Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Brown & Root, Inc. and Perini Corp., a joint venture

File: B-270505.2; B-270505.3

Date: September 12, 1996

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Kathleen C. Little, Esq., David R. Johnson, Esq., Robert J. Rothwell, Esq., McDermott, Will & Emery, for H.B. Zachry Company, The Parsons Corporation, and Sundt Corp., a joint venture, the intervenor.
Dennis J. Gallagher, Esq., Department of State, for the agency.
John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where agency brought principal concerns about the protester's proposal to the attention of the protester and since various other weaknesses, both individually and in toto, did not prevent the protester from having a reasonable chance for award, the agency's failure to point out those other weaknesses did not deprive the protester of meaningful discussions; agency was not required to hold discussions regarding every weakness identified in the protester's proposal.

2. Where a solicitation lists evaluation factors and subfactors in descending order of importance, each factor listed and each subfactor within each factor is of decreasing weight; such an evaluation scheme does not indicate that the subfactors of lower-weighted factors are necessarily of less individual weight than subfactors of higher-weighted factors.

3. Agency scoring and weighting method used to evaluate and rank offers was consistent with the evaluation scheme stated in the solicitation and did not produce an irrational award selection result.

4. Protester was not prejudiced by the agency's alleged waiver of a requirement that potential offerors have certain security clearances by an established date where the record does not evidence that had the protester been aware of the allegedly relaxed requirement, it would have submitted a different proposal that would have had a reasonable possibility of award.

DECISION

Brown & Root, Inc. and Perini Corporation, a joint venture, protest the award of a contract to H.B. Zachry Company, The Parsons Corporation, and Sundt Corp., a joint venture (ZPS), under request for proposals (RFP) No. MEBCO-95-R-0300, issued by the Department of State to construct secure chancery facilities for the United States Embassy in Moscow, Russia. Brown/Perini argues that the agency failed to conduct meaningful discussions, did not follow the evaluation criteria set forth in the solicitation in evaluating proposals and selecting ZPS' higher-priced proposal, and waived the requirement that all joint venture partners possess a top secret facility clearance by a certain date.

We deny the protest.

Construction began on a new embassy compound in Moscow in 1979. The compound encompasses eight buildings on a 10-acre site. Construction has been completed on seven of the buildings, and these buildings are currently occupied. The subject of this procurement, the New Office Building (NOB), is partially complete and, as presently constructed, is eight stories tall with a penthouse. Construction of the NOB was halted in 1985 when it was discovered that clandestine listening devices had been installed in the NOB's framework. Under the circumstances, the agency determined that security for the design and reconstruction of the NOB is critical.[1]

The work required under the RFP includes the completion of design/construction documentation for the NOB; the complete demolition of a nearby building and demolition of the NOB from the eighth floor to the sixth floor; the construction of a steel frame structure on top of the NOB's sixth floor slab through a tenth floor and penthouse; the completion of the NOB below the sixth floor; and the revision and upgrading of the building core to include, among other things, new heating, ventilation and air conditioning (HVAC), plumbing, and electrical systems. The contractor is required to provide, among other things, the necessary labor, housing, shipping, equipment, consultant services, materials for the design and construction of structures and landscaping, for a complete and fully operational embassy facility.

Because of the overall security concerns and the agency's determination that "[t]ime is of the essence to reduce the risk of security compromise," the agency issued and approved a justification for other than full and open competition for this

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[1]Sections of certain documents relevant to this protest are classified at varying levels. Although the relevant portions of these documents were reviewed during our consideration of this protest, the classified sections of these materials are not described or referred to in any way in this decision.

procurement. The justification provided that in order "to maximize the base of competition while minimizing the exposure of national secrets," the procurement would be conducted by synopsizing the requirement in the Commerce Business Daily (CBD), issuing a request for information (RFI) to those respondents that met certain security requirements, and selecting for receipt of the RFP only those three potential offerors which, based upon their responses to the RFI, were determined by the agency to be best qualified.

