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Decision

Matter of: Ace-Federal Reporters, Inc.

File: B-417846.4; B-417846.5

Date: April 23, 2020

Michael D. McGill, Esq., and Thomas A. Pettit, Esq., Arnold & Porter Kaye Scholer, LLP, for the protester.

John E. McCarthy, Jr., Esq., Sarah A. Hill, Esq., and Christopher D. Garcia, Esq., Crowell & Moring LLP, for Heritage Reporting Corp., the intervenor.

Charles S. Pino, Esq., and Gina K. Grippando, Esq., United States International Trade Commission, for the agency.

Andrew J. Smith, Esq., and Evan C. Williams, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the agency's evaluation under the technical factor is denied where the agency's evaluation was reasonable and consistent with the solicitation.
 2. Protest alleging that the awardee would not comply with transcript formatting requirement is dismissed, where the allegation involves matters of contract administration and there is no significant countervailing evidence reasonably known to the agency evaluators that should create doubt whether the vendor will or can comply with the requirement.
 3. Protest challenging the agency's evaluation of past performance is denied, where the evaluation was reasonable and consistent with the solicitation, and there is no evidence that the evaluators ignored adverse information about which they should have been aware.
 4. Protest alleging that the awardee's quotation violated the solicitation's subcontracting limitation clause is denied where the awardee's quotation did not indicate that the awardee took exception to the limitation.
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DECISION

Ace-Federal Reporters, Inc., a small business of Washington, District of Columbia, protests the award of a contract to Heritage Reporting Corp., also a small business of

Washington, District of Columbia, by the United States International Trade Commission (USITC) under request for quotations (RFQ) No. 34300019Q0017, for court reporting services. The protester challenges the agency's evaluation and award decision.

We deny the protest.

BACKGROUND

On June 6, 2019, the USITC issued the RFQ as a small business set-aside pursuant to the commercial item procedures of Federal Acquisition Regulation (FAR) part 12.6. Agency Report (AR), Tab A, RFQ at 2, Joint Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 3.¹ The RFQ sought quotations to provide court reporting services to support the USITC's legal proceedings. RFQ at 3.

The USITC is an independent, quasi-judicial federal agency with broad investigative responsibilities on matters of trade. *Id.* The USITC investigates the effects of dumped and subsidized imports on domestic industries and conducts global safeguard investigations. *Id.* The USITC also adjudicates cases involving imports that allegedly infringe intellectual property rights. *Id.*

The RFQ contemplated the award of a fixed-unit-price, time-and-materials contract, with a 1-year base period and four 1-year option periods. *Id.* at 2, 21. The successful vendor would provide the court reporting services at no cost to the agency and would instead receive compensation through the sale of transcripts and real-time services to the parties who appear before the USITC. *Id.* at 2; COS/MOL at 3. On June 25, the agency amended the RFQ to provide answers to vendors' questions. AR, Tab A, RFQ amend. 001 at 55-59; AR, Tab G, Source Selection Decision (SSD) at 2.

The RFQ provided that award was to be made to the vendor whose quotation provided the best overall value to the government, price and other factors considered. RFQ, at 21. The solicitation anticipated consideration of the following factors: technology, past performance, and price. *Id.* at 20-23. The technical factor included three subfactors: use of technology, management plan, and technical approach. *Id.* at 20-21. For purposes of award, the technical factor was the most important factor and the past performance factor was not as important as the technical factor, but more important than price. *Id.* The technical and past performance factors, when combined, were more important than price. *Id.*

Under the use of technology subfactor, the RFQ stated that the agency would evaluate vendors' "ability to meet the Federal Information Processing Standards Publication (FIPS PUB) 140-3, Security Requirements for Cryptographic Modules." *Id.* at 24. To assist with this assessment, vendors were required to discuss their plan to remain current in technological advances, and describe how they would make any

¹ References to page numbers in this decision are to the Bates numbering provided by USITC in the AR.

technological advances available to the USITC. *Id.* at 21. Additionally, vendors were required to propose cryptographic modules, and provide the National Institute of Standards and Technology (NIST) Cryptographic Module Validation Program (CMVP) certificate numbers for each proposed module. *Id.* Under this subfactor, the USITC would also evaluate vendor's "access to and use of current technology as it relates to court reporting." *Id.* at 24. In addition, the agency would evaluate the vendor's technology training program and its plan to update technology as advances are made. *Id.*

