

**DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD**

PROTEST OF:

Martha's Table, Inc.

Solicitation No. DCCF-2011-R-3962-SDA 1

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CAB No: P-0896

For the protester: Stuart Turner and Avi Baldinger, Arnold & Porter. For the District of Columbia Government: Talia Sassoon Cohen, Assistant Attorney General, Office of the Attorney General.

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

OPINION

Filing ID 44187484

Martha's Table, Inc. ("Martha's Table" or "protester") has filed a protest challenging its removal from the competitive range under a solicitation seeking a contractor to design and implement an in-school youth workforce development program to support between 250-500 at-risk youths. (AR at Ex.1a, §B.1.) The protester's challenges generally concern (a) the District's failure to evaluate the proposals in accordance with the law and the terms of the solicitation, and (b) the District's failure to conduct meaningful discussions. (Protest 12-21, Sept. 26, 2011.) On October 17, 2011, the District filed a motion to dismiss the protest as either untimely or for lack of standing.

We find the protest timely and that the protester has standing. Further, the Board finds that the District's Office of Contracting and Procurement ("OCP") violated procurement law by failing to follow proper procedures in evaluating the proposals. This violation resulted in a materially flawed procurement process warranting termination of the current contract effective no later than the close of the current school year in June 2012. To the extent that the District seeks to procure these services for the summer school session of 2012 and beyond, the District shall issue a request to the eleven offerors for revised technical and cost proposals for the remainder of the base year and the option years. The District shall evaluate the revised proposals in accordance with the law and the terms of the RFP. This protest is sustained.

BACKGROUND

On April 1, 2011, OCP issued a Request for Proposals for Solicitation No. DCCF-2011-R-3962-SDA 1 ("RFP") for a contractor to design and implement a quality, year-round educational program to support between 250-500 at-risk youths.¹ (AR at Ex. 1a.) Per the RFP, the District intended to issue a contract consisting of a base year with four additional option years. (AR at Ex 1a, §§ F.1-F.2.4.) The RFP was revised six times prior to the deadline for receipt of proposals on June 8, 2011. The revisions are as follows: (i) on April 14, 2011, the due date was changed from April 22, 2011, to May 4, 2011; (ii) on

¹This solicitation follows an earlier solicitation issued in September 2010 for the same services. (*See, e.g.*, Protest ¶ 1, Sept. 26, 2011.)

April 26, 2011, (Amendment 0001), the due date was extended to May 13, 2011; (iii) on May 9, 2011 (Amendment 0002), the due date was extended to May 27, 2011; (iv) on May 18, 2011 (Amendment 0003), the RFP was replaced in its entirety and the due date was extended to May 31, 2011; (v) on May 26, 2011 (Amendment 0004), technical amendments were made to certain sections of the RFP and the due date was extended to June 6, 2011; and (vi) the due date was extended for the final time, via E-Sourcing message board, to June 8, 2011. (AR at Ex. 2.)

Terms of the Solicitation

Under the Revised RFP, the District of Columbia was divided into two Service Delivery Areas ("SDAs"):

SDA 1: Wards 1, 2, 3, and 4

SDA 2: Wards 5, 6, 7, and 8

(AR at Ex. 1b, § B.3.1.)

The RFP stated: "It is the intent of the District to award at least one contract for each of the SDAs. The District will award additional contracts based upon program needs and availability of funds." (*Id.*) Potential offerors were to submit proposals to design and implement a year-round in-school youth program to provide services promoting academic achievement, successful graduation, awareness of and readiness for post-secondary education, career preparation, and connections to employment. (AR at Ex. 1b, § C.1.)

The RFP further stated that the District would award a contract to the responsible offeror(s) whose offer(s) is most advantageous to the District (AR at Ex. 1c, § M.1.1) based upon the following technical evaluation criteria: (1) Price Criterion, 10 points; (2) Technical Approach, 50 points, (3) Technical Expertise, 30 points, (4) Past Performance, 10 points. (AR at Ex. 1c, §§ M.3.3.1 – M.3.3.4.) The evaluation criteria also allowed an additional 10 technical bonus points for in kind/cash match resources and 12 points for CBE preference, providing for a maximum 122 total points. (AR at Ex. 1c, §§ M.3.4.1, M.3.4.2, M.5.)

