

**THE CESAR CHAVEZ PUBLIC CHARTER
SCHOOLS FOR PUBLIC POLICY**

**NOTICE FOR SOLICITATION OF PROPOSALS TO
PROVIDE EMPLOYEE INSURANCE AND BENEFITS**

The Cesar Chavez Public Charter Schools for Public Policy, in accordance with section 2204 (c) (1) (A) of the DC School Reform Act of 1995 (Public Law 104-134), hereby solicits proposals to provide health insurance, dental insurance, and other employee benefits.

The Cesar Chavez Public Charter Schools will receive bids from March 2, 2007 to COB March 9, 2007 Attn: Christy Gill, 709 12th Street, SE, Washington, D.C. 20003. All necessary forms and a full RFP may be obtained by calling 202-547-3975.

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

BOARD FOR

THE CONDEMNATION OF INSANITARY BUILDINGS

NOTICE OF PUBLIC INTEREST

The Director of the Department of Consumer and Regulatory Affairs, in accordance with section 742 of the District of Columbia Home Rule Act of 1973, as amended, D.C. Code section 1-1504 (1999 Repl.), hereby gives notice that the Board for the Condemnation of Insanitary Buildings' (BCIB) regular meetings will be held on the dates listed below for calendar year 2007, (the second and fourth Wednesday of each month). The meetings will begin at 10:00 a.m. in Room 7100 of 941 North Capitol Street, NW, Washington, D.C. 20002. These regularly scheduled meetings of the BCIB are open to the public. Please call the Building Condemnation Division on (202) 442-4322 or 442-4486 for further information or for changes in this schedule.

The BCIB is charged with examining the sanitary condition of all buildings in the District of Columbia, determining which buildings are in such insanitary condition as to endanger the health or lives of its occupants or persons living in the vicinity, and issuing orders of condemnation requiring the owners to remedy the insanitary condition. Should the owner fail to remedy the cited conditions, the BCIB shall cause the building to be made habitable, safe and sanitary or razed and removed. The cost of work performed by the District of Columbia Government shall be assessed to the property.

Calendar Year 2007 Meeting Dates

February 28th

March 14th
March 28th

August 8th
August 22nd

April 11th
April 25th

September 12th
September 26th

May 9th
May 23rd

October 10th
October 24th

June 13th
June 27th

November 14th
November 28th

July 11th
July 25th

December 12th
December 26th

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
BOARD FOR THE CONDEMNATION OF INSANITARY BUILDING

**NOTICE OF PUBLIC INTEREST
LIST OF CONDEMNED BUILDINGS**

Find enclosed a list of buildings against which condemnation proceedings have been instituted. This list is current as of January 2007. The following paragraphs will give some insight into why these buildings were condemned and the meaning of condemnation for insanitary reasons.

Each listed property has been condemned by the District of Columbia Government's Board for the Condemnation of Insanitary Buildings (BCIB). The authority for this board is Title 6, Chapter 9, of the District of Columbia Code, 2001 Edition. The BCIB has examined each property and has registered with the record owner (via condemnation) a strong disapproval of the condition in which the property is being maintained. The BCIB has recorded at the Office of the Recorder of Deeds an Order of Condemnation against each property for the benefit of purchasers and the real estate industry.

These properties were condemned because they were found to be in such an insanitary condition as to endanger the health and lives of persons living in or in the vicinity of the property. The corrective action necessary to remove the condemnation order could take the form of demolition and removal of the building by the owner or the BCIB. However, most buildings are rendered sanitary, i.e., the insanitary conditions are corrected by the owner or the BCIB.

The administration of the condemnation program does not take title to property. The title to each property remains with the owner. Accordingly, inquiries for the sale or value of these properties should be directed to the owner of record. Inquiries regarding the owner or owner's address should be directed to the Office of Tax and Revenue, Customer Service, Office of Real Property Tax (202) 727-4829, 941 North Capitol Street, NE, 1st floor.

For further assistance, contact the Support Staff of the BCIB on 442-4486.

THE BOARD FOR THE CONDEMNATION OF INSANITARY BUILDING

Enclosure:

**BOARD FOR
THE CONDEMNATION OF INSANITARY BUILDINGS**

LIST OF CONDEMNED BUILDINGS

<u>BUILDINGS CONDEMNED</u>	<u>LOT</u>	<u>SQUARE</u>	<u>WD</u>
<u>Northwest</u>			
51 Bryant Street	0104	3127	5
1126 Columbia Road	0056	2853	1
5109 Connecticut Avenue	0048	1989	3
5109 Connecticut Avenue-Rear	0048	1989	3
412 Delafield Place	0175	3251	4
410 Florida Avenue	0040	0507	5
1461 Florida Avenue	0147	2660	1
3003 Georgia Avenue	0111	3052	1
3919 Georgia Avenue	0035	3027	4
4607 Georgia Avenue	0016	3015	4
1710 Irving Street	0001	2771	4
1301 Kalmia Road	0001	2771	4
806 Kennedy Street	0812	2994	4
1000 M Street	0057	0341	2
1002 M Street	0056	0341	2
1006 M Street	0051	0341	2
223 Missouri Avenue	0043	3331	4
1824 Monroe Street	0813	2614	1
212 Morgan Street	0083	0555	6
216 Morgan Street	0018	0555	6
3642 New Hampshire Ave.-Rear	0032	2898	1
52 New York Avenue	0155	0619	6
1320 North Capitol Street	0154	0617	5
1424 North Capitol Street	0010	0616	5
1426 North Capitol Street	0836	0616	5
86 O Street	0201	0617	5
405 O Street	0802	0511	2
509 O Street	0479	2001/2002	2
605 P Street	0154	0445	2
1429 Parkwood Place	2688	0062	1
1433 Parkwood Place	0064	2688	1
1427 Q Street	0009	0208	2
53 S Street	0039	3106	5
423 Shepherd Street	0038	3238	4
423 Shepherd Street-Rear	0038	3238	4
815 T Street	0023	0393	1

<u>BUILDINGS CONDEMNED</u>	<u>LOT</u>	<u>SQUARE</u>	<u>WD</u>
<u>Northwest (Con't)</u>			
901 U Street	0100	0360	2
1359 U Street	0805	0236	1
1361 U Street	0805	0236	1
613 Upshur Street	0072	3226	4
613 Upshur Street-Rear	0072	3226	4
2023 Vermont Avenue	0087	0360	1
215 Whittier Street-Rear	0820	3363	4
1329 Wisconsin Avenue	0068	1232	2
1401 1 st Street	0814	0616	5
1821 1 st Street	0137	3110	5
1837 1 st Street	0126	3110	5
1202 3 rd Street	0837	0523	2
1506 3 rd Street	0818	0521	5
1859 3 rd Street	0810	3096	1
1922 3 rd Street-Rear	0010	3089	1
1209 4 th Street	0810	0523	6
1211 4 th Street	0502	2026	6
1417 5 th Street	0054	0511	2
1425 5 th Street	0511	0817	2
1905 8 th Street	0802	0416	1
1905 8 th Street -Rear	0802	0416	1
1301 9 th Street	0801	0399	2
1303 9 th Street	0062	0399	2
1305 9 th Street	0063	0399	2
1307 9 th Street	0803	0399	2
1309 9 th Street	0804	0399	2
715 11 th Street	0010	0335	2
3007 11 th Street	0099	2851	1
3414 11 th Street	0839	2839	1
3416 11 th Street	0839	2839	1
1316 12 th Street	0824	0280	2
5113 13 th Street-Rear	0019	2929	4
5749 13 th Street-Rear	58/818	2935	4
2208 14 th Street	0030	0202	1
3405 14 th Street	0115	2836	1
3431 14 th Street	0133	2836	1
3509 14 th Street	0053	2827S	1
4024 14 th Street	0053	2694	4
5209 14 th Street	0105	2804	4
3350 17 th Street	0093	2612	1
3350 17 th Street-Rear	0093	2612	1
2423 18 th Street	0093	2560	1
3222 19 th Street	0817	2604	1

<u>BUILDINGS CONDEMNED</u>	<u>LOT</u>	<u>SQUARE</u>	<u>WD</u>
<u>Northeast</u>			
4611 Clay Street	0011	5134	7
4615 Clay Street	0012	5134	7
1334 Downing Place	0039	4027	5
1350 East Capitol Street	0087	1035	6
2800 Evart Street	0009	4346	5
837 Florida Avenue	0063	0908	6
903 Florida Avenue	0802	931N	6
905 Florida Avenue	0804	931N	6
1369 Florida Avenue-Rear	0129	1026	6
1654 Gales Street	0122	4510	6
413 H Street	0812	0809	6
1511 Isherwood Street	0176	4544	6
1249 Lawrence Street	0021	3930	5
4813 Jay Street	0087	5149	7
5069 Just Street	0305	5176	7
5095 Just Street	0314	5176	7
303 K Street	0804	0775	6
4502 Lee Street	0148	5155	7
5119 Lee Street	0038	5200	7
1310 Monroe Street	0010	3964	5
1310 Monroe Street-Rear	0010	3964	5
1210 Montello Avenue	0032	4065	5
1410 Montello Avenue	0809	4059	5
1414 Montello Avenue	0807	4059	5
5706 NHB Avenue	0010	5214	7
4943 Nash Street	0043	5173	7
4943 Nash Street-Rear	0043	5173	7
735 Nicholson Street	0089	3742	4
1925 North Capitol Street	0014	3509	5
1309 North Carolina Avenue	0115	1035	6
22 P Street	0057	0668	5
24 P Street	0056	0668	5
1243 Owen Place	0188	4060	5
115 Riggs Road	0085	3701	5
3610 South Dakota Avenue	0033	4224	5
3610 South Dakota Ave.-Rear	0033	4224	5
21 T Street	0029	3510	5
227 Tennessee Avenue	0127	1033	6
227 Tennessee Avenue-Rear	0127	1033	6
215 Warren Street	0809	1033	6
915 3 rd Street	0801	0775	6
1811 3 rd Street	0007	3570	5
2433 3 rd Street	0098	3555	5

<u>BUILDINGS CONDEMNED</u>	<u>LOT</u>	<u>SQUARE</u>	<u>WD</u>
<u>Northeast (Con't)</u>			
1020 4 th Street-Rear	0034	0774	6
2410R 4 th Street-Rear	0059	3555	5
2416R 4 th Street-Rear	0075	3555	5
819 8 th Street	0028	0911	6
2250 13 th Street-Rear	0034	3942	5
3300 18 th Street	0019	4143	5
4310 22 nd Street	0012	4232	5
1322 45 th Place	0025	5120	7
1202 47 th Place	0060	5160	7
1227 47 th Place	0039	5160	7
1055 48 th Street	0098	5153	7
109 53 rd Street	0091	5243	7
244 56 th Street	0141	5250	7

<u>BUILDINGS CONDEMNED</u>	<u>LOT</u>	<u>SQUARE</u>	<u>WD</u>
<u>Southeast</u>			
1523 A Street	0816	1072	6
1751 A Street	0063	1097	6
1751 A Street-Rear	0063	1097	6
5019 A Street	0005	5327	7
5019 A Street-Rear (Shed)	0005	5327	7
5055 A Street	0014	5327	7
5010 Benning Road	0068	5340	7
5032 Benning Road	0037	5340	7
3401 Brothers Place	0803	6006	8
5201 C Street	0009	5312	7
5000 Call Place	0035	5323	7
3213 Dubois Place	0038	5430	7
627 E Street-Rear	0842	0877	6
3118 E Street	0807	5440	7
3326 Ely Place	0807	5444	6
647 G Street	0139	0878	6
3009 G Street	0807	5480	7
1239 Good Hope Road	0089	3033	8
1410 Good Hope Road	0024	5605	8
2262 High Street	0899	5799	8
1220 Maplevue Place	0811	5800	8

<u>BUILDINGS CONDEMNED</u>	<u>LOT</u>	<u>SQUARE</u>	<u>WD</u>
<u>Southeast (Con't)</u>			
1909 MLK Jr. Avenue	0829	5770	8
1911 MLK Jr. Avenue	0829	5770	8
1913 MLK Jr. Avenue	0829	5770	8
2228 MLK Jr. Avenue	0810	5802	8
2234 MLK Jr. Avenue	0811	5802	8
2238 MLK Jr. Avenue	0978	5802	8
2629 MLK Jr. Avenue-East	0192	5867	8
2629 MLK Jr. Avenue-West	0192	5867	8
2759 MLK Jr. Avenue-Rear	0802	5982	8
1500 Savannah Street	0801	5912	8
1502 Savannah Street	0802	5912	8
1225 Sumner Road	0980	5865	8
1609 T Street	0026	5611	7
1333 Valley Place	0891	5801	8
821 Virginia Avenue	0006	0929	6
1242 W Street	0099	5782	8
4010 3 rd Street	0806	6167	8
4014 3 rd Street	0804	6167	8
3009 8 th Street	0814	5953	8
3009 8 th Street -Rear	0814	5953	8
102 9 th Street	0801	0943	6
221 11 th Street	0045	0969	6
223 11 th Street	0046	0969	6
911 12 th Street	0019	0969	6
1912 17 th Street	0045	5612	7
321 18 th Street	0801	1100	6
20 53 rd Place	0884	5284	7
433 53 rd Street	0030	5313	7

<u>BUILDINGS CONDEMNED</u>	<u>LOT</u>	<u>SQUARE</u>	<u>WD</u>
<u>Southwest</u>			
78 Darrington Street-Rear	0023	6223S	8
35 Forrester Street	0054	6240	8
41 Forrester Street	0056	6240	8
61 Forrester Street	0063	6240	8
157 Forrester Street	0803	6240	8

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

SAFE, INC.)	
)	CAB No. P-0702
Under RFA No. 1001-04-FY 2005)	
Ryan White Title I Regional Grant)	

For the Protester: Jacqueline Bacchus, Executive Director, SAFE, Inc. For the District Government: Howard Schwartz, Esq., and Talia Cohen, Esq., Assistant Attorneys General, District of Columbia.

Opinion by Administrative Judge Warren J. Nash, with Chief Administrative Judge Jonathan D. Zischkau and Administrative Judge Matthew S. Watson, concurring.

OPINION

(Lexis-Nexis Filing ID 5020670)

SAFE, Inc. ("SAFE"), by letter to this Board dated November 15, 2004, requests that the Department of Health ("DOH"), HIV/AIDS Administration, extend the deadline for submission of applications for the FY 2005 Ryan White Title I Regional Grant for HIV/AIDS services (Request for Applications ("RFA") No. 1001-04-FY 2005) by one week to November 22, 2004, from November 15, 2004. SAFE asserts that the District failed to properly post the existing Amendments and Responses to applicant's questions in a timely manner before the RFA submission date of November 15, 2004, at 5:00 p.m. In its Motion to Dismiss, the District responds that the Board lacks jurisdiction to consider a protest regarding a grant application. The protester did not file comments on the District's Motion to Dismiss. We agree with the District that we do not have jurisdiction and we dismiss the protest.

BACKGROUND

On October 1, 2004, DOH placed in the District Register an announcement of the RFA and posted the RFA on the DOH Website. DOH held a pre-application conference on October 14, 2004. On November 1 and November 9, 2004, DOH posted on its website questions submitted by interested grant applicants and answers to those questions prepared by DOH. On November 3 and November 8, 2004, DOH sent to all organizations that had expressed an interest in the RFA certain amendments that consisted of questions submitted by interested grant applicants and answers to those questions prepared by DOH. SAFE filed its protest on November 15, 2004, alleging that DOH belatedly notified SAFE of information that was necessary for SAFE to satisfactorily complete and file with DOH its response to the RFA.