Relevant to this protest, a vendor posed a question regarding the digital security requirement in the solicitation's statement of work (SOW) for the contractor to employ encryption using FIPS PUB 140-3 validated cryptographic modules. RFQ amend. 001 at 57. The question noted that FIPS PUB 140-3 would be effective on September 22, 2019, and testing under the new standard would only begin September 22, 2020. *Id.* After noting that FIPS PUB 140-3 was not yet effective, the vendor asked if FIPS PUB 140-2 would be acceptable. *Id.* In response to the question, the agency provided the following answer: "USITC will evaluate cryptographic solutions using the relevant standard. The current NIST CMVP evaluates 140-2. 140-2 is acceptable." *Id.*

Under the past performance factor, the RFQ required vendors to provide at least three past performance references for contracts of similar work and scope. *Id.* at 23. The agency's evaluation would be based on the relevancy of recent effort, the breadth and depth of the referenced experience, and the degree the firm's past performance "was positive taking into consideration the [o]fferor's technical effectiveness, timeliness of performance, and management effectiveness." *Id.* at 25. The RFQ indicated the agency may also "use past performance information obtained from Past Performance Information Retrieval System (PPIRS), Federal Awardee Performance and Integrity Information System (FAPIIS), and any other past performance information available to the Contracting Officer, such as but not limited to performance history under USITC." *Id.*

With regard to price, the RFP informed vendors that the agency would evaluate proposed prices for realism and reasonableness. *Id.*

The agency received three timely quotations, including those of Ace-Federal and Heritage, by the RFQ's deadline of July 8.² AR, Tab G, SSD at 2. The technical evaluation team (TET) assigned Ace-Federal's and Heritage's quotations the same adjectival ratings under the technical and past performance factors. *Id.* at 13. Heritage proposed a lower price, as calculated by multiplying each vendor's proposed unit prices by the agency's estimated quantities. *Id.*; AR, Tab B, Heritage Proposal at 22. The table below summarizes the results of the TET's evaluation:

² The third vendor's quotation proposed the highest price and was rated lower than both Ace-Federal and Heritage's quotations in the non-price factors.

	Technical	Past Performance	Price
Ace-Federal	Good	Outstanding	\$4,257,602
Heritage	Good	Outstanding	\$3,885,500

AR, Tab G, SSD at 12.

On July 31, the contracting officer, who also served as the source selection authority (SSA), concurred with the findings of the TET. *Id.* at 12-13. The SSA then determined that Heritage’s quotation represented the best overall value to the government and awarded it the contract. *Id.* at 13; AR, Tab F, Contract to Heritage at 1; Tab I, Award Notification at 3.

Prior Protest

On August 12, Ace-Federal filed a protest with our Office, arguing that Heritage’s quotation did not comply with the solicitation’s pricing requirements; the agency failed to recognize the merits of Ace-Federal’s quotation; and the agency improperly rated Heritage’s past performance. Protest, B-417846, at 10-17. The protester also contended that the resulting best-value tradeoff decision was flawed. *Id.* at 19-20.

The USITC submitted its agency report in response to this prior protest on September 16, asserting that the protest grounds were speculative, legally and factually insufficient, and should be dismissed for challenging matters of contract administration. COS/MOL, B-417846, at 18-37.

On September 26, Ace-Federal filed its comments and supplemental protest, which included allegations that Heritage’s transcripts did not comply with the solicitation’s formatting requirements and resulted in overpriced transcripts; the awardee’s proposed wireless router failed to comply with the RFQ’s encryption requirements; and Heritage did not intend to comply with the small business limitations on subcontracting under FAR clause 52.219-14. Comments & Supp. Protest, B-417846; B-417846.2, at 3-7. In response, the USITC contended that the RFQ’s encryption provisions were neither a solicitation requirement nor a component of the agency’s pre-award evaluation, and were instead a matter of the awardee’s responsibility not for review by our Office. Supp. MOL, B-417846.2, at 6.

On November 5, after full development of the record, the GAO attorney assigned to the protest conducted an outcome prediction alternative dispute resolution (ADR) conference. See GAO Notice, Nov. 4, 2019. In the ADR conference, the GAO attorney advised that she would likely draft a decision sustaining the protest based on the agency’s failure to consider whether the awardee’s wireless router complied with the RFQ’s encryption requirements. The GAO attorney also advised that her review did not identify merit in any other protest allegation.

Corrective Action

On November 8, the USITC advised our Office of its intent to take corrective action by reevaluating vendors' technical quotations with respect to their use of encryption technology and making a new source selection decision. Notice of Corrective Action & Req. for Dismissal at 1. Ace-Federal objected to the proposed corrective action as "too narrow" for not addressing all of its alleged defects. Protester Objection to Corrective Action. On November 15, we dismissed the protest, finding that the proposed corrective action rendered the protest academic. *Ace-Federal Reporters., Inc.*, B-417846.1, B-417846.2, Nov. 15, 2019 (unpublished decision).

