
IN THE UNITED STATES COURT OF FEDERAL CLAIMS
BID PROTEST

Number 11-420C
Judge Eric G. Bruggink

MED TRENDS, INC.,

Plaintiff,

v.

THE UNITED STATES,

Defendant,

and

MICROTECHNOLOGIES, LLC,

Defendant-Intervenor.

PLAINTIFF'S BRIEF IN SUPPORT OF RESPONSE TO MOTIONS TO DISMISS

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**PLAINTIFF'S BRIEF IN SUPPORT OF
PLAINTIFF'S RESPONSE TO MOTIONS TO DISMISS**

ARGUMENT

I. The Language Of The Sunset Provision Is Neither Unclear Nor Ambiguous; Exclusive United States Government Accountability Office (GAO) Jurisdiction Over Certain Task Order Protests Has Terminated; This Court Has Jurisdiction To Hear And Consider This Task Order Protest.

As Defendant United States Department of Labor (DOL) points out (ECF Document Number 23, at pages 3 through 4 of 10, filed July 25th, 2011) Congress in 1994 with enactment of the Federal Acquisition Streamlining Act (FASA) placed a general ban on Civilian Agency Task Order Protests, save for one narrow exception:

Protests: A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order contract 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), formerly codified at 41 U.S.C. § 253j(e).

This general statutory ban on Task Order Protests expressly excepted those Task Order Protests where it was asserted that a Task Order had increased the scope, period, or maximum value of the Multiple-Award Indefinite-Delivery/Indefinite Quantity (IDIQ) Contract under which the Order

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was issued. This general statutory ban on Task Order Protests did not make clear just which sort of un-expected Task Order Protests were statutorily banned.

In *Severn Companies, Inc.*, B-275717.2, April 28th, 1997, 1997 U.S. Comp. Gen. LEXIS 192, *4, GAO narrowly construed the scope of this 1994 general statutory ban on Task Order Protests, there limiting this 1994 general statutory ban only to Task Order Protests which resulted from Task Order Competitions conducted under Multiple-Award IDIQ Task Order Contracts, these the Multiple-Award IDIQ Task Order Contracts newly-authorized by FASA, formerly 41 U.S.C. § 253h(a), re-codified at 41 U.S.C. § 4103(d).

The regulatory implementation for these newly-authorized Multiple-Award IDIQ Task Order Contracts is set out in Federal Acquisition Regulation (FAR) Subpart 16.5, “Indefinite Delivery Contracts.” FAR 16.504(c), “Indefinite Quantity Contracts,” is the regulatory authority for initial placement of Multiple-Award IDIQ Task Order Contracts. And FAR 16.505, “Ordering,” is the regulatory authority for Task Order Competitions conducted among Awardees of these Multiple-Award IDIQ Task Order Contracts.

This Court later ruled much as had GAO in *Severn Companies*, because here on a Post-Award Procurement Protest concerning a Department of Defense Task Order Competition under a Gener-

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al Services Administration (GSA) Multiple-Award IDIQ Schedule Contract this Court took jurisdiction notwithstanding the 1994 general statutory ban on certain Task Order Protests. *Group Seven Associates, LLC v. United States*, 68 Fed. Cl. 28, 31-33 (2005). The regulatory implementation for these GSA Multiple-Award IDIQ Schedule Contracts is set out in FAR Subpart 8.4, “Federal Supply Schedules,” a FAR Subpart different from the FAR Subpart governing initial placement of Multiple-Award IDIQ Task Order Contracts, and different from the FAR Subpart governing Task Order Competitions conducted among Awardees of these Multiple-Award IDIQ Task Order Contracts,

Despite the general ban of 1994, this Court has taken jurisdiction of Task Order Protests where it was alleged, as was formerly expressly allowed under 41 U.S.C. § 4106(f)(1)(A), that a Task Order had increased the scope, period, or maximum value of the Multiple-Award IDIQ Task Order Contract under which the Task Order was placed. *Northrop Grumman Corp. v. United States*, 50 Fed. Cl. 443, 445, 455 (2001); *Phoenix Air Group, Inc. v. United States*, 46 Fed. Cl. 90, 105 (2000).

