

GOVERNMENT OF DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD
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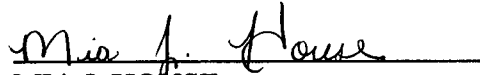
Date: June 18, 1999

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SUBJECT: CAB Nos. P-583 & P-585, Protest of B & B Security Consultants, Inc.

Attached is a copy of the Board's opinion in the above-referenced matters.


MIA J. HOUSE
Clerical Assistant

Attachment

cc: Laurence Schor, Esquire
Jonathan Cramer, Esquire
McMANUS, SCHOR, ASMAR & DARDEN, L.L.P.
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GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTESTS OF:

B&B SECURITY CONSULTANTS, INC.)	
)	CAB Nos. P-583 and P-585
Under Solicitation No. 8005-AA-NS-1-DW)	(Consolidated)

For the Protester, B&B Security Consultants, Inc.: Larry D. Harris, Esq., Scott N. Godes, Esq., Piper & Marbury, L.L.P. For the Intervenor, Global Services, Inc.: Laurence Schor, Esq., and Jonathan Cramer, Esq. For the Government: Howard Schwartz, Esq., and Warren J. Nash, Esq., Assistants Corporation Counsel.

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

OPINION

B&B Security Consultants, Inc. ("B&B") has protested the award of letter contracts for District-wide security services to five other offerors under a total of eight aggregate award groups. B&B argues that: (1) the contracting officer erred in determining B&B to be nonresponsible and unlawfully based his nonresponsibility determination on the fact that B&B had filed a Chapter 11 bankruptcy petition; (2) the contracting officer subjected B&B to disparate treatment with regard to the manner in which the responsibility determination was made of B&B but not of other offerors; (3) the contracting officer failed to refer the responsibility matter to the Local Business Opportunity Commission ("LBOC") prior to making his nonresponsibility determination; (4) the contracting officer failed to exercise independent judgment in the evaluation of proposals and selection; (5) the technical evaluation panel considered unstated evaluation criteria and improperly evaluated the proposals; and (6) the contracting officer failed to conduct discussions with all offerors.

We conclude that the contracting officer violated the responsibility regulations by failing to refer the issue of B&B's responsibility to the LBOC to obtain any relevant evidence on responsibility. Accordingly, we remand the responsibility matter to the contracting officer so that he may make the appropriate referral prescribed by 27 DCMR § 2202.6, consider any evidence furnished by the LBOC, and issue a new responsibility determination. We also conclude that the contracting officer failed to exercise independent judgment in the evaluation of proposals and selection of awardees. We remand the matter to the contracting officer so that he may complete his evaluation duties and then make a proper selection decision documented with his assessment of the relative merits of the competing proposals and the basis for his selections. We reject the other challenges raised by B&B and one other interested party, Global Systems, Inc.

BACKGROUND

Since September 30, 1997, the District had been procuring security services from four contractors, including the protester, B&B Security, under a succession of 120-day emergency contracts. On February 11, 1998, the District's Office of Contracting and Procurement ("OCP") issued a Request for Proposals ("RFP"), Solicitation No. 8005-AA-NS-1-DW for City-Wide Security Services, to satisfy the District's long-term requirements. (Agency Report ("AR") Ex. 1). OCP received nine timely proposals, including the proposal of B&B, by the due date of April 30, 1998.¹ (AR Exs. 2-3). The offerors submitted Best and Final Offers ("BAFOs") in approximately August 1998. (Shellow Dep. 36; AR Ex. 3). On November 16, 1998, OCP canceled the solicitation, due primarily to an improper technical evaluation performed by District personnel. (AR Exs. 3-4). On December 22, 1998, OCP rescinded the cancellation and determined that the solicitation should proceed with new evaluations of the proposals by outside security consultants. (AR Ex. 4). On December 29, 1998, OCP transmitted a letter to the offerors, inquiring whether those offerors were still interested in the competition for city-wide security services. (AR Ex. 5). Eight offerors confirmed their interest in continuing to participate in the solicitation: B&B, Global Systems, Inc., Hawk One Security, Inc., Atlas International Security, Inc., Watkins Security Agency Inc., Unlimited Security, Inc., Security Assurance Management, Inc., and Jenkins Security Consultants Inc. (AR Ex. 6; Black Dep. 49).

