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Decision

Matter of: LightBox Parent, LP

File: B-420032.2; B-420032.3; B-420032.4; B-420032.5

Date: February 24, 2022

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Michael Willems, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that agency failed to consider that data rights offered by the awardee were inconsistent with data rights information contained in the protester's proposal, as well as other information in the awardee's proposal, is denied because the record did not reflect any inconsistencies.
2. Protest alleging that awardee cannot license certain data to the agency because the data is licensed from a third party, and the third party does not itself have the necessary rights to allow the awardee to license the data to the agency is dismissed. These arguments pertain to a dispute between private parties in which the government is not involved. In addition, the ancillary question of whether, as a result of these agreements, the awardee will ultimately be able to furnish the agency with appropriate data rights is a question of contract administration not for our forum.
3. Protest alleging that awardee materially misrepresented terms of license agreements it held with a third party is denied, in part, where the record does not establish that statements in the awardee's proposal were false, and dismissed, in part, to the extent resolving the alleged misrepresentation would require our Office to resolve facially legitimate disputes about differing interpretations of agreements between private parties that our Office does not review.

DECISION

LightBox Parent, L.P., of Irvine, California, protests the award of a contract to CostQuest Associates, Inc., of Cincinnati, Ohio, under request for proposals (RFP) No. 273FCC21R0005, issued by the Federal Communications Commission (FCC) for the creation and delivery of a broadband internet availability dataset. The protester alleges the agency erred in its evaluation in several respects, that CostQuest's proposal contained material misrepresentations, and that CostQuest will not be able to meet material solicitation requirements due to the terms of various data licensing agreements.

We deny the protest in part, and dismiss it in part.

BACKGROUND

On June 1, 2021, the FCC issued the RFP seeking the creation and delivery of a dataset concerning broadband internet availability, called the "Broadband Serviceable Location Fabric" (BSL Fabric).¹ Contracting Officer's Statement (COS) at 4. The RFP contemplated a single award based on a best-value tradeoff between four evaluation factors: (1) technical approach; (2) data usage rights; (3) past performance; and (4) price. Agency Report (AR), Tab 6d, Instructions to Offerors at 1, 9-10. The RFP also provided that non-price factors when combined were significantly more important than price. *Id.* Further, the RFP provided that offerors should include only one technical and past performance proposal volume, but that each offeror could propose up to three alternative data rights proposal volumes with accompanying alternative price volumes that would each be evaluated separately. *Id.* at 10.

Relevant to this protest, the agency identified three tiers of increasing data rights that offerors could propose. See AR, Tab 5d, Statement of Objectives at 9-13. Specifically, tier one rights reflected the minimum rights that offerors needed to provide to be technically acceptable, and included rights to prepare derivative works for certain identified uses, as well as the rights to publish specific portions of the data and derivative works created from the data. *Id.* at 10-12. Tier two rights were preferred to tier one rights and included all tier one rights as well as additional rights, including, most significantly, the right to publish all of the data on the FCC's website subject to an end-user license agreement. *Id.* at 12. Finally, tier three rights were the least restrictive and most preferred set of rights, and would, among other things, permit the FCC to use the data commercially or permit others to do so. *Id.* at 13. Of note, the solicitation was clear that the agency was seeking these rights in data to be furnished as part of the BSL

¹ The Broadband Deployment Accuracy and Technological Availability Act, codified in relevant part at 47 U.S.C. §§ 641-642, required the FCC to issue rules that would provide for the creation of the BSL Fabric, describing it as "a common dataset of all locations in the United States where fixed broadband internet access service can be installed, as determined by the Commission." See 47 U.S.C. § 642(b)(1)(A)(i); 47 U.S.C. § 641(6).

Fabric, but not necessarily in underlying data used by offerors to generate the BSL Fabric. *Id.* at 10.

The solicitation required offerors, as part of their proposed technical approach, to describe their proposed sources for the various data fields in the BSL Fabric. AR, Tab 6d, Instructions to Offerors at 6. Moreover, the RFP required that, to the extent an offeror proposed any data subject to existing third-party license agreements, the offeror must either provide a copy of the licensing agreement or a sufficiently detailed summary of their license rights. *Id.* at 7. The RFP noted that the agency would evaluate those license agreements or summaries to assess what level of data usage rights the offeror would be able to furnish to the agency. *Id.*

The agency received a total of twelve proposals and alternate proposals from seven offerors, including two proposals from the protester and two from CostQuest.² COS at 11. Relevant to this protest, CostQuest’s proposal identified many different sources of data that it intended to use in preparing the BSL Fabric. AR, Tab 36, CostQuest Data Usage Volume at 8-9. Two of the data sources that CostQuest proposed to use--tax assessor data and parcel boundary data--were sublicensed from [DELETED], which is not a party to this protest. *Id.* [DELETED], in turn, licensed the parcel boundary data from Digital Map Products, L.P., which is a wholly owned subsidiary of LightBox. 1st Supp. Protest at 6-7. CostQuest proposed to use the tax assessor data as a primary source for address data and for internal processing, and proposed to use the parcel boundary data for internal processing only. AR, Tab 36, CostQuest Data Usage Volume at 8.

