GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTESTS OF:

HEALTH RIGHT, INC.,	)	
D.C. HEALTH COOPERATIVE, INC., and	)	
THE GEORGE WASHINGTON UNIVERSITY HEALTH PLAN	)	CAB Nos. P-507, 510, and 511 (Consolidated)
	)	
Under Solicitation No. 7010-AA-NS-2-CR	)	

For the Protester Health Right, Inc.: Edward T. Waters, Esq., and Kathy S. Ghiladi, Esq., Feldesman, Tucker, Leifer, Fidell & Bank. For the Protester D.C. Health Cooperative, Inc.: Laurence Schor, Esq., and Brian T. Scher, Esq., McManus, Schor, Asmar & Darden. For the Protester The George Washington University Health Plan: Keith J. Harrison, Esq., and Jeffrey L. Poston, Esq., King, Pagano & Harrison. For the Intervenor D.C. Chartered Health Plan, Inc.: Charles R. Work, Esq., and Donald J. Kissinger, Jr., Esq. For the Intervenor American Preferred Provider Plan, D.C., Inc.: Thomas C. Papson, Esq., and Patrick K. O'Keefe, Esq., McKenna & Cuneo. For the Intervenor Capital Community Health Plan: Thomas C. Wheeler, Esq., and David P. Handler, Esq., Piper & Marbury. For the Intervenor Prudential Health Care Plan, Inc.: Michelle T. Waldman, Esq. For the District of Columbia: Warren J. Nash, Esq., and Howard Schwartz, Esq., Assistants Corporation Counsel.

Opinion by Administrative Judge Jonathan D. Zischkau, with Chief Administrative Judge Lorilyn E. Simkins and Administrative Judge Phyllis W. Jackson, concurring.

OPINION

Health Right, Inc., filed a protest challenging the proposed award of contracts to four of seven offerors under a solicitation to provide health care services to the Aid to Families with Dependent Children ("AFDC") and AFDC-related population through the District of Columbia medical assistance (Medicaid) program. Two of the other offerors, D.C. Health Cooperative ("DCHC") and The George Washington University Health Plan ("GW Health Plan") subsequently filed protests raising additional protest grounds. As supplemented, the protesters' claims may be categorized as follows: (1) the contracting agency improperly conducted the evaluation and selection when it used the procurement regulations found at 27 DCMR Chapter 19 (regulations governing Brooks Act-type procurements) rather than the procedures for competitive sealed proposals found at 27 DCMR Chapter 16; (2) the selection was flawed because it was based on an arbitrary and irrational technical evaluation and (a) evaluators employed unannounced evaluation criteria or subcriteria or otherwise departed from the evaluation criteria announced in the solicitation, (b) the evaluators relied on information learned outside the proposal review process, (c) the evaluators improperly established a baseline of zero for the assignment of point scores because all offerors met the solicitation's minimum requirements and improperly awarded

"bonus points" to proposals that exceeded the minimum requirements, (d) the evaluators unfairly treated the protesters' proposals by giving higher evaluation scores to the four selected firms and lower evaluation scores to the protesters without objective basis, and (e) the evaluation scheme as applied gave disproportionate weight to non-price evaluation factors since two of the protesters had significantly lower prices than the four selected offerors; (3) the agency failed to conduct meaningful discussions; (4) a remedial order issued by the United States District Court in *Salazar v. District of Columbia* substantially changed the terms of the solicitation after initial proposals had been submitted and evaluated but the agency failed to issue an amendment requesting new proposals; (5) the agency failed to incorporate a legally-binding stipulation when it refused to give Health Right's parent corporation a direct contract to provide services as a federally qualified health center; (6) DCHC was entitled to receive preference points for purposes of evaluation pursuant to the District's Equal Opportunity for Local, Small, and Disadvantaged Business Enterprises Act; (7) the Mayor, in referring the proposed contracts to the Council of the District of Columbia and urging their approval, and certain members of the Council, in voting to approve the proposed contracts, violated federal code of conduct requirements set forth at 45 C.F.R. § 74.42 by receiving campaign contributions from two of the successful offerors; (8) the procurement violates D.C. Code § 1-359; and (9) the contracts awarded to the intervenors fail to include required clauses.

We conclude that the District violated procurement requirements in conducting the evaluation of proposals and in the selection of offerors. From the record presented to us, we conclude that the evaluations failed to meet the standards of reasonableness and rationality required by law. Presented with woefully inadequate documentation of the scope, content, and consensus results of the evaluation by the technical evaluation board ("TEB"), and the lack of meaningful discussions with the offerors, the contracting officer conducted no independent evaluation of the offerors, made no meaningful review of the TEB's actions, and made no record supporting the evaluation of any offeror much less a comparative evaluation of all the offerors. Therefore, the contracting officer improperly adopted the TEB's rankings and her selection decision cannot be sustained. Other protest grounds are either untimely, invalid grounds for protest, or not sustainable on the merits.

The protests, as supplemented, are sustained in part, dismissed in part, and denied in part. Because the Board has sustained the Director's determination to proceed with award and performance to the four intervenors, and based on the circumstances attending to this important procurement, sending the matter back to the contracting agency to conduct meaningful discussions, receive best and final offers, and conduct a proper re-evaluation is neither possible nor in the bests interests of the District. Therefore, the Board directs the contracting officer to negotiate contracts with DCHC, GW Health Plan, and Health Right under terms consistent with the contracts awarded to the intervenors including the modifications required by the *Salazar* Amended Remedial Order. Because the contracting officer never performed a valid evaluation and the TEB's technical evaluation, to the extent that it can be discerned, was seriously flawed and essentially undocumented, it is not clear which firms the contracting officer would rank first and second based on technical and price under a new evaluation. Therefore, the District shall modify the

contracts recently awarded to D.C. Chartered Health Plan and Capital Community Health Plan by eliminating the provision which provides two-thirds of the "default" or automatic assignments to D.C. Chartered and one-third of the automatic assignments to Capital Community. The District shall divide automatic assignments proportionally among all the managed care contractors, subject *inter alia* to the District's right under Article 1.G.2.d of the contract to adjust the rate of automatic assignments if a contractor fails to comply with the terms of its contract.

BACKGROUND

On October 21, 1996, a contracting officer with the Department of Administrative Services ("DAS"), issued Solicitation No. 7010-AA-NS-2-CR requesting proposals, including completed Qualification Data Forms ("QDFs"), from qualified Managed Care Organizations ("MCOs") to provide managed health care services to the Aid to Families with Dependent Children ("AFDC") and AFDC-related population through the District of Columbia medical assistance (Medicaid) program. (Agency Report ("A.R.") Ex. 1). The cover letter accompanying the solicitation announced that the District was seeking at least four contractors to provide managed health care services to Medicaid recipients in the District of Columbia. The cover letter also stated that these services were being procured pursuant to the District's medical and human care services regulations found at 27 DCMR §§ 1905 to 1912; that an evaluation board would review the QDFs and responses to the solicitation, evaluate the firms, hold discussions with at least four of the most qualified firms and prepare a selection report for the contracting officer listing in order of preference the four firms most highly qualified to perform the work; and that the contracting officer would attempt to negotiate a satisfactory contract with the four most highly qualified firms.

In *CorVel Corp.*, CAB Nos. 482, 490, Aug. 22, 1997, 8 P.D. 7351, we recently reviewed the District's procurement regulations governing medical and human care services which are based on the federal Brooks Act procedures for architectural and engineering services procurements. The traditional approach under the Brooks Act as well as the District's regulations at 27 DCMR Chapter 19 is for an evaluation board to rank firms submitting QDFs based only on their technical qualifications, followed by the contracting officer's selection of the most highly qualified firm, a request for a proposal from that firm, followed by negotiations with the firm to achieve a fair and reasonable price. If the contracting officer is unable to obtain a fair and reasonable price from the most highly qualified firm, then the contracting officer terminates negotiations and commences negotiations with the second most qualified firm, and so on, until agreement is reached. *See id.* at 7352; 27 DCMR §§ 1905-1907, 1911.

DAS acted as the contracting agency for the Commission on Health Care Finance ("CHCF") which was initially part of the Department of Human Services ("DHS") but later became part of the Department of Health. (Solicitation Section C.1.1; Moorman Dep. 19). CHCF is the agency responsible for administering the District's Medicaid program. During the procurement, DHS had provider agreements with six MCOs and with 270 primary care physicians (PCPs) to serve the health care needs of recipients in the District's Medicaid Managed Care Program

("MMCP"). (Solicitation Section C.2.1). Under the new program which is the subject of the solicitation, recipients currently assigned to a fee-for-service provider will be required to choose from among the selected MCOs. Recipients currently enrolled with an MCO that is not selected also will be required to choose from among the selected MCOs. (C.2.2.2). Recipients who do not choose an MCO will be assigned by default (automatic assignment) to an MCO by the CHCF. (C.2.3, Amendment No. 5).

Under the solicitation, as amended: (1) MCOs must provide to recipients necessary health, maintenance, preventive, and treatment services through a network of physicians, hospitals, and ancillary providers (C.4.2); (2) MCOs are prohibited from soliciting Medicaid recipients (C.5.2); (3) the CHCF will transition from the existing program to the new program during a period of six months (C.6.2); (4) MCOs are required to allow enrollees to choose among its participating PCPs (C.6.6); (5) PCPs are not permitted to care for more than 2000 recipients (C.6.9); (6) MCOs must provide education and outreach to recipients (C.7); (7) MCOs must establish and maintain a quality assurance program to monitor the quality, appropriateness, and timeliness of services performed (C.8); (8) MCOs must submit performance measuring and encounter data to the CHCF (C.9); (9) MCOs must submit financial data to the CHCF (C.10); (10) escrow requirements to be maintained by the MCOs are established (C.11); (11) accessibility requirements for providing services to members is established (C.16); (12) MCOs must assure that each child recipient receives Well Child/EPSDT (Early Periodic Screening, Diagnostic, and Testing) services required by the District's Well Child Program and provide coordination of services required by federal EPSDT guidelines (C.16.4, C.16.5, C.26); (13) MCOs must provide recipients access to federally qualified health center ("FQHC") services (C.19); (14) MCOs must ensure that recipients have access to pharmacy, hospital, and emergency services (C.23-C.25); and (15) CHCF will pay each MCO a prospective monthly capitation rate, as negotiated, for each member enrolled with the MCO (C.13).

Section M of the solicitation as initially issued, addressing the factors to be used in evaluating proposals, stated that evaluation would be made in accordance with 27 DCMR § 1905.5. Section 1905.5 provides:

> The contracting officer shall evaluate each potential contractor based on the following criteria:
>
> (a) Professional qualifications necessary for satisfactory performance of the required services;
>
> (b) Specialized experience and technical competence in the type of work required;
>
> (c) Capacity to accomplish the work in the required time;
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> (d) Past performance on contracts with the District, other governmental

entities, and private industry in terms of cost control, quality of work, and compliance with performance schedules; and

(e) Acceptability under other appropriate evaluation criteria.

Section M in the original solicitation tracked the language of section 1905.5, identifying the following technical criteria with accompanying maximum points for each:

- Professional qualifications necessary for satisfactory performance of the required services (5 points);
- Specialized experience and technical competence in the type of work required (40 points);
- Capacity to accomplish the work specified in the Statement of Work (25 points);
- Past performance on contracts with District, other governmental entities and private industry in terms of cost control, quality of work and compliance with performance schedules (10 points); and
- Financial Stability (15 points).

