SEC. ___. TIMELINESS RULES FOR FILING BID PROTESTS AT THE UNITED STATES COURT OF FEDERAL CLAIMS.

(a) JURISDICTION.—Paragraph (1) of section 1491(b) of title 28, United States Code, is amended—

(1) in the first sentence, by striking "Both the" and all that follows through "shall have" and inserting "The United States Court of Federal Claims shall have"; and

(2) in the second sentence—

(A) by striking "Both the" and all that follows through "shall have" and inserting "The United States Court of Federal Claims shall have"; and

(B) by striking "is awarded." and inserting "is awarded, but such jurisdiction is subject to time limits as follows:

"(A) A protest based upon alleged improprieties in a solicitation that are apparent before bid opening or the time set for receipt of initial proposals shall be filed before bid opening or the time set for receipt of initial proposals. In the case of a procurement where proposals are requested, alleged improprieties that do not exist in the initial solicitation but that are subsequently incorporated into the solicitation shall be protested not later than the next closing time for receipt of proposals following the incorporation. A protest that meets these time limitations that was previously filed with the Comptroller General may not be reviewed.

"(B) A protest other than one covered by subparagraph (A) shall be filed not later than 10 days after the basis of the protest is known or should have been known (whichever is earlier), with the exception of a protest challenging a procurement conducted on the basis of competitive proposals under which a debriefing is requested

and, when requested, is required. In such a case, with respect to any protest the basis of which is known or should have been known either before or as a result of the debriefing, the initial protest shall not be filed before the debriefing date offered to the protester, but shall be filed not later than 10 days after the date on which the debriefing is held.

"(C) If a timely agency-level protest was previously filed, any subsequent protest to the United States Court of Federal Claims that is filed within 10 days of actual or constructive knowledge of initial adverse agency action shall be considered, if the agency-level protest was filed in accordance with subparagraphs (A) and (B), unless the contracting agency imposes a more stringent time for filing the protest, in which case the agency's time for filing shall control. In a case where an alleged impropriety in a solicitation is timely protested to a contracting agency, any subsequent protest to the United States Court of Federal Claims shall be considered timely if filed within the 10-day period provided by this subparagraph, even if filed after bid opening or the closing time for receipt of proposals.

"(D) A protest untimely on its face shall be dismissed. A protester shall include in its protest all information establishing the timeliness of the protest; a protester shall not be permitted to introduce for the first time in a motion for reconsideration information necessary to establish that the protest was timely. Under no circumstances may the United States Court of Federal Claims consider a protest that is untimely because it was first filed with the Government Accountability Office.".

(b) AVAILABLE RELIEF.—Paragraph (2) of such section is amended by inserting "monetary relief shall not be available if injunctive relief is or has been granted, and" after "except that".

(c) AGENCY DECISIONS OVERRIDING STAY OF CONTRACT AWARD OR PERFORMANCE.—Such section is further amended—

(1) by redesignating paragraphs (5) and (6) as paragraphs (6) and (7), respectively; and

(2) by inserting after paragraph (4) the following new paragraph (5):

"(5) The United States Court of Federal Claims shall have jurisdiction to render judgment on an action by an interested party challenging an agency's decision to override a stay of contract award or contract performance that would otherwise be required by section 3553 of title 31.".

(d) CONFORMING AMENDMENTS.—

(1) IN GENERAL.—Section 3556 of title 31, United States Code, is amended—

(A) by inserting "instead of with the Comptroller General" before the period at the end of the first sentence; and

(B) by striking the second sentence.

(2) SECTION HEADING AMENDMENT.—The heading of such section is amended by striking "**; matter included in agency record".**

(e) EFFECTIVE DATE.—The amendments made by this section shall apply to any cause of action filed 180 days or more after the date of the enactment of this Act.

Section-by-Section Analysis

This proposal would amend section 1491 of title 28, United States Code, to impose timeliness rules at the U.S. Court of Federal Claims (COFC) that will mirror those for bid protests filed with the Government Accountability Office (GAO), thereby reducing the time to decide bid protests by avoiding unnecessarily repetitive protests.

