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United States Government Accountability Office
Washington, DC 20548

Comptroller General
of the United States

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Decision

Matter of: Heritage Reporting Corporation

File: B-409331.2; B-409331.3; B-409331.4

Date: March 26, 2014

John E. McCarthy Jr., Esq., James G. Peyster, Esq., and Mary M. Gilbert, Esq., Crowell & Moring LLP, for the protester.

Ronald Henry, Esq., Robert Wagman Jr., Esq., and David Hibey, Esq., Kaye Scholer LLP, for Ace-Federal Reporters, Inc., the intervenor.

Clara Kuehn, Esq., Courtney S. McNamara, Esq., and Paul Bardos, Esq., United States International Trade Commission, for the agency.

Eric M. Ransom, Esq., and Jennifer Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest concerning agency's use of point scores is denied where the record demonstrates that the award decision was based on consideration of the qualitative differences between the proposals and not the point scores.
 2. Protest alleging an unequal evaluation of proposals is denied where protester's proposal contained an additional error supporting the agency's less favorable evaluation as compared to the awardee.
 3. Protester is not prejudiced by agency's failure to review a specific weakness during discussions where protester's final revised proposal contained multiple unrelated deficiencies, which were considered the discriminators in the award decision.
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DECISION

Heritage Reporting Corporation, of Washington, D.C., protests the award of a contract to Ace-Federal Reporters, Inc., of Washington, D.C., by the United States International Trade Commission (ITC) under request for proposals (RFP) No. ITC-RFP-12-0006, for court reporter and transcription services. The protester challenges the ITC's evaluation of proposals and argues that the agency conducted unequal discussions.

We deny the protest.

BACKGROUND

ITC issued the RFP, which seeks various court reporting services, as a total small business set-aside on July 13, 2012. The RFP anticipated the award of a single time-and-materials contract with fixed-price contract line item numbers (CLINs) for a period of performance consisting of one 12-month base period and four 12-month option periods. The award was to be made on the basis of the best value to the government. ITC anticipated that the award would be made at little to no cost to the government, and that the selected contractor would be compensated primarily through transcript fees paid by private parties to proceedings and interested members of the public.

The RFP's best value evaluation criteria consisted of four non-price evaluation factors and price, with the non-price factors, when combined, of significantly more importance than price. The non-price factors, listed in descending order of importance, were: use of technology, management plan, qualifications of personnel, and past experience/past performance. RFP at 75. With regard to price, the RFP stated that each offeror's price for each CLIN would be reviewed for reasonableness. Additionally, for price comparison purposes, the solicitation sought offeror prices for two sample tasks.

According to ITC's technical evaluation plan (TEP), the proposals were to be rated under each evaluation factor, and overall, as excellent, good, fair, and poor.¹ The TEP provided evaluator worksheets on which the individual evaluators were to record narrative evaluations as well as comments on any strengths, weaknesses, or deficiencies. Additionally, the TEP included a point scoring spreadsheet on which the evaluators were to enter a point score for each technical factor. The point scoring spreadsheet also linked the points score to the overall adjectival ratings (i.e., 76-100 points for excellent, 51-75 points for good, etc.).

ITC received six proposals in response to the RFP. After receipt of those proposals, ITC recognized that it had omitted a vital information technology (IT) security standard from the RFP. ITC therefore issued an amendment revising the RFP and requested revised proposals.

¹ The TEP also provided narrative guidance for each adjectival rating. For example, the TEP provided that for an excellent rating, a proposal response should be a "[v]ery comprehensive in depth, clear response. Proposal consistently meets this standard with no omissions. The proposal indicates that consistently high quality performance can be expected." Agency Report, Tab 17, TEP, at 5.

ITC subsequently issued another amendment after it became apparent that additional information was required to evaluate the offerors' ability to satisfy IT security requirements previously incorporated in the RFP. This amendment--amendment 7--specifically required the offerors to submit IT security information on an agency-provided spreadsheet to demonstrate that their approach satisfied the IT security requirements in 13 separate areas. The amendment also provided that the information required by the IT security spreadsheet would be considered as a part of the use of technology factor evaluation. In response to amendment 7, the offerors again submitted revised proposals.

An ITC technical evaluation team (TET) comprised of five members evaluated the proposals and found that no offeror could fully meet the ITC's requirements. ITC therefore decided to create a competitive range of five offerors and to conduct discussions. ITC sent discussion letters to each of the five competitive range offerors, including Heritage and Ace, providing detailed descriptions of weaknesses and deficiencies in their proposals. ITC also conducted oral discussions with each offeror reviewing the information previously provided in the discussion letters. As relevant here, ITC's discussions with Heritage identified several significant weaknesses and deficiencies in Heritage's proposal, including two significant weaknesses and five deficiencies related to Heritage's responses to the agency-provided IT security spreadsheet.

