

Once Bitten, Twice Shy: How the Department of Defense Should Finally End its Relationship with the Court of Federal Claims Second Bite of the Apple Bid Protests

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Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time.¹

I. Introduction

As of August 19, 2014, nearly 9,900 U.S. service members and Department of Defense (DoD) civilians were frustratingly waiting to see their privately-owned vehicles again after returning from or going to overseas assignments.² International Auto Logistics LLC (IAL), the new DoD contractor responsible for the processing, storage, and worldwide shipping of their personally-owned vehicles (POVs), had struggled to meet the demand of the hectic DoD summer permanent change of station season. International Auto Logistics blamed delays on having to begin performance of the contract on May 1, 2014, just before the greatest volume of yearly DoD moves would occur.³ The DoD contracting agency responsible for the award had scheduled the performance to begin on December 1, 2013.⁴ However, two successive bid protests from the incumbent contractor to two separate bid protest forums led to a five-month delay.⁵ After having failed to convince the Government Accountability Office (GAO) that the DoD contract award to IAL was unreasonable, the incumbent contractor, American Auto Logistics, LP, protested anew to the Court of Federal Claims (COFC) on February 5, 2014, ultimately delaying IAL's performance for another three months.⁶

The ability of would-be federal contractors to protest successively at two separate forums as described in the above

scenario has received attention in the DoD contracting community over the past several years. This attention culminated with DoD attempting in both its 2013 and 2014 National Defense Authorization Act (NDAA) legislative proposals to persuade Congress to end these repetitive protests.⁷ Although the DoD proposals provided solid data and arguments to support the change, they ultimately failed to gain traction in Congress.

However, a few key changes to DoD's proposal may provide for a more supportable piece of legislation. This paper will begin by providing a brief historical overview of the current bid protest fora and their development. Next, it will discuss the arguments for and against the DoD's proposed legislation to end second bite protests at the COFC. Finally, it will provide analysis and support for the proposition that the DoD could gain wider support for future legislative proposals if it makes the following changes: (1) increase the COFC filing deadline from ten days to thirty days; (2) strengthen the GAO reconsideration review process by requiring a separate, higher echelon GAO attorney conduct the reconsideration review; and (3) allow for an exception to the COFC filing deadline in situations where the agency decides not to follow a GAO recommendation.

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¹ *Abraham Lincoln*, 2 COLLECTED WORKS THE ABRAHAM LINCOLN ASSOCIATION, SPRINGFIELD, ILLINOIS 81 (Roy P. Basler ed., 1953) [hereinafter *Collected Works: Lincoln*].

² Adam Mathis, *Servicemembers File Class-Action Lawsuit Against Car Shipping Contractor*, STARS & STRIPES (Aug. 22, 2014), <http://www.stripes.com/news/servicemembers-file-class-action-lawsuit-against-car-shipping-contractor-1.299486>. The author obtained the 9,900 figure by multiplying the total number of vehicles in transit as of August 19, 2014 (14,154) by the estimated seventy percent of vehicles missing the required delivery date. *Id.*

³ Karen Jowers, *Troops Complain About New POV Shipping Company*, NAVY TIMES (Jul. 17, 2014), <http://www.navytimes.com/article/20140717/BENEFITS07/307170076/Troops-complain-about-new-POV-shipping-company>.

⁴ *Am. Auto Logistics, LP v. United States*, 117 Fed. Cl. 137, 147 (2014). The period of performance under the contract would begin December 1, 2013. *Id.* at n.5.

⁵ *Id.* at 141, 171-72.

⁶ *Id.* United States Transportation Command (TRANSCOM), the Government agency awarding the contract, agreed to voluntarily stay performance of the contract so that "litigation could proceed." Accordingly, the COFC judge orally denied the protestor's motion for an injunction prohibiting performance. *Id.* at 141.

⁷ See U.S. Dep't of Def., Sixth Package of Legis. Proposals Sent to Cong. for Inclusion in the Nat'l Def. Auth. Act for Fiscal Year 2013, DOD.MIL (April 12, 2012), <http://www.dod.mil/dodge/olc/docs/25April2012Proposals.pdf> [hereinafter *DoD 2013 NDAA Proposal*]; See also U.S. Dep't of Def., Dep't of Def.'s Proposed Nat'l Def. Auth. Act for Fiscal Year 2014—Section-by-Section Analysis, DOD.MIL (April 26, 2013), <http://www.dod.gov/dodge/olc/docs/26April2013NDAASectionalAnalysis.pdf> [hereinafter *DoD 2014 NDAA Proposal*].

II. The Bid Protest Playing Field

As of January 1, 2001, a person desiring to protest the award of a government procurement has three choices of forum.⁸ First, the disappointed offeror may file a bid protest with the agency that awarded the contract.⁹ Second, the offeror may file a bid protest with the GAO.¹⁰ Lastly, the offeror may file a bid protest claim with the COFC.¹¹ Although it is typically beneficial to all parties involved to solve bid protests at the agency level, the focus of this paper is the issues caused by the availability of both the GAO and the COFC as successive bid protest forums. Accordingly, this section will include a discussion of only the GAO and COFC bid protest forums.¹²

A. GAO—The Quick, Informal Protest of Choice

Congress created the GAO in June 1921 by passing the “Budget and Accounting Act, 1921.”¹³ It created the GAO as an organization independent from the Executive departments and under the direction of the Comptroller General.¹⁴ The Comptroller General and the Deputy Comptroller General are both appointed by the President with and by the advice of the Senate for fifteen year terms.¹⁵ The GAO’s duties include the investigation of all matters involving the “receipt, disbursement, and use of public money.”¹⁶

The first recorded GAO bid protest decision occurred in 1925 when it declared Panama Canal construction officials had unlawfully modeled a solicitation’s specifications after

particular brand name components.¹⁷ The GAO would remain the sole bid protest forum until 1970, when the U.S. District Court of Appeals for the D.C. Circuit held that citizens may bring actions under the Administrative Procedure Act in U.S. district courts for agency decisions that are “arbitrary and capricious abuses of discretion.”¹⁸

The GAO obtained its formal, congressionally-designated ability to adjudicate bid protests in 1984 upon passage of the Competition in Contract Act (CICA).¹⁹ Congress, in passing CICA, expressed its intent that the Comptroller General “shall provide for the inexpensive and expeditious resolution of protests.”²⁰ In order to meet this intent, Congress included several provisions that would serve to shape the GAO bid protest procedure into the popular forum it is today.²¹

What is arguably the most appealing of these provisions to would-be government contractors, or “disappointed offerors,” is the automatic “CICA stay.”²² As long as the agency receives the protest within ten days of award or five days of a required debriefing, whichever is later, the agency must stay performance of the awarded contract.²³ An agency may override the stay if the Head Contracting Authority (HCA) determines in writing that it is “in the best interests of the United States” or that “urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting.”²⁴ However, any override decisions by the agency are immediately appealable to the COFC where they are subject to a strict review.²⁵

⁸ The U.S. District Courts’ jurisdiction to hear bid protests ended January 1, 2001. Pub. L. No. 104-320, 110 Stat. 3875 (Oct. 19, 1996). Congress ended the jurisdiction in order to provide for a more uniform bid protest law and eliminate “forum shopping” between the U.S. District Courts and the Court of Federal Claims (COFC). 142 CONG. REC. S6155 (statement of Sen. Cohen).

