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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Analytic Strategies LLC; Gemini Industries, Inc.--Reconsideration

File: B-413758.4; B-413758.5

Date: March 9, 2017

J. Alex Ward, Esq., Damien C. Specht, Esq., and Ethan E. Marsh, Esq., Morrison & Foerster LLP, for Analytic Strategies LLC; Clayton S. Marsh, Esq., for Gemini Industries, Inc., the protesters.

Kelli Cochran-Seabrook, Esq., and Michael D. Tully, Esq., General Services Administration, for the agency.

Louis A. Chiarella, Esq., Joshua R. Gillerman, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Requests for reconsideration of prior decision, which dismissed protests due to our Office's lack of jurisdiction over civilian agency task order protests, are denied, notwithstanding Congress's reinstatement of such jurisdiction, where the requesters do not show that the prior decision contained an error of law that warrants reversal or modification of the decision, and where the subsequent reinstatement of our jurisdiction was not made retroactive.

DECISION

Analytic Strategies LLC, of Vienna, Virginia, and Gemini Industries, Inc., of Burlington, Massachusetts, request that we reconsider our decision in Analytic Strategies LLC; Gemini Indus., Inc., B-413758.2; B-413758.3, Nov. 28, 2016, 2016 CPD ¶ 334, dismissing, for lack of jurisdiction, the firms' protests of the General Services Administration's (GSA) exclusion of the vendors' proposals from further consideration under task order request (TOR) No. GSC-QF0B-16-32998, to provide mission support services for the Joint Improvised-Threat Defeat Agency (JIDA). We dismissed these protests because our statutory grant of jurisdiction to consider protests in connection with task and delivery orders valued above \$10 million, issued under civilian agency multiple-award indefinite-delivery/indefinite-quantity (IDIQ) contracts, had expired. Analytic Strategies and Gemini

Industries request that their initial protests be reinstated in light of Congress's reestablishment of such jurisdiction.¹

We deny the requests for reconsideration.

BACKGROUND

History of GAO's Civilian Agency Task Order Protest Jurisdiction

In 1994, Congress enacted the Federal Acquisition Streamlining Act (FASA), which, as relevant here, provided statutory guidance for the award of IDIQ contracts. See Pub. L. No. 103-355, 108 Stat. 3243 (1994), codified in Titles 10 and 41 of the U.S. Code; Technatomy Corp., B-405130, June 14, 2011, 2011 CPD ¶ 107 at 2. The authorities to award IDIQ contracts and to issue orders under IDIQ contracts are codified under Titles 10 and 41.² See 10 U.S.C. §§ 2304a, 2304b, 2304c; 41 U.S.C. §§ 4103, 4105, 4106. FASA also established a general bar against protests filed in connection with military and civilian agency task and delivery orders issued under multiple-award IDIQ contracts, with the exception of those protests alleging that an order increased the scope, period, or maximum value of an underlying IDIQ contract. See Pub. L. No. 103-355, 108 Stat. 3243, 3253, 3264 (1994), codified in Titles 10 and 41 of the U.S. Code; Technatomy Corp., supra, at 2-3.

The National Defense Authorization Act (NDAA) for Fiscal Year 2008 amended FASA to grant GAO jurisdiction to hear protests in connection with the issuance or proposed issuance of orders placed under military agency IDIQ contracts and orders placed under civilian agency IDIQ contracts, in instances where the value of the order exceeded \$10 million. Pub. L. No. 110-181, 122 Stat. 3, 237, 239 (2008). The 2008 NDAA also included a sunset provision under which the general bar on our task and delivery order protest jurisdiction would expire on May 27, 2011. Id.; Ryan Consulting Grp., Inc., B-414014, Nov. 7, 2016, 2016 CPD ¶ 324 at 2; Kevcon, Inc., B-406418, Mar. 7, 2012, 2012 CPD ¶ 108 at 2-3; Technatomy Corp., supra. The Fiscal Year 2012 NDAA amended our jurisdiction to reinstate the FASA task or delivery order bar, as well as the \$10 million exception to the bar established under

¹ While Gemini requests that we "vacate" our prior decision--based upon the statutory reinstatement of our jurisdiction--we consider this to be a request for reconsideration of our prior decision. See 4. C.F.R. § 21.14.

