DOD FINALIZES "ENHANCED DEBRIEFING" RULE FOR FEDERAL PROCUREMENTS

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U.S. Policy and Regulatory Alert

A new regulation outlines U.S. Department of Defense (DOD) contractors' rights to an "enhanced debriefing" in certain procurements. On 18 March 2022, the DOD published a final rule to implement Section 818 of the National Defense Authorization Act for Fiscal Year 2018 (2018 NDAA), which required the DOD to implement certain procedures to increase the information offerors receive pursuant to required debriefings in DOD procurements. The rule, which makes minor changes to the proposed rule published on 20 May 2021, revises the Defense Federal Acquisition Regulation Supplement (DFARS).

KEY TAKEAWAYS

The final rule makes two significant changes to the DOD debriefing process, though one of these changes has been in effect since a 2018 class deviation to the DFARS debriefing provisions.

Disclosure of a redacted copy of the agency's source selection decision document (SSDD). The final rule requires DOD contracting officers to provide a copy of the procuring agency's SSDD. The SSDD is the document that outlines the agency's decision for awarding a contract to a particular offeror. In providing the SSDD, DOD is required to redact the document to protect the confidential and proprietary information of other offerors. This means that while contractors will receive more information about how the agency evaluated their own proposal, they will still only receive the price and evaluation scores for themselves and for the awardee.

The final rule requires disclosure of the SSDD in two circumstances:

- For award of contracts between $10 million and $100 million, small businesses and "nontraditional defense contractors" can request the SSDD. The rule defines a “nontraditional defense contractor” as an entity that is not currently performing a contract or subcontract for DOD that is subject to full coverage under the Cost Accounting Standards, and has not performed such a contract or subcontract within the past year preceding publication of the solicitation for the procurement at issue.
- For award of contracts in excess of $100 million, an agency must provide the SSDD (regardless of offeror type).

Notably, the requirement to provide a redacted SSDD was not included in the 2018 class deviation implementing portions of the statutory requirement for enhanced debriefings, though in practice some agencies have already been providing this information upon request.

Opportunity to ask questions. The final rule provides unsuccessful offerors the opportunity to ask additional questions within two business days after receipt of a required debriefing. This Q&A process is material for potential protesters: certain deadlines to file a protest at the Government Accountability Office (GAO) and the

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opportunity to receive a stay of performance on the awarded contract run from the date that a requested and required debriefing is offered by an agency, but under DOD's enhanced debriefing process, those deadlines do not start until the receipt of agency answers to timely submitted questions. While this Q&A process has been in effect since DOD's 2018 class deviation, the final rule clarifies a prior ambiguity regarding the Q&A process's impact on protest filing deadlines for offerors that elect not to ask post-debriefing questions. The final rule states that, consistent with the Federal Circuit's 2021 holding in Nika Technologies v. United States, when a debriefed offeror elects not to ask questions, the protest and stay deadlines run from the date the debriefing is offered by the agency.

SCOPE AND IMPACT OF THE FINAL RULE

The final rule applies to DOD procurements in which a debriefing is required by procurement regulations. Notable exemptions from “required” debriefings include orders under $6 million for indefinite delivery, indefinite quantity contracts and orders placed under GSA's Federal Supply Schedule. Additionally, the final rule states that the enhanced debriefing requirements will not apply to contracts valued at or below the simplified acquisition threshold, which is currently $250,000.

Finally, the final rule confirmed that the enhanced debriefing requirements will apply to contracts for the acquisition of commercial products (including commercially available off-the-shelf items) and for the acquisition of commercial services.

As noted previously, DOD agencies have already been operating under a class deviation since 2018 to implement a portion of the enhanced debriefing requirements, and in practice some DOD agencies have been providing all of the information required under Section 818 of the 2018 NDAA. However, the final rule clarifies some of the timing issues left open by the deviation and will hopefully provide more uniform application of the enhanced debriefing requirements.

Debriefing procedures, and particularly their impact on the timeliness of a protest or stay of performance at the GAO, can be complicated and require a thorough understanding of what constitutes a “required” debriefing and what steps must be taken to ensure protest and stay deadlines have been properly tolled. The K&L Gates Government Contracts Team is available to help contractors take advantage of their enhanced debriefing rights and to navigate the protest process.

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