

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

PSYCHIATRIC INSTITUTE OF WASHINGTON, INC.)	
)	CAB No. P-0905
)	
Under Solicitation No. RM-11-RFP-83-BY4-VM)	
)	

For Psychiatric Institute of Washington, Inc.: Jeffrey Weinstein, Esq., Jeffrey Weinstein, PLLC.
For the District of Columbia Government: Janice N. Skipper, Esq., Assistant Attorney General.

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

OPINION

Filing ID 45653191

Psychiatric Institute of Washington, Inc. (“PIW” or “protester”), has filed a protest challenging the District’s decision to award Pathways to Housing DC (“Pathways”) a contract pursuant to Solicitation No. RM-11-RFP-83-BY4-VM (“solicitation” or “RFP”) issued by the District of Columbia Department of Mental Health Contracts and Procurement Administration (“DMH”). The solicitation requested proposals to “operate an Urgent Care Clinic at the DC Superior Court (UCC).” (AR at Ex. 1, § C.3.1.) The protester’s challenge generally concerns allegations that (1) the District unreasonably evaluated the offeror technical proposals, and (2) the District treated offerors unequally in that Pathways was afforded additional opportunities to correct deficiencies in its proposal while PIW was not afforded comparable opportunities. (*See* Comments on AR/ Resp. to Mot. to Dismiss 2-15, Mar. 27, 2012 [hereinafter “Comments on AR”].) On March 9, 2012, the District filed a motion to dismiss for protester’s alleged failure to comply with the requirements of Board Rule 301.1(c) which require protester to present a clear and concise statement of the legal and factual grounds of the protest. (Mot. to Dismiss 6-7, Mar. 9, 2012.) On May 16, 2012, the District filed a “Determination and Findings to Proceed with Contract Performance while a Protest is Pending” (“D&F”). Following protester’s successful challenge on July 9, 2012, to a Board Order dated June 22, 2012, sustaining the D&F, *see Wis. Ave. Psychiatric Ctr., Inc. v. D.C. Dep’t of Mental Health*, C.A. No. 005211 B (D.C. Super. Ct. July 3, 2012), the District filed a second D&F. (*See* Notice of Supplement to Determination to Proceed with Contract Performance While A Protest is Pending, Ex. 1 [hereinafter “Second D&F”].)

We deny the District’s motion to dismiss finding that PIW’s protest grounds are sufficiently clear to meet the standard established by Board Rule 301.1 and that the Agency Report has provided the Board with sufficient evidence to rule on the merits of the claim. However, the Board finds no evidence in the record that the District evaluated the offeror technical proposals unreasonably or that the District unlawfully treated the offerors in an unequal manner. Accordingly, the protest is denied. Protester’s motion to override the Second D&F is also denied as moot.

BACKGROUND

On May 24, 2011, DMH issued a solicitation requesting proposals to “operate an Urgent Care

Clinic at the DC Superior Court (UCC).” (AR at Ex. 1, § C.3.1.) The RFP sought “a Contractor to provide individuals [who have contact with the court system] with mental health and/or substance abuse service in an easily accessible service environment located at the Superior Court.” (AR at Ex. 1, § B.1.) PIW had been providing services similar to those requested under the RFP pursuant to a contract beginning May 16, 2008, with a Base Year and two One Year Option periods. (D & F ¶ 3.d, May 14, 2012.)¹ The RFP was revised twice prior to the deadline for receipt of proposals on June 27, 2011. The revisions are as follows: (i) on June 13, 2011, (Amendment No. 1), the District’s responses to questions by prospective offerors were incorporated into the contract and amendments were made to certain sections of the RFP, (AR at Ex. 2) and (ii) on June 20, 2011, (Amendment No. 2), additional questions by prospective offerors were responded to and the responses were incorporated into the RFP (AR at Ex. 3).

Terms of the RFP

Section C of the solicitation detailed the technical requirements entitled “Description/ Specifications/Work Statement.” The following are the requirements of particular relevance to this protest:

- § C.6 The Scope of Work (SOW) for the UCC at the District of Columbia Superior [Court] is delineated in the sections that follow. All Prospective Contractors shall clearly describe how each of these requirements shall be addressed in the proposal.
- § C.6.1 The staffing pattern of the UCC shall include a team comprised of mental health and substance abuse clinicians. The staffing pattern shall be sufficient to provide services to a minimum of 300 individuals per year. The staff team will be led by a psychiatrist who will be responsible for the overall supervision and management of the UCC. The psychiatrist shall be available on a daily basis to see individuals referred for service within 90 minutes of presenting at the UCC.
- § C.6.1.2 The UCC shall employ three staff, including two Certified Addiction Counselors (CACs), to provide substance abuse screening, assessment and referral services. The staff shall have the capacity to conduct the Global Appraisal of Individual Needs (GAIN) assessment. . . .
- § C.7 In addition to the contract funding, the selected Contractor shall be expected to have the capacity to bill Medicaid for all appropriate reimbursable services including mental health rehabilitation services (MHRS), Medicaid fee for service and/or the Managed Care Organizations (MCOs).
- § C.9.1 Prospective contractors responding to the RFP shall provide detailed responses to the requirements described in the Scope of Work.

¹ PIW’s contract expired on May 15, 2011, however a Single Available Source Contract (“SAS”) was issued to PIW on May 16, 2011, and extended to May 15, 2012. (D & F ¶ 3.d, May 14, 2012.) The District then issued another short term SAS contract to facilitate the transition from PIW to the awardee under the RFP.

