

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTESTS OF:

LOTTERY TECHNOLOGY ENTERPRISES)
) CAB Nos. P-0774, P-0778
Under Solicitation No. CFOPD-07-R-053)

For the Protester: Joanne Doddy Fort, Esq. and Walter Buzzetta, Esq., Baach, Robinson & Lewis PLLC. For the District of Columbia Government: Howard Schwartz, Esq., Senior Assistant Attorney General, and Talia S. Cohen, Esq., Assistant Attorney General. For the Intervenor: Peter F. Garvin, III, Esq. and Grant H. Willis, Esq., Jones Day.

Opinion by Chief Administrative Judge Jonathan D. Zischkau, with Administrative Judge Warren J. Nash, concurring.

OPINION

Filing ID 22306255

Lottery Technology Enterprises (“LTE”) has protested the District’s proposed award to W2I Joint Venture of a contract to provide to the DC Lottery and Charitable Games Control Board (“DCLB”) a new gaming system platform. LTE raises numerous challenges to the technical and price evaluations and selection decision made by the contracting officer of the Office of the Chief Financial Officer (“OCFO”). We conclude that some of the protest grounds raised by LTE are untimely and that the remaining grounds do not merit sustaining the protests. Accordingly, we dismiss in part and deny in part the consolidated protests.

BACKGROUND

On May 23, 2007, OCFO issued a Request for Proposals, Solicitation No. CFOPD-07-R-053. The solicitation sought a contractor to provide to the DC Lottery and Charitable Games Control Board (“DCLB”) a new gaming system platform. The type of contract contemplated under the RFP was a fixed-priced contract (based upon a fixed fee rate applied to DCLB sales) with the contractor’s fee based upon a percentage of DCLB sales. OCFO originally contemplated a multi-year contract with a base period of five years, and five one-year option periods. (Agency Report (“AR”) Ex. 2, §§ B.10.3, B.10.4). The RFP required offerors to propose a fee rate as a percentage to apply to the Net Instant Sales and Net On-line Sales. The RFP stated that the successful offeror would receive no compensation from the DCLB prior to the completion of a conversion period lasting a maximum of eighteen months. The RFP required the contractor to complete the conversion period no later than November 22, 2009, at which point the performance period of the contract would begin. At the conclusion of the conversion period, the contractor is required to begin providing to the DCLB the lottery services contemplated in the RFP. (AR Ex. 2, § B.10.2).

Prior to the RFP closing date, OCFO issued three amendments to the RFP. By

Amendment No. 1, issued July 23, 2007, OCFO extended the date proposals were due from August 24, 2007, to September 13, 2007, and also provided to potential offerors responses to 126 questions previously submitted to OCFO by interested parties on June 21, 2007. (AR Ex. 5). By Amendment No. 2, issued August 20, 2007, OCFO responded to 48 additional questions submitted by potential offerors. (AR Ex. 6). By Amendment No. 3, issued September 12, 2007, OCFO extended the RFP due date to September 20, 2007, deleted Section K.4 in its entirety, and amended Section M.4.1.2. The amendment to Section M.4.1.2 increased from three percent to five percent the “reduction in bid price or the addition of five points on a 100-point scale for a Resident-Owned Business Enterprise (ROB) certified by the SLBOC or the [District of Columbia Department of Small and Local Business Development], as applicable.” (AR Ex. 7).

By September 20, 2007, the closing date of the RFP, OCFO received proposals from two joint venture offerors, W2I and LTE. W2I is a joint venture comprised of W2Tech, LLC, a District of Columbia limited liability company, and INTRALOT DC LLC, a Delaware limited liability company. (AR Ex. 20). LTE is a joint venture comprised of New Tech Games, Inc., Opportunity Systems, Inc., and GTECH Corporation. (AR Ex. 21).

Under the terms of the RFP, the OCFO was to award the contract to the offeror whose proposal the OCFO determined was “most advantageous to the District in terms of price, technical, and other factors.” (AR Ex. 2, § M.1.1). The evaluation criteria set forth in the RFP indicated that the OCFO was to evaluate offerors’ proposals based on a technical proposal worth 1000 points and a price proposal worth 2000 points, for a total of 3000 points. The technical evaluation was further sub-divided into nine categories. (AR Ex. 2, § M.3.2). The eight categories were:

Section C.2 Central Configuration	120
Section C.3 Terminals for Retailers and Games Management	140
Section C.4 Communications Network	120
Section C.5 Software Controls and Data Management	200
Section C.6 Games and Marketing	100
Section C.7 Contractor Facilities	50
Section C.8 Staffing, Services, and Operations Security Plan	120
Section C.9 Implementation	<u>150</u>
Technical Score	1000

In addition, up to a total of 360 preference points were available for certified local, small, disadvantaged, enterprise zone, and resident business ownership businesses. (AR Ex. 2, § M.4). We note that both offerors received the maximum preference point total of 360 points for evaluation purposes.

To assist the OCFO contracting officer, Eric W. Payne, with the technical evaluation of the proposals, Mr. Payne convened a Source Selection Evaluation Board (“SSEB”). The SSEB was comprised of the DCLB’s Chief Operations Officer, the Director of Operations, the Information Technology Director, the Chief Information Officer, the Trade Manager and Director of Sales, a finance official, and an OCFO internal auditor. The contracting officer appointed Jay Young, the Chief Operating Officer, to chair the SSEB. (AR Ex. 11, ¶ 7). By

letter dated August 29, 2007, the contracting officer provided to each member of the SSEB an evaluation package providing instructions on how to properly serve as a member of the SSEB. The evaluation package consisted of the following documents: (1) cover letter; (2) CD ROM including the RFP, Amendments 1 and 2, and all attachments; (3) SSEB Instructions; (4) Conflict of Interest Certification; and (5) Scoring Form. The contracting officer required all SSEB members to sign the Conflict of Interest Certification. (AR Ex. 9). The contracting officer also provided to the SSEB members instructions advising panel members *inter alia*:

You will independently read the RFP and become familiar with the Statement of Work, and the evaluation criteria and scoring. You will then evaluate and score the proposals using the numerical rating as stated in Section M.3 "Proposal Evaluation Criteria."