The agency evaluated the proposals as follows:

	CostQuest	LightBox 1	LightBox 2
Technical Approach	Good	Good	Good
Data Usage Rights	Fair	Fair	Fair
Past Performance	Substantial Confidence	Satisfactory Confidence	Satisfactory Confidence
Price	\$44,921,200	\$38,700,000	\$56,200,000

COS at 11-12

On the basis of this evaluation, the agency conducted a tradeoff and concluded that CostQuest’s proposal represented the best value to the government because CostQuest’s proposal had substantive technical advantages over LightBox’s proposals that were not captured by the adjectival ratings, and also had superior past performance. AR, Tab 9, Source Selection Decision Document (SSDD) at 34. For example, while both offerors’ proposals were rated as “Fair” for data usage rights indicating that they proposed data rights that included more than tier one rights but less

² Because only one of CostQuest’s proposals was selected for award, CostQuest’s other unsuccessful proposal is irrelevant to this protest.

than tier two rights, the agency concluded that CostQuest's data rights were closer to tier two rights than LightBox's proposed data rights. *Id.* Accordingly, the agency concluded that these advantages were worth paying a \$6.2 million price premium over LightBox's lower priced proposal. *Id.* On November 9, 2021, the agency made award to CostQuest, and this protest followed.

DISCUSSION

The protester raises numerous challenges to the agency's evaluation. Central to the protest, however, are three related challenges concerning the awardee's data rights that pose complex questions regarding our Office's jurisdiction over the issues challenged. First, the protester alleges the agency erred in its evaluation of the awardee's data rights proposal and related aspects of the awardee's technical approach. 1st Supp. Protest at 14-22, 27-28. Second, the protester alleges that the awardee will be unable to furnish the data rights it promised in its proposal due to the terms of various licensing agreements. *Id.* Third, the protester alleges that the awardee materially misrepresented its data rights in several respects. 3rd Supp. Protest at 14-27. In addition to these data rights arguments, the protester also raises challenges to the agency's evaluation of both past performance and the protester's technical approach. Comments and 2nd Supp. Protest at 46-63. We address these arguments in turn.³

Jurisdiction over Data Rights Challenges

As an initial matter, the protester advances three principal arguments concerning the agency's evaluation of the awardee's data rights proposal. These three arguments can be summarized as follows: (1) the agency failed to reasonably consider information in LightBox and CostQuest's proposals showing that CostQuest could not provide the data rights it offered, and the agency also engaged in disparate treatment in its evaluation of the competing offerors' proposed data rights; (2) CostQuest proposed to license rights to the agency that it cannot actually furnish because CostQuest sublicensed certain data from [DELETED], but [DELETED] itself lacked the necessary rights under its license agreement with LightBox's subsidiary; and (3) CostQuest materially misrepresented its data rights based on its sublicense agreement with [DELETED]. See 1st Supp. Protest at 14-22, 27-28; 3rd Supp. Protest at 14-27.

In response, the agency and intervenor argue that the protester's arguments rely on an alleged breach of an agreement between private parties, and that to address these

³ The protester raises several collateral arguments not addressed in this decision. We have considered each of these arguments and conclude they provide no basis to sustain the protest. For example, the protester alleges that the agency erred in conducting its best-value tradeoff on the basis of the numerous alleged evaluation errors identified in the protester's other arguments. 1st Supp. Protest at 35-36. However, this argument is entirely derivative of the protester's other evaluation arguments. As we discuss in this decision, we find no merit in any of the protester's other arguments, so this argument is likewise without merit.

protest grounds, our Office would need to, in effect, resolve a private dispute between private parties over which our Office lacks jurisdiction. See, e.g., 2nd Supp. Memorandum of Law (MOL) at 3-7; Intervenor's Comments on 2nd Supp. AR at 4-9. As discussed in greater detail below, we agree with the agency and intervenor in part, but conclude that we have jurisdiction to consider the protester's first argument and portions of the third argument. By contrast, the protester's second argument is clearly an argument concerning a private dispute that we will not consider.

Our Office's jurisdiction extends to allegations of violations of procurement laws or regulations. 31 U.S.C. § 3552. For this reason, we generally decline to review disputes between private parties that do not involve improper government action. See, e.g., *Ellwood Nat'l Forge Co.*, B-402089.3, Oct. 22, 2010, 2010 CPD ¶ 250 at 3-4. Moreover, we have repeatedly declined to address such private disputes in the specific context of disputed data rights. See, e.g., *Wamore, Inc.*, B-417450, B-417450.2, July 9, 2019, 2019 CPD ¶ 253 at 8 (concluding that a dispute between the parties concerning data rights is a dispute between private parties that we will not consider); *York Indus., Inc.*, B-186958, Nov. 29, 1976, 76-2 CPD ¶ 453 at 2 ("We are not in a position to adjudicate the rights of private parties each of whom apparently claims rights in contested data.").

