

## DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

### PROTEST OF:

World Wide Parking, Inc. )  
 ) CAB No. P-0927  
Under Solicitation No. DCKA-2012-R-0018 )

For the protester: Warner H. Session, Esq., Warren J. Nash, Esq., Session Law Firm. For the intervenor: Thomas C. Papson, Esq., Jason A. Carey, Esq., McKenna Long & Aldridge LLP. For the District of Columbia Government: Alton E. Woods, Esq., Assistant Attorney General.

Opinion by: Administrative Judge Maxine E. McBean with Chief Administrative Judge Marc D. Loud, Sr. concurring.

### OPINION

*Filing ID #53066054*

This protest concerns Solicitation No. DCKA-2012-R-0018 (the “Solicitation” or “RFP”) which was issued by the District of Columbia Department of Transportation (“DDOT” or “District”) for a contractor to provide asset management services for parking meter assets in the District. An offeror to the Solicitation, World Wide Parking, Inc. (“WWP” or “protester”) has alleged that DDOT (i) conducted an improper debriefing; (ii) issued a flawed Solicitation; (iii) did not comply with District law in evaluating WWP’s proposal; and (iv) failed to “act in the best interest of the District”<sup>1</sup> by entering into negotiations with the highest-ranked offeror.

The Board rejects protester’s arguments for the following reasons: (i) an inadequate debriefing is not, by itself, a valid protest ground; (ii) protester’s allegations concerning improprieties in the Solicitation are untimely; (iii) DDOT evaluated the offeror technical proposals reasonably, and in accordance with District law; and (iv) pursuant to D.C. Code § 2-354.03(h)(1) and (2), a contracting officer may decide to enter into negotiations with the highest-ranked offeror and such decision shall not be subject to review by the Board. Finding that the District did not violate procurement laws or regulations, we deny the instant protest.

### BACKGROUND

#### I. The Solicitation

On November 21, 2011, the District issued the Solicitation for a “Performance Based Asset Management Contract” to manage and operate over 14,000 parking meters<sup>2</sup> in the District, along with the related systems and assets. (Agency Report (“AR”) 4-5.) The Solicitation contemplated the issuance of a five year “performance-based contract with payment based on

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<sup>1</sup> See generally Protester’s Comments on the AR 2-11.

<sup>2</sup> These parking meters collectively manage over 18,000 parking spaces. (AR 5.)

firm fixed prices (FFP) and firm fixed unit prices (FFUP).” (AR at Ex. 1, § B.2.) There were nine amendments to the RFP between the time when it was originally issued and the deadline for receipt of initial proposals on February 13, 2012. (*See generally*, AR at Ex. 2, § L.12.)

The RFP required the awardee to undertake responsibility for managing, maintaining, and repairing virtually all parking meters in the District — a system which “generates roughly \$30M [per year] in revenue.” (AR at Ex. 1, § B.) The District expected “to increase the size of the system to 20,000 meters as part of the Asset Refresh” and anticipated that the successful contractor would “collect coins and process virtual transactions for the parking meters.” (*Id.*) Specifically, the RFP stated that the contractor would be expected to:

- Proactively maintain all parking meter assets
  - Collect all physical payments
  - Process virtual payments
  - Respond to all service requests
  - Manage input into the Parking Meter Management System
  - Interface with the District’s Maintenance Management System
  - Provide near real time data to the District
- (*Id.*)

In addition, the District was “interested in pursuing a replacement of existing mechanical meters with newer technology.” (*Id.*) The District therefore wanted prospective bidders to be capable of implementing improvements “such as dynamic pricing.” (*Id.*) As described in Section C.5.2 of the RFP:

Dynamic pricing is the ability to change the rate for parking based on the level of availability. The fewer spaces available, the higher the rate charged per hour. Dynamic pricing represents a valuable tool in managing parking spaces as a resource and helping to ensure the availability of parking spaces within the District.  
(AR at Ex. 1, § C.5.2.)