On January 6, 2020, the USITC completed its reevaluation and, as relevant here, found that both Heritage and Ace-Federal's quotations were compliant with FIPS PUB 140-2 standards. AR, Tab Q, FIPS 140 Evaluation at 1-3. On January 8, the SSA concurred with the technical evaluation and notified Ace-Federal that Heritage was again selected for award. AR, Tab R, Corrective Action SSDD at 12; AR, Tab R, Declaration of the Contracting Officer at 1; AR, Tab CC, Notification of Award Decision at 2. This protest followed.

DISCUSSION

Ace-Federal's protest contains four primary grounds. First, the protester contends that Heritage's quotation should have been considered technically unacceptable, alleging Heritage's router did not comply with FIPS PUB 140-2, as required by the RFQ. Protest at 15-20. Second, Ace-Federal alleges that the USITC ignored Heritage's history of non-compliance with transcript formatting requirements, which rendered the best-value decision unreasonable. *Id.* at 20-23. Third, the protester asserts that the agency misevaluated both Heritage's and Ace-Federal's past performance. *Id.* at 23-26. Fourth, Ace-Federal argues that Heritage's quotation should have been considered technically unacceptable because the agency should have known that Heritage would not comply with the limits on subcontracting. *Id.* at 23-27. For the reasons discussed below, we find no basis to sustain the protest.³

³ Ace-Federal has made arguments that are in addition to, or variations of, those discussed in this decision. While we do not address every issue raised, we have considered them all and conclude that none furnishes a basis to sustain the protest. For example, Ace-Federal raised a supplemental protest ground on February 28, 2020, alleging that the agency unreasonably assigned Heritage's quotation a strength for its approach to digital security. Comments and Supp. Protest at 47-51. We dismiss this supplemental protest ground as untimely, as it was not filed within 10 days of when Ace-Federal knew of the basis for this allegation as required under our Bid Protest Regulations. 4 C.F.R. § 21.2(a)(2). Here, the agency provided the protester with all of

Use of Technology Subfactor

Ace-Federal contends that the USITC unreasonably determined that Heritage's quotation was technically acceptable under the use of technology subfactor because of its proposed encryption technology. Protest at 15. In this regard, the protester asserts that Heritage's proposed router, which had a historical rather than an active NIST CMVP certificate, did not comply with the RFQ requirement to propose equipment that met the NIST encryption standards for "the current version" of FIPS PUB 140-2. *Id.* at 20. Under Ace-Federal's view, when a NIST CMVP certificate status changes from active to historical, the certificate should be considered expired--and therefore not compliant--because the NIST has not "recertified the hardware against current standards." *Id.* at 19. Alternatively, Ace-Federal argues that the agency failed to consider the substantive differences between the vendors' proposed use of encryption technology and their relative level of cybersecurity. *Id.* at 19-20.

The agency responds that it reasonably concluded that quotations proposing encryption hardware with either active or historical NIST CMVP certificates were compliant. COS/MOL at 18-19. Thus, the agency maintains that it reasonably found that Heritage's quotation demonstrated its ability to comply with FIPS PUB 140-2 standards and to implement FIPS 140-3 validated cryptographic modules in the future. *Id.* at 25.

In considering protests challenging an agency's evaluation of quotations, we will not re-evaluate quotations; rather, we will examine the record to determine whether the agency's evaluation conclusions were reasonable and consistent with the terms of the solicitation and applicable procurement laws and regulations. *Information Ventures, Inc.*, B-407478.4, July 17, 2013, 2013 CPD ¶ 176 at 5. The evaluation of a vendor's quotation is a matter within the agency's discretion. *V3Gate*, B-413001 *et al.*, July 22, 2016, 2016 CPD ¶ 236 at 5. A protester's disagreement with the agency's evaluation judgments, without more, does not establish that the evaluation was unreasonable. *Id.* at 5-6.

the information it needed to raise this allegation on September 16, 2019, when the agency filed its report in response to B-417846 that included Heritage's quotation and the agency's contemporaneous evaluation of it. Electronic Protest Docketing System (Dkt.) No. 30. Ace-Federal contends that the protest was timely filed because it was raised within 10 days of learning that the agency does not view the security requirements of FIPS 140-2 as applicable. Comments and Supp. Protest at 51. The record does not support the protester's characterization of the agency's position. The agency has maintained that the security requirements of FIPS PUB 140-2 are applicable to this procurement, and conducted an additional evaluation of each vendor's proposed compliance with FIPS PUB 140-2 as part of its corrective action. Supp. COS/MOL at 2-3; AR, Tab Q, FIPS 140 Evaluation at 2-93. As the protester did not raise the protest ground within 10 days of September 16, 2019, it is untimely and will not be considered.