In Section M.2.2, more information is provided concerning the evaluation under each criterion. We quote the language in full later in this opinion during our analysis of the evaluation of proposals. Section M also provided for the award of preference points to qualifying firms (Local Business--5 points, Disadvantaged Business--5 points, Business located in an Enterprise Zone--2 points).

On November 5, 1996, Health Right filed a pre-submission protest alleging solicitation improprieties including the following:

(1) The solicitation violated the Medicaid/Medicare Anti-Kickback Act (42 U.S.C. § 1320a-7b(b) by inducing proposed contractors to offer remuneration to the District and D.C. General Hospital under Section C.2.2.4.2. of the solicitation in return for one-third of the default patients;

(2) The solicitation violated 31 U.S.C. § 1301(a) by requiring a prospective contractor to make an "up-front" financial investment in the physical plant of D.C. General Hospital, over and above the amount of federal funds appropriated by Congress for D.C. General Hospital;

(3) The solicitation violated 45 C.F.R. Part 74, which requires that price must be a factor in awarding contracts funded by grants subject to 45 C.F.R. Part 74; and

(4) The solicitation adversely affected a Medicaid recipient's ability to receive services from federally qualified health centers, thereby violating the Social

Security Act (which governs the Medicaid program).

The District resolved the first two protest grounds by issuing solicitation Amendment No. 5 on November 26, 1996, which removed the challenged terms. Regarding the third protest allegation, the District responded that the solicitation complied with the Medical and Human Care Services procurement procedures set forth in 27 DCMR Chapter 19 and that those procedures complied with the federal requirements set forth in 45 C.F.R. Part 74. The parties to the protest and the Board agreed to refer the issue to the U.S. Department of Health and Human Services ("HHS") for an interpretation of their regulations. *See* Board Order dated December 9, 1996. On January 6, 1997, HHS responded to the referral concerning the propriety of conducting a Chapter 19 Brooks Act-type procurement where price is not a competitive evaluation factor. Based on its interpretation of 45 C.F.R. Part 74 and other federal regulations, HHS advised the District that price was required to be a factor in the competitive selection and that a process under which price is considered only after the competitive selection decision is inconsistent with that requirement. The HHS opinion provides in pertinent part:

> We conclude that the District's procedures are inconsistent with 45 C.F.R. section 74.43 because we read that provision to require that price be among the factors to be considered by federal grantees when determining the group of offerors with whom the grantee will negotiate. The two-tiered approach undertaken by the District allows for consideration of price only after that group has been determined. Section 74.43 contains no suggestion that price should be regarded as categorically less important than quality or other factors, which is an automatic consequence of addressing price only after a tentative selection has been made based on other factors. . . . [W]e do not believe it is reasonable to interpret 45 C.F.R. section 74.43 to permit a practice which allow grantees to categorically regard price as less important than other factors where (with very limited exceptions) the FAR specifically prohibits the Federal Government itself from doing so. We know of no reason why the conservation of federal funds should be any less important simply because the funds in question will be expended by a grantee, and not the Government itself.

(A.R. Ex. 13, attachment). In a protest conference held on January 9, 1997, memorialized in a Board order dated January 13, 1997, the District informed the Board of HHS's opinion letter and of the District's intent to issue another amendment which would revise the solicitation "to provide for a one-step procurement and price as a competitive evaluation factor." (A.R. Ex. 14). On January 10, 1997, the contracting officer issued Amendment 10, adding *inter alia* a new Section C.42 to the solicitation, stating:

> C.42.1 The District Government may award a contract resulting from this solicitation to the responsible offerors whose offer conforming to the solicitation will be most advantageous to the District Government, in terms of price, technical and other factors specified

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elsewhere in this solicitation.

C.42.2 The District Government may award a contract on the basis of initial offers received, without discussion. Therefore, each initial offer should contain the offeror's best terms from a standpoint of price, technical and other factors.

Amendment 10 also added a 25-point price evaluation factor, while reducing the "Capacity to Accomplish the Work" and the "Specialized Experience and Technical Competence" criteria by 10 points each and the "Financial Stability" criterion by 5 points. Thus, in its final amended form, the solicitation provided the following evaluation criteria with the indicated maximum points for each:

- Professional qualifications necessary for satisfactory performance of the required services (5 points);
- Specialized experience and technical competence in the type of work required (35 points);
- Capacity to accomplish the work specified in the Statement of Work (15 points);
- Past performance on contracts with District, other governmental entities and private industry in terms of cost control, quality of work and compliance with performance schedules (10 points);
- Financial Stability (10 points); and
- Price (25 points).

Amendment Nos. 8 and 9 to the solicitation had been issued earlier in January 1997 to address other protest grounds raised by Health Right and DCHC, which also filed a protest challenging the solicitation. The closing date for proposals was January 21, 1997.

On January 21, 1997, DAS received seven timely responses to the solicitation. They were from the following firms:

1. D.C. Health Cooperative (A.R. Ex. 2)
2. GW Health Plan (A.R. Ex. 3)
3. Capital Community Health Plan ("Capital Community") (A.R. Ex. 4)
4. Health Right (A.R. Ex. 5)
5. D.C. Chartered Health Plan ("D.C. Chartered") (A.R. Ex. 6)
6. American Preferred Provider Plan, D.C., Inc. ("American Preferred") (A.R. Ex. 7)
7. Prudential Health Care Plan, Inc. ("Prudential") (A.R. Ex. 8)

Also on January 21, 1997, the United States District Court for the District of Columbia issued a remedial order in *Salazar v. District of Columbia*. Pursuant to the *Salazar* remedial order, the District had to ensure that, beginning no later than November 1, 1997, District children

eligible for Medicaid would be contacted for EPSDT services, including EPSDT screens, laboratory tests, immunizations, follow-up treatment and other services. During the negotiations that resulted in the Medicaid managed care contracts recently awarded to the intervenors, the contractors were required to agree to the additional requirements, particularly those relating to EPSDT services, mandated by the *Salazar* court in its remedial order as amended on May 5, 1997. (A.R. Ex. 30).

On January 24, 1997, the consolidated solicitation protests of Health Right and DCHC were voluntarily dismissed. (A.R. Ex. 15).

By memorandum dated January 30, 1997, Mr. Dallas Evans, the DAS Director, appointed a five-member technical evaluation board ("TEB") to evaluate proposals submitted by the seven offerors. (A.R. Ex. 16). They were: Mr. Ron Lewis, Deputy Commissioner of Health Care Finance, who was appointed as chairman of the TEB; Mr. Dan Manyindo, Special Assistant, Office of the City Administrator; Ms. Jane Thompson, Chief, Managed Care Section, CHCF; Terri Thompson, Esq., Acting Deputy, DHS's Office of General Counsel; and Mr. Edward Williams, Program Analyst, Income Maintenance Administration, DHS. (A.R. at 21-22). Copies of the offerors' technical proposals were distributed to the TEB. The contracting officer retained the offerors' price proposals.

On February 7, 1997, the TEB chairman, Mr. Lewis, and the contracting officer, who was the source selection authority, conducted an orientation session for the TEB members. At the orientation, the contracting officer stressed that in scoring the proposals the evaluators had to "give a narrative to discuss or justify why they gave the points that they gave." (Moorman Dep. 74). By memorandum dated February 10, 1997, Mr. Lewis distributed a schedule for the evaluation of the offerors' proposals to the members of the TEB. (A.R. Ex. 18). The TEB met a number of times during February 1997. Ms. Jane Thompson initially prepared a two-page chart, entitled "Technical Evaluation Review," to summarize the evaluation criteria and the maximum points for each, because the solicitation and the many amendments "were so confusing to follow." (Thompson Dep. 103-04, 109; Thompson Dep. Ex. 5, at 2-3). After discussions with Mr. Lewis, Ms. Thompson prepared a 13-page chart (Thompson Dep. Ex. 5, at 4-16) to "give more clarification about each of the different [evaluation] areas" and to help the TEB members in evaluating and scoring proposals. (Thompson Dep. 104). The 13-page chart was a "work-in-progress" during the early TEB meetings, as the TEB members reviewed the solicitation and discussed what the solicitation evaluation criteria meant. (*Id.* at 106). The TEB did not use the 13-page chart subsequently because, according to Ms. Thompson, the TEB felt it was not fair to subcategorize the evaluation criteria (with their own point system) as the chart did since this information was not identified in the solicitation. (*Id.* at 109-11).

In the TEB meetings both before and after the members read the proposals, the members discussed how they were going to evaluate the proposals. (*Id.* at 113). Ms. Jane Thompson did not take any notes of those meetings and does not recall whether other TEB members took notes. (*Id.* at 107-08). If any notes were taken, they no longer exist.

Because of questions with regard to the proposals, the TEB decided it was not going to score the proposals until after the TEB had an opportunity to discuss the proposals with the offerors. (Moorman Dep. 101). Mr. Lewis contacted the contracting officer and asked if it was permissible for the TEB to meet with offerors to discuss some areas of concern in the offerors' proposals. The contracting officer said that it was permissible so long as discussions were conducted with all offerors. (*Id.* at 100-02). Between March 3 and March 10, 1997, some TEB members conducted discussions with representatives of all offerors. During the discussions, offerors made presentations, TEB members asked questions and follow-up questions, and the discussions were a "give-and-take" exchange. (*See, e.g., id.* at 157). During DCHC's discussions, the TEB requested information from DCHC regarding the incentives it would provide for certain services if it was awarded a contract and the percentage of commercial enrollment. The TEB expressed doubts about the capacity of DCHC's computer hardware to handle an unstated volume of Medicaid enrollment. DCHC responded that its software vendor assured DCHC that the hardware was more than adequate to handle the expected number of enrollees and could be expanded if required. (DCHC Protest, Ex. 5). The computer hardware capacity was the only perceived weakness raised by the TEB during its discussions with DCHC. During Health Right's discussions, the TEB asked about matters such as information systems, financing, and case management. The TEB did not ask about Health Right's quality assurance plan or past performance on contracts. (Protesters' Joint Response, Ex. 9). During discussions with representatives of GW Health Plan, the TEB did not express any concerns about staffing turnover, a proposed sale of the GW Hospital, or the GW Health Plan's financial stability. (Protesters' Joint Response, Ex. 2; Thompson Dep. 174-75). In fact, although the attending TEB members had concerns, uncertainties, and reservations with the various proposals, they did not discuss them during the sessions with the offerors' representatives, with the exception of the capacity of DCHC's computer hardware. (*E.g.*, Thompson Dep. 175). Not all TEB members attended all sessions. Although members took notes at the sessions, their notes no longer exist. (*See id.* at 157). The contracting officer never received any information concerning the discussions that were held with the offerors in March 1997. (Moorman Dep. 80-81, 99-100). No revised proposals or BAFOs were solicited after the discussions.

After the early March discussions, the TEB met a couple of times and "got comfortable" on how they were going to award points. (Thompson Dep. 158). By this time, they had agreed that all seven offerors had submitted technically competent and qualified proposals and met the solicitation's minimum requirements. (A.R. Ex. 33).

