

Curtains For GAO's Civilian Bid Protests?

Law360, New York (March 4, 2011) -- With the passage of the National Defense Authorization Act for Fiscal Year 2008 (the 2008 act), Congress expanded the U.S. Government Accountability Offices's jurisdiction to include bid protests in connection with civilian and defense contract task and delivery orders valued at over \$10 million. See Section 843 of the 2008 Act, Pub. L. No. 110-181.

Congress also included a sunset provision in the 2008 act that limited that grant of expanded jurisdiction to three years — i.e., until May 27, 2011. See *id.*[1]

With the expiration date in sight, Congress sought to extend the GAO's expanded jurisdiction until Sept. 30, 2016. See Section 825 of the National Defense Authorization Act for Fiscal Year 2011 (the 2011 Act).

Or so we thought. Section 825 of the 2011 act only references 10 U.S.C. § 2304c(e), which relates to U.S. Department of Defense contracts. There is no mention of Title 41, which applies to civilian contracts, as there had been in the 2008 act. See H.R. 6523, Section 825; see also S. 3454, Section 833.

As a result, Section 825 of the 2011 act extends the GAO's jurisdiction over task and delivery orders in excess of \$10 million until Sept. 30, 2016 only for DOD contract task and delivery orders. The GAO's expanded jurisdiction over civilian contract task and delivery orders apparently will sunset on May 27, 2011.

In this regard, the 2011 act's legislative history is in fact directed primarily toward the extension of the GAO's jurisdiction over DoD task and delivery order bid protests. The Senate Report only refers to 10 U.S.C. § 2304c, which, as mentioned above, relates to DOD contracts. See Senate Report 111-201, Section 833.

In addition, the Joint Explanatory Statement of the Committees on Armed Services of the U.S. Senate and House of Representatives on H.R. 6523 likewise only referenced DOD contract task and delivery orders and merely summarized Section 825's procedural development.

However, many in the government contracts community continued to ponder whether Section 825's omission of Title 41 was a technical error or the result of mere oversight. The Senate report included an intriguing additional detail that leaves one wondering why the extension of jurisdiction was limited to DoD orders:

"The sunset date was included in section 2304c to provide the committee an opportunity to adjust the provision if the new protest authority resulted in a surge of bid protests. In April 2009, the Government Accountability Office reported that only a handful of bid protests are attributable to the new authority. The committee concludes that no adjustment to the authority is needed." See id.

The referenced GAO report did conclude that, at the time, there had been a limited number of DOD protests filed under the GAO's expanded bid protest jurisdiction. See Report to Congress on Bid Protests Involving Defense Procurements, B-401197, at p. 8 (Apr. 9, 2009).

Interestingly, although the GAO report "generally refer[red] only to DOD procurements," it went on to say that "[i]n many cases, the analysis and our conclusions would be the same for civilian agency procurements." See id. at p. 5 n.7. The GAO report also cautioned that "no inference should be drawn that protest processes or trends would be different for civilian procurements." See id.

Thus, while the GAO report was directed at DOD procurements, it did not suggest that there was a "surge" of new protests on either the defense or civilian side of the equation. In other words, the referenced GAO report did not provide a basis for failing to extend the GAO's jurisdiction over civilian contract task and delivery order bid protests.

In sum, the 2011 act and accompanying materials are all directed toward extending the GAO's bid protest jurisdiction over DOD contract task and delivery orders valued at over \$10 million until Sept. 30, 2016. While there is a growing chorus alleging that Congress' failure to extend the GAO's jurisdiction over civilian contract task and delivery orders was the result of a technical error or oversight, it remains to be seen whether and when Congress will act to correct the omission.

For the time being, it seems to be clear that absent further legislative action, the GAO's bid protest jurisdiction over civilian contract task and delivery orders valued at over \$10 million will sunset after May 27, 2011, with the exception of protests alleging that the task or delivery order exceeded the scope, period or maximum value of the underlying contract.

--By Marko W. Kipa, Sheppard Mullin Richter & Hampton LLP

Marko Kipa is an associate in Sheppard Mullin's Washington, D.C., office in the firm's government contracts and regulated industries practice group.

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[1] We previously discussed Section 843 of the 2008 Act and its implications here, here, and here.