The Solicitation required offerors to provide the District with two options: (1) an offer where existing mechanical meters are replaced with connected meters – the System Refresh; and (2) an offer that does not involve upgrading assets at the start of the contract and instead upgrades assets in batches – No System Refresh. (AR at Ex. 1, § B.4.)

With respect to award criteria, the RFP stated, “[t]he contract will be awarded to the responsible Offeror whose offer is technically acceptable to [DDOT], and offers the best value to the District as determined by the total overall score from the evaluation criteria. . . .” (AR at Ex. 1, § M.1.) In evaluating the proposals, the following Technical Rating Scale was to be used:

<b>Numeric Rating</b>	<b>Adjective</b>	<b>Description</b>
1	Unacceptable	Fails to meet minimum requirements; major deficiencies which are not correctable.
2	Poor	Marginally meets minimum requirements; significant deficiencies which may be correctable.
3	Acceptable	Meets requirements; only minor deficiencies which are correctable.
4	Good	Meets requirements; no deficiencies.
5	Excellent	Exceeds most, if not all requirements; no deficiencies.

(AR at Ex. 1, § M.2.)

The technical evaluation consisted of rating each offeror's proposal utilizing the following factors: (1) Technical proposal (**40 points** maximum), (2) Staffing/Management/QC/QA/Past Performance/Facilities proposal (**30 points** maximum), and (3) Price proposal (**30 points** maximum). (AR at Ex.1, § M.3.) However, in order for a proposal to be considered technically acceptable, the Technical proposal needed to receive at least 60% of the available 40 points, and the Staffing/Management/QC/QA/Past Performance/Facilities proposal needed to receive at least 60% of the available 30 points. (*Id.*) Significant to Past Performance was “[t]he extent to which the Prime Contractor’s and subcontractor’s experience and past performance on asset preservation, maintenance, and management [of] contracts of comparable size demonstrates a likelihood of successfully performing all of the tasks set forth in [the] RFP.” (AR at Ex. 1, § M.4.2.A.1.)

Section M.4.3 of the Solicitation required an objective evaluation of the price proposal. The offeror with the lowest cost/price would receive the maximum price points. All other proposals would receive a proportionately lower total price score. (AR at Ex. 1, § M.4.3.) The RFP also stated that the Technical Evaluation Panel (“TEP”) would check price proposals to evaluate price reasonableness. (AR at Ex. 1, § M.3.)

Lastly, up to 12 preference points could be awarded to businesses certified pursuant to the Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005.<sup>3</sup> (AR at Ex.1, §§ M.4.5, M.5.) In all, an offeror could receive a cumulative total of 112 points. (AR at Ex.1, § M.4.6.)

## **II. The Evaluation Process**

Two responsive bidders submitted proposals by the RFP’s due date of February 13, 2012—WWP and the incumbent asset manager, ACS State & Local Solutions, Inc., a Xerox

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<sup>3</sup> See D.C. Code §§ 2-218.01-.82 (2010).

Company (“Xerox”).<sup>4</sup> (AR at Exs. 2, 3.) Pursuant to Section M.3 of the Solicitation, the District used the TEP to conduct the initial evaluation of proposals which took place on March 1-2, 2012. (AR 5, ¶ 4.) The initial evaluations were followed by the offerors’ oral presentations on March 9, 2012. (AR 6, ¶ 5.)

#### **A. Deficiency Letters**

On March 15, 2012, Mr. Jerry M. Carter, the Contracting Officer (“CO”), issued Requests for Clarification to WWP and Xerox. (AR at Exs. 6(a), 6(b).)<sup>5</sup> Each offeror was instructed to provide a “Performance Plan” describing how they would “monitor the parking meter system to ensure that the Performance Measures are met.” (*Id.*)

In his letter to WWP, the CO expressed concern that WWP’s proposed Parking Meter Management System (“PMMS”) did not currently exist<sup>6</sup> and that that created “a risk to success in the District’s evaluation.” (AR at Ex. 6(a), at 2.) The CO’s letter included a request that WWP “[d]escribe in detail the functionality of the Dynamic Pricing system” being offered. (AR at Ex. 6(a), at 3.) Therefore, WWP needed to provide details about its past experience with asset management systems, including how the PMMS would be started, whether WWP had a contingency plan in the event that the PMMS was not completed on time, and how WWP would otherwise mitigate the risks identified by the CO. (AR at Ex. 6(a), at 2.)