However, this does not mean that our Office will not consider the terms and applicability of agreements between private parties when they bear directly on alleged improper agency action. For example, when, as here, a solicitation requires offerors to furnish evidence of agreements with third parties, or provides that an agency will evaluate proposals on the basis of such agreements, we have routinely reviewed the reasonableness of an agency's evaluation of private agreements. See, e.g., *Omni2Max*, B-419445, Mar. 4, 2021, 2021 CPD ¶ 114 at 3-4 (when a solicitation provided that proposals must demonstrate a legally enforceable right to purchase, charter, or lease a vessel from a third party, and the agency excluded an offeror because its letters of commitment with a third party were not legally enforceable agreements, we assessed whether agency's evaluation of those letters was reasonable in light of the terms of the letters of commitment); *Poplar Point RBBR, LLC*, B-417006.2, B-417006.3, Sept. 3, 2019, 2019 CPD ¶ 302 at 6-9 (when a solicitation to lease a building required offerors to provide evidence of certain amenities near the proposed building via signed leases, construction contracts, or letters of intent with third parties, and the agency excluded an offeror on the basis that the private agreements it provided were vague and unenforceable, we assessed whether the agency's conclusions were reasonable in light of the text of the provided agreements).

In resolving this case, we find our decision in *Tapestry Technologies, Inc.*, to be instructive. *Tapestry Techs., Inc.*, B-416670.2, B-416670.3, Dec. 12, 2019, 2019 CPD ¶ 442. In *Tapestry*, the solicitation required offerors to demonstrate their ability to provide a secure facility with certain attributes. *Id.* at 2. The awardee in *Tapestry* provided a signed lease agreement with the owner of a secure facility in its proposal, and the agency concluded that the signed lease provided adequate evidence of the awardee's ability to furnish a facility. *Id.* at 5. However, the protester in *Tapestry* argued that it held an exclusive right to lease and occupy the very same facility that the

awardee proposed, and provided a competing signed agreement. *Id.* The *Tapestry* protester, much like the protester in this case, argued that the agency erred in evaluating the awardee's proposal, that the awardee made a material misrepresentation concerning its rights, and that, in any case, the awardee would not actually be able to occupy the facility because the protester had a separate agreement securing exclusive access. *Id.* at 3-4.

In *Tapestry* we assessed whether the agency's evaluation of the awardee's proposal--to include the lease agreement--was reasonable based on the contemporaneous record, and we similarly addressed the question of whether the awardee made a material misrepresentation based on the information reasonably known to the awardee at the time. *Tapestry Techs., Inc., supra* at 6-7. However, we specifically declined to address the protester's arguments concerning its alleged exclusive right to the facility, because those arguments concerned a dispute solely between the protester, the awardee, and the owner of the building, in which the government was not involved. *Id.* at 6 n.6. We likewise declined to address the protester's argument that the awardee might ultimately be unable to furnish the facility, despite the awardee's signed lease agreement, as a question of contract administration not appropriately resolved in our forum. *Id.* at 6 n.7.

This case is directly analogous. Here, the solicitation required offerors to provide significant information about their license rights in data, and specifically contemplates that the agency would evaluate those data rights. AR, Tab 6d, Instructions to Offerors at 7. Accordingly, because the protester's first data rights argument alleges that the agency erred in its evaluation of the awardee's data rights as reflected in the information provided by the awardee in its proposal, we will address whether the agency's evaluation of the awardee's proposal was reasonable, and consistent with the terms of the solicitation and procurement law.

On the other hand, we cannot address LightBox's second argument that CostQuest cannot legally offer to provide certain rights in data to the agency because the data is licensed from [DELETED], and [DELETED] itself lacked the necessary rights to provide suitable rights in the data to CostQuest. LightBox's arguments in this regard, are predicated on alleged violations of a sublicense between [DELETED], which is not a party to the protest, and one of LightBox's subsidiaries, which is also not a party to this protest. Those arguments clearly pertain to a private dispute between private parties in which the government is not involved. Similarly, the question of whether, as a result of these agreements, CostQuest will ultimately be able to furnish the agency with appropriate data rights is a question of contract administration not for our forum. 4 C.F.R. § 21.5(a). Therefore, all arguments predicated on the agreement between LightBox's subsidiary and [DELETED] are dismissed.

Finally, with respect to the protester's third allegation that CostQuest made material misrepresentations concerning private agreements, our decisions support a limited inquiry. While we have, in some cases, assessed whether an offeror made a material misrepresentation concerning basic facts about a private agreement--such as the existence or non-existence of such an agreement--in cases that would require a more

searching inquiry we have concluded that we will not address material misrepresentations that are inextricably intertwined with interpreting a private agreement. *Compare Tapestry Techs., supra* (concluding awardee made no misrepresentation when it had a “reasonable belief” it could furnish a facility on the basis of a signed lease agreement with the owner of the property) and *Integration Techs. Grp., Inc.*, B-291657, Feb. 13, 2003, 2003 CPD ¶ 55 (finding material misrepresentation when offeror claimed that it had an agreement in place with a subcontractor but no such agreement existed) with *AVER, LLC*, B-419244, Nov. 2, 2020, 2020 CPD ¶ 360 at 4-5 (declining to resolve material misrepresentation where the allegation is “inseparable” from the terms and enforceability of a private agreement).