To support your scoring, you should articulate in a narrative the rationale for the points assigned to each proposal. The narrative should briefly explain the strength and weaknesses of each proposal evaluated. Your proposal evaluation and scoring should be determined solely by the evaluation criteria provided.

(AR Ex. 9, at 6). The contracting officer's instructions explained the process by which members would evaluate proposals individually, after which they would then meet as a group to determine consensus scores for each proposal. They would assist with the evaluation of BAFOs and help the SSEB chair with writing the SSEB evaluation report. (AR Ex. 9). The source selection kick-off meeting was held on September 12, 2007, at which time the SSEB received the evaluation package described above. (AR Ex. 12).

By the amended closing date, September 20, 2007, OCFO received proposals from two offerors, W2I and LTE. On September 20, 2007, the contracting officer provided to the SSEB the offerors' technical proposals.

On October 26, 2007, the SSEB completed initial scoring of each offeror's technical proposal and forwarded to the contracting officer the SSEB's evaluation. (AR Ex. 10, DCLB SSEB Final Report, at 6). The SSEB found W2I's technical proposal superior after the initial evaluation. The SSEB determined that W2I's proposal merited a technical score of 886.1 and that LTE's proposal merited a technical score of 800.3. The SSEB found upon initial evaluation that W2I's proposal exceeded that of LTE in all but one category of the technical evaluation. (AR Ex. 10). SSEB scoring for each category was as follows (AR Ex 10, Table 1):

Offeror	RFP Section								Total
	C.2	C.3	C.4	C.5	C.6	C.7	C.8	C.9	
LTE	96.1	111.5	96.8	159.1	74.1	41.6	97	124.1	800.3
W2I	113.5	122.3	104.3	186.6	85.8	40.1	101	132.5	886.1

In a report of the initial scoring, the following SSEB findings were set forth:

Overall the SSEB found the proposals submitted by the Vendors to be satisfactory in just about every respect. Either vendor could perform the tasks assigned.

However, the SSEB found there to be a substantive difference in the quality of the presentations, the responsiveness, and the technology of the W2I proposal. W2I's proposal outscored LTE's proposal during the first round in every category. Generically some of the reasons for this include:

- a true open architecture throughout the layers of the W2I platform;
- an interest and demonstrated ability to incorporate third party games;
- a focused and more impressive games library and delivery system;
- a detailed orientation toward future market and revenue growth; and
- a demonstrated commitment to partner with the DCLB through included items, upgrades at no charge, and a well constructed software release process.

In the central configuration category, LTE leaned heavily on its 40 previous installations and security, while W2I had similar feature functionality plus a number of upgrades at no charge. For example there is a 48 second validation from Battelle on send to print. In terminals, the W2I configuration offers more variety, functionality, and various footprints with an excellent paper solution. The line loading capability is impressive and shows a real server based technology, while the LTE format still sounds in terminal host speak and functionality. W2I offers a highly customized approach with better instant integration (GUI interface).

The communication approaches in each proposal were initially viewed skeptically by the SSEB. The SSEB had problems with the W2I proposed digit mesh radio configuration based on the DCLB's earlier experience with radio transmission in the District. The same can be said for the LTE approach utilizing VSAT. Both have high speed, offer redundancy and are an upgrade to what we currently use. The original scores reflect the SSEB's concerns in the communication area.

Each vendor however, did offer a realistic implementation plan that made sense. Again the W2I plan was more comprehensive and covered more areas in the critical path, logical skill sets, and work assignments. The facilities, staffing, and implementation plans were all fairly close.

One big difference was manifested in the games offering. There W2I distinguished itself with real insight into the local market, a robust product offering, and reporting that was more than marginally better than the LTE proposal. It is worth noting as well that the W2I proposal contained current market research, a proactive way to expand market share, and some new approaches to attacking the marketplace. All will be critically important to reaching new customers.

(AR Ex. 10, SSEB Final Report, at 7-8; AR Ex. 12, at 3-4).

After the initial consensus scoring, the SSEB arranged to have the proposals evaluated by Battelle Memorial Institute. OCFO had engaged Battelle, a well-known lottery consulting firm

which also had a member on the panel for the prior lottery acquisition, to assist the contracting officer and the SSEB in evaluating the proposals. Battelle prepared a detailed report on each technical proposal (AR Exs. 23, 24) which, according to the SSEB,

highlighted many of the technical issues discussed by the SSEB and served to clarify several issues related to offered configurations . . . operating architectures, as well as clearly indicating what was included in each offer. The Battelle reports also served to reinforce that the SSEB had observed and properly discussed the issues.

(AR Ex. 10, SSEB Final Report, at 8).