As an initial matter, Ace-Federal contends that the RFQ, as amended, required vendors to propose equipment compliant with the “current NIST standards,” and only modules with active certificates could be considered compliant with the most recent updates to these encryption requirements. Protest at 17-18. The agency counters that because the RFQ did not prohibit a vendor from proposing an encryption module with historical certificates, it was within its discretion to consider historical certifications acceptable. Supp. MOL/COS at 2-3.

Where a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions. *49er Pressure Wash and Water Serv., Inc.*, B-417926, B-417926.2, Nov. 27, 2019, 2019 CPD ¶ 394 at 5. To be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. *Id.*

Here, the RFQ did not prohibit vendors from proposing encryption modules with historical NIST CMVP certificates, nor did it require the agency to eliminate quotations that proposed such modules. RFQ at 22, 24. Rather, the RFQ used broad language to describe the evaluation criteria for this subfactor, and therefore granted the agency considerable discretion in evaluating a vendor’s “access to and use of current technology” and its ability to meet the upcoming FIPS PUB 140-3 security requirements. *Id.* at 24.

Further, we reject the protester’s contention that the RFQ, as amended, prohibited the agency from accepting a historical NIST CMVP certificate. Contrary to the protester’s assertion, the RFQ amendment incorporating the agency’s response to a question regarding the SOW requirement to comply with FIPS PUB 140-3 before the regulation was effective did not alter the evaluation criteria discussed above. RFQ amend. 001 at 57. Rather, in its answer, the agency’s merely clarified that it was acceptable for the contractor to comply with the current encryption standard, which at that time was FIPS PUB 140-2. *Id.* Regarding its technical evaluation, the agency’s answer affirmed that it would evaluate “cryptographic solutions using the relevant standard.”⁴ *Id.* In our view, the solicitation language, when read as a whole, supports the agency’s interpretation that it had broad discretion to determine that historical certificates were acceptable for this requirement. *49er Pressure Wash and Water Serv., Inc., supra* at 5.

In conducting its technical evaluation, the agency determined that FIPS PUB 140-2 was the current and applicable version of the encryption standard but that the “requirement was forward looking” to FIPS PUB 140-3. AR, Tab Q, FIPS 140 Evaluation at 2. The agency’s technical evaluator concluded that proposed modules with either historical or

⁴ To the extent that Ace-Federal contends that this language changed the relevant evaluation criteria to require vendors to propose encryption modules with active NIST CMVP certificates under FIPS PUB 140-2, such a contention would, at best, raise a patent ambiguity that is untimely raised. 4 C.F.R. § 21.2(a)(1); *RELI Grp., Inc.*, B-412380, Jan. 28, 2016, 2016 CPD ¶ 51 at 6.

active certificates were compliant with FIPS PUB 140-2, while modules that had either revoked certificates or no certificates would be considered noncompliant. AR, Tab Q, FIPS 140 Evaluation at 2. In doing so, the technical evaluator determined that because of the “complexity of service provider systems” and “the fact that those service provider systems are expected to evolve over time and replace equipment as needed,” historical certifications were acceptable. AR, Tab Q, FIPS 140 Evaluation at 3. In the evaluator’s judgment, the level of compliance with FIPS PUB 140-2 deserved “no additional weight/emphasis” and accordingly the evaluators did not assign strengths or weaknesses in this regard. *Id.* at 3. As a result, the agency determined that both Ace-Federal and Heritage’s quotations were compliant with the requirements of FIPS PUB 140-2. *Id.* at 2-3. While Ace-Federal claims that the agency was required to account for the substantive differences between the vendors’ proposed use of encryption technology, the protester provides no basis to question the agency’s determination that vendors possessing an active certificate did not merit additional credit when compared to vendors possessing a historical certificate. Accordingly, we find that the agency’s evaluation under this subfactor was reasonable and consistent with the solicitation.

Finally, we find no merit to Ace-Federal’s assertion that the agency’s technical evaluation was unreasonable because procuring encryption modules with historical certificates would violate the Federal Information Security Management Act (FISMA), and NIST regulations implementing FISMA. Protest at 15-20. In making this allegation, the protester relies on the following NIST guidance: “If a validation certificate is marked as historical, Federal Agencies should not include these in new procurements.” *Id.*; AR, Tab DD, NIST Regulation at 2.

