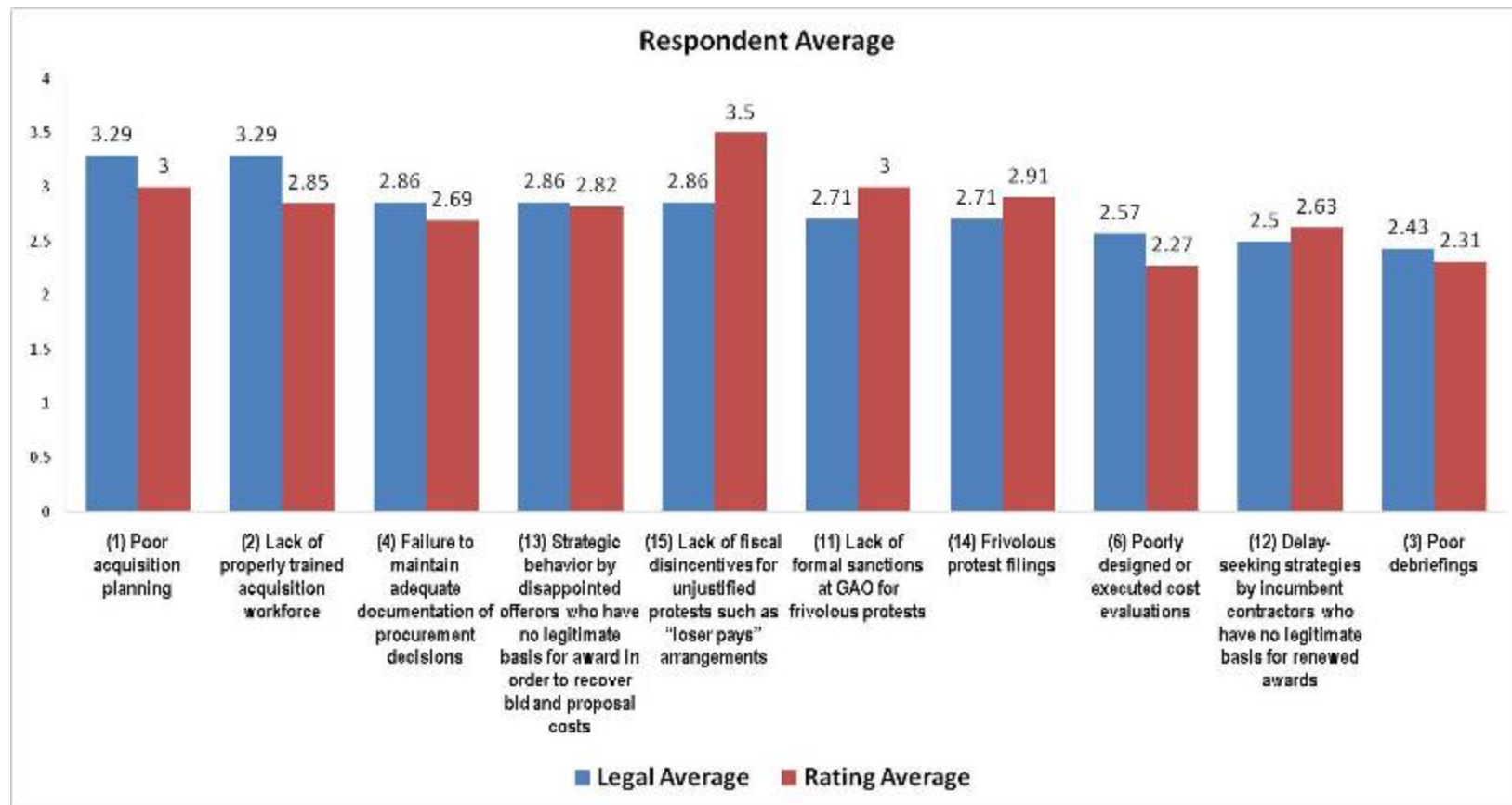
Part III. Legal v. Acquisition Perspective: Least Used Prevention & Resolution Strategies



