

NDAAs FY17: Bid Protest Reform Recommendations

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Executive Summary

Any delay to our acquisition process in the Department of Defense chips away at the strength of our national security, military power and technological capability. Bid protests when filed within the acquisition process create an inherent delay with any procurement. Although the Government Accountability Office (GAO) protest is limited to 100 days, this is not the only form of a “protest” available to contracting agencies. Furthermore, a study conducted by Lone Star Analysis noted that 58% of the average 32 week delay within the acquisition process results from the attempt to avoid a protest, rather than the protest itself.

The perception and behaviors in the procurement offices are such that we are wasting roughly 19 weeks of time attempting to prevent something that will either happen regardless of our efforts or never surface. 19 weeks of man hours, time and resources are being thrown away on an outcome outside of our control. Not collected within this data is the time delay associated with negotiations, mediations or informal protests at the agency level. Without any data currently being collected on agency protests, it is still logical to conclude that percentage share of the delay attributed to the actual GAO protest would continue to shrink and become less of a driving variable if we factor in the time associated with an agency level protest.

In both the Senate (S. 2934) and House (H.R. 4909) versions of the National Defense Authorization Act (NDAA) there is a demonstrated need of evaluating the protest process. Both share the same inclination that there is a problem and that we need to begin understanding and educating ourselves of the issues present. Unfortunately the language of the bills limits the evaluation to a very narrow scope and does not allow for true reform efforts.

The Congressional Research Service “argue[s] that by using data more effectively to support acquisition decision-making, DOD could save billions of dollars, more efficiently and effectively allocate resources, and improve the effectiveness of military operations”. Therefore, to effectively support our decision making in regards to the bid protest we must apply the same methodology. In order to achieve significant reform of the bid protest process, Congress must analyze a broader and more detailed set of data pertaining to the bid protest process. Current studies directed in the NDAA’s do not address the lack of data that many acquisition experts are missing in their evaluations.

These key data points necessary are disregarded by the current versions of the NDAA from both the House and Senate. The language of the bills should be amended in conference in order to expand the scope of the called for evaluation. If Congress hopes to effectively determine the needs of the bid protest process they must examine the process in its entirety. Congress must step outside of the GAO protest process and begin to evaluate the delays and time associated with negotiations, mediations and informal protests at the agency level. Congress must properly evaluate the perceptions, attitudes and behaviors held by the parties involved in the process and analyze their effect on the wasted resources attributed to a protest. Congress must expand our scope beyond the current level if we have any desire to reach FY18 with sufficient qualitative data that can facilitate our discussion and decision-making efforts in regards to the bid protest process.

Summary

The defense acquisition process is the means through which the DOD acquires, maintains, or invests in technology and product support as a means to further its national security efforts. Recent legislation has suggested that the Department of Defense (DOD) acquisition process is long overdue for reform efforts. Although we have taken steps towards defense acquisition, through recent legislation, it is still not enough. As we continue to pursue incremental change in lieu of comprehensive reform, we also continue to lose hold of our military prowess against other countries. In order to mitigate the delays incurred in our attempts to acquire the latest technological advances, we must seek immediate changes in the acquisition process. With the bid protest process being one piece that causes a guaranteed delay when utilized, we should shift our immediate focus on how to properly evaluate and improve our handling of protests.

One impediment to a more rapid acquisition process is bid protests. The latest versions of the National Defense Authorization Act (NDAA) are a step towards true acquisition reform, but we must expand their efforts. The Senate version (S.2934) of the NDAA focuses on shifting the authority outside of the Undersecretary's office to delegate responsibility more effectively and focusing on a rapid acquisition approach in order to reduce the time of standard acquisition. Furthermore, it does begin to address one facet of protest reform. The Senate version of the NDAA seeks to create responsibility for an incumbent seeking to protest for their own benefit. They will initiate the protest in hopes to acquire a bridge contract and extend their ability to make profit, while awaiting the protest results. The current language looks to create a negative repercussion for committing such an act.

Let us not forget that in both versions of the NDAA for fiscal year 16, called for an evaluation of the bid protest process, but this never made it out of conference. This year, there is again, in both the Senate and House (H.R. 4909) versions of the NDAA a demonstrated need of evaluating the protest process. Both share the same inclination that there is a problem and that we need to begin understanding and educating ourselves of the issues present. Unfortunately the language of the bills limits the evaluation to a very narrow scope and does not allow for true reform efforts.