Using Ms. Thompson's disk containing the previously-rejected 13-page chart, Mr. Lewis had generated a 3-page document entitled "Medicaid Managed Care Evaluation Board Scoring Sheet" to replace the earlier 13-page chart. (Thompson Dep. 118; A.R. Ex. 26, at 4-6). The table format of the 13-page chart and Ms. Thompson's point system for subcategories were deleted. The text from the 13-page chart under the professional qualifications criterion was carried over essentially intact to the 3-page chart. For the specialized experience and technical competence criterion, the text of page 2 of the 13-page chart was included but all of the subcategory text was deleted. For the capacity to accomplish the work criterion, most of the text

remained unchanged. The text for the past performance and financial stability criteria were essentially the same. Ms. Thompson had also created a one-page score sheet form, entitled "Managed Care Proposal Evaluation" listing the five non-price criteria and containing a column for comments, one showing the maximum points allocated to each criterion, and a column for the score. That form was eventually used by the TEB members to score the proposals.

Each TEB member was given the 3-page document as a guide explaining how each of the evaluation criteria should be evaluated and scored. On the version of the 3-page document that appears in the record, there are two "assumptions" listed at the beginning of the document. The first assumption reads: "The Evaluation Board is reviewing organizations that meet minimum criteria for all categories; consequently, minimum qualifications for each category is a baseline score of zero." (A.R. Ex. 26, at 4). Ms. Thompson explained the baselining approach this way:

> And we, after much discussion with all five committee members, we decided that the best way to properly reflect the differences among the plans was to give points. I emphasize "give" because other methods you could say would take the 75 points as a given for everybody and start subtracting from there.
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> But the nature of this scope of work and the solicitation in general didn't work very well for that, giving everybody 75 and start taking away. We found, after much discussion, it really worked better for us to give points where we believe firms had a better plan to achieve the goals of the program to improve care for all of its members.

(Thompson Dep. 119). The baselining assumption consumed hours of the TEB's discussion. (*See also id.* at 120-21, 144).[1]

The other assumption on the 3-page guidance document read: "The network of DCGH [D.C. General Hospital] is eliminated from all plans for capacity determination, since all plans will offer a contract to D.C. General."

Later in March, Mr. Lewis tried to schedule a series of TEB meetings to score the proposals but had difficulties due to some of the members' schedules. (Thompson Dep. 158). Eventually, two meetings were held (March 21 and March 28, according to the dates found on most of the score sheets) at which scoring was done by most of the members. Each member individually filled out his or her own score sheet for one offeror, turned it into Mr. Lewis, and

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[1] Although the contracting officer on a number of occasions during the course of her deposition characterized the baselining assumption as meaning that all the offerors "could have been a managed care organization contractor" (*e.g., id.* at 70), the record demonstrates that the baselining assumption meant that each offeror's proposal met all solicitation requirements and that each offeror had submitted a technically competent and qualified proposal.

then began the scoring of the next offeror. (*Id.* at 159-60). Members completed their score sheets at different rates which explains why some are dated March 21 while others are dated March 28. (*Id.*). One member's score sheets all bear the date of March 31, except one sheet which is undated. This member attended some portion of one meeting but filled the score sheets out on his own after the meetings and sent them directly to Mr. Lewis. Someone else may have missed part of one or both meetings and filled out one or more score sheets outside the TEB meetings. (*Id.* at 160). Except for Mr. Lewis who collected all score sheets, the other members did not see the scoring of any other member. (*See id.* at 111-12). Because any final evaluating and the scoring were done individually, and each member did it differently, Ms. Thompson was able to testify at her deposition only as to how she evaluated proposals and awarded points. (*See,e.g., id.* at 124).

Mr. Lewis then took the scores from all the score sheets, added up the scores for each evaluation criterion for each offeror and then calculated an average score for each criterion by dividing the total by 5 and rounding to the nearest whole number. The average criterion scores for an offeror were then added to give a total technical score. (*Id.* at 161; A.R. Ex. 26, at 3). Mr. Lewis placed the results on a spreadsheet entitled "Bidder's Score Summary By Category." (A.R. Ex. 26, at 3). We summarize the document as follows:

Evaluation Criteria	Chartered Health	Capital Comm.	Prud-ential	APPP	GW	DCHC	Health Right
Prof. Qual.	4	4	3	2	2	2	2
Spec. Exp.	27	24	21	23	16	14	14
Capacity	11	11	10	10	6	7	5
Past Perf.	8	6	7	6	5	4	3
Fin. Stability	7	7	8	4	4	4	2
TOTAL	57	52	49	45	33	30	25

The sum of DCHC's criterion averages is 31, if rounding is done by criterion. This one-page spreadsheet was the TEB's "final report" for the contracting officer. (*Id.* at 161).

By cover memorandum dated (Friday) April 4, 1997 (A.R. Ex. 26 at 1), Mr. Lewis submitted the one-page "Bidder's Score Summary By Category" spreadsheet (*id.* at 3), a one-page document entitled "Managed Care Evaluation Technical Scores" listing the total technical score for each offeror taken from the spreadsheet's "Total" row (*id.* at 2), the 3-page evaluation guidance document (*id.* at 4-6), and the actual score sheets prepared by the TEB members for each

of the offerors (A.R. Exs.19-25). (*See* Moorman Dep. 81-82). This is the only documentation the contracting officer received concerning the evaluations. (Moorman Dep. 79-80, 81). Evaluators either did not prepare evaluation workpapers or their workpapers were destroyed. Neither the TEB collectively nor its chairman on behalf of the TEB prepared any evaluation memorandum giving the TEB's consensus evaluation of the proposals, relative differences among the proposals, their strengths, weaknesses, and risks. The score sheets, showing individual member's numerical scores and brief comments, were the only evaluation data prepared and transmitted to the contracting officer.

The contracting officer received the package the following Monday, April 7.[2] At the bottom margin of Mr. Lewis' cover memorandum, she made a handwritten note dated April 8 addressed to the contract specialist which reads: "I talked to Ron Lewis yesterday and advised him that we would now begin the price evaluation process." At her deposition, the contracting officer testified that she requested that Mr. Lewis meet with her on April 7 to discuss "how the [TEB] conducted their evaluations because the scores were very low." (*E.g.*, Moorman Dep. 65-66, 97-98). She testified:

> [We] had about a two hour discussion about how the [TEB] evaluated the proposals and the reason that I'm making the distinction is as I recall in the technical part of the proposal technical was worth 75 points. And the scores seemed to be very low to me and I needed an explanation as to why the scores were low.
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> And in the discussion with Mr. Lewis he explained to me the [TEB]'s methodology for evaluating the proposals that I was satisfied with. And I recall some of the specifics of our discussion and in that discussion Mr. Lewis explained to me that the [TEB] concluded all of the seven offerors were capable of being managed care organizations. So that was the baseline under which they started to review and score their proposals[,] [s]ince everybody could have potentially been one of the District's . . . Medicaid organization contract[or]s. The baseline that they used was to give points as opposed to deducting points, which is why the scores appeared low. And that was the discussion that I had with him.

(Moorman Dep. 66-67). In her testimony during these protest proceedings, the contracting officer states that she did not meet with anybody else concerning the technical evaluations. (*E.g.*, *id.* at 80). Other than one, earlier, very brief conversation with Mr. Lewis prior to March when Mr. Lewis asked for permission to conduct discussions with the offerors, and the April 7 two-hour meeting concerning the baselining methodology, the contracting officer did not have any discussion with Mr. Lewis or any of the other TEB members concerning their technical

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[2] In the Agency Report, the District states that the contracting officer received the April 4 transmittal on April 8. (A.R. at 23).

evaluations. She stated that she "didn't do anything or couldn't do anything" until after the TEB had evaluated the proposals, that "there was nothing that [she] could do until the [TEB] made a decision in terms of evaluation of the proposals," that she did not have "any discussion with any of the [TEB] members at any time about what their duties and responsibilities were," and that her "sole discussion has been with Mr. Lewis." (*See,e.g., id.* at 55-67, 71-74, 78-84, 89-100).[3]

The contracting officer received an explanation of the *methodology* of the scoring by starting with a baseline of zero for each offeror, but she does not know "exactly how [the TEB] scored the proposals other than what [she] read." (*E.g., id.* at 71).[4] She did not see her role as contracting officer to include independently reviewing the technical proposals. (*Id.* at 55-57, 72). She did not know the point scheme employed by the evaluators (*id.* at 74) and does not know what documents the TEB members had with them when they were doing the scoring (*id.* (Vol. 2) at 66-67). Although she testified that she *believed* the actual scoring sheets of the evaluators "supported" the scoring charts and the 3-page "summary"[5] furnished by Mr. Lewis as the "technical evaluation report", she could not even affirm that statement because she "did not have that level of discussion with Mr. Lewis." (*Id.* at 96; *see also id.* at 86-88). When asked whether she relied primarily on the individual scoring sheets to make her own determination, she replied "No. That's not my testimony at all." (*Id.* at 98).

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[3] The contracting officer previously testified that she had conducted an orientation with the TEB members on February 7, 1997, advising the TEB members of their "duties and responsibilities" as TEB members. Her testimony that she did not discuss with TEB members at any time "about what their duties and responsibilities were" means, consistent with her other testimony, that she had no discussions with the TEB members concerning their evaluations of the proposals, the March discussions, or their scoring.

[4] Later in her deposition, she stated that her discussion with Mr. Lewis was to learn why the scores were so low, and "what was the rationale and the methodology that was used to score the proposals." We find, based on our reading of the entire deposition, and the evaluation and selection documentation of record, that "rationale" as used by the contracting officer here means no more than the *reasons for using* the baselining "methodology." It does not refer to her inquiring into the specific substance of their evaluations, either individually or collectively. That line of inquiry she did not pursue.

[5] The contracting officer seemed to think that the evaluation guidance document constituted in some way a summary of the TEB's substantive evaluation. (*Id.* at 95-97). We believe it is more accurate to say that the document represents guidance on how TEB members should evaluate proposals. With regard to the first "assumption" concerning baselining, it appears that the TEB members followed this guidance when actually scoring the proposals. When it came to explaining the rationale for the technical evaluations and scoring, her deposition testimony reveals that she deferred to Mr. Lewis because she had no knowledge about the technical evaluations or the proposals.

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By memorandum dated April 9, 1997, the contracting officer transmitted copies of the offerors' price proposals to Mr. Lewis for review by members of the TEB. (A.R. Ex. 27). From the contracting officer's testimony, and the record as a whole, it appears that the price evaluation was conducted by Ms. Jane Thompson, Mr. Lewis, and the contracting officer, with the assistance of a CHCF consultant (Moorman Dep. 103-07).

By memorandum dated May 1, 1997, the contracting officer transmitted a report to Mr. Michael Rogers, City Administrator, setting forth the status of the procurement as of that date. (A.R. at 5; A.R. Ex. 28). This status report was prepared because the contracting officer had been required to report to the *Salazar* court concerning the status of the procurement. (Moorman Dep. 31, 108). The court was concerned with the ultimate terms of the MCO contracts and the District's compliance with its remedial order requirements, including, for example, that the District ensure, beginning no later than November 1, 1997, District children eligible for Medicaid were being contacted for various EPSDT services. (A.R. at 5). The District was concerned with how the new requirements mandated in the remedial order would affect this procurement. When the court issued its Amended Remedial Order in early May (A.R. Ex. 30), the deadline for completing the procurement remained critical. As a result of substantial delays in issuing the solicitation (a prior solicitation had been cancelled) and finalizing the solicitation through the ten amendments, the court ordered deadlines, and the projected major negative financial consequences for each month of delay in transitioning to the new Medicaid program, the record shows that the contracting officer was under intense pressure from her superiors and other authorities to complete the procurement as quickly as possible. The May 1 memorandum states that price evaluations were being conducted:

> However, the issue involving the capitation rate is of concern to all parties associated with the effort. Consequently, the District's Health Care Finance Administration has scheduled a briefing by an outside consultant to provide insight to designated District staff in an effort to assist us in this area.