Also on December 29, 1998, OCP issued a Technical Proposal Evaluation Task Order that enabled OCP to engage outside security consultants to conduct the evaluations for this procurement. (AR Ex. 7). OCP contracted with Dr. Robert Shellow, Dr. James H. Ryan, and Mr. John R. Smith to serve as the new technical evaluation panel and to conduct the technical evaluations. (AR Ex. 7). In the Task Order, OCP instructed the contracted evaluators to read and be familiar with the solicitation, particularly, the statement of work, "to understand the evaluation criteria and scoring methodology that will be used in the evaluation of the technical proposals," and to attend a kick-off meeting with OCP personnel on January 12, 1999, when all issues relating to the task would be discussed. (AR Ex. 7).

The Task Order also advised the evaluators concerning the process by which evaluators would evaluate and score proposals. For example, the evaluators were instructed to read "each technical proposal carefully for overview and actual evaluation/scoring of the technical proposal" and to evaluate independently and impartially each technical proposal by completing an evaluation score sheet consisting of "a numerical score and a narrative section that provides written comments relating to each offeror's ability to meet each specific criteria as shown in the technical proposal." The instructions added that it was "important that detailed notes be made to indicate shortcomings, weaknesses, questionable areas of the proposals, strengths etc." The evaluators were to complete evaluations by January 19, 1999, "at which time [the evaluator] will submit to the District all score sheets with narratives generated on each and every technical proposal scored." The Task Order informs the evaluators that OCP personnel would then "tabulate all technical proposal scores as well as all price proposals (to be scored by the OCP's Cost and

¹ A proposal from another offeror was timely received but later determined to be outside of the competitive range.

Pricing [personnel])." The Task Order provides further that "[a]fter computing all aggregate total combined scores for all offerors, the Chief Procurement Officer . . . will determine and delegate staff to hold discussions and/or interviews with all firms designated to be in the competitive range" and that the evaluators shall be available to participate in "an Evaluation Panel meeting with all firms in OCP's competitive range" on January 27, 1999, and to participate in a meeting on February 3, 1999, to discuss offerors' BAFOs.

On January 12, 1999, the evaluators attended the kick-off meeting with OCP contracting personnel, including the contracting officer, Mr. Harry E. Black, who also is OCP's Deputy Chief Procurement Officer for Public Management and Contract Operations. (Black Dep. 45). Regarding this meeting, the contracting officer recalls making certain that the evaluators "thoroughly understood the Statement of Work, what the task at hand was, and the need for their . . . evaluations to be as tight as possible, to be as scientific as possible due to the sensitive nature of just this whole marketplace period." (Black Dep. 45). The contracting officer testified that he did not participate directly with the evaluation panel but rather "just basically maintained regular communications with the contract specialist to make certain that everything was on track, that there weren't any problems, that everybody was still clear on what the mission and assignment was. That was the extent of my role. I left it up to [the contract specialist] primarily to engage directly." (Black Dep. 45-48).

The evaluation criteria, set forth in Section M of the RFP, were distributed among technical (70 points possible), price (30 points possible), and preferences (12 points possible), for a total possible score of 112 points. Section M.3.1 states in part that "while the points in the evaluation criteria indicate their relative importance, the total scores will not necessarily be determinative of award. Rather, the total scores will guide the District in making an intelligent award decision based upon the evaluation criteria. . . . The District may award a contract on the basis of initial offers received, without discussions." The technical criteria, found at Section M.5.2 and M.5.3, are as follows:

Experience and Management Capability (0-35 points)

Quality and efficiency of the methods, procedures, and organizational structure proposed for the performance of the contract. Offerors should furnish in their proposal sufficient detailed information on their quality assurance program. (0-30)

