

Better Debriefings, Fewer Protests, Better Proposals OFPP Myth-Busting Provides Good Advice for All

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Government Contracts Issue Update

Last month, the Office of Federal Procurement Policy (OFPP) issued a memorandum intended to help agencies improve their debriefings of federal contractors. It was the third in a series of “myth-busting” memos focusing on improved communications between agencies and industry, an ongoing effort facilitated by industry groups such as the Professional Services Council. The overall theme of the latest memo focuses on the benefits of more expansive debriefings with contractors, to both improve the quality of future proposals, and to quell the risk of bid protests filed in response to inadequate debriefings.

Woven throughout the memo is criticism of poor debriefing practices that many a contractor has experienced. Some debriefings can be downright confrontational, with the atmosphere more appropriate for the OK Corral than a collaborative business discussion. Other debriefings can be uninformative, with agency personnel treating their views of the contractor’s proposal as state secrets. And virtually all debriefings spend too much time reading boilerplate slides.

OFPP’s memo recognizes that neither contractors nor agencies benefit in these scenarios. OFPP identified eight “misconceptions” about debriefings, offered countervailing “facts,” and encouraged agencies to consider adopting better practices in these areas. This article focuses on the “facts” and how contractors can avail themselves of the opportunities:

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Debriefings provide business opportunity, not just fodder for protests. OFPP recognized that contractors often seek debriefings to understand the weaknesses in their proposals and to identify opportunities to improve in future competitions, not always to gather information for protests. OFPP also emphasized that contractors are less likely to protest when they understand how and why agencies reached their source-selection decisions. To maximize the future business benefits of thoughtful debriefings where the agency makes an effort to provide areas for improvement, contractors should have processes to record in real time, assess and then share lessons learned so that future capture efforts can benefit from these insights. To these ends, each debriefing team should include, if possible, a “designated note-taker” qualified and dedicated to documenting exchanges with the agency as they happen. Following the debriefing, the team should convene immediately to confirm recollections and take-aways from the meeting while still fresh.

Better debriefings lead to fewer protests. Speaking of protests, OFPP emphasized that debriefings do not lead inevitably to protests. To the contrary, OFPP confirmed what has largely been our experience as outside counsel in dozens of debriefings—that contractors are *less* likely to protest if they receive a briefing that shows the agency evaluated proposals “with fairness, consistency, objectivity, and in accordance with evaluation criteria described in the solicitation.” Offerors should seek out opportunities to ask probing questions about where their unsuccessful offer fell short, and attempt to gather as much objective information as an agency will share regarding the points of distinction or discrimination with the awardee. And, as part of its post mortem process, contractors should include time to “debrief the debrief”: to objectively consider the agency’s analysis, ideally with the help of objective advisors (either in-house business leaders or counsel) who were not part of the capture effort and may be able to provide a useful sounding board.

Preparation improves debriefings. OFPP explained that agencies can prepare organized and orderly debriefings, even if they don’t know every contractor question in advance. OFPP explained that contractors generally have the same motivations for debriefings (ensuring fairness and preparing for the next competition), such that preparation generally involves the same categories of information. OFPP also encouraged agencies to have technical and program personnel attend the debriefing—presumably to offer more nuanced information as needed. Contractors should be prepared to reciprocate, by preparing for the debriefing and ensuring competent personnel, such as technical and cost proposal leads, participate. Contractors should consult with executives and in-house or outside counsel early to identify the best questions for both general competition issues and specific areas of attention, focus, and concern, as well as to best understand the strategic importance of the particular award and the overall client.

FSS and Simplified Acquisitions. OFPP encouraged agencies to offer more than the minimal debriefing required for acquisitions under the Federal Supply Schedules or simplified acquisition procedures. To be sure, OFPP wrote, the FAR requires only limited information in these situations (see FAR 8.405-2(d) and 13.106-3(d)). But the limited debriefing requirements do “not mean that an offeror can more easily infer the reason for non-selection.” For these awards, contractors should therefore seek as much information as possible. When an agency offers only limited information, contractors should consider asking for more and sharing their genuine desire to learn where their proposals missed the agency’s needs. Of course, that can be a fine line in the event that the debriefing turns up information that the contractor determines to warrant a protest.

Role of Attorneys. OFPP debunked the myth that when a contractor brings an attorney to the debriefing, it means that the offeror will protest. OFPP indicated that contractors have varied reasons for an attorney to attend, so agencies should not limit information shared during the debriefing just because counsel is present. On the other side of the coin, contractors should consider in advance how their attorneys will participate during a debriefing, and the potential chilling effect that having an attorney attend could have on the amount of information disclosed and the tone of the interaction. Experience with the procuring agency's personnel may provide insight into the best role for in-house/outside counsel, whether as a lead, active participant, or silent observer.

More expansive debriefing approach. OFPP encouraged agencies to provide more than just the adjectival ratings and other information needed to satisfy the FAR. Ultimately, OFPP explained, the point of the debriefing is to help contractors identify how they can improve their proposals for future procurements. OFPP did note the limits on what can be shared during debriefings. For example, agencies cannot provide page-by-page analyses of proposals. But agencies *can* offer a robust discussion that treats contractors as ongoing business partners intent on proposing a more responsive solution in the next procurement. To encourage such a presentation, questions should be framed (where possible) in a way that emphasizes the desire to learn, and avoids any implied critique of agency actions.

Awardee debriefings. OFPP highlighted the value in debriefing the winning offeror(s). Awardee debriefings are perhaps the hidden gems of the federal procurement system. Even though a contractor may have won a particular award, often the contractor's proposal still had room for improvement—and thus there is information that can be applied to future proposals for these contractors, too. Contractors celebrating proposal wins should be wise to request these learning opportunities and take as many lessons as possible.

Constraints of written debriefings. OFPP discouraged agencies from offering only written debriefings. Although such debriefings are permissible, OFPP acknowledged, they don't lend to the same "open, flexible space" for agency and contractor personnel to "communicate in a productive manner and foster a positive rapport." OFPP wrote that if in-person debriefings are not feasible, agencies *can* offer live debriefings by phone or videoconferencing. Contractors should keep these considerations in mind. Even when agencies provide written debriefings, contractors can request live follow-up sessions, explaining that they want to better understand how their proposals can improve. But keep in mind that if the agency agrees, the initial written debriefing may still serve as the date triggering applicable protest deadlines.

Of course, the memo recognized that protests may be unavoidable even with the most transparent and informative of debriefings. But what OFPP's memo emphasizes is that both the Government and industry will benefit over the long term if agencies treat these sessions as cooperative efforts instead of negotiations with the enemy.

This memo also should remind contractors that debriefings do (or at least should) offer valuable information about the immediate procurement and for use in future competitions. Although issued in the final weeks of the Obama administration, nothing yet suggests that this memo's guidance will not have staying power in the Trump administration. The memo focuses on nuts-and-bolts communications issues, offering little likely to

generate controversy or significant disagreement on Capitol Hill or at the White House. There's no recommendation to provide debriefings via Twitter, for example (e.g., "#bestvalue. You. Lose.").

Finally, although this memo encourages better communication from agencies, contractors should remain vigilant in protecting their interests and meeting all deadlines when the circumstances show protests to be appropriate considerations. Because even the friendliest and most collaborative of agencies won't hesitate to seek dismissal of an untimely protest.