

CLIENT ALERT

Congress Extends GAO's Bid Protest Jurisdiction Over Certain DoD Task And Delivery Orders

January 14, 2011

On January 7, 2011, President Obama signed the National Defense Authorization Act for Fiscal Year 2011, which, among other things, extends the Government Accountability Office's ("GAO") protest jurisdiction over certain Department of Defense ("DoD") task and delivery orders through September 30, 2016. However, absent congressional action, GAO's jurisdiction over protests of task and delivery orders under civilian agency procurements will lapse on May 27, 2011 (unless there is an allegation that the order is outside the scope of the underlying ID/IQ contract).

The 2008 National Defense Authorization Act, Pub. L. No. 110-181, established supplemental GAO protest authority for task and delivery orders over \$10 million. Section 843 of that Act contained dual conforming statutes in Title 10 (controlling DoD procurements) and Title 41 (controlling civilian agency procurements) of the U.S. Code. Those parallel clauses contained a sunset provision, such that this supplemental protest authority would expire on May 27, 2011 ("this subsection shall be in effect for three years, beginning on the date that is 120 days after the date of the enactment of the National Defense Authorization Act for Fiscal Year 2008.").

Section 825 of the NDAA for FY2011 extends until September 30, 2016, GAO's supplemental protest authority over DoD task and delivery order procurements in excess of \$10 million. However, because Section 825 only amends Title 10 (but not Title 41), GAO's supplemental jurisdiction over protests regarding task and delivery order order procurements for civilian agencies in excess of \$10 million lapses on May 27, 2011.

The legislative history does not explain any policy rationale for this incongruity, and we are not aware of any reason to distinguish DoD from civilian agency procurements for these purposes. It is possible that subsequent legislation will extend the sunset date for civilian agencies. If not, some interesting questions may arise as the expiration of GAO's jurisdiction approaches. For example, if a protest is filed before the sunset date, will GAO have jurisdiction to decide that protest and issue a recommendation even if it is unable to do so before the sunset date?

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Daniel R. Forman

Partner – Washington, D.C.
Phone: +1.202.624.2504
Email: dforman@crowell.com

Peter Eyre

Partner – Washington, D.C.
Phone: +1.202.624.2807
Email: peyre@crowell.com