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THE NASH & CIBINIC REPORT

government contract analysis and advice monthly from
professors ralph c. nash and john cibinic

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COMPETITION & AWARD

¶ 10 ENHANCED DEBRIEFINGS: A Toothless Mandate?

Steven L. Schooner

Last month, Ralph described a “procurement to illustrate how frustrating the competitive negotiated procurement process can be to a contractor that knows it is fully qualified to perform the contract work but loses the competition.” *Postscript: Frustrating Competitive Negotiation*, 34 NCRNL ¶ 1, discussing *IBM Corp.*, Comp. Gen. Dec. B-417664, 2019 CPD ¶ 327, 2019 WL 4688729. Competitive negotiation remains complicated, expensive, slow, frustrating to many of the parties involved, and, all too often, serves as a common breeding ground for protests. Against that backdrop, Ralph seemed pleased to attribute the reduction in Government Accountability Office bid protest volume “to the renewed attention being paid to better debriefings.” *Protest Data From the Government Accountability Office: Progress?*, 33 NCRNL ¶ 72, citing the GAO’s *Bid Protest Annual Report to Congress for Fiscal Year 2019*, B-158766 (Nov. 5, 2019), <https://www.gao.gov/assets/710/702551.pdf>.

All of which failed to prepare us for (some of) the allegations in the (most recent) protest of the Department of Defense’s Joint Enterprise Defense Infrastructure (JEDI) cloud computing program brought by disappointed offeror Amazon Web Services (AWS), now proceeding in the U.S. Court of Federal Claims, raising issues largely unrelated to the prior GAO and COFC protests previously brought by Oracle America, Inc. See 61 GC ¶ 340; *Oracle America, Inc.*, Comp. Gen. Dec. B-416657 et al., 2018 CPD ¶ 391, 61 GC ¶ 8; *Oracle America, Inc. v. U.S.*, 144 Fed. Cl. 88 (2019), 61 GC ¶ 230. In addition to complaints about the source selection strategy and conflicts of interest, Amazon complained about the manner in which the DOD conducted Amazon’s postaward debriefing:

Despite the significance of the JEDI procurement—which had been years in the making and had a potential ceiling of \$10 billion—on the same day DoD announced its award decision, *DoD provided AWS a written debriefing...and advised AWS that it had two business days to submit written questions based on the debriefing, foreclosing the opportunity for AWS to request and receive an in-person debriefing.*

* * *

DoD [then] failed to provide “reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulation, and other applicable authorities were followed.” See 48 C.F.R. § 15.506(d). In fact, *DoD did not provide a substantive response to a single one of the 265 questions that AWS timely submitted*, leaving AWS in the dark about DoD’s explanations for the substantive issues for which AWS raised concern in the debriefing questions.

See Complaint (redacted version) at 91–92, *Amazon Web Services, Inc. v. U.S.*, No. 1:19-cv-01796-PEC (Fed. Cl. filed Dec. 9, 2019) (emphasis added). While these are merely allegations, it sure sounds like the debriefing following the DOD’s critically important, high-value, high-profile procurement isn’t destined to be a teaching model for “enhanced debriefings” at the Defense Acquisition University.

The Debriefing Mandate: A Paper Tiger

We don’t expect the quality of the DOD’s debriefing to factor heavily in the JEDI procurement protest litigation. Had Amazon elected to bring its protest at the GAO, it might not even have bothered raising the debriefing issue because it’s well established that inadequate debriefings do not create a protestable issue at the GAO. Cibinic et al., *FORMATION OF GOVERNMENT CONTRACTS* 992 (4th ed. 2011), citing, among others, *Thermolten Tech., Inc.*, Comp. Gen. Dec. B-278408, 98-1 CPD ¶ 35, 1998 WL 27114, 40 GC ¶ 211, where the GAO explained:

A protester’s challenge to the adequacy of a debriefing is a procedural matter concerning agency actions after award which are unrelated to the validity of the award; we generally will not review such matters. *C-Cubed Corp.*, B-272525, Oct. 21, 1996, 96-2 CPD ¶ 150 at 4 n.3...While the debriefing here may not have been what [the protester] expected, there is nothing to indicate that it was improper or inadequate under the requirements of [FAR 15.506].

