GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

CLAIM OF:

CHIEF PROCUREMENT OFFICER Office of Contracting and Procurement District of Columbia Government 441 Fourth Street, N.W. Washington, D.C. 20001	)	CAB No. D-1182
Under Public Safety Systems and Products Agreement dated August 6, 1999 by and between GTE South Incorporated and the Government of the District of Columbia (Computer Assisted Dispatch)	)	

ORDER ON MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT
(Courtlink Filing ID 1080971)

Together with its answer, Verizon South, Inc., filed 8 counterclaims.[1] (I) Breach of Contract (Complaint at 9); (II) Quantum Meruit (*id.* at 10); (III) Conversion (*id.* at 10); (IV) Fraud/Fraudulent Inducement/Fraudulent Misrepresentation (*id.* at 11); (V) Negligent Misrepresention (*id.* at 12); (VI) Declaratory Judgment--Arbitration Provision is Enforceable (*id.* at 13); (VII) Declaratory Judgment--Contract as a Whole is Enforceable (*id.* at 13); (XIII) Equitable Adjustment (*id.* at 13).

The District has moved to dismiss, or in the alternative, for summary judgment on each of the counterclaims. The District's motion asserts with regard to all counterclaims that the contract was executed with GTE South Incorporated and that Verizon South has no standing to assert the counterclaims; that the counterclaims were not timely filed; that the contract is invalid for any amount above $500,000, the limit of authority of the contracting officer; and that the full lawful value of the contract, $500,000, has been paid thus fully satisfying the District's obligations. The District further asserts that each of the counterclaims fails to state a cause of action upon which relief can be granted.

The Motion to Dismiss and the alternative Motion for Summary Judgment as to Counterclaims I and II are denied. The Motion to Dismiss Counterclaims III through VIII is granted.

[1] Verizon South's claims are not numbered in its counterclaim. For convenience, the Board has numbered the claims sequentially.

Jurisdiction

Initially, the Board must determine whether it has jurisdiction to consider the counterclaims. Jurisdiction of the Board over counterclaims is identical to jurisdiction of the Board over claims. The Board is not a tribunal of general jurisdiction but possesses only the jurisdiction granted to it by the Procurement Practices Act ("PPA"). D.C. Code Division 1, Title 2, Chapter 3 (2000 ed.). Pursuant to section 2-309.03(2), the Board is granted jurisdiction to decide "[a]ny appeal by a contractor from a final decision by the contracting officer on a claim by a contractor, *when such claim arises under or relates to a contract.*" The Board's jurisdiction is limited to contract actions and does not extend to actions founded in tort.[2] This limition on jurisdiction of the Board is consistent with the interpretation of similar statutory language granting jurisdiction to Federal boards of contract appeals.[3] Federal boards have consistently recognized that their jurisdiction is also limited to claims founded in contract and excludes jurisdiction over claims founded in tort. *Henry H. Norman*, GSBCA No. 15070, 2002 GSBCA LEXIS 231, 246, Oct. 16, 2002.

Counterclaims III through V are clearly tort claims over which the Board has no jurisdiction:

> **Counterclaim III** (Conversion) asserts that the District has "unlawfully retained control over materials provided by Verizon South without paying Verizon South;"[4] *see Restatement (Second) Torts (1981) § 222*
>
> **Counterclaim IV** (Fraud/Fraudulent Inducement/Fraudulent Misrepresentation) alleges fraud in that the contracting officer "had a duty not to misrepresent his authority;" *see Restatement (Second) Torts (1981) § 525*
>
> **Counterclaim V** (Negligent Misrepresentation) asserts an unintentional misrepresentation of the contracting officer's authority. *see Restatement (Second) Torts (1981)* § *552*

The Board is similarly without jurisdiction to consider requests for declaratory or other equitable relief. Federal boards of contract appeals have also consistently held that that they lack jurisdiction to hear requests for declaratory judgments. *Hugh W. Harrell* AGBCA No. 85-305-1, 86-3 BCA. ¶ 19,063. Absent specific statutory authorization,

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[2] Although, at times, the Board exercises jurisdiction over claims which are framed in the language of tort actions, those cases deal with contract performance, not torts unrelated to performance. For example, references to "negligence" and "professional malpractice" in performance of a contract, although sounding like a tort, do not convert into a tort what is in essence a claim for defective performance. *See e.g. Fry & Welch Associates, P.C.*, CAB No. D-0821, July 31, 1997 44 D.C. Reg. 6859, 6875.

[3] 41 U.S.C. 607(d) Jurisdiction. Each agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relative to a contract made by its agency. . . .

[4] While this claim might be interpreted as a contract claim for breach of contract by reason of failure to pay the contract amount, such an interpretation would make the claim duplicative of Counterclaim I.

boards of contract appeals are also without equity powers. *Midlands Community Action Agency, Inc.*, GSBCA No. LD-17; 73-1 BCA ¶ 9790.

Counterclaim VI (Arbitration Provision is Enforceable) specifically seeks the Board to enter a declaratory judgment.

Counterclaim VII (Contract as a Whole is Enforceable) specifically requests a declaratory judgment.

Counterclaim VIII (Equitable Adjustment) requests that the Board order an increase in contract price to compensate the contractor for extra costs resulting from its mistaken expectation of arbitration. The counterclaim asserts that "[h] ad Verizon South known that the Contracting Officer could not bind the District to arbitration, Verizon South would have quoted a higher price for the CAD project." Essentially, Verizon South is seeking reformation, an equitable remedy, *see Restatement of the Law, Second, Contracts, § 155 comment d and § 166 Reporter's Notes,* over which the Board has no jurisdiction.

Thus, of the 8 counterclaims made by Verizon South, the Board has jurisdiction to consider only the first two.

"Statute of Limitations"

The District argues that all claims by the contractor, including Counterclaims I and II, are barred by a contractually imposed "statute of limitations," citing Art. XVIII, ¶2 of the contract, Opposition, Ex Q at 12, which states that "no action, regardless of form, arising out of the subject matter of this agreement may be brought by either party more than (2) years after the cause of action accrued."

The contract clause relied upon by the District, and thus the limitation, is invalid.[5] The District procurement regulations require that "[e]ach District contract shall contain a disputes clause, approved by the Director, that provides for resolution of disputes in accordance with the provisions of this chapter." 27 DCMR § 3801.2. Since the cited clause attempts to limit dispute procedures, it must be considered a disputes clause. The District has not alleged that this modified disputes clause was approved. Just as the attempt to insert a dispute arbitration clause was ineffective, Board Order of July 24, 2002, the attempt to insert a limitation clause is similarly ineffective. The PPA governs timeliness of filing claims with the Board.

The PPA provides that "[e]xcept as provided in § 2-308.05, within 90 days from the date of receipt of a decision of the contracting officer, the contractor may appeal the decision to the Board." D.C. Code § 2-309.04(a). As recognized by the District, the Board considers the presentation of an invoice to be a claim under the contract. Motion to Dismiss, 8. Although the District has refused to pay Verizon South's invoice for over two years, the Contracting Officer has not issued any final decision formally rejecting the

[5] Pursuant to the "Severability" clause of the contract, § 8, invalidity of one section does not "invalidat[e] the remaining provisions of the Agreement."

claim. Motion, 9. Thus this appeal falls within the exception of §2-308.5 which provides in subsection (d) that "any failure by the contracting officer to issue a decision on a contract claim within the required [90 day] time period will be deemed to be a denial of the claim, and will authorize the commencement of an appeal on the claim as otherwise provided in this subchapter." Had the Contracting Officer issued a final decision at any time during this period, the clock for filing an appeal would have begun to run. The District did not do so, however, and the appeal is therefore timely.

Authority of the Contracting Officer

The District seeks Summary Judgment on Counterclaims I and II on the basis that the Contracting Officer's authority was limited to $500,000 and that any contract amount in excess of this amount is invalid. Since it is undisputed that the contractor has already received over $500,000, the District argues that judgment should be granted dismissing any further claim. *See Coffin v. District of Columbia,* 320 A.2d 301 (1974). Summary judgment is a remedy entitling the moving party to judgment as a matter of law only when no genuine issue of material fact is present at the time the motion is made. Super. Ct. Civ. R. 56(c).

The fact that the designated contracting officer's authority was limited to $500,000 is not necessarily dispositive of whether the contract was valid above that amount. Absent the authority of the designated contracting officer, the contract may still be valid if the contract action that exceeds the contracting officer's authority was ratified by an official with sufficient authority. The Board fully discussed the law of ratification in *W.M. Schlosser Company, Inc.*, CAB No. D-0903 Sept. 13, 1994, 42 D.C. Reg. 4824:

> Ratification is well-established in the law of agency and in procurement law. It is the adoption of an unauthorized act resulting in the act being given effect as if originally authorized. *See Restatement (Second) Agency* § 82. In government contracting, a government agent's unauthorized actions may be subsequently ratified by those with authority to bind the government. *Parking Company of America, Inc.*, GSBCA No. 7654, 87-2 BCA ¶ 19,823 at 100,296. Ratification may be found where the ratifying government official has actual or constructive knowledge of a representative's unauthorized act and expressly or impliedly adopts the act. *Williams v. United States*, 127 F. Supp 617, 130 Ct. Cl. 435, cert. denied, 349 U.S. 938 (1955) (contracting officer ratified an improperly authorized agreement through his inaction where he had actual or constructive notice of the work); *W. Southard Jones, Inc.*, ASBCA No. 6321, 61-2 BCA ¶ 3182 (being on actual or constructive notice of changes, contracting officer impliedly ratified them by "sitting passively back and doing nothing"); *Parking Company of America, Inc.,* 87-2 BCA ¶1 9,823 at 100,296 (having actual knowledge, contracting officer impliedly ratified agreement made by unauthorized representative). The doctrine of ratification is also found in the law of the District of Columbia. *Lewis v. Washington Metro. Area Transit Auth.*, 463 A.2d 666, 671-72 (D.C. 1983)

(the principal may ratify the unauthorized act of an agent expressly or impliedly by conduct inconsistent with any other hypothesis). Because silence and inaction have been found sufficient to ratify an unauthorized act, affirmative actions by contracting officials have also been found sufficient. *See, e.g., Reliable Disposal Company, Inc.*, ASBCA 40100, 91-2 BCA ¶ 23,895 at 119,718 (contracting officials' actions to obtain funding for changes ordered by unauthorized representative constituted ratification of unauthorized changes); *General Electric Co. v. United States*, 412 F.2d 1215, 1220-21 (Ct. Cl. 1969) (on cross motions for summary judgment, court held that contracting officer's concurrence with internal correspondence that recommended funding for unauthorized work was effective to bind the government even though the request for funds was denied by a higher authority); *see also Texas Instruments Inc. v. United States,* 922 F.2d 810, 813-14 (Fed. Cir. 1990).

In *Schlosser,* the Board found ratification based, in part, on the fact that "contracting officials, including the agency's Director, Acting Director, and several contracting officers, had actual notice of all of the changes." There is a genuine issue of fact in this matter as to whether there was similar knowledge among senior officials both before and after award of the contract.[6] This issue of fact precludes granting summary judgment as to either Counterclaim I (breach of contract) or Counterclaim II (quantum meruit in the event that the contract is declared void).[7]

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[6] "The delay in answering emergency calls is one of the problems Police Chief Charles H. Ramsey, who took over the department on April 21, faces in reforming the beleaguered department. Chief Ramsey has said the Police Department is dysfunctional and its equipment and facilities are outdated."

* * *

Assistant Chief Michael Fitzgerald, commander of the technical services bureau, said that within the next 18 months the department will spend $3 million on a new computer-assisted dispatch system that will be built in the 300 block of McMillan Drive.

The Washington Times, June 2, 1998 p. c3

". . . In the Washington area, most local governments have already reported completing work on their systems related to 911 emergency call centers."

* * *

". . . The District is still in the process of installing a new computer-assisted dispatch system that is scheduled to be operating by early December. But even if it is not ready--which is considered unlikely--the city has made repairs to its old system to ensure that it is Y2K-compliant, said Steve Gaffigan, the police department's interim chief information officer.

The Washington Post, November 11, 1999, p. A8

[7] It is the Board's opinion that Verizon South's invoice for payment of the remaining contract amount encompasses both a request under the contract and necessarily implies a request for quantum meruit should the contract be determined invalid.

"GTE South Incorporated vs. "Verizon South, Inc."

It is the District's contention that Verizon South, Inc. lacks standing to raise any counterclaim because it was not a party to the original contract and no novation agreement adding it as a party has been executed, Motion, 13-14. That position is without merit.

It is the essence of the corporate form of organization that a corporation is independent of its shareholders. A corporation shall "have perpetual succession by its corporate name" D.C. Code § 29-101.04(1), and authority in its own name "[t]o make contracts and incur liabilities." *Id.* (8). "A holder . . . {of] shares of a corporation shall be under no obligation to the corporation or its creditors with respect to such shares." D.C. Code §29-101.22. It is apparent that there has been no change in the corporate form of the counterclaimant, other than to change its name. While it is undisputed that the ownership of the shares has changed from GTE to Verizon, Opposition, 18, a change in ownership of shares of a corporation does not effect the obligation of the corporation. Before the purchase of GTE, the shares of then GTE South Incorporated were owned by GTE. After the assets parent GTE wee acquired by Verizon, Verizon owned the shares of GTE South. GTE South remained the same corporation. The change of the share ownership is of no moment. Following acquisition of the stock of GTE South by Verizon, the name of the corporation was changed to Verizon South, Inc. Opposition, Ex. P.

Even if GTE South had itself merged into a new entity, the rights of the merged corporation to proceed with this action would not be altered. Under Virginia law, where GTE South was incorporated, [t]he surviving corporation has all liabilities of each corporation party to the merger" Va. Code Ann. § 13.1-721 [8]

With regard to the change of name, the District is in error when it asserts that Verizon South is in violation of 27 D.C.M.R. §1220. Although the section is titled "Novation and Change-of-Name Agreements," only subsections.1220.1 and 1220.5. apply to a change of name. Subsection 1220.1 merely requires that both a change-of-name agreement and a successor-in-interest agreement must be in writing. Subsections 1220.5 requires that the Corporation Counsel review both types of agreement. But subsections 1220.2 through 1220.5 and 1220.6 though 1220.8, which the District asserts have not been complied with, Motion, 13-14, deal exclusively with successors in interest

[8] The District law. D. C. Code § 29.101(70), is to the same effect:

(5) Such surviving or new corporation shall thenceforth be responsible and liable for all the liabilities and obligations of each of the corporations so merged or consolidated; and any claim existing or action or proceeding pending by or against any of such corporations may be prosecuted to judgment as if such merger or consolidation had not taken place, or such surviving or new corporation may be substituted in its place. Neither the rights of creditors nor any liens upon the property of any such corporation shall be impaired by such merger or consolidation

Interpretation of the Federal anti-assignment statutes, 3 U.S.C. § 203 and 41 U.S.C. § 15, are also in accord. *Appeal of Isotopes, Inc.*, ASBCA Nos. 15663 and 15874, 74-1 BCA ¶ 10,730.

are thus inapplicable to a change of name. A novation, which the District asserts is required, *id.,* is only required where there is a transferor and transferee. Subsection 1220.7. As noted above, a change in stock ownership makes no change in the corporate issuer of the stock and creates no transferee or successor. The Board believes that the substantial written correspondence under the changed name is sufficient to comply with written request requirement of subsection 1.

Year 2000 Remediation Procurement Authority

Verizon South asserts that the *Chief Technology Officer Year 2000 Remediation Procurement Authority Temporary Amendment Act of 1999*, (D.C. Law 13-17), exempts the Office of the Chief Technology Officer from the requirements of the Procurement Practices Act. Response 14. Based on this Act, Verizon South asserts that the entire contract, including the arbitration provision, is valid and binding on the District. There appears to be agreement that the purpose of the contract was not exclusively Y2K remediation. Opposition, 2; Reply, 2. The parties, however, differ on the extent that the contract services were Y2K remediation. The Board believes that this factual issue must be determined before the issue of the applicability of the Temporary Act can be resolved.

