

# BRIEFING PAPERS<sup>®</sup> SECOND SERIES

PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

## Recognizing And Maximizing Debriefing Opportunities

*Kara M. Sacilotto\**

A debriefing is frequently, but not always, available to an offeror in a federal procurement either after elimination from the competition or after the award of a contract. Knowing when a debriefing is required, timely and properly requesting a debriefing, and then navigating the debriefing process is not always easy and can frequently trip up a contractor seeking to find out why it has been eliminated from or lost a competition. Properly requesting and pursuing a debriefing is important for the separate reason that it may affect when the contractor must file a bid protest. This BRIEFING PAPER is a deep dive into the debriefing process, including the “enhanced” debriefing rights available for Department of Defense (DoD) procurements over \$10 million.<sup>1</sup> Although this BRIEFING PAPER will refer to bid protest timing rules, it is not focused on the bid protest process. It is simply not possible to meaningfully discuss the debriefing process and the rules that apply (or do not apply) to debriefings without also discussing how bid protest timing is affected.

### Introduction To Debriefing

To begin at the beginning, a debriefing is intended to provide information about an agency’s competitive determination in a procurement. While feedback in one form or another under different labels is available for many federal procurements, a debriefing is a term of art and not universally available. Federal Acquisition Regulation (FAR) 15.505 governs the requirements for pre-award debriefings, and FAR 15.506 governs the requirements for post-award debriefings.<sup>2</sup> Debriefings are designed to provide a disappointed offeror with sufficient information to understand why it lost (or was eliminated early) and, ideally, to make its

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proposal more competitive in future procurements. In addition, this information sharing function is intended to reduce bid protests, on the theory that contractors that know why they lost (or how badly) are less likely to file a bid protest or won't feel compelled to file one simply to obtain this information.<sup>3</sup>

But, debriefings are not “required” in all procurements. Whether a debriefing is permissive or “required” has important implications. First, if a debriefing is not “required,” there is no right to it, and there are no minimum content requirements. Second, protest deadlines are affected by whether a debriefing is “required” or not.<sup>4</sup> For protests filed with the procuring agency or the Government Accountability Office (GAO), the forum that hears the most bid protests, an offeror will be entitled to an automatic stay of performance of the awarded contract pending resolution of the protest, if the protest is filed within 10 days of contract award or five days of the close of a required debriefing.<sup>5</sup> Further, GAO’s rules toll the 10-day requirement to file a timely protest, which is a separate deadline from the deadline to receive an automatic stay, to 10 days after the offeror receives its debriefing, but again, only if the debriefing is “required.” In other words, for a GAO protest where a debriefing is timely requested and required, a protest should not be filed before the debriefing is received and will be timely as long as it is filed within 10 days of the required debriefing.<sup>6</sup> Stated differently, a protester that has properly requested a required debriefing must wait until that debriefing is received before filing at GAO, or else its protest will be deemed premature.<sup>7</sup> The objective again is to allow a disappointed offeror to receive the debriefing and evaluate its options before deciding to

file a protest. For any procurement not subject to a required debriefing, the timing for both an agency and GAO protest is 10 days from when the protester knew or should have known of its grounds for protest, which is frequently triggered by the notice of contract award.<sup>8</sup> Thus, a threshold determination, especially if a bid protest is a possibility, is whether a debriefing is required.

As discussed below, there is great variability in the quality of debriefings across and even within agencies. Agencies have considerable discretion in this regard, and there is little recourse for recipients of a “bad” debriefing. Still, debriefings, and particularly enhanced debriefings, provide disappointed offerors an opportunity to gain valuable information. Ensuring that a contractor makes the most of them is important.

## When Is A Debriefing Required (And How To Preserve Its Status)?

Debriefings are available for all procurements conducted under Part 15 of the FAR. They are also available for task or delivery order procurements conducted under FAR Part 16 if the task or delivery order is over \$6 million (the applicable dollar limit at the time of this BRIEFING PAPER).<sup>9</sup> If a procurement is conducted under FAR Part 12, which applies to acquisition of commercial products and services, the right to a debriefing is slightly more complicated. FAR Part 12 does not provide an independent right to a debriefing.<sup>10</sup> Nonetheless, many, but not all, FAR Part 12 commercial product or service procurements are conducted using FAR Part 15 procedures. If the commercial product or service is acquired in a procurement that uses

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FAR Part 15 procedures, then a required debriefing is available, as long as the requirements for a timely request are met.<sup>11</sup> Some indications that a FAR Part 15 procurement is contemplated are (1) the agency uses Standard Form 33 and checks “negotiated” in Box 4; (2) the agency issues a request for proposals (as opposed to an invitation for bids); (3) the solicitation states that FAR Part 15 procedures apply; (4) the procurement value exceeds the simplified acquisition threshold; (5) the agency establishes a competitive range; or (6) the agency conducts discussions with offerors.