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

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

5	Excellent	Exceeds most, if not all requirements; no deficiencies.
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(AR at Ex. 1c, § M.2.)

According to the Procurement Chronology prepared by Contract Specialist, Crystal Farmer-Linder, the minimum solicitation requirements were contained in Sections B.3 (B.3.1, B.3.2, B.3.3), C.5.2, and C.5.2.1. (AR at Ex. 2.) These sections provided:

§ B.3 **SERVICE DELIVERY AREAS**

§ B.3.1 For the purpose of this RFP and the ensuing contracts the District will be divided into two Service Delivery Areas (SDAs);

SDA District 1: Wards 1, 2, 3, and 4.

SDA District 2: Wards 5, 6, 7, and 8.

It is the intent of the District to award at least one contract for each of the SDAs. The District will award additional contracts based upon program needs and availability of funds.

§ B.3.2 In order for an Offeror to be awarded a contract, the Offeror must serve the entire SDA and the Offeror must operate programming at a location within the SDA. The Offeror is not limited to serving only youth who reside within that SDA and the District reserves the right to refer eligible youth to any Offeror awarded a contract who has capacity at the time.

§ B.3.3 If an Offeror submits proposals for both SDAs, and, if the Offeror is awarded a contract for each SDA, each contract shall stand alone. The awarded Offeror shall not co-mingle funds, personnel, required activities, services or any other contract requirement between the two contracts.

§ C.5.2 **YOUTH POPULATION**

The following youth population shall be targeted:

§ C.5.2.1 The Offeror shall provide services to youth who are most likely to become disconnected. This represents youth who are low-income individuals, between the ages of 14 and 21, and who are currently in school (See Section C.3.12 for a definition of the term "In-School Youth")

(AR at Ex. 1b.)

The District has also noted that other sections of the RFP required offerors to provide services to students in the age range 14 to 21. (*See* Mot. to Dismiss 4-5, Oct. 17, 2011.) Those requirements are contained in Sections C.1 and C.5.2.2. (*Id.* at 5.) They provide:

§ C.1

* * *

The program must focus on drop-out prevention and intervention strategies for youth at-risk of not completing high school for a maximum of fifty (50) youths ages 14 through 21, for a minimum of ten (10) and a maximum of fifteen (15) hours per week.

* * *

§ C.5.2.2

The population that requires services and will be eligible to participate includes youth who are:

1. Age 14 to 21 years on the program start date;
2. A resident of the District of Columbia
3. Low income . . . , according to federal WIA eligibility guidelines;
4. Demonstrate one or more of the following characteristics:
 - a. Deficient in basic skills (8th grade level or below grade in reading or math;
 - b. School dropout;
 - c. A homeless, runaway, or foster child;
 - d. Pregnant or parenting;
 - e. An offender or youth involved in the juvenile or criminal justice system;
 - f. A youth with disability; and
 - g. A youth requiring additional assistance to complete an educational program to secure and hold employment.

(AR at Ex. 1b.)

The Evaluation of Proposals Chronology

Eleven offerors submitted proposals in response to the RFP by the June 8 deadline. (AR at Ex. 2.) Between June 13 and June 17, 2011, the Technical Evaluation Panel ("Panel"), consisting of three members of the Department of Employment Services ("DOES"), performed independent reviews of the initial proposals and created a consensus panel report. (AR at Ex. 2.) According to the Procurement Chronology, each proposal was redacted so that the Panel could perform a blind evaluation. (AR at Ex. 2.)

Simultaneously, the Contracting Officer ("CO") conducted his own review and scoring of each proposal. (AR at Ex. 2.) The three independent scores of the panelists, the Panel's consensus scores and the CO's scores were consolidated onto a Score Sheet along with comments by the Panel and the CO. (AR at Ex. 2.)

During the initial evaluation of proposals, the Panel and the CO each noted the strengths and weaknesses of the Martha's Table proposal. In the comments for subfactor M.3.3.2.f, the Panel stated:

The Offeror proposed a [sic] year-round activities for 35 to 40 youth from Ward One ages 14-18 years old. This submission is too limited in scope by not providing services to the entire SDA and not providing services to 14-21 years old as required by the RFP.