Conclusion

For the reasons set forth above, the District's Motion to Dismiss for lack of standing is denied; the District's Motion to Dismiss and the alternative Motion for Summary Judgment is denied as to the Counterclaims I and II; the District's Motion to Dismiss is granted for Counterclaims III through VIII is granted. Counterclaims III, IV, V, VI, VII, and VIII are dismissed.

SO ORDERED.

DATED: November 29, 2002

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

CONCUR:

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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

RESPIRATORY THERAPY SPECIALISTS OF AMERICA, INC.	)	
	)	CAB No. P-0662
Under Solicitation No. RM-02-C-2113-SJ	)	

For the Protester: Reuben B. Collins, Esq., Turner & Collins, PLLC. For the District of Columbia Government: Howard Schwartz, Esq., and Warren J. Nash, Esq., Assistants Corporation Counsel.

Opinion by Administrative Judge Matthew S. Watson, with Chief Administrative Judge Jonathan D. Zischkau, concurring.

OPINION

CourtLink Filing ID 109xxx

Respiratory Therapy Specialists of America, Inc. ("RTSA") protests award of a contract to Critical Link Associates, Inc. ("CLA"), alleging various procurement improprieties. The District moved to dismiss the protest as untimely filed. We agree with the District and dismiss the protest as untimely.

FACTS

On October 27, 2001, the Department of Mental Health ("DMH") issued Solicitation No. RM-02-C-2113-SJ ("RFP") for Respiratory Therapy Services at St. Elizabeth's Hospital. (Motion Ex. 1). Section L.7.1 of the RFP notified RTSA that a protest must be filed with the Board within ten days of the time that RTSA knew or should have known of the basis of the protest. (Motion, Ex.7). By letter dated November 19, 2001, Mr. Lalith Gnansiri, project manager of RTSA, informed Mr. Donnie Bryant, Deputy Chief of the Office of Contracts and Procurement, of incidents at the workplace that occurred in the fall of 2001 regarding an unknown individual obtaining RTSA's business information. (Motion, Ex. 2). Specifically, Mr. Gnansiri complained that an unnamed individual attempted to talk with RTSA's employees and may have obtained confidential data about RTSA from agency employees. (Motion, Ex. 2).

The RFP closed on December 4, 2001. (Motion, Ex. 1). On February 20, 2002, Mr. Bryant orally informed RTSA that the contract had been awarded to CLA. On February 27, 2002, DMH awarded a letter contract to CLA. (Motion Ex. 4). By letter dated February 27, 2002, Mr. Bryant informed RTSA that the contract had been awarded to CLA. (Motion, Ex. 5). By letter dated March 11, 2002, to Joy Holland, Chief Executive Officer of St. Elizabeth's Hospital, RTSA alleged that fraudulent activities had taken place during the proposal process. (Motion, Ex. 6). The subject

protest was filed with the Board on October 3, 2002, with the November 19, 2001 letter to Mr. Bryant as an attachment. On October 24, 2002, the District moved to dismiss the protest as untimely filed.

DISCUSSION

Section 2-309.08(b)(2) of the D.C. Code provides that "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."

RTSA acknowledges that it knew of the proposed award to another firm and discussed the contemplated award with Mr. Bryant on February 20, 2002. During this conversation, RTSA stated that it "would be filing a protest." (Protest ¶ 12). A written notice of the contract award was sent to RTSA on February 27, 2002. Even ignoring the oral notice and accepting RTSA's allegation that it did not receive this letter until the second week in March 2002 (Response, at 3), the protest should have been filed no later than March 29, 2002. The protest was filed with the Board on October 3, 2002.

On its face, the protest is untimely. RTSA filed the protest with the Board over 6 months after it received notice that the contract had been awarded to CLA. Citing our decision in *Fort Myer Construction Corp.*, CAB No. P-0452, July 23, 1996, 44 D.C. Reg. 6476, RTSA asserts that its November 19, 2001 letter to Mr. Bryant and its March 11, 2002 letter to the Chief Executive Officer of St. Elizabeth's Hospital[1] were "the functional equivalent of filing with the Board" and thus the protest may be considered timely. (Response, at 2). We disagree. In *Fort Myer,* we held that "filing of [a timely] protest with the contracting officer was functionally equivalent to filing the protest with this Board and . . . [the Board] should not dismiss the protest as untimely." 44 D.C. Reg. at 6481. The facts in this matter bear very little resemblance to the record in *Fort Myer*. In *Fort Myer*, a letter clearly intended to be a protest was mistakenly addressed to the contracting officer, rather than to the Board. The letter was filed by Fort Myer within one day of its learning of the contract award. The letter was captioned "PROTEST." (*Id.* at 6477). "Fort Meyer's letter was unambiguously a protest from the standpoint of form and content . . . . From the record there can be no ambiguity that the protester intended to file a protest." (*Id.* at 6481). Upon notice that the protest was misfiled, Fort Myer immediately refiled the identical protest with the Board. (*Id.* at 6478).

In the instant matter, the two letters RTSA relies on as functionally equivalent to a protest were not denominated as protests, and did not otherwise indicate that they we intended as protests. Neither letter requested any specific relief. Indeed, both letters appear to disavow any intent to be recognized as protests. The November 19, 2001 letter to Mr. Bryant did not ask for any relief and concludes, "I thought it was important to keep you informed of developments." (Protest, Ex. A, at 2). Similarly, the March 11, 2002 letter to the Director of St. Elizabeth's Hospital did not request relief and concludes, "I felt it important to let you know the facts about this situation . . . ." (Motion,

[1] Protester states that the "November 19, 2001 letter in particular" constituted the functional equivalent of filing with the Board. (Response, at 2).

Ex. 6).

From the record before us, the Board cannot conclude that the letters sent by RTSA in November 2001 and March 2002 were intended to be protests. Even if RTSA subjectively intended the letters to be protests, the letters certainly fail any objective test for expressing this intent. We cannot fault the contracting officer in this case for failing to recognize that the letters should be treated as protests and immediately forwarded to the Board as is required by our decision in *Fort Myer*. 44 D.C. Reg. at 6481. Since the actual filing with the Board did not occur until October 3, 2002, over 6 months after RTSA knew of the award of the contract to another contractor, its protest must be dismissed as untimely.

SO ORDERED.

DATED: December 6, 2002

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

CONCURRING:

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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

RGII Technologies, Inc. 1997 Annapolis Exchange Parkway Suite 210 Annapolis, MD 21401 Under Solicitation No. POTO-2002-R-0047	))))))	CAB Nos. P-0664, P-0669 and P-0670 (Consolidated)

For the Protester: Richard L. Moorhouse, Esq. and Leigh T. Hanson, Esq., Reed Smith LLP. For the Government Howard Schwartz, Esq. and Warren J. Nash, Esq., Assistants Corporation Counsel.

Opinion by Administrative Judge Matthew S. Watson with Chief Administrative Judge Jonathan D. Zischkau, concurring.

OPINION
(Courtlink Filing ID: 1489749)

On October 25, 2002, RGII Technologies, Inc. ("RGII" or "Protester") protested the consideration by the District of Columbia ("District") of a proposal from firms which Protester asserts have an organizational conflict of interest. This protest was docketed as as CAB No. P-0664. During the pendancy of the protest, the District advised RGII that it was not within the competitive range and would not be permitted to enter the next round of negotiations. RGII filed an Amended Protest adding an allegation that RGII was improperly excluded from further competition on November 26, 2002, which protest was docketed as CAB No. P-0669. On December 24, 2002, the Board, at the request of the parties, suspended proceedings until January 24, 2003, to permit discovery of further information necessary to further amend the protest. A Second Amended protest was filed January 24, 2002, and docketed as CAB No. P-0670[1]. The District moved to dismiss the protest against acceptance of proposals from firms with alleged conflicts of interest as untimely, or in the alternative, to dismiss the protest for lack of standing, asserting that Protester, not being within the competitive range, is not in line for award.[2] The Board finds that the protest is premature as to the allegations of conflict of interest and timely as to the allegations that it

[1] The Board has consolidated the three protests. The time for determining the resolution of these protests shall be measured from the filing date of the last protest.

[2] In addition, the District contends that the protest should be suspended since the Board "may" be without jurisdiction on the basis that OCFO procurements under $500,000 are exempt from any "procurement review process." The District asserts that if award is made to a proposer under $500,000 the Board will be divested of jurisdiction, notwithstanding the fact that other proposals within the competitive range are over $500,000 and the District's own estimate may have exceeded $500,000. It is not necessary for the Board to reach this issue, however, it is unlikely that Congress intended that the Board's jurisdiction be so fluid as to cause the Board to gain or lose jurisdiction during a proceeding or that award to an offeror under $500,000 would divest the Board of jurisdiction to consider the handling of a offer over the $500,000 exemption.

was unfairly excluded from the competitive range for further negotiations. Having considered Protester's objections to its exclusion from the competitive range, the Board finds the District's action was not unreasonable and denies the protest.

CONFLICT OF INTEREST

On September 9, 2002, the Office of Contracting and Procurement (OCP) issued RFP No. POTO-2002-R-0047 for budget software. On September 18, 2002, OCP held a pre-proposal conference. In response to a question raised by RCII regarding the entities who assisted in preparing the RFP document, OCTO responded that, as well as District agencies, Keane Consulting Group ("Keane") participated in the development of the RFP. In addition, "The RFP included requirements which had been developed by Accenture prior to the creation of the RFP. Accenture had no direct involvement with the development of the RFP." Upon further questioning OCTO stated, "Because of its role . . . Keane is not allowed to bid on any additional integration work . . . . However, Accenture is free to bid." (Complaint, ¶ 3).

By letter dated October 2, 2002, RGII complained to the Contracting Officer that the RFP allowed certain offerors to compete that had actual or apparent organizational conflicts of interest, which could taint and compromise the integrity of the procurement. RGII received no response from the District.

RGII's protest contends that a named proposer should be excluded from competition due to organizational conflicts of interest. The Board agrees with the District's contention that RGII knew the grounds of the protest as to the alleged organizational conflict of interest on September 18, 2002, or, at the latest on October 2, 2002, when it complained to the contracting officer. The protest was filed more than 10 business days after the later date and would normally be considered untimely. The Board, however, adopts the policy of the General Accounting Office and finds that a protest on grounds of conflict is premature until an award is actually made to a conflicted offeror. In *REEP, Inc.*, B-290688, Sep. 20, 2002, 2002 CPD ¶156 the Comptroller General held:

> The agency advises our Office that it has made no award decision in connection with the acquisition. This being the case, REEP's protest merely anticipates what it considers improper action by the agency, namely, award to Worldwide. We recognize that it could be argued that the failure to exclude a firm with an alleged conflict of interest from a competition is a defect in a solicitation that should be challenged prior to the submission of proposals or quotations. See 4 C.F.R. § 21.2(a)(1) (2002). Solicitation provisions, however, are not generally the vehicle for excluding firms with a conflict of interest from competing for award; rather, conflicts are generally handled on a case-by-case basis without public notice through the solicitation. Moreover, treating protests such as this one as premature may avoid unnecessary litigation, since the allegedly conflicted firm may not be the eventual awardee, either because it loses the competition or because the agency ultimately concludes that the firm has an impermissible conflict of

interest. See *Saturn Indus.*--Recon., B-261954.4, July 19, 1996, 96-2 CPD ¶ 25 at 5. Unless the firm with the alleged conflict of interest is actually selected for award, the protester has not suffered any competitive prejudice; we will not sustain a protest absent a showing of such prejudice. *McDonald-Bradley*, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see *Statistica, Inc. v. Christopher*, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

Since no award has yet been made, the Board cannot determine whether an award is precluded by a conflict of interest. Counts I and II of the protest with regard to conflict of interest are dismissed without prejudice as premature.

EXCLUSION FROM COMPETITIVE RANGE

RGII further protests its exclusion from the competitive range as not supported by the record and the product of bias. The Board will not interfere with an evaluation decision if, based on the entire record, the decision is documented in sufficient detail to show that it is not arbitrary and appears reasonable and in accord with the evaluation criteria listed in the solicitation. *Ideal Electronic Security Company and Accutech Systems, Inc.,* CAB Nos. P-0554, 0561, Dec. 29, 1998, 46 D.C. Reg. 8540. RGII disputes the validity of the weaknesses in the RGII proposal asserted by the District to support its evaluation of the RGII proposal and asserts that the poor evaluation was the result of retaliation for RGII filing this protest. Upon review of the record, the Board finds the weaknesses concluded by the districted to be adequately documented and not unreasonable.

For example, as to the weakness claimed by the District that "RGII's software does not have a flexible ad hoc reporting feature," RGII contends that because " 'ad hoc' flexibility" is not defined in the solicitation, the District has no basis to downgrade the RGII proposal. Reply, 3. The District documented that customized budget reports are often required on "as little as 15 minutes" notice and that "the fastest report-creation turnaround the [RGII] product could offer was 24 hours, because each time a custom report was needed, they would have to reconfigure the product." Nitz Affidavit, ¶ 28. The Board does not believe that the District interpretation that a 24-hour turnaround time does not meet the "ad hoc flexibility" requirement is unreasonable.

The District downgraded the RGII proposal because the software offered could not be maintained by District employees and "would require constant on-site vendor representatives to maintain the software correctly." Nitz Affidavit, ¶ 26. RGII countered that its recommendation of continued on-site presence is "best practice" and the District cannot downgrade its proposal because the RFP called for offerors to submit proposals based upon "best practices." Reply, 7. The District's analysis of RGII's proposal is documented and its conclusion that this "best practice" by the proposer does not measure up to other proposals is not unreasonable.

Paragraph 33 of the Second Amended Complaint states that "on information and belief, therefore, RGII was downgraded during Phase II, Oral Evaluation, in material part because it was pursuing the instant protest with the Board." RGII has not alleged any facts to support its assertion. RGII appears to assert that, having made the unsupported allegation

there is a burden on the District to disprove any possibility of taint. RGII's reply in Section III concludes, "If the District wishes to bring closure to this issue of protest, it would be appropriate to obtain affidavits or declarations from other members of the SSEB confirming that all evaluations of RGII's proposal and oral presentation were fully completed before the S[ource] S[election E[valuation B[oard] member in question learned of the filing of the protest." Contrary to the implication of this statement, mere knowledge of the protest does not support a presumption that the SSEB decision was tainted.

Based upon the record herein, the Board finds no evidence of bias in the decision to exclude RGII from the competitive range and concludes that the determination to exclude RGII from further negotiation was adequately documented and did not violate, law, regulation or the terms of the solicitation. Count III of the protest is DENIED.

March 6, 2003

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

CONCURRING:

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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

FORT MYER CONSTRUCTION CORPORATION))
Under Contract No. 00-C-026F) CAB No. D-1195

For the Appellant: Christopher M. Kerns, Esq., John D. Bosley, Esq. and Monica L. Rose, Esq. For the Government: Mark D. Back, Esq. and Jennifer L. Longmeyer, Esq., Assistants Corporation Counsel.

Opinion by Administrative Judge Matthew S. Watson with Chief Administrative Judge Jonathan D. Zischkau, concurring.

OPINION and **ORDER**
(*Courtlink Filing ID 1563753*)

Appellant Fort Meyer Construction Corporation ("Appellant"), claims $2,180,404.59 in compensation for breach of contract. In support of its claim, Appellant alleges that the Department of Public Works ("DPW") breached its contract by ordering services, which the District was required to order from Fort Myer from other contractors. The District has moved to dismiss the action for failure to state a claim upon which relief can be granted.[1] The motion of the District is granted and the appeal is dismissed.