* * *

[A]ll proposals must include a proposed budget which delineates expected revenues from billings as well as needed contract and client support dollars. The budget shall include line item expenditures and a budget narrative.

(AR at Ex. 1.)

The solicitation contemplated a Fixed Price Contract. (AR at Ex. 1, § B.2.) Under the terms of the solicitation, the District would award a single contract to the “responsive and responsible Offeror whose offer is most advantageous to the District,” (AR at Ex. 1, § M.1) based upon the following evaluation criteria: (1) Technical Criteria (90 points) (AR at Ex. 1, § M.3.1), and (2) Price Criterion (10 points) (AR at Ex. 1, § M.3.2). “[W]hile the points in the evaluation criteria indicate their relative importance, the total scores shall not necessarily be determinative of the award. Rather the total scores shall guide the District in making an intelligent award decision based upon the evaluation criteria.” (AR at Ex. 1, § M.1.)

The technical criteria was subdivided into the following four factors:

- The Offeror demonstrates a well developed plan that details proposed organizational structure, staffing pattern, commitment to clinical competence in treating co-occurring services and an evaluation plan. **(40 PTS.)**
- The Offeror demonstrates evidence that the applicant shall develop the project based upon a recovery-based philosophy, active peer involvement and knowledge of the court system. **(15 PTS.)**
- The Offeror demonstrated evidence of the ability to link individuals with community-based services, including linkage with CSAs as appropriate and enrollment with substance abuse providers when appropriate. **(20 Points)**
- The Offeror demonstrates ability to maximize revenue collection. **(15 Points)**

(AR at Ex. 1, § M.3.1 (emphasis in original).)

Ratings were to be assigned for each technical factor according to the scale below:

<u>Numeric Rating</u>	<u>Adjective</u>	<u>Description</u>
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

(AR at Ex. 1, § M.2.1.)

The technical rating is a weighting mechanism that shall be applied to the point value for each evaluation factor to determine the Offeror's score for each factor. The Offeror's total technical score shall be determined by adding the Offeror's score in each evaluation factor. For example, if an evaluation factor has a point value range of twenty (20) points, using the Technical Rating Scale above, if the District evaluates the Offeror's response as "Good", then the score for that evaluation factor is 4/5 of 20 or 16.

(AR at Ex. 1, § M.2.2.)

The price criterion was worth a maximum of ten (10) points and was to be awarded on a purely objective basis. (AR at Ex. 1, § M.3.2.) "The Offeror with the lowest cost/price shall receive the maximum price points. All other proposals shall receive a proportionately lower total score." (*Id.*)

The evaluation criteria also allowed for additional preference points to be awarded on the following bases: (1) DSLBD certified Resident-Owned Business (5 points) (AR at Ex. 1, § M.5.1.2); (2) DSLBD certified Longtime Resident Business (5 points) (AR at Ex. 1, § M.5.1.3); (3) DSLBD certified Local Business Enterprise (2 points) (AR at Ex. 1, § M.5.1.4); (4) DSLBD certified Local Business Enterprise with its principal offices located in an Enterprise Zone (2 points) (AR at Ex. 1, § M.5.1.5); (5) DSLBD certified Disadvantaged Business Enterprise (2 points) (AR at Ex. 1, § M.5.1.6); (6) DSLBD certified Veteran-Owned Business (2 points) (AR at Ex. 1, § M.5.1.7); (7) DSLBD certified Local Manufacturing Business Enterprise (2 points) (AR at Ex. 1, § M.5.1.8). "Notwithstanding the availability of the preceding preferences, the maximum total preference to which a certified business enterprise is entitle [sic] under the Act is the equivalent to twelve (12) points on a 100-point scale for proposals submitted in response to this RFP." (AR at Ex. 1, § M.5.2.)

The District reserved its right to award the contract "on the basis of initial offers received, without discussion." (AR at Ex. 1, § L.1.2.) However, if the District decided to conduct negotiations

[a]ll Offerors within the competitive range shall be so notified and shall be provided an opportunity to submit written best and final offers at the designated date and time. . . . After receipt of best and final offers, no discussions shall be reopened unless the Director/ACCO determines that it is clearly in the Government's best interest to do so[.] . . . If discussions are reopened, the Director/ACCO shall issue an additional request for best and final offers to all Offerors still within the competitive range.

(AR at Ex. 1, § L.17.)

Evaluation of Proposals

Only two offerors, PIW and Pathways, submitted timely proposals to the RFP. (*See* AR at Ex. 6, § 5.) The Evaluation Committee ("Committee") met on the seventh, seventeenth, and twenty-first of November 2011 to review, evaluate and score the submitted proposals. (AR at Ex. 6, § 4.) The Committee, composed of three members, concluded its initial evaluation of offeror proposals on December 14, 2011. PIW received raw scores of 69, 37, and 57 from the three respective Committee

members for a total score of 163 and an average score of 54.3. (AR at Ex. 6, § 5.1.) Pathways received raw scores of 73, 65, and 73 for a total score of 211 and an average score of 70.3. (AR at Ex. 6, § 5.1.)

DMH's Chief Contracting Officer ("CCO") issued each offeror a "Notification of Deficiencies" Best and Final Offer ("BAFO") request dated December 16, 2011. (AR at Exs. 7, 9.) PIW's "Notification of Deficiencies" identified a number of deficiencies under the heading entitled "Price Proposal." (See AR at Ex. 7.) Under the "Technical Proposal" caption, the notice also stated:

Psychiatric Institute of Washington's (PIW) proposal lacks detail about peer involvement, peer empowerment. PIW proposal lacks discussion on management data or QI mechanisms. PIW shall provide reason for inability to bill MHRS and discuss in more detail about PIW's client centered approach.