The project was announced in the CBD on May 17, 1995. The announcement contained a general description of the work contemplated and noted that the estimated value of the contract to be awarded exceeded $150 million and that the award of a firm, fixed-price contract was planned. This CBD announcement also informed potential offerors that in order to be eligible to receive the RFI, they were required to have "SECRET facility and personnel clearances and SECRET safeguarding capability." The CBD notice added that in order to "participate in the acquisition procedure" and receive the RFP, potential offerors were to have "TOP SECRET facility and personnel clearances together with SECRET safeguarding capability" by July 31. Potential offerors were also informed by this notice that the agency would sponsor potential offerors for top secret facility clearances only if they had at least secret clearances. On May 31, a second CBD announcement was published, which extended from July 31 to October 30 the date by which the top secret security clearances that were required for an offeror to "participate in the acquisition" and receive the RFP were to be effective.

Nine potential offerors responded to the CBD announcements and were determined to meet the established pre-qualification eligibility requirements. The RFI was issued to each of these potential offerors, and six of the potential offerors responded by the August 18 RFI due date. The responses, which in accordance with the RFI addressed only the technical aspects of the project and did not include any price information, were reviewed by the Pre-Selection Board (PSB). The PSB determined three of the respondents to be best qualified and recommended that they be issued the RFP. In so doing, the PSB noted that two of the joint venture respondents, including ZPS, had amended their joint venture agreements since submitting their RFI responses. Specifically, ZPS had deleted Sundt as a joint venture partner, and designated that firm as a consultant because it was not going to obtain the requisite security clearances by October 30, and another joint venture offeror had amended its agreement to delete one of the joint venturers from the joint venture and place it in a subcontractor status. The PSB determined that the amendments by ZPS and the other joint venture offeror to their respective joint venture agreements had no impact on the selection of these joint ventures as best qualified to perform the project, and recommended that Zachry/Parsons, Brown/Perini, and the other joint venture receive the RFP.

The RFP was issued to each of these joint venture offerors on November 1. The RFP stated that the procurement process would proceed in two phases, with the first phase consisting of the offerors' submission of their specific plans, without any pricing information, as to how each would "achieve the requirements of the contract and the resources and experience that [they would] commit to the project if awarded the contract." The RFP informed offerors that during the second phase they were to submit both a lump-sum price and a price breakout and any refinements necessary to the plans and resources proposed during the first phase.

The RFP provided for the award of a firm, fixed-price, award fee contract and informed the offerors that award would be made to the responsible offeror whose offer represented the best value to the government, price and other factors considered. The RFP provided that price would be weighted as one third and the technical evaluation as two thirds in determining which offer represented the best value to the government, and set forth a formula implementing this price/technical ratio to be used to determine the relative standing of the offers, as well as sample calculations based upon hypothetical technical scores (on a 1,000-point scale) and hypothetical prices. The RFP cautioned that although an offeror may achieve the highest technical/price score under the formula, an award to the offeror submitting the highest-priced offer would only be made if the technical attributes of the offer were considered to justify the additional cost.

The RFP, as amended, stated the following technical "evaluation factors and subfactors . . . in descending order of importance":

1. Management Plan

    a. Organization and Staffing Plans
    b. Concept of Operations
    c. Personnel Management Plan
    d. Subcontract Plan

2. Construction Plan

    a. Construction Contractor Quality Control Plan
    b. Network Analysis System Plan
    c. Special Approaches/Techniques
    d. Safety and Accident Prevention Plan

3. Security Plan

    a. Security Contractor Quality Plan
    b. Cleared American Guard Program
    c. Transit Security Plan

d. Industrial Security and Special Access Program Plan
e. Physical Security Plan

4. Logistics Plan

a. Availability of Materials and Equipment
b. Construction Camp Plan
c. Operation of the Moscow Embassy Buildings Control Office (MEBCO) Secure Warehouse in Moscow

5. Impact Minimization Plan

The RFP provided detailed instructions for the preparation of the offerors' proposals and requested, among other things, that offerors organize the technical volumes of their proposals to respond to the evaluation factors and subfactors.

With regard to the actual scoring of proposals under the stated technical factors and subfactors, the source selection plan, which was not disclosed to offerors, provided a grading form for use in evaluating proposals that set forth the following point scoring system and the corresponding adjectival ratings: 9 to 10 points for an "excellent" response; 7 to 9 points for a "very good" response; 4 to 7 points for a "good" response; 2 to 4 points for a "fair" response; and 0 to 2 points for a "poor" response.

