



CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance & Litigation

A Lawyer's View of FASA - Debriefings

January 27, 1995



Debriefings – The New FASA Requirements by Lisa J. Obayashi

I hate debriefings. Don't you? Who enjoys telling someone face-to-face: "Thank you for spending hundreds of thousands of dollars and nine months preparing a proposal, but you're not getting the contract. We liked your competitor's proposal better. By the way, we realize your price is a lot lower than your competitor's, but in our judgment, we think it's in the Government's best interests to award at a higher cost because the awardee scored higher than you technically, but we're not telling you how much higher."

One of the more "revealing" aspects of the new Federal Acquisition Streamlining Act (FASA) is the requirement dealing with post-award debriefings. FASA has vastly expanded what an offeror will be entitled to "get out of" a debriefing. Although some contracting officers are loathe to disclose much more than the significant strengths and weaknesses of the losing offeror's proposal – usually, for fear that the debriefed offeror will turn around and use whatever information it obtains during the debriefing as a basis for protest, FASA will require the Government to add a few more items to the contracting officer's debriefing agenda.



Present Requirements

Under present regulations, when a contract is awarded on the basis of other than price alone, the FAR requires only that the Government provide the basis for the selection decision and the Government's evaluation of significant weak or deficient factors in a debriefed offeror's proposal. FAR § 15.1003(b). The FAR prohibits any point-by-point comparisons with other offerors' proposals, relative merits or technical standing of competitors, the evaluation scoring, and any information that is not revealable under a Freedom of Information Act (FOIA) request. Id.

New Requirements

FASA §1064 will now require that the debriefing include, at a minimum–

1) the evaluation of the significant weak or deficient factors in the offeror's offer;

2) the overall evaluated cost and technical rating of the offer of the awardee;

3) the overall evaluated cost and technical rating of the offer of the debriefed offeror;

4) the overall ranking of all offerors;

5) a summary of the rationale of the award;

6) in the case of a contract which requires commercial end items, the identity of the make and model of the commercial end item proposed by the awardee; and

7) reasonable responses to relevant questions posed by the debriefed offeror as to whether source selection procedures and other applicable regulations and authorities were followed.

FASA still prohibits point-by-point comparisons of the debriefed offeror's offer with other offers or divulging any information that is exempt under FOIA. Another new requirement is that each solicitation for competitive proposals is to include a statement that the information described above may be disclosed in post-award debriefings. FASA also requires that if, as a result of a successful protest (by a protestor), the agency either reissues a solicitation or asks for another round of best and final offers to fulfill its requirement, an agency is to make available to all offerors the information about the contractor awarded the contract provided in the debriefing.

Some of what FASA requires is not new: evaluation of the significant weak or deficient factors of a debriefed offeror's offer; informing the debriefed offeror that source selection procedures were followed (many CO's are more than happy to volunteer this information); overall technical rating of the debriefed offeror. However, the new debriefing requirements raise a lot of

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A Lawyer's View is a periodic publication of the Contract Law Division designed to give practical advice to the Department's procurement officers. Comments, criticisms, and suggestions for future topics are welcome.—Call Jerry Walz at 202-482-1122, or via e-mail to Jerry Walz@FinLit@OGC or jwalz@doc.gov.



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interesting questions. For example, if the agency has to reveal the overall ranking of all offerors, does this mean the agency must reveal the identity of all offerors? Presumably, it does. Does "overall ranking" mean a ranking after combining cost and technical scores? Or is it simply the technical ranking? The assumption is that if there is no combined score, technical ranking should suffice because an offeror's price is considered proprietary. What is a "reasonable response to a relevant question" regarding a solicitation's source selection procedures? Does this mean answering questions regarding particular technical scores received by the offeror, i.e. what did I receive for such-and-such technical evaluation factor? The safest answer is to state: "Of course the agency followed the source selection procedures contained in the solicitation as well as applicable agency regulations such as the Commerce Acquisition Manual."

Deadlines

Procedurally, FASA will require that unsuccessful offerors request in writing a debriefing three (3) days after the date on which the notification of contract award is received by the unsuccessful offeror. The agency then has to debrief the offerors within five (5) days after receipt of the request, with the caveat "to the maximum extent practicable." FASA leaves open the question of what happens when that request for the debriefing comes in late, i.e. on the 4th day after notification of contract award. Does this mean the unsuccessful offeror is time barred from requesting a debriefing? If so, this is significant in terms of a protestor's ability to bring a protest based on information learned during a debriefing. FASA, however, also provides for a suspension hearing to be held (if requested by an interested party) as late as five days after the debriefing date, which could in some circumstances be later than ten (10) calendar days after contract award, the present deadline for requesting a suspension. (FASA §1433; FAR 33.105)

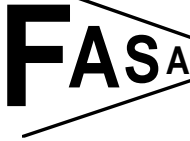
Effective Date

The new FASA requirements for debriefings go into effect as soon as final regulations are im-

plemented or October 1, 1995, (just in time to do all those end of fiscal-year award debriefings).

Summary and Recommendation

1. Prepare an agenda and script of exactly what will be revealed during the debriefing.
2. Have your assigned attorney review the script.
3. Stick by your guns as to what you believe is allowable debriefing information under FASA.
4. Have your lawyer present.



SEC. 1064. POST-AWARD DEBRIEFINGS.

Section 303B of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253b) is amended--

(1) by redesignating subs):

"(e)(1) When a contract is awarded by the head of an executive agency on the basis of competitive proposals, an unsuccessful offeror, upon written request received by the agency within 3 days after the date on which the unsuccessful offeror receives the notification of the contract award, shall be debriefed and furnished the basis for the selection decision and contract award. The executive agency shall debrief the offeror within, to the maximum extent practicable, 5 days after receipt of the request by the executive agency.

"(2) The debriefing shall include, at a minimum--

"(A) the executive agency's evaluation of the significant weak or deficient factors in the offeror's offer;

"(B) the overall evaluated cost and technical rating of the offer of the contractor awarded the contract and the overall evaluated cost and technical rating of the offer of the debriefed offeror;

"(C) the overall ranking of all offers;

"(D) a summary of the rationale for the award;

"(E) in the case of a proposal that includes a commercial item that is an end item under the contract, the make and model of the item being provided in accordance with the offer of the contractor awarded the contract; and

"(F) reasonable responses to relevant questions posed by the debriefed offeror as to whether source selection procedures set forth in the solicitation, applicable regulations, and other applicable authorities were followed by the executive agency.

"(3) The debriefing may not include point-by-point comparisons of the debriefed offeror's offer with other offers and may not disclose any information that is exempt from



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disclosure under section 552(b) of title 5, United States Code.

"(4) Each solicitation for competitive proposals shall include a statement that information described in paragraph (2) may be disclosed in post-award debriefings.

"(5) If, within one year after the date of the contract award and as a result of a successful procurement protest, the executive agency seeks to fulfill the requirement under the protested contract either on the basis of a new solicitation of offers or on the basis of new best and final offers requested for that contract, the head of such executive agency shall make available to all offerors--

"(A) the information provided in debriefings under this subsection regarding the offer of the contractor awarded the contract; and

"(B) the same information that would have been provided to the original offerors.

"(6) The contracting officer shall include a summary of the debriefing in the contract file."