While we will consider whether the awardee made material false statements about readily ascertainable facts concerning a license agreement, if the protester’s arguments would require us to resolve competing interpretations of a license agreement, we will not resolve what amounts to a dispute about an agreement between private parties. For these reasons, as discussed in greater detail below, we deny the protester’s material misrepresentation arguments in part and dismiss them in part when they are inseparable from competing interpretations of a private agreement.

Data Rights Evaluation

Concerning the data rights evaluation, the protester argues that the agency erred by concluding that CostQuest offered sufficient rights to meet the solicitation’s requirements. For example, the protester alleges that information in its own proposal should have alerted the agency to the fact that CostQuest could not offer the rights it proposed. Comments and 2nd Supp. Protest at 45-46. Additionally, the protester contends that the agency engaged in impermissible disparate evaluation of proposals with respect to the data rights submission. *Id.* at 41-45.

Adequacy of Rights

The protester alleges the agency ignored information in the protester’s proposal, which should have led the agency to conclude that CostQuest could not furnish the data rights required by the solicitation. *Id.* at 45-46. Specifically, LightBox notes that CostQuest’s proposal identified “LightBox/Digimap” as one of its third-party sources for parcel boundary data. *Id.* However, LightBox’s proposal specifically noted that “LightBox has not provided license rights to third parties to our proprietary data in a manner which would permit such third parties to directly provide such data to the FCC.” *Id. citing* AR, Tab 23, LightBox Technical Proposal at 41. Thus, LightBox argues the agency was on notice from the information in its proposal that no offeror but LightBox properly could provide the parcel boundary data to the agency, and the evaluators erred by ignoring this information when they considered CostQuest’s proposed approach.

When reviewing a protest challenging an agency’s evaluation, our Office will not reevaluate proposals, nor substitute our judgment for that of the agency, as the evaluation of proposals is a matter within the agency’s discretion. Rather, we will

review the record to determine whether the agency's evaluation was reasonable and consistent with the stated evaluation criteria and with applicable procurement statutes and regulations. *AECOM Mgmt. Servs., Inc.*, B-417639.2, B-417639.3, Sept. 16, 2019, 2019 CPD ¶ 322 at 9. A protester's disagreement, without more, does not form the basis for us to conclude that an evaluation was unreasonable. See *DynCorp Int'l, LLC*, B-412451, B-412451.2, Feb. 16, 2016, 2016 CPD ¶ 75 at 7-8.

In this case, the protester's argument relies on a misreading of CostQuest's proposal. While CostQuest identified LightBox/Digimap data as a data source for parcel boundary data, CostQuest's proposal also made clear that this data would be used for internal processing only and that its attributes would "not pass into the [F]abric." See AR, Tab 36, CostQuest Data Usage Volume at 8. That is to say, CostQuest did not propose to convey any data or rights in the parcel boundary data to the agency. Such a proposed use, on its face, is not inconsistent with the claim in LightBox's proposal that no other offeror could "directly provide" LightBox's data to the FCC. AR, Tab 23, LightBox Technical Proposal at 41. Because there is no inconsistency between the two proposals in this respect, we see no basis to question the agency's evaluation on this point. As such, the protester's arguments in this regard are denied.

Disparate Treatment

Next, the protester argues the agency's evaluation treated similar proposal features differently with respect to data rights agreements. Protester's Comments and 2nd Supp. Protest at 41-45. The agency assigned the protester's proposal a weakness because one of the license agreements, on which the protester's proposal relied for address data, was not yet finalized. *Id.* However, the protester notes CostQuest also did not have a finalized agreement for address data, and received a strength rather than a weakness.⁴ *Id.*

⁴ Collaterally, the protester contends that the agency evaluators also erroneously concluded that only one of CostQuest's agreements was not finalized, while CostQuest's proposal actually identified two incomplete agreements, one for address data and one for data to support internal processing. Comments and 2nd Supp. Protest at 41-45. In this regard, the protester is correct that CostQuest's proposal identified two agreements that it had not finalized, and the SSDD nonetheless concluded that CostQuest's proposal provided a summary of the data rights it had negotiated "largely with agreements in place, but with one negotiated but not yet executed." AR, Tab 9, SSDD at 17.

While this is clearly an error, it is not clear that the protester can demonstrate competitive prejudice in this case. Competitive prejudice is an essential element to every viable protest, and where an agency's improper actions did not affect the

It is a fundamental principle of federal procurement law that a contracting agency must treat all vendors equally and evaluate their proposals evenhandedly against the solicitation's requirements and evaluation criteria. *Rockwell Elec. Commerce Corp.*, B-286201 *et al.*, Dec. 14, 2000, 2001 CPD ¶ 65 at 5. However, when a protester alleges unequal treatment in a technical evaluation, it must show that the differences in the evaluation did not stem from differences between the proposals. *IndraSoft, Inc.*, B-414026, B-414026.2, Jan. 23, 2017, 2017 CPD ¶ 30 at 10; *Paragon Sys., Inc.*; *SecTek, Inc.*, B-409066.2, B-409066.3, June 4, 2014, 2014 CPD ¶ 169 at 8-9.