² The procurement provisions of Title 10 apply to the Secretaries of Defense, Army, Navy, Air Force, Homeland Security (for the Coast Guard), and the Administrator of the National Aeronautics and Space Administration (i.e., military departments or agencies). 10 U.S.C. §§ 2302, 2303. Title 41 applies to executive agencies (i.e., civilian agencies). 41 U.S.C. § 4103.

the FY 2008 NDAA (in addition to the exception concerning scope, as discussed above). Pub. L. No. 112-81, § 813, 125 Stat. 1298, 1491 (2011), codified at 41 U.S.C. § 4106(f)(2012). It also established a new sunset date, whereby the grant of jurisdiction to hear protests in connection with orders issued under the authority and procedures established by Title 41, valued in excess of \$10 million, expired after September 30, 2016.³

The sunset provision went into effect on October 1, 2016, resulting in our Office losing jurisdiction over protests of task and delivery order contracts entered into under section 4103 of Title 41. See Ryan Consulting Grp., Inc., supra. On December 14, 2016, President Obama signed into law the GAO Civilian Task and Delivery Order Protest Authority Act of 2016 (hereinafter the Protest Authority Act), Pub. L. No. 114-260, 130 Stat. 1361 (2016), codified at 41 U.S.C. § 4106(f)(3). This act removed the sunset provision (“Section 4106(f) of title 41, United States Code, is amended by striking paragraph (3)”), thereby reinstating GAO’s jurisdiction over protests of task orders placed under civilian agency IDIQ contracts valued in excess of \$10 million. Id. The Protest Authority Act contained no provision regarding its effective date. See id.

Protest History

On April 20, 2016, the GSA issued TOR No. GSC-QF0B-16-32998, under the provisions of Federal Acquisition Regulation (FAR) subpart 16.5, to contractors holding GSA’s One Acquisition Solution for Integrated Services (OASIS) small business multiple-award IDIQ – pool 1 contracts, including Analytic Strategies and Gemini Industries. The solicitation contemplated the issuance of a single cost-plus-award-fee task order with not-to-exceed contract line item numbers for travel, materials and equipment, and other direct costs, on a best-value basis. Analytic Strategies, LLC; Gemini Indus., Inc., supra, at 2. The solicitation estimated the total value of the cost-plus-award-fee portion of the task order to be between \$126,081,247 and \$132,717,104. Id. The TOR provided that the task order awardee will provide mission support services to JIDA.

³ Although our jurisdiction with respect to protests of task and delivery orders issued pursuant to Title 41 was set to expire on September 30, 2016, section 830 of the Fiscal Year 2013 NDAA amended Title 10 to delete the sunset language with respect to military agency task and delivery orders. See Pub. L. No. 112-239, 126 Stat. 1632, 1842 (2013) (codified at 10 U.S.C. § 2304c(e)). This change had the effect of making permanent GAO’s jurisdiction to hear protests in connection with Title 10 task and delivery orders. The dollar threshold applicable to such military agency task order protests was subsequently increased to \$25 million. See 2017 NDAA, Pub. L. No. 114-328, 130 Stat. 2000 § 835 (2016).

Analytic Strategies and Gemini Industries submitted responses to the TOR. Id. On September 21 and October 18, 2016, respectively, GSA informed these vendors that the agency would no longer consider their proposals for award. Id. Analytic Strategies filed its protest on October 3, and Gemini Industries filed its protest on October 28, each challenging the exclusion of its proposal from further award consideration. Id. On November 28, our Office dismissed the vendors' protests on the basis that our statutory grant of jurisdiction to consider protests in connection with task and delivery orders valued above \$10 million, issued under civilian agency multiple-award IDIQ contracts, had expired on September 30. Id. at 4-5. We explained that "the sunset provision [41 U.S.C. § 4106(f)(3)] with respect to GAO's task and delivery order protest jurisdiction effectively reinstated the original FASA prohibition on GAO's task order jurisdiction" involving multiple-award IDIQ contracts awarded by civilian agencies. Id. at 4.

On December 21 and December 22, respectively--following the December 14 enactment of the Protest Authority Act--Analytic Strategies and Gemini Industries filed their requests for reconsideration of our November 28 decision.⁴

DISCUSSION

Analytic Strategies and Gemini Industries contend that our decision dismissing their protests should be reconsidered in light of the reinstatement of GAO's civilian agency task order protest jurisdiction. The protesters both generally argue that Congress intended this legislation to apply retroactively to protests that were filed prior to the Act's enactment date.⁵ In support of this point, the protesters rely upon a September 21, 2016, committee report from the House Committee on Oversight and Government Reform, which stated that the bill would prevent "disruption" in the protest process, and "ensure there is no gap in GAO's existing authority to hear protests of civilian task and delivery order contract awards over \$10 million[.]" See, e.g., Gemini Industries Request for Reconsideration at 1 (quoting H.R. REP. No. 114-779, at 3 (2016)).

