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¶ 46 POSTSCRIPT III: ENHANCED DEBRIEFINGS: A Simple Strategy For A More Manageable Protest Process

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We welcome the Department of Defense's proposed Defense Federal Acquisition Regulation amendments, 86 Fed. Reg. 27354 (May 20, 2021), to formally implement the "enhanced" debriefing procedures that Congress mandated through § 818 of the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91. At this significant milestone, it is worth considering whether civilian agencies stand to benefit from implementing similarly enhanced debriefing procedures. Given the variety of debriefing approaches prevalent even within the DOD, with some agencies providing more evaluation materials than others, there is also room to discuss whether DOD components are positioned to benefit from enhancing their debriefings beyond the minimum that Congress mandated through § 818.

This Report has repeatedly addressed the potential for debriefings to improve the protest process. Vern Edwards has recounted the history of debriefings and argued for agencies to share detailed evaluation materials with disappointed offerors. See *Protest Reform: We Dare To Dream*, 27 NCRNL ¶ 51, and *Postscript: Enhanced Debriefings*, 34 NCRNL ¶ 21. Steve Schooner recently discussed the significance of debriefings-gone-wrong in the context of a certain, highly publicized DOD procurement. See *Enhanced Debriefings: A Toothless Mandate?*, 34 NCRNL ¶ 10, and *Postscript II: Enhanced Debriefings*, 34 NCRNL ¶ 26.

Long before Congress passed § 818, the Air Force voluntarily provided disappointed offerors with relatively broad access to their evaluation materials, and often an opportunity to engage with the procurement officials that conducted the evaluation and source selection. While there is plenty of room for debating the precise procedures to follow in any enhanced debriefing, we do not attempt to engage here with the mechanics or minutia of the debriefing process. For our purpose, the defining feature of an enhanced debriefing is for the agency to provide each disappointed offeror with the

actual evaluation materials relevant to evaluation and non-selection of that offeror's proposal. Allowing the offeror some opportunity to ask questions and receive answers about those materials follows naturally.

Section 818 and the proposed DFARS amendments are important steps forward in this regard, requiring the DOD to provide offerors with the source selection decision, redacted as needed to protect source selection sensitive and proprietary information. Section 818 also guarantees the disappointed offeror an opportunity to ask questions and requires the agency to answer those questions before the debriefing closes. Section 818 and the proposed DFARS amendments stop short of requiring DOD agencies to provide the evaluation reports that underly the source selection decision (e.g., consensus technical and cost/price evaluation reports). However, many DOD components voluntarily provide these evaluation materials to a disappointed offeror, often as attachments to the notice of award.

Based on our experience on both sides of bid protest disputes, we are confident that the protest process as a whole stands to benefit from widespread adoption of enhanced debriefings. Enhanced debriefings may or may not reduce the number of protests filed; while we suspect they serve to avoid more protests than they spawn, we are not aware of any data source to answer that empirical question. However, we do believe that enhanced debriefings are a readily available tool for improving the protest process, making it more efficient and manageable for all involved. And even though § 818 and the proposed DFARS amendments do not expressly require as much, the benefits of enhanced debriefings are even greater for those procurement teams that are willing to provide underlying evaluation reports in addition to redacted source selection decisions.

The Role Of Debriefings In The Protest Process

The most common justification for robust debriefing is the idea that, if agencies are transparent with disappointed offerors about the reasons behind competition outcomes, those offerors are more likely to accept the results and less likely to protest. We have no doubt that robust debriefings have, in many instances, served to avoid protests that otherwise would have been filed. But there is no data to confirm whether, in aggregate, enhanced debriefings increase or decrease protest rates compared to standard debriefing procedures. Indeed, because of the varied personalities and incentives involved, there is no obvious method of debrief that is likely to systematically reduce protests. Vern summarized this sentiment well in *Postscript: Enhanced Debriefings*, 34 NCRNL ¶ 21:

> Simply put, the reason for debriefing an unsuccessful offeror is to satisfy the curiosity of a firm that has spent time, energy, money, and yes, emotion, preparing a proposal and enduring the Government's acquisition process for months or even years. An offeror's reason for asking for a debriefing and the use to which it intends to put the information it receives are its own business. The offeror may want information that will help it write better proposals in the future. It may hope to confirm its suspicions that the Government was either incompetent, trying to fulfill a preordained preference, or both. Various members of the offeror's proposal team may be seeking exculpation. In any case, it is hard for a Government debriefing team to know what would be "meaningful" to a particular unsuccessful offeror.
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> Will better debriefings reduce the numbers of protests? We like to think so, but we do not know.

