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Decision

Matter of: Kord Technologies, Inc.

File: B-417748.5

Date: April 17, 2020

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DIGEST

Protest of the scope of an agency's corrective action is dismissed as premature where the protest is essentially a challenge to the technical evaluation that the agency conducted as part of the corrective action, and was filed prior to the protester receiving a required debriefing.

DECISION

Kord Technologies, Inc. (Kord), of Huntsville, Alabama, protests the scope of the corrective action taken by the Department of the Army, Missile Defense Agency (MDA), under request for proposals (RFP) No. HQ0147-18-R-0009, for services to support the MDA's Advanced Research Center (ARC). Kord argues that the scope of the agency's corrective action, now completed, failed to adequately remedy the issues raised in Kord's prior protest.

We dismiss the protest because we conclude it is, in essence, a premature challenge to the technical evaluation the agency conducted as part of its corrective action.

BACKGROUND

The agency issued the RFP as a woman-owned small business set-aside on September 10, 2018, seeking management and engineering services for the MDA's

ARC facility. RFP § M-1.1; Performance Work Statement (PWS) § 1.¹ The ARC is designed and operated to support MDA’s ballistic missile defense system hardware-in-the-loop ground test and flight test activities. See RFP, PWS § 1.

The RFP stated that the agency intended to award a single contract with a five-year base period and three one-year option periods. RFP § M-1.1. Award would be based on a best-value tradeoff determination considering the following factors:

Factor 1: Information Management Control Plan
Factor 2: Transition Plan Subfactor 1: Recruitment Subfactor 2: On-Board Processing
Factor 3: Past Performance
Factor 4: ARC Technical Subfactor 1: Network and Schedule Management/Asset Allocation Subfactor 2: Test Support Subfactor 3: Cybersecurity Subfactor 4: Network Design - Task Instructions
Factor 5: Contract and Program Management Subfactor 1: Program Management Approach Subfactor 2: Technical Staffing and Recruitment/Retention Approach
Factor 6: Cost and Price

Id. § M-2.1. Under the first three factors, proposals were evaluated as acceptable or unacceptable. *Id.* § M-2.3.1, M-2.3.2. Under the fourth factor, ARC technical, and fifth factor, contract and program management, proposals were assigned a qualitative technical rating and a technical risk rating for each of the subfactors.² *Id.* § M-2.3.4. Ratings were not assigned at the factor level. *Id.* § M-2.1. The RFP stated that the “technical rating reflects the degree to which the proposed approach meets or does not meet the minimum performance or capability requirements through an assessment of the strengths, weaknesses, significant weaknesses, and deficiencies.” *Id.* § M-2.3.3.

On June 6, 2019, the agency informed Kord that it had not been selected, and award had been made to DTechLogic, LLC. In the debriefing, Kord learned that the agency had evaluated Kord’s proposal as acceptable under all four subfactors of the ARC technical factor. Protest, exh. 6, Agency Debrief, at 14. For the contract and program

¹ The agency filed a request for dismissal prior to the deadline for the agency report (AR), and we suspended the requirement for the agency to file the AR pending resolution of the agency’s request. As a result, there is no AR for this protest; the RFP is available on the System for Award Management (SAM) website.

² The available technical ratings were, in order from highest to lowest, blue-outstanding, purple-good, green-acceptable, yellow-marginal, and red-unacceptable; the technical risk ratings were, in order from highest to lowest, low, moderate, high, unacceptable. RFP § M-2.3.4.

management factor, the agency rated Kord's proposal as good for the program management approach subfactor, and acceptable for the technical staffing and recruitment/retention approach subfactor. *Id.*

On July 8, Kord filed a protest with our Office, challenging the award to DTechLogic. Among other things, Kord alleged that the agency's decision not to assess a number of strengths to Kord's proposal under the ARC technical and contract and program management factors was inconsistent with the evaluation process set forth in the solicitation. Protest at 4-5. In this regard, Kord argued that the solicitation stated that strengths would be assessed for aspects of an offeror's proposal that exceeded specified performance requirements, and that several aspects of Kord's proposal objectively exceeded these requirements and therefore should have been assessed strengths. *Id.*

On August 12, the agency requested that GAO dismiss Kord's protest because the agency intended to take corrective action by conducting an inquiry into the protest allegations and reviewing the evaluation and award decision to determine what actions were warranted. Req. for Dismissal, exh. 2, Req. to Dismiss Protest as Academic. Three days later, we dismissed Kord's protest as academic, stating that we understood that as part of the corrective action, "the agency will review its prior procurement actions and, upon completion of that review, create documentation memorializing its conclusions--which will reflect either revision(s) to, or affirmation(s) of its prior actions--and, thereafter, notify the parties of its conclusions." *Kord Techs., Inc.*, B-417748, B-417748.2, Aug. 15, 2019 (unpublished decision).