If the procurement falls within a category of those for which a debriefing is available, it does not spring to life automatically. Instead, the requirement is only triggered if the debriefing is “timely requested” in “writing” within three calendar days of award (or notification of exclusion from the competition).<sup>12</sup> To ensure that a request is timely made, it is a best practice to have the debriefing request ready to go in advance of contract award and to send it immediately upon notification of the contract award. To ensure that unsuccessful offeror notices do not languish in unattended email inboxes, it is a good idea to have more than one person designated for receipt of agency procurement communications and in the loop to request the debriefing.

There are no “magic words” or format to the debriefing request: it can be made via email to the Contracting Officer identified in the solicitation with a simple request for a debriefing. To ensure that the Contracting Officer recognizes the request, however, it is a good idea to identify the solicitation number, reference the applicable FAR provision that provides the right to a debriefing, and request confirmation of receipt of the request. Note that the request cannot be made telephonically or in person (only): it must be in writing. Further, be cognizant that weekends are included in the three-day calculation, that email is not infallible, and that many agencies close earlier than some businesses or are in a different time zone.<sup>13</sup> So, get the written debriefing request submitted in sufficient time to be assured that it has been timely received.

A further, subtle, procedural step that must be met for a debriefing to be a “required” one is that the

contractor making the request accept the first date *offered* by the agency, assuming a written debriefing is not provided. This is a function of how timing to receive an automatic stay of performance in a GAO bid protest is described in the Competition in Contracting Act (CICA).<sup>14</sup> Thus, regardless of the inconvenience, always accept the date and time the agency offers. If the first date offered is not accepted, protest deadlines (for both timeliness of the protest and the CICA stay) will still run from that first offered date.

All of the requirements for a timely written debriefing request apply equally to pre-award debriefings under FAR 15.505, and accepting the first offered debriefing date is just as important. For pre-award debriefings, although Contracting Officers are encouraged to provide the debriefing “as soon as practicable,” it is possible that the agency will elect to defer a debriefing until after an award has been made.<sup>15</sup> This *agency-initiated* (not contractor-chosen) delay should not affect the timeliness of a debriefing request as long as all the requirements for a timely written request were met.<sup>16</sup> But, if the *contractor* elects to have the debriefing conducted post-award, the FAR warns that any subsequent protest may not be timely.<sup>17</sup> This is consistent with the requirement that for *any* debriefing, the first offered date must be accepted for the debriefing to stay in the “required” debriefing zone.

Finally, although pre-award debriefings are available only to offerors that have been omitted from the competitive range or otherwise excluded from the competition, any offeror, including the awardee, can request a post-award debriefing.<sup>18</sup> Therefore, a contract awardee can and should timely request a post-award debriefing to understand how its proposal was evaluated and leverage that knowledge in future procurements.

## When Is A Debriefing Not Required?

If a debriefing was available, but it was not timely requested, an agency can still provide a debriefing, but it will no longer be a required one and no deadlines will be extended. Beyond this, certain types of procurements are affirmatively excluded from requiring any type of debriefing. An obvious exclusion is sealed bidding procurements conducted under FAR Part 14.

Because FAR Part 14 procurements are based solely on price and are announced publicly, there is no need for a debriefing: an offeror with a higher price than the awardee knows why it lost right away.

A more prevalent, but perhaps less obvious, exclusion is procurements for orders under General Services Administration (GSA) schedule contracts, conducted under FAR Subpart 8.4. For these procurements where award is based on factors other than price, the agency is required, upon request, to provide only “a brief explanation of the basis for the award decision.”<sup>19</sup> A “brief explanation” is not synonymous with a debriefing and thus does not serve to toll any GAO protest deadlines.<sup>20</sup> Further, there are no content requirements, and there is no right to ask questions.

Simplified acquisition procurements conducted under FAR Part 13,<sup>21</sup> procurements conducted under FAR Part 12 that do not follow FAR Part 15 procedures, procurements pursuant to Broad Agency Announcements (BAAs),<sup>22</sup> architect/engineer competitions conducted under the Brooks Act and FAR Part 36,<sup>23</sup> Small Business Innovation Research (SBIR) procurements conducted under 15 U.S.C.A. § 638,<sup>24</sup> and competitions that are not subject to CICA at all, such as Other Transaction Agreement competitions and grant awards, are also excluded from the category of required debriefings.

But, even if a debriefing is not required and a “brief explanation” is all an agency must provide, a contractor may still wish to consider requesting that brief explanation, with all the caveats on protest timing noted herein, because any information may be more valuable than no information.