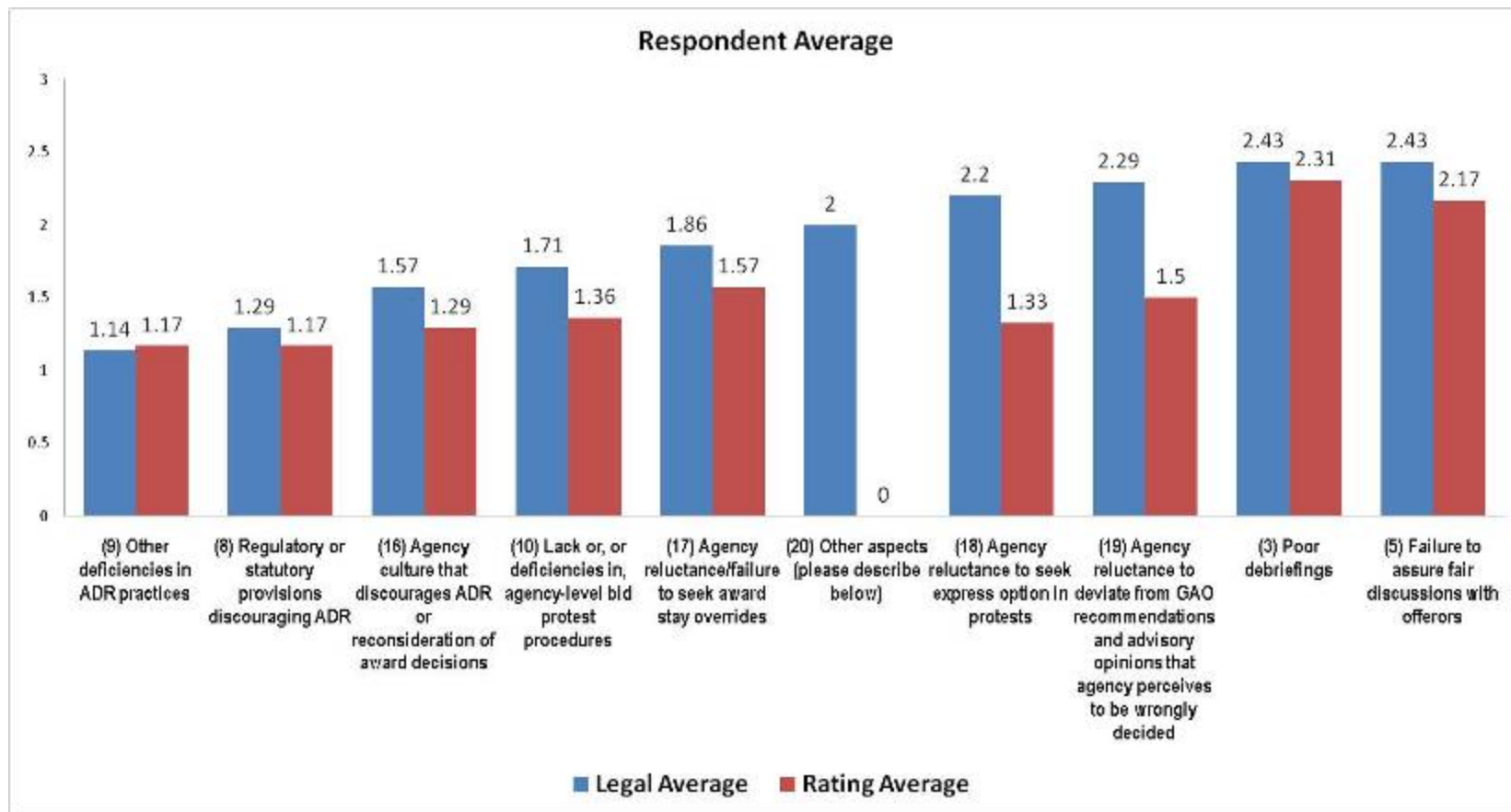
Part III. Legal v. Acquisition Perspective: Use of ADR Procedures



Part III. Legal v. Acquisition Perspective: Top Obstacles to Effective Prevention & Resolution



Part III. Legal v. Acquisition Perspective: Least Cited Obstacles to Effective Prevention and Resolution

