Legal and Practical Aspects of Debriefings: Adding Value to the Procurement Process

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Introduction

Debriefings of unsuccessful offerors can be a key stage of many competitive negotiated procurements under Federal Acquisition Regulation (FAR) Part 15.[2] In a debriefing, which can occur before or after contract award, agency representatives inform the offeror, commonly face to face, of the proposal's weaknesses and deficiencies. The procuring agency in a post-award debriefing will further disclose limited information relating to the awardee's proposal, such as the awardee's overall evaluated cost or price, and the rationale for the source selection. The debriefed offeror either before or after award is entitled to receive certain other information, such as whether the agency followed the applicable source selection procedures. Debriefings are closely regulated by statute[3] and the FAR,[4] which identify appropriate topics for further discussion in this article.

Properly conducted, debriefings can greatly aid offerors, who can obtain insights for improving their proposals in future procurements. A skillfully performed debriefing also can ward off a potential protest by an unsuccessful offeror to the agency, the General Accounting Office (GAO), or the United States Court of Federal Claims whereby the agency allays the debriefed offeror's concerns about possible prejudicial error in the evaluation or selection decision.

Poorly conducted, debriefings can decrease an offeror's confidence in the agency's evaluation practices, and can discourage that offeror from pursuing future business with that agency, thereby decreasing competition. A confusing or poorly executed debriefing also can spark a protest when the offeror was not otherwise so inclined. Most protests consume extensive agency resources in defending the procurement before the protest decision maker.[5]

Award protests further impact the agency's mission. In this regard, timely protests to the GAO, the usual forum of choice, automatically invoke a stay of the agency's performance of a contract, unless the procuring activity obtains the approval of the agency head for an override of the automatic stay.[6] In the Department of the Army, that official is the Secretary of the Army, who closely scrutinizes—and does not always grant—such requests.[7] The ordinary GAO stay period is 100 calendar days, which can be extended when the protester files timely, supplemental protest grounds.[8] Therefore, agency procurement officials have every incentive to provide disappointed offerors with a well-conceived and executed debriefing so that both offerors and agencies can obtain the maximum benefit from these sessions.

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1. An earlier version of this article appeared in Steven Feldman, *Effective Debriefings from a Government Perspective*, CONTRACT MGMT., Jan. 2001, at 51.

2. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REGULATION 33.104(c)(1) (June 1997) [hereinafter FAR].

3. 10 U.S.C. § 2305(b) (2000); 41 U.S.C. § 253b (2000).

4. FAR, *supra* note 2, Subpart 15.5.

5. The case law reflects many instances where a debriefing appeared to prompt, in whole or part, an unsuccessful offer to protest the agency's evaluation or selection decision. *See, e.g.*, AWD Techs., Inc., Comp. Gen. Dec. B-250081.2, 93-1 CPD ¶ 83; CACI Field Servs., Inc., Comp. Gen. Dec. B-234945, 89-2 CPD ¶ 97; Sechan Elecs., Inc., Comp. Gen. Dec. B-233943, 89-1 CPD ¶ 337; Raven Servs. Corp., Comp. Gen. Dec. B-231639, 88-2 CPD ¶ 173; Gov't Computer Sales, GSBCA 9981-P, 89-2 BCA ¶ 21779.

6. 31 U.S.C. § 3553(d)(4) (2000). A contracting officer must immediately suspend performance of a contract when the agency receives notice of a protest from the GAO within ten days after a contract award, or within five days after a debriefing date offered to the protester for a "required" debriefing under FAR 15.505 or 15.506, whichever is later. *See* FAR, *supra* note 2, at 33.104(c)(1) (summarizing statutory rules). For a discussion of "required debriefings," see section on Debriefings—Purpose and Procedures, *infra.* These rules on invoking the mandatory stay differ slightly from the rules for timely award protests. *See infra* section "Relationship to GAO Timeliness Regulations.

7. *See* FAR, *supra* note 2, at 2.101; U.S. DEP'T OF ARMY, ARMY FEDERAL ACQUISITION REG. SUPP. 202.101 (Dec. 1, 1984) [hereinafter AFARS] (defining "agency head"). The head of the agency may authorize contract performance upon a written finding (and notification to GAO) that, notwithstanding the protest, contract performance will be in the best interests of the United States, or that urgent and compelling circumstances significantly affecting the interests of the United States will not permit waiting for the GAO's decision. *See* 31 U.S.C. § 3555(d)(3)(C); FAR, *supra* note 2, at 33.104(c)(2), (3).

8. 31 U.S.C. § 3554(a); FAR, *supra* note 2, at 33.104(f) (explaining GAO's obligations).

This article seeks to aid government representatives in performing quality debriefings, and to help agency personnel avoid common pitfalls. It first examines the essentials of competitive negotiated procurement, which are a substantive focus of many debriefings. It then explains the procurement regulations on debriefings, along with GAO decisions construing this process. Next the article discusses in depth the relationship between debriefings and the GAO's rules on timely bid protests. Lastly, the article offers practical suggestions for ensuring successful debriefings from a government perspective.

