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Decision

Matter of: LexisNexis, a Division of RELX Inc.

File: B-418885; B-418885.2

Date: October 8, 2020

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DIGEST

1. Protest that agency misevaluated protester's proposal and engaged in unequal evaluation treatment is denied where the record shows the evaluation was reasonable and that differences in the evaluation were based on differences in offerors' proposals.
 2. Protest that agency conducted misleading discussions is denied where the agency identified inaccurate results in testing the protester's product and, although the protester asserted in its final proposal revision that it had identified and corrected the problem, the agency's subsequent testing justified similar concerns with inaccurate results.
 3. Protest that agency erroneously assessed both a significant strength and a strength for the same attribute to the awardee's proposal, and made other errors, is denied where the protester was not competitively prejudiced by the errors.
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DECISION

LexisNexis, a division of RELX, Inc. (Lexis), of Washington, D.C., protests the award of contracts to Bureau of National Affairs, Inc. (BNA), of Boston, Massachusetts, and to West Publishing Corporation, doing business as West, a Thomson Reuters Business (Thomson), of Eagan, Minnesota, under request for proposals (RFP)

No. 2032H8-19-R-00003, issued by the Department of the Treasury, Internal Revenue Service (IRS), for commercial online research services in the form of a specialized tax research service and a more general comprehensive research service, respectively. Lexis argues that Treasury misevaluated the proposals, held defective discussions, and made unreasonable source selection decisions.

We deny the protest.

BACKGROUND

The RFP, issued August 9, 2019, sought proposals to provide electronic research services for IRS staff under two indefinite-delivery, indefinite-quantity contracts. The agency would make a separate award decision for the tax research service contract (referred to as award group 1) and the comprehensive research service (award group 2). Offerors were allowed to submit a proposal for either or both. Lexis is the incumbent contractor for the tax research service, and Thomson is the incumbent contractor for the comprehensive research service.

The procurement was conducted under Federal Acquisition Regulation (FAR) subpart 12.1, which the contracting officer explains applied policies unique to the acquisition of commercial items in conjunction with the policies and procedures prescribed in FAR part 15. Contracting Officer's Statement (COS) at 5. The contract for each award group would be made to the offeror whose proposal provided the best value based on an evaluation under five factors, in descending order of importance: technical approach, management approach, small business participation, past performance, and price. Agency Report (AR), Tab G.4.1, RFP amend. 3 at 105.¹

The RFP provided instructions on the organization and submission of proposals, and noted that each offeror might be required to provide temporary accounts to the government so that it could subjectively evaluate the ease of use for online features. *Id.* at 99. For each award group, the RFP identified mandatory specifications, requirements, and features, along with lists of highly desirable content and features. RFP amend. 3 at 13-26. Other highly desirable features were generally applicable to both award groups. *Id.* at 24.

Specific to award group 1, the mandatory features included having "[a] tax citator which provides the history of federal tax related judicial and administrative interpretations." *Id.* at 15. The highly desirable content elements for award group 1 included having secondary tax research material, and having the service not display links to content that Treasury users could not access. *Id.* The highly desirable content elements for award group 2 included secondary tax research material, and tax-related books, treatises, and journals, as well as treatises and books for financial and various business sectors. *Id.* at 19-22.

¹ Our decision cites to this amendment because its revision of the RFP applied to the evaluation of final proposal revisions (FPR) that is at issue in this protest.

After receiving and evaluating initial proposals from three offerors for award group 1 (BNA, Thomson, and Lexis), and two offerors for award group 2 (Lexis and Thomson), Treasury opened discussions with all offerors and requested FPRs. During discussions, Treasury informed Lexis of two issues that affected its proposal under both award groups. The first issue related to communication with the agency and the system’s security. The second issue related to the use of the [DELETED] citator and its “[DELETED]” function. Specifically, Treasury stated the following:

Address the accuracy of [DELETED] statutes occasionally produces incorrect results. For example, on Lexis Advance Tax, [DELETED] IRC [Internal Revenue Code section] 61 from the [DELETED] tab retrieves no results. If, however, you [DELETED] the document from the main search dialog box, one retrieves four instances of IRC 61. The selection of each cite yields different result counts ranging from retrieving no documents to a [DELETED] report with over 10,000 references. Similar results are retrieved when [DELETED] IRC 108. These are examples illustrating an overall concern with [DELETED] functionality not just problems with two code sections.

AR, Tab I.1.1, Discussions Letter from Treasury to Lexis at 1.