DISCUSSION

The protester asserts that the District failed to properly post the existing Amendments and

Responses to applicant's questions in a timely manner before the RFA submission date of November 15, 2004. In its Motion to Dismiss, the District responds that the Board lacks jurisdiction to consider a protest regarding a grant application. The Board agrees with the District and dismisses the protest. Protester's applications were submitted pursuant to an RFA for subgrants of Federal grant funds administered by the District of Columbia. Had the protester's application been successful, it would have resulted in a grant award and not a contract. The Procurement Practices Act establishes and limits the Board's jurisdiction to be "consistent with the coverage of ... [the PPA] as defined in 2-301.04 and 2-303.20" D.C. Code § 2-309.03(b) (2001 ed.). Section 2-301.04(b) specifically excludes from the PPA's coverage, and therefore from the Board's jurisdiction, any "contract or agreement receiving or making grants-in-aid or for federal financial assistance." Since this matter relates to award of a grant, the Board is without jurisdiction. *District of Columbia Local Development Corporation*, CAB No. P-0421, Nov. 14, 1994, 42 D.C. Reg. 4885, holding affirmed, but vacated on other grounds, Jan. 31, 1995, 42 D.C. Reg. 4914.

We DISMISS the protest for lack of jurisdiction.

SO ORDERED.

DATE: January 26, 2005

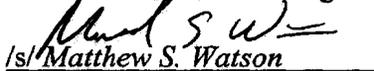

Warren J. Nash

WARREN J. NASH
Administrative Judge

CONCURRING:


/s/ Jonathan D. Zischkau

JONATHAN D. ZISCHKAU
Chief Administrative Judge


/s/ Matthew S. Watson

MATTHEW S. WATSON
Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

OWEN E. JACKSON)
) CAB No. D-1114
Under Contract with the)
D.C. Public Schools)

For the Appellant: Phyllis Jackson, Esq. For the Government: Wendell Hall,
Esq., Assistant Attorney General.

Opinion by Administrative Judge Warren J. Nash, with Chief Administrative
Judge Jonathan D. Zischkau and Administrative Judge Matthew S. Watson, concurring.

OPINION

Lexis-Nexis Filing ID 5477097

Appellant Owen Jackson, through his personal representative, claims entitlement to contract interest penalties of 1 percent per month for late payments. The District responds that there is no basis for granting to Mr. Jackson the relief requested in this appeal. The Board denies the appeal, concluding that there is no basis for an interest penalty in the contract or law.

BACKGROUND

Appellant alleges that on June 2, 1995, the District of Columbia Public Schools (DCPS) awarded a consulting contract to him. Appellant alleges that he performed the work under the contract and submitted invoices to DCPS for payment. Appellant alleges that the contract is an undated document signed by Dr. Franklin L. Smith, former D.C. Superintendent of Schools, which contains the following description of work:

The consultant will compile, review and update existing school facilities data. Develop a spatial database for the preliminary Facilities Master Plan for D.C. Public Schools. Train D.C. Public School and Task Force staff in the use of spatial databases. Provide a user's manual on the spatial database system. Specify, acquire, assemble and configure the hardware and software required to support spatial database and facilities survey.

(Exhibit 2 of Appellant's letter to the Board dated August 22, 2000).

Appellant alleges that DCPS incorporated into the contract a proposal letter dated March 27, 1995, from Mr. Owen Jackson, President and CEO of Project Resources, Inc. (PRI), to the "Task Force on Education Infrastructure for the 21st Century, District of Columbia Public Schools" (Exhibit 1 of Appellant's August 22, 2000, letter). The

following language appears on page 5 of the proposal in a paragraph entitled "Contract Terms":

PRI will invoice the Task Force at the beginning of each month and payment will be made within 30 days of invoice. Should payment be delayed after proper invoicing the contractor should be paid interest at 1 percent per month. Any disputes among the parties will be resolved by arbitration under the rules of the American Arbitration Association in Washington, D.C. under the laws of Washington, D.C. Should arbitration be required because of a breach of contract, the party responsible for the breach should reimburse the other party for its reasonable legal fees and expenses.

The PRI proposal letter dated March 27, 1995, lists PRI's address as 1655 North Fort Myer Drive, Suite 301, Arlington, VA 22209.

Among the exhibits presented by Mr. Jackson is a document entitled "Summary Statement of Services to be Rendered" which includes a statement of duties to be performed by the contractor (Exhibit 1 of Appellant's letter dated August 22, 2000, to the Board). That statement of duties is similar to the statement of duties set forth in the document signed by Dr. Smith. Ms. Cecilia Wirtz, DCPS Legal Counsel, signed the summary statement on June 2, 1995. The document also includes an unreadable signature in a space for the signature of an "evaluator." In the space below the signature appear the words "Director Facilities Management" and the date "May 22, 1995." The summary statement document does not contain a reference to PRI.

Mr. Jackson presented to the Board another undated document entitled "Personal Service Contract for Facility Management Consulting Services Between Owen Jackson and District of Columbia Public Schools." (Defendant's Exhibit 3, attached to Statement of Material Facts (SMF) dated October 27, 2000). The signature page is not signed by either Jackson or Dr. Smith and contains the following language directly above the signature blocks: "This is the entire agreement between DCPS and OWEN JACKSON. Any changes, additions or deletions must be in writing and signed by both parties to this agreement." The unsigned document does not contain any language requiring DCPS to pay interest to Jackson.

Also in the record is a document entitled "District Of Columbia Public Schools Request for Employment of Expert/Consultant." (Defendant's Exhibit 1, dated May 17, 1995, attached to SMF; Exhibit 2 of Appellant's letter dated August 22, 2000, to the Board). Ms. Cecilia Wirtz reviewed the document on June 2, 1995. The document lists Mr. Jackson's address as 2110 Yorktown Road, N.W., Washington, D.C. That document does not contain a reference to PRI.

The record includes several invoices submitted by Mr. Jackson to DCPS, beginning with invoice number 1 dated June 1, 1995. The invoices submitted by Mr. Jackson do not contain any references to PRI.

Mr. Jackson submitted his claim to arbitration on February 12, 1997. Mr. Jackson's claim consisted of amounts for invoices 4, 5, and 6 totaling \$34,457.41. By letter dated June 30, 1997, after an ex parte arbitration proceeding (DCPS declined to participate in the proceeding), the arbitrator awarded to Mr. Jackson \$10,935.43. The award included \$10,540.00 for costs incurred by Mr. Jackson as a result of DCPS' failure to provide data and materials to Mr. Jackson on a timely basis, and \$395.43 for interest at 1 percent per month for a two month delay in the DCPS payment of invoice number three, dated July 19, 1995. The arbitrator also noted that the District would owe to PRI interest on the unpaid award at the rate of 9 percent per annum. The arbitrator denied Mr. Jackson's requests for legal fees and expenses. The arbitrator determined that the parties should equally bear the administrative fees and expenses of the arbitration proceeding, as well as the compensation and expenses of the arbitrator. To that end, the arbitrator ordered DCPS to pay to Mr. Jackson \$375.00 for that portion of the DCPS share of administrative fees and expenses still due the American Arbitration Association. The arbitrator ordered each party to pay \$408.75 to the arbitrator as compensation.

On June 22, 1998, DCPS paid Mr. Jackson \$34,457.41. On June 25, 1998, Mr. Jackson submitted to DCPS a claim for interest on the payment of \$34,457.41. Mr. Jackson also requested that DCPS pay the costs of the arbitration. Mr. Jackson submitted the claim for interest, claim number 8, to the Contract Appeals Board by letter dated March 19, 1999. Mr. Jackson died on March 30, 1999. On October 27, 2000, the District filed a motion to dismiss or, in the alternative, for summary judgment. In that motion, the District requested that the Board either dismiss the appeal for failure to state a claim upon which relief can be granted, or, in the alternative, render judgment in favor of the District. On January 3, 2001, Appellant filed a response to the District's motion to dismiss. The Board bases its opinion on a review of the pleadings and documents filed by both parties.

DISCUSSION

In the appeal letter dated March 19, 1999, Mr. Jackson asserts that DCPS owes unpaid interest to him. He asserts that the terms of the contract awarded to PRI on June 2, 1995 require payment of interest.

We note at the outset some confusion regarding the identity of the contracting party. Mr. Jackson alleges that the PRI proposal letter of March 27, 1995, is a part of the contract. However, we could not locate in any of the other documents in the record any references to PRI. We also note that Mr. Jackson submitted all invoices to DCPS in his own name. PRI did not submit any invoices to DCPS. The documents signed by Ms. Wirtz and Mr. Franklin include Mr. Jackson, individually, as the contracting party.

Mr. Jackson alleges that the PRI proposal letter of March 27, 1995, is a part of the contract. However, the documents signed by Dr. Smith and Ms. Wirtz do not contain any references to the PRI proposal. We could not locate in the record any evidence that DCPS incorporated the March 27, 1995 PRI proposal into the contract. Therefore, even if the Board assumes that DCPS received the PRI proposal, DCPS did not incorporate

that proposal into the contract, and the contract does not require DCPS to pay the Appellant any late payment penalty. We further note that DCPS has never admitted that the parties incorporated the PRI proposal into the contract.

Interpretation of a contract must begin with the contract itself, particularly when the contract is a so-called "integrated" agreement. An integrated agreement is a writing or writings constituting a final expression of one or more terms of the agreement. (Restatement, Second, Contracts § 209(1)). The undated document entitled "Personal Service Contract for Facility Management Consulting Services Between Owen Jackson and District of Columbia Public Schools" provides on page 10:

This is the entire agreement between DCPS and OWEN JACKSON. Any changes, additions or deletions must be in writing and signed by both parties to this agreement.

The documents signed by Dr. Smith and Ms. Wirtz on June 2, 1995, set forth a scope of work, a rate of pay, and a term for delivery of the services. Those documents taken together appear to be a complete contract. Mr. Jackson did not allege that the contract documents are not complete. Neither party alleges any extrinsic evidence that could explain the meaning of any contract term. Accordingly, the Board can only interpret the documents presented to it by the parties. The Board finds that the contract does not incorporate the PRI proposal letter dated March 27, 1995, and that the contract does not set forth an interest penalty for late payment of invoiced amounts. There is no evidence that shows that Dr. Smith or Ms. Wirtz intended to incorporate into the contract the PRI proposal.¹ Since the contract does not include a late payment penalty clause, the contract does not allow the relief requested by the Appellant. While it is true that the PRI proposal contains a late payment provision, the contract does not incorporate the late payment clause of the PRI proposal.

Appellant argues that DCPS owes him interest at the rate of 1 percent per month on the unpaid claim from the date that the contracting officer received the claim (August 7, 1998) until DCPS paid the claim. Mr. Jackson alleges that the Procurement Practices Act, D.C. Code § 2-308.06 (formerly D.C. Code § 1-1188.6), requires DCPS to pay interest to the claimant.

In the Appellee's Motion to Dismiss, the District responded that the PPA did not apply to this contract on the date of award of the contract, that is, June 2, 1995. The District asserts that because DCPS awarded the contract before May 8, 1998, the effective date of the Procurement Reform Amendment Act of 1998, D.C. Law 12-104, PPA interest provisions do not apply to the Jackson contract. The District further asserts that the damages awarded to claimant in arbitration bar the claimant from collecting further damages, and there is nothing in D.C. Code § 2-308.06 to support Jackson's claim that he is now entitled to further interest payments.

¹ The Board has not considered the question of whether DCPS could include in a contract a late payment provision that provides interest penalties of 1 percent per month beyond the twelve month period set forth in the Quick Payment Act.

As noted above, on June 30, 1997, the arbitrator awarded claimant \$10,935.43. On June 22, 1998, DCPS paid Mr. Jackson \$34,457.41. The claimant failed to present to the Board any documents that explained why DCPS paid the claimant on June 22, 1998. Additionally, the claimant has not shown that he is entitled to any interest payments under the contract. Therefore, any claim of Mr. Jackson for interest must rest on statute or regulation.

Mr. Jackson asserts that the interest provision of the PPA applies to the contract even if the contract itself does not include any interest payment clause. He argues that under the PPA, he is entitled to late payment fees of 1 percent per month from the date that the contracting officer received the claim until payment of the claim.

We do not agree. First, the Quick Payment Act did not apply to DCPS contracts until April 9, 1997, not May 8, 1998, as set forth in the District's brief.² Despite the argument of claimant's counsel, there is no provision of the QPA or PPA that requires the District to pay to the claimant interest at 1 percent per month from the date that the claimant files a claim with the contracting officer until the date that the District pays the claim. D.C. Code § 2-308.06 states: "[i]nterest on amounts due to a contractor on claims shall be payable at a rate set in § 28-3302(b) applicable to judgments against the District government from the date the contracting officer receives the claim until payment of the claim." The rate applicable to judgments against the District under § 28-3302(b) is a rate "not exceeding 4 percent per annum." Accordingly, if the PPA did apply to Mr. Jackson's contract, he could recover interest at the maximum rate of 4 percent per annum. Since the PPA did not apply to the contract, Mr. Jackson cannot recover any interest on any unpaid sums from the District.³

CONCLUSION

The Board finds that the DCPS contract with Jackson did not incorporate into the contract the PRI proposal letter dated March 27, 1995. Accordingly, the contract does not require DCPS to pay to Mr. Jackson any interest amounts for late payment of invoices. Additionally, the Board finds that the QPA interest provisions did not apply to Jackson's contract because the parties entered into the contract before the QPA interest

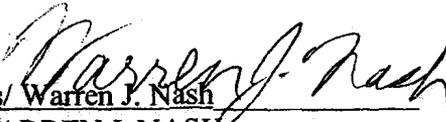
² On April 9, 1997, the effective date of the Procurement Reform Amendment Act ("PRAA") all departments, agencies, instrumentalities, boards and commissions of the District of Columbia, including independent agencies, such as DCPS, became subject to the Procurement Practices Act ("PPA") and the Procurement Regulations found in 27 DCMR. See D.C. Code § 2-301.04(a), formerly D.C. Code § 1-1181.4(a); D.C. Law 11-259 § 101(b), 44 D.C. Reg. 1423, *Hood's International Foods*, CAB No. D-996, February 20, 1998, 45 D.C. Reg. 8742; *Educational In-Roads*, CAB No. P-552, October 22, 1999, 46 D.C. Reg. 8519.

³ Mr. Jackson has acknowledged that on June 22, 1998, DCPS paid Mr. Jackson \$34,457.41.

provisions applied to DCPS contracts. Accordingly, the QPA and PPA do not require DCPS to pay to Mr. Jackson any interest penalties for late payment of invoices.

SO ORDERED.

DATE: March 31, 2005


/s/ Warren J. Nash
WARREN J. NASH
Administrative Judge

CONCURRING:


/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge


/s/ Matthew S. Watson
MATTHEW S. WATSON
Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

Protest of:

ENTERPRISE FLEET SERVICES)
) CAB No. P-0703
Under Solicitation No. POKT-2004-B-0080-CM)

For the Protester: Doug Blanchard, Account Executive, Enterprise Fleet Services. For District of Columbia: Howard Schwartz, Esq., Senior Assistant Attorney General and Talia Sassoon Cohen, Assistant Attorney General..

Opinion by Administrative Judge Matthew S. Watson, with Chief Administrative Judge Jonathan D. Zischkau and Administrative Judge Warren J. Nash, concurring.

