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Postscript II: Enhanced Debriefings

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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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¶ 26 POSTSCRIPT II: ENHANCED DEBRIEFINGS

Steven L. Schooner

Supplementing my recent discussion, *Enhanced Debriefings: A Toothless Mandate?*, 34 NCRNL ¶ 10, Vern, in his *Postscript* at 34 NCRNL ¶ 21, asked the fundamental question: to the extent “that debriefings should be ‘meaningful,’ ... what does that mean?” Vern emphasized the important point that “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.” Vern also added helpful and informative history and addressed the more complex issues related to creativity in proposal preparation, the nature of judgment in source selection, and the realities inherent in protests (the adversarial byproduct of many debriefings). He offered the sobering observation that “none of the guidance or regulations that we have reviewed, from past to present, instruct agencies to answer the three questions to which many unsuccessful offerors will want ‘reasonable’ responses: (1) *specifically, and in detail*, how were we different from the winner?, (2) *specifically, and in detail*, how was the winner better?, and (3) *specifically, and in detail*, how did you reason from what premises to those conclusions?” Ultimately, Vern reminded the REPORT’s readers of his prior recommendation in *Protest Reform: We Dare To Dream*, 27 NCRNL ¶ 51, which seems conceptually and pragmatically aligned with the enhanced debriefing initiative, legislation, and policy, that agencies “retain and, during discussions and at the time of debriefing, give offerors copies of all documentation of the evaluations of their own proposals, including the work papers and notes of individual evaluators, properly collated. Every scrap of paper.” They also should “produce and distribute at the time of debriefing a chart showing the top-level summary proposal ratings of all offerors and their proposed prices.” That makes sense.

Added Perspective: The DOD IG Report

On April 13, 2020, the Department of Defense Inspector General issued its lengthy report on the JEDI procurement report. DODIG-2020-079, *Report on the Joint Enterprise Defense Infrastructure (JEDI) Cloud Procurement*, <https://www.dodig.mil/reports.html/Article/2150471/report-on-the-joint-enterprise-defense-infrastructure-jedi-cloud-procurement-do/>. At 313 pages, and chock-full of conclusions that I expect will satisfy no one, it’s an extraordinary read. Veteran observer Jason Miller opined: “By now Dana Deasy, the DoD [Chief Information Officer], or David Norquist, the DoD deputy secretary, should be able to see that the time for JEDI has passed and the Pentagon should cut its losses and cancel the contract.” *Time for DoD To Cancel JEDI, Ride the CIA’s Cloud Coattails*, FED. NEWS NETWORK (Apr. 13, 2020), <https://federalnewsnetwork.com/reporters-notebook-jason-miller/2020/04/time-for-dod-to-cancel-jedi-ride-the-cias-cloud-coattails/>. He’s not alone in his perception.

The bulk of the media coverage of the report focused on the potential impact of presidential pressure to derail an award to Amazon, leading to this seemingly inconsistent conclusion:

We sought to review whether there was any White House influence on the JEDI cloud procurement. *We could not review this matter fully* because of the assertion of a “presidential communications privilege,” which resulted in several DoD witnesses being instructed by

the DoD Office of General Counsel not to answer our questions about potential communications between White House and DoD officials about JEDI. Therefore, *we could not definitively determine the full extent or nature of interactions that administration officials had, or may have had, with senior DoD officials regarding the JEDI Cloud procurement.*

* * *

...[Nonetheless,] we believe the evidence we received showed that the DoD personnel who evaluated the contract proposals and awarded Microsoft the JEDI Cloud contract were not pressured regarding their decision on the award of the contract by any DoD leaders more senior to them, who may have communicated with the White House. [Emphasis added.]

