

## Jurisdictional Changes for Bid Protests

*Congress increases DoD task order protest threshold to \$25 million, reinstates civilian task order jurisdiction.*

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- Two new statutes—the 2017 National Defense Authorization Act (NDAA) and the GAO Civilian Task and Delivery Order Protest Authority Act of 2016 (Civilian Task Order Act)—greatly impact the ability of government contractors to pursue bid protests of task order awards.
- The NDAA increases the jurisdictional threshold from \$10 million to \$25 million to file a bid protest at the Government Accountability Office (GAO) for Department of Defense (DoD) task order awards.
- Disappointed bidders for task order awards valued at less than \$25 million will have little recourse to protest flaws in DoD task order procurements.
- The Civilian Task Order Act, signed into law on December 14, 2016, restored the GAO's jurisdiction over protests involving task order awards valued at over \$10 million issued by civilian agencies, which had lapsed on September 30, 2016.
- The NDAA contains similar language restoring civilian task order jurisdiction at GAO.

President Obama is expected to sign the NDAA soon. The NDAA creates a new headache for disappointed bidders for government contracts but the Civilian Task Order Act resolves another.

Congress had incorporated a sunset provision for GAO protest jurisdiction for DoD and civilian agencies' task order awards in the 2012 NDAA. In 2013, Congress eliminated the sunset clause for the DoD in 10 U.S.C. § 2304c(e), but not for civilian agencies in 41 U.S.C § 4106(f)(3). Because Congress did not eliminate the sunset for civilian agencies, the GAO's task order jurisdiction expired on September 30, 2016 for civilian task orders exceeding \$10 million, resulting in GAO's dismissal of protests for lack of jurisdiction. After September 30, 2016, contractors could only protest the award of a civilian agency task order on the basis that the order increased the scope, period, or maximum value of the underlying indefinite delivery indefinite quantity (IDIQ) contract.

With the passage of the 2017 NDAA, Congress significantly altered the GAO's permanent authority for DoD contractors pursuing a task order protest. The NDAA amends 10 U.S.C. § 2304c(e)(1)(B) by increasing the GAO's jurisdictional threshold value for DoD task orders from \$10 to \$25 million. This sizable increase in the threshold value will have a significant impact on DoD acquisitions. Disappointed offerors will not have any clear legal recourse to challenge DoD task orders valued at less than \$25 million, except on the narrow basis that the order increased the scope, period, or maximum value of the underlying contract. In 2017, it is reasonable to expect that the DoD will issue more task orders valued under the new \$25 million threshold, because those awards cannot be challenged at the GAO.

Contractors, however, recently received the welcome news that the Civilian Task Order Act permanently reinstated the GAO's jurisdiction over protests of civilian task orders valued at over \$10 million by eliminating the sunset provision in 41 U.S.C. § 4106(f)(3). President Obama signed the Act into law on December 14, 2016. The NDAA contains similar (now superfluous) language restoring civilian task order jurisdiction at GAO. The immediate restoration of civilian task order protest jurisdiction ends several months of frustration on the part of disappointed offerors for task order procurements, who found themselves without recourse to challenge civilian agencies' task order awards.

Finally, the NDAA did not adopt certain bid protest reforms aimed at DoD contractors that were present in the Senate's version of the bill. Such proposed reforms included a provision that would have required a DoD contractor earning more than \$100 million in annual revenue to reimburse GAO for "costs incurred for processing" an unsuccessful protest and another provision that would have required an incumbent contractor to forfeit profits earned during a bridge contract or extension received during the pendency of its protest. Although these provisions were omitted from the final bill, the NDAA nonetheless demonstrates Congress' continued interest in DoD bid protest reform. NDAA section 885 requires the DoD to contract with an independent entity to conduct a thorough report on task order protests, including an analysis of protests filed by incumbent contractors and the rate at which incumbents are awarded bridge contracts or extensions during protests. Based on the report's requirements, it seems likely that Congress will continue to consider significant DoD bid protest reforms in future legislation.

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