⁹ FAR 33.103 (2014).

¹⁰ 31 U.S.C. §§ 3551-3556 (2009).

¹¹ 28 U.S.C. § 1491(b) (2011).

¹² For a more thorough discussion of all three forums, one article to consider is Michael Schaengold, Michael Guiffre & Elizabeth Gill, *Choice of Forum for Bid Protests*, BRIEFING PAPERS, Oct. 2008, at 08-11.

¹³ Pub. L. No. 67-13, 42 Stat. 20 (June 10, 1921).

¹⁴ *Id.*

¹⁵ 31 U.S.C. § 703(a)-(b) (2014).

¹⁶ 31 U.S.C. § 712(1) (2014).

¹⁷ Daniel I. Gordon, *Bid Protests: The Costs Are Real, But The Benefits Outweigh Them*, 42 PUB. CONT. L.J. 489, 490 (2013).

¹⁸ *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 869 (D.C. Cir. 1970). While addressing the appellee (Government) argument that citizens should exhaust all administrative remedies, including the Government Accountability Office (GAO), before bringing action in district court, the D.C. Circuit court held that while the GAO is a “useful alternative procedure under certain circumstances, it is not a prerequisite to court review.” *Id.* at 876. The Administrative Dispute Regulation Act (ADRA)

of 1996 ended the district courts’ jurisdiction, effective January 1, 2001, thereby paving the way for the COFC to obtain sole jurisdiction for judicial, post-award bid protests. *See* Pub. L. No. 104-320, § 12(a), 110 Stat. 3870, 3874 (1996).

¹⁹ Pub. L. No. 98-369, 98 Stat. 1200 (July 18, 1984) (codified as amended at 31 U.S.C. § 3553(a) (2014)).

²⁰ 31 U.S.C. § 3554(a)(1) (2013).

²¹ MOSHE SCHWARTZ, KATE M. MANUEL, & LUCY P. MARTINEZ, CONG. RESEARCH SERV., R40227, GAO BID PROTESTS: TRENDS AND ANALYSIS 2 (2013).

²² 31 U.S.C. § 3553(d) (2014). Other important provisions arising from the Competition in Contracting Act (CICA) include its time limits on the GAO’s review period. The Comptroller General, in accordance with the mission of providing for an “inexpensive and expeditious resolution” of bid protests, must issue a final decision within 100 days of receiving a bid protest. 31 U.S.C. § 3554(a)(1) (2013). The Comptroller General must also offer a sixty-five-day “express option” for cases it determines suitable for expedited review. 31 U.S.C. § 3554(a)(2) (2013).

²³ 31 U.S.C. § 3553(d) (2014).

²⁴ *Id.* The U.S. Army override authority is the Deputy Assistant Secretary of the Army (Procurement) (DASA(P)) or the U.S. Army Materiel Command’s (AMC’s) Counsel in the case of an AMC override. AFAR 5133.104(b)(1)(B) (2014).

²⁵ *See, e.g., Beechcraft Def. Co., LLC v. United States*, 111 Fed. Cl. 24, 31 (2013) (explaining that in reviewing an override decision, COFC considers: “(1) ‘whether significant adverse consequences will necessarily occur if the stay is not overridden;’ (2) ‘whether reasonable alternatives to the override exist that would adequately address the circumstances presented;’ (3) ‘how

Preparing and filing GAO bid protests is also quicker and less arduous than what one would experience in dealing with a more formal adjudicative body, such as a judicial forum. A disappointed offeror need only submit a signed, written protest detailing, among other administrative items, the concerned contract number, factual and legal grounds for the protest, a request for relief by the Comptroller General, and the form of relief requested.²⁶ Attorney representation is not required to file with GAO.²⁷ If an attorney is used and the protest is sustained, GAO may recommend the agency pay attorney fees.²⁸

If GAO determines the agency's evaluation was not consistent with the evaluation criteria or applicable law and regulation, it will recommend the agency take one or more corrective actions to remedy the violation.²⁹ These corrective actions may include recompeting the protested award, issuing a new solicitation, terminating an awarded contract, or awarding a contract consistent with a particular statute or regulation.³⁰ Agencies may choose not to implement GAO recommendations on corrective action,³¹ although in such cases the agency procurement activity must provide notice to the Comptroller General within sixty-five days of the GAO recommendation.³²

B. COFC-Protest Decisions with Teeth

Congress created the Court of Federal Claims in 1992 through passage of the Federal Courts Administration Act.³³ The COFC initially retained jurisdiction to hear only pre-award bid protests.³⁴ However, in 1996 the COFC received

the potential cost of proceeding with the override, including the costs associated with the potential that the GAO might sustain the protest, compare to the benefits associated with the approach being considered for addressing the agency's needs; and (4) 'the impact of the override on competition and integrity of the procurement system'" (quoting Reilly's *Wholesale Produce v. United States*, 73 Fed. Cl. 705, 711 (2006)).

²⁶ 4 C.F.R. § 21.1(c) (2008).

²⁷ GAO, *BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE* 8 (GAO-09-471SP, 9th ed. 2009).

²⁸ 31 U.S.C. § 3554(c)(1) (2013). The GAO may also recommend the agency pay expert fees if the protestor utilized an expert in preparing the protest filings. *Id.*

²⁹ 31 U.S.C. § 3554(b)(1) (2013). GAO's standard of review for bid protests involves determining whether the agency's judgment "was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations." *See* *Intelligent Decisions, Inc.*, B-409686, 2014 CPD ¶ 213, 33 (Comp. Gen. Jul. 15, 2014) (citing *Shumaker Trucking & Excavating Contractors, Inc.*, B-290732, 2002 CPD ¶ 169, 3 (Comp. Gen. Sept. 25, 2002)). *See also* 31 U.S.C. § 3552(a) (2014) (directing that a "protest concerning an alleged violation of a procurement statute or regulation shall be decided by the Comptroller General.").

³⁰ 31 U.S.C. § 3554(b)(1) (2013).

³¹ 31 U.S.C. § 3554(b)(3) (2013).

