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District of Columbia REGISTER

HIGHLIGHTS

- D.C. Council passes Law 20-169, License to Carry a Pistol Temporary Amendment Act of 2014
- D.C. Council passes Law 20-183, Civil Marriage Dissolution Equality Clarification Amendment Act of 2014
- D.C. Council passes Law 20-185, Stroke System of Care Act of 2014
- D.C. Council schedules a public hearing on the Fiscal Year 2016 Proposed Budget and Financial Plan
- Executive Office of the Mayor issues a ban on official travel to the State of Indiana (Mayor's Order 2015-109)
- D.C. Water and Sewer Authority schedules a public hearing on the Fiscal Year 2016 Proposed Water and Sewer Retail Rates, Fees and Charges
- Office of the Tenant Advocate publishes the District of Columbia Tenant Bill of Rights
- Contract Appeals Board publishes Opinions issued between January 21, 2010 and April 24, 2013

DISTRICT OF COLUMBIA REGISTER

Publication Authority and Policy

The District of Columbia Office of Documents and Administrative Issuances publishes the *District of Columbia Register* (ISSN 0419-439X) every Friday under the authority of the *District of Columbia Documents Act*, D.C. Law 2-153, effective March 6, 1979, D.C. Official Code § 611 et *seq*. (2012 Repl.). The policies which govern the publication of the *Register* are set forth in the Rules of the Office of Documents and Administrative· Issuances (1 DCMR 300, *et seq.*). The Rules of the Office of Documents and Administrative Issuances are available online at dcregs.dc.gov. Rulemaking documents are also subject to the requirements of the *D.C. Administrative Procedure Act*, D.C. Official Code §2-50l et *seq.* (2012 Repl.).

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The deadline for filing documents for publication for District of Columbia Agencies, Boards, Commissions, and Public Charter schools is THUSDAY, NOON of the previous week before publication. The deadline for filing documents for publication for the Council of the District of Columbia is WEDNESDAY, NOON of the week of publication. If an official District of Columbia government holiday falls on Thursday, the deadline for filing documents is Wednesday. Email the Office of Documents and Administrative Issuances at dcdocuments@dc.gov to request the *District of Columbia Register* publication schedule.

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DISTRICT OF COLUMBIA
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MURIEL E. BOWSER
MAYOR

VICTOR L. REID, ESQ.
ADMINISTRATOR

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The "DC ACTS" section of the Table of Contents of the D.C. Register, Volume 62, No. 13, published on March 27, 2015 references incorrect Bill numbers for A21-9 and A21-10. The correct Bill numbers are:

A21-9 Contract No. CW31686 Approval and Payment Authorization Emergency Act of 2015 [B21-81]

A21-10 Contract No. CW31163 Approval and Payment Authorization Emergency Act of 2015 [B21-82]

End of Errata Notice

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COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. LAW 20-169

"License to Carry a Pistol Temporary Amendment Act of 2014"

Pursuant to Section 412 of the District of Columbia Home Rule Act, P.L. 93-198 (the Charter), the Council of the District of Columbia adopted Bill 20-927 on first and second readings September 23, 2014, and October 7, 2014, respectively. Following the signature of the Mayor on October 31, 2014, pursuant to Section 404(e) of the Charter, the bill became Act 20-462 and was published in the November 14, 2014 edition of the D.C. Register (Vol. 61, page 11814). Act 20-462 was transmitted to Congress on January 23, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional review period has ended, and Act 20-462 is now D.C. Law 20-169, effective March 7, 2015.

Phil Mendelson
Chairman of the Council

Days Counted During the 30-day Congressional Review Period:

January	23, 26, 27, 28, 29, 30
February	2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 19, 20, 23, 24, 25, 26, 27
March	2, 3, 4, 5, 6

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. LAW 20-170

"H Street, N.E., Retail Priority Area Incentive Temporary Amendment Act of 2014"

Pursuant to Section 412 of the District of Columbia Home Rule Act, P.L. 93-198 (the Charter), the Council of the District of Columbia adopted Bill 20-964 on first and second readings October 7, 2014, and October 28, 2014, respectively. Following the signature of the Mayor on November 10, 2014, pursuant to Section 404(e) of the Charter, the bill became Act 20-475 and was published in the November 28, 2014 edition of the D.C. Register (Vol. 61, page 12121). Act 20-475 was transmitted to Congress on January 23, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional review period has ended, and Act 20-475 is now D.C. Law 20-170, effective March 7, 2015.

Phil Mendelson
Chairman of the Council

Days Counted During the 30-day Congressional Review Period:

January	23, 26, 27, 28, 29, 30
February	2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 19, 20, 23, 24, 25, 26, 27
March	2, 3, 4, 5, 6

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. LAW 20-171

"Grocery Store Restrictive Covenant Prohibition Temporary Act of 2014"

Pursuant to Section 412 of the District of Columbia Home Rule Act, P.L. 93-198 (the Charter), the Council of the District of Columbia adopted Bill 20-962 on first and second readings October 7, 2014, and October 28, 2014, respectively. Following the signature of the Mayor on November 20, 2014, pursuant to Section 404(e) of the Charter, the bill became Act 20-490 and was published in the December 5, 2014 edition of the D.C. Register (Vol. 61, page 12448). Act 20-490 was transmitted to Congress on January 23, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional review period has ended, and Act 20-490 is now D.C. Law 20-171, effective March 7, 2015.

Phil Mendelson
Chairman of the Council

Days Counted During the 30-day Congressional Review Period:

January	23, 26, 27, 28, 29, 30
February	2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 19, 20, 23, 24, 25, 26, 27
March	2, 3, 4, 5, 6

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. LAW 20-172

"Nationwide Mortgage Licensing System Conformity Act of 2014"

Pursuant to Section 412 of the District of Columbia Home Rule Act, P.L. 93-198 (the Charter), the Council of the District of Columbia adopted Bill 20-802 on first and second readings October 28, 2014 and November 18, 2014, respectively. Following the signature of the Mayor on December 8, 2014, pursuant to Section 404(e) of the Charter, the bill became Act 20-498 and was published in the December 12, 2014 edition of the D.C. Register (Vol. 61, page 12577). Act 20-498 was transmitted to Congress on January 23, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional review period has ended, and Act 20-498 is now D.C. Law 20-172, effective March 7, 2015.

Phil Mendelson
Chairman of the Council

Days Counted During the 30-day Congressional Review Period:

January	23, 26, 27, 28, 29, 30
February	2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 19, 20, 23, 24, 25, 26, 27
March	2, 3, 4, 5, 6

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. LAW 20-173

"Metropolitan Police Department Commencement of Discipline and Command Staff Appointment Amendment Act of 2014"

Pursuant to Section 412 of the District of Columbia Home Rule Act, P.L. 93-198 (the Charter), the Council of the District of Columbia adopted Bill 20-810 on first and second readings October 28, 2014, and November 18, 2014, respectively. Following the signature of the Mayor on December 8, 2014, pursuant to Section 404(e) of the Charter, the bill became Act 20-499 and was published in the December 12, 2014 edition of the D.C. Register (Vol. 61, page 12582). Act 20-499 was transmitted to Congress on January 23, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional review period has ended, and Act 20-499 is now D.C. Law 20-173, effective March 7, 2015.

Phil Mendelson
Chairman of the Council

Days Counted During the 30-day Congressional Review Period:

January	23, 26, 27, 28, 29, 30
February	2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 19, 20, 23, 24, 25, 26, 27
March	2, 3, 4, 5, 6

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. LAW 20-174

"Inspector General Qualifications Temporary Amendment Act of 2014"

Pursuant to Section 412 of the District of Columbia Home Rule Act, P.L. 93-198 (the Charter), the Council of the District of Columbia adopted Bill 20-950 on first and second readings October 28, 2014 and November 18, 2014, respectively. Following the signature of the Mayor on December 8, 2014, pursuant to Section 404(e) of the Charter, the bill became Act 20-505 and was published in the December 19, 2014 edition of the D.C. Register (Vol. 61, page 12711). Act 20-505 was transmitted to Congress on January 23, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional review period has ended, and Act 20-505 is now D.C. Law 20-174, effective March 7, 2015.

Phil Mendelson
Chairman of the Council

Days Counted During the 30-day Congressional Review Period:

January	23, 26, 27, 28, 29, 30
February	2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 19, 20, 23, 24, 25, 26, 27
March	2, 3, 4, 5, 6

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. LAW 20-175

"District Government Certificate of Good Standing Filing Requirement Temporary Amendment Act of 2014"

Pursuant to Section 412 of the District of Columbia Home Rule Act, P.L. 93-198 (the Charter), the Council of the District of Columbia adopted Bill 20-985 on first and second readings October 28, 2014 and November 18, 2014, respectively. Following the signature of the Mayor on December 8, 2014, pursuant to Section 404(e) of the Charter, the bill became Act 20-506 and was published in the December 19, 2014 edition of the D.C. Register (Vol. 61, page 12713). Act 20-506 was transmitted to Congress on January 23, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional review period has ended, and Act 20-506 is now D.C. Law 20-175, effective March 7, 2015.

Phil Mendelson
Chairman of the Council

Days Counted During the 30-day Congressional Review Period:

January	23, 26, 27, 28, 29, 30
February	2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 19, 20, 23, 24, 25, 26, 27
March	2, 3, 4, 5, 6

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. LAW 20-176

"Standard Deduction Withholding Clarification Temporary Act of 2014"

Pursuant to Section 412 of the District of Columbia Home Rule Act, P.L. 93-198 (the Charter), the Council of the District of Columbia adopted Bill 20-998 on first and second readings November 18, 2014, and December 2, 2014, respectively. Following the signature of the Mayor on December 18, 2014, pursuant to Section 404(e) of the Charter, the bill became Act 20-522 and was published in the December 26, 2014 edition of the D.C. Register (Vol. 61, page 13108). Act 20-522 was transmitted to Congress on January 23, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional review period has ended, and Act 20-522 is now D.C. Law 20-176, effective March 7, 2015.

Phil Mendelson
Chairman of the Council

Days Counted During the 30-day Congressional Review Period:

January	23, 26, 27, 28, 29, 30
February	2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 19, 20, 23, 24, 25, 26, 27
March	2, 3, 4, 5, 6

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. LAW 20-177

"Grandparent Caregivers Program Subsidy Transfer Temporary Amendment Act of 2014"

Pursuant to Section 412 of the District of Columbia Home Rule Act, P.L. 93-198 (the Charter), the Council of the District of Columbia adopted Bill 20-993 on first and second readings November 18, 2014, and December 2, 2014, respectively. Following the signature of the Mayor on December 19, 2014, pursuant to Section 404(e) of the Charter, the bill became Act 20-536 and was published in the January 2, 2015 edition of the D.C. Register (Vol. 62, page 21). Act 20-536 was transmitted to Congress on January 23, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional review period has ended, and Act 20-536 is now D.C. Law 20-177, effective March 7, 2015.

Phil Mendelson
Chairman of the Council

Days Counted During the 30-day Congressional Review Period:

January	23, 26, 27, 28, 29, 30
February	2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 19, 20, 23, 24, 25, 26, 27
March	2, 3, 4, 5, 6

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. LAW 20-178

"Pepco Cost-Sharing Fund for DC PLUG Establishment Temporary Act of 2014"

Pursuant to Section 412 of the District of Columbia Home Rule Act, P.L. 93-198 (the Charter), the Council of the District of Columbia adopted Bill 20-995 on first and second readings November 18, 2014, and December 2, 2014, respectively. Following the signature of the Mayor on December 23, 2014, pursuant to Section 404(e) of the Charter, the bill became Act 20-537 and was published in the January 23, 2015 edition of the D.C. Register (Vol. 62, page 864). Act 20-537 was transmitted to Congress on January 23, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional review period has ended, and Act 20-537 is now D.C. Law 20-178, effective March 7, 2015.

Phil Mendelson
Chairman of the Council

Days Counted During the 30-day Congressional Review Period:

January	23, 26, 27, 28, 29, 30
February	2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 19, 20, 23, 24, 25, 26, 27
March	2, 3, 4, 5, 6

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. LAW 20-179

"Fiscal Year 2015 Budget Support Clarification Temporary Amendment Act of 2014"

Pursuant to Section 412 of the District of Columbia Home Rule Act, P.L. 93-198 (the Charter), the Council of the District of Columbia adopted Bill 20-958 on first and second readings October 7, 2014, and October 28, 2014, respectively. The legislation was deemed approved without the signature of the Mayor on December 31, 2014, pursuant to Section 404(e) of the Charter, the bill became Act 20-555 and was published in the January 16, 2015 edition of the D.C. Register (Vol. 62, page 424). Act 20-555 was transmitted to Congress on January 23, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional review period has ended, and Act 20-555 is now D.C. Law 20-179, effective March 7, 2015.

Phil Mendelson
Chairman of the Council

Days Counted During the 30-day Congressional Review Period:

January	23, 26, 27, 28, 29, 30
February	2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 19, 20, 23, 24, 25, 26, 27
March	2, 3, 4, 5, 6

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. LAW 20-180

"Trauma Technologists Licensure Temporary Amendment Act of 2014"

Pursuant to Section 412 of the District of Columbia Home Rule Act, P.L. 93-198 (the Charter), the Council of the District of Columbia adopted Bill 20-1005 on first and second readings December 2, 2014, and December 17, 2014, respectively. Following the signature of the Mayor on January 14, 2015, pursuant to Section 404(e) of the Charter, the bill became Act 20-588 and was published in the January 30, 2015 edition of the D.C. Register (Vol. 62, page 1324). Act 20-588 was transmitted to Congress on January 23, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional review period has ended, and Act 20-588 is now D.C. Law 20-180, effective March 7, 2015.

Phil Mendelson
Chairman of the Council

Days Counted During the 30-day Congressional Review Period:

January	23, 26, 27, 28, 29, 30
February	2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 19, 20, 23, 24, 25, 26, 27
March	2, 3, 4, 5, 6

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. LAW 20-181

"Zion Baptist Church Way Designation Act of 2014"

As required by Section 412(a) of the District of Columbia Home Rule Act, P.L. 93-198 (the Charter), the Council of the District of Columbia adopted Bill 20-683 on first and second readings October 7, 2014, and October 28, 2014, respectively. Following the signature of the Mayor on November 6, 2014, as required by Section 404(e) of the Charter, the bill became Act 20-463 and was published in the November 14, 2014 edition of the D.C. Register (Vol. 61, page 11826). Act 20-463 was transmitted to Congress on January 26, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional review period has ended, and Act 20-463 is now D.C. Law 20-181, effective March 10, 2015.

Phil Mendelson
Chairman of the Council

Days Counted During the 30-day Congressional Review Period:

January	26, 27, 28, 29, 30
February	2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 19, 20, 23, 24, 25, 26, 27
March	2, 3, 4, 5, 6, 9

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. LAW 20-182

"Bishop Iola B. Cunningham Way Designation Act of 2014"

As required by Section 412(a) of the District of Columbia Home Rule Act, P.L. 93-198 (the Charter), the Council of the District of Columbia adopted Bill 20-242 on first and second readings October 7, 2014, and October 28, 2014, respectively. Following the signature of the Mayor on November 6, 2014, as required by Section 404(e) of the Charter, the bill became Act 20-466 and was published in the November 14, 2014 edition of the D.C. Register (Vol. 61, page 11832). Act 20-466 was transmitted to Congress on January 26, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional review period has ended, and Act 20-466 is now D.C. Law 20-182, effective March 10, 2015.

Phil Mendelson
Chairman of the Council

Days Counted During the 30-day Congressional Review Period:

January	26, 27, 28, 29, 30
February	2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 19, 20, 23, 24, 25, 26, 27
March	2, 3, 4, 5, 6, 9

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. LAW 20-183

"Civil Marriage Dissolution Equality Clarification Amendment Act of 2014"

As required by Section 412(a) of the District of Columbia Home Rule Act, P.L. 93-198 (the Charter), the Council of the District of Columbia adopted Bill 20-793 on first and second readings October 7, 2014, and October 28, 2014, respectively. Following the signature of the Mayor on November 6, 2014, as required by Section 404(e) of the Charter, the bill became Act 20-467 and was published in the November 14, 2014 edition of the D.C. Register (Vol. 61, page 11834). Act 20-467 was transmitted to Congress on January 26, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional review period has ended, and Act 20-467 is now D.C. Law 20-183, effective March 10, 2015.

Phil Mendelson
Chairman of the Council

Days Counted During the 30-day Congressional Review Period:

January	26, 27, 28, 29, 30
February	2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 19, 20, 23, 24, 25, 26, 27
March	2, 3, 4, 5, 6, 9

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. LAW 20-184

"Nap Turner Way Designation Act of 2014"

As required by Section 412(a) of the District of Columbia Home Rule Act, P.L. 93-198 (the Charter), the Council of the District of Columbia adopted Bill 20-794 on first and second readings October 7, 2014, and October 28, 2014, respectively. Following the signature of the Mayor on November 6, 2014, as required by Section 404(e) of the Charter, the bill became Act 20-468 and was published in the November 14, 2014 edition of the D.C. Register (Vol. 61, page 11836). Act 20-468 was transmitted to Congress on January 26, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional review period has ended, and Act 20-468 is now D.C. Law 20-184, effective March 10, 2015.

Phil Mendelson
Chairman of the Council

Days Counted During the 30-day Congressional Review Period:

January	26, 27, 28, 29, 30
February	2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 19, 20, 23, 24, 25, 26, 27
March	2, 3, 4, 5, 6, 9

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. LAW 20-185

"Stroke System of Care Act of 2014"

As required by Section 412(a) of the District of Columbia Home Rule Act, P.L. 93-198 (the Charter), the Council of the District of Columbia adopted Bill 20-327 on first and second readings October 7, 2014, and October 28, 2014, respectively. Following the signature of the Mayor on November 12, 2014, as required by Section 404(e) of the Charter, the bill became Act 20-469 and was published in the November 28, 2014 edition of the D.C. Register (Vol. 61, page 12103). Act 20-469 was transmitted to Congress on January 26, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional review period has ended, and Act 20-469 is now D.C. Law 20-185, effective March 10, 2015.

Phil Mendelson
Chairman of the Council

Days Counted During the 30-day Congressional Review Period:

January	26, 27, 28, 29, 30
February	2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 19, 20, 23, 24, 25, 26, 27
March	2, 3, 4, 5, 6, 9

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. LAW 20-186

"Record Sealing for Decriminalized and Legalized Offenses Amendment Act of 2014"

As required by Section 412(a) of the District of Columbia Home Rule Act, P.L. 93-198 (the Charter), the Council of the District of Columbia adopted Bill 20-467 on first and second readings October 7, 2014, and October 28, 2014, respectively. Following the signature of the Mayor on November 12, 2014, as required by Section 404(e) of the Charter, the bill became Act 20-470 and was published in the November 28, 2014 edition of the D.C. Register (Vol. 61, page 12108). Act 20-470 was transmitted to Congress on January 26, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional review period has ended, and Act 20-470 is now D.C. Law 20-186, effective March 10, 2015.

Phil Mendelson
Chairman of the Council

Days Counted During the 30-day Congressional Review Period:

January	26, 27, 28, 29, 30
February	2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 19, 20, 23, 24, 25, 26, 27
March	2, 3, 4, 5, 6, 9

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. LAW 20-187

"N Street Village Way Designation Act of 2014"

As required by Section 412(a) of the District of Columbia Home Rule Act, P.L. 93-198 (the Charter), the Council of the District of Columbia adopted Bill 20-521 on first and second readings October 7, 2014, and October 28, 2014, respectively. Following the signature of the Mayor on November 10, 2014, as required by Section 404(e) of the Charter, the bill became Act 20-471 and was published in the November 28, 2014 edition of the D.C. Register (Vol. 61, page 12112). Act 20-471 was transmitted to Congress on January 26, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional review period has ended, and Act 20-471 is now D.C. Law 20-187, effective March 10, 2015.

Phil Mendelson
Chairman of the Council

Days Counted During the 30-day Congressional Review Period:

January	26, 27, 28, 29, 30
February	2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 19, 20, 23, 24, 25, 26, 27
March	2, 3, 4, 5, 6, 9

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. LAW 20-188

"Solid Waste Facility Permit Amendment Act of 2014"

As required by Section 412(a) of the District of Columbia Home Rule Act, P.L. 93-198 (the Charter), the Council of the District of Columbia adopted Bill 20-638 on first and second readings October 7, 2014, and October 28, 2014, respectively. Following the signature of the Mayor on November 10, 2014, as required by Section 404(e) of the Charter, the bill became Act 20-472 and was published in the November 28, 2014 edition of the D.C. Register (Vol. 61, page 12114). Act 20-472 was transmitted to Congress on January 26, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional review period has ended, and Act 20-472 is now D.C. Law 20-188, effective March 10, 2015.

Phil Mendelson
Chairman of the Council

Days Counted During the 30-day Congressional Review Period:

January	26, 27, 28, 29, 30
February	2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 19, 20, 23, 24, 25, 26, 27
March	2, 3, 4, 5, 6, 9

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. LAW 20-189

"Medical Marijuana Expansion Amendment Act of 2014"

As required by Section 412(a) of the District of Columbia Home Rule Act, P.L. 93-198 (the Charter), the Council of the District of Columbia adopted Bill 20-766 on first and second readings October 7, 2014, and October 28, 2014, respectively. Following the signature of the Mayor on November 12, 2014, as required by Section 404(e) of the Charter, the bill became Act 20-474 and was published in the November 28, 2014 edition of the D.C. Register (Vol. 61, page 12119). Act 20-474 was transmitted to Congress on January 26, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional review period has ended, and Act 20-474 is now D.C. Law 20-189, effective March 10, 2015.

Phil Mendelson
Chairman of the Council

Days Counted During the 30-day Congressional Review Period:

January	26, 27, 28, 29, 30
February	2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 19, 20, 23, 24, 25, 26, 27
March	2, 3, 4, 5, 6, 9

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. LAW 20-190

"Affordable Homeownership Preservation and Equity Accumulation Amendment Act of 2014"

As required by Section 412 of the District of Columbia Home Rule Act, P.L. 93-198 (the Charter), the Council of the District of Columbia adopted Bill 20-604 on first and second readings October 7, 2014, and October 28, 2014, respectively. The legislation was deemed approved without the signature of the Mayor on November 19, 2014, as required by Section 404(e) of the Charter, the bill became Act 20-482 and was published in the November 28, 2014 edition of the D.C. Register (Vol. 61, page 12156). Act 20-482 was transmitted to Congress on January 26, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional review period has ended, and Act 20-482 is now D.C. Law 20-190, effective March 10, 2015.

Phil Mendelson
Chairman of the Council

Days Counted During the 30-day Congressional Review Period:

January	26, 27, 28, 29, 30
February	2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 19, 20, 23, 24, 25, 26, 27
March	2, 3, 4, 5, 6, 9

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. LAW 20-191

"Food Policy Council and Director Establishment Act of 2014"

As required by Section 412(a) of the District of Columbia Home Rule Act, P.L. 93-198 (the Charter), the Council of the District of Columbia adopted Bill 20-821 on first and second readings October 7, 2014, and October 28, 2014, respectively. The legislation was deemed approved without the signature of the Mayor on November 19, 2014, as required by Section 404(e) of the Charter, the bill became Act 20-483 and was published in the November 28, 2014 edition of the D.C. Register (Vol. 61, page 12160). Act 20-483 was transmitted to Congress on January 26, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional review period has ended, and Act 20-483 is now D.C. Law 20-191, effective March 10, 2015.

Phil Mendelson
Chairman of the Council

Days Counted During the 30-day Congressional Review Period:

January	26, 27, 28, 29, 30
February	2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 19, 20, 23, 24, 25, 26, 27
March	2, 3, 4, 5, 6, 9

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. LAW 20-192

"Commission on Health Disparities Establishment Act of 2014"

As required by Section 412(a) of the District of Columbia Home Rule Act, P.L. 93-198 (the Charter), the Council of the District of Columbia adopted Bill 20-572 on first and second readings October 7, 2014, and October 28, 2014, respectively. Following the signature of the Mayor on November 21, 2014, as required by Section 404(e) of the Charter, the bill became Act 20-484 and was published in the December 5, 2014 edition of the D.C. Register (Vol. 61, page 12403). Act 20-484 was transmitted to Congress on January 26, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional review period has ended, and Act 20-484 is now D.C. Law 20-192, effective March 10, 2015.

Phil Mendelson
Chairman of the Council

Days Counted During the 30-day Congressional Review Period:

January	26, 27, 28, 29, 30
February	2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 19, 20, 23, 24, 25, 26, 27
March	2, 3, 4, 5, 6, 9

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. LAW 20-193

"Disposition of District Land for Affordable Housing Amendment Act of 2014"

As required by Section 412(a) of the District of Columbia Home Rule Act, P.L. 93-198 (the Charter), the Council of the District of Columbia adopted Bill 20-594 on first and second readings October 7, 2014, and October 28, 2014, respectively. The legislation was deemed approved without the signature of the Mayor on November 27, 2014, as required by Section 404(e) of the Charter, the bill became Act 20-485 and was published in the December 5, 2014 edition of the D.C. Register (Vol. 61, page 12407). Act 20-485 was transmitted to Congress on January 26, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional review period has ended, and Act 20-485 is now D.C. Law 20-193, effective March 10, 2015.

Phil Mendelson
Chairman of the Council

Days Counted During the 30-day Congressional Review Period:

January	26, 27, 28, 29, 30
February	2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 19, 20, 23, 24, 25, 26, 27
March	2, 3, 4, 5, 6, 9

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. LAW 20-194

"Special Education Student Rights Act of 2014"

As required by Section 412(a) of the District of Columbia Home Rule Act, P.L. 93-198 (the Charter), the Council of the District of Columbia adopted Bill 20-723 on first and second readings October 7, 2014, and October 28, 2014, respectively. Following the signature of the Mayor on November 20, 2014, as required by Section 404(e) of the Charter, the bill became Act 20-486 and was published in the December 5, 2014 edition of the D.C. Register (Vol. 61, page 12411). Act 20-486 was transmitted to Congress on January 26, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional review period has ended, and Act 20-486 is now D.C. Law 20-194, effective March 10, 2015.

Phil Mendelson
Chairman of the Council

Days Counted During the 30-day Congressional Review Period:

January	26, 27, 28, 29, 30
February	2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 19, 20, 23, 24, 25, 26, 27
March	2, 3, 4, 5, 6, 9

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. LAW 20-195

"Enhanced Special Education Services Amendment Act of 2014"

As required by Section 412(a) of the District of Columbia Home Rule Act, P.L. 93-198 (the Charter), the Council of the District of Columbia adopted Bill 20-724 on first and second readings October 7, 2014, and October 28, 2014, respectively. Following the signature of the Mayor on November 18, 2014, as required by Section 404(e) of the Charter, the bill became Act 20-487 and was published in the December 5, 2014 edition of the D.C. Register (Vol. 61, page 12419). Act 20-487 was transmitted to Congress on January 26, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional review period has ended, and Act 20-487 is now D.C. Law 20-195, effective March 10, 2015.

Phil Mendelson
Chairman of the Council

Days Counted During the 30-day Congressional Review Period:

January	26, 27, 28, 29, 30
February	2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 19, 20, 23, 24, 25, 26, 27
March	2, 3, 4, 5, 6, 9

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. LAW 20-196

"Special Education Quality Improvement Amendment Act of 2014"

As required by Section 412 of the District of Columbia Home Rule Act, P.L. 93-198 (the Charter), the Council of the District of Columbia adopted Bill 20-725 on first and second readings October 7, 2014, and October 28, 2014, respectively. Following the signature of the Mayor on November 18, 2014, as required by Section 404(e) of the Charter, the bill became Act 20-488 and was published in the December 5, 2014 edition of the D.C. Register (Vol. 61, page 12425). Act 20-488 was transmitted to Congress on January 26, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional review period has ended, and Act 20-488 is now D.C. Law 20-196, effective March 10, 2015.

Phil Mendelson
Chairman of the Council

Days Counted During the 30-day Congressional Review Period:

January	26, 27, 28, 29, 30
February	2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 19, 20, 23, 24, 25, 26, 27
March	2, 3, 4, 5, 6, 9

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. LAW 20-197

"Vehicle-for-Hire Innovation Amendment Act of 2014"

As required by Section 412(a) of the District of Columbia Home Rule Act, P.L. 93-198 (the Charter), the Council of the District of Columbia adopted Bill 20-753 on first and second readings October 7, 2014, and October 28, 2014. Following the signature of the Mayor on November 18, 2014, as required by Section 404(e) of the Charter, the bill became Act 20-489 and was published in the December 5, 2014 edition of the D.C. Register (Vol. 61, page 12430). Act 20-489 was transmitted to Congress on January 26, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act.

The Council of the District of Columbia hereby gives notice that the Congressional review period has ended, and Act 20-489 is now D.C. Law 20-197 , effective March 10, 2015.

Phil Mendelson
Chairman of the Council

Days Counted During the 30-day Congressional Review Period:

January	26, 27, 28, 29, 30
February	2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 19, 20, 23, 24, 25, 26, 27
March	2, 3, 4, 5, 6, 9

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. LAW 20-198

"Retirement Technical Amendments Act of 2014"

As required by Section 412(a) of the District of Columbia Home Rule Act, P.L. 93-198 (the Charter), the Council of the District of Columbia adopted Bill 20-440 on first and second readings October 7, 2014, and October 28, 2014, respectively. Following the signature of the Mayor on November 26, 2014, as required by Section 404(e) of the Charter, the bill became Act 20-491 and was published in the December 5, 2014 edition of the D.C. Register (Vol. 61, page 12450). Act 20-491 was transmitted to Congress on January 26, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional review period has ended, and Act 20-491 is now D.C. Law 20-198, effective March 10, 2015.

Phil Mendelson
Chairman of the Council

Days Counted During the 30-day Congressional Review Period:

January	26, 27, 28, 29, 30
February	2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 19, 20, 23, 24, 25, 26, 27
March	2, 3, 4, 5, 6, 9

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. LAW 20-199

"Truth in Affordability Reporting Act of 2014"

As required by Section 412 (a) of the District of Columbia Home Rule Act, P.L. 93-198 (the Charter), the Council of the District of Columbia adopted Bill 20-369 on first and second readings October 28, 2014, and November 18, 2014, respectively. Following the signature of the Mayor on December 8, 2014, as required by Section 404(e) of the Charter, the bill became Act 20-493 and was published in the December 12, 2014 edition of the D.C. Register (Vol. 61, page 12561). Act 20-493 was transmitted to Congress on January 26, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional review period has ended, and Act 20-493 is now D.C. Law 20-199, effective March 10, 2015.

Phil Mendelson
Chairman of the Council

Days Counted During the 30-day Congressional Review Period:

January	26, 27, 28, 29, 30
February	2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 19, 20, 23, 24, 25, 26, 27
March	2, 3, 4, 5, 6, 9

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. LAW 20-200

"St. Matthews Evangelical Lutheran Church Community Garden Equitable Real Property Tax Relief Act of 2014"

As required by Section 412(a) of the District of Columbia Home Rule Act, P.L. 93-198 (the Charter), the Council of the District of Columbia adopted Bill 20-539 on first and second readings October 28, 2014, and November 18, 2014, respectively. Following the signature of the Mayor on December 8, 2014, as required by Section 404(e) of the Charter, the bill became Act 20-494 and was published in the December 12, 2014 edition of the D.C. Register (Vol. 61, page 12563). Act 20-494 was transmitted to Congress on January 26, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional review period has ended, and Act 20-494 is now D.C. Law 20-200, effective March 10, 2015.

Phil Mendelson
Chairman of the Council

Days Counted During the 30-day Congressional Review Period:

January	26, 27, 28, 29, 30
February	2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 19, 20, 23, 24, 25, 26, 27
March	2, 3, 4, 5, 6, 9

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. LAW 20-201

"Transaction Modernization Electronic Delivery or Posting Act of 2014"

As required by Section 412(a) of the District of Columbia Home Rule Act, P.L. 93-198 (the Charter), the Council of the District of Columbia adopted Bill 20-673 on first and second readings October 28, 2014, and November 18, 2014, respectively. Following the signature of the Mayor on December 8, 2014, as required by Section 404(e) of the Charter, the bill became Act 20-495 and was published in the December 12, 2014 edition of the D.C. Register (Vol. 61, page 12565). Act 20-495 was transmitted to Congress on January 26, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional review period has ended, and Act 20-495 is now D.C. Law 20-201, effective March 10, 2015.

Phil Mendelson
Chairman of the Council

Days Counted During the 30-day Congressional Review Period:

January	26, 27, 28, 29, 30
February	2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 19, 20, 23, 24, 25, 26, 27
March	2, 3, 4, 5, 6, 9

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. LAW 20-202

"Closing of a Portion of the Public Alley System in Square 368, S.O. 13-09586, Act of 2014"

As required by Section 412(a) of the District of Columbia Home Rule Act, P.L. 93-198 (the Charter), the Council of the District of Columbia adopted Bill 20-684 on first and second readings October 28, 2014, and November 18, 2014, respectively. Following the signature of the Mayor on December 8, 2014, as required by Section 404(e) of the Charter, the bill became Act 20-496 and was published in the December 12, 2014 edition of the D.C. Register (Vol. 61, page 12570). Act 20-496 was transmitted to Congress on January 26, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional review period has ended, and Act 20-496 is now D.C. Law 20-202, effective March 10, 2015.

Phil Mendelson
Chairman of the Council

Days Counted During the 30-day Congressional Review Period:

January	26, 27, 28, 29, 30
February	2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 19, 20, 23, 24, 25, 26, 27
March	2, 3, 4, 5, 6, 9

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. LAW 20-203

"Captive Insurance Company Amendment Act of 2014"

As required by Section 412(a) of the District of Columbia Home Rule Act, P.L. 93-198 (the Charter), the Council of the District of Columbia adopted Bill 20-774 on first and second readings October 28, 2014, and November 18, 2014, respectively. Following the signature of the Mayor on December 8, 2014, as required by Section 404(e) of the Charter, the bill became Act 20-497 and was published in the December 12, 2014 edition of the D.C. Register (Vol. 61, page 12572). Act 20-497 was transmitted to Congress on January 26, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional review period has ended, and Act 20-497 is now D.C. Law 20-203, effective March 10, 2015.

Phil Mendelson
Chairman of the Council

Days Counted During the 30-day Congressional Review Period:

January	26, 27, 28, 29, 30
February	2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 19, 20, 23, 24, 25, 26, 27
March	2, 3, 4, 5, 6, 9

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. LAW 20-204

"Douglas Knoll, Golden Rule, 1728 W Street, and Wagner Gainesville Real Property Tax Exemption Amendment Act of 2014"

As required by Section 412(a) of the District of Columbia Home Rule Act, P.L. 93-198 (the Charter), the Council of the District of Columbia adopted Bill 20-832 on first and second readings October 28, 2014, and November 18, 2014, respectively. Following the signature of the Mayor on December 8, 2014, as required by Section 404(e) of the Charter, the bill became Act 20-500 and was published in the December 12, 2014 edition of the D.C. Register (Vol. 61, page 12585). Act 20-500 was transmitted to Congress on January 26, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional review period has ended, and Act 20-500 is now D.C. Law 20-204, effective March 10, 2015.

Phil Mendelson
Chairman of the Council

Days Counted During the 30-day Congressional Review Period:

January	26, 27, 28, 29, 30
February	2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 19, 20, 23, 24, 25, 26, 27
March	2, 3, 4, 5, 6, 9

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE

D.C. LAW 20-205

"Paint Stewardship Act of 2014"

As required by Section 412(a) of the District of Columbia Home Rule Act, P.L. 93-198 (the Charter), the Council of the District of Columbia adopted Bill 20-886 on first and second readings October 28, 2014, and November 18, 2014, respectively. Following the signature of the Mayor on December 8, 2014, as required by Section 404(e) of the Charter, the bill became Act 20-501 and was published in the December 12, 2014 edition of the D.C. Register (Vol. 61, page 12587). Act 20-501 was transmitted to Congress on January 27, 2015 for a 30-day review, in accordance with Section 602(c)(1) of the Home Rule Act.

The Council of the District of Columbia hereby gives notice that the 30-day Congressional review period has ended, and Act 20-501 is now D.C. Law 20-205, effective March 11, 2015.

Phil Mendelson
Chairman of the Council

Days Counted During the 30-day Congressional Review Period:

January	27, 28, 29, 30
February	2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 17, 18, 19, 20, 23, 24, 25, 26, 27
March	2, 3, 4, 5, 6, 9, 10

ENROLLED ORIGINAL

AN ACT

D.C. ACT 21-11

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MARCH 26, 2015

To amend, on an emergency basis, due to congressional review, Title 47 of the District of Columbia Official Code to clarify the applicability date of the market-based sourcing legislation and the tax sale interest rate to be paid to certain purchasers; and to amend the Fiscal Year 2015 Budget Support Act of 2014 to provide grant-making authority for a specified purpose to the Deputy Mayor for Planning and Economic Development for Fiscal Year 2015.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Market-based Sourcing Inter Alia Clarification Congressional Review Emergency Amendment Act of 2015".

Sec. 2. Title 47 of the District of Columbia Official Code is amended as follows:

(a) Section 47-1334 is amended to read as follows:

"§ 47-1334. Interest rate.

"(a) The rate of simple interest on all amounts due, owing, or paid for the taxes sold or bid off to the District under this chapter shall be 1.5% per month or portion thereof until paid, excluding surplus; provided, that interest on the amount sold at tax sale, excluding surplus, shall accrue at the applicable interest rate beginning the first day of the month following the tax sale. No interest shall accrue for surplus, expenses, or the reasonable value of improvements.

"(b) The purchaser shall receive simple interest of 1.5% per month or portion thereof on the amount paid for the real property, excluding surplus, beginning on the first day of the month immediately following when the real property was sold or the certificate of sale was assigned by the Mayor until the payment to the Mayor is made as required under § 47-1361(a), by another purchaser under § 47-1382(c), or by the trustee under § 47-1382.01(d)(2), and as provided in § 47-1354(b) for the period when such other taxes were paid. The purchaser shall receive no interest for expenses or the reasonable value of improvements.".

(b) Section 47-1348 is amended as follows:

(1) Subsection (a)(10) is amended to read as follows:

"(10) A statement that the rate of simple interest, upon redemption, shall be 1.5% per month or portion thereof on the amount paid for the real property, excluding surplus,

beginning on the first day of the month immediately following the date of the tax sale or the date when the certificate of sale was assigned by the Mayor.".

(2) Subsection (c) is amended by striking the phrase "On redemption, the purchaser will be refunded the sums paid on account of the purchase price, together with interest thereon at the rate of 18% per annum from the date the real property was sold to the date of redemption; provided, that the purchaser shall not receive interest on any surplus." and inserting the phrase "Upon payment to the Mayor as specified in § 47-1361(a) or, if payment to the Mayor is made by another purchaser under § 47-1382(c), the purchaser shall be refunded the sums paid on account of the purchase price, together with simple interest thereon at the rate of 1.5% per month or portion thereof on the amount paid for the real property, excluding surplus, beginning on the first day of the month immediately following the date of the tax sale or the date when the certificate of sale was assigned by the Mayor until the payment to the Mayor is made as required under § 47-1361(a) or § 47-1382(c); provided, that the purchaser shall not receive interest on any surplus." in its place.

(c) Section 47-1353(d) is amended to read as follows:

"(d) Upon payment to the Mayor as specified in § 47-1361(a) or if payment to the Mayor is made by another purchaser as specified in § 47-1382(c), the purchaser shall be refunded the sums paid on account of the purchase price, together with simple interest thereon at the rate of 1.5% per month or portion thereof on the amount paid for the real property, excluding surplus, beginning on the first day of the month immediately following the day of the tax sale to the purchaser or the date when the certificate of sale was assigned by the Mayor until the payment to the Mayor is made as required under § 47-1361(a) or § 47-1382(c); provided, that the purchaser shall not receive interest on any surplus.".

(d) Section 47-1810.02(g)(3) is amended to read as follows:

"(3)(A) For the tax years beginning after December 31, 2014, sales, other than sales of tangible personal property, are in the District if the taxpayer's market for the sales is in the District. The taxpayer's market for sales is in the District:

"(i) In the case of sale, rental, lease, or license of real property, if and to the extent the property is located in the District;

"(ii) In the case of rental, lease, or license of tangible personal property, if and to the extent the property is located in the District;

"(iii) In the case of the sale of a service, if and to the extent the service is delivered to a location in the District; and

"(iv) In the case of intangible property:

"(I) That is rented, leased, or licensed, if and to the extent the property is used in the District; provided, that intangible property utilized in marketing a good or service to a consumer is used in the District if that good or service is purchased by a consumer who is in the District; and

"(II) That is sold, if and to the extent the property is used in the District; provided, that:

ENROLLED ORIGINAL

"(aa) A contract right, government license, or similar intangible property that authorizes the holder to conduct a business activity in a specific geographic area is used in the District if the geographic area includes all or part of the District;

"(bb) Receipts from intangible property sales that are contingent on the productivity, use, or disposition of the intangible property shall be treated as receipts from the rental, lease, or licensing of such intangible property under sub-sub-subparagraph (I) of this sub-subparagraph; and

"(cc) All other receipts from a sale of intangible property shall be excluded from the numerator and denominator of the sales factor.

"(B) If the state or states of assignment under subparagraph (A) of this paragraph cannot be determined, the state or states of assignment shall be reasonably approximated.

"(C) If the taxpayer is not taxable in a state in which a sale is assigned under subparagraph (A) or (B) of this paragraph, or if a state of assignment cannot be determined under subparagraph (A) of this paragraph or reasonably approximated under subparagraph (B) of this paragraph, the sale shall be excluded from the denominator of the sales factor.

"(D) The Chief Financial Officer may prescribe regulations as necessary or appropriate to carry out the purposes of this subsection.

"(E) This paragraph shall apply as of October 1, 2014.'.

Sec. 3. Section 6089 of the Fiscal Year 2015 Budget Support Act of 2014, enacted on September 23, 2014 (D.C. Act 20-424; 61 DCR 9990), is amended by striking the period at the end and inserting the phrase ", and a grant of $1 million for economic development to the Washington, DC Economic Partnership." in its place.

Sec. 4. Fiscal impact statement.

The Council adopts the fiscal impact statement of the Budget Director as the fiscal impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(3)).

Sec. 5. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), and shall remain in effect for no longer than 90 days, as provided for emergency acts of the Council of the District of Columbia in section

ENROLLED ORIGINAL

412(a) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 788; D.C. Official Code § 1-204.12(a)).

Chairman
Council of the District of Columbia

Mayor
District of Columbia
APPROVED
March 26, 2015

ENROLLED ORIGINAL

AN ACT

D.C. ACT 21-12

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MARCH 26, 2015

To approve, on an emergency basis, the exercise of the third option year of Contract No. DCPO-2011-T-0079 with Cellco d/b/a Verizon Wireless to supply the District with wireless telecommunications products and services related to enterprise communications and information technology, and to authorize payment for the services received and to be received under the contract.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Contract No. DCPO-2011-T-0079 Option Year Three Approval and Payment Authorization Emergency Act of 2015".

Sec. 2. Pursuant to section 451 of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 803; D.C. Official Code § 1-204.51), and notwithstanding the requirements of section 202(a) of the Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code § 2-352.02(a)), the Council approves the exercise of the third option year of Contract No. DCPO-2011-T-0079 with Cellco d/b/a Verizon Wireless to supply the District with wireless telecommunications products and services related to enterprise communications and information technology, and authorizes payment not to exceed $4,200,000 for services received and to be received under the contract from October 1, 2014 through September 30, 2015.

Sec. 3. Fiscal impact statement.

The Council adopts the fiscal impact statement of the Chief Financial Officer as the fiscal impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(3)).

Sec. 4. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), and shall remain in effect for no longer than 90 days, as provided for emergency acts of the Council of the District of Columbia in

ENROLLED ORIGINAL

section 412(a) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 788; D.C. Official Code § 1-204.12(a)).

Chairman
Council of the District of Columbia

Mayor
District of Columbia
APPROVED
March 26, 2015

ENROLLED ORIGINAL

AN ACT

D.C. ACT 21-13

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MARCH 26, 2015

To amend, on an emergency basis, the Uniform Per Student Funding Formula for Public Schools and Public Charter Schools Act of 1998 to modify guidelines for spending at-risk funds within the District of Columbia Public Schools.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "At-Risk Funding Emergency Amendment Act of 2015".

Sec. 2. Section 108a(b) of the Uniform Per Student Funding Formula for Public Schools and Public Charter Schools Act of 1998, effective February 22, 2014 (D.C. Law 20-87; D.C. Official Code § 38-2907.01(b)), is amended as follows:

(a) Paragraph (1) is amended to read as follows:

"(1) Funds provided to schools pursuant to subsection (a)(3) of this section shall be available for school utilization at the direction of the Chancellor in consultation with the principal and local school advisory team, for the purpose of improving student achievement among at-risk students. The Chancellor shall make publicly available an annual report that explains the allocation of funds sorted by individual schools.".

(b) Paragraph (2) is repealed.

Sec. 3. Fiscal impact statement.

The Council adopts the fiscal impact statement of the Budget Director as the fiscal impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(3)).

Sec. 4. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), and shall remain in effect for no longer than 90 days, as provided for emergency acts of the Council of the District of Columbia in

ENROLLED ORIGINAL

section 412(a) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 788; D.C. Official Code § 1-204.12(a)).

Chairman
Council of the District of Columbia

Mayor
District of Columbia
APPROVED
March 26, 2015

ENROLLED ORIGINAL

AN ACT

D.C. ACT 21-14

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MARCH 26, 2015

To amend, on an emergency basis, due to congressional review, Chapter 5 of Title 24 of the District of Columbia Municipal Regulations to regulate the sale of tickets from public space.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Ticket Sale Regulation Congressional Review Emergency Amendment Act of 2015".

Sec. 2. Chapter 5 of Title 24 of the District of Columbia Municipal Regulations is amended by adding a new section 573.8 to read as follows:

"573.8 No person shall sell or offer to sell any ticket from the sidewalks, streets, or public spaces anywhere in the District of Columbia for any excursion, musical or theatrical performance, opera, sporting event, circus, or any entertainment of any kind; provided, that sales of tickets on public space for sightseeing bus excursions shall comply with the provisions of §§ 573.5, 573.6, 573.7.".

Sec. 3. Fiscal impact statement.

The Council adopts the fiscal impact statement of the Budget Director as the fiscal impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code §1-206.02(c)(3)).

Sec. 4. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), and shall remain in effect for no longer than 90 days, as provided for emergency acts of the Council of the District of Columbia in section

ENROLLED ORIGINAL

412(a) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 788; D.C. Official Code §1-204.12(a)).

Chairman
Council of the District of Columbia

Mayor
District of Columbia
APPROVED
March 26, 2015

ENROLLED ORIGINAL

AN ACT

D.C. ACT 21-15

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MARCH 26, 2015

To amend, on an emergency basis, due to congressional review, An Act To provide for the abatement of nuisances in the District of Columbia by the Commissioners of said District, and for other purposes to clarify that the posting requirement in section 5a is satisfied by posting the initial vacant or blight determination.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Nuisance Abatement Notice Congressional Review Emergency Amendment Act of 2015".

Sec. 2. Section 5a of An Act To provide for the abatement of nuisances in the District of Columbia by the Commissioners of said District, and for other purposes, effective August 15, 2008 (D.C. Law 17-216; D.C. Official Code § 42–3131.05a), is amended by striking the phrase "Notice shall also be posted on the vacant building" and inserting the phrase "Notice of the initial vacant or blighted property determination shall also be posted on the vacant building" in its place.

Sec. 3. Fiscal impact statement.

The Council adopts the fiscal impact statement of the Budget Director as the fiscal impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code §1-206.02(c)(3)).

Sec. 4. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), and shall remain in effect for no longer than 90 days, as provided for emergency acts of the Council of the District of Columbia in section

ENROLLED ORIGINAL

412(a) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code §1-204.12(a)).

Chairman
Council of the District of Columbia

Mayor
District of Columbia
APPROVED
March 26, 2015

ENROLLED ORIGINAL

AN ACT

D.C. ACT 21-16

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MARCH 26, 2015

To amend, on an emergency basis, due to congressional review, An Act To provide for voluntary apprenticeship in the District of Columbia and the Amendments to An Act to Provide for Voluntary Apprenticeship in the District of Columbia Act of 1978 to make technical and conforming amendments to allow the District of Columbia to continue to be recognized by the U.S. Department of Labor as a State Apprenticeship Agency.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Apprenticeship Modernization Congressional Review Emergency Amendment Act of 2015".

Sec. 2. An Act To provide for voluntary apprenticeship in the District of Columbia, approved May 21, 1946 (60 Stat. 204; D.C. Official Code § 32-1401 *et seq.*), is amended as follows:

(a) Section 1 (D.C. Official Code § 32-1401) is amended to read as follows:

"It is the purpose of this act to:

"(1) Open to District of Columbia residents the opportunity to obtain training that will equip them for profitable employment and citizenship;

"(2) Establish, as a means to this end, a program of voluntary apprenticeship under approved apprenticeship agreements providing facilities for the training and guidance of apprentices in the arts and crafts of industry and trade, with parallel instruction in related and supplementary education;

"(3) Promote employment opportunities for young people under conditions providing adequate training and reasonable earnings;

"(4) Relate the supply of skilled workers to employment demands;

"(5) Establish standards for apprentice training;

"(6) Establish an Apprenticeship Council;

"(7) Provide for the establishment of local joint trade apprenticeship committees and non-joint committees to assist in effectuating the purposes of this act;

"(8) Provide for an associate of apprenticeship within the District of Columbia;

"(9) Provide that reports be submitted to the Council of the District of Columbia and to the public regarding the status of apprenticeship in the District of Columbia;

ENROLLED ORIGINAL

"(10) Establish a procedure for the determination of apprenticeship agreement controversies; and

"(11) Accomplish related purposes.".

(b) Section 2 (D.C. Official Code § 32-1402) is amended as follows:

(1) Strike the phrase "Superintendent of Schools" and insert the phrase "Chancellor of District of Columbia Public Schools" in its place.

(2) Strike the phrase "appointed for a term of three years. Any member" and insert the phrase "appointed for a term of 3 years. At the end of a term, a member shall continue to serve until a successor is appointed and sworn into office. Any member" in its place.

(3) Strike the sentence "The compensation of each member not otherwise compensated by public money shall be paid not more than $ 25 per day for each day spent in attendance at meetings of the Apprenticeship Council; provided, however, that any applicable laws passed by the Council of the District of Columbia shall supersede the provisions of this section.".

(c) Section 3 (D.C. Official Code § 32-1403) is amended to read as follows:

"Sec. 3. (a) The Director of the Department of Employment Services shall appoint an Associate Director of Apprenticeship whose office shall have responsibility and accountability for the apprenticeship system in the District of Columbia. The Office of Apprenticeship, Information and Training, which shall be known as the Registration Agency, shall have the authority to approve apprenticeship registration for federal purposes.

"(b) The Associate Director of Apprenticeship shall be chosen from among the employees of the Apprenticeship Training Service actually engaged in formulating and promoting standards of apprenticeship under the provisions of An Act To enable the Department of Labor to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices and to cooperate with the States in the promotion of such standards, approved August 16, 1937 (50 Stat. 664; 29 U.S.C. §§ 50, 50a, and 50b).

"(c) The Office of Apprenticeship, Information and Training is authorized to supply the Associate Director of Apprenticeship or the Apprenticeship Council with the clerical, technical, and professional assistance considered essential to effectuate the purposes of this act.".

(d) Section 4 (D.C. Official Code § 32-1404) is amended as follows:

(1) Strike the word "Director" and insert the phrase "Associate Director of Apprenticeship" in its place.

(2) Strike the phrase "Secretary of Labor" and insert the phrase "Director of the Department of Employment Services" in its place.

(3) Strike the sentence "Not less than once every two years the Apprenticeship Council shall make a report through the Mayor of its activities and findings to Congress and to the public.".

(4) Add the following sentence at the end:

"Once every year the Registration Agency shall make a report through the Mayor of its findings and activities to the Council of the District of Columbia and to the public.".

(e) Section 5 (D.C. Official Code § 32-1405) is amended to read as follows:

"The Associate Director of Apprenticeship, under the supervision of the Director of the Department of Employment Services and with the advice and guidance of the Apprenticeship Council, shall:

"(1) Administer the provisions of this act in cooperation with the Apprenticeship Council, local joint apprenticeship committees, and non-joint apprenticeship committees to develop criteria and training standards for apprentices, which shall in no case be lower than those required by this act;

"(2) Act as secretary of the Apprenticeship Council;

"(3) Approve, if approval is in the best interest of the apprentice, any apprentice agreement that meets the standards established by or in accordance with this act;

"(4) Terminate or cancel any apprenticeship agreement in accordance with the provisions of the apprenticeship agreement;

"(5) Engage with the State Board of Education and area community colleges on the administration and supervision of related and supplemental instruction for apprentices to ensure coordination of the instruction with job experiences; and

"(6) Perform such other duties necessary to carry out the intent of this act.".

(f) Section 6 (D.C. Official Code § 32-1406) is amended to read as follows:

"(a) Local joint apprenticeship committees and non-joint apprenticeship committees in any trade or group of trades may be submitted to the Registration Agency for approval. Such apprenticeship committees shall be composed of an equal number of employer and employee representatives appointed by the groups or organizations they represent, or the committee may consist of the employer and not less than 2 representatives from the recognized bargaining agency.

"(b) In a trade or group of trades in which there is no bona fide employee organization, the Registration Agency, with the advice and guidance of the Apprenticeship Council, may approve a joint trade apprenticeship committee and a non-joint apprenticeship committee (also referred to as a unilateral or group non-joint committee).

"(c) Subject to the approval of the Registration Agency, and in accordance with standards established by or under authority of this act, joint trade apprenticeship committees and non-joint apprenticeship committees may develop standards to govern the training of apprentices and give such aid as may be necessary to effectuate the standards.".

(g) Section 7 (D.C. Official Code § 32-1407) is amended to read as follows:

"For the purposes of this act, the term "apprentice" means a worker at least 16 years of age, except when a higher minimum age standard age is otherwise fixed by law, who is employed to learn an apprenticeable occupation meeting the criteria approved by the Registration Agency and who has entered into a written apprenticeship agreement, which contains the terms and conditions of the employment and training of the apprentice, with either the apprentice's program sponsor or an apprenticeship committee acting as agent for the program sponsor.".

(h) Section 8 (D.C. Official Code § 32-1408) is amended to read as follows:

"Every apprenticeship agreement entered into pursuant to this act shall contain:

"(1) The names and signatures of the contracting parties, including the apprentice's parent or guardian, if the apprentice is a minor, and the contact information of the program sponsor and the Registration Agency;

"(2) The date of birth of the apprentice and social security number, given on a voluntary basis;

"(3) A statement of the craft or occupation that the apprentice is to be taught and the time period at which the apprenticeship will begin and end;

"(4) A statement showing:

"(A) The number of hours to be spent by the apprentice in on-the-job learning in a time-based program;

"(B) A description of the skill sets to be attained by completion of a competency-based program, including the on-the-job learning component; or

"(C) The minimum number of hours to be spent by the apprentice and a description of the skill sets to be attained by completion of a hybrid program; and

"(D) Provisions for related and supplemental instruction;

"(5) A statement setting forth a schedule of the processes in the occupation or industry division in which the apprentice is to be trained and the approximate time to be spent in each process;

"(6) A statement of the graduated scale of wages to be paid the apprentice and whether the required school time shall be compensated;

"(7) A statement providing for a period of probation without adverse impact on the sponsor during which time the apprenticeship agreement shall be terminated by the Associate Director of Apprenticeship at the request, in writing, of the apprentice or suspended or cancelled by the sponsor for good cause with due notice to the apprentice and a reasonable opportunity for corrective action with due notice to the Associate Director of Apprenticeship, and providing that after a probationary period, the apprenticeship may be cancelled by the Associate Director of Apprenticeship by mutual agreement of all parties or canceled by the Associate Director of Apprenticeship for good and sufficient reasons;

"(8) Contact information (name, address, phone, and e-mail, if appropriate) of the person in the Registration Agency designated under the program to receive, process, and make disposition of a controversy or difference arising out of the apprenticeship agreement when the controversy or difference cannot be adjusted locally or resolved in accordance with the established procedure or applicable collective bargaining provisions.

"(9) A provision that a sponsor who is unable to fulfill the obligations under the apprenticeship agreement may, with the approval of the Associate Director of Apprenticeship or under the direction of the joint trade apprenticeship committee or non-joint apprenticeship committee or individual sponsor, transfer the apprenticeship agreement to another sponsor; provided, that:

"(A) The apprentice consents and that the other sponsor agrees to assume the obligations of the apprenticeship agreement;

"(B) The transferring apprentice is provided a transcript of related instruction and on-the-job learning by the program sponsor;

"(C) The transfer is to the same occupation; and

"(D) A new apprenticeship agreement is executed when the transfer between program sponsors occurs; and

"(10) Such additional terms and conditions as may be prescribed or approved by the Registration Agency with the advice and guidance of the Apprenticeship Council, if not inconsistent with the provisions of this act.".

(i) Section 9 (D.C. Official Code § 32-1409) is amended by striking the word "Director" both times it appears and inserting the phrase "Associate Director of Apprenticeship" in its place.

(j) Section 10 (D.C. Official Code § 32-1410) is amended as follows:

(1) Subsection (a) is amended as follows:

(A) Strike the word "Director" and insert the phrase "Associate Director of Apprenticeship" in its place.

(B) Strike the phrase "under this act, and he may hold" and insert the phrase "under this act and may hold" in its place.

(C) Strike the phrase "Secretary of Labor" and insert the phrase "Registration Agency" in its place.

(2) Subsection (b) is amended to read as follows:

"(b)(1) The determination of the Associate Director of Apprenticeship shall be filed with the Apprenticeship Council. If no appeal is filed with the Apprenticeship Council within 10 days after the date of filing the appeal, the determination of the Associate Director of Apprenticeship shall become the order of the Apprenticeship Council.

"(2) Any person aggrieved by a determination or action of the Associate Director of Apprenticeship may appeal to the Apprenticeship Council, which shall hold a hearing after due notice to the interested parties.

"(3) Any person aggrieved by the action of the Apprenticeship Council may appeal as provided in Title I of the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1204; D.C. Official Code § 2-501 *et seq.*).".

(k) Section 12 (D.C. Official Code § 32-1412) is repealed.

Sec. 3. Section 5(c)(2) of the Amendments to An Act to Provide for Voluntary Apprenticeship in the District of Columbia Act of 1978, effective March 6, 1979 (D.C. Law 2-156; D.C. Official Code § 32-1431(c)(2)), is amended by striking the phrase "Contracting Officer" wherever it appears and inserting the phrase "Department of Employment Services" in its place.

Sec. 4. Fiscal impact statement.

The Council adopts the fiscal impact statement of the Budget Director as the fiscal impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(3)).

ENROLLED ORIGINAL

Sec. 5. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), and shall remain in effect for no longer than 90 days, as provided for emergency acts of the Council of the District of Columbia in section 412(a) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 788; D.C. Official Code § 1-204.12(a)).

Chairman
Council of the District of Columbia

Mayor
District of Columbia
March 26, 2015

ENROLLED ORIGINAL

AN ACT

D.C. ACT 21-17

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MARCH 26, 2015

To amend, on an emergency basis, the Health Benefit Exchange Authority Establishment Act of 2011 to provide for the financial sustainability of the Health Benefit Exchange Authority by adopting an annual broad- based assessment of all health insurance carriers that will support its annual budget.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Health Benefit Exchange Authority Financial Sustainability Emergency Amendment Act of 2015".

Sec. 2. The Health Benefit Exchange Authority Establishment Act of 2011, effective March 2, 2012 (D.C. Law 19-94; D.C. Official Code § 31-3171.01 *et seq.*), is amended as follows:

(a) Section 2 (D.C. Official Code § 31-3171.01) is amended as follows:

(1) A new paragraph (3A) is added to read as follows:

"(3A) "Direct gross receipts" means all policy and membership fees and net premium receipts or consideration received in a calendar year on all health insurance carrier risks originating in or from the District of Columbia.".

(2) A new paragraph (8C) is added to read as follows:

"(8C) "Net premium receipts or consideration received" means gross premiums or consideration received less the sum of premiums received for reinsurance assumed and premiums or consideration returned on policies or contracts canceled or not taken.".

(b) Section 4 (D.C. Official Code § 31-3171.03) is amended by adding a new subsection (f) to read as follows:

"(f)(1) The Authority shall annually assess, through a "Notice of Assessment," each health carrier doing business in the District with direct gross receipts of $50,000 or greater in the preceding calendar year an amount based on a percentage of its direct gross receipts for the preceding calendar year. These assessments shall be deposited in the Fund.

"(2) The Authority shall adjust the assessment rate in each assessable year. The amount assessed shall not exceed reasonable projections regarding the amount necessary to support the operations of the Authority.

"(3) Each health carrier shall pay to the Authority the amount stated in the Notice of Assessment within 30 business days after receipt of the Notice of Assessment.

ENROLLED ORIGINAL

"(4) Any failure to pay the assessment in accordance with paragraph (3) of this subsection shall subject the health carrier to section 5 of the Insurance Regulatory Trust Fund Act of 1993, effective October 21, 1993 (D.C. Law 10-40; D.C. Official Code § 31-1204).".

Sec. 3. Fiscal impact statement.

The Council adopts the fiscal impact statement of the Chief Financial Officer as the fiscal impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(3)).

Sec. 4. Effective date.

This act shall take effect following approval by the Mayor, (or in the event of veto by the Mayor, action by the Council to override the veto), and shall remain in effect for no longer than 90 days, as provided for emergency acts of the Council of the District of Columbia in section 412(a) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 788; D.C. Official Code § 1-204.12(a)).

Chairman
Council of the District of Columbia

Mayor
District of Columbia
APPROVED
March 26, 2015

ENROLLED ORIGINAL

AN ACT

D.C. ACT 21-18

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MARCH 26, 2015

To amend, on an emergency basis, the Human Rights Act of 1977 to clarify that the prohibition of discrimination on the basis of sex shall not be construed to require an employer to provide insurance coverage related to a reproductive health decision; and to repeal a superseded provision of the Reproductive Health Non-Discrimination Amendment Act of 2014.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Reproductive Health Non-Discrimination Clarification Emergency Amendment Act of 2015".

Sec. 2. Section 105(a) of the Human Rights Act of 1977, effective July 17, 1985 (D.C. Law 6-8; D.C. Official Code § 2-1401.05(a)), is amended by striking the phrase "related medical conditions, or breastfeeding." and inserting the phrase "related medical conditions, breastfeeding, or reproductive health decisions. This act shall not be construed to require an employer to provide insurance coverage related to a reproductive health decision." in its place.

Sec. 3. Section 2(a) of the Reproductive Health Non-Discrimination Amendment Act of 2014, enacted on January 23, 2015 (D.C. Act 20-593; 62 DCR 1337), is repealed.

Sec. 4. Fiscal impact statement.

The Council adopts the fiscal impact statement of the Budget Director as the fiscal impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code §1-206.02(c)(3)).

Sec. 5. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), and shall remain in effect for no longer than 90 days, as provided for emergency acts of the Council of the District of Columbia in section

ENROLLED ORIGINAL

412(a) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 788; D.C. Official Code § 1-204.12(a)).

Chairman
Council of the District of Columbia

Mayor
District of Columbia
APPROVED
March 26, 2015

ENROLLED ORIGINAL

AN ACT

D.C. ACT 21-19

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MARCH 26, 2015

To amend, on an emergency basis, the Marijuana Possession Decriminalization Amendment Act of 2014 to clarify that, for the purposes of the act, a private club is a place to which the public is invited, but does not include a private residence, and that the prohibition on consumption of marijuana in public is not limited by the Legalization of Possession of Minimal Amounts of Marijuana for Personal Use Initiative of 2014; and to amend Chapter 28 of Title 47 of the District of Columbia Official Code to require the Mayor to revoke any license, certificate of occupancy, or permit held by an entity that knowingly permits a violation of section 301(a) of the Marijuana Possession Decriminalization Amendment Act of 2014 to occur at the specific address or unit identified in the license, certificate of occupancy, or permit.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Marijuana Possession Decriminalization Clarification Emergency Amendment Act of 2015".

Sec. 2. Section 301 of the Marijuana Possession Decriminalization Amendment Act of 2014, effective July 17, 2014 (D.C. Law 20-126; D.C. Official Code § 48-911.01), is amended as follows:

(a) Subsection (a)(3) is amended to read as follows:

"(3) Any place to which the public is invited. For the purposes of this subsection, and notwithstanding any other provision of law, a private club, which includes any building, facility, or premises used or operated by an organization or association for a common avocational purpose, such as a fraternal, social, educational, or recreational purpose, is a place to which the public is invited; provided, that a private club does not include a private residence.".

(b) A new subsection (f) is added to read as follows:

"(f) No provision of the Legalization of Possession of Minimal Amounts of Marijuana for Personal Use Initiative of 2014, effective February 26, 2015 (D.C. Law 20-153; 62 DCR 880), shall limit or be construed to limit the application of any provision of this section.".

Sec. 3. Section 47-2844(a-1)(1) of the District of Columbia Official Code is amended as follows:

(a) Subparagraph (B) is amended by striking the phrase "Title 48; or" and inserting the phrase "Title 48;" in its place.

ENROLLED ORIGINAL

(b) Subparagraph (C) is amended by striking the period at the end and inserting the phrase "; or" in its place.

(c) A new subparagraph (D) is added to read as follows:

"(D) Conduct that violates section 301(a) of the Marijuana Possession Decriminalization Amendment Act of 2014, effective July 17, 2014 (D.C. Law 20-126; D.C. Official Code § 48-911.01(a)). In addition, the Mayor shall revoke any certificate of occupancy or permit associated with the specific address or unit, whichever is more specific, of the holder of a certificate of occupancy or permit who knowingly permits a violation of section 301(a) of the Marijuana Possession Decriminalization Amendment Act of 2014, effective July 17, 2014 (D.C. Law 20-126; D.C. Official Code § 48-911.01(a)), to occur at the specific address or unit identified in the certificate of occupancy or permit.".

Sec. 4. Fiscal impact statement.

The Council adopts the fiscal impact statement of the Chief Financial Officer as the fiscal impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code §1-206.02(c)(3)).

Sec. 5. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), and shall remain in effect for no longer than 90 days, as provided for emergency acts of the Council of the District of Columbia in section 412(a) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code §1-204.12(a)).

Chairman
Council of the District of Columbia

Mayor
District of Columbia
APPROVED
March 26, 2015

COUNCIL OF THE DISTRICT OF COLUMBIA

NOTICE OF INTENT TO ACT ON NEW LEGISLATION

The Council of the District of Columbia hereby gives notice of its intention to consider the following legislative matters for final Council action in not less than **15 days**. Referrals of legislation to various committees of the Council are listed below and are subject to change at the legislative meeting immediately following or coinciding with the date of introduction. It is also noted that legislation may be co-sponsored by other Councilmembers after its introduction.

Interested persons wishing to comment may do so in writing addressed to Nyasha Smith, Secretary to the Council, 1350 Pennsylvania Avenue, NW, Room 5, Washington, D.C. 20004. Copies of bills and proposed resolutions are available in the Legislative Services Division, 1350 Pennsylvania Avenue, NW, Room 10, Washington, D.C. 20004 Telephone: 724-8050 or online at www.dccouncil.us.

COUNCIL OF THE DISTRICT OF COLUMBIA **PROPOSED LEGISLATION**

RESOLUTIONS

PR21-110	Adams Morgan Moratorium Zone Approval Resolution of 2015 Intro. 3-23-15 by Chairman Mendelson at the request of the Mayor and referred to the Committee on Business, Consumer, and Regulatory Affairs
PR21-111	Foster Youth Statement of Rights Rules II Approval Resolution of 2015 Intro. 3-24-15 by Chairman Mendelson at the request of the Mayor and referred to the Committee on Health and Human Services
PR21-112	Board of Zoning Adjustment Fred Hill Confirmation Resolution of 2015 Intro. 3-26-15 by Chairman Mendelson at the request of the Mayor and referred to the Committee of the Whole
PR21-113	Public Charter School Board Stephen D. Bumbaugh Confirmation Resolution of 2015 Intro. 3-26-15 by Chairman Mendelson at the request of the Mayor and referred to the Committee on Education

PR21-114	Public Charter School Board Barbara Nophlin Confirmation Resolution of 2015 Intro. 3-26-15 by Chairman Mendelson at the request of the Mayor and referred to the Committee on Education
PR21-115	District of Columbia Housing Authority Board of Commissioners Jose Ortiz Confirmation Resolution of 2015 Intro. 3-26-15 by Chairman Mendelson at the request of the Mayor and referred to the Committee on Housing and Community Development
PR21-116	Police Complaints Board Patrick Burke Confirmation Resolution of 2015 Intro. 3-26-15 by Chairman Mendelson at the request of the Mayor and referred to the Committee on Judiciary
PR21-117	Police Complaints Board Bobbi Strang Confirmation Resolution of 2015 Intro. 3-26-15 by Chairman Mendelson at the request of the Mayor and referred to the Committee on Judiciary

COUNCIL OF THE DISTRICT OF COLUMBIA
NOTICE OF PUBLIC HEARINGS
FISCAL YEAR 2016 PROPOSED BUDGET AND FINANCIAL PLAN,
FISCAL YEAR 2016 BUDGET SUPPORT ACT OF 2015,
FISCAL YEAR 2016 BUDGET REQUEST ACT OF 2015, AND
COMMITTEE MARK-UP SCHEDULE

3/26/2015

SUMMARY

April 2, 2015	Mayor Transmits the Fiscal Year 2016 Proposed Budget and Financial Plan
April 13, 2015	Committee of the Whole Public Briefing on the Mayor's Fiscal Year 2016 Proposed Budget and Financial Plan
April 15, 2015 to May 7, 2015	Committee Public Hearings on the "Fiscal Year 2016 Budget Request Act of 2015." (The Committees may also simultaneously receive testimony on the sections of the Fiscal Year 2016 Budget Support Acts that affect the agencies under each Committee's purview)
May 8, 2015	Committee of the Whole Public Hearing on the "Fiscal Year 2016 Budget Request Act of 2015" and the "Fiscal Year 2016 Budget Support Act of 2015"
May 12, 13, and May 14, 2015	Committee Mark-ups and Reporting on Agency Budgets for Fiscal Year 2016
May 27, 2015	Committee of the Whole and Council consideration of the "Fiscal Year 2016 Budget Request Act of 2015", and the "Fiscal Year 2016 Budget Support Act of 2015"
June 16, 2015	Council consideration of the "Fiscal Year 2016 Budget Support Act of 2015"

The Council of the District of Columbia hereby gives notice of its intention to hold public hearings on the FY 2016 Proposed Budget and Financial Plan, the "Fiscal Year 2016 Budget Request Act of 2015", and the "Fiscal Year 2016 Budget Support Act of 2015". The hearings will begin Monday, April 13, 2015 and conclude on Friday, May 8, 2015 and will take place in the Council Chamber (Room 500), Room 412, Room 120, or Room 123 of the John A. Wilson Building; 1350 Pennsylvania Avenue, N.W.; Washington, DC 20004.

The Committee mark-ups will begin Tuesday, May 12, 2015 and conclude on Thursday, May 14, 2015 and will take place in the Council Chamber (Room 500) of the John A. Wilson Building; 1350 Pennsylvania Avenue, N.W.; Washington, DC 20004.

Persons wishing to testify are encouraged, but not required, to submit written testimony in advance of each hearing to Nyasha Smith, Secretary to the Council of the District of Columbia; Suite 5; John A. Wilson Building; 1350 Pennsylvania Avenue, N.W.; Washington, DC 20004. If a written statement cannot be provided prior to the day of the hearing, please have at least 15 copies of your written statement available on the day of the hearing for immediate distribution to the Council. The hearing record will close two business days following the conclusion of each respective hearing. Persons submitting written statements for the record should observe this deadline. For more information about the Council's budget oversight hearing and mark-up schedule please contact the Council's Office of the Budget Director at (202) 724-8544.

ADDENDUM OF CHANGES TO THE PUBLIC HEARING SCHEDULE

New Date	Original Date	Hearing
4/15/2015 (COW-new insert)		Office of Contracting & Procurement Contract Appeals Board Executive Office of the Mayor Office of the City Administrator Secretary of the District of Columbia
4/15/2015	4/20/2015	Housing Finance Agency
4/15/2015	4/23/2015	Office on Aging
4/17/2015	4/30/2015	DC Board of Elections (Judiciary)
4/17/2015	4/30/2015	Office of Campaign Finance (Judiciary)
4/21/2015	4/24/2015	District Department of Transportation
4/23/2015	5/6/2015	Office of Women's Policy and Initiatives
4/23/2015	4/20/2015	DC Housing Authority
4/29/2015 (F&R-new insert)		Washington Metropolitan Area Transit Authority

PUBLIC HEARING SCHEDULE

COMMITTEE OF THE WHOLE **Chairman Phil Mendelson**

MONDAY, APRIL 13, 2015; COUNCIL CHAMBER (Room 500)	
Time	**Subject**
10:00 a.m. - End	Committee of the Whole Public Briefing on the Mayor's Fiscal Year 2016 Proposed Budget and Financial Plan

COMMITTEE ON THE JUDICIARY **Chairperson Kenyan McDuffie**

WEDNESDAY, APRIL 15, 2015; COUNCIL CHAMBER (Room 500)	
Time	**Agency**
10:00 a.m. - End	Office of Police Complaints
	Criminal Justice Coordinating Council
	Sentencing and Criminal Code Revision Commission

Persons wishing to testify about the performance of any of the foregoing agencies may contact: Katherine Mitchell, kmitchell@dccouncil.us or by calling 202-727-8275.

COMMITTEE OF THE WHOLE **Chairman Phil Mendelson**

WEDNESDAY, APRIL 15, 2015; Room 412	
Time	**Agency**
2:30 p.m. - 6:00 p.m.	Office of Contracting and Procurement
	Contract Appeals Board
	Executive Office of the Mayor
	Office of the City Administrator
	Secretary of the District of the Columbia

Persons wishing to testify about the performance of any of the foregoing agencies may contact: Evan Cash, ecash@dccouncil.us or by calling 202-724-8196.

COMMITTEE ON HOUSING & COMMUNITY DEVELOPMENT **Chairperson Anita Bonds**

WEDNESDAY, APRIL 15, 2015; Room 123	
Time	**Agency**
10:00 a.m. - End	Housing Finance Agency
	Office of Aging

Persons wishing to testify about the performance of any of the foregoing agencies may contact: Barry Weise, bweise@dccouncil.us or by calling 202-724-8171.

COMMITTEE ON HEALTH & HUMAN SERVICES **Chairperson Yvette Alexander**

WEDNESDAY, APRIL 15, 2015; Room 120	
Time	**Agency**
10:00 a.m. - End	Department of Behavioral Health

Persons wishing to testify about the performance of any of the foregoing agencies may contact: Rayna Smith, rsmith@dccouncil.us or by calling 202-741-2111.

COMMITTEE ON HEALTH & HUMAN SERVICES **Chairperson Yvette Alexander**

FRIDAY, APRIL 17, 2015; COUNCIL CHAMBER (Room 500)	
Time	**Agency**
10:00 a.m. - End	Department of Healthcare Finance

Persons wishing to testify about the performance of any of the foregoing agencies may contact: Rayna Smith, rsmith@dccouncil.us or by calling 202-741-2111.

COMMITTEE OF THE WHOLE **Chairman Phil Mendelson**

FRIDAY, APRIL 17, 2015; Room 412	
Time	**Agency**
2:00 p.m. - 6:00 p.m.	Council of the District of Columbia
	Metropolitan Washington Council of Governments
	Office of the Chief Technology Officer
	Department of Human Resources
	District of Columbia Retirement Board/Funds
	Retiree Health Contribution (Other Post-Employment Benefits)

Persons wishing to testify about the performance of any of the foregoing agencies may contact: Greg Matlesky, gmatlesky@dccouncil.us or Evan Cash, ecash@dccouncil.us or by calling 202-724-8196.

COMMITTEE ON TRANSPORTATION & THE ENVIRONMENT **Chairperson Mary Cheh**

FRIDAY, APRIL 17, 2015; Room 123	
Time	**Agency**
11:00 a.m.	Department of Motor Vehicles
	Department of Public Works

Persons wishing to testify about the performance of any of the foregoing agencies may contact: Aukima Benjamin, abenjamin@dccouncil.us or by calling or by calling 202-724-8062.

COMMITTEE ON THE JUDICIARY **Chairperson Kenyan McDuffie**

FRIDAY, APRIL 17, 2015; Room 120	
Time	**Agency**
10:00 a.m. - End	Commission on Fathers, Men, and Boys
	Department of Youth Rehabilitation Services
	DC Board of Elections
	Office of Campaign Finance

Persons wishing to testify about the performance of any of the foregoing agencies may contact: Katherine Mitchell, kmitchell@dccouncil.us or by calling 202-727-8275.

COMMITTEE ON HOUSING & COMMUNITY DEVELOPMENT **Chairperson Anita Bonds**

MONDAY, APRIL 20, 2015; COUNCIL CHAMBER (Room 500)	
Time	**Agency**
10:00 a.m. - End	Department of Housing and Community Development
	Rental Housing Commission
	Housing Production Trust Fund

Persons wishing to testify about the performance of any of the foregoing agencies may contact: Irene Kang, ikang@dccouncil.us or by calling 202-724-8198.

COMMITTEE OF THE WHOLE **Chairman Phil Mendelson**

MONDAY, APRIL 20, 2015; Room 412	
Time	**Agency**
2:00 p.m. - 6:00 p.m.	University of the District of Columbia
	Office of Labor Relations and Collective Bargaining
	Office of Employee Appeals
	Public Employee Relations Board
	District of Columbia Auditor

Persons wishing to testify about the performance of any of the foregoing agencies may contact: Taneka Miller, tmiller@dccouncil.us or by calling 202-724-4865.

COMMITTEE ON EDUCATION **Chairperson David Grosso**

TUESDAY, APRIL 21, 2015; COUNCIL CHAMBER (Room 500)	
Time	**Agency**
1:00 p.m. - End	Office of the Deputy Mayor for Education
	District of Columbia Public Library System

Persons wishing to testify about the performance of any of the foregoing agencies may contact: Christina Henderson, chenderson@dccouncil.us or by calling 202-724-8061.

COMMITTEE ON TRANSPORTATION AND THE ENVIRONMENT **Chairperson Mary Cheh**

TUESDAY, APRIL 21, 2015; Room 412	
Time	**Agency**
1:00 p.m. - End	District Department of Transportation

Persons wishing to testify about the performance of any of the foregoing agencies may contact: Aukima Benjamin, abenjamin@dccouncil.us or by calling 202-724-8062.

COMMITTEE ON FINANCE & REVENUE **Chairperson Jack Evans**

WEDNESDAY, APRIL 22, 2015; COUNCIL CHAMBER (Room 500)	
Time	**Agency**
10:00 a.m. - End	Washington Convention & Sports Authority (EventsDC)
	Destination DC
	Real Property Tax Appeals Commission
	DC Lottery
	Office of the Chief Financial Officer

Persons wishing to testify about the performance of any of the foregoing agencies may contact: Sarina Loy, sloy@dccouncil.us or by calling 202-724-8058.

COMMITTEE ON EDUCATION **Chairperson David Grosso**

WEDNESDAY, APRIL 22, 2015; Room 412	
Time	**Agency**
10:00 a.m. - End	Public Charter School Board
	Bullying Prevention Taskforce
	Healthy Youth and Schools Commission

Persons wishing to testify about the performance of any of the foregoing agencies may contact: Christina Henderson, chenderson@dccouncil.us or by calling 202-724-8061.

COMMITTEE ON HEALTH & HUMAN SERVICES **Chairperson Yvette Alexander**

WEDNESDAY, APRIL 22, 2015; Room 120	
Time	**Agency**
10:00 a.m. - End	Department on Health

Persons wishing to testify about the performance of any of the foregoing agencies may contact: Rayna Smith, rsmith@dccouncil.us or by calling 202-741-2111.

COMMITTEE OF THE WHOLE **Chairman Phil Mendelson**

THURSDAY, APRIL 23, 2015; COUNCIL CHAMBER (Room 500)	
Time	**Agency**
2:00 p.m. - 6:00 p.m.	Office of Budget and Planning
	Deputy Mayor for Planning & Economic Development
	Office of Zoning
	Office of Planning

Persons wishing to testify about the performance of any of the foregoing agencies may contact: Cynthia LeFevre, clefevre@dccouncil.us or by calling 202-724-8092.

COMMITTEE ON EDUCATION **Chairperson David Grosso**

THURSDAY, APRIL 23, 2015; Room 412	
Time	**Agency**
10:00 a.m. - End	District of Columbia Public Schools (Public Witnesses Only)

Persons wishing to testify about the performance of any of the foregoing agencies may contact: Christina Henderson, chenderson@dccouncil.us or by calling 724-8061.

COMMITTEE ON HOUSING & COMMUNITY DEVELOPMENT **Chairperson Anita Bonds**

THURSDAY, APRIL 23, 2015; Room 120	
Time	**Agency**
11:00 a.m. - End	Advisory Neighborhood Commission
	Office of Religious Affairs/Interfaith Council
	Office of Veteran Affairs
	Office of Women's Policy and Initiatives
	DC Housing Authority

Persons wishing to testify about the performance of any of the foregoing agencies may contact: Nishant Keerikatte, nkeerikatte@dccouncil.us or by calling 202-724-8025.

COMMITTEE ON HEALTH & HUMAN SERVICES **Chairperson Yvette Alexander**

FRIDAY, APRIL 24, 2015; COUNCIL CHAMBER (Room 500)	
Time	**Agency**
10:00 a.m. - End	Department of Human Services

Persons wishing to testify about the performance of any of the foregoing agencies may contact: Rayna Smith, rsmith@dccouncil.us or by calling 202-741-2111.

COMMITTEE ON TRANSPORTATION & THE ENVIRONMENT **Chairperson Mary Cheh**

FRIDAY, APRIL 24, 2015; Room 412	
Time	**Agency**
10:00 a.m. - End	DC Taxicab Commission

Persons wishing to testify about the performance of any of the foregoing agencies may contact: Aukima Benjamin, abenjamin@dccouncil.us or by calling 202-724-8062.

COMMITTEE ON BUSINESS, CONSUMER & REGULATORY AFFAIRS **Chairperson Vincent Orange**

MONDAY, APRIL 27, 2015; COUNCIL CHAMBER (Room 500)	
Time	**Agency**
10:00 a.m. - End	Alcoholic Beverage Regulation Administration
	Department of Consumer and Regulatory Affairs
	Department of Employment Services
	Department of Small and Local Business Development
	Office of Risk Management
	Office of Tenant Advocate
	Workforce Investment Council

Persons wishing to testify about the performance of any of the foregoing agencies may contact: Peter Johnson, pjohnson@dccouncil.us or by calling 202-727-6683.

COMMITTEE ON THE JUDICIARY **Chairperson Kenyan McDuffie**

MONDAY, APRIL 27, 2015; Room 412	
Time	**Agency**
10:00 a.m. - End	Fire and Emergency Medical Services
	Office of Unified Communications
	Office of Human Rights
	Department of Corrections
	Office of Returning Citizen Affairs
	Corrections Information Council

Persons wishing to testify about the performance of any of the foregoing agencies may contact: Katherine Mitchell, kmitchell@dccouncil.us or by calling 202-727-8275.

COMMITTEE ON TRANSPORTATION & THE ENVIRONMENT **Chairperson Mary Cheh**

TUESDAY, APRIL 28, 2015; COUNCIL CHAMBER (Room 500)	
Time	**Agency**
10:00 a.m. - End	Department of General Services

Persons wishing to testify about the performance of any of the foregoing agencies may contact: Aukima Benjamin, abenjamin@dccouncil.us or by calling 202-724-8062.

COMMITTEE ON EDUCATION **Chairperson David Grosso**

TUESDAY, APRIL 28, 2015; Room 412	
Time	**Agency**
10:00 a.m. - End	District of Columbia Public Schools (Government Witnesses only)

Persons wishing to testify about the performance of any of the foregoing agencies may contact: Christina Henderson, chenderson@dccouncil.us or by calling 202-724-8061.

COMMITTEE ON HEALTH & HUMAN SERVICES **Chairperson Yvette Alexander**

TUESDAY, APRIL 28, 2015; Room 120	
Time	**Agency**
10:00 a.m. - End	Health Benefit Exchange Authority
	Child and Family Services Administration

Persons wishing to testify about the performance of any of the foregoing agencies may contact: Rayna Smith, rsmith@dccouncil.us or by calling 202-741-2111.

COMMITTEE OF HEALTH & HUMAN SERVICES **Chairperson Yvette Alexander**

WEDNESDAY, APRIL 29, 2015; COUNCIL CHAMBER (Room 500)	
Time	**Agency**
10:00 a.m. - End	Department of Disability Services
	Office of Disability Rights

Persons wishing to testify about the performance of any of the foregoing agencies may contact: Rayna Smith, rsmith@dccouncil.us or by calling 202-741-2111.

COMMITTEE ON FINANCE & REVENUE **Chairperson Jack Evans**

WEDNESDAY, APRIL 29, 2015; Room 412	
Time	**Agency**
10:00 a.m. - End	Commission on the Arts and Humanities
	Office of Inspector General
	Office of Partnerships and Grant Services
	Washington Metropolitan Area Transit Authority

Persons wishing to testify about the performance of any of the foregoing agencies may contact: Sarina Loy, sloy@dccouncil.us or by calling 202-724-8058.

COMMITTEE ON THE JUDICIARY **Chairperson Kenyan McDuffie**

WEDNESDAY, APRIL 29, 2015; Room 120	
Time	**Agency**
10:00 a.m. - End	Office of the Attorney General
	Mayor's Office of Legal Counsel
	Office of Administrative Hearings
	Judicial Nomination Commission
	Commission on Judicial Disabilities and Tenure
	Access to Justice Initiative

Persons wishing to testify about the performance of any of the foregoing agencies may contact: Katherine Mitchell, kmitchell@dccouncil.us or by calling 202-727-8275.

COMMITTEE ON EDUCATION **Chairperson David Grosso**

THURSDAY, APRIL 30, 2015; COUNCIL CHAMBER (Room 500)	
Time	**Agency**
10:00 a.m. - End	Office of State Superintendent of Education
	State Board of Education

Persons wishing to testify about the performance of any of the foregoing agencies may contact: Christina Henderson, chenderson@dccouncil.us or by calling 202-724-8061.

COMMITTEE ON BUSINESS, CONSUMER & REGULATORY AFFAIRS **Chairperson Vincent Orange**

THURSDAY, APRIL 30, 2015; Room 412	
Time	**Agency**
10:00 a.m. - End	Department of Insurance, Securities, and Banking
	Office of Cable Television
	Office of Motion Picture and Television Development
	Office of People's Counsel
	Public Access Corporation
	Public Service Commission

Persons wishing to testify about the performance of any of the foregoing agencies may contact: Peter Johnson, pjohnson@dccouncil.us or by calling 202-727-6683.

COMMITTEE ON THE JUDICIARY **Chairperson Kenyan McDuffie**

THURSDAY, APRIL 30, 2015; Room 120	
Time	**Agency**
10:00 a.m. - End	Board of Ethics and Government Accountability
	Office of Victim Services
	Justice Grants Administration

Persons wishing to testify about the performance of any of the foregoing agencies may contact: Katherine Mitchell, kmitchell@dccouncil.us or by calling 202-727-8275.

COMMITTEE ON TRANSPORTATION & THE ENVIRONMENT **Chairperson Mary Cheh**

FRIDAY, MAY 1, 2015; COUNCIL CHAMBER (Room 500)	
Time	**Agency**
11:00 a.m. - End	District Department of the Environment
	Department of Parks and Recreation

Persons wishing to testify about the performance of any of the foregoing agencies may contact: Aukima Benjamin, abenjamin@dccouncil.us or by calling 202-724-8062.

COMMITTEE ON HEALTH & HUMAN SERVICES **Chairperson Yvette Alexander**

FRIDAY, MAY 1, 2015; Room 412	
Time	**Agency**
10:00 a.m. - End	Children and Youth Investment Trust Corporation
	United Medical Center
	Deputy Mayor of Health and Human Services

Persons wishing to testify about the performance of any of the foregoing agencies may contact: Rayna Smith, rsmith@dccouncil.us or by calling 202-741-2111.

COMMITTEE ON THE JUDICIARY **Chairperson Kenyan McDuffie**

MONDAY, MAY 4, 2015; COUNCIL CHAMBER (Room 500)	
Time	**Agency**
11:00 a.m. - End	Department of Forensic Sciences
	Metropolitan Police Department
	Office of the Chief Medical Examiner
	Homeland Security and Emergency Management Agency
	District of Columbia National Guard

Persons wishing to testify about the performance of any of the foregoing agencies may contact: Katherine Mitchell, kmitchell@dccouncil.us or by calling 202-727-8275.

COMMITTEE ON HOUSING & COMMUNITY DEVELOPMENT **Chairperson Anita Bonds**

WEDNESDAY, MAY 6, 2015; COUNCIL CHAMBER (Room 500)	
Time	**Agency**
10:00 a.m. - End	Advisory Commission on Caribbean Community Affairs
	DC Youth Advisory Council
	Office of Gay, Lesbian, Bisexual, and Transgender Affairs
	Commission on Asian and Pacific Islander Affairs
	Office of Latino Affairs
	Office of African Affairs
	Office of African American Affairs

Persons wishing to testify about the performance of any of the foregoing agencies may contact: Joseph Trimboli, jtrimboli@dccouncil.us or by calling 202-724-8198.

COMMITTEE OF THE WHOLE

FRIDAY, MAY 8, 2015; COUNCIL CHAMBER (Room 500)	**Chairman Phil Mendelson**
Time	**Agency**
10:00 a.m.	Committee of the Whole Hearing on the "Fiscal Year 2016 Budget Request Act of 2015", and the "Fiscal Year 2016 Budget Support Act of 2015"

COMMITTEE MARK-UP SCHEDULE

TUESDAY, MAY 12, 2015; COUNCIL CHAMBER (Room 500)

Time	Committee
Noon - 2:00 p.m.	Open
2:00 p.m. - 4:00 p.m.	Committee on Health and Human Services

WEDNESDAY, MAY 13, 2015; COUNCIL CHAMBER (Room 500)

Time	Committee
	Open
12:00 p.m. - 2:00 p.m.	Committee on Finance and Revenue
2:00 p.m. - 4:00 p.m.	Committee on Housing and Community Development
4:00 p.m. - 6:00 p.m.	Committee on Business, Consumer and Regulatory Affairs

THURSDAY, MAY 14, 2015; COUNCIL CHAMBER (Room 500)

Time	Committee
10:00 a.m. - 12:00 p.m.	Committee on the Judiciary
12:00 p.m. - 2:00 p.m.	Committee on Education
2:00 p.m. - 4:00 p.m.	Committee on Transportation and the Environment
4:00 p.m. - 6:00 p.m.	Committee of the Whole

COUNCIL OF THE DISTRICT OF COLUMBIA
Notice of Reprogramming Requests

Pursuant to DC Official Code Sec 47-361 et seq. of the Reprogramming Policy Act of 1990, the Council of the District of Columbia gives notice that the Mayor has transmitted the following reprogramming request(s).

A reprogramming will become effective on the 15th day after official receipt unless a Member of the Council files a notice of disapproval of the request which extends the Council's review period to 30 days. If such notice is given, a reprogramming will become effective on the 31st day after its official receipt unless a resolution of approval or disapproval is adopted by the Council prior to that time.

Comments should be addressed to the Secretary to the Council, John A. Wilson Building, 1350 Pennsylvania Avenue, NW, Room 5 Washington, D.C. 20004. Copies of reprogramming requests are available in Legislative Services, Room 10.
Telephone: 724-8050

Reprog. 21-33: Request to reprogram $768,648 of Fiscal Year 2015 Local funds budget authority within the Department of Corrections (DOC) was filed in the Office of the Secretary on March 25, 2015. This reprogramming ensures that DOC is able to procure medical supplies for the Central Cell Block, additional pharmaceuticals from the Department of Health, furniture for the Juvenile Unit, professional services and travel for the Office of Returning Citizens Affairs, software for in-house disaster recovery, repairs and upgrades to meet American Correctional Association reclassification, and procure Language Access services.

RECEIVED: 14 day review begins March 26, 2015

Reprog. 21-34: Request to reprogram $2,164,937 of Fiscal Year 2015 Local funds budget authority within the District of Columbia Public Schools (DCPS) was filed in the Office of the Secretary on March 25, 2015. This reprogramming ensures that DCPS is able to support enrollment changes within multiple District schools.

RECEIVED: 14 day review begins March 26, 2015

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

NOTICE OF PUBLIC HEARING

Posting Date:	April 3, 2015
Petition Date:	May 18, 2015
Hearing Date:	June 1, 2015
Protest Date:	August 5, 2015

License No.:	ABRA-098308
Licensee:	Fast Good LLC
Trade Name:	Beefsteak
License Class:	Retailer's Class "C" Restaurant
Address:	1528 Connecticut Ave., N.W.
Contact:	Kayla Brown: 407-506-0514

WARD 2 ANC 2B SMD 2B02

Notice is hereby given that this applicant has applied for a new license under the D.C. Alcoholic Beverage Control Act and that the objectors are entitled to be heard before the granting of such on the hearing date at 10:00 am, 4th Floor, 2000 14th Street, N.W., Washington, DC 20009. Petition and/or request to appear before the Board must be filed on or before the petition date. The Protest Hearing Date is scheduled for August 5, 2015 at 4:30 pm.

NATURE OF OPERATION

New casual restaurant offering vegetable-centered meals with a sidewalk café with seating for 43 patrons and total occupancy load of 93.

HOURS OF OPERATION & ALCOHOLIC BEVERAGE SALES/SERVICE/CONSUMPTION FOR PREMISES AND SIDEWALK CAFÉ

Sunday through Saturday 11am – 10pm

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

NOTICE OF PUBLIC HEARING

****READVERTISED**

Posting Date:	April 3, 2015**
Petition Date:	May 18, 2015**
Roll Call Hearing Date:	June 1, 2015**
Protest Hearing Date:	August 5, 2015**

License No.:	ABRA-097302
Licensee:	Omar LLC
Trade Name:	Castello Restaurant and Lounge
License Class:	Retailer's Class "C" Tavern
Address:	931 Hamilton Street, N.W.
Contact:	Dee Hunter: 202-321-4529

WARD 4 ANC 4D SMD 4D04

Notice is hereby given that this applicant has applied for a new license under the D.C. Alcoholic Beverage Control Act and that the objectors are entitled to be heard before the granting of such license on the Roll Call Hearing Date at 10:00 am, 2000 14th Street, N.W., 400 South, Washington, DC 20009. Petitions and/or requests to appear before the Board must be filed on or before the Petition Date. The Protest Hearing Date is scheduled on August 5, 2015** at 4:30 pm.

NATURE OF OPERATION
Restaurant serving International and American cuisine. Entertainment to include a DJ and a live jazz band. Sidewalk Café with seating for 46 patrons and a total occupancy load of 159.

HOURS OF OPERATION AND ALCOHOLIC BEVERAGE SALES/SERVICE/CONSUMPTION
Sunday through Thursday 10am – 2am, Friday and Saturday 10am – 3am

HOURS OF LIVE ENTERTAINMENT
Sunday through Thursday 6pm – 2am, Friday and Saturday: 6pm – 3am

HOURS OF OPERATION AND ALCOHOLIC BEVERAGE SALES/SERVICE/CONSUMPTION FOR SIDEWALK CAFÉ
Sunday through Saturday: 10am – 2am

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

NOTICE OF PUBLIC HEARING

****RESCIND**

Posting Date:	March 6, 2015**
Petition Date:	April 20, 2015**
Roll Call Hearing Date:	May 4, 2015**
Protest Hearing Date:	July 15, 2015**
License No.:	ABRA-097302
Licensee:	Omar LLC
Trade Name:	Castello Restaurant and Lounge
License Class:	Retailer's Class "C" Tavern
Address:	931 Hamilton Street, N.W.
Contact:	Dee Hunter: 202-321-4529

WARD 4 ANC 4D SMD 4D04

Notice is hereby given that this applicant has applied for a new license under the D.C. Alcoholic Beverage Control Act and that the objectors are entitled to be heard before the granting of such license on the Roll Call Hearing Date at 10:00 am, 2000 14th Street, N.W., 400 South, Washington, DC 20009. Petitions and/or requests to appear before the Board must be filed on or before the Petition Date. The Protest Hearing Date is scheduled on July 15, 2015** at 4:30 pm.

NATURE OF OPERATION
Restaurant serving International and American cuisine. Entertainment to include a DJ and a live jazz band. Sidewalk Café with seating for 46 patrons and a total occupancy load of 159.

