

fixed hourly rates under three primary contract line items (“CLINs”) across the base contract year, as well as the four option year periods identified by the Solicitation. (*Id.*) Several amendments to the Solicitation were issued in December 2011, which extended the due date for receipt of proposals and changed the evaluation criteria for the Solicitation. (AR Ex. 3.)

The final evaluation criteria that would be the basis for the contract award, as amended by the District’s December 19, 2011, Amendment to the Solicitation, included Management Plan (30 points); Experience of Proposed Key Personnel (20 points); Business References (20 points); Price (30 points); and any Certified Business Enterprise (“CBE”) Preference Points awarded pursuant to Section M.5.2 of the Solicitation.¹ (*Id.*) As it relates to the price evaluation, the Solicitation specified that the price evaluation would be objective with the lowest priced offeror receiving the maximum price points available. (AR Ex. 2a.) All other higher priced proposals were required to receive a proportionately lower final price evaluation score as determined by the same objective evaluation formula.² (*Id.*)

The District received four proposals in response to the Solicitation, including proposals from the protester (U.S. Security Associates, Inc.), the awardee (Allied Barton Security Services, LLC), Security Assurance Management, Inc., and Securitas Security Services USA, Inc. (Protest Ex. B.) As the result of the evaluation, the ultimate awardee was assigned a total of 88.40 points of which 59.11 points were for its technical proposal and 29.29 points were for its price proposal. (*Id.*) [REDACTED]

[REDACTED]³ (*Id.*) [REDACTED]

[REDACTED] (*Id.*) Lastly, the protester, received a total of 60.73 points from the evaluation, which included 34.78 points for its technical proposal and 25.95 points for its price proposal. (*Id.*) In short, the District determined the protester to be the fourth ranked offeror based upon its final combined technical and price evaluation scores.

Additionally, as it relates to the present protest allegations, Allied Barton’s proposed hourly rate prices over the four option year periods did not escalate and essentially remained static for the life of the contract.⁴ (AR Ex. 5.) While the majority of the other offerors did escalate their proposed hourly personnel rates over the four option years of the contract, these overall cost escalation amounts were extremely nominal in nature. (AR Ex. 6.) Based upon

¹ Under the original evaluation criteria set forth by Section M.3 of the Solicitation, the maximum number of points allocated to Management Plan and Price were 20 points and 40 points, respectively. (AR Ex. 2a.)

² The objective formula for evaluating all higher priced proposals was as follows: (lowest price proposal/price of proposal being evaluated) x weight = evaluated price score. (*Id.*)

[REDACTED]

⁴ The contract was also subject to a U.S. Department of Labor Wage Determination pursuant to the federal Service Contract Act (“SCA”), 41 U.S.C. § 6702 (2011) (formerly 41 U.S.C. § 351). (AR Ex. 2.)

these evaluation scores and the District's determination that Allied Barton was a responsible bidder, the District awarded the contract to Allied Barton on February 27, 2012. (AR Ex. 1.)

The protester's initial grounds of protest included an allegation that the District improperly calculated the protester's proposed price for performing the contract. (Protest 1.) The protester, however, subsequently withdrew this particular protest allegation. (Protester's Opp'n to District's Mot. to Dismiss and Comments to AR ("Protester's Opp'n and Comments") 2.) The protester also alleges that the awardee's proposed pricing was insufficient to cover the Solicitation's collective bargaining agreement ("CBA") wage escalation requirements, and that the District intentionally downgraded the protester's technical proposal as a part of this improper price evaluation. (Protest 5-6.) Lastly, the protester contends that the District colluded with the Service Employees International Union ("SEIU") to award the contract to the awardee because it is a labor union contractor. (Protest 6.) The evidence proffered by the protester in support of this particular allegation is that the District miscalculated the protester's bid price and ignored the awardee's inability to pay union wages given its overall static proposed price to perform the contract. (*Id.*) In short, the protester primarily challenges the propriety of the District's price evaluation and its motivation for accepting the awardee's proposed costs.