OPINION AND ORDER
LexisNexis Filing ID 5733222

On October 19, 2004, the Office of Contracting and Procurement (“OCP”) solicited bids for a “requirements contract” (IFB No. POKT-B-2004-B-0080-CM (“Solicitation”)) on behalf of the Department of Public Works (“DPW”) for lease of sedans, vans and pickup trucks divided into line items for 10 types of gasoline and 10 types of alternative fuel vehicles. (Agency Report (“AR”) Ex. 1). The Solicitation estimated the District’s requirements for each of the 20 categories of vehicles totaling 188 vehicles. Bids from four companies, including Enterprise Fleet Services (“Enterprise”), stating separate prices for each of the 20 separate vehicle types for the base and each of the two option years were opened and made public on November 19, 2004. On March 9, 2005, Enterprise protested an expected cancellation of the solicitation Enterprise asserted in its protest that cancellation of the solicitation was not warranted.

On March 28, 2005, 18 days after the protest was filed, the CPO did, in fact, determine to reject all bids and cancel the solicitation citing a reduction in estimated need from 42 to 19 gasoline fueled vehicles and from 146 to 92 alternative fuel vehicles as the reason for the action. (AR Ex. 3). The contracting officer found that the District no longer had need for any vehicles in 14 of the 20 line items. The estimated quantities for 4 of the remaining 6 vehicle types remained constant and increased for two vehicle types.

But for an inherently ambiguous term of the invitation which independently dictates cancellation of the solicitation, we would have agreed with Enterprise that the District should not have cancelled the entire solicitation.

DISCUSSION

Cancellation

The Board's jurisdiction over this protest is founded on D.C. Code § 2-309.03(a)(1). D.C. Code § 2-303.07 provides that "An invitation for bids, a request for proposals, or other solicitations may be cancelled, or all bids or proposals may be rejected, only if it is determined in writing by the [Chief Procurement Officer] that the action is taken in the best interest of the District government." Our standard of review of a cancellation determination is well settled. An invitation for bids may be cancelled only if the CPO determines in writing that the action is taken in the best interest of the District government and there is a reasonable basis for cancellation. D.C. Code § 2-303.07 (2001); *American Consultants and Management Enterprises, Inc.* CAB No. P-0683, May 17, 2004. While cancellation of a solicitation is within the discretion of the CPO, that discretion is limited in an advertised procurement, as in this matter, because "[t]he cancellation of an IFB after bid opening tends to discourage competition because it results in making all bidders' prices and competitive positions public without award," *Singleton Electric Co.*, CAB No. P-411, Nov. 15, 1994, 42 D.C. Reg. 4888, 4893. The Board, following well established Federal procurement precedent, has interpreted the best interests of the District in canceling an advertised procurement to require a "compelling" reason for the cancellation. *Id.* The general rule is expressed in the *Federal Acquisition Regulation*:

Preservation of the integrity of the competitive bid system dictates that, after bids have been opened, award must be made to that responsible bidder who submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the invitation.

48 CFR 14.404-1(a)(1).

The District asserts that the cancellation is supported by the contracting officer's finding adopted by the CPO that the "District's specifications changed regarding the amount and types of vehicles that the District currently requires for leasing." AR at 3. Considering the solicitation in the aggregate, the contracting officer found that the number of gasoline fueled vehicles was reduced from 42 to 19 and the number of alternative fueled vehicles from 146 to 92. Although all of the solicitation's individual line items specify vehicles, the Board believes that the line items are so dissimilar¹ that the changed needs must be considered for each of the individual line items,² not for the aggregate number of vehicles in the total solicitation, particularly since the individual line items were to be priced separately. This conclusion is further supported by the fact that the solicitation contains no minimum order requirement, allowing the District to place orders for single vehicles from individual line items at any time during the term of the contract.

¹ For example, 4 passenger subcompact sedans (item 6) and full-size cargo vans (item 7).

² In an analogous Federal vehicle procurement, the Comptroller General upheld "GSA[']s determin[ation] that its needs had changed and, as a result, elected to award the vehicles other than the subcompacts and cancel the requirement for the subcompacts." *Chrysler Corp.*, B-206943, Sept. 24, 1982, 82-2 Comp. Gen. Proc. Dec. ¶271.

Reduction of the estimated quantity required to zero for 14 of the line items clearly justifies cancellation of those items.³ On the other hand, there appears to be no support for cancellation of the four line items for which the estimated needs are unchanged. Resolicitation would permit rebidding for identical items for which bid prices have been made public. The increase in estimated quantity of the remaining two line items, gasoline full-size cargo vans (item 8) from 4 to 7 and gasoline full-size, crew cab pick-up trucks (item 9) from 2 to 5 are insignificant for mass-market commercial vehicles.⁴ Allowing other bidders to undercut previously submitted sealed bids for substantially identical line items would not enhance competition and fair play and would appear to create an impermissible auction. See, *C.P.F. Corp.*, CAB No. P-413, Nov. 18, 1994, 42 D.C. Reg. 4902. But for the inherent solicitation ambiguity discussed below, the Board would have found that the cancellation of line items 6-9 and 12-13 are without reasonable basis.

In addition to the lack of need for certain vehicle types requested in the solicitation, the contracting officer found that the District had an additional need for three types of alternative fuel vehicles, totaling 42 additional vehicles, not included in the original solicitation. Increased requirements do not support cancellation of an IFB after opening. 27 DCMR 1530.3 provides:

After the opening of a bid, an IFB shall not be canceled and resolicited due solely to increased requirements for the items being procured. Award shall be made on the initial IFB and the additional quantity shall be treated as a new procurement.

If additional requirements for items included in a solicitation cannot support cancellation, cancellation clearly cannot be justified by the need for items not included in the original solicitation.

Solicitation Defects

Upon review of the solicitation, the Board concludes that there are conflicting provisions with regard to the term of the contract requiring correction before a valid contract can be formed. Section F.1 entitled "Term of Contract" states:

F.1.1 The term of this contract shall be for a period of three (3) years from the date of award specified on page 1 of the contract.

F.1.2 The lease term for each vehicle ordered during the first (1st) year shall be for thirty-six (36) months from the date the vehicle is accepted by the District. Vehicles

³ 27 DCMR §1530.4(c) specifically authorizes cancellation of an invitation after bid opening when "[t]he supplies or services being contracted for are no longer required."

⁴ Orders in excess of the estimated quantity may be placed under a requirements contract. The instant solicitation provides:

. . . [t]he estimated quantities stated [in the solicitation] reflect the best estimates available. The estimate shall not be construed as a representation that the estimated quantity will be required or ordered, or that conditions affecting requirements will be stable. They shall not be construed to limit the quantities which may be ordered from the Contractor by the District or to relieve the Contractor of his/her obligation to fill all such orders." AR Ex. 3, §B.3.

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leased under the second (2nd) year shall be for a 24 months lease term. Vehicles leased under the third (3rd) year shall be for 12 months only. The delivery order, issued to the contractor, will stipulate whether the lease is for a 12, 24 or 36 months lease term.

Section B – SERVICE/DESCRIPTION/PRICE appears to be generally in agreement with Section F, except that it refers to the “first base year of the contract.” Section B.1 provides:

B.1 The Government of the District of Columbia, Office of Contracting and Procurement (OCP) on behalf of the Department of Public Works (the District) is seeking a contractor to provide leased vehicles. The District intends to retain vehicle leased during the first base year of the contract for a period of thirty-six (36) months lease term. Vehicles leased during the second year shall be retained for a period of twenty-four (24) months lease term, and vehicles leased during the third year shall be for a twelve (12) months lease term only.

The term “base year” is normally used in connection with a one year contract followed by options. Indeed, the solicitation requests price quotations at the end of Section B only for a one year contract term with two option years, as opposed to a three year contract. Similarly, the evaluation clause states that:

F.2.3 The government will evaluate bids for award purposes by adding the total price for all options to the total price for the base year requirement. Evaluation of options will not obligate the government to exercise the option(s).

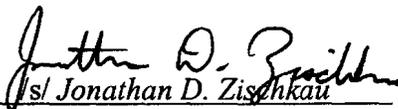
If the contract were a three year contract, as the term clause clearly states, it would be improper to consider only the first of three years in the evaluation. Every contract must, at a minimum, establish the price, quantity and length of contract. The contradictory clauses make it impossible for any definitive determination of the length of the contract.

CONCLUSION

Although the reasons asserted by the contracting officer do not support the canceling the solicitation, we conclude that the solicitation must be cancelled in order to correct the contradictory provisions dealing with the term of the contract.

SO ORDERED.

May 2, 2005


/s/ Jonathan D. Zischkau
Chief Administrative Judge


/s/ Warren J. Nash
Administrative Judge


/s/ Matthew S. Watson
Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

W.M. SCHLOSSER COMPANY, INC.)
) CAB No. D-1254
Under Contract No. 99-0040)

For the Appellant W.M. Schlosser Company: Charlie C.H. Lee, Esq., Kristen A. Bennett, Esq., Moore & Lee, LLP. For the District of Columbia Water and Sewer Authority: Frederick A. Douglas, Esq., Monica E. Monroe, Esq., Douglas & Boykin, PLLC.

Opinion by Chief Administrative Judge Jonathan D. Zischkau, with Administrative Judges Matthew S. Watson and Warren J. Nash, concurring.

OPINION

LexisNexis Filing ID 5742822

Appellant, W.M. Schlosser Company, Inc., filed this appeal on behalf of its subcontractor, Tate Fabricating Company, Inc., from an August 25, 2004 final decision of the General Manager of the District of Columbia Water and Sewer Authority ("WASA"). WASA has moved to dismiss the appeal on the ground that the Board lacks jurisdiction over WASA procurements. We agree with WASA that D.C. Code §§ 2-309.03, 2-301.04, and 2-303.20 specifically exempt WASA procurements from the Procurement Practices Act and the Board's jurisdiction, and accordingly we dismiss the appeal.

BACKGROUND

In 2001, WASA awarded Schlosser Contract No. 99-0040 for the construction of additional dewatering facilities at the Blue Plains Wastewater Treatment Plant located in the District of Columbia. Schlosser, as prime contractor, issued a subcontract to Tate Fabricating to furnish and install certain structural steel and steel deck as well as other miscellaneous metals pursuant to the contract. Tate claims that it incurred increased costs as a result of WASA directed changes and modifications to the structural steel portion of the project. WASA has promulgated procurement regulations at 21 DCMR Chapter 53. Those regulations provide for submitting claims to a contracting officer and a second level review of claims by the WASA General Manager. WASA's procurement regulations also contain the following disputes provision:

21-5361. CONTRACT DISPUTE RESOLUTION

5361.1 WASA shall attempt to resolve all contract disputes arising under, or relating to, contracts by mutual agreement after informal discussions have taken place

between the contractor and WASA.

5361.2 The Contracting Officer shall consider the advisability of including a disputes resolutions clause in all contracts. Dispute resolution clauses may require alternate dispute resolution.

Tate Fabricating submitted a claim to Schlosser, who in turn submitted the claim to WASA's contracting officer. On June 1, 2004, WASA's contracting officer denied the claim. Schlosser sought review of the claim and the contracting officer's decision by petitioning WASA's General Manager. On August 25, 2004, the General Manager issued a decision denying the claim. On November 30, 2004, Schlosser appealed the General Manager's decision to the Board. Noting that there might be a question as to whether we have jurisdiction over the appeal, Schlosser states that it also filed simultaneously a complaint in the United States District Court for the District of Columbia based on diversity jurisdiction. On December 30, 2004, WASA moved to dismiss the appeal on the ground that the Board lacks jurisdiction over WASA procurements. Schlosser filed a motion to stay or extend the time to respond to WASA's motion pending resolution of jurisdiction in the United States District Court.

DISCUSSION

D.C. Code § 2-309.03(b) provides in relevant part:

Jurisdiction of the Board shall be consistent with the coverage of this chapter [the Procurement Practices Act] as defined in §§ 2-301.04 and 2-303.20, except that the Board shall have the authority to enter into fee-for-service agreements with agencies, departments, boards, commissions, and instrumentalities of the District or other public entities that are not subject to the Board's jurisdiction.

Section 2-301.04 provides that the PPA shall apply to all departments, agencies, instrumentalities, and employees of the District government except as provided in section 3-303.20. Section 3-303.20(j) provides:

Nothing in this chapter [the Procurement Practices Act] shall affect the District of Columbia Water and Sewer Authority's powers to establish and operate its procurement system and to execute contracts pursuant to Chapter 22 of Title 34. . . .

Chapter 22 of Title 34 contains D.C. Code § 34-2202.14 which provides that "Except as provided in § 2202.17(b) [transition provisions not relevant here], [D.C. Code] § 2-301.01 et seq. [the Procurement Practices Act], shall not apply to the [Water and Sewer] Authority."

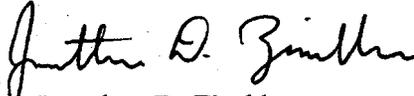
Taken together, these provisions make clear that the Board does not exercise jurisdiction over WASA procurements conducted pursuant to WASA's own procurement system under the authority of Chapter 22 of Title 34 of the D.C. Code. Because the procurement at issue here was conducted pursuant to WASA's procurement authority, we lack jurisdiction to consider any appeal from the

General Manager's decision on Schlosser's sponsored claim on behalf of Tate Fabricating. See *Dixon's Termite and Pest Control, Inc.*, CAB No. P-0659, Aug. 7, 2002, 50 D.C. Reg. 7453, 7454. Schlosser and Tate Fabricating are not without recourse because, as WASA observes in its pleadings, there is at least one forum where Schlosser can seek judicial review of the decision of WASA's General Manager.

Accordingly, we dismiss the appeal.

SO ORDERED.

DATED: May 3, 2005


/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge

CONCURRING:


/s/ Matthew S. Watson
MATTHEW S. WATSON
Administrative Judge


/s/ Warren J. Nash
WARREN J. NASH
Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

DIXON'S TERMITE AND PEST)	
MANAGEMENT)	CAB No. P-0706
)	
Under Requisition No. 6635, Water and Sewer)	
Authority)	

For the Protester: Robert Dixon, President, Dixon's Termite and Pest Management, Inc., pro se. For the Government: Monica E. Monroe, Esq., and Frederick A. Douglas, Esq., Douglas, Boykin & Oden, PLLC.

Opinion by Administrative Judge Warren J. Nash, with Chief Administrative Judge Jonathan D. Zischkau and Administrative Judge Matthew S. Watson, concurring.

OPINION

(Lexis-Nexis Filing ID 5747976)

The District of Columbia Water and Sewer Authority ("WASA") filed a motion to dismiss the instant protest on the grounds that the Board lacks jurisdiction to consider protests against WASA contract awards, or, in the alternative, that protester had failed to exhaust administrative remedies prior to appealing to the Board. The Board finds that it is without jurisdiction over WASA procurements and dismisses the protest.

BACKGROUND

WASA issued Requisition No. 6635 for pest control work at WASA. On March 28, 2005, Dixon's Termite and Pest Management, Inc., protested the award and alleged that WASA had not provided to Dixon any information about the requisition. On April 18, 2005, WASA filed its motion to dismiss the protest.

DISCUSSION

This Board is an administrative agency created by the Procurement Practices Act of 1985 ("PPA") which is codified as Chapter 3 of Title 2 of the D.C. Code (2001 ed.), (§ § 2-301.01 to 2-327.03), and particularly, Subchapter IX (id. at § § 2-309.01 to 2-309.08). Jurisdiction of the Board shall be consistent with the coverage of . . . [the PPA] and [the exceptions provided in] § 2-303.20. . . ." D.C. Code § 2-309.03(b). The Board shall have only those powers conferred on it by statute, either expressly or by necessary implication. See, e.g., *Black Entertainment Television*, CAB No. P-0436, Oct. 2, 1995, 44 D.C. Reg. 6394; *Xerox Corp.*, CAB No. D-0979, Nov. 6, 1995, 44 D.C. Reg. 6406.