Current legislation does not address the lack of data that many acquisition experts are missing in their evaluations. Solutions to protest reform cannot be looked at because there is an overwhelming lack of evidence. By expanding the evaluation already being called for in both versions of the current NDAs and including key metrics currently being left out, we can properly educate ourselves on where reform efforts for FY18 need to be directed. To understand the bid protest process as a whole we need to research and acquire metrics both within and outside of the Government Accountability Office (GAO). The sheer lack of data is delaying our ability to effectively develop and maintain our national security, military readiness and status as a global leader.

According to a Congressional Research Service (CRS) report in 2015, government spending decreased 25% from 2008 to 2014 while protests rose 45% percent in the same time frame. Protests are becoming more likely and the culture and perception of the protest process are such that regardless of the outcome it is still beneficial to file a protest. While solutions are available,

we need the proper metrics to help us determine which methods will actually resolve the current problems rather than further complicate the protest process.

The CRS exemplifies the need for proper data and analytics in DOD decision making.

Without data, there may not be an appropriate basis for making policy decisions, measuring or assessing the effectiveness of government programs, or providing transparency into government operations. Despite the importance of data, most observers believe that the Department of Defense (DOD), and other government agencies lag behind the private sector in effectively incorporating data analyses into decision making. These analysts argue that by using data more effectively to support acquisition decision making, DOD could save billions of dollars, more efficiently and effectively allocate resources, and improve the effectiveness of military operations.

Senator John McCain, chairman of the Senate Armed Services Committee, was noted in the CRS study in 2015 with the following statement in regards to the DOD's lack of data.

It's hard to address management problems when you lack basic data that are essential to understanding and diagnosing those problems. And, yet, that is the case with the Department of Defense... The result is not just greater inefficiency and wasted resources. It also harms the effectiveness of the Department of Defense, and, thus, our national security.

It is necessary for us to acquire and properly evaluate the bid protest process if we have any hope of making positive properly informed changes to the system. Our evaluation needs to be extended outside of the GAO protest level if we hope to fully understand the bid protest environment. The following are key areas where proper metrics are needed.

- Evaluation of the protest process at the PCO, PEO and PM level
- Evaluation of the number of negotiations, mediations and protests at the Agency level that are then filed with the GAO
- Evaluation of the number of GAO protests that are withdrawn/dismissed and then negotiated, mediated or protested at the Agency level
- Evaluation of the number of GAO protests sustained or dismissed that are then taken to the Court of Federal Claims and how often is GAO overturned
- Evaluation of perception, behavior and attitude towards the protest system of major parties involved in the protest process
- Define time and actions associated with preventing or avoiding a protest
- Evaluate the time and actions associated with preventing or avoiding a protest compared with the time spent for the contract to be awarded and begun
- Evaluate how often a stay of award is waived

Now that we are taking the initial step we need to ensure that we are looking at the protest process from the correct lens.

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Introduction

Recent legislation has suggested that the Department of Defense (DOD) acquisition process is long overdue for reformation efforts. The defense acquisition process is the means through which the DOD acquires, maintains, or invests in technology and product support as a means to further its national security efforts. As we continue to pursue incremental change in lieu of comprehensive reform, we also continue to lose hold of our military prowess against other countries. Although we have taken steps towards defense acquisition, through recent legislation, it is still not enough¹. In order to mitigate the deceleration in the rate in which we are able to acquire the latest technological advances, we must seek immediate changes in the acquisition process². Our immediate focus needs to shift to how to manage and prepare for an almost guaranteed protest.

In both the Senate and House versions of the NDAA there is a demonstrated need of evaluating the protest process³. Unfortunately the language of the bills limits the evaluation to a very narrow scope and does not allow for true reform efforts to begin taking fruition⁴.

In order to truly make headway in acquisition protest reform, we must apply a broader and more intensive evaluation of the protest process. Current legislation does not address the lack of data that the CRS states is necessary for acquisition experts to make the decisions needed in the bid protest process⁵. A continued negligence to collect the necessary data is threatening our national security, military readiness and status as a global leader.

Background

Since sequestration, the Defense budget has continued to drop while the amount of protests has continued to rise⁶. According to a CRS report, government spending decreased by 25% from 2008 to 2014 while protests increased by 45% in the same time⁷. The drop in government

¹ Johnson, Justin T. "Defense Reform Bill Is Biggest in Decades, But More Remains to Be Done." The Heritage Foundation. N.p., 15 Dec. 2015. For more information, <http://www.heritage.org/research/reports/2015/12/defense-reform-bill-is-biggest-in-decades-but-more-remains-to-be-done>

² Captain, Tom. "Opinion: Reversing Our Sorry Trend On Defense Program Management." *Aviation Week & Space Technology* 177.4 (2015): 1. Academic Search Complete. For more information, <http://aviationweek.com/defense/opinion-reversing-our-sorry-trend-defense-program-management>