In response, the District challenges the protester's standing to file a protest on the grounds that the District improperly evaluated the awardee's price proposal because U.S. Security allegedly has not demonstrated it would be in line for the contract award, even if the Board were to sustain its protest. (District's Combined Mot. to Dismiss and AR 4.) Further, the District also challenges the protester's allegations of collusion by the District in the subject procurement on the grounds that this allegation is untimely and fails to provide a clear and concise statement of the legal and factual grounds of the protest as required by Board Rule 301.1(c).⁵ (*Id.* at 4-5.)

DISCUSSION

We may exercise jurisdiction over this protest and its underlying allegations pursuant to D.C. CODE § 2-360.03(a)(1) (2011). However, in order for the Board to exercise this grant of jurisdiction over this protest matter, the protester must establish that it has standing to pursue such an action, which has been challenged by the District.

With respect to a protester's standing, the Board is bound by the jurisdictional requirements set forth in the Procurement Practices Reform Act ("PPRA"), which provides unequivocally that a protester be an "actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract." D.C. CODE § 2-360.08(a) (2011). Although the statute does not further define the term "aggrieved," the Board has

⁵ The Board finds it appropriate to address the issue of standing with respect to all of the protester's remaining allegations in this protest given the nature of the allegations as detailed in the relevant protest filings.

repeatedly held that a protester must have a “direct economic interest in the procurement” in order to have standing. *MTI-Recyc., A Joint Venture*, CAB No. P-287, 40 D.C. Reg. 4554 (Oct. 1, 1992) (finding that the protester did not have standing because a higher ranked bidder had greater interest in the procurement, and, thus, the protester’s interest was too remote to qualify it as an aggrieved party); *W.S. Jenks & Son*, CAB No. P-644, 49 D.C. Reg. 3374 (Aug. 14, 2001) (dismissing protest for lack of standing because the protester’s bid was not submitted on time, so the protester did not have a direct economic interest in the procurement).

Thus, in applying this required showing of a direct economic interest in the resulting contract award, the Board has consistently required a protester to demonstrate that it was in line to receive the contract in question. *E.g.*, *Roy’s Towing & Auto Care Corp.*, CAB No. P-468, 44 D.C. Reg. 6832 (June 13, 1997) (dismissing protest because the protester was the third lowest bidder and, therefore, lacked standing to bring the protest).⁶ Moreover, in the seminal case of *Unfoldment*, CAB No. P-358, 41 D.C. Reg. 3656 (Sept. 17, 1993), the fourth lowest bidder challenged the District’s award decision before the Board. Much like the protester in this case, the protester in *Unfoldment* alleged that the District’s bias in the overall procurement process rendered the award improper. (*Id.*) Nonetheless, the *Unfoldment* Board still found that the protester lacked standing because the protester ranked fourth, and, thus, would not be in line for award, even if the Board sustained its protest. (*Id.*) Consequently, the Board dismissed the protest in that matter.⁷ (*Id.*)

Indeed, the Board has consistently held that in order to overcome what would otherwise be a remote interest in the contract award because of a lower ranking final evaluation score, a protester that is not in line for contract award must specifically challenge the evaluation score or eligibility of any higher ranked, intermediate offerors to establish its standing in a protest. *Crawford/Edgewood Managers, Inc.*, CAB No. P-424, 42 D.C. Reg. 4957 (Mar. 22, 1995) (dismissing protest where protester failed to challenge directly the second and third ranked offerors’ evaluation scoring); *Am. Combustion Indus., Inc.*, CAB No. P-499, 44 D.C. Reg. 6896 (Aug. 14, 1997) (holding that protester lacked standing because it was not in line for award even if the Board granted its protest, since it offered no grounds or evidence for challenging the second and third ranked bids); *Protest of Thomas*, CAB No. P-579, 46 D.C. Reg. 8618, (May 11, 1999) (holding that protester’s general challenge of the procurement process did not demonstrate how he could surpass the six higher ranked offerors and become in line for award).