DOD IG Report at 6–7. The IG also rehashes the litany of improper conflicts of interest that Judge Eric Bruggink chronicled during the *prior* U.S. Court of Federal Claims protest, *Oracle America, Inc. v. U.S.*, 144 Fed. Cl. 88 (2019), 61 GC ¶ 230. Not surprisingly, Deep Ubhi, the former Product Manager for the Defense Digital Service, garners the most attention (consuming approximately 10% of the lengthy report) and some of the most extensive redactions, leading to the IG’s conclusion that (1) “Mr. Ubhi committed ethical violations when he lied, or failed to disclose information, on at least three occasions, in an effort to conceal relevant information from, or mislead, his Amazon and DoD supervisors and DoD [Standards of Conduct Office] officials”; (2) “[t]hese actions, combined with his involvement in early Cloud Initiative activities in ... 2017, also created the appearance of violation of laws and ethical standards”; and (3) “[a]las, because] Mr. Ubhi left the DoD on November 24, 2017,...disciplinary action regarding his misconduct is not available to the DoD.” DOD IG Report at 152, 157. But, while most JEDI procurement aficionados were already familiar with Mr. Ubhi’s exploits and evasions, the report’s most surprising twist was that there are *even more conflicts!* For example, the DOD IG Report at 10, 222 states:

Ms. Cummings, the Principal Deputy Assistant Secretary of Defense for Acquisition and Deputy Assistant Secretary of Defense for Acquisition Enablers, violated her ethical requirements by improperly participating in a particular matter related to the JEDI procurement while owning stock in Microsoft valued between \$15,001 and \$50,000....[S]he participated and made recommendations in meetings and briefings where participants evaluated options for either making substantive changes to the procurement or continuing as planned with the ongoing proposal evaluations. Ms. Cummings participated even though Microsoft was one of two remaining competitors for the pending JEDI Clod contract award.... [S]he should not have participated in those JEDI procurement activities.

* * *

Ms. Cummings’s actions violated ethical standards when she participated personally and substantially in a particular matter related to the JEDI procurement while owning shares of Microsoft stock....[Also,] Ms. Cummings participation in the JEDI procurement process created the appearance of a violation of law or ethical standards.

The report also painstakingly recounts the DOD’s improper disclosure of source selection and proprietary Microsoft information to Amazon, plus the failure to properly redact DOD source selection team members’ names from the source selection reports. This raises intriguing evidentiary issues for the pending COFC litigation, to the extent that the Judge Campbell-Smith’s preliminary injunction order focused on the DOD’s errors in evaluating Microsoft’s price proposal, rather than an improper evaluation of Amazon’s proposal. (“Had the DOD properly evaluated [Microsoft’s] proposal of [] storage in Price Scenario 6,...the DOD would have concluded that the proposal was ‘noncompliant,’ and ‘should have found [its] technical approach unfeasible, assigned a deficiency, and eliminated [it] from the competition.’”) *Amazon Web Services, Inc. v. U.S.*, 147 Fed. Cl. 146, 153 (2020), 62 GC ¶ 72.

In highlighting management and training failures that led to the improper disclosures, the DOD IG “recognize[d] the challenges that the [Procuring Contracting Officer] faced on award day ..., but she did not fully review the disclosures, as she should have.” DOD IG Report at 90. A post hoc legal and contracting review “concluded that the decision to notify the unsuccessful offeror and simultaneously provide a written debriefing for the strategic purpose of starting the protest clock immediately ‘created extraordinary pressure on the contracting team’ and did not allow for the proper amount of time that all the tasks required [and] also recommended [that] contracting leadership reexamine the use of written debriefs by default because it was unlikely that the disclosure would have occurred during an oral debriefing.” DOD IG Report at 87. But I digress.

Leadership And Debriefing Policy vs. Practice?

The DOD IG discussed the debriefing issue at length, confirming many of the allegations in Amazon’s original complaint. 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). But the broader picture is that the debriefing-preparation rubric employed by the DOD at the conclusion of the JEDI

procurement has little in common with the aspiration of the enhanced debriefing initiative, best practices, or the common justifications for the debriefing mandate. It also shines an unflattering light on the attorneys' role in the process.