HOURS OF OPERATION AND ALCOHOLIC BEVERAGE SALES/SERVICE/CONSUMPTION
Sunday through Thursday 10am – 2am, Friday and Saturday 10am – 3am

HOURS OF LIVE ENTERTAINMENT
Sunday through Thursday 6pm – 2am, Friday and Saturday: 6pm – 3am

HOURS OF OPERATION AND ALCOHOLIC BEVERAGE SALES/SERVICE/CONSUMPTION FOR SIDEWALK CAFÉ
Sunday through Saturday: 10am – 2am

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-089591 **License Class/Type: A Retail - Liquor Store**

Applicant: 7 River, LLC **Trade Name: 7 River Mart**

ANC: 6A03

Has applied for the renewal of an alcoholic beverage license at the premises:

250 11TH ST NE

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	7 am - 10 pm	9 am -10 pm
Monday:	7 am - 10 pm	9 am - 10 pm
Tuesday:	7 am - 10 pm	9 am - 10 pm
Wednesday:	7 am - 10 pm	9 am - 10 pm
Thursday:	7 am - 10 pm	9 am - 10 pm
Friday:	7 am - 10 pm	9 am - 10 pm
Saturday:	7 am - 10 pm	9 am - 10 pm

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-000104 **License Class/Type: A Retail - Liquor Store**
Applicant: Mac Arthur Liquors, Inc. **Trade Name: Bassin's Mac Arthur Liquors**
ANC: 3D05
Has applied for the renewal of an alcoholic beverage license at the premises:

4877 MACARTHUR BLVD NW

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	-	-
Monday:	9:30 am - 8:30 pm	9:30 am - 8:30 pm
Tuesday:	9:30 am - 8:30 pm	9:30 am - 8:30 pm
Wednesday:	9:30 am - 8:30 pm	9:30 am - 8:30 pm
Thursday:	9:30 am - 8:30 pm	9:30 am - 8:30 pm
Friday:	9:30 am - 8:30 pm	9:30 am - 8:30 pm
Saturday:	9:30 am - 8:30 pm	9:30 am - 8:30 pm

ENDORSEMENTS: Tasting

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-072334 **License Class/Type: A Retail - Liquor Store**
Applicant: MMGZ Incorporated **Trade Name: Benmoll Liquors**
ANC: 2B08
Has applied for the renewal of an alcoholic beverage license at the premises:

1700 U ST NW

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	10 am - 12 am	10 am -12 am
Monday:	10 am - 12 am	10 am - 12 am
Tuesday:	10 am - 12 am	10 am - 12 am
Wednesday:	10 am - 12 am	10 am - 12 am
Thursday:	10 am - 12 am	10 am - 12 am
Friday:	10 am - 12 am	10 am - 12 am
Saturday:	10 am - 12 am	10 am - 12 am

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-072074 **License Class/Type: A Retail - Liquor Store**
Applicant: Yene, Incorporated **Trade Name: Brightwood Liquors**
ANC: 4A06
Has applied for the renewal of an alcoholic beverage license at the premises:

5916 GEORGIA AVE NW

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	7 am - 12 am	7 am -12 am
Monday:	7 am - 12 am	7 am - 12 am
Tuesday:	7 am - 12 am	7 am - 12 am
Wednesday:	7 am - 12 am	7 am - 12 am
Thursday:	7 am - 12 am	7 am - 12 am
Friday:	7 am - 12 am	7 am - 12 am
Saturday:	7 am - 12 am	7 am - 12 am

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-000343 **License Class/Type: A Retail - Liquor Store**
Applicant: W & R, Inc. **Trade Name: Cairo Liquor Store**
ANC: 2B03
Has applied for the renewal of an alcoholic beverage license at the premises:

1618 17TH ST NW

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	9 am - 9 pm	9 am -9 pm
Monday:	8:30 am - 9 pm	8:30 am - 9 pm
Tuesday:	8:30 am - 9 pm	8:30 am - 9 pm
Wednesday:	8:30 am - 9 pm	8:30 am - 9 pm
Thursday:	8:30 am - 9 pm	8:30 am - 9 pm
Friday:	8:30 am - 10 pm	8:30 am - 10 pm
Saturday:	8:30 am - 10 pm	8:30 am - 10 pm

ENDORSEMENTS: Tasting

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-073058 **License Class/Type: A Retail - Liquor Store**
Applicant: In Ja Kim **Trade Name: Chinatown Liquor**
ANC: 2C01
Has applied for the renewal of an alcoholic beverage license at the premises:

602 H ST NW

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	5:30am - 12am	9am -12am
Monday:	5:30 am - 12 am	9 am - 12 am
Tuesday:	5:30 am - 12 am	9 am - 12 am
Wednesday:	5:30 am - 12 am	9 am - 12 am
Thursday:	5:30 am - 12 am	9 am - 12 am
Friday:	5:30 am - 12 am	9 am - 12 am
Saturday:	5:30 am - 12 am	9 am - 12 am

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-080830 **License Class/Type: A Retail - Liquor Store**
Applicant: Majestic Beverage Sales, LLC **Trade Name: Circle Wine & Spirits**
ANC: 3G05
Has applied for the renewal of an alcoholic beverage license at the premises:

5501 CONNECTICUT AVE NW

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	9 am - 10 pm	9 am -10 pm
Monday:	9 am - 10 pm	9 am - 10 pm
Tuesday:	9 am - 10 pm	9 am - 10 pm
Wednesday:	9 am - 10 pm	9 am - 10 pm
Thursday:	9 am - 10 pm	9 am - 10 pm
Friday:	9 am - 10 pm	9 am - 10 pm
Saturday:	9 am - 10 pm	9 am - 10 pm

ENDORSEMENTS: Tasting

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-097605 **License Class/Type: A Retail - Liquor Store**
Applicant: RED SEA INC. **Trade Name: Dennies Liquors**
ANC: 7E01
Has applied for the renewal of an alcoholic beverage license at the premises:

5000 BENNING RD SE

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	7 am - 12 am	7 am -12 am
Monday:	7 am - 12 am	7 am - 12 am
Tuesday:	7 am - 12 am	7 am - 12 am
Wednesday:	7 am - 12 am	7 am - 12 am
Thursday:	7 am - 12 am	7 am - 12 am
Friday:	7 am - 12 am	7 am - 12 am
Saturday:	7 am - 12 am	7 am - 12 am

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-091199 **License Class/Type: A Retail - Liquor Store**
Applicant: D C Vines, LLC **Trade Name: D'Vines**
ANC: 1A06
Has applied for the renewal of an alcoholic beverage license at the premises:

3103 14TH ST NW

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	7 am - 12 am	7 am -12 am
Monday:	7 am - 12 am	7 am - 12 am
Tuesday:	7 am - 12 am	7 am - 12 am
Wednesday:	7 am - 12 am	7 am - 12 am
Thursday:	7 am - 12 am	7 am - 12 am
Friday:	7 am - 12 am	7 am - 12 am
Saturday:	7 am - 12 am	7 am - 12 am

ENDORSEMENTS: Tasting

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-095032 **License Class/Type: A Retail - Liquor Store**
Applicant: ALAZAR INC **ANC: 5E02**
Trade Name: Edgewood International Wine and Spirits
Has applied for the renewal of an alcoholic beverage license at the premises:

2303 4TH ST NE

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	9am - 12am	9am -12am
Monday:	9 am - 12 am	9 am - 12am
Tuesday:	9 am - 12am	9 am - 12am
Wednesday:	9 am - 12am	9 am - 12am
Thursday:	9 am - 12am	9 am - 12am
Friday:	9 am - 12am	9 am - 12am
Saturday:	9 am - 12am	9 am - 12am

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-078013 **License Class/Type: A Retail - Liquor Store**
Applicant: JH & YJ, Inc. **Trade Name: Fairfax Liquors**
ANC: 7B06
Has applied for the renewal of an alcoholic beverage license at the premises:

3851 PENNSYLVANIA AVE SE

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	7 am - 12 am	7 am -12 am
Monday:	7 am - 12 am	7 am - 12 am
Tuesday:	7 am - 12 am	7 am - 12 am
Wednesday:	7 am - 12 am	7 am - 12 am
Thursday:	7 am - 12 am	7 am - 12 am
Friday:	7 am - 12 am	7 am - 12 am
Saturday:	7 am - 12 am	7 am - 12 am

ENDORSEMENTS: Tasting

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-075977 **License Class/Type: A Retail - Liquor Store**
Applicant: First Vine, LLC **Trade Name: First Vine**
ANC: 1C07
Has applied for the renewal of an alcoholic beverage license at the premises:

1701 FLORIDA AVE NW

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	-	-
Monday:	Online only -	9 am - 9 pm
Tuesday:	Online only -	9 am - 9 pm
Wednesday:	Online only -	9 am - 9 pm
Thursday:	Online only -	9 am - 9 pm
Friday:	Online only -	9 am - 9 pm
Saturday:	Online only -	9 am - 9 pm

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-085209 **License Class/Type: A Retail - Liquor Store**
Applicant: Jade Liquors, Inc. **Trade Name: Georgetown Wine and Spirits**
ANC: 2E07
Has applied for the renewal of an alcoholic beverage license at the premises:

1500 27TH ST NW

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	10 am - 10 pm	10am -10pm
Monday:	10am - 10 pm	10am - 10pm
Tuesday:	10am - 10pm	10am - 10pm
Wednesday:	10am - 10pm	10am - 10pm
Thursday:	10am - 10pm	10am - 10pm
Friday:	10am - 10pm	10am - 10pm
Saturday:	10am - 10pm	10am - 10pm

ENDORSEMENTS: Tasting

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-071950 **License Class/Type: A Retail - Liquor Store**
Applicant: Soo & Chan, Inc. **Trade Name: Georgia Avenue Food Barn**
ANC: 4B03
Has applied for the renewal of an alcoholic beverage license at the premises:

6205 GEORGIA AVE NW

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	7 am - 12 am	7 am -12 am
Monday:	7 am - 12 am	7 am - 12 am
Tuesday:	7 am - 12 am	7 am - 12 am
Wednesday:	7 am - 12 am	7 am - 12 am
Thursday:	7 am - 12 am	7 am - 12 am
Friday:	7 am - 12 am	7 am - 12 am
Saturday:	7 am - 12 am	7 am - 12 am

ENDORSEMENTS: Tasting

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-074791 **License Class/Type: A Retail - Liquor Store**
Applicant: Giant Enterprises, Inc. **Trade Name: Giant Liquors**
ANC: 1A08
Has applied for the renewal of an alcoholic beverage license at the premises:

3504 GEORGIA AVE NW

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	7 am - 12 am	7 am -12 am
Monday:	7 am - 12 am	7 am - 12 am
Tuesday:	7 am - 12 am	7 am - 12 am
Wednesday:	7 am - 12 am	7 am - 12 am
Thursday:	7 am - 12 am	7 am - 12 am
Friday:	7 am - 12 am	7 am - 12 am
Saturday:	7am - 12 am	7 am - 12 am

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-091095 **License Class/Type: A Retail - Liquor Store**
Applicant: Holiday Family Liquor Inc **Trade Name: Holiday Liquors**
ANC: 8C07
Has applied for the renewal of an alcoholic beverage license at the premises:

3505 WHEELER RD SE

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	9 am - 10 pm	9 am -10 pm
Monday:	9 am - 11 pm	9 am - 11 pm
Tuesday:	9 am - 11pm	9 am - 11 pm
Wednesday:	9 am - 11pm	9 am - 11 pm
Thursday:	9 am - 11 pm	9 am - 11 pm
Friday:	9 am - 11 pm	9 am - 11pm
Saturday:	9 am - 11 pm	9 am - 11 pm

ENDORSEMENTS: Tasting

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-000301 **License Class/Type: A Retail - Liquor Store**
Applicant: Lee-Irving Liquor, Inc. **Trade Name: Irving Wine & Spirits**
ANC: 1D04
Has applied for the renewal of an alcoholic beverage license at the premises:

3100 MT PLEASANT ST NW

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	9 am - 10 pm	9 am -10 pm
Monday:	9 am - 10 pm	9 am - 10 pm
Tuesday:	9 am - 10 pm	9 am - 10 pm
Wednesday:	9 am - 10 pm	9 am - 10 pm
Thursday:	9 am - 10 pm	9 am - 10 pm
Friday:	9 am - 11 pm	9 am - 11 pm
Saturday:	9 am - 11 pm	9 am - 11 pm

ENDORSEMENTS: Tasting

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-074373 **License Class/Type: A Retail - Liquor Store**
Applicant: Joung's Jefferson, Inc. **Trade Name: Jefferson Liquors**
ANC: 4D01
Has applied for the renewal of an alcoholic beverage license at the premises:

5307 GEORGIA AVE NW

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	12pm - 8pm	12pm -8pm
Monday:	9 am - 10 pm	9 am - 10pm
Tuesday:	9 am - 10 pm	9 am - 10 pm
Wednesday:	9 am - 10 pm	9 am - 10 pm
Thursday:	9 am - 10 pm	9 am - 10 pm
Friday:	9 am - 11 pm	9 am - 11 pm
Saturday:	9 am - 101m	9 am - 11 pm

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-000420 **License Class/Type: A Retail - Liquor Store**
Applicant: Jumbo Liquors, Inc. **Trade Name: Jumbo Liquors**
ANC: 6A01
Has applied for the renewal of an alcoholic beverage license at the premises:

1122 H ST NE

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	7 am - 12 am	7 am -12 am
Monday:	7 am - 12 am	7 am - 12 am
Tuesday:	7 am - 12 am	7 am - 12 am
Wednesday:	7 am - 12 am	7 am - 12 am
Thursday:	7 am - 12 am	7 am - 12 am
Friday:	7 am - 12 am	7 am - 12 am
Saturday:	7 am - 12 am	7 am - 12 am

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-095751 **License Class/Type: A Retail - Liquor Store**
Applicant: Daniman L.L.C. **Trade Name: Lee's Liquor**
ANC: 7B03
Has applied for the renewal of an alcoholic beverage license at the premises:

2339 PENNSYLVANIA AVE SE

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	8 am - 9:30 pm	8 am -9:30 pm
Monday:	7 am - 10 pm	7 am - 10 pm
Tuesday:	7 am - 10 pm	7 am - 10 pm
Wednesday:	7 am - 10 pm	7 am - 10 pm
Thursday:	7 am - 12 am	7 am - 12 am
Friday:	7 am - 12 am	7 am - 12 am
Saturday:	7 am - 12 am	7 am - 12 am

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-072037 **License Class/Type: A Retail - Liquor Store**
Applicant: Lucky Pioneer, Inc. **Trade Name: Mac Market & Deli**
ANC: 3D05
Has applied for the renewal of an alcoholic beverage license at the premises:

5185 MACARTHUR BLVD NW

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	6 am - 10 pm	7 am -10 pm
Monday:	6 am - 10 pm	7 am - 10 pm
Tuesday:	6 am - 10 pm	7 am - 10 pm
Wednesday:	6 am - 10 pm	7 am - 10 pm
Thursday:	6 am - 10 pm	7 am - 10 pm
Friday:	6 am - 12 am	7 am - 12 am
Saturday:	6 am - 12 am	7 am - 12 am

ENDORSEMENTS: Tasting

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-094779 **License Class/Type: A Retail - Liquor Store**
Applicant: DREAM TWO LIQUOR, INC. **Trade Name: Malcolm Liquors**
ANC: 7F01
Has applied for the renewal of an alcoholic beverage license at the premises:

3845 MINNESOTA AVE NE

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	9 am - 10 pm	9 am -10 pm
Monday:	9 am - 10 pm	9 am - 10 pm
Tuesday:	9 am - 10 pm	9 am - 10 pm
Wednesday:	9 am - 10 pm	9 am - 10 pm
Thursday:	9 am - 10 pm	9 am - 10 pm
Friday:	9 am - 10 pm	9 am - 10 pm
Saturday:	9 am - 10 pm	9 am - 10 pm

ENDORSEMENTS: Tasting

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-097197 **License Class/Type: A Retail - Liquor Store**
Applicant: I M Shin Enterprises, Inc. **Trade Name: Market of Columbia Plaza**
ANC: 2A05
Has applied for the renewal of an alcoholic beverage license at the premises:

516 23RD ST NW

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	-	-
Monday:	7 am - 10 pm	10 am - 10 pm
Tuesday:	7 am - 10 pm	10 am - 10 pm
Wednesday:	7 am - 10 pm	10 am - 10 pm
Thursday:	7 am - 10 pm	10 am - 10 pm
Friday:	7 am - 10 pm	10 am - 10 pm
Saturday:	7 am - 10 pm	10 am - 10 pm

ENDORSEMENTS: Tasting

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-060602 **License Class/Type: A Retail - Liquor Store**
Applicant: Shree Corporation **Trade Name: Metro Wine & Spirits**
ANC: 1C06
Has applied for the renewal of an alcoholic beverage license at the premises:

1726 COLUMBIA RD NW

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	7am - 12am	7am -12am
Monday:	7am - 12am	7am - 12am
Tuesday:	7am - 12 am	7am - 12 am
Wednesday:	7am - 12 am	7am - 12 am
Thursday:	7am - 12 am	7am - 12 am
Friday:	7am - 12 am	7am - 12 am
Saturday:	7am - 12 am	7am - 12 am

ENDORSEMENTS: Tasting

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-000222 **License Class/Type: A Retail - Liquor Store**
Applicant: Bob-kat, Inc. **Trade Name: Minnesota Liquors**
ANC: 8A01
Has applied for the renewal of an alcoholic beverage license at the premises:

2237 MINNESOTA AVE SE

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	9am - 9pm	9am -9pm
Monday:	9 am - 9 pm	9 am - 9 pm
Tuesday:	9 am - 9 pm	9 am - 9 pm
Wednesday:	9 am - 9 pm	9 am - 9 pm
Thursday:	9 am - 9 pm	9 am - 9 pm
Friday:	9 am - 9 pm	9 am - 9 pm
Saturday:	9 am - 9 pm	9 am - 9 pm

ENDORSEMENTS: Tasting

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-084387 **License Class/Type: A Retail - Liquor Store**
Applicant: Pour Liquor & More LLC **Trade Name: Modern Liquors**
ANC: 2F06
Has applied for the renewal of an alcoholic beverage license at the premises:

901 M ST NW

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	9 am - 10 pm	9 am -10 pm
Monday:	9 am - 10 pm	9 am - 10 pm
Tuesday:	9 am - 10 pm	9 am - 10 pm
Wednesday:	9 am - 10 pm	9 am - 10 pm
Thursday:	9 am - 10 pm	9 am - 10 pm
Friday:	9 am - 10 pm	9 am - 10 pm
Saturday:	9 am - 10 pm	9 am - 10 pm

ENDORSEMENTS: Tasting

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-060270 **License Class/Type: A Retail - Liquor Store**
Applicant: Northwest Liquors, Inc. **Trade Name: Northwest Liquors**
ANC: 4D02
Has applied for the renewal of an alcoholic beverage license at the premises:

300 KENNEDY ST NW

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	10 am - 10 pm	10 am -10 pm
Monday:	10 am - 10 pm	10 am - 10 pm
Tuesday:	10 am - 10 pm	10 am - 10 pm
Wednesday:	10 am - 10 pm	10 am - 10 pm
Thursday:	10 am - 10 pm	10 am - 10 pm
Friday:	10 am - 12 am	10 am - 12 am
Saturday:	10 am - 12 am	10 am - 12 am

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-096105 **License Class/Type: A Retail - Liquor Store**
Applicant: Ratnakrupa, LLC **Trade Name: Peacock Liquors**
ANC: 5D01
Has applied for the renewal of an alcoholic beverage license at the premises:

1625 NEW YORK AVE NE

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	7 am - 12 am	7 am -12 am
Monday:	7 am - 12 am	7 am - 12 am
Tuesday:	7 am - 12 am	7 am - 12 am
Wednesday:	7 am - 12 am	7 am - 12 am
Thursday:	7 am - 12 am	7 am - 12 am
Friday:	7 am - 12 am	7 am - 12 am
Saturday:	7 am - 12 am	7 am - 12 am

ENDORSEMENTS: Tasting

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-000037 **License Class/Type: A Retail - Liquor Store**
Applicant: The Fischer Corporation **Trade Name: Riverside Liquors**
ANC: 2A07
Has applied for the renewal of an alcoholic beverage license at the premises:

2123 E ST NW

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	10 am - 10 pm	10am -10 pm
Monday:	10 am - 10 pm	10 am - 10 pm
Tuesday:	10 am - 10 pm	10 am - 10 pm
Wednesday:	10 am - 10 pm	10 am - 10 pm
Thursday:	10 am - 10 pm	10 am - 10 pm
Friday:	10 am - 10 pm	10 am - 10 pm
Saturday:	10 am - 10 pm	10 am - 10 pm

ENDORSEMENTS: Tasting

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-060496 **License Class/Type: A Retail - Liquor Store**
Applicant: LAL, Inc. **Trade Name: Roha Liquors**
ANC: 4D01
Has applied for the renewal of an alcoholic beverage license at the premises:

620 KENNEDY ST NW

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	9 am - 12 am	9 am -12 am
Monday:	9 am - 12 am	9 am - 12 am
Tuesday:	9 am - 12 am	9 am - 12 am
Wednesday:	9 am - 12 am	9 am - 12 am
Thursday:	9 am - 112 am	9 am - 12 am
Friday:	9 am - 12 am	9 am - 12 am
Saturday:	9 am - 12 am	9 am - 12 am

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-086022 **License Class/Type: A Retail - Liquor Store**
Applicant: Krishna Corporation **Trade Name: Sherry's Wine and Spirits**
ANC: 3C01
Has applied for the renewal of an alcoholic beverage license at the premises:

2627 CONNECTICUT AVE NW

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	7am - 12am	7am -12am
Monday:	7am - 12am	7am - 12am
Tuesday:	7am - 12am	7am - 12am
Wednesday:	7am - 12am	7am - 12am
Thursday:	7am - 12am	7am - 12am
Friday:	7am - 12am	7am - 12am
Saturday:	7am - 12am	7am - 12am

ENDORSEMENTS: Tasting

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-085215 **License Class/Type: A Retail - Liquor Store**
Applicant: H & M Liquors, Inc. **Trade Name: Shipley Liquors**
ANC: 8B06
Has applied for the renewal of an alcoholic beverage license at the premises:

2281 SAVANNAH ST SE

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	8 am - 8 pm	8 am -8 pm
Monday:	7 am - 12 am	7 am - 12 am
Tuesday:	7 am - 12 am	7 am - 12 am
Wednesday:	7 am - 12 am	7 am - 12 am
Thursday:	7 am - 12 am	7 am - 12 am
Friday:	7 am - 12 am	7 am - 12 am
Saturday:	7 am - 12 am	7 am - 12 am

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-087100 **License Class/Type: A Retail - Liquor Store**
Applicant: CSB, LLC **Trade Name: Southern Express Liquors**
ANC: 7E02
Has applied for the renewal of an alcoholic beverage license at the premises:

4416 SOUTHERN AVE SE

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	10 am - 12 am	10 am -12 am
Monday:	10 am - 12 am	10 am - 12 am
Tuesday:	10 am - 12 am	10 am - 12 am
Wednesday:	10 am - 12 am	10 am - 12 am
Thursday:	10 am - 12 am	10 am - 12 am
Friday:	10 am - 12 am	10 am - 12 am
Saturday:	10 am - 12 am	10 am - 12 am

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-092450 **License Class/Type: A Retail - Liquor Store**
Applicant: KGB LIQUOR, INC. **Trade Name: SPAR LIQUOR**
ANC: 8C05
Has applied for the renewal of an alcoholic beverage license at the premises:

3916 SOUTH CAPITOL ST SE

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	7am - 12am	7am -12am
Monday:	7am - 12am	7am - 12am
Tuesday:	7am - 12am	7am - 12am
Wednesday:	7am - 12am	7am - 12am
Thursday:	7am - 12am	7am - 12am
Friday:	7am - 12am	7am - 12am
Saturday:	7am - 12am	7am - 12am

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-096294 **License Class/Type: A Retail - Liquor Store**
Applicant: Staples Beer & Wine Grocery LLC
Trade Name: Staples Beer & Wine Grocery LLC
ANC: 5D06
Has applied for the renewal of an alcoholic beverage license at the premises:

1364 FLORIDA AVE NE

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	9 am - 10 pm	9 am -10 pm
Monday:	9 am - 10 pm	9 am - 10 pm
Tuesday:	9 am - 10 pm	9 am - 10 pm
Wednesday:	9 am - 10 pm	9 am - 10 pm
Thursday:	9 am - 10 pm	9 am - 10 pm
Friday:	9 am - 10 pm	9 am - 10 pm
Saturday:	9 am - 10 pm	9 am - 10 pm

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-009272 **License Class/Type: A Retail - Liquor Store**
Applicant: Sun Ok Kim
Trade Name: Strand Liquors
ANC: 7C06
Has applied for the renewal of an alcoholic beverage license at the premises:

605 DIVISION AVE NE

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	9 am - 9 pm	9 am -9 pm
Monday:	9 am - 9 pm	9 am - 9 pm
Tuesday:	9 am - 9 pm	9 am - 9 pm
Wednesday:	9 am - 9 pm	9 am - 9 pm
Thursday:	9 am - 9 pm	9 am - 9 pm
Friday:	9 am - 10 pm	9 am - 10 pm
Saturday:	9 am - 10 pm	9 am - 10 pm

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-082349 **License Class/Type: A Retail - Liquor Store**
Applicant: TF Two, Inc.
Trade Name: Sunny's Liquor
ANC: 8A06
Has applied for the renewal of an alcoholic beverage license at the premises:

2400 MARTIN LUTHER KING JR AVE SE

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	CLOSED - CLOSED	CLOSED - CLOSED
Monday:	9 am - 10 pm	9 am - 10 pm
Tuesday:	9 am - 10 pm	9 am - 10 pm
Wednesday:	9 am - 10 pm	9 am - 10 pm
Thursday:	9 am - 10 pm	9 am - 10 pm
Friday:	9 am - 10 pm	9 am - 10 pm
Saturday:	9 am - 10 pm	9 am - 10 pm

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-079241 **License Class/Type: A Retail - Liquor Store**
Applicant: Y.O.K., Inc. **Trade Name: Super Liquors**
ANC: 5E04
Has applied for the renewal of an alcoholic beverage license at the premises:

1633 NORTH CAPITOL ST NE

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	Closed - Closed	Closed -Closed
Monday:	9 am - 10 pm	9 am - 10 pm
Tuesday:	9 am - 10 pm	9 am - 10 pm
Wednesday:	9 am - 10 pm	9 am - 10 pm
Thursday:	9 am - 10 pm	9 am - 10 pm
Friday:	9 am - 10 pm	9 am - 10 pm
Saturday:	9 am - 10 pm	9 am - 10 pm

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-000434 **License Class/Type: A Retail - Liquor Store**
Applicant: Sheldon Plotnick **Trade Name: Target Liquor**
ANC: 4D01
Has applied for the renewal of an alcoholic beverage license at the premises:

500 KENNEDY ST NW

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	-	-
Monday:	10 am - 9 pm	10 am - 9 pm
Tuesday:	10 am - 9 pm	10 am - 9 pm
Wednesday:	10 am - 9 pm	10 am - 9 pm
Thursday:	10 am - 9 pm	10 am - 9 pm
Friday:	10 am - 10 pm	10 am - 10 pm
Saturday:	10 am - 10 pm	10 am - 10 pm

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-078014 **License Class/Type: A Retail - Liquor Store**
Applicant: R&P Enterprises, LLC **Trade Name: Tenley Wine & Liquors**
ANC: 3E01
Has applied for the renewal of an alcoholic beverage license at the premises:

4525 WISCONSIN AVE NW

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	12 pm - 6 pm	12 pm -6 pm
Monday:	9 am - 10 pm	9 am - 10 pm
Tuesday:	9 am - 10 pm	9 am - 10 pm
Wednesday:	9 am - 10 pm	9 am - 10 pm
Thursday:	9 am - 10 pm	9 am - 10 pm
Friday:	9 am - 10 pm	9 am - 10 pm
Saturday:	9 am - 10 pm	9 am - 10 pm

ENDORSEMENTS: Tasting

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-013855 **License Class/Type: A Retail - Liquor Store**
Applicant: Union Wine & Liquor, Inc. **Trade Name: Union Wine & Liquor**
ANC: 6C04
Has applied for the renewal of an alcoholic beverage license at the premises:

50 MASSACHUSETTS AVE NE

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	12 pm - 8 pm	12 pm -8 pm
Monday:	9 am - 9 pm	9 am - 9 pm
Tuesday:	9 am - 9 pm	9 am - 9 pm
Wednesday:	9 am - 9 pm	9 am - 9 pm
Thursday:	9 am - 9 pm	9 am - 9 pm
Friday:	9 am - 10 pm	9 am - 10 pm
Saturday:	10 am - 9 pm	10 am - 9 pm

ENDORSEMENTS: Tasting

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-089532 **License Class/Type: A Retail - Liquor Store**
Applicant: ANS Enterprises, Inc. **Trade Name: University Wine & Spirit**
ANC: 5A06
Has applied for the renewal of an alcoholic beverage license at the premises:

333 HAWAII AVE NE

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	9 am - 12 am	9 am -12 am
Monday:	9 am - 12 am	9 am - 12 am
Tuesday:	9 am - 12 am	9 am - 12 am
Wednesday:	9 am - 12 am	9 am - 12 am
Thursday:	9 am - 12 am	9 am - 12 am
Friday:	9 am - 12 am	9 am - 12 am
Saturday:	9 am - 12 am	9 am - 12 am

ENDORSEMENTS: Tasting

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-093199 **License Class/Type: A Retail - Liquor Store**
Applicant: Gerald Yun **Trade Name: 9 & P St. Liquor**
ANC: 2F06
Has applied for the renewal of an alcoholic beverage license at the premises:

1428 9TH ST NW

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	10 am - 9 pm	10 am -9 pm
Monday:	10 am - 9 pm	10 am - 9 pm
Tuesday:	10 am - 9 pm	10 am - 9 pm
Wednesday:	10 am - 9 pm	10 am - 9 pm
Thursday:	10 am - 9 pm	10 am - 9 pm
Friday:	10 am - 9 pm	10 am - 9 pm
Saturday:	10 am - 9 pm	10 am - 9 pm

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-023984 **License Class/Type: A Retail - Liquor Store**
Applicant: MG Liquors, Inc. **Trade Name: Barrel House Liquors**
ANC: 2F03
Has applied for the renewal of an alcoholic beverage license at the premises:

1341 14TH ST NW

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	9 am - 12am	9 am -12am
Monday:	9 am - 12am	9 am - 12am
Tuesday:	9 am - 12am	9 am - 12am
Wednesday:	9 am - 12am	9 am - 12am
Thursday:	9 am - 12am	9 am - 12am
Friday:	9 am - 12am	9 am - 12am
Saturday:	9 am - 12am	9 am - 12am

ENDORSEMENTS: Tasting

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-086168 **License Class/Type: A Retail - Liquor Store**
Applicant: Giant MJ Corporation **Trade Name: Best One Liquor**
ANC: 5E06
Has applied for the renewal of an alcoholic beverage license at the premises:

322 FLORIDA AVE NW

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	9 am - 10 pm	9 am -10 pm
Monday:	9 am - 10 pm	9 am - 10 pm
Tuesday:	9 am - 10 pm	9 am - 10 pm
Wednesday:	9 am - 10 pm	9 am - 10 pm
Thursday:	9 am - 10 pm	9 am - 10 pm
Friday:	9 am - 10 pm	9 am - 10 pm
Saturday:	9 am - 10 pm	9 am - :10 pm

ENDORSEMENTS: Tasting

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-060622 **License Class/Type: A Retail - Liquor Store**
Applicant: Brentwood Liquors, Inc. **Trade Name: Brentwood Liquors**
ANC: 5C05
Has applied for the renewal of an alcoholic beverage license at the premises:

1319 RHODE ISLAND AVE NE

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	-	-
Monday:	9 am - 10 pm	9 am - 10 pm
Tuesday:	9 am - 10 pm	9 am - 10 pm
Wednesday:	9 am - 10 pm	9 am - 10 pm
Thursday:	9 am - 10 pm	9 am - 10 pm
Friday:	9 am - 10 pm	9 am - 10 pm
Saturday:	9 am - 10 pm	9 am - 10 pm

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-003730 **License Class/Type: A Retail - Liquor Store**
Applicant: Woodley Wine & Liquor, Inc. **Trade Name: Calvert Woodley Wine & Liquor**
ANC: 3F02
Has applied for the renewal of an alcoholic beverage license at the premises:

4339 CONNECTICUT AVE NW

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	8:30 am - 7 pm	8:30 am -7 pm
Monday:	8:30 am - 9 pm	8:30 am - 9 pm
Tuesday:	8:30 am - 9 pm	8:30 am - 9 pm
Wednesday:	8:30 am - 9 pm	8:30 am - 9 pm
Thursday:	8:30 am - 9 pm	8:30 am - 9 pm
Friday:	8:30 am - 9 pm	8:30 am - 9 pm
Saturday:	8:30 am - 9 pm	8:30 am - 9 pm

ENDORSEMENTS: Tasting

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-016969 **License Class/Type: A Retail - Liquor Store**
Applicant: Tri-Dev, Inc. **Trade Name: Cleveland Park Liquors**
ANC: 3C04
Has applied for the renewal of an alcoholic beverage license at the premises:

3423 CONNECTICUT AVE NW

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	7 am - 12am	7 am -12am
Monday:	7 am - 12am	7 am - 12am
Tuesday:	7 am - 12am	7 am - 12am
Wednesday:	7 am - 12am	7 am - 12am
Thursday:	7 am - 12am	7 am - 12am
Friday:	7 am - 12am	7 am - 12am
Saturday:	7 am - 12am	7 am - 12am

ENDORSEMENTS: Tasting

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-089508 **License Class/Type: A Retail - Liquor Store**
Applicant: Myongwoo Inc. **Trade Name: Grand Liquors**
ANC: 6A08
Has applied for the renewal of an alcoholic beverage license at the premises:

409 15TH ST NE

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	9am - 12am	9am -12am
Monday:	9 am - 12 am	9 am - 12 am
Tuesday:	9 am - 12 am	9 am - 12 am
Wednesday:	9 am - 12 am	9 am - 12 am
Thursday:	9 am - 12 am	9 am - 12 am
Friday:	9 am - 12 am	9 am - 12 am
Saturday:	9 am - 12 am	9 am - 12 am

ENDORSEMENTS: Tasting

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-092419 **License Class/Type: A Retail - Liquor Store**
Applicant: YAKP Incorporation **Trade Name: Kiflu's Wine & Spirits**
ANC: 6E04
Has applied for the renewal of an alcoholic beverage license at the premises:

1201 5TH ST NW

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	10 am - 10 pm	10 am -10 pm
Monday:	10 am - 10 pm	10 am - 10 pm
Tuesday:	10 am - 10 pm	10 am - 10 pm
Wednesday:	10 am - 10 pm	10 am - 10 pm
Thursday:	10 am - 10 pm	10 am - 10 pm
Friday:	10 am - 10 pm	10 am - 10 pm
Saturday:	10 am - 10 pm	10 am - 10 pm

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-091195 **License Class/Type: A Retail - Liquor Store**
Applicant: MGDWS, LLC **Trade Name: Magruder's of DC**
ANC: 3G06
Has applied for the renewal of an alcoholic beverage license at the premises:

5618 - 5626 CONNECTICUT AVE NW

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	10am - 6pm	10am -6pm
Monday:	9 am - 8 pm	9 am - 8 pm
Tuesday:	9 am - 8 pm	9 am - 8 pm
Wednesday:	9 am - 8 pm	9 am - 8 pm
Thursday:	9 am - 8 pm	9 am - 8 pm
Friday:	9 am - 9 pm	9 am - 9 pm
Saturday:	9 am - 9 pm	9 am - 9 pm

ENDORSEMENTS: Tasting

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-060532 **License Class/Type: A Retail - Liquor Store**
Applicant: JY Rigg's Liquors, Inc. **Trade Name: Rigg's Liquors**
ANC: 4B09
Has applied for the renewal of an alcoholic beverage license at the premises:

5581 S DAKOTA AVE NE

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	10 am - 10 pm	10 am -10 pm
Monday:	10 am - 10 pm	10 am - 10 pm
Tuesday:	10 am - 10 pm	10 am - 10 pm
Wednesday:	10 am - 10 pm	10 am - 10 pm
Thursday:	10 am - 10 pm	10 am - 10 pm
Friday:	10 am - 12 am	10 am - 12 am
Saturday:	10 am - 12 am	10 am - 12 am

ENDORSEMENTS: Tasting

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-016866 **License Class/Type: A Retail - Liquor Store**
Applicant: 4652 Livingston, Inc. **Trade Name: South Capitol Liquors**
ANC: 8D02
Has applied for the renewal of an alcoholic beverage license at the premises:

4652 LIVINGSTON RD SE

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	9:30am - 10pm	9:30am -10pm
Monday:	9:30am - 10pm	9:30am - 10pm
Tuesday:	9:30am - 10pm	9:30am - 10pm
Wednesday:	9:30am - 10pm	9:30am - 10pm
Thursday:	9:30am - 10pm	9:30am - 10pm
Friday:	9:30 am - 10pm	9:30am - 10pm
Saturday:	9:30am - 10pm	9:30am - 10pm

ENDORSEMENTS: Tasting

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-081464 **License Class/Type: A Retail - Liquor Store**
Applicant: Weygandt Wines, LLC **Trade Name: Weygandt Wines**
ANC: 3C04
Has applied for the renewal of an alcoholic beverage license at the premises:

3519 CONNECTICUT AVE NW

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	9 am - 10 pm	9 am -10 pm
Monday:	9 am - 10 pm	9 am - 10 pm
Tuesday:	9 am - 10 pm	9 am - 10 pm
Wednesday:	9 am - 10pm	9 am - 10pm
Thursday:	9 am - 10 pm	9 am - 10 pm
Friday:	9 am - 10 pm	9 am - 10 pm
Saturday:	9 am - 10 pm	9 am - 10 pm

ENDORSEMENTS: Tasting

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-080559 **License Class/Type: A Retail - Liquor Store**
Applicant: Brentwood Road Beverages, LLC
Trade Name: Woodridge Vet's Liquors **ANC: 5B03**
Has applied for the renewal of an alcoholic beverage license at the premises:

1358 BRENTWOOD RD NE

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	7am - 12 am	7am -12 am
Monday:	7 am - 12 am	7 am - 12 am
Tuesday:	7 am - 12 am	7 am - 12 am
Wednesday:	7 am - 12 am	7 am - 12 am
Thursday:	7 am - 12 am	7 am - 12 am
Friday:	7 am - 12 am	7 am - 12 am
Saturday:	7 am - 12 am	7 am - 12 am

ENDORSEMENTS: Tasting

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-026574 **License Class/Type: A Retail - Liquor Store**
Applicant: 2325 Bladensburg Rd Corp **Trade Name: Syd's**
ANC: 5C04
Has applied for the renewal of an alcoholic beverage license at the premises:

2325 BLADENSBURG RD NE

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	12 pm - 8 pm	12 pm -8 pm
Monday:	9 am - 10 pm	9 am - 10 pm
Tuesday:	9 am - 10 pm	9 am - 10 pm
Wednesday:	9 am - 10 pm	9 am - 10 pm
Thursday:	9 am - 10 pm	9 am - 10 pm
Friday:	9 am - 10 pm	9 am - 10 pm
Saturday:	9 am - 10 pm	9 am - 10 pm

ENDORSEMENTS: Tasting

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-060116 **License Class/Type: A Retail - Liquor Store**
Applicant: Mohabat, Inc. **Trade Name: Good Ole Reliable Liquors**
ANC: 5C06
Has applied for the renewal of an alcoholic beverage license at the premises:

1513 RHODE ISLAND AVE NE

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	7 am - 12 am	7 am -12 am
Monday:	7 am - 12 am	7 am - 12 am
Tuesday:	7 am - 12 am	7 am - 12 am
Wednesday:	7 am - 12 am	7 am - 12 am
Thursday:	7 am - 12 am	7 am - 12 am
Friday:	7 am - 12 am	7 am - 12 am
Saturday:	7 am - 12 am	7 am - 12 am

ENDORSEMENTS: Tasting

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-060177 **License Class/Type: A Retail - Liquor Store**
Applicant: Sanghera Corporation **Trade Name: King Avenue Liquors**
ANC: 8C02
Has applied for the renewal of an alcoholic beverage license at the premises:

2757 M.L. KING JR., AVE SE

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	10 am - 9 am	10 am -9 am
Monday:	9 am - 9 pm	9 am - 9 pm
Tuesday:	9 am - 9 pm	9 am - 9 pm
Wednesday:	9 am - 9 pm	9 am - 9 pm
Thursday:	9 am - 9 pm	9 am - 9 pm
Friday:	9 am - 10 pm	9 am - 10 pm
Saturday:	10 am - 10 pm	10 am - 10 pm

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-060424 **License Class/Type: A Retail - Liquor Store**
Applicant: Nara Incorporated **Trade Name: Bloomingdale Wine and Spirits**
ANC: 5E07
Has applied for the renewal of an alcoholic beverage license at the premises:

1836 1ST ST NW

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	9 am - 12am	9 am -12am
Monday:	9 am - 12am	9 am - 12am
Tuesday:	9 am - 12am	9 am - 12amm
Wednesday:	9 am - 12am	9 am - 12am
Thursday:	9 am - 12am	9 am - 12am
Friday:	9 am - 12am	9 am - 12am
Saturday:	9 am - 12am	9 am - 12am

ENDORSEMENTS: Tasting

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

4/3/2015

Notice is hereby given that:

License Number: ABRA-074611 **License Class/Type: A Retail - Liquor Store**
Applicant: SD Liquors, Inc **Trade Name: Al's Liquor**
ANC: 8D07
Has applied for the renewal of an alcoholic beverage license at the premises:

4009 SOUTH CAPITOL ST SW

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:

5/18/2015

A HEARING WILL BE HELD ON:

6/1/2015

AT 10:00 a.m., 2000 14th STREET, NW, 4th FLOOR, WASHINGTON, DC 20009

Days	Hours of Operation	Hours of Sales/Service
Sunday:	10 am - 9 pm	10 am -9 pm
Monday:	9 am - 9 pm	9 am - 9 pm
Tuesday:	9 am - 9 pm	9 am - 9 pm
Wednesday:	9 am - 9 pm	9 am - 9 pm
Thursday:	9 am - 9 pm	9 am - 9 pm
Friday:	9 am - 10 pm	9 am - 10 pm
Saturday:	9 am - 10 pm	9 am - 10 pm

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

NOTICE OF PUBLIC HEARING

Posting Date:	April 3, 2015
Petition Date:	May 18, 2015
Hearing Date:	June 1, 2015
Protest Date:	August 5, 2015

License No.:	ABRA-097889
Licensee:	Nando's of H Street, LLC
Trade Name:	Nando's Peri-Peri H Street
License Class:	Retailer's Class "C" Restaurant
Address:	411 H Street, N.E.
Contact:	Sheila Linn: 202-955-3000

WARD 6 ANC 6C SMD 6C04

Notice is hereby given that this applicant has applied for a new license under the D.C. Alcoholic Beverage Control Act and that the objectors are entitled to be heard before the granting of such on the hearing date at 10:00 am, 4th Floor, 2000 14th Street, N.W., Washington, DC 20009. Petition and/or request to appear before the Board must be filed on or before the petition date. The Protest Hearing Date is scheduled for August 5, 2015 at 1:30 pm.

NATURE OF OPERATION

New restaurant with seating for 138 patrons and a total occupancy load of 200.

HOURS OF OPERATION & ALCOHOLIC BEVERAGE SALES/SERVICE/CONSUMPTION

Sunday through Thursday 11am – 11pm, Friday & Saturday 11 am – 12 am

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

NOTICE OF PUBLIC HEARING

Posting Date:	April 3, 2015
Petition Date:	May 18, 2015
Roll Call Hearing Date:	June 1, 2015
Protest Hearing Date:	August 5, 2015
License No.:	ABRA-097794
Licensee:	Washington Heights, LLC
Trade Name:	Washington Heights Bar & Lounge
License Class:	Retailer's Class "C" Restaurant
Address:	3714 14th Street, N.W.
Contact:	Ana De Leon: 202-246-7601

WARD 4 ANC 4C SMD 4C04

Notice is hereby given that this applicant has applied for a new license under the D.C. Alcoholic Beverage Control Act and that the objectors are entitled to be heard before the granting of such license on the Roll Call Hearing Date at 10:00 am, 2000 14th Street, N.W., 400 South, Washington, DC 20009. Petitions and/or requests to appear before the Board must be filed on or before the Petition Date. The Protest Hearing Date is scheduled on August 5, 2015 at 1:30 pm.

NATURE OF OPERATION

Family-oriented restaurant serving American and French food.
Inside seating for 42 patrons and a total occupancy load of 48.

HOURS OF OPERATION

Sunday through Thursday 6am - 2am, Friday and Saturday 6am - 3am

HOURS OF ALCOHOLIC BEVERAGE SALES/SERVICE/CONSUMPTION

Sunday through Thursday 8am - 2am, Friday and Saturday 8am - 3am

DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY

NOTICE OF PUBLIC HEARING

Wednesday, May 13, 2015

6:30 p.m.

Department of Employment Services
4058 Minnesota Avenue, NE, Suite 1300 (Community Room)
Washington, D.C. 20019

The Board of Directors of the District of Columbia Water and Sewer Authority (the Board), in accordance with Section 216 of the Water and Sewer Authority Establishment and Department of Public Works Reorganization Act of 1996, effective April 18, 1996, (D.C. Law 11-111; D.C. Official Code § 34-2202.16) (2001 Ed.) will conduct a public hearing at the above stated date, time, and place, to receive comments on proposed rules, which, if adopted, would amend Section 112 (Fees) and 199 (Definitions) of Chapter 1 (Water Supply); and Sections 4100 (Rates for Water Service), 4101 (Rates for Sewer Service), 4102 (Customer Assistance Program), and 4103 (Fire Protection Service Fee) of Chapter 41 (Retail Water and Sewer Rates) of Title 21 (Water and Sanitation) of the District of Columbia Municipal Regulations (DCMR). The proposed rules were published in the February 20, 2015 edition of the *D.C. Register*, at 62 DCR 2367-2372 and the April 3, 2015 edition of the *D.C. Register*.

Below is the draft agenda for this meeting. A final agenda will be posted to DC Water's website at www.dcwater.com.

Each individual or representative of an organization who wishes to present testimony at the public hearing is requested to furnish his or her name, address, telephone number and name of the organization (if any) by calling (202) 787-2330 or emailing the request to Lmanley@dcwater.com no later than 5:00 p.m., Monday May 11, 2015. Other persons wishing to present testimony may testify after those on the witness list. Persons making presentations are urged to address their statements to relevant issues.

Oral presentations by individuals will be limited to five (5) minutes. Oral presentations made by representatives of an organization will not be longer than ten (10) minutes. Statements should summarize extensive written materials so there will be time for all interested persons to be heard. Oral presentations will be heard and considered, but for accuracy of the record, all statements should be submitted in writing. The hearing will end when all persons wishing to make comments have been heard.

Written testimony may be submitted by mail to Linda R. Manley, Secretary to the Board, District of Columbia Water and Sewer Authority, 5000 Overlook Ave., S.W., Washington, D.C. 20032, or by email to Lmanley@dcwater.com. Such written testimony is to be clearly marked "Written Testimony for Public Hearing, May 13, 2015" and received by 5:00 p.m. Monday, May 11, 2015.

PUBLIC HEARING ON
Proposed Retail Rates, Fees & Charges
for Fiscal Year 2016

Wednesday, May 13, 2015

6:30 p.m.

AGENDA

1. Call to Order.....Matthew Brown, Chairman

2. Opening Statement .....Matthew Brown, Chairman

3. DC Water Management Presentation.....George Hawkins, General Manager
   Proposed FY 2016 Retail Rates, Fees & Charges Mark Kim, Chief Financial Officer

4. Presentation by Independent Consultant..... Amawalk Consulting
   Proposed FY 2016 Retail Rates, Fees & Charges

5. Public Witnesses
   - Pre-registered Speakers
   - Other comments (time permitting)

6. Closing Statement.....Matthew Brown, Chairman

7. Adjournment .....Matthew Brown, Chairman

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF PUBLIC HEARING

TIME AND PLACE: **Thursday, June 18, 2015, @ 6:30 p.m.**
Office of Zoning Hearing Room
441 4th Street, N.W., Suite 220-S
Washington, D.C. 20001

FOR THE PURPOSE OF CONSIDERING THE FOLLOWING:

Case No. 15-06 (Trustees for Harvard University – 2015-2025 Campus Plan @ Square 2155)

THIS CASE IS OF INTEREST TO ANC 2E

Application of Trustees for Harvard University, pursuant to 11 DCMR §§ 210, 3104, and 3035, for special exception review and approval of a new Campus Plan for the Center for Hellenic Studies Campus Plan to permit the continuation of a university use in the D/R-1-A District at 3100 Whitehaven Street, N.W. (Square 2155, Lot 802).

PLEASE NOTE:

- Failure of the Applicant to appear at the public hearing will subject the application or appeal to dismissal at the discretion of the Commission.

- Failure of the Applicant to be adequately prepared to present the application to the Commission, and address the required standards of proof for the application, may subject the application to postponement, dismissal, or denial.

The public hearing in this case will be conducted in accordance with the provisions of Chapter 31 of the District of Columbia Municipal Regulations, Title 11, Zoning. Pursuant to § 3117.4 of the Regulations, the Commission will impose time limits on the testimony of all individuals.

How to participate as a witness.

Interested persons or representatives of organizations may be heard at the public hearing. The Commission also requests that all witnesses prepare their testimony in writing, submit the written testimony prior to giving statements, and limit oral presentations to summaries of the most important points. The applicable time limits for oral testimony are described below. Written statements, in lieu of personal appearances or oral presentation, may be submitted for inclusion in the record.

How to participate as a party.

Any person who desires to participate as a party in this case must so request and must comply with the provisions of 11 DCMR § 3106.2.

A party has the right to cross-examine witnesses, to submit proposed findings of fact and conclusions of law, to receive a copy of the written decision of the Zoning Commission, and to exercise the other rights of parties as specified in the Zoning Regulations. If you are still unsure of what it means to participate as a party and would like more information on this, please contact the Office of Zoning at dcoz@dc.gov or at (202) 727-6311.

Except for the affected ANC, any person who desires to participate as a party in this case must clearly demonstrate that the person's interests would likely be more significantly, distinctly, or uniquely affected by the proposed zoning action than other persons in the general public. Persons seeking party status **shall file with the Commission, not less than 14 days prior to the date set for the hearing, a Form 140 – Party Status Application, a copy of which may be downloaded from the Office of Zoning's website at:** http://dcoz.dc.gov/services/app.shtm. This form may also be obtained from the Office of Zoning at the address stated below.

If an affected Advisory Neighborhood Commission (ANC), pursuant to 11 DCMR 3012.5, intends to participate at the hearing, the ANC shall also submit the information cited in § 3012.5 (a) through (i). The written report of the ANC shall be filed no later than seven (7) days before the date of the hearing.

All individuals, organizations, or associations wishing to testify in this case are encouraged to inform the Office of Zoning their intent to testify prior to the hearing date. This can be done by mail sent to the address stated below, e-mail (donna.hanousek@dc.gov), or by calling (202) 727-0789.

The following maximum time limits for oral testimony shall be adhered to and no time may be ceded:

1.	Applicant and parties in support	60 minutes collectively
2.	Parties in opposition	60 minutes collectively
3.	Organizations	5 minutes each
4.	Individuals	3 minutes each

Pursuant to § 3020.3, the Commission may increase or decrease the time allowed above, in which case, the presiding officer shall ensure reasonable balance in the allocation of time between proponents and opponents.

Written statements, in lieu of oral testimony, may be submitted for inclusion in the record. Written statements may be submitted by mail to 441 4th Street, N.W., Suite 200-S, Washington, DC 20001; by e-mail to zcsubmissions@dc.gov; or by fax to (202) 727-6072. Please include the case number on your submission. **FOR FURTHER INFORMATION, YOU MAY CONTACT THE OFFICE OF ZONING AT (202) 727-6311.**

ANTHONY J. HOOD, MARCIE I. COHEN, ROBERT E. MILLER, PETER G. MAY, AND MICHAEL G. TURNBULL -------- ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA, BY SARA A. BARDIN, DIRECTOR, AND BY SHARON S. SCHELLIN, SECRETARY TO THE ZONING COMMISSION.

DEPARTMENT OF HEALTH CARE FINANCE

NOTICE OF FINAL RULEMAKING

The Director of the Department of Health Care Finance ("DHCF"), pursuant to the authority set forth in An Act to enable the District of Columbia to receive federal financial assistance under Title XIX of the Social Security Act for a medical assistance program, and for other purposes, approved December 27, 1967 (81 Stat. 744; D.C. Official Code § 1-307.02 (2014 Repl.)) and Section 6(6) of the Department of Health Care Finance Establishment Act of 2007, effective February 27, 2008 (D.C. Law 17-109; D.C. Official Code § 7-771.05(6) (2012 Repl.)), hereby gives notice of the adoption of an amendment to Section 4209 of Chapter 42 (Home and Community-Based Services Waiver for Persons who are Elderly and Individuals with Physical Disabilities) of Title 29 (Public Welfare) of the District of Columbia Municipal Regulations ("DCMR").

These final rules amend the previously published standards governing reimbursement of providers of personal care services under the Home and Community-Based Services Waiver for Persons who are Elderly and Individuals with Physical Disabilities ("EPD Waiver") by increasing the rates for services rendered by a personal care aid ("PCA") to comply with the Living Wage Act of 2006 ("Living Wage Act"), effective June 8, 2006 (D.C. Law 16-118; D.C. Official Code §§ 2-220.01 *et seq*. (2012 Repl.)). These rules increase the previous living wage rates by twenty cents (20¢) per hour, or five cents (5¢) per fifteen (15) minute increment. This adjustment was made to comply with the Department of Employment Services' recent increases to the living wage rate effective January 1, 2015.

A Notice of Emergency and Proposed Rulemaking was published in the *D.C. Register* on February 6, 2015 at 62 DCR 001765. No comments were received and no changes have been made. The Director adopted these rules as final on March 19, 2015, and they shall become effective on the date of publication of this notice in the *D.C. Register*.

Section 4209, REIMBURSEMENT RATES: PERSONAL CARE AIDE SERVICES, of Chapter 42, HOME AND COMMUNITY-BASED SERVICES WAIVER FOR PERSONS WHO ARE ELDERLY AND INDIVIDUALS WITH PHYSICAL DISABILITIES, of Title 29 DCMR, PUBLIC WELFARE, is amended as follows:

Subsections 4209.2 and 4209.3 are amended to read as follows:

4209.2 Each Provider shall be reimbursed four dollars and seventy-two cents ($4.72) per fifteen (15) minutes for services rendered by a PCA, of which three dollars and forty-five cents ($3.45) per fifteen (15) minutes shall be paid to the PCA to comply with the Living Wage Act of 2006, effective June 8, 2006 (D.C. Law 16-118; D.C. Official Code §§ 2-220.1 *et seq*. (2012 Repl.)).

4209.3 A unit of service for PCA services shall be fifteen (15) minutes spent performing the allowable tasks.

DEPARTMENT OF HEALTH CARE FINANCE

NOTICE OF FINAL RULEMAKING

The Director of the Department of Health Care Finance ("DHCF"), pursuant to the authority set forth in An Act to enable the District of Columbia to receive federal financial assistance under Title XIX of the Social Security Act for a medical assistance program, and for other purposes, approved December 27, 1967 (81 Stat. 744; D.C. Official Code § 1-307.02 (2014 Repl.)) and Section 6(6) of the Department of Health Care Finance Establishment Act of 2007, effective February 27, 2008 (D.C. Law 17-109; D.C. Official Code § 7-771.05(6) (2012 Repl.)), hereby gives notice of the adoption of an amendment to Section 5015 of Chapter 50 (Medicaid Reimbursements for Personal Care Aide Services) of Title 29 (Public Welfare) of the District of Columbia Municipal Regulations ("DCMR").

These final rules amend the previously published standards governing reimbursement of providers of personal care services under the District of Columbia State Plan for Medical Assistance by increasing the rates for services rendered by a personal care aide ("PCA") to comply with the Living Wage Act of 2006 ("Living Wage Act"), effective June 8, 2006 (D.C. Law 16-118; D.C. Official Code §§ 2-220.01 *et seq*. (2012 Repl.)). These rules increase the previous living wage rates by twenty cents (20¢) per hour, or five cents (5¢) per fifteen (15) minute increment. This adjustment was made to comply with the Department of Employment Services' recent increases to the living wage rate effective January 1, 2015.

A Notice of Emergency and Proposed Rulemaking was published in the *D.C. Register* on February 6, 2015 at 62 DCR 001767. No comments were received and no changes have been made. The Director adopted these rules as final on March 19, 2015, and they shall become effective on the date of publication of this notice in the *D.C. Register*.

Section 5015, REIMBURSEMENT, of Chapter 50, MEDICAID REIMBURSEMENT FOR PERSONAL CARE AIDE SERVICES, of Title 29 DCMR, PUBLIC WELFARE, is amended as follows:

Subsection 5015.1 is amended to read as follows:

5015.1 Each Provider shall be reimbursed four dollars and seventy-two cents ($4.72) per fifteen (15) minutes for services rendered by a PCA, of which three dollars and forty-five cents ($3.45) per fifteen (15) minutes shall be paid to the PCA to comply with the Living Wage Act of 2006, effective June 8, 2006 (D.C. Law 16-118; D.C. Official Code §§ 2-220.01 *et seq*. (2012 Repl.)).

DISTRICT DEPARTMENT OF THE ENVIRONMENT

NOTICE OF PROPOSED RULEMAKING

District of Columbia Mold Assessment and Remediation Licensure Regulations

The Acting Director of the District Department of the Environment (DDOE or Department), pursuant to the authority set forth in Sections 103(b)(1)(B)(ii)(III) and 107(4) of the District Department of the Environment Establishment Act of 2005, effective February 15, 2006 (D.C. Law 16-51; D.C. Official Code § 8-151.03 (b)(1)(B)(ii)(III) and 8-151.07(4) (2013 Repl.)); Title III, Subtitle B of the Air Quality Amendment Act of 2013, effective September 9, 2014 (D.C. Law 20-135; D.C. Official Code §§ 8-241.01 *et seq*. (2013 Repl.)); and Section III.18 of Mayor's Order 2006-61, dated June 14, 2006, hereby gives notice of the intent to promulgate a new Chapter 32 of Title 20 (Environment) of the District of Columbia Municipal Regulations (DCMR), the Mold Assessment and Remediation Licensure Regulations.

This rulemaking implements the provisions of Title III, Subtitle B of the Air Quality Amendment Act of 2014 by providing mold licensure and certification mechanisms for all mold assessment or remediation professionals who operate in the District of Columbia. This rulemaking also sets a threshold above which a property owner must employ assessment and remediation professionals if the property is rented for residential use.

The Certification and Licensure Program: Purpose and Description

The proposed rulemaking establishes a certification and licensure program for mold assessment and remediation professionals that offer their services in the District of Columbia. It is the interpretation of the Department that the intent of the regulation and the authorizing statute is to prevent fraudulent operators from offering their services without being certified or licensed and thereby guaranteeing a basic level of competence in the performance of this activity. The Department has determined that all professionals – without respect to the location of the work performed – who perform mold assessment or remediation should be certified and licensed to prevent unscrupulous actors from exploiting a perceived gap in regulatory authority. All persons who offer these services are required to be licensed by the Department.

The certification mechanism describes the criteria by which the Acting Director may recognize the certification of an independent body as the basis for licensure granted by the District. The Director may recognize one or more bodies based on these criteria and may withdraw the recognition of the certifying body and any licensure based on that certification if the Director determines the certifying body is no longer operating in a method consistent with standards necessary to protect the health and welfare of the residents of the District of Columbia.

Through this rulemaking, the Department is establishing a licensure program. To obtain a license to perform mold assessment or remediation, the applicant must be certified by a recognized body and apply to the Department. Consistent with the provisions of the Air Quality Amendment Act of 2013 no person may offer mold assessment or remediation services in the District of Columbia without a license from the Department.

The Threshold: Purpose and Description

Under the authority granted by the Act the Department has established a threshold of 25 square feet of contiguous mold as the concentration above which a landlord must enlist the services of a mold professional. The Department chose square footage as a method of establishing the threshold because it provides a readily discernible and measurable method without additional technical measurements allowing for an easily accessible measure that non-technical persons can use to trigger the protections of the Act.

Title 20, ENVIRONMENT, is amended by adding a new Chapter 32 as follows:

CHAPTER 32 MOLD LICENSURE AND CERTIFICATION

3200 PURPOSE AND SCOPE

3200.1 The purpose of this chapter is to implement Title III of the Air Quality Amendment Act of 2014 (Act), effective September 9, 2014 (D.C. Law 20-135; D.C. Official Code §§ 8-241.01 *et seq*. (2013 Repl.)).

3200.2 This chapter establishes (1) a licensing program for indoor mold assessment and remediation professionals performing work on all properties in the District of Columbia, (2) a twenty-five contiguous square feet threshold level of indoor mold contamination for residential property, and (3) guidelines for indoor mold assessment and remediation below the threshold level.

3200.3 Indoor mold remediation obligations of residential property owners and tenants are stated in D.C. Official Code § 8-241.04 (2013 Repl.).

3201 EXCEPTIONS AND THRESHOLD FOR MOLD PROFESSIONALS

3201.1 This chapter shall not apply to:

(a) The following activities when not conducted for the purpose of mold assessment or mold remediation:

(1) Routine cleaning;

(2) The diagnosis, repair, cleaning, or replacement of plumbing, heating ventilation, air conditioning, electrical, or air duct systems or appliances;

(3) Commercial or residential real estate inspections; or

(4) The incidental discovery or emergency containment of indoor mold growth during the conduct or performance of services listed in this subsection.

(b) The repair, replacement, or cleaning of construction materials during the construction of a structure; or

(c) A pest control inspection conducted by a person regulated under Chapter 23 of this title.

3201.2 A license shall not be required under this chapter to perform mold assessment or remediation in a residential property containing a total surface area of less than twenty-five contiguous square feet (25 $ft.^2$) of indoor mold growth.

3201.3 A license shall not be required under this chapter to perform mold assessment or remediation in an outdoor area or a non-residential property.

3201.4 A license shall not be required under this chapter to perform mold assessment or remediation when it is performed by the owner of a residential dwelling unit when the dwelling unit is owner occupied.

3201.5 An individual shall not be required to be licensed under this chapter to perform mold assessment or mold remediation while supervised by a licensee.

3201.6 Individuals currently licensed by the District of Columbia or another jurisdiction in another field (including, but not limited to, medicine, architecture, or engineering) who provide to a licensee only consultation related to that other field are not required to be separately licensed under this chapter. In such a case, the responsibility for the project or activity remains with the licensee.

3201.7 An individual who is performing the regulated activities of a licensed insurance adjuster, including investigation and review of losses to insured property, assignment of coverage, and estimation of the usual and customary expenses due

under the applicable insurance policy, including expenses for reasonable and customary mold assessment and remediation.

3201.8 An individual who is performing mold assessment or remediation under the licensing exemption(s) of § 3201.2 and identifies additional mold such that the mold affects a total surface areas of twenty-five contiguous square feet (25 ft.^{2}) or more shall:

(a) Immediately cease all assessment or remediation work;

(b) If remediation work was being performed, implement containment if necessary; and

(c) Advise the person requesting the assessment or remediation that the exemption under § 3201.2 is no longer applicable and that any additional work in the area shall be conducted by a person licensed under this chapter.

3202 REQUIREMENTS AND FEES TO OBTAIN A LICENSE

3202.1 An individual shall not engage in the business of mold assessment or mold remediation without a license issued pursuant to this section.

3202.2 Each individual applying to be licensed under this chapter shall be at least eighteen (18) years old at the time of application.

3202.3 An individual applying to be licensed as an indoor mold assessment or remediation professional shall apply to the Department after passing an examination approved by the Department pursuant to this subsection.

3202.4 The Department may approve examinations offered by organizations that are recognized in the mold assessment or mold remediation industry. The Department may also approve other states' examinations. The Department's website shall contain an active list of approved examinations.

3202.5 The Department shall adhere to the following standards for approval of mold assessment and remediation examinations:

(a) The examination shall be proctored;

(b) The mold assessment examination shall cover:

(1) The physical sampling and detailed evaluation of data obtained from a building history and inspection to formulate a hypothesis about the origin, identity, location, and extent of amplification of indoor mold growth; and

(2) Mold remediation strategies.

3206.6 The mold remediation examination shall cover remediation planning and the removal, cleaning, sanitizing, demolition, or other treatment, including preventive activities, of mold or mold-contaminated matter.

3206.7 The Department may consider the following standards when approving an examination:

(a) Whether the recognized organization requires examinees to participate in continuing education in the areas of mold assessment, remediation, or a related field; and

(b) The overall difficulty of the examination and the score required to pass.

3206.8 An individual shall have either passed a Department-approved examination or recertified their credential with the appropriate recognized organization two years prior to submitting an application to the Department.

3202.9 An individual applying to be licensed as an indoor mold assessment or remediation professional shall meet one or more of the following education and experience requirements of this subsection:

(a) At least a two (2)-year associate of arts degree, or the equivalent, with at least thirty (30) semester hours in microbiology, engineering, architecture, industrial hygiene, occupational safety, or a related field of science from an accredited institution and a minimum of one (1) year of documented relevant field experience;

(b) A certified industrial hygienist, a professional engineer, a professional registered sanitarian, a certified safety professional, or a registered architect, with at least six (6) months of documented relevant field experience; or

(c) A high school diploma or the equivalent with a minimum of three (3) years of documented relevant field experience.

3202.10 An applicant for an indoor mold assessment or remediation professional license shall submit a completed application that includes the following:

(a) A fee of four hundred dollars ($400) for an initial application.

(b) Documentation that the applicant meets the following requirements:

(1) The age requirement, as specified in § 3202.2;

(2) The examination requirement, as specified in § 3202.3;

(3) One of the educational and experience requirements, as specified in § 3202.9;

(4) Proof that the applicant meets the insurance requirement, as specified in § 3207; and

(5) Any other information that the Department requires for a complete application.

(c) For a renewal, submit the evidence required in (b)(2), (4), and (5) and a fee of one hundred and five dollars ($105).

3202.11 Submission of a current, valid license for mold assessment or remediation that is issued by another state, as approved by the Department following the standards established in this section, is sufficient for practice as an indoor mold assessment or remediation professional in the District of Columbia, if the applicant includes in an application to the Department:

(a) A fee of fifty dollars ($50); and

(b) Documentation that the applicant is licensed by an approved state.

3202.12 The term of each license shall be two (2) years.

3202.13 A licensee whose license has expired but continues to hold himself or herself out as an indoor mold assessment or remediation professional is in violation of this chapter.

3202.14 Beginning in 2016, license fees charged by the Department may be adjusted annually based on the change in the Consumer Price Index value published by the U.S. Department of Labor for all-urban consumers over the twelve (12) month period ending on August 30th of the calendar year preceding the calendar year in which the fee is assessed.

3203 SCOPE OF MOLD LICENSES

3203.1 An indoor mold assessment professional is permitted to:

(a) Record visual observations and take on-site measurements, including temperature, humidity, and moisture levels, during an initial or post remediation mold assessment;

(b) Collect samples for mold analysis during a mold assessment;

(c) Plan surveys to identify conditions favorable for indoor mold growth or to determine the presence, extent, amount, or identity of mold or suspected mold in a building;

(d) Conduct activities recommended in a plan developed under paragraph (c) of this subsection and describe and interpret the results of those activities;

(e) Determine locations at which the licensee or individuals under the licensee's supervision shall record observations, take measurements, or collect samples;

(f) Prepare a mold assessment report, including the observations made, measurements taken, and locations and analysis;

(g) Develop a mold management plan for a building or dwelling unit, including recommendations for periodic surveillance, response actions, and prevention and control of indoor mold growth;

(h) Prepare a mold remediation protocol, including the evaluation and selection of appropriate remediation strategies, personal protective equipment, engineering controls, project layout, post-remediation clearance evaluation methods and criteria, and preparation of plans and specifications;

(i) Evaluate a mold remediation project for the purpose of certifying that indoor mold identified for the remediation project has been remediated as outlined in a mold remediation protocol; and

(j) Complete appropriate sections of a Certificate of Mold Damage Remediation as defined in § 3299.1.

3203.2 An indoor mold remediation professional is permitted to:

(a) Perform mold remediation, as defined in § 3299.1;

(b) Prepare a mold remediation work plan providing instructions for the remediation efforts to be performed for a mold remediation project;

(c) Conduct and interpret the results of activities recommended in a work plan developed under paragraph (b) of this subsection; and

(d) Complete appropriate sections of a Certificate of Mold Damage Remediation as defined in § 3299.1.

3204 PROHIBITIONS AND LICENSEE OBLIGATIONS

3204.1 An individual shall not perform indoor mold assessment or remediation in the District of Columbia, unless licensed by the Department or exempted by § 3201.

3204.2 A person shall not use the name or title of "licensed," "professional," "certified," or any other term or terms that communicates a level of expertise in mold assessment or remediation, unless that person is an individual licensed by the Department or employs individuals who are licensed with the Department.

3204.3 All persons using such names or titles as referenced in § 3204.2 shall have readily available their name and license number or the name and license number of the individual(s) who are an employee of that person and who are also licensed by the Department.

3204.4 All licensees shall:

(a) Perform only services that they are licensed to conduct;

(b) Meet or exceed the minimum industry standards for mold assessment and remediation and the standards set in this chapter;

(c) Disclose any known or potential conflict of interest to any party affected by such conflicts;

(d) To the extent required by law, keep confidential any personal information regarding a client (including medical conditions) obtained during the course of a mold-related activity;

(e) Promptly furnish required documents or information to the Department and promptly respond to requests for information from the Department;

(f) Maintain knowledge and skills for continuing professional competence;

(g) Promptly report alleged misrepresentation or violations of the Act or this chapter to the Department;

(h) Competently and efficiently perform their duties and report to the Department incompetent, illegal, or unethical conduct of any licensee; and

(i) Be responsible for supervising any person assisting with the licensee's work, ensuring that supervisees are following best standard practices.

3204.5 Licensees shall not:

(a) Perform both mold assessment and mold remediation on the same project;

(b) Accept or offer any compensation to any other mold licensee or their company for the referral of any mold-related business;

(c) Assess or remediate for a fee any property in which the indoor mold assessment professional or indoor mold remediation professional or their company has any financial interest;

(d) Misrepresent any professional qualifications or credentials;

(e) Provide any information to the Department or client that is false, deceptive, or misleading;

(f) Work if impaired as a result of drugs, alcohol, sleep deprivation, or other conditions and not allow supervisees to work if the licensee knows or reasonably should know that the supervisee is impaired;

(g) Make any false, misleading, or deceptive claims, or claims that are not readily subject to verification, in any advertising, announcement, presentation, or competitive bidding;

(h) Make a representation that is designed to take advantage of the fears or emotions of the public or a customer;

(i) Retaliate against any person who reported in good faith to the Department alleged incompetent, illegal, or unethical conduct; or

(j) Supervise the work of more than ten (10) individuals at one time.

3204.6 Indoor mold assessment professionals shall:

(a) When conducting a mold assessment, provide to the client a mold assessment report following an initial mold assessment;

(b) If the licensee includes the results of the initial assessment in a mold remediation protocol or a mold management plan, not provide a separate assessment report;

(c) If mold is identified in a mold assessment, provide to the client a mold remediation protocol before a remediation project begins;

(d) Within ten (10) days, after successful completion of remediation activities, provide a clearance report to the client or, if an indoor mold assessment professional ceases to be involved with a project before it passes clearance, provide a final status report to the client and the appropriate indoor mold remediation professional;

(e) When issuing a clearance report, complete applicable sections and provide a Certificate of Mold Damage Remediation as defined in § 3299.1 to the appropriate indoor mold remediation professional; and

(f) In all issued reports, protocols, or other documents, include the date when the document was issued and all indoor mold assessment professional's names, license numbers, and, if applicable, business name and addresses.

3204.7 When conducting mold remediation, indoor mold remediation professionals shall:

(a) Provide to a client a mold remediation work plan for the project before the mold remediation preparation work begins;

(b) Inquire of the client whether any known or suspected hazardous materials, including lead-based paint and asbestos are present in the project area, and, if present, follow appropriate work practices in accordance with District and federal law;

(c) If remediation is complete, provide to the property owner a completed Certificate of Mold Damage Remediation not later than the tenth (10^{th}) day after the project stop date; and

(d) In all issued reports, plans, or other documents, include the date when the document was issued and all indoor mold remediation professionals' names, license numbers, and, if applicable, business name and addresses.

3205 MINIMUM PERFORMANCE STANDARDS AND WORK PRACTICES FOR LICENSEES

3205.1 Indoor mold assessment professionals shall adhere to the following minimum standards:

(a) If an indoor mold assessment professional determines that personal protective equipment should be used during a mold assessment project, the indoor mold assessment professional shall ensure that all individuals who engage in assessment activities and who will be, or are anticipated to be, exposed to indoor mold growth are provided with, fit tested for, and trained on the appropriate use and care of the specified personal protective equipment.

(b) If samples for laboratory analysis are collected during the assessment:

(1) Sampling and analysis shall be performed according to industry best practices;

(2) Preservation methods shall be implemented for all samples where

necessary;

(3) Proper sample documentation, including the sampling method, the sample identification code, each location and material sampled, the date collected, the name of the person who collected the samples, and the project name or number shall be recorded for each sample; and

(4) Proper chain of custody procedures shall be used.

(c) If mold remediation is to be conducted by an indoor mold remediation professional, prepare a mold remediation protocol that is specific to each remediation project and provide the protocol to the client before the remediation begins. The mold remediation protocol shall specify:

(1) The rooms or areas where the work shall be performed;

(2) The estimated quantities of materials to be cleaned or removed;

(3) The methods to be used for each type of remediation in each area;

(4) The personal protective equipment to be used by indoor mold remediation professionals. A minimum of an N-95 respirator is recommended during mold-related activities when indoor mold growth could or would be disturbed. Using professional judgment, an indoor mold assessment professional may specify additional or more protective personal protective equipment if he or she determines that it is warranted;

(5) The proposed types of containment, as described in (d) of this subsection, to be used during the project in each area; and

(6) The proposed clearance procedures and criteria, as described in (g) of this subsection, for each type of remediation in each area.

(d) Containment shall be specified in a mold remediation protocol when indoor mold growth affects a total surface area of twenty-five contiguous square feet (25 $ft.^2$) or more for the project in accordance with the following requirements:

(1) The containment specified in the remediation protocol shall prevent the spread of mold to areas of the building outside the containment;

(2) If walk-in containment is used, supply and return air vents shall be blocked, and air pressure within the walk-in containment shall be

lower than the pressure in building areas adjacent to the containment; and

(3) Containment is not required if only persons who are licensed or supervised by the licensee under this chapter occupy the building in which the remediation takes place at any time between the start date and stop date for the project as specified on the notification required under § 3208.2 of this chapter;

(e) An indoor mold assessment professional who indicates in a remediation protocol that a disinfectant, biocide, or antimicrobial coating is recommended to be used on a mold remediation project shall indicate a specific product or brand only if it is registered by the District of Columbia and the United States Environmental Protection Agency for the intended use and if the use is consistent with the manufacturer's labeling instructions.

(f) A decision by an indoor mold assessment professional to use products in paragraph (e) of this subsection shall take into account the potential for occupant sensitivities and possible adverse reactions to chemicals that have the potential to be off-gassed from surfaces coated with such products.

(g) In the remediation protocol for the project, the indoor mold assessment professional shall specify:

(1) At least one industry-recognized analytical method for use within each remediated area to determine whether the indoor mold growth identified for the project has been remediated as outlined in the mold remediation protocol;

(2) The criteria to be used for evaluating analytical results to determine whether the mold remediation project passes clearance;

(3) That post-remediation assessment shall be conducted while walk-in containment is in place, if walk-in containment is specified for the project; and

(4) The procedures to be used in determining whether the underlying causes of the mold identified for the project have been remediated so that it is reasonably certain that the mold will not return from those same causes.

3205.2 Indoor mold remediation professionals shall adhere to the following standards:

(a) An indoor mold remediation professional shall prepare a mold remediation

work plan that is specific to each project, fulfills all the requirements of the mold remediation protocol, and provides specific instructions or standard operating procedures for how a mold remediation project shall be performed. The indoor mold remediation professional shall provide the mold remediation work plan to the client before site preparation work begins;

(b) If an indoor mold assessment professional specifies in the mold remediation protocol that personal protective equipment is required for the project, the indoor mold remediation professional shall provide the specified personal protective equipment to all individuals who engage in remediation activities and who will, or are anticipated to, disturb or remove indoor mold growth, when the mold affects a total surface area for the project of twenty-five contiguous square feet (25 ft.^{2}) or more. The recommended minimum personal protective equipment is an N-95 respirator;

(c) The containment specified in the remediation protocol shall be used on a mold remediation project when the mold affects a total surface area of twenty-five contiguous square feet (25 ft.^{2}) or more for the project. The following procedures shall apply:

(1) The containment shall be constructed to prevent the spread of mold to areas outside the containment;

(2) If walk-in containment is used, supply and return air vents shall be blocked, and air pressure within the walk-in containment shall be lower than the pressure in building areas adjacent to the containment; and

(3) Containment is not required if only persons who are licensed or supervised by licensees under this chapter occupy the building in which the remediation takes place at any time between the start date and stop date for the project as specified on the notification required under § 3208.2 of this chapter;

(d) Signs advising that a mold remediation project is in progress shall be displayed at all accessible entrances to remediation areas and shall meet the following requirements:

(1) The signs shall be at least eight (8) inches by ten (10) inches in size and shall bear the words “NOTICE: Mold remediation project in progress” in black on a yellow background; and

(2) The text of the signs shall be legible from a distance of ten (10) feet;

(e) No person shall remove or dismantle any walk-in containment structures or materials from a project site prior to receipt, by the indoor mold remediation professional overseeing the project, of a written notice from an indoor mold assessment professional that the project has achieved clearance as described under § 3299.1;

(f) Disinfectants, biocides, and antimicrobial coatings may be used only if their use is specified in a mold remediation protocol, if they are registered by the District of Columbia and the United States Environmental Protection Agency (EPA) for the intended use, and if the use is consistent with the manufacturer's labeling instructions; and

(g) If a protocol specifies the use of such a product but does not specify the brand or type of product, an indoor mold remediation professional may select the brand or type of product to be used, subject to the other provisions of this chapter.

3206 MINIMUM WORK GUIDELINES REQUIREMENTS FOR NON-LICENSEES: ASSESSMENT

3206.1 In general, an indoor mold assessment professional should be consulted when assessing the extent of a moisture problem, indoor mold growth, and performing other related activities.

3206.2 The following guidelines are applicable to non-licensed individuals performing mold assessment on areas potentially affected by less than twenty-five contiguous square feet (25 ft.^{2}) of indoor mold growth; unless exempt by § 3201, a non-licensed individual shall not perform mold assessment on indoor mold growth when it is equal to or greater than twenty-five contiguous square feet (25 ft.^{2})

3206.3 A visual inspection should be performed that assesses the following:

(a) The extent of water damage, indoor mold growth, and affected building materials;

(b) Crawl spaces, attics, behind wallboards, carpet backing and padding, wallpaper, baseboards, insulation, and other materials that are suspected of hiding indoor mold growth;

(c) Ventilation systems for damp conditions and indoor mold growth on system components, like filters, insulations, and coils or fins; and

(d) Certain materials that are susceptible to indoor mold growth when damp, including ceiling tiles, paper-covered gypsum wallboard (drywall), structural wood, and other cellulose-containing surfaces.

3206.4 If assessment work might disturb indoor mold growth, personal protective equipment, like gloves and respiratory protection, should be worn.

3206.5 If indoor mold growth or water-damaged materials are visually identified, remediation shall be conducted in accordance with the guidance document published by the Department.

3206.6 If indoor mold growth equal to or greater than twenty-five contiguous square feet (25 $ft.^2$) is visually identified, the property owner, unless if exempt by § 3201.4, shall hire an indoor mold assessment professional who is licensed pursuant to § 3202 to conduct an indoor mold assessment.

3207 LICENSEE INSURANCE REQUIREMENTS

3207.1 An indoor mold assessment professional shall maintain general liability and errors and omissions insurance coverage of at least one million dollars ($1,000,000) for preliminary and post remediation mold assessment.

3207.2 An indoor mold remediation professional shall maintain a general liability insurance policy in an amount of at least one million dollars ($1,000,000) that includes specific coverage for mold-related claims.

3207.3 An indoor mold assessment professional or an indoor mold remediation professional shall maintain the applicable insurance policy unless covered under an employer's policy.

3208 NOTIFICATION REQUIREMENTS

3208.1 An indoor mold assessment professional shall properly notify the Department when he or she determines that a property is impacted by indoor mold covering a total surface area of twenty-five contiguous square feet (25 $ft.^2$) or more in accordance with the following requirements:

(a) The notification shall be provided to the Department no more than five (5) calendar days after issuance of a mold assessment report, mold remediation protocol, or a mold management plan; and

(b) The notification shall include the address of the site, a short description of the building and its mold condition, building owner, the date(s) of the assessment, and the name and license number of the indoor mold assessment professional.

3208.2 An indoor mold remediation professional shall properly notify the Department of a planned mold remediation at a property, when contamination affects a total surface area of twenty-five contiguous square feet (25 $ft.^2$) or more in accordance

with the following requirements:

(a) The notification shall include the address of the site, a short description of the building, the building owner, the start date, the anticipated stop date, and the name and license number of the indoor mold remediation professional;

(b) The indoor mold remediation professional shall provide this notification at least five (5) calendar days prior to the date when remediation is scheduled to start and, if the scheduled start date changes, the indoor mold remediation professional shall provide the proper scheduled date at least five (5) calendar days prior to the scheduled start of remediation, unless the indoor mold remediation professional determines that remediation must occur because of an emergency; and

(c) In the case of an emergency, the indoor mold remediation professional shall provide the Department with a notification as soon as practicable but no later than the following business day after the indoor mold remediation professional identifies the emergency.

3209 INDOOR MOLD REMEDIATION PROFESSIONAL RECORDKEEPING REQUIREMENTS

3209.1 An indoor mold remediation professional shall maintain the following records and documents on-site at a project for its duration:

(a) A copy of the mold remediation work plan and all mold remediation protocols used in the preparation of the work plan;

(b) A listing of the names and applicable license numbers for all individuals working on the remediation project; and

(c) The written contract between the indoor mold remediation professional or his/her employer and the client, and any written contracts related to the mold remediation project between the indoor mold remediation professional or his/her employer and any other party.

3210 INSPECTION

3210.1 The Department may inspect or investigate the business practices of any person that it has reason to believe is licensed in accordance with this chapter, holding themselves out as an indoor mold assessment or remediation professional, or performing work that shall only be performed by an indoor mold assessment or remediation professional.

3210.2 The Department, upon presenting proper identification, shall have the right to

enter at all reasonable times any area or environment, including, but not limited to, any containment area, building, construction site, storage, or office area, or vehicle to review and copy records or question any person for the purpose of ensuring compliance with this chapter.

3210.3 If a person denies access to the Department acting pursuant to the authority of the Act or this chapter, the Department may apply for an administrative search warrant in a court of competent jurisdiction, in addition to other actions authorized by law and regulations.

3211 SUSPENSION, REVOCATION, AND DENIAL OF LICENSES

3211.1 After providing notice and opportunity for a hearing, the Department may suspend, revoke, modify, or refuse to issue, renew, or restore a license issued to an individual pursuant to this chapter, if the Department finds that the applicant or holder:

(a) Has failed to comply with a provision of the Act or a rule in this chapter;

(b) Has misrepresented facts relating to a mold-related activity to a client, the Department, or other District agency;

(c) Has made a false statement or misrepresentation material to the issuance, modification, or renewal of a license;

(d) Has submitted a false or fraudulent record, invoice, or report;

(e) Has a history of repeated violations of District regulation; or

(f) Has had a certification or license denied, revoked, or suspended either by the Department or by another state or jurisdiction.

3211.2 An action to suspend, revoke, or refuse to issue, renew, or restore license shall be conducted in accordance with the following procedure:

(a) The notice of proposed suspension, revocation, or denial shall be in writing and shall include the following:

(1) The name and address of the applicant for, or holder of, the license;

(2) A statement of the proposed action and the proposed effective date and duration of a proposed refusal to issue, renew, or restore a license;

(3) A statement of the legal and factual basis for the proposed action;

(4) The method for requesting a hearing to appeal the decision by the Department before it becomes final; and

(5) Any additional information that Department may decide is appropriate; and

(b) If the individual requests a hearing pursuant to this section, the Department shall provide the individual an opportunity to submit a written statement in response to DDOE's statement of the legal and factual basis, and to provide any other explanations, comments, and arguments it deems relevant to the proposed action.

3211.3 An individual whose license has been suspended, revoked, or denied by the Department shall not be eligible to apply for any license available under this chapter until a period of ninety (90) days has passed after the effective date of such suspension, revocation or denial.

3212 ENFORCEMENT AND PENALTIES

3212.1 The Department may enforce a violation of the Act or this chapter by issuing one or more of the following:

(a) Notice of Violation;

(b) Notice of Infraction;

(c) Cease and Desist Order, which shall take effect immediately, or a Compliance Order;

(d) Notice of suspension, revocation, or denial of a license pursuant to § 3211; or

(e) Any other order necessary to protect human health or the environment, or to implement this chapter consistent with the purposes of the Act.

3212.2 Orders issued pursuant to § 3211.1(b), (c), and (e):

(a) Shall identify the name and address of the recipient;

(b) Shall identify the alleged violation or threatened violation;

(c) May require the respondent to conduct corrective action;

(d) Shall make clear the basis for the order and that the respondent's failure to take the measures directed will constitute an additional violation of the Act or the chapter; and

(e) Shall state the process for objecting to the order.

3212.3 A person may object to an order by requesting a hearing within fifteen (15) calendar days of service, or twenty (20) calendar days if service is made by United States mail, as follows:

(a) If specific instructions are not on the order, the owner, individual, firm, or entity shall file a written request for a hearing, including the grounds for the objection, with the Office of Administrative Hearings (OAH), established pursuant to the Office of Administrative Hearings Establishment Act of 2001, effective March 6, 2002 (D.C. Law 14-76; D.C. Official Code, §§ 2-1831.01 *et seq*.), in accordance with the Rules of Practice and Procedure of the Office of Administrative Hearings set forth in Title 1 DCMR Chapter 28;

(b) If a hearing is not requested within the specified time period, the order becomes final and remains in effect until the Department determines that any applicable corrective actions have been completed; and

(c) A hearing request does not stay the effective date of a Cease and Desist Order.

3212.4 The Department may also initiate a civil action in the Superior Court of the District of Columbia to secure a temporary restraining order, preliminary injunction, or other relief necessary for enforcement of these rules.

3299 DEFINITIONS

3299.1 When used in this chapter or Title III of the Air Quality Amendment Act of 2014, the following words and phrases shall have the meaning as described:

Certificate of Mold Damage Remediation - a document that includes a statement from the indoor mold assessment professional that based on visual, procedural, and analytical evaluation, the indoor mold growth identified for the project has been remediated as specified in the mold remediation protocol and a statement that all identified underlying causes of the mold have been remediated so that it is reasonably certain that the mold will not return from those same causes.

Certified industrial hygienist - an industrial hygienist who is certified by the American Board of Industrial Hygiene.

Certified safety professional - any individual who has been certified by the American Society of Engineers, American Board of Industrial Hygiene, or other nationally recognized health and safety industry organization.

Clearance report - a document that an indoor mold assessment professional issues when the indoor mold assessment professional determines that a project's remediation has been successful. The report includes:

(a) A description of relevant worksite observations;

(b) The type and location of all measurements made and samples collected at the worksite;

(c) All data obtained at the worksite, including but not limited to temperature, humidity, and material moisture readings;

(d) The results of analytical evaluation of the samples collected at the worksite;

(e) Copies of all photographs; and

(f) Clear statements that:

(1) All areas are free from visible mold;

(2) All work has been completed in compliance with the remediation protocol; and

(3) The project has achieved clearance.

Conflict of interest - because of other past, present, or future planned activities or relationships, the licensee is unable, or potentially unable, to render impartial services to the client.

Containment – a component or enclosure designed or intended to prevent the release of mold or mold-containing dust or materials into surrounding areas in the building during mold-related activities.

Containment area – an area that has been enclosed to prevent the release of mold or mold-containing dust or materials into surrounding areas.

Contiguous – in close proximity; neighboring.

Department – The District Department of the Environment.

Dwelling Unit – a room or group of rooms used or designed to be used in whole

or in part, as a living and sleeping place for one or more persons.

Emergency – a situation in which water damage has occurred and a delay in mold remediation would allow indoor mold growth to increase.

Final Status Report – a document issued by an indoor mold assessment professional that includes:

(a) A description of relevant worksite observations;

(b) The type and location of all measurements made and samples collected at the worksite; all data obtained at the worksite, such as temperature, humidity, and material moisture readings; and

(c) The results of analytical evaluation of the samples collected at the worksite; copies of all photographs; and any conclusions that the indoor mold assessment professional has drawn.

Indoor mold assessment professional – a person who conducts mold assessment as defined in this section and who is licensed under this chapter as a mold indoor mold assessment professional.

Indoor mold growth – mold that exists on an interior surface of a building, including common spaces, that was not purposely grown or brought into a building, and is visible or otherwise has the potential to affect the indoor air quality of the building.

Indoor mold remediation professional – a person who conducts mold remediation as defined in this section and who is licensed under this chapter as an indoor mold remediation professional.

License – any license issued by the Department under this chapter.

Licensee – an individual licensed under this chapter to perform mold assessment or remediation.

Mold – living or dead fungi or related products or parts, including spores, hyphae, and mycotoxins.

Mold analysis – the examination of a sample collected during a mold assessment for the purpose of:

(a) Determining the amount or presence of or identifying the genus or species of any living or dead mold or related parts (including spores and hyphae) present in the sample;

(b) Growing or attempting to grow fungi for the purposes of paragraph (a); or

(c) Identifying or determining the amount or presence of any fungal products, including but not limited to mycotoxins and fungal volatile organic compounds, present in the sample.

Mold assessment - an inspection, investigation, or survey of a dwelling unit or other structure to provide the owner or occupant with information regarding the presence, identification, or evaluation of mold that includes a mold assessment report and may include one or more of the following:

(a) The development of a mold remediation protocol;

(b) The development of a mold management plan; and

(c) The collection or analysis of a mold sample(s).

Mold assessment report - a document prepared by an indoor mold assessment professional for a client that describes any observations made, measurements taken, and locations and analytical results of samples taken during a mold assessment. An assessment report can be either a stand-alone document or a part of a mold management plan or mold remediation protocol.

Mold management plan - a document prepared by an indoor mold assessment professional for a client that provides guidance on how to prevent and control indoor mold growth at a location.

Mold-related activities - the performance of a mold assessment, mold remediation, or related activities.

Mold remediation - the removal, cleaning, sanitizing, demolition, or other treatment, including preventive activities, of mold or mold-contaminated matter.

Mold remediation protocol - a document, prepared by an indoor mold assessment professional for a client, that:

(a) includes photograph(s) of the scene of mold remediation prior to remediation;

(b) specifies the estimated quantities and locations of materials to be remediated; and

(c) specifies the proposed remediation methods and clearance criteria

for each type of remediation in each type of area for a mold remediation project.

Mold remediation work plan - a document, prepared by an indoor mold remediation professional that fulfills all of the requirements of the mold remediation protocol and provides specific instructions or standard operating procedures for how a mold remediation project shall be performed.

Person - an individual, corporation, company, contractor, subcontractor, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, District government entity, or any other association of individuals.

Personal Protective Equipment – items worn on an individual that limit their exposure to mold, including but not limited to gloves, goggles, respirators, and body suits.

Preventive activities - actions intended to prevent future indoor mold growth at a remediated area, including repairing leaks and other sources of water intrusion, and applying biocides or anti-microbial compounds.

Professional engineer - an engineer registered in a United States or Canadian jurisdiction.

Professional registered sanitarian - a sanitarian registered in a United States or Canadian jurisdiction.

Project - mold-related activities at a particular address for which a specific start date and a specific stop date is or will likely be provided.

Registered Architect - An architect registered in a United States or Canadian jurisdiction.

Relevant field experience - experience that involves:

(a) For a mold indoor mold assessment professional: conducting microbial sampling or investigations; or

(b) For a mold indoor mold remediation professional: mold remediation as defined in this section.

Residential Property - a building that contains one or more dwelling units, including common areas. Each street address constitutes a different residential property.

Routine cleaning - cleaning that is ordinarily done on a regular basis.

Start date - the date on which the mold remediation begins. Preparation work is not considered mold remediation.

Stop date - the date following the day on which a clearance report has been issued for the project.

Supervise or supervision - to direct and exercise control over the activities of an individual by being physically present at the job site or, if not physically present, accessible by telephone within ten minutes and able to be at the site within one hour of being contacted.

Survey - an activity undertaken in a building to determine the presence or absence, location, or quantity of indoor mold or to determine the underlying condition(s) contributing to indoor mold growth, whether by visual or physical examination or by collecting samples of potential mold for further analysis.

Visible - exposed to view; capable of being seen with the naked eye.

Work plan - a mold remediation work plan.

Please direct all comments on these proposed rules, in writing, no later than thirty (30) days after the date of publication of this notice in the *D.C. Register* care of "Mold Licensure Regulations", District Department of the Environment, 1200 First Street NE, 5th Floor, Washington D.C. 20002, by US mail, or via email at moldlicensure.regs@dc.gov. Copies of the proposed rule may be obtained between the hours of 9:00 a.m. and 5:00 p.m. at the address listed above for a small fee to cover the cost of reproduction or on-line at http://ddoe.dc.gov/moldlicensureregs.

DEPARTMENT OF HEALTH CARE FINANCE

NOTICE OF PROPOSED RULEMAKING

The Director of the Department of Health Care Finance (DHCF), pursuant to the authority set forth in An Act to enable the District of Columbia to receive federal financial assistance under Title XIX of the Social Security Act for a medical assistance program, and for other purposes, approved December 27, 1967 (81 Stat. 744; D.C. Official Code § 1-307.02 (2014 Repl.)) and Section 6(6) of the Department of Health Care Finance Establishment Act of 2007, effective February 27, 2008 (D.C. Law 17-109; D.C. Official Code § 7-771.05(6) (2012 Repl.)), hereby gives notice of the intent to amend Chapter 9 (Medicaid Program) of Title 29 (Public Welfare) of the District of Columbia Municipal Regulations (DCMR) by adopting a new Section 991, entitled "Other Laboratory and X-Ray Services."

District of Columbia Medicaid beneficiaries are entitled to a set of mandatory benefits under federal law. One of these benefits is Laboratory and X-Ray Services. Federal law requires that all Medicaid programs provide services that are sufficient in amount, duration and scope to reasonably achieve their purpose. These proposed rules will clarify coverage limitations for other laboratory and x-ray services.

The proposed rulemaking correlates to an amendment to the District of Columbia State Plan for Medical Assistance which requires approval by the Council of the District of Columbia (Council) and the Centers for Medicare and Medicaid Services (CMS), U.S. Department of Health and Human Services (HHS). After approval by the Council, the SPA will be submitted to CMS for review and approval. Implementation of this proposed rule is contingent upon CMS approval of the corresponding SPA.

The Director also gives notice of the intent to take final rulemaking action to adopt these rules not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*.

Chapter 9, MEDICAID PROGRAM, of Title 29 DCMR, PUBLIC WELFARE, is amended as follows:

A new Section 991, OTHER LABORATORY AND X-RAY SERVICES, is added to read as follows:

991 OTHER LABORATORY AND X-RAY SERVICES

991.1 Medicaid reimbursable other laboratory and x-ray services shall be professional and technical laboratory and radiological services that are:

(a) Medically necessary;

(b) Ordered, in writing, by a physician or advanced practice registered nurse (APRN) practicing under the supervision of a physician who is screened

and enrolled as a District Medicaid program provider pursuant to 29 DCMR §§ 9400 *et seq.*; and

(c) Provided in an office or similar facility other than a hospital outpatient department or clinic.

991.2 All ordering clinicians shall be licensed pursuant to the District of Columbia Health Occupations Revision Act of 1985, effective March 25, 1986 (D.C. Law 6-99; D.C. Official Code §§ 3-1202 *et seq.*)

991.3 Coverage of and Medicaid reimbursement for other laboratory and x-ray services shall be limited as follows:

(a) Other laboratory and x-ray services performed in connection with a routine physical examination shall not be billed separately;

(b) Services primarily for, or in connection with, cosmetic purposes shall require prior approval by the Department of Health Care Finance or its designee;

(c) Services primarily for, or in connection with, dental or oral surgery services, shall be limited to those required as a result of the emergency repair or accidental injury to the jaw or related structure; and

(d) Other laboratory and x-ray services provided to an individual who is in an outpatient setting, including services referred to an outside office or facility shall be included in a hospital outpatient claim.

991.4 To receive Medicaid reimbursement, a provider of other laboratory services shall meet the following requirements:

(a) Be certified under Title XVIII of the Social Security Act and the Clinical Laboratories Improvement Amendments of 1988;

(b) Be licensed or registered in accordance with D.C. Official Code § 44-202;

(c) Hold an approved District Medicaid program Provider Agreement as an independent laboratory provider; and

(d) Be screened and enrolled as a District Medicaid provider pursuant to 29 DCMR § 9400.

991.5 To receive Medicaid reimbursement, a provider of x-ray services shall be:

(a) Licensed or registered in accordance with D.C. Official Code § 44-202 and other applicable District of Columbia laws;

(b) In compliance with manufacturer's guidelines for use and routine inspection of equipment; and

(c) Screened and enrolled as a District Medicaid provider pursuant to 29 DCMR § 9400.

991.6 Medicaid reimbursement rates for other laboratory or x-ray services shall not exceed eighty percent (80%) of the rates established by Medicare, where applicable, for each service.

991.7 The Department of Health Care Finance shall publish Medicaid reimbursement rates for other laboratory or x-ray services on the District Medicaid fee schedule, available online at www.dc-medicaid.com.

991.99 DEFINITIONS

For purposes of this section, the following terms shall have the meanings ascribed.

Outpatient - A patient of an organized medical facility, or distinct part of that facility who is expected by the facility to receive and who does receive professional services for less than a twenty-four (24) hour period regardless of the hour of admission, whether or not a bed is used, or whether or not the patient remains in the facility past midnight in accordance with the requirements set forth in 42 C.F.R. § 440.2.

Professional service - A service that may only be provided by a physician or Advanced Practice Registered Nurse who is qualified to analyze a procedure or service and providing a written report of findings.

Technical services - Services necessary to secure a specimen and prepare it for analysis, or to take an x-ray and prepare it for reading and interpretation, *e.g.*, machines test, laboratory, and radiology procedures.

Comments on the proposed rule shall be submitted, in writing, to Claudia Schlosberg, J.D., Senior Deputy Director/State Medicaid Director, Department of Health Care Finance, 441 4th Street, NW, Suite 900S, Washington, D.C. 20001, via telephone on (202) 442-8742, via email at DHCFPubliccomments@dc.gov, or online at www.dcregs.dc.gov, within thirty (30) days after the date of publication of this notice in the *D.C. Register*. Copies of the proposed rule may be obtained from the above address.

DISTRICT DEPARTMENT OF TRANSPORTATION

NOTICE OF SECOND PROPOSED RULEMAKING

The Director of the District Department of Transportation ("Department"), pursuant to the authority set forth in Sections 4(a)(5)(A) (assigning authority to coordinate and manage public space permits and records to the Department Director), 5(4)(A) (assigning duty to review and approve public space permit requests to the Department Director), and 6(b) (transferring the public right-of-way maintenance function previously delegated to the Department of Public Works ("DPW") under Section III (F) of Reorganization Plan No. 4 of 1983 to the Department) of the Department of Transportation Establishment Act of 2002 ("DDOT Establishment Act"), effective May 21, 2002 (D.C. Law 14-137; D.C. Official Code §§ 50-921.03(5)(A), 50-921.04(4)(A), and 50-921.05(b) (2014 Repl.)), and Section 604 of the Fiscal Year 1997 Budget Support Act of 1996, effective April 9, 1997 (D.C. Law 11-198; D.C. Official Code § 10-1141.04 (2013 Repl. & 2014 Supp.)), which was delegated to the Director of DPW pursuant to Mayor's Order 96-175, dated December 9, 1996, and subsequently transferred to the Director of the Department in Section 7 of the DDOT Establishment Act (transferring to the Director of the Department all transportation-related authority previously delegated to the Director of DPW) (D.C. Official Code § 50-921.06 (2014 Repl.)), hereby gives notice of the intent to adopt amendments to Chapter 1 (Occupation and Use of Public Space) and Chapter 33 (Public Right-of-Way Occupancy Permits) of Title 24 (Public Space and Safety) of the District of Columbia Municipal Regulations ("DCMR").

A Notice of Proposed Rulemaking was published in the *D.C. Register* on July 4, 2014, at 61 DCR 6850. In response to public comments received, the proposed rulemaking is revised to: require that, if applicable, the Historic Preservation Office, the Historic Preservation Review Board, and the U.S. Commission of Fine Arts approve park improvements prior to the Director issuing a permit; limit how far a landscaped privacy buffer may extend onto a triangle park from any abutting property; prohibit improvements within eight feet (8 ft.) of an abutting property unless the property owner is the applicant; prohibit the use of fencing as a privacy buffer; include the adjacent property owner in the permit application review process when a triangle park abuts private property; and provide the adjacent property owner thirty (30) days to provide comments.

The rulemaking will also clarify that a permit from the Director is required to make certain changes to existing landscape and hardscape improvements. Additionally, the proposed rulemaking is revised to clarify that any improvements made to a park under this section become the property of the District government; to add a definition of landscape maintenance to resolve several comments that landscape maintenance did not include replacing dead plants, bushes, or small trees; and to add definitions.

Several commentators asked that the Advisory Neighborhood Commission ("ANC") review period be increased from thirty (30) days to sixty (60) days, but the review period was not increased. Thirty (30) days is the standard time period set forth in law and the public space permit office may grant an extension to an ANC if it is requested. A number of commentators wanted the definition of a triangle park to specify the configuration the park had when it was transferred to the District. The current park configurations are already as they were at the time

they were transferred, so no change was made in response to these comments. Also, a number of commentators suggested including provisions pertaining to the District government maintenance of the U.S. reservations under District control, but no changes were made because the scope of this rulemaking is limited to the permitting of private improvements. Finally, a number of commentators suggested revisions that conflict with the Department's policy regarding public accessibility to triangle parks under its jurisdiction, so no revisions were made to accommodate these comments.

Final rulemaking action to adopt these amendments shall be taken in not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*.

Title 24, PUBLIC SPACE AND SAFETY, is amended as follows:

Chapter 1, OCCUPATION AND USE OF PUBLIC SPACE, is amended as follows:

Section 102, PUBLIC PARKING: UPKEEP AND PLANTINGS, is amended by repealing Subsection 102.8.

Section 199, DEFINITIONS, is amended by adding a new definition after the definition of "Personalized Marker", to read as follows:

Public parking - the area of public space devoted to open space, greenery, parks, or parking that lies between the property line, which may or may not coincide with the building restriction line, and the edge of the actual or planned sidewalk that is nearer to the property line, as the property line and sidewalk are shown on the records of the District; except the term "public parking" does not include United States reservations.

Chapter 33, PUBLIC RIGHT-OF-WAY OCCUPANCY PERMITS, is amended as follows:

A new Section 3314 is added to read as follows:

3314 PRIVATE IMPROVEMENTS TO CERTAIN UNITED STATES RESERVATIONS UNDER THE JURISDICTION OF THE DISTRICT DEPARTMENT OF TRANSPORTATION

3314.1 It is the policy of the Department that the United States reservations that are triangle parks under the Department's jurisdiction should be preserved as publicly accessible neighborhood amenities in addition to maintaining them for the purpose for which the reservation was transferred to the District.

3314.2 No person shall make a landscaping or hardscaping improvement, such as the removal or planting of shrubs or trees or the installation of paving, fencing, benches, park identification signage, or other fixtures, to a United States reservation that is a triangle park under the Department's jurisdiction without first obtaining a public right of way occupancy permit from the Director.

3314.3 Notwithstanding § 3314.2, a person may perform landscape maintenance to, or may clean up a United States reservation that is a triangle park under the Department's jurisdiction, without the need to first obtain a public right of way occupancy permit from the Director.

3314.4 Without first obtaining a public right of way occupancy permit from the Director pursuant to § 3314.2, no person shall replace more than ten percent (10%) of the shrubs comprising an existing hedge or replace or repair any existing fence or wall that is located on a United States reservation that is a triangle park under the Department's jurisdiction.

3314.5 The Director shall issue a public right of way occupancy permit to make a landscaping or hardscaping improvement to a United States reservation that is a triangle park under the Department's jurisdiction if the proposed improvement:

(a) Does not change the real or implied function of the park as a public open space;

(b) Preserves public access to the park;

(c) Promotes the public enjoyment and use of the park;

(d) Avoids the use of impervious surface coverings to the maximum extent practicable;

(e) Limits any proposed privacy buffer to an area extending no further than eight feet (8 ft.) onto the triangle park from the property line of any private property abutting the triangle park;

(f) Does not include improvements located within eight feet (8 ft.) of an abutting private property when the person applying for the permit is not the abutting property owner;

(g) Avoids the use of fencing that creates the appearance that any of the triangle park is under the ownership or control of an adjacent private property owner; and

(h) Has the approval of the Historic Preservation Office, the Historic Preservation Review Board, or the U.S. Commission of Fine Arts when such an approval is required.

3314.6 Before issuing a permit for a landscaping or hardscaping improvement to a United States reservation that is a triangle park under the Department's jurisdiction, the Director shall send the permit application to the following:

(a) The affected Advisory Neighborhood Commission (ANC); and

(b) The owner of any private property that abuts the triangle park.

3314.7 The ANC and the abutting private property owner shall have thirty (30) days to review the application and provide recommendations.

3314.8 The recommendations, if any, of the affected ANC shall be given great weight, as that term is described in Section 13(d)(3)(A) of the Advisory Neighborhood Councils Act of 1975, effective March 26, 1976 (D.C. Law 1-58; D.C. Official Code § 1-309.10(d)(3)(A)).

3314.9 The recommendations, if any, made by the owner of property abutting the triangle park pursuant to § 3314.6(b) may include proposing alterations to the placement, species and cultivar of landscape elements and the placement and design of any hardscape elements proposed by the applicant.

3314.10 Any improvements made under a permit issued pursuant to this section shall become the property of the District government.

3314.11 The Director may modify or remove any public or private improvements made to a United States reservation that is a triangle park under the Department's jurisdiction without approval by, or notice to, the permittee (if any) who implemented the improvements or the adjacent property owner.

3314.12 Notwithstanding §§ 3310.3 and 3310.4 of this chapter, the Director may revoke any permit issued pursuant to this section at any time.

Section 3399, DEFINITIONS, is amended as follows:

New definitions are added, after the definition of "Director", to read as follows:

Hedge - a row of bushes or shrubs planted close together to form a barrier or boundary.

Landscape maintenance – mowing or reseeding existing grass areas; edging, weeding, or cultivating existing planting beds; the in-kind replacement of plants or flowers; minor trimming of shrubs and hedges; and the in-kind replacement of an existing dead shrub or small ornamental tree. Landscape maintenance shall not include the creation of new planting beds, the planting of new trees or shrubs or the replacement of an existing hedge.

A new definition is added, after the definition of "Personalized paver", to read as follows:

Privacy Buffer – a border of shrubs or combination of shrubs and trees, designed to screen an abutting property from activities at the adjacent triangle park.

A new definition is added, after the definition of "Public bicycle path", to read as follows:

Public parking -- the area of public space devoted to open space, greenery, parks, or parking that lies between the property line, which may or may not coincide with the building restriction line, and the edge of the actual or planned sidewalk that is nearer to the property line, as the property line and sidewalk are shown on the records of the District; except, the term "public parking" does not include United States reservations.

A new definition is added, after the definition of "Sharrow lane markings", to read as follows:

Shrub - a woody plant of relatively low height, having several stems arising from the base and lacking a single trunk; a bush.

A new definition is added, after the definition of "Tour bus service", to read as follows:

Triangle park – an area of open space, generally triangular in shape, that is located at the intersection of two (2) streets (generally, one of which is orthogonal and one of which is diagonal) and that has been set aside for public ownership. Examples of triangle parks include United States Reservations 142 and 143, located at the intersection of New Hampshire Avenue and 20th Street, NW; United States Reservation 230, located at the intersection of Independence Avenue and North Carolina Avenue, SE; and United States Reservation 61, located at the intersection of Massachusetts Avenue and P Street, NW.

All persons interested in commenting on the subject matter in this proposed rulemaking may file comments in writing, not later than thirty (30) days after the publication of this notice in the *D.C. Register*, with Samuel D. Zimbabwe, Associate Director, District Department of Transportation, 55 M Street, S.E., 5th Floor, Washington, D.C. 20003. An interested person may also send comments electronically to publicspace.policy@dc.gov. Copies of this proposed rulemaking are available, at cost, by writing to the above address, and are also available electronically, at no cost, on the District Department of Transportation's website at www.ddot.dc.gov.

DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY

NOTICE OF PROPOSED RULEMAKING

The Board of Directors (Board) of the District of Columbia Water and Sewer Authority (DC Water), pursuant to the authority set forth in Sections 203(3) and (11) and 216 of the Water and Sewer Authority Establishment and Department of Public Works Reorganization Act of 1996, effective April 18, 1996 (D.C. Law 11-111, §§ 203(3), (11) and 216; D.C. Official Code §§ 34-2202.03(3) and (11) and § 34-2202.16 (2012 Repl.)); Section 6(a) of the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1206; D.C. Official Code § 2-505(a) (2012 Repl.)); and in accordance with Chapter 40 (Retail Ratemaking) of Title 21 (Water and Sanitation) of the District of Columbia Municipal Regulations (DCMR); hereby gives notice that at its rescheduled regular meeting on March 19, 2015, adopted Board Resolution #15-31 to propose the amendment of Section 4103 (Fire Protection Service Fee) of Chapter 41 (Retail Water and Sewer Rates) of Title 21 (Water and Sanitation) of the DCMR.

The purpose of the amendments is to amend the Fire Protection Service Fee.

The Board will also receive comments on this proposed rulemaking at a public hearing on May 13, 2015. The Notice of Public Hearing is published in this edition of the *D.C. Register*. Final rulemaking action shall be taken in not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*.

Section 4103, FIRE PROTECTION SERVICE FEE, of Chapter 41, RETAIL WATER AND SEWER RATES, of Title 21 DCMR, WATER AND SANITATION, is amended as follows:

4103 FIRE PROTECTION SERVICE FEE

4103.1 The charge to the District of Columbia for fire protection service, including, but not limited to the delivery of water flows for firefighting as well as maintaining and upgrading public fire hydrants in the District of Columbia, (plus the cost of fire hydrant inspections performed by the DC Fire and Emergency Medical Services) shall be Ten Million Seven Hundred Ninety-Six Thousand Dollars ($10,796,000) per fiscal year (FY) for FY 2015, FY 2016, and FY 2017.

4103.2 The fee may be examined every three years to determine if the fee is sufficient to recoup the actual costs for providing this service.

4103.3 In the event the actual costs are not being recouped, the District shall pay the difference and the fee will be appropriately adjusted pursuant to the rulemaking process.

4103.4 In the event the costs paid by the District of Columbia exceed the actual costs, the fee shall be adjusted pursuant to the rulemaking process.

Comments on these proposed rules should be submitted in writing no later than thirty (30) days after the date of publication of this notice in the *D.C. Register* to Linda R. Manley, Secretary to the Board, District of Columbia Water and Sewer Authority, 5000 Overlook Ave., S.W., Washington, D.C. 20032, by email to Lmanley@dcwater.com, or by FAX at (202) 787-2795. Copies of these proposed rules may be obtained from the DC Water at the same address or by contacting Ms. Manley at (202) 787-2332.

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA

NOTICE OF PROPOSED RULEMAKING
Z.C. Case No. 14-20
(Map Amendment to Rezone a Portion of Square 1070)

The Zoning Commission for the District of Columbia, pursuant to its authority under § 1 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797; D.C. Official Code § 6-641.01 (2012 Repl.)), hereby gives notice of its intent to amend the Zoning Map. If adopted, the amendment would rezone Lots 38, 39, 73–76, 80–86, and 94 on Square 1070 from C-2-A to the R-4 Zone District.

Final rulemaking action shall be taken not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*.

The Zoning Map is proposed to be amended as follows:

Rezone Lots 38, 39, 73–76, 80–86, and 94 on Square 1070 from the C-2-A Zone District to the R-4 Zone District.

All persons desiring to comment on the subject matter of this proposed rulemaking action should file comments in writing no later than thirty (30) days after the date of publication of this notice in the *D.C. Register*. Comments should be filed with Sharon Schellin, Secretary to the Zoning Commission, Office of Zoning, 441 4th Street, N.W., Suite 200-S, Washington, D.C. 20001. Ms. Schellin may also be contacted by telephone at (202) 727-6311 or by email at Sharon.Schellin@dc.gov. Copies of this proposed rulemaking action may be obtained at cost by writing to the above address.

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ALCOHOLIC BEVERAGE CONTROL BOARD

NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The Alcoholic Beverage Control Board (Board), pursuant to the authority set forth in the Omnibus Alcoholic Beverage Amendment Act of 2004, effective September 30, 2004 (D.C. Law 15-187; D.C. Official Code § 25-211(b) (2012 Repl. & 2014 Supp.)), hereby gives notice of the adoption of emergency and proposed rules to amend existing Subsection 718.2 of Chapter 7 (General Operating Requirements) of Title 23 (Alcoholic Beverages) of the District of Columbia Municipal Regulations (DCMR).

The amendment would increase the number of days covered by the Reimbursable Detail Subsidy Program (Program) from two to seven days a week. The rules would also allow reimbursement under the Program for certain Board-approved outdoor Special Events where alcohol is to be sold or served. The rules also amend Subsections 718.2 and 718.3 of Title 23 to increase, starting March 1, 2015, the percentage of distribution of subsidies paid by ABRA to MPD from fifty percent (50%) to seventy percent (70%) when covering the costs incurred by Alcoholic Beverage Control (ABC) licensees for Metropolitan Police Department (MPD) officers working reimbursable details under the Program.

By way of background, these rules have been amended by the Board over the past several years to expand the Program regarding the reimbursable detail coverage on an as needed basis. For example, this expansion of the Program has included modifying the percentage of the reimbursed subsidy amount, the number of hours worked by the MPD, the number of nights of the week worked by MPD, and the addition of federal and District holidays, and certain holiday weekends.

The rules were modified again as recently as August 15, 2014 to expand the distribution of subsidies paid by ABRA to MPD under the Program from two days a week to seven days a week, and to allow for coverage of certain Special Events. Special Events are deemed to be those events sponsored by a Licensee who has received approval from the Board for a One Day Substantial Change License or a Temporary License.

Adequate funding is now available in ABRA's Fiscal Year 2015 budget to allow for further expansion of the Program. Specifically, the Board seeks to increase the percentage of distribution of subsidies paid by ABRA to MPD from fifty percent (50%) to seventy percent (70%) when covering the costs incurred by ABC licensees for MPD officers working reimbursable details under the Program. Given the importance of this Program to public safety, the Board regularly monitors the Program's funding to make adjustments for the distribution of subsidies to cover the costs incurred by licensees.

This emergency action is necessary to immediately expand the Program for the remainder of fiscal year 2015, most notably the upcoming summer months where public safety is at greater risk. This subsidy assists licensed establishments to defray the costs of retaining off-duty MPD officers to patrol the surrounding area of an establishment or an outdoor Special Event for the purpose of maintaining public safety, including the remediation of traffic congestion and the

safety of public patrons, during their approach and departure from the establishment or Special Event.

These emergency and proposed rules were adopted by the Board on February 18, 2015, by a four (4) to zero (0) vote. The rules will become effective on March 1, 2015. The emergency rules will remain in effect for up to one hundred twenty (120) days from adoption, expiring June 18, 2015, unless earlier superseded by publication of a Notice of Final Rulemaking in the *D.C. Register*.

The Board also gives notice of its intent to take final rulemaking action to adopt these rules on a permanent basis in not fewer than thirty (30) days after the date of publication of this notice in the *D.C. Register*. Pursuant to D.C. Official Code § 25-211(b)(2)(2012 Repl.), these emergency and proposed rules are also being transmitted to the Council of the District of Columbia (Council) for a ninety (90) day period of review. The final rules shall not become effective absent approval by the Council.

Chapter 7, GENERAL OPERATING REQUIREMENTS, of Title 23 DCMR, ALCOHOLIC BEVERAGES, is amended as follows:

Section 718, REIMBURSABLE DETAIL SUBSIDY PROGRAM, is amended by replacing Subsections 718.2 and 718.3 to read as follows, and renumbering the following subsections:

718.2 ABRA will reimburse MPD seventy percent (70%) of the total cost of invoices submitted by MPD to cover the costs incurred by licensees for MPD officers working reimbursable details on Sunday through Saturday nights. The hours eligible for reimbursement for on-premises retailer licensees shall be 11:30 p.m. to 5:00 a.m. ABRA will also reimburse MPD seventy percent (70%) of the total costs of invoices submitted by MPD to cover the costs incurred for outdoor Special Events where the Licensee has been approved for a One Day Substantial Change License or a Temporary License. The hours eligible for an outdoor Special Event operating under a One Day Substantial Change License or a Temporary License shall be twenty-four (24) hours a day.

718.3 MPD shall submit to ABRA on a monthly basis invoices documenting the seventy percent (70%) amount owed by each licensee. Invoices will be paid by ABRA to MPD within thirty (30) days of receipt in the order that they are received until the subsidy program's funds are depleted.

718.4 ABRA shall notify MPD when funds in the subsidy program fall below two hundred and fifty thousand dollars ($250,000).

718.5 Any invoices unpaid by ABRA either for good cause or a lack of sufficient funds left in the subsidy program shall remain the responsibility of the licensee.

718.6 ABRA shall not be involved in determining the number of MPD officers needed to work a reimbursable detail.

Copies of the proposed rulemaking can be obtained by contacting Martha Jenkins, General Counsel, Alcoholic Beverage Regulation Administration, 2000 14th Street, N.W., 4th Floor, Washington, D.C. 20009. All persons desiring to comment on the emergency and proposed rulemaking must submit their written comments, not later than thirty (30) days after the date of the publication of this notice in the *D.C. Register*, to the above address or via email to martha.jenkins@dc.gov.

DEPARTMENT OF HEALTH CARE FINANCE

NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The Director of the Department of Health Care Finance (DHCF), pursuant to the authority set forth in An Act to enable the District of Columbia to receive federal financial assistance under Title XIX of the Social Security Act for a medical assistance program, and for other purposes, approved December 27, 1967 (81 Stat. 744; D.C. Official Code § 1-307.02 (2014 Repl.)) and Section 6(6) of the Department of Health Care Finance Establishment Act of 2007, effective February 27, 2008 (D.C. Law 17-109; D.C. Official Code § 7-771.05(6) (2012 Repl.)), hereby gives notice of the adoption of an amendment to Section 1910 (Personal Care Services) of Chapter 19 (Home and Community-Based Waiver Services for Individuals with Intellectual and Developmental Disabilities) of Title 29 (Public Welfare) of the District of Columbia Municipal Regulations (DCMR).

These rules establish standards governing reimbursement of personal care services provided to participants in the Home and Community-Based Waiver Services for Individuals with Intellectual and Developmental Disabilities (ID/DD Waiver) and conditions of participation for providers.

The ID/DD Waiver was approved by the Council of the District of Columbia and renewed by the U.S. Department of Health and Human Services, Centers for Medicaid and Medicare Services for a five-year period beginning November 20, 2012. Personal care services assist waiver participants with activities of daily living including bathing, toileting, transferring, dressing, eating, feeding, and assisting with incontinence. These emergency and proposed rules amend the previously published standards governing reimbursement of providers of personal care services to ensure that they are consistent with rates set by the District of Columbia State Plan for Medical Assistance rates for services rendered by a personal care aide (PCA).

Emergency action is necessary for the immediate preservation of the health, safety, and welfare of beneficiaries who are in need of personal care aide services. A rate increase is necessary at this time to ensure that there is an adequate provider supply and to maintain continuity of care for beneficiaries who are receiving PCA services. To preserve beneficiaries' health, safety, and welfare, and to avoid any lapse in access to PCA services, it is necessary that these rules be published on an emergency basis.

The emergency and proposed rulemaking was adopted on March 25, 2015 and became effective on that date. The emergency rules shall remain in effect for one hundred and twenty (120) days or until July 23, 2015, unless superseded by publication of a Notice of Final Rulemaking in the *D.C. Register*. The Director of DHCF also gives notice of the intent to take final rulemaking action to adopt these proposed rules in not less than thirty (30) days after the date of publication of this notice in the *D.C. Register*.

Section 1910, PERSONAL CARE SERVICES, of Chapter 19, HOME AND COMMUNITY-BASED WAIVER SERVICES FOR INDIVIDUALS WITH

INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, of Title 29 DCMR, PUBLIC WELFARE, is amended as follows:

1910 PERSONAL CARE SERVICES

1910.1 The purpose of this section is to establish standards governing Medicaid eligibility for personal care services for individuals enrolled in the Home and Community-Based Services Waiver for Persons with Intellectual and Developmental Disabilities (ID/DD Waiver) and to establish conditions of participation for providers of personal care services.

1910.2 Personal care services are the activities that assist the person with activities of daily living including bathing, toileting, transferring, dressing, eating, feeding, and assisting with incontinence.

1910.3 To be eligible for Medicaid reimbursement for personal care services under the ID/DD Waiver, the person shall:

(a) Exhaust all available personal care services provided under the State Plan for Medical Assistance (Medicaid State Plan) prior to receiving personal care services under the ID/DD Waiver;

(b) Be unable to independently perform one or more activities of daily living for which personal care services are needed;

(c) Be in receipt of a written order for PCA services by a physician in accordance with Subsections 5006.1 and 5006.2 of Title 29 DCMR; and

(d) Be authorized for personal care services based on a comprehensive assessment of the person's support needs and risk screening using the DDA Level of Need Assessment and Screening Tool (LON), or its successor, and reflected in the person's Individual Support Plan (ISP) and Plan of Care.

1910.4 Persons eligible for personal care services under the ID/DD Waiver shall be exempt from the requirement to obtain an authorization for services from DHCF or its agent under Section 5003 of Chapter 50 of Title 29 of the DCMR.

1910.5 Personal care services eligible for Medicaid reimbursement shall include, but not be limited to the activities identified under Subsection 5006.7 of Chapter 50 of Title 29 of the DCMR.

1910.6 Medicaid reimbursable personal care services shall not include:

(a) Services that require the skills of a licensed professional as defined by the District of Columbia Health Occupations Revision Act of 1985, as

amended, effective March 25, 1986 (D.C. Law 6-99; D.C. Official Code §§ 3-1201.01 *et seq.*);

(b) Tasks usually performed by chore workers or homemakers, such as cleaning of areas not occupied by the beneficiary and shopping for items not used by the person receiving services; and

(c) Money management.

1910.7 Personal care services delivered by a personal care aide shall be supervised by a registered nurse. The registered nurse shall review the person's health management care plan, if available, in order to make the initial assessment for personal care services

1910.8 The registered nurse shall conduct an initial assessment with the person enrolled in the ID/DD Waiver within seventy two (72) hours of receiving authorization for personal care services from DDS.

1910.9 A plan of care for the delivery of personal care services shall be developed in accordance with Subsection 5005.2 of Chapter 50 of Title 29 of the DCMR.

1910.10 In order to be eligible for Medicaid reimbursement for personal care services, the provider shall review the plan of care at least once every sixty (60) days, and shall update or modify the plan of care as needed. The registered nurse shall notify the person's physician of any significant change in the beneficiary's condition.

1910.11 If an update or modification to the plan of care requires any change in the frequency, duration, or scope of personal care services provided to the person enrolled in the ID/DD Waiver, the provider shall obtain an updated authorization for personal care services from DDS in accordance with § 1910.3(d).

1910.12 To be eligible for Medicaid reimbursement for personal care services, a provider shall:

(a) Be a home care agency licensed pursuant to the requirements for home care agencies as set forth in the Health Care and Community Residence Facility, Hospice and Home Care and Community Residence Facility, Hospice and Home Care Licensure Act of 1983, effective February 24, 1984 (D.C. Law 5-48; D.C. Official Code §§ 44-501 *et seq.* (2012 Repl.)), and implementing rules;

(b) Be enrolled as a Medicare home health agency qualified to offer skilled services as set forth in Sections 1861(o) and 1891(e) of the Social Security Act and 42 C.F.R. § 484; and

(c) Comply with the requirements under Section 1904 (Provider Qualifications) and 1905 (Provider Enrollment Process) of Chapter 19 of Title 29 DCMR.