In the memorandum, the contracting officer projected completion of price evaluations by May 21. She states that the next step requires her to "prepare the selection report ranking the firms from the most highly qualified to the least highly qualified." She then projected commencing negotiations with the firms selected in her selection report by June 2. Finally, she anticipated contract awards by July 15 assuming higher-level approvals of the recommended awardees.

The price evaluation was made on the basis of each offeror's blended capitation rate. These blended rates were then compared to the Federal Upper Payment Limit ("UPL") of $148.42 announced in the solicitation. The technically acceptable offeror with the lowest blended capitation rate received the maximum 25 points for price. The other offerors received a portion of 25 points based on the ratio of the difference between their blended capitation rates and the UPL divided by the UPL minus the lowest offered capitation rate. (Solicitation Section M.2.2.5.2).

DCHC proposed the lowest blended capitation rate ($117.17) and received the maximum 25 points. GW Health Plan offered the second lowest blended capitation rate ($124.60) and received 19.06 price points. American Preferred offered the third lowest capitation rate ($131.29) and received 13.70 points. Health Right offered the fourth lowest blended capitation rate ($136.79) and received 9.30 price points. D.C. Chartered offered the fifth lowest capitation rate ($137.51) and received 8.73 points. Prudential offered the sixth lowest capitation rate ($138.03) and received 8.31 points. Capital Community offered the highest capitation rate ($139.50) and received 7.14 points.

The results of these calculations were presented on a chart prepared in the CHCF's offices which we summarize as follows:

Offeror	Technical Score	Price Score	Total Score	Ranking
D.C. Chartered	57.00	8.73	65.73	1
Capital Community	52.40	7.14	59.54	2
Prudential	49.00	8.31	57.31	4
American Preferred	45.00	13.70	58.70	3
GW Health Plan	33.00	19.06	52.06	6
DCHC	30.00	25.00	55.00	5
Health Right	25.00	9.30	34.30	7

(*See* A.R. Ex. 31). On May 21, 1997, Ms. Jane Thompson sent the chart listing the scoring and ranking to the contracting officer. (A.R. at 5). According to the District's Agency Report, Ms. Thompson's chart showed the allocation of price points and "the selection of the default plans under the solicitation." (*Id.*).[6]

On June 4, 1997, the contracting officer signed two somewhat different versions of a "Final Selection Report" listing four selected offerors in order of preference: (1) D.C. Chartered, (2) Capital Community, (3) American Preferred, and (4) Prudential. In the original version of the report, the contracting officer states:

> Pursuant to 27 DCMR, Chapter 19, Section 1907, this document serves as the final selection report for the District's Medicaid Managed Care solicitation.
>
> I have taken into consideration the recommendations of the evaluation board and based on discussions and input with appropriate staff representatives in the Department of Human Services an[d] Health, I have made the final selections.

[6] It is the contracting officer who determines the default plans because it is ultimately the duty of the contracting officer to evaluate the offerors, and make the final selections. *See infra.*

These firms are considered "selected" firms in order of preference with which negotiations will be conducted.

The final selections are the same as the recommendation by the evaluation board. The final selections are based on the evaluation board's determination that **all** seven offerors are capable of being managed care organizations and based on price. Price is a significant factor since all seven offerors were determined technically capable to be one of the District's managed care organizations. Therefore, price must be a major determining factor in final selection. According to the Chairperson of the Evaluation Board, Ronald Lewis, all offerors submitted technically competent and qualified proposals. This determination served as the baseline from which the technical evaluations were ranked.

The final selections are listed as follows, ranked in order of preference:

Chartered Health Plan
This firm remains the first ranked based on their experience with the District's Medicaid population. This factor outweighs the overall price offered.

Capital Community
This firm is the fifth ranked qualified based on the overall reasonable price offered.

American Preferred
This firm is ranked third based on the overall reasonable price offered.

Prudential
This firm is the sixth most highly qualified based on the overall reasonable price offered.

(A.R. Ex. 33 (original version)). The contracting officer testified that her handwritten draft for this document was typed and presented to her for signature the morning of June 4, just as she and others were ready to meet with representatives from D.C. Chartered to commence negotiations. (Moorman Dep. 112). She states that she did not have time to read it in its entirety because of the rush to begin the negotiations. (*Id.* at 112-13). She has testified that after the negotiation session ended, she read the document and it "contained errors, and it did not represent what was submitted for typing; and, therefore, a corrected copy was prepared." (*Id.* at 112-13). The corrected version only modified the descriptions for each of the selected firms:

Chartered Health Plan
This firm remains the first ranked based on their experience with the District's Medicaid population and overall technical competence and price.

Capital Community
This firm is ranked second based on technical competence and price.

American Preferred
This firm is ranked third based on technical competence and price.

Prudential
This firm is ranked fourth based on technical competence and price.

(A.R. Ex. 33 (corrected version)). The corrected version is also dated June 4. We do not find credible that the language in the original version resulted merely from typing errors. The changes are too different and substantial for that explanation. The rankings referred to in the original version cannot be explained as simply reflecting a ranking based on price alone. In any event, we need not detain ourselves on this point because the flaws in the contracting officer's final selection transcend the language in the selection listing found in these two versions of this selection report.

Neither during the TEB's evaluation process nor thereafter did the contracting officer conduct any independent evaluation or determine the relative merits of the proposals. She never had any substantive discussions with any of the TEB members concerning either individual member's evaluations or any TEB consensus evaluation. Her statement in the final selection report that she has "taken into consideration the recommendations of the evaluation board" and has based her final selections on "discussions and input with appropriate staff representatives in the Department of Human Services an[d] Health" does not remedy her failure to evaluate the offerors. Based on the testimony, and the remainder of the record, the only "recommendations of the evaluation board" contained in the record that she "considered" were the spreadsheet summarizing the TEB's numerical scoring, the TEB evaluation guidance document, and the TEB score sheets, although she denied that she relied primarily on the score sheets to make her determination. Based on the testimony, and remainder of the record, her "discussions and input with appropriate staff representatives" in the Departments of Human Services and Health related solely to the price evaluation. The third paragraph of her selection report confirms our findings. Finally, the contracting officer's statement that final selections "are based on the evaluation board's determination that **all** seven offerors are capable of being managed care organizations and based on price" (and the other comments in the third paragraph) fully supports the fact that she did not (1) evaluate the proposals and determine the relative merits of the competing proposals, and (2) receive substantive individual or consensus evaluation data from the TEB.

After the negotiation session with D.C. Chartered, the contracting officer requested and received a BAFO. Negotiations were then conducted with Capital Community, followed by a BAFO. Next, negotiations were held with American Preferred, followed by a BAFO. Finally, there were negotiations with Prudential, followed by a BAFO. By memoranda dated July 7, 1997, Mr. Lewis advised the contracting officer that the BAFO's of Prudential, D.C. Chartered, American Preferred, and Capital Community were acceptable. (A.R. Ex. 51).

The four successful offerors executed proposed contracts on July 10, 1997. (A.R. Exs. 54, 55, 56, and 57). The District presented the four proposed medicaid managed care contracts to the Council of the District of Columbia on July 11, 1997.

Health Right filed a protest with the Board on July 24, 1997 and supplemental protests on July 25, 1997, August 6, 1997, and September 4, 1997. DCHC and the GW Health Plan filed protests on August 12, 1997 and supplemental protests on September 4, 1997.

On July 30, 1997, the District of Columbia Financial Management and Assistance Authority approved the four proposed Medicaid managed care contracts. (A.R. Ex. 52). By emergency resolutions dated July 31, 1997, the Council gave its approval. (A.R. Ex. 53). We declared those contracts a nullity pursuant to D.C. Code § 1-1189.8(c)(1) (Supp. 1997) on August 22, 1997. (*See* Board order dated August 25, 1997).

Pursuant to Board order, the contracting agency provided debriefings to Health Right on August 19, 1997, to DCHC on August 20, 1997, and to GW Health Plan on August 21, 1997.

In a determination and finding of August 28, 1997, the Director of the Office of Contracting and Procurement determined that award to the four selected offerors should be made and performance under the protested procurement should proceed while the protest is pending, based on a finding that urgent and compelling circumstances that significantly affect the interests of the District would not permit waiting for a decision in the pending consolidated protests. The Commissioner on Health Care Finance of the Department of Health certified findings that: (1) if performance of the Medicaid Managed Care Contracts did not begin immediately, thousands of Medicaid recipients would be denied essential necessary medical care which they do not now receive under the current program; (2) access and quality of care enhancements would be postponed which would constitute a great injustice to Medicaid recipients; (3) if the Medicaid contracts were not implemented immediately, the District would be in violation of a federal court remedial order to protect Medicaid recipients with deadlines for District compliance beginning on November 1, 1997; (4) if the District failed to comply with the remedial order, it would face significant sanctions from the court and children and other individuals eligible for Medicaid would be denied vital, needed, and long overdue medical care, diagnosis, and treatment; and (5) if performance were stayed, the District would be forced to spend one million dollars a month in unnecessary expenditures. In the findings, the estimated fair and reasonable cost for the contracts over two years is $212,000,000.

The protesters challenged the Director's determination to award and proceed with performance. We sustained the Director's determination based on urgent and compelling circumstances represented to the Board by the Director in his determination and findings.

DISCUSSION

These consolidated protests are before us pursuant to D.C. Code §§ 1-1189.3 and 1-1189.8 (Supp. 1997). We review to determine whether the contract awards, and the underlying evaluation and selection actions, violated procurement law and regulations or the terms of the solicitation.

A. Challenges to the Procedures for Conducting the Evaluation and Selection

The protesters allege that the scope and terms of the solicitation, as amended, necessarily created a hybrid procurement process for the evaluations and selection. They point especially to Amendment No. 10 which added price as a required evaluation factor (contrary to the normal MHCS procurement) and made *contract award* (rather than final selection) possible on the basis of initial offerors received thereby changing the nature of the initial proposals into second-step proposals. They argue that the contracting agency, in conducting evaluations and selection, sometimes used Chapter 16 procedures for competitive sealed proposals and at other times used the Chapter 19 procedures. They complain that they were excluded from submitting BAFOs even though they were in the competitive range. The protesters state that the agency should have adopted the Chapter 16 procedures after Amendment No. 10 and then applied them consistently rather than returning to Chapter 19 procedures for the selection phase. According to the protesters, the process resulted in an arbitrary and irrational selection.[7]

The District and the intervenors argue that these protest grounds are allegations of improprieties in the solicitation and are therefore untimely. They also argue that the District properly and consistently followed the Chapter 19 procedures throughout the process and that the Chapter 16 procedures are inapplicable.