The report explains, at the highest levels of the DOD acquisition and information food chains, it was simply *assumed* that there would be an oral debriefing. See DOD IG Report at 81, stating:

FAR 15.506 allows a contracting officer to conduct an oral or written debriefing. *According to Mr. [Peter] Ranks, the Deputy CIO for Information Enterprise, and the Cloud Computing Program Office (CCPO) Program Manager (PM), they expected the debriefing for the unsuccessful contractor to be conducted orally, as did Mr. Deasy, the Chief Information Officer (CIO) and Ms. Lord, the Undersecretary of Defense for Acquisition and Sustainment (USD[A&S]).* Mr. Ranks told us that neither he, Mr. Deasy, nor Ms. Lord inquired about how the debriefing would be conducted because, in their experience, *an oral debriefing was standard practice for a contract of this magnitude.* The CCPM told us that she considered an oral debriefing a courtesy to the contractor, and both Mr. Ranks and the CCPM told us that in their experience, an oral debriefing can de-escalate a contentious situation. [Emphasis added.]

The worm turns, however, when three attorneys “advised the PCO against conducting an oral debriefing,” which either led the PCO to believe, or confirmed her belief, that an oral debriefing would neither de-escalate the situation nor reduce the risk of protest. Indeed, one of the attorneys later explained to the IG that “in his opinion, oral debriefings are a bad idea ‘mainly because of how parties in procurements of this size, magnitude, and publicity...don’t tend to use [an oral debriefing] in the manner in which it’s intended. They tr[y] to trick the [PCO] and the Government [into] saying something they don’t mean, that they can then use against [the Government] in litigation,’ which could jeopardize the contract award.” DOD IG Report at 81. That seems antithetical to the Office of Federal Procurement Policy’s articulated debriefing best practices (as discussed in 34 NCRNL ¶ 10, citing Lesley A. Field, “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). The DOD IG Report at 82 continues:

FAR 15.506 states that to the maximum extent practicable, the Government has five days from the date of a contractor’s request for a debriefing to provide the debriefing. In the weeks leading to the JEDI Cloud contract award, [one of the attorneys] advised the PCO to notify the unsuccessful contractor and provide the written debriefing documents at the same time. The [attorney] told us, “When conducting debriefings in accordance with the FAR, DFARS, and Class Deviation [2018-O0011]...it’s best for us to get [the information] out immediately.”

All of this apparently led to a running debate between the PCO and the Program Manager, which continued until after the contract was awarded. As noted above, the DOD’s post hoc review expressed skepticism with regard to the strategic efficacy of starting the protest clock immediately by simultaneously delivering the written debriefing with notice to the unsuccessful offeror (and perceived that the strategy directly contributed to the improper disclosure of source selection information).

With regard to Amazon’s protest allegation that the DOD failed to respond to the 265 questions it submitted in response to the written debriefing, the DOD IG Report at 88 explained:

[T]he ACO provided responses to questions that she determined were “relevant and within the scope of a debriefing.” Specifically, from the 265 questions AWS submitted, the ACO did not respond to 139 questions. The ACO stated that 25 questions were outside the debriefing scope, in accordance with FAR 15.506, and 114 questions were derived from the improper disclosure of Microsoft’s proprietary information and, therefore, also outside the scope of AWS’s debriefing.

Alas, given the breadth of the IG’s data dump, the report reads like an unfinished novel or the first book in an ongoing serial. The IG does not appear to have meaningfully examined Amazon’s allegation that “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.” (Emphasis added.) Given the IG’s specific reference to DOD Class Deviation 2018-O0011, “Enhanced Postaward Debriefing Rights” (Mar 22, 2018), <https://www.acq.osd.mil/dpap/policy/policyvault/USA000563-18-DPAP.pdf> (DOD IG Report at 77 n.93), and its findings about the legal advice steering the acquisition team, that’s surprising. Were the 126 “responses” that the ACO did provide substantive? Were the ACO’s responses formalistic and unhelpful (and, thus, consistent with counsel’s prior strategic advice), or did they supply additional information? At a minimum, did the ACO’s responses represent a good faith effort to point the disappointed offeror towards meaningful information?