See also *CACI Field Services, Inc.*, Comp. Gen. Dec. B-234945, 89-2 CPD ¶ 97, 1989 WL 241567; *Haworth, Inc.*, Comp. Gen. Dec. B-215638.2, 84-2 CPD ¶ 461, 1984 WL 46838.

That might seem strange to the extent that the current Federal Acquisition Regulation has articulated the postaward debriefing mandate as, well, a mandate, since the implementation of the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355. See FAR 15.506(a)(1): “An offeror, upon its written request...shall be debriefed and furnished the basis for the selection decision and contract award.” (Emphasis added.) Contrast that with the discretionary nature of preaward debriefings where the Contracting Officer “may refuse the request for a debriefing if, for compelling reasons, it is not in the best interests of the Government to conduct a debriefing at that time.” FAR 15.505(b) (although, of course, doing so entitles the offeror to, in effect, a postaward debriefing). Nor does anything on the GAO’s seemingly exhaustive list of “protest issues not for consideration” discourage such a protest. 4 CFR § 21.5(a)–(m). Granted, debriefing rights are not enumerated in the GAO’s definition of “adverse agency action,” but nor are they obviously excluded. 4 CFR § 21.0(e). And it’s not like the GAO isn’t fully cognizant of the debriefing mandate, to the extent that it’s an integral part of the protest filing timeliness calculation. Indeed, the GAO concedes that their timeliness rules are constructed “to encourage offerors to seek, and agencies to give, early and meaningful debriefings.” GAO, *GAO-18-510SP, Bid Protests at GAO: A Descriptive Guide* 10 (10th ed. May 2018), <https://www.gao.gov/assets/700/691596.pdf>.

Nonetheless, the GAO apparently doesn’t see debriefings as a legally significant or relevant aspect of “a solicitation or other request...for offers for a contract...; the cancellation of such a solicitation or other request; an award or proposed award of such a contract; [or] a termination of such a contract,” so there is no right to complain of “improprieties” or failures with regard to debriefings. 4 CFR § 21.1(a). And the GAO’s consistent, summary refusal to substantively engage on inadequate debriefings can be traced back to the pre-FAR Defense Acquisition Regulation. See, e.g., *Reliability Sciences, Inc.*, Comp. Gen., B-212852, 84-1 CPD ¶ 493, 1984 WL 44181, where the GAO explained:

[W]e are not aware of any provision requiring the Navy to debrief [the protester] on the protest filed here....If the debriefing was requested on [the protester’s] proposal under Defense Acquisition Regulation § 3-508.4 (Defense Acquisition Circular No. 76-24, August 28, 1980), the postponement of the debriefing is merely a procedural matter which does not affect the validity of the award.

Nor has the GAO signaled any intention to change its position to accommodate the enhanced debriefing mandate or various agency initiatives offering more fulsome debriefings. See, e.g., *Leader Communications, Inc.*, Comp. Gen. B-417152.2, 2019 CPD ¶ 241, 2019 WL 3001499 (“[O]ur Office does not consider protests challenging an agency debriefing. *Healthcare Tech. Solutions Int’l*, B-299781, July 19, 2007, 2007 CPD ¶ 132 at 5 (...adequacy and conduct of debriefing is a procedural matter that does not involve the validity of contract award.”). This laissez-faire approach prevails even where an agency fails to provide any debriefing. *CAMRIS International, Inc.*, Comp. Gen. B-417152.2, 2018 CPD ¶ 285, 2018 WL 3868955 (“Whether an agency provides a debriefing and the adequacy of a debriefing are not issues that our Office will consider, because the scheduling and conduct of a debriefing is a procedural matter that does not involve the validity of an award.”). But see *Best*

Value Technology, Inc.—Costs, Comp. Gen. B-412624.3, 2017 CPD ¶ 50, 2017 WL 587027 (where the agency unduly delayed taking corrective action after a meritorious protest, the GAO stated: “Although our Office will not review a protester’s contention that the debriefing it received was inadequate, we note that the flaw in the debriefing appears emblematic of the flaws that plagued this procurement.” (Internal citations omitted.)).