Accordingly, to prevail on an allegation of disparate treatment, a protester must show that the agency unreasonably downgraded its proposal for deficiencies that were substantively indistinguishable from, or nearly identical to, those contained in other proposals. *Office Design Group v. United States*, 951 F.3d 1366, 1372 (Fed. Cir. 2020); *Battelle Memorial Inst.*, B-418047.3, B-418047.4, May 18, 2020, 2020 CPD ¶ 176 at 5. In this case, the protester's disparate treatment argument is without merit because the proposals are not meaningfully the same in the ways the protester suggests.

Here, the record reflects that the agency's concern with LightBox's agreement was not simply that it was not finalized, but rather that LightBox's proposal did not meaningfully explain the state of negotiations for that agreement and it was LightBox's only proposed source of address data. See AR, Tab 15, LightBox Data Usage Technical Evaluation Team (TET) Consensus Report at 2; Tab 9, SSDD at 19. Specifically, LightBox's proposal noted that it had reached an "agreement in principle" with a vendor for address data and provided no further detail. See AR, Tab 25, LightBox Data Usage Volume at 6. Because the evaluators considered the address field to be a significant data point, they concluded that the lack of an agreement in place for that field posed a risk to performance. AR, Tab 15, LightBox Data Usage TET Consensus Report at 2.

By contrast, CostQuest's proposal explained that it had negotiated the terms of a preliminary agreement, and provided a summary of those terms. See AR, Tab 36, CostQuest Data Usage Vol. at 9. More significantly, the source in question was only one of [DELETED] different sources of address data that CostQuest identified in its

protester's chances of receiving award, there is no basis for sustaining the protest. See, *e.g.*, *American Cybernetic Corp.*, B-310551.2, Feb. 1, 2008, 2008 CPD ¶ 40 at 2-3.

In this regard, when discussing the evaluation findings concerning the agreements that had not been finalized, the source selection authority (SSA) specifically noted that "this is not one of the most important factors to me in distinguishing the two offerors' data usage rights proposals." AR, Tab 9, SSDD at 19 n.3. The SSA further explained that CostQuest's less restrictive data rights proposal was of greater significance in distinguishing the proposals, and the SSDD's tradeoff narrative makes no mention of the lack of finalized agreements. *Id.* at 19, 34. Accordingly, we cannot conclude that this error had a meaningful effect on the agency's award decision or worked to the protester's competitive prejudice.

proposal. *Id.* In sum, there were significant differences between the proposals, and the protester has not demonstrated that the agency unreasonably downgraded its proposal for deficiencies that were substantively indistinguishable from, or nearly identical to, those contained in CostQuest's proposal. Accordingly, the allegations are without merit and are denied.

Material Misrepresentations

The protester alleges CostQuest materially misrepresented its rights in data by omitting key limiting provisions from its license agreement in several portions of its proposal. 3rd Supp. Protest at 14-27. According to the protester, CostQuest's summary of its data rights created a false impression by quoting expansive language from the license agreement while omitting limiting language that would render the data unsuitable for the uses identified in the solicitation. *Id.* For example, the protester argues CostQuest misrepresented its rights by omitting limiting provisions concerning its ability to prepare derivative works with the tax assessor data. *Id.* As an additional example, the protester notes that CostQuest's proposal omitted that the agency's use of CostQuest's work product would be limited to "internal business use." *Id.*

An offeror's material misrepresentation in its proposal can provide a basis for disqualifying the proposal and canceling a contract award based on the proposal. *Integration Techs. Group, Inc.*, B-291657, Feb. 13, 2003, 2003 CPD ¶ 55 at 2-3. A misrepresentation is material where the agency relied on it and it likely had a significant impact on the evaluation. *Sprint Communications Co. LP; Global Crossing Telecommunications, Inc.--Protests and Recon.*, B-288413.11, B-288413.12, Oct. 8, 2002, 2002 CPD ¶ 171 at 4. For a protester to prevail on a claim of material misrepresentation, the record must show that the information at issue is false. *Vizada Inc.*, B-405251, *et al.*, Oct. 5, 2011, 2011 CPD ¶ 235 at 9; *Commercial Design Group, Inc.*, B-400923.4, Aug. 6, 2009, 2009 CPD ¶ 157 at 6.

