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112th CONGRESS }
1st Session }

SENATE

{ REPORT
112-16

INDEPENDENT TASK AND DELIVERY ORDER
REVIEW EXTENSION ACT OF 2011

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 498

TO ENSURE OBJECTIVE, INDEPENDENT REVIEW OF TASK AND
DELIVERY ORDERS



MAY 9, 2011.—Ordered to be printed

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Mr. LIEBERMAN, from the Committee on Homeland Security and
Governmental Affairs, submitted the following

R E P O R T

[To accompany S. 498]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 498) to ensure objective, independent review of task and delivery orders, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

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I. PURPOSE AND SUMMARY

S. 498, the Independent Task and Delivery Order Review Extension Act of 2011, extends through September 30, 2016 the authority of the Government Accountability Office (GAO) to hear protests of certain task and delivery orders—federal agency purchases made under umbrella contracts. Specifically, the bill extends the authority to hear protests of task and delivery orders in excess of \$10 million awarded under Federal civilian agency contracts.

II. BACKGROUND AND NEED FOR THE LEGISLATION

For more than 80 years, GAO has provided an objective, independent and impartial forum for the resolution of disputes con-

cerning the award of Federal contracts. Through what is known as the bid protest process, an interested party may ask GAO to review whether a contract has been, or is about to be, awarded improperly or illegally. GAO issues bid protest decisions not later than 100 days from the date the protest is filed, providing a quick adjudicative process that ensures that Federal contracts are awarded fairly and in compliance with applicable statutes and regulations.¹

In 1994, Congress passed the Federal Acquisition Streamlining Act (FASA) to provide greater flexibilities to agencies in their purchases of goods and services.² FASA laid out specific procedures for the use of indefinite-delivery, indefinite-quantity (IDIQ) contracts, which allow agencies to negotiate contracts with broad statements of work and then procure goods and services through specific task and delivery orders as needs arise. FASA, though, limited GAO's jurisdiction over protests of task and delivery orders to cases in which the protest alleged that the order increased the scope, period or maximum value of the contract under which the order was issued.³ Prior to FASA, GAO heard protests concerning task and delivery orders that were competed among multiple vendors holding contracts, regardless of value.⁴

In 2003, Congress created the Acquisition Advisory Panel ("Panel") to review laws, regulations, and government-wide acquisition policies, and to make appropriate recommendations to improve, among other things, the effective, efficient and fair award of Federal contracts.⁵ The Panel issued its report in 2007.⁶ In the area of competition, the Panel found that IDIQ contracts provide significant benefits to the government, including reduced administrative costs for fulfilling recurring service needs. However, the Panel also found that agencies frequently use task and delivery orders to make significant purchases of complex services, and that the ordering process under task and delivery order contracts sometimes occurs without rigorous acquisition planning, adequate source selection, and meaningful competition. The Panel also heard evidence from GAO, Inspectors General and others concerning the improper use of IDIQ contracts.

The Panel recommended that Congress expand GAO's jurisdiction to hear protests of task and delivery orders beyond those related to scope, period and maximum value. Specifically, the Panel wanted GAO to have authority to consider whether agencies followed applicable statutes and regulations, including relevant competition requirements, when awarding task and delivery orders over \$5 million.⁷

¹The bid protest authority is codified at 31 U.S.C. §§ 3551 et seq.

²Pub. L. No. 103-355.

³Section 1004 of FASA prescribed procedures for task and delivery order contracts of the Department of Defense; section 1054 prescribed those procedures for civilian agency contracts.

⁴*E.g.*, GAO docket numbers B-254428, B-227340. In contrast, GAO viewed a protest concerning the issuance of a task or delivery order under a single, stand-alone contract to be generally a matter of contract administration, unless the protester was contending that the task order was beyond the scope of the underlying contract, thus changing the nature of the original contract. *E.g.*, GAO docket number B-262800.

⁵The Panel was authorized by Section 1423 of the Services Acquisition Reform Act of 2003, which was enacted as section 1423 of the National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136.

⁶Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress (January 2007) ("Report of the Panel").

⁷Report of the Panel, pp. 9-11, 36.