The unsubstantiated possibility that robust debriefings may dissuade some protests seems cold comfort to the agency procurement teams that are asked to hand raw evaluation materials to disappointed offerors (and their counsel). Since disappointed offerors may well use those same evaluation materials to support their protest, why shouldn't agencies keep their cards close during the debrief-

ing period and require the offerors to first invest in a protest before gaining access to the evaluation materials? We believe the best argument for widespread adoption of enhanced debriefings is not that enhanced debriefings reduce the number of protests, but that enhanced debriefings make the protest process more efficient and manageable for all involved.

The Fundamental Difference Between "Enhanced" And "Standard" Debriefings: Actual Evaluation Materials

It is easy enough to get caught in the details of debriefing procedure. Exactly when and how must an offeror request the debriefing? Can the debriefing process play out on paper alone, or must there be a live discussion? Does the disappointed offeror have an opportunity to ask questions before the agency provides the debriefing, afterwards, or both? When and how must the agency respond, if at all? When does the debriefing close? Where exactly are the lines between information that an agency must share, may share, usually will not share, and absolutely cannot share? These are important questions, but we need not grapple with them here.

Nor is it necessary to detail the various debriefing processes currently available in the federal procurement system. The relevant authorities are readily available. The most prominent rules for "standard" or "non-enhanced" debriefings are available in FAR 15.505 (preaward), FAR 15.506 (postaward), FAR 8.405-2 (Federal Supply Schedule orders), and FAR 16.505 (indefinite-delivery/indefinite-quantity orders). The DOD's enhanced debriefing procedures are reflected in § 818 of the 2018 NDAA, the recently proposed DFARS amendment to implement the same (86 Fed. Reg. 27354), and the DOD's DFARS class deviation that implements § 818 pending formal amendment, at https://www.acq.osd.mil/dpap/policy/policyvault/USA000563-18-DPAP.pdf.

For our purposes, there is one critical distinction between the enhanced debriefings that Congress has mandated across most DOD procurements and the standard debriefings that are still the norm in civilian agency acquisitions. In an enhanced debriefing, the agency sends the disappointed offeror *actual evaluation materials*. As noted above, pursuant to § 818 and the proposed DFARS amendments, at a minimum this must include the source selection decision, redacted as necessary. Many DOD components go further and provide each disappointed offeror their consensus technical and price/cost reports.

By contrast, in a standard debriefing, disappointed offerors typically receive evaluation summary documents and debriefing decks that are prepared specifically for the debriefing. Sometimes, these debriefing materials contain excerpts of actual evaluation findings. Sometimes not. In either event, the offeror is rarely permitted meaningful review of the contemporaneously documented source selection rationale. And the offeror has no assurance whether the justifications included in the debriefing materials are actually reflected in the contemporaneous evaluation materials, nor whether the evaluation materials address issues beyond those reflected in the debriefing materials.

Of course, enhanced debriefings existed long before Congress mandated them across the DOD in 2018. The Air Force is generally recognized as leading the movement toward enhanced debriefings. Through various procedures, the Air Force voluntarily provided offerors access to actual evaluation materials and often an opportunity to discuss those evaluation materials with the procurement officials that conducted the evaluation.

The Air Force is not alone in emphasizing actual evaluation materials during the debriefing process. Providing offerors full access to evaluation materials relating to their own proposals was one of Vern's primary recommendations in *Protest Reform: We Dare To Imagine*, 27 NCRNL ¶ 51.

Whether it reduces protests or not, we believe the enhanced debriefing practice of providing *actual evaluation materials* during debriefings can significantly improve the protest process for all involved. These benefits only increase when the debriefing is further enhanced to include the offerors' underlying evaluation reports.