But in 2006, a date between 1994 and 2008, a Task Order Protest filed with this Court specifically concerning a Multiple-Award IDIQ Task Order Contract, and not a GSA Multiple-Award IDIQ Schedule Contract, a Task Order Protest which did not assert that the Task Order increased the scope, period, or maximum value of the Multiple-Award IDIQ Task Order Contract under which

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the Task Order was competed, was dismissed by this Court for lack of jurisdiction. *A & D Fire Protection, Inc. v. United States*, 72 Fed. Cl. 126, 133-135 (2006). *A & D Fire Protection* was issued before the National Defense Authorization Act for Fiscal Year 2008 came into force and effect and consequently considered only the general Task Order Protest ban of 1994, not the later-enacted Task Order Protest ban of 2008, Pub. L. No. 110-181, 122 Stat. 3, 239 (2008) which added another exception to the general Task Order Protest ban of 1994.

In the National Defense Authorization Act for Fiscal Year 2008 a subsequent Congress amended the general Task Order Protest ban of 1994 by adding a second exception, this an exclusive grant of new GAO Task Order Protest jurisdiction for Task Orders valued in excess of \$10,000,000. This subsequent Congress left intact the express grant of Task Order Protest jurisdiction created by an earlier Congress in 1994 for those Task Order Protests where it was alleged that a Task Order had increased the scope, period, or maximum value of the Multiple-Award IDIQ Task Order Contract under which the Task Order had earlier been placed. The remaining language and general ban of all other Civilian Agency Task Order protests “in connection with the issuance or proposed issuance of a task or delivery order” was not changed:

(f) Protests

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(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 January 28, 2008.

41 U.S.C. § 4106(f), formerly codified at 41 U.S.C. § 253j(e).

This Court considered *sub silentio* the general ban of 41 U.S.C. § 4106(f) for Task Order Protests in a Procurement Protest filed here during the general ban's three-year effective period, 41 U.S.C. § 4106(f)(3) (May 27th, 2008 through May 27th, 2011), this in *Bilfinger Berger AG Sede Secondaria Italiana v. United States*, 97 Fed. Cl. 96 (2010), the Court there applying FAR Subpart 16.504 procedures for initial placement of Multiple-Award IDIQ Contracts, *Id.*, at 149-150, n.77. The challenged Task Order Contract, not a Task Order Competition, in *Bilfinger* was before GAO and then came to this Court on July 26th, 2010, *Id.*, at 131-132. The *Bilfinger* Court enjoined the United States Army Corps of Engineers (USACOE) from issuing new Task Orders and the *Bilfinger* Court ordered USACOE to suspend performance under previously-issued Task Orders, *Id.*, at 160.

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The *Bilfinger* result, not its reasoning, simply confirms that the former 41 U.S.C. § 4106(f) was a general ban (with two exceptions) on Task Order Protests arising from Task Order Competitions, and not a ban on Protests concerning the Multiple-Award IDIQ Contracts under which Task Orders are subsequently placed.

Earlier, in *DataMill, Inc. v. United States*, 91 Fed. Cl. 740 (2010), the Court considered the phrase “in connection with the issuance or proposed issuance of a task or delivery order” which was used in the general ban on Task Order Protests in former 41 U.S.C. § 4106(f)(1), and is still in force in the general ban on Task Order Protests for the Military Departments which is set out in 10 U.S.C. § 2304c(e)(1). This general ban on Task Order Protests for the Military Departments continues in effect, and is in force through September 30th, 2016, 10 U.S.C. § 2304c(e)(3).

10 U.S.C. § 2304c(e), the statutory provision generally precluding Task Order Protests on Procurements for the Military Departments, is a statute which was *in pari materia* with the former 41 U.S.C. § 4106(f).

The *DataMill* Court rejected the argument that the sub-phrase “proposed issuance” could somehow be ignored when construing 10 U.S.C. § 2304c(e)(1), and held that the Protester there could not disengage an Army decision to acquire a software program through a non-competitive mechanism

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from the ultimate implementation of that decision, the issuance of a Task Order. *Id.*, at 756. The *DataMill* Court held that “*it could not adopt an interpretation that gives effect to or can be harmonized with only part of a statute.*” *Id.*, at 758 (Emphasis added).

This Civil Action concerns a Post-Award Procurement Protest under a Task Order Competition conducted by a Civilian, not a Military Agency, wherein the Task Order which is challenged is valued at \$39,886,717.88 (ECF Document Number 21-1, page 21 of 27, filed July 22nd, 2011), well in excess of the \$10,000,000 jurisdictional threshold formerly established in 41 U.S.C. § 4106(f)(1)(B) for exclusive GAO Task Order Protests. The Task Order Contract under which this Task Order Competition is proceeding is a competitively-awarded Government-Wide Acquisition Contract (GWAC) issued by GSA, a Multiple-Award IDIQ Contract, the Veterans Technology Services (VETS) GWAC.

