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**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
CONTRACT APPEALS BOARD**

**Public**  
~~Revised~~  
~~Proposes~~  
**Redacted Version**  
~~11/13/12~~

PROTEST OF:

RIDECHARGE, INC. )  
CREATIVE MOBILE TECHNOLOGIES, LLC )  
Solicitation No: DCPO-2012-R-0342 )

CAB Nos. P-0920 and P-0921 CONS

For the Protester, RideCharge, Inc.: Bruce J. Klorès, Esq., Scott M. Perry, Esq., Andrea E. Allen, Esq., Kiores Perry Mitchell, P.C. For the Protester, Creative Mobile Technologies, LLC: A. Scott Bolden, Esq., Lawrence S. Sher, Esq., Gunjan R. Talati, Esq., Joelle E.K. Lazlo, Esq., Reed Smith LLP. For the District of Columbia: Howard Schwartz, Esq., Assistant Attorney General. For the Intervenor, VeriFone, Inc.: Richard L. Moorhouse, Esq., William M. Jack, Esq., Ryan G. Bradel, Esq., Greenburg Traurig, LLP.

Opinion by Administrative Judge Monica C. Parchment with Administrative Judge Maxine E. McBean concurring. Concurring Opinion by Chief Administrative Judge Marc D. Loud, Sr.

**OPINION**

Filing ID #47660551

The protesters, RideCharge, Inc. ("RideCharge") and Creative Mobile Technologies, LLC, ("CMT") challenge the District's award of a contract to VeriFone, Inc. ("VeriFone"), for the procurement of a Taxicab Smart Meter System for implementation in the District's fleet of taxicab vehicles, which are regulated by the District of Columbia Taxicab Commission. The protesters contend that several aspects of the District's price and technical evaluation, as well as its discussion with offerors, were improperly conducted and resulted in an improper decision that VeriFone was the only offeror qualified to remain in the competitive range and receive the contract award. The protesters also argue that the District awarded a contract to VeriFone that exceeded the original scope of the Solicitation requirements and was, therefore, in violation of procurement law.

We sustain the protests. First, the meager source selection record herein does not provide a credible contemporaneous record which establishes that the award to VeriFone was reasonable and consistent with evaluation criteria and procurement law. In particular, there is no written explanation or justification in the record from the Contracting Officer explaining why the protester, CMT, was excluded from the competitive range, and denied an opportunity for meaningful discussions with the Contracting Officer prior to its exclusion.

Additionally, the Board finds that the record clearly establishes that the Contracting Officer violated the terms of the solicitation and procurement law by failing to perform an independent analysis of offeror proposals in the competitive range, including the proposals of

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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD PROTECTIVE ORDER**

CMT and RideCharge, prior to making an award decision. Specifically, the record establishes that the Contracting Officer's Determination and Findings of Competitive Range pertaining to RideCharge and VeriFone was copied nearly verbatim from the Technical Evaluation Panel's consensus report and, in other cases, erroneously copied as it pertains to CMT. The Contracting Officer's failure to also conduct an independent analysis of the offerors' best and final offers and oral presentations violated § M.1.1 of the Request for Proposals and D.C. MUN. REGS. tit. 27, §§ 1618.1, 1622.6 (2002).

For the above reasons, the Board finds that the Contracting Officer's decision to award the disputed contract to VeriFone, was without reasonable basis, and was made in a manner inconsistent with the evaluation criteria and procurement law.

### **FACTUAL BACKGROUND**

The present protest arises from the District's June 29, 2012, award of a \$34.9 million contract to VeriFone to implement a Taxicab Smart Meter System ("TSMS") in the city's approximately 6,500 licensed taxicabs. (Agency Report ("AR"), Ex. 2 § B.1.) This effort to overhaul and modernize the city's taxicab fleet is intended to strengthen the District of Columbia Taxicab Commission ("DCTC"), upgrade licensure requirements, and address what city leaders have described as an "absence of modern vehicles, quality services and innovative technology." Taxicab Service Improvement Amendment Act of 2012, D.C. CODE §50-301(3) (2012 Supp.). The protesters, RideCharge and CMT, participated in the competition for the award of the disputed contract and subsequently challenged the reasonableness of the District's evaluation of proposals in this procurement, as well as the propriety of the award decision to VeriFone.

#### ***The Solicitation***

The District of Columbia Office of Contracting and Procurement ("OCP"), on behalf of the DCTC, issued Request for Proposals No. DCPO-2012-R-0342 (the "Solicitation") on January 25, 2012, seeking a contractor to develop, install, and operate a TSMS for approximately 6,500 taxicabs in Washington, D.C. (AR Ex. 2 § B.1; *see also* AR Ex. 3, Attach. A at 2, 5 (District responses to Solicitation questions).) The Solicitation contemplated the award of a five-year fixed price contract with three possible one-year option periods. (*Id.* §§ B.1, F.1, F.2.) Implementation of the TSMS was required to be completed within 90 days after the date of award. (*Id.* §§ C.3.2.)

The Solicitation specifications further established that the TSMS would require strong authentication, include electronic trip reporting, offer credit card payment processing, and display news and other programming through a back-seat Personal Information Monitor ("PIM") and Driver Information Monitor ("DIM").<sup>1</sup> (*Id.* § B.1.) The TSMS would, thus, be required to

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<sup>1</sup> Recognizing that some taxicab companies and drivers might choose to purchase their own TSMS equipment, the Solicitation specified that such independently purchased equipment must meet the same requirements as the Solicitation's TSMS equipment requirements and also be compatible with the ultimate awardee's TSMS Back Office Management Information System technology. (AR Ex. 2 § C.3.5.) The reference to "authentication" in the

accept fare payment from all major credit and debit cards through the PIM, and to collect a per ride surcharge. (*Id.* §§ C.4.4.1, C.4.4.6.) The contractor would also be responsible for securing and placing advertisements to run on the PIM. (*Id.* § C.3.7.6.1.)

Additionally, the TSMS was required to incorporate safety devices for drivers and passengers, require management of all aspects of in-cab advertising, and provide a fully integrated Back Office Management Information System ("BOMIS") for automated trip reporting and GPS tracking. (*Id.* § B.1.) Based upon these specifications, offerors were required to price their proposals for both the five year contract period and the three one-year option periods according to the price schedule identified in the Solicitation (which included upfront installation costs, ongoing operation and maintenance costs under 22 separate contract line item numbers ("CLINs")). (*Id.* § B.4.) The original Solicitation terms also required offerors to subcontract at least thirty-five percent of the dollar volume of the contract to certified small business enterprises ("CBE"), as required by law.<sup>2</sup> (*Id.* §§ B.3, H.9.)

### ***Evaluation Criteria***

The Solicitation listed the following evaluation criteria: Relevant Experience (25%), Approach and Methodology (25%), Technical Requirements (20%), and Cost/Cost and Revenue Proposal (30%). (*Id.* § M.5.) The Relevant Experience factor included consideration of having developed and implemented a TSMS in a major metropolitan area; operating, maintaining, and managing another TSMS; developing opportunities and generating revenue from the TSMS component; and knowledge of, and access to, the local subcontracting market. (*Id.* § M.5.1.) Under the Approach and Methodology factor, the offerors were required to submit a Project Management Plan that demonstrated a knowledge of the process and impediments that must be overcome, and ensure that sufficient staffing would be provided. (*Id.* § M.5.2.) The Technical Requirements factor requested that the offerors demonstrate their overall capabilities to fulfill, and their technical and technological advantages to satisfy, the requirements in Section C of the Solicitation.<sup>3</sup> (*Id.* § M.5.3.) The Solicitation provided that each offeror's compliance with the technical requirements would be rated according to the following scale:

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specifications refers to ensuring that the driver is authorized to drive a taxi and operate the fare meter through the use of a personal identification number. (*Id.* § C.4.1.1.)