(AR at Ex. 2.)

The Panel awarded the protester 2 out of a possible total of 5 points for subfactor M.3.3.2.f. (AR at Ex. 2.) It did not discuss the age range as a factor for scoring any other subfactor of the solicitation. (See AR at Ex. 2.) The Panel's comments for other subfactors were, in fact, generally more indicative of the following: "The Offeror has presented and addressed the basic requirement(s) within this subsection as prescribed by the solicitation." (AR at Ex. 2.) The Panel awarded the protester 30 out of 50 points for Technical Approach. (AR at Ex. 2.)

In reviewing the same proposal, the CO noted:

Not clear if program targets only youth in Wards 1 and 4 or if major focus is on these wards with recruitment activities planned for 2 and 3.
Does not meet minimum requirement for age; excludes 19 to 21.

(AR at Ex. 2.)

This comment appeared next to every evaluation subfactor for Technical Approach. (AR at Ex. 2.) Thus, the CO repeatedly penalized the offeror because of the deficiency in subfactor M.3.3.2.f. and assigned a rating of 2 for every subfactor under Technical Approach.² (See AR at Ex. 2.) The CO awarded the protester 20 out of 50 points for Technical Approach. (AR at Ex. 2.)

According to the District, proposals that "clearly demonstrated an inability to meet one or all of the requirements [stated in Sections B.3, C.5.2, and C.5.2.1]" were immediately removed from the competitive range by OCP. (AR at Ex. 2.) OCP determined that five offerors were outside the competitive range for failing to meet the minimum requirements set forth in Sections B.3.2, C.5.2.1, or B.3.3: (i) Citywide Computer Training, (ii) Job's for America's Graduates-DC, Inc., (iii) Ethiopian Community Service and Development Council, (iv) Howard University (The Learning Center), and (v) Priority Professional Development. (AR at Ex. 2.)

First Round Best and Final Offers ("1st BAFO") were conducted in writing with the remaining six offerors, beginning July 12th and closing July 15th. (AR at Ex. 2.) The remaining "Offerors were provided questions regarding noted deficiencies in their original proposal submissions." (AR at Ex. 2.) Martha's Table was asked to:

[S]pecifically address the deficiencies/weaknesses listed below:

Technical

1. Please clarify the age range of the target population for the proposed program. What methods will be utilized to target and recruit youth residing in Wards 2 and 3?
(M.3.3.2.a)

² The CO and Panel each used similar approaches in evaluating proposals that were ultimately determined to be outside of the competitive range. They often noted flaws relating to Sections B.3.2, C.5.2.1, and B.3.3. (See AR at Ex. 2.) However, in the Panel's assessment, the deficiency in subfactor M.3.3.2.f. was confined to that one subfactor and the deficiency did not impact scoring in other subfactors. (See AR at Ex. 2.) On the other hand, the CO consistently discussed the subfactor M.3.3.2.f deficiency in his analysis of multiple subfactors and, due to the deficiency in subfactor M.3.3.2.f., he uniformly downgraded protester's proposal across almost all subfactors. (See AR at Ex. 2.)

(Protest Ex. A.)

All six remaining offerors, including Martha's Table, submitted responses to the 1st BAFO.³ (AR at Ex. 2.) Citing an inability to reconvene the Panel to review the BAFO proposals in time to meet the award deadline, the CO scored the BAFO submissions without the assistance of the Panel. (AR at Ex. 2.) At this time, the CO then determined that Latin American Youth Center should be excluded from the competitive range as "the Offeror's proposal did not provide service to the full age range of the targeted youth population." (AR at Ex. 2.)

Alluding to budgetary concerns in light of the proposed cost of services under the 1st BAFOs, the District decided to hold a Second Round BAFO ("2nd BAFO") with all five remaining offerors, including Martha's Table. The 2nd BAFO related to pricing only. (AR at Ex. 2.) The 2nd BAFO instructions were that the "District sought a per participant cost range between \$2,500.00 and \$4,500.00." (AR at Ex. 2.) The request for 2nd BAFOs was issued July 28, 2011. (AR at Ex. 2.) During the 2nd BAFO review, OCP conducted further analysis and "determined that Martha's Table should have also been excluded from the competitive range [for failure to provide service to the full range of the targeted youth population]." (AR at Ex. 2.)