Essentials of Competitive Negotiation

In sealed bidding under FAR Part 14, the award must be made strictly on the solicitation's price and price-related factors to the lowest, responsive, and responsible bidder.[9] In competitive negotiations under FAR Part 15, the responsible offeror with the lowest-priced, technically acceptable offer is not necessarily entitled to an award, unless the Request for Proposals (RFP) states otherwise.[10] Usually, the focus of a competitive negotiated procurement is an assessment of both cost and price and the relative merits of the offerors' technical proposals under the announced evaluation factors. Thus, an RFP may include evaluation factors based on traditional responsibility factors—such as experience**,** technical excellence, or past performance—that would be impermissible for sealed bidding.[11]

In negotiated procurements, FAR 15.303 makes the source selection authority (SSA), typically the contracting officer, responsible for selection decisions. Further, FAR 15.303(b)(4) states that the SSA must ensure that proposals are evaluated based solely on the factors and subfactors in the solicitation. Federal Acquisition Regulation 15.303(b)(6) requires the agency to select the source or sources whose proposal is the "best value" to the government, a term that has two variants under FAR 15.101. First, the agency can select the lowest price, technically acceptable offer under FAR 15.101-2(b), provided that the RFP announced this award process. Second, the agency under FAR 15.101-1(c) can compare the price and non-price qualifications of the proposals. Thus, the agency may determine to award to a higher priced, but technically superior proposal, or to award to a lower priced, but less technically qualified proposal, depending on which proposal the agency deems to be the most advantageous offer to the government. The GAO and the other protest adjudicators will approve these trade-offs so long as they are reasonable and consistent with the announced evaluation factors.[12]

In the author's experience, the two most frequently recurring legal issues in debriefings are whether the agency followed the announced evaluation factors and whether the agency adequately justified its trade-off decision.

Debriefings—Purpose and Procedures

Debriefings are a creature of both statute and regulation. For the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration, 10 U.S.C. § 2305(b) spells out the process in great detail. For other covered executive agencies, 41 U.S.C. § 253b provides parallel guidance. Subpart 15.5 of the FAR implements these statutes for FAR-covered procuring activities.

The purpose of a debriefing is two-fold: to inform the offeror of its significant weaknesses and deficiencies, and to provide essential information in a post-award debriefing on the rationale for the source selection decision.[13] The procuring activity has substantial discretion on the mode of debriefing—it may occur orally, in writing, or by any other method acceptable to the contracting officer.[14] The contracting officer should

9. 10 U.S.C. § 2305(b)(3) (2000); 41 U.S.C. § 253b(c) (2000); Communications Network, Comp. Gen. Dec. B-215902, 84-2 CPD ¶ 609, at 2.

10. Ingersoll-Rand Co., Comp. Gen. Dec. B-232739, 89-1 CPD ¶ 124; Raven Servs. Corp., Comp. Gen. Dec. B-231639, 88-2 CPD ¶ 173; Sal Esparaza, Inc., Comp. Gen. Dec. B-231097, 88-2 CPD ¶ 168.

11. *See* FAR, *supra* note 2, at 15.304(c)(2) (addressing permissible quality evaluation factors in negotiated procurements). The only proper award factors in sealed bidding are price and price-related factors. *See id.* § 6.401(a)); Eaglefire, Inc., Comp. Gen. Dec. B-257951, 94-2 CPD ¶ 214, at 7 (analyzing 10 U.S.C. § 2304(a)(2); KIME Plus, Inc., Comp. Gen. Dec. B-231906, 88-2 CPD ¶ 237, at 2; Variable Staffing Sys., Comp. Gen. Dec. B-224105, 86-2 CPD ¶ 705, at 2.

12. *See* Valenzuela Eng'g, Inc., Comp. Gen. Dec. B-283889, 2000 CPD ¶ 1, and cases cited therein; Widnall v. B3H Corp., 75 F.3d 1577 (Fed. Cir. 1996).

13. *See* 10 U.S.C. §§ 2305(b)(5)(B), (6)(C); 41 U.S.C. §§ 253b(e)(2), (f)(3); FAR, *supra* note 2, at 15.505(e) (pre-award debriefing), 15.506(d) (post-award debriefing). The GAO has said: "The primary function of a debriefing is not to defend or justify selection decisions, but to provide unsuccessful offerors with information that would assist them in improving their future proposals." AWD Tech., Inc., Comp. Gen. Dec. B-250081.2, 93-1 CPD ¶ 83, at 6 n.2. This GAO observation, made in 1993, applies equally to the current version of the debriefing rules, which Congress changed in 1994. *See* Pub. L. No. 103-355, secs. 1014, 1064 (amending 10 U.S.C. § 2305(b) and 41 U.S.C. § 253b). Subpart 15.5 of the FAR was last revised in 1997. FEDERAL ACQUISITION CIRCULAR 97-2, 62 Fed. Reg. 51224 (Sept. 30, 1997).

Clearly, the purpose of a debriefing is not to provide the offeror with the opportunity to correct the deficiencies that led to its elimination from the competition. OMV Medical, Inc., Comp. Gen. Dec. B-281388, 99-1 CPD ¶ 53; Security Defense Systems Corp., Comp. Gen. Dec. B-237826, 90-1 CPD ¶ 231. The debriefing rules in FAR Subpart 15.5 apply to procurements using competitive proposals, FAR, *supra* note 2, at 6.102(b), and to acquisitions using a combination of competitive procedures, *id.* at 6.102(c). For simplified acquisition procedures, the unsuccessful vendor is entitled only to receive a brief explanation for the basis of the award decision. *See id.* at 13.106-3(d), 15.503(b)(2); *see also id* at 2.101 (setting usual threshold at $100,000 for this class of procurements). The rules on post-award debriefing of offerors, *id.* at 15.506, and protest after award, *id.* at 15.507, with reasonable modifications, should be followed for sole source procurements, architect engineer procurements, and competitive selection of basic and applied research submissions. *See id.* at 15.502.

