
# Jurisdiction over Challenges to "Large" Orders Under Federal Contracts

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# Summary

On December 31, 2011, President Obama signed the National Defense Authorization Act for FY2012. This act amends Title 41 of the United States Code to extend the Government Accountability Office's (GAO's) jurisdiction over protests involving "large" orders issued under civilian agency contracts and clarifies that protests of such orders may not be heard after September 30, 2016, if this jurisdiction is not reauthorized (P.L. 112-81, § 813). Title 41's provisions regarding the protests of "large" orders previously had a May 27, 2011, sunset date. However, the language of these provisions was such that GAO and the U.S. Court of Federal Claims construed them to mean that they could hear protests of orders of any size issued under civilian agency contracts after May 27, 2011. These cases arose because of amendments that the Federal Acquisition Streamlining Act (FASA) of 1994 and the National Defense Authorization Act (NDAA) for FY2008 made to the Armed Services Procurement Act and the Federal Property and Administrative Services Act.

Before FASA was enacted, GAO, the federal courts, and procuring agencies had jurisdiction over protests alleging that agency conduct in the issuance of orders under federal contracts was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. However, FASA limited this jurisdiction, barring all protests regarding the issuance of orders except those alleging that the order increased the scope, period, or maximum value of the underlying contract. Later, the NDAA for FY2008 amended FASA to expand the grounds upon which the issuance of orders could be protested, authorizing GAO to hear protests of orders valued in excess of $10 million that did not increase the scope, period, or maximum value of the underlying contract. The NDAA for FY2008 also included a sunset provision, specifying that this "subsection" expired on May 27, 2011. Executive branch agencies and many commentators construed this language to mean that GAO's jurisdiction over protests of "large" orders expired on May 27, 2011. However, GAO and, later, the Court of Federal Claims disagreed.

First, in *Technatomy Corporation*, GAO relied upon the statute's "plain meaning" to find that "subsection" meant the entirety of FASA's provisions regarding protests of orders, as amended, and not just the amendments made to these provisions by the NDAA for FY2008. According to GAO, what expired on May 27, 2011, were the limitations on its jurisdiction over protests that do not increase the scope, period, or maximum value of the underlying contract, as amended by the expansion of its jurisdiction to include protests of "large" orders. Thus, it concluded that it may hear protests of orders of any size issued under civilian agency contracts, regardless of whether the protest alleges that the order increased the scope, period, or maximum value of the underlying contract. Later, in *Med Trends, Inc. v. United States*, the court similarly relied upon the "plain meaning" of FASA, as amended by the NDAA for FY2008. However, the court also explicitly rejected the government's argument that the legislative history of the NDAA for FY2008 supported construing "subsection" to mean only those provisions of FASA granting GAO jurisdiction over protests of orders valued in excess of $10 million.

These decisions would have resulted in protests of orders under civilian agency contracts being treated differently than protests of similar orders under defense contracts, and could also have increased the number of bid protests. The 111th Congress (P.L. 111-383, § 825) had previously amended Title 10 of the United States Code, which governs the procurements of defense agencies, with language identical to that in P.L. 112-81.

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# Introduction

This report discusses recent legislation and decisions by the Government Accountability Office (GAO) and the U.S. Court of Federal Claims regarding jurisdiction over orders issued under civilian agency contracts. On December 31, 2011, President Obama signed legislation[1] that effectively overturned two recent decisions by GAO and the Court of Federal Claims finding that they have jurisdiction over protests challenging the issuance of task and delivery orders of any size under civilian agency contracts,[2] even if these orders do not increase the scope, period, or maximum value of the underlying contract.[3] Prior to these decisions, executive branch agencies and many commentators had construed the Federal Acquisition Streamlining Act (FASA) of 1994, as amended by the National Defense Authorization Act (NDAA) for FY2008, as authorizing only protests concerning the issuance of orders under civilian agency contracts that (1) increased the scope, period, or maximum value of the underlying contract or (2) were valued in excess of $10 million, as well as granting GAO temporary exclusive jurisdiction over protests involving the latter.[4] However, GAO and the court rejected this interpretation, finding that what expired on May 27, 2011, were limitations on their jurisdiction imposed by FASA, as amended by the NDAA for FY2008. Thus, they concluded that they and, potentially, procuring agencies had jurisdiction over protests of orders of any size issued under the contracts of civilian agencies, regardless of whether these orders increased the scope, period, or maximum value of the underlying contract.[5]

Had they not been overturned by Congress, these decisions would have resulted in protests of orders under civilian agency contracts being treated differently than protests of similar orders under defense contracts, and could also have increased the number of bid protests.

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[1] National Defense Authorization Act for FY2012, P.L. 112-81, §813,—Stat.—(December 31, 2011).