## What Can Contractors Expect In A Pre-Award Debriefing?

Under FAR 15.505, offerors excluded from the competition or the competitive range may request a debriefing before award of the contract—that is, within three days of learning of their exclusion or elimination. The minimum content for a pre-award debriefing includes (1) the agency’s evaluation of significant elements of the eliminated contractor’s proposal; (2) a summary of the reason for eliminating the contractor from the com-

petition; and (3) reasonable responses to relevant questions about whether the procedures in the solicitation, regulations, or law were followed.<sup>25</sup> The debriefed contractor will not be told the number or identity of the other offerors, information about the content of other offerors’ proposals, the ranking or evaluation of other offerors, and information prohibited from disclosure pursuant to FAR 15.506(e) such as trade secrets or other confidential information of other offerors.<sup>26</sup> In essence, the principal information an offeror can hope to learn is why it was disqualified or not included in the competitive range, not the evaluation of other offerors. Because there is likely to be a live procurement still ongoing, an eliminated competitor should not expect information about other competitors or the ongoing conduct of the procurement. The most useful information is to learn the basis for the elimination and if a protest seeking to be put back into the competition is worthwhile.

## What Can Contractors Expect In A Post-Award Debriefing?

Under FAR 15.506, a post-award debriefing should provide (1) the agency’s evaluation of any significant weaknesses or deficiencies in the debriefed offeror’s proposal; (2) the overall evaluated cost or price and technical rating, if applicable, of the successful offeror and the debriefed offeror, as well as past performance information on the debriefed offeror; (3) the ranking of offerors, if they were ranked;<sup>27</sup> (4) a summary of the rationale for award; (5) if a commercial product acquisition, the make and model of the selected product; and (6) reasonable responses to relevant questions about whether the procedures in the solicitation, regulations, or law were followed.<sup>28</sup> The debriefing should not include (a) point-by-point comparisons of the debriefed offeror’s proposal and the awardee; and (b) information that should not be released under the Freedom of Information Act (FOIA), such as trade secrets, confidential manufacturing processes or techniques, proprietary or confidential financial or commercial information, like pricing details, and the names of individuals who provided past performance information.<sup>29</sup> While the FAR suggests that agency’s “should” provide a debriefing within five days of the request, this is

entirely aspirational and unenforceable. It is not uncommon for an agency to take weeks to provide a debriefing.

If the goal for the debriefing is to get detailed information or information about how your competitors were evaluated, in particular, this process might feel a little underwhelming. As previewed above, there is variability in the quality of debriefings, with some agencies providing even less than the FAR's minimum and others providing no more than the FAR's minimum. Overall, agencies are more likely to provide more information about the evaluation of the debriefed offeror, including in some cases redacted technical evaluations or summaries of the debriefed offeror's evaluation. But many agencies will not provide more than the FAR's minimum with regard to the evaluation of the awardee, and it is unlikely any agency will identify specific information about the awardee's proposal or the positive discriminators of the awardee's approach that led to the award decision. The bottom line is that agencies have considerable discretion to determine the format, timing, and content of a debriefing, and there is no real recourse for a "bad" debriefing besides filing a protest in hopes of finding out more information, the very thing debriefings were intended to prevent. The enhanced debriefing processes discussed below are an attempt to improve the baseline for DoD debriefings in procurements over \$10 million, while still protecting source selection and competitively sensitive information.

## Preparing For The Debriefing

Increasingly, agencies provide written debriefings. Besides being logistically easier, especially during the COVID-19 pandemic, a written debriefing allows the agency to "control the narrative." It can release the information it selects, have it reviewed by relevant agency personnel and counsel in advance, and provide the debriefing on its own timeline. If the debriefing is to be written, and the agency does not request or accept questions in advance, there is not much advance preparation for the contractor: you wait until you receive the debriefing and you must be prepared to ask questions in response.

If, however, the agency offers a live or telephonic

debriefing, it does behoove a contractor to prepare in advance. Of course, a critical first step is accepting the first date and time offered, as discussed above. Once that is done, a contractor should determine who will attend the debriefing. Often, agencies will limit the number of participants, and it obviously is most beneficial for those with direct knowledge of the offeror's proposal to attend. As for attendee roles, it is a good idea to identify leads for asking questions and to designate one attendee to do nothing except take notes, as debriefings are almost never recorded, and it is difficult to take notes and also be fully engaged in questioning and listening.

Should lawyers attend? That is a judgment call. For large procurements where a protest seems likely, it is beneficial to get protest counsel up to speed on the procurement as soon as possible, which may include having counsel attend the debriefing. But, lawyer attendance may also lead the agency to be more circumscribed in its discussion. In short, it is not a given that counsel should attend. Regardless whether counsel actually attends the debriefing, it is helpful to have counsel involved in the preparation. After all, lawyers are trained to ask questions.