To date, protest litigation involving enhanced debriefing rights has been limited to the (formalistic and procedural rather than substantive) time for filing of a protest. See, e.g., *State Women Corp.*, Comp. Gen. Dec. B-416510, 2018 CPD ¶ 240, 2018 WL 3414767 (after enhanced debriefing procedures, the protest filing period remains 10 (not 5) days); *IACCESS Technologies, Inc. v. U.S.*, 143 Fed. Cl. 521 (2019) (record unclear with regard to disappointed offeror’s failure to timely request the debriefing that the agency apparently had prepared).

The GAO has seen cases in which the agency provided a written debriefing and then, later, provided an enhanced debriefing, *Quantech Services, Inc.*, Comp. Gen. Dec. B-417347, 2019 CPD ¶ 203, 2019 WL 2353606 (Air Force, Space and Missile Systems Center); *Tridentis LLC*, Comp. Gen. Dec. B-417096, et al., 2019 CPD ¶ 91, 2019 WL 1035778 (Naval Surface Warfare Center); the agency notified the offeror of the adverse award decision and provided the protester with both an initial and enhanced debriefing, all on the same day, *Normandean Associates, Inc.*, Comp. Gen. Dec. B-417136, 2019 CPD ¶ 76, 2019 WL 581222 (Army Corps of Engineers); enhanced debriefings were followed by (uncontested) agency responses to additional questions, *Technatomy Corp.*, Comp. Gen. Dec. B-414672.5, 2018 CPD ¶ 353, 2018 WL 5292575 (DOD, Defense Information Systems Agency); *OGSystems, LLC*, Comp. Gen. Dec. B-414672.6, et al., 2018 CPD ¶ 352, 2018 WL 5292576, 60 GC ¶ 354 (same); *Solers, Inc.*, Comp. Gen. Dec. B-414672.3, 2018 CPD ¶ 350, 2018 WL 5292572 (same); *Novetta, Inc.*, Comp. Gen. Dec. B-414672.4, 2018 CPD ¶ 349, 2018 WL 5292574 (same); and at least one written (e.g., no oral component) enhanced debriefing, *Oracle America, Inc.*, Comp. Gen. Dec. B-417046, 2019 CPD ¶ 74, 2019 WL 581630 (also from DISA, which the GAO did not appear to find remarkable).

Although Amazon filed at the COFC, there is no reason to expect a dramatically different approach. See *RX Joint Venture, LLC v. U.S.*, 145 Fed. Cl. 207 (2019) (preaward protest based on the offeror’s elimination from the competitive range), where the CO notified the protester that “[a]ll offerors w[ould] receive a written debrief” but that “[t]here w[ould] be no in person or oral debriefs scheduled.” Within two days of receiving a written debrief, the protester submitted a list of follow-up questions, at which point the CO explained that “the Government will not [be] addressing the questions submitted” and that the “debrief was concluded” on the date of the written debrief. None of this appeared to factor into the court’s decision. But see *Trax International Corp. v. U.S.*, 144 Fed. Cl. 417 (2019), in which the Army’s CO did respond to a series of questions following a written debriefing, and *Mission1st Group, Inc. v. U.S.*, 144 Fed. Cl. 200 (2019), where the Army gave a “debriefing presentation” and then responded to “several additional questions” from the disappointed offeror.

What Constitutes A Satisfactory Response?

It’s hard to imagine how the court could find the DOD’s refusal to meet with Amazon face-to-face to be actionable. A written debriefing *could* be both substantively and legally sufficient. The statute mandates “a requirement for a written or oral debriefing,” which is consistent with FAR 15.506(b): “Debriefings of successful and unsuccessful offerors may be done orally, in writing, or by any other method acceptable to the contracting officer.” Sure, the FAR explains that “[t]he contracting officer should normally chair any debriefing session held. Individuals who conducted the evaluations shall provide support.” FAR 15.506(c). But, again, that’s discretionary.