In accordance with RFP Section L.5, after initially scoring the proposals, the SSEB arranged site visits with both offerors. During the site visits, the SSEB provided to each offeror a detailed list of questions and a technical checklist of areas the SSEB wished to observe. (AR Ex. 10). The SSEB standardized the visit to each offeror’s site as much as possible, and allotted similar amounts of time to the site visits to each offeror’s facility. As stated in the SSEB Final Report:

The SSEB members were also authorized to ask follow up questions about the original areas of concern. Further, the SSEB was given the opportunity to meet with local lottery officials where each technical center was in operation. This allowed the SSEB to get a comprehensive overview of all of the elements of the proposal, to see some of the equipment in action, and to validate statements made in the proposals. A particular focus of the conversation centered on telecom issues, conversion and implementation issues, observed problems, and potential resolutions. Some of this information was used in the preparation of the best and final offer process

Upon completing the site visits and obtaining answers to technical questions, the SSEB re-evaluated each offeror’s proposal in light of the information obtained through the site visits and developed a new consensus score for each offeror. (AR Ex. 12 at 4). Although the SSEB determined that each offeror’s technical evaluation score improved, W2I’s technical score improved by a greater amount than LTE’s technical score. Upon re-scoring, the SSEB’s technical evaluation score for W2I increased from 886.1 to 919.7, while the technical score for LTE improved slightly from 800.3 to 815.5. (AR Ex. 10, at Table 2). After the completion of the site visits, the SSEB’s technical scoring by category was as follows:

Offeror	RFP Section								
	C.2	C.3	C.4	C.5	C.6	C.7	C.8	C.9	Total
LTE	100	108.3	98.1	170	75	45	96.6	122.5	815.5
W2I	115.8	131.6	109.1	185	95	43.3	109.1	130.8	919.7

The SSEB Final Report summarizes the consensus scoring as follows:

What Table 2 shows is that the vendors were able to improve their overall scores through the site visits, additional explanations, and observations. It also demonstrates how much impact the W2I presentation had on the SSEB. They improved in just about every area, but significantly in terminals, communications, and games. For example, W2I made mention of the SSEB questions during their presentation and also wrote out answers to the questions and gave them to the SSEB. W2I's technical presentation was crisp, on point, and covered many of the system security, auditing, and backup questions that concerned SSEB members during the First Round of technical scoring. In the staffing area the local team discussed aspects of their involvement in detail, and a strong plan was laid out for field support, planning, and post implementation. LTE's local team did not participate much in the substantive presentation. That partially explains the dramatic change in staffing scores between the vendors. Another portion is related to the integrated training approach and staffing that W2I has used on other engagements. Overall, the site visits validated what had been presented in the written responses and the differences in working styles. LTE relied heavily on the safety and security of their system, while W2I showcased how their fully integrated, secure system serves to [deliver] new content to players and offers the best chance for market expansion.

After the SSEB re-scored each offeror's proposal upon completion of the site visits, the SSEB recommended that the contracting officer request Best and Final Offers ("BAFOs") from LTE and W2I. (AR Ex. 10, at 10). On or about December 11, 2007, the OCFO contracting officer requested BAFOs. The contracting officer sent identical letters to both offerors, requesting that they provide to the DCLB "a Best and Final Offer for all portions of your official response including any relevant technical, administrative, or price elements by the close of business on Tuesday, December 18, 2007." (AR Ex. 13). In the BAFO request the contracting officer requested offerors to address the following:

- a. Please make the DCLB aware of any risks likely to result from a schedule acceleration in your development plan and the steps your firm would take to initiate these tasks.
- b. Please detail the methodology you have used in the past to ensure data integrity in migrating information from the existing system configuration to a new system configuration.
- c. Assuming the worst case scenario with your proposal, which risk elements are likely to cause the longest delays, what would be the likely time impact, and what adjustments could you make to get the project back on schedule?
- d. How much would you reduce your proposed price if the number of years in the initial term were extended?
- e. How much would you reduce your proposed price if the option years were accelerated after the current initial term?
- f. How much could you reduce your proposed price once gross DCLB revenues exceed \$320M?
- g. Please propose a vendor incentive bonus formula that you would receive for helping DCLB exceed \$85M in transfers during any given fiscal year.

h. Please detail other ways in which the DCLB may tie your compensation to performance over the life of this agreement.

Upon receipt of both offerors' BAFOs on December 18, 2007, the SSEB evaluated the BAFOs and determined that the information provided by each offeror did not warrant a change in the SSEB's technical score for each offeror. (AR Ex. 10, § D). However, the SSEB did note that W2I's response further validated its technical approach and that W2I provided in its BAFO "strong replies to the implementation question, implementation of the telecommunication solution, and staffing." (*Id.*).

The BAFOs also provided revised pricing. The contracting officer evaluated the pricing offered by LTE and W2I. In response to the BAFO request, W2I reduced its price proposal, submitting to OCFO a graduated price proposal. W2I's fee rate improved in response to the BAFO request. In its original proposal, W2I had submitted a fee rate of 2.6282 percent. In response to the BAFO, W2I submitted a tiered fee rate based upon DCLB sales. For DCLB sales below \$300,000,000, W2I proposed a fee rate of 2.2990 percent. For DCLB sales between \$300,000,000 and \$330,000,000, W2I proposed a fee rate of 2.5000 percent. For DCLB sales in excess of \$330,000,000, W2I proposed a fee rate of 2.6000 percent. (AR Ex. 14). In response to the BAFO request, LTE revised its pricing proposal, lowering its fee for gross revenue in excess of \$308,000,000. Below the \$308,000,000 threshold, LTE retained its initially proposed rate of 3.1995 percent of DCLB sales. (AR Ex. 15). Because LTE failed to reduce its fee rate for sales below \$308,000,000, the contracting officer identified a significant pricing difference between W2I's fee rate and LTE's fee rate. As a result, W2I's BAFO offered a significant savings to the District based upon current and projected DCLB sales. (AR Ex. 10, Table 4). Although W2I's initial proposal pricing was lower than LTE's initial pricing, the contracting officer found that W2I's BAFO represented a significant fee reduction from its original price proposal, making W2I's pricing far more attractive than LTE's.