(AR at Ex. 7.)

BAFOs were due on January 5, 2012. (AR at Exs. 7, 9.) Both offerors submitted BAFOs to the District. (See AR at Ex. 11, § 5.) The Committee met on January 9, 2012, to review, evaluate and score the BAFO submissions of both offerors. (AR at Ex. 11, § 4.) Following the BAFO submissions, Pathways received raw scores of 68, 73, and 73 from the three respective Committee members for a total score of 214 and an average score of 71.3. (AR at Ex. 11, § 5.2.) PIW received raw scores of 66, 70, and 45 from the three respective Committee members for a total score of 181 and an average score of 60.3. (AR at Ex. 11, § 5.1.) Pathways' proposed price for the base year of the contract was \$686,356.74; \$238,593.26 less than PIW's proposed price of \$924,950.00. (AR at Ex. 16.) Accordingly, Pathways received all 10 evaluation points for price; its total evaluation score was 81.33. (*Id.*) Applying the solicitation's objective price formula, PIW was awarded 7.42 evaluation points for price; its total evaluation score was 67.75. (*Id.*) In its Evaluation Committee Report, the Committee "unanimously recommend[ed] the contract be awarded to Pathways to Housing, Inc." (AR at Ex. 11, § 5.) In the same report, the Committee then "request[ed] further clarity" on four areas of Pathways' proposal: (1) the methodology for billing both MHRS and non-MHRS services; (2) a detailed explanation of the role of Neighbors Consejo; (3) the plan to hire and retain qualified staff and minimize staff turnover; and (4) the methodology Pathways would use for in-kind services. (*Id.*)

Following the Committee's recommendation to award the contract to Pathways, on January 12, 2012, the CCO issued Pathways an "Additional Information Request" for "some additional points of clarification that must be addressed by Pathways to Housing (Pathways) prior to moving forward in the process."² (AR at Ex. 12.) On January 17, 2012, Pathways provided its responses to the CCO's additional information request. (AR at Ex. 13.) The CCO met with Pathways on January 18, 2012, and raised additional questions. (See AR at Ex. 14.) Pathways responded to the District's questions in writing on January 23, 2012. (AR at Ex. 14.) "On January 25, 2012, the three member evaluation committee reconvened to evaluate the responses submitted [by Pathways] to the Court Urgent Care RFP – **Additional Information Request.**" (AR at Ex. 15, § 5.) The Committee determined that Pathways' responses "adequately clarified the concerns of the evaluation committee." (AR at Ex. 15, § 5.1.)

On February 1, 2012, the CCO issued a Determination and Findings that (i) Pathways was a responsible offeror, and (ii) its proposed contract price was fair and reasonable. (AR at Exs. 17, 18.) On

² In addition to the four areas of clarification identified by the Committee, the CCO's letter to Pathways included one additional item concerning how Pathways would provide a plan to obtain the best qualified individuals to provide the highest level of service. (AR at Ex. 12.)

the same day, the District notified PIW that it was an unsuccessful offeror and notified Pathways that it was the successful offeror. (AR at Exs. 19, 20.) PIW requested a debriefing from the District which was held on February 9, 2012. (Protest ¶ 16.) Subsequently, PIW filed its protest with this Board on February 15, 2012.

Determination and Findings to Proceed with Contract Performance while a Protest is Pending

On May 16, 2012, the District its first D&F which was executed by DMH's CCO. The Board sustained the D&F in an Order dated June 22, 2012. In *Wisconsin Avenue Psychiatric Center, Inc. v. D.C. Department of Mental Health*, C.A. No. 005211 B (D.C. Super. Ct. filed June 22, 2012), protester filed a motion for entry of a temporary restraining order of the Board's June 22nd Order. On July 3, 2012, the D.C. Superior Court granted protester's motion, reversed the Board's Order, and remanded the case to the Board. On July 9, 2012, the District filed the Second D&F. The Board vacated its June 22nd Order on July 12, 2012; the July 9th filing of the Second D&F having rendered moot the May 16th D&F. The Board also ordered the District to stay execution of the Second D&F until protester had the opportunity to pursue a challenge of the Second D&F. Protester challenged the Second D&F in a motion dated July 16, 2012.

DISCUSSION

I. MOTION TO DISMISS

On March 9, 2012, the District filed a motion to dismiss in which it argued that the Board should dismiss the protest because it fails to comply with the requirements of Board Rule 301.1(c). (Mot. to Dismiss 6-7, Mar. 9, 2012.) Board Rule 301.1 provides in pertinent part:

All protests shall be in writing, addressed to the Board, and shall include the following:

* * *

(c) a clear and concise statement of the legal and factual grounds of the protest, including copies of relevant documents, and citations to statutes, regulations or solicitation provisions claimed to be violated.