Award of the contract giving rise to this appeal was not a normal government purchase of services. The procurement was initially made by the Financial Responsibility and Management Assistance Authority ("Authority"), commonly referred to as the "Control Board," pursuant to the Authority's less than comprehensive procurement regulations so as to short-circuit the District's procurement process. Actions taken by the Authority during its existence concerning solicitation of bids and proposals were also not subject to independent review by the Contact Appeals Board. *James Martin Government Consulting, Inc.*, CAB No. P-0589, Sept. 9, 1999, 46 D.C. Reg. 8690.

In order to remedy the severe disrepair of the streets in the District, the District Government requested the Authority to provide assistance by issuing emergency contracts for street and roadway pavement restoration to be funded by $12,000,000 from the National Capital Infrastructure Fund which had been appropriated to the District by Congress. The Authority published notice of the requirement for milling and paving

[1] The District also asserts that the action should not be categorized as an appeal, but rather as a protest, and dismissed as untimely. The Board does not believe that the District's assertion has merit.

services in the Commerce Business Daily and on a private construction website, but did not take other customary steps to publicize the solicitation. Neither the Authority nor DPW mailed copies of the solicitation or otherwise directly notified prospective bidders or offerors on bidders mailing lists as would be normal procurement practice. *See* 27 DCMR § 1300.8(b). By ignoring established procurement procedures, the Authority delayed, rather than expedited, purchase of the services. Without adequate publicity of the solicitation, the Authority received no requests for the solicitation document and consequently no offers were made.

Faced with no offerors to provide the required services, the Authority obtained a list of six potentially qualified street repair contractors from the Department of Public Works and contacted them as to their interest in performing the work. All but one of the contractors agreed to "support the requirement." The Authority secured offers from the 5 contractors and evaluated them on the basis of procurement of the entire requirement for services from each contractor. Although the evaluation was based on the total requirement estimated at $12,000,000, the Authority approved the issuance of 5 "sole source" contracts for identical services with the 5 interested contractors, each with a not to exceed limit of $2,000,000.[2] Notwithstanding the specific limitation of the sole source approvals, the final contracts, permitted ordering of the total $12,000,000 requirement from each contractor.[3] The contracts were assigned by the Authority to the Department of Public Works a month after the award. The ordering requirements are contained in the Special Conditions section of the contract.

SPECIAL CONDITIONS

SCOPE

The contractor, when required by a directive issued by the Engineer, shall furnish all material, equipment, labor and supervision required to perform pavement restoration at various locations throughout the City. Work includes the following:

Item #1 Milling
Item #2 Overlay
Item #3 FCC Base Repair (Limited)

ORDERING PERIOD:

The ordering period of this contract shall begin at contract award date and expire twelve

[2] The Board notes that, since only 5 of the 6 potential contractors expressed an interest, the combined maximum expenditure on issued contracts would be $10,000,000, two million short of the $12,000,000 of funds provided by Congress.

[3] Although the sole-source approval documents limited each contract to $2,000,000, the Contracting Officer's Final Decision erroneously claims that the Fort Myer contract, as executed, was not to exceed $2,000,000. This assertion is contradicted both by the terms of the contract and by the fact that over $3,000,000 was ordered on the contract.

(12) months after the contract award date unless the Authority elects to extend the term of this contract The minimum requirement for Items 1 through 3 is a total of 10,000 square yards. At contract award, the Authority Government will issue an order totaling five (5) locations for Items 1,2 or 3. The maximum requirement is $12,000,000.00. The District Government reserves the right to order work units (Items 1 through 3) in any combination up to and including the maximum established in this paragraph.

ORDERING AND PAYMENT

A. The contractor shall not accept orders for services under this contract unless a valid purchase order has been issued. It is anticipated that purchase orders will be issued at regular intervals during the term of the contract, covering areas within the Authority government authorized to order services under this contract. The participating agency shall be the Department of Public Works, Division of Transportation.

B. Work orders shall initially, be placed with the contractor who has the lowest contract unit price. When that contractor can no longer meet contract requirement, e.g., the Contracting Officer determines the basis of workload, performance and other factors when contractor's capacity is reached.[4] The decision of the Contracting Officer shall be final. In summary orders will be placed on a rotating basis with each contractor based upon each contractor's capacity and ability to meet contract requirements starting with the contractor with the lowest contract unit price. The Contracting Officer shall determine when contractor capacity is reached and the decision shall be final.

C. Delivery or performance shall be made only as authorized by purchase orders issued in accordance with the ordering clause of this contract. The Authority shall order at least the minimum quantity of supplies or services designated in the Schedule.

D. Except for any limitations on quantities in the Schedule, there is no limit on the number of purchase orders that may be issued. Except as otherwise limited by this contract, the Authority may issue purchase orders requiring delivery to multiple destinations or performance at multiple locations.

E. Any purchase order issued during the period of this contract and not completed within that period shall be completed by the contractor within the time specified in the purchase order. The contract shall govern the contractor's and Authority rights and obligations with respect to that purchase order to the extent as if the purchase order were completed during the contract's effective period; provided, that the contractor shall not be required to make any deliveries under this contract after the fiscal year in which the purchase order was issued.

METHOD OF AWARD

This invitation for bids shall result in the award of five contract for each aggregate award group. Contracts shall be awarded to five (5) independent responsible bidders with the lowest evaluated bid price for each aggregate award group. For the purpose of award, the District shall utilize the estimated quantity as referenced in the Schedule to determine the

[4] The sentence fragment is how the contract reads. From the context, the sentence was probably intended to be completed to the effect that when the initial contractor's capacity had been reached, the District would order from the next low contractor.

estimated dollar value for each item in the Schedule. All awards will be based on the evaluated bid prices. The evaluated bid price will be the total price for the base year, for each group taking into account any applicable preferences. Orders against the contract shall be placed in accordance with the procedures specified in paragraph 14.B, ORDERING AND PAYMENT

TERM OF CONTRACT

The term of the contract shall be for a period of one (1) year from the award date specified on page 1 of the contract.

TIME OF DELIVERY ESSENTIAL

A. Time of delivery is of the essence. The contractor shall have no more than ten (10) days after award to mobilize its personnel and equipment prior to being required to commence work on the contract

B. Upon receipt of notification from the contract administrator/designee, the contractor shall report to the designated work location within twenty-four (24) hours, except for emergency service requests. The services shall be initiated within forty-eight (48) hours of notification under normal conditions.

C. The contractor shall report to' the designated work location within four (4) hours of receipt of the telephonic request, for emergency service.

DISPUTES

This S.P. modifies Article 7 of the STANDARD SPECIFICATIONS FOR HIGHWAYS AND STRUCTURES, 1996:

Wherever the name Director, "Department of Administrative Services" appear, replace with "Authority" Contract Appeals Board".

Fort Myer's appeal asserts that the contract required the District to purchase all of the paving services from Fort Myer, as low bidder, until the Contracting Officer, in his sole discretion, determined that Fort Myer had exhausted its capacity, at which time the Contracting Officer could place orders with the next low bidder. In essence, Appellant contends that until it had reached its capacity for handling work, as low bidder, it had a requirements contract for the subject services. A requirements contract requires the District to purchase all of the items covered by the contract from a single vendor. 27 DCMR § 2791.1. Fort Myer asserts that the District breached the contract by purchasing services from other contractors without determining that Fort Myer had reached its capacity.[5] The District, on the other hand, has interpreted the contract as merely an

[5] For purposes of this motion, the Board assumes that Fort Myer had the capacity to provide the entire District requirement for paving and milling services and that any contrary determination by the Contracting Officer would have been arbitrary.

indefinite quantity contract permitting it to simultaneously place orders with more than one contractor. Resolution of this matter depends on the interpretation of the contract document. If the contract is interpreted as Appellant asserts, it has asserted a claim for breach. If the contract is interpreted as the District asserts, no claim for breach of contract has been asserted and the complaint must be dismissed.[6]

"A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together." Restatement, Second, Contracts § 202(2). In general "an interpretation which gives reasonable, lawful and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect." *Id.* § 203(a).

The poor drafting of the contract terms make a reasonable and consistent interpretation of the Special Conditions of the contract difficult. Critical sections of the contract have no apparent meaning. For example, the "Ordering Period" section provides that "At contract award, the Authority Government will issue an order totaling five (5) locations for Items 1, 2 or 3." Since the individual items in the contract schedule are expressed in square yards, cubic yards and tons, the specification of number of locations is incongruous and it is possible that the term "locations" was not intended.[7] If the phase is given a more logical reading to mean that initial orders would be placed with each of the 5 "contractors," not "locations," an inconsistency would be created with the requirement in part B of the Ordering and Payment section stating that "[w]ork orders shall initially be placed with the contractor who has the lowest contract unit price[8]."

Part A of the same Ordering and Payment section provides that "[i]t is anticipated that purchase orders will be issued at regular intervals during the term of the contract, covering areas within the Authority government authorized to order services under this contract" followed in Part B by a statement that "[I]n summary orders will be placed on a rotating basis with each contractor based on each contractor's capacity and ability to meet contract requirements starting with the contractor with the lowest unit price." The

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[6] Dismissal under SCR-Civil Rule 12(b)(6) is proper only where it appears beyond doubt that a plaintiff [appellant] can prove no set of facts that could support the claim. *Schiff v. American Ass'n of Retired Persons*, 697 A.2d 1193, 1196 (D.C. 1997). Accordingly, the factual allegations are viewed in the light most favorable to the appellant and every reasonable doubt concerning those allegations resolved in the appellants' favor. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Fred Ezra Co. v. Pedas*, 682 A.2d 173, 174 (D.C. 1996); *American Ins. Co. v. Smith*, 472 A.2d 872, 874 (D.C. 1984); *Owens v. Tiber Island Condominium Ass'n*, 373 A.2d 890, 893 (D.C. 1977); *Early Settlers Ins. Co. v. Schweid*, 221 A.2d 920, 922 (D.C. 1966).

[7] If construed literally, placing of orders "at contract award" for 5 locations on each of 5 contracts would have required work to begin immediately at 25 locations.

[8] The Board is not certain as to the meaning of "lowest unit price," since the contracts were to be awarded based on evaluation "for each aggregate award group," notwithstanding that there were only individual items.

requirement of "rotating basis with each contractor" would seem to indicate that orders would be awarded to all contractors regardless of whether a lower priced contractor had sufficient capacity to perform all of the work.

Although the contract has some of the aspects of a requirements contract, as the Appellant asserts, *i.e.,* that orders will be placed with only one contractor, the lowest contractor, until that contractor's capacity is reached, this categorization of the contract is inconsistent with inclusion in the contract of a stated minimum quantity. In a requirements contract, the consideration provided by the Government is its promise to fulfill all of its requirements by using the contractor's services. In an indefinite quantity contract, the consideration provided by the Government is its promise to pay for a stated minimum quantity. *United Management Inc.*, GSBCA No. 13515-TD, 97-2 B.C.A. ¶ 29,262; *see* 27 DCMR § 2791.1.

Since the terms of the contract are so ambiguous and conflicting, the Board must look to the parties' conduct during performance of the contract to determine the meaning of the contract. "Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement." Restatement, Second, Contracts §202(4).

The contract in question was awarded in August 2000 and all of the contractors were directed to proceed with work that same month. The Board presumes that Fort Myer, as a major District road repair contractor, knew almost immediately that it was not being awarded all of the work under the contracts and that substantial work was being awarded to others. Even without this presumption, because Fort Myer was engaged as a subcontractor on work contracted to two other contractors, it must have known that parts of the work were being contracted to others no later than November 2000.[9] Notwithstanding this clear knowledge of the interpretation of the Contracting Officer, Fort Myer did not raise the issues upon which this appeal is based until July 30, 2002, more than a year and a half after the latest date Fort Myer had notice of what it now states was a breach of the contract and more than a year after Fort Myer completed work under the contract.

Fort Myer clearly had an opportunity to object to the District's performance of the contract and assert its view that it was entitled to all of the work, but it raised no objection until August 2001, when other contractors' work was substantially complete. The Board considers such failure to make any objection as acquiescence to the District's interpretation of Fort Myer's contract as an ordinary indefinite quantity contract permitting such orders with other contractors and not a requirements contract that would be breached by a failure to order all requirements for the services from Fort Myer.

[9] In order to have completed the amount of subcontact work asserted, subcontracting must have begun in Nobember.

The Board finds that it was the intention of the parties, as shown by the performance of the contract, that the contract be interpreted as an indefinite quantity contract with no guarantee of orders in excess of the stated minimum and that Appellant's complaint therefore fails to state a claim upon which relief can be granted. The District's motion is granted and the appeal is DISMISSED.

SO ORDERED.

March 24, 2003

MATTHEW S. WATSON
Administrative Judge

CONCURRING:

JONATHAN D. ZISCHKAU
Chief Administrative Judge

DISTRICT OF COLUMBIA GOVERNMENT
CONTRACT APPEALS BOARD

PROTEST OF:

COMMUNITY HEALTH MINISTRY dba Community Medical Care Health Center	)	
	)	CAB No. P-0665
Under Request for Applications No. 1031-02	)	

For the Protester: Urla Barrow, Executive Director, Community Medical Care Health Center. For the District Government: Howard Schwartz, Esq., and Warren J. Nash, Esq., Assistants Corporation Counsel.

Opinion by Administrative Judge Matthew S. Watson, with Chief Administrative Judge Jonathan D. Zischkau, concurring.

OPINION and **ORDER**
(*Courtlink Filing ID: 1569284*)

Protester raised substantial issues as to the fairness of handling its two applications for funding under the Ryan White Title I Regional Grant Request for Proposals. The District, without responding on the merits, moved to dismiss the protest on the ground that the Board lacks jurisdiction to consider protests concerning grant awards. The Board agrees with the District and dismisses the protest.

Protester's applications were submitted pursuant to a Request for Applications ("RFA") for subgrants of Federal grant funds administered by the District of Columbia. Had the protester's applications been successful, they would have resulted in grant awards (RFA 3) and not contracts. The Board's jurisdiction is established and limited by the coverage of the Procurement Practices Act. D.C. Code § 2.309.03 (2001 ed.). That Act specifically excludes from its coverage, and therefore from the Board's jurisdiction, any "contract or agreement receiving or making grants-in-aid or for federal financial assistance." *Id.* § 2-301.04(c). 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.

The protest is DISMISSED for lack of jurisdiction.

SO ORDERED.

March 25, 2003

MATTHEW S. WATSON
Administrative Judge

CONCURRING

JONATHAN D. ZISCHKAU
Chief Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTESTS OF:

WILLIAMS, ADLEY & COMPANY, LLP and MVS, INC.	)	
	)	CAB Nos. P-0666, P-0667
Under Solicitation No. DCAE-2003-T-0010	)	

For the Protester Williams, Adley & Company, LLP: Frederick D. Cooke, Jr., Esq., Rubin, Winston, Diercks, Harris & Cooke, LLP. For the Protester MVS, Inc.: Stephen M. Seeger, Esq., Quagliano & Seeger, P.C. For the District of Columbia Government: Howard Schwartz, Esq., and Warren J. Nash, Esq., Assistants Corporation Counsel.

Opinion by Chief Administrative Judge Jonathan D. Zischkau, with Administrative Judge Matthew S. Watson, concurring.

OPINION

Williams, Adley & Company, LLP ("WAC"), and MVS, Inc., have protested the District of Columbia's award of contracts to Thompson, Cobb, Bazilio and Associates ("TCBA") and Digital Safetynet for project management and related services for the District-wide Health Insurance Portability and Accountability Act ("HIPAA") Implementation Project. The protesters contend that TCBA was ineligible to compete in the procurement, TCBA had an unfair competitive advantage through access to HIPAA information not available to other offerors, TCBA had a potential organizational conflict of interest, the contracting officer improperly amended the solicitation after receiving best and final offers, and the contracting officer improperly failed to conduct debriefings after the awards. The District has moved to dismiss both protests on the ground that they are moot because the District's Chief Procurement Officer cancelled the solicitation and letter contract awards because the proposed definitized contract awards would significantly exceed the $999,999 maximum contract amount permitted for task orders under the District of Columbia Supply Schedule. When canceling the solicitation, the District also issued a new solicitation for the same services but using GSA's federal supply schedule rather than the District's supply schedule. The protesters oppose dismissal, arguing that the protest issues are not moot because the new solicitation and awards will lead to the same protest grounds which are raised in these existing protests and that the protesters are entitled to proposal preparation costs incurred in responding to the now cancelled solicitation.

