

Recommendation 69: Provide as part of a debriefing, in all procurements where a debriefing is required, a redacted source selection decision document and the technical evaluation of the vendor receiving the debriefing.

Problem

Despite the Office of Management and Budget's (OMB's) *Myth-busting 3* memo, which explains how meaningful debriefings can mitigate the risk of protest, many DoD contracting agencies do not consider debriefings as a means of avoiding protests.¹ This perception results in debriefings that many industry and private bar stakeholders described as adversarial, incomplete, and insufficient for informing unsuccessful offerors of the government's rationale for making an award. The presumption across much of DoD appears to be that the more information that is provided at a debriefing, the more likely a disappointed offeror will use the information to file a protest.

Background

The Federal Acquisition Streamlining Act of 1994 created the requirement for debriefings.² Debriefings are currently required under FAR Part 15 for competitive negotiated procurements and FAR 16.5 for all task or delivery orders valued in excess of \$5.5 million.³ Section 818 of the FY 2018 NDAA expanded the requirement for a written or oral debriefing to all DoD contract awards and task or delivery orders valued at or above \$10 million.⁴

The Section 809 Panel found, similar to what was presented in the RAND report, that the quality and timeliness of debriefings varies across DoD. Even the debriefings that complied with FAR 15.505 often provided insufficient information for bidders to determine if their proposals had been properly evaluated.⁵ Some are provided promptly on request and are complete in terms of explaining to offerors why they lost, or why they won a contract award. Many in industry, and the private Bar, report that timely and complete debriefings provide them with the information they need to improve future proposals. Debriefings also help companies determine if the government followed its procedures and the governing laws and regulations in making the award determination so they can decide whether to file a protest.

In Section 818 of the FY 2018 NDAA, Congress also created the requirement for DoD to provide a redacted source selection decision document as part of debriefings for all contract awards in excess of \$100 million, and, when requested by nontraditional or small businesses, for all contract awards in excess of \$10 million.⁶

¹ OMB Memorandum, "Myth-busting 3": Further Improving Industry Communication with Effective Debriefings, January 5, 2017, accessed November 7, 2018, https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/procurement/memo/myth-busting_3_further_improving_industry_communications_with_effectiv....pdf.

² Section 1014 of the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355 (1994). The requirement for DoD is now codified in 10 U.S.C. §§ 2305(b)(5) and (b)(6).

³ See Postaward Debriefing of Offerors, FAR 15.506. Section 818(a)(2) of FY 2018 NDAA, Pub. L. No. 115-91 (2017).

⁴ Section 818 of FY 2018 NDAA, Pub. L. No. 115-91 (2017).

⁵ Mark V. Arena et al., *Assessing Bid Protests of U.S. Department of Defense Procurements*, RAND Corporation, December 2017, 22, accessed November 9, 2018, https://www.rand.org/content/dam/rand/pubs/research_reports/RR2300/RR2356/RAND_RR2356.pdf.

⁶ Section 818(a)(1) of FY 2018 NDAA, Pub. L. No. 115-91 (2017).

Discussion

In some cases, industry and the private Bar report that they file protests so they can get the information they need to understand why they lost the contract award. Based on the small number of protests that are actually filed, RAND's finding that "[t]he bottom line is that too little information or debriefings that are evasive or adversarial will lead to a bid protest in most cases," may be a bit of hyperbole.⁷ Corporate counsel informed the Section 809 Panel that in many cases bid and proposal teams within companies that find themselves on the losing end of an award decision often lobby corporate leadership to file a protest, especially when the company was the incumbent. The fullness of the debriefing was often a critical element of the decision-making process. An evasive or confrontational debriefing only reinforced the bid and proposal team's assumption that the government made the wrong decision or could not adequately support its decision. Yet in the reportedly rare case in which DoD provided a redacted source selection decision document or other meaningful information, the corporate counsel was able to explain to senior leadership within the company why it lost a potential contract and that a protest would be a waste of time and resources.

It appears that the fear of protests drives the debriefing to be less complete, as opposed to more complete, and agency counsel may end up controlling the actual debriefing. Often times the presence of counsel at a debriefing can send the wrong message to the various parties. Contracting officers reportedly have a tendency to become adversarial if corporate or outside counsel accompany a contractor to a debriefing. At the same time the bidder's decision to have counsel present at the debriefing may be to gain enough information to explain to a bid and proposal team why a protest would not be in the best interest of the contractor. This proposal will not provide the same level of transparency as some of the enhanced debriefing procedures that allow outside counsel are provided access to the evaluation of the successful offeror. Yet, the combination of a redacted source selection decision document and the technical evaluation of the contractor requesting the debriefing, should provide disappointed offerors with adequate information to improve future proposals and understand the rationale behind DoD's award decision.

Conclusions

Congress should expand the Section 818 requirement to provide a redacted source selection decision document as part of a debriefing for all situations in which a debriefing is required and to also provide the technical evaluation documentation of the vendor requesting the debriefing. Providing this additional transparency should minimize the likelihood contractors will file protests because of a lack of information. Providing this additional information may create more work for contracting officers, but in addition to decreasing the number of protests, it should also increase the quality of future proposals, and help recalibrate DoD contracting activities' understanding of the value of a more fulsome debriefing.

⁷ Mark V. Arena et al., *Assessing Bid Protests of U.S. Department of Defense Procurements*, RAND Corporation, December 2017, 23, accessed November 9, 2018, https://www.rand.org/content/dam/rand/pubs/research_reports/RR2300/RR2356/RAND_RR2356.pdf.