³ Herb, Jeremy. "Two Defense Bills on Tap This Week." *POLITICO*. POLITICO LLC, 09 May 2016. For more information, <http://www.politico.com/tipsheets/morning-defense/2016/05/two-defense-bills-on-tap-this-week-the-democrats-secretary-of-war-30-year-shipbuilding-plan-falls-short-of-navy-goal-214179>

⁴ Turner, Stuart W., R. David Pore, and Sonia Tabriz. "House Bid Protest Reform Vs. Senate Bid Protest Reform." *Law360*. Portfolio Media Inc., 31 May 2016. For more information, <http://www.law360.com/aerospace/articles/802180/house-bid-protest-reform-vs-senate-bid-protest-reform>

⁵ Schwartz, Moshe. "Using Data to Improve Defense Acquisitions: Background, Analysis, and Questions for Congress." Congressional Research Service (n.d.): n. January 2016. For the full report, <https://www.fas.org/sgp/crs/natsec/R44329.pdf>

⁶ Schwartz, Moshe, and Kate M. Manuel. "GAO Bid Protests: Trends and Analysis." Congressional Research Service (n.d.): n. July 2015. For the full report, <https://www.fas.org/sgp/crs/misc/R40227.pdf>

⁷ Ibid

spending has led to fewer government contracts being available and protests that are virtually guaranteed in every acquisition effort.

The trend, noted by the CRS, has clearly shown that protests will only increase, yet the DOD continues to waste resources on trying to prevent a protest rather than resolving one. A protest may not be prevented in today's climate, but we can still shorten the time of a protest and effectively increase the rate of acquisition efforts.

Current legislative efforts are beginning to lay a foundation for larger reform efforts. However, comprehensive defense acquisition reform may take years to effectively be implemented⁸. Until then, we must work to fully evaluate the protest process in order to make key changes necessary to mitigate the short term losses in acquisition, prevent delays and lessen wasted resources.

Current NDAA Legislation

Both the House and Senate have recently passed their own version of the NDAA but they have yet to go to conference and finalize a joint bill passed by both the House and Senate. The key pieces of legislation in the bill that relate to protest reform do not have guarantee of remaining in the final bill after conference. In fact the NDAA for FY16 had the language regarding the evaluation of the protest process removed during conference.

Senate S.2934

Section 821 creates an amendment to where there would be repercussions to what some would consider a "frivolous" protest⁹. The language however is still very lenient requiring that all elements of the protest must be denied in order for the cost to be the burden of the company who filed the protest. This amendment would only apply to a party whose revenue exceeds \$100,000,000. This cap is a way to prevent a small business from being dissuaded from filing a protest if they do not have the resources to afford the penalty.

Section 821 then further addresses incumbent parties who file a protest on a contract they lost in order to acquire a "bridge" contract, which allows them to continue the contract until the protest is resolved¹⁰. This allows them, in essence, to "extend" their contract and receive profit while preventing the winning party in question from starting production and acquiring profit that could be rightfully theirs¹¹.

⁸ O'Hanlan, Michael E. "The State of Defense Acquisition Reform (an October Update)." The Brookings Institution. N.p., 26 Oct. 2015. For more information, <http://www.brookings.edu/blogs/up-front/posts/2015/10/26-acquisition-reform>

⁹ See Sec 821 of S.2934: National Defense Authorization Act for Fiscal Year 2017. Full text available here <https://www.congress.gov/bill/114th-congress/senate-bill/2943/text>

¹⁰ Ibid

¹¹ Senate Armed Services Committee: Executive Summary of S.2934: National Defense Authorization Act for Fiscal Year 2017. See here <http://www.armed-services.senate.gov/imo/media/doc/FY17%20NDAA%20Bill%20Summary.pdf>

The amendment for incumbent protests, where a bridge contract is awarded, would “hold” the profits of the incumbent until the protest is resolved. If the protest filed by the incumbent is found to have any of the grounds upheld then the incumbent would receive the held funds. If the incumbent’s protest is not found to have any grounds upheld, then the held profit will go to the awardee as compensation for the delay. The GAO will claim the held profits if the decision of the protest results in no award being given.

The language is still quite lenient on the incumbent. The decision does not have to be overturned for the incumbent to continue playing the system and squeeze extra profit out of the contract by filing what most would deem a frivolous protest. The incumbent could still lose the contract through the protest, but as long as one of their grounds for protest is deemed acceptable they can still retain the profit from their bridge contracts.

Finally section 822 addresses the need for a review of the protest system. It requires the Office of the Secretary of Defense to enter into a contract with a third party entity in order to examine and evaluate the effectiveness of the current protest process. They will evaluate the following aspects of the protest process¹².

