

## **UNLESS PROTESTER ASKS QUESTIONS IN EXTENDED DEBRIEF THE 5 DAY REQUIREMENT IN CICA APPLIES**

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A protester filed a bid protest on a Defense Department procurement at the Government Accountability Office (“GAO”) six days after receiving a written debriefing. The GAO denied the stay as untimely, but the Court of Federal Claims instituted the stay. On appeal the Court of Appeals for the Federal Circuit reversed, and denied the stay. *Nika Tech., Inc., v. United States*, No. 2020-1924 (Fed. Cir. Feb. 4, 2021).

After timely requesting a debriefing on an Army Corps of Engineering (“Corps”) procurement where Nika did not receive award, Nika made a timely request for a debriefing, and on March 4, 2020, the Corps sent Nika a written debriefing, and advised it of the right to submit additional questions. However, Nika did not submit any additional questions. Rather, Nika filed a protest at the GAO on March 20, 2020—six days after the written debriefing. The GAO denied the stay.

The GAO bid protest rules state that a protest will invoke a stay on procurement for the duration of the GAO proceeding if the protest is filed within 10 days of contract award, or within 5 days of the debriefing date offered for a required debriefing. 31 U.S.C. §3553(d) (This is part of the Competition in Contracting Act—“CICA”). When it considered Nika’s appeal, the Court of Federal Claims held that 10 U.S.C. §2305(b)(5)(B)(vii) states that “the debriefing [for Defense Department procurements] shall include ...an opportunity for a disappointed offeror to submit, within two business days after receiving a post-award debriefing, additional questions related to the debriefing.” This is the so-called “enhanced debriefing” in DoD procurements.

The Federal Circuit examined the issue on appeal and held that the debriefing is not automatically held open for an additional two days. Invoking the plain meaning rule, the Court held that the 5 day period starts on the debriefing date—the day that a bidder receives its debriefing, not two days afterward. Furthermore, the statute did not extend the deadline, as it has done elsewhere. For example, 10 U.S.C. §2305(b)(5)(B)(vii) states that when there are additional questions submitted “[t]he agency shall not consider the debriefing to be concluded until the agency delivers its written responses...” The Court held that when no additional questions are submitted, the debriefing period is not held open.

The Court held that the plain meaning of the statute is that *when no additional questions are submitted*, the debriefing date is the date upon which the party receives its debriefing—and the five day period begins on the debriefing date, rather than two days later. Because NIKA did not file at the GAO within the five-day period, it did not timely invoke the stay. The court made it clear that the five day period does not commence until the day the government delivers to a disappointed offeror the written responses to any questions submitted pursuant to 10 U.S.C. §2305(b)(5)(B)(vii).

**The Takeaway.** On DoD procurements, unless you want the five day period (to file a timely protest at GAO) to run from the date of *receipt* of the debriefing, you must submit at least two questions to the agency. This would extend the five day period until 5 days after the answers are

received. (Note: the court refers to “questions” not a question, so at least two would be necessary.) It makes sense to always ask at least two questions.

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