normally chair the debriefing, and evaluators shall provide support.[15]

Pre-Award Debriefing

Offerors that the agency excluded from the competitive range or otherwise removed from the competition before the award may request a pre-award debriefing by making a written request to the contracting officer within three days of receipt of the notice of exclusion from the competition.[16] The offeror may request that the debriefing be postponed until after award, but if so delayed, the debriefing shall include all information normally provided in a post-award debriefing.[17] Absent a timely request, the offeror has no entitlement to receive a pre- or post-award debriefing.[18]

The agency must make every effort to provide a pre-award debriefing as soon as practicable.[19]

> [T]he honest exchange of information in a preaward debriefing may well obviate the need for, or discourage, a bid protest; competitive range evaluation results for excluded offerors are always "fresher" in the pre-award than in the post-award time frame . . . [S]ince a protest could result in disruption to correct a procurement deficiency, it generally would be better to correct the problem at an earlier time whenever possible.[20]

The agency may decline a timely request for a pre-award debriefing if, for compelling reasons, the government's best interests dictate a postponement; however, the agency must document the reasons for the delay.[21]

Post-Award Debriefings

If the offeror makes a written request for a debriefing within three days after receiving notification of an award decision, the offeror under FAR 15.506(a)(1) shall be debriefed and furnished the basis for the selection decision and contract award. To the maximum practicable extent, the debriefing should occur within five days after the receipt of the written request.[22] An offeror that was notified of its exclusion from the competitive range, but that fails to submit a timely request, is not entitled to a debriefing.[23] The agency may accommodate untimely requests for a debriefing.[24]

Information Disclosure

With some variations, the rules for disclosure of information are similar for pre- and post-award debriefings. For pre-award debriefings, the debriefing "shall" include the following information:

> (1) The agency's evaluation of significant elements in the offeror's proposal;
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> (2) A summary of the rationale for the elimination of the offeror from the competition; and
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> (3) Reasonable responses to relevant questions about whether source selection proce-

14. FAR, *supra* note 2, at 15.505(c) (pre-award debriefing), 15.506(b) (post-award debriefing).

15. *Id*. at 15.505(d) (pre-award debriefing), 15.506(c) (post-award debriefing).

16. 10 U.S.C. § 2305(b)(6)(A); 41 U.S.C. § 253b(f)(1); FAR, *supra* note 2, at 15.505(a). "Days" under FAR Subpart 15.5 has the same meaning as under FAR 33.101. *See* FAR, *supra* note 2, at 15.501. Thus, in counting days, the first day encompassing the event is excluded, but the last day for counting is included, except where the last day is a non-business day, in which case the total includes the next business day. The GAO uses the same approach for counting "days" in bid protests. *See* 4 C.F.R. § 21.0(e) (2000). *See also* Int'l Res. Group, Comp. Gen. Dec. B-28663, 2001 CPD ¶ 35 (interpreting "three day" rule of FAR 15.505(a)(1).

17. FAR, *supra* note 2, at 15.505(a)(2).

18. *Id*. at 15.505(a)(3).

19. 10 U.S.C. § 2305(b)(6)(A); 41 U.S.C. § 253b(f)(1).

20. Global Eng'g & Constr., Joint Venture, Comp. Gen. Dec. B-27599.3, 97-1 CPD ¶ 77.

21. 10 U.S.C. § 2305(b)(6)(a); 41 U.S.C. § 2536b(f)(1); FAR 15.505(b).

22. *Id*. at 15.506(a)(2). Although no cases address the issue, it would appear that an electronic mail message should qualify, because a document can be "signed" when sent via electronic mail. *See id*. at 2.101 (defining "signature").

23. *Id*. at 15.506(a)(3).

24. *Id*. at 15.506(a)(4)(i). Notwithstanding this permissive rule, agencies characteristically accommodate untimely debriefing requests. FAR 15.506(a)(4)(i) *analyzed in* Beneco Enters., Inc., Comp. Gen. Dec. B-283154, 2000 CPD ¶ 69.

dures in the solicitation, applicable regulations, and other applicable authorities were followed in the process of eliminating the offeror from the competition.[25]

A pre-award debriefing "shall not" disclose:

(1) The number of offerors;

(2) The identity of other offerors;

(3) The content of other offerors' proposals;

(4) The ranking of other offerors;

(5) The evaluation of other offerors; or

(6) Any other information prohibited from disclosure by FAR 15.506(e).[26]

Regarding prohibited information, FAR 15.506(e) precludes point-by-point comparisons with other offerors' proposals and disclosure of trade secrets, confidential commercial or financial information, or the names of persons providing past performance references about an offeror.[27]

At a minimum, the post-award debriefing information shall include:

(1) The Government's evaluation of the significant weaknesses or deficiencies in the offeror's proposal;

(2) The overall evaluated cost or price (including unit prices), and technical rating, if applicable, of the successful offeror and the debriefed offeror, and "past performance information"[28] on the debriefed offeror;

(3) The overall ranking of all offerors, when any ranking was developed by the agency during the source selection;

(4) A summary of the rationale for the award;

(5) The make and model of the item to be delivered by the successful offeror in a commercial item procurement; and

(6) Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed.[29]