<sup>2</sup> The District of Columbia Department of Small & Local Business Development, pursuant to D.C. CODE § 2-218.51, granted the agency's request for a waiver of the thirty-five percent small business subcontracting requirement on April 26, 2012. (AR Ex. 5.) The requirement was later removed per the District's May 1, 2012, Solicitation amendment. (AR Ex. 6.)

<sup>3</sup> Section C of the Solicitation detailed all of the specifications that an offeror's proposed TSMS solution was required to meet.

<u>Numeric Rating</u>	<u>Adjective</u>	<u>Description</u>
0	Unacceptable	Failed to meet minimum requirements; e.g., no demonstrated capacity, major deficiencies which are not correctable; offeror did not address the factor.
1	Poor	Marginally meets minimum requirements; major deficiencies which may be correctable.
2	Minimally Acceptable	Marginally meets minimum requirements; minor deficiencies which may be correctable.
3	Acceptable	Meets requirements; no deficiencies.
4	Good	Meets requirements and exceeds some requirements; no deficiencies.
5	Excellent	Exceeds most, if not all requirements; no deficiencies

(*Id.* § M.4.1.)

The Solicitation requested two separate pricing proposals—for a “cost and acquisition model” and also for a “cost and revenue model”—under the Solicitation’s “Cost” evaluation factor, from which the District would ultimately elect to evaluate only one of these models as its preferred model for price evaluation purposes. (*Id.* § M.5.4.) With respect to the cost and acquisition model, the District indicated that it would allocate 20 points to upfront costs, and 10 points would be allocated to operating and maintenance costs. (*Id.*) The Solicitation specified that under this model, the offeror with the lowest upfront costs and, likewise, the offeror with the lowest operating and maintenance cost proposal, would be allocated the maximum price points with all other proposals receiving fewer proportional points. (*Id.*) Under the cost and revenue model proposal, on the other hand, that was also requested by the District, the upfront costs would be allocated 10 points, operating and maintenance costs would be allocated 5 points, and revenue generation would be allocated 15 points.<sup>4</sup> (*Id.*)

#### ***The Contracting Officer & the Technical Panel***

The Solicitation advised offerors that a Technical Evaluation Panel (“TEP”) would also be utilized during the contract competition to evaluate each technical proposal submission and prepare a written report summarizing the TEP’s findings that would be submitted to the Contracting Officer (“CO”). (*Id.* § M.2.) Notwithstanding the role of the TEP, however, the Solicitation made clear that the CO was responsible for independently determining the offeror whose proposal was most advantageous to the District after assessing the technical point scores of each offeror to determine whether the point differentials between the offerors represented an actual significant difference in technical merit between the proposals.<sup>5</sup> (*Id.* § M.1.1.) The Solicitation also stated that offerors in the competitive range would be required to make oral presentations, which would also be a basis for the TEP to re-score proposals at the conclusion of these presentations.<sup>6</sup> (*Id.* § M.3.)

<sup>4</sup> The Solicitation, however, did not specify how cost evaluation points would be allocated to the lowest priced offeror under the cost and revenue model.

<sup>5</sup> In making the award decision, the Solicitation provided that the CO could award the contract to a lower-rated, lower-priced offeror, if the CO reasonably determined that the higher scored offeror was not worth an associated price premium. (AR Ex. 2 § M.1.1.)

<sup>6</sup> Prior to the receipt date for proposals, the District made several minor administrative amendments to the Solicitation including changing the locations for the pre-proposal conference, responding to questions from offerors, and extending the deadline for receipt of proposals until March 26, 2012. (AR Ex. 3.)

### ***The Evaluation Process and Award Decision***

On March 26, 2012, the District received proposals from eight offerors in response to the Solicitation, including proposals from the protesters, RideCharge and CMT, and the ultimate awardee, VeriFone.<sup>7</sup> (AR Ex. 8.) As detailed below, a very limited amount of contemporaneous documentation was provided to the Board to reflect the actual evaluation factors that were analyzed by the CO in conjunction with the initial evaluation scores assessed by the TEP.

Initially, the contemporaneous record indicates that the seven individual evaluators from the TEP reviewed each offeror's proposal in early April 2012. (*See generally* Supplemental AR Exs. 18, 19, 28 (individual scoring sheets for VeriFone, CMT, and RideCharge, respectively).) Each evaluator scored the proposals under the Relevant Experience, Approach and Methodology, and Technical Requirements factors, according to the 5-point scale stated in the Solicitation, and provided personal comments related to their evaluation of particular offerors in connection with these criteria. (*See* Supplemental AR Exs. 18, 19, 28.) After the individual evaluators scored the proposals, the TEP developed a written Consensus Report whereby the panel collectively attributed "consensus" strengths and weaknesses to each offeror's proposal under the three technical evaluation factors, and assigned final consensus numerical scores to each offeror under the foregoing evaluation factors.<sup>8</sup> (AR Ex. 11.) The initial technical scores assigned to offerors by the TEP appear to have subsequently been given additional weight, and increased numerical value, consistent with the technical value scale for each criteria set forth in the Solicitation.<sup>9</sup>

As a result of the TEP's initial evaluation of proposals, CMT, VeriFone, and RideCharge were scored as follows:<sup>10</sup>

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<sup>7</sup> The initial eight offerors submitting proposals were CabConnect, MELE, TaxiPass, TDC, Wireless Edge, CMT, RideCharge, and VeriFone.

<sup>8</sup> The initial consensus scores, before being weighted, appear to simply be an average of the scores assigned by the individual evaluators. (*See* AR Ex. 11.)

<sup>9</sup> The Board notes the existence of a relatively minor numerical difference between the final technical scores contained in the TEP Consensus Report for each offeror and final technical scores for the same offerors that are included in an undated scoring summary, including price scores, which was provided by the District during these proceedings. (*Compare* AR Ex. 11, *with* AR Ex. 25.) The reason for this minor discrepancy has not been explained by the District in this protest. Additionally, the same foregoing scoring summary inexplicably describes two of the evaluation criteria as "Technical Expertise" and "Past Performance" instead of the proper technical criteria of "Approach and Methodology" and "Technical Requirements." (AR Ex. 25.)

<sup>10</sup> The scores of the other five offerors that initially submitted proposals along with CMT, RideCharge, and VeriFone, that were later excluded from the competitive range, have been omitted as they are not parties to this action. The Board notes, however, that the May 24, 2012, competitive range determination that eliminated these five offerors from the competitive range, again, erroneously misstates the technical criteria under which the offerors were to be evaluated in this procurement. Specifically, this first May 24, 2012, competitive range determination misstates the Solicitation's technical criteria as "Technical Capacity and Expertise," "Technical Approach," and "Past Performance." (AR Ex. 8.) Again, the *correct* criteria to be applied under the Solicitation, as set forth earlier, were "Relevant Experience," "Approach and Methodology," and "Technical Requirements." (AR Ex. 2 § M.5.)

**REDACTED**

*RideCharge, Inc.  
Creative Mobile Techs., LLC  
CAB Nos. P-0920, P-0921 CONS*

	CMT	VeriFone	RideCharge
Relevant Experience	[REDACTED]	[REDACTED]	[REDACTED]
Approach and Methodology	[REDACTED]	[REDACTED]	[REDACTED]
Technical Requirements	[REDACTED]	[REDACTED]	[REDACTED]
TOTAL POINTS	[REDACTED]	[REDACTED]	[REDACTED]
RANK	[REDACTED]	[REDACTED]	[REDACTED]

(Id.)

