

DOD issues proposed rule on enhanced post-award debriefing rights: 5 things you should know

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As we previously reported,¹ Section 818 of the National Defense Authorization Act for Fiscal Year 2018 (2018 NDAA) required the Department of Defense (DOD) to issue new regulations to establish more detailed and comprehensive post-award debriefing rights.

This would be a significant change giving contractors greater insight into the strengths and weaknesses of their proposals and how their proposals compared to that of the awardee.

In March 2018, DOD issued a class deviation² to implement some, but not all, of the rights required by the 2018 NDAA. On May 20, 2021, DOD published a proposed rule³ that would amend the Defense Federal Acquisition Regulation Supplement to make permanent various changes in the class deviation and to implement the remaining enhanced post-award debriefing rights detailed in the 2018 NDAA.

Below are five things government contractors should know about the proposed rule which, if implemented, could significantly affect a contractor's decision to file a bid protest.

- (1) Right to a debriefing for all awards over \$10 million:** The proposed rule clarifies that, if timely requested within three days of notification of award, a debriefing would be required for all contracts, task orders, and delivery orders valued at \$10 million or more, including contracts for the acquisition of commercial items.
- (2) Disclosure of the award decision:** The proposed rule would require that, for awards over \$100 million, the debriefing must include the disclosure of a redacted version of the agency's source selection decision document (SSDD).
For awards between \$10 million and \$100 million, small businesses and nontraditional defense contractors would have the option to request a redacted SSDD under the proposed rule, but the SSDD would not be disclosed automatically as part of the debriefing.

This would be a significant change giving contractors greater insight into the strengths and weaknesses of their proposals and how their proposals compared to that of the awardee.

- (3) Right to ask follow-up questions:** Under the proposed rule, successful and unsuccessful offerors would be able to submit questions within two business days after receiving a debriefing, and the agency would have to respond within five business days after receipt of questions.

The debriefing would remain open until receipt of the agency's responses. However, the proposed rule makes clear that, if the contractor did not submit follow-up questions within two business days, the debriefing would be considered closed as of the second business day after receipt of the debriefing.

- (4) New timeframes for suspension of performance following protest:** The proposed rule clarifies how suspension of contract performance would occur upon filing of a protest at the Government Accountability Office (GAO).

DOD is hopeful that enhanced post-award debriefing requirements will assist in developing small business capabilities, provide increased participation, and promote competition.

Generally, performance would be suspended or terminated for a contract, task order, or delivery order upon notice from GAO of a protest being filed within the time periods below, whichever is later:

- within ten days after award of a contract or issuance of a task/delivery order where the value of the order exceeds \$25 million;
- within five days after a requested and required debriefing was given and no additional questions were submitted;
- within five days after the date offered by the agency for a requested and required debriefing where the debriefing

date offered is not accepted by the contractor (note that this means the ability to get an automatic stay would begin to run from the first offered debriefing date, so contractors would need to think very carefully before choosing not to accept the first date offered); or

- within five days of the agency's written response to follow-up questions timely submitted.

(5) Applicable only to DOD post-award debriefings: The proposed rule's enhanced debriefing rights would apply only to post-award debriefings for DOD procurements. Civilian agency debriefings would not change and would continue to be governed by FAR 15.506.

Further, the procedures would apply only to post-award debriefings, meaning a contractor could not take advantage

of enhanced debriefing rights if it were eliminated from the competitive range but an award decision was not yet made.

DOD is hopeful that enhanced post-award debriefing requirements will assist in developing small business capabilities, provide increased participation, and promote competition.

Transparent debriefings would give defense contractors better insight into the strengths and weaknesses of their proposals and allow more time to make an informed decision as to whether filing a bid protest would be in their best interests. Comments on the proposed rule are due July 19, 2021.

Notes

¹ <https://bit.ly/3x5jXto>

² <https://bit.ly/3cqf2Lt>

³ <https://bit.ly/3x4jrLU>

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