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FEATURE COMMENT: Contesting Task And Delivery Order Awards At The COFC—Policy Implications Of A Choice Federal Courts May Soon Have To Make

Other than obtaining relief and remedies at an executive agency itself, protests of contract award decisions may be brought before the Government Accountability Office or the U.S. Court of Federal Claims, while disputes and claims relating to contract administration may be brought before the COFC or a board of contract appeals. Over the years, allowing two fora for Government contract litigation has been favored by Congress, and the relative costs and risks of litigation in each forum have tended to influence disappointed contractors in their choice of forum.

For protests, GAO, as compared to the COFC, is seen as a relatively inexpensive, faster and more effective forum because contract performance is automatically stayed (see Steven L. Schooner, “The Future: Scrutinizing The Empirical Case For the Court of Federal Claims” (2003), available at papers.ssrn.com/sol3/papers.cfm?abstract_id=355360), even though GAO’s protest process, by itself, may not be very disruptive (see GAO, *Report to Congress in Bid Protests Involving Defense Procurements*, B-401197 (April 9, 2009), at 10). In comparison, the COFC’s protest system offers advantages associated with a more formal, conservative legal forum, permitting greater recourse to traditional legal processes such as discovery and deposition, and allowing a longer “reasonable” time for disappointed offerors to file protests. See generally Michael J. Schaengold, T. Michael Guiffre and Elizabeth M. Gill, “Choice of Forum for Bid Protests,” Briefing Papers No. 08-1 (2008).

Revisiting FASA’s Protest Bar—The Federal Acquisition Streamlining Act of 1994, P.L. 103-355, changed this landscape somewhat, limiting protests of individual task and delivery orders under multiple-award indefinite-delivery, indefinite-quantity contracts to only those cases related to scope, period or maximum-value of the underlying IDIQ contract. Although the COFC, on at least one occasion, was doubtful that FASA’s bar against task order protests actually referred to a protest *before* the COFC (see *A&D Fire Protection v. U.S.*, 72 Fed. Cl. 126, 133 (2006)), the court suggested, in dicta, that the FASA bar applied equally to protests before GAO and to “protest-like” actions before the court. See, e.g., *Id.* at 133–134; *Idea Int’l v. U.S.*, 74 Fed. Cl. 129, 136–137 (2006); *Data Mgmt. Servs. Joint Venture v. U.S.*, 78 Fed. Cl. 366, 371 (2007).

Single Forum for High-Value Task Order Challenges: Changing the Landscape—The National Defense Authorization Act for Fiscal Year 2008 recently mandated greater and more formal competitive requirements for task orders valued over \$5 million, and simultaneously relaxed FASA’s protest bar. Now, protests need *not be limited* to scope, period or maximum value. Section 843 was in Federal Acquisition Regulation 16.505(a)(9)(i) through interim rule dated Sept. 17, 2008. The Defense Authorization Act thus specifically permits protests of task orders worth over \$10 million, but apparently exclusively at GAO. See § 843(e)(2), National Defense Authorization Act for Fiscal Year 2008 (“notwithstanding section 3556 of title 31, the Comptroller General ... shall have exclusive jurisdiction of a protest”). The interim rule states that “no protest under subpt. 33.1 is authorized in connection with ... an order” unless it relates to scope, period or maximum value of the underlying contract, or if the task order is valued over \$10 million, and further states that protests of orders worth over \$10 million may only be filed with GAO. 48 CFR § 16.505(a)(9)(i)(B). The authority is temporary, limited to a three-year sunset period (§ 843(e)(3), Defense Authorization Act), after which

Congress presumably would extend, modify or withdraw GAO's expanded authority to hear protests of high-value task orders.

This grant of an "exclusive" jurisdiction to GAO for protests of high-value task orders seems at odds with an important aspect of Government contract litigation in the U.S., viz., the choice of *alternative* fora for litigating contract formation disputes, while it also threatens to dislocate one of the fundamental doctrines of the American legal system—that for every wrong, there must be a remedy (*Marbury v. Madison*, 5 U.S. (Cranch 1) 137 (1803))—by precluding almost any form of injunctive relief to disappointed offerors in any forum.

This FEATURE COMMENT examines the exclusivity of GAO's protest jurisdiction and its impact on efficiency in contract administration, while suggesting why it may be worthwhile to discard the *pre-Defense Authorization Act* case law in favor of a completely different approach to COFC jurisdiction over task order protests. The suggested approach may be radical, but it appears to be much more consistent with that sometimes-elusive objective of a procurement system: minimizing the risks for offerors and maximizing competition through enhanced transparency and procurement integrity. Schooner, *supra*, at 2–4.

