



PilieroMazza Webinar

Unlocking the Secrets of Debriefings

April 12, 2018

Presented by

Megan Connor, Partner
mconnor@pilieromazza.com
(202) 857-1000



Julia Di Vito, Associate
jdivito@pilieromazza.com
(202) 857-1000



About PilieroMazza

PilieroMazza PLLC is a full-service law firm with offices in Washington, DC and Boulder, CO. We are most well known as a government contracting firm and for 25 years we have helped our clients navigate the complexities of doing business with the federal government. We also provide a full range of legal services including advice on corporate, labor and employment, SBA procurement programs, and litigation matters. Our clients value the diverse array of legal guidance they receive from us and our responsiveness as we guide their growth and secure their success.

Our primary practice areas are:

- Government Contracting
- Small Business Programs & Advisory Services
- Labor & Employment
- Business & Corporate
- Litigation
- Intellectual Property & Technology Rights

Sign up for our newsletters and blog at
www.pilieromazza.com



Overview

- When a debriefing is required
- Mechanics of a debriefing
- New DoD debriefing rules
- How to make the most of a debriefing
- Common misconceptions
- Questions

When Is a Debriefing Required?

- Pre-award notifications
 - Exclusion from the competitive range
 - Procurements that are set aside
- Post-award notifications
 - FAR part 15 procurement
 - FAR part 16 procurement (multiple-award contracts)
 - FAR part 8 procurement (GSA Schedule)
 - FAR part 12 procurement (commercial items)

Mechanics of Requesting a Debriefing

- Pre-award
 - You must request one within 3 days after notice of exclusion from the competition
 - The debriefing will happen “as soon as practicable”
 - The debriefing can occur post-award
- Post-award
 - You must request one within 3 days after notice of contract award
 - The debriefing should occur within 5 days of the request, but only to the “maximum extent practicable”
- Impact of debriefing date on protest timing

What the Agency Must Tell You

- Pre-award
 - The agency's evaluation of significant elements in your proposal
 - A summary of the rationale for eliminating you from the competition
 - Reasonable responses to relevant questions
- Post-award
 - Significant weaknesses or deficiencies in your proposal
 - Overall evaluated cost and technical rating of you and the awardee
 - Your past performance information
 - Overall ranking of offerors (if developed)
 - Summary of rationale for award
 - Reasonable responses to relevant questions

What the Agency Cannot Tell You

- The number, identity, ranking, and evaluation of other offerors and the content of their proposals (pre-award only)
- Trade secrets
- Privileged and confidential manufacturing processes and techniques
- Privileged or confidential commercial and financial information
- Names of individuals providing past performance references

Format of Debriefing

- Oral or written
- In person or via telephone
- Led by the contracting officer
- Should attorneys attend?

New Department of Defense Debriefing Rules

- 2018 NDAA
 - If over \$100 million (or over \$10 million for small businesses), release the redacted source selection award determination
 - Debriefings required for all awards over \$10 million
 - Responses to written questions submitted within 5 business days after debriefing
- DoD FAR Class Deviation
 - Unsuccessful offerors can submit questions within 2 business days after receiving a debriefing, to which the agency must respond within 5 business days
 - The debriefing stays open until the agency responds to the questions
 - If the offeror timely submits questions, the protest is due within 5 days after the Government responds to the questions in writing

How to Make the Most of a Debriefing

- Analyze proposal and evaluation criteria
- Identify the right attendees
- Take detailed notes
- Prepare questions in advance
- Don't argue, don't accuse...just listen carefully
- If the agency agrees to look into your questions and respond later, ask to keep the debriefing “open” and then confirm this in writing

Common Debriefing Questions

- What was your technical rating?
- What was your evaluated price/cost?
- For LPTA procurement: Where did your company rank? Is your price the second-lowest?
- For procurement requiring “realism” analysis: Was a “realism” analysis performed? If so, what was this process?
- Any recommendations for future proposals?
- Was your proposal assigned any weaknesses? If so, what were they?
- Definitions of ratings