Following discussions, ITC received final proposal revisions from all five offerors in the competitive range. After conducting an evaluation, the TET determined that four of the five offerors' proposals warranted overall adjectival scores of excellent. According to the TET's point scores, Ace was highest rated, with a score of 91 out of 100 points. Heritage was rated third overall, with a total score of 80.4. Another offeror, rated second, received a score of 83.4. With regard to price, Ace had a combined evaluated price for the sample tasks of \$14,820, while Heritage's price for the sample tasks was \$[DELETED]. The second-rated offeror's proposed price for the sample tasks was \$[DELETED] (the lowest price proposed). All offerors' CLIN prices were considered fair and reasonable. Based on its evaluation, the TET recommended award to Ace, concluding that Ace was the best-qualified offeror.

The contracting officer, who was also the source selection authority (SSA), agreed with the TET evaluation, with minor exceptions. As relevant, the SSA disagreed with, and removed, a weakness assigned to Ace under the use of technology factor, and also removed two weaknesses assigned to Heritage under that factor. The SSA determined that the removal of these weaknesses did not affect the offerors' respective ratings for the factors overall.

In the source selection decision's (SSD) best-value tradeoff the SSA considered that while Ace, Heritage and the second-ranked offeror were all rated excellent overall, Ace was the only offeror whose proposal did not have any remaining deficiencies under the most heavily-weighted evaluation factor--use of technology.

In comparison, the second-rated offeror's proposal had one remaining deficiency under the use of technology factor, related to IT security spreadsheet item 5, and Heritage's proposal had four remaining deficiencies under the use of technology factor, related to IT security spreadsheet items [DELETED]. Based on this review, the SSA concluded that "it is a good business decision to award to Ace-Federal at a slightly higher price than the other offerors in the competitive range," where "Ace-Federal provides the highest technically rated proposal with no material failures (deficiencies)." SSD at 54.

A notice of the award of a contract to Ace was issued on December 9, 2013. After receiving a debriefing, Heritage protested to our Office.

DISCUSSION

Heritage now asserts that the agency's scoring methodology was unreasonable, that the agency's scoring of its proposal under the use of technology factor was unreasonably low, and that the agency conducted an unequal evaluation under IT security spreadsheet item 11. The protester also complains that the agency conducted unequal discussions.²

Heritage first argues that as a result of the evaluators' reliance on a flawed scoring methodology, the TET assigned its proposal an unreasonably low score under the use of technology factor. In making this argument, Heritage is attaching unwarranted significance to the point system utilized by the evaluators in this procurement.

Our Office has consistently recognized that ratings, be they numerical, adjectival, or color, are merely guides for intelligent decision-making in the procurement process. Citywide Managing Servs. of Port Washington, Inc., B-281287.12, B-281287.13, Nov. 15, 2000, 2001 CPD ¶ 6 at 11. Where the evaluation and source selection decision reasonably consider the underlying basis for the ratings, including the advantages and disadvantages associated with the specific content of competing proposals, in a manner that is fair and equitable, and consistent with the terms of the solicitation, the protester's disagreement over the actual numerical, adjectival, or color ratings is essentially inconsequential in that it does not affect the reasonableness of the judgments made in the source selection decision. General Dynamics, American Overseas Marine, B-401874.14, B-401874.15, November 1, 2011, 2012 CPD ¶ 85 at 10.

² Heritage also asserted throughout the protest that the agency's best value tradeoff decision was flawed for various reasons. However, in its final comments on the protest, Heritage asserted only that the tradeoff decision was flawed where it was predicated on an unreasonable evaluation. As discussed in this decision, we disagree that the agency's evaluation was unreasonable in this case.

Here, the record reflects that the agency reasonably considered the actual qualitative differences in the proposals and did not rely on the point scores for purposes of making the final award decision. While the agency assigned the proposals point scores and used a point scale as an evaluation aid in this procurement, the record reflects that the TET recorded substantial narratives, including overall impressions and comments on the strengths, weaknesses, and deficiencies in each proposal, which formed the core basis for the agency's evaluation.