Skills and expertise of available staff. Offerors should furnish copies of training certificates or other documentation for all officers in their employ, as evidence that they have received the required training as specified in Section H. (0-05)

Past Performance (0-35 points)

Experience in the operation and administration of any projects similar in size and nature to those described in the solicitation within the last six (6) years for the District of Columbia Government, Federal Government and/or private commercial concerns. The District shall consider the offeror's past performance as well as the quality of the offeror's current

performance in carrying out the work. (0-35)

The three evaluators evaluated the proposals between January 12 and January 19, 1999, and prepared evaluation score sheets to record their scoring and comments. For each offeror, an evaluator prepared three evaluation score sheets, a score sheet for each of the two subfactors under the Experience and Management Capability factor and another score sheet for the Past Performance factor. (E.g., AR Ex. 8; B&B Comments, Attachment 3, Tab 4, at CC-00093, CC-00096, CC-00099). At some point prior to February 3, 1999, the contract specialist realized that he had not provided the August 1998 BAFOs to the evaluators in connection with the evaluations conducted between January 12 and 19, 1999. The contract specialist delivered the BAFOs to the evaluators, the evaluators apparently reviewed them, and at least one of the evaluators, Dr. Shellow, made revisions to his scores on some evaluation score sheets. (Shellow Dep. 36-38, 59-62, 64-65; B&B Attachment 3, at CC-00097, CC-00157).²

Up to this time, the evaluators had relied exclusively on the contents of the proposals in evaluating past performance. Rather than contact the offerors' references directly, OCP retained Dun & Bradstreet to conduct past performance reviews of the offerors based on the references contained in their proposals. (B&B Attachment 3, Synopsis of Proposal Evaluation and Contract Award Recommendation, at CC-00076; Shellow Dep. 42-50). Between February 23 and February 26, 1999, Dun & Bradstreet transmitted to the contract specialist the results of its past performance review, in the form of a 2-page document called "Supplier Performance Review" for each offeror. (E.g., B&B Attachment 3, at CC-00111 to -00112, CC-00171 to -00172).

On March 3, 1999, the evaluators met again to re-evaluate the technical proposals, including the supplier performance information provided by Dun & Bradstreet. (B&B Attachment 3, at CC-00076; Shellow Dep. 63, 67). During this re-evaluation, the contract specialist requested that each evaluator complete three new sheets for each offeror, two for the experience and management capability subfactors and the third for the past performance factor. (E.g., CC-00162 to -00169). On these forms, the evaluators were asked to identify strengths, weaknesses, and technical rating scale (for scoring) for each offeror by factor or subfactor. The evaluators changed a few of their ratings based on the information from Dun & Bradstreet. For example, regarding B&B, Dr. Shellow raised his rating for the subfactor relating to skill and expertise of available staff from poor (2 points) to acceptable (3 points). (CC-00170). No discussions were conducted with the offerors because, according to OCP, "it was felt that the submitted technical and price proposals represented Offeror's best offer to the District." (CC-00077).³

² Although some score changes are noted on some of the evaluation score sheets for Mr. Smith (e.g., CC-00135, -00141), the changes are undated and may have been made in connection with the subsequent March 3, 1999 re-evaluation meeting. *See infra*.

³ In an affidavit of Mr. Cortez Fletcher of Global Systems, an unsuccessful offeror who has filed comments on the Agency Report in support of B&B's protest, Mr. Fletcher states that representatives from OCP conducted discussions with Global on or about July 24, 1998, followed by Global's submission of a BAFO on July 31, 1998. (Global's Comments, Ex. 1).

The record of the technical evaluation consists of the January 12-19, 1999 evaluation score sheets and the March 3, 1999 re-evaluation sheets, which were prepared by the technical evaluators, together with the undated document entitled "Synopsis of Proposal Evaluation and Contract Award Recommendation" (AR Ex. 9; B&B Attachment 3, at CC-00075 to -00078), and the undated "summaries of rankings for the Offerors" (CC-00262 to -00269), which probably were prepared by the contract specialist and OCP staff in April 1999. The District has not identified any consensus summary of findings of the technical evaluation panel.