In its 35-page response to the deficiency letter, on March 23, 2012, WWP provided DDOT with additional details on its proposed PMMS. However, WWP’s response did not appear to dispute that a full version of its proposed PMMS was not yet in existence. WWP stated that “[t]he central components of the PMMS do exist today [*sic*] are being used by many of [subcontractor] CYIOS clients.” (AR at Ex. 7(a), at 10.) Notably, although WWP’s response described CYIOS Corporation’s (“CYIOS”) successful past performance, WWP did not directly address whether it had a contingency plan – notwithstanding the CO’s request for the information – in the event that its PMMS was not timely completed. (*Id.*)

#### **B. RFP Amendments and 1<sup>st</sup> BAFOs**

On May 3, 2012, the CO sent letters to both offerors requesting that each submit revised proposals (“1<sup>st</sup> BAFOs”) to the District on or before May 11, 2012. (AR at Exs. 8(a), 8(b).) Each letter included a list of deficiencies still present in the recipient’s proposal. (*Id.*) In the letter to WWP, the CO noted that although WWP had provided extensive information about the past performance and capabilities of subcontractor CYIOS, its previous response “did not sufficiently convey the Worldwide Team’s ability to develop a [PMMS] and have it in place within the 90 days allowed under the contract.” (AR at Ex. 8(a), ¶ 2.) Specifically, the CO expressed concern that none of the subcontractors had experience related to parking meter assets and, further, that

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<sup>4</sup> On October 15, 2012, Xerox moved to intervene in the instant protest pursuant to Board Rules 100.2(k) and (l). (*See* Mot. for Leave to Intervene.) The Board granted Xerox’s motion on October 19, 2012. (Order Granting Mot. to Intervene.)

<sup>5</sup> In the AR, these documents are described as “deficiency letters.” (AR 6, ¶ 6-7.)

<sup>6</sup> This finding is seemingly consistent with WWP’s initial proposal which stated that WWP “in conjunction with CYIOS Corporation . . . will develop a Parking Meter Management System (PMMS).” (AR at Ex. 2, § 1.1.)

WWP's proposal had also failed to establish that WWP itself had experience with the use of a PMMS. (*Id.*) The CO requested that WWP provide specific details by addressing a list of deficiencies including items related to performance, resources, and design. (*Id.*)

Concurrent with the May 3, 2012, request for 1<sup>st</sup> BAFOs, the CO issued Amendment 10 to the RFP. (AR at Ex. 8(e).) Amendment 10 replaced the previous pricing workbooks in the RFP, updated the parking meter financial data, and eliminated the requirement that proposals meet certain minimum levels of technical acceptability. (*Id.*) It also moved the Contract Line Item Numbers ("CLINs") for parking space sensors from System Asset Refresh to Dynamic Pricing with a capability of adjusting the meter pricing in 15 minute increments. (*Id.*)

On May 9, 2012, the CO issued Amendment 11 to the RFP. (AR at Ex. 9.) Amendment 11 extended the deadline to submit 1<sup>st</sup> BAFOs to May 16, 2012, and responded to additional questions from the offerors concerning the dynamic pricing program.<sup>7</sup> (*Id.*) The CO explained that the "solicitation requires offerors to determine the appropriate number of sensors for the installation to enable dynamic pricing." (*Id.*) However, "sensors are not the only means of gathering data for dynamic pricing, but rather one element in the solution." (*Id.*)

On May 11, 2012, the CO issued Amendment 12 to the RFP. (AR at Ex. 10.)<sup>8</sup> Amendment 12 clarified that the Solicitation did not call for 100% sensor coverage; however, even though "existing assets were not required to be retrofitted with sensors," an offeror could choose to do so. (*Id.*) Therefore, offerors were "expected to propose a dynamic pricing solution that met the District's requirements and best met their capabilities and proposed technology." (*Id.*)

WWP and Xerox each submitted timely 1<sup>st</sup> BAFO responses. (AR at Exs. 11(a), 11(b).) The TEP then evaluated the offerors' 1<sup>st</sup> BAFOs on or about May 25, 2012. (AR 7, ¶ 13; AR at Ex. 12.)