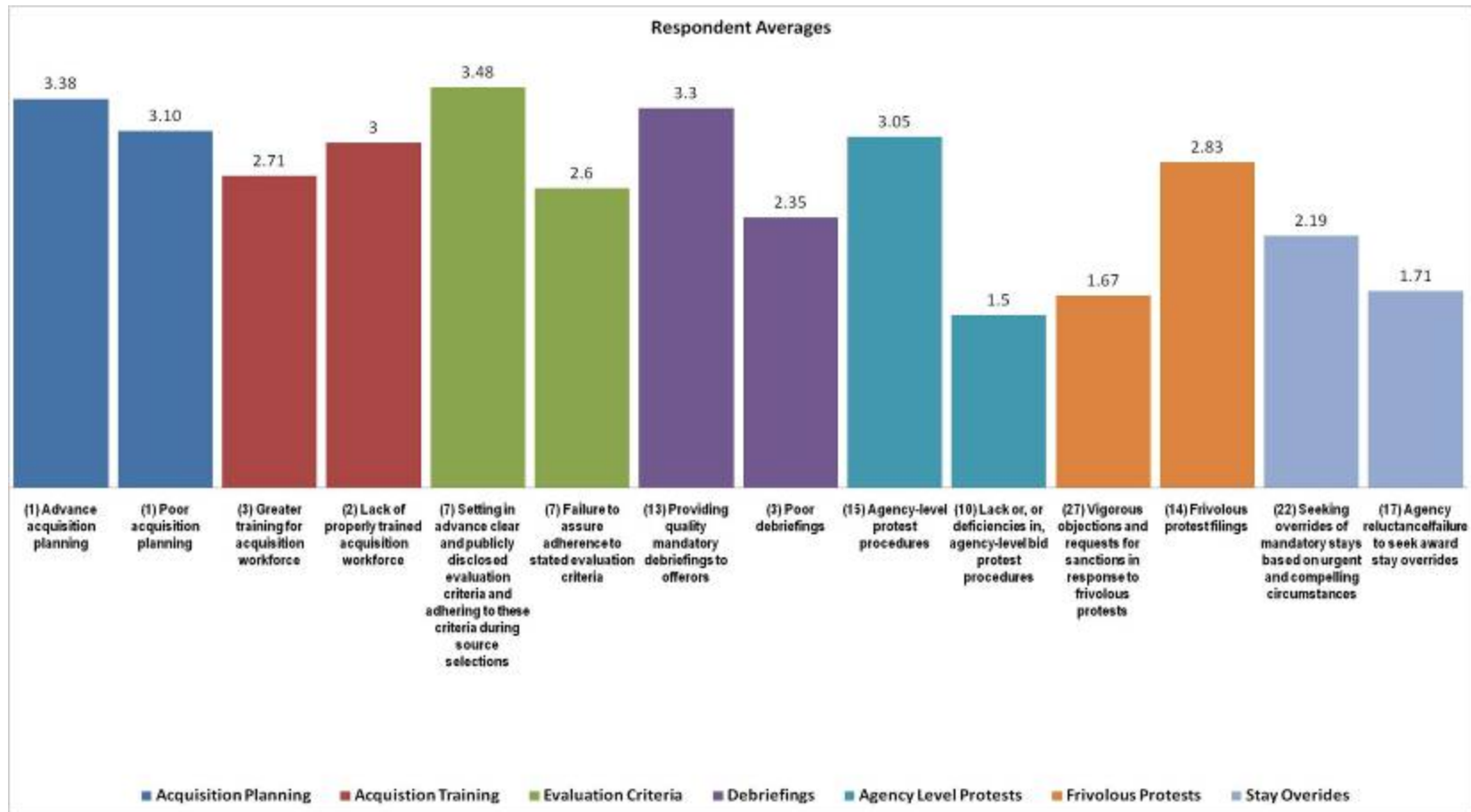


PART IV. Back to the Questions . . .

- Are Frivolous, Costly, Dilatory Bid Protests Besieging the Federal Acquisition System?
- Are Agencies Doing Everything They Can to Reduce Delays and Costs of Bid Protests?



Top Defensive Strategies and Top Challenges for Effective Prevention and Resolution: Is There a Match?



