



The Sun Also Rises: GAO’s Jurisdiction Over Civilian Task and Delivery Orders is Restored

by Steve Pozefsky and Walter Wilson

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Government contractors wondering whether and when they can protest military and civilian task and delivery orders should be aware of recent changes in the law affecting a party’s right to protest before the General Accounting Office (“GAO”). As a result of recently enacted legislation, bidders or other interested parties can now go back to the GAO to protest civilian agency task and delivery orders in excess of \$10 million, as well as military task and delivery orders in excess of \$25 million.

Bid protests to the GAO involving military and civilian agency task and delivery orders under multiple award indefinite delivery indefinite quantity contracts (“IDIQs”) were originally prohibited by the Federal Acquisition Streamlining Act of 1994 (“FASA”). FASA contained a limited exception to this prohibition for protests alleging that an order improperly increased the scope, period, or underlying value of the underlying IDIQ.

In addition to FASA’s limited exception, the 2008 National Defense Authorization Act (“NDAA”) expressly conferred jurisdiction on GAO over task and delivery orders valued in excess of \$10 million for both military and civilian orders. This jurisdictional grant was reauthorized in the 2012 NDAA. However, the 2012 NDAA contained a statutory sunset provision which provided that this task and delivery order jurisdiction would expire on September 30, 2016. See *National Defense Authorization Act for Fiscal Year 2012*, Pub. L. No. 112-81, sec. 813, 125 Stat 1298, 1491 (2011).

In the 2013 NDAA, Congress repealed the expiration date for military task order protests, but left the September 30, 2016 expiration date in place for civilian task order protests. Thus, on October 1, 2016, the GAO’s jurisdiction over civilian agency task orders was again limited to protests that the order increased the scope, period or maximum value of the underlying IDIQ. This resulted in the dismissal of multiple civilian task order protests filed after the expiration. See, e.g., *HP Enter. Servs., LLC*, B-413382.2, Nov. 30, 2016.

On December 16, 2016, the GAO's jurisdiction over civilian task and delivery orders valued over \$10 million was reinstated by the GAO Civilian Task and Delivery Order Protest Authority Act of 2016, Pub. L. No. 114-260, 130 Stat. 1361 (the "Act"), and by Section 835 of the 2017 NDAA. On January 26, 2017, the GAO held that the Act did not apply retroactively to provide GAO with jurisdiction to consider civilian agency task order protests filed between October 1 and December 16, 2016, because the Act did not expressly provide for such retroactive application. *HP Enter. Servs., LLC – Reconsideration*, B-413382.3, Jan. 26, 2017.

It is also significant to note that the 2017 NDAA increased the threshold for the GAO's jurisdiction over military task and delivery order protests to those valued in excess of \$25 million. *2017 NDAA*, Pub. L. No. 114-328, 120 Stat. 2000.

Pay Up: Agencies Cannot Use Corrective Action to Avoid Paying Protest Costs

by Steve Pozefsky and Walter Wilson

A recent decision by the General Accounting Office ("GAO") illustrates how an agency cannot use corrective action to avoid having to reimburse the protester for its costs, including attorneys' fees, in bringing a clearly meritorious protest. *Best Value Tech., Inc. – Costs*, B-412624.3, Feb. 6, 2017.

In *Best Value*, the protester, Best Value Technology, Inc. ("BVTI"), sought reimbursement of its costs in pursuing a protest of the contract award made by the Department of Veterans Affairs ("VA") for auditing support services. BVTI filed its timely protest on January 10, 2016 and, over the course of the next month

and a half in response to the administrative record and the VA's arguments, filed supplemental protest grounds and asserted that the VA failed to provide a substantive response to BVTI's initial protest grounds. GAO then requested that the VA provide a more substantive response to BVTI's initial protest grounds. One day later, the VA filed a notice of corrective action, stating its intention to terminate the contract and to "conduct further acquisition planning." GAO subsequently dismissed the protest as academic, and BVTI petitioned the GAO for reimbursement of its costs in filing and pursuing the protest.

In response to BVTI's request for costs, the VA argued that it did not unduly delay in taking corrective action and that BVTI's protest was not clearly meritorious. According to the VA, BVTI's protest put the contracting officer on notice of a potential Procurement Integrity Act ("PIA") violation by the VA's evaluators. But, argued the VA, it would have been premature for the VA to take corrective action until the alleged violation became apparent and there was sufficient evidence to justify the taking of corrective action.

The GAO rejected this argument, emphasizing that "[t]he agency's rationale for taking corrective action . . . is unrelated to the question of whether the agency unduly delayed taking corrective action in the face of a clearly meritorious protest." In a footnote, the GAO noted that the VA's reasoning was backwards, stating:

If anything, the agency's rationale supports BVTI's request for reimbursement of its protest costs because, as the agency concedes, it is only through BVTI's protest that the potential PIA violation was brought to light. . . . One of the fundamental goals of the bid protest provisions of [the Competition in Contracting Act] is to empower disappointed bidders to act as private attorney generals . . . and to relieve a protester of the financial demands of acting as a private attorney general where it brings to light an agency's failure to conduct a procurement in accordance with law and regulation." (Internal citations and quotations omitted.)

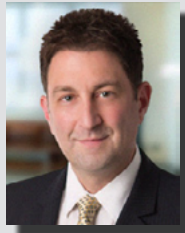


In a separate footnote, the GAO rejected yet another rationale urged by the VA as to why it should not have to reimburse BVTI for its protest costs. The VA argued that BVTI's request for costs "runs afoul [of] equity and fairness" because BVTI is the incumbent and was being paid for its continued performance on the contract. In dismissing this argument, the GAO explained that the compensation BVTI received for rendering services to

the VA was wholly separate and distinct from the reimbursement of its protest costs.

The decision in *BVTI* illustrates that agencies cannot use corrective action, including their rationale for taking it, as both a sword and a shield against protesters seeking reimbursement for their costs in having to pursue a clearly meritorious protest.

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