The Legal Muddle with § 843: Unclear Language, Uncertain History—The COFC's protest jurisdiction in contract-formation disputes arises under the Tucker Act, 28 USCA § 1491. Section 843 of the Defense Authorization Act does not block that Tucker Act jurisdiction, but instead states only that "notwithstanding section 3556 of title 31," GAO is to have exclusive jurisdiction. Title 31 relates to the general functioning of GAO, and § 3556 specifically states that GAO's jurisdiction to hear protests does not detract from protesters' right to bring protests to the agencies themselves under the FAR, or to bring actions before the COFC under the Tucker Act.

The term "protest" has been statutorily defined only in relation to GAO (31 USCA § 3551) and *not* in relation to the COFC; and the FAR interim rule suggests that the "exclusivity" of GAO's protest jurisdiction relates to agency-level protests under FAR subpt. 33.1. At one level, it is therefore possible to argue that § 843 of the Defense Authorization Act, although it made GAO's jurisdiction exclusive, did so only with reference to agency-level protests and *not* protests at the COFC. The absence of clear legislative history documenting the rationale behind such exclu-

sivity (see 50 GC ¶ 188) could only serve to enhance the perception that GAO's jurisdiction may, after all, coexist with that of the COFC.

Another argument in support of retaining COFC jurisdiction over task order protests is that any "waiver" of sovereign immunity needs to be effected by unequivocal expression in the statutory text itself (*U.S. v. Nordic Village, Inc.*, 530 U.S. 30, 37 (1992); 3 Sutherland Stat. Const. § 62.1 (6th ed.)), and the Tucker Act effects just such a waiver. See also *U.S. v. Mitchell et. al.*, 463 U.S. 206, 212 (1983) ("the bill was a comprehensive measure by which claims against the United States may be heard and determined"). Under this principle, any suit against the U.S. or any of its agencies must be based on a specific statutory waiver of sovereign immunity. See Robert Porter, "Contract Claims Against the Federal Government: Sovereign Immunity and Contractual Remedies," Harvard Law School Briefing Paper No. 22 (2006), at 4; see also Congressional Research Service, *Statutory Interpretation: General Principles and Recent Trends* (2008), at CRS-20.

From this, one can argue that just as a *waiver* of sovereign immunity must be unequivocal, so too any *claimed withdrawal* of a waiver, once a waiver has *effected* in a previous statute, must find unequivocal expression through specific insertion in statutory texts. It is an important legal doctrine that jurisdiction cannot be conferred merely by acquiescence on the part of the Government (*Coastal Corp. v. U.S.*, 713 F.2d 728, 730 (Fed. Cir. 1983)), and since the Defense Authorization Act's withdrawal of Tucker Act jurisdiction was so unclear, arguably any doubts should be resolved by assuming that Congress did not intend to vitiate protest jurisdiction so clearly granted to the COFC.

Basic Choices before Federal Courts: 'Cut-Away' or Conform—If a case arises that presents the question of the COFC's jurisdiction over task order protests, the courts may have to revisit some of the choices made earlier in interpreting FASA's protest bar, when they *assumed* there were limitations on their jurisdiction even though legislative intent was not clearly present.

The courts will have essentially two options: (1) to hold that the COFC has no protest jurisdiction over orders valued above \$10 million under multiple-award IDIQ contracts, which would *significantly limit* the COFC's protest jurisdiction (to scope, period and maximum-value issues only), as compared to GAO, or (2) to hold that the statute excludes only parallel

agency-level protests, and not the COFC. This would mean, in turn, that the COFC has jurisdiction to hear protests related to scope, period and maximum value for task orders valued up to \$10 million, and *full* jurisdiction to hear protests of task orders worth over \$10 million. The latter approach would, of course, *significantly expand* the COFC's limited protest jurisdiction, and bring it on par with GAO's new, expanded jurisdiction.

