

## **CLAIMS COURT LACKS JURISDICTION OVER TASK ORDER SIZE PROTESTS, INCLUDING BID PROTESTS**

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The Federal Circuit recently affirmed the decision of the Court of Federal Claims that it had no jurisdiction over a bid protest challenge of a size determination made by the Small Business Administration (“SBA”) Office of Hearings and Appeals (“OHA”), in connection with the issuance of a task order. *22<sup>nd</sup> Century Tech., Inc. v United States, No. 2022-1275 (Fed. Cir. Jan. 10, 2023)*. The Federal Acquisition Streamlining Act of 1994 (“FASA”) specifically bars the Claims Court from exercising jurisdiction over 22<sup>nd</sup> Century’s bid protest.

The case relates to a task order issued under an Army Indefinite Delivery, Indefinite Quantity (“IDIQ”) multiple award contract that involved proposals for Command, Control Computers, Intelligence and Surveillance needs. The solicitation was not set-aside for small business but allowed the Army to restrict subsequent task order competitions to small business contractors. In 2015, when 22<sup>nd</sup> Century submitted its proposal for the IDIQ contract, it was a small business. However, in December 2020, the Army issued a Task Order Request for Proposals under this IDIQ contract which limited competition to small businesses and required proposals to represent whether the submitter was small or not for purposes of the Task Order. Although 22<sup>nd</sup> Century was no longer small, it represented that it had been “a small business for this IDIQ” (at the time of its proposal in 2015).

In two formal size determinations, OHA held that 22<sup>nd</sup> Century was other-than small for purposes of the Task Order RFP. 22<sup>nd</sup> Century brought a bid protest under the Tucker Act, requesting that the Claims Court set aside OHA’s determination. The company argued that because the Request for Proposals under the Task Order did not contain an explicit request for recertification, SBA must measure 22<sup>nd</sup> Century’s size on the date it submitted its proposal for the IDIQ contract.

The government moved to dismiss the complaint, arguing that FASA, in 10 U.S.C. § 3406 (f)(1) (see below) barred review of the bid protest because the challenged actions by the SBA and the Army were “in connection with the issuance or proposed issuance of a task or delivery order.” This section is as follows:

- (f) 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 \$25,000,000.
- (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).

10 U.S.C. § 3406(f)

The Federal Circuit noted that in FASA, the jurisdiction of the Claims court was limited in the context of protests of task or delivery orders, whether in the sense of a bid protest (such as an

award protest) or a challenge to a size determination, where the size determination is issued in connection of a task or delivery order. The Federal Circuit affirmed that the Claims Court had correctly concluded that it lacked jurisdiction over this protest.

Takeaway. Challenges of bid protests in connection with a task or delivery order (except those alleging that the order increases the scope, period of maximum value of the contract, or a protest of an order valued in excess of \$25 million) cannot be taken to the Claims Court, but can be submitted to the Comptroller General (the Governmental Accountability Office, GAO).

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