On March 12, 1999, the contracting officer issued an amendment to the RFP which updated the applicable wage determination. Because of that amendment, the contracting officer requested BAFOs from the offerors due by March 16. (B&B Attachment 3, at CC-00077; AR Ex. 10). All offerors submitted BAFOs. (B&B Attachment 3, at CC-00254 to -00261). By letter of March 19, 1999, the contracting officer provided offerors an opportunity to submit another BAFO by March 22. (AR Ex. 11). The District does not clearly indicate whether any offeror submitted another BAFO.

After receipt of the BAFOs, OCP staff analyzed the pricing information and generated pricing summaries of all offerors by aggregate award group. (B&B Attachment 3, at CC-00254 to -00261; Black Dep. 134). Thereafter, the summary of rankings of the offerors by aggregate award group was prepared by the contract specialist and OCP staff. (Black Dep. 134). These rankings, incorporating technical, price, and preference points, showed Hawk One as the highest ranked offeror for award groups I and III-VI, Atlas as highest ranked offeror for award group II, and Unlimited Security as highest ranked offeror for award groups VII and VIII. The second highest ranked offerors were Unlimited for award groups I-VI, Hawk One for award group VII, and Atlas for award group VIII. The third highest ranked offerors were B&B for award groups I-II and IV-VIII and Jenkins for award group III.

At the end of March or beginning of April 1999, OCP received unsolicited from the D.C. Lottery and Charitable Games Control Board ("Lottery Board") a March 29, 1999 interoffice memorandum prepared by the Lottery Board's Assistant Chief Financial Officer assessing B&B's financial stability. (B&B Attachment 3, at CC-00272 to -00273; Black Dep. 115-116). B&B had an ongoing contract with the Lottery Board for providing security services. The Assistant CFO states in the memorandum that he examined B&B's Balance Sheet of December 31, 1998, B&B's Income Statement for the period ended December 31, 1998, and a Dun & Bradstreet "Comprehensive Report" of B&B dated March 19, 1999, which are attached to the memorandum. (CC-00274 to -00285).⁴ In the memorandum, the Assistant CFO reviews the financial condition of B&B and notes that B&B filed a Chapter 11 bankruptcy petition and received from Dun & Bradstreet a financial stress class rating of 0 indicating that B&B had an open

⁴ Also appearing in this collection of financial documentation is another Dun & Bradstreet report entitled "Business Information Report" which is dated February 16, 1999. This report appears to have been requested by OCP. (CC-00296 to -00302).

bankruptcy case, discontinued operations, or could not be scored.⁵ The memorandum ends with the following paragraph:

Based on the information noted above, it is my opinion that B&B Security Consultants, Inc. is not financially stable. The company is in serious financial debt and experiencing cash flow problems. Its ability to provide required contractual services without financial interruption and to continue as a going concern is questionable.

Also attached to the memorandum is a March 29, 1999 cure notice issued by the Lottery Board to B&B. (CC-00286 to -00295). In the cure notice, the Lottery Board's contracting officer states that the security services provided by B&B have been deficient and have resulted in continuous unsatisfactory performance and that B&B's deficiencies constitute a breach of their contract. The cure notice contains two attachments listing various incidents of contract violations as determined by the Lottery Board. The cure notice requested B&B to respond by April 5, 1999. B&B's response to the cure notice is not in the record although B&B does admit that "it had some problems in the performance of the Lottery Board contract." B&B states that it resolved the problems to the satisfaction of the Lottery's contracting officer and that B&B continues to provide security services to the Lottery Board. (B&B Comments, at 15; Attachment 1).

