

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

|                         |   |                                  |
|-------------------------|---|----------------------------------|
| MED TRENDS, INC.,       | ) |                                  |
|                         | ) | BID PROTEST                      |
| Plaintiff,              | ) |                                  |
|                         | ) | <b>Public Version</b>            |
| v.                      | ) | <b>(No Redactions Necessary)</b> |
|                         | ) |                                  |
| THE UNITED STATES,      | ) |                                  |
|                         | ) |                                  |
| Defendant,              | ) |                                  |
|                         | ) | No. 11-420C                      |
| and                     | ) | (Judge Bruggink)                 |
|                         | ) |                                  |
| MICROTECHNOLOGIES, LLC, | ) |                                  |
|                         | ) |                                  |
| Intervenor.             | ) |                                  |

**DEFENDANT’S MOTION TO DISMISS**

Pursuant to Rule 12(b)(1) of the Rules of the Court of Federal Claims (“RCFC”), defendant, the United States, respectfully requests that the Court dismiss the complaint filed by plaintiff MED Trends, Inc. (“MED Trends”) for lack of jurisdiction. MED Trends protests the June 8, 2011 decision of the Department of Labor (“DOL”) to award a task order for technology services to intervenor MicroTechnologies, LLC (“MicroTech”). However, because this Court does not have jurisdiction over protests of task order awards, MED Trends’ complaint should be dismissed. In support of this motion, we rely upon the complaint, the administrative record, and the following brief, with appendix.

**QUESTION PRESENTED**

Whether 41 U.S.C. § 4106(f) bars the Court’s jurisdiction over a protest of a task order award.

## **STATEMENT OF THE CASE**

This protest concerns a task order for information technology (“IT”) services issued under the Veterans Technology Services Governmentwide Acquisition Contract (“Contract”), an indefinite delivery, indefinite quantity, multiple-award contract designed to provide agencies with the ability to obtain these services “in a timely and cost-effective manner.” AR26 (Tab 6). The Contract “outline[s] the general requirements” for solicitations issued pursuant to it, while individual task orders provide “[s]pecific details of work assignments, deliverables, documentation, training, [and] applicable . . . standards.” AR27 (Tab 6). The only parties that can compete for task orders are Service-Disabled Veteran-Owned small technology firms that were previously named as the Contract awardees.

On February 23, 2011, the DOL issued a request for proposals for operation and maintenance support services for the Integrated Management Information System used by the Occupational Safety and Health Administration (“OSHA”). AR93-135 (Tab 8). This solicitation sought a variety of complex IT services related to the upgrading and expansion of OSHA’s central repository of Federal information related to occupational safety and health. AR110-126 (Tab 8). The DOL ultimately awarded the task order to MicroTech. AR600-601 (Tab 24). MED Trends subsequently filed its complaint in this Court protesting that award.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

It is well settled that this Court is one of limited jurisdiction. *Bath Iron Works Corp. v. United States*, 27 Fed. Cl. 114, 122 (1992), *aff’d*, 20 F.3d 1567 (Fed. Cir. 1994) (citation omitted). Its authority to grant relief against the United States is limited by the extent to which the United States has waived sovereign immunity. *United States v. Testan*, 424 U.S. 392, 399

(1976). “[T]he United States, as sovereign, ‘is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court’s jurisdiction to entertain the suit.’” *Id.* (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). “[I]n a Court of Claims context . . . waiver of the traditional sovereign immunity ‘cannot be implied but must be unequivocally expressed.’” *Id.* (citations omitted).

In addressing a RCFC 12(b)(1) motion, “[d]etermination of jurisdiction starts with the complaint, which must be well-pleaded in that it must state the necessary elements of the plaintiff’s claim, independent of any defense that may be interposed.” *Holley v. United States*, 124 F.3d 1462, 1465 (Fed. Cir. 1997) (citations omitted). The Court may consider evidentiary matters outside the pleadings in ruling on a motion brought pursuant to RCFC 12(b)(1). *See Indium Corp. of Am. v. Semi-Alloys, Inc.*, 781 F.2d 879, 884 (Fed. Cir. 1985).

## **II. THIS COURT DOES NOT HAVE JURISDICTION TO ENTERTAIN THIS PROTEST OF A TASK ORDER AWARD**

In its complaint, MED Trends alleges that jurisdiction in this Court is proper because 41 U.S.C. § 4106(f), which governs jurisdiction over task order protests, ceased to be effective on May 27, 2011. Complaint ¶ 12.<sup>1</sup> In support of this assertion, MED Trends relies on the recent decision of the Government Accountability Office (“GAO”) in *Matter of Technatomy Corp.*, B-405130, 2011 WL 2321836 (Comp. Gen. June 14, 2011). However, MED Trends’ jurisdictional argument rests upon an incorrect interpretation of section 4106(f).