Once attendees are identified, it is best to prepare an outline of key issues and questions based on, among other things, the solicitation, the award notification, any interim evaluations, and your own proposal. Notably, a debriefing is not a forum to argue about the merits of the award decision or to expect an agency to change its mind. It is an information gathering exercise and so questions should be formulated to receive information.

Whether the debriefing is "live" or in writing, and regardless whether DoD's enhanced debriefing rules apply, a contractor may wish to evaluate the information it has received and ask additional questions. Further, even without enhanced debriefing rights, the FAR requires an agency to provide "reasonable responses to relevant questions."<sup>30</sup> Thus, even if enhanced debriefing rules do not apply, to maximize its ability to obtain as much information as possible, a contractor should still request that the agency keep the debriefing open to provide the contractor an opportunity to ask or submit questions. If the Contracting Officer agrees, it is wise

to get that confirmation in writing and to confirm both the deadline for questions and that the debriefing remains open until responses to those questions are received. If there is any ambiguity and the contractor wishes to preserve its protest rights, the safer course is to assume that the debriefing has closed. Although there are exceptional cases where GAO has found that the agency itself has created ambiguity as to when the debriefing closed during the time period when a protest could still be timely filed, those exceptions are few and far between.<sup>31</sup> And, if the CO does not agree to keep the debriefing open, there is little recourse, unfortunately. The debriefing should be considered closed.

Assuming questions are permitted, under an enhanced debriefing for DoD procurements or otherwise, contractors should develop questions with an eye toward understanding the information from the debriefing itself and maximizing the information they will obtain. Framing the questions as open-ended (as opposed to a manner that can be answered with a simple yes or no) is more likely to garner a meaningful response. Contractors should also consider approaching important areas or topics from multiple angles with multiple, differently worded questions to elicit the requested information and ensure the agency understands the inquiry. There is an understandable desire to ask the agency specific questions about the awardee or its approach: understand that these questions are unlikely to be answered, even in an enhanced debriefing, and consider devoting your question resources to those that will be (*i.e.*, about the conduct of the procurement itself, the evaluation of the debriefed contractor's proposal, and the source selection decision).

## Enhanced Post-Award Debriefing Rights For Certain DoD Procurements

Section 818 of the National Defense Authorization Act for Fiscal Year 2018 (FY 2018 NDAA) was enacted to improve debriefings in DoD procurements by providing "enhanced" debriefing rights.<sup>32</sup> In a nutshell, the statute provides that all procurements over \$10 million are subject to a post-award debriefing for both the successful and unsuccessful offerors,<sup>33</sup> as part of such post-award debriefings in procurements over \$100 million

or for procurements between \$10 million and \$100 million involving small businesses or nontraditional contractors, the agency must provide a redacted version of its source selection decision;<sup>34</sup> debriefed offerors will have the opportunity to submit questions related to the debriefing within two "business" days;<sup>35</sup> and the agency must respond to those questions in writing within five days, with the debriefing held open (*i.e.*, not concluded) until the agency provides its written responses to the questions.<sup>36</sup> CICA was also amended to clarify that for DoD procurements, the five-day period for filing a protest at GAO and receiving an automatic stay of performance does not begin to run until the agency provides its written responses to the debriefed offeror's submitted questions.<sup>37</sup>

For three years, from March 2018 until DoD issued regulations to implement the provision in March 2022,<sup>38</sup> the enhanced debriefing rights were implemented through a Class Deviation.<sup>39</sup> During this time, GAO and the U.S. Court of Appeals for the Federal Circuit grappled with how the enhanced debriefing rights should be interpreted and implemented.

For example, GAO addressed rather early on the question of when an enhanced debriefing closes, and the five-day period for submitting a protest and receiving an automatic stay begins to run, if the offeror submits multiple rounds of questions. GAO determined that a debriefed offeror is afforded only one opportunity to submit questions. Although an agency may voluntarily respond to multiple rounds of questions, the debriefing does not stay open, and the five-day period commences upon the offeror's receipt of written responses to its first set of questions.<sup>40</sup>

GAO also addressed whether a protest is premature if filed before the agency has provided its written responses to enhanced debriefing questions submitted by the protester. GAO held that it is, which is consistent with its rules promulgated before the enhanced debriefing rights were granted.<sup>41</sup>

