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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

ACS STATE AND LOCAL SOLUTIONS, INC)
) CAB No. P-0740
Under RFP No: POFA-2006-R-0066)

For the Protester, ACS State and Local Solutions, Inc.: William W. Thompson, Esq., Michael A. Branca, Esq., Peckar, Abramson, Bastianelli & Kelley. For the Intervenor, Richard J. Conway, Esq., Robert J. Moss, Esq., Dickstein Shapiro, LLP. For the District of Columbia Government: Howard Schwartz, Esq., Jon Kulish, Esq., Assistant Attorneys General.

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

OPINION

Filing ID 14390514

ACS State and Local Solutions, Inc., ("ACS") filed a pre-award protest and a supplemental protest of a contract award to American Traffic Solutions, Inc. ("ATS") to provide support, maintenance, and improvements to the District's existing Automated Traffic Safety Enforcement Systems ("ATSE") which consist of red light cameras, and fixed and mobile speed radar camera systems. ACS alleges that the District failed to properly evaluate its proposal and ATS's proposal, that ACS was the only offeror that could meet the requirements of the solicitation's scope of work, that ATS should not have received a higher technical evaluation than ACS who was the incumbent contractor, that the District's technical evaluation was unreasonable and arbitrary and not in accordance with the evaluation criteria set forth in the solicitation, and that the District failed to properly evaluate the price evaluation factor. The District argues that the protests are untimely, that the District properly evaluated the proposals under both the technical and price criteria, and that the contracting officer correctly determined that ATS's higher priced proposal was the most advantageous to the District. We conclude that the protests were timely filed and that the contracting officer violated no law, regulation, or terms of the solicitation in awarding the contract to ATS. Accordingly, we deny ACS's protests.

BACKGROUND

The District has operated an automated traffic safety enforcement program, using contracted services since 1999, and seeks to continue the current program and expand as new technologies and program initiatives become available. The District's Office of Contracting and Procurement issued the Request for Proposals ("RFP") on February 28, 2006, requiring the prospective contractor to provide support and maintenance for the existing ATSE. The RFP set forth a contract base term of two years with the possibility of three one-year options. The RFP describes the ATSE system, but the RFP does not indicate the manufacturer of the hardware used in that system. According to the protest, the current ATSE equipment was manufactured by a company named Gatsometer B.V. ("Gatsometer"), based in the Netherlands. The RFP sets forth the performance goals of the ATSE system, and the minimum standards for hardware availability and usage. The RFP also set forth the functional requirements for all of the hardware and software in the ATSE.

One component of the RFP required fixed-price proposals for the operation, support, and maintenance of the existing ATSE system, and another component invited offerors to submit proposals for system process improvements, including a “conversion plan for any existing equipment to more current technology for automated traffic safety enforcement” (RFP C.1.1.1 – C.1.1.2), under a cost-reimbursable pricing structure.

The RFP in section C.3.7 contemplated under the conversion plan the installation of new red light cameras, fixed radar units, and new mobile units with the agreement of the District. The RFP required the contractor to agree with the District on the cost of the new installation prior to performing work on the new installation. The RFP also set forth requirements for the printing of both red light and speeding violations, as well as requirements for transmitting data between the contractor and the District.

The District substantially revised the technical portion of the original RFP through Amendment No. A0007, issued May 5, 2006. The amended RFP did not change introductory sections B.1 and B.2 which provide:

B.1 The Government of the District of Columbia, Office of Contracting and Procurement, on behalf of Metropolitan Police Department (MPD), is seeking [offerors] to provide support and maintenance for the existing Automated Traffic Safety Enforcement (ATSE) System. Also, [offerors] shall, in their respective proposals, make recommendations to the District for process improvements.

B.2 The District contemplates award of a multiyear contract with a base period of two (2) years from date of award and three one-year options, and has two separate components: (a) a firm fixed price component with payment based on a monthly fixed rate, and (b) a cost reimbursement component.

The remainder of section B contains the price schedules for the various contract line items:

B.3 PRICE SCHEDULE FIRM-FIXED PRICE-Based Period

	<u>Item Description</u>	<u>Mthly fixed rate</u>	<u>Total/24mts</u>
CLIN 0001	Provide all Resources to Operate the ATSE System (Reference: Sec.C.3)	_____	_____

B.4 COST SCHEDULE-COST REIMBURSEMENT FOR DIRECT COST AS FOLLOWS:

	<u>Item Description</u>	<u>Not-to-exceed Total/24mts</u>
CLIN 0002	Equipment Repair and/or Replace (Reference: Sec.C.3.1.2.11)	_____
CLIN 0003	Public Information & Education Campaign	

	(Reference: Sec.C.3.10.2)	_____
CLIN 0004	V Street Facility Lease Expense (Reference: Sec.C.3.18)	_____
	Total Not-to-Exceed Amount	_____

Section C of the RFP contains the statement of work for the support and maintenance of the ATSE system. The reference in CLIN 2 to “Equipment Repair and/or Replace” refers to section C.3.1.2.11, which makes clear that the contractor is to repair *or replace* inoperable ATSE equipment. Although ACS mentions only the “repair” aspect (ACS’s Response to Agency Report and Supplemental Protest, at 6), the solicitation nowhere limits the awardee only to repairing the existing equipment. Replacement is an option and the solicitation does not limit replacement to a specific manufacturer of the equipment components. A fair reading of the solicitation shows that the contractor would be required to maintain an operable system and meet all of the functional requirements of the equipment and system, regardless of the manufacturer. The requirement to repair or replace inoperable equipment can also be found in other sections, including sections C.3.2.10 (mobile radar units) and C.3.3.11 (red light camera units). Some relevant portions of section C read as follows:

SECTION C: SPECIFICATION/WORK STATEMENT

C.1 SCOPE:

- C.1.1 The Government of the District of Columbia Office of Contracting and Procurement, on behalf of the Metropolitan Police Department (MPD), is seeking offerors to provide support and maintenance for the existing Automated Traffic Safety Enforcement (ATSE) System. Also, offerors shall, in their respective proposal, make recommendations to the District for process improvements.
 - C.1.1.1 Offerors are invited to submit a proposal that will provide support and maintenance for the existing ATSE system equipment. This RFP provides offerors with the relevant characteristics of the existing equipment, and the service and maintenance requirements for the ATSE system. This information will enable all offerors to respond in a format that makes for a fair comparison and ensures that the proposed solution meets the current system requirements.
 - C.1.1.2 Offerors shall make recommendations in their respective proposals based upon their expertise, for process improvements and best practices that could be implemented by the District in support of its ATSE system. To that end, offerors are requested to submit a conversion plan for any existing equipment to more current technology for automated traffic safety enforcement. Offerors are encouraged to provide alternatives and options that may create operational efficiencies, cost savings, service improvements, or enforcement improvements by the District. All suggestions and alternative solutions provided in the proposal will be considered, by the District, during proposal evaluation, but only after the offeror has first responded with a proposal to provide the ATSE system in accordance with the requirements set forth herein. Separate pricing must be provided by the offeror for this part of the proposal in accordance with Section L.22.1 through L.22.3.

C.2 BACKGROUND

C.2.1 The District of Columbia (hereinafter “the District”), Metropolitan Police Department (MPD), seeks to continue operating an automated Traffic Safety Enforcement (ATSE) System, which will deter motorists from running the red light and from exceeding the posted speed limits, and when unsuccessful in deterring, record and cite the registered owners of motor vehicles which fail to comply with traffic light signals and posted speed limits. The District has operated an automated traffic safety enforcement program, using contracted services since 1999, and seeks to continue the current program and expand as new technologies and program initiatives become available.

C.2.1.1 The ATSE system includes all automated red light and radar equipment system required for the enforcement of red light running and speeding violations in the District of Columbia. The ATSE system shall send images of red light running and speeding violations, and the actual violation information to a processing application for the generation of a citation. The citation will be validated by the District, for issuance of a ticket.

C.3 REQUIREMENTS

C.3.1 The contractor shall operate, maintain and service existing hardware and system which include, at a minimum all computer interfaces, software, cameras, flash units, violation detection devices (i.e., loops), and wirings.

C.3.1.2.11 The contractor shall be responsible for routine and preventive maintenance of the ten (10) fixed pole radar units. Inoperable equipment shall be repaired or replaced by the contractor, at contractor expense, within forty-eight (48) hours after the District determines the equipment to be inoperable. Should it be determined that the damage is caused due to negligence by the District’s staff or vehicular accidents, the cost for repair or replacement shall be agreed upon as a reimbursable expense to the contractor.

C.3.2 MOBILE RADAR UNITS

The District’s ATSE system currently includes a total of twelve (12) mobile radar units. Ten (10) mobile radar units are police interceptors and two (2) units are vans. Six (6) of the police interceptors are equipped with cameras that take images using 35mm film, and four (4) of the police interceptors and the two (2) van are equipped with digital cameras.

C.3.2.10 The contractor shall be responsible for routine and preventive maintenance of the mobile radar equipment. Inoperable equipment (as determined by the District) shall be repaired or replaced by the next shift change by the contractor, at contractor’s expense. Should it be determined that damage is caused due to negligence by the District’s staff or vehicular accidents, the cost for repair or replacement shall be agreed upon by the District, and submitted by the contractor as a reimbursable expense.

C.3.3 RED LIGHT CAMERA UNITS

The District's ATSE system currently includes forty-nine (49) red light camera units. Thirty-nine (39) of the units take images using 35mm film, and ten (10) takes images using a digital camera unit.

- C.3.3.11 The contractor shall be responsible for routine and preventive maintenance of the red light equipment. Inoperable equipment shall be repaired or replaced by the contractor, at contractor's expense within forty-eight (48) hours after the District determines the equipment to be inoperable. Should it be determined that damage is caused due to negligence by the District's staff or vehicular accidents, the cost for repair or replacement shall be agree upon by the District, and submitted by the contractor as a reimbursable expense.

Section G of the solicitation provides additional information concerning the requirements and confirms that the contractor is to repair *or replace* inoperable ATSE equipment:

- G9.5.2 There are a total of Seventy-one (71) camera units in the red light camera, mobile radar unit and fixed pole radar unit. Twenty-Five (25) are digital camera units and forty-six (46) take images using 35mm film.

Of the twenty-five (25) digital camera units in the system, Nine (9) are on fixed pole radar units, Six (6) are on mobile radar units (which consist of four (4) police interceptors and two (2) vans, and Ten (10) are for the red light camera units.

a. If a digital camera unit fails to operate for a period of longer than two (2) calendar days due to the District's determination of contractor causes, the monthly invoice will be reduced by the District, by an amount calculated by dividing the monthly fee by the number of camera units being serviced from the third calendar day and each day thereafter until the camera is replaced or becomes operational.

b. If the forty-six (46) cameras which take images using 35mm film fails to operate for a period of longer than two (2) calendar days due to the District's determination of contractor causes, the monthly invoice will be reduced by the District, by an amount calculated by dividing the monthly fee by the number of camera units being serviced from the third calendar day and each day thereafter until the camera is replaced or becomes operational.

- G9.5.3 If any other components of the camera system such as a pole, (Ref: c.3.3.1) camera housing unit, (Ref: C.3.3.2), flash unit, (Ref: c.3.3.4), digital induction loop detectors, (Ref: C.3.3.5), and the electrical connections (Ref: C.3.3.6) fail to operate for any reason determined by the District to be within the contractor's control, for a period longer than fourteen (14) calendar days, the monthly invoice shall be reduced on a pro-rata basis on the fifteenth calendar day the unit is out of service and every calendar day thereafter until the entire camera unit is replaced or operational. (Ref: G.9.5.2 for calculation example).

The District specified the content it expected in the technical proposals which would be the basis for the evaluations of each offeror's technical approach. ACS alleges errors by the District in evaluating its project plan and downgrading its score because of deficiencies identified by the contracting officer and the technical panel regarding its plan. Section L provides in relevant part:

L.25.1 TECHNICAL PROPOSAL

L.25.1.1 Technical Approach

(a) Offeror's shall provide a Project Plan in the form of a bar chart that details how it proposes to meet all technical requirements as stated in Sections C.3 through C.16, including a Work Breakdown Structure, staff assignments, start and finish dates, and milestones. Offerors shall also provide a narrative or graphic presentation tied to the Project Plan that fully describes each milestone and details how the milestones will be met, and interdependencies with other milestones, risk management plan and contingency plan to ensure implementation of automated traffic safety enforcement services by September 1, 2006.

(b) Offerors shall provide a Management Plan detailing its organization structure and project organization, where the Offeror will be located, financial and accounting controls, quality assurance plan, production control plan, and the notice management plan.

(i) The Management Plan should describe the means by which Offerors will control and monitor work to ensure that system hardware maintained for users remains operational during regular working hours, the user experience with system applications remains positive, user requests are answered timely and successfully, the automated traffic safety enforcement system and its ancillary applications remain fully operational during regular working hours, and system modifications are made in accordance with user requirements and required timeframe.

(ii) The Management Plan shall describe the means by which requests for system changes or assigned tasks or work orders will be received and the means by which they will be monitored and tracked.

(iii) Offerors proposals shall be responsive to the requirements and be sufficiently clear and efficient and submitted in a timely manner. Offerors should not simply repeat RFP requirements but rather detail fully how the Offeror's proposed system and services, with necessary modifications will meet the stated requirements.

Technical factors included in Amendment No. A0007 are substantially more detailed than the generic technical factors found in the original solicitation:

M.4.1 TECHNICAL FACTORS

M.4.1.1 TECHNICAL APPROACH 0-40 POINTS

M.4.1.1.1 Offeror's proposal will be ranked on its ability to demonstrate how its proposed Project Plan will meet all technical requirements. Offeror has presented a detailed Project Plan, including a work structure breakdown, staffing plan and milestone schedule that demonstrates the Offeror's ability to meet the requirements stated in Sections C. **(0-20 points)**

M.4.1.1.2 Offeror's proposal will be evaluated and ranked on the quality of their Management Plan and how the plan details its organization structure, project organization and other required information under Section C. **(0-5 points)**

M.4.1.1.3 Offeror's proposal will be evaluated and ranked on the comprehensiveness and quality of its Management Plan. Offeror has provided an organization structure, project organization, and quality control plan detailing how the Offeror will effectively and efficiently control and monitor ongoing operation of the automated traffic safety enforcement support services. **(0-15 points)**

M.4.1.2 OFFEROR'S EXPERIENCE AND PAST PERFORMANCE 0-15POINTS

M.4.1.2.1 Past experience in providing automated traffic safety enforcement systems

Offeror's proposal will be evaluated and ranked on their ability to demonstrate its past experience providing automated traffic safety enforcement system processing systems similar to that defined in Section C to include imaging (Please reference Sections C.3.4.1), reporting (Please reference Section F), and interface with other systems (Please reference Section C.3.12.1). **(0-5 points)**

M.4.1.2.2 Past Performance

Offerors' will be evaluated and ranked on the quality of its past performance from responses obtained from its references, and its experience in providing similar services within a timeline similar to the timeline required in this RFP. **(0-10 points)**

M.4.1.3 QUALITY AND RETENTION OF PERSONNEL 0-10 POINTS

M.4.1.3.1 Experience with automated traffic safety enforcement system and managing high-volume, production-oriented operations on a similar basis as described in this RFP.

Offeror's proposal will be evaluated and ranked based on its ability to demonstrate its key personnel and management experience with automated traffic safety enforcement system services or related experience. Offeror's proposals will also be evaluated and ranked on the level of experience in managing high-volume, production-oriented operations and extent of project management experience of key personnel including knowledge of system applications and services. **(0-5 points)**

M.4.1.3.2 Ability to retain employees

Offeror's proposal will be evaluated and ranked on their ability to demonstrate the retainage of employees, ensure low turnover and ability to retain qualified personnel. **(0-5 points)**

M.4.1.4 SYSTEMS PERFORMANCE IMPROVEMENT**0-5 POINTS**

Offeror's proposal will be evaluated and ranked on their ability to demonstrate operational improvements and cost savings derived from the systems enhancements to the exiting automated traffic safety enforcement system.

In a meeting on March 13, 2006, ACS informed the District that ACS was the exclusive agent for the existing Gatsometer ATSE equipment, and that the District would need to protect Gatsometer's proprietary information, intellectual property, and trade secrets, which included Gatsometer's software, instructions, and operations manuals. According to the protest, the District informed the offerors that the District had no control over the software for the system. By Amendment A0010 dated May 22, 2006, the District informed prospective offerors that the contractor would be required to maintain the ATSE system, in spite of any exclusive distributorship that ACS may have with Gatsometer. According to ACS, Gatsometer informed the District in May, 2006, that ACS was the exclusive partner of Gatsometer in the United States and that their relationship would be continuing. (Protest, Ex. 5). Gatsometer further advised the District that it would not support any contractors other than ACS with "spare parts, training, intellectual property, equipment manuals or software." (*Id.*). The District's contract specialist, Darlene Harkins, had a telephone conversation with Andrew Noble of Gatsometer on May 19, 2006, in which Noble advised Harkins that Gatsometer would consider agreeing to work with a contractor other than ACS for the maintenance of the District's ATSE system so long as the new contractor was not a manufacturer of competing camera equipment. (AR Exs. 34; 33, ¶ 10). In a subsequent telephone conversation with Noble on July 24, 2006, Harkins attempted to confirm Gatsometer's willingness to deal with a contractor other than ACS but Harkins states that Noble this time said Gatsometer would not deal with any contractor but ACS as its United States representative. (AR Ex. 34).

ATS, ACS, and two other offerors, submitted proposals to the District by the May 24, 2006, proposal due date. ACS points out that its proposal details how it will maintain the existing ATSE equipment and that it is uniquely positioned to do the work, being both the incumbent contractor and the only firm in the United States authorized by Gatsometer (the cameras are actually manufactured by a firm called Robot), to maintain Gatsometer equipment.

ATS proposed not only to maintain the existing ATSE system but also to upgrade the ATSE equipment by initially replacing the Gatsometer software with its own software, and replacing 5 ATSE systems with its own Axis systems. ATS also proposed as part of its process improvements to replace all of the existing Gatsometer equipment with its own Axis equipment.

The contracting officer assigned a technical evaluation panel with ATSE technical expertise to review the proposals, score them, and transmit a consensus evaluation to her based on the technical criteria set forth in the RFP. The technical panel conducted its evaluation and submitted a consensus report to the contracting officer by letter dated June 5, 2006. The panel concluded that ATS had the best technical proposal but that ACS was rated only 4 points lower than ATS. (AR Ex. 15). The contracting officer conducted her own independent assessment of the proposals, rating ATS's technical proposal higher than ACS's proposal. (AR Exs. 16, 17, 24). Discussions were held on June 12 and June 14 with ACS and ATS followed by a request for best and final offers (BAFOs) which were submitted on June

15 and 16, 2006. (AR Ex. 24). By letter of June 20, 2006, the technical evaluation panel submitted to the contracting officer its consensus evaluation report regarding the proposals as supplemented by the BAFOs. (AR Exs. 23, 15). The panel raised ATS's consensus ratings for technical approach, experience and past performance, and quality and retention of personnel. The panel did not change its consensus rating for ACS. (AR Exs. 15, 23, 24). The contracting officer's independent assessment of the BAFOs resulted in an increase of 5 points in her rating of ATS under the quality and retention of personnel factor but no change in her rating of the ACS proposal. (AR Exs. 16, 17, 24). After evaluating the proposals as supplemented by the BAFOs, the contracting officer's technical rating summary shows ATS with an 8 point advantage for technical approach, while ATS and ACS had equal numerical ratings for experience and past performance, quality and retention of personnel, and system performance improvements. (AR Ex. 24). The contracting officer submitted affidavits explaining the evaluation and selection process, and her assessment that ATS had the better overall offer, considering the technical and price factors. (AR Exs. 33, 40). We have studied her analysis underlying her determination that ATS can perform the services required by the RFP, and we find that her determination is neither unreasonable nor arbitrary based on a review of the entire record.

The contracting officer prepared a Business Clearance Memorandum, dated June 29, 2006, recommending award of the contract to ATS, memorializing her evaluation of the proposals and her selection decision. She then submitted the contract package to the City Council for approval because the value of the contract exceeded \$1,000,000. The Council approved award of the contract to ATS on July 11, 2006. ACS filed its initial protest on July 25, 2006, alleging technical and price evaluation errors. On August 15, 2006, the District filed a motion to dismiss the protest on the ground that the protester really was asserting a solicitation impropriety and thus the protest was untimely being filed after the closing date for proposals. ACS opposed the motion on the ground that its protest raised issues concerning the evaluation and selection, rather than the terms of the solicitation itself. The Board orally denied the motion to dismiss and directed the District to file its Agency Report addressing the merits. The District filed its Agency Report on November 9, 2006. ACS filed comments on the Agency Report and a supplemental protest on November 22, 2006. ACS states that it based its supplemental protest on facts included in the District's Agency Report and accompanying exhibits. The District responded to the supplemental protest on December 12, 2006. ACS replied to the District's response on December 21, 2006. By Determination and Findings to Proceed ("D&F") dated December 13, 2006, the District determined that it had a compelling need to proceed with contract award, despite the protest. On December 20, 2006, the Chief Procurement Officer ("CPO") signed the Determination and Findings to Proceed with Award pending decision on the protest. On December 27, 2006, ACS timely challenged the D&F to proceed, alleging that the D&F does not provide substantial evidence that supports award to ATS. In addition, ACS asserts that the District has failed to meet its burden of establishing that the award to ATS will further an urgent or compelling need of the District. The District filed its reply to ACS's challenge on January 3, 2007.

DISCUSSION

A. The District's Motion to Dismiss for Untimeliness

The District asserts that ACS knew the grounds of its protests before the proposal due date of May 24, 2006. According to the District, ACS was required to file its protest when the contracting

officer refused to amend the solicitation to require the District to award a sole source contract to ACS. Therefore, according to the District, the protest is untimely because it was filed more than 10 days after ACS knew, or should have known, of the grounds for its protest. However, we think the District has not properly characterized ACS's grounds for protest. ACS simply does not argue in its protest that the solicitation should have been a sole source award to it. Rather, ACS argues that because of its incumbency and its being the exclusive agent for Gatsometer in the United States, it should have received the highest technical evaluation, and thus should have been awarded the contract. Further, there is no evidence that ACS learned of the proposed award to ATS before it received the notice of award on July 11, 2006.

The District argues that ACS's contention that the District improperly evaluated the ATS proposal to the detriment of ACS, is untimely because ACS failed to allege a specific date by which it learned of the facts underlying the allegation, and failed to establish the date and circumstances of its coming to know both about the allegedly improper rating of ATS for the Experience and Past Performance factor and about the adverse action by the District. The protest record adequately demonstrates that ACS first learned of the basis for this protest ground on July 11, 2006. Accordingly, we conclude that ACS timely filed its protests.

B. ACS's Challenge to the Determination to Proceed

The contract is for support and maintenance of the existing ATSE. In the D&F, the District asserts that providing for the enforcement of traffic speed regulations is a compelling and urgent requirement of the District government. According to the District, because the current contract could not be extended beyond January 5, 2007, and because the District could not allow the ATSE system to become idle (stating that the system has resulted not only in a reduction of the number of red light violations, but also a significant reduction in the number of deaths associated with motorists illegally entering protected intersections), the CPO determined that it is imperative that the contract be awarded to provide continual operations for the ATSE system. We deny the motion challenging the determination to proceed because the CPO sets forth a compelling need to continue with ATSE services.

C. ACS's Arguments that the District's Selection of ATS was Arbitrary and Unreasonable and Contrary to the Terms of the Solicitation

We now address, pursuant to D.C. Code § 2-309.03(a)(1), the merits of the protest grounds raised by ACS. In the original protest, ACS argues that an award to any offeror other than ACS would violate applicable statutes and regulations as well as the terms of the solicitation. The following introduction from ACS's supplemental protest fairly summarizes its contentions:

The cornerstone of the RFP was the requirement that offerors must demonstrate their ability to support and maintain the existing ATSE. The existing ATSE is the proprietary hardware and software of Gatsometer, and ACS, as the incumbent contractor, is the exclusive licensee of Gatsometer's products in North America. The RFP further provided that, if an offeror first demonstrated its capability to support and maintain the existing ATSE, then and only then would the District consider proposed "process improvements," which were worth up to five points in the overall evaluation

scheme (out of total possible score of 112).

The record shows beyond any doubt that the District's technical team and the Contracting Officer improperly elevated proposed process improvements from a minor potential factor under the RFP's evaluation scheme to the overarching factor in the actual evaluation of proposals. Instead of assigning ATS a low technical score that reflected its clear inability to meet the RFP's requirements to support and maintain the existing ATSE and assigning ACS a correspondingly higher technical score that reflected its demonstrated ability to meet those same requirements, ATS was awarded a higher score because of its promised process improvements. It is simply impossible to reconcile the District's evaluation of the proposals with the RFP's requirements and evaluation criteria.

This fundamental flaw in the procurement process permeated all aspects of the District's evaluation. For example, the RFP assigned the majority of the technical merit points to an offeror's proposal to support and maintain the existing equipment. ACS's vast experience with the Gatsometer equipment, as compared with ATS's complete inexperience with the Gatsometer equipment, reasonably should have resulted in ACS receiving a higher score. However, the District's improper application of the RFP's evaluation criteria resulted in ATS receiving the higher score. Similarly, the administrative record demonstrates that ACS's initially high scores for technical merit were downgraded when the process improvement evaluation factor was improperly injected into the evaluation. Further, whereas the District selected ATS based on its process improvements, the District failed to consider the cost of these improvements in its price and cost analyses. Because of the substantial cost of ATS's process improvements, the true cost to the District of award to ATS was never considered.

(Supplemental Protest, at 2-3). We address in order ACS's refined protest contentions, found in its supplemental protest.

1. Technical Evaluation of ACS's and ATS's Proposals

ACS alleges that the technical evaluations and scoring of ACS's and ATS's proposals were arbitrary and unreasonable based on ACS's vast superiority over ATS in its experience and ability to support and maintain the existing ATSE equipment. ACS repeatedly emphasizes that it is the incumbent contractor and the exclusive representative of Gatsometer's products in North America and thus is the only contractor capable of maintaining the existing ATSE equipment. ACS believes that it was unreasonable for the contracting officer and technical evaluation panel to rate ATS higher by 8 points in the technical approach evaluation factor unless ATS's process improvements were improperly considered under the technical approach factor.

We have carefully reviewed the record and conclude that the contracting officer did not violate law or the terms of the solicitation in rating ATS superior overall to ACS in the technical evaluation factors, including technical approach. The evaluation record prepared by the contracting officer and the technical panel might have been more specific and detailed, but, overall we are satisfied from our

review of the record that the contracting officer properly conducted her own independent analysis of the proposals, and we see no unreasonable or arbitrary conduct in her determinations on the technical or cost merits of the competing proposals.

The contracting officer noted in her Business Clearance Memorandum, which memorializes her evaluation and selection determinations, the following ATS proposal strengths: a well-documented response to the technical requirements, the details of the project plan were clear and well presented, extensive experience in automated traffic safety enforcement operations, experience in managing red light camera programs of comparable size and complexity, a readable Gantt chart, a comparable processing plant, contact information regarding other radar contracts, and an acceptable employee retention plan. The contracting officer noted ACS's strengths as follows: currently providing the services to the District as well as to other jurisdictions, responded to the solicitation requirements, submitted a Gantt chart, provided "information on how the equipment operation and maintenance would operate at new contract conception," and offered better process improvements. The following ACS weaknesses were noted: project plan was not detailed, did not demonstrate work structure, and "Gantt chart as well as details of how the operation and maintenance at new contract conception did not provide an additional level of information." While ATS's BAFO provided additional clarification on the experience, quality, and retention of personnel – resulting in an overall increase in ATS's technical score by 5 points, ACS's BAFO was not evaluated as improving its overall technical rating. The contracting officer's assessment is supported by similar analysis found in the technical evaluation panel's consensus findings. In addition, the contracting officer's supplemental declaration provides ample support for her conclusion that ATS could perform the contract services, without assistance from ACS or Gatsometer.

ACS urges that it is unreasonable and arbitrary for the District to have found a technical advantage in ATS's offer to outweigh the 7.7 point cost advantage for ACS, when considering that ACS is the incumbent contractor and exclusive representative of Gatsometer. We agree with the District that the protest record adequately supports sustaining the contracting officer's finding that ATS provided the best technical offer and that ATS could perform as required by the solicitation. Although ACS makes much of Gatsometer's refusal to support any contractor but ACS, ATS provided in its proposal a plan to service the existing ATSE equipment, repair or replace inoperable equipment, and use either its own depot Gatsometer/Robot equipment or its own Axis equipment as required. As the District correctly observes, the solicitation simply does not prohibit an offeror from replacing inoperable equipment with functionally equivalent equipment, even if the equipment manufacturer is different. Moreover, ACS has not persuaded us that the solicitation requires that specific Gatsometer equipment must be retained.

ACS complains that the technical evaluation panel and the contracting officer improperly gave higher ratings to ATS for the technical approach factor based on ATS's plan to replace the existing Gatsometer and Robot equipment with ATS's Axis equipment. In support of its position, ACS argues that it was only proper to consider the technical merit of ATS's proposal to replace the existing equipment with the ATS Axis equipment under the process improvement factor, but not the technical approach factor. We do not agree. As part of its maintenance and support services, ATS, like the other offerors, had to repair *or replace* inoperable equipment under CLIN 2. Quite apart from a consideration of the benefits of a complete retrofit of all equipment under the process improvement factor, it was certainly not contrary to the RFP evaluation factors for the contracting officer and the technical panel to

consider technical approach advantage to having the existing older equipment replaced as it became inoperable with what they considered to be more technically capable equipment, from the standpoint not only of performance improvements but also from the standpoint of future maintenance and operational servicing improvements.

ACS argues that neither the contracting officer nor the technical panel adequately documented their evaluation. Although the record might have been better documented with more detailed strengths and weaknesses, we find the documentation adequate to support the evaluations of the proposals under the RFP evaluation factors.

2. ACS's Technical Approach and its Project Plan

ACS argues that the downgrading of its proposal based on its purported failure to include a project plan was arbitrary and unreasonable. ACS points to the evaluation panel note in its consensus report that ACS's "Project plan narrative not provided in support of the Gantt chart." ACS also urges that 4 of the 5 technical evaluators changed their general technical approach assessment of ACS on the basis of improper influence on the part of the panel's chair. ACS stated in its proposal under the project plan section (AR Ex. 13):

ACS is uniquely positioned as the District's existing ATSE vendor. All required field service staff, event processing staff, management team, and all required facilities are in place and operating the District's ATSE program today. With ACS, there are no new activities to schedule nor is a Project Plan required as the program is fully operational today. . . .

In its BAFO, responding to the contracting officer's request for project plan narrative, bar chart, details, work breakdown structure, staff assignments, milestones, and plans, ACS provided additional information as well as a project plan by separate fax apparently after the BAFO submission. However, the contracting officer and the technical panel did not increase their technical approach rating of ACS based on the BAFO submission. The panel noted that the ACS's bar chart was unreadable and that the narrative was the same as that found in the original proposal. The contracting officer noted that the "Gantt chart as well as details of how the operation and maintenance at new contract conception did not provide an additional level of information." (AR Ex. 24). On the other hand, ATS's initial proposal and BAFO were given good ratings for readability and detail. On the record, we see no basis for concluding that the evaluations of ATS and ACS on the project plan rendered the overall technical approach ratings unreasonable or arbitrary.

3. The District's Evaluation pursuant to the RFP Evaluation Criteria

ACS points to four facts as proving that the District evaluated and scored ACS's and ATS's proposals inconsistently with the evaluation and selection criteria in the RFP. ACS asserts that the District improperly considered system process improvements in ATS's proposal (conversion of the Gatsometer equipment to ATS Axisis equipment) when evaluating ATS's and ACS's proposals under the technical approach factor. We do not believe that ACS properly distinguishes between ATS's maintenance and service proposal, which includes some initial ATS equipment replacement and ATS's

system process improvement proposal to replace all Gatsometer equipment. ACS urges that the technical approach factor meant considering the quality and comprehensiveness of the offeror's proposal to support and maintain the existing equipment. But, as discussed earlier, maintaining and servicing existing equipment, as defined in the RFP, is not limited to maintaining and servicing indefinitely the Gatsometer equipment. The RFP contemplated a contractor maintaining and servicing not only the initial Gatsometer equipment, but also newer equipment that a contractor could put in operation to replace inoperable Gatsometer equipment. Also, ATS proposed some initial replacements of Gatsometer equipment with ATS equipment as part of its fixed-price proposal. We agree with ATS that perceived technical advantages with ATS's maintenance upgrades could properly be considered under the technical approach factor, and not as part of its systems performance improvement proposal. We see no basis for concluding that the District improperly evaluated the proposals on criteria differing from those stated in the RFP.

4. Whether the District should have rejected ATS's Proposal

Continuing its earlier argument, ACS argues that the District should have rejected ATS's proposal due to ATS's alleged failure to propose a plan to support and maintain the existing ATSE equipment. We do not find error in the contracting officer's determination that ATS is capable of supporting and maintaining the existing ATSE equipment. ATS's proposal indicates that ATS has access to spare parts needed to repair the District's existing equipment, whether from its own sources or from decommissioning some of the Gatsometer equipment as part of an initial replacement. Further, as described earlier, the solicitation does not prohibit a contractor from replacing inoperable existing equipment with new equipment from another manufacturer. The contracting officer carefully considered ATS's ability to fulfill the RFP requirements, concluding that ATS was capable of maintaining the ATSE equipment. We see no legal basis for rejecting that conclusion.

5. The District's Cost Analysis and Price Evaluations

ACS argues that the District cost analysis and price evaluations were defective because the District failed to consider the proposed price for ATS's process improvements and therefore the true cost to the District of an award to ATS. ACS starts with the premise that the ATS proposal contemplated a complete conversion of all Gatsometer equipment to ATS equipment, and concludes that the District should have included the process improvements pricing in ATS's proposal in arriving at an evaluated price for ATS's proposal. The problem with ACS's argument is that it ignores that some initial replacements were included in the ATS's fixed price proposal and replacement of inoperable equipment (not due to negligence by the District's staff or vehicular accidents) would also be covered by ATS's fixed-price proposal. (*See* AR Ex. 40 ¶ 12). The District properly evaluated the price by excluding the cost-reimbursable items under ATS's process improvement recommendations. Accordingly, we deny this basis of the protest.

6. District's RFP Price Evaluation to include Option Year Prices

ACS asserts that the District's failure to include option year pricing in the price evaluation caused the overall evaluation differential to change from 7 points in favor of ACS to 8 points in favor of ACS, resulting in a tie between ACS and ATS when computing the overall technical plus price

evaluation scores. The District admits that the price evaluation incorrectly omitted option year prices but that the corrected price evaluation score shows ACS with 7.7 points, leaving ATS an overall score of 0.3 points more than ACS. The contracting officer states that the change in pricing would not change her overall assessment that the recommended award to ATS was the most advantageous to and in the best interest of the District. (See AR Ex. 40 ¶ 10-11). We see no legal error in the contracting officer's conclusion.

7. Evaluation of ATS's Experience and Past Performance

ACS argues that because ATS has no experience in maintaining and operating Gatsometer equipment, the contracting officer's evaluation of ACS and ATS and equivalent scoring of both proposals was arbitrary and irrational. ACS argues that ATS has "virtually no experience in maintaining and operating ATSE systems." ACS asserts that the two ATS employees formerly employed by ACS had no direct involvement with the District's ATSE program. The contracting officer points out that ATS has supported other state and municipal photo enforcement programs which initially had Gatsometer equipment, that ATS had a business relationship with a company that supplied spare parts for Gatsometer equipment, and that it had certified Robot camera technicians on its team to operate, maintain, and service the existing cameras. (AR Ex. 40). Based on the information provided to the District during the proposal phase, we conclude that ACS has not shown that the evaluation of experience and past performance was unreasonable or arbitrary.

CONCLUSION

For the reasons discussed above, we deny ACS's initial and supplemental protests.

SO ORDERED.

DATED: April 6, 2007

/s/ Warren J. Nash

WARREN J. NASH

Administrative Judge

CONCURRING:

/s/ Jonathan D. Zischkau

JONATHAN D. ZISCHKAU

Chief Administrative Judge

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

SYSTEM "42" INC.)	
	)	CAB No. P-0751
Under Solicitation No: DCAM-2007-B-0006)	

For the Protester, System "42" Inc.: Aniema Udofa, President, *pro se*. For the District of Columbia Government: Howard Schwartz, Esq., and Talia S. Cohen, Esq., Assistant Attorneys General.

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

OPINION

Filing ID 14517956

System "42" Inc., the protester, has challenged a contract award to Garcete Construction Company for construction of the Ward One Senior Wellness Center, on the ground that Garcete is not capable of performing the construction work. The District has filed a combined motion to dismiss and Agency Report, arguing that System "42" lacks standing to protest because it is not certified as a small business enterprise ("SBE") in this SBE set-aside procurement, and that on the merits, Garcete was properly awarded the contract. We conclude that the solicitation was an SBE set-aside procurement and that System "42" has not demonstrated that it was properly certified as an SBE under District of Columbia law. Accordingly, we dismiss the protest because System "42" lacks standing.

BACKGROUND

On November 29, 2006, the Office of Contracting and Procurement ("OCP"), on behalf of the Office of Property Management ("OPM"), issued IFB No. DCAM-2007-B-0006, for the construction of a new Ward One Senior Wellness Center. There is a dispute between the parties concerning whether the solicitation is an SBE set-aside or open market procurement. Centered at the bottom of the title page for the specifications, there is text in bold font which reads: "OPEN MARKET." However, at page 1 of the IFB, in block 6, the text "SBE Set-Aside" is checked while the text "Open Market with set aside [f]or LSDBE subcontracting" is not checked. Section B.2, entitled "Designation of Solicitation for the Small Business Set Aside Market Only", at page 3, states:

This Invitation for Bids is designated for certified small business enterprise (SBE) bidders only under the provisions of the "Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005" (the Act), Title II, Subtitle N, of the "Fiscal Year 2006 Budget Support Act of 2005", D.C. Law 16-33, effective October 20, 2005, as amended.

An SBE must be certified as small in the procurement category of Building Construction in order to be eligible to submit a bid in response to this solicitation.

(Agency Report ("AR") Ex. 1). System "42" notes in its protest that OCP's advertising for the solicitation in the Washington Times Classified Section and at the OCP website both identify the procurement "Market Type" as "Small Business Enterprise Set-Aside." (System "42" Protest, at 1; AR Ex. 10, BCM ¶ 4.2). System "42" never raised any question of an ambiguity in the solicitation being an open market or set-aside procurement prior to bid opening. OCP opened five bids on January 5, 2007, with bid prices as follows:

<u>Bidder</u>	<u>Price</u>
CNA	\$1,707,000
Monument	\$4,351,000
System "42"	\$4,995,000
Garcete	\$5,200,000
FEI	\$6,057,000

(AR at 4).

FEI, the highest bidder, filed a protest on January 10, 2007, docketed as CAB No. P-0747, challenging the four lower bids. On January 23, 2007, Garcete filed a protest of the same procurement, docketed as CAB No. P-0749. Thereafter, OCP determined the bids of System "42" and CNA to be nonresponsive because neither provided proof of its certification as an SBE by the District of Columbia Small and Local Business Opportunity Commission ("SLBOC") as required by the IFB. The District awarded the contract to Garcete after determining that it was properly certified and was a responsive and responsible bidder. On February 20, 2007, we dismissed FEI's protest because FEI voluntarily requested dismissal and Garcete's protest was moot in light of the District's award to it. On February 23, 2007, System "42" filed the instant protest. The District filed its combined motion to dismiss and Agency Report on March 15, System "42" filed a one-page response on April 3, and the District filed a reply on April 13, 2007.

DISCUSSION

Considering the solicitation in its totality, the only reasonable interpretation is that the solicitation was an SBE set-aside in the procurement category of building construction. Section B.2 clearly places the solicitation in the SBE set-aside market. Block 6 found on page 1 of the solicitation confirms the fact of the SBE set-aside, as do the newspaper and website advertisements noted by System "42" in its protest. The "Open Market" label found on the title page of the specifications must be seen merely as a typographical error in light of the specific solicitation provisions defining the solicitation as an SBE set-aside procurement. System "42" also argues that it is a "small business" in accordance with the United States Small Business Administration's "Small Business and Size Guidelines." This argument misses the mark because federal SBA certification is not determinative of District of Columbia SBE certification by the SLBOC. These certification systems are governed by their own legislation and regulations. System "42" has provided no evidence that it was, at the time of bid opening, certified by the District's SLBOC as an SBE in the procurement category of building construction. System "42" also relies on certifications it says it has with the Maryland Department of

Transportation, Prince George's County Minority Program, and the Metropolitan Washington Airport Authority. These certifications are not relevant to whether System "42" is an SBE (certified by the District's SLBOC) in the procurement category of building construction. As there is no indication that System "42" was so certified as a District SBE in the appropriate procurement category, it was not eligible to bid on this set-aside procurement, and therefore lacks standing to protest. *See M&G Services, Inc.*, CAB No. P-0652, May 10, 2002, 50 D.C. Reg. 7419. Accordingly, we dismiss the protest for lack of standing.

CONCLUSION

For the reasons discussed above, we dismiss the protest of System "42" for lack of standing.

SO ORDERED.

DATED: April 17, 2007

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

HOOD'S INSTITUTIONAL FOODS, INC.)
) CAB No. P-0750
Under Solicitation No. RFQ 308282)

For the Protester, Mr. Lenward C. Hood, pro se. For the District of Columbia Government: Howard Schwartz, Esq., and Talia S. Cohen, Esq., Assistant Attorneys General.

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

OPINION DENYING PROTEST

Filing ID 14576967

Hood's Institutional Foods, Inc. ("Hood"), the protester, has challenged a purchase order awarded to J&K Distributors, Inc. ("J&K") for the warehousing and delivery of various foods, on the grounds that J&K's certification as a small business enterprise ("SBE") is improper, and that the contracting officer erred in identifying the lowest price quotation without considering various other economic factors. The District has filed an Agency Report, arguing that there are no exceptional circumstances to justify Board review of the SBE certification, and that the contracting officer's price determination was proper and consistent with the request for quotations ("RFQ"). On the unrebutted record presented by the District, we find a reasonable basis for the award of the purchase order to J&K. Accordingly, we deny the protest.

BACKGROUND

On November 17, 2006, the District issued RFQ No. 308282 on behalf of the District of Columbia State Education Office for a contractor to provide dry, cooler, and freezer storage (warehousing) and distribution of indefinite quantities of dry products, including approximately 36,000 pounds of chicken products and other commodities requiring freezing or refrigeration. (Agency Report ("AR") at 3; AR Ex. 1). Pursuant to D.C. Code § 2-218.44 (Supp. 2006), this RFQ was issued only to companies certified by the Small and Local Business Opportunity Commission ("SLBOC") (or its predecessor, the Local Business Opportunity Commission) as small business enterprises ("SBEs") since section 2-218.44 requires that purchases of less than \$100,000 must be set aside for SBEs, absent certain exceptions not relevant here.

Pursuant to the RFQ, the reply date for submission of quotes was November 22, 2006, and Hood and J&K timely submitted quotes. (AR Exs. 1, 2). Based on the quotes submitted by Hood and J&K, the District determined that J&K's price was the lowest price. (AR Ex. 7). In a price analysis memorandum dated December 4, 2006, the contract specialist determined that by comparing minimum quantities, Hood's quote was 63 percent more than J&K's quote for food pickup services and 34 percent more than J&K's for delivery services. (AR Ex. 7). On December 5, 2006, the District issued Purchase Order No. PO207851 to J&K. (AR Ex. 9).

On December 21, 2006, Hood misfiled a protest with the District's Chief Procurement Officer ("CPO") of the award to J&K, arguing that J&K should not have been found to comply with the local, small, and disadvantaged business enterprise certification requirements because J&K's warehousing operations allegedly are carried out predominantly in Maryland, not the District. On December 29, 2006, Hood filed a supplemental protest with the CPO, alleging that the District failed to "factor in the economic differences between a warehouse storage facility located in the District of Columbia and a storage facility located in another jurisdiction." Rather than immediately forwarding the misfiled protests to the Board, the contracting officer responded to the December 21 protest by letter of January 8, 2007, stating that the District properly awarded the contract to J&K, that J&K's SBE certification was verified as current, and that if Hood wished to challenge the certification, it should contact the SLBOC's enforcement division. On January 15, 2007, Hood sent a letter to the CPO, claiming that the contracting officer's response did not address Hood's challenge to J&K's responsibility and responsiveness, the storage location issue, and the failure to evaluate the economic factors. By letter of January 18, 2007, the contracting officer transmitted the protest correspondence to the Board, which the Board received on January 31, 2007. The Board docketed the filing as CAB No. P-0750.

On February 28, 2007, the District filed an Agency Report, arguing that Hood had not alleged any exceptional circumstances justifying the Board's review of an SLBOC certification determination. Also, the District responds that the contracting officer properly considered only the bidders' prices and not other "economic factors" such as warehouse location and District tax revenue. Hood has not responded to the Agency Report.

DISCUSSION

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

We conclude that there is no basis in the law or the facts here to justify our reviewing the SLBOC/LBOC certification of J&K as an SBE. Only in exceptional circumstances will we consider such a review, such as where the certifying agency has abdicated its function and we are left with no choice but to review the certification so as to protect the integrity of the procurement process and fulfill our statutory obligation under D.C. Code § 2-309.08(d) of deciding whether an award complies with applicable law, regulations, and terms and conditions of the solicitation. *Capitol Paving of D.C., Inc.*, CAB No. P-0736, Oct. 12, 2006, 54 D.C. Reg. 2036, 2040-41; *Urban Service Systems Corp.*, CAB No. P-0714, Nov. 15, 2005, 54 D.C. Reg. 1973, 1978; *C&D Tree Service, Inc.*, CAB No. P-0440, Mar. 11, 1996, 44 D.C. Reg. 6426, 6433-39. Those exceptional circumstances are not present here. Such challenges to a certification are properly addressed to the SLBOC through the statutory mechanism provided in D.C. Code § 2-218.63. We find no error by the contracting officer in relying on the certification made by the SLBOC in this case.

Hood's argument, that the contracting officer failed to consider other "economic factors" in the price evaluation, is not well taken. Warehouse location and presumed tax revenue to be earned by the District are not price evaluation factors under the RFQ. Hood has not demonstrated that the contracting officer's price evaluation was flawed in any respect. To the extent that Hood's other allegations can be considered challenges to J&K's responsibility or responsiveness, we conclude there was no error by the

contracting officer in determining J&K's quote to be responsive and J&K to be a responsible bidder.

Accordingly, we deny the protest.

SO ORDERED.

DATED: April 23, 2007

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

HORTON & BARBER CONSTRUCTION SERVICES, LLC)
) CAB No. P-0752
Under IFB No. DCHA-2007-B-0002)

For the Protester: Latif Doman, Esq., Doman Davis LLP. For the District of Columbia Government: Howard Schwartz, Esq., Senior Assistant Attorney General, and Talia S. Cohen, Esq., Assistant Attorney General.