D.C. Code § 3-303.20(j) provides:

Nothing in this chapter [the Procurement Practices Act] shall affect the District of Columbia Water and Sewer Authority's powers to establish and operate its procurement system and to execute contracts pursuant to Chapter 22 of Title 34.

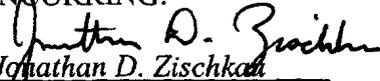
This decision is controlled by our identical decision involving the same protester in *Dixon's Termite and Pest Control, Inc.*, CAB No. P-0659, Aug. 7, 2002, 50 D.C. Reg. 7453, 7454. WASA's Motion to Dismiss is GRANTED and the protest is DISMISSED for lack of jurisdiction.

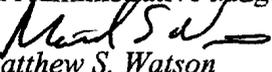
SO ORDERED.

DATE: May 4, 2005


/s/ Warren J. Nash
WARREN J. NASH
Administrative Judge

CONCURRING:


/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge


/s/ Matthew S. Watson
MATTHEW S. WATSON
Administrative Judge

the presence of the auctioneer.² Although such sales took place on negotiated terms after the auctioneer had completed calling for bids (Chisley Dep. 33), they were listed in the auction records as though the sales had been made by the auctioneer. (*Id.* 34). Such negotiated transactions were made below the minimum auction price and were sometimes made for groups of unsold vehicles. (*Id.* 118).

The District argues, in essence, that because neither the contract, nor any written agency policy, establishes a minimum bid price for the vehicles, the District was free to arbitrarily determine the salability of each vehicle. As a consequence, the District argues, AnA cannot demonstrate how many vehicles it should have received and is therefore not entitled to compensation. (Opposition, 8). The District further argues that the vehicles were sold at auction meeting the terms of the contract, even though sold outside the presence of the auctioneer because bidders in attendance at the auction were advised of the possible sales. (Respondent's Opposition to Appellant's Statement of Material Facts ¶¶ 14 and 16).

The District's arguments are incorrect as to both positions. The absence of an objectively determinable basis for quantifying AnA's entitlement to vehicles, as the District alleges, would render the contract invalid for lack of consideration. The Board presumes that contracts are valid. The Board concludes, based on the District's undisputed normal business practice, that the contract may reasonably be read to establish a \$50 minimum price. AnA is entitled to compensation for every vehicle sold by the District for less than \$50.

Alternatively, even if the District was correct that no minimum sales price is established, the vehicles sold for less than \$50 were not sold in the presence of the auctioneer. The contract requires the District to sell unclaimed vehicles "at public auction." Vehicles sold outside the presence of the auctioneer, even if their availability is publicly announced in the presence of the auctioneer, are not sold "at public auction." AnA is entitled to compensation for every vehicle sold outside a public auction. It is undisputed that the vast majority of vehicles sold for under \$50 were sold outside the presence of the auctioneer and, to the extent that vehicles were sold for under \$50 in the presence of the auctioneer, the District, due to its own record keeping system cannot identify such vehicles. For this reason AnA is alternatively entitled to damages for every

² The District has been less than forthright in responses to discovery. No mention is made in the District's answer of any vehicles which were "passed over" being sold for less than \$50 after the close of the auction. In fact, the number of vehicles sold for less than \$50 dwarfs the number of vehicles auctioned at a later date by a factor of over 17 to 1. The District provided a spreadsheet prepared by Stephen Chisley purporting to list all vehicles sold for under \$50 and all vehicles transferred to future auctions. Of the 3,213 vehicles listed, only 180 were shown as transferred to later auctions (Chisley Dep. 50); the bulk of the remainder appear to have been sold outside of the presence of the auctioneer. The District mischaracterizes the Chisely testimony when it claims that "Hundreds of vehicles were sold for less than \$50 by the auctioneer during the auction." (Opposition ¶ 13). Ms. Jones testified that auctioneers never accepted below-minimum bids, but rather passed vehicles which did not receive the minimum opening bid and did not go back to those vehicles. (Jones Dep. 39). Ms. Holmes-Smith testified that she never "actually saw" an auctioneer accepting a bid below the minimum opening bid, but had "heard" that it had happened. (Holmes-Smith Dep. 18). Based even on this hearsay, Ms. Holmes-Smith stated that such sales happened "very seldom." (*Id.* 19). In fact, Mr. Chisely specifically testified that there is no way to tell whether a vehicle was sold by the auctioneer or after the auctioneer passed the vehicle. (Chisley Dep. 34).

vehicle sold for less than \$50 as being sold in breach of the contract requirement that all vehicles be offered for sale at public auction.

The District concedes that 3,213 vehicles were either sold for less than \$50 or transferred to future auctions. The District has not disputed AnA's valuation of \$75 per vehicle, it has merely objected to the nature of AnA's proof. The Board therefore grants partial summary judgment to Appellant and awards damages of \$62.50 (\$75, less the \$12.50 contract purchase price) for each of 3,213 vehicles sold for less than \$50 or transferred to future auctions, totaling \$200,812.50.

DISCUSSION

Evidentiary Standard

Summary judgment should be granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Prince Construction Co., Inc.*, CAB No. D-1011, July, 15, 2003, 50 D.C. Reg. 7518, citing, *RDP Development Corp. v. District of Columbia*, 645 A.2d 1078, 1081 (D.C. 1994); see also, *Moorehead v. District of Columbia*, 747 A.2d 138, 143 n.7 (D.C. 2000), citing, *Beegle v. Restaurant Management, Inc.*, 679 A.2d 480, 483 (D.C. 1996).

A party opposing summary judgment may not rely on "mere allegations or denials" in its opposition to a movant's motion for summary judgment. See Super. Ct. R. 56(e). Rather, the non-movant must demonstrate specific facts showing a "genuine issue for trial." (*Id.*) "Mere conclusory allegations on the part of the non-moving party are insufficient to create a genuine issue of material fact." *W.M. Schlosser Co., Inc.*, CAB No. D-0903, Sept. 13, 1994, 42 D.C. Reg. 4824. With regard to facts which are peculiarly within the knowledge of a party, that party may not create a dispute of fact by conflicting testimony of its own witnesses.

The Superior Court Rules of Civil Procedure recognize that a corporate party can only speak through individuals and provides that a corporate party may be required to designate an individual who speaks on its behalf. Rule 30(b)(6). "The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose." Super. Ct. R. 32(2). The District's representation that its employee, Stephen Chisley, is "[t]he most knowledgeable person about the process and the records" (Opposition 9) is the equivalent of a Rule 30(b)(6) designation and the Board therefore accepts as conceded by the District the facts as stated in Mr. Chisley's sworn deposition and the "definitive spreadsheet of all vehicles sold for less than \$50 or transferred to subsequent auctions," which Mr. Chisley prepared after having "personally reviewed each and every statistic sheet for the period in question, and compared that information to what was in the Blue Plains computer system." (*Id.*)

Minimum Price

It is an elementary principle of contract law that there can be no valid contract unless there is mutual consideration. (Restatement, Second, Contracts § 17). In performance of the contract, AnA gave valuable consideration by removing vehicles from the streets and delivering the vehicles to Blue Plains. The District's position is, essentially, that the contract lacks an objective method of determining the vehicles to which AnA is entitled as compensation. The final decision of the contracting officer stated:

The agreement between AnA and the District is for the purpose of disposing of junk and/or unsaleable vehicles. The term unsaleable is defined in section 2, Definitions as "a vehicle which is not sold at Department of Public Works public auction."

The contract does not mention a minimum price at which the District is required to sell the vehicle before the vehicle is determined to be unsaleable, nor does the contract mention that vehicles not sold at one auction are to be automatically designated as "unsaleable." The District as the owner of the abandoned and junk vehicles has the exclusive right to determine the final price for which it will sell a vehicle and to determine when a vehicle is classified as "unsaleable."

While this statement is absolutely correct in the abstract, entering into a bilateral contract for the disposal of vehicles may contractually limit the District's right to determine unsalability. The Board presumes good faith on the part of the District and the contractor in entering into the contract. AnA obligated itself to provide, and the District received and accepted, a valuable service, that is, pick up of vehicles from the streets of the District and delivery of those vehicles to the auction lot at Blue Plains. The assertion by the District that it has the exclusive right to determine which vehicles will be sold to AnA cannot be accepted since it would negate any obligation of the District in consideration of AnA's promise and void the contract.

As formulated in the final decision, the contracting officer appears to have reserved to himself the right to arbitrarily determine AnA's compensation. The contracting officer appears to have arbitrarily determined the number of vehicles for which AnA was entitled to damages. Although the final decision stated AnA's right to compensation for 245 vehicles, neither the final decision, nor the District's pleadings, shed any light on the derivation of the number.

The Board concludes as a matter of law that the subject contract would be invalid for lack of consideration unless a minimum sales price to determine unsalability was intended by the parties. As a general rule of construction, the law presumes the validity of contracts, 6A A. Corbin, *Contracts* §§ 1499, 1533 (1962). Ambiguously worded contracts should not be interpreted to render them invalid where the wording lends itself to a logically acceptable construction that renders them valid. *Walsh v. Schlecht*, 429 U.S. 401, 408 (U.S., 1977); see also, Restatement, Second, Contracts, § 203. It is a rule of interpretation that, where a contract is fairly open to two constructions, by one of which it would be valid and the other invalid, the former must be adopted. *Hobbs v. McLean*, 117 U.S. 567, 576 (U.S. 1886).

Although a minimum price is not stated expressly in the contract or in law or regulations, there is no genuine issue of fact that the understood minimum price established at the beginning of performance of the contract was \$50. The District now attempts to distinguish the \$50 price as an "opening" price for bidding, rather than a "minimum" price for sale. It is clear that at the time of contracting the District understood the so-called "opening" price to be a minimum price. Interrogatory No. 7 of Appellant's first set of interrogatories asked the District to "[i]dentify and/or describe in detail the practices and procedures pursuant to which DPW conducted the Auctions. ..." The District responded, in part:

The auctioneer begins the sale by announcing the sale number of the vehicle to be auctioned and typically asks for an opening bid of \$50. Customers place bids on the vehicle by lifting up their bidder's card as the auctioneer "cries" escalating prices for the vehicle, and this process continues up to the highest bidder. *If no one acknowledges the opening bid, the vehicle is passed over and either auctioned at a latter date or sold to the scrap contractor.* [emphasis supplied]

Contrary to the District's statement in its Opposition that there was "no minimum opening bid," (at 6), the evidence is unambiguous that there clearly was an *understood* minimum bid. Judy Holmes-Smith, Lead Property Control Specialist in charge of the storage and auction Branch (Holmes-Smith Dep. 5) testified as follows:

Q. Are you familiar with what a minimum bid is?

A. Yes.

Q. Did you use it at the DPW, at auctions in 1998, 1999?

A. Yes, we did.

Q. Based upon your best recollection today, what was that minimum bid that was normally used in 1998, 1999.

A. Fifty dollars.

(*Id.* 15-16)

Cynthia L. Jones, supervisory property control specialist at the Blue Plains impoundment lot at the time of contract performance (Jones Dep. 8) and subsequently a "certified public auctioneer" (*Id.* 31) described the auction process:

Q. You come to a car, you don't get the opening bid, what do you do with that car?

A. We say pass.

Q. Pass the car?

A. We go to the next vehicle.

Q. And then you continue on until you come to the last vehicle?

A. Exactly.

Q. And you never go back to the last car?

A. No we do not.

(*Id.* 39).

DISTRICT OF COLUMBIA REGISTER

The possibility that an auctioneer would only “very seldom,” (Smith Dep. 19), or “occasionally,” but “not frequently,” (Chisley Dep. 118), accept a bid below the stated opening bid confirms, rather than negates, the conclusion that \$50 was understood as the minimum acceptable bid price. The Board concludes that, based on the District’s normal business practice, a minimum auction sales price of \$50 was intended by the parties to the contract.

Sale at Public Auction

Apart from the minimum sales price implicit in the contract, AnA is entitled by the express terms of the contract to purchase at a bargain rate every vehicle delivered by it and “not sold [by the District] at public auction.” (Scope of Work ¶ 2.4). The term “public auction” used in the contract has a clear meaning both in common usage and in law. A sale at public auction must be in the presence of the auctioneer. Indeed, in nongovernment transactions, a sale alleged to be at public auction outside of the presence of a licensed auctioneer might subject the seller and the auctioneer to criminal prosecution. The very first section of the District’s commercial practice regulations dealing with “public auctions” provides:

No person or corporation shall offer for sale, sell, or cause to be offered for sale or sold, any real or personal property at public action in the District of Columbia, unless that sale is cried by a duly licensed auctioneer.

16 DCMR § 1100.1. The regulations further provide:

No licensed auctioneer shall permit any other person or corporation to hold or conduct any auction sale in his or her name.

Id. § 1101.2. Criminal penalties are provided for violation of these regulations. *Id.*, § 1106. The District’s interpretation of the “public auction” requirement in the contract as including sales made outside the presence of the auctioneer after the “crying” of the auction was complete (Respondent’s Opposition to Appellant’s Statement of Material Facts ¶¶ 14 and 16) would permit improper sales not cried by the auctioneer and further permit the government to make sales in the name of the auctioneer, both of which would violate the public auction regulations. Although consumer regulations may not be directly applicable to government action, without some persuasive showing of authority, the Board cannot interpret a contract to allow the government to act in a manner which would be clearly improper if undertaken by a private party. The Board also notes that the District, in apparent recognition of the requirements of a public auction, utilized only “certified auctioneers” to conduct the auctions and followed commercial auction procedures. (Jones Dep. 35-36).

As noted above, vehicles which did not receive the minimum bid were “passed” by the auctioneer. Such vehicles were sold after the auctioneer finished public bidding, (Chisley Dep. 32), in the “customer service office.” (Jones Dep. 44). By definition, any vehicle sold outside of the presence of the certified auctioneer was “not sold at public auction.”³ Failure to sell such vehicles to AnA was thus a breach of contract for which AnA is entitled to damages.

³ The District’s record keeping system does not distinguish between sales properly made by the auctioneer and sales made outside the auctioneer’s presence. (Chisley Dep. 34-37; Jones Dep. 44).

Number of vehicles wrongly withheld from AnA

The contracting officer determined that AnA was entitled to damages for 245 vehicles. Consideration of this matter is hindered because the District is unable to offer any cogent explanation of the contracting officer's decision. Since the decision appealed from gave no indication as to how the contracting officer decided that AnA was entitled to damages for failure to deliver 245 vehicles to it, AnA sought through interrogatories and depositions to ascertain the reasoning. Interrogatory 10 provided:

State the basis for the Contracting Officer's ("CO") contention, in his Final Decision, that AnA is entitled to compensation for only 245 of the vehicles that were not sold at the original Auction at which they were offered but were transferred to a subsequent Auction.

In response the District stated:

... Although the Contracting Officer's Final Decision ("COFD") dated April 14, 2002 states that AnA is entitled to some compensation for 245 vehicles, the decision was not intended to imply that these vehicles were once sold at an auction and subsequently transferred to another auction. The District's position is that AnA was entitled to 245 vehicles that were disposed of by the District outside of its agreement with AnA. AnA is entitled to compensation for the 245 vehicles only because these vehicles were sold to entities outside of the bidding process and therefore they fell outside of the District's agreement with AnA.