This rule is "meant to advise protesters of the expected form and content of a protest, so that the protester identifies the legal and factual grounds of the protest for the Board and the agency and its counsel." *Unfoldment, Inc.*, CAB No. P-0435, 44 D.C. Reg. 6378, 6381 (Sept. 12, 1995). "Our expectation of specificity in the initial protest submission must take into account that the protester may often have little more than the benefit of the solicitation documentation, its observations as a participant in the procurement, and a debriefing." *Id.*

While the initial protest raised only a generalized allegation that the District "failed to properly evaluate [PIW's and] the awardee's technical proposal and preference points as provided by the terms of the RFP," (Protest ¶¶ 15, 17) the protester has since raised multiple alleged errors with the District's evaluation and evaluation process upon which it challenges the present solicitation.³ The District initially challenged the specificity of protester's allegations and argued in its motion to dismiss that protester had

³ In this case, the protester's later raised bases are intended to supplement its initial argument that the District failed to properly evaluate the proposals. Under these circumstances, the Board considers the additional arguments as timely made. See, e.g., *Rodgers Bros. Custodial Servs. Inc.*, CAB No. P-0565, 46 D.C. Reg. 8564, 8566 (Feb. 17, 1999).

failed to meet the requirements set forth in Rule 301.1(c).⁴ We have held that “[w]here the District believes that a protest ground fails to state a violation of procurement law or regulation or is unsupported by the facts, the matter should be addressed through the Agency Report on the merits in the first instance and the absence of detailed facts concerning an alleged procurement deficiency in the initial protest filing does not necessarily dictate dismissal.” *CUP Temporaries, Inc.*, CAB No. P-0474, 44 D.C. Reg. 6841, 6844 (July 3, 1997). *See also Unfoldment, Inc.*, CAB No. P-0435, 44 D.C. Reg. at 6381. Therefore, based on a review of the record, the Board finds that the protester’s filings are sufficient to meet the standard established by Rule 301.1 and the Agency Report has provided the Board with sufficient evidence to rule on the merits of the claim. Accordingly, the District’s motion to dismiss on the ground that PIW failed to provide a clear and concise statement of the legal and factual grounds of the protest is denied. The Board will consider the merits of the protest.

II. MERITS OF THE PROTEST

We exercise jurisdiction over this protest and its underlying allegations pursuant to D.C. Code § 2-360.03(a)(1) (2011). Protester has standing to file this protest as an aggrieved party because it timely submitted a proposal in response to the RFP and would be next in line for the award if the protest were sustained. (AR at Ex. 6, § 5.) Further, PIW timely filed this protest on February 15, 2012, within ten (10) business days of learning of the basis of the protest, in this case the notice of award to another bidder, pursuant to D.C. Code § 2-360.08(b)(2) and Board Rule 302.2(b).

The protester challenges the current award and alleges that (1) the District’s evaluation of the offeror technical proposals was irrational and therefore flawed and unreasonable, and (2) offerors were treated unequally in that Pathways was afforded three additional opportunities to correct deficiencies in its proposal while PIW was not afforded comparable opportunities. (Comments on AR/ Resp. to Mot. to Dismiss 2, Mar. 27, 2012 [hereinafter “Comments on AR”].)

Issue One: Was the District’s Evaluation of Both Offeror Technical Proposals Reasonable?

The protester has alleged that the District failed to evaluate the proposals reasonably and in accordance with the terms of the solicitation. (Comments on AR 2-15.) PIW therefore contends that its protest should be sustained because “DMH’s award decision was unreasonable.” (Comments on AR 2.) However, the District maintains that the respective proposals from PIW and Pathways were properly evaluated. (Mot. to Reply to the Protester’s Comments on AR/ Resp. to Mot. to Dismiss, & the District’s Reply 3-4, Apr. 5, 2012.) Upon a review of the record, the Board finds that while there is sufficient evidence of a reasonable basis for award, there is no evidence that the evaluation conducted by the Committee deviated from the terms of the solicitation and/or violated procurement law.

The Board’s standard of review for proposal evaluations and the related selection decision is whether the District’s actions were reasonable, in accord with the evaluation and selection criteria identified in the solicitation, and whether there were violations of procurement laws or regulations. *See, Trifax Corp.*, CAB No. P-0539, 45 D.C. Reg. 8842, 8847 (Sept. 25, 1998); *see also Health Right, Inc., D.C. Health Coop., Inc., & The George Washington Univ.*, CAB Nos. P-0507, P-0510, P-0511, 45 D.C. Reg. 8612, 8630 (Oct. 15, 1997). It is not this Board’s place to make an independent evaluation of offeror proposals or determine how we might have evaluated proposals were we in the position of the Committee. *See Group Ins. Admin., Inc.*, CAB No. P-0309-B, 40 D.C. Reg. 4485, 4508 (Sept. 2, 1992) (“[I]t is not

⁴ The District has not reasserted its claim that a motion to dismiss is warranted based on Rule 301.1(c) since the protester filed its Comments on the Agency Report. (Mot. to Reply to the Protester’s Comments on Agency Report, Apr. 5, 2012.)

this Board's function to evaluate proposals de novo.") Rather, we only consider whether the District's actions were arbitrary. *See RGII Tech., Inc.*, CAB Nos. P-0664, P-0669, P-0670, 50 D.C. Reg. 7475, 7477 (Mar. 6, 2003). "The Board will not interfere with an evaluation decision if, based on the entire record, the decision is documented in sufficient detail to show that it is not arbitrary and appears reasonable and in accord with the evaluation criteria listed in the solicitation." *RGII Tech., Inc.*, CAB Nos. P-0664, P-0669, P-0670, 50 D.C. Reg. at 7477.

Accordingly, "[t]he protester has the burden of affirmatively proving its case and the fact that the protester does not agree with the agency's technical conclusions does not itself render the evaluation unreasonable." *Emergency Assocs. of Physician's Assistants & Nurse Practitioners, Inc.*, CAB No. P-0500, 46 D.C. Reg. 8527, 8532 (Dec. 15, 1998). See also *O'Donnell Construction Co.*, CAB No. P-0158 39 D.C. Reg. 4479, 4489 (Mar 24, 1992), wherein the Board held that "[a]bsent a showing that the District has violated specific provisions of the [Minority Contracting] Act or the PPA or the District's procurement regulations, the protest must be denied. This is so because there is a presumption that public officials perform their official duties properly and in good faith."

