

ALERT

# GAO Reminds Offerors Excluded from a Competitive Range to Request a Pre-Award Debriefing

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April 24, 2019

**WHAT:** GAO's recently issued decision in B-417431, *Loc Performance Products, Inc.*, revived a rarely invoked rule that has a significant impact on the rights of contractors excluded from a competitive range to challenge that exclusion. In *Loc*, after excluding the contractor from the competitive range, the agency gave the contractor a choice between a pre- or post-award debriefing. The contractor chose a post-award debriefing, during which it first learned why it had been excluded. After receiving its debriefing, the contractor filed a protest at GAO and challenged the agency's decision to exclude it from the competitive range. GAO dismissed the protest, finding that it was untimely. GAO held that where an offeror is offered a pre-award debriefing but elects to delay its debriefing, the offeror has failed to diligently pursue its protest. Because the protester would have learned of its protest grounds during the pre-award debriefing, any protest challenging such flaws in the evaluation is untimely.

**WHEN:** GAO's decision was issued April 23, 2019.

**WHAT DOES IT MEAN FOR INDUSTRY:** Contractors that have been excluded from a competitive range should always request a pre-award debriefing. Although the FAR cautions offerors that delaying a debriefing until after award "could affect the timeliness of any protest," GAO's decision in *Loc* reaffirms a decade-old rule that essentially bars post-award competitive range protests if the offeror was offered either a pre- or post-award debriefing but elected a post-award debriefing. This is true even where the agency seems to suggest that a post-award debriefing would be better: in *Loc*, after

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the offeror requested a pre-award debriefing, the agency responded by explaining that the offeror would receive different information in a post-award debriefing, and clarified that the offeror could choose either a pre- or post-award debriefing. Unsurprisingly, this exchange changed the offeror's mind about choosing a pre-award debriefing, but GAO was unsympathetic.

To preserve all protest rights, a contractor excluded from a competitive range should request a pre-award debriefing within three days of receiving notice of exclusion; and accept the first date of the debriefing offered. If the agency declines to provide a pre-award debriefing, a protest after a required post-award debriefing will still be timely.

This course of action will ensure the contractor retains the ability to timely file a protest or to obtain a stay.