At the conclusion of both BAFO rounds only four of the eleven offerors remained in the competitive range. (AR at Ex. 2.) On August 15, 2011, the District awarded the contract to the highest ranking remaining offeror, Dance Institute of Washington ("DIW"). (Mot. to Dismiss 4.)

The Protest

Protester did not initially receive notice of award from the District. (Protest ¶ 39.) However, on August 30, 2011, protester learned that an offeror to the solicitation had filed a protest of award. (Protest ¶ 33.) Protester requested a debriefing and, accordingly, was debriefed on September 12, 2011. (Protest ¶¶ 33-34.) The District created a notice of award after the debriefing and sent it to protester. (Protest ¶ 39.) Following the debriefing, Martha's Table filed its protest with this Board ten business days later on September 26, 2011. It asserted five grounds for protest alleging: (i) the District's failure to conduct meaningful discussions or treat offerors equally during discussion; (ii) the District's misapplication of evaluation criteria; (iii) unreasonable evaluation of DIW and Martha's Table with respect to the Past Performance score; (iv) miscalculation of the Price Evaluation score; and (v) a fundamentally flawed DOES procurement process. (Protest 12-21.)

DISCUSSION

I. BOARD JURISDICTION

³ The Procurement Chronology states that seventeen of the twenty offerors responded to the request for BAFOs. (See AR at Ex. 2.) However, a total of only eleven offerors were ever involved in this solicitation. Notwithstanding this typographical error, the Board can deduce that all six remaining offerors responded to the 1st BAFO because other parts of the Procurement Chronology detail the determination by OCP that two offerors were not in the competitive range and that four offerors were included in the competitive range and ranked according to their scores. (See AR at Ex. 2.)

We exercise jurisdiction over this protest and its underlying allegations pursuant to D.C. Code § 2-360.03(a)(1) (2011).

A. Standing

The District has argued that the protester is without standing because it did not have a reasonable chance of award. (Mot. to Dismiss 6.) More specifically, the District argues that the protester was properly eliminated from the competitive range because it did not agree to provide services to youth ages 14 through 21, a purportedly clear requirement of the contract. (See Mot. to Dismiss 5-7.)

Martha's Table protests its removal from the competitive range and challenges the evaluation methodology. (See Martha's Table Resp. to Mot. to Dismiss 4-6, Oct. 26, 2011.) Specifically, it alleges that its score was improperly reduced by 30 points where at best only 5 points should have been deducted. (Protest ¶ 15-16.) The four offerors determined to be within the competitive range did not receive similar deductions because they were deemed to meet the requirements of the solicitation with respect to Section C.5.2.1. (See AR at Ex. 2.) In fact, the awardee received a total score of 68 for its 1st BAFO; protester received a score of 56. (See AR at Ex.2.) Therefore, but for the CO's deduction across multiple subfactors due to the deficiency in subfactor M.3.3.2.f, protester would arguably have been next in line for award. Indeed, by the District's own admission, it is uncertain where protester would have ranked but for the CO's evaluation methodology that resulted in 10 points less being assigned to protester than had been assigned by the Panel.

In addition, protester alleges that the awardee, DIW, and itself each received a score of 7 for past performance and past experience. However, the past performance score consisted of two subfactors worth 5 points each based on: (i) experience with DOES or another funder, and (ii) general past performance. (AR at Ex. 1c, § M.3.3.4.) Protester argues that it has significant experience working with DOES while the awardee does not; therefore, they should not have received similar scores for this factor. (Protest ¶ 58.) Again, protester challenges the integrity of the evaluation based on the number of points assigned to the awardee and itself for this factor. The scoring discrepancy for subfactor M.3.3.2.f along with the scoring discrepancy for past performance and past experience, taken together, result in the protester not only being next in line for award, but potentially prevailing ahead of the awardee.