Our Office reviews the procurement record to determine whether the agency’s evaluation conclusions were reasonable and consistent with the terms of the RFQ and applicable procurement laws and regulations. *Information Ventures, Inc., supra* at 5. Our jurisdiction does not extend to the review of allegations of violations of non-procurement regulations such as the NIST.⁵ See 31 U.S.C. §§ 3551(1), 3552; 4 C.F.R. § 21.1(a).

To the extent the protester raises these alleged violations of FISMA and the NIST regulation as evidence that the agency’s technical evaluation was unreasonable, we are not persuaded. The agency’s technical evaluators considered the NIST guidance during its evaluation and determined that the guidance was not mandatory, and only

⁵ The plain language of the relevant NIST guidance does not expressly prohibit the agency from acquiring a commercial service that utilizes a router with a historical certificate. Our Office has consistently stated that in some contexts, the use of the word “should” should be interpreted as expressing a requirement, while in other contexts, “should” indicates a preference or discretionary characteristic. See *The Arora Grp., Inc.*, B-288127, Sept. 14, 2001, 2001 CPD ¶ 154 at 6. Here, when the NIST guidance is read as a whole, the use of the word “should” suggests a discretionary preference, and not a mandatory requirement as the protester contends.

applied in a discretionary manner for new procurements of encryption hardware, not services. AR, Tab Q, FIPS 140 Evaluation at 3. In support of its interpretation, the agency pointed out that the NIST guidance also allows the agency to continue to use modules with historical certifications “based on their own assessment of where and how the module is used.” *Id.* In light of this discretion, and its own reasonable assessment of its requirement, the agency concluded that “[g]iven the complexity of service provider systems and the fact that those systems are expected to evolve over time and replace equipment as needed, ‘historical’ designations are considered compliant for the purposes of this evaluation.” *Id.* While the protester disagrees with the agency’s conclusions, that disagreement, without more, does not render the technical evaluation unreasonable. *V3Gate, supra* at 5-6.

Transcript Formatting

Ace-Federal next argues that Heritage “cannot comply” with the RFQ’s mandatory transcript formatting requirements. Protest at 20. As support, the protester alleges “a history of failing to comply” with the USITC formatting requirements. *Id.* Ace-Federal claims that Heritage uses a larger margin, which “improperly lengthens its transcripts by approximately 30%” and resulting in charging more for transcripts than if it complied with the formatting requirements. *Id.* at 22.

In response, the USITC argues that whether Heritage complies with the transcript formatting requirements is a matter of contract administration or contractor responsibility that our Office does not consider. COS/MOL at 36-39. In this regard, the agency contends that the RFQ’s formatting provisions are post-award performance requirements stating how the work will be done under the contract. AR, Tab S, Quillman Declaration at 3.

Whether an awardee will meet its contractual obligations is a matter of contract administration which our Office will not consider. 4 C.F.R. § 21.5(a); *see also Knight Point Systems, LLC*, B-414802, Sept. 20, 2017, 2017 CPD ¶ 306 at 8; *United Airlines, Inc.*, B-411987, B-411987.3, Nov. 30, 2015, 2015 CPD ¶ 376 at 10. Here, whether Heritage will comply with the mandatory transcript formatting requirements during the course of contract performance is a quintessential matter of contract administration that our Office will not consider.

Ace-Federal argues that this issue is not a matter of contract administration because there is “significant countervailing evidence” reasonably known to the agency evaluators that should create doubt whether the vendor will or can comply with that requirement. Protest at 20, *citing Maritime Berthing, Inc.*, B-284123.3, Apr. 27, 2000, 2000 CPD ¶ 89 at 6. Our Office has explained that, in certain circumstances, an agency may not accept at face value a proposal’s promise to meet a material requirement where there is significant countervailing evidence reasonably known to the agency that should create doubt as to whether the vendor will or can comply with that requirement. *See Fidelis Logistic and Supply Servs.*, B-414445, B-414445.2, May 17, 2017, 2017 CPD ¶ 150 at 6. Although the protester argues that the agency should have doubted Heritage’s

ability to comply with the RFQ's mandatory formatting requirements, we find that the protester has not demonstrated that there was significant countervailing evidence reasonably known to the agency evaluators that should have created any such doubt.