[2] In so finding, GAO, in particular, assumed, without deciding, that the identity of the agency that awarded the underlying contract, and not that of the agency issuing the challenged order, determines whether the protest is governed by the provisions in Title 10 of the United States Code or those in Title 41 of the United States Code. *See* Technatomy Corp., B-405130, at ¶ 2 n.1 (June 14, 2011). The provisions of Title 10 generally apply to the procurements of defense agencies, while the provisions of Title 41 generally apply to the procurements of civilian agencies.

[3] Like the cases upon which it is based, the discussion of orders in this report excludes orders issued under the Federal Supply Schedules (FSS). While FSS contracts can be characterized as task and delivery order contracts, GAO and the courts historically found that orders under FSS contracts were protestable, notwithstanding the Federal Acquisition Streamlining Act (FASA) and the National Defense Authorization Act (NDAA) for Fiscal Year 2008, because their issuance is governed by a different section of the Federal Acquisition Regulation (FAR) than that governing orders under non-FSS contracts. *See, e.g.*, Labat-Anderson, Inc. v. United States, 50 Fed. Cl. 99, 104 (2001). However, it should be noted that, although the *Technatomy* protest involved an FSS contract, GAO did not address its possible jurisdiction in light of *Labat-Anderson* and related cases.

[4] *See, e.g.*, Mason Alinger, Recent Developments in Task and Delivery Order Contracting, 39 *Pub. Cont. L. J.* 839, 839 (2010) (stating that the NDAA for FY2008 "temporarily expanded [GAO's] jurisdiction to consider protests regarding certain task and delivery orders"); Ryan Roberts, Does Automatic Mean Automatic? The Applicability of the CICA Automatic Stay to Task and Delivery Order Bid Protests, 39 *Pub. Cont. L.J.* 641, 652 n.79 (2010) (suggesting that the inclusion of the sunset provision "demonstrate[s] legislative skepticism as to the benefit of task and delivery order protests, and therefore the new jurisdiction will either be a short-lived anomaly or a test run for later permanent jurisdiction").

[5] Procuring agencies had construed the 2008 amendments to FASA to mean that they lacked jurisdiction over protests regarding the issuance of orders valued in excess of $10 million. *See, e.g.*, Memorandum from Al Matera, Chairman, Civilian Agency Acquisition Council, Office of the Chief Acquisition Officer, Gen. Servs. Admin., to Civilian Agencies Other than NASA, Enhanced Competition for Task and Delivery Order Contracts, May 23, 2008 (copy on file with the authors). However, agencies could potentially have found that they had such jurisdiction under the reasoning adopted by GAO and the Court of Federal Claims.

# FASA and Subsequent Amendments

The decisions by GAO and the Court of Federal Claims arose from questions regarding the meaning of certain provisions of FASA[6] and amendments made to it by the NDAA for FY2008[7] and the Ike Skelton NDAA for FY2011.[8] For various reasons, including agencies' use of detailed specifications to restrict competition and difficulties procuring commercial items during the Gulf War, by the early to mid-1990s, many Members of Congress and commentators had become concerned that the federal procurement process was excessively cumbersome and time-consuming for both agencies and contractors.[9] FASA represented Congress's first attempt to respond to these concerns "by greatly streamlining and simplifying [the federal government's] buying practices."[10] FASA did so, in part, by explicitly recognizing "task and delivery order contracts,"[11] and by limiting contractors' ability to protest alleged improprieties in agencies' issuance of orders under task and delivery order (TO/DO) contracts, among other things. TO/DO contracts are contracts for services or goods, respectively, that do not "procure or specify a firm quantity of supplies (other than a minimum or maximum quantity)," but rather "provide[] for the issuance of orders for the delivery of supplies during the period of the contract."[12] Because the time of delivery and the quantity of goods or services to be delivered are not specified (outside of stated maximums or minimums) in TO/DO contracts, such contracts are sometimes referred to as indefinite delivery/indefinite quantity (ID/IQ) contracts.[13] TO/DO contracts are sometimes also described as single-award or multiple-award contracts, a designation based upon the number of firms—one or more than one, respectively—able to compete for task and delivery orders under the contract.[14] Before FASA was enacted, disappointed bidders and offerors could generally protest agency conduct in the award, or proposed award, of federal contracts that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" before GAO, the

[6] P.L. 103-355, 108 Stat. 3243 (1994).

[7] P.L. 110-181, §843, 122 Stat. 236-39 (October 14, 2008).

[8] P.L. 111-383, §825, 124 Stat. 4270 (January 7, 2011).

[9] *See, e.g.*, James K. Nagle, *History of Government Contracting* 506-07 (2d ed. 1999) (describing such aspects of pre-FASA procurements as specifications for sugar cookies that were 15 pages long; bid documents weighing three tons; and soldiers during the Gulf War requesting their families to send them commercial global positioning systems that reportedly worked better than the Army's navigational gear).

