

## Differing GAO Task Order Protest Thresholds

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*On December 23, 2016, President Obama signed the 2017 National Defense Authorization Act (NDAA), which contains changes to the Government Accountability Office's (GAO) jurisdiction over contractor bid protests of task order awards. Following its passage, government contractors now must consider several distinct dollar thresholds relevant to the GAO's jurisdiction over bid protests of task order awards.*

- The GAO now has jurisdiction over bid protests of Department of Defense (DoD) task order awards only where the value of such an award is at least \$25 million. The jurisdictional threshold for such protests had been \$10 million.
- The GAO has jurisdiction over protests of civilian agency task order awards valued at \$10 million or more.
- DoD task orders issued under civilian agency Government Wide Acquisition Contracts (GWAC) are subject to the \$10 million threshold applicable to *civilian* task order awards.
- Protests of Federal Supply Schedule (FSS) orders remain unaffected by the NDAA and a contractor therefore still may protest to the GAO the award of an FSS order of any value.

The NDAA amended 10 U.S.C. § 2304c(e)(1)(B) by substantially increasing the GAO's jurisdictional threshold for DoD task order protests from \$10 million to \$25 million. In other words, disappointed bidders for DoD task order awards valued at less than \$25 million generally can no longer file protests at the GAO. This revised threshold is particularly important because the GAO has almost exclusive jurisdiction over task order protests. (The Court of Federal Claims has jurisdiction over task order protests where the protester alleges an increase in scope, period or maximum value of the contract under which the order is issued.) (See 41 U.S.C. § 4106(f); 10 U.S.C. § 2304c(e).)

The \$25 million threshold, however, is not applicable to DoD task orders issued under civilian agency GWACs. Instead, the \$10 million threshold associated with civilian agency task order applies, as confirmed by the GAO in recent decisions. (See *Analytic Strategies LLC*, B-413758.2 (Nov. 28, 2016); *HP Enterprise Services, LLC*, B-413382.2 (Nov. 30, 2016).)

The GAO Civilian Task and Delivery Order Protest Authority Act of 2016, and subsequently the NDAA, permanently reinstated the GAO's jurisdiction over protests of civilian agency task order awards by eliminating the sunset provision in 41 U.S.C. § 4106(f)(3). The civilian agency task order threshold at the GAO remains \$10 million.

Finally, the NDAA had no impact on protests of orders under a FSS contract. There remains no dollar threshold applicable to such protests. (See *Analytic Strategies LLC*, B-413758.2 (Nov. 28, 2016), which explains that the jurisdictional bar for task orders, as established by the Federal Acquisition Streamlining Act, is not applicable to FSS orders.)

The recent changes to the GAO's bid protest jurisdiction will likely have several impacts. Because many DoD task orders are issued with a value between \$10 million and \$25 million, the new DoD task order threshold will leave more disappointed bidders for DoD task orders without recourse at the GAO. DoD agencies may be expected to use this jurisdictional change to their advantage by increasing the number of task order awards issued below the \$25 million threshold, thereby avoiding the GAO's review. Similarly, the DoD may choose to "unbundle" various task orders in an effort to bring the value of each task order below \$25 million. DoD agencies also may reduce their use of civilian agency GWACs, because of the lower associated protest threshold of \$10 million.

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