On April 8, 1999, OCP's contracting officer executed a Determination and Findings for Nonresponsibility. In the nonresponsibility determination, the contracting officer notes that B&B, as the third ranked offeror for award groups VI and VII, was in line for those awards because the higher ranked offerors (Hawk One and Unlimited) had already received the maximum allowable two aggregate group awards. The contracting officer made the following findings:

- a. B&B Security does not appear to possess financial resources adequate to perform the requirements of one or both of the two aggregate groups. The company, by its own admission and from Dun & Bradstreet records, has been in bankruptcy since September 20, 1996 with a liabilities total of \$1,058,833.00. D&B supplier risk score for B&B Security is at the highest risk level of 9 (See attached D&B Report).
- b. The contract security guard and related services function is a positive cash flow and resources dependent endeavor. Cash on hand and/or the ability to acquire it is essential to efficient and effective service delivery and/or performance on schedule. A business under bankruptcy faces a difficult time maintaining necessary positive cash flow for business needs e.g. salaries, benefits and other resources. The potential for failure on the contract by B&B Security is a risk that the District is better to avoid, given the criticality of the security guard services to public safety and

⁵ B&B filed its bankruptcy petition on September 19, 1996. B&B states that the Bankruptcy Court approved a reorganization plan on January 18, 1999. (B&B Comments, at 5). Neither the reorganization plan nor any other filings from the bankruptcy proceedings are in the record.

the protection of District Government property.

- c. Record of unsatisfactory performance on contract with the DC Lottery & Charitable Games Control Board (See attached).
- d. B&B achieved a low technical proposal score in the evaluation process. However, cost and preference points catapulted the company to the third highest overall scores for the two aggregate groups. Watkins Security and Jenkins Security had higher technical score in the two aggregate groups. . . .

Based on these reasons, OCP is recommending the award of aggregate award groups VI and VII to Watkins Security and Jenkins Security respectively.

(AR Ex. 12). In his deposition, the contracting officer stated that he found the financial analysis by the Lottery Board's Assistant CFO to be compelling and consistent with the Dun & Bradstreet Comprehensive Report. He added that he linked B&B's problems on the Lottery Board contract with B&B's "overall financial condition or inability to maintain a sufficient work force." (Black Dep. 147-149, 153).

On April 9, 1999, Mr. Richard P. Fite, the District's Chief Procurement Officer, executed a Determination and Findings for Award to Other Than Highest Score that set forth the same reasons as stated in the nonresponsibility determination that Aggregate award Groups VI and VII were not awarded to B&B. (AR Ex. 13).

The document entitled "Synopsis of Proposal Evaluation and Contract Award Recommendation" (AR Ex. 9; B&B Attachment 3, at CC-00075 to -00078) was completed by the contract specialist and other OCP staff after the nonresponsibility and award determinations were executed. The Synopsis, however, does not explain the contracting officer's selection decision. Absent from the record is any form of selection memorandum from the contracting officer that explains how he used the technical evaluation materials prepared by the technical evaluation panel members and the price evaluation materials from OCP staff in arriving at his selection decision. After reviewing his deposition testimony, we find that the contracting officer essentially had no involvement in the evaluation of the offerors and little input into the selection, other than (1) determining that B&B was nonresponsible and the awardees were responsible, and (2) approving the contracting specialist's selection recommendations once he felt that the process had been done properly. When asked if he participated in the decision to award the contracts, the contracting officer replied:

No, sir. My role was as contract officer, by guidance, direction, to make certain that from a project management standpoint that the procurement was on track, it was on target, on schedule, and it was being done according to the procurement plan for that acquisition. . . . The key is it is not my role to influence decisions or the process. My role is to make certain that the process is adhered to, and that whatever decision is made at the end of the day is pursuant to a fair, open, ethical responsible process; because my signature is the signature that goes on the contract. . . .

(Black Dep. 51-52). When asked who the selection official was if not him, the contracting officer replied:

The contract specialist basically takes all of the data, in essence, all of the numbers, and basically goes through the mathematical calculations, and does the tallying up of all the scores. The technical responsibility determination, the pricing – in this case there were really only two numbers, technical and responsibility. Responsibility just has two components to it. That is performance and price. So, in essence, that contract specialist, with help from other people on staff, pulled the numbers together, tabulated them, and came up with a ranking or score for each offeror.