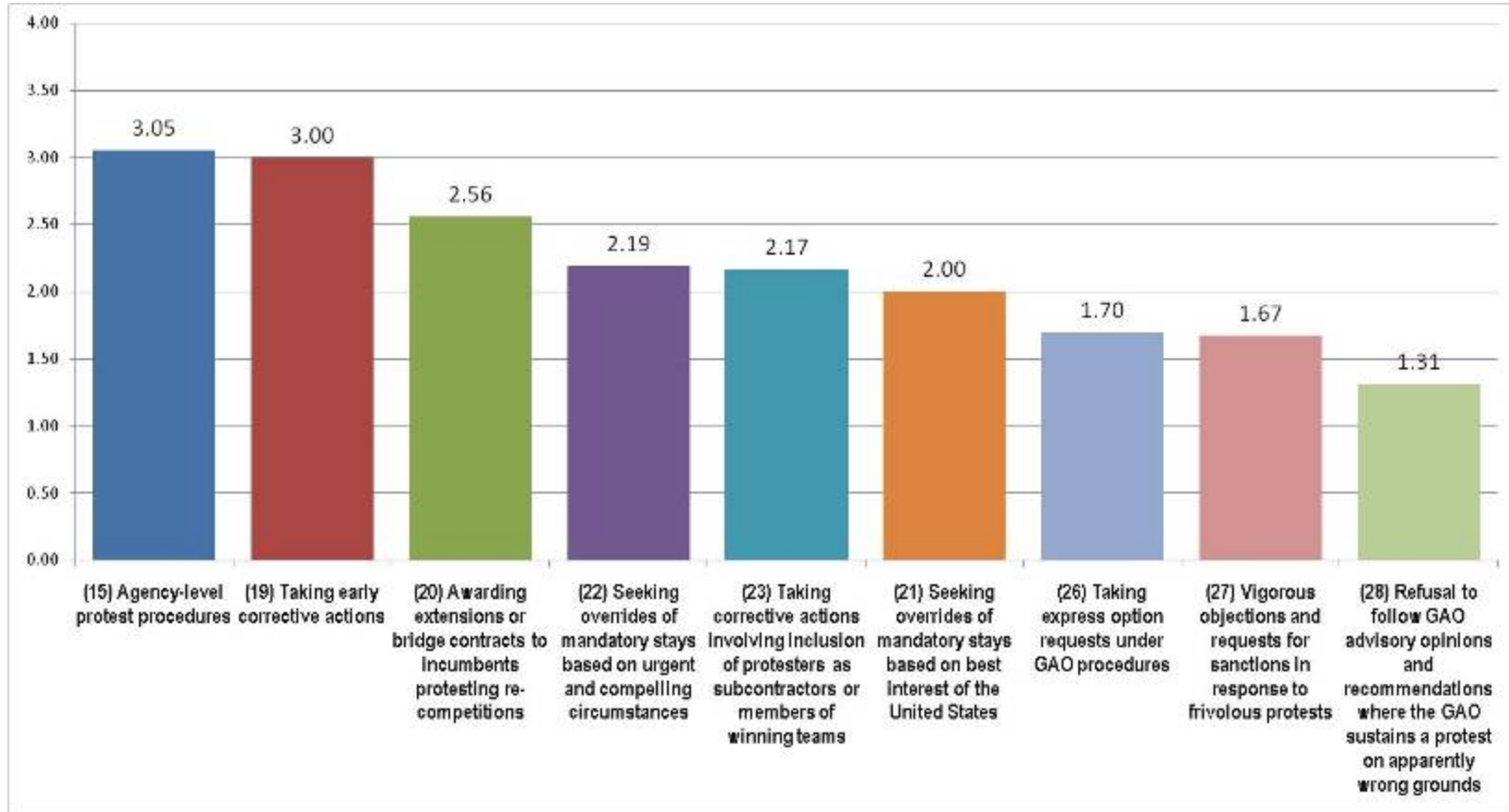
Are Agency Strategies Tailored to Match Agencies' Problems?

Mostly, NO

- Frivolous protest as a problem: 2.83. Vigorous objections and sanctions: 1.67
- Poor debriefings: 2.35. Quality mandatory debriefings: 3.3.
- Lack of properly trained acquisition workforce: 3.0. Proper training for workforce: 2.71.
- Poor acquisition planning: 3.10. Advance acquisition planning: 3.38
- Significant disparities on agency-level protest procedures (versus need), stay overrides (versus need), and assurance of clear and consistent evaluation criteria



How Serious Are Agencies About Fighting Delays to Procurement Programs?



