

Task And Delivery Order Protests: Taking Aim At A Moving Target

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The saga began with the passage of the 2008 National Defense Authorization Act. While the Act contained a general prohibition barring bid protests of task and delivery order awards (excluding challenges to scope, period, or maximum value), it granted the GAO exclusive jurisdiction over bid protests of civilian and defense agency task and delivery order awards valued at over \$10 million. The Act also included a sunset date – May 27, 2011. The reach of the Act’s sunset provision would prove to be critical in shaping the GAO’s and the Court of Federal Claims’ jurisdiction over bid protests of civilian agency task and delivery order awards.

As the sunset date approached, Congress sought to extend the GAO’s exclusive bid protest jurisdiction over civilian and defense agency task and delivery order awards valued at over \$10 million. A close reading of the legislation revealed, however, that the extension applied only to defense agency task and delivery order awards valued at over \$10 million. Congress subsequently introduced bills to rectify the omission. See H.R. 899; S. 498. However, the sunset date came and went without the bills becoming law.

The jurisdictional void was filled quickly. Several weeks after the sunset date passed, the GAO concluded that the plain meaning of the sunset provision rendered it applicable to the entire statutory “subsection” – *i.e.*, the general bid protest prohibition and the exclusive grant of jurisdiction to the GAO over bid protests of task and delivery order awards valued at over \$10 million. See *Technatomy Corp.*, B-405130, 2011 CPD ¶ 107 (Comp. Gen. June 14, 2011). As a result, the GAO held that it possesses jurisdiction over bid protests of civilian task and delivery awards under its original Competition in Contracting Act (“CICA”) jurisdiction. *Id.*

The Court of Federal Claims likewise held recently that it possesses bid protest jurisdiction over civilian task and delivery order awards. *Med Trends Inc. v. United States*, 2011 WL 4037418 (Fed. Cl. Sept. 13, 2011). The Court also reasoned that the plain meaning of the sunset provision made it clear that the entire statutory “subsection” expired. *Id.* As such, the Court concluded that it possesses bid protest jurisdiction over civilian agency task and delivery order awards under the Tucker Act.^[1] *Id.*

In sum, until the pending Congressional bills become law, the GAO and the Court of Federal Claims have agreed that neither the grant of exclusive jurisdiction to the GAO, the general bid protest prohibition, nor the \$10 million jurisdictional threshold applies to protests of civilian task and delivery order awards. Disappointed offerors can thus file bid protests of civilian agency task and delivery order awards—irrespective of the value of the award—at either the GAO or the Court of Federal Claims. The same does not hold true, however, for protests of defense agency task and delivery order awards. Timely legislation was passed with respect to these protests. Disappointed offerors may only file protests of defense agency task and delivery order awards valued at over \$10 million at the GAO.

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^[1] The Tucker Act confers jurisdiction upon the Court of Federal Claims to hear certain types of cases, including those where the government is a party to a contract. 28 U.S.C. § 1491.