1910.13 A home care agency shall meet the requirements described under Section 5008 (Staffing) and Section 5010 (Staffing Agencies) of Chapter 50 of Title 29 of the DCMR.

1910.14 In order to be eligible for Medicaid reimbursement, each direct support professional (DSP) including personal care aides providing personal care services shall comply with Section 1906 (Requirements of Direct Support Professionals) of Chapter 19 of Title 29 DCMR.

1910.15 In order to be eligible for Medicaid reimbursement, each personal care services provider shall comply with the requirements described under Section 1908 (Reporting Requirements) and Section 1911 (Individual Rights) of Chapter 19 of Title 29 DCMR.

1910.16 In order to be eligible for Medicaid reimbursement, each personal care services provider shall comply with the record maintenance requirements described under Section 1909 (Records and Confidentiality of Information) of Chapter 19 of Title 29 of the DCMR, and Section 5013 of Chapter 50 of Title 29 of the DCMR.

1910.17 In order to be eligible for Medicaid reimbursement, each provider of personal care services shall comply with the denial, suspension, reduction or termination of services requirements under Section 5007 of Chapter 50 of Title 29 of the DCMR.

1910.18 In order to be eligible for Medicaid reimbursement, each provider of personal care services shall develop contingency staffing plans to provide coverage for a person receiving personal care services if the assigned personal care aide cannot provide the service or is terminated by the provider.

1910.19 If person receiving personal care services seeks to change providers, the DDS service coordinator shall assist the person in selecting a new provider. In order to be eligible for Medicaid reimbursement for personal care services, the current provider shall continue to provide services until the transfer to the new provider has been completed.

1910.20 Personal care services shall not be provided in a hospital, nursing facility, intermediate care facility, or other living arrangement that includes personal care as part of the reimbursed service.

1910.21 Personal care services may be provided by family members other than the person's spouse, parent, guardian, or any other individual legally responsible for the person receiving services who ordinarily would perform or be responsible for performing services on the person's behalf.

1910.22 Family members who provide personal care services, with the exception of those listed under Subsection 1910.21, shall meet the requirements for direct support professionals referenced under Subsection 1910.14.

1910.23 In order to be eligible for Medicaid reimbursement, personal care services shall not be provided concurrently with the following ID/DD Waiver services:

(a) Residential Habilitation;

(b) Supported Living;

(c) Host Home; and

(d) Shared Living.

1910.24 The Medicaid reimbursement rate for personal care services shall be the same as the rate listed in Subsection 5015.1(Reimbursement) of Chapter 50 (Medicaid Reimbursement for Personal Care Aide Services) of Title 29 (Public Welfare) of the DCMR.

Comments on these rules should be submitted in writing to Claudia Schlosberg, J.D., Medicaid Director, Department of Health Care Finance, Government of the District of Columbia, 441 4th Street, NW, Suite 900, Washington DC 20001, via telephone on (202) 442-8742, via email at DHCFPubliccomments@dc.gov, or online at www.dcregs.dc.gov, within thirty (30) days of the date of publication of this notice in the *D.C. Register*. Additional copies of these rules are available from the above address.

GOVERNMENT OF THE DISTRICT OF COLUMBIA

ADMINISTRATIVE ISSUANCE SYSTEM

Mayor's Order 2015-095
March 20, 2015

SUBJECT: Appointment – Acting Director, Department of Youth Rehabilitation Services

ORIGINATING AGENCY: Office of the Mayor

By virtue of the authority vested in me as Mayor of the District of Columbia by section 422(2) of the District of Columbia Home Rule Act, approved December 24, 1973, 87 Stat. 790, Pub. L. 93-198, D.C. Official Code § 1-204.22(2) (2014 Repl.), and in accordance with section 102(b) of the Department of Youth Rehabilitation Services Establishment Act of 2004, effective April 12, 2005, D.C. Law 15-335, D.C. Official Code § 2-1515.02(b) (2012 Repl.), it is hereby **ORDERED** that:

1. **CLINTON LACEY** is appointed Acting Director, Department of Youth Rehabilitation Services and shall serve in that capacity at the pleasure of the Mayor.

2. This Order supersedes Mayor's Order 2015-043, dated January 14, 2015.

3. **EFFECTIVE DATE**: This Order shall be effective *nunc pro tunc* to February 2, 2015.

MURIEL E. BOWSER
MAYOR

ATTEST:
LAUREN C. VAUGHAN
ACTING SECRETARY OF THE DISTRICT OF COLUMBIA

GOVERNMENT OF THE DISTRICT OF COLUMBIA

ADMINISTRATIVE ISSUANCE SYSTEM

Mayor's Order 2015-096
March 25, 2015

SUBJECT: Appointment - Inspector General

ORIGINATING AGENCY: Office of the Mayor

By virtue of the authority vested in me as Mayor of the District of Columbia by section 422(2) of the District of Columbia Home Rule Act of 1973, 87 Stat. 790, Pub. L. 93-198, D.C. Official Code § 1-204.22(2) (2014 Repl.), in accordance with section 208 of the District of Columbia Procurement Practices Act of 1985, effective February 21, 1986, D.C. Law 6-85, D.C. Official Code § 1-301.115a(a)(1)(A) (2014 Repl.), and section 2 of the Confirmation Act of 1978, effective March 3, 1979, D.C. Law 2-142, D.C. Official Code § 1-523.01 (2014 Repl.), and pursuant to the Inspector General Daniel W. Lucas Confirmation Resolution of 2014, effective October 28, 2014, Res. 20-661, it is hereby **ORDERED** that:

1. **DANIEL W. LUCAS, ESQ.** is appointed Inspector General and shall serve in that capacity for a term to end May 19, 2020, pursuant to D.C. Official Code § 1-301.115a(a)(1)(A)(A-ii) (2014 Repl.).

2. This Order supersedes Mayor's Order 2014-117, dated May 20, 2014.

3. **EFFECTIVE DATE:** This Order shall be effective *nunc pro tunc* to October 28, 2014.

MURIEL E. BOWSER
MAYOR

ATTEST: _____
LAUREN C. VAUGHAN
ACTING SECRETARY OF THE DISTRICT OF COLUMBIA

GOVERNMENT OF THE DISTRICT OF COLUMBIA

ADMINISTRATIVE ISSUANCE SYSTEM

Mayor's Order 2015-097
March 25, 2015

SUBJECT: Delegation of Authority - Chairperson of the District of Columbia Taxicab Commission to Implement the Enforcement Provisions of the Vehicle-for-Hire Innovation Amendment Act of 2014

ORIGINATING AGENCY: Office of the Mayor

By virtue of the authority vested in me as Mayor of the District of Columbia by section 422(6) and (11) of the District of Columbia Home Rule Act, approved December 24, 1973, 87 Stat. 790, Pub. L. No. 93-198, D.C. Official Code §§ 1-204.22(6) and (11) (2014 Repl.) and the Vehicle-for-Hire Innovation Amendment Act of 2014 (**"the Act"**), effective March 10, 2015, D.C. Law 20-197, 61 DCR 12430 (December 5, 2014), it is hereby **ORDERED** that:

1. The Chairperson of the District of Columbia Taxicab Commission is delegated the Mayor's authority under section 8b of the Act, related to a review of reciprocity agreements for vehicles for hire; section 20j-7 of the Act related to the certification, enforcement, and regulation of private vehicles-for-hire; and section 20k of the Act, related to vehicle inspection officers, the authority to promulgate, implement, enforce, and establish by rulemaking civil fines and penalties.

2. The authority delegated herein to the Chairperson of the District of Columbia Taxicab Commission may be further delegated to subordinates under his jurisdiction.

3. **EFFECTIVE DATE:** This Order shall be effective immediately.

MURIEL E. BOWSER
MAYOR

ATTEST:
LAUREN C. VAUGHAN
ACTING SECRETARY OF THE DISTRICT OF COLUMBIA

GOVERNMENT OF THE DISTRICT OF COLUMBIA

ADMINISTRATIVE ISSUANCE SYSTEM

Mayor's Order 2015-098
March 25, 2015

SUBJECT: Designation of Special Event Area – Candlelight Vigil Marking the Sesquicentennial of Abraham Lincoln's Death

ORIGINATING AGENCY: Office of the Mayor

By virtue of the authority vested in me as Mayor of the District of Columbia by section 422(11) of the District of Columbia Home Rule Act, approved December 24, 1973, 87 Stat. 790, Pub. L. 93-198, D.C. Official Code § 1-204.22(11) (2014 Repl.), and pursuant to 19 DCMR § 1301.8, it is hereby **ORDERED** that:

1. The following public space areas as identified below shall be designated as a Special Event Area to accommodate activities associated with the commemoration of Abraham Lincoln's life, on the 150th anniversary of his assassination and death.

2. Beginning Tuesday, April 14, 2015 and concluding Wednesday April 15, 2015, from 7:30 p.m. to 8:00 a.m., Tenth Street, N.W. between E and F Streets, N.W. shall be identified as a public space area.

3. That block of 10th Street, N.W., shall be closed to vehicular traffic, beginning just south of the Atlantic Building from 7:30 p.m. to 8:00 a.m.

4. The designated area and the ceremonies shall be operated and overseen by the Ford's Theatre Society, in conjunction with the Mayor's Special Events Task Group chaired by Chris Geldart, the Director of the D.C. Homeland Security Emergency Management Agency (HSEMA).

5. This Order is authorization for the use of the designated street and curb lanes only, and the Ford's Theatre Society shall secure and maintain all other licenses and permits applicable to the activities associated with the operation of the Candlelight Vigil. All building, health, life, safety, ADA and use of public space requirements shall remain applicable to the Special Event Area designated by this Order.

6. **EFFECTIVE DATE**: This Order shall become effective immediately.

MURIEL E. BOWSER
MAYOR

ATTEST:
LAUREN C. VAUGHAN
ACTING SECRETARY OF THE DISTRICT OF COLUMBIA

GOVERNMENT OF THE DISTRICT OF COLUMBIA

ADMINISTRATIVE ISSUANCE SYSTEM

Mayor's Order 2015-099
March 26, 2015

SUBJECT: Appointments – Concealed Pistol Licensing Review Board

ORIGINATING AGENCY: Office of the Mayor

By virtue of the authority vested in me as Mayor of the District of Columbia pursuant to section 422(2) of the District of Columbia Home Rule Act, approved December 24, 1973, 87 Stat. 790, Pub. L. 93-198, D.C. Official Code § 1-204.22(2) (2014 Repl.), and in accordance with section 2 of the License to Carry a Pistol Second Emergency Amendment Act of 2014, effective January 6, 2015 (D.C. Act 20-0564; 62 DCR 866 (January 23, 2015)), it is hereby **ORDERED** that:

1. **DR. NICOLE R. JOHNSON** is appointed, as a member, as a mental health professional employed by the Department of Behavioral Health, to the Concealed Pistol Licensing Review Board (**"Board"**), for a term to end four years from the date a majority of the members are sworn in.

2. **ALICIA D. WASHINGTON** is appointed, as a member, as the designee of the Attorney General for the District of Columbia, to the Board, for a term to end four years from the date a majority of the members are sworn in.

3. **LAURA INGERSOLL** is appointed, as a member, as a former employee of the United States Attorney's Office for the District of Columbia, the United States Attorney having declined to provide a representative, to the Board, for a term to end four years from the date a majority of the members are sworn in.

4. **GARY L. ABRECHT** is appointed, as a member, as a former sworn officer of a law enforcement agency other than the Metropolitan Police Department, to the Board, for a term to end four years from the date a majority of the members are sworn in.

5. **DR. CLAYTON LAWRENCE** is appointed, as a public member, as a mental health professional, to the Board, for a term to end four years from the date a majority of the members are sworn in.

6. **PIA CARUSONE** is appointed, as a public member, as a District resident with experience in the operation, care, and handling of firearms, to the Board, for a term to end four years from the date a majority of the members are sworn in.

7. **ZACH STEWART** is appointed, as a public member, as a District resident with experience in the operation, care, and handling of firearms, to the Board, for a term to end four years from the date a majority of the members are sworn-in.

8. **APPOINTMENT OF CHAIRPERSON: ALICIA D. WASHINGTON** is appointed chairperson of the Board and shall serve in that capacity at the pleasure of the Mayor.

9. **RESCISSION:** Mayor's Order 2015-46, dated January 14, 2015, is hereby rescinded.

10. **EFFECTIVE DATE:** This Order shall become effective immediately.

MURIEL E. BOWSER
MAYOR

ATTEST:
LAUREN C. VAUGHAN
ACTING SECRETARY OF THE DISTRICT OF COLUMBIA

GOVERNMENT OF THE DISTRICT OF COLUMBIA

ADMINISTRATIVE ISSUANCE SYSTEM

Mayor's Order 2015-100
March 26, 2015

SUBJECT: Appointments – Washington, DC Convention and Tourism Corporation (operating as Destination DC)

ORIGINATING AGENCY: Office of the Mayor

By virtue of the authority vested in me as Mayor of the District of Columbia by section 422(2) of the District of Columbia Home Rule Act of 1973, as amended, 87 Stat. 790, Pub. L. No. 93- 198, D.C. Official Code § 1-204.22(2) (2014), and pursuant to Article IV, Section 4.1(a)(vii) of the Amended and Restated Bylaws of Destination DC, as amended June 26, 2008, it is hereby ORDERED that:

1. **JESSICA WASSERMAN** is appointed as a member of the Board of Directors of Destination DC, serving as the mayoral appointee, for a term to end March 26, 2018.

2. **EFFECTIVE DATE:** This Order shall become effective immediately.

MURIEL BOWSER
MAYOR

ATTEST:
LAUREN C. VAUGHAN
ACTING SECRETARY OF THE DISTRICT OF COLUMBIA

GOVERNMENT OF THE DISTRICT OF COLUMBIA

ADMINISTRATIVE ISSUANCE SYSTEM

Mayor's Order 2015-101
March 26, 2015

SUBJECT: Appointment – Director, Department of Health

ORIGINATING AGENCY: Office of the Mayor

By virtue of the authority vested in me as Mayor of the District of Columbia by section 422(2) of the District of Columbia Home Rule Act, approved December 24, 1973, 87 Stat. 790, Pub. L. 93-198, D.C. Official Code § 1-204.22(2) (2014 Repl.), and in accordance with section 2 of the Confirmation Act of 1978, effective March 3, 1979, D.C. Law 2-142, D.C. Official Code § 1-523.01 (2014 Repl.), and pursuant to the Director of the Department of Health LaQuandra Nesbitt Confirmation Resolution of 2015, effective March 17, 2015, Res. 21-0056, it is hereby **ORDERED** that:

1. **DR. LAQUANDRA NESBITT** is appointed Director, Department of Health, and shall serve in that capacity at the pleasure of the Mayor.

2. This Order supersedes Mayor's Order 2015-022, dated January 8, 2015.

3. **EFFECTIVE DATE:** This Order shall be effective *nunc pro tunc* to March 17, 2015.

MURIEL E. BOWSER
MAYOR

ATTEST:
LAUREN C. VAUGHAN
ACTING SECRETARY OF THE DISTRICT OF COLUMBIA

GOVERNMENT OF THE DISTRICT OF COLUMBIA

ADMINISTRATIVE ISSUANCE SYSTEM

Mayor's Order 2015-102
March 26, 2015

SUBJECT: Appointment – Director, Department of Human Services

ORIGINATING AGENCY: Office of the Mayor

By virtue of the authority vested in me as Mayor of the District of Columbia by section 422(2) of the District of Columbia Home Rule Act, approved December 24, 1973, 87 Stat. 790, Pub. L. 93-198, D.C. Official Code § 1-204.22(2) (2014 Repl.), and in accordance with section 2 of the Confirmation Act of 1978, effective March 3, 1979, D.C. Law 2-142, D.C. Official Code § 1-523.01 (2014 Repl.), and pursuant to the Director of the Department of Human Services Laura G. Zeilinger Confirmation Resolution of 2015, effective March 17, 2015, Res. 21-0057, it is hereby **ORDERED** that:

1. **LAURA G. ZEILINGER** is appointed Director, Department of Human Services, and shall serve in that capacity at the pleasure of the Mayor.

2. This Order supersedes Mayor's Order 2015-050, dated January 29, 2015.

3. **EFFECTIVE DATE:** This Order shall be effective *nunc pro tunc* to March 17, 2015.

MURIEL E. BOWSER
MAYOR

ATTEST:
LAUREN C. VAUGHAN
ACTING SECRETARY OF THE DISTRICT OF COLUMBIA

GOVERNMENT OF THE DISTRICT OF COLUMBIA

ADMINISTRATIVE ISSUANCE SYSTEM

Mayor's Order 2015-103
March 26, 2015

SUBJECT: Appointment – Director, District Department of the Environment

ORIGINATING AGENCY: Office of the Mayor

By virtue of the authority vested in me as Mayor of the District of Columbia by section 422(2) and (11) of the District of Columbia Home Rule Act, approved December 24, 1973, 87 Stat. 790, Pub. L. 93-198, D.C. Official Code §§ 1-204.22(2) and (11) (2014 Repl.), and by section 104 of the District Department of the Environment Establishment Act of 2005, effective February 15, 2006, D.C. Law 16-51, D.C. Official Code § 8-151.04 (2013 Repl.), and in accordance with section 2 of the Confirmation Act of 1978, effective March 3, 1979, D.C. Law 2-142, D.C. Official Code § 1-523.01 (2014 Repl.), and pursuant to the Director of the District Department of the Environment Tommy Wells Confirmation Resolution of 2015, effective March 17, 2015, Res. 21-0052, it is hereby **ORDERED** that:

1. **TOMMY WELLS** is appointed Director, District Department of the Environment, and shall serve in that capacity at the pleasure of the Mayor.

2. This Order supersedes Mayor's Order 2015-010, dated January 2, 2015.

3. **EFFECTIVE DATE**: This Order shall be effective *nunc pro tunc* to March 17, 2015.

MURIEL E. BOWSER
MAYOR

ATTEST:
LAUREN C. VAUGHAN
ACTING SECRETARY OF THE DISTRICT OF COLUMBIA

GOVERNMENT OF THE DISTRICT OF COLUMBIA

ADMINISTRATIVE ISSUANCE SYSTEM

Mayor's Order 2015-104
March 26, 2015

SUBJECT: Appointment – Director, District Department of Transportation

ORIGINATING AGENCY: Office of the Mayor

By virtue of the authority vested in me as Mayor of the District of Columbia by section 422(2) of the District of Columbia Home Rule Act, approved December 24, 1973, 87 Stat. 790, Pub. L. 93-198, D.C. Official Code § 1-204.22(2) (2014 Repl.), and by section 3(a) of the Department of Transportation Establishment Act of 2002, effective May 21, 2002, D.C. Law 14-137, D.C. Official Code § 50-921.02(a) (2014 Repl.), and in accordance with section 2 of the Confirmation Act of 1978, effective March 3, 1979, D.C. Law 2-142, D.C. Official Code § 1-523.01 (2014 Repl.), and pursuant to the Director of the District Department of Transportation Leif Dormsjo Confirmation Resolution of 2015, effective March 17, 2015, Res. 21-0053, it is hereby **ORDERED** that:

1. **LEIF A. DORMSJO** is appointed Director, District Department of Transportation, and shall serve in that capacity at the pleasure of the Mayor.

2. This Order supersedes Mayor's Order 2015-011, dated January 2, 2015.

3. **EFFECTIVE DATE:** This Order shall be effective *nunc pro tunc* to March 17, 2015.

MURIEL E. BOWSER
MAYOR

ATTEST:
LAUREN C. VAUGHAN
ACTING SECRETARY OF THE DISTRICT OF COLUMBIA

GOVERNMENT OF THE DISTRICT OF COLUMBIA

ADMINISTRATIVE ISSUANCE SYSTEM

Mayor's Order 2015-105
March 27, 2015

SUBJECT: Appointment – Acting State Superintendent of Education

ORIGINATING AGENCY: Office of the Mayor

By virtue of the authority vested in me as Mayor of the District of Columbia pursuant to section 422(2) of the District of Columbia Home Rule Act, approved December 24, 1973, 87 Stat. 790, Pub. L. 93-198, D.C. Official Code § 1-204.22(2) (2014 Repl.), and in accordance with section 2 of the State Education Office Establishment Act of 2000, effective October 21, 2000, D.C. Law 13-176, D.C. Official Code § 38-2601(b) (2014 Supp.), it is hereby **ORDERED** that:

1. **HANSEUL KANG** is appointed Acting State Superintendent of Education, Office of the State Superintendent of Education, and shall serve in that capacity at the pleasure of the Mayor.

2. This Order supersedes Mayor's Order 2015-076, dated February 10, 2015.

3. **EFFECTIVE DATE:** This Order shall be effective *nunc pro tunc* to March 23, 2015.

MURIEL E. BOWSER
MAYOR

ATTEST:
LAUREN C. VAUGHAN
ACTING SECRETARY OF THE DISTRICT OF COLUMBIA

GOVERNMENT OF THE DISTRICT OF COLUMBIA

ADMINISTRATIVE ISSUANCE SYSTEM

Mayor's Order 2015-106
March 27, 2015

SUBJECT: Reappointment – Commission on Judicial Disabilities and Tenure

ORIGINATING AGENCY: Office of the Mayor

By virtue of the authority vested in me as Mayor of the District of Columbia by section 422(2) of the District of Columbia Home Rule Act, approved December 24, 1973, 87 Stat. 790, Pub. L. 93-198, D.C. Official Code § 1-204.22(2) (2014 Repl.), and in accordance with section 433 of the District of Columbia Home Rule Act, approved December 24, 1973, 87 Stat. 795, Pub. L. 93-198, D.C. Official Code § 1 204.31(d)(1) (2014 Repl.), and to effectively implement the District of Columbia Commission on Judicial Disabilities and Tenure, re-established pursuant to D.C. Official Code § 1-204.31(d) *et seq.*, it is hereby **ORDERED** that:

1. **THE HONORABLE WILLIAM P. LIGHTFOOT** is reappointed pursuant to § 1-204.31(e)(3)(C) (lawyer) as a member of the District of Columbia Commission on Judicial Disabilities and Tenure for a term to end February 24, 2020. He is a longstanding resident of the District and fulfills the qualifications required by the statute.

2. This Order supersedes Mayor's Order 2008-48, dated March 28, 2008.

3. **EFFECTIVE DATE:** This Order shall become effective *nunc pro tunc* to February 24, 2015.

MURIEL E. BOWSER
MAYOR

ATTEST:
LAUREN C. VAUGHAN
ACTING SECRETARY OF THE DISTRICT OF COLUMBIA

GOVERNMENT OF THE DISTRICT OF COLUMBIA

ADMINISTRATIVE ISSUANCE SYSTEM

Mayor's Order 2015-107
March 27, 2015

SUBJECT: Appointments — District of Columbia Police Officers Standards and Training Board

ORIGINATING AGENCY: Office of the Mayor

By virtue of the authority vested in me as Mayor of the District of Columbia by section 422(2) of the District of Columbia Home Rule Act, approved December 24, 1973, 87 Stat. 790, Pub. L. 93-198, D.C. Official Code § 1-204.22(2) (2014 Repl.), and in accordance with sections 204(b) and 204(h) of the Metropolitan Police Department Application, Appointment and Training Requirements Act of 2000, effective October 4, 2000, D.C. Law 13-160, D.C. Official Code §§ 5-107.03(b) and 5-107.03(h) (2001.), it is hereby **ORDERED** that:

1. **KEVIN DONAHUE** is appointed as a member, as the Mayor's designee, of the District of Columbia Police Officers Standards and Training Board (hereinafter referred to as **"Board"**), replacing Paul Quander, for a term to end September 17, 2015.

2. **PATRICK BURKE** is appointed as a member of the Board, representing the Metropolitan Police Department, replacing Cathy Lanier, for a term to end September 17, 2015.

3. **KEVIN DONAHUE** is appointed Chairperson of the Board and shall serve in that capacity at the pleasure of the Mayor.

4. This Order supersedes Mayor's Order 2013-076, dated April 19, 2013.

5. **EFFECTIVE DATE:** This Order shall become effective immediately.

MURIEL E. BOWSER
MAYOR

ATTEST:
LAUREN C. VAUGHAN
ACTING SECRETARY OF THE DISTRICT OF COLUMBIA

GOVERNMENT OF THE DISTRICT OF COLUMBIA

ADMINISTRATIVE ISSUANCE SYSTEM

Mayor's Order 2015-108
March 27, 2015

SUBJECT: Appointment— District of Columbia Police Officers Standards and Training Board

ORIGINATING AGENCY: Office of the Mayor

By virtue of the authority vested in me as Mayor of the District of Columbia by section 422(2) of the District of Columbia Home Rule Act, approved December 24, 1973, 87 Stat. 790, Pub. L. 93-198, D.C. Official Code § 1-204.22(2) (2014 Repl.), and in accordance with section 204(b) of the Metropolitan Police Department Application, Appointment and Training Requirements Act of 2000, effective October 4, 2000, D.C. Law 13-160, D.C. Official Code § 5-107.03(b) (2012 Repl.), it is hereby **ORDERED** that:

1. **ANDREW MCCABE** is appointed as a member of the Police Officers Standards and Training Board, as the designee of the Assistant Director in Charge, Washington Field Office, Federal Bureau of Investigation, replacing James McJunkin, for the unexpired portion of a three-year term to end September 17, 2015.

2. This Order supersedes Section I.5 of Mayor's Order 2012-145, dated September 17, 2012.

3. **EFFECTIVE DATE:** This Order shall become effective immediately.

MURIEL E. BOWSER
MAYOR

ATTEST:
LAUREN C. VAUGHAN
ACTING SECRETARY OF THE DISTRICT OF COLUMBIA

GOVERNMENT OF THE DISTRICT OF COLUMBIA

ADMINISTRATIVE ISSUANCE SYSTEM

Mayor's Order 2015-109
March 31, 2015

SUBJECT: Travel Ban to the State of Indiana

ORIGINATING AGENCY: Office of the Mayor

By virtue of the authority vested in me as Mayor of the District of Columbia pursuant to section 422(11) of the District of Columbia Home Rule Act, approved December 24, 1973, 87 Stat. 790, Pub. L. 93-198, D.C. Official Code § 1-204.22(11) (2014 Repl.), it is hereby **ORDERED** that:

I. PURPOSE:

WHEREAS the state of Indiana recently enacted a law entitled "The Religious Freedom Restoration Act" to allow businesses to discriminate against lesbian, gay, bisexual and transgender persons in public accommodations;

WHEREAS the courts and legislatures long ago recognized that the refusal to permit the use of public accommodations by minorities was a substantial burden on interstate commerce; and

WHEREAS the laws and public policies of the District of Columbia should support our values of inclusiveness and respect for all.

II. PROHIBITION:

To ensure a consistent voice in policy and practice in the District of Columbia in favor of equal treatment for members of the lesbian, gay, bisexual and transgender community, no officer or employee of the District of Columbia is authorized to approve any official travel to Indiana until such time that the Religious Freedom Restoration Act is permanently enjoined, repealed or clarified to forbid any construction that would deny public accommodations to persons based on their sexuality or gender identity.

III. **EFFECTIVE DATE:** This Order shall become effective immediately.

MURIEL E. BOWSER
MAYOR

ATTEST:

LAUREN C. VAUGHAN
ACTING SECRETARY OF THE DISTRICT OF COLUMBIA

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ALCOHOLIC BEVERAGE CONTROL BOARD

NOTICE OF PUBLIC HEARINGS
CALENDAR

WEDNESDAY, APRIL 8, 2015
2000 14TH STREET, N.W., SUITE 400S
WASHINGTON, D.C. 20009

Ruthanne Miller, Chairperson
Members: Nick Alberti, Donald Brooks, Herman Jones
Mike Silverstein, Hector Rodriguez, James Short

Protest Hearing (Status) **9:30 AM**
Case # 15-PRO-00005, H2, LLC, t/a Satellite Room, 2047 9th Street NW
License #87296, Retailer CR, ANC 1B
Substantial Change (24-Hour Operation & Increase in Summer Garden Hours)

Show Cause Hearing (Status) **9:30 AM**
Case # 14-CMP-00543, Haile G. Bainosai, t/a Selam Restaurant, 1524 U Street NW, License #60080, Retailer CR, ANC 2B
No ABC Manager on Duty

Show Cause Hearing (Status) **9:30 AM**
Case # 14-CMP-00708; Vap H Street, LLC, t/a Vapiano, 623 H Street NW
License #76727, Retailer CR, ANC 2C
Failed to Take Steps Necessary to Ensure Property is Free of Litter, No ABC Manager on Duty

Show Cause Hearing (Status) **9:30 AM**
Case # 14-CMP-00700, 1606 K, LLC, t/a Fuel Pizza & Wings, 1606 K Street NW, License #88452, Retailer CR, ANC 2B
Failed to Take Steps Necessary to Ensure that Cooking Grease is Properly Disposed

Board's Calendar
April 8, 2015

Show Cause Hearing (Status) **9:30 AM**
Case # 14-AUD-00122, Adams Morgan Spaghetti Garden, Inc., t/a Spaghetti Garden, Brass Monkey, Peyote, Roxanne, 2317 18th Street NW, License #10284 Retailer CR, ANC 1C
Failed to Maintain Books and Records (three counts), Failed to Qualify as a Restaurant

Show Cause Hearing (Status) **9:30 AM**
Case # 14-CMP-00709, S & K Corporation, t/a 11th & M Corner Market 1133 11th Street NW, License #86606, Retailer B, ANC 2F
Failed to Maintain Books and Records (two counts)

Show Cause Hearing (Status)
Case # 14-AUD-00099, Thirteenth Step, LLC, t/a Kitty O' Sheas DC, 4624 Wisconsin Ave NW, License #90464, Retailer CR, ANC 3E **9:30 AM**
Failed to File Quarterly Statements (2nd Quarter 2014)

Show Cause Hearing (Status) **9:30 AM**
Case # 14-AUD-00069; Thirteenth Step, LLC, t/a Kitty O' Sheas DC, 4624 Wisconsin Ave NW, License #90464, Retailer CR, ANC 3E
Failed to File Quarterly Statements (1st Quarter 2014)

Show Cause Hearing*
Case # 14-CMP-00462, Hak, LLC, t/a Midtown, 1219 Connecticut Ave NW **10:00 AM**
License #72087, Retailer CN , ANC 2B
Failed to Take Steps Necessary to Ensure Property is Free of Litter, Violation of Settlement Agreement

Show Cause Hearing* **10:00 AM**
Case # 14-CMP-00460; A And A, LLC, t/a Georgia Line Convenience Store 5125 Georgia Ave NW, License #91196, Retailer B, ANC 4D
Operating After Hours, Violation of Settlement Agreement

Show Cause Hearing* **11:00 AM**
Case # 14-AUD-00061; HML Rose, Inc., t/a Lindy's Bon Appetit, 2040 I Street NW, License #23533, Retailer CR, ANC 2A
Failed to File Quarterly Statements (1st Quarter 2014)

Show Cause Hearing* **11:00 AM**
Case # 14-CC-00094, McCormick & Schmick Restaurant Corp., t/a McCormick & Schmick Seafood Restaurant, 1652 K Street NW, License #26432, Retailer CR, ANC 2B
Sale to Minor Violation

Board's Calendar
April 8, 2015

BOARD RECESS AT 12:00 PM
ADMINISTRATIVE AGENDA
1:00 PM

Protest Hearing* **1:30 PM**
Case # 15-PRO-00002, Darnell Perkins & Associates, LLC, t/a Darnell's
944 Florida Ave NW, License #95113, Retailer CT, ANC 1B
Application to Renew the License

Protest Hearing* **4:30 PM**
Case # 15-PRO-00004, S & R Brothers, Inc., t/a S & R Liquors, 1015 18th Street NW, License #97252, Retailer A, ANC 2B, Application for a New License
This hearing is cancelled due to the approval of a Settlement Agreement on March 25, 2015.
*The Board will hold a closed meeting for purposes of deliberating these hearings pursuant to D.C. Offical Code §2-574(b)(13).

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ALCOHOLIC BEVERAGE CONTROL BOARD

NOTICE OF MEETING
CANCELLATION AGENDA

WEDNESDAY, APRIL 8, 2015
2000 14TH STREET, N.W., SUITE 400S, WASHINGTON, D.C. 20009

The Board will be cancelling the following license for the reason outlined below:

ABRA-084857– **Brother's Liquors** – Retail – A – Liquor Store - 1140 FLORIDA AVENUE NE
[Licensee is closing their business and is no longer in need of license and has requested Cancellation of the license.]

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ALCOHOLIC BEVERAGE CONTROL BOARD

NOTICE OF MEETING
INVESTIGATIVE AGENDA

WEDNESDAY, APRIL 8, 2015
2000 14TH STREET, N.W., SUITE 400S, WASHINGTON, D.C. 20009

On April 8, 2015 at 4:00 pm, the Alcoholic Beverage Control Board will hold a closed meeting regarding the matters identified below. In accordance with Section 405(b) of the Open Meetings Amendment Act of 2010, the meeting will be closed "to plan, discuss, or hear reports concerning ongoing or planned investigations of alleged criminal or civil misconduct or violations of law or regulations."

1. Case#15-AUD-00033 Hank's Oyster Bar, 1622 - 1624 Q ST NW Retailer C Restaurant, License#: ABRA-071913

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2. Case#15-AUD-00034 Gordon Biersch Brewery Restaurant, 900 F ST NW B Retailer C Restaurant, License#:ABRA-060326

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3. Case#15-CMP-00071(a) T & T Associates, 5123 GEORGIA AVE NW Retailer C Club, License#: ABRA-017426

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4. Case#15-CMP-00136 Panda Gourmet, 2700 NEW YORK AVE NE Retailer C Restaurant, License#: ABRA-086961

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5. Case#15-CMP-00058 Fuel Pizza & Wings, 1606 K ST NW Retailer C Restaurant, License#: ABRA-088452

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6. Case#15-AUD-00035 Doner Bistro, 1654 COLUMBIA RD NW Retailer D Restaurant, License#: ABRA-089877

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7. Case#15-251-00056 Flash, 645 FLORIDA AVE NW Retailer C Tavern, License#: ABRA-090823

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ALCOHOLIC BEVERAGE CONTROL BOARD

NOTICE OF MEETING
LEGAL AGENDA

WEDNESDAY, APRIL 8, 2015 AT 1:00 PM
2000 14th STREET, N.W., SUITE 400S, WASHINGTON, D.C. 20009

1. Review of the Primary American Source of Supply Amendment Proposal, dated February 26, 2015, submitted by Paul Pascal, Esq. on behalf of the District of Columbia Association of Beverage Alcohol Wholesalers.

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2. Review of Recommendation of Amendment of Procedural Regulations under Title 23, Municipal Regulations, dated March 25, 2015, submitted by Chairperson Ronald Austin on behalf of ANC 4B.

*** In accordance with D.C. Official Code §2-574(b) Open Meetings Act, this portion of the meeting will be closed for deliberation and to consult with an attorney to obtain legal advice. The Board's vote will be held in an open session, and the public is permitted to attend.**

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ALCOHOLIC BEVERAGE CONTROL BOARD

NOTICE OF MEETING
LICENSING AGENDA

WEDNESDAY, APRIL 8, 2015 AT 1:00 PM
2000 14th STREET, N.W., SUITE 400S, WASHINGTON, D.C. 20009

1. Review Application for Safekeeping of License – Original Request. ANC 1C. SMD 1C06. No outstanding fines/citations. No outstanding violations. No pending enforcement matters. Settlement Agreement. ***Chief Ike's Mambo Room,*** 1725 Columbia Road NW, Retailer CT, License No. 017940.

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2. Review Application for Safekeeping of License – Original Request. ANC 1A. SMD 1A09. No outstanding fines/citations. No outstanding violations. No pending enforcement matters. Settlement Agreement. ***Mothership,*** 3301 Georgia Avenue NW, Retailer CR, License No. 091237.

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3. Review Application for Safekeeping of License – Original Request. ANC 5D. SMD 5D06. No outstanding fines/citations. No outstanding violations. No pending enforcement matters. No Settlement Agreement. ***Staples Beer & Wine Grocery,*** 1364 Florida Avenue NE, Retailer-Grocery B, License No. 096294.

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4. Review Request for Change of Hours. ***Approved Hours of Operation and Alcoholic Beverage Sales and Consumption:*** Sunday 9am to 9pm, Monday-Thursday 9am to 10pm, Friday-Saturday 9am to 12am. ***Proposed Hours of Operation and Alcoholic Beverage Sales and Consumption:*** Sunday-Saturday 9am to 12am. ANC 5E. SMD 5E10. No outstanding fines/citations. No outstanding violations. No pending enforcement matters. No conflict with Settlement Agreement. ***Sosnick's Liquor***, 2318 4th Street NE, Retailer A Liquor Store, License No. 072301.

***In accordance with D.C. Official Code §2-574(b) of the Open Meetings Amendment Act, this portion of the meeting will be closed for deliberation and to consult with an attorney to obtain legal advice. The Board's vote will be held in an open session, and the public is permitted to attend.**

CAPITAL CITY PUBLIC CHARTER SCHOOL

REQUEST FOR PROPOSALS

Owner's Representative Services

CCPCS invites interested and qualified vendors to submit proposals to provide owner's representative services for the renovation of an existing theater, including installation of a new HVAC system, catwalk, flooring, stage and risers, as well as the re-use of existing seating and adjacent office space. Design would begin in May 2015 with construction to begin June 2016. Proposals are due no later than 5 PM April 15, 2015. The RFP, bid requirements and supporting documents can be obtained by contacting Jonathan Weinstein at jweinstein@ccpcs.org.

CAPITAL CITY PUBLIC CHARTER SCHOOL

REQUEST FOR PROPOSALS

Design-Build Services

Capital City PCS – RFP Design-build services theater renovation, HVAC installation, catwalk, flooring, stage & risers, reuse of seating & office space. Design begins May 2015, construction begins June 2016. Proposals due 5 PM April 15, 2015. RFP obtained by contacting jweinstein@ccpcs.org.

CARLOS ROSARIO PUBLIC CHARTER SCHOOL

REQUEST FOR PROPOSALS

RESOURCE ROOM RENOVATION: The Carlos Rosario PCS is seeking quotes to renovate 2 resource rooms approx. 1000 sq. ft. to include electrical, heating/AC, lighting. Contact Randy Asbury via email rasbury@carlosrosario.org for floor plans and/or questions. All bids are due by COB April 10th.

REQUEST FOR QUOTE

STATE-OF-THE-ART INTERACTIVE FLAT PANELS: for Carlos Rosario PCS is an adult education public charter school operating in the District of Columbia. CRIPCS is interested in the purchase and installation of state-of-the-art interactive flat panels (IFPs) for its Harvard campus classrooms and selected offices. The total number of IFPs purchased will not exceed 35 and should be delivered and installed as a turnkey product with all of the necessary components to facilitate effective classroom instruction. Responses are required by 5pm, Friday, April 17, 2015. For a full copy of the RFQ please contact Gwen Ellis, Business Manager at 202-797-4700 or gellis@carlosrosario.org Subject: Interactive RFQ

DISTRICT OF COLUMBIA PUBLIC SCHOOLS

NOTIFICATION OF PROPOSED NEW SCHOOL NAME

The District of Columbia Public Schools ("DCPS") hereby gives notice of a proposed change to the name of the former River Terrace Elementary School, located at 420 34th St NE, Washington, DC, 20019. DCPS is consolidating Mamie D. Lee School and Sharpe Health School into a new, modernized campus at the former River Terrace Elementary School, which is slated to open in the fall of 2015 and serve as a model educational environment for students with profound disabilities. Effective May 2, 2015, the school will be named **River Terrace Education Campus**.

To generate a name for the new building, DCPS engaged students and staff from both school communities and residents of the River Terrace neighborhood. The name **River Terrace Education Campus** was chosen because several entities included the words "River Terrace." Others noted that "Education Campus" signifies the new school will serve students between the ages of 8 and 21 across multiple grade levels. Maintaining a component of the old name will also honor the landscape and history of the area and mirror many of the natural, water-themed design elements employed in the new building.

Pending a comment period of 30 days, the name will go into effect May 2, 2015. For further information and/or to submit public commentary, please contact Sarah Scherer, DCPS Office of Specialized Instruction at sarah.scherer@dc.gov or at 202.907.8184.

GOVERNMENT OF THE DISTRICT OF COLUMBIA

OFFICE OF DISABILITY RIGHTS/DEVELOPMENTAL DISABILITIES COUNCIL

NOTICE OF PUBLIC MEETINGS

D.C. Developmental Disabilities Council to Hold Quarterly Meetings

The meetings will be held at:

District of Columbia
City-Wide Conference Center
441 4th Street, NW
Conference Room # 1117 South
★★Meeting held on Wednesday instead of Thursday

The meetings will be held from 3-5 pm on the following dates:

Thursday, May 21, 2015;

Thursday, August 20, 2015;

★★Wednesday, November 18, 2015.

Individuals who wish to attend these meetings are welcome and should call 202-724-8612 seven (7) business days prior to the meeting date to ensure the meeting has not been cancelled or rescheduled.

If you require reasonable accommodations for attendance, please contact Mat McCollough on 202-727-6744 or by email: mat.mccollough@dc.gov seven (7) business days before the public meeting to ensure appropriate accommodations.

DISTRICT OF COLUMBIA
BOARD OF ELECTIONS AND ETHICS

Certification of Filling a Vacancy
In Advisory Neighborhood Commissions

Pursuant to D.C. Official Code §1-309.06(d)(6)(G) and the resolution transmitted to the District of Columbia Board of Elections "Board" from the affected Advisory Neighborhood Commission, the Board hereby certifies that the vacancy has been filled in the following single-member district by the individual listed below:

Barbara Rogers
Single-Member District 4B08

DISTRICT DEPARTMENT OF THE ENVIRONMENT

FISCAL YEAR 2015

PUBLIC NOTICE

Notice is hereby given that, pursuant to 40 C.F.R. Part 51.161, D.C. Official Code §2-505, and 20 DCMR §210, the Air Quality Division (AQD) of the District Department of the Environment (DDOE), located at 1200 First Street NE, 5th Floor, Washington, DC, intends to issue an air quality permit amendment (#6647-A1) to Gallaudet University to construct and operate one (1) 42.00 MMBtu per hour dual fuel (natural gas and No. 2 fuel oil) fired boiler (burner model number LNICM11A-GO-30) at Gallaudet University, Central Utilities Building, located at 800 Florida Avenue NE, in Washington, 20002. The contact person for the facility is Amon Brown, Interim Director, Maintenance and Operations, Gallaudet University, at (202) 651-5007. The facility's mailing address is 800 Florida Avenue NE, Washington, DC 20002.

Emissions:

Maximum emissions from the unit operating 24 hours per day for 365 days per year burning natural gas are expected to be as follows:

	Maximum Annual Emissions
Pollutant	**(tons/yr)**
Particulate Matter (PM) (Total)	0.885
Sulfur Dioxide (SO_2)	0.231
Nitrogen Oxides (NOx)	5.344
Volatile Organic Compounds (VOC)	4.599
Carbon Monoxide (CO)	6.807

Alternatively, although use of No. 2 fuel oil is severely limited to periods of gas supply emergencies, periods of gas curtailment, and periodic testing, as a worst case estimate, assuming that the No. 2 fuel oil were the only fuel used, maximum annual emissions (24 hours per day, 365 days per year) would be as follows:

	Maximum Annual Emissions
Pollutant	**(tons/yr)**
Particulate Matter (PM) (Total)	2.631
Sulfur Dioxide (SO_2)	0.231
Nitrogen Oxides (NOx)	22.075
Volatile Organic Compounds (VOC)	6.990
Carbon Monoxide (CO)	6.807

This proposed permit will amend and replace a permit issued earlier for this unit that incorrectly identified the size of the unit and therefore had a potential to emit calculation indicating that emissions would not exceed levels approximately 25% below those reported above.

The proposed overall emission limits for the equipment are as follows:

a. The 42.00 million BTU per hour dual fuel–fired boiler (identified as Boiler #2) shall not emit pollutants in excess of those specified in the following table [20 DCMR 201]:

Pollutant	Short-Term Limit (Natural Gas) (lb/hr)	Short-Term Limit (No. 2 Fuel Oil) (lb/hr)
Carbon Monoxide (CO)	1.55	1.55
Oxides of Nitrogen (NO_x)	1.22	5.04
Total Particulate Matter (PM Total)*	0.20	0.60
Volatile Organic Compounds (VOC)	1.05	1.60
Sulfur Dioxide (SO_2)	0.02	0.07

*PM Total includes both filterable and condensable fractions.

b. Visible emissions shall not be emitted into the outdoor atmosphere from the boiler, except that discharges not exceeding forty percent (40%) opacity (unaveraged) shall be permitted for two (2) minutes in any sixty (60) minute period and for an aggregate of twelve (12) minutes in any twenty-four hour (24 hr.) period during start-up, cleaning, adjustment of combustion controls, or malfunction of the equipment [20 DCMR 606.1]

c. In addition to complying with Condition (b), the Permittee shall not discharge from the unit any emissions that exhibit greater than 20 percent opacity (6-minute average), except for one 6-minute period per hour of not more than 27 percent opacity. [40 CFR 60.43c(c)]

d. An emission into the atmosphere of odorous or other air pollutants from any source in any quantity and of any characteristic, and duration which is, or is likely to be injurious to the public health or welfare, or which interferes with the reasonable enjoyment of life or property is prohibited. [20 DCMR 903.1]

e. Total suspended particulate matter (TSP) emissions from the boiler shall not exceed 0.07 pounds per million BTU. [20 DCMR 600.1]

f. Emissions shall not exceed those achieved with the performance of annual combustion adjustments on the boiler. To show compliance with this condition, the Permittee shall, each calendar year, perform adjustments of the combustion processes of the boiler with the following characteristics [20 DCMR 805.8(a) and (b)]:

    1. Inspection, adjustment, cleaning or replacement of fuel burning equipment, including the burners and moving parts necessary for proper operation as specified by the manufacturer;

2. Inspection of the flame pattern or characteristics and adjustments necessary to minimize total emissions of NO_x and, to the extent practicable, minimize emissions of CO;

3. Inspection of the air-to-fuel ratio control system and adjustments necessary to ensure proper calibration and operation as specified by the manufacturer; and

4. Adjustments shall be made such that the maximum emission rate for any contaminant does not exceed the maximum allowable emission rate as set forth in this section.

The permit application and supporting documentation, along with the draft permit are available for public inspection at AQD and copies may be made available between the hours of 8:15 A.M. and 4:45 P.M. Monday through Friday. Interested parties wishing to view these documents should provide their names, addresses, telephone numbers and affiliation, if any, to Stephen S. Ours at (202) 535-1747.

Interested persons may submit written comments or may request a hearing on this subject within 30 days of publication of this notice. The written comments must also include the person's name, telephone number, affiliation, if any, mailing address and a statement outlining the air quality issues in dispute and any facts underscoring those air quality issues. All relevant comments will be considered in issuing the final permit.

Comments on the proposed permit and any request for a public hearing should be addressed to:

Stephen S. Ours
Chief, Permitting Branch
Air Quality Division
District Department of the Environment
1200 First Street NE, 5th Floor
Washington, DC 20002
Stephen.Ours@dc.gov

No written comments or hearing requests postmarked after May 4, 2015 will be accepted.

For more information, please contact Stephen S. Ours at (202) 535-1747.

DISTRICT DEPARTMENT OF THE ENVIRONMENT

FISCAL YEAR 2015

PUBLIC NOTICE

Notice is hereby given that, pursuant to 40 C.F.R. Part 51.161, D.C. Official Code §2-505, and 20 DCMR §210, the Air Quality Division (AQD) of the District Department of the Environment (DDOE), located at 1200 First Street NE, 5th Floor, Washington, DC, intends to issue an air quality permit amendment (#6648-A1) to Gallaudet University to construct and operate one (1) 12.60 MMBtu per hour dual fuel (natural gas and No. 2 fuel oil) fired boiler (burner model number LNICM9A-GO-30) at the Gallaudet University Central Utilities Building, located at 800 Florida Avenue NE, Washington, DC, 20002. The contact person for the facility is Amon Brown, Interim Director, Maintenance and Operations, Gallaudet University, at (202) 651-5007. The facility's mailing address is 800 Florida Avenue NE, Washington, DC 20002.

Emissions:

Maximum emissions from the unit operating 24 hours per day for 365 days per year burning natural gas are expected to be as follows:

	Maximum Annual Emissions
Pollutant	**(tons/yr)**
Particulate Matter (PM) (Total)	0.265
Sulfur Dioxide (SO_2)	0.028
Nitrogen Oxides (NOx)	1.600
Volatile Organic Compounds (VOC)	1.379
Carbon Monoxide (CO)	2.042

Alternatively, although use of No. 2 fuel oil is severely limited to periods of gas supply emergencies, periods of gas curtailment, and periodic testing, as a worst case estimate, assuming that the No. 2 fuel oil were the only fuel used, maximum annual emissions (24 hours per day, 365 days per year) would be as follows:

	Maximum Annual Emissions
Pollutant	**(tons/yr)**
Particulate Matter (PM) (Total)	0.789
Sulfur Dioxide (SO_2)	0.087
Nitrogen Oxides (NOx)	6.623
Volatile Organic Compounds (VOC)	2.097
Carbon Monoxide (CO)	2.042

This proposed permit will amend and replace a permit issued earlier for this unit that incorrectly identified the size of the unit and therefore had a potential to emit calculation indicating that emissions would not exceed levels approximately 25% below those reported above.

The proposed overall emission limits for the equipment are as follows:

a. The 12.60 million BTU per hour dual fuel–fired boiler (identified as Boiler #3) shall not emit pollutants in excess of those specified in the following table [20 DCMR 201]:

Pollutant	Short-Term Limit (Natural Gas) (lb/hr)	Short-Term Limit (No. 2 Fuel oil) (lb/hr)
Carbon Monoxide (CO)	0.446	0.446
Oxides of Nitrogen (NO_x)	0.365	1.512
Total Particulate Matter (PM Total)*	0.060	0.180
Volatile Organic Compounds (VOC)	0.315	0.479
Sulfur Dioxide (SO_2)	0.006	0.019

*PM Total includes both filterable and condensable fractions.

b. Visible emissions shall not be emitted into the outdoor atmosphere from the boiler, except that discharges not exceeding forty percent (40%) opacity (unaveraged) shall be permitted for two (2) minutes in any sixty (60) minute period and for an aggregate of twelve (12) minutes in any twenty-four hour (24 hr.) period during start-up, cleaning, adjustment of combustion controls, or malfunction of the equipment [20 DCMR 606.1]

c. An emission into the atmosphere of odorous or other air pollutants from any source in any quantity and of any characteristic, and duration which is, or is likely to be injurious to the public health or welfare, or which interferes with the reasonable enjoyment of life or property is prohibited. [20 DCMR 903.1]

d. Total suspended particulate matter (TSP) emissions from the boiler shall not exceed 0.0962 pound per million BTU. [20 DCMR 600.1]

e. Emissions shall not exceed those achieved with the performance of annual combustion adjustments on the boiler. To show compliance with this condition, the Permittee shall, each calendar year, perform adjustments of the combustion processes of the boiler with the following characteristics [20 DCMR 805.8(a) and (b)]:

1. Inspection, adjustment, cleaning or replacement of fuel burning equipment, including the burners and moving parts necessary for proper operation as specified by the manufacturer;

2. Inspection of the flame pattern or characteristics and adjustments necessary to minimize total emissions of NO_x and, to the extent practicable, minimize emissions of CO;

3. Inspection of the air-to-fuel ratio control system and adjustments necessary to ensure proper calibration and operation as specified by the manufacturer; and

4. Adjustments shall be made such that the maximum emission rate for any contaminant does not exceed the maximum allowable emission rate as set forth in this section.

The permit application and supporting documentation, along with the draft permit are available for public inspection at AQD and copies may be made available between the hours of 8:15 A.M. and 4:45 P.M. Monday through Friday. Interested parties wishing to view these documents should provide their names, addresses, telephone numbers and affiliation, if any, to Stephen S. Ours at (202) 535-1747.

Interested persons may submit written comments or may request a hearing on this subject within 30 days of publication of this notice. The written comments must also include the person's name, telephone number, affiliation, if any, mailing address and a statement outlining the air quality issues in dispute and any facts underscoring those air quality issues. All relevant comments will be considered in issuing the final permit.

Comments on the proposed permit and any request for a public hearing should be addressed to:

Stephen S. Ours
Chief, Permitting Branch
Air Quality Division
District Department of the Environment
1200 First Street NE, 5th Floor
Washington, DC 20002
Stephen.Ours@dc.gov

No written comments or hearing requests postmarked after May 4, 2015 will be accepted.

For more information, please contact Stephen S. Ours at (202) 535-1747.

DISTRICT DEPARTMENT OF THE ENVIRONMENT

FISCAL YEAR 2015

PUBLIC NOTICE

Notice is hereby given that, pursuant to 40 C.F.R. Part 51.161, and D.C. Official Code §2-505, the Air Quality Division (AQD) of the District Department of the Environment (DDOE), located at 1200 First Street NE, 5th Floor, Washington, DC, intends to issue air quality permit #6913 to Comcast of the District, LLC (the Permittee) to construct and operate a 250 kWe Cummins DQDAA Serial # L130610223 emergency generator set with a 464 HP diesel-fired engine at the property located at 900 Michigan Avenue, NE, Washington. The contact person for the facility is Tiffanie Hall, Sr. Manager, Business Operations, at (410) 729-8023.

The proposed emission limits are as follows:

a. Emissions shall not exceed those found in the following table, as measured according to the procedures set forth in 40 CFR 89, Subpart E. [40 CFR 60.4205(b), 40 CFR 60.4202(a)(2) and 40 CFR 89.112(a)]

Pollutant Emission Limits (g/kW-hr)		
NOx	CO	PM
4.0	3.5	0.2

b. Visible emissions shall not be emitted into the outdoor atmosphere from the generator, except that discharges not exceeding forty percent (40%) opacity (unaveraged) shall be permitted for two (2) minutes in any sixty (60) minute period and for an aggregate of twelve (12) minutes in any twenty-four hour (24 hr.) period during start-up, cleaning, adjustment of combustion controls, or malfunction of the equipment [20 DCMR 606.1]

c. In addition to Condition II(b), exhaust opacity, measured and calculated as set forth in 40 CFR 86, Subpart 1, shall not exceed [40 CFR 60.4205(b), 40 CFR 60.4202(a), and 40 CFR 89.113]:

   1. 20 percent during the acceleration mode;

   2. 15 percent during the lugging mode;

   3 40 percent during the peaks in either the acceleration or lugging modes. *Note that this condition is streamlined with the requirements of 20 DCMR 606.1.*

d. An emission into the atmosphere of odorous or other air pollutants from any source in any quantity and of any characteristic, and duration which is, or is likely to be injurious to the public health or welfare, or which interferes with the reasonable enjoyment of life or property is prohibited. [20 DCMR 903.1]

The estimated emissions from the emergency generator set are as follows:

Pollutant	**Maximum Annual Emissions (tons/yr)**
Carbon Monoxide (CO)	0.66
Oxides of Nitrogen (NO_x)	0.77
Total Particulate Matter (PM Total)	0.04
Oxides of Sulfur (SOx)	0.24
Volatile Organic Compounds (VOCs)	0.77

The application to operate the emergency generator and the draft permit and supporting documents are available for public inspection at AQD and copies may be made available between the hours of 8:15 A.M. and 4:45 P.M. Monday through Friday. Interested parties wishing to view these documents should provide their names, addresses, telephone numbers and affiliation, if any, to Stephen S. Ours at (202) 535-1747.

Interested persons may submit written comments or may request a hearing on this subject within 30 days of publication of this notice. The written comments must also include the person's name, telephone number, affiliation, if any, mailing address and a statement outlining the air quality issues in dispute and any facts underscoring those air quality issues. All relevant comments will be considered in issuing the final permit.

Comments on the proposed permit and any request for a public hearing should be addressed to:

Stephen S. Ours
Chief, Permitting Branch
Air Quality Division
District Department of the Environment
1200 First Street NE, 5th Floor
Washington, DC 20002
Stephen.Ours@dc.gov

No written comments or hearing requests postmarked after May 4, 2015 will be accepted.

For more information, please contact Stephen S. Ours at (202) 535-1747.

DISTRICT DEPARTMENT OF THE ENVIRONMENT

FISCAL YEAR 2015

PUBLIC NOTICE

Notice is hereby given that, pursuant to 40 C.F.R. Part 51.161, and D.C. Official Code §2-505, the Air Quality Division (AQD) of the District Department of the Environment (DDOE), located at 1200 First Street NE, 5th Floor, Washington, DC, intends to issue air quality permit #6914 to Comcast of the District, LLC (the Permittee) to construct and operate a 250 kW Cummins DQDAA Serial # L130610224 emergency generator set with a 464 HP diesel-fired engine at the property located at 900 Michigan Avenue NE, Washington, DC. The contact person for the facility is Tiffanie Hall, Sr. Manager, Business Operations at (410) 729-8023.

The proposed emission limits are as follows:

a. Emissions shall not exceed those found in the following table, as measured according to the procedures set forth in 40 CFR 89, Subpart E. [40 CFR 60.4205(b), 40 CFR 60.4202(a)(2) and 40 CFR 89.112(a)]

Pollutant Emission Limits (g/kW-hr)		
NOx	CO	PM
4.0	3.5	0.20

b. Visible emissions shall not be emitted into the outdoor atmosphere from the generator, except that discharges not exceeding forty percent (40%) opacity (unaveraged) shall be permitted for two (2) minutes in any sixty (60) minute period and for an aggregate of twelve (12) minutes in any twenty-four hour (24 hr.) period during start-up, cleaning, adjustment of combustion controls, or malfunction of the equipment [20 DCMR 606.1]

c. In addition to Condition II(b), exhaust opacity, measured and calculated as set forth in 40 CFR 86, Subpart 1, shall not exceed [40 CFR 60.4205(b), 40 CFR 60.4202(a), and 40 CFR 89.113]:

   1. 20 percent during the acceleration mode;

   2. 15 percent during the lugging mode;

   3 40 percent during the peaks in either the acceleration or lugging modes. *Note that this condition is streamlined with the requirements of 20 DCMR 606.1.*

d. An emission into the atmosphere of odorous or other air pollutants from any source in any quantity and of any characteristic, and duration which is, or is likely to be injurious to the public health or welfare, or which interferes with the reasonable enjoyment of life or property is prohibited. [20 DCMR 903.1]

The estimated emissions from the emergency generator set are as follows:

Pollutant	**Maximum Annual Emissions (tons/yr)**
Carbon Monoxide (CO)	0.66
Oxides of Nitrogen (NO_x)	0.77
Total Particulate Matter (PM Total)	0.04
Oxides of Sulfur (SOx)	0.24
Volatile Organic Compounds (VOCs)	0.77

The application to operate the emergency generator and the draft permit and supporting documents are available for public inspection at AQD and copies may be made available between the hours of 8:15 A.M. and 4:45 P.M. Monday through Friday. Interested parties wishing to view these documents should provide their names, addresses, telephone numbers and affiliation, if any, to Stephen S. Ours at (202) 535-1747.

Interested persons may submit written comments or may request a hearing on this subject within 30 days of publication of this notice. The written comments must also include the person's name, telephone number, affiliation, if any, mailing address and a statement outlining the air quality issues in dispute and any facts underscoring those air quality issues. All relevant comments will be considered in issuing the final permit.

Comments on the proposed permit and any request for a public hearing should be addressed to:

Stephen S. Ours
Chief, Permitting Branch
Air Quality Division
District Department of the Environment
1200 First Street NE, 5th Floor
Washington, DC 20002
Stephen.Ours@dc.gov

No written comments or hearing requests postmarked after May 4, 2015 will be accepted.

For more information, please contact Stephen S. Ours at (202) 535-1747.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY

Office of Government Ethics

BEGA – Advisory Opinion – 1202-003 - Guidance for PCSB Member Regarding a Possible Conflict of Interest with a Former Employer

VIA EMAIL TO:

March 23, 2015

Ms. Barbara Nophlin
Board Member
D.C. Public Charter School Board
nophlinb@gmail.com

Dear Ms. Nophlin:

This responds to your request for advice dated March 1, 2015, concerning:

1. Whether a conflict of interest is created by your consulting contract with Friendship Public Charter Schools ("FPCS"), one of the public charter school operators that the D.C. Public Charter School Board ("PCSB") oversees, and whether recusal from any discussion, contemplation, or vote on any matter involving FPCS will suffice to cure any existing conflict of interest; and

2. Whether a conflict of interest exists concerning your relationship with Paul Public Charter School ("PPCS"), one of the Public Charter Schools that the PCSB oversees, and whether recusal from any discussion, contemplation, or vote on any matter involving PPCS will suffice to cure any existing conflict of interest.

Based upon information you provide in a related email, dated March 1, 2015, I conclude that although a financial conflict of interest exists regarding your consulting contract with FPCS, your consulting contract with FPCS is permissible as long as you fully recuse yourself from any and all FPCS matters that come before the PCSB. Additionally, I conclude that a financial conflict of interest does not exist concerning your relationship with PPCS, and you may participate in matters involving PPCS without recusal, though I urge recusal from the PPCS matter, as a best practice.

As background, you are a holdover member of the D.C. Public Charter School Board ("PCSB"), having been nominated and confirmed by the D.C. Council in 2013 to fill a vacancy. That term expired on February 24, 2015. You are hopeful that you will be nominated for another term in March 2015.

Per your first question, I first examine your employment status with the District and with FPCS. You are currently a Board Member of the PCSB, therefore, you are an employee of the District of Columbia.[1] You are also currently under contract with FPCS to provide consulting services. This consulting contract expires no later than July 1, 2017 and is in an amount not to exceed $65,000 per year.

The Ethics Act's Conflict of Interest provision states that, "no employee shall use his or her official position or title, or personally and substantially participate, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter, or attempt to influence the outcome of a particular matter, in a manner that the employee knows is likely to have a direct and predictable effect on the employee's financial interests or the financial interests of a person closely affiliated with the employee."[2]

Because you are serving as a contractor for FPCS, one of the Public Charter Schools that the PCSB oversees, actions you take as a PCSB Member regarding FPCS may have a direct and predictable effect on your financial interests. Therefore, a financial conflict of interest does exist. That said, you should recuse yourself from discussion, contemplation, or vote – indeed, any and all participation – with regard to FPCS matters that come before the PCSB, so that the financial conflict of interest may be remedied.

Per your second question, I again examine your employment status with the District and with PPCS. You are the former Head of School of PPCS. However, you retired from that position, and all employment with PPCS, on June 30, 2009. Otherwise, you have no financial connections to this charter operator. Therefore, because a financial conflict of interest does not exist, recusal is not necessary. That said, because you have close personal friendships with current PPCS employees, you must be aware of the appearance created by these close personal friendships.

The District Personnel Manual ("DPM") prohibits employees from taking actions that create the appearance that they are violating the law or ethical standards.[3] Because of this appearance prohibition and your close personal friendships with current PPCS employees, I urge you, as a best practice, to fully recuse yourself from PPCS matters. If your close personal friendships create, for a reasonable person, even the appearance that you have lost impartiality, the mere appearance could be a Code of Conduct violation.

In sum, I conclude that a financial conflict of interest exists due to your consulting contract with FPCS and your position with the PCSB, but I recommend full recusal as an appropriate remedy.

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[1] D.C. Official Code § 1-1161.01(18) defines an "Employee" as "unless otherwise apparent from the context, a person who performs a function of the District government and who receives compensation for the performance of such services, or a member of a District government board or commission, whether or not for compensation," and 6B DCMR § 1899.1 defines an "Employee/Government Employee" as "an individual who performs a function of the District government and who receives compensation for the performance of such services (D.C. Official Code § 1-603.01(7)), or a member of a District government board or commission, with or without compensation (D.C. Official Code § 1-602.02(3))…".

[2] D.C. Official Code § 1-1162.23(a).

[3] 6B DCMR § 1800.3(n).

Additionally, I recommend that, as a best practice, you recuse yourself from PPCS matters to avoid creating even the appearance of an ethical violation.

Please be advised that this advice is provided to you pursuant to section 219 of the Ethics Act (D.C. Official Code § 1-1162.19), which empowers me to provide such guidance. As a result, no enforcement action for violation of the District's Code of Conduct may be taken against you in this context, provided that you (and others for you) have made full and accurate disclosure of all relevant circumstances and information in seeking this advisory opinion.

You also are advised that the Ethics Act requires this opinion to be published in the *D.C. Register* within 30 days of its issuance, but that your identity will not be disclosed unless you consent to such disclosure in writing. We encourage individuals to so consent in the interest of greater government transparency. Please, then, let me know your wishes about disclosure.

Please let me know if you have any questions or wish to discuss this matter further. I may be reached at 202-481-3411, or by email at darrin.sobin@dc.gov.

Sincerely,

_____/s/_____
DARRIN P. SOBIN
Director of Government Ethics
Board of Ethics and Government Accountability

#1202-003

DEPARTMENT OF HEALTH

PUBLIC NOTICE

The District of Columbia Board of Respiratory Care ("Board") hereby gives notice of a change in its regular meeting, pursuant to § 405 of the District of Columbia Health Occupation Revision Act of 1985, effective March 25, 1986 (D.C. Law 6-99; D.C. Official Code § 3-1204.05 (b)) (2012 Repl.).

The Board's next regular meeting will held on Monday, April 13, 2015 from 9:00 AM to 12:00 PM. The meeting will be open to the public from 9:00 AM until 10:3 0 AM to discuss various agenda items and any comments and/or concerns from the public. In accordance with Section 405(b) of the Open Meetings Amendment Act of 2010, D.C. Official Code § 2-574(b) (2012 Repl.), the meeting will be closed from 10:00 AM to 12:00 PM to plan, discuss, or hear reports concerning licensing issues, ongoing or planned investigations of practice complaints, and or violations of law or regulations.

After the April meeting, the Board will change the frequency of its meeting from once per month to once every two (2) months. Accordingly, the Board's meeting schedule for the remainder of 2015 will be as follows:

June 8, 2015
August 10, 2015
October 5, 2015 (date moved up due to Columbus Day holiday on October 12, 2015
December 14, 2015

The meeting will be held at 899 North Capitol Street, NE, Second Floor, Washington, DC 20002. Visit the Health Professional Licensing Administration website at http://doh.dc.gov/events and to view additional information and agenda.

DEPARTMENT OF HEALTH

PUBLIC NOTICE

The District of Columbia Board of Veterinary Examiners ("Board") hereby gives notice of a change in its regular meeting, pursuant to § 405 of the District of Columbia Health Occupation Revision Act of 1985, D.C. Official Code § 3-1204.05 (b)) (2012 Repl.).

Due to the government closure in observance of the District of Columbia Emancipation on Thursday, April 16, 2015, the Board's regular meeting will be rescheduled to Thursday, April 30, 2015 from 9:30 AM – 12:30 PM. The meeting will be open to the public from 9:30 AM until 10:30 AM to discuss various agenda items and any comments and/or concerns from the public. In accordance with Section 405(b) of the Open Meetings Amendment Act of 2010, D.C. Official Code § 2-574(b) (2012 Repl.), the meeting will be closed from 10:30 AM to 12:30 PM to plan, discuss, or hear reports concerning licensing issues, ongoing or planned investigations of practice complaints, and or violations of law or regulations.

The meeting will be held at 899 North Capitol Street, NE, Second Floor, Washington, DC 20002. Visit the Health Professional Licensing Administration website at www.hpla.doh.dc.gov/ and select Agency Calendars and Board Agendas to view the agenda.

DISTRICT OF COLUMBIA GOVERNMENT
DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT

HOUSING PRODUCTION TRUST FUND ADVISORY BOARD

NOTICE OF APRIL REGULAR MEETING

The Housing Production Trust Fund (HPTF) Advisory Board announces its next Meeting on **Monday, April 6, 2015, from 10:00 A.M. to 12:00 Noon,** at the D.C. Department of Housing and Community Development, Housing Resource Center, 1800 Martin Luther King Jr., Avenue, SE, Washington, DC 20020. See below the Draft Agenda for the April meeting.

For additional information, please contact Oke Anyaegbunam, HPTF Manager, via e-mail at Oke.Anyaegbunam@dc.gov or by telephone at 202-442-7200.

MEETING AGENDA

1. Call to Order & Establish Quorum: David Bowers, Chairman.
2. Consider and Approval of the February 2, 2015 Meeting Highlights.
3. Presentation: NOFA/RFP Recommendations from HPTF Advisory Board
4. Discussion: Interagency Council on Homelessness 5 Year Plan to End Homelessness in the District of Columbia
5. Discussion: Collaboration Among District Housing Agencies
6. New Business.
7. Public Comments.
8. Announcements.
9. Adjournment.

IDEA PUBLIC CHARTER SCHOOL

NOTICE: FOR PROPOSALS FOR SCHOOL IMPROVEMENT SERVICES

IDEA Public Charter School seeks proposals for school improvement services. Bids are due C.O.B. on Friday, April 17, 2015.

Please go to www.ideapcs.org/requests-for-proposals for the full RFP.

MARY MCLEOD BETHUNE
PUBLIC CHARTER SCHOOL

REQUEST FOR PROPOSALS

JANITORIAL SERVICES: Mary McLeod Bethune PCS is advertising the opportunity to bid on Janitorial services at the school for the 2014-2015 school year with a possible extension of (2) one-year renewals. All services must meet at a minimum, but are not restricted to, the custodial services contract. Additional specifications outlined in the Request for Proposals (RFP) such as, days of service, etc. may be obtained beginning on April 3, 2015 from **Don Cole at 202-459-4710 or d.cole@mmbethune.org**

Bids will be accepted at the above address on April 27, 2015 no later than 2:30 P.M.

All bids not addressing all areas as outlined in the (RFP) will not be considered.

HVAC 2 PIPE FAN COIL UNITS: Mary McLeod Bethune PCS is advertising the opportunity to bid on 2 pipe fan coil units s at the school for the 2014-2015 school year. All services must meet at a minimum, but are not restricted to, the units described in the RFP. The Request for Proposals (RFP) may be obtained beginning on April 3, 2015 from **Don Cole at 202-459-4710 or d.cole@mmbethune.org**

Bids will be accepted at the above address on April 27, 2015 no later than 2:30 P.M.

All bids not addressing all areas as outlined in the (RFP) will not be considered.

MUNDO VERDE PUBLIC CHARTER SCHOOL

REQUEST FOR PROPOSALS

Food Service Management Services

Mundo Verde Bilingual Public Charter School is advertising the opportunity to bid on the delivery of breakfast, lunch, snack and/or CACFP supper meals to children enrolled at the school for the 2014-2015 school year with a possible extension of (4) one year renewals. All meals must meet at a minimum, but are not restricted to, the USDA National School Breakfast, Lunch, Afterschool Snack and At Risk Supper meal pattern requirements. Additional specifications outlined in the Request for Proposals (RFP) such as; student data, days of service, meal quality, etc. may be obtained beginning on Friday, April 3, 2015 from Natalie Gori at 202-750-7060 and ngori@mundoverdepcs.org.

Proposals will be accepted at 30 P St NW, Washington DC 20001 on Thursday, April 30, 2015 no later than 4pm.

All bids not addressing all areas as outlined in the RFP will not be considered.

PERRY STREET PREP PUBLIC CHARTER SCHOOL

REQUEST FOR PROPOSALS

Health Insurance Vendor

The Perry Street Prep Public Charter School in accordance with section 2204(c) of the District of Columbia School Reform Act of 1995 solicits proposals for a broker that will help identify a vendor offering health insurance benefits to Perry Street employees.

Please visit http://www.pspdc.org/bids for a full RFP.

Respondents should specify in their proposal and contract drafts whether the services they are proposing are only for a single year or will include a renewal option.

Proposals shall be received no later than 5:00 P.M. **Friday April, 17, 2015.**

OFFICE OF THE SECRETARY OF THE DISTRICT OF COLUMBIA

RECOMMEND FOR APPOINTMENTS OF NOTARIES PUBLIC

Notice is hereby given that the following named persons have been recommended for appointment as Notaries Public in and for the District of Columbia, effective on or after May 1, 2015.

Comments on these potential appointments should be submitted, in writing, to the Office of Notary Commissions and Authentications, 441 4th Street, NW, Suite 810 South, Washington, D.C. 20001 within seven (7) days of the publication of this notice in the *D.C. Register* on April 3, 2015. Additional copies of this list are available at the above address or the website of the Office of the Secretary at www.os.dc.gov.

D.C. Office of the Secretary **Effective: May 1, 2015**
Recommended for appointments as a DC Notaries Public **Page 2**

Alvarado	Sue Ellen	Nossaman LLP 1666 K Street, NW, Suite 500	20006
Anderson	Cecelia	Department of Health and Human Services 330 C Street, SW, Suite 2013	20260
Arias	Erika	Mi Oficina Express 3443 14th Street, NW, Suite 1B	20010
Baker	Vicki S.	Curtin Law Roberson Dunigan & Salans, PC 1900 M Street, NW, Room #600	20036
Barton	Yvonne	Folger Shakespeare Library 201 East Capitol Street, SE	20024
Benton	Miko	Education Association FCU 1201 16th Street, NW, Apartment B-2	20036
Bowen	Jo Ann	Difede Ramsdell Bender PLLC 900 Seventh Street, NW, Suite 810	20001
Boxley	Traneda T.	Federal Contractors Inc. 623 Underwood Street, NW	20012
Bradford	Carl	Self (Dual) 1848 Valley Terrace, SE	20032
Bryant	Corie	1 Enterprise LLC 1402 North Capitol Street, NW	20002
Bulger	James	Office of the Secretary, Office of Notary Commissions and Authentications 441 4th Street, NW, Suite 810 South	20001
Fauntroy	Kathryn Callwood	Adduci, Mastriani & Schaumberg, LLP 1133 Connecticut Avenue, NW, 12th Floor	20036
Capers	Lillian J.	DTZ Americas, Inc. 2101 L Street, NW, Suite 700	20007
Carlton	Andrew Richard	Cava Messa Grill, LLC 1614 14th Street, NW, 2nd Floor	20009

D.C. Office of the Secretary **Effective: May 1, 2015**
Recommended for appointments as a DC Notaries Public **Page 3**

Carmin	John Rhett Jude	American Society of Civil Engineers (ASCE) 101 Constitution Avenue, NW, Suite 375 East	20001
Carnahan	Terri L.	BuckleySandler LLP 1250 24th Street, NW	20037
Carrington	Tyrone R.	George Washington University 2025 F Street, NW	20052
Carter	Jennifer L.	New System Demolition & Excavation, Inc. 3127 Martin Luther King, Jr., Avenue, SE, Suite 200	20032
Cheatham	Carla R.	Hollingsworth LLP 1350 I Street, NW	20005
Chiapetta	Christina O.	Champion Title and Settlements, Inc. 1050 Connecticut Avenue, NW, 10th Floor	20036
Coumarbarbatch	Elmira Evans	Fannie Mae 4000 Wisconsin Avenue, NW, Mailstop 8H-407	20016
Crider	Giles	PNC Bank 1405 P Street, NW	20005
Desormeaux	Shirl L.	Department of Commerce Federal Credit Union PO Box 14720	20044
Douglas	Laurence	TD Bank 905 Rhode Island Avenue, NE	20018
Fassell	Ashley M.	Raffa Wealth Management 1899 L Street, NW, Suite 900	20036
Flowers	Larry Edwards	Ace-Federal Reports Inc. 1625 I Street, NW, Suite 790	20006
Freedman	Sandra L.	Goodwin Proctor LLP 901 New York Avenue, NW	20001
Fribush	Susan	Overseas Private Investment Corporation 1100 New York Avenue, NW	20527

D.C. Office of the Secretary **Effective: May 1, 2015**
Recommended for appointments as a DC Notaries Public **Page 4**

Ganeshan	Linda	Washington REIT 1775 Eye Street, NW, Suite 1000	20006
Garcia	Franklin	Self (Dual) 2218 Newton Street, NE	20018
Girmay	Pawlos	Self 3205 15th Street, NE	20017
Gold	Judi	Self (Dual) 1901 Ingleside Terrace, NW, Apartment 201	20010
Goldman	Judith R.	Greenstein Delorme & Luchs, PC 1620 L Street, NW, Suite 900	20036
Gordon	Lindsey	Roderick Owens Law PLLC 1050 30th Street, NW	20007
Greely	Pamela L.	BuckleySandler LLP 1250 24th Street, NW, Suite 700	20037
Grimes	Olivia A.	Pepco 701 9th Street, NW	20001
Hawkins	Maureen	The NHPF Foundation 1090 Vermont Avenue, NW, Suite 400	20005
Humphrey	Sarah J.	Self (Dual) 1507 Pennsylvania Avenue, SE	20003
Interiano	Jose	Bank of America, N.A. 3131 Mount Pleasant Street, NW	20010
Jackson	Tisha S.	McGlinchy Stafford 1455 Pennsylvania Avenue, Suite 400	20004
Jacobs	Harvey S	Jacobs & Associates Attorneys At Law LLC-Ameritite, Inc. 5100 Wisconsin Avenue, NW, Suite 520	20016
Jeffries	Sharon D.	Self 4710 Hampshire Avenue, NW	20011

D.C. Office of the Secretary **Effective: May 1, 2015**
Recommended for appointments as a DC Notaries Public **Page 5**

Jenifer	Angelo	Bank of America 1001 Pennsylvania Avenue, NW	20004
Jetmund	Jack	Self 1515 15th Street, NW, #702	20005
Jones	Glorine R.	Self 1505 Tubman Road, SE	20020
Kalimon	Catherine O.	Eyman Associates, PC 810 First Street, NE, Suite 210	20002
Kim	Jenny	Koch Companies Public Sector, Inc. 600 14th Street, NW, Suite 800	20005
Klinger	Walter E.	Calvin Cafritz Enterprises 1828 L Street, NW, Suite 703	20036
Lang	Cheryl V.	The Washington Post 1150 15th Street, NW	20071
Lasso	Ricardo A.	Lasso and Lasso 4530 Wisconsin Avenue, NW, Suite 220	20016
Lathon	Darlene	Katten Muchin Rosenman LLP 2900 K Street, NW, Suite 200	20007
Long	Bernedia	The Executive Office of the Mayor 1350 Pennsylvania Avenue, NW	20004
Lyles	Meegan Rae	Sidley Austin LLP 1501 K Street, NW, Suite 600	20005
Maloney	Jennifer C.	Fannie Mae 3900 Connecticut Avenue, NW	20016
Manning	Lisa	Schertlet & Onorato, LLP 575 7th Street, NW, Suite 300 South	20004
Mason	Annette J.	Office of and Retirement Services 441 4th Street, NW, Suite 400 South	20001
Matthew	Monique	Northridge Capital, LLC 1101 30th Street, NW, Suite 150	20007

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Recommended for appointments as a DC Notaries Public **Page 6**

McGale	Shirley S. M.	PNC Bank 833 7th Street, NW	20001
McGrigg	Cynthia S.	Securities and Exchange Commission 100 F Street, NE	20549
McLean	Ann Trisha	Willkie Farr & Gallagher LLP 1875 K Street, NW, Suite 100	20006
Miller	Bonnie K.	Eleven Hundred Connecticut Avenue Associates, LLC 1100 Connecticut Avenue, NW, Suite 720	20036
Mitchell	Patricia Ellis	Columbia Enterprises 1018 7th Street, SE	20003
Mysliwski	Patricia H.	Rini O'Neil, PC 1200 New Hampshire Avenue, NW, Suite 600	20036
O'Connor	Margaret	The Travelers Companies, Inc. 700 13th Street, NW, Suite 1180	20005
Oliver	Katie	Kilpatrick Townsend & Stockton, LLP 607 14th Street, NW, Suite 900	20005
Pannell	Tammi P.	Source Office Suites 1300 Pennsylvania Avenue, NW, Suite 700	20004
Pineros	Manuel	Wells Fargo 1310 G Street, NW	20001
Reyes	Marisol	Wells Fargo Bank 3325 14th Street, NW	20010
Rhyne	Tyonna	Premium Title & Escrow, LLC 3407 14th Street, NW	20010
Ridley	Mary Lizzie	Self 745 Delaware Avenue, SW	20024
Robertson	Vanessa	Barnes & Thornberg LLP 1717 Pennsylvania Avenue, NW, Suite 500	20006

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Roots	Beth	Diversified Reporting Services, Inc. 1101 16th Street, NW, 2nd Floor	20036
Rosnick	Janice	Hogan Lovells US LLP 555 13th Street, NW	20004
Ross	Denise P.	Self 313 17th Street, NE	20002
Sebo	Cindy L.	Esquire Deposition Services 1025 Vermont Avenue, NW, Suite 503	20005
Silverstein	Deborah	JBS, Inc 2418 Wisconsin Avenue, NW	20007
Sott	Benjamin	Premium Title & Escrow, LLC 3407 14th Street, NW	20010
Tate	Bernadette	Potomac Hospitality Services, Inc and Modus Hotels 4660 L Street, NW, Suite 600	20036
Thrasher	Annette B.	Venture Global LNG, Inc. 2200 Pennsylvania Avenue, NW, #600 West	20037
Troiani	Matthew L.	Stewart Title 1730 Rhode Island Avenue, NW, Suite 610	20036
Trower	Sonya	Consumer Financial Protection Bureau 1625 I Street, NW	20006
Vest	Ayanna Nikiah	Barnes & Thornberg LLP 1717 Pennsylvania Avenue, NW, Suite 500	20006
Villamizar	Carlos E.	Roca Services 1701 Pennsylvania Avenue, NW, Suite 300	20006
Vormstein-Fox	Clayton	Self 2907 Tilden Street, NW	20008

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Walle	Fazier	Planet Depos, L.L.C. 1100 Connecticut Avenue, NW	20036
Washington	Brittney	Miriam's Kitchen 2401 Virginia Avenue, NW	20037
Webster	Nicole D.	Metropolitan Police Department #6 DC Village Lane, SW, Building 1B	20032
Wells	LaWonne	Self 1229 G Street, SE, #623	20003
Wesson	Florine M.	Department of Housing and Urban Development 451 7th Street, NW, Room 6164	20410
Williams	Hermione R.	Hollingsworth LLP 1350 I Street, NW	20005
Williams	Maurice T.	Protective Services Division 64 New York Avenue, NE, 5th Floor	20002
Wood	Alexander	One Eight Distilling, LLC 1135 Okie Street, NE	20002
Zurawski	Paulina M	Forest City 301 Water Street, SE, Suite 201	20003

SHINING STARS MONTESSORI ACADEMY PUBLIC CHARTER SCHOOL

REQUEST FOR PROPOSALS

Shining Stars Montessori Academy Public Charter School solicits expressions of interest in the form of proposals with references from qualified vendors, payment and fee schedule, and experience of key personnel for each of the services listed below:

1. HR/Operations Support – provide support to the school's operational and human resource and provide operational support

2. Accounting- general accounting and bookkeeping services

3. Office supplies

4. Montessori and Traditional Classroom Furniture and Equipment (PreK3 – 6-Elementary)

5. Language services- Spanish, French, Arabic

6. Communications/Social Media/Parent Engagement Planning

7. After-Care and Extended Learning Services

8. ELL service providers

Please e-mail proposals and supporting documents to staffops@shiningstarspcs.org, specifying the RFP service request type in the subject heading. Deadline for submissions is **12pm EST April 20, 2015**. No phone calls please.

SOMERSET PREPARATORY DC PUBLIC CHARTER SCHOOL

REQUEST FOR PROPOSALS

Technology Supplies Bid

Somerset DC Public Charter School is opening a bid for technology equipment. The vendor would supply 60 window laptops, and at least 10 Promethean or Smart Interactive Boards.

For more information please contact sspdc_bids@somersetprepdc.org.

Proposals must be submitted by **Friday, April 17, 2015** via email.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DC TAXICAB COMMISSION

NOTICE OF GENERAL COMMISSION MEETING

The District of Columbia Taxicab Commission will hold its regularly scheduled General Commission Meeting on Wednesday, April 8, 2015 at 10:00 am. The meeting will be held at our new office location: 2235 Shannon Place, SE, Washington, DC 20020, inside the Hearing Room, Suite 2023. Visitors to the building must show identification and pass through the metal detector. Allow ample time to find street parking or to use the pay-to-park lot adjacent to the building.

The final agenda will be posted no later than seven (7) days before the General Commission Meeting on the DCTC website at www.dctaxi.dc.gov.

Members of the public are invited to participate in the Public Comment Period. You may present a statement to the Commission on any issue of concern; the Commission generally does not answer questions. Statements are limited to five (5) minutes for registered speakers and two (2) minutes for non-registered speakers. To register, please call 202-645-6002 no later than 3:30 pm on April 7, 2015. Registered speakers will be called first, in the order of registration. A fifteen (15) minute period will then be provided for **all** non-registered speakers. **Registered speakers must provide ten (10) printed copies of their typewritten statements to the Secretary to the Commission no later than the time they are called to the podium.**

DRAFT AGENDA

I. Call to Order

II. Commission Communication

III. Commission Action Items

IV. Government Communications and Presentations

V. General Counsel's Report

VI. Staff Reports

VII. Public Comment Period

VIII. Adjournment

DISTRICT OF COLUMBIA
OFFICE OF THE TENANT ADVOCATE

NOTICE OF DISTRICT OF COLUMBIA TENANT BILL OF RIGHTS

The Tenant Bill of Rights Amendment Act of 2014, effective December 17, 2014 (D.C. Law 20-147; 62 DCR 1248 (January 30, 2015); D.C. Official Code §§ 42-3531.07(8) & 42-3502.22(b)(1)) requires the D.C. Office of Tenant Advocate (OTA) to publish a "D.C. Tenant Bill of Rights" to be updated periodically and noticed in the *D.C. Register*. Starting ninety (90) days following the publication date of this issue of the *D.C. Register*, the Act requires any housing provider in the District to provide any rental applicant with a copy of this document. The document must be provided upon the submission of an application to lease a residential rental unit. The document is available on the agency's website at www.ota.dc.gov and in hard-copy form at the OTA, located at 2000 14th Street, N.W., Suite 300N, Washington, DC 20009.

DISTRICT OF COLUMBIA OFFICE OF THE TENANT ADVOCATE

District of Columbia Tenant Bill of Rights

The Tenant Bill of Rights Amendment Act of 2014 , effective December 17, 2014 (D.C. Law 20-147; D.C. Official Code §§ 42-3531.07(8) & 42-3502.22(b)(1)) requires the D.C. Office of Tenant Advocate to publish a "D.C. Tenant Bill of Rights" to be updated periodically and noticed in the *D.C. Register*. This document is not exhaustive and is intended to provide tenants with an overview of the basic rights of tenancy in the District. Except for rent control, all these rights apply to every tenant in the District.

1. ***LEASE***: A written lease is *not* required to establish a tenancy. If there is one, the landlord must provide you with a copy of the lease and all addendums. The landlord must also provide you with copies of certain District housing regulations, including those for Landlord & Tenant relations. Certain lease clauses are prohibited, including waiver of landlord liability for failing to properly maintain the property. The landlord may not change the terms of your lease without your agreement. After the initial lease term expires, you have the right to continue your tenancy month-to-month indefinitely on the same terms, except for lawful rent increases. (14 DCMR §§ 101, 106 & 300-399)

2. ***SECURITY DEPOSIT*:** The amount of the security deposit may not exceed the amount of 1 month's rent. The landlord must place your security deposit in an interest-bearing account. The landlord must post notices stating where the security deposit is held and the prevailing interest rate. If there is a "move-out" inspection, the landlord must notify you of the date and time. Within 45 days after you vacate the apartment, the landlord must either return your security deposit with interest, or provide you with written notice that the security deposit will be used to defray legitimate expenses (which must be itemized within 30 more days). (14 DCMR §§ 308-311)

3. ***DISCLOSURE OF INFORMATION***: Upon receiving your application to lease an apartment, the landlord must disclose: (a) the applicable rent for the rental unit; (b) any pending petition that could affect the rent (if rent control applies); (c) any surcharges on the rent and the date they expire (if rent control applies); (d) the rent control or exempt status of the accommodation; (e) certain housing code violation reports; (f) the amount of any non-refundable application fee, security deposit, and interest rate; (g) any pending condo or coop conversion; (h) ownership and business license information; (i) either a 3-year history of "mold contamination" (as defined) in the unit and common areas, or proof of proper remediation; and (j) a copy of this D.C. Tenant Bill of Rights document. The landlord must make this information accessible to you throughout your tenancy. Upon a tenant's request once per year, the landlord must also disclose the amount of, and the basis for, each rent increase for the prior 3 years. (D.C. Official Code §§ 42-3502.22 & .13(d))

4. ***RECEIPTS FOR RENTAL PAYMENTS*:** The landlord must provide you with a receipt for any money paid, except where the payment is made by personal check *and* is in full satisfaction of all amounts due. The receipt must state the purpose and the date of the payment, as well as the amount of any money that remains due. (14 DCMR § 306)

5. ***RENT INCREASES*: "**Rent control" limits the amount and the frequency of rent increases. For units that are exempt from rent control, generally only the lease terms limit rent increases. If rent control applies, the landlord may not raise the rent: (a) unless the owner and manager are properly licensed and registered; (b) unless the unit and common areas substantially comply with the housing code; (c) more frequently than once every 12 months; (d) by more than the Consumer Price Index (CPI) for an elderly tenant (age 62 or over) or tenant with a disability, regardless of income, if registered with the Rent Administrator; (e) by more than the CPI + 2% for all other tenants. A rent increase larger than (d) or (e) requires government approval of a landlord petition, which tenants may challenge. You also may challenge a rent increase implemented within the prior 3 years.

6. ***BUILDING CONDITIONS*:** The landlord must ensure that your unit and all common areas are safe and sanitary as of the first day of your tenancy. This is known as the "*warranty of habitability*." The landlord must maintain your apartment and all common areas of the building in compliance with the housing code, including keeping the premises safe and secure and free of rodents and pests, keeping the structure and facilities of the building in good repair, and ensuring adequate heat, lighting, and ventilation. The tenant has the right to receive a copy of a notice of violation issued to the landlord (14 DCMR §§ 106; 301; & 400-999)

7. ***LEAD PAINT HAZARD***: For properties built prior to 1978, the landlord must (a) provide a prospective tenant household with a form issued by the District Department of the Environment about their rights under the D.C. lead laws; (b) provide a current lead-safe "clearance report" to (i) a prospective tenant household that includes a child less than 6 years of age or a pregnant woman, (ii) an in-place tenant household that gains such a person and requests the report in writing from the landlord, and (iii) any tenant household regularly visited by such a person; and (c) disclose to a tenant household what the landlord reasonably should know about the presence in the tenant's unit of a lead-based paint hazard or of lead-based paint, which is presumed to be present unless there is documentation showing otherwise. (20 DCMR §§ 3300 *et seq*.)

8. ***MOLD*:** Upon written notice from a tenant that mold or suspected mold exists in the unit or a common area, the landlord must inspect the premises within 7 days and remediate within 30 days. Mold assessment and remediation must be performed in compliance with District regulations. (D.C. Official Code § 8-241)

9. ***QUIET ENJOYMENT AND RETALIATION*:** The landlord may not unreasonably interfere with the tenant's comfort, safety or enjoyment of a rental unit, whether for the purpose of causing the housing accommodation to become vacant or otherwise (D.C. Official Code § 42-3402.10). The landlord may not retaliate against you for exercising any right of tenancy. Retaliation includes unlawfully seeking to recover possession of your unit, to increase the rent, to decrease services or increase your obligations; and also includes violating your privacy, harassing you, or refusing to honor your lease. (D.C. Official Code § 42-3505.02)

10. ***DISCRIMINATION***: The landlord may not engage in discriminatory acts based upon the actual or perceived: race, color, religion, national origin, sex, age, marital status, genetic information, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, disability, matriculation, political affiliation, source of income, status as a victim of an intra-family offense, or place of residence or business of any individual. Discriminatory acts include refusing to rent; renting on unfavorable terms, conditions, or privileges; creating a hostile living environment; and refusing to make reasonable accommodations to give a person an equal opportunity to use and enjoy the premises. (D.C. Official Code § 2-1401.01 *et seq*.)

11. ***RIGHT TO ORGANIZE*:** The landlord may not interfere with the right of tenants to organize a tenant association, convene meetings, distribute literature, post information, and provide building access to an outside tenant organizer. (D.C. Official Code § 42-3505.06)

12. ***SALE AND CONVERSION*:** Tenants must be given the opportunity to purchase an accommodation before the landlord sells or demolishes the accommodation or discontinues the housing use. The landlord may not convert the rental accommodation to a cooperative or condominium unless a majority of the tenants votes for the conversion in a tenant election certified by the District's Conversion and Sale Administrator. (D.C. Official Code §§ 42-3404.02 & 42-3402.02)

13. ***RELOCATION ASSISTANCE*:** If you are displaced by alterations or renovations, substantial rehabilitation, demolition, or the discontinuance of the housing use, you may have the right to receive relocation assistance from your landlord. (D.C. Official Code § 42-3507.01)

14. ***EVICTION*:** The landlord may evict you only for one of ten specific reasons set forth in Title V of the Rental Housing Act of 1985. For example, you may *not* be evicted just because your lease term expires, or because the rental property has been **sold** or **foreclosed** upon. Even if there is a valid basis to evict you, the landlord may not use "self-help" methods to do so, such as cutting off your utilities or changing the locks. Rather, the landlord must go through the judicial process. You generally must be given a written Notice to Vacate (an exception is non-payment of rent where you waive the right to notice in the lease); an opportunity to cure the lease violation, if that is the basis for the action; and an opportunity to challenge the landlord's claims in court. Finally, any eviction must be pursuant to a court order, and must be scheduled and supervised by the U.S. Marshal Service. (D.C. Official Code § 42-3505.01)

RESOURCES	
D.C. Dept. of Housing and Community Development 1800 Martin Luther King Avenue, SE Washington, DC 20020 **Phone:** (202) 442-9505 **Fax:** (202) 645-6727 **Website:** www.dhcd.dc.gov	D.C. Office of the Tenant Advocate 2000 14th Street, NW, Suite 300 North Washington, DC 20009 **Phone:** (202) 719-6560 **Fax**: (202) 719-6586 **Website:** www.ota.dc.gov
D.C. Dept. of Consumer and Regulatory Affairs 1100 4th Street, SW Washington, DC 20024 **Phone:** (202) 442-4400 **Fax:** (202) 442-9445 **Website:** www.dcra.dc.gov	District Dept. of the Environment 1200 First Street, NE Washington, DC 20002 **Phone:** (202) 535-2600 **Fax:** (202) 535-2881 **Website:** www.ddoe.dc.gov

I/We, _____, confirm that I/We have received a Tenant Bill of Rights and Responsibilities Form on (insert date): _____.

TWO RIVERS PUBLIC CHARTER SCHOOL

REQUEST FOR PROPOSALS

Digital Curator

Two Rivers Public Charter School invites all interested parties to submit proposals to provide curating services. The Curator will serve as the expert in conceptualizing and launching a video-sharing platform of core institutional practices. The complete RFP can be obtained by contacting Khizer Husain at procurement@tworiverspcs.org.

WASHINGTON YU YING PCS

REQUEST OF PROPOSALS

Classroom & Multipurpose Room Projectors

RFP for Classroom & Multipurpose Room Projectors
Washington Yu Ying PCS is seeking competitive bids from qualified vendors to purchase approximately 30-34 ceiling mounted or ultra-short throw projectors for our Primary school classrooms with possible options for installation. Additionally, we are seeking proposals for full purchase and installation of a mounted projector and retractable screen for our Multi-Purpose Room.

For full proposals please e-mail rfp@washingtonyuying.org.

Deadline for submissions is close of business April 20, 2015. Please e-mail proposals and supporting documents to rfp@washingtonyuying.org.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 18898 of Ingleside Presbyterian Retirement Community, pursuant to 11 DCMR § 3104.1, for special exceptions from the community residence facility requirements under § 218, and the health care facility requirements under § 219, to allow an addition and increase in residents at an existing retirement community in the R-1-A District at premises 3050 Military Road, N.W. and 5314 29th Street, N.W. (Square 2287, Lots 802, 804, 809, 813, and Square 2290, Lot 30).[1]

HEARING DATE: January 13, 2015
DECISION DATE: March 10, 2015

SUMMARY ORDER

SELF-CERTIFIED

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR § 3113.2. (Exhibit 11.)

The Board provided proper and timely notice of the public hearing on this application by publication in the *D.C. Register* and by mail to Advisory Neighborhood Commission ("ANC") 3G and to owners of property located within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 3/4G, which is automatically a party to this application. The ANC submitted two reports and testified to its conditioned support of the application. The ANC report dated December 20, 2014, contained a resolution of support for the application, conditioned on the agreement it had reached with the Applicant. The resolution, attached to which was an executed agreement the ANC reached with the Applicant, indicated that at a duly noticed ANC meeting on December 8, 2014, at which a quorum was present, the ANC voted unanimously (7:0) in support of the application provided the Board impose the provisions contained in the agreement as conditions to the Order. (Exhibit 25.) The Applicant also submitted the agreement it reached with the ANC as proposed conditions of approval to the record at Exhibit 27D.

The agreement entered into between the ANC and Applicant contains 39 provisions on which the ANC conditioned its support of the application. Many of these provisions pertain only to the construction phase of the project. At the hearing, the Board acknowledged the agreement that was reached between the ANC and the Applicant, but found that some provisions did not pertain to zoning relief but rather to construction

[1] The Applicant amended the application by removing its request for a variance from the lot width requirements of § 401.3. The Applicant's initial application had requested relief for a variance from the minimum width requirements under § 401.3 for the creation of an independent record lot along 29th Street, N.W.; however, the Applicant later explained that this relief is not necessary since the lot would be subdivided in a manner which satisfies § 401.3. (Exhibit 27.) The caption has been amended accordingly.

management issues that were not under the Board's jurisdiction. The Board's Chair noted that even were the construction provisions not made part of the Board's order, they still would be enforceable by the parties to the agreement in court to the extent that the agreement was enforceable. At the hearing, the Board indicated that it would only incorporate a handful of the conditions, limited to those related to zoning issues, including 1(c), 2(e), 2(f), 4(a), 4(f), and 4(g).

ANC 3/4G submitted a second report reiterating its request that the entirety of its agreement with the Applicant be incorporated into any Board order. As an alternative to incorporating the entire agreement, the ANC also listed other provisions that it believed were not strictly construction-related and asked for these to be incorporated in addition to those the Board already had noted it would include in the Order at the hearing, including 1(e), 2(a), 2(c), 2(d), 3(e), 4(b), and 4(h). (Exhibit 40.)

The Board, during its deliberations, indicated that it would be incorporating the following provisions into the order as conditions: 1(c), 1(e), 2(a), 2(c), 2(d), 2(e), 2(f), 3(e)(viii), 4(a), 4(b), 4(f), 4(g), and 4(h).[2]

The Office of Planning ("OP") submitted a timely report recommending approval of the application and stated that it supported the conditions included in the ANC's resolution of December 8, 204, which the ANC negotiated with the Applicant. (Exhibit 28.) OP testified in support of the application at the hearing. The District Department of Transportation ("DDOT") submitted a timely report of no objection. (Exhibit 29.)

A letter in opposition to the application was submitted to the record by Deborah Kavruck, 5712 26th Street, N.W. (Exhibit 32).[3]

At the January 13 hearing, two residents at Ingleside and a representative from Temple Sinai testified in support of the application. The testimony from Temple Sinai stated that they were in support of the application provided the concerns they raised were addressed through conditions in the order. (Exhibit 35.)

As a preliminary matter, the Board denied the request for party status in opposition submitted by the Carnegie Institution of Washington ("Carnegie") (Exhibit 24), for the

[2] The ANC in its report also discussed the agreement that was reached between the Applicant and its abutting neighbor to the west, the Carnegie Institution of Washington ("Carnegie") and requested that the Board incorporate that full agreement into the Order as well. (Exhibit 40.) Again, the Board acknowledged the agreement herein but declined to put the Carnegie agreement's provisions into the Order as conditions. This is discussed more fully later in this Order.

[3] Other letters in opposition were submitted to the record after the Board closed the record. The Board closed the record at the end of the January 13 hearing for all but the additional materials it specifically requested. As a preliminary matter at its meeting on March 10, 2015, the Board denied requests to reopen the record from Thomas Whitehead and Charles Blankstein.

reason that the issues raised by Carnegie did not affect the zoning requirements, but only pertained to construction and vibrations of the ground. The Board found that the denial of the party status request would not stop Carnegie and the Applicant from making an agreement to resolve these issues themselves. Both Carnegie and Anne Mohnkern Renshaw (Exhibit 36), an abutting neighbor of the Applicant, testified in opposition to the application at the hearing. In its testimony and submissions, Carnegie spoke of its concerns over the adverse impacts that vibration from construction would cause Carnegie's highly sensitive scientific instrumentation, leading it to contract for that testing outside of its institution at great cost; Carnegie testified that it believed that this adverse impact would only occur during construction. Both Carnegie and the Applicant requested that the Board postpone the hearing to provide sufficient time for Carnegie and the Applicant to meet and come to an agreement to resolve Carnegie's issues.

The Board completed testimony at the January 13 hearing and closed the record to all but any agreements that were reached by the Applicant. The Board then postponed its decision on the case to give the Applicant sufficient time to meet with both Carnegie and Ms. Renshaw to reach agreement on the concerns they raised. The Board gave leave for the Applicant to submit any agreement the Applicant reached with them. An executed agreement with Carnegie and the Applicant was submitted to the record at Exhibit 42. The Applicant also submitted a letter detailing the steps it had taken to meet with both Ms. Renshaw and Carnegie to reach agreements with them. As to Ms. Renshaw, the Applicant indicated that it had met with her and would continue to keep an open dialogue with her as construction moves forward through the Task Force that was established through the agreement the Applicant has entered into with the ANC. (Exhibit 41.)

Carnegie submitted a letter that among other things, withdrew its objection to the application, citing the agreement that had been reached with the Applicant. (Exhibit 46.) Both Carnegie and the Applicant requested that the agreement between them be incorporated into any order granting approval of the project. (Exhibits 41 and 46.) The Board in its deliberations specified that the Order would reference the agreements that the Applicant had entered into with both the ANC and Carnegie, and stated that, in the Board's view, both agreements would be enforceable by the parties to those agreements in court.[4] The Board only included certain specified conditions that pertained to zoning matters in the Order from the ANC agreement.

As directed by 11 DCMR § 3119.2, the Board required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case for special exceptions from the community residence facility requirements under § 218, and the health care facility requirements under § 219, to allow an addition and increase in residents at an existing retirement community in the R-1-A District. No parties appeared

[4] The Board found that the agreement between Carnegie and the Applicant was a construction management agreement and as there was nothing related to zoning, it would not be appropriate to include the agreement as conditions to this Order.

at the public hearing in opposition to the application. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board, and having given great weight to the ANC and OP reports filed in this case, the Board concludes that the Applicant has met the burden of proof for special exception relief, pursuant to 11 DCMR §§ 3104.1, 218, and 219, and that the requested relief can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

Pursuant to 11 DCMR § 3100.5, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. The waiver will not prejudice the rights of any party and is appropriate in this case.

It is therefore **ORDERED THAT THIS APPLICATION IS HEREBY GRANTED SUBJECT TO THE APPROVED PLANS IN THE RECORD AT EXHIBITS 27B1-27B4 AND WITH THE FOLLOWING CONDITIONS**:

1. **1(c).**[5] Ingleside and the General Contractor shall designate the Ingleside Project Manager (or, in the Project Manager's absence, an alternate) as the single point of contact who will be responsible for receiving, addressing, and resolving any questions, concerns, Complaints (as defined in paragraph 6.a. of the Agreement between the ANC and the Applicant), or suggestions from the ANC, the Task Force, or from the community (including residents or institutions in the surrounding neighborhood and Ingleside residents). The Ingleside Project Manager shall keep a log of outstanding questions or issues that have been raised by the ANC, the Task Force, or the community to identify their status, estimated dates for resolution, and resolution. This log shall be available for review by the ANC and the Task Force. This log also shall be published on a bi-weekly basis on the Expansion Project Webpage for informational purposes only and shall be updated as the outstanding questions or issues are resolved.

2. **1(e)** Current contact information for the Ingleside Project Manager shall be published on the Expansion Project Webpage.

3. **2(a)** The exterior design of the proposed expansion buildings shall be substantially in accordance with the drawings and materials submitted to the BZA on October 6, 2014, as may be modified by the BZA or in response to ANC or Task Force comments.

[5] The numbers in bold in front of each of the conditions in this Order refer to the number given that condition in the agreement between the ANC and the Applicant. (Exhibits 25 and 27D.)

4. **2(c)** Ingleside shall prepare and provide to the Task Force for comment its plans for trees, shrubs, and other vegetation that it will plant and maintain on the "berm" between the area of the Expansion Project and Military Road, N.W. The objective of these plantings will be to preserve the existing screening of the buildings from view from Military Road and to plant additional screening that will reasonably minimize the view of the buildings from Military Road following completion of the Expansion Project. Ingleside shall maintain the plantings on the "berm" during construction and after the Expansion Project is completed. These plans for the "berm" also shall be published on the Expansion Project Webpage.

5. **2(d)** Under no circumstances will Ingleside modify the design of its expansion plans to include a service drive or any other driveway or entrance to its property from Military Road, N.W. or 29th Street, N.W., and it further stipulates and warrants that it will not build, construct, or erect a service drive or any other driveway or entrance to its property from Military Road or 29th Street NW for a period of at least 20 years following the effective date of the final BZA Order approving Application No. 18898. Furthermore, for a period of a minimum of 20 years from the effective date of the BZA Order approving Application No. 18898, Ingleside will not extend, expand, or alter any existing driveway associated with any house Ingleside owns on Military Road for the purpose of providing access to any portion of Square 2287, Lot 809. Nothing in this paragraph affects Ingleside's continued use of the currently existing entrance at Military Road, N.W. and 31st Street, N.W.

6. **2(e)** Ingleside represents that it has no plans to design, build, construct, or erect any permanent facilities or structures on its property east of the existing buildings known as "Classic Residences" (the "Ravine Area"), and it further stipulates and warrants that it will not build, construct, or erect any facilities or structures on this portion of its property for a period of at least 20 years following the effective date of the final BZA Order approving Application No. 18898. The Ravine Area does not include the area south of the Manor House, which Ingleside may consider for a future expansion.

7. **2(f)** Ingleside shall review its design to evaluate the impact of the additional new structures on stormwater runoff and shall identify and implement design additions or modifications that will mitigate stormwater runoff, which may include the following: (i) installation of rain gardens; (2) installation of turfblock or pervious pavements and sidewalks; (3) use of cisterns or rainbarrels to catch and store rainwater for future use; (4) installation of roof gardens or ecoroofs; (5) additional vegetation to reduce erosion and to increase absorption; and (6) installation of drywells or soakage trenches. Ingleside shall coordinate its stormwater management plan with the District Department of the Environment ("DDOE") and the RiverSmart program. The Expansion Project will be required to comply

with DDOE's recently implemented stormwater management amendments specified in Chapter 5 of Title 21 of the District of Columbia Municipal Regulations and must satisfy the requirements of the District's Municipal Separate Storm Sewer System ("MS4") permit issued by the U.S. Environmental Protection Agency under the Clean Water Act.

8. **3(e) (viii)** At least four months before the planned start of construction, Ingleside and the General Contractor will prepare and provide to the Task Force a plan to accommodate parking and transportation during construction for the expected number of construction workers as well as for Ingleside employees (the "Parking and Transportation Plan"). At a minimum, the plan will include, (i)-(vii) (omitted), and (viii) formal adoption of the following commitments for long-term parking management, including the period after construction is complete: (a) all residents and staff of Ingleside shall be required to register their vehicles with Ingleside; (b) staff shall not be charged for parking; (c) all residents and staff shall be required to park on-site in the parking garage or on Military Road, directly in front of Ingleside property, except that during the construction phase when employees who cannot be accommodated on site or on Military Road will park in the off-site location; (d) any permanent resident or staff member found not parking on the premises shall be reminded of the requirement to park on-site, and additional actions shall be taken for any permanent resident or staff member that is found not abiding by the parking policy; (e) visitor spaces shall be designated on-site and monitored by management to ensure their use and availability for Ingleside guests to minimize potential spillover onto adjacent streets; (f) any visitor to Ingleside that will be parked for more than one day, or for an overnight visit, shall be required to register their vehicles with management and receive a guest pass; (g) all visitors to Ingleside shall be notified of the requirement to park on premises in designated spaces; (h) any unregistered vehicles occupying a parking space shall be towed after reasonable attempts have been made to contact the owner; (i) any vehicles illegally parked in a fire lane or blocking access shall be towed immediately; and (j) parking in Ingleside facilities by neighboring institutions shall only be permitted at times when it can be demonstrated that all Ingleside residents, staff and visitor needs are met, and a surplus of available parking remains. The plan also shall provide detailed contact information for the Ingleside Project Manager for residents or institutions in the surrounding neighborhood to contact should they observe a violation of the plan (e.g., construction workers parking on neighborhood streets). The Parking and Transportation Plan shall be published to the Expansion Project Website and updated as necessary by the General Contractor and Ingleside.

9. **4(a).** In order to reduce the construction schedule for the Expansion Project to approximately 30 months, Ingleside may, consistent with all required approvals and permits, use the existing house that it owns at 5314 29th Street, N.W. ("Temporary Facility") to temporarily house no more than ten current assisted-

living residents until construction of the new assisted-living facility is completed. In the event Ingleside determines not to convert the house for use as the Temporary Facility, then the conditions in subparagraphs 4(b)-(g) of the Agreement between the ANC and the Applicant in the record at Exhibits 25 and 27D shall not be applicable.

10. **4(b)** Ingleside shall make all necessary changes or modifications to the Temporary Facility so that it will safely and lawfully accommodate no more than ten assisted-living residents and upon the termination of the temporary use and prior to sale, Ingleside shall remove not less than three bedrooms and three bathrooms in the Temporary Facility. Ingleside shall, however, make no material changes or modifications to the exterior of the house which alters its residential character consistent with the other homes on 29th Street, N.W. None of the changes or modifications will affect or infringe upon the Ravine Area between the Temporary Facility and the Classic Residences on Ingleside's property, and all access to the Temporary Facility will be from 29th Street, N.W.

11. **4(f).** Within 30 days after the issuance of a certificate of occupancy and necessary licenses for the building containing the permanent assisted living units, Ingleside shall terminate the use of the Temporary Facility and shall record a covenant on the 5314 29th Street lot limiting the use of the house, after it is vacated by the assisted living residents, and the lot, to uses permitted as a matter of right under the Zoning Regulations for the R-1-A zone district. Any use of the house by Ingleside after use as a Temporary Facility is terminated and prior to the sale of the house, shall be limited to single-family residential use.

