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Better Acquisition Management through Alternative Dispute Resolution (ADR) and Other Best Practices for Preventing and Resolving Bid Protests

24 January 2012

by

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Abstract

This project examines bid protest prevention and resolution strategies to shed light on ways to save the government money and time. Successful resolution 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 identified and analyzed best ADR practices and other remedies and preventive methods 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 were 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 were 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.

Keywords: Bid Protests, Acquisition Process, Best Practices, Alternative Dispute Resolution, Federal Agencies, Defense Contracting

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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	General Accounting Office 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
U.S.C.	*United States Code*
USD(AT&L)	Under Secretary of Defense for Acquisition, Technology, and Logistics

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I. Introduction

A. Purpose

The Office of the Assistant Secretary for Acquisition, U.S. Department of the Air Force, and the Acquisition Research Program of the Naval Postgraduate School commissioned a multi-disciplinary team from the Naval Postgraduate School's Defense Resource Management Institute and Graduate School of Business and Public Policy to study strategies to minimize time delays and costs borne by defense acquisition programs as a result of bid protests. This is the second companion report in this study; it follows the first report entitled *A New Paradigm to Address Bid Protests* (Melese, Angelis, LaCivita, Kidalov, Coughlan, Franck, and Gates, 2010).

Bid protests are defined by the Competition in Contracting Act of 1984 (CICA; 2010) 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. (31 U.S.C. § 3551(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, precedential interpretations, 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 was 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, learn as much information as possible about denial or exclusion, and, ultimately, obtain some type 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 (Gordon, 2006, p. 430-432). 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 (FAR, 2010, § 33.103(c)), with the Government Accountability Office (GAO; CICA, 2010, 31 U.S.C. § 3551 *et. seq*.), or the U.S. Court of Federal Claims (Tucker Act, 2010, 28 U.S.C. § 1491(b)). The Comptroller General, head of the GAO, is mandated by CICA to provide "for the inexpensive and expeditious resolution of protests" (CICA, 2010, 31 U.S.C. § 3554 (a)(1)). In 1995, President William J. Clinton signed Executive Order (E.O.) No. 12,979 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 Executive Order(1995), 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." In Subpart 33.1, Protests, the Federal Acquisition Regulation also incorporates the tenets of the CICA and E.O. 12,979. 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 (FY) 2008, 1,652 bid protests were filed with the GAO. The GAO issued formal decisions in 291 cases, sustaining 60 protests (more detailed statistics are provided in Chapter II). In the same year, the 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 (Kepplinger, 2008). In general, the GAO utilizes two types of 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; GAO, Office of the General Counsel, 2009). The only substantial difference between outcome prediction and a formal decision is the issuance of a written decision by the GAO. In terms of time, effort, and cost, the processes are nearly identical.

C. Research Objective

The objective of this project was 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 with 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

Because this project consisted of the identification and analysis of best ADR practices for resolving bid protests, the main focus revolved around the following primary research question: 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 protest resolutions. Our analysis also answers 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?
- What are the obstacles that impede effective cooperation in resolving bid protests?

This research provides decision makers with a usable analysis of current best practice examples along with recommendations.

E. Methodology

This project was 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 included 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 report 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.

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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" (p. 429). 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. The Competition in Contracting Act (CICA; 2010), the Tucker Act (2010, 28 U.S.C. § 1491(b)), the Federal Acquisition Regulation (FAR Subpart 33.1; 2010), and the GAO Bid Protest Regulations (2010, 4 C.F.R., §§ 21.0-.10) permit protests to be resolved through judicial or administrative litigation, but informal procedures are encouraged. One of the key requirements to prevail in a bid protest is showing that the protester has been prejudiced by improper agency activities. The mere presence of a 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 (FAR, 2010, § 33.103; *Myers Investigative & Security Services v. United States*, 2002). 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 the CICA to provide "for the inexpensive and expeditious resolution of protests" (2010, 31 U.S.C. § 3554 (a)(1)). With this legal mandate comes a necessary duty to serve the public interest. As noted by the GAO's then-General Counsel Gary Kepplinger (2009b), the GAO seeks

> to balance the competing interests and goals of the procurement process . . . [because] the presence of an independent forum for disappointed bidders 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. (p. 1)

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 (Worthington & Goldsman, 1998, p. 472). Figure 1 illustrates this concept.

Figure 1. Competing Interests in a Protest System

B. Impact on the Acquisition Process

The number of protests filed increased by 37% between FY 2001 and FY 2008 (Schwartz & Manuel, 2009, p. 2). 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 20 years.

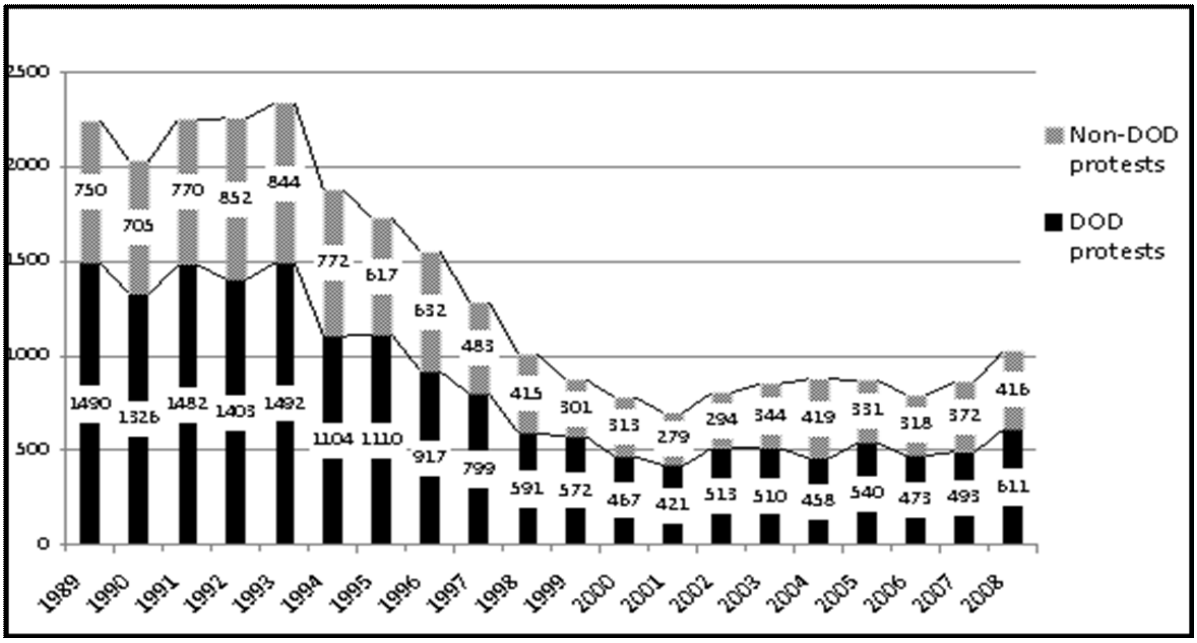

Figure 2. Number of Protests Filed at the GAO Since 1989
(Kepplinger, 2009a, p. 7)

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 increased by 37% between FY 2001 and FY 2008 (Schwartz & Manuel, 2009, p. 2). Figure 3 contains detailed GAO bid protest statistics for FYs 2001–2008. Data we retrieved 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.

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–FY2008
(Schaengold, Guiffré, & Gill, 2009, p. 255)

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–FY2007
(Schaengold, Guiffré, & Gill, 2009, p. 255)

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 capability; strain relations with our industry partners and stakeholders; and create misperceptions among American citizens. (as cited in Crean, 2008, p. 3)

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; GAO, 2008, p. 5). 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 (Gordon, 2008, p. 3). During the lengthy protest litigation, the Air Force paid the salaries of its 19-lawyer defense team, and the GAO decision recommended that the Air Force pay the fees of the 15 attorneys of record representing Boeing. By February 2010, the Air Force once again issued a "new" draft RFP for the KC-X tanker (U.S. Air Force Aeronautical Systems Center, 2010, p. 1). 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 (Schwartz & Manuel, 2009, p. 10). 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 (Schwartz & Manuel, 2009, p. 9), the systemic impact of protests still remains. Both industry and government should welcome the implementation of a policy that could reduce this impact. Alternative Dispute Resolution is one such policy tool that, if used effectively, has such potential. Other policy tools include flexibilities such as stay overrides, express options, and other similar measures provided under current laws and regulations. Additionally, these tools have the potential to preserve the delicate balance between the competing interests of the bid protest process and to empower military and civilian agencies to reduce protest costs and delays. In order to understand this fully, Federal agency leaders 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. Guide to Agency Management of the Protest Process to Minimize Time Delays and Costs

1. The Legal Toolbox for Bid Protest Resolution and Prevention

Bid protests in the Federal procurement system are generally heard in one of three fora: at the agency level, the Procurement Law Control Group of the GAO Office of General Counsel, or the Court of Federal Claims (COFC). Agency-level protests are the quickest, least formal, and least procedure oriented, and they provide the least access to information, while the judicial process at the COFC is, arguably, the longest, most formal, and most procedure oriented, and, potentially, it provides the most access to information, including formal discovery and depositions of contracting officers. The GAO is a much more prolific forum than the COFC. However, workload comparison with agency-level protests is not possible because agency-level protests data are not available across the government.

Protests are governed primarily by the following laws and regulations: the Competition in Contracting Act of 1984 (31 U.S.C. §§ 3551-3557, 2010) and GAO Bid Protest Regulations (4 C.F.R. Part 21, 2010) for protests at the GAO; the Tucker Act (28 U.S.C. § 1491, 2010) and Rules of the Court of Federal Claims (2011) for protests at the COFC as well as for review of agency conduct, such as stay overrides, in GAO protests; Executive Order 12,979 (60 FR 55171, 1995) for agency-level protests; and FAR Subpart 33.1 for all of the above. Agency-level FAR supplements and mandatory procedures, as well as judicial precedents, provide additional direction for resolving bid protests. The Administrative Dispute Resolution Act of 1990, as amended (5 U.S.C. § 572, 2010) governs ADR. All of these authorities contain numerous tools for preventing, avoiding, and resolving bid protests promptly, efficiently, and effectively.

This Guide (Subchapter II (c) of this Report), for the first time ever, attempts to fuse legal knowledge into an engineering design framework in order to construct bid protest prevention and resolution flowcharts that enable government officials faced with protests to make least disruptive and most cost-effective decisions. In doing so, this Guide draws not only from the previously mentioned statutes and regulations, but also from the combined perspective of professional and academic literature such as:

- the GAO's *Bid Protests at the GAO: Descriptive Guide* (GAO-09-471SP; GAO, Office of General Counsel, 2008);
- the 2009 article "Choice of Forum for Federal Government Contract Bid Protests" by Schaengold, Guiffré, and Gill;
- the 2003 Spriggs and Kidalov article "No Way to Protest";
- the 2009 Sacilotto article "Is the Game Worth the Candle? The Fate of the CICA Override";
- two 2005 Troff articles, "The United States Agency-Level Bid Protest Mechanism: A Model for Bid Challenge Procedures in Developing Nations" and *Agency-Level Bid Protest Reform: Time for a Little Less Efficiency?;* and
- two Congressional Research Service reports: the 2009 Schwartz and Manuel report *GAO Bid Protests: Trends, Analysis, and Options for Congress;* and the 2010 Schwartz and Manuel report, *GAO Bid Protests: An Overview of Timeframes and Procedures.*

In general, a protest may occur at any of the following five stages in the acquisition process:

- **Stage 1.** Prior to solicitation (e.g., during acquisition planning, and publication of FAR Subpart 15.2 Requests for Information or FAR Part 5 Synopsis);
- **Stage 2.** During the solicitation (e.g., issued as FAR Part 15 Requests for Proposals, FAR Part 14 Invitation for Bids, or Requests for Quotation under FAR Part 13 or Subpart 8.4);

- **Stage 3.** During the evaluation (e.g., at creation of the competitive range under FAR Part 15 and consequent exclusion of certain offerors from further consideration);
- **Stage 4.** Post award; and
- **Stage 5.** After agency-level protest (to the GAO or COFC) or GAO protest (to the COFC).

Depending on the bid protest forum, specifically, its formality, and on the stage of the procurement, the legal toolbox for preventing and resolving protests includes multiple tools for bid protest prevention and resolution. Prior to the protest, an agency may always employ pro-competitive acquisition strategies and provide more thorough debriefings. At the agency level, these tools involve early corrective actions and advance agreements with potential protesters for extended stay of the procurement process during follow-on GAO protests. At the GAO, these tools include mandatory stay overrides, bridge contracts, motions to dismiss as frivolous or meritless, early corrective actions, ADR, express option requests, declaratory relief, payment of protest costs, refusals to follow GAO recommendations, and refusals to exercise options. At the Court of Federal Claims, these tools include Motions to Dismiss; opposition to temporary, preliminary, or permanent injunctions; requests for bonds to pay for the cost of stay; Motions for Judgment on Administrative Record; requests to consider national defense or national security grounds; ADR; and Rule 11 sanctions for frivolous protests.

2. Protests at the GAO

The GAO protest process offers several disadvantages to the agency, including mandatory stay of the procurement in many circumstances up to 100 days, extensive discovery/production of documents, possible contracting officer participation in hearings, and possible payment of bid and proposal costs and attorney fees.

a. Filing of GAO Protest at the Stage of Synopsis or Request for Information (RFI) Prior To Procurement

As shown in Chart 1, the process begins when the agency announces an acquisition strategy through a FAR Part 5 synopsis of a proposed contract or publishes a FAR Part 10 Request for Information (RFI). A protest filed at this stage typically concerns the types of products or services the agency intends to buy, the method of procurement, or the types or sizes of prospective eligible bidders. Upon filing, the GAO gives notice of protest to the agency. By operation of law, the GAO's notice triggers a mandatory stay of the procurement.

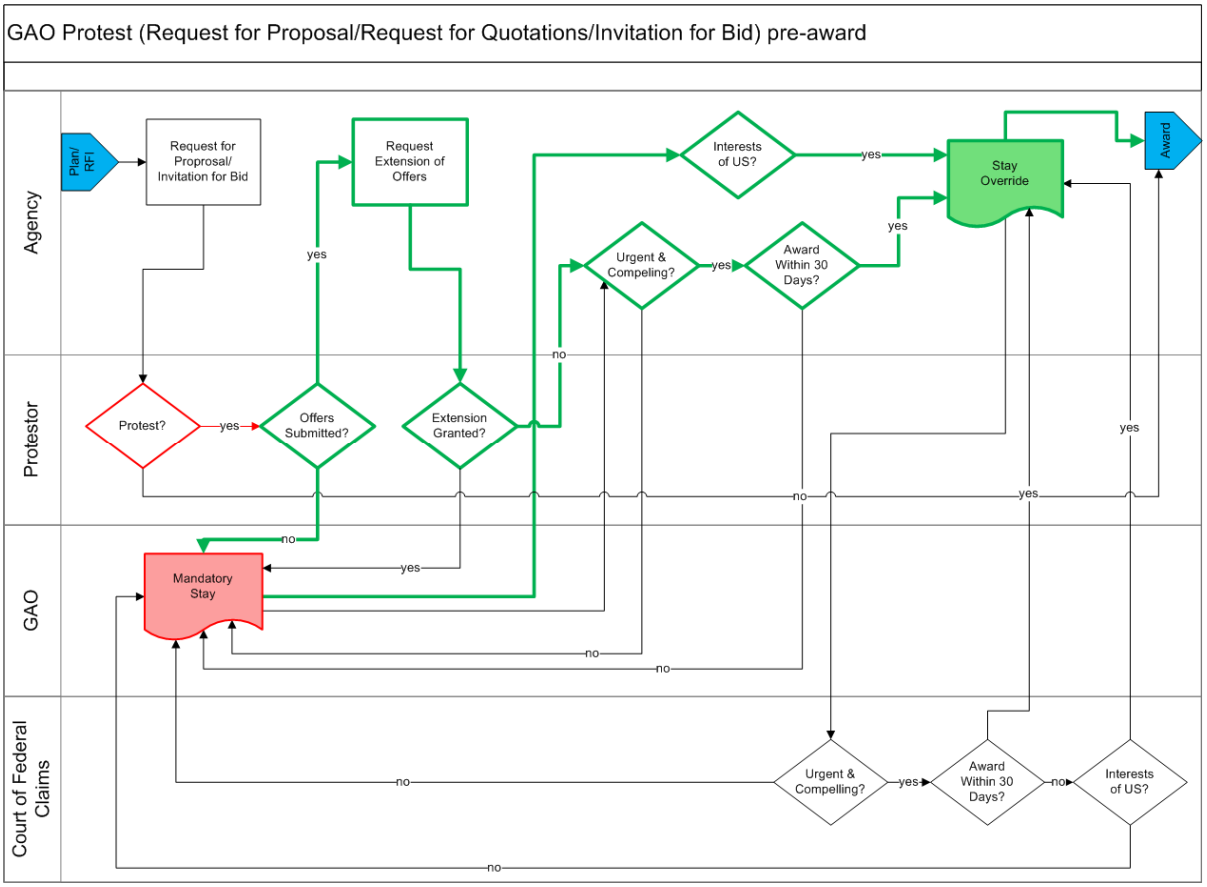

Chart 1. GAO Protest Process (Planning/Request for Information)

To reduce costs or time delays resulting from a mandatory stay, the agency can override the mandatory stay on the grounds of "urgent and compelling

circumstances," as long as it intends to make the award within 30 days. At this stage in the procurement process, such overrides can usually benefit procurements of commercial items or procurements under simplified acquisition procedures. Under the Federal Acquisition Regulation, agencies are generally required to publish a synopsis and a solicitation. The typical procurement administrative lead time (PALT) for such publications is 45 days. However, PALT can be reduced to fewer than 30 days for procurements of commercial items under FAR Part 12 or procurements under simplified acquisition procedures in FAR Part 13.

A protester is able to review the stay override at the Court of Federal Claims (CFC). The CFC will make a separate determination of whether "urgent and compelling circumstances" exist and of whether the agency intends to make the award within 30 days. If the CFC sustains the agency's override of the stay, the agency is able to move the procurement program along by issuing the solicitation.

Least Disruptive/Most Cost-Effective Strategies: The least disruptive/most cost-effective strategies at the GAO at this stage involve two strategies:

1) seeking an override of the stay based on urging and compelling circumstances if the award is to be made within 30 days; or

2) withdrawing or cancelling of the synopsis or RFI in favor of a more pro-competitive acquisition strategy.

b. Filing of GAO Protests at the Stage of Solicitation

As shown in Chart 2, the process begins when the agency issues a solicitation, such as a FAR Part 15 Request for Proposals (RFP) or a FAR Part 14 Invitation for Bids (IFB). A protester (potential offeror or bidder) files a protest. Upon filing, the GAO gives notice of protest to the agency. By operation of law, the GAO's notice triggers a mandatory stay of the procurement.

To reduce costs or time delays resulting from a mandatory stay, the agency can override the mandatory stay on the grounds of (1) "urgent and compelling circumstances," as long as it intends to make the award within 30 days; and/or (2)

best interests of the United States. The agency's ability to secure an override on "urgent and compelling" grounds depends on whether offers were submitted. If offers were submitted, the agency must seek to obtain an extension of bids or offers. If extensions are not granted, the agency may assert an "urgent and compelling" override. If extensions are granted, the agency may assert only the "interests of the United States" override.

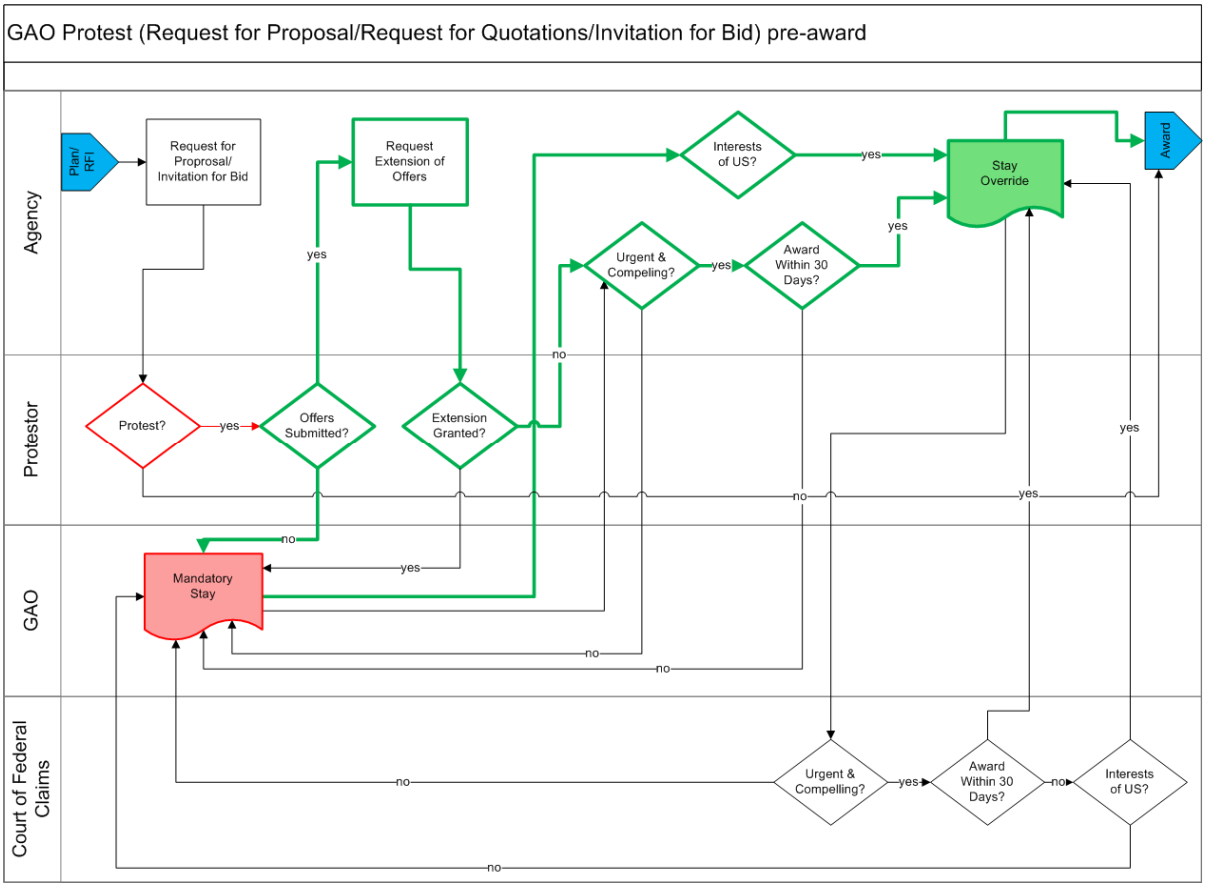

Chart 2. GAO Protest Process (Request for Proposal/Request for Quotations/Invitation for Bid)

A protester is able to obtain a review of the stay override at the Court of Federal Claims (CFC). The CFC will make a separate determination of whether "best interest of the United States" grounds exist, whether "urgent and compelling circumstances" exist, and whether the agency intends to make the award within 30 days. If the CFC sustains the agency's override of the stay, the agency is able to move the procurement program along by evaluating the offers or bids received.

Least Disruptive/Most Cost-Effective Strategies: The least disruptive/most cost-effective strategies at this stage of the GAO protest involve

1) withdrawing or cancelling the solicitation and revision in favor of a more pro-competitive acquisition strategy;

2) if offers, bids, or quotes were already submitted, seeking extensions;

3) if extensions are not granted or no bids, offers, or quotes were submitted, and award is expected within 30 days, seeking an override of mandatory stay for urgent and compelling circumstances; or

4) seeking override on the grounds of best interests of the United States. If the agency subsequently loses the protest, the GAO is required to recommend relief regardless of the impact on the procurement program.

c. Filing of GAO Protest at the Pre-Award Stage of Proposal Evaluation and Exclusion from Competitive Range

As shown in Chart 3, the process begins when the agency has received offers in response to FAR Part 15 Request for Proposals (RFP), conducted an initial evaluation of proposals, and created the competitive range by excluding some offerors. An agency gives these offerors a notice of exclusion from the competitive range within 3 days of exclusion decision.

An excluded offeror has 3 days from the notice of exclusion from the competitive range to request a mandatory debriefing. The agency must provide a debriefing as soon as possible if the excluded offeror requests it within 3 days of the notice. However, the agency may make a determination to provide such a debriefing after the award has been made, based on the best interests of the United States.

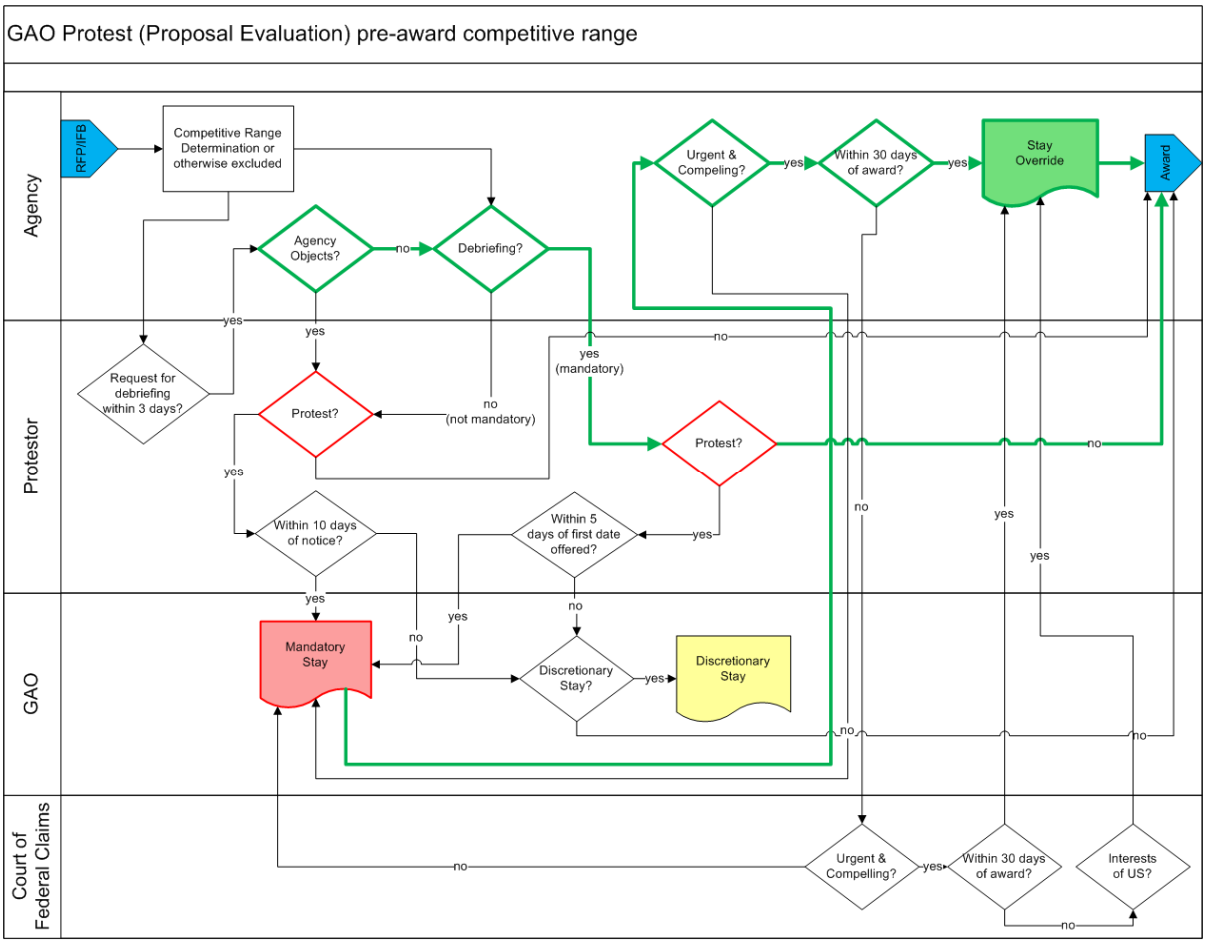

Chart 3. GAO Protest Process (Proposal Evaluation, Pre-Award Competitive Range)

If the agency objects to providing a debriefing prior to the award, a protester has 10 days from the date of the notice of exclusion to file a protest in order to obtain a mandatory stay. If an excluded offeror waits beyond 3 days from the date of the notice to ask for a debriefing, the agency is not legally obligated to provide a debriefing, either pre-award or post-award. However, an agency may offer a non-mandatory debriefing. Again, an excluded offeror has 10 days from the date of notice to file a protest in order to obtain a mandatory stay.