- (1) A description of trends in the number of bid protests filed, and the rate of such bid protests compared to contract obligations and the number of contracts.
- (2) An analysis of bid protests filed by incumbent contractors, including—
 - (A) the rate at which such protesters are awarded bridge contracts or contract extensions over the period that the protest remains unresolved; and
 - (B) An assessment of the cost and schedule impact of successful and unsuccessful bid protests filed by incumbent contractors on contracts for services with a value in excess of \$100,000,000.
- (3) A description of trends in the number of bid protests filed and the rate of such bid protests on—
 - (A) contracts valued in excess of \$3,000,000,000;
 - (B) contracts valued between \$500,000,000 and \$3,000,000,000;
 - (C) contracts valued between \$50,000,000 and \$500,000,000; and
 - (D) contracts valued under \$50,000,000.
- (4) An assessment of the cost and schedule impact of successful and unsuccessful bid protests filed on contracts valued in excess of \$3,000,000,000.
- (5) An analysis of how often protestors win the protested contract.
- (6) A summary of the results of protests in which the contracting agencies took unilateral corrective action, including—
 - (A) the average time for remedial action to be completed; and
 - (B) a determination as to what extent such unilateral action was a result of a violation of law or regulation by the agency, or such action was a result of some other factor.
- (7) A description of the time it takes agencies to implement corrective actions after a ruling or decision.

Though an extensive list and a great starting point we will still be left without vital metrics necessary to implement a proper solution for protest reform. One area that lacks the scrutiny the

¹² See Sec 822 of S.2934: National Defense Authorization Act for Fiscal Year 2017. Full text available here <https://www.congress.gov/bill/114th-congress/senate-bill/2943/text>

GAO has is the Agency level protest. These are primarily handled at the Program Executive Office (PEO) and Procurement Contracting Office (PCO) level. If we do not address and evaluate the Agency level protests and external factors than we will be continuing the negative trend of having insufficient and uncomprehensive data in making a decision for the protest process.

House H.R.4909

The House version of the NDAA (H.R. 4909) approaches acquisition reform from a different angle when compared to the Senate version. The House Armed Services Committee (HASC) focused on “how” the acquisition process takes places rather than “who” is making the decisions.

One of the key components of the House version of the NDAA is part of what has been deemed the Acquisition Agility Act (AAA). The purpose of the AAA is to increase the speed in which we are able to acquire technology for the Department of Defense. Most notable is the requirement for newly developed weapon systems to have an open architecture¹³. The open architecture system allows for the weapon systems to be upgraded with ease and modifications to be added on throughout the process. This allows our weapons systems to quickly adapt as technology rapidly evolves.

It also focuses on allowing rapid prototyping and fielding processes within the acquisition cycle. In regards to protest reform we see a study called for in Section 831¹⁴.

SEC. 831. REVIEW AND REPORT ON THE BID PROTEST PROCESS.

(a) Review.--The Secretary of Defense shall conduct a review of the bid protest processes related to major defense acquisition programs. The review shall examine the extent to which--

- (1) the incidence and duration of bid protests have increased or decreased during the previous decade;
- (2) bid protests have delayed procurement of items or services;
- (3) there are differences in the incidence and outcomes of bid protests filed by incumbent and non-incumbent contractors;
- (4) protests filed by incumbent contractors result in extension of the period of performance of a contract, and whether there are benefits (monetary or non-monetary) to incumbent contractors under such circumstances; and
- (5) there are alternative actions or authorities that could give the Government more flexibility in managing contracts if a bid protest is filed.

(b) Contract With Independent Entity.--Not later than 30 days after the date of the enactment of this Act, the Secretary of Defense shall enter into a contract with an independent entity with appropriate expertise to conduct the review required in subsection (a).

¹³ House Armed Services Committee Communications: 52539. Summary Report – H.R. 4909 The National Defense Authorization Act For Fiscal Year 2017. See here https://armedservices.house.gov/sites/republicans.armedservices.house.gov/files/wysiwyg_uploaded/FY17%20NDA%20Summary.pdf

¹⁴See Sec 831 of H.R.4909: National Defense Authorization Act for Fiscal Year 2017. Full text available here <https://www.congress.gov/114/bills/hr4909/BILLS-114hr4909pcs.pdf>

(c) Briefing.--Not later than March 1, 2017, the Secretary, or his designee, shall brief the Committees on Armed Services of the Senate and House of Representatives on interim findings of the independent entity.

(d) Report.--Not later than July 1, 2017, the Secretary shall submit to the congressional defense committees a report on the findings of the independent entity, along with a description of any actions that the Secretary proposes to address the findings of the independent entity.