### ***Oral Presentations and BAFOs***

After receipt of initial proposals, on May 14, 2012, the District invited VeriFone, CMT, and RideCharge to give oral presentations on May 22, 2012. (See CMT Protest Ex. H; RideCharge Protest Ex. A-5; AR Ex. 1.) Oral presentations were limited to VeriFone, CMT and RideCharge based upon the CO's determination, at some point prior to May 14, 2012, that the competitive range would only include these three offerors.<sup>11</sup> (AR Ex. 4 ¶ 8.) Further, while the Solicitation indicated that proposals would be re-scored at the conclusion of oral presentations, proposals were not re-scored immediately thereafter as prescribed by the Solicitation.<sup>12</sup> (AR Ex. 2 § M.3.) There is also no contemporaneous record of the matters which these offerors discussed at oral presentations or any record that describes the extent to which the CO assessed or analyzed the information discussed at these sessions with the competitive range offerors.

On May 25, 2012, the CO requested best and final offers ("BAFOs") from these same three offerors, and directed that BAFO responses be submitted to the District by June 6, 2012.<sup>13</sup> (CMT Protest Ex. I; RideCharge Protest Ex. A-6; AR Ex. 1.) VeriFone, CMT, and RideCharge each submitted timely BAFOs. (AR at 4.) However, again, the record is devoid of any contemporaneous documentation showing either: (1) when a specific review by the CO of BAFOs may have actually taken place; or (2) the factors or information which the CO or TEP considered when evaluating the BAFOs of CMT, RideCharge, and VeriFone, particularly as these considerations may have addressed the issue of whether each offeror adequately responded to the proposal issues or concerns raised by the District in the initial BAFO request. Instead of providing the Board with such contemporaneous documentation particularly as it relates to the CO's assessments of these issues, the District has, alternatively, provided the Board with declarations in this proceeding from its Contracting Specialist and TEP Chairman, stating that members of the TEP and the CO reviewed the offerors' BAFOs on June 8, 2012, and discussed oral presentations as well. (Supplemental AR Ex. 26 ¶ 4, Ex. 27 ¶ 7.) Further, these individuals represent in their declarations that the CO concurred with the TEP's finding that the BAFO responses did not result in any changes to the scores previously assigned to the proposals of RideCharge, CMT, and VeriFone. (Supplemental AR Ex. 26 ¶ 5, Ex. 27 ¶ 8.)

<sup>11</sup> Under the Solicitation, oral presentations were to be conducted with each offeror in the competitive range. (AR Ex. 2 § M.3.) The D&F limiting the competitive range was actually executed on May 24, 2012, after oral presentations. (AR Ex. 8.) The new CO for this procurement asserts that although the D&F was executed on May 24, 2012, the determination to limit the competitive range was made before oral presentations were requested on May 14, 2012. (AR Ex. 4 ¶ 8.)

<sup>12</sup> As noted below, the District contends that the information received from oral presentations was considered when reviewing the offerors' BAFOs. (Supplemental AR Ex. 26 ¶ 5, Ex. 27 ¶ 8.)

<sup>13</sup> The original BAFO due date of June 1, 2012, was later modified by the District to June 6, 2012. (CMT Protest Ex. J; RideCharge Protest Ex. A-6.)

**REDACTED**

*RideCharge, Inc.  
Creative Mobile Techs., LLC  
CAB Nos. P-0920, P-0921 CONS*

***Award to VeriFone***

The CO first documented his exclusion of CMT and RideCharge from the competitive range on June 11, 2012, with a rather scant, two-page, explanation of this decision. (AR Ex. 9.) The CO issued a second document, a July 5, 2012, Determinations and Finding of Competitive Range ("July 5, 2012 D&F") which provided a more extensive explanation of the CO's basis for excluding all seven competing bidders, other than VeriFone, from the competitive range in making the award decision to VeriFone.<sup>14</sup> (AR Ex. 10.) As it relates to the two protesters and the awardee, the CO's discussion of each offeror's proposal weaknesses or strengths is largely a restatement, at times verbatim, of the weaknesses or strengths found by the TEP in its Consensus Report for these same proposals.<sup>15</sup> (*Compare id.* at 5-6, with AR Ex. 11.) The July 5, 2012 D&F is the only contemporaneous document in the evaluation record written by the CO that discusses the basis for the award decision to VeriFone after the exclusion of all other offerors from the competitive range. On or about July 17, 2012, the CO for this procurement, Mr. John R. Dean, separated from his employment with the District.<sup>16</sup> (*See* Dist. Resp. to Sua Sponte Order, Oct. 9, 2012; AR Ex. 4 ¶ 3.)

***The Protest Allegations***

After being notified by the District of their exclusion from the competitive range, both CMT and RideCharge filed protests challenging this competitive range decision as well as the propriety of the manner in which the District conducted its evaluation of proposals.

The protester CMT filed an initial protest with the Board alleging that: (1) there was no rational basis for its exclusion from the competitive range and that the resulting award to VeriFone was a *de facto* sole source award; (2) the District failed to engage in meaningful discussions with CMT; (3) the contracting officer erred in finding VeriFone a responsible contractor; and (4) the District improperly removed the subcontracting requirement applicable to this procurement. (CMT Protest 15-25.) CMT's supplemental protest allegations also challenge the sufficiency of the CO's independent assessment of proposals and documentation of the same, as well as various aspects of the technical and price evaluations which it argues were unreasonable. (CMT Supplemental Protest 14-31.) Both CMT and RideCharge also contend that the terms of the contract as awarded to VeriFone differed materially from the contract contemplated by the terms of the Solicitation. (*Id.* at 36-41; RideCharge Comments on AR 7-8.)

RideCharge's protest allegations also arise from its contention that the District: (1) violated procurement law by failing to normalize assumptions in evaluating prices under specific CLIN requirements; (2) improperly allowed VeriFone to pass the costs of installing the TSMS equipment to the taxicab owners; and (3) may have improperly considered car-top advertising

<sup>14</sup> In conjunction with its award decision, the CO also made separate findings that VeriFone was a responsible bidder and that its price of \$[REDACTED] was fair and reasonable. (AR Ex. 7; Supplemental AR Ex. 24.)

<sup>15</sup> On the same day that the CO executed this July 5, 2012 D&F, the District also notified RideCharge and CMT in writing that they were no longer in the competitive range. (AR Ex. 15.)

<sup>16</sup> On July 6, 2012, the District submitted a Contract Summary for approval to the Council of the District of Columbia, as required by D.C. CODE § 1-204.51(o)(3). (CMT Protest Ex. O.) The new Contracting Officer, Derrick White, who replaced John R. Dean, executed the contract on behalf of the District on August 1, 2012. (AR Ex. 17.)

revenue, which was not a proposal requirement, in violation of the Solicitation terms.<sup>17</sup> (RideCharge Protest 8-11.)

### ***The Decision to Override the Statutory Stay***

On August 1, 2012, after this protest was filed, the OCP Chief Procurement Officer ("CPO") executed a D&F to Proceed with Contract Award While a Protest Is Pending pursuant to D.C. CODE § 2-360.08(c)(2), which was opposed by the protesters. (D&F to Proceed with Contract Award.) In attempting to override the statutory contract stay arising from this protest, the CPO represented that immediate performance of the contract was required to (1) protect the public safety and welfare; (2) allow implementation prior to the 2013 Presidential Inauguration; (3) collect data to determine whether there is adequate service in traditionally underserved neighborhoods; and (4) to collect a surcharge for each taxicab transaction. (*Id.* at 2-3.) After considering the factors presented by the CPO in this D&F, the Board overruled the D&F upon determining that the District failed to provide substantial evidence of the existence of urgent and compelling circumstances that required performance of the contract during the pendency of this protest. Accordingly, the Board ordered that the contract stay be reinstated by the District.

