GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

COMMERCIAL RECOVERY, INC.	)	
	)	CAB No. P-362
Under RFP No. 1313-AA-NS-7-LH	)	

For the Protestor: JePhunneh Lawrence, Esquire. For the Government: Howard S. Schwartz, and Edward J. Rich, Assistants Corporation Counsel.

Opinion by Administrative Judge Zoe Bush with Administrative Judge Terry Hart Lee concurring.[1/]

OPINION

Commercial Recovery, Inc. (Commercial, Protestor), has challenged award of the above-captioned solicitation and requests that the contract be terminated for the convenience of the District of Columbia Government and that a new solicitation be issued. The solicitation was for a Discrimination Study on Minority Business Enterprises.

The protest consists of nineteen (19) numbered paragraphs. Some of the paragraphs are informational, and some set forth the grounds of the protest. In sum, the Protestor alleges: (a) the protest is timely filed; (b) the awardee is not responsive or responsible because it does not employ a licensed attorney; (c) the awardee is not responsive or responsible because it is a foreign corporation; (d) the awardee's initial proposal was not responsive in that ". . . the cost price portion was too low to even come within the competitive range established by the Government and as a result, displayed a lack of understanding as to the specifics of the solicitation."; (e) the awardee was accorded preferential treatment and given unfair advantage as a result of being extended multiple opportunities to submit best and final offers (BAFO) to move into the competitive cost proposal range while the protestor was not accorded such treatment; (f) the awardee was accorded preferential treatment and given unfair advantage as a result of being given notice of a substitution of an entirely new "scope of work", deliverables, proposal content and evaluation proposal requirements, while the protestor was not given this notice and the opportunity to submit a new or revised proposal; (g) the substitution of an entirely new "scope of work", deliverables, proposal content and evaluation proposal requirements was such a material change in the solicitation that a new solicitation should have been made and notice given to all offerors; (h) the price proposal and technical proposal submitted by the

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[1/]At the time this matter came before the Board, three judges were assigned to the panel. This decision is rendered by a majority vote of the three judges assigned. Rule 101.5, 36 DCR 2686 (April 21, 1989). See Federal Trade Commission v. Flotill Products, Inc., 389 U.S. 179 (1967).

Protestor on January 2, 1992, was permitted to be placed in an unsecured location in an open safe for several months; (i) the District government's withholding of requested information as to the qualifications of the awardee was totally arbitrary, capricious and done in a bad faith attempt to frustrate disclosure of the basis for protest and contesting an award; and (j) the awardee in this instance is not qualified to perform the services solicited and the inclusion of ". . . majority subcontractors who will perform the technical services solicited, is nothing more than a ruse to place the responsibility for the work to be performed in the hands of majority contractors who do not have to quality [sic] independently or be subjected to public scrutiny."

The District of Columbia has timely moved to dismiss the protest in part, and has filed an agency report with regard to the remainder of the protest. In its motion to dismiss the District argues that counts (paragraphs) 7, 9, 14, 15, 16, 18 and 19 of the protest should be dismissed because they do not set forth a clear and concise statement of the legal and factual grounds of the protest pursuant to Board Rule 302.1(c), 36 DCR 2711.[2/] The

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[2/]The referenced paragraphs, or counts, of the protest assert as follows:

> 7. That the awardee appears to be a foreign corporation organized under the Laws of the State of Delaware with one share-holder who also serves as the sole Director, the sole President, the sole Secretary and the sole Treasurer.
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> 9. That at issue here is the integrity of a program designed to facilitate minority business participation in District of Columbia Government Procurement involving several hundred million dollars in procurement.
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> 14. That the contract should not have been awarded to a contractor who is located out of state and has no nexus with the District of Columbia especially where sensitive and confidential District of Columbia proprietary data and information is moved outside of the District of Columbia and housed at such locations out side [sic] of the District of Columbia. From the materials disclosed, it appears that these sensitive and confidential data could be housed at locations in Maryland, Texas and Ohio.
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> 15. That fees paid to this out of state awardee are not currently taxable by the District of Columbia and is contrary to the policy of the District of Columbia Government and Mayoral Orders favoring District of Columbia minority and disadvantaged companies. (sic).
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> 16. That the price proposal and technical proposal submitted by the protestor on January 2, 1992, was permitted to be placed in an unsecured location in an open safe for several months.
>
> 18. That the District Government's withholding of requested information as to the qualifications of the awardee was totally arbitrary, capricious and done in a bad faith attempt to frustrate disclosure of the basis for protest and contesting any award.
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> 19. That the awardee in this instance is not qualified to perform the services solicited and the inclusion of "majority subcontractors" who will perform the technical services solicited, is nothing more than a ruse to place the responsibility for the work to be performed

