SEC. 817. 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 the 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 request 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 striking "except that" and inserting "except injunctive relief shall not be combined with monetary relief, and".

(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) 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.

Under the existing statutory arrangement, a protester may file a GAO protest, litigate it fully, and if disappointed, commence the entire process anew before the COFC. There, because of different procedural rules and a different standard of review, a protester may obtain the success that eluded it before the GAO. While this process favors few fortunate protesters, it is increasingly the case that COFC decisions are issued that are at odds with longstanding GAO precedent. This plays havoc with the predictability of the procurement system because GAO decisions have precedential value, while the decision of any individual COFC does not. Also, this chaotic process greatly lengthens the time required to resolve a protest, which translates into increased costs for the procuring agency.

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 Administrative Dispute Resolution Act (P. L. 104-320, section 12(a)) 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.

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.

Budgetary Implications: The proposal, if enacted, would bar serial protests of the same procurement by the same protester. It requires no budget line to implement because it will actually eliminate tasks that are being performed today. As such, the proposal would generate cost savings as the direct result of avoiding unnecessary litigation that currently forces the Department to keep high-priced contracts in place, and to pay delay costs to contractors whose performance is delayed because a competitor engages in serial protests.

The Army estimates that cost savings for the Army to be about $2 million per year. This figure is based on an analysis of actual costs incurred in calendar years 2008 -2011 as the result of serial protests that would have been avoided if this proposed legislative change was in place during those years. This figure was determined based on input from the impacted contracting offices as to the costs incurred as the result of keeping a higher-priced contractor in place during a serial protest before the COFC, and claims for delay submitted by awardees that were ordered to stop performance until resolution of a COFC protest on the heels of a GAO protest. (The total cost reported for serial protests during this three year period was $5,793,818, which rounds up to $6 million, or $2 million per year.)

Assuming that the Air Force and Navy each handle a comparable protest workload as the Army, with comparable experience with serial protests before the COFC, each of these Services would realize savings of approximately $2 million per year if these protest reforms were implemented. The savings of all the Services would translate into overall Department-wide savings in the range of $6 million per year. If the cost incurred by DLA as a result of avoidable COFC protests is also considered, the total savings per year would likely be even higher.

In addition to these tangible cost savings, there are nonfinancial benefits as well. Specifically, operational efficiencies will be realized because procurement personnel (contracting officers and specialists, attorneys, and technical experts) will not be required to devote time and effort to defending the same protest twice in succession. These valuable personnel assets will be freed to concentrate instead on awarding other contracts or more effectively administering contracts already awarded. These savings are difficult to objectively calculate, yet they exist.

Changes to Existing Law: This proposal will make the following changes to section 1491 of title 28, United States Code:

§ 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 request 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~~ except injunctive relief shall not be combined with monetary relief, 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.