



**MAY THE CLAUSE
BE WITH YOUSM**

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Enhanced Debriefings
(DFARS 215.506(d); DFARS 215.506-70;
DFARS 233.104)**

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Enhanced debriefing is? In time you must be...

- The Death Star just turned your big proposal into a million particles when you get an award notice you lost the big contract you bid on.
- Depending on what agency you are before and the type of procurement, all may not be lost as you can request a debriefing and try and find out if you have any good protest grounds to challenge your loss.
- And now, you can even get an “enhanced” debriefing in certain cases (which just sounds better than a regular old debriefing).
- What could go wrong...

Boba Background

- The General Accountability Office (GAO) bid protest regulations state that all protests, other than those challenging improprieties in the solicitation, must be filed no later than 10 days after the basis of protest is known or should have been known, **except for** “protests challenging a procurement conducted on the basis of competitive proposals under which a debriefing is requested, and when requested, is required.” 4 C.F.R. § 21.2(a)(2)



When is a Debrief is Required?



- Types of Procurements With Required Debrief
 - FAR Part 15 Procurements (Contracting by Negotiation)
 - FAR Part 16.5 (Indefinite Delivery Contracts)
 - For FAR Part 16.5, debriefings are required in accordance with FAR 16.505(b)(6) that states a debriefing is required for orders over \$6 million.
- If you fall into one of these two buckets, then you are entitled to a required debriefing, but only if you submit a timely written request (within three days of notice of award) to the contracting officer.
- Types of Procurements Where No Required Debrief
 - FAR Part 8 (Federal Supply Schedule)
 - FAR Part 12 (Commercial Item)
 - Occasionally, a FAR Part 12 procurement can result in a required debriefing if it is conducted with FAR Part 15 procedures. See *Gen. Rev. Corp.*, B-414220.2, Mar. 27, 2017, 2017 CPD ¶ 106.
 - FAR Part 13 (Simplified Acquisition)
 - FAR Part 14 (Sealed Bidding)
 - “It’s a trap!”
 - With the exception of the circumstances outlined above re: FAR Part 12, if you get offered a debriefing here, it is certainly not a “required” debriefing and therefore cannot be treated as such under GAO’s timeliness rules.

Impact of a Required Debriefing – Time



- First off, you get information in a required debriefing—or at least you should. Not all agencies always provide all the information required by the FAR and there is no real recourse for a bad debriefing (GAO has specifically stated this is not a valid basis to challenge an award).
- Second, you get more time to file both a timely protest at GAO and a protest that would trigger an automatic stay at GAO.
- When a debriefing is required, either for a FAR Part 15 procurement, or a sufficiently large task or delivery order under FAR Part 16, the close of the debriefing will start the clock for purposes of GAO timeliness and the automatic stay of contract performance under the Competition in Contracting Act.

Impact of a Required Debriefing – Time cont.



- It is also important in this context to have a clear understanding of when a debriefing is closed.
 - For example, in a non-extended debriefing, if an agency agrees to respond to questions at a time following an oral debriefing and confirms that the debriefing will be held open until such questions are answered, the clock will begin to run only when the agency has responded. If, on the other hand, the agency refuses to answer questions or is unclear as to whether it will hold the debriefing open, the safest interpretation is that the agency closed the debriefing on the date of the oral debriefing.
- Once the agency has closed a required debriefing, a contractor wishing to file a protest has 10 days to submit its protest to the GAO.
 - This is considered the GAO's "debriefing exception." 4 C.F.R. § 21.2(a)(2).
- To ensure a stay of contract performance under the Competition in Contracting Act, however, the Agency must receive notice of a protest by the GAO within five days of the requested and required debriefing. 31 U.S.C. § 3553(d)(4)(B).

Extended Debriefings; A Not So Long Time Ago...

- Until recently all Federal procurements generally adhered to the same debriefing requirements.
- However, Section 818 of the Fiscal Year 2018 National Defense Authorization Act (NDAA) amended 10 U.S.C. § 2305 to provide “enhanced” postaward debriefing rights for offerors in connection with U.S. Department of Defense (DoD) procurements for competitively awarded contracts procured under Federal Acquisition Regulation (FAR) Part 15, and for awards of task or delivery orders under Indefinite Delivery/Indefinite Quantity (ID/IQ) contracts over \$10 million.
- In addition to providing a right to ask questions if submitted within two business days following a debriefing, Section 818 kept the debriefing open until the Government provided written responses to those questions, and thus amended the Competition in Contracting Act (CICA) to extend the time period for filing a timely protest and receiving a stay of performance.