In 1994, Congress enacted the Federal Acquisition Streamlining Act (“FASA”), which stated as follows:

---

<sup>1</sup> Prior to January 2011, 41 U.S.C. § 4106(f) was codified at 41 U.S.C. § 253j(e). *See* Pub. L. No. 111-350, 124 Stat. 3677 (2011). For clarity in this brief, we refer only to 41 U.S.C. § 4106(f), even when discussing the statute as it existed prior to January 2011.

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.

Pub. L. No. 103-355, § 1054, 108 Stat. 3243, 3264 (1994). Congress’s intent in passing FASA was to reform the Federal procurement system by “streamlining and simplifying” the Government’s buying practices, in part by limiting bid protests. *A & D Fire Protection, Inc. v. United States*, 72 Fed. Cl. 126, 133 (2006) (quoting 140 Cong. Rec. H9240, H9240 (1994) (statement of Rep. Conyers)). There is no allegation in this case that the task order being challenged “increases the scope, period, or maximum value of the contract under which the order [was] issued.”

In the National Defense Authorization Act for Fiscal Year 2008 (“2008 NDAA”), Congress amended FASA to expand the GAO’s jurisdiction to include protests of task orders in excess of \$10 million. Pub. L. No. 110-181, § 843, 122 Stat. 3, 239 (2008). Specifically, the previous statutory language was changed to read as follows:

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 . . . .

*Id.* (currently codified at 41 U.S.C. § 4106(f)) (App. 5).<sup>2</sup> The three-year effective period set forth in section 4106(f)(3) (“Sunset Provision”) ended on May 27, 2011.

The legislative history strongly demonstrates that Congress intended that the Sunset Provision apply only to the GAO’s exclusive jurisdiction over protests of task orders greater than \$10 million under sections 4106(f)(1)(B) and (f)(2). The Federal Circuit has held that, regardless of whether statutory language appears to be clear or ambiguous, “the legislative history should usually be examined at least ‘to determine whether there is a clearly expressed legislative intention contrary to the statutory language.’” *Glaxo Operations UK Ltd. v. Quigg*, 894 F.2d 392, 395-96 (Fed. Cir. 1990) (quoting *Madison Galleries Ltd. v. United States*, 870 F.2d 627, 629 (Fed. Cir.1989)) (emphasis omitted). Even if a statute may appear unambiguous, where the legislative history embodies “an ‘extraordinary showing of contrary intentions,’” it can override a statute’s language. *Sharp v. United States*, 80 Fed. Cl. 422, 434 (2008) (quoting *Glaxo*, 894 F.2d at 396); *see also Garcia v. United States*, 469 U.S. 70, 75 (1984) (“When we find the terms of a statute unambiguous, judicial inquiry is complete, except in “‘rare and exceptional circumstances’”) (citations omitted); *United States v. American Trucking Ass’ns*, 310 U.S. 534, 543-44 (1940) (indicating that legislative history should be consulted to aid in interpreting statutes “however clear the [statute’s] words may appear on ‘superficial examination’”) (citations omitted).

In this case, the legislative history overwhelmingly demonstrates that Congress did not intend for the Sunset Provision to erase all jurisdictional limits over task order protests, but instead intended that the Provision only apply to the three-year trial period of expanded GAO

---

<sup>2</sup> “App. \_\_\_” citations refer to the Appendix containing various legislative materials, which is being submitted with this motion.

jurisdiction over protests in excess of \$10 million. When Congress amended FASA in 2008 to expand the GAO's jurisdiction, the Senate proposed to authorize protests for task orders in excess of \$5 million. 153 Cong. Rec. H14929 (daily ed. Dec. 6, 2007) (App. 6). In response, the House of Representatives proposed the language that was ultimately adopted, authorizing protests of task orders over \$10 million and providing for review of this increase in jurisdiction after three years. *Id.* ("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."). This history reveals that Congress was concerned only with the effect of increasing the GAO's jurisdiction to include protests above a monetary threshold, and that the purpose of enacting the Sunset Provision was to evaluate this singular change to the existing law.

Moreover, the text of bills currently pending before Congress that would extend GAO's jurisdiction over task orders, and Committee discussion of the pending bills, make clear that the Sunset Provision concerned only GAO's protest authority, and had nothing whatsoever to do with this Court's jurisdictional bar. Specifically, the Report of the Senate's Committee on Homeland Security and Governmental Affairs regarding Senate Bill 498, which is currently pending before the Senate and proposes to extend GAO's jurisdiction to entertain protests of task orders over \$10 million until 2016 (S. 498, 112th Cong. (2011) (App. 8)), states that the purpose of the Sunset Provision was "to allow Congress the opportunity to assess the impact of the [high-value] protests on [the] Federal procurement system before deciding whether to extend, or let expire, the authority." S. Rep. No. 112-16, at 3 (2011) (App. 18). The Committee Report then notes that after conducting this review, "the Committee has concluded that Congress should

reauthorize GAO's expanded jurisdiction for another five years." *Id.* Similarly, House Bill 899 proposes that section 4106(f)(3) be amended to read "Paragraph (1)(B) and paragraph (2) of this subsection shall not be in effect after September 30, 2016," showing that the Sunset Provision was intended to apply to GAO's \$10 million task order jurisdiction, and has nothing to do with this Court's jurisdiction. H.R. 899, 112th Cong. (2011) (App. 12).