Evaluation of PIW's Proposal Was Reasonable

PIW argues that the District failed to properly credit the strength of the staffing offered in PIW's proposal and inappropriately used price and cost considerations to downgrade PIW's technical scores. (Comments on AR 3, 8.) Specifically, the protester has alleged that the District failed to give appropriate credit to PIW's proposal to provide the services of a child and adolescent psychiatrist. (Comments on AR 3.) The record, however, establishes that the District's evaluation was reasonable with respect to each of the four technical evaluation criteria, including staffing considerations.

There is no evidence to support protester's assertion that PIW's staffing strengths were overlooked. Staffing and organizational structure were all evaluated under the first technical evaluation factor ("Factor 1"), worth a maximum of 40 points. (AR at Ex. 11, § 2.) PIW's proposal received scores of 40, 32, and 40, (AR at Ex. 16) which corresponds to receiving two fives and a four under the solicitation's rating scale (AR at Ex. 1, § M.2.1). Clearly, the Committee gave PIW's proposal significant credit for the strength of its proposed staffing and organizational plan since its proposal received a very high score for Factor 1.

Furthermore, the protester has failed to prove that the District was arbitrary in its decision to award PIW's proposal lower scores for the other three technical evaluation factors. The Committee's summary of its evaluation of PIW's BAFO stated:

[D]id not sufficiently address the deficiencies. The offeror dismissed the need to involve peers even though this was an evaluation criterion. The offeror does not have the ability to bill MHRS and did not offer a plan to maximize revenue collections. The offeror did not sufficiently explain or address the high executive and administrative costs. The raw scores of the offeror's BAFO from the three (3) committee members were, 66, 70, and 70⁵ totaling 181 out of a maximum score of 270. . . . It is noted that a possible 10 points were not included as part of the abovementioned evaluation summary. CPA will utilize Price/Cost formula to calculate

⁵ The Board notes the existence of a typographical error in this evaluation narrative written by the Committee. In particular, PIW's actual scores were 66, 70, and 45, which is properly reflected in the next paragraph of the evaluation and totals 181 points overall. (AR at Ex. 11, § 5.1; AR at Ex. 16.)

cost proposal scores.

(AR at Ex. 11, § 5.1.)

The fourth technical evaluation factor, worth 15 points, exclusively concerned whether the offeror “demonstrates [an] ability to maximize revenue collection,” (AR at Ex. 1, § M.3.1; AR at Ex. 6, § 2) and MHRS billing was a key requirement of the solicitation, which related to an offeror’s capacity to bill Medicaid for reimbursable costs for mental health services. (AR at Ex. 1, § C.7). However PIW’s proposal did not provide for MHRS billing. Nor did it include peer support services despite solicitation language which stated that “[t]he applicant must . . . show how these principles will be operationalized within the project.” (AR at Ex. 1, § C.3.3.) Both of these significant deficiencies were brought to the attention of PIW in the section under Technical Proposal in the “Notification of Deficiencies” letter. (AR at Ex. 7.) However, PIW failed to amend its proposal to address these deficiencies, instead stating in its BAFO that “[t]he use of peers would not be clinically effective” and that it was currently operating without MHRS billing services because to do so “would have costs associated with it beyond the scope of the current contract.” (AR at Ex. 8.)

Section C.6 of the RFP unambiguously states that “[a]ll Prospective Contractors shall clearly describe how each of these requirements shall be addressed in the proposal.” (AR at Ex. 1, § C.6.) Yet PIW’s proposal was nonresponsive to those specific solicitation requirements wherein MHRS billing and peer involvement were, in fact, within the proposed scope of work. Although PIW was an incumbent contractor providing UCC services similar to those being sought by the District through the RFP, it was incumbent upon PIW to respond to the requirements of the *present* solicitation regardless of how PIW may have provided similar services under a previous contract. Accordingly, the Committee properly and reasonably lowered PIW’s scores for failing to address the requirements of the current solicitation.

There is also no evidence to support PIW’s argument that its low technical scores were actually the result of the Committee inappropriately considering price factors when scoring technical factors. Although the Committee noted that the “offeror did not sufficiently explain or address the high executive and administrative costs,” (AR at Ex. 11, § 5.1) there is no showing that this deficiency affected the Committee’s scoring of PIW’s proposal because staffing was evaluated under Factor 1 and, as noted previously, PIW received high scores for Technical Factor 1. (AR at Ex. 16.) In fact, the record shows that PIW’s scores for Factor 1 increased after the Committee evaluated and scored PIW’s BAFO.