Because these protest allegations go to the actual process used by the agency during the

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[7] The protesters also challenge the failure of the contracting agency to conduct the "one-step procurement" represented by the District at the January 9, 1997 protest conference in the earlier solicitation protests. (*See* Board order date January 13, 1997). In its Agency Report, the District states that its intent to conduct a "one-step procurement" simply meant that both technical and price factors would be considered in the competitive step. The District states correctly that we had suggested in the earlier protest proceedings that price might be considered a proper evaluation criterion under the Chapter 19 regulations, 27 DCMR § 1905.5(e). It points out that Amendment No. 10, which amended the solicitation to include price as a factor, was issued on January 10, 1997, and thereafter no prospective offeror protested the solicitation as being inconsistent with the District's representation or the Board's order. We conclude that the agency's stated understanding of what it meant by a one-step procurement was reasonable under the circumstances and did not violate our order. Any challenge of the agency's "one-step procurement" through Amendment No. 10 is untimely.

evaluation and selection process, in light of the solicitation as amended, they do not raise solicitation improprieties. These protest allegations are timely.

As a preface to our discussion of the merits, there is no question that this solicitation as amended was substantially different from a normal request for a Qualification Data Form (QDF) under Chapter 19. The solicitation was for a complex procurement for contracts in excess of $200,000,000. The solicitation, hundreds of pages in length, contained evaluation criteria and a system of point scoring more reflective of a request for proposals under Chapter 16. The type of response required through proposals was well beyond a standard QDF response. (Protestors' Joint Response Ex. 1). Amendment No. 10 making *award* possible on the basis of initial offers received, without discussions, has no counterpart in the District's Chapter 19 or the federal Brooks Act procurements. Price as an evaluation factor, mandated here by federal Medicaid grantee regulations, resulting in the submission of initial price and technical proposals, also is not normal for a Chapter 19 procurement.

The District, intervenors, and the protesters seem to read Chapter 19 and Chapter 16 as having no relationship with one another and that each stands independently of the remainder of the procurement regulations. That may be based on a misreading of 27 DCMR § 1905.3 which provides:

> The contracting officer shall use the procedures set forth in §§1905 through 1912 of this chapter rather than the solicitation or source selection procedures specified elsewhere in this title.

This provision simply does not create the MHCS regulations of Chapter 19 as a fully autonomous set of procedures for conducting all MHCS procurements. Section 1900, the general provisions for Chapter 19 ("Contracting for Services"), provides:

> The provisions of the [Procurement Practices] Act and this title [Title 27] requiring competition and setting forth the requirements and procedures for competitive procurement shall apply to the procurement of services.

27 DCMR § 1900.2. A careful reading of the MHCS regulations at sections 1905 through 1912 reveals that these regulations provide only a framework — in the form of certain regulations unique to MHCS procurements — for conducting MHCS procurements. In other words, there are more requirements for conducting an MHCS procurement than are spelled out in the text of the Chapter 19 MHCS regulations. A Chapter 19 procurement is a type of negotiated procurement. The nature of the solicitation and the process for evaluation of proposals also determine the types of requirements that will be applicable. To the extent that other procurement requirements are applicable to a competitive procurement under Chapter 19, and are not inconsistent with specific, specialized requirements in the MHCS regulations, they cannot be ignored simply because they are not specified in the text of the MHCS regulations.

The very first provision of the MHCS regulations demonstrates that these regulations are not autonomous:

> The contracting officer shall publicly announce all requirements for medical and human care services in accordance with chapter 13 of this title.

27 DCMR § 1905.1.

More pertinent here are the regulations governing the evaluation of proposals. Section 1905.5, quoted earlier, states that the contracting officer "shall evaluate each potential contractor" based on certain listed technical criteria and any other evaluation criteria deemed by the contracting officer to be appropriate. The only other Chapter 19 MHCS provision that gives any further definition to the contracting officer's evaluation of proposals is 27 DCMR § 1906.6 which requires that the TEB's selection report include "a description of the discussions and evaluation conducted by the board to allow the contracting officer to review the considerations upon which the [TEB's selection] recommendations are based." From section 1906.6 we can infer that the contracting officer must review the recommendations (and evaluation) of the TEB as part of the contracting officer's obligation to evaluate offerors. But the requirement to evaluate the proposals and to review the evaluation of the TEB is as general a summary of the contracting officer's duties as can be framed. There is more to evaluation than that. There are other sources of authority governing specifically the contracting officer's duties to evaluate proposals. First, there is 27 DCMR § 1618 ("Proposal Evaluation") which provides in relevant part:

> 1618.1 The contracting officer shall evaluate each proposal in accordance with the evaluation criteria in the solicitation.
>
> 1618.2 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.
>
> 1618.3 The contracting officer shall document the cost or price evaluation.
>
> 1618.4 If any technical evaluation is necessary beyond ensuring that the proposal meets the minimum requirements in the solicitation, the contracting officer shall forward the proposals to the appropriate technical official for technical evaluations.
>
> 1618.5 If a technical evaluation is done, a technical evaluation report shall be prepared by the technical official and shall contain the following:
>
> (a) The basis for evaluation;

(b) An analysis of the technically acceptable and unacceptable proposals, including an assessment of each offeror's ability to accomplish the technical requirements;

(c) A summary, matrix, or quantitative ranking of each technical proposal in relation to the best rating possible; and

(d) A summary of findings.

No one would argue that the requirement of section 1618.1 is inapplicable to the present procurement. Because price was a required evaluation factor in the competitive evaluation in the present procurement, sections 1618.2 and 1618.3 are also applicable. Because 27 DCMR § 1906 requires the appointment of a medical and human care services evaluation board in a MHCS procurement and defines its tasks, section 1618.4 does not add anything not already provided in section 1906. The requirements of section 1618.5 are not only consistent with section 1906 requirements but properly augment the MHCS requirements in view of the type and scope of technical evaluation provided in the instant solicitation. In addition to section 1618, and more significant from the standpoint of detail, is the well-established body of federal and District precedent defining the responsibilities of the contracting officer in conducting evaluations. It would be entirely illogical to take the position that, because the contracting officer has chosen the Chapter 19 MHCS regulations to conduct a procurement, the only standards for contracting officer evaluations are that he or she conduct one and that the TEB evaluation be reviewed in connection with that evaluation. Indeed, at least for defending the evaluations conducted by the TEB, the District and intervenors rely solely on federal negotiated procurement precedent or its District equivalent under Chapter 16.

Another pertinent example of the applicability of Chapter 16 procedures to Chapter 19 procurements is the requirement for discussions. In the Supplemental Agency Report, and again in the joint reply brief, the District and the intervenors argue that Chapter 19 "only requires discussions with firms or individuals on the Contracting Officer's final selection list, 27 DCMR § 1907." Section 1907, however, deals with the contracting officer's final selection of the most highly qualified offeror, not discussions during the evaluation process.[8] By the very fact that the contracting officer is required to evaluate proposals, the contracting officer must also have authority to conduct discussions as required. The power is implicit in section 1905.5. The regulatory authority is found in 27 DCMR §§ 1619 ("Discussions with Offerors") and 1621 ("Conduct of Discussions with Offerors").

Section 1619.1 requires the contracting officer to conduct discussions except in enumerated

[8] That the contracting officer may have "discussions" regarding technical and price matters during the negotiations phase after final selection has nothing whatever to do with discussions conducted during the evaluation of proposals prior to final selection.

circumstances. Section 1619.3 states that if discussions are not held pursuant to one of the enumerated exceptions of section 1619.1, then all offerors must have been notified of the possibility that an award might be made without discussion and the award must be made without any written or oral discussions with any offeror. We do not decide here that discussions are required in all MHCS procurements, but section 1619 makes clear the authority of contracting officers to conduct discussions. In addition, consistent with section 1619, the contracting officer modified the solicitation, through Amendment No. 10, to provide that "The District Government may award a contract on the basis of initial offers received, without discussion."

Section 1621 provides detailed requirements for the contracting officer to control all discussions held with offerors, including the content of discussions. It requires that the contracting officer ensure that, if discussions are held with any offeror within the competitive range, discussions are held with all offerors in the competitive range. *Id.* § 1621.1. The contracting officer must provide the offeror a reasonable opportunity to submit any cost or price, technical, or other revision to its proposal that may result from the discussions. *Id.* § 1621.2. Beyond section 1621 there is the well-established body of case law defining the obligations of the contracting officer relating to discussions.

Nothing in Chapter 19 prohibits the type of discussions traditionally conducted in other types of negotiated procurements during the evaluation phase. To the contrary, the decision of the contracting officer to conduct discussions is by nature a function of the solicitation, the content of the proposals, and the contracting officer's sound judgment in conducting evaluations, subject to the regulations described above and case precedent.

For the procurement here, the requirements of section 1621 were applicable. The record shows unambiguously that the TEB conducted discussions with all of the offerors in early March 1997. The District's and intervenors' characterization -- during protest proceedings -- of the discussions as "interviews/presentations" is no more than an euphemism. During her deposition, when asked about the existence of guidelines for conducting the March 1997 "interviews" with offerors in this particular procurement, the contracting officer responded that there were none, "other than what's written in 27 [DCMR]." (Moorman Dep. 102). What she meant was precisely 27 DCMR § 1621.

The District has not argued, and there is no basis in the record to argue, that the TEB discussions constituted the type of specialized discussions under section 1906.5(c) which requires the TEB to:

> [h]old discussions with at least three (3) of the most highly qualified firms or individuals concerning concepts and the relative utility of alternative methods of furnishing the required services (but not including fees), when the prospective medical or human care services contract is estimated to exceed ten thousand dollars ($10,000).

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The record discloses no such discussions by the TEB.[9] There is also nothing in the record meeting the requirement that the TEB include in its selection report for the contracting officer "a description of the discussions . . . conducted by the board . . . ." *Id.* § 1906.6.

Finally, it is clear from the conduct of the agency personnel involved with the procurement that they understood that some requirements applicable to negotiated procurements generally, and not specified within the four corners of Chapter 19, had to be followed.[10]

B. The Evaluation of Proposals

The protesters argue that the evaluation of their offers was unreasonable, arbitrary, and capricious. They contend that the evaluators used undisclosed criteria and subcriteria, improperly used a baselining technique, and failed to treat all offerors fairly by, among other things, treating similar proposal content unequally among offerors. The protesters challenge the evaluations conducted under all five non-price criteria.

Standards

In 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. *Halter Marine, Inc.*, B-255429, Mar. 1, 1994, 94-1 CPD ¶ 161; *Southwest Marine, Inc.*, B-265865, Jan. 23, 1996, 96-1 CPD ¶ 56; *Biochemical Genetics*, CAB No. P-470, Feb. 25, 1997, 8 P.D. 7245. By their nature, such judgments have certain subjective elements, but they are not entirely subjective. There are also objective bases for evaluation decisions. Considering the totality of the record, evaluations must be reasonable and must bear a rational relationship to the announced criteria upon which competing offers are to be selected.

Implicit in the foregoing is that these judgments must be documented in sufficient detail to show that they are not arbitrary. *Southwest Marine,* 96-1 CPD ¶ 56; *S&M Property Management*, B-243051, June 28, 1991, 91-1 CPD ¶ 615; *Wadell Eng'g Corp.*, 60 Comp. Gen. 11 (1980), 80-2 CPD ¶ 269; *Benchmark Sec., Inc.*, B-247655, Feb. 4, 1993, 93-1 CPD ¶ 133. In particular, the agency's technical evaluation documentation is required to include an analysis of the technically acceptable and unacceptable proposals, including an assessment of each offeror's

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[9] The section 1906.5(c) discussions are not limited to the selected offeror. The MHCS regulations are written assuming a single selectee. Thus, discussions with "at least three of the most highly qualified firms" embraces more than the selectee.

