

## GAO Declines to Apply GAO Civilian Task and Delivery Order Protest Authority Act Retroactively to Lapse in Jurisdiction

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In two recent opinions, the **Government Accountability Office (“GAO”)** has declined to reconsider protests it dismissed during the recent lapse in its jurisdiction over protests of civilian agency task and delivery orders valued at more than \$10 million under multiple-award IDIQ contracts. In a third opinion, GAO dismissed a protest filed for the first time following reinstatement of that jurisdiction, when the protestor received its debriefing during GAO’s jurisdictional lapse. The GAO’s lapse in jurisdiction, which did not impact military agency task orders or Federal Supply Schedule task orders, began October 1, 2016, when a sunset provision established by the National Defense Authorization Act for Fiscal Year 2012 took effect, and ended December 14, 2016, when President Obama signed the GAO Civilian Task and Delivery Order Protest Authority Act (the “Act”) into law, removing that sunset provision. Several disappointed offerors have since attempted to have their protests heard or reconsidered based on the change in law, each unsuccessfully.

In [\*HP Enterprise Services, LLC\*](#), B-413382.3, HP Enterprise Services (“HP”), requested reconsideration of its protest, which GAO had dismissed for lack of jurisdiction on November 30, 2016. HP’s original protest was of the General Services Administration’s (“GSA”) award of a civilian agency task order for IT support services for the Department of Defense. HP’s request for reconsideration argued that the GSA erred as a matter of law in dismissing its protest because the procurement was on behalf of a defense agency, and GAO should have had uninterrupted jurisdiction under Title 10 governing military task and delivery order protests. HP also contended that GAO should reconsider its protest in light of the Act reinstating its jurisdiction over civilian task and delivery orders valued over \$10 million. GAO rejected both arguments in a decision issued January 26, 2017. On the first point, GAO refused to extend Title 10’s application to civilian agencies conducting procurements on behalf of a defense agency. To the second point, GAO declined to apply the Act retroactively to the period during which its jurisdiction lapsed. GAO looked to the language of the Act, which contained no effective date. “In this regard, our Office has found that in the absence of an express statement in the statute providing for it, such retroactivity is disfavored by law. See *Technatomy Corp.*, *supra*, at 6; *KPMG Peat Marwick, LLP—Costs*, B-259479.4, July 25, 1996, 96-2 CPD ¶ 43 at 4 (*citing Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988)).” GAO was unmoved by language in House Report Number 114-779, cited by HP, stating that the Act was intended to “ensure there is no gap” in GAO’s jurisdiction.

GAO similarly declined to reconsider protests by [\*Analytic Strategies, LLC\*](#) and Gemini Industries, Inc.

GAO dismissed the original protests, *Analytic Strategies LLC; Gemini Indus., Inc.*, on November 28, 2016, for lack of jurisdiction during the lapse. The protestors both timely requested reconsideration within 10 days following reinstatement of GAO's jurisdiction in December 2016. Each argued that the Act should apply retroactively to cover the two-month jurisdictional lapse, and that the enactment of the Act warranted reversal or vacation of GAO's dismissal of its protest. GAO rejected these arguments, reasoning that its authority and jurisdiction to hear protests are based on the date of filing, such that no later event can change the circumstances that existed on the filing date. Therefore, there were no grounds to reverse or vacate its prior opinions. Regarding retroactive application, as in *HP Enterprise Services*, GAO reasoned that the Act contained no statement of effective date and thus should not be applied retroactively. GAO cited *Hughes Aircraft Co. v. Schumer*, 520 U.S. 939, 951 (1997), for the proposition that where a statute creates jurisdiction where none existed before (even if only temporarily in this case), there is a presumption against retroactivity.

[Bart & Associates, Inc.](#) ("Bart") of McLean, VA, tried a different approach by filing its protest for the first time following reinstatement of GAO's jurisdiction in December 2016. Bart protested the Department of Homeland Security, U.S. Customs and Immigration Services' award of task orders for flexible agile software development services. The government notified Bart of the award on September 30, 2016, then provided Bart a debriefing on October 5, 2016, five days into the GAO's lapse in jurisdiction. On October 13, 2016, Bart sent a "letter of concern" to the contracting officer taking issue with the evaluation and award. Following reinstatement of GAO's jurisdiction, Bart filed a protest with GAO on December 23, 2016. The GAO dismissed Bart's protest, stating, "While our Office had no jurisdiction to consider a protest filed within 10 days of the issuance of the task order awards, this fact does not alter or affect the basis for Bart's protest," and thus Bart's protest was not timely filed. Bart also argued that its protest was timely filed because its letter of concern should be treated as an agency-level protest to which it never received an adverse agency action in response. GAO rejected this argument in its dismissal, reasoning that a protestor has an "affirmative obligation to diligently pursue the information that forms the basis of its protest." The protestor may wait a reasonable length of time for a contracting officer decision before filing at GAO, but the 71 days Bart waited was not reasonable "based on the circumstances of this case." GAO did not explain how the lapse in jurisdiction affected its reasonableness calculation, but GAO concluded that Bart did not diligently pursue the basis of its protest.

GAO made clear in the opinions above that, absent express congressional direction, it will not apply the GAO Civilian Task and Delivery Order Protest Authority Act retroactively. Because the Court of Federal Claims does not have and has never had jurisdiction to hear protests of civilian agency task and delivery orders, GAO appears to have closed every door to protestors who were denied venue by the lapse in jurisdiction late last year.

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