On October 30, 2019, the agency informed all offerors that as part of its corrective action, it had "committed to continue its inquiry into the allegations raised in the protests, revisit the acquisition, and determine what actions, if any, are warranted." Req. for Dismissal, exh. 4, Req. for Final Proposal Revision (FPR). The agency further stated that it had determined that it was necessary to reevaluate proposals and make a new award decision. *Id.* The agency thus requested offerors submit an FPR, or confirm that no changes were required to the FPR submitted prior to the initial award. *Id.* In response, Kord timely submitted an FPR on November 18. Protest at 7.

On January 16, 2020, the agency notified Kord that it had been excluded from the competitive range because its proposal was not among the most highly rated. Protest, attach. 4, Notice of Exclusion from the Competitive Range. The agency informed Kord that its November FPR had been rated marginal under two of the four subfactors for the ARC technical factor--a decline in ratings from its initial proposal. *Id.* The ratings for Kord's proposal under the two subfactors for the contract and program management factor remained the same.

On January 16, Kord requested a debriefing from the agency. Before receiving the debriefing, Kord filed this protest with our Office on January 24, 2020.

DISCUSSION

Kord states that it is protesting the scope of the agency's corrective action. Kord's argument unfolds as follows: The agency's evaluation of Kord's November FPR was again inconsistent with the solicitation's evaluation criteria because the agency once more failed to assess strengths to certain aspects of Kord's FPR, just as it did when it evaluated Kord's initial proposal. Protest at 7-8. Accordingly, Kord asserts, the "MDA's failure to evaluate technical proposals consistent with the terms of the [s]olicitation indicates that the scope of the [a]gency's promised corrective action fails to remedy the allegations in Kord's protest[], and therefore, MDA's corrective action was inadequate and should be re-conducted in a manner that remedies the concern that caused the agency to take corrective action."³ *Id.* at 9 (quotations omitted).

The agency argues that Kord's protest is really a challenge to the agency's evaluation of Kord's FPR, and therefore should be dismissed as premature because the agency has not yet held the requested and required debriefing.⁴ Req. for Dismissal at 6. In response, Kord reasserts that because the agency again failed to assess certain strengths to Kord's November FPR, the "implemented corrective action did not address the allegations in the [initial] protest[], and therefore, was not appropriate to remedy the concern that caused the agency to take corrective action." Response to Req. for Dismissal, at 4. Based on this logic, Kord maintains that its protest is not premature because it "is protesting the corrective action process, not the evaluation of revised FPRs resulting from the process." *Id.* at 5 (emphasis in original). We disagree, and find that Kord has filed a premature protest challenging the agency's evaluation of Kord's November FPR.

In essence, Kord is alleging that the agency's evaluation of Kord's November 2019 FPR, conducted as part of the corrective action, failed to follow the solicitation's

³ Kord raises other arguments that we find provide no basis to sustain the protest. For example, Kord asserts as a supplemental protest ground that the agency's evaluation of the ARC technical factor improperly applied an evaluation criterion that was to be considered only under the contract and program management factor. Response to Req. for Dismissal, at 4-5. Because this allegation was raised prior to a required debriefing, we also dismiss it as premature. See 4 C.F.R. § 21.2(a)(2). Kord also argues that it should be awarded the costs of pursuing this protest because the agency unreasonably and unduly delayed taking corrective action. Protest at 9. To the extent that Kord is requesting costs for filing this protest, that request is denied because we dismiss Kord's protest as premature. To the extent Kord is requesting costs for its initial protest, that request is dismissed as untimely. See 4 C.F.R. § 21.8(e).