The Board has granted standing to a protester that is a lower ranked offeror when that protester also challenged with specificity the eligibility of the higher ranked offerors, thereby

⁶ Historically, the Board’s decisions have used the term “in line” and “next in line” interchangeably when referring to the same direct economic interest standard required for standing. *E.g.*, *C.P.F. Corp.*, CAB No. P-521, 45 D.C. Reg. 8697 (Jan. 12, 1998) (holding that protester lacked standing because it did not show it would be “next in line for award”); *Unfoldment*, CAB No. P-358 (articulating that a protester does not have standing where it would not be “in line for award”).

⁷ In addition to dismissing the protest for lack of standing, the Board found that the protest was untimely. (*Unfoldment*, CAB No. P-358.)

demonstrating that it would be in line for contract award in the event that its protest is sustained. *E.g., Barcode Techs., Inc.*, CAB No. P-524, 45 D.C. Reg. 8723 (Feb. 11, 1998) (holding that protester had standing after directly challenging the eligibility of the awardee and second-ranked offeror on the grounds that they lacked required certifications to receive the contract and protester was, therefore, in line for award).

Similarly, and of important note, the Board's federal protest counterpart at the U.S. Government Accountability Office ("GAO") also requires, under its federal legal framework, that a protester be an aggrieved or interested party in order to have standing at GAO. *Jack Young Assocs. Inc.*, B-243633, 91-1 CPD ¶ 585 (Comp. Gen. June 20, 1991) (holding that a protester must be an "interested party," defined as an "actual or prospective bidder or offeror whose direct economic interest would be affected by the award or failure to award a contract"). GAO, like the Board, mandates that a protester show a direct economic interest in the procurement by demonstrating that it would be in line for a contract award if GAO sustains the protest. *Serco, Inc.*, B-404033, 2010 CPD ¶ 302 (Comp. Gen. Dec. 27, 2010) (dismissing protest because the protester lacked a direct economic interest in the procurement as it ranked third and was not in line for award even if GAO sustained the protest).

Furthermore, consistent with the Board's rationale on the issue of protester standing, GAO has held repeatedly that the protester must also attack the eligibility of any intermediate bids or higher ranked proposals above the protester in order to show standing in a protest. *Four Seas & Seven Winds Travel, Inc.*, B-244916, 91-2 CPD ¶ 463 (Comp. Gen. Nov. 15, 1991) (holding that the second ranked offeror had a greater economic interest in the procurement than the protester, which ranked third, and that the protester's interest was "too remote to qualify [it] as an interested party [with standing]"); *U.S. Def. Sys., Inc.*, B-248928, 92-2 CPD ¶ 219 (Comp. Gen. Sept. 30, 1992) (dismissing protest because nothing in the protester's complaint would alter the rankings of the intervening offerors, and the protester would not be in line for award even if GAO sustained the protest).

Accordingly, this well-established legal precedent is the basis upon which the Board must analyze the protester's contention that it has legal standing to maintain this protest action, given the nature of its protest allegations.

A) Allied Barton's Alleged Collective Bargaining Agreement Violation

As noted above, U.S. Security's first ground of protest concerns the awardee's compliance with the collective bargaining agreement ("CBA") requirements under the Solicitation. (Protest 5-6.) Specifically, the protester alleges that the awardee's pricing in its bid was "underpriced" because it would be insufficient to pay the amount of wages required by the awardee's CBA. (Protester's Opp'n and Comments 2-3.) In this regard, the protester takes issue with Allied Barton's proposed price remaining static for the base year and the four subsequent option years of the contract. (*Id.*) According to the protester, the awardee's static pricing did

not account for the annual wage increases that the protester alleges were verbally required by the District, which artificially lowered the final price of the awardee's proposal. (*Id.* at 3.) The protester further maintains that due to the District's alleged "extensive and intentional errors," it is not possible to determine which offeror would be in line for award. (Protest 2.)

Nonetheless, as the fourth ranked bidder in the procurement, and pursuant to the Board's holding in *Unfoldment*, CAB No. P-358, and *Roy's Towing & Auto Care*, CAB No. P-468, the protester in this case must show that it has a direct economic interest, and, thus, standing in this protest in order to maintain this action. This requires that the protester challenge the scoring or eligibility of the higher ranked offerors to establish that it would be in line for contract award in the event that this protest is sustained. However, as it relates to the protester's challenge to the awardee's proposed CBA pricing, the protester's complaints largely rest upon the evaluation of the awardee's allegedly underpriced proposal and not the proposals of the intervening offerors. (Protest 2, 5-6.)

