Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Executive Court Reporters, Inc.

File: B-272981; B-272982; B-272983; B-272981.2; B-272982.2; B-272983.2

Date: December 5, 1996

Lawrence J. Sklute, Esq., for the protester.
Roy Goldberg, Esq., Galland, Kharasch, Morse & Garfinkle, for Ann Riley & Associates, Ltd., and On the Record Reporting, Inc., intervenors.
Stanley Shaw, Esq., U.S. Tax Court, for the agency.
Christina Sklarew, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Federal Acquisition Regulation § 15.608(a)(2)(iii) (FAC 90-31) does not require procuring agency to neutralize an experienced offeror's performance record simply because the firm's experience is not as directly relevant as another firm's experience.

2. Where protester advocates a cost evaluation method that is not required by the solicitation and which would not reflect the agency's anticipated requirement, protester has provided no legal basis to object to the evaluation; further, where a recalculation of scores using the evaluation method the protester is advocating results in no change to the protester's competitive position, protester has shown no competitive prejudice.

3. Where award is to be made on the basis of best value to the government, and solicitation provides that technical merit will be considered "significantly more important than cost," protester has no basis to object to agency weighting cost as 9 percent of the total score where protester's competitive position would not place it in line for award even if cost and technical factors were weighted equally.

DECISION

Executive Court Reporters protests the award of contracts for court reporting services by the United States Tax Court under requests for proposals (RFP) Nos. 96-2048NE, 96-2049SE, and 96-2050NC. Executive alleges that the evaluation of competing proposals was improperly performed for each of these procurements and that the resulting award decisions were flawed. We deny the protest.

On May 1, 1996, the Tax Court issued 116 solicitations for court reporting contracts for various geographical regions, including ones for the Northeast, North Central, and Southeast regions, which are at issue here. The RFPs generally include identical provisions and requirements. Each solicitation required electronic court reporting and verbatim transcript services.

The RFPs listed three technical evaluation criteria, as follows, and provided that combined, these were to be significantly more important than cost in the award decision:

> (a) Business Experience: Quantity and quality of experience providing reporting and transcribing services to federal courts, state courts, administrative agencies and private sector clients. The company must demonstrate the financial stability to perform all required tasks as set forth in this RFP.
>
> (b) Past Performance: The company's background and references. The quality of managing, staffing, and performing similar reporting contracts with courts, administrative agencies, and private sector clients.
>
> (c) Technical Capability: Experience, qualifications and training of managers, reporters, transcribers and other personnel who would be assigned to this contract. The management plan for this contract. Equipment inventory for this contract. Demonstrate understanding of USTC requirements as set forth in this RFP.

The RFP advised that although the overall cost proposed would be considered less important than the combined technical evaluation criteria, cost could become the deciding factor if all proposals were ranked technically equal or nearly so. The RFP also stated that the Tax Court intended to award the contract without holding discussions.

The Tax Court received between seven and nine proposals in response to each of the three RFPs at issue here. Each proposal was reviewed and point-scored by members of an evaluation committee after which the committee prepared an evaluation report for each region. At the same time, a senior contracts specialist prepared a cost evaluation for each offer. The contracting officer reviewed these evaluation materials and added the committee's average technical point score for each proposal to that proposal's cost score. The contracting officer then ranked the offers and made his award determination based on the rankings. The ranking for the three regions was as follows:

Southeast Region

Offeror	Ave. Tech. Score	Cost Score	Total Score
On the Record	98	6.3	104.3
(Offeror 2)	93	7.8	100.8
(Offeror 3)	85	10.0	95.0
Executive	85	7.2	92.2

North Central Region

Ann Riley	98	6.2	104.2
(Offeror 2)	93	7.8	100.8
(Offeror 3)	85	10.0	95.0
Executive	85	7.9	92.9

Northeast Region

Ann Riley	98	6.2	104.2
(Offeror 2)	93	7.8	100.8
(Offeror 3)	92	6.7	98.7
(Offeror 4)	85	10.0	95.0
(Offeror 5)	90	4.7	94.7
Executive	83	8.3	91.3

A Tax Court Reporting Advisory Committee reviewed the evaluation committee's conclusions for each of the regions and concurred with the award decisions of the contracting officer. Accordingly, Ann Riley received the awards for the Northeast and North Central regions while On the Record received the award for the Southeast region.

Following notice of the awards, Executive filed a protest in Our office based on general allegations of evaluation and source selection improprieties. The protester then requested and was granted a debriefing, after which it filed an amended

protest.[1] Because of the timely filing of Executive's initial protest, performance has been suspended under the awarded contracts, pending resolution of these protests.

