

CONTRACT MANAGEMENT www.ncmahq.org



Thriving
Through
Change
Together



NCMA
NATIONAL CONTRACT MANAGEMENT ASSOCIATION

CONNECTING TO
CREATE WHAT'S NEXT

COUNSEL COMMENTARY

Congress Focuses on Incumbent Protesters

DoD incumbent contractors will face potential financial penalties for filing protests that lack a reasonable legal or factual basis.

BY STEPHEN L. BACON



During the past several years, the U.S. Congress has considered potential legal mechanisms that would impose financial penalties on contractors that file unsuccessful bid protests.

In 2025, Congress required the Government Accountability Office (GAO) to propose a process that would require unsuccessful protesters to pay protest-related costs incurred by the Department of Defense (DoD) and the contract awardees' lost profits that would have been earned during the pendency of the protest.¹

After studying these issues, GAO concluded that the "fee-shifting" proposal from Congress was impractical because information regarding protest-related costs and contractor profit rates are not readily available or easily collected.

In addition, GAO did not endorse a fee-shifting process because of the

"chilling effect" it could have on protest participation, which GAO believes is vital to maintaining the integrity of the procurement system.

As an alternative to the broad fee-shifting provision proposed by Congress, GAO offered a more limited proposal for lawmakers to consider.

Specifically, GAO noted, "Congress might consider a focused statutory requirement for DoD to include a contract provision that would permit DoD to recoup – or otherwise withhold – profit or fee where the incumbent contractor files a protest that is subsequently dismissed as legally or factually insufficient or for otherwise being procedurally infirm."²

Congress ultimately adopted this requirement in Section 875 of the National Defense Authorization Act (NDAA) for Fiscal Year 2026 even though DoD

itself believed the costs associated with implementing a withholding and forfeiture process would outweigh any benefits.

This provision adds a new variable to the decision-making equation for incumbent contractors that are considering filing a bid protest at GAO.

Section 875: How It Works

Under the Competition in Contracting Act (CICA), a protest filed at GAO challenging the award of a contract triggers a "stay" of performance on that contract during the pendency of the protest.

To ensure that work can continue, agencies routinely award extensions or new "bridge" contracts to the incumbent contractor to perform while the protested contract is being challenged.

Section 875 seeks to discourage incumbent contractors who try to exploit

this dynamic by filing frivolous protests to extend their incumbency.

Section 875 directs DoD to amend the *Defense Federal Acquisition Regulation Supplement (DFARS)* to authorize contracting officers to withhold up to 5% of payments owed to incumbent contractors during the pendency of a GAO protest.³

If the incumbent contractor's protest is ultimately dismissed "based on a lack of any reasonable legal or factual basis," the incumbent contractor will forfeit the amounts withheld.⁴

The statute applies to the specific circumstance in which a DoD contractor performing an incumbent contract protests a follow-on contract for goods and services "that are the same or substantially similar to" those acquired under the incumbent contract.⁵

The withholding and forfeiture provisions apply to payments made "under a contract that was awarded or extended" because of a GAO protest that triggered a CICA "stay" of performance.⁶

The specific procedural mechanisms used to implement Section 875 will be detailed in a forthcoming *DFARS* rule expected by June 2026. This will likely include a new standard clause that gives contracting officers the contractual right to execute the payment withholding and forfeiture provisions of Section 875.

A New Calculus for DoD Incumbent Protesters

Historically, protesters have not had to worry about financial penalties for filing a bid protest. Once Section 875 is implemented, however, DoD incumbent contractors will face the threat of real monetary consequences if they choose to file a protest at GAO.

The withholding of 5% of payments, and the possibility that those funds could ultimately be forfeited, will have ramifications for incumbent contractors that are considering a protest.

As an initial matter, Section 875 is likely to create an incentive for incumbent contractors to file more protests at the U.S. Court of Federal Claims (COFC) instead of GAO. Section 875 only applies to protests filed at GAO.

Thus, an incumbent contractor can avoid a reduction in cash flow and a potential hit to their bottom line by filing their protest at the COFC.

This option will not be available in every case because the COFC generally lacks jurisdiction to resolve task and delivery

order protests. However, in cases where a protest may be filed at either GAO or the COFC, incumbent contractors that are subject to Section 875 may begin to view the COFC as a more favorable forum.

This could accelerate a recent trend of a greater share of protests being filed at the COFC.

Section 875 will also influence the preparation of protests that DoD incumbent contractors choose to file at GAO.

Contractors must always ensure that their protest grounds are well-supported both legally and factually, but Section 875 raises the stakes and requires incumbent contractors to exercise even greater diligence when preparing their protests to avoid a potential forfeiture of payments.



Secure Networks
safeguard acquisitions -
on-site or in the cloud

- Classified / unclassified source selection
- Custom built networks
- Information systems security
- Web-based applications
- Cloud migration
- Helpdesk support

BVTI
Best Value Technology Inc

Cleared IT and contracting professionals
send your resume to recruiting@bvti.com

703.229.4200
bd@bvti.com
www.bvti.com


U.S. Small Business Administration
SERVICE-DISABLED
VETERAN-OWNED
CERTIFIED

COUNSEL COMMENTARY CONT'D

When preparing a protest, contractors have access to relatively limited information about the agency’s evaluation and source selection decision.

As a result, contractors are often forced to make inferences based on incomplete information to develop their protest grounds. If GAO considers an inference too speculative or unsupported, the protest may be dismissed for failing to state legally or factually sufficient grounds.

In practice, there can be a fine line between reasonable inference and speculative conjecture. In these cases, the threat of financial penalties under Section 875 may cause more protesters to err on the side of not asserting grounds that could be dismissed as speculative.

