

Government Contracts & International Trade Blog

The Latest Updates on Developments Affecting Government Contracts

Presented By **SheppardMullin**

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The GAO Holds It Possesses Jurisdiction Over Bid Protests of Civilian Agency Task and Delivery Order Awards

By Marko W. Kipa

Many believed that the Government Accountability Office's ("GAO's") jurisdiction over bid protests of civilian agency task and delivery order awards valued at over \$10 million expired on May 27, 2011. This belief was based on the fact that certain broadened jurisdiction over civilian agency task and delivery order protests granted by the 2008 National Defense Authorization Act ("2008 Act") expired on that date. With the expiration of the broadened jurisdictional grant found in the 2008 Act, many thus contended that a contractor would not be able to protest a civilian agency task or delivery order award at the GAO unless the protest alleged that the order exceeded the scope, period or maximum value of the underlying contract. Protests of Department of Defense task and delivery order awards valued at over \$10 million were not similarly affected because Congress extended the GAO's exclusive, broadened jurisdiction over these protests through the 2011 National Defense Authorization Act.

The House of Representatives and the Senate introduced bills in March 2011 to level the playing field by providing the GAO with exclusive jurisdiction over civilian agency task and delivery order awards valued at over \$10 million. See H.R. 899; S. 498. The Senate recently passed its version of the bill. The bill must still pass the House and be signed by the President before it becomes law. But, the GAO did not wait. Rather, based on a plain meaning of the 2008 Act, the GAO recently held that it now possesses jurisdiction over bid protests of civilian agency task and delivery order awards. See *Technatomy Corp.*, B-405130, June 14, 2011.

The GAO provided the following rationale for its decision:

The Competition in Contracting Act ("CICA") provided the GAO with authority to decide bid protests, including protests in connection with task and delivery order

awards. See *id.* at p. 2. In 1994, Congress changed that jurisdiction with the passage of the Federal Acquisition Streamlining Act (“FASA”), which **barred protests against individual task and delivery order awards, unless the protest alleged that the order exceeded the scope, period or maximum value of the underlying contract.** See *id.* at pp. 2-3.

In 2008, Congress again fiddled with the jurisdiction of the GAO, in this instance, replacing the FASA provision with the 2008 Act. The 2008 Act again barred protests against individual task and delivery order awards but included exceptions to that bar where the awards were valued at over \$10 million or the allegation was that the award exceeded the scope, period or maximum value of the underlying contracts. See *id.* at p. 3. The 2008 Act’s broadened grant of authority, however, contained a three year sunset period. See *id.* at pp. 3-4. Importantly, as drafted, the sunset provision of the 2008 Act applied to the entire statutory subsection, which included (a) the bid protest bar, (b) the exception for protests alleging that the order exceeded the scope, period or maximum value of the underlying contract, as well as the (c) the new broadened exception that allowed protests of orders valued at over \$10 million. See *id.* at p. 4. The GAO concluded that since this entire subsection ceased to exist on May 27, 2011, the GAO thereafter regained jurisdiction over bid protests of civilian agency task and delivery order awards **under its original CICA jurisdiction.** See *id.* at pp. 4-5.

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The legislative process continues to move forward. The suspense over what would happen in the interim to the protest jurisdiction over task and delivery orders issued by civilian agencies, however, has been lifted. We now know that, even as we await Congressional action, the GAO will continue to entertain jurisdiction over bid protests challenging civilian agency task and delivery order awards.

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