

GAO CIVILIAN TASK AND DELIVERY ORDER PROTEST
 AUTHORITY ACT OF 2016

SEPTEMBER 21, 2016.—Committed to the Committee of the Whole House on the
 State of the Union and ordered to be printed

Mr. CHAFFETZ, from the Committee on Oversight and Government
 Reform, submitted the following

R E P O R T

[To accompany H.R. 5995]

The Committee on Oversight and Government Reform, to whom
 was referred the bill (H.R. 5995) to strike the sunset on certain
 provisions relating to the authorized protest of a task or delivery
 order under section 4106 of title 41, United States Code, having
 considered the same, report favorably thereon without amendment
 and recommend that the bill do pass.

CONTENTS

	Page
Committee Statement and Views	1
Section-by-Section	3
Explanation of Amendments	3
Committee Consideration	3
Roll Call Votes	3
Application of Law to the Legislative Branch	3
Statement of Oversight Findings and Recommendations of the Committee	4
Statement of General Performance Goals and Objectives	4
Duplication of Federal Programs	4
Disclosure of Directed Rule Makings	4
Federal Advisory Committee Act	4
Unfunded Mandate Statement	4
Earmark Identification	4
Committee Estimate	4
Budget Authority and Congressional Budget Office Cost Estimate	5
Changes in Existing Law Made by the Bill, as Reported	5

COMMITTEE STATEMENT AND VIEWS

PURPOSE AND SUMMARY

The Government Accountability Office (GAO) Civilian Task and
 Delivery Order Protest Authority Act of 2016, H.R. 5995, will make

GAO's existing authority to hear protests related to civilian task and delivery order contract awards over \$10 million permanent. GAO's authority for civilian agency task and delivery order contract awards over \$10 million expires on September 30, 2016. GAO has similar authority for the Department of Defense (DOD) task and delivery orders over \$10 million, but GAO's DOD authority is permanent.

BACKGROUND AND NEED FOR LEGISLATION

In 1994, the Federal Acquisition Streamlining Act (FASA) was enacted in response to concerns that the federal procurement process was too cumbersome and complicated.¹ One of the FASA reforms included an authorization for task and delivery order contract awards and a limitation on contractors' ability to protest certain allegations related to agencies' issuance of task and delivery order contracts.²

However, the National Defense Authorization Act for Fiscal Year 2008 later authorized GAO to hear task and delivery order contract awards over \$10 million.³ GAO was given this authority in response to concerns related to allegations of waste, fraud, and abuse in contracts supporting military, diplomatic, and reconstruction efforts in Iraq and Afghanistan.⁴

In addition to these concerns, a 2007 Report to Congress by the Acquisition Advisory Panel, which was established by the Services Acquisition Reform Act (SARA) of 2003, recommended that contractors be authorized to protest certain large task orders or delivery orders.⁵ Senator Susan Collins (R-ME) included GAO protest authority language in response to these concerns in the Government Contracting Act of 2007 because "providing contractors an opportunity to protest awards in which agencies failed to follow appropriate processes will result in more competitive and accountable procurements."⁶ The Government Contracting Act of 2007 was not enacted, but similar language was ultimately included in the National Defense Authorization Act for Fiscal Year 2008.

GAO's authority to hear protests related to civilian task and delivery order contract awards was extended through September 30, 2016 in the National Defense Authorization Act for Fiscal Year 2012.⁷ With respect to GAO's DOD authority to hear related task or delivery order contract award protests, this authority was made permanent in the National Defense Authorization Act of Fiscal Year 2012.⁸

¹Federal Acquisition Streamlining Act (FASA) of 1994, P.L. 103-355, Sec. 1004, 108 Stat. 3253 (Oct. 13, 1994); *see, e.g.*, James K. Nagle, History of Government Contracting 506-507 (2d Ed. 1999) (outlining the pre-FASA contracting environment).

²Federal Acquisition Streamlining Act (FASA) of 1994, P.L. 103-355, Sec. 1004, 108 Stat. 3253 (Oct. 13, 1994).