The VETS GWAC was competed as an exclusive small business set-aside for Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBCs). The VETS GWAC became effective on February 2nd, 2007 and is in force through February 1st 2012. (<http://www.gsa.gov/portal/content/104996>, last visited July 8th, 2011) (ECF Document Number 21-1, page 2 through 3 of 27, filed July 22nd, 2011). The VETS GWAC is a Multiple-Award IDIQ Task Order Contract where Task Order

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Competitions proceed under FAR 16.505, "Ordering." The VETS GWAC is not a GSA Multiple Award IDIQ Schedule Contract where Orders proceed under FAR 8.405, "Ordering Procedures for Federal Supply Schedules." GSA is a Civilian Agency, not a Military Department.

Defendant DOL is correct when it says (ECF Document Number 20, at page 4 of 10, filed July 20th, 2011) that this Post-Award Procurement Protest does not challenge under former 41 U.S.C. § 4106(f)(1)(A) the Task Order awarded to Defendant-Intervenor MicroTechnologies, LLC (Micro Tech) on the ground that the challenged Task Order increased the scope, period, or maximum value of the Multiple-Award IDIQ Task Order Contract under which the Task Order was placed, one of the two exceptions to the general ban on Task Order Protests arising from Task Order Competitions conducted by Civilian Agencies. And Defendant DOL is also correct that the exclusive grant of Task Order Protest jurisdiction to GAO under 41 U.S.C. § 4106(f)(1)(B) (Task Orders valued in excess of \$10,000,000) terminated under the Sunset Provision of 41 U.S.C. § 4106(f)(3) on and after May 27th, 2011 (ECF Document Number 20, at page 5 of 10, filed July 20th, 2011). Indeed, FAR 16.505(a)(9)(ii) confirms that the "authority to protest the placement of an order under this subpart expires . . ." "on May 27, 2011 for other [Civilian] agencies (41 U.S.C. 4103(d) and 4106(f)."

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This Post-Award Procurement Protest Complaint was filed here on June 24th, 2011 (ECF Document Number 1, at page 1 of 20, filed June 24th, 2011), almost one month after the general statutory ban on Task Order Protests arising from Task Order Competitions conducted by Civilian Agencies terminated on May 27th, 2011. And it was not just the general statutory ban on Task Order Protests arising from Task Order Competitions conducted by Civilian Agencies which terminated on May 27th, 2011, because the two exceptions to this general statutory ban likewise terminated under the Sunset Provision of 41 U.S.C. § 4106(f)(3) for Task Order Protests filed on and after May 27th, 2011.

Defendant DOL moves to dismiss Plaintiff MED Trends' Task Order Protest for lack of jurisdiction under RCFC 12(b)(1), arguing that notwithstanding the plain language of the Sunset Provision of 41 U.S.C. § 4106(f)(3), the Sunset Provision applies only to the three-year effective period, 41 U.S.C. § 4106(f)(3) (May 27th, 2008 through May 27th, 2011), of the general statutory ban on Task Order Protests in 41 U.S.C. § 4106(f)(1), and not to the exclusive grant of GAO Task Order Protest jurisdiction under former 41 U.S.C. § 4106(f)(1)(B) (Task Orders valued in excess of \$10,000,000). Defendant DOL claims that the Court should resort to legislative history which shows, *mirabile dictu*, that the exclusive grant of GAO Task Order Protest jurisdiction under former 41 U.S.C. § 4106(f)(1)(B) (Task Orders in excess of \$10,000,000) remains in full force and effect, and thus that

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GAO, and not this Court, still has exclusive jurisdiction of Task Order Protests such as this one (ECF Document Number 20, at pages 5 through 6 of 10, filed July 20th, 2011).

And Defendant DOL goes on to assert that the express grant of Task Order Protest jurisdiction under former 41 U.S.C. § 4106(f)(1)(A) (Task Order increased the scope, period, or maximum value of the Multiple-Award IDIQ Task Order Contract under which the Order was placed) likewise remains in full force and effect, and thus Defendant DOL likewise concedes that this Court would have jurisdiction over such a Task Order Protest, this on the basis of the former 41 U.S.C. § 4106(f)(1)(A) (ECF Document Number 23, at page 8 of 10, filed July 25th, 2011), save that Plaintiff MED Trends' Post-Award Procurement Protest does not challenge the Task Order awarded to Defendant-Intervenor Micro Tech under former 41 U.S.C. § 4106(f)(1)(A) on the ground that the challenged Task Order increased the scope, period, or maximum value of the Multiple-Award IDIQ Task Order Contract under which the Task Order was placed (ECF Document Number 23, at page 4 of 10, filed July 25th, 2011).