Addressing COFC Protest Jurisdiction: Could the Regulatory Process Provide a Solution?—Resolving this issue of concurrent jurisdiction may turn, in part, on the issue of a stay—the suspension of a procurement pending a protest. Comments on the FAR Councils' interim rule implementing § 843 have, among other things, urged the councils to revise the rule to state, *inter alia*, that: (a) “a protest of a solicitation for the award of a task or delivery order ... should trigger an automatic stay of performance” (ABA, *Re: FAC 2005-27, FAR Case 2008-006, 73 Fed. Reg. 54008 (Sept. 17, 2008)*, Letter dated Nov. 17, 2008, at 2, available at www.abanet.org/contract/federal/regscmm/formation_011.pdf); (b) GAO has sole jurisdiction over any bid protest of task and delivery orders valued over \$ 10 million under multiple-award IDIQ contracts (ITAA, *Re: FAR Case 2008-006; Enhanced Competition for Task and Delivery Order Contracts, 73 FR 54008 (Sept. 17, 2008)*, Letter dated Nov.17, 2008, at 2, available at www.ita.org/upload/es/docs/Comments_FAR_2008-006.pdf); and (c) “the bid protest limitations ... extend to agency decisions to invoke exceptions under the Competition in Contract[ing] Act's mandatory stay provisions ... in connection with the award of a task or delivery order” (ITAA, *id.*, at 2). These commentators, although accepting GAO's exclusive jurisdiction, have raised a related issue: should a task order protest at GAO trigger an automatic stay, as does a protest of a normal *contract* award?

However, to the extent that the COFC is an *Article I* tribunal, its jurisdiction (or the *lack* of such jurisdiction) is a matter for Congress and the court, not regulators. See generally *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982). And to the extent that a stay of a federal contract, and a federal court's jurisdiction, both relate directly to fundamental constitutional issues of sovereignty, it is unlikely that the FAR councils, with no authority to *limit* a federal court's jurisdiction, could satisfactorily address these issues.

In fact, the authority of the FAR councils is limited to preparing and issuing revisions to the FAR (48 CFR § 1.201-1), subject to the provisions of FAR 1.103. This latter section tasks the councils with ensuring that the FAR system is in accordance with the requirements of the Office of Federal Procurement Policy Act of 1974, P.L. 93-400, as amended by P.L. 96-83, and the FAR councils can promulgate regulations *only in accordance with* applicable laws. Given the controversy regarding the COFC's jurisdiction over task order protests, it appears unlikely that the final rule, when issued by the councils, will resolve the jurisdictional matter.

As for the CICA stay—the stay of a contract award decision that automatically comes into play when that *contract* award decision is challenged before GAO—this stay may simply be unavailable in the context of task orders because such orders may not be “contracts.” The FAR councils could probably resolve the CICA stay issue by redefining the term “contract” under FAR 2.101 to include task orders, but given the serious nature of the controversy and its likely impact on other aspects of the multiple-award IDIQ contracting system, that sort of redefinition appears unlikely because treating task orders as “contracts” could trigger other procedural obligations.

The controversy will therefore likely have to be resolved by the COFC or by the U.S. Court of Appeals for the Federal Circuit, on the presentation of an appropriate case, or by Congress. Anticipating that, it may be worthwhile to weigh the policy implications of opening the COFC to task order protests, especially given the lack of clarity in the statutory texts on the “exclusivity” of GAO's protest jurisdiction. Many of these policy factors are, moreover, the same ones Congress is expected to consider when it assesses the future of task order protests after the initial three-year period of GAO's expanded jurisdiction ends.

Policy Implications of Denying COFC Jurisdiction—If GAO does indeed have exclusive jurisdiction over protests of task orders valued above \$10 million, the direct legal implication is that a disappointed offeror cannot challenge agency decisions on higher-value task orders on *any grounds* before the COFC.

Barring any access to the COFC for high-value orders would have enduring and serious ramifications because the COFC may be the only ready source of injunctive relief—if, for example, normal CICA stays were unavailable during GAO task order protests. Unlike ordinary protests, which can be brought first

at GAO and subsequently at the COFC, task order protests would almost never enjoy this second “bite at the apple.”

This is counterintuitive because one normally expects alternate litigation fora *and* an enhancement of the grounds for relief for higher-value procurement decisions: the need for accountability and transparency *goes up* in proportion to the monetary value of the procurement decision. Also, because high-value task orders typically are more complex, the short time frames that GAO allows for filing of protests may be inadequate for a meaningful challenge. And even if task order protests could weather the severely limited time frames at GAO, the fact remains that GAO’s procedures do not provide a protester with the full range of legal processes such as discovery, and therefore may not be adequate to the requirements of such challenges.