Section 3552 of title 31, United States Code, provides statutory authority for bid protests to be decided by the Government Accountability Office (GAO). P. L. 98–369, div. B, title VII, §2741(a), July 18, 1984, 98 Stat. 1199. Section 1491(b)(1) of title 28, United States Code, provided temporary concurrent federal jurisdiction between the COFC and the United States District Courts to hear pre-award or post-award bid protest matters. Section 12(d) of the

Administrative Disputes Resolution Act of 1996 (P. L. 104-320; 110 Stat. 3870; 5 U.S.C. 571 note) (ADRA), contained a sunset provision that terminated District Court jurisdiction to hear such bid protests under section 1491 as of January 1, 2001, leaving all ADRA bid protest cases under the jurisdiction of the COFC. The jurisdiction of the COFC and the GAO are concurrent. As a result, a protestor may file a protest with the GAO and, if the protest is denied, file suit at the COFC.

The Federal bid protest system is fashioned around the two goals of ensuring accountability through visibility in the procurement process while expeditiously resolving bid protests. Expeditious resolution of protests is an express requirement of COFC and GAO jurisdiction. Section 3554(a)(1) of title 31, United States Code, states, "the Comptroller General shall provide for the inexpensive and expeditious resolution of protests" and section 1491(b)(3) of title 28, United States Code, states that "[i]n exercising jurisdiction . . . [the COFC] shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action."

The expeditious resolution of protests is greatly hindered by the ability of a protestor to seek redress at GAO and, faced with a negative outcome, then seek another review of the agency's actions by filing a protest with the COFC. In Axiom Resource Management, Inc. v. United States, 80 Fed. Cl. 530, 539 (2008), rev 564 F.3d 1374 (Fed. Cir. 2009), Axiom challenged an award to Lockheed Martin Federal Healthcare, Inc. ("Lockheed") to perform program management services for the Tricare Management Agency. Axiom alleged the award to Lockheed was improper because Lockheed suffered from a variety of organizational conflicts of interest ("OCIs").

These same allegations had previously been challenged at the GAO. Id. at 1377. In response to two GAO protests, the agency took corrective action to analyze the OCI allegations raised by Axiom. After performing a detailed analysis, the Contracting Officer concluded the alleged OCIs could be avoided or mitigated. The award to Lockheed stood, and Axiom filed a third GAO protest which was denied. Axiom subsequently filed suit at the COFC where, ultimately, the award to Lockheed was set aside. Axiom Res. Mgmt., Inc. v. United States, 80 Fed. Cl. 530, 539 (2008). The COFC decision was ultimately reversed by the Federal Circuit. Axiom Resource Management, Inc v. United States, 564 F.3d 1374 (Fed. Cir. 2009). This protest litigation took nearly two years. A similar procedural history occurred in MASAI Technologies Corp. v. United States, 79 Fed. Cl. 433 (2007). In MASAI, the allegations considered by the COFC had been raised previously at the GAO resulting in corrective action by the agency two times. Id. at 436-40. Ultimately, the Contracting Officer determined the initial award was correct and GAO denied MASAI's protest. In MASAI, however, the COFC agreed with GAO's denial. The MASAI litigation took approximately fourteen months. See also Labatt Food Serv., Inc. v. United States, 577 F.3d 1375 (Fed. Cir. 2009) (one year to resolve) and Ala. Aircraft Indus., Inc.--Birmingham v. United States, 586 F.3d 1372 (Fed. Cir. 2009) (over one year to resolve). At the conclusion of the litigation, the parties in each of these cases found themselves in the same position they held when the GAO issued its decision on the merits of the protests; the agency's actions were ultimately upheld.

By establishment of parallel timelines at GAO and COFC, the statutory requirement for expeditious resolution of protests is maintained, without sacrificing accountability. Regarding pre-award protests, GAO has clearly established timeliness rules.

> Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals. In procurements where proposals are requested, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested not later than the next closing time for receipt of proposals following the incorporation.
>
> 4 C.F.R. § 21.2(a)(1).

Neither the Tucker Act nor the ADRA established a unique statute of limitations for COFC bid protests. The COFC can entertain protests "without regard to whether suit is instituted before or after the contract is awarded." 28 U.S.C. 1491(b)(1) (2006). Under section 2501 of title 28, United States Code, the statute of limitations at the COFC is six years. Several COFC decisions have considered whether or not protests based upon alleged improprieties in a solicitation are barred when filed after the solicitation closing date, with varying outcomes. See TransAtlantic Lines LLC v. United States, 68 Fed. Cl. 48, 52-53 (2005) (GAO rule that limits its advisory role cannot limit the exercise of jurisdiction of the COFC); Software Testing Solutions, Inc. v. United States, 58 Fed. Cl. 533, 535 (2003) (delay in bringing a protest may be considered in the analysis of whether injunctive relief is warranted but not basis for rejecting request); ABF Freight Sys., Inc. v. United States, 55 Fed. Cl. 392, 399-400 (2003) (quoting N.C. Div. of Servs. for the Blind v. United States, 53 Fed. Cl. 147, 165 (2002)) (GAO timeliness rule applied); Aerolease Long Beach v. United States, 31 Fed. Cl. 342, 358 (1994) (citing Logicon, Inc. v. United States, 22 Cl. Ct. 776, 789 (1991) (declining to accept the GAO bid protest timeliness regulations as always controlling).

