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Decision

Matter of: K&K Industries, Inc.

File: B-420422; B-420422.2

Date: March 7, 2022

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DIGEST

1. Protest is dismissed as untimely where it was filed more than 10 days after the agency unambiguously stated that the protester’s enhanced debriefing had concluded; the agency’s voluntary responses to additional questions, sent to the protester after the time to protest had expired, did not revive an untimely protest.
 2. Supplemental protest based on information obtained by the protester in connection with an untimely initial protest is dismissed as untimely.
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DECISION

K&K Industries, Inc., a small business of Junction City, Kansas, protests the award of a contract to Blinderman Construction Co., Inc., of Chicago, Illinois, under Request for Proposals No. W912DQ-21-R-4005 (the “solicitation”), issued by the Department of the Army, Army Corps of Engineers, for the design and renovation of a historic barracks building in Fort Riley, Kansas. The protester argues that the agency conducted an unreasonable and unequal evaluation of proposals resulting in a flawed best-value tradeoff determination.

We dismiss the protest as untimely.

BACKGROUND

The Army issued the solicitation on April 8, 2021, seeking proposals for a fixed-price design-build contract for the renovation of Building 404, a historic barracks located at Fort Riley. Contracting Officer's Statement (COS) at 2-3. The solicitation envisioned award using the two-phase design-build selection procedure of Federal Acquisition Regulation (FAR) section 36.301. Agency Report (AR), Tab 4, Phase 1 Solicitation at 29.

Phase 1 of the evaluation assessed corporate experience and performance confidence. Phase 1 Solicitation at 29. Eight offerors submitted phase 1 proposals. COS at 8. After evaluation of the phase 1 proposals, the agency invited three offerors, including K&K and Blinderman, to submit phase 2 proposals. *Id.* Phase 2 proposals were due on August 25, and all three selected offerors submitted timely proposals. *Id.* at 15.

The phase 2 solicitation stated that the agency intended to make award on a best-value tradeoff basis under FAR section 15.501. AR, Tab 15, Phase 2 Solicitation at 18-19. Phase 2 proposals would be evaluated on six factors, listed in descending order of importance: corporate experience, performance confidence, technical approach, key personnel, small business commitment document, and price. *Id.* at 18-19. The non-price technical factors, when combined, were of much greater importance than price. *Id.* at 18.

In its evaluation of phase 2 proposals, the agency rated the proposals of K&K and Blinderman as follows:

	K&K	Blinderman
Corporate Experience	Good	Outstanding
Performance Confidence	Substantial Confidence	Substantial Confidence
Technical Approach	Good	Good
Key Personnel	Good	Good
Small Business Commitment	Good	Outstanding
HUBZone Preference Price¹	\$11,223,995	\$13,075,150

COS at 15; AR, Tab 33, Source Selection Decision Document (SSDD) at 11, 25.

The agency selected Blinderman as the best overall value to the government. COS at 16; SSDD at 27. The source selection authority concluded that, under the

¹ The solicitation included FAR clause 52.219-4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns, which requires large business contractors to be evaluated by adding 10% to their price. AR, Tab 4, Phase 1 Solicitation at 53. Because K&K is a HUBZone small business, and Blinderman is not, the agency added 10% to Blinderman's price in evaluating its offer. COS at 15.

solicitation's relative ranking of evaluation factors, Blinderman's advantage on the non-price factors outweighed its higher price. *Id.* at 17; SSDD at 26-27.

After award, the agency and K&K engaged in several rounds of communication before K&K filed its protest. The timing and content of these communications is central to our Office's determination of whether K&K's protest was timely.

The agency notified K&K on September 28 that it had selected Blinderman for award. COS at 18; AR, Tab 34, Notice of Award at 1-2. The agency's notice informed K&K of its right to request a debriefing pursuant to FAR section 15.506. *Id.* at 1-2. K&K timely submitted a request for a debriefing, and asked that the debriefing include a redacted copy of the SSDD. Protest, exh. C, Debriefing Request at 23-24.²

The agency provided K&K with an initial written debriefing on October 13. Protest, exh. D, Initial Debriefing at 26-35. The debriefing stated that the agency was preparing the redacted version of the SSDD and would provide it to K&K when complete. *Id.* at 26, 35. Notably, the initial debriefing letter stated: "Should you have any additional questions please submit them to [the contracting officer] no later than two days after receiving the redacted SSDD. If no further questions are asked after receipt of the SSDD, K&K Industries' written debriefing will conclude." *Id.* at 35. The agency sent K&K the redacted SSDD on Friday, October 22. Protest, exh. E, Redacted SSDD at 37-63; see COS at 18. On Monday, October 25, K&K submitted additional questions to the contracting officer. Protest, exh. F, Protester Letter to Agency at 66-76.