The restrictions in FAR 15.506(e) for pre-award debriefings, summarized above, have equal force in post-award debriefings. In addition, the agency must make a record of both pre-award debriefings[30] and post-award debriefings.[31]

Relationship to GAO Timeliness Regulations

To account for the revised FAR debriefing rules, GAO has changed its protest timeliness regulations.[32] Ordinarily, when making a challenge other than one to the terms of a solicitation, a protester under 4 C.F.R. § 21.2(a)(2) must file its complaint with GAO not later than ten days after the basis of protest is known, or should have been known, whichever is earlier. When the offeror obtains a required debriefing, a qualification exists. In this situation—when a protest is known or should have been known, either before or as a result of the debriefing—the initial protest may be filed only within ten days *after* the date the debriefing occurs. The policy for the revised rule is to encourage early and meaningful debriefings and to preclude "strategic" or "defensive" protests, such as protests filed before the offeror has actual knowledge that a basis for protest exists or in anticipation of improper actions by the agency.[33]

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25. 10 U.S.C. § 2305(b)(6)(C) (2000); 41 U.S.C. § 253b(f)(3) (2000); FAR, *supra* note 2, at 15.505(e).

26. 10 U.S.C. § 2305(b)(6)(D); 41 U.S.C. § 253b(f)(4); FAR, *supra* note 2, at 15.505(f).

27. FAR, *supra* note 2, at 15.506(e) (stating the debriefing may not reveal information that is exempt from disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), and the implementing regulation, FAR 24.202). *See also* 10 U.S.C. § 2305(b)(5)(C), 41 U.S.C. § 253b(e)(3).

28. *See* FAR, *supra* note 2, at 42.1501.

29. 10 U.S.C. § 2305(b)(5)(B); 41 U.S.C. § 253b(e)(2); FAR, *supra* note 2, at 15.506(d).

30. FAR, *supra* note 2, at 15.505(g).

31. *Id.* at 15.506(f).

32. 4 C.F.R. § 21.2 (2000).

33. *See* Minotaur Eng'g, Comp. Gen. Dec. B-276843, 97-1 CPD ¶ 194; Real Estate Ctr., Comp. Gen. Dec. B-274081, 96-2 CPD ¶ 74 (explaining revised regulation).

The GAO has strictly enforced the revised protest timeliness regulation. The rule forbidding pre-"required debriefing" protests applies even if the protester knew the basis of the complaint before the debriefing. Thus, in *Real Estate Center*, the agency rejected the protester's offer on 7 August 1996, and the protester timely invoked its right to a "required" debriefing.[34] Although the agency had not yet responded to the request, the protester filed its challenge to the award with GAO on 9 August 1996. Since the protester filed its complaint before the required debriefing, the GAO dismissed the protest under 4 C.F.R. § 21.2(a)(2).[35]

The revised GAO timeliness rules pertain only to "required" debriefings. If the protester challenging an award fails to make a timely, written request for a debriefing per FAR 15.506, but obtains a debriefing anyway, then the usual timeliness rules under 4 C.F.R. § 21.2(a)(2) will control.[36] Thus, in such circumstances, no preclusive filing rule pertains to protest grounds that are known or should have been known before the debriefing.

Delayed pre-award debriefings could also affect the timeliness of any protest filed subsequent to the debriefing.[37] This rule for potential protesters was nicely illustrated in *United International Investigative Services, Inc*.[38] In this GAO decision, the agency informed the protester on 8 June 2000 that its proposal was excluded from the competitive range. The next day, the protester sought a pre-award debriefing pursuant to FAR 15.505, but also requested that the debriefing be delayed until after award. On 13 September 2000, the agency made the award to another offeror. The agency provided the protester a written debriefing on 19 September 2000, and the protester filed a GAO protest on 22 September 2000, challenging its exclusion from the competitive range.[39]

The agency argued that the GAO should dismiss the protest as untimely because the protester had failed to pursue diligently the grounds for complaint. The protester countered that its complaint was timely under 4 C.F.R. § 21.2(a)(2), because it was filed on 22 September 2000, which was fewer than the ten days required under the regulation. The GAO agreed with the agency and dismissed the protest under 4 C.F.R. § 21.2(a)(2), reasoning:

> (1) The protester did not actually request a pre-award debriefing, but merely requested that its debriefing be delayed until after award. Therefore, the written debriefing the agency provided on September 19, 2000, was not a "required" debriefing under the applicable statute, 41 U.S.C. § 2453b(f) [and, inferentially, FAR 15.506(a)(1)]; and
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> (2) Since the debriefing was not "required" under the statute, the rules of 4 C.F.R. § 21.2(a)(2) applied, i.e., the protest was required to be filed within 10 days after the basis of the protest was known, or should have been known, whichever was earlier. Since the protester waited more than three months until it protested in September, 2000, the protester was guilty of failing to pursue the protest grounds diligently, which required GAO's invocation of 4 C.F.R. § 21.2(a)(2) to dismiss the complaint.[40]

Debriefings and Agency Corrective Action

During a one-year period after a contract award, when a protest causes the agency to take corrective action on the procurement—that is, to issue either a new solicitation or a new request for revised proposals on the award—the agency has certain disclosure obligations. Under FAR 15.507(c), the agency shall make available to all prospective offerors (for a new solicitation) and for all competitive range offerors (for any final proposal revisions) the following information: (1) materials contained in any debriefing conducted on the original award about the successful offeror's proposal, and (2) other nonproprietary information that would have been provided to the original offerors.[41]

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34. Comp. Gen. Dec. B-274081, 96-2 CPD ¶ 74.