Defendant DOL's claim of a miracle whereby this Court ought to ignore plain statutory text centers on just two sentences in a House of Representatives' Conference Report of December 6th, 2007, 153 Cong. Rec. H14929 (daily ed. December 6th, 2007) (ECF Document Number 23-1, at page 7 of

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23, filed July 25th, 2011) which Defendant DOL says must be read together to learn their true meaning, the second sentence reading “[t]he conferees expect that the sunset date will provide an opportunity to review the implementation of the provision and make any necessary adjustments,” and the immediately preceding sentence explaining that the House of Representatives had raised the jurisdictional threshold formerly established in 41 U.S.C. § 4106(f)(1)(B) from \$5,000,000 to \$10,000,000 (ECF Document Number 20, at page 6 of 10, filed July 20th, 2011).

The problems with this apparition from legislative history are: (1) the second sentence in the House Conference Report is not expressly linked to the immediately preceding sentence or to any other sentence, and (2) the Sunset Provision in the enacted Bill, 41 U.S.C. § 4106(f)(3), clearly applies: (a) to the general statutory ban on Civilian Agency Task Order Protests in 41 U.S.C. § 4106(f)(1); (b) to the express grant of Task Order Protest jurisdiction under former 41 U.S.C. § 4106(f)(1)(A) (Task Order increased the scope, period, or maximum value of the Multiple-Award IDIQ Task Order Contract under which the Order was placed); and (c) to the exclusive grant of GAO Task Order Protest jurisdiction under former 41 U.S.C. § 4106(f)(1)(B) (Task Orders valued in excess of \$10,000,000).

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Defendant DOL ignores *DataMill* which could not adopt an interpretation that gives effect to or can be harmonized with only part of a statute, just the thing attempted here. But undaunted by this flooding of the hold and lower decks of its *Flying Dutchman*, Defendant DOL goes on.

Next, Defendant DOL resorts to the legislative history of Bills pending before the current Congress, the first of these a Report of the Senate's Committee on Homeland Security and Governmental Affairs, Report 112-16 of the Senate Committee on Homeland Security and Governmental Affairs to Accompany Senate Bill 498 (2011), which characterizes the Sunset Provision, 41 U.S.C. § 4106(f)(3), enacted by an earlier Congress as allowing Congress an opportunity to assess the impact of former 41 U.S.C. § 4106(f)(1)(B) (Task Orders valued in excess of \$10,000,000) on the Federal procurement system "before deciding to extend, or let expire, the authority" (ECF Document Number 23-1, at page 19 of 23, filed July 25th, 2011), and the next an un-enacted Bill, House Bill 899, 112th Cong. (2011), which would amend the former Sunset Provision, 41 U.S.C. § 4106(f)(3), so as to reinstate the general statutory ban on Task Order Protests and to make 41 U.S.C. § 4106(f)(1)(B), the former exclusive GAO Task Order Protest jurisdiction (Task Orders in excess of \$10,000,000), effective only through September 30th, 2016 (ECF Document Number 23-1, at page 13 of 23, filed July

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25th, 2011). This un-enacted Bill would conform former 41 U.S.C. § 4106(f) for Civilian Agencies to 10 U.S.C. § 2304c(e) which is still in effect for the Military Departments.

Defendant DOL trumpets that the happenstance of the Sunset Provision, 41 U.S.C. § 4106(f)(3), taking effect on May 27th, 2011 before Congress could act to extend former 41 U.S.C. § 4106(f) should not be an occasion for this Court acquiring the Task Order Protest jurisdiction (Task Orders valued in excess of \$10,000,000) formerly given exclusively to GAO (ECF Document Number 23, at page 5 of 10, filed July 25th, 2011).