12. **4(g).** During the period when Ingleside uses the Temporary Facility to house no more than ten assisted-living residents, the staff at the Temporary Facility will normally consist of two persons during the day and evening shifts and up to two persons during the night shift. No Ingleside employee staffing the Temporary Facility shall be permitted to park on 29th Street, N.W., Kanawha Street, N.W., Legation Street, N.W., Jenifer Street, N.W., 28th Street, N.W., or 27th Street, N.W. except that parking directly in front of 5314 29th Street or in front of the adjacent vacant lot owned by Ingleside is permitted. Other construction-related activities (e.g., materials delivery, dumpster/waste disposal, etc.) shall also be limited to the space directly in front of 5314 29th Street or in front of the adjacent vacant lot owned by Ingleside. Ingleside shall provide a point of contact who neighbors on 29th Street, N.W., Jenifer Street, N.W., 28th Street, N.W., or 27th Street may contact if they observe an Ingleside employee parking on these streets while working at the Temporary Facility. Deliveries to the Temporary Facility will be limited to smaller vans. Ingleside shall also provide security services for the house similar to those provided for the other Ingleside facilities and shall be responsible for snow removal on 29th Street, N.W. to assure emergency and other access to the house.

13. **4(h)** Within 90 days of the effective date of this BZA Order, Ingleside shall: (i) submit a subdivision application to create a record lot for the adjacent vacant property, and (ii) list and actively market the adjacent vacant lot for sale. Within 30 days of the effective date of the recordation of a subdivision plat creating a buildable lot out of the adjacent vacant property, Ingleside shall record a covenant limiting its use to uses permitted as a matter of right in the R-1-A Zone District. Nothing in these conditions shall restrict the right to construct a driveway on 29th Street to access a residential house on the currently vacant lot.

VOTE: **3-0-2** (Lloyd J. Jordan, Marnique Y. Heath, and Anthony J. Hood (by absentee vote) to APPROVE; Jeffrey L. Hinkle, not present or participating; one seat vacant.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of the Board members approved the issuance of this order.

FINAL DATE OF ORDER: March 20, 2015

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSE OF SECURING A BUILDING PERMIT, OR THE APPLICANT FILES A REQUEST FOR A TIME EXTENSION PURSUANT TO § 3130.6 PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THE REQUEST IS GRANTED. PURSUANT TO § 3129.9, NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO §§ 3129.2 OR 3129.7, SHALL TOLL OR EXTEND THE TIME PERIOD.

PURSUANT TO 11 DCMR § 3125, APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT.

BZA APPLICATION NO. 18898
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PURSUANT TO 11 DCMR § 3205, THE PERSON WHO OWNS, CONTROLS, OCCUPIES, MAINTAINS, OR USES THE SUBJECT PROPERTY, OR ANY PART THERETO, SHALL COMPLY WITH THE CONDITIONS IN THIS ORDER, AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT. FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 *ET SEQ.* (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 18940 of H Street Legacy, LLC, as amended, pursuant to 11 DCMR § 3103.2, for a variance from the off-street parking requirements under § 2101.1, to construct a six-story multi-family residential building with ground floor retail in the HS-A/C-3-A District at premises 1371-1375 H Street N.E. (Square 1027, Lot 848).[1]

HEARING DATE: March 10, 2015
DECISION DATE: March 10, 2015

SUMMARY ORDER

SELF-CERTIFIED

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR § 3113.2. (Exhibit 8.)

The Board of Zoning Adjustment ("Board" or "BZA") provided proper and timely notice of the public hearing on this application by publication in the *D.C. Register* and by mail to Advisory Neighborhood Commission ("ANC") 6A and to owners of property located within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 6A, which is automatically a party to this application. The ANC submitted a resolution in support of the application, dated February 25, 2015, which was based on the Applicant's original request for relief. The ANC's letter indicated that at a duly noticed and scheduled public meeting on February 12, 2015, at which a quorum was in attendance, the ANC voted 7-1 in support of the application. (Exhibit 31.) On February 24, 2015, the Applicant submitted its Prehearing Statement (Exhibit 30) showing the revised plans (Exhibit 31A).

The Office of Planning ("OP") submitted a timely report on March 2, 2015, recommending approval of the application (Exhibit 33) and testified in support of the application at the hearing. The District Department of Transportation ("DDOT") submitted a timely report, dated March 3, 2015, indicating that it had no objection to the Applicant's requests for a variance from the parking requirements and a variance [sic] from the roof structure setback. (Exhibit 35.) A total of 14 support letters were filed in the record. (See Exhibits 29, 30D, and 36.)

Variance Relief

As directed by 11 DCMR § 3119.2, the Board required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case pursuant to § 3103.2 for a variance

[1] The application was amended to eliminate the special exception relief under §§ 411.11 and 770.6. The Applicant filed a revised statement (Exhibit 30) and revised plans (Exhibit 30A). The caption has been amended accordingly.

from 11 DCMR § 2101.1. No parties appeared at the public hearing in opposition to the application. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board, and having given great weight to the OP report and ANC 6A report filed in this case, the Board concludes that in seeking a variance from 11 DCMR § 2101.1, the Applicant has met the burden of proof under 11 DCMR § 3103.2, that there exists an exceptional or extraordinary situation or condition related to the property that creates a practical difficulty for the owner in complying with the Zoning Regulations, and that the relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map.

Pursuant to 11 DCMR § 3100.5, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. The waiver will not prejudice the rights of any party and is appropriate in this case.

It is therefore **ORDERED** that the application is hereby **GRANTED SUBJECT TO THE APPROVED REVISED PLANS AT EXHIBIT 30A, AND THE FOLLOWING CONDITIONS:**

1) The Applicant shall restrict the project from being included as RPP eligible.

2) The Applicant shall record covenants in the land records for each unit prohibiting the owner or resident of the unit from obtaining a residential parking permit.

3) The Applicant shall include in the bylaws for the building a provision that prohibits any owner or resident of a unit from obtaining a residential parking permit, requires a regular review as to whether this bylaw provision has been violated, and provides an enforcement mechanism in the event that the provision has been violated.

4) The Applicant shall record a covenant in the land records that provides that the by-law provisions related to residential permit parking may not be amended or removed.

5) The Applicant shall offer a five-year Capital Bikeshare and Car share membership for the initial condo residents.

6) The Applicant shall post all TDM commitments on-line for a one-year period. The source will also include links to CommuterConnections.com, goDCgo.com, WMATA Metrobus routes, DC Bicycle maps and other useful information in support of car-free urban living.

7) The Applicant shall install a Transit Screen in the lobby to keep residents and visitors informed regarding available transportation choices and provide real-time transportation updates.

8) The Applicant shall provide a convenient-accessible bicycle room for both residential and visitor storage.

9) As a one-time incentive, the Applicant shall provide each initial purchaser a bicycle helmet (27 helmets).

10) The Applicant shall include in the bylaws for the building a provision requiring that the condominium association contract for trash removal to occur every weekday during daytime hours, with trash maintained in the building, then hauled from the building to a truck waiting in Linden Court.

11) The Applicant shall include in the bylaws for the building a provision requiring that the condominium association be responsible for remediating any trash spillage that occurs in public space during the regular removal of trash from the building.

VOTE: **4-0-1** (Lloyd L. Jordan, Marnique Y. Heath, Jeffrey L. Hinkle, and Peter G. May to Approve, one Board seat vacant.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of the Board members approved the issuance of this order.

FINAL DATE OF ORDER: March 20, 2015

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSE OF SECURING A BUILDING PERMIT, OR THE APPLICANT FILES A REQUEST FOR A TIME EXTENSION PURSUANT TO § 3130.6 AT LEAST 30 DAYS PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THAT SUCH REQUEST IS GRANTED. NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO §§ 3129.2 OR 3129.7, SHALL EXTEND THE TIME PERIOD.

PURSUANT TO 11 DCMR § 3125, APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE.

AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT.

PURSUANT TO 11 DCMR § 3205, THE PERSON WHO OWNS, CONTROLS, OCCUPIES, MAINTAINS, OR USES THE SUBJECT PROPERTY, OR ANY PART THERETO, SHALL COMPLY WITH THE CONDITIONS IN THIS ORDER, AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT. FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 *ET SEQ.* (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 18946 of N Street Venture, LLC, pursuant to 11 DCMR § 3104.1, for a special exception from the historic resource parking requirements under § 2120.6, to provide 13 parking spaces rather than the 15 parking spaces required for an addition to historic structures in the DC/SP-1 District at premises 1745 N Street, N.W. (Square 158, Lot 84).

HEARING DATE: March 17, 2015
DECISION DATE: March 17, 2015

SUMMARY ORDER

SELF-CERTIFIED

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR § 3113.2. (Exhibit 8.)

The Board provided proper and timely notice of the public hearing on this application by publication in the *D.C. Register* and by mail to Advisory Neighborhood Commission ("ANC") 2B and to owners of property located within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 2B, which is automatically a party to this application. The ANC submitted a written report in support that indicated that at a regular, duly noticed meeting held on February 11, 2015, at which a quorum was present, the ANC voted 9-0 to support the application for a special exception under § 2120.6. (Exhibit 30.)

The Office of Planning ("OP") submitted a timely report recommending approval of the application (Exhibit 35) and testified in support of the application at the hearing. The District Department of Transportation ("DDOT") submitted a timely report of no objection. (Exhibit 36.)

As directed by 11 DCMR § 3119.2, the Board required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case from the historic resource parking requirements under § 2120.6, to provide 13 parking spaces rather than the 15 parking spaces required for an addition to historic structures in the DC/SP-1 District. No parties appeared at the public hearing in opposition to the application. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board, and having given great weight to the ANC and OP reports filed in this case, the Board concludes that the Applicant has met the burden of proof for special exception relief, pursuant to 11 DCMR § 3104.1 and § 2120.6, and that the requested relief can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the

requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

Pursuant to 11 DCMR § 3100.5, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. The waiver will not prejudice the rights of any party and is appropriate in this case.

It is therefore **ORDERED THAT THIS APPLICATION IS HEREBY GRANTED SUBJECT TO THE APPROVED PLANS AT EXHIBITS 14A AND 14B AND WITH THE FOLLOWING CONDITIONS**:

1. The Applicant shall appoint a member of the property management group to be the Transportation Management Coordinator ("TMC"). The TMC shall be a point of contact and shall be responsible for coordinating, implementing, and monitoring the Transportation Management Program strategies. This would include the development and distribution of information and promotional brochures to residents and visitors regarding transit facilities and services, pedestrian and bicycle facilities and linkages, ridesharing (carpool and vanpool) and car sharing. In addition, the TMC shall be responsible for ensuring that loading and trash activities are properly coordinated and do not impede the pedestrian, bicycle, or vehicular lanes adjacent to the development. The Applicant shall provide the contact information for the TMC which shall be provided to DDOT/Zoning Enforcement with annual contact updates.

2. The Applicant shall install a TransitScreen in the residential lobby to keep residents and visitors informed on all available transportation choices and provide real-time transportation updates. In addition, the TMC shall make printed materials related to local transportation alternatives available to residents upon request and at move-in for new residents.

3. The Applicant shall encourage all alternative transportation modes, including bicycling, by the provision of 23 secure bicycle parking spaces for residents as well as four temporary bicycle parking spaces along N Street. The Applicant shall provide complimentary annual Capital Bikeshare membership to the owners for the first five years. The Applicant's marketing program shall include information brochures on bicycling in the District and for Capital Bikeshare.

VOTE: **4-0-1** (Marnique Y. Heath, Lloyd J. Jordan, Jeffrey L. Hinkle, and Robert E. Miller, to APPROVE; one Board seat vacant.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of the Board members approved the issuance of this order.

FINAL DATE OF ORDER: March 24, 2015

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSE OF SECURING A BUILDING PERMIT, OR THE APPLICANT FILES A REQUEST FOR A TIME EXTENSION PURSUANT TO § 3130.6 PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THE REQUEST IS GRANTED. PURSUANT TO § 3129.9, NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO §§ 3129.2 OR 3129.7, SHALL TOLL OR EXTEND THE TIME PERIOD.

PURSUANT TO 11 DCMR § 3125, APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT.

PURSUANT TO 11 DCMR § 3205, THE PERSON WHO OWNS, CONTROLS, OCCUPIES, MAINTAINS, OR USES THE SUBJECT PROPERTY, OR ANY PART THERETO, SHALL COMPLY WITH THE CONDITIONS IN THIS ORDER, AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT. FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 *ET SEQ.* (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC

INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 18955 of Good Home Investments LLC, pursuant to 11 DCMR § 3104.1, for a special exception from the fast food restaurant requirements under § 733, to establish a fast food restaurant in the C-2-A/R-3 District at premises 1918-B 14th Street S.E. (Square 5767, Lot 1019).

HEARING DATE: March 24, 2015
DECISION DATE: March 24, 2015

SUMMARY ORDER

SELF-CERTIFIED

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR § 3113.2.[1] (Exhibit 4.)

The Board of Zoning Adjustment ("Board" or "BZA") provided proper and timely notice of the public hearing on this application by publication in the *D.C. Register* and by mail to Advisory Neighborhood Commission ("ANC") 8A and to owners of property located within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 8A, which is automatically a party to this application. The ANC did not submit a written report or testify at the hearing in the case. A letter of support for the application was submitted to the record by the Single Member District ("SMD") ANC 8A-06. (Exhibit 46.) At the hearing, the Applicant's representative testified that they had met with the ANC twice but only the letter from the SMD was submitted to the record.

The Office of Planning ("OP") submitted a timely report recommending approval of the application with one condition (Exhibit 45) and testified in support of the application at the hearing. The District Department of Transportation ("DDOT") submitted a timely report of no objection. (Exhibit 44.)

As directed by 11 DCMR § 3119.2, the Board required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case for a special exception from the fast food restaurant requirements under § 733, to establish a fast food restaurant in the C-2-A/R-3 District. No parties appeared at the public hearing in opposition to the application. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board, and having given great weight to the OP report filed in this case, the Board concludes that the Applicant has met the burden of proof for special exception relief, pursuant to 11 DCMR § 3104.1 and § 733, and that the requested relief can be granted as being in harmony with the general purpose and intent of the

[1] A letter of authorization was submitted to the record, as requested by the Board. (Exhibit 48.)

Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

Pursuant to 11 DCMR § 3100.5, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. The waiver will not prejudice the rights of any party and is appropriate in this case.

It is therefore **ORDERED THAT THIS APPLICATION IS HEREBY GRANTED SUBJECT TO THE APPROVED PLANS AT EXHIBITS 6-12 AND WITH THE FOLLOWING CONDITION**:

1. No outdoor seating shall be permitted.

VOTE: **4-0-1** (Lloyd J. Jordan, Jeffrey L. Hinkle, Marnique Y. Heath, and Marcie I. Cohen, to APPROVE; one Board seat vacant.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of the Board members approved the issuance of this order.

FINAL DATE OF ORDER: March 25, 2015

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSE OF SECURING A BUILDING PERMIT, OR THE APPLICANT FILES A REQUEST FOR A TIME EXTENSION PURSUANT TO § 3130.6 PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THE REQUEST IS GRANTED. PURSUANT TO § 3129.9, NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO §§ 3129.2 OR 3129.7, SHALL TOLL OR EXTEND THE TIME PERIOD.

PURSUANT TO 11 DCMR § 3125, APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE. AN APPLICANT SHALL CARRY OUT THE

CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT.

PURSUANT TO 11 DCMR § 3205, THE PERSON WHO OWNS, CONTROLS, OCCUPIES, MAINTAINS, OR USES THE SUBJECT PROPERTY, OR ANY PART THERETO, SHALL COMPLY WITH THE CONDITIONS IN THIS ORDER, AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT. FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 *ET SEQ.* (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 18957 of Guggan Datta/Masala Dosa, LLC, pursuant to 11 DCMR § 3104.1, for a special exception from the HS Overlay requirements under § 1320.4(c), to establish a fast food restaurant in two existing row dwellings in the HS-H/C-2-A District at premises 411 H Street N.E. (Square 809, Lot 69).

HEARING DATE: March 24, 2015
DECISION DATE: March 24, 2015

SUMMARY ORDER

SELF-CERTIFIED

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR § 3113.2. (Exhibit 3.)

The Board of Zoning Adjustment ("Board" or "BZA") provided proper and timely notice of the public hearing on this application by publication in the *D.C. Register* and by mail to Advisory Neighborhood Commission ("ANC") 6C and to owners of property located within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 6C, which is automatically a party to this application. The ANC submitted a written report in support that indicated that at a regular, duly noticed meeting held on March 11, 2015, at which a quorum was present, the ANC voted 6-0-0 to support the application with conditions. (Exhibit 29.)

The Office of Planning ("OP") submitted a timely report recommending approval of the application with conditions (Exhibit 30) and testified in support of the application at the hearing. The District Department of Transportation ("DDOT") submitted a timely report of no objection. (Exhibit 31.)

A letter of support was submitted to the record by the Capitol Hill Restoration Society. (Exhibit 33.)

As directed by 11 DCMR § 3119.2, the Board required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case for a special exception from the HS Overlay requirements under § 1320.4(c), to establish a fast food restaurant in two existing row dwellings in the HS-H/C-2-A District. No parties appeared at the public hearing in opposition to the application. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board, and having given great weight to the ANC and OP reports filed in this case, the Board concludes that the Applicant has met the burden of proof for special exception relief, pursuant to 11 DCMR § 3104.1 and § 1320.4(c), and that the requested relief can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the

requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

Pursuant to 11 DCMR § 3100.5, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. The waiver will not prejudice the rights of any party and is appropriate in this case.

It is therefore **ORDERED THAT THIS APPLICATION IS HEREBY GRANTED SUBJECT TO THE APPROVED PLANS AT EXHIBITS 12 AND 28B AND WITH THE FOLLOWING CONDITIONS**:

1. All deliveries shall be made using the 4th Street loading zone and not through the alley.

2. Any trash / recycling / grease collection trucks entering the alley exit the alley to 5th Street and return directly to H Street.

3. Any exhaust fan(s) shall be directed away from nearby residential properties, and such fan(s) shall not produce in excess of 60 dB as measured from any point in the adjacent residential zone.

4. The Applicant shall be required to prohibit and prevent employees and others from congregating outside at the rear of the property.

5. Carry out service shall be clearly subordinate to the principal use of on-premises consumption.

6. Food for on-premises consumption shall be served only in/on non-disposable tableware and shall be served to patrons by staff (as opposed to self-service).

7. The show windows and associated clerestory for the building at 413 H Street, N.E. shall be restored consistent with those in the H Street Overlay area.

VOTE: **4-0-1** (Lloyd J. Jordan, Marcie I. Cohen, Marnique Y. Heath, and Jeffrey L. Hinkle, to APPROVE; one Board seat vacant.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of the Board members approved the issuance of this order.

FINAL DATE OF ORDER: March 25, 2015

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSE OF SECURING A BUILDING PERMIT, OR THE APPLICANT FILES A REQUEST FOR A TIME EXTENSION PURSUANT TO § 3130.6 PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THE REQUEST IS GRANTED. PURSUANT TO § 3129.9, NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO §§ 3129.2 OR 3129.7, SHALL TOLL OR EXTEND THE TIME PERIOD.

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WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 14-17
Z.C. Case No. 14-17
AE Tower, LLC
(Map Amendment @ Square 4310)
March 9, 2015

The Zoning Commission for the District of Columbia ("Commission"), pursuant to its authority under § 1 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 787, *et seq.*; D.C. Official Code § 6-641.01), and § 102 of Title 11 of the District of Columbia Municipal Regulations ("DCMR"), having held a public hearing to consider the application of AE Tower, LLC ("Applicant"), and referred the proposed amendments to the National Capital Planning Commission ("NCPC") for a 30-day review pursuant to § 492 of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 774; D.C. Official Code § 6-641.02) ("District Charter"), hereby gives notice of its adoption of an amendment to the Zoning Map of the District of Columbia that rezones a portion of Lot 808 in Square 4310 (the "Property") from R-1-B to the C-2-A Zone District.

FINDINGS OF FACT

1. On September 29, 2014, the Office of Zoning received an application from the Applicant requesting that the Commission rezone a portion of the Property from the R-1-B Zone District to the C-2-A Zone District, making all of Lot 808 to be within the C-2-A Zone District.

2. At the time the application was filed, the Applicant was the contract purchaser of the Property.

3. The triangular-shaped Property is located at Rhode Island Avenue, N.E., north of Monroe Street, N.E. and is bounded by a public alley to the southeast. It consists of one, split-zoned lot totaling slightly over one-half acre in area. The topography of the Property is generally flat along Rhode Island Avenue, but slopes down, towards the southeast near Monroe Avenue, N.E. and the public alley, which is the eastern boundary of the Property. There currently is a surface parking lot (currently unused) on the R-1-B-zoned portion of the Property, and a vacant, one-story structure located in the C-2-A portion of the Property, between Rhode Island Avenue, N.E. and the public alley. The adjacent property immediately to the east of the Property is a car lot/dealership. The Property was previously subject to BZA Order No. 14256, approved April 3, 1985, which allowed special exception accessory parking spaces for the adjacent car dealership to the east.

4. The immediately surrounding neighborhoods to the north, south, and west are zoned to the R-1-B Zone District and primarily consist of single-family detached residences. To the northeast along Rhode Island Avenue towards Eastern Avenue (the District boundary), there exists low-scale commercial development including a gas station,

convenience store, liquor store, etc., zoned in the C-2-A Zone District. No other lots on the square are split-zoned R-1-B and C-2-A.

5. The existing C-2-A zoning for a portion of the Property permits low-to-medium density commercial and residential uses. The purpose of the C-2-A Zone District is to provide facilities for shopping and business needs, allow a mix of uses including residential, and accommodate commercial developments, serving local residential areas. The existing R-1-B zoning for the remainder of the Property allows for low-density single-family detached residential development on lots of 5,000 square feet. It does not permit commercial or mixed-use development.

6. By memorandum dated October 31, 2014, and through testimony at the public meeting held on November 10, 2014, the Office of Planning ("OP") recommended that the Commission set down the application for a hearing, as the request was not inconsistent with the Comprehensive Plan.

7. The Commission set the case down for a public hearing at its November 10, 2014 public meeting as a contested case. The Commission adopted OP's recommendation that the Commission consider rezoning the R-1-B portion of the Property to C-2-A.

8. Notice of the public hearing was provided in accordance with the provisions of 11 DCMR §§ 3014 and 3015. Notice to Advisory Neighborhood Commission ("ANC") 5C was sent on October 2, 2014.

9. On February 5, 2015, the Commission held a public hearing on the application. The representative of the Applicant primarily relied on the record and on the report of OP, but also provided testimony generally about his interactions with the community and with ANC 5C, and generally about the Applicant's conceptual plan to pursue a matter-of-right, mixed-use project on the Property.

10. In its Public Hearing Report dated February 5, 2015, OP recommended approval of the map amendment application, writing that the request was consistent with the Comprehensive Plan and policies for the area. In particular, OP based its position on the Future Land Use Map, providing that under the FLU Map, the "low-density commercial" designation corresponds to areas that are low in scale and character and are primarily retail, office, and service businesses. Per the Citywide Elements of the Comprehensive Plan, "areas with this designation range from small business districts that draw primarily from surrounding neighborhoods to large business districts that draw from a broader market area. Their common feature is that they are comprised primarily of one- to three-story commercial buildings. The corresponding zone districts are generally C-1 and C-2-A, although other districts may apply." In addition to the basis of map consistency,

because a portion of the property is zoned to the C-2-A Zone District, as are other nearby properties along Rhode Island Avenue, it is an appropriate zone district to consider for the portion of the property currently zoned to the R-1-B Zone District (low-density residential).

11. On February 4, 2015, ANC 5C, the ANC in which the Property is located, submitted a letter in support of the proposed rezoning. (Exhibit 23.) The letter stated that, with a quorum present at its meeting, the ANC voted 7-0 to support the application to amend the Zoning Map. The letter stated that the ANC's advice was to grant the relief, without listing any qualifications or conditions.

12. Elder Keith Young, a representative of the property owner, testified in support of the application, stating that the church had received input from the community that it preferred some type of mixed-use development on the site, rather than a townhouse development.

13. Kyle Todd, the executive director of Rhode Island Avenue Main Street, also testified in support of the application.

14. At the conclusion of the public hearing on February 5, 2015, the Commission took proposed action to approve the map amendment.

15. Pursuant to § 492(b)(2) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 810: D.C. Official Code §6-641.05), the Commission referred the application to the National Capital Planning Commission ("NCPC") for review and comment.

16. On February 18, 2015, ANC 5C submitted a second letter. The second letter was identical to the first letter, except that the ANC attached a list of conditions to the ANC's support. The conditions were as follows:

- That a representative of the Applicant solicit comments for owners and residents of nearby properties concerning the Applicant's intent to build on the Property;
- That the Applicant conduct a traffic study prior to construction;
- That the Applicant allow for vibration monitoring during the construction for residences immediately adjacent to the property; and
- That the Applicant purchase an insurance policy to protect nearby property owners for damages caused by the construction.

17. The Commission finds that the proposed map amendment is not inconsistent with the Comprehensive Plan.

CONCLUSIONS OF LAW

The Commission's authority to amend the Zoning Map derives from the Zoning Act of 1938, effective June 20, 1938 (52 Stat. 797. D.C. Official Code § 6-641.01, *et seq*.) ("Zoning Act"). Section 1 of the Zoning Act authorizes the Commission to regulate the uses of property in order to "promote health, safety, morals, convenience, order, prosperity, or general welfare of the District of Columbia and its planning and orderly development as the national capital." (D.C. Official Code § 6-641.01.)

Section 2 of the Zoning Act provides that the:

> zoning regulations shall be designed to lessen congestion on the street, to secure safety from fire, panic, and other dangers to promote health and general welfare, to provide adequate light and air, to prevent the undue concentration and the overcrowding of land, and to promote such distribution of population and of the uses of land as would tend to create conditions favorable to health, safety, transportation, prosperity, protection or property, civic activity, and recreational , educational, and cultural opportunities, and as would tend to further economy and efficiency in the supply of public services. Such regulations shall be made with reasonable consideration, among other things, of the character of the respective districts and their suitability for the uses provided in the regulations, and with a view to encouraging stability for the uses provided in the regulations, and with a view to encouraging stability of districts and of land values therein.

(D.C. Official Code § 6-641.02.)

Section 3 of the Zoning Act, among other things, authorizes the Commission to amend the zoning regulations and maps. (D.C. Official Code § 6-641.03.)

The Commission concludes that approval of an amendment to the C-2-A Zone District is consistent with the purpose of the Zoning Act, and also finds that the request is not inconsistent with the policies and maps of the Comprehensive Plan.

In amending the Zoning Map, the Commission is constrained by the limitation in the District Charter that the Zoning Map be "not inconsistent" with the Comprehensive Plan. § 492(b)(1) of the District of Columbia Home Rule Act: D.C. Official Code § 6-641.02. The Commission concludes that approval of the requested map amendment is not inconsistent with the Comprehensive Plan. The requested map amendment furthers the goals of the Comprehensive Plan, and promotes orderly development in conformity with the Zone Plan as embodied in the Zoning Regulations and Map.

The Commission concludes that the requested map amendment is in the best interest of the District of Columbia and will benefit the community in which the Property is located.

The Commission is required under § 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 ("ANC Act") (D.C. Law 1-21: D.C. Official Code § 1-309.10(d)) to give great weight to the affected ANC's written recommendation. ANC 5C provided written support of the application in this case. ANC 5C then amended its support to make it subject to certain conditions that pertain to a development proposal for the site.

The Commission does not adopt the conditions listed in the ANC's second letter. The proposed conditions listed by the ANC in its second letter relate to a specific construction proposal that is not the subject of this application. The conditions are therefore not relevant to the decision before the Commission, which is limited to whether the requested C-2-A Zone District is consistent with the purposes of the Zoning Act, and not inconsistent with the Comprehensive Plan. In addition, ANC 5C's second letter was submitted late. The Commission's rules require that ANCs provide their report no less than seven days prior to the hearing date. (11 DCMR § 3102.5.) In this case, the second report was submitted 13 days after the hearing. Section 13(d)(4) of the ANC Act permits oral testimony to be followed by a written report, if the written report is submitted no more than seven days after the oral testimony is presented. (D.C. Official Code § 1-309.10(d)(4).) In this case, there was no oral testimony by ANC 5C, and the letter was filed well after the seven day window.

The Commission is required under § 5 of the Office of Zoning Independence Act of 1990, effective September 20, 1990 (D.C. Law 8-163. D.C. Official Code § 6-623.04) to give great weight to OP's recommendations. The Commission concurs with the OP's recommendation for rezoning the Property to the C-2-A Zone District and has given its recommendation the great weight to which it is entitled.

DECISION

In consideration of the Findings of Fact and Conclusions of Law contained in this Order, the Zoning Commission for the District of Columbia hereby **ORDERS APPROVAL** of the application for an amendment of the Zoning Map to change the zoning of the portion of Lot 808 in Square 4310 that is currently zoned R-1-B to C-2-A.

In accordance with the D.C. Human Rights Act of 1977, as amended, D.C. Official Code § 2-1401.01 *et seq.* ("Act"), the District of Columbia does not discriminate on the basis of actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, matriculation, political affirmation, genetic information, disability, source of income, or place of residence or business. Sexual harassment is a form of sex discrimination which is prohibited by the Act. In addition, harassment based on any of the above protected categories is prohibited by

the Act. Discrimination in violation of the Act will not be tolerated. Violators will be subject to disciplinary action.

On February 5, 2015, upon the motion of Vice Chairperson Cohen, as seconded by Chairman Hood, the Commission **APPROVED** the application at the conclusion of its public hearing by a vote of **4-0-1** (Anthony J. Hood, Marcie I. Cohen, Robert E. Miller, and Michael G. Turnbull to approve; Peter G. May not present, not voting).

On March 9, 2015, upon the motion of Vice Chairperson Cohen, as seconded by Commissioner Miller, the Commission **ADOPTED** this Order at its public meeting by a vote of **4-0-1** (Anthony J. Hood, Marcie I. Cohen, Robert E. Miller, and Michael G. Turnbull to approve; Peter G. May, not having participated, not voting).

In accordance with the provisions of 11 DCR § 3028, this Order shall become final and effective upon publication in the *D.C. Register* on April 3, 2015.

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 14-23
Z.C. Case No. 14-23
Forest City SEFC, LLC
(Continuation of Trapeze School Use - Lot 27 in Square 826, "Parcel O")
March 12, 2015

Application of Forest City SEFC, LLC, pursuant to the Southeast Federal Center Overlay review standards and special exception requirements of 11 DCMR §§ 1804.8, 1808, 1809, and 3104, to permit the continuation of the Trapeze School on the property located at Square 826, Lot 27 (also known as "Parcel O") in the SEFC/CR Zone District.

HEARING DATE: March 12, 2015

DECISION DATE: March 12, 2015 (Bench Decision)

SUMMARY ORDER

The Zoning Commission for the District of Columbia ("Commission") provided proper and timely notice of the public hearing on this application by publication to the *D.C. Register*, and by mail to Advisory Neighborhood Commission ("ANC") 6D, and to owners of property within 200 feet of the site. The application was also referred to the Office of Planning ("OP") for review and report.

The subject property is located within the jurisdiction of ANC 6D. ANC 6D, which is automatically a party to the application, submitted a written statement (Exhibit 17) stating that at its regularly scheduled, duly noticed meeting on February 9, 2015, with a quorum present, ANC 6D voted unanimously (7-0) to support the Applicant's special exception request.

OP submitted a written report (Exhibit 20) and testified in support of the application. The District Department of Transportation also submitted a written report (Exhibit 19) finding no objection to the application.

Since no person requested to participate as a party in this proceeding and the ANC supported the application, a decision by the Commission to grant this application would not be adverse to any party. Therefore, pursuant to 11 DCMR § 3000.8, the Commission waived the requirement of 11 DCMR § 3028.8 that a final order must include findings of fact and conclusions of law. The waiver will not prejudice the rights of any party and is not contrary to law.

As directed by 11 DCMR § 1804.8, the Commission required the Applicant to satisfy the burden of proving that the application satisfied the general special exception standard of 11 DCMR § 3104.1 and the specific Southeast Federal Center Overlay review standards and requirements of 11 DCMR §§ 1804.8, 1808, and 1809 pertaining to the continuation of the Trapeze School after December 31, 2014.

Subsection § 1804.8 indicates that the Commission's review "shall include a determination as to whether and what amount of parking should be required." The Commission concludes that no parking is required.

Based upon the record before the Commission, the Commission concludes that the Applicant has met the burden of proof pursuant to 11 DCMR §§ 1804.8, 1808, 1809, and 3104.1, and that the requested relief can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Commission further concludes that granting the requested relief will not tend to adversely affect the use of neighboring property. The record reflects no objections to the application, and the Commission gives great weight to the recommendations of approval from OP and the affected ANC.

It is, therefore, **ORDERED** that the application be **GRANTED** for a period expiring on December 31, 2015.

In accordance with the D.C. Human Rights Act of 1977, as amended, D.C. Official Code §§ 2-1401.01 et seq. (Act), the District of Columbia does not discriminate on the basis of actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, matriculation, political affiliation, genetic information, disability, source of income, or place of residence or business. Sexual harassment is a form of sex discrimination which is prohibited by the Act. In addition, harassment based on any of the above protected categories is prohibited by the Act. Discrimination in violation of the Act will not be tolerated. Violators will be subject to disciplinary action.

On March 12, 2015, upon the motion of Vice Chairperson Cohen, as seconded by Commissioner Miller, the Commission **ADOPTED** this Order at the conclusion of its public hearing by a vote of **5-0-0** (Anthony J. Hood, Marcie I. Cohen, Robert E. Miller, Peter G. May, and Michael G. Turnbull to adopt).

In accordance with the provisions of 11 DCMR § 3028, this Order shall become final and effective upon publication in the *D.C. Register* on April 3, 2015.

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF FILING
Z.C. Case No. 15-07
(MRP Realty – Consolidated PUD @ Square 777, Lots 24-28 and 813-815)
March 24, 2015

THIS CASE IS OF INTEREST TO ANC 6C

On March 19, 2015, the Office of Zoning received an application from MRP Realty (the "Applicant") for approval of a consolidated PUD for the above-referenced property.

The property that is the subject of this application consists of Lots 24-28 and 813-815 in Square 777 in Northeast Washington, D.C. (Ward 6), which is located at 315 H Street, N.E. The property is zoned C-2-B/ HS-H.

The Applicant proposes construct a multifamily housing building, with ground-floor retail, that will be 90 feet in height and have a density of 6.0 floor area ratio ("FAR"). There will be 125 housing units, with two percent of the units dedicated to housing affordable at the 60% area median income ("AMI") and six percent dedicated to housing at the 80% AMI level. There will be 29 below-grade parking spaces.

This case was filed electronically through the Interactive Zoning Information System ("IZIS"), which can be accessed through http://dcoz.dc.gov. For additional information, please contact Sharon S. Schellin, Secretary to the Zoning Commission at (202) 727-6311.

CONTRACT APPEALS BOARD
Opinions Issued Between January 21, 2010 and April 24, 2013

COMPANY NAME	CAB No.	DATE ISSUED
M.C. Dean, Inc.	P-0825	01-21-2010
CNA Corporation	P-0826	02-05-2010
Keystone Plus Construction Corp.	P-0822, P-0830, P-0832	09-19-2010
	P-0833	02-24-2010
American Consultants & Management Enterprises, Inc.	D-1258	03-15-2010
Roberson International, Inc., et al	D-1241, D-1224	03-19-2010
Columbia Enterprises	P-0840	04-22-2010
Netsystems Corporation	P-0841	04-28-2010
Victor Stanley, Inc.	P-0842	05-11-2010
Netsystems Corporation	P-0841	05-13-2010
Jenkins Security Consultants, Inc.	P-0846	08-03-2010
Mid Atlantic Tennis Courts & Supplies	P-0849	08-03-2010
Urban Service Systems Corp.	P-0845	08-30-2010
Kennedy Development, LLC	P-0850	08-30-2010
Unfoldment, Inc.	P-0843	11-02-2010
Comprehensive Community Health and Psychological Services, LLC	P-0859	11-09-2010
Advantage Energy LLC,	D-1199	12-03-2010
Tri Gas & Oil Co. Inc.	P-0867	12-10-2010
Community Bridge, Inc.	P-0848	01-06-2011
Children, Children, Children, Inc.	P-0858	01-07-2011
Our Future, Inc.	P-0860	01-20-2011
Comprehensive Community Health and Psychological Services, LLC	P-0859	02-08-2011
Certified Learning Centers	P-0861	02-17-2011
CNA, Inc.	P-0875	03-14-2011
Decision Support LLC	P-0853	05-19-2011
Micon Constructions, Inc.	P-0857	05-19-2011
C & E Services, Inc.	P-0874	05-19-2011
Goel Services, Inc.	P-0862	06-16-2011
S3 Integration LLC	P-0868	06-16-2011
Bank of America	D-1416	08-19-2011
Lorenz Lawn & Landscape, Inc.	P-0869	09-29-2011
Progressive Educational Experiences in Cooperative Cultures	P-0889	11-03-2011
MXI Environmental Services, LLC	P-0897	12-30-2011
Elite People Protective Services, Inc.	P-0898	01-09-2012

Friends of Carter Barron Foundation of the Performing Arts,	P-0888	01-12-2012
Keystone Plus Construction Corp.	D-1358	01-27-2012
Enterprise Information Solutions, Inc.	P-0901	02-09-2012
Urban Alliance Foundation, Voices of Our Sisters, Progressive Educational Experiences in Cooperative Cultures, Higher Development Academy and Jobs for America's Graduates	P-0886, P-0887, P-0890, P-0891, P-0892 et al (Consolidated)	02-15-2012
Martha's Table, Inc.	P-0896	05-10-2012
AMI Risk Consultants, Inc.	P-0900	05-25-2012
Grand Turk Equipment Co. Inc.	P-0884	06-05-2012
Psychiatric Institute of Washington Inc.	P-0905	08-01-2012
Horton & Barber Construction Services, LLC	P-0907	08-06-2012
Alliance for Equity and Diversity in Education	P-0913	08-16-2012
24/7 Computer Doctors, LLC	P-0909	09-17-2012
Harris Resources, PC	P-0894	10-10-2012
Commonwealth Service Operations Inc.	P-0915	10-23-2012
RideCharge Consoladated	P-0920 P-0921	11-09-2012
MorphoTrust USA,	P-0924	11-28-2012
Forney Enterprises, Inc.	P-0902	12-13-2013
Duane A. Brown	P-0914	12-14-2013
Seagrave Fire Apparatus LLC	P-0928	12-20-2012
Nastos Construction Inc.	P-0883	12-20-2012
Citelum DC LLC,	P-0922	03-01-2013
Civil Construction, LLC,	D-1294, D-1413, D-1417	03-14-2013
Unfoldment, INC.	D-1062	03-14-2013

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

M.C. DEAN, INC.	)	
	)	CAB No. P-0825
Under Solicitation No. DCKA-2009-B-0100	)	

For the Protester, M.C. Dean, Inc.: Lawrence M. Posen, Esq. For the Intervener, Fort Myer Construction Corporation: Christopher M. Kerns, Esq. For the District of Columbia Government: Robert Schildkraut, Esq., Assistant Attorney General.

Opinion by Administrative Judge Warren J. Nash, with Chief Administrative Judge Jonathan D. Zischkau, concurring.

OPINION

Filing ID 29144954

M.C. Dean, Inc., has protested the award of a contract to the low bidder, Fort Myer Construction Corporation. M.C. Dean contends that Fort Myer's bid is nonresponsive because the bid contained the following alleged irregularities: (1) the bid did not include a letter of agreement between PEPCO and Fort Myer; (2) the Disclosure of Lobbying Activities form was not signed; (3) the bid did not contain a completed and signed Equal Employment Opportunity Employer Information Report; and (4) the bid did not contain Fort Myer's Clean Hands Certification or license to transact business in the District. The contracting officer executed a determination and findings that the incomplete forms in Fort Myer's bid constituted a minor informality and that it was in the best interests of the District to waive the solicitation requirements related to these items. We conclude that the contracting officer did not violate law, regulation, or the terms of the solicitation by waiving the minor informalities in Fort Myer's bid, and determining that the bid was responsive. Accordingly, we deny the protest.

BACKGROUND

On August 4, 2009, the District's Office of Contracting and Procurement ("OCP"), on behalf of the District's Department of Transportation ("DDOT") issued Invitation for Bids ("IFB") No. DCKA-2009-B-0100. (Agency Report ("AR"), at 2; AR Ex. 2). The IFB was seeking a contractor to supply and install traffic signal control equipment and other communication devices in accordance with contract specifications. Three amendments were issued. (AR Ex. 3). The bid opening occurred on September 18, 2009, with three bids being submitted. (AR Ex. 1). The results of the bid submissions are as follows: Fort Myer $1,250,808.27; M.C. Dean $1,280,116.40; and Utility Systems C&E, LLC, $1,427,763.00. (AR Ex. 4). On September 25, 2009, M.C. Dean filed its protest. On October 26, 2009, the contracting officer signed a

"Determination and Finding of Minor Informality in Ft. Myer's Bid Submission" ("D&F"). (AR Ex. 6). We discuss the facts relevant to each of the challenged portions of Fort Myer's bid.

PEPCO Agreement

The IFB contained a deliverables requirement in section F.2 for each bidder to provide in its bid a letter of agreement between PEPCO and the bidder for electric services disconnect/reconnect. (AR at 4-5; AR Ex. 2). Fort Myer did not provide such an agreement in its bid. However, no bidder, including M.C. Dean, provided such a letter. (AR at 4-5). M.C. Dean in its comments on the Agency Report agrees that the contracting officer appropriately waived the requirement for the PEPCO agreement to be submitted in the bid.

Disclosure of Lobbying Activities form

Fort Myer submitted but did not sign the Disclosure of Lobbying Activities form referenced in section J.1.11 of the IFB. At the top of the form, printed instructions state: "Complete this form to disclose lobbying activity pursuant to 31 U.S.C. 1352." (AR Ex. 5a). Fort Myer inserted the words "Not Applicable" at the top of page 1 of the form. (AR Ex. 5a). The contracting officer understood this designation to mean that Fort Myer had not engaged in lobbying activities requiring execution of the form. In his D&F, the contracting officer determined that it was in the best interests of the District to waive the need for Fort Myer to sign the form. (AR at 5; AR Ex. 6).

Equal Employment Opportunity Employer Information Report

IFB section J.1.12 requires bidders to prepare and submit an "Equal Opportunity/Non Segregated Facilities Certificate (1 Page)" and section J.1.5 requires bidders to prepare and submit "E.E.O. [Equal Employment Opportunity] Compliance Documents (6 Pages)." (AR Exs. 2a, 2b). Fort Myer completed and signed the Equal Employment Opportunity Policy Statement and the Assurance of Compliance with Equal Employment Opportunity Requirements. (AR Ex. 5a). In Fort Myer's bid, the Equal Employment Opportunity Employer Information Report is blank except for Fort Myer's typed notation at the top of the page reading "See attached 2008 Employer Information Report EEO-1." (AR Ex. 5a). Immediately following the Information Report is Fort Myer's referenced 2008 EEO Information Report containing a spreadsheet of Fort Myer EEO data, a blank "Employment Data" one-page form, and a partially completed and signed "Projected Goals and Timetables for Future Hiring" form. The contracting officer in his D&F determined that any page that was not completed was a minor informality because Fort Myer submitted all of the required data, when considering all of Fort Myer's bid submission, including its own computer generated form, *i.e.*, the 2008 Employer Information Report. (AR Ex. 6).

Clean Hands Certification and License to Transact Business in the District

A "Clean Hands Certification" is required by section L.13.2 of the solicitation. (AR Ex. 2c). This section also requires each corporate bidder to provide a copy of its license, registration, or certification to transact business in the District or a statement of intent to obtain such documentation. Fort Myer's bid provided neither a Clean Hands Certification nor a license to transact business in the District nor a statement of intent to obtain the license. The contracting officer in his D&F found that the Clean Hands Certification merely duplicates checks conducted by the District's Department of Tax and Revenue and the District's Department of Employment Services to certify the legal tax status of the bidder before award. (AR at 6; AR Ex. 6). The contracting officer provided a copy of the tax certifications from the Department of Tax and Revenue and Department of Employment Services. (AR Ex. 6). Further, the contracting officer determined in the D&F that a copy of the license to transact business in the District was not required as it had previously been determined that Fort Myer held such a license. The contracting officer determined that it was in the best interests of the District to waive the need for these documents. (AR at 6-7; AR Ex. 6).

On October 26, 2009, Fort Myer intervened in the protest. On October 29, 2009, the District filed its Agency Report. M.C. Dean filed comments on November 9, 2009. On November 18, 2009, the District responded to M.C. Dean's comments. As of November 18, no contract had been awarded under the IFB.

DISCUSSION

We exercise jurisdiction over this protest pursuant to D.C. Code § 2-309.03 (a)(1), and address M.C. Dean's challenges to Fort Myer's bid responsiveness due to alleged irregularities in the bid documents. The test for responsiveness is whether a bid offers to perform the exact thing called for in an IFB, so that the acceptance of the bid will bind a bidder to perform in accordance with all of the terms and conditions of the solicitation without exception. *Omni Elevator Co.,* B-241678, Feb. 25, 1991, 91-1 CPD ¶ 207. A bid defect which is not material does not require rejection of the bid. Rather, it may be waived as a minor informality. A defect is minor if it does not affect price, quantity, delivery or quality or otherwise affect the bidder's obligations under the contract." *Walker Construction,* B-246759, Mar. 30, 1992, 92-1 CPD ¶ 319. Further, 27 DCMR § 1535.1 provides that "[m]inor informalities or irregularities in bids may be waived if the contracting officer determines that the waiver is in the best interest of the District." When it is in the best interest of the District, "the contracting officer shall give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid, or waive the deficiency." 27 DCMR § 1535.4.

PEPCO Agreement

M.C. Dean in its comments on the Agency Report agrees that the contracting officer appropriately waived the requirement for the PEPCO agreement to be submitted in the bid.

Disclosure of Lobbying Activities form

M.C. Dean contends that the failure to complete and sign the Disclosure of Lobbying Activities form renders Fort Myer's bid nonresponsive. We agree with the District that the contracting officer properly understood Fort Myer's "Not Applicable" designation at the top of the form to mean that Fort Myer had not engaged in lobbying activities requiring execution of the form. We sustain the contracting officer's determination that it was in the best interests of the District to waive the need for Fort Myer to sign the form. (AR at 5; AR Ex. 6). We have previously held that a bidder's failure to complete a Disclosure of Lobbying Activities form to be a minor irregularity that does not render a bid nonresponsive because such an omission does not affect the material obligations of the bidder. *Modern Electric, Inc.*, CAB No. P-0341, Apr. 5, 1993, 40 D.C. Reg. 5068, 5069.

Equal Employment Opportunity Employer Information Report

M.C. Dean argues that Fort Myer did not comply with the IFB by preparing and submitting an Equal Employment Opportunity Employer Information Report. We agree with the District that the contracting officer properly determined that Fort Myer's bid contained the requested Equal Employment Opportunity employer information even though Fort Myer used its own form in one case to provide some of the requested data. *See Modern Electric, Inc.*, 40 D.C. Reg. at 5069 (failure to sign EEO certificate did not affect any material term of the solicitation and could be waived by the contracting officer).

Clean Hands Certification and License to Transact Business in the District

M.C. Dean argues that the contracting officer had no reasonable grounds for waiving the requirement that Fort Myer prepare and submit a Clean Hands Certification and license to transact business in the District. We disagree. The contracting officer in his D&F found that the Clean Hands Certification merely duplicates checks conducted by the District's Department of Tax and Revenue and the District's Department of Employment Services to certify the legal tax status of the bidder before award. The contracting officer provided copies of those agencies' certifications. (AR Ex. 6). In addition, the contracting officer determined in the D&F that a copy of the license to transact business in the District was not required as it had previously been determined that Fort Myer held such a license. We see no error by the contracting officer in determining that it was in the best interests of the District to waive the minor informalities in Fort Myer's bid.

Finally, M.C. Dean labels the D&F a *post-hoc* rationalization of the contracting officer's actions and thus the D&F is entitled to little or no weight. We cannot agree. Although the D&F was prepared after the protest filing, it preceded award as the District points out in its reply to M.C. Dean's comments. Moreover, as described above, the

contracting officer articulates in the D&F reasonable grounds to support his determination to waive the minor informalities in Fort Myer's bid for each of the items challenged by M.C. Dean.

In sum, we conclude that the contracting officer's determination to waive the minor informalities in Fort Myer's bid did not violate law, regulation, or the terms of the solicitation.

CONCLUSION

For the reasons discussed above, we deny M.C. Dean's protest.

DATED: January 21, 2010

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

CNA CORPORATION	)	
	)	CAB No. P-0826
Solicitation No: DCKA-2009-B-0193	)	

For the Protester, CNA Corporation: John C. Cheeks, CEO, *pro se*. For the District of Columbia Government: Alton E. Woods, Esq., Assistant Attorney General.

Opinion by Administrative Judge Warren J. Nash, with Chief Administrative Judge Jonathan D. Zischkau, concurring.

OPINION

Filing ID 29422218

Protester, CNA Corporation, challenges award of a contract and alleges that other bidders committed non-collusion affidavit violations. The District filed a motion to dismiss the protest, arguing that CNA's bid was nonresponsive, CNA lacks standing as the fourth lowest bidder, and CNA's protest lacks a clear and concise statement of its legal and factual grounds and is frivolous. We agree with the District that CNA's bid was nonresponsive and that its collusion allegations are meritless. Accordingly, we dismiss the protest with prejudice.

BACKGROUND

On August 25, 2009, the Office of Contracting and Procurement ("OCP") advertised Invitation for Bids No. DCKA-2009-B-0193 ("IFB") for the Citywide Safe Routes to School Project in the Washington Times and posted it on its website. The solicitation, issued on behalf of the District's Department of Transportation ("DDOT"), was for multiple contractors to provide the installation and reconstruction of small scale safety improvements on roadways and at intersections within the District of Columbia. (Motion to Dismiss Ex. 1(a)). Bids were due and received on September 28, 2009, as follows:

1. Anchor Construction	$2,161,473
2. Capital Paving of DC	$2,341,770
3. Fort Myer Construction	$2,344,870
4. CNA	$2,376,095.90 as corrected
5. Civil Construction	$2,415,255
6. Prince Construction	$2,440,235
7. Omni Excavators	$2,617,405
8. A&M Concrete Corp.	$2,682,519.35 as corrected
9. Potomac Construction Co.	$2,847,280

(AR Ex. 5). Subsequent to the bid tabulation, the contracting officer informed CNA that a mathematical error had been discovered in line 1200 of its bid regarding mobilization, and that the amount had been adjusted to the allowable maximum amount of $189,337.90.

The IFB required that bidders provide a bid security for a period of 90 working days after bid opening. The appropriate bid guaranty form was made a part of the bidding documents. (Motion to Dismiss Ex. 1 (a)). In the "Instructions to Bidders" section of the Standard Contract Provisions for Construction Projects, Article 12, Bond Requirements, bidders were informed that no bid will be accepted unless it is guaranteed by a bid bond with good and sufficient sureties, a certified check payable to the District Treasurer, negotiable United States bonds (at par value), or in an irrevocable letter of credit in an amount not less than 5 percent of the bid as a bid guaranty. The "bid bond" submitted by CNA is an unsigned letter to CNA from Tobi Wilkins of Quantum Corporate Funding, Ltd., dated September 25, 2009, stating:

> RE: FY-09 CITY-WIDE SAFE ROUTES TO SCHOOL
>
> GOVERNMENT OF THE DISTRICT OF COLUMBIA DEPARTMENT OF TRANSPORTATION
>
> DCKA-2009-B-0193 BID/CONTRACT AMOUNT $3,194,813.00
>
> OFFER EXPIRES: DECEMBER 25, 2009 @ 2:00 PM EST
>
> This letter will verify that your letter of credit/factoring line (75%) is, indeed, in place. We will purchase whatever invoices you submit to us that we can verify in writing with your procurement officer that the work you are billing for has been performed and accepted or the services you are billing for has been rendered…dollar amount is correct and they will pay Quantum.
>
> I am attaching the letter they would have to sign for their perusal and OK.

(Motion to Dismiss, Ex. 6).

On September 29, 2009, CNA filed its protest, asking the Board to: (1) grant its protest based on the "NON-COLLUSION AFFIDAVIT violations" of companies that responded to the IFB (except CNA); (2) "dismiss all companies listed who submitted bids by engaging or sharing common board of director(s), ownership affiliation, financial interest, family relations or Sub Contractor single tier price fixing and violation of non-collusion affidavit"; and (3) that "DC OCP/DC DOT release and suspend all affiliated companies listed, in violation of the NON-COLLUSION AFFIDAVIT, from bidding on solicitations and performing DC Public Works Contracts for a period of seven years each from 09/28/09 to 12/30/16." CNA has presented no documents or other evidence to support its allegations.

On October 19, 2009, the contracting officer, Mr. Jerry Carter, executed a declaration respecting the protest stating, in part, that:

> 5. In two prior protests before the CAB (P-0794 and P-0810), as in this protest, CNA has made the same allegation of collusive bidding by other contractors. In each case, in accordance with 27 DCMR § 1007.2, I requested that CNA provide documents to me to support the allegations. CNA never provided any documents to me to support the allegations.
>
> 6. On May 18, 2009, I attended a meeting with John C. Cheeks, CNA's CEO, to discuss bids that he had submitted on other solicitations, and to also discuss his allegation of collusive bidding among bidders. The meeting was held at the Office of Contracting and Procurement (OCP) and was also attended by Alton E. Woods, from the District's Office of the Attorney General. In this meeting Mr. Cheeks told me that he had documents to support all of the allegations and would provide them to me after the meeting. I told Mr. Cheeks that if he provided evidence to me to support the allegations of collusive bidding, that I would investigate the matter and refer the issue to the District's Chief Procurement Officer, as required by 27 DCMR § 1007.2. As of this date, Mr. Cheeks has not provided any information to me to support this assertion.

(Motion to Dismiss Ex. 5).

On October 19, 2009, the District filed a motion to dismiss. On November 9, 2009, CNA responded to the District's motion to dismiss. On November 30, 2009, the District filed a determination and finding to proceed with contract award and performance ("D&F"). On December 8, 2009, CNA filed its opposition to the D&F, and a statement at paragraph 3 that: "CNA shall continue to file bid protests with the approval of District of Columbia Contract Appeals Board each time when CNA is exposed to bid rigging, non-collusion violations, discrimination and/or contract steering. . . ."

DISCUSSION

We exercise jurisdiction pursuant to D.C. Code § 2-309.03(a)(1).

A. Responsiveness of CNA's Bid

The IFB required that bidders provide a bid security for a period of 90 working days after bid opening. The appropriate bid guaranty form was made a part of the bidding documents. In the "Instructions to Bidders" section of the Standard Contract Provisions for Construction Projects, Article 12, Bond Requirements, bidders were informed that no bid will be accepted unless it is guaranteed by a bid bond with good and sufficient sureties, a certified check payable to the District Treasurer, negotiable United States bonds (at par value), or in an irrevocable letter of credit in an amount not less than 5 percent of the bid as a bid guaranty.

We have consistently recognized that a bid bond is a material requirement because it is a type of security that assures that a bidder will not withdraw its bid within the time specified for acceptance and, if required, will execute a written contract and furnish payment and performance bonds. The purpose of a bid bond is to secure the liability of a surety to the government in the

event the bidder fails to fulfill these obligations. When a bidder supplies a defective bond, the bid itself is rendered defective and must be considered nonresponsive. *Nation Capital Builders, LLC*, CAB No. P-0761, Nov. 20, 2007, 57 D.C. Reg. 741; *NAPA Development Corp.*, CAB No. P-0384, Nov. 19, 1993, 41 D.C. Reg. 3839.

Clearly, CNA did not submit with its bid a proper surety bond, but rather a letter from a company promising to purchase invoices from CNA upon the completion of performance, and only if the "procurement officer verifies that the work has been performed." In this case, CNA's failure to submit adequate bid security in strict accordance with the IFB instructions rendered its bid nonresponsive.

B. Standing

Because CNA's bid is nonresponsive, it is not in line for award and therefore lacks standing to raise other challenges regarding an award. *C.P.F. Corp.*, CAB No. P-0521, Jan. 12, 1998, 45 D.C. Reg. 8697, 8699 (the Board will not consider protests by bidders who are not next in line for award if the protest is sustained).

C. Collusion Allegations

As detailed above, CNA has made a number of vague and unsupported allegations of collusion among the other bidders. Although CNA lacks standing, we address these allegations so that CNA will not repeat its baseless allegations in the future. Board Rule 301.1(c) requires that a protest contain "a clear and concise statement of the legal and factual grounds of the protest, including copies of relevant documents, citations to statutes, regulations, or solicitation provisions claimed to be violated." In its response to the District's motion to dismiss, CNA merely reargues its allegations of collusion and attaches a listing of various named individuals for the other bidders and their relationships with the other bidders' representatives. Neither its protest nor its response to the District's motion to dismiss provides support for its collusion allegations. Accordingly, we dismiss this protest ground as wholly unsupported and bordering on the frivolous. CNA has raised the issue of collusive bidding in two prior protests before the Board (P-0794 and P-0810) and in none of the cases has CNA supported its allegations. Both the PPA and the Board's rules provide for sanctions where the Board determines that a protest is frivolous:

> The Board may dismiss, at any stage of the proceedings, any protest, portion of a protest, it deems frivolous. In addition, the Board may require the protester to pay the agency attorney fees, at the rate of $100 per hour, for the time counsel spent representing the agency in defending the frivolous protest or its frivolous parts. If the entire protest is dismissed on frivolous grounds, it may also assess the protester damages for each day the contract was suspended equal to the amount of liquidated damages specified in the contract for late completion of the contract. The Board shall not determine damages, if liquidated damages are not specified in the contract. In addition, counsel for the protester may be suspended or barred from practicing before the Board.

D.C. Code § 2-309.08(g); Board Rule 308.2. Because CNA is represented by its owner, Mr. Cheeks, and not by counsel, we will not assess sanctions at this time. However, if CNA were to file similar unsupported allegations in the future, we will consider sanctions.

We dismiss the protest with prejudice.

SO ORDERED.

DATED: February 5, 2010

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTESTS OF:

KEYSTONE PLUS CONSTRUCTION CORP.	)	
	)	CAB Nos. P-0822, P-0830,
	)	And P-0832
	)	
Solicitation No: DCAM-2009-B-0040	)	

For the Protester: John Hardin Young, Esq. For the Intervener: Mr. Keith Forney, President, FEI Construction Company. For the District of Columbia Government: Talia Cohen, Esq., Howard Schwartz, Esq., Assistant Attorneys General.

Opinion by Administrative Judge Warren J. Nash, with Chief Administrative Judge Jonathan D. Zischkau, concurring.

OPINION

Filing ID 29663771

Keystone Plus Construction Corporation protests the decision of the contracting officer to award to Forney Enterprises, Inc. ("FEI"), a contract for renovations of Building #52 at the University of the District of Columbia's ("UDC") Van Ness Campus. Keystone's bid was determined to be nonresponsive due to an inadequate certified business enterprise ("CBE") subcontracting plan. Because the CBE subcontracting plan in Keystone's bid was materially incomplete, Keystone's bid was nonresponsive pursuant to D.C. Code § 2-218.46(d). Accordingly, the contracting officer did not err in determining Keystone's bid to be nonresponsive. We dismiss in part and deny in part the consolidated protests.

BACKGROUND

On July 8, 2009, the District's Office of Property Management, Contracts Division for the District of Columbia Government, issued Invitation for Bids No. DCAM-2009-B-0040 ("IFB") in the Open Market for a contractor to provide all labor, materials, equipment, and supervision for the renovation of Building #52, University of the District of Columbia, Van Ness Campus, 4350 Connecticut Avenue, NW, Washington, DC, 20008. (Agency Report ("AR"); AR Ex. 1).

Between July 15, 2009, and August 25, 2009, the District issued 12 amendments. (AR Ex. 1). Section B.2 of the IFB provides:

> Any prime contractor responding to this solicitation must submit with its bid, a notarized statement detailing its subcontracting plan. Proposals responding to this IFB shall be deemed nonresponsive and shall be rejected if the bidder fails to submit a subcontracting plan that is required

> by this solicitation. For construction contracts in excess of $250,000, at least 35% of the dollar volume of the contract shall be subcontracted in accordance with section M.1.5.

(AR Ex. 1). In addition, pursuant to Section M.1.1, the IFB allowed preferences in evaluating bids under the Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005. (AR Ex. 1). Section L.9 of the IFB initially provided:

> L.9 SUBMISSION OF SUBCONTRACTING PLAN:
>
> L.9.1 Any prime contractor responding to this solicitation shall submit, within 5 days of the CO's request, a notarized statement detailing it [sic] plan. This plan shall meet the requirements described under Section M.1.10 of this solicitation.
>
> L.9.2 A Contractor cannot make any changes to its subcontracting plan without prior written approval by the CO. The approved plan will be incorporated into and become part of the contract.

(AR Ex. 1). On August 21, 2009, the District issued Amendment 9, which required bidders to submit a subcontracting plan with the bid consistent with Sections B.2 and M:

> (1) Section L.9 of the solicitation is hereby changed to read as follows:
>
> L.9.1 Any prime contractor responding to this solicitation shall submit with the bid, a notarized statement detailing its subcontracting plan. This plan shall meet the requirements described under Section M.1.10 of this solicitation.
>
> (2) All other terms and conditions remain the same.

The first page of the solicitation at section 6 of Standard Form A made applicable a provision stating: "Open Market with set aside for LSDBE subcontracting (see Sec-M)". (AR Ex. 1). The referenced Section M provides in pertinent part:

> M.1.5 Mandatory Subcontracting Requirement
>
> M.1.5.1 For construction contracts in excess of $250,000, at least 35% of the dollar volume of the construction contract shall be subcontracted to certified small business enterprises; provided, however, that the costs of materials, goods and supplies shall not be counted towards this 35% subcontracting requirement unless such materials, goods and supplies are purchased from SBEs. . . .

M.1.6 Certified Business Enterprise Prime Contractor Performance Requirements

M.1.6.1 If a certified business enterprise is selected as a prime contractor and is granted a price reduction pursuant to the Act or is selected through a set-aside program under the Act, that certified business enterprise prime contractor shall perform at least 35% of the contracting effort, excluding the cost of materials, goods and supplies, with its own organization and resources and, if it subcontracts, at least 35% of the subcontracted effort, excluding the cost of materials, goods and supplies, shall be with certified business enterprises. . . .

M.1.9 Subcontracting Plan

Any prime contractor responding to this solicitation shall submit with its bid, a notarized statement detailing its subcontracting plan. Bids responding to this IFB shall be deemed nonresponsive and shall be rejected if the bidder fails to submit a subcontracting plan that is required by this solicitation. Once the plan is approved by the contracting officer, changes will only occur with the prior written approval of the contracting officer and the Director of DSLBD. Each subcontracting plan shall include the following:

M.1.9.1 A description of the goods and services to be provided by SBEs or, if insufficient qualified SBEs are available, by any certified business enterprises;

M.1.9.2 A statement of the dollar value of the bid that pertains to the subcontracts to be performed by the SBEs or, if insufficient qualified SBEs are available, by any certified business enterprises;

M.1.9.3 The names and addresses of all proposed subcontractors who are SBEs or, if insufficient SBEs are available, who are certified business enterprises;

M.1.9.4 The name of the individual employed by the prime contractor who will administer the subcontracting plan, and a description of the duties of the individual;

M.1.9.5 A description of the efforts the prime contractor will make to ensure that SBEs, or, if insufficient SBEs are available, that certified business enterprises will have an equitable opportunity to compete for subcontracts;

M.1.10 Compliance Reports

> By the 21st of every month following the execution of the contract, the prime contractor shall submit to the contracting officer and the Director of DSLBD a compliance report detailing the contractor's compliance, for the preceding month, with the subcontracting requirements of the contract. The monthly compliance report shall include the following information. . .

(AR Ex. 1). Viewing the solicitation as a whole, we find that the solicitation clearly required bidders to submit with their bids a certified business enterprise subcontracting plan and made the subcontracting plan submission a matter of bid responsiveness.

On August 31, 2009, the following eleven prospective contractors submitted bids in response to the IFB: (1) Chiaramonte Construction Company ($5,342,094.03); (2) Horton & Barber ($6,142,400.00); (3) Keystone ($6,389,100.00); (4) FEI ($6,450,400.00); (5) Hess Construction ($7,150,000.00); (6) GCI, Inc. ($7,341,500.00); (7) Specialty Construction ($7,992,400.00); (8) Prince Construction Company ($8,688,000.00); (9) Apex Services, Inc. ($8,564,500.00); (10) Maryland Construction ($8,184,483.00); and, (11) Ammka Inc. ($9,649,600.00). (AR Ex. 2).

The District prepared an Evaluated Bid Tabulation indicating the following regarding the four lowest bidders: (1) Chiaramonte offered the lowest evaluated price of $5,342,094.03; (2) Horton & Barber offered the second lowest evaluated price of $6,142,400.00; (3) Keystone offered the third lowest evaluated price of $6,389,100.00; and (4) FEI offered the fourth lowest evaluated price of $6,450,400.00. (AR Ex. 2).

In its subcontracting plan, Keystone omitted the total dollar amount of subcontracts, and the total dollar amount of LSDBE subcontracts. For the LSDBE percentage set-aside, Keystone stated that the percentage equaled 35% but an asterisk below reads: "if awarded, [Keystone] shall subcontract a minimum of 35% to LSDBE's." (AR Ex. 3). This notation suggests that Keystone intended to have more than one LSDBE subcontractor. However, only one subcontractor is listed on the subcontracting plan, Swann Construction, and for that subcontractor, the lines requesting the total subcontract dollar amount and the percentage of the total set aside amount are left blank. The plan included Swann's address, telephone number, email address, LSDBE certifications, and statement of work items to be performed. (AR Ex.3). At an evidentiary hearing on January 7, 2010, Keystone witnesses provided no testimony to support a finding that its subcontracting plan included in its bid was materially complete. As described below, the evidence shows that the initial subcontracting plan was materially incomplete at the time of bid opening.

By letter dated August 31, 2009, Chiaramonte requested permission to withdraw its bid as its bid contained a mathematical error. (AR Ex. 2). In the belief that the District intended to award the proposed contract to Horton & Barber, Keystone file a protest with the Board on September 10, 2009 (docketed as CAB No. P-0822), challenging any contract award to Horton & Barber or any other company other than Keystone. On October 7, 2009, the District reviewed Horton & Barber's bid and found it to be nonresponsive due to an insufficient bid bond. (AR Ex. 6). On October 8, 2009,

the District reviewed the bid of Keystone and found it nonresponsive due to an incomplete subcontracting plan. (AR Ex. 6).

On October 13, 2009, the contract specialist contacted Keystone's subcontractor, Swann Construction. (AR Ex. 7). Swann failed to respond to the contract specialist. On October 13, 2009, the contract specialist also contacted Keystone, requesting a list of its subcontractors and the percentages of work to be performed. (AR Ex. 7; Tr. 14). On October 14, 2009, Keystone sent an email to the District stating, in pertinent part:

> Please find below our preliminary estimate of subcontractors for UDC Bldg 52
>
> | Subcontractor | Percentage | Designation |
> |---|---|---|
> | Dominion Electric of Washington, D.C. | 20% | CBE |
> | Swann Construction | 19% | CBE |
> | SEF Metal Fabricators | 8% | DBE |
> | Calvert Jones | 53% | n/a |

(AR Exs. 5, 6; Tr. 19). By a Determination and Findings for Award to Other than Low Bidder, dated October 21, 2009, the contracting officer determined inter alia that Keystone's bid was nonresponsive for failure to submit a complete subcontracting plan and, based on Keystone's October 14, 2009 email, District officials noted that "[f]urther review revealed that Keystone intended to subcontract 100% of the contract out for completion. This is in violation of D.C. Code 2-218.46(b)(1) (A)." (AR Ex. 2).

On October 22, 2009, Keystone provided another subcontracting plan to the District via email. The plan, dated October 9, 2009, included only two subcontractors: Swann and Dominion Electric. (Keystone's Exhibits B and C attached to Roubin affidavit of December 12, 2009).

On October 29, 2009, the District filed a motion to dismiss Keystone's protest in P- 0822 based on mootness and lack of standing. On October 29, 2009, Keystone filed with the Board an additional protest (CAB No. P-0830) challenging the District's rejection of Keystone's bid as nonresponsive. On November 4, 2009, Keystone filed a response to the District's motion to dismiss in P-0822. On November 5, 2009, Keystone filed a third protest (CAB No. P-0832) challenging FEI's subcontracting plan. The Board consolidated protests P-0830 and P-0832. On November 12, 2009, the District filed a notice of intent to award dated November 10, 2009, in P-0822, P-0830 and P-0832 (consolidated) and filed a Determination and Findings to Proceed with Contract Award while a Protest is Pending. On November 25, 2009, the District filed its agency report and motion to dismiss in CAB Nos. P-0830 and P-0832. A hearing before the Board was held on January 7, 2010, and the parties have filed post-hearing briefs.

DISCUSSION

We exercise jurisdiction pursuant to D.C. Code § 2-309.03(a)(1). The main issue presented in these consolidated protests is whether the contracting officer properly determined that Keystone's admittedly incomplete subcontracting plan furnished with its bid rendered Keystone's bid nonresponsive.

D.C. Code §§ 2-218.46(d) and (e) provide:

> (d) Bids or proposals responding to a solicitation, including an open market solicitation, shall be deemed nonresponsive and shall be rejected if the solicitation requires submission of a certified business enterprise subcontracting plan and the prime contractor fails to submit a subcontracting plan as part of its bid or proposal. A certified business enterprise subcontracting plan shall specify the following:
>
> (1) The name and address of the subcontractor;
> (2) Whether the subcontractor is currently certified as a certified business enterprise;
> (3) The scope of work to be performed by the subcontractor; and
> (4) The price to be paid by the contractor to the subcontractor.
>
> (e) No prime contractor shall be allowed to amend the subcontracting plan filed as part of its bid or proposal except with the consent of the contracting officer and the Director. Any reduction in the dollar volume of the subcontracted portion resulting from such amendment of the plan shall insure [sic] to the benefit of the District.

There is no dispute that subsection 2-218.46(d) applies to this procurement and the procuring agency. As the facts amply demonstrate, the solicitation was an open market solicitation requiring submission of a certified business enterprise subcontracting plan. Section M of the solicitation tracks much of the language of D.C. Code § 2-218.46, including subsection 2-218.46(d). Thus, each bidder was required to submit a complete subcontracting plan including the name and address, current CBE certification status, scope of work, and price to be paid, for each subcontractor.

Keystone argues that the subcontracting plan language from Amendment No. 9, when read in conjunction with the mistakenly referenced Section M.1.10 regarding compliance reports, somehow makes the CBE subcontracting requirements only a matter of responsibility, which Keystone could have satisfied after bid opening but before contract award. Indeed, prior to enactment of D.C. Code § 2-218.46 in 2005, District procurement law addressed subcontracting plans in bids as a matter of bidder responsibility, not responsiveness. However, section 2-218.46, in regulating performance and subcontracting requirements, including CBE participation, mandates that CBE subcontracting plans, under certain defined circumstances which are applicable here, be a matter of bid responsiveness. Although Amendment No. 9 lacked the clarity and precision that one would expect, Section M, particularly M.1.9, of the solicitation provides more than adequate clarity that the subcontracting plan here was a matter of responsiveness. Each bidder in this procurement was required to submit a CBE

subcontracting plan with its bid. In future applicable solicitations, contracting officers should make very clear in the relevant parts of the solicitation the fact that a CBE subcontracting plan is required with the bid, including the statutorily required information, and that a materially incomplete subcontracting plan at the time of bid opening will render the bid nonresponsive.

On the facts presented in the record, Keystone's subcontracting plan was materially incomplete so as to render its bid nonresponsive. In its subcontracting plan, Keystone omitted the total dollar amount of subcontracts, and the total dollar amount of LSDBE subcontracts. For the LSDBE percentage set-aside, Keystone stated that the percentage equaled 35% but states further: "if awarded, [Keystone] shall subcontract a minimum of 35% to LSDBE's." This suggests that Keystone intended to have more than one LSDBE subcontractor. However, only one subcontractor is listed on the subcontracting plan, and for that subcontractor, the lines requesting the total subcontract dollar amount and the percentage of the total set aside amount are left blank. Over a month after bid opening, on October 14, 2009, Keystone furnished by email a "preliminary estimate of subcontractors" for the project, listing four subcontractors with percentages of 20, 19, 8, and 53. On October 22, 2009, Keystone furnished a new subcontracting plan identifying the same subcontractor listed on the original subcontracting plan (but this time including a subcontract dollar amount and percentage set aside amount) plus an additional subcontractor with all of the information completed on the subcontracting plan form. At the evidentiary hearing, Keystone admitted that the original subcontracting plan submitted with its bid was incomplete and that it intended to complete its plan after notice of award. The omissions in the original subcontracting plan submitted with Keystone's bid, taken together, rendered that plan materially incomplete.

Because the CBE subcontracting plan in Keystone's bid was materially incomplete, Keystone's bid was rendered nonresponsive pursuant to D.C. Code § 2-218.46(d). Accordingly, the contracting officer did not err in determining Keystone's bid to be nonresponsive.

We have considered the other protest grounds raised by Keystone and these grounds are either moot or lack merit. With regard to Keystone's allegations regarding FEI, Keystone lacks standing to challenge the award.

CONCLUSION

For the reasons discussed above, we conclude that the contracting officer did not err in determining Keystone's bid to be nonresponsive based on a materially incomplete CBE subcontracting plan submitted with its bid. Accordingly, the protests are dismissed in part and denied in part.

SO ORDERED.

DATED: February 19, 2010

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

KEYSTONE PLUS CONSTRUCTION CORP.)
) CAB No. P-0833
Solicitation No: DCAM-2009-B-0052)

For the Protester: Mr. Carlos Perdomo, *pro se*. For the District of Columbia Government: Alton E. Woods, Esq., Assistant Attorney General.

Opinion by Administrative Judge Warren J. Nash, with Chief Administrative Judge Jonathan D. Zischkau, concurring.

OPINION

Filing ID 29740668

Keystone Plus Construction Corporation ("Keystone") protests the decision of the contracting officer to reject Keystone's bid as nonresponsive because Keystone failed to submit a subcontracting plan as required by Section M.1.9 of the solicitation. The District asserts that the contracting officer was required to reject the bid as nonresponsive since the subcontracting plan listed no subcontractor information. We agree with the contracting officer and deny the protest.

BACKGROUND

On July 29, 2009, the District's Department of Real Estate Services ("DRES") issued Invitation for Bids No. DCAM-2009-B-0052 ("IFB") in the certified small business enterprise ("SBE") set-aside market for build out of the 10th floor office space for the office of the Attorney General at One Judiciary Square at 441 4th Street, NW. (Agency Report ("AR") Ex. 1).

The original solicitation required the following at section L.9.1:

> Any prime contractor responding to the solicitation shall submit, within 5 days of the CO's request, a notarized statement detailing its subcontracting plan. This plan shall meet the requirements described under Section M.1.10 of this solicitation.

(AR Ex. 1). Although five amendments were issued to the solicitation, only Amendment 2, issued on August 24, 2009, is germane to this protest. It provides:

> (1) Section L.9 is hereby deleted in its entirety and is now changed to read as follows:

> (2) Any prime contractor responding to this solicitation shall submit with its bid, a notarized statement detailing its subcontracting plan. This plan shall meet the requirements described under Section M.1.10 of this solicitation.

(AR Ex. 2). Section M.1.9 of the solicitation includes the following language regarding the subcontracting plan

> Any prime contractor responding to this solicitation shall submit with its bid, a notarized statement detailing its subcontracting plan. Bids responding to this IFB shall be deemed nonresponsive and shall be rejected if the bidder fails to submit a subcontracting plan that is required by the solicitation.…

(AR Ex. 1). Subsections of M.1.9 identify the specific information that must be included in each subcontracting plan:

> M.1.9.1 A description of the goods and services to be provided by the SBEs…;
>
> M.1.9.2 A statement of the dollar value of the bid that pertains to the subcontract to be performed by SBEs…;
>
> M.1.9.3 The names and addresses of all proposed subcontractors who are SBE's…;
>
> M.1.9.4 The name of the individual employed by the prime contractor who will administer the subcontracting plan…;
>
> M.1.9.5 A description of efforts that the prime contractor will make to ensure that SBEs, or, if insufficient SBEs are available, that certified business enterprises will have an equitable opportunity to compete for subcontracts;
>
> M.1.9.6 In all subcontracts that offer further subcontracting opportunities, assurances that the prime contractor will include a statement, approved by the contracting officer, that the subcontractor will adopt a subcontracting plan similar to the subcontracting plan required by the contract;
>
> M.1.9.7 Assurances that the prime contractor will cooperate in any studies or surveys that may be required by the contracting officer…;
>
> M.1.9.7 A list of the type of records the prime contractor will maintain to demonstrate procedures adopted to comply with the requirements set forth in the subcontracting plan, and assurances that the prime contractor will such records available for review upon the District's request; and

> M.1.9.9 A description of the prime contractor's recent effort to locate SBEs or, if insufficient SBEs are available, certified business enterprises and to award subcontracts to them.

(AR Ex. 1).

Twenty-one bidders responded to the solicitation at the bid opening of September 16, 2009. Keystone's bid was the fourth lowest actual bid price, and the third lowest price after evaluation of bidder preferences. (AR at 3; AR Ex. 5). Keystone acknowledged receipt of all five amendments. All bidders with prices lower than Keystone's were found to be ineligible. In a determination and findings dated December 10, 2009, the contracting officer found Keystone's bid to be nonresponsive since Keystone failed to submit a valid subcontracting plan as required by section M.1.9. (AR Ex. 5). Keystone's subcontracting plan, signed by its President, Carlos Perdomo, included only the company's contact information and tax identification number. Keystone's plan failed to include any subcontracting information. Thus, the substantive part of the subcontracting plan was left entirely blank. (AR Ex. 3). Keystone filed this protest on November 25, 2009, challenging the contracting officer's decision to reject its bid as nonresponsive. Keystone asserts that section L.9.1 of the original solicitation (prior to Amendment 2) is applicable and that the contracting officer had never requested Keystone to submit its subcontracting plan.

DISCUSSION

We exercise jurisdiction pursuant to D.C. Code § 2-309.03(a)(1). The main issue presented in this protest is whether the contracting officer properly determined that Keystone's incomplete subcontracting plan furnished with its bid rendered Keystone's bid nonresponsive.

D.C. Code §§ 2-218.46(d) and (e) provide:

> (d) Bids or proposals responding to a solicitation, including an open market solicitation, shall be deemed nonresponsive and shall be rejected if the solicitation requires submission of a certified business enterprise subcontracting plan and the prime contractor fails to submit a subcontracting plan as part of its bid or proposal. A certified business enterprise subcontracting plan shall specify the following:
>
> (1) The name and address of the subcontractor;
> (2) Whether the subcontractor is currently certified as a certified business enterprise;
> (3) The scope of work to be performed by the subcontractor; and
> (4) The price to be paid by the contractor to the subcontractor.

> (e) No prime contractor shall be allowed to amend the subcontracting plan filed as part of its bid or proposal except with the consent of the contracting officer and the Director. Any reduction in the dollar volume of the subcontracted portion resulting from such amendment of the plan shall insure [sic] to the benefit of the District.

Our decision in this case is controlled by our recent decision in *Keystone Plus Construction Corp.*, CAB Nos. 822, 830, 832, Feb. 19, 2010. There is no dispute that subsection 2-218.46(d) applies to this procurement and the procuring agency. As the facts amply demonstrate, the solicitation was a set-aside solicitation requiring submission of a certified business enterprise subcontracting plan. Section M of the solicitation tracks much of the language of D.C. Code § 2-218.46, including subsection 2-218.46(d). Thus, each bidder was required to submit a complete subcontracting plan including the name and address, current CBE certification status, scope of work, and price to be paid, for each subcontractor.

Keystone argues that the contracting officer improperly found Keystone's bid to be nonresponsive, even though the contracting officer had not requested from Keystone a subcontracting plan after bid opening, as required by the original Section L.9.1 of the solicitation. Keystone's argument ignores the fact that Section L.9.1 was removed from the solicitation by Amendment 2. Additionally, prior to enactment of D.C. Code § 2-218.46 in 2005, District procurement law addressed subcontracting plans in bids as a matter of bidder responsibility, not responsiveness. However, section 2-218.46, in regulating performance and subcontracting requirements, including SBE participation, mandates that CBE subcontracting plans, under certain defined circumstances which are applicable here, be a matter of bid responsiveness. Section M, particularly M.1.9, of the solicitation provides more than adequate clarity that the subcontracting plan here was a matter of responsiveness. Each bidder in this procurement was required to submit a CBE subcontracting plan with its bid.

On the facts presented in the record, Keystone's subcontracting plan was materially incomplete so as to render its bid nonresponsive. In its subcontracting plan, Keystone failed to provide any of the required information in its subcontracting plan. Because Keystone failed to submit a valid CBE subcontracting plan, Keystone's bid was rendered nonresponsive pursuant to D.C. Code § 2-218.46(d). Accordingly, the contracting officer did not err in determining Keystone's bid to be nonresponsive.

CONCLUSION

For the reasons discussed above, we conclude that the contracting officer did not err in determining Keystone's bid to be nonresponsive based on a failure to submit a valid subcontracting plan with its bid. Accordingly, we deny the protest.

SO ORDERED.

DATED: February 24, 2010

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

APPEAL OF:

AMERICAN CONSULTANTS & MANAGEMENT ENTERPRISES, INC.	)	
	)	CAB No. D-1258
Under Contract Nos. JA/93584, POHC-2000-C0036	)	

For the Appellant: Dr. Ernest Middleton, *pro se*. For the District of Columbia Government: Kimberly M. Johnson, Esq., Section Chief, General Litigation Section I, Office of the Attorney General.

Opinion by Chief Administrative Judge Jonathan D. Zischkau, with Administrative Judge Warren J. Nash, concurring.

OPINION

Filing ID 30054064

American Consultants & Management Enterprises, Inc. ("ACME") participated in a joint venture with Capitalcare, Inc. ("CCI"), which contracted with the District to provide comprehensive outpatient substance abuse treatment services. ACME appeals the contracting officer's final decision denying its claim for District funds paid to CCI and for payment resulting from an unjustified sole source contract award to CCI. The District has moved to dismiss the appeal, arguing that the complaint fails to state a claim for which relief can be granted, and that the appeal was untimely filed. ACME did not respond to the District's motion. We conclude that the appeal was untimely filed pursuant to D.C. Code § 2-309.04(a). Accordingly, we dismiss the appeal.

BACKGROUND

On July 17, 1995, CCI/ACME Joint Venture executed contract number JA/93584 with the District's Department of Human Services ("DHS") to provide comprehensive outpatient substance abuse treatment services for 360 alcohol or chemically dependent adults. The term of the contract was from July 25, 1995, to July 23, 1996, with four one year options. (Appeal File ("AF") Ex. 3, Attachment A). All options were exercised by DHS, so that CCI/ACME provided services through July 24, 2000. (AF Ex. 3, at 2).

The CCI/ACME joint venturers, Capitalcare and ACME, executed a letter of dissolution on December 23, 1998, stating in part:

> [I]t is mutually agreed upon that effective 12/25/98, Capitalcare Inc. will take complete responsibility of execution and administration of the DHS Contract # JA93584. ACME Inc. and all its corporate officers . . . relinquish all rights to CCI/ACME JOINT VENTURE DHS contract #

> JQA93584. It is further agreed upon that for the remaining length of the contract CCI will pay to ACME $4,341.00 per month.
>
> Starting Dec. 25th, 1998's invoice, [e]ach month, when the monies are received from DC Government for the services rendered, CCI will pay to ACME $4,341.00 to ACME.

(AF Ex. 3, Attachment B). There is no evidence in the record that the contract was modified to reflect a novation. (AF Ex. 3, at 3).

The contract expired on July 24, 2000. According to a 2003 report of the District's Inspector General, between July 25 and September 25, 2000, CCI continued to provide outpatient substance abuse treatment services without a written contract to do so. (AF Ex. 3, at 3). CCI received two payments for services provided during this period. (*Id*.). On September 26, 2000, CCI and District entered into a one year sole source contract, POHC-2000-C0036, to provide continuing substance abuse services. (*Id*.).

On February 22, 2004, ACME, by letter to Mr. Jacques Abadie, III, the District's Chief Procurement Officer, asserted claims related to the original ACME/CCI contract and the CCI sole source contract. The contracting officer, Ms. Esther Scarborough, responded with a final decision dated June 4, 2004, sent certified mail, return receipt requested, denying ACME's claim for relief sought against the District for payments made to CCI under the above referenced contracts, stating in pertinent part:

> Issue #1. You have requested $15,513 in compensation out of $89,342.36 paid to [CCI/ACME] for outpatient substance abuse treatment services performed between July 25, 2000 and September 25, 2000. Despite the fact that the Inspector General found the District paid CCI/ACME for these services beyond the period of the written contract, No. JA/93584, CCI/ACME was the actual entity performing the services and full payment was rendered to it. Therefore, any amount that may be owed to you out of that payment is a matter between you and CCI/ACME.
>
> Issue #2. You have claimed $52,504 on account of a sole source contract, No. POHC -2000-C-0036 that was awarded to CCI on September 25, 2000 for the same services. Because the Inspector General concluded . . . that the procurement as a sole source contract was unjustified, you assert that your company, ACME, should have been entitled to a share of the amount due under that contract. In no way does the determination that the sole source contract was not justified give rise to an entitlement of payment to you in lieu of payment under that contract. To approve payment to you without a contract would be tantamount to the District's authorizing an oral contract, which is the same violation for which the Inspector General cited the Office of Contracting and Procurement as to Issue Number 1. . . .

. . . .

> This is the final decision of the Contracting Officer. In accordance with D.C. Official Code § 2-309.04, you may appeal this decision within 90 days from the date of receipt to the Contract Appeals Board . . . .

(AF" Ex.1). ACME does not contend that it received the June 4, 2004 final decision in an untimely manner. (Notice of Appeal, at 2). On February 22, 2005, ACME filed its notice of appeal, dated February 17, 2005, with the Board, and amended its factual statement on March 1, 2005. Although the appeal lacks clarity, it is without question an appeal of the contracting officer's June 4, 2004 final decision. On April 1, 2005, the District filed a motion to dismiss. ACME did not respond to the District's motion to dismiss.

DISCUSSION

We exercise jurisdiction pursuant to D.C. Code § 2-309.03(a)(2).

The contracting officer's final decision was issued on June 4, 2004. ACME's notice of appeal of the final decision was received by the Board 261 days later on February 22, 2005. The Procurement Practices Act, in D.C. Code § 2-309.04 ("Contractor's right of appeal to Board"), sets forth a time limit for appealing to the Board a contracting officer's final decision:

> (a) Except 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.

As the appeal was filed long after the appeal period mandated by the statute, we must dismiss the appeal as untimely. Accordingly, we dismiss ACME's appeal with prejudice.

SO ORDERED.

DATED: March 15, 2010

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

APPEALS OF:

ROBERSON INTERNATIONAL, INC., et al.)
) CAB Nos. D-1241, D-1224
From Debarment Decision dated July 14, 2003)

For the Appellant: Ronald C. Jessamy, Esq. For the District of Columbia Government: Carlos M. Sandoval, Esq., Assistant Attorney General, Office of the Attorney General.

Opinion by Chief Administrative Judge Jonathan D. Zischkau, with Administrative Judge Warren J. Nash, concurring.

OPINION

Filing ID 30158102

Roberson International, Inc., and its president, Steven A. Roberson, Sr., and its vice president, Steven A. Roberson, Jr., appeal from a debarment decision by the Chief Procurement Officer that debarred Appellants from contracting with the District government for a period of one year. According to the debarment decision, the corporate Appellant submitted a false bonding document purportedly representing that it had obtained bonding for a procurement when in fact it had not. Appellants contend that the company should not have been debarred because the president attempted to rescind the bonding submission and the consultant who prepared the forged bonding document was terminated by Roberson. Appellants also urge that the debarment of the president and vice president should be vacated as those individuals never received separate notice of their proposed debarment and thus lacked an opportunity to fairly respond to the charges. We conclude that the debarment of the corporate Appellant is supported by the record and the law but we vacate the debarment of the individual Appellants because the District did not provide adequate notice and opportunity to respond. Accordingly, the appeals are sustained in part and denied in part.

BACKGROUND

The facts are not in dispute. The following findings are taken from the July 14, 2004 debarment decision:

> On July 25, 2002, the Office of Contracting and Procurement ("OCP") issued Solicitation No. POAM-2002-B-00 19DR (Solicitation). Roberson submitted a bid for this procurement on August 29, 2002. The solicitation called for an indefinite delivery/indefinite quantity contract for construction services. Roberson submitted the third lowest bid and was being considered for the contract award. As a condition for award, the

> Solicitation required the potential awardee to meet certain Bonding Requirements (Section 1.5). Specifically, the Solicitation required the successful bidder to furnish a document from its surety company showing capability of securing performance and payment bonds in the amount of $5 million. Moreover, the successful contractor was required to submit the required bonds during the issuance of the Task Order.
>
> On November 22, 2002, in response to the Solicitation, Roberson sent OCP a letter purporting to be from its bonding company, Patriot Bonding, stating that Roberson was bonded for $5 million in the case of a single contract award and up to $10 million in the case of an aggregate award.
>
> In reviewing the submitted letter, OCP noticed that the document was not written on company letterhead and did not otherwise appear to read as a typical suretyship verification letter. Therefore, OCP contacted the Patriot Bonding signatory, Leif Gibson, Associate Underwriter, to inquire about the document.
>
> On December 6, 2002, Mr. Gibson sent a facsimile to OCP enclosing a notarized affidavit of forgery from the State of Arizona, County of Maricopa, to acknowledge that Patriot Bonding did not send the suretyship verification letter received by OCP and that someone forged Mr. Gibson's signature.

(CAB No. D-1224 Notice of Appeal, Attachment).

On December 9, 2002, Roberson's vice president, Steven Roberson, Jr., sent an unsigned letter to OCP's contract specialist, regarding the submitted bond letter, informing the contract specialist that Roberson was rescinding the previously submitted bond letter because it "was sent prematurely." (D-1233 Appeal File ("AF") Tab 14). Steven Roberson, Sr., sent another letter dated December 9, 2002, advising the contract specialist that Roberson would "have bonding in place by the close of business on December 11, 2002." (*Id.*).

On March 12, 2003, the agency chief contracting officer sent a letter notifying Roberson that it was being proposed for debarment as a result of the false bonding verification document. (D-1233 AF Tab 11). The letter was addressed to Steven A. Roberson, President of Roberson International, Inc., and contained a subject line reading: "Re: Proposed Debarment/Suspension Action (Roberson International)." A reading of the relevant portions of the letter indicates only that the company is being proposed for debarment:

> This letter is to inform you that the Chief Procurement Officer (CPO), Office of Contracting and Procurement (OCP), District of Columbia, is proposing debarment of Roberson International, Inc. (Roberson) from consideration for award of District contracts and subcontracts.

. . . .

> The CPO is proposing the debarment of Roberson for submitting a false bonding document in an effort to receive a District contract award. The action by Roberson was taken in an effort to defraud the District and obtain a public contract. Such action provides a significant indication of Roberson's lack of business integrity. Moreover, Roberson's action was sufficiently serious and compelling to affect Roberson's responsibility as a District government contractor in responding to Solicitation No. POAM-2002-B-OO 19DR.
>
> This letter serves as notice of the proposed debarment action against Roberson. As of the date of this notice, the District will not solicit offers from, award contracts to, renew, or otherwise extend contracts with, or consent to subcontracts with Roberson pending a debarment decision.
>
> Within thirty business days after receipt of this notice, Roberson must submit to OCP, in person, in writing, or through a representative, information addressing the aforementioned issues raised regarding this matter. In addition, Roberson may submit any additional specific information that raises a genuine issue of material fact. If a response from Roberson is not received by OCP within the thirty-day period, OCP will make a final decision to debar Roberson on the basis of available information in its possession. Attached you will find a copy of the applicable District regulations articulating the procedures governing debarment.
>
> According to D.C. Official Code §2-308.04(f), the debarment or suspension of any person or business shall constitute a debarment or suspension of any affiliate of that person or business. Affiliate means any business in which a suspended or debarred person is an officer or has a substantial financial interest (as defined by regulations), and any business that has a substantial direct or indirect ownership interest (as defined by regulations), in the suspended or debarred business, or in which the suspended or debarred business has a substantial direct or indirect ownership interest.

On April 11, 2003, Roberson responded to the notice of proposed debarment by stating that Roberson had rescinded the forged suretyship verification document and that the company's president, Steven Roberson, Sr., was recuperating from a kidney transplant during the procurement phase, that a company consultant had submitted the forged verification document, and that the services of the consultant had been terminated. In its response, Roberson argued that the circumstances did not warrant debarment or suspension and that if the charges were not dismissed, Roberson demanded a hearing and a copy of current applicable debarment regulations. (D-1233 AF Tab 12).

In a letter dated May 19, 2003, the Chief Procurement Officer replied to Roberson's letter of April 11, stating that Roberson had raised an issue of fact relating to the "circumstances surrounding the attempt by Mr. Roberson to rescind the false bonding document" and set a hearing for May 30. The subject line of the letter reads: "Re: Proposed Debarment/Suspension Action (Roberson International, Inc.)." (D-1233 AF Tab 13). In a May 29, 2003 letter, counsel for Roberson stated that Roberson's president and vice president would be witnesses at the hearing, and attached copies of their December 9, 2002 letters to the contract specialist. (D-1233 AF Tab 14).

On May 30, 2003, the CPO conducted a hearing in the debarment proceeding. The CPO began the hearing as follows: "In meeting my responsibilities as the Chief Procurement Officer, I also serve as the buying official under the [Procurement Practices Act]. By a letter dated March 12, OCP informed Roberson International, Incorporated, hereinafter referred to as Roberson, of its proposed debarment from consideration for award of District contracts and subcontracts." (D-1233 AF Tab 15). By letter of June 4, 2003 to Roberson's counsel, containing a subject line reading: "Re: Proposed Debarment/Suspension Action (Roberson International, Inc.)," the CPO stated: "Thank you for meeting me on May 30, 2003. The purpose of your visit was to provide your client, Roberson International, Inc. (Roberson) an informal hearing to discuss facts in dispute material to the proposed debarment of Roberson." (D-1233 AF Tab 16).

On July 14, 2003, the CPO issued his final decision on the proposed debarment action of Roberson. The decision states:

> On November 22, 2002, OCP received the false bonding document from Roberson. Upon receiving the letter, OCP contacted the bonding company to verify its accuracy. Exactly two weeks later, on Friday, December 6, 2002, the bonding company provided information identifying the document as false. On Monday, December 9, 2002, Mr. Roberson wrote two letters to OCP attempting to rescind the false document. Although no evidence was presented at the informal hearing to suggest that OCP informed Roberson of the falsity before Mr. Roberson attempted to rescind the document, the submission of a false bonding document to obtain a contract is sufficiently serious and compelling to affect Roberson's present responsibility.
>
> Roberson's actions were sufficiently serious and compelling to affect its present responsibility as a District government contractor. Such is the case despite Mr. Roberson's attempt to rescind the false bonding document on December 9, 2002. Although Mr. Roberson made an attempt to rescind the document, the fact remains that Roberson submitted a false bonding document in an effort to obtain a District contract. However, Mr. Roberson's attempt to rescind the false document was considered when I decided the debarment period.
>
> . . . .

> Given the circumstances of this matter, I am debarring Roberson, its principals, and its affiliates from consideration for award of District contracts and subcontracts for one-year. Mr. Roberson's attempt to rescind the false document was considered in making this decision. In rendering this decision, however, the CPO placed great emphasis on the fact that Roberson submitted a false bonding document to obtain a District award. In addition, Roberson presented no evidence in writing or at the informal hearing to suggest it had or will take remedial measures to ensure that similar events will not occur in the future.
>
> . . . .
>
> This debarment decision is applicable to the principals of Roberson. The identified principals of Roberson are: Steven Roberson Sr., President, and Steven Roberson Jr., Vice President. The principals of Roberson are being debarred under the applicable standard. Individuals can be debarred if they "participated in, knew of or had reason to know" of the contractor's misconduct. Novicki v. Cook, 946 F.2d 938 (D.C. Cir. 1991). Roberson asserts the company consultant facilitated the submission of the false document. However, principals are usually responsible for the actions of their employees. Therefore, the principals knew of or had reason to know of the consultant's misconduct in submitting the false bonding document.

(D-1233 AF Tab 17). The company and the two principals were debarred for a period of one year from March 12, 2003, through March 12, 2004. On September 12, 2003, Appellants filed an appeal docketed as CAB No. D-1224, but the appeal was voluntarily dismissed when the District initiated a new debarment proceeding challenged by Appellants in CAB No. D-1233. The original debarment period concluded on March 12, 2004, despite the subsequent attempts by the District to reopen the debarment proceeding and impose additional debarment penalties on Roberson and its principals. *See Roberson International, Inc., et al.*, CAB No. D-1233, Sept. 9, 2004, 52 D.C. Reg. 4229. On September 10, 2004, Roberson filed a notice of appeal docketed as CAB No. D-1241, to contest the propriety of the July 14, 2003 debarment decision by the CPO. In a status conference of March 11, 2010, the parties agreed that the case should be resolved on the written record, including the District's October 13, 2004 combined motion to dismiss and motion for summary judgment.

DISCUSSION

We exercise jurisdiction over these appeals pursuant to D.C. Code §§ 2-308.04(d) and 2-309.03.

Roberson International challenges its one-year debarment as being contrary to the findings of the CPO and the evidence adduced at the hearing. The corporate Appellant also argues that the debarment decision is a nullity because the debarment regulations are

outdated and not consistent with the procurement law changes made by the Procurement Reform Amendment Act of 1996. We sustain the CPO's debarment decision regarding Roberson International. The record amply supports the CPO's conclusion that the company's submission of a forged bonding verification in order to obtain contract award was sufficiently serious and compelling evidence of a lack of business integrity and ethics that undermined its present responsibility. Although it had an opportunity at the hearing, Appellant did not introduce testimony from Steven Roberson, Sr., or Steven Roberson, Jr., regarding their knowledge of the forged bonding document and its submission as part of the company's bid. We discern no legal error in the CPO's conclusion that the remedial actions taken by Roberson International after the fact of forgery became known to the District were insufficient to find the company presently responsible. Regarding Roberson International's challenge to the debarment regulations, it fails to point to any specific regulatory prescription in 27 DCMR Chapter 22 that was applied to its debarment proceeding in a manner inconsistent with the debarment provisions found in D.C. Code § 2-308.04. Moreover, Roberson International has demonstrated no prejudice arising from any application of the debarment regulations to it.

Steven Roberson, Sr., and Steven Roberson, Jr., the individual Appellants, challenge the CPO's decision to impose the same one-year debarment on them as affiliates. They argue that the March 12, 2003 notice of proposed debarment only identified Roberson International, Inc., as the entity being proposed for debarment.

The Procurement Practices Act requires "reasonable notice to a person or a business and reasonable opportunity to be heard" before the District may impose debarment or suspension. D.C. Code § 2-308.04. Due process itself mandates such notice and an opportunity to be heard. *ATL, Inc. v. United* States, 736 F.2d 677, 682-83 (Fed. Cir. 1984); *Transco Security, Inc. of Ohio, et al. v. Freeman*, 639 F.2d 318, 323 (6th Cir.), cert. denied 454 U.S. 820 (1981); *Gonzalez v. Freeman*, 334 F.2d 570, 574 (D.C. Cir. 1964). The debarment regulations specify the form and manner of the notice and opportunity to be heard. 27 DCMR § 2213.3 provides: "The [CPO] may extend the debarment decision to include any affiliates of the contractor by specifically naming the affiliate and giving the affiliate written notice of the proposed debarment and an opportunity to respond in accordance with the provisions of this chapter." 27 DCMR § 2214.1 provides in relevant part: "The [CPO] shall initiate debarment proceedings by notifying the contractor and any specifically named affiliates by certified mail, return receipt requested, of the following: (a) The reasons for the proposed debarment in sufficient detail to put the contractor on notice of the conduct or transaction(s) upon which the proposed debarment is based . . . ." In *Fort Myer Construction Corp.*, CAB No. D-1223, Dec. 9, 2003, 52 D.C. Reg. 4155, 4156-58, we concluded on very similar facts as here that the debarments of the individual Appellants in Fort Myer were void *ab initio* because the District had failed to provide adequate written notice to each principal. In the present case, neither the initial notice of proposed debarment of Roberson International, nor any of the subsequent correspondence from the CPO prior to the debarment decision, put the individual Appellants on notice that they individually and specifically were being considered for debarment. Accordingly, we conclude that the debarments of Steven Roberson, Sr., and Steven Roberson, Jr., are void *ab initio*.

CONCLUSION

We conclude that the debarment of the corporate Appellant, Roberson International, Inc., is supported by the record and the law but we vacate the debarment of the individual Appellants because the District did not provide adequate notice and opportunity to respond. Accordingly, the appeals are sustained in part and denied in part.

SO ORDERED.

DATED: March 19, 2010

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

COLUMBIA ENTERPRISES	)	
	)	CAB No. P-0840
Solicitation No: DCAM-2010-B-0076	)	

For the Protester, Columbia Enterprises: Mr. Virgil J. Hood, Jr., *pro se*. For the District of Columbia Government: Alton E. Woods, Esq., Assistant Attorney General, Office of the Attorney General.

Opinion by Administrative Judge Warren J. Nash, with Chief Administrative Judge Jonathan D. Zischkau, concurring.

OPINION

Filing ID 30728346

On February 2, 2010, Columbia Enterprises protested the captioned solicitation, contending that original solicitation erroneously called for bid opening at 2 a.m. on Monday, February 1, 2010, and asserting that any bids received after close of business on Friday, January 29, 2010, should be rejected as untimely. However, the contracting officer in fact had issued Amendment 3 to the solicitation on Friday, January 29, 2010, at about 9 a.m., correcting the bid opening from 2 a.m. to 2 p.m. on February 1, 2010. Columbia Enterprises did not submit a bid. As Columbia Enterprises' protest is based upon the mistaken assumption that the bid opening date was never amended, when in fact it was, we deny the protest.

BACKGROUND

The District of Columbia's Department of Real Estate Services ("DRES"), Contracting and Procurement Division ("CPD"), issued IFB No. DCAM-2010-B-0076 as a CBE set-aside on December 31, 2009, for a contractor to provide all labor, materials, equipment, and supervision for the build-out of office space for the District's Office of Administrative Hearings. (Agency Report ("AR") Ex. 1).

On January 15, 2010, a pre-bid conference was held that was attended by Columbia Enterprises. (AR Ex. 3). During the pre-bid conference potential bidders were informed that any upcoming amendments to the solicitation could be acquired from the CPD website. (AR Ex. 3). The contracting officer also informed the bidders that all questions should be submitted to the contracting officer no later than January 22, 2010. (AR Ex. 3). On January 20, 2010, Amendment No. 1 was issued by CPD providing for a second site visit on January 22, 2010, at 3:30 p.m., and extending the date for submission of questions to January 25, 2010. (AR Ex. 3).

On January 26, 2010, Columbia Enterprises submitted a list of questions by email to the contracting officer. (AR Ex. 4). In the email, Columbia Enterprises explained that it "happened upon" Amendment No. 1 on the CPD website. (AR Ex. 4). The contracting officer responded to the email and informed Columbia Enterprises that section L.22.3 of the solicitation informed all bidders that amendments to the solicitation are available on the CPD website. (AR Ex. 4). Section L.22.3 further advised that it is the responsibility of the bidders to check the website periodically for updates to the solicitation. (AR Ex. 1).

On January 27, 2010, Amendment No. 2 was issued and also posted on the CPD website. (AR Ex. 2). Due to the short turnaround time for submission of bids on February 1, 2010, the contracting officer emailed a copy of Amendment No. 2 to all bidders that had attended the pre-bid conference. (Exs. 3, 6). The email from the contracting officer dated January 27, 2010, at 3:48 p.m., identified Virgil Hood, Jr., Project Manager from Columbia Enterprises, as one of the recipients. (AR Exs. 3, 6).

On January 29, 2010, the contracting officer discovered an error in Block 10 of Standard Form A of the solicitation. Block 10 erroneously identified the bid submission time as 2:00 a.m. on February 1, 2010. (AR Exs.1-2). The contracting officer issued Amendment No. 3 on January 29, 2010, that corrected the time for submission of bids from 2:00 a.m. to 2:00 p.m. on February 1, 2010. (AR Exs. 2, 3). Again, due to the short turnaround time for submission of bids, the contracting officer posted the amendment on the CPD website and emailed a copy of Amendment No. 3 to all bidders that had attended the pre-bid conference, including Virgil Hood from Columbia Enterprises. (AR Exs. 3, 7). The email is dated January 29, 2010, at 8:58 a.m. (AR Ex. 7).

On February 1, 2010, nine bidders responded to the solicitation. (AR Ex. 3). Columbia Enterprises did not submit a bid in response to the solicitation. (AR Exs. 3, 8). On February 2, 2010, Columbia Enterprises filed its protest alleging:

> Columbia Enterprises formally protest the timely submission of bids for the above referenced project [DCAM-2010-B-0076]. Page two, item #10 of the bid document invitation states that sealed offers will be received at the bid counter for the DC Department of Real Estate Services until 2:00 AM on February 1, 2010. There were three amendments issued for this solicitation and none changed the deadline for submission of bids. If bids were not received at the bid counter by Close of Business on Friday January 29, 2010 then they should be considered late and nonresponsive. All bids should be rejected and a new bid date set.

DISCUSSION

We exercise jurisdiction over this protest pursuant to D.C. Code § 2-309.03 (a)(1).

Columbia asserts that bids were due by close of business January 29, 2010, and any bids received after that time are late and nonresponsive. Although Columbia seems to be aware of Amendment 3, it contends (erroneously) that that the amendment did not change the bid opening time. It is clear from the record that Amendment 3 corrected bid opening from 2 a.m. to 2 p.m. on February 1, 2010. Columbia did not respond to the agency report and thus we deem it to concede the point. Accordingly, all bids received on or before 2 p.m., February 1, 2010, were timely.

For the reasons discussed above, we deny Columbia Enterprises' protest.

SO ORDERED.

DATED: April 22, 2010

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

VICTOR STANLEY, INC.	)	
	)	CAB No. P-0842
Solicitation No: DCKT-2007-C-0007	)	

For the Protester, Victor Stanley, Inc.: Mr. Stan Skalka, *pro se*. For the District of Columbia Government: Robert Schildkraut, Esq., Assistant Attorney General, Office of the Attorney General.

Opinion by Chief Administrative Judge Jonathan D. Zischkau, with Administrative Judge Warren J. Nash, concurring.

OPINION

Filing ID 31032910

Victor Stanley, Inc., challenges the failure of the District to exercise its option to renew its contract. The District's decision not to exercise the option stemmed from Victor Stanley's failure to return a tax affidavit certification form prior to the contract expiration date. On the record presented, we conclude that the decision not to exercise the option was a matter of contract administration and not a proper subject for protest. Accordingly, we dismiss the protest.

BACKGROUND

On November 20, 2006, the District awarded Victor Stanley a requirements contract to furnish metal trash receptacles. (Agency Report ("AR") Ex. 2). The term of the contract was for a period of one year from the date of award. (AR Ex. 2, Section F.1). The contract stated that the District may extend the term of the contract for a period of up to four one-year option periods, or fraction thereof by written notice to the contractor before the expiration of the contract, provided that the District give the contractor a preliminary written notice of its intent to extend at least thirty days before the contract expires. (AR Ex. 2, Section F.2). The preliminary notice did not commit the District to an extension. (AR Ex. 2, Section F.2). Further, the contractor could waive the thirty day preliminary notice requirement by providing a written waiver to the contracting officer prior to expiration of the contract. (AR Ex. 2, Section F.2).

On November 14, 2007, the District issued Amendment M0001 extending the term of the contract from November 20, 2007, through November 19, 2008. (AR Ex. 3). On September 25, 2008, the District issued Amendment M0002 extending the term of the contract from November 20, 2008, through November 19, 2009. (AR Ex. 3).

On November 4, 2009, the District sent a preliminary notice to Victor Stanley indicating the District's intent to exercise option year three from November 20, 2009, through November 19, 2010. (AR Ex. 4). The notice requested a waiver of the 30-day notice requirement and requested that a tax affidavit form be completed and returned. (AR Ex. 4). The letter also noted that the then current term of the contract expired on November 19, 2009. (AR Ex. 4).

Victor Stanley returned the signed waiver of the 30-day notice requirement on November 13, 2009. (AR Ex. 4). On the same November 13 date that it submitted its signed waiver, Victor Stanley had several email exchanges with the contracting agency in which it stated that it was not required to submit a tax affidavit certification form and alternatively requested that it be able to use an older tax certification form and simply sign and notarize it rather than complete the new form. (AR Ex. 5; Victor Stanley March 17, 2010 Response to Motion to Dismiss, attachment). In an email dated November 13, 2009, Victor Stanley was told that it needed to complete the new tax form. (AR Ex. 5). The new tax affidavit form was not received by the District until December 4, 2009. (AR Ex. 6). Since the tax affidavit form was not received before November 19, 2009, the District did not exercise the option and thus the existing contract expired by its terms.

In a February 1, 2010 email, the contracting officer stated:

> I have reviewed the file again and the circumstances that caused the option not to be exercised. Unfortunately the contract has expired at this point. The notice that you received indicated that it could not be construed as a commitment to exercise the option. We were not able to exercise the option because we did not receive confirmation of your company's compliance with the tax filing requirements of the District until after the contract had expired. For each contract year we must make a determination of a contractor's responsibility. One factor is the contractor's compliance with the tax filing requirement of the District.
>
> I also looked at the order history. The District did not place an order during the last contract term (11/20/08- 11/19/09). After speaking with the program office, there was no intent to place an order this fiscal year due 10 budgetary constraints. They do however anticipate a need in the next fiscal year beginning 10/1110. Please note that the awarded contract was a requirements contract and that no orders were guaranteed.
>
> The program office is currently reviewing its specifications for a new solicitation. We can include your company on the bidders list for that solicitation.

On February 19, 2010, Victor Stanley protested the District's "cancellation" of the contract. The District responded with a motion to dismiss, to which Victor Stanley replied.

