

The Benefits Of More Alternative Dispute Resolution At GAO

By **Noah Bleicher** (January 12, 2021, 5:35 PM EST)

In late December, the U.S. Government Accountability Office issued its highly anticipated Bid Protest Annual Report to Congress.[1] The statutorily mandated report contains an array of information about the GAO's bid protest forum over the prior fiscal year, including the most prevalent reasons the GAO sustained protests along with a variety of statistical data.

The data points that typically gain the most attention are the total number of cases filed (2,149 in fiscal year 2020; the number of protests sustained (84, or 15% of merit decisions); and the effectiveness rate (51%), which reflects the proportion of cases where the protester obtained some form of relief, either in the form of a GAO sustain decision or voluntary agency corrective action.



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But one statistic warrants more attention than it usually receives, especially this year: the number of cases where the GAO conducted alternative dispute resolution. As further explained below, the GAO deploys alternative dispute resolution to seek resolution of a protest matter without the need for a substantive written decision.

The GAO reports that in fiscal year 2020, it conducted alternative dispute resolution in a whopping 124 cases.[2] This uptick reflects a 210% increase over the prior year and the highest use of alternative dispute resolution since fiscal year 2013 — 145 cases.

Drilling into the numbers a little deeper shows that the GAO used alternative dispute resolution in nearly 20% of developed cases — i.e., those cases that were resolved on the merits or would have been resolved on the merits had alternative dispute resolution not been used. Even more precisely, in just over 15% of developed cases, alternative dispute resolution led to resolution of the protest without the need for a written decision on the merits.

Why is the focus on developed cases insightful? The GAO does not conduct alternative dispute resolution to resolve protests where the agency voluntarily takes corrective action before the submission of an agency report; those matters are promptly dismissed by the GAO as academic. Likewise, the GAO generally does not use alternative dispute resolution to close a procedurally deficient filing; those matters typically are dismissed without substantive development.

But where a matter is procedurally sound and the contracting agency elects to defend its procurement

actions, alternative dispute resolution at the GAO is a viable option to resolve the matter. In fact, the GAO can use alternative dispute resolution as an accelerated protest resolution procedure in nearly every one of these developed cases.

Therefore, the use of alternative dispute resolution as a percentage of developed cases sheds light into how prevalent the tool truly is in any given year. And, during this past fiscal year, nearly one in five developed cases was subject to alternative dispute resolution.

This is great news. I served as a bid protest hearing officer for several years, and I frequently conducted alternative dispute resolution for the efficient resolution of protests, cost claims and reconsideration requests. In my view, alternative dispute resolution is a crucial tool that advances the GAO's status under the Competition in Contracting Act of 1984 as a forum for the inexpensive and expeditious resolution of protests. The more frequently the GAO successfully resolves protests through alternative dispute resolution, the more efficient the bid protest process becomes.

Put simply, not every matter before the GAO warrants a comprehensive, substantive decision on the merits, especially where the issues are not legally complex or novel. From the GAO's perspective, removing the need to draft a substantive decision frees the forum's bid protest hearing officers to focus on the more nuanced and multifaceted matters the office regularly resolves. These are the cases where a written decision benefits the procurement community.

Arguably nothing is gained from publishing yet another decision denying a perfunctory "mere disagreement" evaluation challenge. And from the perspective of the protester or contracting agency, there are benefits to learning the likely outcome of the case earlier in the process. An agency can more quickly undertake any necessary corrective actions or, in the case of a deny outcome and a withdrawn protest, lift the stay of performance and obtain the goods or services under protest.

As the GAO acknowledges, the office's accelerated protest resolution procedures, including alternative dispute resolution, serve to minimize disruptions to the procurement cycle.[3]

Alternative Dispute Resolution at the GAO

Alternative dispute resolution at the GAO is somewhat unique. The GAO bid protest hearing officer assigned to the case conducts the alternative dispute resolution — no third-party mediator steps in to assess liability and negotiate damages. In a typical alternative dispute resolution at the GAO, the only open question is whether, after the GAO advises of the likely protest outcome, the party on the losing side of the matter wants a written decision on the merits, or prefers to take voluntary action to close the matter without the need for a published decision.