### **C. 2<sup>nd</sup> BAFOs**

On June 7, 2012, the CO sent letters to the offerors requesting that they submit another Best and Final Offer ("2<sup>nd</sup> BAFO"), taking into account RFP Amendments 10-12. (AR at Exs. 13(a), 13(b).) As before, the CO's letters included a list of deficiencies that had been identified in the recipient's 1<sup>st</sup> BAFO. (*Id.*) In the case of WWP, in order to correct the noted deficiencies, the CO required WWP to submit: (1) detailed resumes and letters of commitment for WWP's subject matter experts; (2) a plan to implement all elements of dynamic pricing pursuant to the RFP's requirements; (3) letters of commitment from proposed vendors; (4) a contingent lease letter from the proposed facility; and (5) all "Asset Breakdown Sheet" items. (AR at Ex. 13(a).)

By contrast, the CO's letter to Xerox identified fewer deficiencies. It required Xerox to provide additional information such as: (1) an analysis on the purchase of any extended

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<sup>7</sup> The CO indicated that traffic disincentive and increasing parking turnover were among the stated goals of the dynamic pricing program. (AR at Ex. 9.)

<sup>8</sup> The Board notes that in the electronic filing index, AR at Ex. 10 is erroneously labeled as "Amendment 11" instead of "Amendment 12."

warranties; (2) letters of commitment from proposed vendors; and (3) a contingent lease letter from the proposed facility. (AR at Ex. 13(b).)

On June 11, 2012, the CO issued Amendment 13 to the RFP. (AR at Ex. 14.) This amendment provided clarification concerning the data entry for the pricing workbooks, and for the CLINs for electronic locks. (*Id.*) It did not however, extend the deadline for receipt of the 2<sup>nd</sup> BAFOs. (*Id.*) Accordingly, both offerors submitted their 2<sup>nd</sup> BAFOs by the due date of June 14, 2012. (AR at Exs. 15(a), 15(b).)

The TEP evaluated the 2<sup>nd</sup> BAFOs on or about June 19, 2012. (AR 7 ¶ 17; AR at Ex. 16.) Although following its initial evaluation of WWP’s proposal, the TEP had concluded that WWP “had extensive on-street expertise,” the TEP found that WWP’s 1<sup>st</sup> BAFO and 2<sup>nd</sup> BAFO failed to mitigate the risks identified by the CO in the WWP deficiency letters. (AR at Ex. 17, at 2.) In addition, the TEP was not persuaded that WWP “understood the work effort related to either the parking meter management system (PMMS) or Dynamic Pricing.” (*Id.*) The TEP further noted that, in its 2<sup>nd</sup> BAFO, WWP failed to price any parking sensors as required by the RFP and that such omission rendered WWP’s pricing proposal “non-compliant” and therefore, in effect, “the actual price to the District would be higher.” (*Id.*)

On June 20, 2012, the TEP chair conveyed via memorandum to the CO, the TEP’s recommendation that Xerox was the highest-ranked offeror. (AR at Ex. 17.) The final technical and price score calculations are as follows:

	<b>Evaluated Price</b>	<b>Price Score</b>	<b>Technical Score</b>	<b>Total Score</b>
WWP Option 1	\$131,431,160.60	30.00	36.50	66.50
Xerox Option 1	\$182,672,400.15	18.30	50.50	68.80
	<b>Evaluated Price</b>	<b>Price Score</b>	<b>Technical Score</b>	<b>Total Score</b>
WWP Option 2	\$105,325,976.67	30.00	36.50	66.50
Xerox Option 2	\$151,315,499.16	16.90	50.50	67.40

(AR 7.)