Derivative Works

First, the protester notes that CostQuest's summary of its rights in the tax assessor data represents that CostQuest has the right to use the data commingled with information from other sources to create a transformative derivative work that it can provide to its customers, including the FCC. AR, Tab 36, CostQuest Data Usage Vol. at 8. The protester complains that CostQuest's proposal did not, however, explain that its rights were granted with limiting provisions, specifically that: (1) users must be unable to reverse engineer or recreate the tax assessor data; (2) any field solely sourced from the tax assessor data must be separately licensed or approved; and (3) any data in the derivative work derived from the tax assessor data must not be identified as being sourced from the tax assessor data. 3rd Supp. Protest Exhs. at 63-64. By omitting these provisions, the protester contends that CostQuest materially misled the agency about its rights in the tax assessor data. 3rd Supp. Protest at 14-27.

With respect to the alleged omission of the first provision concerning reverse engineering, the record reflects that the limiting provision was in fact included in CostQuest's proposal. Specifically, the agency explains that CostQuest's end user license to the agency expressly prohibited reverse engineering, among other things, which captured the allegedly omitted provision. AR, Tab 36, CostQuest Data Usage Vol. at 4. Accordingly, because the record reflects that CostQuest's proposal included the allegedly omitted provision, CostQuest's proposal was not materially misleading with regard to that provision, and the protester's arguments about this provision are denied.

With respect to the protester's second and third arguments concerning provisions that would require the agency to seek a separate license for certain data or that would prohibit CostQuest from identifying the source of certain data fields, it is true that CostQuest's proposal did not clearly identify the limitations the protester argues were required. CostQuest, however, disputes the protester's interpretation of its license rights and their application to its proposal. Because these aspects of the protester's misrepresentation arguments ultimately turn on the conflicting interpretation of terms of privately negotiated license agreements, we conclude that the issues are not a matter for consideration by our forum.

Concerning, specifically, the protester's second argument, the protester notes that requiring the FCC to seek a separate license for certain data was clearly inconsistent with the solicitation's requirements. Thus, by failing to advise the agency that any field solely sourced from the tax assessor data must be separately licensed or approved, the awardee materially misled the agency about the rights it could furnish to the agency. 3rd Supp. Protest at 14-27. In response, CostQuest concedes that this provision was omitted from its proposal, but argues that its proposed use of the data does not actually implicate any omitted terms. Intervenor's Comments on 2nd Supp. AR at 11. More specifically, the intervenor argues the separate license provision, by its terms, only applies to data points solely sourced from the tax assessor data. *Id.* This distinction is important because the record reflects that, while CostQuest's proposal noted that the tax assessor data would be a "primary" source for address data, CostQuest did not propose to solely source any data points from the tax assessor data. AR, Tab 36, CostQuest Data Usage Vol. at 8. Rather, CostQuest intended to source address data from [DELETED] different sources in combination. *Id.* at 8-9.

Similarly, with respect to the third argument, the protester contends that the RFP requires offerors to identify certain source data for the BSL Fabric, and that CostQuest listed [DELETED] as a data source in its proposal. Comments on Second Supp. AR at 20-21. Accordingly, the protester questions how CostQuest can furnish the required data consistent with the provision of its license agreement that prohibits identifying the source of certain data. *Id.* In response, CostQuest notes that it did not propose, and does not intend, to identify [DELETED] as a data source for any specific fields in the Fabric, so the provision prohibiting identification of the source of the data is not implicated by its proposed use. Intervenor's Comments on 2nd Supp. AR at 11. Moreover, CostQuest notes that its license to the agency prohibited the agency from

attempting to gain access to sources of the data not otherwise provided to it. AR, Tab 36, CostQuest Data Usage Vol. at 4.

With respect to these two arguments, the protester has advanced an interpretation of the terms of a private agreement that, if correct, could potentially render CostQuest's proposal misleading. However, CostQuest has also advanced a competing interpretation of the terms that is entirely consistent with its proposal. Any resolution of the protester's arguments would require us to construe the terms of the private agreement and definitively resolve the rights of the parties to that agreement, which is not a matter for our forum. Because the resolution of the protester's challenges are inseparable from a dispute over the terms of a private agreement between private parties they are dismissed. See *AVER, supra* (dismissing allegations of material misrepresentation where the arguments were inseparable from a private dispute concerning a private agreement); see also *Wamore, supra* (concluding that a dispute between the parties concerning whether a party has rights in data is dismissed where it amounts to a dispute between private parties that we will not consider).

Internal Business Use

Next, the protester argues that CostQuest misrepresented the rights it could convey to the agency by omitting another limiting provision from its license agreement with [DELETED] that would limit the agency's use of CostQuest's work product to "internal business use" only. 3rd Supp. Protest at 14-27. While the [DELETED] agreement does not define the phrase "internal business use," LightBox notes that the minimum rights required by the solicitation involve publishing portions of the data, which appears to be inconsistent with such a limitation. *Id.* Further, the protester notes that the agency actually concluded that CostQuest offered greater rights than the minimum required by the solicitation because the agency believed that CostQuest's data could be shared by the agency with various external parties, and the agency assigned a strength to CostQuest's proposal on this basis. *Id.* Such external sharing, according to the protester, also appears to exceed internal business use. *Id.* By omitting the fact that the agency's uses would be limited to internal business use, the protester contends that CostQuest materially misled the agency about the data rights CostQuest was able to offer the agency. *Id.*