⁴ The agency also argues that the protest should be dismissed as an untimely challenge to the scope of the corrective action, the terms of which the agency outlined in its October 2019 communication with offerors. Req. for Dismissal at 3-4.

evaluation criteria in the same way that the agency evaluated Kord's initial proposal. While Kord claims that the evaluation results simply demonstrate that the agency's scope of corrective action was improper because it did not "remedy the allegations in Kord's protest[]," in our view, Kord's protest is a direct and straightforward challenge to the agency's evaluation of Kord's November 2019 FPR.

Kord still argues that the agency's October 30 request for FPRs stated that the corrective action involved an "inquiry into the allegations raised in the protests," but that the evaluation of Kord's FPR shows that the agency "has not done what it promised it would do." Response to Req. for Dismissal, at 1, 5. Kord therefore contends that we should review "the reasonableness of [the] [a]gency's inquiry into this procurement and whether the resulting process was appropriate to remedy the concern that caused the [a]gency to take corrective action." *Id.* at 5. However, the agency's inquiry into the procurement and the underlying reasons leading it to take corrective action are irrelevant here.⁵ The agency has already evaluated Kord's November FPR, and no matter how Kord characterizes its basis for protest, Kord is simply protesting this evaluation.

Our Bid Protest Regulations provide that we will not consider a protest challenging a procurement conducted on the basis of competitive proposals where a debriefing is required if the protest is filed before the debriefing date offered to the protester; the protest instead should be filed not later than 10 days after the debriefing. 4 C.F.R. § 21.2(a)(2). This rule is designed to encourage early and meaningful debriefings and to preclude strategic or defensive protests. *The Real Estate Ctr.*, B-274081, Aug. 20, 1996, 96-2 CPD ¶ 74; see also *Celeris Systems, Inc.*, B-416890, Oct. 11, 2018, 2018 CPD ¶ 354 at 3-4. The Competition in Contracting Act, as amended, requires that offerors that are excluded from the competitive range must be debriefed by the procuring agency if, within 3 days after receiving notice of such exclusion, the offeror requests a pre-award debriefing. 41 U.S.C. § 3705(a); *Loc Performance Prods., Inc.*, B-417431, Apr. 22, 2019, 2019 CPD ¶ 149, at 2.

⁵ Kord also claims that our dismissal decision contemplated that the agency would create a record memorializing the agency's "review of its procurement actions prompting it to take corrective action and its plan to remedy the identified deficiencies," and that we should review this record. Response to Req. for Dismissal at 5. Kord's argument relies on the language in the dismissal decision stating that the agency's corrective action would "review its prior procurement actions and, upon completion of that review, create documentation memorializing its conclusions--which will reflect either revision(s) to, or affirmation(s) of its prior actions." *Id.* at 1, 5. This language referred to the agency memorializing any revisions to or affirmations of its prior actions of conducting its evaluation and making the award decision, the exact thing it has done with its evaluation of Kord's November FPR. It did not direct or require the agency to document the internal process of how it determined its corrective action plan.

As stated above, Kord requested a debriefing the same day that it was notified of its exclusion from the competitive range, but filed its protest before it received that debriefing.⁶ Because Kord is in essence challenging the agency's evaluation of Kord's November FPR--and not the scope of the corrective action--Kord's protest filed prior to receiving its required debriefing is dismissed as premature.⁷

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⁶ The contracting officer represented that after Kord's request for a debriefing, the agency "was working internally to prepare for and schedule the debrief" when it received notification of Kord's protest. Req. for Dismissal, exh. 5, Contracting Officer's Statement, at 3. The contracting officer also stated that the agency "is prepared to provide Kord with the required and requested debrief in accordance with [Federal Acquisition Regulation section] 15.505." *Id.* Kord has not challenged either of these statements.

⁷ Even if we were to construe Kord's protest as a challenge to the scope of the corrective action, it would be untimely. Challenges to the scope of an agency's corrective action are akin to challenges to the terms of a solicitation and therefore must be filed prior to the deadline for submitting revised proposals. See *e.g.*, *CPS Professional Servs., LLC d/b/a CATHEXIS*, B-417928.2, Feb. 5, 2020, 2020 CPD ¶ 69, at 5. As explained above, the agency notified offerors of how it intended to implement the corrective action on October 30, 2019, when it requested FPRs. To the extent that Kord believed that the agency's stated intentions for corrective action failed to do enough to correct the alleged errors in the initial procurement, it should have filed a protest prior to the deadline for submission of FPRs.