The Committee agreed with the Panel's assessment and recommendation and approved, as part of a larger acquisition reform bill, a provision authorizing the protest of task and delivery orders under both Department of Defense and civilian agency contracts.⁸ This provision, in amended form, was then enacted into law as part of the National Defense Authorization Act for Fiscal Year 2008.⁹ The authorization limited protests to task and delivery orders exceeding \$10 million and included a three-year sunset, in order to allow Congress the opportunity to assess the impact of the protests on Federal procurement system before deciding whether to extend, or let expire, the authority.

After reviewing the implementation of these provisions over the past three years, the Committee has concluded that Congress should reauthorize GAO's expanded jurisdiction for another five years. An increasing amount of taxpayer money has gone to fund task and delivery orders. Such orders now commonly exceed \$100 million; indeed, GAO recently received protests of three task orders that each passed the \$1 billion mark.¹⁰ Review of large task and delivery orders by GAO provides important oversight and discipline against abuse or other inappropriate use of IDIQ contracts, and the ability of interested parties to protest task and delivery orders promotes transparency, accountability, and competition in the expenditure of tax dollars through contracts.

In considering the reauthorization of task and delivery order protests, the Committee has been sensitive to concerns that protests slow the procurement process, and can thereby burden agencies, contractors and taxpayers. The Committee must weigh this concern, however, against the benefits yielded by a process that ensures greater transparency, integrity and discipline in government contracting, and enforces the statutory requirements for competition.

Just as importantly, data provided to the Committee by GAO show that GAO's expanded jurisdiction has not brought with it an unwieldy increase in protests. In Fiscal Year 2009, GAO reviewed 38 civilian agency task order protests, and in Fiscal Year 2010, it heard 65, representing challenges to far less than even one-tenth of one percent of all task and delivery orders awarded under civilian agency contracts. Moreover, even with GAO's expanded jurisdiction to hear protests of task and delivery orders, the total number of protests filed at GAO in Fiscal Years 2009 and 2010, while higher than recent years, remains well below the number filed annually in the late 1980's and early 1990's. This is true despite the substantial increase in dollars expended by the U.S. government on contracts over the past decade, from \$222 billion in Fiscal Year 2001 to \$536 billion in Fiscal Year 2010.

⁸Section 203 of S. 680, 110th Congress, 1st Session, passed by the Senate on November 7, 2007. S. 680 set an initial threshold of \$5 million for the protest of task and delivery orders but also would have provided the Administrator for the Office of Federal Procurement Policy, upon finding that the threshold was unduly burdensome, the discretion to increase the threshold to an amount no higher than \$25 million.

⁹Section 843, National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181.

¹⁰GAO docket numbers B-404263.6 (regarding a \$2.6 billion task order awarded by the General Services Administration (GSA) for information technology support to the Department of Homeland Security for the St. Elizabeths campus); B-404671 (regarding a \$1 billion task order awarded by the Department of the Army for the training of the Afghan National Police); and B-404682 (regarding a \$2.5 billion task order awarded by the Department of State under GSA's Alliant contract for consolidation of the Department's information technology systems).

In considering GAO's experience with protests of task and delivery orders thus far, the Committee concludes that extension of the authority is in the best interest of the U.S. government, contractors, and taxpayers. Section 825 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011,¹¹ signed into law on January 7, 2011, has already extended the task and delivery order protest authority for Department of Defense contracts through September 30, 2016. S. 498 will align the authority for civilian contracts to the authority for defense contracts. The new sunset date will again provide Congress the opportunity to assess the effectiveness of the protest authority in five years.

III. LEGISLATIVE HISTORY

On March 7, 2011, Senators Lieberman, Collins, McCaskill and Portman introduced S. 498, which was referred to the Senate Committee on Homeland Security and Governmental Affairs. The Committee considered the bill on April 13, 2011. The Committee adopted by voice vote an amendment offered by Senator Collins and then ordered the bill favorably reported, also by voice vote. Members present for both votes were Chairman Lieberman and Senators Levin, Akaka, Carper, Begich, Collins, Coburn, McCain, and Johnson.