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

OPINION

Filing ID 15020818

Horton & Barber Construction Services, LLC, has protested the District’s nonresponsibility determination regarding a solicitation to provide comprehensive landscape maintenance and management services for approximately 450 acres of land at 72 recreational centers and facilities in the District. The contracting officer determined Horton & Barber to be nonresponsible due to a failure to show inter alia financial capacity, lack of adequate staff, equipment, and facilities to perform the work, and inadequate references of comparable prior work. Horton & Barber argues that it has adequate financial resources, staff, equipment, and facilities and that the District did not provide it sufficient time to make a more complete response to the request for responsibility data. We sustain the nonresponsibility determination on the record presented, concluding that Horton & Barber has not demonstrated that the contracting officer’s determination lacked a reasonable basis. On the issue of adequate time to respond, Horton & Barber never asked the contracting officer for more time to supplement its responsibility submission and thus we see no error by the contracting officer in making her determination based on the data provided by Horton & Barber. Because the contracting officer did not violate either the law or the terms of the solicitation, we deny the protest.

BACKGROUND

On January 22, 2007, the Office of Contracting and Procurement (“OCP”) issued in the open market (with a 35 percent set-aside for LSDBE subcontracting) IFB No. DCHA-2007-B-0002, on behalf of the Department of Parks and Recreation (“DPR”), for a contractor to provide comprehensive landscape maintenance and management services for approximately 450 acres of land at 72 recreational centers and facilities in Wards 1 through 8. (Agency Report (“AR”) Ex. 1). Bidders were to bid fixed-unit prices that would result in a requirements contract with total amounts based on estimated quantities of work. (AR Ex. 1). The bid opening date was February 5, 2007. Six bidders responded with bids and OCP performed an initial bid tabulation based on an evaluation of bid prices that was later determined to be erroneous. The initial bid tabulation showed the following order of evaluated prices from lowest to highest: Horton & Barber, IIU

Consulting, Community Bridge, Inc., RBK Landscaping Construction, KC Home Improvement, and Turf Center Lawns. (AR at 3; AR Ex. 5). The OCP contract specialist and the contracting officer's technical representative made site visits to the facilities of Horton & Barber, IIU Consulting, and Community Bridge. (AR Ex. 6).

During the evening of February 8, 2007, OCP faxed Horton & Barber a letter requesting responsibility data by noon on February 9. (AR Ex. 11). The contracting officer requested financial data consisting of the following "certified" documents: balance sheet, most recent income statement, cash flow statement (and any additional notes, explanations, or disclosures relating to the financial statements provided), auditor or reviewer report (if the financial statements provided had been audited or reviewed), written evidence that the company is being given favorable consideration for a surety bond, financial rating from Dun and Bradstreet for the last two years, and a list of any back taxes owed. (AR Ex. 11). The letter also requested current and past production data including a listing of current contracts similar in size, scope, and dollar value to the services to be provided under the solicitation; employee/staffing data; data reflecting tools, equipment, vehicles, and facilities; written statements or commitments concerning financial assistance and subcontracting arrangements; insurance; and analysis of operational procedures. (*Id.*).

On February 9, Horton & Barber responded to the request by furnishing a package consisting of an undated cover letter and approximately 100 pages. (AR Ex. 12). The cover letter merely states: "[Horton & Barber] inadvertently did not include our Tax, First source, and EEO compliance information in our bid for Contract DCHA-B-2007-0002. Please find the enclosed documents." (*Id.*). In another undated cover letter, which Horton & Barber says accompanied the responsibility package, Mr. Barber states: "Horton & Barber . . . is please[d] to submit our responsibility information to the District [A]ttached is [our] response to the information received via fax at 7:58 p.m. February 8 Please [call] my office . . . if there [are] any further questions or information needed." (Response to Agency Report, Ex. D). The responsibility documents submitted by Horton & Barber do not seem to be well organized, lacking an index and only partial indications of which documents were meant to respond to the various categories of responsibility data requested by the contracting officer. The Horton & Barber documentation is comprised of the following: a first source employment agreement, a 1-page employment plan that is for the most part blank, a tax certification affidavit, EEO forms, employment data form, subcontract summary form, partial corporate and financial information, information relating to tools, equipment, vehicles, and facilities, current and past contracts, subcontract information, employee/staffing data, written commitments concerning financial assistance, an analysis of operational procedures, insurance, and information regarding other contracts.

Horton & Barber's financial documentation consisted of 3 pages: a 1-page profit and loss statement for the year ended December 31, 2006, a 1-page balance sheet for the year ended December 31, 2005, and a 1-page statement of earnings for the year ended December 31, 2005. Although the latter two documents contain a note referring to an "independent accountant's report and notes to compiled financial statements", there are no such reports, notes, or other statements in the package submitted by Horton & Barber. There is no reliable information indicating that these three financial documents in the record were prepared by an independent

accountant. The profit and loss statement for 2006 shows net income of \$230,678 on gross revenue of slightly more than \$3,300,000. The approximate \$3,100,000 in expenses included expenses of almost \$846,000 for "trucking" and \$756,000 for "dumping." The 2005 "statement of earnings" shows net income before taxes of \$276,333, but a net increase to retained earnings of less than \$100,000, on gross 2005 revenue of \$3,195,000. Expenses include \$657,000 in "trucking" and nearly \$614,000 for "consultants." (AR Ex. 12).

Regarding employees, there is a document entitled "Employment Data" which shows 4 "officials and managers", 1 "office and clerical", 2 "craftsman (skilled)", 5 "operative (semi-skilled)", for a total of 12 employees. On a subsequent page, entitled "Projected Goals and Timetable for Future Hiring", hiring of 10 craftsmen and 2 laborers is indicated. Under the category for "tools/equipment, vehicles, and facilities", we find reference to: a November 2006 rental agreement for a half acre lot in Upper Marlboro, 5 illegible certificates of title for vehicles, and a 2-page document dated January 31, 2007, apparently invoicing Horton & Barber for approximately \$50,000 for certain pieces of equipment.

The contracting officer provides the following summary of two site visits of Horton & Barber's facilities conducted by the contract specialist and contracting officer technical representative:

DPR and OCP visited two sites for Horton and Barber. There were no fax machines, phone lines or computers at the sites visited. The first site was a secluded and vacant lot void of any facilities or improvements other than a muddy, gravel lot. The contractor had (3) pickup trucks on site and an enclosed trailer attached to one of them. None of the trucks had signage. DPR/OCP observed that there was no building to keep the equipment out of the elements and it appeared as if the site had been created recently, as there were new border markers staking out the property. There were several ride-on mowers, but upon closer observation, the mileage on the odometers was high. Horton and Barber had no "zero-turn" and walk-behind mowers, one backpack blower and three "weed-eaters."

On the second site visited, the observation team members observed several parked passenger buses, none of which appeared to be in operating condition. The team members believed the site to be a junkyard. There was no signage that identified the name and type of business.

At the site, there was one trailer with several walk behinds mowers. The mowers appeared to be in an advanced age. DPR/OCP only saw one "weed-eater". This equipment, assuming it ran at all, was adequate for one crew. Based on their site visit, DPR/OCP concluded that the equipment . . . that was shown was not adequate to provide the services required for this IFB.

(AR Ex. 6). On February 21, 2007, the contracting officer determined Horton & Barber to be nonresponsible. (AR Ex. 7). The determination provides in relevant part:

1. Lack of Financial Capability - Balance Sheet, Income Statement, Profit or Loss Statements, Dun & Bradstreet Business Reports, and other documentation of financial capability.

The requested information was analyzed by the OCP Cost Price Analyst. Based on the Financial Statement Analyses dated 02/12/07, attached to this D&F, the Contracting Officer determined that Horton and Barber does not have the financial capability for a project of this magnitude.

....

5. Organizational and Operational Experience - Contractor's time in business and experience with similar (size and dollar value) performance requirements. Based on the information submitted the Contracting Officer determined that Horton and [Barber has] had no similar size projects within the last three years.

....

7. Production Equipment, Supplies, and Facilities - Government estimate provided by DPR with consideration for any agreements providing the Contractor the ability to access the needed equipment or supplies. . . . The Contracting Officer directed the Contract Specialist and the COTR to make a site visit of the three lowest bidding vendors. The site visit, which is further detailed below, showed that Horton and Barber have insufficient equipment at their sites to service this contract. An inspection of the Horton and Barber sites by the Contract Specialist and the COTR found that they did not have adequate equipment, as specified by DPR in the specification list shown below, to perform the services required in this contract. . . .

8. Evidence of Obtaining Performance Bond - All bidders were asked to obtain a performance Bond. Horton and Barber submitted a letter from Infinity Surety stating that a Bond could be obtained for Landscaping (Design, Fertilizing and Planting), but not for grounds maintenance or tree trimming services. Based on this information the Contracting Officer determined that Horton and Barber could not comply with this requirement.

In the business clearance memorandum, the contracting officer summarized the nonresponsibility determination as follows:

Based on the site visits and the financial statement analyses, it was determined that Horton and Barber failed to satisfactor[ily] meet the requirements of the solicitation for the following reasons:

Horton and Barber does not have sufficient equipment to perform the landscaping requirements of the contract and needs the assistance from a subcontractor to do so. However, their subcontracting plan, as submitted, is not responsive to the requirements of the IFB and does not adequately address these issues.

Horton and Barber identified a specific area on a vacant lot as the space that would be utilized for their equipment, rather than an existing, stocked and dedicated facility.

OCP asked Horton and Barber to provide evidence of being eligible to obtain a performance Bond. They submitted a letter from Infinity Surety stating that a Bond could be obtained for Landscaping (Design, Fertilizing and Planting) but not for grounds maintenance or tree trimming services - as specified in the IFB.

The OCP Cost Price Analyst analyzed Horton and Barber's financial statements. H&B provided a profit and loss statement dated December 31, 2006 and a balance sheet for the year ending on December 31, 2005. A review of the 2005 Balance Sheet (which is outdated) revealed only \$18,617 in cash.

Staffing levels did not appear to be sufficient to fulfill the requirements of the contract.

Horton and Barber submitted the lowest bid but price but it is not feasible or reasonable when compared to the government estimate and the other bidders' pricing. . . .

(AR Ex. 6). On February 21, 2007, by a Determination and Finding for Contractor Responsibility, the contracting officer determined Community Bridge a responsible bidder. (AR Ex. 8).

On March 5, 2007, Horton & Barber filed the instant protest challenging the District's determination of nonresponsibility. By a March 15, 2007 determination and findings to proceed with award, OCP determined that it was in the best interest of the District to proceed with award of the contract while the protest is pending. On March 19, 2007, the District awarded the landscape and maintenance contract, Contract No. DCHA-2007-C-0002, to Community Bridge.

On March 26, 2007, the District filed its Agency Report, arguing in support of the nonresponsibility determination that Horton & Barber did not have the financial capability for a project of this size, did not meet DPR recommended staffing levels, did not provide the District with three references of work of similar size and scope, did not have the necessary equipment to perform the contract, and failed to meet the mandatory 35 percent set-aside for LSDBE subcontracting as required by the IFB.

On or about March 30, 2007, OCP discovered that section B, CLIN 3, of the solicitation contained an incomplete format for calculating the total estimated amount of the bid extensions. OCP did not discover the problem until March 30, 2007. Solicitation section B, CLIN 3, grass cutting, reads as follows:

Turf Management and Maintenance Services As Described in C.3.2 through C.3.2.4	UNIT Per acre	PRICE PER UNIT \$_____	ESTIMATED QUANTITY 450 Acres	TOTAL ESTIMATED AMOUNT \$_____
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From the table set forth above, a bidder must bid a price per acre and the acre price would then be multiplied by 450 acres for the total estimated amount of CLIN 3. In initially tabulating the bids for CLIN 3, OCP used the price for performing *one cut* of the 450 acres and compared the total of all CLINS for the base and option years to establish the lowest to the highest bid prices. However, on or about March 30, 2007, OCP discovered that the correct method of establishing the lowest to the highest bid prices would require OCP to “extend” each total bid for CLIN 3 by the estimated number of cuts for the first year of the contract (20 cuts), which would require OCP to multiply the total amount for cutting 450 acres by the estimated 20 cuts for the first year of the contract and recalculate the option years accordingly. When OCP revised the bid tabulation based on 20 cuts, the order of the lowest to the highest bidders changed, but Horton & Barber remained the lowest priced bidder. (District’s April 20, 2007 Supplement to the Agency Report and Reply to Horton & Barber’s Response to the Agency Report, at 3-4; AR Ex. 13). The corrected bid prices and evaluated prices for the six bidders are as follows:

Bidder	Bid Price for Base Year and Four Option Years (Estimated Amounts)	Evaluated Bid Price
1. Horton & Barber	\$7,794,019.50	\$6,858,737.16
2. IIU Consulting	\$10,217,403.85	\$9,359,141.93
3. RBK Landscaping Construction	\$11,771,969.58	\$10,359,333.23
4. Turf Center Lawns	\$12,200,900.00	\$12,200,900.00
5. Community Bridge	\$13,385,668.60	\$12,342,925.02
6. KC Home Improvement	\$15,119,490.00	\$14,907,817.14

(AR Ex. 13). The contracting officer reevaluated the remaining order of bidders, and ultimately concluded that the three low bidders, including Horton & Barber, were nonresponsible, while the fourth low bidder withdrew its bid, leaving Community Bridge, the awardee, as the lowest

responsible bidder. (District's Supplement to the Agency Report; District's Agency Report in CAB No. P-0753 (RBK Landscaping Protest)).

DISCUSSION

We exercise jurisdiction over this protest pursuant to D.C. Code § 2-309.03(a)(1).

Horton & Barber asserts that it was unreasonable for the contracting officer to require it to respond with responsibility data within 17 hours (*i.e.*, February 8 at about 7:30 p.m. to February 9 at 12 noon). (Response to Agency Report, at 2-3). The District replies that Horton & Barber did not object to the expedited response time and the contracting officer acted reasonably in basing her nonresponsibility determination on the data actually provided by Horton & Barber. We see no basis for setting aside the nonresponsibility determination. Horton & Barber made no objection to the response time – nor requested additional time to respond – and thus the contracting officer could properly assume that the contractor had no additional information it wished to provide. If Horton & Barber had asked for more time, there is no reason to believe that the contracting officer would not have allowed Horton & Barber to supplement its response in light of the short request time.

Horton & Barber argues that it provided financial data showing solvency and cash reserves. We sustain the contracting officer's determination that Horton & Barber did not demonstrate adequate financial capacity to perform the contract. The financial statements were not current and complete, rendering it impossible for the contracting officer to have a reasonable understanding of the company's financial position. For a contract of the size at issue here, the contracting officer reasonably doubted the company's ability to finance the significant work required by the solicitation.

Horton & Barber also complains that the contracting officer used "secret criteria" in rendering the nonresponsibility determination and should not have found it nonresponsible with regard to bonding, equipment, facilities, and staffing capacity. We conclude that Horton & Barber has not demonstrated that the contracting officer violated law or the terms of the solicitation. The contracting officer properly analyzed the factors for making a determination on responsibility and we find a reasonable basis in the record provided by Horton & Barber and the contracting agency for the nonresponsibility determination. Horton & Barber has not rebutted the showing that it had insufficient and inoperable equipment and inadequate facilities to perform this large contract. Without addressing the adequacy of the new information provided in Horton & Barber's response to the Agency Report, we note that the new information was not provided in a timely manner to the contracting officer for her even to consider it in making the responsibility determination. Finally, we sustain the contracting officer's conclusion that Horton & Barber did not provide adequate evidence of past performance references for work of similar scope and size.

CONCLUSION

Horton & Barber has not shown that the contracting officer's determination of nonresponsibility violated law or the terms of the solicitation. We find that the record adequately

supports the findings of the contracting officer. Accordingly, for the reasons discussed above, we deny Horton & Barber's protest.

SO ORDERED.

DATED: May 25, 2007

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

CONCURRING:

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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

SYSTEMS ASSESSMENT & RESEARCH, INC.)	
	)	CAB No. P-0738
Under Solicitation No. GAGA-2006-R-0176)	

For the Protester: Julian H. Spirer, Esq., and Brian M. Lowinger, Esq., Spirer & Goldberg, P.C.
For the District of Columbia Public Schools: Erika L. Pierson, Esq., Deputy General Counsel, and Aaron E. Price, Sr., Esq., Attorney-Advisor.

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

OPINION

LexisNexis Filing ID 12431107

Systems Assessment & Research, Inc. (“SAR”), protests the award of a contract to Columbus Educational Services, LLC, as a special education services provider who would provide a variety of special education personnel to assist the District of Columbia Public Schools (“DCPS”) in the implementation of a consent decree entered in the federal class action lawsuit *Blackman v. District of Columbia, et al.*, 97-CV-1629 (D.D.C.) (“Blackman consent decree”). Columbus had the highest evaluated proposal, and SAR was scored a distant second. Although the evaluation record is poorly documented before us, perhaps because SAR did not frame its *pro se* protest particularly well, we conclude that the protest should be dismissed because the federal court in *Blackman* exempted the District of Columbia from the Procurement Practices Act for procurements implementing the *Blackman* consent decree, and the procurement at issue clearly is meant to implement the consent decree. Accordingly, we dismiss the protest.

BACKGROUND

On April 13, 2006, DCPS’s Office of Contracts and Acquisitions (“OCA”) issued Solicitation No. GAGA-2006-R-0176 for the procurement of special education instructional and related services to assist in the implementation of the *Blackman* consent decree. (Agency Report (“AR”) Exs. 1, 10). The special education personnel to be provided included physical therapists, occupational therapists, psychologists, speech language pathologists, master social workers, special education teachers, a project coordinator, and a project director.

On April 14, 2006, the *Blackman* court entered an order providing in pertinent part: “Ordered that pending final approval of the Consent Decree, in order to implement the preliminary approved Consent Decree, the [District of Columbia Government is] not bound by the D.C. Procurement Practices Act or any other District or federal law relating to procurement, or any regulations thereunder.” (AR Ex. 9).

The closing date for proposals was April 21, 2006. Five proposals were timely received. OCA conducted an initial screening of the proposals, determining that only three offers were within the competitive range: (1) Tai Pedro & Associates, (2) SAR, and (3) Columbus. On May 12, 2006, OCA began negotiations with these offerors. After negotiations had concluded, OCA requested best and final offers (“BAFOs”). The BAFOs were evaluated by a panel of agency personnel knowledgeable about special education, special education related services, and special education services providers. The panel ultimately selected Columbus for the award. The record, however, does not contain any evaluation score sheets, consensus reports of the technical evaluation team, or the independent evaluation and selection reports of the contracting officer. All the record contains are summary sheets of the initial technical evaluations and BAFO evaluations, listing simply the total technical evaluation scores of the evaluators which presumably were adopted by the contracting officer. (AR Exs. 6, 7). The Agency Report states that the “[evaluation] panel ultimately selected Columbus for the award.” (AR at 2).

In its efforts to begin immediate implementation of the consent decree’s terms, OCA issued a letter contract to Columbus on June 1, 2006, with instructions to begin performance. (AR at 2). Subsequently, OCA conducted a debriefing with SAR to review its proposal and evaluation. During the course of this debriefing, SAR was informed of the shortcomings in its proposal. On June 26, 2006, in the midst of the awardee’s performance under the letter contract, SAR, *pro se*, filed the instant protest. SAR asserts that DCPS: (1) eliminated the requirement for a resume and position description for the project director position; (2) discounted the protester’s proposal for lack of a subcontracting plan; (3) misread the SAR’s staffing ability; (4) unjustifiably credited Columbus with past performance experience; and (5) failed to include in the solicitation a local business participation requirement.

On June 30, 2006, the final consent decree was entered in the *Blackman* case, which provides in part: “Under this Consent Decree, the [District of Columbia Government is] not bound by the D.C. Procurement Practices Act, D.C. Code Section 2-301.01 et seq., any other District or federal law relating to procurement, and any regulation thereunder.” (AR Ex. 10).

DCPS filed its Agency Report on July 20, 2006, addressing each of the grounds raised by the protest. On July 27, SAR, represented by counsel, filed its comments on the Agency Report. In its comments, SAR dropped all of the initial protest challenges except for the ones relating to the evaluation based on the project director resume and the timing of staffing availability. SAR’s comments raised, for the first time, the failure of the contracting officer and the technical evaluation team to consider the evaluation factors, as reflected in the absence of records documenting how the evaluators arrived at the summary scores presented in the protest record. DCPS did not respond to SAR’s comments.

DISCUSSION

In its Agency Report, DCPS contends that it has fully complied with the District’s procurement laws. Before reaching the merits, however, we must decide whether we properly exercise jurisdiction pursuant to D.C. Code § 2-309.03(a)(1). DCPS states in the final sentence of its Agency Report, that “the United States District Court in [*Blackman*] waived the procurement laws of the District of

Columbia as they apply to implementation of the [Blackman] Consent Decree.” SAR did not address the consent decree exemption in its comments on the Agency Report.

We have carefully reviewed the language of the April 14, 2006 court order and the final consent decree of June 30, 2006, along with DCPS’s record of the special education services procurement at issue. We conclude that the federal court order and consent decree in *Blackman* clearly exempt the protested procurement from the Procurement Practices Act. Accordingly, we dismiss the protest for lack of jurisdiction.

SO ORDERED.

DATED: September 21, 2006

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

RBK LANDSCAPING & CONSTRUCTION, INC.)
) CAB No. P-0753
 Under IFB No. DCHA-2007-B-0002)

For the Protester: Mr. Keith Lomax, President, *pro se*. For the District of Columbia Government: Howard Schwartz, Esq., Senior Assistant Attorney General, and Talia S. Cohen, Esq., Assistant Attorney General.

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

OPINION

Filing ID 15303956

RBK Landscaping & Construction, Inc., has protested the District's responsibility determination of the awardee, Community Bridge, Inc., and the nonresponsibility determination of RBK, regarding a solicitation to provide comprehensive landscape maintenance and management services for approximately 450 acres of land at 72 recreational centers and facilities in the District. The contracting officer determined RBK nonresponsible for failing to show *inter alia* financial capacity, adequate staffing for the job, compliance with District tax laws, adequate equipment to perform the work, and ability to obtain a surety bond. RBK argues that it has adequate financial resources, staff, and equipment, and that it complies with District tax laws and provided evidence that it could obtain a bond. We sustain the nonresponsibility determination on the record presented, concluding that RBK has not demonstrated that the contracting officer's determination lacked a reasonable basis. The evidence in the record supporting Community Bridge's responsibility is un rebutted. Because the contracting officer did not violate either the law or the terms of the solicitation, we deny the protest.

BACKGROUND

On January 22, 2007, the Office of Contracting and Procurement ("OCP") issued in the open market IFB No. DCHA-2007-B-0002, on behalf of the Department of Parks and Recreation ("DPR"), for a contractor to provide comprehensive landscape maintenance and management services for approximately 450 acres of land at 72 recreational centers and facilities in Wards 1 through 8. (Agency Report ("AR") Ex. 3). Bidders were to bid fixed-unit prices that would result in a requirements contract with total amounts based on estimated quantities of work. (AR Ex. 3). The bid opening date was February 5, 2007. Six bidders responded with bids and OCP performed an initial bid tabulation based on an evaluation of bid prices that was later determined to be erroneous. The initial bid tabulation showed the following order of evaluated prices from lowest to highest: Horton & Barber, IIU Consulting, Community Bridge, Inc., RBK Landscaping, KC Home Improvement, and Turf Center Lawns. (AR at 3-4; AR Ex. 6). The OCP contract specialist and the contracting officer's technical representative made site visits to the bidders' facilities, including RBK's facility. (AR at 4; AR Ex. 13).

On February 9, 2007, OCP sent all bidders a letter requesting responsibility data. (AR Exs. 13, 14). RBK responded to the request by furnishing a package consisting of approximately 23 pages. (AR Ex. 15). The RBK submission has no index and only partial indications of which documents were meant to respond to the various categories of responsibility data requested by the contracting officer. The RBK documentation is comprised of the following: insurance information, a 1-page "Analysis of Operating Procedures" composed by its president, a 1-page balance sheet as of October 31, 2006, a 2-page profit and loss statement for the period January through October 2006, an inventory of equipment and vehicles, a list of current and past contract work with the District Government, and a Dun & Bradstreet report.

On February 21, 2007, the contracting officer determined Horton & Barber and IIU nonresponsible. (AR at 4). On the same date, the contracting officer determined Community Bridge a responsible bidder. (AR at 4; AR Ex. 10). On March 5, 2007, Horton & Barber protested the District's determination of its nonresponsibility. We denied that protest on May 25, 2007. On March 19, 2007, the District awarded the landscape and maintenance contract, Contract No. DCHA-2007-C-0002, to Community Bridge.

On March 26, 2007, RBK filed the instant protest. On or about March 30, 2007, OCP discovered that section B, CLIN 3, of the solicitation contained an incomplete format for calculating the total estimated amount of the bid extensions. When OCP revised the bid tabulation based on properly extending the bid prices, the order of the lowest to the highest bidders changed, with RBK becoming the third lowest bidder, followed by Turf Center and Community Bridge (AR at 5-6), with the corrected evaluated prices and order as follows:

Bidder	Bid Price for Base Year and Four Option Years (Estimated Amounts)	Evaluated Bid Price
1. Horton & Barber	\$7,794,019.50	\$6,858,737.16
2. IIU Consulting	\$10,217,403.85	\$9,359,141.93
3. RBK Landscaping Construction	\$11,771,969.58	\$10,359,333.23
4. Turf Center Lawns	\$12,200,900.00	\$12,200,900.00
5. Community Bridge	\$13,385,668.60	\$12,342,925.02
6. KC Home Improvement	\$15,119,490.00	\$14,907,817.14

(AR at 6). Because the contracting officer had previously determined Horton & Barber and IIU nonresponsible, RBK became the low bidder if it was found responsible. On May 9, 2007, however, the contracting officer determined RBK nonresponsible. (AR at 6; AR Ex. 9). Turf Center withdrew its bid, leaving Community Bridge, the awardee, as the lowest responsible

bidder. (AR at 6; District's May 21, 2007 Supplement to the Agency Report). The May 9 nonresponsibility determination provides in relevant part:

1. Lack of Financial Capability - The requested information was analyzed by the OCP Cost Price Analyst. Based on the Financial Statement Analyses dated 04/10/2007, attached to this D&F, the Contracting Officer determined that RBK does not have the financial capability for a project of this magnitude. Critical findings in this report include:

- The financial statements provided were for the ten months ended 10/31/06 and un-audited or reviewed. As such, they did not provide a full year's financial activity and are not current.
- According to RBK's balance sheet, at 10/31/2006 they had only \$40,605 in cash. There was no additional information provided by them regarding lines of credit or access to additional sources of capital.
- The COTR for DPR has estimated that they will need a minimum of 60 days funds, approximately \$300,000 in cash based on their bid price for CLIN003 alone, and assuming an operating profit margin of 20%. Based on this, the bidder does not appear to have adequate financing to absorb a contract of this size.

2. Comply with Required Performance Schedule - The bidder's response to the Contracting Officer's request for information reflected notable discrepancies: According to RBK's employment data (Schedule D), RBK currently has 28 employees, while his listing of [current] employees attached to his First Source Employment Agreement shows 6 current employees. . . .

. . . .

4. Compliance with DC licensing and tax laws - As of 02/2/07, RBK was "not in compliance with the tax filing and payment requirements of the District of Columbia Unemployment Tax Laws."

5. Production Equipment, Supplies, and Facilities - The Contracting Officer and the Contract Specialist conducted a site visit of RBK on 02/10/07. RBK requested that the group travel to the site of one [of] its (non-LSDBE) subcontractors, Chapel Valley Landscaping in Woodbine, Maryland. At the site, RBK explained that the majority of the equipment belonged to the subcontractor, although he pointed out certain items that belonged to them. The Contracting Officer and Contract Specialist, using an equipment checklist provided by the COTR, did not see any vehicles, trucks or trailers on the premises. They cannot perform the contract without vehicles and trailers to transport equipment from Woodbine, Maryland to the District of Columbia. . . .

6. Evidence of Obtaining a Performance Bond - The bidder provided no evidence that they were being given "favorable consideration for a surety bond", as requested in the Contracting Officer's letter dated 02/10/07.

(AR Ex. 9). Attached to the D&F is a February 28, 2007 tax verification response from the Department of Employment Services indicating that RBK is not in compliance with the tax filing or payment requirements of the District's unemployment tax laws.

DISCUSSION

We exercise jurisdiction over this protest pursuant to D.C. Code § 2-309.03(a)(1).

RBK argues that it has the financial capability to perform the contract, noting that it performed the "same contract in 2006 without financial complications by employing a \$350,000 working capital line of credit as needed to underwrite the District's payment timing, which at times was very delayed." (Comments on Agency Report, at 1). Regarding staffing, RBK urges that the reference to the reduced staffing in the First Source Agreement reflected its employment "in the off season" and should not have been considered as a negative factor. Regarding equipment and vehicles, RBK states that it offered the same items that it used in successfully performing the 2006 contract. RBK states that it has timely paid its unemployment taxes and timely filed its returns but has introduced no evidence that it was in tax compliance as of the date of the determination of nonresponsibility. RBK points out that it had its bonding agent send a bonding letter directly to OCP but there is no evidence in the record of that letter. Finally, RBK argues that the contracting officer's D&F of nonresponsibility is invalid because in the final line of the document, the name "Unicorn Landscaping Services" is mentioned rather than RBK.

We sustain the contracting officer's determination that RBK did not demonstrate adequate financial capacity to perform the contract. The financial statements were not current and complete, rendering it impossible for the contracting officer to have a reasonable understanding of the company's financial position. For a contract of the size at issue here, the contracting officer reasonably doubted the company's ability to finance the significant work required by the solicitation. On staffing and equipment, we see no legal error in the contracting officer's determination based on the meager record presented by RBK. The only evidence submitted by RBK was that found in the package submitted to the contracting officer in response to the responsibility data request. For the same reason, RBK has failed to rebut the findings and determination by the contracting officer regarding the lack of a bonding letter. Argument by the protester's representative in RBK's comments on the Agency Report does not constitute evidence. Finally, the contracting officer's reference to "Unicorn Landscaping Services" in the final sentence of the D&F is simply a typographical error. The repeated references to RBK throughout the D&F convincingly show that the nonresponsibility determination was directed to RBK, not "Unicorn Landscaping Services."

RBK argues that Community Bridge, the awardee, should have been found nonresponsible. The determination and findings of contractor responsibility, dated February 21, 2007, adequately support the contracting officer's determination. Unsupported allegations by the protester's representative of poor past performance on the part of Community Bridge are insufficient to rebut the determination.

CONCLUSION

RBK has not shown that the contracting officer's determination of RBK's nonresponsibility violated law or the terms of the solicitation. We find that the record adequately supports the findings of the contracting officer regarding RBK's nonresponsibility and Community Bridge's responsibility. Accordingly, for the reasons discussed above, we deny RBK's protest.

SO ORDERED.DATED: June 20, 2007

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

GINICORP)
) CAB No. P-0757
Under Solicitation No. GAGA 2007-I-0012)

For the Protester GiniCorp: George A. Hawkins, Esq., Peterson Noll & Goodman PLC, and Virginia Master, CEO, Ginicorp. For the District of Columbia Public Schools: Edward C. Dolan, Esq., and Michael McGill, Esq., Hogan & Hartson, L.L.P., and Aaron E. Price, Sr., Esq., Attorney-Advisor, DCPS.

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

OPINION

Filing ID 15938473

In an April 23, 2007 letter, received and docketed at the Board on April 27, 2007, protester GiniCorp challenges the award to Tandem Conglomerate, LLC ("Tandem") of a contract for resources and staff to maintain a program within the District of Columbia Public Schools ("DCPS") called "DC STARS." The District filed its initial Agency Report on June 11, 2007, more than 20 days late. After substitution of counsel, the District filed a combined motion to dismiss and supplemental Agency Report on July 11, 2007. DCPS asserts that the Board should dismiss the protest because DCPS's contracting officer informed GiniCorp's executive, Mr. Michael Masters, in January 2007 that DCPS had decided to exclude GiniCorp from the competitive range, and GiniCorp did not file its protest until April 27, 2007. We agree with DCPS that GiniCorp's protest was filed long after it was informed of its exclusion from the competition. Accordingly, we deny the protest.

BACKGROUND

DCPS issued solicitation No. GAGA 2007-I-0012 in November 2006, for the procurement of information technology services and consulting in the implementation of the DC STARS student records information system. Three offerors (GiniCorp, Tandem, and Tecknomic) submitted timely proposals on November 20, 2006. A technical evaluation panel examined the proposals. In December 2006, the panel determined that GiniCorp's proposal was technically unacceptable, containing numerous deficiencies, and that it should not be included in the competitive range. The contracting officer agreed with the panel's assessment and excluded GiniCorp from the competitive range and continued to evaluate the remaining two proposals. The contracting officer states that he informed GiniCorp's Michael Masters of this decision in a telephone conversation in January 2007:

Because GiniCorp was determined to not be in the competitive range, I informed GiniCorp through a January 2007 telephone conversation with Michael Masters of GiniCorp and through a January 2007 e-mail that GiniCorp had been excluded from the competition and that it would not be considered for an award. The call was very brief and Mr. Masters did not seem upset. . . .

(July 12, 2007 Toorie Affidavit (Corrected) ¶ 8). DCPS has not located a copy of the email Toorie states that he sent to GiniCorp. The only evidence presented by GiniCorp on this factual issue is the following statement of Michael Masters:

The DC Public Schools had not contacted GiniCorp during the previous five (5) months concerning its evaluation of GiniCorp's proposal nor had it verified any of GiniCorp's references. GiniCorp received no notices from the DC Public Schools requesting discussions or presentations to the DC Public Schools. GiniCorp received no notification for any best and final offer request.

(June 13, 2007 Masters Affidavit ¶ 8). This affidavit was filed several weeks before the Toorie affidavit was filed by DCPS. GiniCorp responded on July 18 with legal argument responding to Toorie's July 12 corrected affidavit and DCPS's July 11 supplemental Agency Report and motion to dismiss on timeliness, but GiniCorp never submitted any evidence directly and unequivocally rebutting Toorie's statement that he had a brief conversation with Masters sometime in January 2007 in which he informed Masters that GiniCorp was excluded from the competition. Masters' statement in his affidavit that DCPS "had not contacted GiniCorp during the previous five (5) months" is ambiguous as to timing and thus is not unambiguously inconsistent with Toorie having a telephone conversation with Masters between January 1 and January 12, 2007. GiniCorp had adequate opportunity to persuasively rebut Toorie's statement but failed to do so. On the evidence presented, we find that Toorie communicated to Masters in January 2007 that GiniCorp was excluded from the competition.

The contracting officer ultimately selected Tandem for award and DCPS entered into a letter contract with Tandem on March 15, 2007. DCPS definitized that contract on April 23, 2007. The Board received GiniCorp's protest on April 27, 2007.

In its protest, GiniCorp's chief executive officer, Virginia Masters, states that GiniCorp learned about the contract award to Tandem from an IBM employee assigned to the same work. Masters states that GiniCorp requested a meeting with Kevin Green, the subsequent DCPS contracting officer, two weeks before the date of its April 23, 2007 protest letter, *i.e.*, on April 9, 2007. GiniCorp states that Mr. Green refused to meet with GiniCorp. GiniCorp then mailed its protest and was received by the Board on April 27, 2007.

DCPS filed its initial Agency Report on June 11, 2007, more than 20 days late. Shortly thereafter, DCPS engaged outside counsel to represent it. DCPS filed a combined supplemental Agency Report and a motion to dismiss the protest on July 11, 2007. DCPS asserts that GiniCorp's protest, filed on April 27, 2007, was filed more than 10 days after it knew or should have known of the basis of its protest, and therefore, the protest should be

dismissed as untimely. On July 18, 2007, GiniCorp filed a motion to strike DCPS's July 11 submission and in the alternative addressed the merits of the DCPS filing.

DISCUSSION

We begin by addressing the threshold issue of whether GiniCorp's protest was timely filed. The Procurement Practices Act provides that protests, other than challenges to the terms of a solicitation, "shall be filed no later than ten (10) business days after the basis of protest is known or should have been known." D.C. Code §2-309.08(b)(2). *See Sigal Construction Corp.*, CAB No. P-0690, *et al.*, Nov. 24, 2004, 52 D.C. Reg. 4243, 4253-54; *Professional Recruiters, Inc.*, CAB No. P-0700, Dec. 21, 2004, 52 D.C. Reg. 4258, 4259-60.

In the motion to dismiss, DCPS asserts that GiniCorp filed its protest more than 10 days after the date in January 2007 that the contracting officer, by telephone and email, informed GiniCorp that its proposal was no longer in the competitive range. GiniCorp moved to strike DCPS's motion to dismiss, asserting that DCPS could not file a motion to dismiss after DCPS had already filed a late Agency Report. DCPS's supplementation of the deficient initial Agency Report was entirely consistent with our order on July 11 for such supplementation. Nothing in our order or in our rules prohibited DCPS from including a motion to dismiss on timeliness in this submission. GiniCorp did not request additional time to respond to the submission and we cannot conclude that GiniCorp was prejudiced by the supplemental submissions of DCPS. Indeed, we find merit in DCPS's argument that GiniCorp untimely filed its protest.

Although the protest record was extended unnecessarily by DCPS's failure to file its initial June 11 Agency Report in a timely manner, and further by DCPS's failure to raise the timeliness issue in that submission, DCPS cured its inadequate June 11 submission when its newly retained outside counsel filed the supplemental pleadings on July 11 and July 12, 2007. The protest record also has been hampered by DCPS's failure to locate and file a copy of the email message which Toorie states he sent to Masters in January 2007. Notwithstanding DCPS's poor record keeping on this procurement, a situation we expect will not be repeated in the future, we find that the uncontradicted statement by Toorie that he informed Masters by telephone in January 2007 that GiniCorp had been excluded from the competition, renders the April 27 protest of GiniCorp untimely. As we found above, nothing in Masters' affidavit directly and unambiguously contradicts Toorie's recollection of the January telephone conversation. Because GiniCorp filed its protest on April 27, 2007, more than 10 business days after learning of its exclusion from the competition in January 2007, GiniCorp's protest is untimely.

We have concerns about the methods used by DCPS to notify unsuccessful offerors about significant procurement actions. In this matter, the original contracting officer, no longer employed by DCPS, notified the offeror by telephone and email that the offeror had been excluded from the competitive range. The contracting officer should have documented contemporaneously his actions in the contract file, not leaving it to an affidavit after a protest has been filed. Moreover, contracting officers should notify bidders and offerors *in writing*

and *without delay* when making determinations such as to award or not to consider further a firm's bid or offer.

CONCLUSION

For the reasons discussed above, we dismiss GiniCorp's protest as untimely filed.

DATED: August 14, 2007

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

CONCURRING:

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

time, online reverse energy auctions, energy acquisition services and energy consultant services.” (District’s June 11, 2007 Motion to Dismiss/Agency Report (“AR”), Ex. 1). Soderberg was the procurement contracting officer and the RFP stated that Soderberg would execute any award pursuant to the RFP. The RFP contemplated that the successful offeror would conduct reverse auctions in order to identify the lowest-cost supplier of natural gas or electricity to meet the District’s energy supply requirements. The RFP also contained a “Metropolitan Washington Council of Governments Rider Clause” which allowed over governments with the Council of Governments (“COG”) to purchase services under the contract. (AR Ex. 1, Section K.8; Protest ¶ 13).

On July 10, 2006, OCP issued Amendment No. 1, which provided answers to various questions about the RFP. (AR Ex. 2). Proposals were due on July 26, and World Energy and Co-exprise were the only offerors to submit proposals. OCP conducted discussions with the offerors and received best and final offers on August 15 (Co-exprise) and August 16 (World Energy). (AR Ex. 3). On August 16, 2006, OCP issued RFP Amendment No. 2, which reserved to the District the right to make multiple awards. (AR Ex. 2). World Energy states that Amendment No. 2 was issued to the offerors only minutes before the closing time for BAFOs and after it had already submitted its BAFO. World Energy and Co-exprise acknowledged the amendments. (AR Ex. 2). After the RFP closed and after negotiations and evaluations, the contracting officer determined that World Energy and Co-exprise were both technically equal and that their prices for the reverse auctions were fair and reasonable. (AR Ex. 3). World Energy offered a lower price for the natural gas services while Co-exprise offered a lower price for the electricity services. As recorded in his Business Clearance Memorandum dated August 18, 2007, the contracting officer decided to award contracts to both World Energy and Co-exprise. (AR Ex. 3). On August 18, 2006, the contracting officer awarded Contract No. POAM-2006-D-0005-A (AR Ex. 4) to Co-exprise and Contract No. POAM-2006-D-0005-B to World Energy (AR Ex. 5). Soderberg told Havey on August 18 that both World Energy and Co-exprise would receive contracts for energy acquisition services, that World Energy would receive a task order to conduct the first natural gas auction but that no decision had yet been made as to which company would conduct an expected auction for electricity. (Protest ¶ 15).

By an undated letter from World Energy to Soderberg, faxed to OCP on August 23, 2006, World Energy stated in pertinent part:

[W]e are concerned about the impact of the District’s unexpected decision to modify Section B.2 of the solicitation and award multiple contracts for this requirement after World Energy had submitted their Best and Final Offer Inasmuch as World Energy’s BAFO reflected a pricing model based upon a single-award contract, the possibility of receiving only a partial (i.e., natural gas only) award may seriously undermine the basis of the World Energy proposal. . . . World Energy respectfully requests a debriefing to address any deficiencies in its proposal that may have led your office to solicit an alternative awardee.

(AR Ex. 6). On August 31, 2006, Soderberg issued a notice to proceed to World Energy, directing it to conduct the first natural gas reverse auction. (AR Ex. 7).

On September 7, 2006, Soderberg conducted a debriefing as requested by World Energy on August 23. Soderberg informed World Energy of Co-exprise's offered prices and that Co-exprise would be selected to conduct the electricity reverse auction. (Protest ¶ 16). World Energy never timely filed a protest challenging either the solicitation amendment permitting multiple awards nor of the award made to Co-exprise.

By email of September 20, 2006, World Energy's John Harvey requested that Soderberg clarify with the other members of the Council of Governments ("COG") that they could acquire both electricity and natural gas reverse auction services from World Energy under its contract, POAM-2006-D-0005-B. By reply email the same day, Soderberg confirmed that the COG members may use either the District's contract with World Energy or the District's contract with Co-exprise to satisfy their energy auction needs. (AR Ex. 8). Soderberg added that the District had tasked Co-exprise to conduct the first electricity auction and World Energy to conduct the first natural gas auction.

By internal OCP email dated September 22, 2006, the contracting officer decided to "lock in" the prices of natural gas that were quoted by Washington Gas Energy Services, Inc, under the third option year of a cooperative purchase agreement which the District had previously entered into with Prince William County Public Schools, a solicitation agent for the COG. (AR Ex. 9). By letter to World Energy dated September 22, 2006, the contracting officer notified World Energy that the District had decided to rescind the August 31 notice to proceed with the natural gas action since it was in the best interest of the District to exercise the option on the current supply contract rather than conduct the reverse auction. (AR Ex. 9).

By letter dated October 13, 2006, World Energy filed with the contracting officer a dispute pursuant to the disputes clause of its contract. (AR Ex. 10). World Energy raised a number of issues with respect to contract administration: (a) rescission of the notice to proceed with the natural gas auction was inconsistent with the District's obligation to World Energy under the contract, and revealed a "bait-and-switch" by the District with respect to the allocation of work under the contract; (b) the contract is a requirements contract mandating that the District's energy supply acquisition requirements be filled by World Energy; (c) the contract entitles World Energy to conduct online reverse auctions to whatever extent that the District has requirements for natural gas and/or electrical power; (d) the District's rescission notice constitutes a breach of the contract and is not a permissible termination for convenience unless the District has a valid reason for the termination; (e) at the time of award of contract, the District acted in bad faith since the District did not intend to honor its commitment to utilize World Energy's services for its natural gas and electrical power supply acquisition requirements; and (f) the contracting officer's administration of the contract was tainted by a conflict of interest since World Energy refused to participate in an unrelated prospective transaction in which World Energy understood the contracting officer to have a significant and direct personal financial interest and that any resulting personal disappointment or frustration with World Energy regarding that matter irretrievably compromised the contracting officer's objectivity for administering the contract. (AR Ex. 10).

On October 26, 2006, Harvey from World Energy initiated a meeting with Soderberg in an effort to resolve the October 13 claims. We learn from an undated letter from World Energy

received by the contracting officer on November 3, 2006, that at this meeting the parties agreed to “defer formal dispute procedures” while they attempted to resolve the dispute by the contracting officer proposing “contract modifications that would specify standards for issuing task orders for all requirements within the scope of work.” (AR Ex. 12; CAB D-1308 Complaint ¶ 33). Soderberg had a draft response denying each of the claims of World Energy, however the draft letter was never delivered to World Energy and was left as a memorandum to the file containing the contracting officer’s rationale for rejecting World Energy’s October 13 claims. (AR Ex. 11; District’s June 26, 2007 Reply). In the memorandum, the contracting officer indicates that (1) World Energy acknowledged Amendment 2 to the RFP and agreed, without objection, to multiple awards; (2) future natural gas reverse auctions may be required by the District and participating parties but the District is not required to procure its energy requirements only through reverse auctions; and (3) logistics, timing, price, and the slow progress of World Energy to move the auction forward were factors in his determination to rescind the notice to proceed and instead exercise an option on another existing contract. (AR Ex. 11).

By letter dated November 8, 2006, Soderberg responded to World Energy setting forth the procedures by which he would evaluate World Energy and Co-exprise to determine the awardee of future task orders for natural gas and electricity. In addition, the contracting officer notified World Energy that the District may decide to fill the need for energy by direct purchases from suppliers, without using reverse auction services. (AR Ex. 12). In a December 8, 2006 letter, World Energy responded to the contracting officer and requested further clarification of the procedures for awarding future task orders and requesting appropriate contract modifications to clarify that the contract would not be administered as a “full requirements” contract. (AR Ex. 12). By letter dated December 26, 2006, the contracting officer responded to the December 8, 2006 letter of World Energy, declining to revise the procedures set forth in his letter dated November 8, 2006, and concluding the letter by stating: “If World Energy does not believe that it can meet the terms required by these task order evaluation criteria please let me know and we can discuss the possibility of releasing World Energy from the above referenced contract or formally amending the terms thereof.” (AR Ex. 12).

On February 8, 2007, Ms. Patti Lovelady, an energy consultant working on behalf of OCP, called Harvey to ask if World Energy would be interested in canceling the contract and participating in a re-competition. Harvey stated that World Energy was fully committed to providing services to meet the District’s full energy supply procurement requirements, and that it would not agree to cancel its contract. By letter of February 15, 2007, Harvey reiterated World Energy’s objection to the suggestion that it agree to cancel the contract. (World Energy 06-19-2007 Response, Ex. 17). He explained that a re-competition of the contract would be problematic, as World Energy’s pricing for the natural gas auction had become public as a result of the prior award, and that a re-competition would allow competitors to undercut World Energy’s pricing.

On February 27, 2007, Soderberg issued a notice terminating World Energy’s contract for the convenience of the District, effective March 1, 2007. (AR Ex. 13).

By Amendment M0001 to Co-exprise’s contract signed by Soderberg on March 8, 2007, Co-

exprise agreed to reduce its price for the reverse auction for natural gas from \$0.07/dth to \$0.0495/dth as a flat fee for all natural gas volumes acquired through the reverse auction. (AR Ex. 2). Co-exprise's revised price thus was exactly \$0.005 less than the BAFO price (\$0.05/dth) offered by World Energy in August 2006.

On March 12, 2007, Soderberg issued a notice to proceed to Co-exprise to perform the reverse auction for natural gas. (AR Ex. 14). By email string dated April 9, 2007 and April 10, 2007, between World Energy and the District, the contracting officer notified World Energy that Co-exprise was going to conduct the reverse energy auction for natural gas. (AR Ex. 15).