We conclude that the protesters can raise appropriate protest grounds under the new solicitation and awards and there is no good reason to address issues where the underlying solicitation has been cancelled. Finally, the protesters have not demonstrated that the District's actions toward the protesters in connection with the cancelled solicitation were arbitrary or capricious as required by D.C. Code § 2-309.08(f)(2) to authorize award of proposal preparation costs. Accordingly, we dismiss the protests as moot and deny the request for proposal preparation costs.

BACKGROUND

On October 22, 2002, the District of Columbia's Office of Contracting and Procurement ("OCP") on behalf of the Office of the Deputy Mayor for Children, Youth, Families and Elders issued Solicitation No. DCAE-2003-T-0010 for project management and related services for the District-wide Health Insurance Portability and Accountability Act ("HIPAA") Implementation Project. (District's Motion to Dismiss, filed February 19, 2003). OCP issued a request for task order proposals to seven contractors on the District of Columbia Supply Schedule. OCP received five proposals in response to the solicitation. After an evaluation of the technical proposals and best and final offers, the contracting officer awarded, on January 7, 2003, letter contracts to TCBA for contract line item numbers 0001, 0003, and 0004, and to Digital Safetynet for item number 0002.

On January 21, 2003, WAC filed its protest of the award to TCBA, which was docketed as CAB No. P-0666. WAC contended that TCBA was ineligible to compete in the procurement pursuant to an OCP directive, because TCBA had participated in a preliminary assessment report underlying the solicitation. It also alleged that TCBA had an unfair competitive advantage through access to HIPAA information not available to other offerors because of its work under a prior District contract. WAC also contends that TCBA has a potential organizational conflict of interest with Chartered Health Plan which is a health provider allegedly affiliated with TCBA. WAC claims that the contracting officer improperly amended the solicitation to waive the 50 percent LSDBE subcontracting requirement after receiving best and final offers but never gave offerors another opportunity to update their BAFOs. Finally, WAC states that the contracting officer improperly failed to conduct a debriefing after the awards.

On January 22, 2003, MVS filed its protest of the awards, which was docketed as CAB No. P-0667. MVS complained that the contracting officer initially set a date for debriefing but then cancelled the debriefing and has never rescheduled it despite repeated requests from MVS.

On February 19, 2003, the District moved to dismiss both protests on the ground that they are moot because the District's Chief Procurement Officer cancelled the solicitation and letter contract awards. The cancellation was necessary, according to the District, because the proposed definitized contract awards significantly exceeded the $999,999 maximum contract amount permitted for task orders under the District of Columbia Supply Schedule. Paragraph 5 ("Ordering Limitations & Information") of the terms and conditions of the District of Columbia Supply/Service Schedule, effective March 2002, provides in relevant part:

> MINIMUM ORDER: The District guarantees the minimum order for each awardee in an amount of $50.00 for the base year only.
>
> MAXIMUM ORDER: For any task or delivery order, the maximum order limitation shall be no greater than the maximum contract ceiling amount.

> MAXIMUM CONTRACT CEILING: The maximum contract ceiling for each year is $999,999.00.

(MVS Submission, filed Mar. 12, 2003, Ex. 4). The Determination and Findings to cancel the solicitation, dated February 4, 2003, states in relevant part:

> Solicitation Number DCAE-2003-T-0010, Request for Task Order Proposal (RFTP) was issued on October 22, 2002. According to the solicitation, awards would be made against the DC Supply Schedule contracts. Evaluations were complete on December 30, 2002 and an award recommendation was made and approved. Two letter contracts were executed to allow the selected contractors to begin work immediately to meet the fast-approaching compliance deadlines for HIPAA.
>
> After award of the letter contracts, it was brought to the Contracting Officer's attention that the proposed contract award amounts, $10M[illion] to Thompson, Cobb, Bazilio and Associates (TCBA) and $1.5M[illion] to Digital Safetynet (DSI), exceeded the maximum contract amount of $999,999.99 for task orders under the DC Supply Schedule terms and conditions. Therefore, the definitized contract awards could not be made against the DC Supply Schedule.
>
> Based on this, the letter contracts are voidable. The services will be resolicited through a combination of orders from the GSA Federal Supply Schedule and one sole source contract pursuant to D.C. Official Code 2-303.05(a)(3A). New statements of work are to be developed to reflect the current requirements. The effective date of the cancellation of the letter contracts is February 28, 2003.
>
> . . . .
>
> The District has a compelling reason to cancel the RFTP because definitized contracts can not be awarded against the DC Supply Schedule as indicated in the solicitation. An award could not be made based on this mistake in the solicitation.
>
> In accordance with D.C. Code § 2-303.07, 27 DCMR Section 1615.3, and the findings contained herein, it is hereby determined that the cancellation of the RFTP is in the best interest of the District. . . .

(District of Columbia Motion to Dismiss Protest, Ex. 1).

On February 4, 2003, OCP issued a Request for Task Order Proposals No. DCAE-2003-T-0046 for HIPAA Remediation and Implementation Project under GSA's federal supply schedule to four contractors: Ernst & Young, First Consulting Group, TCBA, and WAC. (District's Motion to

Dismiss, at 3, in CAB No. P-0671). The scope of work was changed somewhat from the original solicitation. It appears that contract line item 0002 from the original solicitation was not included in the new solicitation because the District gave a sole source award to Digital Safetynet for that work. The record of the protests does not indicate any other specific changes. (See MVS Submission, at 1, filed Mar. 12, 2003). On February 12, 2003, OCP received proposals from First Consulting Group, TCBA, and WAC. The contracting officer selected TCBA as the highest scored offeror. The contracting officer also determined that TCBA did not have a conflict of interest based on its response to an Organizational Conflict of Interest and Non-Disclosure of Information form that all offerors were required to submit with their proposals. On February 28, 2003, the contracting officer awarded a GSA letter task order to TCBA. (*Id.*, Exs. 4-5).

Responding to a Board request made at a status conference on March 5, 2003, MVS submitted on March 12 its request for proposal preparation costs and costs of pursing its protest pursuant to D.C. Code § 2-309.08(f)(2).

On March 14, 2003, WAC protested the award to TCBA under the new solicitation, alleging that an organizational conflict of interest precluded TCBA from receiving the GSA letter task order. (Protest, CAB No. P-0671). The District filed a motion to dismiss the protest in CAB No. P-0671 on April 7, 2003. On April 8, WAC filed a consent motion to dismiss the protest and the Board dismissed the protest on April 9.

DISCUSSION

MVS and WAC do not contend that the cancellation of the original solicitation under the District supply schedule was improper. Rather, they argue that the cancellation did not moot the protest grounds raised by their protests and that they are entitled to proposal preparation costs because the District clearly violated the law by issuing a solicitation and conducting a procurement when the value of the procurement substantially exceeded the District's supply schedule maximum ceiling amount. Alternatively, the protesters argue that we should recognize an exception to the mootness doctrine where the protest issues are ended by a procurement cancellation but the same issues will likely be raised again, especially in the present situation where the District procures essentially the same services but changes the contracting vehicle from the District supply schedule to the GSA supply schedule.

By canceling the solicitation and the resulting letter contract awards, the District mooted the protest grounds raised by the protesters in P-0666 and P-0667. We do not agree with the protesters that we should recognize an exception to the mootness doctrine under the present circumstances. Requiring a protester to file a new protest for a new solicitation or award following the cancellation of an earlier solicitation and award does not unreasonably prevent the Board from meaningfully resolving protest issues in a timely manner. By addressing a live procurement rather than a cancelled one, the parties will better focus on the actual issues in controversy and the Board avoids providing advisory opinions. WAC and MVS had an opportunity to challenge the subsequent solicitation

under the GSA supply schedule and resulting award to TCBA. WAC filed an award protest and raised one of the five issues it had raised in its earlier protest, the organizational conflict of interest issue. However, WAC agreed to a voluntary dismissal of that protest prior to the Board making a decision on the merits. Thus, in hindsight, it becomes even clearer that there was no need for the Board to address the protest issues raised in the cancelled procurement.

The protesters argue that they are entitled to proposal preparation costs and costs of pursuing their protests in CAB Nos. P-0666 and P-0667. That argument is not mooted by the cancellation because if the District acted in an arbitrary or capricious manner toward the protesters, then D.C. Code § 2-309.08(f)(2) provides that a protester may receive its reasonable proposal preparation costs and costs of pursing the protests. Section 2-309.08(f)(2) provides:

> The Board may, when requested, award reasonable bid or proposal preparation costs and costs of pursuing the protest, not including legal fees, if it finds that the District government's actions toward the protester or claimant were arbitrary and capricious.

We do not find that the District acted in an arbitrary or capricious manner toward the protesters. The District reasonably determined to cancel the solicitation when it discovered that the contract value would exceed the maximum contract ceiling amount permitted for a District supply schedule contract. Thus, when faced with the two protests, although raising different issues, the District took corrective action and made the contracting officer available to address the protest issues during a status conference attended by the parties. We agree with the District that any negligence or lack of due diligence by the agency in preparing the solicitation and failure to realize that the District supply schedule could not be use for a procurement in excess of $999,999 does not rise to the level of arbitrary and capricious conduct toward the protesters. The protesters received copies of the solicitation, as did other offerors, but never questioned the agency about the District supply schedule ceiling amount. Thus, it seems that neither the District nor any of the offerors realized the ceiling limitation problem during the procurement and that the problem was first identified only during the District's legal review of the proposed definitized contracts for TCBA and Digital Safetynet.

In comparable situations, the GAO has denied claims for bid or proposal preparation costs where the protest record demonstrated nothing more than agency negligence or lack of due diligence leading agencies to cancel solicitations. *E.g.*, *Special Systems Services, Inc.*, B-238168, Apr. 4, 1990, 90-1 CPD ¶ 359 (inadequate showing of arbitrary or capricious conduct where the agency had to cancel its solicitation because it had negligently prepared specifications which "drastically failed to include many requirements necessary to meet the agency's actual minimum needs"); *Computer Resource Technology Corp.*, B-218292.2, July 2, 1985, 85-2 CPD ¶ 14 (lack of due diligence or carelessness on the agency's part in allowing the solicitation to be issued or in not canceling it at an earlier date does not entitle protester to bid preparation costs since conduct did not rise to level of arbitrary or capricious action).

MVS, in its proposal preparation costs submission, also raises an argument that the District improperly proceeded under a sole source procurement with Digital Safetynet for the work formerly required under contract line item number 0002 of the now canceled solicitation. This issue was not raised as a ground for protest and is irrelevant to the question of recovering proposal preparation costs.

CONCLUSION

By canceling the solicitation and awards, the District has rendered the protests of WAC and MVS moot. We have considered all of the protesters' arguments for recovering proposal preparation costs and costs of pursing their protests, but conclude that the protesters are not entitled to recover those costs. Accordingly, we dismiss the protests as moot.

SO ORDERED.

DATED: April 14, 2003

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

CONCURRING:

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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

PRINCE CONSTRUCTION CO., INC,	)	
	)	CAB No. D-1173
Under Contract No. 96-0023-AA-2-0-CC	)	

CORRECTED
ORDER ON CROSS MOTIONS FOR SUMMARY JUDGEMENT
CourtLink Filng ID 1806211

This matter is before the Board on cross motions for summary judgment. Prince Construction Co., Inc. ("Appellant") was awarded a contract for renovation of the Chevy Chase Community Center on November 15, 1998 (Contract No. 96-0023-AA-0-CC) in the amount of $1,594,000.00. That amount was subsequently increased by $557,308 for additional work and decreased by $191,063.00 for reprocurement costs resulting from a partial termination for default. (Change Order 10).[1] The District admits that the balance of funds remaining on this contract is $148,622.00. (Rasson Aff. ¶ 10).

The District took beneficial occupancy of the project on February 11, 2000. (*Id.* ¶ 7). On September 30, 2001, Prince submitted an invoice for final payment of the amount remaining on the contract, giving allowance for the reprocurement costs, notwithstanding that it is disputing the partial termination for default. (*Id.* ¶ 27) The District refused to process the invoice asserting four reasons. First, that the District has claims for repairs and damage due to improperly performed work. Second, that there remain uncompleted punchlist items for which the District claims it is entitled either to specific performance or compensation. Third, that since the contract is not fully completed, the District cannot release the 10% contract retainage. And fourth, that the substantial completion of performance was 232 days late, potentially entitling the District to liquidated damages exceeding the admitted balance of funds. (Appellee's Motion, 2). On November 6, 2001, Prince submitted the returned invoice directly to the Contracting Officer requesting payment. The Contracting Officer has never responded. Prince filed this appeal to compel payment of the remaining balance.

It is conceded by the District that the Contracting Officer has never issued a final decision as to any of the District's claims. Although deficiencies have been alleged by various government employees other than the Contracting Officer (*see, e.g.,* Rasson Aff. Ex. 9), the Contracting Officer has not determined that work was improperly done, nor has the Contracting Officer determined any damages incurred by the District as a result of any allegedly improperly done work. Similarly, the Contracting Officer has not issued any determination as to the allegedly incomplete work or made a finding as to liability for

[1] The default termination and the amount are the subject of appeals before the Board (D-1120 and D-1168, respectively). For purposes of this order, the default and reprocurement costs will be assumed to be valid.

the late completion. Indeed, the affidavit supporting the District's motion, is neither made by the Contracting Officer nor purports to be a "final" determination. By its own terms the affidavit merely gives "examples" of alleged deficiencies in contract performance. *See, e.g., id.* ¶¶ 14, 16 and 18-21.

If the admitted balance on the contract is not subject to any existing claim by the District, then summary judgment must be granted to Appellant. If, on the other hand, there are claims which have been properly asserted by the District, whether or not they have been adjudicated by the Board, summary judgment denying immediate payment of Appellant's claims must be granted to the District to the extent of the District's validly asserted claims.

It is inexplicable why, to this date, there has not been a final decision of the Contracting Officer on any claim raised in defense of final payment. The liabilities of the contractor to the District raised as a defense to payment of the contractor's claim are the equivalent of counterclaims by the District against the contractor to offset the amounts admitted to be owed to the contractor. The Procurement Practices Act provides:

> All claims by the District government against a contractor arising under or relating to a contract shall be decided by the contracting officer who shall issue a decision in writing, and furnish a copy of the decision to the contractor.

D.C. Code § 2-308.03(a)(1).

In the absence of a final decision by the contracting officer, the Board has no jurisdiction to consider a demand of the District either as a claim, counterclaim or defense. There is no contracting officer's decision on the items claimed by the District. Appellant is entitled to summary judgment. It would not be efficient, however, for the Board to grant summary judgment if a final decision of the contracting officer could be immediately made and a new appeal immediately taken. *See Beck Associates,* ASBCA No. 24494, 85-2 BCA ¶ 18,134. The Board must therefore consider the nature of the claims raised by the District to determine whether a final decision can now be issued and considered by the Board.

The claims alleged by the District are of two types. The defective performance and punchlist claims are unliquidated claims, that is, claims of an uncertain amount, which cannot be determined by mere computation. The claim for damages for late completion is a liquidated claim that can readily be computed by multiplying the number of days that the project was late by the daily damage amount stated in the contract.