If an agency agrees to offer a pre-award mandatory debriefing, an excluded offeror must file a protest within 5 days of first date offered by the agency for mandatory debriefing in order to obtain a mandatory stay.

If an excluded offeror waits beyond 10 days from the date of notice or, in the case of a mandatory debriefing request, 5 days from the first date offered for debriefing, an agency may impose a discretionary stay.

A protester (excluded offeror) files a protest. Upon filing, the GAO gives notice of the protest to the agency. By operation of law, the GAO's notice triggers a mandatory stay of the procurement, provided the protest was filed within 10 days from the date of notice or, in the case of a mandatory debriefing request, 5 days from the first date offered for debriefing.

To reduce costs or time delays resulting from a mandatory stay, the agency can override the mandatory stay on the grounds of (1) "urgent and compelling circumstances," as long as it intends to make the award within 30 days; and/or (2) the best interests of the United States. The agency's ability to secure an override on "urgent and compelling" grounds depends on whether offers were submitted. If offers were submitted, the agency must seek to obtain an extension of bids or offers. If extensions are not granted, the agency may assert an "urgent and compelling" override. If extensions are granted, the agency may assert only the "best interests of the United States" override. If an agency decides to pursue a "best interests" override, proceeds to file an agency report as a defense, and subsequently loses the protest, the law authorizes the GAO to recommend relief, regardless of the impact on the program.

A protester is able to obtain a review of the stay override at the Court of Federal Claims (CFC). The CFC will make a separate determination of whether "best interests of the United States" exist, whether "urgent and compelling circumstances" exist, and whether the agency intends to make the award within 30 days. If the CFC sustains the agency's override of the stay, the agency is able to move the procurement program along by evaluating the offers or bids received.

Least Disruptive/Most Cost-Effective Strategies: The least disruptive/most cost-effective strategies at this stage of the GAO protest involve

1) holding untimely requested debriefings (as a mitigation measure) or refusal to hold untimely debriefings, as may be appropriate;

2) making objections to the debriefing until after the award;

3) seeking an override of mandatory stay for urgent and compelling circumstances; or

4) seeking an override of mandatory stay on the grounds of the best interests of the United States. If the agency subsequently loses the protest, the GAO is required to recommend relief, regardless of the impact on the procurement program.

Imposing a discretionary stay at this stage is not recommended as a measure to prevent disruption of the procurement process, as there may be other protests after the award on similar grounds. However, agency procurement officials should take into account the allegations made in the protest at this stage and ensure that the evaluations are consistent with the solicitation criteria.

d. Filing of GAO Protest Post-Award

As shown in Chart 4, the process begins when the agency makes a contract award decision and notifies unsuccessful offerors.

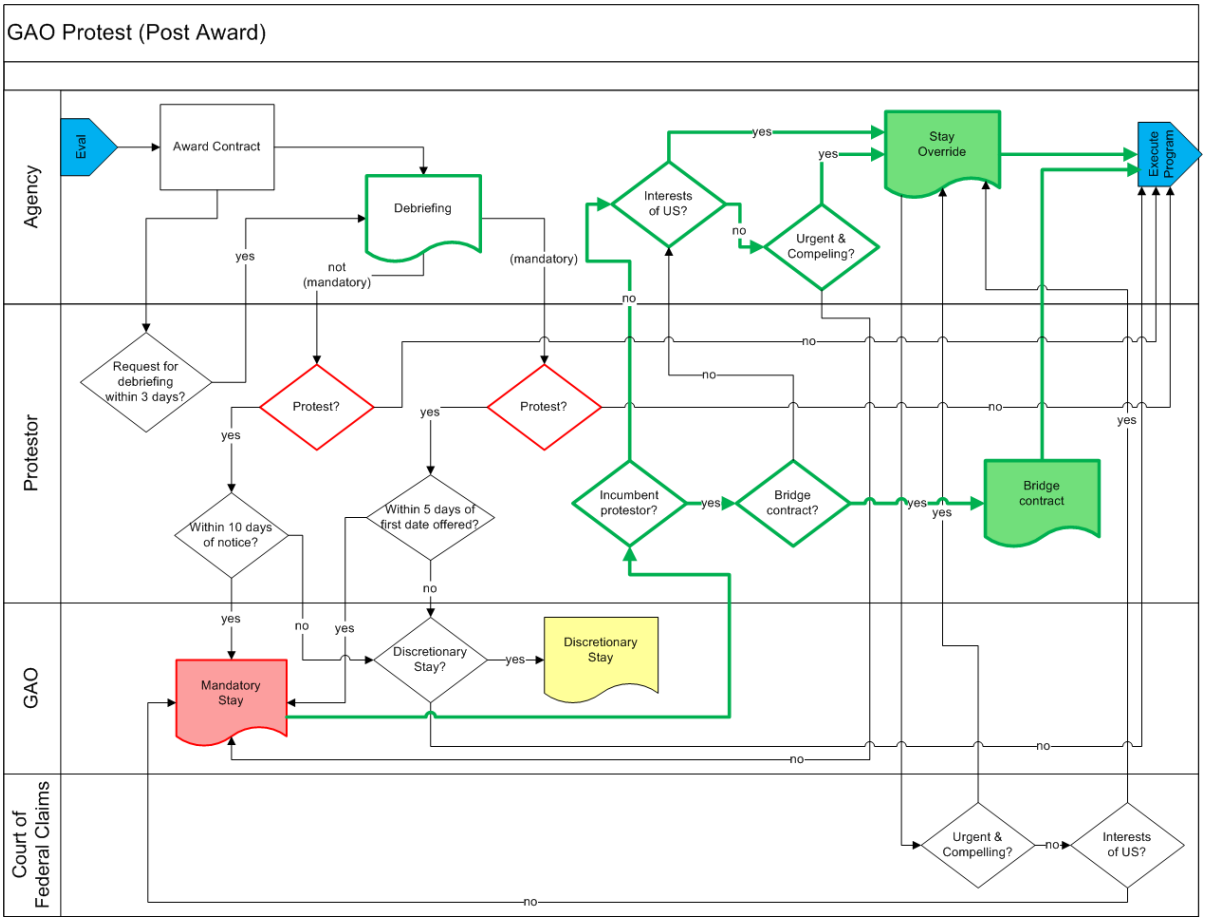

Chart 4. GAO Protest Process (Post Award)

An excluded offeror has 3 days from the notice of award to request a mandatory debriefing. The agency must provide a mandatory debriefing within 5 days of the award decision if an excluded offeror requests within 3 days of the notice. If an excluded offeror does not request a debriefing, the offeror has 10 days from the date of the notice of award to file a protest in order to obtain a mandatory stay. If an excluded offeror waits beyond 3 days from the date of the notice to ask for a debriefing, the agency is not legally obligated to provide a debriefing, but an agency may offer a non-mandatory debriefing. Again, an excluded offeror has 10 days from the date of notice to file a protest in order to obtain a mandatory stay.

If an excluded offeror requested a debriefing within 3 days of the notice of award, such a debriefing is mandatory. An excluded offeror must file a protest within

5 days of the first date offered by the agency for mandatory debriefing in order to obtain a mandatory stay.

If an excluded offeror waits beyond 10 days from the date of notice or, in the case of mandatory debriefing request, 5 days from the first date offered for a debriefing, an agency may impose a discretionary stay.

An excluded offeror becomes a protester by filing a protest. Upon filing, the GAO gives notice of protest to the agency. By operation of law, the GAO's notice triggers a mandatory stay of the procurement, provided the protest was filed within 10 days from the date of notice or, in the case of a mandatory debriefing request, 5 days from the first date offered for debriefing.

To reduce costs or time delays resulting from a mandatory stay, the agency can override the mandatory stay on the grounds of (1) "urgent and compelling circumstances," and/or (2) the best interests of the United States. The agency's ability to secure override based on the "best interests" grounds depends on whether the protester is an incumbent contractor. If the protester is an incumbent contractor, the agency must decide whether to place a bridge contract extending the incumbent's performance. Only if the agency does not place a bridge contract will it be able to assert the best interests override.

A protester is able to obtain a review of the stay override at the Court of Federal Claims (CFC). The CFC will make a separate determination of whether "best interest of the United States" grounds exist, and whether "urgent and compelling circumstances" exist. If the CFC sustains the agency's override of the stay, the agency is able to move the procurement program along by evaluating the offers or bids received.

Least Disruptive/Most Cost-Effective Strategies: The least disruptive/most cost-effective strategies at the GAO at this stage involve

1) holding untimely requested debriefings (as a mitigation measure) or refusal to hold untimely debriefings, as may be appropriate;

2) imposing a discretionary stay if a belated, but apparently meritorious, protest was filed;

3) if the protester is an incumbent - seeking to place a bridge contract for the pendency of the protest while the award is subject to mandatory stay;

4) seeking an override of mandatory stay for urgent and compelling circumstances; or

5) seeking an override of mandatory stay on the grounds of best interests of the United States. If the agency subsequently loses the protest, the GAO is required to recommend relief regardless of the impact on the procurement program.

3. Agency Response Strategies to Filing of Protest at the GAO

As shown in Chart 5, an agency has five (5) options with which to respond to the filing of a protest.

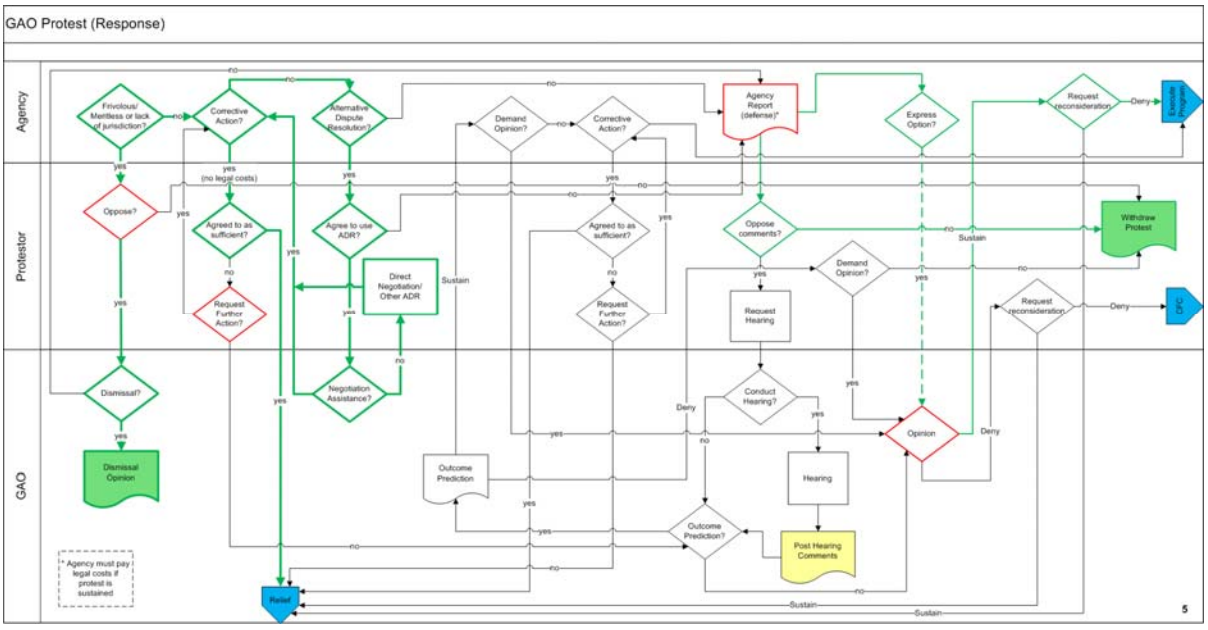

Chart 5. GAO Protest Process (Agency Response)

The first option for the agency is to move to dismiss the protest on the grounds that the protest was frivolous, meritless, or outside the GAO jurisdiction. This option allows the agency to avoid close to 100 days of delay (the statutory time limit for a GAO bid protest); to preserve the agency's acquisition strategy, its competitive range, or its award decision; to prevent discovery and extensive production of documents; to save the agency's legal and administrative costs of defending the protest; and to avoid potential payments of the protester's legal fees as well as the protester's bid and proposal preparation costs. The protester can respond to the agency motion by withdrawing the protest or opposing the motion. If the protester opposes the motion, the GAO may dismiss the protest with a summary dismissal, dismiss it with a dismissal opinion, or refuse to dismiss the protest.

In the alternative, the agency's second option is to undertake corrective action by affording the protester some form of relief. This option allows the agency to avoid close to 100 days of delay (the statutory time limit for a GAO bid protest); to save the agency's legal and administrative costs of defending the protest; and to avoid potential payments of the protester's legal fees. However, corrective action may involve changing or reversing the agency's acquisition strategy, its competitive range, or its award decision; payment of the protester's bid and proposal preparation costs; or other relief to the protester. The protester may either agree to the corrective action or request further corrective action. An agency may refuse further corrective action and proceed to its third or fourth options.

As another alternative, the agency's third option is to engage in Alternative Dispute Resolution (ADR). This option allows the agency to avoid close to 100 days of delay (the statutory time limit for a GAO bid protest); to save the agency's legal and administrative costs of defending the protest; and to avoid potential payments of the protester's legal fees. However, corrective action may involve changing or reversing the agency's acquisition strategy, its competitive range, or its award decision; payment of the protester's bid and proposal preparation costs; or other relief to the protester. The protester may either agree to use ADR, or disagree to

use ADR. If the protester agrees to use ADR, the ADR can take the form of negotiation assistance facilitated by the GAO or ADR without GAO involvement, such as direct negotiation, mediation, or arbitration. If ADR succeeds, it can result in corrective action or withdrawal of a protest. If ADR fails, the agency can proceed to option four, agency defense by agency report. The regulatory timing for filing the agency report within 30 days from the date of the award is not affected by the agency's decision to pursue ADR.

As yet another alternative, the agency's fourth option is to defend the procurement by filing its defense in the form of an agency report within 30 days of the filing of the protest. This option allows the agency an opportunity to protect its acquisition strategy, competitive range decision, or award decision. However, the agency will incur a delay of up to 100 days (the statutory time limit for a GAO bid protest) and incur legal and administrative costs of defending against a protest. Further, if an agency takes this option and subsequently loses a protest, it will be obligated to pay the protester's legal fees and costs. If an agency takes this option and subsequently loses a protest after a "best interests" override was put in place, the law authorizes the GAO to recommend relief regardless of the impact on the acquisition program.

A protester may file opposing comments or withdraw a protest. The protester may also file a supplemental protest. The agency is able to exercise the same response option in regards to the supplemental protest as in regards to the original protest, and the GAO will consolidate all protests together for a single resolution. The protester may also request a hearing. The GAO may conduct a hearing on one or all protests, in which case the parties will be asked to file post-hearing comments.

Following the full exchange of comments, the GAO may conduct an outcome prediction ADR. During outcome prediction, the GAO will recommend either to sustain or to deny the protest. If the GAO recommends to sustain the protest and the agency agrees, an agency may take corrective action in accordance with the GAO recommendation. The protest is then dismissed as academic. If the GAO

recommends a denial or if the agency or the protester disagree with the outcome prediction, they can ask the GAO to issue an opinion.

Once the GAO issues an opinion, with or without outcome prediction, the parties may ask for reconsideration. If the GAO opinion (including the reconsideration request) denies the protest, the protester may file a protest at the Court of Federal Claims. If the GAO opinion (including reconsideration) sustains the protest and recommends relief, the agency can provide the protester with the recommended relief or refuse to follow the GAO recommendation. The GAO will report the agency to Congress and recommend sanctions or relief, including private relief legislation, rescission or cancellation of funds, Congressional investigation, or other action. Further, if the agency refuses to follow the GAO recommendation, it can request the Office of Federal Procurement Policy within the Office of Management and Budget or the Office of Legal Counsel within the Justice Department to issue an opinion supporting its position.

In addition to the fourth option, the agency may also undertake the fifth option: a request for an express option. This request must be made not later than 5 days after protest filing. Under this option, the agency would defend the procurement by filing its defense in the form of an agency report within 30 days of the filing of the protest. This option allows the agency an opportunity to protect its acquisition strategy, competitive range decision, or award decision. However, the agency will incur a delay of up to 65 days, instead of the usual 100 days (the statutory time limit for a GAO bid protest), and incur the legal and administrative costs of defending against a protest. Further, if an agency takes this option and subsequently loses a protest, it will be obligated to pay the protester's legal fees and costs. If an agency takes this option and subsequently loses a protest after a "best interests" override was put in place, the law authorizes the GAO to recommend relief regardless of the impact on the program.

Least Disruptive/Most Cost-Effective Strategies: The least disruptive/most cost-effective strategies at this stage of the GAO protest involve

1) filing aggressive requests to dismiss protests as frivolous, meritless, or lacking jurisdiction;

2) instituting an early corrective action and settlement;

3) instituting Alternative Dispute Resolution (ADR), including direct negotiation ADR or ADR with the GAO's negotiation assistance. This strategy generally provides the protester a process-type relief, including reconsideration of agency decisions and explanation of agency decisions to the protester;

4) making a formal protest defense through an agency report, which can take up to 100 days to obtain a GAO decision; and

5) making a formal protest defense through agency report under an express option, which compresses adjudication timelines but can still take up to 65 days to obtain a GAO decision.

Of these five strategies, Strategies 4 and 5 are the least cost effective and have the greatest potential for program disruption. Both of these strategies will lead to payment of the protesters' attorney fees and protest costs if the agency loses.

To lessen disruption to the procurement program, Strategies 4 and 5 can be combined with overrides of mandatory stay from the initial filing stages. Strategy 1 can also be combined with an override if there is a concern that the GAO will take too long to rule on the dismissal; the success of Strategy 1 will have essentially the same effect as an override. Strategies 2 and 3 do not require stay overrides because they provide for a speedy final resolution of a protest, either by the agency on its own or cooperatively by the agency and the protester (and, possibly, any intervenor).

4. Available Relief in GAO Protests

In Chart 6, an agency is faced with the option of providing or refusing to provide relief to the protester in whole or in part. Relief as described in this chart can be provided following: (1) voluntary corrective action, (2) ADR (including GAO-assisted ADR) resulting in corrective action, or (3) GAO decision (including decision

on reconsideration) to sustain protest after filing of the agency report and full litigation on the regular 100-day schedule or on the express option 65-day schedule.

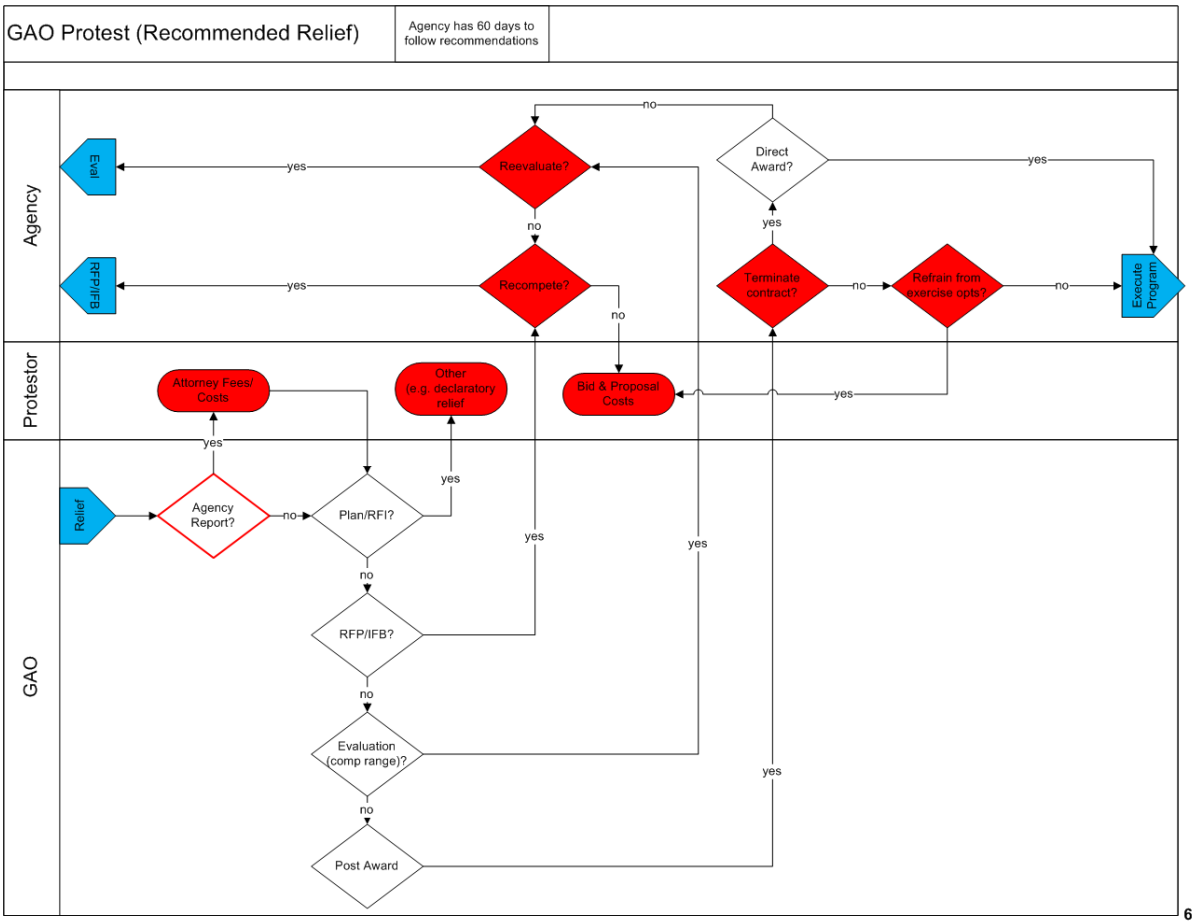

Chart 6. GAO Protest Process (Recommended Relief)

To begin with, the GAO will recommend that an agency reimburse protester for reasonable attorney fees and costs if an agency chose to defend the protest through litigation and file an agency report, and if the GAO recommended sustaining the protest in a formal decision or in GAO-assisted ADR. This fee-shifting mechanism operates as an anti-dilatory penalty on the agency, and is imposed for failure to properly investigate the protest allegations and take voluntary corrective action prior to filing of the agency's formal legal defense, the agency report. Expert and consultant fees may also be recommended.

Substantively, an agency generally can provide a protester with ten (10) types of relief, not including combinations, as described in the following paragraphs.

The first through the third types of relief are available in pre-award protests, and will generally require additions to the procurement administrative lead time (PALT) and to program costs. Under FAR Part 5, PALT for high-dollar, non-commercial item, non-emergency acquisitions can be 45 days or longer. This time is required to publish a stand-alone FAR Part 5 synopsis and solicitation. The fourth through the tenth types of relief are available in post-award protests. Those types of relief can also add to PALT and to program costs. Program costs can include administrative reprocurement costs. Thus, in addition to payment of the protester's legal fees and increases in other program costs, an agency's decision to litigate in defense against a protest can be expected to delay a major defense acquisition program by 110 days or more under the express option and by 145 days or more under the regular GAO schedule. The last, tenth (10^{th}) type of relief is available in pre-award or post-award protests. It typically does not result in time delays or substantially increased program costs.

The first type of relief an agency can provide involves issuing a new acquisition plan or strategy, including a new Request for Information or a new FAR Part 5 synopsis of proposed contract action. Publication of a new stand-alone FAR Part 5 synopsis can add 15 or more days to PALT.

The second type of relief an agency can provide involves issuing a new solicitation, such as a new Request for Proposals, Invitation for Bids, or Request for Quotations. Issuing a new stand-alone solicitation can add 30 or more days to PALT.

The third type of relief an agency can provide is a new evaluation of a protester excluded from the competitive range. This, too, can add time to PALT. All of these types of relief also involve new administrative costs required to administer the program during the extended PALT.

The fourth type of relief involves termination of the protested contract award (held by the protester's competitor that may have been a third-party intervenor in the protest). This type of relief can add 45 or more days to PALT. Typically, an agency may choose to refuse to provide termination relief if the contract has been substantially performed. Substantial performance typically occurs if the procurement has not been subject to stay, either because the protester missed the filing deadline, triggering mandatory stay, or because an agency overrode the stay based on grounds of the best interests of the United States and/or urgent and compelling circumstances significantly affecting the interests of the United States.

The fifth type of relief involves re-awarding the contract by means of direct award to the protester. If the protester is a small business, a joint venture or team of small businesses, or a mentor-protégé joint venture between large and small businesses, and the protester was bypassed from the award for responsibility or capacity reasons, direct award relief may be conditioned on a satisfactory Certificate of Competency from the Small Business Administration. The direct award type of relief is generally rare. It is typically proper only in post-award protests, and only if the protester is the only other offeror that is eligible for a lawful award if the protested impropriety or illegality had not taken place. If other offerors may also have been eligible for the award if the protested impropriety or illegality had not taken place, this type of relief is improper, even if the protester is so far the best of all eligible offerors. The fact that the protester must have had substantial chance of receiving the award as a jurisdictional standing requirement in bid protest cases does not mean that other offerors may not benefit from a legal and proper source selection procedure.

If an agency chooses not to provide termination relief, the agency may provide the sixth type of relief, refraining from exercising options in a contract. Generally, this relief is chosen when performance during the base period of the contract advanced far ahead and the legal violation at issue is not severe enough to warrant termination (unlike, for example, a procurement integrity violation). This

relief must generally be provided in conjunction with the seventh type of relief, the award of bid and proposal costs.

The seventh type of relief, bid and proposal costs, can also be recommended by the GAO as stand-alone relief. Agencies often prefer this type of relief as voluntary corrective action because it involves the least disruption to agency policies and to the program in question.

The eighth type of relief involves re-evaluation of the protester and other offerors (including the incumbent awardee). This is a common type of relief. It is attractive to the agencies because of the perception that it is fair to all offerors, including the protester and the incumbent awardee, and that it allows the agency to obtain better value. If an agency simply deviated from the stated evaluation criteria, this relief may involve re-evaluation based solely on the offers already submitted. If the agency evaluated based on legally or factually improper evaluation criteria, this relief may involve requiring offerors to amend parts of their offers. This relief would typically extend PALT and program costs, and it is typically recommended in conjunction with termination of the incumbent awardee's contract.

The ninth type of relief involves recompetition of the procurement. This is also a common and attractive type of relief for the same reasons as the post-award re-evaluation. The difference between the post-award re-evaluation and the post-award recompetition is that in the post-award recompetition, the offerors may be required to submit new offers in response to a new solicitation. This relief can saddle the agency with substantial reprocurement costs and extend its PALT by 45 days or more, and will likely be recommended in conjunction with bid and proposal costs and termination of the incumbent's contract.

Agencies must take into account that the GAO will recommend termination, recompetition, or re-award of the protested award whenever (1) an agency chose to invoke only a best-interests override, and (2) the GAO recommended sustaining the protest in a formal decision or in GAO-assisted ADR. Under the CICA, the GAO is

specifically required to make this recommendation regardless of any impact of cost or disruption from the recommendation. This requirement operates as a penalty to ensure that agencies do not elevate their programmatic interests over the Congressionally established interest of the United States in full and open competition as set forth in the CICA.

The last, tenth, type of relief involves declaratory relief, such as a change to agency policy. This relief is attractive to established contractors and offers minimal time and cost impacts on agencies. It does involve change to agency actions in future contracts.

The relief recommended by the GAO is in the nature of non-binding recommendations. If the GAO recommends sustaining the protest as part of GAO outcome prediction, the agency must promptly make a decision on what corrective action/relief it wants to take. At this stage, the agency retains greater flexibility in choosing its corrective action (except for payment of the protester's legal fees) than after a formal GAO opinion. For example, an agency that is faced with a GAO sustain decision may be able to opt for payment of bid and proposal costs at the outcome prediction stage, instead of risking a recompetition, re-evaluation, or re-award recommendation in a formal GAO opinion. However, agencies are well-advised to include declaratory or other relief (such as change in agency policies) to any corrective action at the outcome prediction stage in order to prevent recurrence of policies or practices that give rise to protests. Declaratory or other relief can assure the protester that it will fare better in future procurements and, therefore, reduce the risk that the protester will take its grievances to the Court of Federal Claims in order to obtain more relief.

On the other hand, if the GAO issues a formal sustain decision, an agency has 60 days from the date of the decision to decide whether to follow GAO recommendations.

