

CLIENT ALERT

Filing a Timely Protest is Half the *Battelle*

March 24, 2022

A difficult decision facing an offeror eliminated from a competition prior to award is *when* to be debriefed. FAR 15.505 instructs that an offeror eliminated from a competition must request a debriefing within three days of the notification of their elimination, but may choose to defer the actual debriefing until after an award is made. There is some facial appeal to that delay—more information may be available after the agency’s award decision. But GAO’s recent decision in *Battelle Memorial Institute*, B-420403, B-420403.2, B-420403.3, Mar. 10, 2022, highlights the risk of that delay: a protest being dismissed as filed too late.

Battelle involved a Navy procurement under FAR Part 36.6 seeking architect-engineering services in support of environmental cleanup efforts. Five offerors, including Battelle and Geosyntec Jacobs (“Jacobs”), each timely submitted a statement of qualification (“SF 330”). In April 2021, the Navy identified Jacobs as the highest qualified firm and opened negotiations pursuant to FAR 36.606(a). At this point, the Navy offered all unsuccessful offerors the option of receiving a pre-award debriefing or delaying the debriefing until after the Navy made its award decision. Battelle timely requested a pre-award debriefing, but then revised that request, and asked for a post-award debriefing instead. Seven months later, the Navy awarded the contract to Jacobs, and then provided Battelle with a written post-award debriefing.

One day after receiving its debriefing, Battelle protested the award at GAO. Battelle argued that the Navy unreasonably evaluated its SF 330 and that but for the Navy’s errors, Battelle, not Jacobs, would have been selected as the highest qualified firm. The Navy requested that Battelle’s protest be dismissed, arguing that it was based on information Battelle could have learned in a pre-award debriefing, and that Battelle did not diligently pursue its basis of protest when it voluntarily postponed its debriefing until after award.

GAO agreed with the Navy, and dismissed Battelle’s protest as untimely, applying the foundational principle that a protester must expeditiously gather all information available and then timely protest based on that information. GAO has repeatedly dismissed as untimely protests filed after a deferred debriefing, where the information would have been available in a pre-award debriefing. Although *Battelle* involved a procurement under FAR 36.6—as opposed to FAR Part 15, which contains the relevant agency debriefing obligations—GAO explained that the diligent pursuit obligation is universal. GAO held that because Battelle was challenging the Navy’s evaluation of *Battelle’s* SF 330 (as opposed to the ultimate award to Jacobs), a pre-award debriefing in April 2021 “would have been the most expeditious information-gathering approach available under these facts, as information regarding the agency’s evaluation of Battelle’s SF 330 would have likely been disclosed in a pre-award debriefing.” GAO concluded that by deferring its pre-award debriefing, Battelle had not met its diligent pursuit obligation.

While the takeaway from *Battelle* seems clear—take your debriefing as soon as it is offered, and assume your protest clock has begun to run as soon as the debriefing closes—questions around the time for filing a protest can be difficult. (We previously explained the risk of filing a protest too early). Fortunately, Crowell already has a tool to help answer those questions. Still,

would-be protesters should engage with outside counsel early in the procurement process to ensure they understand the applicable protest-timing requirements, and the risks attendant to each.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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