As noted above, performance of this contract was substantially complete and beneficial occupancy accepted on February 11, 2000. "The notice of beneficial occupancy of the building portion of the project was accompanied by a deficiencies list. That list was sixteen (16) pages long. The deficiencies were to be cured within 30 days, i.e., by March 12, 2000." (Rasson Aff. ¶ 22). On March 23, 2000, Prince requested a

final decision for the problems associated with the project. (Unanswered Complaint in CAB No. D-1126 (consolidated with this matter) ¶ 14). Although, the District now claims, without specificity, that "[a]s of the date of this declaration (August 8, 2002), almost two and a half years later, there are significant items on that deficiencies list that have not been cured" *Id.* ¶ 23, the Contracting Officer has not made any determination as to contract deficiencies.

On February 4, 2000, shortly before acceptance of beneficial occupancy of the building, the Contracting Officer partially terminated the items of the contract relating to heating and cooling. On September 17, 2001, the Contracting Officer issued a final decision decreasing the contract amount by $191,063.00 as the cost of reprocuring the terminated items.

It is the opinion of the Board that it is not a permissible procurement practice to withhold a Contracting Officer's decision on a known, but unasserted, unliquidated claim by the District against the contractor for an unreasonable length of time. If the District is aware of a claim and the contracting officer fails to determine the claim when it reasonably should be determined, the District shall be deemed to have waived the claim and the claim shall be barred as either a claim or defense before the Board. Based on the uncontested facts of this matter, the Board finds that the District is bound by its acceptance of the renovated building and may not now assert claims alleging defective, as opposed to late contract performance. The District delivered a punchlist of alleged defects to Prince in February 2000. The letter transmitting the punchlist set a deadline to correct the punchlist items in March 2000. Shortly after that deadline, Prince requested a decision of the Contracting Officer as to any remaining problems. The C.O. never asserted a deficiency through a final decision. Even if that request had not been made, the Contracting Officer had an obligation to determine any claim of defective performance within a reasonable time, particularly if the District continues to hold the contract retainage. Under the circumstances here, we find it unreasonable to assert a claim now for defective performance.

In addition, shortly before the punchlist was transmitted, the Contracting Officer partially terminated part of the contract, making Prince liable for reprocurement costs of the terminated portion. The Contracting Officer assessed the reprocurement costs against Prince in September 2001, over a year and a half later. Since the Contracting Officer clearly must have known, or should have inquired at the time of determining the reprocurement costs, of any other unasserted claims of defective performance against Prince, failure of the Contracting Officer to determine any other existing District claims against the contractor at the time of assessment of reprocurement costs was clearly unreasonable. It would be unfair at this time, now three years after the Appellant left the job, to require the Appellant to respond to such stale accusations. The District is barred from asserting unliquidated claims with regard to performance in this matter.

Although the Board holds that unliquidated claims are precluded by the unreasonable delay, the same logic does not work to preclude liquidated claims. In its defense to Prince's Motion for Summary Judgment, the District asserts the liability of

Prince for contractual damages for late performance. Prince was just as aware of the late completion of the project as was the District. Although it is the opinion of the Board that, pursuant to acceptable contracting practice, the Contracting Officer should have seasonably made a final decision as to the District's claim for late completion, whether or not Prince presented justification for any of the delay, at any time in the last three years Prince could have submitted a justification for the late performance and requested a final decision on the amount of liquidated damages to be assessed. Prince did not do so, and, since both parties have had equal knowledge of the fact of late performance, the Board will not preclude the District from raising liquidated damages for late performance as a counterclaim or defense.

At the present time there has been no determination by the Contracting Officer as to any claim against the contractor by the District. Prince is therefore entitled on the current state of the record to the summary judgment for the unpaid balance of the contract not subject to claim. The Board will stay that judgment for two weeks to permit the District to issue a Contracting Officer's decision to perfect claims not inconsistent with this Order.

The District's motion for summary judgment is denied. The Appellant's motion for summary judgment is granted subject to a stay until Tuesday, May 20, 2003.

SO ORDERED.

May 6, 2003

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

Concurring

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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

PRINCE CONSTRUCTION CO., INC.	)	
	)	CAB No. D-1127
Under Contract No. 97-0007-AA-2-0-CC	)	
[McKinley Pool and Bathhouse]	)	

For the Appellant: Robert Klimack, Esq., Klimek, Kolodney & Casale. For the District of Columbia: Jack Simmons, III, Esq. and Jenifer Longmeyer, Esq., Assistants Corporation Counsel.

Opinion by Administrative Judge Matthew S. Watson, with Chief Administrative Judge Jonathan D. Zischkau, concurring.

OPINION
BCD-4 QUANTUM

(Courtlink Filing ID 1769496)

Prince Construction Co., Inc. ("Prince") seeks an equitable adjustment in the amount of $232,800.14 as a result of an acceleration unilaterally ordered by the District in a change order ("BCD-4") dated March 2, 1999. It is agreed by the District that BCD-4 constitutes a unilateral change pursuant to Article 3 of the contract for which Prince is entitled to an equitable adjustment. Prince's claim includes its own direct labor charges, claims for additional labor and material costs by 6 subcontractors and extended unabsorbed overhead. The Board held hearings on February 25, 26 and March 10, 2003, to determine the amount of this adjustment. The Board finds that Prince is entitled to $32,427.63 for its own direct labor; $35,518.19 for subcontractor claims; and $16,995.05 for unabsorbed overhead, for a total equitable adjustment of $84,940.87, less any payments previously made.

BACKGROUND

Prince and the District entered into Contract No. 97-0007 to construct a pool and bathhouse adjacent to McKinley High School in 1997. Work commenced July 6, 1998 (Appellant's Ex. 10). Completion was required by March 13, 1999. By February 1999, the District recognized that the construction was well behind schedule and would not be completed by the scheduled completion date. On March 2, 1999, the District issued BCD 4 which confirmed a direction made February 26, 1999, requiring Prince to "[t]ake any and all necessary action to complete the project on or before May 15, 1999."

In transmitting the change order, the District recognized that Prince would incur additional costs to comply with the acceleration order and authorized $45,000.00 "pending settlement, processing and execution of change order for total compensation which is attributable to this change." The $45,000 was not stated as a limitation, but rather an interim amount to permit Prince to proceed with required acceleration. Prince was requested to submit a proposed increase due to the change within 20 days of receipt of the BCD transmittal. Prince did not submit such a proposal. As part of this proceeding, Prince submitted a report dated January 6, 2003, detailing $232,800 in additional costs that it asserts are due as a result of BCD-4.

The claim includes:

1. Prince direct labor costs	$ 145,094.89
2. Subcontractor costs from 5 subcontractors:	
a. Paddock Swimming Pool Company	10,481.72
b. Joshua Construction, Inc.	11,295.19
c. LDC Masonry, Inc.	6,250.77
d. HLW Electric, Inc.	32,034.00
e. Aggregate Placement, Inc.	4,541.99
f. Material Distributors, Inc.	755.48
3. Prince extended ("Eichleay") overhead	22,346.10

In support of its own claim Prince presented the testimony of its in-house accountant (Tr. V/20, *et. seq.*), its field superintendent for the job (Tr. V/33, *et. seq.*) and its president. (Tr. V/116, *et. seq.*). Prince also presented a witness from each of the subcontractors except Material Distributors, Inc. in support of their respective claims. (Paddock Pools, Tr. VII/48, *et. seq.*; Joshua Construction, Tr. VII/64, *et. seq.*; LDC Masonry, Tr. VII/13, *et. seq.*; HLW Electric, Tr. VII/21 *et. seq.*; Aggregate Placement, Tr. V/74 *et. seq.*). The District presented the testimony of an expert on construction costs. (Tr. VII/90 *et. seq.*)

The contract involved construction of an outdoor swimming pool and bathhouse. The pool was intended to be open for the summer of 1999. By BCD-4, the District recognized that work had been delayed, making completion by March 13, 1999, impossible and that, at the contractor's rate of progress, the pool might not open at the beginning of the 1999 swimming season. BCD-4 directed Prince to accelerate performance so as to complete performance by May 15, 1999.

Prince is entitled to payment of additional costs reasonably incurred to accelerate performance after issuance of the issuance of BCD 4 at least through May 15, 1999, the extended completion date. Construction of the pool was not completed by May 15. The District's position, as expressed in the report of its expert witness, is that the order to accelerate terminated on the May 15 revised completion date. The expert testified that the any acceleration costs incurred after that date should be disallowed. (Tr. VII/101) The Board finds the District's interpretation to be unreasonable. It was the clear intent of the

District that the pool be open for the 1999 swimming season. Even though the District set a target date of May 15 stated in BCD-4, in light of the desire to open the pool that summer, it would have been irresponsible to cease the acceleration when the target date was passed. In fact, the District must have been aware that Prince continued its accelerated performance beyond May 15 and thus approved the extended accelerated performance. Thus the Board believes that the only reasonable interpretation of the District's intent is that the acceleration order continued until the pool opened. The Board finds that Prince is entitled to reasonable costs incurred in accelerating the project from the date of the BCD to the pool opening. Although the pool apparently partially opened in June, it was not fully open until July. (Tr. VI/122). Prince is entitled to acceleration costs through July, 1999

The proper measure for an equitable adjustment is the difference between the cost of the work required by the original contract terms and the reasonable cost of performing the work as changed. *J.R.Pope, Inc.*, DOTCAB No. 78-55, 80-2 BCA ¶ 14,562. There are two key factors in determining the inclusion of costs in an equitable adjustment. First, the additional effort necessary to perform the changed work, in this case accelerating performance of the project, above the effort necessary to perform the contract as originally written. And second, whether the costs claimed for the additional effort are reasonable.

Prince claims three categories of direct costs to accelerate the work. First, the entire salary and benefits cost of its president, who applied himself full-time to accelerating the project. Second, the cost of overtime hours worked by labor other than the president. And third, the cost of extra labor to compensate for inefficiency resulting from requiring workers to work overtime.

Prince also claims additional costs incurred by subcontractors for extra work and overtime labor.

PRINCE DIRECT LABOR COSTS

Direct Labor Performed By The President Of Prince

The Board does not question the full-time presence of the president on this job during the acceleration period. The record, however, does not support the value of the work of the president other than to "help out" (Tr. V/122) and to improve "morale." (Tr. V/151). The president did not replace the site supervisor, who was also charged to the job. (Tr. V/127). As authority for charging its president's time directly to the acceleration, Prince relies on the general requests by District employees to the president that he "be there, to make sure that [he] would be there then they needed [him] to answer the telephone, and to deal directly with the inspector," (Tr. V/121), and implying that unless the president complied "they were going to take more drastic action." (Tr. V/126). The Board finds that these statements are mere puffing and did not amount to a contracturally directed requirement.

Accordingly, the Board finds that the full-time presence of the president is not a reasonable cost of carrying out the acceleration.

Overtime Labor

Prince has claimed as additional cost the full compensation for overtime hours worked to accelerate performance, which was charged at time-and-a-half rates. BCD-4 directed acceleration, but did not add to the work to be accomplished under the contract. Thus, if the project had not been accelerated, the hours worked as overtime hours would still have had to be expended as straight time hours over a longer period of time. The only additional cost of the acceleration was the overtime premium, not the entire time-and-a-half compensation.

Prince documented $30,594.51 in direct labor at overtime rates. (Appellant's Ex. 3). Of that amount $1,612.78 must be disallowed as being expended in August, (*id.*), after opening of the pool, leaving a balance of $28,981.73. However, even though this amount was expended during the acceleration effort, as noted above, only the overtime premium is a proper acceleration cost. Unaccelerated performance would have required utilization of the same number of labor hours paid at base wage rates. Only the 50% overtime premium is properly allocated to the acceleration. The overtime premium represents one-third of the total labor charge, or $9,660.58. Adding 34.22% for insurance, fringes and taxes; 20% for overhead; and 1% for bonding costs, results in a total allowable labor cost of $15,715.31.

Inefficiency

Prince has claimed compensation for inefficiency resulting from overtime work. Building industry practice recognizes that employees consistently working over 8 hours per day accomplish more each day than employees working eight or fewer hours per day, but are less efficient on a per hour basis. Thus, it is understood that 2 employees each working 60 hours per week, a total of 120 hours, will produce less than 3 employees working the same 120 hours, but each working 40 hours per week. This inefficiency is only recognized, however, when overtime is required for sustained periods. Inefficiency is generally not recognized for sporadic overtime efforts. The inefficiency factor applies to all labor hours of the workers working overtime, not just the overtime hours. The Mechanical Contractors Association of America publishes tables of recognized inefficiency factors. These tables give inefficiency factors to be applied to total payroll based on overtime worked each day for 5, 6 and 7 day weeks. (Bulletin 18A). The parties acknowledge the reasonableness of MCAA's inefficiency factors.

The parties agreed that acceleration of the contract work required working longer then 8-hour days at times during the acceleration period. Prince employees, however, did not work the longer days consistently during the entire acceleration period. We find that in this matter inefficiency should be recognized only for those weeks which Prince had workers in overtime status for sustained periods, such as an entire work-week. Prince has computed its claim for inefficiency based on its total payroll for all weeks during the entire period of acceleration, regardless of whether overtime was consistently worked.

The Board finds that an increase for inefficiency is allowable only for weeks in which overtime was worked the entire work week. Based on Prince's certified payrolls, sustained overtime was worked during the acceleration period for the weeks ending May 1 and 8, June 12, 19 and 26, and July 17. Payroll for these weeks, including both regular and overtime hours, totaled $69,014.53. Using an average inefficiency rate of 15%, Prince is entitled to $10,352.18 for inefficiency resulting from the acceleration.

The Board finds that Prince is entitled to an equitable adjustment for additional labor costs attributable to the acceleration of $10,352.18 for overtime inefficiency, plus 34.22% for insurance, fringes and taxes; 20% for overhead and profit; and 1% for additional bonding costs for a total of $16,840.37

SUBCONTRACTOR CLAIMS

Paddock Swimming Pool Company

Prince has submitted a claim for extra costs due to the acceleration incurred by subcontractor Paddock Pools. Paddock Pools costs result from a requirement made necessary by the acceleration to finish the pool before water connections were available. (Tr. VII/57). As a result, Paddock was required to regularly brush and vacuum the pool surface in order to prevent damage from leaving the pool unfilled. Had the work not been accelerated, water would have been available when the pool was completed and none of the costs claimed on behalf of Paddock would have been required. Therefore, all reasonable efforts expended are attributable to the acceleration. All of the costs were incurred before opening.

A change order, however, is not a blank check to accomplish the changed work without regard to reasonable cost. The additional work, brushing and vacuuming, is not skilled work. The work was done in part by laborers, but, according to Paddock's claim, was largely performed by skilled carpenters and plumbers. (Appellant's Ex. 19). It was unreasonable that skilled plumbers and carpenters were assigned and charged at their skilled mechanic rates to perform the laborer work of brushing and vacuuming. Although the work was necessary to accomplish the acceleration, the overqualified workers were not. In addition, Paddock claims 25 hours at $60 per hour for services of the "General Superintendent," as well as a charge for 16 deliveries, none of which is documented. (*Id.*)

The Board finds that only an amount equal to what would have been paid to laborers to accomplish the work is allowable as an equitable adjustment for the labor provided, plus 2 hours of the General Superintendent's time that was documented. Paddock utilized 88.5 hours of straight time and 36.75 hours of overtime in performing the work required by the acceleration. Laborer's time was charged by Paddock at $19.32 per hour for straight time and $28.98 for overtime. The Board finds that $2,894.84 is allowable for labor. In addition, $1,905.08 is allowable for supplies and pump "rental."[1]

[1] The Board finds that the sales tax claimed on these purchases in not allowable. Sales tax for deliveries to the site was improperly paid to the State of Maryland. In addition, pumps are shown in the claim as rental equipment and Maryland sales tax added. The documentation, however, shows the pumps as Paddock owned equipment. A reasonable charge for the pumps without sales tax is allowable. (Appellant's Ex. 14).

Paddock is entitled to recover $4,799.92, plus 17% profit and overhead for a total of $5,615.91. Prince is entitled to its markup of 10% and additional bonding cost of 1% on this amount for a total of $6,239.27.