At best, the answer is disingenuous. Thousands of vehicles were sold to others outside the bidding process. Although District personnel could identify the transactions for which the contracting officer determined that AnA was entitled to damages, the individual who provided information to the contracting officer for his final decision had no recollection of why the determination was limited to those transactions. (Chisley Dep. 92-93 and 103). The District's pleadings similarly fail to give any rationale supporting the contracting officer's decision.⁴

⁴ The District merely asserts in its opposition to AnA's claim that "because Appellant has failed to show a 'minimum price' below which the District should not have sold vehicles to anyone other than Appellant, Appellant cannot therefore demonstrate how many vehicles it should have received." The District's analysis is not a sufficient defense to a motion for summary judgment. In essence, it is that District's position that the contract which the District drafted was deficient and that the District is therefore entitled to deny any compensation to the contractor. Further, the District will not reveal how the actual determination was reached. In its Opposition to Appellant's Statement of Undisputed Material Facts, the District itself expresses uncertainty by stating its answer in hypothetical form, Paragraph 23 states:

The District objects of paragraph 23 of the ASUMF, in part because of improper characterization and argument. Mr. Chisley, in fact, did explain how the figure of 245 vehicles *might* have been calculated. . . . (245 figure *could* be achieved by adding 86 vehicles to 159 vehicles, two group sales to bidders on the two dates referenced in [Mr. Chisley's] e-mail) . . . (The only data I *could* have reviewed was those dates [November 16 and December 7, 1999] that are listed [in the [Chisley] e-mail] for those particular bidders.)"

(continued on next page)

Mr. Chisley was, in fact, the source of the 245 vehicle figure, which he admitted upon being shown documents he prepared in response to a request from Tara Sigamoni on behalf of the contracting officer. In order to respond to AnA's initial claim, Ms. Sigamoni asked by email, in part, for the following information:

1. How many vehicles were sold to entities other than AnA towing from 4/15/98 to 4/14/00 (upon conclusion of the auction). . . .⁵

Mr. Chisley responded by email:

1. There were two-hundred and forty five (245) vehicles that were sold to entities other than AnA towing from 4/15/98 through 4/14/00. November 16, 1999, 86 vehicles were sold for \$15 each, totaling \$1,290 to J & T Auto Wreckers. On December 7, 1999, 159 vehicles were sold for \$20 each, totaling \$3,180, to Friendly Motors & Parts.

Although Mr. Chisley advised the contracting officer that 245 vehicles were improperly sold "from 4/15/98 through 4/14/00," in his deposition he admitted, without explanation, that the only sales data which he "reviewed was those dates that are listed [November 16 and December 7, 1999]. . . for those particular bidders [J&T and Friendly]." (Dep. 96). Mr. Chisley was unable to

(Footnote 4 continued)

Mr. Chisley was not forthcoming in his deposition. Initially he gave the following answers:

- Q. Did you have any role in gathering any information about 245 vehicles which ANA should have received that it did not get?
- A. No.
- Q. You had none whatsoever?
- A. No.
- Q. Do you know where the 245 number came from?
- A. Not particularly, no.

* * *

- Q. Do you know how the number 245 was arrived at?
- A. No I do not.

(Dep. 92-93).

⁵ The formulation, "upon the conclusion of the auction," appears to confirm that vehicles were sold outside of the "public auction."

give any reason why the two specific dates or sales were chosen (Dep. 102-103) even when asked leading questions by his own counsel.⁶

Mr. Chisley was the sole source of the contracting officer's determination of the number of vehicles which AnA was entitled to purchase. (Dep. 103). The District has not named any other knowledgeable person. Mr. Chisley now admits that his original computation was incorrect and that if he were providing the information today he "would probably list almost the same spreadsheet" as was submitted as Exhibit 2. (Dep. 103). As the designated representative of the District, the Board accepts as conceded the total number of vehicles on the spreadsheet prepared and submitted by Mr., Chisley. (Dep. 57 and Dep. Ex. 2). AnA is entitled to compensation for 3,213 vehicles.

Damage for each vehicle wrongfully withheld.

AnA moved for judgment for damages of \$75 for each vehicle improperly sold or transferred, representing the price which it received during the contract period for sale of junk vehicles, for each of the vehicles which it claimed it was entitled to purchase, but which were not offered to it. The District did not offer any evidence disputing the AnA sales price for junk vehicles as a measure of damages for failure to receive vehicles to which AnA was entitled. The District argues only that AnA did not submit bills of sale and that AnA's submission of the price through sworn depositions was insufficient. The District however does not allege, nor does it

⁶ Questioning by District counsel:

Q. One final question, Exhibit 13 [Chisley email]. Directing your attention, again on page 2 down at the bottom, paragraph one, that was the question that Tara Sigamoni had directed to you regarding AnA's claims, is that correct?

A. Yes

Q. Let me read the first sentence, quote, "How many vehicles were sold to entities other than AnA Towing from 4/15/98 through 4/14/00" Now, Plaintiff's Exhibit 2 shows over 3200 vehicles, is that correct?

A. Correct.

Q. Could it be that the parenthetical after the first sentence of paragraph one upon conclusion of the auction could be how that number was reduced to 245?

A. Yes. Mm-hmm.

Q. Can you tell me how you got that number 245, if you recall, how you arrived at that number from the 3,000, whatever, that went for less than \$50.

A. The particular dates I noted in the e-mail, those are probably dates that when we just didn't give the vehicles to AnA for whatever reason. I'm not sure what the exact reason is, but it has to be something why November 16th, '99 and December 7th, those two particular dates are the only dates that are specified there. And I can't really recall at this time what the reasoning was.

Q. Could it have been there were the large 86 vehicles to J&T and 159 to Friendly, could they have been sold as a group to each of those bidders at the conclusion of the auction?

* * *

A. It could be, yes.

Q. Do you know whether or not that was the case?

* * *

A. I can't recall at this time.

(Dep. 129-130)

point to any evidence showing that the price claimed to have been received by AnA is unreasonable. It does not appear that the District even attempted to determine the scrap value of vehicles during the contract period. (See Chisley Dep. 104-108). In the absence of any contrary evidence, the Board accepts the Appellant's sworn statements (Ingraham Dep. 19-22), as undisputed. The Board takes notice, however, that the contract obligated AnA to pay \$12.50 to the District for each vehicle received by AnA. Had the District delivered the improperly sold vehicles to AnA, AnA would have paid that amount per vehicle. The Board therefore grants summary judgment and awards damages to AnA of \$62.50 for each of 3,213 vehicles sold for less than \$50 or transferred to a future auction, totaling \$200,812.50 plus interest at the rate of 4 percent per annum from January 30, 2002, the date of AnA's claim to the District. (D.C. Code §§ 2-308.06 and 2-3302(b)).

SO ORDERED.

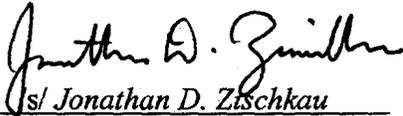
May 27, 2005



/s/ Matthew S. Watson

MATTHEW S. WATSON
Administrative Judge

CONCURRING:



/s/ Jonathan D. Zischkau

JONATHAN D. ZISCHKAU
Chief Administrative Judge



/s/ Warren J. Nash

WARREN J. NASH
Administrative Judge

during specified daytime hours each weekday. Urban is allowed to offer public parking in the parking spaces not reserved for the District during the workdays and during the hours not assigned for parking space use by the District government. Urban retains the revenue it generates from the public parking activities.

The dispute between Urban and the District centers on whether and to what extent District vehicles used parking spaces at the Reeves Center and the 1 Judiciary Square building in excess of the contract allotment, and whether District vehicles used parking spaces beyond the contract specified hours.

On June 16, 2004, during a telephone status conference with the parties, the Board denied an earlier District motion to dismiss the appeal or alternatively enter summary judgment on the basis that Urban had not properly submitted a claim to the District. The Board ruled that Urban's claim was adequate under District procurement law and that the District's failure to issue a contracting officer final decision constituted a deemed denial of Urban's claim. Furthermore, the Board found summary judgment inappropriate, as matters raised by the District involve disputed factual issues. (Order and Report on Telephone Conference, June 16, 2004). Urban advised the Board that it needed to revise and supplement its claim. On July 8, 2004, Urban submitted to the District a revised and supplemental claim. (AF Tab 8). By letter of July 21, 2004, the District requested documentary evidence supporting Urban's claim that District employees used parking spaces beyond the contract specified allotment and hours. (AF Tab 9). On August 13, 2004, Urban submitted additional supporting documentation. (AF Tab 10). Despite several extensions granted by the Board, allowing the District more time for the contracting officer to respond to the supplemental claim through a final decision, no final decision has ever been issued.

On December 6, 2004, the parties participated in another telephone conference with the Board. The District stated that the contracting officer would not issue any final decision because it was the District's position that the agreements are not covered by the Procurement Practices Act. The Board concluded that Urban could treat the District's new position as a deemed denial of its supplemental claim. Urban filed a supplemental complaint with the Board on December 3, 2004. On January 3, 2005, the District filed an answer to the supplemental complaint as well as a motion to dismiss for lack of jurisdiction, and Urban filed its opposition on January 21, 2005. On March 14, 2005 the District filed a motion to have the Board declare the contracts void *ab initio*. On April 6, 2005, Urban filed its opposition, and the District replied on April, 18, 2005.

DISCUSSION

A. Jurisdiction

The District contends that the Board lacks jurisdiction to hear this matter because real property is neither a good nor service covered by the PPA; and the procurement or disposal of an interest in real property is not covered by District procurement regulations. (District Motion to Dismiss, at 4). Further, the District notes that the Board's jurisdiction is limited to matters covered

by the PPA, and the PPA is only applicable to acquisitions for goods and services – not the procurement or disposal of real property.

We conclude that the lease agreements between Urban and the District were covered by the PPA at the time they were entered into by the parties. The PPA defines the term “acquisition” as:

the obtaining by contract of property, supplies, and services (including construction) by and for the District through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated, and includes the establishment of agency needs, the description of requirements to satisfy agency needs, solicitation of sources, award of contracts, contract financing, contract performance, contract administration, and those technical and management functions directly related to the process of fulfilling agency needs by contract.

D.C. Code § 2-301.07(1). Although each contract is entitled “Lease Agreement”, each provides for the acquisition of services for the District government. For example, paragraph 6 of the 1 Judiciary Square agreement states in relevant part:

6. Use of Leased Premises

Tenant agrees that it shall use the Leased Premises solely for operating a public parking garage Tenant shall stack-park vehicles, shall secure and store the vehicles’ keys, and shall move vehicles as necessary. . . . At the conclusion of Operating Hours for each day, Tenant shall ensure that the garage door at the entrance to the Leased Premises is securely closed Tenant shall remove or cause to be removed from the Leased Premises all unauthorized vehicles remaining after at the conclusion of each day’s hours of operation. . . .

....

At all times during the Operating Hours, Tenant shall provide the following on-site staffing: one facility manager, two facility attendants, and one zone manager. During the first two months of the Term, Tenant shall provide at least three additional persons to staff the Leased Premises

Tenant agrees that the District shall be entitled to two hundred-forty (240) parking spaces, at no charge to the District, for parking of vehicles operated by District government employees

(AF Tab 2, at 4-5). Clearly, the agreements are contracts by which the District was to obtain parking garage management and maintenance services, including the management of parking for District vehicles in the contract-specified allotments and weekday hours. Thus, these contracts were District government “acquisitions” for “the obtaining by contract of property, supplies, and services . . . by and for the District through purchase or lease” as defined in D.C. Code § 2-301.07(1).

The District contends that the agreements with Urban are "out-leases" which are beyond the scope of the PPA. The District relies upon our decision in *McMillan Ltd. Partnership*, CAB No. P-0301, Mar. 6, 1992, 39 D.C. Reg. 4466. In *McMillan*, a controversy arose respecting an RFP whereby the District would lease land to be developed including housing, community facilities, open space, and commercial development. The District, as in the instant case, moved to dismiss the case on the ground that it concerned a solicitation by the District to out-lease real property which the District argued was beyond the Board's jurisdiction under the PPA. In *McMillan*, we denied the District's motion to dismiss, holding that we properly exercised jurisdiction because under the law a leasehold interest is treated as personal property, not real property in being. 39 D.C. Reg. at 4471-74. Thus, our holding in *McMillan* contradicts the District's contention in its present motion to dismiss. We have followed *McMillan* consistently. See *Potomac Capital Investment Corp., et al.*, CAB No. P-0383, Jan. 4, 1994, 41 D.C. Reg. 3885, 3893-94; *Black Entertainment Television*, CAB No. P-0436, Oct. 2, 1995, 44 D.C. Reg. 6394, 6402; *C. Payton Barton, Jr.*, CAB No. P-0638, May 4, 2001, 49 D.C. Reg. 3359, 3360-61.

We conclude that we properly exercise jurisdiction pursuant to the PPA over the agreements between the District and Urban.

B. Validity of the Agreements

In its second motion, the District contends that if the Board has jurisdiction over the lease agreements, the agreements are void *ab initio* because the 10-year agreements with Urban are multiyear contracts which were never approved by the City Council, and thus the agreements violate D.C. Code § 1-204.51(c)(3) (2001) and D.C. Code §§ 2-301.05a(a) and 2-301.05a(d) (2001). We conclude that none of these provisions are applicable to the agreements at issue here.

The key provisions are subsections (a) and (c) of D.C. Code § 1-204.51. Subsection (a) provides:

(a) Contracts extending beyond one year. – No contract involving expenditures out of an appropriation which is available for more than 1 year shall be made for a period of more than 5 years unless, with respect to a particular contract, the Council, by a two-thirds vote of its members present and voting, authorizes the extension of such period for such contract. Such contracts shall be made pursuant to criteria established by act of the Council.

This subsection contains the original language of section 451 of Title IV of the District of Columbia Self-Government and Governmental Reorganization Act of 1973 ("District Charter"), Dec. 24, 1973, 87 Stat. 803, Pub. L. No. 93-198, Title IV. Subsection (b) of D.C. Code § 1-204.51 authorizes Council approval of contracts exceeding \$1,000,000, and was added by Congress in section 304(a) of the District of Columbia Financial Responsibility and Management Assistance Act of 1995, Pub. L. No. 104-8, Apr. 17, 1995, 109 Stat. 151-152. Although this provision is not directly applicable here, it is relevant to note that this provision was promulgated by Congress to properly

authorize the Council to review and approve District contracts exceeding \$1,000,000. Prior to 1995, the Council had enacted legislation amending the PPA to provide Council review and approval of contracts exceeding \$1,000,000, but that legislation was struck down in *Wilson v. Kelly*, 615 A.2d 229 (D.C. 1992), where the court held that the Council may not limit the contracting authority granted to the Mayor by Congress under the District Charter. In 1995, Congress granted that review and approval authority to the Council in Public Law No. 104-8. In addition to granting the Council the authority, Congress also specifically authorized the Council to enact legislation for establishing criteria for implementing this new review and approval authority. The Council enacted amendments to the PPA, now codified at D.C. Code § 2-301.05a, specifying the *criteria* for implementing the Council's review and approval authority under D.C. Code § 1-204.51(b).

For *multiyear* contracts which exceed 5 years and involve expenditures out of an appropriation, the Council already had review and approval authority by virtue of section 451 of the District Charter, now codified at D.C. Code § 1-204.51(a) as quoted and discussed earlier. That provision requires two-thirds of the Council members present and voting to authorize such contracts exceeding 5 years.

In 1996, as part of the District of Columbia Appropriations Act of 1996, Congress authorized the Council to review and approve multiyear contracts of any duration exceeding 1 year. Pub. L. No. 104-134, § 134, Apr. 26, 1996, 110 Stat. 1321-92. That authority is codified at D.C. Code § 1-204.51(c) which provides:

(c) Multiyear contracts.