The final technical scores and resulting ranks are as follows:

<b>Option</b>	<b>Offeror</b>	<b>Averaged Total Technical Score</b>	<b>Pricing Score</b>	<b>Total</b>	<b>Rank</b>
1	Xerox	50.5	18.3	68.8	1
1	Worldwide Parking	36.5	30*	66.5	2
2	Xerox	50.5	16.9	67.4	1
2	Worldwide Parking	36.3	30*	66.5	2

\*Worldwide Parking did not price any sensors in its 2<sup>nd</sup> BAFO.  
(AR at Ex. 17, at 2.)

The CO signed his acknowledgement of the TEP's recommendation on June 28, 2012. (AR at Ex. 17, at 4.) He also sent letters to WWP and Xerox notifying them of their ratings. (AR at Exs. 18, 19.) The CO then began negotiations with Xerox, the highest-rated offeror, pursuant to D.C. Code § 2-354.03(h).<sup>9</sup> (AR at Ex. 25.) The District has not made a contract award under the Solicitation. (AR 11.)

### III. Debriefing and Protest

On August 3 and August 31, 2012, WWP requested a debriefing. (AR at Ex. 20.) The debriefing was held on September 13, 2012. (AR at Ex. 22.) On September 24, 2012, WWP timely filed the instant protest with the Board.<sup>10</sup> (Protest.) WWP's initial protest grounds are as follows:

- (1) WWP conformed to the essential requirements of the RFP.
  - (2) The District did not fairly evaluate WWP's past performance and technical capability given its experience with the existing contract as a subcontractor.<sup>11</sup>
  - (3) WWP offered a substantially lower price—approximately \$50 million—than Xerox, yet the Contracting Officer did articulate [*sic*] in the debriefing how Xerox was technically superior to justify making the award to Xerox.
  - (4) The Dynamic Pricing issue was constantly changing throughout the procurement process and, therefore, should not have been a basis for evaluation.
  - (5) WWP demonstrated in its proposal superior management capability.
- Taken together, the DDOT Contracting Officer's decision was in error, arbitrary and contrary to the facts and law, and not in the best interest of the District.  
(Protest 5.)

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<sup>9</sup> D.C. Code §2-354.03(h) states, in relevant part, "(1) After ranking the prospective contractors, the contracting officer may elect to proceed with negotiations in accordance with paragraph (2) of this subsection. The contracting officer's decision shall not be subject to review. (2) If the contracting officer elects to proceed with negotiations, the contracting officer shall negotiate with the highest-ranked prospective contractor on price or matters affecting the scope of the contract, so long as the terms of the final contract are within the scope of the request for proposals."

<sup>10</sup> On February 8, 2013, the protester requested that the Board permit it to engage in discovery. During a telephone status conference with the parties on March 7, 2013, we held that WWP had failed to show that discovery was necessary to aid the Board in a just resolution of the protest. *See Carter Fuel Oil Co.*, CAB No. P-0208, 39 D.C. Reg. 4263, 4267 (July 12, 1991) ("[t]he purpose of discovery is to aid the Board in a just resolution of the protest, not to enable a protestor to conduct a fishing expedition so as to develop the grounds of its protest"). Accordingly, the Board denied protester's discovery request.

<sup>11</sup> During its performance as the incumbent asset manager to the District, Xerox has retained WWP as its subcontractor. (WWP's Comments 5.)

Following its review of the AR, WWP synthesized its allegations into three main protest grounds: (1) the agency debriefing was inadequate; (2) the evaluation of protester's proposal was not fair and reasonable and did not comply with District law; and (3) DDOT did not act in the best interest of the District. (Protester's Comments on the AR (hereinafter "WWP's Comments") 1-2.)

## DISCUSSION

### *Board Jurisdiction*

We exercise jurisdiction over this protest and its underlying allegations pursuant to D.C. Code § 2-360.03(a)(1) (2011).