On May 4, 2007, the District issued an invitation for bids to identify natural gas supply providers to participate in the online reverse auction to supply natural gas to be conducted by Co-exprise pursuant to its August 2006 contract and the March 12, 2007 task order. World Energy states that it learned of the invitation for bids on May 16, 2007.

World Energy filed its protest on May 18, 2007, protesting the District's "designation of Co-exprise to conduct this natural gas supply auction." (Protest, at 2). World Energy argues that it, not Co-exprise, should have been the one to conduct the online reverse auction. World Energy simultaneously filed a notice of appeal with our Board, docketed as CAB No. D-1308, stating in pertinent part:

[World Energy] hereby files this notice of appeal based on actions taken by the Office of Contracting and Procurement ("OCP") regarding contract number POAM-2006-D-0005-B ("the Contract"). World Energy notices this appeal to contest OCP's termination of the Contract and the contracting officer's failure to recuse himself in light of a conflict of interest. This appeal is timely, as it is being filed less than 90 days after the termination was issued on February 27, 2007, as well as "within a reasonable time" after the Contracting Officer's failure to render a final decision on World Energy's request for his recusal, which was submitted on October 13, 2006.

(CAB No. D-1308, Notice of Appeal, at 1).

By Determination and Finding to Proceed with Contract Performance While a Protest is Pending ("D&F") dated May 29, 2007, the District decided to continue with the reverse auction for natural gas, which was scheduled for June 4, 2007. On May 30, 2007, World Energy challenged the District's D&F, but the Board sustained the D&F in an order dated June 1, 2007. Co-exprise conducted the online reverse auction on June 4, 2007, as scheduled.

DISCUSSION

World Energy frames its protest as challenging the May 2007 invitation for bids issued to the natural gas suppliers to participate in the online reverse auction that was to be conducted by Co-exprise on June 4, 2007. Thus, World Energy asserts that (1) the District made an improper sole source "selection" of Co-exprise to conduct the reverse auction; (2) World Energy was improperly

excluded from revising its BAFO pricing but Co-exprise was permitted to reduce its pricing slightly below World Energy's prices; (3) Co-exprise was a nonresponsible contractor; (4) the contracting officer failed to follow task order award procedures spelled out in his November 8, 2006 letter; (5) the District failed to award the reverse auction to a required source, namely World Energy; and (6) the contracting officer was subject to a conflict of interest that compelled his recusal from selecting the contractor to conduct the reverse auction for natural gas supplies.

The facts demonstrate that World Energy's true complaint is that Soderberg, the contracting officer, improperly dealt with it after contract award in August 2006, including the rescission of its August 31, 2006 task order to conduct the natural gas reverse auction, the series of transactions relating to its October 13, 2006 contract claims, and culminating in the February 27, 2007 convenience termination of its contract. World Energy's allegations are properly seen as contract administration disputes that are properly within our dispute jurisdiction and will be addressed in World Energy's appeal, CAB No. D-1308. To the extent that the protest allegations challenge the August 18, 2006 award to Co-exprise, those allegations are clearly untimely. World Energy received a debriefing on September 7, 2006, and never filed a protest challenging the dual award to Co-exprise nor the amendment permitting multiple awards.

For these reasons, we dismiss World Energy's protest.

SO ORDERED.

DATED: September 28, 2007

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

KIDD INTERNATIONAL HOME CARE, INC.)
) CAB No. P-0760
Under RFP No. DCKV-2007-R-0001)

For the Protester, Kidd International Home Care, Inc.: Kiyo D. Oden, Esq., The Oden Firm, P.C. For the District of Columbia Government: Howard Schwartz, Esq., Senior Assistant Attorney General, and Talia S. Cohen, Esq., Assistant Attorney General.

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

OPINION

Filing ID 16574962

Kidd International Home Care, Inc., protests the District’s award of a contract to Industrial Bank to perform ticket payment, lockbox, and secondary ticket collection services for the Department of Motor Vehicles (“DMV”). Kidd International contends that the contracting officer (1) misled it during its discussions regarding changes in key personnel, (2) failed to properly evaluate Industrial Bank’s proposal for price realism, and (3) improperly evaluated and scored the proposals relating to debt collection strategy and past performance. We conclude that the contracting officer’s evaluation and selection did not violate the terms of the solicitation or District law. Accordingly, we deny the protest.

BACKGROUND

On July 28, 2006, OCP issued RFP No. DCKV-2007-R-0001 (“RFP”), on behalf of the Department of Motor Vehicles, to procure the services of a contractor to provide ticket payment, lockbox, and secondary ticket collection services for a base period of two years, with three one-year option periods. (Agency Report (“AR”) Ex. 1 and Ex. 8, § 4.1). Section C.2.1 of the RFP (AR Ex. 1) provides:

The District requires this contract in order to support the ability of customers to mail payments for photo enforcement, parking and moving [violation] tickets issued within the District, and to support the ability of customers to pay tickets pursuant to secondary collection activity. The mail payments lockbox function includes the receipt, processing and deposit of payments, and transmission of payment data to the ticket system. The secondary ticket collection function includes the design and pursuit of a collection strategy for tickets that have been assigned for secondary collections, customer service pursuant to incoming correspondence and phone calls, and transmission of payment data to the ticket system. A ticket system and ancillary support services including primary noticing, mailing and back-office processing, is being separately solicited.

With regard to pricing, section C.2.6 of the RFP provides:

Contract pricing shall consist of a fixed price per payment processed and updated by the lockbox, and a contingency fee based as a percentage of the amount collected for secondary collections, with certain fee eligibility exclusions.

Between July 28, 2006, and October 6, 2006, OCP issued six amendments. (AR Ex. 2, Ex 8, § 4.2). Section M of the RFP identifies four general evaluation criteria and maximum points for each: Technical Approach (40 points) consisting of a work plan (10 points), management plan (10 points), quality assurance plan (10 points), and responsiveness to the stated requirements (10 points); Experience and Past Performance (15 points), consisting of past experience in providing lockbox and collection services (10 points) and quality of references (5 points); Quality and Retention of Personnel (15 points), consisting of experience managing high volume, production oriented lockbox and collection services at the scale described in the RFP (5 points), ability to retain employees (5 points), and project management experience of key personnel (5 points); and Price (30 points).

The RFP closed on October 13, 2006, with four offerors responding: Industrial Bank, Kidd International, and two other contractors who were later determined not to be within the competitive range. A technical evaluation panel (“TEP”) was assigned to review, evaluate, and score the technical proposals. On November 14, 2006, the TEP submitted to the contracting officer a report of its technical evaluation of the initial proposals, containing scoring of proposals pursuant to the RFP evaluation criteria and detailed comments of the relative strengths and weaknesses of the proposals. (AR Ex. 5, Ex. 8, § 5.2). The TEP’s consensus technical score for Kidd International was 36 points while Industrial Bank’s was 32 points. The four point difference resulted from Kidd receiving 20 points for technical approach while Industrial Bank received 16 points. The total scores for experience and past performance and quality and retention of personnel were the same for the two proposals. (AR Ex. 8, § 5.3). The contracting officer’s initial evaluation of the proposals resulted in scoring of 40 points for Kidd and 36 points for Industrial Bank, reflecting a similar 4 point differential based on technical approach favoring Kidd. (AR Ex. 8).

The contracting agency prepared a detailed list of questions for Kidd and a separate list of questions for Industrial Bank on January 10, 2007, in preparation for discussions held by the contracting officer with the offerors on January 12, 2007. (AR Ex. 4; Ex. 8, § 13.2). As a result of the discussions, the contracting officer requested best and final offers (“BAFOs”) including responses to the written questions with submissions due on January 22, 2007. (AR Ex. 8, § 13.4). Both offerors responded with BAFOs and they were evaluated by the TEP which issued an evaluation report dated January 30, 2007. (AR Ex. 5, Ex. 8, § 13.6). The TEP advised the contracting officer that because of a substantial strengthening in Industrial Bank’s work plan, management plan, and quality assurance plan, as well as an overall strengthening of its responsiveness to the RFP requirements, the TEP increased its score of Industrial Bank to 41 points, an increase of 9 points. On the other hand, the TEP evaluation of Kidd International resulted in its score rising by only one point to a new consensus score of 37 points, reflecting a one point increase under the project management experience of key personnel subfactor. (AR Ex. 5).

The contracting officer had price analysts evaluate the cost and pricing of each of the proposals. The first price analysis report, dated December 1, 2006, indicates a number of cost and pricing issues in both proposals. The contracting agency sought clarification from the offerors in the written questions and oral discussions. (AR Ex. 3). Following the BAFOs which incorporated the written responses, another price analysis was conducted resulting in a price analysis report dated January 30, 2007, analyzing the cost and pricing data of Kidd International and Industrial Bank. (AR Ex. 6.). In this second price analysis report, the analyst indicates that Kidd International had an unexplained “gap” of \$1,627,119 (Kidd’s costs did not support its BAFO price of \$18,727,509), and that Kidd had an excessive profit of 27 percent. (AR Ex. 6, at 8, 12).

As a result of the price analysis report, the contracting officer requested a second round of BAFOs to address price issues, with responses due on February 9, 2007. In the second round of BAFOs, Kidd’s revised offer was \$16,717,244, while Industrial Bank (which did not submit a revised offer) held its price to \$15,647,607. The contracting officer’s independent assessment of the (1) technical proposals, (2) BAFOs, (3) TEP evaluations, and (4) prices resulted in the following total technical and price scores: Kidd received 77 points, and Industrial Bank received 80 points. (AR Ex. 8, §13.7). In the Business Clearance Memorandum (AR Ex. 8, §13.8.1), the contracting officer states:

In spite of the offerors’ similarities in capabilities, Industrial Bank provided a proposal that met the requirements of the RFP with a price of approximately 5% lower than the next lowest offeror. The merits of each are summarized below:

A. Industrial Bank, NA processes approximately two (2) million checks per year is about twice the volume required under this contract and two (2) million now managed through lockbox services. Industrial offers the ability for customers to pay tickets at any Industrial Bank site, a value added feature. Also, the bank transition to the Check-21 environment four (4) years prior to the Check-21 legislative mandate, minimizing potential check imaging issues.

B. Kidd International Home Care, Inc. ranked second, brings the experience of ACS State and Local Solutions as a subcontractor. ACS is the current prime contractor providing lockbox and collection services of which Kidd International is a subcontractor.

By Determination and Finding for Price Reasonableness dated March 16, 2007, the contracting officer determined Industrial Bank’s prices to be reasonable. (AR Ex. 9). By Determination and Finding for Contractor Responsibility dated March 15, 2007, the contracting officer determined Industrial Bank to be a responsible contractor. Accordingly, after Council approval, on June 13, 2007, the contracting officer awarded Industrial Bank contract number DCKV-2007-C-0001. (AR Ex. 10). On June 28, 2007, OCP held a procurement debriefing for Kidd. On July 13, 2007, Kidd filed its protest.

DISCUSSION

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

Kidd International first argues that it was “unreasonably misled” by OCP during its contract discussions “to believe that certain changes should be made in its personnel proposal to increase its chances of receiving the contract award although the agency had no real intent to do anything but downgrade Kidd’s personnel proposal regardless of any changes which it later made in its BAFO responses.” (Protest, at 6). First, the record simply does not support the allegation that “the agency had no real intent to do anything but downgrade Kidd’s personnel proposal” On the contrary, the contracting agency had identified as a weakness in Kidd’s proposal that the proposed manager for collection strategy would commit 50 percent of her time to the contract but this same person was identified in another District contract as devoting 100 percent of her time to the other contract. In its BAFO, Kidd replaced this proposed manager with another who would be dedicated full time to the contract. The TEP did not downgrade Kidd for this change but rather increased its score from 2 points to 3 points. We find no merit in this protest ground.

Next, Kidd alleges that the contracting officer failed to properly evaluate the reasonableness of Industrial Bank’s proposed costs, did not perform a price realism analysis, and improperly downgraded Kidd’s proposal based upon a \$1 million price decrease from its first to its second BAFO. Kidd cites 27 DCMR §§ 1614.2 and 1618.2, the latter of which provides that the contracting officer “shall evaluate the cost estimate or price, not only to determine whether it is reasonable, but also to determine the offeror’s understanding of the work and ability to perform the contract.” More particularly, Kidd states that it “strains credulity” to believe that Industrial Bank could perform the contract at a lower price than Kidd when Kidd had substantial experience working on the existing contract with the incumbent contractor.

We have carefully reviewed the three cost and price analyses prepared by the contracting agency and the determination and findings for contractor responsibility and conclude that the record does not support finding that the contracting officer violated District procurement law or regulation. The contracting officer had detailed cost and pricing analyses prepared and this data was considered in the evaluation of the proposals and in the selection decision. The determination for price reasonableness indicates that Industrial Bank’s \$0.69 unit price for lockbox services is lower than Kidd’s \$0.85 price but nearly matches the \$0.68 unit price in the incumbent contract. Meanwhile, the percentage of collection price of Industrial Bank (19.9 percent) is nearly identical to that of Kidd International (19.8 percent). Although Kidd claims that the contracting officer unreasonably downgraded its second BAFO due to a price reduction, there is no support in the record for that assertion. The contracting officer agreed with the TEP that Kidd’s technical score increased by one point from its initial proposal to its BAFOs. There was no downgrade in its technical evaluation from its first to second BAFO. In sum, we discern no basis for sustaining the protest on the reasonableness of Industrial Bank’s pricing or responsibility.

For its third ground of protest, Kidd alleges that the contracting officer unequally evaluated

the technical proposals in that Industrial Bank's outgoing call plan for collecting debts was more favorable than Kidd's plan. Industrial Bank proposed making the outgoing telephone calls for secondary debt collections at an earlier point in the collections cycle than proposed by Kidd. Kidd argues that because any plan for telephone calls made to collect District debts must first be approved by the Mayor, "it would have been speculative for OCP to presume that either outgoing call approach . . . was better than the other because only the Mayor can ultimately make that determination." (Protest, at 13). The District responds that it is aware of no legal authority for Kidd's contention that the Mayor must approve the outgoing call plans. Even if there were a required Mayoral approval, we see no basis for concluding that differences between the call plans could not be considered in evaluating the strengths and weaknesses of the proposals under the RFP's evaluation criteria. The TEP found that Kidd's proposal provided incomplete information regarding the commitment of resources and phone collection strategy. While Kidd provided some additional information in its BAFO, the overall evaluation did not change. In contrast, the evaluators found that Industrial Bank had proposed a "robust" telephone collections strategy with supporting statistics from other contracts. We find no basis for sustaining the third protest ground.

In its fourth basis for protest, Kidd contends that OCP gave no meaningful consideration to its "extensive experience under the incumbent contract." (Protest, at 14). Kidd states that its experience was "arbitrarily ignored by the agency by effectively opting to award the contract to Industrial Bank having no comparable levels of experience" (*Id.*).

In her Business Clearance Memorandum, the contracting officer clearly indicates that Kidd's experience was considered a strength. Indeed, of the 6 strengths listed, 5 directly relate to Kidd's experience under the incumbent contract. For example, the first two strengths are as follows: "[Kidd] is teaming with entities that are experienced in ticket processing and collections. Kidd, DCI and ACS are already performing on the District's ticket processing and collections contract. . . . A relatively painless transition would be likely. Lockbox, call center and collection noticing procedures are already established and fully tested." (AR Ex. 8, BCM at 11). Further, in her source selection determination, quoted *infra*, the contracting officer noted that Kidd would bring the experience of performing on the incumbent contract. (AR Ex. 8, § 13.8.1). We conclude from the record that the contracting officer and the TEP were well aware of and did consider Kidd's experience on the incumbent contract. The record also indicates that Industrial Bank had considerable relevant experience. We are unable to conclude that the contracting officer's evaluation and scoring were unreasonable or arbitrary. In sum, we discern no violation of the law or the terms of the RFP in the evaluation and scoring of the experience and past performance criterion. In its comments on the Agency Report, Kidd raises additional grounds for protest in its discussion of the past performance issues (*see* Comments on Agency Report, at 6-7), but we find no merit in these additional allegations.

CONCLUSION

Based on the protest record, we conclude that the contracting officer violated neither the law nor the terms of the RFP in her evaluation of proposals and in the selection of Industrial Bank for award. Accordingly, we deny Kidd International's protest.

SO ORDERED.

DATED: October 5, 2007

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

NATION CAPITAL BUILDERS, LLC)
Under IFB No. DCKA-2007-B-0082) CAB No. P-0761

For the Protester, Nation Capital Builders, LLC, Leonard A. White, Esq. For the Government: Howard Schwartz, Esq., and Talia Sassoon Cohen, Esq., Assistant Attorneys General.

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

OPINION (Filing ID 17323071)

Nation Capital Builders, LLC, ("NCB") filed a protest on August 28, 2007, challenging the District's rejection of its bid for failing to submit a bid bond. NCB argues that it was not required to submit a bid bond with its bid and that alternatively the contracting officer should waive the bond requirement as a minor informality. On October 23, 2007, the District's Acting Chief Procurement Officer ("CPO"), pursuant to D.C. Code § 2-309.08(c)(2), determined that the District should proceed with contract performance while the protest is pending. On October 30, 2007, NCB filed a motion challenging the determination to proceed with performance under a recently awarded contract. For the reasons discussed below, we conclude that the CPO's determination should be sustained. We further determine that the solicitation required a bid bond, NCB did not submit a bond with its bid, and that the contracting officer properly rejected NCB's bid as nonresponsive. Accordingly, we deny the protest.

BACKGROUND

On June 29, 2007, the Office of Contracts and Procurement issued solicitation IFB No. DCKA-2007-B-0082 on behalf of the District Department of Transportation ("DDOT") requesting bids to provide preventative maintenance activities to rehabilitate and maintain roadway and roadway assets, within the rights of way on the District's portion of the National Highway System. (Agency Report, Ex. 1). The bid documents set forth a contract base term of one year with the possibility of four successive one-year options. Bids were submitted by several prospective contractors, including NCB, on August 13, 2007. By letter dated August 15, 2007, the DDOT contracting officer informed NCB that DDOT declared NCB's bid non-responsive because NCB failed to submit a signed and completed bid bond. (Agency Report, Ex. 5). NCB protested the determination of non-responsiveness on August 28, 2007. Since the protest was filed before award of the contract, an automatic stay of performance went into effect pursuant to D.C. Code § 2-309.08(c)(1). By Determination and Findings ("D&F") dated October 23, 2007, the Acting CPO determined that urgent and compelling circumstances that significantly affect interests of the District would not permit waiting for the final decision of the Board concerning the protest.

On October 30, 2007, the protester timely filed a Motion to Challenge the D&F alleging that the D&F does not provide substantial evidence of urgent and compelling circumstances that “significantly affect interests of the District.” (Motion at 1).

DISCUSSION

The solicitation at issue seeks a contractor to provide preventive maintenance activities to rehabilitate and maintain roadway and roadway assets within the rights of way on the District’s portion of the National Highway System. There is no question that providing for the maintenance of the roadway and roadway assets is a compelling and urgent requirement of the government. In the D&F, the CPO sets forth the District’s compelling need to proceed with contract award. According to the CPO, because the District could potentially lose up to 60 days of the construction season while it waited for a protest decision, and because waiting on a decision could impair the District’s ability to repair city streets before winter, the District could not wait to proceed with the preventative maintenance activities. The CPO clearly sets forth a compelling need to proceed with preventative maintenance services. For purposes of lifting the stay, once a compelling need for the services is shown, whether another contractor can also perform is irrelevant. *Whitman-Walker Clinic, Inc.*, CAB Nos. P-0672 and P-0674, July 25, 2003, 50 D.C. Reg. 7521. Accordingly, we deny NCB’s motion challenging the CPO’s determination to proceed with contract award.

Regarding the merits of the protest, NCB alleges that it is now ready to submit a bid bond and performance bond so that the District could award the contract to NCB. Although NCB’s protest is not a model of clarity, NCB seems to argue that the solicitation did not require a bid bond to be submitted with its bid. We assume that NCB is arguing that the District, by improperly rejecting NCB’s bid, improperly removed NCB from consideration as the lowest bidder for the procurement. The District responds that since the bid bond form was included in the IFB, the procurement clearly required the bidder to furnish a bid bond at bid opening.

NCB alleges that the bid bond form is ambiguous, and that the form allows the bidder to produce a bid bond up to 90 days after bid opening. NCB further alleges that in any event, the procurement regulations allow the contracting officer to accept a bid without a bid bond, if the bid is in the best interests of the District, citing 27 DCMR § 2702.1(b). The District responds that the language setting forth the bid bond period is not ambiguous, and that the bid bond form requires a bid bond to remain in effect for 90 days after bid opening. Additionally, the District responds that the contracting officer cannot waive the bid bond requirement unless the bid meets the criteria set forth in 27 DCMR § 2702.1. Section 2702.1 provides that the bid meet the requirements for a waiver under one of the other bid bond waiver exceptions of section 2702 and that the waiver be in the best interests of the District.

D.C. Code § 2-305.02(a)(1) provides that “[b]id security shall be required for all competitive sealed bids and competitive sealed proposals for construction contracts when the price is estimated by the Director to exceed \$100,000.” In the IFB, the District set forth an estimated price over \$100,000, thereby requiring all bidders to submit a bid bond. D.C. Code § 2-305.02(c) further requires that the District reject a bid that does not include a bid bond when

the IFB requires a bid bond. This Board has noted the well-settled doctrine that in deciding whether a bond is defective, we must determine whether the surety would be bound to its surety obligation by the bid bond as submitted. See *MC Services, Inc.*, CAB No. P-0570, March 18, 1999, 46 D.C. Reg. 8582; *HR General Maintenance Corp.*, CAB No. P-0557, February 2, 1999, 46 D.C. Reg. 8556. There is no question that the District required a bid bond in the IFB. Likewise, 27 DCMR § 2702.1 is clear and unambiguous when it requires the contracting officer to reject a bid when the bidder fails to comply with the bid security requirements. Therefore, since NCB's bid did not include a bid bond, and since NCB's bid was not eligible for a waiver of the bid bond requirement under any of the other subparts of section 2702, the contracting officer properly determined that NCB's bid was nonresponsive to the IFB.

In the response to the Agency Report, NCB questioned whether sealed bids for construction IDIQ type contracts require bid bonds at bid opening. NCB did not present this ground of protest in its protest filing. The District responded by noting that the protester should have sought clarification of this alleged impropriety in the IFB by filing a protest before bid opening. D.C. Code § 2-309.08(b)(1) provides that "[a] protest based upon alleged improprieties in a solicitation which are apparent prior to bid opening ... shall be filed prior to bid opening" The District contends that this protest ground is untimely and should be dismissed. We agree. Indeed, to the extent that NCB raises new protest grounds in its response to the Agency Report, those grounds are untimely and are hereby dismissed.

Since NCB did not provide a bid bond, the contracting officer properly rejected the bid. Accordingly, we deny the protest.

SO ORDERED.

DATED: November 20, 2007

/s/ Warren J. Nash
Administrative Judge

/s/ Jonathan D. Zischkau
Chief Administrative Judge

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

INCLUSION RESEARCH INSTITUTE)	
	)	CAB No. P-0762
Under RFQ No. POHC-2007-RQ-158143)	

For the Protester Inclusion Research Institute: Carl T. Cameron, Ph. D, President. For the District of Columbia Government: Howard Schwartz, Esq., Talia S. Cohen, Esq., Office of the Attorney General.

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

OPINION

Filing ID 17513780

By letter dated August 31, 2007, and received by the Board on September 7, 2007, protester Inclusion Research Institute (“IRI”) protests the award by the Office of Contracts and Procurement (“OCP”) of a contract for activities in support of a Medicaid Infrastructure Grant issued to the District by the United States Department of Health and Human Services (“HHS”). IRI argues that it was the only contractor proposed in the District’s grant application to HHS, that it had the most experience in performing the solicited services, and that OCP wrongfully excluded IRI from the competition by limiting the procurement to firms on the District of Columbia Supply Schedule (“Supply Schedule”). The District filed a combined motion to dismiss and Agency Report on October 15, 2007, asserting that the protest is untimely because the protester should have filed the protest by August 2, 2007. The District also asserts that the District properly purchased services for this RFQ under the Supply Schedule. We dismiss the protest as untimely.

BACKGROUND

HHS’s Center for Medicare and Medicaid Services (“HHS/CMS”) issued a request for grant proposals for states and the District to compete for Medicaid Infrastructure Grants (“MIGs”). (Agency Report, Ex. 2). These federal grant funds are used by the states to improve the services to maintain employment for workers with disabilities. The District submitted its grant proposal on July 13, 2006. In the grant proposal, the District stated that IRI “will be asked to serve as a contractor for the MIG project. . . .” (Agency Report, Ex. 3).

By letter dated November 14, 2006, HHS/CMS informed the District that the District had received a grant award. (Agency Report, Ex. 4). HHS/CMS attached to that letter an award profile, the terms and conditions of the grant award, and a notice of grant award. (Agency Report, Ex. 5). HHS/CMS did not include language in the grant award documents that required the District to enter into a contract with IRI.

On July 31, 2007, the District issued Request for Quotations No. POHC-2007-RQ-158143 (“RFQ”) to seven firms on the District of Columbia Supply Schedule for a contractor to develop key components to launch a Medicaid Buy-In for persons with disabilities in the District. (Agency Report, Ex. 6). IRI did not receive a copy of the RFQ from the District because it is not on the D.C. Supply Schedule. IRI observes that D.C. Supply Schedule contracts are set aside for District certified local, small, and disadvantaged business enterprises and IRI as a non-profit entity is ineligible to be so certified. (IRI Response, at 4 & n.1). On August 3, 2007, the District received two quotations, one from HGM Management (“HGM”), for \$120,095, and the other from Motir Services, Inc., for \$367,500. (Agency Report, Ex. 8). Motir included in its quotation a letter from IRI dated August 2, 2007, stating that IRI would participate as a subcontractor to Motir. (Agency Report, Ex. 11). IRI states in its response to the motion to dismiss that it first received notification of the RFQ when it was contacted by Motir to be a subcontractor if Motir received a contract award. On August 20, 2007, the District issued a task order under the RFQ to HGM, the lowest responsive and responsible bidder. (Agency Report, Ex. 13). On September 7, 2007, IRI filed the instant protest.

DISCUSSION

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

In the motion to dismiss, the District asserts that IRI filed its protest more than 10 business days after August 2, 2007, the date of the letter in which IRI stated that it would participate with Motir as a subcontractor. (Agency Report, Ex. 11). The District asserts that because IRI knew that the District had issued the RFQ under the D.C. Supply Schedule as of August 2, 2007, IRI should have filed its protest within 10 business days of that date, that is, by August 17, 2007. IRI’s other contention, that the District committed to awarding it a sole source contract by mentioning IRI in the grant application to HHS, is no different from the first contention in alleging an impropriety in the solicitation and deciding to competitively procure the services rather than obtain them non-competitively through a sole source award.

Both of IRI’s grounds of protest are untimely. D.C. Code § 2-309.08 (b)(1) requires a protester to file, prior to bid opening or the time set for receipt of initial proposals, its protest based upon alleged improprieties in a solicitation. D.C. Code § 2-309.08 (b)(2) allows the protester to file a protest, in cases other than those covered in paragraph b(1), not later than 10 business days after the basis of the protest is known or should have been known, whichever is earlier. When IRI submitted its August 2, 2007, letter to Motir for inclusion in Motir’s quote, IRI knew, or should have known, that IRI was not listed in the RFQ as a “preferred contractor.” Moreover, because the RFQ limited responses to contractors with D.C. Supply Schedule contracts, and because IRI did not have a Supply Schedule contract, IRI knew, or should have known, by August 2, 2007, that it could not submit to the District a response to the RFQ. Accordingly, we agree with the District that the protest is untimely and that it should have been filed earlier than September 7, 2007.

The Procurement Practices Act favors competitive bidding. D.C. Code § 2-303.02 sets forth the hierarchy of methods to be used by the District government to award contracts. Competitive sealed bidding and competitive proposals are favored above all other methods for

contract awards. D.C. Code § 2-303.04 sets forth the standards to be used for contracting by competitive sealed proposals. D.C. Code § 2-303.04(b) requires proposals from the maximum number of qualified sources, with adequate public notice of the intended procurement. D.C. Code § 2-303.05 sets forth the limited bases for conducting sole source procurements. Those standards require that the District certify that there is only one source for the required commodity, service or construction item. In this matter, the contracting officer did not certify that only one contractor could provide the services set forth in RFQ POHC-2007-RQ-158413 for activities in support of a Medicaid Infrastructure Grant. Further, there is nothing in the record demonstrating that the District was legally bound to award a sole source contract to IRI solely based upon a statement made in a grant application to HHS.

CONCLUSION

For the reasons discussed above, we dismiss the protest.

DATED: December 4, 2007

/s/ Warren J. Nash

WARREN J. NASH

Administrative Judge

CONCURRING:

/s/ Jonathan D. Zischkau

JONATHAN D. ZISCHKAU

Chief Administrative Judge

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

Camille Howe Cleaning Service)
Under IFB No: RM-08-B-049) CAB No. P-0768

OPINION (Filing ID 19286433)

For the Protester, Camille Howe Cleaning Service: Camille Howe, pro se. For the District of Columbia Government: Howard Schwartz, Esq., Talia Sassoon Cohen, Esq., Assistant Attorneys General.

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

Camille Howe Cleaning Service ("Camille Howe") filed a protest of an award on January 7, 2008. Ms. Howe argues that the District of Columbia Department of Mental Health ("DMH") awarded the contract to a nonresponsive bidder under IFB No. RM-08-B-049 ("IFB") in violation of applicable statutes and regulations. Camille Howe claims that the awardee (Marcellus Cobb) failed to attend a mandatory site visit, rendering the bid nonresponsive. The District submitted an un rebutted affidavit stating that the awardee did attend the site visit. In any event, the failure of a bidder to attend a site visit is not a matter of responsiveness. Accordingly, we deny the protest.

BACKGROUND

OCP issued the IFB on October 26, 2007, after the cancellation of a previous IFB on September 27, 2007. (Agency Report, Ex. 4). The IFB for the fixed unit price contract required the prospective contractor to provide cleaning services at five Community Services Facilities seven days a week, including holidays. The IFB set forth a contract base term of one year with the possibility of four one-year options.

Camille Howe submitted its response to the IFB on November 16, 2007. Two other prospective contractors, Marcellus Cobb and Building Services, also submitted responses. The bid tabulation sheet (Agency Report, Ex. 3) sets forth the ranking of the three prospective contractors after tabulation of their bid prices. Camille Howe's prices for the contract are the highest prices of the three bidders in the base year and in three out of the four option years. Camille Howe filed its protest on January 7, 2008. In the Agency Report, the District submitted an affidavit of the contracting officer, Samuel J. Feinberg, indicating that the awardee in fact attended the mandatory site visit. (Agency Report, Ex. 7). By Determination and Findings to Proceed ("D&F") dated January 9, 2008, DMH determined that it had a compelling need to proceed with contract award,

despite the protest. On January 11, 2008, the Chief Procurement Officer (“CPO”) signed the Determination and Findings to Proceed with Award pending decision on the protest.

On January 26, 2008, the protester filed a “Rebuttal to Incorrect Facts Contained in the Determination & Finding to Proceed with Performance While Protest is Pending.” The Board denies the protester’s challenge to the D&F to proceed. There is no question that providing for cleaning services at the facilities is a compelling and urgent requirement of the government. In the D&F, the CPO sets forth the District’s compelling need to proceed with contract award, because any disruption of cleaning services at the facilities could present health and safety risks to the public and to the staff who provide services to the patients.

DISCUSSION

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

In the protest, Howe argues that the other bidders submitted nonresponsive bids because those bidders did not attend the mandatory site visit required by the IFB. OCP responded to that allegation by submitting the affidavit of the contracting officer stating that the other bidders did attend the site visit. Howe did not respond to the Feinberg affidavit.

The Comptroller General has previously held that the failure to attend a mandatory site visit is not a matter of bid responsiveness. In *Edw. Kocharian & Company, Inc.*, B-193045, 58 Comp. Gen. 214, 79-1 CPD ¶ 20, Jan. 15, 1979, the Comptroller General set forth the rule regarding mandatory site visits and responsiveness. Kocharian argued that failure on the part of the bidder to attend the mandatory site inspection should cause the bid to be rejected as nonresponsive. The Comptroller General stated that the test to be applied in determining the responsiveness of a bid is whether the bid as submitted is an offer to perform the exact thing set forth in the IFB. If the bidder promises to perform the work as set forth in the IFB, then the bid should not be rejected as being nonresponsive because the bidder did not attend the site visit. In the instant matter, the un rebutted evidence from the District shows that the awardee did attend the site visit. However, even if the awardee had not attended the site visit, the failure to attend the site visit does not render its bid nonresponsive. Accordingly, we deny the protest.

DATED: April 5, 2008

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

ACE COMMUNICATIONS)
) CAB No. P-0772
Under Contract No. DCTO-2008-C-0064)

For the Protester, Ace Communications: Mr. Frank Clancy, Jr., pro se. For the District of Columbia Government: Howard Schwartz, Esq., Senior Assistant Attorney General, and Mark Hansen, Esq., Assistant Attorney General.

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

OPINION

Filing ID 20555807

Ace Communications protests the District’s award of a contract to Audio Visual Innovations (“AVI”) to install a new audio/visual system in the Metropolitan Police Department (“MPD”) Synchronized Operations Command Center (“SOCC”) complex. Ace Communications contends that it should have received the award because it was an “equally qualified firm” and proposed a lower price than the awardee. The record shows no error on the part of the contracting officer in determining that AVI’s offer was more advantageous than Ace’s offer, considering technical and price factors. AVI’s technical proposal was rated significantly higher than Ace’s proposal such that the relatively smaller pricing advantage for Ace did not change the ultimate ranking of offerors with AVI ranked highest. We conclude that the contracting officer’s evaluation and selection did not violate the terms of the solicitation or District law. Accordingly, we deny the protest.

BACKGROUND

On December 13, 2007, the District of Columbia Office of Contracting and Procurement (“OCP”), on behalf of the MPD, issued Request for Proposals (“RFP”) No. DCTO-2008-R-0025 for the provision and installation of a new audio/visual retrofit in various locations at the MPD SOCC complex. (AR Ex. 1, Sec. B.1). The scope of work required the upgrade/replacement of the audio/visual system in the (1) SOCC Command Information Center; (2) SOCC Intelligence Operations Center; (3) SOCC Secure Compartmented Information Facility; (4) SOCC Conference Room; (5) Chief’s Conference Room; and (6) MPD HQ Conference Room. The contractor was required to replace/upgrade the AMX control system and assure connectivity with various other systems. OCP intended to award a fixed-price contract to the offeror with a proposal most advantageous to the District. (AR Ex. 2, Sec. L). The District did not amend the RFP, and received four proposals prior to the January 5, 2008 closing date. (AR Ex.2, at 3).

Section B.3.1 of the RFP required fixed-unit prices. The RFP contemplated eight CLINs for the base period, which were to be added by the offerors to propose a total price for the base period.

Additionally, the RFP contemplated four fixed-price one year option periods to provide maintenance and warranty of the audio/visual retrofit. (AR Ex. 1, Sec. B). The District intended to award the contract to the offeror whose proposal provided the best value to the District. (AR Ex. 1, Sec. M).

The contracting officer convened a source selection panel on January 17, 2008, and provided instructions on how to properly evaluate the technical proposals consistent with the rating scale contained in the RFP, including instruction that each score had to be substantiated by recording the strengths and weaknesses. The solicitation provided a maximum of 70 points for the technical evaluation criteria, divided into four categories:

- Understanding of the requirement: 20 points
- Management of operations and resumes: 20 points
- Quality control: 20 points
- Past performance: 10 points

The source selection panel evaluated the four technical proposals and forwarded the following consensus scores to the contracting officer:

	Factor 1	Factor 2	Factor 3	Factor 4	Total Score
OFFEROR	Understanding Requirement 20 Points	Management of Operations 20 Points	Quality Control 20 Points	Past Performance 10 Points	
AVI	20 Points Consensus Rating 5	20 Points Consensus Rating 5	20 Points Consensus Rating 5	10 Points Consensus Rating 5	70
Activu	17.5 Points Consensus Rating 3.75	17.5 Points Consensus Rating 3.75	20 Points Consensus Rating 5	10 Points Consensus Rating 5	65
Ace/Tri Tech	5 Points Consensus Rating 1.25	7 Points Consensus Rating 3	12 Points Consensus Rating 1.75	10 Points Consensus Rating 5	34
Vantix	5 Points Consensus Rating 1.25	5 Points Consensus Rating 1.25	10 Points Consensus Rating 2.5	10 Points Consensus Rating 5	30

(AR Ex. 2, at 8). The evaluators determined that only AVI provided a true turnkey solution and provided timelines for the work that met the requirements of the solicitation. Other comments included that AVI fully understood the requirements, had a clear and concise proposal, and more than 30 years experience. (AR Ex. 4). The contracting officer, contracting specialist, and cost/price analyst evaluated each offeror’s price proposal. (AR Ex. 2, at 8). The RFP stated that the best value proposal would receive the maximum 30 points score for the price factor, with other proposals receiving proportionally lower scores. (AR Ex. 1, Sec. M.3.2). The contract specialist initially awarded AVI 30 points for its price evaluation as providing the best value to the District. The contracting officer corrected the contract specialist’s initial impression on price evaluation, determining that the maximum 30 points should be awarded to the offeror with the lowest price and

proportionally lower scores to other offerors, consistent with the District's intent for the pricing factor:

<u>Offeror</u>	<u>Score</u>	<u>Price</u>
AVI (awardee)	23	\$1,107,966.71
Activu	16	\$1,548,847.85
Ace (protester)	30	\$868,059.27
Vantix	0	\$375,000.00

(AR Ex. 2, at 11). Vantix received a 0 score for price as they did not provide option year prices and thus its proposal was unacceptable. The contracting officer therefore determined Ace's price to be the lowest. Adding the revised price evaluation scores to the technical evaluation scores yielded the following point totals:

<u>Offeror</u>	<u>Technical</u>	<u>Price</u>	<u>Total</u>
AVI (awardee)	70	23	93
Activu	65	16	81
Ace (protester)	34	30	64
Vantix	30	0	30

On February 27, 2008, the District awarded the contract to AVI in accordance with RFP Section L.1.2 which states that the District may award contracts on the basis of initial offers received, without discussion. The contracting officer determined that the difference in technical scores between AVI and the protester "virtually eliminated Ace/Tri Tech from consideration for award." (AR Ex. 2, at 11).

On March 4, 2008, Ace filed the instant protest with the Board, contending that "this award was made to an equally qualified firm whose bid price was significantly higher than the bid price which we had submitted." (Protest). By letter dated March 18, 2008, the District notified AVI to cease performance due to the filing of the protest. On March 21, 2008, the District filed a Determination and Finding to proceed with the Protest while a Protest is pending ("D&F"), and Ace Communications opposed the District's D&F. In an order of March 28, 2008, the Board sustained the CPO's determination to proceed.

Ace filed a motion for summary judgment on March 24, 2008, alleging that the District had failed to timely file its Agency Report, and thus that the protest allegations should be taken as un rebutted. The District, however, timely filed its Agency Report later the same day. On March 26, 2008, Ace filed a second motion for summary judgment, contending that the Agency Report was deficient and incomplete for failing to include its proposal and the proposal of AVI. In the motion, Ace further contends that the District's Agency Report was not timely filed because it was not electronically filed until 5:16 p.m., that is, past the 5 p.m. standard closing time for the Board. On March 27, the District supplemented the Agency Report by submitting the proposals of Ace and AVI. The District also argues that the Agency Report was timely filed because the Board's rule for electronic filing, Rule 403.1, states that "any document filed with the Board before midnight local time at the Board's offices is filed with the Board on that date."

DISCUSSION

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

Our standard of review for proposal evaluations and the selection decision is whether they were reasonable and in accord with the evaluation and selection criteria listed in the solicitation and whether there were material violations of procurement laws or regulations. *Trifax Corp.*, CAB No. P-0539, Sept. 25, 1998, 45 D.C. Reg. 8842, 8847. Ace has neither argued nor shown that any aspect of the evaluation of proposals or selection decision was flawed or unsupported by the record. The awardee, AVI, received a perfect technical score of 70 points and was the only offeror to provide a true turnkey solution requested by the solicitation. Ace was a distant third with a technical score of 34 points. Even with its 7 point advantage in pricing, Ace's total score of 64 points is well below AVI's total score of 93. Having reviewed the contracting officer's selection memorandum, and the underlying consensus evaluation reports of the evaluation panel, we conclude that the technical evaluations and selection decision were adequately documented and rationally supported. Regarding Ace's allegation that the District's Agency Report was untimely filed, we agree with the District that its filing met the Board's deadline for electronic filing.

Because Ace has not demonstrated that the evaluations and selection decision violated the law or the terms of the solicitation, we deny the protest.

SO ORDERED.

DATED: July 8, 2008

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTESTS OF:

REHMA COMMUNITY SERVICES, INC.)	
	)	CAB Nos. P-0765, P-0771
Under Solicitation No. CFSA-06-R-0010)	

For the Protester, REHMA Community Services, Inc.: Susan L. Schor, Esq., Jeanne A. Anderson, Esq., McManus, Schor, Asmar & Darden, L.L.P. For the District of Columbia Child and Family Services Agency: Howard Schwartz, Esq., Senior Assistant Attorney General.

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

OPINION

Filing ID 21566799

REHMA Community Services, Inc., protests the District’s Child and Family Services Agency (“CFSA”) award of contracts to 14 other offerors for providing mentoring services to children. REHMA claims that the contracting officer and evaluators failed properly to evaluate its proposal. In response to the protest, and after CFSA had replaced the initial contracting officer, the new contracting officer initiated a re-evaluation of the proposals and discovered errors in the technical evaluation and price evaluation. In particular, with regard to the price evaluation, the contracting officer determined that some of the awardees had failed to propose prices for both contract line items and others had only proposed prices for the base year although the amended solicitation required prices for both line items for the base and all option years. In the Agency Report, CFSA stated that the remedy should be to leave the 14 contracts in place for the remaining base year period (expiring September 30, 2008) since CFSA would need the time to reprocur the mentoring services and disrupting the services in the middle of performance would have adverse consequences on the well-being of the children being mentored. After the Agency Report was filed, REHMA filed a supplemental protest (CAB No. P-0771) arguing that the price evaluation was unreasonable and contrary to the terms of the solicitation, that the contracting agency unreasonably evaluated its technical proposal, that it was improperly excluded from the competitive range, and that the agency failed to make a proper best value determination.

The District and CFSA readily admit that the price evaluation was seriously flawed, and, on this basis alone, we must sustain the consolidated protests. Further, we agree with REHMA that it was improperly excluded from the competitive range. Regarding the technical evaluations, the record does not adequately demonstrate that the contracting officer made an independent evaluation of the proposals. We conclude the evaluation and selection was arbitrary and unreasonable such that REHMA is entitled to recover its proposal preparation costs. Regarding the remedy for the 14 contracts, we agree with the District that the proper action is to allow the 14 contracts awarded pursuant to the solicitation to expire on September 30, 2008. In other words, options shall not be

exercised. Rather, the District shall award new contracts based on a valid reprocurement for the mentoring services.

BACKGROUND

On November 8, 2006, CFSA's Contracts and Procurement Administration issued Request for Proposals No. CFSA-06-R-0010. (Agency Report ("AR") Ex. 1). The solicitation sought contractors to provide mentoring services in order to improve the functioning and development of children. (AR Ex. 1, § B.1.1). The original solicitation contemplated an indefinite quantity contract with payment based on fixed hourly rates pre-determined by CFSA. (AR Ex. 1, § B.2.1). CFSA intended to award multiple contracts, and received a total of 33 proposals, of which 24 were deemed acceptable and timely received by the December 8, 2006, closing date for proposals. (AR Ex. 1, § B.1.2, and Ex. 8). Prior to the closing date, CFSA issued Addendum No. 1 in order to clarify the date and time offerors' proposals were due to CFSA. (AR Ex. 1, Addendum No. 1).

CFSA initially intended to award contracts for mentoring services based on two evaluation criteria: (1) technical evaluation worth 85 points; and (2) price criteria worth 15 points, for a maximum possible score of 100 points. (AR Ex. 1, § M). The contracting officer selected a technical evaluation panel ("TEP") to score the offerors' technical proposals. (AR Ex. 9, ¶ 3). The TEP evaluated and scored offerors' proposals between March 2007 and June 2007. (AR Ex. 4).

On June 11, 2007, CFSA issued a second amendment to the solicitation clarifying issues surrounding offerors' pricing and LSDBE preference points. (AR Ex. 1, Addendum No. 2). The original solicitation had not required offerors to propose unit prices; instead CFSA had provided pre-determined unit prices based on the prices from previous mentoring services contracts. (AR Ex. 1, § B, Pricing Schedule). In Addendum No. 2, CFSA informed offerors that the unit prices previously included in the Pricing Schedule were merely government estimates. (AR Ex. 1, Addendum No. 2, Pricing Schedule). CFSA included in Addendum No. 2 a Pricing Schedule with two CLINs; CLIN 0001 for Individual Mentoring Services, and CLIN 0002 for Group Mentoring Services. Addendum No. 2 also required offerors to submit pricing for up to a maximum of 50 students, the number of hours the contractor would provide service per month to each student, and the price per hour (unit price) for each student. (AR Ex. 1, Addendum No. 2, Pricing Schedule). Addendum 2 clearly required pricing information for the base and option years for both CLINs: "The Offeror shall use the revised Pricing Schedules, which are included with this Addendum #2, to fill in the minimum and maximum number of hours to be provided for the two categories of students for the base year and option years." However, the Addendum only attached a pricing sheet for the base year. Addendum 2 also clarified that eligible offerors could receive a maximum of 12 LSDBE preference points resulting in a total maximum score 112 points – 85 points for technical, 15 points for price, and 12 LSDBE preference points. (AR Ex. 1, Addendum No. 2 and § M). Offerors were to submit pricing pursuant to the revised pricing instructions by June 19, 2007.

On June 20, 2007, the TEP submitted to the contracting officer its technical evaluations. The contracting officer began reviewing the TEP's recommendations on July 23, 2007. After reviewing the evaluation panel's recommendations, the contracting officer held a meeting with the contracts specialist and contracts manager to discuss the soundness of the evaluation process and quality

assurance procedures relating to the TEP's final scores. (AR Ex. 4). Although the Agency Report states that the contracting officer conducted an independent evaluation of the proposals in July 2007, there is no substantive evidence of his independent evaluation of the proposals in the record. The Agency Report includes a two-page memorandum dated July 31, 2007 (AR Ex. 10), from Jim Moye, Agency Chief Contracting Officer, to the CFSA Agency Director, Dr. Sharlynn E. Bobo. But the contracting officer merely lists in the memorandum the final numerical technical evaluation scores presumably received from the TEP, along with the flawed price evaluation scores, and his recommendation to award to the top 14 offerors. The offerors ranked 9 through 14 had total evaluation scores of 86, 86, 85, 84.5, 84, and 84, respectively. (AR Ex. 10). REHMA had a total score of 82 and was ranked 15th.