Treasury received and evaluated FPRs from all three offerors. Lexis’s FPR responded to the discussions letter by addressing the communications and system security issue, and by explaining that it had identified and corrected the root cause of the issue regarding the results from the [DELETED] citator. Lexis stated that its engineers had reloaded the citator data to prevent recurrence of the issues that Treasury identified in discussions. AR, Tab D.2.1, Lexis Technical FPR at 36.

During the evaluation of FPRs, the evaluators identified strengths in the Lexis proposal in multiple areas, as well as one significant weakness, which again arose from the accuracy of the [DELETED] citator. AR, Tab H.2.2, Final Evaluation Report at 13. The evaluation described the significant weakness as the citator “occasionally produces incorrect results,” and notes that after discussions raising that concern, “[p]roblems, however, persist,” which the evaluators considered to be systemic. *Id.* at 15. The FPR evaluation resulted in the following results for award group 1:

	BNA	Thomson	Lexis
Technical Approach	Excellent	Good	Good
Management Approach	Excellent	Excellent	Excellent
Small Business Participation	Good	Good	Good
Past Performance	Excellent	Excellent	Good
Overall Price	\$12.0 million	\$9.56 million	\$15.5 million

AR, Tab H.2.3, Source Selection Decision Document (SSDD) for Award Group 1 at 7.

And for award group 2:

	Thomson	Lexis
Technical Approach	Excellent	Good
Management Approach	Excellent	Excellent
Small Business Participation	Good	Good
Past Performance	Excellent	Good
Evaluated Price	\$28.8 million	\$22.8 million

AR, Tab H.3.3, SSDD for Award Group 2 at 7.

The contracting officer concluded that BNA's proposal provided the best value for award group 1, and that Thomson's proposal for award group 2 was superior to Lexis's in ways that justified paying the higher evaluated price. This protest followed.

DISCUSSION

Lexis raises multiple arguments contending that Treasury misevaluated the firm's proposal, treated offerors unequally, and conducted discussions that were not meaningful. As a result, Lexis contends the agency made unreasonable award decisions.² We address these arguments in turn and, as explained below, we conclude that none have merit.³

Evaluation Challenges

Lexis argues that its proposal was unreasonably assessed a significant weakness, and that Treasury also overlooked the proposal's strengths and significant strengths, while assessing strengths for Thomson and BNA for essentially the same features. We address first Lexis's principal challenge--to the assessment of the significant weakness--and then its remaining challenges. While the record supports the reasonableness of the evaluation in most respects, Treasury concedes three errors, which we address separately below.

² We have reviewed all of the issues raised by Lexis and have determined that the record does not provide a basis to sustain the protest. This decision reviews the protester's central arguments.

³ In its initial protest, Lexis challenged the evaluation of the awardees' proposals by asserting simply that it was questionable whether Treasury had scrutinized the awardees' proposals as thoroughly as it had its own. See Protest at 17. Treasury asked that we dismiss those allegations as speculative. We agreed with the agency that this challenge was speculative and failed to state a valid basis of protest. By notice of August 4, 2020, we advised the parties that this unsupported allegation lacked a factual basis, so further development of the record on the issue was not required. Electronic Procurement Docketing System, Docket Entry No. 40.

Lexis maintains that it corrected the concerns raised during discussions about its [DELETED] citator, and that the record does not support the assessment of a significant weakness for this concern under the technical approach factor. Lexis also argues that Treasury failed to evaluate multiple strengths in its proposal, and engaged in unequal treatment by evaluating the awardees' FPRs more favorably than its own for what the protester contends were essentially the same features. Protest at 13-23; Comments & Supp. Protest at 16-28.

In response, the agency contends that it reasonably assessed a significant weakness for the firm's citator because inaccurate results continued to occur. As a result, the agency argues that the evaluation record justifies the assessment of a significant weakness, and an overall adjectival rating of good under the technical approach factor. The agency also argues that the allegedly unequal treatment of Lexis was actually the result of valid evaluation judgments based on differences in the proposals that were appropriately documented in the contemporaneous record.

In reviewing an agency's evaluation, we do not conduct a new evaluation or substitute our judgment for the agency's, but, instead, examine the record to determine whether the evaluation was reasonable and consistent with the solicitation's evaluation criteria. *Interactive Gov't Holdings, Inc.*, B-414071, B-414071.2, Feb. 2, 2017, 2017 CPD ¶ 131 at 5. When discussions are conducted in a negotiated procurement, they must be meaningful, equitable, and not misleading. *QinetiQ N. Am., Inc.*, B-405163.2 *et al.*, Jan. 25, 2012, 2012 CPD ¶ 53 at 16. To satisfy the requirement for meaningful discussions, an agency need only lead an offeror into the areas of its proposal requiring amplification or revision; all-encompassing discussions are not required. *Id.* Our Office will review the record to ensure that procurements are conducted consistent with a concern for fair and equitable competition and with the terms of the solicitation. *Freedom Sci., Inc.*, B-401173.3, May 4, 2010, 2010 CPD ¶ 111 at 4.