In the recent *Technatomy* case cited in MED Trends' complaint, the GAO concluded that the effect of the Sunset Provision was to eliminate section 4106(f) in its entirety, thereby also eliminating all limits on the GAO's jurisdiction to entertain protests of civilian agency task orders. *Technatomy*, 2011 WL 2321836, at \*3-4. Importantly, that decision does not purport to decide the scope of this Court's jurisdiction over task orders in light of section 4106(f). Further, the GAO acknowledged that the legislative history of section 4106(f) was not supportive of its holding, but refused to consider that history. *Id.* at \*4 n.5. The Federal Circuit requires a different analysis, however: legislative history should be examined even where a statute may appear unambiguous. *Glaxo*, 894 F.2d at 395-96; *accord, e.g., Novo Nordisk A/S v. Caraco Pharmaceutical Laboratories, Ltd.*, 601 F.3d 1359, 1365 (Fed. Cir. 2010) ("Although the statutory language on its face presents no ambiguities, this court nonetheless examines the legislative history to make sure that it does not contain any clear intent to the contrary.").

Completely eliminating the language regarding this Court's jurisdiction contained in section 4106(f) would lead to an absurd result: This Court's jurisdiction over task orders would potentially be expanded in a very significant way, despite clear indications that Congress' only intent in enacting the 2008 NDAA was to allow for a three-year experiment expanding GAO's jurisdiction, not to modify this Court's jurisdiction. *See, e.g., Johnson v. United States*, 529 U.S. 694, 706 n.9 (2000) ("[N]othing is better settled, than that statutes should receive a sensible

construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion”) (quoting *In re Chapman*, 166 U.S. 661, 667 (1897)).

Particularly in light of the principle that waivers of the Government’s sovereign immunity should be express and unequivocal, this Court should avoid interpreting the Sunset Provision as having expanded this Court’s jurisdiction. *See Testan*, 424 U.S. at 399 (Congress must have “unequivocally expressed” its “consent[] to a cause of action against the United States”) (quotation omitted).

Accordingly, section 4106(f) should be interpreted as limiting this Court’s jurisdiction over task order protests to cases where the order is alleged to modify the underlying contract. Since there is no such allegation in this case, this Court should not exercise jurisdiction.

#### **CONCLUSION**

Because this Court lacks jurisdiction over this case, MED Trends’ complaint should be dismissed.

Respectfully submitted,

TONY WEST  
Assistant Attorney General

JEANNE E. DAVIDSON  
Director

s/ Brian M. Simkin  
BRIAN M. SIMKIN  
Assistant Director

OF COUNSEL:

HERMAN J. NARCHO  
Office of the Solicitor  
U.S. Department of Labor  
200 Constitution Ave., N.W.  
Room No. N-2434  
Washington, D.C. 20210  
Telephone: (202) 693-5531

s/ Nicholas Jabbour  
NICHOLAS JABBOUR  
Trial Attorney  
Commercial Litigation Branch  
Civil Division, Department of Justice  
P.O. Box 480  
Ben Franklin Station  
Washington, D.C. 20044  
Telephone: (202) 616-0338  
Facsimile: (202) 307-0972  
E-mail: Nicholas.Jabbour@usdoj.gov

*Attorneys for Defendant*

Dated: July 20, 2011

**CERTIFICATE OF FILING**

I hereby certify that on the 20th day of July, 2011, a copy of the foregoing was filed electronically. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/ Nicholas Jabbour

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

|                         |   |                  |
|-------------------------|---|------------------|
| MED TRENDS, INC.,       | ) |                  |
|                         | ) | BID PROTEST      |
| Plaintiff,              | ) |                  |
|                         | ) |                  |
| v.                      | ) | No. 11-420C      |
|                         | ) | (Judge Bruggink) |
| THE UNITED STATES,      | ) |                  |
|                         | ) |                  |
| Defendant,              | ) |                  |
|                         | ) |                  |
| and                     | ) |                  |
|                         | ) |                  |
| MICROTECHNOLOGIES, LLC, | ) |                  |
|                         | ) |                  |
| Intervenor.             | ) |                  |

**APPENDIX TO DEFENDANT’S MOTION TO DISMISS**

TABLE OF CONTENTS

| Beginning Page | Description   |
|----------------|---|
| App. 1         | National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3 (2008) (excerpts)             |
| App. 6         | 153 Cong. Rec. H14929 (daily ed. Dec. 6, 2007)  |
| App. 7         | Senate Bill 498, 112th Cong. (2011)   |
| App. 10        | House Bill 899, 112th Cong. (2011)  |
| App. 14        | Report 112-16 of the Senate Committee on Homeland Security and Governmental Affairs to Accompany Senate Bill 498 (2011) |

Public Law 110-181  
110th Congress

An Act

To provide for the enactment of the National Defense Authorization Act for Fiscal Year 2008, as previously enrolled, with certain modifications to address the foreign sovereign immunities provisions of title 28, United States Code, with respect to the attachment of property in certain judgments against Iraq, the lapse of statutory authorities for the payment of bonuses, special pays, and similar benefits for members of the uniformed services, and for other purposes.