On January 4, 2008, the SSEB forwarded to the contracting officer its SSEB evaluation report, indicating that the proposal submitted by W2I was technically superior and offered a lower price than that offered by LTE. The SSEB recommended that the contracting officer make award to W2I. In recommending that OCFO award the contract to W2I for the District lottery system, the SSEB stated that "W2I's proposal offers the DCLB the best technical competency and the best price." The SSEB based this recommendation on the proposals, the onsite visits, and the analysis done by the SSEB members. (AR Ex. 10, at 13). The SSEB evaluated the proposed cost savings to the DCLB by comparing W2I's price proposal with LTE's price proposal, as well as comparing W2I's price proposals with the current fee rate charged by LTE under the existing DCLB Lottery contract. The SSEB projected the DCLB sales revenue for the next 10 years and then applied each offeror's fee rate to the projected future revenue. The results, included in the SSEB report forwarded to the contracting officer, show that W2I's fee rate, when compared with LTE's proposed fee rate, would save the DCLB approximately \$20,000,000 over 10 years. Additionally, W2I's proposed fee rate would save the DCLB approximately \$40,000,000 over the next 10 years when compared with the fee rate in the current District lottery system contract. (AR Ex. 10 at Table 4).

After making his own independent assessment of the proposals and considering the SSEB’s report, the contracting officer determined that W2I’s proposal offered the most advantageous method for the District to fulfill the RFP’s requirements. The contracting officer determined, by a “Contracting Officer’s Independent Assessment,” dated January 24, 2008, that W2I’s proposal “provide[d] the best overall value to the District of Columbia.” (AR Ex. 12, at 6). In justifying W2I’s proposal as the best overall value, the contracting officer noted that W2I received the highest technical score and offered the lowest price to the District. In a table contained in the Contracting Officer’s Independent Assessment, the contracting officer supported his decision with reference to the following scores: (AR Ex. 12, at 7 and AR Ex. 11 ¶ 18).

	<u>W2I</u>	<u>LTE</u>
Technical	919.7	815.5
Price	2,000	1,437
Preference	360	360
Total	3,279.7	2,612.5

Section M.3 of the RFP provided that evaluation of the proposals would be done on a 3,000 point scale. The evaluation criteria consisted of a possible 2,000 points for price, 1,000 points for technical evaluation, and up to 360 preference points for offerors certified by the District of Columbia Department of Small and Local Business Development (“DSLBD”). The contracting officer determined that the technical evaluation scores assigned by the SSEB were appropriate for each offeror. Section M.3.2 does not set forth any formula for evaluating price. To evaluate prices, the contracting officer took the fee rate proposed by each offeror and multiplied it by \$265,000,000, a figure representing the most recent data for DCLB gross revenue for fiscal year 2007. (AR Ex. 11 ¶ 16). W2I, with its lower evaluated price, was awarded the maximum 2,000 points, whereas LTE received 1,437 points, computed by applying the formula:

$$\frac{\text{Lowest Offeror's Price Proposal}}{\text{Evaluated Offeror's Price Proposal}} \times 2,000 \text{ points} = \text{Evaluated Proposal's Price Score}$$

Finally, in determining the total points for evaluation purposes, the contracting officer evaluated each proposal for LSDBE preference points. For evaluation purposes, Section M.3.3 of the RFP limited preference points to a maximum of 360 points. In accordance with the RFP, Section M.5.4 Preferences for Certified Joint Ventures, the contracting officer awarded to W2I 12 preference points based upon a LSDBE Summary Review Report issued by the DSLBD. According to the LSDBE Summary Review Report, the joint venture, W2I, was eligible for 14 preference points. However, the RFP allowed only a maximum of 12 preference points based upon a 100-point scale. Because the RFP contemplated a 3000-points scale, the maximum available preference points equaled 360. (AR Ex. 2, §§ M.3, M.4).

The contracting officer completed both a Determination and Findings (“D&F”) for Contractor Responsibility and a D&F for Price Reasonableness. By a D&F for Contractor Responsibility, dated January 24, 2008, the contracting officer found W2I responsible. Specifically, the contracting officer found that W2I: (a) possessed the financial resources adequate to perform the contract, (b) demonstrated the ability to perform the proposed schedules,

(c) provided proof of the necessary organization, experience, operational controls, and resources, (d) complied with applicable District licensing and tax laws and regulations, and (e) was not debarred by either the District or the Federal Government. (AR Exs. 16-17, 30). By a D&F for Price Reasonableness, the contracting officer found W2I's proposed fee rate to be fair and reasonable based upon market research performed by the DCLB. In particular, the contracting officer found that W2I's proposed solution will save the District approximately \$5,000,000 per year compared with the currently operating District lottery contract set to expire in November 2009. (AR Exs. 17, 30). On April 4, 2008, LTE filed its protest. W2I intervened on May 16, 2008. The District filed its Agency Report to the initial protest on May 19, 2008. LTE filed an amended protest on May 30, 2008. On June 9, 2008, LTE and W2I filed comments on the Agency Report. The parties filed additional briefing and exhibits through September 15, 2008.

DISCUSSION

We exercise jurisdiction over these consolidated protests pursuant to D.C. Code § 2-309.03(a)(1).

Timeliness

LTE raised the following grounds in its original protest of April 4, 2008: (1) W2I was not a "responsive, responsible" offeror; (2) LTE was denied a fair and impartial review of its proposal, as W2I received more favorable treatment, and LTE's proposal was not judged with neutrality and impartiality; and (3) the change in contract duration as awarded denied LTE an equal chance to submit a proposal.

The amended protest of May 30, 2008, restated and expanded upon the original grounds and raised as an additional ground that the District had "disregarded DC law and regulations and the terms of the solicitation itself in its efforts to award the proposed contract to W2I." (Amended Protest, at 20). LTE argues that the "procurement process in general, and the evaluation criteria and selection process in particular, were not consistent with the procurement regulations that govern the procurement activities of OCFO and the RFP" As examples, LTE cites (1) "failing to prepare specific evaluation criteria for allocating the 2,000 pricing points prior to receiving the proposals and prior to reviewing the proposals;" (2) using "the standard cost/price formula used by the Office of Contracts" which does not appear in OCFO regulations and which OCFO declined to confirm it would be using when asked during the question and answer phase prior to the closing date for proposal submission; (3) providing the SSEB with the W2I BAFO containing its pricing information contrary to the solicitation and stated OCFO procedures; (4) permitting W2I to change majority ownership after the proposal was submitted and the selection of the proposed contractor was made; and (5) providing LSDBE preference points to W2I even though the owner certified as a "resident owned business" and "disadvantaged business enterprise" had resigned.