(Black Dep. 52-53). In response to a follow-up question concerning who reviewed the rankings and scoring and made the ultimate decision to go forward with award, the contracting officer answered that:

The contract specialist, as the process requires, they engage in all the tabulation of the numbers. They package the documents up for the contract document. And then they make a recommendation or recommendation for award. That was done by Mr. Dosunmu [the contract specialist] to me. And I am the one who actually signs off at the end of the day. But, in essence, the results of the scores as tabulated lead to a recommendation of award, or awards in this case, to the contracting officer, in this case was me.

(Black Dep. 53-54). In deciding to adopt the contracting specialist's recommendation to make awards to five of the eight offerors, the contracting officer states that he based his decision on a review of the contract files, including the evaluation score sheets, and his belief (arising from his regular contacts with the contract specialist) that the contract specialist had properly managed the evaluation and selection process. (Id. at 54-55). The contracting officer never met with any of the evaluators. (Id. at 55).

On April 12, 1999, OCP transmitted notices of award to the winning offerors and executed letter contracts with them. (AR Exs. 14, 15). B&B filed its initial protest on April 21, 1999 (P-583), was debriefed by OCP staff on April 22, 1999, and filed a supplemental protest (P-585) on April 29, 1999. On April 29, 1999, the Chief Procurement Officer filed a "Determination and Findings to Proceed With Contract Performance After Receipt of a Protest" which we sustained in a May 24, 1999 decision. The District filed its Agency Report on May 14, 1999. B&B filed its Comments on the Agency Report on May 20, 1999, and Global filed its Comments on May 21, 1999.

DISCUSSION

We exercise jurisdiction over these consolidated protests pursuant to D.C. Code § 1-1189.3(a)(1) (Supp. 1998).

B&B and Global raise a number of challenges to the evaluation and selection. B&B also challenges the nonresponsibility determination which effectively excluded B&B from the competition. Because the nonresponsibility determination raises a threshold issue on B&B's participation in the competition, we address it first.

Nonresponsibility Determination

The procurement regulations provide that contracting officers "shall make purchases from and award contracts only to responsible contractors." 27 DCMR § 2200.1. In addition, the "contracting officer shall not make a purchase or award unless the contracting officer has determined in writing that the prospective contractor is responsible, in accordance with the provisions of this chapter." *Id.* § 2200.2. To be determined responsible, a prospective contractor must meet the following requirements:

- (a) Financial resources adequate to perform the contract, or the ability to obtain them;
- (b) Ability to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;
- (c) A satisfactory performance record;
- (d) A satisfactory record of integrity and business ethics;
- (e) The necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them;
- (f) Compliance with the applicable District licensing and tax laws and regulations;
- (g) The necessary production, construction, and technical equipment and facilities, or the ability to obtain them; and
- (h) Other qualifications and eligibility criteria necessary to receive an award under applicable laws and regulations.

Regarding a nonresponsibility determination, 27 DCMR § 2205.2 provides:

When an offer on which an award would otherwise be made is rejected because the prospective contractor is found to be nonresponsible, the contracting officer shall make, sign, and place in the contract file a determination of nonresponsibility, which shall state the basis for the determination.

B&B argues that it was subject to disparate treatment because no responsibility determinations were made for the successful offerors, while B&B was assumed to be nonresponsible. We are satisfied from the record that the contracting officer considered the responsibility of the awardees prior to awards. The contracting officer's execution of the letter contracts constitute a determination that the awardees were responsible with respect to those contracts. 27 DCMR § 2205.1. B&B also argues that the contracting officer improperly based his nonresponsibility determination on the fact of B&B's bankruptcy proceedings. The record does not support the allegation. The contracting officer considered the bankruptcy in the

context of assessing the financial condition of B&B, including whether B&B has the financial resources adequate to perform the security services.