(continued...)

District cites as support CUP Temporaries, Inc., CAB No. P-271, 39 DCR 4251 (1991); Track-Tech International, CAB No. P-231, 38 DCR 3137 (1990).

In its agency report the District notes that Commercial contends that the District should have afforded it an opportunity to submit a proposal on the amended RFP. The District responds that the evaluation panel and the contracting officer found the proposal of Commercial not to be within the competitive range and, therefore, not eligible to receive amendments or participate further in the procurement. The District points out that section 1615.2(c) of the procurement regulations requires the contracting officer to send amendments only to those offerors found to be within the competitive range. Further, the District argues that section 1615.3 of the procurement regulations requires the contracting officer to issue a new solicitation if the change to the solicitation ". . . is so substantial that it warrants complete revision of a solicitation." That is not the case here, the District asserts, because the changes to the specifications either included updated statistical information or reduced the amount of time to perform the contract.

The District also argues that the multiple requests for BAFO's were done pursuant to 27 DCMR § 1622.3 and were requested of all offerors in the competitive range. Finally, the District argues that the contracting officer properly determined in writing, pursuant to 27 DCMR § 2200.2, that the prospective contractor was responsible and met the requirements for responsibility set forth in the regulations.

On March 22, 1992, the Protestor filed its "Opposition to Government's Motion for Summary Judgment."[3/] The Board assumes that this pleading is intended to address the motion to dismiss and agency report of the District. In its opposition, the Protestor summarily asserts that its protest sets forth a clear and concise statement and cites as support, Track-Tech International, CAB No. P-231, 38 DCR 3137 (1990). Protestor argues also that the Board must look to the "cardinal changes" doctrine developed by the Court of Federal Claims to evaluate this protest where the modified work is materially different from the work for which the parties contracted. Air-A-Plan Corp. v. United States, 408 F.2d 1030 (Ct. Cl. 1969); American Air Filter Co., Inc., 57 Comp. Gen. 285 (1978). Protestor continues that when an agency's needs change so that a material discrepancy is created between the RFP's ground rules and the agency's actual needs, the RFP should be amended and all eligible offerors be given an opportunity to revise their proposals accordingly. Union Carbide Corp., 55 Comp. Gen. 802 (1976), 76-1 CPD ¶ 134.

Protestor further argues that the awardee had submitted a mathematically unbalanced bid and therefore it should have been rejected. Landscape Builders Contractors, B-225808.3 (1987) 87-1 CPD ¶ 533. Finally, Protestor argues that the District's action in assisting the

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[2/](...continued)
in the hands of "majority contractors" who do not have to quality [sic] independently or be subjected to public scrutiny.

[3/]Protestor was granted an enlargement of time within which to file this pleading by Board Order dated March 15, 1993.

awardee to bring its cost price proposal into the competitive range constituted technical leveling. Raytheon Ocean Sup. Co., B-218620.2 (1986) 86-1 CPD ¶ 134.

On May 12, 1993, the District filed a response to Protestor's opposition. The District correctly points out that Protestor failed to adequately address the District's challenge that seven grounds of the protest fail to set forth clear and concise statements as required by the Board's rules. Further, the District correctly points out that while Protestor cites case law concerning cardinal changes and technical leveling, Protestor fails to show any evidence of either.

