

ALERT

Preparing for the September 30, 2016 Sunset on GAO Jurisdiction over Civilian Agency Task Order Protests

August 30, 2016

WHAT: The 2012 National Defense Authorization Act (NDAA) provides that the jurisdiction of the Government Accountability Office (GAO) over civilian agency task orders valued at \$10 million or more expires on September 30, 2016. Recent Congressional inertia has prevented action on the House's proposed elimination of the sunset provision that would allow GAO to continue to assert jurisdiction over these civilian agency task order protests. The sunset provision does not apply to "out of scope" protests involving task orders.

WHEN: September 30, 2016, absent Congressional action. This protest jurisdiction could disappear permanently or until Congress addresses this issue, likely sometime after the November elections.

WHAT DOES IT MEAN FOR INDUSTRY: Unless Congress takes action, beginning October 1, 2016, companies will likely be unable to file protests challenging the terms of a civilian agency task order solicitation or the award of a civilian agency task order at GAO. Because the Court of Federal Claims does not have jurisdiction over task order protests, disappointed offerors for civilian agency task orders may find themselves without a forum for protest.

Civilian agencies are likely to award numerous task orders between now and the end of the fiscal year, forcing companies to be proactive in considering their protest options in at least two ways. First, with GAO civilian task order protest jurisdiction expiring on September 30, a timely request for a required debriefing, especially close to the end of the month, could prevent a disappointed offeror from being able to protest an award: GAO will dismiss as premature any protest filed

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before a “required” debriefing, and a protest filed after September 30 will be barred by the sunset provision. Accordingly, offerors on civilian agency task orders awarded towards the end of September 2016 should carefully consider the risk that requesting a debriefing may actually deprive them of a right to protest.

Second, companies anticipating major or strategically important civilian agency task order awards between now and the end of the fiscal year should consider the potential value in having counsel read into those procurements prior to award so as to ensure the ability to file a protest prior to GAO’s civilian agency task order jurisdiction expiration on September 30.

Wiley Rein has one of the nation’s most active bid protest practices. We are monitoring this and all aspects of the proposed 2017 NDAA that affect contractors and will issue updates as appropriate.