The agency received first phase proposals from Brown/Perini, ZPS, and the third offeror by the closing date of January 19, 1996. A proposal was submitted by ZPS, rather than Zachry/Parsons, because Sundt had received the requisite security clearances on November 21, and the agency, upon Zachry/Parsons' request, agreed to the submission of an offer from ZPS.

After the first phase responses were evaluated by a source evaluation board (SEB), discussions were held in which various proposal weaknesses and clarifications were brought to the offerors' attention. Second phase responses were then received and evaluated. Additional written discussion questions were issued to each of the three offerors and the responses thereto received and considered. Brown/Perini's proposal was rated at 636.5 out of 1,000 technical points at a price of $134,628,482, ZPS' proposal was rated at 762.5 points at a price of $144,505,938, and the third offeror's proposal was rated at 678.5 points at a price of $169,499,973. The agency calculated Brown/Perini's proposal's overall score using the formula set forth in the RFP, which, as explained above, considers the proposal's technical score and price, as 889.8 points, ZPS' as 977.2 points, and the third offeror's as 858 points.

The agency then compared the offerors' proposals and determined that although ZPS' proposal was 7.4 percent higher in price than Brown/Perini's, its technical score was 16.5 percent higher, with its technical proposal being rated higher than Brown/Perini's under 14 of the 17 evaluation factors/subfactors, and equal to Brown/Perini's under another evaluation factor/subfactor. The agency concluded that because, among other things, "ZPS' proposal [was] the most thorough and comprehensive of its competitors with plans that are the most completely developed with the best attention to detail . . . [and] are in the highest state of readiness," ZPS' proposal represented the best overall value to the government. ZPS was awarded the contract on May 2, and after requesting and receiving a debriefing, Brown/Perini filed these protests.

Brown/Perini first protests that the agency failed to conduct meaningful discussions with it. Brown/Perini, listing each of the weaknesses in its proposal as identified by the agency during the debriefing and virtually every weakness identified by the SEB in its memorandum to the Source Selection Officer (SSO), argues that the agency acted improperly in not advising it of each of these perceived weaknesses during discussions. Brown/Perini contends that if the agency had pointed out during discussions each of the weaknesses identified by the agency, it "could have revised its proposal or otherwise taken steps to rectify the weaknesses."

Federal Acquisition Regulation (FAR) § 15.610(c)(2) (FAC 90-31) requires that a contracting agency "[a]dvise the offeror of deficiencies in its proposal so that the offeror is given an opportunity to satisfy the [g]overnment's requirements"; we review the adequacy of agency discussions to ensure that agencies point out weaknesses that, unless corrected, would prevent an offeror from having a reasonable chance for award. Department of the Navy--Recon., 72 Comp. Gen. 221 (1993), 93-1 CPD ¶ 422. An agency is not required to afford offerors all-encompassing discussions, however, nor is it required to discuss every aspect of an offeror's proposal that receives less than the maximum score. DAE Corp., B-259866; B-259866.2; May 8, 1995, 95-2 CPD ¶ 12. Neither is an agency required to advise an offeror of a minor weakness that is not considered significant, even where the weakness subsequently becomes a determinative factor between two closely ranked proposals. Volmar Constr. Inc., B-270364; B-270364.2, Mar. 4, 1996, 96-1 CPD ¶ 139; Booz, Allen & Hamilton, B-249236.4; B-249236.5, Mar. 5, 1993, 93-1 CPD ¶ 209. Contracting agencies have wide discretion in determining the nature and scope of discussions, and their discretion will not be questioned unless it is clearly shown to be without a rational basis. Textron Marine Sys., B-255580.3, Aug. 2, 1994, 94-2 CPD ¶ 63.