In *Nika Technologies, Inc. v. United States*, the U.S. Court of Federal Claims (COFC) and the Federal Circuit addressed yet another wrinkle regarding when the debriefing closes if an offeror does not avail itself

of submitting enhanced debriefing questions within the allotted two business day window following its debriefing.<sup>42</sup> The COFC had held that a covered DoD debriefing does not close until the two business day period for submission of questions passes, but a panel of the Federal Circuit reversed.<sup>43</sup> Focusing on the “plain meaning” of CICA, the Federal Circuit panel held that the protest “clock starts on the day that the bidder receives debriefing.”<sup>44</sup> The panel explained that while the statute states that a covered DoD debriefing “shall include. . .an opportunity” to submit questions related to the debriefing “within two days after receiving its post-award debriefing,” the two business day period is “after” the debriefing and within the five-day window for filing a protest at GAO and receiving an automatic stay.<sup>45</sup> Further, the Federal Circuit held that when Congress intended to extend the debriefing period, it did so explicitly by stating that an agency “shall not consider the debriefing to be concluded until the agency delivers its written responses.”<sup>46</sup> Thus, “[b]y implication,” the court held, if there are no additional questions submitted, “the debriefing period is not held open.”<sup>47</sup>

In issuing regulations to implement the enhanced debriefing rights, DoD stated that it intended to adopt “the plain language interpretation” in the Federal Circuit’s *Nika Technologies* decision, and new Defense Federal Acquisition Regulation Supplement (DFARS) 215.506-70 reflects this intent by providing offerors the opportunity to submit questions related to the debriefing within two business days and stating that the debriefing is not concluded until the later of (1) the date the debriefing is delivered or (2) if additional written questions are timely received, the date the agency delivers its written responses.<sup>48</sup> The final rule also fills a gap in the Class Deviation by providing that small business offerors and nontraditional defense contractors may request a copy of the source selection decision, redacted as necessary to protect proprietary information, for awards over \$10 million, and any offeror can make a similar request for awards over \$100 million.<sup>49</sup>

The final rule is not without ambiguity, however. DFARS 215.506(b) states: “Notwithstanding FAR 15.506(b), when requested by a successful or unsuc-

cessful offeror, a written or oral debriefing is required for contract awards valued at \$10 million or more (section 818 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91)).” But, the codified version of this NDAA provision does not restrict debriefings for awards based on competitive proposals to awards over \$10 million.<sup>50</sup> Nor does the FAR: FAR 15.506(b) states only: “Debriefings of successful and unsuccessful offerors may be done orally, in writing, or by any other method acceptable to the contracting officer.” By stating that a post-award debriefing is “required” for awards over \$10 million, “despite” FAR 15.506(b), DFARS 215.506(b) may imply that a post-award debriefing is not required for a DoD contract award under \$10 million, even though debriefings on FAR Part 15 contract awards are not restricted or triggered based on the dollar value of the award. DFARS 252.216-7010 similarly states that a debriefing will be provided for task order awards over \$10 million, whereas the FAR provides a right to post-award debriefings for task orders over \$6 million.<sup>51</sup> Offerors should consider extra caution if their procurements fall within these potentially gray zones.

## Final Thoughts

Nobody likes to hear that they were eliminated from the competition or did not receive the award. Given the considerable expense contractors devote to preparation of competitive proposals and participation in the procurement system, a good debriefing seems to be the least they should receive. Further, the right to a debriefing, and receipt of a meaningful one, are important to promote trust in the procurement system, allow contractors to understand an agency’s decision, learn how they might make their proposals more competitive in the future (a win-win), and evaluate the merits of a bid protest. Although a “good” debriefing is not a guarantee, contractors nevertheless should take the opportunity to timely request one and make the most of their debriefing opportunity. In the words of the Rolling Stones, you might not get what you want, but hopefully, you’ll get what you need.

## Guidelines

These *Guidelines* are intended to assist you with

understanding and maximizing debriefing opportunities. They are not intended to be, nor are they a substitute for, legal advice or professional representation in any specific situation.

1. Understand your procurement and whether there is a right to request a debriefing or not. Get counsel if necessary and make this assessment early so you know your rights if you are eliminated from the competition or receive an award announcement earlier than anticipated.

2. Have a plan for receipt of procurement notifications and, if available, for requesting a debriefing in writing. Make it a “muscle memory” that the debriefing request—email is fine—goes out upon receipt of the award or elimination notification. There are three days to make this request and usually no good reason to wait that long. There is time to lick wounds later.

3. Accept the first date and time offered for any telephonic, video, or in-person debriefing (*i.e.*, anything that is not a written debriefing).

4. Prepare questions in advance for any debriefing. It is particularly beneficial to prepare questions and assign roles in advance for any type of in-person/telephonic/video debriefing, but useful also to begin preparing questions even if the debriefing is written. Having questions at the ready may allow you to ask them even when the DoD enhanced debriefing rules do not apply. When the DoD rules do apply, two business days can go by quickly. Draft questions that are open ended and encourage a narrative response. Do not expect an agency to answer pointed questions about a competitor’s approach or specific evaluation.

5. For in-person/telephonic/video debriefings, assign roles and stick to the plan. A debriefing is an information gathering exercise. It is not the forum to argue with the agency about why its decision was wrong or to expect it to change its decision.