DISCUSSION

In its protest, Victor Stanley states that the contracting officer acted improperly when she "cancelled" the contract. The contracting officer did not cancel the contract. The contracting officer determined that she would not exercise option year three of the contract because Victor Stanley had not submitted a completed tax verification affidavit. The District was under no obligation to exercise option year three of contract. Although Victor Stanley is correct that the District did not clearly state in the November 4 notification letter that the tax verification was required prior to contract expiration on November 19, Victor Stanley also failed to seek clarification on the point. We see no basis for finding that the District acted in bad faith because the tax certification affidavit is used by the contracting officer to document contractor responsibility. The decision to exercise an option is committed to the discretion of the contracting officer. The Board, as well as the GAO, has repeatedly held that the government's decision not to exercise an option is a matter of contract administration and not subject to protest review. See *Terry M. Banks, Esq., et al*, CAB Nos. P-0743, P-744, Dec. 27, 2006, 54 D.C. Reg. 2060; *Brooks & Brooks Services, Inc.*, CAB No. P-0605, Jan. 6, 2000, 48 D.C. Reg. 1477; *Advanced Elevator Services, Inc.*, B-272340, Sept. 26, 1996, 96-2 CPD ¶ 125.

CONCLUSION

We dismiss the protest of Victor Stanley because its challenge to the District's failure to exercise a contract option is not a proper basis for protest.

SO ORDERED.

DATED: May 11, 2010

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

NETSYSTEMS CORPORATION	)	
	)	CAB No. P-0841
Solicitation No: DCKA-2010-B-0120	)	

ORDER DENYING MOTION FOR RECONSIDERATION

Filing ID 31101005

NetSystems Corporation moves for reconsideration of the Board's decision of April 28, 2010, dismissing Netsystems' protest which challenged the terms of the solicitation. In our decision, we held that the protest should be dismissed as untimely filed because the protest was filed after bid opening. Pursuant to D.C. Code § 2-309.08(b)(1), protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening must be filed prior to bid opening. The motion for reconsideration states that the protest is timely as the protest challenges the award of the contract, and not the terms of the solicitation. Because the protest unambiguously challenged only the terms of the solicitation, not an award, we deny the motion for reconsideration.

DISCUSSION

The Board's April 28, 2010 opinion found that NetSystems' protest related specifically to the terms of the solicitation, and should have been filed prior to bid opening. D.C. Code § 2-309.08(b)(1) states:

> A protest based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals. . . .

Board Rule 302.2(a) restates D.C. Code § 2-309.08(b)(1) and emphasizes that protests challenging the terms of a solicitation must be filed "prior to bid opening or the time set for receipt of initial of initial proposals." NetSystems did not protest until 10 days after bid opening and thus we concluded that its protest was untimely.

Netsystems does not contend that we erred in finding that a protest based upon alleged improprieties in a solicitation must be filed prior to bid opening. Netsystems motion instead argues that its protest was timely filed as it "is not challenging the terms of the solicitation; [Netsystems is] protesting the award of the contract on the basis that the evaluation of both its price and the price of the apparent low bidder were arbitrary and

unreasonable because the prices were based on faulty and unreasonable assumptions that are in violation with the applicable law." (Motion for Reconsideration at 2).

The question of whether the protest alleges improprieties in the solicitation or challenges an award can be answered by a review of the protest. Netsystems' protest states, in pertinent part:

> Protest of Solicitation: DCKA-20 1 O-B-O 120 (Utility Marking) . . . .
>
> NetSystems has been aggrieved by Solicitation DCKA-2010-B-0120 due to irregularities in the Solicitation that are not pursuant to Chapter 27 Underground Facilities Protection. Most of the irregularities impacted the Company's price. Since all solicitations must adhere to its applicable law, the company is requesting that the solicitation is modified so that it adheres to its applicable law; afterwards, it should be re-bid.
>
> Reason for protest:
>
> The Solicitation was gravely flawed. It contained several irregularities that are not applicable to Chapter 27 Underground Facilities Protection which is the applicable law.
>
> Remedy:
>
> Modify the Solicitation to conform with Chapter 27 Underground Facilities Protection which is the applicable law.
>
> Summation of the irregularities in the Solicitation:
>
> 1.) Section C.4.1 The Contractor shall investigate all service requests and notify the requestor within 48 hours of the disposition of the request.
> DC Code: 34-2704 Notification prior to excavation. Pargraph (c) . . . .

The remainder of the protest contains 8 additional sections of the solicitation paired with the allegedly inconsistent D.C. Code provisions.

Despite the protester's assertions to the contrary in its motion for reconsideration, its February 9, 2010 protest clearly challenges the terms of the solicitation, and requests as a remedy that the solicitation be modified. The protest does not contest any contract award.

Because NetSystems provides no proper basis for reconsideration, we deny its motion.

SO ORDERED.

DATED: May 13, 2010

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

Electronic Service:

Mr. Craig Xavier Jackson
NetSystems Corporation
3000 Connecticut Avenue, N.W., Suite 110
Washington, D.C. 20008

Alton E. Woods, Esq.
Assistant Attorney General
2000 14th Street, N.W., 5th Floor
Washington, D.C. 20009

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

JENKINS SECURITY CONSULTANTS, INC.)
) CAB No. P-0846
Solicitation No: DCHC-2009-R-5026)

For the Protester, Jenkins Security Consultants, Inc.: Philip L. Kellogg, Esq. For the District of Columbia Government: Talia S. Cohen, Esq., Assistant Attorney General, Office of the Attorney General.

Opinion by Chief Administrative Judge Jonathan D. Zischkau, with Administrative Judge Warren J. Nash, concurring.

OPINION

Filing ID 32460553

Jenkins Security Consultants, Inc., challenges the District's cancellation of a request for proposals ("RFP") for animal control services. Jenkins' proposal received the highest score from the technical evaluation panel. Prior to the required submission of the proposed contract to the City Council for approval, the Chief Procurement Officer ("CPO") signed a determination cancelling the solicitation in order to reassess the acquisition strategy, review the best practices around the country, and issue a new solicitation to insure that the District obtains quality services at the best price. Jenkins contends that the cancellation is arbitrary, capricious, and unlawful. We conclude that the decision to cancel the RFP has a reasonable basis, and that the District did not violate law, regulation, or the terms of the solicitation. Accordingly, we deny the protest.

BACKGROUND

On April 30, 2009, the Office of Contracting and Procurement ("OCP") issued a solicitation for a contractor to provide a combination of comprehensive animal care, animal control services, and management of the District's animal care and control facility. (Agency Report ("AR") Ex. 2). By August 5, 2009, the District received proposals from two offerors, Jenkins and the Washington Humane Society. (AR Ex. 3).

After reviewing the two proposals, and determining that each of the offerors was in the competitive range, the contracting officer conducted discussions with both offerors. After the discussions, the technical evaluation panel evaluated and ranked each offeror and determined that Jenkins had the highest overall technical score. The contracting officer reviewed the technical evaluation panel's recommendation and, after conducting an independent evaluation, recommended award to Jenkins as the offeror with the highest rated technical proposal and lowest priced proposal. (AR Ex. 3).

The contracting officer then initiated the process for obtaining an internal review required before sending the proposed contract to the City Council, but the CPO decided that the RFP should be canceled and thus OCP did not submit to the Council the proposed award. (AR Ex. 3). On March 1, 2010, the CPO signed a determination cancelling the solicitation, stating in relevant part:

> After careful review, the Chief Procurement Officer (CPO) decided to cancel the solicitation in order to reassess the acquisition strategy and determine the most appropriate method to procure the required animal and control services. The CPO concluded that after a review of the best practices around the country, the District will prepare and issue a new solicitation to ensure the District obtains quality services at the best price for [the] residents of the District.

(AR Ex. 1). On March 29, 2010, Jenkins filed with the Board the instant protest of the cancellation of the RFP. The District filed its agency report on April 15, and the parties have filed various responsive pleadings.

On May 11, 2010, the contracting officer, James H. Marshall, filed a declaration stating, in pertinent part:

> Prior to issuing RFP No. DCHC-2009-R-5026, on March 3, 2009, the Department of Health provided the Office of Contracting and Procurement with the results of market research conducted on the delivery of animal care and control services in the Washington metropolitan region. (Attachment 1) The market research was used exclusively for the purpose of projecting a fair and reasonable price for the delivery of the required services; the information was not considered for the purpose of identifying possible alternative acquisition strategies. The acquisition strategy to be used in the procurement was never in question due to the fact that the approach to be used in the procurement was consistent with the manner in which the services had been previously procured by the District.

On May 28, 2010, Marshall filed a supplemental declaration including a comprehensive outline of a national animal control and care research project to be conducted by OCP and the Department of Health to identify best practices to be utilized by the District, with a July 10, 2010 timeline for recommending an acquisition strategy.

DISCUSSION

Our standard of review of a cancellation determination is well settled. A request for proposals may be cancelled if the CPO determines that the action is taken in the best interest of the District government and there is a reasonable basis for cancellation. D.C. Code § 2-303.07; *JHARBO Limited, Inc*., CAB No. P-0527, Jan. 16, 1998, 45 D.C. Reg.

8701, 8703; *Singleton Electric Co*., CAB No. P-0411, Nov. 15, 1994, 42 D.C. Reg. 4888, 4893.

Jenkins argues that the cancellation is legally insufficient because the District does not provide facts upon which it may be concluded that there was a reasonable basis for the cancellation, stating that "[t]he C[P]O's declaration contains no reference to *facts* of any kind that gave rise to the need to 'reassess the acquisition strategy.' " (Response to Agency Report, at 3). We do not agree. The CPO's cancellation determination and the contracting officer's two declarations clearly indicate a reasonable basis for cancellation, namely, the contracting agency's need to consider alternative acquisition strategies based upon a national survey. This type of determination is committed generally to the business judgment of the contracting official and we see no ground for concluding that the cancellation was arbitrary or irrational. Thus, we cannot agree with Jenkins that the cancellation rationale is unsupported.

CONCLUSION

Because the District's cancellation of the RFP has a reasonable basis, we deny Jenkins' protest.

SO ORDERED.

DATED: August 3, 2010

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

MID ATLANTIC TENNIS COURTS & SUPPLIES	)	
	)	CAB No. P-0849
Under Solicitation Nos. DCHA-2010-B-0105 and	)	
DCHA-2010-B-0112	)	

For the Protester, Mid Atlantic Tennis Courts & Supplies, Mr. Marc D. Farthing, *pro se*. For the District of Columbia Government: Alton E. Woods, Esq., Assistant Attorney General, Office of the Attorney General.

Opinion by Chief Administrative Judge Jonathan D. Zischkau, with Administrative Judge Warren J. Nash, concurring.

OPINION

Filing ID 32471737

Mid Atlantic Tennis Courts & Supplies has challenged two solicitations issued by the Department of Real Estate Services ("DRES"), Contracting and Procurement Division, on behalf of the Department of Parks and Recreation ("DPR") for resurfacing of tennis and basketball courts. Mid Atlantic did not submit a bid. Each solicitation was for a "brand name or equal" resurfacing product to be used by the contractor. The solicitation identified a product called Premier Court as the "brand name" resurfacing product. Mid Atlantic is a resurfacing contractor and hoped to be a subcontractor for the contractor ultimately selected by the District. Mid Atlantic challenges the District's decision to specify a "brand name or equal" resurfacing product in both IFBs, and to require that the product be installed only by a Premier Court authorized installer. Because Mid Atlantic is not an aggrieved party, it lacks standing to protest. Accordingly, we dismiss the protest.

BACKGROUND

On March 1, 2010, IFB No. DCHA-2010-B-0105 was issued for the resurfacing of tennis courts at the Fort Stevens Recreation Center, 1327 Van Buren St., N.W., with bid opening on March 22, 2010. (Corrected Agency Report "AR" Ex. 1). On March 22, IFB No. DCHA-2010-B-0112 was issued for the resurfacing of select basketball and tennis courts at DPR facilities throughout the District. (AR Ex. 4). Both solicitations specified the installation of the "Premier Court" resurfacing system manufactured by Premier Concepts, Inc., or an approved equal. (AR Ex. 1, at 5; AR Ex. 4, at 5). The specifications also provided that alternative products could be submitted to DPR for approval prior to submission of bids. (AR Ex. 4). No proposals for alternative products were timely submitted by any bidder in connection with the 0105 IFB. (AR at 4). It appears that one alternative product, called Xtreme Court, was approved by DPR for one

tennis court under the 0112 IFB. (AR at 7). On March 22, 2010, eight bids were received in response to the 0105 IFB, with Mosaic Investment Group ("MIG") as the apparent low bidder. Mid Atlantic did not submit a bid. (AR Ex. 22). The contract specialist requested that MIG confirm that it would use the Premier Court product for the Fort Stevens courts. In a March 31, 2010 email, MIG confirmed its use of the Premier Court product and that installation would be done by American Tennis Courts, Inc. ("ATC"), one of three installers approved by Premier Concepts. (AR Ex. 9; AR at 4-5). Mid Atlantic is not an approved Premier Court installer. (AR Ex. 11). MIG asked the contracting agency if it could consider a quote from Mid Atlantic as one of the installers for the Premier Court product. On April 1, 2010, the contracting officer sent a letter to MIG rejecting its bid on the mistaken basis that MIG was not installing a Premier Court system and that Mid Atlantic, a proposed installer, was not on the list of authorized installers of the Premier Court system, and that failure to use an authorized installer would prevent the District from receiving the 25-year warranty from Premier Concepts for the re-surfacing. (AR Exs. 13, 16).

Thereafter, Mid Atlantic raised questions of possible "unfair practices" and requested a meeting with DRES representatives. (AR Ex. 17). Mid Atlantic alleged that MIG's decision to use ATC as its installer on the Fort Stevens project was prompted by the fact that ATC and Premier Concepts have common ownership. (AR Ex. 17). On April 7, 2010, after hearing the concerns of Mr. Farthing of Mid Atlantic, DRES's Deputy Director of the Contracting and Procurement Division requested that the 0105 and 0112 procurements be delayed until DRES completed an investigation. (AR Ex. 11). On April 8, 2010, Amendment 2 extended bid opening for the 0112 IFB to April 26, 2010. (AR Ex. 6). On April 9, 2010, as a result of a meeting with Mid Atlantic, the contracting officer sent a letter to Premier Concepts requesting information on the process used to authorize a company to install the Premier Court system. (AR Ex. 12). Premier Concepts responded that unless its product was installed by an authorized installer, it could not issue a 25-year warranty to the District. Premier Concepts discussed the training, experience, and oversight required by Premier Concepts before an installer can be considered "authorized" to install its products. (AR Ex. 13). Based on this information, the Deputy Director considered the investigation completed and directed the contracting officer to award the contract (to MIG) under the 0105 IFB, and proceed with the receipt of bids for the 0112 IFB. (AR Ex. 11).

On April 13, 2010, Mid Atlantic filed its protest. For the Fort Stevens project, Mid Atlantic challenges the contracting officer's decision not to allow installers who were not authorized Premier Court installers, and for the District-wide solicitation, the specifications should be modified to identify other re-surfacing products equivalent to Premier Courts.

DISCUSSION

We exercise jurisdiction over this protest pursuant to D.C. Code § 2-309.03 (a)(1).

The Procurement Practices Act ("PPA") requires that a protester be "any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract." D.C. Code § 2-309.08(a).

With respect to both solicitations, Mid Atlantic is not an aggrieved party as it did not bid on either solicitation, and seeks only to be an installation subcontractor for a prime contractor under the solicitations. Although Mid Atlantic, as a potential subcontractor, has some economic interest in offering services to a prime contract awardee, that interest is not the direct economic interest of an actual or prospective bidder as contemplated by the PPA. *Virginia E. Durbin,* CAB No. P-0591, Sept. 13, 1999, 46 D.C. Reg. 8693, 8694; *Control Technologies, Inc.,* B-251335, Jan. 5, 1993, 94-1 CPD ¶ 16. As Mid Atlantic is not an aggrieved party and lacks standing, its challenges cannot be adjudicated here.

CONCLUSION

For the reasons discussed above, we dismiss Mid Atlantic's protest because it is not an aggrieved party.

SO ORDERED.

DATED: August 3, 2010

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

URBAN SERVICE SYSTEMS CORPORATION	)	
	)	CAB No. P-0845
	)	
Solicitation No: DCKT-2010-B-0136 and DCKT-2008-B-0160	)	
	)	

For the Protester, Urban Service Systems Corp.: Joanne Doddy Forte, Esq., For the District of Columbia Government: Robert Schildkraut, Esq., Assistant Attorney General.

Opinion by Administrative Judge Warren J. Nash, with Administrative Judge Jonathan D. Zischkau, concurring.

OPINION

Filing ID 32948535

Urban Service Systems Corporation protests the contracting officer's decisions (1) to cancel Solicitation DCKT-2008-B-0160 for hauling and disposal of combustible and non-combustible municipal solid waste, and (2) to issue new Solicitation DCKT-2010-B-1036, for the same services. Urban Service requests that the Board find that the 2008 solicitation was improperly cancelled and that the 2010 solicitation is fatally flawed. The District asserts that the contracting officer properly cancelled the 2008 solicitation and that the 2010 solicitation is not flawed. After carefully considering the documentary record, we conclude that the contracting officer did not violate law or regulation in cancelling the 2008 solicitation. We also conclude that Urban filed its protest regarding the cancellation of the 2008 solicitation more than 10 days after it knew or should have known of the grounds for the protest. Additionally, we conclude that the contracting officer did not violate law or regulation in issuing the 2010 solicitation. Accordingly, we dismiss the protest of the cancellation of the 2008 solicitation and we deny the protest of the 2010 solicitation.

BACKGROUND

A. Invitation for Bids DCKT-2008-B-0160

On December 2, 2008, the Office of Contracting and Procurement ("OCP"), on behalf of the Department of Public Works ("DPW"), issued IFB DCKT-2008-B-0160 (the 2008 IFB), in the open market, for a contractor to haul and dispose of combustible and non-combustible municipal solid waste including tires and white goods. (Agency Report ("AR") at 3). The IFB required the contractor to (1) transfer the solid waste from the Fort Totten and Benning Road solid waste transfer stations and dispose of it at a licensed solid waste disposal facility, (2) enter into disposal agreements with a solid

waste disposal facility and a metal recycling facility, and (3) transport leaves to a composting facility each year from November through January. OCP anticipated awarding a multiyear contract for a period of 5 years. The District estimated its waste tonnage to be 1,021,000 tons per year and its leaf tonnage to be 8,000 tons per year. (AR Ex. 1; *Goel Services, Inc*., CAB No. P-0804, February 2, 2010 ("P-0804 Opinion"), at 1).

The District had estimated its requirements for disposal of combustible solid waste at 180,000 tons per year. (AR Ex. 14, Declaration of Hallie Clemm, Deputy Administrator for Solid Waste Management, DPW).

Under the 2008 IFB, prospective bidders were required to submit prices for the hauling and disposal of four types of solid waste set forth in the IFB:

a. 100,000 tons per year of combustible solid waste to the Fairfax County Energy Resource Recovery Facility ("E/RRF") where it would be disposed, at the District's cost, under an Agreement between the District and Fairfax County (Contract Line Item Number ("CLIN") 001);

b. 180,000 tons per year of combustible solid waste to a licensed disposal facility selected by the prospective contractor, with disposal to be at the contractor's cost by its agreement with its chosen facility (CLINs 002A and B);

c. 24,000 tons per year of non-combustible solid waste (CLINs 003A and B) and up to 1,500 tons per year of white goods, each at a licensed disposal facility selected by the prospective contractor, with disposal to be at the contractor's cost by its agreement with its chosen facility; and

d. Leaves and yard waste would be hauled to a District designated composting facility for disposal at the District's cost.

(AR Ex. 1, IFB §§ B.5, H.9 and H.10; see Protest, at 2-3). The 2008 IFB included in CLIN 0001 the hauling of an estimated 100,000 tons per year of combustible solid waste to the Fairfax County E/RRF, and in CLIN 0002A, the hauling of an estimated 180,000 tons per year of combustible solid waste to a licensed disposal facility selected by the contractor, as provided in IFB section H.10.1. (AR Ex. 1, at 3, 23-24). Under CLIN 0001, the contractor would deliver up to 100,000 tons per year to the E/RRF as allowed by the District's agreement with Fairfax County. CLINs 0001 and 0002A in the 2008 IFB provided two options for disposal of the estimated annual District requirements of 180,000 tons of combustible solid waste.

On January 23, 2009, OCP received and opened thirteen bids. The three lowest evaluated bidders were Goel Services, Covitta, and Urban. (AR Exhibit 3, P-0804

Opinion, at 3). By his May 19, 2009 Determination and Finding of Non-Responsibility, the contracting officer found Goel to be nonresponsible. (AR Exhibit 3, P-0804 Opinion, at 3 and 8). On May 18, 2009, before the District had made an award to another bidder, Goel filed with the Board a protest (CAB No. P-0804) challenging the District's nonresponsibility determination. The District did not award a contract under the 2008 IFB while awaiting the decision of the Board. (P-0804 Opinion).

While the Goel protest in CAB No. P-0804 was pending, the District continued to obtain solid waste hauling and disposal services from TAC Transport, LLC, under Contract No. POKY-2004-B-0056-NJ. (AR Ex. 7).

In August, 2009, the Chief Procurement Officer ("CPO") approved a Determination and Findings to Proceed with Award under the 2008 IFB. When Goel challenged the determination to proceed, the District withdrew the determination and instead extended the existing solid waste hauling and disposal contract with TAC Transport. That extension kept the TAC contract in effect through December 2009. (AR Ex. 13, ¶ 6).

From December 2009 up to the filing of the protest here in P-0845 on March 19, 2010, the District continued to extend the existing hauling and disposal contract with TAC Transport so that solid waste hauling and disposal services could continue without interruption. (AR Exs. 11A and 11B).

B. The Fairfax Agreement and Cancellation of the 2008 IFB

In October and November 2009, DPW program personnel began re-reviewing the solid waste hauling and disposal requirements and researching other options for obtaining the necessary services. DPW was exploring an option that would change the requirements in terms of volume by directing most of the District's solid waste, estimated now for the combustible solid waste component to be up to 200,000 tons annually, to the Fairfax County E/RRS, And, if necessary, to an alternate disposal site. (AR Exs. 13, ¶ 6-7, and 14, ¶ 8).

Compared to the 2008 IFB, under which only part of the combustible solid waste would have been disposed of at the Fairfax County E/RRF, this new option included the following major differences:

> a. Use of the E/RRF was limited to 125,000 tons per year by the Waste Delivery/Disposal Agreement, between Fairfax County, Virginia, and the District of Columbia (Fairfax Agreement), in effect since December 5, 2008. (Fairfax Agreement, ¶ 5, Attachment to AR Ex. 7, at 5-9).

> b. Under the 2008 IFB, the combustible solid waste that was not hauled to the E/RRF would be disposed of by the contractor at a licensed facility of its choosing and at the contractor's cost. The contractor was required to pay the disposal cost (and therefore was deemed to have bid a price that included the costs of such payment). (AR Ex..1, 2008 IFB §§B.5, C.2, H.9, and H.10).

As a result, the contracting officer determined that the bid prices and responsibilities of the District and the contractor would be significantly affected by the different requirements that would be included in a new solicitation because of the amendment to the Fairfax County Agreement. [AR Ex. 13, ¶ 8]. Therefore the District decided to issue a new solicitation in lieu of awarding a contract under the now-obsolete requirements of the 2008 IFB.

In late December 2009, the DPW Program Manager, Hallie Clemm, contacted Fairfax County officials to discuss potential changes to the terms of the Fairfax County Agreement. Negotiations with the Fairfax County Division of Solid Waste Disposal and Resource Recovery began in January 2010 and District contracting and project management personnel came to final agreement on terms with Fairfax officials in February 2010. This agreement is embodied in the Amended Waste Delivery/Disposal Agreement, between Fairfax County, Virginia, and the District of Columbia ("Amended Agreement") (AR Ex. 10.A). (AR Exs. 14, ¶¶ 10-11, and 13, ¶ 9). This Amended Fairfax Agreement is subject to formal approval by both the District and Fairfax County governments and, as of the date of the District's Agency Report in P-0845, had been approved and executed by the District.

In the Amended Fairfax County Agreement, the District agrees to send up to 200,000 tons per year of its combustible solid waste to the E/RRF. The District will divert all waste under its control to the E/RRF unless requested not to by Fairfax County. The parties to the agreement anticipate that Fairfax County will be able to accommodate up to 200,000 tons per year of "Acceptable Waste" (a term defined in the agreement). (AR Ex. 10.C, Amended Agreement, ¶ 5; AR Ex. 14, ¶ 14).

In paragraph 6 of the Amended Agreement, Fairfax and the District have also agreed that when the E/RRF is unable to accept the District's acceptable waste, Fairfax will redirect the District's waste to an alternate facility and will bill the District for these diverted loads at the price set in the Amended Agreement for waste disposed of at the E/RRF. (AR Ex. 10.C, ¶¶ 5-6, Amended Agreement, at 2; AR Ex. 14, ¶ 14). In paragraph 11 of the Amended Agreement, the District and Fairfax have further agreed that the new annual ceiling cost is $7,000,000, replacing the annual cost ceiling of $4,000,000 in the original agreement. (Compare AR Ex. 10.C, Amended Fairfax Agreement, ¶ 11, with Attachment to Ex. 7, Fairfax Agreement, ¶ 11).

The contracting officer forwarded the proposed Amended Agreement with Fairfax County to the Mayor, who then submitted the Agreement to the Council of the District of Columbia for approval. As of March 29, 2010, under Council No. CA 18-276, the Council was considering the proposed award of the Amended Agreement under the approval standard stated in CA 18-276. Under this standard, the Agreement was deemed approved by the Council on April 8, 2010 and executed by the CPO on April 9, 2010. (AR Exs. 14 (¶ 12), 13 (¶ 10), 10.C, and 10.B, Council action number CA 18-276).

This Board denied Goel's protest in P-0804 on February 2, 2010. (AR Ex. 3). By Determination and Findings for Cancellation of a Solicitation ("Cancellation D&F"), the contracting officer proposed cancelling the 2008 IFB, DCKT-2008-B-0160. The Chief Procurement Officer approved the cancellation on February 22, 2010. (AR Exs. 13 (¶ 11), 4.A, and 4.B).

In the Cancellation D&F, the contracting officer found that cancelling the 2008 IFB was in the best interest of the District due to changed circumstances that occurred during the one-year period after the original bid closing date of January 23, 2009, until the Goel protest was decided by the CAB on February 2, 2010:

a. The District will no longer require the contractor to have an agreement with a licensed disposal facility to dispose of combustible waste.

b. Instead, the contractor under a new solicitation would haul the District's full volume of combustible solid waste to a facility designated by the District (the Fairfax County E/RRS facility), predicated upon the pending revision to the District's Agreement with Fairfax County.

c. The proposed changes to the District's Agreement with Fairfax County do not change the Agreement's five-year term, measured from December 5, 2008, and therefore, for a new contract commencing by mid-2010, would allow a base term of three years for a new multi-year contract that substantially coincides with the remaining term on the Fairfax County Agreement.

(AR Ex. 4.A; see AR Ex. 14, ¶ 9). Apparently, in the 2008 IFB, the District overstated, by some 55 percent (280,000 tons versus 180,000 tons), its annual requirements for hauling combustible solid waste. In preparing to issue the 2008 IFB, the District had determined that it generated 180,000 tons per year of combustible solid waste (SOF ¶ 2). In Section B.3.1 of the 2008 IFB, the District split the requirements for hauling combustible solid waste between CLIN 001 (to the E/RRF) and CLIN 002-A (to the contractor-chosen licensed facility). (AR Ex. 1, at 3). In the 2008 IFB, the District incorrectly included as "Estimated Tons Per Year" a total of 280,000 tons of combustible

solid waste, of which 100,000 tons were in CLIN 0001 and 180,000 tons were in CLIN 0002-A. (AR Ex. 1, 2008 IFB, § B.5; see AR Exs. 14, ¶¶ 3-6, and 13 (¶ 12)).

On February 23, 2010, the District notified the other bidders, including Urban, of the cancellation. (AR Ex. 4.B).

C. 2010 IFB DCKT-2010-B-0136

On March 5, 2010, OCP, on behalf of DPW, issued in the open market IFB No. DCKT-2010-B-0136 seeking sealed bids from prospective contractors for a requirements contract under which the contractor would provide hauling and disposal of municipal solid waste, including white goods and tires, to a licensed disposal facility, the Fairfax County E/RRF (IFB §§ B.1 and B.2, AR Ex. 5). According to the District, the District intends to award one requirements contract for performance of the DPW requirements and the contract is to have a base term of three years with provision for the District to exercise two option years. (AR Ex.1, IFB §§ F.1 and F.2, at 13; AR Ex. 13, ¶¶ 12-13).

The 2010 IFB includes estimated requirements for each of the several categories of solid waste that the contractor will haul. Relevant to the protest, the District estimated an annual requirement of 200,000 tons of combustible solid waste and included this amount in the applicable CLINs in the IFB (AR Ex. 5, IFB, CLINs 001 (3 Base Years); and 1001 and 2001 (Option Years), at 3). DPW's estimate was based upon the historical records. As the District informed the bidders in Amendment 02 to the 2010 IFB (AR Ex. 7, IFB Amendment 0002, Question and Answer 1, page 2 of 4), the average yearly volume for years 2005-2009 was 173,967.07 tons. In the judgment of DPW, the actual tonnage is expected to increase over the next several years. On this basis, DPW used an annual estimated requirement of 200,000 tons per year for hauling of combustible solid waste. (AR Ex. 14, Declaration of Hallie Clemm, ¶ 15). A prospective bidder had asked for monthly historical waste hauling data and, in response, the District provided annual tonnage for five fiscal years (through 2009), in each of the four categories of waste to hauled under the IFB. (AR Ex. 7, page 2 of 4).

In the 2010 IFB, the District also included a new CLIN 0005 to accommodate the provision in paragraph 6 of the Amended Fairfax Agreement, that Fairfax might divert District waste from the E/RRF to an alternate disposal site. In IFB § B.3.4, Additional Hauling Service, the District provided CLIN 0005 for such diversions and provided that the bidders must submit unit hauling prices per mile based on an assumption that each diversion trip will add 98 miles to the trip (over and above the round trip from the District facility to the E/RRF). Under the 2010 IFB, for the actual additional miles of hauling (for diversions of waste from the E/RRF), the District then will pay the contractor at the bid rate per mile in the CLINs in § B.3.4. (AR Ex. 14, ¶ 16).

In Amendment No. 2, the District informed the prospective bidders in response to a question, that, for bid evaluation purposes, for CLINs 0005-2005, the District would use the price of one round trip under CLINs 0005-2005. (AR Exhibit 7, IFB Amendment 002, Questions and Answers 11 and 2, pages 2-4 of 4; see AR Ex. 9, Bid Tabulation Sheet for the 2010 IFB).

The bid submission and opening date for the 2010 IFB, as extended by Amendment 003, was March 19, 2010. (AR Exs. 8 and 13, Declaration of Gena Johnson, ¶ 13).

Urban Service filed this protest on March 19, 2010, alleging that the 2010 IFB is defective and ambiguous, and that the grounds for the protest did not become apparent until the District issued Amendment No. 3 to the 2010 IFB on March 17, 2010.

On March 19, 2010, five bidders responded to the 2010 IFB. TAC Transport had the lowest evaluated bid at $ 14,560,646.02 for the base period and two option years. In addition, two other bidders offered substantially lower prices than Urban Service's bid of $19,447,586.61. S.T.S. Inc. had an evaluated bid of $18,354,480.96 and Copeland Trucking had an evaluated bid of $18,153,864. (AR Ex. 9, Bid Tabulation; see AR Ex. 13, ¶ 14).

On March 22, 2010, in a Determination and Findings to Proceed with Contract Performance While a Protest is Pending ("D&F to Proceed"), the DPW Director and the contracting officer made and certified requisite findings and thereupon recommended that the District proceed with award of the contract under the 2010 IFB to TAC Transport. (AR Ex. 12).

On April 7, 2010, upon review of the D&F to Proceed, the Chief Procurement Officer determined, in accordance with D.C. Code § 2-309.08 (c)(2) and based upon the findings by agency officials, that "urgent and compelling circumstances that significantly affect interests of the District will not permit waiting for the final decision of the Board concerning the protest …[and that] … it is in the best interest of the District of Columbia to proceed with contract award and performance while the protest is pending." (AR Exs. 12 and 13, ¶ 14). On April 7, 2010, the District filed with the Board the Chief Procurement Officer's Determination to proceed with award and performance of the contract pursuant to the 2010 IFB. The District awarded the contract under 2010 IFB to TAC Transport on June 4, 2010, after Council approval. (AR Ex. 18).

DISCUSSION

Urban Service alleges that at the time of the filing of the protest, the 2010 solicitation is defective and ambiguous and contains an impropriety because it seeks to acquire services that legally cannot be provided in the requested quantities under the terms of the existing agreement that DPW has executed with Fairfax County for the use of the Fairfax Energy Resource Recovery Facility ("Fairfax Incinerator"). Urban Service alleges that the 125,000 ton ceiling set forth in the old agreement renders any possible

change in the solicitation that contemplates a higher ceiling defective and ambiguous. In the Agency Report, the District set forth its rationale for cancelling the 2008 solicitation and replacing it with the 2010 solicitation, regarding the increased use of the Fairfax Incinerator. Additionally, the District of Columbia and the Fairfax County Board of Supervisors both approved the new agreement regarding the District's trash disposal at the Fairfax Incinerator, thereby rendering moot Urban's first protest ground.

Urban next alleges that the 2010 solicitation is defective and ambiguous and contains an impropriety because it seeks to evaluate the bid prices based in part on the price of one roundtrip haul to a yet-to-be-finalized alternative disposal site. Urban alleges that the contracting officer's decision regarding the evaluation of a 96-mile roundtrip haul is at odds with the District's existing agreement for the use of the incinerator. Urban further alleges that because the District has not changed the solicitation to match the terms of the District's current agreement with Fairfax, the solicitation remains defective. The District in its Agency Report asserts that the evaluation for one annual round trip to the alternative disposal site was reasonable because Fairfax County had not redirected any waste from the incinerator to an alternative site since December 2008. We find that the District reasonably used, as an evaluation criteria, an estimated one round trip per year to an alternative site.

Urban further alleges that the 2010 solicitation is deficient because it does not contain sufficient information to allow a prospective bidder that is not the incumbent to competitively price the solicited services and thereby gives a competitive advantage to the incumbent contractor. In support of this allegation, Urban alleges that the District's refusal to provide monthly tonnage data for the materials hauled from the District's two transfer stations, including the amount of combustible solid waste hauled to Fairfax and to an alternate disposal facility, keeps the District from providing a realistic picture of the amount of combustibles being hauled in each month on a regular basis. The District in its Agency Report replies that the District provided estimated hauling tonnage requirements for the three-year base term and the two option years and that the data were reasonably based upon historical annual performance data. Additionally, Urban Service does not show how monthly tonnage data could impact any bidder's ability to respond to the IFB.

Urban alleges that the 2008 solicitation was improperly cancelled because DPW's factual reasons for cancellation were false or pre-textual. As a threshold matter, the Board notes that the District cancelled the 2008 solicitation on February 23, 2010, and Urban filed this protest on March 19, 2010. Urban's protest of the cancellation occurred more than 10 days after the cancellation, or more than ten days after the protester knew, or should have known, of the grounds of the protest. *See* D.C. Code § 2-309.08(b)(2); *CNA Corp.*, CAB No. P-0810, Oct. 7, 2009. Therefore, Urban's protest of the cancellation of the 2008 solicitation is untimely, and we must therefore dismiss its challenge of the cancellation. Even if we were to reach the merits, we could not sustain Urban's challenge as the District's revision to the solicitation specifications were reasonably based on an intended modification of its agreement with Fairfax County. See *First Federal Corp.*, CAB No. P-0311, Sept. 4, 1992, 40 D.C. Reg. 4520 (failure of an

IFB [for a requirements contract] to contain estimates based on the most current information available clearly evinces a compelling reason for cancellation).

CONCLUSION

For the reasons discussed above, we deny in part and dismiss in part Urban Service's protest.

SO ORDERED.

DATED: August 31, 2010

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

CONCURRING:
/s/ Jonathan Zischkau
JONATHAN ZISCHKAU
Administrative Judge

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

Kennedy Development, LLC	)	
	)	CAB No. P-0850
Under RFP No: DCKT-2009-R-0120	)	

For the Protester, Sandra Pone, CEO, Kennedy Development, LLC. For the District of Columbia Government: Robert Schildkraut, Esq., Assistant Attorney General.

Opinion by Administrative Judge Warren J. Nash, with Administrative Judge Jonathan D. Zischkau, concurring

OPINION

Filing ID 32946228

Kennedy Development, LLC, has protested the award of a contract issued for grounds keeping and landscaping services to Lorenz, Inc., or any offeror other than Kennedy. Kennedy's *pro se* protest is not a model of clarity but appears to allege that the solicitation was improperly drafted to restrict competition, that awarding the contract to a firm from outside of the District would not provide economic benefits to the city, and that the method of making awards unfairly harmed small businesses. On May 3, 2010, the District filed a motion to dismiss the protest, alleging that Kennedy lacks standing to protest because it had the lowest technical score of the four offerors and its price proposal was incomplete and therefore rejected by the contracting officer. In addition, the District argues that to the extent that Kennedy is alleging improprieties in the solicitation, such protest grounds are untimely because the protest was filed after award. We conclude that Kennedy has not raised valid grounds for protest, that its challenges to the solicitation are untimely, and that Kennedy has not shown prejudice in the awards that were made. Accordingly, we dismiss Kennedy's protest.

BACKGROUND

The Office of Contracting and Procurement ("OCP") of the District Government issued solicitation DCKT-2009-R-0120 in the open market for grounds keeping and landscaping services on September 3, 2009. (Motion to Dismiss, Ex. 2). The solicitation required prospective contractors to provide grounds maintenance, landscaping services, and other related services to several District agencies. (*Id.*). The solicitation contemplated award of multiple contracts, and stated that the District would award all of its requirements for each geographical ward of the city to a single contractor. (*Id.*). Kennedy submitted a proposal to provide services in Ward 8. (Motion, Exs. 4 and 5). The Technical Evaluation Panel ("TEP") reviewed Kennedy's proposal and gave Kennedy a consensus score of 0 for all four technical factors included in the solicitation. (Motion, Ex. 6). The contracting officer, after conducting his own independent review,

concurred with the TEP's findings. (*Id.*). Kennedy also failed to provide pricing for each contract line item number in its pricing proposal as required by the solicitation and thus the contracting officer rejected Kennedy's price proposal. (*Id.*). The District could not calculate a total evaluation score for Kennedy due to Kennedy's failure to provide a complete pricing proposal. (*Id.*). There were three vendors in line for award before Kennedy not including Lorenz. The District could not award to Kennedy under any circumstance since its price proposal was incomplete and its technical proposal was unacceptable. (*Id.*). The District awarded a contract to Lorenz, Inc., on April 13, 2010. Kennedy filed this protest on April 15, 2010. In its protest, Kennedy alleges: the "contract [solicitation] did not include minimum and maximum costs quotes" for the contract, the offeror's experience in Washington, DC, was not factored into the solicitation, the price per acre quoted by the awardee is not possible under Davis Bacon Act wage scales, the awarded company is from out of state and economic benefit to the city would be minimal, contracts were awarded in groups too large for small companies to be competitive, awards should have been made to at least 4 companies and up to 8 companies, contracts for Wards 3-8 were awarded to one company, and that contracts were awarded for up to five years which "locks out" many small companies from competing.

DISCUSSION

In the motion to dismiss, the District argues that Kennedy lacks standing to protest because Kennedy would not be the next offeror in line for award, even if successful on the merits. Kennedy did not file a response to the District's motion. A protester lacks standing where it would not be in line for award, even if its protest was sustained. Kennedy received a technical score of 0 for all four technical evaluation factors set forth in the solicitation, and Kennedy failed to provide a complete price proposal. Kennedy has not raised any valid protest challenge to the award made to Lorenz and had not shown that its offer could have been considered for award in any event due to its unsatisfactory technical proposal and incomplete price proposal. Thus, we dismiss Kennedy's protest as not raising valid protest grounds, raising untimely challenges to the terms of the solicitation, and failing to show how it was prejudiced by the awards.

SO ORDERED:

DATED: August 27, 2010

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

UNFOLDMENT, INC.	)	
	)	CAB No. P-0843
Solicitation No. TM 05-97	)	

For the Protester, Unfoldment, Inc.: Kemi Morten, Esq. For the District of Columbia Government: Robert Schildkraut, Esq., Assistant Attorney General.

Opinion by Administrative Judge Jonathan D. Zischkau, with Administrative Judge Warren J. Nash concurring.

OPINION

Filing ID 34139257

Unfoldment, Inc., protests the Department of Child and Family Services Agency's ("CFSA") failure to award it a contract for teen mother and babies services in 1997. Unfoldment alleges that it only recently became aware of its grounds for protest as a result of discovery conducted in a pending contract dispute it has been litigating with CFSA. Unfoldment claims that the alleged newly discovered evidence shows that it was the top ranked offeror in the 1997 competition but the contracting officer failed to award it a contract in bad faith or for racially discriminatory reasons. We conclude that this protest is untimely, and accordingly, dismiss it.

BACKGROUND

CFSA, under the control of the LaShawn General Receiver, issued RFP No. TM 05-97, on February 18, 1997, for foster care services to assist pregnant teenagers and teen mothers and their children, with assistance including well-baby, parenting, and independent living skills. (CAB No. P-0502 Agency Report Ex. 2; Protest, Ex. 1). The RFP contained a provision under Section II ("Proposal Preparation & Submission"), Paragraph 13.a ("Proposal Protests"), stating:

> Any Offeror may file a protest in connection with this solicitation or award of a contract in accordance with D.C. Law 6-85, Section 908, D.C. Code, Section 1-1189.8 (1987) and 27 DCMR 300 *et seq*. (33 DCR 5670, *et seq*. September 12, 1986).
>
> All protests must [be] addressed to Director, Contracts, Grants and Procurement, Child and Family Services Agency, 900 Second Street, NE, Suite 221, Washington DC 20002.

Section 908 of the Procurement Practices Act referenced in Paragraph 13.a provides that protests of solicitations or awards must be filed within 10 business days after the basis of the protest is known or should have been known.

The amended closing date for proposals for the RFP was March 24, 1997. CFSA received 14 proposals which were evaluated from late March to early April 1997. (CAB P-0502 CFSA filing, dated Oct. 28, 1997). Unfoldment, Catholic Charities, Family and Child Services of Washington, D.C., Inc., and For Love of Children, Inc. ("FLOC"), were initially ranked as the top four proposals based on technical and price, and included in the competitive range, and the offerors were invited to submit best and final offers. The other 10 proposals were excluded from the competitive range, including the proposal of Sasha Bruce Youthworks, and those offerors were so informed by letters dated May 16, 1997. (CAB P-0502 Agency Report, Ex. 10; Oppedisano Statement of Facts, filed Sept. 8, 1997). CFSA prepared a "List of Offerors and Awardees (Bid Analysis and Spread Sheet)" most likely in approximately May 1997 after the request for best and final offers from the four top ranked offerors. Family and Child Services and FLOC apparently did not change their offers, while Catholic Charities increased the number of offered units from 8 to 20. Those three offerors are listed under the heading "Best and Final Offer Selections." Unfoldment is listed under the heading "Best and Final Offer Refused" and its BAFO appears to show a reduction in the number of units being offered from 24 to 12. (AR Ex. 11). Sasha Bruce, one of the offerors excluded from the competitive range, contended in a protest filed in 1997 that CFSA improperly refused to make awards to offerors who proposed less than 20 units.

Contracts with Family and Child Services, Catholic Charities, and For Love of Children were signed on June 4, June 6, and June 9, 1997, respectively. Sasha Bruce requested a debriefing and received its debriefing on June 23, 1997. During the debriefing, Sasha Bruce's representatives were told by CFSA's Oppedisano that:

> CFSA negotiated with four vendors with the intention of awarding four contracts. Problems arose in one case and CFSA awarded contracts to three vendors. They are FLOC [For Love of Children], Family and Child Services, and Catholic Charities.

(CAB P-0502 Protest, Ex. II).

Unfoldment's executive director, Kemi Morten, asserts in an affidavit of April 13, 2010, that she received a notice of non-award in approximately July 1997, that after receiving the letter she contacted Oppedisano inquiring why Unfoldment had not received award, and that Oppedisano told her that Unfoldment's proposal did not fall within the competitive range. (Morten Declaration, Apr. 13, 2010, at ¶¶ 4-6). She asserts further that she asked Oppedisano "how and where I could file a protest of the Non-Award decision, as required in Section 13.1 of the Teen Mothers and Babies RFP TM 05-97 at page 8 . . . ." (Id. ¶ 7). She claims that Oppedisano informed her that "the CFSA LaShawn Receivership was an independent agency, and the Receivership's decision not to award Unfoldment a Teen Mother and Babies Contract was final and non-appealable."

Morten states in her affidavit that after speaking with Oppedisano, she "filed a formal, written protest regarding the non-award decision on Unfoldment's behalf with Contracts Director John Oppedisano" but that "Oppedisano did not respond to [her] letter" and that because Jerome Miller had resigned as CFSA Receiver "there was no one to whom I could appeal Mr. Oppedisano's non-award decision." (Id. ¶¶ 8-10). Morten is an attorney licensed to practice law in the District. Unfoldment has not submitted into the record any written protest from Unfoldment in 1997 as referenced in Morten's declaration. We accord little weight to Morten's recollections 13 years after the fact. Rather, we find the 1997 written record contained in Sasha Bruce's protest (CAB No. P-0502 and P-0523) far more reliable and find it more likely than not that Unfoldment never filed a formal written protest with the CFSA contracting officer. As a licensed attorney, Unfoldment's executive director was certainly as capable as the *pro se* protester in CAB No. P-0502 to vindicate its protest rights given the clarity of the Procurement Practices Act, the Board's published rules of practice governing protests, and the solicitation's clear invocation of the Procurement Practices Act for protests of awards.

Sasha Bruce, another offeror in the same Teen Mothers and Babies procurement, filed a protest as provided for in the District's Procurement Practices Act and as referenced in the RFP section noted by Unfoldment. On July 8, 1997, Sasha Bruce served a copy of its protest on Oppedisano at CFSA (during business hours) and delivered the original protest to the Board (arriving after business hours that same day). The Board docketed the protest as CAB No. P-0502 and concluded that the protest was filed timely with the Board based on July 8 date of service on the CFSA contracting officer. CFSA filed its Agency Report with exhibits on August 12, 1997. On September 8, 1997, CFSA filed a legal memorandum addressing the protest grounds, as well as Oppedisano's 3-page "Statement of Facts" regarding the procurement. CFSA supplemented the record with additional documentation on October 15 and 28, 1997. On November 17, 1997, Sasha Bruce filed a response to the Agency Report and supplemental submissions from CFSA. Sasha Bruce filed a supplemental protest, docketed as CAB No. P-0523, on November 10, 1997, based on the evaluation information disclosed by CFSA in its October 28 filing. The two protests were consolidated for further proceedings and the next significant event was a status conference among the parties and the Board on August 6, 1998, in which the Board indicated its view that CFSA's evaluation of proposals violated the procurement law and encouraged the parties to discuss settling the protests. The parties ultimately agreed upon a settlement and the Board dismissed the protests in an order dated August 21, 1998. Unfoldment never intervened in either P-0502 or P-0523, nor filed its own protest with the Board, during the pendency of Sasha Bruce's protests.

Unfoldment claims that it first became aware of the existence of the pleadings in CAB No. P-0502 when it was preparing for a deposition of Oppedisano in connection with a contract dispute case against the District and CFSA in CAB No. D-1062. In that dispute, Unfoldment claims that Oppedisano and another contracting official with CFSA breached in bad faith a contract entered into between CFSA and Unfoldment for group home services. Unfoldment claims that Oppedisano and the other representative held a racial animas against Unfoldment, a minority contractor. In her April 2010 declaration,

Morten states: "Based on my knowledge of John Oppedisano's racial animus toward African Americans and the fact that Unfoldment was one of the largest African American controlled vendors doing business with CFSA in 1997 and 1998, I am of the opinion that Oppedisano refused to award the Teen Mothers and Babies contract to Unfoldment, the number one ranked bidder, in bad faith and/or for reasons in which race played an impermissible role."

DISCUSSION

The protest provision from the Procurement Practices Act cited in Section II, Paragraph 13.a, of the 1997 solicitation, which is the predecessor of the current provision found at D.C. Code § 2-309.08, states in relevant part:

> (a) This section shall apply to a protest of a solicitation or award of a contract addressed to the Board by any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract.
> (b) For a protest pursuant to subsection (1) of this section, the aggrieved person shall file a protest with the Board within 10 working days after the aggrieved person knew or should have known of the facts and circumstances upon which the protest is based.

Unfoldment argues that its protest filing on February 26, 2010, in the current case (CAB No. P-0843) is timely because Unfoldment first became aware of the pleadings in CAB No. P-0502 in early February 2010 when Morten was preparing for Oppedisano's February 12, 2010 deposition in CAB No. D-1062. The District urges *inter alia* that the long delay by Unfoldment in filing its protest renders the protest clearly untimely. We agree with the District.

Protests are serious matters which require effective and equitable procedural standards to assure both parties will have a fair opportunity to present their cases so that protests can be resolved without unduly disrupting the procurement process. *See Amerind Constr., Inc. – Recon.,* B-236686.2, Dec. 1, 1989, 89-2 CPD ¶ 508. For this reason, the Procurement Practices Act contains strict timeliness requirements for filing protests. Protesters have a duty to pursue diligently any information that reasonably would be expected to disclose whether a basis for a protest exists, and where a protester has not done so, we will not view the protest as having been timely filed. *Potomac Capital Investment Corp.*, CAB No. P-0383, Jan. 4, 1994, 41 D.C. Reg. 3885 n. 13. This includes diligently pursuing a debriefing, so that the protester may determine whether it in fact has a basis for protest, and if so, what it is. *Professional Rehabilitation Consultants, Inc.*, B-275871, Feb. 28, 1997, 97-1 CPD ¶ 94 (2 month delay in requesting a debriefing not a diligent pursuit of information); *Unicom System Inc.*, B-222601.4, Sept. 15, 1986, 86-2 CPD ¶ 297 (54 day delay in requesting a debriefing not a diligent pursuit).

Unlike Sasha Bruce, which requested a debriefing in the same procurement and received its debriefing on June 23, 1997, Unfoldment failed to request a debriefing. Unlike Sasha Bruce which filed its protest on July 8, 1997, Unfoldment did not file a protest until nearly 13 years after receiving notice in 1997 that it would not be receiving an award. Clearly, Unfoldment did not diligently pursue information that reasonably would be expected to disclose whether it had a basis for protest. Accordingly, we dismiss its protest as untimely.

SO ORDERED.

DATED: November 2, 2010

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

COMPREHENSIVE COMMUNITY HEALTH AND PSYCHOLOGICAL SERVICES, LLC	)	
	)	CAB No. P-0859
Under Contract Nos. DCFL-2006-D-6001 and DCFL-2010-R-0001	)	

For Comprehensive Community Health and Psychological Services, LLC: Mr. Ernest Middleton, *pro se*. For the District of Columbia Government: Robert Schildkraut, Esq., Assistant Attorney General.

Opinion by Administrative Judge Jonathan D. Zischkau, with Administrative Judge Warren J. Nash, concurring.

OPINION

Filing ID 34265802

Comprehensive Community Health and Psychological Services, LLC ("CCHPS") protests the approval and administration by the Office of Contracts and Procurement of an option year contract with Unity Health Care, Inc. CCHPS protests for the third time the administration of a contract performed by Unity and the failure of Unity to award a subcontract to CCHPS in connection with a 2006 procurement. We dismissed two earlier protests raising the same allegations in CAB Nos. P-0809 and P-0821. We again conclude that CCHPS as a disappointed subcontractor lacks standing to protest and that the allegations it raises concerning various contract administration issues are not proper grounds for protest. CCHPS also seems to challenge the cancellation of a 2010 solicitation but we conclude that this challenge is untimely. Accordingly, we dismiss CCHPS's protest. We further find that CCHPS's repeat protest of the 2006 procurement which we previously rejected in two earlier protest decisions is frivolous pursuant to D.C. Code § 2-309.08(g) and Board Rule 308.2.

BACKGROUND

On July 19, 2006, the Office of Contracting and Procurement ("OCP") awarded to Unity Health Care ("Unity") a sole source contract, DCFL-2006-D-6001 ("2006 procurement"), for community oriented correctional health care for the Department of Corrections ("DOC"). (CAB No. P-0809 Opinion, dated August 26, 2009). Prior to this instant protest, CCHPS filed two separate protests with the Board regarding the 2006 procurement. The first protest was filed on June 15, 2009, docketed by the Board as CAB No. P-0809. In that protest CCHPS alleged: (1) the District improperly awarded the 2006 sole source contract to Unity; (2) the District improperly reduced the subcontracting set-aside requirement of the Unity contract from 35 to 20 percent; (3) the

District improperly allowed Unity to subcontract with its wholly owned subsidiary (Health Right, Inc.) to the detriment of CCHPS; and (4) Unity improperly refused to subcontract with CCHPS. (CAB No. P-0809 Opinion). On August 26, 2009, the Board dismissed the protest in CAB No. P-0809 stating that the protest was untimely, that CCHPS lacked standing to protest the procurement, and that CCHPS's contract administration allegations were not proper protest grounds under the Procurement Practices Act. (*Id.*).

Undaunted, CCHPS filed a second protest, CAB No. P-0821, on September 9, 2009, reiterating its earlier grounds from CAB No. P-0809, and again alleging improprieties by the District in administering the 2006 contract and exercise of options. (CAB No. P-0821 Opinion). On September 10, 2009, the Board summarily dismissed CAB No. P-0821, citing the untimely filing, CCHPS's lack of standing, and the absence of valid protest grounds. We also drew CCHPS's attention to the Board Rule 308.2 that allows the Board to award sanctions where a protester files a frivolous protest: "The Board directs CCHPS's attention to Board Rule 308.2 which discusses possible sanctions for parties who file frivolous protests."

On November 30, 2009, Solicitation DCFL-2010-R-0001 was issued for comprehensive health care services by OCP for DOC. (Motion to Dismiss, Ex. 1). The 2010 solicitation was cancelled on May 10, 2010, by Amendment 0011. (Motion to Dismiss, Ex. 2). On May 11, 2010, all prospective offerors were emailed a copy of Amendment 0011 and notified that the solicitation was cancelled. (Motion to Dismiss, Exs. 3, 4). CCHPS was included on the list of prospective offerors and was sent the May 11, 2010 email. (*Id.*).

On July 13, 2010, CCHPS filed the instant protest restating the arguments found in its previous protests, CAB Nos. P-0809 and P-0821, which we rejected. CCHPS also appears to argue that the cancellation of the 2010 solicitation was improper. On July 22, 2010, CCHPS filed an amended protest, that for the most part duplicates its July 13 protest except that CCHPS adds a paragraph challenging the "finding of CAB that CCHPS does not have standing" and asking us to "immediately void the option year" and not allow a new option to be exercised. On July 30, 2010, the District filed a motion to dismiss including a request for sanctions. CCHPS responded to the motion to dismiss on August 27, 2010, and October 4, 2010.

DISCUSSION

With respect to CCHPS's objection to the cancellation of the 2010 solicitation, we note that CCHPS does not deny that it received notice of the cancellation on May 11, 2010. By waiting over two months to file its protest on July 13, 2010, CCHPS has not timely raised its protest ground as required by D.C. Code § 2-309.08(b)(2) and Board Rule 302.2 (requiring this type of protest to be filed "not later than ten (10) business days after the basis of the protest is known or should have been known"). Accordingly, we conclude that this protest ground was untimely filed and must be dismissed.

Regarding the repeat protest challenges of the 2006 procurement involving the award to Unity Health Care of Contract No. DCFL-2006-D-6001, we dismiss all of these protest grounds for the same reasons stated in our August 26, 2009 and September 10, 2009 decisions in CAB Nos. P-0809 and P-0821. D.C. Code § 2-309.08(g) and Board Rule 308.2 provide that:

> The Board may dismiss, at any stage of the proceedings, any protest, or portion of a protest, it deems frivolous. In addition, the Board may require the protester to pay the agency attorney fees, at the rate of $100 per hour, for time counsel spent representing the agency in defending the frivolous protest or its frivolous part.

CCHPS's repeat challenges of the 2006 procurement are frivolous and we warned CCHPS in our second decision (CAB No. P-0821) on these same allegations that a frivolous protest may result in sanctions. This is the third time that CCHPS has raised these allegations. Sanctions are therefore appropriate under D.C. Code § 2-309.08(g). Pursuant to Board Rules 308.3 and 308.4, the District shall file with the Board within 20 days of receipt of our decision a statement of the number of hours spent by District counsel in responding to the portion of this protest relating to the frivolous allegations concerning the 2006 procurement, accompanied by sufficient documentation supporting the requested costs and/or damages. CCHPS may respond as provided in Board Rule 308.5 by filing its written response to the District's filing within 15 days after its receipt of the District's filing.

The Board will not accept for filing any new protest from CCHPS that challenges the 2006 procurement in DCFL-2006-D-6001.

CONCLUSION

For the reasons discussed above, we dismiss the protest and conclude that a portion of the protest is frivolous pursuant to D.C. Code § 2-309.08(g).

SO ORDERED.

DATED: November 9, 2010

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

APPEAL OF:

ADVANTAGE ENERGY, LLC)
) CAB No. D-1199
Under Contract No. DCAM-2000-C-0019)

For Advantage Energy, LLC: Gary J. Silversmith, Esq. and Robert C. Sanders, Esq. For the District of Columbia Government: J. Anthony Towns, Esq. (assigned to the case after briefing completed), Assistant Attorney General.

Opinion by Administrative Judge Jonathan D. Zischkau, with Administrative Judge Warren J. Nash, concurring.

OPINION

Filing ID 34672871

Appellant Advantage Energy, LLC, appeals a final decision of the contracting officer from the Office of Contracting and Procurement, dated December 19, 2002, denying its claim seeking $900,031.29 for services under its energy performance savings contract. During the term of the contract, the District never made any payments to Advantage. Advantage now seeks amounts exceeding $2,000,000 based on various contract breach theories. The District claims that the contract was an unauthorized "no-cost" type contract inconsistent with the Procurement Practices Act and District procurement regulations because it was structured to pay Advantage from savings realized by the District government in providing energy services to its agencies. The District also alleges that the contract lacked required financial approvals and price terms, violated the Anti-Deficiency Act, and was tainted by an illegal conflict of interest by a government official involved in the procurement. We conclude that the contract did not violate the Anti-Deficiency Act, was supported by lump-sum general utility appropriations, was not tainted by a conflict of interest, and was a valid agreement containing fixed unit prices and an incentive performance fee. The contracting officer knew of Advantage's performance throughout the base year contract period, directed Advantage to continue its work, and promised that payment would be made pursuant to the terms of the contract, accepted the benefits of Advantage's work, and clearly ratified the terms of the contract. We find that the District is liable to Advantage in the amount of $669,132 for natural gas management fees, consulting fees, and performance fees.

BACKGROUND

Energy deregulation refers to the process of lessening the amount of government regulation and oversight applied to utility companies. (Appeal File ("AF") Exs. 27, 28). As with other industries that have been deregulated, natural gas deregulation has increased customer choices. Before deregulation, a utility charged its customers for all the necessary steps to get natural gas from the production field to the customer's home or business, including purchasing the natural gas, delivering it to the customer, measuring the customer's use, providing emergency service, and billing the customer. Through deregulation, the complete package of services has been unbundled so that a customer can choose to separate the gas purchasing transaction from the delivery transaction. (AF Ex. 27). "Bundled" natural gas acquisition refers to acquiring energy in the traditional method of purchasing the gas from the local utility. The local utility, in this case Washington Gas, purchases its natural gas requirements from suppliers. The gas is delivered usually through interstate pipelines to the "city gate" which is the entry point for natural gas transported over the interstate pipeline system to the local utility's own internal pipeline. The local utility transports the natural gas throughout its system to its customers' point of consumption, referred to as the "burner tip." (Tr. 1153). To calculate the cost for bundled natural gas is a rather complex exercise. Fundamental cost components include a weighted average "purchased gas charge" defined in section 16 of the D.C. Public Service Commission's General Service Provisions, and a number of other charges set forth in tariff rate schedules (*e.g.*, Rate Schedule 2) published by the Public Service Commission. (AFS Exs. 93, 131). "Unbundled" natural gas acquisition refers to acquiring gas through the purchase of the commodity from an independent supplier who obtains the commodity from the production field and transports it through the interstate pipeline system to the city gate for delivery to the burner tip with the assistance of the local utility. Rate Schedule 2A provides tariff rates for various charges (not including the gas commodity cost) that Washington Gas may charge a customer for delivering the gas commodity (received from the independent supplier at the city gate) to the burner tip.

In 1999, Lewis Chapman, Jr., became the District's Chief Energy Management Officer and director of the Energy Management Division within the former Office of Property Management ("OPM"), now called the Department of Real Estate Services. (AF Ex. 26, Tr. 13). Chapman was responsible for the strategic energy planning, energy management and conservation, policy review, procurement of utility services (such as natural gas, electricity, and fuel oil), and building utility management for District government properties. Prior to the beginning of the District's fiscal year 2001 (*i.e.*, October 1, 2000), he supervised three auditors, two professional engineers, and an administrative support person. (AF Ex. 26, Tr. 15). His office audited approximately 3,400 utility bills per month, made sure that those bills were correct as rendered by the utilities, and signed off on the bills so that the bills could be paid by the Office of Finance and Resource Management ("OFRM") within the Office of the Chief Financial Officer ("OCFO"). (AF Ex. 26, Tr. 13).

Upon coming to OPM, Chapman wanted to see if the District government could purchase its requirements for natural gas in the deregulated market using an unbundled acquisition strategy rather than using the traditional bundled acquisition strategy. (AF Ex. 26, Tr. 27-28). With the unbundled method, the District would strategically time its purchases of natural gas from independent gas suppliers when the seasonal price for gas was advantageous. (Tr. 102, 1155). In 1999, Chapman contacted John Cory (who was president of Pepco Energy's Gas Atlantic Division), informing him of his intention to initiate District government unbundled energy acquisitions, and asking if Pepco Energy wanted to bid on providing unbundled services to the District. (Tr. 320-321). Cory advised Chapman that an unbundled service could be achieved more quickly through a federal supply schedule contract issued by the General Services Administration ("GSA"). GSA was already providing these services to some facilities of the federal government and GSA had negotiated supply schedule contracts with suppliers of natural gas. (Tr. 112-113, 320-321). Cory left Pepco Energy and later started Advantage Energy to continue providing energy consulting services. (Tr. 113). Cory introduced Chapman to GSA representatives. (*Id*.). As a result, Chapman developed and submitted a proposal to the District's Office of Contracting and Procurement ("OCP") in order to gain approval for this new acquisition strategy.

While the process of securing an agreement with GSA was ongoing, Mohamed A. Mohamed, the Budget Director for OCFO/OFRM sent a memorandum to Linda Thomas, an OCP contract specialist, dated December 21, 1999, with a subject entitled "Certification of Funding for Natural Gas," in which he stated:

> The Office of Finance and Resource Management certifies that funding will be in place for the various natural gas contracts once our collection efforts are complete. As of the above date, OFRM has collected $6.3 million for natural gas. The balance will be collected as soon as agencies identify financial attributes.

(AF Ex. 35). Mohamed testified that each of the approximately 65 agencies that use natural gas must annually budget for their natural gas usage. (Tr. 1446-1447). As in previous years, the budget amounts were based on buying gas through the traditional bundled acquisition from Washington Gas. The agency budget amounts are then submitted by the Mayor to the Council as part of the District's budget process for approving each agency's annual budget. The Council ultimately approves a budget for each agency and the agency budgets are then submitted to Congress for approval. The fixed cost budget amounts, including the amounts for natural gas, were routinely in agency budgets for the years at issue here, fiscal year 2000 (October 1, 1999,through September 30, 2000) and fiscal year 2001 (October 1, 2000, through September 30, 2001) and such budget amounts were incorporated in the appropriations acts that were approved by Congress. *See, e.g*., Public Law No. 106-113, Nov. 29, 1999, 113 Stat. 1501, 1505-08. At or near the beginning of these fiscal

years, OFRM sets aside the funds from the natural gas budget account (0304) for each agency, effectively encumbering the funds so that payment could later be made by OFRM for natural gas services. (Tr. 1447-1450). These encumbrances of appropriated funds in fiscal years 2000 and 2001 supported the purchases of natural gas services made by the District during those fiscal years. (Tr. 1446-1449, 1386-1387).

After receiving OCP approval, Chapman made additional presentations to the Mayor's office and the City Council to gain approval for the District to begin acquiring natural gas through unbundled services. (AF Ex. 26, Tr. 27-28). Discussions and negotiations between the District and GSA resulted in the execution of a tripartite task order, on March 27, 2000, among GSA, the District, and Tiger Natural Gas ("Tiger"), one of the natural gas suppliers with a GSA supply schedule contract. (Task Order No. DC-001, under GSA's Contract No. GS-OOP-99-BSC-0123). An attachment to the task order, dated October 31, 1999, lists the District government facilities to receive delivery of gas from Tiger. (CAB No. D-1163, Appellant's Complaint, Ex. B). The point of delivery noted on the task order is "Burner Tip" and GSA was to "verify that Contractor invoices reflect LDC [Washington Gas] billing." Tiger's responsibility under the tripartite agreement was to deliver natural gas to the burner tip at actual customer locations, obviously with the assistance of Washington Gas for distribution through the Washington Gas local distribution pipelines. (Tr. 117-124; AF Ex. 30). Chapman was named the contracting officer's technical representative ("COTR") for the tripartite agreement, and Chapman met with GSA's director of utilities to understand the mechanics for operating under the agreement and how other federal agencies purchased their unbundled services under the supply schedule contract. (AF Ex. 26, Tr. 30-32). Although the contract was for a one-year period, the District could purchase the gas from Tiger in varying segments, such as monthly, quarterly, or another length of time, based on the market prices and anticipated conditions and fluctuations, in order to obtain the best value for the District. (AF Ex. 26, Tr. 34-35, 95-96). The District could also revert back to procuring gas under the traditional bundled method from Washington Gas through modification, negotiated suspension, or convenience termination of the task order.

Chapman wanted a consultant under contract with the District to perform strategic analysis with recommendations, as well as to provide overall management of the task order's unbundled acquisitions and billing review and analysis. (AF Ex. 26, Tr. 30, 43-45, 96). Chapman invited Cory to compete for a contract to provide such energy consulting services to the District. (AF Ex. 26, Tr. 51-52). During the period from April to June 2000, the District issued a request for information and solicited competitive proposals for energy management services from three or four firms, including Advantage, for the purpose of providing ongoing management, analysis, and recommendations regarding the District's energy purchases. (AF Ex. 26, Tr. 51-52, 66). By memorandum of April 21, 2000, Advantage responded to a request for information issued by Chapman. (AFS Ex. 61 (Exhibit A3iii)). The purpose of the

proposed contract was to have the consultant help OPM identify the best strategic purchasing strategies to enable the District to maximize its savings on purchases of gas and electricity, and to provide continuous management while the District executed its purchasing strategies. The principal strategy was to pursue and manage the District's switch from purchasing bundled energy requirements from the local regulated suppliers, Washington Gas and Pepco, to acquiring its energy requirements in deregulated energy markets. Although natural gas was subject to deregulation prior to the effective date of the tripartite agreement, electricity was not deregulated in the District until 2001 and the District never implemented unbundled electricity purchases during the relevant period at issue in this case.

Around June 2000, with the informal assistance of Advantage, OPM's Energy Management Division switched to an unbundled method of acquiring the District's natural gas requirements. (Tr. 100). The record indicates that the first unbundled natural gas deliveries to the District began in June 2000, notwithstanding the District's notification to Washington Gas that the District chose to purchase its natural gas from another supplier effective July 1, 2000. (Washington Gas Light ("WGL") Exs. 1-2; AF Ex. 33).

Chapman's Energy Management Division functions for managing the new unbundled acquisition strategy were to be contracted under the planned consulting contract because OPM was eliminating all of the Division's staff except for Chapman. (AF Ex. 26, Tr. 14-15). The solicitation for the energy consultant to manage the unbundled acquisitions of energy for the District requested that the proposed contactor commit an entire energy management team to replace the existing OPM Energy Management Division staff because they did not have the experience or the resources (e.g., software applications) to manage the new unbundled energy acquisitions. (Tr. 104-105, 98-100, 107-109; AF Ex. 26, Tr. 43-45). In response to the solicitation, Advantage submitted, on June 30, 2000, a statement of costs proposal which itemized the major areas of work and the estimated fees. (AF Ex. 1, at bates 66-70). In addition, Advantage submitted a proposal on August 9, 2000, providing narrative of its intended performance and the fees it was proposing as referenced in its earlier statement of costs. (AF Ex. 2). Advantage listed estimated annual fees totaling $885,083, including hourly consulting fees at a rate of $75 per hour, commodity management fees ($0.03 per dekatherm and $0.0003 per kilowatt hour) for managing the unbundled gas and electricity services, and a 15 percent performance-based incentive fee on net savings arising from strategic review and recommendations. Based on Advantage's proposal, the contracting officer determined that Advantage should receive contract award. (AF Ex. 26, Tr. 66).

It is more likely than not that most of the contract language was drafted by OCP's contract specialist for this procurement, Debor Dosunmu, with support from Chapman and Advantage. (AF Ex. 26, Tr. 50-51; Tr. 1390-1393). The District declined to call Dosunmu as a witness at the Board hearing. At Dosunmu's request, Chapman drafted a scope of work which was incorporated into the contract by

Dosunmu as Section C. (AF Ex. 26, Tr. 82-89). Dosunmu asked Cory to prepare a draft of the payment provisions for the contract using the fee rates from Advantage's proposal. Dosunmu incorporated that language into Section G.1 of the contract. (Tr. 789; AF Ex. 26, Tr. 93-94). Dosunmu requested that Advantage put in writing a requirement that Advantage would be paid its fixed, variable, or performance-based fees only if the payment of such fees would not result in total energy costs to the District in excess of the energy costs that the District would have incurred for bundled tariff services. (AF Ex. 2, bates 65; Tr. 227-228). Cory prepared the language and it was transmitted by letter of August 11, 2000. (AF Ex. 2, bates 65). This language was incorporated by Dosunmu into Section B of the contract. The remaining portions of the contract's terms, for example, the cover page, Sections E, F, G.2-G.5, H, I, J, and K were drafted by Dosunmu or others at OCP. Although the District argues that Chapman was conflicted by Advantage "offering to facilitate an outside business relationship" or negotiating "for outside employment for Chapman prior to the execution of the contract," we find no credible evidence of this sort in the record. We find no evidence in the record of an improper business relationship between Chapman and Advantage (or its principals) at any time prior to contract award. (Tr. 319-329; AF Ex. 19, Tr. 193). Contrary to the District's implication, the discussions that Cory had with Chapman – regarding OCP's preliminary consideration of privatizing the existing energy office or a privatization contract pursuant to D.C. Code § 2-301.05b – did not result in any business arrangement between Advantage and Chapman. (Tr. 329-337, 341-342).

During the formation process, representatives from OCFO/OFRM, including Barbara Jumper, the director of OFRM and deputy CFO, and Mohamed Mohamed (who reported to Jumper), met with OCP personnel including the contracting officer, Janice Watson, OPM personnel including Chapman, and Cory from Advantage. Mohamed testified that Chapman and Cory made presentations on how the District could save energy funds with the proposed contract but Mohamed said that OCFO/OFRM did not want to have anything to do with this contract, that OCFO would not participate, that OCFO did not budget for it, that OCFO did not have enough budget to cover this contract, and that OCFO felt the projected savings were "not tangible" and the proposed strategy to achieve savings was "not going to work." (Tr. 1418-1426). We find it odd that OCFO/OFRM personnel were making judgments about the programmatic strategy and likelihood of success as there is no evidence that Mohamed or Jumper held an expertise in energy acquisition strategies. In any event, OCP continued toward implementing the contract because it determined that it did not need OCFO involvement or any additional approval for this contract because there existed sufficient certified general appropriations for the District's energy requirements for natural gas and Advantage would only be paid out of any actual savings realized within these general energy appropriations. (AF Exs. 35 and 2, bates 10, 65; Tr. 1386-1387, 1426-1428, 1447-1448). The concept of a performance savings contract may have been a new concept for OCFO/OFRM personnel but we find it peculiar that OCFO/OFRM refused to consider the possibility that a performance savings contract like the one here could indeed generate savings,

and from a fiscal point of view, that Advantage could be paid fees within those savings supported by the certified general appropriations funding of natural gas for the District.

The Chief Procurement Officer and the contracting officer approved of the award to Advantage. (Tr. 1385-1387). Accordingly, the contract was finalized by OCP and signed on August 29, 2000, by Janice Watson, the contracting officer for the District, and by John Cory, on behalf of Advantage. (AF Ex. 2). The contract had an effective date of September 1, 2000. The contract's cover page, under block 17, and Section J, contain language expressly incorporating Advantage's proposals and statement of costs. (AF Ex. 2, bates 9, 55).

Section B of the contract provides:

> All consulting fees due to be paid to Advantage Energy pursuant to this contract, whether fixed, variable, or performance-based fees, will be paid to Advantage Energy only if the payment of such fees will not result in total energy costs to the District of Columbia Government in excess of the energy costs that the District of Columbia Government would have incurred for bundled tariff services for electricity and gas from Pepco or Washington Gas, respectively, for facilities managed by Advantage Energy.

The estimated payment to the contractor was $885,083, matching Advantage's proposal estimate of fees. The contract's line item 0001 reads:

> Energy Management Service to buy, sell, store, exchange, and transport natural gas for the District of Columbia.

(AF Ex. 2, bates 10). The contract's scope of work, Section C, provides:

> C.1 REVIEW AND ANALYSIS
>
> Advantage Energy Marketing will provide DC with a comprehensive review and analysis of DC's current and historical utility and energy purchases. The review and analysis must include in detail all purchases broken down into major cost components of tariff rates and bundled services. Advantage Energy Marketing will submit to DC a comparison of the current and historical utility and energy purchases with other purchase options available to DC during the proceeding [sic] two fiscal years. Advantage Energy Marketing will provide DC with an analysis of the risks, costs and benefits of each alternate option, and recommend to DC the alternative purchase options(s) that best fit DC's goals and objectives with regard to risks, costs and benefits.

C.2 STRATEGY

Advantage Energy Marketing will provide DC with strategic consultation, negotiating assistance, and/or representation in the following areas:

1. Natural Gas purchase, exchange, hedging, storage and sale;
2. Intra/Interstate pipeline capacity acquisition, exchange and release (short and long term);
3. Distribution company negotiations;
4. Public Service Commission and industry forum positions and representation;
5. Gas for electricity exchanges-structure and timing; and
6. Studies or reports as required by DC, related to strategic discussions or recommendations.

C.3 EXECUTION

Advantage Energy Marketing will provide DC with daily execution of selected strategies. This execution will encompass the following areas of work. Short and long term purchase and sale request for qualifications and proposals, and negotiated contracts for natural gas and intra/interstate pipeline and distribution company capacity, including all terms and conditions as well as any attachments to these contracts. Daily monitoring, scheduling, and balancing on intra/interstate pipeline and distribution companies, including any storage injection or withdrawal requirements. Advantage Energy Marketing will pay any penalties assessed by suppliers, transporters or local delivery companies due to contractor's action, untimely action, inaction, incorrect action, negligence, or inability to perform as required by the party assessing the penalty.

C. 4 RECONCILIATION

Advantage Energy Marketing will reconcile all supplier, transporter, and natural gas service supplier statements and invoices and resolve any disputes with any part associated with the statements and invoices. The contractor will document and summarize all charges, credits, dispute resolutions, tariff rates, price or volume adjustments, statements and invoices monthly and submit to DC's energy suppliers as the basis for monthly billings to DC. Advantage Energy Marketing will provide DC and/or its energy suppliers with pertinent data as and when requested.

(AF Ex. 2, bates 11-12). Section F.1.2 states that the "term of the contract shall be for a period of one (1) year from date of award specified on page one (1) of the contract." (AF Ex. 2, bates 15).

Since Advantage would be committing all of its personnel to working on the contract, the parties structured the contract with three types of fees to balance the risks between the parties. Under the arrangement, the District would pay Advantage an hourly consulting fee, two fixed management fees based on the monthly quantity of commodity (gas or electricity) being managed, and a monthly performance fee in which Advantage would receive a percentage of any saving achieved through strategic purchasing of the District's energy requirements. Section G of the contract, and Advantage's incorporated proposals, define how the District would pay Advantage for its work under the contract. Advantage's proposals identified the hourly consulting fee, the gas and electricity management fees, and the 15 percent performance fee on savings. Section G provided that savings were to be determined based on a monthly comparison of total actual unbundled costs with what total bundled costs would have been if the quantities consumed had been purchased in the traditional bundled manner:

G.1 INVOICE PAYMENT

The District shall make payments to the Contractor upon the submission of proper invoices or vouchers at the prices stipulated in this contract for supplies delivered and accepted and/or services performed and accepted, less any discounts, allowances, or adjustments provided for in this contract. Actual payments will be made by the bank to the contract from the Natural gas lock box account.

A. Unbundled market energy costs for energy commodities and services: the actual total energy costs each month managed by Advantage Energy, including any fees to be paid to Advantage Energy pursuant to its consulting agreement with the District of Columbia Government, and

B. Bundled utility costs for a similar volume of firm utility service: the total monthly energy costs that would have been incurred by the District of Columbia Government for regulated firm gas and electric service pursuant to the then current service rates for each month offered by the regulated local utilities.

C. All fees earned will be invoiced to the District of Columbia Government by Advantage Energy on or about the first day of the month following the month in which such fees were earned, and the District of Columbia Government will pay such fees within fifteen days of receipt of the invoice.

D. The comparison test for the payment of performance-based fees will be met each month.

E. Fees earned by Advantage Energy will be paid each month only to the extent that the costs for each month as specified in paragraph A.) above, do not exceed the costs for the same month as specified in paragraph B.) above: This will be the comparison test.

F. Any fees earned but not paid due to this comparison test, that is, any arrearage of fees, will be:

1. Carried over to each subsequent month, and

2. Paid to Advantage Energy in the first and any subsequent months in which any arrearage remains, to the extent that the comparison test allows payment of any or all arrearage.

G. Performance-based fees will be earned on the strategic purchase and sale of commodities during the actual month of such purchase and sale. In the event that the actual month of such purchase or sale of strategic purchases or sales should occur subsequent to termination of the consulting agreement, performance-based fees earned on such purchases or sales of commodities will be paid as arrearages (see Paragraph H., below).

H. Any arrearage of fees not paid upon termination of the consulting agreement will be:

1. Carried over to each subsequent month, and
2. Paid to Advantage Energy in the first month in which the above comparison test allows payment of any or all arrearage, but
3. Paid only in amounts that meet the comparison test, and
4. Paid only with regard to any strategies, policies, or procedures supplied or managed by Advantage Energy during the term of the consulting agreement.

G.2 INVOICE SUBMITTAL

The Contractor shall submit proper invoices, on a monthly basis or as otherwise specified in this contract. Invoices shall be prepared in duplicate and be submitted to the Agency Chief Financial Officer . . . .

G.2.1 To constitute a proper invoice, the Contractor shall submit the following information: Contractor's name and invoice date (contractor's are

> encouraged to date invoices as close to the date of mailing or transmittal as possible[)];
> G.2.2 Contract number (assignment of an invoice number by the contractor is also recommended);
> G.2.3 Description, price, and quantity of property and services actually delivered and/or performed;
> G.2.4 Contract Line Item Number (CLIN) and contract sub-line item number (SLIN), if applicable;
> G.2.5 Shipping and payment terms (if applicable);
> G.2.6 Other supporting documentation or information, as required by the contract . . . .

(AF Ex. 2).

Once the contract became effective on September 1, 2000, Advantage managed for OPM the tripartite task order and the unbundled acquisition of natural gas. The intent was for Advantage to help the District achieve savings by purchasing natural gas through unbundled strategies in which the District would procure its natural gas requirements from an independent supplier at a cost lower than was being charged by the local distribution company, Washington Gas, pursuant to a bundled acquisition. (Tr. 140-143). During the course of the contract, Advantage performed price analyses of various acquisition strategies, developed a list of potential alternate natural gas suppliers, screened and negotiated with energy supply bidders, and monitored and analyzed the billings of Tiger and Washington Gas. (Tr. 133-134; 137, 143). Advantage was tasked with ensuring that Tiger delivered the required natural gas commodity as well as reviewing Tiger's billing and interfacing with Washington Gas representatives who dealt with Tiger and the District accounts. Additionally, Advantage was tasked with providing strategic advice to the District regarding the District's relationship with GSA and Tiger. (Tr. 282-283). As the District no longer had a staffed energy management office, Advantage performed that function because it had the expertise to manage the unbundled energy acquisition and the tripartite task order. (AF Ex. 26, Tr. 42-45). Advantage devoted its entire staff to perform the contract work, including managing the natural gas functions identified in the contract. (Tr. 104). Advantage's consulting services can be divided into four categories: (1) review and analysis, (2) strategy, (3) execution, and (4) reconciliation as provided for in the contract. (Tr. 108; AF Ex. 11). During the course of the contract, Advantage completed 1,024 deliverables which included memoranda, analyses, recommendations, billing studies, and written communications with the District, Washington Gas, suppliers, and other energy consultants. (Tr. 114-118).

In October 2000, Advantage requested that the District set up a lockbox account as required under the contract. This lockbox would receive the gross receipts tax owed by Washington Gas and the funds would be used to pay the Tiger, GSA, Washington Gas, and Advantage. (Tr. 129, 138-140, 1386-1387; AFS Ex. 16, at 12). OCFO's Jumper refused to approve the lockbox arrangement. (Tr. 1429-1430, 1433,

1439). According to Chapman, Jumper was at some point determined by government counsel to have a potential or actual conflict of interest in dealing with the lockbox matter. (AF Ex. 26, Tr. 103-104). The District's position during the litigation was that Jumper blocked the establishing of a lockbox because the Advantage contract was not valid. (Tr. 1440). However, establishing the lockbox also supported another major purpose – namely allowing the gross receipts tax funds to be paid into the lockbox so that the District could make direct payments under the tripartite agreement without floating the funds to Washington Gas.

Advantage continued each month during the contract to provide strategic analyses and recommendations to OPM such that it is proper for us to find that Advantage provided substantial and material support in the form of analyses, strategic recommendations, coordination, and management which allowed the District to achieve some savings throughout contract performance. Some of Advantage's recommendations were not acted upon by the District. Although there were some larger purchases of natural gas during the June to October period that far exceeded consumption, the record shows that Tiger via Washington Gas billed the District for its use of this surplus gas when it was consumed in the winter period (November through March) at market prices for the commodity which were higher than the market prices when originally delivered. The District's expert, John Perrone, agreed that Advantage had made sound and reasonable recommendations, even if some recommendations were not adopted by OPM. (AF Ex. 24, Findings). But beyond any OPM decisions not to implement some of Advantage's recommendations, there were other savings that the District was entitled to receive but did not timely receive due to overbilling by Tiger. The District did not recover its savings (or at least a portion of its savings) until it decided to withhold payments from the March and April 2001 billings from Tiger. There were incorrect Tiger charges for monthly gas consumption, overstated gas deliveries, and there were savings from the District's large quantities of gas delivered during the non-peak months of 2000 that resulted in surpluses stored by Washington Gas for later use during the peak winter months beginning in November/December. In these situations, however, the record indicates that the District was overcharged for its unbundled gas purchases.

Advantage submitted to OPM and OFRM its first invoices for payment in late 2000 for the months of September 2000 and October 2000. (AF Ex. 3, bates 260-261, 274-275). Advantage billed for natural gas management and electricity management, hourly consulting fees, and the performance savings fee. However, because Advantage did not have detailed and complete Tiger invoice data, nor the detailed billing information from Washington Gas, Advantage's invoice amounts for the performance fee were estimates based on the limited data it possessed. Based on our review of the record, the Tiger invoice data was chronically deficient from the standpoint of required content, clarity, and delivery details. The District collected the Washington Gas meter and billing data and generated the payment files which were then submitted to Washington Gas which in turn processed the data, made

adjustments, and processed payments using the District's gross receipts tax through offsets and reconciliations.

Advantage continued its performance under the contract and also continued to seek payment for its work. OCFO/OFRM refused to make any payments to Advantage due to its original objections to the Advantage contract. From approximately December 2000 until March 2001, there was discussion among OPM, OCP, OCFO/OFRM, and the City Administrator of replacing the Advantage contract with a new contract that would be acceptable to OCFO/OFRM, with draft contracts being circulated, but no new contract was ever awarded. (Tr. 338, 339, 342, 344, 510; AF Ex. 26, Tr. 74). As discussed below, Advantage's efforts in analyzing and demonstrating significant overcharging by Tiger in the prior months of the contract led OCP and OCFO/OFRM to agree to continue with Advantage's existing contract through contract expiration on August 31, 2001.

In early 2001, Advantage prepared strategic analyses and recommendations based on additional documentation it had obtained of Tiger and Washington Gas billings. Advantage became convinced that Tiger improperly inflated its invoices, charged improper fees, and overstated gas deliveries, and that as a result, the District had been significantly overcharged by Tiger and Washington Gas. (AF Ex. 12; Advantage Deliverables CD, files 49, 114, dated April 12 and 17, 2001). For example, large quantities of gas had been continuously delivered by Tiger to the District starting in the summer of 2000, and stored by Washington Gas in its storage facilities (as demonstrated by the District's paying storage fees to Washington Gas to store the surplus) so that the District could use this surplus gas supply during the peak winter months. However, when the District consumed this gas during the peak winter months, the District was charged the much higher unbundled commodity market prices in effect at the time of consumption rather than the lower prices in effect when the gas was originally delivered. After months of effort by Advantage to convince OPM to stop paying Tiger invoices in order to recoup prior overpayments, District officials ultimately agreed that the District had been substantially overcharged by Tiger. (AF Ex. 12; AFS Ex. 110; Tr. 1397-1398, 1407-1408). The District's recognition of these overcharges resulted in the District advising Washington Gas that the District was not approving payments for gas deliveries made by Tiger starting with March 2001 deliveries. Washington Gas made its last payment to Tiger on March 14, 2001, for bills for gas delivered through February 2001. (District's June 15, 2006 Filing, Ex. 3 (Jennings Sept. 13, 2001 Letter to Jumper)). Washington Gas instituted at that time a "reserve" by which it withheld payments to Tiger under a separate Tiger-Washington Gas agreement. Theresa Call from Washington Gas stated that these reserve withholdings were to "offset a risk" that Washington Gas could potentially have by switching its billing system from paying Tiger what was billed by Tiger versus what was collected from the District. (Tr. 1599-1607). In effect, Washington Gas withheld in a reserve a total of $5,038,686 for April 2001 billings (March 2001 gas deliveries), and then an additional $4,298,581 for May 2001 billings (April 2001 deliveries), and amounts for the following two months such that

the reserve grew to $15,725,686. Washington Gas established the reserve to ensure that it would not have to pay Tiger any amounts after the February 2001 gas deliveries unless and until the District approved such billings. Theresa Call stated that the District did not approve any subsequent payments to Tiger. The $3,646,052 in Tiger billings were never paid to Tiger and accordingly that billed amount was "returned" by Washington Gas to Tiger for Tiger to seek payment directly from the District. The remaining reserve was zeroed out by Washington Gas later in 2001 because Washington Gas concluded that the $3,646,052 amount was the only remaining disputed amount and the billings supporting those amounts had been "returned" to Tiger for Tiger to pursue separately with the District. (WGL Ex. 1; Tr. 1599-1607).

Although Tiger and even the GSA's contracting officer for the supply schedule contract exerted pressure on the District to pay Tiger the disputed amounts, the District concluded from its own analysis of the records, consistent with Advantage's recommendations, that Tiger had overcharged the District in excess of $3 million for the period July 2000 through March 2001, not including June 2000 and April 2001 charges. (AF Ex. 12).

GSA terminated for convenience Tiger's supply schedule contract in March/April 2001. (*See* Tr. 418-419). That action had the effect of terminating the tripartite task order. The record suggests that Washington Gas, through Washington Gas Energy Services, continued to obtain natural gas from Tiger during at least the month of April 2001 while Advantage assisted the District in replacing Tiger with a new supplier, Energy Services Provider Group, LLC ("ESPG"). (Tr. 971, 812; CAB No. D-1163, Appellant's Complaint, Ex. A (Tiger May 15, 2001 letter to Jonathan Butler)). ESPG began deliveries of natural gas in May 2001 and those deliveries continued through the remainder of the contract term and beyond. (AFS Exs. 64, 72, 80-83).

In a District government memorandum dated May 29, 2001, from the contracting officer to OPM's Deputy Director, Michael Lorusso, the contracting officer designated Lorusso as the new contracting officer's technical representative, replacing Chapman who was leaving OPM. The COTR was to "[e]nsure that the Contractor performs the technical requirements of the contract in accordance with the contract terms, funding, conditions and specifications," perform inspections of the work, maintain liaison and direct communication with the contractor and the contracting officer, and "[p]rovide the designated Finance and Accounting Office and the Contracting Officer with appropriate proof of delivery and acceptance . . . ." (AFS Ex. 22). OCFO's Barbara Jumper is copied on this memorandum.

By letter dated June 7, 2001, the contracting officer instructed Advantage to continue performance through August 31, 2001, the end of the contract's one-year term, and clearly confirmed the validity of the contract from the standpoint of the Office of the Chief Procurement Officer. The contracting officer also indicates that

the OCFO was no longer objecting to the validity of Advantage's contract, based on his identifying the involvement of the agency CFO and OFRM in reviewing contract invoices and payment where savings can be demonstrated. In that connection, the contracting officer directed Advantage to submit proper invoices, complying with paragraph G.2 of the contract. The letter reads:

> The District of Columbia, Office of Contracting and Procurement is in receipt of your May 23, 2001 e-mail correspondence to Mr. Mike Lorusso, Deputy Director for the Office of Property Management (OPM) regarding administrative issues pertaining to Contract Number: DCAM-2000-C-0019 to provide energy management services to the agency.
>
> A review of the correspondence and the contract files coupled with an understanding of the current status of the agency's energy management program environment indicate the following:
>
> 1. Mr. Lewis Chapman will be leaving the employment of the Office of Property Management and the District of Columbia in the immediate future, and as such, will no longer be the Contracting Officer's Technical Representative (COTR) for your contract, effective immediately. Mr. Lorusso replaced Mr. Chapman as the COTR on May 29, 2001 with his acknowledged receipt of a COTR designation letter from the Contracting Officer. . . .
>
> 2. Your letter referencing that Advantage Energy began work on behalf of the District of Columbia in July 1999 is incorrect. The Contracting Officer executed Contract No.: DCAM-2000-C-0019 on August 29, 2000 as a one (1) year contract from September 1, 2000 through August 3, 2001. Per your assertion that your company performed any energy management service on behalf of the District for any period of time prior to the execution of this contract is new and undocumented information to this office. To the extent that Advantage can provide demonstrable (and documented) proof of specific work performed to OPM or any other agency of the District Government during the timeframe at issue without a valid District contract, this office would gladly take up the issue with the agency (and/or individual) so named.
>
> 3. You stated in your correspondence that the District owes Advantage Energy an estimated $400,000 arrearage to date, that the amount included $356,000 calculated through April 30, 2001 plus a projected amount for services performed in May 2001. Particularly, you mentioned that the District is yet to reimburse Advantage for work performed by the company on the District's behalf in almost two years.

> While I would like to assure you that it is our intent to fully compensate Advantage Energy for work performed for the District in accordance with the requirements of Contract No: DCAM-2000-C-0019, it is also appropriate to mention that the District's contract with Advantage Energy is not a cost reimbursement contract. Rather, it is a performance-based contract in which any and all payments to Advantage are tied to savings realized for the District by Advantage Energy (Section B: Supplies or services and Price/Costs). . . .
>
> OCP has confirmed from the District's Office of Finance and Resource Management (OFRM) that Advantage Energy has not submitted any invoice(s), monthly (or otherwise) to date to the Agency Chief Financial Officer in accordance with the requirements of section G.2 of the contract. It is only after an invoice(s) supported by sufficient documentation of realized, savings, is (are) submitted to OFRM, with concurrent copy to the COTR that a COTR review and certification of the documentation for legitimacy vis-a-vis the requirements of the contract will begin. A certification of the invoice(s) by the COTR is required by OFRM before payment is made to the contractor. The COTR will duly notify the contractor in writing if an invoice is not certified for payment, and the contractor can appeal to the Contracting Officer to review the information and render a decision. Based on information received to date from the COTR and OFRM, this process has not taken place. I encourage you to adhere to the requirements of Section G.2 of the contract and forward your invoices for services rendered to OPM on the contract, with supporting documentation of realized savings to the District, to the COTR and the Agency Chief Financial Officer.
>
> 4. The contract is a one-year contract and will expire on August 31, 2001. It is our intention that the contract run its full course and I expect Advantage Energy will continue to provide energy management services to OPM in accordance with the scope of the contract until August 31, 200l.

(AF Ex. 10, bates 324-326). OCFO/OFRM's Barbara Jumper and the District's Chief Procurement Officer were copied on this important correspondence. There is no evidence in the record of Jumper or other OCFO/OFRM representatives contradicting the contracting officer's decision to ratify and confirm the validity of the contract with Advantage from this date through the end of the contract. Accordingly, we find that at least by June 2001, OCFO/OFRM had ceased its objections to the validity of Advantage's contract based on budget authority or fiscal certifications. (AF Ex. 10). The District failed to call Jumper to testify at the Board hearing.

Anthony Jiminez took over Chapman's role as OPM's energy officer starting in June 2001 while Chapman was still with OPM. (Tr. 1394-1395). Chapman left the District government on approximately June 30, 2001. (AF Ex. 26, Tr. 14). One part of Jiminez' job was to review utility invoices for accuracy with a view to approving them for payment by OFRM. (Tr. 1396). During June and July 2001, he worked with Lorusso in reviewing Tiger's billings for accuracy. Jiminez received information about gas consumption and prices from Washington Gas, and he tried to compare that information with information from Tiger. (Tr. 1405). Despite requests for data from Tiger, Tiger submissions did not provide the requested data and the information submitted by Tiger raised more questions. (Tr. 1407-1408). Jiminez stated that there were "serious variances" between the information submitted by Tiger and the information submitted by Washington Gas. (*Id.*). As a result of their investigation, Jiminez and Lorusso concluded that Tiger had overcharged the District by an amount "just over $3 million." (Tr. 1397-1398).

In a July 26, 2001 memorandum from an assistant corporation counsel to Michael Lorusso, counsel states:

> OPM's position has been that Tiger made deliveries to WGL's city gate on behalf of the District at times when the cost of natural gas was relatively low, but that this gas has been burned and billed to the District at times when the cost of gas is high. Consequently, if the District had title to the gas at the time it was delivered, the District has been denied the savings from the lower-cost gas it purchased.
>
> . . . .
>
> [The tripartite] contract provision, and the WGL Rate Schedule 2A, provide solid support for OPM's claim that the prices it pays should be determined on the basis of when deliveries of gas were made. Information from Tiger on amounts delivered, dates of delivery, and pipeline company used, is crucial to this determination. Yet this information has not been promptly furnished by Tiger, despite numerous requests from OPM.
>
> In this regard, Section G(1)(a)(1) at page 20 of the tri-partite agreement provides that the contractor, Tiger, is to provide "prior to submitting a final invoice to each facility, . . . by the twentieth working day of the month" detailed documentation on volumes of gas delivered, delivery points, commodity price, inter- and intra-state transportation prices at the time of delivery of gas. The costs of some transportation services can be significantly less than their competitors, and the District's delivered cost should reflect any such cost advantages.
>
> . . . .

> In light of the foregoing considerations it appears that OPM's position that it must have relevant billing documentation prior to approving payments to Tiger is well considered. The tri-partite agreement expressly provides that payment may be withheld in the absence of the requisite pricing data. Without this pricing data, the District may not realize any of the cost savings to which it is entitled under the tri-partite agreement.

(AFS Exs. 67, 110). In response to the District's claim of attorney-client privilege, we find that the authoring counsel voluntarily emailed this memorandum to John Cory on July 31, 2001, and that this disclosure was not inadvertent. Accordingly, we reject the District's claim of privilege. Although the document is not crucial to our findings, it corroborates other portions of the record showing that the District was withholding payment from Tiger and that it was doing so because of Tiger overcharging and Tiger's failure to produce required documentation to substantiate its charges.

By letter of August 6, 2001, OPM's Lorusso advised Tiger's president that OPM had reconstructed the information previously supplied by Tiger, Washington Gas, and others and concluded that Tiger had overcharged the District $3,064,510 on gas supplied for the period July 2000 through March 2001, and that the overcharges could be greater based on a determination for the months of June 2000 and April 2001 once OPM had adequate data from Tiger for those months. (AF Ex. 12). Lorusso also stated that Tiger overstated its gas deliveries for the period January through April 2001 by 116,000 dekatherms. Lorusso directed Tiger to submit numerous items of documentation to support Tiger's charges throughout the contract. After outlining numerous instances of Tiger's excessive charges and failures of Tiger to provide required documentation to support its charges, Lorusso states:

> The foregoing serves to demonstrate that the District of Columbia has been subject [to] overcharges under a number of scenarios. These overcharges stem from direct application at the billing level from Washington Gas, from penalty gas charges due to a lack of oversight in management of the loads, and lack of notification in alerting interruptible about switching to alternate fuels, among others. Moreover, OPM contends that charges by Tiger Natural Gas for its gas supplies were excessive. More specifically, OPM contends that the price charged by Tiger Natural Gas was far greater than the price at which the gas was purchased.

(AF Ex. 12). Lorusso also directed Tiger to submit supporting documentation for its June 2000 and April 2001 charges, and noted that Tiger had placed a stop payment on two checks to the District Treasury in the amount of approximately $600,000. OPM's Jimenez testified that much of Tiger's information submittals were redacted so that

OPM had to reconstruct the data itself. (Tr. 1407-1408). It appears that Tiger never submitted to OPM any of the requested data and thus OPM's issues with Tiger's overcharges were never resolved with the result that the District never made any additional payments to Tiger. (Tr. 1399).

On May 13, 2002, Advantage filed a claim with the District seeking the payment of its contract fees, totaling $772,778. (AF Ex. 9, bates 299-300). The claim consisted of: gas management fee of $80,972, electricity management fee of $141,156, consulting hours fee of $139,290, expenses of $517, and a "shared savings" (15 percent performance fee) of $410,853. AF Ex. 9, bates 306). Advantage submitted an updated cost breakdown for $900,031 on October 9, 2002. (AF Ex. 5, bates 280-281). The breakdown was as follows: gas management fee of $72,977.31, electricity management fee of $127,167.55, consulting hours fee of $126,011.38, expenses of $565.85, 15 percent performance fee of $484,116.38, and a gross receipts tax amount of $98,192.29.

On December 18, 2002, a new contracting officer issued a final decision denying Advantage's claim in its entirety. (AF Ex. 1). The contracting officer stated that Advantage was entitled to no contract payments because she concluded that the contract was void *ab initio* on three grounds: (1) the contract was a "no-cost contract" which violates or is not authorized by the District's procurement regulations; (2) the contract violated the Anti-Deficiency Act; and (3) the contract violated the District of Columbia Procurement Practices Act because it lacked the required budget authorization.

After receiving the denial of its claim, Advantage retained Chapman as a consultant to assist it in preparing for challenging the denial through an appeal to the Board. (Tr. 322-325). Although the District argues that this consulting relationship was evidence was a prior ongoing conflict of interest by Chapman, we do not agree. On March 14, 2003, Advantage filed a notice of appeal with the Board.

Tiger entered into a December 31, 2003 settlement agreement resolving civil fraud claims asserted by the United States against Tiger arising from Tiger misrepresentations regarding deliveries of natural gas under the GSA supply schedule contract. (AR Ex. 31). Because the Department of Justice determined that Tiger could not pay the full amount of any judgment that might be obtained from the pursuit of the civil claims based on Tiger's conduct, DOJ agreed to settle based on Tiger's ability to pay. (*Id*. ¶ D.). Under the terms of the Settlement Agreement, the United States agreed to pay $4 million to a trust account of Tiger's attorneys in resolution of the GSA Board of Contract Appeals claim that Tiger had previously filed seeking $4 million for gas deliveries to the District, Tiger's attorneys agreed to pay $1.5 million from the trust account to the United States and the remaining $2.5 million to Tiger. (*Id*. Section III.1.-2.). Tiger agreed to pay the United States contingency payments not exceeding $10 million based on periodic percentages of its total annual revenue. (*Id*. Section III.3.). In addition, Tiger was prohibited from participating in any future

procurements with GSA for a period of 5 years, and its president, Lori Johnson, was prohibited from participating in any business with the GSA for a term of not less than 5 years. (*Id*. Section III.3.e-g). Under the Agreement, Tiger agreed to file jointly with GSA a motion for a final stipulated award in the amount of $4 million in Tiger Natural Gas, Inc., GSBCA No. 15895. (*Id*. Section III.5.).

Although the Agreement states that it "is intended to be for the benefit of the Parties and the District of Columbia only", (*id*. Section III.12.), the District government was not a party to GSBCA No. 15895 (or 16355) and was not a party to the Settlement Agreement. (AF Exs. 30, 31). By letter of March 10, 2004, the Department of Treasury's Judgment Fund Staff requested that the District reimburse the Judgment Fund in the amount of $4 million for the payment the United States made to Tiger's attorneys. By letter of March 30, 2004, the District's Office of Corporation Counsel responded by requesting a copy of the Settlement Agreement, investigation reports by the GSA Inspector General or other federal entity regarding the Tiger-GSA misconduct, expert or audit reports prepared for the federal government to examine Tiger documentation in the matter, and a detailed breakdown of Tiger-invoiced amounts properly attributable to the District and any supporting documentation. (AF Ex. 16). On June 22, 2005, the Treasury again requested reimbursement of the Judgment Fund. (AF Ex. 17). By reply of July 6, 2005, Corporation Counsel noted that Treasury had never responded to its March 30, 2004 request for documentation. (AF Ex. 18). Treasury has never responded to the July 6, 2005 letter, and the District has not paid into the Judgment Fund the requested amount. As discussed above, we find no basis in the record that the District underpaid Tiger pursuant to the tripartite task order or GSA supply schedule contract. Rather, the District's withholdings in March and April 2001 were valid offsets to Tiger overcharges during the preceding months. (AF Ex. 12; AFS Exs. 73, 80-81, 110; Advantage Deliverables CD, filed June 26, 2006; Tr. 416-427, 1397-1398, 1407-1408). Based on the record, we find it likely that the District will not pay the United States Treasury for the amounts overcharged by Tiger.

Analysis of Advantage's Claims Based on the Hearing Evidence

The contract contained four separate monthly fees for which Advantage could receive a payment: (1) a $75 per hour consulting fee; (2) a $0.03 per dekatherm gas management fee (a therm is a measure of natural gas, a dekatherm equals 10 therms) for managing unbundled natural gas delivery; (3) a $0.0003 per kilowatt hour electricity management fee for managing unbundled electricity delivery or delivery preparation (kilowatt hours are a measure of electricity, 1 kilowatt equals 1000 watt hours); and (4) a 15 percent performance savings fee of any residual savings (net of any amounts paid in a month to Advantage for consulting and energy management fees) by comparing the total monthly cost of the District government's unbundled energy consumption with what the total monthly cost for the same quantity of energy consumption would have been if the District had obtained its energy requirements directly from Washington Gas using the traditional bundled (tariff) acquisition

method. (AF Ex. 2 at 11; Tr. 191-194). The contract provides that each of the four monthly fees could only be paid if there were savings in that month. (Tr. 783). The contract also provided that any fees (consulting and management fees) earned but not paid in any month could be carried over and paid from savings in a subsequent month. (AF Ex. 2 at 10). Finally, the contract also contains an annual limitation which permits payment of fees to Advantage only to the extent of total net savings computed by comparing the annual total actual unbundled costs with the annual total projected bundled costs.

Hourly Consulting Services

Under paragraph C.1 of the contract, Advantage was to provide the District with a comprehensive review and analysis of its current and historical utility and energy purchases. Advantage was to be paid $75 per hour for these consulting services. (AF Ex. 2 at 66). The review and analysis was to detail all purchases broken down into major cost components of tariff rates and bundled services. Advantage was required to submit a comparison of the current and historical utility and energy purchases with other purchase options available to the District during the two preceding fiscal years. Advantage was also required to provide the District with an analysis of the risks, costs, and benefits of each alternate option, and to make a recommendation to the District as to which option best fit with its goals and objectives with regard to risks, costs, and benefits. (AF Ex. 2, bates 11).

Upon execution of the contract, Advantage began a comprehensive review and analysis of the current and historical utility and energy purchases. John Cory billed the most hours for consulting work and incurred hours in every month of the contract period. Others who billed time included Robbie Robertson (September 2000 through January 2001), Mike Riskin (September 2000 through February 2001), Kevin Scott (December 2000 through January 2001), and four staff who handled accounting, supplier invoicing, billing, and communications, namely, Donna Burdick, Jackie Dunn, Lisa Maxwell, and Marjorie Tittle. (Tr. 95, 170-171).

Advantage invoiced the District for the months of November 2000 through August 2001 by invoices all dated December 14, 2001. (AFS Ex. 3, bates 282-294, 255-261, 263-275). Advantage invoiced the following hours: 196.73 for September 2000; 354.40 for October 2000; 153.55 for November; 228.33 for December 2000; 143.63 for January 2001; 165.88 for February 2001; 107.96 for March 2001; 95 for April 2001; 116.33 for May 2001; 94.33 for June 2001; 16.83 for July 2001; and 3.17 hours for August 2001. These consulting hours total 1,676.14. On May 13, 2002, Advantage submitted a demand for payment of all fees due under the contract, including the hourly consulting fees. Advantage submitted narrative descriptions of consulting work for Cory, Robertson, Riskin, and Scott. (AF Ex. 9). In its certified claim letter of August 20, 2002, Advantage submitted additional documentation supporting the claimed hours, totaling 1680 hours. (AF Ex. 3, bates 75-275). The contracting officer denied the claim for consulting hours as part of the overall final

decision of December 19, 2002. Because the contracting officer concluded that the contract was invalid, the District never paid for any of Advantages' consulting hours.

By the time of the hearing, Advantage was claiming 2,256 consulting hours for Cory, Robertson, Riskin, and Scott, and 1,920 staff consulting hours for Burdick, Dunn, Maxwell, and Tittle, for a grand total of 4,176 consulting hours. (AFS Exs. 13, 19, 20, 20A). We find that the 1,680 hours from Advantage's certified claim and the 1,920 staff hours are adequately supported. We find the 576 additional hours sought by Advantage to be unsupported by the record. Thus, we find supported a total of 3,600 consulting hours. Considering that Advantage provided the energy management function for OPM's Energy Management Division for 12 months, we do not find this consulting hours total to be unreasonable. The District does not credibly challenge the amount of hours billed by Advantage. (Tr. 772, 1150, 1363-1364; AF Ex. 24). The staff hours, which were not reflected in the original invoices, are reasonable estimates of the hours committed by the staff personnel to the consulting effort. (Tr. 105, 127-129). We find 3,600 hours to be reasonable in light of the scope of the analyses performed by Advantage, Tiger's data, billing, and documentation deficiencies, the billing and documentation difficulties arising in the relationship between the District and Washington Gas, and the electricity management functions performed in preparation for future unbundling. (Tr. 1376). Accordingly, we determine that Advantage is entitled to $270,000 for consulting hourly fees pursuant to the contract.

Gas Management Fee

Under paragraph C.2 of the contract, Advantage was to be paid $0.03 per dekatherm for the management of natural gas. (AF Ex. 2, bates 66). Advantage's gas management services included responsibility for the management of daily and monthly execution of unbundled natural gas deliveries and natural gas services on interstate and/or local distribution pipeline systems, including supply schedules, pipeline nominations, local delivery allocations, metering, notices, invoices, and reconciliation. The purpose of this oversight was to assure the District of maximum efficiency and minimum interruption of natural gas deliveries and associated services to all District facilities. These services aided the District in using the then new unbundled natural gas service without the risks inherent in using non-utility, private sector energy suppliers. (AF Ex. 24, Background Section, at 1).

It is undisputed that Advantage managed during the contract period a total of 2,624,646 dekatherms of natural gas. (AFS Ex. 86; AF Ex. 24, Conclusion Section). Using the contract gas management fee percentage of $0.03 per dekatherm, Advantage is entitled to compensation of $78,739 for gas management fees.

Electric Management Fee

Under paragraph C.2 of the contract, Advantage was to be paid an electric management fee of $0.0003 per kilowatt for managing unbundled electricity delivery. (AF Ex. 2, bates 66). Electrical energy deregulation began in 2001 but the District government did not begin acquiring unbundled electric service during the term of the contract. (Tr. 131-132). For this reason, it is undisputed that Advantage did not manage the acquisition of electricity for the District during the contract period. Because the electricity acquisition planning and strategic analysis performed by Advantage was prior to actual unbundled acquisitions, we agree with the District's expert that such work is covered by the hourly consulting fees charges identified above. (AF Ex. 24, Findings Section, Electric Management Fees; Tr. 1376). Accordingly, Advantage is not entitled to compensation for electricity management fees.

Performance-Based Fees

Section B of the contract provides that "[a]ll consulting fees due to be paid to Advantage Energy . . . whether fixed, variable, or performance-based fees, will be paid to Advantage Energy only if the payment of such fees will not result in total energy costs to the District of Columbia Government in excess of the energy costs that the District of Columbia Government would have incurred for bundled tariff services for electricity and gas from Pepco or Washington Gas, respectively, for facilities managed by Advantage Energy." Because electricity deregulation was not implemented during the contract period, no performance-based services were performed by Advantage for unbundled electricity service to the District government. (AF Ex. 25). Advantage presented a significant amount of documentation in support of its claim that its ongoing analysis and recommendations, which were partially adopted by the District regarding strategic purchases of natural gas in the unbundled market, resulted in savings to the District under the comparison test provided in the payment provision of the contract. The contract's performance fee of 15 percent is applied to net monthly savings of unbundled costs of actual gas consumed over what the same quantity of gas would have cost at the tariff bundled rate from Washington Gas.

To determine whether Advantage is entitled to a performance fee, we must determine pursuant to Section G of the contract, the monthly total unbundled costs for natural gas actually consumed by the District government, the monthly quantity of natural gas actually consumed, and the total monthly bundled costs if the same quantity of gas had been acquired through traditional bundles energy purchases. In addition, we must calculate the total unbundled costs, total quantities consumed, and total bundled costs over the entire contract one-year term, and net unbundled and bundled total costs, because Section B permits performance fees only if the total actual energy costs to the District for the contract period do not exceed the energy

costs that the District would have incurred for bundled tariff services. In other words, both a monthly comparison and a final one-year comparison are required.