The contracting officer determined (incorrectly) that only the top 14 offerors who were intended to be the awardees were within the competitive range and held discussions with these 14 offerors between September 13 and September 30, 2007. (AR Ex. 4). The contracting officer failed to notify REHMA or any of the other lower ranked contractors that they were excluded from the competitive range. The contracting officer recommended awarding 14 contracts with 50 available slots each based on the projected need for the services, the projected budget available to pay for the mentoring services, the need to maintain a manageable number of vendors to ensure proper monitoring by CFSA, and the perceived contractor economies of scale of having a minimum of 50 students to serve. (AR Ex. 10).

On September 20, 2007, by letter sent certified mail, the contracting officer notified REHMA that it was not selected for award of a mentoring contract. (AR Ex. 11). The contracting officer held a debriefing with REHMA on October 3, 2007. (AR Ex. 4). On December 10, 2007, the contracting officer held a second debriefing with REHMA. (AR Exs. 4, 7, 12). REHMA filed its protest on December 12, 2007.

On December 21, 2007, CFSA's Director appointed a new interim chief contracting officer to CFSA, who determined during the course of this protest that in light of concerns about the original evaluation of proposals raised by REHMA, a re-evaluation was necessary. (AR Ex. 5). As noted in the District's Agency Report and exhibits, filed February 19, 2008, the contracting officer determined – after attempting to conduct a re-evaluation and discovering technical evaluation errors – that it was not possible to properly re-evaluate the existing proposals because of the lack of proper pricing data from some of the offerors (including awardees) and also due to the many variables introduced by the revised Pricing Schedules of Addendum 2. Although the revised solicitation indicated that the District would evaluate offers for award purposes “by evaluating the total price for all options as well as the base year”, CFSA did not receive option year pricing from all offerors, nor did all offerors provide pricing for both CLINs.

CFSA originally evaluated offerors' pricing based on the per unit price in the offerors' proposals. However, upon re-evaluation, CFSA determined that averaging CLIN prices was not a viable approach, as this method did not comply with the price evaluation criteria listed in the solicitation. (AR Ex. 5). Due to her concerns about the procurement process, the interim contracting officer stated that she would not exercise the options for any of the 14 awarded contracts. In addition, the contracting officer stated that she was re-soliciting the mentoring services during the

period March through September 2008 so that new contracts would be in place when the 14 contracts expire on September 30, 2008. (AR Ex. 5).

In her affidavit submitted with the Agency Report, the contracting officer urged that the contracts not be terminated by the Board but that the contracts be allowed to expire because CFSA is providing mentoring to 356 students, 25 percent of whom are receiving the mentoring services pursuant to court order, and that a disruption to the services would be detrimental to the well-being of the children being served. (AR Ex. 5).

In its supplemental Agency Report, the District recognizes the procurement flaws in the evaluation and award and states that “[i]n order to preserve the integrity of the District procurement system, it is clear the District must resolicit for the required mentoring services.”

DISCUSSION

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

Our standard of review for proposal evaluations and the selection decision is whether they were reasonable and in accord with the evaluation and selection criteria listed in the solicitation and whether there were material violations of procurement laws or regulations. *Trifax Corp.*, CAB No. P-0539, Sept. 25, 1998, 45 D.C. Reg. 8842, 8847. The District has admitted that the price evaluation and thus the selection decision were seriously flawed. Clearly, the price evaluation was arbitrary and unreasonable when measured against the procurement law and the revised solicitation. We also must conclude that there is inadequate evidence of an independent evaluation of the proposals by the contracting officer, as the record is devoid of supporting documentation of such an evaluation. Finally, we agree with REHMA that the contracting officer unreasonably excluded it from the competitive range. The competitive range “shall be determined on the basis of cost or price and other factors, in accordance with the evaluation criteria that were stated in the solicitation, and shall include all proposals that have a reasonable chance of being selected for award.” 27 DCMR §1620.1. “If there is doubt as to whether a proposal is in the competitive range, the proposal shall be included.” *Id.* §1620.2. “The contracting officer shall notify, in writing, an unsuccessful offeror at the earliest practicable time that its proposal is no longer being considered for award.” *Id.* §1620.3. Here, REHMA’s proposal should have been included in the competitive range as it had a reasonable chance of being selected for award. Its technical evaluation by the TEP was only 2 points below that of the next two higher ranked offerors and within 4 points of the next six higher ranked offerors. Given the discrepancies in the technical scoring by one of the evaluators, the contracting officer should have considered this in his own independent evaluation and invited REHMA for discussions as REHMA had a reasonable prospect of improving its technical evaluation based on meaningful discussions. In the present case, it appears that the contracting officer gave no thought to the possibility that discussions were meant to help improve the offerors’ proposals. Moreover, the contracting officer failed timely to inform REHMA that it had been excluded from the competitive range.

In sum, we sustain the consolidated protests for the serious procurement flaws in the evaluation and selection. We have carefully considered CFSA’s evidence concerning remedies and

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have decided not to order termination of the contracts but to allow them to expire on September 30, 2008, at which time the District will have in place new awards based on a valid procurement of the mentoring services. Options under the flawed awards shall not be exercised. Because the actions toward REHMA were arbitrary in the evaluation and selection, REHMA is entitled to its proposal preparation costs pursuant to D.C. Code §2-309.08(f)(2). It shall submit an application for costs and the parties shall attempt to agree on the amount of those costs.

SO ORDERED.

DATED: September 17, 2008

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

C&D TREE SERVICE, INC.)
) CAB No. P-0780
Under Contract No. DCKA-2007-B-0159)

For the Protester, C&D Tree Service, Inc: Richard L. Moorhouse, Esq., Sean M. Connolly, Esq., David T. Hickey, Esq., Greenberg Traurig, LLC. For the District of Columbia Government: Howard Schwartz, Esq., Senior Assistant Attorney General, and Alton E. Woods, Esq., Assistant Attorney General.

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

OPINION

Filing ID 21771414

C&D Tree Service protests the District’s awards of indefinite delivery, indefinite quantity (“IDIQ”) contracts on February 21 and March 3, 2008, to four other bidders on a solicitation issued for emergency tree and debris removal services. C&D claims that although those contracts called for only emergency tree and debris removal services, the District of Columbia Department of Transportation (“DDOT”) Urban Forestry Administration improperly has been issuing work orders for routine tree removal services during the performance of the IDIQ contracts. C&D is the incumbent contractor under an existing requirements contract to perform all routine tree removal services. As a losing bidder in the recent solicitation for emergency tree and debris removal services, C&D asserts that it has been competitively prejudiced by alleged “material changes in the scope of work now being directed or allowed by the District in the performance of the IDIQ contracts.” We dismiss the protest because the alleged constructive changes in the scope of work are contract performance issues rather than award challenges subject to protest.

BACKGROUND

On October 19, 2007, the District’s Department of Transportation (“DDOT”) issued in the open market Invitation No. DCKA-2007-B-0159 (“IFB”) to provide emergency tree and debris removal services. (Protest, Attachment A). Section C.2 states that:

The District has a recurring need to provide emergency tree removal service during a storm event or emergency situation, which will require the use of a crane or log truck to complete the work. It includes trees that fall into public space or from public space to private space and trees that have been identified as “standing hazardous trees” that need to be removed to prevent a public safety issue. . . .

The IFB contemplated award of four IDIQ fixed unit price contracts. (Id., IFB Section B). Bids

were opened on November 21, 2007. (Motion to Dismiss, at 2).

After evaluation, DDOT awarded contracts for emergency tree and debris removal services under the IFB to: Heavy Equipment Training Academy, LLC, on February 21, 2008, Excel Tree Expert Company on February 21, 2008, Community Bridge, Inc., on March 3, 2008, and Adirondack Tree Experts on March 3, 2008. (*Id.*). By letter dated March 4, 2008, the contracting officer informed C&D that it had awarded to other bidders the four contracts for emergency tree and debris removal services. (*Id.*).

C&D states that it is a long-standing contractor providing tree removal services to the District under POKA-2003-B00076-JBY, a requirements contract DDOT awarded to C&D on November 19, 2003. (Protest, Attachment B). According to C&D, under the terms of its requirements contract, the District agreed to purchase its requirements for the removal of all standing dead, dangerous, and diseased trees from C&D. (Protest, at 2). DDOT exercised several options to extend C&D's period of performance through November 18, 2008. (Protest, Attachment C). Despite the C&D requirements contract, C&D asserts that the District's arborists have provided information regarding numerous delivery orders issued by DDOT under the four 2008 IDIQ contracts where the work relates to routine, non-emergency tree removal services covered by C&D's 2003 requirements contract. (Protest, at 3-5, and Attachment D). We observe that C&D's work order data shows work orders presumably being assigned to C&D between August 2006 through 2008 under its requirements contract but later reassigned to one of the new IDIQ contractors in 2008. The record does not provide information regarding the dates of reassignment or the reasons for reassignment. There may well be some overlap between the requirements contract's specification for the removal of standing "dangerous" trees and the IDIQ contracts' specification for the removal of "standing hazardous trees" but C&D did not file a protest of the IDIQ solicitation so we need not address that here.

On July 10, 2008, C&D filed its protest, contending that C&D was competitively prejudiced since DDOT improperly issued delivery orders under the four IDIQ contracts for routine tree removal services and thus modifying or relaxing the contract specifications of the IDIQ contracts. C&D urges that DDOT should terminate the four IDIQ contracts for convenience and recompile the District's emergency tree removal needs under a "legally sufficient solicitation."

DISCUSSION

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

The District has moved to dismiss the protest on the ground that C&D is alleging essentially a contract dispute under its requirements contract, rather than a protest of the new awards. Both C&D and the District recognize the general rule that a protester's argument that an agency improperly relaxed specification requirements after award is based on contract performance and is thus not a proper ground for protest. *Shane Meats Co.*, CAB Nos. P-0339 *et al.*, Jan. 8, 1993, 40 D.C. Reg. 4885, 4899. The parties also recognize an exception to this rule where the agency modifies or relaxes the specifications in the awarded contract so that a bidder is competitively prejudiced because a competition for the contract as modified could have been materially different

from the competition originally obtained. *M&M Welding and Fabricators, Inc.*, CAB No. P-0542, Mar. 15, 1999, 46 D.C. Reg. 8576, 8579-80. Under the circumstances of this case, we agree with the District that the protest should be dismissed under the general rule that the matter involves contract performance issues properly addressed under our disputes jurisdiction.

M&M Welding and GAO precedent create a limited exception to the general rule where the modification or relaxation of a material term of the solicitation happens at the time of contract award or so close to award that it demonstrates the agency's intention to change or relax the contract term at the time of the award. In the present case, it is clear that the IDIQ contracts as awarded did not modify the solicitation's emergency tree removal services specification. There is no evidence that DDOT intended such a change at the time of award. Indeed, there has not been any change to the tree removal services through contract modification. Rather, C&D claims that DDOT has effectively modified the IDIQ contracts during performance by issuing delivery orders that cover routine tree removal work, not just emergency removal work. Even the record on this point is ambiguous. Work that may have been identified initially as routine when assigned to C&D under its requirements contract could later become emergency removal work after the passage of time or due to other causes. C&D says it did not learn of the alleged changes or relaxation until long after the awards and the beginning of performance. If some of the work assigned to C&D in 2007 was emergency tree removal services (the IDIQ emergency removal contracts were not awarded until February and March 2008), C&D could not complain that such work was reassigned to the four IDIQ contractors after the awards. Finally, as noted above, there may be some overlap between the requirements contract's specification for the removal of standing "dangerous" trees and the IDIQ contracts' specification for the removal of "standing hazardous trees." In any event, these issues are performance issues properly resolved under our dispute jurisdiction, not under our protest jurisdiction.

Because C&D raises issues that are properly contract administration issues rather than protest grounds, we dismiss the protest.

SO ORDERED.

DATED: September 30, 2008

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

CONCURRING:

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

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

CHEEKS OF NORTH AMERICA, INC.)
Under Solicitation No. 080020) CAB No. P-0786

For the Protester: John C. Cheeks, pro se. For the District of Columbia Water and Sewer Authority: John D. Bosley, Esq., Principal Counsel.

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

OPINION DISMISSING PROTEST

Filing ID 22338111

Cheeks of North America, Inc. ("CNA") protests the determination by the District of Columbia Water and Sewer Authority ("WASA") that its bid was nonresponsive based on a bid bond defect. WASA filed a motion to dismiss the protest on the grounds that the Board lacks jurisdiction to consider protests of WASA contract awards. Because WASA is exempt from our protest jurisdiction, we agree that the protest must be dismissed for lack of jurisdiction.

BACKGROUND

WASA issued Solicitation No. 080020 for replacement of small diameter priority water mains. At bid opening on August 20, 2008, CNA contends that it was the low bidder. However, by letter of September 9, 2008, the WASA contracting officer advised CNA that its bid was determined nonresponsive due to a bid bond defect. On September 30, 2008, CNA filed a protest of the award on the grounds of: "bid rigging, discrimination, failure to give adequate notice and time to cure compliance issues for invitation award." (Protest, at 1). On October 14, 2008, WASA moved to dismiss the protest on the ground that our Board lacks jurisdiction to consider the protest.

DISCUSSION

Section 2-309.03(b) of the D.C. Code provides that "[j]urisdiction of the Board shall be consistent with the coverage of this chapter [the Procurement Practices Act] as defined in §§ 2-301.04 and 2-303.20" D.C. Code § 2-301.04(a) ("Application of chapter") provides that:

Except as provided in § 2-303.20, this chapter shall apply to all departments, agencies, instrumentalities, and employees of the District government, including agencies which are subordinate to the Mayor, independent agencies, boards, and commissions"

D.C. Code § 2-303.20(j) provides a specific exemption for WASA:

Nothing in this chapter shall affect the District of Columbia Water and Sewer Authority's powers to establish and operate its procurement system and to execute contracts pursuant to Chapter 22 of Title 34.

Consistent with this provision, WASA published its procurement regulations which are found at 21 DCMR Chapter 53. Its regulation relating to protests of WASA solicitations and awards is set forth at 21 DCMR § 5330, which provides in part:

5330.3 A person protesting an award decision is required to file the protest with the Contracting Officer within five (5) working days of when the protester knew or should have known of the facts and circumstances upon which the protest is based. . . .

Because WASA is exempt from the Procurement Practices Act, we have no jurisdiction over protests of WASA awards. *Dixon's Termite and Pest Management*, CAB No. P-0706, May 4, 2005, 54 D.C. Reg. 1917, 1918; *Dixon's Termite and Pest Control, Inc.*, CAB No. P-0659, Aug. 7, 2002, 50 D.C. Reg. 7453, 7454. Accordingly, we dismiss CNA's protest for lack of jurisdiction.

SO ORDERED.

DATE: November 5, 2008

/s/ Jonathan D. Zischkau

Jonathan D. Zischkau
Chief Administrative Judge

CONCURRING:

/s/ Warren J. Nash

Warren J. Nash
Administrative Judge

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTESTS OF:

SODEXO OPERATIONS, LLC)	
	)	CAB Nos. P-0779, P-0781
Under RFP No. GAGA-2008-R-0064)	

For the protester: Kristin E. Ittig, Esq., Stuart W. Turner, Esq., and Chad W. Miller, Esq., Arnold & Porter, LLP. For the District of Columbia Government: Howard Schwartz, Esq., Senior Assistant Attorney General, and Talia S. Cohen, Esq., Assistant Attorney General. For the Intervenor: John H. Williamson, Esq., Michael C. Laurence, Esq., and James W. Dyke, Esq., McGuire Woods, LLP.

OPINION (REDACTED)

Filing ID 23176365

Sodexo Operations, LLC ("Sodexo"), has protested the District's award of the school lunch program contract to Compass USA Inc., through its Chartwells Schools Dining Services Division and Thompson Hospitality, LLC ("Compass"). Sodexo also challenges its elimination from the competitive range by the contracting officer of the District of Columbia Public Schools ("DCPS") on cost realism bases and on its failure to provide a loss guarantee. According to Sodexo, DCPS improperly downgraded its proposal based on erroneous cost and technical evaluations. Because we determine that DCPS's cost realism and loss guarantee analyses find reasonable support in the record, and that Sodexo was not prejudiced by the evaluation and selection actions, we deny the consolidated protests.

BACKGROUND

On February 17, 2008, the DCPS Office of Contracts and Acquisitions issued Request for Proposals ("RFP") No. GAGA-2008-R-0064 in the open market. (Agency Report ("AR") Ex. 1). Through the RFP, DCPS sought a food service management company ("FSMC") to operate a food service program for the approximately 148 District of Columbia public schools that serve breakfast and lunch meals. (AR Ex. 1, C.1.). The proposed contract was meant to privatize the food service program which had been operated in-house by DCPS at a significant cost deficit each year. The selected FSMC was to be responsible for "full meal planning, preparation and delivery at all DCPS schools." (AR Ex. 1, C.2.1.2.). The relevant scope of work is provided in section C.2 of the RFP:

C.2.1 The scope of services will be as follows:

C.2.1.1. For the full life of the contract for the period of one (1) base year and four (4) option years not to exceed a total of five (5) years, the FSMC is expected to:

- Manage and accurately report all revenue generating activities in coordination with the Office of the Chief Financial Officer (OCFO), including, but not limited to, cash sales and federal reimbursements

- Improve free and reduced form collection, and improve breakfast and lunch meal participation (and summarize the improvement plan and history of success in the proposal)
- Manage commodity program in coordination with DCPS
- Manage and accurately report all expense items, including, but not limited to, personnel and consumables
- Manage and accurately report the Food Service income statement, including net income (loss) on a monthly basis
- All income accruing as a result of payments by children and adults, federal and state reimbursements, and all other income from sources such as donations, special functions, grants, and loans, shall be deposited in the DCPS food service account in coordination with the Office of the Chief Financial Officer. Any profit or guaranteed return shall remain in the DCPS food service account. The DCPS and the FSMC agree that this contract is neither a “cost-plus-a-percentage-of-income” nor a “cost-plus-a-percentage-of-cost” contract

C.2.1.2 For the Contract Period, (and subsequent option years of the Contract), the FSMC is expected to provide:

- Full meal planning, preparation and delivery at all DCPS schools
- In its proposal the FSMC should document its plan to manage the elementary schools’ food delivery system

C.2.1.3 For the entire contract period, the FSMC will provide a net income/guaranteed minimized loss to DCPS, as calculated by using the templates provided in Attachment A.

The RFP states that “DCPS contemplates a Cost Reimbursable contract” and that the contractor “agrees to meet all obligations under this contract within the cost-reimbursement ceilings.” (AR Ex. 1, B.2). Section B.2 further states that the

District is not obligated to reimburse the Contractor for cost incurred in excess of the cost-reimbursement ceiling, and the Contractor is not obligated to continue performance under this contract (including action under the Termination clauses of this contract), or otherwise incur costs in excess of the cost-reimbursement ceilings specified in B.2 listed in the contract, until the Contracting Officer provides written notification to the Contractor that the estimated cost has been increased and provides revised cost-reimbursement ceilings for performing this contract.

Section B.3, entitled “Price Qualification”, provides in relevant part:

To effectively determine the overall best value relative to pricing, DCPS will assess the net income/guaranteed minimized loss provided by the FSMC. The prices shall be for the base year and four (4) option years. The FSMC shall use

the pricing templates to provide the pricing information (see J.1—Appendices) with specific reference to the following sections in J.1:

- Attachment A: Net Income/Minimized Loss Worksheet
- Attachment B: DCPS School Calendar
- Attachment M: Cost Responsibility Detail Sheet

(*Id.*). The Net Income/Minimized Loss Worksheet has tables for obtaining the offeror's pricing data per contract performance year: (1) total revenue consisting of the sum of total cash sales revenue, total anticipated federal reimbursement revenue, and total summer program revenue; and (2) total program costs consisting of food costs, labor costs, other direct costs, administrative costs, and management fee. At the bottom of the form, DCPS requested the following information:

PROFIT/LOSS (SUBSIDY)

Bid Price Per Meal (Total Cost divided by Equivalent Meals Per Year)

Signed: _____ [calling for the contractor's signature]

- 1) Are your projected budget results (and bottom line) guaranteed?
- 2) Up to what amount or limit is the guarantee?

(AR Ex. 1, J.1.1.A).

Section M (Evaluation Factors) of the RFP provided 65 points for technical criteria and 35 points for price/cost criteria as follows:

52 Points Technical Evaluation
3 Points Financial Condition of the Food Service Management Company (FSMC)
10 Points Transition Plan
35 Points Price/Cost
100 Total Combined Points

The closing date for proposals was March 21, 2008. DCPS received proposals from Sodexo and Compass. (AR Ex. 2, 4). In its proposal, Sodexo stated that it would reduce the current school year's projected loss of \$11,000,000 to approximately \$[REDACTED]. Sodexo did not directly respond to the guarantee questions on the Net Income/Minimized Loss worksheets. At item 7 of its proposal, entitled "Guaranteed Results", Sodexo states: "We believe so strongly in our financial projections that we will guarantee our projections up to [REDACTED] dollars in excess of our fees."

A technical evaluation panel ("TEP") consisting of three representatives from the Offices of Food and Nutrition Services, Business Operations, and the Office of the Chancellor, convened in March 2008, to evaluate the technical proposals. The technical evaluation report by the TEP was submitted to the contracting officer on April 1, 2008. (September 16, 2008 Supplemental Agency Report, Ex. F). The TEP, in its summary of findings, stated in part:

The two proposals submitted were judged to be technically acceptable and met the requirements of #RFP-GAGA-2008-R-0064, Food Service Management Company. Each company presented proposals which addressed all areas of the solicitation. They both exhibited knowledge of food service management and demonstrated the capability to provide the required services for school food service needs. Though the proposals were different in the length, they both responded to the level of complexity and addressed the various aspects of the solicitations. . . . There are various aspects of the two proposals that need additional clarity and discussion; however, the major areas of concern identified in the review relate to the level of investment; field staff for schools; detail and clarity of rollout plan; and experience with large urban school districts.

Compass received overall technical scores of 59.25, 64, and 60 from the three evaluators. Sodexo received overall technical scores of 56.25, 49, and 55.5. (Supplemental AR, Ex. F, Attachment A).

On April 4, 2008, a Food Show Student Taste Test was conducted by certain students to evaluate the food products of each offeror. (Supplemental AR, Ex. G, ¶5). Compass was rated higher on the taste test by the students. On April 7, the TEP revised its original evaluation report to incorporate the student food taste test scores which resulted in a one point increase in the Compass score of one evaluator. Compass received overall technical scores of 60.25, 64, and 60 from the three evaluators. Sodexo received overall technical scores of 56.25, 49, and 55.5. (*Id.* ¶¶ 5-6). On April 13, the contracting officer issued a request to conduct discussions which were held on April 15, 2008. The contracting officer requested Best and Final Offers (“BAFOs”) from the offerors and both offerors submitted BAFOs by April 18, 2008. (*Id.* ¶¶ 6-7).

The TEP evaluated the BAFOs and prepared a consensus report dated April 22, 2008. (Supplemental AR, Ex. F, Attachment B). The technical scores for Compass were generally higher with the evaluators giving it overall technical scores of 63, 64, and 61.5, while Sodexo received overall technical scores of 56.25, 49, and 58.5 (one evaluator increased Sodexo’s overall score by 3 points). (*Id.* ¶¶ 8-9). The TEP presented a consensus finding for each contractor. For Compass, the TEP narrative included the following:

This vendor provided additional clarity relative to all aspects of the proposal and responded thoroughly to all questions in the BAFO; therefore the Panel adjusted their scores accordingly. . . . As part of their oral presentation, the company provided a comprehensive assessment of their management structure and demonstrated additional expertise working with USDA commodities and marketing strategy. . . . The key area that this vendor highlighted relates to their financial information. In addition to remaining consistent with the Minimized Loss Guarantee, this vendor provided a clear outline of their capital investment and detailed an enhancement to their proposal to include a cashless POS system as part of their capital investment.

For Sodexo, the TEP narrative stated the following:

It appeared that the vendor addressed the concerns regarding the Minimized Loss Guarantee outlined by DCPS, however, the technical report did not include critical financial data regarding revenues and associated expenses. Specifically, the vendor did not respond to the following deficiency that the Panel noted in their original proposal: Explain how projected revenue will increase by over [REDACTED] dollars in the out years without corresponding increase in food cost.

The Panel noted that the integrity and reliability of the financial data for this vendor's BAFO appears suspect as the data could not be verified based on the information they provided.

In addition, the Panel noted a new weakness relative to the vendor's proposal for bulk feeding. The BAFO outlined a plan that would [REDACTED].

Overall, this vendor's BAFO raised additional concerns rather than address the deficiencies that were identified as part of the initial review.

(Supplemental AR, Ex. F, Attachment B).

On May 2, 2008, the contracting officer selected Compass for award of the contract, attaching the BAFO price evaluations and the technical evaluation reports of the panel as support for the decision. (Supplemental AR, Ex. F). The contracting officer also determined at this time to exclude Sodexo from the competitive range though the rationale for that decision was not memorialized until June 11, 2008. (AR Ex. 7). The contracting officer followed up her selection determination with a determination and findings memorializing her independent evaluation assessment, dated June 4, 2008. (AR Ex 8.). She states in relevant part:

Pursuant to 27 DCMR, Section 1618, the Contracting Officer evaluated the proposals received in accordance with the above evaluation criteria as set forth in the solicitation. Upon the evaluation/assessment, it was determined that both proposals met the District's minimum requirements as stated in the solicitation and the overall price was deemed acceptable via the reviews of both original proposals and price for Best and Final Offers

The contracting officer issued another determination and findings, dated June 11, 2008, relating to her determination to exclude Sodexo from the competitive range which was made on May 2, 2008, when she had selected Compass for award. (AR Ex. 7). She determined that Sodexo did not use industry standards to determine food costs for school districts, that Sodexo did not respond to questions in the guaranteed minimized loss worksheet as required by the RFP, and that students from the Chancellor's Student Cabinet rated Compass' food taste quality higher than Sodexo's. In the June 11 determination, the contracting officer explained her decision of May 2, 2008, as follows:

The final evaluation for the Best and Final Offer (BAFO) determined that Compass Group scored 8.5 points higher than Sodexo in the overall technical evaluation. Compass Group received a combined technical score of 63. Sodexo received 54.5. Pursuant to the combined price for the base year and four option years Compass Group offered \$163,575,250 [with a] base year amount [of] \$28,023,275 and received a 31.8 price score and Sodexo offered \$[REDACTED] [with a] base year amount [of] \$[REDACTED] and received a 35 price score, the maximum weighted factor.

Contractor	Net Subsidy Base Year	Net Subsidy Base Year and Option Years
Compass Group	(\$[REDACTED])	(\$[REDACTED])
Sodexo	(\$[REDACTED])	(\$[REDACTED])

Contractor	Technical Evaluation Score	Price Evaluation Score	Total Score
Compass Group	63	31.8	94.8
Sodexo	54.5	35	89.5

It should also be noted that students from the Chancellor’s Student Cabinet, who participated in a food taste testing held on April 4, 2008 rated Compass Group overwhelmingly higher than Sodexo; there was a difference of 244 points in the favor of Compass Group.

Contractor	Student Food Taste Evaluation Score
Compass Group	673
Sodexo	429

The evaluation outlined areas of concern in Sodexo’s BAFO. This information was reviewed and validated as follows:

- Sodexo’s response to the deficiency relative to how projected revenue will increase by over [REDACTED] dollars in the out years without corresponding increase in food cost (letter dated 4/13/08 – question #11) raised serious concerns:
 - [REDACTED].
 - In their oral presentation, Sodexo proposed that they [REDACTED].
- Sodexo did not use the industry standard percentage for determining food cost for school districts, which is 45%; instead the contractor used an unrealistic rate of [REDACTED] % lower than the national average.
- Below is a detailed analysis of food costs for Compass Group vs. Sodexo as it relates to the Guaranteed Project Loss. Also attached is a spreadsheet detailing the analysis below.

The national school lunch program averaged food cost percentage across the nation is 45% of the total sales.

An Analysis of the Compass proposal shows that over the 5 year period proposed in the BAFO each of the years percentages were as follows: (See attachment A):

Year 1 – [REDACTED] %
Year 2 – [REDACTED] %
Year 3 – [REDACTED] %
Year 4 – [REDACTED] %
Year 5 – [REDACTED] %

Those percentages fall into an acceptable margin of error in food cost under a strict compliance purchasing organization within the respective company. Using those percentages Compass projected operating losses over 5 years of \$[REDACTED].

An analysis of the Sodexo Proposal shows that over the 5 year period proposed in the BAFO each of the year's percentages were as follows:

Year 1 – [REDACTED] %
Year 2 – [REDACTED] %
Year 3 – [REDACTED] %
Year 4 – [REDACTED] %
Year 5 – [REDACTED] %

Those percentages fall far out of an acceptable margin of error in food cost under a strict compliance purchasing organization within the respective company.

Using those percentages the contractor Sodexo projected operating losses over 5 years of \$[REDACTED].

If the Government evaluators inserted the national standard of 45% into Sodexo's proposal to correct a deficiency in the proposal, the extended losses over the 5 years period would have been \$[REDACTED] instead of \$[REDACTED].

- Sodexo did not respond to questions in the guaranteed minimized loss document as required:
 - Are your projected budget results and bottom line guaranteed?
 - Up to what amount or limit is the guarantee?

Taking into consideration all of the factors indicated above and a thorough review of the evaluation, I determined that further negotiations with Sodexo would not result in a reasonable likelihood that Sodexo could receive an award, therefore, Sodexo was eliminated from the competitive range.

After the evaluation of the BAFOs, source selection and development of the draft contract, I was advised that the FY09 student enrollment was projected at 47,744 and not the 50,000 plus as outlined in the solicitation; therefore, there was a need to adjust the numbers in the proposed contract with the Compass Group.

In light of the above factors, I did not request Sodexo to submit an amended BAFO to address solely the reduction of the enrollment from 50,000 to 47,744 and thus moved forward with the process of formalizing the source selection and drafting of the proposed contract.

DCPS awarded the contract to Compass on June 27, 2008. Sodexo filed its first protest (CAB No. P-0779) on July 2, 2008. After receiving documents attached to the initial agency report, Sodexo filed two supplemental protests on July 30, 2008 (CAB No. P-0781) and August 27, 2008.

DISCUSSION

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

Sodexo raises several protest grounds in its original protest of July 2, 2008. Sodexo alleges that DCPS failed to properly analyze Sodexo's costs set forth in its initial proposal and BAFO, thereby leading DCPS to assert that Sodexo's proposal included weaknesses that did not actually exist. Sodexo further alleges that these actions by DCPS caused DCPS to improperly exclude Sodexo from the competitive range. In its agency report, the District asserts that the contracting officer reasonably determined that Sodexo was not in the competitive range and that the District properly awarded the contract to Compass.

Sodexo argues that the District misread the cost section of the Sodexo initial proposal and BAFO, and that the District could not correctly conclude that its cost proposal was deficient in view of its misreading of the cost proposal and BAFO. Specifically, Sodexo alleges that DCPS's belief that the food costs set forth in the Sodexo BAFO were too low led DCPS to wrongfully evaluate the Sodexo proposal. In the supplemental protest filed July 31, 2008, Sodexo alleges that DCPS severely penalized Sodexo for nonconformity to an undisclosed evaluation standard. Sodexo alleges that the District relied on an out-of-print treatise from 1999 to analyze Sodexo's proposed food costs. Sodexo argues that the District should not have imposed the baseline percentage of 45 percent for food costs upon Sodexo, and that the use of a nationwide percentage for determining food cost is facially unreasonable. The contracting officer relied on a 1999 study entitled *School Food Service Management for the 21st Century*, fifth edition, by Dorothy Pannell-Martin, to verify the food cost assumption. The District argues that DCPS verified the percentage amount by examining a study produced by the Food and Nutrition Service of the United States Department of Agriculture, Office of Research, Nutrition and Analysis, dated April 2008. As noted by the District, that study found that "food costs, including donated commodities, accounted for 46 percent of reported costs, while labor costs accounted for 45 percent of reported costs." The contracting officer's determination also cites comparable food cost percentages from Compass' proposal. The District in its agency report states that the contracting officer's reliance on a 45 percent food cost assumption was supported because the results of the 1999 study remain valid and accurately reflect the current industry standard percentage for determining food costs for school districts.

We see no basis for concluding that the contracting officer's and the technical evaluators' downgrading of Sodexo's proposal for its food cost estimates was unreasonable, irrational, or violated the evaluation terms of the solicitation. Although Sodexo argues that it provided adequate data in its initial technical proposal and in its BAFO showing that it could furnish food at the lower costs, we cannot conclude from the record that the agency's downgrading of Sodexo's proposal for its food cost estimates is unsupported. The contracting agency did not simply or mechanically employ a 45 percent cost assumption based on a 10-year old study. The contracting officer referred to reasonably current food cost data in support of her determination. She had before her the one paragraph response in Sodexo's BAFO on the issue and Sodexo's 1-line comparison of its projected food cost per meal for DCPS (\$[REDACTED]) with that of four other school systems managed by Sodexo. As a protest tribunal, our function is not to re-evaluate the offerors' proposals or to make our own independent evaluation of the technical offerings or cost realism analysis. On the record before us, Sodexo has not shown that the evaluation of the food costs was unreasonable or irrational to merit sustaining the protest.

In the supplemental protest, Sodexo argues that it suffered "devastating competitive prejudice as a result of the District's methodology" regarding cost analysis of its proposal. In support of this argument, Sodexo asserts that the District improperly applied a higher cost to the Sodexo proposal, thereby failing to grant Sodexo's proposal its cost advantage. Sodexo's analysis ignores the analysis set forth by the contracting officer. In the technical evaluation, Compass' proposal received a combined technical score of 63, and Sodexo's proposal received a combined technical score of 54.5. (AR Ex. 7, at 2). After evaluation of the costs proposed by the offerors, Compass' proposal received a price score of 31.8, to yield a total score of 94.8. Sodexo's proposal received a price score of the maximum 35 points, to yield a total score of 89.5. Thus, Sodexo's proposal was ranked lower than Compass' proposal even after the agency gave Sodexo's proposal the maximum price score, and before downgrading Sodexo's cost proposal for its food cost estimates. Accordingly, Sodexo has not shown that the contracting agency's actions prejudiced Sodexo.

Sodexo contends that the contracting officer improperly concluded that Sodexo had not provided the required minimized loss guarantee. We do not agree. The RFP required offerors to submit with their proposals a "Net Income/Minimized Loss" worksheet for the base year and each option year, in accordance with section M.1.2.2 of the solicitation. The form required offerors to analyze their costs and set forth projected cost amounts based on annual revenues. Sodexo asserts that it provided a cost guarantee to the District on the first page of its Best and Final Offer. Sodexo does not deny that it failed to answer the questions on the Net Income/Minimized Loss worksheets but says that its cost guarantee satisfied the proposal requirement. The first page of that BAFO sets forth the following language:

Sodexo is continuing to project and guarantee a substantial first year financial performance improvement. Our projection of first year Student Nutrition losses to DCPS is \$[REDACTED]. If following the completion of fiscal year 08/09 the Student Nutrition Program, DCPS should experience a loss greater than \$[REDACTED], Sodexo will refund to DCPS any amounts that exceed the projected loss.

Sodexo argues that the language set forth above operates as a cost guarantee. While we agree that the guarantee language can be interpreted as a promise for the base year to absorb costs beyond the stated amount, we are not able to conclude that the language promises a loss guarantee for the option years of the contract.

Sodexo submitted the Net Income/Minimized Loss worksheets for the base year and four option years, but declined to answer the two questions on any of the worksheets. The District notes in its agency report that Compass answered positively the two questions that appear at the bottom of the worksheet for the base year and each of the option years. Additionally, the contracting officer, in her BAFO request letter to Sodexo dated April 15, 2008 (AR Ex. 11), requested that Sodexo “[p]rovide a detailed explanation of your minimized loss guarantee.” We agree with the District that Sodexo failed to provide a guarantee for the option years and thus find no ground for sustaining Sodexo’s protest on the basis of the loss guarantee issue.

Sodexo alleges that DCPS misconstrued or improperly evaluated various other aspects of Sodexo’s proposal, mostly relating to cost (*e.g.*, pre-plated meal costs, direct expenses, summer program expenses, capital investment, labor costs, taste test), and that the weaknesses cited in Sodexo’s proposal are factually flawed. Sodexo has not convinced us that the evaluations of these items were unreasonable or prejudicial. Although Sodexo repeatedly states that its BAFO loss guarantee eliminated any cost risks to DCPS, the loss guarantee even in the base year does not eliminate DCPS cost concerns at least up to the limit of the DCPS loss subsidy. Since Sodexo failed to provide a loss guarantee for the option years, it is hard to imagine how Sodexo could argue that DCPS was wrong in considering cost concerns in the evaluation. We have considered Sodexo’s arguments but find that they have no merit.

Sodexo challenges the contracting officer’s decision to eliminate Sodexo from the competitive range on the same date (May 2, 2008) that she made her source selection decision to award the contract to Compass. Sodexo was not prejudiced by the competitive range decision because it was made simultaneously with the selection decision and the selection of Compass was based on the DCPS evaluation that Compass provided the most advantageous offer to the District considering the technical and price criteria. Because we conclude that the selection decision does not violate the law or the terms of the solicitation, we similarly conclude that the competitive range determination is also supported by the record. As mentioned earlier, the final rankings, with Compass as the higher ranked offeror, incorporated the cost evaluation scores in which Sodexo received the maximum 35 points to Compass’ 31.8 points. Because the record indicates that no further discussions were conducted with Compass after May 2, 2008, Sodexo’s elimination from the competitive range had no material effect beyond the contemporaneous decision to award to Compass.

Sodexo urges as an additional protest ground that the contracting officer did not memorialize the competitive range determination until June 11, 2008, and did not notify Sodexo of that decision until June 18, 2008, long after she made her decisions on May 2, 2008. The contracting officer states that the urgency of finalizing a contract with Compass so that it could prepare to serve food during the 2008-2009 school year delayed her preparation of the competitive range determination. Certainly, the award and competitive range decisions should have been communicated within days of May 2, 2008, not six weeks later. Nevertheless, we

cannot conclude that the delayed notification prejudiced the rights of Sodexo in this procurement to justify sustaining the protest on this ground alone.

CONCLUSION

In sum, we have carefully considered each of the challenges raised by Sodexo with respect to the evaluation and selection of Compass for award, and the elimination of Sodexo from the competitive range, and conclude that the contracting officer's actions were not contrary to the law or the terms of the solicitation. Accordingly, we deny the consolidated protests.

SO ORDERED.

DATED: December 11, 2008

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

SECURUS TECHNOLOGIES)	
	)	CAB No. P-0784
Under Solicitation No. DCTO-2008-B-0217)	

For the Protester, SECURUS Technologies: Mr. John Viola, *pro se*. For the District of Columbia Government: Howard Schwartz, Esq., Senior Assistant Attorney General, and Robert Schildkraut, Esq., Assistant Attorney General.

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

OPINION

Filing ID 23001117

SECURUS Technologies has protested the District's solicitation for a contractor to provide inmate telephone services at the District of Columbia Department of Corrections. SECURUS argues that the inclusion of video-visitation systems with the inmate telephone services required by the solicitation will add unnecessary costs to each offeror's proposal, causing the offerors to inflate the rates that parties pay for calls. Further, SECURUS argues that the RFP is potentially in conflict with D.C. Law 13-280 which prohibits the imposition of commissions or surcharges on inmate telephone service rates. Finally, SECURUS contends that the weight the District assigned to the price factor in its evaluation criteria is inconsistent with D.C. Law 13-280. Because we conclude that the District's decision to include video-visitation systems is neither unreasonable, irrational, nor contrary to D.C. Law 13-280, and that the solicitation evaluation weightings also do not violate D.C. Law 13-280, we deny the protest.

BACKGROUND

On June 25, 2008, the District's Office of Contracting and Procurement ("OCP") issued RFP No. DCTO-2008-R-0217 on behalf of the Department of Corrections ("DOC") for a contractor to provide inmate telephone services at the District of Columbia Department of Corrections Detention Facility ("CDF"). (Agency Report ("AR") Ex. 1). The contractor would be responsible for providing labor, materials, and equipment necessary to furnish, install, and maintain a coinless, collect call, commissary account debit-type telephone system appropriate for inmate use. (AR Ex. 1, RFP § 3.C). The RFP stated that all proposals had to be submitted by July 24, 2008.

OCP issued Amendment 1 to the RFP on July 21, 2008. (AR Ex. 1). This amendment provided answers to various questions submitted by prospective offerors and extended the closing date of the RFP until August 14, 2008. OCP issued Amendment 2 to the RFP on July 29, 2008. (AR Ex. 1). Amendment 2 changed section C.3.12 of the RFP to require that 3 telephones on each housing unit have video capability to offer inmates video conferencing/video-visitation access, and

that the contractor provide 54 video-visitation terminals at the CDF visitor center for video conferencing/video-visitation use. (AR Ex. 1). Amendment 3 to the RFP was also issued on August 20, 2008. Amendment 3 answered a question regarding whether the telephones in each unit would also be able to function as video visitation phones. Amendment 4 to the RFP was issued on September 9, 2008. This amendment addressed additional questions from prospective offerors, and extended the closing date of the RFP until September 26, 2008. (AR Ex. 1).

On September 9, 2008, SECURUS filed a protest with the Board. The basis of the protest is that: (1) the inclusion of video-visitation phones in the RFP was improper and in conflict with D.C. Law 13-280, and (2) the evaluation criteria for price established too low a weight (20 points out of 112) relative to the weight for the technical criteria, contrary to D.C. Law 13-280.

SECURUS requests that the RFP be modified to eliminate the video-visitation component, and that the RFP be amended so that the price factor accounts for at least 50 percent of the final scoring in each offeror's proposal in order to provide a scoring mechanism that will assure an award that complies with DC Law 13-280. On September 23, 2008 OCP issued Amendment 5 to the RFP extending the closing date of the RFP until October 10, 2008. (AR Ex. 1). On September 29, 2008, the District filed its agency report. Exhibit 2 of the District's agency report, a September 25, 2008, declaration of Thomas Hoey, Director of the Office of Management Information and Technology Services for the DOC, responds to the protest grounds as follows:

6. The use of video visitation phones is considered best practice in the correctional field today. With video visitation phones inmates can do visits right from the housing unit; there is no need for escorts and the security strength on the housing unit can be maintained rather than compromised.

7. In addition, corrections agencies are setting up visitation centers outside the facility, so visitors don't have to pass through the walls to talk to the inmate. This saves staff, and most importantly, eliminates contraband from the facility. So, there is an overriding public safety imperative to use video visitation phones.

8. Video visitation will greatly expand opportunities for inmates to visit with friends and family, with access potentially available during all out of cell time seven days per week. Research has shown that frequent social contacts can lower stress and tension levels within the inmate population. This in turn contributes to greater safety and security for inmates and staff alike.

9. The District is not charging a surcharge, commission, or other financial imposition that is in addition to legally established rates for local or long-distance telephone service.

10. The DOC is seeking to obtain quality service for the least cost to the individual party paying for the telephone call by an inmate. In order to balance the need for quality service and low price the District made a determination that (20) twenty points out of a maximum total of one hundred twelve (112) points used in evaluating each proposal be based upon the offeror's total price for the base and option years.

11. Access to phones and video visitation capability under DOC's latest initiative is very important to the inmate population. DOC seeks to avoid frequent and/or

prolonged delays in access caused by inferior quality equipment or poor service responsiveness. The audio and visual quality of the connection is important as well. Problems in these areas can lead to higher tension levels, verbal conflicts, assaults and even multi inmate disturbances. Enormous security risks are at stake in the jail's maximum security environment.

In a September 30, 2008 declaration (Exhibit 1 of the District's response to SECURUS' comments on the agency report), Mr. Hoey expands upon his earlier declaration and responds to the allegation that the video-visitation system should have been separately procured by DOC:

It would not be realistic, nor in the District's best interests, both technically and economically, to conduct two separate procurements. The integrated video-visitation/telephone system originally specified is preferred and is dependent upon the technology from the inmate telephone service to function. The video-visitation system is not a stand alone product that will work independently of the inmate telephone system. The system that is being procured is in fact one piece of equipment. Further, it is important that the video-visitation/inmate telephone system be awarded to the same vendor in order to increase operational effectiveness. Since the systems are so intertwined, it is essential that implementation and administration of the systems be handled by one party because of economies that can be achieved and the government's desire to avoid needless disruption of inmate housing units. Multiple contractors working in each of the housing units would place a greater strain on security personnel which could create an unsafe environment for inmates and personnel. Moreover, inmates, their families, and taxpayers are spared the total overhead cost associated with separate procurements, which is considerable. The additional cost for two procurements could easily exceed \$100,000.

(District's October 31 Response, Ex. 1 ¶ 6.).

DISCUSSION

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

SECURUS argues that the inclusion of video-visitation phones in the inmate telephone services RFP will add unnecessary costs to each offeror's proposal, causing the offerors to inflate the rates that inmates and called parties pay for collect and debit calls. Further, SECURUS argues that the RFP is potentially in conflict with D.C. Law 13-280 which prohibits the imposition of commissions or surcharges on inmate telephone service rates.

SECURUS' argument that the video-visitation phones are unnecessary to achieve the District's desired goals raises the question of the District's determination of its minimum needs for this procurement. SECURUS faces a difficult burden. The District has the primary responsibility for determining its minimum needs and the method of accommodating them. *See In re Prison Health Services, Inc.*, CAB No. P-0610 (reconsideration), June 22, 2000, 48 D.C. Reg. 1556, 1557. We have recognized that government procurement officials, since they are the ones most familiar

with the conditions under which supplies, equipment, or services have been used in the past and how they are to be used in the future, are generally in the best position to know the government's actual needs. Consequently, we will not question an agency's determination of its actual minimum needs unless there is a clear showing that the determination has no reasonable basis. See *Mell, Brownell & Baker*, CAB No. P-0615, Jan. 18, 2001, 49 D.C. Reg. 3321, 3324-25; *Beretta U.S.A. Corp.*, CAB Nos. P-0144, P-0177, Aug. 23, 1990, 38 D.C. Reg. 3098, 3120-3121; *G. Koprowski*, B-400215, Aug. 12, 2008, 2008 U.S. Comp. Gen. LEXIS 150; *Ray Service Company*, B-217218, May 22, 1985, 85-1 CPD ¶ 582.

We conclude that the factual record reasonably supports the contracting agency's need to include video-visitation phones in the solicitation. DOC's Director of Management Information and Technology Services explains in his declaration that video-visitation phones provide important security, safety, and cost benefits for the inmate phone service: (1) the video-visitation phones are considered best practice in the correctional field today, (2) with video-visitation phones, inmates can conduct visits right from the housing unit, and there is no need for escorts and the security strength of the housing unit can be maintained rather than compromised, (3) by setting up a visitation center outside the facility, visitors will not have to enter the secure prison facility to talk to inmates, thus saving staff and eliminating the potential transfer of contraband, and (4) video visitation will greatly expand opportunities for inmates to visit with family and friends, with access potentially available during all out-of-cell time, seven days per week and research has shown that frequent social contacts can lower stress and tension levels within the inmate population. (AR Ex. 2). SECURUS has made no effective showing to the contrary.

We see no basis for SECURUS' other argument that including the video-visitation system would result in a 60 percent commission on calling rates, in conflict with D.C. Law 13-280, which regulates telephone charges in correctional institutions. D.C. Law 13-280 was codified as D.C. Code § 24-263.01 (Telephone charges in penal or correctional institutions), § 24-263.02 (Prohibited charges in government contracts), and § 24-263.04 (Operator-assisted calls). The relevant language regarding this issue can be found in D.C. Code §§ 24-263.01 and 24-263.02:

§ 24-263.01. Telephone charges in penal or correctional institutions,

(a) Notwithstanding any other District of Columbia law, no telephone service provider shall charge a customer a rate for operator-assisted calls made from a penal or correctional institution in the District of Columbia in excess of the maximum rate determined by the Public Service Commission of the District of Columbia.