35. *Id.*

36. *See* Trifax Corp., Comp. Gen. Dec. B-279561, 98-2 CPD ¶ 24, at 5; Minotaur Eng'g, Comp. Gen. Dec. B-276843, 97-1 CPD ¶ 194, at 4 n.2. *See also* Empire State Med. Scientific & Educ. Found., Inc., Comp. Gen. Dec. B-238012.2, 90-1 CPD ¶ 261; Beneco Enters., Inc., Comp. Gen. Dec. B-283154, 2000 CPD ¶ 69.

37. FAR, *supra* note 2, at 15.505(a)(2). In a similar vein, FAR 15.506(a)(4)(ii) states that for post-award debriefings, "Government accommodation of a request for a delayed debriefing pursuant to 15.505(a)(2), or any untimely debriefing request, does not automatically extend the deadline for filing protests." *Id.* at 15.506(a)(4)(ii). These rules regarding pre-award and post-award required debriefings are inapplicable when the agency, and not the offeror, delays setting the required debriefing.

38. Comp. Gen. Dec. B-286327, 2000 CPD ¶ 173.

39. *Id.*

40. *Id.*

The United States Court of Federal Claims has held that this regulation does not authorize the agency's disclosing information under the above standard when the agency elected to make no award on the procurement, or decided to reopen negotiations after making an initial award.[42] Furthermore, even where the agency fails to satisfy FAR 15.507(c), such an omission is not grounds for protest absent proof of competitive prejudice—that is, evidence that, but for the agency's action, the protester would have had a substantial chance of receiving the award.[43]

Frequently, the agency takes corrective action on an award decision after an unsuccessful offeror submits a protest based on information learned from the debriefing. The awardee usually finds this process disconcerting because the agency in a post-award debriefing will commonly reveal to a competitor the awardee's overall and unit prices, which are required disclosures under FAR 15.506(d)(2). Under what circumstances may the awardee challenge the corrective action based on such debriefing disclosures? The GAO has held that reasonable corrective action on an award decision will be valid, notwithstanding that the unsuccessful offerors had debriefings under FAR Subpart 15.5. The reason is that no unfair competitive advantage results where an agency discharges its debriefing obligations and later events require reopening of the procurement.[44] Similarly, the GAO has rejected protesters' arguments that the public disclosure of the awardee's prices at a debriefing creates an improper price revelation or other unfair negotiation practice.[45] The GAO holds that the importance of correcting an improper award through further negotiations outweighs any harmful effect on the integrity of the competitive procurement system resulting from an otherwise proper disclosure of the awardee's prices.[46]

Legal Challenges to Debriefings

Disappointed offerors are almost uniformly unsuccessful in challenging the quality or conduct of the debriefing, as opposed to the underlying evaluation and source selection. In case law principles that remain valid with the current version of the debriefing statutes and regulations, the Comptroller General has ruled:

> (1) The agency's best interests decision to decline a pre-award debriefing is not a cognizable protest issue;[47]
>
> (2) The scheduling of a debriefing is a procedural issue, and not independent grounds for protest;[48]
>
> (3) The agency's alleged failure to provide an adequate debriefing is a procedural matter that has no affect on an otherwise valid award;[49]
>
> (4) No requirement exists for the agency to answer questions to the offeror's satisfaction;[50]
>
> (5) Any agency miscommunications or misinformation at a debriefing are procedural matters that have no affect on the validity of an actual evaluation and award decisionmaking;[51]
>
> (6) An offeror has no grounds for overturning an award when the agency fails to respond to

41. FAR, *supra* note 2, at 15.507(c).

42. DGS Contract Serv., Inc. v. United States, 43 Fed. Cl. 227, 237 (1999); Fore Sys. Fed., Inc. v. United States, 40 Fed. Cl. 490, 491 (1998).

43. Norvar Health Services—Protest and Reconsideration, Comp. Gen. Dec. B-286253.2, 2000 CPD ¶ 204. The same result should hold in the Federal Circuit, which has a similar standard on competitive prejudice. *See infra* note 59.

44. *Norvar*, 2000 CPD ¶ 204 at 4-5. Agencies have broad discretion in a negotiated procurement to take corrective action when the agency determines that such action is needed to ensure fair and impartial competition. Rockville Mailing Servs., Inc., Comp. Gen. Dec. B-270161.2, 96-1 CPD ¶ 184, at 4; DGS Contract Serv., 43 Fed. Cl. at 238. No requirement exists for the agency to be certain that a protest will be sustained before it takes corrective action, provided the agency has a reasonable basis for its decision. Main Bldg. Maint., Inc., Comp. Gen. Dec. B-279191.3, 98-2 CPD ¶ 47, at 3.

45. *Norvar*, 2000 CPD ¶ 205; Computing Devices Int'l, Comp. Gen. Dec. B-258554.3, 94-2 CPD ¶ 162.

46. *See* cases cited *supra* notes 44-45; *see also* Navcom Def. Elecs., Inc., Comp. Gen. Dec. B-276163.3, 97-2 CPD ¶ 126; Park Sys. Maint., Inc., Comp. Gen. Dec. B-252453.4, 93-2 CPD ¶ 265; Anderson-Hickey Co., Comp. Gen. Dec. B-250045.3, 93-2 CPD 15; Telesec Library Services—Reconsideration, Comp. Gen. Dec. B-245844.3, 92-2 CPD ¶ 103.

