

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.