

ALERT

# GAO's Jurisdiction Over Protests of Task and Delivery Orders Gets Complicated

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In a major jurisdictional decision, the Government Accountability Office (GAO) has ruled that government contractors may now protest task and delivery orders issued under multiple-award indefinite-delivery/indefinite-quantity (IDIQ) contracts awarded under Title 41 of the U.S. Code, regardless of the task order's value or the grounds of protest. By way of background, Title 41 of the U.S. Code governs acquisitions by federal civilian agencies. Procurements by the Department of Defense (DoD) and the National Aeronautics and Space Administration (NASA) are governed by Title 10 of the Code. This decision significantly expands GAO's jurisdiction over protests of task and delivery orders and creates an imbalance between GAO's jurisdiction over task orders issued under Title 41 as compared to those issued under Title 10.

On June 14, 2011, GAO issued its decision in *Technatomy Corp.*, B-405130. Technatomy protested the issuance of a task order to Catapult Technology, Inc. under the Veterans Technology Services (VETS) government-wide acquisition contract administered by the General Services Administration (GSA). The task order was issued by the Defense Information Systems Agency (DISA) for support to the U.S. Army Information Technology Agency. The protestor challenged the agency's evaluation of the vendors' technical and cost quotations.

DISA moved to dismiss the protest, arguing that GAO's bid protest jurisdiction over task and delivery orders had expired. A brief history of GAO's jurisdiction over task and delivery order protests is necessary to understand the DISA argument. 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 delivery orders under IDIQ

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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).<sup>[1]</sup> In 2008, as part of the National Defense Authorization Act (NDAA) for Fiscal Year 2008, Pub. L. No. 110-181, 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, Pub. L. No. 111-383, Congress extended the sunset date for protests of task and delivery orders under Title 10 (DoD and NASA) contracts through September 30, 2016. Similar legislation with regard to task and delivery orders issued under Title 41 (non-defense) contracts is pending in both Houses of Congress but has not been enacted. The Senate passed its version, S. 498, by unanimous consent on May 12, 2011. While the House Committee on Oversight and Government Reform approved a companion bill, H.R. 899, on March 17, 2011, it has not been addressed by the full House.

In *Technatomy*, the protest was filed before May 27, 2011, but DISA argued that GAO must dismiss the protest because its jurisdiction over task and delivery order protests had expired. For the purposes of the protest, the parties did not dispute that the task order was issued under an IDIQ contract awarded by GSA under Title 41 and that the order exceeded \$10 million in value. GAO denied the motion to dismiss and found that the 2008 NDAA's sunset provision applies to the entirety of 41 U.S.C. § 253j(e). Consequently, the sunset provision applies not only to the 2008 NDAA's exception for task orders in excess of \$10 million, but also to FASA's limitation on the scope of task and delivery order protests. For IDIQ contracts issued under Title 41, GAO's decision therefore reverts the bid protest world to a pre-FASA environment in which GAO retains its original jurisdiction over all task and delivery order protests regardless of value or the bases of protest.

GAO acknowledged in a footnote that its decision could be viewed as contrary to language in the legislative history of the 2008 NDAA. However, GAO found that the plain language of the statute was clear, rendering the legislative history unnecessary to interpret the statute. The decision also noted that even if DISA was correct that the sunset provision barred jurisdiction as of May 27, 2011, it would not affect GAO's ability to entertain task and delivery order protests filed prior to that date that met the \$10 million threshold.

Under *Technatomy*, disappointed offerors for task and delivery orders issued under Title 41 IDIQ contracts may now file protests without regard for the size of the order or the grounds for the protest. In contrast, protests of task and delivery orders issued under Title 10 contracts will be permitted only if the order exceeds \$10 million. Thus, 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.

GAO's decision in *Technatomy* could spur further legislative action in an attempt to harmonize GAO's bid protest jurisdiction over task and delivery orders issued under Title 10 and Title 41. Wiley Rein will continue to monitor bid protests at the GAO and developments related to task and delivery order protests.

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[1] Title 41 was recodified in January 2011, and Section 253 now appears at 41 U.S.C. § 4106. For continuity with previous statutes and the GAO decision, we refer to the original numbering scheme throughout this article.