LTE's June 9, 2008 Comments to the District's Agency Report raised many new protest grounds but we conclude that these new protest grounds are untimely because they were filed more than 10 business days after LTE knew or should have known the basis of the protest. D.C. Code § 2-309.08(b)(2). In *Abadie, et al. v. D.C. Contract Appeals Board, et al.*, 916 A.2d 913,

919-20 (D.C. 2007), the court quoted approvingly of the following discussion from our decision in *Rodgers Bros. Custodial Servs.*, CAB No. P-0565, Feb. 17, 1999, 46 D.C. Reg. 8564, 8566, on the requirement that the statutory 10-day timeliness rule applies to each independent protest ground:

Generally, the timeliness of . . . additional bases of protest raised after the filing of a timely initial protest depends upon the relationship that the later-raised bases bear to the initial protest. Where the later bases present new and independent grounds for protest, they must independently satisfy our timeliness requirements. Conversely, where the later contentions merely provide additional support for an earlier timely raised objection, we consider these additional arguments.

The District filed its Agency Report on May 19, 2008, at 9:11 p.m. Thus, the statutory 10-day period began on May 20, 2008, and the 10-day period concluded prior to LTE's filing of additional protest grounds in its comments filed on June 9, 2008, and July 25, 2008. LTE states that the 10-day period should begin on May 27, 2008, which is the date that the District had its Agency Report exhibits changed from a "sealed" filing status to a "public" status by the Board's electronic file and serve vendor. We reject this argument as LTE's counsel had full access to the Agency Report and exhibits as of May 20, 2008. LTE had sufficient documentation to formulate the additional protest grounds as of May 20, 2008, and, moreover, the Board and the parties had agreed that nearly all of the exhibits originally filed under seal were deemed publicly releasable as of May 22, 2008.

Accordingly, the new grounds raised for the first time in LTE's filings of June 9, 2008, and July 25, 2008, are untimely, as follows: (1) OCFO violated its regulations by failing to have a source selection plan, (2) OCFO failed to prepare quantitative standards for use in the evaluation of the proposals, (3) the SSEB improperly evaluated the proposals under the evaluation criteria, (4) the evaluation and selection violated the Buy American Act clause, (5) the contracting officer was unreasonable in selecting the SSEB members, (6) the contracting officer improperly involved the SSEB before their kick-off meeting, (7) the contracting officer failed to investigate W2I's claims regarding liquidated damages assessments, and (8) the SSEB unfairly and unreasonably scored the proposals regarding the communications network factor, the terminals factor, the implementation plans factor, the staffing services, and operations security factor, the games and marketing factor, and the facilities factor. We have considered whether any of these grounds could be considered as being fairly raised within the grounds stated in the initial protest or the amended protest, but conclude that none of them are mere elaborations of earlier, timely raised grounds. Specifically, we cannot conclude that the very detailed allegations in LTE's June 9 and July 25 comments can be related back for timeliness purposes to the general statement in the amended protest that the District had "disregarded DC law and regulations and the terms of the solicitation itself in its efforts to award the proposed contract to W2I" and that "the procurement process in general, and the evaluation criteria and selection process in particular, were not consistent with the procurement regulations that govern the procurement activities of OCFO and the RFP"

Responsibility of W2I

LTE argues that W2I did not satisfy a definitive responsibility criteria set forth in RFP Section C.10.3(a) which provides:

It is required as a minimum that the Offeror has one or more current North American clients to whom it has supplied a Lottery Gaming System comparable to the functional specifications of this RFP. The Offeror shall describe, in detail, the current and historical experience of the Offeror with lottery gaming systems; that is, descriptions and references for all gaming industry engagements of comparable complexity and sensitivity that have been conducted by the Offeror over the past five (5) years.

Noting that W2Tech formed its joint venture by partnering with INTRALOT which is described as a company with “forty subsidiaries plus seven business offices on five continents,” LTE contends that nowhere does the OCFO state that INTRALOT meets the minimum requirement of having “one or more current North American clients to whom it has supplied a Lottery Gaming System comparable to the functional specifications of this RFP” because, according to LTE, INTRALOT does not supply to the small number of lotteries it operates in North America Keno or rapid draw games. (Amended Protest, at 13). The District responds that the contracting officer had more than an adequate basis from which to reasonably conclude that W2I satisfied the RFP’s definitive responsibility criteria by finding that W2I had supplied to one or more North American clients lottery gaming systems that are “comparable to the functional specifications” of the RFP. W2I cites to its technical proposal and the wide variety of games it offered and the scoring of the contracting officer and the SSEB for the games and marketing criterion. W2I argues that the INTRALOT-operated lotteries in Nebraska, Montana, Idaho, and New Mexico have functional specifications comparable to those in the RFP here and that INTRALOT conducted during the District’s site visit a live rapid draw demonstration. We agree with W2I and the District that the record provides an adequate basis for sustaining the contracting officer determination that W2I met this definitive responsibility criterion.

