New rules issued last week to all defense agencies significantly bolster the rights of government contractors to learn from, and potentially protest in response to, required post-award debriefings provided pursuant to Part 15 of the Federal Acquisition Regulation (FAR).

Defbriefing Background

Most contractors are familiar with post-award debriefings—and the frustration that often surrounds them. FAR 15.506 provides that, if an offeror for a procurement conducted under FAR Part 15 procedures requests a debriefing in writing within three calendar days after the agency’s award notice, the offeror is entitled to a debriefing, which may be conducted “orally, in writing, or by any other method acceptable to the contracting officer.” Whatever their form, post-award debriefings often reveal little more than the minimum information required by FAR 15.506(d), such as the awarded cost/price, the offerors’ high-level technical ratings and a perfunctory statement of the basis for award. Although FAR 15.506(d) also
requires agencies to provide “reasonable responses to relevant questions” as part of the debriefing, many agencies often assign little importance to this requirement and fail to provide contractors a fair opportunity to submit questions or to receive useful responses before the agency deems the debriefing closed. Thus, to the offeror’s chagrin, post-award debriefings often have failed to shed significant light on agency award decisions.

Compounding offerors’ information deficit in connection with post-award debriefings is the very narrow window a disappointed offeror has to file a bid protest at the Government Accountability Office (GAO). Under the Competition in Contracting Act of 1984 (CICA) (codified in several chapters of the U.S. Code, with relevant regulations at FAR Part 33), an offeror must file a protest at GAO within five calendar days of the close of its debriefing in order to obtain an automatic stay of performance of the new award. Without the “CICA stay,” many GAO protests would become academic exercises. Thus, many a disappointed offeror has felt compelled to file a protest despite possessing little information about the award decision and little time to consider its options or to engage with the agency. New rules applicable to defense agencies promise to improve both aspects of this situation for many contractors.

**New Class Deviation**

On March 22, 2018, the Defense Department issued FAR Class Deviation No. 2018-O0011, titled “Enhanced Postaward Debriefing Rights,” which implements provisions of the National Defense Authorization Act of 2018 (2018 NDAA).[1] The Class Deviation provides that “[e]ffective immediately,” contracting officers “shall” provide unsuccessful offerors “an opportunity to submit additional questions related to the debriefing within two business days after receiving the debriefing.” Moreover, agencies “shall respond in writing” within five business days after the receipt of the questions. The Class Deviation, thus, attempts to ensure a more meaningful exchange of information between the agency and the offeror by imposing two new deadlines: the offeror now has two business days to consider its post-debriefing questions, and the agency must respond to those questions within five business days.

Perhaps most important is the Class Deviation’s next mandate: “The agency shall not consider the postaward debriefing to be concluded until the agency delivers its written responses to the unsuccessful offeror” and the “agency shall comply with the requirements of FAR 33.104(c) regarding the suspension of contract performance.” Defense agencies can no longer, for example, unilaterally declare an offeror’s debriefing to be closed on the day the debriefing began, thus starting the protest clock. Instead, an offeror’s debriefing will not conclude until it has received the agency’s answers to its debriefing questions. This rule will provide disappointed offerors reasonable additional time to develop debriefing questions, to consider the important decision whether to protest and, likewise, to determine the content of any protest.

This Class Deviation is an important step in the direction of transparency and fairness in defense procurements and allows disappointed offerors reasonably to exercise their statutory protest rights.
While this Class Deviation implements paragraphs (b) and (c) of section 818 the 2018 NDAA, it does not implement paragraph (a) of section 818. Under paragraph (a), DoD must establish new procedures to, among other things, include “disclosure of the agency’s written source selection award determination, redacted to protect the confidential and proprietary information of other offerors for the contract award” in the case of an award over $100 million, and “an option to request this disclosure” for a “small business or nontraditional contractor” in the case of an award above $10 million. For more information, see Pillsbury’s client alert on enhanced debriefing rights in the 2018 NDAA.