The House is calling for a review of the bid protest process but it is less detailed than the Senate version. The House version still lacks evaluation in key areas needed to facilitate an appropriate discussion on protest reform.

The intent is to ensure we gather all necessary and available metrics to hold the conversation on protest reform for FY18.

Need for Further Analysis, Evaluation and Research

The CRS report, *Using Data to Improve Defense Acquisitions*, highlights the need for a complete understanding of an environment before proceeding forward with a solution¹⁵. Working to secure data that is both reliable and comprehensive was seen as one of the primary issues currently facing the DOD in the decision making process. If we do not correct the language now then we will effectively halt the decision making process. The GAO maintains a great amount of the information for research currently being asked for and metrics on protests to expand through the GAO protest evaluation. However it is not often the protest that is filed with the GAO that causes an issue in procurement or delay in the contract award.

Where we need to focus our evaluation efforts are outside of the GAO. We need to look into the Agency level protests that take place in the PCO level, PEO, and Program Manager (PM) level.

In order to understand how to proceed on protest reform within the DOD we need to evaluate further the four following areas. We need to research the perception of protests by the government and private sector, the “automatic protest culture” that has taken hold, the delays on procurement both from the protest and the time spent attempting to prevent a protest and lastly emphasize the lack of data available in the protest process.

Perception of Protests

Within the government there is a very negative fear and perception around protests. No one wants to have a protest filed, nor do they want the workload of managing a protest. At the PCO

¹⁵ Schwartz, Moshe. "Using Data to Improve Defense Acquisitions: Background, Analysis, and Questions for Congress." Congressional Research Service (n.d.): n. January 2016. For the full report, <https://www.fas.org/sgp/crs/natsec/R44329.pdf>

level there is a notion to prevent the protest at all costs. Most PCO's do not want the press associated with a publicly filed GAO bid protest¹⁶. It can easily show that the office is not handling procurements well and cause unnecessary negative publicity for the DOD¹⁷.

The prime contractors align with this view point as well. The negative perception around a bid protest is not favored by the contractor. Often they are competing for multiple contract awards at a time and unfavorable press does not help their reputation, public opinion or relations with their investors. Additionally, the filing of a GAO protest brings the customer into the negative publicity as well.

We must make the effort to extensively survey and analyze the perception of the protest process so that we can properly account for the notions held on both sides of the table. Without this information we could very easily find ourselves implementing a solution that is not in line with culture and attitudes of those directly involved with bid protests.

Automatic Protest Culture

The number of defense contract awards continues to shrink as budgetary issues are capping what the DOD is able to procure¹⁸. It is such that regardless of the decision, the company has the directive and mindset to automatically protest¹⁹.

There seems to be a notion that overturning the decision of award is not the sole reason for filing a protest. Rather, there are secondary benefits that come with the filing of a protest that a party is vying to obtain²⁰.

Lone Star Analysis was able to determine 5 benefits that accompany the filing of a protest and modeled a cost benefit analysis associated with filing a protest. When a company protests, they are aiming to claim at least 1 out of the 5 benefits associated with the proceedings²¹.

¹⁶ Conversations held with senior House Armed Services Committee Members

¹⁷ Ibid

¹⁸ Gracie, Jaime. "Bring Accountability to Contract Protests." *FCW*. 1105 Media Inc, 25 Jan. 2011.

<https://fcw.com/articles/2011/01/31/comment-jaime-gracia-bid-protests.aspx>

¹⁹ Roemer, Steve. "Why DoD Contractors File Protests, Why Some Don't, and What the Government Can Do." *Defense AT&L* November December (2010): 9-12. Defense Acquisition University. For more information, <http://www.dau.mil/pubscats/atl%20docs/nov-dec10/roemer.pdf>

²⁰ Lone Star Analysis, *Summary of Protest Research, Modeling & Simulations*, January 13, 2015. For information on Lone Star, see <http://www.lone-star.com/>. According to Lone Star, the survey consisted of 297 respondents with complete or nearly complete surveys (of 373 total).

- 194 said they had "never been involved with government contracting."
- 22 gave conflicting responses on their experience and were used only for comparative purposes
- 81 indicated acquisition experience (Average respondent had personally witnessed 4 protests)
 - 53 were most familiar with DOD
 - 53 were had experience as contractors
 - 12 were most familiar with other Federal Agencies
 - 15 were most familiar with states
 - 29 had experience in a Federal procurement organization or program office.