Executive's amended protest challenges the three award decisions on identical grounds. The protester alleges that the technical evaluations were improper because the agency downgraded Executive's proposal based on its lack of experience with Federal or state courts under both the experience and past performance evaluation factors. The protester believes that the evaluation violated the Federal Acquisition Regulation (FAR), which requires that firms lacking a relevant past performance history be given a neutral evaluation for past performance.[2] Executive later protested that the agency had deviated from the weights that were to be assigned to various factors and subfactors in the technical evaluation, and that the selection of the awardee as representing the best value to the government was improper because it was based on an improper evaluation of costs.

Executive argues that the agency was required to evaluate past performance in a manner consistent with the applicable provisions of the FAR. FAR § 15.608(a)(2)(ii) (FAC 90-31) provides that:

> "Where past performance is to be evaluated, the solicitation shall afford offerors the opportunity to identify Federal, state and local government, and private contracts performed by the offerors that were similar in nature to the contract being evaluated, so that the Government may verify the offerors' past performance on these contracts . . . . The source and type of past performance information to be included in the evaluation is within the broad discretion of agency acquisition officials and should be tailored to the circumstances of each acquisition."

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[1]This protest is not subject to the revised timeliness rules of our Bid Protest Regulations published in the Federal Register on July 26, 1996 and applicable to protests filed on or after August 8, 1996, 61 Fed. Reg. 39039, 39047 (to be codified at 4 C.F.R. Part 21) because it was filed on August 2. Therefore, our current requirement that a protester not file its protest in this circumstance until after the debriefing does not apply.

[2]Executive's amended protest also included allegations involving the evaluation of its compliance with an equipment requirement, a training method requirement, and the agency's "best value" determination; however, these three protest grounds were expressly withdrawn in Executive's comments on the agency report.

FAR § 15.608(a)(2)(iii), which Executive cites, provides that "[f]irms lacking relevant past performance history shall receive a neutral evaluation for past performance."

Executive argues that the agency equated "experience" with "past performance" and, by citing the protester's lack of experience in federal and state courts as a weakness in its technical evaluation, failed to neutralize Executive's lack of relevant past performance history as required by the FAR.

We disagree. The evaluation record shows that experience and past performance were, in fact, separately considered and separately scored, consistent with the evaluation terms of the RFP. In this regard, under "business experience," the evaluation score sheet lists "quantity and quality of prior experience" and "contractor's financial stability," and describes the standards under which point scores would be assigned. For example, to earn the maximum points available for the experience subfactor, the offeror should have "had Federal Courts and Agencies along with private sector reporting contracts which have been fulfilled to clients' satisfaction"; for the next highest available score, the offeror should have "had only Federal Agencies and private sector reporting contracts which have been fulfilled to clients' satisfaction." Under Past Performance, on the other hand, the score sheet lists "Contractor's references" and "Quality of managers, staffing and performance of similar contracts." Thus, while the factors of "past performance" and "experience" are necessarily related, the evaluation record shows that differing criteria were considered when each of these factors was scored.

Pursuant to this scoring scheme, Executive's proposal received fewer than the maximum number of points available under "business experience," reflecting the fact that although the firm has extensive experience providing court reporting services before administrative agencies, its experience does not include contracts for reporting in federal courts. Under "past performance," Executive also received slightly fewer points than the highest available score, based on the quality of the firm's references (which included a "mixed satisfied and very satisfied" reference) and the level of successful performance that was demonstrated under its other contracts (which took into consideration the level of similarity in the type of contract that Executive had performed). While the protester argues at length that contemporary evaluation sheets show a number of points were deducted from Executive's score based on its lack of experience in federal courts and concludes that this resulted in an improperly low score for past performance, the "experience" evaluation to which the protester refers is separate from the "past performance" evaluation. In short, the record does not support Executive's allegation.

Moreover, while Executive argues that it should not have lost evaluation points since "a fundamental purpose of FAR § 15.608(a)(2)(iii) is to allow firms that lack past performance history to fairly compete," Executive is not a first-time offeror or a new firm lacking relevant past performance history. In its proposal, Executive

lists more than 15 years of experience in the electronic court reporting business. The relevant experience and references included in Executive's proposal earned it respectable scores under both the experience and the past performance evaluation factors. Since Executive had relevant past performance history, the FAR provision cited by Executive simply did not apply.