#### **I. An Inadequate Debriefing is Not a Valid Protest Ground**

WWP argues that DDOT delivered an inadequate debriefing which therefore "raises questions of the fairness and equitable treatment of WWP during the evaluation process." (WWP's Comments 2.) However, an inadequate debriefing does not, by itself, constitute a valid protest ground since a debriefing has no bearing on the District's source selection activity. Rather, a debriefing is, by definition, a post-source selection activity. The Government Accountability Office ("GAO") (which the Board finds to be persuasive authority)<sup>12</sup> has similarly held that, "the adequacy and conduct of a debriefing is a procedural matter that does not involve the validity of" a contract award. *Eggs and Bacon, Inc.*, B-310066, 2007 CPD ¶ 209, n.4 (Comp. Gen. Nov. 20, 2007) (citing *Healthcare Tech. Solutions Int'l*, B-299781, 2007 CPD ¶ 132 at 5 (Comp. Gen. July 19, 2007); see also *Thermolten Tech, Inc.*, B-278408, 98-1 CPD ¶ 35 at \*4 (Comp. Gen. Jan. 26, 1998) (holding, in part, that "the purpose of a debriefing is not to give offerors the opportunity to cure deficiencies for the instant procurement, but to furnish the basis for the selection decision and contract award"). Accordingly, the Board denies WWP's protest ground concerning the alleged inadequacy of its debriefing.

#### **II. WWP's Protest Ground Concerning the Solicitation Is Untimely**

WWP further contends that the Solicitation contained multiple flaws. These alleged flaws include improper and/or confusingly-formatted pricing workbook templates, and an inconsistent and poorly-defined approach to dynamic pricing. (See generally, WWP's Comments 3-10.) Specifically, the protester states that "the District did not clearly set forth in Amendment 10 what elements of the two option workbooks would be combined to produce the final price in each workbook." (WWP's Comments 3.) As such, "WWP asserts that the calculated results in the workbooks are not trustworthy [in] that they cause confusion." (*Id.*) In considering these allegations, the Board notes that these purported improprieties would have been apparent to protester as soon as it reviewed the RFP.

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<sup>12</sup> See *Potomac Techs., Inc.*, 36 D.C. Reg. 4045 at 4052, 1989 WL 508650 (DC CAB Feb. 13, 1989) ("[w]hile the Board is not bound by the decisions of the Comptroller General, this large body of federal government contracting law is frequently helpful and persuasive when we are confronted with similar factual situations"). In addition, "[t]he protest authority and procedures of this Board were patterned on those of the GAO." *In re Prison Health Servs., Inc.*, CAB No. P-0610, 48 D.C. Reg. 1503, 1507 (Mar. 16, 2000).



However, the Solicitation expressly states that, “[a] protest based on alleged improprieties in a solicitation which are apparent prior to proposal opening or the time set for receipt of initial proposals shall be filed with the Board prior to proposal opening or the time set for receipt of initial proposals.”<sup>13</sup> (AR at Ex. 1, § L.7.) Therefore, protest grounds concerning any alleged improprieties in the RFP needed to be asserted prior to February 13, 2012, the deadline for receipt of initial proposals. This requirement applies equally to any amendments to the Solicitation whereby protest grounds concerning improprieties in an amendment need to be filed prior to the time set for receipt of the corresponding proposals or BAFOs. In *Capitol Entm’t Servs., Inc.*, CAB No. P-0932, 2013 WL 2453772 (May 22, 2013), we held that two protest grounds were untimely because they were based on Amendment 2 to the Solicitation yet the protest was filed more than a month after BAFOs were due. *See also, West Group*, CAB No. P-0612, 48 D.C. Reg. 1550 (June 8, 2000) (holding that where a solicitation with a submission deadline of June 22, 1999, had been cancelled then reissued with a revised deadline of January 7, 2000, the deadline for filing a protest based on an alleged solicitation impropriety was January 7, 2000, the date for submission of revised proposals). The Board finds that WWP’s protest ground pertaining to the terms of the Solicitation, and any amendments thereto, is untimely.