Benefit Type 1 – Delay

- Usually only benefits an incumbent

Benefit Type 2 – Value outside GAO’s process

- Get a winner to give up some work-share
- Collect competitive intelligence, and other various benefits
- Strategic loss that makes winning “cursed”

Benefit Type 3 - GAO favorable ruling and Sustain

- Rarest but most discussed way to win

Benefit Type 4 - GAO “relief” ruling but no Sustain

- Example – refund legal and proposal costs

Benefit Type 5 – “Soft Protest” outside GAO’s Process – most common?

- Attempting to get the PCO to create set asides
- Shape a competition
- Get a winner to give up some work-share
- Collection of competitive intelligence

By filing a protest you are buying your chance to win out on one of the benefits listed above. The study notes 3 out of 5 benefits have at least a 50-50 chance of winning, leaving a considerably minute chance to lose out on all of the benefits²². A protest has become a smart bet that any rational actor would make in today’s climate.

In support of this notion a study from Washington Technology noted that 86.1% of contractors would protest again even with the known risks taken by filing a protest²³. Amongst the concerns of hindering the relationship with the customer, the cost associated with a protest and the delay, 9 out of 10 times a company would still file a protest²⁴.

We need to take a deeper look into why these contractors are continuing to protest and understand their behavior and motivation. Our solutions can only be successful if they are in line with the mindset of those involved²⁵. It is evident to evaluate and survey both ends of the spectrum to understand how to tailor any reform efforts that may be necessary in the protest process.

²¹ Ibid

²² Ibid

²³ Washington Technology, *Insider Report 2016: Debriefings and Bid Protests*, 2016. Survey included 155 respondents. The business experience of the respondents is below (multiple selections allowed)

- 73.4% - Federal Government
- 71.2 % Defense/Military Contracting
- 47.5% Homeland Security
- 26.6% - State/Local Government (continued...)
- 25.2% - Commercial Sector
- 14.4% - Education
- 7.9% - Other

For full study see here, <https://washingtontechnology.com/pages/insider-reports/debriefings-and-bid-protests.aspx>

²⁴ Ibid

²⁵ CSIS. "Outcomes of Recent Defense Acquisition Reform: Lessons for the Future." Center for Strategic and International Studies. N.p., 30 Sept. 2015. For more information, <https://www.csis.org/events/outcomes-recent-defense-acquisition-reform-lessons-future>

Delay on Procurement

Every protest filed forces some delay of the procurement process. The CRS report found that the average delay of a protest was 39 days²⁶. When the process is to be completed in 100 days this result is quite impressive. Unfortunately, the primary delays on procurement will not be assessed by the evaluations called for, nor will the GAO have the data available. It is no fault to the GAO or legislation that this is not being addressed properly. We are simply looking in the wrong area. Every protest filed with the GAO is officially recorded and documented properly. It is easy to understand the GAO process of handling a bid. However, the protest process as a whole does not always include the GAO.

This is where it becomes vital to understand the attitudes, behavior and culture of the participants in the protest process. The government and prime contractors seem to not want to file a protest with the GAO even with the limited delay and decision that is not guaranteed elsewhere. If it all possible, they would rather handle it at the Agency level. These Agency level protests are where the real delay occurs. We need to survey and examine how the PCO, PEO and PM offices deal with and process a protest. Without this data we will never address where the delays are actually occurring.

According to a study conducted by Lone Star Analysis there is a median of 32 weeks of time spent trying to prevent a protest before the protest is even filed²⁷. This does not include the median time of an Agency protest because they have yet to be measured. With a protest the average delay jumped to 48 weeks²⁸. 58% of the time in a delay is a direct result of the effort to avoid the protest according to Lone Star's study²⁹. More than half of the delay period is caused by our attempt to avoid an inevitable protest.

This is seen through constant evaluations of Section L and M requirements, adjusting contract requirements prior to decision and constant push backs on award dates³⁰. These actions are continuing to cripple the acquisition process. The fear of a protest and the mindset to prevent one is delaying the entire procurement process beyond a 100 day GAO protest. Furthermore the time spent attempting to delay the protest is not included in the current research proposed by the House and Senate versions of the NDAA.

²⁶ Schwartz, Moshe, and Kate M. Manuel. "GAO Bid Protests: Trends and Analysis." Congressional Research Service (n.d.): n. July 2015. For the full report, <https://www.fas.org/sgp/crs/misc/R40227.pdf>

²⁷ Lone Star Analysis, *Summary of Protest Research, Modeling & Simulations*, January 13, 2015. For information on Lone Star, see <http://www.lone-star.com/>. According to Lone Star, the survey consisted of 297 respondents with complete or nearly complete surveys (of 373 total).

