

Summer School: Recent Bid Protest Decisions on Timing Issues That Business Teams and In-House Counsel Need to Know

September 2018

The Government Accountability Office (GAO) issued decisions over the summer that make up a short course on proposal- and protest-related deadlines. For proposal/capture teams and in-house counsel involved in the debriefing and protest decision-making process, this article highlights two lessons involving debriefing requests and DOD's new "enhanced" debriefing procedures. These decisions reinforce a basic tenet of protest procedures: late still means late.

What Time Is a Debriefing Request Due?

For GAO protest filings, 5:30 p.m. Eastern is ingrained as the default deadline. But what about protest-related submissions to agencies, such as the written request for a debriefing under FAR 15.506(a)(1) that must be submitted within three days after receiving a notice that an offeror was not selected for award? According to GAO: unless another time is stated, meeting a filing deadline means receipt by the agency in full **by 4:30 p.m.** in the agency's local time.

In *Exceptional Software Strategies, Inc., B-416232, July 12, 2018*, an agency notified ESSI of its exclusion from the competitive range on a Thursday; the notice explained the agency's reasons for the exclusion. At 5:24 p.m. the following Monday, the agency received an email from ESSI requesting a debriefing. Two weeks later, the agency furnished a debriefing that included an account of the reasons for exclusion that was "nearly verbatim" of the initial notice.

Authors

Kara M. Sacilotto
Partner
202.719.7107
ksacilotto@wiley.law
Craig Smith
Partner
202.719.7297
csmith@wiley.law

Practice Areas

Government Contracts

Although ESSI subsequently filed a protest within ten days after receiving the debriefing, GAO dismissed the protest as untimely because it was filed more than ten days after ESSI first learned the reasons for its exclusion from the competitive range (via the exclusion notice). GAO determined that the safe harbor in GAO bid protest rule 4 C.F.R. § 21.2(a)(2) for protests filed within ten days of any “required” debriefing did not apply, because the debriefing the agency furnished to ESSI was not “required.”

Under FAR 15.505(a)(1), a pre-award debriefing is “required” only if the offeror submits a written request for one to the contracting officer within three days of receiving the exclusion notice. Here, due to the weekend, ESSI had until the Monday following receipt of the notice of exclusion to submit the written request for a required debriefing. So the question boiled down to whether the submission of that request at 5:24 p.m. on the third day was timely or late.

FAR 15.505 does not specify a time deadline for debriefing requests, so GAO looked to FAR Subpart 33.1, which governs protest procedures. FAR 33.101 defines “filed” to mean an agency’s complete receipt of a document “before its close of business.” Except when another time is stated, FAR 33.101 presumes “4:30 p.m. local time” to be the “agency close of business.”

Applying that rule to the debriefing request, GAO determined that the submission at 5:24 p.m. local time on the third day was too late to be considered submitted (or “filed”) that day, and thus was not timely submitted within three days. Consequently, the debriefing the agency ultimately furnished was not a “required” debriefing that extended ESSI’s period for filing a timely protest until ten days after the debriefing. And, because ESSI did not receive any new information in the debriefing that it had not already learned from the initial notice, the protest was dismissed as untimely.

Lesson learned: When it comes to debriefings, avoid any timing risk and submit your written request right away but, if you must submit the request on the third day, be sure to submit before 4:30 p.m. local time for the agency. In cases where the contracting activity may be overseas, that deadline could be earlier than anticipated. ***The 4:30 p.m. deadline also likely applies to agency-level protests***, which are subject to the same deadlines in FAR Subpart 33.1 that GAO applied in *Exceptional Software Strategies*.

“Enhanced Debriefings” are not Endless Debriefings

Another contractor ran afoul of protest deadlines by taking too many liberties with the March 22, 2018 DOD class deviation implementing Section 818 of the FY 2018 NDAA. The class deviation prescribes “enhanced debriefings” for disappointed offerors and states that contracting officers should inform these offerors that they can submit additional questions related to the debriefing within two business days of receiving the debriefing. The debriefing is to be held open until the agency provides its written responses.

In *State Women Corp., B-416510, July 12, 2018*, State Women Corp. (SWC) lost a competition to construct a new morgue and visitation center at the Kabul National Military Hospital in Afghanistan. After SWC’s timely request, the Army Corps of Engineers provided a written debriefing that invited SWC to submit any additional questions relating to the debriefing within the class deviation’s two-day window.

SWC timely submitted written questions, and the Corps responded in writing within a few days. The Corps' response expressly stated that the debriefing was "hereby concluded." But the following week, SWC submitted additional questions, which the Corps responded to almost two weeks later. Four days after receiving these additional responses—but more than three weeks after receiving answers to its first round of follow-up questions—SWC filed a protest at GAO.

The Corps filed a motion to dismiss, arguing that to be timely a protest must be filed "[f]ive days after the Government delivers its written response to additional questions by the unsuccessful offeror," and citing text in the class deviation that establishes when an agency must stay performance of the awarded contract in accordance with the Competition in Contracting Act (CICA). SWC responded that its protest was timely because it was filed within five days of receiving the Corps' response to its second set of questions.

GAO found the protest untimely, but not for the reasons the Corps advanced. As GAO noted, a timely protest must be filed within ten days of a required debriefing. The enhanced debriefing class deviation does not change GAO's deadlines for a timely protest—the five-day deadline cited by the agency determines only whether the protest filing triggers an automatic stay of performance under CICA (an issue generally outside GAO's purview). The real timeliness issue was that SWC's protest was not based on new information learned from the agency's responses to SWC's second round of debriefing follow-up questions, so the protest was not filed within ten days of the conclusion of SWC's required debriefing.

For GAO, the only question was whether the agency held the debriefing open after it responded to SWC's first round of debriefing questions. Because the Corps specifically stated that the debriefing was "hereby concluded" when it responded to the first round of questions, GAO concluded that the debriefing did not remain open for subsequent rounds of additional questions. GAO explained that SWC's dissatisfaction with its debriefing, and its posing continued questions to the agency, did not extend the time for filing a protest based on the debriefing. GAO further found no support in either FAR 15.506(d) or the class deviation "for the proposition that an offeror is entitled to multiple rounds of postaward debriefing questions."

Lesson learned: Be thankful for what you get. Under the enhanced debriefing class deviation, a disappointed offeror for a DOD competition subject to FAR 15.506(d) should be provided at least one opportunity to submit questions and receive a written response. Although that offeror might continue to ask questions, and the agency might continue to entertain them, if the agency says the debriefing is over, it is over. And, if the agency does not indicate one way or the other whether the debriefing remains open, it is best to ask and get an express answer that the agency is holding the debriefing open for additional rounds of questions. Although GAO will resolve ambiguities about timing in favor of the protester, *see Harris IT Servs. Corp.*, B-406067, Jan. 27, 2012, it is better to be safe than sorry.