To alleviate any unfairness resulting from such disclosures, however, the agency may release the prices of all competitors as an appropriate remedial action where one competitor obtained the "awardee's" prices in a debriefing and the agency properly opened negotiations. *See DGS Contract Service*, 43 Fed. Cl. at 237-38 (citing GAO decisions and noting that such disclosures do not violate the Procurement Integrity Act, 41 U.S.C. § 423).

47. Global Eng'g & Constr., Joint Venture, Comp. Gen. Dec. B-275999.3, 97-1 CPD ¶ 77. Based on *Global Engineering*, the FAR guidance on pre-award debriefings has little compulsory force for procuring agencies. *See also* Ralph C. Nash & John Cibinic, *Pre-Award Debriefings: Get Them Over Quickly*, NASH & CIBINIC REP., Apr. 1998, at 59 (criticizing *Global Engineering*) ("[T]he Comptroller's refusal to review such actions appears to permit the agency to arbitrarily deny a pre-award debriefing, thus thwarting congressional policy.").

a request for a debriefing,[52] totally denies the firm a debriefing,[53] or intentionally postpones a debriefing;[54] and

(7) The agency commits no protestable error when it excludes an offeror representatives from attending a face to face session.[55]

Practical Considerations

Quality debriefings are hard to accomplish. The principal debriefers are typically engineers or other technical personnel, and not always well-versed in the statutes and regulations governing evaluation of competitive proposals. Debriefings require quick agency responses in pressure-filled situations, and once the agency makes a verbal slip-up, the damage might not be reversible. If the agency has reviewed many proposals and receives requests from numerous unsuccessful offerors, the challenge only increases.

As stated above, perhaps the most frequently recurring legal issue in a debriefing is whether the agency followed the RFP's announced evaluation factors. By adhering to some key practical strategies, as described below, the procuring activity will likely provide the offeror with solid assurance that the agency properly evaluated the proposal.

Be Prepared

The first prerequisite for a successful debriefing is sound preparation by the debriefers. These persons should have a thorough understanding of the solicitation, the evaluation record, and the proposal of the awardee and the offeror being debriefed. Nothing more undermines the confidence of an offeror being debriefed more than when agency representatives are unprepared or, even worse, make mistakes in discussing the deficiencies and weaknesses of the proposal. Preferably, the debriefers should have a session before the debriefing to plan the approach and to assign duties and responsibilities. The agency also should bring the solicitation, the evaluation record, and the full proposal to the debriefing so that proper research can be done on the spot to answer all valid questions properly. Another helpful technique is to ask the offeror beforehand if it has specific concerns that it wants addressed during the debriefing.

Opening the Debriefing

Before a telephonic or in-person debriefing, the debriefers should ensure that each offeror representative identifies himself or herself and his or her duty for the offeror. If possible, the agency should obtain this information before the debriefing so that the agency can ensure that the right mix of people represents the procuring activity. Agency representatives should provide a similar introduction of its personnel.

If the offeror is accompanied by an attorney, a strong possibility exists that the offeror is considering a protest against the award. Therefore, the debriefing should not continue until the agency is similarly represented by counsel. In fact, since agency counsel are integral members of the acquisition team, as recognized by Army Federal Acquisition Regulation Supplement 1.602-2(c)(i),[56] counsel should be present in any event, depending on availability. If the agency is conducting a telephonic debriefing, the agency should request that the offeror not make a tape recording unless the government consents to this procedure.

48. Canadian Commercial Corp., Comp. Gen. Dec. B-222515, 86-2 CPD ¶ 73.

49. *See* Senior Communications Servs., Comp. Gen. Dec. B-233173, 89-1 CPD ¶ 37; *cf.* United Int'l Investigative Servs., Inc. v. United States, 42 Fed. Cl. 73, 79 n.7 (1998) (implying that a violation of the rules on debriefing could be grounds for protest where it created a substantial likelihood of competitive prejudice regarding the award).

50. *See* Trellclean USA, Inc. Comp. Gen Dec. B-213227.2, 84-1 CPD ¶ 661 (predating current FAR Subpart 15.5, but still good law). Indeed, it appears that denying the firm any chance to pose questions is not protestable before the GAO. *See* Acquest. Dev. LLC, Comp. Gen. Dec. B-287439, 2001 CPD ¶ 101 (rejecting protest that firm did not have an opportunity to ask questions regarding a written debriefing).

51. *See* CACI Field Servs., Inc., Comp. Gen. Dec. B-234945, 89-2 CPD ¶ 97, at 3 n.1 (citing BDM Mgmt. Servs. Co., Comp. Gen. Dec. B-228287, 88-1 CPD ¶ 93). Professors Nash and Cibinic have suggested that "if the improper information received at the debriefing was the cause of the protest, the protester should obtain the costs of filing and pursuing the protest until the correct information was obtained." *See* Ralph C. Nash & John Cibinic, *Debriefing: Tell It Like It Is*, NASH & CIBINIC REP., July 1990, at 102. No cases were found addressing this theory.

52. Emerson Elec. Co., Comp. Gen. Dec. B-213382, 84-1 CPD ¶ 233.

53. Piezo Crystal Co., Comp. Gen. Dec. B-236160, 89-2 CPD ¶ 477.

54. Reliability Sciences, Inc., Comp. Gen. Dec. B-212582, 84-1 CPD ¶ 493.

55. Wilderness Mountain Catering, Comp. Gen. Dec. B-280767.2, 99-1 CPD ¶ 4 (protester's counsel).

56. *See* AFARS, *supra* note 7, at 1.602-2(c)(i) ("Legal counsel participates as a member of the contracting officer's team throughout the acquisition process, from acquisition planning through completion and close out of contracts.").

