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## Post-Med Trends Mess: Where To File A Task Order Protest

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On Oct. 25, 2011, the U.S. Department of Justice appealed the ruling of the United States Court of Federal Claims in *Med Trends Inc. v. United States*, — Fed. Cl. —, No. 11-420 (Fed. Cl. Sept. 12, 2011). In this opinion, the COFC ruled that it had jurisdiction to hear protests of task or delivery orders awarded by civilian federal agencies.

This ruling followed a similar ruling from the Government Accountability Office in *Technatomy Corporation*, B-405130, June 14, 2011, that the GAO also had jurisdiction to entertain such protests. But both of these opinions are contradicted by an interim Federal Acquisition Regulation rule issued in July 2011 stating that protests such as these were not permitted. As a result of all this, some issues of government contracts jurisprudence have become quite murky.

How have we come to this? How can basic issues such as the proper forum in which to file a protest and the types of permissible protests that may be filed have become so unclear? To answer these questions, we must revisit 25 years' worth of legislative history.

### In The Beginning ...

Prior to 1984, the COFC (which was known then as the Claims Court) had jurisdiction “to render judgment on an action by an interested party.” 28 U.S.C. § 1491(b)(1). “Actions,” as used in this statute, included bid protests. But in 1984 Congress passed the Competition in Contracting Act (“CICA”), 31 U.S.C. § 3551 et seq., which gave the GAO power to decide protests “if filed in accordance with this subchapter.” 31 U.S.C. § 3552. The CICA contained procedural requirements for filing protests with the GAO, but was careful to note that the GAO’s jurisdiction to hear protests was not exclusive.

This subchapter does not give the Comptroller General exclusive jurisdiction over protests, and nothing contained in this subchapter shall affect the rights of any interested party to file a protest with the contracting agency or to file an action in the United States Claims Court.

31 U.S.C. § 3556 (2011).

So in 1984 bid protests could be filed in a variety of venues: the COFC, United States district courts,<sup>[1]</sup> the GAO and the agency awarding the contract. That jurisdictional scheme continued until 1994, when Congress enacted the Federal Acquisition Streamlining Act (“FASA”).

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<sup>1</sup> At that time, United States district courts also had the power to hear and decide bid protests. But that authority terminated on Jan. 1, 2001. See Administrative Dispute Resolution Act of 1996, Pub. L. 104-320 at § 12(d) and 12(e), 110 Stat. 3870.

## **The Rise Of The “Task Order”**

FASA was intended to be “a comprehensive overhaul of the federal acquisition laws.” S. Rep. No. 103-258, at 3 (1994). Instead of issuing individual contracts for each task — with the corresponding procurement paperwork and processes — agency heads were encouraged to “enter into a task or delivery order contract ... for procurement of services or property.” 41 U.S.C. § 253h(a) (2011).

These were defined as contracts that did “not procure or specify a firm quantity of [services or property] ... and that provides for the issuance of orders for the” performance of tasks or the delivery of property during the term of the contract. 41 U.S.C. § 253k(2) (2011). FASA was intended to increase the use of the indefinite duration/indefinite quantity (“ID/IQ”) contract by federal agencies. See *Digital Techs. Inc. v. United States*, 89 Fed. Cl. 711, 719 (Fed. Cl. 2009).

Prior to FASA, there was no distinction between protests of various types of contracts. But FASA reduced permissible protests of ID/IQ task or delivery orders.

A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for a protest on the ground that the order increases the scope, period or maximum value of the contract under which the order is issued.

41 U.S.C. § 253j(d) (2011). So unless a task order somehow increased the underlying ID/IQ contract, it was immune to protest by a disappointed business. Congress made no change to the jurisdiction of either the GAO or the COFC to entertain such protests.

In 2008, Congress again changed the jurisdictional rules for protesting awards of task orders when it passed the National Defense Authorization Act (“NDAA”). See Pub. L. No. 110□181, 122 Stat. 3 (2008). The NDAA granted the GAO exclusive jurisdiction to hear and decide a protest of an ID/IQ task or delivery order award if the order had a value of greater than \$10 million. 41 U.S.C. § 253j(e)(1)(B) and (e)(2) (2011).

Congress also included a sunset provision in this subsection. It stated in paragraph (e)(3) that “This subsection shall be in effect for three years.” The sunset provision took effect on May 27, 2011. As a result, “this subsection” was eliminated. But what exactly did that mean? Shortly thereafter, the GAO had occasion to determine the meaning of 41 U.S.C. § 253j(e)(3).

## **The GAO’s Decision In Technatomy Corporation**

By decision dated June 14, 2011, the GAO ruled that the sunset provision invalidated all of subsection 253j(e). This included not only the 2008 amendments made pursuant to NDAA, but also the amendments made under FASA in 1994.

Here, the plain meaning of the sunset provision unambiguously refers to the whole of subsection 253(j)(e). ...

