

## Could Senate NDAA Spell the End of Incumbent Bid Protests?

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Defense contractors seeking to protect their incumbent contracts by filing protests with the Government Accountability Office (GAO) may need to think twice if Congress enacts protest reform provisions included in the Senate Armed Services Committee's recently released version of the National Defense Authorization Act (NDAA) for Fiscal Year 2017 ([S. 2943](#)). Under Sec. 821 of the proposed bill, an incumbent contractor would forfeit any profit or fee earned on a bridge contracts awarded as a result of delays caused by such a protest, if the protest is unsuccessful. To make matters worse, that profit or fee may end up in the pocket of the incumbent's competitor.

Specifically, the bill would require that incumbents on defense contracts "have all payments above incurred costs withheld on any bridge contracts or temporary contract extensions awarded to the contractor as a result of a delay in award resulting from the filing of such protest." These withholdings would be released to the incumbent contractor only in the event that "the subject of the protest is cancelled and no subsequent request for proposal is released or planned for release," or GAO "issues an opinion that upholds any of the protest grounds filed under the protest."

In all other circumstances, the withheld payments would go either to GAO or the contractor that was awarded the contract prior to the protest. GAO would receive the payment when the protest is not sustained but no award is made, such as when the contracting agency voluntarily takes corrective action and reevaluates proposals or revises its solicitation. The awardee would receive the payments in the event that GAO denies the protest.

As currently written, these provisions raise several important questions. For example, if the incumbent was one of several competitors to file a protest, would a bridge contract "result" from the incumbent's protest or those filed by the other contractors? Additionally, if it is clear that a contracting agency is taking corrective action as a result of a flaw raised by the incumbent protest, why should the contractor forfeit the withheld payments simply because GAO did not have the opportunity to issue an opinion upholding the protest? This question is particularly relevant in light of GAO's 2015 bid protest statistics indicating that, although GAO sustains just 12 percent of all protests, the bid protest effectiveness rate, which includes protests in which the Agency takes

voluntary corrective action, is a lofty 45 percent.

The most important question though, is whether these provisions simply go too far. Clearly aimed at curbing the practice of incumbent contractors filing meritless protests simply to extend performance through bridge contracts, the bill as written would almost certainly have a chilling effect on meritorious bid protests as well. Because protesters do not have access to the complete procurement record prior to filing, even the strongest protests are often based upon a degree of circumstantial evidence and speculation. Faced with such evidentiary uncertainty and the risk that they would have to devote considerable resources to performing a bridge contract for no profit or fee whatsoever, incumbent contractors may have little choice but to accept the contracting agency's award decision, even when there are signs of a potential flaw in the award process.

Given this potentially stifling effect on the bid protest system, as well as the serious questions raised by the bill as proposed, this section of the bill merits careful monitoring as it advances through the Senate and then conference with the House.<sup>1</sup>

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[1] The current House version of the NDAA ([H.R. 4909](#)) does not contain similar provisions. The House version merely instructs the Secretary of Defense to conduct a review of defense contract bid protests that includes an evaluation of protests filed by incumbents.