The amendment offered by Senator Collins makes clear that the bill does not authorize appropriations for the specific purpose of processing protests of task and delivery orders, and that such protests shall be processed using existing resources of GAO and Federal agencies. The Committee finds that GAO and agencies have been able to absorb the costs of processing and responding to task and delivery order protests into their existing budgets, and therefore specific authorization and appropriation of funds for this activity are unnecessary.

IV. SECTION-BY-SECTION SUMMARY OF THE BILL

Section 1. Short title

The short title of the bill is the "Independent Task and Delivery Order Review Extension Act of 2011."

Section 2. Extension of sunset date for certain protests of task and delivery order contracts

This section extends the jurisdiction of GAO to hear protests of civilian task and delivery order contracts in excess of \$10 million through September 30, 2016, allowing interested parties to seek GAO's review of whether a task order was awarded in accordance with applicable laws and regulations. The extension of jurisdictional authority also allows protests of task and delivery orders of any amount on the ground that the order increases the scope, period, or maximum value of the contract under which the order was issued.

¹¹Pub. L. No. 111-383.

Section 3. Use of existing resources to process task and delivery order protests

This section states that no amounts are authorized to be appropriated for the specific purpose of processing protests of task and delivery orders and that all such protests shall be processed using the existing resources of the Government Accountability Office and executive agencies.

V. REGULATORY IMPACT AND EVALUATION

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of the bill. The Congressional Budget Office states that the bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandate Reform Act and would not affect the budgets of State, local, or tribal governments. The enactment of this legislation will not have significant regulatory impact.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

APRIL 19, 2011.

Hon. JOSEPH I. LIEBERMAN,
Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 498, the Independent Task and Delivery Order Review Extension Act of 2011.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

S. 498—Independent Task and Delivery Order Review Extension Act of 2011

S. 498 would amend federal law to extend the process for protesting the awards of certain civilian agency procurements. Under the legislation, contractors could protest certain task and delivery order contracts through September 30, 2016. In addition, the legislation would provide that no funds are authorized to be appropriated for processing protests made under the bill.

Task and delivery order contracts authorize deliveries during the life of the contract without specifying a firm quantity of supplies or services. Such contracts are often used when an agency cannot determine the precise number of supplies or services that will be required. Under current law, contractors under such orders can protest the award of any order valued over \$10 million, and the Government Accountability Office (GAO) has exclusive jurisdiction to hear those protests through May 2011. S. 498 would extend those procedures through September 2016.

Information from GAO and several civilian agencies indicates that more than 100 cases have been filed to protest contract awards during the past two years; 50 percent of the protestors have reported obtaining some form of relief from the procuring agency.

The form of relief can vary from improvements in the procurement process to reimbursement of the protestors' costs. Based on that information, CBO expects that complying with the bill would increase the administrative expenses of federal agencies for contract personnel, lawyers, and general administrative overhead. Such expenses would generally be paid from agencies' salaries and expense budgets, which are subject to annual appropriation. CBO estimates that such costs would total a few million dollars over the 2011–2016 period.

Enacting S. 498 also could affect direct spending by agencies not funded through annual appropriations, such as the Tennessee Valley Authority and the Bonneville Power Administration; therefore, pay-as-you-go procedures apply. CBO estimates, however, that any net increase in spending by those agencies would not be significant. Enacting S. 498 would not affect revenues.

S. 498 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

On March 16, 2011, CBO transmitted a cost estimate for H.R. 899, a bill to amend title 41, United States Code, to extend the sunset date for certain protests of task and delivery order contracts. The two pieces of legislation are similar, and CBO's estimate of their costs is the same.

The CBO staff contact for this estimate is Matthew Pickford. The estimate was approved by Peter H. Fontaine, Assistant Director for Budget Analysis.

VII. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the following changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman).

Title 41.

Section 4106.

* * * * *

(f) PROTESTS.—

(1) PROTEST NOT AUTHORIZED.—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) JURISDICTION OVER PROTESTS.—Notwithstanding section 3556 of title 31, the Comptroller General shall have exclusive jurisdiction of a protest authorized under (1)(B).

(3) EFFECTIVE PERIOD.—~~¶~~This subsection shall be in effect for three years, beginning on the date that is 120 days after January 28, 2008 *¶ Paragraph (1)(B) and paragraph (2) of this subsection shall not be in effect after September 30, 2016.*