On November 17, the agency responded to K&K's questions. Protest, exh. G, Agency Letter to Protester at 78-100 ("first agency response"). The first agency response stated: "This concludes your written debriefing," and did not invite any further questions. *Id.* at 78. Nevertheless, on November 19, K&K sent the agency a second round of questions. Protest, exh. H, Protester Letter to Agency at 102-103. *Id.*

On November 23, the agency responded to K&K's second round of questions. Protest, exh. I, Agency Letter to Protester at 105-135 ("second agency response"). After responding to K&K's questions, the second agency response stated: "Any additional questions must be submitted by December 1, 2021. This concludes your written debriefing." *Id.* at 105. On November 24, K&K sent the agency additional questions related to its debriefing. Protest, exh. J, Protester Letter to Agency at 136-138.

On December 13, the agency responded to K&K's third round of questions. Protest, exh. K, Agency Letter to Protester at 140-141 ("third agency response"). After addressing the questions, the third agency response stated: "This concludes your written extended debriefing." *Id.* at 140.

² The protest and its exhibits were filed as one Adobe PDF document without page numbers for each exhibit. Page citations are to PDF page numbers in this document.

On December 20, K&K filed a protest with our Office. The protester alleges that the agency improperly evaluated K&K on several of the phase 2 evaluation factors, and that these evaluation errors resulted in a flawed best-value decision. Protest at 9-13.

The agency filed its report in response to the protest on January 19, 2022. The agency report included the awardee's proposal, the agency's technical evaluation of all proposals, and an unredacted version of the SSDD. See AR, Tabs 28-31, Blinderman's Proposal; AR, Tab 32, Source Selection Evaluation Board Report; AR, Tab 33, SSDD.

K&K timely filed its comments on Monday, January 31. On the basis of information first disclosed in the agency report, K&K filed supplemental protest grounds challenging the agency's evaluation of the awardee and alleging that the agency treated offerors unequally. See Comments & Supp. Protest at 5-17.

Following the filing of the supplemental protest, our Office invited the parties to submit written argument regarding whether we should dismiss the protest as untimely, and suspended further filings on the merits of the protest. GAO Notice to Parties, Feb. 4, 2022, at 1-2. The agency, protester, and intervenor all filed briefs on the issue of timeliness. The agency and protester then filed reply briefs.

DISCUSSION

As explained below, our Office finds that K&K's debriefing concluded no later than November 23, 2021. Under our Bid Protest Regulations, K&K's protest was therefore due no later than December 3. Accordingly, we dismiss as untimely K&K's protest filed on December 20. Further, because we find K&K's initial protest to be untimely, we also dismiss its supplemental protest based on information contained in the agency report.

K&K's Initial Protest is Untimely

Our Bid Protest Regulations contain strict rules for the timely submission of protests. Under these rules, a protest, other than one based on alleged improprieties in a solicitation, must be filed not later than 10 calendar days after the protester knew, or should have known, of the basis for the protest. 4 C.F.R. § 21.2(a)(2). There is an exception for protests that challenge a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested is required; in such cases, protest bases known either before or as a result of the debriefing may not be filed until the debriefing date offered to the protester, and must be filed not later than 10 days after the date on which the debriefing is held.³ *Id.*

³ While the debriefing exception to our timeliness rules typically does not apply to architect/engineer procurements under FAR part 36, *McKissack-URS Partners, JV*, B-406489.2 *et al.*, May 22, 2012, 2012 CPD ¶ 162 at 4, it does apply in a two-phase design-build procurement where, as here, award is made on the basis of proposals evaluated in accordance with FAR part 15. See *State Women Corp.*, B-416510,

In the context of required debriefings conducted over multiple days, such as Department of Defense (DOD) enhanced debriefings pursuant to 10 U.S.C. § 2305(b)(5) and DOD Class Deviation 2018-O0011⁴ (collectively, the “enhanced debriefing rights”), our Office considers the 10-day period to file a protest to begin when a required debriefing is “concluded.” See *State Women Corp.*, B-416510, July 12, 2018, 2018 CPD ¶ 240 at 4-5 (dismissing a protest as untimely because it was filed more than ten days after the DOD enhanced debriefing concluded). This is consistent with our view that a protest filed during an enhanced debriefing, but before such debriefing is concluded, is premature. *Celeris Systems, Inc.*, B-416890, Oct. 11, 2018, 2018 CPD ¶ 354 at 2.