## **DISCUSSION**

The Board exercises jurisdiction over this protest and its underlying allegations pursuant to D.C. CODE § 2-360.03(a)(1). As set forth above, the allegations that have been presented to the Board for adjudication largely surround the issue of whether the District's award decision was based upon a proper evaluation of the price and technical proposals of the protesters, CMT and RideCharge, and of the awardee, VeriFone, as well as whether the award decision was consistent with the terms of the Solicitation.

The Board will review the propriety of an agency's award decision to ensure that it is reasonable and consistent with the evaluation criteria and procurement law based upon the source selection record presented to the Board for review. *See RGII Techs., Inc.*, CAB Nos. P-0664 et al., 50 D.C. Reg. 7475, 7477 (Mar. 6, 2003). The Board will first look to the contemporaneous evaluation record for the most accurate explanation of the source selection events that occurred, and to determine the reasonableness of the basis for the contract award. While the Board will afford some weight to declaration statements from contracting officials that are drafted and provided to the Board by the District during protest proceedings, the Board continues to afford the greatest weight to the contemporaneous record rather than to arguments and documentation prepared in response to protest contentions. *Trifax Corp.*, CAB No. P-0539, 45 D.C. Reg. 8842, 8847 (Sept. 25, 1998); *Health Right, Inc. et al.*, CAB Nos. P-0507 et al., 45 D.C. Reg. 8612, 8636 (Oct. 15, 1997).

While an agency is not required to keep every document or worksheet generated during its evaluation of proposals, *Health Right*, CAB Nos. P-0507 et al., 45 D.C. Reg. at 8636, the Board cannot blindly accept final evaluation findings and an award decision by an agency that are not reasonably supported by the evaluation record, *Urban Alliance Found. et al.*, CAB Nos.

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<sup>17</sup> The District has moved to dismiss all of RideCharge's protest grounds as either untimely or moot. (AR 5-8.)



P-0886 et al., 2012 WL 4775002 (Feb. 15, 2012). It is axiomatic that contracting agencies must document the evaluation of proposals to provide an explanation of the basis for the evaluation, including an assessment of each offeror's ability to accomplish the technical requirements, and the relative differences among the proposals as it relates to proposal strengths, weaknesses, and risks in connection with the evaluation criteria. D.C. MUN. REGS. tit. 27, §§ 1618.5, 1622.7; *Health Right*, CAB Nos. P-0507 et al., 45 D.C. Reg. at 8636 (citation omitted). It has been held by the Government Accountability Office ("GAO") that an agency that fails to properly document its source selection decision through contemporaneous records bears the risk that there may be inadequate supporting rationale to support the reasonableness of the agency's award decision. See, e.g., *Clark Foulger-Pratt JV*, B-406627, B-406627.2, 2012 CPD ¶ 213 at 10 (July 23, 2012); *Acepex Mgmt. Corp.*, B-283080 et al., 99-2 CPD ¶ 77 at 5 (Oct. 4, 1999).

Notwithstanding our broad grant of protest jurisdiction over this matter, we have long held that the Board's function is not to evaluate proposals de novo. *Scruples, Inc.*, CAB No. P-0622, 48 D.C. Reg. 1596, 1598 (Sept. 18, 2000); *Busy Bee Envtl. Servs., Inc.*, CAB No. P-0617, 48 D.C. Reg. 1564, 1567 (July 24, 2000). Indeed, the relative merit of competing proposals is primarily a matter of agency discretion and we will not substitute our judgment for that of the agency. *Group Ins. Admin., Inc.*, CAB No. P-0309, 40 D.C. Reg. 4485, 4508 (Sept. 2, 1992).

As applied to the instant facts, the very limited contemporaneous source selection record that has been provided to the Board for this procurement and the supplemental statements provided by the District fail to establish that the CO's award decision was reasonable and consistent with evaluation criteria and procurement law. For this reason and as discussed further below, we sustain the instant protests.

**There is an Extremely Limited Contemporaneous Evaluation Record, and an Inexplicable Absence of any Supplemental Statements from the CO, in this Procurement to Support the Award Decision.**

In light of the complexity of the contract requirements, the extended source selection process including oral presentations and BAFOs, the voluminous proposals that each offeror submitted to describe their overall technical approach and price (AR Ex. 2; Supplemental AR Exs. 20, 21, 29), and the city's much publicized commitment to modernize taxicab transportation operations, the Board would expect that the contemporaneous evaluation record for this procurement would be fairly extensive, particularly with respect to the CO's progressive assessment of the relative strengths of each offeror's proposal throughout the entire evaluation process.

However, as detailed below, *inter alia*, the CO only drafted a single document during the entire evaluation which purports to provide a detailed basis for the CO's decision to exclude all offerors, other than VeriFone, from the competition. (See AR Ex. 10.) Additionally, on its face, this document does not even mention the manner in which the CO evaluated the merits of the offerors' oral presentations or BAFO responses, much less note that these events took place, and were considered by the CO, as part of making the source selection decision. (See *id.*) Moreover, there are no contemporaneous materials which document a single meeting that the TEP and/or CO may have conducted (e.g., meeting minutes, notes, e-mail correspondence) during the

evaluation to even partially corroborate the District's protest allegations that progressive meetings occurred between the CO and TEP during the evaluation to discuss the merits of each competitive range proposal before the award decision was made. (*See, e.g.,* Supplemental AR 7 ("The reviews of the BAFOs from RideCharge, CMT, and VeriFone were conducted during a meeting that included the Contracting Officer and some members of the original TEP team.").)

Further, in lieu of providing the Board with a complete and contemporaneous evaluation record, the District has instead relied heavily upon the submission of declaration testimony from individual members of the TEP and contracting officials *other than* the CO, created during this protest, to attempt to prove that the CO's ultimate July 2012 award decision was allegedly reasonable and consistent with procurement law. (*See generally* AR Ex. 4; Supplemental AR Exs. 26, 27.)

The CO who presided over the award to VeriFone, now separated from employment with the District, has inexplicably refused to provide any supplemental or sworn statement to the Board to clarify the evaluation record in this matter or to attempt to establish that his award decision was reasonable. (Dist. Additional Resp. to Sua Sponte Order, Oct. 10, 2012.) More notable is the fact that the record is silent as to whether the District even attempted to obtain a supplemental statement from the CO to support the District's defense of the subject award before the Board inquired about the District's ability to obtain such a statement. (*See* Board's October 2, 2012 Sua Sponte Order ("The Board's notes, however, that the District has not similarly produced declaration or affidavit testimony from the former Contracting Officer, John R. Dean, who is identified in the District's filings in this matter as having had primary responsibility over the source selection process particularly as it relates to the activities of the TEP."); *see also* (Dist. Resp. to Sua Sponte Order, Oct. 9, 2012 ("On October 4, 2012, the District contacted Mr. Dean and requested that Mr. Dean provide a declaration as it relates to his activities concerning the evaluation and award decision."))<sup>18</sup>

The fact that the former CO has separated from employment with the District of Columbia government makes the need for a meaningful and contemporaneous evaluation record even more critical for purposes of the Board's assessment of the propriety of the CO's decision. Consequently, the failure of the District's contracting officials to properly and contemporaneously document their evaluation of proposals, or even to actively pursue obtaining a supplemental testimonial statement from the former CO to clarify the evaluation record, limits the available evidence to support the award decision to "arguments and documentation prepared in response to protest contentions" as opposed to the contemporaneous record as to which we afford the greatest weight. *Trifax Corp.*, CAB No. P-0539, 45 D.C. Reg. at 8847. Furthermore, the District's failure to contemporaneously document its evaluation of proposals is an obvious violation of the evaluation documentation requirements required by D.C. MUN. REGS. tit. 27, § 1622.7.