Historically, agencies have usually followed GAO recommendations. However, each agency must decide whether to follow any GAO recommendations in any particular case. The U.S. Court of Federal Claims requires agencies to make an independent, reasonable determination, based on applicable law and facts, of whether to follow GAO recommendations issued as part of a decision or outcome prediction, instead of blindly following GAO recommendations. Even though the Court of Federal Claims and the GAO are both in the Legislative Branch, the GAO's views are not binding on the Court of Federal Claims. Rather, the GAO's views are treated by the Court merely as persuasive expert opinions. Further, the predecessor of the Court of Appeals for the Federal Circuit and the Court of Federal Claims expressly recognized that the GAO may make its recommendations based on the GAO's own policy agenda for improving competitive procurement that goes beyond the requirements of procurement laws. Contrary to misperceptions by some agencies, scrupulous adherence to deficient or policy-driven GAO recommendations does not immunize an agency's procurement from future protests. Rather, the Court requires agencies to make contracting decisions on the whole record, including the record of proceedings before the GAO. If an agency believes that GAO recommendations are wrong or otherwise detrimental to the interests of the United States, that agency may choose not to follow GAO recommendations. The agency is actually required by the Court of Federal Claims not to follow the GAO recommendations if the GAO recommendations are illegal.

An agency has three options when faced with GAO recommendations: (1) agree to fully follow the GAO recommendations, (2) disagree with the GAO recommendations in whole or in part and take no further action, or (3) disagree with the GAO recommendations in whole or in part and request a binding legal opinion supporting its position from the Office of Legal Counsel within the U.S. Department of Justice and/or request formal guidance supporting its position from the Office of Federal Procurement Policy within the White House Office of Management and Budget.

Option 1 creates the risk of protest litigation at the Court of Federal Claims by the incumbent, while Options 2 and 3 create the risk of protest litigation at the Court of Federal Claims by the offeror or potential offeror that was the protester at the GAO level. Options 2 and 3 enable the agency to avoid all or some of the costs and delays resulting from implementing GAO recommendations. However, Options 2 and 3 also create the risk of Congressional actions against the agency. Under the CICA, the GAO will report to Congress any refusal to follow its recommendations. The GAO also must recommend whether Congress should correct inequity or protect procurement integrity by private relief legislation, legislative rescission or cancellation of funds, further Congressional investigation, or some other action.

5. Protests at the Agency Level

Agency-level protests are authorized by Executive Order 12,979 and implemented in FAR Sections 33.102 and 33.103. As shown in Chart 7, the process can take place either before or after the award.

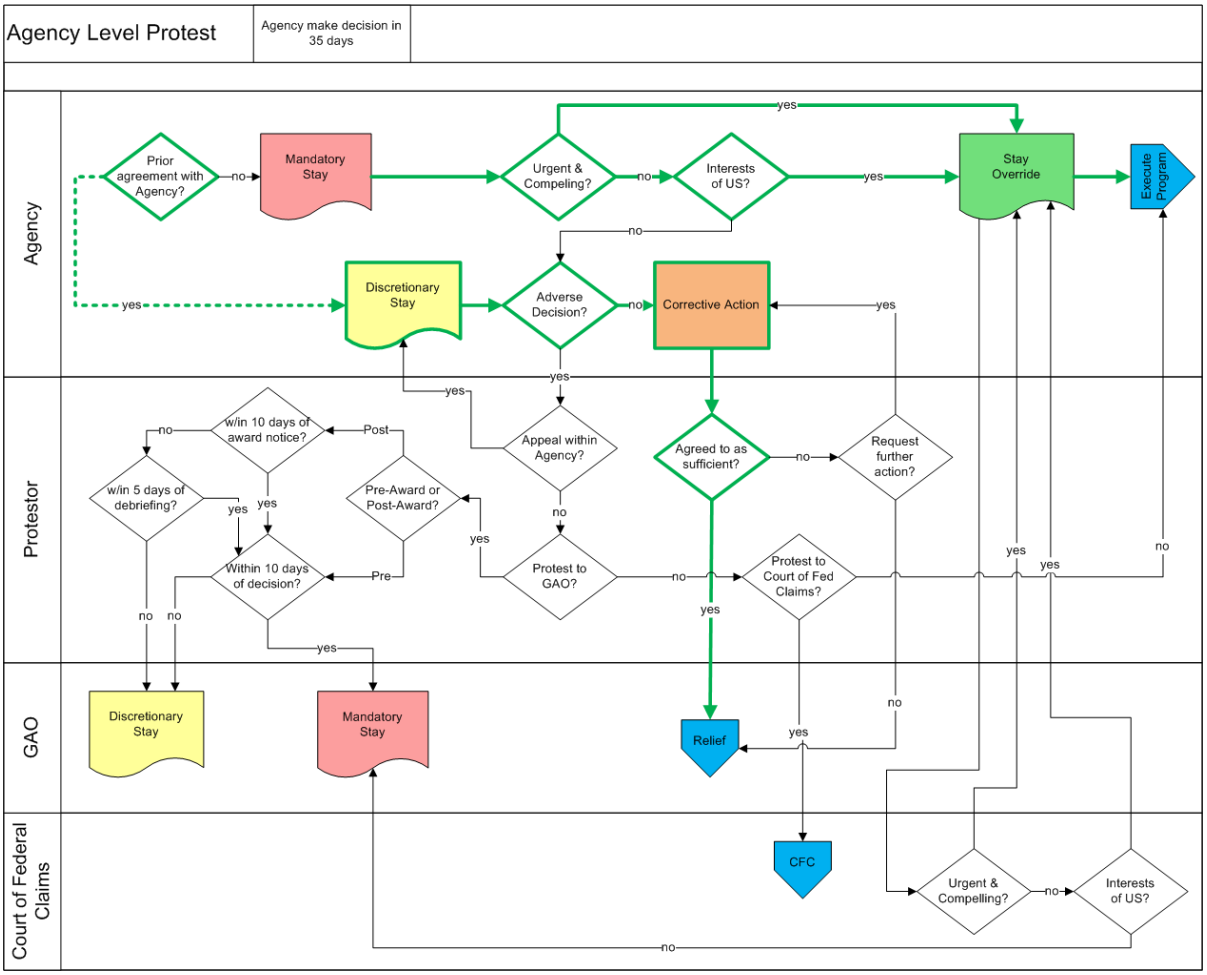

Chart 7. Agency-Level Protest

Prior to the agency-level protest, E.O. 12,979 requires that both the protester and the contracting officer resort to negotiations: "all parties shall use their best efforts to resolve concerns at the contracting officer level through 'frank discussions.'" An agency-level protest is advantageous for the agency from a reputational standpoint, because resolution can take place within the agency and a published decision is not required. For this reason, an excluded offeror or potential offeror often chooses to file an agency-level protest as a matter of good customer relations. However, an agency-level protest does not extend time for obtaining a stay at the GAO and no automatic stay is available for appeals of unsuccessful agency-level protests within an agency. Therefore, a potential protester may seek to

negotiate an agency's agreement to impose a voluntary stay during any appeals within the agency or any subsequent protests at the GAO.

Agency-level protests may be filed either at the contracting officer level or at some level above the contacting officer, depending on agency regulations.

A protest challenging improper solicitations or acquisition strategies is filed prior to the due date for bid opening or proposal submission. Protests in all other cases are filed not later than 10 days after the protest grounds are known or should have been known, whichever is earlier. Just like the GAO with respect to its own timeliness limits, agencies may waive these timeliness requirements.

If a protest is received before award (including a protest of exclusion from the competitive range), the procurement is subject to a mandatory stay such that the agency cannot make an award. To reduce costs or time delays resulting from mandatory stay, the agency can override the mandatory stay on the grounds of (1) "urgent and compelling circumstances," and/or (2) best interests of the United States. Unlike in protests at the GAO, there is no requirement for the best interests override that the agency intend to make an award within 30 days. The agency's ability to obtain an override depends on whether the agency is able to obtain extensions of acceptance deadlines from all offerors.

If a protest is received after an award, the procurement is subject to a mandatory stay provided the protest was filed within 10 days from the date of notice or, in case of mandatory debriefing request, 5 days from the first date offered for debriefing. An excluded offeror has 3 days from the notice of award to request a mandatory debriefing. Agency must provide a mandatory debriefing within 5 days of the award decision if requested within 3 days of the notice. If an excluded offeror does not request a debriefing, the offeror has 10 days from the date of the notice of award to file a protest in order to obtain a mandatory stay. If an excluded offeror waits beyond 3 days from the date of the notice to ask for debriefing, agency is not legally obligated to provide a debriefing, but an agency may offer a non-mandatory

debriefing. Again, an excluded offeror has 10 days from the date of notice to file a protest in order to obtain a mandatory stay.

If an excluded offeror requested debriefing within 3 days of notice of award, such debriefing is mandatory. An excluded offeror must file a protest within 5 days of first date offered by the agency for mandatory debriefing in order to obtain a mandatory stay.

If an excluded offeror waits beyond 10 days from the date of notice or, in the case of a mandatory debriefing request, 5 days from the first date offered for debriefing, an agency may impose a discretionary stay.

To reduce costs or time delays resulting from a mandatory stay, the agency can override the mandatory stay on the grounds of (1) "urgent and compelling circumstances," and/or (2) best interests of the United States. The agency's ability to secure an override on the "best interests" grounds depends on whether the protester is an incumbent contractor. If the protester is an incumbent contractor, the agency must decide whether to place a bridge contract extending the incumbent's performance. Only if the agency does not place a bridge contract will it be able to assert the best interests override.

Consistent with direction in the FAR 33.103 and Executive Order 12,979, agencies are obligated to provide for "inexpensive, informal, procedurally simple, and expeditious resolution of protests." Agencies are also directed to utilize alternative dispute resolution techniques (ADR), including third party neutrals and personnel from other agencies.

An agency is required to use its best efforts to make a decision within 35 days of the filing of the protest. There is no required discovery, although information exchanges between parties are authorized.

An agency may provide any form of relief that is available in GAO protests.

If an agency makes an adverse decision, the mandatory stay expires. A protester may appeal the adverse decision within if allowed by agency procedures. An agency may provide for a voluntary or discretionary stay while the appeal is pending.

A protester may file a protest at the GAO or the Court of Federal Claims following an agency-level protest (with or without an appeal within the agency).

If a protester files first at the agency level and the resolution is unsuccessful, the protester risks losing the ability to obtain a stay during the subsequent GAO protest. As stated previously, an agency-level protest does not extend time for obtaining a stay at the GAO. However, an agency may agree to impose a discretionary stay in future GAO protests. An agency-level protest does not affect stays at the Court of Federal Claims.

Least Disruptive/Most Cost-Effective Strategies: The least disruptive/most cost-effective strategies at this stage of the procurement process involve

1) taking early corrective action, especially on a pre-award protest. However, early corrective action in agency-level protests may not be most cost-effective. If the protester receives a cash settlement or a subcontract at a higher price than the originally selected contractor or contractor team, this could result in higher costs for the agency;

2) entering into a prior agreement with a potential protester that the agency will continue the stay of the procurement during the pendency of the protest at the GAO in order to encourage disappointed bidders to take their protests to the agency. This strategy is valid only if the procurement is not time sensitive and if the agency intends to achieve resolutions with the consent of the protester; and

3) providing greater transparency into the procurement process and into the agency's reasoning and decision-making as part of the agency-level protest.

Overall, agency-level protest is the least disruptive/most cost-effective resolution strategy of any bid protests. The agency must use its best efforts to make the initial agency decision within 35 days. In general, no mandatory stay is required

beyond the initial agency decision. An agency may also issue an override of the stay. This is also the least paperwork-intensive protest resolution process. Discovery/productions of documents and depositions of contracting officers are not required in agency-level protests.

Disappointed bidders are not required to file at the agency level. However, agency-level protests are particularly advantageous to protesters at the acquisition planning or solicitation (RFP/IFB/RFQ) stage because the agency is in a position to easily make changes to the acquisition strategy. If the agency immediately takes corrective action, it may also avoid paying the protester's legal fees. At the same time, agency-level protests are the least disruptive for the agency because agency-level protests do not toll the time for mandatory stay at the GAO. If the agency makes an adverse decision, the protester cannot obtain the stay in any subsequent GAO protest unless it met the GAO's timeliness rules.

6. Protests in the Court of Federal Claims

As shown in Chart 8, a protester files a protest in the United States Court of Federal Claims under the authority of the Tucker Act (2010), 28 U.S.C. §1491(a) or (b), and the Rules of the Court of Federal Claims (U.S. Court of Federal Claims [COFC], 2011). Once a protest is filed in the U.S. Court of Federal Claims, the Justice Department assumes full authority to litigate or settle the case on behalf of the United States government. The procuring agency loses formal control of the matter under litigation, such that its views become merely advisory and its lawyers merely assist the Justice Department.

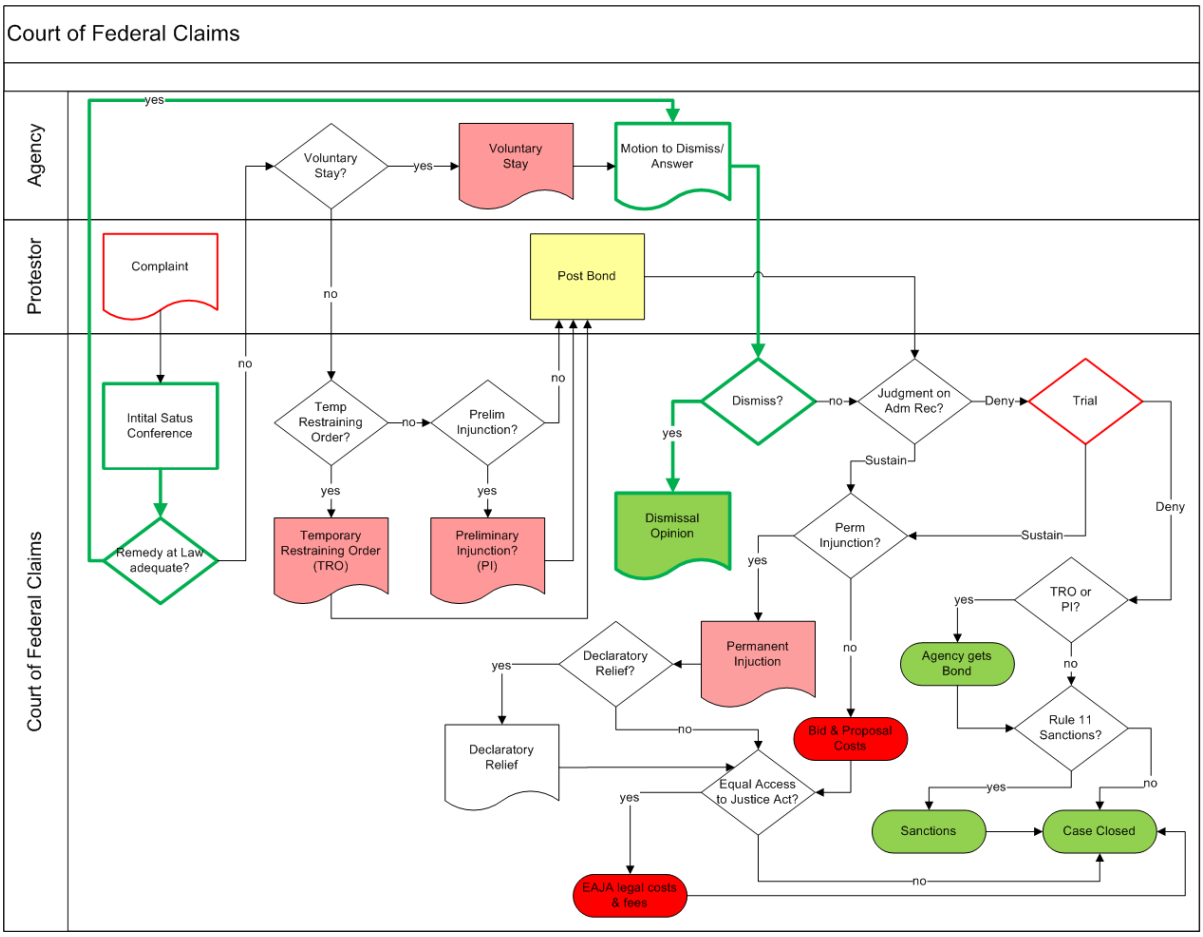

Chart 8. Court of Federal Claims Protest

Under subsection 1491(a), bid protests are traditionally considered by the Court as claims for breach of an implied-in-fact contract between the government and the protester to fairly consider the protester's proposal. Successful protests brought under this theory result in so-called remedies at law, such as monetary relief for bid and proposal costs, declaratory relief, and remand of the matter to the agency. Injunctive relief, such as stay of the procurement, re-evaluation, recompetition, or re-award of the contract, is not authorized under subsection 1491(a). Congress subsequently enacted subsection 1491(b), which authorized the Court to grant "any relief the Court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs." Section 1491(b) further directs that "[i]n exercising jurisdiction

under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action." Section 1491(b) authority is implemented in Appendix C of the Rules of the Court of Federal Claims (U.S. Court of Federal Claims [COFC], 2011), *Procedures in Procurement Protest Cases Pursuant to 28 U.S.C. §1491(b)*. Protesters typically assert jurisdiction under both subsections, such that Appendix C procedures apply.

A protest at the Court of Federal Claims begins, save for exceptional circumstances, with an advance pre-filing notice from the protester to the agency's contracting officer, the Court, the Commercial Litigation Branch of the Civil Division, U.S. Department of Justice, and any apparently successful offeror. The protester's notice, due at least 24 hours prior to the filing of the protester's complaint, must state whether the protester intends to seek discretionary judicial stay of the procurement during the pendency of the case in the form of temporary or preliminary injunctive relief, whether the stay was discussed with the Justice Department, and whether the GAO already ruled on the matter. The notice procedure is designed to ensure that the Justice Department's counsel becomes familiar with the procurement enough to be able to address the adequacy of the remedies and the desirability of voluntary stay of the procurement during the initial status conference. The notice procedure encourages the protester and the Justice Department to discuss the matter and, through negotiations, avoid the need for a judicial order to stay the procurement while the case is pending (but not necessarily a voluntary stay).

Following the pre-filing notice, the protester files a complaint and any appropriate related material with the Court.

As soon as practicable after the filing of the complaint, the Court schedules an Initial Status Conference with the parties. Typically, the Conference is held within one or few days from the filing of the Complaint.

Prior to the Conference, the Justice Department and the agency must consider whether it is advisable to grant voluntary stay, or to oppose any request for

temporary or preliminary injunction/stay. A voluntary stay may be advisable if moving forward with contract award and performance would result in greater costs to the agency in case the Court issues final injunctive relief than if the agency waited to proceed with the acquisition before the Court issues final injunctive relief. Neither voluntary nor judicial stay is necessary if the protester and the government agree that remedies at law, such as bid and proposal costs and/or declaratory relief, are adequate. The government will avoid an injunction whenever it can establish to the Court's satisfaction that (1) the protester is not likely to succeed on the merits of the allegations that the agency action was illegal, arbitrary, capricious, or an abuse of discretion; (2) the protester will not suffer irreparable injury without injunctive relief; (3) the balance of hardships favors the government; and (4) an injunction would be contrary to the public interest, including considerations of national defense or national security.

Alternative Dispute Resolution (ADR) can be conducted between the parties at any time during the Court of Federal Claims protest. The parties can request assistance of the Court of Federal Claims with ADR at the Initial Status Conference or thereafter, or the Court may direct the parties to engage in ADR on its own initiative.

If the government agrees to a voluntary stay of the procurement, it can so advise the Court during the Initial Status Conference. The Court will establish a schedule for further proceedings, and the government can then proceed with its filings, such as any Motions to Dismiss, an Answer, a Motion for Judgment on Administrative Record, any trial filings, and any Motions for Sanctions under Rule 11 of the Rules of the Court of Federal Claims (COFC, 2011).

If the government does not agree to a voluntary stay, then the Court will address the need for temporary or preliminary injunction, or stay, during the Initial Status Conference. Under Rule 65 of the Court of Federal Claims, an injunctive stay is always discretionary with the Court.

A temporary injunction (also known as a Temporary Restraining Order or TRO) may be issued without notice to the government as an immediate, short-term stay for the purpose of protecting the protester from "immediate, irreparable injury, loss, or damage" that can result until the government's position concerning the stay can be heard. To mitigate delays, the government may file a Motion to Dissolve the Temporary Injunction on two (2) days notice to the protester.

On the other hand, a preliminary injunction may be issued only upon notice to the government and upon a hearing where the government is given an opportunity to be heard concerning the stay. A preliminary injunction lasts during the entire pendency of the case until the Court renders its final decision. Under Rule 65, the Court may, at its initiative or the request of any party, consolidate the hearing on the preliminary injunction with the proceedings on the merits of the protest.

The Rules of the Court of Federal Claims (COFC, 2011) give the government a fiscal incentive to oppose any voluntary or judicial stay during the pendency of the case if the government is confident in its legal position. Specifically, if the Court grants a temporary or a preliminary injunction, the protester must post with the Court a bond or other security pursuant to Rules 65 and 65.1. The bond must be in an amount that the Court will determine to be proper to compensate the government if it is later determined to be wrongfully restrained. The government will be able to collect on that bond if it prevails.

Next, the government must file an Answer to the Complaint within 60 days from the date of the filing of the complaint, and may file a Motion to Dismiss under Rule 12 prior to filing an Answer to the Complaint. The Motion to Dismiss may be made on the grounds of lack of jurisdiction, insufficient service of process, failure to state a claim upon which relief can be granted, or failure to join a necessary party. Additional pleadings may be filed. Following the filing of the Answer, any party may also move for judgment on the pleadings.

At the time of the filing of the Answer or the Motion to Dismiss, or at any time thereafter, the government (or the protester) may also file a Motion for Sanctions under Rule 11. The Court may assess Rule 11 sanctions on its own initiative. Rule 11 is the Court's primary authority to penalize false, frivolous, and vexatious claims, defenses, and arguments. Under Rule 11(b), any lawyer or unrepresented party certifies to the Court, by signing, filing, submitting, or advocating any paper or motion, that

1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

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.

If the Court determines that the certification was false, Rule 11 allows sanctions

> limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives [such as a restriction on filing future cases in the Court]; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

Rule 11 sanctions are not available against the parties for their lawyer's legal frivolous arguments. Also, the Court cannot initiate Rule 11 sanctions on its own after the parties settle their claims and the protest is voluntarily dismissed.

If the Court grants the government's Motion to Dismiss, the case is closed and the Court enters final judgment. The final judgment may include recovery from

the protester's bond of costs incurred by the agency due to the procurement stay if there was a temporary or preliminary injunction. Further, under the Equal Access to Justice Act (1980), 28 U.S.C. § 2412, and Rule 54, the government may seek recovery of costs and legal fees. At that time, the government may also obtain sanctions against the protester under Rule 11 of the Court of Federal Claims (COFC, 2011). The protester may appeal the dismissal and any sanctions to the Court of Appeals for the Federal Circuit within 60 days.

If the Court denies the Motion to Dismiss, the government's next opportunity to get the protest dismissed comes when the government files a Motion for Judgment on the Administrative Record (MJAR). The protester may oppose this motion, or file its own Cross-Motion for Judgment on the Administrative Record (C-MJAR).

If the Court grants the government's MJAR and denies the protester's C-MJAR, the protest is dismissed. The final judgment may include recovery from the protester's bond of costs incurred by the agency due to procurement stay if there was a temporary or preliminary injunction. Further, under the Equal Access to Justice Act (1980), 28 U.S.C. § 2412, and Rule 54 (COFC, 2011), the government may seek recovery of costs and legal fees. At that time, the government may also obtain sanctions against the protester under Rule 11 of the Court of Federal Claims (COFC, 2011). The protester has the right to appeal to the Court of Appeals for the Federal Circuit within 60 days from the date of the entry of final judgment.

If the Court does not grant either the protester's or the government's MJARs in their entirety, the protest proceeds to trial on any issues that were not resolved by the Court's ruling on the MJARs.

If the Court denies the government's MJAR and grants the protester's C-MJAR motion, the Court proceeds to the awarding of relief.

If the protest proceeds to trial, the Court either sustains or denies the protest. If the Court denies the protest, the case is dismissed. The final judgment may include recovery from the protester's bond of costs incurred by the agency due to the procurement stay if there was a temporary or preliminary injunction. Further, under the Equal Access to Justice Act, 28 U.S.C. § 2412, and Rule 54, the government may seek recovery of costs and legal fees. At that time, the government may also obtain sanctions against the protester under Rule 11 of the Court of Federal Claims. The protester has the right to appeal to the Court of Appeals for the Federal Circuit within 60 days from the date of the entry of final judgment. If the Court sustains the protest, the Court proceeds to the awarding of relief.

The relief awarded by the Court of Federal Claims may include, (1) based on factors generally applicable to injunctive relief, a permanent injunction in the nature of an order directing the government to recompete, re-evaluate, or re-award the contract, or to issue a new acquisition plan or solicitation; (2) declaratory relief, where the Court rules that agency violated the Constitution, a law, regulation, or Executive Order; and (3) bid and proposal costs, if the Court due to national security or other applicable factors, declined to award a permanent injunction, or if permanent injunction is not possible due to substantial performance. Further, under the Equal Access to Justice Act, 28 U.S.C. § 2412, and Rule 54, the protester may be awarded costs. If the protester is an eligible small entity, it may also be awarded legal costs and fees, unless the Court finds that the government's position was substantially justified or the circumstances make the award unjust. If warranted, a protester may also at this time obtain Rule 11 sanctions against the government. The government may appeal the grant of relief to the Court of Appeals for the Federal Circuit within 60 days from the date of entry of the final judgment.

Least Disruptive/Most Cost Effective Strategies: The least disruptive/most cost-effective strategies at the Court of Federal Claims involve

1) initially, aggressive filing of a Motion to Dismiss;

2) refusing to agree to voluntary stays, aggressively opposing temporary injunctions or preliminary injunctions, and insisting on the protester posting a bond to compensate the government for the costs of any delays pertaining to injunctions. This stage may be substituted for Alternative Dispute Resolution (ADR) or voluntary corrective action by the agency;

3) if a preliminary injunction is granted, seeking of expedited filings and decision on the Motion for Judgment on Administrative Record and on any trial. This stage may be substituted for Alternative Dispute Resolution (ADR) or voluntary corrective action by the agency;

4) if the government prevails on the merits, aggressively requesting Rule 11 sanctions for frivolous or dilatory protests;

5) if the government prevails on the merits, arguing for declaratory relief and reimbursement of legal and proposal costs, rather than a permanent injunction affecting the procurement program; if the government loses on the merits, entering into an ADR settlement as to remedies. Unlike the protest process at the GAO, the agency cannot disregard any relief to the protester ordered by the Court.

7. Summary of Major Prevention and Resolution Tools in Different Protest Forums

a. 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 the "best interests of the United States" (FAR, 2010, § 33.104). When the Court of Federal Claims reviews the validity of the override, it must take national defense and national security considerations into account under the Tucker Act (2010).

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 protest is filed, a stay override may be available at that time as

well. At the GAO, mandatory stays at the two first pre-award stages can be overridden only for urgent and compelling circumstances if the award is likely within 30 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 a new award, the agency may be required to issue a bridge contract in lieu of an 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. As required by its authorizing statute, the Court of Federal Claims provides greater deference to overrides and other agency procurement actions based on national defense or national security considerations (Schwartz & Manuel, 2010, p. 13).

In contrast, 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.

b. Use of Defensive Strategies to Minimize Time Delays and Costs

In addition to stay overrides, agencies have five (5) choices of defensive strategies that may reduce or enlarge delays and costs from bid protests, depending on the strategy chosen. There are multiple possible strategies and resolutions to a protest:

- The GAO dismisses the protest as frivolous, meritless, or outside of its jurisdiction (including one that is untimely or where prejudice is lacking).
- The agency takes early voluntary corrective action and the protest is withdrawn.
- ADR (as defined in the U.S. Department of Justice Electronic Guide to Federal Procurement ADR and cited in Appendix A) is utilized to resolve the protest and the protest is withdrawn.
- The agency opts for 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 in fewer than 30 days and avoid paying the protester's legal fees. Litigation under the fourth strategy can last the maximum of 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 the agency's procurement decisions in the form of a favorable GAO opinion, but at the risk of having to pay the protester's 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 outside of its jurisdiction, then it can seek summary dismissal from the GAO. Barring such a dismissal from the 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.

8. Use of ADR in Protests at the GAO and at the Agency Level to Minimize Time Delays and Costs

As shown in Figure 5, there are essentially five decision points where an agency can influence the process. As discussed earlier, an agency may seek dismissal from the 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 pursing the protest, including attorney's fees and counsel and expert witness fees" (GAO Bid Protest Regulations, 2010, 4 C.F.R. § 21.8(d)(1)). While the exact costs a protestor may incur in filing a protest varies, in the past the GAO has recommended that agencies pay successful protestors payment in excess of $300,000 (GAO, 2009b). 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.