Enhanced Debriefings Improve The Protest Process

The potential for enhanced debriefings to improve the protest process is largely a function of the short filing deadlines that define the Government Accountability Office protest process. Through the automatic Competition in Contracting Act stay, Congress established a tradeoff where agencies must (absent override) temporarily halt performance of procurement activities while GAO reviews a protest, subject to two conditions. First, the GAO must decide the protest and make its recommendation within 100 days after the protest is filed. Second, a protester must file quickly—in the context of a postaward protest, "file quickly" means either 10 days after the award is made or 5 days after the close of a requested and required debriefing. 31 U.S.C.A. § 3553(d). It is fair to say that the entire GAO protest process shares a common theme of: fast, at least as far as litigation speeds go. To understand the benefit of enhanced debriefings (sharing actual evaluation materials), we first need a common understanding of the GAO protest process. Like so much in the bid protest process, it all boils down to timing.

● *Context for the GAO Bid Protest Process: Timing Is Everything*—Understandably, the most generous deadlines appear early in the protest process. There is relative flexibility during the debriefing period that precedes protest filing. Standard debriefings can be completed within a matter of days after the agency issues its notice of award, while extended debriefings may (but need not) extend over several weeks if there are scheduling delays and robust question and answer exchanges. During the debriefing period, disappointed offerors generally engage outside counsel, who are able to confer with their client's proposal teams and technical/cost experts to digest the debriefing materials and identify potential protest grounds and strategies. Critically, because the GAO protest process generally takes places under a protective order that is limited to outside counsel, this debriefing period is the only meaningful opportunity that a protester's outside counsel have to engage with the individuals who actually prepared the proposal and competed under the solicitation.

Of course, at the end of the debriefing process, the disappointed offeror may well decide there is no basis to protest. Or, even if there is a basis to protest, the disappointed offeror may determine following the completion of the debriefing process that filing a protest is not in the company's interests.

If a protest is filed at the GAO, the agency then has a full 30 days to develop its response in the form of an Agency Report. 4 C.F.R. § 21.3. While the 30-day period is relatively luxurious as far as GAO deadlines go, there is a lot of work to do. The agency procurement team and protest counsel must coordinate to understand the protester's arguments, compile the relevant and responsive evaluation materials, decide whether to take corrective action or defend the protest, prepare a Contracting Officer's statement of facts responding to the protest allegations, and prepare a legal memorandum defending the award.

Once the agency files its Agency Report on day 30, the protester (through its outside counsel) has 10 days to file its comments on the Agency Report. 4 C.F.R. § 21.3(i). More importantly, the protester has only 10 days to identify and file supplemental protest grounds based on new materials provided in the Agency Report. New protest arguments can only be raised if they are based on new information provided in the Agency Report; the GAO will dismiss as untimely any argument raised for the first time in a protester's comments that could have been raised in the initial protest filing based on debriefing materials. See 4 C.F.R. § 21.2(a)(2); *InfoPoint LLC*, Comp. Gen. Dec. B-415716.20, 2019 CPD ¶ 191.

This is where the pressure really builds. The agency must now prepare a supplemental report responding to the supplemental protest grounds. And the protester must have an opportunity to file supplemental comments on the supplemental report. In the likely event that the supplemental protest involves areas of the evaluation and award decision not previously addressed (e.g., challenges relating to the awardee's proposal and evaluation revealed in the protected report), the supplemental agency report will likely include new evaluation and proposal documents that may reveal a second round of supplemental protests grounds, a second supplemental report, and a second set of supplemental comments. It is not unheard of for a third round of supplemental protests, and on and on.

Each round of these filings eats into the GAO's 100-day deadline, reducing the time that the GAO hearing officer has to decide the protest and issue a decision. The GAO's rules do not contain default deadlines for responding to supplemental protest grounds. While the GAO can in theory segregate the supplemental protest grounds from the initial protest and treat them as subject to a separate 100-day decision deadline, the GAO rarely does so. Instead, the GAO hearing officer typically imposes increasingly short and demanding deadlines on the parties to file supplemental reports and comments. Whereas the agency had a full 30 days to respond to the initial protest, it may only have 7–10 days to prepare its full supplemental report, and even less than that to respond to second and third rounds of supplemental protests.