Disclose the Ground Rules

Before the agency and the debriefed firm discuss the offeror's proposal, agency debriefers should inform the offeror of the regulatory ground rules for debriefings. Debriefed offerors commonly push the agency to go beyond the FAR requirements for debriefings, especially regarding comparisons between the proposals of the offeror and the awardee. Providing the debriefed offeror the ground rules up-front can prevent wasting time declining to answer questions about the awardee's proposal or the awardee's evaluation.

Provide a Handout

Give the offeror a handout summarizing the weaknesses and deficiencies in the offer. Be clear whether the proposal point is a "weakness," "significant weakness," or "deficiency," as defined in FAR 15.301.[57] This handout will save time and focus the parties' attention on the pertinent issues. The paper will also become part of the record if a dispute arises in a protest about what the agency communicated during the debriefing.

Disclose the Offeror's Full Evaluation

Nothing in FAR 15.505 or 15.506 precludes the agency from disclosing the offeror's full evaluation, including its ratings. The offeror has invested substantial resources in submitting the offer and attending the debriefing; therefore, the meeting should be meaningful and productive. Regarding the offeror's own evaluation, the only information that needs to be protected is the names of past performance references.[58] In fact, the offeror might be more interested in knowing or confirming the strengths or advantages that the agency found in the proposal, in addition to the weaknesses. The sole qualification to the above advice is that stray references in one offeror's evaluation to another offeror's proposal must be excised.

Be Specific

Focus on the particular aspects of the proposal in communicating strengths, weaknesses or deficiencies, as opposed to generalities. Thus, instead of saying that an offeror was "weak on management," say that "the offeror had excessive layers of management control that would likely lead to inefficiency and delay in executing the project."

Avoid Surprises

If the agency held pre-award discussions during the acquisition, the debriefers should comment on the same deficiencies and weaknesses with the offeror that were disclosed during discussions. Under FAR 15.306(d)(3), the agency is required to discuss with all competitive-range offerors, before any award, the significant weaknesses, deficiencies, and other aspects of the proposal that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award. If the agency raises new concerns in the debriefing, the offeror could file a protest, arguing that the agency violated its duty to provide meaningful discussions. Such a protest on the lack of proper discussions could succeed if the omission caused competitive prejudice, that is, a reasonable possibility that, but for the agency's actions, the protester would have had a substantial chance of receiving an award.[59]

In a related issue, the agency should ensure that in discussing the evaluation process, the agency does not give the impression the contracting officer deviated from the announced evaluation criteria, either by overlooking the solicitation's stated factors or by referencing new considerations. As stated above, law and regulation require agencies to evaluate proposals in compliance with the announced evaluation factors, the same as the GAO and the other protest decision makers.[60] If the agency's contemporaneous evaluation was legally sufficient, however, any misstatements at the debriefing are procedural

57. A "deficiency" is a material failure of a proposal to meet a government requirement or a combination of significant weaknesses that increase the risk of unsuccessful contract performance to an unacceptable level. A "weakness" is a flaw in the proposal that increases the risk of unsuccessful contract performance. A "significant weakness" is a flaw in the proposal that appreciably increases the risk of unsuccessful contract performance. FAR, *supra* note 2, at 15.301.

58. *Id.* at 15.506(e)(4).

59. *See* Metro Machine Corp., Comp. Gen. Dec. B-281872, 99-1 CPD ¶ 101, at 9. The GAO's prejudice standard in *Metro Machine* relied in part upon the United States Court of Appeals for the Federal Circuit's decision in *Statistica, Inc. v. Christopher*, 102 F.3d 1577 (Fed. Cir. 1996). In *Statistica*, the court considered a protest case on appeal from the General Services Board Administration, Board of Contract Appeals under the since-repealed Brooks Act, 40 U.S.C. § 759. In articulating its standard for competitive prejudice in a protest after award, the *Statistica* court ruled that, but for the alleged error, there must be a substantial chance that the protester would have received the award. *Statistica*, 102 F.3d at 1581-82. The GAO sees no substantive difference between its "reasonable possibility" standard and the Federal Circuit's "substantial chance" approach. *See* Anthem Alliance for Health, Inc., Comp. Gen. Dec. B-278189.3, 98-2 CPD ¶ 66, at 6 n.9 (analyzing Federal Circuit precedent).

Other GAO decisions relied on the Federal Circuit's competitive prejudice standard in various contexts. *See, e.g.*, Bristol-Myers Squibb Co., Comp. Gen. Dec. B-281681.12, 2000 CPD ¶ 23; SBC Federal Sys., Comp. Gen. Dec. B-283693, 283693.2, 2000 CPD ¶ 5; McHugh/Calumet, Joint Venture, Comp. Gen. Dec. B-276472, 97-1 CPD ¶ 226.

