

FAR Council Issues a Rule Inconsistent with GAO's Position on Its Jurisdiction to Hear Task and Delivery Order Protests

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As we have reported, the Government Accountability Office (GAO) recently issued a decision, *Technatomy Corp.*, B-405130, June 14, 2011, 2011 WL 2321836, declaring that its jurisdiction to hear bid protests of task and delivery orders issued under multiple-award indefinite-delivery/indefinite-quantity (IDIQ) contracts had significantly expanded. See "GAO's Jurisdiction Over Protests of Task and Delivery Orders Gets Complicated," June 15, 2011. Three weeks later, however, the Federal Acquisition Regulatory Council (FAR Council) issued an Interim Rule (see <http://edocket.access.gpo.gov/2011/pdf/2011-16675.pdf>) that appears to contradict GAO's findings but does not expressly discuss GAO's *Technatomy* decision. These contrary views raise several questions about the fate of task and delivery order protests at GAO and, possibly, the Court of Federal Claims.

Background

Title 41 of the U.S. Code governs acquisitions by federal civilian agencies. Procurements by the Department of Defense (DoD), the National Aeronautics and Space Administration (NASA) and the Coast Guard are governed by Title 10 of the Code. Until May 2011, Title 41 and Title 10 contained virtually identical language regarding the award of IDIQ contracts and contractors' ability to protest task or delivery orders issued under those contracts.

Prior to 1994, GAO's bid protest jurisdiction did not distinguish between protests of contract awards and protests of task and delivery orders, and GAO routinely heard protests related to task and

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delivery orders under IDIQ contracts. In 1994, Congress enacted the Federal Acquisition Streamlining Act (FASA), which limited GAO's bid protest jurisdiction over task and delivery orders to protests alleging that "the order increases the scope, period or maximum value of the contract under which the order is issued." 41 U.S.C. § 253j(e) (1994). In 2008, as part of the National Defense Authorization Act (NDAA) for Fiscal Year 2008, Congress expanded GAO's protest jurisdiction and permitted protests of task and delivery orders valued in excess of \$10 million, regardless of the bases of protest. 41 U.S.C. § 253j(e) (2008). However, the 2008 NDAA included a three-year sunset provision, with the result that GAO's expanded jurisdiction would expire as of May 27, 2011. 41 U.S.C. § 253j(e)(3) (2008). In the Fiscal Year 2011 NDAA, Congress extended the sunset date for protests of task and delivery orders under Title 10 (DoD, NASA and Coast Guard) contracts through September 30, 2016, but it did not similarly extend the sunset date for protests of task or delivery orders under Title 41 (civilian) contracts.

In *Technatomy*, GAO found that Congress's failure to extend the sunset date for protests of task or delivery orders awarded under Title 41 meant that its jurisdiction reverted to the pre-1994 version of Title 41—allowing GAO to decide protests of any Title 41 task or delivery order, regardless of the task order's value or the grounds of protest. In contrast, GAO's jurisdiction over protests of task and delivery orders issued under Title 10 contracts is unchanged, and GAO will decide such protests only if the order exceeds \$10 million.

Since the *Technatomy* decision, Congress has not attempted to extend the Title 41 sunset date or otherwise address the imbalance in GAO's bid protest jurisdiction. Bills to extend the Title 41 sunset date are pending in both chambers of Congress, however. The Senate passed its version, S. 498, by unanimous consent on May 12, 2011. The House Committee on Oversight and Government Reform approved a companion bill, H.R. 899, on March 17, 2011, but the full House has not addressed the bill.

The Interim Rule

Without mentioning the *Technatomy* decision, the Federal Acquisition Regulation (FAR) Council stated unequivocally in a July 5, 2011, Interim Rule that the authority to protest task or delivery orders issued under Title 41 contracts expired on May 27, 2011. The Interim Rule incorporates the new sunset date for Title 10 task or delivery order protests into the FAR. 76 Fed. Reg. 39238 (July 5, 2011). The Background section of the two-page Interim Rule explains that Congress has not extended the date for protests of Title 41 task or delivery orders, then concludes that "contractors will no longer be able to protest task or delivery orders awarded by agencies other than DoD, NASA, and the Coast Guard." The Interim Rule then amends FAR 16.505(a)(9) (which authorizes GAO protests of task or delivery orders of more than \$10 million) to reflect this conclusion, with revised language as follows:

The authority to protest the placement of an order under this subpart expires on September 30, 2016, for DoD, NASA and the Coast Guard (10 U.S.C. 2304a(d) and 2304c(e)), and on May 27, 2011, for other agencies (41 U.S.C. 4103(d) and 4106(f)).

76 Fed. Reg. 39240. Although the Interim Rule is effective immediately, the FAR Council is soliciting public comments to consider when drafting the Final Rule. Comments must be submitted by September 6, 2011.

Implications for Contractors

One possible explanation for the divergent statements about jurisdiction over protests of non-DoD task orders is that the Interim Rule was written prior to GAO's decision in *Technatomy* and simply was not amended after the decision was published. Nonetheless, the contradiction between GAO's conclusions in *Technatomy* and the revised FAR language raise two significant issues:

- Based on the clear language in the FAR and the Interim Rule, it is possible that an agency would seek to dismiss any protest of Title 41 task or delivery orders filed at GAO after May 27, 2011. Unless GAO reverses its analysis from *Technatomy*, it seems unlikely that GAO would grant the dismissal request. The agency would then have to decide whether it would follow the recommendations in any GAO decision, despite believing that GAO did not have jurisdiction to hear the protest.
- Relying on the analysis in the *Technatomy* decision, a contractor also could attempt to protest a Title 41 task or delivery order at the Court of Federal Claims. If the court agrees with GAO's reasoning—that the sunset provision applies to the entirety of 41 U.S.C. § 253j(e) rather than simply the portions added in 2008—the court could find that it, too, has jurisdiction to hear any Title 41 task or delivery order protest because the provision providing exclusive jurisdiction to GAO would have sunset along with the rest of Section 253j(e).

Of course, these issues could become moot if Congress revises Title 41 to again match the protest limitations in Title 10. Given all these uncertainties, contractors should carefully review the amount and type of any task or delivery order to determine if the award decision can be protested at GAO or the Court of Federal Claims. Wiley Rein will continue to monitor developments related to task or delivery order protests.