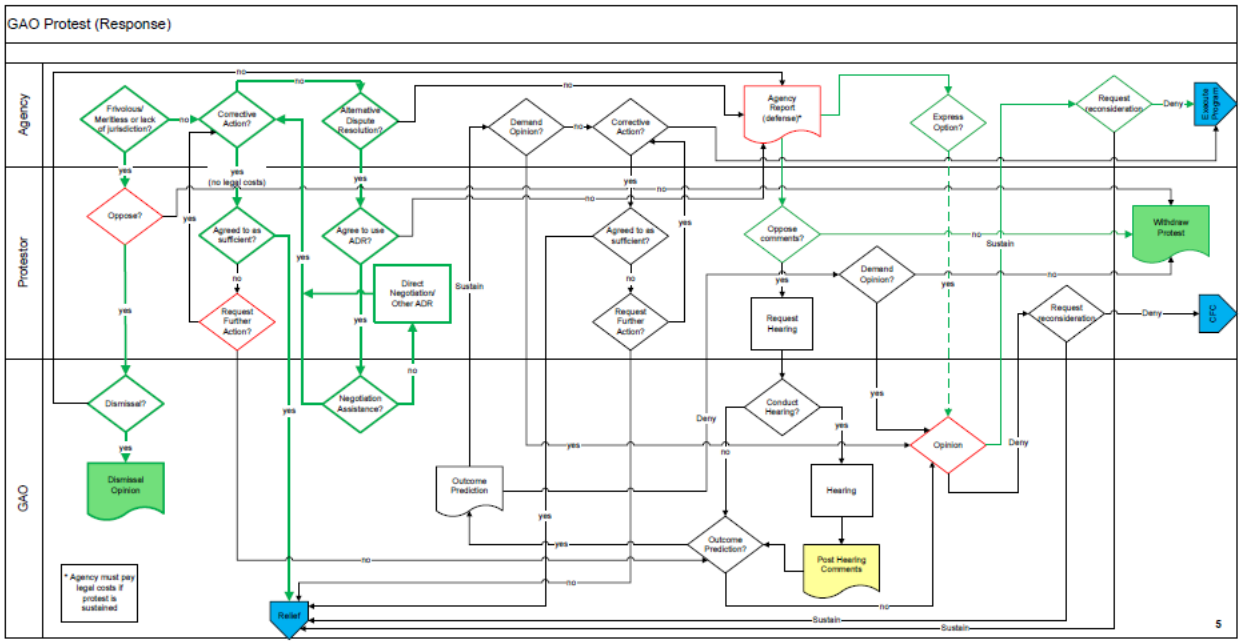

Figure 5. Agency's Protest Response

ADR is far from a new concept. In 1995, President Clinton issued Executive Order No. 12,979 mandating that agencies use "to the maximum extent practicable…the use of alternative dispute resolution techniques." Within the GAO, there are two ADR options available, negotiation assistance and outcome prediction (GAO, Office of General Counsel, 2008, p. 27). Outcome prediction is the most common form of ADR employed by the GAO (Spriggs & Kidalov, 2003, p. 2). 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 (Spriggs & Kidalov, 2003, p. 2), at which point the GAO attorney will advise the parties of the "likely outcome of the case" (GAO, Office of General Counsel, 2008, p. 27).

Thus, the substantial difference between outcome prediction and the formal adjudication of a protest is merely the absence of a written decision by the GAO in the former. In terms of minimizing delays to the acquisition process, it does not seem that outcome prediction is a very 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.

Only around 1% of GAO bid protests are resolved through the GAO's ADR techniques. Such miniscule utilization occurs despite tremendously high GAO ADR success rates. In fiscal years 2001–2009, the GAO handled 1,146; 1,204; 1,352; 1,485; 1,356; 1,326; 1,411; 1,652; and 1,989 bid protests, respectively (Gibson, 2010; Gamboa, 2006).

> For FYs 2001, 2002, 2003, 2004, 2005, 2006, 2007, and 2008, respectively, alternative dispute resolution was used in 150 (with 84% of those protests being resolved through such ADR), 145 (84%), 120 (92%), 123 (91%), 103 (91%), 91 (96%), 62 (85%), and 78 (78%) protests. (Schaengold, Guiffré, & Gill, 2009, p. 255)

In FY 2009, ADR was used in 149 cases with a success rate of 93% (Gibson, 2010).

As previously noted, another common form of ADR is agency-level protests, which are authorized by Executive Order 12,979 and implemented in FAR Sections 33.102 and 33.103.

At the Court of Federal Claims, ADR can be conducted between the parties at any time during the Court of Federal Claims protest. Any party can request

assistance of the Court of Federal Claims with ADR at the Initial Status Conference or thereafter, or the Court may direct the parties to engage in ADR on its own initiative.

D. Common Objections to the Use of ADR and Similar Tools; Benefits of ADR and Similar Tools in Resolving Protests, and Impact on Major Acquisition Programs

1. Objections to ADR and Other Prevention and Resolution Tools

The Administrative Dispute Resolution Act of 1990 (ADRA) provides that federal agencies "may" use ADR, but also allows federal agencies to decline to use ADR in six circumstances: (1) the agency needs to secure an authoritative precedent, (2) the agency needs to resolve significant issues of government policy, (3) the agency needs to maintain its policies and practices without deviation, (4) the matter in dispute has significant effect on non-parties to the ADR, (5) the agency is unable to secure full public records of ADR proceedings, or (6) the agency must preserve its continued jurisdiction over the matter so that it could alter the result achieved in ADR (ADRA, 2010, § 572(b)). ADRA, however, does not specifically address ADR in bid protests and does not require agencies to formally justify the refusal to use ADR. According to legal and professional literature, such as the *Construction Law Handbook* (Shaffer & Belanger, 1999, pp. 284–285) there are at least six reasons why ADR, as well as other flexible dispute prevention and resolution tools, are not commonly used in bid protests. These reasons include (1) strict GAO time limits for filing leave no time for ADR; (2) mandatory overrides of procurement stays in GAO protests are difficult to obtain and sustain; (3) protesters' counsel needs to access protected business or source selection information for proper prosecution of bid protests; (4) an agency needs the concurrence of all potential offerors to proceed to ADR; (5) an agency may want to obtain a definitive "seal of approval" for its acquisition strategy from the GAO; and (6) an agency will be compelled to follow GAO recommendations due to likely Congressional sanctions. Most of these objections found in the literature parallel ADRA considerations. Upon

closer empirical and legal analysis, none of these objections justify agencies going along with bid protest litigation to the extent they currently do.

2. Strict GAO Time Limits for Filing

The first reason is the strict time limits for filing protests set forth in the GAO Bid Protest Regulations (2010) at Title 4, Section 21.2 of the Code of Federal Regulations. These time limits are not tolled for the conduct of ADR. A typical GAO filing window for post-award protests ranges between 10 days from the date of award and as little as five days from the first date offered for debriefing, while pre-award protests must generally be filed prior to the deadline for receipt of bids or proposals (Shaffer & Belanger, 1999, pp. 284–285). However, this objection applies to preventive, pre-protest ADR only. It does not exclude the possibility of parallel track (ADR and regular protest process) or short, intensive post-filing ADR within the first couple of weeks after filing. Indeed, at the Federal Aviation Administration Office of Dispute Resolution for Acquisition (ODRA), which uses a modified parallel track, ADR is emphasized as the default resolution process, and the formal ODRA decision is used as a second option only. Protests submitted to ADR are resolved in an average of 24 days, almost three times more quickly than the 62 days required to resolve bid protests if final agency decision is sought (DoJ, 2008).

Moreover, the "strict filing deadline" objection may be overcome by a voluntary pre-emptive stay during the 5–10 days time window for automatic stays at the GAO. As authorized under FAR 33.102(d), this pre-emptive stay may be issued by the contracting officers if there is a likelihood of a protest and a delay is in the best interests of the United States. As a result, the pre-emptive stay could remove the pressure to file some protests where the protester's concerns are simple and limited in number, and could be resolved with a simple conversation with an agency decision-maker. In more complicated situations, the protester could file, but the agency and the protester could still pursue ADR.

3. Difficulties in Obtaining and Sustaining Mandatory CICA Stay Overrides

The second reason for agencies not to short-circuit bid protest litigation is the purported difficulty in obtaining overrides of mandatory CICA stays within the agencies and of getting the U.S. Court of Federal Claims to sustain overrides of mandatory stays of procurements. Of course, "an agency override of the automatic stay should very rarely, if ever, occur in an agency-level protest—as compared to an override involving a GAO protest—because of the short time period allowed for issuing protest decisions" (Schaengold, Guiffré, & Gill, 2009, p. 271).

Although difficulties with obtaining and sustaining overrides are far from insurmountable, contracting officers seeking overrides face considerable paperwork burdens, multiple reporting requirements, and override considerations that are broad, vague, contradicting, and, possibly, political. To obtain a mandatory stay override, the CICA (2010) at 31 U.S.C., § 3553, requires that the head of the procuring activity, on a non-delegable basis, makes written findings that an override meets the requisite statutory criteria: (1) in case of a pre-award protest, that an agency is likely to make the award within 30 days and that "urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision"; and (2) in case of a post-award protest, that "performance of the contract is in the best interests of the United States" or "urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting for the decision" of the GAO. Section 3553 also requires that the GAO be notified of the findings.

FAR supplements and related procedures issued by the military departments impose additional bureaucratic constraints on override decisions. For instance, the Air Force Mandatory Procedure (AFMP), § 5333.104 (2010), requires that override requests be signed by a general-level or a Senior Executive Service-level officer, and forwarded through a Senior Contracting Official to the Office of the Assistant Secretary of the Air Force for Contracting. The Army FAR Supplement (AFARS) §

5133.104 (2010), requires the contracting officer to prepare a written Determination & Findings (D&F) document for the head of contracting activity's signature, but also requires approval from the Deputy Assistant Secretary of the Army for Procurement or the Army Materiel Command (AMC) Command Counsel. Justifying overrides through those layers of bureaucracy constraints may well deter contracting officers from seeking stay overrides. Unlike the Army and the Air Force, the Navy Marine Corps Acquisition Regulation Supplement (NMCARS) Subpart 5233.170 (2010) does not require multiple senior approval layers for overrides and does not set override standards. It does require briefings to the Deputy Assistant Secretary of the Navy for Acquisition and Logistics Management on protested acquisitions over $1 billion. The Air Force and the Army may well consider following the Navy's lead and reducing the levels of review required for stay overrides. Instead, all services may require high-level review if contracting activities choose not to proceed with an override.

However, military departments seeking overrides will benefit from deferential standards of review at the Court of Federal Claims when seeking to sustain the overrides. As noted by Schaengold, Guiffré, and Gill (2009), "[t]he protester would have to show that the agency's override decision was arbitrary and capricious and the COFC affords substantial deference to the agency's decision, particularly if matters of national security are involved" (p. 287). Specifically, the Tucker Act (2010), 28 U.S.C. § 1491(b), requires the COFC to "give due regard for the interests of national defense and national security and the need for expeditious resolution of the action" and "review the agency's decision pursuant to the standards set forth in Section 706 of Title 5, known as the Administrative Procedure Act (2010), 5 U.S.C. § 706. As part of this review, the COFC will conduct a searching inquiry into the record to test the agency's reasons for the override. In general, overrides will be invalidated if they are based on cost savings to the agency or agency confidence in its legal position or the propriety of the award, or if the override displaces an incumbent or concerns procurement of information technology services (Sacilotto, 2009, p. 7). On the other hand, overrides to maintain performance by incumbents or

national security overrides are likely to be sustained (Sacilotto, 2009, p. 7). Indeed, "where legitimate 'interests of national defense and national security' have been asserted and established to the court's satisfaction, it is 'not necessary' for the court to reach the merits" of the override (*Kropp Holdings, Inc. v. United States*, 2005). However, AFARS (2010) § 5133.104 and AFMP (2010) § 5333.104 seemingly undermine this advantage by requiring contracting activities to consider factors presently considered extraneous by the COFC, such as the agency's legal arguments for the validity of the award or Congressional interest in a protest, before seeking an override.

Further, the court will likely decline to endorse a sole-source contract award to effect an override, and will require a bridge contract, extension, or multiple awards instead (*Kropp Holdings, Inc. v. United States* [63 Fed. Cl. 537], 2005). The specific criteria that the court requires the agencies to consider are, unfortunately, still in flux because of conflicting COFC precedents (*Kropp Holdings, Inc. v. United States* [63 Fed. Cl. 537], 2005).

Moreover, it seems clear that COFC override precedents interpreting the CICA override provisions may be unreasonably tilted in favor of protesters bringing legally or factually weak cases. For example, Federal agencies are apparently prohibited from considering whether they will likely prevail at the GAO, but must consider the potential of protesters prevailing at the GAO (Sacilotto, 2009, p. 5, citing *Chapman Law Firm v. United States* [67 Fed. Cl. 786, 2006], and *E-Management Consultants, Inc. v. United States* [84 Fed. Cl. 1, 2008]). The COFC historically declined to sustain overrides based on cost savings (at least based on low-value cost savings), but "might" allow agencies to justify overrides based on monetary losses without overrides (Sacilotto, 2009, p. 7). In fact, the court's precedents come very close to judicially creating a dollarized threshold range for permissible cost savings or financial losses to the government. For instance, in *Chapman Law Firm v. United States* (67 Fed. Cl. 786, 2006), the COFC sustained an override based on $3 million in monthly losses to the Department of Housing and

Urban Development without the awardee's real property marketing and management services, but in cases such as *Nortel Government Solutions, Inc. v. United States* (84 Fed. Cl. 243 [2008]) and *Advanced Systems Development, Inc. v. United States* (72 Fed. Cl. 25 [2006]), the COFC rejected override justifications based on cost savings that did not exceed $0.5 million per month. Although the COFC is an Article I Congressional court, the issue of cost sufficiency or loss sufficiency for stay overrides seems a matter more appropriate for Congress itself to determine. To reduce delays and costs from mandatory stays, criteria for review need to be clarified in statute or regulation in order to correct unbalanced COFC precedents in override cases.

4. Protesters' Need for Protected Information

The third reason is that, unlike outside lawyers representing protesters, corporate decision-makers are generally excluded from admission to protective orders that allow lawyers to see source selection and confidential business information of other competitors (Shaffer & Belanger, 1999, pp. 284–85). This objection may be taken care of during an early evaluation of the record with outside counsel subject to a protective order who can determine the significance of competitors' source selection and confidential information. Outside counsel typically prepare redacted versions of all protest filings that are provided to corporate executives under GAO bid protest regulations in Title 4, Sections 21.1 and 21.4 of the Code of Federal Regulations, and the same regulations authorized the agency to withhold protected information even in the absence of a protected order. Based on these regulatory provisions for redacted documents, it is reasonable to expect that corporate decision-makers should be able to participate in ADR sessions relying on materials redacted for confidential or source selection information. These decision-makers would be able to resolve disputes through ADR decisions based on high-level principles and considerations that do not get bogged down in low-level details.

5. Need for Awardee or Third-Party Participation and Concurrence; Desire to Obtain Seal of Approval of Agency Conduct so as to Prevent Awardee or Third-Party Protests

The fourth and fifth reasons that the agency may refuse to engage in ADR are the sense that the awardee and all other third-party bidders or potential bidders must participate in ADR and must concur with any relief provided in ADR (Shaffer & Belanger, 1999, pp. 284–85). Otherwise, the agency fears, the awardee or third party may effectively veto any ADR relief by filing a bid protest of their own. For example, the awardee may file a protest challenging re-evaluation of their award or challenging the termination of their contract. In some situations, there may be a potential for multiple potential protestors in addition to the awardee and the next-in-line offeror, which creates a significant litigation risk. These objections have some intuitive appeal, but they are based on four false implicit premises:

1) that unanimous consent from every potential protester, however remote, is required in order to achieve a valid, enduring ADR outcome;

2) that the forum where most protests are filed, the GAO, can provide such a stamp of approval;

3) that the GAO stamp of approval is worth the costs to the taxpayers and warfighters in terms of time and money; or

4) that the protester will likely file in the forum which can issue a binding seal of approval, the U.S. Court of Federal Claims.

As to the first premise, the ADR process generally involves evaluation and consideration of any potential legal and factual arguments that may be raised by others as well as their ability to raise them. Accordingly, third parties that have only remote likelihood of award would likely have no standing and their interests can receive corresponding treatment in ADR. In terms of other potential protesters with standing, their ADR assertions should be evaluated and resolved by the agency on the totality of merits and circumstances, keeping in mind the agency's obligation of compliance with procurement laws and regulations. If an agency fails to obtain

unanimous consent to an ADR outcome from all potential protesters with standing, it can still reach a valid and enduring ADR outcome.

On the other hand, and as responsive to the second premise, if an agency refuses to pursue ADR in favor of obtaining a GAO decision, the agency will not be able to obtain the enduring seal of approval it seeks. As a matter of law, the GAO is powerless to issue such a seal of approval because its opinions are legally nonbinding recommendations under the Competition in Contracting Act (2010). As noted by the Congressional Research Service (Schwarts & Manuel, 2010), the Court of Federal Claims may find an agency "to have acted arbitrarily, capriciously, and in abuse of discretion, in violation of the Administrative Procedure Act (APA), by following GAO precedents or adopting GAO recommendations" (pp. 15–17). For instance, in two 2007 cases, *Geo-Seis Helicopters v. United States* (77 Fed. Cl. 633 [2007]), and *Grunley Walsh International, LLC v. United States* (78 Fed. Cl. 35 [2007]), the Court of Federal Claims invalidated the agency's decisions to follow the GAO where the GAO's opinions were contrary to the plain meaning of statutes and regulations.

As to the third premise, acquisition leadership of defense agencies must acknowledge that purchasing a stamp of approval from the GAO by effectively inviting or condoning a protest adjudication is a not a compelled necessity. Rather, it is a choice with significant attendant costs and uncertain results—a choice that closely resembles gambling. First, this choice produces uncertain results because the goals of the GAO review and of the relief recommended by the GAO are different in scope from the nature of the review and relief recommended by the Court. As recognized by the Court of Claims since the 1960s case of *John Reiner Co. v. United States* (325 F.2d 438 [Ct. Cl. 1963]),

> Because of his general concern with the proper operation of competitive bidding in government procurement, ... [the Comptroller General, the head of the GAO] can make recommendations and render decisions that, as a matter of procurement policy, awards on contracts should be cancelled or withdrawn even though they would not be held invalid in court. He is not confined to the

> minimal measure of legality but can sponsor and encourage the observance of higher standards by the procuring agencies. Courts, on the other hand, are restricted, when an invitation or award is challenged, to deciding the rock-bottom issue of whether the contract purported to be made by the Government was invalid and therefore no contract at all—not whether another procedure would have been preferable or better attuned to the aims of the competitive bidding legislation.

Second, this choice has significant costs in case the agency loses. In a 2009 opinion *Public Communications Services, Inc.—Costs* (GAO, 2009b), the GAO stated that it will recommend payments of attorney fees ranging from $185 to $750 per hour, and legal support staff fees ranging from $110 to $275 per hour. In that relatively low-profile case, the protester's attorney fees for six lawyers (including four attorneys of record) easily exceeded $300,000. By comparison, in the KC-X tanker protest, the winning protester, Boeing, was represented by 15 attorneys of record and, likely, many other supporting lawyers. This means that the Air Force purchased a legally non-binding GAO decision highlighting the facts the Air Force should have known (e.g., belated changes in evaluation criteria and other errors) at the cost to the taxpayers in the neighborhood of $1 million in protester's legal fees. To better control taxpayers' dollars, there should be a process for making a conscious decision of whether the GAO seal of approval is worth that kind of expenditure of taxpayer dollars. Moreover, the agency's behavior inviting full-blown protest litigation at the GAO in the hopes of buying a GAO decision means a substantial expenditure of agency-legal resources.

Third, the GAO decision is not binding on the protester (Schwartz & Manuel, 2010, p. 15). Although the number of COFC protests with previous GAO proceedings is small, such cases do happen. In that case, the agency may have wasted both time and money "buying" a decision at the GAO.

As to the fourth premise, it is highly unlikely that the agency will be able to buy a binding seal of approval with a protest from the Court of Federal Claims. The annual number of bid protests at the Court of Federal Claims is less than 1% of the annual bid protest docket at the GAO (Schwartz & Manuel, 2010, pp. 19–20). In

comparison with the COFC, the GAO is clearly the preferred forum for protesters. It is, therefore, unlikely that an agency should count on obtaining a seal of approval from the COFC in the vast majority of protests. Further, there are timeliness issues. In theory, a protest can be filed at the Court of Federal Claims within up to six (6) years from the date the grounds for the protest arose. In practice, COFC protests are filed much sooner to avoid the defense of laches (i.e., that the protester was sleeping on his or her rights), but COFC protests are not subject to the GAO's timeliness rules for filing. Unlike the GAO, the COFC also has no cap on time by which it must make a decision. Further, COFC protests can be appealed to the U.S. Court of Appeals for the Federal Circuit, which also has no time limits on issuing decisions.

6. Fear of Congressional Sanctions for Non-Compliance with GAO Recommendations in Bid Protests

Federal agencies customarily follow the GAO because of concerns with Congressional sanctions. Empirical evidence, however, does not support giving in to this fear blindly, at least in the case of military procurements. In fiscal years 1995–2009, there have been only six instances of Federal agencies refusing to follow GAO recommendations (Schwartz & Manuel, 2010, p. 16; Schaengold, Guiffré, & Gill, 2009, pp. 257–58). Of those, two instances involved civilian agencies and four instances involved military agencies, as follows:

1) *Pemco Airplex, Inc*. (GAO, 1998), involving an Air Force bundled procurement for logistics at the Sacramento Air Logistics Center;

2) *Rockwell Electronic Commerce Corp.* (GAO, 2000), involving a Social Security Administration procurement for telecommunications services;

3) *Aberdeen Technical Services* (GAO, 2000), involving an Army competitive sourcing procurement for management of base industrial operations;

4) *Consolidated Engineering Services* (GAO, 2002), involving the Department of Defense competitive sourcing procurement for operation of the Pentagon Heating and Refrigeration Plant;

5) *Symplicity Corp.* (GAO, 2003), involving an Office of Personnel Management procurement of services for the Federal employment services database USAJobs.gov; and

6) *Mission Critical Solutions* (GAO, 2009a), involving the Army's contract for informational technology (IT) support.

This evidence shows that military agencies on average refuse to follow the GAO once every 3.5 years. This evidence also shows that military buyers refused to follow the GAO on exactly zero protests related to major acquisition programs or any other kinds of programs for procurement of weapons, devices, or other supplies.

Is this near-blind following of the GAO by contracting agencies warranted? Empirical evidence strongly suggests it is not. There appears to be only one instance of publicly reported Congressional sanction for failure to follow the GAO recommendation (Schwartz & Manuel, 2010, p. 17, note 109). The sanction involved a threat of project funding loss issued by the Chairman of the House Government Reform Committee to the Office of Personnel Management concerning a contract for an online federal employment database, USAJobs.gov. There appear to have been no such threats reported by the Congressional Research Service or in scholarly literature against military agencies' refusals to follow GAO recommendations. On the contrary, in the recent case of *Mission Critical Solutions* (GAO, 2009a), the Army's refusal was supported by policy directions and legal opinions from the Office of Management and Budget and the Office of Legal Counsel within the Justice Department (Orszag, 2009; Rhee, 2009). Unlike the GAO's opinions, the Office of Legal Counsel's opinions are "controlling on questions of law within the Executive Branch" (Bradbury, 2005). Even though the Court of Federal Claims validated the GAO position, Congress apparently took the side of the agency. In September 2010, Congress passed and the President signed the Small Business Jobs Act of 2010, Public Law 111-240. Section 1347 of this law overruled the GAO position in *Mission Critical Solutions* (GAO, 2009a).

7. Benefits and Impact on Major Acquisition Programs

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

Literature review suggests that ADR could be particularly useful to resolve procedural issues and to prevent successful post-award protesters from obtaining untimely pre-award remedies of cancellation and resolicitation/recompetition. For instance, when Unisys and General Dynamics protested the award of the $500 million Information Technology Infrastructure Program (ITIP) contract, the Transportation Security Administration twice stopped the work because of indecision on whether the FAA ODRA or the GAO had jurisdiction to hear the protest (Wakeman, 2009). The jurisdictional issue was addressed in the solicitation issued 16 months prior to the award. The GAO eventually asserted that it had jurisdiction to hear the protest. The jurisdictional issue should have been resolved through ADR, since both the FAA and the GAO hear challenges to best value evaluations, and the agency could have moved on to resolving the merits of protest allegations.

In three recent protests concerning major acquisition programs, protesters who brought post-award protests apparently sought or obtained untimely pre-award remedies. For instance, in the Family of Medium Tactical Vehicles (FMTV) protest, the protester BAE challenged the risk and capacity of its competitor, Oshkosh, because Oshkosh did not have the necessary facilities at the time of award and promised lower prices without backing them up with actual production experience ("FMTV 2010–2015," 2010). On the contrary, the protester BAE Systems recently invested in acquisition of Armor Holdings, a military truck manufacturer. The GAO recommended a re-evaluation, but not resubmission of proposals or recompetition. As a result, the original award remained, but performance was substantially delayed. ADR could have facilitated this "re-look" remedy without a stay.

In the Combat Search and Rescue-X (CSAR-X) helicopter procurement, the GAO recognized that the agency made a significant change in its intent to the procurement in both price and non-price aspects of the procurement and recommended proposal revisions, potential contract termination, and recommended payment of legal fees ("CSAR-X…," 2009). Although the CSAR-X program was eventually cancelled, the GAO decision was followed by multiple subsequent RFP revisions that had the effect of favoring or disfavoring some of the three potential helicopter models. ADR should have facilitated an agreement on specifications that would have allowed the industry to compete and the agency to achieve full and open competition.

In the KC-X tanker procurement, the mandatory stay and Boeing's winning protest of the evaluation provided the momentum for a recompetition. It also enabled Congress to hold hearings on time-barred, non-protestable pre-award issues, such as conformance of foreign government subsidies to EADS to the World Trade Organization (WTO) Agreement on Government Procurement and compliance of the Department of Defense with statutory requirements to consider the U.S. defense industrial base (10 U.S.C. §§ 2501-2508 (2008)). ADR could have helped the Air Force to settle on the preferred design early on and conduct a competition on that basis. Also, ADR would have helped the Air Force to identify and narrow down industrial base parameters in the solicitation.

Further, the KC-X procurement was a prime candidate for mandatory stay override. One such ground could have been military necessity to treat critical care patients, an issue affected by the poor reliability and suitability of current KC-135 tankers that are also used for medical evacuations (Weinberger, 2010). The other ground could have been the significant financial losses to the government from ballooning maintenance costs. According to the Congressional Research Service,

> The Air Force's most comprehensive study of the KC-135 fleet is the *KC-135 Economic Service Life Study* (February 2001), which serves as the most appropriate baseline, and point of departure for considering the urgency of KC-135 recapitalization. The Economic Service Life Study (ESLS) made cost

> and availability forecasts for the KC-135 fleet for the years 2001 through 2040. It was conducted by a team of experts from throughout the Air Force and led by the Air Mobility Command (AMC). Regarding cost, the ESLS found that the KC-135 fleet would incur "significant cost increases" between 2001 and 2040, but "no economic crisis is on the horizon", "there appears to be no run-away cost-growth," and "the fleet is structurally viable to 2040." . . . Following the ESLS publication, the Air Force planned to wait until 2013 to begin KC-135 replacement. (Gupta, Belasco, Else, & O'Rourke, 2003, pp. 2–3)

Admittedly, the narrative in the ESLS study does not appear to provide a compelling case for the GAO protest stay override. The issue, however, is whether these significant, but not catastrophic, losses would have been legally sufficient under COFC precedents to sustain an override. The answer to this question appears to be affirmative. The Air Force ESLS study projected maintenance cost increases (mainly to the airframe and engine) of about $40 billion over the period from 2001 through 2040 (Gupta, Belasco, Else, & O'Rourke, 2003, pp. 2–3). This translates into average losses of approximately $25 million a year or a little over $2 million a month. This amount is much closer to the $3 million in monthly losses that justified an override in *Chapman Law Firm v. United States* (67 Fed. Cl. 786 [2006]) than the cost savings of under $0.5 million rejected by the COFC in *Nortel Government Solutions, Inc. v. United States* (84 Fed. Cl. 243 [2008]) and *Advanced Systems Development, Inc. v. United States* (72 Fed. Cl. 25 [2006]). Thus, the Air Force could have issued a valid override, and that option could have been made widely known to the industry well in advance of the proposal due date. In turn, the implicit threat of a valid override could have compelled the offerors to opt for an ADR, agency-level protest instead of lengthy, expensive post-award litigation at the GAO, or, at the very least, a pre-award GAO protest designed to secure a fair evaluation methodology and proper industrial base considerations in the solicitation. Yet, inexplicably, the Air Force failed to even attempt an override. Instead of putting the industry on notice that an override might be issued and encouraging offerors to submit to ADR, the Air Force tanker buying office took to the trade press in a futile effort to complain about potential protests and the lack of sanctions on protesters (Kreisher, 2008). It may have been that tactical mistake more than any other that

helped set the stage for delays, extensive Congressional pressure, and eventual recompetition.

