

# ***Late is Late: Debriefing Best Practices for Bid Protest Timeliness***

October 2020

The statutory scheme and regulatory implementation of the rules governing the timeliness of bid protests in negotiated procurements at the U.S. Government Accountability Office (GAO) are neither unduly complex nor counterintuitive. First, you have 10 calendar days from the date of award or from the close of a “required” debriefing to meet GAO’s strict timeliness rules. Second, you have 10 days from award or five calendar days from a required debriefing to secure the usually-critical Competition in Contracting Act (CICA) “automatic stay” of performance of the awarded contract. Simple, right? Well, often in the heat of post-award disappointment, firms may concentrate on the demerits of the award decision, and, in doing so, overlook the “little things” that can make a big difference in terms of whether GAO will entertain their protests or the agency must keep the awardee from proceeding with the work while the protest is litigated. A recent U.S. Court of Federal Claims (COFC) decision provides one judge’s view about the interplay between a debriefing and the automatic stay; the case deserves note by itself, but it also presents an opportunity for all contractors to refresh the basics of sound protest timeliness best practices.

On a complaint and motion by an unsuccessful offeror Nika Technologies, Inc. (Nika), COFC enjoined the Army Corps of Engineers (USACE) from permitting the awardee of a contract to proceed with the work pending resolution of Nika’s GAO protest. *Nika Technologies, Inc. v. U.S.*, 147 Fed. Cl. 690 (2020). Nika had requested and received a required written debriefing on March 4. USACE, under the DOD’s “enhanced” debriefing process, gave Nika two business days – until March 6 – to ask follow-up questions, the debriefing would be closed. Nika did not pose any questions and filed a protest

## **Practice Areas**

Bid Protests

Government Contracts

at GAO on March 10. USACE took the position that the five-day clock for automatic stay purposes began to run on March 4 because Nika had asked no questions. This would mean that Nika's March 10 filing was timely for GAO to decide the protest, but one day late to secure the automatic stay of performance under CICA. When USACE so informed GAO, Nika filed an action at COFC, seeking a CICA stay-based injunction and asserting that the debriefing process concluded on March 6, the last day on which Nika could ask further questions. COFC Judge Lettow sided with Nika for three reasons based on the controlling CICA provision, Section 2305 of the 2018 National Defense Appropriation Act (NDAA), which created enhanced debriefings, and the wording of the USACE debriefing letter itself.

The Government appealed COFC's ruling on June 25, and the case is pending before the U.S. Court of Appeals for the Federal Circuit. In light of this appeal and to protect the right to an automatic stay, when an enhanced debriefing is offered, a contractor should either ask additional post-debriefing questions within the two business days permitted to extend the debriefing or, if it elects not to submit additional questions, file its protest within five days of receiving the initial debriefing.

That's a good start of best practices to protect the automatic stay and file a timely protest. Here are a few more:

1. Sometimes minutes matter. Keep a chronology starting on the date, hour, and minute that the agency dispatches the award notice (not when you received it) – keep precise track of who did what, when they did it, and, as appropriate, why they did it.
2. Make a record of your written debriefing request and be on time. Phone or in-person conversations are inherently subject to ambiguity and differences of recollection. In accordance with Federal Acquisition Regulations (FAR) 15.506(a)(1), submit a written request for a debriefing, and do it within the three calendar days permitted. A good "muscle memory" is to submit the written debriefing request immediately upon receipt of the award notification.
3. Deal with the right person. Always submit any required communications to the person(s) specified in the solicitation. A message sent to, for example, a program manager, might be the same as not sending it at all.
4. Ask for a debriefing even if it seems pointless. Sometimes an agency will include debriefing materials with the award notice. You might think a debriefing request is unnecessary in that case. Don't. The statute requires a debriefing request, so make the request – your protest and automatic stay could be on the line.
5. What are your rights? Several commonplace procurement types, such as those under FAR subpart 8.4, do not provide for a CICA "required" debriefing, but agencies nonetheless will sometimes accommodate a post-award request for award information by, for example, providing a "brief explanation" (that is not a CICA-required debriefing). Determine whether a debriefing is "required" under CICA for your procurement. If not, you might file an untimely protest after a *permissive* debriefing.

6. Accept the first debriefing date offered. GAO will consider that your debriefing occurred on the earliest date offered by the agency. Thus, to maximize the time available, it's best to accept the first date that an agency proposes. If that's impossible, then use the offered date as the protest clock-starter.
7. Take care with civilian agencies. Only DOD "enhanced" debriefings have a statutory basis. Thus, whatever a civilian agency might offer mimicking the DOD process, it could prove to be insufficient to preserve the CICA stay. Read all communications from the agency about the debriefing carefully, and obtain in writing any commitments from the contracting officer to hold any debriefing open while the agency responds to any follow-up questions.
8. Follow up to ensure receipt. Electronic communications are a wonderful convenience, but Government IT systems can misdirect or block receipt. Call if you don't get acknowledgment of your message.
9. Don't wait until the last minute. *Email works at the speed of light, until it doesn't.* Furthermore, you should be aware of the agency's "close of business" for purposes of timely submitting your debriefing request and your questions as part of the enhanced debriefing process. Unless otherwise stated, FAR 33.101 provides that the close of business is presumed to be 4:30 p.m. local time for the receiving agency.

Finally, always assume the worst-case scenario. It costs a company little or nothing to take a conservative approach to its position in the high-stakes protest arena. If there is any doubt about whether, for example, you sent debriefing questions during the agency's business hours – assume you submitted the questions the next day and act accordingly. Close reading of all agency communications, double- and triple-checking your facts, and documenting all messages and requests can prevent disaster. The righteousness of your protest grounds means nothing if GAO dismisses the protest as untimely or if the awardee has a 100-day head start on contract performance because you didn't secure your CICA stay.