The record shows that the agency conducted two rounds of written discussions with Brown/Perini, wherein the protester was apprised of the principal areas of concern regarding its proposal, e.g., the protester's incomplete industrial security plan and its proposed guard service subcontractor. A variety of relative weaknesses

that caused Brown/Perini's proposal to be rated less than perfect were not pointed out to the protester, e.g., concerns about the lines of command in the protester's proposed organization, just as such relative weaknesses were not pointed out to ZPS; in this regard, both these firms' proposals were rated at least "good" for all subfactors. The existence of these weaknesses did not keep Brown/Perini from having a reasonable chance for award; Brown/Perini was very much in the competition, and ultimately was not selected for award simply as a result of a cost/technical tradeoff made by the selection official. Accordingly, since the principal concerns about its proposal were brought to the protester's attention and since the various other concerns, both individually and in toto, did not prevent the protester from having a reasonable chance for award, the agency's failure to point out those other concerns did not deprive the protester of meaningful discussions.

The protester further contends that the agency did not conduct equal discussions, pointing out that during discussions the agency "suggested to ZPS that ZPS should move its security functions in-house," although "there was no suggestion that ZPS' original plan to subcontract its security functions might render the plan unacceptable."

ZPS stated in its first phase proposal that it intended to "assign all security planning, management, and operational responsibilities . . . to its security subcontractor, [DELETED]." Although four of the five members of the SEB did not, in their narratives, consider this aspect of ZPS' proposal to be a significant weakness, the SEB assigned ZPS' proposal a rating of only 4 out of 10 points under the applicable evaluation subfactor. This rating was the lowest received by either ZPS or Brown/Perini under any of the evaluation factors/subfactors. Further, one member of the SEB found ZPS' proposed subcontracting of the management of the security program to constitute "a major flaw to the point of being a deficiency." The SEB noted in its report to the SSO that there was a "minority of one" which considered ZPS' proposed subcontracting of the security program to be a major flaw, and set forth that member's reasoning. The SSO subsequently approved "[t]he minority report . . . to the effect that ZPS' plan to subcontract the security management function is considered to be a weakness and ZPS should be afforded the opportunity to revise its plan." Accordingly, during discussions the agency requested that ZPS, among other things, "clarify how [it would] achieve project objectives with a subcontractor responsible for security management."

We do not view this as an indication of unequal discussions. The SEB (as evidenced by its scoring of this aspect of ZPS' proposal as only a four) and the SSO perceived ZPS' initial proposal to subcontract the management of the security function to be a significant weakness; therefore, this was an appropriate matter to point out to ZPS. We think the agency's approach to discussions was evenhanded, as indicated by the fact that Brown/Perini was apprised during discussions of an analogous weakness in it proposal, the incompleteness of its industrial security

plan, which had been initially scored at 4.5. Thus, while an agency may not conduct prejudicially unequal discussions, SeaSpace, B-241564, Feb. 15, 1991, 91-1 CPD ¶ 179, the record simply provides no support for the protester's factual assertion that unequal discussions occurred here.

Brown/Perini next protests that the scoring and weighting method used by the agency in its evaluation of technical proposals was inconsistent with the RFP's stated evaluation and award criteria. Specifically, Brown/Perini argues that in addition to the weights descending from evaluation factor to evaluation factor, as well as descending from subfactor to subfactor within each evaluation factor, the weights had to descend subfactor to subfactor throughout each of the 16 subfactors, in order to be consistent with the RFP's statement that "the evaluation factors and subfactors . . . [are] listed in descending order of importance." For example, Brown/Perini notes that the 10-point weighting of the Organization and Staffing Plan evaluation subfactor--the first-listed subfactor under the first-listed Management Plan evaluation factor (weighted at 35 points)--as well as the lesser weightings of the lower-listed subfactors of this primary factor, were all less than the 11-point weighting assigned the Construction Contractor Quality Control evaluation subfactor--which was the first-listed subfactor under the second-listed Construction Plan evaluation factor (weighted at 25 points). According to the protester, this was improper because all of the subfactors of the primary technical evaluation factor should be weighted greater than the Contractor Quality Control subfactor to be consistent with the evaluation scheme designated in the RFP.

To be reasonable, an interpretation of solicitation language must be consistent with the solicitation when read as a whole and in a manner that gives effect to all of its provisions. Stabro Labs. Inc., B-256921, Aug. 8, 1994, 94-2 CPD ¶ 66. The protester's interpretation of the RFP is unreasonable because it renders meaningless the RFP's listing of the evaluation factors. That is, under the protester's interpretation of the RFP, the agency would have had to list only the 16 evaluation subfactors and inform offerors that the subfactors were listed in descending order of importance. In order to give meaning to the RFP's listing of evaluation factors as well as evaluation subfactors, the RFP can only reasonably be read as providing that the evaluation factors are listed in descending order of importance, and that each of the subfactors within the evaluation factors is listed in descending order of importance. Accordingly, the weights accorded to the evaluation subfactors and factors are not, as argued by the protester, inconsistent with the terms of the RFP.

