DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

CITELUM DC, LLC	)	
	)	CAB No. P-0922
Solicitation No.: DCKA-2011-R-0150	)	

For the protester: Douglas Proxmire and Elizabeth Gill, Patton Boggs, LLP. For the intervenor: Lawrence Prosen of Thompson Hine, LLP. For the District of Columbia government: Alton Woods, Assistant Attorney General.

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

OPINION

AND ORDER DENYING THE DISTRICT'S MOTION TO DISMISS WITHOUT PREJUDICE AND/OR STAY PROCEEDINGS

Filing ID #49874586

Citelum DC, LLC ("Citelum" or "protester") filed the present protest on July 19, 2012, challenging the District's award of the Citywide Streetlight Asset Management Services contract (the "Contract") to M.C. Dean, Inc. ("MCD" or "intervenor"). The Board held a telephone conference with the parties and intervenor on November 20, 2012, wherein we advised the parties of our preliminary conclusion that the record supported a finding that the District's actions in awarding this procurement violated procurement laws and regulations. The District thereafter filed a motion to dismiss without prejudice or, alternatively, motion to stay based on corrective action. (District's Mot. to Dismiss Protest Without Prejudice or Mot. to Stay the Protest Based on Corrective Action [hereinafter District's Mot. to Dismiss or Stay] 2.) The protester has filed its opposition thereto while the intervenor has filed its response to protester's opposition.

Upon review of the entire record, we sustain the protest and deny the District's motion to dismiss or stay. The District failed to identify a contracting officer ("CO") for this procurement who was responsible for exercising oversight of the evaluation process, the CO failed to conduct a cost realism analysis prior to the proposed contract award to MCD, and the District failed to treat the offerors equally by permitting one offeror, MCD, to take exception to the LED requirement of the Request for Proposals ("RFP"). Consequently, the District's proposed corrective action does not remedy the improprieties in

this procurement. Accordingly, the Board hereby orders the District to undertake the following corrective action:

(1) withdraw any proposed award to MCD;
(2) designate a CO to perform responsibilities as required by the District's procurement law including, but not limited to, conducting a cost price analysis, ensuring that the evaluation factors are applied equally and consistently to each offeror, and making a source selection;
(3) reissue the solicitation, as necessary, to adequately identify the District Department of Transportation's ("DDOT's") minimum contract requirements;
(4) provide the offerors an opportunity to submit revised proposals, consistent with the solicitation's minimum requirements, in order to conduct new technical and price evaluations of those proposals; and
(5) reevaluate the final proposals for technical requirements compliance and pricing in a manner consistent with the terms of the solicitation and relevant procurement laws and regulations.

BACKGROUND

On August 9, 2011, the District's Office of Contracting and Procurement ("OCP"), on behalf of DDOT, issued Solicitation No. DCKA-2011-R-0150 (the "Solicitation" or "RFP") which sought a contractor to perform asset management services to maintain, rehabilitate, and preserve approximately 70,000 lighting assets and supporting systems within the District of Columbia. (Agency Report ("AR") at Ex. 1, §§ B.1-B.1.1.) The District intended to issue a firm-fixed-price contract consisting of a base year with four additional option years. (*Id.* at § B.2.1.) Award of the contract would go to the offeror providing the best value to the District by achieving substantial energy and cost savings while maintaining good service quality. (*Id.*)

The RFP's initial deadline to submit bids was September 9, 2011. (*Id.* at § L.3.1.) It was subsequently amended four times before submission of the first proposals on October 21, 2011. (AR at 4.) The amendments are as follows: (i) August 31, 2011, Amendment 1, extended the bid opening date to October 6, 2011 (AR at Ex. 1, - Amend. 1); (ii) September 29, 2011, Amendment 2, amended the Price Schedule, amended Specifications, revised Contract Terms and Conditions, and provided responses to questions from prospective offerors (AR at Ex.1, - Amend. 2); (iii) October 3, 2011, Amendment 3, extended the proposal submission date to October 14, 2011, amended the Specifications, revised the Contract Terms and Conditions, established a deadline to submit questions, and responded to additional offeror questions (AR at Ex. 1, - Amend. 3); and (iv) October 11, 2011, Amendment 4, replaced the

RFP's initial CO, Mr. Jerry Carter, with a new CO, Ms. Cora Boykin, amended Specifications, revised Contract Terms and Conditions, and responded to additional offeror questions (AR at Ex. 1, - Amend. 4).

The Chronology

This procurement has been the subject of two protests. By way of background, on October 21, 2011, the first proposals were submitted by Citelum, MCD and W.A. Chester, LLC ("Chester"), which is not a party to this protest.[1] (AR at Ex. 3 (1) – Citelum Proposal, Ex. 3 (1) – Technical Proposal – Chester, Ex. 4 – Dean Proposal – Volume 1, Ex. 7 (1).) The proposals were evaluated and scored by members of DDOT's proposal evaluation panel ("Panel") between October 21 and 30, 2011. (*See* AR at Ex. 7 (1).) On October 31, 2011, the Panel convened to adjust the individual scores of the offeror proposals – based on discussions of the strengths and weaknesses of each proposal – and average them to determine a final score for each offeror. (*Id.*) Although concerns were noted with each, the Panel determined all of the proposals to be technically acceptable. (*Id.*) The following evaluation summary was documented by the Panel.[2]