Actual Unbundled Natural Gas Costs

In a typical unbundled purchase of natural gas, the supplier transports the gas to the city gate and then hands off the gas to the local distribution company which delivers the gas to the customer's burner tip. (Tr. 1156). For the tripartite agreement, Tiger was to deliver the gas to the burner tip. Therefore, Tiger and Washington Gas had an agreement under which Washington Gas distributed the gas from the city gate to the burner tip using its local distribution system. Pricing of the commodity (gas plus transport to the city gate) is governed by the tripartite agreement involving published market prices and a cost savings provision. The unbundled rate for Washington Gas' costs of distributing the gas from the city gate to the burner tip in the District is determined by consulting the Public Service Commission's Rate Schedules 2A (firm transport) and 3A (interruptible transport). Under Schedule 2A, the distribution charge is the per therm charge paid to the local utility to move the gas from the city gate to the burner tip, expressed as a unit rate per delivery therm of gas. (AFS Ex. 44; Tr. 560). This charge is applied to volumes delivered through the meter at the customer premises. (Tr. 563). Rate Schedule 2A also lists a balancing charge, customer charges, seasonal rates, peak usage charges, and heating/cooling rates. (AFS Ex. 44; Tr. 565-566). Because the customer pays the supplier for the cost of the gas outside of the regulated environment, Schedule 2A contains no commodity cost. (AFS Ex. 44; Tr. 564). A Washington Gas utility bill for a District government account shows total gas delivered during the month, multiplied by the per therm rate, and an additional 10 percent for the gross receipts tax for the total to be paid to Tiger. (AFS Ex. 91). The bill separately lists the charges by Washington Gas: distribution cost amount, balancing charge, system charge amount, gross receipts tax, DC Rights of Way fee, and transition surcharge. (*Id*.).

Based on our review of the record evidence, including the data supplied by Theresa Call of Washington Gas, the Washington Gas interdepartmental communications, the Tiger and ESPG invoices, Tiger's May 2001 delivery summaries, and Advantage's data analysis, we find that the District paid the following amounts for unbundled natural gas for the contract months of September 2000 through August 2001:

Metered Month	DC Govt Accts CommodityTotal	Public Housing (PH) Accts Commodity Total	Total DC Govt and PH Accts Paid to TNG/WGES/ESPG	WGL Distrib Costs Charged for DC Govt Acct	WGL Distrib Costs Charged for PH Accts	Total DC Govt and PH Distrib Costs Paid to WGL by DC	Total Unbundled Costs Paid by DC

Sep 2000	294,114	123,555	417,669	143,624	126,963	270,587	688,256
Oct 2000	648,102	311,489	959,591	219,645	256,733	476,378	1,435,969
Nov 2000	914,643	537,720	1,452,363	867,071	469,813	1,336,884	2,789,247
Dec 2000	3,103,004	1,631,170	4,734,174	754,596	628,880	1,383,476	6,117,650
Jan 2001	2,184,517	1,346,095	3,530,612	754,596	338,820	1,093,416	4,624,028
Feb 2001	3,138,102	1,026,891	4,164,993	1,339,712	536,532	1,876,244	6,041,237
Mar 2001	1,884,996	785,576	0	666,881	307,725	974,606	974,606
Apr 2001	559,872	306,150	0	200,920	197,507	398,427	398,427
May 2001			1,254,483			307,630	1,562,113
June 2001			447,918			160,200	608,118
July 2001			781,051			147,562	928,613
Aug 2001			133,934			50,548	184,483
Totals			17,876,788			8,475,957	26,352,746

(WGL Exs. 1-2; AFS Exs. 72-73, 80-85). Although the source data is far from perfect, we find that the figures shown above are reasonably accurate amounts for calculating the actual total monthly unbundled costs of natural gas actually consumed at the burner tip for all District government accounts.

The exhibits prepared by Theresa Call of Washington Gas show total monthly payments made to Tiger for the actual gas commodity for two different categories of District accounts, one covering what was referred to as the "Public Housing" accounts and the other covering all other District government accounts. Based on a review of these documents, and the testimony at the hearing by Call and the other witnesses, and comparing Call's data with other source data including Tiger's invoices and Advantage's data, we find that the spreadsheets prepared by Call (WGL Ex. 1, at bates 1-2 and WGL Ex. 2, at 3) are reasonably accurate and complete for the period September 2000 through April 2001. Call lists the figures in her spreadsheets using the billing month, so what she lists for her October 2000 billing month, we prefer to identify by the actual metered consumption month, approximately one month earlier, September 2000. (Tr. 719, 1536). We have used the actual commodity consumption figure of $417,669 for September 2000 rather than a credit amount carryover noted in Call's spreadsheet. (WGL Exs. 2, 5). Call testified that she received "payment files" from the District, which were in the form of large electronic text files, listing the natural gas consumption data for all of the District's metered accounts. She made adjustments to the payment file data, and then put them in proper format so that Ann Ferguson in Washington Gas' cash receipts department could process the files for payment to Tiger for the commodity and payment to Washington Gas for the distribution charges.

Having identified the actual unbundled costs for each month, we must now calculate what the cost would have been if the District had purchased the same quantities consumed at the burner tip using the traditional bundled acquisition method.

Bundled Natural Gas Cost

To calculate savings realized by the District under the contract's payment term, we must compare the actual unbundled monthly cost of gas with the "would-have-cost bundled rate" had the District instead purchased its natural gas requirements using the traditional regulated supplier, Washington Gas, according to the applicable published tariff rates determined by the D.C. Public Service Commission. To calculate the "would-have-cost" bundled rate, we must know the actual quantity of gas purchased per month, and then multiply that quantity by the sum of the purchased gas charge and appropriate tariff rates per dekatherm.

Advantage extracted quantity figures of natural gas delivered to the burner tip of all District government accounts (including Public Housing accounts) by consulting the suppliers' invoices. The records of gas deliveries categorize the gas delivery as either firm transport ("FT") or interruptible transport ("IT"). The total FT and IT burn (gas consumed) quantities by month shown in Advantage's quantum model are listed in the second and third columns below followed by a total quantity ("IT + FT") in fourth column. The Tiger invoices in the delivery months for September 2000 through February 2001 were coordinated with delivery quantities reported by Washington Gas. We find that those quantities from Tiger via Washington Gas reasonably approximate the quantities consumed under the District accounts. The March and April 2001 IT burn quantities from Tiger strike us as unreliable, when viewed in the context of historical data and the Washington Gas distribution cost data. We find that for those months, a more reliable total quantity can be derived from Theresa Call's spreadsheets identifying Washington Gas' distribution costs. By dividing Washington Gas total distribution costs for those two months by Rate Schedule 2A distribution charge of $3.768 per dekatherm, we find the total quantity for IT and FT of 258,653 dekatherms for March 2001 and 105,740 dekatherms for April 2001. The monthly quantities for the entire contract period are summarized below:

Delivery Month	IT Quantity (DTh) Burner tip	FT Quantity (DTh) Burner tip	Total Quantity IT + FT (DTh)
Sept 2000	33,211	47,420	80,631
Oct 2000	41,545	76,855	118,400
Nov 2000	60,108	256,262	316,370

Dec 2000	31,751	359,368	391,119
Jan 2001	60,876	310,981	371,857
Feb 2001	51,738	306,261	357,999
Mar 2001	59,903	198,750	258,653
Apr 2001	28,563	77,177	105,740
May 2001	24,647	40,795	65,442
Jun 2001	29,138	26,603	55,741
Jul 2001	26,508	24,510	51,018
Aug 2001	16,933	5,341	22,274

(AFS Exs. 64, 72-73, 80-85; WGL Exs. 1-7).

The monthly gas quantities are then multiplied by the computed bundled rate per dekatherm pursuant to the Public Service Commission's Rate Schedules 2 and 3 for bundled FT and IT gas services. The rate per dekatherm is calculated as follows: add the monthly published Purchased Gas Cost per therm for the District of Columbia with the per therm balancing fee to yield the city gate delivered price per therm, then add the applicable distribution charge per therm, the computed customer charge per therm, and the applicable DC row fee/transition/peak monthly surcharge fees per therm, then multiply the resulting sum by 1.1 for the District government gross receipts tax rate and then multiply that result by 10 to convert from a per therm rate to a per dekatherm rate. The bundled rates are summarized below:

Date	City Gate Delivery Price per Therm	Distribution Charge per Therm	Customer Charge on a per Therm Basis	DC Row Transition Fee and Peek Month Surcharges	Gross Receipts Tax (%)	Bundled Rate per Dekatherm
Sept 2000	.5929	0.3768	.0488	.0068	0.10	11.2780
Oct 2000	.6400	0.3768	.0332	.0068	0.10	11.6250
Nov 2000	.6400	0.3768	.0124	.0381	0.10	11.7404
Dec 2000	.6974	0.3768	.0101	.0321	0.10	12.2799
Jan 2001	.8492	0.3768	.0106	.0334	0.10	13.9698
Feb 2001	.8220	0.3768	.0110	.0344	0.10	13.6865
Mar 2001	.7683	0.3768	.0138	.0416	0.10	13.2590
Apr 2001	.7977	0.3768	.0170	.0495	0.10	14.4328
May 2001	.7977	0.3768	.0601	.1580	0.10	15.3186
June 2001	.6584	0.3768	.0601	.0068	0.10	12.1230
July 2001	.6584	0.3768	.0706	.0068	0.10	12.2381
Aug 2001	.6584	0.3768	.0771	.0068	0.10	12.3099

(WGL Exs. 1-7; AFS Exs. 88, 44, 92, 93; Tr. 101-102, 538-541, 554-557, 727, 745-757). To calculate what the total bundled cost of gas would have been per month, one multiplies the bundled rate per dekatherm for each month by the total IT and FT quantities consumed at the burner tip. The resulting monthly bundled "would have cost" totals are set forth below in the second column of the table for the Performance Fee Calculation section.

Performance Fee Calculation

To calculate the performance fee to which Advantage is entitled under Section G of the contract, the comparison test requires that we subtract the unbundled actual monthly costs from the bundled "would have" cost figures. That difference is the net savings per month (if any) from the District following Advantage's recommendation each month to acquire its gas requirements using the unbundled acquisition strategy. The performance fee is calculated by multiplying the 15 percent contract performance fee rate times the net savings. The record shows the following amounts for net savings and the performance fee:

Contract Performance Month	Bundled Total Monthly "Would Have" Cost	Unbundled Actual Total Monthly Cost for Performance Fee Calculation	Net Savings/Loss (Bundled minus Unbundled)	15 Percent Performance Fee on Net Savings
Sept 2000	909,361	688,256	221,105	33,166
Oct 2000	1,376,398	1,435,969	(59,571)	0
Nov 2000	3,714,302	2,789,247	925,055	138,758
Dec 2000	4,802,901	6,117,650	(1,314,749)	0
Jan 2001	5,194,792	4,624,028	570,764	85,615
Feb 2001	4,899,753	6,041,237	(1,141,484)	0
Mar 2001	3,429,475	974,606/ 3,645,178*	2,454,869/ (215,703)	0
Apr 2001	1,526,128	398,427/ 1,264,449*	1,127,701/ 261,679	39,252
May 2001	1,002,484	1,562,113	(559,629)	0
June 2001	675,753	608,118	67,635	10,145
July 2001	624,364	928,613	(304,249)	0
Aug 2001	274,195	184,483	89,712	13,457
Totals	**28,429,906**	**26,352,747**	**2,077,159**	**320,393**

(WGL Exs. 1-2; AFS Exs. 64, 72-73, 80-85, 88, 44, 92, 93; Tr. 745-758). For March and April 2001, we list two quantities in each cell. The $974,606 actual unbundled

cost for March is the amount the District paid for gas consumed during that month, but those costs represent only the distribution costs charged by Washington Gas to bring the gas from the city gate to the burner tip. The other amount, $3,645,178, is what the unbundled costs would have been for March 2001 if the District had paid Tiger the commodity costs of $2,670,572 plus the distribution costs of $974,606. The reason the District did not authorize the payment of the commodity costs to Tiger is because Advantage had carefully analyzed the invoices and billing data for Tiger over the prior performance months and determined that Tiger had overcharged the District in excess of $4,000,000. This also explains why the District withheld payment of $866,022 of commodity costs in April 2001. Thus, the unbundled costs would have been $1,264,449 in April if the District had paid both the commodity costs plus the $398,427 of distribution charges paid to Washington Gas. In total, the District saved $3,536,594 by withholding the commodity amounts invoiced by Tiger for March and April 2001 gas consumption. In calculating the 15 percent performance fee, however, we have not included those savings on the March and April 2001 commodity because in our view the 15 percent performance fee was meant to apply to savings from strategic acquisition recommendations acted upon by the District. In this situation, the savings resulted primarily from Advantage's gas management and consulting work on reconciling invoices and billing data. Nevertheless, the savings are true savings which were the product of Advantage's contract work and thus should be considered in the annual comparison test of the scope of net contract savings. Total actual unbundled costs for the entire contract equaled $26,352,747 while bundled costs would have totaled $28,429,906 if the District had simply used the traditional bundled tariff strategy. Accordingly, we find that Advantage was responsible for assisting the District in achieving net savings over the entire one-year contract period of $2,077,159. Advantage earned a total of $320,393 in monthly performance fees during the one-year contract term.

The sum of the performance fees ($320,393), the gas management fees ($78,739), and the hourly consulting fees ($270,000) equals $669,132, and that total is well within the Section B limitation of the net one-year contract savings amount.

The District offered very little in factual rebuttal, and did not credibly challenge Advantage's evidence of savings. OCFO's Mohamed testified that he had been paying the energy bills since 1998 and he had not "noticed any savings." We do not find this conclusory statement persuasive as it lacks any supporting empirical data and analysis. Perrone, the District's expert, believed that savings should have been calculated at the city gate, not at the burner tip. (Tr. 1147). This approach is not consistent with the Advantage contract and the tripartite task order which can only be interpreted reasonably as requiring measurement at the burner tip, that is, actual District government consumption, and comparison of bundled versus unbundled *total* monthly energy costs. Perrone also felt that the performance savings fee should have been calculated only by netting the annual actual unbundled costs with what the bundled costs would have been, in part because of the fluctuations in the monthly savings and losses. However, we interpret Section G.1 of the contract as clearly

calling for a monthly comparison test for computing any monthly savings. Perrone is partially correct in that Section B of the contract does require an annual comparison (and limitation) test to determine annual net savings from which the contract fees could be paid. Thus, even if Advantage had achieved some monthly savings but did not achieve a net annual saving, it could receive no fee under the risk allocations of the contract. Perrone admitted that Advantage would be entitled to performance fees amounting to $657,372 if calculating the savings on a monthly basis although he felt an annual basis was a better method computing any potential savings. (Tr. 1214, 1252).

DISCUSSION

We exercise jurisdiction over this appeal pursuant to D.C. Code § 2-309.03 (a)(2).

The District has raised numerous defenses to this appeal, most of which challenge the validity of the contract: (1) the contract violates the Anti-Deficiency Act; (2) the contract was a "no-cost" contract type prohibited by the Procurement Practices Act ("PPA") and Chapter 24 of Title 27 of the DCMR; (3) the contract was procured and formed through the conflict of interest of a government employee; (4) the contract is a multi-year contract that was not approved by the City Council; (5) the pricing provision omits the terms "city gate" and "burner tip" thus rendering a material term of the contract defective, or in the alternative, the provision should be interpreted against Advantage as the drafting party; (6) Advantage exploited its superior knowledge of the energy industry in drafting the contract and this causes the contract to be one-sided in its favor; and (7) the District did not realize any savings during the energy management contract and the monthly calculation of fees stated in the contract is not typical in the energy industry.

Advantage argues that the contract is valid and that it is entitled to natural gas management fees of $78, 739, electricity management fees of $127,168, hourly consulting fees of $313, 211, performance-based fees in the amount of $1,698,655, and a variety of other breach damages.

We address first the District's threshold challenges to the validity of the contract.

Anti-Deficiency Act

The District argues that the contract is void *ab initio* because it violates the Anti-Deficiency Act, 31 U.S.C. § 1341, D.C. Code § 47-105, 47-355.01, based on the testimony of the original contracting officer, Janice Watson, and OCFO/OFRM's Mohamed Mohamed that the contract "had no funding mechanism established, the lock box arrangement was determined to be voidable and no appropriated funds existed for the contract." (District Posthearing Brief at 3). The District also argues

that there was "no certification of the prior encumbrance of appropriated funds as required by 27 DCMR § 3240." (*Id*. at 4).

The Anti-Deficiency Act provides in pertinent part:

§ 1341. Limitations on expending and obligating amounts

(a)(1) An officer or employee of the United States government or the District of Columbia government may not—

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;

(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law . . . .

31 U.S.C. § 1341(a)(1). The District relies on *Williams v. District of Columbia*, 902 A.2 91 (D.C. 2006), and cases cited in *Williams* which hold that contracts for future payments of money, in advance of or in excess of existing appropriations, are void *ab initio*. 902 A.2d at 94. In *Williams*, the contract was awarded in 1985 and provided that the District would not be required to make any payment any sooner than 18 months from the date of contract signing. The contract also explicitly provided that the District agency had set aside funds for the project, however, the agency in fact had never done so.

It is equally well settled that as long as Congress has appropriated sufficient legally unrestricted funds to pay a contract at issue, the Government normally cannot back out of a promise to pay on grounds of "insufficient appropriations," even if the contract uses language such as "subject to the availability of appropriations," and even if an agency's total lump-sum appropriation is insufficient to pay all the contracts the agency has made. *Cherokee Nation v. Leavitt*, 543 U.S. 631, 637-38 (2005) (between 1994 and 1997, Congress annually appropriated $1.277 billion to $ 1.419 billion for the Indian Health Service to carry out *inter alia* the Indian Self-Determination Act).

Applying the law to facts here, it is clear that the Advantage contract did not violate the Anti-Deficiency Act. Section F of Advantage's contract limited the contract to a duration of one year and both the District and Advantage recognized that the contract expired on August 31, 2001. Thus, there were no future payments of money, in advance of or in excess of existing appropriations. The District of Columbia Appropriations Act, as enacted by Congress for fiscal year 2000, for example, identifies operating expenses that Congress "appropriated for the District of Columbia for the current fiscal year out of the general fund of the District of Columbia" including an amount of $137,134,000 from local funds for agencies within

Governmental Direction and Support, $565,511,000 from local funds for agencies within Public Safety and Justice, and $721,847,000 from local funds within the Public Education System. Public Law No. 106-113, Nov. 29, 1999, 113 Stat. 1501, 1505-08 (District of Columbia Appropriations Act for 2000); Public Law No. 106-522, Nov. 22, 2000, 114 Stat. 2440 (District of Columbia Appropriations Act for 2001). The District's CFO was required to submit a revised appropriated funds operating budget under section 149 of this appropriations act for all District agencies in the format of the budget submitted by the District government pursuant to D.C. Code 47-301. The individual agency budgets identify a lump-sum amount for "utilities" in each agency with budget requirements for utilities, including natural gas. The sum of the agency amounts for utilities far exceeded the amounts to be paid to Advantage under its contract, and exceeded the amounts budgeted to be paid by the District for natural gas under its natural gas contracts with Washington Gas, Tiger/GSA, and Advantage. The record demonstrates that the District obligated all of its budgeted amounts for natural gas, arising from the lump-sum appropriations at the agency cluster level and at the individual agency utility budget level, near the beginning of each fiscal year. Thus, Advantage's contract was supported by appropriated and budgeted energy funds in the same manner that the District supported its arrangement with Washington Gas for bundled energy services in fiscal year 2000 prior to implementing the March 2000 tripartite agreement with Tiger and GSA, and in prior fiscal years. In addition, Advantage could only receive fees under its contract within recognized net savings, which precluded any payment exceeding the budgeted amounts for bundled services.

In sum, because Congress and the Council appropriated sufficient general energy funds to pay for natural gas contracts, including the Advantage contract at issue here, the District cannot avoid its contract obligation to pay for services rendered. *Cherokee Nation*, 543 U.S. at 637-38 *Viacom, Inc. v. United States*, 70 Fed. Cl. 649, 657 (2006), *modified on other grounds sub nom. CBS Corp. v. United States*, 75 Fed. Cl. 498 (2007) ("as long as Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue, the Government normally cannot back out of a promise to pay").

Similarly, the District's argument, that there was no certification of the prior encumbrance of appropriated funds as required by 27 DCMR § 3240, misses the mark. OFRM in fact provided to OCP a certification of funding for its natural gas contracts. Moreover, OFRM obligated the entire natural gas budget near the beginning of every fiscal year toward natural gas purchases during the fiscal year. By June 7, 2001, OFRM had ceased its objections to the validity of Advantage's contract based on budget authority or fiscal certifications.

Conflict of Interest

The District argues that the contract is void *ab initio* because there was a conflict of interest on the part of Chapman, the District's Chief Energy Management Officer. According to the District, Chapman had an improper business relationship

with Advantage during the contract formation period, approximately April through August 2000. The District further alleges that Chapman "became Advantage's contract author and advocate within the government attempting to overcome resistance from within the government and championing a conflict of interest charge against one of Advantage's opponents . . . ." (District Reply, at 8). Finally, the District points to Advantage retaining Chapman in connection with challenging the contracting officer's final decision rejecting Advantage's claim. The District alleges that Chapman's post-government consulting arrangement with Advantage "relates back and colors the entire relationship tainting it throughout with a conflict of interest" as serious as the relationship examined in *United States v. Mississippi Valley Generating Co*., 364 U.S. 520 (1961). (District Reply at 9).

In *Mississippi Valley*, the Supreme Court held that a contract was void *ab initio* due to the illegal conflict of interest activities of a financial institution director who was also a special government employee advising the government throughout the formation of the contract. This individual and his company were likely to benefit if selected to finance the project. But for the illegal conflict, the contract would not have been formed. *Mississippi Valley*, 364 U.S. at 553. Illegal acts by the Government contracting agent arising from the conflict of interest must be causally linked to the contract formation, for example, such as in causing unfavorable contract terms to be included. *See, e.g.*, *Godley v. United States*, 5 F.3d 1473, 1476 (Fed. Cir. 1993).

The District has not shown an illegal conflict of interest in the present matter. Although Advantage representatives knew of Chapman as early as 1995, there is no credible evidence that Chapman had any business relationship with Advantage or its principals prior to or during the contract formation period. The evidence suggests that Chapman represented the District government's interest when appointed as head of OPM's energy office. He was interested in assisting the District government by reducing its energy costs through unbundled energy acquisitions. His main objective for acquiring unbundled services was to secure a reliable supplier, and the tripartite agreement with GSA and Tiger appeared to District government officials to be the best vehicle. Advantage was solicited along with other firms in managing the unbundled acquisitions under the tripartite agreement. Although the contract formation process is not well documented by OCP's contract files, and the District declined to offer the testimony of the contract specialist (Dosunmu) who was most involved in the contract drafting for OCP, we discern no hint of illegality during the contract formation period on the record presented to us. After Chapman left OPM, he had a brief joint venture arrangement with Advantage attempting to market unbundled services to another government entity, and after the District denied Advantage's claim, Advantage hired Chapman as a consultant to assist in analyzing its claim for payment. Those activities occurred after Chapman had left government employment and long after the contract formation period. We find that Chapman's conduct did not taint the formation of Advantage's contract.

Contract Type

The District argues that the contract is void because the PPA and 27 DCMR § 2400.1 do not recognize a "no-cost" contract as a valid contract type. In addition, the District claims that the PPA, at the time of contract execution, did not recognize a contract type where a contractor would receive compensation resulting from implementing energy conservation measures. The District states that the District did not obtain the authority to enter into energy performance-based contracts until January 2003, citing the Energy and Operational Efficiency Performance-Based Contracting Amendment Act of 2003, D.C. Law 14-284, 50 D.C. Reg. 935 (codified at D.C. Code § 2-303.22).

The District does not cite which PPA provision it says prohibits the type of contract entered into with Advantage. The District's label of the Advantage contract as a "no-cost" contract was simply a short-hand description of the contract and was not meant to be a formal contract type definition. The Advantage contract is a fixed unit price, incentive-fee contract. This type of contract clearly is not prohibited by the PPA. D.C. Code § 2-303.11 provides:

> (a) Subject to the limitations of § 2-303.10 [regarding cost-reimbursement contracts] and this section, any type of contract which will promote the best interest of the District government may be used.
>
> (b) Preference shall be given in the order indicated to the following types of contracts: First, fixed-price; second, fixed-price incentive; third, cost-plus incentive fee; and fourth, cost-plus fixed fee or cost-reimbursement.

We are not dealing with a cost-plus-a-percentage-of-cost contract, prohibited by D.C. Code § 2-303.09, nor the general limitations on cost reimbursement contracts found in D.C. Code § 2-303.10. The contracting officer, supported by the Chief Procurement Officer, used a fixed unit price incentive-fee contract type here and this type is authorized by the PPA. Chapter 24 of Title 27 of the DCMR cannot and in fact does not contradict the PPA. For example, 27 DCMR § 2401.3 states that

> The contracting officer shall use a firm-fixed price contract when the risk involved is minimal (or can be predicted with an acceptable degree of certainty) and when fair and reasonable prices can be established. However, if a reasonable basis for firm-fixed pricing does not exist, the contracting officer may consider other contract types, or combination of types, that will appropriately link profit to contractor performance, except as limited by § 2401.1 [regarding procurements by competitive sealed bids].

The contract types found in 27 DCMR § 2401.4 include fixed-price incentive contracts and are fully consistent with the PPA in D.C. Code § 2-303.11. That the PPA was amended to specifically authorize energy performance savings contracts in 2003 does not logically compel the conclusion that energy performance savings contracts were not authorized in the District before the 2003 amendment. The amendment permits multiyear contracts (10 years, and up to 15 years with an option) and provides a series of requirements for such contracts. The PPA and the procurement regulations, as stated above, permitted energy performance savings contracts but under more general procurement requirements. Accordingly, the District's argument regarding contract type is unpersuasive.

Multi-Year Contract

The District argues that the Advantage contract is void because it was a multi-year contract requiring Council approval. As noted in our discussion above regarding the Anti-Deficiency Act, a plain reading of Section F of the contract shows that it was a one-year contract, effective September 1, 2000, and that it expired by its terms on August 31, 2001. The record shows that the parties understood they were entering into a one-year contract at the time of execution. During performance, they manifested that understanding, particularly in the contracting officer's June 7, 2001 letter to Advantage.

Advantage seeks fees beyond the one-year contract period based on Section G.1.H of the contract which provides for payment of arrearages of fees "not paid upon termination of the consulting agreement . . . ." There was no convenience termination of the contract, rather, the contract expired on August 31, 2001. Section G.1.H cannot reasonably be interpreted as extending indefinitely the term of the contract which is set forth in Section F. We conclude that Advantage is not entitled to any fees for savings realized beyond the expiration of the contract.

Price Term

The District argues that the contract contains an indefinite price term, and thus the contract fails in a material term. Alternatively, the District argues that if the price term is valid, it nonetheless must be interpreted against Advantage as the drafter of the provision. The District claims that Section G.1 fails to identify either the term "city gate" or "burner tip" in specifying how to calculate energy costs for the comparison test between unbundled and bundled costs in G.1.A and G.1.B. The District and its expert witness claim that the contract should be read as requiring that the cost comparison be made at the city gate, not the burner tip. Advantage argues that the energy costs identified in G.1.A and G.1.B must be the total cost of acquiring the gas and its delivery to the point of actual consumption, the burner tip.

We conclude that the contract payment provision is valid and that it must be interpreted as requiring the comparison test of "total energy costs" – meaning the total

cost of providing the natural gas to the point of consumption. What the District fails to consider in its analysis is that Advantage's contract was to manage the unbundled services provided under the GSA/Tiger tripartite task order. The task order expressly provides that Tiger was to deliver and bill for gas actually consumed at the burner tip. The billing and payment arrangements among Tiger, Washington Gas, and the District are entirely consistent with this understanding. Washington Gas billed monthly based on consumption at the burner tip and paid Tiger monthly based on consumption, not deliveries at the city gate. The District paid Washington Gas and Tiger based on consumption at the burner tip. With that understanding of the tripartite task order and the billing and payment arrangements among the parties to the task order, it is clear that the phrase "actual total energy costs each month managed by Advantage Energy" means the total costs of acquiring and delivering natural gas to the burner tip. This conclusion is further confirmed by the rate schedules which state their charges based on actual consumption at the point of metering, the burner tip. Rate Schedules 2 and 2A defines the "distribution charge" as the amount the Washington Gas charges for delivering each therm of purchased gas consumed by the customer. And the "purchased gas charge" is "the amount the Company charges for each therm of gas consumed by the customer. Such charge is a measure of the costs of the company to purchase gas to be distributed to the customer for use at the customer's premises." Thus, Advantage's performance fee was to be paid on monthly savings achieved on unbundled acquisitions when compared with the traditional bundled purchases through Washington Gas. Because bundled costs are only measured at the burner tip, Section G.1's comparison can only rationally mean comparing bundled costs at the burner tip with unbundled costs at the burner tip.

The District's expert stated that Advantage's performance fee should not have been calculated monthly but rather on an annual basis so as to more fairly represent net actual savings since losses in one month would not be carried over to offset gains in another month. The monthly calculation of the performance fee is clearly stated in Section G.1. Although the District argues that Advantage had "superior knowledge" of the energy industry and that OCP personnel were inexperienced in negotiating pricing terms for an energy performance savings contract, we discern no misrepresentations by Advantage, but rather find that its proposed fees were understood by the District's contracting officials and accepted by the same officials with the District negotiating a key limitation on Advantage's fees – namely, that Advantage could earn fees only if and to the extent that there were net annual savings from its management of the unbundled acquisition. We do not find the risk sharing agreed to by the parties to be unconscionable.

We have considered all of the District's arguments on contract validity and quantum, including its challenges to some of the exhibits based on deliberative process, but are not persuaded by those arguments. Also, we have considered Advantage's other claims for breach of contract damages but deny those claims.

CONCLUSION

We conclude that the District's contract with Advantage was valid. The District has never made any payment to Advantage for its significant contract work. Based on a review of the record, we find the District liable for a total of $669,132 in unpaid contract fees, plus interest pursuant to D.C. Code § 2-308.06, from October 9, 2002, until paid.

SO ORDERED.

DATED: December 3, 2010

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

TRI GAS & OIL CO. INC.	)	
	)	
	)	CAB No. P-0867
	)	
Invitation For Bid No: DCAM-2011-B-0011-001	)	

For the Protester, Tri Gas & Oil Co. Inc., Mr. John Dalina, *pro se*. For the District of Columbia Government: Robert Schildkraut, Esq., Assistant Attorney General, Office of the Attorney General.

Opinion by Chief Administrative Judge Marc D. Loud, Sr., with Administrative Judge Warren J. Nash, concurring.

OPINION

Filing ID 34792685

Protester Tri Gas & Oil Co., Inc. ("Tri Gas") alleged in its protest that the District improperly rejected the Tri Gas bid as late. Tri Gas contends that its bid should have been accepted by the District because the admittedly late submission was "very minor" and would have resulted in the "lowest offer". The District's Agency Report asserts that the Board must reject the Tri Gas bid as late under 27 DCMR §1523.2 and prior decisions of the board. The Board agrees that the District properly rejected the protester's bid. Accordingly, we dismiss the protest.

BACKGROUND

The Office of Contracting and Procurement ("OCP") issued Invitation For Bid ("IFB"), DCAM-2011-B-0011 on October 20, 2010, for E85 fuel. (Agency Report ("AR") Ex. 2). On October 21, 2010, OCP issued an amendment to provide responses to bidders' questions, not pertinent hereto. The IFB required responses to the bid by 2:00 p.m. on October 26, 2010. (AR Ex. 2/p.1). The IFB further directed bidders to submit bids in the following manner:

> Address Offer To:
> Office of Contracting and Procurement
> Transportation Specialty Equipment Group
> 2000 14th Street, N.W., 3rd Floor Bid Room (Reeves Center)
> Washington, D.C. 20009 (AR Ex. 2/p.1)

The IFB also included the following language:

> CAUTION: Late Submissions, Modifications, and Withdrawals: See 27 DCMR chapters 15 & 16 as applicable. All offers are subject to all terms and conditions contained in this solicitation. (AR Ex. 2/p.1).

On the bid opening date of October 26, 2010, three bids were received by the 2:00 pm submission deadline. The Tri Gas bid was received on October 26, 2010, at 3:07 pm. (AR Exhibits 1, 3 & 4). The Tri Gas bid was incorrectly addressed to the Office of Contracting and Procurement, 2000 14th Street, NW., *6th Floor (italics added)*, instead of 2000 14th Street, NW., 3rd Floor, as required by sections A.8 and A.9 of the IFB. (AR Exs. 1-2, 4). The bid room is located on the 3rd floor, and thus the Tri Gas bid package was not clocked in at the Bid Room per the IFB's requirements. (AR, Ex. 4, Contracting Officer Declaration).

It appears from the record that the Tri Gas bid was delivered express mail by the United States Postal Service to a representative in the contracting office of the District Department of Transportation ("DDOT") on the 6th Floor. (AR Exs. 1, 3 & 4). The DDOT employee delivered the Tri Gas bid package to the instant Contracting Officer on the 6th Floor soon after delivery. (AR Ex. 4). The Contracting Officer obtained a print out from the United States Postal Service website, which confirmed that the Tri Gas bid was delivered to DDOT at 3:07 pm on October 26, 2010. (AR Exs. 1, 3 & 4). The USPS tracking form shows that the bid entered the US mail system on October 25, 2010. (AR Ex. 3). Tri Gas was notified on October 28, 2010, that its bid was considered late. (AR Exs. 1 & 4).

DISCUSSION

In its protest, Tri Gas does not dispute that its bid was addressed and delivered to the wrong floor, and delivered after the 2:00 p.m. deadline. Tri Gas has included in its protest a United States Postal Service tracking form that shows the untimely delivery to the erroneous location. Rather, Tri Gas argues that its bid submission errors were "minor" and that, if accepted, its bid would have offered the lowest price.

The rules regarding the acceptance of late bids are set forth in 27 DCMR 1523.2:

> Any bid received at the place designated in the solicitation after the time and date for receipt of bids shall be considered a "late" bid unless it was received prior to the contract award and either of the following applies.
>
> (a) It was sent by registered or certified mail not later than five (5) calendar days before the bid receipt specified; or
>
> (b) It was sent by mail (or telegram if authorized) and the contracting officer determines that the late receipt was due solely to mishandling by the District after receipt at the location specified in the IFB.

Furthermore, we have previously stated the general rule that bidders are responsible for delivering their bids to the proper place at the proper time. *Protest of Traffic Lines, Inc.*, CAB No. P-0715, December 21, 2005, 2005 DCBCA LEXIS 13 (*citing W.S. Jenks & Son*, CAB No. P-0644, August 14, 2001, 49 D.C. Reg. 3374 and *Quest Diagnostics*, CAB No. D-0840, July 9, 1997, 44 D.C. Reg. 6849). In *Traffic Lines*, *infra at p.2*, we found that the District had properly rejected a bid that arrived in the bid room approximately one hour and seventeen minutes past the deadline. We noted, *inter alia*, that the protester had "significantly contributed to the late delivery by failing to properly address" its bid. (*Id.* at p.3).

Both the governing regulations and precedent noted herein do not allow consideration of a late bid under the circumstances presented by protester. The Tri Gas bid was sent by mail one day before the deadline as opposed to the five days referenced in section 1523.2(a). Additionally, the Tri Gas bid was addressed improperly by the protester and its late receipt was due to the protester's inaccurate address. There is no evidence in the record of agency mishandling of the Tri Gas bid.

Accordingly, we deny the protest.

CONCLUSION

For the reasons discussed above, we deny the Tri Gas protest.

SO ORDERED.

DATED: December 10, 2010

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

CONCURRING:

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

Community Bridge, Inc.	)	
	)	CAB No. P-0848
Under RFP No: DCKT-2009-R-0120	)	

For the Protester, Warner H. Session, Esq. For the District of Columbia Government: Robert Schildkraut, Esq., Assistant Attorney General.

Opinion by Administrative Judge Warren J. Nash, with Chief Administrative Judge Marc D. Loud, Sr., concurring.

OPINION

Filing ID 35233836

Community Bridge, Inc., ("Community Bridge") on April 9, 2010, protested the award of any contract from the above solicitation to any bidder other than Community Bridge. On April 27, 2010, the District of Columbia filed its motion to dismiss the protest, alleging that Community Bridge had filed an untimely protest more than 10 days after it knew, or should have known, of the grounds of its protest. The District on April 12, 2010, executed a Determination and Finding to proceed with contract performance. Community Bridge filed its opposition to the D&F on April 15, 2010. Since we have determined that the protest was untimely filed, there is no need to determine the adequacy of the D&F. The Board agrees with the District and the Board hereby dismisses the protest with prejudice.

BACKGROUND

The Office of Contracting and Procurement ("OCP") of the District Government issued solicitation DCKT -2009-R-0120 in the open market for grounds maintenance and landscaping services on September 23, 2009. (Exhibit 2). The solicitation required a prospective contractor to provide grounds maintenance, landscaping services and other related services to several District agencies. (Exhibit 2). The District contemplated award of multiple contracts, and the District wanted to award single contracts to one contractor in each ward of the city. (Exhibit 2). Community Bridge submitted a proposal to provide services under the RFP, and was awarded a contract on April 3, 2010. (Exhibit 8). Community Bridge is protesting the award of contracts to Lorenz for services in Wards 3 through 8. The District awarded a contract to Lorenz, Inc., on April 13, 2010. Kennedy filed this protest on April 9, 2010.

DISCUSSION

In the motion to dismiss, the District alleges 1) that Community Bridge lacks standing to protest because the protest was filed after March 17, 2010, and was therefore untimely, and that 2) alternatively, the protest is untimely because it was filed more than 10 days after the district

submitted the Lorenz and Community Bridge approval resolutions on March 12, 2010, and that Community Bridge knew about the adverse action taken against its interest by March 16, 2010, the date that Community Bridge's attorney submitted an email message to Councilmember Jim Graham that outlined the reasons for Community Bridge's support of a disapproval resolution submitted by Councilmember Harry Thomas, Jr. The District alleges that Community Bridge knew that the award resolution had been sent to the Council, and that Community Bridge actively lobbied against award of the companion contract to Lorenz. The District further alleges that since Community Bridge knew of the Lorenz award by March 16, 2010, any protest of the award to Lorenz should have been earlier than April 9, 2010, or by March 30, 2010. Therefore, this protest is untimely.

The District correctly cites *Sigal Construction Corporation*, DCCAB No. P-0690, P-0693, P-0694 (Consolidated)(2004) to support the proposition that in certain cases of active lobbying of the DC Council by a protester, the timeliness of a protest may be affected by the actions of the protester. In *Sigal*, the protester actively worked to convince the Council to disapprove a proposed award to a competing contractor. However, *Sigal's* protest was untimely because it was filed more than 10 business days after *Sigal's* actual notice that a proposed award had been submitted to the Council. *Sigal* did not receive a formal notice of the proposed award, but it actively lobbied the council against approving the award.

In *Sigal*, the Board set forth the parameters to be used when considering the timeliness of a protest that involves active council lobbying by the protester:

> The Procurement Practices Act provides the following in D.C. Code § 2-309.08 with regard to an award protest:
>
> (a) This section shall apply to a protest of a solicitation or award of a contract addressed to the Board by any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract.
>
> . . . .
>
> (b)(2) In cases other than those [based upon alleged improprieties in a solicitation] . . . , 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.
>
> The correct principle of law on timeliness of a protest in connection with an award is that the 10-business day period stated in D.C. Code § 2-309.08 begins when the bidder or offeror knows or should have known the basis of its protest and the party has become aggrieved in connection with the award by an official action adverse to that party. JLTJV (Jair Lynch/Tompkins Joint Venture) misconstrues our decision in Micro Computer. That case addressed the issue of the timeliness of a protest filed against the presumptive low bidder even though no award had been made. Micro Computer simply stands for the proposition that the Board may entertain jurisdiction over a protest which technically is premature because there has been no formal action taken by the contracting officer adverse to the protester. There is no difficulty in such an approach because if the

presumptive low bidder does not receive award or the protester receives the award, the protest will be moot and voluntary dismissal will follow. See, e.g., *Consolidated Waste Industries*, CAB No. P-0300, Oct. 8, 1992, 40 D.C. Reg. 4570. If the protester does not receive award, the Board can then resolve the protest based on an actual decision adverse to the protester. Further, it may be useful for the contracting officer and government legal counsel to learn of a protest ground even if prematurely filed because the agency may be expected to take a more informed contract action based on the issues raised in the protest.

Usually, the contracting officer's official action adverse to the party will be a notice of award, a notice of intent to award, a notice that the party did not receive award, a notice that the party's bid or offer will not be further considered in the procurement, a notice that the party's offer is not within the competitive range, or a notice that the bid or offer is rejected for some other reason. It is well settled in our cases that a bidder or offeror does not have to file a protest in connection with an award until it has received notice of an official action by the contracting officer which is adverse to it. See, e.g., *Unfoldment, Inc.*, CAB No. P-0447, Aug. 2, 1996, 44 D.C. Reg. 6488, 6490-91 (protester's challenge to an anticipated award to the incumbent and an affirmative determination of the incumbent's responsibility status is premature and speculative); *Consolidated Waste Industries*, CAB No. P-0430, June 12, 1995, 42 D.C. Reg. 4983 (protester merely surmises that the District intends to award the IFB to another bidder; since the District had not yet completed its responsibility determination nor awarded a contract; protest was premature). In *Alexandria Scale*, CAB No. P-0361, Mar. 25, 1993, 40 D.C. Reg. 5055, the facts showed bid opening on June 12, 1992, that protester notified the contracting officer by letter of June 23 that the low bidder could not meet the specifications, and that between June 18 and December 14, 1992, the contracting agency made inquiries to the low bidder seeking responses to protester's June 23 letter. On January 7, 1993, after a partial award was made to the low bidder, the protester filed its protest on January 14, 1993, 7 days after award, but months after being on notice of the underlying basis for the protest. The Board held that the protest was timely filed because the operative date for starting the 10-day filing period was the date on which the bidder was notified of the adverse agency action -- January 7, 1993, in that case. In *Koba Associates, Inc.*,, CAB Nos. P-0344, P-0359, Mar. 3, 1993, 40 D.C. Reg. 5003, we held that the 10-day period for filing a protest begins to run when the District takes adverse action to the concerns of the offeror, not when the offeror raises the issues in a letter to the contracting officer seeking clarification. In *Koba*, the protester sought clarification by letter of August 27, 1992, challenging a direction given by the contracting agency during discussions, but the 10-day time for filing its protest began to run when protester received the September 24, 1992 notice terminating negotiations. Thus, *Koba's* protest was timely filed on October 7, 1992. See also *Fort Myer Construction Corp*., CAB No. P-0261A, Jan. 28, 1992, 39 D.C. Reg. 4400 (although Fort Myer was aware of low bidder's bid mistake at the time of bid opening on October 10, 1990, it was not aggrieved until November 1, 1990, when the District informed Fort Myer that the low bidder's error was not disqualifying).

Under these principles of timeliness, we conclude that Community Bridge untimely raised the protest grounds on April 9, 2010. The documents submitted by the protester clearly show that the Community Bridge knew on March 16, 2010, that Lorenz would be awarded the contract after the contract was approved by Council. Further, Community Bridge lobbied the Council by attempting to stall, or end, the approval of the contract. Community Bridge filed this protest more than 10 days after it attempted to lobby the Council to disapprove the contract. Accordingly, we dismiss this protest as untimely.

SO ORDERED:

DATED: January 6, 2011

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

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

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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

CHILDREN, CHILDREN, CHILDREN, INC.)
) CAB No. P-0858
Under IFB Solicitation CFSA -09-I-0004)

For the Protester: Henry Culbreath, Jr., President and CEO, Children, Children, Children, Inc. For the Government: Janice N. Skipper, Assistant Attorney General, D.C.

Opinion by Administrative Judge Warren J. Nash with Chief Administrative Judge Marc D. Loud, Sr., concurring.

ORDER DISMISSING PROTEST

Filing ID 35251959

On July 2, 2010, Children, Children, Children, Inc. ("CCC") protested the District's Child and Family Services Agency's ("CFSA") determination that CCC was not a responsible bidder for the above solicitation. The protester alleged that it was responsible, and its price was lower than other prices bid by bidders who received contracts. The District responded in its Agency report that the District had properly determined that CCC was not a responsible bidder, and that the District had not acted in bad faith in finding CCC nonresponsible.

BACKGROUND

On December 9, 2009, CFSA issued IFB CFSA-09-I-0004 for an Indefinite delivery indefinite quantity ("IDIQ") contract to provide home based and community based supplemental educational services, tutoring, and remediation services in individual sessions or group settings to wards (students) of the District of Columbia between the ages of six (6) and twenty-one (21) who were enrolled in a general or special education program in an elementary or secondary school. Section B.2.1 of the IFB contemplated award of an IDIQ contract with fixed unit hourly prices. (AR Ex. 1). The IFB set forth service requirements in Section C.4 that required the contractor to provide a range of services to students who resided in the metropolitan area within a 75 mile radius of the Baltimore/Washington area. (AR Ex. 1). CFSA received 20 bids by December 29, 2009. (AR Ex. 1 and 3).

The District began its responsibility determinations for the first 10 apparent low bidders in March of 2010. CCC was included in the initial group of bidders that were given responsibility reviews. (AR Ex. 3). There was some initial confusion about the facility where the District would conduct the site visit. (AR Ex. 3). CFSA went to the initial address and discovered that the address was a private residence that apparently was not usable for extensive business activities. (AR Ex. 3). CFSA conducted further site visits at CCC's DC office at 1776 I Street, NW, an address which had been provided to CFSA after bid opening. At that address, CFSA evaluated the bidder's facilities and lack of instructional materials. CCC responded that all of the materials were housed at the D.C. Superior Court, the site of another contract operation. (AR Ex. 3). CFSA submitted an evaluation of the inspection team which set forth the problems

with CCC's bid. (AR Ex. 9). The inspection team headed by Dr. Benjamin Dukes did not recommend an award to CCC. (AR Ex. 9).

After further evaluation, CFSA determined that CCC was not a responsible bidder. (AR Ex. 3). CFSA also determined that four other bidders were not responsible. On June 14, 2010, CFSA notified CCC that CFSA would not award a contract to CCC. (AR Ex. 11). CCC filed this protest on July 2, 2010.

DISCUSSION

We exercise jurisdiction pursuant to D.C. Code § 2-309.03(a)(1).

CCC asserts that the District improperly determined that the protester was not a responsible bidder and that the protester's price was lower than the prices of other bidders. The District responds that the District could not determine that CCC was responsible, and that without an affirmative determination of responsibility, the District could not award a contract to CCC.

Bidder responsibility is a prerequisite to contract award. D.C. Code § 2-303.03(e). The contracting officer must make a written determination of whether the prospective contractor is responsible, and in the absence of information clearly indicating that the contractor is responsible, the contracting officer shall determine the contractor to be nonresponsible. 27 DCMR §§ 2200.1 - 2200.3. The general standards of responsibility are set forth in 27 DCMR § 2200.4 and in section L.15 of the solicitation. Before making a determination of responsibility, the contracting officer shall possess or obtain information sufficient to satisfy the contracting officer that a prospective contractor currently meets the applicable standards and requirements for responsibility. 27 DCMR § 2204.1. Section L.15 requires the prospective contractor to submit the required documentation within 5 days of a request from the contracting agency. Besides obtaining information from the prospective contractor, the contracting officer should also obtain information on responsibility from other sources as appropriate under the circumstances, including, preaward survey reports and information from "publications, suppliers, subcontractors, and customers of the prospective contractor, financial institutions, government agencies, and business and trade associations." 27 DCMR § 2204.5(e). Section L.15.8 of the IFB mirrors 27 DCMR § 2204.4, which provides:

If the prospective contractor fails to supply the information requested under §2204.3 [responsibility information requested by the contracting officer], the contracting officer shall make the determination of responsibility or nonresponsibility based upon available information. If the available information is insufficient to make a determination of responsibility, the contracting officer shall determine the prospective contractor to be nonresponsible.

In making the determination of responsibility, the contracting officer is vested with wide discretion and business judgment. Therefore, in reviewing a determination concerning general standards of responsibility, we will not overturn a finding of responsibility or nonresponsibility unless the protestor shows bad faith on the part of the contracting agency or that the contracting officer's determination lacks any reasonable basis. *Anchor Construction Corp.*, CAB No. P-

0737, Jan. 9, 2007, 54 D.C. Reg. 2066, 2068; *Ideal Electrical Supply Corp*., CAB No. P-0372, Aug. 13, 1993, 41 D.C. Reg. 3603, 3606.

As discussed below, we conclude that the contracting officer's nonresponsibility determination is supported by the documentation in the record.

The CFSA had safety and security concerns for any clients which may have been assigned to CCC because CCC's office suite was an office space shared with other independent organizations. The single computer in the DC office located at 1776 I Street, NW, appeared to be the director's personal computer. At the time of the office visit, there was no CCC staff available. The proposed office space was a very small space and CCC intended to use shared space as an additional area, even though that shared space was also available to other agencies, companies and corporations not controlled by CCC. CCC's director did not have a key to the shared space.

CCC did not have instructional materials at the DC Office. The director indicated that all of his instructional materials were housed at the DC Superior Court, where CCC was performing under contract. CCC's director stated that the unseen staff at Superior Court would perform services at the 1776 I street location, but CFSA could not determine whether that staff met the requirements enumerated in section C.9 of the solicitation. CCC's director indicated that he would be able to procure more office space after contract award. CFSA also had concerns about the proper name of the offeror (whether the name was Children, Children, Children, Inc., or Culbreth & Culbreth Consulting, Inc.) and whether CCC may have been improperly using a home located in Lanham, MD, as a work performance site.

After reviewing the documentation presented by the protester and the District, this Board agrees with the contracting officer regarding CCC's responsibility, or lack thereof. We find that the contracting officer reasonably concluded that CCC had failed to present adequate information showing that CCC was a responsible contractor. The scope and nature of the contracting officer's task of gathering responsibility data is a matter committed to the contracting officer's discretion and business judgment. The contracting officer and the contracting and program staff reasonably provided CCC adequate opportunities to submit accurate and comprehensive information showing the contractor's responsibility.

CONCLUSION

For the reasons discussed above, we sustain the nonresponsibility determination and accordingly deny CCC's protest.

SO ORDERED.

DATED: January 6, 2011

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

Electronic Service:

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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

OUR FUTURE, INC.,	)	
	)	CAB No. P-0860
Under IFB Solicitation CFSA -09-I-0004	)	

For the Protester: Sharon D. Holley-Ward, President, Our Future, Inc. For the Government: Janice N. Skipper, Assistant Attorney General, D.C.

Opinion by Administrative Judge Warren J. Nash with Chief Administrative Judge Marc D. Loud, Sr., concurring.

OPINION

Filing ID 35481274

On July 13, 2010, Our Future, Inc., ("Our Future") protested the District's Child and Family Services Agency's ("CFSA") determination that Our Future was not a responsible bidder for the above solicitation. The protester alleged that CFSA did not follow the same rules and procedures to determine whether companies competing for the contract had materials needed and qualified staff to conduct the home-based and community based tutoring services set forth in the solicitation. Our Future alleges that CFSA did not revisit Our Future's offices after the initial visit, and did not give Our Future a chance to re-schedule the appointment. The District responded in its Motion to Dismiss, or, in the alternative, Agency Report, that Our Future failed to file its protest within 10 business days after it knew or should have known of the grounds of its protest, as required by D.C. Code §2-309.08, and, in any event, that the District had properly determined that Our Future was not a responsible bidder, and that the District had not acted in bad faith in finding Our Future nonresponsible.

BACKGROUND

On December 9, 2009, CFSA issued IFB CFSA-09-I-0004 for an indefinite delivery indefinite quantity ("IDIQ") contract to provide home based and community based supplemental educational services, tutoring, and remediation services in individual sessions or group settings to wards (students) of the District of Columbia in the care, custody and control of CFSA. The IFB contemplated award of an IDIQ contract with fixed unit hourly prices. (AR Ex. 2). CFSA received 20 bids by December 29, 2009. (AR Ex. 1 and 3).

CFSA made several attempts to conduct site visits with Our Future. (AR Ex. 3). Once the District made contact with Our Future, District representatives went to Our Future's facility at 1629 K Street, NE. The receptionists at that location stated that there was no one available from Our Future. The CFSA representative telephoned Our Future, but representatives from Our Future did not appear to conduct a site visit. Additionally, CFSA could not review staff records to verify educational requirements of Our Futures staff, as required by Section C.9 of the solicitation. The inspection team could not recommend continuing a business relationship with Our Future. (AR Ex. 4).

CFSA determined that Our Future was not a responsible bidder. (AR Ex. 3). CFSA also determined that four other bidders were not responsible. By letter dated June 17, 2010, CFSA

notified Our Future that CFSA would not award a contract to Our Future. (AR Ex. 5). Our Future filed this protest on July 13, 2010.

DISCUSSION

We exercise jurisdiction pursuant to D.C. Code § 2-309.03(a)(1).

Our Future asserts that the District improperly determined that the protester was not a responsible bidder, and that the District did not give Our Future a second opportunity for a site visit. The District responds that it could not determine that Our Future was responsible, and that without an affirmative determination of responsibility, the District could not award a contract to Our Future. The District also asserts that Our Future filed its protest after the protest period set forth in the statute.

We begin by addressing the issue of whether Our Future timely filed its protest. The District asserts that Our Future filed its protest more than 10 business days after June 17, 2010; the date the contracting officer notified Our Future by letter that its bid had been rejected as non-responsible. (AR Ex. 5). The District asserts that because Our Future knew that the District had rejected Our Future's bid on June 17, 2010, Our Future should have filed its protest within 10 business days of that date, that is, by July 2, 2010. *See Sigal Construction Corp.*, CAB No. P-0690, *et al.*, Nov. 24, 2004, 52 D.C. Reg. 4243, 4253-54; *Professional Recruiters, Inc.*, CAB No. P-0700, Dec. 21, 2004, 52 D.C. Reg. 4258, 4259-60.

D.C. Code § 2-309.08 (b)(2) requires the protester to file a protest not later than 10 business days after the basis of the protest is known or should have been known, whichever is earlier. Our Future does not challenge the District's assertion that it informed Our Future of the bid rejection on June 17, 2010. Our Future asserts that it did not receive official notification of the details of the bid rejection until June 29, 2010, and that it filed its protest within ten days of that date. In making that assertion, Our Future asks the Board to ignore the letter dated June 17, 2010, signed by Tara Sigamoni, contracting officer, who personally informed Our Future that its bid had been rejected as nonresponsible. (AR. Ex. 5) Because Our Future failed to submit its protest within 10 business days after June 17, 2010, its protest is untimely. Accordingly, we dismiss the protest. Additionally, we see no need to address the responsibility issues raised by the District.

CONCLUSION

For the reasons discussed above, we dismiss Our Future's protest.

SO ORDERED.

DATED: January 14, 2011

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

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

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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

COMPREHENSIVE COMMUNITY HEALTH AND PSYCHOLOGICAL SERVICES, LLC	)	
	)	CAB No. P-0859
Under Contract Nos. DCFL-2006-D-6001 and DCFL-2010-R-0001	)	

For Comprehensive Community Health and Psychological Services, LLC: Mr. Ernest Middleton, *pro se*. For the District of Columbia Government: Robert Schildkraut, Esq., Assistant Attorney General.

Opinion by Administrative Judge Warren J. Nash, with Chief Administrative Judge Marc D. Loud, Sr., concurring.

OPINION ON MOTION FOR RECONSIDERATION

Filing ID 35825551

Comprehensive Community Health and Psychological Services, LLC ("CCHPS") protested the approval and administration by the Office of Contracts and Procurement of an option year contract with Unity Health Care, Inc. CCHPS protested for the third time in P-0859 the administration of a contract performed by Unity and the failure of Unity to award a subcontract to CCHPS in connection with a 2006 procurement. We dismissed two earlier protests raising the same allegations in CAB Nos. P-0809 and P-0821. We concluded in our opinion in this protest that CCHPS, a disappointed subcontractor, lacks standing to protest and that the allegations it raises concerning various contract administration issues are not proper grounds for protest. CCHPS also seems to challenge the cancellation of a 2010 solicitation but we conclude that this challenge is untimely. Accordingly, we dismiss CCHPS's protest. We further find in our P-0859 opinion that CCHPS's repeat protest of the 2006 procurement which we previously rejected in two earlier protest decisions is frivolous pursuant to D.C. Code § 2-309.08(g) and Board Rule 308.2. On December 1, 2010, CCHPS filed a motion requesting that the Board reconsider its decision to dismiss the protest of option year contract DCFL-2006-D-6001. CCHPS alleges that the Board does not understand all of the facts regarding the protest. After review, we deny the protester's request for reconsideration of our opinion in P-0859.

DISCUSSION

This Board held in two prior opinions that CCHPS does not have standing to protest the administration of contract DCFL-2006-D-6001. A full discussion of those issues is set forth in our opinions in P-0809 (CAB No. P-0809 Opinion, dated August 26, 2009) and P-0821 (CAB No. P-0821 Opinion, dated September 10, 2009). The protester's motion for reconsideration adds nothing to our understanding of the facts that are set forth in the three opinions. The protester asserts that his position as a subcontractor should not disqualify him from participating in the protest process. The Board answers that assertion by stating that the Procurement

Practices Act does not grant protest standing to prospective subcontractors. In order for the Board to have jurisdiction over a protest, the protestor must be an actual bidder or offeror, or a contractor who is aggrieved in connection with the solicitation or award. (DC Code §§ 1-1189.3 and 1-1189-8(a), 45 DC Reg. 1386).

Although not specifically raised in the protester's motion to reconsider, we see no reason to revisit our opinion that CCHPS failed to timely file its protest of the 2010 solicitation.

CONCLUSION

For the reasons discussed above, we deny the protester's motion to reconsider our opinion in P-0859.

SO ORDERED.

DATED: February 8, 2011

/s/ *Warren J. Nash*
Warren J. Nash
Administrative Judge

CONCURRING:

/s/ Marc D. Loud, Sr.
Marc D. Loud, Sr.
Chief Administrative Judge

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

CERTIFIED LEARNING CENTERS	)	
	)	CAB No. P-0861
Under IFB Solicitation CFSA -09-I-0004	)	

For the Protester: Patricia M. Felton, President, Certified Learning Centers. For the Government: Janice N. Skipper, Assistant Attorney General, D.C.

Opinion by Administrative Judge Warren J. Nash with Chief Administrative Judge Marc D. Loud, Sr., concurring.

OPINION

Filing ID 36021303

On July 10, 2010, Certified Learning Centers ("CLC") protested the District's Child and Family Services Agency's ("CFSA") decision to award contracts under this solicitation to bidders other than CLC. The protester alleged that CFSA discriminated against CLC during the selection process. CLC alleges that CFSA did not visit CLC's work site, and therefore, did not evaluate CLC in the same manner that CFSA evaluated other bidders. The District responded in its Motion to Dismiss that CLC is not next in line for award even if CLC succeeds in its protest, and that CLC lacks standing to bring the protest.

BACKGROUND

On December 9, 2009, CFSA issued IFB CFSA-09-I-0004 for an indefinite delivery indefinite quantity ("IDIQ") contract to provide home based and community based supplemental educational services, tutoring, and remediation services in individual sessions or group settings to wards (students) of the District of Columbia in the care, custody and control of CFSA. The IFB contemplated award of an IDIQ contract with fixed unit hourly prices. (AR Ex. 2). CFSA received 20 bids by December 29, 2009. (AR Ex. 1 and 3). CFSA prepared a bid tabulation sheet that set forth the rankings of the 20 bidders. (AR Ex. 3). CLC's offer was the seventeenth lowest priced bid, out of the 20 bids received.

Between June 2 and June 9, 2010, CFSA awarded four contracts to bidders with higher rankings and lower prices than CLC. CLC filed this protest on July 16, 2010.

DISCUSSION

We exercise jurisdiction pursuant to D.C. Code § 2-309.03(a)(1).

CLC Asserts that the District did not visit CLC's work site, and that CLC was not given the opportunity to show its capabilities to the District. The District replies that even if CLC's assertion were true, CLC could not be awarded the contract because CLC, at rank number 17, is

not next in line for award. The District asserts that there are six bidders between CLC and the lowest priced bidder that did not get a contract. Accordingly, CLC is not next in line for award unless CLC can somehow remove six bidders whose bids are lower priced than CLC's.

This Board has granted District motions to dismiss protests when the bidder is not next in line for award. In *Commando K-9 Detectives and Executive Security & Engineering Technologies, Inc.*, CAB Nos. P-405, P-406 (Consolidated), 42 DCR 4597 (Aug 18, 1995), this Board sustained a District Motion to Dismiss the Protest because the protester was seventh in line for award and would not be next in line for award even if the Board sustained the protest. The Board stated:

> Only aggrieved persons have standing to protest agency award decisions. In order to have standing, an actual or prospective bidder or offeror must show that it has suffered, or will suffer, a direct economic injury as a result of the alleged adverse agency action. *District of Columbia v. Group Insurance Administration*, 633 A.2d 2, 18-19 (D.C. 1993). A protestor lacks standing where it would not be in line for award, even if its protest were upheld. *Unfoldment, Inc.*, CAB No. P-358, (Sept. 17, 1993), 6 P.D. 5399, 5401-02. The record demonstrates that neither Commando nor Executive would be in line for award even if their protests were sustained.

See also American Combustion Industries, Inc., CAB No. P-499, (August 14, 1997).

Accordingly, we dismiss the protest.

CONCLUSION

For the reasons discussed above, we grant the District's motion and dismiss CLC's protest.

SO ORDERED.

DATED: February 17, 2011

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

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

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CAB No. P-0861

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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

DECISION SUPPORT LLC	)	
	)	CAB No. P-0853
Under RFP No. DCTO-2010-R-0028	)	

For the Protester, Decision Support, LLC.: President Mike Sibley, *pro se*. For the District of Columbia Government: Talia S. Cohen, Esq., Assistant Attorney General, Office of the Attorney General.

Opinion by Administrative Judge Warren J. Nash, with Chief Administrative Judge Marc D. Loud, Sr., concurring

OPINION

Filing ID 37689633

On June 17, 2010, Decision Support LLC ("Decision") protested the award made to Hart Inter Civic, Inc. ("Hart"), under the above RFP. The District of Columbia moved to dismiss the protest on July 6, 2010, asserting that Decision lacks standing to bring this protest because the protester is not next in line for award. We agree with the District and hereby dismiss the protest.

BACKGROUND

On January 13, 2010, the District of Columbia, Office of Contracting and Procurement ("OCP"), on behalf of the Board of Elections and Ethics ("BOEE"), issued RFP DCTO-2010-R-0028 ("RFP") in the open market for a contractor to provide Electronic Poll Books. (Agency Report ("AR") Ex. 1, RFP). The poll books printed on paper contain a listing of all voters registered in a specific precinct by the close of registration. (AR Ex. 1). This solicitation would allow the BOEE to keep voter data electronically and would provide BOEE with other benefits that are set forth in paragraph C.2 of the specifications.

Five offerors submitted proposals by the due date of February 17, 2010: Election Systems & Software ("Election Systems"), Hart, Datacard Group ("Datacard"), Robis Elections, Inc. ("Robis"), and Decision, the protester. (AR Ex. 2). On March 23, 2010, the evaluation panel submitted its report to the Contracting Officer. (AR Ex. 2). The five offerors submitted Best and Final Offers, and the evaluation panel submitted its final report to the Contracting Officer on May 7, 2010. The cost price analyst submitted a report to the Contracting Officer on May 10, 2010.

After review, the Contracting Officer ("CO") determined that Hart had the highest overall evaluation score. Decision's proposal was ranked in fourth place. The Contracting Officer notified the offerors of an award to Hart on June 8, 2010. Decision filed its protest on June 17, 2010. OCP issued a Determination and Findings to Proceed with Contract Performance While a Protest is Pending on June 25, 2010. Decision challenged the D&F by letter dated July 2, 2010. The District filed a Motion to Dismiss the Protest on July 6, 2010, for lack of standing, alleging that the protester was not next in line for award. Decision filed its response to the Motion to

Dismiss on July 15, 2010. In its response, Decision argues that several offerors could not meet certain requirements of the Omnibus Election Reform Act of 2009.

DISCUSSION

We exercise jurisdiction over this protest pursuant to D.C. Code § 2-309.03 (a)(1).

The District presented its D&F to proceed on June 25, 2010, asserting that BOEE had an extremely tight schedule to implement the electronic poll books in time for the scheduled September, 2010, primary election. The D&F set forth OCP's urgent and compelling circumstances to proceed with the procurement without waiting for this Board's decision on the protest. Decision's response to the D&F alleges that the contract had been improperly awarded to a vendor that allegedly had never met the requirements of the Omnibus Election Reform Act of 2009. However, Decision's response to the D&F did not provide any specific details of Hart's failure to meet the requirements of the Reform Act. Those more specific allegations appeared, for the first time, in Decision's Response to the District of Columbia Motion to Dismiss, dated July 25, 2010. And, this Board notes that the response to the D&F alleged that Hart could not meet the requirements of the election reform Act.

The Response to the D&F made no mention of the other vendors (Datacard, and Robis) that had higher evaluation scores than Decision. Additionally, the response did nothing to counter the assertions made by the District regarding the need to proceed with performance. Accordingly, we determine that OCP's D&F to Proceed set forth adequate circumstances allowing the District to proceed with contract performance.

The District's Motion to Dismiss asserts that Decision lacks standing to file a protest because it is not next in line for award. The District's argument is based on the relative ranking of the vendors set forth in the District's motion and in exhibit 3 to the Motion to Dismiss, the Business Clearance memorandum. After evaluation of the Technical proposals and the cost proposals, Decision's proposal is the fourth ranked proposal out of the group of five. In order to survive the evaluation process as the highest ranked proposer, Decision would have to move three proposers out of consideration for the award (Hart, Datacard, and Robis). In the protest, Decision argues that Hart should not receive the award. Decision does not mention the existence of any other vendor in the protest. Additionally, Decision's protest reserves the right to amend the protest after the June 17 debriefing and after it receives copies of Hart's proposal in response to a Freedom of Information request. However, Decision did not amend its protest at any later date.

As the District properly determined that Decision's bid was the fourth highest ranked bid, then Decision is not in line for award and therefore lacks standing to raise the other challenges with respect to the award to Hart. See *Configuration, Inc.*, CAB No. P-0819, November 9, 2009, and *C.P.F. Corp.*, CAB No. P-0521, Jan. 12, 1998, 45 D.C. Reg. 8697, 8699 (the Board will not consider protests by bidders who are not next in line for award if the protest is sustained). Our review of the record reveals that the District properly evaluated the proposals, that Decision's bid was properly evaluated as the fourth highest ranked bid, and that the District set forth adequate grounds to proceed with performance in spite of the protest.

CONCLUSION

For the reasons discussed above, we deny Decision's challenge of the contracting officer's determination, and we dismiss its challenge to the award for lack of standing.

SO ORDERED.

DATED: May 19, 2011

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

CONCUR:

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

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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

MICON CONSTRUCTIONS	)	
	)	CAB No. P-0857
Solicitation No: DCAM-2010-B-0133	)	

For the Protester, Micon Constructions, Inc.: Operations Director Steven D. Gray, *pro se*. For the District of Columbia Government: Alton Woods, Esq., Assistant Attorney General, Office of the Attorney General.

Opinion by Administrative Judge Warren J. Nash, with Chief Administrative Judge Marc D. Loud, Sr., concurring.

OPINION

Filing ID 37689892

On June 30, 2010, Micon Constructions ("Micon") protested a contracting officer's determination that Micon's bid was nonresponsive because the bid did not include information regarding Micon's experience in meeting the special standards of responsibility set forth in Section C.5 of the solicitation. Micon contends that its failure to provide the information could have been corrected as a minor informality. The contracting officer subsequently rescinded the June 22, 2010, letter, and stated that as a result of bid reevaluation, Micon was nonetheless determined to be nonresponsible in accordance with 27 DCMR §§ 2200.1-2200.5, based on lack of appropriate experience, and nonresponsive, based on failure to provide an adequate subcontracting plan. Micon did not respond to the District's motion to dismiss. As the District rescinded its nonresponsiveness determination of June 22, 2010, that effectively moots the basis of Micon's protest. Moreover, Micon has not responded to the subsequent nonresponsibility determination issued by the contracting officer. Because the latter nonresponsibility determination violates neither the law nor the terms of the solicitation on the record before us, we sustain the contracting officer's determination and deny the protest.

BACKGROUND

On May 24, 2010, the District of Columbia's Department of Real Estate Services ("DRES") Contracting and Procurement Division ("CPD") issued Solicitation No. DCAM-2010-B-0113 ("IFB") in the open market, with a SBE subcontracting set-aside, for the construction of the Girard Street Family Shelter located at 1413 Girard Street, NW, in Washington DC. (Agency Report ("AR"); AR Ex.1). There were three amendments issued to the IFB. (AR Ex. 1).

On June 14, 2010, bids were publicly opened by CPD with six bidders responding to the IFB. (AR Ex. 4). Molina Construction ("Molina") submitted the lowest bid of $217,500.00 in section B.5 of the IFB, but in the Price Breakdown Form in section B.6, the lump sum price of Molina's bid was $1,032,750.00. (AR Ex. 4). The Contracting Officer could not determine Molina's actual bid amount, and she rejected Molina's bid as not responsive to the IFB. Molina's bid also failed to provide the information requested in section C.5 of the IFB, and the Contracting Officer ("CO") determined that the bid was not responsive. (AR Ex. 4).

The second low bid was submitted by Micon with a bid price of $1,251,606.97. (AR Ex. 2). However, the CO initially rejected Micon's bid as nonresponsive for failing to provide all of the information required in section C.5 of the IFB. (AR Ex. 4). On June 23, 2010, the CO informed Micon by email and by letter that its bid had been rejected as nonresponsive. (AR Ex. 3).

On June 30, 2010, the CAB docketed this protest in which Micon challenged the CO's nonresponsiveness determination. On July 1, 2010, the CO, in a letter to Micon, rescinded the earlier determination that Micon's bid was nonresponsive. The CO determined that Micon's bid did not include any information regarding a minimum of two projects that were similar in size and scope to the Girard Street family shelter. The CO rejected the bid and found it nonresponsible. (AR Ex. 5). The CO also concluded that Micon's bid was not responsive to the solicitation because the bid failed to provide a completed subcontracting plan which included all of the required information. (AR Ex. 5). Micon's Subcontracting Plan submitted with its bid failed to include the contract value, the amount of the contract (excluding the cost of materials, goods, supplies and equipment), the amount of all subcontracts, LSDBE totals, and the percentage of set-asides. (AR Ex. 2). Micon did not respond to the CO's July 1, 2010, letter that rescinded the initial nonresponsive determination and found Micon to be nonresponsible.

DISCUSSION

We exercise jurisdiction over this protest pursuant to D.C. Code § 2-309.03 (a)(1).

Because the contracting officer rescinded his June 22, 2010 determination that Micon was nonresponsive for failing to provide all of the information required in section C.5 of the IFB, that portion of the protest is moot. The District initially determined that Micon's bid was not responsive to the IFB because the bid did not include any information in response to Section C.5 of the solicitation. (AR Ex. 3). Micon filed this protest on June 30, 2010. Subsequently, the CO reconsidered the determination of nonresponsiveness, and determined that Micon's bid did not provide the information regarding prior projects required in Section C.5 of the specifications, Special Standards of Responsibility. (AR Ex. 5). The District rejected the bid as nonresponsible. In the District's procurement regulations regarding responsibility, 27 DCMR §2200.5 states that "to be found responsible, a prospective contractor shall meet all of the following requirements:

> (a) Financial resources adequate to perform the contract, or the ability to obtain them;
> (b) Ability to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;
> (c) A satisfactory performance record;
> (d) A satisfactory record of integrity and business ethics;
> (e) The necessary organization, experience, accounting and operational controls, and
> technical skills, or the ability to obtain them;
> (f) Compliance with the applicable District licensing and tax laws and regulations;

(g) The necessary production, construction, and technical equipment and facilities or the ability to obtain them; and
(h) Other qualifications and eligibility criteria necessary to receive the award under applicable laws and regulations.

The contractor has the burden of establishing its responsibility and "in the absence of information clearly indicating that a prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility." 27 DCMR §2200.3; *Goel Services, Inc*., CAB No. P-0804, Feb. 2, 2010. Here, the contracting officer determined that Micon did not provide evidence of experience required by the solicitation, and the contracting officer rejected the bid.

Additionally, the CO determined that Micon's bid was not responsive because it did not contain requested information regarding Micon's subcontracting plan. Micon did not respond to the District's motion to dismiss the protest as moot, filed July 22, 2010. Micon also failed to rebut the CO's determination of July 1, 2010, rescinding the original action, but finding Micon to be both nonresponsive and nonresponsible. Thus, we see no reason to overturn the contracting officer's determination of nonresponsiveness and nonresponsibility.

CONCLUSION

Micon has not rebutted the contracting officer's reasons for determining Micon's bid to be nonresponsive and nonresponsible. Accordingly, we deny the protest.

SO ORDERED.

DATED: May 19, 2011

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

CONCURRING:

/s/ Marc D. Loud, Sr.
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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

C & E SERVICES, INC.	)	
	)	
	)	CAB No. P-0874
	)	
Under Solicitation No. RM-0ll-IFB-027-BYO-DJW	)	

OPINION

Filing ID 37692230

For the Protester: Warner Sessions, Esq. For the Government: Robert Schildkraut, Esq., Assistant Attorney General, D.C.

Opinion by Administrative Judge Warren J. Nash. Concurring Opinion filed by Chief Administrative Judge Marc D. Loud, Sr.

OPINION

On January 14, 2011, C&E Services, Inc. ("C&E") protested the Department of Mental Health ("DMH") determination that C&E was not a responsible bidder for the above solicitation. The protester alleged that it was responsible, and that the information held by the District's Office of Tax and Revenue ("OTR") regarding its tax filings was incorrect. The District responded in its Motion to Dismiss that the Contracting Officer ("CO") had acted properly, and that protester would not be next in line for award. Further, the District asserts that the protester did not suffer any competitive harm due to a lack of public bid opening or not reviewing other bids at the debriefing. We conclude that the Contracting Officer acted properly, and that we have no reason to void the contract awarded to the successful bidder, CRW Mechanical, Inc. ("CRW").

BACKGROUND

On October 19, 2010, DMH issued IFB No. RM-0ll-IFB-027-BYO-DJW (solicitation) seeking a contractor to supply and install Valve and Filter Corporation's Duplex Vertical Type Water Filter inside the mechanical room of the new St. Elizabeth's Hospital at 1100 Alabama Ave. SE, in Washington, DC. The prospective contractor's bid price would include all labor, equipment, tools, material, installation, and disposal charges resulting in a fixed price contract. The contractor would have 365 days to perform the contract. Bids were due by November 10, 2010, at noon. DMH received three bids on the amended bid opening date of November 17, 2010 (a fourth bid came in after the deadline). CMH awarded the contract to CRW on January 4, 2011. On January 6, 2011, C&E received a letter from Mr. Samuel Feinberg, CO, informing C&E that C&E had not been chosen for award. C&E requested a debriefing, which occurred on January 12, 2011.

C&E asserts that at the debriefing, Mr. Feinberg presented to C&E a copy of a tax verification response that indicated that C&E was not in compliance with DC tax law requirements for bidders. C&E also asserts that it requested from Mr. Steinberg disclosure of public information from the bid opening, including the successful bidder and the contract price. C&E asserts that Mr. Feinberg refused to disclose that information, and the IFB debriefing meeting subsequently closed. After the debriefing, C&E contacted the District's OTR and discovered that the OTR had changed C&E's filing requirements, but had not updated its database to show that C&E was in compliance with the new filing protocols. C&E filed this protest on January 14, 2011. After several telephone conferences with the parties, the Board held an evidentiary hearing on March 29 and 31, 2011, to determine what remedies, if any, were available to C&E as a result of the events set forth above.

DISCUSSION

We exercise jurisdiction over this protest pursuant to D.C. Code § 2-309.03 (a)(1).

C&E sets forth two protest grounds. C&E alleges that the DMH CO erroneously rejected C&E's bid in response to the solicitation, and that the bid information, including the bidder's prices, should have been released to the public at a public bid opening. The Board's opinion will respond to those allegations in that order.

According to the District's Combined Motion to Dismiss and Agency Report, DMH made a request to OTR on November 29, 2010, to determine the tax status of the three timely bidders. (Exh. 10 and 11, District's Motion to Dismiss). OTR replied on December 1, 2010, stating that C&E, as well as American Combustion Industries (ACI), were not in compliance with the tax filing and payment requirements of the District of Columbia. (Exh. 7 and 11, District's Motion to Dismiss). On December 16, 2010, the Contracting Officer prepared a Determination and Findings of Nonresponsibility for both C&E and ACI, stating that they were not responsible bidders because neither bidder had complied with their tax obligations to the District. (Exh 6 and 11, District's Motion to Dismiss). On January 3, 2011, the CO sent letters to the nonresponsible bidders, notifying them that they were not eligible for award. (Exh 8, District's Motion to Dismiss). The CO awarded the contract to the remaining bidder on January 4, 2011. (Exh. 5 and 11, District's Motion to Dismiss). C&E requested a debriefing as soon as it received the non-award letter from the CO. The debriefing occurred on January 12, 2011, and C&E filed this protest on January 14, 2011. The CO did not inform C&E of the reason for the nonresponsibility finding until the debriefing. (Exh. C, Protest).

According to information provided by C&E, C&E contacted OTR immediately after the debriefing to determine C&E's true tax status. (Exh. D-1, Protest). C&E discovered that OTR had failed to update its tax payment records after OTR changed C&E's tax payment requirements (Exh. 9, District's Motion to Dismiss). C&E provided information to OTR on January 12, 2011, that allowed OTR to update its records. (Exh. 10, District's Motion to Dismiss). OTR provided to C&E a statement dated January 12, 2011, stating that C&E was in compliance with the tax filing and payment requirements of the District. (Exh. 10, District's Motion to Dismiss).

On January 26, 2011, the District filed a Determination and Findings to Proceed with Contract Performance While a Protest is Pending with the Board. According to the CO, this particular project will alleviate poor water quality problems at the hospital which affect patient care and new equipment which has been installed at the facility. Therefore, according to the CO, the hospital has a need to continue with this project. The protester did not file an objection to the determination and findings to proceed.

C&E also complained of the CO's failure to disclose bid information of other bidders after bid opening. C&E alleges that the CO failed to disclose the names of the bidders and the prices of each bid at the debriefing, and that the CO did not allow C&E to examine the bids. C&E further alleges that it requested this information from the CO on two separate occasions, in the request for a debriefing and at the time of the debriefing. The District responded that the CO had failed to offer that information, but that the CO had an explanation for his failure which he offered at the hearing of March 29, 2011.

After several telephone conferences with the parties that included discussions of possible remedies, the Board held an evidentiary hearing on March 29 and March 31, 2011, to hear testimony from the parties regarding those remedies. Board Rule 314.4 (based on DC Code 2-309.08(f)(2) allows the Board to award to a protester reasonable bid or proposal preparation costs and the costs of pursuing the protest when the Board finds that the District government actions were arbitrary and capricious. Accordingly, the evidentiary hearing was limited to the issues set forth in the Order Granting Motion In Limine dated March 12, 2011, that is, 1) the current status of the delivery, furnishing, fabrication, and installation of the water filter at the hospital, and 2) the possible harm the District may suffer if the Board terminates the award to CRW and awards the contract to C&E. The District determined that it would not present at the hearing any additional evidence from OTR regarding the tax certifications.

At the hearing, the CO described the events leading up to the issuance of the solicitation. According to the CO, DMH thought that the price for the purchase and installation of the filter would be less than $100,000, and that DMH could purchase and install the filter by using an invoice, rather than a solicitation (Tr. 201). However, when the program managers in charge of construction of the new hospital could not provide a reliable estimate to the CO for the purchase and installation of the filter, the CO decided to use a solicitation as a vehicle for the work (Tr. 201-202). In the effort leading to the preparation of the solicitation, the CO failed to ensure that the solicitation contained the necessary provisions setting forth open bid requirements (Tr. 201-202). The CO characterized the failure as "an oversight of not including in the documentation the requirement for the bidding and the public bid opening." (Tr. 201). This oversight led to the CO failing to perform a public bid opening. To his credit, the CO also stated that he had never heard of C&E before this protest, and that he had no positive or negative feelings toward the company. (Tr. 202-203). He also stated that he had never heard of the awardee of this contract, CRW, before this procurement. (Tr. 203). The CO stated that the original estimate for the purchase and installation of the filter system was $68,000, but that he was not comfortable with that estimate (Tr. 204-205). After evaluation of the CO's testimony regarding the public disclosure of the bids and the failure to include in the IFB the requirements for disclosure of those bids at the bid opening, the Board regards the CO's testimony as truthful. We are dismayed that the CO made the mistake, especially since this mistake was the first mistake of several included in this procurement. However, without further evidence of any intent by the CO

to favor one contractor over another, and without any evidence that the CO had any experience with either contractor before this procurement, we cannot say that the CO's actions regarding the failure to publicly disclose the bids are an indication of bad faith. That analysis leads us to an evaluation of the finding of nonresponsibility, to determine whether there is any indicia of bad faith in that finding.

The parties agree that OTR's database contained incorrect information regarding C&E's tax status, and that C&E made efforts to correct the information as soon as possible after the debriefing. (Ex. 10, Reed Affidavit, paragraph 6). The information in the record shows that C&E had paid its taxes, and that OTR provided a statement dated January 12, 2011, that corrected the information in the database. At this point, we are required to analyze the CO's actions after the debriefing. Mr. C. Biggs testified that after he discovered the tax issue at the debriefing, one of his employees contacted OTR and cleared up the tax issue the same day (Tr. 37-39). That employee sent the information to the CO. (Tr. 37). Inexplicably, the CO proceeded with his prior course of action. We don't know if the CO had any reservations about the award that he had just made to CRW, but we do know that the CO did not testify about any remedial actions taken after that day. The CO also testified that he failed to notify the DSLBD that he had prepared a D&F for nonresponsibility regarding a local small business. (At this point, the CO had an opportunity to step back and re-evaluate his actions.) C&E filed its protest on January 14, 2011, thereby making the CO aware that C&E was not satisfied with the CO's award decision. The CO's first response to the protest was the preparation of a Determination and Findings to proceed with contract performance, which he signed on January 21, 2011, a full week after the filing of the protest. We have no indication in the record of any re-evaluation of the award that the CO may have performed after the filing of the protest, but the record does indicate that the CO should have received a fax copy of the OTR tax payment letter regarding C&E that had been prepared on January 12, 2011.

The problem for the Board on this issue is that we have never ordered a CO to look askance at a certification from OTR, and we have always assumed that OTR's certifications are correct. Yet, this record shows that OTR was not in command of its own data, and we are faced with the dilemma of deciding a course of action. The District concedes that the CO did not follow all of the rules that he should have followed, i.e., he failed to perform a public bid opening and he failed to notify DSLBD regarding C&E's nonresponsibility. The District argues that the CO followed regulations regarding OTR's certification of tax payments, and that the CO had no choice except to find C&E nonresponsible. However, in light of the action that OTR performed on January 12, 2011, that is, correcting OTR's records regarding C&E's tax payments, we are still faced with the dilemma of deciding a course of action.

To compound our analysis, we have to consider the effect of C&E's failure to file an objection to the D&F to proceed. An objection to the D&F would have allowed the Board to review the facts at some time before the filing date of the District's Motion to Dismiss, February 10, 2011. Our rules do not require a protester to object to a D&F to proceed, but the failure to make that objection does affect the time of our response.

C&E argues that the Board should follow the precedent set forth in *Prince Construction, et al.*, CAB Nos. P-530 et al, July 21, 1998, and determine that this contract is void ab initio due to the irregularities that occurred in the procurement process. C&E argues that in a procurement

that does not involve a contract tainted by fraud or wrongdoing, the courts hold that contracts are void ab initio where the illegality is plain and material.

The general federal rule is that a government contract tainted by fraud or wrongdoing is void ab initio. See *Godley v. United States*, 5 F.3d 1473, 1475-76 (Fed Cir. 1993). If the contract is not tainted by fraud or wrongdoing, the courts hold that contracts are void ab initio where the illegality is plain and material. In these circumstances, the government is not estopped to deny the limitations on the contracting officer's authority, even though the contractor may have relied on the contracting officer's apparent authority to his detriment, for the contractor is charged with notice of all statutory and regulatory limitations. (See *Prince Construction, Inc.*, CAB No. P-530 et al., page 21). At this point, our analysis differs from the analysis set forth in Prince for the reasons set forth below.

DC Code § 2-302.05(d)(1), formerly DC Code 1-1182.5(d), requires the District to void any contract that has been entered in violation of the District's rules and regulations, unless the parties substantially comply with the procurement rules. The statute provides the following:

> 2-302.05(d)(1) Except as otherwise provided in this chapter, a contract which is entered into in violation of this chapter or the rules and regulations issued pursuant to this chapter is void, unless it is determined in a proceeding pursuant to this chapter or subsequent judicial review that good faith has been shown by all parties, and there has been substantial compliance with the provisions of the chapter and the rules and regulations.
>
> (2) If a contract is void, a contractor who has entered into the contract in good faith, without directly contributing to a violation and without knowledge of any violation of the chapter or rules and regulations prior to the awarding of the contract, shall be compensated for costs actually incurred.

To void CRW's contract, C&E must show that the District or the CO acted in bad faith. In this procurement, C&E would have to show that OTR's mistake regarding C&E's tax payment is a mistake that indicates bad faith. C&E alternatively would have to show that the CO's actions regarding the non-disclosure of bid information, or the failure of the CO to inform DSLBD that C&E had been found nonresponsible, are actions in bad faith that affect the procurement. C&E would also have to show that the actions set forth above, taken individually or cumulatively, show that there has been no substantial compliance with the District's procurement rules and regulations.

The actions protested by C&E were actions taken by the District. There is no showing that CRW did anything to induce the District to improperly award the contract to CRW. There is no evidence showing that CRW acted in bad faith during the procurement process. The evidence shows a difference in bid price of $2,000 on a $100,000 contract. (Ex. 4, District's Motion to Dismiss). The witnesses from the hospital testified about the need for the water filter and the ways that poor water quality affects patient care and hospital equipment.

Any discussion of bad faith by government officials must begin with an analysis of the conduct that constitutes the bad faith. *Kalvar Corporation, Inc. v. United States*, 211 Ct.Cl. 192, 543 F.2d 1298, (1976), involved a claim contending that the Government had shown bad faith or clear abuse of discretion in determining that films requested by one agency were beyond the scope of the primary source contract and that plaintiff had incurred costs that were recoverable under the termination for convenience clause of contract. In analyzing the proof needed to prove bad faith, the court stated:

> Any analysis of a question of Governmental bad faith must begin with the presumption that public officials act 'conscientiously in the discharge of their duties. Librach v. United States, 147 Ct.Cl. 605, 612 (1959). The court has always been 'loath to find to the contrary,' and it requires 'well-nigh irrefragable proof' to induce the court to abandon the presumption of good faith dealing. Knotts v. United States, 121 F.Supp. 630, 631, 128 Ct.Cl. 489, 492 (1954).
>
> In the cases where the court has considered allegations of bad faith, the necessary 'irrefragable proof' has been equated with evidence of some specific intent to injure the plaintiff. Thus, in Gadsden v. United States, 78 F.Supp. 126, 127, 111 Ct.Cl. 487, 489-90 (1948), the court compared bad faith to actions which are 'motivated alone by malice.' In Knotts, supra, at 128 Ct.Cl. 500, 121 F.Supp. 636, the court found bad faith in a civilian pay suit only in view of a proven 'conspiracy * * * to get rid of plaintiff.' Similarly, the court in Struck Constr. Co. v. United States, 96 Ct.Cl. 186, 222 (1942) found bad faith when confronted by a course of Governmental conduct which was 'designedly oppressive.' But in Librach, supra, at 147 Ct.Cl. 614, the court found no bad faith because the officials involved were not 'actuated by animus toward the plaintiff.'

Bad faith cannot consist solely of mistakes, but it must also include some specific intent to injure the plaintiff. Without the intent to injure C&E, we find that the government's admitted mistakes in this procurement do not rise to the level that would require the Board to void the contract to CRW under D.C. Code § 2-302.059(d)(1) and applicable case law.

After reviewing the evidence presented by the District, this Board believes that termination of CRW's contract would not be in the best interests of the District. According to the District's witness, Mr. Robert Poe, the new contractor would have to duplicate the engineering work that CRW has already completed. (Tr. 101-102). There is no evidence to show how much time the new contractor would need to complete the preliminary drawings. The factory has already started the process of fabricating the filter. And, the District set forth in the D&F to proceed with performance the reasons why CMH wanted to proceed with the project. We also note that the protest filed January 14, 2011, did not include as grounds the failure of the CO to notify DSLBD that C&E had been determined to be nonresponsible. The failure to notify DSLBD does not rise to the level necessary to require the remedy of termination of the contract. The Board also distinguishes Prince, infra, from the instant case in that Prince concerned company principals acting badly to commit fraud. Here, the contractors' principals did nothing wrong.

The CO at the hearing explained his failure to conduct a public bid opening. That failure is a violation of the regulations, but C&E fails to show that there was a specific intent to injure the protestor or how the failure prejudiced C&E. On the other hand, C&E was harmed by OTR's failure to keep adequate records. This failure caused the CO to determine that C&E had not paid its taxes, or had some unspecified tax issue. Without a showing of OTR intent to harm C&E, however, this failure does not show bad faith of the District against C&E. We have never required a CO to look behind the OTR certification regarding taxes to make his own determination that the certification is correct. Indeed, under our current system, there is no method that the CO can use to accomplish that task. It is clear to us that OTR's mistake is one of the main reasons for this protest. Hopefully, the problem has been solved and this particular mistake will not happen again. The tax mistake, while regrettable, does not show specific intent to harm C&E, and therefore does not show bad faith against C&E. Mr. Feinberg's failure to notify DSLBD of the C&E nonresponsibility finding also does not show bad faith against C&E. Finally, we cannot speculate about any possible outcomes that may have occurred if Mr. Feinberg would have picked up the telephone and asked OTR if they were sure about C&E's tax status after DMH received the second certification. To be sure, Mr. Feinberg had already made the award, but we cannot require contracting officers to verify tax certifications that have been provided by OTR. Accordingly, we have concluded that we will not order DMH to terminate the CRW contract.

DC Code § 2-309.08(f)(2) allows the Board to award reasonable bid preparation costs and the costs of pursuing the protest if the District acted in an arbitrary or capricious manner. That section 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.

After reviewing the evidence presented, we cannot say that OTR's failure to keep adequate records (which kept C&E from being considered for award) was arbitrary and capricious. OTR's actions were regrettable, and a mistake, but we cannot say that they were arbitrary and capricious. See *Williams, Adley & Company*, P-0666, P-0667, April 14, 2003. Accordingly, we cannot order DMH to award to C&E any bid preparation costs and the costs of pursuing this protest.

CONCLUSION

We conclude that the Contracting Officer acted properly, and that the Contracting Officer's actions were not arbitrary and capricious. Accordingly, we dismiss the protest.

SO ORDERED.

DATED: May 19, 2011

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

CONCURRING OPINION: I concur with my colleague that the appropriate test to void a District contract is codified at D.C. Code § 2-302.05(d)(1). As noted above, the voiding of a District contract requires a showing of bad faith as evidenced by a specific intent to injure the plaintiff or protester. In this case, there is no such evidence of bad faith by the Contracting Officer, the Office of Tax and Revenue (OTR), or the District government.

The contracting officer contacted OTR on November 29, 2010, to ascertain the tax status of each of the three timely bidders. On December 1, 2010, the OTR notified the contracting officer that two of the three bidders were non compliant with tax requirements, including the protester C&E. A nonresponsibility determination was completed as to C&E on December 16, 2010, and the contract was awarded to CRW on January 4, 2011.

It was reasonable for the contracting officer to find C&E nonresponsible on December 16, 2010, based on the tax status information forwarded by OTR two weeks earlier. Similarly, it was reasonable for the water filtration contract to be awarded to CRW on January 4, 2011, given the contracting officer's knowledge at the time of award.

Although the contracting officer learned of the OTR error one week after the award, there is no evidence in the record to conclude that his decision not to rescind C&E's nonresponsibility determination was based on bad faith (actuated by a "specific intent to injure" C&E). In fact, the evidence demonstrates that the contracting officer's decision to continue the forward momentum of the procurement with CRW was done to promptly stabilize the threat to St. Elizabeth's water quality presented by unacceptable levels of sediment and foreign materials in the water. (District's Motion To Proceed With Performance, January 26, 2011.)

The above good faith test and its application to these facts notwithstanding, there is something unsettling about the idea that the putative lowest, responsive and responsible bidder could potentially lose an award because of a contracting officer's good faith reliance on a sister agency's erroneous record of tax non-compliance. This possibility suggests the clear urgency of the District taking immediate action to review and (where appropriate) promptly update the records upon which procurement officials rely in making responsibility (and other) evaluation determinations.

In cases such as this, where a favorable responsibility determination clearly hinges on the accuracy of tax (or other) records maintained by a District agency, the bad faith standard will continue to serve as the test for contract termination. Nonetheless, the Board should scrutinize the District's conduct very carefully in such cases, providing the protester adequate opportunity to present its evidence and directly challenge the District's in a proper forum (as happened instantly with the 2 day hearing). As noted, however, the record herein fails to support a finding of bad faith on the part of the District.

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

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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

GOEL SERVICES, INC.	)	
	)	CAB No. P-0862
	)	
Solicitation No: DCEB-DMPED-10-I-0012	)	

For the Protester: Paul V. Waters. Esq., Erin A. Behbehani, Esq. For the District of Columbia Government: Talia Sassoon Cohen, Esq., Assistant Attorney General.

Opinion by Administrative Judge Warren J. Nash, with Chief Administrative Judge Marc D. Loud, Sr., concurring.

OPINION

Filing ID 38185928

Goel Services, Inc. ("Goel") protests the award of a contract for the demolition of the D.C. General Hospital's former pediatric unit (hereafter "Hill East Building 10") to Keystone Plus Construction. Goel challenges the award on the grounds that the contracting officer's nonresponsibility determination erred in concluding that Goel could not meet the detailed schedule of performance required by the solicitation, submitted an unrealistically low bid price, and failed to submit evidence of the categorized project cost breakdown. Goel also contends that the Contracting Officer's award to Keystone was a sham, noting that the Determination and Finding ("D&F") to award the contract to Keystone was completed before obtaining responsibility information from the protester (the apparent low bidder). After carefully reviewing the entire record herein, we conclude that the contracting officer did not violate law, regulation, or the terms of the solicitation in determining Goel to be nonresponsible. Accordingly, we deny the protest.

BACKGROUND

On June 23, 2010, the Office of the Deputy Mayor for Planning and Economic Development ("DMPED") issued IFB No. DCEB-DMPED-10-I-0012 ("IFB") in the open market. (Agency Report ("AR"); AR Ex. 1 and 7). The IFB was for a contractor to provide all labor, materials and equipment to fully execute the requirements to demolish the existing building, including removing all site furnishings and appurtenances and cutting or abandoning site utilities at Hill East Building 10, located at 1900 Massachusetts Avenue, SE, Washington D.C., in accordance with the scope of work. (AR Ex. 1).

The bid opening date was June 30, 2010. (AR Ex. 1). By 2:00 p.m. on June 30, 2010, the following three bidders submitted lump sum bids:

Bidder	Total Price	Total Evaluated Bid
Horton & Barber	$3,250,000.00	$2,860,000.00
Goel	$3,985,000.00	$3,985,000.00
Keystone Plus Construction	$4,398,000.00	$4,090,140.00

(AR Ex. 5)

The Contracting Officer determined that Horton & Barber was the apparent low bidder. The Contracting Officer also determined that Horton & Barber's bid was nonresponsive since Horton & Barber failed to submit a bid bond with their bid. (AR Ex. 7).

Further, by a Determination and Findings for Contractor Nonresponsibility ("D&F for Nonresponsibility") dated July 14, 2010, the Contracting Officer determined Goel nonresponsible. (AR Ex. 6). By a Determination and Findings for Award to Other Than Low Bidder dated June 30, 2010, the District recommended award to Keystone Plus Construction ("Keystone") as it met all the requirements of the solicitation. (AR Ex. 6).

The District awarded Contract No. DCEB-DMPED-10-C-0012 ("contract") dated August 11, 2010, to Keystone. On August 20, 2010, Goel filed the instant protest challenging the District's determination of nonresponsibility. On August 24, 2010, the District issued to Keystone a Notice to Cease Performance. By a Determination and Findings to Proceed with Contract Performance after Receipt of a Protest dated August 24, 2010, OCP determined that it was in the best interest of the District to proceed with contract performance while the protest is pending. On August 25, 2010, pursuant to the Determination and Findings to Proceed with Contract Performance after Receipt of a Protest, the District issued to Keystone a Notice to Resume Performance. (AR Ex. 11). On August 31, 2010, Goel filed a Motion Challenging the District's Determination and Findings to Proceed with Contract Performance after Receipt of a Protest ("Motion to Challenge"). On September 2, 2010, the District filed its Response to the Protester's Motion to Challenge. On September 24, 2010, the Board sustained the Chief Procurement Officer's written determination to proceed with contract performance.

Goel challenges the Contracting Officer's determination of nonresponsibility regarding Goel's bid. The District responds that the District properly determined Goel nonresponsible.

DISCUSSION

Goel alleged in its protest that the Contracting Officer erred when he found Goel nonresponsible. Goel expanded its argument when it filed the Challenge to the D&F to proceed with contract performance. In the challenge to the D&F, Goel sets forth its version of a telephone conversation of June 30, 2010, between Mr. P.J. Goel and the Contracting Officer regarding Goel's ability to perform the contract. (Ex. 2, Challenge to D&F, Declaration of Piyush J. Goel). Mr. Goel further asserts that the Contracting Officer did not contact the protester on any other occasion to discuss the bid, and that the Contracting Officer did not request any other information or documents from Goel.

The Contracting Officer prepared a D&F for Contractor Nonresponsibility on July 14, 2010. (AR Ex. 6). In that D&F, the Contracting Officer set forth his reasons for finding Goel nonresponsible.

The Procurement Regulations set forth the District's rules regarding responsibility. 27 DCMR § 2200.4 states that "[t]o be determined responsible, a prospective contractor shall meet all of the following requirements:

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

Moreover, 27 DCMR § 2200.5 provides as follows:

> If the contracting officer determines that the price bid or offered by a prospective contractor is so low as to appear unreasonable or unrealistic, the contracting officer may determine the prospective contractor to be nonresponsible.

As indicated in the D & F for Nonresponsibility, on July 2, 2010, the Contracting Officer contacted Goel and spoke with Goel about whether Goel could meet the performance schedule. According to the Contracting Officer, Goel indicated that it would perform the project within the time stated in the IFB but failed to provide any further details. Additionally, the Contracting Officer determined that Goel's bid was unrealistically low. Goel failed to provide the District with evidence of the project cost breakdown, as required by Section B.7 (E) of the IFB. When asked by the Contracting Officer to explain their costs to knock down a building, Goel responded "that they knock down buildings all the time." (AR Ex. 6). Goel submitted a price for removal

of contaminated soil at $25.00 per ton. The Contracting Officer determined that a realistic estimate is $50.00 to $95.00 per ton.

In addition, the Contracting Officer determined that Goel submitted unrealistically low amounts for cutting and patching existing fixtures, and for the demolition of the building. Goel submitted a price of $10,000 for cutting and patching fixtures whereas the Contracting Officer determined that a realistic estimate is $75,000 to $100,000. Goel submitted a price of $600,000 for building demolition whereas the Contracting Officer determined that a realistic price for that work would be $900,000.

This Board has consistently held "that the determination of a prospective contractor's responsibility is the duty of the contracting officer and that that official is vested with wide discretion and business judgment." *Protest of: Kidd International Home Care Services, Inc., No. P-547, Sept. 15, 1998, 45 D.C. Reg. 8835; Protest of: Aceco, LLC., CAB No. P-486, July 23, 1997, 44 D.C. Reg. 6852; Protest of: Central Armature/Fort Myer, CAB No. P-478, June 6, 1997, 44 D.C. Reg. 6823; Protest of: Ideal Electrical Supply Corporation, CAB No. P-372, Aug. 13, 1993, 41 D.C. Reg. 3603. See* 27 DCMR §§ 2200, 2204. Therefore, in reviewing a determination concerning general standards of responsibility, we will not overturn a finding of responsibility or nonresponsibility unless the protestor shows bad faith on the part of the agency or that the determination lacks any reasonable basis. *Protest of: Ideal Electrical Supply Corporation*, supra. *See also Protest of: Alexandria Scale t/a Bay Scale, Inc.*, CAB No. P-361, 1993 DCBCA Lexis 277, (March 25, 1993).

In the *Protest of: Group Insurance Administration, Inc.*, CAB No. P-309-B, Sept. 2, 1992 40 D.C. Reg. 4485 (aff'd, No. 92-12406 Super. Ct. Apr. 25, 1994) this Board expressed its standard of review as follows:

> This Board will not reverse an affirmative determination of responsibility, which is largely a business judgment, unless the protestor shows possible fraud or bad faith on the part of procurement officials, or that the solicitation contains definitive responsibility criteria which have not been met. It is well-established that procurement officials are presumed to act in good faith; and in order for this Board to conclude otherwise, the record must show that the procuring officials had a specific, malicious intent to harm the protestor.

This Board will not reverse an affirmative determination of responsibility or non-responsibility unless there is evidence of bad faith on the part of the District. In this regard, the protestor provides no evidence of bad faith. In papers filed by the protester after its initial response to the agency report, the protester alleged bad faith on the part of the District regarding the Contracting Officer's determination of nonresponsibility. It appears that the protester forwarded the allegations to the Inspector General in August of 2010. However, the protester provided no further information regarding the alleged bad faith of any District officials.

Any discussion of bad faith by government officials must begin with an analysis of the conduct that constitutes the bad faith. *Kalvar Corporation, Inc. v. United States*, 211 Ct.Cl. 192,

543 F.2d 1298 (1976), involved a claim contending that the Government had shown bad faith or clear abuse of discretion in determining that films requested by one agency were beyond the scope of the primary source contract and that plaintiff had incurred costs that were recoverable under the termination for convenience clause of contract. In analyzing the proof needed to prove bad faith, the court stated:

> Any analysis of a question of Governmental bad faith must begin with the presumption that public officials act conscientiously in the discharge of their duties". *Librach v. United States, 147 Ct.Cl. 605, 612 (1959)*. The court has always been 'loath to find to the contrary,' and it requires 'well-nigh irrefragable proof' to induce the court to abandon the presumption of good faith dealing. *Knotts v. United States, 121 F.Supp. 630, 631, 128 Ct.Cl. 489, 492 (1954)*.
>
> In the cases where the court has considered allegations of bad faith, the necessary 'irrefragable proof' has been equated with evidence of some specific intent to injure the plaintiff. Thus, in *Gadsden v. United States, 78 F.Supp. 126, 127; 111 Ct.Cl. 487, 489-90 (1948)*, the court compared bad faith to actions which are 'motivated alone by malice.' In *Knotts, supra*, at 128 Ct.Cl. 500, 121 F.Supp. 636, the court found bad faith in a civilian pay suit only in view of a proven 'conspiracy * * * to get rid of plaintiff.' Similarly, the court in *Struck Constr. Co. v. United States, 96 Ct.Cl. 186, 222 (1942)* found bad faith when confronted by a course of Governmental conduct which was 'designedly oppressive.' But in *Librach, supra, at 147 Ct.Cl. 614*, the court found no bad faith because the officials involved were not 'actuated by animus toward the plaintiff.'

Bad faith cannot consist solely of mistakes, but it must also include some specific intent to injure the plaintiff. After reviewing the record in this procurement, we have determined that the Contracting Officer acted appropriately in finding Goel nonresponsible. Goel failed to detail how it would meet the project's performance schedule, and submitted unrealistically low bids for removal of contaminated soil, cutting and patching existing fixtures, and building demolition. Additionally, we see no evidence of any bad faith committed by any District official toward the protester.

CONCLUSION

For the reasons discussed above, we dismiss Goel's protest to the award of the contract.

SO ORDERED.

DATED: June 16, 2011

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

CONCURRING:

Goel Services Inc.
CAB No. P-0862

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

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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

S3 Integration L.L.C.	)	
	)	CAB No. P-0868
	)	
Solicitation No.: DCAM-2010-B-0166	)	

For the Protester: Michael Simmons, Vice President, pro se. For the District of Columbia Government: Jon N. Kulish, Esq., Assistant Attorney General.

Opinion by Administrative Judge Warren J. Nash, with Chief Administrative Judge Marc D. Loud, Sr., concurring.

OPINION

Filing ID 38422837

S3 Integration L.L.C ("S3 Integration" or "S3") protests the award of a contract for electronic security systems to Orion Systems Group LLC ("Orion"). S3 Integration challenges the award on the grounds that the contracting officer did not understand S3 Integration's bid, and mistakenly awarded the contract to the wrong bidder. The District responds that S3 Integration did not understand the bidding requirements of the IFB, and that S3 Integration submitted a bid that was more than twice as high as the low bid submitted by Orion. After carefully reviewing the entire record herein, we conclude that the contracting officer did not violate law, regulation, or the terms of the solicitation in determining Orion to be the low bidder. Accordingly, we deny the protest.

BACKGROUND

On August 12, 2010, the District of Columbia government, acting through the Contracting and Procurement Division of the Department of Real Estate Services ("DRES") and on behalf of the Protective Services Police Department ("PSPD"), issued IFB DCAM-2010-B-0166. Agency Report ("AR") Ex. 1. The District was looking for a contractor to provide all management, supervision, labor, materials, supplies, transportation, and equipment for the Electronic Security Systems Operation, Installation and Maintenance Conversion for District owned and leased facilities. The statement of work required the contractor to both maintain the current hardware and software in the city wide Electronic Security System, and to convert the present system to a New Security Management System ("NSMS") that has more capabilities than the current system. The IFB contemplated award of a firm fixed price contract. AR Ex. 1, section B.2.

Bids were opened on September 17, 2010, the date set forth in IFB Amendment 005 AR Ex. 6. Three bidders submitted bids, as follows:

Bidder	Price
Orion Systems Group LLC	$869,000.00
S3 Integration LLC	$2,093,713.00
Condortech Service, Inc.	$997,096.66

(AR Ex. 10)

The solicitation required bidders to submit prices for the items set forth in Sections B.5.1 and B.5.2 of the solicitation. The bidders were required to add the Service Lump Sum Price of Section B.5.1 to the Conversion Lump Sum Price of Section B.5.2 to equal the bid price for the project. Amendment No. 4 to the solicitation, issued on September 2, 2010, set forth explicit instructions in attachment b on page 1 regarding the items that would determine the bidder's price. AR Ex. 5.

For the bidders, the sum of the two Lump Sum prices in B.5.1 and B.5.2 were as follows:

Bidder	Sum
Orion Systems Group LLC	$869,000.00
S3 Integration LLC	$881,266.00
Condortech Service, Inc.	$997,096.66

(AR Ex. 10)

In the bid document, S3 Integration had entered the larger amount set forth in the first table above. The amount of $2,093,713.00 is the sum of the lump sum prices set forth in items B.5.1 and B.5.2 of S3's bid document. The bid form did not require bidders to add the lump sum items into one entry.

In the protest, S3 Integration alleges that the District's contract specialist, Ms. Helena Barbour, made a number of statements regarding the evaluation of bids. The specialist, in a declaration attached to the agency report (AR Ex. 16), dated December 9, 2010, sets forth her own recollections regarding statements made at the bid opening. She denies making the statements alleged by the protester. The protester did not submit a response to the agency report.

The District completed its evaluation of the bids by October 27, 2010. The contract specialist determined that S3 Integration had improperly prepared its bid, and had included extra work in the bid items in B.5.2. AR. Ex. 16. She also noted that the written Questions and Answers issued after the pre-bid conference set forth the District's intended method of evaluating the prices that were to be set forth on the bid form.

The Contracting Officer awarded the contract to Orion on October 27, 2010, for a price of $869,000. AR Ex. 8. S3 Integration filed this protest on November 12, 2010.

DISCUSSION

S3 Integration LLC
CAB No. P-0868

We exercise jurisdiction over the protest pursuant to D.C. Code § 2-309.03 (a)(1).

S3 Integration alleged in its protest that the contract specialist at the bid opening announced that each bidder had a different interpretation of the bid form requirements of the IFB. S3 Integration further alleges that the contract specialist announced that the District would request more information from S3 to aid in bid evaluation. S3 alleges that it forwarded information to the contract personnel after the bid opening, but did not receive any confirmation of receipt of that information from the District. S3 Integration alleges that after S3's price is broken down to one door and one panel, S3 is the lowest bidder. S3 in the protest requests award of the IFB, or a re-bidding of the solicitation.

In response, the District argues that S3 Integration's bid is not responsive to the IFB. S3 Integration presented a bid that included, in Section B, a price to convert all remaining doors and all remaining panels to the new system. However, the District did not request a price for that work. As the District asserts in the agency report, the District may not make an award to S3 Integration pursuant to a bid that is not responsive to the IFB. In support of its analysis, the District presented the declaration of the contract specialist, Ms. Helena Barbour, who provided information regarding her statements at the bid opening. (AR Ex. 16). S3 Integration did not respond to the District's agency report.

The District may not make an award to a bidder that presented a bid that is not responsive to the IFB. A responsive bid must present an unequivocal offer to provide the exact item set forth in the solicitation. When the District accepts a bid, the offeror is bound to perform the contract in accordance with all of the material terms of the solicitation. In *Advance Medical Systems, Inc.*, CAB No. P-0202, April 1, 1992, 39 D.C. Reg. 4516, 4518, we quoted the following from *Trail Equipment Co.*, B-241004, Feb. 1, 1991, 91-1 CPD ¶ 102: "Responsiveness must be determined at the time of bid opening, and, in general, solely from the face of the bid and the material submitted with the bid. To allow a bidder to make its nonresponsive bid responsive after bid opening is tantamount to allowing the bidder to submit a new bid." *Parsons Precision Products, Inc.*, 92-2 CPD ¶ 431 ("A bid which is nonresponsive on its face may not be converted into a responsive bid by post opening bid clarifications or corrections.").

The District correctly asserts that it cannot award a contract based on a nonresponsive bid. Therefore, we see no reason to express an opinion regarding whether S3 had presented the lowest bid.

CONCLUSION

For the reasons discussed above, we dismiss S3 Integration's protest to the award of the contract.

SO ORDERED.