²⁸ Ibid

²⁹ Ibid

³⁰ Roemer, Steve. "Why DoD Contractors File Protests, Why Some Don't, and What the Government Can Do." Defense AT&L November December (2010): 9-12. Defense Acquisition University. For more information, <http://www.dau.mil/pubscats/atl%20docs/nov-dec10/roemer.pdf>

The current language of both NDAA versions narrows us to only look at what causes 42% of the delay in a protest and even then that information is not only already readily available through the GAO but it fails to factor in the key variable of the delay and time associated with an Agency protest.

Lack of Data in Key Areas

It is very unclear whether or not the bid protest process needs to seek major reformation efforts. Amidst all the legislative efforts in acquisition reform we have never taken the time to accurately depict the entirety of the bid protest process. Now that we are taking the initial step we need to ensure that we are looking at the protest process from the correct lens.

What the current versions of the NDAA are asking for is information that is readily available. We understand the GAO protest system and we can easily evaluate their metrics due to their requirements to record the details of a protest. What we are lacking are the metrics for what takes place outside of the GAO office. Time spent dealing with a protest starts long before a protest is filed with the GAO and often protests never reach the GAO. This is where the current language of the current versions of the NDAA falls short³¹.

They only call for an evaluation of known metrics. Furthermore these known metrics only account for 42% of the delay, which is not even the prime motivator of the delay, and they leave out the time associated with an Agency protest³². In order to properly facilitate a discussion on protest reform we need to evaluate and research the following areas.

- Evaluation of the protest process at the PCO, PEO and PM level
- Evaluation of the number of negotiations, mediations and protests at the Agency level that are then filed with the GAO
- Evaluation of the number of GAO protests that are withdrawn/dismissed and then negotiated, mediated or protested at the Agency level
- Evaluation of the number of GAO protests sustained or dismissed that are then taken to the Court of Federal Claims and how often is GAO overturned
- Evaluation of perception, behavior and attitude towards the protest system of major parties involved in the protest process
- Define time and actions associated with preventing or avoiding a protest
- Evaluate the time and actions associated with preventing or avoiding a protest compared with the time spent for the contract to be awarded and begun
- Evaluate how often a stay of award is waived

³¹Turner, Stuart W., R. David Pore, and Sonia Tabriz. "House Bid Protest Reform Vs. Senate Bid Protest Reform." *Law360*. Portfolio Media Inc., 31 May 2016. For more information, <http://www.law360.com/aerospace/articles/802180/house-bid-protest-reform-vs-senate-bid-protest-reform>

³² Lone Star Analysis, *Summary of Protest Research, Modeling & Simulations*, January 13, 2015. For information on Lone Star, see <http://www.lone-star.com/>.

- Determine if prime contractors felt they understood the requirements being asked by the contract and what areas of the acquisition process lead to parties involved to feel they did not understand fully the requirements of the contract thus leading to a protest

Potential Solutions

Although we are missing the vital information needed to effectively pursue any of the following solutions, it is important to be aware of the possible solutions we are currently looking towards. If we are conscious of some of the more prominent solutions available to us then we can better understand why we need to change where we are looking for reform efforts in the protest process.

Filing Fee

The issuance of a filing fee is becoming more of a reality through the recently proposed changes of the Federal Register from GAO³³. Their new Electronic Protest Docketing System (EPDS) is a necessary step that needed to be taken to improve the administrative side of a protest³⁴. This will help to organize, streamline and acquire data on protests for current and future use and provide easier access to data for evaluation. The proposed filing fee is a modest amount of \$350³⁵. This amount is still lower than the filing fee for the Court of Federal Claims. Primarily the purpose of this fee is to provide funding for the EPDS and allow for continual improvements to be made in the system.

Where this filing fee becomes a larger reform effort is when we tack a larger fee onto the proposed filing amount. Lone Star Analysis made comments on the proposed rule changes and suggested weighting a larger portion of the fee to the prime contractors to ease the burden of a small business³⁶. The weighting would still cap the amount for a prime contractor to \$1,000 and a small business to \$500³⁷. Alternatively it is possible to have funds generated from the higher weight of a larger company set aside to support a small business who cannot afford the filing fee. Even then there is the possibility to cap the small business rate at the proposed \$350 and simply apply a heavier weight onto the larger companies.

³³ Hallmark, Gregory R. "GAO Proposes Changes to Bid Protest Regulations, Including Imposing a Filing Fee." *JD Supra*. Holland and Knight LLP, 11 May 2016. For more information, <http://www.jdsupra.com/legalnews/gao-proposes-changes-to-bid-protest-24877/>

³⁴ Lone Star Analysis, *Comments on Proposed Rules*, April 15, 2016. Report sent to the GAO over proposed rule changes.