Barring COFC Jurisdiction: Whither Injunctive Relief?—This counterintuitive construction, *viz.*, fewer avenues for higher-value procurements, would be aggravated by GAO’s limited legal authority to make only *recommendations* to executive agencies, which the agencies need not follow. GAO’s limited authority to enforce its orders, although not yet a practical problem (GAO’s annual bid protest reports are available online at www.gao.gov/decisions/bidproan.htm), means that if there were no recourse to the COFC, limiting jurisdiction to GAO would in effect shift the risk of agency compliance—which is voluntary in GAO protests—to the disappointed offeror. This risk allocation would not be so unfair in a challenge to an ordinary “contract” award decision, since in that case, a disappointed offeror has the opportunity to approach the COFC for relief after protesting at GAO, and is therefore in a position to consciously weigh risks and costs of litigation in the two fora. That choice would be unavailable if GAO had exclusive jurisdiction.

Further, if the Defense Authorization Act is read broadly to bar task order protesters from *any* recourse to the COFC, including injunctive relief, this would increase risk because it is not clear that procurements must be stayed, under CICA, when a task order is protested at GAO. Section 3553(d), title 31, states that the automatic stay is triggered only if a GAO protest is brought within 10 days after contract award, or within five days after the debriefing date offered to an unsuccessful offeror for any debriefing that is requested and required, whichever is later.

The first time period, from the date of contract award to 10 days after contract award, is irrelevant to protesting task orders, since such orders are not “contracts” in themselves. See definitions of “task order” and “delivery order” under FAR 2.101. As for the period ending five days after the date of a requested and required debriefing, there are reasons to doubt if postaward debriefings for task orders worth over \$10 million under § 843 are “requested and required” debriefings within the meaning of CICA’s automatic stay provision. See McCullough, Melander and Speros, Feature Comment, “Acquisition Reform Revisited—Section 843 Protests Against Task And Delivery Order Awards At GAO,” 50 GC ¶ 75. Hence, just as CICA’s automatic stay may not be *mandatory* in a task order protest, so also may an agency not be required to stay contract performance under 31 USCA § 3553(d)(3).

From a reading of GAO’s decisions issued after May 27, 2008, when the new challenge procedures came into effect, there appears to be at least one case in which the agency stayed performance of the protested task order. *Access Systems, Inc.*, Comp. Gen. Dec. B-400623.3, 2009 CPD ¶ 56. Informal discussions suggest that agencies could be routinely staying performance of task orders upon protests, even if they are not *legally obligated* to do so. However, this issue requires more research into agency records that may perhaps yield different results about how willingly agencies have put a *CICA-like* stay in place when task orders have been challenged before GAO. Also, the confusion over whether requested and required debriefings trigger an automatic stay has not been helped by GAO’s refusal to amend its bid protest rules to accommodate the Defense Authorization Act. GAO, *Proposed Rules*, 73, Federal Register 15098 (March 21, 2008). And in the absence of further guidance from GAO, these issues remain open.

It may be important to note that for traditional protests, Congress believes that (1) the automatic CICA stay provision helps to ensure competition and ensure that vendors will win fair relief, and (2) the inability to stop a contract award or contract performance while a protest is pending was a major deficiency in the previous bid-protest regime. H.R. Rep. No. 99-138, at 4–5 (1985). Denying COFC jurisdiction over *any* task order protests would foreclose any possibility of staying the performance of challenged task orders, and such a construction is inconsistent with Congress’ larger public policy objectives of competition and fair relief.

Implications of Allowing Only a Residual, Indirect Challenge before the COFC and Federal District Courts—Even if original task order protests were barred at the COFC, a disappointed offeror could still perhaps challenge agency inaction on a GAO recommendation, or challenge an agency override, if the agency overrode the CICA stay, before the COFC, and ask for injunctive relief (see 50 GC ¶ 188), alleging arbitrary and capricious agency action, distinct from an *original* protest before the district courts that is no longer available under the Tucker Act. *Emery Worldwide Airlines v. U.S.*, 264 F.3d 1071, 1079–80 (Fed.Cir. 2001). See Schooner, Feature Comment, “Watching The Sunset: Anticipating GAO’s Study Of Concurrent Bid Protest Jurisdiction In The COFC And The District Courts,” 42 GC ¶ 108. Under either of these scenarios, a protester would have to be prepared to initiate *collateral* litigation when protesting at GAO.