The best ADR and other resolution practices need to be identified and implemented by Federal agencies. The Federal government has numerous examples of successful ADR programs. Statutorily exempt from the federal acquisition system under the 1996 Department of Transportation (DoT) and Related Agencies Appropriations Act (Public Law Number 104-50, § 347), 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 (1997), 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 to those of the GAO process is presented in Chapter V.

In order to gain insight into these practices and 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 IV and V, respectively.

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III. Strategic Protests: Post-Award Bid Protests as Strategies to Maintain Competition in the U.S. Defense Industrial Base

One possible reason for the difficulties in reducing bid protests is the issue of so-called strategic protests. Anecdotal as well as statistical evidence suggests that the industry may be predisposed to use post-award protests as a proxy for addressing pre-award concerns about competition in the industrial base. However, evidence also suggests that the government's preference for contracting strategies that exclude or eliminate competition is what drives such strategic protests. In general, neither the COFC, nor the GAO, nor the agencies will consider complaints about pre-award matters, such as allegations that an acquisition strategy has a negative impact on the U.S. defense industrial base or that a procurement solicitation improperly stifles full and open competition. However, press reports concerning high-profile post-award bid protests suggest that industry protesters effectively achieved the remedy of total recompetition—which is normally used to correct pre-award violations.

In the KC-X tanker protest case, the Air Force had the option "to 'paper the record a little better'—adjusting the relative cost estimates of the two planes and fully briefing both parties as to where they stand so as to address its acknowledged errors—but without changing the final outcome" (Gates, 2008). Under Title 31, Section 3554 of the U.S. Code, the Air Force could have also refused to follow the GAO decision altogether. The Air Force, however, chose neither course. As a result, Congress took the opportunity to press the USAF on pre-award issues, "[a]side from technical matters such as the A330's higher fuel costs and higher maintenance costs," including "alleged illegal Airbus subsidies, preserving the U.S. industrial base, 'protecting the crown jewels of technology,' and securing American

jobs" (Gates, 2008). The Air Force subsequently cancelled the solicitation altogether and announced a total recompetition (Lyle, 2009).

Similarly, one commentator argued that Navistar and BAE Systems recently protested the evaluation and award of the Family of Medium Tactical Vehicles (FMTV) contract to Oshkosh Corp. because of pre-award considerations, namely, the Army's "winner-take-all" acquisition strategy that threatened to lock out major suppliers and drive them out of business:

> The GAO did not agree with all of the protesters' points which included complaints that Oshkosh bid too low and could not meet that price as well as that they might not be able to ramp up production fast enough. The GAO did say that the Army had to review its use of the award criteria but did not agree on the price issue. The Army will now probably go back and write up how it did apply the source selection factors properly and try to justify the award to Oshkosh. It is hard to believe that they will redo the competition and award it to one of the losing firms. Several months have already been lost due to the protest. Unfortunately that does not help BAE or Sealy who need the contract to build the FMTV. BAE Systems spent several billion dollars on investing in its U.S. subsidiary and the loss of that contract will harm their U.S. revenue and profit. Sealy is in even worse shape as without the FMTV plant running the city's economy will be seriously harmed. Of course the Wisconsin economy will grow as the work is moved there. That unfortunately is the problem right now with these large, single winner defense contracts. There often is no work to make up for losing the contract. That is why protests are prevalent and why companies fight hard for these contracts. (Potter, 2009)

When Oshkosh won the recompetition, another commentary suggested that the award might be subject to Congressional intervention on industrial base grounds:

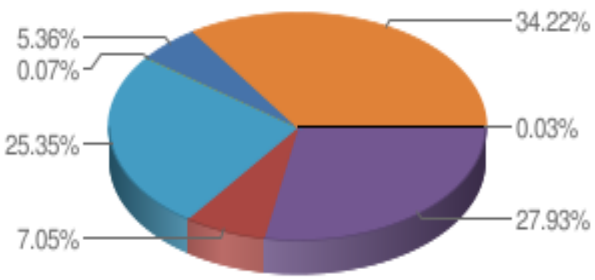
> [With an Oshkosh win,] production would mostly take place on the firm's existing campus in Oshkosh, WI, with some sub-contracting to current subcontractors. That kind of concentration generally improves price and efficiency numbers, but lowers political leverage. The other potential political strike is the "industry consolidation" card, which notes the risks of placing all medium and heavy truck production (Army's FMTV & FHTV [Family of Heavy Tactical Vehicles], USMC's MTVR & LVSR [U.S. Marine Corps' Medium Tactical Vehicle Replacement and Logistic Vehicle System Replacement]) with one supplier and, for the most part, one campus. Oshkosh's response is to cite the number and range of large firms involved in the MRAP [Mine Resistant Ambush

> Protected Vehicles] and JLTV [Joint Light Tactical Vehicle] programs, and to state their belief that there has been a fundamental industry change over the past few years. ("FMTV 2010–2015," 2009)

BAE Systems, the losing incumbent, subsequently mounted a lobbying campaign in Congress to address Oshkosh's "monopoly on the military truck business" (Tiron, 2009). In effect, successful bid protests create a momentum and a window of opportunity for the defense industry to force re-consideration of acquisition strategies with a view towards maximizing competition and diversification in the U.S. defense industrial base.

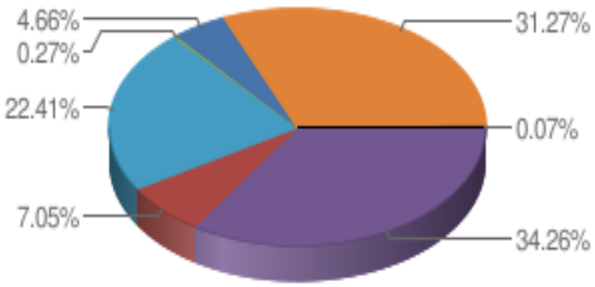
Compelling evidence reported on the www.USASpending.gov database substantiates the anecdotal commentaries that protests are the industry's reaction to drastically decreasing competition, increasing consolidation, and decreasing support for the industrial base in DoD procurements. (OMB, n.d.) For instance, between FY2009 and FY2001, contracts competed "within a limited pool" increased from about 13% to about 25% of total contract spending, and more than tripled in absolute dollar value from about $19 billion to about $65 billion. Contracts "not competed for an allowable reason" increased from 30–34%, or doubled from about $44 billion to about $88 billion. Contracts in the category "Everyone could compete, but only one offer was received" increased from 5–7%, more than doubling from about $7 billion to about $18 billion. Tables 1–9 show total spending in each of these contract categories for FY2001–2009, and Table 10 provides definitions for each category.

Table 1. FY2009 Extent of Competition in DoD Contracts



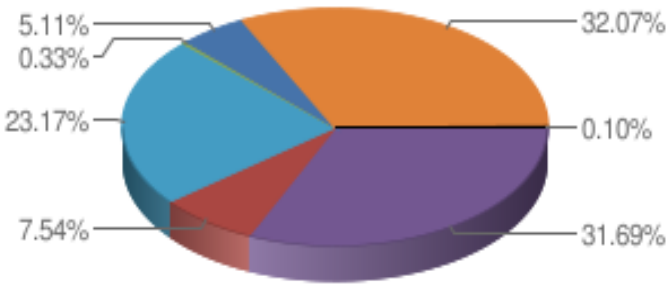
	Available for everyone for competition	$71,862,341,259
	Everyone could compete, but only one bid or offer was received	$18,149,089,194
	Competition within a limited pool	$65,212,283,764
	Actions necessary to continue existing competitive contracts for continuity (until the next one could be competed)	$168,159,455
	Available only for groups such as disabled persons, prisoners, and regulated utilities	$13,786,272,712
	Not competed for an allowable reason	$88,031,165,945
	Not identified, soon to be addressed	$68,602,274

Table 2. FY2008 Extent of Competition in DoD Contracts



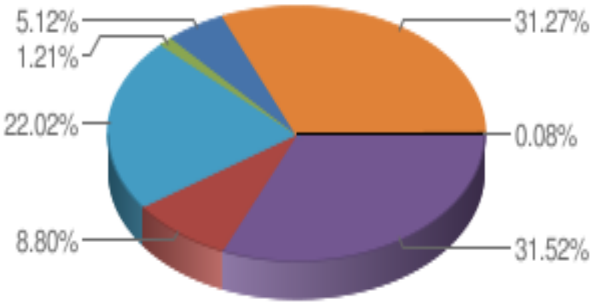
	Available for everyone for competition	$134,316,760,171
	Everyone could compete, but only one bid or offer was received	$27,640,279,731
	Competition within a limited pool	$87,873,646,604
	Actions necessary to continue existing competitive contracts for continuity (until the next one could be competed)	$1,069,180,319
	Available only for groups such as disabled persons, prisoners, and regulated utilities	$18,284,622,369
	Not competed for an allowable reason	$122,604,742,440
	Not identified, soon to be addressed	$290,265,574

Table 3. FY2007 Extent of Competition in DoD Contracts



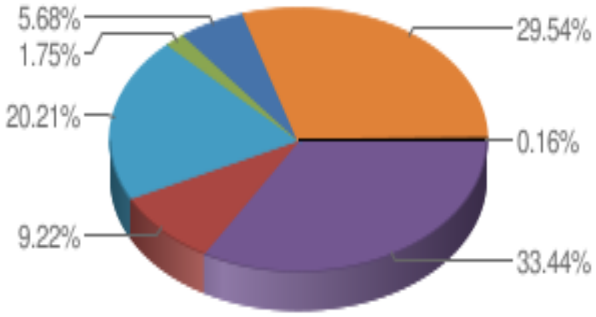
	Available for everyone for competition	$105,617,742,863
	Everyone could compete, but only one bid or offer was received	$25,137,524,349
	Competition within a limited pool	$77,195,109,770
	Actions necessary to continue existing competitive contracts for continuity (until the next one could be competed)	$1,086,111,576
	Available only for groups such as disabled persons, prisoners, and regulated utilities	$17,016,769,180
	Not competed for an allowable reason	$106,861,223,201
	Not identified, soon to be addressed	$319,307,891

Table 4. FY2006 Extent of Competition in DoD Contracts



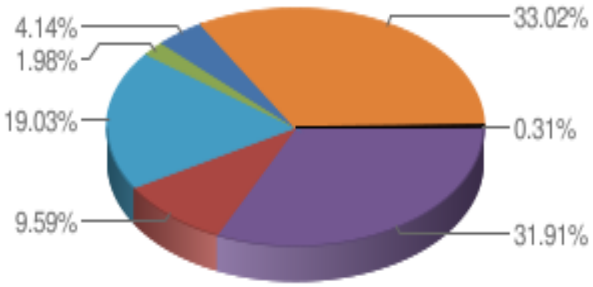
	Available for everyone for competition	$94,428,740,635
	Everyone could compete, but only one bid or offer was received	$26,365,442,157
	Competition within a limited pool	$65,971,434,913
	Actions necessary to continue existing competitive contracts for continuity (until the next one could be competed)	$3,613,655,111
	Available only for groups such as disabled persons, prisoners, and regulated utilities	$15,326,201,680
	Not competed for an allowable reason	$93,674,689,317
	Not identified, soon to be addressed	$229,885,610

Table 5. FY 2005 Extent of Competition in DoD Contracts



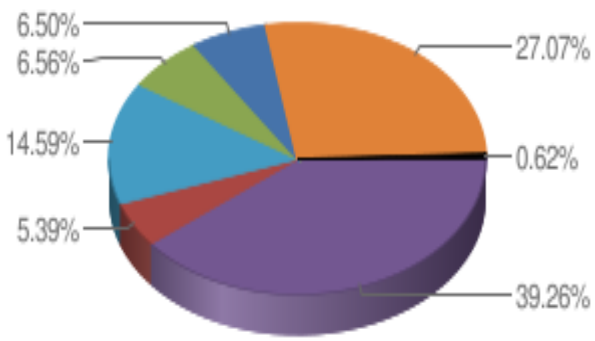
	Available for everyone for competition	$90,383,471,507
	Everyone could compete, but only one bid or offer was received	$24,917,799,855
	Competition within a limited pool	$54,611,598,609
	Actions necessary to continue existing competitive contracts for continuity (until the next one could be competed)	$4,737,502,186
	Available only for groups such as disabled persons, prisoners, and regulated utilities	$15,356,195,590
	Not competed for an allowable reason	$79,830,994,649
	Not identified, soon to be addressed	$426,304,575

Table 6. FY 2004 Extent of Competition in DoD Contracts



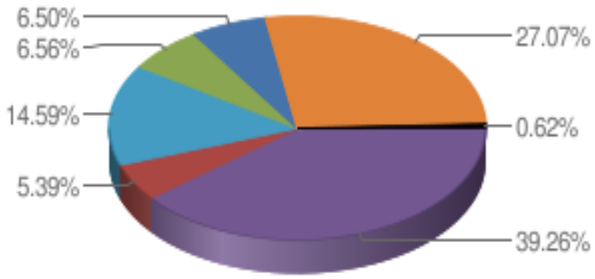
	Available for everyone for competition	$73,637,071,793
	Everyone could compete, but only one bid or offer was received	$22,139,872,004
	Competition within a limited pool	$43,924,723,811
	Actions necessary to continue existing competitive contracts for continuity (until the next one could be competed)	$4,579,591,360
	Available only for groups such as disabled persons, prisoners, and regulated utilities	$9,563,623,506
	Not competed for an allowable reason	$76,203,595,586
	Not identified, soon to be addressed	$717,604,014

Table 7. FY2003 Extent of Competition in DoD Contracts



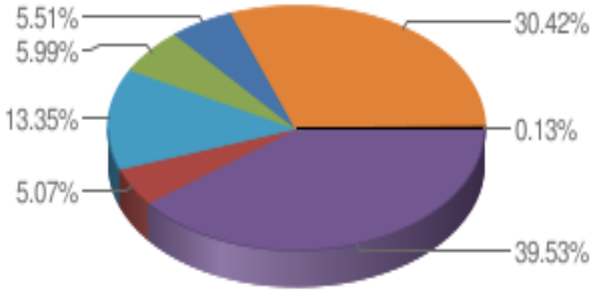
	Available for everyone for competition	$76,687,657,895
	Everyone could compete, but only one bid or offer was received	$10,522,430,023
	Competition within a limited pool	$28,507,833,628
	Actions necessary to continue existing competitive contracts for continuity (until the next one could be competed)	$12,823,482,136
	Available only for groups such as disabled persons, prisoners, and regulated utilities	$12,704,604,704
	Not competed for an allowable reason	$52,885,333,389
	Not identified, soon to be addressed	$1,215,877,837

Table 8. FY2002 Extent of Competition in DoD Contracts



	Available for everyone for competition	$76,687,657,895
	Everyone could compete, but only one bid or offer was received	$10,522,430,023
	Competition within a limited pool	$28,507,833,628
	Actions necessary to continue existing competitive contracts for continuity (until the next one could be competed)	$12,823,482,136
	Available only for groups such as disabled persons, prisoners, and regulated utilities	$12,704,604,704
	Not competed for an allowable reason	$52,885,333,389
	Not identified, soon to be addressed	$1,215,877,837

Table 9. FY2001 Extent of Competition in DoD Contracts



	Available for everyone for competition	$57,191,594,809
	Everyone could compete, but only one bid or offer was received	$7,340,047,643
	Competition within a limited pool	$19,310,456,494
	Actions necessary to continue existing competitive contracts for continuity (until the next one could be competed)	$8,659,346,483
	Available only for groups such as disabled persons, prisoners, and regulated utilities	$7,965,186,828
	Not competed for an allowable reason	$44,008,762,573
	Not identified, soon to be addressed	$194,721,744

Table 10. Definitions of Competition Categories on USASpending.gov

Federal Procurement Data System "Extent Competed" Description	USASpending.gov Competition Category	Exceptions
Full and Open Competition (A)	Full and open competition	• Records with a reason for non competition, statutory exception to fair opportunity, or set-aside are moved to "Competed After Exclusion." • Records with zero or one offers are moved to "Full and Open Competition but only One Bid."
Competitive Delivery Order (CDO)		
Full and Open Competition (A)	Full and open competition, but only one bid	Includes only Full and Open Competition records with zero or one offers.
Full and Open Competition after exclusion of sources (D)	Competed after exclusion of sources	None
Competed under Simplified Acquisition Threshold (F)		
Not Competed (C)	Not competed	None
Not Competed under SAT (G)		
Non-Competitive Delivery Order (NDO)		
Not Available for Competition (B)	Not Available for Competition	None
Follow-On to Competed Action (E)	Follow-on to previous contract	None

At this point, neither the USASpending.gov database nor the Federal Procurement Data System-Next Generation (FPDS-NG) are synchronized with the GAO bid protest docket or the COFC electronic docket. Similarly, procurement agencies do not uniformly maintain databases of agency-level protests, and information on agency-level protest is not synchronized with contract information in FPDS-NG or USASpending.gov. To better evaluate the impact rate (the rate of relationship between protests and the contract dollars impacted by protests) and the connection between the acquisition strategies and the bid protests, we recommend

that information concerning the filing of protests, the grounds, and the remedies be electronically fed into the FPDS-NG and USASpending.gov databases. Once the databases are linked, additional studies should be conducted to examine what types of contracts are protested and what remedies are implemented.

There are several ways for the Department of Defense to minimize the impact rate of protests and remedy the use of post-award protests by proxy. One way, addressed in this paper's survey and in the discussion, is for the DoD's senior acquisition leaders to reassert control over the management of the bid protest process (including the use of ADR, stay overrides, and settlements) and over the remedies implemented in the aftermath of bid protests.

Another way is to preemptively minimize the use of exclusionary acquisition strategies that lock the market for one supplier and thereby damage the defense industrial base because of winner-takes-all contracting. The DoD's reliance on foreign suppliers for ensuring competition cannot alleviate the industrial base pressures on the protest system because foreign contractors (including U.S. subsidiaries) have demonstrated their willingness to pursue bid protests. It is time to reconsider winner-take-all strategies.

Yet another way is to expand the scope of GAO remedies available in bid protests to include program management considerations in GAO bid protest recommendations. Institutionally, the GAO evaluates government procurement programs in at least four divisions: the Acquisition and Sourcing Management division responsible for evaluating contracting practices; the Office of General Counsel, including the Procurement Law Control Group responsible for adjudicating bid protests and other legal staff responsible for advising agencies on fiscal law issues; the Defense Capabilities and Management division responsible for studying military readiness issues; and the Forensic Audits and Investigations group responsible for investigating fraud, waste, and abuse in Federal government operations (GAO, n.d.). Since bid protest decisions do not get implemented in a vacuum, it would be prudent for the GAO to consider the impact of its bid protest

recommendations from different perspectives. A program management perspective, economics perspective, procurement and fiscal law perspective, and readiness perspective should be included by the GAO in bid protest opinions, at least those that concern the Major Defense Acquisition Programs. The GAO previously used bid protests to recommend procurement program improvements to federal agencies (Spriggs & Kidalov, 2003). This practice should be restored.

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IV. Survey Methodology

A. Survey Goals

In order to identify best practices, we sought input 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 focused on the following 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 aggrieved offerors from or encourage them to protest. Lastly, respondents were asked to describe possible improvements to law, policy, or regulation that would increase the effectiveness of the protest system, and, at the same time, would ensure transparency, integrity, compliance, economy,

and efficiency. In this chapter of our Report, survey questions or answers are identified with quotation marks.

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, as follows:

- 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 question concerning factors "that constrain or 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 www.SurveyMonkey.com website where the online 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, remained 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.

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V. Survey Results and Analysis

A. Response Rate and Background Results

Fifty-one senior level acquisition and legal professionals (at the level of General Counsel or Deputy General Counsel for Acquisition, and Assistant Secretary/Administrator/Director for Acquisition), across 22 federal agencies were asked to participate in the survey. Twenty-one personnel, representing 10 federal agencies, ultimately participated in the survey, yielding an overall response rate of 41%. As the survey was anonymous, it is not known who actually provided the responses to the survey. Fourteen respondents (67%) identified themselves as acquisition professionals, while seven respondents (33%) identified themselves as legal professionals. These results are summarized in Figures 6 and 7.

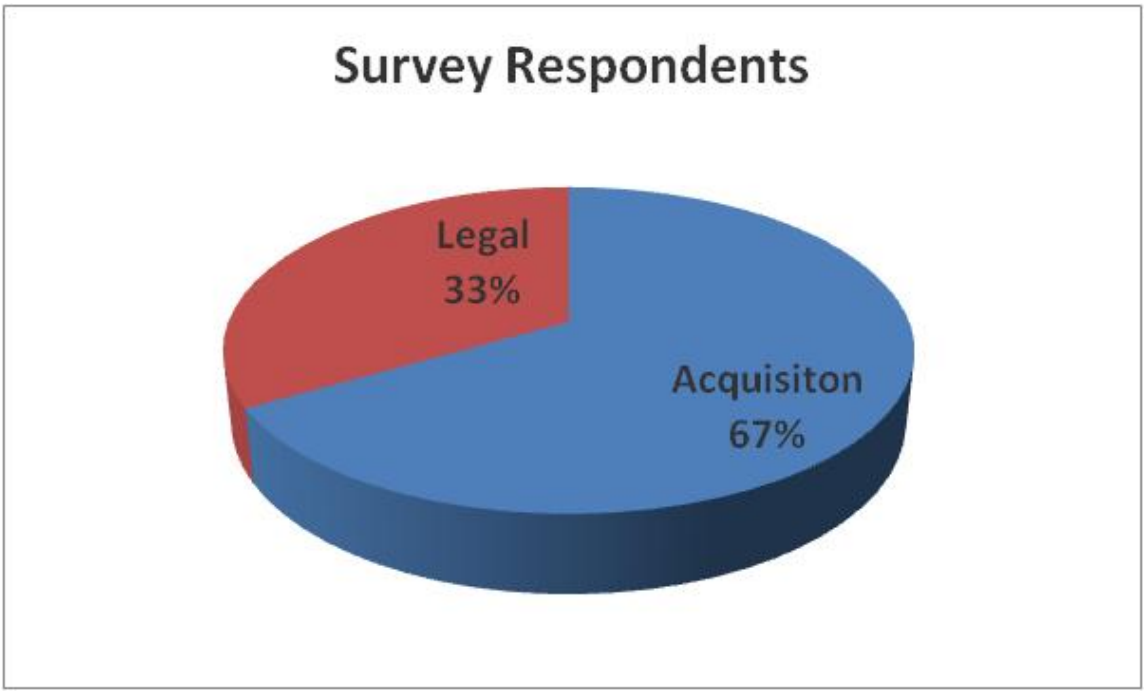

Figure 6. Survey Respondents' Professional Backgrounds

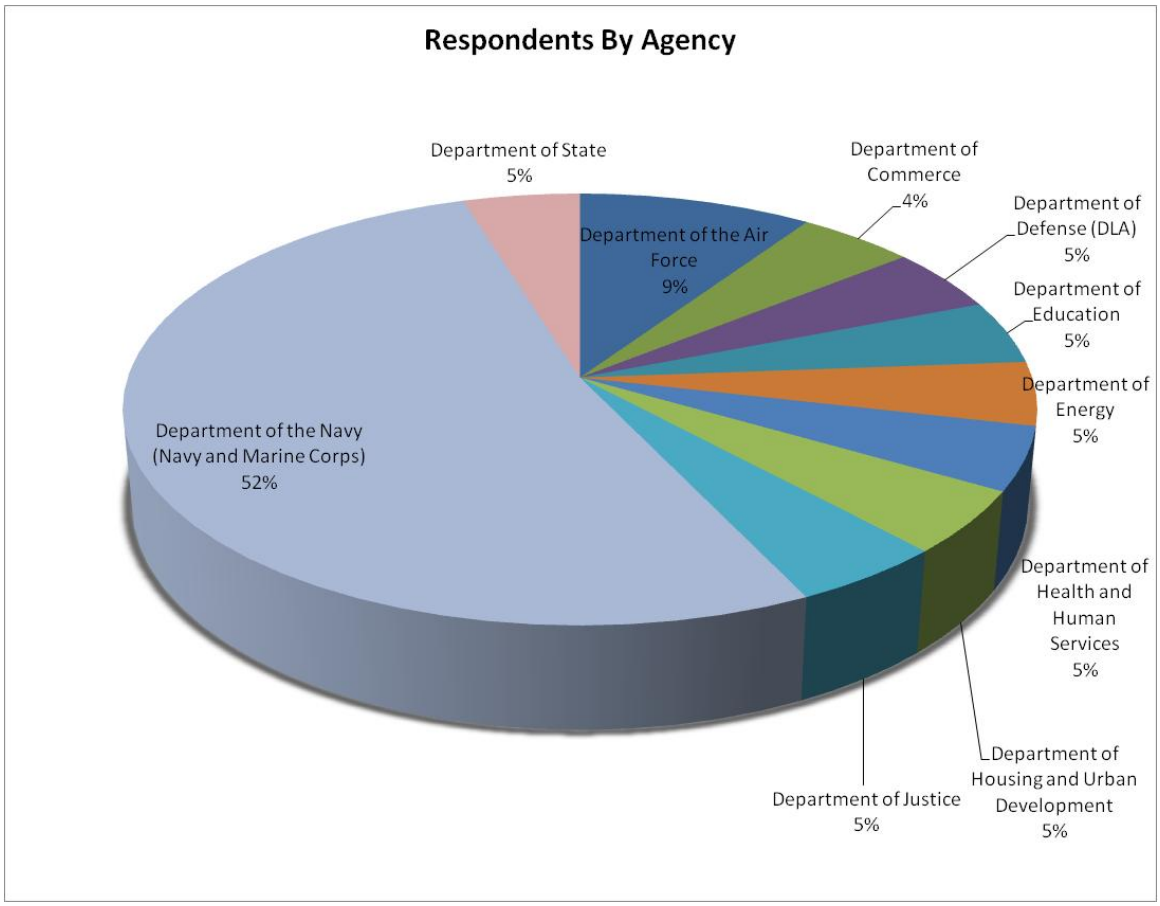

Figure 7. Respondents by Agency

B. Strategies and Practices to Minimize Bid Protest Impact

1. Most Frequently Cited Strategies and Practices

Given a list of 30 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, "Setting 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 "Advance acquisition planning," with a mean score of 3.38. "Agency procedures to prevent fraud," "Provide quality mandatory debriefings to offerors," "Thorough market research and engagement with industry," "Agency-level protest procedures," and

"Taking early corrective actions," were 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 had 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 actions," 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, these data suggest 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 10 defensive/preventive strategies and practices identified are summarized in Figure 8.