This Board has long held that in order to have standing a bidder must be next in line for award in order to show that it has suffered, or will suffer, direct economic injury as a result of the adverse agency action. *Scientific Games, Inc.*, CAB No. P-0294, 41 D.C. Reg. 3666, 3670 (Sept. 24, 1993). However, this Board's protest jurisdiction turns on whether the protester has suffered, or will suffer, direct economic injury as a result of the adverse agency action. See *M.C. Dean, Inc.*, CAB No. P-0528, 45 D.C. Reg. 8746, 8749-50 (Apr. 16, 1998). Accordingly, the Board has also held that protesters have standing when challenging the integrity of the manner in which offeror proposals are scored even if they are not next in line for award. In *CUP Temporaries, Inc.*, CAB No. P-0474, 44 D.C. Reg. 6841, 6844 (July 3, 1997), the Board held that "[b]ased on the final rankings of the evaluators, it is clear that the Protester is ranked third among the offerors on the RFP. Nevertheless, since the Protester challenges the integrity of the manner in which the agency officials scored all the offerors the Protester meets the standing requirements."

In *ACS State and Local Solutions, Inc.*, P-0691, 52 D.C. Reg. 4227 (Aug. 31, 2004), this Board considered the standing of a protester challenging an award on the basis of improper evaluation of the protester's and awardee's proposals. In that instance, the District argued that ACS lacked standing because it had been determined to be non-responsive during the solicitation and, therefore, could not be next in line for award. *See id.* at 4227-28. This Board held that ACS did have standing to protest because "its proposal was not clearly non responsive and was not treated as non-responsive by the contracting officer." *See id.* at 4228 (holding that the protester had standing under the clearly non responsive standard but ultimately denying the protest on the merits). In this case, the District itself did not treat protester's proposal as clearly non responsive in that it requested 1st BAFO and 2nd BAFO proposals and the protester was not removed from the competitive range until after the District's receipt of the 2nd BAFO proposal.

The Board's holding in *CUP Temporaries, Inc.* and *ACS State and Local Solutions, Inc.* is readily distinguishable from those instances where a protester was found to not have standing. For example, in *St. John's Cmty. Serv.*, CAB No. P-0555, 46 D.C. Reg. 8594 (Mar. 23, 1999), the protester was third in line for the contract. St. John's argued that it not only challenged the awardee, but also "the entire procurement process as inconsistent with federal and local law." *Id.* at 8596. The Board, however, found that "this generality cannot recast the evaluation and award challenges" of St. John's and dismissed the protest. *Id.* Similarly, in *Thomas*, CAB No. P-0579, 46 D.C. 8618, 8620 (May 11, 1999), the Board found that where the protester challenged the integrity of the manner in which the agency officials scored all offerors, "[t]his general argument cannot substitute for showing how the six higher-ranked offerors were improperly evaluated such that Thomas would be in line for award if his protest were sustained. . . . Thomas has not shown any reasonable possibility of being in line for award even if his evaluation challenges were sustained."

In the instant case, the protester has specifically challenged the scoring methodology due to the CO's across the board application of a deficiency that is based on the requirement of a single factor. Protester has also challenged the past performance and past experience scores for both itself and the awardee. Meanwhile, the District has allegedly indicated that it does not know where protester would have ranked but for the CO's evaluation methodology. In other words, the protester may have had a reasonable chance of award. Based on the foregoing, we find that protester's claims are sufficient to show its status as an interested party with a direct economic injury as a result of the adverse agency action. Accordingly, protester has standing to bring this protest.

B. Timeliness

The District has argued in the alternative that this Board lacks jurisdiction because the protest is untimely. The District asserts that if the protester was not properly eliminated from the competitive range then the RFP is ambiguous with respect to the age requirement contained in Section C.5.2.1 of the RFP. And, therefore, under CAB Rule 302.2(a) and "pursuant to D.C. Official Code § 2-360.08(b)(1), this protest is untimely." (District Reply to Matha's Table's Resp. to Mot. to Dismiss 4, Nov. 3, 2011 [hereinafter District Reply].)

Under CAB Rule 302.2(a), "[a] protest based upon alleged improprieties in a solicitation which are *apparent* prior to bid opening or the time set for receipt of initial proposals shall be filed with the Board prior to bid opening or the time set for receipt of initial proposals." (emphasis added.) The Board has held that "[a] bidder who fails to seek clarification of an ambiguity on the face of a solicitation prior

to bid opening risks a contrary interpretation of the allegedly ambiguous provision and is precluded from raising such issues to the Board after opening.” *Md. Constr., Inc.*, CAB No. P-0650, 50 D.C. Reg. 7398, 7399 (Jan. 17, 2002).