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<sup>18</sup> In short, the Board inquired as to the notable absence of a declaration from the former CO on October 2, 2012. (Board's October 2, 2012 Sua Sponte Order.) The District did not attempt to obtain such a declaration until October 4, 2012, two days after the Board's inquiry. (Dist. Resp. to Sua Sponte Order, Oct. 9, 2012.)

**The Written Competitive Range Determination Failed to Include Any Discussion of the Basis for Excluding the Protester CMT From the Competitive Range.**

The present protest also largely stems from protester CMT's contention that the CO's decision to exclude its proposal from the competitive range was unreasonable and in violation of procurement law. (CMT Protest 15-16.) More specifically, CMT alleges that the District's July 5, 2012, written competitive range determination does not address, or provide, the basis for the District's exclusion of CMT from the competitive range. (*Id.* at 15; CMT Supplemental Protest 10-11.) In particular, CMT argues that the CO's only written determination to exclude CMT from the competitive range—in the July 5, 2012 D&F—includes a discussion of another offeror's proposal weaknesses in the portion of the document supposedly designated by the CO to discuss the merits of CMT's proposal and, thus, provides no explanation for CMT's exclusion. (CMT Supplemental Protest 11-13.)

In addressing the protester's challenge to the competitive range determination, the Board initially notes that the competitive range generally consists of "all proposals that have a reasonable chance of being selected for award," in accordance with the evaluation criteria as stated in the solicitation. D.C. MUN. REGS. tit. 27, § 1620.1; *Busy Bee Envtl. Servs.*, CAB No. P-0617, 48 D.C. Reg. at 1566. The determination of the competitive range is primarily a matter of agency discretion. *Educ. In-Roads*, CAB No. P-0552, 46 D.C. Reg. 8519, 8525 (Oct. 27, 1998); *see also Main Bldg. Matnt., Inc.*, B-406615 et al., 2012 CPD ¶ 212 at 4 (July 23, 2012) ("The determination of whether a proposal is in the competitive range is principally a matter within the judgment of the contracting agency.") (citing *Dismas Charities, Inc.*, B-284754, 2000 CPD ¶ 84 at 3 (May 22, 2000)).

Accordingly, the Board treats the competitive range determination as it does other evaluation decisions, and will not disturb the agency's determination if it "is not arbitrary and appears reasonable and in accord with the evaluation criteria listed in the solicitation." *RGH Techs.*, CAB Nos. P-0664 et al., 50 D.C. Reg. at 7477; *accord Data Solutions & Tech., Inc.*, B-405077.2, 2011 CPD ¶ 215 at 4 (Oct. 12, 2011) ("In reviewing an agency's evaluation of proposals and subsequent competitive range determination, ... [GAO] will examine the record to determine whether the documented evaluation was fair, reasonable, and consistent with the evaluation criteria.").

On the other hand, however, where a competitive range determination is based upon a flawed evaluation, the decision to exclude an offeror from the competitive range may be deemed unreasonable. *See Educ. In-Roads*, CAB No. P-0552, 46 D.C. Reg. at 8525-26 (finding that a flawed cost evaluation rendered the protestor's exclusion from the competitive range unreasonable); *see generally Wilson Beret Co.*, B-289685, 2002 CPD ¶ 206 (Apr. 9, 2002) (sustaining a protest challenging the protester's exclusion from the competitive range due to an unreasonable evaluation under one of the technical factors).

Because of the limited evaluation record produced in this matter, there are only two contemporaneous evaluation documents that address the CO's decision to exclude CMT from the competitive range. The first document is a two-page June 11, 2012, D&F that deems all offerors except VeriFone, as excluded from the competitive range. (AR Ex. 9.) This document in no

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way details the CO's particular findings regarding the strengths and/or weaknesses of CMT's proposal, or any other offeror's proposal, as part of making this competitive range determination. (*See id.*) At best, this document simply states that CMT and RideCharge were excluded from the competitive range after evaluation of their BAFOs, without further explanation, while the CO generally noted that VeriFone was still in the competitive range because of several positive features found in its technical and price proposal. (*Id.* at 2.)

The second document drafted by the CO to explain his competitive range determination that all offerors except for VeriFone were to be excluded is the July 5, 2012 D&F which purports to provide facts and analysis which justify the CO's competitive range determination. (AR Ex. 10.) This July 5, 2012 D&F document is divided into eight separate written sections, with eight corresponding section title headers identifying the names of the eight companies that competed for the contract award: (1) CabConnect; (2) MELE; (3) TaxiPass; (4) TDC; (5) Wireless Edge; (6) CMT; (7) RideCharge; and (8) VeriFone, the awardee. (*See generally id.*)

Upon the Board's review of the July 5, 2012 D&F, the stated basis for CMT's exclusion from the competitive range is problematic.<sup>19</sup> First, the paragraph specifically designated for "CMT," never specifically references, or names CMT at any time in its narrative text when referring to proposal weaknesses identified by the CO. (*See id.* at 5.) Instead, the paragraph supposedly designated for CMT only identifies by name the offeror "Wireless Edge" in the narrative concerning identified proposal weaknesses as a basis for exclusion from the competitive range.<sup>20</sup> (*Id.*) More striking to the Board, is the fact that this paragraph designated by title for a discussion about CMT, with only narrative references to Wireless Edge and not CMT, is almost identical in wording to another section of the July 5, 2012 D&F that is expressly designated by title for a discussion about the proposal of Wireless Edge.<sup>21</sup> (*Id.* at 4-5.) In other words, the narrative in the July 5, 2012 D&F regarding CMT is identical to the narrative in the same document regarding Wireless Edge. The CO has presumably excluded CMT from the competition for deficiencies found in the Wireless Edge proposal.

Through declaration testimony, the District's current CO, who was uninvolved with the award decision, attempts to explain that there is no duplicative Wireless Edge passage for CMT in the July 5, 2012 D&F. In particular, this new CO simply states that the designated CMT narrative in the July 5, 2012 D&F simply contains a typographical error and that all of the references to "Wireless Edge," in this discussion should have referred to "CMT" instead. (AR Ex. 4 ¶ 10.) This rather basic attempt at an explanation, however, does not explain why the substantive content of both the CMT and Wireless Edge passages in the July 5, 2012 D&F are almost exactly identical in content. Consequently, given that the CMT titled section of the document, on its face, seemingly includes a discussion of the merits of Wireless Edge's proposal

<sup>19</sup> The July 5, 2012 D&F discussion paragraph attributed to CMT is titled: "6. CMT – BAFO Technical Score [REDACTED], Price Score [REDACTED], Total Point Score [REDACTED], Base Price [REDACTED], plus option price [REDACTED], total price [REDACTED]." (AR Ex. 10 at 5.)

<sup>20</sup> Wireless Edge was one of the first five offerors excluded by the CO from the competitive range in this procurement on May 24, 2012.