DATED: June 29, 2011

/s/ *Warren J. Nash*
WARREN J. NASH

Administrative Judge

CONCURRING:

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

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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

APPEAL OF:

BANK OF AMERICA, N.A.	)	
	)	CAB No. D-1416
Under Contract No. CFOPD-05-C-083	)	

ORDER GRANTING APPELLANT'S MOTION TO STAY PROCEEDINGS
Filing ID 39372173

Before the Board is appellant Bank Of America's Motion To Stay, the District of Columbia's Opposition To The Appellant's Motion To Stay Appeal, Bank Of America's Reply in Support Of Its Motion To Stay Appeal, Bank of America's Letter Brief To Judge Warren Nash In Support Of Its Motion To Stay Appeal, and the District of Columbia's Response To The Bank of America's May 27, 2011, Letter Brief. The parties herein (through counsel) also appeared before the Board for oral argument on the above matter on August 10, 2011. Following the hearing, the Board closed the record with respect to further pleadings on this issue.

Upon review of the appellant's Motion To Stay, the District's opposition thereto, the parties' subsequent responsive pleadings on this issue as noted above, oral argument conducted August 10, 2011, and the entire record herein, the Board hereby grants a stay in this matter. The stay shall go into effect immediately, and shall remain in effect until the District of Columbia Court of Appeals has issued a decision in *Bank of America, N.A. v. District of Columbia*, Appeal No. 10-OA-22, filed January 17, 2010.

BACKGROUND

In broad terms, the dispute herein involves the appellant Bank of America's (hereafter "appellant") provision of a controlled disbursement account[1] ("CDA") to the District, and the parties' cross-contentions as to civil liability for the alleged theft of tens of millions of dollars from the account by District and bank employees. Since 2008, the District has sought recovery of over $100 million damages from the appellant based on the alleged CDA theft, pleading a variety of claims in the D.C. Superior Court ("trial court") and before the Board.

The various claims alleged to date include fraud, negligence, conversion, breach of fiduciary duty, violations of D.C. Code §§ 28:3-404 and 28:3-405 (Uniform Commercial Code), violations of the Federal Arbitration Act[2], violation of the D.C. False Claims Act[3], and alleged

[1] A CDA is a specialized deposit account that allows the District to transfer the exact amount of funds needed to cover checks presented that day for payment. Over the course of a year, hundreds of millions of dollars flowed through the CDA. December 9, 2009, D.C. Superior Court Order Denying Bank of America's Motion To Dismiss, Or In The Alternative, Stay Based On Forum Selection And Arbitration Clauses, at p.8 (hereafter "December 9 Order")
[2] 9 U.S.C. §1 *et seq*.
[3] D.C. Code § 2-308.14.

breach of contract under the District's Procurement Practices Act ("PPA")[4]. (Motion To Stay Appeal at pp. 4-6.) Of the above referenced claims, only the breach of contract action is before this Board. The District is pursuing the remaining claims in the trial court.

Throughout the CDA proceedings in the trial court and in the instant action before the Board, the appellant has consistently raised jurisdictional challenges. The appellant has argued that the trial court and the Board lack jurisdiction because the parties agreed that all CDA disputes were to be governed exclusively by arbitration. (Motion To Stay Appeal at p.1. Bank of America's Motion To Dismiss Or, In The Alternative, Stay Based On Forum Selection And Arbitration Clauses, filed January 16, 2009, D.C. Superior Court, CA No. 2008 CA 007763 B.)

The trial court's December 9 Order rejected appellant's argument that arbitration precluded its jurisdiction, concluding after an evidentiary hearing that the parties intended for the PPA to govern dispute resolution. (December 9 Order at p. 39.) The order further ruled that the trial court would only retain jurisdiction over the District's False Claims Act count and that the other CDA claims (i.e., negligence, fraud, conversion, etc.) are subject to the jurisdiction of the Contract Officer and the CAB pursuant to the PPA. (December 9 Order at pp. 32, 39.)

The December 9 Order is currently on appeal before the D.C. Court of Appeals, where a primary issue for consideration is the validity of appellant's arbitration argument. (Motion To Stay, Ex. B, Bank of America's Appellate Brief, filed November 15, 2010.) Pending the appellate court's ruling, the trial court has stayed further proceedings on the CDA claims before it. (Motion To Stay Appeal, Ex. D, Superior Court's March 31, 2010, Order Partially Granting Bank of America's Motion To Stay.)

DISCUSSION

At issue presently is the appellant's motion to stay the breach of contract action before the Board. The current action is an appeal from a Contract Officer Final Decision dated August 18, 2010, that awards the District $13,502,852.27 in damages for appellant's alleged breach of the parties November 13, 2005, contract for CDA services. (Motion To Stay Appeal, Ex. A, Contracting Officer Final Decision.) The District's claim alleged that on 33 separate occasions between 2005-07, the appellant breached its promise under section II./paragraph C of their contract to (1) require all persons presenting checks drawn on the CDA to display current photo identification (if the payees were also Bank of America account holders), or (2) require all persons presenting checks drawn on the CDA to provide photo identification and place a thumbprint on the face of the check (if payees were not Bank of America account holders). *Id.*

In support of its motion to stay, the appellant argues that (1) the Federal Arbitration Act pre-empts the District's state law PPA claims under *Preston v. Ferrer*, 552 U.S. 346 (2008); (2) all (state and federal) proceedings are stayed pending appeal of denial of a party's arbitration rights, citing *Bombardier Corporation v. National Railroad Passenger Corporation*[5], 2002 U.S.

[4] D.C. Code § 2-309.03.
[5] *Bombardier*, *infra*, is not cited in any of appellant's pleadings herein, but was mentioned by appellant's counsel during oral argument at the August 10, 2011, hearing.

App. LEXIS 25858 (D.C. Cir. 2002) and *Bradford-Scott Data Corp., Inc. v. Physician Computer Network, Inc.,* 128 F.3d 504 (7th Cir. 1997); and (3) the interest of judicial economy in preventing the same issues and facts from being litigated in two forums at the same time.

The District argues in opposition to appellant's stay motion that (1) appellant has not met the four-part test for a stay set forth in *Barry v. Washington Post Co., Inc.*, 529 A.2d 319, 320-21 (D.C. 1987). The District asserts that this Board can only grant a stay where the movant shows that (1) it is likely to succeed on the merits, (2) will suffer irreparable injury if the stay is denied, (3) the non-movant will not be harmed by the stay, and (4) public interest favors the stay.

Upon review of the parties' contentions herein, the Board finds that judicial economy favors a stay in this case. As noted by the appellant, the Board concludes that it has broad discretion to manage dockets, including the power to grant a stay of proceedings. *See Landis v. North American, Co.,* 299 U.S. 248 (1936)*; Procter & Gamble Co. v. Kraft Foods Global, Inc.,* 549 F.3d 842, 848-49 (Fed. Cir. 2008).

In this case, the very first issue for Board consideration absent a stay would be appellant's challenge to the Board's jurisdiction. Indeed, the appellant filed a Motion To Dismiss Or, In The Alternative Stay Based On Forum Selection And Arbitration Clauses with this Board on April 20, 2011. Appellant's referenced motion argues that the parties agreed to resolve any disputes pertaining to the CDA by arbitration. (Bank of America's Motion To Dismiss at p.2) However, as noted herein, the precise issue that the D.C. Court of Appeals has pending before it is whether arbitration governs the parties' disputes pertaining to the CDA.

This Board would be wise to suspend proceedings herein until the District's highest court has opined on this issue. Moreover, it would be a tremendous waste of Board, District and appellant resources for this Board to authorize discovery, motions practice, and render a final decision only to have these actions completely nullified within months by an adverse appellate court ruling.

The District's argument that *Barry, supra,* controls as regards the test for granting a stay of proceedings is not persuasive. In the *Barry* case, the government requested a stay of the trial court's order directing that the government release the Mayor's security detail expenses to the Washington Post under a FOIA request. The stay request in *Barry* was made to the appellate court, after the case had already run its course in the trial court. In the instant case, the appellant is requesting that the *hearing tribunal* stay the proceedings at the outset of the case to avoid duplication and waste. There are numerous Board cases where a stay of proceedings has been granted without reference to the *Barry* test. *See In Re Sasha Bruce Youthwork*, CAB No. P-594, Dec. 1, 2000, 49 D.C. Reg. 3247, 3248; *Appeal of Tri-Continental Industries, Inc*., CAB No. D-804, Nov. 21, 1996, 47 D.C. Reg. 6768; *Appeal of Kora & Williams Corp*., CAB No. D-839, Mar. 7, 1994, 41 D.C. Reg. 3954, 3956; *Appeal of A.A. Beiro Construction, Inc*. CAB No. D-822, Mar. 30, 1992, 39 D.C. Reg. 4507, 4508.

Having ruled that judicial economy dictates that the instant matter be stayed, the Board does not reach the additional arguments advanced by the appellant regarding the stay. The Board does note, however, that *Preston, Bombardier,* and *Bradford-Scott Data Corp., supra,* are

inapplicable to the instant breach of contract claims. Application of any of the above cases to the instant matter would first require a finding that an arbitration agreement exists between the parties. However, the existence of an arbitration agreement between the parties is hotly contested in this case, and the Board would not rule that an arbitration agreement exists absent an evidentiary hearing.

CONCLUSION

The Board hereby grants appellant's motion for a stay in this matter. The stay shall go into effect immediately, and shall remain in effect until the District of Columbia Court of Appeals has issued a decision in *Bank of America, N.A. v. District of Columbia*, Appeal No. 10-OA-22.

SO ORDERED.

DATED: August 19, 2011

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

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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

LORENZ LAWN & LANDSCAPE, INC.)
) CAB No. P-0869
Under Solicitation No. DCKA-2010-B-0219)

For the Protester, Lorenz Lawn & Landscape, Inc.: Randy Alan Weiss, Esq. For the District of Columbia Government: Alton E. Woods, Esq., Assistant Attorney General, Office of the Attorney General for the District of Columbia.

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

OPINION

Filing ID 40105790

The protester Lorenz Lawn & Landscape, Inc. ("Lorenz") challenges the award made to C&D Tree Services, Inc. ("C&D") by the District of Columbia ("District") Department of Transportation ("DDOT") for tree planting and other related landscaping services under IFB No. DCKA-2010-B-0219 ("IFB"). Lorenz alleges that the award decision was improper because the awardee did not meet the IFB qualification requirements and was not the lowest responsible bidder.

Having reviewed the record, we find no evidence that the District violated procurement law or regulation, or the terms of the IFB, in making the subject award. Accordingly, we deny Lorenz's protest challenge to the District's source selection decision in this matter.

BACKGROUND

The IFB, issued on August 3, 2010, contemplated the award of a firm fixed-priced contract to a company having proven experience in completing municipal tree planting contracts to provide transportation, equipment, tools, materials, supplies, facilities, labor and supervision required to plant trees and perform incidental tree parts removal services. (Agency Report ("AR") Ex. 1). The District Office of Contracting and Procurement issued the IFB on behalf of the Urban Forestry Administration ("UFA") division within DDOT which is responsible for establishing and maintaining a full population of healthy trees within the District. (AR Ex. 1).

The IFB Provisions

The services being solicited by the IFB were categorized into four different "Aggregate Award Groups" (Groups 1, 2, 3, and 4) which each included the base year contract period, and four additional one year option periods. (AR Ex. 1). More specifically, each of the Aggregate Award Groups in the IFB detailed, by respective contract line items ("CLINs") 0001 - 0012, the

particular tree planting related services that the successful bidder would be required to provide within certain divisions of the District also known as "Wards" in the District. (AR Ex. 1).[1]

Accordingly, in response to the IFB, offerors were directed to submit proposed bid prices to perform all of the CLINs in each of the four Aggregate Award Groups for the base year contract period as well as for each of the four one year option periods. (AR Ex. 1). The IFB advised that, in turn, the resulting award would be made to the successful bidder by Aggregate Award Group for the contract base year period and the four one year option periods. (AR Ex. 1).

Section L.18 of the IFB also included "General Standards of Responsibility" that were to be applied to all of the bidders in this procurement. (AR Ex. 1). These standards required that offerors demonstrate to the satisfaction of the District their capability to fully perform the contract requirements by providing, within 5 days of request by the District, evidence of adequate financial resources, credit or ability to obtain such resources as required during the performance of the contract. (AR Ex. 1).

Additionally, the IFB set forth corporate licensing, registration and certification requirements for each bidder in at least two instances. Section H.21 of the IFB stated very generally that the successful bidder would be required to obtain the required licenses, permits, and registrations immediately after contract award although this provision did not establish an exact completion deadline for this requirement after the award:

> Immediately following award, the Contractor shall obtain at its expense any licenses, permits [sic] registrations necessary for the performance of this contract.

(AR Ex. 1).

In a second instance, Section L.15 of the IFB further specified the same requirements as follows:

> Each bidder must provide the following information:
>
> … A copy of each District of Columbia license, registration or certification that the bidder is required by law to obtain. This mandate also requires the bidder to provide a copy of the executed "Clean Hands Certification" that is referenced in D.C. Official Code §47-2862, if the bidder is required by law
>
> to make such certification. If the bidder is a corporation or partnership and does not provide a copy of its license, registration or certification to transact

[1] Aggregate Award Group 1 related to services to be provided by the awardee in Wards 1 and 3; Aggregate Award Group 2 related to services to be provided by the awardee in Wards 4 and 5; Aggregate Award Group 3 related to services to be provided by the awardee in Wards 2 and 6; and Aggregate Award Group 4 related to services to be performed by the awardee in Wards 7 and 8.

> business in the District of Columbia, the bid shall certify its intent to obtain the necessary license, registration or certification prior to contract award or its exemption from such requirements…"

(AR Ex. 1).

Further, because of the dollar value of the subject procurement, the IFB incorporated a provision, Section B.5, mandating that the successful bidder subcontract a certain percentage of the contract work:

> A bidder responding to this solicitation must submit with its bid, a notarized statement detailing any subcontracting plan required by law. Proposals responding to this IFB shall be deemed nonresponsive and shall be rejected if the bidder fails to submit a subcontracting plan that is required by law. For contracts in excess of $250,000, at least 35% of the dollar volume of the contract shall be subcontracted ...

(AR Ex. 1).

The Award Decision

Bids were opened on September 10, 2010, and only two timely bids were received from C&D and the protester, Lorenz. (AR Ex. 6) C&D submitted a total bid price of $3,955,192.00 for the performance of the contract, which included a bid price of $988,798 for the base and four one year option periods for all four of the Aggregate Award Groups. (AR Exs. 2, 4(b)). Lorenz's total bid, on the other hand, amounted to $4,127,760 for the four Aggregate Award Groups including a proposed price of $1,031,940.00 for the base and four one year options periods for all four of the Aggregate Award Groups. (AR Exs. 3, 4(a)). Thus, C&D's overall proposed price for performing the four Aggregate Award Groups over the base and option years of the contract was lower than Lorenz's bid.

Subsequently, as part of the District's evaluation of the two bids that it received from C&D and Lorenz, the UFA conducted a site visit with C&D at the work site of Denison Landscaping & Nursery, Inc. ("Denison"). (AR Ex. 7). At this site visit on September 24, 2010, C&D provided the District with a subcontracting plan which identified Denison as one of the two proposed subcontractors that C&D contemplated using to perform the contract. (AR Ex. 7).[2] During the site visit, UFA observed Denison's equipment, staff, inventory, and knowledge of tree planting as it related to its ability to perform the requirements in the IFB. (AR Ex. 7).[3]

Consistent with the General Standards of Responsibility criteria in the IFB described earlier, on October 7, 2010, the contracting officer also issued email correspondence to C&D requesting that the company provide a Responsibility Determination Data ("RDD") response to the

[2] C&D, however, indicated a preference to use Denison as its subcontractor for this contract. (AR Ex. 7).
[3] The District also noted that Denison maintained a 900 acre nursery from which the District could get locally grown nursery stock for use on the contract. (AR Ex. 7).

contracting officer. (AR Exs. 9(a), 9(b)). This included a request by the District for information related to C&D's financial data, past performance, and corporate operational procedures. (AR Exs. 9(a), 9(b)). C&D responded with the requested RDD by letter dated October 18, 2010. (AR Exs. 10(a), 10(b), 10(c)).[4]

In order to also confirm compliance with the IFB certification requirements, on October 28, 2010, DDOT's contract specialist undertook the process of attempting to obtain a Clean Hands Certification for C&D to confirm that it had filed all required tax returns with the District and that it did not owe any significant outstanding monies to the District. (AR Ex. 6). [5] A company that does not meet these tax requirements is prohibited from receiving an award of a District contract. (AR Ex. 6). The Clean Hands Certification is issued by the District's Office of Tax and Revenue ("OTR") and Department of Employment Services ("DOES"). (AR Ex. 6).

The initial Clean Hands report generated by the OTR and DOES database on October 28, 2010, indicated that C&D could not be awarded a District contract, and be issued a Clean Hands Certification, due to its failure to comply with the District's tax payment laws. (AR Exs. 6, 11). In response to this report of C&D's non-compliant tax status, the contracting officer sent an email to C&D on October 28, 2010 informing it that it had failed to receive the required Clean Hands Certification approval from OTR and DOES. (AR Ex. 11). The District also later contacted OTR for further clarification regarding this report of tax non-compliance. (AR Ex. 6).

In response to the foregoing inquiry from the District, on October 29, 2010, OTR advised the contracting officer that the information in the Clean Hands database was not accurate due to a backlog in entering current information into the database during the relevant time period. (AR Ex. 6). To correct this administrative error, OTR ultimately provided the District with a manually completed tax compliance status report for C&D which effectively acted as a Clean Hands Certification for this company. (AR Ex. 6).

Based upon a resulting determination that C&D was the lowest responsible, responsive bidder, on November 8, 2010, the contracting officer awarded the contract to C&D. (AR Ex. 5). On November 18, 2010, Lorenz filed this protest with the Board challenging the District's award. (AR Ex. 6).[6] As it relates to the protest allegations, C&D provided its Foreign Corporate Registration ("FCR") and Basic Business License ("BBL") to the District on December 8, 2010, after they were requested by the contracting officer. (AR Exs. 6, 14).

DISCUSSION

[4] C&D's RDD response also included a second subcontracting plan which identified Denison as a subcontractor, and in which C&D provided more information concerning Denison's equipment, personnel, years of experience, letters of commitment, and other resources that would be available for the tree planting contract. (AR Ex. 10).

[5] The District's current Clean Hands Compliance Status database was implemented during February or March 2010, and replaced the manual system of having each contracting officer send a separate request to the Office of Tax and Revenue (OTR) and the Tax Division of the Department of Employment Services ("DOES") to acquire Clean Hands Certification for a proposed contractor. (AR Ex. 6).

[6] On January 4, 2011, the District subsequently filed a Determination and Findings to Proceed with Award after Receipt of a Protest, and did subsequently proceed with performance. (January 4, 2011 Notice of Determination and Finding to Proceed with Performance).

We exercise jurisdiction over this protest and its underlying allegations pursuant to District of Columbia Code §2-360.03(a)(1).[7]

Awardee's Qualifications

Lorenz initially challenges the qualifications of C&D to perform the scope of services required by the IFB.[8] In particular, Lorenz primarily contends that the awardee is not competent to successfully perform the tree planting requirements set forth in the IFB because C&D's primary line of business has not involved tree planting services. The protester also alleges that the District improperly allowed C&D to rely upon its subcontractor Denison's tree planting experience to meet the IFB requirement that the successful contractor have a significant background in performing tree planting contracts. Our standard of review for proposal evaluations and the selection decision is whether they were reasonable and in accord with the evaluation and selection criteria listed in the solicitation and whether there were material violations of procurement laws or regulations. *Trifax Corp.*, CAB No. P-539, Sept. 25, 1998, 45 D.C. Reg. 8842, 8847.

Here, the record reflects that C&D has largely provided tree removal and pruning services to the District over the past twenty-five years under different contracts. (AR Ex. 5). While the District expressly recognized during the evaluation that C&D did not have prior tree planting experience of the same magnitude as the subject contract, UFA's site visit and review of C&D's subcontracting plan led it to reasonably conclude that C&D's strong subcontracting arrangement with Denison would allow it to successfully provide the services required under the subject tree planting contract**.** (AR Ex. 5).

Specifically, as described earlier, during this site visit at Denison's work space, UFA officials were able to see Denison's facility, inspect its equipment, meet its personnel, discuss its knowledge and understanding of tree planting, and tour some of the over 900 acre nursery that it maintains. (AR Ex. 7). Thus, UFA officials reasonably determined that, as a landscaping team, C&D and Denison had the capacity, resources, and past experience to perform the tree planting contract for the District based upon this site visit and C&D's written subcontracting plan that it submitted to the contracting officer describing its overall project performance approach. (AR Ex. 5). C&D also identified crew leaders/foreman, and supporting personnel, for each Aggregate Award Group as required by the IFB. (AR Ex. 10(a)).

Further, the fact that C&D proposed a subcontracting arrangement to largely support the tree planting work required under the contract was not improper as the IFB itself mandated that ***at least*** 35% of the dollar value of the project work be subcontracted by the prime contractor because of the higher dollar value of this procurement as noted earlier. The IFB also did not specify, or limit, the role that could be performed by any proposed subcontractor such that

[7] Effective April 8, 2011, the Procurement Practices Reform Act ("PPRA"), District of Columbia Code §2-360.03(a)(1) is the controlling statute with respect to the Board's jurisdiction. At the time that the instant protest was filed on November 18, 2010, the Board's jurisdiction was governed by former District of Columbia Code §2.309.03. The current §2-360.03(a)(1) is identical to the former §2-309.03(a)(1).

[8] This decision responds to Lorenz's protest allegations in the same order in which they were presented as Legal Argument in its November 18, 2010 protest.

Denison's support of the tree planting function performed by C&D under the contract was not improper.

As another basis for attempting to invalidate the contract award, Lorenz also argues that there has been past litigation, judgment liens, and criminal cases filed against C&D and its principals which the District is alleged to have failed to properly investigate while determining the awardee's qualifications. (Protest 7 n.9). Lorenz, however, concedes that it is unknown whether all of its cited tax lien and criminal cases actually involve C&D's principals or other parties with the same names. (Protest 7 n.9). Moreover, the record in this case reflects that, prior to contract award, the District checked the District and federal debarment databases and confirmed that C&D was not suspended or debarred at bid opening and, thus, the District reasonably determined that C&D was not precluded from receiving the contract award. (AR Ex. 5).

Based upon these factors, the Board believes that it was reasonable for the District to ultimately find that C&D, along with its subcontractor Denison, were qualified and as a team could reasonably meet the IFB performance requirements.[9] Therefore, the contracting officer's ultimate conclusion that C&D's stated qualifications met the IFB requirements was not unreasonable or in violation of the IFB requirements.

Bidder Responsibility

Lorenz also protests the District's determination that the awardee was a responsible bidder as set forth in its initial protest filing in this matter. (Protest 5-6). Specifically, Lorenz alleges that, contrary to the IFB responsibility requirements, the awardee: 1) failed to obtain its FCR in the District of Columbia; 2) failed to obtain the BBL required of companies doing business in the District under §47-2851.02 of the District of Columbia Code; and 3) failed to comply with corporate tax law requirements which precluded the awardee's ability to obtain the Clean Hands Certification in the District. (Protest 5-6). The protester asserts that this was in violation of the terms of the IFB which required that offerors meet these registration, licensing and certification requirements prior to contract award.

Bidder responsibility is a prerequisite to contract award. District of Columbia Code §2-353.02(a). The contracting officer must make a written determination as to whether the prospective contractor is responsible, and in the absence of information clearly indicating that the contractor is responsible, the contracting officer shall determine the contractor to be nonresponsible. 27 District of Columbia Municipal Regulations ("DCMR") §§2200.1 – 2200.3. The general standards of responsibility are set forth in 27 DCMR § 2200.4.

In making the determination of responsibility, the contracting officer is vested with wide discretion and business judgment. Therefore, in reviewing a determination concerning general standards of responsibility, the Board will not overturn a finding of responsibility or

[9] Well after its November 18th protest was filed in this matter, Lorenz made a number of allegations challenging the qualifications, and responsibility, of Denison. These allegations are obviously untimely and do not provide grounds that can be considered by the Board for overturning the subject award decision. (*See, e.g.*, Protester's August 19, 2011, Supplemental Evidence in Support of Motion for Limited Discovery).

nonresponsibility unless the protestor shows bad faith on the part of the contracting agency or that the contracting officer's determination lacks any reasonable basis. *Children, Children, Children, Inc.*, CAB No. P-0858, Jan. 7, 2011 *citing* Anchor Construction Corp., CAB No. P-0737, Jan. 9, 2007, 54 D.C. Reg. 2066, 2068; *Ideal Electrical Supply Corp*., CAB No. P-0372, Aug. 13, 1993, 41 D.C. Reg. 3603, 3606.

In this case, there is no evidence that the District's responsibility determination with regard to the awardee was made in bad faith or lacked a reasonable basis. First, the protester has not shown that the awardee failed to meet the General Standards of Responsibility for bidders as set forth in Section L.18 of the IFB by virtue of C&D's response to the RDD prior to contract award concerning its financial and operational capabilities to perform the contract. Instead, the protester primarily challenges whether the awardee failed to meet additional responsibility criteria, including the FCR, BBL and Cleans Hands Certification, prior to contract award.

However, as stated earlier as it relates to the license and registration requirements, Section H.21 of the IFB only generally stated that the successful bidder must obtain all required licenses, permits and registrations immediately after contract award. No fixed date or deadline was attached to this requirement to further define or limit the period within which the successful bidder was required to obtain these approvals after award assuming this provision was to apply to the FCR and BBL requirements.

Similarly, Section L.15 of the IFB also seemingly addresses these same registration, license and certification requirements. In this regard, L.15 provided that the bidder could either produce evidence of these approvals with their bid submission or, alternatively, certify to the contracting officer their intent to obtain these approvals prior to award.

Undoubtedly, C&D did not provide its FCR or its BBL with its original bid submission and only provided it to the contracting officer on December 8, 2010 after the contract had been awarded on November 8, 2010. Nonetheless, as discussed above, Sections H.21 and L.15 of the IFB, read together, clearly evidence that the contracting officer could reasonably accept evidence of the FCR and BBL requirement being met after bids were submitted and even after the contract was awarded.

Indeed, this Board, as well as other bid protest tribunals such as the Government Accountability Office ("GAO"), have repeatedly held that these very types of registration, license and certification requirements are matters of responsibility and may be met by a bidder after bid opening and even after contract award. *See C&D Tree Services, Inc.*, DC CAB No. P-440, March 11, 1996, 44 D.C. Reg. 6426, 6433-6439, *citing Modern Electric, Inc*., DC CAB No. P-341, April 5, 1993, 40 D.C. Reg. 5068, 5069; *see also Chem-Spray-South*, B-400928.2, June 25, 2009, 2009 CPD ¶ 144, *citing Serguranca, Ltd.*, B-294388, Oct. 24, 2004, 2004 CPD ¶ 207. Therefore, the Board does not believe that the contracting officer acted unreasonably in accepting this documentation from C&D after the award decision was made. Moreover, C&D was also clearly and reasonably deemed to have met the other general responsibility criteria in the IFB.

In addition, while there was initially a question as to whether C&D could obtain the required Clean Hands Certification, this issue was later resolved in favor of C&D prior to contract award. As noted earlier, the contracting officer first received a report that C&D could not obtain the Clean Hands Certification and, after further investigation with OTR, the contracting officer learned that this information was incorrect. As a result, this administrative error was corrected and a valid Clean Hands Certification was issued by OTR and DOES for C&D as required by the IFB.

For these reasons, the Board finds that C&D was properly deemed by the District to have met the responsibility criteria in the IFB and, therefore, that the District did not act arbitrarily in finding C&D to be eligible for award.[10]

The Evaluation Results

Lorenz further cites to a number of professional accolades which it purports to have received from its clients in arguing that the District's award decision was generally improper and arbitrary and capricious as Lorenz was allegedly more qualified. Lorenz's allegations that it is more qualified, at best, constitute mere disagreement with the District's award decision. The protester has the burden of affirmatively proving its case and the fact that the protester does not agree with the agency's technical conclusions does not in itself render the evaluation unreasonable. *Emergency Associates of Physician's Assistants & Nurse Practitioners, Inc.,* CAB No. P-500, Dec. 15, 1998, 46 D.C. Reg. 8527, *citing* Contel Information Systems, Inc., B-220215, Jan. 15, 1986, 86-1 CPD ¶ 44; Litton Systems, Inc., 63 Comp. Gen. 585, 84-2 CPD ¶ 317.

Lorenz also challenges the bid price evaluation and maintains that it and C&D's prices were essentially equal because Lorenz's bid was lower priced in the base year. Therefore, Lorenz asserts that it should have received the award given its claim of having superior qualifications. The IFB, however, advised bidders that award would be made to the overall lowest priced responsible and responsive bidder. (IFB Section B.1.2). Undeniably, C&D proposed $3,955,192 in total to perform the contract's four Aggregate Award Groups over the life of the contract which was lower than Lorenz's total bid of $4,127,760. Thus, the fact that Lorenz's bid may have been lower in the base year did not justify making the award to Lorenz at an overall higher cost.

CONCLUSION

Based upon the factors discussed herein, we conclude that the District's source selection decision was reasonable and consistent with the IFB and, thus, the Board finds no violation of procurement law in this matter.

[10] Over the course of these proceedings before the Board, Lorenz also argued that C&D has failed to meet these registration, license and certification legal requirements for many years preceding the present contract award. C&D's history of legal compliance on other procurements, other than the present contract, are not relevant to this proceeding and, thus, do not provide sufficient or timely bases for challenging the present contract award.

Lorenz Lawn & Landscape, Inc.
CAB No. P-0869

The protest is DENIED.

SO ORDERED.

DATED: September 29, 2011

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

CONCURRING:

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

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

PROGRESSIVE EDUCATIONAL EXPERIENCES IN COOPERATIVE CULTURES	)	
	)	CAB No. P-0889
Solicitation No: DCCF-2011-R-3562 SDA 2	)	

For the Protester: Sara Stone, *pro se*. For the District of Columbia Government: Janice N. Skipper, Esq., Assistant Attorney General, Office of the Attorney General.

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

OPINION

Filing ID 40712511

The protester, Progressive Educational Experiences in Cooperative Cultures ("PEECC"), challenges the evaluation and resulting awards made by the District of Columbia under Request for Proposal No. DCCF-2011-R-3562 SDA 2 ("Solicitation") for year-round youth workforce development programs in the District. The protester alleges that the District's award decision was improperly based upon a number of ethical and procedural irregularities during the evaluation which form the basis of its protest allegations. The District has moved to dismiss this protest as untimely and has also asserted that the protester lacks legal standing to pursue this protest before the Board.

The Board also finds that the present allegations were untimely filed and, for this reason, dismisses this protest.

BACKGROUND

The Solicitation was first issued by the District's Office of Contracting and Procurement, on April 8, 2011, on behalf of the Department of Employment Services ("DOES") and sought a contractor to provide quality year-round youth workforce development programs to meet the needs of the District's youth and the requirements of the District of Columbia Youth Employment Services Initiative Amendment Act of 2005 and the Workforce Investment Act of 1998. (Agency Report ("AR") Ex. 2.) In particular, the Solicitation specified that the successful offeror would design and implement a year round youth program that would provide services to eligible out-of-school youth, ages 16-21 years old, including alternative education opportunities, career exploration and work readiness, placement, case management and follow-up services. (*Id.*)

The Solicitation further stated that the awardee would provide the required services for two distinct Service Delivery Areas ("SDA") to include SDA District 1 (Wards 1, 2, 3, 4) and SDA District 2 (Wards 5, 6, 7, 8). (*Id.*) The District stated in the Solicitation its intent to award

at least one contract for each SDA. (*Id.*) Several amendments were issued by the District to the original Solicitation after it was issued. (AR Ex. 3.)

In total, the District received 22 proposals in response to the Solicitation including the proposal of the protester, PEECC. (*Id.*) The District convened a technical panel which conducted independent and consensus evaluations and scoring of these 22 proposals. (*Id.*) The Contracting Officer also conducted a separate and independent evaluation of each proposal received by the District. (*Id.*)

Based upon the evaluation and scoring of these proposals, 13 of the 22 offerors were determined to be within the competitive range based upon the fact that the District determined that they met the minimum mandatory requirements of the Solicitation. (AR Exs. 3, 6.) Accordingly, these competitive range offerors were directed to submit best and final offers to the District. (AR Ex. 3.) The other remaining 9 offerors, including the protester, PEECC, were excluded from the competitive range based upon their lower assigned technical scores. (*Id.*) Additionally, these same 9 offerors were also issued letters from the Contracting Officer on July 28, 2011, stating that their proposals had been determined not to be in the competitive range and that they were no longer being considered for award. (AR Exs. 3, 7.) The record in this protest reflects that this notice of exclusion from the competitive range was, in fact, sent by email to PEECC on July 28, 2011. (AR Ex. 7.)

However, despite its receipt of notice of its exclusion from the competitive range on July 28, 2011, PEECC did not file this protest with the Board until August 23, 2011. The protester generally alleges in this bid protest that: 1) the District compromised the integrity of the procurement process during its conduct of this procurement; 2) the District issued excessive modifications, communication lags, leadership changes, and irregular extensions beyond the official Solicitation closing date thereby providing an unfair competitive advantage to certain offerors; 3) the District inappropriately disclosed its preferred pricing ceiling and other pertinent information thereby providing an unfair competitive advantage to certain offerors; 4) the District improperly made awards to offerors with no significant past performance experience for the services sought under the Solicitation; and 5) the District failed to receive and fully evaluate and score the protester's complete proposal.

On September 23, 2011, the District filed a motion to dismiss the protest as untimely and also asserted that the protester lacks standing. The protester opposed the motion and further alleged that its ability to obtain information regarding the underlying evaluation to support its protest allegations was impeded despite its numerous Freedom of Information Act ("FOIA") requests and other requests for information that it made to the District.

DISCUSSION

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

D.C. Code §2-360.08(b) mandates that protests be filed with the Board "not later than 10 business days after the basis of protest is known or should have been known, whichever is

earlier." The Board has clarified this by stating that the 10 business days begin to calculate when the bidder or offeror knows or should have known both the basis of the protest and that the District has taken an adverse action towards it. *Sigal Construction Corporation*, CAB No. P-0690, Nov. 24, 2004, 52 D.C. Reg. 4243. The Board has also established that notice to a bidder that it is not in the competitive range constitutes knowledge of adverse action by the District against the bidder. *Community Bridge, Inc.*, CAB No. P-0848, Jan. 13, 2011. This 10 day time limit may not be extended by the Board, even in instances where the bidder is waiting for information from a FOIA request. *SAGA Adventures, Inc.*, CAB No. P-0704, June 17, 2005, 54 D.C. Reg. 1936.

The protester has alleged that, between October 25, 2010, and June 8, 2011, it observed pervasive irregularities in this procurement process which it believed to be inappropriate and prejudicial to its company. Protester Response to Motion to Dismiss, p. 1. However, the protester failed to file a single protest challenging any of these alleged, ongoing, irregularities within 10 business days after they supposedly occurred between October 25, 2010, and June 8, 2011.

Similarly, PEECC also did not timely protest its exclusion from the competitive range in this procurement within 10 business days notwithstanding this adverse action by the District. Specifically, the protester did not file the instant protest until August 23, 2011, which was 18 business days subsequent to the District notifying PEECC that its proposal would not be considered for award as it was not within the competitive range.

Consequently, we now find that PEECC's present protest is untimely with respect to both challenging its alleged observation of evaluation irregularities occurring between October 25, 2010, and June 8, 2011 and, more significantly, its exclusion from the competitive range upon which PEECC certainly knew, or should have known, that it had a basis of protest and that it had been subject to adverse action by the District. Further, having found these protest allegations to be untimely filed, the Board finds it unnecessary to determine the issue of whether the protester would otherwise have legal standing in this case under the relevant circumstances.

CONCLUSION

For the reasons discussed above, we hereby dismiss the present protest as untimely.

SO ORDERED.

DATED: November 3, 2011

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

CONCURRING:

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

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:	)	
	)	
MXI Environmental Services, LLC	)	CAB No. P-0897
	)	
Solicitation No. DCKT-2011-B-0147	)	

For the Protester: Marc Kodrowski, *pro se*. For the District of Columbia Government: Jon N. Kulish, Esq., Assistant Attorney General, Office of the Attorney General.

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

OPINION

Filing ID 41633712

The protester, MXI Environmental Services, LLC ("MXI"), challenges the contracting officer's determination that its bid for household hazardous waste collection and disposal related services under Invitation for Bids No. DCKT-2011-B-0147 ("IFB") was nonresponsive to the IFB's two separate employee training requirements. The protester asserts that its bid clearly offered to meet the two distinct types of required employee training and should not have been rejected as nonresponsive.

The Board, however, finds that the contracting officer's nonresponsiveness determination reasonably concluded that the protester's bid for training services included an alternative unit price structure, other than what was requested by the IFB, primarily because the protester used ambiguous supplemental language in its proposed unit price bid. For these reasons, the protest is denied.

BACKGROUND

The District's Department of Public Works ("DPW") issued the subject IFB on August 23, 2011, for the award of a requirements type contract to a contractor that would provide household hazardous waste collection and disposal related services to DPW. (Agency Report ("AR") Ex. 1.) The services required under the IFB were detailed with specificity under four Contract Line Item Numbers ("CLINs"), including CLINs 0001-0004 for the base year. (*Id.*) The IFB also extended these same services across four option year CLINs for the contract. (*Id.*) A single contract was to be awarded to the lowest responsive and responsible bidder based upon the bidder's total proposed price for the contract base and option year periods. (*Id.*)[1]

[1] Additionally, an amendment to the IFB was issued on September 1, 2011, which answered prospective bidder questions, revised two provisions, and extended the bid opening date from September 6, 2011, to September 13, 2011. (AR Ex. 2.)

The Training Requirement

The IFB also included a mandatory DPW employee training requirement that had to be met in each offeror's bid. Specifically, Section C.4.12 of the IFB mandated that the awardee perform the following types of employee training: (a) on-site yearly training for at least three District employees in overall household hazardous waste work related activities, in compliance with all federal, state, and local laws, including training on hazardous waste packing procedures and completion of proper documentation (IFB Section C.4.12.1); and (b) off-site training for up to two employees of the Department of Public Works Solid Waste Management Administration in accordance with 29 CFR 1910.120 to include all costs incurred, and lodging travel per diem for each contract year (IFB Section C.4.12.2). (*Id*.)[2] Thus, by virtue of IFB Sections C.4.12.1 and C.4.12.2, the District required the awardee to provide two separate categories of DPW employee training that substantially differed with respect to the number of employees to be trained by the awardee, the type of training required to be provided by the awardee, and the location where the awardee was to conduct the training. (*Id*.)

The training requirements under IFB Sections C.4.12.1 and C.4.12.2 corresponded to the proposed pricing required by the IFB for this training under CLIN 0003 for the base year, as well as for CLINs 1003, 2003, 3003, and 4003 across the four option year periods of the contract. (*Id*.) For these particular training CLINs, the IFB directed offerors to propose both a "unit" price and then a total proposed "estimated amount" for providing the two distinct types of employee training, in connection with IFB Sections C.4.12.1 and C.4.12.2, over the base and option years of the contract. (*Id*.)[3] Further, the IFB pricing grid expressly indicated, by inserting a number "1" under estimated quantity, that for each contract base and option year, DPW estimated that it would only order 1 unit of the two types of C.4.12 training under CLINS 0003, 1003, 2003, 3003, and 4003.[4] (*Id*.)

The Evaluation of Bids

In response to the IFB, the contracting officer ("CO") received two bids, one from the protester, MXI, and one from the later putative awardee, Care Environmental Corporation. (AR Exs. 3, 8.) Upon bid opening, the bids were manually recorded on a bid tabulation sheet. (AR Ex. 5.) This sheet was later corrected twice by DPW and ultimately showed a total bid price of $1,002,947.50 for Care Environmental and $998,485.00 for MXI. (AR Ex. 6.)

Additionally, the CO and the contract specialist reviewed MXI's bid under CLINs 0003, 1003, 2003, 3003 and 4003 with respect to the pricing that it was required to provide for the two

[2] 29 CFR 1910.120 refers to federal Occupational Safety and Health Administration ("OSHA") prescribed training for the handling of hazardous materials.

[3] Throughout this protest, the District appears to interchangeably refer to the IFB's requirement for a total "estimated amount" as a request for a "lump sum" price for a full year of training. The protester takes issue with this characterization of there being a per se "lump sum" requirement although the Board finds this issue to be immaterial to its ultimate decision in this matter.

[4] Specifically, the IFB pre-populated the "estimated quantity" column with the number "1" thereby confirming that, for both the base and option years, DPW estimated that it would order 1 unit of the IFB Section C.4.12 training based upon the awardee's proposed unit price for these services. Offerors would, therefore, theoretically, calculate the total estimated amount for the training requirement CLIN in their proposal by multiplying their proposed unit price by the District's estimated unit quantity (i.e., 1 unit) to calculate the final estimated amount for training under these training CLINs.

distinct categories of employee training mandated under IFB Section C.4.12. (AR Ex. 11.) The CO and contract specialist noted that, under the CLIN pricing column calling for MXI to provide a "unit" price for these two types of Section C.4.12 training for the base year, MXI inserted the number $1000 followed directly by the words "per day."[5] (*Id*.) Further, in the corresponding pricing column calling for the total estimated amount for this same IFB Section C.4.12 training, MXI's bid inserted the number $1000 as the total estimated amount for this training for the contract year. (AR Exs. 3, 11.)

Thus, because MXI expressly qualified its unit price bid for the Section C.4.12 training with the words "per day," which were not otherwise called for by the terms of the IFB, the CO and contract specialist concluded at the time of bid opening that MXI's bid did not unequivocally offer to perform the two distinct categories of training required by IFB Section C.4.12 at a determinable unit price. (AR Ex. 11.) Accordingly, the CO and the contract specialist determined that MXI's training offer under IFB Section C.4.12 was nonresponsive to the training requirement and, further violated Section L.2.4 of the IFB, which prohibits bidders from making changes to the requirements in the solicitation. (AR Exs. 1, 11.)

On September 21, 2011, the CO advised MXI by letter correspondence that its bid was rejected as nonresponsive under IFB Section C.4.12 as described herein. (AR Ex. 4.) MXI then filed the present protest on September 29, 2011.

DISCUSSION

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

In its protest, MXI challenges the CO's determination that its bid was nonresponsive based upon its alleged failure to unambiguously offer to provide all training required by IFB Section C.4.12 at a specific unit price.[6] (Protest 3.) The protester maintains that its bid was unambiguous in that it offered to perform both distinct types of required IFB Section C.4.12 training at the proposed cost of $1000 per day, and at a total cost of $1000 in the base year, regardless of the fact that these two required training sessions were different in nature, were to take place at different locations, and potentially involved differing numbers of employees. (Protester Resp. to AR 5-6.)

The District, however, contends in this protest that the protester's bid for the training services was ambiguous because it was subject to two different interpretations primarily resulting from the fact that MXI qualified its unit price bid with the words "per day" and also because it only offered to perform one day of training at a total estimated price of $1000. (District Resp. to Protester's Reply to AR 5-8.) Thus, the District argues that it was unclear, upon bid opening, whether MXI was offering either: 1) a bid to perform all required OSHA training under IFB

[5] While MXI's base year unit price started at $1000 per day for these training services, each subsequent option year CLIN for this training requirement incorporated a minor $100 escalation in the "per day" unit price offered by MXI.
[6] Initially, MXI also appeared to be challenging the clarity of the training provision terms in the IFB but subsequently clarified that it was not making such a challenge in this protest. (Protest 1; Protester Resp. to AR 4.)

Section C.4.12.2, as well as the separate requirement for employee on the job training under IFB Section C.4.12.1 both in a single day for the cost of only $1000 despite the differing nature and extent of these two types of training; or, alternatively, 2) a restricted bid for some incomplete or partial combination of the required OSHA training and/or the required on the job training, in one day, given the differing nature and extent of these two types of training. (*Id.*) Consequently, based upon the information which was only available to the CO from the face of the protester's bid at bid opening, the CO was unable to conclusively determine that MXI's bid offered to provide the exact type and extent of the training required by the IFB and was, thus, deemed to be nonresponsive. (*Id.*)

The Board has previously held that in order to be considered responsive to an IFB, a bid must be an unequivocal offer to provide the exact items called for by the solicitation. *Barcode Technologies, Inc.*, CAB No. P-524, 45 D.C. Reg. 8723 (Feb. 11, 1998); *S. Md. Restoration, Inc.*, CAB No. P-241, 39 D.C. Reg. 4268 (Aug. 7, 1991). In this regard, we have affirmed that uncertain or ambiguous bids are properly rejected as nonresponsive. *Mont "T" Que Inc.*, CAB No. P-0725, 54 D.C. Reg. 2008 (Apr. 6, 2006) (ancillary notations made by protester on its bid made it susceptible to two different interpretations and, thus, the bid was reasonably rejected as ambiguous and nonresponsive).

Accordingly, based upon the foregoing legal standard, the Board finds that, in this case, the CO and contract specialist acted reasonably in determining that MXI's inclusion of the words "per day" following the number $1000 under its proposed unit price bid qualified its unit price offer in a way that made it questionable as to whether the protester was offering to meet the exact training requirements of the IFB.[7] Clearly, on its face, the IFB contemplated and directed the offerors to simply include a number amount for the proposed unit price as there is no other direction in the IFB that the required unit price could be converted to a "per day" rate. The decision to qualify its proposed unit price in this way was the protester's independent decision alone.

Moreover, this uncertainty created by MXI's use of the qualifying words "per day" was further exacerbated by the fact that the IFB required the offerors to provide two very distinct types of employee training, and pricing for the same, that substantially differed with respect to the number of employees to be trained, the type of training required to be provided, the location where the training was to occur, and even the lodging travel per diem expenses that would potentially be incurred by the awardee in connection with the training. (District Resp. to Protester's Reply to AR 5-8.) It was, therefore, reasonable for the contracting officials to be uncertain, from the face of MXI's bid, as to whether it was offering to provide all of this required training in only one day, or whether it was only offering to provide a portion of the required training. Thus, in light of these factors, the Board finds it reasonable that the CO found the protester's bid to be ambiguous in responding to the IFB Section C.4.12 training requirements

[7] In fact, the numerous filings that the protester has made in these proceedings have been largely dedicated to explaining what its "per day" unit price bid was allegedly intended to unequivocally offer in terms of pricing which, in the Board's view, further underscores the fact that the exact terms of its price proposal were reasonably deemed ambiguous on their face at the time of bid opening.

because of MXI's inclusion of an alternative "per day" unit pricing structure other than what was called for by the IFB.

Additionally, while MXI has provided very extensive explanations during these protest proceedings to better clarify the intent behind the training offer outlined in its bid, these post-award statements cannot be used to supplement or correct deviations contained within its bid at the time of bid opening. C*onfiguration Inc.*, CAB No. P-0819, 57 D.C. Reg. 687 (Nov. 9, 2009) (bid deviation cannot be corrected after bids have been opened). Indeed, allowing a protester to make a nonresponsive bid responsive after the bids have been opened would essentially permit the submission of a new bid. *Dist. Healthcare and Janitorial Supply Co.*, CAB No. P-317, 40 D.C. Reg. 4704 (Nov. 16, 1992).

Based upon the facts discussed herein, we find that the CO reasonably found MXI's proposal to be nonresponsive to the IFB employee training requirements and properly rejected MXI from receiving the contract award. Accordingly, we deny the protest.

SO ORDERED.

DATED: December 30, 2011

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

CONCURRING:

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

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

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

Friends of Carter Barron Foundation of the Performing Arts	)	CAB No. P-0888
Under Solicitation No. DCCF-2011-R-3962-SDA 1	)	

OPINION AND ORDER ON DISTRICT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Filing ID 41922808

The protester, Friends of Carter Barron Foundation of the Performing Arts, has filed a protest concerning Request for Proposals No. DCCF-2011-R-3962-SDA 1 ("RFP") issued by the District's Department of Employment Services ("DOES"). The protester argues that the award made to another bidder is invalid on three separate grounds: (1) the District's mismanagement of an earlier solicitation led to unfair competition in the present RFP (Count I); (2) the District failed to notify protester of the award (Count II); and (3) the District's decision to issue only two in-school awards was not consistent with statements to prospective bidders that the budget for the solicitation was four million dollars (Count III). The District has moved the Board to dismiss Count I and Count III arguing that the protester has failed to clearly articulate a violation of procurement law, regulation, or RFP provision. In addition, the District argues that Count II is moot. We deny in part and dismiss in part the protest.

BACKGROUND

On April 1, 2011, the District's Office of Contracting and Procurement ("OCP") issued the RFP seeking contractors to design and implement an in-school year round youth program providing services that promote academic achievement, successful graduation, career preparation, and other skills development goals to 250-500 at risk youth. (District's Mot. to Dismiss, Ex. 2.)

There were six revisions to the RFP; each involved an extension of the due date while at least two changed the technical requirements of the RFP. (*Id.* at Ex. 4.) The revisions are as follows: (1) on April 14, 2011, the due date was changed from April 22, 2011, to May 4, 2011; (*id.*) (2) on April 26, 2011, (Amendment 0001), the due date was extended to May 13, 2011; (*id.*) (3) on May 9, 2011, (Amendment 0002), the due date was extended to May 27, 2011; (*id.*) (4) on May 18, 2011, (Amendment 0003), the RFP was replaced in its entirety and the due date was changed from May 27, 2011, to May 31, 2011; (*id.*) (5) on May 26, 2011, (Amendment 0004), technical amendments were made to the RFP and the due date was extended to June 6, 2011; (*id.*) (6) the due date was extended for the final time to June 8, 2011, (*id.*).

Section B.3.1 of the revised RFP stated:

> For the purpose of this RFP and the ensuing contracts the District will be divided into two Service Delivery Areas (SDAs):
>
> SDA District 1: Wards 1, 2, 3, and 4.
>
> SDA District 2: Wards 5, 6, 7, and 8.
>
> It is the intent of the District to award at least one contract for each of the SDAs. The District will award additional contracts based upon program needs and availability of funds.
> (*Id.* at Ex. 2.)

By the final RFP deadline of June 8, 2011, the District received a total of 11 proposals, including the proposal from protester. (*Id.* at Ex. 4.) On August 15, 2011, the District awarded the contract to Dance Institute of Washington ("Dance Institute"). (*Id.* at Ex. 5.) The protester filed a protest with this Board on August 22, 2011, and an amended protest on August 23, 2011 ("Amended Protest"). Notice regarding the contract award to Dance Institute was not issued until September 12, 2011. (*Id.* at Ex. 6.)

In its Amended Protest, protester asserts three independent grounds for its protest of the award: (1) an earlier solicitation was mismanaged such that bidders in the present solicitation were able to gain access to the earlier proposal submitted by protester and better compete in the present competition (Count I); (2) OCP failed to notify protester about the SDA 1 in-school award either electronically or by mail (Count II); and (3) the District decided to issue only two in-school awards despite informing prospective bidders that they were competing for a solicitation budgeted at four million dollars (Count III).

The District filed a motion to dismiss arguing that in Count I and Count III, the protester failed to articulate an alleged violation of procurement law, regulation or solicitation provision as required pursuant to CAB Rule 301.1(c). Additionally, the District argues that Count II is moot. The protest is denied in part and dismissed in part.

DISCUSSION

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

Count I: The District's Mismanagement of an Earlier Solicitation

Protester asserts that the Board should sustain the protest "[b]ecause the last Solicitation process stood without appropriate procurement oversight and supervision to lead a non-competitive Performing Arts Bidder to receive a competitive awarded proposal." (Am. Protest 3.) The District contends that the charge is unclear and fails to articulate any alleged violation of procurement law, regulation or solicitation provision. As such, the District argues that Count I

should be dismissed for failure to comply with the requirements of Board Rule 301.1(c) which provides in pertinent part:

> All protests shall be in writing, addressed to the Board, and shall include the following:
>
> . . .
>
> (c) a clear and concise statement of the legal and factual grounds of the protest, including copies of relevant documents, and citations to statutes, regulations or solicitation provisions claimed to be violated.

However, this Board's precedent has been to read Rule 301.1(c) very narrowly. We have held that "[w]here the District believes that a protest ground fails to state a violation of procurement law or regulation or is unsupported by the facts, the matter should be addressed through the Agency Report on the merits in the first instance and the absence of detailed facts concerning an alleged procurement deficiency in the initial protest filing does not necessarily dictate dismissal." *CUP Temporaries, Inc.*, CAB No. P-0474, 44 D.C. Reg. 6841, 6844 (July 3, 1997). Thus, even where a protester's allegations are mainly conclusory or barely supported by fact, where the applicable law and regulations at issue are made reasonably clear, this Board must address the allegations on the merits. *Unfoldment, Inc.*, CAB No. P-0435, 44 D.C. Reg. 6377, 6381 (Sept. 12, 1995); *see also CUP Temporaries, Inc.*, CAB No. P-0474, 44 D.C. Reg. at 6844 (denying the protest on the merits rather than dismiss the protest for failure to provide a clear and concise statement of its factual and legal grounds citing that (1) allegations were reasonably clear concerning the alleged improprieties of the award decision and the applicable law and regulations implicated and (2) the District had provided sufficient evidence to rule on the merits of the claim where the protestor claimed that the evaluation process was flawed due to its extreme brevity of only one day).

If understood correctly, the protester's allegation amounts to a claim that during an earlier October 2010 solicitation[1], the protester submitted a bid and that bid was subsequently obtained and used by the awardee, Dance Institute, in this solicitation in order to win the present contract. Although lacking in clarity, protester's argument is sufficient to show an allegation of a violation of D.C. Code § 2-354.17[2] which states:

> The CPO shall review information which has been designated as confidential or proprietary by a person and which has been submitted in response to an Invitation for Bids or Request for Proposals. If the CPO determines that the designation is proper, the information shall be treated by the CPO, and any other District employee, in a confidential manner, shall be disclosed only to District employees for use in the procurement process, and shall

[1] Throughout its filings with this Board, the protester has interchangeably referred to the earlier solicitation as having occurred in October 2010 and October 2011. (*Compare* Protest 1 *with* protester's Second Resp. to District's Mot. To Dismiss 2.) This Board is proceeding under the assumption that the earlier solicitation referenced by protester occurred in October 2010.

[2] D.C. Code § 2-354.17 was enacted April 8, 2011.

> not be disclosed to other persons or parties without prior written consent of the person . . . .

In addition, protester's charge necessitates improper conduct by District government employees in the course of the RFP process. The conduct of District employees is governed by the District of Columbia municipal regulations as set forth in Title 6, Chapter 18. Specifically, "[i]t is the policy of the District government to avoid conflicts of interest concerning the award, implementation, monitoring, and performance of contracts for services." D.C. Mun. Regs., tit. 6-B, § 1803.14 (2011). Since this claim entails an alleged violation of the statute and the regulation, we shall address it on the merits.

Based on a review of the record, it is clear that the protester has not met its burden of proof on this allegation. Protester has had at least four opportunities to set forth its record before the Board: the initial protest, the Amended Protest, the response to the District's motion to dismiss, and the second response to the motion to dismiss. Protester has alleged but provided no evidence to support its claim that the October 2010 request for proposal process enabled noncompetitive contractors to obtain access to its proposal. Protester has stated that it was the "only" competitive bidder in the October 2010 solicitation and that Dance Institute was not competitive at that time. (Protester's Second Resp. to District's Mot. to Dismiss 2, Oct. 25, 2011.) Thus, protester assumes that Dance Institute obtained a copy of protester's earlier proposal in order to become the winning bidder in the present solicitation. However, in support of its claim, protester has submitted its Past Performance Data only, and mere surmise is an inadequate basis upon which protester's case must be made. In the past, this Board has held that a protest must not be based merely on conjecture or speculation, or a mere expression of disagreement with the contracting agency's decision. *Metropolitan Pest Control, Inc.*, CAB No. P-0123, 38 D.C. Reg. 2958, 2959 (July 28, 1989). Furthermore, protester has even failed to show that its October 2010 proposal was designated as "confidential" or "proprietary" as that proposal was not submitted to the Board for review of its confidential or proprietary designation. Accordingly, there is no evidence to show any breach of confidentiality under the statute and no evidence to show any regulatory violation due to improper District employee conduct.

We find that the protester has failed to provide any facts or documents to support its allegation of improper procurement procedures during the earlier solicitation that resulted in its disadvantage in the present RFP process. Therefore, Count I is denied.

Count II. The District's Failure to Give Notice of Award

When this protest was filed on August 23, 2011, the District had not yet informed offerors that an award had been made to Dance Institute. Protester asserts that the District's failure to give notice of the award to offerors provides a basis upon which to sustain the protest. And, by its own admission, the District did not inform offerors of the August 15, 2011 award until September 12, 2011. However, the District argues that this ground is moot as the District has, since the initial filing of this protest, provided notice of the contract award.

The municipal regulations governing the procurement process in the District require that the contracting officer notify unsuccessful bidders promptly that their bids were not accepted.

See, 27 DCMR §1544.4. Prompt notice is a procedural requirement which is expected to be observed. *John E. Kelly & Sons Elec. Constr., Inc.*, CAB No. P-0214, 38 D.C. Reg. 3065 (May 24, 1990). Our primary concern with giving notice of award to unsuccessful bidders is that "delays [in providing notice] create uncertainty as to whether a protester received knowledge of an award and consequently introduce unnecessary issues before the Board as to the timeliness of protests." *In re Horton & Barber Prof'l Servs., Inc.*, CAB No. P-0634, 49 D.C. Reg. 3333, 3338 (Feb. 21, 2001).

In the instant case, the policy concerns raised in *Horton* are not at issue. Despite not having received official notice from the District, the protester filed its protest with the Board within four business days of the award to Dance Institute. While we do not support what appears to be an inexplicable month long delay in providing notice, the protester was not injured by not receiving timely notice and has, at this time, received official notice. Accordingly, Count II is dismissed as moot.

Count III. The District's Decision to Issue Two In-School Awards

In Count III, protester alleges that the District's decision to issue only two in-school awards violated the terms of the solicitation. Protester asserts that during pre-proposal conferences, the District stated that the budget for the solicitation was four million dollars. However, the District contends that this protest basis is untimely in that the District's choice to award only one contract for each SDA was clearly stated in the RFP.

Section B.3.1 of the revised RFP stated:

> For the purpose of this RFP and the ensuing contracts the District will be divided into two Service Delivery Areas (SDAs):
>
> SDA District 1: Wards 1, 2, 3, and 4.
>
> SDA District 2: Wards 5, 6, 7, and 8.
>
> It is the intent of the District to award at least one contract for each of the SDAs. The District will award additional contracts based upon program needs and availability of funds.
> (District's Mot. to Dismiss, Ex. 2.)

Based on the above RFP provision, the District intended to award at least one contract for each SDA but was under no obligation to award any additional contracts. To the extent that protester took issue with the language as set forth in the RFP, in light of statements made by OCP personnel during the conduct of the RFP, such alleged improprieties in the solicitation were readily apparent prior to bid opening or the time set for receipt of proposals. Under D.C. Code § 2-360.08(b)(1), a protest based on alleged improprieties which are apparent prior to bid opening must be filed with the Board prior to bid opening or the time set for receipt of initial proposals.

Friends of Carter Baron
CAB No. P-0888

This Board has held that "in order to timely challenge the terms of a solicitation, the protest must be filed prior to the closing date for receipt of proposals or bid opening." *Unfoldment, Inc.*, CAB No. P-0358, 41 D.C. Reg. at 3659; *see also Int'l Builders, Inc.*, CAB No. P-0661, 50 D.C. Reg. 7461 (Oct. 11, 2002). As noted, the protests herein were filed on August 22 and August 23 (amended), 2011, respectively; whereas the proposal closing date was June 8, 2011. Consequently, this protest charge is untimely.

Moreover, this Board has the responsibility to determine whether the solicitation or award was in accord with the applicable law, regulations and terms and conditions of the solicitation. *Recycling Solutions, Inc.*, CAB No. P-0377, 42 D.C. Reg. 4550 (April 15, 1994). We find that there is no violation of procurement laws, regulations, or solicitation provision in the District's decision to award just one contract per service area. To the contrary, the District's decision to award one contract per service area was consistent with the terms of the RFP. Therefore, Count III of the protest is denied.

SO ORDERED.

DATED: January 13, 2012

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

CONCURRING:

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

/s/ Monica S. Parchment
MONICA S. PARCHMENT
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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

APPEAL OF:

KEYSTONE PLUS CONSTRUCTION CORP.)
) CAB No. D-1358
Under Contract No. POAM-2005-C-0022-RS)

ORDER GRANTING APPELLEE'S MOTION TO DISMISS
Filing ID # 42186089

This matter arises from the District of Columbia's (hereafter appellee or District) motion to dismiss this action for lack of jurisdiction based upon Keystone Plus Construction Corporation's (hereafter appellant) alleged failure to submit claims to the contracting officer that were pleaded in Counts I through III of its amended complaint. The appellant contends that its amended complaint contains claims that were first submitted to the contracting officer in the form of two letters dated January 7, 2009, and May 14, 2009, respectively. Upon review of the appellee's motion to dismiss, the appellant's opposition thereto, the supplemental pleadings on this issue submitted by both parties, and the entire record herein, we dismiss this matter without prejudice for lack of jurisdiction.[1]

BACKGROUND

The factual backdrop to the instant dispute is straightforward. In 2006, the parties entered into a 390 day contract under which appellant was to renovate a District homeless shelter for $6,150,000. (Appeal File, Contract and Amendments, Ex. A.) The record indicates that the project was hampered by delays from the very beginning. Roof leaks and bathroom mold resulted in appellant's requests for change orders within the project's first four months. (Appellant's Opposition To Appellee's Motion To Dismiss, Ex. A, January 7, 2009, Response To OCP Letter; Termination For Default Dated January 5, 2009, at Bates No. KPCC02646-02649)(hereafter January 7 letter.)

Additional problems alleged include malfunctioning AC units, the discovery of pigeon feces in a penthouse tower, the untimely relocation of shelter occupants from areas scheduled for renovation, the absence of ventilation fans in showers and bathrooms, vandalism in renovated showers, and total roof replacement. (January 7 letter at Bates Nos. KPCC02644; KPCC02649; KPCC02663; KPCC02664.)

As a consequence of the many delays occasioned during the project, the District issued an October 30, 2008, cure notice to the appellant which culminated in a default termination on

[1] As a preliminary matter, the Board grants Appellant's unopposed Motion Requesting Leave to File a Surreply to the District of Columbia's Motion to Dismiss, and accepts for filing Appellant's Surreply to the District of Columbia's Motion to Dismiss, Appellee's Supplemental Memorandum In Support of its Motion to Dismiss And Response to Appellant's Surreply, Appellee's Second Supplemental Memorandum In Support of its Motion to Dismiss, and Appellant's Opposition to the District of Columbia's Second Supplemental Memorandum In Support of its Motion to Dismiss.

January 5, 2009. (Answer/Counterclaim at ¶¶5-6.) The appellant responded thereto immediately with a January 7, 2009, letter requesting rescission of the default termination and an informal hearing with the Director/Office of Contracts and Procurement. (January 7 letter at Bates No. KPCC02642.) Attached to the letter was appellant's rebuttal to the default termination notice, a narrative summary purporting to justify the grounds for a 567 day time-extension, and email/letter exchanges between the parties relative to project delays. (*Id*. at Bates Nos. KPCC02643-02644; KPCC02646-02673.)

Before the contract officer replied to the January 7 letter, the appellant filed a notice of appeal with the Board stating that it appealed from the District's January 5 default termination.[2] Since that time, the dispute forum has shifted to our Board, where the parties have pursued their claims and defenses vigorously. The appellant filed a complaint and amended complaint on March 5, 2009, and May 9, 2009, respectively.[3] The amended complaint contains (1) a monetary claim for conversion of the default termination into a convenience termination, (2) a delay damages claim asserting 567 excusable delay days, (3) several breach of contract claims under the parties' Standard Contract Provisions, (4) a claim for arbitrary breach of the District's default termination regulations, (5) a claim for breach of the District's default termination regulations, and (6) a damages claim totaling $2,217,472.81. (Amended Complaint, ¶¶ 19-48.) The District filed its Answer and Counterclaim on June 8, 2009.

Nearly 20 months *after* appellant's amended complaint and the District's answer/counterclaim were filed, the District moved to dismiss this action for lack of jurisdiction. The District's motion contains several grounds. First and foremost, the District contends that the appellant never submitted *any* of the amended complaint counts to a contracting officer for a final decision. (Appellee Motion to Dismiss at pp. 1- 2.) Second, the appellee contends that in order to invoke the Board's jurisdiction, a convenience termination claim must include a monetary claim and be submitted to a contracting officer for a final decision. (*Id*. at pp. 3-6.) Finally, appellee contends that to the extent appellant submitted claims in the form of letter correspondence to a contracting officer, the correspondence failed to meet the definition of a "claim," did not request a final decision, was submitted to the contracting officer *after* the appeal herein was filed and/or was not "certified." (Appellee's Reply To Appellant's Opposition at pp. 2-5; Appellee's Second Supplemental Memorandum In Support of its Motion To Dismiss at pp. 1-4.)

In arguing against the District's motion to dismiss, the appellant contends that all of its amended complaint counts were submitted to a contracting officer for a final decision, and that

[2] Notice of Appeal, February 4, 2009. The notice expressly stated that the "decision [appealed] from is the Termination for Default issued by the Office of Contracting and Procurement, dated on [sic] January 5, 2009" [as] rendered by "Tony Reed, Assistant Director, Construction, Design & Building, Renovation Group, Office of Contracting and Procurement."

[3] There were no material differences between the two complaints except that the amended complaint (1) increased the number of alleged contract delay days from 536 to 567, and (2) increased the amount of claimed damages from $2,066,204 to $2,217,472.81. (Complaint at ¶¶ 10(a)-(b), 19; Amended Complaint at ¶¶ 10(c); 19.) For purposes of appellee's motion to dismiss, the Board accepts the May 9, 2009, amended version as the complaint of record.

the contracting officer's failure to issue a decision in nearly three years constitutes a "deemed denial" for purposes of the Board's jurisdiction. (Appellant's Opposition to Appellee's Motion To Dismiss at pp. 1-4; 8-9)(hereafter Appellant's Opp.) Specifically, appellant contends that its claims are contained in two letters that were submitted to the contracting officer in 2009. The first letter is the January 7 correspondence noted herein, which appellant contends contains all of its claims, including the monetary damages plea to convert a default termination into a convenience termination. (*Id.* at pp. 6, 9.) That notwithstanding, the appellant argues alternatively that the Board's jurisdiction[4] is "sufficiently broad" to hear wrongful termination claims even if they are not linked to a claim for monetary damages. (*Id.* at p. 10.)

The second claim letter is dated May 14, 2009[5], and is identified as "Renovation of the City Shelter POAM-2005-C-0022-RS/Claim" (hereafter May 14 letter) (*see* Appellant's Opp., Ex. D at Bates No. KPCC02498 et seq.). Appellant contends that its May 14 letter sought damages of $2,207,423.81 for unpaid base work and compensable delay damages. (Appellant's Opp. at p. 4.) Appellant also contends that its May 14 letter asserts a monetary demand linked to its claim for conversion of the default termination. (*Id.* at p. 9.) The appellant further contends that its January 7 and May 14 letters meet the District's criteria for "claims", and that the District does not require claim certification in disputes. (*Id.* at pp. 5-8; *see also* Appellant's Opposition To The District of Columbia's Second Supplemental Memorandum In Support of Its Motion To Dismiss at pp. 3-5.)

Finally, the appellant urges the Board to deny dismissal herein because it would be "inefficient and wasteful" due to the likelihood that appellant would immediately refile this action after obtaining a contracting officer final decision. (Appellant Surreply at pp. 5-6.)

DISCUSSION

The ultimate issue presented is whether the Board has jurisdiction over this appeal under D.C. Code § 360.03(a)(2), which authorizes our jurisdiction over "any appeal by a contractor from a final decision by the contracting officer on a claim … when such claim arises under or relates to a contract." The Board also has jurisdiction over the "deemed denial" of a claim, if a contracting officer fails to issue a final decision within 120 days. D.C. Code § 2-359.08(c).[6]

The appellant has offered three alternative bases for our jurisdiction. First, appellant's Notice of Appeal states that it appeals from the District's January 5 default termination. In response to appellee's motion to dismiss, however, appellant now contends that it appeals from

[4] Appellant cites D.C. Mun. Regs. Tit. 27, § 3801.3 (pertaining to "claims") and the Board's former jurisdictional statute, D.C. Code § 2-309.03(a)(2). The Procurement Practices Reform Amendment Act of 2010 (PPRAA) replaced the District's former Procurement Practices Act on April 8, 2011. Unless otherwise noted, references herein to the Board's jurisdictional statute are to the PPRAA.

[5] Appellant's Opposition to appellee's motion to dismiss describes the second letter as dated May 15, 2009. The actual letter is dated May 14, 2009, but was sent to appellee with a letter of transmittal dated May 15, 2009. For consistency's sake, the second purported claim letter is referenced herein as the "May 14 letter".

[6] At all times material to the instant matter, the applicable review period was 90 days. Former D.C. Code § 2-308.05.

the "deemed denials" of its purported January 7 and May 14 claim letters. We have carefully reviewed each of the appellant's contentions and hold that we lack jurisdiction over all of the claims in appellant's amended complaint.

We find alternative grounds upon which to base our decision, and note that each ground serves as an independent bar against the exercise of jurisdiction. First, we find that the Board lacks jurisdiction to review any of appellant's amended complaint claims due to the absence of a contracting officer final decision (actual or deemed) on any of the asserted claims. Specifically, a default termination is not a contracting officer final decision, and we lack jurisdiction to review it. Further, there was no contracting officer final decision on any of appellant's January 7 letter claims, and we lack jurisdiction over any such claims. Finally, there was no contracting officer final decision on appellant's May 14 purported letter claims (nor could there have been), because the May 14 letter was filed with the contracting officer three months *after* this appeal.

Alternatively, we find a lack of jurisdiction over appellant's amended complaint because its claims were never presented to the contracting officer for a final decision. Specifically, appellant's amended complaint contains new claims which exceed the scope of the January 7 purported claims. Therefore, we find that appellant's January 7 letter failed to include claims for (1) a conversion of the default termination to a convenience termination, (2) delay damages due to an alleged 567 day contract delay, (3) breach of the parties' Standard Contract Provisions, (4) breach of the District's termination for default regulations, and (5) arbitrary default termination. We discuss these matters below.

In a motion to dismiss for lack of subject matter jurisdiction, the court may review any evidence submitted by the parties without converting the motion into a Rule 56 motion for summary judgment. *Lipscomb v. Crudup*, 888 A.2d 1171, 1173 (D.C. 2005). With respect to appellee's motion to dismiss, the Board has reviewed the parties' pleadings, the attachments thereto, and the entire record herein.

I. The Board Lacks Jurisdiction Because There Is No Final Decision From Which An Appeal Can Be Taken

A. The January 5 Default Termination Does Not Constitute A Final Decision

Initially, appellant contended that its appeal was from the January 5 default termination of the District. *See* Notice of Appeal. Appellant's initial contention, however, misconstrues a default termination as a contracting officer "final decision." It is not. *See e.g., Keystone Plus Construction Corp.*, CAB No. D-1414, Order of July 1, 2011, at p.2; *Vista Contracting, Inc*., CAB Nos. D-1388 & D-1398 CONS, Order of June 15, 2011. Rather, the request to convert a default termination into a convenience termination, when coupled with a monetary plea, is a claim that must first be submitted to a contracting officer for a final decision. *Keystone Plus Construction Corp.*, at 2.

Once the contracting officer issues a final decision on the claim (or fails to do so within the statutory period), the contractor may then appeal to our Board. *Keystone Plus Construction Corp.*, at p. 2; *Vista Contracting, Inc*., at p. 4. In this case, appellant erroneously construed the January 5 default termination as a contracting officer final decision, and appealed it directly to our Board. Under these circumstances, and to the extent that the appeal is from a supposed "final decision" embodied in the January 5 default termination, we hold that the Board lacks jurisdiction.

B. No Final Decision Has Been Issued On Appellant's January 7 "Claim" Letter

Through subsequent pleadings in opposition to appellee's motion to dismiss, appellant has recast the basis for our jurisdiction. In those pleadings, appellant contends that it appeals from two "deemed denials" of claims submitted to the contracting officer in 2009. (Appellant Opp. at pp. 1-4; 8-9.) The first of the two deemed denials is premised upon the purported January 7 claim letter noted herein. Appellant contends that the claims pleaded in its amended complaint are the "very same items" asserted in the January 7 letter. (*Id*. at p. 1.) Appellant contends further that the contracting officer has failed to issue a final decision on the January 7 letter in nearly three years. We have reviewed the appellant's contentions and hold that the Board lacks jurisdiction over the January 7 purported "claim" letter because there is no contracting officer final decision thereon (actual or deemed), from which to appeal.

First, the *timing* of the instant appeal does not support appellant's contention that its February 5, 2009, appeal stems from a deemed denial. A deemed denial occurs when a contracting officer fails to issue a final decision on a claim pending before it for 120 days.[7] D.C. Code § 2-359.08(c). At that point, our statute construes the contracting officer's failure to act as a "deemed denial," and permits an appellant to seek redress from the Board. *Id*. In this case, the appellant's January 7 purported "claim" had only been pending with the contracting officer for 29 days before appellant noticed its appeal herein. Thus, there was no "deemed denial" in this matter when appellant noticed its appeal.

The appellant's argument that its claim matured into a deemed denial because the contracting officer has failed to issue a decision in nearly three years is without merit. The deemed denial referenced in our statute must become effective *prior* to an appeal, rather than during its pendency. *Vista Contracting, Inc*., ("[t]he contracting officer's denial or deemed denial of the contractor's claim is what gives rise to the Board's jurisdiction over any action"); *Appeal of Tensas Enterprises*, CAB No. D-868, 39 D.C. Reg. 4362 (June 12, 1992)("the Board's jurisdiction is derived either from a timely appeal of the [contracting officer's] final decision or a timely appeal from …the failure to issue a final decision…"); *Appeal of Professional Development Corporation*, CAB No. I-001, 38 D.C. Reg. 2961 (May 17, 1991)(without first obtaining a final decision by the [contracting officer] (or the time period in which the

[7] At all times material to the instant dispute, the contracting officer's review period was 90 days. Former D.C. Code §2-305.08(d).

[contracting officer] must issue such a final decision has expired) the contractor has not met the jurisdictional prerequisites for filing an appeal with this Board").

In reviewing this issue, we also look to federal courts and/or contract appeals boards for guidance. In that regard, the federal claims court has consistently held that a "deemed denial" premature at the time of filing does not ripen into a mature claim while suit is pending due to passage of the statutory period. *See, e.g., Mendenhall v. U.S.*, 20 Cl. Ct. 78, 84 (1990).

Additionally, the federal Civilian Board of Contract Appeals has opined on the policy rationale for requiring a party to exhaust its contracting officer review *before* invoking Board jurisdiction. "Submission of a claim to the contracting officer may result in resolution of some issues, and narrowing of the differences between the parties. This in turn could shorten the litigative process." *See Bowers Investment Co., LLC v. Dep't of Trans.*, CBCA 825, 08-1 BCA ¶33,783 (granting the government's motion to dismiss where a contractor failed to submit its claim to a contracting officer first). Similarly, appellant's submission herein of claims to the Board on February 5, 2009, effectively deprived the contracting officer of an opportunity to potentially resolve some issues, narrow others, and shorten litigation.[8]

Accordingly, we conclude that our Board lacks jurisdiction over all of the purported claims contained in appellant's January 7 letter because there was no contracting officer final decision thereon (actual or deemed), at the time of appeal. Moreover, the contracting officer's failure to issue a final decision does not ripen into a "deemed denial" during the pendency of a Board appeal. *Mendenhall* at 84.

C. Appellant's May 14 "Claim" Letter Was Filed After The Instant Appeal

Appellant also contends that this Board's jurisdiction has been conferred by the "deemed denial" of appellant's May 14 letter. As with its January 7 purported claim letter, appellant contends that the claims pleaded in its amended complaint are the "very same items" found in the May 14 letter. (Appellant's Opp. at p. 1.) The appellee contends that appellant's May 14 "correspondence" is unable to confer Board jurisdiction because it was submitted to the contracting officer three months *after* the appeal herein was filed. (Appellee's Reply to Appellant's Opposition at p. 4.) We agree with the appellee.

For the reasons that we have stated above, the "deemed denial" which confers jurisdiction on this Board has to have occurred *prior* to filing an appeal. *Vista*; *Mendenhall*. It is conceded that the appellant's May 14 purported claim letter was submitted to the contracting officer three months *after* the instant appeal. We therefore conclude that the Board lacks jurisdiction because the May 14 purported claims had not been submitted to the contracting officer at the time of this

[8] The Federal Circuit has also found that "the filing of an appeal divests a contracting officer of jurisdiction to issue a final decision". *See Sharman Co. v. U.S.*, 2 F.3d 1564 (Fed. Cir. 1993), *overruled in part, Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995). Neither party has argued the *Sharman* case instantly, and the Board does not require reliance thereon to resolve the jurisdictional issues presented.

appeal, let alone become the subject of a final decision. And, as noted herein, a claim that does not exist at the time of appeal does not ripen into a "deemed denial" claim during the pendency of an appeal.[9]

II. The Board Lacks Jurisdiction Because Appellant's Amended Complaint Claims Are New Claims And Were Not Presented To The Contracting Officer

A. Appellant's January 7 Letter Is Not A "Claim" For Conversion Of The Default Termination Into A Convenience Termination

The prayer for relief in appellant's amended complaint contains a claim for conversion of the District's default termination into a convenience termination, and pleads a monetary claim for $2,217,428 and "all amounts permitted under law and regulations for a Termination for Convenience." (Amended Complaint at p. 9.) Appellant contends that this claim was in its January 7 letter along with a monetary demand. (Appellant's Opp. at pp. 6, 9.) We find no support for this assertion in our record. Appellant's monetary claim for a convenience termination is a new claim that exceeds the scope of appellant's January 7 letter, and is beyond the jurisdiction of the Board.

The general rule is that the proper scope of an appeal is based on the nature of the claim presented to the contracting officer, the contracting officer's decision thereon, and the contractor's appeal therefrom. *See, e.g., Stencel Aero Engineering Corp.*, ASBCA No. 28654, 84-1 BCA ¶16,951 at 84,315; *Appeal of Transco Contracting Co*., ASBCA No. 28620, 85-2 BCA ¶17,977; *Centurion Electronics Service*, ASBCA No. 51956, 03-1 BCA ¶ 32,097; *LTD Builders*, ASBCA No. 28005, 83-2 BCA ¶ 16,685. A board or court will retain jurisdiction over a claim even though its dollar amount increases from the one presented to the contracting officer[10], offers a different legal theory of recovery from the one presented to the contracting officer[11], and/or asserts factual allegations in support of the underlying claim that were not submitted to the contracting officer.[12]

However, *new* claims not presented to the contracting officer but advanced for the first time on appeal are beyond Board jurisdiction. *Appeal of Transco*, *supra* (citing *Modular Devices, Inc*., ASBCA No. 24198, 82–1 BCA ¶ 15,536; *L.T.D. Builders*, *supra).* A new claim is one that does not arise from the same set of operative facts as the claim submitted to the contracting officer. *J. Cooper & Associates, Inc. v. U.S*., 47 Fed. Cl. 280, 285 (2000)(citations

[9] The Board does not reach the issue of whether the May 14 letter has ripened into its own deemed denied appeal. That issue is not ripe for consideration until such time as the appellant notices an appeal with our Board from a contracting officer final decision (actual or deemed) on the May 14 letter. Should the appellant notice such an appeal, the Board will render a timely ruling based on each party's briefing materials and the applicable case law. The Board notes, however, that a piecemeal submission of the various claims arising from and/or relating to the instant contract does not appear to be efficient.

[10] *See, e.g., Appeal of American Consulting Services, Inc*., ASBCA No. 52923, 00-2 BCA ¶31,084.

[11] *See, e.g., Scott Timber Co. v. U.S*., 333 F.3d 1358 (Fed. Cir. 2003).

[12] *See, e.g., Appeal of Lockheed Martin Librascope Corporation, ASBCA No. 50508, 00-1 BCA ¶30,635.*

omitted). Courts have construed the "same set of operative facts" language in such manner as to require that the claim submitted to the contracting officer must provide "adequate notice of the basis and amount" of the claim later submitted to a board or court. *See Scott Timber Company,* at 1365-66; *J. Cooper & Associates, Inc*. at 285-286; *Hawkins and Powers Aviation, Inc. v. U.S.*, 46 Fed. Cl. 238, 243 (2000).

In this case, appellant's January 7 letter does not contain a claim for conversion of the default termination to a convenience termination, and hence appellant's amended complaint request for a convenience termination is a new claim. The January 7 letter is largely appellant's straightforward request for rescission of the January 5 default termination and an informal hearing on its request for a rescission. The first sentence of the January 7 letter expressly requests rescission, and the first paragraph specifically seeks an informal hearing. The letter ends with appellant noting that it "look[s] forward to meeting with (appellee) and resolving this matter." The other matters addressed in the letter do not relate to appellant's purported request for conversion of the default termination to a convenience termination.[13]

Although similar, a request for a rescission differs from a request to convert a default termination to a termination for convenience. *See Seneca Timber Co.,* AGBCA Nos. 84-175-1, 83-228-1, 86-1 BCA ¶18,518. As noted in *Seneca*, the difference is that "the remedy for default is prescribed by a contract clause, whereas rescission is not." *Id*. A claim premised on a remedy granting clause in the parties' contract cannot be viewed as part and parcel of a claim that does not "arise from" the parties' contract. *J. Cooper & Associates, Inc*., at p. 287.[14] Hence, appellant's January 7 request for a "rescission" is not the same claim as its amended complaint request for conversion of the default termination to a convenience termination, and did not provide sufficient notice of the convenience termination claim. As such, appellant's claim for a convenience termination is new and the Board lacks jurisdiction.

Finally, the Board notes that the appellant has not helped its case by failing to articulate *how* the January 7 letter included a convenience termination claim. There is nothing in the January 7 letter that expressly or by implication requests a convenience termination, or couples such a request to a monetary claim. Appellant's January 7 letter does not include the damages plea typically sought in a convenience termination claim (i.e., all costs incurred plus a reasonable profit). *See, e.g., D.C. v. Organization For Environmental Growth, Inc.,* 700 A.2d 185, 199-200 (D.C. 1997)(a contractor's recovery for termination for convenience is actual costs incurred plus a reasonable profit). In short, the record as a whole does not support appellant's assertion that a

[13] The remainder of the two-page letter castigates the contracting officer for not filing a "written claim with the Director" prior to termination, faults a District employee for not "returning messages" or attempting to resolve disputes, and "contends" that the District is in "material breach" for not making timely progress payments, paying an allegedly outstanding $588,000 change order, and issuing payment for work performed after June 2008. (January 7 letter at p.1.)

[14] The *Cooper* case notes that government contract claims can be divided into two broad categories: claims "arising from" remedy granting clauses in the parties' contract, and claims "relating to" the contract but not resolved through any contract clause. *Id*. at 285-286 (citations omitted).

convenience termination claim (with or without a monetary plea) was included in the January 7 letter.

Appellant's entire argument is supported solely by the conclusory statements that the January 7 letter contained "claims…for the very same items" in the appeal, "sought…a termination for convenience" and included "monetary demands". (Appellant's Opp. at pp.1, 6, 9.) Apart from these assertions, however, appellant is silent as to where the language purporting to establish a convenience termination claim can be found in the January 7 letter.[15]

Because appellant's January 7 letter does not include a claim for conversion of the default termination into a convenience termination, nor a monetary claim attached thereto, and does not provide adequate notice of the later amended complaint request, our Board lacks jurisdiction.

B. Appellant's January 7 Letter Does Not Contain A Delay Damages Claim

Appellant's amended complaint and its Count I therein contain a monetary claim for delay costs arising out of (alleged) government caused delays. (Amended Complaint at ¶¶ 10(a)-(c); 19(b); 23, 26(d).) The appellant contends that these delay costs consist of $828,268.81 in extended job site and home office overhead due to a government caused 567 day delay. (Id. at ¶19(b).) As with its other claims, the appellant asserts a broad brush contention that all of its claims were submitted with the January 7 letter. (Appellant's Opp. at p. 1.) The appellee does not specifically address whether appellant's delay damages claim was submitted to the contracting officer.[16] We have carefully reviewed appellant's contention that a delay damages claim was contained in the January 7 letter and find that it is meritless. The Board, therefore, is without jurisdiction to review the delay damages claim in appellant's amended complaint.

The general rule is that a monetary claim for delay damages must be submitted to the contracting officer prior to a Board appeal. *See, e.g., Appeal of Skip Kirchdorfer, Inc.* ASBCA Nos. 40515, 40516, 43619, 43620, 93-3 BCA ¶25,899*; All Star Metals, LLC v. Dep't of Trans.,* CBCA 91, 07-1 BCA ¶33,562. Moreover, a delay damages claim must also include "supporting data establishing the extended overhead costs allegedly incurred during the claimed delay period and the methodology by which a daily extended overhead rate was determined". *Id.* The rationale offered for the latter requirement is that "without such information the contracting officer would

[15] Appellant notes twice that the January 7 letter consists of "32 page[s]". (Appellant's Opp. at pp. 2,8.) The mere length of the document does not correlate to whether a convenience termination claim was embedded therein. The Board notes that the document is voluminous, but nonetheless finds that it fails to contain an express or implied claim for a convenience termination (monetized or not).

[16] While not specifically addressing appellant's delay damages claim, the appellee generally contends that any change order sought by appellant had to include a certification that its costs were current, complete, and accurate. (Appellee's Second Supplemental Memorandum In Support of Its Motion To Dismiss at p. 1.) Appellee contends further that the disputes claim itself must be certified. (*Id.*) We do not address these contentions raised by appellee because we find that appellant's January 7 letter did not submit a monetized delay damages claim to the contracting officer.

be precluded from making a meaningful review of the claim and thus be unable to make the requested determination." *Id*.

In the instant matter, the appellant did not submit a monetary claim for delay damages to the contracting officer in the January 7 letter (or its attachments). In fact, the only dollar figure mentioned anywhere in the January 7 letter refers to a $588,000 unpaid change order. (January 7 letter at p. 1.) Moreover, the January 7 letter does not include any supporting data establishing the basis for calculating extended job site and/or home office costs. Under these circumstances we find that the January 7 claim letter failed to include a delay damages claim, did not provide the required supporting data establishing the basis for the extended job site and/or home office costs, and failed to provide the contracting officer with adequate notice of the later pleaded claim for delay damages. Therefore, to the extent that appellant contends that the January 7 letter includes a delay damages claim, we find that the Board lacks jurisdiction.[17]

The Board does note that an attachment to the January 7 letter requests "an equitable adjustment" for a 567 day time extension and extended costs for "job site and home office overhead." (January 7 letter at Bates No. KPCC02652.) As noted, however, appellant's January 7 letter (including attachments) lacks a monetary claim for the alleged delay, and omits supporting documentation and a methodology for calculating job site and home office overhead costs. The attachment as a whole serves merely to outline five categories of events that appellant contends led to the 567 day alleged delay (mutual delays, roof deterioration, mold remediation, deficiencies to the existing AC system, and added work activities). (January 7 letter at Bates Nos. KPCC02645-02673.) The attachment does not establish a delay damages claim.

Finally, the Board notes that a nonmonetary claim for a 567 day time extension is contained in appellant's January 7 letter[18], and that appellant has pleaded a claim therefore in its amended complaint[19]. We do not reach the propriety of this claim, however, because (as noted herein) there is no contracting officer final decision on appellant's time extension claim upon which to base our jurisdiction.

C. Appellant's January 7 Letter Does Not Contain "Claims" For Breach Of Contract

Appellant's amended complaint Count I also sets forth very detailed claims for breach of the parties' Standard Contract Provisions Article 2 (failure to abide by binding drawings/specifications in the contract); Article 3 (failure to issue required change orders); Article 5 (unlawful default termination); and Article 8 (failure to make monthly progress payments). (Amended Complaint at ¶¶21-28.) As noted herein, appellant contends broadly that its January 7 letter included claims for each of the above. (Appellant's Opposition at p. 1).

[17] We do not find herein that appellant's claim for extended job site and/or home office costs must include a "methodology" for determining daily overhead rates. We find only that the claim must include supporting data that allows the contracting officer to establish the basis for the costs claimed during the delay period.
[18] January 7 letter at Bates Nos. KPCC02651-02652.
[19] Amended Complaint at ¶23; Appellant's Surreply to the District of Columbia's Motion to Dismiss at pp. 3-4.

Appellee disputes that these claims were submitted to the contracting officer. We agree with the appellee. The Count I claims pleaded in appellant's amended complaint are new claims. As such, we lack jurisdiction over Count I.

As noted herein, a new claim is one that does not arise from the same set of operative facts as the claim submitted to the contracting officer, and as to which the contracting officer did not receive adequate notice of the basis and amount through the original claim. *Scott Timber Company,* at 1365-66; *J. Cooper & Associates, Inc*. at 285-286 . As noted further, the January 7 letter sets forth a request for a rescission of the parties' contract, and seeks a 567 day time extension. The January 7 letter claim does not provide adequate notice of the basis for and amount of the contract breach claims pleaded in appellant's Count I. The January 7 letter fails to mention the contract clause breaches in the amended complaint and/or contains only vague references to them. *See J. Cooper & Associates, Inc*. at 286 ("in order to identify to the contracting officer that the [contractor] was making a breach of contract claim, the [contractor] would have had to articulate such a claim in the claim letter; … the language of the … claim letter does not mention or even suggest that [contractor] seeks damages … for breach of contract").

Breach of Article 2 (binding specifications and drawings). Appellant contends that the District breached its duty to abide by the parties' agreed to specifications and drawings. Appellant contends that project drawings required it to install a fuel pipe on the roof. (Amended Complaint at ¶¶ 15(a); 16(a).) That notwithstanding, the appellee is alleged to have given the appellant a deficiency determination in the cure notice for not installing the fuel pipe on the interior ceiling of the third floor. (Amended Complaint at ¶¶15.)

We have reviewed the January 7 purported claim letter carefully, and conclude that it does not contain a claim for breach of Article 2. In fact, the January 7 letter does not mention Article 2 at all, and contains only a brief and vague reference to the fuel pipe issue . (January 7 Letter at Bates No. KPCC02644.)("the fuel pipe has been formally addressed in writing by KPCC.") Thus, appellant's alleged breach of Article 2 is a new claim that exceeds the scope of the January 7 letter, and is beyond our jurisdiction.

Breach of Article 3 (failure to make required change orders). We have noted already herein that appellant's amended complaint includes a claim for a 567 day time extension. (Amended Complaint at ¶ 23.) Similarly, we note that appellant's January 7 letter includes a request for a 567 day time extension change order. (January 7 letter at Bates No. KPCC02651-02652.) While we believe that appellant's time extension claim is therefore within the scope of the January 7 letter claim, we nonetheless lack jurisdiction due to the absence of a contracting officer final decision.

We have also noted herein that appellant's January 7 letter mentions an unpaid $588,000 change order for "numerous proposals (work performed) dating back to 5/17/06." (January 7 letter at Bates No. KPCC02642.) Appellant's amended complaint does not allege a claim for an unpaid $588,000 change order. Therefore, we find that the alleged unpaid $588,000 change

order is not before us. However, if the change order were before our Board, we would nonetheless lack jurisdiction due to the absence of a contracting officer final decision.

Breach of Article 5 (wrongful termination where delays are excused). The amended complaint also alleges a breach of the parties' contract provision preventing termination where contractor delays are excusable (i.e., result from "unforeseen causes, acts of the District, acts of other contractors, and delays of subcontractors from unforeseen causes"). (Amended Complaint at ¶ 24.) The Board construes this argument as synonymous with appellant's claims for a time extension credit of 567 days due to excusable delay (discussed herein). Accordingly, we lack jurisdiction because there is no contracting officer final decision.

Breach of Article 8 (failure to make timely progress payments). The amended complaint alleges a claim for failure to make timely progress payments. (Amended Complaint ¶¶ 25, 26 (c).) Appellant's January 7 letter contains a conclusory statement that the appellee "materially failed to make timely payments." (January 7 letter at Bates No. KPCC02642.) However, the January 7 letter contains no further reference to untimely payments beyond this initial statement. The letter does not specify which month(s) were untimely paid, nor demand a sum certain pertaining thereto.

A claim is defined as a written demand or written assertion by a contractor seeking as a matter of right, the payment of a sum certain. *See, e.g., Davis & Assoc. v. Williams*, 892 A.2d 1144, 1150 (D.C. 2006). Appellant's reference to untimely payments is both fleeting and vague. We find that the mention of untimely payments in appellant's January 7 letter is vague, is not a "sum certain" and does not constitute a claim. Accordingly, we lack jurisdiction to review it on appeal.

D. Appellant's January 7 Letter Does Not Contain "Claims" For Breach of the District's Default Termination Regulations nor Arbitrary Termination.

Put succinctly, the final two counts in appellant's amended complaint assert claims for violation of the District's default termination regulations (Count II)[20], and arbitrary default termination of the contract (Count III). (Amended Complaint at ¶¶ 29-42; 43-48.) As with its other claims, the appellant asserts a broad brush contention that its Count II and III claims were submitted with the January 7 letter. (Appellant's Opp. at p. 1.) We have reviewed appellant's contentions carefully and find that Counts II and III are new claims, were not contained in appellant's January 7 letter, and are beyond the jurisdiction of the Board. Accordingly, we lack jurisdiction to review Counts II and III.[21]

[20] D.C. Mun. Reg. Tit. 27, §3711 et seq. The regulations cited establish procedural guidelines to follow in exercising the government's right to a default termination.

[21] We also find as to these Counts II-III, that no monetary claim was included therewith. Claims, including wrongful termination claims, must include a monetary plea. *See Vista; Keystone*.

Count II of appellant's amended complaint alleges breach of the District's default termination regulations as pertains to the District's waiver of the contract performance date, failure to provide certain notices for certified minorities, failure to make determinations regarding excused failure to perform, termination of the contract after completion and beneficial occupancy, and failure to consider "non-termination actions". (Amended Complaint at ¶¶ 29-42.) These very detailed claims go well beyond the scope of appellant's January 7 letter which, as noted, consists of a rescission request, a request for a hearing on the rescission request, and a request for a 567 day time-extension. Nothing in the January 7 letter provided the contracting officer with adequate notice of the basis and amount of claims for breach of the District's default termination regulations. And notably, while appellant's January 7 letter specifically mentions sections of the District's procurement regulations pertaining generally to District claims against contractors,[22] there is no reference to the default termination regulations.

The amended complaint's count III alleges "arbitrary" default termination. (Amended Complaint at ¶ 48.) The doctrine of arbitrary default termination precludes a contractor from acting unreasonably in the exercise of its discretion to terminate a contractor for default. *See e.g., Darwin Construction Co. v. U.S.*, 811 F.2d 593 (Fed. Cir. 1987). The doctrine is involved in scenarios where there is a technical default, but the evidence shows that the motivation for termination is something improper. *See Darwin Construction Co.*, (a contractor was default terminated solely to get rid of having to deal with the contractor); *Schlesinger v. U.S.*, 390 F.2d 702 (Ct. Cl. 1968)(a contractor was default terminated after pressure from a Congressional committee). We have reviewed appellant's January 7 letter carefully and find that there is neither an express arbitrary default termination claim therein, nor allegations that would fall within the scope of the arbitrary default termination doctrine.

Additionally (and significantly), the absence in the January 7 letter of any monetary claim that would support appellant's claims for breach of the District's default termination regulations and/or arbitrary default termination is fatal. As noted herein, a claim must include a sum certain. *Davis, infra*. The sole monetary figure in the January 7 letter pertains to an alleged unpaid change order for $588,000, which has not been carried forward on appeal. (January 7 letter at p. 1.) Absent such a monetary component to appellant's default termination claims, we lack jurisdiction.

III. Dismissal Will Not Be Stayed Under Principles Of Judicial Economy

Finally, the appellant urges the Board not to dismiss this action because to do so would be a waste of resources. (Appellant's Surreply at pp. 2, 5-6.) Appellant asserts that it could simply re-file the action immediately after dismissal. (*Id.*) This argument implies that there could be an immediate refiling and final decision, followed by a seamless assertion of Board jurisdiction. We disagree. As a practical matter, the Board's action herein will require the appellant to carefully review whether or not it wishes to submit claims that mirror the allegations

[22] D.C. Mun. Regs. Tit. 27, §§ 3802, 3802.3, 3802.4, and 3806.1. (January 7 letter at pp. 1-2.).

in the amended complaint, and to properly plead and document monetary amounts consistent therewith.

Moreover, following appellant's resubmission of claims, two additional events must occur. First, the contracting officer must "determine any [known] unliquidated claims/counterclaims" the District may have or run the risk of having those claims "waived or barred as defenses" before our Board. *Prince Construction Co*., Inc., CAB No. 1173, May 6, 2003, Order On Cross Motions For Summary Judgment. Second, the contracting officer must issue a final decision (or the statutory period for issuing such decision must lapse).

With respect to asserting "known unliquidated claims/counterclaims," the appellee might be expected to assert claims for costs to correct and complete deficiencies, and reimbursement for work not performed.[23] As such, the contracting officer herein will have a comprehensive case including appellant's claims and appellee's claims/counterclaims for the first time. The Board expects the contracting officer to evaluate the case fully and to ascertain the prospects for settlement of all or parts of the claims herein. In short, we expect the contracting officer to use its best efforts to resolve "some issues" and "narrow the differences between the parties."

Finally, Appellant's reliance on *Prince*, is misplaced. In *Prince*, the Board allowed the District to assert a liquidated damages claim for late performance as a counterclaim/defense as to which the contracting officer had never issued a final decision. The Board allowed this by staying the appeal for two weeks to allow the contracting officer to issue a final decision on the liquidated damages claim. Although the Board could easily have dismissed the District's counterclaim for lack of jurisdiction, it did not. The Board reasoned that it would not be efficient to dismiss the counterclaim "if a final decision of the contracting officer could be immediately made and a new appeal immediately taken."

In this case, we have noted that the resubmission of the instant claims and any applicable counterclaims will not result in an immediate "final decision." Nor should they. The resubmitted claims/defenses will provide the contracting officer herein with its first opportunity for a comprehensive review of these claims, and an opportunity to evaluate them in good faith, seek claim resolution where possible, and ultimately issue a ruling on the merits.

SO ORDERED.

DATED: January 27, 2012

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

[23] The appellee submitted a counterclaim herein seeking such damages. (Appellee's Answer to Amended Complaint and Counterclaim, ¶¶ 8-10.) Ironically, the appellant sought summary judgment as to the counterclaims on the ground that they were not submitted to the contracting officer. Appellant's motion for summary judgment is rendered moot by our ruling herein.

KEYSTONE PLUS
CONSTRUCTION CORP.
CAB No. D-1358

CONCURRING:

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

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

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:	)	
ENTERPRISE INFORMATION SOLUTIONS, INC.	)	
	)	CAB No. P-0901
Solicitation No. DCKA-2011-G-0182	)	

For the Protester: William W. Goodrich, Jr., Esq., Judith B. Kassel, Esq. For the District of Columbia Government: Alton E. Woods, Esq., Assistant Attorney General, Office of the Attorney General.

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

OPINION

Filing ID #42425982

Enterprise Information Solutions, Inc. protests the District's exclusion of its proposal from consideration for a contract award based upon its alleged submission of a late proposal. The protester contends that the District's issuance of multiple solicitation modifications to the original due date for submission of proposals effectively created an ambiguity with respect to any corresponding change to the exact time deadline for receipt of proposals on the required submission date.

The District moves to dismiss this protest as an untimely protest against the terms of the solicitation and further asserts that the solicitation was unambiguous and was never modified by the District with respect to the original time deadline for receipt of proposals.

The Board finds this protest to be untimely and the underlying protest allegations to be without merit. The protest is dismissed.

BACKGROUND

The District's Office of Contracting and Procurement, on behalf of the District Department of Transportation, issued Request for Task Order Proposal No. DCKA-2011-G-0182 ("Solicitation"), on September 28, 2011, through the General Service Administration's ("GSA") procurement website ("E-Buy"). (Agency Report ("AR") Ex. 1.) The Solicitation sought a contractor to provide automated vehicle pavement data collection services. (*Id.*) The original Solicitation terms specified a closing date and time of October 17, 2011, at 2:00 p.m. (*Id.*)

Subsequently, eleven modifications were made to the Solicitation by the District after it was issued on September 28, 2011. (AR Ex. 2.) Four of these modifications specifically changed the original due date for receipt of proposals under the Solicitation. (*Id.*) In particular, Modification 1 changed the due date for receipt of proposals from October 3, 2011, to October

17, 2011[1]; Modification 7 changed the closing date for receipt of proposals from October 17, 2011, to October 24, 2011; Modification 8 changed the closing date for receipt of proposals from October 24, 2011, to October 28, 2011; and Modification 9 changed the closing date for receipt of proposals from October 28, 2011, to November 4, 2011. (*Id.*) However, none of the aforementioned modifications in any way addressed or directed a change to the original time of 2:00 p.m. stated in the Solicitation by which proposals had to be submitted to the District on the required due date.

The protester submitted its quote to the District on November 4, 2011, at 2:36 p.m. (AR Ex. 6.) After submitting its quote to the District, the protester sent a follow-up email to the District stating that it had attempted to submit its bid the morning of November 4, 2011, through the GSA E-Buy website but had experienced technical difficulties in attempting to make this submission. (AR Ex. 4.) In this correspondence, the protester seemingly acknowledged that the deadline for proposal submission was at 2:00 p.m. on November 4, 2011, and asked the District for the opportunity to have its proposal considered for award despite it being filed after this 2:00 p.m. deadline:

> We tried to submit [the proposal] on GSA website this morning, and the web site seems to hang upon hitting submit. We found out just after 2pm and I sent you the documents right after.
> **Please accept our apologies and I hope the proposal can still be accepted and reviewed based on merits**.

(emphasis added). (*Id.*)

The District, however, advised the protester that its proposal could not be considered for award because it was filed after the 2:00 p.m. deadline on November 4, 2011. (AR Ex. 7.) The present protest followed.

DISCUSSION

The Board exercises jurisdiction over this protest and its underlying allegations pursuant to D.C. CODE §2-360.03(a)(1) (2011).

The basis for the protester's present challenge to its exclusion from consideration for the contract award is fairly straightforward. The protester contends that the four modifications to the Solicitation noted above that specifically changed the deadline for submission of proposals did not similarly address or provide an exact new time by which proposals were required to be submitted to the District. (Protest; Supplemental Protest 4.) Hence, the protester essentially argues that these modifications changing the deadline date for receipt of proposals also effectively removed the original time deadline in the Solicitation (2:00 p.m.) by which proposals had to be submitted on the specified due date, without ever providing a new time deadline in any subsequent modification. (Supplemental Protest 4.) The protester further maintains that this

[1] For unknown reasons, Modification 1 was issued by the District notwithstanding the fact that it was redundant of the original Solicitation terms, which had previously designated October 17, 2011, as the due date for receipt of proposals.

created an ambiguity in the Solicitation documents that must be construed against the District as the drafter of the documents, as the protester was unable to reach the District for clarification about this ambiguous requirement prior to the deadline for receipt of proposals. (*Id.*)

In moving to dismiss this action, the District argues that the present protest is untimely as it challenges the terms of a solicitation provision as ambiguous and, therefore, was required to be filed by the protester prior to the deadline for receipt of proposals in accordance with D.C. CODE §2-309.08(b)(1) (2001)[2] and Board Rule 302.2(a). (AR 7.) Additionally, with respect to the underlying merits of the protester's allegations, the District asserts that none of its eleven modifications to the Solicitation were intended, or attempted, to change the original time deadline for submission of proposals and, thus, the original time deadline remained unambiguously the same. (AR Ex. 6.)

Upon review of the record, and as a fundamental matter in this case, we do not conclusively accept the protester's assertion in this proceeding that it, in fact, believed the time deadline for receipt of proposals to be unclear or ambiguous as the result of the multiple modifications to the Solicitation that were issued. Indeed, as noted earlier, on the very day that proposals were due, the protester sent an e-mail correspondence to the District where it appears to acknowledge the 2:00 p.m. deadline for receipt of proposals and the fact that it realized that its proposal was not submitted by this time. (AR Ex. 4.) The protester specifically requested that its proposal still have the opportunity to be considered for the award because of technical difficulties that it allegedly experienced when attempting to submit the document through the GSA website.[3] (*Id.*) Moreover, in no instance did the foregoing e-mail correspondence, sent on the due date for proposals, even attempt to assert that the protester did not know or understand the deadline by which its proposal had to be submitted to the District. Thus, the protester's contrary statement, in this proceeding, that it found the Solicitation modifications to have created an ambiguity as to the time deadline for receipt of proposals lack veracity.

Moreover, to the extent that the protester believed that the Solicitation was ambiguous with respect to the applicable time deadline for submission of its proposal, it was legally required to challenge this alleged ambiguity in advance of the deadline for receipt of proposals. "A protest based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals." D.C. CODE § 2-360.08(b)(1) (2011).[4] Accordingly, in comparable situations, the Board has held that "[a] bidder who fails to seek clarification of an ambiguity on the face of a solicitation prior to bid opening risks a contrary interpretation of the allegedly

[2] D.C. CODE §2-309.08(b)(1) (2001) has been repealed, but this same language is presently codified in D.C. CODE §2-360.08(b)(1) (2011).
[3] The District counters the protester's allegation that it had problems attempting to submit its proposal through the GSA E-Buy website by virtue of the fact that this website did not report any problems accepting proposals on November 4, 2011 through the appropriate system reporting mechanism. (AR 7-8; AR Ex. 8.) The District also notes that the Solicitation, in multiple instances, advised offerors that proposals could be submitted directly to the District independent of utilizing the GSA website. (AR 8.)
[4] The language of Board Rule 302.2(a) mirrors this statutory language.

ambiguous provision and is precluded from raising such issues to the Board after opening." *Fort Myer Constr. Corp.*, CAB No. P-0688, 52 D.C. Reg. 4173, 4197 (Apr. 22, 2005) *citing Maryland Constr., Inc.*, CAB No. P-0650, 50 D.C. Reg. 7347, 7398 (Aug. 29, 2003).

Thus, to the extent that the protester is now representing that it attempted to contact the District for clarification regarding this time deadline issue prior to submitting its proposals, it would have also been aware of this alleged ambiguity from the face of the Solicitation documents prior to the deadline for submission of proposals. Consequently, the protester's failure to protest this matter prior to the deadline for submission of proposals renders the present protest untimely.

Further, the Board also finds the underlying protest allegations in this matter to be lacking in merit even if they could be assumed to be timely raised, which they are not.[5] A solicitation may be considered ambiguous when it is susceptible to two or more reasonable interpretations. *Koba Assoc., Inc.*, CAB No. P-350, 41 D.C. Reg. 3446 (June 10, 1994). In this case, however, the four relevant modifications to the Solicitation only expressly modified the calendar due date for submission of proposals. (AR Ex. 2.) The modifications did not, on the other hand, expressly remove, alter, or even address the original 2:00 p.m. time deadline for receipt of proposals stated in the Solicitation. (*Id.*) Therefore, it is clear, and in no way ambiguous, that the original 2:00 p.m. deadline in the Solicitation remained unchanged notwithstanding the other multiple changes to the original calendar due date for receipt of proposals.

For the reasons set forth herein, the Board dismisses the present matter as it is an untimely protest against the terms of the Solicitation, and finds that the protester was properly rejected from consideration for receiving the contract award.

SO ORDERED.

DATED: February 9, 2012

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

CONCURRING:

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

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

[5] The Board still opts to address the merits of the underlying allegations in this matter, although the matter is ripe for dismissal on the timeliness grounds discussed herein.

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:		
Urban Alliance Foundation	)	CAB Nos.: P-0886, P-0887,
Voices of Our Sisters	)	P-0890, P-0891,
Progressive Educational Experiences in Cooperative Cultures	)	P-0892
Higher Development Academy	)	(Consolidated)
Jobs for America's Graduates	)	
Solicitation No. DCCF-2011-R-3963-SDA 2	)	

For the protester Urban Alliance: James P. Gallatin, Jr., Lawrence S. Sher, Gregory S. Jacobs, Joelle E.K. Laszlo, Melissa E. Beras and Stacy C. Forbes, Reed Smith LLP. For the protester Voices of Our Sisters: Kenya Welch, *pro se*. For the protester Progressive Educational Experience in Cooperative Cultures: Sara Stone, *pro se*. For the protester Higher Development Academy: Deborah Hayman, *pro se*. For the protester Jobs for America's Graduates: Lawrence P. Block, Dennis Lane, and Thorn Pozen, Stinson Morrison Hecker LLP. For the District of Columbia Government: Talia Sassoon Cohen, Assistant Attorney General, Office of the Attorney General.

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

OPINION

Filing ID 42527096

Urban Alliance Foundation ("Urban Alliance") has filed a protest challenging its removal from the competitive range under a solicitation seeking a contractor to design and implement an in-school youth workforce development program to support between 250-500 at-risk youths. (AR at Ex.1, §B.1.) Subsequent to the District's award of the contract to Synergistic, Inc. ("Synergistic"), four other offerors, Voices of Our Sisters ("VOOS"), Progressive Educational Experience in Cooperative Cultures ("PEECC"), Higher Development Academy ("HDA"), and Jobs for America's Graduates ("JAG") filed protests with this Board raising additional protest grounds. On September 2, 2011, the Board issued an order consolidating the protests. The protesters' challenges generally concern (a) irregularities with and cancellation of a procurement process beginning in September 2010, (b) the District's failure to evaluate the proposals in accordance with the law and the terms of the solicitation, and (c) non-responsibility of the awardee, Synergistic. On September 23, 2011, the District filed a motion to dismiss all protests as either untimely or for lack of standing.

We find the protests timely and that the protesters have standing. Further, the Board finds that the District's Office of Contracting and Procurement ("OCP") failed to follow proper procedures in evaluating the proposals. This failure was pervasive and extensive so as to render the final award decision arbitrary and capricious. Following are four areas where OCP acted inconsistently in terms of the solicitation and in violation of procurement law: (A) failure to disclose mandatory minimum requirements, (B) failure to adequately document, (C) failure to evaluate reasonably, and (D) failure to conduct a blind evaluation. Taken together, these findings constitute sufficient basis for sustaining the present protest thus the Board finds it unnecessary to address the responsibility of the awardee at this time. However the irregularities of the evaluation process are sufficiently material so as to warrant termination of the current contract effective no later than the close of the current school year in June 2012. To the extent that these services are required by the District for the summer school session of 2012 and beyond, the District shall issue a request to the twenty-three offerors for revised technical and cost proposals for the remainder of the base year and the option years. The District shall evaluate the revised proposals in accordance with the law and the terms of the RFP. These consolidated protests are sustained.

