



GAO

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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Technatomy Corporation

File: B-405130

Date: June 14, 2011

J. Cobble De Graft, Esq., for the protester.
John E. McCarthy, Esq., Sarah B. Gleich, Esq., and Howard H. Yuan, Esq., Crowell & Moring LLP, for Catapult Technology, Inc., an intervenor.
Stephanie A. Kreis, Esq., Department of Defense, for the agency.
Paul N. Wengert, Esq., Jonathan L. Kang, Esq., Sharon L. Larkin, Esq.,
James A. Spangenberg, Esq., and Daniel M. Reach, Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

The Government Accountability Office (GAO) will not dismiss a protest concerning the issuance of a task order under the authority of Title 41 of the U.S. Code, notwithstanding the sunset of 41 U.S.C. § 4106(f) (2006 & Supp. IV 2010) (formerly codified at 41 U.S.C. § 253j(e) (2006 & Supp. III 2009)). The sunset provision eliminated both a pre-existing restriction on GAO's jurisdiction to hear protests concerning the issuance of task or delivery orders under multiple-award indefinite-delivery/indefinite-quantity contracts, and a temporary partial waiver of that restriction concerning task orders over \$10 million. With the elimination of both the underlying restriction, and the partial waiver of that restriction, GAO's jurisdiction reverts to its original jurisdiction for its bid protest function—i.e., the jurisdiction set forth in the Competition in Contracting Act of 1984—under which GAO had jurisdiction to hear such protests.

DECISION

Technatomy Corporation, of Fairfax, Virginia, protests the issuance of a task order to Catapult Technology, Inc., of Bethesda, Maryland, under solicitation No. EG0184.00, by the Department of Defense, Defense Information Systems Agency (DISA), for support of the U.S. Army Information Technology Agency. The order was issued under a multiple-award indefinite-delivery/indefinite-quantity (ID/IQ) contract awarded by the General Services Administration (GSA). The protester argues that the agency unreasonably evaluated vendors' technical and cost quotations.

This decision addresses DISA's request that we dismiss the protest. The agency argues that because this protest concerns a challenge to a task order issued under an ID/IQ contract authorized under Title 41 of the U.S. Code, the Government Accountability Office (GAO) does not have jurisdiction to hear the protest.¹ DISA argues that GAO's jurisdiction to hear protests concerning task or delivery orders under ID/IQ contracts valued in excess of \$10 million was authorized under 41 U.S.C. § 253j(e)(1) (2006 & Supp. III 2009), but that this authority expired on May 27, 2011, when a sunset provision in section 253j(e)(3) took effect.² For the reasons discussed below, we conclude that we have jurisdiction to hear the protest, and deny the request for dismissal. Our conclusion on the merits of Technatomy's protest will be set forth in a separate decision.

History of GAO's Jurisdiction over Task or Delivery Order Protests

The Competition in Contracting Act of 1984 (CICA) established GAO's statutory authority to hear bid protests concerning challenges to the terms of solicitations and the award or proposed award of contracts. See Pub. L. No. 98-369, 98 Stat. 1175 (1984) (codified at 31 U.S.C. § 3551 et seq. (2006)). Prior to 1994, the statutory authority of our Office under CICA did not distinguish between protests of contract awards and protests of task or delivery orders, as discussed more fully below.

In 1994, Congress enacted the Federal Acquisition Streamlining Act (FASA), which, as relevant here, provided statutory guidance for the award of ID/IQ contracts. See Pub. L. No. 103-355, 108 Stat. 3243 (1994) (codified in Titles 10 and 41 of the U.S. Code). FASA also amended CICA by limiting the jurisdiction of our Office with respect to protests of task or delivery orders placed under ID/IQ contracts under both Title 10 and Title 41 of the U.S. Code. FASA's bar on protests of orders applicable to ID/IQ contracts under Title 41 read as follows:

¹ The task order here was issued under the Veterans Technology Services (VETS) government-wide acquisition contract, which is an ID/IQ contract awarded by GSA. DISA argues, and we agree, that because the VETS contract was awarded by GSA, the contract and any task orders issued under it are governed by the provisions of Title 41 of the U.S. Code. See 41 U.S.C. §§ 3101(c), 4103. For purposes of this decision, we also assume, and the parties do not dispute, that this protest concerns a task order issued under an ID/IQ contract valued at more than \$10 million, and that this protest does not concern allegations that the task order issued to Catapult exceeds the scope, period, or maximum value of the VETS contract.