(b) No penal or correctional institution in the District of Columbia shall charge a surcharge, commission, or other financial imposition that is in addition to legally established rates for local or long-distance telephone service.

§ 24-263.02. Prohibited charges in government contracts.

In any contract to which the District of Columbia is a party that is for the holding or incarceration of persons charged or convicted in the Superior Court of the District of

Columbia, such contract shall prohibit surcharges, commissions, or other financial impositions that are in addition to the legally established rates for calls made by any inmate subject to the contract. The District of Columbia government shall seek to obtain quality service for the least cost to the individual party paying for the telephone call by an inmate subject to the contract.

There is no evidence that the solicitation requires charging “a customer a rate for operator-assisted calls made from a penal or correctional institution in the District in excess of the maximum rate determined by the Public Service Commission of the District.” In addition, there is no evidence that the solicitation at issue here will cause the District to charge a “surcharge, commission, or other financial imposition that is in addition to legally established rates for local or long-distance telephone service.” Under section 24-263.02, as we read it, the contract must affirmatively prohibit the charging of surcharges and commissions beyond the legally established rates. SECURUS has not persuaded us that the District’s requirement for the video-visitation system violates the prohibition on assessing improper surcharges or commissions.

SECURUS further argues that the weight the District assigned to the price factor in its evaluation criteria is inconsistent with D.C. Law 13-280. The RFP's price criterion provides that each offeror's proposal would be scored and ranked based upon a maximum 12 points. (AR Ex. 1). An offeror can receive a maximum of 80 points for its technical proposal, a maximum of 20 points for its price proposal, and a maximum of 12 preference points. (AR Ex. 1). The relevant language in § 24-263.02 states: “The District of Columbia government shall seek to obtain quality service for the least cost to the individual party paying for the telephone call by an inmate subject to the contract.” SECURUS contends that the RFP should have established a minimum of 50 percent of the offeror's overall evaluation score for the price criterion. Clearly, the statute does not require any specific percentages for price or technical evaluation criteria in a District solicitation. We conclude that the stated evaluation criteria do not violate D.C. Law 13-280. SECURUS has not shown that the agency’s allocation of technical and price evaluation points violates any other District laws. The DOC Director of Office of Management Information and Technology Services explains in his declaration that: “DOC seeks to avoid frequent and/or prolonged delays in access caused by inferior quality equipment or poor service responsiveness. The audio and visual quality of the connection is important as well. Problems in these areas can lead to higher tension levels, verbal conflicts, assaults and even multi inmate disturbances. Enormous liability risks are at stake in the jail's maximum security environment.” (AR Ex. 2). Under our deferential standard of review of the business judgments of agency officials regarding the establishment of evaluation criteria and the allocation of points among those criteria, we find that the criteria are neither unreasonable nor irrational.

In its comments on the District’s agency report, SECURUS argues that the District should not bundle two distinct systems, *i.e.*, the inmate telephone system and the video-visitation system, in the same procurement. We agree with the District that this argument is not supported by the facts. According to the DOC, the system being procured is really one integrated system, not two separate systems and it would not be in the best interest of the District, both technically and economically, to conduct two separate procurements. The DOC states that the video-visitation system is dependent upon the technology from the inmate telephone service to function, the video-visitation system is not a stand alone product that will work independently of the inmate telephone system, the system that is

being procured is in fact one piece of equipment, and it is important that the video-visitation system and inmate telephone system be awarded to the same vendor in order that administration of the systems be handled by one vendor because of economies that can be achieved and the District's desire to avoid needless disruption to inmate housing units. (Response, Ex. 1). We find that the District has justified its procuring the video-visitation system and inmate telephone service together since the District has shown that the systems are dependent on each other, and technical and financial economies will be achieved by not separately procuring the systems. *See Nautical Engineering, Inc.*, B- 309955, Nov. 7, 2007, 2007 CPD ¶ 204; *Boehringer Ingelheim Pharm., Inc.*, B-294944.3, B-295430, Feb. 2, 2005, 2005 CPD ¶ 32.

We have considered each of the grounds raised by SECURUS but find that the solicitation violates no District law. Accordingly, we deny the protest.

SO ORDERED.

DATED: December 19, 2008

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

EXCEL TREE EXPERTS CO., INC.)
Under DCKA-2008-B-0050) CAB No. P-0787

For Excel Tree Experts Co., Inc.: Donald J. Walsh, Esq., Offit Kurman, Attorneys at Law. For the District of Columbia Government: Howard Schwartz, Esq., Alton E. Woods, Esq., Office of the Attorney General. For the Intervenor, C&D Tree Services, Inc.: Richard L. Moorhouse, Esq., and Sean M. Connolly, Esq.

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

OPINION

Filing ID 23355037

By letter dated October 9, 2008, and received by the Board on the same date, protester Excel Tree Experts Co., Inc., ("Excel") protests the rejection of its bid for the above procurement by the Office of Contracts and Procurement ("OCP"). Excel also protests OCP's failure to issue a contract in accordance with the solicitation. The District filed a motion to dismiss on October 28, 2008, asserting that the protest is untimely because the protester should have filed the protest no more than 10 business days after August 25, 2008, the date its bid was rejected as late. We dismiss the protest as untimely.

BACKGROUND

The District's Department of Transportation ("DDOT") Urban Forestry Administration ("UFA") issued the Invitation for Bids ("IFB") for pruning services. On June 25, 2008, the contracting officer, by a determination and findings, shortened the IFB's advertising period from 30 days to 21 days. The IFB, issued to thirty-nine companies, was an indefinite delivery indefinite quantity ("IDIQ") firm fixed unit price procurement. Amendment number 6 to the IFB, dated August 12, 2008, extended the bid opening date to August 14, 2008. Amendment number 7 revised the price schedule and required bidders to submit two sets of unit prices, one set based on a minimum quantity and one set based on a maximum quantity. Amendment number 8 extended the bid opening to August 18, 2008.

The District asserts that the fax cover sheet for amendment number 8 that was sent to all bidders on August 14, 2008, set forth an erroneous bid opening date of August 25, 2008. Later On August 14, 2008, the District sent a corrected fax cover sheet to all bidders, except Excel, whose courier happened to be in OCP's bid room at the time. The District gave a copy of the corrected cover sheet to the courier. The District further

asserts that later on that day, Ms. Bernetha Armwood, an OCP employee, sent by fax a second copy of the fax cover sheet to all bidders, including Excel.

On August 25, 2008, Excel delivered its bid to the bid room. Ms. Ingram, the bid room supervisor, returned the bid to Excel's deliveryman and told him that bids were due on August 14, 2008. Ms. Ingram also consulted with Jerry Carter, DDOT Contracting Officer. According to the District's motion, Ms. Ingram rejected the bid at Mr. Carter's direction. Excel filed this protest on October 9, 2008.

DISCUSSION

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

In the motion to dismiss, the District asserts that Excel filed its protest more than 10 business days after August 18, 2008, the bid opening date, and August 25, 2008, the date that DDOT rejected Excel's bid. The District asserts that Excel should have known the correct bid opening date. The District also asserts that Excel should have filed this protest within 10 business days of August 25, 2008, the date that the District rejected Excel's bid.

Excel's protest is untimely. D.C. Code § 2-309.08 (b)(1) requires a protester to file, prior to bid opening or the time set for receipt of initial proposals, its protest based upon alleged improprieties in a solicitation. D.C. Code § 2-309.08 (b)(2) allows the protester to file a protest, in cases other than those covered in paragraph (b)(1), not later than 10 business days after the basis of the protest is known or should have been known, whichever is earlier. When Excel submitted its bid on August 25, 2008, the District rejected the bid because it was late. Even if we ignore all of the assertions about the incorrect fax cover sheets and the possible confusion over the bid opening date of August 14, 2008, we cannot ignore the fact that the District rejected Excel's bid on August 25, 2008. Therefore, Excel was required to file this protest within 10 business days of August 25, 2008. Accordingly, we agree with the District that the protest is untimely.

CONCLUSION

For the reasons discussed above, we dismiss the protest.

DATED: January 16, 2009

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

HORTON & BARBER CONSTRUCTION SERVICES, INC.)
) CAB No. P-0792
Under Solicitation No. DCKA-2008-B-0097)

For the Protester Horton & Barber Construction Services, Inc.: Will Purcell, Esq. For the District of Columbia Government: Alton Woods, Esq., Assistant Attorney General, D.C.

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

OPINION

Filing ID 24511793

In a protest filed with the Board on November 9, 2008, protester Horton & Barber Construction Services, Inc., challenges the nonresponsibility determination made by the contracting officer on October 24, 2008. Horton further alleges that the contracting officer failed to respond to Horton’s request for informal discussions in accordance with 27 DCMR § 3801.1. The District in its agency report responds that Horton’s bid contained an inadequate bid guaranty, thereby rendering the bid nonresponsive, and that Horton’s bid was unreasonably below the government estimate, rendering the bidder nonresponsive. We agree with the District that Horton’s bid was nonresponsive. Further, we agree that Horton has not demonstrated with adequate evidence that the contracting officer erred in finding Horton nonresponsive based on an unreasonably low price. Accordingly, we deny the protest.

BACKGROUND

The District’s Office of Contracting and Procurement, on behalf of the Department of Transportation, issued Solicitation No. DCKA-2008-B-0097 in May 2008, for the demolition and removal of the existing ramp bridges for Ramps SE and ES at the interchange of 11th Street and the Southeast Freeway. (Agency Report (“AR”) at 2). The ramps provide access to the Robert F. Kennedy Memorial Stadium from the freeway. Eight bids were submitted on July 24, 2008. Horton was the apparent low bidder with a price of \$504,619.50. The next low bid was Milani Construction, LLC, with a price of \$1,871,180. The remaining bids ranged from \$2,599,199 to \$4,957,263.50. (AR Ex. 5). The District’s initial estimate for the job was \$5,764,730 but that estimate was later revised to \$1,904,990 when the statement of work was amended to remove the requirement that certain materials removed from the bridges under the contract be salvaged and delivered to the District. (AR at 3). Horton’s bid guaranty included a bid bond underwritten by Infinity Surety of Saginaw, Texas. The asset pledged by Infinity Surety to support the bond was a parcel of land identified as “Lot 20, Block 7, Woodmont addition, an addition to the City of Fort Worth, Texas.” (AR at 5, AR Ex. 2).

Horton did not provide any other documentation or details about the pledged parcel of land with its bid. By letter dated July 25, 2008, the contracting officer requested that Horton confirm its bid price. (AR at 3). The contracting officer did not request that Horton provide cost data supporting the pricing of the various line items found in its bid. On July 29, 2008, Horton confirmed its bid price. (AR Ex. 4). Horton did not provide any cost data supporting the pricing of the solicitation's line items. On August 6, a bid opening transmittal letter was forwarded to Barton Clark, who is the program manager for the District's Anacostia Waterfront Initiative, requesting a recommendation for award and a justification for the disparity between the bid prices and the government's estimate. (AR at 3-4). On August 7, the contracting officer received from the program management office a recommendation to award to the second low bidder, Milani Construction. (AR at 4).

On October 24, 2008, the contracting officer approved a Determination and Findings (D&F) to reject the Horton's bid for an unreasonably low price. (AR Ex. 3). One major portion of the work consisted of bridge demolition over an active railroad facility, M Street and the SE/SW Expressway. The contracting agency notes that the demolition and removal of the bridges' superstructures/substructures is both labor and equipment intensive. The contracting officer concluded that Horton could not perform this complex portion of the work for its unit price of \$250,000. The next low bidder had a price of \$1,090,000 for this same work. For mobilization, Horton bid \$30,000, while the average price of the eight bidders is \$106,937.50 and the government estimate is \$100,000. For the construction lane closing line item, Horton bid \$10,000 while the average price for this bid item was \$107,312.50 and the government estimate is \$50,000. For the protection shield line item needed to protect public and CSX property during demolition, Horton bid \$20,000 while the next low bidder's price was \$185,000, a difference of \$165,000. According to the contracting agency, improper or ill prepared plans can result in project delays and/or a danger to public safety. (AR at 7-8; AR Exs. 2, 3, and 7).

Also on October 24, 2008, the District's Chief Procurement Officer approved the D&F to award the contract to Milani Construction. (AR Ex. 5). By letter dated October 29, 2008, the contracting officer informed Horton that it had been determined to be nonresponsible due to an unreasonably low bid price. (AR Ex. 6). On November 9, 2008, Horton filed this protest. On December 1, 2008, the District filed its Agency Report arguing that (1) Horton's bid was nonresponsive because the bid bond was defective, and (2) Horton was properly determined to be nonresponsible because its bid price was unreasonably low pursuant to 27 DCMR §§ 1531.6 and 2200.5. On December 19, 2008, Horton filed its comments on the Agency Report and included an affidavit from Horton's CEO, Herman W. Barber, III. Horton argues that the contracting officer acted in bad faith in making his nonresponsibility determination without requesting Horton to provide support for its pricing and to otherwise obtain the required types of responsibility information set forth in 27 DCMR § 2204.1 – 2204.5. Mr. Barber states in his affidavit that he "received price commitments from buyers of steel, concrete and other salvage materials identified in the 'Summary of Quantities' list provided in the solicitation. For example . . . a per ton price of \$365.00 for steel." (Barber Affidavit ¶ 6). He adds: "I used all of the price quotes received and salvage value research I obtained to help determine my solicitation bid price." (Barber Affidavit ¶ 7). After bid opening, Barber states that he confirmed his bid price but that the contracting officer "never

requested that I verify, justify or explain my bid price” and “did not respond to any of my additional attempts to inquire about the need to extend my bid bond or provide any additional information.” (Barber Affidavit ¶¶ 9-11).

The District awarded the contract to Milani Construction on March 5, 2009. (Contract No. DCKA-2008-C-0097, filed March 26, 2009). The contract price matches Milani’s bid price of \$1,871,180 and Milani executed performance and payments bonds as part of the contract.

DISCUSSION

We exercise jurisdiction over this protest pursuant to D.C. Code § 2-309.03(a)(1).

The District argues that Horton submitted an inadequate bid bond, and thus its bid is nonresponsive. Horton argues that the contracting officer failed to identify the alleged bid bond defect and that the District is estopped from raising it for the first time in its Agency Report. We conclude that the District was not estopped from raising the bid bond issue in the Agency Report and that the bond was defective, rendering Horton’s bid nonresponsive. The IFB required bidders to provide a bid guaranty for 90 calendar days after bid opening. (AR Ex. 1). Horton submitted a bid bond that contained a pledge of real estate described as “Lot 20, Block 7, Woodmont addition, an addition to the City of Fort Worth, Texas.” (AR at 5, AR Ex. 2). Horton provided no other information about the real estate with its bid.

The sufficiency of a bid bond depends on whether the surety is clearly bound by the bond and whether the government will receive the full and complete protection contemplated by the government if the bidder fails to execute the required contract documents. *Fort Myer Constr. Corp.*, CAB No. P-0452, July 23, 1996, 44 D.C. Reg. 6476, 6481; *Communications by Johnson, Inc.*, B-255478, Mar. 2, 1994, 94-1 CPD ¶ 163; *Gulf & Texas Trading Co.*, B-253991, Jan. 24, 1994, 94-1 CPD ¶ 31. If the surety’s liability is not clear from the face of the bond, the bond is defective and must be rejected as nonresponsive. *See Gulf & Texas Trading Co.*, B-253991, Jan. 24, 1994, 94-1 CPD ¶ 31; *H.R. General Maintenance Corp.*, CAB No. P-0557, Feb. 2, 1999, 44 D.C. Reg. 8556, 8560. Horton’s bond did not include an appraisal of the property. Therefore, the contracting officer could not determine the value of the secured property, and he could not determine whether the property had the value needed to support the value of Horton’s bid. Accordingly, the bid bond was defective. *Communications by Johnson, Inc.*, B-255478, Mar. 2, 1994, 94-1 CPD ¶ 163; *Gulf & Texas Trading Co.*, B-253991, Jan. 24, 1994, 94-1 CPD ¶ 31.

Horton cites no authority, and we can find none, for concluding that the contracting agency should be estopped from rendering such a determination four months after bid opening and three months before award to the second low bidder. *Computer Terminal Sales*, B-200366, Jan. 22, 1981, 81-1 CPD ¶ 37 (even if the agency erroneously rejected the protester’s bid on one ground, GAO found protester could not have been prejudiced because its bid should have been rejected on another basis). Even if Horton had been notified of the defect shortly after bid opening, Horton could not have cured that defect after bid opening. *Spotless Janitorial Services, Inc.*, B-257341, Sept. 15, 1994, 94-2 CPD ¶ 102; *H.R. General*

Maintenance Corp., 44 D.C. Reg. at 8560. Horton was thus not prejudiced by the delayed notification of the defective bid bond.

Horton also argues that the District should be barred from awarding the contract to Milani Construction because the District failed to act within 90 calendar days after bid opening and presumably Milani's bid expired. The record is not clear on whether the contracting officer requested that the other bidders extend their bids in October 2008 beyond the initial 90 days. Nevertheless, the contracting officer and Milani executed a contract on March 5, 2009, and there is a notification on the same date to extend its bid. There is no argument that Milani's bid, at the time of bid opening, was nonresponsive or that the bid bond was defective. The issue raised by Horton is whether Milani's bid, if it expired after the initial 90 day period, could be revived and an award made based on the revived bid. We believe that Milani could have elected not to extend its bid but the record shows that it elected to extend its bid and there was no legal error on the part of the contracting officer in entering into a contract with Milani under its revived bid. *See General Oil Corp.*, CAB No. P-0355, Apr. 16, 1993, 40 D.C. Reg. 5097, 5102-03; *Holk Development, Inc.*, B-230830.2, Dec. 1, 1988, 88-2 CPD ¶ 543.

The contracting officer determined in a D&F dated October 24, 2008, and in a letter to Horton dated October 24, 2008, that Horton's bid was unreasonably low and that Horton was therefore nonresponsive. The contracting officer asked Horton to confirm its bid price, which Horton did, but the contracting officer did not ask Horton to further justify its bid prices for the various line items. Horton maintains that it should have been given a further opportunity to explain its pricing to the District, and that the "contracting officer acted in bad faith by prematurely determining the protestor non-responsible without fully appraising himself of the Protester's capabilities."

We see no evidence for concluding that the contracting officer acted in bad faith in determining Horton's bid price to be unreasonably low. Although the contracting officer should have asked for additional information from Horton on the particular line items that he found were unreasonably low, under the circumstances here we conclude that the nonresponsibility determination is sustainable because Horton has not introduced sufficient evidence rebutting the contracting officer's findings on the pricing. Horton only presented some evidence of salvage value per ton of steel but without identifying its total costs to perform the solicited work, and evidence of its costs to perform the challenged line items, there is no basis for us to conclude that the matter should be remanded to the contracting office for further review. Horton should have introduced evidence of its costs and salvage revenue in its original protest filing but failed to do so and even after the Agency Report identified the various line items as being significantly below estimates and other bidders' prices, Horton still failed to introduce adequate evidence of the reasonableness of its pricing.

CONCLUSION

For the reasons discussed above, we deny Horton's protest.

SO ORDERED.

DATED: April 3, 2009

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

TOMPKINS BUILDERS, INC.)
) CAB No. P-0801
Under RFP No. DCAM-2008-R-0088)

For the Protester: Douglas L. Patin, Esq., Robert J. Symon, Esq., Bradley Arant Boult Cummings LLP. For the District of Columbia Government: Robert Schildkraut, Esq., Assistant Attorney General. For the Intervener: Claude M. Bailey, Esq., Terry L. Elling, Esq., Venable LLP.

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

OPINION

Filing ID 25312712

Tompkins Builders, Inc., has protested the contracting officer’s decision to eliminate it from a competition for construction of the Consolidated Forensics Laboratory (“CFL”) on the ground that Tompkins did not meet two special standards of responsibility. Tompkins relied on projects performed by its parent company, Turner Construction Company, and Turner’s involvement in the CFL to satisfy the special standards of responsibility. Having reviewed the record, we find that the contracting officer’s determination to exclude Tompkins from the competition because it did not satisfy the special standards of responsibility was unreasonable and irrational. Tompkins’ proposal and BAFO clearly demonstrate the commitment of the personnel, management, and financial resources of its parent, Turner Construction, such that Turner will have meaningful involvement in contract performance. Accordingly, we sustain the protest and direct the contracting officer to perform a new and proper evaluation of Tompkins, including conducting discussions and requesting additional BAFOs if necessary, and make a proper selection decision.

BACKGROUND

On September 25, 2008, the District of Columbia, through the Office of Contracting and Procurement (“OCP”), issued RFP DCAM-2008-R-0088 for the construction of the new Consolidated Forensics Laboratory (“CFL”). (Agency Report (“AR”), Ex. 1). The new building will enable the District to co-locate the District’s Metropolitan Police Department Forensic Laboratory, the Department of Public Health, and the Chief Medical Examiner for improved and efficient coordination of the functions of crime scene investigation, protection, and management of public health issues, and forensic law enforcement.

Included in the RFP were special standards of responsibility. (AR Exs. 1, 1a). These special standards of responsibility were included in two separate sections of the RFP, section B.2

and section L.5.1.1. (AR Exs. 1, 1a). Amendment No.2 of the RFP amended the language used in section B.2 and section L.5.1.1. (AR Ex. 2).

Amendment No.2 deleted the language from section B.2 in the RFP in its entirety and replaced it with the following language:

B.2 Special Standard of Responsibility: In order to be eligible for award, the offeror, as General Contractor, must have completed in the past five years a LEED certified construction project value of at least \$75,000,000; and must have completed or is currently in the process of completing (at least 50% percent completion at the time of submitting proposals) a scientific research laboratory with the a construction value of at least \$75,000,000 (See paragraph L.5.1.1).

Failure to meet any of the above requirements shall constitute a technically unacceptable offer. (emphasis in the original).

The language in Amendment No.2 also deleted the language from section L.5.1.1 in the RFP in its entirety and replaced it with the following language:

L.5.1.1 Special Standards of Responsibility - In order to be eligible for award, the offeror, as General Contractor, must have completed in past five years a LEED certified construction project with a construction value of at least \$75,000,000; and must have completed or is currently in the process of completing (at least 50% completion at the time of submitting proposals) a scientific research laboratory with a construction value of at least \$75,000,000. Offeror shall describe in detail all current projects detailing the above. In addition, the District will not find responsible any offeror that does not provide with its proposal information adequate to determine its compliance with the Stated Special Standards of Responsibility. At a minimum, an offeror should provide the following:

- a) Time Period of the Construction;
- b) Name and location of scientific research laboratory;
- c) Name of contact person;
- d) Phone number of contact person;
- e) Total contract amount;
- f) Year completed

Failure to meet any of the above requirements shall constitute a technically unacceptable offer. (emphasis in the original).

On December 15, 2008, two offerors, Tompkins and Whiting Turner Contracting Company, Inc., timely submitted sealed proposals. In its proposal, to meet the special standards of responsibility, Tompkins submitted several project references in which its parent, Turner Construction, served as the general contractor. (AR Ex. 5). There is no dispute that the project references meet the special standards of responsibility if Tompkins can rely on them. Tompkins

is a wholly-owned subsidiary of Turner. (AR Ex. 5). Tompkins' president is a Turner vice-president. Additionally, the Tompkins proposal states that:

In 2003, Tompkins Builders became a wholly owned subsidiary of Turner Construction Company. This acquisition has allowed Tompkins to continue its ability to perform quality construction as well as integrate itself into the many attributes of Turner. Benefits to Tompkins include access to the best managers and builders, as well as experience with specialty market segments such as Laboratories, Pharmaceutical and Life Sciences buildings. As a Turner business unit, Tompkins has all of the resources of the nation's largest General Contractor and is able to offer all services brought to fruition by Turner. These advantages include the following: Marketplace Influence, Buying Power, 5000+ Employees, Bonding Capacity, Turner Logistics, LEED® Leadership, Comprehensive Insurance, Financial Strength.

Under the Project Approach Introduction, the proposal provides: "Additionally, Tompkins' team will be supported by the technical capabilities of our corporate office and trade subcontractors, which will add significant value to the project in terms of cost efficiency, logistical resources and qualified manpower, realization of schedule performance, cost containment and quality." Included in the proposal was a Tompkins CFL project organizational chart which listed Ed Small, the Tompkins president and Turner vice president, Turner employees as Project Director and Project Superintendent, and the Turner Laboratory Bio-Medical Group for "Corporate Oversight." The Project Manager, Mr. Jim Gaughan, was listed as a Turner manager who would serve "as the on-site Project Director for Tompkins for the Consolidated Forensics Laboratory (CFL) Project . . . and daily on-site contact for all issues with the CFL Project Team . . . [and] will utilize his past experience in national laboratory, and other public health and safety projects to manage and coordinate the overall construction program." The Project Superintendent, Mr. Greg Dudek, is listed as being "responsible for the overall success of the laboratory operations, scheduling and coordination of all subcontractor field activities, expediting materials and equipment, monitoring the project schedule and budget, implementing safety, and interfacing with the project owner and architect on a day-to-day basis." (Tompkins Supplemental Authority in Support of Amended Complaint, at 3, Exs. C-E).

The contracting officer appointed four technical evaluators. The technical evaluation panel was given the technical proposals, and conducted an evaluation of the proposals. One panel member, Allain Al-Alami, in an apparent reference to the projects listed by Tompkins for the special standards of responsibility, included the following evaluation comments: "Not clear if they 'Tompkins' performed or their parent company 'Turner'. However Turner's depth/resources are behind them."

By letter dated January 16, 2009, the original contracting officer for the procurement advised Tompkins that it was within the competitive range and requested that Tompkins submit a written best and final offer ("BAFO") including any revisions to the original technical and price proposals. Apparently, no oral discussions were conducted with the two offerors. In the January 16 letter, the contracting officer also required that Tompkins provide a detailed response to each

of the questions listed in an attached "BAFO - Questions to Offeror" document. (Tompkins Comments on Agency Report, Ex. A). BAFO Question 1 states:

The feedback from the District's conducted reference check yielded the fact that all of the projects listed to satisfy the Special Standard of Responsibility Clause and experience, and most of the projects listed for similarity were actually performed by Turner and not Tompkins:

a. Has "Tompkins Builders" completed or is in the process of completing a scientific research laboratory facility by itself as GC with a minimum value of \$75M as required under the solicitation, and with the contract its own name (Tompkins Builders)? If yes, provide details.

b. Explain the exact role the "Turner Construction" will play in the CFL project if your firm is the successful awardee, and what will be its exact contractual relationship with Tompkins Builders as an awardee under this contract.

In a BAFO response under cover letter dated January 29, 2009, Tompkins submitted responses to the BAFO questions. Tompkins' response to BAFO Question 1 states as follows:

1.) Response: Tompkins Builders is a wholly-owned subsidiary of Turner Construction Company and operates as 1 of 44 business units operating under the Turner flag and is therefore entitled to include in its portfolio all relevant corporate experience, services and resources. As presented in the technical response, Tompkins Builders was attempting to demonstrate to the DC Government our depth and breadth of experience by exceeding the requirements of Standard Responsibility and Similarity.

Turner treats Tompkins as one of its subsidiaries and business units much like our competitors

We share resources such as people, bonding, insurance, and financial management.

1A.) Response: Yes, The Harvey Wiley Federal Building was completed by Tompkins Builders on October 2001. This project met the similar requirements to the CFL project based on its complexity, size value and building purpose. The building is a new research facility which houses the FDA Center for Food Safety and Applied Nutrition. The 410,000 SF, five story research laboratory building provides new life sciences and chemistry laboratories along with offices for scientists and their staff. The building features two mass spectrometer labs, an insectaria, two general labs, a microbiology lab, two Class 1,000 and 100 clean rooms, bio-level three (BL3) suites, a herbarium, six environmental rooms, and tissue culture rooms. Since the site work and foundation package work was performed by a separate contractor, the Tompkins contract value of \$73 million actually represents a project value greater than \$75 million. In addition, this FDA

Laboratory project is 100,000 square feet larger than the CFL and, years of cost escalation represents a project valued well in excess of \$100 million in today's construction dollars.

1B.) Response: If selected to construct the CFL, Tompkins Builders will have the contractual responsibility and accountability to the District of Columbia Government. As our parent company, Turner Construction Company will provide the pool of resources from which Tompkins will have to perform the requirements of the contract. This pool, as described above, includes financial, bonding, expertise and personnel to name a few. As 1 of Turner's 44 business units, Tompkins operates with the full faith and credit of Turner Construction Company.

Tompkins further responded to BAFO Question 1 by attaching to its submittal a Turner corporate officer chain of command showing the relationship between various business segments and Turner, with Mr. Ed Small as Tompkins president and Turner vice president reporting to Turner's executive vice president. Another attachment was a Tompkins/Turner DC area combined revenue summary recently published in the Washington Business Journal. (AR Ex. 6).

Tompkins BAFO included a commitment letter and resume/CFL project responsibilities document for the Senior Project Manager, Mr. John Rinaldo, a Turner manager, providing additional detail respecting the Tompkins/Turner relationship:

John comes to Tompkins as an intra-company resource bringing over 27 years of experience in laboratory and pharmaceutical projects with Turner Construction Company. John has been selected to serve as the on-site Sr. Project Manager for Tompkins for the Consolidated Forensics Laboratory (CFL) Project due to his extensive knowledge and experience in constructing laboratories.

He will be the daily on-site contact for all issues with the CFL Project Team. John will utilize his past experience in national laboratory, and other public health and safety projects to manage and coordinate the overall construction program.

(AR Ex. 6). In response to BAFO question 3, Tompkins states that Mr. Rinaldo "will be the primary point of contact on day to day activities and interface with the Owner, Jacobs, and HOK. In the BAFO, Tompkins "fully commits John Rinaldo to fulfill the role of Senior Project Manager" on the CFL contract and Tompkins "guarantee[s] his availability and 100% commitment to the [CFL] project from Notice-to-Proceed until construction completion." This commitment letter is signed by Mr. Ed Small, president of Tompkins, and as stated above, a general manager and vice president of Turner. According to Exhibit C in Tompkins' response to the Agency Report, Mr. Small serves as a vice president of Turner Construction and as "General Manager of a Turner unit, [has] the authority ... to enter into business agreements and contracts up to the prescribed limits." Mr. Small signed the BAFO and its proposal on behalf of Tompkins. In another Tompkins CFL project organizational chart furnished in the BAFO response, Turner's John Rinaldo reports to the Tompkins vice president and construction executive, Mr. Kamrad. Also on a reporting line to Mr. Kamrad is the "Turner Laboratory Bio-Medical Group" for corporate oversight of the CFL project. Listed as Project Superintendent on

the same chart is Mr. Greg Dukek, another Turner employee. In the "Corporate Overview" section of the BAFO response, Tompkins states that it was acquired by Turner Construction in 2003, is a wholly-owned subsidiary of Turner and that "Turner has three wholly-owned facilities around the country" one of which is Tompkins. The response further states that "Tompkins operates with the full support of Turner Construction in all aspects of our business" including access to over 5000 employees nationwide, and that if Tompkins needs special expertise and personnel, such expertise or personnel "are immediately made available to Tompkins from Turner as a normal course of business." Regarding bonding capacity, "Turner Construction Company maintains bonding capacity in excess of \$6 billion and provides bonding for all of its Business Units which includes Tompkins." Regarding financial capacity, the BAFO response states that "Tompkins operates with the full faith and credit of Turner Construction."

The chair of the evaluation panel made the following comment in an evaluation on February 5, 2009:

In addition, the final information provided by Tompkins in their BAFO submission failed to provide any new or additional information that would allow the evaluation panel to revise their scoring of Tompkins Builders, especially on its past performance and required experience in meeting the Special Standard of Responsibility clause. The additional project information presented by Tompkins in their BAFO submission falls short in meeting the minimum dollar amount of 75K [sic] for LEED and Lab projects completed and the period of performance range, of [the] past 5 years, required in the Special Standard of Responsibility clause.

(District's May 21, 2009 Response, at 2).

By letter dated February 17, 2009, the contracting officer notified Tompkins that its proposal would not be recommended for award. (AR Ex. 3). By email dated February 18, 2009, Tompkins requested a debriefing. (AR Ex. 3). The contracting officer refused to provide a debriefing stating that the request for a debriefing was premature because an award had yet to be made. (AR Ex. 3). Tompkins filed a protest (CAB No. P-0797) on February 27, 2009, requesting the Board to direct the contracting officer to provide Tompkins with a debriefing. A telephone status conference regarding the protest was conducted by the Board on March 4, 2009. At the conclusion of the status conference, the Board issued an order directing the contracting officer to provide the debriefing requested by Tompkins. (CAB No. P-0797 Order dated March 4, 2009). The debriefing was held on March 11, 2009, and conducted by a second contracting officer. (Protest, dated March 20, 2009; AR Ex. 3). During the debriefing, the new contracting officer became aware of irregularities in the technical evaluation of Tompkins. (AR Ex. 4). The contracting officer stated that OCP was advised by legal counsel that Turner's experience could not be considered for their evaluation of Tompkins' proposal and that Tompkins' failure to possess the requisite experience played a significant role in the results of the technical evaluation. Tompkins then questioned why Tompkins' proposal had not been considered technically unacceptable and eliminated from award consideration. The contracting officer admitted that OCP did not properly follow RFP Section L.5.1.1. (CAB No. P-0801 Protest dated March 20, 2009). Due to these irregularities, the contracting officer and District counsel

terminated the debriefing and instructed Tompkins that the contracting officer would review the technical evaluation to determine whether it was conducted in compliance with the requirements stated in the RFP. (AR Ex 4).

On March 20, 2009, Tompkins filed a protest docketed as CAB No. P-0801. The issues raised by this protest were: (1) whether the contracting officer conducted an analysis of the offer "most advantageous" to the District, (2) whether the District properly evaluated Tompkins' technical proposal; and (3) whether the District conducted a proper cost-technical trade-off analysis. On March 31, 2009, the District filed a motion to dismiss Tompkins' protest arguing that all three of Tompkins' allegations were premature since the contracting officer was currently reviewing the technical evaluation and would not provide an award recommendation until that review was completed. (AR Ex. 3). Tompkins submitted its opposition to the District's motion on April 3, 2009. (AR Ex. 3).

On March 31, 2009, a new (third) contracting officer was appointed for this procurement. (AR Ex. 3). Based upon the irregularities in the technical evaluation that were discovered during the debriefing, the contracting officer determined that it would be proper to re-evaluate each proposal in accordance with the evaluation criteria in the RFP. (AR Ex. 4). While conducting this re-evaluation of Tompkins' proposal and BAFO, the contracting officer determined that Tompkins did not meet the special standards of responsibility stated in the RFP. (AR Ex. 4). In a determination dated April 17, 2009, the contracting officer determined that Tompkins did not meet the special standards of responsibility because Tompkins could not rely on Turner's projects to meet the special standards, and thus Tompkins was eliminated from further consideration for award. (AR Ex. 4). Upon receiving notification of its elimination from the procurement, Tompkins filed an amended protest on April 22, 2009. Between April 28 and May 21, 2009, the parties (including the intervener) filed briefs and exhibits to supplement the record.

DISCUSSION

We exercise jurisdiction over this protest pursuant to D.C. Code § 2-309.03(a)(1).

The parties agree that the primary issue for us to decide is whether the contracting officer properly determined to exclude Tompkins from the competition on the basis that Tompkins could not rely on the performance experience of its parent company, Turner Construction, in satisfying the solicitation's special standards of responsibility. Definitive or special standards of responsibility are specific and objective standards established by an agency as a precondition to award that are designed to measure a prospective contractor's ability to perform the contract." *M.C. Dean, Inc.*, CAB No. P-0505, Dec. 3, 1997, 45 D.C. Reg. 8664, 8669. The criteria limit the class of contractors to those meeting the specified qualitative and quantitative qualifications necessary for adequate contract performance. *Id.* Unless the contracting officer's determination was unreasonable, the determination should not be disturbed. *M.C. Dean*, 45 D.C. Reg. at 8672 (sustaining protest where contracting officer could not reasonably have found that the proposed awardee complied with the special standards of responsibility); *Universal Bldg. Maint., Inc.*, B-282456, July 15, 1999, 99-2 CPD ¶ 32. We conclude that the contracting officer's determination -- that Tompkins could not rely on its parent company's past performance in assessing compliance with the special standards of responsibility -- was unreasonable and irrational.

Here, the contracting officer concluded that Tompkins could not rely on Turner's performance in meeting the special standards of responsibility and thereby eliminated Tompkins from the competition, leaving only one offeror in the competition, Whiting Turner Contracting Company. We begin by noting that the contracting officer misapprehended the law in his determination by implying in his April 17 determination that Turner had to furnish a written commitment of resources in Tompkins' proposal. The contracting officer states in his determination: "Tompkins did not provide any documentation in its proposal from Turner that states it will fully back Tompkins' efforts to obtain the contract. Nor did Tompkins provide documentation from Turner that states the financial resources of Turner, including lines of credit, operating capital, and performance bonding, would be used to complete the contract."

GAO precedent, followed by the United States Court of Federal Claims, sets out the standard guiding our resolution of the issue before us. The GAO has repeatedly held that an agency properly may attribute the experience or past performance of a parent or affiliated company to an offeror where the firm's proposal demonstrates that the resources of the parent or affiliated company will affect the performance of the offeror. *Perini/Jones, Joint Venture*, B-285906, Nov. 1, 2000, 2002 CPD ¶ 68; *Hot Shot Express, Inc.*, B-290482, Aug. 2, 2002, 2002 CPD ¶ 139; *Universal Bldg. Maint., Inc.*, B-282456, July 15, 1999, 99-2 CPD ¶ 32. The relevant consideration is whether the resources of the parent or affiliated company -- its workforce, management, facilities, or other resources -- will be provided or relied upon, such that the parent or affiliate will have meaningful involvement in contract performance. *Perini/Jones, Joint Venture*, B-285906, Nov. 1, 2000, 2002 CPD ¶ 68; *NAHB Research Ctr., Inc.*, B-278876.2, May 4, 1998, 98-1 CPD ¶ 150. Where no provision in the solicitation precludes offerors from relying on the resources of their corporate parent or affiliated companies in performing the contract, and an offeror represents in its proposal that resources of a related company will be committed to the contract, the agency properly may consider those resources in evaluating the proposal. See *Physician Corp. of America*, B-270698 et al., Apr. 10, 1996, 96-1 CPD ¶ 198; *T&S Products, Inc. v. United States*, 48 Fed. Cl. 100, 111 (2000). Absent a direction from the contracting officer requesting an offeror to provide a written commitment from the parent or affiliated firm, the offeror itself may commit the resources of its parent or affiliate.

In *Ecompex, Inc.*, B-292865.4, June 18, 2004, 2004 CPD ¶ 149, cited by the District, the offeror's (AEC) proposal included a letter from Ahtna, Inc., its parent company, stating that it fully backed AEC's efforts to obtain the contract, and also specifically stated that the financial resources of Ahtna including lines of credit, operating capital, and performance bonding, would be used to complete the contract. The GAO held that in view of Ahtna's commitment of financial resources, the agency had a reasonable basis for attributing the experience of Ahtna to AEC in evaluating AEC's experience. Here, there is no question that there was a similar commitment of Turner's financial resources to the CFL contract. The only difference here is that the commitment was stated by Tompkins in its proposal on behalf of Turner.

Tompkins' BAFO and proposal show the commitment of key Turner personnel, management, and financial resources to the CFL project. Three key personnel Turner are identified in the proposal and BAFO with the commitment of any additional Turner personnel that Tompkins would need. John Rinaldo, Tompkins' "Senior Project Manager" for the CFL, is

a Turner employee, was selected to serve as the on-site senior project manager for the CFL project and the BAFO states that he will be “the daily on-site contact for all issues with the CFL Project Team” and that he will “utilize his past experience in national laboratory and other public health and safety projects to manage and coordinate the overall construction program.” (AR Ex. 6). In response to BAFO question 3, Tompkins states that Mr. Rinaldo “will be the primary point of contact on day to day activities and interface with the Owner, Jacobs, and HOK.) In the BAFO, Tompkins “fully commits John Rinaldo to fulfill the role of Senior Project Manager” on the CFL contract and Tompkins “guarantee[s] his availability and 100% commitment to the [CFL] project from Notice-to-Proceed until construction completion.” This commitment letter is signed by Mr. Ed Small, who is the president of Tompkins. Mr. Small, according to the Turner/Tompkins organization chart referenced in response to BAFO question 1, and included as an attachment to the BAFO response, is one of 7 managers/vice presidents reporting to Turner’s executive vice president. According to Exhibit C in Tompkins’ response to the Agency Report, Mr. Small serves as a vice president of Turner Construction and as “General Manager of a Turner unit, [has] the authority ... to enter into business agreements and contracts up to the prescribed limits.” Mr. Small signed the BAFO and its proposal on behalf of Tompkins. In another Tompkins CFL project organizational chart furnished in the BAFO response, Turner’s John Rinaldo reports to the Tompkins vice president and construction executive, Mr. Kamrad. Also on a reporting line to Mr. Kamrad is the “Turner Laboratory Bio-Medical Group” which will provide corporate oversight for the CFL project. Listed as Project Superintendent on the same chart is Mr. Greg Dukek, another Turner employee. In Tompkins’ proposal, Mr. Dukek is listed as being “responsible for the overall success of the laboratory operations, scheduling and coordination of all subcontractor field activities, expediting materials and equipment, monitoring the project schedule and budget, implementing safety, and interfacing with the project owner and architect on a day-to-day basis.”

In the “Corporate Overview” section of the BAFO response, Tompkins states that it was acquired by Turner Construction in 2003, is a wholly-owned subsidiary of Turner and that “Turner has three wholly-owned facilities around the country” one of which is Tompkins. The response further states that “Tompkins operates with the full support of Turner Construction in all aspects of our business” including access to over 5000 employees nationwide, and that if Tompkins needs special expertise and personnel, such expertise or personnel “are immediately made available to Tompkins from Turner as a normal course of business.” Regarding bonding capacity, “Turner Construction Company maintains bonding capacity in excess of \$6 billion and provides bonding for all of its Business Units which includes Tompkins.” Regarding financial capacity, the BAFO response states that “Tompkins operates with the full faith and credit of Turner Construction.”

These pledges of Turner personnel, management, and financial resources clearly demonstrate that the resources of Turner will affect Tompkins’ performance of the CFL project, such that Turner will have meaningful involvement in contract performance. Accordingly, the contracting officer’s determination to exclude Tompkins from the competition was unreasonable and irrational. To the extent that the evaluators in prior technical evaluations downgraded Tompkins under the mistaken belief that Turner’s experience could not be considered for their evaluation of Tompkins’ proposal and that Tompkins’ failure to possess the requisite experience

played a significant role in the results of the prior technical evaluations, those evaluations were flawed. A new evaluation of Tompkins is required.

CONCLUSION

In sum, we have carefully considered the record presented in this protest and conclude that the contracting officer unreasonably excluded Tompkins from the CFL competition based on the special standards of responsibility. Accordingly, we sustain the protest and direct the contracting officer to complete a proper new evaluation of Tompkins' offer. If the contracting officer deems it necessary to conduct discussions with the offerors, he shall do so and request further BAFOs. After completing a new evaluation, the contracting officer shall make a proper, documented selection decision based on the terms and conditions of the solicitation and the law.

SO ORDERED.DATED: May 21, 2009

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTESTS OF:

HUMILITY OUTREACH MISSIONARY)	
MINISTRIES, INC.)	
	)	CAB Nos. P-0788, P-0789, P-0793
Under RFP No. RM-08-RFP-021-BY4-CPA)	

For the Protester: Susan L. Schor, Esq., McManus, Schor, Asmar & Darden, LLP. For the District of Columbia Government: Talia S. Cohen, Esq., and Robert Schildkraut, Esq., Assistant Attorneys General.

OPINION

Filing ID 25459586

Humility Outreach Missionary Ministries, Inc. (“Humility”) has protested the District’s award of four IDIQ contracts to provide supported residential services to consumers diagnosed as having a serious and persistent mental illness. Humility argues *inter alia* that the source selection decision and the technical evaluations were unreasonable and arbitrary and not properly documented and that the contracting officer used undisclosed and improper evaluation criteria in assessing the merits of the competing offers. Although the contracting officer’s own evaluations and selection decision were poorly documented, we conclude that the record as a whole supports the awards. Accordingly, we deny the consolidated protests.

BACKGROUND

On May 16, 2008, the District issued solicitation RM-08-RFP-021-BY4-CPA for the District's Department of Mental Health (“DMH”) seeking offerors to provide supported residential services to consumers diagnosed as having a serious and persistent mental illness, who do not currently have a level of functioning that would allow them to live independently within the community, and who choose to live in a Mental Health Community Residential Facility (“MHCRF”). (Agency Report (“AR”) Ex. 1). A MHCRF is defined in Section C.3.10 as “a publicly or privately owned residence that houses individuals, 18 or older, with a principal diagnosis of mental illness and who require twenty-four (24) hours per day/seven (7) days per week on-site supervision, personal assistance, lodging, along with meals” Section B.2 of the solicitation stated that the District contemplated awarding multiple indefinite delivery indefinite quantity (“IDIQ”) contracts sufficient to ensure services to a maximum of 223 consumers. (AR Ex. 1). Section M of the solicitation provided the following technical evaluation criteria and maximum scores: technical understanding of the requirement and technical approach (30 points), management plan (20 points), quality improvement plan (10 points), and personnel (15 points). The other evaluation factors were: past performance evaluation (10 points) and price evaluation (15 points). On May 20, 2008, the District placed an advertisement announcing the solicitation in the Washington Times. (AR Ex. 2). On May 28,

2008, the District conducted a pre-proposal conference. (AR Ex. 2). Between May 28, 2008, and June 13, 2008, the District issued four amendments to the solicitation. (AR Ex. 1).

The solicitation closed on June 23, 2008. (AR Ex. 1). The District received proposals from ten offerors, including Humility. (AR Ex. 2). Samuel J. Feinberg, the Director of Contracts and Procurement and Agency Chief Contracting Officer for DMH, and the contracting officer and source selection authority for this solicitation, appointed three persons to conduct a technical evaluation of the proposals. On June 25-27, 2008, and July 2, 2008, the District's technical evaluation panel ("TEP") evaluated the proposals. The contracting officer states that during the evaluation of initial proposals, the evaluators always met as a group with the contract specialist present, each evaluator reviewed each technical proposal individually and assigned a preliminary score, and the evaluators then discussed each proposal as a group, including their preliminary scores for each evaluation factor, and the strengths and weaknesses noted by each evaluator. (Feinberg First Supplemental Declaration ¶¶ 5-9). After the group discussion, each evaluator reached his or her own final score for each evaluation factor, with the scores and supporting narratives for each evaluation factor being recorded on the technical evaluation criteria worksheets. (*Id.* ¶¶ 10-11). There was no separate consensus report of the TEP summarizing its findings. After all evaluations of all technical proposals had been completed, each evaluator then reviewed each price proposal, discussed each price proposal as a group, and made narrative comments on the price proposal review and comment sheets. (*Id.* ¶ 12). The summary score for each evaluation factor was the average of the scores of the three members of the TEP. (*Id.* ¶ 22).