[10] A&D Fire Protection Inc. v. United States, 72 Fed. Cl. 126, 133 (2006) (internal quotations omitted) (quoting 140 *Cong. Rec.* H9240 (1994) (statement of Rep. Conyers). *See also* Recent Developments in Task and Delivery Order Contracting, *supra* note 4, at 839. Congress further streamlined aspects of federal procurement when it enacted the Federal Acquisition Reform Act (FARA) of 1996 (P.L. 104-106, div. D) and the Services Acquisition Reform Act (SARA) of 2003 (P.L. 108-136, tit. XIV).

[11] *See* P.L. 103-355, §1004, 108 Stat. 3249-50 (codified at 10 U.S.C. §2304a(a)) (procurements of defense agencies); *id*., §1054, 108 Stat. 3261 (codified at 41 U.S.C. §4103(a)) (procurements of civilian agencies). Although they lacked explicit statutory authority to do so, agencies used task and delivery order (TO/DO) contracts prior to 1994, and some commentators had asserted that TO/DO contracts were sometimes "improper[ly] use[d] … to avoid competing new or expanded requirements when competition is appropriate, or ensure proper approval of the justification when it is not." *See Report of the Advisory Panel on Streamlining and Codifying Acquisition Laws*, quoted in John Cibinic, Jr., Task and Delivery Order Contracting: Great Concept, Poor Implementation, 12 *Nash & Cibinic Rep.* ¶ 30, May 1998, at 75-76. For this reason, the Advisory Panel (also known as the "Section 800 Panel") recommended the codification of TO/DO contract authority, a recommendation which Congress adopted when it enacted FASA.

[12] 48 C.F.R. §16.501-1.

[13] *See* 48 C.F.R. §16.501-2(a).

[14] Multiple-award task order contracts are sometimes also referred to as MATOCs. Only firms holding the underlying contract may generally compete for orders issued under the contract.

federal courts, or procuring agencies.[15] GAO, in particular, had found that it had jurisdiction over protests regarding the issuance of orders under TO/DO contracts.[16]

Use of TO/DO contracts can greatly simplify the procurement process for federal agencies because agencies can issue orders to contractors holding the underlying TO/DO contract without complying with the requirements of the Competition in Contracting Act (CICA) of 1984, among other things.[17] This, in itself, can significantly reduce the time necessary for agencies to procure goods or services.[18] However, FASA further simplified the procurement process for federal agencies by limiting the ability of bidders or offerors to protest alleged improprieties or illegalities in the issuance of orders under TO/DO contracts.[19] In identical provisions codified in Titles 10 and 41 of the United States Code, FASA expressly prohibited protests challenging the issuance of orders except on certain narrow grounds:

> 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.[20]

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[15] The Administrative Procedure Act (APA) generally furnishes the substantive standard used in determining whether agency conduct in the award or proposed award of a government contract is permissible. *See* 5 U.S.C. §706(2)(A) (scope of review under the APA); Superior Helicopter LLC v. United States, 78 Fed. Cl. 181, 186-87 (2007) (application of APA to agency procurement activities).

[16] *See, e.g.*, Nautica Int'l, Inc., B-254428 (December 15, 1993); Data Comm'ns Sys. Corp., B-227340 (August 6, 1987).

[17] *See* P.L. 103-355, §1004, 108 Stat. 3252 (codified at 10 U.S.C. §2304c(a)(1)) ("The following actions are not required for issuance of a task or delivery order under a task or delivery order contract: … a competition (or [an approved] waiver of competition…) that is separate from that used for entering into the contract."); *id*. at §1054, 198 Stat. 3264 (codified at 41 U.S.C. §4106(b)(2)) (same). However, FASA did establish a general preference for multiple-award contracts and generally requires agencies to give all contractors holding the contract "a fair opportunity to be considered" for each order valued in excess of $3,000. *Id*., §1004, 108 Stat. 3250-52 (codified at 10 U.S.C. §2304a(d); 10 U.S.C. §2304c(b)); *id*., at §1054, 108 Stat. 3262-64 (codified at 41 U.S.C. §4103(d)(4); 41 U.S.C. §4106(c)). Congress subsequently enacted legislation requiring that the FAR be amended to provide "specific guidance" on the appropriate use of multiple-award TO/DO contracts, as well as the steps that agencies should take to ensure that contractors have a "fair opportunity to be considered" for orders. *See* NDAA for FY2000, P.L. 106-65, §804, 113 Stat. 704 (October 5, 1999). It also required that "smaller" orders (i.e., those valued in excess of the simplified acquisition threshold (generally $150,000) but below $5 million) issued under defense contracts be awarded on a "competitive basis," which means that (1) "fair notice" of the intent to make the purchase is provided to all contractors offering that good or service under the contract, and (2) all contractors responding to the notice are afforded a "fair opportunity" to make an offer and have that offer considered by the official making the purchase. NDAA for FY2002, P.L. 107-107, §803, 115 Stat. 1178-79 (December 28, 2001). Similar later requirements were later imposed on "smaller" orders under civilian agency contracts. *See infra* note 26.