As shown in the fifteen (15) exhibits appended to the agency report, the following facts are relevant to this protest:

1. By Determination & Findings (D&F) dated November 13, 1991, the Director of the Department of Administrative Services (DAS) authorized the use of competitive sealed proposals for solicitation of a Discrimination Study On Minority Business Enterprises. (Exhibit 1 to Agency Report). On November 17, 1992, notice of the issuance of RFP 1313-AA-NS-7-LH for Discrimination Study On Minority Business Enterprises (RFP) appeared in the Washington Post. (Id.) DAS issued the RFP on November 19, 1991, with a closing date of December 20, 1991. (Exhibit 2 to Agency Report). The RFP provided for a contract term of one year with an option to extend the term for an additional one-year period. On December 12, 1991, DAS issued Addendum No. 1; and on December 23, 1991, DAS issued Addendum No. 2 to the RFP. (Id.) Addendum No. 1 extended the proposal submission date from December 20, 1991 to January 2, 1992. Addendum No. 2 changed the price evaluation section of the RFP and extended the proposal submission date to January 16, 1992.

2. On January 16, 1992, prior to 4:30 p.m., DAS received five acceptable offers regarding the RFP. (Exhibit 3 to Agency Report). By memorandum dated February 25, 1992, the evaluation panel sent to DAS the technical scores. (Exhibit 5 to Agency Report). By memorandum dated March 27, 199[2], the evaluation panel submitted to DAS the combined technical and price scores and suggested to DAS areas which required clarification during negotiations. (Exhibit 6 to Agency Report). The combined technical and price scores were as follows:

1. A. D. Jackson Consultants, Inc. (Jackson)	--	79.5
2. Roberts - Roberts & Assoc. (Roberts)	--	73.6
3. Coopers & Lybrand (Coopers)	--	64.8
4. ES, Inc.	--	43.4
5. Commercial	--	15.4

(Id.)

The evaluation panel found Jackson, Roberts, and Coopers to be within the competitive range and recommended that DAS began negotiations with the three offerors. (Id.)

3. By letter dated April 20, 1992, DAS wrote to Jackson, Roberts, and Coopers setting forth areas for clarification and requesting additional information regarding each proposal. (Exhibit 7 to Agency Report). By letters dated April 27, 1992, from Jackson and Roberts, and letter dated April 28, 1992, from Coopers, the three offerors responded to DAS. (Exhibit 8 to Agency Report).

4. On June 12, 1992, DAS issued Addendum No. 3 and requested best and final offers (BAFO's) by June 18, 1992. (Exhibit 9 to Agency Report). Addendum No. 3 eliminated the option year and required that the contractor complete the discrimination study within 12 months of award. Addendum No. 3 also conformed deliverables to the 12-month performance period and made minor changes to the scope of work. (Id.)

5. On June 17, 1992, DAS issued Addendum No. 4, which set forth the estimated number of contracts over $10,000.00. (Id.)

6. By letter dated June 17, 1992, Jackson submitted its first BAFO. (Exhibit 10 to Agency Report).

7. By memorandum dated July 1, 1992, the evaluation panel sent to DAS the evaluation of the first round of BAFO's submitted by June 18, 1992. The evaluation panel scored the first round of BAFO's as follows: (1) Jackson - 86.169; (2) Roberts - 68.73; (3) Coopers - 67.85. (Exhibit 11 to Agency Report). In the memorandum dated July 1, 1992, the evaluation panel set forth uncertainties regarding the BAFO's and requested DAS to conduct another round of BAFO's which would clarify the uncertainties. (Id.)

8. By letter dated July 3, 1992, and Addendum No. 5, DAS advised each of the offerors of the various uncertainties in the BAFO's which were submitted to DAS on June 17, 1992. (Exhibit 12 to Agency Report). DAS requested a second round of BAFO's which were to be submitted to DAS by July 10, 1992. Addendum No. 5 made minor additions and corrections to the RFP. (Id.)

9. By letter dated July 9, 1992, Jackson submitted to DAS its second BAFO dated July 9, 1992, and acknowledged Addendum No. 5. (Id.)