Executive also alleges that the agency deviated from the RFP's evaluation scheme "that required equal treatment of the factors and subfactors." The RFP listed the three evaluation criteria--business experience, past performance, and technical capability--and stated that they were not listed in any order of importance. The protester asserts that the three factors should therefore have been given equal weight in the evaluation. Since the three technical evaluation criteria combined were scored on a 100-point scale, Executive reasons that each criterion should have been worth 33-1/3 points. Since the agency allotted 35 points to each of the first two criteria and 30 points to the last one, Executive contends that "the entire evaluation scheme was flawed."

While it is true that offerors should assume, in the absence of contrary information in the solicitation, that stated evaluation factors are of substantially equal importance, see North-East Imaging, Inc., B-256281, June 1, 1994, 94-1 CPD ¶ 332, it is also true that competitive prejudice is an essential element of a viable protest. Lithos Restoration Ltd., 71 Comp. Gen. 367 (1992), 92-1 CPD ¶ 379. Where no prejudice is shown or is otherwise evident, our Office will not disturb an award, even if some technical deficiency in the award process arguably may have occurred. Merrick Eng'g, Inc., B-238706.3, Aug. 16, 1990, 90-2 CPD ¶ 130. In order to show prejudice, Executive would have to show that the slightly unequal weighting of the three factors in the evaluation had a material effect on Executive's proposals' score and resulting competitive position. However, the impact of this deviation on the scores at issue was de minimus. A comparison of the evaluation scores as they were calculated by the agency and as they would be calculated if equal weight were given to the three criteria demonstrates that Executive's competitive position would not have changed and, thus, we find no harm resulting in competitive prejudice in this instance.[3]

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[3]Although Executive has not provided any figures to support its allegation that the impact of the deviation had a significant effect, we have recalculated the scores. We recalculated average scores for the three technical criteria by averaging the individual scores on the evaluators' scoresheets and then weighted these scores equally by multiplying the 35-point scale scores by 35/33.33 and the 30-point scale scores by 30/33.33. These calculations did not alter Executive's competitive position.

Executive also alleges that the agency failed to weight the "subfactors" equally, and that this distorted the scores. However, there were no subfactors listed in the evaluation scheme that was established in the RFP. The RFP listed the technical evaluation criteria, followed by a few sentences generally describing what each criterion included. The "subfactors" to which Executive now refers first appeared on the evaluation score sheets as guidelines for awarding points for the three technical evaluation criteria. In our view, these served much as an agency's source selection plan would, and are part of the internal process of the evaluation; these internal agency guidelines do not give outside parties any rights. Quality Sys., Inc., B-235344; B-235344.2, Aug. 31, 1989, 89-2 CPD ¶ 197. Rather, the agency is required to follow the evaluation scheme set forth in the RFP for the information of potential offerors, and to conduct its evaluation in a manner that will reach a rational result. Id. Here, it is clear from the record that Executive's proposal was reasonably evaluated pursuant to the evaluation factors set forth in the RFP. While Executive argues that it assumed that the factors and subfactors would be treated equally and prepared its proposal accordingly, in fact, none of the offerors had any knowledge of the "subfactors" and therefore, no expectation that they would be weighted in any particular way.

Similarly, Executive alleges that the agency deviated from the RFP's evaluation scheme for evaluating costs. The protester contends that the RFP required that the agency treat the transcripts' cost per page for standard, expedited, and daily transcripts on an equal basis, yet the agency estimated its requirements as 95 percent standard delivery, 4 percent expedited delivery, and 1 percent daily delivery transcripts when it evaluated proposed prices. We find no requirement in the RFP for the evaluation method Executive cites. In section M, the RFP establishes the evaluation factors that will be considered for award. It lists the technical evaluation criteria, as discussed above, and cost. For cost, it states only that "[a]lthough the overall cost proposed is less important than the combined technical evaluation criteria, it could be the deciding factor if all proposals are ranked technically equal or nearly so." There is simply no provision describing how the offered prices for the various types of transcripts will be evaluated.[4] The RFP

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[4]Although indefinite quantity contracts should reveal the estimated quantities that will be needed, in order to permit offerors to prepare their offers intelligently and to avoid unbalanced pricing, see Price Bros. Co., B-228524, Feb. 22, 1988, 88-1 CPD ¶ 180, the agency's failure to reveal its estimated quantities or the relative weight that each of the different prices would have in the cost evaluation was never protested. Executive must have known, when it completed its proposal, that the RFP did not include estimated quantities of the various types of transcripts, but it did not protest this apparent impropriety in the solicitation. Any such objection at this point would be untimely. 4 C.F.R. § 21.2(a)(1); Engelhard Corp., B-237824, Mar. 23, 1990, 90-1 CPD ¶ 324.