[18] *See, e.g.*, *Federal Acquisition Trends, Reforms and Challenges: Hearings before the Subcomm. on Gov't Mgmt., Info. & Tech. of the H. Comm. on Gov't Reform, 106th Cong.*, 6-7 (2000) (statement of Henry L. Hinton, Jr., Assistant Comptroller General).

[19] *See, e.g.*, S. REP. NO. 103-259, at 7 (FASA "revise[d] and simplif[ied] the bid protest process with a view towards reducing the number of protest that are filed"); James Fontana, Multiple Awards: A Protest-Proof Process, 13 *Wash. Tech.* 18 (December 10, 1998) (characterizing use of TO/DO contracts under FASA as "virtually protest-proof").

[20] P.L. 103-355, §1004, 108 Stat. 3253 (codified, as amended, at 10 U.S.C. §2304c(e)); *id*. at §1054, 108 Stat. 3261 (codified, as amended, at 41 U.S.C. §4106(f)). In an attempt to provide contractors with additional opportunities to challenge alleged agency misconduct in the issuance of orders, FASA also directed all executive agencies using TO/DO contracts to appoint a task and delivery order ombudsman, who "shall be responsible for reviewing complaints from the contractors on such contracts and ensuring that all of the contractors are afforded a fair opportunity to be considered" for certain orders. *Id*., §1004, 108 Stat. 3253 (codified at 10 U.S.C. §2304c(f)); *id*., at §1054, 108 Stat. 3254 (codified at 41 U.S.C. §4106(g)).

The provisions codified in Title 10 apply to the procurements of defense agencies, while those codified in Title 41 apply to the procurements of civilian agencies.

## National Defense Authorization Act for FY2008

By 2008, congressional and public concerns regarding federal procurement had shifted, largely because of alleged waste, fraud, and abuse in contracts supporting military, diplomatic, and reconstruction efforts in Iraq and Afghanistan.[21] Rather than viewing the federal procurement process as too burdensome and time-consuming, as they did when FASA was enacted, some Members of Congress and commentators now believed that agencies had used their authority under FASA and similar laws to evade the spirit, if not the letter, of competition and other requirements.[22] These concerns persisted notwithstanding a series of judicial and administrative decisions finding that GAO and the federal courts *could* exercise jurisdiction over certain protests involving the issuance of orders that did not increase the scope, period, or maximum value of the underlying contract.[23] In fact, the Acquisition Advisory Panel, chartered under Section 1423 of the Services Acquisition Reform Act (SARA) of 2003, explicitly recommended that contractors be able to protest the issuance of "large" orders that do not increase the scope, period, or maximum value of the underlying contract.[24]

Congress responded, in part, to these concerns when it enacted the NDAA for FY2008. This act amended FASA to promote competition for orders under TO/DO contracts by (1) prohibiting agencies from using single-award TO/DO contracts valued in excess of $103 million (including options) unless certain conditions are met,[25] and (2) specifying what constitutes a "fair

[21] *See, e.g.*, Does Automatic Mean Automatic?, *supra* note 4, at 642.

[22] *See, e.g.*, Ralph C. Nash, Jr. & John Cibinic, Jr., Taming the Task Order Contract: Congress Tries Again, 22 *Nash & Cibinic Rep.* ¶ 31 (May 2008), at 75 (noting instances of improper use of TO/DO contracts, including "broad contract scopes, 10-year ordering periods, poorly defined task orders with long performance periods, options to extend task order performance for years on end, and open-ended hourly-rate-based pricing schemes that defy meaningful comparative evaluation during source selection"); Michael C. Wong, Current Problems with Multiple Award Indefinite Delivery/Indefinite Quantity Contracts: A Primer, *The Army Lawyer*, September 2006, at 25, 27 (same).

[23] *See, e.g.*, *Labat-Anderson*, 50 Fed. Cl. at 104 (protest of order under FSS contract not barred by FASA because the order was issued under Part 8 of the FAR, not Part 16); Electro-Voice, Inc., B-278319; B-278319.2 (January 15, 1998) (finding that FASA's bar on protests of orders that do not increase the scope, period, or maximum value of the underlying contract does not apply to "downselections," or two-step procurement processes wherein the number of potential competitors is first reduced by preliminary screening and then a competition is conducted among the remaining firms); L-3 Comm'ns Corp., ASBCA No. 54920, 06-2 B.C.A. (CCH) ¶ 33,374, at 165,451 (noting that breach of the contract clause obligating agencies to give contractors a "fair opportunity to be considered" "may theoretically be grounds for both a 'protest' seeking to cancel or modify the award and a 'claim' for damages").