While the protester attempts to assert that all offerors were disadvantaged because of the awardee's failure to escalate its proposed CBA wages, these allegations do not meet the Board's requirement that the protester demonstrate it would be in line for award. In other words, nothing specifically alleged by the protester in this matter alters or changes the evaluation results with respect to the second- and third-ranked offerors that were scored higher than the protester. *See U.S. Def. Sys.*, B-248928; *Med. Info. Servs.*, B-287824, 2001 CPD ¶ 122 (Comp. Gen. July 10, 2001) (holding that protester lacked standing because its protest did not alter the rankings of the eight intervening offerors, and the protester would not be in line for award even if GAO sustained the protest).

Moreover, the Board also independently finds the underlying merits of the protester's challenge to the price evaluation to be deficient. Notably, the protester does not allege that there was a mandatory price escalation requirement in the Solicitation, which the awardee allegedly violated by keeping its proposed hourly personnel costs static. Instead, the protester alleges that it was "verbally" advised by the District prior to contract award that it should escalate its hourly personnel costs over the life of the contract, and believes that the second- and third-ranked offerors were directed to do the same. (Protester's Opp'n and Comments 3.) This, however, is not sufficient evidence that the awardee's proposal failed to comply with a mandatory solicitation requirement. *See Alt. Resolutions*, CAB No. P-338, 40 D.C. Reg. 4924 (Jan. 19, 1993) (articulating that an agency's evaluation of proposals will not be overturned unless it is arbitrary, inconsistent with stated evaluation criteria, or in violation of procurement statutes or regulations).

Additionally, the awardee's price evaluation score, in particular, was based upon objective, and not subjective, solicitation criteria that were applied to the price proposed by the awardee. (*See* AR Ex. 2a.) These *objective* criteria, and the underlying mathematical formula noted herein, were the basis of the price evaluation scores that each offeror received. (*See* AR

Ex. 6; Protest Ex. B.) However, the protester has presented no evidence that the District skewed the application of this price scoring criteria in a way that benefited the awardee. Of note, and consistent with the objective solicitation price criteria, the awardee did not even receive the highest price evaluation score in this procurement because it did not propose the lowest overall cost to perform the contract. (Protest Ex. B.) As a result, the protester's contention that the awardee submitted an artificially low bid, when it was not even the lowest priced bidder, is unsupported.⁸ The Board, therefore, finds no evidence that the District improperly evaluated the price proposal of the awardee, or any other offeror, in a way that would alter the final scores assigned to each offeror in this procurement.

a) Trade-off Challenge

The protester's "Comments on the Agency Report" also allege for the first time that, in addition to allowing the awardee to underbid its CBA wages, the District also performed an improper trade-off analysis during the evaluation, which impacted the scoring of all of the offerors. (Protester's Opp'n and Comments 3-4.) This, however, is a new allegation as the protester's original protest in no way included a challenge to the District's trade-off analysis. Further, because the District has neither asserted that it performed a trade-off analysis during the evaluation or included documents in the records detailing that such a trade-off analysis occurred, the protester's allegation that the District improperly performed a trade-off analysis is factually unsupported and also without merit.⁹

B) District's Alleged Collusion with SEIU

Furthermore, as another ground for challenging the contract award, U.S. Security alleges that the District colluded with SEIU to ensure that the awardee would receive favorable consideration of its bid proposal. (Protest 6.) In support of this alternative argument, the protester presents several general allegations challenging the integrity of the District's procurement process. For example, the protester alleges that the District intended to terminate its current contract with the protester in order to procure the same services from an SEIU-approved contractor. (*See id.* at 2, 5-6.) The protester further alleges that the presence of an SEIU official during the pre-bidder's conference indicated SEIU's improper influence over the procurement. (*Id.* at 6.) However, the protester does not at all address how the District's alleged collusion affected the scoring of the intervening offerors that were ranked in second and third place during the evaluation.