Joshua Construction, Inc.

The Board finds that the entire Joshua claim is allowable. All of the extra cost claimed by Joshua was for work performed between the issuance of BCD-4 and the opening of the pool. Joshua has properly claimed only the additional cost of the overtime premium for the work performed and made no claim for work performed at base wages or the base wage portion of the wages for overtime work. In addition, Joshua has properly applied an inefficiency factor only for those weeks where overtime was required every day of the week and not claimed any inefficiency costs for the week in which no overtime was worked. Joshua conservatively used an inefficiency factor based on employees working five 12-hour days, 60 hours, in the week. In fact, Joshua employees averaged 67.5 hours per week for the two weeks for which an inefficiency factor is claimed. (Appellant's Ex. 14).

The Board sustains Prince's claim of $11,295.19 on behalf of Joshua.

LDC Masonry, Incorporated

LDC's claim is divided into two parts. One part, $2,448.28, is based on extra effort required by an accident and a site management problem. There is no claim that either of these problems was attributable to the District. The Board found these problems to be unrelated to the acceleration ordered by BCD-4 and this portion of the claim was dismissed orally at the hearing. (Tr. VI/59-60).

The remainder of the claim is for overtime premium for hours worked between February 20, 1999 to April 13, 1999, to accelerate the project. (Appellant's Ex. 11). To the extent that the extra effort was expended prior to the effective date of the acceleration order, it is not an allowable cost for an equitable adjustment. The Board finds that for the period within the acceleration period between February 27, 1999, and April 13, 1999, LDC had 82.5 and 121.5 overtime hours for bricklayers and laborers, respectively. The overtime premium was $10.70 for bricklayers and $5.50 for laborers.

LDC is entitled to recover $1,551 plus 48.75% labor burden, 10% overhead and 10% profit resulting in allowable amount to LDC of $2,791.61. Prince is entitled to its markup of 10% and additional bonding cost of 1% on this amount for a total of $3,101.48.

HLW Electric, Inc.

HLW claims labor charges for 394.5 hours of electrician overtime at $44.16 per hour plus 79.5 hours of laborer overtime at $12 per hour, for a total of $18,375.12, which includes total base wages and overhead premium. The HLW invoices assert that "[t]his

overtime cost is additional to the base contract due to the fact that my base bid allowed 900 man hours to complete project." (Appellant's Ex. 16, 17 and 18). The number of labor hours upon which the bid is based is not relevant to determine the charges applicable to the acceleration since no additional labor, other than an inefficiency factor was required here to accelerate the construction project. Although the witness for HLW testified at the hearing that there were certain inefficiencies due to the smaller sizes of crews on evenings and weekends, he was not able to quantify this amount. (Tr. VII/38). The Board finds that HLW is only entitled to the overtime premium as a reasonable charge to implement BCD-4.

HLW is entitled to $6,125.04 plus 25%[2] for insurance, taxes and fringe benefits; 10% for field overhead; 3% for office overhead; and 10% for profit totaling $9,542.05. Prince is entitled to its markup of 10% and additional bonding cost of 1% on this amount for a total of $10,601.21.

Aggregate Placement, Inc.

With the urging of District employees, not including the Contracting Officer, Aggregate Placement, Inc., was requested to pour the pool deck on a day that there was a chance of rain. (Tr. V/79). Although Aggregate advised against proceeding with the pour, it mobilized a crew to make the pour in the afternoon. (V/97). As a result of rain, the pour did not take place. The Board finds that in view of the District's intent that the pool be completed as quickly as possible, mobilization in the face of a possibility of rain was a reasonable step to take in furtherance of the order to accelerate. The pour was scheduled for late in the afternoon requiring overtime pay. Although the District officials' direction to mobilize for the pour may not have been a contractual direction, the fact of the active participation of District personnel supports the reasonableness of the action. Since the crew was present only for 2 hours before the pour was cancelled, meaningful work on the job could not be accomplished, making the entire base wages and overtime premium allowable costs of acceleration.

Aggregate Placement is entitled to recover its entire claim for labor and subcontract costs, including sales tax,[3] plus a markup on the subcontract cost of 5% for a total amount of $4,088.20. Prince is entitled to its markup of 10% and additional bonding cost of 1% on this amount for a total of $4,541.99.

Material Distributors, Inc.

No direct evidence was produced to support the Material Distributors, Inc. claim for additional acceleration costs. The Board therefore dismisses this portion of the claim as unproved.

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[2] HLW submitted three invoices, 1 showed labor burden at 25% and 2 showed the burden at 30%. (Appellant's Ex. 16, 17 and 18). Only the invoice showing 25% is signed. The Board accepts the 25% figure.

[3] The Board notes that the subcontractor paid District sales tax on its concrete pump rental.

UNABSORBED OVERHEAD

Prince claims additional overhead computed pursuant to the so-called "Eichleay Formula." See *Eichleay Corp.*, ASBCA No. 5183, 60-2 BCA ¶ 2688, aff'd on recon 61-1 BCA ¶ 2894. The District's expert report questioned whether Price incurred any additional overhead from the extended period. This is precisely the problem the Eichleay formula is intended to overcome.

> The Eichleay formula furnishes a necessary surrogate for the normal accounting practice of applying an overhead rate to the appropriate direct cost base in situations where the contractor is delayed and direct costs that normally would have been incurred in the performance of the contract decreased or were eliminated during the period of delay. It is a practical and necessary expedient to compensate the contractor in situations where the direct cost base is eroded thus making use of the normal indirect cost allocation percentage rate inappropriate. Derivation of a daily overhead rate is merely a necessary substitute designed for such situations where achieving a more precise measurement is impracticable and/or use of the percentage rate on direct costs would be inequitable. The Eichleay formula is a time-honored means of approximating a "fair allocation" of unabsorbed indirect costs in situations where direct costs have been reduced during periods of compensable suspensions of work.

R.W. Contracting, Inc., ASBCA No. 24627, 84-2 BCA ¶ 17,302 at 86,219.

Prince computed the extended contract period pursuant to BCD-4 as being the 63 days from March 13, 1999, the original contract completion date, to May 15, 1999, the BCD-4 target date. BCD-4 was a unilateral change drafted and issued by the District without negotiation. Any ambiguity was thus created by the District and the Board must accept a reasonable interpretation by Prince of the ambiguous language. Although BCD-4 is silent as to whether the unilateral change includes an extension of the contract, BCD-4 clearly establishes a new completion date. Prince's interpretation of the change that it extends the contract by 63 days is therefore not unreasonable and Prince is entitled to compute its additional overhead on the basis of that extension.[4]

The District expert's report concedes that, if extended overhead is allowable, Prince's computation of $354.70 per day is reasonable. Eichleay overhead, however, is intended to account for <u>unabsorbed</u> overhead. By the Board's ruling on Prince's entitlement to an equitable adjustment for direct labor due to the acceleration, Prince is entitled to absorb $5,372.23 of overhead related to the additional direct labor. The Board finds that Prince is entitled to the $22,346.10 claimed as "Eichleay" overhead, less $5,372.23 for overhead received, or $16,973.87.

[4] Regardless of whether BCD-4 grants an extension of time, the District concedes that it was responsible for delaying the project by at least 50 days. (Testimony of expert witness Christopher Smith, Tr. IV/1180.

SUMMARY OF FINDINGS

The Board finds that, as a result of BCD-4, Prince is entitled to the following equitable adjustment as a result of the extension of time and acceleration ordered in BCD-4:

1. Prince direct labor costs:

a. Overtime	$ 15,715.31
b. Inefficiency	16,840.37

2. Subcontractor costs from 5 subcontractors:

a. Paddock Swimming Pool Company	6,329.27
b. Joshua Construction, Inc.	11,295.19
c. LDC Masonry, Inc.	3,101.48
d. HLW Electric, Inc.	10,601.21
e. Aggregate Placement, Inc.	4,541.99

Prince extended ("Eichleay") overhead	16,973.87
Total equitable adjustment	$ 85,398.69

The equitable adjustment shall be reduced by payments previously made under BCD-4.

SO ORDERED

May 12, 2003

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

Concur:

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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:	)	
	)	
FORT MYER CONSTRUCTION CORPORATION	)	CAB No. D-1206
	)	
Suspension dated April 25, 2003	)	

For the Appellant: Christopher M. Kerns, Esq. For the Government: Jennifer L. Longmeyer-Wood, Esq., Assistant Corporation Counsel.

Opinion by Administrative Judge Matthew S. Watson with Chief Administrative Judge Jonathan D. Zischkau, concurring.

OPINION

(Courtlink Filing ID 1872675)

On May 12, 2003, Fort Myer Construction Corporation ("Fort Myer" or "Appellant") appealed from a notice of suspension received April 25, 2003.[1] The suspension was combined with a notice of proposed debarment. The notice letter advised Fort Myer that it could submit information concerning the debarment within 30 days. Fort Myer submitted written information on May 8, 2003, and made an oral presentation to the Chief Procurement Officer ("CPO") on May 23, 2003. The CPO considered the information presented in writing and orally for both the suspension and debarment and confirmed the suspension pending a decision on debarment by letter dated May 30, 2003.

The District moved the Board to reconsider its order of May 13, 2003, in which the Board exercised jurisdiction over Fort Myer's appeal of the suspension. The District contends this matter is not ripe for consideration because Appellant has not exhausted its administrative remedy of submitting information and argument in opposition to the suspension pursuant to 27 DCMR § 2214.[2] Although notice of both the suspension and proposed debarment were given in the same document and the suspension is in effect

[1] Although the original notice was sent over the signature of the Agency Chief Contracting Officer of the Department of Transportation, by letter dated May 30, 2003, the Chief Procurement Officer confirmed that the notice reflected his determination and was sent at his direction.

[2] 27 DCMR 2214.1 provides in relevant part:

> The Director shall initiate debarment proceedings by notifying the contractor . . .
>
> (c) That, within thirty (30) working days after receipt of the notice, the contractor may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment, including any additional specific information that raises a genuine issue of material fact . . . .

until a determination is made as to the proposed debarment, the two actions are separate and distinct. This Board has jurisdiction to consider appeals from both. D.C. Code § 2-308.04(d). The instant appeal is of the suspension alone. The administrative remedies referenced by the District apply only to debarment proceedings. No further administrative remedy other than appeal to the Board is afforded to a suspended contractor. *See* 27 DCMR § 2215. This matter is therefore properly before the Board. The District's motion to reconsider is denied.

The essence of Appellant's complaint is that Appellant was entitled to a hearing prior to suspension. The District argues in support of its motion for reconsideration that a contractor may be suspended pending debarment without a hearing. (Motion, 6-7). If that proposition advanced by the District is true, Appellant fails to state a cause of action. Because the Board agrees with the District that the procurement law does not require the CPO to provide a hearing prior to suspension, the appeal of the suspension is denied.

DISCUSSION

Fort Myer states in ¶ 2 of its complaint:

> This appeal is filed with the Contract Appeals Board pursuant to D.C. Code, Section 2 -308.04(a)(1), which provides that suspension or debarment may be imposed only "**After reasonable notice to a person or a business, and reasonable opportunity to be heard.**" (Emphasis added.)

D.C. Code § 2-308.4(a) states:

> (1) After reasonable notice to a person or a business, and reasonable opportunity to be heard.
>
> > (A) The CPO shall debar a person or business from consideration for award of contracts or subcontracts for any conviction under subsection (b)(1) through (3) of this section, or for a judicial determination of a violation under subsection (b)(4) of this section, unless the CPO makes a finding in writing that it would be contrary to the best interests of the District of Columbia to do so;
> >
> > (B) The CPO may debar a person or business from consideration for award of contracts or subcontracts if one or more of the causes listed in subsection (b) of this section exist.

Fort Myer's statement is correct as to a debarment, but it is not correct as to a suspension. Although the title of § 2-308.4 is "Authority to debar or suspend," it is clear that the cited subsection (a)(1) applies only to debarments as described in parts (A) and (B) of that subsection. Suspensions are covered by subsection (3) which does not require a hearing prior to suspension. Subsection 3 provides:

(3) (A) The CPO shall suspend a person or business from consideration for award of contracts or subcontracts for any conviction listed in subsection (b)(1) through (3) of this section, or for a judicial determination of a violation under subsection (b)(4) of this section, unless the CPO makes a finding in writing that it would be contrary to the best interests of the District of Columbia to do so.

(B) The CPO may suspend a person or business from consideration for award of contracts or subcontracts if the person or business is charged with the commission of any offense described in subsection (b) of this section and if the CPO makes a finding in writing that such suspension would be in the best interests of the District of Columbia.

The District's requirements as to suspension and debarment are similar to the Federal requirements for such actions. The Comptroller General recently reviewed these requirements in *Shinwha Electronics*, B-290603, 2002 Comp. Gen. Proc. Dec. ¶ 154:

> Suspensions are imposed for a temporary period before suspected misconduct is proven or disproven, and while an investigation and any ensuing legal proceedings of the contractor are taking place. FAR § 9.407-4(a). An agency may, upon "adequate evidence," suspend a contractor suspected of fraud or other misconduct indicating a lack of business integrity. FAR § 9.407-2. "Adequate evidence" means information sufficient to support the reasonable belief that a particular act or omission has occurred. FAR § 2.101(b). ("Adequate evidence" may be likened to a probable cause standard, necessary for the issuance of a search warrant. *Electro-Methods, Inc., v. United States*, 728 F.2d 1471, 1473 (Fed. Cir. 1984).) The FAR provides that, in assessing the adequacy of the evidence, agencies should consider, among other factors, "how much information is available, how credible it is given the circumstances, [and] whether or not important allegations are corroborated." FAR § 9.407.1(b)(1).
>
> Because suspensions are imposed in order to provide immediate protection of the government's interest where contractor misconduct is suspected, there is no requirement that a contractor be afforded an opportunity to be heard prior to the suspension. (In contrast to suspensions, which serve as protective measures, debarments are imposed where contractor misconduct has been established. Where an agency proposes a contractor for debarment and, after proceedings where the contractor is afforded the opportunity to dispute material facts, the agency concludes that the cause of debarment has been established by a preponderance of the evidence, the agency may then debar the contractor for a period commensurate with the seriousness of the cause. FAR §§ 9.406-3, 9.406-4.)
>
> Following the imposition of a suspension, however, the contractor must be afforded an opportunity to submit information and argument in opposition to the suspension. See FAR § 9.407-3(b).

Appellant's suspension was based upon a guilty plea to a crime involving the performance of a District contract. Although neither the Procurement Practices Act nor the procurement regulations require that the contractor be heard after the suspension is imposed, the CPO did, in fact, afford an informal hearing, after which the CPO confirmed the suspension citing the guilty plea. (CPO letter dated May 30, 2003) Reliance by the CPO solely on the guilty plea to a crime involving contract performance is "adequate evidence" to support the temporary suspension. *See* 27 DCMR § 2215.2. The complaint states no cognizable error in suspending or confirming the suspension. The Board must therefore deny this appeal.

The suspension and notice of proposed debarment were incorporated into a single document. This decision relates only to the issuance and continuation of the suspension, and not to any proposed debarment. Since review of suspensions and debarments are matters of first impression before the Board, interpretations of similar suspension and debarment provisions in the Federal Acquisition Regulation and other Federal regulations by the General Accounting Office and Federal boards of contract appeals are therefore relevant to our consideration. In *TS Generalbau GmbH*, B-246034, 92-1 Comp. Gen. Proc. Dec. ¶ 189, the Comptroller General stated:

> Suspensions are imposed for a temporary period before the suspected misconduct is proven and while an investigation of the contractor is taking place. FAR § 9.407-4. Debarments, on the other hand, are imposed for reasonable periods commensurate with the seriousness of the causes, after proceedings where the person proposed for debarment is afforded the opportunity to dispute facts material to the proposed debarment. FAR §§ 9.406-3; 9.406-4.