[24] *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress* 108 (2007) (recommending that contractors be authorized to protest orders valued in excess of $5 million that do not increase the scope, period, or maximum value of the underlying contract). Industry groups and the Office of Federal Procurement Policy generally opposed authorizing such protests. *See, e.g.*, James J. McCullough, Acquisition Reform Revisited: Section 843 Protests Against Task and Delivery Orders at GAO, 50 *Gov't Cont.* ¶ 75, March 5, 2008, at 1; Office of Mgmt. & Budget, Statement of Administration Policy on S. 1547, National Defense Authorization Act for FY2008, at 5 (July 10, 2007) (copy on file with authors) (expressing concern that authorizing protests of "large" orders could delay the procurement process).

[25] P.L. 110-181, §843(a), 122 Stat. 236-37 (codified at 10 U.S.C. §2304a(d)(3)(A)); *id*., at §843(b), 122 Stat. 238-39 (codified at 41 U.S.C. §4103(d)(3)(A)). Single-award TO/DO contracts valued in excess of $100 million may be used only when the agency head determines in writing that (1) the task or delivery orders expected under the contract are so integrally related that only a single source can reasonably perform the work; (2) the contract provides for only firm fixed price task or delivery orders for products for which unit prices are established in the contract, or services for which prices are established in the contract for the specific tasks to be performed; (3) only one source is qualified and (continued...)

opportunity to be considered" for orders valued in excess of $5 million.[26] In addition, the NDAA for FY2008 also expanded protesters' ability to challenge alleged improprieties or illegalities in the issuance of orders. Specifically, the NDAA for FY2008 amended FASA to read as follows:

> A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for—
>
> (A) a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued; or
>
> (B) a protest of an order valued in excess of $10,000,000.[27]

The 2008 amendments further specified that GAO was to have exclusive jurisdiction over protests of orders valued in excess of $10 million that did not increase the scope, period, or maximum value of the underlying contract,[28] and that

> This subsection shall be in effect for three years, beginning on the date that is 120 days after January 28, 2008.[29]

Many commentators interpreted the word "subsection" here to refer to the provisions regarding GAO's exclusive jurisdiction over protests of orders valued in excess of $10 million because these provisions were added, along with the sunset clause, in 2008.[30] In addition, the legislative history of the 2008 amendments arguably indicated that Congress intended to temporarily authorize protests of "large" orders in order to gauge their effects on the procurement and protest processes before permanently authorizing such protests.[31]

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capable of performing the work at a reasonable price to the government; and (4) because of exceptional circumstances, it is necessary in the public interest to award the contract to a single source.

[26] *Id*., at §843(a)(2), 122 Stat. 237 (codified at 10 U.S.C. §2304c(d)); *id*., at §843(b)(2), 122 Stat. 238-39 (codified at 41 U.S.C. §4106(d)). Under the 2008 amendments, contractors have not had a "fair opportunity to be considered" unless they are provided with (1) a notice of the task or delivery order that includes a clear statement of the agency's requirements; (2) a reasonable period of time to provide a proposal in response to the notice; (3) disclosure of the significant factors and subfactors that the agency expects to consider in evaluating the proposals and their relative importance; (4) in the case of an award that is made on the basis of "best value," a written statement documenting the basis for the award and the relative importance of quality and price or cost factors; and (5) the opportunity for a post-award debriefing. The 110th Congress later expanded the competition requirements for TO/DO contracts of civilian agencies when it enacted the Duncan Hunter NDAA for FY2009. Among other things, this act requires that orders valued in excess of the simplified acquisition threshold (generally $150,000) and below $5 million be issued on a "competitive basis" unless certain conditions are met. P.L. 110-417, §863, 122 Stat. 4547 (October 14, 2008). In addition, the 2009 act also generally requires that notices related to sole-source task and delivery issues be posted on FedBizOpps (https://www.fbo.gov/) within 14 days of being placed. *Id*., §863(c), 122 Stat. 4547-48.

[27] P.L. 110-181, §843(a)(2), 122 Stat. 237 (codified, as amended, at 10 U.S.C. §2304c(e)(1)); *id*., at §843(b)(2), 122 Stat. 239 (codified at 41 U.S.C. §4106(f)(1)). The Senate version of the NDAA for FY2008 would have authorized protests of orders valued in excess of $5 million. However, the House version, which authorized protests of orders, valued in excess of $10 million, prevailed in conference. *See* H.R. REP. NO. 110-417, at 956 (2007).

[28] P.L. 110-181, §843(a)(2), 122 Stat. 237 (codified, as amended, at 10 U.S.C. §2304c(e)(2)); *id*., at §843(b)(2), 122 Stat. 239 (codified at 41 U.S.C. §4106(f)(2)).

[29] *Id*., at §843(a)(2), 122 Stat. 237 (codified, as amended, at 10 U.S.C. §2304c(e)(3)); *id*., at §843(b)(2), 122 Stat. 239 (codified at 41 U.S.C. §4106(f)(3)).

[30] *See supra* note 4 and accompanying text.

[31] *See* H.R. REP. NO. 110-477, at 956 (2007) ("The conferees expect that the sunset date will provide Congress with an opportunity to review implementation of the provision and make any necessary adjustments.").