³National Defense Authorization Act for Fiscal Year 2008: Conference Report to Accompany H.R. 1585, 110th Cong. 1st Sess., 956 (2007).

⁴*See, e.g.*, Mason Alinger, *Recent Developments in Task and Delivery Order Contracting*, 39 PUB. CONT. L.J. 839, 839 (2010).

⁵*See, e.g.*, Ralph C. Nash, Jr. & John Cibinic, Jr., *Taming the Task Order Contract: Congress Tries Again*, 22 NASH & CIBINIC REP. ¶31, May 2008, at 75.

⁶*See* Accountability in Government Contracting Act of 2007: Report on the Committee on Homeland Security and Governmental Affairs, U.S. Senate, to accompany S. 680, 110th Cong., 1st Sess. 12 (2007).

⁷P.L. 111-383, Sec. 825, 124 Stat. 4270.

⁸The sunset date for GAO's authority to hear Department of Defense task and delivery orders over \$10 million was removed in 2013. *See* the National Defense Authorization Act of Fiscal Year 2013, P.L. 112-239, Sec. 830, 126 Stat. 1842 (Jan. 2, 2013).

In order to ensure there is no gap in GAO's existing authority to hear protests of civilian task and delivery order contract awards over \$10 million, H.R. 5995 will make this authority permanent. This bill will also harmonize GAO's current authority to hear protests for task and delivery order contract awards over \$10 million for the DOD and civilian agencies. H.R. 5995 will ensure there is no disruption in GAO's authority and make sure this process continues as an important accountability mechanism in federal contracting.

LEGISLATIVE HISTORY

H.R. 5995, the GAO Civilian Task and Delivery Order Protest Authority Act of 2016, was introduced on September 12, 2016 by Representative Mark Meadows (R-NC) and referred to the Committee on Oversight and Government Reform. Representative Gerry Connolly (D-VA) is an original cosponsor. H.R. 5995 was ordered reported by the Committee on September 15, 2016 by unanimous consent.

SECTION-BY-SECTION

Section 1. Short title

Designates the short title of the bill as the "GAO Civilian Task and Delivery Order Protest Authority Act of 2016."

Section 2. Orders

Modifies section 4106(f) of title 41, United States Code, to strike the sunset of the U.S. Government Accountability Office's authority to hear civilian agency protests of task and delivery orders over \$10 million, thereby making this authority permanent.

EXPLANATION OF AMENDMENTS

No amendments to H.R. 5995 were offered or adopted during Full Committee consideration of the bill.

COMMITTEE CONSIDERATION

On September 15, 2016, the Committee met in open session and ordered reported favorably the bill, H.R. 5995, by unanimous consent, a quorum being present.

ROLL CALL VOTES

No roll call votes were requested or conducted during Full Committee consideration of H.R. 5995.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104-1 requires a description of the application of this bill to the legislative branch where the bill relates to the terms and conditions of employment or access to public services and accommodations. This bill strikes the sunset on certain provisions relating to the authorized protest of a task or delivery order under section 4106 of title 41, United States Code. As such this bill does not relate to employment or access to public services and accommodations.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF
THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goal and objective of the bill is to strike the sunset on certain provisions relating to the authorized protest of a task or delivery order under section 4106 of title 41, United States Code.

DUPLICATION OF FEDERAL PROGRAMS

No provision of this bill establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111-139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

The Committee estimates that enacting this bill does not direct the completion of any specific rule makings within the meaning of 5 U.S.C. 551.

FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the legislation does not establish or authorize the establishment of an advisory committee within the definition of 5 U.S.C. App., Section 5(b).

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandate Reform Act, P.L. 104-4) requires a statement as to whether the provisions of the reported include unfunded mandates. In compliance with this requirement the Committee has received a letter from the Congressional Budget Office included herein.