Extended Debriefings; A Not So Long Time Ago... cont.

- For several years, Section 818 was implemented through DoD Class Deviation 2018-O0011, which provided most, but not all, of the enhanced debriefing rights afforded by Section 818.
- In particular, the Class Deviation did not expressly state that offerors could request and receive a redacted copy of the source selection decision, a right afforded to small businesses and nontraditional defense contractors for awards over \$10 million and for all contractors for awards over \$100 million.
- On May 20, 2021, DoD published a proposed rule to incorporate the full scope of the enhanced debriefing rights into the Defense Federal Acquisition Regulation Supplement (DFARS).
- Comments on the proposed rule were due July 19, 2021.

The Federal Circuit Gets Involved



- In *Nika Technologies, Inc. v. United States*, 987 F.3d 1025 (Feb. 4, 2021), the Federal Circuit got involved with the enhanced debriefing process when it ruled on when a disappointed offeror's clock to file a protest starts if it declines to submit questions to the agency following its receipt of its debriefing.
- In *Nika Technologies*, the protester received a written debriefing, did not submit follow-up questions, and filed a protest with GAO six days after its written debriefing. When the agency did not impose an "automatic stay" of performance of the awarded contract, the protester sought an injunction at the COFC.

Nika cont.

- At the COFC, the protester advanced its theory that the two-day period for submitting follow-up questions extends the debriefing period, even if the offeror does not submit follow-up questions to the agency, as permitted under the enhanced debriefing protocol.
- The protester argued that the automatic stay must be implemented for any bid protest filed within seven days of the start of the debriefing—five days, plus the additional two days permitted for follow-up questions. The COFC agreed, holding that the extended debriefing, by definition, includes the two-day period in which contractors can submit follow-up questions.
- The Government appealed to the Federal Circuit, which reversed.
- The Federal Circuit focused on the plain meaning of the relevant provision of CICA, 31 U.S.C. § 3553(d)(4)(A)(ii), and held that the two-day period for additional questions under the enhanced debriefing program does not extend the debriefing if the contractor does not submit any questions.
- In that situation, the debriefing concludes on the same day it is offered. The debriefing is only extended—and the CICA deadline for submitting a protest likewise extended—if a debriefed offeror submits follow-up questions within the two-day period after the debriefing.

The Final Rules

- The U.S. Department of Defense (DoD) issued a final rule implementing the requirement for enhanced debriefings established in Section 818 of the National Defense Authorization Act (NDAA) for Fiscal Year 2018 and since governed by Class Deviation 2018O0011 on March 18, 2022.
- As previously noted, industry has been operating under a Class Deviation that provided for enhanced debriefings, but did not expressly allow offerors, in procurements worth over \$10 million, to receive a redacted source selection decision. The final rule fills that gap.
- In addition, DoD “simplified the text throughout the final rule to address potential confusion and adopt the plain language interpretation in [Nika Techs., Inc. v. United States, 987 F.3d 1025 (Fed. Cir. 2021)].”
- The final rule applies to contract, certain task order, commercial item, and commercial-off-the-shelf (COTS) awards, but not awards below the simplified acquisition threshold.
- Finally, although the final rule resolves some of the proposed rule’s ambiguities, it does not resolve all of them.

Source Selection Decision

- First, DoD's final rule implements the NDAA requirement for offerors to receive a redacted source selection decision for small business awards over \$10 million and for large business awards over \$100 million in new DFARS 215.506(d).

Debrief Closing Time

- Next, it implements the requirement for DoD to allow submission of follow-up questions within two business days and hold the debriefing open until the offeror receives written responses to those questions in new DFARS 215.506-70.
- Specifically, DFARS 215.506-70(c) states 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. This is consistent with the Federal Circuit's Nika decision.

Protest/Stay Timeliness

- The final version of DFARS 233.104, which identifies when a stay of performance is implemented in response to a U.S. Government Accountability Office (GAO) protest, is more closely aligned with DFARS 215.506-70 than in the proposed rule.
- The preamble to the final rule also states that DoD “clarified” the final rule to provide that the 5-day protest window in FAR 33.104 “begins on the date that the postaward debriefing is offered, unless additional questions are received within two business days after the debriefing date.”
- If questions are received, the window does not begin until the agency’s responses are received.