[10] For example, a proposal submitted by an eighth prospective offeror after the time specified in the solicitation was rejected by the contracting agency under the specific authority of 27 DCMR § 1609. (GW Health Plan's Supplemental Response to the Agency Report, Ex. A). The MHCS regulations in Chapter 19 contain no provisions dealing with late proposals.

ability to accomplish the technical requirements. As we have emphasized before, the District's procurement regulations require contracting agencies:

> to document their evaluation of proposals so as to show the basis for evaluation, an assessment of each offeror's ability to accomplish the technical requirements, and the relative differences among the proposals, their strengths, weaknesses, and risks in terms of the evaluation criteria.

Recycling Solutions, Inc., CAB No. P-377, Apr. 15, 1994, 42 D.C. Reg. 4550, 4581 (citations omitted); 27 DCMR §§ 1618.5, 1622.6, 1622.7. Federal procurement law requires the same. *S&M Property Management*, 91-1 CPD ¶ 615; *Universal Shipping Co.*, B-223905, Apr. 20, 1987, 87-1 CPD ¶ 424. While an agency is not required to retain every document or worksheet generated during its evaluation of proposals, the agency's evaluation must be sufficiently documented to allow review of the merits of a protest. *Southwest Marine*, 96-1 CPD ¶ 56; *KMS Fusion, Inc.*, B-242529, May 8, 1991, 91-1 CPD ¶ 447. Where an agency fails to document or retain evaluation materials, it bears the risk that there is inadequate supporting rationale in the record for the source selection decision and that we will not conclude that the agency had a reasonable basis for the decision. *Southwest Marine*, 96-1 CPD ¶ 56; *Engineering & Computation, Inc.*, B-261658, Oct. 16, 1995, 95-2 CPD ¶ 176; *American President Lines, Ltd.*, B-236834.3, July 20, 1990, 90-2 CPD ¶ 53.

In determining the reasonableness of an agency's evaluation and award decision, we do not limit our review to contemporaneous evidence, but consider all the information provided, including the parties' arguments, explanations, and testimony. *Southwest Marine*, 96-1 CPD ¶ 56; *Benchmark Sec.*, 93-1 CPD ¶ 133; *KMS Fusion*, 91-1 CPD ¶ 447. While we consider the entire record, including the parties' later explanations and arguments, we accord greater weight to contemporaneous evaluation and source selection material than to arguments and documentation prepared in response to protest contentions. *Southwest Marine*, 96-1 CPD ¶ 56; *DynCorp*, 71 Comp.Gen. 129 (1991), 91-2 CPD ¶ 575; *Biochemical Genetics*, 8 P.D. at 7251.

The contracting officer has a critical and unique role in the evaluation and selection process. It is the contracting officer who ultimately is responsible for the evaluation of proposals and determining the relative merits of competing proposals. *Property Analysts, Inc.*, B-259853, June 13, 1995, 95-1 CPD ¶ 270; *Wyle Labs., Inc.*, 69 Comp. Gen. 648 (1990), 90-2 CPD ¶ 107. Although the contracting officer may be assisted in the evaluation by others, such as a technical evaluation board constituted under 27 DCMR § 1906, the contracting officer always remains responsible for the evaluation of proposals. While technical point scores and descriptive ratings of lower-level evaluators must be considered by the contracting officer in making the final selection, he or she is not bound by those evaluations or recommendations. The determining element is not the difference in technical scores, *per se*, but the contracting officer's judgment concerning the significance of any such difference and the relative merits of the proposals. While point scores are useful as guides, they generally are not controlling because they often reflect the disparate subjective judgments of evaluators. *S&M Property Management*, 91-1 CPD ¶ 615. In

reviewing the reasonableness of the contracting officer's evaluation and selection judgments, we will not substitute our judgment for that of the contracting officer, even where we disagree with the wisdom of that official's choice. This presupposes a valid exercise of judgment by the contracting officer.

In this case, the contracting officer "adopted" the evaluation results of the TEB.[11] This was not a valid exercise of her judgment. She did not conduct any independent evaluation of the proposals. She read no TEB consensus evaluation reports, preliminary or final, because there were none. She did not make the required substantive review of any TEB evaluation. The TEB's "selection report" consisted merely of average point scores and the disparate and uninformative score sheets. The contracting officer had no substantive discussions with the chairman of the TEB concerning their technical evaluations (other than to learn about the baselining methodology[12] used in scoring) and had no discussions at all with the other TEB members concerning their technical evaluations. No doubt the contracting officer was handicapped here by the TEB's failure to present evaluation workpapers (showing the substance of their technical evaluation) or any substantive consensus evaluation memorandum. Notwithstanding the substantial time pressures under which the contracting officer was operating, she was not justified in abdicating her legal duty to make a substantive evaluation. The post-protest amplifications, including the few comments from the debriefings in the record, the deposition testimony, and the District submissions, do not remedy what remains a wholly inadequate record of a reasonable or rational evaluation and selection.

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[11] *Southwest Marine, Inc.*, B-265865, Jan. 23, 1996, 96-1 CPD ¶ 56, provides an instructive comparison. In *Southwest Marine*, the source selection official independently reviewed the technical proposals, had a number of conversations with the technical board chair regarding the process of the board's initial evaluation and its initial findings, and reviewed an early draft of the board's evaluation report. After receiving the board's final evaluation report, he spent a week comparing and validating the evaluation findings against his own review of the technical proposals. His "adoption" of the board's evaluation findings as his own was quite different from the "adoption" here.

[12] The protesters argue that the use of the baselining technique was impermissible because there was no notice in the solicitation that such a method would be used, the effect of baselining was to unduly limit price as a factor, and use of the method meant that the District was procuring services exceeding its stated minimum needs. We agree with the District that there is nothing *per se* wrong with a baselining method of scoring. *See Hoffman Management, Inc.*, B-238752, July 6, 1990, 90-2 CPD ¶ 15. Regardless of the method of scoring proposals (adding points or subtracting points), the contracting officer must ensure that the evaluation, and the scoring done in connection with the evaluation, is performed and documented so as to show the basis for evaluation, an assessment of each offeror's ability to accomplish the technical requirements, and the relative differences among the proposals, their strengths, weaknesses, and risks in terms of the evaluation criteria. The problem in this case was not the baselining itself, but the absence of a record showing either a reasonable or rational evaluation of the offerors.

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The Evaluation Criteria

The contracting officer was required to evaluate each offeror under the five non-price criteria appearing in Section M of the solicitation. Based on the woefully inadequate record presented by the District, we are unable to conclude that a reasonable or rational evaluation was conducted under any of the five non-price criteria.

The score sheets of the TEB members, with examples cited below, show quite a variation in content. The comments on some score sheets appear to reflect some thought processes of a TEB member during the scoring session, but it is impossible to discern the actual scope or content of a TEB member's evaluation of each offeror from the score sheets. The numerical scores and largely uninformative comments uniformly fail to adequately document the individual TEB member's evaluation of each offeror and fail to show each member's comparative evaluation of the offerors. There is no explanation in the evaluation documentation which gives a reasonable or rational basis for the significant disparities in individual point scores, considered individually or collectively. The District's post-protest submissions shed no more light. Moreover, the comments and the numerical scoring show inconsistencies by an individual member in the way that different offerors were treated. The comments and numerical scoring also show disparities among evaluators in the way the offerors were evaluated or scored under identical criteria. In addition, the score sheets and the spreadsheets reflecting the numerical average scores, provide no consensus evaluation summary of the TEB. When considering the record as a whole, including isolated debriefing comments, deposition testimony, and other post-protest descriptions found in the District submissions,[13] it remains clear that there is no adequately documented evaluation under the evaluation criteria which can be supported as reasonable or rational.[14] As stated earlier, the

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[13] The post-protest submissions of the District generically state that the evaluators properly evaluated proposals under each of the criteria and that the evaluators considered all subfactors specified in the solicitation and other subfactors which were reasonably related to the criteria (*e.g.*, Supp. A.R. at 11-12); and that the TEB evaluated offerors by awarding points based upon the comparative strength of each proposal which depended on how it proposed to satisfy the solicitation's requirements (*e.g.*, Joint Reply at 8).

[14] The present facts may be compared with the situations in cases such as *Management Technology, Inc.*, B-257269, Nov. 8, 1994, 95-1 CPD ¶ 248, and *Sierra Cybernetics, Inc.*, B-259055, Apr. 5, 1995, 95-1 CPD ¶ 249. In *Management Technology* the individual evaluator score sheets and narrative comments were consolidated into consensus score sheets and narrative summary statements of strengths, weaknesses, and risks for each proposal. The technical board chairman submitted a memorandum detailing the differences in the scoring of the competing proposals and the one offeror's technical advantages considered significant under each of the technical evaluation criteria. In *Sierra Cybernetics*, involving a relatively simple procurement, notwithstanding "skimpy" narrative evaluations, the contracting officer was provided with sufficient evaluation information and the scoring had a specific and rationally understandable meaning that was explained in the agency's evaluation plan and was contained in the evaluation

contracting officer has made no substantive evaluation of the proposals, no comparative assessment of the competing offers, and no substantive review or analysis of the TEB's evaluation efforts. Thus, she did not and could not have made a selection decision based on her independent judgment of the relative merits of the competing proposals and she could not reasonably or rationally adopt the inadequate evaluation of the TEB as a substitute.

We will review briefly the record with respect to each non-price evaluation criterion.

1. Professional Qualifications (5 points)

Section M.2.2.1 provides verbatim: "Professional qualifications necessary for satisfactory performance of the required services. **(MCOs will be evaluated on the professional qualifications of the key staff as pertaining to the areas of responsibility).**

The TEB's 3-page guidance instructions told individual evaluators to evaluate key staff which "should include, at a minimum: CFO/President, Vice-Presidents of Heads of: Operations, Marketing, Medical, Network Relations, Systems/MIS, and Finance."

The following is a sampling from the score sheets. For D.C. Chartered, Evaluator "A" gave the full 5 points with the following comments: "Current capacity more than adequate to provide network medical service. Preparing for upgrade and GDI format." Evaluator "B" gave 4 points with the following comments: "Bowles, Spencer very experienced. NCQA knowledge." Evaluator "C" gave 4 points with the comment "Excellent qualifications." Evaluator "D" gave 4 points with the comments: "High marks for extent of qualified staff. Top level plan staff highly qualified." Evaluator "E" gave 3 points with the comment: "Experience in managed care from federal & state perspective." For GW Health Plan, Evaluator "A" gave 2 points with the comments: "Utilization Review and Physician Head; Knowledge and strategy for addressing clients." Evaluator "C" gave 2 points with the comment: "'Fair' cadre of professionals presented." Evaluator "B" gave 2 points with the comment: "Hickman, Parrot, Addison qualified to run the program." Evaluator "D" gave 2 points with the comment" "Highly qualified proven by great results in commercial business." Evaluator "E" gave no points with the comment: "Minimum standards." For DCHC, Evaluator "E"'s unsigned and undated score sheet gives 2 points with the comment: "MCO experience." Evaluator "C" gave 2 points with the comment: "Impressive CEO & Medical/Operations Director." For Health Right, Evaluator "D" gave 1 point with the comment: "Diversity of work group. Experience of CSS good." Evaluator "E" gave 1 point with the comment: "MCAC/NACHC." Evaluator "C" gave 2 points with the comment: "Diverse high caliber staffing presented."