³² *Id.*

³³ Pub. L. No. 102-572, § 902, 106 Stat. 4506 (Oct. 29, 1992) (changing the name of the U.S. Claims Court to the Court of Federal Claims). The U.S.

post-award jurisdiction after passage of the Administrative Dispute Resolution Act (ADRA).³⁵ The ADRA also contained a sunset provision that ended the U.S. district courts' bid protest jurisdiction, thereby making the COFC the sole judicial forum for bid protests as of January 1, 2001.³⁶

The COFC is an Article I, legislative court and its judges serve fifteen-year terms.³⁷ The filing process for bid protest complaints at the court is more formal than that of GAO. Claimants must comply with the strict procedures and pleading requirements of the Rules of United States Court of Federal Claims (RCFC).³⁸ Claimants are also normally required to obtain legal representation by an attorney barred before the court.³⁹ The COFC may award attorney fees to a "prevailing party"⁴⁰ pursuant to the Equal Access to Justice Act (EAJA) if the U.S. position was not "substantially justified" and "special circumstances" making reimbursement unjust do not exist.⁴¹ But there are limits on claimants' net worth before they qualify for reimbursement under EAJA.⁴²

The COFC's standard of review for bid protests involves whether an agency action, findings, or conclusions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁴³ With regard to remedies available, the COFC may "award any relief that the court considers proper, including declaratory and injunctive relief[.]" as long as any monetary relief is "limited to bid preparation and proposal costs."⁴⁴ The court has accordingly declined to award lost profits where an agency has improperly awarded a

Claims Court began operations in 1982 after Congress passed the Federal Courts Improvement Act. Pub. L. No. 97-164, § 105, 96 Stat. 26 (Apr. 2, 1982).

³⁴ *See* *United States v. John C. Grimberg Co.*, 702 F.2d 1362, 1374 (Fed. Cir. 1983) (holding the Court of Claims has only pre-award bid protest jurisdiction).

³⁵ Pub. L. No. 104-320, § 12(a), 110 Stat. 3870, 3874 (1996).

³⁶ *Id.* at § 12(d).

³⁷ 28 U.S.C. §§ 171(a), 172(a) (2014).

³⁸ R. CT. FED. CL.

³⁹ R. CT. FED. CL. 83.1(a)(3) (allowing pro se representation only if representing oneself or a family member).

⁴⁰ 28 U.S.C. §2412(d)(2)(H) (2014).

⁴¹ 28 U.S.C. §2412(d)(1)(A) (2014).

⁴² *See generally* 28 U.S.C. §2412(d) (2014) (explaining that individual protestors with a net worth of less than \$2 million dollars or protesting corporations with a net worth of less than \$7 million may qualify for attorney fees of not more than \$125 an hour).

⁴³ 28 U.S.C. § 1491(b)(4) (2011) (incorporating the Administrative Procedure Act (APA) judicial review standard found at 5 U.S.C § 706 (2014)).

⁴⁴ 28 U.S.C. § 1491(b)(2) (2011).

contract.⁴⁵ It has also repeatedly refused to require agencies to award to specific contractors as a form of relief.⁴⁶

The COFC's jurisdiction does not extend to a review of GAO's "substantive or procedural decisions."⁴⁷ Further, the GAO's decisions are not binding on the COFC.⁴⁸ Nonetheless, agencies defending bid protest claims at the COFC must include any related GAO decisions as part of their required administrative record filing.⁴⁹ The court's use of GAO decisions most often occurs in one of two ways. First, it may use a GAO decision for "instructive" purposes.⁵⁰ The COFC has described such purposes as receiving "general guidance to the extent it is reasonable and persuasive in light of the administrative record" and aiding the "court in better understanding and evaluating the procurement."⁵¹ Second, it will consider a GAO decision when adjudicating a bid protest of an agency's decision to take corrective action based upon a GAO recommendation.⁵²

Claimants may appeal final decisions of the COFC to the United States Court of Appeals for the Federal Circuit (CAFC).⁵³ The CAFC reviews COFC findings of fact for clear error and findings of law without deference, or *de novo*.⁵⁴

III. The Second Bite Debate

Despite the benefits of the COFC's binding decisions and injunctive relief, Abraham Lincoln's sentiments on litigation⁵⁵ hold true today in the realm of bid protests. The

GAO, as an alternative to the more burdensome COFC litigation, continues to receive an overwhelming number of the federal government's bid protests.⁵⁶ Even so, a number of those protestors filing with the GAO will later file anew with the COFC after receiving an unsatisfactory decision.⁵⁷ This section will discuss the DoD's recent attempts to end these serial protests.

A. DoD Proposes an End to Second Bites

In 2012, the DoD first sought to end second bite protests through its 2013 NDAA legislative proposal to Congress.⁵⁸ The proposal contained a significantly revised version of 28 U.S.C. § 1491, which created a ten-day post-award bid protest filing deadline at the COFC.⁵⁹ Because the GAO filing deadline is also ten days,⁶⁰ the change would effectively end follow-up protests to the COFC by forcing disappointed offerors to choose between the two fora.

The supporting analysis for the proposal explained that the change would eliminate "forum shopping" between GAO and COFC, reduce the amount of time procurement awards are engaged in protest, save agency resources by preventing personnel from defending protests in two successive forums, and provide potential savings to the DoD of \$6 million per year.⁶¹ Ultimately, Congress did not include the language in its 2013 NDAA.

⁴⁵ See *Gentex Corp. v. United States*, 61 Fed. Cl. 49, 54 (2004); See also *Lion Raisins, Inc. v. United States*, 52 Fed. Cl. 629, 635 (2002).

⁴⁶ *FirstLine Transp. Sec., Inc. v. United States*, 100 Fed. Cl. 359, 401 (2011); See also *MVM, Inc. v. United States*, 46 Fed. Cl. 137, 144 (2000); and *Hydro Eng'g, Inc. v. United States*, 37 Fed. Cl. 448, 461 (1997).

⁴⁷ *Centech Grp., Inc. v. United States*, 78 Fed. Cl. 496, 506-07 (2007).

⁴⁸ *Id.*

⁴⁹ 31 U.S.C. § 3556 (2001).

⁵⁰ *Centech Grp., Inc. v. United States*, 554 F.3d 1029, 1038 n. 4 (Fed. Cir. 2009) (noting that while GAO decisions are not binding authority, they may be "instructive in the area of bid protests").

⁵¹ *Cubic Applications v. United States*, 37 Fed. Cl. 339, 342 (1997).

⁵² *Centech Grp., Inc.*, 78 Fed. at 507. See also *Sys. Application & Techs. v. United States*, 100 Fed. Cl. 687, 722 (2011); *Honeywell, Inc. v. United States*, 870 F.2d 644, 648 (Fed. Cir. 1989).

⁵³ 28 U.S.C. § 1295(a)(3) (2014).

⁵⁴ *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1353 (Fed. Cir. 2006).

⁵⁵ See introductory quote at beginning of paper. Abraham Lincoln once expressed his belief that winners in litigation are oftentimes nominal winners and "real loser[s]" when it comes to "fees, expenses, and waste of time." See *Collected Works: Lincoln*, *supra* note 1.

⁵⁶ See James W. Nelson, *GAO-COFC Concurrent Bid Protest Jurisdiction: Are Two Fora Too Many?*, 43 PUB. CONT. L.J. 587, 606-07 (2014) (explaining that in 2011 there were 2,353 GAO bid protests compared to 98

COFC bid protests; and in 2012 there were 2,475 GAO bid protests compared to 99 COFC bid protests).