After the TEP completed its evaluation, the contracting officer met with the contract specialist to review the TEP's evaluation criteria worksheets and to discuss details of the proposals. (AR Ex. 3, at 35). The contracting officer states that he reviewed each proposal and then analyzed the proposed capacities (number of consumers that could be served) of each offeror against the anticipated capacity required by the District as identified in section 8.2 of the solicitation to determine a competitive range. (AR Ex. 3). Capacity was not an evaluation factor and thus did not affect a competitive range determination. It is not clear that any offeror was excluded from the competitive range. We believe that the contracting officer simply misused the term "competitive range" in this context.

By letter dated July 16, 2008, the District entered into discussions with all offerors. (AR Ex. 2). By letter dated July 17, 2008, the District outlined for each offeror the deficiencies in its initial proposal and scheduled a meeting with each offeror to discuss its proposal. (AR Ex. 2). On July 21-24, 2008, the District met with each offeror and discussed its proposal. (AR Ex. 2). By letter dated July 25, 2008, the District notified each offeror that discussions had concluded and requested that each offeror submit a Best and Final Offer ("BAFO"). (AR Ex. 2). On July 31, 2008, each offeror submitted a BAFO. (AR Ex. 2).

On August 5-7, 2008, the TEP evaluated the BAFOs. (AR Ex. 3). On August 21, 2008, the contracting officer reviewed each BAFO and the findings of the TEP regarding the BAFOs. (AR Ex. 3). On August 21, 2008, the contracting officer also concluded a review of the tabulated final combined scores (technical, price, past performance, and CBE preferences) and rankings of each offeror and performed an independent assessment. (AR at 5; AR Ex. 2). The

contracting officer concurred with the TEP's evaluation of the offerors and concluded that awarding contracts to the four highest ranked offerors for the full consumer capacity that each had proposed would result in the award of contracts for services with a capacity of 225 consumers, two more than the 223 maximum slots stated in the solicitation. (AR at 5; AR Exs. 2, 3).

On September 19, 2008, DMH notified the successful and unsuccessful offerors of DMH's decision to award contracts, subject to the prior approval of the City Council, as applicable. (AR at 5-6; AR Ex. 2). On September 27-28, 2008, proposed contracts with Community Connections, Inc., Life Stride, Inc., and Careco Health Services, Inc., were deemed approved by the Council. (AR at 6; AR Ex. 2). On October 1, 2008, the contracting officer executed contracts with Deaf-REACH, Community Connections, Life Stride, and Careco Health Services, and the contractors began performance. (AR at 6; AR Ex. 2).

DMH conducted a debriefing for Humility on October 7, 2008, attended by the contracting officer and the contract specialist, as well as David Gilmore for Humility. (AR Exs. 2, 4). The contracting officer recorded in a declaration dated November 12, 2008 (AR Ex. 4), the comments he made at the October 7 debriefing. He states that Humility received an acceptable rating for the personnel factor because Humility had 3 years of experience as an organization while the successful offerors had many more years. (AR Ex. 4 ¶ 5). The contracting officer states that Humility's proposed solution for the licensed clinical supervisor to oversee residential services had deficiencies which was a weakness for its quality improvement plan and personnel, while the awardees scored higher not only because of longer experience but because their personnel credentials including the clinical supervisor were stronger. (*Id.* ¶ 5). The contracting officer also explained in the debriefing the reason for Humility's score for the quality improvement plan factor and the weakness associated with the experience and qualifications of Humility's proposed licensed clinical supervisor. (*Id.* ¶¶ 7-8).

Humility filed protests on October 15 and 20, and December 1, 2008.

DISCUSSION

We exercise jurisdiction over these consolidated protests pursuant to D.C. Code § 2-309.03(a)(1). Humility raises a number of challenges to the awards, most of which question the propriety of the evaluations of Humility's and the awardees' proposals and the contracting officer's source selection decision.

Humility contends that the technical evaluation panel did not properly compare the offerors' proposals and failed to prepare the required documentation of its evaluations. In its first supplemental protest, Humility correctly observes that there is no consensus technical evaluation report of the panel containing the bases, analyses, and summary of findings. Humility points out that the record here contains only the evaluators' worksheets and evaluation score summaries of the initial proposals and BAFOs. Although Humility urges that the evaluations do not identify relative differences among the proposals, proposals' strengths or weaknesses, and proposals' risks vis-à-vis the stated evaluation criteria, we do not agree. The evaluators'

worksheets contain reasonably detailed proposal strengths and weaknesses and risks that highlight the relative differences among the proposals. Clearly, it would have made the record far stronger if the contracting officer had obtained a consensus evaluation report from the TEP. More importantly, the contracting officer's documentation of his independent evaluation of the offers is quite thin, limited to his concurrence with the TEP's evaluations, his evaluation narrative for the four awardees in the business clearance memoranda, and his notes of his debriefing explanations to Humility. The evaluation record should have been documented with a comprehensive evaluation narrative, scoring, and ranking of *all* offerors and supported by the TEP's evaluation work papers and preferably also a consensus report. Despite the shortcomings in the record, we are able to discern adequate documentation of the technical evaluation of the top four ranked offerors and Humility as contained in the evaluation worksheets, the scoring summaries, the business clearance memoranda, and the contracting officer's declarations including his notes of the debriefing. The contracting officer states that he concurred in the technical evaluation made by the TEP and we see adequate narrative and analysis by the evaluators with respect to the solicitation's evaluation criteria to support his conclusion.

Humility argues that it was improperly downgraded in the experience, quality improvement plan, and the qualified practitioner requirement. We have carefully considered Humility's arguments, but find that the evaluation was neither arbitrary nor contrary to the evaluation criteria stated in the solicitation. Nor can we conclude that the record shows that either DMH or the contracting officer determined in advance to limit the number of awardees to the offerors with the largest capacity. Clearly, the four offerors with the largest capacity were not the four ultimate awardees. We see no basis for concluding that the capacity of an offeror was improperly used as an undisclosed evaluation factor. The record supports the contracting officer's position that capacity of offerors was used only to determine how many awards would be made, beginning with the highest ranked offeror and proceeding to make awards until the maximum capacity was met.

In connection with the evaluation and selection challenge, Humility argues that the contracting officer failed to conduct a cost/technical tradeoff and support his decision that the successful proposals were the most advantageous to the District, price and technical factors considered. The business clearance memoranda, supported by the evaluation worksheets, provide adequate support for the contracting officer's conclusion that the offers of the four awardees were the most advantageous to the District.

Humility argues that the District never intended to award any contract to a number of the offerors including Humility. On June 9, 2008, the District issued solicitation amendment 2 which, *inter alia*, provided that only DMH-certified Mental Health Rehabilitative Services ("MHRS") providers could submit offers. (AR Ex. 1, Amendment 2 § L.21.3). This requirement was removed by Amendment 4. (AR Ex. 1, Amendment 4). According to Humility, the putative opening of the solicitation to contractors not certified as MHRS providers was a sham, with DMH intending only to award contracts to certified MHRS providers, notwithstanding the relaxation of the specifications. In fact, all of the awardees are certified MHRS providers. Humility infers that DMH never intended to award to a non-MHRS certified provider, and concludes that the award process and awards were unreasonable, arbitrary, and contrary to the law that requires full and open competition. We have reviewed the entire record and find no

evidence that DMH intended to award only to certified MHRS providers notwithstanding Amendment 4.

Humility also argues that the contracting officer did not fairly consider Humility for award and never intended to make an award to Humility even if it were the top ranked offeror. District counsel's comment that the "District has no intention of 'moving' [the existing six] . . . consumers [at Humility's facility] whether you win or lose the bid protest" refers, according to the contracting officer, to the fact that Humility has been operating as an independent MHCRF rather than as a contracted MHCRF. MHCRFs are licensed by DMH as part of the District's continuum of mental health care. (AR Ex. 43 ¶ 23, First Supplemental Declaration of Samuel J. Feinberg, dated December 18, 2008). Consumers are informed of their residential options by their core service agency and can elect to be placed at an independent MHCRF. A core service agency is a "community-based provider of mental health services and mental health supports that is certified by DMH and that acts as a clinical home for Consumers of mental health services by providing a single point of access and accountability for diagnostic assessment, medication-somatic treatment, counseling and psychotherapy, community support services, and access to other needed services." (RFP Section C.3.1). Independent MHCRFs determine on their own how they provide services and to whom, subject to licensing requirements contained in 22 DCMR Chapter 38. (AR Ex. 43). Some MHCRFs have a contract with the District and those contracted MHCRFs must abide by the contractual requirements they have with the District and presumably accept consumer slots referred to them by the District. Here, Humility was anticipating that if it won an award under the solicitation, it could convert its current six consumers from the lower reimbursement rates for independently placed consumers it now receives to the significantly higher contract rates. We need not address this issue because we find no legal error in the awards made by the contracting officer to the four higher ranked offerors. We do not believe it was reasonable, in any event, for Humility to assume that its six existing consumers would be converted necessarily to six of the 223 contracted consumer slots identified in the solicitation if Humility was selected for award. Humility should have sought clarification from the contracting officer prior to the submission of proposals on the question of the specific status of the six preexisting consumers receiving services from Humility.

Humility also raises a number of other challenges regarding whether the awardees were required to have MHCRF licensed properties when they submitted their proposals, whether the past performance evaluations of Careco and Life Stride were reasonable, and whether awards were made to offerors whose proposals were deficient. We agree with the District that these arguments have no merit. Humility does not demonstrate that the solicitation required properties to be purchased or rented at the time of the proposal due date. We have examined the record regarding the past performance evaluations of Careco and Life Stride and the alleged proposal deficiencies but we find no basis for sustaining the protests on these grounds.

CONCLUSION

In sum, we have carefully considered each of the challenges raised by Humility, and conclude that the contracting officer's evaluation and selection actions were not contrary to the law or the terms of the solicitation. The detailed evaluation worksheets prepared by the technical evaluation panel members and the contracting officer's analysis found in the business clearance

memoranda and his declarations are adequate to support the awards. Accordingly, we deny the consolidated protests.

SO ORDERED.

DATED: June 2, 2009

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

I.C.A.STAR.N.U)
) CAB No. P-0795
Under IFB No. CFSA-08-I -0004)

For the Protester: Ms. Sherry J. Bailey, pro se. For the District of Columbia Government: Talia S. Cohen, Esq., Assistant Attorney General.

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

OPINION

Filing ID 25506948

i.c.a.STAR.n.u ("STAR") has protested the contracting officer's decision not to award it a youth mentoring contract. The District has moved to dismiss the protest on the ground that STAR lacks standing. STAR has not challenged the two awards made by CFSA and does not allege that CFSA violated any law, regulation, or the terms of the solicitation. Even if we could discern a valid challenge to the awards, STAR lacks standing to protest, as it would not be next in line for an award if we were to sustain its protest grounds. Accordingly, we dismiss the protest.

BACKGROUND

On September 24, 2008, the District of Columbia's Child and Family Services Agency ("CFSA") issued IFB No. CFSA-08-I-0004 ("IFB") for a proposed indefinite delivery indefinite quantity ("IDIQ") contract. The IFB sought qualified contractor(s) to provide mentoring services for up to 500 clients, with a bid opening date of October 24, 2008. (District's Motion to Dismiss, Ex. 1). CFSA set forth in Section B.3 the method of bid evaluation, based on the hourly rate for each CLIN times 288 hours for each CLIN. The 288 hours represented the number of hours of mentoring services one client could receive during the contract term. (Motion to Dismiss, at 2; Exs. 1, 14). On October 15, 2008, CFSA issued Amendment No. 1, which provided responses to bidders' questions. (Motion to Dismiss, Ex. 2). On October 24, 2008, CFSA received a total of 23 bids, four of which were received after bid opening and not opened. (Motion to Dismiss, at 2).

CFSA prepared bid tabulation sheets of the bidders (Motion to Dismiss Ex. 13) indicating that M.M.G. LLC ("M.M.G.") offered the lowest total bid price of \$24,480. Our Future offered the second lowest total bid price of \$25,056. Culbreth & Culbreth Consultant, Inc. ("Culbreth") offered the third lowest total bid price of \$28,494.72, and Family Enrichment Center offered the fourth lowest total bid price of \$28,512. (Motion to Dismiss, Ex. 13; District Reply, dated March 19, 2009, Ex. A). CFSA determined M.M.G., the lowest bidder, to be nonresponsible. (Motion to Dismiss, Ex. 14), and on December 31, 2008, CFSA awarded Contract No. CFSA-09-C-0133 to the second lowest bidder, Our Future. (Motion to Dismiss, Ex. 11). On January 31, 2009, CFSA awarded Contract No. CFSA-09-C-0130 ("Contract No. 0130") to the third lowest

bidder, Culbreth. (Motion to Dismiss, Ex. 12). The contracting officer has not awarded a contract for the remaining 80 clients. (Motion to Dismiss, at 3; District Reply, at 3).

On February 6, 2009, STAR filed the instant protest with the Board alleging that:

1. STAR did not fully understand the contracting process;
2. STAR’s contract has always been negotiable on price when it pertains to keeping the clients’ services in place;
3. STAR has contracted with CFSA for 11 years and the price has never increased or decreased;
4. Six years ago CFSA had two companies servicing hundreds of children and CFSA hired more contractors to avoid the displacement of children should one of the contractors be unable to perform;
5. STAR cannot understand why CFSA would sever an excellent relationship with STAR when STAR is willing to negotiate a reduction in price; and
6. STAR mentors will not work with the two companies that CFSA awarded contracts to pursuant to the IFB.

On February 26, 2009, the District filed a motion to dismiss asserting that STAR lacks standing to protest since STAR is not next in line for award even if the protest were sustained, and, moreover, even on the merits, none of the six protest grounds raised by STAR is an adequate ground for protest. On March 8, 2009, the STAR filed its opposition, raising two new issues: (1) the District incorrectly indicates in the bid tabulation sheets (Exhibit 13) that STAR was eighth in line for award when in fact STAR was tied for fourth place with three other bidders, and (2) that Family Enrichment is a nonresponsible bidder. As a result of the STAR’s opposition, CFSA conducted a complete and thorough review of the bids and CFSA produced a revised bid tabulation sheet which was submitted as Exhibit A to the District’s March 19, 2009 reply to STAR’s opposition. Below is a table summarizing the revised bid tabulation of Exhibit A (excluding bidders ranked below STAR):

BIDDERS	Total Price Per Client for the Base Year and Four Options	LSDBE Preference	Adjusted Value
1. M.M.G.	\$24,480.00	0	\$24,480.00
2. Our Future	\$25,056.00	0	\$25,056.00
3. Culbreth	\$28,494.72	0	\$28,494.72
4. Family Enrichment	\$28,512.00	0	\$28,512.00
5. Kidd International	\$37,324.80	10 %	\$33,592.32
6. Steppingstones	\$38,992.32	12 %	\$34,313.24
7. Greater Fellowship	\$34,560.00	0	\$34,560.00
7. Way of the Word	\$34,560.00	0	\$34,560.00
7. GANG	\$34,560.00	0	\$34,560.00
7. STAR	\$34,560.00	0	\$34,560.00

As can be seen from the revised bid tabulation sheet, the rankings of the first four bidders did not change even though CFSA corrected several bid prices. M.M.G. still offered the lowest total bid price of \$24,480.00 but was determined nonresponsible and therefore eliminated from the competition. Our Future still offered the second lowest total bid price of \$25,056, Culbreth still offered the third lowest total bid price of \$28,494.72, and Family Enrichment still offered the fourth lowest total bid price of \$28,512. (District's March 19 Reply, Ex. A). However, the revised bid tabulation sheet shows two other bidders with the fifth and sixth low evaluated bids – namely, Kidd International Home Care, and Steppingstones Management Services, LLC, based on their right to a bid reduction based on preferences for being local, small, and disadvantaged business enterprises. In addition, CFSA determined that there was an error in the unit prices for both Steppingstones and for STAR. Accordingly, the revised bid tabulation indicates that beyond the awardees (Our Future and Culbreth), Family Enrichment, Kidd International, and Steppingstones have lower evaluated bids than STAR. STAR challenged the responsibility of Family Enrichment in its opposition to the District's motion to dismiss. STAR has never responded to the District's reply with the revised bid tabulation sheet showing STAR is tied for seventh with three intervening bidders ahead of it.

DISCUSSION

We exercise jurisdiction over this protest pursuant to D.C. Code § 2-309.03(a)(1).

The Board notes that none of STAR's six protest grounds allege that CFSA violated any procurement law or regulation or the terms of the solicitation. STAR does not challenge the two awards but rather argues that CFSA should have continued to contract with STAR notwithstanding the new procurement. STAR misunderstands the nature of a competitive procurement under District procurement law. We see nothing in the record demonstrating that CFSA improperly conducted this procurement. In response to the District's motion to dismiss, raising STAR's lack of standing to challenge the awards (which STAR really does not challenge), STAR has only alleged that one bidder should have been determined nonresponsible. Thus, this protest can be dismissed on two bases. First, STAR does not properly challenge the awards made to Our Future and Culbreth and alleges no violation of the law in its protest grounds. Second, even if we could treat the protest as challenging the awards, STAR lacks standing because it is not in line for award if we were to find merit in its protest grounds. *Commando K-9 Detectives, Inc.*, CAB Nos. P-0405, Aug. 18, 1995, 42 D.C. Reg. 4597, 4598 (protester lacks standing because it is not next in line for award even if the protest were sustained).

CONCLUSION

STAR has not challenged the two awards made by CFSA and does not allege that CFSA violated any law, regulation, or the terms of the solicitation. Even if we could discern a valid challenge to the awards, STAR lacks standing to protest, as it would not be next in line for an award if we were to sustain its protest grounds. Accordingly, we dismiss the protest.

SO ORDERED.

DATED: June 4, 2009

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

CNA CORPORATION)
) CAB No. P-0794
Under Solicitation No. DCKA-2009-B-0022)

For the Protester CNA Corporation: John C. Cheeks, CEO, For the District of Columbia: Alton Woods, Esq., Assistant Attorney-General, DC.

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

OPINION

Filing ID 2553320

Protester CNA Corporation challenges the contracting officer’s determination that CNA’s bid was nonresponsive for failure to submit a bid bond with good and sufficient sureties as required by the bond requirements of the solicitation. The District filed a motion to dismiss the protest as untimely, alleging that CNA filed its protest more than 10 days after it knew, or should have known, of the basis for its protest. On the merits, the District asserts that the contracting officer properly rejected CNA’s bid as nonresponsive since CNA submitted with its bid an unacceptable bid guaranty. We agree with the District that CNA’s protest was untimely. Accordingly, we dismiss the protest.

BACKGROUND

The District’s Office of Contracting and Procurement, on behalf of the District’s Department of Transportation, issued Solicitation No. DCKA-2009-B-0022 in September 2008 for the rehabilitation of three bridges over the C&O Canal in Georgetown. (AR Ex. 1). Seven bids were received and opened on October 22, 2008 (AR at 3; AR Ex. 3). CNA was the apparent low bidder. CNA’s bid included as bid guaranty a non-certified company check drawn on Sun Trust Bank in the name of “Cheeks of North, Inc.” CNA submitted no other evidence of any bid guaranty in its bid package. Section 102, Article 12, Bond Requirements, Bid Guaranty of the Standards and Specifications for Highways and Structures (2005), incorporated by reference into the IFB (page v of the IFB) provides as follows:

On all bids of \$100,000.00 or more, security is required to insure the execution of the contract. No bid will be considered unless it is so guaranteed. Each bidder must furnish with his bid either a bid bond (Form 2640-5) with good and sufficient sureties, a certified check payable to the Treasurer of the District of Columbia (uncertified check will not be accepted), negotiable United States bond (at par value), or an irrevocable letter of credit in an amount not less than five percent (5) of the amount of his bid

(AR Ex. 1).

By Determination and Finding dated November 26, 2008, the Chief Procurement Officer approved an award to other than the low bidder. The D&F recommended award to the second low bidder. (AR Ex. 4). On December 2, 2008, the contracting officer notified CNA that the CNA bid had been rejected as non-responsive. (AR Ex. 5). On December 31, 2008, CNA filed its protest. The District filed a motion to dismiss the protest as untimely on January 22, 2009. CNA has not responded to the motion.

DISCUSSION

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

We begin by addressing the issue of whether CNA timely filed its protest. The District asserts that CNA filed its protest more than 10 business days after December 2, 2008, the date the contracting officer notified CNA that its bid had been rejected as non-responsive. (AR Ex. 5). The District asserts that because CNA knew that the District had rejected CNA's bid on December 2, 2008 (or December 5, 2008, after allowing three days for mail delivery), CNA should have filed its protest within 10 business days of that date, that is, by December 19, 2008.

D.C. Code § 2-309.08 (b)(2) requires the protester to file a protest not later than 10 business days after the basis of the protest is known or should have been known, whichever is earlier. CNA does not challenge the District's assertion that it informed CNA of the bid rejection on December 2, 2008. Because CNA failed to submit its protest within 10 business days after December 2, 2008, its protest is untimely. Accordingly, we dismiss the protest.

SO ORDERED.

DATED: June 8, 2009

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

WE CARE PHYSICALS, LLC)
) CAB No. P-0791
Under IFB No. DCHC-2008-B-0010)

For the Protester: Ms. Lillian V. Willis, pro se. For the District of Columbia Government: Talia S. Cohen, Esq., Assistant Attorney General.

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

OPINION

Filing ID 25568887

We Care Physicals, LLC, has protested the contracting officer’s award of a drug testing services contract to B&W Stat Laboratory, Inc., on the ground that B&W is not a certified Clinical Laboratory Improvement Act (“CLIA”) facility and that B&W’s bid price was so low as to render it nonresponsible. We conclude that the record supports the contracting officer’s award to B&W. Accordingly, we deny the protest.

BACKGROUND

On May 27, 2008, the Office of Contracting and Procurement (“OCP”) on behalf of the Department of Health (“DOH”), Addiction Prevention Rehabilitation Administration (“APRA”), issued IFB No. DCHC-2008-B-0010. The IFB was for a contractor to provide drug testing services for approximately 31 APRA safety net programs providing substance use disorder treatment services. (Agency Report (“AR”) at 2; AR Ex 1). OCP issued the IFB in the certified small business enterprise set-aside market. (AR Ex. 1). The IFB contemplated award of an indefinite delivery indefinite quantity contract based on fixed unit prices for a base year and four option years. (AR Ex. 1). Section B.5.1 provided that the minimum number of urine samples that the bidder would collect per year was 2,500 and the maximum number of urine samples collected per year would be 25,000. (AR Ex. 1). Section C.3.4 of the IFB provided that “[t]he Contractor shall ensure that the urinalysis testing services are conducted in a fully qualified laboratory that has received accreditation by the Department of Health and Human Services (DHHS) as a Clinical Laboratory Improvement Act (“CLIA”) certified facility.” (AR Ex. 1). In addition, Section H.1 provided that “[t]he Contractor shall be bound by the Wage Determination 2005-2103 dated May 8, 2008 issued by the U.S. Department of Labor in accordance with the Service Contract Act (41 U.S.C. § 351 et seq.)” (AR Ex. 1).

By Amendment No. M001, dated June 23, 2008, the District extended the bid opening date to July 11, 2008. (AR Ex. 2). In addition, Amendment No. M001, revised Section C.3.4 of the IFB by deleting “accreditation by the Department of Health and Human Services (DHHS)” and inserting “certification by the D.C. Department of Health and” (AR at 3; AR Ex. 2). By Amendment No. M002, dated July 8, 2008, the District again extended the bid opening date

to July 25, 2008. By Amendment No. M003, dated July 9, 2008, the District revised, among other things, Section B.5.1 by increasing the minimum and maximum quantities of samples to be collected annually as follows: minimum 24,000 and maximum 50,000. In addition, Amendment No. M003 revised the certification requirement back to that of the original certification requirement articulated in the IFB Section C.3.4: “[t]he Contractor shall ensure that the urinalysis testing services are conducted in a fully qualified laboratory that has received accreditation by the Department of Health and Human Services (DHHS) CLIA certified facility.” (AR Ex. 2).

By July 25, 2008, the date of bid opening, the following four bidders submitted bids: (1) B&W, (2) We Care, (3) Norton Medical Industries (“Norton”), and (4) Clear Choice Systems (“Clear Choice”). (AR at 3; AR Ex. 6). OCP tabulated the bids as follows:

<u>Bidder</u>	<u>Total maximum bid price for base and four option years</u>
Norton	\$ 2,618,750.00
B&W	\$ 3,650,000.00
Clear Choice	\$ 5,362,466.00
We Care	\$13,000,000.00

(AR Ex. 4). After reviewing the bids, the contracting officer determined that the bids of Norton and Clear Choice were nonresponsive because they failed to provide DHHS accreditation that they were CLIA certified facilities and were certified small business enterprises. (AR at 4; AR Ex. 5). The contracting officer then recommended award to B&W, as it was the lowest responsive and responsible bidder certified as a small business enterprise possessing a DHHS certificate of compliance as a CLIA facility. (AR at 4; AR Ex. 7). On October 1, 2008, the District awarded the contract to B&W but We Care did not receive notice of the award until October 24, 2008. On October 31, 2008, We Care filed the instant protest. The District filed its Agency Report on November 20, 2008. We Care responded to the Agency Report on December 8, 2008, and the District filed a reply on December 15, 2008.

DISCUSSION

We exercise jurisdiction over this protest pursuant to D.C. Code § 2-309.03(a)(1).

The protest raises two issues for the Board’s consideration: whether the contracting officer properly determined that B&W was certified by the DHHS as a CLIA certified facility and whether B&W was a responsible bidder.

We Care asserts that B&W was only certified to receive samples but not to conduct the actual tests, citing the Mandatory Guidelines for Federal Workplace Drug Testing Programs (“Guidelines”). In addition, We Care argues that the District is ignoring federal law since it failed to award the contract to a certified laboratory as listed on page 59640 of the Federal Register, Volume 73, No. 197, dated October 9, 2008. However, the District points out that the

Guidelines only apply to workplace drug testing of federal employees and that here the IFB is for treatment services for the District, not workplace drug testing. We see no basis in the record for concluding that the contracting officer erred in determining that the IFB required the awardee to have accreditation by the DHHS as a CLIA certified facility and that B&W was properly accredited as such a facility. The District states that the Center for Medicare & Medicaid Services regulates all laboratory testing (except research) performed on humans in the United States through the Clinical Laboratory Improvement Amendments and that “[i]n total, CLIA covers approximately 200,000 laboratory entities.” (District’s Dec. 15 Reply, Ex. B). We Care has not rebutted the showing made by the District regarding B&W’s CLIA certification.

Regarding the responsibility challenge, We Care argues that B&W cannot perform the contract work at a unit price of \$13 per sample when We Care has been performing similar work at a contracted unit price of \$45. We Care provides no evidence that B&W’s bid is below the cost of performance and more importantly fails to show that B&W’s unit price renders it a nonresponsible bidder. Thus, we find no evidence to support We Care’s responsibility challenge.

CONCLUSION

We Care has not demonstrated that the contracting officer erred in determining B&W to be a properly accredited CLIA facility and to be a responsible bidder. Accordingly, we deny the protest.

SO ORDERED.

DATED: June 9, 2009

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

C & D Tree Service, Inc.)	
	)	CAB No. P-0799
Under IFB No. DCKA-2008-B-0050)	

For the Protester: Richard L. Moorhouse, Esq., Greenberg Traurig, LLP. For the District of Columbia Government: Alton E. Woods, Esq., Assistant Attorney General.

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

OPINION

Filing ID 25967143

C&D Tree Service, Inc. has protested the contracting officer's decision to award multiple IDIQ contracts even though the solicitation states that the District intended to make multiple awards. While C&D's protest comes over six months after bid opening, it states that it is not challenging the solicitation terms as such but rather the decision to make awards to other contractors. We conclude that the protest was untimely filed because C&D is really challenging the terms of the solicitation despite its protestations to the contrary. Accordingly, we dismiss the protest.

BACKGROUND

The District's Department of Transportation ("DDOT"), Urban Forestry Administration ("UFA") had a requirement for a contractor to provide tree pruning services. The Office of Contracting and Procurement ("OCP") advertised the indefinite delivery indefinite quantity ("IDIQ") fixed unit price Invitation for Bids ("IFB") in the Washington Times on June 27, 2008. It was posted on OCP's website the same day. There were eight amendments to the IFB, none of which changed the procurement strategy or the statement of work. Amendments 1-6 each extended the bid opening date. Amendment No. 7 revised the price schedule and required bidders to submit two sets of unit prices, one set based on a minimum quantity and one set based on a maximum quantity. Amendment No. 8 extended the bid opening to August 18, 2008. Section B.1.1 of the IFB stated: "The District Government contemplates award of four Indefinite Delivery- Indefinite Quantity (IDIQ) contracts for the services specified with payment based on firm fixed unit prices as set forth in the schedule." Section B.1.2 of the IFB provided that: "It is the District's intent to award four (4) contracts, one contract per contractor." (AR Ex. 1, Protest Ex. A).

Bids were opened on August 18, 2008. Eight firms submitted bids in order from low to high: Heavy Equipment Training Academy, minimum amount \$2,900, maximum amount \$365,625; C&D Tree Service, minimum amount \$2,700, maximum amount \$367,500; Adirondack Tree Experts, minimum amount \$3,660, maximum amount \$438,125; Community Bridge, Inc., minimum amount \$3,590, maximum amount \$451,000; Kennedy Development, LLC, minimum amount \$3,333, maximum amount \$522,250; Arbor Care, minimum amount

\$7,385, maximum amount \$897,500; The Care of Trees, minimum amount \$10,395, maximum amount \$1,246,500; and Excel Tree Experts Co., Inc. (AR at 3; Protest, Ex. B). Heavy Equipment Training Academy was the apparent low bidder, but the firm was determined nonresponsive by the contracting officer on February 11, 2009. The bid submitted by Arbor Care was determined non-responsive because it did not adhere to Amendment No. 7 which amended the pricing schedule. The bid submitted by Excel was submitted on August 25, 2008, and was rejected as late. On October 9, 2008, in CAB No. P-0787, Excel protested the rejection of its bid and OCP's failure to issue a contract in accordance with the IFB. On October 28, 2008, the District filed a motion to dismiss asserting that the protest was untimely. On January 16, 2009, the Board dismissed Excel's protest as untimely.

On February 11, 2009, the District awarded two of the pruning contracts to C&D and Adirondack. John Thomas, UFA's Administrator, and Kathy Hatcher, the contracting officer, met with C&D on March 3, 2009 and with Adirondack on March 4, 2009, to discuss the contract requirements, and other post-award logistical issues. (AR at 4). During the March 3 meeting, C&D asked the District why it was awarding more than one contract. Mr. Nelson, C&D's representative, stressed the fact that because of the variance in prices the District would pay more for the services. Mr. Thomas emphasized that the District needed to award at least four contracts in order to quickly respond to new service requests and to catch up on the large backlog of service requests. During the discussion, Mr. Thomas and Ms. Hatcher expressed UFA's desire to have multiple contractors working throughout the city at the same time. Mr. Thomas stated that four contractors would allow UFA to respond more quickly to requests from the Mayor, the Council, and the public. (AR at 4-5; AR Ex. 6).

Before the District could award a contract to Kennedy Development, LLC, and make a fourth award, C&D filed this protest on March 6, 2009, challenging the District's decision to make multiple awards under the IFB, arguing that such a decision is too expensive. The District filed a Motion to Dismiss and Agency Report on March 20, 2009, and C&D filed its opposition on April 3, 2009.

DISCUSSION

We exercise jurisdiction over this protest pursuant to D.C. Code § 2-309.03 (a)(1).

C&D argues that it is improper and unreasonable for the District to award contracts to Adirondack and Kennedy under the IFB when the total cost to the District exceeds the cost of a single contract with C&D. Citing 27 DCMR § 1541 and FAR § 14.103-2, C&D argues that the District may award multiple awards under an IFB only if doing so is "economically advantageous to the Government" and results in the "lowest aggregate cost to the Government." Thus, C&D contends that the District is prohibited from making multiple awards that would result in a higher overall cost. A higher overall cost resulting from multiple awards is implicit in the solicitation. Sections B.1.1 and B.1.2 indicate the District's intent to award four IDIQ contracts. Clearly, the IFB anticipates a cost exceeding the cost of a single contract awarded to the lowest bidder, however, the extent of the costs to the District cannot be determined until all task orders are issued under the contracts. If C&D wished to challenge multiple awards, it had to do so by bid opening. Because it waited more than six months after bid opening to file its challenge, we dismiss its protest as untimely.

CONCLUSION

The solicitation clearly stated the District's intent to make multiple IDIQ awards. C&D had to file a protest of the solicitation provisions providing for multiple awards by bid opening on August 18, 2008. Its protest, filed more than six months after bid opening, is thus untimely. Accordingly, we dismiss the protest.

SO ORDERED.DATED: July 6, 2009

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

OHMS ENERGY COMPANY, LLC)
) CAB No. P-0807
Under IFB No. DCAM-2009-B-7003)

For Ohms Energy Company, LLC: Mr. Sheirmiar White, pro se. For the District of Columbia Government: Talia Sasson Cohen, Esq., Assistant Attorney General, Office of the Attorney General.

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

OPINION DISMISSING PROTEST

Filing ID 26475091

Ohms Energy Company, LLC, protests the failure of the Office of Contracts and Procurement ("OCP") to issue the subject solicitation for electricity supply as a set aside procurement and otherwise comply with the requirements of the Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005, D.C. Code §§ 2-218.46, 2-218.47, and 2-218.52. The District has moved to dismiss the protest as untimely since the protest was filed over two months after the bid opening date. Ohms has not responded to the motion. We deem the motion as conceded and in any event the record clearly shows that Ohms' challenge of the solicitation is untimely. Accordingly, we dismiss the protest.

BACKGROUND

On February 13, 2009, OCP issued on behalf of the Office of Property Management ("OPM"), IFB No. DCAM-2009-B-7003 in the open market for a contractor to provide electricity supply for an annual load of approximately 400,000,000 kilowatt hours. (Agency Report ("AR") at 2; AR Ex. 1). The IFB provided for a reverse auction whereby only bidders that met certain eligibility requirements were permitted to participate in the reverse auction. (Id.). In addition, while the IFB contemplated the award of one requirements contract for the supply of electricity for OPM accounts, both the energy purchasers under the DC Municipal Aggregation Program and the Metropolitan Council of Governments could (i) issue their own invitation for bid and execute their own contracts or (ii) negotiate a price under the IFB and issue a separate order. (Id.). The original deadline for the submission of bid packages was March 16, 2009. By Amendment A0001, dated March 13, 2009, the District extended the date for the submission of bid packages to March 20, 2009. Through subsequent amendments, the District extended the date for the submission of bid packages to March 24, 2009. (Id.).

Section 1.3 of the IFB provided that “Bidders interested in participating in this IFB shall comply with the Eligibility Criteria as defined in Section 2 and shall submit a Bid as described in Section 4.” Once OCP determined that a bidder met the eligibility criteria as listed in section 2 of the IFB, then that bidder could participate in the reverse auction. Section 2, entitled “Eligibility Criteria”, provided as follows:

In order to bid each Bidder must possess and submit the following with its Bid Package:

- i. Evidence that the Bidder is licensed by the District of Columbia Public Service Commission to provide Electricity Supply;
- ii. Evidence that the bidder possesses a Federal Energy Regulatory Commission (FERC) power marketing license. Bidders must include FERC Docket No., Date of Application, and Date of Approval;
- iii. Evidence that the Bidder has firm transmission service agreements in the Bidder’s name with the Pennsylvania, New Jersey, Maryland Interconnection, L.L.C (“PJM”) for the interconnection points between the applicable Local Distribution Utility “LDU”, as defined in Section 6.1, system and PJM to effect delivery to the Delivery Points of the contract; and
- iv. Signed acceptance of the Fee Schedule. Attached herein as ATTACHMENT G.

(AR Ex. 1).

On March 24, 2009, the date for the submission of the bid packages, OCP received bids from the following six bidders: Constellation New Energy Power, Gexa Energy DC, LLC, Hess Corporation, Ohms, Pepco Energy Services, Inc., and Washington Gas Energy Services, Inc. (AR Ex. 2). On May 12, 2009, OCP requested from all six bidders additional responsibility data. On May 18, 2009, OCP received responses from the following four bidders: Gexa, Hess, Pepco, and Washington Gas. On June 1, 2009, OCP conducted the reverse auction and on June 2, 2009, awarded Contract No. DCAM-2009-R-7003, to Washington Gas. (AR at 3; AR Ex. 2). Because Ohms failed to comply with the responsibility data request, the District found Ohms nonresponsible, and Ohms thus did not participate in the reverse auction. Ohms filed its protest on June 1, 2009. The District moved to dismiss the protest as untimely on June 29, 2009. Ohms was given an extension of time to respond but has never responded to the motion.

DISCUSSION

Ohms’s protest is not a model of clarity but Ohms appears to contend that the IFB fails to satisfy the requirements of the Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005, D.C. Code §§ 2-218.46, 2- 218.48, and 2-218.52. The District responds that the protest is untimely since Ohms failed to file the protest with the Board prior to bid opening and waited until over two months after bid opening to file its protest. If a

protest is based upon alleged improprieties in a solicitation, the Procurement Practices Act requires the protester to file its protest prior to bid opening. D.C. Code § 2-309.08(b)(1) states in relevant part: “A protest based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals.”

It is clear from the facts that Ohms waited until after bid opening to file its protest challenging the terms of the solicitation. By not responding to the motion to dismiss, we deem the motion as conceded by Ohms. In any event, the record shows that Ohms’ protest is untimely.

Accordingly, we dismiss the protest.

SO ORDERED.

DATE: August 6, 2009

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

CORINTHIAN CONTRACTORS, INC.)
) CAB No. P-0812
 Under IFB No. DCKA-2009-B-0090)

For the Protester: Timothy J. McEvoy, Esq., Cameron McEvoy PLLC. For the District of Columbia Government: Alton E. Woods, Esq., Assistant Attorney General. For the Intervenor: Christopher M. Kerns, Esq., Fort Myer Construction Corp.

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

OPINION

Filing ID 26493845

Corinthian Contractors, Inc., the apparent low bidder under a solicitation for certain reconstruction work on Pennsylvania Avenue, SE, has protested the contracting officer’s decision to reduce its bid amount for mobilization to the maximum amount permitted by section 612.02 of the Standard Specifications for Highways and Structures which was incorporated into the solicitation. We conclude that the contracting officer was required by the terms of the solicitation to reduce Corinthian’s bid amount for mobilization to the maximum permitted by section 612.02 of the Standard Specifications. If Corinthian believed that the solicitation contained an unreasonably low mobilization maximum, it should have brought that issue to the attention of the contracting officer prior to bid opening. Accordingly, we deny the protest.

BACKGROUND

On May 4, 2009, the District’s Department of Transportation (“DDOT”) Invitation for Bids (“IFB”) No. DCKA-2009-B-0090 was advertised in the Washington Times and posted on the Office of Contracting and Procurement (“OCP”) website. (Agency Report (“AR”) Ex. 1). The IFB was for the reconstruction of Pennsylvania Avenue, SE, from 200 Feet West of 27th Street, SE, to Southern Avenue, SE. (*Id.*). From May 6, 2009, to June 10, 2009, five amendments were issued to the IFB, none having any bearing on this protest. On June 12, 2009, bids were received and opened from six bidders with the evaluated bids with Certified Business Enterprise preferences adjusted as follows:

<u>Name:</u>	-	<u>Total Bid:</u>
1. Corinthian Contractors, Inc.	-	\$23,464,629.65
2. Fort Myer Construction Corp.	-	\$25,182,540.26
3. Civil Construction, LLC.	-	\$25,582,048.70
4. Capitol Paving of DC, Inc.	-	\$27,332,237.90
5. Rustler Construction, Inc.	-	\$29,676,271.49
6. Tompkins Builders, Inc.	-	\$29,968,820.96

On June 15, 2009, the contracting officer certified and signed a tabulation of the bids. (AR Ex. 2). On June 16, 2009, the contracting officer sent a letter (AR Ex 3) to Corinthian indicating that the contracting officer had discovered a mathematical error in Corinthian’s bid regarding mobilization and that the bid amount of \$2,653,310.00 for mobilization had been adjusted to the allowed maximum amount of \$1,203,231.48 as required by section 612.02 of the Measure and Payment portion of DDOT’s Standard Specifications for Highways and Structures 2005 (Revised 2007), which is incorporated into the IFB (Appendices Index, at ii (AR Ex. 1, Part 4)). Section 612.02 provides in relevant part:

Payment for Mobilization will be made at the contract lump sum price, subject to allowable limits under this section, which payment will include all operations and expense needed to mobilize, remobilize and demobilize. Lump sum price for Mobilization shall not exceed applicable amounts determined as follows:

Original Contract Total Including Mobilization More Than To and Incl.	Maximum Lump Sum for Mobilization
\$ 0	10% of Contract Total
\$200,000	\$20,000 plus 7.5% (of Contract Total minus \$200,000)
\$1,000,000	\$80,000 plus 5% (of Contract Total minus \$1,000,000)

If the lump sum shown in the Pay Item Schedule for any bid for Mobilization exceeds the allowable amount shown in the table above, the District reserves the right to adjust the amount and total bid accordingly when checking bids. Said adjustment will in no way invalidate bids. . . .

(AR Ex. 7). The contracting officer informed Corinthian that the total price of its bid had been adjusted from \$23,464,629.65 down to \$22,014,551.13. The letter requested that Corinthian acknowledge the changes by signing the letter and returning a signed copy to the contracting officer. (AR Ex. 3). Corinthian did not sign the letter acknowledging the adjustment, and by letter of the same date, took exception to the revised price for mobilization and to the adjustment to the total contract price. (AR Ex. 4). Corinthian argued that since the project was being funded by the American Recovery and Reinvestment Act, federal requirements supersede the cited District requirements. On June 17, the contracting officer sent a letter to Corinthian requesting responsibility data. (AR Ex. 5). On June 18, 2009, the contracting officer received a second letter from Corinthian, arguing that the price adjustment was unfair and that it could not perform the contract for the adjusted price. (AR Ex. 4(a)). On June 23, 2009, Corinthian provided the responsibility data to the contracting officer. (AR Ex. 6). On June 25, 2009, Corinthian filed this protest with the Board challenging the mobilization price reduction and the overall contract price reduction. Corinthian requests that the District be required either to accept the original bid price or permit Corinthian to adjust the bid by reducing the mobilization amount and commensurately increasing other line items in its bid. Fort Myer intervened on June 30, 2009. On July 15, 2009, the District filed its Agency Report, and filed a determination and

finding to proceed with contract performance on July 24, 2009. Corinthian thereafter filed comments on the Agency Report.

DISCUSSION

We exercise jurisdiction over this protest pursuant to D.C. Code § 2-309.03 (a)(1).

The sole issue presented is Corinthian's contention that the District had discretion not to reduce the mobilization price and that the contracting officer's decision to reduce Corinthian's bid price was arbitrary and capricious. Corinthian contends that the following standard specification provision provides the contracting officer with discretion in deciding whether to reduce the contract price due to an excessive mobilization bid:

If the lump sum shown in the Pay Item Schedule for any bid for Mobilization exceeds the allowable amount shown in the table above, *the District reserves the right to adjust the amount and total bid accordingly when checking bids*. Said adjustment will in no way invalidate bids.

(AR Ex 7). (emphasis added). Citing D.C. Code § 2-301.01, Corinthian states that the Procurement Practices Act requires that the procurement law should "be liberally construed to promote its underlying purposes and policies" and that penalizing the low bidder by reducing the bid amount is contrary to public policy. Corinthian argues that the contracting officer should have considered whether the bid presented an "undue risk" to the government.

We disagree with Corinthian. The standard specification mobilization price limitation states:

Payment for Mobilization will be made at the contract lump sum price, subject to allowable limits under this section, which payment will include all operations and expense needed to mobilize, remobilize and demobilize. *Lump sum price for Mobilization shall not exceed applicable amounts determined as follows*

(AR Ex. 3). (emphasis added). This standard, using "shall" and not "may", provides the contracting officer no discretion to accept a higher mobilization price. The portion of section 612.02 cited by Corinthian merely gives the contracting officer the right to adjust the mobilization bid item after bid opening in connection with award. Corinthian has not demonstrated that any federal provision expressly supersedes or contradicts the provisions found in section 612.02. Accordingly, Corinthian's reliance on the American Recovery and Reinvestment Act is misplaced.

The adjustment requested by Corinthian, adding the excess mobilization amount to other line items after bid opening has been specifically considered and rejected by the Board in *Corman Construction, Inc.*, P-0217, 39 D.C. Reg. 4235 (1991). In that matter, Corman made an arithmetical error in calculating the appropriate amount of mobilization, pursuant to the then-governing section 104.07(C) of the District of Columbia Department of Highways and Traffic Standard Specifications for Highways and Structures (1974). The language of section 104.07(C)

essentially mirrors that of the current section 612.02 of the DDOT Standard Specifications for Highways and Structures. Corman contended that the error should be corrected by maintaining the total bid amount and increasing other items to make up for the reduction of the excess amount from the mobilization item. The Board held that the interpretation used by the District was correct, that “the mistake may be corrected by decreasing the total bid by the excess amount in the Mobilization item”, denied the protest, and permitted Corman to withdraw its bid.

CONCLUSION

The solicitation clearly limited the mobilization amount and provided the contracting officer the right to adjust the mobilization bid item to the maximum allowable amount. The contracting officer’s action was consistent with the solicitation and the law. Accordingly, we deny the protest.

SO ORDERED.

DATED: August 7, 2009

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

AAA Termite & Pest Control)	
	)	CAB No. P-0811
Under IFB No. DCAM-2009-B-0004)	

For the Protester, AAA Termite Pest Control: Michael Wanamaker, President, pro se.
For the Government: Robert Schildkraut, Esq., Assistant Attorney General.

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

OPINION

Filing ID 26603720

On June 18, 2009, AAA Termite Pest Control (“AAA”) protested the cancellation of IFB DCAM-2009-B-0004, for pest control services. The District filed a motion to dismiss the protest as moot after the contracting officer found that the specifications were ambiguous and failed to state the needs of the District. After review of the protest and the motion to dismiss, the Board denies the protest.

FACTS

On January 16, 2009, the Office of Contracting and Procurement (“OCP”) on behalf of the Office of Property Management (recently renamed the Department of Real Estate Services), issued IFB No. DCAM-2009-B-0004, in the small business set-aside market. (Motion to Dismiss, Ex. 1). The IFB described a firm fixed price contract for a comprehensive pest control program for District Government facilities. (Motion to Dismiss, Ex. 1). Bids were submitted on February 24, 2009. (Motion to Dismiss, Exs. 1, 6). The protester’s bid was the lowest of five bids. (Motion to Dismiss, Ex. 6). The IFB was the subject of a prior protest, P-0798, which was dismissed on April 10, 2009. The present protest was filed on June 18, 2009.

DISCUSSION

In its July 8, 2009 motion to dismiss, the District asserts that the Board should dismiss the protest because the District cancelled the solicitation after determining that the specifications were ambiguous and that the specifications failed to set forth the needs of the District. In support of that determination, the contracting officer submitted a declaration dated July 7, 2009 (Motion to Dismiss, Ex. 11), setting forth the District’s reasons for cancelling the solicitation. There is no dispute that the District has properly supported the cancellation which resolves the basis for the

protest. AAA has not objected to the motion. Accordingly, we deny the protest as the motion is conceded.

The protest is denied.