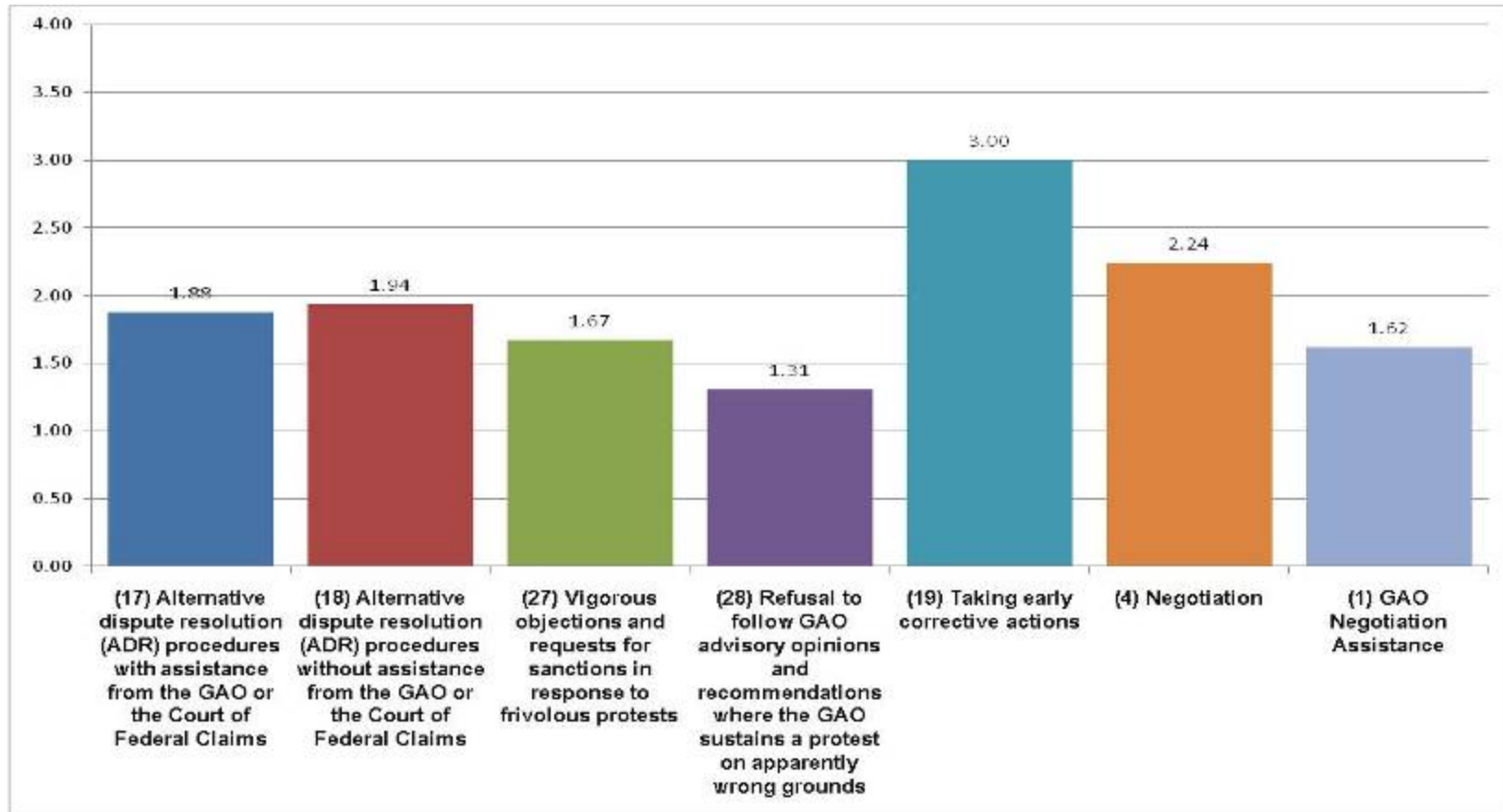
Are Agencies Serious About Reducing Delays to Procurement Programs?

Mostly, NO

- Stay overrides, express options, vigorous objections for dismissal, and refusals to follow GAO opinions are not frequent
- Obtaining and following a formal GAO opinion to recompete could mean 100 days of mandatory stay + at least 45 days of procurement administrative lead time (PALT) under FAR Part 5 for advertising + evaluation



How Serious Are Agencies About Reducing Costs from Bid Protests?