The FAR sets forth specific information, which the debarring official should consider:

> 9.406-1 General.
>
> (a) It is the debarring official's responsibility to determine whether debarment is in the Government's interest. The debarring official may, in the public interest, debar a contractor for any of the causes in 9.406-2, using the procedures in 9.406-3. The existence of a cause for debarment, however, does not necessarily require that the contractor be debarred; the seriousness of the contractor's acts or omissions and any remedial measures or mitigating factors should be considered in making any debarment decision. Before arriving at any debarment decision, the debarring official should consider factors such as the following:
>
> (1) Whether the contractor had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for debarment or had adopted such procedures prior to any Government investigation of the activity cited as a cause for debarment.

(2) Whether the contractor brought the activity cited as a cause for debarment to the attention of the appropriate Government agency in a timely manner.

(3) Whether the contractor has fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.

(4) Whether the contractor cooperated fully with Government agencies during the investigation and any court or administrative action.

(5) Whether the contractor has paid or has agreed to pay all criminal, civil, and administrative liability for the improper activity, including any investigative or administrative costs incurred by the Government, and has made or agreed to make full restitution.

(6) Whether the contractor has taken appropriate disciplinary action against the individuals responsible for the activity which constitutes cause for debarment.

(7) Whether the contractor has implemented or agreed to implement remedial measures, including any identified by the Government.

(8) Whether the contractor has instituted or agreed to institute new or revised review and control procedures and ethics training programs.

(9) Whether the contractor has had adequate time to eliminate the circumstances within the contractor's organization that led to the cause for debarment.

(10) Whether the contractor's management recognizes and understands the seriousness of the misconduct giving rise to the cause for debarment and has implemented programs to prevent recurrence.

The existence or nonexistence of any mitigating factors or remedial measures such as set forth in this paragraph (a) is not necessarily determinative of a contractor's present responsibility. Accordingly, if a cause for debarment exists, the contractor has the burden of demonstrating, to the satisfaction of the debarring official, its present responsibility and that debarment is not necessary.

Since Fort Myer's contracts are generally funded by Federal highway aid, it is also relevant to consider the holdings of the U.S. Department of Transportation Board of Contract Appeals concerning debarments. That Board has expressed the standard for debarment in a number of similar cases. For example, in the *Proposed Debarment Of*

Lundin Construction Company, Inc., Fin. Asst . Pgm. Docket #2, 1985 DOT BCA Lexis 66, the DOT Board stated:

> The grounds for debarment as set forth in 49 CFR § 29.41[3] include, *inter alia*: (a) Conviction for any cause which is a ground for suspension as set forth in § 29.23 (a)(1) or § 29.23(a)(2). The grounds for suspension in these regulatory provisions include (1) Commission of fraud or any criminal offense as an incident to obtaining, seeking to obtain, or performing government business or a public contract (§ 29.23(a)(1) and (2) Commission of any criminal offense indicating a lack of business integrity or business honesty that seriously and directly affects the question of present responsibility . . . (*Id.*) I find that Lundin's conviction for the offense of bidrigging clearly comes within the purview of these regulatory provisions and satisfies the regulatory standard of a preponderance of the evidence essential to support debarment of Lundin.
>
> But although the record clearly establishes the existence of adequate cause for the proposed debarment, the question remains whether the circumstances of this case are such as to warrant the debarment of Lundin, since the regulatory scheme makes clear that the proposal to debar, in each case, is a matter of discretion to be exercised "in the public interest, including the interest of doing business with participants who are presently responsible and the interest in preserving adequate competition". (49 CFR § 29.45(a)) *See Stanko Packing Co. v. Bergland*, 489 F. Supp. 947, 950 (D.D.C. 1980)
>
> While Lundin's conviction for conspiring to fix prices in road construction projects constituted a willful criminal act, deplorable, indefensible, repugnant to the public interest, and demonstrated a manifest lack of business integrity and honesty, court precedents, nonetheless, mandate that in assessing the need to impose debarment, Lundin's present responsibility is the critical matter of concern and its status in that regard should be evaluated in light of all mitigating factors offered in its behalf. *Rolmer v. Hoffman*, 419 F. Supp. 130 (D.D.C. 1976) And since a determination on this point directs the power and prestige of government at a particular person or entity and may have a serious and adverse economic and social impact, the decision-maker must take care to assure the decision is a correct one. *Gonzalez v. Freeman*, 118 U.S. App. D.C. 180, 334, F.2d 570, 578 (1964); *Rolmer v. Hoffman, supra*, 419 F. Supp. at 131.

Similar interpretations have been made by other Federal agencies in nonprocurement debarment cases. The EPA held that "[u] nder 40 C.F.R. Part 32, and 48

[3] The provisions relied upon by the DOT Board were repealed and replaced by new regulations in 1988. Although the quoted language was not repromulgated, there is nothing contradictory in the current regulations.

C.F.R. Subpart 9.4, the Decision Official imposes debarment where warranted. The existence of cause alone is not disposative of whether debarment is warranted. As a matter of regulation the existence of past misconduct establishing cause is the beginning rather than the end of the inquiry. Debarment is a discretionary, case-by-case judgment. The Debarring Official must assess the record presented for the presence and value of mitigating factors and remedial measures. 40 C.F.R. § 32.300, and 48 C.F.R. § 9.406-1(a)." *Carol Rowell*, EPA Case No. 97-0152-12, 2001 EPADEBAR LEXIS 1.

A cause for debarment, the guilty plea, has clearly been established. The final decision as to debarment, however, must consider the Appellant's present responsibility and a finding regarding the public interest, including the interest of doing business with participants who are presently responsible and the District's interest in preserving adequate competition.

June 6, 2003

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

CONCURRING:

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

GOVERNMENT OF THE RESPONDENT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

ANA TOWING AND STORAGE, INC.	)	
	)	CAB No. D-1176
Under Contract No. 98-0015-AA-OMS-KH	)	

For the Appellant: Laurence Schor, Esq., McManus, Schor, Asmar & Darden, LLP and David S. Greene, Esq. For the Government: Andrew J. Saindon, Esq. and Charles Barksdale, Esq., Assistants Corporation Counsel.

Opinion by Administrative Judge Matthew S. Watson with Chief Administrative Judge Jonathan D. Zischkau, concurring.

OPINION
(Courtlink Filing ID 1949301)

On April 15, 1998, AnA Towing and Storage, Inc. ("AnA" or "Appellant" and the District ("Appellee") entered into Contract No. 98-0015-AA-OMS-KH ("contract") which obligated AnA, at the direction of the District, to pick up abandoned vehicles on public and private property within the District and to deliver the vehicles to the Blue Plains Storage and Auction lot to be offered by the District for sale at auction. The District paid no monetary compensation to the contractor for the required pick-up services. As consideration, AnA was granted the exclusive right to purchase vehicles not sold at auction for a bargain rate of $12.50 per vehicle.

Appellant contends that it is entitled to purchase any vehicle not sold in the first auction at which it is offered for sale and that the District breached this agreement by holding vehicles not sold at the first auction for sale at later auctions. The District contends Appellant is not entitled to purchase a vehicle until the District withdraws the vehicle from the auction process, regardless of whether it was unsold in the first or subsequent auction at which it is offered. Thus, it is the District's position that Appellant was not entitled to purchase vehicles that, although they were not sold in the first auction at which they were offered, were nevertheless sold in a later auction. Appellant moved for partial summary judgment as to its entitlement to purchase all vehicles not sold when first offered at auction. The Board believes that both interpretations are reasonable resulting from ambiguous contract language. Because the Board concludes that the ambiguity was created by the District and was not patent, we sustain the reasonable interpretation of Appellant. Summary Judgment is granted to Appellant as to its entitlement to have purchased all vehicles not sold in the first public auction at which each was offered.

BACKGROUND

Pursuant to the contract, the vehicles which Appellant was entitled to purchase were vehicles classified as "abandoned/unsaleable" vehicles defined as any abandoned vehicle impounded by the District which is unclaimed by its owner and which "is not sold at Department of Public Works public auction." (Contract, Scope of Work ¶ 2.4).

The parties disagree on the meaning of the phrase "is not sold at Department of Public Works public auction." The District contends that the phrase identifies only unsold vehicles determined by the District not to be offered at any future auction. By this interpretation, a vehicle which is not sold during the first or subsequent auction at which it is offered for sale may be held for sale at a future auction and an unsold vehicle is not "unsaleable" until the District determines not to place it for sale in a future auction. Testimony indicated that a vehicle is generally determined to be unsaleable after the unsuccessful offering of the vehicle at the second auction.

Appellant contends that the phrase identifies vehicles it is entitled to purchase for $12.50 as vehicles that are not sold during the first auction at which they are offered for sale. Thus, it is Appellant's position that a vehicle not sold the first time it is offered for sale at auction must be sold to Appellant and may not be transferred and offered for sale at a future auction.

To be clear, Appellant would have written the phrase as *not sold at the first Department of Public Works public auction at which the vehicle is offered for sale.* To be similarly clear, the District should have written the phrase as *not sold at the first or subsequent Department of Public Works public auction at which the vehicle is offered for sale.*

DISCUSSION

It is well settled that "the language of a contract must be given that meaning that would be derived from the contract by a reasonably intelligent person acquainted with the contemporaneous circumstances." *See Hol-Gar Manufacturing Corp. v. United States*, , 351 F.2d 972, 975 (Ct. Cl. 1965). The Board must, when considering the contract language, place itself in the position of a "reasonable and prudent" contractor. *Firestone Tire & Rubber Co. v. United States*, 444 F.2d 547, 551 (Ct. Cl. 1971). If the Board finds that only one reasonable interpretation of the contract is possible, the Board's inquiry is at an end, *see Cherry Hill Sand & Gravel Co. v. United States,* 8 Cl. Ct. 757, 767 (1985), and the single reasonable interpretation will be applied.

If a contract provision is susceptible to more than one reasonable interpretation, it is ambiguous. In interpreting an ambiguous provision, the Board must first look to whether the ambiguity is patent or latent. A contractor has a duty to inquire about a major patent discrepancy such as an obvious omission or a drastic conflict in provisions. However a contractor is not normally required to seek clarification of any and all ambiguities, doubts, or possible differences in interpretation. The Government, as the author, has to shoulder the major task of seeing that within the zone of reasonableness the words of the agreement communicate the proper notions--as well as the main risk of a failure to carry that responsibility. "[W]here the government draws specifications which are fairly susceptible of a certain interpretation and the contractor actually and reasonably so construes them, justice and equity require that construction be adopted." *Peter Kiewit Sons' Co. v. United States*, 109 Ct. Cl. 390, 418 (1947). When a contract's ambiguity is latent, even if both contracting parties have different reasonable interpretations of the ambiguity, the cost is charged against the government. *MCI Contractors*, Inc., CAB No. D-1056, March 27, 2002, 13 P.D. 8232, 8236.

The contract provides as a condition precedent to Appellant's entitlement to purchase a vehicle that the vehicle "is not sold at Department of Public Works public auction." The Board finds that the phrase may be given two reasonable meanings. The District's interpretation, which permits unsold vehicles at one auction to be sold in future auctions, and the Appellant's interpretation, which entitles Appellant to purchase vehicles not sold at the first auction at which the vehicle is offered for sale.

The linguistic problem in the contract formulation is that there is more than one Department of Public Works public auction and the contract language does not specify which auction is intended. The District and Appellant have each relied on different auctions for their interpretations. Neither interpretation is unreasonable.

Although the Board finds that the contract language can be given two reasonable interpretations, we conclude that the language was not patently ambiguous such that a prudent contractor should bear responsibility for seeking clarification. *See, e.g., United States v. Turner Construction Co.*, 819 F.2d 283, 285-86 (Fed. Cir. 1987). As noted above, since the provision was drafted by the District, the Board is constrained to adopt the contractors interpretation.

Appellant's motion for partial summary judgment as to entitlement is granted. Appellant is entitled to compensation for each vehicle offered for sale at an auction and not sold at that (first) auction.

It is not clear from the record as to whether Appellant is entitled to compensation for all 1652 vehicles it claims, since that count may duplicate vehicles transferred to future auctions more than once. The total may also include vehicles which were transferred to a future auction, but also failed to be sold at the later auction and were actually purchased by AnA. Appellant must prove the actual number of vehicles sold at auctions other than the first auction at which the vehicle was offered.

The Board directs the parties to negotiate the amount of compensation to which AnA is entitled. If the parties are unable to agree on the amount, they shall advise the Board no later than August 1, 2003, to schedule further proceedings.

SO ORDERED.

June 25, 2003

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

CONCURRING:

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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT OF APPEALS BOARD

APPEAL OF:

PRINCE CONSTRUCTION COMPANY, INC.	)	
	)	CAB No. D-1011
Under Contract Nos. 93-0037-AA-2-0-KA	)	(Quick Payment Act)
94-0065-AA-2-0-CC	)	

For the Appellant: Robert Klimek, Esq., Klimek, Kolodney & Casale, P.C. For the Government: Jack Simmons, III, Esq., Assistant Corporation Counsel.

Opinion by Administrative Judge Matthew S. Watson with Chief Administrative Judge Jonathan D. Zischkau, concurring.

OPINION

(Courtlink Filing ID 2150339)

The Department of Public Works, Division of Transportation ("Appellee" or "District"), pursuant to Board Rules 117.1(a) and (d), moved for reconsideration of the Board's order granting summary judgment as to the entitlement of Prince Construction Co., Inc. ("Appellant" or "Prince") to penalty interest under the Quick Payment Act, D.C. Code § 2-221.01 *et seq.* (2001 ed.) ("QPA"). Because we conclude that the Appellant admitted in Superior Court that payment of the underlying principal amounts was an equitable recovery, not as a contractual recovery, Appellant is not entitled to QPA interest. Accordingly, we grant reconsideration, vacate our prior order and dismiss the appeal.

BACKGROUND

This action was brought by Appellant to recover payment from the District for work performed allegedly under Contract No. 93-0037-AA-2-0-KA for the repair of utility cuts in District streets ("Patch Contract") and Contract No. 94-0065-AA-0-CC for repairs to the DPW Salt Storage Facility on Brentwood Road ("Salt Dome Contract"), (Complaint ¶7), together with interest penalties pursuant to the QPA for late payment. (Complaint ¶8). Just prior to filing this action with the Board, Appellant filed a two count complaint in Superior Court based on the same facts seeking recovery on alternative theories of *quantum meruit* and breach of contract. (C.A. No. 3528-97). The amount claimed in Superior Court was identical to the amount claimed before the Board, except that the court action did not include the additional request for QPA interest.[1] The parties jointly moved the court for a consent judgment in a motion filed July 23, 1997. The court action was concluded by a consent judgment and

[1] The parties agree that initial jurisdiction to award QPA interest is exclusively with the Board.

payment by the District of the full amount claimed in the court action.[2] In the joint memorandum supporting the motion for consent judgment the parties stated:

> Plaintiff has filed a complaint against the District of Columbia seeking $2,506,487.00 which is the agreed value of 1) unpaid construction and road maintenance services which plaintiff Prince Construction Co., provided to the District of Columbia between December 1993 and September 1996 plus 2) unpaid work relating to Prince's construction of a salt storage facility for the District of Columbia between October 14, 1994 and August 21, 1995. All work was provided at the behest of the Department of Public Works. . . .

DISCUSSION

The Quick Payment Act requires interest to be paid for late payment only for work performed under contract. If payment is made other than pursuant to a valid contract, the QPA is inapplicable. The Quick Payment Act is patterned after the federal Prompt Payment Act of 1982, as amended, 31 U.S.C. §§ 3901-3906. *A.S. Mcgaughan Co., Inc.* CAB No. D-897, Aug. 10, 1994, 42 D.C. Reg. 4667. The Comptroller General has held that the federal act does not authorize interest to be paid for delayed payment for work not covered by a valid contract, even if the work was done at the request and for the benefit of the government. *See Maintenance Service and Sales Corp.*, 70 Comp. Gen 664 (1991).