LTE further contends that the District failed to disclose in its Agency Report and the OCFO failed to initially inform the Council that the ownership and key personnel of W2Tech and W2I changed after the selection of W2I. LTE states that Warren Williams, Jr., bought the majority ownership interest in W2Tech and in W2I for \$5 after the proposals were submitted and evaluated and after the proposed contract was first sent to the Council for review. According to LTE, both Warren Williams, Sr., and Warren Williams, Jr., have now elected to take no role in the operation of the enterprise. Additionally, LTE argues that the District failed to conduct a determination of contractor financial responsibility after the majority ownership of W2I and W2Tech changed. We conclude that the record does not show any prejudice to LTE from the change in the majority ownership interest. The change in ownership did not have any effect on the evaluation and selection of W2I. In addition, there is adequate evidence supporting the financial responsibility of W2I, notwithstanding the change in the majority owner. For the same reason, there is no ground for invalidating the award of LSDBE preferences to W2I due to the ownership change because preferences are determined for evaluation purposes as of the closing

date for proposals. See *C&D Tree Service, Inc.*, CAB No. P-0440, Mar. 11, 1996, 44 D.C. Reg. 6426, 6435.

Alleged Unfair Manipulation of the Procurement

A. Discussions after BAFO Submission

In its protest, LTE contends that the contracting officer may have inappropriately contacted W2I, requesting W2I to submit a BAFO with terms different from those originally contemplated by the RFP, and argues that “[i]f W2I Venture did not provide a specific price for the six (6) year term and the price was reached by discussions between OCFO and W2I Venture, then OCFO was obligated to reopen the competition and conduct negotiations with both parties.” (Protest, at 28). The District responds that the contracting officer did not hold any discussions with W2I regarding a six year term. Rather, W2I proposed in its BAFO a six year term in response to the BAFO request issued by the OCFO, which was the same BAFO request provided to LTE. We agree with the District that the record does not disclose any improper discussions with W2I.

B. Amendment No. 3’s Extension of the Closing Date

LTE speculates that the contracting officer extended the closing date for proposals from September 13, 2007, to September 20, 2007, in order to allow W2I to qualify for preference points that would not have been available but for the extension because W2Tech was certified by the SLBOC as a LBE, DBE, ROB, and DZE as of September 12, 2007, and W2I was certified in the same categories on September 17, 2007. In the Agency Report, the District states that the contracting officer issued Amendment No. 3 because of an email sent to the OCFO from the DSLBD Office, notifying the OCFO that Section M.4 of the RFP did not represent to potential offerors the correct apportionment of preference points. (AR Ex. 22; AR Ex. 11 ¶ 6). The contracting officer issued Amendment No. 3 in order to revise Section M.4, correcting the error in the RFP identified by the DSLBD and extending the due date of proposals for one week to September 20, 2007. (AR Ex. 11 ¶ 6). We find no support in the record for concluding that the contracting officer extended the closing date with any improper motive to favor W2I.

C. Proposed Contract Submission to the Council

LTE urges that the OCFO showed bias toward W2I by allegedly misrepresenting facts to the City Council. For instance, LTE states that the OCFO Council Contract Summary package submitted to the Council suggests erroneously that LTE’s existing contracts were to expire in June 2008, and that the existing system was “outdated and obsolete.” (Amended Protest, at 16). The District responds that the OCFO’s standard practice is to submit to the Council by emergency legislation all contracts requiring “active Council approval.” Also, LTE alleges that the Mayor’s action to withdraw the initial contract submission from the Council and immediately resubmit it to gain another 45-day review period was a “transparent attempt at an end run around the 45-day requirement” and reflects a pattern of disregard for the integrity of the procurement process. Without deciding our scope of review of the executive-legislative process by which the Mayor submits proposed contracts to the Council for approval, we conclude that LTE has not

demonstrated that it was prejudiced by the actions of the Mayor and the OCFO in connection with the second 45-day review period before the Council. Moreover, LTE has not demonstrated that the actions of the OCFO before the Council constitute evidence of bias by the contracting officer in the evaluation and selection of W2I.

Technical Evaluation

LTE raises numerous challenges to the technical evaluation of the proposals. Most of the protest grounds are untimely for the reasons discussed above but even if we were to reach the merits, we see no basis for concluding that the technical evaluation of the contracting officer or SSEB violated the law or the terms of the solicitation.

A. Source Selection Plan and Quantitative Standards for Technical Evaluation

LTE argues that the OCFO violated its own regulations in failing to prepare a source selection plan prior to the solicitation and evaluation of proposals and in failing to provide quantitative standards in the form of subfactors for the evaluation criteria. We conclude that LTE has not shown any prejudice to support sustaining the protest on these grounds. The record shows that the evaluators were advised of the guidelines for conducting their evaluation of the proposals, studied the solicitation, and understood the statement of work, the evaluation criteria, and the procedures they were to follow in carrying out their responsibilities. With regard to the scoring of the proposals for each evaluation criterion, there is no evidence that the evaluators improperly, unreasonably, or arbitrarily scored the proposals and thus the lack of quantitative subfactors in this procurement did not prevent the SSEB members from performing a proper technical evaluation.

B. Alleged SSEB Bias, Conflict of Interest, and Inexperience

LTE contends that the contracting officer unreasonably selected the members of the SSEB. LTE states that the contracting officer should have selected a representative from a consultant such as Battelle or someone drawn from the national state lottery community who had a “broader understanding about lottery operations and lottery equipment.” Also, LTE faults OCFO for not having a representative on the panel from the Office of the Chief Technology Officer experienced in the selection of large computer and communications systems.

The District responds that the members of the SSEB had sufficient expertise to evaluate the proposals. The SSEB was comprised of the DCLB’s Chief Operations Officer, the Director of Operations, the Information Technology Director, the Chief Information Officer, the Trade Manager and Director of Sales, a finance official, and an OCFO internal auditor. We see no procurement violation in the contracting officer’s choice of the SSEB. Regarding having expertise from a consultant such as Battelle, the fact is that the contracting officer and SSEB consulted with Battelle and Battelle prepared reports for them analyzing LTE’s and W2I’s proposals against the RFP’s statement of work.