	Chester	Citelum	MC Dean
Rank	[redacted]	[redacted]	[redacted]
Bid $	[redacted]	[redacted]	[redacted]
Price Score	[redacted]	[redacted]	[redacted]
Tech Score	[redacted]	[redacted]	[redacted]
Total	[redacted]	[redacted]	[redacted]

(*Id.*)

In November 2011, DDOT held oral presentations and clarification discussions with each of the offerors. (AR at Ex. 7 (3).) On December 6, 2011, DDOT sent letters to each offeror requesting Best and Final Offers ("BAFOs") that were to be submitted no later than 2:00 p.m. on December 20, 2011. (*Id.*; AR at Exs. 6, 6 (1), 8.) The requests for BAFOs included a requirement that the offerors propose the

[1] Fort Myer Construction, Inc. also submitted a proposal; however, its proposal was submitted after the bid opening date and, therefore, found non-responsive so as to preclude Fort Myer Construction from further participation in the process.

[2] The evaluation memorandum also recommended that the offerors provide clarification on prices, incomplete documentation, insufficient references, innovative plan details, and conditions to the proposals. (AR at Ex. 7 (1).)

installation of an extra 30,000 LED lighting fixtures in addition to the initial 2,500 LED requirement in the RFP. (AR at Exs. 6, 6 (1).)

The three offerors all submitted BAFOs ("1st BAFOs") on December 20, 2011. (AR at Ex. 8.) The Panel met on December 22 and 23, 2011, and January 3, 2012, to evaluate the 1st BAFOs. (*Id.*) In a January 24, 2012, evaluation memorandum to Mr. Carter, the Panel recommended award of the contract to Citelum. (AR at Ex. 8.) The following summary was reflected in the evaluation memorandum:

	Citelum DC	MC Dean	WA Chester
Rank	[redacted]	[redacted]	[redacted]
Bid $	[redacted]	[redacted]	[redacted]
Technical	[redacted]	[redacted]	[redacted]
Price Score	[redacted]	[redacted]	[redacted]
Total	[redacted]	[redacted]	[redacted]

(*Id.*)

On February 23, 2012, MCD timely filed the first protest in this procurement by challenging the award to Citelum. (AR at Ex. 10.) On March 21, 2012, the District filed a consent motion to dismiss,[3] (AR at Ex. 11), which resulted in the protest being dismissed by the Board on March 23, 2012. *M.C. Dean, Inc.*, CAB No. P-0906, 2012 WL 4753870 (Mar. 23, 2012). On April 12, 2012, Ms. Courtney Lattimore sent letters to each of the three offerors requesting a new BAFO ("2nd BAFO"), (AR at Exs. 13 (1), 13 (2), 13 (3)), and the three offerors submitted 2nd BAFOs on April 27, 2012, (AR at Ex. 17 (1)).

The Panel reviewed the 2nd BAFOs and met on May 4, 2012, to discuss its observations regarding the strengths and weaknesses of each proposal. (*Id.*) In a letter dated June 15, 2012, Ms. Lattimore requested clarifications from Citelum with respect to its 2nd BAFO submission.[4] (Protest at Ex. 6.) She

[3] The motion to dismiss provided that the District would undertake the following corrective action: (i) the District would not proceed with the proposed award and rescind the February 7, 2012, notice of award letter sent to Citelum; (ii) the District would amend the RFP to ensure that the RFP properly and completely set forth the District's minimum needs and contained all required and applicable clauses; (iii) the District would advise each offeror of the weaknesses and deficiencies in their initial proposal; and (iv) the District would request BAFOs from each offeror. (AR at Ex. 11.)

[4] The Board presumes that DDOT sent similar letters to the other offerors although those letters are not in the record.

also asked that Citelum submit its 3rd BAFO ("3rd BAFO") by June 22, 2012.[5] (*Id.*) Between June 22 and 29, 2012, MCD, Citelum and Chester all submitted revised final BAFOs. (AR at Ex. 26, ¶ 32, 34.)

On June 29, 2012, the Panel reviewed and scored the final BAFOs. (AR at Ex. 7 (4).) In addition, the Panel reviewed the offerors' responses to the clarification letters and scored the price proposals. (*Id.*)

Price score summary:

Offeror	Offeror's Proposed BAFO Price (Contract Total)	Offeror's Corrected BAFO Price (Contract Total)	Price to be Scored	Price Score (Max 30)	Rank
M.C. Dean	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Citelum DC	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
W.A. Chester	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

(*Id.* at 3.)

The resulting technical and price score summary:

Rank	[redacted]	[redacted]	[redacted]
Offeror	[redacted]	[redacted]	[redacted]
Technical Score	[redacted]	[redacted]	[redacted]
Price Score	[redacted]	[redacted]	[redacted]
Total Score	[redacted]	[redacted]	[redacted]

(*Id.*)

[5] According to Ms. Lattimore, MCD and Chester submitted their 3rd BAFOs on June 22, 2012. (AR at Ex. 26, ¶ 32.) But Citelum claims that it did not receive DDOT's June 15th request for a 3rd BAFO and, therefore, failed to submit a 3rd BAFO by the due date. (*Id.*) At Citelum's request, DDOT extended the final BAFO submission deadline to June 29, 2012, for all offerors. (*Id.* at ¶ 33.) Thereafter, Citelum alleges that MCD had the opportunity to submit 4 BAFOs (on June 22 and again on June 29, 2012) whereas Citelum submitted a total of 3 BAFOs. (Protest 28.) According to the District, however, MCD was required to retrieve its June 22, 2012, proposal submission and resubmit it on June 29, 2012. (District's Comments on Citelum DC, LLC's Supp. Grounds of Protest & Citelum's Comments on the District's AR [hereinafter District's Comments on Supp. Protest].)