In 2007, however, the Court of Appeals for the Federal Circuit resolved this issue when it issued its decision in Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308 (Fed. Cir. 2007). In that decision the Federal Circuit held that ". . . a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims." Id. at 1313. Accordingly, with respect to protests based upon solicitation improprieties, the Federal Circuit has, in essence, adopted the GAO bid protest timeliness regulation.

The same cannot be said for post-award bid protests. As discussed, the COFC will consider protests filed after consideration by GAO and months after contract award. In PlanetSpace Inc. v. United States, 92 Fed. Cl. 520 (2010), the United States sought to bar the protestor's claim under the doctrine of laches since the protestor filed at the COFC three months after losing its GAO protest and seven months after contract award. The COFC held,

Even if the court . . . were to conclude that there was no reason for the delay in filing, defendant's laches argument would still fail. "When a limitation on the period for bringing suit has

been set by statute, laches will generally not be invoked to shorten the statutory period." Adv. Cardiovascular Sys., Inc. v. Scimed Life Sys., Inc., 988 F.2d 1157, 1161 (Fed. Cir. 1993) (citing Cornetta v. United States, 851 F.2d 1372, 1377-78 (Fed. Cir. 1988) (en banc)). This bid protest is properly before the court pursuant to 28 U.S.C. § 1491(b) and thus is governed by the Tucker Act's six-year statute of limitations set forth at 28 U.S.C. § 2501. Absent "extraordinary circumstances," this court will not invoke laches to bar an otherwise timely protest. CW Gov't Travel, Inc., 61 Fed. Cl. 559, 569 (2004) ("Had Congress wanted to set a statute of limitations on bid protest actions, it would have done so. Because Congress did not so limit the jurisdiction of this court to hear such actions, we would be reluctant to invoke laches except under extraordinary circumstances that are not present in this case."). To be sure, defendant has not cited, and the court is not aware of, a single instance in which the court invoked laches to bar a bid protest that was filed a mere three months after a failed GAO protest or a mere seven months after contract award. Id. at 531. The Court noted that should the protestor succeed on the merits of the case, the requested injunctive relief is not automatic. Thus, similar to the pre-award decision in Software Testing Solutions, supra, the delay in filing is properly considered in determining whether injunctive relief is appropriate, but does not preclude review of the underlying protest.

Despite the COFC's willingness to consider a delay in filing in fashioning its remedy, the disruption to the procurement process and associated costs and uncertainties stemming with serial protests and the lack of a reasonable statute of limitations for COFC protests outweigh any perceived benefit. For these reasons, 28 U.S.C. 1491 should be amended to impose jurisdictional limitations that parallel those imposed at GAO.

Specifically, subsection (a) of the proposal strikes any reference to the United States district courts and makes clear that only the COFC has jurisdiction to provide judicial review of bid protests. By eliminating references to the district courts, section 1491(b) is reconciled with the sunset provisions of the ADRA that ended district court bid protest jurisdiction in 2001, and with section 861 of the FY 2012 National Defense Authorization Act (P. L. 112-81) that ended district court jurisdiction over bid protests pertaining to the award of maritime contracts.

Subparagraph (a)(2)(B) of the proposal lays out the timeliness rules for bid protests by adding four new subparagraphs to section 1491(b)(1):

It would add a new subparagraph (A) which will impose time limits for bringing a pre-award bid protest before the COFC. A pre-award protest is a challenge to a solicitation before award is made. This provision requires that such protests be brought before the receipt of proposals. If an objectionable provision is introduced by an amendment to the original solicitation, any protest must be brought before the revised date for submittal of proposals as forth set in the amendment to the solicitation. This provision makes these time limits jurisdictional. The Federal Circuit's decision in Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308 (Fed. Cir. 2007) began the process of aligning COFC practice with that of the GAO in the area of pre-award timeliness. There, the Federal Circuit effectively applied the pre-award timeliness rules of the GAO to bid protests filed at the COFC by ruling that a party that failed to challenge the terms of a solicitation prior to the close of the bidding process waived its ability to do so after award. Subsequent COFC decisions emphasized that this time bar is based upon the doctrine of waiver, and is not jurisdictional. In at least one decision the COFC therefore considered untimely pre-

award protest allegations in determining whether a protester possessed sufficient standing to bring a COFC protest. The above language fully aligns GAO practice with COFC practice by mirroring precisely the GAO timeliness rules at 4 C.F.R. § 21.2(a)(2), and making the bar to untimely COFC pre-award protests jurisdictional.