Lexis stated in its FPR that it had resolved the database issue that had caused the inaccurate results for its citator. Nonetheless, when the evaluators conducted additional tests, the citator continued to provide inaccurate results. The evaluation observed that "[p]roblems . . . persist[ed] in [DELETED] other statutes," and that the problems appeared to be systemic. Specifically, in testing the [DELETED] citator by searching two IRC sections, the evaluators obtained inaccurate results similar to the initial evaluation. The agency noted that the citator produced no results when invoked in one way, and produced multiple sets of results when invoked in another way; they also noted that each methodology yielded a different number of citing references for the same IRC section. AR, Tab H.2.2, Final Evaluation Report at 15-16, 18.

In the source selection decisions for both award groups, the contracting officer identified the concern over inaccuracy in the [DELETED] citator results as the basis for assessing the significant weakness, and discussed the finding that multiple tests of the citator

using typical IRC sections had produced multiple conflicting results.⁴ AR, Tab H.2.3, SSDD for Award Group 1 at 16; AR, Tab H.3.3, SSDD for Award Group 2 at 14. The contracting officer also explained the importance of accurate citator results, and the risk posed to users of a citator that produced conflicting or inaccurate results. *Id.*

Based on our review, the record provides a reasonable basis for Treasury to assess a significant weakness to Lexis's FPR. Contrary to the protester's assertions, the agency's post-FPR testing still showed that the [DELETED] citator produced unreliable and inaccurate results for IRC citations.⁵ The record thus adequately supports the contracting officer's judgment in assessing a significant weakness for Lexis's technical approach.

In other challenges, Lexis argues that its proposal should have received additional strengths for multiple aspects, and that Treasury instead unequally assessed strengths in BNA's and Thomson's proposals but failed to assess strengths for equivalent aspects of the protester's proposal. Treasury responds that the evaluation was reasonable, that it treated offerors equally, and that the evaluation record shows that differences in the proposals justified the differences in the evaluation.

We have reviewed each of the protester's arguments, and find that, with one exception, which we discuss separately below, the contemporaneous record supports Treasury's evaluation. Although Lexis raises many allegations of unequal treatment, for purposes of this decision, we address only its first two arguments as examples.

⁴ Lexis also argues that discussions were not meaningful because the evaluators criticized both the way the [DELETED] citator functioned and the way its results were organized, but did not identify any concern during the discussions about how the results were organized. *Id.* at 16-18. Our review of the record shows that this concern did not affect the evaluation. The SSDDs for both award groups do not base the significant weakness on this concern about organization, and it is not mentioned in the contracting officer's award rationale for either award group. Instead, as noted above, the contracting officer noted multiple instances of the [DELETED] citator producing conflicting results. The concern over conflicting results provided a sufficient and reasonable basis for Treasury to assess the significant weakness.

⁵ Lexis challenges the record as inadequately documented because the agency did not take screenshots of its post-FPR [DELETED] testing. Comments & Supp. Protest at 13 n.8. We disagree with the premise that only screenshots would adequately document the evaluation record, particularly in the context of a commercial item procurement. Rather, the final evaluation report reasonably documents both the specific testing performed and the evaluators' basis for considering the results inaccurate and unreliable. Beyond questioning the veracity of the evaluation record (that is, suggesting that Treasury did not perform additional testing of the citator, or performed tests only before FPRs were due), the protester provides no factual basis to question the evaluation record here.

First, Lexis notes that the evaluation for award group 1 assessed a significant strength for BNA's proposal of a "single, comprehensive, authoritative, commercial tax service." See AR, Tab H.2.2, Final Evaluation Report at 3. Lexis argues that its own proposal should have received more than the single strength because Lexis offered access to four separate commercial tax services.⁶ Comments & Supp. Protest at 19-20. Treasury responds that the record documents a reasonable judgment that BNA's single comprehensive tax service provided significant benefits to the agency. Its product covers over 500 topics, is highly regarded in the tax industry, and is easy for both novice and expert users to use. AR, Tab H.2.3, SSDD for Award Group 1 at 7. In contrast, the evaluators concluded that the multiple services in Lexis's proposal lacked equivalent advantages, even though they assessed a strength for the combined breadth of the tax services. *Id.* at 15.