⁸ The protester, on the other hand, does not directly challenge the bid of the offeror that received the highest price evaluation score based upon its submission of the lowest cost proposal. (*See* Protest 1-2.)

⁹ Under Board Rule 302.2(b), a protest must be filed within 10 days after a party knew or should have known the basis of the protest. Consequently, given that this trade-off allegation does not appear to be based upon any new information or documents provided by the District in its Agency Report, it should have been raised by the protester with its original protest filing and is now untimely. *See Am. Consultants & Mgmt. Enters., Inc.*, CAB No. P-632, 49 D.C. Reg. 3317 (Jan. 16, 2001) (dismissing protest as untimely because the protester knew or should have known the basis of its protest after receiving notice that another bidder won the contract but failed to file a protest within the 10-day filing period).

Again, because the protest does not directly challenge, or even argue that, the scores of the two higher offerors should be altered because of this alleged collusion by the District, the protester does not even attempt to establish that it, and not the intervening offerors, would be in line for award if the Board sustains its protest on the basis of this ground. *See Am. Combustion Indus., Inc.*, CAB No. P-499 (holding that the protester lacked standing because it offered no grounds challenging the higher ranked offerors, and protester did not demonstrate it would become in line for award). Consequently, the protester has not demonstrated a direct economic interest in the procurement sufficient to establish standing in this action. *See Crawford/Edgewood Managers*, CAB No. P-424 (holding that the protester was not an interested or aggrieved party because it ranked fourth and did not challenge the higher ranked offerors); *Four Seas and Seven Winds Travel, Inc.*, B-244916 (dismissing protest because the protester did not challenge the higher ranked offeror, and, thus, its interests were too remote to establish standing).

While the Board has, in rare instances, acknowledged that a lower ranked bidder, such as U.S. Security, can have standing in a protest that challenges the overall integrity of the procurement process, the Board still required the protester to demonstrate with specificity that, as a result of evaluation improprieties, it could ultimately achieve a ranking above the intervening offerors that received higher evaluation scores. *Protest of Thomas*, CAB No. P-579 (articulating that a general attack on the procurement process cannot substitute the requirement that the protester challenge higher ranked, intermediate offerors to show that the protester would be in line for award if the Board sustains its protest). Here, again, the protester's allegation of collusion between the District and SEIU even fails to meet this bar as it generally only relates to the awardee's alleged preferential status in this procurement and does not specifically establish how any alleged collusion between the District and the awardee would alter the scoring assigned to the higher ranked, intervening offerors in this procurement.

Similar to its other protest allegations, the Board also finds a lack of merit to the protester's allegations concerning the District's collusion in this procurement. The protester largely attempts to support its allegations by providing examples of statements supposedly made by union officials and the awardee, and not even by the District, regarding the need for unionization. (*See* Protester's Opp'n and Comments 9-10.) From these assertions, the protester then makes the sweeping conclusion that the District supported these improper unionization activities because the District made a determination and finding to override the stay in this protest. (*Id.* at 10.) The Board finds this alone to be insufficient evidence that the District colluded with the union and awardee to exclude the protester from receiving the contract award. Further, by simply offering very general allegations of collusion by the District without further substantiation, the protester has not overcome the presumption that government officials act in good faith. *Prison Health Servs. Inc.*, CAB No. P-610, 48 D.C. Reg. 1540 (May 24, 2000); *Triton Marine Constr. Corp.*, B-250856, 93-1 CPD ¶ 171 (Comp. Gen. Feb. 23, 1993).

CONCLUSION

For the reasons discussed herein, the Board finds that the protester, as the fourth ranked offeror, lacks standing in this matter by virtue of its failure to show a direct economic interest in the subject contract award.¹⁰

The present protest is, therefore, dismissed.

SO ORDERED.

DATED: July 25, 2012

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

CONCURRING:

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¹⁰ Having found that the protester lacks standing in this matter, the Board finds it unnecessary to address the District's secondary challenge to the specificity of the protester's allegations.