⁵⁷ *Id.* at 608-09 (explaining that in 2011, there were ten protestors who filed a bid protest complaint at COFC after losing a bid protest at GAO; in 2012 there were eight). According to data tracked by the Contract and Fiscal Law Division, U.S. Army Legal Services Agency (KFLD), the Army defended six second bite, post-award bid protests before the COFC in Fiscal Year (FY) 2014; and as of February 12, 2015, five in FY 2015. E-mail from Scott Flesch, Chief, Bid Protests, U.S. Army Legal Services Agency, Contract & Fiscal Law Division, to author (Feb. 12, 2015, 17:00 EST) (on file with author). Although these figures seem to indicate a recent increase in the number of second bite protests, they could also be influenced by the difficulty in compiling COFC data. Not only does the COFC not publish all of its opinions, but the court also does not publish data specific to its bid protest decisions as does the GAO. See Raymond M. Saunders & Patrick Butler, *A Timely Reform: Impose Timeliness Rules for Filing Bid Protests at the Court of Federal Claims*, 39 PUB. CONT. L.J. 539, 551 n. 73 (2010); KATE M. MANUEL & MOSHE SCHWARTZ, CONG. RESEARCH SERV., R40228, *GAO BID PROTESTS: AN OVERVIEW OF TIME FRAMES AND PROCEDURES* 20 tbl. 5 (2010).

⁵⁸ See DoD 2013 NDAA Proposal, *supra* note 7.

⁵⁹ *Id.* Although COFC may apply laches in certain circumstances where a disappointed offerer has unreasonably delayed in filing a claim, the statute of limitations for filing a claim with COFC is six years. See 28 U.S.C. § 2501 (2014); See also *CW Gov't Travel, Inc. v. United States*, 61 Fed. Cl. 559, 568-69 (2004) (explaining what is required to establish the affirmative defense of laches).

⁶⁰ 4 C.F.R. § 21.2(a)(2) (2014).

⁶¹ See DoD 2013 NDAA Proposal, *supra* note 7.

Undeterred, the DoD again proposed the language in its 2014 NDAA proposal.⁶² The supporting analysis for the 2014 proposal took a different approach than that of 2013 by citing specific cases illustrating how the change would further the GAO and COFC goals of “expeditious resolution” of bid protests.⁶³

The analysis included a discussion of *Axiom Res. Mgmt., Inc. v. United States*, a COFC case that had seen two corrective actions and a denial at GAO before the protestor finally filed at the COFC.⁶⁴ The protestor’s decision proved fruitful as the COFC disagreed with the GAO’s analysis and set aside the agency award.⁶⁵ However, following an agency appeal, the CAFC ultimately reversed the COFC decision.⁶⁶ After nearly two years of litigation, the agency found itself in virtually the same position it had been in after the GAO protests.

The analysis also included three other examples of bid protests obtaining decisions at the GAO, only to experience more delay at the COFC before achieving the same result as at the GAO.⁶⁷ One such case was *Labatt Food Serv. v. United States*.⁶⁸ Similar to *Axiom*, *Labatt* involved a disappointed offeror who, after multiple protests to GAO, filed a claim with COFC.⁶⁹ Even though the claimant achieved temporary success at the COFC, the CAFC ultimately reversed COFC’s decision to vacate the agency award.⁷⁰ After nearly one year of litigation at the COFC and CAFC, the agency in *Labatt*, as in *Axiom*, found itself in nearly the same position it had been after the GAO protests.

Although Congress ultimately chose not to include DoD’s proposed language in its 2014 NDAA,⁷¹ DoD’s proposed changes to 28 U.S.C. § 1491 could serve to prevent

serial protests as seen in *Axiom* and *Labatt*. If such changes are instituted, agencies would no longer be forced to defend their contract award decisions *de novo* at both the GAO and COFC forums. Agencies could save their already-limited manpower, money, and resources by defending bid protests in a more predictable, one-forum environment. Most importantly, the changes would serve the Congressional goal of achieving “expeditious resolution” of bid protests for all interested parties.⁷² Despite these noble intentions, the DoD’s proposal to end repetitive protests at the COFC has had its fair share of dissenters.⁷³

B. DoD Proposal Hits a Wall

Critics from both within and outside the government contracting community have expressed their opposition to the DoD proposal to end second bite protests.⁷⁴ Some opponents of the proposal have argued that these protests are rare and not a problem considering the total number of bid protests filed every year.⁷⁵ One critic of the proposal estimated that only twenty-five out of the nearly five thousand bid protests filed between 2011 and 2012 were reviewed at both the GAO and COFC.⁷⁶ The commentator concluded that such a small number is “infinitesimal” and “nothing to fear” considering the federal government awards nearly 200,000 procurements a year.⁷⁷ However, one could also conclude from these same figures that ending second bite protests would not significantly impact due process for protestors. Given the opportunity to file a bid protest at the two separate forums, very few actually do. This indicates protestors, in nearly all cases, are satisfied with the due process received solely at the GAO or COFC.

⁶² See DoD 2014 NDAA Proposal, *supra* note 7.

⁶³ *Id.*

⁶⁴ *Id.* (citing *Axiom Res. Mgmt., Inc. v. United States*, 80 Fed. Cl. 530, 539 (2008)).

⁶⁵ *Id.*

⁶⁶ *Id.* (citing *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374 (Fed. Cir. 2009)).

⁶⁷ *Id.* (citing *MASAI Technologies Corp. v. United States*, 79 Fed. Cl. 433 (2007); *Labatt Food Serv., Inc. v. United States*, 577 F.3d 1375 (Fed. Cir. 2009); *Ala. Aircraft Indus., Inc.-Birmingham v. United States*, 586 F.3d 1372 (Fed. Cir. 2009)).

⁶⁸ *Labatt Food Serv., Inc.*, 577 F.3d at 1375.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ The Department of the Navy, Office of the General Counsel (DON-OGC) provided language and analysis for the 2014 DoD NDAA proposal to end second bite protests. Telephone Interview with Thomas L. Frankfurt, SES, Assistant General Counsel (Research, Development & Acquisition), Office of the General Counsel, Department of the Navy (Feb. 12, 2015). Although DON-OGC held meetings with House Armed Services Committee (HASC) staffers regarding details of the proposed bill’s text,

progress stalled when the House Judiciary Committee was solicited for coordination. *Id.*

⁷² See 28 U.S.C. § 1491(b)(3) (explaining the COFC goal of “expeditious resolution” of claims); 31 U.S.C. § 3554(a)(4) (explaining the Comptroller General’s duty to provide for the “expeditious resolution of protests”).

