

Federal Circuit Clarifies Protest Timeliness Rules to Obtain Automatic Stay Following DOD Enhanced Debriefing Opportunity

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A recent decision by the U.S. Court of Appeals for the Federal Circuit in *Nika Technologies, Inc. v. United States* provides an important clarification of the timeliness rules for filing a bid protest with the U.S. Government Accountability Office (GAO) and obtaining an automatic stay following a DOD “enhanced debriefing.” The Federal Circuit’s decision establishes that in cases where an unsuccessful offeror receives an opportunity to submit written debriefing questions after the government’s debriefing, but declines to do so, the debriefing concludes—and the clock for obtaining an automatic stay of contract performance under the Competition in Contracting Act (CICA) starts—at the end of the government’s affirmative debriefing, not the deadline that the offeror would have had to submit additional questions had it chosen to do so. This reversed a decision by the U.S. Court of Federal Claims (COFC) that we previously featured (with caution) in our October 2020 Newsletter. The Federal Circuit’s decision underscores the importance for federal contractors to remain vigilant and adhere strictly to the CICA timeliness requirements to obtain an automatic stay.

The “automatic stay.” CICA’s “automatic stay” of performance prevents a contract awardee from performing work while a GAO bid protest is being litigated. The stay helps preserve the status quo during GAO’s 100-day review period, so that GAO can recommend effective corrective actions in the event it sustains a protest. For a protester to obtain the automatic stay, the procuring agency must receive notice from GAO that a protest has been filed within one of two periods: (i) ten days from the date of award; or (ii) five days from

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a required debriefing. Typically, the debriefing concludes the same day it is offered by an agency, unless the contracting officer agrees to hold the debriefing open to address questions raised during the debriefing.

In 2018, DOD formalized the question and response process through its “enhanced debriefing” protocols, under which a debriefed offeror is permitted to submit follow-up questions to the agency in writing within two days after the debriefing. When a contractor submits follow-up questions within the two-day period, the debriefing will conclude—and the CICA clock will start—when the agency provides a written response to the questions.

The *Nika* quirk. The *Nika Technologies* case clarifies how to apply the CICA deadlines where an offeror has the opportunity to submit questions under DOD’s enhanced debriefing program, but elects not to. In *Nika Technologies*, the protester received a written debriefing, did not submit follow-up questions, and filed a protest with GAO six days after its written debriefing. When the agency did not impose an “automatic stay” of performance of the awarded contract, the protester sought an injunction at the COFC.

At the COFC, the protester advanced its theory that the two-day period for submitting follow-up questions extends the debriefing period, even if the offeror does not submit follow-up questions to the agency, as permitted under the enhanced debriefing protocol. The protester argued that the automatic stay must be implemented for any bid protest filed within seven days of the start of the debriefing—five days, plus the additional two days permitted for follow-up questions. The COFC agreed, holding that the extended debriefing, by definition, includes the two-day period in which contractors can submit follow-up questions.

The Federal Circuit reversal. The Government appealed to the Federal Circuit, which reversed. The Federal Circuit focused on the plain meaning of the relevant provision of CICA, 31 U.S.C. § 3553(d)(4)(A)(ii), and held that the two-day period for additional questions under the enhanced debriefing program does not extend the debriefing if the contractor does not submit any questions. In that situation, the debriefing concludes on the same day it is offered. The debriefing is only extended—and the CICA deadline for submitting a protest likewise extended—if a debriefed offeror submits follow-up questions within the two-day period after the debriefing.

A cautionary tale. *Nika Technologies* provides a critical reminder that the CICA timelines to file a bid protest with GAO and obtain an automatic stay are strictly enforced and must be carefully monitored. Contractors can minimize the risk of missing these deadlines by establishing standard post-award procedures. First, be sure to read with great attention to detail all written communications received from the government, including the award notice, debriefing, and any additional written communications about key dates or deadlines. Second, always submit a written request for a debriefing from the government within three calendar days after receiving any award notice, as a timely written request is an essential predicate to a required debriefing under CICA. Third, when the agency is using an enhanced debriefing process, submit any written follow-up questions to the contracting agency within two days of the debriefing to extend the debriefing period; or, if you have no questions, understand that the deadline to obtain the automatic stay under CICA will be five days from the initial debriefing.

Nika Technologies is a cautionary tale about missed deadlines. With so many different deadlines floating around—three days to request a debriefing; two days to ask follow-up questions; five days after the debriefing (or ten days after the award) to submit a protest—it requires diligence and a clear plan to protect your interests and preserve the status quo.