Ineffective Complaints to Task and Delivery Order Ombudsmen—Barring relief at the COFC would also impact protesters that filed complaints before agency task and delivery order ombudsmen, who are responsible for reviewing complaints from contractors and ensuring that all contractors are afforded a fair opportunity to be considered for task orders. 10 USCA § 2304c(e); 41 USCA § 253j(e); FAR 16.505(b)(5). An ombudsman could perhaps make an order asking the agency to take corrective action, but the exact scope of an ombudsman’s authority is unclear. Sean A. Sabin, “What Happened to the Federal Acquisition Streamlining Act’s Protest Restrictions On Task And Delivery Orders? Recent Developments In Protests (And Protests Disguised As Contract Disputes) Related To The Issuance Of Task And Delivery Orders And Proposals To Improve An Impaired System,” 56 A.F. L. Rev. 283, 309 (2005).

An ombudsman may not have the power to *direct* agencies, and certainly lacks the power to *enforce* directions. So, absent recourse to the COFC, the choice of this forum would be a high-risk proposition for a disappointed offeror. If an agency did not abide by the ombudsman’s *advice* (for want of a more appropriate term), a protester could challenge such agency inaction—no longer a *direct* protest—before the COFC as arbitrary, capricious and unlawful. See Michael C. Wong, “Current Problems with Multiple Award Indefinite Delivery/Indefinite Quantity Contracts: A Primer,” *The Army Lawyer* (September 2006), at 28–29. And if an ombudsman failed to provide desired

relief, a complainant could possibly challenge the ombudsman’s advice—once again, no longer a *mere* protest—on grounds of arbitrariness and capriciousness. The ombudsman’s advice and agency inaction could also perhaps be challenged under the Administrative Procedure Act before federal district courts.

Forcing disappointed offerors to these limited options illustrates, again, problems with cutting off original relief at the COFC. Although a disappointed offeror may complain to an ombudsman, it necessarily would be “eating into” the limited time available for a protest at GAO. By foreclosing original relief at the COFC, and making GAO the sole forum, this approach would in essence steer protesters even further away from using ombudsmen—another unforeseen consequence of reading GAO’s “exclusive” jurisdiction too broadly.

The ‘Multiple-Award IDIQ’ and ‘MAS’ Contract Dichotomy—Barring COFC jurisdiction over protests of high-value task orders under IDIQ contracts also means perpetuating the dichotomy that currently exists in the federal procurement system for protests of task order awards under the General Services Administration’s Multiple Award Schedule (MAS) program on the one hand and under multiple-award IDIQ contracts on the other, even though the character of task orders under the two systems remains essentially the same. The present position is that task orders under the MAS program are fully protestable, without constraints on minimum value of the order or possible grounds for challenge. See Noah B. Bleicher, Wesley I. Dunn, Daniel I. Gordon and Jonathan L. Kang, “Accountability in Indefinite-Delivery/Indefinite-Quantity Contracting: The Multifaceted Work of the U.S. Government Accountability Office,” 37 Public Contract L.J. 375, 392–394 (2008).

It can be argued that task orders under multiple-award IDIQ contracts need *more*, not *less*, transparency and accountability, since multiple-award IDIQ contracts are closed-end contracts for which sources are fixed at the beginning of the underlying contract. In contrast, MAS contracts are open-ended contracts that allow for continuous entry of new suppliers, thus constantly maintaining competitive market pressures and reducing the need for regulatory oversight. If there is a case for oversight of task orders, multiple-award IDIQ contracts are in *greater* need of such oversight than MAS contracts—and yet task orders under MAS contracts are much more easily protestable.

Summing up the Costs—Excluding COFC protest jurisdiction would therefore place disappointed offerors in a position in which (a) they might have no meaningful injunctive relief in any forum whatsoever; (b) they would need to challenge a high-value task order within a very short time before GAO with limited procedures for discovery; (c) the distinctions between IDIQ and MAS contracts would be perpetuated, even though multiple-award IDIQ contracts, by their very nature, require greater transparency and accountability; and (d) offerors would end up bearing higher costs and risks in eventually litigating collateral challenges before the COFC or the federal district courts. This would mean, in turn, that offerors would not have a *lower-risk, lower-cost* option of *directly* litigating agency procurement decisions before the COFC.