⁷³ See, e.g., Ken Weckstein & Tammy Hopkins, *DOD Proposes a Legislative ‘Fix’ for Something That Isn’t Broken*, 100 FCR 46 (2013) (opposing view of a private Government Contracts and Litigation Firm); Nelson, *supra* note 56, at 609 (opposing view of an U.S. Army Judge Advocate working in the Army’s Contract and Fiscal Law Division); Daniel I. Gordon, *Bid Protests: The Costs Are Real, But the Benefits Outweigh Them*, 42 PUB. CONT. L.J. 489, 505-06 (2013) (opposing view of Associate Dean for Government Procurement Law Studies at The George Washington University Law School and the former Administrator for Federal Procurement Policy).

⁷⁴ Nelson, *supra* note 56, at 609.

⁷⁵ See Weckstein, *supra* note 73 (stating that “[i]n reality, there just aren’t that many second bite protests”); See also Nelson, *supra* note 56, at 609 (stating that in CY11 and CY12 only twenty-five out of five thousand bid protests were second bite protests); and Gordon, *supra* note 73, at 505-06 (stating that the number of second bite protests are so small they “cannot legitimately be seen as a significant cost of the bid protest system”).

⁷⁶ See Nelson, *supra* note 56, at 608-09.

⁷⁷ *Id.*

Considering the benefits of second bite protests to due process are so small, the importance of retaining such a process is outweighed by the impact they have on federal agencies. One supporter of the DoD proposal has argued that second bite protests, like “killer tornadoes,” have significant negative effects on agencies when they do happen.⁷⁸ As illustrated by the aforementioned cases of *Am. Auto Logistics*, *Axiom Res. Mgmt., Inc.*, and *Labatt Food Serv.*, they often add months, if not years, of delay to a bid protest system that is designed to work efficiently.

What has added further angst and uncertainty for agencies under the current framework is the catch-22 scenario involving corrective action, as highlighted by recent cases such as *Sys. Application & Techs. v. United States* and *Rush Constr., Inc. v. United States*.⁷⁹ In *SA Tech*, the COFC found an awardee had standing to protest a Department of the Army decision to terminate its contract after the GAO had recommended the agency take the corrective action.⁸⁰ In *Rush*, the COFC held that the U.S. Army Corps of Engineers was arbitrary and capricious in accepting the GAO’s recommendations to terminate the awardee’s contract and award to the next lowest bidder.⁸¹ *SA Tech* and *Rush* are but a few examples of why agencies must routinely weigh the risks of implementing GAO recommendations against the alternative of not following them and the GAO reporting them to Congress. Because of Congress’s power of the purse, agencies are understandably averse to disregarding a GAO recommendation. By allowing the COFC to second guess agency decisions to follow ostensibly lawful GAO recommendations, an undesirable environment is created in which agencies must choose between following one authority at the risk of violating another.

Opponents of the DoD proposal have also argued that second bite protests are often not disruptive to agencies since the COFC does not always issue preliminary injunctions before litigation.⁸² But this argument discounts the compounding administrative costs of agencies having to defend bid protests successively at both the GAO and COFC. Numerous agency contracting personnel, to include contracting specialists, contracting officers, and attorneys, are required to prepare agency responses and litigation materials in defense of such protests. These labor commitments have an opportunity cost to the agency, which amounts to less contracting manpower to effectively administer the agency’s procurement needs.

Additionally, the argument does not consider the fact that it is not uncommon for agencies to voluntarily stay performance pending a COFC appeal.⁸³ Pursuant to the RCFC, agencies are required to discuss at the COFC initial status conference whether they agree to voluntarily stay performance.⁸⁴ It is reasonable to expect some agencies to implement such a measure depending on the litigation risk⁸⁵ involved in the specific bid protest.

Finally, opponents of the DoD proposal have argued it will actually decrease the efficiency of the bid protest system by influencing more protestors to go directly to the COFC.⁸⁶ Opponents argue this would occur for two reasons. First, the GAO does not offer decisions that are binding on the agency.⁸⁷ Although this is true, the factor would likely have little impact on the number of protestors choosing the COFC over the GAO considering the rare occasions in which agencies choose not to follow GAO recommendations.⁸⁸ Nonetheless, it does highlight a fundamental fairness issue to

⁷⁸ Vernon J. Edwards, *Postscript: Pathologies of the Protest System*, 27 No. 8 NASH & CIBINIC REP. NL ¶ 38 (2013).

⁷⁹ See *Sys. Application & Techs. v. United States*, 691 F.3d 1374, 1384 (2012) (holding that COFC had proper jurisdiction to enjoin the agency from taking corrective action based upon informal advice of GAO); *Rush Constr., Inc. v. United States*, 117 Fed. Cl. 85 (2014) (holding that the agency was arbitrary and capricious in implementing an irrational GAO recommendation); See also *Centech Group, Inc. v. United States*, 79 Fed. Cl. 562, 574 (2007).

⁸⁰ *Sys. Application & Techs. v. United States*, 100 Fed. Cl. 687, 707-08 (2011). COFC rejected Department of Army’s (DA’s) contention that the court lacked jurisdiction because the termination involved a Contract Disputes Act (CDA) matter. *Id.* at 705. The court was also not persuaded by DA’s argument that the awardee had no standing because the awardee would not suffer harm until DA awarded to a different offeror. *Id.* at 707-08.

⁸¹ *Rush Constr., Inc.*, 117 Fed. Cl. at 104.

⁸² See Nelson, *supra* note 56, at 605; Dietrich Knauth, *DOD Revisions To Bid Protests Would Limit Chances To Appeal*, LAW360 (Oct. 2, 2014, 2:20 PM), <http://www.law360.com/articles/445221/dod-revisions-to-bid-protests-would-limit-chances-to-appeal>; PSC: *DoD Bid Protest Proposal Denies Due Process*, PSC (Oct. 2, 2014, 2:45 P.M.), http://www.pscouncil.org/News2/NewsReleases/2012/PSC_DoD_Bid_Protest_Proposal_Denies_Due_Process.aspx; and Gordon, *supra* note 73, at 505-06.

⁸³ Depending on the facts of the procurement involved, it is not uncommon for the Department of Army to voluntarily stay performance during a COFC bid protest. Telephone Interview with Raymond Saunders, Chief Trial Attorney, Contract and Fiscal Law Division, U.S. Army Legal Services Agency (Oct. 7, 2014); See also *Am. Auto Logistics, LP v. United States*, 117 Fed. Cl. 137 (2014); *Sentrillion Corp. v. United States*, 114 Fed. Cl. 557, 566 (2014); *ST Net, Inc. v. United States*, 112 Fed. Cl. 99, 106 (2014); *Sotera Def. Solutions v. United States*, 118 Fed. Cl. 237, 237 (2014).

⁸⁴ See R. CT. FED. CL. Appx. C, ¶ 15(c) & (d) (requiring a discussion of whether the government will agree to a voluntary stay of performance pending final decision on the merits).

⁸⁵ It is not uncommon to have differing legal interpretations among the COFC judges or between the COFC judges and GAO recommendations. Schaengold, *supra* note 13, at 5. Agencies must take into account these subtle differences in interpretation and determine the appropriate level of litigation risk associated with the COFC agreeing with the the GAO recommendation(s) involved in their specific protest.