(1) The District may enter into multiyear contracts to obtain goods and services for which funds would otherwise be available for obligation only within the fiscal year for which appropriated.

(2) If the funds are not made available for the continuation of such a contract into a subsequent fiscal year, the contract shall be cancelled or terminated, and the cost of cancellation or termination may be paid from:

(A) appropriations originally available for the performance of the contract concerned;

(B) appropriations currently available for procurement of the type of acquisition covered by the contract, and not otherwise obligated; or

(C) funds appropriated for those payments.

(3) No contract entered into under this subsection shall be valid unless the Mayor submits the contract to the Council (in accordance with criteria established by act of the Council). The Council shall be required to take affirmative action to approve the contract within 45 days. If no action is

taken to approve the contract within 45 calendar days, the contract shall be deemed disapproved.

Just as in the case of subsection (b) of D.C. Code § 1-204.51, Congress specifically authorized the Council in subsection (c) to enact legislation for establishing criteria for implementing this review and approval authority for multiyear contracts. The Council's criteria for implementing its review and approval authority for multiyear contracts under subsection (c) are codified at D.C. Code § 2-301.05a, along with the criteria for reviewing and approving contracts exceeding \$1,000,000. The implementing criteria in D.C. Code § 2-301.05a cannot expand the Council's review and approval authority authorized by Congress in D.C. Code § 1-204.51. Indeed, D.C. Code § 2-301.05a itself references the Congressional legislation upon which Council authority is predicated:

(a) Pursuant to § 1-204.51 ("FRMAA"), prior to the award of a multiyear contract or a contract in excess of \$1,000,000 during a 12-month period, the Mayor (or executive independent agency) shall submit the proposed contract to the Council for review and approval in accordance with the criteria established in this section.

....

(d) After July 28, 1995, no proposed multiyear contract or lease and no proposed contract or lease worth over \$1,000,000 for a 12-month period may be awarded until after the Council has reviewed and approved the proposed contract or lease as provided in this section.

(e) After July 28, 1995, any employee or agency head who shall knowingly or willfully enter into a proposed multiyear contract or a proposed contract or lease in excess of \$1,000,000 without prior Council review and approval in accordance with this section shall be subject to suspension, dismissal, or other disciplinary action

Council review and approval authority for multiyear contracts, codified in subsections (a) and (c) of D.C. Code § 1-204.51, is limited to contracts involving District government expenditures out of appropriated funds. Because the Council's implementing criteria found in the PPA at D.C. Code § 2-301.05a cannot expand upon the Congressional grant of authority in D.C. Code § 1-204.51, the PPA provisions are similarly limited to multiyear contracts involving District government expenditures out of appropriated funds.

The agreements between Urban and the District at issue here are not contracts involving District government expenditures out of appropriated funds. The agreements with Urban required the District to make no expenditures to Urban. Rather, Urban was required to make monthly payments to the District for the right to provide the parking garage management and maintenance services, and Urban would generate revenue by charging the public for parking in the spaces not being used by the District government. Because these agreements between the District and Urban are not subject to D.C. Code § 1-204.51, the contracting agency was not required in 1999 to submit the agreements to the Council for review and approval and thus the agreements are not invalid on

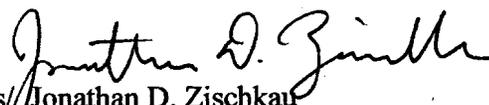
that basis. Accordingly, we deny the District's motion to declare the agreements void *ab initio*.

CONCLUSION

We deny the District's motion to dismiss for lack of jurisdiction because the contracts with Urban are for the acquisition of services covered by the PPA. We deny the District's motion to declare the contracts void *ab initio* because the multiyear agreements with Urban do not involve District government expenditures out of appropriated funds, and thus did not require Council review and approval pursuant to D.C. Code §§ 1-204.51 and 2-301.05a.

SO ORDERED.

DATED: June 2, 2005


/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge

CONCURRING:


/s/ Matthew S. Watson
MATTHEW S. WATSON
Administrative Judge


/s/ Warren J. Nash
WARREN J. NASH
Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

SAGA Adventures, Inc.)
) CAB No. P-0704
 Under Solicitation RFP No. CFSA-03-R-0005)

For the Protester: Sherri L. Wyatt, Esq. For the Government: Howard Schwartz, Esq.,
and Talia S. Cohen, Esq., Assistant Attorneys General.

Opinion by Administrative Judge Matthew S. Watson, with Chief Administrative Judge
Jonathan D. Zischkau and Administrative Judge Warren J. Nash, concurring.

ORDER

LexisNexis Filing ID 6042267

SAGA Adventures, Inc. filed a protest on March 24, 2005, against awards made as of July 1, 2004, under a solicitation issued by the Child and Family Service Agency ("CFSA") for Independent Living Main Facilities Programs (Solicitation Line Item Number 0001CA) on the basis that SAGA was given insufficient time to obtain the required Independent Living Program License prior to award and that it was thus at a competitive disadvantage to other offerors who were given longer notice of the license requirement. The District moved to dismiss the protest as untimely. We agree with the District and dismiss the protest.

DISCUSSION

The solicitation was initially issued July 28, 2003, requesting submission of proposals no later than September 10, 2003. (§ L.3.1). The solicitation scheduled a bidders' conference on August 12, 2003. Amendment 1 to the solicitation was issued August 29, 2003. The amendment responded to questions asked at the bidders' conference, including notice of licensing requirements, and extended the date for submission of proposals to September 17, 2003. (§ T). SAGA submitted its proposal on September 17, 2003.¹ A current Independent Living Program ("ILP") license was not required to submit a proposal; however, such a license was required before award. (Agency Report "AR" Ex. 10).

¹ Protester asserts that it did not receive Amendment 1. The Board notes that this is unlikely since SAGA's proposal was filed on the extended due date. Whether or not SAGA received the amendment, however, is not material. "Normally, a prospective contractor bears the risk of not receiving a solicitation amendment, unless it is shown that the contracting agency made a deliberate effort to prevent the firm from competing, or even if not deliberate there is evidence (other than non-receipt by the protester) that the agency failed to provide the amendment after the firm availed itself of every opportunity to obtain it." (*Southern Maryland Restoration, Inc.*, CAB No. P-0459, Sept. 20, 1996, 44 D.C. Reg. 6503)

SAGA's proposal was in the competitive range, with deficiencies² noted in a letter dated November 24, 2003. SAGA corrected the deficiencies. On February 18, 2004, CFSA requested a Best and Final Offer from SAGA. On March 18, 2004, CFSA sent SAGA and all other offerors lacking an ILP license a letter indicating that within sixty (60) days of the date of the letter offerors needed to obtain a license for the Independent Living Program – Main Facilities Congregate Care. (AR Exs. 4 and 6). On May 27, 2004, SAGA sent CFSA a letter requesting an extension of time to comply with the licensing requirement. (AR Ex. 7). CFSA never responded to the request. However, since the license was not granted to SAGA until August 5, 2004, well after the requested extension would have run and after award of the contracts was determined, the issue of the requested extension is moot.

SAGA learned sometime before July 8, 2004 that it would not be awarded a contract. On July 8, 2004, SAGA sent the Contracting Officer a letter requesting that CFSA reconsider its decision not to award a contract to SAGA, specifically referencing the limited time it was allowed to obtain the ILP license. (AR Ex. 8). On August 11, 2004, SAGA sent Robert Bobb, City Administrator, a letter in which SAGA alleges mistreatment by CFSA. (AR Ex. 9). On August 18, 2004, CFSA sent SAGA a letter specifically advising SAGA that its ineligibility for award was based on its failure to timely obtain the required license³. (AR Ex. 10).

On December 23, 2004, SAGA made a FOIA request on the contract awards and on March 14, 2005, CFSA provided the requested FOIA documents. (AR Ex. 13). On March 24, 2005, SAGA filed the instant protest with the Board.

The essence of SAGA's protest is "the disparity in treatment of Protester [with regard to the requirement for an ILP license] in comparison with the other Offerors similarly situated." (Protest ¶ 29). Although the FOIA response to SAGA included some specific details as to alleged disparate treatment, namely that other proposers may have been reminded of the license requirement earlier⁴ than SAGA, which permitted other proposers to timely obtain the required license, while SAGA was unable to obtain the license before contract award, the basis of the protest was clearly known to SAGA on July 8, 2004, when it complained to the contracting officer as to the unfairness of the time it was allowed to obtain the requisite license. SAGA repeated these complaints to the City Administrator in a letter dated August 11, 2004. SAGA

² Although the District was aware that SAGA had not applied for the proper license (Protest Ex 11), the deficiency letter did not mention this failure. While technically correct that the lack of the license was not a "proposal" deficiency, since the license was not required until award, the agency could have improved competition by advising proposers of the licensing requirement.

³ It is not clear why CFSA did not send formal notification of the rejection of SAGA's proposal until January 14, 2005. (AR Ex. 12).

⁴ The evidence included in the FOIA response was a copy of a memo apparently written in November 2003 purporting to indicate that a group of proposers, including SAGA, had been sent notice that the ILP license was required. (Protest Att. H). SAGA alleges that it did not receive this notice. The contracting officer has, contrary to the memo, denied that such notice was ever sent, asserting that the only notice to any contractor was sent March 18, 2004. (Affidavit ¶ 4, AR Ex. 3).

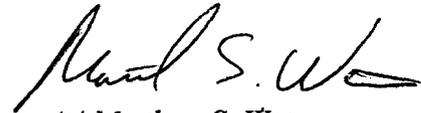
was specifically advised by letter dated August 18, 2004 that it was ineligible for award due to its failure to have the license by July 1, 2004. (AR Ex. 10). At that point it was clear that SAGA would not receive an award of a contract.

To invoke the jurisdiction of the Board, "protests shall be filed not later than 10 business days after the basis of protest is known or should have been known, whichever is earlier." (§2-309.08(b)(2)). To begin the statutory jurisdictional time period, such knowledge need only be sufficient information upon which to base a protest. "[A] protester may not wait until it obtains additional information under FOIA pertaining to the protest before filing if it is already reasonably aware of the protest basis. *Sperry Corp.*, B-225492; B-225492.2, Mar. 25, 1987, 87-1 CPD ¶ 341." *Oak Ridge Associated Universities*, Recon. B-238411.2, May 31, 1990, 90-1 CPD ¶ 513.

SAGA knew that it would not be awarded the contract and knew the basis of its protest no later than its receipt of the contracting officer's letter of August 18, 2004. Its protest filed over 7 months later was clearly untimely. The protest is dismissed.

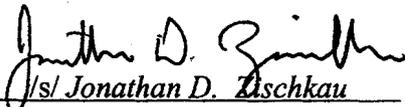
SO ORDERED.

June 17, 2005



/s/ Matthew S. Watson

Administrative Judge



/s/ Jonathan D. Zischkau
Chief Administrative Judge



/s/ Warren J. Nash
Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

B&B SECURITY CONSULTANTS, INC.)

Under RFP No. POAM-2004-R-0015-DW)

) CAB No. P-0708
)

For the Protester, B&B Security Consultants, Inc.: Robert Klimek Jr., Esq., Klimek, Kolodney & Cassale, P.C. For the Government: Howard Schwartz, Esq., and Jon N. Kurlish, Esq., Assistant Attorneys General.

Opinion by Administrative Judge Matthew S. Watson, with Chief Administrative Judge Jonathan D. Zischkau and Administrative Judge Warren J. Nash, concurring.

**ORDER DENYING PROTESTER'S MOTION CHALLENGING
THE CPO'S OVERRIDE OF THE AUTOMATIC STAY OF PERFORMANCE**

LexisNexis Filing ID 6067890

B&B Security Consultants, Inc., has filed a motion challenging the determination by the District's Interim Chief Procurement Officer ("CPO"), pursuant to D.C. Code § 2-309.08(c)(2) to proceed with performance under a recently awarded contract for security services during the pendency of this protest. For the reasons discussed below, we conclude that the CPO's determination should be sustained.

BACKGROUND

The subject solicitation is for city-wide security services. It is undisputed that it is vital to provide guard services at District facilities and that the District cannot allow the provision of guard services to lapse, even for a short period of time. (Solicitation § I.8.1). The solicitation covering guard service for 77 locations divided into 4 award groups was issued by the Office of Contracts and Procurement ("OCP") on August 4, 2004. Proposals were received September 7, 2004. Award was made to a single contractor for all 4 award groups on May 16, 2005. The services solicited had been previously provided under long-term contracts by 3 contractors, with the majority provided by Hawk One Security, Inc., the awardee under this solicitation, and the remainder divided between Atlas International Security, Inc., and B&B, the protester. The previous long-term contracts expired some months ago. Pending award of a new long-term contract, OCP continued procurement of the services through a series of short-term contracts with the previous long-term contractors, the most recent of which expired May 31, 2005. (Findings ¶ 2).

The protester was immediately aware of the new contract award. On May 17, 2005, the contracting officer asked B&B to cooperate with transition of the guard services which B&B was then performing to Hawk One, the awardee of the protested new long-term contract, at the conclusion of the final short-term contract. (Appeal File Ex. 9). On May 27, 2005, B&B filed this protest. Since the protest was filed within 11 days of contract award, an automatic stay of performance went into effect. D.C. Code § 2-309.08(c)(1) On June 1, 2005, the CPO signed a

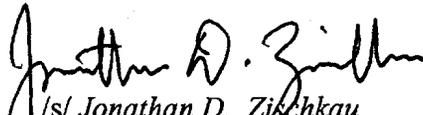
determination and finding for the contract to proceed¹ which B&B timely challenged on June 7, 2005.

In *Whitman-Walker Clinic, Inc.*, CAB Nos. P-0672 and P-0674, July 25, 2003, 50 D.C. Reg. 7521, the Board discussed the standards to be applied in reviewing a determination to permit performance of a contract during the pendency of a bid protest. We stated that "[b]ecause the stay provision is meant to provide effective and meaningful review of procurement challenges before the protested procurements become *faits accomplis*, [in deciding whether to overturn the Chief Procurement Officer's determination to lift an automatic stay of performance] we consider whether there will be irreparable harm to the protester and whether a corrective award may later be made if the protester is successful on the merits of its protest."

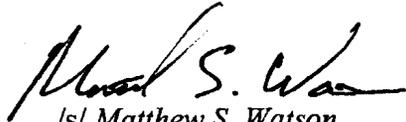
There is no allegation that the transition of the portion of performance not already held by Hawk pursuant to short-term contracts to the permanent contract was not made smoothly. There is also no indication that transition from Hawk One back to the protester would not be handled equally well if the protest is sustained. Indeed, the protester requests a retransfer of performance through a temporary contract with protester pending decision on the protest. Further, if the protest is sustained, there is no reason why a one-year contract, as solicited, could not be made to the protester. The Board sees no irreparable damage to protester caused by not suspending performance by the awardee. Accordingly, we deny B&B's motion challenging the CPO's determination to proceed with contract performance.

SO ORDERED.

June 22, 2005


/s/ Jonathan D. Zischkau
Chief Administrative Judge


/s/ Warren J. Nash
Administrative Judge


/s/ Matthew S. Watson
Administrative Judge

¹ Performance of the challenged contract apparently began at 12:01 am on June 1. The Board can only assume that the D&F, dated June 1, 2005, was signed at a later time during business hours. Although the Board believes that the determination required by the statute in order to proceed pending determination of a protest (D.C. Code § 2-309.08(c)(2)) should be executed *prior* to commencement of performance, in light of the fact that the protest was filed on Friday, May 27, with Monday, May 30, being the Memorial Day Holiday, leaving just one business day between the protest and the expiration of the temporary contracts, the Board will not take exception to the timeliness of the determination.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

WATKINS SECURITY AGENCY OF D.C., INC.)