LTE contends that DCLB’s Information Technology Director and Trade Manager rated LTE performance under the existing LTE contract “poor”, and as members of the SSEB, they

were biased against LTE. We agree with the District that the record does not show bias by these members or any other members of the SSEB. Mere knowledge of an offeror's performance on another contract does not imply bias against that offeror. *Omega World Travel, Inc.*, B-271262.2, July 25, 1996, 96-2 CPD ¶ 44. The contracting officer instructed the SSEB not to consider LTE's past performance under the existing lottery contract.

From a review of the record, we see no basis for LTE's contention that the members of the SSEB lacked neutrality and objectivity in their roles as evaluators notwithstanding that certain members of the SSEB participated in the preparation of the RFP, the responses to offerors, and in other activities surrounding the development and issuance of the RFP. Besides being untimely, the protest ground is without merit. LTE has cited no legal authority for the argument that a government employee who works on the preparation of the RFP may not serve on a technical evaluation panel for the same procurement.

C. Neutrality and Impartiality of the Contracting Officer

LTE argues in its amended protest that the OCFO's Director of Contracts was not impartial because he had dual roles, serving as the contracting officer for both LTE's existing contract and the procurement that is the subject of these protests. As contracting officer for the existing LTE contract, he reviewed LTE's performance. LTE further notes that during the time that the evaluation and selection processes were underway, the Director of Contracts, in his role as contracting officer for the ongoing lottery procurement at issue here, was taking the lead in an effort to negotiate the amount of payment due to the OCFO as a result of a 2006 breach of the wireless communications system operated by LTE's venture partner, GTECH. The breach allowed access to DCLB's on-line gaming system and resulted in the unauthorized production of a limited number of lottery tickets. The OCFO did not quantify its losses after the breach was resolved in July 2006. GTECH submitted an unsolicited offer to the OCFO on May 10, 2007, two weeks before the issuance of the RFP, to compensate the DCLB for the \$86,166 in lost lottery transactions and the full cost of the investigation by Battelle to analyze the causes and the fixes that GTECH and LTE implemented as soon as the cause of the breach became known. After receiving no response from the OCFO for five months, LTE received a letter from the contracting officer on October 24, 2007. The response made no comment on GTECH's offer of settlement; rather it asserted that LTE's system was "outdated and obsolete" and suggested that OCFO could terminate the existing contract for convenience and expedite the award of the new contract.

On December 6, 2007, in the midst of the evaluation and selection process for the RFP and shortly before the OCFO requested BAFOs from LTE and W2I, the OCFO asked LTE and GTECH to respond to a District settlement proposal that sought to more than triple the stated amount of damages to be paid for the 2006 communications breach and added additional damages that were not yet quantified. GTECH and LTE had previously expressed their reservations about negotiating with the OCFO and DCLB representatives, some of whom were on the evaluation team. DCLB's counsel, by letter dated December 12, 2007, requested LTE and GTECH to respond to the OCFO's settlement demands by attending an in-person meeting on December 14, 2007, just four days before LTE's BAFO was due. GTECH and LTE declined to attend the meeting. In its amended protest, LTE claims that the contracting officer penalized

LTE in the ongoing procurement for not succumbing to improper pressure to settle the breach claim under the existing contract.

We agree with W2I that this ground of protest is untimely as LTE knew the ground for this protest long before filing its amended protest on May 30, 2008. The OCFO contracting officer and counsel should have delayed the settlement effort on the existing LTE contract until after the evaluation and selection had been completed on the new procurement to avoid the appearance of leveraging a settlement favorable to the OCFO. Nevertheless, even if we were to reach the merits, we could not conclude that the contracting officer's actions, when viewed in the totality of the procurement, prejudiced his evaluation of the proposals or rendered his or the SSEB's evaluation unreasonable.

D. Technical Evaluation under the RFP's Evaluation Criteria

LTE alleges that the contracting officer and the SSEB unfairly and unreasonably evaluated the technical proposals when they scored W2I's proposal more favorably than LTE's proposal. LTE focuses its challenge on individual scoring and evaluation by specific members of the SSEB, attempting to show improper evaluation by individual members. To a limited extent, LTE also challenges some of the bases for the consensus evaluation of the SSEB and the contracting officer. We agree with W2I and the District that these grounds were untimely raised. On the merits, the evidence of the individual SSEB members' scoring, considered in the context of the SSEB consensus evaluation, does not demonstrate prejudicial errors meriting sustaining the protests on the ground of an improper technical evaluation. Our principal focus is to determine whether the contracting officer's independent evaluation and the consensus evaluation of the technical panel accurately reflect the merits of each proposal, not whether the final rating can be mathematically traceable to the individual scores of the individual panel members. *Appalachian Council, Inc.*, B-256179, May 20, 1994, 94-1 CPD ¶ 319; *Nat'l Beef Packing Co.*, B-296534, Sept. 1, 2005, 2005 CPD ¶ 168.

In reviewing an evaluation under an RFP, we consider whether the overall evaluation was reasonable and in accordance with the evaluation and selection criteria set forth in the solicitation. It is clear from the overall scores established by the SSEB that there is no basis for concluding that the evaluations of either LTE or W2I rendered the overall technical scores unreasonable or arbitrary. The SSEB Final Report documents that the proposals submitted by both LTE and W2I were satisfactory and that either vendor could perform the tasks assigned. The SSEB concluded that the overall higher score of W2I was due to the superior quality of the W2I proposal, technology, and presentation.

LTE argues that the evaluation of the communications network criterion was flawed because W2I received a better evaluation than LTE even though LTE's VSAT implementation was demonstrated and in use whereas W2I's mesh radio system was not used in any current lottery system. The SSEB assigned W2I an average of 109.1 points for its communications network and LTE's proposal an average of 98.1 points. LTE cites the notes of some of the evaluators which questioned W2I's technology and its less robust backup. On the other hand, the evaluators specifically cited "high confidence" in W2I's proposed mesh radio system, noted that W2I offered the "newer and potentially better solution" and further recognized that in the

event this solution encountered problems, W2I was prepared to use VSAT or frame relay as backup systems. (AR Ex. 19). Recalling that our role is not to re-evaluate the proposals, we discern no basis for finding the evaluation to be improper or unreasonable.