⁸⁶ See Weckstein, *supra* note 74; Marcia G. Madsen & David F. Dowd, *Protests—Another Turn of the Wheel*, 97 FCR 531 (2012); Knauth, *supra* note 83.

⁸⁷ See sources cited *supra* note 87.

⁸⁸ The GAO received notification of nine occasions between 2009 and 2013 in which a federal agency chose not to follow a GAO recommendation. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-14-276SP, GAO BID PROTEST ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2013 1 (2014); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-162SP, GAO BID PROTEST

consider for those occasions when an agency would choose not to follow a GAO recommendation.

Second, protestors choosing the GAO as a forum would have no judicial appeal rights if they disagree with a GAO decision.⁸⁹ This assertion is also true. However, considering the limited number of COFC second bite protests per year, most disappointed offerors choose not to enter the judicial forum even after receiving an unfavorable GAO decision.⁹⁰

Additionally, of those protestors receiving an unfavorable decision at the GAO, more choose to file for GAO reconsideration than to file anew at the COFC.⁹¹ In the end, protesting to the GAO would remain the cheapest, quickest way to achieve a performance stay and have a bid protest competently adjudicated. A mass exodus of disappointed offerors to the more expensive, time-consuming COFC for the off-chance they may want to appeal is unlikely. Nevertheless, the concerns described above do emphasize the need to ensure any change to a hard forum choice between the GAO and COFC will offer adequate assurances of an independently fair process.

IV. Championing the Change

Achieving the right balance of independent due process for both the GAO and COFC bid protests is paramount to realizing an end to second bite protests at the COFC. Congress has once before expressed an appetite for curbing litigation in favor of Administrative Dispute Resolution (ADR).⁹² In order to now garner congressional buy-in and withstand arguments from those wishing to preserve the current framework, the DoD should consider tailoring its proposal as discussed below.

A. Close the Non-follow Loop

First, the DoD should add an exception to its proposed COFC bid protest filing deadline that tolls any time used for

GAO bid protests in which the agency ultimately decides not to follow a GAO recommendation. This measure would relieve a fundamental problem with instituting the change as previously proposed. As opponents to DoD's proposals have asserted, GAO recommendations are not binding on agencies. As such, under the framework suggested by the previous two DoD proposals, a disappointed offeror could potentially file with the GAO, incur costs during the nearly 100-day process, only to receive no recovery or corrective action upon the GAO sustaining the protest. Adding to the protestor's frustration, he would be further time-barred from filing at the COFC and essentially have no other legal recourse. In these situations it would be fundamentally unfair to hold a bid protester to his decision to file with the GAO if the agency later chooses not to follow the GAO recommendation.

Proponents of the previous DoD proposals could discount the need for such an exception, considering it is customary practice for agencies to follow GAO recommendations. However, as mentioned previously, agencies occasionally do not follow them.⁹³ Congress should then not deny an exception for such occurrences based on their rarity for reasons converse to why Congress should end second bite protests despite their infrequency. In these situations, the minimal adverse effects to agencies in allowing such a rare exception are outweighed by the substantial due process concerns in preventing the abovementioned protesters from later filing at the COFC.

Including the exception could also help settle important legal disagreements between the GAO and federal agencies. For example, in *Mission Critical Solutions v. United States*, the COFC was able to rule on a statutory interpretation disagreement between the Department of the Army (DA) and the GAO regarding the order of precedence among socioeconomic set-asides.⁹⁴ The DA, on advice from the Department of Justice (DoJ) and Small Business Administration (SBA) had notified the GAO that DA would not follow GAO's recommendations following their sustainment of the post-award bid protest.⁹⁵ After the COFC

ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2012 1 (2012); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-199SP, GAO BID PROTEST ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2011 1 (2012); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-211SP, GAO BID PROTEST ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2010 1 (2011); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-264SP, GAO BID PROTEST ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2009 1 (2010).

⁸⁹ See Weckstein, *supra* note 74; Madsen, *supra* note 86; Knauth, *supra* note 86.

⁹⁰ One author has estimated that twenty-five out of the nearly five thousand bid protests filed between 2011 and 2012 were reviewed at both GAO and COFC. See Nelson, *supra* note 56, at 608-09.

⁹¹ See KATE M. MANUEL & MOSHE SCHWARTZ, CONG. RESEARCH SERV., R40228, GAO BID PROTESTS: AN OVERVIEW OF TIME FRAMES AND PROCEDURES 19-20 tbls. 4 & 5 (2010) (providing data from GAO showing the number of reconsideration requests GAO received as 65 in 2002, 83 in 2003, 98 in 2004, 71 in 2005, 57 in 2006, and 93 in 2007; as well as data showing the number of COFC bid protest decisions published following a GAO protest as 6 in 2002, 17 in 2003, 20 in 2004, 23 in 2005, 25 in 2006,

and 23 in 2007). All updates to the CRS Report R40228 following the March 15, 2010 report have not included data regarding the number of COFC bid protest decisions published following a GAO decision.

⁹² Senator William Cohen, in introducing the Alternative Dispute Resolution Act of 1995, described an emerging consensus that traditional litigation is inefficient and explained that "[p]rivate corporations recognized many years ago that certain types of disputes could be resolved much less expensively and with less acrimony by relying on techniques such as mediation, arbitration, and partnering . . ." 142 CONG. REC. S6155.

⁹³ In accordance with the agency reporting requirements of 31 U.S.C. § 3554(e)(2), the GAO received notification of nine occasions between 2009 and 2013 in which a federal agency chose not to follow a GAO recommendation. See sources cited *supra* note 89.

⁹⁴ *Mission Critical Solutions v. United States*, 91 Fed. Cl. 386 (2010).

⁹⁵ *Id.* at 391 (explaining that even though GAO interpreted 15 U.S.C. § 657a(b)(2) to require an agency to consider Historically Underutilized Business Zones (HUBZones) small business concerns before other socioeconomic programs, the Department of the Army chose not to follow

ultimately sided with the GAO and disagreed with the DA, DoJ, and SBA interpretation of the statute concerned, Congress stepped in and settled the issue with new legislation.⁹⁶ Without the COFC's decision on the issue, it arguably would have taken much longer to obtain Congressional attention and action on the ambiguity in the law.

For these reasons, the DoD should add a tolling exception that would allow any protester faced with such a result at the GAO a reasonable amount of time to then file a claim with the COFC. The exception would be similar in location and language to the one proposed by the DoD for agency protests preceding a COFC protest.⁹⁷ The measure would also have no effect on the number of second bite protests experienced by the DoD since they occur only after a protestor is first unsuccessful at the GAO. Ultimately, such an exception would ensure proper due process is maintained for protestors in the rare circumstances in which agencies choose not to follow GAO recommendations.