10. By memorandums dated July 21, 1992, and July 27, 1992, the evaluation panel submitted to DAS the evaluation of the second round of BAFO's of the three offerors. (Exhibit 13 to Agency Report). The final evaluation scores were as follows:

Jackson	--	76.56
Roberts	--	72.06
Coopers	--	59.26

(Id.)

By memorandum dated July 31, 1992, from the evaluation panel to DAS, the evaluation panel recommended that DAS award the contract to "the highest responsible and responsive offeror." That offeror was Jackson. (Id.)

11. By D&F dated August 7, 1992, the contracting officer determined Jackson to be responsible. (Exhibit 14 to Agency Report).

12. By contract dated August 7, 1992, DAS made the award to Jackson. (Exhibit 15 to Agency Report).

Turning first to the District's motion to dismiss, it will be granted in part and denied in part. The Board notes that the grounds of the protest are disjointed and poorly pled. However, it appears that paragraphs 7 and 14 of the protest (see footnote 2 for their text) attempt to assert that the awardee is not responsive or responsible because it is not a District of Columbia corporation. Our review of the RFP reveals that it does not require that the successful offeror be a District of Columbia corporation. (Exhibit 2 to Agency Report). In that regard, the District's procurement regulations provide that proposals be evaluated based on the evaluation criteria of the solicitation. 27 DCMR § 1618.1. Inasmuch as the awardee cannot properly be found nonresponsive or nonresponsible based on a non-existent evaluation criterion, Protestor's challenge is without merit.

The RFP does require that proposals be evaluated based on, and awarded points of 0-10, for furthering the goal of contracting with District of Columbia Government Minority Business Opportunity Commission certified minority firms. The RFP at Section E: Evaluation of Proposals, Evaluation Criteria, 3, provides in relevant part:

> Each proposal will be evaluated to the extent that it furthers the District of Columbia Government's goals and policies of promoting minority business opportunities and contracting and subcontracting with District of Columbia Government Minority Business Opportunity Commission certified minority firms. Points in this category can be earned only by offerors firmly demonstrating specific commitments to the participation of District certified minority firms in the proposed contract. The District is strongly encouraging a minority business participation level of at least thirty-five percent of the total contract price and will award points in this category in accordance with the scale shown below.

Percentage Participation	Points
0 to < 35	0
> 35 to < 36	1
> 36 to < 37	2
> 37 to < 38	3
> 38 to < 40	4
> 40 to < 42	5
> 42 to < 44	6
> 44 to < 46	7
> 46 to < 48	8
> 48 to < 50	9
> 50	10

(Exhibit 2 to Agency Report, p. 41).

With regard to the above-quoted evaluation criterion, the evaluation panel awarded the successful offeror, Jackson, ten out of the ten points possible. (Exhibit 5 to Agency Report). The Board's review of Jackson's proposal reveals that while it is a Delaware Corporation, it is also, as the prime contractor, a minority-owned enterprise certified by the District of Columbia Department of Human Rights and Minority Business Development; and a copy of its certification was included in its proposal. (Exhibit 4 to Agency Report). In addition, one of its two subcontractors is also a District-certified minority owned business enterprise, and its certification was also submitted. (Id.) Therefore, because Jackson was properly evaluated based on the evaluation criterion in the RFP, the Protestor's challenge, that it was not responsive or responsible because it is a Delaware Corporation, must fail. Thus, this ground of the protest is **DENIED.**

Paragraph nine of the protest (see footnote 2 for text) does not set forth a proper ground for protest and therefore, it is **DISMISSED**, with prejudice. Paragraph 15 of the protest (see footnote 2 for text) raises a policy issue not within the purview of this Board and therefore, it is **DISMISSED**, with prejudice. Paragraph 16 of the protest (see footnote 2 for text) does not set forth a proper ground for protest and therefore, it is **DISMISSED**, with prejudice. Protestor has submitted no evidence or even argument to support paragraph 18 of the protest (see footnote 2 for text) and, therefore, it is **DISMISSED**, with prejudice. See CUP Temporaries, Inc., supra. Paragraph nineteen (see footnote 2 for text) raises the issue of evaluation of Jackson's minority business enterprise certification, which was addressed above; and therefore, that ground is also **DENIED.**

The Board considers now the remaining grounds of the protest.