Based on the above scores of the final BAFOs, the Panel determined MCD's proposal to be the "best value to the District" and it recommended award of the Contract to MCD.[6] (*Id.*) Notably, the record is void of any information that the CO conducted an independent evaluation of the Panel's findings.

Finding itself on the losing side of the award, on July 19, 2012, Citelum filed the instant protest. (Protest 1.) In doing so, Citelum enumerated at least eleven grounds for protest. (*See* Protest; Citelum DC, LLC's Supplemental Grounds of Protest & Comments on the Agency Report [hereinafter Supp. Protest].) On July 25, 2012, the proposed awardee, MCD, moved the Board to intervene in the protest. (Mot. to Intervene 1.)

On September 25, 2012, the District's Chief Procurement Officer filed with the Board a determination and finding to proceed with award while a protest is pending ("D&F"). (District of Columbia's Determination to Proceed with Contract Performance [hereinafter District's D&F] at Ex. 1.) On September 28, 2012, the Board held a telephone conference with the parties wherein it challenged the findings set forth in the D&F by the District. Subsequently, the District filed a notice to withdraw the D&F. (District of Columbia's Notice to Withdraw District's D&F.) In its Order, the Board stated that it "did not find credible the District's contention that the emergency contract with Chester[7] could not have been extended until issuance of the Board's merits decision in this matter." (Order Following the District's Notice to Withdraw District's D&F 1.)

Terms of the RFP

The RFP set forth the District's requirement for a single contractor to perform asset management services for specific lighting assets within the District. (AR at Ex. 1, - RFP, § B.1.) The contractor would be required to manage and rehabilitate over 70,000 lighting assets and support systems, the South Capitol Bridge electrical system, the Welcome to Washington signs and their structures, and all electrical components such as panels and junction boxes that contain equipment and materials covered by the Contract. (*Id.* at § B.1.1.) As such, the District required that its "comprehensive group of assets need to be maintained, rehabilitated, administered, and managed effectively to achieve the performance

[6] The Panel's contract award recommendation, and all other correspondence intended for the CO, was issued to Mr. Carter notwithstanding his replacement by Ms. Boykin as CO. (AR at Ex. 1, - Amend. 4.)
[7] Immediately prior to the District's issuance of the D&F, Chester had been providing interim services for lighting in the District. (Citelum DC, LLC's Emergency Opp'n to the District's D&F [hereinafter Citelum's Opp'n to District's D&F] 3; District's Resp. to Citelum's Opp'n to District's D&F 2.)

standards" of the RFP and "[t]he broad scope of the work necessitates both a good management plan and a positive partnering relationship." (*Id.*)

Initially, the RFP requested "proposals which will allow for rapid implementation of LED lighting throughout the District," and required the replacement of 2,500 obsolete and defective fixtures. (*Id.* at § B.1.3.) In a letter to the offerors dated December 6, 2012, DDOT amended the minimum LED requirement by requiring an extra 30,000 LED fixtures in addition to the initial amount of 2,500.[8] (*Id.* at Exs. 6, 6 (1).) Therefore, the offerors were ultimately required to propose an upgrade of 32,500 LED fixtures. (*See id.*) The RFP also required that the proposals "provide enough detail for DDOT to assess the price realism of the suggestions." (AR at Ex. 1 – RFP, § B.2.1.2.3.)

Section L of the RFP provided specific instructions, conditions and notices that needed to be addressed in each offeror's proposal. It also advised potential offerors that "this is a request for proposals and not an invitation for bids" and that award would not be based on price alone. (*Id.* at § L.2.1.) It stated that DDOT "reserves the right to hold discussions and seek clarifications prior to award." (*Id.*)

Section M of the RFP identified the evaluation factors and advised offerors that a contract would be awarded "to the offeror whose offer is technically acceptable to DDOT/TOA, and offers the best value to the District as determined by the overall score from the evaluation criteria." (*Id.* at § M.1.) Technical proposals were to be rated based upon the extent to which each offeror demonstrated "their experience, knowledge and understanding of issues relating to preservation and maintenance of the assets covered by [the] RFP." (*Id.* at § M.4.1.)

Procurement Improprieties

On November 20, 2012, the Board held a teleconference[9] to discuss the status of the protest and inform the parties of its preliminary finding that the procurement had not been conducted in a manner consistent with the District's procurement laws and regulations. Chief among the Board's concerns was the fact that Ms. Lattimore, the alleged CO, had never been appointed CO for the procurement, nor fulfilled certain responsibilities required of the CO. In fact, she joined DDOT, the procuring agency, well

[8] Amendment 5, which was issued on April 12, 2012, revised Section B.1.3 of the RFP to reflect this requirement. (AR at Ex. 14 (1).)