Failure to meaningfully respond to reasonable questions might prove more fruitful. In the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 818, Congress mandated that the DOD (1) allow the unsuccessful offeror to pose at least one round of follow-up questions (within two business days of receipt of the initial debriefing) and (2) respond with written answers (within five business days). Accordingly, the court *could* decide—and provide guidance—as to whether responses such as “we consider your questions unreasonable” or “no more information will be forthcoming” or “this form letter constitutes your congressionally mandated response to your questions” will suffice. Sadly, Congress failed to anticipate the need to clarify that written responses must be, well, responsive or informative. And the DOD’s minimalist class deviation memo requires only that “unsuccessful offerors [shall have] an opportunity to submit additional questions related to the

debriefing ... [and] the agency shall respond in writing.” DOD Class-Deviation 2018-O011, *Enhanced Postaward Debriefing Rights* (Mar. 22, 2018), <https://www.acq.osd.mil/dpap/policy/policyvault/USA000563-18-DPAP.pdf> (citing Pub. L. No. 115-91, § 818(b) & (c) (amending 10 USCA § 2305(b)(5) and 31 USCA § 3553(d)(4))). Nor does the legislative history signal an unambiguous expectation that questions will be followed by fulsome, meaningful responses:

The Senate amendment ... would require the...[Defense FAR Supplement] to require that all mandatory post-award debriefings must provide *details and comprehensive statements of the agency’s rating for each evaluation criterion and of the agency’s overall award decision*. The revision would *encourage the release of all information that would otherwise be releasable in the course of a bid protest challenge* to an award....This provision would allow for the opportunity for follow-up questions for a disappointed offeror within two business days of receiving a post-award debriefing to be answered in writing by the agency within five business days.

H.R. Rep. No. 115-404, 870 (Nov. 9, 2017) (Conf. Rep.) (emphasis added).

All that the statute requires is a response, and neither the FAR 15.506(d)(6) mandate nor the term “reasonable responses” is new. In other words, there’s nothing in the recent legislation that might prompt the court to consider how little substance a procuring agency can provide when a disappointed offer asks a question (or scores of questions).

A Squandered Opportunity

This suggests that the enhanced debriefing legislation represents a squandered opportunity. We think debriefings make sense, but only if they are informative or, more to the point, responsive. Formalistic debriefings serve no purpose, waste Government resources, and frustrate (and potentially enrage) private sector offerors that invested valuable resources preparing lengthy proposals. And, yes, we remain deeply skeptical of expensive, time-consuming essay-writing proposal contests. See, inter alia, *Postscript III: Page Limitations*, 34 NCRNL ¶ 2; *Essay-Writing Contests: How Did We Get Here?*, 30 NCRNL ¶ 47; *Technical Approach Deficiencies and Significant Weaknesses: Must They Be Discussed?*, 27 N&CR ¶ 30; *The Essay-Writing Contest: An Extreme Example*, 21 N&CR ¶ 46; *Best Value Procurement: A Flawed Process?*, 20 N&CR ¶ 34; *Postscript III: The Technical Proposal*, 12 N&CR ¶ 45; *The Technical Proposal: Is It Fish or Fowl?*, 11 N&CR ¶ 22.

We favor meaningful, informative debriefings, both from a transparency and a good business perspective, despite the Government anxiety they induce. To start, the FAR 1.102 “guiding principles” discuss “maintaining the public’s trust” and (somewhat awkwardly) assert that “[t]he Federal Acquisition System will...[c]onduct business with integrity, fairness, and openness.” In *Debriefing: Tell It Like It Is*, 4 N&CR ¶ 43, John Cibinic conceded that many Government officials perceive debriefings “to be one of the most difficult and distasteful tasks in the entire procurement process. It seems to instill fear and loathing in procurement personnel far out of proportion to the demands of the assignment....[But] there are a number of benefits which can be achieved from a properly handled debriefing.” See also *Preaward Debriefings: Get Them Done Quickly*, 12 N&CR ¶ 22; *Protests and Debriefings: A Tangled Web*, 11 N&CR ¶ 47; *Debriefing: Congress Has Now Spoken*, 9 N&CR ¶ 3 (noting that in 4 N&CR ¶ 43, John “predicted that if the Government procuring agencies did not provide more adequate debriefings, Congress would get into the act. They didn’t and it has.”).