Further, a review of the Committee reports shows that the Committee used the budgets submitted by offerors as a means of assessing the practicality of the technical approach proffered by both offerors. For instance, in assessing PIW’s offer, the Committee noted that “[t]he second CAC position is present in the organizational chart however does not appear to be included in the budget.” (AR at Ex. 11, § 5.1.) This inconsistency in the proposal raised concerns over how many CAC positions PIW actually intended to use to offer substance abuse counseling consistent with the terms of the solicitation, which required two Certified Abuse Counselors. (AR at Ex. 1, § C.6.1.2; AR at Ex. 11, § 2.) The Committee took the same approach in assessing Pathways’ proposal noting that “[t]he cost for a Psychiatrist is low. The part-time psychiatrist will not be able to meet the needs of UCC.”⁶ (AR at Ex. 6, § 5.2.) Admittedly, the solicitation was silent on how the budget would be used in assessing offeror technical proposals. (AR at Ex. 1, § C.9.1.) However, it appears that the Committee reasonably and uniformly used the budget as a

⁶ In fact, PIW asserts that Pathways’ technical evaluation score should have been “downgraded” in light of certain cost-related deficiencies. (Comments on AR 13-14.) Therefore PIW has argued that the District should consider price factors in scoring Pathways’ technical proposal even as it claims that its own proposal was improperly evaluated because the District allegedly used price factors in scoring its technical proposal.

means to assess the reliability of both offeror proposals.

Evaluation of Pathways' Proposal was Reasonable

Based upon a review of the entire record, the Board finds that protester's allegation that the District unreasonably assigned higher scores to Pathways' proposal is similarly without merit. PIW claims that the Committee failed to appropriately score Pathways' proposal for Factor 1. Yet the record shows that Pathways received scores of 32, 32, and 32 from the Committee. (AR at Ex. 16.) A score of 32 reflects that the panel unanimously felt that Pathways' proposal warranted a ranking of "Good" or that it "[m]eets requirements and exceeds some requirements; no deficiencies." (AR at Ex. 1, § M.2.1.) This rating refutes protester's argument that "none of the evaluators scored Pathways any lower for factor # 1," (Comments on AR 12) because two of the three evaluators did in fact score Pathways lower than PIW since PIW received scores of 40, 32, and 40 for Factor 1. A review of the Committee's report shows that the Committee noted some areas of concern with respect to the staffing aspects of Pathways' proposal but also noted many strengths including that Pathways' BAFO "clarified the organizational structure and increased psychiatric time and salary," and demonstrated that "the licensed clinical staff present competent [sic] in the area of co-occurring substance abuse treatment." (AR at Ex. 11.) Given the noted strengths of Pathways' proposal which directly relate to the criteria detailed under evaluation Factor 1, there is no basis upon which the Board can conclude that the Committee's scoring of Pathways' proposal was arbitrary and unreasonable.

The protester also alleges that the District unreasonably failed to downgrade Pathways' proposal with respect to the third subfactor, worth 20 points, which considered offeror capabilities in the area of substance abuse and related systems. (Comments on AR 14-15.) In support of this allegation, protester highlights that on January 9, 2012, the Committee evaluated Pathways' proposal and unanimously recommended the award to Pathways. Yet, at the same time, the Committee sought clarification on the role of Neighbors Consejo, specifically:

What services will Neighbors Consejo provide? Who will provide these services and how will the services be reimbursed? What kind of contract will be in place between Neighbors Consejo and Pathways?

(AR at Ex. 11, § 5.)

PIW contends that this need for clarification evidences that it was "irrational for DMH to evaluate as a 'strength' Pathways' 'well discussed' description regarding the use of its subcontractor." (Comments on AR 13.) In its initial proposal, Pathways stated that "Pathways will subcontract with Neighbors to hire one Spanish speaking Certified Addictions Specialist, as well as a Spanish speaking case aide as part of the core staffing plan." (AR at Ex. 5a, at 1.) The proposal further detailed Pathways' intent to create two substance abuse counselor positions, both full time – one an employee of Pathways and the other to be filled through a partnership with Neighbors Consejo. (AR at Ex. 5a, at 3.) In its BAFO, Pathways then stated "Consistent with the RFP instructions, PTHDC will be hiring two Certified Addiction Counselors. It is PTHDC's expectation that each of the Certified Addiction Counselors will spend at least 10 hours per week in the Community to coordinate substance abuse treatment services for those referred and in need of services." (AR at Ex. 10, at 4.) Therefore in both its initial proposal and the BAFO, Pathways was consistent in stating that it was prepared to provide two full time employees to support its substance abuse program. Accordingly, it was reasonable for the Committee to award Pathways' proposal high scores in this area even though it requested more detailed information on the scope of Pathways' contractual relation with its sub-contractor.

Award Decision was Reasonable

Lastly, the protester alleges that the District failed to conduct an appropriate technical strengths/price trade off and should “have determined that the additional major strengths of PIW’s proposal justified the additional cost of the ‘most advantageous,’ best value procurement.” (Comments on AR 18.) While the protester is correct that the terms of the solicitation called for the District to award a contract “to the responsive and responsible Offeror whose offer is most advantageous to the District,” (AR at Ex. 1, § M.1) its argument that the District failed to recognize PIW’s proposal as the most advantageous despite its significantly higher cost is illogical. The record shows that PIW failed to comply with key requirements of the solicitation. PIW’s staffing strengths did not overcome its major technical deficiencies, as noted by the Committee, in other aspects of its proposal. Accordingly, the Committee properly awarded PIW’s proposal lower scores for some technical evaluation factors. (AR at Ex. 16.) Ultimately, after the BAFOs were submitted, evaluated, and scored, PIW’s offer had a lower technical and price score than Pathways’, (AR at Ex. 16) while Pathways’ proposal offered a better technical product at a lower price, according to the terms of the solicitation. (*Id.*). Therefore, the District acted reasonably in making its best value procurement decision when it chose to award the contract to the offeror that submitted the best technical proposal at the lowest cost to the District.

Issue Two: Did the District Treat the Offerors Unequally and Thereby Act Unlawfully?