[9] The following individuals participated in the telephone conference: Administrative Judge Maxine McBean and Chief Administrative Judge Marc Loud for the DC Contract Appeals Board ("CAB"); Douglas Proxmire and Elizabeth Gill of Patton Boggs LLP for the protester; Lawrence Prosen of Thompson Hine, LLP for the intervenor; and Alton Woods, Jerry Carter and Courtney Lattimore for the District.

after the procurement was underway. (AR at Ex. 26.) The record is unclear as to who retained ultimate responsibility for ensuring that this procurement complied with the requirements set forth in the D.C. Mun. Regs. tit. 27, §§ 1614.2(d), 1618.1 – 1618.3, 1622.7, 1626.1 – 1626.3 (2002).

In response to the Board's concerns, the District filed a motion requesting that the Board dismiss the present protest without prejudice or, alternatively, stay the protest based on corrective action. (District's Mot. to Dismiss or Stay.) Therefore, at issue is whether the corrective action proposed by the District remedies certain violations of procurement law and regulation identified by the Board. Although this Opinion does not address the merits of each protest ground, it identifies three main areas of impropriety and sets forth the appropriate corrective remedy for the procurement.

First, the absence of an identifiable CO to perform responsibilities consistent with the requirements of the District's procurement law has created an impropriety that cannot rectify itself retroactively, several months after the fact.[10] In other words, the District's failure to timely identify a contracting officer is not remedied by a post hoc appointment of an official to rubber-stamp its earlier decisions.

Second, the record does not support a finding that certain requirements, such as conducting a cost realism analysis, were in fact performed by the CO. In this case, it was not only a legally required step given the CO's responsibility of source selection, (D.C. Mun. Regs. tit. 27, §§ 1614.2, 1614.3), it was also prudent particularly since MCD's final BAFO consisted of an almost [redacted] and resulted in a final price of [redacted] scored. (*Compare* AR at Ex. 8, 26 (MCD's original BAFO price) *with* AR at Ex. 21, 2 (MCD's final BAFO price).) MCD's price was reduced notwithstanding its own previous statement that Citelum "underbid the project" because its price was less than MCD's then price of [redacted] (*See* Supp. Protest 2, 4-5; AR at Ex. 10, 49 (MCD's Protest).)

Third, the District failed to treat the offerors equally in that it allowed one offeror, MCD, to take exception to the LED requirement of the Solicitation. As a result, MCD was able to bid more competitive pricing by offering a combination of non-LED and LED lighting. (AR at Ex. 20 – Dean Innovation Plan,

[10] A document titled "Contracting Officer's Independent Assessment" was not provided to the Board until September 19, 2012, almost one month after the Agency Report had been entered into the record on August 21, 2012. The Contracting Officer's Independent Assessment document does not disclose the identity of the CO and is not signed or dated. (District's Comments on Supp. Protest at Ex. 8.) It also contains information on proposal clarifications that still needed to be addressed prior to the review of the third and final BAFOs. (*Id.*) Therefore, the record is void of any documents to establish that the CO conducted a contemporaneous independent analysis of the Panel's findings at the conclusion of the final BAFO or otherwise.

§ 1.5 at n.1.) MCD's final BAFO also contained an exception to the Solicitation's LED requirement with respect to underlit areas of the District. (*Id.* at § 1.5.5.1.) Therefore, MCD's proposal benefitted from being evaluated under a different, more favorable, technical requirements standard than that adhered to by the other offerors which ostensibly resulted in its lower pricing.

The District's Proposed Corrective Action

The District's proposed corrective action is detailed in its motion to dismiss or stay. In short, the District proposes to "not proceed" with a contract award to MCD. (District's Mot. to Dismiss or Stay 2.) It seeks to also retroactively amend the solicitation to identify Ms. Lattimore as the CO and, through her, (i) conduct a new cost price analysis, (ii) review the proposals to determine whether offerors were evaluated fairly, (iii) describe weaknesses that were identified to each offeror and explain how such weaknesses were corrected, and (iv) review whether DDOT applied all of the evaluation factors throughout the entire procurement. (*Id.* at 2-3.)

Citelum objects to the District's motion to dismiss or stay on the grounds that the proposed corrective action fails to (i) withdraw the July 6, 2012, recommendation for award to MCD, (ii) identify to offerors weaknesses in their proposals, (iii) identify DDOT's minimum requirements, and (iv) provide offerors an opportunity to submit revised proposals based on identified weaknesses and minimum contract requirements. (Opp'n to the District's Mot. to Dismiss/Mot. to Stay 3-4.) Furthermore, Citelum contends that the corrective action, as proposed, fails to address the vast majority of its protest issues, chief among them being that the District (i) permitted MCD to take exception to the RFP requirements, (ii) disclosed to MCD Citelum's material competitive advantages through technical transfusion,[11] (iii) allowed MCD to propose non-LED materials that other offerors were discouraged from offering, (iv) failed to follow the evaluation criteria in evaluating the proposals, and (v) accepted MCD's final revised proposal despite the absence of a required conflict of interest certification. (*Id.* at 6-7.)