Second, Lexis notes that the evaluation assessed a significant strength in BNA's proposal because it offered legislative history materials for each IRC section back to 1959. The protester argues that its proposal should have received a similar significant strength for various legislative history materials reaching back (depending on the item) to between 1981 and 1954. Comments & Supp. Protest at 20. Treasury responds that the significant strength of BNA's legislative history was not simply for its chronological coverage, but because BNA provided point-and-click access to pre-compiled legislative histories by IRC section, which had the benefit of allowing quick and comprehensive research. AR, Tab H.2.3, SSDD for Award Group 1 at 8.

To succeed in a protest alleging unequal treatment in a technical evaluation, a protester must show that the differences in ratings did not stem from differences between the offerors' proposals. *Paragon Sys., Inc.; SecTek, Inc.*, B-409066.2, B-409066.3, June 4, 2014, 2014 CPD ¶ 169 at 8-9. Contrary to Lexis's arguments, our review of the record does not support any of its allegations of unequal treatment. Based on our review and as illustrated by the foregoing examples, Treasury appropriately assessed the attributes of BNA's and Lexis's proposals. BNA's single topical tax service was well-suited to the range of users at the IRS, whereas Lexis's multiple tax services, despite having some advantages, were not as well-suited. Similarly, the record also supports the evaluators' judgment that the usability of BNA's legislative history offering provided a strength for which Lexis did not offer an equivalent. In short, the record does not validate Lexis's claim of disparate evaluation treatment.

⁶ Lexis also argues that BNA's proposal did not offer an acceptable product because its tax service is merely topical, rather than a comprehensive annotated tax service, such as the one offered by Lexis. Protest at 19-21. The RFP required at least one commercial tax service, and identified both topical tax services and annotated tax services as acceptable. RFP amend. 3 at 14 (¶ C.6.2.4). As a result, a topical tax service satisfied the RFP's requirement for a commercial tax service. Thus, the RFP itself refutes Lexis's contention that Treasury should have rejected BNA's proposal for offering a topical tax service.

Discussions

Lexis also argues that Treasury's discussions were not meaningful because the agency allegedly based the final evaluation on newly-identified concerns about the functionality of the [DELETED] citator and the organization of its results, which the firm contends was a distinctly different weakness than Treasury raised during discussions. Lexis argues that the significant weakness assessed in the final evaluation was thus based on attributes of the [DELETED] citator that had been present throughout the procurement. Lexis contends that by failing to provide meaningful notice of those concerns, the agency unfairly prevented Lexis from addressing them in its FPR.

Treasury argues that the discussions provided about inaccurate results being produced by the [DELETED] citator were meaningful and not misleading. Instead, Treasury contends that it properly based the final evaluation of a significant weakness on the same concern about inaccurate results that had been raised with Lexis in discussions, and which had not been resolved.

When an agency engages in discussions with an offeror, the discussions must be meaningful; that is, the discussions must be sufficient to lead an offeror into the areas of its proposal requiring amplification or revision. *Education Dev. Ctr., Inc.*, B-418217, B-418217.2, Jan. 27, 2020, 2020 CPD ¶ 61 at 5. Nevertheless, our Office's review recognizes that the precise content of discussions is largely a matter of the contracting officer's judgment. *Id.* The communication must, at a minimum, address deficiencies and significant weaknesses identified in the proposal, but it need not be all-encompassing; the contracting officer is not required to discuss every aspect of a proposal that receives less than the maximum evaluation credit. *Education Dev. Ctr., Inc.*, *supra* at 5-6.

The contemporaneous record does not support Lexis's argument that its discussions were not meaningful. As quoted above, Treasury's discussions informed Lexis that the agency had concerns about the accuracy of the [DELETED] citator. The communication explained that the agency's testing of the citator had produced no results in some tests, and multiple results with differing numbers of citing references in others. The agency described two examples using statute sections from the IRC as examples to demonstrate the concern; it also stated that the concern was broader than just those two statutory provisions, and appeared to be systemic.

The record shows that Treasury's assessment of a significant weakness in evaluating FPRs acknowledged that Lexis had affirmed that the reasons for the original inaccurate results had been corrected. The evaluators' subsequent testing using different IRC sections showed that the problem persisted, however. Although Lexis argues that the evaluation also identified additional areas of concern regarding the citator functions and organization of results, the record shows that the assessment of the significant weakness was not based on those additional areas, but on the continued inaccurate

results.⁷ In the context of this procurement, we think Treasury adequately communicated its concern about an apparent systemic problem in the treatment of IRC sections by the [DELETED] citator.