DATE: August 14, 2009

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTESTS OF:

W2I VENTURE)	
	)	CAB Nos. P-0796, P-0802
Under Solicitation Nos. CFOPD-07-R-053)	
and CFOPD-09-R-013)	

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

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

OPINION
Filing ID 26625718

W2I Venture has protested the District’s decision to cancel Solicitation No. CFOPD-07-R-053 for a new gaming system platform for the DC Lottery and Charitable Games Control Board (“DCLB”). The contracting officer canceled the solicitation because the City Council declined to approve the proposed award to W2I. W2I now argues that the Mayor was not required to submit the proposed contract to the Council for approval pursuant to D.C. Code § 1-204.51 because the contract did not involve the expenditure of appropriated funds. The District responds that the proposed contract does involve the expenditure of appropriated funds and moreover the new solicitation incorporates sufficient changes to the old solicitation to merit the cancellation and issuance of the revised solicitation. We conclude that the contracting officer had a cogent and compelling basis for cancelling the proposed contract when the Council refused to approve the proposed contract award to W2I because the lottery contract would involve the expenditure of appropriated funds. We also conclude that the new solicitation contained sufficient changes to independently support the decision to cancel the original solicitation. W2I’s second protest, challenging the District’s issuance and activities under the revised solicitation during the pendency of the protest of the cancellation, is without merit. Accordingly, we deny the captioned protests.

BACKGROUND

On May 27, 2007, the Office of the Chief Financial Officer (“OCFO”) issued a Request for Proposals, Solicitation No. CFOPD-07-R-053 (“RFP-1”). (Motion to Dismiss, Ex. 1). RFP-1 sought a contractor to provide to the DCLB a new gaming system platform. Section I.21 of RFP-1 provided as follows:

I.21 Appropriation of Funds

The District's liability under this contract is contingent upon the future availability of monies with which to make payment for the contract purposes. The legal liability on the part of the District for payment of any money shall not arise unless and until such monies shall have been provided. The District's obligation to pay under this contract is subject to the provisions of (i) the federal Anti-Deficiency Act, 31 U.S.C. §§ 1341, 1342, 1349, 1351; (ii) The District of Columbia Anti-Deficiency Act, D.C. Official Code §§ 47-355.01-355.08 (2001); (iii) D.C. Official Code § 47-105 (2001); and (iv) D.C. Official Code § 1-204.46 (2001), as the foregoing statutes may be amended from time to time.

(Motion to Dismiss, Ex. 1). On September 20, 2007, W2I and Lottery Technologies Enterprises ("LTE") submitted proposals. After an extensive evaluation process, the OCFO contracting officer determined that W2I's proposal offered the most advantageous method for the District to fulfill the RFP's requirements, and on March 14, 2008, the Mayor submitted the proposed lottery contract, Contract No. CFOPD-7-C-053, for the first time to Council for approval. (Motion to Dismiss, Ex. 4). On March 28, 2008, the District of Columbia Register, Vol. 55, No. 13, notified the public of a public hearing on the proposed lottery contract. (Motion to Dismiss, Ex. 3).

On April 4, 2008, LTE filed a protest (CAB No. P-0774) with the Board, challenging the proposed award to W2I. On May 14, 2008, the Mayor withdrew for the first time from Council the proposed lottery contract. On May 14, 2008, the Mayor resubmitted to Council for a second time the proposed lottery contract. LTE filed an amended protest (CAB No. P-0778) on May 30, 2008. On June 27, 2008, the Mayor withdrew from the Council for a second time the proposed lottery contract. On September 16, 2008, the Mayor submitted to the Council for a third time the proposed lottery contract. On October 30, 2008, the Mayor withdrew from the Council for a third time the proposed lottery contract. On November 3, 2008, we dismissed in part and denied in part the consolidated protests of LTE. On November 14, 2008, the Mayor submitted for a fourth and final time to Council the proposed lottery contract. On December 16, 2008, the Council disapproved the proposed lottery contract. (Motion to Dismiss, Exs. 5, 6).

On February 6, 2009, the OCFO contracting officer issued a notice that RFP-1 had been cancelled which stated in pertinent part: "Solicitation No. CFOPD-07-R-053 for On-Line Gaming System is cancelled. The Office of Contracts will issue a new solicitation in the near future." (Protest, Ex. 1). On February 23, 2009, W2I protested the cancellation of RFP-1 (CAB No. P-0796), arguing that although the OCFO concluded that the proposed contract to W2I offered the best value to the District, OCFO incorrectly assumed that the proposed multiyear contract had to be submitted to the Council for approval, and that the Council's ultimate disapproval of the proposed contract was the sole basis for OCFO's cancellation of RFP-1. According to W2I, the procurement did not involve the expenditure of appropriated funds and thus Council approval was not required under D.C. Code § 1-204.51. The District filed a motion to dismiss the protest as untimely on March 16, 2009. On April 3, 2009, the OCFO issued Solicitation No. CFOPD-09-R-013 ("RFP-2") as a replacement for RFP-1. On April 9, W2I filed another protest (CAB No. P-0802) requesting that the Board stay all further activities relating to RFP-2 until the Board resolved the earlier protest challenging the cancellation of RFP-1. Thereafter, the Board directed the District to file an Agency Report for CAB No. P-0796, and the District filed the Agency Report on June 18, 2009. W2I filed its comments on the Agency

Report on June 25, 2009. The District filed a response on July 6, 2009. W2I filed a reply on July 13.

DISCUSSION

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

Timeliness

The District argues that the protest of the cancellation is untimely because W2I should have protested within 10 business days of March 14, 2008, when the Mayor first submitted the proposed contract to the Council. We reject the District's contention as W2I is challenging the cancellation of RFP-1 and it did not receive notice of the cancellation until February 6, 2009. Although the propriety of submitting the proposed award to the Council is at the heart of the protest, the issue did not become ripe for protest until W2I received notice of the cancellation. Accordingly, W2I's protest in CAB No. P-0796 was timely filed.

Standard of Review for the Cancellation of RFP-1

W2I argues that the District must support its cancellation action by the more demanding test that the cancellation is supported by a "cogent and compelling reason" rather than the "reasonable basis" test normally associated with a negotiated procurement like this one. According to W2I, the circumstances here are more akin to the post-opening cancellation in a sealed bid procurement because significant aspects of W2I's proposed pricing and technical proposal have been disclosed to the public and thus the same danger to the competitive process exists as in the case of sealed bids being opened. We agree with W2I and believe that the more demanding standard should apply here, namely that the cancellation be supported by a cogent and compelling reason. Even under this more demanding standard, we conclude for the reasons discussed below, that the contracting officer stated a cogent and compelling reason for cancelling RFP-1.

Council Review under D.C. Code § 1-204.51

W2I argues that the Lottery gaming system procurement did not involve the expenditure of appropriated funds and thus Council approval was not required under D.C. Code § 1-204.51. The relevant portions of D.C. Code § 1-204.51 provide as follows:

(a) *Contracts extending beyond one year.* – No contract involving expenditures out of an appropriation which is available for more than 1 year shall be made for a period of more than 5 years unless, with respect to a particular contract, the Council, by a two-thirds vote of its members present and voting, authorizes the extension of such period for such contract. Such contracts shall be made pursuant to criteria established by act of the Council.

(b) *Contracts exceeding certain amount.*

(1) *In general.* – No contract involving expenditures in excess of \$1,000,000 during a 12-month period may be made unless the Mayor submits the contract to the Council for its approval and the Council approves the contract (in accordance with criteria established by act of the Council). . . .

(c) Multiyear contracts. – (1) The District may enter into multiyear contracts to obtain goods and services for which funds would otherwise be available for obligation only within the fiscal year for which appropriated.

(2) If the funds are not made available for the continuation of such a contract into a subsequent fiscal year, the contract shall be cancelled or terminated

(3) No contract entered into under this subsection shall be valid unless the Mayor submits the contract to the Council for its approval and the Council approves the contract (in accordance with the criteria established by act of the Council). The Council shall be required to take affirmative action to approve the contract within 45 days. If no action is taken to approve the contract within 45 calendar days, the contract shall be deemed disapproved.

W2I argues that “appropriation” only refers to the legal authority of Congress to incur obligations and make disbursements from the United States Treasury. Further, W2I urges that payments to the lottery contractor come from “other funds” – namely, the Lottery and Charitable Games Enterprise Fund, which W2I says are not appropriated funds. Citing section 446 of the Home Rule Act, D.C. Code § 1-204.46 (“no amount may be obligated or expended by any officer or employee of the District of Columbia government unless such amount has been approved by Act of Congress, and then only according to such Act”), W2I distinguishes between Congressional “approval” and “appropriation” and argues that neither the Home Rule Act nor any other provision “mandates that the District operate only with federally provided ‘appropriated’ funds.” (W2I Comments, at 5-6).

We agree with the District that W2I’s arguments miss the mark. Congress appropriates both federal funds and local funds for the District. Pursuant to the most recent Congressional appropriations act for the District, namely the District of Columbia Appropriations Act, 2009, Division D, Title IV, of Pub. L. 111-8, approved March 11, 2009, Congress appropriated – subject to available revenues – \$9,888,095,000, consisting of \$6,082,474,000 from local funds (mainly tax revenues of various kinds), \$2,177,382,000 from federal grant funds (grants in aid such as AFDC, Medicaid, etc.), \$1,621,929,000 from other funds (“Other-Type Funds” which are defined in D.C. Code § 47-368.01(a) as “District revenue . . . generated from fees, fines, assessments, or reimbursements by [the] District of Columbia or its agencies or instrumentalities . . . earmarked for special purposes and accounted for or placed in a fund for such purposes”), \$6,310,000 from private funds (such as donations), and \$202,326,130 from “federal payments” (including money for special projects such as the college tuition assistance program). Under the “District of Columbia Funds” portion of Title IV, the Act states that “the amounts provided

under this heading are to be available, allocated and expended as proposed under ‘Title III--District of Columbia Funds Division of Expenses’ of the Fiscal Year 2009 Proposed Budget and Financial Plan submitted to the Congress by the District of Columbia on June 9, 2008 and such title is hereby incorporated by reference as though set forth fully herein’ Thus, Congress appropriated both local and federal funds in this appropriations act and the local funds portion of the District’s budget must be appropriated by Congress.

District appropriations, and consequently District obligations and expenditures, occur as follows: (1) the District submits to Congress the proposed budget; (2) Congress approves the budget in the form of an appropriations act; and (3) the District can obligate or expend funds if the amount has been appropriated by Congress. The District states that money may not be expended from the Lottery Fund without a congressional appropriation. We agree with the District’s reasoning. Section 450 of the Home Rule Act, as amended, states:

The General Fund of the District shall be composed of those District revenues which on January 2, 1975 are paid into the Treasury of the United States and credited either to the General Fund of the District or its miscellaneous receipts, but shall not include any revenues which are applied by law to any special fund existing on January 2, 1975. The Council may from time to time establish such additional funds as may be necessary for the efficient operation of the government of the District. All money received by any agency, officer, or employee of the District in its or his official capacity shall belong to the District government and shall be paid promptly to the Mayor for deposit in the appropriate fund. . . .

See D.C. Code § 1-204.50; Pub. L. No. 93-198, section 450, 87 Stat. 803 (1973). The Lottery and Charitable Games Fund was established by the Council as a special fund under authority of section 450 of the Home Rule Act. This fund is owned by the District government, and cannot be spent without a congressional appropriation. As the District correctly argues, the lottery contractor must be paid from appropriated funds from the Lottery Fund. As adopted by sections 106 and 134 of the Continuing Appropriations Resolution, 2009, approved September 30, 2008 (Pub. L. 110-329), and further extended by Congress through March 11, 2009, the Fiscal Year 2009 Budget Request Act of 2008, D.C. Act 17-409, effective June 18, 2008, requested an appropriation of \$265,000,000 for the Lottery Fund, of which \$11,225,000 was allocated for the lottery contract. *See, e.g.*, Volume 3, at H-13, of the “FY 2009 Proposed Budget and Financial Plan” that the District submitted to Congress on June 9, 2008. Expenses for the lottery contract have been routinely included in the Lottery Board’s annual budgets in prior years as well. For fiscal year 2008, the Consolidated Appropriations Act, 2008 (Public Law 110-161, 121 Stat. 1844) shows that Congress appropriated \$266,700,000 for the Lottery Fund, of which \$11,312,500.00 was allocated for the lottery contract. *See, e.g.*, Volume 2B, H-15, of the District’s “FY 2008 Proposed Budget and Financial Plan” submitted to Congress on June 7, 2007.

The District cites in further support an opinion by the United States General Accounting Office, dated September 29, 2000, where the GAO held that the District violated the Anti-Deficiency Act by (1) obligating more than Congress appropriated and (2) by using the District of Columbia Fund to pay the District of Columbia Health and Hospitals Public Benefit

Corporation liabilities in excess of the resources ultimately realized. The GAO stated: “The Anti-Deficiency Act . . . prohibits District government officers and employees from making obligations or expenditures in excess of amounts available in an appropriation or fund unless they are otherwise authorized to do so by law. 31 U.S.C. sec. 1341 (1941). Only an appropriation may authorize an obligation and expenditure from the [District’s] General Fund or any other fund.” B-285725, at 6. The reference to “the General Fund or any other fund” shows that every dollar of District government money that is obligated or spent must first be appropriated by Congress, unless Congress has otherwise authorized the obligation or expenditure. The District cites the following examples of the latter kind of authorizations, which do not entail specific numerical appropriations: (1) the acceptance and use of private gifts and donations, made permanent by Section 115 of the District of Columbia Appropriations Act, 2003, approved February 20, 2003, Pub. L. 108-7, 117 Stat. 11, D.C. Code § 1-329.01 and (2) Section 446b of the Home Rule Act, made permanent by Section 808 of the District of Columbia Appropriations Act, 2009, which authorizes the District government to accept and use federal, private, and other grants received by the District government that are not reflected in the budget approved by Congress.

W2I argues that D.C. Code § 3-1311 (enacted in 1981) required an appropriation only for the first year of the Lottery’s operation. Section 3-1311 required the Lottery Board to submit to the Mayor a consolidated budget covering all anticipated income, expenses (including all start-up costs), and capital outlays of the Lottery “which budget shall show the net amount for which it requests an appropriation during its 1st year of operation.” The District responds that this provision is specific to the first budget of the Lottery Board and authorizes an appropriation not only for the Lottery Board’s expenses but also for the net proceeds of the lottery as start-up money to be credited to the Lottery Board Fund and that this does not mean that the Lottery Board needs no later appropriations. The District reasons that together with Congress’ first appropriation, Congress recognized the need for an appropriation to cover the obligation and expenditure of all lottery revenues and D.C. Code § 3-1311 illustrates that for the first year of Lottery Board operations. We agree with the District that this language means there might be appropriations to the Lottery Board beyond the revenues it generates, not that the revenues it generates are exempt from an appropriation.

In sum, under the proposed lottery contract with W2I, the District would expend funds to pay W2I for running the lottery system. This expenditure by the District would be an expenditure of appropriated funds. Accordingly, since the proposed lottery contract with W2I involved an expenditure of appropriated funds, the Mayor was required to submit the proposed lottery contract to the Council for approval pursuant to D.C. Code § 1-204.51. Once the Council voted to disapprove the contract, the contracting officer acted reasonably in cancelling RFP-1 and in determining that the cancellation of RFP-1 was in the District’s best interests.

As an independent basis supporting the cancellation, Exhibit C to the District’s Agency Report, which compares the differences between RFP-1 and RFP-2, identifies a significant number of material differences between RFP-1 and RFP-2 that affect the pricing and delivery of the services. The contracting officer had a compelling basis for cancelling RFP-1 on the basis of the changes reflected in RFP-2.

CONCLUSION

We have carefully considered the arguments raised by W2I with respect to the cancellation of RFP-1 but conclude that the contracting officer had cogent and compelling bases for cancelling the solicitation because of the Council's disapproval of the proposed contract to W2I and the substantial changes made to the solicitation in the formulation of RFP-2. It was also proper for the contracting officer to begin the procurement process under RFP-2 even though W2I had protested the cancellation of RFP-1. Accordingly, we deny the captioned protests.

SO ORDERED.DATED: August 17, 2009

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

COMPREHENSIVE COMMUNITY HEALTH)
AND PSYCHOLOGICAL SERVICES, LLC)
) CAB No. P-0809
Under Contract No. DCFL-2006-D-6001)

For Comprehensive Community Health and Psychological Services, LLC: Mr. Ernest Middleton, pro se. For the District of Columbia Government: Talia S. Cohen, Esq., Assistant Attorney General.

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

OPINION

Filing ID 26790460

Comprehensive Community Health and Psychological Services, LLC ("CCHPS") protests its exclusion as a subcontractor to Unity Health Care, Inc., which received a sole source contract issued by the Office of Contracts and Procurement ("OCP") in July 2006. CCHPS also raises various contract administration issues relating to the same contract which it previously raised in a letter to the contracting officer in August 2008. The District has moved to dismiss the protest for lack of standing and for being untimely. We conclude that CCHPS lacks standing and that the allegations it raises concerning the sole source award and various contract administration actions are not proper grounds for protest. Accordingly, we dismiss the protest.

BACKGROUND

On July 19, 2006, OCP awarded to Unity Health Care a sole source contract, DCFL-2006-D-6001, for community oriented correctional health care for the Department of Corrections. (Protest Ex. B; District's Motion to Dismiss, at 2). On January 25, 2008, CCHPS met with Unity to discuss a subcontract arrangement. (Protest Ex. H). By letter dated February 5, 2008, Unity responded to CCHPS, declining to subcontract with CCHPS because CCHPS's proposal "does not meet the current need of Unity Health Care at the Department of Corrections." (Protest Ex. H, at 1).

By letter dated August 7, 2008, CCHPS wrote to OCP contending that: (1) the District improperly awarded the 2006 sole source contract to Unity; (2) the District improperly reduced the subcontracting set-aside requirement of the Unity contract from 35 to 20 percent; (3) the District improperly allowed Unity to subcontract with its wholly owned subsidiary (Health Right, Inc.) to the detriment of CCHPS; and (4) Unity improperly refused to subcontract with CCHPS. By a memorandum dated November 14, 2008, OCP responded to CCHPS with an

explanation addressing each of the issues that CCHPS raised in its letter dated August 7, 2008. (Protest Ex. B.2).

By letters dated November 20, 2008, February 17, 2009, and February 26, 2009, CCHPS disagreed with OCP's responses of November 14, 2008, and proposed that it be paid \$59,380,000 as a "settlement" of its claims. (Protest, at 1; Ex. C). On May 1, 2009, OCP's general counsel rejected CCHPS's settlement offer. (Protest Ex. A).

On June 15, 2009, CCHPS filed the instant protest, raising the same issues it previously raised with OCP beginning in August 2008. The District filed a motion to dismiss on July 6, 2009, and CCHPS filed an opposition on July 14, 2009.

DISCUSSION

CCHPS does not dispute that it was simply a potential subcontractor to Unity who was awarded a sole source contract in July 2006 and that Unity in February 2008 declined to enter into a subcontract with CCHPS to provide services to the Department of Corrections under Unity's contract. Even if CCHPS had timely raised its allegation that it was improperly excluded from being a subcontractor, such a protest would have been dismissed because potential subcontractors have no standing to challenge such a matter under the protest provisions of the Procurement Practices Act. *Mustang Dynamometer*, CAB No. P-0655, July 30, 2002, 50 D.C. Reg. 7445, 7446 (subcontractor does not have standing to protest a contract award); *MADVAC International, Inc.*, CAB No. P-0595, Nov. 18, 1999, 48 D.C. Reg. 1449, 1450; *Virginia E. Durbin*, CAB No. P-0591, Oct. 22, 1999, 46 D.C. Reg. 8693, 8695 (Durbin lacks standing to protest because its only interest in the procurement is that of a potential subcontractor).

The other issues raised by CCHPS – the subcontracting set-aside percentage reduction and Unity's subcontracting work to Health Right – are not proper protest grounds under the Procurement Practices Act based on the record presented here.

CONCLUSION

For the reasons discussed above, we dismiss the protest.

DATED: August 26, 2009

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

COMPREHENSIVE COMMUNITY HEALTH)
AND PSYCHOLOGICAL SERVICES, LLC)
) CAB No. P-0821
Under Contract No. DCFL-2006-D-6001)

For Comprehensive Community Health and Psychological Services, LLC: Mr. Ernest Middleton, pro se. For the District of Columbia Government: Talia S. Cohen, Esq., Assistant Attorney General.

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

OPINION

Filing ID 27015972

Comprehensive Community Health and Psychological Services, LLC ("CCHPS") protests the approval and administration by the Office of Contracts and Procurement ("OCP") of an option year contract with Unity Health Care, Inc. CCHPS protests that it was not awarded a subcontract by Unity, and raises various contract administration issues. The instant protest raises essentially the same allegations found in CCHPS's recently dismissed protest in CAB No. P-0809, relating to the approval and administration of the original contract awarded to Unity in July 2006. We conclude that CCHPS as a disappointed subcontractor lacks standing to protest and that the allegations it raises concerning various contract administration actions are not proper grounds for protest. Accordingly, we summarily dismiss the protest pursuant to Board Rule 308.1.

BACKGROUND

We set forth below the relevant facts regarding the Unity contract which are drawn from the Board's August 26, 2009 decision dismissing CCHPS's protest in CAB No. P-0809. On July 19, 2006, OCP awarded to Unity a sole source contract, DCFL-2006-D-6001, for community oriented correctional health care for the Department of Corrections. (P-0809, Protest Ex. B; District's Motion to Dismiss at 2). On June 16, 2009, CCHPS filed its protest in CAB No. P-0809, alleging that: (1) the District improperly awarded the 2006 sole source contract to Unity; (2) the District improperly reduced the subcontracting set-aside requirement of the Unity contract from 35 to 20 percent; (3) the District improperly allowed Unity to subcontract with its wholly owned subsidiary (Health Right, Inc.) to the detriment of CCHPS; and (4) Unity improperly refused to subcontract with CCHPS. The Board dismissed that protest because CCHPS as disappointed subcontractor lacked standing, and the challenged contract administration issues were not proper protest grounds under the Procurement Practices Act.

On September 9, 2009, CCHPS filed the instant protest, raising substantially the same issues it previously raised in CAB No. P-0809. Here, CCHPS protests the approval and administration of an option year contract extension to Unity Health Care (Protest at 1) rather than protesting the original award and administration as in CAB No. P-0809. Like its earlier protest, CCHPS again alleges that the District improperly reduced the subcontracting set-aside requirement of the Unity contract from 35 to 20 percent; the District improperly allowed Unity to subcontract with its wholly owned subsidiary to the detriment of CCHPS; and Unity improperly refused to subcontract with CCHPS. (Protest at 2-5).

DISCUSSION

Board Rule 308.1 provides that when a protest is, on its face, invalid or untimely filed, or otherwise not for consideration, the Board shall summarily dismiss the protest without requiring submission of an agency report. This protest is invalid on its face, as the Board less than a month ago dismissed CCHPS's protest in CAB No. P-0809 raising essentially the same protest grounds. We held that CCHPS, as a potential subcontractor, did not have standing to challenge Unity's decision not to subcontract with CCHPS under its contract with the District. We also held in our earlier decision that the other issues raised by CCHPS here – regarding the subcontracting set-aside percentage reduction, Unity's subcontracting work to Health Right, and Unity's contract performance – are not proper protest grounds under the Procurement Practices Act.

The Board directs CCHPS's attention to Board Rule 308.2 which discusses possible sanctions for parties who file frivolous protests.

CONCLUSION

For the reasons discussed above, we summarily dismiss the protest.

DATED: September 10, 2009

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTESTS OF:

WARDMAN INVESTOR, L.L.C. and)	
CIM/WARDMAN, L.L.C.)	
	)	CAB Nos. P-0817 and P-0818
Under Convention Center Headquarters	)	(Consolidated)
Hotel RFP Dated April 26, 2001 and)	
Revised Hotel RFP Dated June 7, 2001)	

For the Protesters: Peter Buscemi, Esq., Morgan, Lewis & Bockius LLP. For the District of Columbia Government: Nancy Hapeman, Esq., Chief, Procurement Section Office of the Attorney General. For the Intervener: Daniel R. Forman, Esq., Crowell & Moring LLP.

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

OPINION

Filing ID 27159349

Wardman Investor, L.L.C. and CIM/Wardman, L.L.C. (collectively “Wardman”) protest the process that the District employed in seeking, evaluating, and pursuing proposals for a new Washington Convention Center Headquarters Hotel. Wardman identifies a 2001 Request for Proposals (“2001 RFP”) related to the development of a Washington Convention Center Hotel and argues that the District repeatedly has made material changes in the terms of its procurement, including the real estate to be used for the Hotel, the terms on which the real estate will be made available for development, and the nature and extent of public financial support to be provided for the development of the Hotel. The District has moved to dismiss the protests on the grounds that the City Council through a series of legislative enactments exempted from the Procurement Practices Act the development agreement and related contracts for the Hotel project, the protest allegations are untimely, and the protesters lack standing because they never submitted proposals in response to the 2001 RFP. We agree with the District that the Council’s legislative enactments exempted the Hotel project from the Procurement Practices Act and thus we have no jurisdiction to consider these protests. The District is also correct that the protesters lack standing and that the protests are untimely. Accordingly, we dismiss the consolidated protests.

BACKGROUND

The relevant facts, as set forth in the District’s motion to dismiss, are not in dispute. On April 26, 2001, the District of Columbia issued the subject RFP for the development of a hotel to complement the new Washington, D.C. Convention Center. On June 7, 2001, a revised RFP was issued. The RFP stated that the new convention center “requires an adequate supply of accessible and high quality rooms as well as substantially more square footage devoted to ballrooms, meeting rooms and lobbies, than found in the basic hotel structure.” (Protest Ex. 1, RFP at 1). The 2001 RFP also mandated that the new convention center hotel be located in

proximity to the new convention center. The RFP stated that the District considered the development of the hotel to be “an opportunity for public-private partnership.” (*Id.*, RFP at 1, 9 (stating that if an offeror requested the District’s financial involvement, the offeror must discuss the value and terms of a District contribution to the project). The Questions and Answers to the RFP also specifically stated that several community development programs may be used to contribute to project funding, including tax increment funding (“TIF”). (*Id.*, RFP Questions & Answers 2, 48, 56, 57, 60, and 66). The RFP set August 8, 2001, as the deadline for the initial receipt of proposals. Wardman points to no language in the RFP indicating that the RFP was to be governed by the Procurement Practices Act.

Two development teams, the Marriott/Gould team and the Landmark/Hilton team submitted their initial proposals to the District. Marriott and Landmark were selected for the short list of proposals, and were invited to submit and did submit Best and Final Proposals. In October 2002, then Mayor Anthony Williams announced that Marriott/Gould had been selected for negotiations for the Hotel project. The District states that no contract was awarded under the 2001 RFP.

The Council of the District of Columbia enacted several pieces of legislation to authorize aspects of the construction, leasing, and financing of the Hotel project between the District, the Washington Convention Center Authority (“WCCA”) and Marriott International, Inc. In 2006, the Council enacted the New Convention Center Hotel Omnibus Financing and Development Act of 2006, D.C. Law 16-163 (“2006 Act”). (District’s Motion to Dismiss, Ex. 1). The legislation was first read on May 2, 2006, approved by the Council on June 6, 2006, and went into effect on September 19, 2006. (*Id.*). The 2006 Act states:

The Council finds that in order for the development of the new convention center hotel to proceed, it is necessary for the District and the [Washington Convention Center] Authority to lease to Marriott International, Inc., the developer of the new convention center hotel, or its designee, 2 parcels of land that are part of the site of the new convention center hotel.

D.C. Law 16-163, § 701 (codified at D.C. Code § 10-1202.21). The Act provides authority to the Mayor to grant a lease to “Marriott International, Inc., or its designee” of certain lots of real property for a lease term of 99 years and with specified payment terms. *Id.* § 702 (codified at D.C. Code § 10-1202.22). Similarly, the Act provides authority to WCCA to lease to Marriott certain lots of real property for a lease term of 99 years with specified payment terms. *Id.* § 703 (codified D.C. Code § 10-1202.23).

In 2008, the Council enacted the New Convention Center Hotel Omnibus Financing and Development Amendment Act of 2008, D.C. Law 17-144 (effective April 15, 2008) (the “2008 Amendment Act”) (Motion to Dismiss, Ex. 2) and the New Convention Center Hotel Technical Amendments Act of 2008, D.C. Law 17-399 (effective March 21, 2009) (the “2008 Technical Amendments Act”) (Motion to Dismiss, Ex. 3). Section 2(e) of the 2008 Amendment Act provides in relevant part:

Unit A of Chapter 3 of Title 2 [the District of Columbia Procurement Practices Act of 1985, effective February 21, 1986 (D.C. Law 6-85); D.C. Code § 2-301.01 *et seq.*] and subchapter III-A of Chapter 3 of Title 47 shall not apply to the Financing Documents, Closing Documents, and any other contract the Mayor may from time to time enter into in connection with the Project.

D.C. Code § 10-1221.09(d). The statute says that the term “Project” means “the financing, refinancing, or reimbursing of costs incurred for the acquisition, construction, installing, and equipping of a hotel having approximately 1,100 rooms and suites, meeting and ballroom space, and other ancillary facilities customarily found in convention center hotels.” D.C. Code § 10-1221.01(18). The 2008 Technical Amendments Act approved the Hotel Development and Funding Agreement (the “DFA”) by which District, WCCA, and Marriott’s designee agreed to the terms by which the District would issue a TIF note; WCCA would issue the bonds to finance a portion of the Hotel project; the District and WCCA would lease land in square 370 adjacent to the Convention Center to Marriott’s designee; and Marriott’s designee would construct the Hotel. (Motion to Dismiss, Ex. 3, D.C. Law 17-399, § 4). This provision exempted contract approval from the Council review criteria for multiyear contracts and contracts exceeding \$1 million found in the D.C. Code § 2-301.05a.

Due to adverse conditions in the financial markets, certain changes to the DFA were subsequently negotiated and on July 31, 2009, the Council approved the revised DFA by enacting the New Convention Center Hotel Emergency Amendment Act of 2009, D.C. Bill No. 18-391 (Motion to Dismiss, Ex. 4) and the New Convention Center Hotel Amendment Act of 2009, D.C. Bill No. 18-310 (the “2009 Act”) (Motion to Dismiss, Ex. 5).

DISCUSSION

The various Hotel Acts enacted by the Council for the Hotel project – namely, the 2006 Act, the 2008 Amendment Act, the 2008 Technical Amendments Act, and the 2009 Act – uniformly show that the Council authorized the Mayor and WCCA to enter into contracts with Marriott for the development of the Hotel project, and that the authority to enter into such contracts was independent of the Procurement Practices Act. Indeed, the Hotel Acts can only reasonably be interpreted as exempting the Hotel project contracts from the requirements of the Procurement Practices Act. Because our jurisdiction is founded upon the Procurement Practices Act, we have no jurisdiction to consider Wardman’s protests. Consistent with the legislative enactments from 2006 through 2009, there is no indication in the 2001 RFP that it was meant to be covered by the Procurement Practices Act. As the District correctly observes, Wardman has no standing with respect to the 2001 RFP because it was not a prospective offeror since it was not in existence at the time of the RFP. The entire selection process by which the Hotel developer was chosen, including the legislative enactments by which the Hotel project was approved, does not reflect a procurement carried out under the authority of the Procurement Practices Act. The Hotel Acts authorize the Mayor and WCCA to enter into contracts with Marriott or its selected designee “notwithstanding any other provision of law.”

Wardman argues that the Procurement Practices Act exemptions found in the Hotel Acts apply only to the “Project” which is defined in the 2008 Act with regard to the financing of the

Hotel. Wardman's argument misses the mark. The express exemptions of the Hotel Acts cover in substance the essential undertaking of the Mayor and WCCA in the Hotel project. Moreover, beyond the express exemptions from the Procurement Practices Act, we construe the Hotel Acts to be special project specific legislation by the Council authorizing and approving the selection of Marriott and the execution of contracts for the Hotel project notwithstanding the provisions of the Procurement Practices Act.

Although we conclude that we have no jurisdiction to consider the selection of Marriott and contracts related to the Hotel project, it is clear that the protesters lack standing to challenge the legislative authorization of the selection and contracts and any "protest" would be untimely in that the Council effectively authorized the Mayor and WCCA to enter into contracts with Marriott in the 2006 Act. Wardman argues that its protests were triggered by the 2009 Act in July 2009, but that Act itself provides no grounds for protest.

CONCLUSION

We lack jurisdiction to consider the protests because the process for the selection of Marriott and the contracts related to the Hotel project are not subject to the Procurement Practices Act as evidenced by the Hotel Acts. Further, even if we had been granted jurisdiction over the contracts related to the Hotel project, the protesters lack standing to challenge the contracts and the challenges are clearly untimely. Accordingly, we dismiss the consolidated protests.

SO ORDERED.

DATED: September 18, 2009

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

CNA CORPORATION)
) CAB No. P-0810
Under Solicitation No. DCKA-2009-B-0025)

For the Protester CNA Corporation: John C. Cheeks, CEO, pro se. For the District of Columbia: Alton Woods, Esq., Assistant Attorney General.

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

OPINION

Filing ID 27455802

Protester CNA Corporation challenges the contracting officer's determination that CNA's bid was nonresponsive for failure to submit a bid bond with good and sufficient sureties as required by the bond requirements of the solicitation. The District filed a motion to dismiss the protest as untimely, alleging that CNA filed its protest more than 10 days after it knew, or should have known, of the basis for its protest. On the merits, the District asserts that the contracting officer properly rejected CNA's bid as nonresponsive since CNA submitted with its bid an unacceptable bid guaranty. We agree with the District that CNA's protest was untimely filed. Accordingly, we dismiss the protest.

BACKGROUND

The District's Office of Contracting and Procurement, on behalf of the District's Department of Transportation, issued Solicitation No. DCKA-2009-B-0025 in January 2009, for the pavement restoration of local streets in the District of Columbia. (Agency Report ("AR") Ex. 1). Four bids were received and opened on the extended bid opening date, March 18, 2009 (AR at 3; AR Ex. 3). CNA was the apparent low bidder. CNA's bid included as bid guaranty five uncertified company checks totaling \$2,712,640.25. (AR Ex. 2) CNA submitted no other evidence of any bid guaranty in its bid package. Section I.8 of the IFB ("Bid Guaranty"), taken from Section 102, Article 12, Bond Requirements, Bid Guaranty of the Standards and Specifications for Highways and Structures (2005), provides as follows:

On all bids of \$100,000.00 or more, security is required to insure the execution of the contract. No bid will be considered unless it is so guaranteed. Each bidder must furnish with his bid either a bid bond (Form 2640-5) with good and sufficient sureties, a certified check payable to the Treasurer of the District of Columbia (uncertified check will not be accepted), negotiable United States bond (at par value), or an irrevocable letter of credit in an amount not less than five percent (5) of the amount of his bid

(AR Ex. 1).

By Determination and Finding (“D&F”) dated March 24, 2009, the contracting officer rejected CNA’s bid as nonresponsive. On April 13, 2009, the Chief Procurement Officer approved an award to other than the low bidder. (AR Ex. 5) The D&F recommended award to the second low bidder. (AR Ex. 5). On May 18, 2009, at a meeting requested by CNA, the contracting officer informed Mr. John Cheeks of CNA that the CNA bid had been rejected as nonresponsive for failure to submit an acceptable bid guaranty. (AR Ex. 8). CNA does not dispute receiving oral notification. On May 27, 2009, the contracting officer sent CNA a letter again informing CNA that its bid had been rejected as nonresponsive. On June 17, 2009, CNA filed this protest. The District filed a motion to dismiss the protest as untimely on July 7, 2009.

DISCUSSION

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

We begin by addressing the issue of whether CNA timely filed its protest. The District asserts that CNA filed its protest more than 10 business days after May 18, 2009, the date the contracting officer notified CNA in a meeting that CNA’s bid had been rejected as non-responsive because of an inadequate bid guaranty. (AR Ex. 5). The District asserts that because CNA knew that the District had rejected CNA’s bid on May 18, 2009, CNA should have filed its protest within 10 business days of that date, that is, by June 1, 2009.

D.C. Code § 2-309.08 (b)(2) requires the protester to file a protest not later than 10 business days after the basis of the protest is known or should have been known, whichever is earlier. CNA does not challenge the District’s assertion that it informed CNA of the bid rejection on May 18, 2009. CNA claims that it did not receive official written notification of the bid rejection until June 4, 2009, and that it filed its protest within ten days of that date. In making that assertion, CNA asks the Board to ignore the affidavit of Jerry Carter, contracting officer, who personally informed CNA on May 18, 2009, that its bid had been rejected as nonresponsive. At that meeting, CNA knew that the District rejected its bid. “A protester’s receipt of oral information forming the basis of its protest is sufficient to start the 10-day time period running; written notification is not required. *See Swafford Indus.*, B-238055, Mar. 12, 1990, 90-1 CPD ¶ 268.” *Optical Energy Technologies*, B-401520, July 13, 2009, 2009 U.S. Comp. Gen. LEXIS 138. Because CNA failed to submit its protest within 10 business days after May 18, 2009, its protest is untimely. Accordingly, we dismiss the protest.

SO ORDERED.

DATED: October 7, 2009

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

TOMPKINS BUILDERS, INC.)
) CAB No. P-0814
Under RFP No. DCAM-2008-R-0088)

For the Protester: Douglas L. Patin, Esq., Robert J. Symon, Esq., Bradley Arant Boult Cummings LLP. For the District of Columbia Government: Robert Schildkraut, Esq., Assistant Attorney General. For the Intervener: Claude M. Bailey, Esq., Terry L. Elling, Esq., Dismas N. Locaria, Esq., Venable LLP.

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

OPINION

Filing ID 27670060

Tompkins Builders, Inc., has protested the contracting officer’s decision to award to Whiting-Turner Contracting Company, Inc., a contract for construction of the Consolidated Forensics Laboratory (“CFL”). Tompkins argues that the two offerors’ technical proposals are essentially equivalent but that Tompkins proposed a significantly lower price and thus the contracting officer erred in selecting the higher priced Whiting-Turner proposal. The District contends that the contracting officer properly considered both the technical and price evaluation criteria in concluding that Whiting-Turner provided the most advantageous offer. Having reviewed the record, we find no violation of the procurement laws or regulations, or the terms of the solicitation. Accordingly, we deny Tompkins’ protest.

BACKGROUND

On September 25, 2008, the District of Columbia, through the Office of Contracting and Procurement (“OCP”), issued RFP DCAM-2008-R-0088 for the construction of the new Consolidated Forensics Laboratory (“CFL”). (Agency Report (“AR”), Ex. 1). The 287,000 square foot new building will enable the District to co-locate the District’s Metropolitan Police Department Forensic Laboratory, the Department of Public Health’s Public Health Laboratory, and the Office of the Chief Medical Examiner for improved and efficient coordination of the functions of crime scene investigation, protection, and management of public health issues, and forensic law enforcement. RFP Section C.3.1 states:

The volume and complexity of the work: The project is a large, unique scientific research facility which is the first of its kind in this country; no other laboratory exists where these three functional elements are co-located. Facilities of this type are by nature technically complex. They include varied and non-conventional finishes and extremely complex mechanical and electrical systems, which result in very “dense” construction. This dense construction is further complicated by

the high number of skilled trades working in relatively small spaces; hence the need for extremely effective coordination and scheduling.

The RFP provided that the procurement would be awarded to the offeror whose offer is most advantageous to the District, based upon the evaluation criteria. The RFP further noted that “[W]hile the points in the evaluation criteria indicate their relative importance, the total scores will not necessarily be determinative of the award. Rather, the total scores will guide the District in making an intelligent award decision[] based upon the evaluation criteria.” Section M of the solicitation provided a maximum of 70 points for the technical proposal, consisting of a maximum of 30 points for relevant experience and past performance of the general contractor, 20 points for the relevant experience and past performance of key subcontractors, and 20 points for the offeror’s project management plan. The price evaluation was worth a maximum of 30 points, where the lowest price proposal would receive the maximum 30 points and other proposals would receive a score based on the maximum 30 points times the ratio of the lowest price to the price of the proposal being evaluated. (AR Ex. 1). The evaluation factor for relevant experience and past performance of the general contractor was to be evaluated based on four subfactors: the special standards of responsibility included in the RFP, similarity of projects, timeliness of performance, and key personnel. (RFP Section L.5.1). The factor for relevant experience and past performance of key subcontractors was to be evaluated on two subfactors: similarity of projects and subcontractor key personnel. (RFP Section L.5.2). The factor for the project management plan was to be evaluated on six subfactors: organization chart, quality control plan, CPM schedule, risk mitigation plan, building information modeling, and safety. (RFP Section L.5.3). Amendment No. 2 of the RFP (AR Ex. 2) provided the following regarding the special standards of responsibility:

B.2 Special Standard of Responsibility: In order to be eligible for award, the offeror, as General Contractor, must have completed in the past five years a LEED certified construction project value of at least \$75,000,000; and must have completed or is currently in the process of completing (at least 50% percent completion at the time of submitting proposals) a scientific research laboratory with a construction value of at least \$75,000,000 (See paragraph L.5.1.1). . . .

* * *

L.5.1.1 Special Standards of Responsibility - In order to be eligible for award, the offeror, as General Contractor, must have completed in the past five years a LEED certified construction project with a construction value of at least \$75,000,000; and must have completed or is currently in the process of completing (at least 50% completion at the time of submitting proposals) a scientific research laboratory with a construction value of at least \$75,000,000. Offeror shall describe in detail all current projects detailing the above. In addition, the District will not find responsible any offeror that does not provide with its proposal information adequate to determine its compliance with the Stated Special Standards of Responsibility. At a minimum, an offeror should provide the following:

- a) Time Period of the Construction;
- b) Name and location of scientific research laboratory;
- c) Name of contact person;
- d) Phone number of contact person;
- e) Total contract amount;
- f) Year completed

Failure to meet any of the above requirements shall constitute a technically unacceptable offer. (emphasis omitted).

RFP Section L.5.1.2, regarding the “Similarity of Projects” subfactor for the general contractor’s relevant experience and past performance factor, requests the offerors to provide information about prior similar projects including the name and location of the “scientific research laboratory or similar project” and a “[d]escription of the work performed by the Offeror; including comparisons to the work of this solicitation and constraints on performance of the work”

On December 15, 2008, two offerors, Tompkins and Whiting-Turner timely submitted sealed proposals. Tompkins is a wholly-owned subsidiary of Turner Construction Company which is not related to Whiting-Turner.

By letter dated February 17, 2009, the contracting officer notified Tompkins that its proposal would not be recommended for award. (AR at 4). After the Board directed the contracting officer to conduct a debriefing as requested by Tompkins (CAB No. P-0797 Order dated March 4, 2009), the contracting officer became aware of irregularities in the technical evaluation of Tompkins and terminated the debriefing. On March 20, 2009, Tompkins filed a protective protest docketed as CAB No. P-0801, challenging the District’s technical evaluation of Tompkins based on what it learned during the truncated debriefing. On March 31, 2009, a newly appointed contracting officer commenced a reevaluation of the proposals. In a determination dated April 17, 2009, the contracting officer eliminated Tompkins from the competition, concluding that Tompkins could not rely on the experience of its parent company, Turner Construction, and thus could not meet the special standards of responsibility. Tompkins filed an amended protest on April 22, 2009, contesting its elimination from the competition. On May 21, 2009, the Board sustained Tompkins’ amended protest. On remand, the contracting officer directed the technical evaluation panel (“TEP”) to reconvene on May 27 to re-evaluate the initial proposal and BAFO submitted by Tompkins. (AR at 5, AR Ex. 28). On May 28, the TEP chairman compiled the panel’s scores, prepared a consensus report, and submitted them to the contracting officer. After reviewing the materials, the contracting officer decided to conduct additional discussions with the offerors. (AR at 5; AR Ex. 28).

On June 4, 2009, the contracting officer held discussions with Tompkins and Whiting-Turner, and requested second BAFOs from them on June 5. The offerors submitted second BAFOs on June 10 and the TEP reconvened to review the proposals on June 11. The panel members individually reviewed and scored the proposals, and the TEP prepared a consensus evaluation report which was transmitted to the contracting officer on June 15 with supplementation on June 18 pursuant to a request for clarification from the contracting officer.

(AR at 6; AR Exs. 23, 24, 25, and 28). The contracting officer reviewed the proposals, the TEP consensus report, and the supplemental clarifications, and made an independent evaluation of the proposals. On June 26, 2009, the contracting officer executed a business clearance memorandum (AR Ex. 28) in which he discussed the technical and price evaluation of the offerors and selected Whiting-Turner for award of the CFL contract. Although the final scores for Tompkins and Whiting-Turner were within 5 points of each other based on a maximum possible score of 112 points (including up to 12 preference points), the contracting officer concluded that Whiting-Turner had the superior proposal. Whiting-Turner received a rating of "excellent" in every technical subfactor but one for the three evaluation factors while Tompkins received a rating of "good" for the subfactors under the first two factors and "excellent" in four of the six subfactors for the third factor. Tompkins received the maximum score for the price evaluation with its total project price being \$4.8 million less than Whiting-Turner's price. Tompkins also received 4 preference points as a certified business enterprise. The contracting officer concluded that it was more advantageous for the District to award to Whiting-Turner based on its better technical proposal notwithstanding its higher price.

On June 30, 2009, the District submitted the proposed contract award to the District of Columbia Council for approval. On July 14, 2009, Tompkins received a debriefing regarding the proposed award. On July 17, 2009, Tompkins filed its protest.

DISCUSSION

We exercise jurisdiction over this protest pursuant to D.C. Code § 2-309.03(a)(1).

Tompkins argues that the contracting officer failed to justify awarding the contract to the higher priced offeror, Whiting-Turner. Tompkins faults the contracting officer for not conducting a proper cost technical tradeoff analysis. Tompkins insists that the technical proposals were essentially equivalent and that awarding to the offeror with a \$4.8 million higher price is irrational and unreasonable. Reviewing the record, we find no basis for sustaining Tompkins' challenge. In the business clearance memorandum which summarizes his evaluation of the proposals and selection decision, the contracting officer determined that Whiting-Turner's proposal was superior to Tompkins' proposal, with superior experience in the construction of laboratory facilities, a better commitment of key general contractor personnel and subcontractors with experience working with each other on other similar projects, and a fully developed project management plan that showed a solid grasp of a sound project approach. The contracting officer agreed with the evaluation conducted by his technical evaluation panel, and his decision for additional discussions and second BAFOs plus his request for TEP clarifications of the June 15 consensus report demonstrate that he conducted a reasonably thorough independent assessment of the technical evaluation. Even with the total evaluation points for technical, cost, and preferences indicating Whiting-Turner as the top-ranked offeror, the contracting officer nevertheless considered in his selection decision whether the technical advantages he and the TEP found with the Whiting-Turner proposal justified the higher price. The contracting officer concluded that the technical proposal commitment by Whiting-Turner was worth the \$4.8 million higher price. We see no basis in the record for concluding that the contracting officer acted unreasonably or irrationally in deciding that the awardee's proposal was most advantageous to the District.

Tompkins further argues that the contracting officer effectively changed the evaluation criteria by narrowing the range of “relevant” past performance from “scientific research laboratory or similar projects” as stated in the solicitation to “forensics or medical examiner facilities.” Tompkins points to what it calls disparate treatment in the evaluation of past projects of the offerors based on similarity of those projects to the CFL project. Tompkins states that in connection with the second BAFO request, the contracting officer had more questions about Tompkins’ past performance projects and concentrated on whether its prior projects involved forensic/police laboratories or medical examiner/morgue facilities and whether the square footage of those projects were similar to the CFL project. Tompkins contends that Whiting-Turner’s proposal contained no medical examiner/morgue project experience and at most two or three forensic labs but with smaller square footage than CFL.