B. Strengthen the GAO Reconsideration Process

In addition to closing the non-follow loop, any future DoD proposals should seek to strengthen the GAO reconsideration process by mandating a separate, next-level echelon GAO attorney conduct the review.⁹⁸ As discussed in subsection III.B. above, eliminating the COFC second bite option for bid protestors will likely not significantly affect due process as asserted by opponents of the DoD proposal. However, in making this change, Congress would ensure bid protestors are provided a more comprehensive, independent review process at the GAO in the event that second-chance protests to COFC are ended.

The requirement would not significantly affect the way the GAO currently processes bid protest reconsiderations. Pursuant to its own internal processes, the GAO Procurement Law Control Group (PLCG) coordinates each reconsideration review through an attorney from a different bid protest team than the one conducting the initial recommendation.⁹⁹ The reconsideration decision then goes to that attorney's team lead for coordination.¹⁰⁰ The GAO's Bid Protest Descriptive Guide alludes to the procedure in that it explains it is "generally GAO's practice to assign a different attorney to the reconsideration."¹⁰¹

Despite this informal, internal policy, bid protestors in a post-second bite framework should have more certainty regarding the independence of their potential GAO reconsiderations. Congressional codification of such a requirement would ensure an independent review is obtained in all cases and would remove the possibility of the same GAO attorney making both the initial and reconsideration decision.¹⁰² Creating a next-level echelon of reconsideration attorneys, instead of the current practice of shifting the review to a different bid protest team, would also serve to strengthen the process by concentrating the level of expertise of those conducting the reviews as well as bolstering their independence from the attorneys completing the initial decisions.

These requirements would also formally align the GAO reconsideration process with what a protestor would expect to receive at the other two bid protest fora in terms of a separate, independent review. As explained in subsection II.B. above, claimants at the COFC may appeal their bid protests to the next higher judicial forum, the CAFC.¹⁰³ With regard to bid protests to the agency, protestors may appeal contracting officer decisions to the next level above the contracting

GAO's recommendations based on guidance from the Department of Justice and the Small Business Administration). *See also* Mission Critical Solutions, B-401057, 2009 CPD ¶ 93 (Comp. Gen. May 4, 2009) (explaining GAO's interpretation of 15 U.S.C. § 657a(b)(2)).

⁹⁶ *See* Pub. L. No. 111-240, §1347, 124 Stat. 2504, 2546 (2010) (removing the mandatory "shall" language from 15 U.S.C. § 657a(b)(2) which required contracting officers award to HUBZone small businesses when they reasonably expected two or more HUBZone small businesses would submit offers).

⁹⁷ *See* DoD 2013 NDAA Proposal, *supra* note 7 (proposing a new 28 U.S.C. §1491(b)(1)(C) that allows for protestor receiving an adverse decision at the agency to then file at COFC if within 10 days). For example, the DoD could include an exception at 28 U.S.C. §1491(b)(1)(D) specifying that if a timely GAO protest is filed, and the agency concerned later notifies Congress it will not follow the GAO recommendation, the protestor will then have a specified number of days to file with COFC. DoD's most recently-proposed 28 U.S.C. §1491(b)(1)(D) that addresses dismissal of untimely protests could be shifted to 28 U.S.C. §1491(b)(1)(E). *See* DoD 2013 NDAA Proposal, *supra* note 7.

⁹⁸ Although not ultimately included in the DoD's 2014 NDAA proposed legislation, the OGC DON considered including language creating an appeal option from the GAO to the United States Court of Appeals for the Federal Circuit (CAFC). Telephone Interview with Thomas L. Frankfurt, SES, Assistant General Counsel (Research, Development & Acquisition),

Office of the General Counsel, Department of the Navy (Feb. 12, 2015). Similar to the appeal rights offered at the Armed Services Board of Contract Appeals (ASBCA), the measure would have allowed disappointed protestors at GAO an opportunity to appeal the legal merits of GAO's decisions to CAFC. *Id.* The greatest difficulty in including such a measure would likely be that agencies do not have a legal obligation to follow GAO recommendations. Thus, disappointed protestors at GAO would likely have no standing or legal interest to then appeal to CAFC.

⁹⁹ E-mail from Louis A. Chiarella, Senior Attorney, Procurement Law Control Group (PLCG), GAO, to author (Feb. 10, 2015, 17:00 EST) (on file with author).

¹⁰⁰ *Id.* Once the team lead has reviewed the reconsideration it then goes to the PLCG's Managing Associate General Counsel for coordination before the decision is issued. *Id.*

¹⁰¹ GAO, BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE 31 (GAO-09-471SP, 9th ed. 2009).

¹⁰² Congress could create the requirement by including appropriate language at 31 U.S.C. § 3554 (explaining the Comptroller General's responsibilities in issuing bid protest decisions).

¹⁰³ *See* 28 U.S.C. §1295(a)(3) (2014) (allowing for an appeal to CAFC from a COFC decision on a bid protest).

officer.¹⁰⁴ As such, codifying a requirement for next-level echelon reconsideration attorneys at the GAO would more equally align its review procedures with what is mandated in these other fora. In doing so, Congress could not only strengthen public confidence in the reconsideration process in the event second bite protests are eliminated, but also reinforce the federal government's commitment to achieving another of its overarching goals for bid protest resolution—maintaining the proper accountability within the federal procurement system.¹⁰⁵

C. Extend the Protest Period to Thirty Days

Lastly, the DoD should consider increasing its proposed COFC post-award bid protest filing period. Neither opponents nor proponents of the previous two DoD proposals have provided significant written discussion regarding the feasibility of bid protestors meeting a ten-day filing deadline at the COFC. The proposed ten-day deadline, which mirrors that of the GAO protest requirements, is intended to ensure second bite protests to the COFC are eliminated by leaving would-be protestors with no time left to potentially file in both forums. However, a ten-day filing requirement at the COFC may prove too brief for its more formal and rigorous filing requirements.

As discussed in subsection II(B) above, COFC bid protests almost always require attorney representation.¹⁰⁶ This requirement will likely lengthen the claim preparation process for many bid protestors choosing the COFC over the GAO. The COFC also requires its claimants to adhere to the formal pleading requirements of the Rules of the United States Court of Federal Claims,¹⁰⁷ which is more administratively and legally exhaustive than that of GAO's protest requirements. Considering these two factors together, as well as the Congressional intent and structuring of the GAO to provide for a more expedited bid protest process, one

could reasonably expect a longer filing period is needed for COFC bid protests.

In order to test this assumption, a review of the filing history of recent COFC bid protest claims is warranted. According to an analysis of the procedural history of 102 COFC post-award bid protest decisions published on or after January 1, 2012, approximately fourteen percent of claims filed directly with the COFC from the agency are accomplished in ten days or less.¹⁰⁸ Of the three bid protests that were filed within ten days of agency decision or debriefing date, two of them had followed an initial bid protest to the agency lasting two weeks or more.¹⁰⁹ If a protester were to file directly with the COFC after an agency award or debriefing date, he would have more difficulty meeting the ten-day requirement without the benefit of a multi-day toll period resulting from an agency protest.