Under Contract No. POFA-20050D-003)

CAB No. P-0709

For the Protester, Watkins Security Agency of D.C., Inc, Dirk Haire, Esq., Holland and Knight LLP. For the Government: Howard Schwartz, Esq., and Jon N. Kurlish, Esq., Assistant Attorneys General.

Opinion by Administrative Judge Matthew S. Watson together with Chief Administrative Judge Jonathan D. Zischkau, and Administrative Judge Warren J. Nash, concurring.

**ORDER DENYING PROTESTER'S MOTION CHALLENGING
THE CPO'S OVERRIDE OF THE AUTOMATIC STAY OF PERFORMANCE**

(LexisNexis Filing ID 6107674)

Watkins Security Agency of D.C., Inc., has filed a motion challenging the determination by the District's Interim Chief Procurement Officer ("CPO") pursuant to D.C. Code § 2-309.08(c)(2) to proceed with performance under a recently awarded contract for public school security services during the pendency of this protest. For the reasons discussed below, we conclude that the CPO's determination should be sustained.

BACKGROUND

On September 7, 2004, the Office of Contracts and Procurement issued a solicitation on behalf of the Metropolitan Police Department requesting proposals to perform security services at 167 public schools currently being performed by the protester under a contract with the District of Columbia Public Schools ("DCPS"). The change in the contracting agency undertaking the solicitation was mandated by the School Safety and Security Contracting Procedures Act of 2004, D.C. Law 15-350, April 13, 2005, which provided that "[r]esponsibility for the issuance of a Request for Proposals for any security guard or security related contract for DCPS for a contract term to begin June 30, 2005, or later shall be transferred to the MPD as of August 2, 2004." On June 1, 2005, the MPD contract was awarded to Hawk One Security Inc. Watkins protested the award on June 8, 2005. Since the protest was filed within 11 days of contract award, an automatic stay of performance went into effect pursuant to D.C. Code § 2-309.08(c)(1). On June 9, 2005, the CPO signed the Determination and Findings to Proceed with Award pending decision on the protest.

On June 17, 2005, the protester timely filed a Motion to Challenge the Determination and Finding to Proceed ("D&F") alleging that the D&F does not "provide substantial evidence that urgent and compelling circumstances that significantly affect interests of the District [that] will not permit waiting for a decision of the Board concerning the protest." (Motion 3-4). In addition, protester asserts that it will be irreparably harmed if the stay is not lifted.

DISCUSSION

The contract award protested is for provision of security services in and around public school buildings. There is no question that providing for the safety of public school students is a compelling and urgent requirement of the government. While the CPO might have stated the essential requirement that public school students and public school buildings require a constant security presence in his D&F," the discussion in the D&F of the transition of the service without any gap between the completion of the prior contract and the inception of the new contract unambiguously expresses the urgent and compelling safety justification for proceeding with the contract. Protester's reliance on the Board's recent decision in *Arrow Construction Co., LLC/W.M. Schlosser Co., Inc., Joint Venture*, CAB No. P-0692, Oct. 6, 2004, in support of its position as to the lack of substantial evidence supporting the decision to proceed is not well founded. (Motion at 3) In *Arrow*, the Board held that the Determination to proceed must be made by the District's CPO established by D.C. Code § 2-301.05. (*Id.* 3). The Board therefore refused to sustain the Determination to Proceed in *Arrow*, not on the basis of the evidence, but rather because the determination was made by the Chief Procurement Officer of the Public Schools, and not by the District's Chief Procurement Officer. In the instant matter, the determination was made by the appropriate District CPO.

Watkins' argument further confuses the compelling need test. The compelling need to proceed with a contract pending determination of a protest is an urgent and compelling need for the contract services, not a compelling need to contract with the awardee. As noted, it is clear that the safety of students and the security of public school buildings require uninterrupted security services. Watkins' argues, however, that, based on its own ability to provide the services either through a continuation of the existing contract or an emergency contract, there is no compelling reason to lift the stay to proceed with the awardee. For purposes of lifting the stay, once a compelling need for the services is shown, whether another contractor can also perform is irrelevant. In *Burnside-Ott Aviation Training Center, Inc. v. Department of Navy*, 1988 U.S. Dist. LEXIS 17606, 10-11, 1988 WL 179796, 35 Cont. Cas. Fed. (CCH) ¶ 75,586 (1988), the U.S. District Court for the District of Columbia considered a similar situation with regard to Navy pilot training:

In the Court's analysis, however, Burnside-Ott's argument is misplaced. Indeed, by admitting the "urgent and compelling" need for uninterrupted provision of the pilot training services, Burnside-Ott has conceded the validity of the Navy's finding. The finding required by CICA to override the automatic stay was that performance of the contract by any contractor was urgent and compelling. If the Navy could have lived without those services pending GAO's disposition of the bid protest, it would have been arbitrary and capricious to allow either Ford or Burnside-Ott to perform. The analysis is no different for incumbent, versus first-time contractors. Indeed, as counsel for Ford argues, nothing would prevent Ford from bringing an identical challenge were the situation reversed. Burnside-Ott, therefore, has no special, vested right to perform during the interim period once urgent and compelling circumstances have been found to lift the stay.

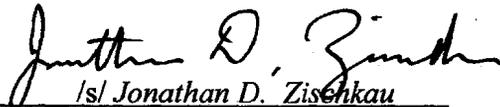
In *Whitman-Walker Clinic, Inc.*, CAB Nos. P-0672 and P-0674, July 25, 2003, 50 D.C. Reg. 7521, the Board discussed the standards to be applied in reviewing a determination to permit performance of a contract during the pendency of a bid protest. We stated that "[b]ecause

the stay provision is meant to provide effective and meaningful review of procurement challenges before the protested procurements become *faits accomplis*, [in deciding whether to overturn the Chief Procurement Officer's determination to lift an automatic stay of performance] we consider whether there will be irreparable harm to the protester and whether a corrective award may later be made if the protester is successful on the merits of its protest."

There is no allegation that the transition of performance of the services from the incumbent to the awardee cannot be made smoothly. There is also no indication that transition from the awardee back to the protester would not be handled equally well if the protest is sustained. Further, if the protest is sustained, there is no reason why award of the full contract term, as solicited, could not be made to the protester. The Board sees no irreparable damage to protester caused by not suspending performance by the awardee. Accordingly, we deny Watkins' motion challenging the CPO's determination to proceed with contract performance.

SO ORDERED.

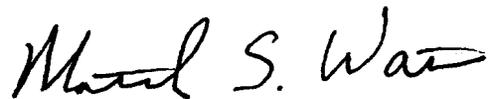
June 27, 2005


/s/ Jonathan D. Zischkau

Chief Administrative Judge


/s/ Warren J. Nash

Administrative Judge



/s/ Matthew S. Watson

Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

The Washington Center for Internships and Academic Seminars)	CAB No. P-0705
)	
Under RFP for the Renovation and Development of the Franklin School)	

For the Protester: Timothy J. Bloomfield, Esq., and Stuart R. Turner, Esq., Holland & Knight LLP. For the Government: Howard Schwartz, Esq., and Talia S. Cohen, Office of the Attorney General.

Opinion by Administrative Judge Warren J. Nash, with Chief Administrative Judge Jonathan D. Zischkau and Administrative Judge Matthew S. Watson, concurring.

OPINION

(Lexis-Nexis Filing ID 6134855)

The District of Columbia filed a motion to dismiss the instant protest on the grounds that the Board lacks subject matter jurisdiction over the protest. The Board denies the motion, concluding that it has subject matter jurisdiction over the protest.

BACKGROUND

On September 3, 2003, the District of Columbia Deputy Mayor for Planning and Economic Development (Deputy Mayor), on behalf of the Mayor, issued an RFP for the disposition and adaptive reuse of the Franklin School building located at 925 13th Street, NW, in downtown Washington. The RFP stated that 1) the District intended to select a development team that would redevelop the property, and 2) the District intended to negotiate with the winning proposer an Exclusive Rights Agreement ("ERA") that would allow the winner to lease the property from the District, and develop the property and collect the profits from any development. However, the RFP further stated that the District did not intend to sell the property to the winner and would not entertain any proposals that required the District to sell the property. The RFP set forth additional requirements for the proposed lease of the property, as follows:

- 1) The initial lease would extend for a period of ten years, and the initial term would be followed by five option periods of ten years each. At the end of the initial sixty years, the District would retain the right to extend the lease;
- 2) The winning proposer must adhere to the terms of the initial lease;
- 3) The District reserved the right to reappraise the property to its highest and best use;

4) The District retained the right to reappraise the value of the lease after 20 years, and any increase in ground rent would be proportional to any increase in value of the property; and

5) The District retained the right to make annual CPI (Consumer Price Index) adjustments after the tenth year.

The RFP set forth criteria to be used to evaluate the proposals. The RFP closed on October 31, 2003. Three offerors, including the Washington Center for Internships and Academic Seminars ("Washington Center"), submitted proposals. On March 11, 2005, the District informed the protester that the District did not intend to select the Washington Center proposal for award. Washington Center filed its protest on March 25, 2005. Washington Center requested a debriefing, which took place on April 12, 2005. On April 18, 2005, the District filed its motion to dismiss the protest.

DISCUSSION

This Board is an administrative agency created by the Procurement Practices Act of 1985 ("PPA") which is codified as Chapter 3 of Title 2 of the D.C. Code (2001 ed.), (§ § 2-301.01 to 2-327.03), and particularly, Subchapter IX (id. at § § 2-309.01 to 2-309.08). Jurisdiction of the Board shall be consistent with the coverage of . . . [the PPA] and [the exceptions provided in] § 2-303.20. . . ." D.C. Code § 2-309.03(b). The Board shall have only those powers conferred on it by statute, either expressly or by necessary implication. See, e.g., *Black Entertainment Television*, CAB No. P-0436, Oct. 2, 1995, 44 D.C. Reg. 6394; *Xerox Corp.*, CAB No. D-0979, Nov. 6, 1995, 44 D.C. Reg. 6406. In the portion of D.C. Law 8-257 which is codified at D.C. Code § 1-336 (1992) (D.C. Code 1-301.91), the Council expressly made the PPA competition requirements of D.C. Code § § 1-1183.3 and 1-1183-4 (D.C. Code § § 2-303.03 and 2-303.04 respectively) applicable to the Mayor's acquisition of "a leasehold interest in any building that is proposed to be leased for the predominant use by, or constructed for lease to and for predominant use by, the District government" D.C. Code § 1-336(h).

In its Motion to Dismiss, the District asserts that neither the RFP nor the resulting ERA is subject to the PPA, and that the Board lacks jurisdiction to hear the protest. In support, the District asserts that the facts of this protest do not comply with the four factor jurisdictional test set forth in our cases. Our precedent requires the Board to consider four factors in determining whether the Board should exercise jurisdiction: (1) the type of contract or agreement contemplated; (2) the nature of the agency conducting the solicitation; (3) the basis for the procurement or contracting authority; and (4) the statutory and regulatory scheme which controls the procurement or disposal being solicited. *McMillan Limited Partnership*, CAB No. P-0301, Mar. 6, 1992, 39 D.C. Reg. 4466; *Potomac Capital Investment Corp., et al.*, CAB No. P-0383, Jan. 4, 1994, 41 D.C. Reg. 3885; and *Eastern Avenue Development Corp.*, CAB No. P-0437, Sept. 26, 1995, 44 D.C. Reg. 6384.

In *Potomac Capital*, the protester challenged a decision by DHCD to enter into a negotiated exclusive rights agreement with a developer which was to lead to the sale of certain

real property by the District to the developer. The District of Columbia Community Development Act of 1975, as amended, D.C. Code § § 5-901 through 5-907 (1994), and in particular, D.C. Code § 5-905(c), authorized the District to dispose of the real property. In our decision, we stated that the Procurement Practices Act did not contain any authorization for disposing of real property. In that case, DHCD carried out the disposition under the authority of statutes and regulations other than the Procurement Practices Act and the procurement regulations. Therefore, we concluded that the PPA's grant of protest jurisdiction did not supply the Board with jurisdiction over either the exclusive rights agreement or the ultimate disposal of the real property at issue.

In *McMillan*, a controversy arose respecting a RFP whereby the District would lease land to be developed including housing, community facilities, open space and commercial development. The District moved to dismiss the protest on the ground that it concerned a solicitation by the District to out-lease real property, which the District argued was beyond the Board's jurisdiction under the PPA. After a comprehensive analysis of District and federal law, we denied the motion to dismiss. We view the factual situation and issue in *McMillan* as analogous to the instant case, and note that the District does not suggest a meaningful distinction. We have consistently followed *McMillan*. See *Urban Parking Ventures, L.L.C.*, CAB No. 1204, June 2, 2005; *Potomac Capital*, CAB No. P-0383; *Black Entertainment Television*, CAB No. P-0436, Oct. 2, 1995, 44 D.C. Reg. 6394, 6402; and *C. Payton Barton, Jr.*, CAB No. P-0638, May 4, 2001, 49 D.C. Reg. 3359, 3360-61.

The District also cites the Property Management Reform Amendment Act ("PMRAA") of 2004, D.C. Law 15-238, D.C. Act 15-578, effective March 16, 2005, which provides the Superior Court sole jurisdiction over issues involving a "contract to acquire or dispose, in whole or in part, of a real property asset, by lease, purchase, sale or otherwise" where the contract is awarded by the Chief Property Officer of the District. However, because the PMRAA applies only to those transactions awarded by the Chief Property Officer, which is not the case here, we conclude that the PMRAA does not contradict our long-standing precedent.

After analyzing the current protest in accordance with the four factors, we determine that the Board should exercise jurisdiction. Firstly, the Board has determined that the instant protest involves a disposition of personal property, not real property. Because the District intends to keep the Franklin school property and lease it to the winning proposer, the Franklin school property remains the property of the District and the revenues from the property accrue to the benefit of the District, thereby making the procurement of the lease subject to the competition requirements of the PPA. Secondly, the Executive Office of the Mayor is conducting the procurement of the Franklin school ERA. Thirdly, this lease procurement is governed by D.C. Code § 10-801 et seq. While it is true that § 10-801 sets forth provisions for the sale or lease of land for a period greater than 20 years, the provisions regarding leases do not bar the Board from exercising jurisdiction over the leasing process. Fourthly, the D.C. Council did not refer the Franklin school lease transaction to any specific regulatory scheme.

We conclude that we have jurisdiction to consider this protest. Accordingly, we deny the District's motion to dismiss. The District shall file its Agency Report by July 22, 2005.

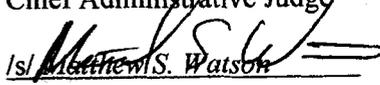
SO ORDERED.

DATE: July 1, 2005


/s/ Warren J. Nash
WARREN J. NASH
Administrative Judge

CONCURRING:


/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge


/s/ Matthew S. Watson
MATTHEW S. WATSON
Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

Protest of:

B&B SECURITY CONSULTANTS, INC.)

CAB No. P-0708

Under RFP No. POAM-2004-R-0015-DW)

For the Protester, B&B Security Consultants, Inc.: Robert A. Klimek Jr., Esq., Klimek, Kolodney & Cassale, P.C. For the Government: Howard Schwartz, Esq., and Jon N. Kulish, Esq., Assistant Attorneys General.