Ms. Jane Thompson testified at her deposition that she gave points to persons whom she either knew were qualified or from their resumes she could see demonstrated qualifications. She

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documents that were submitted to the contracting officer.

stated: "So for me, I wasn't able to give points where I didn't know anything about the individuals." (Thompson Dep. 133). But her score sheets, like the others, supply no adequate basis upon which we can discern any substantive comparative evaluation under this criterion among the seven offerors and the rationale for the actual numerical scores. We see nothing in the evaluators' comments that correspond to the excerpts of debriefing comments identified by GW Health Plan and the arguments found in the District's protest submissions (*e.g.*, Supp. A.R. at 14). Some of the evaluators' comments appear to contradict the District's post-protest assertions.

2. Specialized experience and technical competence (35 points)

Section M.2.2.1 provides: "Specialized experience and technical competence in the type of work required. **(MCOs will be awarded points for demonstrations of specific experiences in working with the AFDC and AFDC-related population and technical competence in the ability to improve the quality of health care services required in the Statement of Work. Points will be awarded in this section by evaluating the strength of the MCO's: (1) Quality assurance program and its demonstrated ability to measure and monitor quality of care and expeditiously address detected quality deficiencies; (2) Member education and outreach program; (3) Provider education program; (4) Well Child (EPSDT) Program; (5) Systems, policies and procedures for claims processing; (6) Utilization management program; (7) Data reporting capabilities; and (8) Overall administrative structure, experience, and demonstrated competence of management team. Additionally, points will be awarded to MCOs that: (1) have a network or relationships that include existing non-profit community health agencies; (2) can demonstrate that it values the rich diversity of cultures in the Medicaid population and has developed effective guidelines to promote cultural competency; (3) promote comprehensive, family-oriented case management so as to coordinate care; and (4) have developed and can demonstrate the effectiveness of innovative strategies or special arrangements for specific populations with high risk health factors.)"**

The TEB's 3-page guidance instructions added that "An indication of a high level of technical competence is the achievement of NCQA accreditation."

The TEB score sheets are wholly inadequate to support a rational evaluation under this criterion. In her deposition, when asked whether she took into account that GW Health Plan was the only federally-qualified MCO, Ms. Thompson said that did not carry any weight with her in the evaluation. (Thompson Dep. 167, 169). She explained that the very thorough independent accreditation given by NCQA "much more accurately reflects the plan's quality of services delivered which is our highest priority." (*Id.* at 167). Of the offerors, only GW Health Plan and Prudential had received NCQA accreditation. (*Id.* at 168). She pointed out that Prudential's 3-year accreditation was significantly better than the 1-year accreditation of GW Health Plan. She testified that she could not evaluate the other firms which had not undergone NCQA review and received accreditation in the same way as a firm (like Prudential and GW Health Plan) that had applied for and received it. The TEB's 3-page evaluation guidance document also states that NCQA accreditation indicated "a high level of technical competence." Prudential received from

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her 19 points out of 35 and GW Health Plan received 15 points out of 35. She scored no offeror lower than 15 points. Overall, GW Health Plan received the second lowest score under the criterion. Reviewing the record, we are unable to discern any substantive comparative evaluation under this criterion among the seven offerors and the rationale for the actual numerical scores.

3. Capacity to Accomplish the Work (15 points)

Section M.2.2.3 provides: "Capacity to accomplish the work specified in the Statement of Work. **(MCOs will be evaluated on its capacity to accept MMCP enrollees and its ability to meet the access standards specified in Part I, Section C.16. Given the high numbers of women and children in the eligible population, MCOs must demonstrate sufficient numbers of OB/GYNS, Pediatricians and Pediatric specialties. Points will be awarded in this section by evaluating the strength of the MCO's: (1) numbers of PCP open panels; (2) specialty provider networks; and (3) procedures for monitoring the timeliness of meeting appointment requests.)**

In the 3-page evaluation guidance document, under the heading "Procedures for monitoring the access standards," the first item reads: "Award points based on the MCO's description of their internal methods [for] monitoring their compliance with the appointment standards listed in C.16.3 . . . ." The next 7 items under the heading summarize the appointment standards found at Section C.16.3.1 through C.16.3.7 of the solicitation. Under another heading, "Numbers and locations of PCPs," the guidance provides *inter alia* "Award points based on the numbers of PCPs in the network and their locations. Types of PCPs are: Family practitioners, Pediatricians, OB/Gyns, and Internists. . . . Consider in your evaluation, the extent that the MCO has addressed communications with all members of the target population, including those who speak other languages and the hearing impaired." Under the final heading, "Numbers of and types of specialists," it states: "Award points based on the numbers of appropriate speciality providers. MCOs must demonstrate that they have sufficient numbers of Pediatric specialists and specialists with expertise in the populations with high risk factors . . . . Consider in your evaluation, the extent that the MCO has addressed communications with all members of the target population . . . ."

Ms. Thompson testified as follows concerning this criterion:

> But a common problem is how to measure that capacity. Because, as we know, individual primary care physicians have different methods of practices. For instance, we have some primary care physicians who operate in a clinic setting who only see Medicaid. We have some primary care physicians who operate in a network in an individual practice office where they see Medicaid clients plus a lot of commercial clients.
>
> So it's very difficult to measure capacity given all the different types of doctors. . . .

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> We asked in the solicitation for HMOs to give us their networks, and also to show what a -- how many additional members that they could sign up, so beyond what they were already seeing, how many additional members could they sign up. We felt that this was a good way that we could then compare plans for how many new members that this plan could accept.
>
> Now, as we expected, the information came in, in a lot if different ways in the proposals. And, as you can see in the seven proposals, they all gave us a different way of doing this. . . .
>
> So what we looked at is, okay every HMO has got a combination of those doctors who only see Medicaid. And every HMO has got a combination of those who see full commercial practices as well. So let's put everybody on equal footing. So we merely counted up the primary care physicians and compared those counts across plans.
>
> So that a plan that had 200 primary care physicians would be given more points than a plan who had 80 primary care physicians, because we could not tell -- because it is better to have more physicians that could possibly take on members than to have fewer. So it is better to have more than fewer in your network.
>
> So we could not tell if a particular plan, if someone is low -- let's say the lowest was 80 doctors -- because of the mixture of the makeup of the doctors, we couldn't tell if 80 was going to be enough unless we did that very detailed analysis. But we knew that in practice 80 times our method of 2000 would meet the minimum requirements.
>
> We moved off of that and said, okay, somebody that has 200, obviously they're going to be able to take more recipients, and not only take more recipients, but the recipients that they do get, those recipients will have better choices, more choices. More choices is better.

(Thompson Dep. 145-48). Even accepting that Ms. Thompson applied this rationale to her evaluation under this criterion, the explanation does not give insight to the remaining aspects of this criterion by which offerors were to be evaluated. Ms. Thompson's explanation contradicts the District's position that evaluators in assessing capacity were justified in distinguishing between network physicians who were dedicated to Medicaid patients and physicians who also served non-Medicaid recipients. (*See* Supplemental Agency Report, at 8). In its Agency Report, the District states that "[t]hose who proposed a greater capacity received a higher score for the capacity evaluation factor than those who proposed a lesser capacity." (A.R. at 37). But these generic explanations do not supply an adequate basis by which we can discern how or whether the TEB members fully evaluated offerors individually, the rationale for the disparate numerical scores, and each evaluator's comparative analysis.

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We agree with the protesters that the "assumption" by which at least some members of the TEB determined that "[t]he network of DCGH [D.C. General Hospital] is eliminated from all plans for capacity determination, since all approved plans will offer a contract to D.C. General" was irrational.[15] Amendment No. 8, which required MCOs to offer a contract to DCGH and its clinics for "PCP, Specialist, and Hospital services" does not reasonably justify, on the record before us, this exclusion from the capacity evaluation. The District argues that the elimination of DCGH from the evaluation affected all offerors equally. DCHC, however, has an existing contract with DCGH with an established network of physicians. A contractual requirement that MCOs who currently do not have a contract with DCGH and its clinics offer one to DCGH does not assure any specific number of physicians.

4. Past Performance on Contracts (10 points)

Section M.2.2.4 provides: "Past performance on contracts with District, other governmental entities and private industry in terms of cost control, quality of work, and compliance with performance schedules. **(MCOs will be evaluated on the past performance on contracts for similar health care services.)**"

The 3-page guidance document provides: "Evaluate the MCO's past performance on contracts for similar health care services. Evaluate all three of the following: the organization's experience; the experience of the MCO's individual personnel; and the experience of the providers. In order of importance, similar health care services are:

> Medicaid Managed Care Contracts
> Other Managed Care Contracts
> Medicaid Non-Managed Care Contracts
> Other Health Care Contracts"

The TEB score sheets are wholly inadequate to support a rational evaluation under this criterion. The remainder of the record, including the District's post-protest submissions, supplies no substantive evaluation data which would remedy the inadequate evaluation documentation of the TEB.

The protesters' complain of inconsistent standards in evaluating the seven offerors' past performance. We agree. For example, Evaluator "A" gave American Preferred a score of 7 points with the comment: "The parent entity executed effective approaches for quickly servicing Medicaid clients." The offeror, American Preferred, is a District entity incorporated in the fall of 1996. It has, therefore, no past performance to measure. On the other hand, GW Health Plan, DCHC, and Health Right have been operating in the District serving Medicaid recipients. In fact, GW Health Plan and

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[15] The contracting officer did not discuss this assumption with Mr. Lewis during their single meeting and did not know the TEB's basis for the assumption. (Moorman Dep. 85, 88).

DCHC are currently under contract with the District for its Medicaid program. The evaluation record also lacks adequate documentation and rationale for the evaluators' treatment of the past performance of Health Right's parent. One evaluator gave Health Right no points, citing its status as a new entity.

5. Financial Stability (10 points)

Section M.2.2.5.1, created by Amendment No. 10, provides: "Financial Stability (MCOs will be evaluated on their ability to accept risk and to ensure continued access to care for its enrollees.)"

In the 3-page evaluation guidance document, Ms. Thompson states: "Evaluate the MCO's ability to accept risk and to ensure continued access to care for its members. Do they have adequate reserves/capital to be able to accept full risk for a large number of Medicaid [enrollees]? Review the historical financial information requested in Attachment J.8 and recent financial statements. Look for stability and solid resources. If the MCO does not have the historical financial information, evaluate the descriptions. Do they have access to sources of funds to ensure continued resources to pay providers?"