[11] Citelum alleges that in a November 9, 2011, meeting, it presented the District with the economic benefits of a larger LED deployment, through energy consumption savings and cost of ownership savings, than the District contemplated at that time. (Protest 17-20.) It further alleges that, following Citelum's presentation, the District increased the RFP's 2,500 LED requirement to 32,500 LEDs and thereby selectively disclosed Citelum's competitive advantage. (*Id.*) The District denies the allegation and asserts that its realization that it could afford an additional 30,000 LEDs was based on the pricing of the proposals and not due to any information obtained from Citelum. (AR 9.)

MCD, the expected awardee, objects to protester's opposition to the District's motion to dismiss or stay. (Intervener M.C. Dean, Inc.'s Resp. to Citelum DC, LLC's Opp'n to the District's Mot. to Dismiss/Mot. to Stay [hereinafter Intervenor's Resp.].) The principal issue in Intervenor's Response relates to its argument that the District should be permitted to devise the appropriate corrective action to achieve compliance with the District's procurement laws and regulations. (*Id.* at 6-7.) In that vein, intervenor asserts that the District has conducted multiple rounds of BAFOs and that reopening discussions, as advocated by protester, would "undermine the competitive procurement itself." (*Id.* at 8.) MCD also details protester's alleged financial difficulties (which are not relevant to this Board's analysis of whether the District conducted the procurement in a lawful manner), (*Id.* at 2-3), and challenges the propriety of protester filing its opposition to the District's motion to dismiss or stay, (*Id.* at 6). However, under Board Rule 116.1, the Board may, on its own initiative, dispense with procedural provisions of the rules for good cause shown (or to expedite a decision). Given the history and complexity of this protest, the Board has taken into account the arguments of protester and intervenor in rendering its decision regarding the District's proposed corrective action.

DISCUSSION

Board's Jurisdiction and Standard of Review

We exercise jurisdiction over this protest and its underlying allegations pursuant to D.C. Code § 2-360.03(a)(1) (2011). In sustaining the protest, the issue before the Board is whether to grant the District's motion to dismiss or stay in light of the procurement improprieties identified by the Board. As noted correctly by intervenor, there is limited precedent from this Board on corrective action-related issues. (Intervenor's Resp. 6.) Therefore, as in previous instances, we have referred to decisions by the Comptroller General for guidance[12] in setting forth the standard of review.

Intervenor contends that the protester seeks to dictate to DDOT the corrective action that it must take rather than permit DDOT to exercise the discretion to which it is entitled in crafting any corrective action. (*Id.* 6.) Intervenor cites *Alliant Techsystem, Inc.*, B-405129.3, 2012 CPD ¶ 50 (Comp. Gen. Jan. 23, 2012), for the proposition that "[c]ontracting officers in a negotiated procurement have broad discretion to take corrective action where the agency determines that such action is necessary to ensure a fair and impartial competition." (Intervenor's Resp. 7.) It also cites *Rel-Tek Sys. & Design, Inc.*, B-280463.7, 99-2 CPD ¶ 1 (Comp. Gen. July 1, 1999) to underscore its assertion that, "[a]s a general matter,

[12] *See, e.g., O'Donnell Const. Co.*, CAB No. P-0158, 39 D.C. Reg. 4479, 4485 (Mar. 24, 1992); *Koba Associates, Inc.*, CAB Nos. P-0344, P-0359, 40 D.C. Reg. 5003, 5013 (Mar. 3, 1993).

the details of implementing . . . recommendations for corrective actions are within the sound discretion and judgment of the contracting agency." (Intervenor's Resp. 7.) However, *Rel-Tek Systems & Design, Inc.* also stands for the proposition that the agency's manner of compliance will not be questioned "so long as it remedies the procurement impropriety that was the basis for the decision's recommendation." *Id.* at *2. Moreover, in a case where the agency's corrective action was found to be unreasonable because the agency had failed to conduct a reasonable cost realism analysis of the awardee's proposed costs, the Government Accountability Office ("GAO") held that "[s]uch [agency] discretion must be exercised reasonably and in a fashion that remedies the procurement impropriety that was the basis for our protest recommendation." *The Futures Grp. Int'l*, B-281274.5 *et al.*, 2000 CPD ¶ 148 (Comp. Gen. Mar. 10, 2000) at *6 (citations omitted). The Board therefore holds that the standard of review of an agency's proposed corrective action is whether the agency's discretion is exercised reasonably in a manner that remedies the procurement impropriety.

The Evaluation Process

In applying the above referenced standard of review to the proposed corrective action, we find that the violations of law that occurred in this procurement during the most recent evaluation of proposals are sufficiently material so as to sustain the protest yet the District's recommended course of action fails to remedy the procurement's improprieties whereby (1) the District failed to identify the CO responsible for the procurement, (2) the CO failed to conduct a cost realism analysis prior to the proposed contract award to MCD, and (3) the District failed to treat the offerors equally by permitting MCD to take exception to the Solicitation's LED requirements.

