

Now You See Me, Now You Don't: GAO's Disappearing Jurisdiction Over Civilian Agency Task Orders

By

Congress pulled a ghoulish Halloween trick this month, bringing to an end the Government Accountability Office's (GAO) jurisdiction over bid protests of civilian agency task orders and delivery orders. Before October 1, 2016, bidders could protest the award of a task order worth more than \$10 million before the GAO, as established by prior amendments to the National Defense Authorization Act (NDAA) and the Federal Acquisition Streamlining Act (FASA). But GAO's jurisdiction over task order protests related to civilian agency contracts was temporary, scheduled to sunset at the end of the last Fiscal Year on September 30, 2016. 41 U.S.C. § 4106(f).

Two competing versions of an updated 2017 NDAA in the U.S. House and Senate are supposed to be getting worked out in conference committee, but there has not been final agreement or a final vote on those bills. The House bill permanently restores GAO's jurisdiction over protests of civilian agency task orders worth more than \$10 million, which makes sense given that more and more federal contracts are being structured as overarching Indefinite Delivery/Indefinite Quantity (IDIQ) awards accompanied by individual task or delivery orders when an agency wants to actually purchase a good or service under the IDIQ contract. The Senate bill moves in the opposite direction; not only does it fail to reinstate GAO's jurisdiction over civilian task orders, but it also removes GAO's permanent jurisdiction over protests of defense/military agency task orders.

This situation leaves GAO's authority over task order bid protests in limbo. As of right now, GAO cannot hear any new bid protests regarding civilian agency task orders, unless and until there is a legislative fix that restores this jurisdiction. Meanwhile, GAO's authority over bid protests regarding defense agency task orders exceeding \$10 million continues to be permanent unless and until it is changed or repealed by legislation. See 10 U.S.C. § 2304c(e).

Contractors are left in a pickle. If you've got grounds for a protest of a civilian agency task order, you may be completely out of luck for now. The U.S. Court of Federal Claims, which serves as an alternative forum for bid protests, generally does not have any jurisdiction over task orders and delivery orders; GAO's jurisdiction was essentially exclusive. You may be able to pursue an internal agency protest, but this will depend on each agency's rules and regulations governing those protests, which are usually far less likely to succeed than a GAO protest. However, if your agency protest is timely filed and remains pending for several weeks or even months, Congress could act in the interim and restore GAO's jurisdiction, in which case you might be able to then file a subsequent protest to GAO "within 10 days of actual or constructive knowledge of initial adverse agency action." 4 C.F.R. § 21.2(a)(3). Additionally, GAO retains jurisdiction over *pending* civilian agency task order protests that were initiated *prior* to October 1, 2016. *Technatomy Corp.*, B?405130, Jun. 14, 2011, 2011 CPD ¶ 107 at 5. Accordingly, a protester could argue that a request for reconsideration or other follow-on filing submitted after September 30, 2016 relates back to a previously pending protest, and thus GAO still retains jurisdiction. Note, however, that in order to succeed, a request for reconsideration must be filed within "10 days after the basis for reconsideration is known or should have been known" and "must show that [GAO's] prior decision contains errors of either fact or law, or must present information not previously considered that warrants reversal or modification of [GAO's] decision." 4 C.F.R. § 21.14.

Make sure to also check the nature of the procurement vehicle at issue. The fact that it is labeled a "task order" may not be dispositive of whether it is, in fact, a task order, as a matter of law. If it is an overarching contract of some kind, then GAO may still retain jurisdiction. But unless one of these technicalities applies, contractors are generally left without any remedies to protest any civilian agency task orders – regardless of whether they are worth \$10 million or not – until Congress implements a fix. Congress does not reconvene until November 14, 2016.