As the GAO's bid protest regulations neatly describe it, "[a]lternative dispute resolution encompasses various means of resolving cases expeditiously, without a written decision." [4] Alternative dispute resolution at the GAO can be undertaken in response to a party's request or, more frequently, at the GAO's own volition. The alternative dispute resolution session is usually conducted over the telephone, and it is never ex parte.

The GAO bid protest hearing officers conduct three types of nonbinding alternative dispute resolution: negotiation assistance, litigation risk assessment, and outcome prediction. In negotiation assistance alternative dispute resolution, the GAO attorney assigned to the protest simply assists the parties in reaching agreement on resolution of the matter. The GAO attorney highlights to the parties their areas

of agreement, narrows the areas of disagreement, and encourages them to come to a resolution on their own.

This type of alternative dispute resolution is most effective to resolve solicitation challenges or disputes regarding the scope of corrective action. For instance, the GAO may seek common ground as to whether a solicitation amendment or the disclosure of additional information to all offerors could resolve the protest issues to the protester's and contracting agency's mutual satisfaction. This is the least common type of alternative dispute resolution utilized at the GAO.

In litigation risk assessment alternative dispute resolution, the GAO attorney assigned to the protest offers an informal view of the possible range of outcomes of the protest. This type of alternative dispute resolution is most appropriate where additional substantive briefing or a hearing is on the horizon, and the GAO seeks to focus the parties' attention on the potentially dispositive issue in the protest. Once advised of the apparent risks in their respective positions, the party ostensibly facing the uphill argument has the option to pull the plug on the matter rather than submit further briefing.

By far, the most popular form of alternative dispute resolution at the GAO is outcome prediction alternative dispute resolution. In outcome prediction alternative dispute resolution, the GAO attorney assigned to the protest advises the parties of his or her view of the likely outcome of the case based on a full assessment of the record.

The alternative dispute resolution session is conducted after the matter has been fully briefed, the record is closed, and the GAO Procurement Law Division management has been consulted and agrees on the likely outcome of the case. For the alternative dispute resolution to be considered successful, the party who the GAO advises will likely lose the case must take action to obviate the need for a written decision on the merits — that is, either the contracting agency takes corrective action or the protester withdraws the matter.

While it is a good bet that the contracting agency will take corrective action if the GAO advises that it intends to sustain the protest, the GAO frequently conducts outcome prediction alternative dispute resolution where it intends to deny the protest. In these cases, even though the record is closed and no additional briefing is on the horizon, a protester often is still inclined to withdraw its protest when provided that option.

The primary example is where the matter implicates a protester's negative past performance. Because the GAO usually does not redact past performance information in its published decisions, a protester may prefer to withdraw its protest rather than have potentially embarrassing performance information published. Similarly, where the dispute centers on the reasonableness of proposal weaknesses, the protester may prefer those criticisms not be disclosed publicly.

Alternative Dispute Resolution Usage Over the Years

Since the mid 1990s, the GAO's bid protest regulations provided for flexible alternative procedures to resolve protests, but it was the office's December 2002 regulatory update that expressly identified the use of alternative dispute resolution as one of these flexible procedures.[5] It is no coincidence then that the use of alternative dispute resolution was consistently popular in the early 2000s.

In fact, the high water mark for alternative dispute resolution usage as a percentage of developed cases was in fiscal year 2002, when the GAO utilized alternative dispute resolution in 38.36% of developed

matters. That year, the GAO issued decisions on the merits resolving 256 cases, and alternative dispute resolution obviated the need for written decisions in an additional 122 cases — i.e., because alternative dispute resolution was successfully deployed.[6]

Indeed, between fiscal years 2001 and 2006 — where the GAO saw on average only 1,312 cases each year — the GAO employed alternative dispute resolution in more than 30% of developed matters.

But over the past decade, the use of alternative dispute resolution at the GAO has notably declined. Between fiscal years 2014 and 2019 — where the GAO saw on average 2,565 cases each year — the GAO employed alternative dispute resolution in only 12% of developed matters. Given the efficiencies promoted through the use of alternative dispute resolution, this past year's uptick in the use of the tool is a notable development.