A more cautious approach in this regard can have a substantial impact on protest litigation and outcomes in some circumstances.

For example, at GAO, protesters are only entitled to agency documents related to the grounds alleged in the protest.

This means that if the protester challenges an agency’s evaluation under Factor 1 but not Factors 2 and 3 of the evaluation criteria, the agency will only be required to produce records related to Factor 1, and the protester’s counsel will have very little insight into how the agency evaluated Factors 2 and 3.

Because of this dynamic, protesters who assert grounds covering more of the solicitation’s evaluation factors

are generally in a better position to find errors in the source selection process. Accordingly, DoD incumbent protesters could have a more limited record at GAO if Section 875 causes them to narrow the scope of their protests.

Open Implementation Questions

Although Section 875 is relatively short and straightforward, there are some issues that will need to be clarified through the DoD rulemaking process.

One threshold question is how the DFARS rule will define which protest grounds lack a “reasonable legal or factual basis” to trigger the forfeiture penalty.

GAO dismisses protest grounds for a variety of reasons under its procedural rules. Presumably, the forfeiture penalty will be triggered if a ground is dismissed as “legally or factually insufficient” because the protester fails to adequately support their allegations with legal authority or factual evidence.⁷

But GAO also dismisses grounds that are untimely, outside the jurisdiction of GAO or otherwise not appropriate for GAO consideration under 4 C.F.R. § 21.5. It remains to be seen whether the forfeiture penalty will apply only to grounds dismissed as “legally or factually insufficient,” or whether it will also encompass grounds that are untimely or procedurally defective.

The statute refers to protests dismissed “based on a lack of any reasonable legal or factual basis,” which appears to suggest a focus on the substance of the protest allegations and evidentiary support rather than procedural defects.

But GAO’s report to Congress, which ultimately led to the passage of Section 875, proposed a forfeiture provision that would



BUILD A STRONG FOUNDATION FOR YOUR TEAM

The Commercial & Contract Management Associate Program, developed by the Commerce & Contract Management Institute and backed by WorldCC and NCMA, helps teams align and perform.

Two Ways to Participate:

- The Program: Only 16 hours of learning + CPE/CLP points
- The Certification: Completion of the Program + exam to earn the CCM Associate Certification

Benefits:

- Align procurement, sales, finance & legal
- Reduce inefficiencies
- Build trust with the Contract Management Standard™
- Show global readiness



Consistent, informed decisions start with shared standards.

apply “where an incumbent contractor files a protest that is subsequently dismissed as legally or factually insufficient or for otherwise being procedurally infirm.”⁸

The DFARS rule will need to clarify whether procedural dismissals will cause forfeiture under Section 875.

There is also a question regarding how the forfeiture penalty will apply to protests that include multiple grounds. Bid protests routinely assert several grounds challenging different aspects of the agency’s evaluation.

It is common for GAO to sustain a protest on some grounds while denying or dismissing other grounds.

The statute does not specifically address the scenario in which a protest includes a mix of legally cognizable or meritorious protest grounds and other grounds that lack a reasonable legal or factual basis.

If one ground is dismissed for lack of a reasonable legal or factual basis, but other grounds are denied on the merits or even sustained, does the forfeiture penalty apply?

This question should be answered in the rulemaking, and it could have a substantial impact on how often the forfeiture provision is triggered in practice.

Conclusion

Section 875 is the first law that targets frivolous protesters. By imposing financial penalties on DoD incumbent contractors, Congress has added a new dimension to the protest decision-making calculus.

The forfeiture provisions will likely cause incumbent contractors to exercise greater caution when deciding whether to challenge a follow-on contract award. Some may choose to file at the COFC to

avoid the withholding and forfeiture regime entirely. Others may narrow the scope of their protests to avoid asserting grounds with uncertain legal or factual support.

The ultimate impact of Section 875 may depend on how DoD resolves open implementation questions, including, for example, its application to multi-ground protests.

Contractors should monitor these developments closely and, once Section 875 is implemented, exercise caution before filing any protest that could subject them to the withholding and forfeiture provisions. **CM**

Stephen L. Bacon is a shareholder in the Washington, D.C. office of the law firm Rogers Joseph O’Donnell, where he represents government contractors in bid protests, claims, terminations, investigations, and suspension and debarment proceedings. He frequently litigates cases at the U.S.

Court of Federal Claims, the Government Accountability Office, the Boards of Contract Appeals, and the Small Business Administration’s Office of Hearings and Appeals. He also provides advice and counseling to clients on a broad range of contractual and regulatory compliance issues that confront government contractors.

The views expressed in this article are those of the author and do not necessarily reflect the views of Rogers Joseph O’Donnell or its clients. This article is for general information purposes and is not intended to be and should not be construed as legal advice.

ENDNOTES

- 1 Pub. L. No. 118-159, § 885(a)(3).
- 2 See Government Accountability Office Report No. B-423717 (Jul. 14, 2025), available at: <https://www.gao.gov/assets/880/879950.pdf>.
- 3 Pub. L. No. 119-60 (“FY2026 NDAA”), § 875(a)(1).
- 4 Id. § 875(a)(2).
- 5 Id. § 875(b)(2).
- 6 Id. § 875(b)(5).
- 7 See 4 C.F.R. § 21.5(f).
- 8 GAO Report B-423717 at 2.



 **World Congress**
NCMA

July 26-29, 2026 | Orlando, FL

Swan and Dolphin Hotel
1200 Epcot Resorts Blvd.

REGISTRATION NOW OPEN!

- Upskill with the latest acquisition strategies and tools
- Learn best practices from industry and government leaders
- Build connections to accelerate professional growth
- Over 60 breakout and learning sessions to choose from