Should the Court adopt this construction of the Sunset Provision, 41 U.S.C. § 4106(f)(3), the result, which Defendant DOL carefully fails to mention, is that under GAO timeliness rules, 4 C.F.R. § 21.2(a)(2) (2011), Defendant DOL's selection of Defendant-Intervenor Micro Tech at a Price premium more than double the Price in Plaintiff MED Trends' firm fixed-price Quotation will be forever insulated from third-party review. Plaintiff MED Trends could have filed this Post-Award Procurement Protest at GAO only through Thursday, June 30th, 2011, ten calendar days after June 20th, 2011, the date of MED Trends' written Debriefing. Instead, relying upon the clear language of former 41 U.S.C. § 4106(f)(3), Plaintiff MED Trends came here to the Court six days earlier on Friday, June 24th, 2011.

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There is nothing in the Sunset Provision, 41 U.S.C. § 4106(f)(3), which limits its scope and effect only to the sun-setting of the three-year effective period (May 27th, 2008 through May 27th, 2011) of the general statutory ban on Civilian Agency Task Order Protests set out in former 41 U.S.C. § 4106(f). Neither is there language in the pre-enactment legislative history of the former 41 U.S.C. § 4106(f) from which one could reasonably suppose that the Congress which enacted the Sunset Provision, 41 U.S.C. § 4106(f)(3), meant something other than what the plain language of this Sunset Provision purports to mean. The plain language controls:

This court cannot simply add phrases or words that do not appear in the statute; doing so would be phantom legislative action by this court. Had Congress wanted to adopt Energy East's interpretation, it could have drafted language to effectuate that result. *United States v. Locke*, 471 U.S. 84, 95, 105 S. Ct. 1785, 85 L. Ed. 2d 64 (1985) (“Congress[] typically vote[s] on the language of a bill, [and] generally [the court] assume[s] that the legislative purpose is expressed by the ordinary meaning of the words used.” (internal quotation marks and citation omitted)). Congress did not include the language suggested by Energy East, and therefore, this court must rely on the plain language of the statute as enacted by Congress. *Jones v. Bock*, 549 U.S. 199, 217, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007) (“Given that the [statute] does not itself require plaintiffs to plead exhaustion, such a result ‘must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.’” (quoting *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993))).

Furthermore, nothing in the legislative history supports Energy East's interpretation. The legislative history states that “[t]he Committee believes that taxpayers should be charged interest only on the amount they actually owe, taking into account overpayments and underpayments from all open years.” S. Rep. 105-174, 61 (1998). This state-

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ment simply reflects Congress' desire to eliminate the previous unfairness that allowed collection of interest even where the overpayment and underpayment amounts were equal. It does not, as Energy East asserts, alter the plain language of the statute and allow interest netting for any corporation that files a consolidated return. *See St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 787-88, 101 S. Ct. 2142, 68 L. Ed. 2d 612 (1981) (“[I]ndefinite congressional expressions cannot negate plain statutory language . . .”). Indeed, “[g]oing behind the plain language of a statute in search of a possibly contrary congressional intent is a step to be taken cautiously even under the best of circumstances.” *Locke*, 471 U.S. at 95-96 (quoting *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 75, 102 S. Ct. 1534, 71 L. Ed. 2d 748 (1982) (internal quotation marks and citation omitted)). *The plain language of the statute here controls and there is no need to seek a contrary legislative intent.*

Energy East Corp. v. United States, Fed. Cir. No. 2010-5132, June 20th, 2011, 2011 U.S. App. LEXIS 12447, *9-*11. (Tax refund action filed in this Court under 28 U.S.C. § 1346(a)(1)) (Emphasis added).

Statutes sometimes come into effect only when a subsequent Congress funds their implementation, and, as here, statutes occasionally terminate under an included Sunset Provision. The Supreme Court of the United States of America has condemned the use of the legislative histories of these subsequent enactments to discern the meaning of the earlier enactments, this in a Case once before this Court under the National Childhood Vaccine Injury Act of 1986, a Case wherein parents of a child disabled after receiving diphtheria, tetanus, and pertussis (DTP) vaccine rejected the Judgment of this Court and sought, instead, to proceed under Pennsylvania law, claiming defective design of

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the DTP vaccine. The issue before the Supreme Court was whether or not 42 U.S.C. § 300aa-11(a)-(2) pre-empted Pennsylvania common law.