³⁵ Hallmark, Gregory R. "GAO Proposes Changes to Bid Protest Regulations, Including Imposing a Filing Fee." *JD Supra*. Holland and Knight LLP, 11 May 2016.

³⁶ Lone Star Analysis, *Comments on Proposed Rules*, April 15, 2016. Report sent to the GAO over proposed rule changes.

³⁷ *Ibid*

The reason for this is two-fold. Currently there is no fee associated with filing a protest. The fee in and of itself will already cause an innate second thought on filing the protest. This will help to curb if not completely eliminate frivolous protests from company employees. It would force the employee submitting a protest to charge an account within in the company and greater consideration to the decision.

Furthermore it allows the GAO to acquire needed funding to improve the protest process. The GAO will need to recover the cost spent on the EPDS and further capital to build in continual improvements. The extra funding generated from a larger filing fee will allow the GAO to free up more funds for other programs and internally improve their system to better support the protest efforts. Considerably if it is implemented alongside a loser pays system than the newly generated funds being available to support small businesses who are filing a protest under a new loser pays system.

Loser Pays

The “loser pays” approach is to remove frivolous protests and to ensure that when a protest occurs that the GAO and secondary party do not unnecessarily lose resources during the course of the protest³⁸. In this system the losing protestor would be bear the government and winning parties reasonable cost associated with the protest. This helps ensure that the party launching the protest holds a true belief that the government had made a mistake in the awarding of the contract³⁹.

This approach could create an overbearing burden on small businesses wanting to protest. In this case it is easy enough to reduce the burden of a small business to protest or even eliminate the small business from having to pay. If the filing fee approach is utilized in conjunction with a loser pays system the excess funds could be appropriated for the small business to cover their cost if they lose a protest. Another alternative for a small business is to have them pay only a percentage of the fee scaled to the company’s overall revenue.

Removal of Agency Protests

Removing the ability to pursue an Agency protest from the acquisition process could lead us to several benefits. Agency protests at the time do not have data to support or deny their success or failure. What we do know is that they are forms of protest that do not have the same restrictions and accountability that the GAO or Court of Federal Claims has.

A GAO protest is required to be decided on within 100 days, whereas there is no time limit or structure for an Agency protest. Rather than allow protests to be sustained for an unlimited

³⁸ Greenwalt, William C. "50 Legislative Ideas to Reform Defense Acquisition." Working Paper for the United States House of Representatives and Senate Committees on Armed Services. October 10, 2014. For full report, <http://www.aei.org/wp-content/uploads/2015/01/Greenwalt-AEI-Legislative-Compendium.pdf>

³⁹ Ibid

amount of time, we could require any contest of a contract award to be filed with the GAO to ensure a timely resolution to the protest. Filing with the GAO creates an easy source of data to evaluate if protests need to be reformed or if the system is functioning as intended.

Paradigm Shift: Winning the Protest vs. Preventing the Protest

This approach focuses on needed behavioral change within the organizations involved and the implementation of training and new requirements or standards in the acquisition process.

58% of the time we lose from a protest is not from the protest itself⁴⁰. It is from the time we spend attempting to avoid a protest. Constant revisions of Section L and M requirements, delays on the award date and changes in the schedule we are seeing a greater loss of time than from a protest itself⁴¹. If we understand that currently that the rational behavior is to always protest then it becomes irrational to attempt to prevent a protest⁴². The resources and time spent to avoid what is inevitable is a severe waste of diminishing resources. These resources wasted need to be shifted to resolving a protest versus trying to prevent one.

We need to identify key parts of the process where work is only being done to prevent a protest and either mitigate them or eliminate them completely. The mindset that we can prevent a protest is not logical for the environment we are in. Until we understand better the protest process and evaluate the areas necessary we cannot properly shift the mindset of all parties involved in the protest system.

⁴⁰ Lone Star Analysis, *Summary of Protest Research, Modeling & Simulations*, January 13, 2015. For information on Lone Star, see <http://www.lone-star.com/>. According to Lone Star, the survey consisted of 297 respondents with complete or nearly complete surveys (of 373 total).

⁴¹ Roerman, Steve. "Why DoD Contractors File Protests, Why Some Don't, and What the Government Can Do." *Defense AT&L* November December (2010): 9-12. Defense Acquisition University. For more information, <http://www.dau.mil/pubscats/atl%20docs/nov-dec10/roerman.pdf>

⁴² Gracie, Jaime. "Bring Accountability to Contract Protests." *FCW*. 1105 Media Inc, 25 Jan. 2011. <https://fcw.com/articles/2011/01/31/comment-jaime-gracia-bid-protests.aspx>