The SSEB assigned W2I an average of 131.6 points and LTE an average of 108.3 points for the terminals criterion. LTE alleges that an evaluator improperly focused on the malfunction of an LTE terminal during the District's site visit and that not enough consideration was given to W2I's use of the wrong monitor size for its terminals. Reviewing the evaluation by the contracting officer and the consensus evaluation of the SSEB identifying a number of advantages for W2I's product, we see no basis for concluding that the evaluation was unreasonable or arbitrary.

Regarding the implementation plan criterion, LTE alleges that despite some of the evaluators' stated concerns about the risks of W2I's implementation plan, the SSEB assigned W2I an average of 130.8 points and only 122.5 points for LTE. The consensus evaluation report notes that W2I's plan covered more areas in the critical path, logical skill sets, and work assignments required to do the job. Viewing the record as a whole, we see no basis for concluding that the evaluation was unreasonable or arbitrary.

The SSEB assigned W2I an average of 109.1 points and LTE an average of 96.6 points for the staffing, services, and operations security plan criterion. LTE claims that it was improper for the SSEB to place such emphasis on W2I's one performance at the site visit while essentially ignoring the significant experience of LTE's local staff involved in the existing lottery contract. Again, we are not called upon to make a de novo evaluation. The individual evaluations coupled with the consensus evaluation of the SSEB do not demonstrate a prejudicial evaluation for this criterion.

LTE alleges that the SSEB's assessment favoring W2I over LTE in the games and marketing criterion was unreasonable. We do not agree. The SSEB assigned W2I an average of 95 points and LTE an average of 75 points for this factor. The consensus evaluation and the individual evaluations adequately support the scoring based on W2I's game offerings and marketing plan.

Regarding the facilities criterion, LTE alleges improper and disparate treatment of the proposals favoring W2I. We find the consensus evaluation adequately supports the SSEB assigning W2I an average of 43.3 points and assigning LTE an average of 45 points.

We have considered all of the technical evaluation challenges raised by LTE and conclude, based on our review of the record, that it has not demonstrated that the evaluations by the contracting officer and the SSEB of the technical proposals were unreasonable or arbitrary. The technical evaluation was adequately documented and we can discern no prejudice to LTE in the proposal evaluations.

Price Evaluation

LTE does not challenge the RFP for lacking a formula to evaluate price and allocate the

maximum 2,000 points assigned for the price factor. Rather,

LTE is challenging the District's failure to establish, prior to receipt of offers, a formula for evaluating price that it would use internally to score the pricing proposals and which met the OCFO's procurement regulations. Based on information LTE first learned from the District's Agency Report, LTE challenged the OCFO's evaluation process because (1) the "standard" pricing evaluation formula the District claims to have used is not set forth in OCFO procurement regulations, and (2) the CO did not decide how the 2,000 points would be allocated before he reviewed the initial proposals or before he reviewed the Best and Final Offers ("BAFOs") that called for different pricing strategies.

(LTE July 29, 2008 Comments on the Agency Report, at 7). One interested party asked during the proposal phase about the price scoring, as recorded in Amendment No. 2, Question 47: "We would also appreciate if you could elaborate how the 'Price Section' will be scored. In the absence of a specific formula, it is unclear to us how many points will be received by the Offeror submitting the most competitive (i.e. lower) price compared to the points received by the second in terms of pricing (i.e. higher price) offeror." Apparently, the contracting officer never responded to that question. The District states that the contracting officer reasonably evaluated the offerors' prices "based on the standard pricing formula used by almost all District agencies in a typical RFP." Using the standard formula, the District evaluated the price by comparing W2I's price proposal with LTE's price proposal. The contracting officer took the proposed fee rates and multiplied the fee rates by \$265,000,000, the most recent data for DCLB gross revenue for fiscal year 2007. Using the standard price formula, the contracting officer then calculated the point scores as follows: W2I received the maximum 2,000 points and LTE received 1,437 points. (District's July 18, 2008 Response to Amended Protest, at 4). In addition, the District argues that the contracting officer would be compelled to conclude that W2I provided the best value to the District – even if the contracting officer had judged LTE's technical proposal to be marginally better than W2I's – because W2I's significantly lower price far outweighed the technical evaluation results.

We conclude that the contracting officer's failure to identify internally within OCFO the specific formula to be used in the price evaluation, prior to receipt of the BAFOs, does not merit sustaining the protest. LTE cannot establish that it was prejudiced in preparing its price proposal by the lack of an RFP price evaluation formula nor has LTE shown prejudice in the post-BAFO price evaluation. The contracting officer's selection of W2I as the best value does not have to be tied to a mathematical price formula and looking at the record as a whole, we are not persuaded that the underlying price evaluation was arbitrary or unreasonable. LTE's price would not become more attractive than W2I's until gross revenue exceeded \$420 million. It was not unreasonable for the contracting officer to determine that W2I's pricing would provide significantly better value to the District at gross revenue figures in a range supported by recent revenue data.

We have considered each of the protest ground raised by LTE regarding the price evaluation but conclude that the contracting officer's evaluation was reasonable.

CONCLUSION

We have carefully considered each of the challenges raised by LTE with respect to the evaluation and selection of W2I and conclude that the protests grounds are either untimely or do not merit sustaining the protests. Accordingly, we dismiss in part and deny in part the consolidated protests.

SO ORDERED.

DATED: November 3, 2008

/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge

CONCURRING:

/s/ Warren J. Nash
WARREN J. NASH
Administrative Judge