## Ike Skelton National Defense Authorization Act for FY2011

Three years and 120 days after the enactment of the NDAA for FY2008 would have been May 27, 2011.[32] However, before this date arrived, the 111th Congress amended FASA's provisions regarding protests of orders issued under defense contracts to extend the sunset date and clarify that it applies only to GAO's exclusive jurisdiction over protests of "large" orders. Specifically, the Ike Skelton NDAA for FY2011 amended those provisions of FASA codified in Title 10 of the United States Code to read as follows:

> (1) A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for –
>
> (A) a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued; or
>
> (B) a protest of an order valued in excess of $10,000,000.
>
> (2) Notwithstanding section 3556 of title 31, the Comptroller General of the United States shall have exclusive jurisdiction of a protest authorized under paragraph (1)(B).
>
> (3) *Paragraph (1)(B) and paragraph (2) of this subsection* shall not be in effect after September 30, 2016.[33]

The 111th Congress did not make similar changes to the provisions of FASA codified in Title 41 of the United States Code governing protests of orders under civilian agency contracts. Thus, the provisions in Title 41 differed slightly from those in Title 10 at the time when GAO and the Court of Federal Claims issued their decisions. When their decisions were issued, subsection (B)(3) in Title 41 stated that "*This subsection* shall be in effect for three years, beginning on the date that is 120 days after January 28, 2008,"[34] not "*Paragraph (1)(B) and paragraph (2) of this subsection* shall not be in effect after September 30, 2016."

# The GAO and Court Decisions

In its June 14, 2011, decision in *Technatomy Corporation*, GAO found that it had jurisdiction over an order placed under a civilian agency contract that apparently did not expand the scope, period, or maximum value of the underlying contract.[35] The Department of Defense (DOD),

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[32] *See* Technatomy Corp., B-405130, at ¶ 2.

[33] P.L. 111-383, §825, 124 Stat. 4270 (January 7, 2011) (codified at 10 U.S.C. §2304c(e)) (emphasis added).

[34] 41 U.S.C. §4106(f) (emphasis added).

[35] GAO assumed, and the parties did not contest, that the order in question did not expand the scope, period, or maximum value of the underlying contract. *See* Technatomy Corp., B-405130, at ¶ 2 n.1. Because GAO is a legislative branch agency, the "separation of powers" doctrine means that its recommendations are not legally binding upon executive branch agencies. *See* Ameron, Inc. v. United States Army Corps of Eng'rs, 809 F.2d 979, 987 (3d Cir. 1986) ("The doctrine of separation of powers gives each branch of the government constitutional rights. These rights are of tremendous importance, as they insure that our government functions properly. They thereby serve as bulwarks to the freedom which the doctrine of separation of powers is intended to preserve."). Thus, the executive branch may—and, in fact, recently has—construed statutes in ways that contradict GAO's recommendations. *See* CRS Report R40591, *Set-Asides for Small Businesses: Recent Developments in the Law Regarding Precedence Among the Set-Aside Programs and Set-Asides Under Indefinite-Delivery/Indefinite-Quantity Contracts*, by (name redacted) (discussing disagreements (continued...)

which had issued the challenged order under a General Services Administration (GSA) contract, argued that because Congress had not extended the sunset date as to the orders of civilian agencies, GAO's jurisdiction to hear protests concerning task and delivery orders valued in excess of $10 million issued under civilian agency contracts expired on May 27, 2011.[36] GAO disagreed, because of the "plain meaning" of the relevant provisions of FASA.[37] GAO found that the word "subsection" in 41 U.S.C. §4106(f)(3) "unambiguously refers" to the entirety of subsection (f), which governs protests of civilian agency orders generally, not just subsection (f)(2), which grants GAO jurisdiction over protests of "large" orders.[38] Based upon this interpretation of "subsection," GAO found that what expired in May 2011 were the limitations on its jurisdiction under FASA, as amended by the expansion of its jurisdiction under the NDAA for FY2008.[39] Thus, it concluded that, because of the expiration of these limitations, its jurisdiction "revert[ed] to that originally provided in CICA,"[40] and it could hear protests concerning orders of any value under civilian agency contracts, regardless of whether the order increased the scope, period, or maximum value of the underlying contract.[41]

Subsequently, in its August 19, 2011, decision in *Med Trends, Inc. v. United States*, the Court of Federal Claims also found that it had jurisdiction over protests of orders of any value issued under civilian agency contracts.[42] In so finding, the court rejected the government's argument that, "notwithstanding the clear language of the statute, the legislative history associated with the 2008 amendment makes clear that the grant of jurisdiction to GAO in 2008 was a short-term experiment."[43] The court did so, in part, because it, like GAO, found that the word "subsection" referred to the entirety of FASA's provisions regarding protests of task and delivery orders issued under civilian agency contracts, not just those provisions regarding GAO's jurisdiction over "large" orders issued under civilian agency contracts.[44] Because it viewed this statutory text as

(...continued)

in 2008-2010 between GAO and the executive branch as to whether set-asides for Historically Underutilized Business Zone (HUBZone) small businesses had "precedence" over set-asides for other small businesses under the Small Business Act). Agencies are, however, required by statute to notify GAO when they do not "fully adopt" any recommendations made by GAO in a bid protest. 31 U.S.C. §3554(b)(3). GAO, in turn, is then required to notify four separate congressional committees: the Senate Committee on Homeland Security and Governmental Affairs, the Senate Committee on Appropriations, the House Committee on Oversight and Government Reform, and the House Committee on Appropriations. 31 U.S.C. §3554(e)(1)(A)-(B).

