

Client Alert: DoD Issues Proposed Rule Implementing Enhanced Debriefing Requirement

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The Department of Defense (DoD) has issued a proposed rule to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to require that DoD provide enhanced postaward debriefings to contractors. Although these changes were required by Section 818 the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018, and were partially implemented by a Class Deviation issued by DoD in the same year, the proposed rule would permanently implement these changes in the DFARS and provide for the production of redacted source selection documents in certain debriefings. Comments on the proposed rule are due by July 19, 2021.

Government contractors often struggle to understand the government's decision to select the proposal of another offeror for contract award. The postaward debriefing process is an important tool to gain insight into the government's reasoning, but the limited information provided to contractors during a debriefing frequently raises more questions than it answers and may cause contractors to protest the award decision as a way to gather more information or test the soundness of an agency's opaque award rationale. Increased transparency through postaward debriefings can boost confidence in procurement decisions and provide disappointed offerors with practical insight that can help improve future bids.

Recognizing these benefits, Section 818 for NDAA FY18 required DoD to revise the DFARS to include, at a minimum, disclosure of a redacted version of the agency's source selection decision, and an opportunity to ask follow-up questions and receive answers before the close of the debriefing, thereby delaying the deadline to timely file a bid protest and obtain an automatic stay of performance during the pendency of the protest at the Government Accountability Office (GAO).

Shortly after the passage of the NDAA, DoD partially implemented the requirement through a Class Deviation that required contracting officers to provide unsuccessful offerors with an opportunity to submit additional questions within two business days of receiving the debriefing, and for the agency to respond in writing within five business days of receipt of the questions. Importantly, the debriefing would remain open until the contractor received the written responses. DoD's Class Deviation did not, however, implement the statutory requirement to provide offerors with a redacted

version of the source selection decision, though DoD agencies were not prohibited from providing this documentation; indeed, some did upon request.

DoD's proposed rule, issued on May 20, 2021, seeks to implement both aspects of Section 818 of NDAA FY18. Consistent with the changes implemented in the 2018 Class Deviation, the DFARS would be revised to require that contractors be provided the opportunity to submit written follow-up questions within two business days of receiving a debriefing and for the DoD agency to respond within five business days after receipt of the questions. The debriefing would not be considered concluded until the contractor receives the agency's answers, and the clock to timely file a protest and receive an automatic suspension of contract performance would not begin to run until the debriefing concluded. Importantly, the proposed rule confirms that a contractor must submit follow-up questions for the protest clock to be tolled; otherwise, the time to file a protest begins to run from the day on which the contractor received the debriefing.

In addition, the DFARS would be revised to require that DoD, as part of a postaward debriefing, disclose to a disappointed offeror a redacted version of the source selection decision document where: (a) the offeror is a small business or nontraditional defense contractor, and the award is above \$10 million; or (b) for all offerors, where the award is greater than \$100 million. The proposed rule also clarifies that, when timely requested, a debriefing is required for all contracts and task orders or delivery orders valued at \$10 million or more. These requirements will apply to negotiated procurements and contracts for the acquisition of commercial items, including Commercial-off-the-Shelf (COTS) items.

Government contractors should seek to utilize these procedures to maximize the benefit from a postaward debriefing in DoD procurements. Contractors should prepare and submit thoughtful and detailed follow-up questions and request a redacted version of the agency's source selection decision. This information can provide invaluable insight to a contractor seeking to improve its next proposal submission or evaluate the merits of a potential protest. Practically speaking, the additional time allotted during the enhanced debriefing process provides a contractor with more breathing room to consider the cost/benefit of any potential bid protest—a decision often made under the pressure of short protest deadlines. As part of the DFARS, the proposed rule, once implemented, applies only to DoD and not civilian agencies, but non-DoD agencies are not prohibited from adopting these practices or implementing similar rules.

Jenner & Block's Government Contracts and Grants lawyers have extensive bid protest experience, including prior service as a supervising bid protest hearing officer at GAO, and stand ready to support any challenges to the award of a government contract.

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