We cannot sustain Tompkins protest allegation that the evaluation subfactor for similarity of projects was narrowed or that the contracting officer unfairly downgraded Tompkins for a weakness in forensics or medical examiner project experience. The evaluators and contracting officer found Tompkins past performance projects, which clearly included scientific research laboratories, to be deserving of a “good” rating and Whiting-Turner’s past performance projects to be deserving of an “excellent” rating. The contracting officer committed no error by requesting Tompkins to identify any forensic or medical examiner facilities in its second BAFO response. Such project experience is logically encompassed by the evaluation criteria and the request was meant to provide Tompkins an opportunity to strengthen its proposal. Tompkins supplied additional project references, some of which included forensic laboratories. Some of the references were discounted by the contracting officer and evaluators because the work was performed as the owner’s construction manager rather than as general contractor. The failure of the contracting officer to make a similar BAFO request of Whiting-Turner is best explained in the record as reflecting the contracting officer’s and TEP’s belief that Whiting-Turner had provided already in its initial proposal significant references to scientific and medical research (including forensics) laboratory project experience, meriting the maximum “excellent” rating for the subfactor. We have carefully considered the information provided by each offeror in its proposals, including the BAFOs, and from the record we cannot conclude that the evaluation violated the terms of the solicitation or the law. The question of the aptness of prior performance project references is committed primarily to the business judgment of the evaluators and contracting officer and it would be improper for us to attempt to conduct our own evaluation of the technical features of the proposals. We discern no evidence of disparate treatment favoring Whiting-Turner over Tompkins.

Finally, Tompkins argues that it was improper for the contracting officer and TEP to rely in the second BAFO evaluation on Whiting-Turner’s submission of an augmented CPM schedule, updated site utilization plans, preliminary LEED action plan, and project specific safety plan. Tompkins notes that Whiting-Turner prepared these documents during an approximate 3-month period from the time that it received initial notice in February 2009 of a proposed award. Tompkins contends that the RFP did not require such detailed schedules and plans, the submissions were unnecessary in the proposal phase, and the contracting officer improperly cited the documents as a proposal advantage for Whiting-Turner. Tompkins also points to a cost and pricing certification dated June 22, 2009, submitted by Whiting-Turner to the

contracting officer (4 days before the contracting officer signed the business clearance memorandum) as additional evidence of a predisposition to award to Whiting-Turner. The contracting officer states in a declaration that he requested a revised certification because in reviewing Whiting-Turner's second BAFO price proposal, he noticed a discrepancy in the price and thus he wanted the correct price clarified.

We cannot sustain Tompkins' protest ground. Whiting-Turner worked on the schedules and plans in anticipation of receiving an award and recognized that its work was at its own risk as there was no contract in place. Tompkins cites no legal authority, and we are aware of none, which prohibits a contracting officer from considering such additional documentation provided in a BAFO. Whiting-Turner may have believed that its prospects for receiving an award justified beginning work on these schedules and plans before award. Tompkins has not shown that it was prejudiced in the technical evaluation. Whiting-Turner had received even before the second BAFO the maximum points under the relevant evaluation criteria as determined by the TEP and contracting officer. The contracting officer's reference to a "fully developed Project Management Plan" in his independent assessment may in part refer to the augmented schedules and plans but the record does not support a conclusion that these schedules and plans were the decisive factor in making award to Whiting-Turner.

To the extent that Tompkins alleges bias or bad faith on the part of the District's contracting officials, the record does not support such a finding. The contracting officer and evaluators performed their duties consistent with the law and the terms of the solicitation and their evaluation and selection documentation adequately explains the bases for their determinations. Tompkins' motion challenging the District's determination to proceed with performance is moot in light of our decision denying the protest.

CONCLUSION

We have considered each of the allegations raised by Tompkins in its protest and supplemental pleadings and conclude that Tompkins has not shown that the contracting officer violated the law or the terms and conditions of the solicitation. Accordingly, we deny its protest.

SO ORDERED.

DATED: October 21, 2009

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

CONFIGURATION INCORPORATED)	
	)	CAB No. P-0819
Solicitation No: DCPO-2009-B-0020)	

For the Protester: J. Michael Hannon, Esq., The Hannon Law Group, LLP. For the District of Columbia Government: Talia Cohen, Esq., Assistant Attorney General, Office of the Attorney General. For the Intervener Maryland Office Interiors, Inc.: Peter Garvin, Esq., Jones Day. For the Intervener Standard Business Furniture: Mr. Milton D. Morris, pro se.

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

OPINION

Filing ID 27962129

Configuration has protested the contracting officer’s determination that its bid was nonresponsive and the award made to Maryland Office Interiors, Inc. We conclude that Configuration’s bid was not responsive as it failed to meet the solicitation’s salient characteristics. Accordingly, we deny the protest challenge of the nonresponsiveness determination and dismiss the remaining grounds for lack of standing.

BACKGROUND

On June 5, 2009, the Office of Contracting and Procurement (“OCP”), on behalf of the Office of Property Management, renamed the Department of Real Estate Services, issued IFB No. DCPO-2009-B-0020 for a requirements contract, which included a fixed price component consisting of an order for furniture for the Waterfront project. (Agency Report (“AR”) Ex. 1). The IFB sought a contractor to furnish and deliver to District agencies various systems furniture and case goods ordered from a manufacturer’s price list (Part I) and to furnish and install systems and case goods at the Waterfront located at 1100 and 1101 4th Street SW (Part II) based in part on the prices in Part I. IFB Exhibit F set forth a table containing the salient characteristics of the furniture. (AR Ex. 1).

By Amendments 0001 through 0004, OCP changed the pre-bid conference date from June 26, 2009, to June 19, 2009, clarified the closing date, responded to written questions, and revised IFB Section J.1.1 (Part I) and J.1.2 (Part II). Amendment 0004 also required bidders to submit unit prices for standardized case goods (Attachment J.1.2 Part I, Case goods and Systems Furniture Pricing for 48 items). By Amendment 0005, dated June 26, 2009, the District, among other things, inserted Section J.1.13, Exhibit A, requiring bidders to submit a fixed price for the Waterfront Project. In addition, Amendment 0005 stated “Evaluation of proposed furniture and fixtures shall be a comparison of the item bid and its match to the salient characteristics as specified in Exhibit F.” By Amendments 0006 through 0008, the District responded to questions and revised Exhibit A, responded to a written question, and extended the closing date to July 27,

2009. By Amendment 0009, dated July 8, 2009, the District revised the closing date to July 15, 2009. (AR at 3-4; AR Ex. 1).

On July 15, 2009, the following eight bidders submitted timely bids: American Office, Configuration, F.A. O'Toole Office Systems, Inc., Dynamic Business Interiors ("DBI"), Maryland Office Interiors ("MOI"), Capital Services and Supplies, Inc, Motir Services, and Standard Business Furniture. (AR Ex. 7). The bid opening officials (a program specialist and contract specialist) noted on the original "Goods and Services Bid Abstract Form" dated July 16, 2009, that the prices for American Office, MOI, F.A. O'Toole, and Motir Services were "not in compliance." (Protest, Attachment 2). There is no precise indication in the record regarding why the bid opening officials believed MOI's bid prices to be "not in compliance." However, after the contracting officer reviewed all eight bids, the contracting officer determined that MOI's prices were in compliance with the solicitation requirements. Configuration fails to identify any aspect of MOI's bid that fails to meet the IFB's requirements. In accordance with the IFB as amended, the contracting officer evaluated the bids based on the fixed price component in Part II and the ability of each bidder to meet the technical requirements. The contracting officer prepared a Bid Tabulation Sheet based on the prices submitted for the Waterfront Project Part II. (AR Ex. 8 and 9).

By a Determination and Findings for Award to other than the Lowest Bidder dated July 28, 2009, the contracting officer determined that bids of American Office and Configuration were not responsive. Configuration had submitted with its bid a six-page list entitled "DC Waterfront Furniture Deviation List" describing how the Configuration proposed furniture items deviated from the salient characteristics required by the IFB. (District Response to Comments on the Agency Report, Ex. A). Specifically, the contracting officer determined that 20 items of furniture in Configuration's price schedule failed to meet the salient characteristics set forth in the Attachment F of the IFB. (AR Ex. 10). We find that the following furniture items proposed by Configuration materially deviated from the solicitation's salient characteristics:

<u>Item (Description)</u>	<u>Salient Characteristics</u>	<u>Deviation</u>
32 Training Table	frosted opaque modesty panel	fabric modesty panel
34 Café Table	36" square	29" x 36" rectangular
36 Training Table	frosted opaque modesty panel	fabric modesty panel
37 Conference Table	boat shape, wood legs	rectangular shape, drum base
39 Training Table	frosted opaque modesty panel	fabric modesty panel
42 Conference Table	48" diameter	36" diameter
43 Conference Table	54" diameter	36" diameter
47 Conference Table	boat shape, wood legs	rectangular shape, drum base

Based on his July 28 determination of nonresponsiveness of the two low bidders (American Office and Configuration), the contracting officer determined that the award must go to MOI, the next lowest responsive and responsible bidder. On August 10, 2009, the contract to MOI was deemed approved by the Council. (District Response to Comments on the Agency Report, Ex. B).

On August 28, 2009, Configuration filed with the Board its bid protest which was docketed as CAB No. P-0819. On September 11, 2009, DBI filed with the Board another protest which was docketed as CAB No. P-0823. Subsequent to the filing of the protests, the contracting officer prepared a revised bid tabulation sheet, dated September 21, 2009, which confirmed the following order of bidding and the award to MOI:

BIDDERS	Price Quote for Waterfront Project PART II A	Total of 48 Unit Prices PART I B	Total A + B	CBE Preference	Evaluated Price
1. American Office	\$2,617,434.34	\$25,077.10	\$2,642,511.44	0	\$2,642,511.52
2. Configuration	\$5,321,448.76	\$18,334.30	\$5,339,783.06	9%	\$4,859,202.58
3. MOI	\$6,790,307.97	\$35,195.35	\$6,825,503.32	0	\$6,825,503.32
4. Motir Services	\$7,681,525.75	\$39,567.19	\$7,721,092.94	9%	\$7,026,194.58
5. DBI	\$7,083,867.59	\$22,359.25	\$7,093,518.37	0	\$7,093,518.37
6. F.A. O'Toole	\$7,433,881.31	\$27,926.57	\$7,461,807.88	0	\$7,461,807.88
7. Standard Business Furniture	\$37,454,085.00	\$77,954.59	\$7,532,039.59	0	\$7,532,039.59
8. Capital Services and Supplies	\$8,975,000.00	\$36,745.09	\$9,011,745.09	12%	\$7,930,335.68

(AR Ex. 14). On September 23, 2009, the District filed its motion to dismiss and agency report. By letter dated October 1, 2009, the District terminated for convenience Part I (Case Goods and Systems Furniture) of MOI's Contract No. DCPO-2009-C-0020, as part of a settlement of DBI's protest in CAB No. P-0823, and DBI thereafter withdrew its protest. On October 2, 2009, Standard Business Furniture intervened in CAB No. P-0819. On October 6, 2009, Configuration filed its comments on the agency report. In its response, Configuration protested the District's termination of Part I of the MOI contract which would lead the District to rebid the citywide requirements requested in the solicitation. Configuration also protested the failure of the District to timely notify it of the July 28 nonresponsiveness determination and provide Configuration an opportunity to "address the alleged failures of its bid." Configuration also contends that "[t]hough the IFB solicited 'brand name [Kimball] or equal', the IFB was written in such a manner, and the award granted in such an irregular manner, that Kimball dealers were unduly favored for no legitimate reason." On October 15, 2009, the District responded to the new protest grounds raised by Configuration.

DISCUSSION

We exercise jurisdiction over this protest pursuant to D.C. Code § 2-309.03 (a)(1).

Configuration raises four principal grounds for protest: (1) whether the District properly determined Configuration nonresponsive and therefore not in line for award; (2) whether the District's award to MOI conformed to law; (3) whether the District conducted a proper public bid opening; and (4) whether the Council approved the proposed contract to MOI.

If the District properly determined that Configuration's bid was nonresponsive, then it is not in line for award and therefore lacks standing to raise the other challenges with respect to the award to MOI. *C.P.F. Corp.*, CAB No. P-0521, Jan. 12, 1998, 45 D.C. Reg. 8697, 8699 (the Board will not consider protests by bidders who are not next in line for award if the protest is sustained). To be responsive to a brand name or equal solicitation requirement, a bid offering an equal product must conform to the salient characteristics of the brand name product listed in the solicitation. *Advance Medical Systems, Inc.*, CAB No. P-0202, April 1, 1992, 39 D.C. Reg. 4516, 4518; *Trail Equipment Co.*, B-241004, Feb. 1, 1991, 91-1 CPD ¶ 102. A bidder must submit with its bid sufficient descriptive literature to permit the contracting officer to assess whether the proposed equal product meets all of the salient characteristics specified in the solicitation. *Id.* A bid which materially deviates – that is, one which affects in more than a trivial way, the price, quality, or quantity of goods or services offered – from the salient characteristics must be rejected as nonresponsive. *Id.*; *Parsons Precision Products, Inc.*, B-249940, Dec. 22, 1992, 92-2 CPD ¶ 431.

Based on our review of the record, it is clear that the District properly determined that Configuration's bid was nonresponsive because the bid expressly and materially deviated from a number of salient characteristics specified in Exhibit F of the solicitation. Configuration's "DC Waterfront Furniture Deviations List" submitted with its bid consists of a spreadsheet listing furniture items being proposed by Configuration and how those items deviate from the furniture items listed in the bid at Attachments A and F. In determining Configuration's bid nonresponsive, the contracting officer focused on a subset of the deviating products by comparing how Configuration's proposed items deviated from the Attachment F salient characteristics of the bid items. Configuration's bid for furniture items 32, 34, 36, 37, 39, 42, 43, 47, and 57 clearly deviate from the salient characteristics and Configuration admits as much in its October 6 comments on the agency report. In some cases, Configuration states in its October 6 pleading that it "will provide" a conforming item "at no additional cost to the District" and in other cases it states that it will provide the precise item specified in Attachment A. But Configuration's post-bid opening attempts to cure the deviations in its bid are ineffective precisely because these attempts come after bid opening. In *Advance Medical Systems, Inc.*, CAB No. P-0202, April 1, 1992, 39 D.C. Reg. 4516, 4518, we quoted the following from *Trail Equipment Co.*, B-241004, Feb. 1, 1991, 91-1 CPD ¶ 102: "Responsiveness must be determined at the time of bid opening, and, in general, solely from the face of the bid and the material submitted with the bid. To allow a bidder to make its nonresponsive bid responsive after bid opening is tantamount to allowing the bidder to submit a new bid." *Parsons Precision Products, Inc.*, 92-2 CPD ¶ 431 ("A bid which is nonresponsive on its face may not be converted into a responsive bid by post opening bid clarifications or corrections.").

Accordingly, Configuration's bid was properly determined nonresponsive and it lacks standing to raise its other challenges to the award. Even if we were to address the merits of Configuration's challenges to the award to MOI, we would not sustain the protest grounds. Configuration failed to demonstrate that the award to MOI violated law, regulation, or the terms of the solicitation. The record adequately demonstrates that all bids were publically opened, that MOI's bid was responsive, and that the Council approved the proposed award to MOI. To the extent that Configuration challenges the solicitation as being overly restrictive in designating Kimball furniture, that challenge is untimely.

CONCLUSION

For the reasons discussed above, we deny Configuration's challenge of the contracting officer's determination that its bid was nonresponsive, and we dismiss its other challenges to the award for lack of standing.

SO ORDERED.

DATED: November 9, 2009

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

APPEAL OF:

TUCKER & COMPANY, INC.)
) CAB No. D-1323
Under Solicitation No. GAO6004943-PO193799)

For the Appellant, Tucker & Company, Inc.: Mr. Othello Mahone, Chief Financial Officer, pro se. For the District of Columbia Public Schools: Donna W. Russell, Esq., Supervisory Attorney Advisor.

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

OPINION

Filing ID 28239647

Tucker & Company, Inc. ("Tucker"), appeals the denial of its claim for extra costs associated with preparing a PowerPoint presentation under a contract for alternative school review services. The contracting officer for the District of Columbia Public Schools ("DCPS") found Tucker's claim unsupported. DCPS argues that the appeal should be denied on the grounds that the claimed costs after hearing of \$12,489 are unsubstantiated and unreasonable. We agree with DCPS that Tucker failed to prove its extra costs and to show that such costs were reasonable. Accordingly, we deny the appeal.

BACKGROUND

On June 8, 2006, DCPS issued a Request for Quotation ("RFQ") seeking a vendor to review and evaluate four alternative education schools. The RFQ sought a vendor "with significant background and experience in the design, review, and evaluation of alternative schools, and with a demonstrated history of achieving promising results in similar projects." (Ex. A, DCPS Motion To Dismiss). According to the RFQ, DCPS would make a decision to either modify or discontinue alternative schools based on the vendor's evaluation and recommendations. Among other requirements, the RFQ required the vendor to submit a report to the Board of Education detailing its findings and recommendations and "design and deliver a presentation to the Board during its regularly scheduled meeting in September 2006." (Ex. A, DCPS Motion To Dismiss). On July 8, 2006, Tucker submitted a quote for \$208, 235. On July 10, 2006, Tucker submitted a revised quote for \$98, 227. On August 7, 2006, DCPS issued a purchase order for a fixed price of \$98,227.

On December 5, 2006, Mildred Washington from the DCPS sent Tucker an email detailing what should be included in the presentation to the Board of Education. (Ex. E, DCPS Motion To Dismiss). The email stated that the presentation should be in a Microsoft PowerPoint format. On January 25, 2007, Mr. Othello Mahone, Tucker's Chief Financial Officer, sought guidance from DCPS on the color of paper stock for the main report, PowerPoint presentation,

and abstract, indicating that the PowerPoint was already prepared and that it was 93 pages in length. Mahone stated that the PowerPoint involved extra work as he alleged it to be not a part of the original scope of work. DCPS replied that the PowerPoint was to summarize the main report's findings in 10 frames or less. (Ex. G, DCPS Motion To Dismiss).

On August 15, 2007, Mr. Mahone submitted a claim to the DCPS Chief Procurement Officer, Kevin Greene. According to Tucker, DCPS ordered Tucker to complete additional assignments that were beyond the scope of the original contract. Tucker claimed that DCPS owed it an additional \$19,290. The claim consisted of the following components:

- | | |
|---|---------|
| 1) Non-Personnel Expenditures from first billing period | \$6,216 |
| 2) Non-Personnel Expenditures from 10/1/2006 | \$3,139 |
| 3) Non-Personnel Printing of Final Report | \$1,185 |
| 4) Power Point First Draft | \$7,500 |
| 5) Power Point Second Draft | \$1,250 |

On November 5, 2007, the DCPS contracting officer issued a final decision denying Tucker's claim. In his final decision, the contracting officer stated that Tucker received payment for the full amount of the purchase order, \$98,227, and that Tucker's revised quote stated that any change or adjustment that would affect the cost of services "shall be mutually agreed to prior to the commencement of work on the change order." The contracting officer stated that because there was no record of such mutual agreement, Tucker's claim had to be denied. (Notice of Appeal).

The Board held a hearing on the merits. Mr. Franklin Tucker testified about his involvement with the formation of the contract. At no point did Mr. Tucker offer any documentation or supporting evidence as to the additional costs claimed or how the claimed extra PowerPoint costs were calculated. Tucker called witnesses from DCPS. However, no testimony was elicited from these witnesses that substantiated Tucker's claims. Tucker was given an additional opportunity to introduce into the record evidence detailing the claimed extra costs. After reconvening the hearing a week later, Tucker introduced a letter from a Tucker vendor named Mr. Ron Sefchik. Tucker seems to allege that Sefchik prepared the PowerPoint presentation for Tucker under the DCPS contract. However, the letter from Sefchik fails to identify any reasonable detail of the costs for preparing the PowerPoint presentation. Additionally, the letter fails to lend any support to Mr. Tucker's claim that DCPS owes Tucker any payment beyond what was agreed to in the original purchase order. In fact, in the letter, Sefchik states that he has yet to receive payment from Mr. Tucker. Mr. Tucker failed to bring forth evidence of additional claimed expenses after the Board suspended the hearing for one week.

DISCUSSION

Even if Tucker had shown that the PowerPoint presentation was outside the scope of the original contract statement of work, it failed to meet its burden of proving what additional expenses it incurred. Since Tucker failed to introduce reliable evidence to support its claim for extra costs, we find that Tucker failed to meet its burden. Tucker did not provide reasonable

notice to DCPS that it believed that the PowerPoint presentation constituted extra work until after it had embarked on the performance of the work.

CONCLUSION

Having failed to prove that it incurred costs for extra work, we deny Tucker & Co.'s appeal.

SO ORDERED.

DATED: November 25, 2009

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

AAA TERMITE & PEST CONTROL)
) CAB No. P-0828
Solicitation No: DCAM-2009-B-0055)

For the Protester: Mr. Michael Wanamaker, pro se, AAA Termite & Pest Control. For the District of Columbia Government: Alton E. Woods, Esq., Assistant Attorney General, Office of the Attorney General.

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

OPINION

Filing ID 28406256

AAA Termite & Pest Control has protested the determination that its bid was nonresponsive for failing to acknowledge two solicitation amendments. AAA Termite had downloaded the solicitation from the Office of Contracting and Procurement ("OCP") website but failed to check the website prior to submitting its bid for any amendments. The contracting officer states that bidders who picked up a printed copy of the solicitation from OCP were mailed the amendments but firms that downloaded the solicitation were not known to OCP. Thus, OCP could not mail amendments to firms which had downloaded the solicitation from the website and were not on the bidders list. We conclude that the contracting officer did not violate law, regulation, or the terms of the solicitation by determining AAA Termite's bid to be nonresponsive. Having chosen to obtain the solicitation from the OCP website, it was AAA Termite's responsibility to check the same OCP website for any amendments to the solicitation. Accordingly, we deny the protest.

BACKGROUND

On August 28, 2009, the District's Department of Real Estate Services ("DRES") issued Invitation for Bids ("IFB") No. DCAM-2009-B-0055 for pest control services for various District Government properties. (Agency Report ("AR"), at 2; AR Ex. 2). This IFB was posted on OCP's website on August 28, 2009. The IFB could either be picked up from DRES's bid room or downloaded from OCP's website. AAA Termite most likely downloaded an electronic copy of the solicitation from the OCP website between August 28, 2009, and September 21, 2009, that is, at some point before the first amendment was posted at the website on September 22, 2009. Bidders that picked up a printed copy of the solicitation from the DRES bid room were added to the bidders list. Firms that downloaded the solicitation from the OCP website were not added to the bidders list though presumably a firm could have asked to be added to the bidders list so that it could receive amendments by mail from the contracting agency.

The solicitation provides inter alia in section L.2 (entitled "Pre-Bid Conference"):

All oral questions must be submitted in writing following the close of the pre-bid conference but no later than five working days after the pre-bid conference in order to generate an official answer. Official answers will be provided in writing to all prospective bidders who are listed on the official bidder's list as having received a copy of the solicitation. Answers will also be posted on the OCP website at www.ocp.dc.gov.

(AR Ex. 2). Section L.12 provides that any responses to bidders' questions would be provided in an amendment. Bidders were notified of the need to acknowledge IFB amendments in IFB section L.16 (entitled "Acknowledgment of Amendments"):

The Bidder shall acknowledge receipt of any amendment to this solicitation by (a) signing and returning the amendment; (b) by identifying the amendment number and date in the space provided for this purpose in item 20 of page 1 (Solicitation, Offer, Award Form) of the solicitation; or (c) by letter or telegram, including mailgrams. The District must receive the acknowledgment by the date and time specified for receipt of bids. Bidder's failure to acknowledge an amendment may result in rejection of the bid.

(AR Ex. 2) (emphasis in original). AAA Termite attended the pre-bid conference on September 8, 2009 (*see* District's Determination to Proceed with Contract Performance, filed Nov. 10, 2009), but never had itself added to the bidders list. Amendment No. 1, posted on OCP's website on September 22, 2009, addressed questions posed by the bidders, added buildings to each of the two groups of facilities, and revised the pricing schedule. (AR Ex. 4). Amendment No. 2, posted on OCP's website on September 24, 2009, answered additional questions and again revised the pricing schedule. (AR Ex. 5). In addition to posting the amendments on the OCP website, the two amendments were mailed by OCP's staff to the vendors listed on the official bidders list. Because AAA Termite had downloaded the IFB from the OCP website, it did not appear on the bidders list. AAA Termite failed to check the OCP website during the period leading up to the bid opening date of September 30, 2009, and thus it states that it was not aware of the two amendments. On September 30, 2009, five bids were publicly opened with AAA Termite the apparent low bidder. (AR Ex. 1). Because AAA Termite failed to acknowledge the two amendments as set forth in IFB section L.16, and in 27 DCMR § 1517.1 (*see* AR Ex. 8), the contracting officer determined its bid to be nonresponsive in a letter dated October 1, 2009:

It is the responsibility of the bidders to check the OCP website through the duration of the advertised period and to be aware of amendments made to the solicitation. As your bid did not acknowledge the above mentioned amendments to the subject solicitation, the District finds the bid submitted by AAA Termite and Pest Control non-responsive to the District requirements; and therefore, will not be considered for a contract award.

(AR Ex. 3). On October 1, 2009, the contracting officer issued letters of intent to award contracts to the next two low bidders, Configuration, Inc., and Dixon Termite & Pest Management, Inc. (AR Ex. 9). On October 6, 2009, DRES's deputy director received a call from a representative of AAA Termite asserting that its bid was responsive and that it had not

been notified of the two amendments. (*Id.*). The contracting officer issued a notice the same day cancelling the solicitation. (AR Ex. 6). After a review of the matter and consultation with the Office of the Attorney General, the contracting officer determined that she could proceed with award to bidders other than AAA Termite on the basis that AAA Termite was responsible for checking the OCP website for amendments. (AR at 3; AR Ex. 9). On October 14, 2009, the contracting officer notified all bidders that she was rescinding the October 6 cancellation and that the contract award would proceed. (AR Ex. 7). On October 15, 2009, AAA Termite filed its protest.

DISCUSSION

We exercise jurisdiction over this protest pursuant to D.C. Code § 2-309.03 (a)(1).

AAA Termite argues that the contracting officer's determination finding it nonresponsive was legally erroneous because the solicitation failed to notify bidders that they should check the OCP website for postings of IFB amendments. AAA Termite also argues that the procurement was flawed in that some bidders were mailed the amendments while others (including AAA Termite) were not. The District responds that it was AAA Termite's responsibility to check the OCP website for possible amendments to the IFB because it had downloaded the IFB from the same OCP website. Because the contracting officer only had a bidders list of firms that had obtained a printed copy of the IFB from the DRES bid room, the District points out that the contracting officer could not know the bidders who had downloaded the IFB from the OCP website.

The Procurement Practices Act requires effective competition and fair and equitable treatment of all persons involved in District procurements. D.C. Code § 2-301.01. In order to further these goals, a contracting agency has an affirmative obligation to use reasonable methods for the dissemination of solicitation documents, including amendments, to prospective contractors. *Southern Maryland Restoration, Inc.*, CAB No. P-0459, Sept. 20, 1996, 44 D.C. Reg. 6503, 6506; *U.S. Pollution Control, Inc.*, B-248910, Oct. 8, 1992, 92-2 CPD ¶ 231; *Electromagnetix Corp.*, B-249623, Oct. 29, 1992, 92-2 CPD ¶ 295. Prospective bidders have a duty to avail themselves of every reasonable opportunity to obtain solicitation documents. *Southern Maryland Restoration, Inc.*, 44 D.C. Reg. at 6506; *Optelec U.S., Inc.*, B-400349, Oct. 16, 2008, 2008 U.S. Comp. Gen. LEXIS 178 (GAO held that Optelec "alone was responsible for monitoring the website for the posting of the solicitation"); *Republic Floors, Inc.*, 70 Comp. Gen. 567, 91-1 CPD ¶ 579. Normally, a prospective contractor bears the risk of not receiving a solicitation amendment, unless it is shown that the contracting agency made a deliberate effort to prevent the firm from competing, or even if not deliberate, there is evidence that the agency failed to provide the amendment after the firm availed itself of every reasonable opportunity to obtain it. *Crown Management Services, Inc.*, B-232431.4, Apr. 20, 1989, 89-1 CPD ¶ 393. A prospective bidder's nonreceipt of a solicitation amendment, and subsequent elimination from the competition, will not justify disrupting a procurement, unless evidence exists that the agency failed to comply with the applicable regulations governing the distribution of amendments. *Irwin-Jurkewicz Corp.*, B-249037, Oct. 20, 1992, 92-2 CPD ¶ 257.

In the present protest, AAA Termite does not argue that it was unreasonable for DRES to post the original IFB at OCP's website for prospective contractors to download. Nor does AAA Termite deny that the OCP website warns prospective contractors to check the OCP website daily for any amendments to the posted solicitations. Having opted to download the IFB from the website, and knowing that the downloading function is structured so that the downloading entity remains anonymous to the contracting agency, AAA Termite should have realized that the only way for the contracting agency to communicate an amendment to it would be by posting the amendments at the same OCP website containing the original IFB. Alternatively, if AAA Termite wanted to assure itself of receiving a written notice specifically directed to it, then it should have contacted DRES and had its name added to the official bidders list. The record demonstrates that AAA Termite did not take this measure. Although it would have been reasonable for DRES contracting officials to add to the official bidders list both AAA Termite and the other firm which attended the September 8 pre-bid conference, that was not done. Nevertheless, the agency did not violate procurement law by failing to add these contractors to the bidders list. It was AAA Termite's responsibility to have itself added to the bidders list if it wanted amendments to be mailed to it. In sum, by failing to check the OCP website for IFB amendments and by failing to have its name added to the bidders list, AAA Termite did not avail itself of every reasonable opportunity to obtain the amendments.

AAA Termite failed to respond to the agency report so we deem it to concede that the amendments made material changes to the scope of work and price schedule. The amendments added additional buildings to the statement of work requirements and revised the price schedule. These were material changes such that the failure of AAA Termite to acknowledge the amendments could not be considered a minor informality which could be waived by the contracting officer. By not acknowledging the two amendments, AAA Termite was not legally bound to the IFB requirements as amended, thus rendering its bid nonresponsive. *Northern Sealcoating & Paving, Inc.*, B-299393, Mar. 30, 2007, 2007 CPD ¶ 67.

CONCLUSION

For the reasons discussed above, we deny the protest of AAA Termite of the contracting officer's determination that its bid was nonresponsive for failing to acknowledge the IFB amendments.

SO ORDERED.

DATED: December 8, 2009

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

APPEAL OF:

BREEZE ENTERPRISES)
) CAB No. D-1215
Under Agreement dated August 15, 2000)

For the Appellant Breeze Enterprises: Othello G. Jones, Jr., Esq. For the District of Columbia Public Schools: Erika L. Pierson, Esq., Deputy General Counsel.

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

OPINION

Filing ID 28588411

Breeze Enterprises ("Breeze") claims that it has not been fully compensated for providing computer hardware and software and related support services to the Duke Ellington School for the Arts ("DESA"). The Board held a hearing to determine both jurisdiction and the merits of the claims. During a prolonged period after the hearing, the parties attempted to settle the dispute but were unsuccessful. At the time that Breeze performed work at the school for which it did not receive payment, the school was administered by the Duke Ellington School for the Arts Project ("DESAP") which is a nonprofit corporation. The record contains no valid written contract between Breeze and DESAP and no valid written contract between Breeze and the District of Columbia Public Schools ("DCPS"). Breeze points to a draft contract which was never signed by any person other than Breeze's president. It appears from the record that the school's chief financial officer requested Breeze to provide network services, some hardware and software, and some related support services but this work, except for the network services, does not match the statement of work contemplated in the unsigned draft contract. Although the record suggests a time and materials arrangement between DESAP and Breeze, it is clear that no contracting officer on behalf of DCPS entered into any type of contract with Breeze pursuant to the Procurement Practices Act and Breeze has not shown any contracting officer final decision from which it is appealing. Accordingly, we dismiss the appeal for lack of jurisdiction. We recommend that DESAP pay \$8477.15 plus interest to Breeze to compensate it for the hardware and software admittedly provided and invoiced.

BACKGROUND

Prior to September 5, 2000, the Duke Ellington School for the Arts was operated by DCPS, as evidenced by a document entitled "Agreement Between the Duke Ellington School of the Arts Project, the District of Columbia Public Schools, and the District of Columbia Office of Contracting and Procurement" ("DESAP Organizational Agreement"), dated September 5, 2000. (Hearing Ex. 4, at 1). DESAP, a District of Columbia nonprofit corporation, was formed on April 26, 1999, is partially funded by DCPS and is a collaboration of the Ellington Fund, the John F. Kennedy Center

for the Performing Arts, and The George Washington University. (DESAP Organizational Agreement, at 1). Article III of the DESAP Organizational Agreement clearly transfers DESA operational authority from DCPS to DESAP, effective September 13, 2000:

DELEGATION OF AUTHORITY TO DESAP; LINES OF AUTHORITY

3.1 General Grant of Authority. Except as provided in Section 3.2 of this Article III [Superintendent veto under extraordinary circumstances of action by DESAP Board of Directors], the DCPS hereby grants to DESAP the authority and responsibility for the management and operation of all aspects of DESA commencing on the day immediately following the end of the Transition Period [September 5, 2000 through September 12, 2000, *see* Article II, Section 2.3]. Such grant of authority shall remain in full force and effect for the remainder of the Initial Term and any extensions thereof subject to the terms hereof. DESAP shall exercise such authority in conformity with all applicable laws, rules and regulations, unless a specific waiver or exemption has been obtained from the appropriate government authority.

(Hearing Transcript (“Tr.”) 191; Hearing Ex. 4). Breeze asserts that on August 15, 2000, its president, Wilfred Welsh, met with Peggy Cooper Cafritz, a DESAP representative, and William Weir, the school’s chief financial officer. Welsh claims that Cafritz requested that he submit a proposal to perform various computer services for Duke Ellington School, that he and Weir prepared a draft agreement for the computer equipment and services, that Welsh signed three copies of the draft, and that the draft agreement was left at Cafritz’s home office for signature. (Hearing Tr. 8-22). The draft agreement contained the following statement of work and pricing:

BREEZE ENTERPRISES and CLIENT enter into following agreement (the "Agreement") to adhere to the terms, conditions, and prices stated herein. BREEZE ENTERPRISES will provide the services at the price specified below. No other statements written or implied by any employee of BREEZE ENTERPRISES shall be part of the Agreement. The CLIENT agrees to pay for work done pursuant to this Agreement. Additional terms and conditions which are an integral part of this Agreement are attached as a sheet entitled “EQUIPMENT MAINTENANCE AGREEMENT.” The itemized list of equipment/services covered by this Agreement is "Attachment 1".

OFFICE/PROGRAM	HARDWARE SERVICES	SOFTWARE SERVICES	COST
LAN Cabling	Yes	N/A	\$15,800.00
Networking Equipment/Services	Yes	Yes	\$74,000.00
Computer Hardware	Yes	N/A	\$70,000.00

Software/Support	N/A	Yes	\$40,000.00
		TOTAL	\$199,800.00

See Attachment I for itemized list.

The Agreement period is 30 days beginning August 15th, 2000 with support services covering a period of one (1) year.

(Breeze March 23, 2006 submission, Tab 9, at 1). The "Equipment Maintenance Agreement" referenced in and attached to the one-page draft agreement provided for a 25 percent initial deposit payment of \$49,950.00, but did not specify a payment date. (*Id.* at 3). The draft agreement was never signed by Cafritz nor anyone else other than Welsh. (*Id.*). No initial deposit was paid to Breeze. (Hearing Tr. 23). Welsh testified that on Aug. 16, 2000, Weir requested that Welsh begin work immediately to prepare the school for the start of the academic year, and Welsh agreed based on his having known Ms. Cafritz for years, notwithstanding that she had not yet signed the agreement. (Hearing Tr. 22). Welsh states that he began work on August 16 or 17, though he also states that it took some time, perhaps a few days, to get organized and gain access to various school rooms. (Hearing Tr. 23-24; Amended Affidavit of Wilfred Welsh, March 24, 2006 ("Welsh Aff.") at 1).

Breeze submitted six invoices to DESAP during the period of performance. Invoice No. 2327, dated August 31, 2000, requested payment of \$15,800 for the following work: "Cabling/Engineering Service Charge. Extension of existing Data/Voice Network to accommodate a minimum of 125 additional work area outlets. Correctional modifications of sections of existing cable infrastructure." (Breeze March 23, 2006 submission, Tab 5).

Breeze submitted Invoice No. 2371, dated October 20, 2000, in the total amount of \$8,019.15 for the following hardware, software, and supplies: "3COM 3C905B-TX-N 10/100 Network card (1) @ \$79.00; Mid Tower PC with Intel Pentium III processor running at 550 MHZ with the following: Pentium II/III mother board; Intel Pentium III 550 CPU; 64 MEG SDRAM; Western Digital 7.5 G hard drive; Toshiba 48X CD-ROM; Creative Lab Sound Blaster 128 sound card; Misumi Win 95 keyboard; Microsoft Intelli PS2 Mouse; Windows 98 second edition; 3COM 10/100 3C905 fast Ethernet network interface card; Viewsonic E771 flat screen multimedia Monitor 17" (3) @ \$899.00 [totaling] \$2697.00; CAT 5 Patch cord modular plugs (55) @ \$3.19 [totaling] \$175.45; Category 5 plenum cable (1) \$ 185.00; Lucent module cat 5 jack inserts (10) @ \$5.07 [totaling] \$50.70; Toshiba Tecra 8100 Notebook P3-700 \$3500.00; Black toner cartridge for Phaser 780 (2) @ \$105.00 [totaling] \$ 210.00; Jet Direct print server (2) @ \$159.00 [totaling] \$ 318.00." (Breeze March 23, 2006 submission, Tab 5).

Breeze received a payment check of \$15,800.00 dated December 22, 2000. (Breeze March 23, 2006 submission, Tab 8). The payor of the check was the Government of the District of Columbia. (Breeze March 23, 2006 submission, Tab 8). The \$15,800 payment was funded from DCPS capital budget funds on behalf of DESAP, and appears to have been paid as part of DCPS's

funding of DESAP as contemplated in the DESAP Organizational Agreement. (Hearing Tr. 174-180). To provide the capital funding to DESAP, a requisition and direct purchase order were created based on the authority of the DESAP Organizational Agreement. (Hearing Ex. 3; Tr. 174-180). As referenced in Hearing Ex. 3, Ms. Glorious Bazemore, the DCPS Deputy Chief Procurement Officer at the time, testified that the payment was by direct voucher, also referred to as “direct purchase order”, and was not made pursuant to any contract obligation between DCPS and Breeze as there was no contract between them. (*Id.*).

Breeze submitted Invoice No. 2399, dated January 4, 2001, in the total amount of \$458.00 for the following computer supplies: “Color Imaging kit for Phaser 780 (1) \$ 279.00; Targus Tecra deluxe notebook bag with security system (1) \$ 179.00. (Breeze March 23, 2006 submission, Tab 5).

Breeze submitted Invoice No. 2428, dated March 30, 2001, in the total amount of \$31,181.25, for the following computer consulting services:

Hourly consultancy fee, Sept., 2000 105.2 @ \$75.00	\$7890.00
Hourly consultancy fee, Oct., 2000 45.05 @ \$75.00	\$3378.75
Hourly consultancy fee, Nov., 2000 37.55 @ \$75.00	\$2816.25
Hourly consultancy fee, Dec., 2000 39.5 @ \$75.00	\$2962.50
Hourly consultancy fee, Jan., 2001 130.25 @ \$75.00	\$9768.75
Hourly consultancy fee, Feb., 2001 58.2 @ \$75.00	\$4365.00

(Breeze March 23, 2006 submission, Tab 5). Invoice No. 2428 does not contain any time sheets or other contemporaneous records indicating what services Breeze provided for the hours claimed. In response to the Board’s request for additional documentation to support its claims, Mr. Welsh states in a prehearing filing containing “time sheets” for September 2000 through March 2001:

The times were recorded on the dates that the services were rendered. At the end of the first month, a summary time sheet was submitted to Mr. Weir. Weir then wanted to combine service and equipment into one billing entity in order to reduce the complexity of paperwork submitted to DCPS. No further time sheets were submitted until instructed to do so by Mr. Weir. The time sheets were initially submitted to Mr. Weir, but later resubmitted to the principal Mitzi Yates upon the request of Mr. Weir

at the end of his term as CFO of the school. Included in the submission to Ms. Yates, were all invoices referencing the time sheets, along with invoices for equipment purchased for the school.

(Breeze March 24, 2006 submission, Tab 6). The time sheet for each month consists of five columns labeled with the date, start time, end time, lunch, and hours worked. The entries do not differentiate between work by Welsh and his assistant, do not indicate the work performed, and were not contemporaneously certified by Breeze or DESAP. Welsh testified that he sent each time sheet by fax to Mr. Weir shortly after the end of the month but did not invoice for any of the time for September 2000 through February 2001 until the March 30, 2001 invoice. (Hearing Tr. 102-107, 128-129, 131). There is no documentation in the record corroborating Welsh's testimony about submitting the time sheets to Mr. Weir and no one from DESAP appeared to testify at the hearing. Breeze has submitted service requests forms prepared by DESAP staff outlining requested computer services to further support Breeze's hourly billings. (Breeze March 23, 2006 submission, Tab 4; Hearing Tr. 137-138). The service requests do not indicate the date work was rendered or the number of hours worked, and most do not indicate that work was completed. During the hearing, Mr. Welsh testified that there were no time sheets for the approximately 200 plus hours worked in August 2000, but the August 31, 2000 invoice submitted by Breeze for cabling/engineering services clearly constituted for the most part billing for labor expended during August 2000. (Hearing Tr. 34-60).

Breeze submitted Invoice No. 2430, dated April 6, 2001, in the total amount of \$649.80 for the following computer supplies:

Cyan toner cartridge for Phaser 780 (1)	\$ 179.95
Magenta toner cartridge for Phaser 780 (1)	\$ 179.95
Yellow toner cartridge for Phaser 780 (1)	\$ 179.95
Black toner cartridge for Phaser 789 (1)	\$ 99.95
Shipping and handling	\$ 10.00

(Breeze March 23, 2006 submission, Tab 5). Breeze received payment for this invoice in the amount of \$649.80 by check from the DESAP "Disbursement Account" dated April 26, 2001. (Breeze March 23, 2006 submission, Tab 8). The record contains a DESAP purchase order number 100136, bearing a fax date of March 31, 2001, for these supplies. (Breeze March 24, 2006 submission, Tab 7).

Breeze submitted Invoice No. 2431, also dated April 6, 2001, in the total amount of \$6,615.00, for the following computer consulting services:

Hourly consultancy fee, Aug., 2000	
8.0 @ \$75.00	\$600.00
Hourly consultancy fee, Mar., 2001	
80.2 @ 75.00	\$6015.00

(Breeze March 12, 2004 submission, Ex. F). As with the earlier invoice for hourly fees, there is no evidence in the record identifying the actual work performed, the number of hours billed for such work, certifications of hours, or corroborating documents from DESAP.

Appellant originally filed a suit for payment in the D.C. Superior Court on March 24, 2003, docketed as Civil Action CA03-2142. On May 29, 2003, Breeze consented to the District's motion to dismiss on the grounds that the Contract Appeals Board has exclusive jurisdiction pursuant to the Procurement Practices Act. On July 14, 2003, Breeze filed the instant appeal with the Board, requesting judgment against the DCPS in the amount of \$31,181.25, which was limited to its request for labor hours. On October 6, 2003, DCPS moved to dismiss the appeal on the ground that Breeze failed to allege that a contract existed between DCPS and Breeze and further that no final decision had been rendered by any DCPS contracting officer. On February 15, 2006, DCPS filed a copy of the September 5, 2000 DESAP Organizational Agreement, which DCPS had recently discovered. On April 27, 2006, DCPS filed a renewed motion to dismiss, alleging that there is no contract from which the Appellant may appeal because DESAP under the DESAP Organizational Agreement possessed contracting authority for Duke Ellington School procurements effective September 2000. Breeze filed its opposition motion on May 19, 2006. The Board held a hearing on the merits of the appeal and on jurisdiction on June 19, 2006. Subsequent to the hearing, the parties engaged in a prolonged but unsuccessful effort to settle the case.

DISCUSSION

The District has moved to dismiss the appeal contending that the Board lacks jurisdiction as (1) there was no contract between Breeze and DCPS, and there was no contracting officer's final decision to appeal from; and (2) even if the Board determines that there was some form of contract between Breeze and DESAP, DESAP is not subject to the Board's jurisdiction under the Procurement Practices Act because it is a private entity as shown by the DESAP agreement.

Pursuant to D.C. Code § 2-301.04(a), the Procurement Practices Act is limited to "departments, agencies, instrumentalities and employees of the District government" and the Board's jurisdiction generally is coextensive with the coverage of the PPA. D.C. Code § 2-309.03(b). Thus, DESAP, a private nonprofit corporation, is not subject to the Board's jurisdiction. Breeze relies upon the unsigned contract with DESAP dated August 15, 2000, which, on its face, is not a contract with DCPS or any other instrumentality of the District, and is executed only by Mr. Welsh of Breeze. Further, the actual performance and the invoices for time and materials are not consistent with the draft agreement's statement of work and pricing scheme. Although Breeze claims that the \$15,800 payment via a District government check dated December 22, 2000, "is an acknowledgment of Agents/Employee's authority to enter into this contract on its behalf," (Appellant's Opposition to Appellee's Renewed Motion to Dismiss, May 19, 2006, ¶ 13), this single DCPS payment to Breeze was funded from DCPS capital budget funds and reflected a payment made by DCPS on behalf of DESAP, pursuant to the DESAP Organizational Agreement, rather than pursuant to any contract obligation on the part of DCPS to Breeze. (DCPS Renewed Motion to Dismiss, April 27, 2006, ¶ 5). There is no evidence a DCPS contracting officer entered into a contract with Breeze or directed

Breeze to perform the work at issue.

Clearly, Mr. Welsh provided computer equipment, supplies, and related services to DESAP, believing that he would be fairly compensated based primarily upon the representations of Mr. Weir and Ms. Cafritz. (Hearing Tr. 26, 95, 99; Welsh March 24, 2006 Amended Affidavit, Section A). If the Board had jurisdiction over this dispute, based on the record presented, the Board would conclude that Breeze had shown it was entitled to compensation for Invoice Nos. 2371 (\$8,019.15) and 2399 (\$458.00) because there is reasonable evidence that Breeze provided the computers, printer, and related equipment and supplies, and DESAP has never paid for those items. Although we lack jurisdiction to order any payment, we recommend that DESAP promptly make a payment to Breeze for these items as there is no question as to entitlement and quantum. It is equally clear that the support for Breeze's claim for hours of labor for the months September 2000 through March 2001 is deficient. If we had jurisdiction, we would have no choice but to employ a jury verdict approach to estimate the hours for which Breeze should be compensated.

For the reasons stated above, we dismiss the appeal for lack of jurisdiction.

SO ORDERED.

DATED: December 18, 2009

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

CONCURRING:

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