It would add a new subparagraph (B) to impose a time limit for bringing a post-award protest before the COFC, which is almost invariably a challenge to a contract award decision. This language is closely modeled on the GAO timeliness rules at 4 C.F.R. § 21.2(a)(2). This section imposes a 10-day time limit on bringing bid protests from when the basis of the protest was known or should have been known. It tolls that 10-day period for required debriefings in order to encourage debriefings, which are designed to avoid protests by providing information to disappointed offerors.

It would add a new subparagraph (C) to section 1491(b)(1) to ensure COFC bid protests in much the same manner as GAO. Specifically, the Federal Acquisition Regulations encourage the resolution of protests at the agency level, if possible. The GAO rules further this policy because the GAO will consider a bid protest that is filed outside the 10-day period if the protester first brings a timely protest to the agency (referred to as an "agency-level protest"). See 4 C.F.R. § 21.2(a)(3). The new subparagraph (C) will apply the same concept to COFC bid protests. Also, COFC case law has held that an offeror that fails to submit a proposal before the date set for receipt of proposals is not an interested party to protest. This provision allows a protester to pursue a pre-award, agency-level protest and still bring its protest to the COFC even if it does not submit a proposal and even if the date set for receipt of proposals elapses.

Finally it would add a new subparagraph (D) to section 1491(b)(1) that would align COFC practice with the GAO requirement that protests be timely on their face, and if not, they are dismissed. It also reconciles COFC practice with the GAO requirement at 4 C.F.R. § 21.1(c)(4) that a protester set forth a detailed legal and factual basis of protest. This prevents protesters from presenting a protest in piecemeal fashion and unduly delaying an agency procurement based upon mere speculation about agency misconduct or error. Finally it makes clear that the COFC shall not consider a protest that is untimely because it was first filed at the GAO, thus underlining the choice of forum requirement which is the object of the proposal.

Subsection (b) of the proposal ensures that a protestor may not receive both injunctive relief and monetary relief as they can under the current section 1491(b). As the Department of Justice has noted, a protester that receives injunctive relief is made whole relative to its competitors. If it receives monetary relief in addition, it receives a windfall. Therefore, a protester should be entitled to injunctive relief or monetary relief, but not both.

Subsection (c) of the proposal clarifies that none of the proposed changes to 1491(b) are intended to infringe on the COFC's jurisdiction to review agency overrides of CICA stays, and to enjoin such overrides when appropriate.

Subsection (d) provides a delayed effective date for this provision. A 180-day effective date is appropriate due to the impact on the existing rights of interested parties resulting from shortening the statute of limitations from six years to ten days. It could be prejudicial to

interested parties seeking to take full advantage of their current statutory rights by providing for an effective date which cuts off those rights with a shorter notice period. Currently, interested parties have the ability to file a protest with GAO with the expectation that they can also file a protest with the COFC if unsuccessful at GAO. If a protester files its protest at the ten day limit, and GAO uses the entire 100-day statutory period to issue its protest decision, the GAO process will have taken nearly four months. An effective date of 180 days provides interested parties with a reasonable time to file with the COFC prior to the statutory change taking effect.

Additionally, this proposal amends section 3556 of title 31, United States Code, to conform with the proposed change.

By harmonizing the timeliness rules between the COFC and the GAO, a protester would be forced to make a choice of forum in deciding where to bring its protest. The improvements to the protest system would be as follows: (1) the amount of time that could be consumed by protests would be reduced, (2) scarce agency procurement resources would be conserved by ensuring that two separate trial-level forums do not adjudicate the same bid protest, and (3) protesters would be assured of accountability and transparency no matter which forum they elected. This reform would largely eliminate an unintended "forum shopping" practice that has arisen under the existing bid protest system, and would materially contribute to the expeditious yet fair resolution of bid protests.

Budget Implications: The proposal has no budgetary impact. Modifying the filing deadlines of the Court of Federal Claims to parallel those of the Government Accountability Office does not change costs. Regardless of where or when a bid protest is filed, it must be defended.

