

Government Contracts

DoD Issues Final Rule Implementing Enhanced Debriefing Requirement

By: [Noah B. Bleicher](#), [Carla J. Weiss](#), [Nathaniel E. Castellano](#), [Moshe Broder](#), and [Scott E. Whitman](#)

On March 18, 2022, the Department of Defense (DoD) issued a [final rule](#) to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to mandate that DoD provide enhanced postaward debriefings to contractors. As we [previously highlighted](#), these changes to postaward debriefings in DoD procurements originally were partially implemented by a [Class Deviation](#) issued by DoD in 2018, and further formalized through a [proposed rule](#) issued last May. With this final rule, DoD permanently implements important changes to the postaward debriefing process for defense procurements.

While the final rule tracks the proposed rule in most respects, the final rule contains several notable changes that may impact bid protest timeliness considerations. As highlighted, prior to the final rule, DoD provided enhanced debriefings pursuant to Class Deviation 2018-O0011, which permitted offerors to submit additional questions within 2 business days after receiving their postaward debriefing. Then, the agency would be required to respond in writing within 5 business days after receiving those additional questions. To that end, the proposed rule stated that a debriefing would not be considered closed until “[a]fter the second business day after delivering the debriefing, if no additional questions are received.” Thus, under the proposed rule, each offeror’s “enhanced” timeline automatically would be extended for two days—irrespective of whether that offeror actually submitted additional questions or not.

The final provision at DFARS 215.506-70, however, now dictates that a debriefing is not concluded until the later of: (1) the date the debriefing is delivered; or (2) the date of the agency’s response to the offeror’s additional questions if those questions were timely submitted. Thus, the debriefing is extended only if the offeror submits follow-up questions. And, in turn, DFARS 233.104(c)(1)(D) confirms that the agency is required to implement a stay of performance if a GAO protest is filed within 5 calendar days after a debriefing is “concluded” in accordance with these timeframes.

Beyond the above clarification regarding timeliness, in sum, the final rule sets forth the following requirements DoD agencies must adhere to for any procurement in which an enhanced debriefing is available:

- When timely requested, DoD must provide a debriefing for all contract awards (including task and delivery orders) valued at \$10 million or more.
- While these requirements apply to negotiated procurements, including contracts for the acquisition of commercial products and services, they do not apply to contracts valued below the simplified acquisition threshold.
- Although as part of this process DoD agencies shall protect offerors’ confidential information, agencies are required to provide an offeror with a redacted version of the source selection decision document where—
 - the offeror is a small business or nontraditional defense contractor, the award is above \$10 million, and a copy of the selection decision is requested; or
 - for all offerors, where the award is greater than \$100 million.
- Within 2 business days after receiving a required debriefing an offeror may submit additional questions.
- Within 5 days after an offeror timely submits additional questions the agency shall respond in writing.

- And, as highlighted, the debriefing will not be considered “closed” until the debriefing is delivered, or if the offeror asks follow-up questions, when the agency answers those questions.

As we have suggested previously, contractors that are able to reap the benefits of DoD’s now-formalized robust debriefing process should do so. Regardless of whether the company is successful in the competition or not, contractors should consider targeted follow-up questions tailored to their unique experiences with that procurement and request a redacted version of the agency’s source selection decision. This information can better equip even a successful contractor to improve its next proposal submission and be a source of useful market intelligence. Conversely, and more immediately, this information can arm an unsuccessful offeror (and its attorneys) with critical insights to better assess the viability of a potential protest.

Jenner & Block’s Government Contracts lawyers have extensive bid protest experience, including prior service as a supervising bid protest hearing officer at GAO, and stand ready to support any challenges to the award of a government contract. We continue to monitor developments relating to bid protests, and particularly timing considerations for contractors. Please stay tuned for forthcoming additional guidance in this area.

Contact Us



Noah B. Bleicher

nbleicher@jenner.com | [Download V-Card](#)



Carla J. Weiss

cweiss@jenner.com | [Download V-Card](#)



Nathaniel E. Castellano

ncastellano@jenner.com | [Download V-Card](#)



Moshe Broder

mbroder@jenner.com | [Download V-Card](#)



Scott E. Whitman

swhitman@jenner.com | [Download V-Card](#)

Meet Our Team

Practice Leaders

David B. Robbins

Co-Chair

[drobbins@jenner.com](mailto:d Robbins@jenner.com)

[Download V-Card](#)

Marc A. Van Allen

Co-Chair

mvanallen@jenner.com

[Download V-Card](#)

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