

ALERT

Federal Circuit Nixes COFC Automatic Stay Decision

February 8, 2021

WHAT: On February 4, 2020, the U.S. Court of Appeals for the Federal Circuit (CAFC) reversed a Court of Federal Claims (COFC) judge's ruling in a decision that clarifies what a contractor must do to preserve the right to stop the performance of a contract while pursuing a Government Accountability Office (GAO) protest following a Department of Defense (DOD) award and "enhanced debriefing." The Competition in Contracting Act (CICA) requires agencies to halt performance of a contract if a disappointed bidder files a GAO protest within ten days of award or within five days of a required debriefing – this is the so-called "automatic stay" or "CICA stay" of performance. DOD's 2018-implemented "enhanced debriefing" protocol permits offerors to ask questions within two days of a debriefing, and holds the debriefing open until the agency answers the questions. As we reported in October 2020, a COFC judge ruled, in essence, that enhanced debriefings do not end until the two-day question period ends, even if the offeror does not ask any questions – i.e., an offeror who does not ask questions starts the five-day clock to protest at GAO and obtain an automatic stay two days after receiving the initial debriefing information prescribed by FAR Part 15. CAFC struck down the COFC decision based on the "plain meaning" of the statute under which DOD implemented the enhanced debriefing protocol, which CAFC says "is that when no additional questions are submitted, the "debriefing date" is simply the date upon which the party receives its debriefing. The five-day [automatic stay period] . . . begins on the debriefing date, rather than two days later."

WHAT DOES IT MEAN FOR INDUSTRY: In our October 2020 article, we recommended caution in reliance on the COFC ruling considering that the Department of Justice had filed an appeal of the decision at

Practice Areas

Bid Protests

Government Contracts

CAFC.

The Government appealed COFC's ruling on June 25, and the case is pending before the U.S. Court of Appeals for the Federal Circuit. In light of this appeal and to protect the right to an automatic stay, when an enhanced debriefing is offered, a contractor should either ask additional post-debriefing questions within the two business days permitted to extend the debriefing or, if it elects not to submit additional questions, file its protest within five days of receiving the initial debriefing.

The CAFC reversal validates this advice, once and for all. If, up till now, a protester relied on the COFC ruling and the agency honored the automatic stay demand, congratulations - you lucked out. From now on however, any protester who does not ask questions and does not file at GAO within five days of receiving its debriefing information relinquishes its statutory right to an automatic stay. You have been warned.