GAO's Most Prevalent Reasons for Sustaining Protests in 2017

- **Unreasonable technical evaluation** – E.g., CR/ZWS LLC, B-414766, B-414766.2 (Sept. 13, 2017) (finding that the agency failed to find awardee's proposal unacceptable where its technical proposal failed to satisfy the minimum requirements of the solicitation).
- **Unreasonable past performance evaluation** – E.g., MLU Servs., Inc., B-414555.3, B-414553.6 (July 17, 2017) (finding that the agency unreasonably considered the past performance of a firm that was not proposed to perform any portion of the work).
- **Unreasonable cost or price evaluation** – E.g., NCI Info. Sys., Inc., B-412870.2 (Oct. 14, 2016) (finding that the agency failed to demonstrate that the awardee's low price was consistent with its technical approach).
- **Inadequate documentation of the record** – E.g., Threat Mgmt. Grp., LLC, B-413729 (Dec. 21, 2016) (finding that the record was so limited that GAO could not conclude that the protested task order was within the scope of the underlying contract).
- **Flawed selection decision** – E.g., CALNET, Inc., B-413386.2, B-413386.3 (Oct. 28, 2016) (finding that the agency's best-value tradeoff decision relied entirely on adjectival ratings in finding the proposals equivalent under the non-cost evaluation factors, rather than considering the identified strengths and weaknesses and the evaluators' ranking of proposals).

Source: GAO Bid Protest Annual Report to Congress for Fiscal Year 2017

Bid Protest Statistics for Fiscal Years 2013-2017

	FY2017	FY2016	FY2015	FY2014	FY 2013
Cases Filed ¹	2596 (down 7% ²)	2789 (up 6%)	2639 (up 3%)	2561 (up 5%)	2429 (down 2%)
Cases Closed ³	2672	2734	2647	2458	2538
Merit (Sustain + Deny) Decisions	581	616	587	556	509
Number of Sustains	99	139	68	72	87
Sustain Rate	17%	23%	12%	13%	17%
Effectiveness Rate ⁴	47%	46%	45%	43%	43%
ADR ⁵ (cases used)	81	69	103	96	145
ADR Success Rate ⁶	90%	84%	70%	83%	86%
Hearings ⁷	1.70% (17 cases)	2.51% (27 cases)	3.10% (31 cases)	4.70% (42 cases)	3.36% (31 cases)

What to Look for in Your Debriefing

- How detailed/well-documented is the debriefing?
- Are there any mistakes in the debriefing? For instance, a reference to your technical proposal that is wrong?
- How are you rated vis-à-vis the awardee?
- How does your price/cost compare to the awardee?

Common Misconceptions

- Awardees may request debriefings too!
- They are not just for protests
- Can't protest untimely debriefing
- Can't protest content of the debriefing
- Not entitled to point-by-point comparison
- Can't get information on evaluation of all offerors
- Allegations of bias are rarely successful
- Waiting for post-award debriefing after exclusion from competitive range is not helpful

Procurement Lawyer's Perspective: What We Look For

- In a best value procurement, potential protester is higher rated or lower priced (ideally both!)
- In LPTA with just one possible award, potential protester has second lowest price...or has grounds to knock out the offerors between awardee and protester
- The rationale for award in the debriefing is sparse
- The agency engaged in discussions and potential protester made changes in its proposal as a result of these discussions which led to the protester being unsuccessful

Questions?

Megan Connor

mconnor@pilieromazza.com

Julia Di Vito

jdivito@pilieromazza.com



888 17th Street, NW
11th Floor
Washington, DC 20006
202-857-1000

This material is presented with the understanding that the author is not rendering any legal, accounting, or other professional service or advice. Because of the rapidly changing nature of the law, information contained in this presentation may become outdated. As a result, the user of this material must always research original sources of authority and update information to ensure accuracy when dealing with a specific legal matter. In no event will the author be liable for any damages resulting from the use of this material.