<sup>21</sup> The fifth section of the July 5, 2012 D&F attributed to Wireless Edge is titled: "5. Wireless Edge – Technical Score [REDACTED], price and technical score [REDACTED], Price [REDACTED] for base period and the total for base and options is \$[REDACTED]." (AR Ex. 10 at 4.)

and not CMT's proposal, the July 5, 2012 D&F in no way articulates a reasonable basis for CMT's exclusion from the competitive range to support the propriety of that decision by the CO.

Further supporting the conclusion that the July 5, 2012 D&F contains a duplicative narrative entry for Wireless Edge under the section intended for CMT, is the fact that the TEP Consensus Report describes almost identically the same weaknesses for Wireless Edge that are included in the July 5, 2012 D&F for both CMT and Wireless Edge. (*Compare* AR Ex. 10 at 4-5, *with* AR Ex. 11.) Given that both documents—the July 5, 2012 D&F and the TEP Consensus Report—describe exactly the same weaknesses for Wireless Edge, the District's attempt to dismiss the error in the July 5, 2012 D&F regarding CMT as merely a small typographical error is without basis and troubling. The Board is concerned that the District did not simply acknowledge this glaring error much earlier in this proceeding rather than attempt to defend its allegation that the July 5, 2012 D&F in any way provides a basis, or explanation, for excluding CMT from the competition, which it clearly does not. Consequently, the Board finds that neither the July 5, 2012 D&F, on its face, nor any other contemporaneous evaluation document, articulates a reasonable explanation or basis for the CO's decision to exclude CMT from the competitive range based upon any perceived strengths or weaknesses in its proposal. The unjustified decision to exclude CMT from the competitive range was, therefore, arbitrary, capricious and in violation of procurement law.

**The Contracting Officer Failed to Conduct an Independent Assessment of the Protesters' Proposals and Unreasonably Relied Exclusively Upon the Findings of the Technical Panel.**

Protester CMT also contends that the CO did not conduct the legally required independent review of the proposals in this procurement, or properly document his source selection decision as required by D.C. MUN. REGS. tit. 27, § 1618.1. (CMT Supplemental Protest 19-20.) As it relates to this allegation, the Board has previously held that the contracting officer has "a critical and unique role" in the evaluation and selection process, and as such, is ultimately responsible for the evaluation and for determining the relative merits of competing proposals. *Health Right*, CAB Nos. P-0507 et al., 45 D.C. Reg. at 8636. Although a technical evaluation panel can assist the contracting officer in his decision, the contracting officer ultimately remains responsible for the evaluation of the proposals and, accordingly, must actually conduct his own independent review. *See* D.C. MUN. REGS. tit. 27, § 1618.1; *Urban Alliance Found. et al.*, CAB Nos. P-0886 et al., 2012 WL 4775002; *see also B&B Sec. Consultants, Inc.*, CAB No. P-0583, P-0585, 46 D.C. Reg. 8637, 8647 (June 18, 1999) (finding that the contracting officer must exercise independent judgment in assessing the relative merits of the proposals, even when relying on technical expertise of delegated evaluators).

The contracting officer must prepare documentation supporting his selection decision and demonstrating the relative differences among the merits of the proposals. D.C. MUN. REGS. tit. 27, § 1622.7. While the contracting officer may properly base his independent judgment on reports and analyses prepared by others, the contracting officer cannot merely adopt those findings. *Urban Alliance Found. et al.*, CAB Nos. P-0886 et al., 2012 WL 4775002 (noting that mere adoption of the TEP's average point scores does not constitute a valid exercise of judgment). Hence, while the contracting officer may ultimately concur with the TEP findings, he must still have a well-documented and reasonable basis for the decision to concur with these

findings. *See, e.g., Health Right*, CAB Nos. P-0507 et al., 45 D.C. Reg. at 8637 (holding that the contracting officer may not abdicate his legal duty to make a substantive evaluation). Without sufficient documentation in the record supporting the CO's independent review, the Board cannot conclude that the evaluation is reasonable or rationally related to the solicitation criteria. *See Urban Alliance Found. et al.*, CAB Nos. P-0886 et al., 2012 WL 4775002.

As set forth herein, the CO in this case initially utilized a seven person TEP to individually score the proposals of the eight offerors involved in the competition for the contract award. The TEP members independently evaluated these proposals and assigned each proposal a numerical score under each evaluation factor based upon the perceived relative strengths and weaknesses of each proposal. (*See generally* Supplemental AR Exs. 18, 19, 28.) The TEP used the averages of these individual point scores to calculate each offeror's overall scores which are summarized in the TEP Consensus Report. (*See* AR Ex. 11.) The TEP Consensus Report also contains supplemental narrative comments concerning particular proposal strengths and weaknesses that were identified by the TEP.<sup>22</sup> (*Id.*)

Consistent with our prior holdings, while the CO could have relied to a certain extent upon the findings of the TEP with respect to the merits that the TEP found in each offeror's proposal, the CO was still required to undertake his own independent analysis of the relative strengths and weaknesses of each proposal prior to making an award decision, and to document the results of this independent assessment. As the District has been unable to produce declaration or affidavit testimony from the former CO to even supplement the contemporaneous evaluation record herein, or lack thereof, the Board finds that the July 5, 2012 D&F is the only document drafted by the CO which provides some expanded level of detail regarding technical and price factors which led to the CO's decision to award the contract to VeriFone after excluding all other offerors from the competitive range. No other document appears to have been drafted by the CO that discusses the merits of each competitive range proposal, or BAFO, in any further detail.

The Board has already held, *inter alia*, that the CO failed to provide any basis for his exclusion of CMT from the competitive range and, thus, there is similarly no evidence that the CO performed an independent analysis of this offeror's proposal strengths and weaknesses in making the final award decision. In addition, with respect to RideCharge and VeriFone's proposal features, the Board's review of the July 5, 2012 D&F, in conjunction with the TEP Consensus Report, unequivocally reveals that the July 5, 2012 D&F is largely a "cut and paste" of the TEP's exact findings regarding RideCharge's proposal weaknesses, and VeriFone's proposal strengths. (*Compare* AR Ex. 10 at 5-6, *with* AR Ex. 11.) At no point in the July 5, 2012 D&F does the CO make any additional meaningful statements, observations, or findings to indicate how he independently assessed and documented the merits or weaknesses of each of these offeror's proposals, in addition to relying upon the findings of the TEP, as a basis for his award decision. Thus, the July 5, 2012 D&F does not mention or analyze the potential value of

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<sup>22</sup> The District initially provided the Board with a scoring summary for each offeror's proposal. (AR Ex. 16.) Subsequently, however, the District submitted a second version of the same scoring summary to correct an alleged typographical error in the first version. (AR Ex. 25.)

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any proposal strengths recognized independently by the CO, that were considered as part of the award decision. (*See generally* AR Ex. 10.)

Moreover, the integrity of the CO's award decision is further undermined by the fact that even the costs which the CO identifies in the July 5, 2012 D&F as being CMT's final offer for the base and option years of the contract are incorrect. In particular, the July 5, 2012 D&F identifies CMT's proposed base year cost as \$ [REDACTED] \$ [REDACTED] for the option years; with a total contract price of \$ [REDACTED] (AR Ex. 10 at 5.) These, however, were not the amounts which CMT offered to the District in its final BAFO. CMT's BAFO, in fact, offered \$ [REDACTED] for the base year period of the contract; \$ [REDACTED] for the option period; for a total contract price of \$ [REDACTED] (*See* Supplemental AR Ex. 23, Volume II.) This error is further highlighted by the fact that the District has submitted two different sets of scoring summaries in the protest for the offerors in the competitive range—one summary with the erroneous contract costs for CMT that the CO presumably used in the July 15, 2012 D&F, and then a later scoring summary, filed after this protest was instituted, which correctly includes CMT's actual final BAFO price. (AR Ex. 16; Supplemental AR Ex. 25.) This glaring error is further underscored by the lack of any further written documentation from the CO explaining the actual cost figures that he relied upon in making the award decision to VeriFone.