Jan. 28, 2008  
[H.R. 4986]

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

National Defense  
Authorization  
Act for Fiscal  
Year 2008.

**SECTION 1. SHORT TITLE; TREATMENT OF EXPLANATORY STATEMENT.**

(a) **SHORT TITLE.**—This Act may be cited as the “National Defense Authorization Act for Fiscal Year 2008”.

(b) **EXPLANATORY STATEMENT.**—The Joint Explanatory Statement submitted by the Committee of Conference for the conference report to accompany H.R. 1585 of the 110th Congress (Report 110-477) shall be deemed to be part of the legislative history of this Act and shall have the same effect with respect to the implementation of this Act as it would have had with respect to the implementation of H.R. 1585, if such bill had been enacted.

**SEC. 2. ORGANIZATION OF ACT INTO DIVISIONS; TABLE OF CONTENTS.**

(a) **DIVISIONS.**—This Act is organized into three divisions as follows:

- (1) Division A—Department of Defense Authorizations.
- (2) Division B—Military Construction Authorizations.
- (3) Division C—Department of Energy National Security Authorizations and Other Authorizations.

(b) **TABLE OF CONTENTS.**—The table of contents for this Act is as follows:

- Sec. 1. Short title; treatment of explanatory statement.
- Sec. 2. Organization of Act into divisions; table of contents.
- Sec. 3. Congressional defense committees.

**DIVISION A—DEPARTMENT OF DEFENSE AUTHORIZATIONS**

**TITLE I—PROCUREMENT**

**Subtitle A—Authorization of Appropriations**

- Sec. 101. Army.
- Sec. 102. Navy and Marine Corps.
- Sec. 103. Air Force.
- Sec. 104. Defense-wide activities.
- Sec. 105. National Guard and Reserve equipment.

**Subtitle B—Army Programs**

- Sec. 111. Multiyear procurement authority for M1A2 Abrams System Enhancement Package upgrades.
- Sec. 112. Multiyear procurement authority for M2A3/M3A3 Bradley fighting vehicle upgrades.

122 STAT. 236

PUBLIC LAW 110–181—JAN. 28, 2008

(1) The manner in which contract requirements were developed.

(2) The procedures under which contracts or task or delivery orders were awarded.

(3) The terms and conditions of contracts or task or delivery orders.

(4) The staffing and method of performance of contractors, including cost controls.

(5) The efficacy of Department of Defense management and oversight, including the adequacy of staffing and training of officials responsible for such management and oversight.

(6) The flow of information from contractors to officials responsible for contract management and oversight.

(h) SCOPE OF AUDITS OF OTHER CONTRACTS.—Audits conducted pursuant to subsection (a)(2) shall examine, at a minimum, one or more of the following issues:

(1) The manner in which contract requirements were developed and contracts or task and delivery orders were awarded.

(2) The manner in which the Federal agency exercised control over the performance of contractors.

(3) The extent to which operational field commanders were able to coordinate or direct the performance of contractors in an area of combat operations.

(4) The degree to which contractor employees were properly screened, selected, trained, and equipped for the functions to be performed.

(5) The nature and extent of any incidents of misconduct or unlawful activity by contractor employees.

(6) The nature and extent of any activity by contractor employees that was inconsistent with the objectives of operational field commanders.

(7) The extent to which any incidents of misconduct or unlawful activity were reported, documented, investigated, and (where appropriate) prosecuted.

(i) INDEPENDENT CONDUCT OF AUDIT FUNCTIONS.—All audit functions under this section, including audit planning and coordination, shall be performed by the relevant Inspectors General in an independent manner, without consultation with the Commission established pursuant to section 841 of this Act. All audit reports resulting from such audits shall be available to the Commission.

**SEC. 843. ENHANCED COMPETITION REQUIREMENTS FOR TASK AND DELIVERY ORDER CONTRACTS.**

(a) DEFENSE CONTRACTS.—

(1) LIMITATION ON SINGLE AWARD CONTRACTS.—Section 2304a(d) of title 10, United States Code, is amended—

(A) by redesignating paragraph (3) as paragraph (4);

and

(B) by inserting after paragraph (2) the following new paragraph (3):

“(3)(A) No task or delivery order contract in an amount estimated to exceed \$100,000,000 (including all options) may be awarded to a single source unless the head of the agency determines in writing that—

“(i) the task or delivery orders expected under the contract are so integrally related that only a single source can reasonably perform the work;

PUBLIC LAW 110-181—JAN. 28, 2008

122 STAT. 237

“(ii) the contract provides only for firm, fixed price task orders or delivery orders for—

“(I) products for which unit prices are established in the contract; or

“(II) services for which prices are established in the contract for the specific tasks to be performed;

“(iii) only one source is qualified and capable of performing the work at a reasonable price to the government; or

“(iv) because of exceptional circumstances, it is necessary in the public interest to award the contract to a single source.