⁴ Analytic Strategies also asserts that its reconsideration request is timely because it was filed within 10 days of when the basis for reconsideration was known or should have been known, i.e., the passage of the Protest Authority Act. Analytic Strategies Request for Reconsideration at 2.

⁵ Analytic Strategies also argues that as the sunset provision that was the basis for the underlying dismissal decision no longer exists, GAO's jurisdiction to consider protests of civilian agency task order awards never did sunset, id. at 2-3, while Gemini Industries also asserts that it was "happenstance" that Congress reinstated GAO's jurisdiction after, rather than before, the September 30, 2016, sunset date. Gemini Industries Request for Reconsideration at 1-2.

Under our Bid Protest Regulations, to obtain reconsideration, the requesting party must set out the factual and legal grounds upon which reversal or modification of the decision is deemed warranted, specifying any errors of law or information not previously considered. 4 C.F.R. § 21.14(a), (c); Department of Veterans Affairs--Recon., B-409705.6, Dec. 5, 2016, 2016 CPD ¶ __ at 4. Here, Analytic Strategies and Gemini Industries essentially allege that subsequent events, *i.e.*, the enactment of the Protest Authority Act, warrant reversal of our underlying decision. For the reasons discussed below, we deny the protesters' requests.

As a preliminary matter, there is no dispute that Analytic Strategies and Gemini Industries each filed their protests with our Office after September 30, 2016--after the sunset of our jurisdiction to resolve protests in connection with task and delivery orders issued under civilian agency IDIQ contracts--and before the December 14, 2016, enactment of the Protest Authority Act. We have also repeatedly determined that the authority of our Office to hear a protest, including our jurisdiction to hear task and delivery order protests, is based on the filing date of the protest. *See Kevcon, Inc.*, *supra*, at 3-4; *Standard Commc'ns, Inc.*, B-406021, Jan. 24, 2012, 2012 CPD ¶ 3 at 5-6; *Technatomy Corp.*, *supra*, at 5-6. GAO, therefore, did not possess the jurisdiction necessary to resolve the Analytic Strategies and Gemini Industries protests at the time these protests were filed. Merely because the Protest Authority Act removed the 41 U.S.C. § 4106(f)(3) sunset provision (and thereby reinstated GAO's jurisdiction over protests of task orders placed under civilian agency IDIQ contracts valued in excess of \$10 million) did not alter the fact that the sunset provision previously existed: it was not, as Analytic Strategies suggests, a nonevent or legal nullity.⁶

We also find no merit in the protesters' mutual assertion that the Protest Authority Act applies retroactively to provide GAO with jurisdiction to consider civilian agency task order protests filed during the time our Office's jurisdiction had otherwise lapsed. As set forth above, this legislation was enacted on December 14, 2016, and contained no statement as to its effective date. It is well established that when a statute has no effective date, absent a clear direction by Congress to the contrary, it takes effect on the date of its enactment. *Johnson v. United States*, 529 U.S. 694, 702 (2000); *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991); *Robertson v. Bradbury*, 132 U.S. 491, 493 (1889). Further, our Office has found that in the absence of an express statement in the statute providing for it, retroactive application is disfavored by law. *See Technatomy Corp.*, *supra*, at 6; *KPMG Peat*

⁶ We also find the fact that the reinstatement of our bid protest jurisdiction occurred approximately 2 1/2 months after its expiration was more than mere happenstance, as Gemini Industries so characterizes. Quite simply, our Office lacked jurisdiction to resolve protests in connection with task and delivery orders issued under civilian agency IDIQ contracts and valued in excess of \$10 million from October 1, 2016, to December 14, 2016.

Marwick, LLP--Costs, B-259479.4, July 25, 1996, 96-2 CPD ¶ 43 at 4 (citing Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988)); see also Use of the Chief Administrative Officer's Salaries and Expenses Appropriation to Pay Certain Child Care Center Expenses for Fiscal Year 2003, B-300673, July 3, 2003, 2003 U.S. Comp. Gen. LEXIS 234, at 7 (“[i]t is a general rule of statutory construction that a statute is effective on and after the date of its enactment and is not to be applied retroactively unless it is clear from its language or by necessary implication that a different effective date was intended”).

