

## GAO Declares Expanded Jurisdiction Over Protests of Civilian Task Orders

The US Government Accountability Office (GAO) has ruled that it now has authority over protests challenging civilian agency task and delivery orders issued under multiple-award indefinite-delivery/indefinite-quantity (IDIQ) contracts, **regardless of the task order's value**. This ruling creates a new discrepancy between GAO's jurisdiction over protests of civilian task orders and protests of defense agency task orders, which are limited to task orders valued in excess of US\$10M. The decision may increase task order protests at GAO, unless Congress takes action to the contrary.

GAO's June 14, 2011 decision in *Technatomy Corp.*, B-405130, arose from a task order issued by the Defense Information Systems Agency (DISA) under a General Services Administration contract. DISA moved to dismiss, arguing that GAO's jurisdiction to hear task order protests expired on May 27, 2011, pursuant to a statutory "sunset" of the jurisdiction granted to GAO under 41 U.S.C. § 253j(e)(1) for protests of task orders valued in excess of US\$10 million.<sup>1</sup>

The jurisdictional issue stems from a provision in the 2008 National Defense Authorization Act (NDAA), which expanded GAO's jurisdiction over task order protests. GAO's jurisdiction to hear such protests had been limited by the Federal Acquisition Streamlining Act (FASA), which in 1994 amended GAO's statutory bid protest authority under the Competition in Contracting Act (CICA) by barring all task order protests except on grounds that "the order increases the scope, period, or maximum value of the contract under which the order is issued."<sup>2</sup> Pub. L. No. 103-355, 108 Stat. 3243, 3264 (1994) (codified at 41 U.S.C. § 253j (1994)). The 2008 NDAA relaxed that prohibition by allowing GAO also to consider protests

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<sup>1</sup> GAO noted that Title 41 of the US Code was recodified on January 4, 2011, moving 41 U.S.C. § 253j(e) to 41 U.S.C. § 4106(f). As GAO did in its decision, we refer to 41 U.S.C. § 253j(e) for the sake of clarity.

<sup>2</sup> FASA's limitation on GAO's jurisdiction over task order protests read as follows:

(e) Protests.—

A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued.

Pub. L. No. 103-355, 108 Stat. 3243, 3264 (codified at 41 U.S.C. § 253j (1994)).

regarding task or delivery orders valued in excess of US\$10 million.<sup>3</sup> Pub. L. No. 110-181, 122 Stat. 3, 237 (2008) (codified at 41 U.S.C. § 253j(e) (2006 & Supp. III 2009)). Amended subsection 253j(e) included a sunset provision, which stated broadly that the “subsection shall be in effect for three years.” *Id.* at § 253j(e)(3). The sunset took effect May 27, 2011, four days after Technatomy protested.

Congress extended until September 30, 2016, an equivalent sunset for a provision that permits GAO protests of Department of Defense task and delivery orders exceeding US\$10M,<sup>4</sup> but companion legislation over civilian agency task orders is still pending. Many commentators believed that, once the sunset took effect, GAO’s protest jurisdiction over civilian task orders would revert to only the limited authority outlined in FASA.

GAO instead ruled that its jurisdiction reverted to its *original*, pre-FASA protest jurisdiction set forth in CICA, which did not distinguish between contract and task order protests. Relying on the statute’s plain language, GAO stated that the sunset provision applied to subsection 253j(e) entirely, not just the portion extending protest jurisdiction to task orders in excess of US\$10 million, i.e., subsection 253j(e) (1)(B). GAO observed that the 2008 NDAA struck the prior subsection 253j(e), i.e., the FASA subsection that had

originally limited GAO’s jurisdiction, and entirely replaced it with “new subsection (e),” which established both the US\$10 million threshold and the three year effective period. Pub. L. No. 110-181, 122 Stat. 3, 237 (2008); 41 U.S.C. § 253j(e)(3). As a result, GAO determined that “the entirety of subsection 253j(e) has no effect—including both the bar on task order protests under FASA, and the exceptions to that bar under FASA, and the 2008 NDAA.” GAO thus concluded that “the plain meaning of 41 U.S.C. § 253j(e)(3) eliminates any bar to our jurisdiction to hear and issue decisions concerning bid protests arising from task or delivery orders of any value.”<sup>5</sup>

GAO acknowledged that Congress perhaps intended the sunset provision to apply solely to the authorization to hear protests of task orders in excess of US\$10 million, but GAO noted that where a statute is clear on its face, “courts do not ‘resort to legislative history to cloud a statutory text that is clear.’” Here, GAO stated, there is no basis to ignore the plain language of the statute.<sup>6</sup>

In pending legislation to amend GAO’s jurisdiction over task order protests, Congress tacitly acknowledges the unintended reach of the sunset provision in the 2008 NDAA. Instead of applying broadly to “this subsection,” as it did in the recently expired version interpreted by GAO, the proposed sunset provision explicitly applies only to the provisions permitting protests of task orders in excess of US\$10 million, leaving intact (post-sunset) FASA’s general bar on task order protests other than those asserting an increase in scope, period, or maximum value of the contract. See S. 498, 112th Cong. § 2 (as passed by Senate, May 12, 2011).<sup>7</sup>

Given that Congress most likely did not intend the sunset provision to repeal all limits on GAO’s jurisdiction over task order protests, this new window for contractors to

<sup>3</sup> As amended by the 2008 NDAA, subsection 253j(e) read as follows:

(e) Protests.—

(1) A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for—

(A) a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued; or

(B) a protest of an order valued in excess of \$10,000,000.

(2) Notwithstanding section 3556 of title 31, the Comptroller General of the United States shall have exclusive jurisdiction of a protest authorized under paragraph (1)(B).

(3) This subsection shall be in effect for three years, beginning on the date that is 120 days after the date of the enactment of the National Defense Authorization Act for Fiscal Year 2008.

Pub. L. No. 110-181, 122 Stat. 3, 237 (2008) (codified at 41 U.S.C. § 253j(e) (2006 & Supp. III 2009)).

<sup>4</sup> On January 7, 2011, President Obama signed into law the FY 2011 NDAA, which extended GAO’s protest jurisdiction over defense agency task orders exceeding US\$10 million.

<sup>5</sup> GAO also found that, even if its jurisdiction expired on May 27, 2011, GAO retained jurisdiction over task and delivery order protests filed prior to that date, provided that the order’s value was in excess of US\$10 million.

<sup>6</sup> The decision evidently received thorough consideration at GAO, as evidenced by the decision’s list of five GAO attorneys who participated in the decision.

<sup>7</sup> A companion bill, H.R. 899, has not yet passed the House.

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protest civilian agency task order awards with any value may be short-lived. Indeed, GAO's decision in *Technatomy Corp.* may well spur Congress into action on the pending legislation, which would re-establish the pre-May 27, 2011 status quo for five more years.

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