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ALERT

DoD Issues Final Rule on Enhanced Post-Award Debriefings

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WHAT: The U.S. Department of Defense (DoD) issued a final rule implementing the requirement for enhanced debriefings established in Section 818 of the National Defense Authorization Act (NDAA) for Fiscal Year 2018 and since governed by Class Deviation 2018O0011.

WHEN: DoD published its final rule in the Federal Register on March 18, 2022.

WHAT DOES IT MEAN FOR INDUSTRY: Industry has been operating under a Class Deviation that provided for enhanced debriefings, but did not expressly allow offerors, in procurements worth over $10 million, to receive a redacted source selection decision. The final rule fills that gap. In addition, DoD "simplified the text throughout the final rule to address potential confusion and adopt the plain language interpretation in *[Nika Techs., Inc. v. United States*, 987 F.3d 1025 (Fed. Cir. 2021)]." As we previously wrote, the proposed rule had numerous inconsistencies. The final rule applies to contract, certain task order, commercial item, and commercial-off-the-shelf (COTS) awards, but not awards below the simplified acquisition threshold. Although the final rule resolves some of the proposed rule's ambiguities, it does not resolve all of them. The main thrust of the rule and the remaining ambiguities are addressed below.

First, DoD's final rule implements the NDAA requirement for offerors to receive a redacted source selection decision for small business awards over $10 million and for large business awards over $100 million in new DFARS 215.506(d). It implements the requirement for DoD to allow submission of follow-up questions within two business days and hold the debriefing open until the offeror receives written responses to those questions in new DFARS 215.506-70. Specifically,

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DFARS 215.506-70(c) states that the debriefing is not concluded until the later of (1) the date the debriefing is delivered or (2) if additional written questions are timely received, the date the agency delivers its written responses. This is consistent with the Federal Circuit's *Nika* decision.

The final version of DFARS 233.104, which identifies when a stay of performance is implemented in response to a U.S. Government Accountability Office (GAO) protest, is more closely aligned with DFARS 215.506-70 than in the proposed rule. The preamble to the final rule also states that DoD "clarified" the final rule to provide that the 5-day protest window in FAR 33.104 "begins on the date that the postaward debriefing is offered, unless additional questions are received within two business days after the debriefing date." If questions are received, the window does not begin until the agency's responses are received.

Nonetheless, despite this attempt at alignment, DFARS 233.104 and DFARS 252.216-7010 introduce new ambiguities. First, DFARS 233.104(c) addresses what makes a post-award GAO protest timely so as to require a stay of performance and applies "[i]n lieu of the time periods in FAR 33.104(c)(1)." Under the rule, a timely post-award GAO protest triggering a stay must be filed:

> (A) Within 10 days after the date of contract award;
>
> (B) Within 10 days after the date a task order or delivery order is issued, where the value exceeds $25 million (10 U.S.C. 2304c(e));
>
> (C) Within 5 days after a debriefing date offered to the protestor under *a timely debriefing request in accordance with FAR 15.506 regardless of whether the protestor rejected the offered debriefing date, unless an earlier debriefing date is negotiated as a result*;
>
> or (D) Within 5 days after a postaward debriefing under FAR 15.506 is concluded in accordance with 215.506-70(b).

Although (A), (B), and (D), above, are pretty clear, subparagraph (C) is not. This subparagraph appears to address the situation in which an offeror rejects the first debriefing date offered by an agency, not the situation where it does not submit follow-up questions within two business days. But, it is not a straightforward statement of the timing rules. Accordingly, this oddly worded paragraph may create confusion for contracting officers and disappointed offerors alike.

Second, a similar error appears in DFARS 252.216-7010(b)(2), which states that a stay of performance of a post-award protest of a task or delivery order is required if a protest is filed "[w]ithin 5 days after a debriefing date offered to the protestor under a timely debriefing request in accordance with [FAR] 15.506 unless an earlier debriefing date is negotiated as a result." The bottom line is that the protest clock does not start on the offered date of a timely requested debriefing; it starts when that debriefing is closed.

And, the final rule continues its possible conflict with certain requirements of the FAR, without explanation. For example, new DFARS 215.506(b) states: "Notwithstanding FAR 15.506(b), when requested by a successful or unsuccessful offeror, a written or oral debriefing is required for contract awards valued at $10 million or more (section 818 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91))." FAR 15.506(b)

merely states: "[d]ebriefings of successful and unsuccessful offerors may be done orally, in writing, or by any other method acceptable to the contracting officer." By stating that a post-award debriefing is "required" for awards over $10 million, "despite" FAR 15.506(b), the provision implies that a post-award debriefing is *not* required for a DoD contract award under $10 million. But, this is not consistent with the FAR, which does not restrict debriefings on FAR Part 15 contract awards based on the dollar figure of the award. Nor is it consistent with the Title 10 implementation of Section 818, 10 U.S.C. § 3304(c)(1) (previously located at 10 U.S. C. § 2305(b)(5)) which also does not limit competitive contract debriefings to over $10 million. Further, DFARS 216.505(b)(6) states that "[i]n addition to the notice required by FAR 16.505(b)(6)," a debriefing is required for task or delivery orders valued at $10 million or more. FAR 16.505(b)(6)(ii) requires that the procedures at FAR 15.506 be followed for post-award debriefings to unsuccessful offerors for task or delivery order awards over $6 million, not $10 million. It is not clear if DoD actually intended to reduce debriefings for lower value DoD contract or task order awards because these provisions are not explained in the final rule. As we noted regarding the proposed rule, it seems inconsistent with a statute designed to *enhance* debriefing rights to potentially remove them. Regardless, it is conceivable that DoD contracting officers will interpret the new DFARS provision to deny debriefings altogether in scenarios in which the FAR requires one.

Managing debriefings and the timing of protests can be complicated. Wiley handles hundreds of protests every year and has vast experience navigating these thorny issues.