60. *See* 10 U.S.C. § 2305(b)(1) (2000); 41 U.S.C. § 253b(a)(2000); FAR, *supra* note 2, at 15.303(b)(4), 15.304(a); Consol. Eng'g Servs., Inc., Comp. Gen. Dec. B-279565.2, 99-1 CPD ¶ 75, at 2; Latecoere Int'l, Inc. v. U.S. Dep't of Navy, 19 F.3d 1342, 1350 (11th Cir. 1994); ITT Fed. Servs. Corp. v. United States, 45 Fed. Cl. 174, 194 (1999). The GAO also applies the same competitive prejudice test described in note 59, *supra*, concerning alleged misevaluation of proposals. *See, e.g.*, Nat'l Toxicology Labs., Inc., Comp. Gen. Dec. B-281074.2, 99-1 CPD ¶ 5, at 6 n.4.

matters that should have no affect on the validity of the actual evaluation and selection decision.[61]

Speak with One Voice

Agency representatives should not undermine or contradict one another during the debriefing. Disunity among the government representatives impairs teamwork, lowers confidence by debriefed offerors, and could make a protest more likely. If a government speaker makes a misstatement, another government representative should pass a note to the speaker. If necessary, a recess may be taken so that the government team can discuss the point in more depth.

Be Vigilant Against Improper Disclosures

Debriefed offerors often display inordinate curiousity about the content of their competitors' proposals. Resist these efforts! The agency may not disclose, directly or indirectly, the content of any other proposal in a pre-award debriefing.[62] The only information that bears upon the content of the awardee's proposal that the agency must disclose in a post-award debriefing is the successful offeror's prices and overall rating,[63] and the summary of the rationale for the award.[64]

Commonly, debriefed offerors ask for the government price estimate and a copy of the schedule from the contract containing the awardee's prices. Are these disclosures proper? In a pre-award debriefing, while the procurement is on-going, release of the government estimate would clearly be inappropriate because it would harm the agency's ability to negotiate fair and reasonable prices.[65] These concerns are absent with a post-award debriefing, and the release is proper unless the same government estimate will be used for another procurement where similar concerns exist.[66] Regarding the contract, release of the unit prices in awarded contracts is proper under DOD guidance.[67] The only exception is where the contract schedule reveals the awardee's profit, general and administrative expense rate, or other commercially sensitive information. These items should be redacted from the document.[68]

Be Honest and Point Out the Positives

Offerors who fail to obtain an award after making a substantial investment of their bid and proposal dollars must make a business decision on whether to compete for future contracts from the particular agency. Some unsuccessful offerors will have no real chance of getting business from the agency, but other offerors will be on the edge of future success. Agencies should give a debriefed offeror a frank and specific assessment of its capabilities—the vendor will appreciate sincerity and candor. Also, where an offeror has strengths, agencies should point these out because an offeror needs to know about its strengths as well as its weaknesses.

Solicit the Offeror's Views

Debriefings are intended to be a dialogue. Many agencies frequently forego the opportunity to solicit the offeror's frank assessment of the agency's own acquisition process. Often, the offeror can provide the agency with many constructive suggestions on how to improve future procurements. Since the debriefed offeror frequently will have its senior personnel in attendance, the agency has a perfect opportunity to obtain helpful, knowledgeable input from the offeror.

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61. *See supra* note 51 and accompanying text.

62. FAR, *supra* note 2, at 15.505(f)(3).

63. *Id.* at 15.506(d)(2).

64. *Id.* at 15.506(d)(4).

65. *See id.* at 36.203(c) (government estimate for construction projects); *see also* Gov't Land Bank v. Gen. Servs. Admin., 671 F.2d 613 (1st Cir. 1982); Morrison-Knudsen v. Dep't of the Army, 595 F. Supp. 352 (D.D.C. 1984), *aff'd*, 762 F.2d 138 (D.C. Cir. 1985); Hack v. Dep't of Energy, 538 F. Supp. 1098 (D.D.C. 1982). The government estimate also could be protected from disclosure before award as source selection information under the procurement integrity rules of FAR 3.104.

66. Unless a continued need exists for confidentiality, the need for the privilege diminishes after award. *Cf.* Federal Open Market Committee, 443 U.S. 340, 360 (1979) (an Exemption Five case under FOIA, 5 U.S.C. § 552(b)(5)) (holding the rationale for protecting confidential government commercial information expires upon contract award).

67. *See* Memorandum, Office of the Assistant Secretary of Defense, subject: Release of Unit Prices in Awarded Contracts (Feb. 6, 1998). *But see* McDonnell Douglas Corp. v. NASA, 180 F.3d 303 (D.C. Cir. 1999) (arguably following a stricter view in cases under the FOIA).

68. *See* Pacific Architects & Eng'rs. v. U.S. Dep't of State, 906 F.3d 1345, 1347 (9th Cir. 1990); Acumenics Research & Tech. v. Dep't of Justice, 843 F.2d 800, 807-08 (4th Cir. 1988); Environmental Technology, Inc. v. EPA., 822 F. Supp. 1226, 1229 (E.D. Va. 1993) (a "reverse" FOIA cases). In providing notice of award to unsuccessful offerors, the agency may not reveal an offeror's cost breakdowns, profit, overhead rates, trade secrets, manufacturing processes and techniques, or other confidential business information to any other offeror. FAR, *supra* note 2, at 15.503(b)(1)(v).

Conclusion

Debriefings in negotiated acquisitions are an effective tool in giving meaningful information to unsuccessful offerors. This article summarized the applicable regulatory and case law principles governing debriefings, and also identified some practical pointers in assisting government personnel to avoid common pitfalls. Poorly handled, debriefings can create controversy and needless protests, both to the detriment of the procurement system and the agency's mission.