“(B) The head of the agency shall notify Congress within 30 days after any determination under subparagraph (A)(iv).”

Notification.  
Deadline.

(2) ENHANCED COMPETITION FOR ORDERS IN EXCESS OF \$5,000,000.—Section 2304c of such title is amended—

(A) by redesignating subsections (d), (e), and (f) as subsections (e), (f), and (g), respectively;

(B) by inserting after subsection (c) the following new subsection (d):

“(d) ENHANCED COMPETITION FOR ORDERS IN EXCESS OF \$5,000,000.—In the case of a task or delivery order in excess of \$5,000,000, the requirement to provide all contractors a fair opportunity to be considered under subsection (b) is not met unless all such contractors are provided, at a minimum—

“(1) a notice of the task or delivery order that includes a clear statement of the agency’s requirements;

“(2) a reasonable period of time to provide a proposal in response to the notice;

“(3) disclosure of the significant factors and subfactors, including cost or price, that the agency expects to consider in evaluating such proposals, and their relative importance;

“(4) in the case of an award that is to be made on a best value basis, a written statement documenting the basis for the award and the relative importance of quality and price or cost factors; and

“(5) an opportunity for a post-award debriefing consistent with the requirements of section 2305(b)(5) of this title.”; and

(C) by striking subsection (e), as redesignated by paragraph (1), 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.”.

Notification.

Effective date.

(3) EFFECTIVE DATES.—

(A) SINGLE AWARD CONTRACTS.—The amendments made by paragraph (1) shall take effect on the date that is 120 days after the date of the enactment of this Act, and shall apply with respect to any contract awarded on or after such date.

Applicability.  
10 USC 2304a  
note.

122 STAT. 238

PUBLIC LAW 110-181—JAN. 28, 2008

10 USC 2304c  
note.

(B) ORDERS IN EXCESS OF \$5,000,000.—The amendments made by paragraph (2) shall take effect on the date that is 120 days after the date of the enactment of this Act, and shall apply with respect to any task or delivery order awarded on or after such date.

(b) CIVILIAN AGENCY CONTRACTS.—

(1) LIMITATION ON SINGLE AWARD CONTRACTS.—Section 303H(d) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253h(d)) is amended—

(A) by redesignating paragraph (3) as paragraph (4); and

(B) by inserting after paragraph (2) the following new paragraph (3):

“(3)(A) No task or delivery order contract in an amount estimated to exceed \$100,000,000 (including all options) may be awarded to a single source unless the head of the executive agency determines in writing that—

“(i) the task or delivery orders expected under the contract are so integrally related that only a single source can reasonably perform the work;

“(ii) the contract provides only for firm, fixed price task orders or delivery orders for—

“(I) products for which unit prices are established in the contract; or

“(II) services for which prices are established in the contract for the specific tasks to be performed;

“(iii) only one source is qualified and capable of performing the work at a reasonable price to the government; or

“(iv) because of exceptional circumstances, it is necessary in the public interest to award the contract to a single source.

“(B) The head of the executive agency shall notify Congress within 30 days after any determination under subparagraph (A)(iv).”.

(2) ENHANCED COMPETITION FOR ORDERS IN EXCESS OF \$5,000,000.—Section 303J of such Act (41 U.S.C. 253j) is amended—

(A) by redesignating subsections (d), (e), and (f) as subsections (e), (f), and (g), respectively;

(B) by inserting after subsection (c) the following new subsection (d):

“(d) ENHANCED COMPETITION FOR ORDERS IN EXCESS OF \$5,000,000.—In the case of a task or delivery order in excess of \$5,000,000, the requirement to provide all contractors a fair opportunity to be considered under subsection (b) is not met unless all such contractors are provided, at a minimum—

“(1) a notice of the task or delivery order that includes a clear statement of the executive agency’s requirements;

“(2) a reasonable period of time to provide a proposal in response to the notice;

“(3) disclosure of the significant factors and subfactors, including cost or price, that the executive agency expects to consider in evaluating such proposals, and their relative importance;

“(4) in the case of an award that is to be made on a best value basis, a written statement documenting the basis for the award and the relative importance of quality and price or cost factors; and

Notification.

## PUBLIC LAW 110–181—JAN. 28, 2008

122 STAT. 239

“(5) an opportunity for a post-award debriefing consistent with the requirements of section 303B(e).”; and

(C) by striking subsection (e), as redesignated by paragraph (1), 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, United States Code, 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.”.

Effective date.

(3) EFFECTIVE DATES.—

(A) SINGLE AWARD CONTRACTS.—The amendments made by paragraph (1) shall take effect on the date that is 120 days after the date of the enactment of this Act, and shall apply with respect to any contract awarded on or after such date.

