

# Federal Circuit's NIKA Technologies Decision Reinforces Importance of Asking Questions in Debriefings for DoD Procurements

William Jack, Ken M. Kanzawa

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Pursuing a post-award bid protest at the Government Accountability Office (GAO) can provide protesters the benefit of the stay of performance under the Competition in Contracting Act (the CICA stay). To qualify, offerors must protest either within ten days of contract award, or, within five days after the offered date for a required debriefing, whichever is later.<sup>[1]</sup> As a result of debriefing reforms contained in the National Defense Authorization Act for FY 2018, offerors on Department of Defense (DoD) procurements have had the opportunity to present additional questions within two business days after receiving a post-award debriefing.<sup>[2]</sup> For these debriefings, the five-day period to protest is tolled and begins only after the DoD delivers its written responses to the disappointed offeror.

In *NIKA Technologies*, issued on February 4, 2021, the U.S. Court of Appeals for the Federal Circuit held that when no additional questions are submitted after a DoD debriefing, the debriefing has ended as of the debriefing date, which triggers the five-day period to file a protest at GAO to obtain the CICA stay, rather than two business days after. This Alert summarizes the *NIKA Technologies* decision and provides some practical guidance to ensure offerors take full advantage of required debriefings.

## **NIKA Technologies, Inc. v. United States**

NIKA lost an Army Corps of Engineers multiple-award contract for specialized medical operations and maintenance services<sup>[3]</sup> and timely requested a debriefing. On March 4, 2020, the Corps provided NIKA a written debriefing and alerted NIKA of the right to submit additional questions.<sup>[4]</sup> The debriefing specifically letter stated, “[t]he Government will consider the debriefing closed if additional questions are not received within (2) business days. If additional questions are received, the Government will respond in writing within five (5) business days . . . [and] will consider the debriefing closed upon delivery of the written response to any additional questions.”<sup>[5]</sup> NIKA, however, did not submit any questions within the two business days. NIKA then filed a protest at GAO on March 10, six days after its written debriefing.<sup>[6]</sup>

The Corps did not implement a stay of performance,<sup>[7]</sup> causing NIKA to file a challenge at the Court of Federal Claims.<sup>[8]</sup> NIKA argued that the debriefing date for purposes of calculating the CICA stay

deadline was not March 4 (*i.e.*, the written debriefing date) but March 6, which would include the two-day window to submit questions following receipt of the written debriefing.[9] In support of its argument, NIKA cited two statutory revisions made by the FY 2018 NDAA: (1) CICA's definition of "debriefing" at 10 U.S.C. § 2305(b)(5), which includes "an opportunity for a disappointed offeror to submit, within two business days after receiving a post-award debriefing, additional questions related to the debriefing" and requires the agency to respond in writing within five business days and to not consider the debriefing concluded until the agency delivers its written responses, and (2) the bid protest stay provisions at 31 U.S.C. § 3553(d)(4)(B), which provide that the five-day deadline to trigger the CICA stay begins only once the agency responds to those questions.[10] The Court of Federal Claims agreed with NIKA and enjoined the Corps from proceeding with any task order awards during the pendency of NIKA's GAO protest.[11]

The government appealed and the U.S. Court of Appeals for the Federal Circuit reversed. The Federal Circuit disagreed with the lower court's interpretation including the two-day window for questions within the definition of "debriefing" at 10 U.S.C. § 2305(b)(5)(B)(vii), noting that the statute mandates the window "after" debriefing.[12] The appellate decision made no mention of the fact that the Corps seemed to indicate to NIKA that it would keep the debriefing open for two days by informing NIKA that it would consider the debriefing closed if additional questions were not received within two business days—apparently finding that irrelevant. The Federal Circuit held instead that when a party does not submit additional questions, the clock to obtain a CICA stay is not automatically held open but instead begins "on the day that a bidder receives its debriefing, not two days afterward." [13] Because NIKA did not file at the GAO within the five-day period, it did not timely invoke the stay.

### **Practical Guidance**

The *NIKA* case makes clear that, if offerors fail to submit written questions in two business days following a post-award DoD debriefing, the CICA clock runs from the debriefing date, not two days after. While disappointed offerors can avoid this scenario by submitting additional questions, other aspects of CICA stay deadlines can be tricky. Offerors must carefully follow the timeliness rules, which begins with a written request for a required debriefing within three days of the notice of an award.[14] Disappointed offerors should always take the first debriefing date offered by the agency. Offerors should make sure the post-award debriefing provides the information required under FAR 15.506, including responses to initial questions about whether the evaluation scheme and applicable regulations were followed. For DoD debriefings, offerors should always ask additional questions within two business days after receiving the post-award debriefing. If those additional questions are timely submitted, the five-day period for obtaining the stay will not begin until the day the DoD delivers its written responses.

Once implemented, other debriefing reforms from the FY 2018 NDAA will require DoD agencies to disclose a redacted version of the source selection decision for contract awards in excess of \$100 million, and to give small business or nontraditional contractors the option to request disclosure of a redacted source selection decision for awards in excess of \$10 million and not in excess of \$100 million.[15] Until those reforms are implemented, however, offerors should not hesitate to request a redacted source selection decision as part of a debriefing. DoD agencies may provide redacted versions of their source selection decisions to persuade potential protesters that the evaluation was reasonable and consistent with the solicitation.

Debriefings provide offerors the chance to learn important information regarding an award decision, and offerors should take every opportunity to ask questions. Aside from learning more about an

evaluation and why an offeror's proposal was unsuccessful, submitting additional questions will give offerors and their attorneys more time to analyze the debriefing information and decide whether to protest.

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[1] 31 U.S.C. § 3553(d)(4).

[2] National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 818(b)-(c), 131 Stat. 1283, 1463-64 (Dec. 12, 2017); DoD Class Deviation 2018-O0011, Enhanced Postaward Debriefing Rights (Mar. 22, 2018), *available at* <https://www.acq.osd.mil/dpap/policy/policyvault/USA000563-18-DPAP.pdf>.

[3] *See NIKA Techs., Inc.*, B-418563, June 5, 2020, 2020 WL 3100590.

[4] *NIKA Techs., Inc. v. United States*, No. 2020-1924, 2021 WL 382203 at \*1 (Fed. Cir. Feb. 4, 2021).

[5] *NIKA Techs., Inc. v. United States*, 147 Fed. Cl. 690, 692 (2020), *rev'd*, 2021 WL 382203 (Fed. Cir. 2021).

[6] *See supra* note 4 at \*1.

[7] *See supra* note 5 at 692-93.

[8] *See supra* note 5.

[9] *Id.* at 694-95.

[10] *Id.*

[11] *Id.* at 696.

[12] *See supra* note 4 at \*3.

[13] *Id.*

[14] FAR 15.506(a)(1).

[15] *See supra* note 2, 131 Stat. at 1463.