

DOD Proposes To Formally Implement Enhanced Debriefings

By **Daniel Wilson**

Law360 (May 20, 2021, 8:18 PM EDT) -- The U.S. Department of Defense has proposed a rule to give unsuccessful bidders on many defense contracts the right to more information about why their bid was not chosen, expanding and codifying an existing interim policy.

The proposed Defense Federal Acquisition Regulation Supplement rule, published in the Federal Register on Thursday, would give bidders the right to "enhanced" debriefings following contract awards, according to the DOD.

"These enhanced post-award debriefing requirements will assist in developing small-business capabilities, provide increased participation and promote competition," the department said. "Properly conducted post-award debriefings with this enhanced transparency may minimize the number of unnecessary protests filed while strengthening relationships between DOD and industry."

The proposed rule, which will be open for comment for 60 days, implements Section 818 of the 2018 National Defense Authorization Act, making the enhanced post-award debriefings available for competitive defense contracts and task and delivery orders worth \$10 million or more upon request.

It will give unsuccessful bidders two business days following a debriefing to submit follow-up questions, which the department must answer in writing within five business days. That question-and-response requirement also extends the potential time frame for an automatic stay on contract performance if a related bid protest is filed at the U.S. Government Accountability Office, the DOD said.

Typically, protesters have 10 days following a contract award or five days following a post-award briefing to protest to the GAO and secure an automatic stay until the protest process ends. Under the enhanced debriefing process, that five-day window only begins once a protester receives a response to its post-debrief questions.

For contracts and orders worth \$10 million to \$100 million, small businesses and "nontraditional" defense contractors will be able to request a copy of the DOD's document explaining its source selection decision as part of the debriefing, with the confidential and proprietary information of other bidders redacted. Currently, the department only has to provide a basic summary of its award rationale.

That will cover most such deals, as on average about 4,000 of the roughly 5,500 relevant defense contracts and orders awarded each year from 2018 to 2020 went to small businesses or nontraditional

contractors, the DOD said.

For contracts worth more than \$100 million, debriefings must always include the source selection document, according to the proposal.

The DOD had partly implemented Section 818 in March 2018, including the requirement for bidders to be able to ask follow-up questions about a debriefing, but did not include the requirement to provide source selection documentation.

That beefed-up DOD debriefing process has at least anecdotally served to cut down on bid protests, Morrison & Foerster's James Tucker said on Thursday, following previous complaints about sparse debriefings that left some contract bidders feeling as if they had to protest to get answers to why their bid was not chosen.

"We've seen robust enhanced debriefings convince disappointed offerers to stand down from a pending decision to protest once they see that they lost a competition fair and square," said Tucker, who is of counsel. "We've also seen agencies take corrective action without a protest when enhanced debriefings bring procurement errors to light. And greater transparency tends to bring a greater confidence in the reliability of the federal procurement process."

The GAO's annual bid protest reports add further weight to that anecdotal view. Although the watchdog does not seek to explain the reduction, the reports note that the overall number of bid protests filed dropped significantly from fiscal year 2018 through 2020, with 2,474 new protests filed in 2018, 2,080 in 2019 and 2,052 in 2020.

The reduction in bid protests has also come alongside other benefits, such as a "slightly more civilized time frame in which to decide whether to protest" and more willingness from the DOD to share redacted documents, Tucker said. Similar actions by civilian agencies — or a similar directive from Congress to civilian agencies — would also be welcomed by contract bidders, he said.

--Editing by Karin Roberts.