The protester alleges that the District failed to engage in meaningful discussions during negotiations and treated the offerors unequally by allowing Pathways additional opportunities to engage in discussions. (Comments on AR 5, 15.) Specifically, protester noted that the District failed to inform PIW of certain proposal weaknesses including, that (i) PIW was not DMH certified, and (ii) the referral system seemed complicated to evaluators. (Comments on AR 6.) The protester also alleges that the District treated offerors unequally by allowing Pathways “at least three opportunities after it submitted its BAFO to address DMH’s remaining concerns, including serious concerns regarding Pathways’ organization and staffing.” (Comments on AR 15.) The protester claims that this resulted in prejudice because “PIW’s scores would have been higher had PIW been given the same chance as Pathways to address all of the deficiencies noted in its initial proposal.” (Comments on AR 9.)

“The District’s procurement regulations require that the contracting officer point out deficiencies in proposals, resolve uncertainties and mistakes in proposals, and allow all offerors an opportunity to supplement or revise proposals.” *Med. Extension Servs., Inc.*, CAB No. P-0378, 41 D.C. Reg. 3918, 3921 (Jan. 14, 1994). Specifically, the District’s procurement regulations provide that during negotiations, discussions must:

* * *

- (b) Advise the offeror of deficiencies in its proposal so that the offeror is given an opportunity to satisfy the District’s requirements;
- (c) Attempt to resolve any uncertainties concerning the technical proposal and other terms and conditions of the proposal;
- (d) Resolve any suspected mistakes by calling them to the offeror’s attention as specifically as possible without disclosing information concerning the other offerors’ proposals or the evaluation process; and
- (e) Provide the offeror a reasonable opportunity to submit any cost or price, technical or other revisions to its proposal that may result from discussions.

D.C. Mun. Regs. tit. 27, § 1621.2.

The District opened discussions with both offerors on December 16, 2011.⁷ (See AR at Exs. 7, 9.) In the “Notification of Deficiencies” and request for BAFO sent to PIW, the District stated:

Psychiatric Institute of Washington’s (PIW) proposal lacks detail about peer involvement, peer empowerment. PIW proposal lacks discussion on management data or QI mechanisms. PIW shall provide reason for inability to bill MHRS and discuss in more detail about PIW’s client centered approach.

(AR at Ex. 7.)

PIW claims that it was prejudiced by “DMH’s failure to disclose all its evaluated deficiencies in PIW’s initial proposal” including that PIW was “not DMH certified” and that “the referral system seems complicated.” (Comments on AR 6.) However, consistent with the procurement regulations, the District made PIW aware of the significant weaknesses in its proposal that had an adverse impact on the proposal’s technical rating, and there is no evidence that the particular deficiencies alluded to by PIW carried any significant weight such that overcoming them could have enabled PIW to reverse its considerable scoring disadvantage. It bears mentioning again that the District directed PIW to discuss peer involvement, a significant subfactor of the second technical evaluation factor, and billing issues, which were highly relevant to the fourth technical evaluation factor. Yet, despite the District’s directive to address those proposal deficiencies, PIW failed to revise its proposal to answer those concerns and instead disputed the solicitation requirement for peer involvement and declared that to use the required MHRS billing would result in costs “beyond the scope of the current contract.” (See AR at Ex. 8.) Under these circumstances, it was reasonable for the committee to have given PIW lower technical evaluation scores.

The “contracting officer shall not assist an offeror to bring its proposal up to the level of other proposals through successive rounds of discussion, such as pointing out weaknesses resulting from the offeror’s lack of diligence, competence, or inventiveness in preparing the proposal.” D.C. Mun. Regs. tit 27, § 1621.3. Accordingly, this Board has held that “[a]gencies are required to discuss weaknesses in an offeror’s proposal where the weaknesses have a significant adverse impact on the proposal’s technical rating.” *Health Right, Inc., D.C. Health Coop., Inc., & The George Washington Univ.*, CAB Nos. P-0507, P-0510, P-0511, 45 D.C. Reg. at 8645. But “[a]gencies need not afford offerors all-encompassing discussions, or discuss every element of a technically acceptable proposal that received less than the possible maximum rating; rather agencies need only lead offerors into the areas of their proposal which require amplification.” *Koba Assocs., Inc.*, CAB No. P-0350, 41 D.C. Reg. 3446, 3472 (June 16, 1993) (citing *Signal Corp.*, B-241849.2, B-241849.3, 91-1 CPD ¶ 218 (Feb. 26, 1991)).

On January 9, 2012, the Committee unanimously recommended the contract award to Pathways. (AR at Ex. 11, § 5.) The CCO followed up with a January 12th letter to Pathways seeking clarification on (1) the methodology for billing both MHRS and non-MHRS services; (2) the role of subcontractor Neighbors Consejo; (3) the plan to minimize staff turnover; (4) the methodology to provide in-kind services; and (5) the plan to obtain qualified individuals to provide quality service. (AR at Ex. 12.) On January 17th, Pathways provided additional responses. (AR at Ex. 13.) The CCO then met with Pathways

⁷ Pursuant to RFP section L.17 entitled “Best and Final Offers”, which required the District to issue BAFO requests “to all Offerors still within the competitive range,” (AR at Ex. 1, § L.17) the District issued both offerors a “Notification of Deficiencies” request for BAFO (AR at Exs. 7, 9).

on January 18th and raised additional questions. (AR at Ex. 14.) Pathways' response to the additional information request was submitted on January 23rd. (AR at Ex. 14.) On January 25th, the Committee again recommended unanimously that the contract be awarded to Pathways. (AR at Ex. 15, § 5.1.)