Given the weight of these public-policy arguments and the lack of clarity in the text and legislative history of the Defense Authorization Act, the more *appropriate* course, therefore, may be to accept that there really is no strong rationale to oust the COFC of its protest jurisdiction. This would leave the COFC with full jurisdiction to entertain bid protests of high-value task orders on any grounds, a considerable expansion of its *pre-Defense Authorization Act* protest jurisdiction, which was limited to scope, period and maximum-value issues. This approach arguably could also better align protests of task orders under multiple-award IDIQ contracts and those under MAS contracts.

A standard argument raised in connection with task order *protestability* is that allowing task order protests would somehow reduce efficiency in IDIQ contracting. See, e.g., Sabin, 56 A.F. L. Rev. at 308–309. This premise was echoed in dictum in a COFC opinion that stated that the intent of Congress under FASA was to exempt from protest the issuance of individual task orders to contractors who had already received awards, subject to protest, of their master IDIQ contracts. *A&D Fire Protection*, 72 Fed. Cl. at 134.

Such perceptions do not seem to take into account that inefficiency in procurement systems comes not so much from the threat of litigation, but from the disruptive effect of the *automatic* stay provisions when *coupled* with litigation. Robert S. Metzger and Daniel A. Lyons, “A Critical Reassessment of the GAO Bid-Protest Mechanism,” 2007 Wis. L. Rev. 1225, 1238–40. Protestability, *per se*, does not make a system inefficient, especially if a protester may have to show, to

gain a preliminary stay at the COFC, (1) likelihood of success on merits, (2) degree of irreparable injury if relief is not provided, (3) degree of harm to the party being enjoined if relief is granted and (4) impact of the injunction on public policy considerations. *Cincom Sys., Inc. v. U.S.*, 37 Fed. Cl. 266, 268 (1997); see also ABA Section of Public Contract Law, *The Deskbook for Procurement Professionals* (3rd ed. 2007), at 268–269. The assumption that protests of task orders automatically makes Government contracting more inefficient therefore needs to be reassessed in view of the fact that such orders are not “contracts” where an automatic CICA stay would come into effect.

It is unlikely that opening up the COFC to task order protests will lead to a flood of litigation, since the COFC is a higher-cost, higher-risk platform for review of agency procurement decisions as compared to GAO. It is more likely, therefore, that low-value, or simpler-to-challenge task orders will continue to be protested at GAO, while high-value, high-stake task order protests could be split up between GAO and the COFC.

Conclusions—In allowing COFC protest jurisdiction, disappointed offerors will be able to make a reasoned, careful, better and clearer assessment of their litigation risks and costs, instead of having to make *assumptions* about possible collateral litigation in the wake of an unsuccessful GAO decision or ombudsman review. The policies against increased litigation risks and costs therefore appear to be clearly in favor of allowing COFC protest jurisdiction on high-value task order protests.

Future developments in this area will turn on how the jurisdictional changes in § 843 of the Defense Authorization Act are perceived. If § 843(e) is seen as a mere *extension* of FASA’s bar against task order protests—a *conservative, evolutionary* step only tinkering at the edges—then the courts are likely to take a restrictive view of the COFC’s jurisdiction. However, if the courts view § 843 as a much more *ambitious* and *revolutionary* piece of legislation targeted at substantially enhancing competition and transparency in multiple-award IDIQ contracting, then the outcome may be radically different.

Under the latter, more progressive approach, § 843(e)(1)(B) can be viewed as a major overhaul that did away *completely* with FASA’s bar against protests of task orders, at least those valued over \$10 million, which opened up those large task orders to protest across the board—including at the COFC. Within this

second construction, the statute can be read merely to provide GAO with jurisdiction, excluding only agency-level protests, without restricting challenges to high-value task orders before the COFC.

Although federal courts may choose either of the options discussed in this FEATURE COMMENT, it is likely that the matter may eventually be resolved by Congress, either when reviewing GAO's protest jurisdiction after three years, or perhaps earlier. Even if Congress decided to retain "exclusive" GAO protest jurisdiction, it could still enact legislation to make it clear that CICA-like automatic stays should apply to all task order protests, or at least to protests of high-value task orders. Congress also could permit a longer time for protests of such orders before GAO, and it could grant meaningful enforcement authority to task and delivery order ombudsmen. However, given

the collateral litigation risks that a protester would have to contend with if GAO had generally exclusive jurisdiction over task orders, Congress may be well advised to allow the COFC parallel jurisdiction to hear protests of task orders, so that protesters with high-value, complex and difficult cases have an *ex ante* option of bringing challenges to such task orders directly to the COFC.



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