The consensus that supports more fulsome disclosure is neither new nor without substantive justification. Recall the first recommendation from the 2018 RAND Bid Protest report:

A major concern from the private sector is the quality of post-award debriefings. The consensus among companies is that the quality and number of post-award debriefings vary significantly. The worst debriefings were characterized as being skimpy, adversarial, and evasive or as failing to provide required reasonable responses to relevant questions. In desperation, unsuccessful offerors may submit a bid protest to obtain government documents that delineate the rationale for the contract award.... [I]n most cases, too little information and evasive/adversarial debriefings will lead to a bid protest.

Our recommendation is to consider having DoD adopt a debriefing process similar to the U.S. Air Force’s extended briefing process.

Arena et al., RAND, *Assessing Bid Protests of U.S. Department of Defense Procurements: Identifying Issues, Trends, and Drivers* 65 (Dec. 2017), https://www.rand.org/pubs/research_reports/RR2356.html. See *Postscript: The RAND Study of DOD Protests*, 32 NCRNL ¶ 13; *Bid Protests: The RAND Study of DOD Protests at the GAO and the COFC*, 32 NCRNL ¶ 10; Berger, *Feature Comment: Developments Affecting DOD Bid Protests*, 61 GC ¶ 113 (Apr. 17, 2019) (“With new debriefing procedures..., DOD may be leading the way toward better debriefings Government-wide.... Unsuccessful offerors on contracts

with the DOD can use the newly adopted procedures to obtain valuable and necessary information to help them better understand the agency’s reasoning and decision, why they lost the competition and how they can improve their proposals, and whether there is a valid basis for a bid protest.”)

Reaching back more than generation, see Recommendation 5 (Post-Award Policy) from the *Report of the Commission on Government Procurement*, Vol. 1 at 25 (1972): “When competitive procedures [other than formal advertising, or, today, sealed bid] are utilized,... agencies shall, upon request of an unsuccessful proposer, effectively communicate the reasons for selecting a proposal other than his own.” More recently, the American Bar Association Section of Public Contract Law reminded the Section 809 Panel that:

As part of the Commission’s affirmative plan to reduce the number of protests, the Report recommended improved debriefing procedures based on an unpublished Department of the Air Force study from 1971 indicating that a certain portion of award protests were made unnecessarily because they were “based on incomplete or erroneous information concerning the rationale for making the administrative decisions on which those protests are based” and “[o]ften, after full information is available, the protests are withdrawn.”

ABA Public Contract Law Section, *Comments to Section 809 Panel; Proposed Changes to Procurement System and Bid Protests; Overall Comments* 8 n.25(May 11, 2018). See *ABA Section Criticizes 809 Panel’s Proposals To Limit Bid Protests*, 60 GC ¶ 167. The Office of Federal Procurement Policy (OFPP) has pounded the same drum. See Memorandum from Lesley A. Field, Acting Administrator for Federal Procurement Policy, to Chief Acquisition Officers et al., “*Myth-Busting 3*”: *Further Improving Industry Communication With Effective Debriefings* (Jan. 5, 2017), https://www.ago.noaa.gov/acquisition/docs/ofpp_myth_busting_3.pdf, stating: “Despite the numerous benefits associated with an effective debriefing, a number of misconceptions may be discouraging some agencies from taking full advantage of this tool.” The OFPP’s memo highlighted steps taken and guidance shared by the Department of Homeland Security, the National Aeronautics and Space Administration, DOD, and the Department of the Treasury. The memo specifically addressed the two key practices raised in the JEDI protest. OFPP disagreed with Misconception 8, that: “All debriefings should be completed in writing.”

Fact: ... [B]oth agencies and industry have expressed a preference for in-person debriefings. In-person debriefings allow for an open, flexible space where the government and offeror are able to communicate in a productive manner and foster a positive rapport....

Best Practice: NASA, DHS, and Treasury debriefing guides, as well as DOD policy, encourage in person debriefings whenever practicable....

The OFPP also took issue with Misconception 6, that “the government should avoid engaging in further discussions or follow-up questions during the debrief.”