The protester alleges that had it been given additional opportunities to submit clarifications, it could have raised its score. However, in its BAFO submission the protester was clearly nonresponsive to specific requirements of the RFP despite the fact that the Committee explicitly raised many of these deficiencies with the protester prior to its BAFO submission. (AR at Ex. 8.) Thus, the record shows that after the Committee evaluated and scored the BAFOs of both offerors, it reasonably recommended that award be made to Pathways because it ultimately received the highest evaluation score. At no time thereafter was Pathways proposal rescored by the Committee. (AR at Exs. 15, 16.) Instead, the CCO entered into negotiations with Pathways pursuant to section 2-354.03 (h)(1) and (2) of the D.C. Code which permits a contracting officer to enter into negotiations with the highest-ranked offeror. The statutory provision states:

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

D.C. Code § 2-354.03.

Accordingly, the Board views the CCO's request for the referenced clarifications from Pathways as part of the overall process of commencing negotiations with the highest ranked offeror.⁸ Therefore, notwithstanding the protester's allegation that the District treated offerors unequally when it sought answers to several questions despite having made the decision to award the contract to Pathways, the District acted lawfully and consistent with the relevant statutory provision. The Board finds that the District's actions were reasonable, in accord with the evaluation and selection criteria identified in the solicitation, and that there is no evidence in the record of any violations of procurement laws or regulations in the conduct of this solicitation. For these reasons, the protest is denied.

III. SECOND D&F

In light of the Board's preceding discussion denying the protest on the merits, the protester's motion challenging the Second D&F is also denied as moot. However, the protester has raised an issue related to the Second D&F that warrants further discussion herein.

The protester contends that the Second D&F was unlawfully executed by DMH's CCO instead of the District's Chief Procurement Officer. (Mot. to Challenge Dep't of Mental Health Director's Revised Determination to Proceed with Performance § I, July 16, 2012.) The Procurement Practices Reform Act

⁸ Under D.C. Code § 2-351.04(41), negotiations are defined as "discussions to determine the terms and conditions of a contract or procurement." Hence, the discussions between the CCO and Pathways following the recommendation to award the contract to Pathways serve to clarify that Pathways' proposed services are consistent with the requirements of the RFP and such discussions are appropriate as long as the terms of the final contract are within the scope of the RFP. D.C. Code § 2-354.03(h)(2).

of 2010 (“PPRA”) provides:

Performance under a protested procurement may proceed, or award may be made, while a protest is pending only if the CPO makes a determination, supported by substantial evidence, that urgent and compelling circumstances that significantly affect interests of the District will not permit waiting for the decision of the Board concerning the protest.

D.C. Code § 2-360.08(c)(2).

In this regard, the Board has previously opined on this statutory requirement that the CPO must execute any formal determination that urgent and compelling circumstances exist such that a contract award cannot be stayed during the pendency of a protest before our Board. Specifically, in *Arrow Construction, Co., LLC*, CAB No. P-0692, 52 D.C. Reg. 4233, 4234 (Oct. 6, 2004), the Board noted that the “[District of Columbia Public Schools] Chief Procurement Officer did not have the power to prepare the written determination” required by this section of the code. In *Arrow*, the Board held that D.C. Code § 2-309.08(c)(2)⁹ “required the Chief Procurement Officer (CPO) of the District of Columbia to make a written determination.” *Arrow Constr., Co., LLC*, CAB No. P-0692, 52 D.C. Reg. at 4234. However, this same principle cannot be applied in this case as it relates to DMH. Under the PPRA, DMH’s chief procurement officer has the express authority to exercise CPO authority, at least until October 1, 2015. The PPRA provides:

[U]ntil October 1, 2015, the following agencies, through their chief procurement officers, shall exercise the duties of the CPO for their respective agencies:

* * *

(B) The Department of Mental Health^[10]

D.C. Code § 2-352.01(a)(3).

The Second D&F was executed by the CCO who is the chief procurement officer for DMH. Accordingly, the Second D&F was issued by the appropriate District contracting authority. And although moot, the Board finds it helpful to clarify for the protester’s benefit, the actual procurement authority of DMH’s CCO under law.

CONCLUSION

In conclusion, the Board finds that the protester has not met its burden of proof to establish that the District acted unreasonably, in violation of procurement law or regulation, or inconsistently with the

⁹ This statutory provision has since been repealed; however, an identical provision is now codified in D.C. Code § 2-360.08(c)(2) (2011).

¹⁰ The entire section provides “The Department of Mental Health, if a court order no longer requires the agency to be exempt from the CPO’s authority.” D.C. Code § 2-352.01(a)(3)(B). The D.C. Council’s final report on the PPRA indicates that this language refers to the fact the DMH is currently operating under a court order that specifically requires it to be exempt from CPO authority. Accordingly, the D.C. Council anticipated that, by Fiscal Year 2016 at the earliest, DMH may be moved under the District CPO’s authority. However, the D.C. Council also contemplated that DMH’s authorization to exercise CPO duties could extend beyond October 1, 2015. Rep. on Bill 18-610, the “Procurement Practices Reform Act of 2010” Attach. I. (Oct. 21, 2010).

evaluation and selection criteria set forth in the RFP. Accordingly, the protest is denied. Protester's motion to override the Second D&F is also denied as moot.

SO ORDERED.

DATED: August 1, 2012

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

CONCURRING:

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MARC D. LOUD, SR.
Chief Administrative Judge

/s/ Monica S. Parchment
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