### **III. The District Fairly and Reasonably Evaluated Protester’s Proposal**

WWP alleges that the “evaluation of WWP’s proposal was not fair and reasonable and did not comply with District law.” (WWP’s Comments 3.) Specifically, WWP argues that the CO and the TEP erred in their analysis of WWP’s proposed PMMS and that “[i]n proposing to use CYIOS, WWP offered the District an exceptionally qualified firm that was [experienced in] implementing complex computer database services. . . .” (*Id.* at 6.)

However, as the Board explained in *Health Right, Inc.*, “[i]n determining the propriety of an evaluation decision, we examine the record to determine whether the judgment was reasonable and in accord with the evaluation criteria listed in the solicitation and whether there were any violations of procurement laws or regulations. *Health Right, Inc., D.C. Health Coop., Inc., & The George Washington Univ.*, CAB Nos. P-0507, P-0510, P-0511, 45 D.C. Reg. 8612, 8636 (Oct. 15, 1997) (citing *Halter Marine, Inc.*, B-255429, 94-1 CPD ¶ 161 (Mar. 1, 1994); *Sw Marine, Inc.*, B-265865, 96-1 CPD ¶ 56 (Jan. 23, 1996); *Biochemical Genetics*, CAB No. P-0470, 44 D.C. Reg. 6795 (Feb. 25, 1997)).

Upon reviewing the record in the instant case, the Board finds that there has been a valid exercise of judgment by the CO<sup>14</sup> and, therefore, we will not “substitute our judgment for that of the [CO].” *See Health Right*, CAB Nos. P-0507, P-0510, P-0511, 45 D.C. Reg. at 8637. Although the protester alleges that the CO merely “adopted the evaluation results of the TEP” without conducting an independent evaluation of the proposals, the record indicates otherwise. The CO indicated his own review of the offeror proposals in the March 15, 2012, deficiency

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<sup>13</sup> See D.C. Code § 2-360.08(b)(1); CAB Rule 302.2(a).

<sup>14</sup> The TEP presented its finding to the CO who acknowledged its receipt for his further review and final selection. (AR at Ex. 17, at 4.)

letters to the offerors.<sup>15</sup> (*See* AR at Exs. 6(a), 6(b).) Furthermore, the offerors had substantial discussions with the District over the course of many months—including oral presentations—in addition to extensive correspondence between the CO and the offerors concerning the contents and deficiencies of the offerors’ proposals. The CO also regularly amended the Solicitation to address questions and feedback that he received from WWP and Xerox.

The Board acknowledges that although the CO signed the TEP’s evaluation, there is no contemporaneous documentation of the CO’s decision to adopt the TEP’s recommendation.<sup>16</sup> However, a substantial body of contemporaneous evidence reveals a CO who was engaged throughout the conduct of this procurement with both the offerors and the TEP. Accordingly, the facts of the instant protest are readily distinguished from those in *Health Right* where we found that the contracting officer merely “adopted” the (poorly-documented) evaluation of a technical evaluation board (“TEB”).<sup>17</sup> *Health Right, Inc.*, CAB Nos. P-0507, P-0510, P-0511, 45 D.C. Reg. at 8637. In that case, the record did not show any discussion between the District and the offerors, any discussion between the contracting officer and the TEB, and there was no final evaluation/selection report by the TEB. (*Id.*) Therefore, contrary to our findings in the present case, in *Health Right* we held that the CO could not have made a valid exercise of judgment when she “adopted” the evaluation results of the TEB. (*Id.*)

Lastly, the CO informed the protester of a number of deficiencies in its proposal. (AR at Exs. 6(a), 13(a).) Indeed, the CO stated that protester’s PMMS created “a risk to success in the District’s evaluation.” (AR at Ex. 6(a), at 2.) Yet, WWP failed to correct the identified deficiencies and failed to comply with the CO’s request to provide a contingency plan in the event that its proposed PMMS was not timely developed. In its 2<sup>nd</sup> BAFO, the protester even failed to list pricing for the sensor installation,<sup>18</sup> an item which was central to the District’s interest in dynamic pricing. Together, these concerns reasonably formed the basis for WWP’s lower ranking. Finding no evidence that any procurement laws or regulations have been violated during the evaluation of the offeror proposals, the Board denies this protest ground of WWP.