Opinion by Administrative Judge Matthew S. Watson together with Chief Administrative Judge Jonathan D. Zischkau, and Administrative Judge Warren J. Nash, concurring.

OPINION

(LexisNexis Filing ID 6225689)

B&B Security Consultants, Inc. timely filed a protest against award to Hawk One Security, Inc., of Contract No. POAM-2004-D-0015-DW for citywide security services at District owned and leased facilities that are open to the public. B&B asserts that the award is improper on three bases: (1) while the RFP explicitly stated that the District would make four distinct determinations for each of the four aggregate award groups, the District made only one such determination and awarded a single contract to Hawk One. (Count I); (2) the District had discussions/negotiations with Hawk One after the receipt of Best and Final Offers and held no such discussions with the other offerors (Count II); and (3) the District's evaluation of B&B's proposal was unreasonable, arbitrary, capricious and irrational (Count III). The District denies B&B's allegations asserting that they are not supported by the facts. The Board agrees with the District and denies the protest.

BACKGROUND

Solicitation No. POAM-2004-R-0015-DW was issued August 4, 2004, requesting initial proposals by September 7, 2004, from small business enterprises. The solicitation requested offers for 4 aggregate award groups and provided for evaluation and award to take place in a three step process:

First, a technical evaluation by an evaluation team¹ based on the following criteria contained in the solicitation:

The technical evaluation criteria are outlined below in descending order of importance. Selection of an offeror for contract award will be based on an evaluation of proposals against the following factors:

M.5 TECHNICAL CRITERIA 0-60 POINTS

M.5.1 EXPERIENCE AND PAST PERFORMANCE 0-40 POINTS

Offeror's shall detail its experience with providing security services as required in the RFP. See Paragraph L.3.1.

M.5.2 MANAGEMENT CAPABILITY 0-20 POINTS

Offerors shall submit a management and technical plan that will detail its understanding of the requirements and its approach to successfully provide services to satisfy the District's requirements. See Paragraph L.3.2.

Second, a price evaluation as follows:

M.5.3 PRICE CRITERIA 0-40 POINTS

The price evaluation will be objective. The offeror with the lowest price for the base plus option years will receive the maximum points. All other proposals will receive a proportionately lower total score. The following formula will be used to determine each offeror's evaluated price score:

Lowest price proposal x 40 = Evaluated Price of proposal being evaluated price score

In addition, up to 12 points could be added for local, disadvantaged, resident and enterprise zone businesses (§ M.10.5), for a possible total of 112 points. Based

¹ § M.1.1 of the solicitation provides:

The contract will be awarded to the responsible offeror whose offer is most advantageous to the District, based upon the evaluation criteria specified below. Thus, while the points in the evaluation criteria indicate their relative importance, the total scores will not necessarily be determinative of the award. Rather, the total scores will guide the District in making an intelligent award decision based upon the evaluation criteria.

Upon receipt of proposals, an evaluation team composed of representatives of PSD and such other persons as the CO may designate will evaluate the proposals. Every member will evaluate the proposals based on the evaluation criteria and assign a numerical rating. The CO shall make a substantive independent evaluation of the proposals and shall review the ratings assigned by the evaluation team. The CO shall make a selection decision based on the CO's independent judgment of the relative merits of the competing proposals.

on the technical and price evaluation the offerors shall be ranked based on the evaluation scores.

Third, award shall be made as follows:

M.2.2 After the District has determined the highest scored offeror for each aggregate award group, the District will then determine whether that offeror is a responsible contractor for that aggregate award group. For each determination of responsibility for each aggregate award group, the District will consider any impact on that offeror's responsibility of any awards to that offeror under other aggregate award groups.

Nine offerors submitted timely proposals of which three were from entities not qualifying as small businesses. The evaluation team reviewed and ranked the proposals after which best and final offers ("BAFOs") were requested from 5 qualified proposers and evaluated² by the evaluation team. After completion of the technical evaluation, the technical point score was combined with preference points and the price point score and ranked by the combined score. The combined technical, preference and price evaluation resulted in Hawk One being ranked first for each award group and B&B being ranked last.³

DISCUSSION

Evaluation of individual aggregate award groups

The Protester asserts that the District violated the terms of the solicitation by utilizing a single technical evaluation of each BAFO to rank the proposals for each of the 4 aggregate groups, rather than making a separate technical evaluation of each proposal for each aggregate group taking into account whether the proposer was awarded earlier aggregate groups. The Board disagrees. The technical criteria in the solicitation are generic and identically applicable to each of the 4 aggregate award groups. None of the technical criteria relate to capacity which would cause different evaluation scores depending on the aggregate groups awarded to a particular offeror. The technical evaluation is essentially a determination of responsiveness. Evaluation of capacity taking into account award of previous aggregate groups is a separate

² Protester questioned whether the BAFOs were actually evaluated (Reply to Agency Report, 4) since the attachment to the Business Clearance Memorandum ("BCM") (AR Ex. 10f), purporting to report the BAFO evaluation scores, appears to show the evaluation scores after the BAFOs unchanged from the initial scores. The attachment is apparently erroneous. The text of the BCM shows the revised scores resulting from the BAFOs for each proposal. (§ 13.8). The BAFO technical scores increased between 1 and 5 points for each of the proposals, except the protester's proposal for which the evaluation was unchanged. (§13.6).

³ In the evaluation, B&B was granted 9 preference points. B&B contends that it is entitled to 12 preference points as a local, disadvantaged, resident business located in an enterprise zone. Since B&B's point score was nearly 20 points below the next lowest rated proposal, correction would not change the ranking.

determination of responsibility. *Dental Benefits Providers, Inc.*, CAB No. P-0623, Dec. 1, 2000, 49 D.C. Reg. 3234.

The language of the solicitation is clear. The evaluation criteria make no distinction as to aggregate groups. (§ M.5). This constitutes the first phase of consideration of proposals. The solicitation directs consideration of capacity in the second phase of the consideration of proposals. "After the District has determined the highest scored offeror for each aggregate award group, the District will then determine whether that offeror is a responsible contractor for that aggregate award group. For each determination of responsibility for each aggregate award group, the District will consider any impact on that offeror's responsibility of any awards to that offeror under other aggregate award groups." (§ M.2.2). It is therefore clear that the same technical evaluation is intended to be applied for each offeror to each aggregate group. The application of the technical scores is no different than the award of preference points. An offeror who is in a disadvantaged category for one aggregate award group is similarly in a disadvantaged category for all other aggregate award groups.

The District appropriately followed the award procedures set out in the solicitation by making a single technical evaluation applicable to all 4 aggregate groups and considering capacity only with regard to responsibility. The contracting officer made a determination that Hawk One has capacity to perform all 4 aggregate groups together. (AR Ex. 10g). Implicit in that determination is a determination for each aggregate group sequentially that Hawk One has capacity to perform the subject aggregate group together with each previous aggregate group awarded. Upon that determination, the solicitation mandates that all four aggregate groups be awarded to Hawk One.

Improper discussions with Hawk One

B&B's assertion that the District preferentially conducted further negotiations with Hawk One after receipt of the BAFOs is not supported by the evidence B&B cites. B&B asserts that because Hawk One solicited B&B employees on May 2, 2005, to work for Hawk One on the new contract, prior to the award of the contract, Hawk One must have improperly had prior knowledge of the award. (Complaint, 6-7). The record indicates that the contract was deemed approved by the Council on May 9, 2005. (AR Ex. 5). To have been deemed approved, the contract must have been submitted to the Council by April 29 (D.C. Code § 1-204.51(b) (2)), and the District's intent to award to Hawk One would therefore have been public record prior to May 2, 2005. The fact that Hawk One was aware that it was in line for award of all 4 award groups on May 2, 2005 does not indicate that there was any improper communication.

In its reply to the Agency Report, B&B further notes that Hawk One submitted a "funding letter" dated January 14, 2005 (AR Ex. 10(g)), well after submission of the BAFOs indicating further impermissible negotiations with Hawk One after receipt of its final offer. (Reply, 6). Funding capacity is an element of responsibility, not of responsiveness. Financial resources were not included in the solicitation's technical criteria, but rather in the criteria for determining responsibility. Section L.17 provides:

STANDARDS OF RESPONSIBILITY

The prospective Contractor must demonstrate to the satisfaction of the District the capability in all respects to perform fully the contract requirements, therefore, the prospective Contractor must submit the documentation listed below, within five (5) days of the request by the District.

L.17.1 Furnish evidence of adequate financial resources, credit or the ability to obtain such resources as required during the performance of the contract.

Documentation of responsibility may be obtained after receipt of offers. (*Fort Myer Construction Corp.*, CAB No. P-0685, May 5, 2004; 27 DCMR § 2204.2). The receipt of the funding letter after submission of BAFOs was not improper.

Evaluation of B&B's proposal

Lastly B&B contends that the evaluation was "unreasonable, capricious, irrational and arbitrary." As support for this contention B&B cites 3 areas that the evaluation was incorrect. B&B asserts that, although it was entitled to 12 preference points as a Local Business Enterprise, Disadvantaged Business Enterprise, located in an Enterprise zone, and District resident owned, it was only awarded 9 preference points. (Reply, 5). B&B asserts that the contracting officer's narrative in the Business Clearance Memorandum erroneously fails to recognize that B&B's BAFO submitted an additional reference bringing the number of references to the required 5 references. (Reply, 7). In addition, B&B asserts that it was the lowest priced offeror, yet did not receive award of any award group. (Complaint, 8). Specifically, B&B asserts:

that it was prejudiced by the determination that it was only in the competitive range for aggregate award group 4. For instance, there was little difference between aggregate award group 3 and 4, and B&B had a price for aggregate award group 3 that was \$2,439,611.95 lower than the award made to Hawk One. (A.R.; Ex. 10(b)) The contracting officer was required to make an independent determination and findings for each aggregate award group. Had this been done, B&B's significantly lower price would have offset Hawk One's higher technical score as being in the best interest of the District.

(Reply, 7)

For purposes of this protest, the Board accepts each of the allegations concerning the evaluations. Nevertheless, the protest must still be denied. Following the precedents of the Comptroller General, we "will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award." *McDonald-Bradley*, B-270126, 96-1 Comp. Gen. Proc. Dec. ¶54; *see also Statistica, Inc. v. Christopher*, 102 F.3d 1577 (Fed. Cir. 1996).

B&B's total technical score allowing 12, rather than 9 preference points, would have been 29. (BCM § 13.8). Hawk One had a technical score, including 9 preference points, of 62.5, or a difference of 33.5. (*Id.*). The maximum price point difference between B&B and Hawk One was 1 point. Thus, the respective total point scores combining technical, preference and price scores were B&B 69 and Hawk One 101.5. There is no reasonable possibility that had the contracting officer realized that B&B submitted an additional reference, its technical score would have nearly tripled to overcome Hawk's 32.5 point advantage.

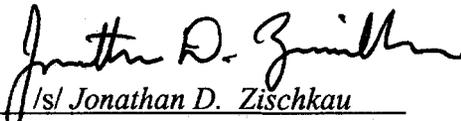
The protest is denied.

July 18, 2005



/s/ Matthew S. Watson

Administrative Judge



/s/ Jonathan D. Zischkau

Chief Administrative Judge



/s/ Warren J. Nash

Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

WATKINS SECURITY AGENCY OF D.C., INC.)	
)	
Under Contract No. POFA-20050D-003)	CAB No. P-0709

For the Protester, Watkins Security Agency of D.C., Inc.: Dirk Haire, Esq., Holland and Knight LLP. For the Government: Howard Schwartz, Esq., and Jon N. Kurlish, Esq., Assistant Attorneys General.

Opinion by Administrative Judge Matthew S. Watson, with Chief Administrative Judge Jonathan D. Zischkau and Administrative Judge Warren J. Nash, concurring.

OPINION

(LexisNexis Filing ID 6589730)

Watkins Security Agency of D.C., Inc., has protested award of the subject contract on the basis that the evaluation of both its proposal and the proposal of the awardee, Hawk One Security, Inc., were arbitrary and unreasonable. We find the District's justification of substantial parts of the evaluations to be unpersuasive. We further find that the evaluation narratives do not indicate that either the evaluators or the contracting officer carefully reviewed the Best and Final Offers ("BAFO") of either the protester or the awardee and that the evaluations were based in substantial part on faulty assumptions of the BAFO contents. Since portions of each evaluation are clearly arbitrary and unreasonable, it is impossible for the Board to determine whether the award determination as a whole was not arbitrary and unreasonable. The protest is sustained and the matter remanded to the contracting officer for a *de novo* reevaluation of the BAFOs, or, if the contracting officer finds that it is necessary to receive further BAFOs, to appropriately evaluate those offers.

BACKGROUND

On September 7, 2004, the Office of Contracts and Procurement issued a solicitation on behalf of the Metropolitan Police Department requesting proposals to perform security services at 167 public schools currently being performed by the protester under a contract with the District of Columbia Public Schools ("DCPS"). The change in the contracting agency undertaking the solicitation was mandated by the School Safety and Security Contracting Procedures Act of 2004, D.C. Law 15-350, April 13, 2005, which provided that "[r]esponsibility for the issuance of a Request for Proposals for any security guard or security related contract for DCPS for a contract term to begin June 30, 2005, or later shall be transferred to the MPD as of August 2, 2004." In addition, the enactment of the Child and Youth, Safety and Health Omnibus Temporary Amendment Act of 2004, D.C. Law 15-117, imposed requirements in performing future contracts beyond those required in the previous DCPS contract. Both of these changes required offerors to submit proposals substantially different from proposals which may have been responsive to previous solicitations for similar services.

variance to all offerors. See, *Greater Washington Dental Services, Inc., Quality Plan Administrators, Inc.* CAB Nos. P-0675 and P-0677, Oct. 22, 2003, 52 D.C. Reg. 4146; *Minnesota Mining and Manufacturing Co. v. Shultz*, 583 F. Supp. 184 (D.D.C. 1984). The evaluation given was unsupported by the facts and unreasonable.

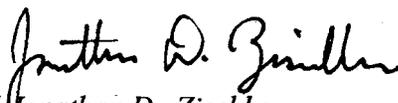
The Board has not reviewed all aspects of the evaluations. Nor does the Board presume to reevaluate the proposals which would usurp the authority of the contracting officer and be beyond the charter of the Board. The Board does, however, find that the noted discrepancies between the record and the evaluation of proposals are so substantial that the Board cannot find the overall evaluation reasonable. The Board gives no opinion on any aspect of the evaluation not discussed here. The Board cannot reach any conclusion as to whether correction of the cited errors would affect the overall evaluation or whether any of the specifications should be amended. The errors in the particular factors noted may, by themselves, affect the total evaluation and the errors may further have had an impact on the evaluation of other factors as well, also potentially altering the outcome.

Because the evaluations of Watkins' and Hawk One's proposals were unsupported to a substantial degree, the award to Hawk One was unreasonable. If no amendments to the solicitation are required, we direct that the District reevaluate the BAFO's in their entirety. If amendments to the specifications are necessary to properly state the minimum needs of the District, solicitation of new BAFOs will be required prior to reevaluation. Since the identity of the offerors has now been made public, as has the awardee's pricing, we believe that reevaluation without amendment of the specifications is preferable. If the contracting officer determines that Watkins should have received the award, the contract with Hawk One should be terminated and award made to Watkins.

The protest is sustained.

SO ORDERED.

August 29, 2005



/s/ Jonathan D. Zischkau
Chief Administrative Judge



/s/ Warren J. Nash
Administrative Judge



/s/ Matthew S. Watson
Administrative Judge