Ms. Thompson testified that all 7 offerors had demonstrated that they could meet the minimum financial requirements of the solicitation, for example at Sections C.11 and C.10 and Attachment J-8. (Thompson Dep. 120). She testified:

> So if we were to, say, give everybody 10 points there, we wouldn't be able to take away any points on anybody and that wouldn't accurately describe the differences in the area of financial stability among the seven firms.
>
> So some firms, obviously, had greater financial stability, greater access to finances. So those firms that had better financial security, greater financial stability, were given more points. So at zero, it was zero that was the minimum -- everybody met minimum. So we gave points to firms who could provide better financial stability.
>
> . . . .
>
> But what we were looking for, particularly in this area, when you think about it, is what if down the road they start getting 10,000 new members each month. That's a strain on any organization. Are they going to be able to pay all of the claims in a timely manner so that providers can continue to deliver service, or are they going to, because they can't pay those claims, they're going to start, you know, denying care to recipients.
>
> So a firm that had access to other resources, to be able to pull from those resources, if they get into that particular situation where it's a financial strain, they

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were higher valued than a firm that didn't have that same access to additional finances.

(*Id.* at 120-22).

Having reviewed the score sheets, the deposition testimony, the few excerpts from the debriefings, and the proposals, it is impossible to determine the scope or content of the TEB members' individual or collective evaluation of each offeror, let alone a comparative evaluation.

Discussions

Under 27 DCMR § 1621.2, the contracting officer must (i) advise offerors of deficiencies in their proposals so that offerors are given an opportunity to satisfy the District's requirements, and (ii) attempt to resolve any uncertainties concerning the technical proposal and other terms and conditions of the proposal. The District and the intervenors have contended that because all proposals were found technically competent and met the solicitation's minimum standards, discussions were unnecessary. We do not agree. Agencies are required to discuss weaknesses in an offeror's proposal where the weaknesses have a significant adverse impact on the proposal's technical rating. *American Development Corp.*, B-251876, July 12, 1993, 93-2 CPD ¶ 49; *Department of the Navy--Recon.*, B-250158.4, May 28, 1993, 93-1 CPD ¶ 422. Discussions need not address every area in which a proposal receives less than a perfect score, and the need for meaningful discussions may be constrained to avoid technical leveling, technical transfusion, and an auction. *Id.* None of the latter constraints is an issue here. Although the TEB evaluations were so disparate and uninformative, if we take the District's generic contentions during these protest proceedings at face value, it was the weaknesses in the protesters' proposals — compared to the intervenors' proposals — that caused the protesters to receive very low technical evaluations and scores. If the District's contention is correct, then the discussions that were conducted with GW Health Plan, DCHC, and Health Right in March 1997 were inadequate and the offerors were significantly prejudiced.

It also follows that the contracting officer failed to provide the offerors a reasonable opportunity to submit any revisions to their proposals resulting from the discussions because the discussions were not meaningful and because the contracting agency did not believe it had to conduct discussions or request revised proposals or best and final offerors. 27 DCMR § 1621.2(e). None of these requirements for discussions and the request for revised proposals is inconsistent with a MHCS procurement under Chapter 19. Neither logic nor the law precludes earlier rounds of BAFOs during the evaluation phase prior to the contracting officer's request for BAFOs after final selection in order to enter into negotiations pursuant to 27 DCMR § 1911.

C. The Contracting Officer's Selection Decision

The contracting officer is ultimately responsible for evaluating the proposals and making the final selection pursuant to 27 DCMR § 1907. *See* 27 DCMR § 1905.5; *Property Analysts,*

Inc., B-259853, June 13, 1995, 95-1 CPD ¶ 270; *Wyle Labs., Inc.*, 69 Comp. Gen. 648 (1990), 90-2 CPD ¶ 107. Based on our discussion above, the record does not demonstrate the existence of a reasonable or rational evaluation. Without a proper evaluation, a proper selection decision could not be made by the contracting officer. *See DNL Properties, Inc.*, B-253734, Oct. 12, 1993, 93-2 CPD ¶ 301; *Universal Shipping Co.*, B-223905, Apr. 20, 1987, 87-1 CPD ¶ 424. For the same reasons discussed above concerning the evaluation, the contracting officer's June 4, 1997 selection decision lacks reasonableness and rationality.

D. Other Protest Grounds

A number of protest grounds effectively have been withdrawn by the protesters. We address those which have not been withdrawn.

The protesters argue that the court's remedial orders in *Salazar v. District of Columbia* materially altered the technical and pricing under the solicitation. It is clear from the record that the Amended Remedial Order imposed additional requirements on the offerors. The District and the selected offerors recognized as much. Nevertheless, we agree with the District that incorporating the *Salazar* requirements did not materially change the solicitation's requirements and did not require a recompetition.

The protesters also allege that the Mayor and certain members of the Council were required to recuse themselves from participating in the award decision because they received political contributions from two of the awardees. The Mayor had forwarded the proposed contracts to the Council for approval and the members of the Council had voted to approve the contracts. The protesters cite the following:

> [N]o employee, officer, or agent [of the recipient] shall participate in the selection, award, or administration of a contract supported by Federal funds if a real or apparent conflict of interest would be involved. Such a conflict would arise when the employee, officer, or agent, or any member of his or her immediate family, his or her partner or an organization which employs her is about to employ any of the parties indicated herein, has a financial or other interest in the firm selected for an award. The officers, employees and agents of the recipient shall neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, or parties to subagreements.

45 C.F.R. § 74.42. Under the record presented here, we are unable to conclude that a real or apparent conflict of interest has been shown. Although District employees and officials should carefully assure themselves that they are not in a conflict of interest situation, and obtaining a legal opinion where appropriate, we do not believe a violation of this regulation has occurred.

Health Right also contends that the solicitation violates the District Medicaid statute and

federal law. According to Health Right, the District's Medicaid statute requires the District to award a contract to Health Right's parent, Unity Health Care, Inc. ("Unity") because Unity is the only "significant" FQHC and a primary care provider from which Medicaid beneficiaries have a right to seek care. Also Health Right states that the procurement will not provide access to FQHC services as required by sections 1905(a)(2)(A) and 1915(b) of the Social Security Act. We believe the allegations are without merit. The prior protest proceedings resolved Health Right's allegations and it interposed no objection to the voluntary dismissal of those earlier consolidated protests. Health Right has also argued that the contracts awarded to the intervenors lacked clauses required under 45 C.F.R. Part 74. We agree with the District that this does not state a valid ground for protest.

DCHC argues that it was entitled to preference points as a local business enterprise. We do not agree. DCHC failed to comply with the self-certification requirements when it failed to submit an acknowledgment letter from the Department of Human Rights and Minority Business Development as part of its self-certification package. The requirement is part of the District's procurement regulations. 27 DCMR § 818.2.

The protesters argue that the procurement violates D.C. Code § 1-359. GW Health Plan and DCHC argue that because they are current Medicaid providers with current contracts with the District, section 1-359 requires the District to exclude from the managed care program any Medicaid recipients who are already enrolled in a managed care program. The District states that ambiguities in the statute will be eliminated by amendment. The District also argues that it would do violence to the statute to interpret it as requiring the District to contract with current contractors in perpetuity. We need not address this issue in light of the remedy we are ordering. GW Health Plan and DCHC will have an opportunity to enter into a contract with the District under the solicitation as modified by *Salazar*.

E. Remedy

The procurement violations in this case are significant and material. One remedy option would be to require reopening of the evaluation process, with meaningful discussions, followed by BAFOs, a valid re-evaluation conducted by a technical evaluation board and the contracting officer, properly documented, and followed by a proper and documented selection decision by the contracting officer, as we have discussed in our decision. Under this approach, any of the seven offerors, including the protesters, could well be selected for an award.

The Board previously sustained the Director's determination to proceed with award and performance to the four intervenors, based on the urgent and compelling circumstances represented by the Director. Returning this matter for re-evaluation and selection is neither possible nor in the bests interests of the District. Therefore, we will not order the intervenors' contracts to be terminated. On the other hand, the solicitation has never precluded the selection of more than four offerors. We believe that when considering all the factors, extending the opportunity to negotiate contracts with the protesters is the proper remedy. First, the public

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interest in maintaining the integrity of the procurement system favors the remedy. The remedy is also in the best interests of the District government. Terminating the recently awarded contracts and restarting the evaluation process would jeopardize urgent and compelling needs determined by the Director of the Office of Contracting and Procurement.

We have considered the agency's mission. The agency is capable of managing all seven MCOs. Under the program now being replaced, the agency is managing six MCOs plus close to three hundred fee-for-service providers. One concern expressed in the record -- that when the agency has more MCOs to oversee, "you tend to spend time with the ones who are not up to par with the rest of the group" (Thompson Dep. 47-48) -- does not appear to apply here because there is no evidence that any of the MCOs are "not up to par with the rest of the group." The District does not challenge that all seven of these offerors are technically competent and qualified to perform under the Medicaid managed care program. Although the District does not make any specific arguments, we have also considered whether having seven contractors rather than only four contractors weighs against the remedy. Of course, the number of Medicaid recipients available for each of seven MCOs will be less than in the case of only four MCOs (*id.* at 49-50) and thus each MCO may receive fewer recipients from the approximate total pool of 80,000 recipients. But the record shows that even with seven MCO contractors, the MCOs will generally have more enrollees than the six MCO contractors had under the current District program which has a hybrid of MCOs and fee-for-service providers. The District has presented no evidence that any of the offerors cannot financially undertake a managed care contract among a field of seven MCOs. According to Ms. Thompson, more managed care provider choices are better. If having more providers in one plan is good for Medicaid recipient enrollees, then more choices among more plans is also good for Medicaid recipients. The District has made no showing that the quality of health care will be worse off with seven rather than four MCOs. We think the record shows the opposite. There is no persuasive evidence in the record that the quality of health care services available through GW Health Plan, DCHC, or Health Right is any less than that available through D.C. Chartered, Capital Community, Prudential, or American Preferred.

The District has repeatedly emphasized the importance of the cost savings that it will realize in the new program. That factor too favors negotiating contracts with GW Health Plan, DCHC, and Health Right. DCHC's pricing rates and GW Health Plan's rates were significantly lower than any of the awardees. The record shows that the District would realize substantial cost savings with these contractors. (*See, e.g.*, Health Right Protest, at 10; Moorman Dep. 121). Health Right's pricing rates were lower than three of the four awardees.

Based on the entire record, balancing the extent of the procurement violations, the integrity of the procurement system, the mission of the agency responsible for the Medicaid program, and the District's needs for the Medicaid program, and having considered carefully all of the factors in D.C. Code § 1-1189.8(e)(1) (1992) and Board Rule 314.2, we conclude that the appropriate remedy is to direct the contracting officer to negotiate contracts with the DCHC, GW Health Plan, and Health Right, assuming they are otherwise responsible, under terms consistent with the contracts awarded to the intervenors including the modifications required by the *Salazar* Amended

Remedial Order. Because the contracting officer never made a proper evaluation and the TEB's evaluation was seriously inadequate, it is not clear which firms the contracting officer would rank first and second based on technical and price after proper discussions, BAFOs, re-evaluations, and selection. Therefore, the District shall modify the contracts of D.C. Chartered Health Plan and Capital Community Health Plan to eliminate the provision in each which requires them to receive the two-thirds and one-third "default" (automatic) assignments. The District shall divide automatic assignments proportionally among the managed care contractors, subject to the District's right under *inter alia* Article 1.G.2.d of the contract to adjust the rate of automatic assignments if a contractor fails to comply with the terms of its contract.

SO ORDERED.

DATE: October 15, 1997

JONATHAN D. ZISCHKAU
Administrative Judge

CONCURRING:

LORILYN E. SIMKINS
Chief Administrative Judge

PHYLLIS W. JACKSON
Administrative Judge

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