² On January 4, 2011, Title 41 of the U.S. Code was recodified. See Pub. L. No. 111-350, 124 Stat. 3677 (2011). As relevant here, 41 U.S.C. § 253j(e) was recodified as 41 U.S.C. § 4106(f). For the sake of clarity, due to the use of the pre-2011 statutory reference in the Public Law citations, we refer to 41 U.S.C. § 253j(e) throughout this decision.

(e) Protests.--

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.

Id. 108 Stat. at 3264 (codified at 41 U.S.C. § 253j (1994)). In other words, after 1994, protests over task or delivery orders were barred unless these protests alleged that the order increased the scope, period, or maximum value of the underlying contract through which the orders were issued.

In 2008, Congress modified FASA's bar on protests of task or delivery orders with the passage of the National Defense Authorization Act (NDAA). See Pub. L. No. 110-181, 122 Stat. 3 (2008). As relevant here, the 2008 NDAA amended FASA (which in turn, had amended CICA) by "striking subsection (e)," and "inserting the following new subsection (e)":

(e) Protests.--

(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) 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.

Id. 122 Stat. at 237 (codified at 41 U.S.C. § 253j(e) (2006 & Supp. III 2009)).

The 2008 NDAA amendment, in essence, expanded the jurisdiction of our Office under FASA to include protests of task or delivery orders valued in excess of \$10 million. 41 U.S.C. § 253j(e)(2). The NDAA also contained a sunset provision,

which stated that the “subsection shall be in effect for three years.” Id. § 253j(e)(3). The sunset took effect after May 27, 2011—4 days after this protest was filed.³

Effect of the Sunset Provision, Generally

In our view, the sunset provision in 41 U.S.C. § 253j(e)(3) applies to the entirety of subsection 253j(e). As a result, the entirety of subsection 253j(e) has no effect—including both the bar on task order protests under FASA, and the exceptions to that bar under FASA, and the 2008 NDAA. Accordingly, GAO’s jurisdiction reverts to that originally provided in CICA.

Our view of the sunset provision is based on the plain meaning of the text of the 2008 NDAA. The starting point of any analysis of the meaning of a statutory provision is the language used by Congress. International Program Grp., Inc., B-400278, B-400308, Sept. 19, 2008, 2008 CPD ¶ 172 at 4 (citing Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1990)). Where, as here, the language of a statute is clear on its face, its plain meaning will be given effect. Carcieri v. Salazar, 555 U.S. 379, 129 S. Ct. 1058, 1063-64 (2009); see also Mission Critical Solutions, B-401057, May 4, 2009, 2009 CPD ¶ 93 at 3-8 (applying plain meaning of Small Business Act), recon. denied, Small Business Admin.-Recon., B-401057.2, July 6, 2009, 2009 CPD ¶ 148 at 5 (same).

Here, the plain meaning of the sunset provision unambiguously refers to the whole of subsection 253j(e). As discussed above, the 2008 NDAA struck the prior “subsection” added by FASA in its entirety and replaced it with “new subsection (e).” Pub. L. No. 110-181, 122 Stat. 3, 237 (2008). The revised subsection (e) stated that “[t]his subsection shall be in effect for three years.” Id.; 41 U.S.C. § 253j(e)(3). Thus, upon operation of the sunset provision on May 27, 2011, the entire subsection, i.e., 41 U.S.C. § 253j(e), no longer has effect.

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. As mentioned above, prior to FASA, our Office’s statutory authority under CICA to hear protests did not distinguish between protests of contracts, and protests of task or delivery orders. Consistent with this authority, our Office heard protests prior to the passage of FASA concerning the issuance of task or delivery orders, including challenges to orders that exceeded the scope of the underlying ID/IQ contract, as well as protests that did

³ The FY 2011 NDAA includes a provision which extends to September 30, 2016 the jurisdiction of our Office to hear protests concerning the issuance of a task or delivery order under Title 10 of the U.S. Code. Pub. L. No. 111-383, 124 Stat. 4137, 4270 (2011) (codified at 10 U.S.C. § 2304c(e)(4) (2006)). While there is legislation pending to effectuate a similar extension under Title 41, it has not yet been enacted.

not involve challenges to scope.⁴ See, e.g., Astronautics Corp. of Am., B-242782, June 5, 1991, 91-1 CPD ¶ 531 (challenge to scope of task order issued under a multiple-award ID/IQ contract); Computer Scis. Corp., B-213287, Aug. 6, 1984, 84-2 CPD ¶ 151 (non-scope challenge to competitive task order issued under ID/IQ contract); Nautica Int'l Inc., B-254428, Dec. 15, 1993, 93-2 CPD ¶ 321 (non-scope challenge to order issued under the Federal Supply Schedule); Integrated Sys. Grp., Inc., B-246447, Mar. 9, 1992, 92-1 CPD ¶ 268 (same); Diversified Comp. Consultants, Inc., B-241764, Feb. 27, 1991, 91-1 CPD ¶ 224 (same); AZTEK, Inc., B-236612, Dec. 6, 1989, 89-2 CPD ¶ 521 (same).