Applicability.  
41 USC 253h  
note.

(B) ORDERS IN EXCESS OF \$5,000,000.—The amendments made by paragraph (2) shall take effect on the date that is 120 days after the date of the enactment of this Act, and shall apply with respect to any task or delivery order awarded on or after such date.

41 USC 253j  
note.

**SEC. 844. PUBLIC DISCLOSURE OF JUSTIFICATION AND APPROVAL DOCUMENTS FOR NONCOMPETITIVE CONTRACTS.**

(a) CIVILIAN AGENCY CONTRACTS.—

(1) IN GENERAL.—Section 303 of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253) is amended by adding at the end the following new subsection:

“(j)(1)(A) Except as provided in subparagraph (B), in the case of a procurement permitted by subsection (c), the head of an executive agency shall make publicly available, within 14 days after the award of the contract, the documents containing the justification and approval required by subsection (f)(1) with respect to the procurement.

Public  
information.  
Deadline.

“(B) In the case of a procurement permitted by subsection (c)(2), subparagraph (A) shall be applied by substituting ‘30 days’ for ‘14 days’.

Applicability.

“(2) The documents shall be made available on the website of the agency and through a government-wide website selected by the Administrator for Federal Procurement Policy.

Website.

“(3) This subsection does not require the public availability of information that is exempt from public disclosure under section 552(b) of title 5, United States Code.”.

(2) CONFORMING AMENDMENT.—Section 303(f) of such Act is amended—

(A) by striking paragraph (4); and

(B) by redesignating paragraph (5) as paragraph (4).

(b) DEFENSE AGENCY CONTRACTS.—

through councils and working groups composed of the relevant inspectors general.

The conferees do not intend for the audits conducted pursuant to this section to duplicate audit work previously performed under other authority.

*Enhanced competition requirements for task and delivery order contracts (sec. 843)*

The House bill contained a provision (sec. 821) that would address the issue of competition in contracting on a government-wide basis.

The Senate amendment contained a provision (sec. 821) that would encourage the use of multiple-award task and delivery order contracts in lieu of single-award contracts, enhance requirements for the competition of task orders and delivery orders under multiple-award contracts, and authorize bid protests for task or delivery orders in excess of \$5.0 million under such contracts.

The House bill contained no similar provision.

The House recedes with an amendment that would address the competition issues in the Senate provision on a government-wide basis. 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.

*Public disclosure of justification and approval documents for noncompetitive contracts (sec. 844)*

The House bill contained a provision (sec. 823) that would require public disclosure of justification and approval documents for noncompetitive contracts.

The Senate amendment contained no similar provision.

The Senate recedes with an amendment that would require the disclosure of such documents through appropriate websites, rather than through the Federal Procurement Data System.

*Disclosure of government contractor audit findings (sec. 845)*

The House bill contained a provision (sec. 824) that would require the head of each federal agency to submit quarterly reports to Congress on completed audits of contractors performed by the agency or department.

The Senate amendment contained no similar provision.

The Senate recedes with an amendment that would require the inclusion of significant findings in final, completed audits of contractors in the semiannual reports submitted to Congress by Inspectors General pursuant to section 5 of the Inspector General Act (Public Law 95-452, as amended). The provision would provide for the redaction from such reports of information that is exempt from public disclosure under the Freedom of Information Act (section 552(b) of title 5, United States Code).

*Protection of contractor employees from reprisal for disclosure of certain information (sec. 846)*

The Senate amendment contained a provision (sec. 861) that would provide enhanced protection for contractor employees who disclose evidence of waste, fraud, or abuse on Department of Defense contracts.

The House bill contained no similar provision.

The House recedes with an amendment that would: expand the categories of government officials to whom a protected communication may be made; expand the categories of waste, fraud, and abuse about which a protected communication may be made; and establish a de novo right of action in federal

district court for contractor employees who have exhausted their administrative remedies under the provision.

*Requirements for senior Department of Defense officials seeking employment with defense contractors (sec. 847)*

The Senate amendment contained a provision (sec. 862) that would require contractors that receive defense contracts in excess of \$10.0 million to report to the Department of Defense (DOD) on an annual basis on certain former senior DOD officials who receive compensation from the contractor.

The House bill contained no similar provision.

The House recedes with an amendment that would require certain former senior DOD officials to obtain written opinions from the appropriate DOD ethics officials before accepting compensation from DOD contractors.

The conferees encourage covered DOD officials to request the required written opinion from an ethics counselor regarding post-employment restrictions that may apply to the official prior to leaving the Department whenever possible.

*Report on contractor ethics programs of major defense contractors (sec. 848)*

The Senate amendment contained a provision (sec. 863) that would require the Comptroller General to report to the Committees on Armed Services of the Senate and the House of Representatives on the internal ethics programs of major defense contractors.

The House bill contained no similar provision.

The House recedes with a technical amendment.