(1) The District Failed to Identify the CO Responsible for Conducting the Procurement

The District proposes to retroactively amend the RFP effective March 2012 and recognize Ms. Lattimore as the CO. (District's Mot. to Dismiss or Stay 2.) In doing so, the District argues that although it had never identified Ms. Lattimore as the CO, she prepared and signed certain documents pursuant to D.C. Mun. Regs. tit. 27, §§ 1614.3 - 1626.1. (*Id.*) Under the District's proposal, Ms. Lattimore would review, revise, and amend, if necessary, any documents in the procurement file that require modification. (*Id.*) She would also conduct a new independent cost analysis. (*Id.* at 3.) In conducting her analysis, Ms. Lattimore would review the proposals to determine whether offerors were evaluated fairly. And, to the extent that offerors may have been evaluated unfairly, she would correct such disparity. (*Id.*) Ms. Lattimore would note weaknesses that were identified during the various evaluations and include a description of each offeror's proposal modification to address or correct the identified weakness. (*Id.*)

She would also determine whether DDOT's Panel used all of the evaluation factors throughout the entire evaluation process. (*Id.*)

Notwithstanding the District's proffered corrective measures, the Board is concerned that a solicitation that the District estimates is valued at over $100 million was conducted in the absence of a correctly identified responsible party as CO. Initially, Mr. Carter was the named CO in the RFP issued August 9, 2011. (AR at Ex. 1 - RFP, § G.5.1.) Amendment Nos. 1 through 4 were signed by Mr. Carter as CO, with Amendment No. 4 serving to identify Ms. Boykin as the new CO. (AR at Ex. 1 – Amend. 4.) However, there are no documents in the record to show that Ms. Boykin performed any CO responsibilities[13] and, to the contrary, Amendment Nos. 5 through 7 were executed by Ms. Lattimore for Mr. Carter as CO. (AR at Ex. 1 – Amend. 7, Ex. 14 – Amend. 6, Ex. 16 – Amend. 5.) The later issued Panel Findings and Recommendations were addressed to Mr. Carter, (AR at Exs. 7, 8, 21), while the February 7, 2012, award letter to Citelum was signed by Mr. Carter as CO, (AR at Ex. 9). On September 19, 2012, the District submitted to the Board supplemental documents to the AR which, for the first time, identified Ms. Lattimore as the CO. (District's Comments on Supp. Protest 8.) However, Ms. Lattimore's declaration of August 20, 2012, appears to refute any argument that her role in this procurement was that of CO. (AR at Ex. 26.) Not only does she fail to mention her responsibility as CO, in paragraph 29 of her declaration, she states that "the Panel submitted an Evaluation Report to the CO." (*Id.*) Lastly, the record bears no evidence that Mr. Carter, the originally-named CO, performed the CO duties of analysis, documentation and source selection pursuant to the District's procurement law.

It is well settled that the CO may not abdicate or delegate its responsibilities,[14] yet, the record before us supports a finding that the CO's responsibilities were delegated to DDOT's Panel. Although a technical evaluation panel can assist the CO in his decision, the CO remains responsible for the evaluation of proposals and must conduct his own independent review. *See, Urban Alliance Found.*, CAB Nos. P-0886 et al., 2012 WL 4775002 (Feb. 15, 2012). We have also noted that the CO has "a critical and unique role" in the evaluation and selection process and, as such, have held that the CO is ultimately responsible for the evaluation and for determining the relative merits of competing proposals. *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, 8636 (Oct. 15, 1997). In this case, the record is void of any independent evaluation by a CO in clear violation of procurement law.

[13] In the Business Clearance Memorandum dated July 17, 2012, Ms. Boykin is identified as the Contract Specialist. (District's Comments on Supp. Protest at Ex. 1.)
[14] *See, B&B Sec. Consultants, Inc.* CAB Nos. P-0583, P-0585, 46 D.C. Reg. 8637, 8647 (June 18, 1999); *RideCharge, Inc.*, et al., CAB Nos. P-0920, P-0921 (Nov. 9, 2012).

(2) The CO Failed to Conduct a Cost Realism Analysis prior to the Proposed Contract Award

There is no record of the CO having performed and documented a contemporaneous cost realism analysis pursuant to D.C. Mun. Regs. tit. 27, §§ 1614.2(d), 1618.1 – 1618.3, 1626.1 – 1626.3. Indeed, the District states that the first cost realism analysis was conducted by members of the Panel on June 29, 2012, while a second cost realism analysis was performed by the CO after the instant protest was filed. (District's Comments on Supp. Protest 3.) Therefore, by the District's own admission, the CO did not perform a cost realism analysis until after the District announced the proposed award to MCD. Since the District has stated that the technical scores of protester and intervenor were "essentially equal," MCD's lower price proposal effectively resulted in MCD being recommended for contract award. (*Id.* at 12.) Taking into account MCD's [redacted] pricing adjustment relative to its earlier proposals,[15] the CO needed to evaluate MCD's pricing proposal and document that analysis. Yet, Ms. Lattimore, the alleged CO at the time, makes no mention of conducting a cost realism analysis prior to the Panel's July 6, 2012, recommendation that the District award the contract to MCD. (*See* AR at Ex. 26.) The relevant District of Columbia municipal regulations pertaining to the CO's duty to perform a cost price analysis are as follows:

> § 1614.2(d) Ensure selection of the source whose proposal has the *highest degree of realism* and whose performance is expected to best meet stated District requirements.
>
> § 1618.1 The contacting officer shall evaluate each proposal in accordance with the evaluation criteria in the solicitation.
>
> § 1618.2 The contracting officer shall *evaluate the cost estimate or price*, not only to determine whether it is reasonable, but also to determine the offeror's understanding of the work and ability to perform the contract.
>
> § 1618.3 The contracting officer shall *document the cost or price evaluation.*

[15] Following its initial proposal and subsequent protest, MCD stated that Citelum underbid the contract because its price was less than MCD's then price of [redacted] (AR at Ex. 10, 49 (MCD's Protest).) However, MCD later clarified that its [redacted] price revision was due to a [redacted] (Intervener, M.C. Dean, Inc.'s, Supp. Agency Report Comments [hereinafter Intervenor Comments] 7.)

