

## **QUESTION PERIOD IS PART OF ENHANCED POST-AWARD DEBRIEFING FOR AUTOMATIC STAY**

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The Court of Federal Claims recently considered an award where the Army Corps of Engineers (“COE”) refused to implement an automatic stay of performance under the Competition in Contracting Act, 31 U.S.C. §§ 2551 – 56 (“CICA”) *NIKA Tech., Inc. v. United States*, No. 20-299C (Fed. Cl. April 16, 2020). The basic question in this case is, in Department of Defense procurements, where offerors receive an enhanced debriefing with subsequent questions, how long does an offeror have to submit a protest in order to invoke the automatic stay?

NIKA filed a GAO protest of a COE award on February 28, 2020. The Corps provided a written debriefing letter on March 4, 2020. The COE included in the debriefing the option for NIKA to submit additional questions related to the debriefing within 2 business days after receiving the debriefing. The letter stated that the government would consider the debriefing closed if additional questions were not received within 2 business days, but if additional questions were received, the government would respond in writing within 5 business days and would consider the debriefing closed upon delivery of written responses to any additional questions. On March 7<sup>th</sup>, NIKA advised the COE that it did not have any official debriefing questions to submit. On March 10, 2020, NIKA filed a post award protest at the GAO, and sought the automatic suspension of contract performance pursuant to 31 USC 3553(c)(1) and FAR 33.104(b)(1). The COE asserted that the protest was untimely for a stay, stating that a timely filing would have been March 9, 2020, i.e. five days after a debriefing date offered to the protester under a timely debriefing request and no additional questions relating to the debriefing were submitted.

NIKA’s position was simple: the five days did not begin to run until March 6<sup>th</sup>—two days after receiving the debriefing, so a March 10<sup>th</sup> filing was timely in order to invoke the stay. The COE position was that the protest had to be submitted by March 9<sup>th</sup>, five days after the original date (not including the question period). The COE contended that NIKA was not entitled to the stay.

The Court analyzed the relevant statutory language. Under 31 USC §3553(d)(4)(A), NIKA is entitled to an automatic stay if its protest is filed within 5 days after the debriefing date offered to an unsuccessful offeror.

For Defense Department procurements, the debriefing shall include, at a minimum, an opportunity for a disappointed offeror to submit, within two business days after receiving a post-award debriefing, additional questions related to the debriefing; and the agency shall respond in writing to any additional question submitted under within five business days after receipt of the question. The agency shall not consider the debriefing to be concluded until the agency delivers its written responses to the disappointed offeror. 10 USC §2305(b)(5)(B) & (C). The text of 31 USC §3553(d)(4)(B) (CICA) makes it clear that for procurements conducted by any component of the Department of Defense, the 5-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 USC §2305(b)(5)(B)(vii).

In analyzing the statutory language, the Court noted that the debriefing includes a “time” of two business days in which a disappointed offeror can submit questions for further debriefing. Furthermore, the “debriefing date” in the statute, while singular, refers to the date at the *end* of a potentially multi-day debriefing *process*. The Court concluded that there are two potential deadlines for the close of the debriefing:

- 1) If no additional questions are submitted, the debriefing closes two days after the debriefing is given.
- 2) If additional questions are submitted, the debriefing closes after the government provides written responses, no later than five days after receiving the questions.

The Court held that NIKA’s protest was timely and entitled to the automatic stay.

Takeaway. In Defense Department procurements, enhanced debriefings do *not* end on the day the agency gives you the debriefing. They end either two days later, or even later if you have additional questions.

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