Fact: The debriefing is meant to provide a thorough explanation of the basis for the award....and reasonable responses to relevant questions.

* * *

[S]uccessful debriefings instill confidence in the unsuccessful offerors that the government treated all offerors fairly and assure them that the government evaluated all proposals in accordance with the solicitation and applicable laws and regulations.

See also Cibinic et al., *FORMATION OF GOVERNMENT CONTRACTS*, 985, 992 (4th ed. 2011) (noting that debriefings serve a number of functions, including providing offerors with information to challenge the selection and “an indication of how those offerors can improve their chances for success in future procurements”).

A Good Debriefing Is Better Than A Lousy Protest

Both debriefings and protests are a common tools for increasing transparency into the procurement process. See *Acquisition Reform: A Progress Report*, 16 N&CR ¶ 48, noting: “Transparency embodies the idea that if you shine the light of day on agency practices, agencies’ violations of rules or their dumb procurement practices will be hung out for everyone to see and try to eliminate....At present, protests are the principal means of achieving transparency.” In that discussion, Vern suggested that, among other things, that “the basis for all awards should also be published on the Internet and made available to the public, including the number of sources sought and the reasons for selecting the source. Such information would already have been documented in the agency files and would not require a significant amount of effort.” That makes sense to me, because transparency makes oversight more effective and far less burdensome. See, e.g., *Oversight of Procurements: Is It Adequate?*,

15 N&CR ¶ 64; Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627, 650 n.77 (2001), which explained one of (few?) bright spots from the FAR Part 15 rewrite:

The most frequently identified government purchasing practice that may have led to a decrease in protest activity is the debriefing process, the requirements for which were upgraded during [OFPP administrator] Kelman's tenure. See 48 C.F.R. §§ 15.505, 15.506.... The revised regulations appear to have resulted in agencies providing more useful information to disappointed offerors on a more expeditious basis. Conventional wisdom suggests that quality debriefings reduce contractors' incentive to file exploratory protests.

Conclusion: Wrong-Headed Form Over Substance

The DOD's debriefing gambit provides a strange coda to an ongoing procurement saga in which two major competitors independently alleged dramatic, facially compelling conflicts of interest. See, e.g., *Developments: DOD Awards JEDI Cloud Contract to Microsoft, Bypassing Amazon, Oracle*, 61 GC ¶ 324(d); *New Defense Secretary To Review JEDI Procurement*, 61 GC ¶ 232; *Oracle Was Not Prejudiced by Alleged Errors in JEDI Procurement, COFC Holds*, 61 GC ¶ 230; *Oracle America, Inc. v. U.S.*, 144 Fed. Cl. 88 (2019), 61 GC ¶ 230 (currently on appeal, 61 GC ¶ 268(f)), *Hiring a Member of the Source Selection Team: Not a Recommended Practice*, 33 NCRNL ¶ 54 (don't hire a member of the Government source selection team in the middle of a competition); *Comp. Gen. Denies Oracle Protest of Single-Award Approach for JEDI Cloud IDIQ*, 61 GC ¶ 8; *Oracle America, Inc.*, Comp. Gen. Dec. B-416657 et al., 2018 CPD ¶ 391, 2018 WL 6040648, 61 GC ¶ 8.

We doubt that the DOD chose this procurement to affirmatively push back against the enhanced debriefing trend; rather, the DOD likely chose a minimalist approach fearing that anything the debriefing disclosed would be used in Amazon's inevitable protest. Time will tell whether Amazon's counsel chose well in proceeding at the COFC instead of the GAO. The DOD was probably correct in assuming there was minimal risk that its behavior would generate adverse precedent, even assuming Amazon's allegations are proven. The court is unlikely to seize this opportunity to more clearly define the minimum standards for what the Government must disclose, and how it should behave, in an enhanced debriefing.

Conversely, the DOD's (alleged) actions send a disappointing and dispiriting message with regard to (substantive rather than formalistic) compliance with the FAR, deference to congressional mandates, and respect for the Government's potential private sector partners and their investment of resources in the source selection process. That's a shame. *SLS*