Brown/Perini also argues that the scoring and weighting method used by the agency in its evaluation of offers, considered in conjunction with the mathematical formula used in the ranking of offers, "grossly exaggerated the importance of individual technical problems--and their dollar worth to relative price--far beyond the 2 to 1 ratio required by the [s]olicitation." Specifically, the protester argues that because proposals could receive a raw score of 4 to 7 points under each evaluation

subfactor where they met the minimum requirements of the RFP, and up to 10 points if they were considered outstanding, the scoring system was "tilted . . . toward technically excessive proposals." With regard to the mathematical formula set forth in the RFP and the weighting system used by the agency, the protester points out that, for example, a 1-point loss in the raw score assigned to its proposal under the most significant evaluation subfactor (Organization and Staffing Plans) of the most significant evaluation factor (Management Plan) equated to an overall loss of 10 points because of the weighting of 10 assigned to this subfactor. The protester then calculates, using the mathematical formula set forth in the solicitation to determine a total overall score for each offeror's proposal considering both technical merit and price, that in order to offset the initial raw score loss of 1 point, it would have had to drop its price by $3 million. The protester concludes that such a system is unreasonable and inconsistent with the RFP.[2]

We have long recognized that contracting agencies have broad latitude in determining the particular method of proposal evaluation to be utilized. Francis & Jackson, Assocs., 57 Comp. Gen. 244 (1978), 78-1 CPD ¶ 79; Augmentation, Inc., B-186614, Sept. 10, 1976, 76-2 CPD ¶ 235. The only requirements are that the method provide a rational basis for source selection and be consistent with the evaluation criteria set forth in the solicitation. See Grey Advertising, Inc., 55 Comp. Gen 1111 (1976), 76-1 CPD ¶ 325; Tracor Jitco, Inc., 54 Comp. Gen. 896 (1975), 75-1 CPD 253, and 55 Comp. Gen. 499 (1975), 75-2 CPD ¶ 344.

We find the scoring and weighting system as well as the RFP formula used by the agency in its evaluation of proposals and ranking of offers for award reasonable and consistent with the terms of the RFP. As indicated previously, the scoring system provided for the evaluation of proposals under each of the evaluation subfactors on a 0 to 10-point scale with the scoring being directly related to the agency's determination of technical merit. The raw scores were then converted to weighted scores by application of multipliers--ranging from 11 to 2--reflecting the relative weight accorded to the particular subfactor. Such a system is clearly consistent with the RFP's admonishment that the agency is "more concerned with obtaining superior management, technical excellence and high quality resources than with making an award at the lowest price," its statement that technical merit would be considered twice as important as price, and the listing of evaluation factors and subfactors in descending order of importance, and we fail to see how it produces an irrational result in the circumstances here. Indeed, in this case, the agency did not simply rely upon the results of the RFP formula in making the award selection, but documented the reasons why ZPS' proposal was technically superior (e.g., its higher

[2]Although the protester's calculations are not repeated here, they appear correct, and neither the agency nor the intervenor has argued otherwise.

ratings in 14 of the 17 technical factors/subfactors) and warranted the price premium.

Brown/Perini finally asserts that the agency improperly waived for ZPS the requirement set forth in the CBD notices and RFI that offerors possess a top secret facility clearance by October 30.

As explained previously, ZPS found that only Zachry and Parsons, and not Sundt, would possess the requisite top secret facility clearance by October 30. It became apparent with regard to Sundt, which possessed a secret facility clearance, that even though the agency had requested that the Defense Industrial Security Clearance Office (DISCO) process a top secret facility clearance for ZPS by letter dated June 29, the upgrade of Sundt's clearance to top secret would not be completed by October 30.[3] Because of this, ZPS deleted Sundt from the joint venture and designated Sundt as a consultant. Sundt received its top secret facility clearance on November 21, and after receiving notification that Sundt had obtained the requisite clearance, the agency permitted Zachry/Parsons to modify its joint venture agreement to add Sundt prior to the date for submission of first phase proposals under the RFP.