In its proposal, protester offered to provide services to students in the age range of 14-18,⁴ that is, students *between* the ages of 14 and 21, consistent with the terms of the RFP. The District, however, treated and understood this requirement to be wholly inclusive of the entire age range. The debriefing slides presented to Martha's Table amended the express language of the requirement by stating that “the age range for the youth population *is* 14-21. Offeror's proposal will only target youth ages 14-18, thus excluding youth ages 19-21.” (Protest Ex. C, at 13 (emphasis added).) For its part, protester has argued that the District's “exchanges with offerors did not express the District's current position that any proposal that did not explicitly propose to serve the population of active high school students ages 19-21 would be eliminated.” (Martha's Table's Resp. to District's Mot. to Dismiss 7.) Therefore, at issue is whether this ambiguity was “apparent” prior to bid opening.

As previously stated, an ambiguity that is *apparent* shall be filed with the Board prior to bid opening or the time set for receipt of initial proposals. CAB Rule 302.2(a). However, a contractor “is not normally required (absent a clear warning in the contract) to seek clarification of any and all ambiguities, doubts or possible differences in interpretation.” *Fry Comm., Inc. v. United States*, 22 Cl. Ct. 497, 509 (1991). Thus, this Board is not time barred from reviewing “latent ambiguities in the requirements” of solicitations. See *THL Assocs.*, CAB No. P-0643, 49 D.C. Reg. 3371, 3373 (Aug. 3, 2001).

It is commonly accepted that the determination of whether an ambiguity is latent is a question of law, the determination of which is made on a case-by-case basis. *Grumman Data Sys. Corp. v. Dalton*, 88 F.3d 990, 997 (Fed. Cir. 1996) (citing *Interstate Gen. Gov't Contractors, Inc. v. Stone*, 980 F.2d 1433, 1435 (Fed. Cir. 1992)). However, we have some “guidance in making this determination.” *Grumman Data Sys. Corp.*, 88 F.3d at 997. A latent ambiguity exists where “the ambiguity is ‘neither glaring nor substantial nor patently obvious.’” *Id.* (quoting *Cnty. Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1579 (Fed. Cir. 1993)).

In *Capitol Paving of D.C., Inc.*, CAB No. P-0736, 54 D.C. Reg. 2036, 2039 (Oct. 12, 2006), this Board noted that the alleged ambiguity was apparent where the heading of the solicitation cover page read “Page 1 through 131 Includes Sec. B thru M and attachments” while a block of the cover page referenced only section B through L. Accordingly, the Board held that Capitol Paving had an obligation to inquire as to whether there was a Section M and whether offerors were required to comply with the requirements of the section. See *id.*

Section C.5.2.1 states:

The Offeror shall provide services to youth who are most likely to become disconnected. This represents youth who are low-income individuals, *between* the ages of 14 and 21, and who are currently in school.

⁴ Martha's Table has asserted that its “proposal did not exclude 19-21 year olds, but instead simply emphasized the age group that is typically in high school, namely 14-18 year olds.” (Protest ¶ 52.)

(AR at Ex. 1b (emphasis added).)

The District has taken the position that if the protester was not properly eliminated from the competitive range, then Section C.5.2.1 is ambiguous, and, as a result, this protest is untimely pursuant to D.C. Code § 2-360.08(b)(1). However, the Board finds that the ambiguity is at best a latent ambiguity that was not apparent prior to bid opening, and, therefore Section 2-360(b)(1) does not bar this protest. It was not clear to the protester until the time of debriefing that the District viewed Section C.5.2.1 as a totally inclusive requirement. The use of the word “between” in connection with an in-school youth program is reasonably read to detail the outer bounds of eligibility for the program. Most high school students are between the ages 14-18, though some may exceed that age range. The District interpreted the requirement to mean that proposals must indicate that services would be provided to in-school youth across the entire age range. We find that in the present protest, prior to bid opening, there was no patently obvious disagreement regarding the terms of the solicitation as in the case of *Capitol Paving of D.C., Inc.*