Two dissenting Justices looked to the post-enactment legislative history of subsequent funding legislation, arguing from this legislative history that Pennsylvania common law was not pre-empted. A majority of the Justices rejected this postulate, and doing so, denounced the use of post-enactment legislative history to revise otherwise unambiguous and authoritative statutory text:

Not to worry, the dissent retorts, a Committee Report by a later Congress “authoritative[ly]” vindicates its interpretation.⁷² *Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation.* See *Jones v. United States*, 526 U.S. 227, 238, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999); *United States v. Mine Workers*, 330 U.S. 258, 281-282, 67 S. Ct. 677, 91 L. Ed. 884 (1947). Real (pre-enactment) legislative history is persuasive to some because it is thought to shed light on what legislators understood an ambiguous statutory text to mean when they voted to enact it into law. See *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005). But post-enactment legislative history by definition “could have had no effect on the congressional vote,” *District of Columbia v. Heller*, 554 U.S. 570, 605, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).

⁷² *Post*, at 12. This is a courageous adverb since we have previously held that *the only authoritative source of statutory meaning is the text that has passed through the Article I process.* See *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005).

It does not matter that § 300aa-22(b)(1) did not take effect until the later Congress passed the excise tax that funds the compensation scheme,⁷³ and that the supposedly dispositive Committee Report is attached to that funding legislation.⁷⁴ Those who voted on

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the relevant statutory language were not necessarily the same persons who crafted the statements in the later Committee Report; or if they were did not necessarily have the same views at that earlier time; and no one voting at that earlier time could possibly have been informed by those later statements. *Permitting the legislative history of subsequent funding legislation to alter the meaning of a statute would set a dangerous precedent. Many provisions of federal law depend on appropriations or include sunset provisions;*⁷⁵ *they cannot be made the device for unenacted statutory revision.*

Bruesewitz v. Wyeth LLC, Sup. Ct. No. 09-152, February 12th, 2011, 2011 U.S. LEXIS 1085, *32-*33.

(Emphasis added).

Use of the pre-enactment legislative history of the Sunset Provision, 41 U.S.C. § 4106(f)(3), to add language which simply does not exist would amount to phantom legislative action by this Court. And it is plainly improper to use the post-enactment legislative history of the Sunset Provision, 41 U.S.C. § 4106(f)(3), to alter its statutory meaning, whether or not the statutory language of the Sunset Provision, 41 U.S.C. § 4106(f)(3), is itself unclear or thereby made ambiguous.

Since the Task Order Competition here proposes a Task Order to satisfy the requirements of an Executive Department of the United States, 5 U.S.C. § 101, for services to support the redesigned and newly-deploying Occupational Safety and Health Administration's (OSHA's) OSHA Information System (ECF Document Number 21-2, page 11 of 54, filed July 22nd, 2011), Defendant DOL must necessarily concede that the Task Order challenged here is a Civilian Procurement of services

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well within 41 U.S.C. § 403(2), and thus that this Court now properly has *exclusive* jurisdiction under 28 U.S.C. § 1491(b)(1), *Resource Conservation Group, LLC v. United States*, 597 F.3d 1238, 1246 (Fed. Cir. 2010) (“Congress intended the 1491(b)(1) jurisdiction to be exclusive where 1491(b)(1) provided a remedy. The legislative history makes clear that the ADRA was meant to unify bid protest law in one court under one standard. . .”).

For the moment, set aside the *DataMill* result and Defendant DOL’s ludicrous attempt at statutory interpretation—a remedy at this Court for this Post-Award Procurement Protest *was expressly unprotected by reason of the exclusive grant of GAO Task Order Protest jurisdiction* under former 41 U.S.C. § 4106(f)(1)(B) (Task Orders in excess of \$10,000,000) *but only during the three-year effective period (May 27th, 2008 through May 27th, 2011) of former 41 U.S.C. § 4106(f)*. Again, this Post-Award Procurement Protest was filed here almost one month after former 41 U.S.C. § 4106(f)(1) (the general statutory ban on Task Order Protests), 41 U.S.C. § 4106(f)(1)(A) (the exception for Task Order Protests premised on Task Orders beyond the scope, period, or maximum value of the underlying Task Order Contract), and 41 U.S.C. § 4106(f)(1)(B) (the exclusive GAO jurisdiction for Task Order Protests premised on Task Orders more than \$10,000,000) all three were terminated. Time to move on.

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II. MED Trends' Agreement To A Term Of The VETS GWAC Contract Banning Agency And GAO Protests Does Not Include A Ban On Procurement Protests Filed With This Court.