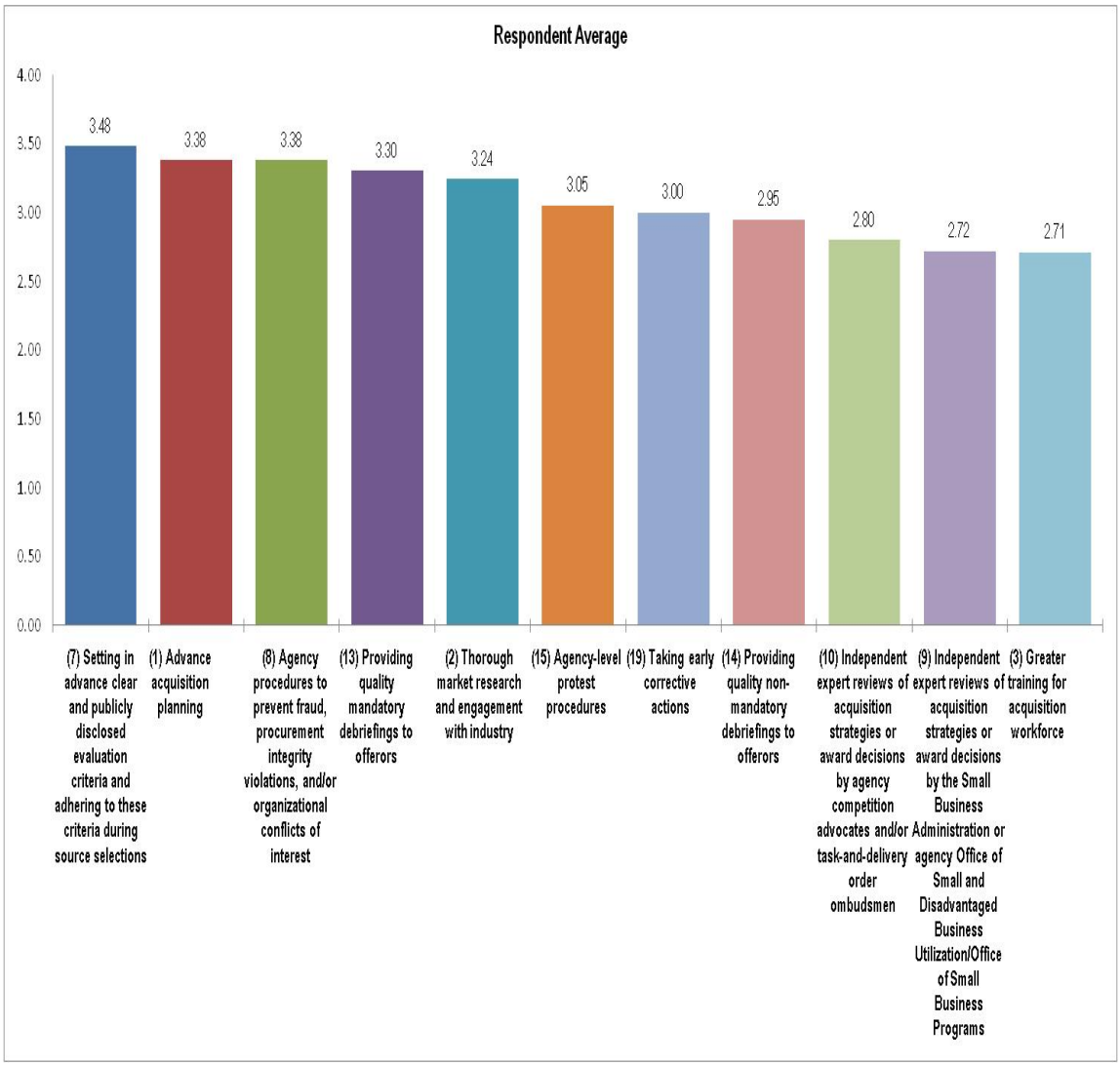

Figure 8. Top 10 Defensive/Preventive Strategies and Practices Identified

2. Least Frequently Cited Strategies and Practices

The strategies and practices least identified among respondents, with a mean score less than or equal to 1.7, include the following: “Refusing to follow GAO advisory opinions where the GAO sustains a protest on apparently wrong grounds,” “Vigorous objections and requests for sanctions in response to frivolous protests,” “Taking corrective actions involving direct awards to protesters, instead of recompetitions or re-evaluations,” and “Taking express option requests under GAO

procedures." The survey data are consistent with empirical data of reported GAO decisions. According to the GAO, the last time the Air Force (or any other contracting agency) identified a protest as frivolous was in 1996, and even then the Air Force conceded that its "frivolous" argument was erroneous. (Kepplinger, 2009a, p. 12, note 13; General Accounting Office [GAO], 1996*).* Other options that all had mean scores above 1.7 and at or below 2.0 include the following: "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 procedures with assistance from the GAO or the Court of Federal Claims" (such as GAO outcome prediction or negotiation assistance), "Taking corrective actions involving declaratory-type relief, such as changes in agency procurement policies," "ADR procedures without assistance from the GAO or the Court of Federal Claims," and "Seeking overrides of mandatory stays based on best interest of the United States" (which apply only to post-award and competitive range protests). The majority of respondents cited 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 12,979, 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 fewer than 65 days. At the same time, agencies are reluctant to risk disputes with Congress over the 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 through contract award and contract performance 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 9 summarizes the 10 least identified practices and strategies.

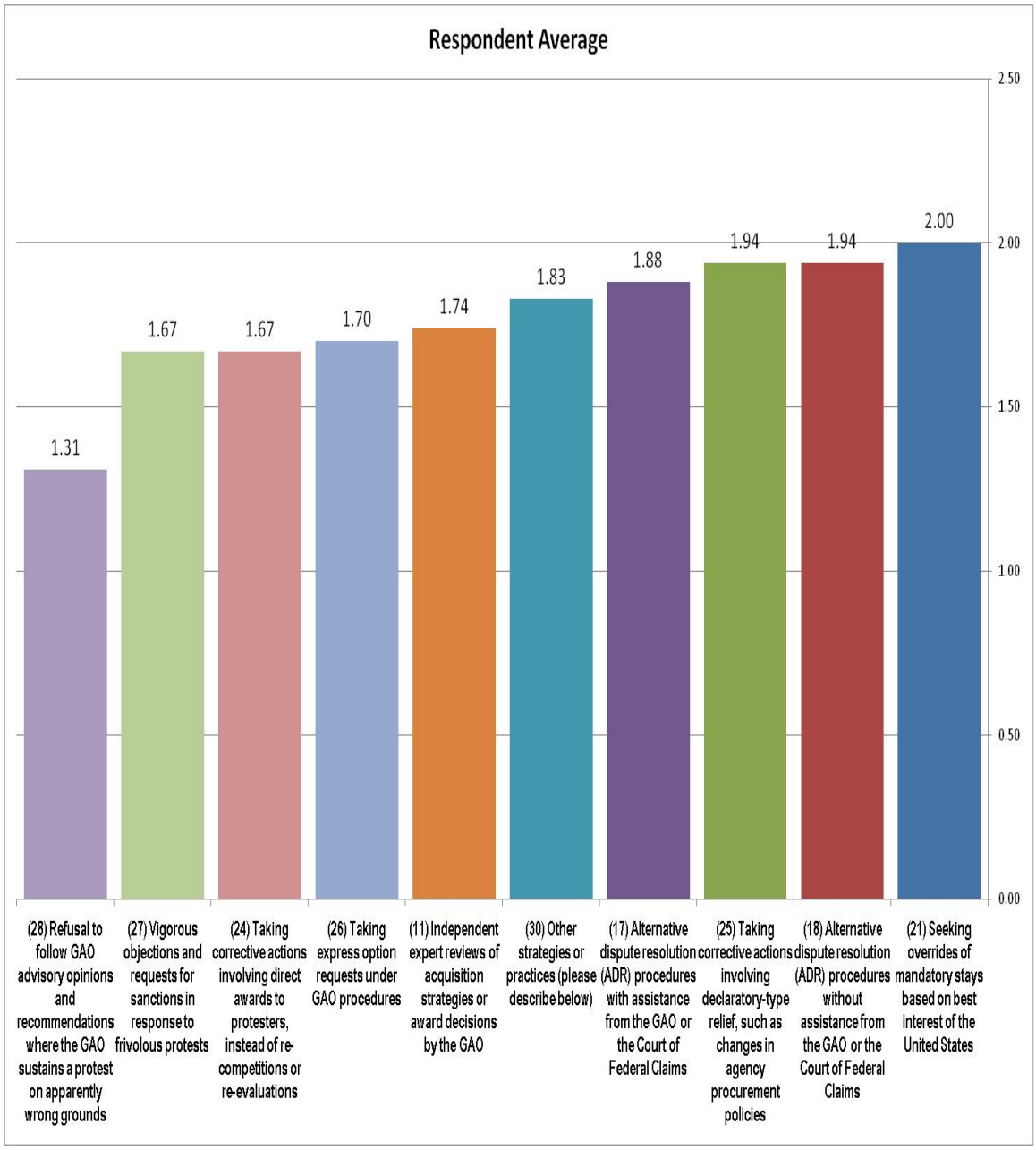

Figure 9. 10 Least Cited Defensive/Preventive Strategies and Practices

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 12,979, which directs agencies to use ADR to the

maximum extent practicable. The mean score of the 11 ADR procedures respondents were able to choose from was 1.55, indicating that respondents believe their agency rarely, if ever, utilizes 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, included the following: "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 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 about 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's *Electronic Guide to Federal Procurement ADR* (Interagency ADR Working Group, n.d.), effective protest ADR requires an agency to conduct some fact-finding and a risk assessment involving the strengths and weaknesses of the agency's position. This process may be guided or refereed by a neutral person. Survey data discussed previously on the most and least cited defensive/preventive strategies and practices shows that directed awards to protesters are rare, implying that new processes are what the protester is 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 10 summarizes respondents' beliefs about their agency's use of ADR procedures to resolve bid protests.

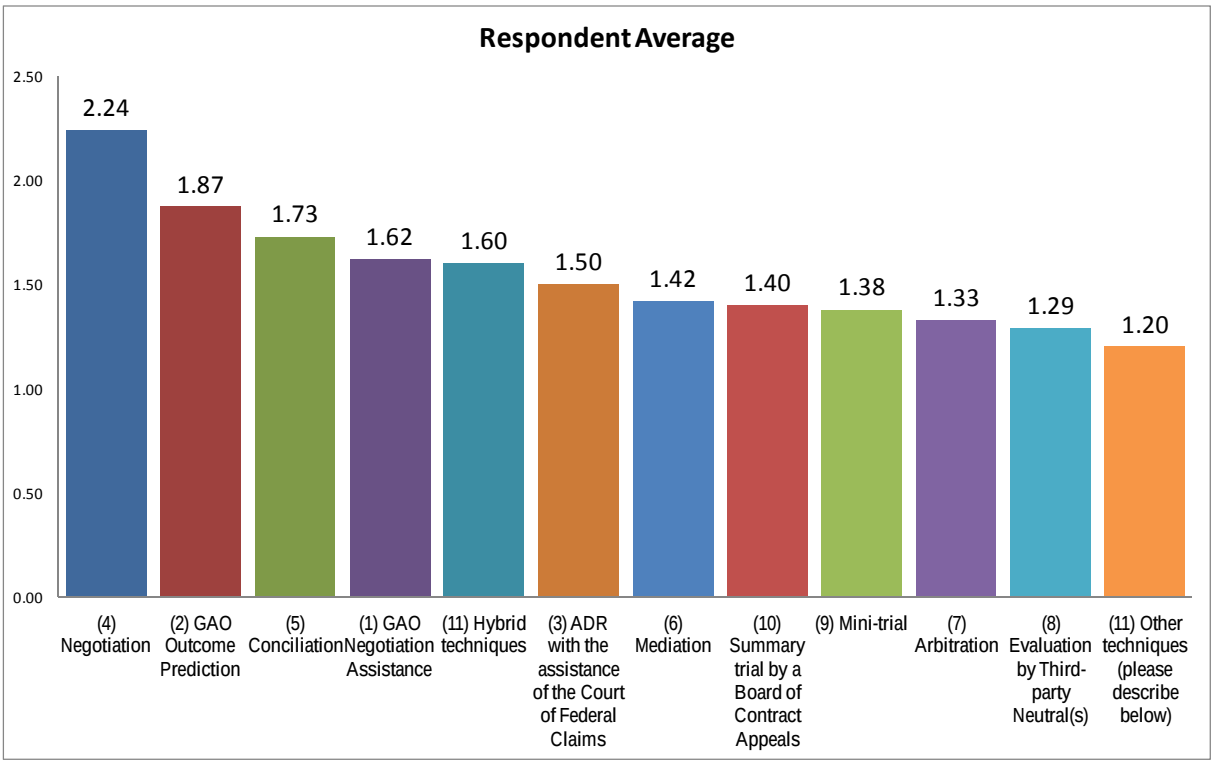

Figure 10. The Use of ADR Procedures to Resolve Bid Protests

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 20 policies, practices, and laws, respondents overwhelmingly noted "Lack of fiscal disincentives for unjustified protests" as the predominant policy factor that they believe precludes or prevents the effective resolution of bid protests. The majority of respondents feel this policy, which had a mean score of 3.20, 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 offerors who have no legitimate basis for award in order 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 incumbent contractors who have no legitimate basis for renewed awards,” and “Poorly designed or executed cost evaluations” had mean scores from 2.88 to 2.39, respectively. 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, the GAO does dismiss frivolous protests. Figure 11 lists the respondents’ top 10 policies, practices, or laws that they believe preclude effective avoidance or resolution of protests.

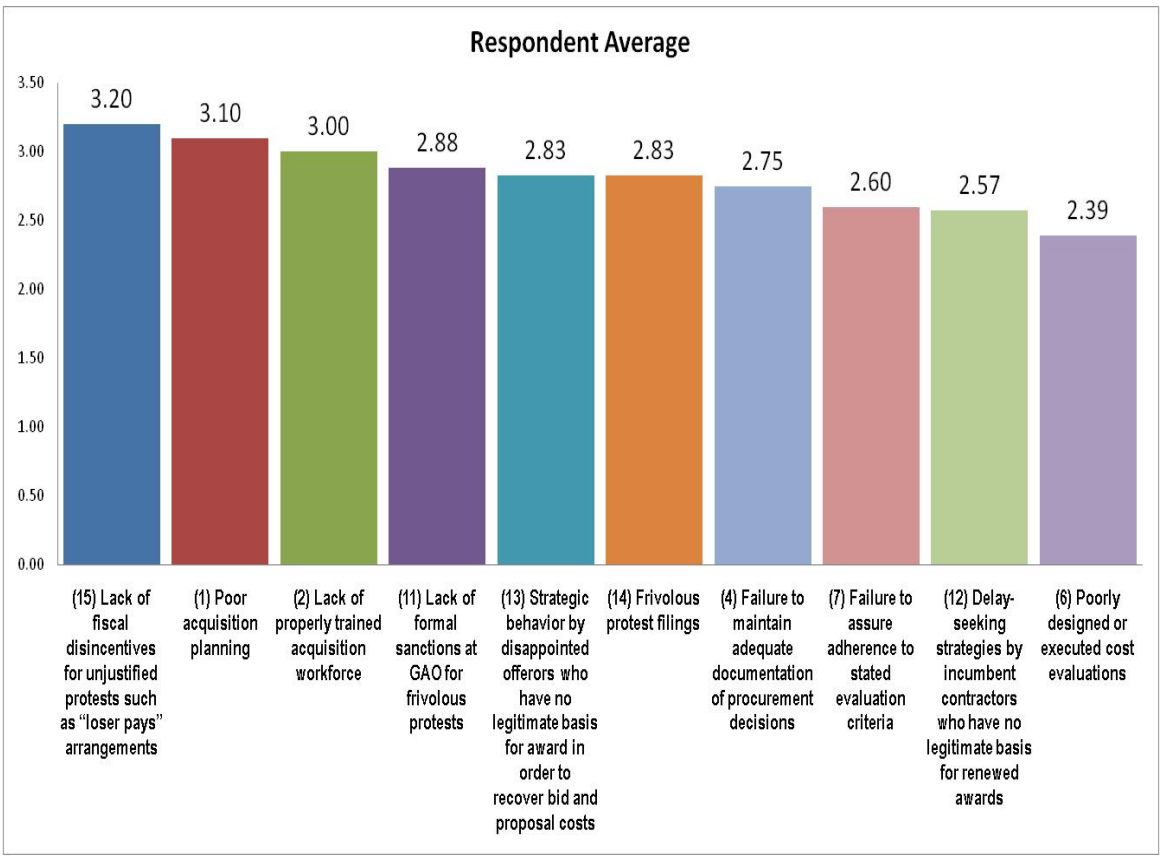

Figure 11. Top 10 Policies, Practices, or Laws That Preclude Effective Avoidance or Resolution of Protests

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 award stay overrides," "Agency reluctance to seek express option in protests," "Agency reluctance to deviate from GAO recommendations," "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 the protest burdens experienced by agencies. Figure 12 displays the 10 least prevalent factors identified by survey respondents that preclude effective avoidance or resolution of protests.

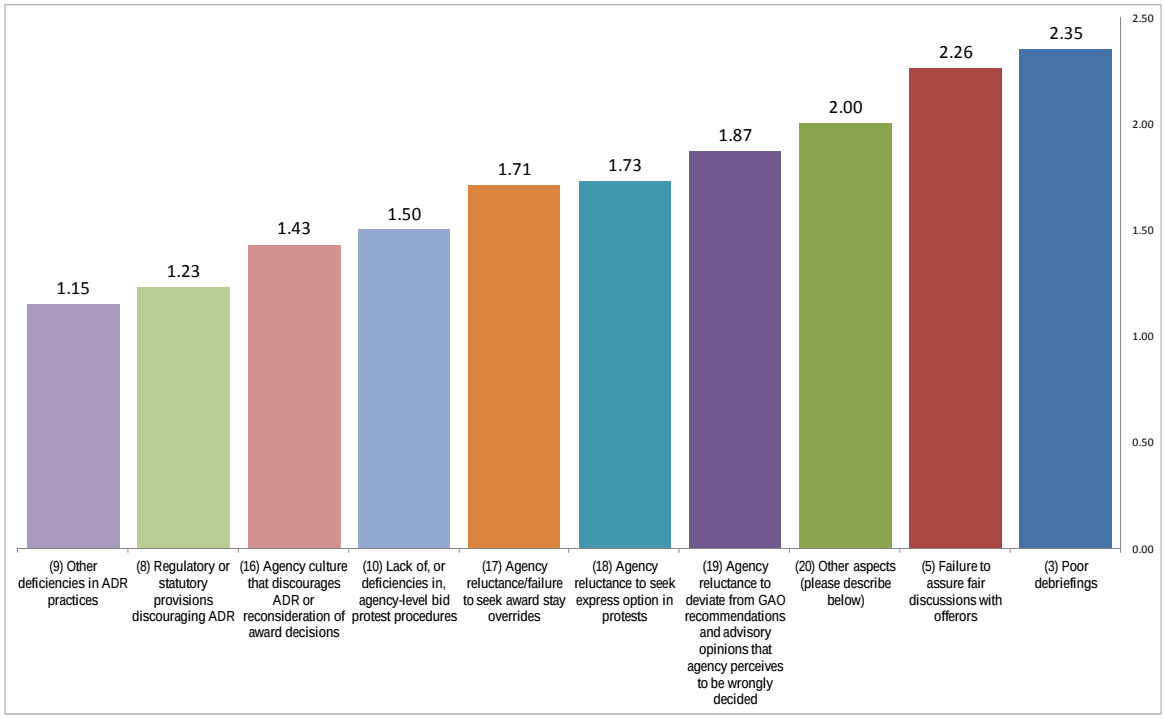

Figure 12. 10 Least Utilized Factors Precluding Effective Avoidance or Resolution of Bid Protests

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 represented a diverse set of agencies and had differing professional responsibilities. Both military and civilian agencies were represented in the survey sample, as were both legal and acquisition professionals. It is, therefore, worthwhile to consider how, or if, these

factors in any way influenced 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 believed 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 was a striking similarity between the most frequently identified practices and strategies employed by respondents representing both civilian and military agencies. Figure 13 compares the scores of the top 10 strategies identified by respondents representing civilian agencies with the corresponding military agency score.

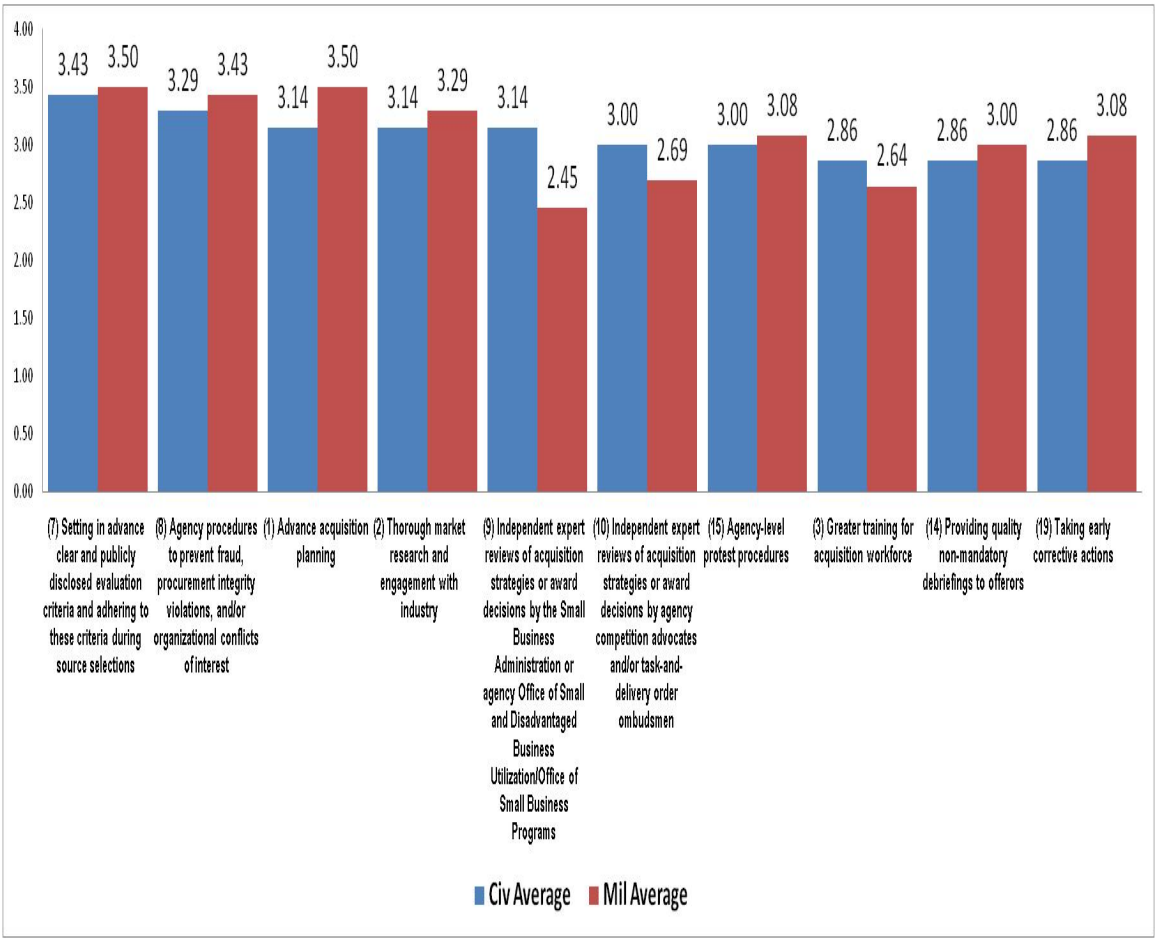

Figure 13. 10 Civilian Agency Strategies Compared to Military Agencies

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. 12,979, 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" (FAR, 2010, § 33.103(b)). 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, "Mini-trials." On the other hand, military agencies topped civilian agencies in the use of "GAO negotiation assistance," "Conciliation," "Mediation," "Summary trial by a 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 that was cited by the military with a mean score equal to or over 2.0. This suggests that overall use of ADR in military agencies is very low. Figure 14 compares the civilian agency respondents' identification of ADR procedures with those of respondents representing military agencies.

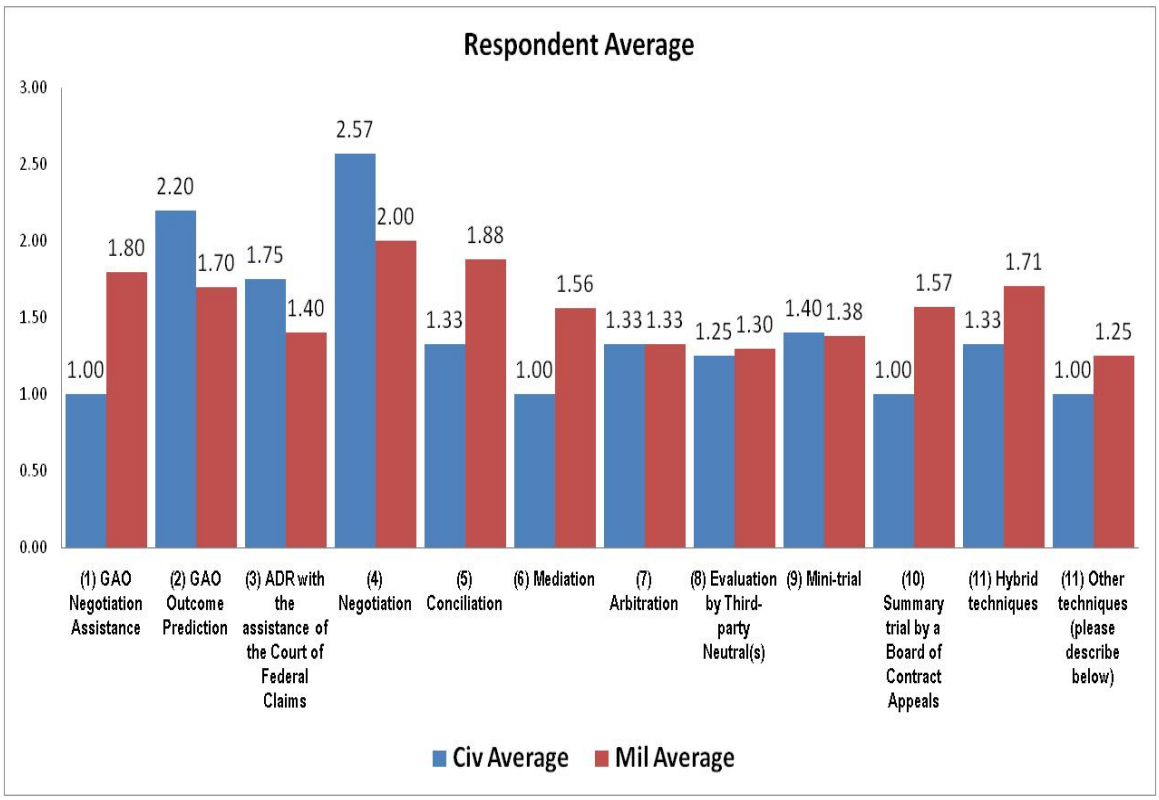

Figure 14. Comparison of Civilian and Military Agency Use of ADR Procedures

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 was 2.13, compared to 1.17 for civilian respondents. Although the military score was 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 (2010) 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 who have 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" were comparatively greater problems for military agencies. For civilian agencies, comparatively greater problems included "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 15 compares the 10 most frequently identified responses of civilian agency respondents with those from military agencies.

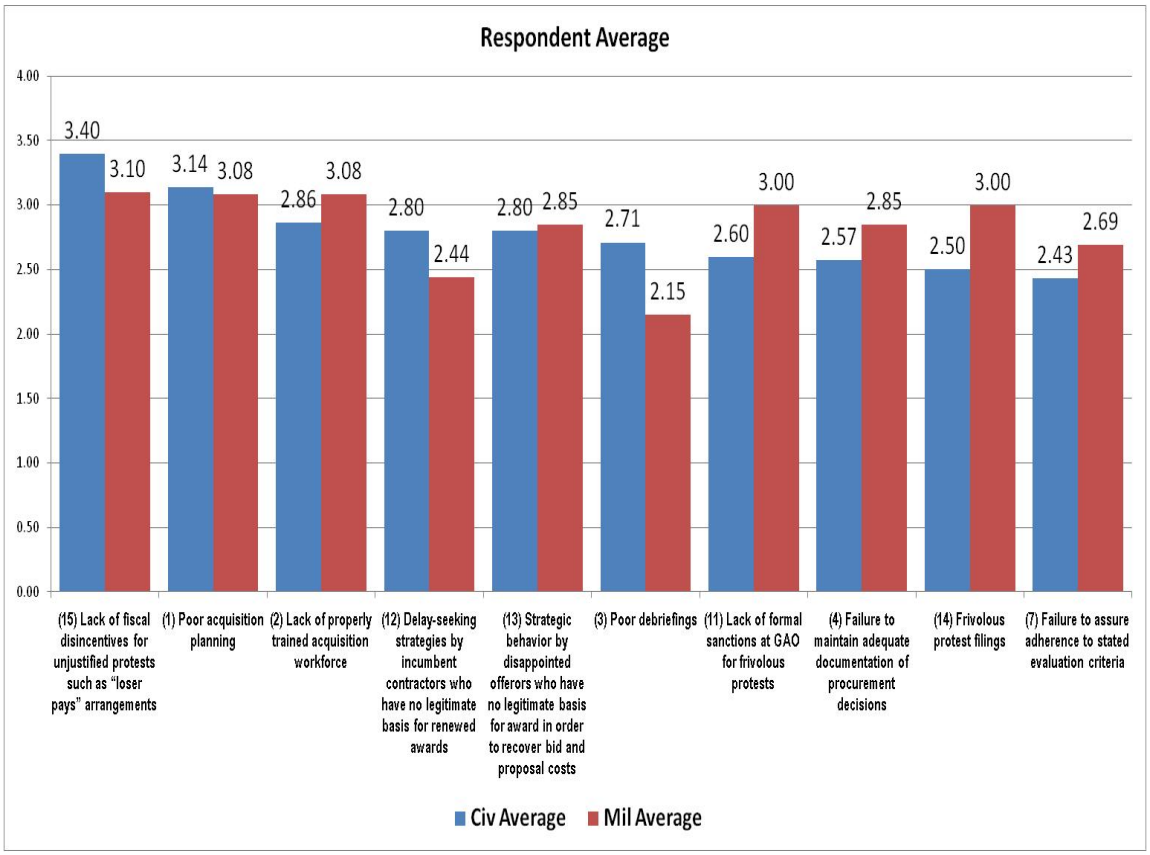

Figure 15. Comparison of the 10 Most Frequently Identified Civilian and Military Agency Perceptions of Processes, Laws, Policies, or Regulations

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 bid protest procedures," "Agency reluctance to seek express options in protests," "Agency reluctance to deviate from GAO recommendations," and "Poorly 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 16 compares the 10 least frequently identified responses of civilian agency respondents with those from military agencies.