In paragraphs six and eight of the protest, Commercial appears to assert that the awardee is not responsive or responsible because it does not employ a lawyer licensed to

practice in the District.[4/] To assess this challenge, the Board must first consider the relevant evaluation criteria for the instant solicitation. The RFP at Section E: Evaluation of Proposals, Evaluation Criteria provides in relevant part:

> The following is the evaluation criteria that will be used to evaluate the proposals submitted:
>
> 1. Knowledge and Experience (0 - 60 points)
>
> a. Expertise and relevant experience of assigned personnel concerning disparity studies or similar types of studies or research; the quality of a sample disparity study or research product; relevant experience of each subcontractor assigned to the project. (0 - 10 points)
>
> b. The quality and comprehensiveness of the work plan for the completion of the scope of work, including the availability of key personnel and the assignment of related tasks and labor hours. (0 - 10 points)
>
> c. Clarity of the statement of understanding of City of Richmond v. J. A. Croson Co. and other relevant cases and their impact on goal-oriented MBE programs. (0 - 10 points)
>
> d. Knowledge of an experience with minority preference programs (MBE/WBE/DBE) in procurement/contracting and the manner in which they are implemented in various government agencies and non-government organizations. (0 - 10 points)

[4/]The referenced paragraphs state:

> 6. That the very nature of this analysis and study mandates legal expertise and professional qualifications and license not possessed by the awardee in this case. More specifically, Sections III and IV of the RFP require disclosure of information about the offeror's organization, including resume's [sic] of personnel to be assigned, * * * etc. Documentation of the offeror's experience is required along with the vitae of all staff members.
>
> 8. Neither the contracting entity nor its sole owner and officer is a lawyer or law firm licensed to practice law in the District of Columbia. In light of the fact that this particular procurement requires work and a work product which clearly constitutes the practice of law in the District of Columbia, it is imperative that full disclosure be made as to the experience and qualifications of the contracting entity and its sole officer to perform this service. Further, it does not appear that any of the sub-contractor "consultants" are licensed to practice law in the District of Columbia. In addition, this end product will have to withstand legal and perhaps even Constitutional scrutiny before the Federal Courts of the United States.

e. Computer/systems capability and ability to develop, and personnel with experience in developing statistical data and other related programs to aid in the analysis and completion of the study. (0 - 10 points)

f. Ability to meet the District's deadline. (0 - 10 points)

(Exhibit 2 to Agency Report, p. 40).

Clearly the evaluation criteria do not require the awardee to be an attorney licensed in the District of Columbia. Instead, the awardee must have, inter alia, expertise in disparity studies and an "understanding" of City of Richmond v. J. A. Croson Co., and other relevant cases. In the initial, January 25, 1992 evaluation, Jackson was awarded 3.4 out of 4 points possible for its expertise in disparity studies. Jackson was awarded 10 out of 10 points possible for its understanding of Richmond v. Croson. (Exhibit 5 to Agency Report). The Board's review of Jackson's proposal reveals that the awardee submitted four pages of related project experience in nine disparity studies. (Exhibit 4 to Agency Report, pp. 53-56). With regard to understanding Richmond v. Croson, Jackson submitted 12 pages discussing the Supreme Court decision, decisions after the Croson decision, and the development of different constitutional standards to evaluate state and federal programs for disadvantaged business entities. (Id., pp. 2-13). It appearing that Jackson's proposal was properly evaluated pursuant to 27 DCMR § 1618.1, the Protestor's challenge must fail. The Board has consistently held that in order to prevail, a protestor must prove by a preponderance of the evidence that the District has committed a material violation of an applicable law, regulation or term or condition of a solicitation. Silver Spring Ambulance Service, Inc., CAB No. P-218, 5 P.D. 4046, 4052-4053 (January 15, 1993); CTA Management Group, Inc., CAB No. P-71, 38 DCR 2935, 2937-2938 (1991). Protestor has failed to show that the awardee was not properly evaluated; and therefore, this ground of the protest is **DENIED.**