Our decision here turns on when K&K’s required debriefing concluded. The agency argues that the debriefing concluded with the first agency response, which stated: “This concludes your written debriefing.” Protest, exh. G, first agency response at 78. As the first agency response was sent on November 17, the agency contends that K&K’s protest was due on November 29.⁵ By contrast, the protester contends that the debriefing did not conclude until the third agency response, on December 13, and that its protest was therefore due on December 23.⁶

In determining when a required debriefing is concluded, our Office has found that only an agency’s action can extend a debriefing; a disappointed offeror cannot extend the debriefing by asking further questions. See *Zafer Constr. Co.; Kolin Constr., Tourism, Industry and Trading Co. Inc.*, B-295903, B-295903.2, May 9, 2005, 2005 CPD ¶ 87 at 5-6 (“The fact that [protester] . . . continued to pursue questions with the agency, did not extend the time for filing a protest with our Office based on information provided in the debriefing.”); *New SI, LLC*, B-295209 *et al.*, Nov. 22, 2004, 2005 CPD ¶ 71 at 3.

July 12, 2018, 2018 CPD ¶ 240 at 3-4 n.1. Accordingly, to be timely, K&K’s protest was due within 10 days of its debriefing. 4 C.F.R. § 21.2(a)(2).

⁴ Where an unsuccessful offeror requests a required debriefing, DOD agencies must provide the offeror with “an opportunity . . . to submit, within two business days after receiving a post-award debriefing, additional questions related to the debriefing.” 10 U.S.C. § 2305(b)(5)(B)(vii). The agencies are then required to “respond in writing to any additional question submitted under subparagraph (B)(vii) within five business days after receipt of the question.” 10 U.S.C. § 2305(b)(5)(C). “The agency shall not consider the debriefing to be concluded until the agency delivers its written responses to the disappointed offeror.” *Id.* These statutory requirements are repeated and mirrored in DOD Class Deviation 2018-O0011.

⁵ The tenth day following November 17 was Saturday, November 27. Under our Bid Protest Regulations, K&K’s protest due date would have extended until Monday, November 29. 4 C.F.R. § 21.0(d).

⁶ K&K does not contend that it first learned of the basis for its protest in the second or third agency responses, or that its protest deadline should be extended on this basis. See Protester’s Timeliness Brief at 1-5.

The enhanced debriefing rights provide a limited exception under which a disappointed offeror's actions can cause a debriefing to remain open: if the offeror submits additional questions to a DOD agency within two business days of the written debriefing, the debriefing cannot conclude until the agency has responded to those questions. See 10 U.S.C. § 2305(b)(5)(C); Class Deviation 2018-O0011 at 1. Cf. *NIKA Technologies, Inc. v. United States*, 987 F.3d 1025, 1028-29 (Fed. Cir. 2021) (when a disappointed offeror does not submit enhanced debriefing questions, the "debriefing date" is the date of the original written debriefing).

Our Office has previously found that the enhanced debriefing rights entitle a disappointed offeror to one round of required questions and answers only. *State Women Corp.*, *supra* at 4-5. Thus, when an agency voluntarily responds to an offeror's additional rounds of post-debriefing questions, after an unequivocal statement that an enhanced debriefing is concluded, this does not extend the time to file a protest. *Id.*

Our Office has, however, recognized that agency action may extend the time to file a protest by creating an ambiguity regarding whether a debriefing has concluded. See *Watts-Weitz, JV*, B-405475, B-405475.2, Nov. 8, 2011, 2011 CPD ¶ 247 at 5; *Harris IT Servs. Corp.*, B-406067, Jan. 27, 2012, 2012 CPD ¶ 57 at 4-5. In both *Watts-Weitz* and *Harris IT*, the agency took actions during the protester's 10-day post-debriefing protest window that suggested that the debriefing had not concluded. See *Watts-Weitz, supra* at 5 ("6 days [after a written debriefing] and within the protester's 10-day protest window, the agency also advised the protester in writing that it would provide the protester with an 'additional debriefing.');" *Harris IT, supra* at 4 ("4 days after Harris received the written debriefing and within its 10-day protest window," the contracting officer indicated a willingness to offer a verbal debriefing). In each of these instances, we found that the agency's action created an ambiguity. *Watts-Weitz, supra* at 5; *Harris IT, supra* at 5. Because we resolve doubts regarding timeliness in favor of protesters, we found these protests to be timely where they were filed within ten days of the ultimate conclusion of the protesters' debriefings. *Watts-Weitz, supra* at 5; *Harris IT, supra* at 5.

Here, the protester first argues that the second agency response "reopened" the debriefing after the first agency response stated that the debriefing was concluded.⁷ Protester's Timeliness Brief at 3. Next, relying on *Watts-Weitz* and *Harris IT*, the protester contends that the second agency response was ambiguous regarding the conclusion of the required debriefing, because it stated both "[a]ny additional questions must be submitted by December 1, 2021" and "[t]his concludes your written debriefing." *Id.*; see second agency response at 105. Because K&K submitted additional questions by the agency's stated deadline, the protester argues that its debriefing remained open until the agency responded to those questions in the third agency response on

⁷ We need not, and do not, determine whether the second agency response reopened the debriefing or otherwise created an ambiguity regarding whether the debriefing concluded with the first or second agency responses. This would mean the difference between the protest being due on November 29 and December 3. The protest was filed on December 20, and would be untimely in either case for the reasons discussed below.