EARMARK IDENTIFICATION

This bill does not include any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

COMMITTEE ESTIMATE

At the time of this writing, the Committee had yet to receive a formal cost estimate from the Congressional Budget Office for H.R. 5995. The Committee asserts that the legislation merely provides a continuation of existing authority, with no new programs or associated spending, and would have no significant budgetary effects.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST
ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause (3)(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has not received a cost estimate for this bill from the Director of Congressional Budget Office, and instead has included a committee estimate in the section prior to this one.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets and existing law in which no change is proposed is shown in roman):

TITLE 41, UNITED STATES CODE

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**SUBTITLE I—FEDERAL PROCUREMENT
POLICY**

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CHAPTER 41—TASK AND DELIVERY ORDER CONTRACTS

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§ 4106. Orders

(a) APPLICATION.—This section applies to task and delivery order contracts entered into under sections 4103 and 4105 of this title.

(b) ACTIONS NOT REQUIRED FOR ISSUANCE OF ORDERS.—The following actions are not required for issuance of a task or delivery order under a task or delivery order contract:

(1) A separate notice for the order under section 1708 of this title or section 8(e) of the Small Business Act (15 U.S.C. 637(e)).

(2) Except as provided in subsection (c), a competition (or a waiver of competition approved in accordance with section 3304(e) of this title) that is separate from that used for entering into the contract.

(c) MULTIPLE AWARD CONTRACTS.—When multiple contracts are awarded under section 4103(d)(1)(B) or 4105(f) of this title, all contractors awarded the contracts shall be provided a fair opportunity to be considered, pursuant to procedures set forth in the contracts, for each task or delivery order in excess of \$2,500 that is to be issued under any of the contracts, unless—

(1) the executive agency's need for the services or property ordered is of such unusual urgency that providing the opportunity to all of those contractors would result in unacceptable delays in fulfilling that need;

(2) only one of those contractors is capable of providing the services or property required at the level of quality required because the services or property ordered are unique or highly specialized;

(3) the task or delivery order should be issued on a sole-source basis in the interest of economy and efficiency because it is a logical follow-on to a task or delivery order already issued on a competitive basis; or

(4) it is necessary to place the order with a particular contractor to satisfy a minimum guarantee.

(d) ENHANCED COMPETITION FOR ORDERS IN EXCESS OF \$5,000,000.—In the case of a task or delivery order in excess of \$5,000,000, the requirement to provide all contractors a fair opportunity to be considered under subsection (c) is not met unless all such contractors are provided, at a minimum—

(1) a notice of the task or delivery order that includes a clear statement of the executive agency's requirements;

(2) a reasonable period of time to provide a proposal in response to the notice;

(3) disclosure of the significant factors and subfactors, including cost or price, that the executive agency expects to consider in evaluating such proposals, and their relative importance;

(4) in the case of an award that is to be made on a best value basis, a written statement documenting—

(A) the basis for the award; and

(B) the relative importance of quality and price or cost factors; and

(5) an opportunity for a post-award debriefing consistent with the requirements of section 3704 of this title.

(e) STATEMENT OF WORK.—A task or delivery order shall include a statement of work that clearly specifies all tasks to be performed or property to be delivered under the order.

(f) PROTESTS.—

(1) PROTEST NOT AUTHORIZED.—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 \$10,000,000.

(2) JURISDICTION OVER PROTESTS.—Notwithstanding section 3556 of title 31, the Comptroller General shall have exclusive jurisdiction of a protest authorized under paragraph (1)(B).

[(3) EFFECTIVE PERIOD.—Paragraph (1)(B) and paragraph (2) of this subsection shall not be in effect after September 30, 2016.]

(g) TASK AND DELIVERY ORDER OMBUDSMAN.—

(1) APPOINTMENT OR DESIGNATION AND RESPONSIBILITIES.—The head of each executive agency who awards multiple task or delivery order contracts under section 4103(d)(1)(B) or 4105(f) of this title shall appoint or designate a task and delivery order ombudsman who shall be responsible for reviewing complaints from the contractors on those contracts and ensuring that all of the contractors are afforded a fair opportunity

to be considered for task or delivery orders when required under subsection (c).

(2) WHO IS ELIGIBLE.—The task and delivery order ombudsman shall be a senior agency official who is independent of the contracting officer for the contracts and may be the executive agency's advocate for competition.

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