

Defense Department enhanced debriefing rights – more time to protest?

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On March 18, the Department of Defense (DOD) finalized its “enhanced debriefing rule,” implementing Section 818 of the FY2018 National Defense Authorization Action. For any contractor that bids on DOD contracts, these changes mean that they should be provided more information about award decisions.

While this increased transparency was intended to discourage bid protests by sharing more information about award decisions, and some speculate that it will have that effect, in practice it gives contractors more information to bolster potential bid protest arguments and adds time to the extremely compressed schedule for filing protests at the Government Accountability Office (GAO).

The standard debriefing process

As most contractors are aware, companies bidding on federal contracts are entitled to a post-award debriefing where one is required by the Federal Acquisition Regulation (FAR) and requested within three days of notification of contract award. These debriefings can provide useful information about the award decision, particularly for contractors considering challenging the award.

In addition, required post-award debriefings extend the time to file a protest at the GAO. Protests must be filed at the GAO within 10 days after the basis of the protest is known or should have been known (typically the date of the award decision), and upon the filing of a timely protest, the performance of the awarded contract is automatically stayed pursuant to the Competition in Contracting Act (CICA). But where a post-award debriefing is required and timely requested, contractors must file within five days after the first offered debriefing date to trigger stay, which is often many days after the expiration of the 10-day period.

While required debriefings can be useful, the information disclosed is often sparse, making it difficult for a contractor to evaluate whether it should file a protest. This lack of transparency can lead disappointed offerors to file protests to find out if the award decision was flawed.

Enhanced debriefing requirements

Based on a perception within the government that additional transparency about award decisions will decrease the number of

protests, which may not be accurate, Section 818 requires two things.

First, it mandates that DOD increase the amount of information provided during post-award debriefings to both awardees and disappointed offerors by requiring the following:

- For awards over \$100 million, DOD must disclose a redacted copy of the source selection decision (SSD), and small business and non-traditional defense contractors must be given the option to request SSDs in awards between \$10 million and \$100 million.
- Written or oral debriefings are mandated for task order and delivery order awards (awards under Indefinite Delivery services and supply contracts, respectively, to which the FAR Part 16.5 ordering procedures apply) over \$10 million (although GAO still does not have jurisdiction over protests of DOD task order awards unless the order is in excess of \$25 million).

Second, Section 818 amended 10 U.S.C. 2305, adding an opportunity for disappointed offerors, irrespective of the size of the procurement, to submit written questions related to post-award debriefings within two business days following the debriefing, which DOD must respond to within five business days after receipt. Importantly, it also extended the time to file a GAO protest, providing that a debriefing will remain open until a contractor receives the government’s written responses to timely submitted questions, meaning a protest filed within five days of receiving those answers is timely and triggers the CICA stay.

Section 818 implementation

In March 2018, DOD issued a class deviation, (<https://bit.ly/3IG0oeL>) a deviation applicable to multiple procurements; it overrides procurement regulations and is used when necessary to meet the specific needs and requirements of an agency, implementing the post-debriefing question process prior to the completion of the regulatory process. While the deviation did not mention the SSD requirement, DOD has been complying.

An interim rule was issued in May 2021, and on March 18, 2022, DOD published the final rule (<https://bit.ly/3wKvTU6>), which amends multiple sections to the DOD procurement regulations and the Defense Federal Acquisition Regulation Supplement (DFARS)

and adds new post-award debriefing contract provisions for both negotiated contracts (DFARS 252.215-7016), and task orders (252.216-7010).

The final rule

In sum, the final rule promulgates DFARS provisions and includes the following:

- (1) Provides that, when requested, a written or oral debriefing is required for all contracts and task orders valued at \$10 million or more.
- (2) Implements the SSD requirements at the thresholds provided in the statute.
- (3) Allows for written questions related to the required debriefing that, if submitted within two business days after the debriefing, must be answered within five business days after receipt.

Interestingly, the DFARS provision regarding follow-up questions (DFARS 215.506-70) gives both successful and unsuccessful offerors the ability to submit post-debriefing questions. In contrast, Section 818 only requires that this opportunity be given to disappointed offerors.

The final rule also clarifies that a contractor must timely ask post-debriefing questions in order to extend the time to file a GAO protest. While this seems intuitive, it was recently the subject of a 2021 U.S. Court of Appeals for the Federal Circuit case. In that case, *Nika Tech. v. United States* (<https://bit.ly/35bQbuD>), a contractor argued unsuccessfully that the two-day post-debriefing window to ask questions extended the time to file a protest even if the contractor did not submit any questions.

The language at DFARS 215.506-70 states that contracting officers shall not consider the post-award debriefing concluded until the later of:

- (1) The date that the post-award debriefing is delivered, orally or in writing; or

- (2) If additional written questions related to the debriefing are timely received, the date the agency delivers its written response.

Practical tips

- (1) Whether successful or unsuccessful, contractors that bid on DOD contracts and task orders valued at \$10 million or more should request a debriefing. You never know what you might learn.
- (2) All small businesses and non-traditional defense contractors who unsuccessfully bid on DOD contracts between \$10 million and \$100 million should request a copy of the SSD. For bidders on DOD contracts over \$100 million, the SSD should automatically be included in the debriefing, but it never hurts to ask.
- (3) After a debriefing, both successful and unsuccessful offerors should submit written questions related to the debriefing no later than two business days after receiving the post-award debriefing.
 - For successful offerors, you may gain insight into how your proposal was evaluated that may be useful in future procurements or even help in the performance of the recently awarded contract.
 - For unsuccessful offerors, you may learn additional information that will either dissuade you from filing a protest or bolster a protest argument. More likely, though, you will learn nothing because the answers tend to be evasive and non-substantive. But you will buy yourself more time, which can be incredibly valuable both to evaluate what you have learned and, if you decide to challenge the award, draft a compelling bid protest.

About the author



Richard Arnholt, a member of **Bass, Berry & Sims PLC** in Washington, D.C., advises companies on the complex rules applicable to contracting with federal and state governments. He focuses on risk mitigation through implementation and upgrades to ethics and compliance programs as well as response to government allegations of procurement fraud or misconduct. He can be reached at rarnholt@bassberry.com.

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