§ 1626.1 The contracting officer shall be required to perform a cost analysis in . . .

(a) The award of any contract in excess of five hundred thousand dollars ($500,000)

§ 1626.2 When cost analysis is required, the contracting officer shall perform cost analysis by using the techniques and procedures set forth in this section.

§ 1626.3 The contracting officer shall verify cost or pricing date (sic) and evaluate the cost elements, including the following:

(a) The necessity for and reasonableness of the proposed cost, including allowances for contingencies.

§ 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.

D.C. Mun. Regs. tit. 27, §§ 1614.2(d), 1618.1 – 1618.3, 1626.1 – 1626.3, 1622.7 (2002) (emphasis added)

MCD has asserted that the CO is not required nor expected to "self-perform and complete every ministerial task involved with source selection," (Intervenor Comments 3) pursuant to this Board's decision in *Kidd Int'l Home Care, Inc.*, CAB No. P-0760, 57 D.C. Reg. 735 (Oct. 5, 2007). However, the facts in the present case are readily distinguished from those in *Kidd International Home Care, Inc.* where the CO made an "independent assessment of the (1) technical proposals, (2) BAFOs, (3) TEP [Panel] evaluations, and (4) prices . . . ." *Kidd Int'l Home Care, Inc.*, CAB No. P-0760, 57 D.C. Reg. at 737. In this case, pricing was the difference in winning or losing the contract for award yet the CO herein not only failed to perform the cost realism analysis, he failed to perform *any* of the legally-required analyses. In light of the above-referenced regulatory requirements, the Board finds that the CO's failure to conduct

and document a cost realism analysis of the offerors' proposals prior to contract award constituted a violation of procurement law.

(3) The District failed to Treat the Offerors Equally by Permitting One Offeror to take Exception to the Solicitation's LED Requirement

When the Citywide Streetlight Asset Management Services RFP was issued in August 2011, it contained a minimum requirement for 2,500 LED fixtures. (AR at Ex.1, RFP (1) § B.1.3.) In its initial offer in response to the RFP, Citelum's proposal exceeded the RFP's requested amount of 2,500 LED fixtures and included a conversion upgrade of 8,241 LED fixtures and 6,399 CosmoPolis fixtures. (Protest 17; AR at Ex. 3 – Citelum Proposal, § 2.c.) In the November 2011 request for clarification of the offeror proposals, the District acknowledged that the respective offerors had proposed using non-LED fixtures – CosmoPolis by Citelum and Ceramic Metal Halide ("CMH") by MCD – but signaled that it "planned to go to energy-efficient LED lighting." (Supp. Protest 23.) In fact, even though Citelum had met the RFP's then minimum LED requirement, the District indicated to Citelum that the use of non-LED lighting in its proposal was "taking DDOT in a different direction that DDOT may not be willing to follow." (Protest at Ex. 9.)

On March 21, 2012, the District agreed to set forth its minimum needs for contract award when it requested that the Board dismiss MCD's protest without prejudice. (AR, Ex. 11 at 2.) Notwithstanding its earlier objecting comment to Citelum on the use of non-LED lighting,[16] the District did not clarify that a proposal which included non-LED lighting, such as CosmoPolis or CMH, would meet its minimum needs. Nonetheless, the District accepted and recommended for award MCD's offer which not only met the District's revised RFP requirement of 32,500 LED fixtures, (AR at Ex. 6), but also included CMH lighting in its final BAFO, (AR at Ex. 20 – Dean Innovation Plan, § 1.5). MCD stated that it included CMH fixtures as a [redacted] and that the [redacted] (*Id.* at n.1.)

Citelum therefore alleges that the District's November 14, 2011, request for clarification with respect to non-LED fixtures resulted in it discontinuing the offer to provide non-LED CosmoPolis fixtures. (Supp. Protest 22.) By failing to make clear that it would accept non-LED fixtures in addition to LED fixtures, the District failed to establish its minimum contract needs in the revised RFP pursuant to its March 21st motion and the Board's dismissal Order of March 23, 2012. Furthermore, when Citelum had similarly proposed non-LED fixtures in addition to the RFP's required quantity of LED fixtures, the

[16] *See*, November 14, 2011, letter of clarification to Citelum. (Protest at Ex. 9.)

District expressed an unwillingness to go in that direction [of non-LED lighting]. By accepting MCD's proposal, which included non-LED lighting, the District subjected the offerors to unequal treatment in violation of procurement law. *See* D.C. Code § 2-351.01(b)(4) (2011).