Protest Timeliness – Ambiguity Remains

- Nonetheless, despite this attempt at alignment, DFARS 233.104 and DFARS 252.216-7010 introduce new ambiguities.
- First, DFARS 233.104(c) addresses what makes a post-award GAO protest timely so as to require a stay of performance and applies “[i]n lieu of the time periods in FAR 33.104(c)(1).”

Protest Timeliness – Ambiguity Remains

- Under the rule, a timely post-award GAO protest triggering a stay must be filed:

(A) Within 10 days after the date of contract award;

(B) Within 10 days after the date a task order or delivery order is issued, where the value exceeds \$25 million (10 U.S.C. 2304c(e));

(C) Within 5 days after a debriefing date offered to the protestor under *a timely debriefing request in accordance with FAR 15.506 regardless of whether the protestor rejected the offered debriefing date, unless an earlier debriefing date is negotiated as a result;*

or (D) Within 5 days after a postaward debriefing under FAR 15.506 is concluded in accordance with 215.506-70(b).

- Although (A), (B), and (D), above, are pretty clear, subparagraph (C) is not. This subparagraph appears to address the situation in which an offeror rejects the first debriefing date offered by an agency, not the situation where it does not submit follow-up questions within two business days. But, it is not a straightforward statement of the timing rules. Accordingly, this oddly worded paragraph may create confusion for contracting officers and disappointed offerors alike.

Protest Timeliness – Ambiguity Remains

- Second, a similar error appears in DFARS 252.216-7010(b)(2), which states that a stay of performance of a post-award protest of a task or delivery order is required if a protest is filed “[w]ithin 5 days after a debriefing date offered to the protestor under a timely debriefing request in accordance with [FAR] 15.506 unless an earlier debriefing date is negotiated as a result.”
- The bottom line is that the protest clock does not start on the offered date of a timely requested debriefing; it starts when that debriefing is closed.

Protest Timeliness – Ambiguity Remains

- Third, the final rule continues its possible conflict with certain requirements of the FAR, without explanation.
- For example, new DFARS 215.506(b) states: “Notwithstanding FAR 15.506(b), when requested by a successful or unsuccessful 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)).”
- FAR 15.506(b) merely states: “[d]ebriefings 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), the provision implies that a post-award debriefing is not required for a DoD contract award under \$10 million.

Protest Timeliness – Ambiguity Remains

- This is not consistent with the FAR, which does not restrict debriefings on FAR Part 15 contract awards based on the dollar figure of the award. Nor is it consistent with the Title 10 implementation of Section 818, 10 U.S.C. § 3304(c)(1) (previously located at 10 U.S.C. § 2305(b)(5)) which also does not limit competitive contract debriefings to over \$10 million.
- Further, DFARS 216.505(b)(6) states that “[i]n addition to the notice required by FAR 16.505(b)(6),” a debriefing is required for task or delivery orders valued at \$10 million or more.
- FAR 16.505(b)(6)(ii) requires that the procedures at FAR 15.506 be followed for post-award debriefings to unsuccessful offerors for task or delivery order awards over \$6 million, not \$10 million.
- It is not clear if DoD actually intended to reduce debriefings for lower value DoD contract or task order awards because these provisions are not explained in the final rule.
- It seems inconsistent with a statute designed to enhance debriefing rights to potentially remove them.
- Regardless, it is conceivable that DoD contracting officers will interpret the new DFARS provision to deny debriefings altogether in scenarios in which the FAR requires one.
- Lastly, GAO has found that the rules on enhanced debriefing rights for unsuccessful bidders do not apply when the debriefing is held pre-award. See *MP Solutions, LLC.*, B-420953, B-420953.2, Nov. 21, 2022, 2022 CPD ¶ 289.

Practical Tips

CICA timelines to file a bid protest with GAO and obtain an automatic stay are strictly enforced and must be carefully monitored. Contractors can minimize the risk of missing these deadlines by establishing standard post-award procedures.

First, be sure to read with great attention to detail all written communications received from the government, including the award notice, debriefing, and any additional written communications about key dates or deadlines.

Second, always submit a written request for a debriefing from the government within three calendar days after receiving any award notice, as a timely written request is an essential predicate to a required debriefing under CICA.

Third, when the agency is using an enhanced debriefing process, submit any written follow-up questions to the contracting agency within two days of the debriefing to extend the debriefing period; or, if you have no questions, understand that the deadline to obtain the automatic stay under CICA will be five days from the initial debriefing.





This presentation is accompanied by oral explanation and should not be relied upon for legal advice.



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