One of the included terms of the proposed Task Order which is challenged here is a term of the VETS GWAC Contract between GSA and the SDVO SBC Contractors, a contractual term which implements the now terminated 41 U.S.C. § 4106(f):

G.10 PROTESTS AND COMPLAINTS (MAR 2009)

No protest under FAR Subpart 33.1 is authorized in connection with the issuance or proposed issuance of an order under this contract, (1) except for a protest on the grounds that the order increases the scope, period, maximum value of the contract (10 U.S.C. 2304c(d) and 41 U.S.C. 253j(d)) or (2) A protest of an order valued in excess of \$10 million. Protests of orders in excess of \$10 million may only be filed with the Government Accountability Office, in accordance with the procedures

Administrative Record (AR), at 58.

Defendant-Intervenor Micro Tech moves to dismiss MED Trends' Post-Award Procurement Protest under RCFC 12(b)(1), arguing that MED Trends and Micro Tech both waived their right to complain here about this Task Order in excess of \$10,000,000 when each signed the VETS GWAC Contract with this included term and then became contractually bound to this waiver in subsequent Task Orders (ECF Document Number 22, at pages 7 through 8 of 20, filed July 25th, 2011).

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Defendant-Intervenor Micro Tech has not carefully read this “G.10 PROTESTS AND COMPLAINTS (MAR 2009)” provision. When the VETS GWAC SDVO SBC Contractors signed the VETS GWAC, they promised only to fore swear “FAR Subpart 33.1 Protests.” And what are “FAR Subpart 33.1 Protests”? Very simply, FAR Subpart 33.1 Protests are protests to the Agency, FAR 33.103; else to GAO, FAR 33.104. FAR Subpart 33.1 Protests are not Procurement Protests filed with this Court, either Pre-Award or Post-Award.

Neither MED Trends nor Micro Tech have promised GSA or any other Civilian Agency authorized to conduct Task Order Competitions under the VETS GWAC to fore swear Pre-Award or Post-Award Procurement Protests to be filed with this Court. This is clear from reading the entirety of the “G.10 PROTESTS AND COMPLAINTS (MAR 2009)” provision.

And likely this is the reason that Defendant-Intervenor Micro Tech has not been completely upfront with the Court and did not set out the entirety of the “G.10 PROTESTS AND COMPLAINTS (MAR 2009)” provision in its Motion to Dismiss. Defendant-Intervenor Micro Tech’s outside counsel perhaps are not well aware of their duty to cut not less than sharp corners in their representations to this Court. *In re Mattox*, 35 Fed. Cl. 425, 430 (1996).

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III. The Rating Of Plaintiff MED Trends' Quotation Meets All Announced Evaluation Criteria Required For Consideration.

Defendant-Intervenor Micro Tech contends, under RCFC 12(b)(6), that Plaintiff MED Trends lacks standing to pursue this Post-Award Procurement Protest because Plaintiff MED Trends did not receive from Defendant DOL a rating no less than "Good" for each one of the four Sub-Factors under the Technical Capability Factor (ECF Document Number 22, pages 14 through 15 of 21, filed July 25th, 2011). This is the announced Evaluation criterion to which Defendant-Intervenor Micro Tech refers:

To receive consideration for award, a rating of no less than "Good" must be achieved for Factor I, and its associated sub-factors (Understanding of the Requirement, Key Personnel, Corporate Experience, and Start-Up Plan-Phase-Out Plan).

AR, at 94.

Nowhere does the Request for Quotations explain whether each of the four Sub-Factors associated with the Technical Capability Factor must receive a rating of no less than "Good," or whether, instead, the adjectival scores of these four Sub-Factors will be averaged by Defendant DOL in order to decide to proceed with consideration of the Quotation, i.e., whether the overall Evaluation criterion is satisfied.

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As it has turned out, Plaintiff MED Trends received one “Excellent,” two “Good,” and one “Marginal” adjectival ratings on the four Sub-Factors associated with the Technical Capability Factor. Plaintiff MED Trends’ Quotation was evaluated, not rejected, by Defendant DOL. AR, at 584. And when Defendant DOL’s Contracting Officer provided her written Debriefing to Plaintiff MED Trends on June 20th, 2011, she then explained to Plaintiff MED Trends that Plaintiff MED Trends’ had received an “**Overall Technical Rating – Good.**” AR, at 635. In other words, Defendant DOL averaged the adjectival scores of the four Sub-Factors associated with the Technical Capability Factor.