In conducting the required review, the conferees direct the Comptroller General to report on the extent to which the internal ethics programs of major defense contractors include: (1) disclosure of personal financial interests and outside employment by key personnel performing work for the government; (2) conflict mitigation measures for addressing any personal conflicts of interest of employees in connection with their work on Department of Defense contracts; and (3) procedures for reporting these personal conflicts of interest and any mitigation measures to the Department of Defense.

*Contingency contracting training for personnel outside the acquisition workforce and evaluations of Army Commission recommendations (sec. 849)*

The Senate amendment contained a provision (sec. 865) that would require the Secretary of Defense to provide for appropriate training of military personnel outside the acquisition workforce who are expected to have acquisition responsibilities during combat operations, post-conflict operations, and contingency operations.

The House bill contained no similar provision.

The House recedes with an amendment that would require the Secretary of Defense and the Secretary of the Army to review the recommendations of the Commission on Army Acquisition and Program Management in Expeditionary Operations and report to the congressional defense committees on steps that they have taken or plan to take to implement those recommendations. The conferees agree with the Commission's conclusion that acquisition failures in expeditionary operations urgently require a systemic fix of Army contracting and urge the Secretary of Defense and the Secretary of the Army to act on the Commission's recommendations as expeditiously as possible.

Subtitle E—Acquisition Workforce Provisions

*Requirement for section on defense acquisition workforce in strategic human capital plan (sec. 851)*

The House bill contained a provision (sec. 802(b)) that would require the Secretary of Defense to include a section on the acquisition workforce in annual updates of the strategic human capital plan required under section 1122 of the National Defense Authorization Act for Fiscal Year 2006 (Public Law 109-163).

The Senate amendment contained a similar provision (sec. 844(h)).

The Senate recedes with an amendment clarifying the issues to be addressed in the plan.

*Department of Defense acquisition workforce development fund (sec. 852)*

The Senate amendment contained a provision (sec. 844) that would establish an acquisition workforce development fund to ensure that the Department of Defense (DOD) has the capacity, in both personnel and skills, needed to properly perform its mission, provide appropriate oversight of contractor performance, and provide the best value for the expenditure of public resources in DOD acquisitions. The fund would be financed through quarterly remittances by the military departments and defense agencies.

The House bill contained no similar provision.

The House recedes with an amendment that would authorize the Secretary of Defense to reduce the percentages on which remittances to the fund are based, if the Secretary determined that credits to the fund would otherwise exceed amounts reasonably needed for the development of the DOD acquisition workforce. The provision would establish minimum levels, below which the Secretary would not be permitted to reduce annual remittances to the fund.

The conferees note that the final report of the Commission on Army Acquisition and Program Management in Expeditionary Operations, released on October 31, 2007, found that the Army has failed to recognize the importance of the contracts requirement development process, failed to allocate resources needed for contract management, and failed to provide defined clear paths for contracting professionals. The report concluded that “contracting, from requirements definition to contract management, is not an Army Core Competence. The Army has excellent, dedicated people, but they are understaffed, overworked, under-trained, under-supported and, most important, undervalued.”

Unfortunately, these shortcomings, which have increased the Army's vulnerability to fraud, waste, and abuse, are not limited to the Department of the Army. The Acquisition Advisory Panel chartered pursuant to section 1423 of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136) reported that the failure of DOD and other federal agencies to adequately fund the acquisition workforce is “penny wise and pound foolish,” as it seriously undermines the pursuit of good value for the expenditure of public resources.” The fund established by this provision is intended to address this problem by making the investments needed to reinvigorate the DOD acquisition workforce.

*Extension of authority to fill shortage category positions for certain federal acquisition positions (sec. 853)*

The House bill contained a provision (sec. 815) that would amend section 1413 of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136) to extend the

112TH CONGRESS  
1ST SESSION

# S. 498

---

## AN ACT

To ensure objective, independent review of task and delivery orders.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Independent Task and  
3 Delivery Order Review Extension Act of 2011”.

4 **SEC. 2. EXTENSION OF SUNSET DATE FOR CERTAIN PRO-**  
5 **TESTS OF TASK AND DELIVERY ORDER CON-**  
6 **TRACTS.**

7 Section 4106(f)(3) of title 41, United States Code,  
8 is amended to read as follows:

9 “(3) EFFECTIVE PERIOD.—Paragraph 1(B)  
10 and paragraph (2) of this subsection shall not be in  
11 effect after September 30, 2016.”.

12 **SEC. 3. USE OF EXISTING RESOURCES TO PROCESS TASK**  
13 **AND DELIVERY ORDER PROTESTS.**

14 No amounts are authorized to be appropriated for the  
15 specific purpose of processing protests authorized under  
16 section 4106(f) of title 41, United States Code, as amend-  
17 ed by section 2, and all such protests shall be processed  
18 using the existing resources of the Government Account-  
19 ability Office and executive agencies.

Passed the Senate May 12, 2011.