In response, the Intervenor notes that the phrase "internal business use," in the data industry, is nothing more than a prohibition on commercial use of the original data, and does not typically bar the creation of derivative works or sharing of the data with other parties subject to an appropriate license. Intervenor's Comments on 2nd Supp. AR at 10-11. For example, CostQuest's license agreement limits CostQuest's use to "internal business purposes" only, but nonetheless permits CostQuest to prepare derivative works and share them with its customers, to include the agency. 3rd Supp. Protest Exhibits at 63. Further, CostQuest argues that the terms of its proposal effectively captured this requirement for several reasons. Intervenor's Comments on 2nd Supp. AR at 11-14. First, CostQuest notes that it did not offer the agency rights to commercialize the work product it provided nor did the agency conclude that it did so.

Id. Second, CostQuest notes that its proposal made clear that any external sharing of CostQuest's original work product would be subject to an appropriate end user license agreement. *Id.* Accordingly, CostQuest contends that its proposal effectively captured the restrictions on the agency's use based on its understanding of the relevant terms.

We find that this matter also concerns a private dispute between the parties, which, as explained above, our Office does not review. Here, the protester's arguments are inextricably tied to the construction of the phrase "internal business use" in a private agreement between private parties. The protester has advanced an interpretation of those terms that, if correct, could render CostQuest's proposal materially misleading. CostQuest has advanced a competing interpretation of that phrase that is consistent with its proposal. Any resolution of the protester's arguments would require us to construe the terms of a private agreement and definitively resolve the rights of the parties to that agreement, which is not a matter for our forum. This argument is therefore dismissed. *See AVER, supra.*

Past Performance

The protester alleges the agency's past performance evaluation erred in several respects. Comments and 2nd Supp. Protest at 46-56. First, the protester argues that the solicitation indicated a preference for federal government past performance, but the agency's evaluation effectively ignored that preference. *Id.* at 46-54. In this regard, the protester notes that it included a past performance questionnaire (PPQ) for a contract with the federal government, while CostQuest had no federal experience, but CostQuest nonetheless received a higher past performance rating. *Id.* Second, the protester argues CostQuest's past performance involved contracts that were significantly smaller in scale than the protester's past performance, but the agency did not appropriately consider those differences. LightBox notes that its past performance efforts on average involved approximately double the dollar value of CostQuest's efforts, but the agency viewed both efforts as basically similar in scope to the current effort. *Id.*

Finally, the protester argues that the agency failed to follow the terms of the solicitation when it impermissibly considered past performance efforts discussed in CostQuest's proposal that did not include PPQs. *Id.* at 54-56. LightBox notes the RFP forbade consideration of any past performance efforts without PPQs. *Id.* In particular, the protester alleges that the agency's evaluation appears to have considered CostQuest's performance on a "follow-on" contract that was not included as a PPQ, but was described in CostQuest's proposal narrative. Comments and 2nd Supp. Protest at 54-56. By contrast, the protester contends the agency did not consider any additional efforts included in LightBox's proposal narrative that lacked a PPQ. *Id.*

An agency's evaluation of past performance, including its consideration of the relevance, scope, and significance of an offeror's performance history, is a matter of discretion which we will not disturb unless the agency's assessments are unreasonable or inconsistent with the solicitation criteria. *Metropolitan Interpreters & Translators, Inc.*, B-415080.7, B-415080.8, May 14, 2019, 2019 CPD ¶ 181 at 10; *see also SIMMEC*

Training Sols., B-406819, Aug. 20, 2012, 2012 CPD ¶ 238 at 4. In addition, the relative merits of an offeror's past performance information is generally within the broad discretion of the contracting agency. See *Paragon Tech. Grp., Inc.*, B-407331, Dec. 18, 2012, 2013 CPD ¶ 11 at 5. A protester's disagreement with the agency's judgment does not establish that an evaluation was unreasonable. *FN Mfg., LLC*, B-402059.4, B-402059.5, Mar. 22, 2010, 2010 CPD ¶ 104 at 7.

In this case, the protester's arguments amount to nothing more than disagreement with the agency's evaluation. Concerning the protester's argument that the agency ignored the RFP's preference for federal past performance, the record reflects that the agency recognized the protester's work for the federal government, and assigned the protester a strength specifically for its federal past performance. AR, Tab 14, TET Consensus Evaluation LightBox Past Performance at 6. The contemporaneous record reflects that the difference in evaluation stemmed from a difference in the relevance of the past performance references, not any disregard of the RFP's preference for federal past performance. See AR, Tab 9, SSDD at 23. The record shows that the agency found the protester's three efforts to be somewhat relevant, relevant, and very relevant, respectively, because several of the efforts did not involve providing comparable data to the BSL Fabric. *Id.* By contrast, all three of CostQuest's efforts were rated as very relevant because they all involved providing substantially similar data to the current effort and were therefore extremely similar in scope and complexity, if not in scale. *Id.* at 22-23. We see no basis to conclude that the agency erred in its evaluation in this respect.