disclosed the number of transcript pages that had been ordered in the previous 2 years, as well as the current contract year per-page rates for each of the delivery types, but did not include any historical information regarding the amounts of pages that were ordered for each of the different delivery categories. Executive submitted its unit prices for the three types of delivery and did not question the RFP's lack of information regarding estimated quantities, either before the closing date for receipt of proposals or in its protest. Rather, Executive bases its objections on the method of evaluation that the agency used, notwithstanding that the RFP did not provide for the method of evaluation that the protester now advocates. Executive has not argued (much less shown) that the 95/4/1 allotment does not accurately reflect the agency's anticipated requirements. Moreover, Executive has not provided any calculations in support of its arguments or otherwise demonstrated that its competitive position would have changed meaningfully under the evaluation method it is suggesting. Thus, even if we accepted Executive's contentions regarding the method of cost evaluation here, we could not conclude that it would then be in line for award.

Executive also argues that the agency's best value determination was improper because proposed costs were not given sufficient weight in relation to technical merit. The protester points out that the RFP established that the technical evaluation criteria would be considered "significantly more important than cost," and argues that instead, technical merit was treated as "overwhelmingly more important" than cost. Executive contends that cost scores improperly accounted for only 9 percent of the overall point score.[5] Even assuming, arguendo, that a legal distinction could be made between the terms "significantly" and "overwhelmingly," we point out that, again, Executive fails to discuss with any particularity how this alleged impropriety prejudiced its competitive position. While Executive has provided some calculations in its final submission through which it purports to demonstrate that weighting costs at 27 percent and technical merit at 73 percent of the total score would place its total score within 1 percent of the awardee's score for the Northeast region, Executive's argument completely ignores the fact that such recalculation would place its score 20 points below the offeror whose proposal was in second place under the original evaluation. Overall, such recalculation would worsen Executive's competitive position, placing it in fifth place based on total

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[5]While we have, as the protester asserts, questioned in certain circumstances whether an evaluation formula allotting only a small portion of the total evaluation score to price is consistent with the requirement under the Competition in Contracting Act that price be one of the significant factors in the evaluation of proposals, see, e.g., Video Ventures, Inc., B-240016, Oct. 19, 1990, 90-2 CPD ¶ 317, we have not found such formula improper per se. Here, we need not decide the minimum weight that should have been given to cost, since the evaluation formula resulted in no competitive prejudice to the protester, as discussed in the decision.

scores. Given the relative proximity of the price scores and the disparity of the technical scores (which scoring we have found to be consistent with the RFP's terms, as discussed above), Executive's overall score would still not place it in line for award even if cost and technical factors were each weighted at 50 percent--a formula which clearly falls short of weighting the technical factor "significantly more important than cost,"[6] as the RFP required. Furthermore, as the agency report points out, cost would have become more significant and could even have been determinative if competing proposals had been rated technically equal, or nearly so, under the RFP's terms.

Executive argues that the evaluation was unequal and lists three instances in which the protester believes its own proposal was held to a higher standard than was the awardee's proposal. We have reviewed the proposals and the evaluation record for each of the three areas at issue, and find no merit to these allegations . For example, Executive complains that the agency should have downgraded the awardees' proposals for allegedly failing to describe the training methods they would use for continuing employees since the requirement was "strictly applied" to Executive's proposals. However, we find that, contrary to Executive's arguments, the awardees' proposals described the methods each would use to keep employees current with new technology, including the use of workshops, manuals, frequent feedback, pairing up with senior staff, and daily meetings. Executive's own proposal, on the other hand, simply asserts that its employees "are already highly trained," and that it "do[es] not foresee any problems with training." While it appears to us that Executive, in fact, submitted the weaker proposal in this area, it was scored slightly higher or equal with the awardee's proposals for this factor. While not discussed here, we reach the same conclusion following our review of the other two instances in which Executive alleges unequal evaluation treatment.

The protest is denied.

Comptroller General
of the United States

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[6]Although the Tax Court states in a supplemental filing that its calculations show that in one region that it uses as an example, "the protester would prevail only if the Court were to change the value assigned to cost relative to technical factors so that more than 40 percent of the total score is attributable to cost," our calculations show that, in fact, the protester would not prevail even if cost were valued at 50 percent of the total score. Increasing the cost score for each offeror by a factor of 10 (to convert the 10-point cost score to a 100-point score) and adding it to the technical score (which is already on a 100-point scale), Executive's position in the Northeast region would only change from fourth position to third.