Attest:

*Secretary.*

112<sup>TH</sup> CONGRESS  
1<sup>ST</sup> SESSION

**S. 498**

---

---

**AN ACT**

To ensure objective, independent review of task and  
delivery orders.

IB

## Union Calendar No. 18

112<sup>TH</sup> CONGRESS  
1<sup>ST</sup> SESSION

# H. R. 899

**[Report No. 112-37]**

To amend title 41, United States Code, to extend the sunset date for certain protests of task and deliver order contracts.

---

### IN THE HOUSE OF REPRESENTATIVES

MARCH 3, 2011

Mr. LANKFORD (for himself and Mr. CONNOLLY of Virginia) introduced the following bill; which was referred to the Committee on Oversight and Government Reform

MARCH 17, 2011

Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

# **A BILL**

To amend title 41, United States Code, to extend the sunset date for certain protests of task and deliver order contracts.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. EXTENSION OF SUNSET DATE FOR CERTAIN**  
4 **PROTESTS OF TASK AND DELIVER ORDER**  
5 **CONTRACTS.**

6 Paragraph (3) of section 4106(f) of title 41, United  
7 States Code, is amended to read as follows:

8 “(3) EFFECTIVE PERIOD.—Paragraph (1)(B)  
9 and paragraph (2) of this subsection shall not be in  
10 effect after September 30, 2016.”.

Union Calendar No. 18

112<sup>TH</sup> CONGRESS  
1<sup>ST</sup> Session

**H. R. 899**

[Report No. 112-37]

---

---

**A BILL**

To amend title 41, United States Code, to extend the sunset date for certain protests of task and deliver order contracts.

---

---

March 17, 2011

Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

**Calendar No. 41**

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

---

U.S. GOVERNMENT PRINTING OFFICE

99-010

WASHINGTON : 2011

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

JOSEPH I. LIEBERMAN, Connecticut, *Chairman*

CARL LEVIN, Michigan

DANIEL K. AKAKA, Hawaii

THOMAS R. CARPER, Delaware

MARK L. PRYOR, Arkansas

MARY L. LANDRIEU, Louisiana

CLAIRE McCASKILL, Missouri

JON TESTER, Montana

MARK BEGICH, Alaska

SUSAN M. COLLINS, Maine

TOM COBURN, Oklahoma

SCOTT P. BROWN, Massachusetts

JOHN McCain, Arizona

RON JOHNSON, Wisconsin

ROB PORTMAN, Ohio

RAND PAUL, Kentucky

MICHAEL L. ALEXANDER, *Staff Director*

BETH M. GROSSMAN, *Deputy Staff Director and Chief Counsel*

TROY H. CRIBB, *Senior Counsel*

CARLY A. STEIER, *Professional Staff Member*

NICHOLAS A. ROSSI, *Minority Staff Director*

MOLLY A. WILKINSON, *Minority General Counsel*

ANNE F. TERRY, *Minority DHS Detailee*

TRINA DRIESSNACK TYRER, *Chief Clerk*

**Calendar No. 41**

|  |        |                    |
|--|--------|--------------------|
| 112TH CONGRESS }<br><i>1st Session</i> | SENATE | { REPORT<br>112-16 |
|--|--------|--------------------|

---

INDEPENDENT TASK AND DELIVERY ORDER REVIEW  
EXTENSION ACT OF 2011

MAY 9, 2011.—Ordered to be printed

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.

CONTENTS

|  |      |
|--|------|
|  | Page |
| I. Purpose and Summary .....                                     | 1    |
| II. Background and Need for the Legislation .....                | 1    |
| III. Legislative History .....                                   | 4    |
| IV. Section by Section Analysis .....                            | 4    |
| V. Evaluation of Regulatory Impact .....                         | 5    |
| VI. Congressional Budget Office Cost Estimate .....              | 5    |
| VII. Changes in Existing Law Made by the Bill, as Reported ..... | 6    |

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.<sup>1</sup>

In 1994, Congress passed the Federal Acquisition Streamlining Act (FASA) to provide greater flexibilities to agencies in their purchases of goods and services.<sup>2</sup> 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.<sup>3</sup> Prior to FASA, GAO heard protests concerning task and delivery orders that were competed among multiple vendors holding contracts, regardless of value.<sup>4</sup>

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.<sup>5</sup> The Panel issued its report in 2007.<sup>6</sup> 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.<sup>7</sup>

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

<sup>2</sup>Pub. L. No. 103-355.

<sup>3</sup>Section 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.

<sup>4</sup>*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.

<sup>5</sup>The 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.

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

<sup>7</sup>Report 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.<sup>8</sup> This provision, in amended form, was then enacted into law as part of the National Defense Authorization Act for Fiscal Year 2008.<sup>9</sup> 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.<sup>10</sup> 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.

---

<sup>8</sup>Section 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.

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

<sup>10</sup>GAO 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,<sup>11</sup> 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.

<sup>11</sup>Pub. 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).

7

(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.*

○