The targeted age range requirement was later clarified by the District through the rewording, “the age range for the youth population is 14-21.” (Protest Ex. C, at 13 (emphasis added).) However, this clarification was not made until debriefing, after contract award. Since the ambiguity did not become apparent until after the close of the solicitation, the use of the word “between” resulted in a latent ambiguity, not a patently obvious ambiguity in the RFP’s requirements, and thus this protest is not subject to D.C. Mun. Regs. tit. 27, § 302.2(a) (2002). Accordingly, the protest is timely under CAB Rule 302.2(b).⁵

II. EVALUATION PROCESS

The Board’s standard of review for proposal evaluations and the related selection decision is whether the District’s actions were reasonable, in accord with the evaluation and selection criteria identified in the solicitation and whether there were violations of procurement laws or regulations. *See, Trifax Corp.*, CAB No. P-0539, 45 D.C. Reg. 8842, 8847 (Sept. 25, 1998); *see also Health Right, Inc., D.C. Health Coop., Inc., & The George Washington Univ.*, CAB Nos. P-0507, P-0510, P-0511, 45 D.C. Reg. 8612, 8630 (Oct. 15, 1997). In applying this standard of review, we find that the District’s actions were not consistent with the evaluation and selection criteria contained in the RFP resulting in a material violation such that the selection decision cannot be supported based on the evidence submitted for review.

According to the Procurement Chronology, the protester was excluded from the competitive range because its proposal did not provide services to the full age range of targeted youth. (AR at Ex. 2.) And, although the District reported that it removed protester from the competitive range at some point after protester submitted its 1st BAFO proposal,⁶ the protester was not removed from the competitive range until late in the solicitation process, after submitting proposals in response to 1st BAFO and 2nd BAFO requests. In analyzing the protester’s 2nd BAFO submission, the CO noted:

⁵ CAB Rule 302.2(b) states that “[p]rotests other than those covered in paragraph (a) shall be filed with the Board not later than ten (10) business days after the basis of the protest is known or should have been known, whichever is earlier.”

⁶ The Procurement Chronology states that after the 1st BAFO the District realized that Martha’s Table should have been excluded from the competitive range. However, it was included in the 2nd BAFO request for proposals purportedly due to an administrative error.

No change in rating. Offeror's BAFO proposal provides specific information about recruiting efforts targeting youth in Wards 2 and 3. However, the Offeror does not meet the minimum need in re age; only youth 14-18.

(AR at Ex. 2.)

Upon his initial review, the CO awarded the protester a rating of 2 across all subfactors in the Technical Approach category. (See AR at Ex. 2.) A score of 2 represents that the proposal "marginally meets minimum requirements; minor deficiencies which may be correctable." (AR at Ex. 1c, § M.2.) The CO also indicated: "Not clear if program targets only youth in Wards 1 and 4 or if major focus is on these wards with recruitment activities planned for 2 and 3. Does not meet minimum requirement for age; excludes 19-21." (AR at Ex. 2.)

Although the CO's score of 2 indicates that the response to that particular requirement contains a minor deficiency, by penalizing the protester in every category because of that single criterion, the minor deficiency became an insurmountable deficiency. As a result, the protester has argued that the District "grossly misapplied the evaluation criteria" and, as a result, "MT's proposal was downgraded by 30 points for the single weakness [failure to provide services to the entire age range under Section C.5.2.1.]" (Protest 15.)

We agree that the CO misapplied the evaluation criteria. In establishing the competitive range, the District arbitrarily identified the requirement of Section C.5.2.1 and raised its importance to the level of a mandatory minimum requirement. The mandatory minimum requirement was used to disqualify the protester even though such mandatory requirement was never communicated to the offerors either in the language of the solicitation or in the subsequent discussions. By failing to disclose a mandatory minimum requirement, the evaluation process was inconsistent with the terms of the solicitation and in violation of procurement law.