The Use of Alternative Dispute Resolution at the GAO, Fiscal Year 2013 - 2020

	FY2020	FY2019	FY2018	FY2017	FY2016	FY2015	FY2014	FY2013
Cases Closed	2,137	2,200	2,642	2,672	2,789	2,647	2,458	2,538
Merit Decisions	545	587	622	581	616	587	556	509
Developed Cases*	647	623	688	654	674	659	636	634
ADR Used	124	40	86	81	69	103	96	145
ADR Used Successfully	102	36	66	73	58	72	80	125
ADR Used / Developed Cases	19.17%	6.42%	12.5%	12.39%	10.24%	15.63%	15.09%	22.87%
ADR Successful / Developed Cases	15.77%	5.78%	9.59%	11.16%	8.61%	10.93%	12.58%	19.72%

Data based largely on GAO's Annual Reports to Congress.

* Developed Cases reflects cases that resulted in a decision on the merits (i.e., sustain + deny) combined with those cases where the GAO used alternative dispute resolution to successfully resolve the protest. The underlying assumption in this metric is that the GAO would have issued a decision on the merits had the alternative dispute resolution session not been successful.

Alternative Dispute Resolution in Fiscal Year 2020 and Ahead

Two compounding factors likely explain this past year's heavy increase in alternative dispute resolution. The first is the pendulum swing away from the paucity of alternative dispute resolution in fiscal year 2019. That year reflected the low water mark in alternative dispute resolution over the past 20 years.

In 2019, it was employed in only 6.42% of developed cases. In each of the previous several years, alternative dispute resolution was used in 10% to 15% of developed cases, and as recently as fiscal year 2013, in nearly 23% of developed cases. And while 2019 saw about a 9% reduction in developed cases from the previous year, the use of alternative dispute resolution plummeted more than 50%.

Course correction was warranted. So, the GAO's Procurement Law Division likely recognized the surprising downtick and recalibrated, as reflected in this year's numbers.

Second, it is likely the coronavirus pandemic led to an increase in alternative dispute resolution at the GAO. Numerous GAO stakeholders are involved in publishing a protest decision. From the writing attorney who takes the first pass at drafting the decision to the multiple levels of subsequent internal substantive review and technical editing, the process is robust and — at least as of a couple years ago — paper-heavy.

While the GAO's bid protest team has undoubtedly adjusted to the complexities of working remotely since midway through the last fiscal year, shepherding a draft decision to a publishable work product has always been an onerous endeavor, and navigating this phase of the protest process in a strictly telework environment likely introduced new challenges.

Consequently, while the use of alternative dispute resolution occasionally serves as an internal case management tactic to alleviate the competing burdens of getting merits decisions out the door within the GAO's aggressive statutory timeframes, this may have been especially true this year. In my view, the pandemic likely exacerbated the reality that sometimes it is simply easier for the GAO to resolve a protest through the use of alternative dispute resolution instead of issuing a public decision on the merits.

While the coronavirus has disrupted countless aspects of our routines, the uptick in the use of alternative dispute resolution at the GAO is arguably a silver lining. Given the various efficiencies to the procurement process realized through the use of alternative dispute resolution at the GAO, protest practitioners should hope the upward trend is one new normal that continues beyond the pandemic.

Indeed, the protest forum and the procurement process itself stand to benefit if practitioners — both those representing the contracting agencies and protesters — more frequently request that alternative dispute resolution be deployed to resolve their matters, and not simply wait for the GAO to initiate alternative dispute resolution. The more often alternative dispute resolution is requested, the more it will be utilized in appropriate cases, and 2020's uptick will not be just another anomaly in an anomalous year.

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[1] GAO Bid Protest Annual Report to Congress for Fiscal Year 2020, GAO-21-281SP (Dec. 23, 2020).

[2] Note that this does not mean that the GAO conducted alternative dispute resolution 124 times. Rather, it reflects that alternative dispute resolution was tied to 124 B-numbers, which are the unique docket number assigned to each protest, supplemental protest, cost claim and request for reconsideration. A single alternative dispute resolution session could be associated with multiple B-numbers for the same procurement.

[3] Bid Protests at GAO: A Descriptive Guide (Tenth Edition, 2018), GAO-18-510SP (May 1, 2018).

[4] 4 C.F.R. § 21.0(h).

[5] 67 Fed. Reg. 79833, 79836, Dec. 31, 2002.

[6] GAO Bid Protest Annual Report to the Congress for Fiscal Year 2003, GAO-04-355R (Jan. 30, 2004) at 4.