[36] Technatomy Corp., B-405130, at ¶ 2 n.1. GAO agreed with DOD's argument that the law governing protests of orders issued by civilian agencies should apply here because the order in question was issued under a multiple-award contract awarded by GSA. *Id*. at ¶ 2 n.1. However, it rejected DOD's argument that the decision should be based upon the law in effect at the time when the protest was heard, as opposed to the time when the protest was filed. *Id*. at ¶ 12-14.

[37] *Id*. at ¶ 8 ("Where, as here, the language of a statute is clear on its face, its plain meaning will be given effect.") (citing Carcieri v. Salazar, 555 U.S. 379, 129 S. Ct. 1058, 1063-64 (2009)).

[38] *Id*. at ¶ 9.

[39] *Id*. at ¶ 8-9.

[40] *Id*. at ¶ 7. In addition to establishing the competition requirements for federal contracts, CICA expressly authorized GAO to hear bid protests. However, GAO had heard protests prior to CICA on the theory that its authority to settle and adjust "all claims and demands" against the United States encompassed bid protests. *See* CRS Report R40228, *GAO Bid Protests: An Overview of Time Frames and Procedures*, by (name redacted) and (name redacted).

[41] B-405130, at ¶ 10.

[42] Previously, the court had found that GAO had exclusive jurisdiction over such protests because of the amendments made to FASA by the NDAA for FY2008. *See, e.g.*, DataMill, Inc. v. United States, 91 Fed. Cl. 740 (March 5, 2010).

[43] 2011 U.S. Claims LEXIS 1872, at *14 (August 19, 2011).

[44] *Id*. at *14-*15.

"unambiguous," the court accorded no weight to a 2007 conference report expressing the conferees' view that the expiration of GAO's jurisdiction over "large" orders would provide "Congress with an opportunity to review the implementation of the provision and make any necessary adjustments."[45] It similarly declined to rely upon legislation introduced in the 112th Congress and accompanying committee reports that purportedly evidenced Congress's intent that the sunset date apply only to GAO's exclusive jurisdiction over protests of orders valued in excess of $10 million.[46]

Had the 112th Congress not enacted legislation extending the sunset date, these decisions would have resulted in protests of orders issued under civilian agency contracts being treated differently than protests of similar orders under defense contracts,[47] and could also have increased the number of bid protests.[48] The legislation also arguably resolves certain questions that had been raised about the authority of the Federal Acquisition Regulatory Council to promulgate an interim final regulation amending the Federal Acquisition Regulation (FAR) to provide that

> (i) No protest under Subpart 33.1 is authorized in connection with the issuance or proposed issuance of an order under a task-order contract or delivery-order contract, except for—
>
> (A) A protest on the grounds that the order increases the scope, period, or maximum value of the contract; or

[45] *Id*. at *14.

[46] *Id*. at *15. According to the court, "[t]he proposed legislation demonstrates two things. First, the perceived need for it suggests that Congress understands that the existing sunset provision does not accomplish the same result. Second, the proposals demonstrate that Congress can legislate with precision when it chooses to do so. Both observations reinforce our reluctance to follow the government's invitation to tell Congress what we think it really intended in 2008."). *Id*.

[47] *Cf*. Daniel J. Kelly, David Himelfarb, and Bonnie A. Vanzler, GAO Opens the Door to Protests of All Civilian Agency Task Orders … But for How Long?, 96 *Fed. Cont. Rep.* 259 (September 13, 2011) (suggesting that GAO's decision "opens the floodgates to many protests that were previously barred"). Specifically, under the GAO and Court of Federal Claims decisions, protesters would have had greater opportunities to protest the issuance of orders under civilian agency contracts than under defense agency contracts, particularly after September 30, 2016. When civilian agency contracts were involved, contractors would have been able to challenge orders of any size (regardless of whether these orders increase the scope, period, or maximum value of the contract) before GAO, the Court of Federal Claims, and, potentially, the procuring agencies. However, when defense contracts were involved, contractors would have been able to challenge "large" orders that do not increase the scope, period, or maximum value of the contract only before GAO. Moreover, absent congressional action, GAO's jurisdiction over "large" defense orders would have expired on September 30, 2016, and contractors would have been able to challenge only defense orders that increased the scope, period, or maximum value of the contract under which they are issued after September 30, 2016.