December 13. Protester's Timeliness Brief at 3. The protester also asserts that the agency itself did not consider the debriefing concluded until the third agency response, because that letter stated that it "concludes your written extended debriefing," whereas the agency had not used the word "extended" in either the first or second agency responses. Protester's Timeliness Brief at 3 (emphasis by protester); *compare* third agency response at 140 *with* first agency response at 78 *and* second agency response at 105. We disagree.

First, we find that the second agency response was not ambiguous regarding whether the debriefing was concluded. The statement "[t]his concludes your written debriefing" is clear, unambiguous, and absolute. In contrast to the agency's statement in the initial debriefing, it is not conditioned on whether K&K submitted additional questions. *Compare* Protest, exh. D, Initial Debriefing at 35 ("[i]f no further questions are asked . . . K&K Industries' written debriefing will conclude") *with* second agency response at 105 ("Any additional questions must be submitted by December 1, 2021. This concludes your written debriefing"). We therefore read the second agency response as the agency offering to voluntarily answer additional questions, but not as extending the conclusion of the required debriefing past the second agency response itself. In this respect, it is similar to the agency's statement in *New SI* that the agency would respond to additional questions "after the debriefing was finished," which we found did not extend the debriefing. *New SI, supra* at 3. An agency's agreement to voluntarily answer additional questions after it has declared the conclusion of a required enhanced debriefing does not extend the time to file a protest. *State Women, supra* at 4-5.

Second, we reject the protester's argument that the third agency response retroactively created an ambiguity in the second agency response or otherwise reopened the debriefing. The agency's choice to add the word "extended" into the third agency response does not affect our conclusion that the second agency response was unambiguous. In any event, more than ten days had passed between the second agency response on November 23 and the third agency response on December 13; and as a result, the protester's time to file its protest had expired. 4 C.F.R. § 21.2(a)(2).

Our Office has previously found that agency action will not revive a protest that is already untimely. *See Peraton, Inc.*, B-416916.11, Feb. 8, 2021, 2021 CPD ¶ 88 at 6 (agency setting a date for receipt of revised proposals did not retroactively render a pre-award protest timely when the 10-day period to file in the absence of the date for revised proposals had already expired); *Loyal Source Gov't Servs., LLC*, B-407791.5, Apr. 9, 2014, 2014 CPD ¶ 127 at 7 (agency making a new source selection decision did not revive protest of evaluation that protester could have brought, but did not bring, in its protest of the original source selection decision). By contrast, in both *Watts-Weitz* and *Harris IT*, the agency action that created an ambiguity regarding the conclusion of the debriefing was taken while the protest was still timely. *See Watts-Weitz, supra* at 5; *Harris IT, supra* at 4-5. Accordingly, even if we were to credit the protester's argument that the third agency response created an ambiguity, this ambiguity was created after the protest would already have been deemed untimely. As such, any ambiguity created by the third agency response does not retroactively make K&K's protest timely.

In sum, K&K's debriefing concluded no later than November 23, 2021. Its protest was therefore due no later than 10 days thereafter, on December 3. Because K&K filed its protest on December 20, we find the protest to be untimely.

K&K's Supplemental Protest is Also Untimely

Having found that K&K's initial protest was untimely, we also dismiss as untimely its supplemental protest based on information contained in the agency report.

Our Office has previously found that supplemental protest grounds should be dismissed as untimely if they are based on information contained in an agency report made in response to an untimely initial protest. *Bart & Associates, Inc.*, B-414234, B-414234.2, Feb. 24, 2017, 2017 CPD ¶ 75 at 5-6; *General Physics Fed. Sys., Inc.*, B-274795, Jan. 6, 1997, 97-1 CPD ¶ 8 at 3-4.⁸ Considering these grounds to be timely raised is inconsistent with our goal of resolving protests expeditiously, without unduly disrupting or delaying the agency's procurement process. *Bart & Associates, supra* at 6. See *Dominion Aviation, Inc.--Recon.*, B-275419.4, Feb. 24, 1998, 98-1 CPD ¶ 62 at 3.

The protest is dismissed.

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General Counsel

⁸ Our Office requested that the protester address whether its supplemental protest should be dismissed in light of *Bart & Associates*. GAO Notice to Parties, Feb. 4, 2022 at 1-2. The protester declined to make any argument on this point. See Protester's Timeliness Brief at 1-5; Protester's Timeliness Reply Brief at 1-3.