A mandatory minimum requirement is pass/fail in nature and may lead to the outright rejection of a proposal that falls short of what [it] specif[ies]." *Banknote of Am., Inc. v. United States*, 56 Fed. Cl. 377, 382 (2003). The protester's only noted deficiency at the time of exclusion from the competitive range was the failure to provide services to youths 19-21. (See AR at Ex. 2.) The across the board reduction in score in the Technical Approach category, along with the decision to exclude offerors from the competitive range who did not meet the requirement of Section C.5.2.1, meant that an offeror who did not satisfy the requirement had, in effect, no chance at award.

Accordingly, this Board must determine whether the language of the RFP contained sufficient notice to offerors that Section C.5.2.1 was, in fact, a mandatory minimum requirement of the solicitation. "[P]rocurement practice dictates that "mandatory minimum requirements must be clearly identified as such so as to put offerors on notice of the serious consequences of failing to meet the requirement.'" *Urban Alliance Found.*, CAB Nos. P-0886, P-0887, P-0890, P-0891, P-0892, slip op. at 11 (Feb. 15, 2012) (quoting *Banknote Corp. of Am., Inc. v. United States*, 56 Fed.Cl. at 382). If one factor in an evaluation is predominantly more important than another, this information should be disclosed to offerors. *Isratex, Inc. v. United States*, 25 Cl. Ct. 223, 230 (1992). A procuring agency should provide "fullest possible disclosure" of the relative importance of all evaluation factors. *Id.*

In *Urban Alliance* we considered Section C.5.2.1 with respect to the SDA 2 portion of this solicitation, which contains the same language as in the SDA 1 portion of the RFP. See *Urban Alliance Found.*, CAB Nos. P-0886, P-0887, P-0890, P-0891, P-0892, slip op. at 4-5. We held that the “mandatory minimum requirements were never communicated to the offerors either in the language of the solicitation or in the subsequent discussions.” *Id.* at slip op. at 11. With respect to the language of Section C.5.2.1, we reaffirm that the language of Section C.5.2.1 “is not distinguishable as creating a mandatory minimum requirement when compared to other sections in the solicitation that are . . . not considered by the District to create a mandatory minimum requirement.” *Id.* at slip op. at 12.

Furthermore, the Board finds that at no point in its BAFO discussions with the protester did the District ever communicate the importance of this section as a mandatory minimum requirement. For example, OCP wrote:

[S]pecifically address the deficiencies/weaknesses listed below:

Technical

2. Please clarify the age range of the target population for the proposed program. What methods will be utilized to target and recruit youth residing in Wards 2 and 3?
(M.3.3.2.a)

(Protest Ex. A.)

Nothing in the language of the above-referenced provision rectifies the failure of the solicitation to give notice by indicating that responses to Section C.5.2.1. must include the provision of services to the full targeted age range of 14-21.

The Board finds that the protester was greatly prejudiced by the District’s failure to follow proper evaluation procedures given that the protester could have received the highest technical score of all offerors but for an improper evaluation process. Bidders should not have been excluded from the competitive range for failing to meet mandatory minimum requirements absent clear notice that failure to address those requirements would result in disqualification. See *Urban Alliance Found.*, CAB Nos. P-0886, P-0887, P-0890, P-0891, P-0892, slip op. at 14. These findings constitute sufficient basis for sustaining the present protest and, as such, the Board finds it unnecessary to address any other allegation by the protester.

Conclusion

Because the District violated procurement law in evaluating the proposals, the award to DIW was unreasonable. The Board hereby directs the District to terminate the contract awarded under this RFP effective no later than the close of the current school year in June 2012. To the extent that the District seeks to procure these services for the summer school session of 2012 and beyond, the District shall issue a request to the eleven offerors for revised technical and cost proposals for the remainder of the base year and the option years. The District shall evaluate the revised proposals in accordance with the law and the terms of the RFP. The protest is sustained.

SO ORDERED.

DATED: May 10, 2012

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

CONCURRING:

/s/ Marc D. Loud, Sr.
MARC D. LOUD, SR.
Chief Administrative Judge

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

Electronic Service:

Stuart Turner, Esq.
Avi Baldinger, Esq.
Arnold & Porter
555 12th Street, NW
Washington, DC 20004

Talia S. Cohen, Esq.,
Janice N. Skipper, Esq.,
Howard Schwartz, Esq.,
Office of the Attorney General
441 4th Street, N.W., 7th Floor South
Washington, D.C. 20001