6. If your debriefing is not covered by the DoD enhanced debriefing rules, consider requesting that the debriefing remain open in any event to allow for questions. If the Contracting Officer is willing to do so, get written confirmation. If the Contracting Officer is

not, you should consider the debrief closed and any protest clock running.

## ENDNOTES:

<sup>1</sup>See 87 Fed. Reg. 15808 (Mar. 18, 2022) (implementing National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 818, 131 Stat. 1283, 1463 (2017)).

<sup>2</sup>The FAR is codified in Title 48 of the Code of Federal Regulations.

<sup>3</sup>See, e.g., Steven L. Schooner, “Enhanced Debriefings: A Toothless Mandate?,” 34 Nash & Cibinic Rep. NL ¶ 10, at 27–28 (Feb. 2020) (Noting the recommendation from the 2018 RAND Bid Protest Report that DoD improve the post-award debriefing process to avoid bid protests and a recommendation in the 1972 Commission on Government Procurement recommendations to provide debriefings to reduce protests); NASA Procurement Debriefing Guide: A Practical Guide for Conducting Debriefings 1 (May 2012) (noting that pre- and post-award debriefings should facilitate “[o]pen, appropriate and meaningful information exchanges that reduce misunderstandings and protests”), available at [https://www.hq.nasa.gov/office/procurement/regs/guides/NASA\\_Debriefing\\_Guide.pdf](https://www.hq.nasa.gov/office/procurement/regs/guides/NASA_Debriefing_Guide.pdf).

<sup>4</sup>As a general matter, there are three forums in which a bid protest can be filed: the procuring agency itself, the Government Accountability Office (GAO), and the U.S. Court of Federal Claims (COFC). (Protests of Federal Aviation Administration (FAA) procurements can only be protested to the FAA Office of Dispute Resolution for Acquisition, and task or delivery order awards under indefinite-delivery/indefinite-quantity (IDIQ) contracts can only be protested at GAO.) For protests made first to the COFC, there are no specific timing rules that are keyed to the date of a debriefing, and the outer limits of timeliness for a protest are based on the statute of limitations in 28 U.S.C.A. § 2401. There is also no right to an automatic stay of performance at the COFC; a stay is only available if performance is stayed voluntarily by the agency or the COFC orders a preliminary injunction. Protest timing for agency protests is addressed in FAR Subpart 33.1, and GAO’s protest timing rules are addressed in its rules in Title 4 of the Code of Federal Regulations. Both of these forums have specific, and strict, rules for timely filing of a protest and for receipt of an automatic stay of performance of the awarded contract.

<sup>5</sup>FAR 33.103(f)(3); 31 U.S.C.A. § 3553(d)(4)(A).

<sup>6</sup>4 C.F.R. § 21.2(a)(2).

<sup>7</sup>There is a difference between the FAR and GAO on this timeliness issue, with only the GAO “tolling”



the deadline for filing a protest until after a debriefing is provided. Compare FAR 33.103(e) (with the exception of protests of the terms of a solicitation, “[i]n all other cases, *protests shall be filed no later than 10 days after the basis of protest is known or should have been known, whichever is earlier*”) with 4 C.F.R. § 21.2(a)(2) (with the exception of protests of the terms of a solicitation, protests “shall be filed not later than 10 days after the basis of protest is known or should have been known (whichever is earlier), *with the exception of protests challenging a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required. In such cases, with respect to any protest basis which is known or should have been known either before or as a result of the debriefing, and which does not involve an alleged solicitation impropriety covered by paragraph (a)(1) of this section, the initial protest shall not be filed before the debriefing date offered to the protester, but shall be filed not later than 10 days after the date on which the debriefing is held.*”) (emphasis added). Thus, contractors choosing to file a post-award agency protest should be cognizant of the timing differences between the two forums.

<sup>8</sup>See FAR 33.103(e); 4 C.F.R. § 21.2(a)(2).

<sup>9</sup>FAR 16.505(b)(6)(ii).

<sup>10</sup>See generally FAR 52.212-1 and FAR 52.212-1(l) (“If a post-award debriefing is given to requesting offerors. . .”).

<sup>11</sup>See, e.g., Gen. Revenue Corp. et al., B-414220.2 et al., Mar. 27, 2017, 2017 CPD ¶ 106.

<sup>12</sup>FAR 15.505(a)(1) (pre-award); FAR 15.506(a)(1) (post-award); see also FAR 2.101, 33.101 (definition of “days”).

<sup>13</sup>See FAR 33.101 (defining agency close of business as 4:30 p.m., local time).

<sup>14</sup>See 31 U.S.C.A. § 3553(d)(4)(A)(ii) (the calculation for an automatic stay at GAO for procurements subject to a required debriefing is “5 days after the debriefing date *offered*”) (emphasis added).