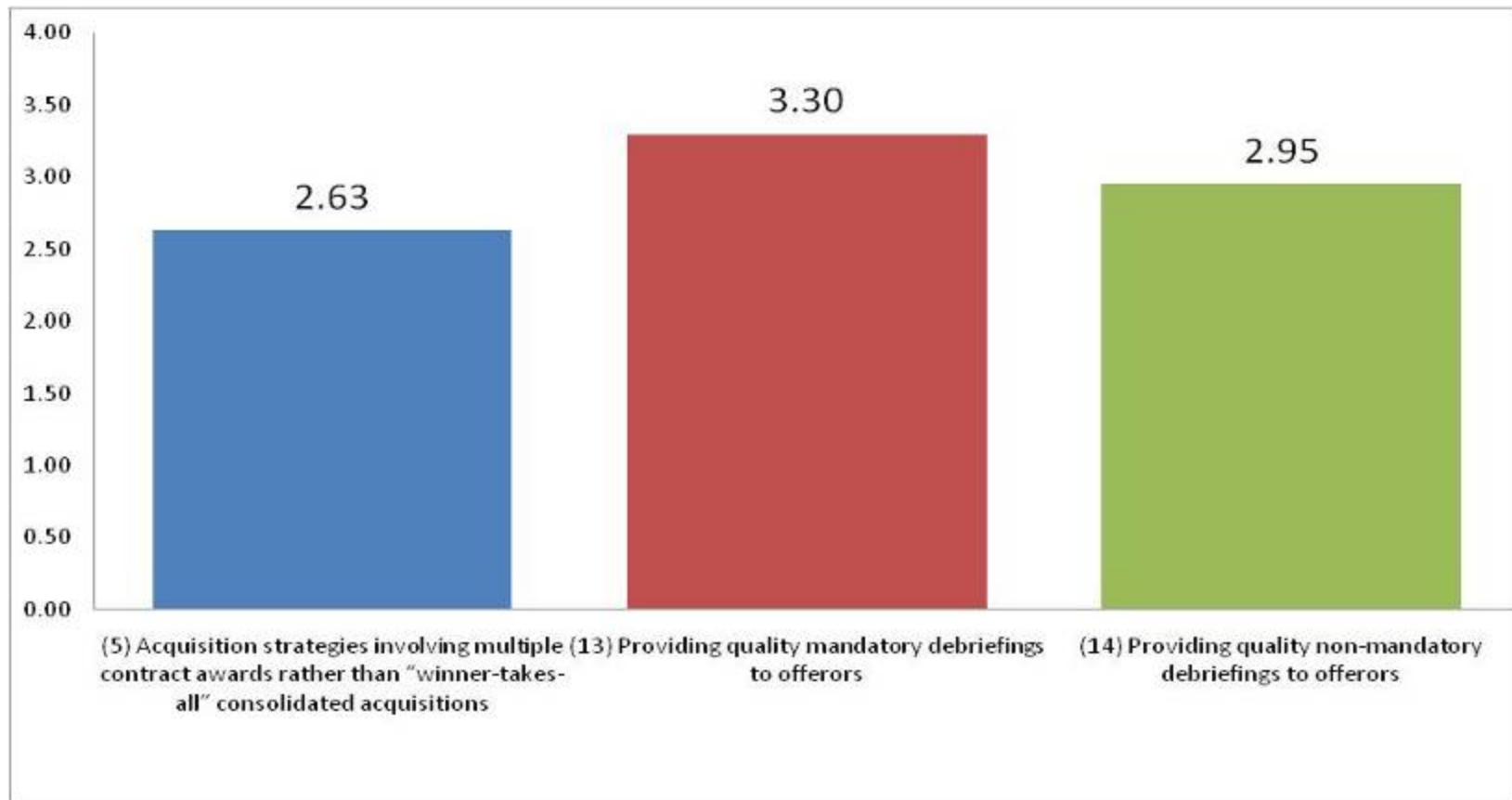


Are Agencies About Cutting Costs from Protests? Mostly, NO

- Unless agencies takes early corrective action or attempts some negotiation early on, they are unlikely to initiate other ADR procedures or refuse to follow costly GAO recommendations which may involve direct payments to protesters or indirect expenditures



Top Defensive Strategies to Reduce “Strategic Protests”: Can Federal Procurement Be Protest-Proofed?



Insights into Protest-Proofing Agency Contracts

- Avoid winner-take-all strategies; make as many awards as possible to promote competition
- Conduct quality debriefings even if not required



How Can Clear Vision and Control Be Restored to Agency Management of Bid Protests?



Findings and Recommendations for Reform



- Case for sanctions beyond truly frivolous not demonstrated; however, Rule 11-type sanctions should be established at the GAO
- Establish procedures to manage bid protests as business decisions in the procurement process
 - Require written justifications/cost-benefit analysis for failure to seek stay overrides, conduct early corrective actions, use ADR, seek express options, refuse to follow GAO recommendation, etc., and approvals to proceed to formal litigation process and to follow GAO
 - Create an FAA-type requirement for ADR as the first option, and formal litigation as the second option
- Vigorously object and seek sanctions for frivolous protests
- Provide quality debriefings to limit strategic protests
- Create and strengthen agency-level protests at all agencies