Our decisions in this area are consistent with Supreme Court jurisprudence on this issue. A “statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication.” Fernandez-Vargas v. Gonzales, 548 U.S. 30, 37 (2006) (citing United States v. St. Louis, S. F. & T. R. Co., 270 U.S. 1, 3 (1926)). Generally, in analyzing whether to apply a statute retroactively, the Supreme Court has applied a two-part test. See id. (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 278-80 (1994)). The first step under this framework is to ask “whether Congress has expressly prescribed the statute’s proper reach.”⁷ Fernandez-Vargas v. Gonzales, supra. If that effort fails, the Court next seeks to determine “whether applying the statute to the person objecting would have a retroactive consequence in the disfavored sense of ‘affecting substantive rights, liabilities, or duties [on the basis of] conduct arising before [its] enactment.’” Id. The Court has also held that a statute that creates jurisdiction, where such jurisdiction did not previously exist, does affect substantive rights--“it thus speaks not just to the power of a particular court but to the substantive rights of the parties as well”--and is therefore subject to the presumption against retroactivity. Hughes Aircraft Co. v. Schumer, 520 U.S. 939, 951 (1997).

Application of the Supreme Court’s test to the Protest Authority Act here provides no support for the protesters’ argument that it was intended to apply retroactively. First, nothing in the legislation itself evidences a clear intent by Congress that it be applied retroactively. As noted above, the Protest Authority Act expressed no effective date and thus, in the absence of clear congressional direction to the contrary, takes effect on the date of its enactment. Further, the Protest Authority Act created jurisdiction for our Office to resolve protests of task orders placed under civilian agency IDIQ contracts valued in excess of \$10 million where no such

⁷ The Court has also held that the omission of an express effective date from a statute is no indication of retroactive purpose. Johnson v. United States, supra. Rather, “[t]he omission simply remits us to the general rule that when a statute has no effective date, ‘absent a clear direction by Congress to the contrary, [it] takes effect on the date of its enactment.’” Id., quoting Gozlon-Peretz v. United States, supra.

jurisdiction existed as of December 14, 2016; it is thus subject to the presumption against retroactivity.⁸

Lastly, we find the protesters' reliance on the September 21, 2016, committee report to be misplaced. First, as a general rule, use of a committee report to evince the intent of Congress must be done cautiously, see Starfleet Marine Trans., Inc., B-290181, July 5, 2002, 2002 CPD ¶ 113 at 7, and is wholly irrelevant when the statutory language is unambiguous. See Executive Protective Sec. Servs., Inc., B-299954.3, Oct. 22, 2007, 2007 CPD ¶ 190 at 7, citing Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253-54 (1992). The committee report here was also created prior to the expiration of GAO's civilian agency task order jurisdiction, which occurred on September 30, 2016. As such, the aspirational statements found in the report regarding the need to "ensure there is no gap" in GAO's existing jurisdiction do not evince an intent, once the Protest Authority Act was subsequently enacted, to make the legislation retroactive. H.R. REP. NO. 114-779, at 3 (2016). Instead, these statements are more naturally read as reflecting a desire to prevent such a gap from occurring in the first place. HP Enter. Servs., LLC--Recon., B-413382.3, Jan. 26, 2017, 2017 CPD ¶ 32 at 6. In sum, a committee report stating the desire not to let the civilian agency task order jurisdiction lapse is not evidence that the

⁸ We also find unpersuasive Analytic Strategies' reliance upon the Supreme Court's decision in Landgraf v. USI Film Prods., supra. In Landgraf, the Court held that the general presumption against retroactivity does not apply to "jurisdiction-allocating" statutes that change the tribunal that is to hear a particular case ("[a]pplication of a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case'"). Id. However, the Supreme Court thereafter distinguished the Landgraf decision in Hughes Aircraft, stating,

Statutes merely addressing which court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties. Such statutes affect only where a suit may be brought, not whether it may be brought at all.

Hughes Aircraft Co. v. Schumer, supra.

A statute, however, such as the Protest Authority Act here, that "does not merely allocate jurisdiction among fora," but "creates jurisdiction where none previously existed," is, "even though phrased in 'jurisdictional' terms, [] as much subject to our presumption against retroactivity as any other." Id.

entire Congress--after the jurisdiction had in fact lapsed--intended retroactive application of the Protest Authority Act once enacted.

The requests for reconsideration are denied.

Susan A. Poling
General Counsel