The agency states that, in its view, "[i]ts decision to permit the Sundt Corp. to rejoin the Zachry/Parsons joint venture was consistent with both the letter and the intent of the requirements stated in the [CBD]." The agency explains that the requirement for offerors to obtain a top secret facility clearance by October 30 was established solely to ensure that there would be no delay in the issuance of the RFP and subsequent award of the contract, and that once it determined that permitting Sundt to rejoin the Zachry/Parsons joint venture would not delay the procurement in any way, it was proper to allow this action. The agency argues that, in any event, the protester was not prejudiced by this action.

We need not decide the propriety of the agency's decision to let Sundt rejoin the Zachry/Parsons joint venture because we find, from this record, that there was no reasonable possibility that the protester was prejudiced by the agency's allegedly improper action. In this regard, competitive prejudice is an essential element of every viable protest, and we will not sustain a protest where the record does not establish prejudice. Lithos Restoration, Ltd., 71 Comp. Gen. 367 (1992), 92-1 CPD ¶ 379.

The protester's argument that it was prejudiced by the alleged waiver of the October 30 deadline for ZPS primarily focuses on what, in the protester's view,

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[3]DISCO is responsible for administering the Department of Defense's National Industrial Security Program.

were the competitive advantages ZPS gained from being able to add Sundt as a joint venturer. However, in cases such as this, where the protester argues that an agency waived a certain requirement, prejudice does not mean that, had the agency failed to waive the requirement, the awardee would have been unsuccessful. Compare Corporate Jets, Inc., B-246876.2, May 26, 1992, 92-1 CPD ¶ 471 (agency's waiver for the awardee of a personnel experience requirement set forth in an RFP was not prejudicial where there is no reasonable possibility that had the protester been aware of the relaxed requirement it would have been in line for award) with Global Assocs., Ltd., B-271693; B-271693.2, Aug. 2, 1996, 96-2 CPD ¶ 100 (agency's conduct of post-BAFO discussions with only the awardee to allow the awardee to revise its unacceptable proposal to make it compliant with a mandatory FAR clause was prejudicial because the agency could have either rejected the awardee's proposal or allowed the protester the same opportunity to revise its proposal). Rather, the pertinent question in such cases as this is whether the protester would have submitted a different offer that would have had a reasonable possibility of being selected for award had it known that the requirement would be waived. SCI Sys.--Recon., B-258786.2, July 17, 1995, 95-2 CPD ¶ 35; RGI, Inc., B-243387.2; B-243387.3, Dec. 23, 1991, 91-2 CPD ¶ 572.

Brown/Perini also generally argues that had it been aware that the security requirements might be relaxed, it might have added other firms to its joint venture that may have made its proposal more desirable to the agency. However, as pointed out by the agency, the only firm identified by the protester in support of its argument, [DELETED], had no security clearance at all (as opposed to Sundt, which possessed a secret clearance), and because of this, could not have received the RFI (receipt of which required a secret clearance). Further, based upon the agency's experience with DISCO, [DELETED], because it lacked even a secret clearance at the outset of the procurement process, would not have been able to obtain a top secret clearance prior to the submission of first phase offers as did Sundt. As such, we fail to see how [DELETED] could have been added to the Brown/Perini joint venture in a manner that, as the protester contends, would have made its proposal more desirable, since it appears from the record that the addition of that firm to the joint venture would have rendered the joint venture ineligible for receipt of the RFI, and, based upon the timetable set forth by the agency, the RFP. In sum, we are not

persuaded by Brown/Perini's arguments that had it been aware that the agency would relax the requirement it would have submitted a different proposal that would have had a reasonable possibility of award, and thus find that Brown/Perini was not prejudiced by the agency's actions.

The protest is denied.[4]

Comptroller General
of the United States

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[4]Brown/Perini has made a number of other related contentions during the course of this protest having to do with the agency's conduct of the procurement and selection of ZPS for award. Although these contentions may not be specifically addressed in this decision, each was carefully considered by our Office and found either to be insignificant in view of our other findings, or invalid based upon the record as a whole.