● *The Impact of Enhanced Debriefings*—If the debriefing is based on materials and justifications other than the actual evaluation documents, as typically occurs in a standard debriefing, then the initial protest will reflect challenges to the information provided in the debriefing, instead of the protester's challenges to the actual evaluation record. But, the GAO reviews procurements based on the actual evaluation record, not debriefing materials. A protest document based on debriefing materials other than the actual evaluation documents becomes largely irrelevant once the agency provides the actual evaluation record. It follows that, if an agency declines to provide actual evaluation documents during the debriefing, then the agency risks wasting the initial 30-day period and its initial Agency Report.

If the protester does not receive the actual evaluation documents until the 30th day of the protest process when the agency files its initial report, then the agency does not receive the protester's actual challenges to the actual evaluation record until at least day 40 of the protest process through supplemental protest filings. By that point, the agency has already used its initial 30-day window and must regroup to respond to the protester's real arguments at the mercy of whatever filing deadlines the GAO imposes for supplemental agency reports.

By contrast, the enhanced debriefing process is far more efficient and manageable. If the agency provides a disappointed offeror with complete evaluation materials for that offeror's proposal and a

redacted source selection decision, then any protest must, pursuant to GAO timeliness rules, include all protest grounds that are apparent from those materials—i.e., essentially all challenges to the protester's technical and cost/price evaluation and most challenges to the source selection rationale. That means the agency is able to spend the full first 30 days of the protest process considering and developing a response to the protester's actual objections to the actual evaluation materials. Again, due to the strict GAO timeliness rules, any new protest grounds that the protester files based on the Agency Report will generally be limited to challenges relating to the awardee's proposal and evaluation, or redacted aspects of the source selection decision. While there may well be a rush to develop the supplemental agency report in the time that the GAO permits, the agency can be confident that it has already prepared its defense to the protester's evaluation, and can focus on new arguments raised based on the awardee's proposal and evaluation materials.

This is why providing underlying evaluation records increases the benefits of enhanced debriefings. In the likely event that the underlying evaluation records contain additional details that are not included directly in the source selection decision, the initial protest will not reflect challenges based on those details. Instead of surfacing and responding to those challenges during the initial 30-day window, the agency risks having to scramble to respond to these new arguments in its supplemental report.

To be sure, the protester also benefits from the enhanced debriefing. Particularly given the tight deadlines, it is far preferable for a protester's outside counsel to develop arguments in collaboration with the individuals who lived through the competition and prepared the proposal. Just as it can be unsettling for the agency to receive a host of new supplemental protest grounds on day 40, it is equally uncomfortable for protester counsel to see the actual evaluation record for the first time on day 30 and have only 10 days to develop challenges to the actual record (all under the protective order).

Even awardees intervening at the GAO to help the agency defend its award benefit from enhanced debriefings. To the extent intervenor counsel are laboring to assist the agency prepare its reports, they suffer from the same inefficiencies that the agency endures when the protest grounds challenging the actual evaluation record do not arise until after the agency prepares and files it initial report. Indeed, the intervenor must prepare comments defending the initial report knowing full well that the protester is simultaneously preparing supplemental protest grounds that will likely render much of the intervenor's comments irrelevant. This inefficiency can be readily avoided by providing the protester with actual evaluation documents during the debriefing to ensure the initial protest and initial agency report are responsive to the protester's actual challenges to its own evaluation.

Finally, the GAO stands to profit from enhanced debriefings as well. The hearing officer benefits from receiving focused, relevant briefing from all parties that is relatively complete early on in the 100-day protest process, rather than receiving multiple, piecemeal rounds of substantive briefing, leaving only a short time to assess the final arguments and prepare a decision. It is no secret that briefing, like all writing, improves with time; there may not be much time to go around in a GAO protest, but there is no need to amplify the time pressure by withholding actual evaluation documents during the initial debriefing period.

Concluding Thoughts

It is rare to find a simple practice that stands to benefit agencies, protesters, intervenors, and

even the GAO—all the more so one that does not require any new legislation or regulatory amendment. Federal agencies have all of the discretion they need to make their own protests more efficient and manageable by providing actual evaluation documents during the debriefing process. The Air Force recognized this years ago, and slowly but surely many in the DOD have come to realize that providing actual evaluation documents during the debriefing process is one the most efficient protest strategies available. We are cautiously optimistic that enhanced debriefings will continue on their trajectory throughout the rest of the procurement system, and that we all stand to gain along the way. *Nathaniel E. Castellano & Peter J. Camp*