Next we consider Protestor's challenges to the awardee's cost proposal. Protestor asserts that Jackson's initial cost proposal was not responsive because it was too low to come within the competitive range established by the government. However, the evidence does not support this challenge. The government's estimated fair and reasonable cost for the contract was $260,000.00. (Exhibit 1 to Agency Report). Jackson's initial cost proposal was for $262,388.00. (Exhibits 4 and 6 to Agency Report). The evaluation criteria for cost of the study was 0 - 20 points. (Exhibit 2 to Agency Report). Jackson was awarded a score of 12.6 points out of a possible 20 points for its cost proposal. (Exhibit 6 to Agency Report). The District determined that a score of 60 and above (combined technical and cost proposal) to be within the competitive range. (Id.) Jackson's initial combined score was 79.5 and within the competitive range. (Id.; F.F. 2).[5/] Therefore, Protestor's challenge that Jackson's cost proposal was not responsive or in the competitive range must fail, and is **DENIED.**

[5/]The findings of fact are referred to herein as "F.F. ___."

Next the Protestor asserts that Jackson was given preferential treatment in being allowed to submit multiple BAFO's, while the Protestor was not. The District is correct that multiple rounds of BAFO's are permitted by 27 DCMR § 1622.3. The District is also correct that BAFO's need only be requested of offerors in the competitive range pursuant to 27 DCMR § 1622.5. Because the Protestor was found not to be within the competitive range, it was not entitled to submit a BAFO. SDC Integrated Services, Inc., B-195624, 80-1 CPD ¶ 44, (1980); United Computing Systems, Inc., B-204045, 81-2 CPD ¶ 247, (1981); see American Communications Company, B-247106, 92-1 CPD ¶ 415; Dynamic Isolation Systems, Inc., B-247047, 92-1 CPD ¶ 399; Facilities Management, Inc., B-247698, 92-1 CPD ¶ 394. Therefore, this ground of the protest is **DENIED.**

The next challenge raised by Protestor with regard to Jackson's cost proposal is that the government, ". . . determined that the awardee's bid was unbalanced and as a result, the bidder should have been rejected." (Opposition to Government's Motion for Summary Judgment, p. 4). The Board does not agree. First of all, the government did not "determine" that Jackson's cost proposal was unbalanced. In response to Jackson's first BAFO, submitted on June 17, 1992 (F.F. 6), the government, by letter dated July 3, 1992, advised Jackson (as well as the other two offerors) of the uncertainties raised by its BAFO (F.F. 8). The government advised Jackson, inter alia, that: (1) the government estimate exceeded its BAFO cost proposal; and (2) the total cost ($244,230.00) quoted on the Cost and Price Analysis form was in conflict with the total cost ($233,548.00) quoted on the Hourly Staff Chart. (Exhibit 12 to Agency Report). Therefore, the government directed that Jackson "[p]rovide an explanation as to how you plan to provide the services at the stated or amended price and the resolution of any conflicting price data." (Id.) Thus, the July 3, 1992, letter from the government does not set forth a determination that Jackson's cost proposal in its initial BAFO was unbalanced. Further, the Board's review of Jackson's initial BAFO, the government's letter of July 3, 1992, and Jackson's second BAFO of July 9, 1992, does not reveal that Jackson's cost proposal was mathematically unbalanced. In our review, we rely on the standards used by the Comptroller General in determining whether a bid should be rejected as unbalanced. A concise statement of that standard is set forth in Oregon Iron Works, Inc., B-247845, 92-1 CPD ¶ 474 (May 27, 1992):

> Before a bid can be rejected as unbalanced, it must be found both mathematically and materially unbalanced. A bid is mathematically unbalanced where it is based on nominal prices for some of the items and enhanced prices for other items. OMSERV Corp., B-237691, March 13, 1990, 90-1 CPD ¶ 271. A bid may not be found mathematically unbalanced absent evidence that it contains prices which are overstated. IMPSA Int'l, Inc., B-221903, June 2, 1986, 86-1 CPD ¶ 506. A mathematically unbalanced bid is considered materially unbalanced and cannot be accepted where there is a reasonable doubt that acceptance of the bid will result in the lowest overall cost to the government. Star Brite Constr. Co., B-244122, Aug. 20, 1991, 91-2 CPD ¶ 173.