While the District has provided protest declaration testimony from various contracting officials asserting that the CO and TEP performed a proper evaluation of proposals, these statements do not provide sufficient and convincing evidence that the CO performed the required independent analysis absent at least some form of basic corroboration from the CO himself in the contemporaneous record or in a supplemental statement. Moreover, it would be inappropriate for the Board to solely accept the statements of TEP members as conclusive evidence about the particular proposal factors that the CO analyzed or considered given the extent of the inconsistencies and errors that the Board has found in the record.

Therefore, because the CO simply copied verbatim the findings of weaknesses and strengths by the TEP, for RideCharge and VeriFone, in making his award decision without any evidence of a further analysis by the CO of the merits of these competitive range proposals, the Board finds that the CO failed to perform the legally required independent analysis of these offerors' proposals prior to making the final award decision in violation of procurement law. Similarly, because the record is void of any documentation written by the CO which describes his evaluation of CMT's proposal, we find that the CO also failed to perform the required independent analysis of the merits of this proposal in violation of procurement law.

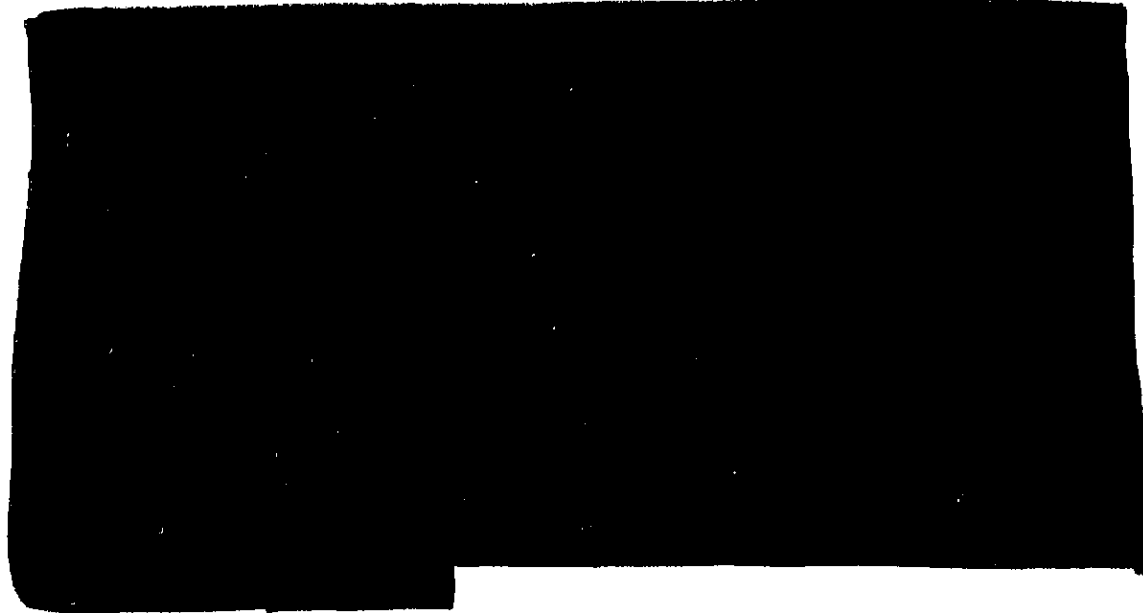
**a. The CO Failed to Confirm, Through an Independent Analysis, That the TEP's Findings Were Reasonable and Consistent with the Solicitation Criteria.**

Protester CMT also challenges the TEP's assignment of point scores and of relative strengths and weaknesses of the proposals. (CMT Supplemental Protest 20-28.) In particular, CMT argues that, based on the strengths and weaknesses of the proposals, its point scores should have been higher under the "Relevant Experience," "Approach and Methodology," and "Technical Requirements" evaluation factors, and that VeriFone should have received lower scores under the "Relevant Experience" and "Approach and Methodology" evaluation factors.

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(*Id.* at 23-28.) CMT points to, what it deems to be, various inconsistencies in the comments made by individual evaluators which it contends evidence an inconsistent application of the Solicitation criteria. For example, CMT contends that:



It is not the role of the Board to re-evaluate proposals where a protester disagrees with the findings of a technical panel and we, therefore, decline to do so in this instance. *Group Ins. Admin.*, CAB No. P-0309, 40 D.C. Reg. at 4508-09. It was the unique responsibility of the CO to independently analyze, and validate, the evaluation findings of the TEP as part of the final award decision to ensure that their evaluation was performed in a manner consistent with the Solicitation requirements and procurement law. For this reason, the Board finds that due to the CO's failure to conduct such an independent assessment of proposals, including a reasonable independent assessment of the TEP's initial evaluation scoring of the competitive range offerors, there is no basis for validating the TEP's scores as reasonable and consistent with the Solicitation criteria. *Cf. Health Right*, CAB Nos. P-0507 et al., 45 D.C. Reg. at 8639 (holding that a contracting officer cannot reasonably adopt inadequate panel evaluation findings as a substitute for his independent judgment).

**The Record Does Not Conclusively Establish That Meaningful Discussions Took Place.**

CMT also contends that the District failed to conduct meaningful discussions with the firm. (CMT Protest 18-19; CMT Supplemental Protest 31-34.) In particular, CMT argues that the District failed to identify, during discussions, weaknesses that it had found in CMT's proposal particularly concerning its proposed [REDACTED] (CMT Protest 19; CMT Supplemental Protest 31-33.)

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The District's procurement regulations require that discussions, if held, must be conducted with every offeror in the competitive range.<sup>23</sup> D.C. MUN. REGS. tit. 27, § 1621.1. Though discussions need not be all encompassing, discussions must be meaningful. *See Health Right*, CAB Nos. P-0507 et al., 45 D.C. Reg. at 8645 (discussing "the need for meaningful discussions"); *Koba Assocs., Inc.*, CAB No. P-0350, 41 D.C. Reg. 3446, 3472-74 (June 16, 1993) (finding that no meaningful discussions were conducted); *accord Creative Info. Tech., Inc.*, B-293073.10, 2005 CPD ¶ 110 at 6 (Mar. 16, 2005) ("When contracting agencies conduct discussions with offerors..., such discussions must be meaningful."). Discussions need not address every aspect of a proposal that receives less than a perfect score. *Health Right*, CAB Nos. P-0507 et al., 45 D.C. Reg. at 8645; *Raytheon Co.*, B-404998, 2011 CPD ¶ 232 at 6 (July 25, 2011). However, agencies must point out deficiencies and resolve mistakes and uncertainties in proposals, and allow offerors an opportunity to revise proposals. D.C. MUN. REGS. tit. 27, § 1621.2; *Psychiatric Inst. of Wash., Inc.*, CAB No. P-0905, 2012 WL 4753869 (Aug. 1, 2012); *Med. Extension Servs., Inc.*, CAB No. P-0378, 41 D.C. Reg. 3918, 3921 (Jan. 14, 1994). Accordingly, agencies are required to discuss weaknesses in an offeror's proposal that have a significant adverse impact on its technical rating. *Psychiatric Inst. of Wash., Inc.*, CAB No. P-0905, 2012 WL 4753869; *Health Right*, CAB Nos. P-0507 et al., 45 D.C. Reg. at 8645.