Discussions with Lexis were meaningful because the post-FPR testing justified the evaluators' conclusion that the citator continued to produce inaccurate and conflicting results. Having been informed of the basis for the agency's concern in discussions, the responsibility to identify and address the technical solution for the issue--and to assure there would be no recurrence of essentially the same problems in post-FPR testing--rests with Lexis. *Portfolio Disposition Mgmt. Grp., LLC*, B-293105.7, Nov. 12, 2004, 2004 CPD ¶ 232 at 2. (agency is not required to initiate additional discussions to resolve a weakness remaining in a proposal that was already the subject of meaningful discussions); see also *W.M. Schlosser Co.*, B-247579, B-247579.2, July 8, 1992, 92-2 CPD ¶ 8 at 4 (agency is not required to reopen discussions where initial meaningful discussions raised issue that offeror failed to resolve in its revised proposal). The protester has not shown a basis to sustain challenge to the adequacy of the discussions here.

Evaluation Flaws and Prejudice

During the course of this protest, Treasury acknowledged that three errors occurred in the evaluation and argued that none resulted in competitive prejudice to Lexis. Most significantly, Treasury notes that Thomson's FPR was inappropriately assessed both a strength and a significant strength for a single issue--its proposal to provide certain secondary source materials. The agency explains that the evaluators failed to replace the strength that had been assessed in the initial evaluation with the significant strength; instead they incorrectly added the significant strength, producing a narrative evaluation that identified two strengths (one a significant strength) for the same issue. Supp. MOL at 18-19; AR, Tab H.3.2, Final Evaluation for Award Group 2 at 4-5. In contrast, the evaluation of Lexis's FPR accurately assessed a single significant strength for the quality of its proposed secondary source materials. Supp. MOL at 19 n.7; AR, Tab H.3.2, Final Evaluation for Award Group 2 at 11.

Treasury also acknowledges that it based the source selection for award group 1 on Lexis's evaluated price being \$15.5 million (as shown above), whereas the correct evaluated price was \$16.5 million. MOL at 2 n.1. The agency also argues that it rated Lexis too highly because the assessment of a significant weakness should have resulted in the adjectival rating of satisfactory, rather than the good, for the technical approach factor under both award groups. COS at 13 n.2.

⁷ Meaningful discussions do not require the agency to provide all-encompassing discussions, and an agency is not required to identify every item that could possibly be revised to improve the offeror's proposal. *E.g., ITT Fed. Sys. Int'l Corp.*, B-285176.4, B-285176.5, Jan. 9, 2001, 2001 CPD ¶ 45 at 7.

Treasury argues that none of these errors resulted in prejudice to Lexis. Although the first error resulted in unequal treatment--the evaluation narrative lists an additional strength for Thomson for its secondary source materials, while Lexis received only a single significant strength for its secondary sources--the agency argues that the error did not affect the ratings or the source selection judgment. Treasury contends that Thomson's technical proposal would have been rated excellent even without the additional strength.

Competitive prejudice is an essential element of every viable protest. Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was competitively prejudiced by the agency's actions; where a protester fails to demonstrate that, but for the agency's actions, it would have a substantial chance of receiving award, there is no basis for finding prejudice, and our Office will not sustain the protest, even if deficiencies in the procurement are found. *Smartronix, Inc.; ManTech Advanced Sys. Int'l, Inc.*, B-411970.9 *et al.*, Dec. 9, 2016, 2016 CPD ¶ 362 at 10. Lexis has not shown that, but for these errors, it would have had a substantial chance of receiving the award. The error that lowered Lexis's evaluated price for purposes of the award group 1 selection enhanced the firm's consideration for award, while the assessment of a good rating for technical approach, rather than satisfactory, likewise favored Lexis in the source selection decision for both award groups.

The identification of both a significant strength and a strength for Thomson's secondary source materials was erroneous. However, the record does not suggest that the error had any effect on the selection of Thomson over Lexis for award group 2. The overall evaluation of the proposal as excellent, and the source selection decision both appropriately focused on the evaluated differences among the proposals, rather than a tally of strengths. But for this error, the record does not show a reasonable likelihood that Lexis's proposal would have been selected over Thomson's for award group 2; rather, the source selection decision concluded that the evaluated advantages of Thomson's proposal justified incurring the higher price over Lexis's proposal. Consequently, as the record does not show that the evaluation errors here resulted in competitive prejudice to Lexis, we do not have a basis to sustain the protest.

The protest is denied.

Thomas H. Armstrong
General Counsel