Further, it is apparent from the record that the SSA reviewed the TET's narratives and comments on strengths, weaknesses, and deficiencies in the various proposals and made an independent judgment about the merits of each proposal.³ In this regard, the record reflects that the SSA did not rely on the point scale as a discriminator in reaching the tradeoff decision. Given the underlying record, the protester's arguments concerning the agency's calculations of the offerors' point scores are of no consequence to the reasonableness of the agency's narrative evaluation findings, or award decision, and do not provide a basis on which to sustain the protest.⁴ See General Dynamics, American Overseas Marine, supra.

Next, Heritage asserts that the agency unequally evaluated the proposals under IT security spreadsheet item 11. In this regard, Heritage argues that despite providing substantially identical responses to this item, Heritage received both a weakness and a deficiency under the item, while Ace received a mere weakness. We disagree, and conclude that when the entirety of the two offerors' responses are considered, differences exist that provide a reasonable basis for the agency's decision to assign Heritage's proposal a deficiency.

³ This review is further supported by the fact that the SSA sought further explanation from individual TET members, and ultimately disagreed with, and discarded, multiple weaknesses assigned by the TET to Ace's and Heritage's proposals. See Contracting Officer Statement at 3.

⁴ Heritage also asserts that the agency's point scoring methodology essentially introduced an unstated evaluation criteria by substantially over-emphasizing the value of the IT security criteria under this RFP for court reporting services. We disagree. First, as discussed, we view Heritage's disagreement with ITC's points scoring as essentially inconsequential where the ultimate SSD was based on consideration of the qualitative differences in the proposals, not the point scores. Second, while this RFP was for the acquisition of court reporting services, the offerors' use of technology was the most important evaluation factor under the RFP, and the IT security requirements were explicitly stated as criteria under that evaluation factor.

Specifically, while both Heritage's and Ace's proposals neglected to include references to certain applicable documents in their responses to item 11's request to explain how the offeror would utilize appropriate security configurations, Heritage additionally provided reference to an IT security publication that was not relevant to the agency's concern under item 11. Based on this reference, the agency concluded that, in addition to its failure to cite applicable documents, Heritage's citation to an irrelevant standard indicated a lack of understanding of the requirement, and warranted a deficiency. Where the entirety of the two offerors' responses indicate that Heritage made an additional error in its response to IT security spreadsheet item 11, we see no unequal treatment in the agency's determination to assign Heritage an additional deficiency.

Heritage also asserts that the agency acted unequally in its conduct of discussions, by failing to raise a weakness concerning Heritage's response to IT security spreadsheet item 4. We agree that the agency's discussions were flawed in this regard; however, we conclude that Heritage was not prejudiced by the agency's error.⁵ Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc., v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

As reviewed above, the major discriminator in the SSD here was the fact that Ace was the only offeror whose final revised proposal did not have any remaining deficiencies under the most heavily weighted evaluation factor--use of technology. In comparison, Heritage's final proposal was assigned four deficiencies under that evaluation factor, while the second-rated offeror's proposal also contained a deficiency under the factor. Where correction of the flawed discussions and removal of Heritage's minor weakness under spreadsheet item 4 would not have reduced Heritage's four deficiencies under the most important evaluation factor--in

⁵ The agency responds that it was not required to raise this weakness with Heritage where the weakness was not a significant weakness. While the Federal Acquisition Regulation (FAR) only specifically requires that discussion address "significant weaknesses, deficiencies, and adverse past performance to which the offeror has not yet had an opportunity to respond," FAR § 15.306(d)(3), discussions, when conducted must also be meaningful, equitable, and not misleading. In this case, the agency acknowledges that its discussions with other offerors in the competitive range addressed every weakness, significant weakness, and deficiency assigned to their proposal. Accordingly, where the agency's discussions with the other offerors addressed minor weaknesses, the agency did not conduct equitable discussions where it failed to raise a minor weakness in Heritage's proposal.

comparison to Ace's zero deficiencies--we have no basis to conclude that Heritage, but for the agency's error, would have had a substantial chance of receiving the award.⁶

The protest is denied.

Susan A. Poling
General Counsel

⁶ Additionally, we see no basis on which resolution of one minor weakness in Heritage's proposal would have altered Heritage's position in relation to the second-rated offeror, whose proposal contained only one deficiency under the use of technology factor and offered a lower price. Accordingly, even were the agency's error in discussions corrected, there is no substantial likelihood that Heritage would even become next in line for award. A protester is not an interested party if it would not be next in line for award if we were to sustain its protest. Resource Title Agency, Inc., B-402484.2, May 18, 2010, 2010 CPD ¶ 118 at 9.