The IG then appeared to lose interest in the DOD’s leadership’s role in the debriefing decision and process. When the Deputy CIO Cloud Computing Program Office PM lost the debate with the PCO over the debriefing strategy, did he elevate the is-

sue? Did Mr. Deasy, the CIO, or Ms. Lord, the USD[A&S] push back? Frankly, who cares whether CIO Deasy and USD[A&S] Lord “expected” an oral debriefing or assumed that to be “standard practice,” if, in the highest profile, hotly contested, and intensely scrutinized procurement in the DOD’s acquisition portfolio, counsel and the PCO are doing exactly the opposite? It strains credulity that this matter wasn’t aired prior to USD[A&S] Lord signing the Acquisition Decision Memorandum (ADM) that authorized the program office to award the JEDI Cloud contract on October 24, 2019, the day before the contract was awarded. DOD IG Report at 224. Moreover, once CIO Deasy and USD[A&S] Lord learned about the written debriefing and time crunch strategy, did they encourage the ACO to reconsider, provide an oral debriefing, or, at a minimum, urge the ACO to be forthcoming in response to written questions? Looking ahead, does USD[A&S] Lord plan to issue policy guidance or lessons learned based upon the disconnect between policies, expectations, and practices?

Ultimately, the IG made no recommendations with regard to debriefings, whereas it had plentiful advice for the DOD with regard to (1) policies to require some level of documentation and analysis supporting key acquisition decisions; (2) administrative action against individuals for failing to review the redacted reports and attachments and disclosing proprietary, proposal, and source selection information; (3) training for handling acquisition-related information not appropriate for disclosure; (4) developing standard redaction policies; (5) action, including counseling and training for, individuals’ ethics violations; and (6) procedures for identifying and mitigating potential conflicts of interest.

Is It Wrong To Do The Right Thing?

It’s not every day that the public is offered this level of detailed insight into an ongoing, high-profile procurement, including voluminous factual recitations related to (some of) the issues pending in a (currently remanded) federal court bid protest. To the extent the DOD IG added copious amounts of flesh to the bare bones of Amazon’s allegations, the picture the IG paints is no more attractive, and, arguably, even less so, than what we had been led to imagine. On the one hand, the DOD IG report merely exposes an unfortunate anecdote of risk-averse attorneys eschewing transparency for tactical advantage. To the extent that the anecdote involves the DOD’s highest-profile procurement, this suggests it’s not an under-the-radar, isolated example. What’s more troubling is the stark disconnect between policy, aspiration, and leadership expectation, on the one hand, and practice in the breach on the other.

All of which begs the question: Is it unrealistic to expect Government attorneys, in advising COs, to view contractors as business partners rather than opponents to defeat or enemies to vanquish? What discourages Government attorneys from playing the debriefing game to win, particularly in anticipation of protest litigation? Does the Government Accountability Office’s longstanding refusal to scrutinize or police the Government’s debriefing obligations—as discussed at length in 34 NCRNL ¶ 10—embolden Government counsel in crafting their advice.

This saga suggests it’s time for GAO to take a fresh look at its jurisdiction over debriefings. In 34 NCRNL ¶ 21, Vern identified more than 3,600 GAO decisions, dating back to 1963, that mentioned debriefings. Yes, the GAO’s consistent mantra is that debriefing is merely a procedural matter that does not affect the validity of the award. See, e.g., *Reliability Sciences, Inc.*, Comp. Gen. Dec. B-212852, 84-1 CPD ¶ 493, 1984 WL 44181. Yet the FAR articulates the postaward debriefing mandate dating back to the implementation of the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355. See FAR 15.506(a)(1) (emphasis added): “An offeror, upon its written request...shall be debriefed and furnished the basis for the selection decision and contract award.” What’s the point of such a mandate, let alone a congressional “enhancement” of that mandate, if there’s no enforcement mechanism?

What does it say about the defense acquisition system when the DOD’s senior leaders’ assumptions, consistent with best practice, suggests an obvious solution, but the Government’s attorneys persuade the CO to do the opposite? Actions speak louder than words (or policy guidance). What signal does the DOD’s behavior here send to the private sector? Nothing I read in the DOD IG report assuaged my prior concerns that the DOD is blowing smoke with regard to enhanced debriefings. The DOD may feel comfortable with their formalistic compliance with the FAR and Congress’ mandates in debriefing the JEDI award, and they may ultimately overcome all protests to the JEDI procurement. But few readers of the DOD IG report will come away with a perception that the DOD is a transparent, honest broker that respects its potential private sector partners or values the private sectors’ (often significant) investment of resources in the source selection process. *SLS*