The protester did not provide any countervailing evidence in its initial prior protest and only made a broad accusation that Heritage had deviated from required formatting in the past and was able to charge "roughly 15% more." B-417846, Dkt. No. 1, Protest, at 17. It was not until Ace-Federal filed its comments in B-417846.2 that it provided two pages from publically available transcripts produced by Heritage that allegedly demonstrated evidence of past non-compliance with formatting requirements. B-417846.2, Dkt. No. 32, Comments and Supp. Protest, at 3-5 and Exhibits A-B; B-417846.2, Dkt. No. 37 at 6-10. Later during the protest, Ace-Federal submitted three complete transcripts produced by Heritage, which it alleges were examples of the significant countervailing evidence of non-compliance. B-417856.2, Dkt. No. 37, Supp. Comments, at 6-10, Exhibit A, Transcript dated Aug. 6, 2019; Exhibit B, Transcript dated Aug. 7, 2019; Exhibit C, Transcript dated Jan. 20, 2012. Our Bid Protest Regulations do not contemplate the piecemeal presentation or development of protest issues through later submissions citing examples or providing alternate or more specific legal arguments missing from earlier general allegations of impropriety. *See Sealift Inc.*, B-405705, Dec. 8, 2011, 2011 CPD ¶ 271 at 3 n.1. As USITC transcripts are publically available, Ace-Federal could have raised the specific examples of alleged noncompliance by Heritage in its initial protest, but instead waited to provide them in its comments, they are untimely. 4 C.F.R. § 21.2(a)(2).

In any event, even if we were to consider these piecemeal arguments, in essence, that Heritage will not comply with the formatting requirements of this contract, we find that these limited examples do not constitute significant countervailing evidence, reasonably known to the agency evaluators. Our review of the record did not reveal that the agency was aware of the alleged history of Heritage's noncompliance during its technical evaluation. The USITC provided declarations from the Contracting Officer's Representative (COR) and the contracting officer for the requirement, who both indicated that they was not aware of any complaints against Heritage during contract performance. AR, Tab T, Bishop Declaration at 2; Tab S, Quillman Declaration at 3. Apart from its own self-serving allegations, the protester has not demonstrated that the agency was previously aware of Heritage's supposed noncompliance.

More fundamentally, the protester fails to demonstrate that Heritage will not comply with the formatting requirements under the current contract. Even assuming that the protester was able to find examples of noncompliance in other contracts, we find that these limited examples do not establish that Heritage will not comply with formatting requirements in this contract, especially if the agency is diligent in enforcing the requirements. In this regard, the agency reasonably concluded Heritage could "easily address" any concerns raised during contract performance and that there was no reason to question Heritage's ability to comply with formatting requirements. Supp. COS/MOL at 3-4. As there was no evidence the agency was aware of this issue during

its technical evaluation, this protest ground is dismissed. *Spectrum Sys., Inc.*, B-401130, May 13, 2009, 2009 CPD ¶ 110 at 3.

Past Performance Evaluation

Ace-Federal next argues that the agency's past performance evaluation was unreasonable because it failed to account for Ace-Federal's superior past performance.⁶ Protest at 23-26. The protest also alleges that the USITCS ignored adverse past performance information regarding Heritage's noncompliance with transcript formatting requirements.⁷ *Id.* at 23-24.

The USITC responds that Ace-Federal's protest is based on unsupported allegations that are contradicted by the record. COS/MOL at 40-41. The agency also argues that the protest ground amounts to a mere disagreement with the agency's reasonable past performance evaluation. *Id.* at 40-46.

Our Office will examine an agency's evaluation of a vendor's past performance only to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations, since determining the relative merit of a vendor's past performance is primarily a matter within the agency's discretion. *Avalon Contracting*, B-417845, B-417845.2, Nov. 19, 2019, 2019 CPD ¶ 390 at 6. The evaluation of past performance, by its very nature, is subjective, and we will not substitute our judgment for reasonably based evaluation ratings; a vendor's

⁶ In its protest, Ace-Federal also alleged that Heritage was unable to submit three past performance references of similar scope and complexity as the current requirement, as required by the RFQ. Protest at 25. Although the agency provided a detailed response to these allegations in its report, including Heritage's quotation that included more than three references, Ace-Federal did not substantively respond to or rebut the agency's position in its comments. Accordingly, we dismiss this aspect of its past performance challenge as abandoned. *Tec-Masters, Inc.*, B-416235, July 12, 2018, 2018 CPD ¶ 241 at 6.