In addition, the District requested that the offerors provide adequate lighting solutions for underlit areas in the city. (Intervenor Comments 17-18; Protest at Ex. 9, Ques. 5 g.) MCD responded that [redacted] (AR at Ex. 20 – Dean Innovation Plan, § 1.5.2.1.1.1.) Specifically, MCD's response on the issue of providing lighting in underlit areas of the District contemplated three possible scenarios:

[redacted]

(*See* AR at Ex. 20 – Dean Innovation Plan, § 1.5.5.1.)

MCD further stated that [redacted] (*Id.* (emphasis added)) In other words, MCD's proposal contemplated that MCD [redacted] Citelum's proposal did not include a similar pricing contingency in its response to the issue of providing LED lighting in the District's underlit areas. Therefore, the offerors submitted proposals that varied greatly in scope in response to the District's luminance requirements and the District accepted MCD's proposal notwithstanding its exception to the Solicitation's LED requirement.[17]

[17] In identifying its minimum needs for contract award, the District may either revise the RFP to permit proposals that, under certain applications, are not required to utilize LED fixtures or disallow proposals containing exceptions to that requirement.

The District's failure to equally apply the Solicitation's LED lighting requirement to the offerors' proposals resulted in the offerors responding to and being evaluated under different technical requirements standards. As noted in *Urban Alliance Found.*, CAB Nos. P-0886 et al., 2012 WL 4775002 (Feb. 15, 2012):

> The unequal treatment of the offeror proposals seriously violated the District's procurement law and undermined the integrity of the process. *See* D.C. Code § 2-351.01(b)(4) (2011) (stating that a purpose of the Procurement Practices Reform Act of 2010 is to "ensure fair and equitable treatment of all persons who deal with the procurement system of the District government"); *see also Rockwell Elec. Commerce Corp.*, B-286201 *et al*, 2001 CPD ¶ 65 (Comp. Gen. Dec. 14, 2000) ("It is ... fundamental that the contracting agency ... treat all offerors equally, which includes ... not disparately evaluating offerors with respect to the same requirements.").

Id.

As stated above, the unequal treatment of offeror proposals violates District law and greatly undermines the integrity of the procurement process. The District's proposed corrective action fails to remedy this impropriety because it does not allow for new BAFOs from the offerors so as to ensure that they are subject to equal technical requirements and evaluation standards.

CONCLUSION

Having sustained the protest on the grounds set forth herein, the Board finds it unnecessary to address the protester's remaining allegations. However, finding that the District's proposed corrective action was not a reasonable exercise of discretion and does not remedy the procurement's improprieties, we deny the District's motion to dismiss the protest or stay the proceedings. Therefore, we hereby order the District to undertake the corrective action of (i) withdrawing the proposed award to MCD; (ii) identifying a CO to carry out those responsibilities required of a CO pursuant to the District's procurement law including, but not limited to, D.C. Mun. Regs. tit. 27, §§ 1614.2(d), 1618.1 – 1618.3, 1622.7, 1626.1 – 1626.3; (iii) reissuing the Solicitation, as necessary, to adequately identify DDOT's minimum contract requirements; (iv) providing offerors an opportunity to submit revised proposals consistent with the Solicitation's minimum requirements[18] in order for the District to conduct new technical and price evaluations of those proposals; and (v) reevaluating the final proposals for technical

[18] We acknowledge intervenor's concern that the parties and intervenor may be prejudiced due to the impermissible disclosure of technical and pricing information. However, we remind all who are subject to the terms of the Protective Order that they have certified agreement to those terms and are subject to the consequences of violating that agreement.

requirements compliance and pricing in a manner consistent with the terms of the Solicitation and the relevant procurement laws and regulations.[19]

SO ORDERED:

DATED: March 1, 2013

/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 TO:

Douglas C. Proxmire, Esq.
Elizabeth M. Gil, Esq.
Patton Boggs LLP
2550 M Street, N.W.
Washington, D.C. 20037

Alton Woods, Esq.
Assistant Attorney General
Office of the Attorney General
55 M Street, S.E., 7th Floor
Washington, D.C. 20003

Lawrence M. Prosen, Esq.
Daniel Edwards, Esq.
Robert Lewis, Esq.
Kyle Baker, Esq.
Thompson Hine, LLP
1919 M Street, N.W., Suite 700
Washington, D.C. 20036

[19] The protester has additionally requested that the Board order the District to advise offerors of weaknesses in their last submitted BAFOs. However, we find that through the successive rounds of BAFOs and clarifications the offerors have been provided adequate notice and information with respect to the weaknesses contained in each of their previous proposals. The District issued the offerors letters requesting clarifications in November 2011 (MCD on Nov. 10th, Citelum on Nov. 14th and W.A. Chester on Nov. 17th); and via requests for BAFOs on June 15, 2012 (to MCD and Citelum). (E-mail from Alton Woods, Esq., Assistant Attorney Gen., DDOT, to Albert Wilcox, Admin. Officer, CAB (Nov. 14, 2012, 13:44 EST) (on file with CAB) (cc'ing all parties) at Items B, C.) DDOT also responded to questions posed by the offerors. (*See*, AR at Ex. 1 –Amend. 3, Ex. 1 – Amend. 4, Ex. 1 – Amend. 7, Ex. 14 – Amend. 6.) These requests for clarification and amendments in response to offeror questions addressed DDOT's concerns regarding the offerors' proposals.