#### **IV. A Contracting Officer’s Decision to Begin Negotiations with the Highest-Ranked Offeror is Not, by Itself, Reviewable by the Board**

The protester alleges that the CO did not act in the best interest of the District when he began negotiations with Xerox, the highest-ranked offeror, particularly since WWP’s proposed price was \$50 million lower than Xerox’s. However, the Solicitation makes clear that price alone would not serve as the basis for contract award. Indeed, the Solicitation indicated that an

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<sup>15</sup> The CO’s letters state, “[i]n review of your submission for the Asset Management Services . . .” (AR at Exs. 6(a), 6(b).)

<sup>16</sup> In his declaration, the CO simply states that he “took the recommendation of the TEP.” (AR at Ex. 25, ¶ 26.)

<sup>17</sup> The facts of the instant protest serve to distinguish it from other protests sustained by the Board due to a contracting officer’s abdication of its responsibilities in clear violation of procurement law. *See, RideCharge, Inc.*, CAB No. P-0921, 2012 WL8021681 (Nov. 9, 2012) (holding that the single document produced by the contracting officer during the evaluation process was insufficient to substantiate his decision to exclude all but one offeror from the competitive range); *Citelum DC, LLC*, CAB No. P-0922, 2013 WL1952320 (Mar. 1, 2013) (sustaining the protest because, in part, the District failed to even identify the contracting officer responsible for conducting the procurement).

<sup>18</sup> *See* AR at Ex. 15(a)(1), at 7.

offeror's technical proposal was the most important factor in DDOT's best value analysis by allocating a total of 70 points (~63%) for technical capability and 30 points (~27%) for pricing. Furthermore, WWP did not include pricing for sensors in its 2<sup>nd</sup> BAFO; therefore, the actual price to the District would have been higher. (AR at Ex. 17, at 2.)

Besides, the CO's decision to enter into negotiations with Xerox is not reviewable by the Board, pursuant to D.C. Code § 2-354.03(h). In relevant part, § 2-354.03(h)(1) states that a contracting officer's decision to enter into negotiations with the highest-ranked offeror on matters concerning price and the scope of the contract "shall not be subject to review." The Board also notes that WWP remains eligible for award should the CO's negotiations with Xerox conclude unsatisfactorily.<sup>19</sup> Therefore, the Board denies WWP's protest ground regarding DDOT's contract negotiations with Xerox.

### CONCLUSION

For the reasons set forth herein, we hold that (i) protester's allegations concerning the inadequacy of its debriefing do not constitute a valid basis for protest; (ii) protester's arguments concerning the terms of the Solicitation are untimely; (iii) the District's evaluation of protester's proposal was fair, reasonable, and in accordance with District law; and (iv) the CO's decision to enter into negotiations with the highest-ranked offeror is not reviewable by the Board pursuant to D.C. Code §2-354.03(h). Accordingly, the present protest is denied.

### SO ORDERED.

DATED: June 28, 2013

/s/ Maxine E. McBean  
MAXINE E. MCBEAN  
Administrative Judge

### CONCURRING:

/s/ Marc D. Loud, Sr.  
MARC D. LOUD, SR.  
Chief Administrative Judge

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<sup>19</sup> Under D.C. Code § 2-354.03(h)(2), if a satisfactory contract cannot be negotiated with the highest-ranked prospective contractor, the contracting officer may negotiate the terms of the contract with the 2<sup>nd</sup> most qualified prospective contractor or lower-ranked prospective contractor in order of ranking until a satisfactory contract can be awarded.

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