The announced Evaluation criterion for the Technical Capability Factor could be read two ways: each of the four Sub-Factors associated with the Technical Capability Factor must have received an adjectival rating of no less than “Good,” else the adjectival ratings of the four Sub-Factors associated with the Technical Capability Factor could be averaged by Defendant DOL and an overall adjectival rating assigned to the Technical Capability Factor. Defendant DOL chose the latter path.

Defendant-Intervenor Micro Tech’s complaint about this averaged adjectival scoring for the Technical Capability Factor comes too late—this should have been raised before the date set for receipt of Quotations, before 12:00 p.m. Eastern Standard Time on April 1st, 2011, April Fool’s Day.

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Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1315 (Fed. Cir. 2007) (“a party who has the opportunity to object to the terms of a government solicitation concerning a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection afterwards in a § 1491(b) action in the Court of Federal Claims”).

IV. Plaintiff MED Trends Post-Award Procurement Protest Complaint Is Not Fatally Flawed In Its Legal Premises.

Defendant-Intervenor Micro Tech concludes with throwing the kitchen sink, so to speak, by arguing as the final ground of its RCFC 12(b)(6) Motion to Dismiss that Plaintiff MED Trends’ Post-Award Procurement Protest Complaint fails to plead sufficient factual matter which, according to Defendant-Intervenor Micro Tech, would demonstrate just why Defendant DOL’s conduct was arbitrary or capricious, or just how Defendant DOL’s conduct violated procurement statute and regulation. (ECF Document Number 22, pages 16 through 19 of 21, filed July 25th, 2011). In support of this premise Defendant-Intervenor Micro Tech parses Plaintiff MED Trends’ Post-Award Procurement Protest Complaint filed on June 24th, 2011 (ECF Document Number 1). Defendant-Intervenor Micro Tech ignores Plaintiff MED Trends’ Motion for Judgment on the Administrative Record, Statement of Facts, and Brief in Support filed on July 18th, 2011 (ECF Document Number 17) after

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Defendant DOL produced the Administrative Record on July 5th, 2011 (ECF Document Number 14).

Motions to Dismiss premised on RCFC Rule 12(b)(6) are adjudicated under the standards announced in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556, 570 (1955) (*Twombly*). When applying the *Twombly* standards, a Court must go beyond simple parsing of the words and phrases of a Complaint, and decide whether or not the Complaint asserts Claims which are facially plausible, a point recently made here in *Outdoor Venture Corp. v. United States*, Fed. Cl. No. 11-353C, July 25th, 2011, 2011 U.S. Claims LEXIS 1487, *12-*13.

RCFC Rule 12(b)(6) Motions to Dismiss may be asserted at any time after a Civil Action is filed, but when, as here, a Rule 12(b)(6) Motion to Dismiss is filed after the Administrative Record is filed, and filed after there is filed a Motion for Judgment on that Administrative Record, such a Rule 12(b)(6) Motion to Dismiss must demonstrate that the Motion for Judgment on the Administrative Record is not facially plausible, and may not, as here, confine itself to a simple parsing of the Post-Award Procurement Protest Complaint. *Cf. L-3 Communications Integrated Systems, L.P. v. United States*, Fed. Cl. No. 06-396C, April 6th, 2011, 2011 U.S. Claims LEXIS 516, *15 (“In bid protests, as in

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any civil litigation, as long as plaintiff has a good faith basis for raising an allegation, it is free to do so.”)

Instead of looking solely to Plaintiff MED Trends’ Post-Award Procurement Protest Complaint, Defendant-Intervenor Micro Tech should have considered Plaintiff MED Trends’ Post-Award Procurement Protest, this now set out, after Plaintiff MED Trends had access to the Administrative Record, in Plaintiff MED Trends’ Motion for Judgment on the Administrative Record, Statement of Facts, and Brief in Support filed on July 18th, 2011. Not done.

CONCLUSION

For all of the reasons set forth in the foregoing Brief in Support of Plaintiff MED Trends’ Response to the Motions to Dismiss, Plaintiff MED Trends respectfully requests that the Court deny the Motions to Dismiss filed by Defendant DOL and by Defendant-Intervenor Micro Tech.

Respectfully submitted,

/s/ Cyrus E. Phillips IV

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July 29th, 2011

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CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury, that on Friday, July 29th, 2011 a true and complete copy of this Plaintiff's Brief in Support of Plaintiff's Response to Motions to Dismiss was filed electronically via the Court's Electronic Case Filing System, through which notice of this filing will be sent to:

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