Perhaps thirty days would be a more reasonable bid protest filing period for the COFC. An analysis of the same sampling described above revealed that approximately fifty-five percent of the claims filed with the COFC were accomplished within thirty days of agency award or debriefing; and approximately seventy-three percent were within forty-five days. The mean number of days from award or debriefing to filing at the COFC was forty-five days.¹¹⁰ Because Congress has yet to create deadlines for bid protestors choosing to file at the COFC,¹¹¹ there has been less incentive on the part of the protestor to file his or her claim quickly and within a specific timeframe. Thus, the figures described above would most certainly decrease if Congress established filing deadlines as the DoD has proposed. On the other hand, to decrease claimants' time to file with the more formal COFC to ten days, from an average of forty-five days, might prove too aggressive of a reduction. Rather, a thirty-day deadline would provide for a more achievable compromise.

¹⁰⁴ See FAR 33.103(d)(4) (2014) (allowing for an independent review of a contracting officer's decision on an agency bid protest).

¹⁰⁵ See FAR 1.102(a) (2014) (stating that the "vision for the Federal Acquisition System is . . . maintaining the public's trust and fulfilling public policy objectives"); See also Raymond M. Saunders & Patrick Butler, *A Timely Reform: Impose Timeliness Rules For Filing Bid Protests at the Court of Federal Claims*, 39 PUB. CONT. L.J. 539, 548 (2010) (stating that the "federal bid protest system is shaped by two powerful, yet competing, policy goals: (1) ensuring accountability in the procurement process while at the same time (2) expeditiously resolving bid protests").

¹⁰⁶ R. CT. FED. CL. 83.1(a)(3)(2014) (allowing pro se representation only if representing oneself or a family member).

¹⁰⁷ See R. CT. FED. CL. Titles II & III (2014) (explaining strict requirements for the commencement of an action; service of process, pleadings, motions, and orders; and pleadings and motions).

¹⁰⁸ The author determined this figure by analyzing the procedural history of 102 post-award bid protest COFC cases decided between the dates of January 1, 2012 and November 1, 2014. The author retrieved the cases by conducting a search on the Lexis Advance Research tool for all COFC cases decided between the dates of January 1, 2012 to November 1, 2014 with the topical head notes of "Public Contract Law, Dispute Resolution, and Bid

Protest." The author then further narrowed the results using the search terms "post w/2 award." Of the 102 post-award, bid protest COFC cases analyzed, 22 went directly to COFC from the agency decision. Only three of these cases were filed with COFC within 10 days of the agency decision or debriefing date.

¹⁰⁹ See *V.I. Paving, Inc. v. United States*, 103 Fed. Cl. 292 (2012); *J.C.N. Constr., Inc. v. United States*, 107 Fed. Cl. 503 (2012).

¹¹⁰ One of the twenty-two cases was excluded from the mean calculation by the author due to it being ultimately dismissed by COFC for laches. See *Aircraft Charter Solutions, Inc. v. United States*, 109 Fed. Cl. 398, 409 (2013).

¹¹¹ Although there are currently no filing deadlines for bid protest claims at COFC, the court may apply laches in certain circumstances where a disappointed offerer has unreasonably delayed in filing a claim. See *CW Gov't Travel, Inc. v. United States*, 61 Fed. Cl. 559, 568-69 (2004) (explaining what is required to establish the affirmative defense of laches). Also, there is a six-year statute of limitations for filing a claim with COFC. See 28 U.S.C. § 2501 (2014).

Extending the filing period from ten days to thirty days should also still achieve DoD's goal of ending second bite protests. Considering thirty days is less than one third the total number of days the GAO has to decide a bid protest and half the number of days it has to decide a sixty-five day, "express option" bid protest,¹¹² protestors would achieve little to no benefit in filing with the GAO before then filing with the COFC. This is because the GAO dismisses any of its pending protests whenever a claim involving the same matter is filed with the COFC.¹¹³ Further, because the agency report is normally due thirty days after the agency receives notice of the GAO protest, the GAO will most often dismiss a case later filed with the COFC before the agency even distributes the report.¹¹⁴ Thus, increasing the proposed filing period to thirty days would still serve the interests of preventing serial protests while also providing an adequate number of days to file for those choosing to protest to the COFC.

V. Conclusion

Second bite protests can oftentimes cause significant detrimental effects on a government contracts system that thrives on efficiency and expediency. They compound costs for all parties involved, as well as frequently add delay to already-suspended contract performance periods. As seen in the DoD's contract with IAL to provide worldwide POV shipping, an additional performance delay of just three months can be the difference in whether or not thousands of service members are forced to wait idly by while their vehicles' shipments are mismanaged by an overwhelmed government contractor.¹¹⁵

Fortunately, the DoD has highlighted the issue and made attempts at correcting it with proposed legislation. However, the attempts have failed to garner the congressional interest needed to ensure passage. By extending the proposed filing deadline, strengthening the reconsideration process, and allowing for a tolling exception when an agency chooses not to implement a GAO recommendation, future DoD proposals should provide the impetus needed to secure more widespread support for the measure.

The success of such a proposal will require not only effective coordination with the appropriate Congressional committees,¹¹⁶ but also another factor often necessary for successful legislation: compromise. As eloquently described

by Kentucky Senator Henry Clay Sr. in February of 1850, "the nature of the government and its operations" sometimes requires opposing parties to make concessions in order to further important government interests.¹¹⁷

The government interests concerned here—efficiency and accountability in bid protest resolution—must achieve a more supportable balance than what is gained simply by implementing a ten-day filing deadline for the COFC. These proposed changes can do that by not only maintaining the efficiency goals hoped for by the original DoD proposals, but by strengthening the amount of accountability expected by those in the government contracting community. In doing so, the DoD may finally realize an end to the practice of second bite protests.

¹¹² 31 U.S.C. § 3554(a)(1)&(2) (2013).

¹¹³ See 4 C.F.R. § 21.11(b) (2014).

¹¹⁴ In most cases, the agency report is due to GAO within thirty days after they receive notice from GAO of the protest. 31 U.S.C. § 3553(b)(2) (2014). In bid protest cases where the express option is used, the agency report is due to GAO within twenty days of notice. *Id.*

¹¹⁵ See Jowers, *supra* note 3.

¹¹⁶ In addition to coordinating with both the House and Senate Armed Services Committee, the DoD will likely need to coordinate the proposed legislation with the House and Senate Judiciary Committee (with regard to

effects to COFC) as well as the Senate Homeland Security and Governmental Affairs Committee and House Committee on Oversight and Government Reform (with regard to effects to Government procurement and GAO). Telephone Interview with Robert Cover, Senior Counsel, Office of Legislative Counsel, DoD Office of the General Counsel (Oct. 22, 2014).

¹¹⁷ WILLIAM J. BENNETT, *THE BOOK OF MAN: READINGS ON THE PATH TO MANHOOD* 318-20 (2011). Lauded by Abraham Lincoln as his "beau ideal of a great man," Senator Henry Clay Sr. became known as the "Great Compromiser" on account of his willingness to reach across the aisle when circumstances so required. *Id.*