

## THE DEBRIEFING EXCEPTION TO PROTEST TIMELINESS AT THE GAO

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The timeliness rules for filing protests at the Government Accountability Office (“GAO”) (other than protests of a solicitation) requires that such protests

shall be filed not later than 10 days after the basis of protest is known or should have been known (whichever is earlier), with the exception of protests challenging a procurement conducted on the basis of competitive proposals under which **a debriefing is requested and, when requested, is required**. In such cases, with respect to any protest basis which is known or should have been known either before or as a result of the debriefing, the initial protest shall not be filed before the debriefing date offered to the protester, but shall be filed not later than 10 days after the date on which the debriefing is held.

4 C.F.R. § 21.2(a)(2) (emphasis added). The rules grant a protester ten days **after** a debriefing is held to submit a timely protest. Although debriefings are supposed to take place “[t]o the maximum extent practicable... within 5 days after receipt of the written request,” FAR 15.506(a)(2), many times they are delayed beyond 5 days. This rule is an exception to the GAO’s rule requiring protests within 10 days of the date you knew or should have known the basis of your protest.

When the Federal Acquisition Streamlining Act of 1994 (“FASA”), Pub. L. No. 103-355 (Oct. 13, 1994) was enacted, and this requirement for debriefings was added, the purpose was to ensure that contractors would understand why they lost a contract before they protested, instead of submitting a GAO protest to get that information. Although no empirical research has demonstrated that this purpose has been fulfilled, contractors do use debriefings to understand why they lost, and in a smaller number of cases, to protest. Indeed, it is always an excellent idea to obtain a debriefing, because you usually learn something. In *Gorod Shtor*, B-411284, May 22, 2015, the GAO recently discussed when the debriefing exception applies and when it does not apply to timely protesting.

In *Gorod Shtor*, the protester was granted a debriefing and submitted its protest within 10 days of the debriefing. However, the GAO concluded that the protest was aware of the basis of its protest 4 days *before* the debriefing, and the debriefing was not required because the procurement was for an item being procured under the simplified acquisition procedures set forth in FAR Part 13, which do not mandate that a debriefing be provided. Therefore, the protest was submitted 14 days after the protester knew its basis of protest, did not qualify for the debriefing exception, and was untimely and dismissed.

The question is, when is a debriefing “required” by the FAR or the procurement statutes? Only if the debriefing is required will the debriefing exception apply.

## **REQUIRED DEBRIEFINGS, SUBJECT TO THE DEBRIEFING EXCEPTION IN THE GAO RULES**

- 41 U.S.C. § 3704(a) requires post-award debriefings (when requested in writing within 3 days of notification of award) when award is made on the basis of competitive proposals. These are FASA non-defense procurements.
- 10 U.S.C. 2305(b)(5)(A) ) requires post-award debriefings (when requested in writing within 3 days of notification of award) when award is made on the basis of competitive proposals. These are FASA defense procurements.
- Both of the above debriefings are set forth in FAR 15.506. There is also a pre-award debriefing requirement in FAR 15.505, for offerors excluded from the competitive range or otherwise excluded from competition before award. 10 U.S.C. § 2305(b) (6)(A) and 41 U.S.C. 3705.

## **NON-REQUIRED DEBRIEFINGS, NOT SUBJECT TO THE DEBRIEFING EXCEPTION IN THE GAO PROTEST RULES**

- For any procurement conducted under the Simplified Acquisition Procedures of FAR Part 13 (acquisitions under \$150,000, except special cases set forth in FAR 2.101). Although FAR 15.503(b)(2) states that contractors may request information on the basis of award in a Simplified Acquisition (if it is more than merely price), FAR 13.106-3(d) indicates that this is not a debriefing, but is a mere “brief explanation of the basis for the contract award.” Simplified acquisitions include commercial procurements up to \$6.5 million conducted under FAR Subpart 13.5, Test Program for Certain Commercial Items.
- **All** procurements conducted under the General Services Administration (or Department of Veterans Affairs) multiple award schedules, also known as “Federal Supply Schedules.” These procurements are subject to the rules in Part 8.4 of the FAR and are not FASA procurements. Although agencies may frequently grant debriefings in these procurements, there is no *requirement* to provide a debriefing, and the debriefing exception does *not* apply. (FAR Part 8.4 expressly exempts Federal Supply Service contracts from the requirements of FAR Parts 13, 14, 1, and 19. FAR 8.404(a). See *Navarro Research and Eng’g, Inc. v. United States*, 94 Fed. Cl. 224, 230-33 (2010).
- Any procurements conducted where the solicitation is a Requests for Quotations (“RFQ”). FAR 2.101 defines an offer as:
  - a response to a solicitation that, if accepted, would bind the offeror to perform the resultant contract. Responses to invitations for bids (sealed bidding) are offers

called “bids” or “sealed bids”; responses to requests for proposals (negotiation) are offers called “proposals”; however, responses to requests for quotations (simplified acquisition) are “quotations”, not offers.

Therefore, quotations do not qualify as “competitive proposals” under the sections of the U.S. Code requiring debriefings where “award is made on the basis of competitive proposals.”

Contractors should be careful in situations where they receive a debriefing but it is not required. These include all Simplified Acquisitions, all procurements under Multiple Award Schedules (VA and GSA—“Federal Supply Schedules”), and all procurements where an RFQ is used as the solicitation. If you want to protest at the GAO, the debriefing exception on timeliness will not apply.