As a result of the sunset of 41 U.S.C. § 253j(e), the jurisdiction of our office over protests of task or delivery orders has, effectively, reverted to the jurisdiction we had under CICA, prior to its amendment by FASA [in 1994].

Matter of Technatomy Corp., B-405130, June 14, 2011. In other words, the GAO claimed authority to decide protests of all task and delivery orders awarded by federal agencies governed by Title 41 of the United States Code.

It is important to note that the Technatomy decision has no effect on federal agencies that are governed by Title 10 of the United States Code, (i.e., the U.S. Department of Defense, NASA and the United States Coast Guard.

In 2008 as part of the NDAA these agencies had the identical sunset provision inserted into their statute regarding protest jurisdiction as did the Title 41 agencies. Compare 41 U.S.C. § 253e with 10 U.S.C. § 2304c(e). The difference is that Congress did act to extend the sunset provision in 10 U.S.C. § 2304c(e), while it failed to extend the identical provision in 41 U.S.C. § 253e.

Therefore, per Technatomy, the jurisdictional bases for the GAO's consideration of protests for task or delivery orders is dependent on whether the federal agency issuing the order is governed by Title 10 or 41 of the U.S. Code.

### **New FAR Provision Contradicts Technatomy**

On July 5, 2011, the FAR Council issued an interim rule amending the FAR to implement the extension of the sunset provision in 10 U.S.C. § 2304c. The new sunset date is Sept. 30, 2016. The problem for practitioners, however, is that the interim rule differs from the Technatomy decision. Recall that in Technatomy the GAO took the position that the sunset provision in 41 U.S.C. § 253j(e)(3) operated to repeal the totality of subsection 253j(e).

That approach deleted not only the 2008 amendments under the NDAA but also the 1994 amendments under FASA. As a result, the GAO claimed jurisdiction to decide protests of orders issued by Title 41 agencies. But the FAR Council believes that the sunset provision in Section 253j(e)(3) deleted only the 2008 amendments, leaving in place the 1994 FASA limitations on task or delivery order protests that were codified in Section 235j(e).

Section 825 [of the National Defense Authorization Act for Fiscal Year 2011] amends 10 U.S.C. § 2304c(e) to extend the sunset date for protests against the award of task and delivery orders from May 27, 2011 to September 30, 2016, but only for Title 10 agencies [i.e., the DOD, NASA and the Coast Guard]. There has been no comparable change to Title 41, so the sunset date for protests against the award of task and delivery orders by other agencies remains May 27, 2011. With this change, contractors will no longer be able to protest task or delivery orders awarded by agencies other than DoD, NASA and the Coast Guard.

Federal Acquisition Regulation; Extension of Sunset Date for Protests of Task and Delivery Orders, 76 Fed. Reg. 39,238, 39,239 (July 5, 2011) (to be codified at 48 C.F.R. pt. 16). The text of the amended FAR clause followed the commentary. FAR § 16.505(a)(9)(ii) now reads as follows.

The authority to protest the placement of an order under this subpart [Indefinite-Delivery Contracts, Subpart 16.5] expires on September 30, 2016 for DoD, NASA and the Coast Guard and on May 27, 2011 for other agencies.

Id. at 76 Fed. Reg. 39,240.

That, of course, is opposite to the position taken by the GAO in Technatomy. Government contract lawyers were aware that COFC was considering this very issue in the Med Trends case. They hoped the COFC would provide some clarification regarding these contradictory pronouncements. They were disappointed.

### **Med Trends Does Not Address the Contradiction**

Med Trends followed Technatomy's reasoning in all particulars, but did not discuss the effect of the recent FAR amendment. Like the GAO in Technatomy, the COFC in Med Trends has claimed jurisdiction to hear and decide orders issued by civilian agencies. FAR § 16.505(a)(9)(ii) says otherwise.

As a result, this issue remains undecided. Perhaps the court of appeals will reverse Med Trends's jurisdictional decision. Perhaps the final version of FAR 16.505(a)(9)(ii) will read differently from the interim rule. But those possibilities are for the future. What is a practitioner to do when faced with advising a client now?

### **Conclusion**

It seems clear that the rules for protesting task orders issued by the DOD, NASA or the Coast Guard are unchanged. Such task orders can be protested only to the GAO, and only if the order either exceeds \$10 million or expands the scope of the contract on which the order is based.

Protests of task or delivery orders awarded by civilian agencies, however, are more complicated. Per Technatomy and Med Trends, protests of task or delivery orders issued by civilian agencies can now be filed in either the GAO or the COFC. But any Title 41 federal agency wishing to contest jurisdiction in those fora would almost certainly invoke the amended FAR provision, which states that such a protest is not permitted. One of these positions will ultimately be proven correct, but not before much time and money will be wasted fighting these battles.

To date, there has been no congressional action undertaken to resolve this issue. Bills have been introduced, but have not advanced. The FAR Council has received written comments on its interim rule, but has not taken further steps. We will continue to monitor these issues. For now, suffice it to say that this is an enormous mess.

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