The difficulty in assessing the sufficiency of discussions in the instant matter arises from the fact that there were other flaws in the technical evaluation noted earlier. In similar cases, the Board has found that evaluations can be performed so improperly as to make meaningful discussions impossible. *See Koba Assocs.*, CAB No. P-0350, 41 D.C. Reg. at 3473 ("evaluations were performed so improperly that no meaningful discussions were (or could have) been conducted"). Here, we have found that the evaluation record was insufficiently documented; the competitive range determination was flawed as it relates to CMT's exclusion, and the CO failed to conduct a proper independent evaluation of proposals to independently confirm that the TEP's initial proposal evaluation findings were reasonable and consistent with the Solicitation and procurement law.

As a result of these pervasive improprieties already found to have occurred in the evaluation, the Board is unable to conclude, as a practical matter, that the CO reasonably and independently determined the existence of weaknesses in CMT's proposal and conducted proper discussions based upon such reasonable findings. Indeed, because the competitive range determination was flawed and the record lacks any written justification from the CO to exclude CMT from the competition, we cannot reasonably determine the factors that the CO relied upon in excluding CMT from the competitive range. Consequently, the Board finds that the record does not demonstrate that the District engaged in meaningful discussions with CMT during the evaluation.

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<sup>23</sup> The District argues that it was not required to conduct discussions pursuant to D.C. CODE § 2-354.03(h)(2) (2011), and could have simply conducted negotiations with the highest ranked offeror. (Supplemental AR 10.) Such discussions with the highest ranked offeror, however, may be conducted only after the contracting officer has ranked proposals from most advantageous to least advantageous. *See* D.C. CODE § 2-354.03(g)(2), (h)(1) (2011). At the time that discussion were alleged to have taken place in the procurement, there is no evidence that the CO had conclusively established that VeriFone was the highest ranked offeror as the District was in the process of requesting BAFOs from all three competitive range offerors during this time period.

## **CONCLUSION**

For the reasons stated above, the Board finds that the District conducted an improper and insufficiently documented technical evaluation of proposals in this matter. The CO appears to have completely abdicated his responsibility to conduct an independent analysis of proposals, issued a flawed competitive range determination, and failed to provide contemporaneous documentation of key proposal evaluation decisions pertaining to oral presentations, BAFOs, and the conduct of meaningful discussions with the protesters. Moreover, the Board is troubled by the numerous unexplained and glaring errors, inconsistencies, and oversights that clearly occurred during this evaluation.

Therefore, in light of these improprieties, the Board hereby directs the District to take corrective action including: (1) terminate the contract awarded to VeriFone; (2) re-issue the Solicitation only insofar as it is necessary to reflect any alteration in performance level requirements based upon the fact that VeriFone has performed limited TSMS installations during the pendency of this protest; (3) request that the offerors in the initial competitive range, including CMT, RideCharge, and VeriFone, submit revised proposals that are responsive to the Solicitation; (4) conduct proper meaningful discussions, if necessary, with offerors in the competitive range; (5) request BAFOs from the offerors in the competitive range; and (6) re-evaluate proposals in a manner that is consistent with the Solicitation and procurement law.

To the extent that the District intends to utilize a technical panel as part of the re-evaluation required by the Board in the foregoing corrective action, the panel shall prepare a written evaluation report per D.C. MUN. REGS. tit. 27, § 1618.5 that contains (1) the basis for the evaluation; (2) an analysis of the technically acceptable and unacceptable proposals, including an assessment of each offeror's ability to accomplish the technical requirements set forth in the Solicitation; (3) a summary, matrix, or quantitative ranking of each technical proposal in relation to the best rating possible; and (4) a summary of the findings of the technical panel. Further, pursuant to D.C. MUN. REGS. tit. 27, §§ 1622.6, 1622.7, prior to making an award decision, the new Contracting Officer shall independently evaluate, and detail in writing, each proposal in the competitive range in a manner which meaningfully explains: (1) the basis for the award decision; (2) the relative differences among the proposals as independently determined by the Contracting Officer; (3) the Contracting Officer's determination of any proposal strengths, weaknesses, and risks for each competitive range proposal as they correspond to the evaluation factors; and (4) any other factors leading the Contracting Officer to determine that one proposal is most advantageous to the District and should receive the contract award.

Because we have ordered the corrective stated herein, we do not address the remaining protest grounds raised by the protesters in further detail. We generally note, however, that the protesters' additional grounds are without merit.

**SO ORDERED.**

DATED: November 9, 2012

/s/ Monica C. Parchment  
MONICA C. PARCHMENT  
Administrative Judge

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

**CONCURRING** (Marc D. Loud, Sr., Chief Administrative Judge):

The single greatest mystery in this procurement is the role played by the District's contracting officer. He is portrayed by the District as *leading* this \$35 million dollar procurement, but emerges from our record as a far more peripheral figure. The source selection materials portray the contracting officer as opting to cut and paste lower level evaluator recommendations rather than analyzing proposals himself. The contracting officer also failed to contemporaneously document the progression of this procurement, and declined an opportunity to clarify whether an independent evaluation was done through submission of a post-litigation declaration.

While others have attempted to plug the evidentiary gap with purported *eyewitness* accounts of the contracting officer's independent proposal evaluations<sup>24</sup>, the contracting officer himself is silent and the record is clear that no such independent evaluations occurred. The contracting officer's July 5, 2012, competitive range D&F was excerpted verbatim from an April 17, 2012, Technical Evaluation Panel report. AR, Ex. 10, Determination and Findings of Competitive Range; AR, Ex. 11, Technical Evaluation Consensus Report for Original Proposals. Moreover, the July 5 D&F purports to evaluate *BAFOs* for CMT and RideCharge, but uses the exact language that the panel used in evaluating *initial* (i.e., pre-BAFO) offeror proposals. AR, Ex. 10, ¶¶ 6-8; AR, Ex. 11, Evaluation Form/RideCharge; AR, Ex. 11 Evaluation Form/Wireless Edge.

It is impossible for the District to conduct a lawful procurement where, as here, the contracting officer is a virtual no-show in the proposal evaluation stage. Our cases are clear that a contracting officer's *independent* evaluation is the determining element in a final selection. *B&B Security Consultants*, 46 D.C. Reg. 8637, 8648; *Health Right*, 45 D.C. Reg. 8612. In this case, there is no credible direct evidence from the contracting officer that such an independent evaluation took place, no contemporaneous records from the contracting officer or other procurement officials that such an independent evaluation took place, and no credible post-litigation evidence leading to that conclusion.

In a footnote discussion in *Health Right*, our Board took note of contracting officer conduct that exemplified an independent evaluation. *Health Right* at 8637 n.11. While there is no formulaic rule regarding acceptable conduct, the following factors were noted in the *Health Right* decision: (1) independent review of technical proposals, (2) conversations with the

<sup>24</sup> AR Ex. 4, ¶¶14-17, Declaration of Derrick White; Supp. AR, Ex. 26, ¶¶ 4, 6-7; Declaration of Leslie Ramdat; Supp. AR, Ex. 27, ¶ 8, Declaration of Ron Linton.

technical board's chair regarding the process of the board's initial evaluation and its initial findings, (3) review of an early draft of the board's evaluation report, (4) reviewing the technical board's final evaluation report, and spending a week comparing and validating the evaluation findings against the contracting officer's own review of the technical proposals. It would prove helpful for the District's current TSMS contracting officer to take note of the above factors.

I concur with the panel's findings and conclusions herein.