[48] A 2009 report indicated that GAO's expanded jurisdiction over protests of "large" orders "has caused few problems and resulted in only a small increase in the number of cases sent to [GAO] for adjudication." David Hubler, New Rule on Task-Order Protests Not Causing Problems, Panel Says, *Wash. Tech.*, December 14, 2009, *available at* http://washingtontechnology.com/Articles/2009/12/14/New-task-order-law-causes-few-problems-panel-says.aspx. However, the number of protests of "large" orders heard by GAO has increased every year since 2009, and the report was issued at a time when GAO could only hear protests of "large" orders, not all orders, issued under civilian agency contracts. *See* GAO Bid Protest Annual Report to Congress for Fiscal Year 2010, November 23, 2010, *available at* http://www.gao.gov/special.pubs/bidpro10.pdf (noting that 189 of the 2,299 protest filed with GAO in FY2010 were due to its expanded jurisdiction over protests of large orders); GAO Bid Protest Annual Report to Congress for Fiscal Year 2009, January 8, 2010, *available at* http://www.gao.gov/special.pubs/bidpro09.pdf (noting that 139 of the 1,989 protest filed with GAO in FY2009 were due to its expanded jurisdiction over protests of large orders); GAO Bid Protest Annual Report to Congress for Fiscal Year 2008, December 22, 2008, *available at* http://www.gao.gov/special.pubs/
bidpro08.pdf (noting that 49 of the 1,652 protest filed with GAO in FY2008 were due to its expanded jurisdiction over protests of large orders).

> (B) A protest of an order valued in excess of $10 million. Protests of orders in excess of $10 million may only be filed with the Government Accountability Office, in accordance with the procedures at 33.104.
>
> (ii) *The authority to protest the placement of an order under this subpart expires* on September 30, 2016, for DoD, NASA and the Coast Guard (10 U.S.C. 2304a(d) and 2304c(e)), and *on May 27, 2011, for other agencies* (41 U.S.C. 4103(d) and 4106(f)).[49]

Both the meaning of this provision and the FAR Council's authority to promulgate such a regulation could have been in doubt, particularly after the decision by the Court of Federal Claims.[50] As amended, the regulation could have been construed to mean that neither protests of orders that allegedly increased the scope, period, or maximum value of the underlying contract, nor protests of orders valued in excess of $10 million, were authorized for civilian agency contracts.[51] However, such an interpretation could potentially have been found not to be entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*.[52] Under *Chevron*, courts generally defer to an agency's formal interpretation of a statute that the agency administers whenever the agency's interpretation is reasonable, and the statute has not removed the agency's discretion by compelling a particular disposition of the matter at issue. Agency interpretations are not granted such deference, though, when "Congress has directly spoken to the precise question at issue," and the agency's interpretation is at variance with the statutory language.[53]

# National Defense Authorization Act for FY2012

The NDAA for FY2012 amended Title 41 of the United States Code so that it reads like Title 10:

> (1) A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for –
>
> (A) a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued; or
>
> (B) a protest of an order valued in excess of $10,000,000.
>
> (2) Notwithstanding section 3556 of title 31, the Comptroller General of the United States shall have exclusive jurisdiction of a protest authorized under paragraph (1)(B).

[49] Dep't of Defense, Gen. Servs. Admin., Nat'l Aeronautics & Space Admin., Federal Acquisition Regulation: Extension of Sunset Date for Protests of Task and Delivery Orders, 76 Fed. Reg. 39238 (July 5, 2011) (codified at 48 C.F.R. §16.505(a)(9)) (emphasis added).

[50] *See supra* note 35.

[51] In particular, the FAR's reference to "subpart" would appear to encompass protests on both grounds.

[52] 467 U.S. 837 (1984).

[53] *Id*. at 412. *See, e.g.*, Mission Critical Solutions v. United States, 91 Fed. Cl. 386 (2010) (finding that Small Business Administration regulations providing for "parity" among the set-aside programs was not entitled to deference under *Chevron* because it did not constitute a reasonable interpretation of the Small Business Act).

> (3) *Paragraph (1)(B) and paragraph (2) of this subsection* shall not be in effect after September 30, 2016.[54]

Because of these amendments, and the amendments made to Title 10 in 2011, GAO and the Court of Federal Claims are unlikely to find that they have jurisdiction over orders that do not increase the scope, period, or maximum value of the underlying contracts after September 30, 2016, absent congressional action. However, because the provisions governing orders under civilian agency contracts are codified in a different section of the United States Code than those governing orders under defense agency contracts, it is possible that differences in the treatment of civilian and defense agency orders could again arise if Congress were to amend Title 10 without amending Title 41, or vice versa.

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[54] P.L. 112-81, §813,—Stat.—(December 31, 2011) (to be codified at 41 U.S.C. §4106(f)).