Implementation

Legislative Branch

- Amend Section 818(a)(1) of the FY 2018 NDAA to eliminate the thresholds and include the requirement to provide the technical evaluation of the vendor requesting the debriefing.

Executive Branch

- Amend DFARS 215 to include the debriefing requirements included in the amended Section 818(a)(1) of the FY 2018 NDAA.

Implications for Other Agencies

- There are no cross-agency implications for this recommendation.

RECOMMENDED REPORT LANGUAGE

SEC. ____. REVISION TO INFORMATION THAT DEPARTMENT OF DEFENSE IS REQUIRED TO PROVIDE IN POST-AWARD DEBRIEFINGS.

This section would amend section 818 of the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91; 10 U.S.C. 2305 note) to expand what is required to be disclosed by the Department of Defense as part of a mandatory debriefing of offerors and when those debriefings are required. The Department would be required to provide the written technical evaluation of the offeror requesting a debriefing as part of the debriefing. The requirement to provide a debriefing when requested would also be expanded to all awards in excess of \$10,000,000.

The committee notes that the Federal Acquisition Regulation already requires the information contained in the written technical evaluation to be provided to offerors that request a debriefing. A 2018 Department of Defense-funded study indicates that, in practice, complete information is often not provided to offerors. The committee expects that providing more complete information to offerors would lead to improved proposals on future acquisitions and reduce protests that often result from a lack of information.

1 **SEC. ____ . REVISION TO INFORMATION THAT DEPARTMENT OF DEFENSE IS**
2 **REQUIRED TO PROVIDE IN POST-AWARD DEBRIEFINGS.**

3 (a) THRESHOLD FOR DEBRIEFINGS AND REQUIRED DISCLOSURES.—Section 818(a) of the
4 National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91; 10 U.S.C. 2305
5 note) is amended—

6 (1) in the matter preceding paragraph (1)—

7 (A) by striking “Not later than” and all that follows through “revise the”
8 and inserting “The Secretary of Defense shall ensure that”; and

9 (B) by striking “to require that all required post-award debriefings” sand
10 inserting “requires than any required post-award debriefing of an offeror”; and

11 (2) in paragraph (1)—

12 (A) by striking “in excess of \$100,000,000” and inserting “for which a
13 debriefing is required pursuant to paragraph (2)”; and

14 (B) by striking “and, in the case of” and all that follows through “such
15 disclosure” and inserting “and of the written technical evaluation by the agency of
16 the offeror requesting the debriefing”.

17 (b) EFFECTIVE DATE.—The Secretary of Defense shall revise the Department of Defense
18 Supplement to the Federal Acquisition Regulation to implement the amendments made by
19 subsection (a) not later than the end of the 180-day period beginning on the date of the
20 enactment of this Act.

Changes to Existing Law: This proposal would change existing law as follows:

National Defense Authorization Act for Fiscal Year 2018
(Public Law 115-91; 10 U.S.C. 2305 note)

SEC. 818. ENHANCED POST-AWARD DEBRIEFINGS.

(a) ~~Not later than 180 days after the date of the enactment of this Act [Dec. 12, 2017], the~~ **The** Secretary of Defense shall ~~revise~~ **ensure that** the Department of Defense Supplement to the Federal Acquisition Regulation ~~to require~~ **requires** that all ~~required post-award debriefings~~ **any required post-award debriefing of an offeror**, while protecting the confidential and proprietary information of other offerors, include, at a minimum, the following:

(1) In the case of a contract award ~~in excess of \$10,000,000,~~ **for which a debriefing is required pursuant to paragraph (2)**, a requirement for 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, ~~and, in the case of a contract award in excess of \$10,000,000 and not in excess of \$100,000,000 with a small business or nontraditional contractor, an option for the small business or nontraditional contractor to request such disclosure~~ **and of the written technical evaluation by the agency of the offeror requesting the debriefing.**

(2) A requirement for a written or oral debriefing for all contract awards and task or delivery orders valued at \$10,000,000 or higher.

(3) Provisions ensuring that both unsuccessful and winning offerors are entitled to the disclosure described in paragraph (1) and the debriefing described in paragraph (2).

(4) Robust procedures, consistent with section 2305(b)(5)(D) of title 10, United States Code, and provisions implementing that section in the Federal Acquisition Regulation, to protect the confidential and proprietary information of other offerors.

RECOMMENDED REGULATORY REVISIONS

SUBPART 215.5—PREAWARD, AWARD, AND POSTAWARD NOTIFICATIONS, PROTESTS, AND MISTAKES

(Added November 18, 2013)

215.503 Notifications to unsuccessful offerors.

If the Government exercises the authority provided in 239.7305(d), the notifications to unsuccessful offerors, either preaward or postaward, shall not reveal any information that is determined to be withheld from disclosure in accordance with section 806 of the National Defense Authorization Act for Fiscal Year 2011, as amended by section 806 of the National Defense Authorization Act for Fiscal Year 2013 (see subpart 239.73).

215.506 Postaward debriefing of offerors.

(a) At a minimum, the debriefing information shall include—

(1) a copy of the source selection document redacted to protect proprietary information of offerors other than the offeror being debriefed; and

(2) a copy of the written technical evaluation of the offeror being debriefed.

~~(e)~~ (b) If the Government exercises the authority provided in 239.7305(d), the debriefing shall not reveal any information that is determined to be withheld from disclosure in accordance with section 806 of the National Defense Authorization Act for Fiscal Year 2011, as amended by section 806 of the National Defense Authorization Act for Fiscal Year 2013 (see subpart 239.73).