

Fed. Circ. Ruling Guides On DOD Enhanced Debrief End Date

By **Aron Beezley** and **Patrick Quigley**

In *NIKA Technologies v. U.S.*, the U.S. Court of Appeals for the Federal Circuit recently reversed the holding of the U.S. Court of Federal Claims regarding when the protest-filing clock starts running for a stay of contract performance pending resolution of a bid protest when U.S. Department of Defense enhanced post-award debriefing procedures are used.[1]

This article discusses the Federal Circuit's noteworthy decision in *NIKA Technologies* and provides practical guidance for government contractors on how to deal with the debriefing problem encountered by the protester in that case.

Background

Bid protests at the U.S. Government Accountability Office have always been a race against the clock because of their short filing deadlines. Private practitioners sometimes suspect that federal agencies might have occasionally used this fact to game the system, giving themselves an advantage by limiting the information given to disappointed offerors — so as to limit arguments — and by making protesters rush their filings.

Thus, when Congress recently mandated enhanced debriefing procedures, disappointed offerors got the gift of more time to consider whether to protest as well as the gift of more fulsome information about the award decision, allowing protesters to choose the most likely grounds.

The Federal Circuit's holding now shifts the ground back to the agencies a bit. Although the practical impact of the case could be limited because the factual scenario in this case is rare, the court's holding imposes hard deadlines where there had arguably been wiggle room before.

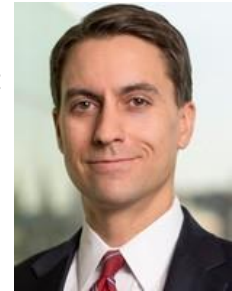
A disappointed offeror protesting at the GAO can obtain a stay of contract performance pending resolution of a protest as long it files the protest by the later of "10 days after the date of the contract award ... [or] the date that is 5 days after the debriefing date offered to an unsuccessful offeror for any debriefing that is requested and, when requested, is required." [2]

In 2018, Congress changed the debriefing rules with Section 818 of the fiscal year 2018 National Defense Authorization Act.[3] Section 818 created an exception for military procurements to the deadline to file a protest after a required debriefing.

The exception allowed "a disappointed offeror to submit, within two business days ... additional questions related to the debriefing," which a military agency must answer within five business days.[4]

The purpose of the revision, as explained in the conference report, was:

[to] require that all mandatory post-award debriefings must provide details and comprehensive statements of the agency's rating for each evaluation criterion and of



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the agency's overall award decision. The revision would encourage the release of all information that would otherwise be releasable in the course of a bid protest challenge to an award to protect the confidential and proprietary information of other offerors.[5]

In other words, the goal was to provide more information to disappointed offerors. Thus, for DOD procurements now, the five-day post-debriefing period for filing a protest and obtaining a stay of performance runs from the date the government responds to a disappointed offeror's questions.

In February 2020, NIKA was not selected for a U.S. Army Corps of Engineers, or USACE, multiple-award indefinite-delivery, indefinite-quantity contract. NIKA requested a debriefing, which it received in writing on a Wednesday.

The debriefing told NIKA that it had two business days to submit follow-up questions and that the debriefing would be considered "closed if additional questions are not received within (2) business days," i.e., on Friday.

On Saturday, NIKA told the USACE that it had no more questions.

NIKA filed a GAO bid protest on the following Tuesday, six days after receiving the written debriefing, but four days after it could have submitted follow-up questions but chose not to.

The USACE did not stay contract performance, stating that NIKA filed the protest outside the five-day window. NIKA took the contract-stay dispute to the Court of Federal Claims while the GAO protest about the reasonableness of the award decision continued separately.

At the Court of Federal Claims, the government argued that, because NIKA submitted no follow-up questions, the debriefing closed on Wednesday when the USACE gave the written debriefing. As such, any protest had to be filed within five days of that date, i.e., the following Monday.

The claims court disagreed with the USACE, holding that the debriefing date was the last day of NIKA's debriefing process — i.e., the Friday NIKA could have submitted follow-up questions, not the Wednesday that NIKA received the written debriefing.

The claims court stated that the statute plainly included two business days to submit additional questions, and the USACE's own interpretation, according to its written debriefing, was that the debriefing had not closed the day the debriefing was written. The claims court thus enjoined the USACE from issuing any task orders pending the resolution of the GAO protest.

On June 5, 2020, the GAO denied NIKA's protest.[6] On June 25, 2020, the U.S. Department of Justice filed a notice of appeal of the claims court decision on the contract-stay issue. NIKA did not participate in the appeal.