B&B next argues that the contracting officer violated 27 DCMR § 2202.6 by failing to refer the responsibility issue concerning B&B to the Local Business Opportunity Commission ("LBOC")⁶ prior to making a determination of nonresponsibility. Section 2202.6 provides:

If a bid or offer of a certified minority business that would otherwise be accepted is to be rejected because of a determination of nonresponsibility, the contracting officer shall refer the matter to the [Local] Business Opportunity Commission (the "[L]BOC"). Within ten (10) working days the [L]BOC shall provide any evidence it deems appropriate relevant to the responsibility of the certified minority business. The contracting officer shall consider any evidence provided by the [L]BOC in deciding whether to issue a determination of nonresponsibility pursuant to §2205.2.

Section 2205.3 provides:

If the contracting officer determines and documents that a responsive certified minority business lacks certain elements of responsibility, the contracting officer shall comply with the provisions of §2202.6.

Also, section 2206.4 provides:

When the prospective contractor surveyed is a certified minority business, the contracting officer shall request information and advice concerning the contractor's capability and past performance from the [L]BOC before making a determination regarding the contractor's responsibility or nonresponsibility.

At the time these regulations were issued, the term "certified minority business" was derived from the District's former Minority Contracting Act. In 1992, the Council enacted new legislation, the Equal Opportunity for Local, Small, and Disadvantaged Business Enterprise Act ("LSDBE Act"), D.C. Code §1-1152, *et seq.* (Supp. 1997), which replaced the "certified minority business" designation with newly defined designations of small business enterprise ("SBE"), local business enterprise ("LBE"), and disadvantaged business enterprise ("DBE"). Although the statutory basis for the cited regulations has changed as well as the nomenclature, the purpose for and meaning of sections 2202.6, 2205.3, and 2206.4 remain clear. There is no dispute that B&B was a DBE and LBE certified by the LBOC (and its predecessor, the MBOC). It is also undisputed in the record that the contracting officer did not contact the LBOC to request relevant evidence from the LBOC concerning B&B's responsibility. Moreover, the contracting officer admits that but for his determination of nonresponsibility, B&B was in line to receive

⁶ The Local Business Opportunity Commission was formerly named the Minority Business Opportunity Commission ("MBOC").

aggregate award groups VI and VII. Therefore, the contracting officer was required to request relevant evidence from the LBOC concerning B&B's responsibility, and consider it, before making a determination concerning B&B's responsibility.

We conclude that the proper course is to remand the responsibility matter to the contracting officer to make the referral prescribed in 27 DCMR § 2202.6. After receiving relevant evidence from the LBOC, the contracting officer shall prepare a new determination which takes account of any relevant evidence provided by the LBOC concerning B&B's responsibility.

Evaluation and Selection

The principal challenge raised by B&B and Global regarding the evaluation and selection concerns the contracting officer's failure to exercise his independent judgment. We must agree. It is well settled that it is the contracting officer who ultimately is responsible for the evaluation of proposals and determining the relative merits of competing proposals. The procurement regulations state that the contracting officer "shall evaluate each proposal in accordance with the evaluation criteria in the solicitation." 27 DCMR § 1618.1. Although the contracting officer may be assisted in the evaluation by others, such as a technical evaluation board, the contracting officer always remains responsible for the evaluation of proposals. *Health Right, et al.*, CAB Nos. P-507, 510, 511, Oct. 15, 1997, 45 D.C. Reg. 8612, 8636-37; *Property Analysts, Inc.*, B-259853, June 13, 1995, 95-1 CPD ¶ 270; *Wyle Labs., Inc.*, 69 Comp. Gen. 648 (1990), 90-2 CPD ¶ 107.