Changes to Existing Law: This proposal would amend section 1491(b) of title 28, United States Code, and section 3556 of title 31, United States Code, as follows:

TITLE 28, UNITED STATES CODE

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§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and

correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 7104(b)(1) of title 41, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act.

(b)(1) ~~Both the Unites States Court of Federal Claims and the district courts of the United States~~ The United States Court of Federal Claims shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. ~~Both the United States Court of Federal Claims and the district courts of the United States~~ The United States Court of Federal Claims shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded, but such jurisdiction is subject to the time limits as follows.

(A) A protest based upon alleged improprieties in a solicitation that are apparent before bid opening or the time set for receipt of initial proposals shall be filed before bid opening or the time set for receipt of initial proposals. In the case of a procurement where proposals are requested, alleged improprieties that do not exist in the initial solicitation but that are subsequently incorporated into the solicitation shall be protested not later than the next closing time for receipt of proposals following the incorporation. A protest that meets these time limitations that was previously filed with the Comptroller General may not be reviewed.

(B) A protest other than one covered by subparagraph (A) shall be filed not later than 10 days after the basis of the protest is known or should have been known (whichever is earlier), with the exception of a protest challenging a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required. In such a case, with respect to any protest the basis of which is known or should have been known either before or as a result of the debriefing, the initial protest shall not be filed before the debriefing date offered to the protester, but shall be filed not later than 10 days after the date on which the debriefing is held.

(C) If a timely agency-level protest was previously filed, any subsequent protest to the United States Court of Federal Claims that is filed within 10 days of actual or constructive knowledge of initial adverse agency action shall be considered, if the agency-level protest was filed in accordance with subparagraphs (A) and (B), unless the contracting agency imposes a more stringent time for filing the protest, in which case the agency's time for filing shall control. In a case where an alleged impropriety in a solicitation is timely protested to a contracting agency, any subsequent protest to the United States Court of Federal Claims shall be considered timely if filed within the 10-day period provided by this subparagraph, even if filed after bid opening or the closing time for receipt of proposals.

(D) A protest untimely on its face shall be dismissed. A protester shall include in its protest all information establishing the timeliness of the protest; a protester shall not be permitted to introduce for the first time in a motion for reconsideration information necessary to establish that the protest was timely. Under no circumstances may the United States Court of Federal Claims consider a protest that is untimely because it was first filed with the Government Accountability Office.

(2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief, except that monetary relief shall not be available if injunctive relief is or has been granted, and any monetary relief shall be limited to bid preparation and proposal costs.

(3) In 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.

(4) In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5.

(5) The United States Court of Federal Claims shall have jurisdiction to render judgment on an action by an interested party challenging an agency's decision to override a stay of contract award or contract performance that would otherwise be required by section 3553 of title 31.

~~(5)~~ (6) If an interested party who is a member of the private sector commences an action described in paragraph (1) with respect to a public-private competition conducted under Office of Management and Budget Circular A–76 regarding the performance of an activity or function of a Federal agency, or a decision to convert a function performed by Federal employees to private sector performance without a competition under Office of Management and Budget Circular A–76, then an interested party described in section 3551(2)(B) of title 31 shall be entitled to intervene in that action.

~~(6)~~ (7) Jurisdiction over any action described in paragraph (1) arising out of a maritime contract, or a solicitation for a proposed maritime contract, shall be governed by this section and shall not be subject to the jurisdiction of the district courts of the United States under the Suits in Admiralty Act (chapter 309 of title 46) or the Public Vessels Act (chapter 311 of title 46).

(c) Nothing herein shall be construed to give the United States Court of Federal Claims jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on conduct of, the Tennessee Valley Authority, or to amend or modify the provisions of the Tennessee Valley Authority Act of 1933 with respect to actions by or against the Authority.

TITLE 31, UNITED STATES CODE

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§3556. Nonexclusivity of remedies~~; matters included in agency record~~

This subchapter does not give the Comptroller General exclusive jurisdiction over protests, and nothing contained in this subchapter shall affect the right of any interested party to file a

protest with the contracting agency or to file an action in the United States Court of Federal Claims instead of with the Comptroller General. ~~In any such action based on a procurement or proposed procurement with respect to which a protest has been filed under this subchapter, the reports required by sections 3553(b)(2) and 3554(e)(1) of this title with respect to such procurement or proposed procurement and any decision or recommendation of the Comptroller General under this subchapter with respect to such procurement or proposed procurement shall be considered to be part of the agency record subject to review.~~