Federal Circuit Appeal and Decision

On Dec. 9, 2020, U.S. Circuit Judges Sharon Prost, Alan D. Lourie and Todd M. Hughes heard the government's oral argument.[7] The DOJ framed the question as one of statutory interpretation, which it contended the claims court got wrong by extending the debriefing by two days to accommodate follow-up questions that never came.

The DOJ argued that, because NIKA asked no follow-up debriefing questions, the DOD's

enhanced debriefing procedures, which track the amended statutory language, did not apply, so the debriefing date was not extended beyond the date NIKA received the written debriefing.

As such, to get a stay of performance, NIKA should have been required to file its GAO protest within five days of the date of the written debriefing, not within five days of the date by which it could have asked questions but did not.

All three judges on the panel asked about the USACE's statement in the written debriefing that apparently kept the debriefing open for at least two days to allow follow-up questions, with Judge Prost asking whether it was not at least ambiguous.

The DOJ responded that the argument about the content of the letter was raised and abandoned at the claims court, and that the statute governed in the event of any confusion.

On Feb. 4, the Federal Circuit issued a published decision, reversing the Court of Federal Claims decision. As an initial matter, the Federal Circuit held that the case was not moot because the issue at hand is evading review due to time constraints and is also capable of repetition.[8]

The Federal Circuit then held that "the plain meaning of the statute is the deadline in [Title 31 of the U.S. Code, Section 3553(d)(4)(A)(ii),] is five days after receipt of the debriefing." [9] In other words, the Federal Circuit held that the debriefing is not automatically held open for an additional two days.[10]

According to the Federal Circuit, the plain meaning of the statute is that the clock starts on the day that the bidder receives its debriefing, and that the statute refers to the debriefing date "using the singular form of the noun." [11]

The Federal Circuit also noted that, while the statute mandates a two-day opportunity to ask questions, it mandates it after debriefing, which, according to the court, "means that the two-day period for questions occurs within the five day window for filing a protest." [12]

Because Nika did not file its protest at the GAO within five days of the original debriefing date, the Federal Circuit held that it did not meet the statutory deadline for invoking the stay. Accordingly, the Federal Circuit reversed the Court of Federal Claim's decision.

Analysis and Tips

The Federal Circuit's decision in NIKA Technologies is noteworthy because it brings clarity to an area that was somewhat vague before, i.e., when an enhanced debriefing actually ends. To the extent that any civilian agencies are voluntarily following the DOD's enhanced debriefing procedures, they are likely to follow Federal Circuit's holding, too.

The practical effect is likely to be somewhat limited because the factual scenario that occurred here does not happen frequently. In the vast majority of the cases involving required debriefings for military agency procurements, the disappointed offeror asks questions, usually lots of question.

They almost never decide not to ask any follow-up questions at all. Thus, the NIKA Technologies factual scenario almost never comes up, and the disappointed offeror simply files its protest within five days of receiving the answer to its supplemental questions.

Now, however, it is crystal clear to any would-be protester's counsel that the protester absolutely must ask at least some questions within the two-day debriefing follow-up period just to force the agency to answer them and, thus, run the clock to have more time to consider if and when to file a protest.

In fact, the more questions, the better because it will force the agencies to take their full five-day period to answer them.

This outcome is probably not what the authors of the 2018 NDAA had in mind when they created the enhanced post-award debriefing process but will be the practical effect of what the Federal Circuit says the legislative text requires.

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[1] NIKA Technologies v. U.S., http://www.cafc.uscourts.gov/sites/default/files/opinions-orders/20-1924.OPINION.2-4-2021_1728126.pdf.

[2] 31 U.S.C. §3553.

[3] <https://www.congress.gov/bill/115th-congress/house-bill/2810>.

[4] 10 U.S.C. §2305.

[5] H.R. Rep. 115-404, 870; <https://www.congress.gov/congressional-report/115th-congress/house-report/404>.

[6] See NIKA Techs. Inc., B-418563, 2020 WL 3100590 (Comp. Gen. June 5, 2020).

[7] http://oralarguments.cafc.uscourts.gov/default.aspx?fl=20-1924_12092020.mp3.

[8] NIKA Techs. Inc. v. U.S., No. 2020-1924, slip op. at 3, 4 (Fed. Cir. Feb. 4, 2021).

[9] *Id.* at 6.

[10] *Id.*

[11] *Id.* (citing 31 U.S.C. § 3553(d)(4)(A)(ii)).

[12] *Id.*