

Who's In Charge? The GAO, the FAR Council, and Jurisdiction Over Task Order Bid Protests

July 15, 2011 by [W. Bruce Shirk](#)

We've previously complained about the FAR Council's tendency to take too much time to issue rules that entail consideration of complex subject matter, as indicated, for example, by the 13 years during which the Council dallied before issuing final rules for commercial off the shelf items, discussed [here](#). Recent events suggest, however, that there may be good reason for the Council's dilatory behavior because, as it turns out, when the Council does move quickly in response, say, to a legislative change, it tends to come up with the wrong answer.

On July 5, 2011 the Council issued an interim rule addressing GAO's jurisdiction to hear defense and civilian agency protests against award of task or delivery orders in light of FY 2011 National Defense Authorization Act provision extending GAO's jurisdiction to hear protests against the award of task orders by DoD or NASA to September 30, 2016, with the limitation that the orders must exceed \$10 million in value or expand the scope, period, or maximum value of a contract. See 76 Fed. Reg. 39,232 (July 5, 2011). The interim rule specifies the GAO's jurisdiction to hear such protests but, noting that Congress didn't get around to extending the same authority to GAO vis-à-vis task orders issued by civilian agencies, also indicates that GAO has no jurisdiction to do so.

The problem (well, "a" problem) with the Council's action in issuing this interim rule is that on June 14 - some three weeks before the Council issued its interim

rule - the GAO issued a well-reasoned decision addressing the question of its jurisdiction and found that its original jurisdiction to hear protests of task order awards by civilian agencies had been restored gloriously to life, courtesy of Congress' failure to extend the applicable sunset provisions or, for that matter, to address them at all. See *Technatomy Corp.*, B-405130, 2011-2 CPD ¶ 107 (June 14, 2011).

Now, all of this would be merely amusing if it weren't for the nature of "interim" rules, *i.e.*, they are effective when issued. In other words, the FAR Council has created a set of circumstances which are at best inopportune for the contracting community and which, if not eliminated, will cause uncertainty and likely lead to increased litigation costs as protestors and intervenors spar over the extent of GAO's jurisdiction to hear protests of task order awards by civilian agencies.

The Council should act promptly to revise its interim rule to be consistent with the GAO decision. After all, the GAO has pointed the way, and there is little danger this time that moving quickly will result in the wrong answer.

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