In sum, the plain meaning of 41 U.S.C. § 253j(e)(3) eliminates any bar to our jurisdiction to hear and issue decisions concerning bid protests arising from task or delivery orders of any value. For this reason, we conclude that we have jurisdiction over the task order protest here.⁵

Effective Date of the Sunset Provision

Even if we were to view the sunset provision as barring our jurisdiction as of May 27, 2011, as DISA argues, it would not end our jurisdiction to complete our review of protests filed with our Office prior to the effective date of the sunset on May 27, 2011. In other words, even if we were to agree with DISA concerning the general effect of the sunset provision, we would not view the sunset as affecting pending protests.

As noted above, 41 U.S.C. § 253j(e)(1), added to CICA by FASA and amended by the 2008 NDAA, stated that “[a] *protest* is not authorized in connection with the issuance or proposed issuance of a task or delivery order except” for the identified exceptions. (Emphasis added.) CICA defines a “protest” as a “written objection by

⁴ Our view concerning our jurisdiction to hear protests involving the issuance of task and delivery orders under multiple-award ID/IQ contracts is further supported by the broad definition of the term “contract” in Federal Acquisition Regulation § 2.101.

⁵ We recognize that there are contrary indications to this conclusion in the statute’s legislative history. See, e.g., the Conference Report for the 2008 NDAA, which states, “The provision would raise the threshold for bid protests to \$10.0 million and sunset the authorization for bid protests after 3 years. The conferees expect that the sunset date will provide Congress with an opportunity to review the implementation of the provision and make any necessary adjustments.” 153 Cong. Rec. H14929 (daily ed. Dec. 6, 2007). However, where, as here, the statute is clear on its face, courts do not “resort to legislative history to cloud a statutory text that is clear.” Ratzlaf v. United States, 510 U.S. 135, 147-48 (1994); see also B-318831, Apr. 28, 2010 (citing Robinson v. Shell Oil, 519 U.S. 337, 340 (1997) (If the statutory language provides an unambiguous expression of the intent of Congress, then the inquiry ends there.)). We do not find a basis to ignore the plain language of the statute.

an interested party” to a solicitation, or the award or proposed award of a contract. 31 U.S.C. § 3551 (2006). CICA further states that “[a] protest concerning an alleged violation of a procurement statute or regulation shall be decided by the Comptroller General if filed in accordance with this subchapter.”⁶ *Id.* § 3552(a). That is, CICA’s definitions of “protest” are based on the filing of a written objection. Thus, reading the 2008 NDAA amendment to CICA in conjunction with CICA’s protest definition, we think that the prohibition of protests in the 2008 NDAA, which states that “[a] protest is not authorized,” can only be reasonably interpreted as meaning a protest may not be filed.⁷

Moreover, a conclusion that the sunset provision applies to protests filed prior to the sunset date would require us to give retroactive effect to the sunset provision. In the absence of statutory direction, however, retroactivity is not favored by the law. KPMG Peat Marwick, LLP–Costs, B-259479, July 25, 1996, 96-2 CPD ¶ 43 at 4 (citing Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988); QAO Corp. v. Johnson, 49 F.3d 721 (Fed. Cir. 1995)). Thus, in the absence of such an express statement, we do not view the sunset provision as applying to pending protests even assuming *arguendo* that the sunset terminates GAO’s jurisdiction.⁸

In sum, we conclude that our Office has jurisdiction to complete our review of protests concerning the issuance of task orders that were filed prior to May 27, 2011, including the order challenged here by Technatomy.

The request for dismissal is denied.

Lynn H. Gibson
General Counsel

⁶ Additionally, our Bid Protest Regulations, which are issued under the authority of 31 U.S.C. § 3555(a), provide strict timeliness rules for the filing of protests. See Bid Protest Regulations, 4 C.F.R. §§ 21.1, 21.2 (2011).

⁷ Consistent with this view, we dismissed a protest challenging the award of a task order under an ID/IQ contract valued at more than \$10 million, because the order had been issued prior to the effective date of the 2008 NDAA. See Systems Research and Applications Corp., B-400227, July 21, 2008, 2008 CPD ¶ 115 at 3-4.

⁸ For this reason, we would view a protest filed prior to the May 27, 2011 sunset date that challenged an order valued at less than \$10 million as not within our jurisdiction, because it would have been filed at a time when 41 U.S.C. § 253j(e) still applied.