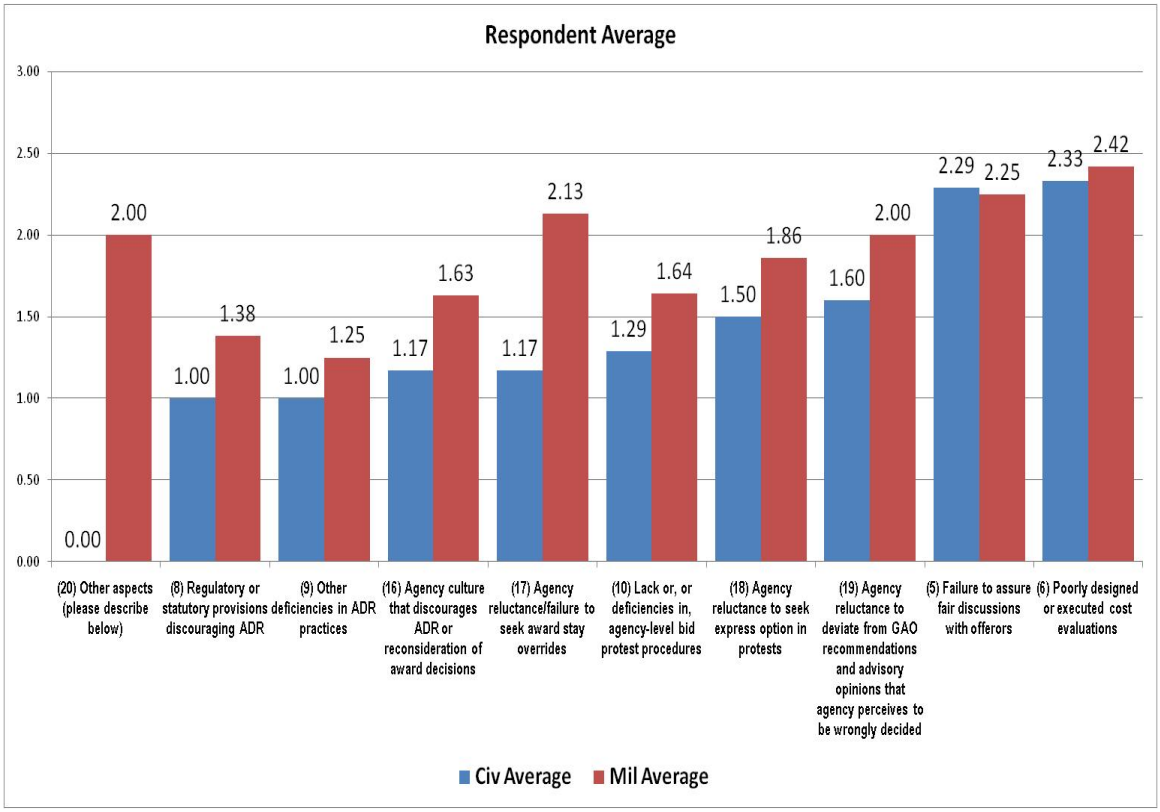

Figure 16. Comparison of the 10 Least Frequently Identified Civilian and Military Agency Perceptions of Processes, Laws, Policies, or Regulations

3. Acquisition vs. Legal Perspective

When comparing the perspective of respondents employed as legal professionals with that of respondents employed as acquisition professionals, there was 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 were 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 indicated 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 contracts to incumbents protesting recompetitions" 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 violations, or organizational conflict of interest violations," and "Agency-level protest procedures." Both groups cited "Taking early corrective action" with the same frequency. Figure 17 compares the 10 most frequently identified practices of legal professionals with those of acquisition professionals.

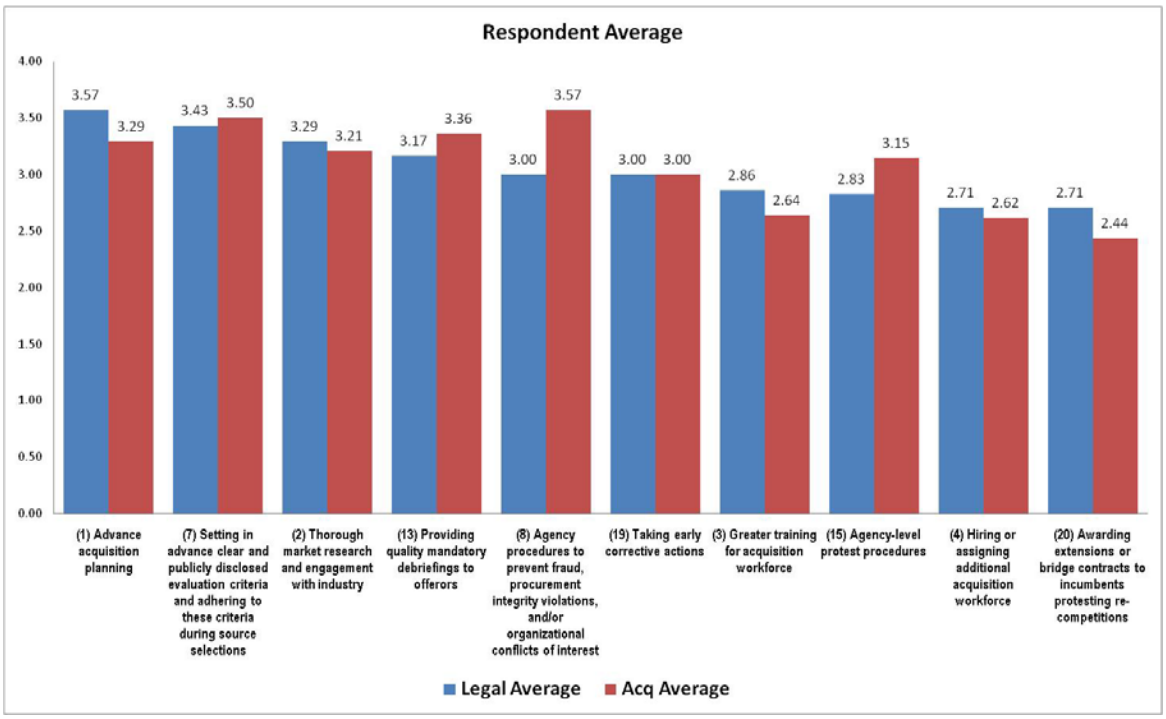

Figure 17. Comparison of the 10 Most Strategies and Practices Most Frequently Identified by Legal Professionals With Those Most Frequently Identified by Acquisition Professionals

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 procurement policies," "Seeking overrides of mandatory stays based on best interest of the United States," "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 GAO recommendations…where the GAO sustains a protest on apparently wrong grounds," "Vigorous objections and requests for sanctions with respect to frivolous protests, and "Taking express option requests." Both sides were equally low on "Corrective actions involving direct awards to protesters."

Figure 18 compares the 10 least identified strategies and practices of legal professionals with those of acquisition professionals.

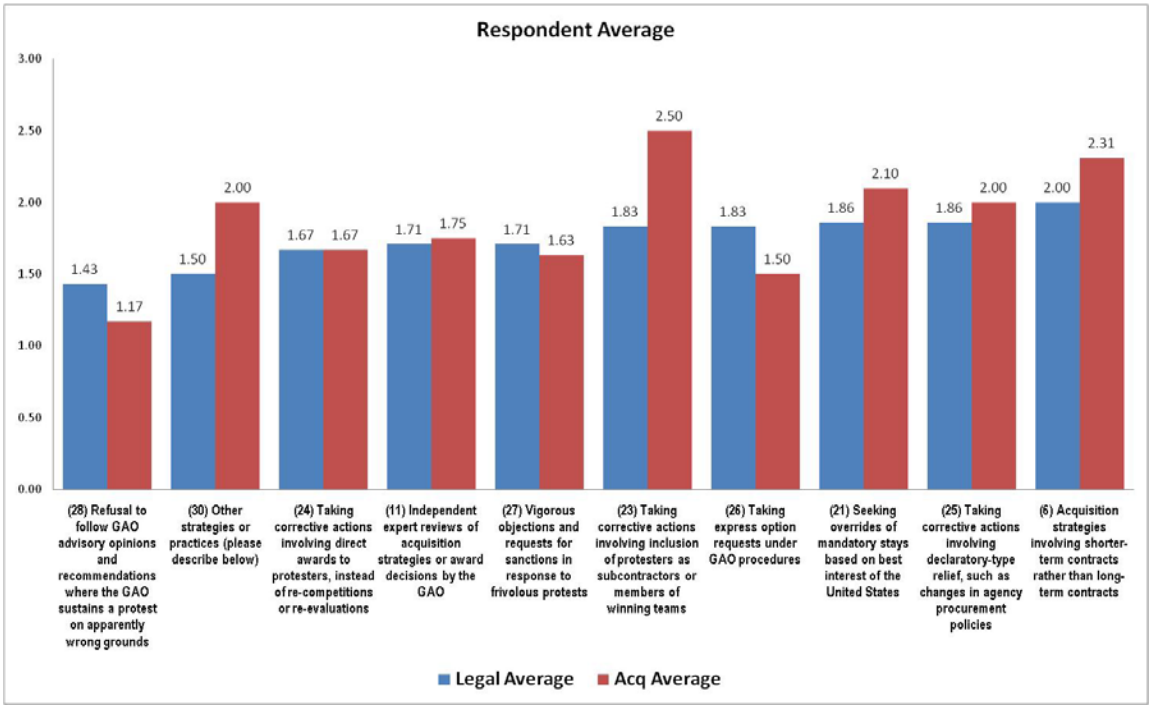

Figure 18. Comparison of 10 Strategies and Practices Least Frequently Identified by Legal Professionals with Those Least Frequently Identified by Acquisition Professionals

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 11 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 seemed to participate more often in "GAO outcome prediction", "GAO negotiation assistance," "ADR with the assistance of the Court of Federal Claims," "Hybrid techniques," "Summary trial by a Board of Contract Appeals," "Evaluation by third-party neutral(s)," "Mini-trial," "Other techniques" (to be defined), and "Arbitration" than acquisition officials. Only for "Mediation" was the frequency reversed. It appears that, in contrast to lawyers, agency acquisition officials rarely become involved in ADR in resolving bid protests. Figure 19 compares the survey results of respondents with a legal background to those of respondents with an acquisition background.

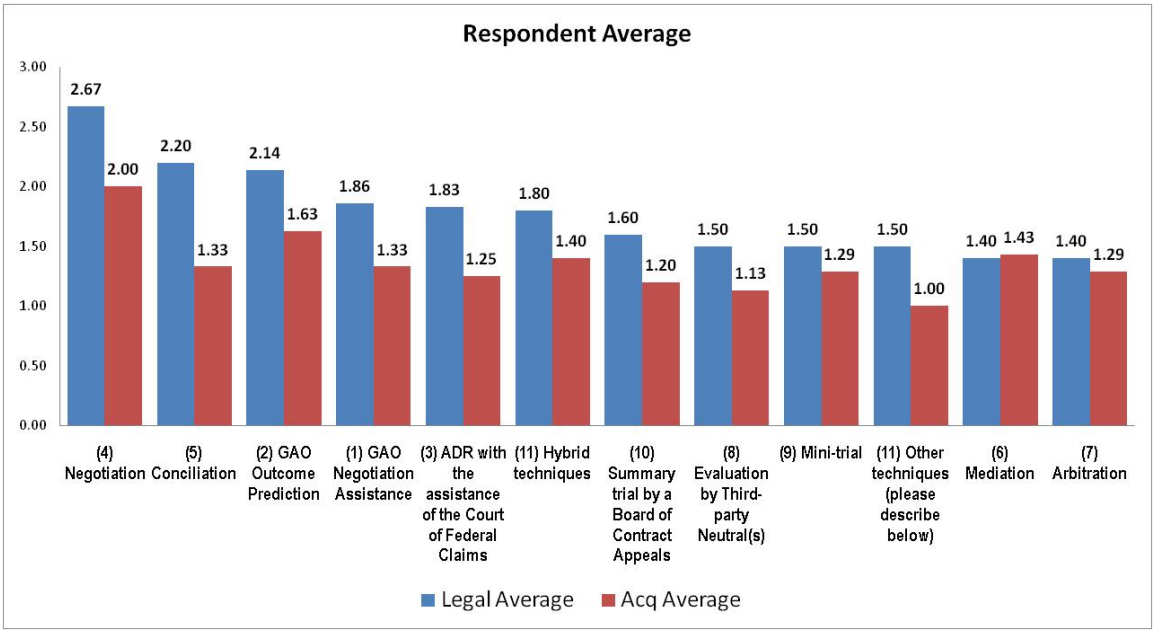

Figure 19. Comparison of Legal and Acquisition Perspectives on the Use of ADR Procedures to Resolve Bid Protests

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 provide some insight into the attitudes and perception of both parties. Overwhelmingly, legal respondents cited "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 cited 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 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 who have no legitimate basis for award in order to recover bid and proposal costs." On the other hand, acquisition professionals also cited "Lack of formal sanctions at GAO for frivolous protests," "Frivolous protest filings," and "Delay-seeking strategies by incumbent contractors who have no legitimate basis for renewed awards." 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 20 compares the 10 most frequently identified factors that preclude effective resolution or avoidance of bid protests between acquisition and legal respondents.

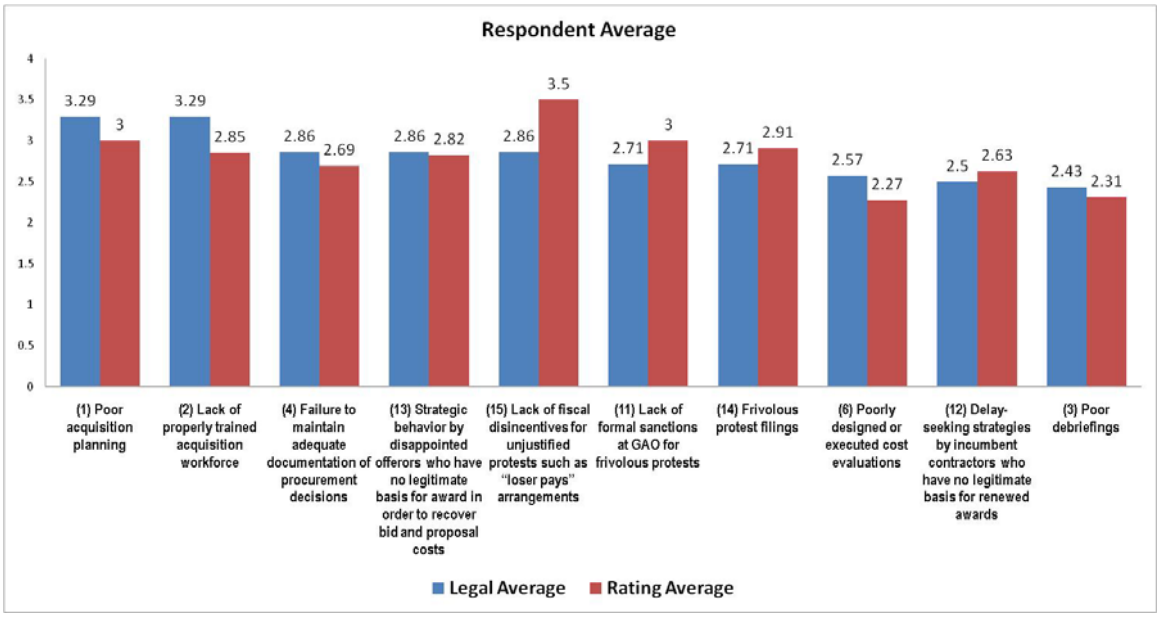

Figure 20. Comparison of the 10 Views Most Frequently Identified by Acquisition and Legal Professionals as Factors That Preclude Effective Resolution or Avoidance of Bid Protests

Across the board, legal professionals seem to believe more than acquisition professionals that all least-cited factors except for "Other deficiencies in ADR practices*"* (to be defined) can have greater detrimental impact on effective resolution of bid protests. For lawyers, the least cited factors ranged from the lowest of "Other deficiencies in ADR" (to be defined) and "Regulatory/statutory provisions discouraging ADR," to the following more often-cited factors: "Agency culture that discourages ADR or reconsideration of award decisions," "Agency reluctance to seek express option," to "Lack/deficiencies in agency-level bid protest procedures," "Agency reluctance to deviate from GAO recommendations," "Agency reluctance/failure to seek stay overrides," "Failure to assure fair discussion with offerors," and "Poor debriefings." For acquisition professionals, these factors ranged from the lowest of "Other deficiencies in ADR*"* (to be defined), to the following more often-cited factors: "Regulatory or statutory provisions discouraging ADR," "Agency culture that discourages ADR," "Agency reluctance to seek express options," "Lack/deficiencies in agency-level bid protest procedures," "Agency reluctance to

deviate from GAO recommendations," "Agency reluctance to seek stay overrides," "Failure to assure fair discussions," and "Poor debriefings." Figure 21 compares the 10 least frequently identified factors that preclude effective resolution or avoidance of bid protests between acquisition and legal respondents.

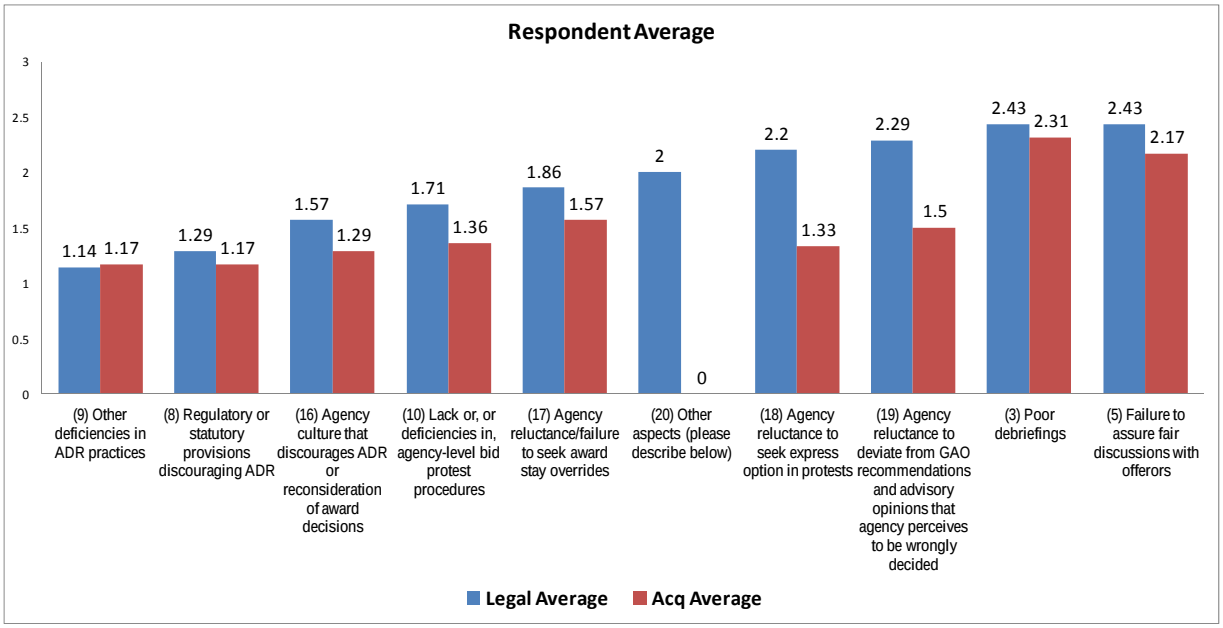

Figure 21. Comparison of the 10 Views Least Frequently Identified by Acquisition and Legal Professional as Factors That Preclude Effective Resolution or Avoidance of Bid Protests

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 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, second, what factors prevent effective resolution of protests? It appears that agencies' defensive strategies are not tailored to match the agencies' avowed problems with bid protests.

Intuitively, one expects that 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 they 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 22 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.

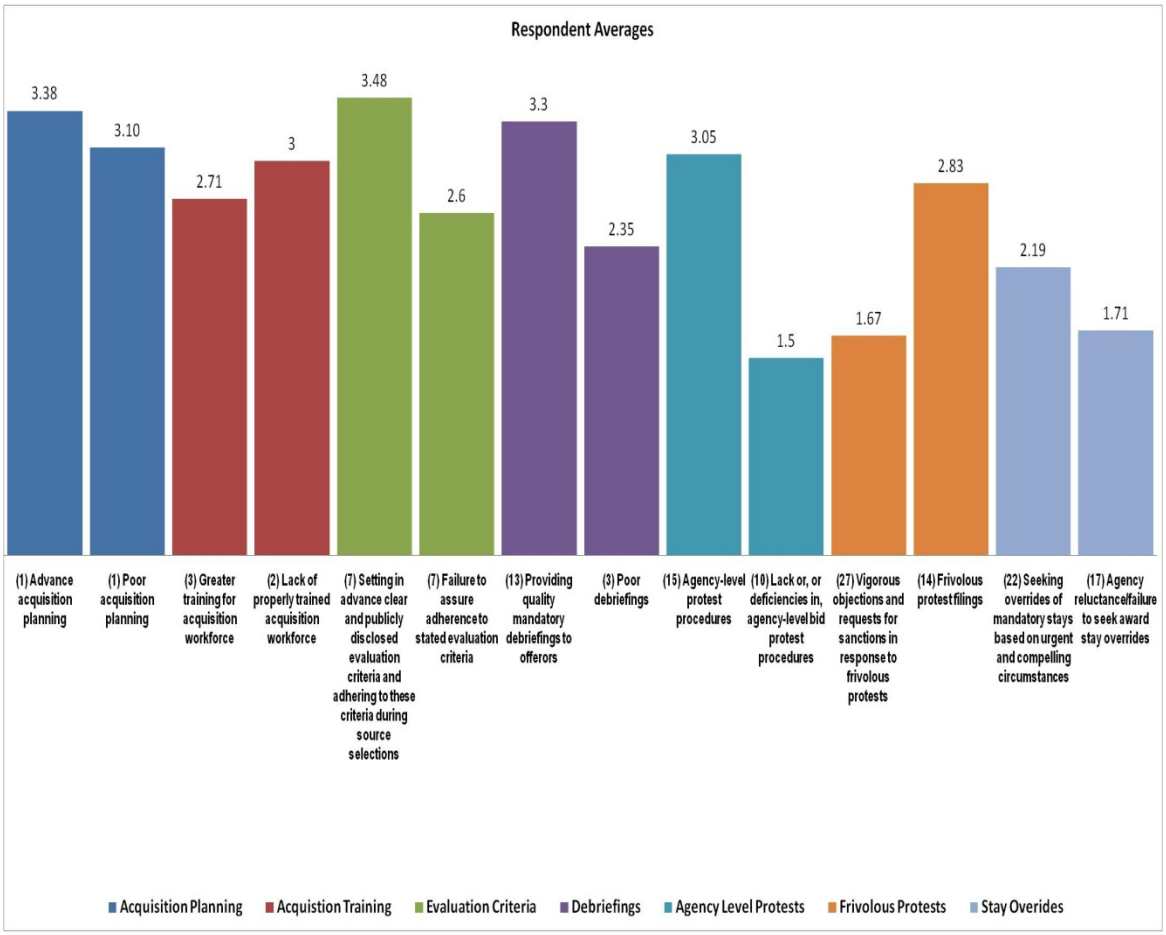

Figure 22. Comparison of Agency Defensive Strategies and Processes That Preclude Effective Resolution of Protests

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 protests 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 use 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.

Significant disparities were also noted between the use of, and need for, agency-level protest procedures, stay overrides, and assurance of clear and consistent evaluation criteria.

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 the GAO’s express option, agency override of mandatory GAO stays, early corrective action, and vigorous objection to frivolous or meritless protests, if effectively employed, could potentially reduce the delays associated with a bid protest. Figure 23 compares the relative frequency with which respondents believe their agencies use a number of these strategies to counteract delays caused by bid protests.

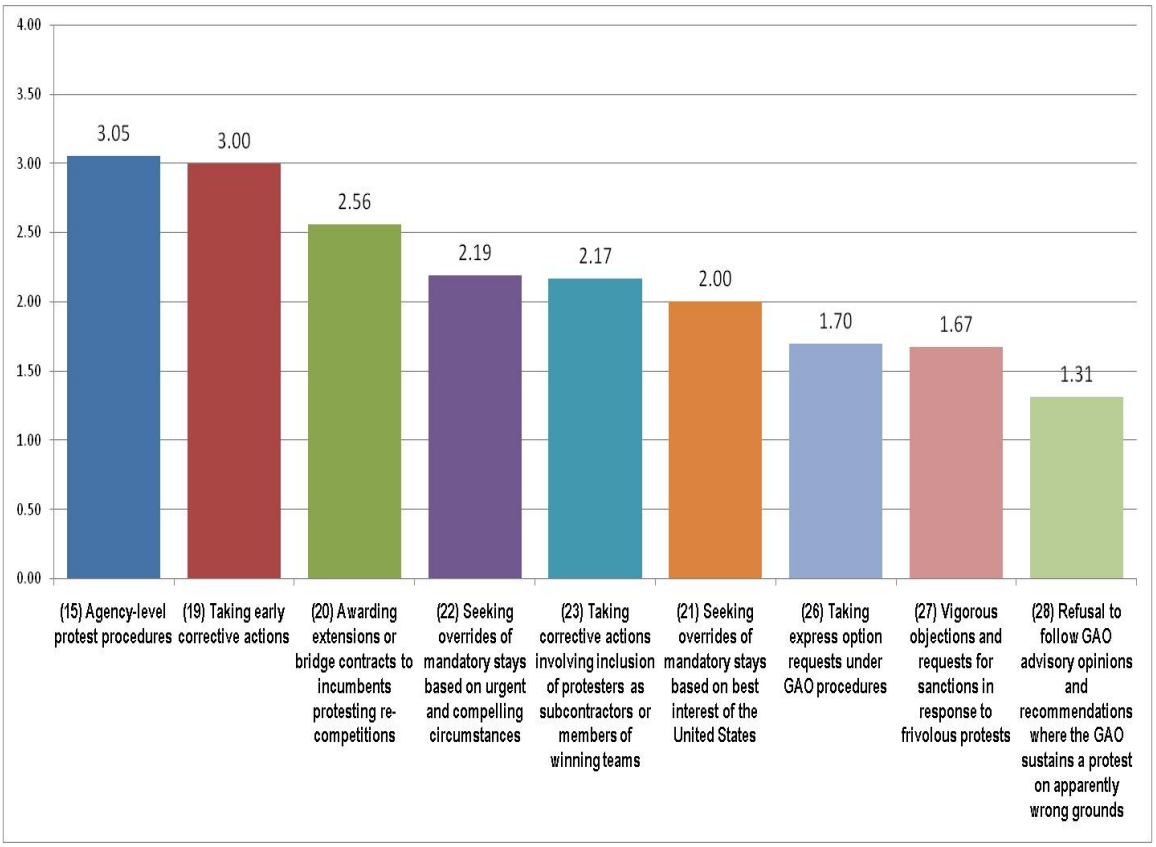

Figure 23. Relative Identification of Defensive Strategies Used to Counteract Delays Caused by Bid Protests

The data clearly shows that respondents believe their agencies utilize strategies such as “Agency-level bid protest procedures” and “Taking early corrective actions” with fairly high frequency. However strategies such as “Taking express option 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. However, obtaining and following a formal GAO recommendation to recompete could mean delaying a procurement program by at least 5–6 months, including 100 days for GAO decision, time for revision of the solicitation, 45 days for default procurement administrative lead time (PALT) under FAR Part 5, and additional time for evaluation. This implies that agencies may be under-utilizing some of the tools they possess to counteract the

delays associated with bid protests. In other words, data suggest that agencies, in practice, are not particularly concerned with delays to procurement programs from 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 24 compares the relative frequency with which respondents believe their agencies use a number of these strategies to reduce costs associated with bid protests.