The District does not dispute that the work was done. As noted above, the District has consented to a court order directing it to pay for the value of the work and payment has been made. The District asserts, however, that it was not obligated to pay Appellant's claim for interest on late payments because the payments were not pursuant to valid contracts. In the case of the Patch Contract, the District asserts that the unpaid work was performed after the expiration of the contract and therefore not covered by a valid contract. In the case of the Salt Dome Contract, the District contends that the work was performed in excess of the contract ceiling without change orders and therefore without contract authority. Appellant, on the other hand, asserts that the payments were due under valid contracts, that payments were clearly late, an thus Appellant is entitled to QPA interest.

Regrettably, the parties failed in their joint motion to the Superior Court requesting the consent order to directly address the effects on the instant action of the proposed order. Thus, we are faced with determining what was intended by the Superior Court order. The issue before the Board is whether or not the amounts owed and paid in this matter were owed and paid pursuant to contract, or owed and paid as *quantum meruit*, that is, not pursuant to a contract, but nevertheless to compensate Appellant for the value of goods and services received and accepted by the District at Appellant's expense. The Board, on reconsideration, has reviewed the record before the Superior Court that culminated in the order for payment for the work performed.

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[2] It is the District's position that the executive branch of government has no authority to pay a claim for work done unless that performance is pursuant to a valid contract. The Superior Court, however, has equitable authority in excess of the legal authority of the executive to remedy unjust enrichment, even of the District. Where the District has accepted work not covered by contract, the District has encouraged claimants to file "friendly" lawsuits to recover the value received by the District so that the District can consent to be "ordered" by the court to make the payment.

We conclude that the parties' joint memorandum establishes that Prince received an equitable recovery. The joint motion is important because it underlies the Superior Court's consent judgment. The difference between a consent judgment and a voluntary dismissal in the Superior Court is that, in a consent judgment, the court receives a motion expressing the facts supporting the consent order and, based on these facts, approves an order directing action by the parties, while in a voluntary dismissal, the court dismisses the action without any review or substantive order. In effect, a motion for consent judgment and supporting memorandum of points and authorities is an admission of the facts supporting the judgment upon which the court will rely in entering the order.

The plain reading of the recitation of facts contained in the parties' joint memorandum in support of the motion for the consent judgment is that the amount of the judgment was based on the "value" of the goods and services, and not on a contract price.[3] In addition, the statement acknowledges that performance was "at the behest of the Department of Public Works," but not that the work was pursuant to a contract. These are the facts admitted by the parties and represented by both the Appellant and the District to the court to justify issuance of the order by the court. The memorandum can only be read to be a request to the court to exercise its equitable powers to direct the District to pay for the value of goods and services the District received and accepted. The memorandum pointedly does not request an order enforcing contract rights, rather it requests an equitable remedy.

The admission by both parties that the payment ordered by the court to be made by the District to Appellant was on equitable grounds was not clearly unreasonable. Appellant, having received the benefit of its admission by the payment ordered cannot now disavow what it previously admitted as fact in Superior Court. In light of the representation of facts by the parties to the court, and the court having acted upon the admitted facts in issuing its order, the Board should have ruled that QPA interest was not recoverable because the parties agreed in the Superior Court action that the Appellant's recovery was equitable, not contractual.

On reconsideration, based on the joint admission of the parties, the Board finds that the payments that were received by Appellant were not founded on contract. Therefore, Appellant is not entitled to Quick Payment Act interest penalties. The Board's summary judgment in favor of Appellant is vacated. Since Appellant's other claims in this matter have been satisfied through the consent judgment in Superior Court and Appellant is not, as a matter of law, entitled to Quick Payment Act interest penalties on the *quantum meruit* payments it received, the appeal is DISMISSED.

SO ORDERED

July 15, 2003

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

CONCURRING:

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

[3] The fact that the "value" of the services and the alleged contract price may have been the same was not before the court.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTESTS OF:

WHITMAN-WALKER CLINIC, INC.	)	
	)	CAB Nos. P-0672 and P-0674
Under Solicitation No. POHO-2002-C-1752	)	

For the Protester, Whitman-Walker Clinic, Inc.: Nicole Greenidge-Hoskins, Esq., Interim General Counsel. For the District of Columbia Government: Howard Schwartz, Esq., and Warren J. Nash, Esq., Assistants Corporation Counsel.

Opinion by Chief Administrative Judge Jonathan D. Zischkau, with Administrative Judge Matthew S. Watson, concurring.

ORDER SUSTAINING THE CPO'S DETERMINATION TO PROCEED WITH CONTRACT PERFORMANCE

CourtLink Filing ID 2202351

Whitman-Walker Clinic, Inc., filed a motion on July 1, 2003, challenging the June 24, 2003 determination of the District's Chief Procurement Officer ("CPO"), pursuant to D.C. Code 2-309.08(c)(2), to proceed during the pendency of the captioned protests with performance under a contract for centralizing the distribution and dispersal of anti-retroviral and other human immunodeficiency virus ("HIV") related medications. Having reviewed the CPO's determination and findings to proceed with contract performance, and the parties' pleadings, we conclude that the CPO's determination should be sustained. The determination is supported by substantial evidence that urgent and compelling circumstances that significantly affect interests of the District will not permit waiting for a decision of the Board on the protests.

BACKGROUND

In August 2002, the Department of Health issued Solicitation No. POHC-2002-R-1752, seeking proposals to centralize the distribution and dispersal of anti-retroviral and other HIV-related medications to the approximately 4,600 HIV-infected residents of the District. (Protest (P-0674), at 4; Whitman-Walker July 3, 2003 Motion, at 4-5; District July 7, 2003 Response, Exs. 1-2). On May 30, 2003, the District and Care Pharmacies, Inc., entered into an indefinite delivery/indefinite quantity letter contract to provide the HIV medication dispensing services to the HIV population, consisting of approximately 3,000 District Medicaid patients and enrollees in a Medicaid HIV demonstration project pursuant to section 1115 of the Social Security Act ("1115 Waiver"), and to the approximately 1,600 qualified District residents participating in the District's AIDS Drug Assistance Program ("ADAP"). (Whitman-Walker Motion, at 4-5; District Response, Exs. 1-2). Previously, Medicaid patients were able to receive their medications at any Medicaid-enrolled pharmacy in the District, and ADAP participants received their medications exclusively through Care Pharmacies. Under the newly awarded contract, ADAP participants will continue to receive their medications from the Care Pharmacies

network, but Medicaid recipients will now obtain their HIV medications only through the Care Pharmacies network.

Prior to the new contract, pricing for medications varied significantly depending on whether the medication was dispensed to Medicaid recipients or ADAP participants. Under the ADAP, the District arranged and paid for the purchase of drugs under pharmaceutical "Prime Vendor Agreements" awarded by the United States Department of Defense. The District distributed these drugs to Care Pharmacies and paid Care a dispensing fee. As a result, the prices for ADAP-eligible individuals was significantly lower than Medicaid retail pricing. (Whitman-Walker Motion, at 5; District Response, Ex. 2). Using the Federal 340-B Drug Pricing Program, Whitman-Walker states that its medication costs are only 2 percent higher than the contract prices the Department of Health pays DOD. The Department of Health says the price difference is on the order of 15 percent. (District Response, Ex. 2, at 3). Care Pharmacies has been under contract with the District for dispensing medications under the ADAP for approximately 10 years. Prior to the recent award to Care Pharmacies, the approximately 3,000 HIV-positive Medicaid beneficiaries could obtain their HIV and AIDS-related medications from any Medicaid-enrolled pharmacy throughout the District, including Whitman-Walker. Whitman-Walker states that it provided HIV medication to over 500 of the District's Medicaid HIV recipients. (Whitman-Walker Motion, Chiliade Aff., at 1).

In its initial protest of the award to Care Pharmacies, filed on June 11, 2003, and docketed as CAB No. P-0672, Whitman-Walker challenged the rejection of its best and final offer but did not specify any protest grounds because the debriefing process had not been completed. On June 24, 2003, the District filed its determination and findings, approved by the CPO, to proceed with contract performance while the protest was pending. Mr. Ronald Lewis, the chief executive officer of the Department of Health ("DOH") provided the following facts justifying the continuation of performance:

> The most immediate and critical impact of stopping work on this contract would be on the AIDS Drug Assistance Program (ADAP). The entire ADAP program has begun to transition to the new contract and all current clients are now being served under this new contract, which began June 1, 2003. Interruption will jeopardize the lives of approximately 1,800 persons who are receiving free HIV/AIDS drugs through the program. Without the support of the Pharmacy Network contract services, there is a strong possibility that the ADAP program would be become fee-for-service. Given the cost of the drugs, an interruption of the contract would be devastating to both the clients and to the Department of Health.
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> . . . . [T]he Department of Health is expanding its coverage of eligible residents of the District of Columbia who are HIV positive. In recent months, the Medical Assistance Administration ["MAA"], which provides medical assistance (Medicaid) to eligible District residents, conducted an intensive review of pharmacy services provided to HIV-infected beneficiaries. Given the high rate of sub-optimal antiretroviral therapy utilization, the District seeks to improve monitoring, facilitate appropriate patient education and outreach, and develop an HIV pharacotherapy adherence program. To that end, DOH is able to expand HIV/AIDS pharmaceutical service through implementation of the 1115 Waiver.

> The 1115 Waiver was approved by the Center for Medicaid and Medicare Services (CMS), a Division of the [U.S.] Department of Health and Human Services, in August [2001]. Section 1115 of the Social Security Act . . . allows state agencies to request a waiver of the usual Medicaid requirements that would otherwise apply for persons who participate in experimental, pilot, or demonstration projects. The 1115 Waiver . . . expands Medicaid eligibility to persons with HIV/AIDS to an array of benefits not otherwise covered by Medicaid. MAA expects to be able to provide coverage to approximately 120-285 HIV infected adults . . . . However, this projection is contingent upon MAA's ability to administer the expansion without incurring additional cost to MAA's approved budget. The savings must offset the cost of implementation. Thus, execution of the 1115 Waiver is contingent upon the District's ability to procure the costly HIV related pharmaceuticals at a substantial discount. The Federal government currently provides matching funds to the District of Columbia at 70 to 30 percent ratios to offset the cost of providing health services to Medicaid eligible recipients. . . .
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> Additionally, the CMS has already been advised of the contract award, and CMS formally advised the District that CMS may rescind the Waiver if work stops. This would prevent DOH from providing services to an additional 250 HIV/AIDS clients this fiscal year and another 1,000-plus over the base year plus the four option years of the contract and could possibly create a lapse in the program affecting the 70 to 30 percent matches. This lapse in the program would also create an extreme hardship for the District residents that are HIV infected clients and their families. . . .

In its motion challenging the determination to proceed with performance, Whitman-Walker states that the status quo would be better maintained by requiring the District to enter into a short emergency contract with Care Pharmacies similar to the District's contract with Care that expired on June 30, 2003, for covering ADAP participants, and allowing Medicaid eligible patients to continue obtaining their medications from Medicaid-enrolled pharmacies, such as the one at Whitman-Walker Clinic. Whitman-Walker's medical director states that the change to an all-Care Pharmacies network for ADAP and Medicaid will disrupt treatment regimens for HIV infected individuals:

> The critical component of successful treatment for HIV disease is adherence to prescribed anti-retroviral regimens. In order for treatment to be successful, patients need to take more than 95% of their medication doses. If that level of adherence is not maintained, the HIV virus is able to replicate and to develop resistance not only to the prescribed medications, but also to many other anti-retroviral agents. This resistance has been proven to result in poor clinical outcomes with rapid disease progression and death. . . . In my experience, when HIV-positive patients change pharmacists, adherence is often jeopardized, resistance develops and progression to AIDS and ultimately death hastened. . . .

(Whitman-Walker Motion, Chiliade Aff., at 1). Whitman-Walker states that if it does not continue to provide pharmacy services, its ability to offer comprehensive HIV-related care will be compromised.

DISCUSSION

The standard for determining whether the District's Chief Procurement Officer properly may override the automatic stay of D.C. Code § 2-309.08(c)(1) is provided in D.C. Code § 2-309.08(c)(2):

> Performance under a protested procurement may proceed, or award may be made, while a protest is pending only if the CPO makes a written determination, supported by substantial evidence, that urgent and compelling circumstances that significantly affect interests of the District will not permit waiting for the decision of the Board concerning the protest. . . .

Because the stay provision is meant to provide effective and meaningful review of procurement challenges before the protested procurements become *faits accomplis*, 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. In *B&B Security Consultants*, CAB Nos. P-0583 and P-0585, 46 D.C. Reg. 8626, involving multiple awards for security services at government buildings, we sustained a CPO determination to override the automatic stay provided in D.C. Code § 2-309.08(c). Although the protester, who had been one of the incumbent contractors, urged us to require the District to extend various emergency contracts during pendency of the protests, we did not find maintaining the status quo through additional emergency contracts to be a compelling factor under the circumstances.

Whitman-Walker relies on *Dairy Maid Dairy, Inc. v. United States*, 837 F. Supp. 1370 (E.D. Va. 1993), and cases cited therein, interpreting an analogous federal statutory stay provision found in the Competition in Contracting Act ("CICA"), for the proposition that the CPO must not only show that urgent and compelling circumstances significantly affecting interests of the government justify continuing performance of the newly awarded contract, but also that performance by the specific proposed contractor is urgent and compelling. The rationale seems to be that simply showing that performance of the contract is urgent and compelling would "eviscerate the purpose and effect of the stay provision . . . because performance of almost any government contract could conceivably be deemed 'urgent and compelling circumstances.'" 837 F. Supp. at 1378-79. The District argues that the approach taken by *Dairy Maid* is inconsistent with the approach we have taken in interpreting the District's stay provision in D.C. Code § 2-309.08(c). We read *Dairy Maid* and the cases it cited as standing for the principle that a court may examine whether award to a specific contractor is urgent and compelling, as part of the overall consideration of urgent and compelling circumstances. But such an examination may carry less weight under different facts. In *Dairy Maid*, the Army had agreed to revise and later reissue a protested solicitation and to negotiate a 6-month extension to Dairy Maid's existing contract while the new procurement was being prepared. When a competitor offered to provide the Army the 6-month dairy requirement, the Army decided to compete the requirement. After the Army awarded the 6-month requirement to the competitor, Dairy Maid protested the award. The new contract was substantially identical to the one being replaced (except for duration) and the history of the administration of the contract "was replete with instances of contract extensions and reflected that the Army in fact had previously stayed award of a virtually identical contract under substantially similar circumstances." 837 F. Supp. at 1378. The court also emphasized that for the award protest, the Army had failed to issue a determination identifying urgent and compelling circumstances justifying the override and that the terms of Dairy Maid's existing contract were more favorable than the terms of the

competitor's contract. Our case is quite different.

Here, the new award for HIV medication services differs significantly from the prior scheme. The contract that expired was Care's contract for providing dispensing services only for ADAP participants. Medicaid pharmacy services were not provided by contract. Whitman-Walker provided pharmacy services for a portion of the Medicaid population infected with HIV. The purpose of the new contract is to centralize the distribution of HIV medication to ADAP participants as well as Medicaid recipients, reducing the costs the District pays for HIV medication services, and thereby permitting the District to expand the number of clients who receive services through the 1115 Waiver program. The District's decision to proceed with performance of the new comprehensive contract with Care, rather than extend a less beneficial contract through an emergency contract action and potentially jeopardize its 1115 Waiver, was reasonable. Moreover, Whitman-Walker will not suffer irreparable harm should it prevail on its protests, and corrective action may be taken if the protests are sustained.

Accordingly, we deny Whitman-Walker's motion challenging the CPO's determination to proceed with contract performance.

SO ORDERED.

DATED: July 25, 2003

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

CONCURRING:

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