<sup>15</sup>See FAR 15.505(b).

<sup>16</sup>See FAR 15.505(b); see also Global Eng’g & Constr. Joint Venture, B-275999.3, Feb. 19, 1997, 97-1 CPD ¶ 77, 39 GC ¶ 270. In Global Eng’g & Constr. Joint Venture, Global timely requested a pre-award debriefing after it was excluded from the competitive range in an Army procurement, but the Army determined that it was in its best interests to conduct the debriefing after award. Although GAO recognized that a pre-award debriefing would have “fresher” information and would potentially be less disruptive to the procurement, it declined to review the Army’s decision that it was in its best interests to defer the debriefing until after award. Regarding protest timing, GAO held:

“[I]t is not relevant to our Office’s evaluation and review of the procurement whether a bid protest in circumstances like these is filed before or after award, so that an agency’s denial of a timely requested preaward debriefing does not prejudice an offeror for purposes of our bid protest forum. Global’s debriefing request, coupled with the Army’s denial, entitles the firm to a post-award debriefing. . . and our Office will consider timely a protest filed within 10 days of the offered debriefing date with respect to any protest bases that are known or should be known either before or as a result of the debriefing. . . . The Army’s decision to delay engaging in an exchange with Global about potentially protestable issues until after award based on the agency’s determination regarding the government’s best interests. . . in itself has no legal effect on any subsequent bid protest proceeding. That the evaluation information may not be fresh by that time, or that the agency may find it difficult to marshal the resources to defend its earlier decision, simply may prejudice the agency in defending the bid protest.”

<sup>17</sup>FAR 15.505(a)(2).

<sup>18</sup>Compare FAR 15.505 (“Offerors excluded from the competitive range or otherwise excluded from the competition before award may request a debriefing before award”) with FAR 15.506(a)(1) (“An offeror, upon its written request received by the agency within 3 days after the date on which that offeror has received notification of contract award. . . shall be debriefed. . .”).

<sup>19</sup>FAR 8.405-2(d).

<sup>20</sup>See The MIL Corp., B-297508 et al., Jan. 26, 2006, 2006 CPD ¶ 34. (GAO’s exception to its timeliness rules in 4 C.F.R. § 21.2(a)(2) for procurements conducted under competitive procurements with a timely requested and required debriefing does not apply to procurements conducted under the Federal Supply Schedule (FSS) program pursuant to FAR Subpart 8.4 because not based on “competitive proposals,” which is a term of art).

<sup>21</sup>See FAR 13.106-3(d); Gorod Shtor, B-411284, May 22, 2015, 2015 CPD ¶ 162.

<sup>22</sup>See FAR 6.102(d); Millennium Space Sys., Inc., B-406771, Aug. 17, 2012, 2012 CPD ¶ 237.

<sup>23</sup>Although FAR 36.607(b) provides for a “debriefing,” it is not a debriefing in a “procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required” under 4 C.F.R. § 21.2(a)(2); McKissack-URS Partners, JV, B-406489.2, May 22, 2012, 2012 CPD ¶ 162, 54 GC ¶ 188.

<sup>24</sup>See Equitus Corp., B-419701, May 12, 2021, 2021 CPD ¶ 201; Global Aerospace Corp., B-414514, July 3, 2017, 2017 CPD ¶ 198.

<sup>25</sup>FAR 15.505(e).

<sup>26</sup>FAR 15.505(f).

<sup>27</sup>Not all debriefings provide a ranking. Indeed, learning the ranking can be a mixed blessing. On the one hand, learning that your proposal was not remotely within the range of award may allow you to move on. On the other hand, that same information may make it difficult to establish standing in any subsequent protest.

<sup>28</sup>FAR 15.506(d).

<sup>29</sup>FAR 15.506(e).

<sup>30</sup>See FAR 15.505(e)(3); FAR 15.506(d)(6).

<sup>31</sup>See, e.g., *Harris IT Servs. Corp.*, B-406067, Jan. 27, 2012, 2012 CPD ¶ 57 (agency advised protester that it intended to provide written debriefing; protester inquired whether agency would be amenable to a verbal debriefing also; before providing written debriefing, agency told protester to first review the written debriefing and then call if there were any gaps the protester would like filled in; agency provided written debriefing that stated that it satisfied FAR 15.506, but during 10-day protest window, it also agreed to a verbal debriefing and requested questions from the protester; agency and protester then had telephone conference regarding the questions, without agency asserting that the question-answer session was not part of the debriefing; GAO held that agency's communications created ambiguity, despite written debrief, and resolved the timeliness issue in favor of the protester); *Watts-Weitz, JV*, B-405475 et al., Nov. 8, 2011, 2011 CPD ¶ 247 (agency created ambiguity as to close of debriefing when it provided protester a written debriefing, then six days later and within the protester's 10-day protest window, stated that it would provide the protester with an additional debriefing; GAO held that because the agency created the ambiguity, it would resolve all doubts regarding timeliness in the protester's favor).