Similarly, with respect to the protester's arguments concerning scale, while the protester is correct that its PPQs were, on average, approximately double the dollar value of CostQuest's efforts, all of the efforts for both offerors were significantly smaller than the scope of the BSL Fabric. Specifically, the largest of the protester's PPQs involved an approximately \$3 million effort, which is less than 10 percent of the size of the instant effort. AR, Tab 14, TET Consensus Evaluation LightBox Past Performance at 1. While that effort is almost twice as large as CostQuest's largest effort, those efforts were much closer in scale to each other than to the instant effort. Moreover, the TET evaluation specifically noted the small scale of CostQuest's PPQs, but indicated that the scope and complexity of the efforts were so similar that a rating of very relevant was nonetheless appropriate in all three cases. AR, Tab 19, TET Consensus Evaluation CostQuest Past Performance at 5-6. On the record before us, we see no basis to disturb the agency's evaluation, especially where, as here, all PPQs from both offerors were significantly smaller than the current effort.

Finally, the protester's contention that the agency inappropriately considered information beyond the submitted PPQs is simply not supported by the record. LightBox's argument is predicated on the TET's observation that CostQuest made "multiple releases of a nationwide Fabric," which the protester interpreted as an apparent reference to follow on work from one of CostQuest's PPQs. Comments and 2nd Supp. Protest at 54-56; Supp. MOL at 44. However, as the agency notes, CostQuest's other submitted PPQs both involved CostQuest's preparation and use of

the dataset in question, and one of those PPQs specifically involved providing a nationwide dataset similar to the BSL Fabric. Supp. MOL at 44. In short, the record reflects that the TET's observation relied on information derived from CostQuest's PPQs, and not from other sources, and this protest ground is accordingly without merit and is denied.

Protester's Technical Evaluation

Finally, the protester challenges several weaknesses assigned to its technical proposal. Comments and 2nd Supp. Protest at 57-63. For example, the protester notes that the agency assigned its proposal a weakness for a proposed supplemental deliverable, but the evaluators specifically concluded that the supplemental deliverable would not negatively affect the quality of LightBox's BSL Fabric. *Id.* at 61-63. Accordingly, the protester contends the supplemental deliverable did not meet the definition of a weakness and should not have been counted against its proposal. *Id.* As an additional example, the protester argues that the agency treated like proposal features differently because the agency assigned LightBox's proposal a weakness for incomplete building footprint data, but did not assign a similar weakness to CostQuest, despite the fact that it also lacked complete data on building footprints. *Id.* at 59-61.

As discussed above, when reviewing agency evaluations, we will review the record to determine whether the agency's evaluation was reasonable and consistent with the stated evaluation criteria and with applicable procurement statutes and regulations. *AECOM Mgmt. Servs., supra*. Further, to prevail on an allegation of disparate treatment, a protester must show that the agency unreasonably downgraded its proposal for deficiencies that were substantively indistinguishable from, or nearly identical to, those contained in other proposals. *Battelle Memorial Inst., supra*.

With respect to the protester's argument concerning the supplemental deliverable, the protester is correct that the TET assigned a weakness for a deliverable that the TET described as neither reducing nor adding value to the protester's proposal, and it is unclear that this aspect of the protester's proposal was appropriately considered to be a weakness rather than a neutral factor by the TET. AR, Tab 17, TET Consensus Evaluation LightBox Technical Approach at 4. However, the SSA did not adopt this weakness from the TET evaluation. See AR, Tab 9, SSDD at 13, 19. Rather, the SSDD does not mention the weakness concerning LightBox's supplemental deliverable and specifically notes in another context that the rights offered for the supplemental deliverable are "neither a strength or a weakness." *Id.* In short, we see no reason to conclude that the arguably erroneous weakness was carried forward by the SSA or played a role in the agency's award decision. See *American Cybernetic, supra* (competitive prejudice is an essential element to every viable protest, and where an agency's improper actions did not affect the protester's chances of receiving award, there is no basis for sustaining the protest).

As to the alleged disparate treatment regarding building footprint data, the record reflects that the proposals are meaningfully different in this regard. Specifically, the TET

concluded that the protester had processed approximately 76 percent of the relevant data, and the agency noted that the remaining 24 percent of locations (approximately 38 million locations) still needed to be generated, which posed some performance risk. AR, Tab 17, TET Consensus Evaluation LightBox Technical Approach at 4. By contrast, CostQuest's proposal noted that it had complete building footprint data for [DELETED], but had partial data concerning [DELETED], which the agency estimates amounts to, at most, only 2.3 percent of the total covered locations. See Supp. MOL at 22-24; Supp. TET Chairperson Statement at 2-3. Thus the record suggests that the protester's proposal was missing at least ten times as much data as CostQuest's proposal, and the agency did not consider CostQuest's comparatively minor shortfall to merit a weakness. In sum, we see no basis to question the agency's judgment in this regard or to conclude that the agency's evaluation reflected disparate treatment of the offerors.

The protest is denied in part and dismissed in part.

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