⁷ In its comments filed on February 28, 2020, Ace-Federal raised an additional past performance allegation, claiming that the USITC failed to reasonably consider Heritage's underlying Contract Performance Assessment Reports (CPARs) and improperly considered the CPARs summaries. Comments and Supp. Protest at 43-46. However, the agency provided the protester with all of the information to raise this allegation on September 16, 2019, when it provided it with the SSD that contained the agency's consideration of Heritage's CPARs ratings. Dkt. No. 30. To the extent that Ace-Federal deemed the agency's consideration of the CPARs inadequate, it was required to protest that issue within 10 days of receiving the SSD. This aspect of the protester's challenge is dismissed as untimely because it was not filed within 10 days of when Ace-Federal knew of the basis for this allegation, as required under our Regulations. 4 C.F.R. § 21.2(a)(2).

disagreement with an agency's evaluation judgments, by itself, does not demonstrate that those judgments are unreasonable. *Id.*

We find that the agency's evaluation of the awardee's past performance was reasonable and consistent with the terms of the RFQ. In conducting its past performance evaluation, the agency considered the Heritage past performance questionnaires it received from the U.S. Supreme Court, the Occupational Safety and Health Administration, the U.S. Environmental Protection Agency, and the USITC. AR, Tab C, Heritage Questionnaires at 2-5. While the protester argues that Heritage's past performance was deficient, based upon our review of the record, we find that the agency reasonably determined that all of Heritage's references rated Heritage's performance as exceptional or very good, which were the two highest possible ratings. *Id.* In rating Heritage's past performance as outstanding, the USTIC noted that the quotation had two strengths and no weaknesses or deficiencies. AR, Tab R, SSD at 11. Similarly, the agency rated Ace-Federal's past performance as outstanding, and determined that it had numerous strengths with no weaknesses or deficiencies. *Id.* at 6-7. The agency also noted that Heritage received higher past performance ratings than Ace-Federal for its previous work with the USITC. COS/MOL at 45; *compare* AR, Tab C, Heritage Past Performance Questionnaires at 4 (indicating that the USITC COR rated Heritage as exceptional in three categories and very good in two) *with* AR, Tab E, Ace-Federal Past Performance Questionnaires at 3 (indicating that the same USITC COR rated Ace-Federal as only very good in all categories).

In its award decision, the SSA determined that Ace-Federal and Heritage were equally rated in all non-price factors, including past performance, and that Ace-Federal's higher price was not "perceived to offer a better value to the Government." AR, Tab R, SSD at 12. While Ace-Federal generally contends that the agency should have viewed its past performance as superior to Heritage's past performance, its arguments amount to disagreement with the agency's assessment, that without more, provide no basis to sustain the protest.

Finally, Ace-Federal argues that the agency failed to consider Heritage's "historical noncompliance" with transcript formatting requirements. Comments and Supp. Protest at 41-42. While agencies generally need not evaluate all past performance references, or those not reflected in the quotations, our Office has recognized that in certain limited circumstances an agency evaluating a vendor's past performance has an obligation (as opposed to the discretion) to consider information that is simply too close at hand to require vendors to shoulder the inequities that spring from an agency's failure to obtain, and consider, the information. *See The MIL Corps.*, B-297508, B-297508.2, Jan. 26, 2006, 2006 CPD ¶ 34 at 11-12; *Exelis Sys. Corp.*, B-407111 *et al.*, Nov. 13, 2012, 2012 CPD ¶ 340 at 22. Our Office has generally viewed these circumstances as limited to situations where the information relates to contracts for the same services with the same procuring activity, or information personally known to the evaluators. *Exelis Sys. Corp.*, *supra*.

We find no basis in the record here to conclude that the evaluators were aware, or should have been aware, of complaints regarding Heritage's formatting of transcripts. As discussed in greater detail above, the agency explained that it has not received any adverse information regarding Heritage's past performance on its previous contracts, including Heritage's previous work with the USITC. AR, Tab S, Quillman Declaration at 3; AR, Tab T, Bishop Declaration at 2. As there is no evidence of Heritage's alleged noncompliance in the record--apart from Ace-Federal's allegations made during the protest--and the USITC and its evaluators were not otherwise aware of any adverse past performance information, we find no merit to the protester's argument. See *Torres-Advanced Enter. Sols, LLC*, B-412755.2, June 7, 2016, 2016 CPD ¶ 167 at 8, 17. Consequently, this protest ground is denied.