Here, Protestor has failed to show, and there is no evidence in the record, that Jackson's cost proposal contained both overstated prices for some items and understated prices for

others. Thus, there is no basis to find that Jackson's cost proposal was mathematically unbalanced and therefore, this ground of the protest is **DENIED.**

The final challenge to awardee's cost proposal is that the government engaged in technical leveling in assisting the awardee to bring its cost proposal into the competitive range. Protestor cites as support Raytheon Ocean Sys. Co., supra. However, by definition, technical leveling relates to the technical aspects of a proposal and not to the cost proposal. We refer Protestor to the Federal Acquisition Regulations (FAR) at subparts 15.610(d) and (e) for the distinction between technical leveling and transfusion (concerning technical proposals) and auction techniques (concerning cost proposals). While the District's procurement regulations do not use the terms "technical leveling" or "auction techniques", they do proscribe such activities. The District's regulations provide at 27 DCMR:

> 1621.3 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.
>
> 1621.4 The contracting officer shall not disclose technical information pertaining to a proposal that results in improvement of a competing proposal.
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> 1621.5 The contracting officer shall not indicate to an offeror a cost or price it must meet to obtain further consideration, advise an offeror of its standing relative to another offeror, or otherwise furnish information about any other offeror's price.

We find that the District did not violate 27 DCMR §§ 1621.3, 1621.4 or 1621.5 with regard to negotiations with Jackson concerning his cost proposal. See also Koba Associates, Inc., CAB No. P-350, June 16, 1993, 6 P.D. 5184.

Even though the issue was not properly raised, we find there were no improper auction techniques used by the District. An improper auction occurs where the government advises an offeror of its price standing relative to another offeror. However, the government may inform an offeror that its cost or price is considered by the government to be too high or unrealistic. FAR 15.610(e)(2)(ii). Here, the government's letter of April 20, 1992 (Exhibit 7 to Agency Report), and letter of July 3, 1992 (Exhibit 12 of Agency Report), which addressed Jackson's costs, did not indicate any cost or price that Jackson had to meet to be considered further and did not advise Jackson of his cost standing vis-a-vis another offeror or furnish information about another offeror's prices. Therefore, there was no improper auction technique used here. Crowley Caribbean Transport, B-246784, March 31, 1992, ___ CPD ¶ ___.

Finally, the Board considers Protestor's challenge that there was a cardinal change to the scope of work under the contract. This Board has recognized and followed the

standard established by the Federal Claims Court for determining whether a contract modification is a cardinal charge. In Fort Myer Construction Corporation, CAB No. P-261(B) 5 P.D. 1060, 1065-1066 (June 10, 1992), the Board, citing Air-A-Plane Corporation v. United States, 408 F.2d 1030, 1033 (Ct. Cl. 1969), held that the standard is whether the modified job is essentially the same work as the parties bargained for when the.contract was awarded. Here, the work under the contract remained unchanged, i.e. to prepare and submit a Discrimination Study On Minority Business Enterprises. The addenda did not materially change the scope of work or constitute a cardinal charge. See F.F. 1, 4, 5, 8. Thus, there is no need to re-solicit proposals from all initial offerors. Fort Myer Construction, supra; American Air Filter, Co., Inc., supra. Protestor's final challenge is also **DENIED.**

Therefore as set forth herein, this protest is hereby **DISMISSED**, with prejudice, in part, and **DENIED** in part. So **ORDERED.**

DATE: **July 12, 1993**

ZOE BUSH
Chief Administrative Judge

CONCUR:

TERRY HART LEE
Administrative Judge