Our ability to review the contracting officer's evaluation and selection is handicapped because the protest record omits certain key documentation. First, the technical evaluators apparently were not told to prepare a technical evaluation report as required by 27 DCMR § 1618.5, which provides:

If a technical evaluation is done, a technical evaluation report shall be prepared by the technical official and shall contain the following:

- (a) The basis for the evaluation;
- (b) An analysis of the technically acceptable and unacceptable proposals, including an assessment of each offeror's ability to accomplish the technical requirements;
- (c) A summary, matrix, or quantitative ranking of each technical proposal in relation to the best rating possible; and
- (d) A summary of findings.

Beyond the January 1999 evaluation score sheets and the March 1999 supplemental forms, the record discloses no consensus technical evaluation report that would provide a consensus summary of the evaluators' findings. Cf. *Management Technology, Inc.*, B-257269, Nov. 8, 1994, 95-1 CPD ¶ 248 (cited in *Health Right*, 45 D.C. Reg. at 8638 n.14).

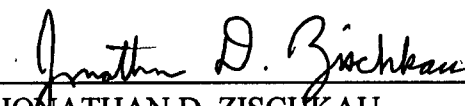
The contracting officer is responsible for source selection. 27 DCMR §§ 1614.3, 1614.4(c). But the record before us includes no memorandum documenting the contracting officer's selection decision. Once BAFOs have been received, the regulations prescribe the following duties:

- 1622.6 After evaluation of the best and final offers, the contracting officer shall select that source whose best and final offer is most advantageous to the District, considering only price and other factors included in the solicitation.
- 1622.7 The contracting officer shall prepare supporting documentation for the selection decision that shows the relative differences among the proposals and their strengths, weaknesses, and risks in terms of the evaluation factors. The supporting documentation shall include the basis for the selection.

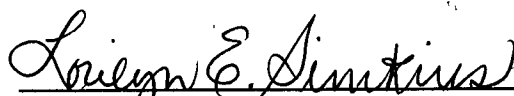
As the contracting officer's deposition testimony makes clear, he did not fulfill his role as contracting officer. In the evaluation of proposals and selection of awardees, the contracting officer must exercise independent judgment in assessing the relative merits of the competing proposals, even when relying on technical expertise of delegated evaluators. Here, there is no evidence that the contracting officer made any substantive review of the proposals. The contracting officer did not meet with any of the technical evaluators to discuss the results of their technical evaluation, and, of course, did not review any consensus evaluation report because there was none. *Cf. Southwest Marine, Inc.*, B-265865, Jan. 23, 1996, 96-1 CPD ¶ 56 (cited in *Health Right*, 45 D.C. Reg. at 8637 n.11). It appears that the contracting officer made his source selection decision based on a purely mechanical application of the numerical scores for technical, price, and preferences which were furnished to him by the contract specialist. That was improper. *Opti-Lite Optical*, B-281693, Mar. 22, 1999, 1999 WL 152145; *Taltara, Inc.*, B-280922, Dec. 4, 1998, 98-2 CPD ¶ 124. B&B and Global raise other challenges to the evaluation and selection but we conclude that the challenges are either not well taken or were not prejudicial.

We remand to the contracting officer so that he may: (1) refer the issue of B&B's responsibility to the LBOC pursuant to 27 DCMR § 2202.6, consider relevant responsibility evidence, and issue a new responsibility determination, and (2) fulfill his evaluation and selection duties by exercising independent judgment in assessing the relative merits of the competing proposals and by preparing a selection memorandum with supporting documentation in accordance with 27 DCMR §§ 1622.6 and 1622.7. If the new selection decision and the new responsibility determination indicate a change of awardees for any of the eight aggregate group awards, then the contracting officer shall take appropriate actions consistent with his selection decision. The District shall report on the status of its compliance within 30 days. An award of costs is not warranted because the District's actions were not arbitrary or capricious. D.C. Code § 1-1189.8(f)(2).

DATED: June 18, 1999


JONATHAN D. ZISCHKAU
Administrative Judge

CONCURRING:



LORILYN E. SIMKINS
Chief Administrative Judge



PHYLLIS W. JACKSON
Administrative Judge