

National Defense Authorization Act Harmonizes Bid Protest Authority for Task and Delivery Orders

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Section 813 of the National Defense Authorization Act for Fiscal Year 2012 (NDAA or Act), which was signed into law by President Obama on December 31, 2011, corrects an imbalance in contractors' ability to protest the award of task and delivery orders issued under indefinite-delivery/indefinite-quantity (IDIQ) contracts. As we previously reported, for several months in 2011, a contractor's ability to protest the award of a task or delivery order varied depending on which government agency issued the underlying IDIQ contract—the right to protest orders issued under contracts awarded by the Department of Defense (DoD), the National Aeronautics and Space Administration (NASA) and the Coast Guard under Title 10 of the U.S. Code was more limited than the right to protest orders issued under contracts awarded by federal civilian agencies under Title 41 of the U.S. Code. *See GAO's Jurisdiction Over Protests of Task and Delivery Orders Gets Complicated.* With the enactment of the 2012 NDAA, the same bid protest rules will again apply to all task and delivery orders, regardless of the agency that awards the IDIQ contract.

As background, the 1994 Federal Acquisition Streamlining Act (FASA) limited contractors' ability to protest task and delivery orders to protests alleging that "the order increases the scope, period or maximum value of the contract under which the order is issued." In 2008, Congress permitted protests of task and delivery orders valued in excess of \$10 million regardless of the bases of protest, but it required contractors to file all such protests at the Government Accountability Office (GAO). However, the 2008 legislation included a three-year sunset provision, so that GAO's expanded jurisdiction

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would expire as of May 27, 2011. In the Fiscal Year 2011 NDAA, Pub. L. No. 111-383, Congress extended the sunset date for protests of task and delivery orders under Title 10 (defense) contracts through September 30, 2016, thus maintaining the status quo for protests of task and delivery orders under DoD, NASA and Coast Guard contracts. Congress did not similarly extend the sunset date for protests of task and delivery orders issued under Title 41 (non-defense) contracts. Rather than reverting to the 1994 prohibition on protests of task and delivery orders, both GAO and the Court of Federal Claims concluded that Congress's failure to extend the sunset date for protests of task and delivery orders under Title 41 contracts created unrestricted jurisdiction to hear such protests. See *Technatomy Corp.*, B-405130, June 14, 2011, 2011 CPD 107; *MED Trends, Inc., v. United States*, 2011 WL 4037418 (Fed. Cl. 2011). As a result, different protest rules applied to Title 10 and Title 41 task and delivery orders for the remainder of 2011.

The 2012 NDAA resolved this discrepancy by extending until September 30, 2016 the sunset date for protests of task and delivery orders under Title 41 contracts—ending several months of confusion for contractors and agencies. The ability to protest task and delivery orders is now the same as it was between May 27, 2008 and May 27, 2011, regardless of the agency that issued the contract: (1) protests that the order exceeds the scope, period or maximum value of the IDIQ contract are permitted at GAO or the Court of Federal Claims, regardless of the value of the order; (2) protests on any other grounds are permitted if the value of the order exceeds \$10 million; and (3) protests that are not based on the scope, period or maximum value must be filed at GAO.

The 2012 NDAA contains several other provisions addressing contracting and acquisition policy. As these provisions are implemented, Wiley Rein's Government Contracts practice will continue to monitor their effects on government contractors.