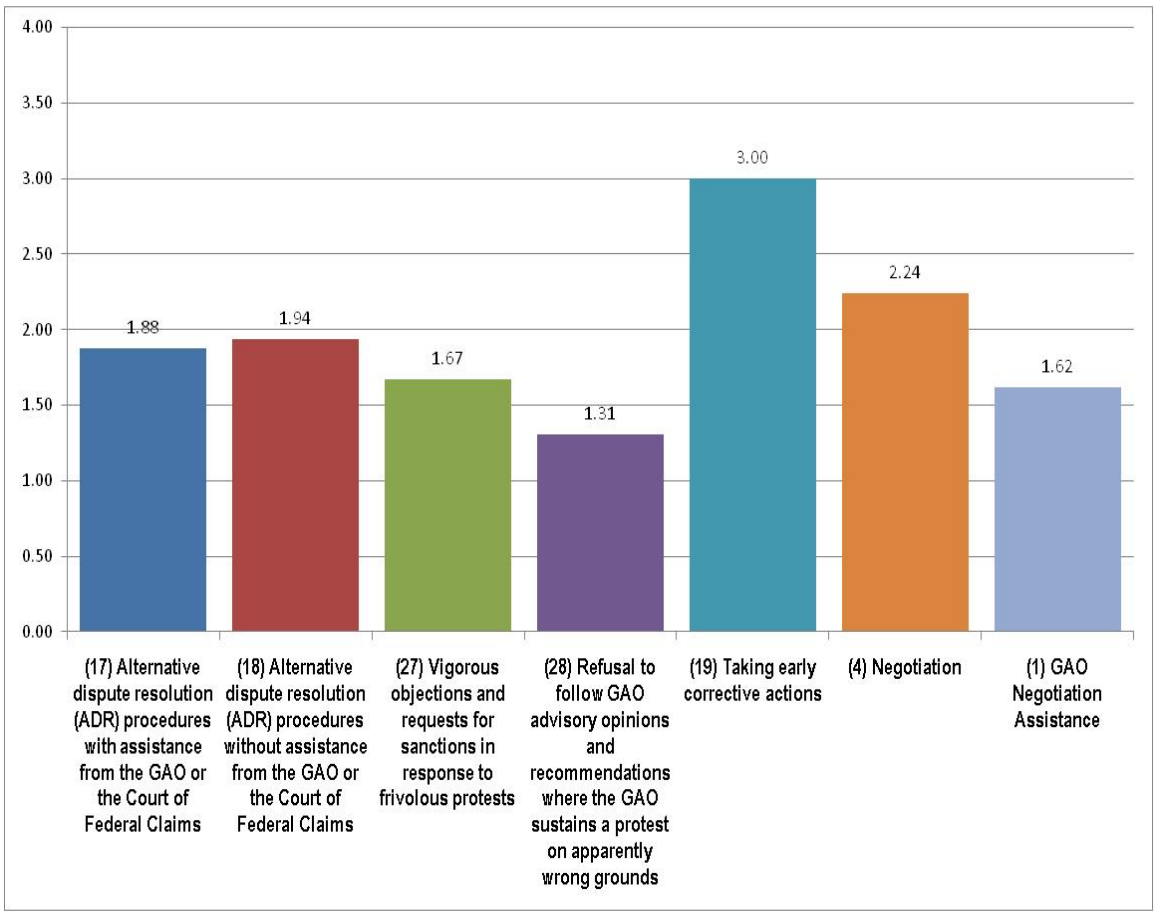

Figure 24. Relative Identification of Defensive Strategies Used to Reduce Costs Associated With Bid Protests

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. Unless agencies take early corrective action or attempt some negotiation early on, they are unlikely to initiate other ADR procedures or refuse to follow costly GAO recommendations that may involve direct payments to protesters or indirect expenditures. 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. In other words, data suggest that agencies may not be very serious about cutting protest costs using presently available legal tools.

Beyond strategies to reduce costs and delays, agencies may also employ strategies to reduce or eliminate a disappointed or unsuccessful offeror's 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 by strategic business decisions. Figure 25 compares the relative frequency with which respondents believe their agencies use these strategies and practices.

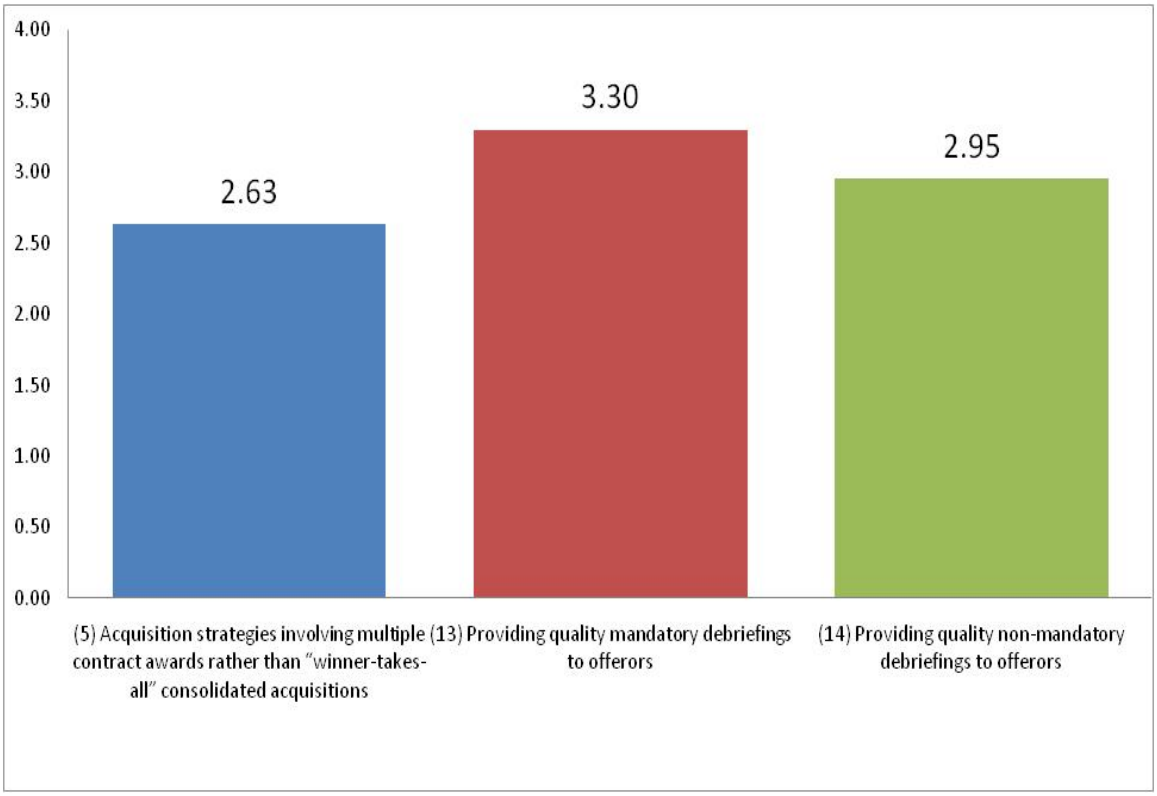

Figure 25. Relative Identification of Defensive Strategies Used to Reduce Protestor's Inclination to Protest for Strategic Business Reasons

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 "protest-proof" their procurements and reduce the strategic business reasons behind a protestor's 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, or 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 involved 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. [A] Senior Procurement Executive reviews all acquisition plans exceeding $10M and a formal Investment Review Board, including acquisition representation, review[s] planned acquisitions over $75M.

Respondents cited protestor familiarity with GAO processes, protestors’ belief in the GAO’s independence, and the relative inexpensiveness of filing and litigating at the GAO as the 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 26 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 contractor's decisions to:
protest under your agency's agency-level 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 26. Respondents' Comments on Factors That Motivate a Protester to Utilize, or Constrain a Protestor From Utilizing, 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" (Troff, 2005b, p. 148).

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 27 lists some of the most common comments regarding the lack of disincentives for filing frivolous or meritless protests.

Lack of Disincetives for Protestors
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 27. Respondent Comments on the Lack of Disincentives to Protest

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VI. 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 Department of Transportation and Related Agencies Appropriations Act of 1996, Pub. L. No. 104-50, § 348(1995). 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. (49 U.S.C.§ 40110(d)(3) and (4) (2010)). 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." (49 U.S.C. § 40110(d)(1)(B) (2010)). Under this system, formal litigation should only be employed as a last resort to resolve a bid protest. As directed in the Vision 100-Century of Aviation Reauthorization Act of 2003, (Public

Law 108-176, § 224b(2)), "a bid protest or contract dispute that is not addressed or resolved through alternative dispute resolution shall be adjudicated by the Administrator through Dispute Resolution Officers or Special Masters of the FAA ODRA (2003, § 224b(1)).

ADR produces a faster and less costly outcome when compared to litigation. (Worthington & Goldsman, 1998, p. 472). 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. (5 U.S.C. §§ 551-559 (2010)).

Because the ODRA expects both parties to attempt ADR, cases are almost universally 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 business days after a protest filing (Department of Transportation [DoT], Federal Aviation Administration [FAA], Procedures for Protests and Contract Disputes, 2010, 14 C.F.R. § 17.17(b)).

B. Key Differences Between the FAA's and the GAO's Bid Protest Process

In terms of volume, the caseload at the GAO is significantly larger than at ODRA. In an average year, ODRA handles just over 30 protests a year (Federal Aviation Administration, Office of Chief Counsel, Office of Dispute Resolution for Acquisition [FAA OCC ODRA], 2009) compared to the more than 1,400 protests filed at the GAO. The GAO, however, has a larger staff, and has been issuing decisions

on bid protests since the 1920s (Kepplinger, 2009b, p. 2). On average, the GAO issues a decision between day 75 and day 100. In certain circumstances, whether on the request of a party, or on its own initiative, the GAO may utilize an express option, wherein a decision is made within 65 days (GAO Bid Protest Regulations [4 C.F.R. § 21.10], 2010).

In comparison, the process at the ODRA is normally concluded at the 52-day mark (Lieberman & Morgan, 2008, p. 29). Since the 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, oftentimes prior to the filing of a formal protest with the 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 the ODRA and the GAO is that the 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 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" (DoT, FAA, Procedures for Protests and Contract Disputes, 2010, 14 C.F.R. § 17.17 (b)(1)(c)). 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" (DoT, FAA, Procedures for Protests and Contract Disputes, 2010, 14 C.F.R. § 17.31 (c)). 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 time frames 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 28, the FAA system, with its emphasis on ADR, usually results in an earlier resolution of the protest than compared to GAO procedures.

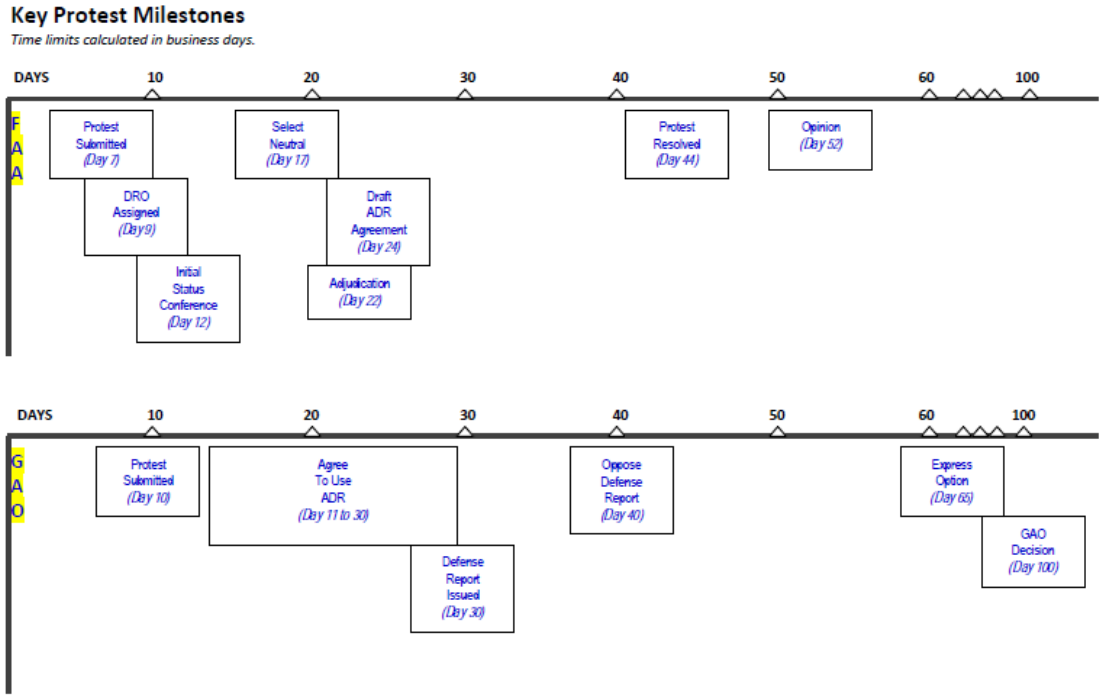

Figure 28. Comparison of GAO and FAA Timelines of Key Protest Milestones (GAO Bid Protest Regulations, 2010, § 21; DoT, FAA, Procedures for Protests and Contract Disputes, 2010, 14 C.F.R. § 17)

C. U.S. Army Materiel Command's Agency-Level Protest Program

Under the authority of FAR Section 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 is expeditious decisions that require fewer resources than formal litigation (AMC, 1997).

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 was designated as one of the "Ten Best Government Procurement Practices" by the Office of Federal Procurement Policy (OFPP). The 1995 Executive Order 12,979, 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 (AMC, 1997, p. 5).

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, and
- 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 the 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 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 (U.S. Department of the Army Office of General Counsel [USAOGC], 2010, p. 13).

D. Key Differences Between the 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 the GAO. AMC handles about 75 protests per year compared to the over 1,400 protests filed with the 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 (2010) Part 33.103(c). Comparatively, under the express option, decisions at the 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 29 compares the AMC's protest timeline to that of the GAO.

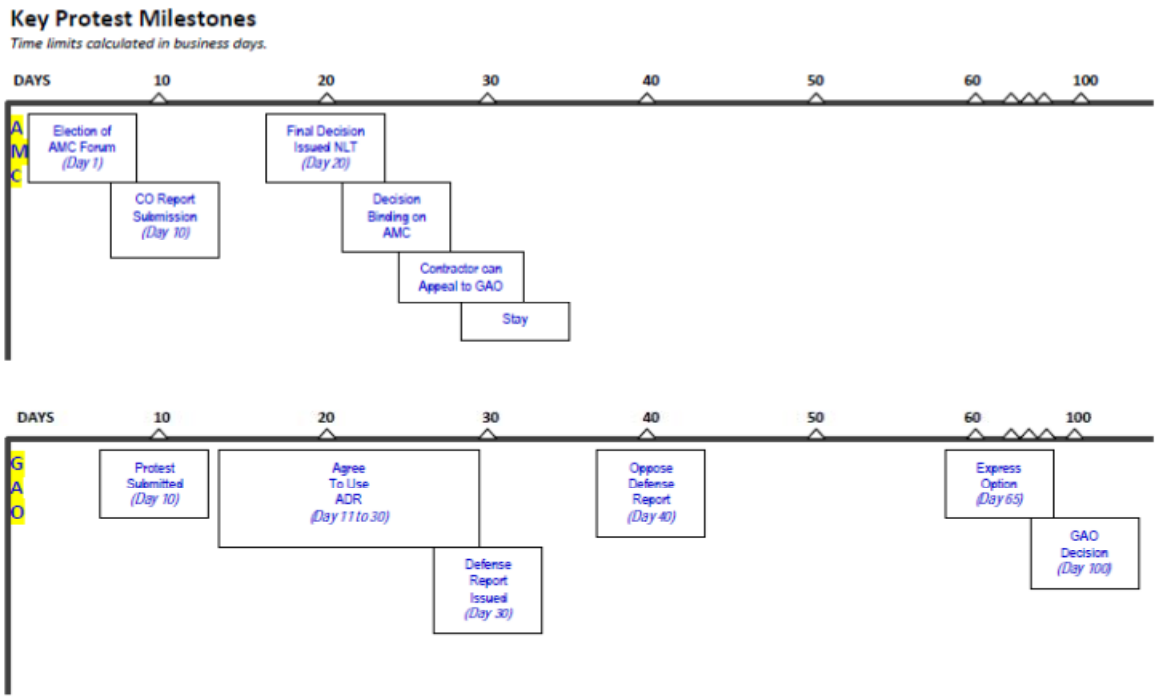

Figure 29. Comparison of GAO and AMC Timelines of Key Protest Milestones Based on GAO Bid Protest Regulations and the AMC ADR Guide
(GAO Bid Protest Regulations, 2010, § 21; AMC, 1997)

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VII. 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, to 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 protest-related delays and costs 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 our 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 the FAA and AMC as so successful is the presumption that all

protests 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; and
- 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 impacts 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 following:

- The lack of fiscal disincentives for unjustified protests, such as "loser pays" arrangements;
- Poor acquisition planning;
- Lack of a properly trained acquisition workforce;

- Frivolous protest filings; and
- Lack of formal sanctions at the GAO for frivolous protests.

However, our research also uncovered some anomalies in the agencies' behavior. Academic and professional literature suggests that agencies may be tacitly consenting to full-blown protest litigation for various reasons. At the same time, survey data suggest that agencies have not tailored their defensive strategies to match the avowed problems with bid protests, and that agencies apparently fail to utilize currently available tools to reduce costs and delays from protest litigation. This suggests either that appropriate training is lacking, or that some procurement organizations may actually prefer to "buy" a formal decision on their procurement programs. Either way, accountability measures may be required to ensure effective defenses against procurement protests.

3. Obstacles to Effective Cooperation

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

Most legal and acquisition professionals surveyed indicated that they believe their agencies do not use ADR to a great extent to resolve protests. However, the research we conducted regarding the FAA and AMC showed the clear benefit of utilizing ADR. At both the FAA and AMC, bid protests are resolved earlier than they are at the 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 indicated 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, or to have an impartial and transparent resolution process, then effective cooperation between the parties will be impaired.

VIII. Recommendations and Areas for Further Research

A. Recommendations

1. The Case for Fiscal Disincentives Beyond Truly Frivolous Protests is not Demonstrated, but GAO Rules Must Include COFC-Style Sanctions

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, Constitutional, or conform to the international obligations of the United States. 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 (Kepplinger, 2009a, p. 13). 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, the 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, the GAO would have to make a separate determination. This new determination might provide deterrence, but at the cost of additional litigation. Further, unless carefully crafted, such disincentives or penalties will likely run afoul of the U.S. Supreme Court's First Amendment protections for the

right of free speech and the right to petition the government for the redress of grievances, or the Fifth Amendment right to due process of law. For example, the Supreme Court held in *Bill Johnson's Restaurants, Inc. v. National Labor Relations Board* (1983), that a federal agency cannot halt lawsuits brought, even for improper motives, unless those lawsuits are based on "intentional falsehoods or on knowingly frivolous claims," or otherwise lack a reasonable basis. In another case, *California Motor Transport Co. v. Trucking Unlimited* (1972), the Supreme Court held that federal antitrust laws may penalize businesses bringing lawsuits and petitions to federal agencies only if such petitions and lawsuits are "a mere sham to cover what is actually nothing more than an attempt to interfere directly with a business relationship of a competitor." Federal appellate courts also identified two limited ways that can render a legal action frivolous:

> First, a legal action is considered "frivolous as filed" when a plaintiff or appellant grounds its case on arguments or issues "that are beyond the reasonable contemplation of fair-minded people, and no basis for [the party's position] in law or fact can be or is even arguably shown." . . . Second, a legal action is considered "frivolous as argued" when a plaintiff or appellant has not dealt fairly with the court, has significantly misrepresented the law or facts, or has abused the judicial process by repeatedly litigating the same issue in the same court. (Kepplinger, 2009a, p. 11)

Any restriction, disincentives, or penalties for strategic protests against the public interest would have to meet the federal courts' stringent requirements. Finally, the United States agreed to provide effective bid protest mechanisms as part of the World Trade Organization Agreement on Government Procurement and agreed to effective non-discrimination in procurement as part of the Reciprocal Defense Procurement and Acquisition Policy Memoranda of Understanding (Miller, 2009, p. 93). Care must be taken to ensure that any restrictions conform to our international trade obligations and agreed-upon standards of fairness.

The U.S. Court of Federal Claims provides a useful model for sanctions against improper bid protests. Under Rule 11 of the Rules of the Court of Federal Claims (COFC, 2011), 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;

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" (Kepplinger, 2009a, p. 13). This process may actually make the overall protest process longer, which could have potential negative impacts on the acquisition system. However, bringing the GAO Bid Protest Regulations (2010) to parity with the COFC concerning sanctions for truly frivolous protests could provide a deterrent and, more importantly, address the perception that the GAO may be welcoming frivolous protests.

2. Standards for Mandatory Stay Overrides in the CICA and Agency FAR Supplements Must be Clarified and Re-Balanced to Protect Taxpayers and the Troops, Not Just the Protesters

Our research demonstrates that contracting agencies must be much more aggressive at issuing and defending overrides of mandatory CICA stays triggered by filing GAO protests. At the same time, our research shows that the fault does not lie entirely with the agencies. COFC interpretations of what the CICA requires to sustain an override seem to be clearly in conflict with each other and with the question most important to the contracting agency, that of validity of contract awards. These COFC interpretations seem to lack balance between the interests of the protesters and of the taxpayers, troops, and Federal agencies. Congress, the

Comptroller General, and the Federal Acquisition Regulation Council should clarify and strengthen the CICA override standards.

3. Agency-Level Protests Must Be Made More Transparent and Trustworthy to Be Truly Effective

Our research reveals that experts in federal agencies recognize the value of agency-level protests as a speedier, less costly, less adversarial alternative to litigation. The Army Materiel Command experience is particularly instructive on this point. However, contractors appear to distrust the agency-level protest process. If Congress and the executive branch are serious about reducing litigation delays and costs, they may want to improve the transparency and trustworthiness of the agency-level protest process. Specifically, the CICA and FAR Part 33 may be amended to provide for greater disclosure of procurement information, mandatory impartial review above the contracting officer level, publication of agency-level protest decisions, and continuation of mandatory stays between agency-level protests and any subsequent GAO protests. Once agency-level protests earn the trust of the federal contracting community, it may be worthwhile to require contractors to exhaust their agency-level protest remedies before filing protests with the GAO or the Court of Federal Claims.

4. The ADRA Must Be Strengthened to Limit Grounds for Refusing ADR

Our research reveals that at least some federal agencies may be tacitly condoning or encouraging the litigation of bid protests at the GAO. While the ADRA allows the U.S. government to decline ADR in certain circumstances, our research shows that contracting agencies are litigating bid protests far more often than even the agencies themselves find appropriate. In addition, our research reveals that agencies go along with GAO protests for improper reasons not authorized under the ADRA. Congress should take steps to toughen the ADRA in order to ensure that agencies are not “buying” GAO decisions with taxpayer funds.

5. ADR Should Be the Default Dispute Resolution in Federal Procurement Protests

Our research shows that the executive branch has extensive experience with ADR as the default bid protest resolution system. Originally created as an exceptional experiment, the protest system at the Federal Aviation Administration ODRA demonstrated its ability to provide significant time savings and achieve protest resolution in a less disruptive manner than the GAO protests. Congress should now take the FAA ODRA's lessons and replicate them across the federal government.

6. Agencies Must Be Required to Vigorously Object to GAO 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" (Kepplinger, 2009a, p. 12). It is incumbent on agencies, however, to object to protests when appropriate. Our research revealed that many top 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. Indeed, the last recorded "frivolous protest" objection was reported by the GAO back in 1996. Since the GAO will dismiss protests that are frivolous or without merit, it is incumbent upon agency officials to raise objections to protests they deem to be frivolous or otherwise without merit.

7. Agencies Must Provide Quality Mandatory and Non-Mandatory Debriefings 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 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, regardless of whether a debriefing is mandatory. 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 debriefings, 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.

8. Defense Agencies Should Object to GAO Recommendations Whenever Military Needs so Require, and the Office of Federal Procurement Policy and the Department of Justice Should Streamline the Process for Supporting Federal Agencies When the GAO Gets it Wrong

Our research revealed that federal, and especially defense, agencies tend to follow the GAO blindly. Significantly, not once did a defense agency refuse to follow GAO recommendations in order to field equipment to the troops. Agencies have traditionally feared Congressional sanctions for refusing to follow the GAO, but research proves that this fear is unwarranted. Indeed, our research shows that during the 2009–2010 dispute between the GAO and the Department of Defense

concerning the latter's refusal to follow the former's protest recommendations, the Office of Management and Budget, the Department of Justice, Congress, and the President took the side of the Department of Defense. However, the process for agencies to secure high-level support against wrong GAO recommendations is not well established within the executive branch. The Federal Acquisition Regulation Council should make appropriate amendments.

9. CICA and GAO Regulations Should Require Protesters to Post Bonds for the Cost of Interruption from CICA Stays

Our review shows federal agencies may not have sufficient tools to reduce costs and delays from mandatory CICA stays. On the contrary, under Rule 65 of the Court of Federal Claims (COFC, 2011), "[t]he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Further, under COFC (2011) Rule 65.1, "[t]he surety's liability may be enforced on motion without an independent action." Congress or the GAO should introduce similar rules for GAO bid protests in order to compensate the taxpayers for the costs of at least some protests that are ultimately found to lack merit.

10. Agency Lawyers and Acquisition Workforce Must Be Trained to Resolve Bid Protests in Accordance With Least Disruptive Paths

Our research reveals that opportunities abound to utilize ADR and other dispute resolution flexibilities, even under current GAO regulations, COFC rules, and agency-level protest rules in FAR Part 33. Unfortunately, our research also reveals that agencies rarely utilize all the tools available to reduce the delays and costs of bid protests. In the beginning of this report, we showed that it is possible to map out with great detail the least disruptive and most cost-effective paths for resolution of bid protests, as well as related decision points. Accordingly, we demonstrated that federal contracting officials can manage the bid protest process in the same business-like manner as they manage other programs. However, our survey data

revealed significant gaps in the understanding of ADR and other flexibility tools by top federal acquisition experts. Therefore, it is imperative that agency protest-resolution procedures and related training programs for the acquisition workforce be revised and improved in order to help contracting officers master the least disruptive and most cost-effective resolution paths. This training is particularly important in military agencies, which are characterized by lower incidents of negotiation and other types of ADR than civilian agencies.

11. To Reduce Protests, Federal Agencies Should Design Acquisition Strategies Promoting Maximum Possible Competition

Our research shows that one of the most effective ways to prevent bid protests is to design competitive acquisition strategies. These strategies involve breaking up large consolidated contracts into smaller contracts, including the awarding of multiple-award contracts instead of single-award contracts. The substantive provisions of the Competition in Contracting Act at Title 10, Section 2304, the Small Business Act at Title 15, Section 644, the anti-consolidation legislation in Title 10, Section 2382, and FAR Part 16.5 all compel emphasis on such competitive contracts. Now, Federal agencies must swiftly implement these statutes not only because that is required, but because doing so makes business sense and compensates the taxpayers through reduced protests and more efficiency.

12. Federal Regulations Should Require Parties and Agency Acquisition Officials to Justify and Document Decisions not to Initiate or Use ADR, Stay Overrides, Express Options, Sanctions for Truly Frivolous Filings, and Other Similar Tools

Our review of the Federal Aviation Administration ODRA procedures highlighted the primary use of ADR to resolve protests. We noted the fact that the ODRA was able to resolve protests more quickly than the GAO's bid protest process. Within the 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 the ODRA's processes. The GAO, in its regulations, and the executive branch, through the Federal Acquisition Regulation or agency supplements, 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 should also be required to formally demonstrate why they did not seek dismissal as frivolous or meritless, sanctions, early corrective action, or stay overrides. Any such justification documents must include business analysis that the costs of formal litigation under the regular process at the GAO and compliance with the GAO recommendations would outweigh the benefits of ADR and/or expedited procedures. The analysis should take into account the potential for disruption that can be created when a post-award protester may seek a pre-award remedy of cancellation and change in the acquisition strategy. Agencies should be proactive in initiating ADR and not wait until the GAO's negotiation assistance or outcome prediction.

B. Areas for Further Research

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

- 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 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 was 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.

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Appendix B. Research Survey

Achieving Better Acquisition Outcomes in Bid Protests: ADR and

1. Consent to particpate 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
Acquisiton	◯
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:

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

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?

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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

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- Navy Contract Writing Guide
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- Strategic Sourcing

Program Management

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- Business Process Reengineering (BPR) for LCS Mission Module Acquisition
- Collaborative IT Tools Leveraging Competence
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