<sup>32</sup>National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 818, 131 Stat. 1283, 1463 (2017). This provision was originally codified at 10 U.S.C.A. § 2305. Effective January 1, 2022, Title 10 was reorganized and post-award debriefings are now addressed in 10 U.S.C.A. § 3304.

<sup>33</sup>Pub. L. No. 115-91, § 818(a)(2), (a)(3). Note that this provision is potentially less fulsome than existing regulations. As discussed herein, FAR 15.506 does not place a dollar value on the right to a post-award debriefing, and FAR 16.505(b)(6) provides for a debriefing for task or delivery order awards over \$6 million.

<sup>34</sup>Pub. L. No. 115-91, § 818(a)(1).

<sup>35</sup>Pub. L. No. 115-91, § 818(b)(2)(C). This is one of the rare instances in government contracting timing that uses "business" days instead of "calendar" days.

<sup>36</sup>Pub. L. No. 115-91, § 818(b)(3)(C).

<sup>37</sup>See Pub. L. No. 115-91, § 818(c); 31 U.S.C.A. § 3553(d)(4)(B); 10 U.S.C.A. § 3304(c)(2).

<sup>38</sup>87 Fed. Reg. 15808 (Mar. 18, 2022).

<sup>39</sup>See Class Deviation 2018-O0011, Enhanced Postaward Debriefing Rights (Mar. 22, 2018), available at [https://www.acq.osd.mil/dpap/dars/archive/2018/class\\_deviations.html](https://www.acq.osd.mil/dpap/dars/archive/2018/class_deviations.html) (last visited June 1, 2022).

<sup>40</sup>*State Women Corp.*, B-416510, July 12, 2018, 2018 CPD ¶ 240; see also *K&K Indus., Inc.*, B-420422 et al., Mar. 7, 2022, 2022 CPD ¶ 62, 64 GC ¶ 83 (even though agency responded to three rounds of post-debriefing questions, stating that debriefing was closed after each set of responses, debriefing closed after the first responses received; there was no ambiguity, and subsequent agency responses did not "reopen" the debriefing).

<sup>41</sup>See *Celeris Sys., Inc.*, B-416890, Oct. 11, 2018, 2018 CPD ¶ 354 (protest filed two days after protester submitted enhanced debriefing questions was premature; GAO rejected protester's argument that agency's responses should not delay its right to protest and receipt of an automatic stay of performance; GAO held: "In the context of the extended debriefing procedures, we consider a protest to be premature until the conclusion of the entire debriefing process, so as in other circumstances, we will also dismiss a protest filed before completion of the extended debriefing process, and we will recognize one filed afterward as timely so long as it is filed within the timeliness requirements. The potential effect on an agency's ability to commence or continue performance of the awarded contract (or task order, as here) during the extended debriefing process (or from the protester's perspective, its entitlement to a stay of performance), must be considered secondary to the policy interests identified above, which require the dismissal of a protest filed before the completion of a debriefing.").

<sup>42</sup>*Nika Techs., Inc. v. United States*, 147 Fed. Cl. 690 (2020), rev'd, 987 F.3d 1025 (Fed. Cir. 2021), 63 GC ¶ 49.

<sup>43</sup>*Nika Techs.*, 987 F.3d 1025.

<sup>44</sup>*Nika Techs.*, 987 F.3d at 1028.

<sup>45</sup>*Nika Techs.*, 987 F.3d at 1029 (interpreting 10 U.S.C.A. § 2305(b)(5)(B)(vii), now 10 U.S.C.A. § 3304(c)(1)(G)).

<sup>46</sup>*Nika Techs.*, 987 F.3d at 1029 (interpreting 10 U.S.C.A. § 2305(b)(5)(C), now 10 U.S.C.A. § 3304(c)(2)).

<sup>47</sup>*Nika Techs.*, 987 F.3d at 1029 (footnote omitted).

<sup>48</sup>87 Fed. Reg. at 15808; DFARS 215.506-70.

<sup>49</sup>DFARS 215.506(d); see also DFARS 252.215-7016(a) (definition of "nontraditional defense contractor").

<sup>50</sup>See 10 U.S.C.A. § 3304(a) (“When a contract is awarded by the head of an agency on the basis of competitive proposals, an unsuccessful offeror, upon written request received by the agency within 3 days. . . shall be debriefed and furnished the basis for

the selection decision and contract award.”).

<sup>51</sup>Compare DFARS 216.506-70 and DFARS 252.216-7010 with FAR 16.505(b)(6).

# BRIEFING PAPERS