Subcontractor Limitation

Finally, Ace-Federal claims that the Heritage quotation was technically unacceptable because it proposed to "rely exclusively on subcontractors to perform all of the reporting services" and would not be able to comply with the subcontractor limitations set out in FAR clause 52.219-14. Protest at 26. In making this allegation, the protester claims that the USITCS knew, or should have known, that Heritage has not employed court reporters on any of its prior contracts, including contracts with the USITC. *Id.* Ace-Federal also claims that Heritage's quotation repeatedly referred to the use of "independent contractors," and that the list of functions performed by "in-house staff" were "almost entirely administrative, back-office functions." *Id.* at 27. The USITC argues that whether Heritage complies with the limitations on subcontracting is a matter of contract administration that is not reviewable by our Office, pursuant to 4 C.F.R. § 21.5(a). COS/MOL at 39.

An agency's judgment as to whether a small business vendor can comply with the limitation on subcontracting provision is generally a matter of responsibility and the contractor's actual compliance is a matter of contract administration. *NEIE Med. Waste Servs.*, B-412793.2, Aug. 5, 2016, 2016 CPD ¶ 213 at 3-4. Neither issue is one that our Office generally reviews. *Id.* at 4; see also 4 C.F.R. § 21.5(a), (c). However, where a proposal, on its face, should lead an agency to the conclusion that a vendor could not and would not comply with the subcontracting limitation, the quotation may not form the basis for an award. *KAES Enters., LLC*, B-408366, Aug. 7, 2013, 2013 CPD ¶ 192 at 2.

A vendor, however, need not affirmatively demonstrate compliance with the subcontracting limitations in its quotation. See *Dorado Servs., Inc.*, B-408075, B-408075.2, June 14, 2013, 2013 CPD ¶ 161 at 12. Rather, such compliance is presumed unless specifically negated by other language in the quotation. See *Express Med. Transporters, Inc.*, B-412692, Apr. 20, 2016, 2016 CPD ¶ 108 at 6. Accordingly, where a vendor submits a quotation in response to an RFQ that incorporates FAR clause 52.219-14, the vendor agrees to comply with the limitation, and in the absence of any contradictory language, the agency may presume that the vendor agrees to comply with the subcontracting limitations. *Id.* It is the protester who bears the burden of demonstrating that the quotation should have led the agency to conclude that the vendor did not comply with this limitation. See *KAES Enters., LLC*, *supra* at 3.

Here, the RFQ incorporated FAR clause 52.219-14. Heritage is presumed to have agreed to comply with the subcontracting limitation by submitting a quotation. RFQ at 37 (“By submission of an offer and execution of a contract, the Offeror/Contractor agrees that in performance of the contract in the case of a contract . . . [a]t least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern.”). Contrary to Ace-Federal’s contentions, there is nothing on the face of Heritage’s quotation that evidences that the firm will not comply with the RFQ’s subcontracting limitations provision. In fact, Heritage’s quotation explicitly agreed to accept “all terms, conditions, and provisions” included in the RFQ. AR, Tab B, Heritage’s Quotation at 3. Ace-Federal’s argument that Heritage’s quotation contains references to “independent contractors” does not provide sufficient evidence to overcome the presumption of compliance. The RFQ did not prohibit the use of subcontractors and Heritage never indicates in its quotation that it intended to use independent contractors to such an extent that it would exceed the subcontracting limitation. See *Express Med. Transporters, Inc.*, *supra* at 7.

In support of the protester’s claim that all of Heritage’s proposed court reporters are subcontractors, Ace-Federal provided LinkedIn profiles which purport to show that Heritage’s proposed reporters are currently independent contractors, and not Heritage employees.⁸ Protest at 26-27; Comments and Supp. Protest, Exhibits E-I, LinkedIn Profiles. Ace-Federal also alleges that Heritage relied heavily on independent contract reporters to perform prior contracts, including prior contracts with the USITC. Protest at 26. We are not persuaded by Ace-Federal’s use of extrinsic evidence to attempt to demonstrate that Heritage did not intend to comply with the subcontracting limitations. See *NEIE Med. Waste Serv.*, *supra* at 4 (rejecting protester’s attempt to use extrinsic evidence to support its positions that the awarded would not comply with subcontracting limitations). Even if we assume that the submitted profiles are accurate or that the awardee relied on independent contractors on other contracts, we have explained that a vendor is not prohibited from hiring additional personnel as needed to complete a project or to comply with subcontracting limitations. See *Express Med. Transporters, Inc.*, *supra* at 8. As there is no indication on the face of Heritage’s quotation that should have led the agency to conclude that Heritage had not agreed to comply with the subcontracting limitation, this protest ground is denied.

The protest is denied.

Thomas H. Armstrong
General Counsel

⁸ LinkedIn is a social networking website for people in professional occupations; it is mainly used for professional networking.