BACKGROUND

On April 1, 2011, OCP issued a Request for Proposals for Solicitation No. DCCF-2011-R-3963-SDA 2 ("RFP") for a contractor to design and implement a quality, year-round educational program to support between 250-500 at-risk youths.[1] (AR at Ex. 1.) Per the RFP, the District intended to issue a contract consisting of a base year with four additional option years. (AR at Ex 1, §§ F.1-F.2.4.) The RFP was revised six times prior to the deadline for receipt of proposals on June 8, 2011. (Mot. to Dismiss 3.) The revisions are as follows: (i) on April 14, 2011, the due date was changed from April 22, 2011, to May 4, 2011; (AR at Ex. 2) (ii) on April 26, 2011, (Amendment 0001), the due date was extended to May 13, 2011; (*id.*) (iii) on May 9, 2011 (Amendment 0002), the due date was extended to May 27, 2011; (*id.*) (iv) on May 18, 2011 (Amendment 0003), the RFP was replaced in its entirety and the due date was extended to May 31, 2011; (*id.*) (v) on May 26, 2011 (Amendment 0004), technical amendments were made to certain sections of the RFP and the due date was extended to June 6, 2011; (*id.*) and (vi) the due date was extended for the final time, via E-Sourcing message board, to June 8, 2011, (*id.*).

Terms of the Solicitation

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

SDA 1: Wards 1, 2, 3, and 4
SDA 2: Wards 5, 6, 7, and 8

[1]This solicitation follows an earlier solicitation issued in September 2010 for the same services. (*See, e.g.*, Urban Alliance Protest 3, Aug. 10, 2011.)

(AR at Ex. 1, § B.3.1.)

The RFP stated: "It is the intent of the District to award at least one contract for each of the SDAs. The District will award additional contracts based upon program needs and availability of funds."[2] (*Id.*) Potential offerors were to submit proposals to design and implement a year-round in-school youth program to provide services promoting academic achievement, successful graduation, awareness of and readiness for post-secondary education, career preparation, and connections to employment. (AR at Ex. 1, § C.1.)

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

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

(AR at Ex. 1, § M.2.)

[2] All protesters in this matter are challenging only the award for SDA 2.

Urban Alliance et al
CAB Nos. P-0886, P-0887,
P-0890, P-0891, P-0892

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

§ B.3 **SERVICE DELIVERY AREAS**

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

SDA District 1: Wards 1, 2, 3, and 4.
SDA District 2: Wards 5, 6, 7, and 8.

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

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

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

§ C.5.2 **YOUTH POPULATION**
The following youth population shall be targeted:

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

(AR at Ex. 1.)

Subsequently, in the District's response to this Board's October 25th request for supplemental information, the mandatory minimum requirements were further identified as Sections B.3, C.1, C.5.2, C.5.4.2, and C.5.12.9. (District's Resp. to Order of the Board Dated Oct. 25 ¶ A [hereinafter Resp. to Bd. Order].) Notably, the District did not previously identify Sections C.1, C.5.4.2 and C.5.12.9 as mandatory requirements in either its Motion to Dismiss or in the Procurement Chronology. (*See* AR at Ex. 2; Mot. to Dismiss 3.) These sections provide:

§ C.1 **SCOPE**

> The Government of the District of Columbia (District), Office of Contracting and Procurement (OCP) on behalf of the Department of Employment Services (DOES), is soliciting Offerors to design and implement quality year-round youth workforce development programs that best meet the needs of District youth and the provisions of the District of Columbia Youth Employment Services Initiative Amendment Act of 2005 and the Workforce Investment Act of (WIA) of 1998. The In-School Year Round Youth Program, supporting between 250-500 youth, will be provided to District of Columbia youth who are at-risk of becoming disconnected.
>
> The Offeror shall design and implement a Year Round In-School Youth Program that shall provide services promoting academic achievement, successful graduation, awareness of and readiness for post-secondary education, career preparation, attainment of measurable technical or occupational skills, and connections to employment. The program must focus on drop-out prevention and intervention strategies for youth at-risk of not completing high school for a maximum of fifty (50) youth ages 14 through 21, for a minimum of ten (10) and a maximum of fifteen (15) hours per week.
>
> During the summer, the program shall provide academic enrichment, career exploration, employment, job readiness, and leadership skills training. The summer component shall support the goal of enhancing the educational and work readiness competencies of youth through innovative learning activities. Youth ages 14-15 will be permitted to work for up to 20 hours per week and youth ages 16-21 will be permitted to work for up to 25 hours per week. Program

> activities shall conclude by 7:00PM and may include weekend activities and training sessions.
>
> § C.5.4.2 All youth served must meet eligibility criteria detailed in Sections C.5.2 through C.5.2.3.
>
> § C.5.12.9 For each year that a youth participates in a program, DOES will provide the youth up to $2,625 for wages and/or stipends. Youth may receive up to $50 per week for stipends. Youth may receive wages for work experience for up to 10 weeks a year, for up to 20 hours per week (for youth ages 14-15) and up to 25 hours per week (for youth ages 16-21). Youth will be paid $7.25 per hour.
>
> (AR at Ex. 1, §§ C.1, C.5.4.2, C.12.9.)

The RFP detailed the evaluation procedure that was to be used to review the proposals of offerors. It stated that OCP will "review each proposal to determine its responsiveness. Proposals determined to be ineligible or nonresponsive will be discarded." (AR at Ex. 1, § M.3.6.1.) The solicitation further provided that:

> Each proposal determined to be responsive will be evaluated by a technical review team. Teams will evaluate proposals based on the Evaluation Factors for Technical Approach (Section M.3.3.2); Technical Expertise (Section M.3.3.3); Past Performance (Section M.3.3.4); and Technical Bonus Points (M.3.3.5). Team members will represent a range of expertise in youth workforce development and may include DOES staff; other DC agency staff; and professionals from national and local organizations.
>
> OCP will determine the Price Proposal score based on the evaluation formula as described in Section M.3.3.1. The Price Proposal score will be combined with the Technical Proposal score once the Technical Evaluations have been completed. OCP will also determine whether proposals qualify for Preference Points (M.3.4).
>
> All proposals will be ranked accordingly.
>
> (AR at Ex. 1, § M.3.6.2.)

In response to questions from potential offerors, OCP stated: "The offeror's proposal should be submitted with the offeror's identity. OCP will redact the offeror's identity from the submitted proposals to ensure a 'blind' evaluation process." (AR at Ex. 1, 30Q.)

The Evaluation of Proposals

By June 8, 2011, twenty-three offerors submitted proposals in response to the RFP. (Mot. to Dismiss 3.) As noted, OCP assured bidders in writing that it would conduct a blind evaluation whereby the names of offerors would be removed. (AR at Ex. 1, 30Q.) Between June 13 and June 24, 2011, the Technical Evaluation Panel ("Panel"), consisting of three members of DOES, performed independent reviews of the initial proposals and created a consensus panel report. (AR at Ex. 2.) According to the Procurement Chronology, each proposal was redacted so that the Panel could perform a blind evaluation. (AR at Ex. 2.)

Simultaneously, the Contracting Officer ("CO") conducted his own review and scoring of each proposal. (AR at Ex. 2.) Unlike the Panel, the CO's review was not blind. (Resp. to Bd. Order ¶ L.) And, despite the inconsistency, there is no evidence that the District informed offerors of this change in procedure. The three independent scores of the panelists, the Panel's consensus scores and the CO's scores were tabulated and are provided in the Exhibit entitled "Consolidated Twenty-three evaluations and Bid Tabulation Sheet." (AR at Ex. 3.)

The evaluation conducted by the Panel resulted in the following:

(i) twelve offerors received a higher score than the awardee, Synergistic;
(ii) seven offerors received the same score as Synergistic, including protester Urban Alliance; and
(iii) three offerors received a lower score than Synergistic. (*See generally* AR at Ex. 3.)

However, the CO's evaluation of the same proposals under the same rubric resulted in the following:

(i) Synergistic received the highest score of any offeror (the CO awarded 29.4 more points to Synergistic than did the Panel); (*see* AR at Ex. 3, at 53)
(ii) Urban Alliance received 23.8 points less from the CO than it did from the Panel; (*see* AR at Ex. 3, at 57)
(iii) Bidder J's individual evaluation sheet was marked as unresponsive and appears without scores for any of the evaluation factors, (Resp. to Bd.

Order at Ex. C) yet, the CO provided scores for Bidder J in every category for the Bid Tabulation Sheet. (AR at Ex. 3, at 31-32.)

According to the District, proposals that "clearly demonstrated an inability to meet one or all of the requirements [stated in Sections B.3, C.5.2, and C.5.2.1]" were immediately removed from the competitive range by OCP. (AR at Ex. 2.) OCP determined that three offerors were outside the competitive range: (i) Marquita Anissa Vaughn Foundation, (ii) Urban Alliance, and (iii) United Planning Organization. (AR at Ex. 2.) Specifically, Urban Alliance was said to not meet the minimum requirements set forth in Section C.5.2.1. (AR at Ex. 2.)

A First Round BAFO ("1st BAFO") was conducted in writing with the remaining twenty offerors, beginning July 12th and closing July 15th. (AR at Ex. 2.) Seventeen offerors submitted responses to the 1st BAFO. (AR at Ex. 2.) The Procurement Chronology states that "[i]n most cases, offerors responded to the noted deficiencies." (AR at Ex. 2.)

Citing an inability to reconvene the Panel to review the BAFO proposals in time to meet the award deadline, the CO scored the BAFO submissions without the assistance of the Panel. (AR at Ex. 2.) The District states that the CO reviewed the offerors' original submissions, the original findings of the Panel, and the offerors' BAFO submissions in evaluating the 1st BAFO proposals. (AR at Ex. 2.) Despite the claim that the CO took into account the ratings of the Panel, the technical scores of many offerors remained unchanged throughout the CO's evaluation process. In fact, the scores from the CO's initial review of proposals remained exactly the same for eight out of seventeen offerors. (*See* AR at Ex.3.)

Alluding to budgetary concerns in light of the proposed cost of services under the 1st BAFOs, the District decided to hold a Second Round BAFO ("2nd BAFO") with all seventeen remaining offerors. The 2nd BAFO related to pricing only. (AR at Ex. 2.) The 2nd BAFO instructions provided that the "District sought a per participant cost range between $2,500.00 and $4,500.00." (AR at Ex. 2.) The request for 2nd BAFOs was issued July 28, 2011. (AR at Ex. 2.) All seventeen remaining offerors submitted proposals in response to the District's request. (AR at Ex. 2.)

During the 2nd BAFO review, the Contract Specialist "determined that nine of seventeen BAFOs did not meet the [mandatory] requirements of the solicitation and should have been removed from the competitive range after the 1st BAFO." (AR at Ex. 2.) Evidently, the evaluators themselves were unclear as to which requirements were mandatory under the RFP.

Additionally, OCP's Cost/Price Analyst conducted a review of the 2nd BAFO responses and provided findings to the CO. (AR at Ex. 2.) Synergistic's 2nd BAFO proposed a base year cost of $225,017.31 with the cost for option years 1 through 3 at $225,019.88 each. (*See* AR at Ex. 2.) Remarkably, the cost of providing the very same services for option year 4 was offered at $8,118.25, a mere 3.61% of the cost of the other years. (*See* AR at Ex. 2.) While some of the other offerors also reduced their prices for option year 4, those that did, reduced the cost for

option year 4 by an average of 45%. (*See* AR at Ex. 2.) The analysis of Synergistic's proposal concluded that its proposed budget included 72.34% overhead on labor plus fringe benefits and that the rates could not be supported. (Resp. to Bd. Order at Ex. H, at 4.)

The Board's Record

The record consists of the RFP, Procurement Chronology, Determination and Findings ("D&F") Reports, and other documents submitted by the protesters and the District, including those in the Agency Report or in response to a request from this Board. Most notably, the District provided a Bid Tabulation Spreadsheet for every offeror that shows each evaluation factor under each evaluation criterion. For each evaluation factor, the District provided the individual score of each panelist along with the consensus score of the Panel for each factor and for each offeror. The District also provided the CO's scores and the scores following the 1st BAFO. (*See* AR at Ex. 3.)

With respect to the individual evaluation sheets of offeror proposals (*see* Resp. to Bd. Order at Ex. C), there are significant gaps in the record and unexplained inconsistencies. For example,

(1) some evaluations are incomplete, with missing pages; (*see id.*)
(2) there are no evaluation sheets provided for contractors I, K and P; (*see id.*)
(3) the District provided only one evaluation sheet per bidder (*see id.*) yet the Bid Tabulation Sheets show that four individual evaluations were completed for each bid (three panelist evaluations and one CO evaluation) (*see* AR at Ex. 3);
(4) all of the evaluation sheets reflect only the CO's scores; (*compare* Resp. to Bd. Order at Ex. C, *with* AR at Ex. 3)
(5) there is no record of the Panel's individual evaluation sheets (with the exception of the evaluation for Offeror X)[3];
(6) the District provided two different evaluation sheets for Offeror S and, even though both evaluation sheets were completed by the CO, different scores appear on each sheet and only one evaluation sheet matches the scores on the Bid Tabulation Sheet; (*see* Resp. to Bd. at Ex. C; *see also* AR at Ex. 3)

[3]The evaluation sheet provided for Offeror X corresponds to the set of scores assigned to Evaluator 3 on the Bid Tabulation Sheet. (*Compare* Resp. to Bd. Order at Ex. C, *with* AR at Ex. 3.) However, the evaluation was completed by Crystal Farmer-Linder, the Contracting Specialist. (*See* Resp. to Bd. Order at Ex. C.) It is unclear whether Ms. Farmer-Linder was part of the Panel since at times her scores appear in the CO column on the Bid Tabulation Sheets.

(7) individual evaluation sheets are inconsistent with the Bid Tabulation Sheet; (*compare* Resp. to Bd. Order at Ex. C, *with* AR at Ex. 3)
(8) in seven instances the scores on the individual evaluation sheet do not match scores on the Bid Tabulation Sheet; (*compare* Resp. to Bd. Order at Ex. C, *with* AR at Ex. 3)
(9) in three instances the inconsistency is confined to a single evaluation criterion or a few technical approach factors; (*compare* Resp. to Bd. Order at Ex. C, *with* AR at Ex. 3)
(10) in one instance the CO's comments in the spreadsheet are consistent with the comments in the corresponding evaluation sheet; however, none of the scores match those recorded on the evaluation sheet; (*compare* Resp. to Bd. Order at Ex. C, *with* AR at Ex. 3)
(11) in five instances the Board was unable to locate any scores on the Bid Tabulation Sheet that reflect those on the evaluation sheet; (*compare* Resp. to Bd. Order at Ex. C, *with* AR at Ex. 3)
(12) the evaluation sheet for one Offeror is completely blank except for the word "unresponsive" in the header; yet, for this particular bidder, there are scores from every evaluator for each evaluation factor; (*compare* Resp. to Bd. Order at Ex. C, *with* AR at Ex. 3) and
(13) lastly, the District has been unable to provide sufficient contemporaneous documentation of the evaluation process.[4]

The Protests

On July 28, 2011, Urban Alliance received notice that it was not in the competitive range. (Urban Alliance Protest 2, Aug. 10, 2011.) Urban Alliance filed its protest with this Board on August 10, 2011. (*Id.*) It asserted three grounds for protest based on: (i) alleged irregularities that permeated the procurement process from as early as September 2010 when an earlier solicitation was issued for the same services;[5] (ii) the District's cancellation and reissue of a nearly identical solicitation; and (iii) the District's failure to evaluate the proposals in accordance with the law and the terms of the solicitation. (*Id.* at 3-8.)

[4]The D&F Report was completed more than a month after the award to Synergistic. (*See* AR at Ex. 2.)
[5]On December 16, 2010, Urban Alliance was awarded a contract for similar services under the earlier solicitation; however, the award was later cancelled on January 14, 2011. (Urban Alliance Protest 3-4.) Protesters have alleged that unexplained irregularities started in the earlier procurement and continued through to the present solicitation. (*See, e.g.*, Urban Alliance Resp. to Mot. to Dismiss 2, Oct. 4, 2011.)

On August 12, 2011, the Chief Procurement Officer signed a Determination and Finding to Proceed with Award While Protest is Pending.[6] (Letter to Board of Contract Appeals from Howard Schwartz, Senior Assistant Attorney General Attach. 1, Aug. 15, 2011.) The District awarded the contract to Synergistic on August 12, 2011. (AR at Ex. 5.)

On August 17, 2011, VOOS and PEECC received notice of award. (VOOS Protest 1, Aug 19, 2011; PEECC Protest 1, Aug. 24, 2011.) VOOS filed its protest on August 19, 2011, and asserted the same three grounds for protest as Urban Alliance.[7] (VOOS Protest 3-7.) On August 24, 2011, PEECC filed its protest. PEECC asserted fifteen different bases for protest which fall into two general categories: (i) that incomprehensible irregularities occurred during a five month procurement process; and (ii) that the District failed to comply with the legal conditions and terms of solicitation. (PEECC Protest 2-5.)

On August 18, 2011, JAG and HDA received notice of award. (JAG Protest 2, Sept. 1, 2011; HDA Protest 2, Aug. 26, 2011.) HDA filed its protest with this Board on August 24, 2011, and alleged two bases for protest: (i) that unexplained irregularities permeated the procurement; and (ii) that the District failed to evaluate the proposals in accordance with the law and the terms of the solicitation. (HDA Protest 4-7.) On September 1, 2011, JAG filed the last of these related protests and asserted the same protest grounds as Urban Alliance. (JAG Protest 3-9.)

On September 2, 2011, the Board consolidated the above-referenced protests. On September 23, 2011, the District filed its Motion to Dismiss with the Board.

DISCUSSION

I. BOARD JURISDICTION

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

A. Timeliness

The District has argued that the protests are untimely because the protesters were aware of alleged procurement irregularities that were said to have occurred prior to June 8, 2011, the deadline for receipt of proposals. Under CAB Rule 302.2(a), "[a] protest based upon alleged

[6] On September 6, 2011, Urban Alliance filed a motion challenging the D&F and the Board then requested that the parties file briefs on its authority to decide such challenges. The District and Urban Alliance each filed briefs affirming the Board's authority to rule on D&Fs following the Procurement Practices Reform Act of 2010. (*See* District of Columbia Br. to the Contract Appeals Bd. 1-3, Sept. 19, 2011; Urban Alliance Br. on the Authority of the Contract Appeals Board to Rule on a Challenge to an Agency's DNF 1-2, Sept. 12, 2011.) The present Order renders moot the challenge to the August 12th D&F.

[7] On December 16, 2010, VOOS was awarded a contract for similar services under the earlier solicitation. The award was later cancelled on January 14, 2011. (VOOS Protest ¶ 3.)

improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed with the Board prior to bid opening or the time set for receipt of initial proposals." These irregularities, as alleged, generally relate to the cancellation of the earlier solicitation, the cancellation and reissue of the RFP, numerous extensions of the due date, and extending the final deadline for receipt of proposals after some offerors had already submitted their proposals. Since these alleged improprieties, in particular, were all known to the protesters prior to June 8th, the protest grounds related to these irregularities are, in fact, untimely.

However, in addition, each of the protesters alleged that the District failed to evaluate the proposals in accordance with the law and the terms of the solicitation. Although the District has argued that the protesters have failed to meet the requirement of CAB Rule 301.1(c) which requires the protests to include a clear and concise statement of the legal and factual grounds of the protest, (Mot. to Dismiss 9) this Board's precedent has been to read Rule 301.1(c) very narrowly. We have held that "[w]here the District believes that a protest ground fails to state a violation of procurement law or regulation or is unsupported by the facts, the matter should be addressed through the Agency Report on the merits in the first instance and the absence of detailed facts concerning an alleged procurement deficiency in the initial protest filing does not necessarily dictate dismissal." *CUP Temporaries, Inc.*, CAB No. P-0474, 44 D.C. Reg. 6841, 6844 (July 3, 1997). Thus, even where a protester's allegations are mainly conclusory or barely supported by fact, where the applicable law and regulations at issue are made reasonably clear, this Board must address the allegations on the merits. *Unfoldment, Inc.*, CAB No. P-0435, 44 D.C. Reg. 6377, 6381 (Sept. 12, 1995).

In this instance, the law and regulations at issue are reasonably clear due to the protesters' allegations of improper evaluation procedures. And, by filing protests within (10) business days of their knowledge of the award to Synergistic, the protests, as they relate to the evaluation process, were timely. Under CAB Rule 302.2 (b), protests shall be filed with the Board not later than (10) business days after the basis of the protest is known or should have been known. In *Sigal Construction*, CAB Nos. P-0690, P-0693, P-0694, 52 D.C. Reg. 4243, 4254 (Nov. 24, 2004), the Board clarified that the (10) day period begins when the offeror knows the basis of the protest *and* the party has become aggrieved due to an official action adverse to that party. The Board also held that notice of award is considered an adverse official action. *Id.*

For Urban Alliance, the adverse official action occurred on July 28, 2011, when it received notice that it was not in the competitive range. (*See* Urban Alliance Protest 2.) It filed its protest with this Board on August 10, 2011, well within (10) business days of the District's adverse official action. With respect to the other protesters, notice of adverse official action occurred on either August 17th or 18th when they received notice of the award to Synergistic. (*See, e.g.*, VOOS Protest 1.) Each offeror had until August 31 or September 1 respectively to file a protest with this Board. JAG filed the last of these consolidated protests on September 1, 2011. (JAG Protest.) Accordingly, all protests were timely filed with this Board.

B. <u>Standing</u>

The District has argued that the protesters are without standing since they are not next in line and therefore do not have a reasonable chance of award. (Mot. to Dismiss 7.) This Board has long held that in order to have standing a bidder must be next in line for award in order to show that it has suffered, or will suffer, direct economic injury as a result of the adverse agency action. *Scientific Games, Inc*., CAB No. P-0294, 41 D.C. Reg. 3666, 3670 (Sept. 24, 1993). However, the Board has also held that protesters have standing when challenging the integrity of the manner in which offeror proposals are scored even if they are not next in line for award. In *CUP Temporaries, Inc*., CAB No. P-0474, 44 D.C. Reg. 6841 (July 3, 1997), the Board held that "[b]ased on the final rankings of the evaluators, it is clear that the Protester is ranked third among the offerors on the RFP. Nevertheless, since the Protester challenges the integrity of the manner in which the agency officials scored all the offerors the Protester meets the standing requirements."

In this case, the protesters have alleged irregularities in the procurement process and we have specifically noted herein a number of evaluation irregularities in the record.[8] Under the circumstances, the evaluation rankings are not dispositive and the protesters meet the *CUP* standard for standing.

II. EVALUATION PROCESS

The Board's standard of review for proposal evaluations and the related selection decision is whether the District's actions were reasonable, in accord with the evaluation and selection criteria identified in the solicitation and whether there were violations of procurement laws or regulations. *See, Trifax Corp.*, CAB No. P-0539, 45 D.C. Reg. 8842, 8847 (Sept. 25, 1998); *see also Health Right, Inc., D.C. Health Coop., Inc., & The George Washington Univ.*, CAB Nos. P-0507, P-0510, P-0511, 45 D.C. Reg. 8612, 8630 (Oct. 15, 1997). In applying this standard of review to this protest, we find that the violations of procurement law are sufficiently material such that the selection decision cannot be supported based on the evidence submitted for review. Following are four general areas where the Board finds the evaluation process inconsistent in terms of the solicitation and in violation of procurement law: (A) failure to disclose mandatory minimum requirements, (B) failure to adequately document, (C) failure to evaluate reasonably, and (D) failure to conduct a blind evaluation.

A. Failure to Disclose Mandatory Minimum Requirements

Urban Alliance alleges that the District's decision to exclude it from the competitive range was based on an improper application of an undisclosed mandatory minimum requirement.[9] (Urban Alliance's Resp. to District's Mot. to Dismiss 5, Oct. 4, 2011.)

[8] See our discussion of evaluation irregularities *supra* pp 7-8.

[9] Urban Alliance's technical proposal stated that its High School Internship Program targets youths ages 16-19. (Urban Alliance Resp. to District's Mot. to Dismiss Ex. A-1, at Part I.B.) The District may have been unclear whether Urban Alliance intended to provide services to all of the ages 14-21 youth population; however, this Board has held that "if there is a close question of acceptability or if the noted deficiency is susceptible to correction

Specifically, Urban Alliance points to Section C.5.2.1 as the basis for its exclusion from the competitive range. (Urban Alliance's Comments on the AR 4, Oct. 12, 2011.) But it argues that the language of C.5.2.1 is not sufficiently distinct from other requirements in the solicitation to set it apart as a mandatory minimum requirement. (*Id.* at 4-5.)

We agree. This Board finds that in establishing the competitive range, the District arbitrarily identified mandatory minimum requirements that were used to disqualify Urban Alliance and other bidders even though such mandatory requirements were never communicated to the offerors either in the language of the solicitation or in the subsequent discussions.

A mandatory minimum requirement is "pass/fail in nature and may lead to the outright rejection of a proposal that falls short of what [it] specif[ies]." *Banknote Corp. of Am., Inc. v. United States*, 56 Fed. Cl. 377, 382 (2003). Accordingly, procurement practice dictates that "[m]andatory minimum requirements must be clearly identified as such within the solicitation so as to 'put the offerors on notice' of the serious consequences of failing to meet the requirement." *Id.* Additionally, if one factor in an evaluation is predominantly more important than another, this information should be disclosed to offerors. *Isratex, Inc. v. United States*, 25 Cl. Ct. 223, 230 (1992). A procuring agency should provide "fullest possible disclosure" of the relative importance of all evaluation factors. *Id.*

In the Agency Report, the Contract Specialist states that "[t]he competitive range included those offerors whose proposals met the minimum requirements of the solicitation as set forth in the following Sections:" B.3.1, B.3.2, B.3.3, C.5.2, and C.5.2.1. (AR at Ex. 2.) In its response to the Board's October 25th request for supplemental information, the District put forth not only those previously-identified sections, but in addition, Sections C.1, C.5.4.2 and C.5.12.9 were newly-identified as mandatory minimum requirements of the solicitation.[10] (*See* Resp, to Bd. Order ¶ A.)

A review of Section B.3.2 shows that it clearly and plainly states that in order to be awarded a contract, the offeror must fulfill that section's proposal requirement.

> In order for an Offeror to be awarded a contract, the Offeror must serve the entire SDA and the Offeror must operate programming at a location that is within the SDA.
>
> (AR at Ex. 1, § B.3.2)

Section C.5.2.1, which has also been identified by the District as a mandatory minimum requirement, states:

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through relatively limited discussion, then the inclusion of the proposal in the competitive range is in order." *Educ. In-roads, a div. of Sylvan Learning Sys., Inc.*, CAB No. P-0552, 46 D.C. Reg. 8519, 8525 (October 27, 1998).

[10]The Procurement Chronology does not include these three sections as a basis for establishing the competitive range or as minimum requirements of the solicitation.

> The Offeror shall provide services to youth who are most likely to become disconnected. This represents youth who are low-income individuals, between the ages of 14 and 21, and who are currently in school.
>
> (AR at Ex. 1, § C.5.2.1)

However, Section C.5.2.1 is not distinguishable as creating a mandatory minimum requirement when compared to other sections in the solicitation that are similarly phrased with the use of the word "shall" but not considered by the District to create a mandatory requirement. For example, the District does not consider Section C.5.4.1 to be a mandatory minimum requirement of the solicitation. This section states:

> The Offeror shall conduct preliminary activities to market the year-round program to eligible youth in the community . . .
>
> (AR at Ex. 1.)

Similarly, Section C.5.5.1 has not been identified as a mandatory minimum requirement yet it states:

> The Offeror shall engage in activities and services related to three components:
> 1. Education;
> 2. Work Readiness and Experience; and,
> 3. Placement and Transition Support."
>
> (AR at Ex. 1.)

Urban Alliance was removed from the competitive range prior to any BAFOs for failure to meet the mandatory minimum requirement in the above-referenced Section C.5.2.1. (AR at Ex. 2.) However, Sections C.5.4.1 and C.5.5.1 are similarly phrased and those sections are not considered by the District to be mandatory minimum requirements. We find that Section C.5.2.1 was not worded so as to put offerors on notice of the importance of that section as a mandatory minimum requirement.

After the 2nd BAFO, protesters JAG and PEECC were removed from the competitive range for failing to meet the requirement of Section B.3.1 which states:

> For the purpose of this RFP and the ensuing contracts the District will be divided into two Service Delivery Areas (SDAs);
>
> SDA District 1: Wards 1, 2, 3, and 4.
> SDA District 2: Wards 5, 6, 7, and 8.

> It is the intent of the District to award at least one contract for each of the SDAs. The District will award additional contracts based upon program needs and availability of funds.
>
> (AR at Ex. 2.)

It remains unclear which words within this section provide notice of a requirement, let alone a mandatory minimum requirement.

The evaluators themselves appeared to not have a clear understanding of the mandatory requirements that would result in offerors being removed from the competitive range. Two bidders[11] failed to meet the mandatory minimum requirement of Section C.5.2.1 yet, inexplicably, were asked to submit BAFOs for both the first and second rounds of discussion. (*See* AR at Ex. 2.) Urban Alliance was disqualified prior to the 1st BAFO for failure to satisfy the very same requirement. Therefore some offerors were not similarly excluded from the competitive range. (*See* AR at Ex. 2.) The unequal treatment of the offeror proposals seriously violated the District's procurement law and undermined the integrity of the process. *See* D.C. Code § 2-351.01(b)(4) (2010) (stating that a purpose of the Procurement Practices Reform Act of 2010 is to "ensure fair and equitable treatment of all persons who deal with the procurement system of the District government"); *see also Rockwell Elec. Commerce Corp.*, B-286201 *et al*, 2001 CPD ¶ 65 (Comp. Gen. Dec. 14, 2000) ("It is . . . fundamental that the contracting agency . . . treat all offerors equally, which includes . . . not disparately evaluating offerors with respect to the same requirements.").

By way of explanation, the Contracting Specialist states that "[i]t was determined by the evaluation panel and the Contracting Officer that proposals submitted by [the Marquita Anissa Vaughn Foundation, the United Planning Organization, and Urban Alliance] would require substantial revisions in order to be determined acceptable." (AR at Ex. 2.) This argument lacks credibility. Urban Alliance and the awardee, Synergistic, each received the same scores from the Panel. Ultimately, after reviewing the 2nd BAFOs, the Contracting Specialist determined that nine of seventeen bidders were mistakenly identified as being within the competitive range even though they should have been excluded after the 1st BAFO for failing to meet the mandatory minimum requirements. (*See* AR at Ex. 2.)

This Board finds that the protesters were prejudiced by the District's failure to follow proper procedures in evaluating the proposals. Bidders should not have been excluded from the competitive range for failing to meet mandatory minimum requirements absent clear notice that failure to address those requirements would result in disqualification. With the exception of Section B.3.2, the language of the mandatory minimum requirements, as identified by the District, is insufficient to provide appropriate notice. Even more importantly, the District did not

[11] Perry School Community Center and Priority Professional Development.

treat offerors equally in applying mandatory minimum requirements, in clear violation of procurement law.

B. Failure to Adequately Document

The District submitted the Agency Report to the Board on October 3, 2011. Upon its review, the protesters filed a response to the Agency Report challenging OCP's failure to adequately document its source selection decision. (*See, e.g.*, Urban Alliance's Comments on the AR 8.) We agree that the District has failed to offer sufficient documentation of its evaluation process. There is a severe lack of contemporaneous documentation to explain or support an overall rational basis for the award decision as well as OCP's decision to exclude offerors from the competitive range.

This Board has stated that source selection "decisions must be documented in sufficient detail to show that they are not arbitrary." *Health Right, Inc., D.C. Health Coop., Inc., & The George Washington Univ.*, CAB Nos. P-0507, P-0510, P-0511, 45 D.C. Reg. 8612, 8635 (Oct. 15, 1997). This in no way means that an agency is required to "retain every document or worksheet generated during its evaluation of proposals." *Id.* at 8636. However, "[w]here an agency fails to document or retain evaluation materials, it bears the risk that there is inadequate supporting rationale in the record for the source selection decision and that we will not conclude that the agency had a reasonable basis for decision." *Id.* quoting *Sw Marine, Inc.*, B-265865, 96-1 CPD ¶ 56 (Comp. Gen. Jan. 23, 1996)). Moreover, the District's regulations require certain documentation in the conduct of a procurement. Most pertinent to this protest, the regulations require that where a Technical Evaluation Panel is formed to evaluate proposals, a technical evaluation report shall be prepared by the technical official and shall contain the following:

> (a) The basis for evaluation;
> (b) An analysis of the technically acceptable and unacceptable proposals, including an assessment of each offeror's ability to accomplish the technical requirements;
> (c) A summary, matrix, or quantitative ranking of each technical proposal in relation to the best rating possible; and
> (d) A summary of findings.
>
> D.C. Mun. Regs. tit. 27 § 1618.5 (2002)

While the District was not required to keep copies of every piece of paper generated throughout the evaluation process, the documents submitted to the Board in support of this award are exceedingly inadequate. First, there is very little contemporaneous documentation as many items submitted to the record were not created until more than a month after the award decision. (*See, e.g.*, AR at Ex. 2.) *Cf. Trifax Corp.*, CAB No. P-0539, 45 D.C. Reg. 8842, 8847 (Sept. 25, 1998) ("We accord greater weight to contemporaneous evaluation and source selection material than to arguments and documentation prepared in response to protest contentions."). The only

truly contemporaneous documentation provided by the District are the individual evaluation sheets; a set of five page documents completed by a single evaluator for a particular contractor including scores for each solicitation factor and comments of the particular evaluator. (*See* Resp. to Bd. Order at Ex. C.) Where provided, the documentation submitted by the District is incomplete. There are no evaluation sheets for contractors I, K, and P, and pages are missing from some evaluations. (*See id.*) While three offerors are completely absent from the record, the District, with one exception, provided only one evaluation sheet for each of the remaining twenty offerors. (*See id.*) It is important to note that a total of four evaluation sheets should have been provided for each individual offeror as the Bid Tabulation Spreadsheet indicates that four individual evaluations were conducted for each of the twenty-three offerors, one by the CO and one by each member of the Panel. (*See* AR at Ex. 3.) The one exception is Offeror S. The District provided two evaluation sheets for Offeror S. Both were completed by the CO but contain different sets of scores and one set of those scores appear on the Bid Tabulation Sheet. Most troubling, the evaluation sheets provided reflect only the CO's scores. (*Compare* Resp. to Bd. Order at Ex. C, *with* AR at Ex. 3.) There is no record of the Panel's evaluation sheets.

Second, the few contemporaneous documents that the District provided are incongruous. Specifically, the evaluation sheets at times are inconsistent with the Bid Tabulation Sheet. In seven instances the evaluation sheets do not concur with the set of scores on the Bid Tabulation Sheet. (*Compare* AR at Ex. 3, *with* Resp. to Bd. Order at Ex. C.) Some of these incongruities are minor, though still concerning. For example, there is a sub-factor score for Offeror E that does not match the score awarded on the individual evaluation sheet; and similarly, Offeror M's Technical Bonus points do not match. (*Compare* Resp. to Bd. Order at Ex. C, *with* AR at Ex. 3.) Some inconsistencies, on the other hand, are truly problematic. In five instances entire sets of scores on the individual evaluation sheets do not match any scores on the Bid Tabulation Sheet. (*Compare* Resp. to Bd. Order at Ex. C, *with* AR at Ex. 3 (Offerors A, H, J, U, & V).) The materials provided do not support a conclusion that a rational and lawful evaluation process occurred.

Whereas this Board will not substitute its judgment for that of the CO with respect to the evaluation findings, it cannot blindly accept evaluation findings and a resulting award decision that are not reasonably supported by the factual record. Although a Panel is not required to be used, when a Panel is convened as in this case, under D.C. Mun. Regs. tit. 27, § 1618.5, a technical evaluation report must be completed consisting of the basis for the evaluation, an analysis of the proposals, a quantitative ranking of each technical proposal, and a summary of findings. The District failed to provide a technical evaluation report as required. Given the inadequacy of the record, the District did not provide sufficient documentation to support a finding that the award had a rational basis. Further, in light of the inconsistency of the information provided, the Board finds that there is insufficient evidence to support the award decision.

C. Failure to Evaluate Reasonably

Urban Alliance et al
CAB Nos. P-0886, P-0887,
P-0890, P-0891, P-0892

The protesters have alleged that the District failed to evaluate the proposals reasonably and in accordance with the terms of the solicitation. (*See, e.g.*, Urban Alliance Protest 8.) They contend that the protest should be sustained because the award decision was arbitrary. (*See, e.g., id.*) The District has maintained that it scored the proposals in strict compliance with the evaluation criteria set forth in the RFP. (Mot. to Dismiss 10-11.) Upon a review of the record, the Board finds that the evaluation process violated procurement law as there is no consistent, discernable standard or approach. The Board concludes that the process was arbitrary, unreasonable and not in accordance with the terms of the solicitation or the relevant procurement statutes and regulations.

"In determining the propriety of an evaluation decision, we examine the record to determine whether the judgment was reasonable and in accord with the evaluation criteria listed in the solicitation and whether there were any violations of procurement laws or regulations." *Health Right, Inc., D.C. Health Coop., Inc., & The George Washington Univ.*, CAB Nos. P-0507, P-0510, P-0511, 45 D.C. Reg. at 8635. In reviewing an evaluation decision, the Board must consider the totality of the record to determine if the evaluations are reasonable and "bear a rational relationship to the announced criteria upon which competing offerors are to be selected." *Id.*

The terms of the solicitation clearly stated that a technical review team would be used to evaluate each responsive proposal. (AR at Ex. 1, § M.3.6.2.) According to the Procurement Chronology, the Panel consisted entirely of DOES staff. (*See* AR at Ex. 2.) The panelists and the CO each independently conducted a simultaneous review of the proposals in accordance with the evaluation criteria set forth in Section M of the RFP. (AR at Ex. 2.) The CO then reviewed the 1st BAFOs and the 2nd BAFOs without assistance of the Panel. (*See* AR at Ex. 2.)

A review of the Bid Tabulation Sheet shows that the individual scores of panelists, prior to the consensus panel discussion, were often within a comparable range of each other. (*See* AR at Ex. 3.) For example, in the case of Synergistic, the panelists' individual scores are all within a one point range of each other. (*See* AR at Ex. 3, at 51-53.) After independent review, the Panel met to assign a consensus score to each offeror's bid. (AR at Ex. 2.) The following is a brief summary of the Panel's findings:

Proposals receiving scores >Synergistic's score	12
Proposals receiving scores = Synergistic (7) + Synergistic'sscore (1)	8
Proposals receiving scores <Synergistic's score	3
Total Offerors	23

The CO's evaluation of the same proposals according to the same evaluation criteria yielded markedly different results. The CO awarded Synergistic's proposal the highest score of all proposals, in part by awarding 29.4 more points to Synergistic's proposal than did the Panel. (*See* AR at Ex. 3, at 53.) The CO's scoring also deviated significantly from the Panel's with

respect to Urban Alliance. The Panel awarded Urban Alliance's proposal the same score as it awarded Synergistic's. (*See* AR at Ex. 3.) By contrast, the CO assigned 23.8 points less to Urban Alliance. (*See* AR at Ex. 3, at 57.) The result is that the two proposals, when reviewed by the three-member Panel, were found to be generally of a similar strength. Following the CO's review, the two proposals were separated by more than 50 points on a 122 point scale. (*See generally* AR at Ex. 3). No explanation was provided for the scoring differential between the CO and the Panel.

Therefore, although the District asserts that the CO considered the Panel's findings throughout, there is no evidence to support this assertion. In fact, the record supports an opposite conclusion. In eight out of seventeen instances the CO's scores remained unchanged from his initial review. (*See* AR at Ex. 3.) And while the CO was authorized to exercise his own decision-making authority and disagree with the Panel, the critical point is that the CO failed to document why he disagreed with the Panel. Under the relevant case law, it is not the score per se that determines whether the opinions of lower level evaluators were properly considered, but rather the CO's judgment concerning the difference and the relative merits of proposals. *Health Right, Inc., D.C. Health Coop., Inc., & The George Washington Univ.*, CAB Nos. P-0507, P-0510, P-0511, 45 D.C. Reg. at 8636. The two evaluations of the same proposal under the same criteria diverge by more than 50 points out of a total 122 points. Given that significant disparity, certainly, a comment in the Bid Tabulation Sheet was warranted to explain the CO's decision to maintain his initial scores. Without that information, the Board has no way of understanding the CO's judgment and, as a consequence, calls into question any claim that the CO properly considered the Panel's findings.

Moreover, although the CO may have found Synergistic's pricing proposal reasonable, the Board notes that the record does not support that same conclusion specifically because the CO failed to account for Synergistic's questionable pricing for option year 4. Under the District's procurement regulations, it is the responsibility of the contracting officer to "evaluate the cost estimate or price [of a proposal], not only to determine whether it is reasonable, but also to determine the offeror's understanding of the work and ability to perform the contract." D.C. Mun. Regs. tit. 27, § 1618.2 (2002). Synergistic proposed a base year cost of $225,017.31 with the cost for option years 1 through 3 at $225,019.88 each. (*See* AR at Ex. 2.) The cost for option year 4, however, is priced at $8,118.25, (*see* AR at Ex. 2) which represents a mere 3.61% of the cost of services for the other years. This calls into question whether Synergistic would be able to provide the required services during option year 4 at that stated price. The CO's analysis makes no note of that fact despite this significant variance. Some other offerors also reduced their pricing for option year 4; however, those that did, reduced the price for option year 4 by an average of 45%. (*See* AR at Ex. 2.) Besides, in the analysis, the Contract Specialist reviewed Synergistic's pricing and stated that Synergistic's proposed budget included 72.34% overhead on labor plus fringe benefits and that the rates could not be supported. (*See* Resp. to Bd. Order at Ex. H.) There is no evidence that the CO properly accounted for this incongruity when scoring pricing under the solicitation.

Hence, we find that the CO failed in his duty to properly evaluate the proposals in two significant ways. First, as previously discussed, the CO did not properly consider the evaluations and comments prepared by the Panel as there is no documentation to support the – oftentimes significant – deviation from the Panel's scores. Second, the CO appears to have at times merely adopted evaluation scores and comments written by other individuals (and it is unclear whether such persons are panelists or OCP or DOES employees).[12]

The District's procurement regulations provide that a contracting officer may be assisted by others in evaluating proposals. However, where a contracting officer is in fact assisted, he must not relinquish his decision-making authority even though it is incumbent upon him to consider the opinions of those chosen to assist him. In the past this Board has held that "technical point scores and descriptive ratings of lower level evaluators must be considered by the Contracting Officer in making the final selection even though he is not bound by those evaluations or recommendations." *Health Right, Inc., D.C. Health Coop., Inc., & The George Washington Univ.*, CAB Nos. P-0507, P-0510, P-0511, 45 D.C. Reg. at 8636. At the same time, the procurement regulations clearly state that it is the responsibility of the contracting officer to "evaluate each proposal in accordance with the evaluation criteria in the solicitation." D.C. Mun. Regs. tit 27, § 1618.1 (2002). Consequently, this Board has noted that "[a]lthough the contracting officer may be assisted in the evaluation by others, . . . the contracting officer always remains responsible for the evaluation of proposals." *Health Right, Inc., D.C. Health Coop., Inc., & The George Washington Univ.*, CAB Nos. P-0507, P-0510, P-0511, 45 D.C, Reg. at 8636. Ultimately, it is inappropriate for the contracting officer to merely "adopt" evaluation and scoring conducted by individuals other than himself. *See id.* at 8637.

In this case, the CO appears to have been assisted by individuals other than Panel members. In nine instances, three other individuals scored proposals and the scores provided appear as the CO's scores on the Bid Tabulation Sheet.[13] The CO personally completed only eight evaluation sheets. (*See* Resp. to Bd. Order at Ex. C.) All the evaluation sheets provided, whether completed by the CO or one of the three other individuals, reflect the scores of the CO on the Bid Tabulation Sheet. (*Compare* Resp. to Bd. Order at Ex. C, *with* AR at Ex. 3.) It is the CO's responsibility to review proposals and where scores awarded by individuals other than the CO are presented as the CO's scores, it appears that the CO abdicated his responsibility. There is no explanation in the record for this practice, which as it stands, does not constitute a valid exercise of contracting officer judgment.

The Board finds that the CO acted in an arbitrary and unreasonable manner in failing to evaluate offeror proposals in accordance with the law and the terms of the solicitation. He failed

[12] Although Stuart Keeler has been identified as the Contracting Officer (AR at Ex. 1), the names of Eloine Evans-McNeill, John Deer, and Crystal Farmer-Linder all appear along with the CO on the individual tabulation sheets. (*See* Resp. to Bd. Order at Ex. C.)

[13] Eloine Evans-McNeill, John Deer, and Crystal Farmer-Linder completed 12 of the 20 evaluation sheets. (*See* Resp. to Bd. Order at Ex. C.)

to consider the findings of the Panel as well as failed to conduct a personal evaluation of all proposals. Given the totality of the record, we cannot conclude that the evaluation process was reasonable or rationally related to the criteria set forth in the RFP.

D. Failure to Conduct a Blind Evaluation

The District has indicated that the CO's evaluation of the proposals was not blind, that is, at the time of his review, the offeror proposals were not anonymous. (AR at Ex. 2.) However, the CO's failure to conduct a blind evaluation violated the express terms of the solicitation. In protests of solicitations and awards, the Board conducts a de novo review to determine whether the solicitation or award was in accord with the applicable law, regulations and terms and conditions of the solicitation. *Recycling Solutions, Inc.*, CAB No. P-0377, 42 D.C. Reg. 4550, 4578 (April 15, 1994). Under CAB Rule 314.1, in sustaining a protest, the Board determines whether the solicitation, proposed award, or award complies with the applicable law, regulations, or terms and conditions of the solicitation.

While not addressed specifically in the RFP, in response to questions submitted by potential offerors, the District stated that "[t]he offeror's proposal should be submitted with the offeror's identity. OCP will redact the offeror's identity from the submitted proposals to ensure a 'blind' evaluation process." (AR at Ex. 1, Q.30.) The question and the District's response were incorporated into the revised RFP and became a term of the solicitation. (*See id.*) Despite affirming that the proposals would be evaluated in redacted form to ensure anonymity, the CO performed the evaluations with full knowledge of each offeror's identity. (AR at Ex. 2.) In fact, the Board has reviewed twenty-one evaluation sheets and all but seven individual evaluation sheets clearly show the name of the offeror. (*See* Resp. to Bd. Order at Ex. C.)

There is nothing in the solicitation or in procurement practice to suggest that a contracting officer's review of proposals should not be subject to the very terms of the solicitation whether such terms are contained in the RFP or incorporated in the form of the District's responses to questions submitted by potential offerors. The CO's review was not blind yet offerors were never provided notice of the change in review process. And while this violation, by itself, would not necessarily void the award decision, in this case, the violation further undermines the integrity of the procurement. A contracting officer's review is at the heart of any evaluation process and yet the District failed to follow its own solicitation guidelines in clear violation of procurement law.

Conclusion

Because the proposal evaluations were unsupported to a substantial degree, the award to Synergistic was unreasonable. The Board hereby directs the District to terminate the contract awarded under this RFP effective no later than the close of the current school year in June 2012. To the extent that these services are required by the District for the summer school session of 2012 and beyond, the District shall issue a request to the twenty-three offerors for revised technical and cost proposals for the remainder of the base year and the option years. The District

shall evaluate the revised proposals in accordance with the law and the terms of the RFP. These consolidated protests are sustained.

SO ORDERED.

DATED: February 15, 2012

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

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

LOUD, Chief Administrative Judge, concurring.

I concur with my colleagues that the consolidated protests herein should be sustained. The District's award decision to Synergistic followed an unreasonable and arbitrary evaluation process that included, but was not limited to, the removal of Urban Alliance from the competitive range for deficiencies (i.e., failure to meet the requirements of Section C.5.2.1) shared by two other bidders who were asked to submit BAFOs for the first and second rounds. When coupled with the numerous additional inconsistencies in the record (missing individual evaluation sheets, separate CO evaluation sheets for the same bidder with different scores on each, an evaluation sheet for one offeror containing the word "unresponsive" as to which every evaluator provided a score for each evaluation factor, etc.), the clear picture that emerges is of an evaluation process that failed to follow the solicitation terms and provisions of law.

There should now be a growing sense of alarm among the procurement and program professionals charged with implementing this aspect of the District of Columbia Youth Employment Services Initiative Amendment Act of 2005 and the Workforce Investment Act of (WIA) of 1998 (DCYES and WIA). Our record shows that there have now been three consecutive solicitations for in-school youth services that have not been executed properly, as shown either by delayed solicitations, agency cancelled solicitations, or as here through the Board's cancellation of an award.

The trail of failed solicitations date back to at least *Appeal of Friends of Carter Barron Foundation Of The Performing Arts*, CAB No. D-1421 (unpublished) (Nov. 15, 2011), wherein the Board first learned of the December 16, 2011, award for in-school youth services in Contract No. DCCF-2011-R-1000. *Appeal of Friends of Carter Barron Foundation*, at 4-5 (the Board dismissed the appeal and protest on jurisdictional grounds). Through the consolidated cases

herein, we now learn that the December 16, 2010, awards were cancelled by the District on January 14, 2011. (Urban Protest 3-4; VOOS Protest ¶3). Further, we learn that a second solicitation for these same youth in-school services was issued on March 31, 2011, and cancelled on May 18, 2011. (Urban Protest, Ex. 2 Procurement Chronology; see also Urban Protest at p¶¶8-9.) Finally, the Board has now cancelled the award made under the third consecutive District attempt to effectuate the provisions of the DCYES and WIA.

The services procured through this solicitation have the potential to positively impact life outcomes for disconnected youth in Wards 5-8 of the District. I am hopeful that the alarm bells set off by this string of troublesome solicitations will now translate into decisive action by the District's procurement professionals to lawfully conduct a solicitation that will enable program professionals to commence the delivery of, and sustain the relationships with youth necessary to successfully effectuate the purposes of the Acts noted above.

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

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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:		
Martha's Table, Inc.	)	CAB No: P-0896
Solicitation No. DCCF-2011-R-3962-SDA 1	)	

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

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

OPINION

Filing ID 44187484

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

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

BACKGROUND

On April 1, 2011, OCP issued a Request for Proposals for Solicitation No. DCCF-2011-R-3962-SDA 1 ("RFP") for a contractor to design and implement a quality, year-round

educational program to support between 250-500 at-risk youths.[1] (AR at Ex. 1a.) Per the RFP, the District intended to issue a contract consisting of a base year with four additional option years. (AR at Ex 1a, §§ F.1-F.2.4.) The RFP was revised six times prior to the deadline for receipt of proposals on June 8, 2011. The revisions are as follows: (i) on April 14, 2011, the due date was changed from April 22, 2011, to May 4, 2011; (ii) on April 26, 2011, (Amendment 0001), the due date was extended to May 13, 2011; (iii) on May 9, 2011 (Amendment 0002), the due date was extended to May 27, 2011; (iv) on May 18, 2011 (Amendment 0003), the RFP was replaced in its entirety and the due date was extended to May 31, 2011; (v) on May 26, 2011 (Amendment 0004), technical amendments were made to certain sections of the RFP and the due date was extended to June 6, 2011; and (vi) the due date was extended for the final time, via E-Sourcing message board, to June 8, 2011. (AR at Ex. 2.)

Terms of the Solicitation

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

SDA 1: Wards 1, 2, 3, and 4
SDA 2: Wards 5, 6, 7, and 8

(AR at Ex. 1b, § B.3.1.)

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

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

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

Numeric Rating	Adjective	Description
0	Unacceptable	Fails to meet minimum requirements; e.g., no demonstrated capacity, major deficiencies which are not correctable; offeror did not address the factor.

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

1	Poor	Marginally meets minimum requirements; major deficiencies which may be correctable.
2	Minimally Acceptable	Marginally meets minimum requirements; minor deficiencies which may be correctable.
3	Acceptable	Meets requirement; no deficiencies.
4	Good	Meets requirements and exceeds some requirements; no deficiencies.
5	Excellent	Exceeds most, if not all requirements; no deficiencies.

(AR at Ex. 1c, § M.2.)

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

§ B.3 **SERVICE DELIVERY AREAS**

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

SDA District 1: Wards 1, 2, 3, and 4.
SDA District 2: Wards 5, 6, 7, and 8.

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

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

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

§ C.5.2 **YOUTH POPULATION**
The following youth population shall be targeted:

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

(AR at Ex. 1b.)

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

§ C.1 * * *

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

* * *

§ C.5.2.2 The population that requires services and will be eligible to participate includes youth who are:

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

(AR at Ex. 1b.)

The Evaluation of Proposals Chronology

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

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

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

> The Offeror proposed a [sic] year-round activities for 35 to 40 youth from Ward One ages 14-18 years old. This submission is too limited in scope by not providing services to the entire SDA and not providing services to 14-21 years old as required by the RFP.
>
> (AR at Ex. 2.)

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

In reviewing the same proposal, the CO noted:

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

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

[2] The CO and Panel each used similar approaches in evaluating proposals that were ultimately determined to be outside of the competitive range. They often noted flaws relating to Sections B.3.2, C.5.2.1, and B.3.3. (See AR at

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

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

> [S]pecifically address the deficiencies/weaknesses listed below:
>
> Technical
> 1. Please clarify the age range of the target population for the proposed program. What methods will be utilized to target and recruit youth residing in Wards 2 and 3? (M.3.3.2.a)
>
> (Protest Ex. A.)

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

Alluding to budgetary concerns in light of the proposed cost of services under the 1st BAFOs, the District decided to hold a Second Round BAFO ("2nd BAFO") with all five remaining offerors, including Martha's Table. The 2nd BAFO related to pricing only. (AR at Ex. 2.) The 2nd BAFO instructions were that the "District sought a per participant cost range between $2,500.00 and $4,500.00." (AR at Ex. 2.) The request for 2nd BAFOs was issued July 28, 2011.

Ex. 2.) However, in the Panel's assessment, the deficiency in subfactor M.3.3.2.f. was confined to that one subfactor and the deficiency did not impact scoring in other subfactors. (See AR at Ex. 2.) On the other hand, the CO consistently discussed the subfactor M.3.3.2.f deficiency in his analysis of multiple subfactors and, due to the deficiency in subfactor M.3.3.2.f., he uniformly downgraded protester's proposal across almost all subfactors. (See AR at Ex. 2.)

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

(AR at Ex. 2.) During the 2nd BAFO review, OCP conducted further analysis and "determined that Martha's Table should have also been excluded from the competitive range [for failure to provide service to the full range of the targeted youth population]." (AR at Ex. 2.)

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

The Protest

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

DISCUSSION

I. BOARD JURISDICTION

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

A. Standing

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

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

District's own admission, it is uncertain where protester would have ranked but for the CO's evaluation methodology that resulted in 10 points less being assigned to protester than had been assigned by the Panel.

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

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

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

The Board's holding in *CUP Temporaries, Inc.* and *ACS State and Local Solutions, Inc.* is readily distinguishable from those instances where a protester was found to not have standing. For example, in *St. John's Cmty. Serv.*, CAB No. P-0555, 46 D.C. Reg. 8594 (Mar. 23, 1999), the protester was third in line for the contract. St. John's argued that it not only challenged the awardee, but also "the entire procurement process as inconsistent with federal and local law." *Id.* at 8596. The Board, however, found that "this generality cannot recast the evaluation and award

challenges" of St. John's and dismissed the protest. *Id.* Similarly, in *Thomas*, CAB No. P-0579, 46 D.C. 8618, 8620 (May 11, 1999), the Board found that where the protester challenged the integrity of the manner in which the agency officials scored all offerors, "[t]his general argument cannot substitute for showing how the six higher-ranked offerors were improperly evaluated such that Thomas would be in line for award if his protest were sustained. . . . Thomas has not shown any reasonable possibility of being in line for award even if his evaluation challenges were sustained."

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

B. Timeliness

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

Under CAB Rule 302.2(a), "[a] protest based upon alleged improprieties in a solicitation which are *apparent* prior to bid opening or the time set for receipt of initial proposals shall be filed with the Board prior to bid opening or the time set for receipt of initial proposals." (emphasis added.) The Board has held that "[a] bidder who fails to seek clarification of an ambiguity on the face of a solicitation prior to bid opening risks a contrary interpretation of the allegedly ambiguous provision and is precluded from raising such issues to the Board after opening." *Md. Constr., Inc.*, CAB No. P-0650, 50 D.C. Reg. 7398, 7399 (Jan. 17, 2002).

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

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

(Martha's Table's Resp. to District's Mot. to Dismiss 7.) Therefore, at issue is whether this ambiguity was "apparent" prior to bid opening.

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

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

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

Section C.5.2.1 states:

> The Offeror shall provide services to youth who are most likely to become disconnected. This represents youth who are low-income individuals, ***between*** the ages of 14 and 21, and who are currently in school.
>
> (AR at Ex. 1b (emphasis added).)

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

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

II. EVALUATION PROCESS

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

(Protest Ex. A.)

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

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

Conclusion

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

SO ORDERED.

DATED: May 10, 2012

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

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

/s/ Monica C. Parchment
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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

GRANTURK EQUIPMENT COMPANY, INC.	)	CAB No. P-0884
Solicitation No. DCKT-2011-B-0034	)	

OPINION DENYING THE PROTEST OF GRAN TURK
Filing ID 44639736

In this matter, third-ranked bidder GranTurk Equipment Co., Inc. (protester or GranTurk) protests the Department of Public Works' (District) award of a contract for the acquisition of two refuse trucks to low bidder Waste Equipment Sales and Service, Inc. (Waste or Intervenor). The protester also challenges the responsiveness of the second ranked bidder, Maryland Industrial Trucks (M.I.T.). M.I.T. has neither protested the award to Waste, nor intervened in this matter.

After carefully reviewing the entire record herein, we dismiss GranTurk's protest because it has not demonstrated that it would be next in line for award were the protest to be sustained. The second ranked bid submitted by M.I.T. would be next in line for award if the protest were sustained. Gran Turk's contention that M.I.T.'s bid is non-responsive because its *descriptive literature* fails to conform to two bid specifications is without merit. Under Section L.20.2 of the solicitation herein, the contracting officer had discretion to *accept* bids whose descriptive literature failed to conform to solicitation specifications. Accordingly, even if the descriptive literature submitted with M.I.T.'s bid failed to conform to solicitation specifications, M.I.T.'s bid was properly determined responsive. Under these circumstances, the protester is not next in line for award, and lacks standing to protest the award to Waste.

BACKGROUND

On January 6, 2011, the District issued IFB No. DCKT-2011-B-0034 (IFB) for the acquisition of seven refuse trucks.[1] The protest herein centers solely on the District's award to Waste of a single component of the IFB: CLIN#1 for two 16 cubic-yard high compaction rear loader refuse trucks. (AR, Ex. 2.)

With respect to CLIN#1 and the issues material to the instant protest, the IFB included three specifications (at Section C) and two instructions (at Section L) of singular import:

C.2.2.25.3 Compaction force: minimum 89,000 pounds. Must be high compaction.

[1] The District procured a total of two 16 cubic-yard high compaction rear loader refuse trucks, one 6 cubic-yard rear loader refuse packer, and four 8 cubic-yard rear loader packers. (AR, Ex. 2.) The IFB provided each vehicle type with its own Contract Line Item Number (CLIN), and also stated the District's intention to award a firm fixed-price contract to a single contractor for each CLIN.

(State compaction force to be provided): _____

C.2.2.25.5 Body sides shall be minimum 11 gauge to 1/8 inch AR450 high tensile sheet which has tensile strength of over 200,000 PSI. Curved shell design with ¼" wrap around reinforcement top and bottom. The body floor shall be ¼" minimum.[2]

C.2.2.26.4 Hopper: minimum 3/8 inch 100,000 PSI steel one-piece (no liners).

L.20.1 Descriptive literature must be furnished as a part of a bid and must be received before the time set for opening bids. The literature furnished must be identified to show the items in the bid to which it pertains. The descriptive literature is required to establish, for the purpose of bid evaluation and award, details of the products the bidder proposes to furnish as to design, material, quality, construction, and performance characteristics.

L.20.2 Failure of descriptive literature to show that the product offered conforms to the specifications and other requirements of this invitation for bids *may* require rejection of the bid. Failure to furnish the descriptive literature by the time and date set for receipt of bids *will* require rejection of the bid, except that if the materials are transmitted by mail and received late, it may be considered under the provision for considering late bids, as set forth elsewhere in this invitation for bids. The Contracting Officer may waive the requirement for furnishing descriptive literature if either of the following occurs:

> A. Bidder states in the bid that the product being offered is the same as a product previously or currently being furnished to the District; or
> B. The CO, on advice of technical personnel determines that the product offered by the bidder complies with the specification requirements of the current invitation for bids. (emphasis added.)

(AR, Ex. 2a.) On February 3, 2011, the District received six timely bids in response to CLIN#1 (including two no-bids). (Protest at 5; AR, Ex. 1.) The bids were ranked as follows per the bid tabulation sheet:

Bidder	Bid Amount
1. Mid-Atlantic Waste Systems	$376,666.00
2. Waste Equipment Sales and Service	$378,060.00
3. Maryland Industrial Trucks	$381,340.00
4. GranTurk Equipment Co., Inc.	$393,232.00

[2] Section C.2.2.25.5 was amended by the District on January 26, 2011, to accept a minimum of 80,000 psi. (AR, Ex. 3, Amendments to the Solicitation.) The amendment does not impact the Board's analysis or conclusions.

The contracting officer's technical representative concluded its bid review on February 8, 2011; noting that Mid-Atlantic Waste Systems' bid was non-responsive[3], but concluding that the bids of Waste, M.I.T. and Gran Turk were responsive. (AR, Ex. 10.) Each of the three responsive bidders submitted descriptive literature with their bids as required by Sections L.20.1 and L.20.2 of the IFB.

On April 5, 2011, approximately five weeks *after* bid opening, the District's contract specialist (at the behest of the contracting officer) sent emails to Mid-Atlantic, Waste, M.I.T. and Gran Turk, asking each to clarify whether their particular refuse truck met the IFB's requirement for 89,000 lbs. minimum compaction force.[4] (AR, Exs. 9, 11.) The four bidders replied to the referenced emails by April 6-7, 2011; with the result being that the bid rankings and responsiveness memorandum of February 8, 2011, remained unchanged[5]. (AR, Ex. 9.)

On April 27, 2011, the District awarded the contract for the two rear loader refuse trucks to Waste. (AR, Ex. 7.) Third low bidder GranTurk filed the instant protest timely on May 11, 2011. The awardee Waste intervened on June 14, 2011.[6] Second low bidder M.I.T. has neither protested nor intervened in the instant protest. The Board conducted a hearing on July 26-27, 2011.[7] The parties and Waste filed post-hearing briefs on August 30, 2011. Miscellaneous pleadings were filed by the parties after the filing of post-hearing briefs through December 2011.

In its protest, Gran Turk challenges both the awardee[8] and the next in line bidder, M.I.T. (Protest at 9, 11, 12-14, 18-19.) With respect to the protester's challenge to M.I.T., Gran Turk contends generally that the District erred in determining M.I.T.'s bid responsive to two specifications of the IFB. Very specifically, Gran Turk contends that M.I.T.'s descriptive literature for the curved shell design specification (C.2.2.25.5) does not "demonstrate that M.I.T.'s offering will comply with this specification". (Gran Turk Post-Hr'g Br. 5, 46.) Gran

[3] Mid-Atlantic's bid offering of "69,000 lbs psi" compaction force was found unacceptable as to specification C.2.2.25.3, and its "minimum 4 to 4.5 inches of bore packing carrier or slide cylinder" was found unacceptable as to specification C.2.27.13. (AR, Ex. 10.)

[4] The District's emails also sought clarification as to whether each bidder's equipment met minimum requirements for cubic yard space (C.2.2.25.2), refuse capacity (C.2.2.25.4), body thickness (C.2.2.25.5), and hydraulic system operating pressure (C.2.2.27.3). (AR, Ex. 9.)

[5] Mid Atlantic's earlier non-responsiveness determination did not change, and the bids of Waste, M.I.T., and GranTurk continued to be viewed as responsive by the contracting officer. (AR, Ex. 9, Greg Harrelson Email.)

[6] Waste intervened pursuant to D.C. Mun. Reg. tit. 27, §100.2(l) (2002).

[7] This case was originally assigned to former Administrative Judge Warren Nash, who presided over the hearing but retired before a decision was issued. Thereafter, the case was reassigned to Chief Judge Loud.

[8] With respect to the awardee, the protester contends that (1) Waste's "descriptive literature" noted that its equipment produced "79,500 pounds of compaction force, not the 89,000 pounds of compaction force required by" the specifications, (2) Waste's bid "did not state that its" equipment could meet the curved body shell design specification and the descriptive literature submitted therewith also failed to demonstrate such compliance, and (3) Waste's bid did not meet the specification requirement for a 3/8 inch hopper floor based on "descriptive literature" that described Waste's rear loader as providing "3/8 inch AR200" instead of the required "3/8 inch 100,000 PSI steel". (Gran Turk Protest at 12-14.) Subsequent to filing its protest, Gran Turk asserted an additional ground for challenging the award to Waste, namely that the District violated procurement law by requesting and considering additional information from bidders subsequent to bid opening. (Gran Turk Comments To AR at 13-17; Gran Turk Post Hr'g Br. 13-19.) The additional allegation focuses almost exclusively, however, on the District's request for and consideration of additional information from Waste. *Id*.

Turk also contends that M.I.T.'s descriptive literature differed from specification C.2.2.26.4 by stating that "the tailgate hopper floor [would] be ¼ inch" rather than the specification's required 3/8 inch thickness. (Gran Turk Post-Hr'g Br. 5-6; GranTurk Comments To AR, Ex. A, Decl. of Edward A. Antoniewicz.)

Finally, Gran Turk contends as to both specifications (C.2.2.25.5 and C.2.2.26.4) that M.I.T.'s failure to "state that [it] would comply with [the specifications] rendered its bid non-responsive in light of the fact that "M.I.T. stated 'yes' … it would comply with many of the other specifications in Section C of the IFB". [9] (Gran Turk Post Hr'g Br. 5, 50-51.)

DISCUSSION

We exercise jurisdiction pursuant to D.C. Code §2-360.03(a)(1).

The threshold question presented is whether the protester has standing to challenge the award to Waste. As noted herein, Gran Turk is not next in line for award. (AR, Ex. 1). Gran Turk had the highest priced of three responsive bids. Gran Turk contends, however, that it has standing because its pleadings challenge both the awardee *and* the next in line (M.I.T.). (Gran Turk Post Hr'g Br. 10-11.)

A protester has standing for purposes of jurisdiction if it has some direct economic interest in the procurement. *Micro Computer Co., Inc*., CAB No. P-226, 40 D.C. Reg. 4388 (May 12, 1992). However, where there is "an intermediate party who has a greater interest in the procurement than the protester, the protester's interest will be, and is, considered too remote to qualify as an aggrieved or interested party". *Protest of MTI-RECYC*, CAB No. P-287, 40 D.C. Reg. 4554 (Oct. 1, 1992). The Board will not consider protests by offerors who are not next in line for award if the protest is sustained. *St. John's Community Services*, CAB No. P-555, 46 D.C. Reg. 7695 (Mar. 23, 1999)*; C.P.F. Corporation*, CAB No. P-521, 45 D.C. Reg. 8697 (Jan. 12, 1998*)*.

We conclude that the protester has failed to demonstrate that it is next in line for award if the protest were to be sustained. M.I.T. is a clear intermediary bidder in this matter whose bid ranked second overall to the awardee Waste. The bid tabulation sheet ranks M.I.T. as the second low responsive bidder (AR, Ex. 2), the contracting officer determined M.I.T. as the second low responsive bid (AR, Exs. 6, 10), and the contracting officer testified that M.I.T. would be next in line for award if the protest against Waste were to be sustained (Hr'g Tr. vol. 2, 147:5-20, July 27, 2011.)

To determine whether Gran Turk is next in line for award, this board must first address whether Gran Turk's challenge to the second low bidder herein (M.I.T.) has merit. Gran Turk

[9] Initially, Gran Turk also contended that M.I.T.'s descriptive literature failed to conform to specification C.2.2.25.3 regarding compaction force. (Protest at 18-19.) Gran Turk has not included the latter protest grounds in its post-hearing brief materials. The Board therefore treats the latter argument as abandoned by Gran Turk. It is immaterial to the Board's analysis and conclusions, however, whether Gran Turk challenges M.I.T.'s descriptive literature as to Section C.2.2.25.3 (compaction force).

contends that M.I.T.'s bid was non-responsive because its *descriptive literature* failed to conform to sections C.2.2.25.5 and C.2.2.26.4. It is important to note that Gran Turk's basis for challenging M.I.T.'s second place ranking is the (purported) failure of its *descriptive literature* to comply with certain IFB specifications[10]. (Gran Turk Post Hr'g Br. 20-27.) Gran Turk's protest rests entirely on its *interpretation* that section L.20 of the IFB requires descriptive literature to conform to IFB specifications. (Gran Turk Post Hr'g Br. 22, 50-51.)

Our review of section L.20 of the IFB does not support Gran Turk's contention. In pertinent part, Section L provides:

> **L.20.1** Descriptive literature must be furnished as a part of a bid and must be received before the time set for opening bids. The literature furnished must be identified to show the items in the bid to which it pertains. The descriptive literature is required to establish, for the purpose of bid evaluation and award, details of the products the bidder proposes to furnish as to design, material, quality, construction, and performance characteristics.
>
> **L.20.2** Failure of descriptive literature to show that the product offered conforms to the specifications and other requirements of this invitation for bids *may* require rejection of the bid. Failure to furnish the descriptive literature by the time and date set for receipt of bids *will* require rejection of the bid, except that if the materials are transmitted by mail and received late, it may be considered under the provision for considering late bids, as set forth elsewhere in this invitation for bids. The Contracting Officer may waive the requirement for furnishing descriptive literature if either of the following occurs:
>
> > A. Bidder states in the bid that the product being offered is the same as a product previously or currently being furnished to the District; or
> > B. The CO, on advice of technical personnel determines that the product offered by the bidder complies with the specification requirements of the current invitation for bids. (emphasis added.)

(AR, Ex. 2a.)

The general rule is that where a contract is not ambiguous, the wording of the contract controls its meaning and resort cannot be had to extraneous circumstances or subjective interpretations to determine such meaning. *Appeal of Heller Elec. Co., Inc*., CAB No. D-939, 41 D.C. Reg. 3717, 3723 (Nov. 17, 1993)(citations omitted). The same maxim applies to interpretation of a solicitation. *Allied Technology Group, Inc. v. U.S.*, 39 Fed. Cl. 125, 144 (Cl. Ct. 1997); *Blake Constr. Co. v. U.S.*, 202 Ct. Cl. 794, 798 (1973).

In our view, the plain language of Section L.20.2 makes it very clear that a bid whose descriptive literature does not conform to IFB specifications "may" be accepted. The relevant section L.20.2 expressly states that "[f]ailure of descriptive literature to show that the product offered conforms to the specifications and other requirements of this invitation for bids *may* require rejection of the bid". (Emphasis added.) In this case, it was lawful for the contracting

[10] Protester states that "the only way to give meaning to Section L.20 of the IFB … is that the bid and the descriptive literature …must be read together to determine" bid responsiveness. (Gran Turk Post Hr'g Br. 22.)

officer to accept M.I.T.'s bid as responsive, notwithstanding the alleged failure of its descriptive literature to conform to specifications C.2.2.25.5 and C.2.2.26.4. Under these circumstances, M.I.T. is next in line for award and the only bidder with standing to challenge the award to Waste herein.

A review of our previous decisions addressing descriptive literature finds nothing inconsistent with our conclusion that Section L.20.2 herein grants the contracting officer discretion to *accept* bids with non-conforming descriptive literature. In *Protest of Advanced Medical Systems Inc.*, CAB No. P-202, 39 D.C. Reg. 4516 (April 1, 1992), the Board ruled that the protester's bid was properly rejected as non-responsive because its descriptive literature failed to establish that its fetal monitor met the specification requirement for an autocorrelation feature. In *Protest of Lewis Systems*, CAB No. P-252, 38 D.C. Reg. 3242 (April 11, 1991), the Board ruled that the protester's bid was properly rejected as non-responsive because its descriptive literature failed to establish that its curbside recycling containers met the specification requirement for a minimum drainage capacity of 10 ounces.

In each of the above mentioned cases, however, the District's contracting officer was *required* by the terms of the solicitation to reject bids whose descriptive literature failed to conform to contract specifications. The descriptive literature clauses in *Advanced Medical Systems, supra,* and *Lewis Systems, supra,* are identical and read as follows: "[f]ailure of descriptive literature to show that the product offered conforms to the specifications and other requirements of this invitation for bids *will* require rejection of the bid" (emphasis added). (AR, IFB No. 081-9-65-CW, ¶27, §B, *Advanced Medical Systems, supra*; AR, Ex. C Special Conditions, ¶ 9, §B, *Lewis Systems, supra.)* Therefore, the Board's previous cases are distinguished from the instant matter in that Section L.20.2 herein expressly gives the contracting officer discretion to accept a bid with non-conforming descriptive literature.[11]

Further, we have reviewed the federal government contract cases cited by the protester regarding descriptive literature clauses. *FFR-Bauelement-Bausanierung GmbH,* Comp. Gen. Dec. B-274828, 97-1 CPD ¶7; *Thermal Reduction Co.*, Comp. Gen. Dec. B-211405, 83-2 CPD ¶180; *RMTC Sys., Inc. v. Dep't of the Army*, GSBCA 12637-P, 94-2 BCA ¶26,614; *Nu-Lite Electrical Wholesalers, Inc.*, Comp. Gen. Dec. B-248383, 92-2 CPD ¶104; *AMSCO Scientific*, Comp. Gen. Dec. B-255313, 94-1 CPD ¶112.

These cases are inapposite to the issues presented by the present protest because Section L.20.2 herein grants the contracting officer discretion to accept bids with non-conforming descriptive literature. The federal cases cited by protester either involve descriptive literature clauses that specifically require rejection of bids with non-conforming descriptive literature, *Thermal Reduction Co.*, Comp. Gen. Dec. B-211405, 83-2 CPD; *AMSCO Scientific*, Comp. Gen. Dec. B-255313, 94-1 CPD ¶112; or involve "brand name or equal" solicitations where the contracting officer is only authorized to accept bids whose descriptive literature "meets the

[11] The descriptive literature clause in *Advanced Medical Systems, supra,* and *Lewis Systems, supra,* also appears in *Protest of Chesapeake Bus & Equipment*, CAB No. P-611, 48 D.C. Reg. 1537 (May 10, 2000). It is possible, therefore, that the District inserted the instant Section L.20.2 language into solicitations to clarify contracting officer's discretion to accept bids with non-conforming descriptive literature, and that the current clause is the successor to the District's earlier descriptive literature clause. The record is silent, however, as to the basis for the change in language from the compulsive "will" to the permissive "may" as regards the District's descriptive literature clause.

salient physical, functional, and other characteristics" specified in the solicitation, *FFR-Bauelement-Bausanierung GmbH,* Comp. Gen. Dec. B-274828, 97-1 CPD; *RMTC Sys., Inc. v. Dep't of the Army,* GSBCA 12637-P, 94-2 BCA ¶26,614; or invoke rules regarding treatment of unsolicited descriptive literature, *Nu-Lite Electrical Wholesalers, Inc.*, Comp. Gen. Dec. B-248383, 92-2 CPD ¶104.

We have considered the protester's other arguments challenging the award to Waste and find them equally devoid of merit. The protester's contention that the contracting officer testified that descriptive literature must be read to make a proper responsiveness determination is legally irrelevant. (Gran Turk Post Hr'g Br. 25-26). It is legally irrelevant because Section L.20.2 is manifestly clear that bids with non-conforming descriptive literature can be accepted by the contracting officer. And as we noted in *Heller, supra*, where contract language is unambiguous, resort to extraneous circumstances or subjective interpretations is not permissible for purposes of contract interpretation. *Heller at 3723.*

Additionally, there is nothing in D.C. Mun. Regs. tit. 27, §1507.2 (2002) that prevents a contracting officer from accepting a bid whose descriptive literature fails to conform to IFB specifications. (Gran Turk Post Hr'g Br. 23.) The regulation cited by the protester merely delimits the two circumstances under which a contracting officer can require the submission of descriptive literature with bids. Neither circumstance, however, limits the contracting officer's discretion to *accept* bids with non-conforming descriptive literature.[12] In this case, the IFB specifically conferred that authority on the contracting officer at Section L.20.2.

Further, we disagree with the protester's labeling of the instant descriptive literature clause as meaningless. (Gran Turk Post Hr'g Br. 22.) To the contrary, the contracting officer herein testified that she uses the bid as "controlling" and that the descriptive literature "is just supplemental". (Hr'g Tr., Gena Johnson, vol. 2, 94:19-22, July 27, 2011.) The contracting officer's use of descriptive literature in said manner is consistent with Section L.20.1 of the solicitation, which notes that descriptive literature is required to provide details about the product being offered (i.e., its design, material, quality, construction, and performance characteristics).

Additionally, protester's contention that M.I.T.'s bid was rendered ambiguous because it failed to "state that [it]will comply" with specifications C.2.2.25.5 and C.2.2.26.4 "although [M.I.T.] stated "yes" that it would comply with many of the other specifications" is without merit. The protester has not cited any authority for the proposition that a bidder has a duty to write the word "comply" next to each specification in its bid to demonstrate responsiveness. Moreover, item No. 12 of M.I.T.'s signed bid states that "in compliance with the above [including Section C], the undersigned agrees…to furnish any or all items upon which prices are offered." (AR, Ex. 5, M.I.T. Bid.) The bidder's signed execution of the bid at item No. 12 denotes acceptance of IFB terms, excluding those that the bidder has taken exception to. *Cf. Matter of: Image Contracting,* B-253038, 1993 WL 316192 (bidder's signed execution of the bid documents represents its agreement to be bound by all sections in the Table of Contents).

[12] The regulation provides that descriptive literature can be required if the contracting officer needs it to determine before award that products offered meet bid specifications. D.C. Mun. Regs. tit. 27, §1507.2 (2002). *Alternatively,* the regulation provides that a contracting officer can require submission of descriptive literature if he/she needs it to establish exactly what the bidder proposes to furnish. *Id.*

Finally, it is not altogether clear from the record whether the protester asserts standing on the grounds that the integrity of the evaluation process was compromised by the District's requesting email clarifications from bidders on equipment characteristics five weeks after bid opening. *See CUP Temp., Inc.* , CAB No. P-474, 44 D.C. Reg. 6841 (July 3, 1997). The initial protest herein includes specific challenges to M.I.T. as next in line, but only on the ground that descriptive literature made its bid non-responsive to IFB "specifications and essential requirements". (Gran Turk's Protest 1,6,11,18-19, 21.) Similarly, Gran Turk's post-hearing brief states conclusorily that it has standing because "([it] has challenged the first and second ranked bidders (Waste and M.I.T. respectively)". (Gran Turk Post Hr'g Br. 10-11.)

Nonetheless, we noted in *CUP, supra*, that a protester ranking third among offerors had standing to challenge the award because it challenged the integrity of the evaluation process. Assuming arguendo, that the protester contends that standing is conferred under the principle articulated in *CUP, supra*, we disagree. In *In Re Thomas*, CAB No. P579, 46 D.C. Reg. 4618 (May 11, 1999), we noted that a protester challenging "the integrity of the manner in which the agency officials scored all the offerors" must show how the higher-ranked offerors were improperly evaluated "such that the protester would be in line for award if his protest grounds were sustained". *Id.*

Accordingly, we find nothing in the record that shows that the District's belated email request for clarification of certain equipment characteristics resulted in improper scoring that would render Gran Turk next in line for award. The record shows that prior to the request for email clarification, Waste, M.I.T., and Gran Turk were found responsive and ranked one, two, and three respectively on the basis of price. (AR, Ex. 10.) After the series of email exchanges between April 5-7, 2011, Waste, M.I.T. and Gran Turk were still found responsive by the District, and still ranked one, two, and three respectively. Though admittedly unusual, the District's request for email clarifications herein had no impact on M.I.T.'s ranking as second low bidder and Gran Turk's ranking as third. Gran Turk has not establish a nexus between the District's request for email clarifications and how M.I.T.'s bid was improperly evaluated "such that [Gran Turk] would be in line for award if [its] protest grounds were sustained".

Accordingly, Gran Turk's protest is dismissed with prejudice. Gran Turk would not be next in line for award if the protest against Waste were sustained and therefore lacks standing.

SO ORDERED.

Date: June 5, 2012

/s/ Marc D. Loud, Sr.
Chief Administrative Judge

CONCURRING:

/s/Monica C. Parchment
Administrative Judge

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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

PSYCHIATRIC INSTITUTE OF WASHINGTON, INC.	)	
	)	CAB No. P-0905
	)	
Under Solicitation No. RM-11-RFP-83-BY4-VM	)	
	)	

For Psychiatric Institute of Washington, Inc.: Jeffrey Weinstein, Esq., Jeffrey Weinstein, PLLC. For the District of Columbia Government: Janice N. Skipper, Esq., Assistant Attorney General.

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

OPINION

Filing ID 45653191

Psychiatric Institute of Washington, Inc. ("PIW" or "protester"), has filed a protest challenging the District's decision to award Pathways to Housing DC ("Pathways") a contract pursuant to Solicitation No. RM-11-RFP-83-BY4-VM ("solicitation" or "RFP") issued by the District of Columbia Department of Mental Health Contracts and Procurement Administration ("DMH"). The solicitation requested proposals to "operate an Urgent Care Clinic at the DC Superior Court (UCC)." (AR at Ex. 1, § C.3.1.) The protester's challenge generally concerns allegations that (1) the District unreasonably evaluated the offeror technical proposals, and (2) the District treated offerors unequally in that Pathways was afforded additional opportunities to correct deficiencies in its proposal while PIW was not afforded comparable opportunities. (*See* Comments on AR/ Resp. to Mot. to Dismiss 2-15, Mar. 27, 2012 [hereinafter "Comments on AR"].) On March 9, 2012, the District filed a motion to dismiss for protester's alleged failure to comply with the requirements of Board Rule 301.1(c) which require protester to present a clear and concise statement of the legal and factual grounds of the protest. (Mot. to Dismiss 6-7, Mar. 9, 2012.) On May 16, 2012, the District filed a "Determination and Findings to Proceed with Contract Performance while a Protest is Pending" ("D&F"). Following protester's successful challenge on July 9, 2012, to a Board Order dated June 22, 2012, sustaining the D&F, *see Wis. Ave. Psychiatric Ctr., Inc. v. D.C. Dep't of Mental Health*, C.A. No. 005211 B (D.C. Super. Ct. July 3, 2012), the District filed a second D&F. (S*ee* Notice of Supplement to Determination to Proceed with Contract Performance While A Protest is Pending, Ex. 1 [hereinafter "Second D&F"].)

We deny the District's motion to dismiss finding that PIW's protest grounds are sufficiently clear to meet the standard established by Board Rule 301.1 and that the Agency

Report has provided the Board with sufficient evidence to rule on the merits of the claim. However, the Board finds no evidence in the record that the District evaluated the offeror technical proposals unreasonably or that the District unlawfully treated the offerors in an unequal manner. Accordingly, the protest is denied. Protester's motion to override the Second D&F is also denied as moot.

BACKGROUND

On May 24, 2011, DMH issued a solicitation requesting proposals to "operate an Urgent Care Clinic at the DC Superior Court (UCC)." (AR at Ex. 1, § C.3.1.) The RFP sought "a Contractor to provide individuals [who have contact with the court system] with mental health and/or substance abuse service in an easily accessible service environment located at the Superior Court." (AR at Ex. 1, § B.1.) PIW had been providing services similar to those requested under the RFP pursuant to a contract beginning May 16, 2008, with a Base Year and two One Year Option periods. (D & F ¶ 3.d, May 14, 2012.)[1] The RFP was revised twice prior to the deadline for receipt of proposals on June 27, 2011. The revisions are as follows: (i) on June 13, 2011, (Amendment No. 1), the District's responses to questions by prospective offerors were incorporated into the contract and amendments were made to certain sections of the RFP, (AR at Ex. 2) and (ii) on June 20, 2011, (Amendment No. 2), additional questions by prospective offerors were responded to and the responses were incorporated into the RFP (AR at Ex. 3).

Terms of the RFP

Section C of the solicitation detailed the technical requirements entitled "Description/ Specifications/Work Statement." The following are the requirements of particular relevance to this protest:

> § C.6 The Scope of Work (SOW) for the UCC at the District of Columbia Superior [Court] is delineated in the sections that follow. All Prospective Contractors shall clearly describe how each of these requirements shall be addressed in the proposal.
>
> § C.6.1 The staffing pattern of the UCC shall include a team comprised of mental health and substance abuse clinicians. The staffing pattern shall be sufficient to provide services to a minimum of 300 individuals per year. The staff team will be led by a psychiatrist who will be responsible for the overall supervision and management of the UCC. The psychiatrist shall be available on a daily basis to see individuals referred for service within 90 minutes of presenting at the UCC.

[1] PIW's contract expired on May 15, 2011, however a Single Available Source Contract ("SAS") was issued to PIW on May 16, 2011, and extended to May 15, 2012. (D & F ¶ 3.d, May 14, 2012.) The District then issued another short term SAS contract to facilitate the transition from PIW to the awardee under the RFP.

§ C.6.1.2 The UCC shall employ three staff, including two Certified Addiction Counselors (CACs), to provide substance abuse screening, assessment and referral services. The staff shall have the capacity to conduct the Global Appraisal of Individual Needs (GAIN) assessment. . . .

§ C.7 In addition to the contract funding, the selected Contractor shall be expected to have the capacity to bill Medicaid for all appropriate reimbursable services including mental health rehabilitation services (MHRS), Medicaid fee for service and/or the Managed Care Organizations (MCOs).

§ C.9.1 Prospective contractors responding to the RFP shall provide detailed responses to the requirements described in the Scope of Work.

* * *

[A]ll proposals must include a proposed budget which delineates expected revenues from billings as well as needed contract and client support dollars. The budget shall include line item expenditures and a budget narrative.

(AR at Ex. 1.)

The solicitation contemplated a Fixed Price Contract. (AR at Ex. 1, § B.2.) Under the terms of the solicitation, the District would award a single contract to the "responsive and responsible Offeror whose offer is most advantageous to the District," (AR at Ex. 1, § M.1) based upon the following evaluation criteria: (1) Technical Criteria (90 points) (AR at Ex. 1, § M.3.1), and (2) Price Criterion (10 points) (AR at Ex. 1, § M.3.2). "[W]hile the points in the evaluation criteria indicate their relative importance, the total scores shall not necessarily be determinative of the award. Rather the total scores shall guide the District in making an intelligent award decision based upon the evaluation criteria." (AR at Ex. 1, § M.1.)

The technical criteria was subdivided into the following four factors:

- The Offeror demonstrates a well developed plan that details proposed organizational structure, staffing pattern, commitment to clinical competence in treating co-occurring services and an evaluation plan. **(40 PTS.)**

- The Offeror demonstrates evidence that the applicant shall develop the project based upon a recovery-based philosophy, active peer involvement and knowledge of the court system. **(15 PTS.)**

- The Offeror demonstrated evidence of the ability to link individuals with community-based services, including linage with CSAs as appropriate and enrollment with substance abuse providers when appropriate. **(20 Points)**

- The Offeror demonstrates ability to maximize revenue collection. **(15 Points)**

(AR at Ex. 1, § M.3.1 (emphasis in original).)

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

Numeric Rating	Adjective	Description
1	Poor	Marginally meets minimum requirements; major deficiencies which may be correctable
2	Minimally Acceptable	Marginally meets minimum requirements; minor deficiencies which may be correctable
3	Acceptable	Meets requirements; no deficiencies
4	Good	Meets requirements and exceeds some requirements; no deficiencies
5	Excellent	Exceeds most, if not all requirements; no deficiencies

(AR at Ex. 1, § M.2.1.)

> The technical rating is a weighting mechanism that shall be applied to the point value for each evaluation factor to determine the Offeror's score for each factor. The Offeror's total technical score shall be determined by adding the Offeror's score in each evaluation factor. For example, if an evaluation factor has a point value range of twenty (20) points, using the Technical Rating Scale above, if the District evaluates the Offeror's response as "Good", then the score for that evaluation factor is 4/5 of 20 *or* 16.
>
> (AR at Ex. 1, § M.2.2.)

The price criterion was worth a maximum of ten (10) points and was to be awarded on a purely objective basis. (AR at Ex. 1, § M.3.2.) "The Offeror with the lowest cost/price shall receive the maximum price points. All other proposals shall receive a proportionately lower total score." (*Id.*)

The evaluation criteria also allowed for additional preference points to be awarded on the following bases: (1) DSLBD certified Resident-Owned Business (5 points) (AR at Ex. 1, § M.5.1.2); (2) DSLBD certified Longtime Resident Business (5 points) (AR at Ex. 1, § M.5.1.3); (3) DSLBD certified Local Business Enterprise (2 points) (AR at Ex. 1, § M.5.1.4); (4) DSLBD

certified Local Business Enterprise with its principal offices located in an Enterprise Zone (2 points) (AR at Ex. 1, § M.5.1.5); (5) DSLBD certified Disadvantaged Business Enterprise (2 points) (AR at Ex. 1, § M.5.1.6); (6) DSLBD certified Veteran-Owned Business (2 points) (AR at Ex. 1, § M.5.1.7); (7) DSLBD certified Local Manufacturing Business Enterprise (2 points) (AR at Ex. 1, § M.5.1.8). "Notwithstanding the availability of the preceding preferences, the maximum total preference to which a certified business enterprise is entitle [sic] under the Act is the equivalent to twelve (12) points on a 100-point scale for proposals submitted in response to this RFP." (AR at Ex. 1, § M.5.2.)

The District reserved its right to award the contract "on the basis of initial offers received, without discussion." (AR at Ex. 1, § L.1.2.) However, if the District decided to conduct negotiations

> [a]ll Offerors within the competitive range shall be so notified and shall be provided an opportunity to submit written best and final offers at the designated date and time. . . . After receipt of best and final offers, no discussions shall be reopened unless the Director/ACCO determines that it is clearly in the Government's best interest to do so[.] . . . If discussions are reopened, the Director/ACCO shall issue an additional request for best and final offers to all Offerors still within the competitive range.
>
> (AR at Ex. 1, § L.17.)

Evaluation of Proposals

Only two offerors, PIW and Pathways, submitted timely proposals to the RFP. (*See* AR at Ex. 6, § 5.) The Evaluation Committee ("Committee") met on the seventh, seventeenth, and twenty-first of November 2011 to review, evaluate and score the submitted proposals. (AR at Ex. 6, § 4.) The Committee, composed of three members, concluded its initial evaluation of offeror proposals on December 14, 2011. PIW received raw scores of 69, 37, and 57 from the three respective Committee members for a total score of 163 and an average score of 54.3. (AR at Ex. 6, § 5.1.) Pathways received raw scores of 73, 65, and 73 for a total score of 211 and an average score of 70.3. (AR at Ex. 6, § 5.1.)

DMH's Chief Contracting Officer ("CCO") issued each offeror a "Notification of Deficiencies" Best and Final Offer ("BAFO") request dated December 16, 2011. (AR at Exs. 7, 9.) PIW's "Notification of Deficiencies" identified a number of deficiencies under the heading entitled "Price Proposal." (*See* AR at Ex. 7.) Under the "Technical Proposal" caption, the notice also stated:

> Psychiatric Institute of Washington's (PIW) proposal lacks detail about peer involvement, peer empowerment. PIW proposal lacks discussion on management data or QI mechanisms. PIW shall provide reason for inability to bill MHRS and discuss in more detail about PIW's client centered approach.

(AR at Ex. 7.)

BAFOs were due on January 5, 2012. (AR at Exs. 7, 9.) Both offerors submitted BAFOs to the District. (*See* AR at Ex. 11, § 5.) The Committee met on January 9, 2012, to review, evaluate and score the BAFO submissions of both offerors. (AR at Ex. 11, § 4.) Following the BAFO submissions, Pathways received raw scores of 68, 73, and 73 from the three respective Committee members for a total score of 214 and an average score of 71.3. (AR at Ex. 11, § 5.2.) PIW received raw scores of 66, 70, and 45 from the three respective Committee members for a total score of 181 and an average score of 60.3. (AR at Ex. 11, § 5.1.) Pathways' proposed price for the base year of the contract was $686,356.74; $238,593.26 less than PIW's proposed price of $924,950.00. (AR at Ex. 16.) Accordingly, Pathways received all 10 evaluation points for price; its total evaluation score was 81.33. (*Id.*) Applying the solicitation's objective price formula, PIW was awarded 7.42 evaluation points for price; its total evaluation score was 67.75. (*Id.*) In its Evaluation Committee Report, the Committee "unanimously recommend[ed] the contract be awarded to Pathways to Housing, Inc." (AR at Ex. 11, § 5.) In the same report, the Committee then "request[ed] further clarity" on four areas of Pathways' proposal: (1) the methodology for billing both MHRS and non-MHRS services; (2) a detailed explanation of the role of Neighbors Consejo; (3) the plan to hire and retain qualified staff and minimize staff turnover; and (4) the methodology Pathways would use for in-kind services. (*Id.*)

Following the Committee's recommendation to award the contract to Pathways, on January 12, 2012, the CCO issued Pathways an "Additional Information Request" for "some additional points of clarification that must be addressed by Pathways to Housing (Pathways) prior to moving forward in the process."[2] (AR at Ex. 12.) On January 17, 2012, Pathways provided its responses to the CCO's additional information request. (AR at Ex. 13.) The CCO met with Pathways on January 18, 2012, and raised additional questions. (*See* AR at Ex. 14.) Pathways responded to the District's questions in writing on January 23, 2012. (AR at Ex. 14.) "On January 25, 2012, the three member evaluation committee reconvened to evaluate the responses submitted [by Pathways] to the Court Urgent Care RFP – **Additional Information Request.**" (AR at Ex. 15, § 5.) The Committee determined that Pathways' responses "adequately clarified the concerns of the evaluation committee." (AR at Ex. 15, § 5.1.)

On February 1, 2012, the CCO issued a Determination and Findings that (i) Pathways was a responsible offeror, and (ii) its proposed contract price was fair and reasonable. (AR at Exs. 17, 18.) On the same day, the District notified PIW that it was an unsuccessful offeror and notified Pathways that it was the successful offeror. (AR at Exs. 19, 20.) PIW requested a debriefing from the District which was held on February 9, 2012. (Protest ¶ 16.) Subsequently, PIW filed its protest with this Board on February 15, 2012.

Determination and Findings to Proceed with Contract Performance while a Protest is Pending

[2] In addition to the four areas of clarification identified by the Committee, the CCO's letter to Pathways included one additional item concerning how Pathways would provide a plan to obtain the best qualified individuals to provide the highest level of service. (AR at Ex. 12.)

On May 16, 2012, the District its first D&F which was executed by DMH's CCO. The Board sustained the D&F in an Order dated June 22, 2012. In *Wisconsin Avenue Psychiatric Center, Inc. v. D.C. Department of Mental Health*, C.A. No. 005211 B (D.C. Super. Ct. filed June 22, 2012), protester filed a motion for entry of a temporary restraining order of the Board's June 22nd Order. On July 3, 2012, the D.C. Superior Court granted protester's motion, reversed the Board's Order, and remanded the case to the Board. On July 9, 2012, the District filed the Second D&F. The Board vacated its June 22nd Order on July 12, 2012; the July 9th filing of the Second D&F having rendered moot the May 16th D&F. The Board also ordered the District to stay execution of the Second D&F until protester had the opportunity to pursue a challenge of the Second D&F. Protester challenged the Second D&F in a motion dated July 16, 2012.

DISCUSSION

I. MOTION TO DISMISS

On March 9, 2012, the District filed a motion to dismiss in which it argued that the Board should dismiss the protest because it fails to comply with the requirements of Board Rule 301.1(c). (Mot. to Dismiss 6-7, Mar. 9, 2012.) Board Rule 301.1 provides in pertinent part:

> All protests shall be in writing, addressed to the Board, and shall include the following:
>
> * * *
>
> (c) a clear and concise statement of the legal and factual grounds of the protest, including copies of relevant documents, and citations to statutes, regulations or solicitation provisions claimed to be violated.

This rule is "meant to advise protesters of the expected form and content of a protest, so that the protester identifies the legal and factual grounds of the protest for the Board and the agency and its counsel." *Unfoldment, Inc.*, CAB No. P-0435, 44 D.C. Reg. 6378, 6381 (Sept. 12, 1995). "Our expectation of specificity in the initial protest submission must take into account that the protester may often have little more than the benefit of the solicitation documentation, its observations as a participant in the procurement, and a debriefing." *Id.*

While the initial protest raised only a generalized allegation that the District "failed to properly evaluate [PIW's and] the awardee's technical proposal and preference points as provided by the terms of the RFP," (Protest ¶¶ 15, 17) the protester has since raised multiple alleged errors with the District's evaluation and evaluation process upon which it challenges the present solicitation.[3] The District initially challenged the specificity of protester's allegations and argued in its motion to dismiss that protester had failed to meet the requirements set forth in Rule

[3] In this case, the protester's later raised bases are intended to supplement its initial argument that the District failed to properly evaluate the proposals. Under these circumstances, the Board considers the additional arguments as timely made. *See, e.g., Rodgers Bros. Custodial Servs. Inc.*, CAB No. P-0565, 46 D.C. Reg. 8564, 8566 (Feb. 17, 1999).

301.1(c).[4] We have held that "[w]here the District believes that a protest ground fails to state a violation of procurement law or regulation or is unsupported by the facts, the matter should be addressed through the Agency Report on the merits in the first instance and the absence of detailed facts concerning an alleged procurement deficiency in the initial protest filing does not necessarily dictate dismissal." *CUP Temporaries, Inc.*, CAB No. P-0474, 44 D.C. Reg. 6841, 6844 (July 3, 1997). *See also Unfoldment, Inc.*, CAB No. P-0435, 44 D.C. Reg. at 6381. Therefore, based on a review of the record, the Board finds that the protester's filings are sufficient to meet the standard established by Rule 301.1 and the Agency Report has provided the Board with sufficient evidence to rule on the merits of the claim. Accordingly, the District's motion to dismiss on the ground that PIW failed to provide a clear and concise statement of the legal and factual grounds of the protest is denied. The Board will consider the merits of the protest.

II. MERITS OF THE PROTEST

We exercise jurisdiction over this protest and its underlying allegations pursuant to D.C. Code § 2-360.03(a)(1) (2011). Protester has standing to file this protest as an aggrieved party because it timely submitted a proposal in response to the RFP and would be next in line for the award if the protest were sustained. (AR at Ex. 6, § 5.) Further, PIW timely filed this protest on February 15, 2012, within ten (10) business days of learning of the basis of the protest, in this case the notice of award to another bidder, pursuant to D.C. Code § 2-360.08(b)(2) and Board Rule 302.2(b).

The protester challenges the current award and alleges that (1) the District's evaluation of the offeror technical proposals was irrational and therefore flawed and unreasonable, and (2) offerors were treated unequally in that Pathways was afforded three additional opportunities to correct deficiencies in its proposal while PIW was not afforded comparable opportunities. (Comments on AR/ Resp. to Mot. to Dismiss 2, Mar. 27, 2012 [hereinafter "Comments on AR"].)

Issue One: Was the District's Evaluation of Both Offeror Technical Proposals Reasonable?

The protester has alleged that the District failed to evaluate the proposals reasonably and in accordance with the terms of the solicitation. (Comments on AR 2-15.) PIW therefore contends that its protest should be sustained because "DMH's award decision was unreasonable." (Comments on AR 2.) However, the District maintains that the respective proposals from PIW and Pathways were properly evaluated. (Mot. to Reply to the Protester's Comments on AR/ Resp. to Mot. to Dismiss, & the District's Reply 3-4, Apr. 5, 2012.) Upon a review of the record, the Board finds that while there is sufficient evidence of a reasonable basis for award, there is no evidence that the evaluation conducted by the Committee deviated from the terms of the solicitation and/or violated procurement law.

[4] The District has not reasserted its claim that a motion to dismiss is warranted based on Rule 301.1(c) since the protester filed its Comments on the Agency Report. (Mot. to Reply to the Protester's Comments on Agency Report, Apr. 5, 2012.)

The Board's standard of review for proposal evaluations and the related selection decision is whether the District's actions were reasonable, in accord with the evaluation and selection criteria identified in the solicitation, and whether there were violations of procurement laws or regulations. *See, Trifax Corp.*, CAB No. P-0539, 45 D.C. Reg. 8842, 8847 (Sept. 25, 1998); *see also Health Right, Inc., D.C. Health Coop., Inc., & The George Washington Univ.*, CAB Nos. P-0507, P-0510, P-0511, 45 D.C. Reg. 8612, 8630 (Oct. 15, 1997). It is not this Board's place to make an independent evaluation of offeror proposals or determine how we might have evaluated proposals were we in the position of the Committee. *See Group Ins. Admin., Inc.*, CAB No. P-0309-B, 40 D.C. Reg. 4485, 4508 (Sept. 2, 1992) ("[I]t is not this Board's function to evaluate proposals de novo.") Rather, we only consider whether the District's actions were arbitrary. *See RGII Tech., Inc.*, CAB Nos. P-0664, P-0669, P-0670, 50 D.C. Reg. 7475, 7477 (Mar. 6, 2003). "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." *RGII Tech., Inc.*, CAB Nos. P-0664, P-0669, P-0670, 50 D.C. Reg. at 7477.

Accordingly, "[t]he protester has the burden of affirmatively proving its case and the fact that the protester does not agree with the agency's technical conclusions does not itself render the evaluation unreasonable." *Emergency Assocs. of Physician's Assistants & Nurse Practitioners, Inc.*, CAB No.P-0500, 46 D.C. Reg. 8527, 8532 (Dec. 15, 1998). See also *O'Donnell Construction Co.*, CAB No. P-0158 39 D.C. Reg. 4479, 4489 (Mar 24, 1992), wherein the Board held that "[a]bsent a showing that the District has violated specific provisions of the [Minority Contracting] Act or the PPA or the District's procurement regulations, the protest must be denied. This is so because there is a presumption that public officials perform their official duties properly and in good faith."

Evaluation of PIW's Proposal Was Reasonable

PIW argues that the District failed to properly credit the strength of the staffing offered in PIW's proposal and inappropriately used price and cost considerations to downgrade PIW's technical scores. (Comments on AR 3, 8.) Specifically, the protester has alleged that the District failed to give appropriate credit to PIW's proposal to provide the services of a child and adolescent psychiatrist. (Comments on AR 3.) The record, however, establishes that the District's evaluation was reasonable with respect to each of the four technical evaluation criteria, including staffing considerations.

There is no evidence to support protester's assertion that PIW's staffing strengths were overlooked. Staffing and organizational structure were all evaluated under the first technical evaluation factor ("Factor 1"), worth a maximum of 40 points. (AR at Ex. 11, § 2.) PIW's proposal received scores of 40, 32, and 40, (AR at Ex. 16) which corresponds to receiving two fives and a four under the solicitation's rating scale (AR at Ex. 1, § M.2.1). Clearly, the Committee gave PIW's proposal significant credit for the strength of its proposed staffing and organizational plan since its proposal received a very high score for Factor 1.

Furthermore, the protester has failed to prove that the District was arbitrary in its decision to award PIW's proposal lower scores for the other three technical evaluation factors. The Committee's summary of its evaluation of PIW's BAFO stated:

> [D]id not sufficiently address the deficiencies. The offeror dismissed the need to involve peers even though this was an evaluation criterion. The offeror does not have the ability to bill MHRS and did not offer a plan to maximize revenue collections. The offeror did not sufficiently explain or address the high executive and administrative costs. The raw scores of the offeror's BAFO from the three (3) committee members were, 66, 70, and 70[5] totaling 181 out of a maximum score of 270. . . . It is noted that a possible 10 points were not included as part of the abovementioned evaluation summary. CPA will utilize Price/Cost formula to calculate cost proposal scores.
>
> (AR at Ex. 11, § 5.1.)

The fourth technical evaluation factor, worth 15 points, exclusively concerned whether the offeror "demonstrates [an] ability to maximize revenue collection," (AR at Ex. 1, § M.3.1; AR at Ex. 6, § 2) and MHRS billing was a key requirement of the solicitation, which related to an offeror's capacity to bill Medicaid for reimbursable costs for mental health services. (AR at Ex. 1, § C.7). However PIW's proposal did not provide for MHRS billing. Nor did it include peer support services despite solicitation language which stated that "[t]he applicant must . . . show how these principles will be operationalized within the project." (AR at Ex. 1, § C.3.3.) Both of these significant deficiencies were brought to the attention of PIW in the section under Technical Proposal in the "Notification of Deficiencies" letter. (AR at Ex. 7.) However, PIW failed to amend its proposal to address these deficiencies, instead stating in its BAFO that "[t]he use of peers would not be clinically effective" and that it was currently operating without MHRS billing services because to do so "would have costs associated with it beyond the scope of the current contract." (AR at Ex. 8.)

Section C.6 of the RFP unambiguously states that "[a]ll Prospective Contractors shall clearly describe how each of these requirements shall be addressed in the proposal." (AR at Ex. 1, § C.6.) Yet PIW's proposal was nonresponsive to those specific solicitation requirements wherein MHRS billing and peer involvement were, in fact, within the proposed scope of work. Although PIW was an incumbent contractor providing UCC services similar to those being sought by the District through the RFP, it was incumbent upon PIW to respond to the requirements of the *present* solicitation regardless of how PIW may have provided similar services under a previous contract. Accordingly, the Committee properly and reasonably lowered PIW's scores for failing to address the requirements of the current solicitation.

[5] The Board notes the existence of a typographical error in this evaluation narrative written by the Committee. In particular, PIW's actual scores were 66, 70, and 45, which is properly reflected in the next paragraph of the evaluation and totals 181 points overall. (AR at Ex. 11, § 5.1; AR at Ex. 16.)

There is also no evidence to support PIW's argument that its low technical scores were actually the result of the Committee inappropriately considering price factors when scoring technical factors. Although the Committee noted that the "offeror did not sufficiently explain or address the high executive and administrative costs," (AR at Ex. 11, § 5.1) there is no showing that this deficiency affected the Committee's scoring of PIW's proposal because staffing was evaluated under Factor 1 and, as noted previously, PIW received high scores for Technical Factor 1. (AR at Ex. 16.) In fact, the record shows that PIW's scores for Factor 1 increased after the Committee evaluated and scored PIW's BAFO.

Further, a review of the Committee reports shows that the Committee used the budgets submitted by offerors as a means of assessing the practicality of the technical approach proffered by both offerors. For instance, in assessing PIW's offer, the Committee noted that "[t]he second CAC position is present in the organizational chart however does not appear to be included in the budget." (AR at Ex. 11, § 5.1.) This inconsistency in the proposal raised concerns over how many CAC positions PIW actually intended to use to offer substance abuse counseling consistent with the terms of the solicitation, which required two Certified Abuse Counselors. (AR at Ex. 1, § C.6.1.2; AR at Ex. 11, § 2.) The Committee took the same approach in assessing Pathways' proposal noting that "[t]he cost for a Psychiatrist is low. The part-time psychiatrist will not be able to meet the needs of UCC." [6] (AR at Ex. 6, § 5.2.) Admittedly, the solicitation was silent on how the budget would be used in assessing offeror technical proposals. (AR at Ex. 1, § C.9.1.) However, it appears that the Committee reasonably and uniformly used the budget as a means to assess the reliability of both offeror proposals.

Evaluation of Pathways' Proposal was Reasonable

Based upon a review of the entire record, the Board finds that protester's allegation that the District unreasonably assigned higher scores to Pathways' proposal is similarly without merit. PIW claims that the Committee failed to appropriately score Pathways' proposal for Factor 1. Yet the record shows that Pathways received scores of 32, 32, and 32 from the Committee. (AR at Ex. 16.) A score of 32 reflects that the panel unanimously felt that Pathways' proposal warranted a ranking of "Good" or that it "[m]eets requirements and exceeds some requirements; no deficiencies." (AR at Ex. 1, § M.2.1.) This rating refutes protester's argument that "*none* of the evaluators scored Pathways any lower for factor # 1," (Comments on AR 12) because two of the three evaluators did in fact score Pathways lower than PIW since PIW received scores of 40, 32, and 40 for Factor 1. A review of the Committee's report shows that the Committee noted some areas of concern with respect to the staffing aspects of Pathways' proposal but also noted many strengths including that Pathways' BAFO "clarified the organizational structure and increased psychiatric time and salary," and demonstrated that "the licensed clinical staff present competent [sic] in the area of co-occurring substance abuse treatment." (AR at Ex. 11.) Given the noted strengths of Pathways' proposal which directly

[6] In fact, PIW asserts that Pathways' technical evaluation score should have been "downgraded" in light of certain cost-related deficiencies. (Comments on AR 13-14.) Therefore PIW has argued that the District should consider price factors in scoring Pathways' technical proposal even as it claims that its own proposal was improperly evaluated because the District allegedly used price factors in scoring its technical proposal.

relate to the criteria detailed under evaluation Factor 1, there is no basis upon which the Board can conclude that the Committee's scoring of Pathways' proposal was arbitrary and unreasonable.

The protester also alleges that the District unreasonably failed to downgrade Pathways' proposal with respect to the third subfactor, worth 20 points, which considered offeror capabilities in the area of substance abuse and related systems. (Comments on AR 14-15.) In support of this allegation, protester highlights that on January 9, 2012, the Committee evaluated Pathways' proposal and unanimously recommended the award to Pathways. Yet, at the same time, the Committee sought clarification on the role of Neighbors Consejo, specifically:

> What services will Neighbors Consejo provide? Who will provide these services and how will the services be reimbursed? What kind of contract will be in place between Neighbors Consejo and Pathways?
>
> (AR at Ex. 11, § 5.)

PIW contends that this need for clarification evidences that it was "irrational for DMH to evaluate as a 'strength' Pathways' 'well discussed' description regarding the use of its subcontractor." (Comments on AR 13.) In its initial proposal, Pathways stated that "Pathways will subcontract with Neighbors to hire one Spanish speaking Certified Addictions Specialist, as well as a Spanish speaking case aide as part of the core staffing plan." (AR at Ex. 5a, at 1.) The proposal further detailed Pathways' intent to create two substance abuse counselor positions, both full time – one an employee of Pathways and the other to be filled through a partnership with Neighbors Consejo. (AR at Ex. 5a, at 3.) In its BAFO, Pathways then stated "Consistent with the RFP instructions, PTHDC will be hiring two Certified Addiction Counselors. It is PTHDC's expectation that each of the Certified Addiction Counselors will spend at least 10 hours per week in the Community to coordinate substance abuse treatment services for those referred and in need of services." (AR at Ex. 10, at 4.) Therefore in both its initial proposal and the BAFO, Pathways was consistent in stating that it was prepared to provide two full time employees to support its substance abuse program. Accordingly, it was reasonable for the Committee to award Pathways' proposal high scores in this area even though it requested more detailed information on the scope of Pathways' contractual relation with its sub-contractor.

Award Decision was Reasonable

Lastly, the protester alleges that the District failed to conduct an appropriate technical strengths/price trade off and should "have determined that the additional major strengths of PIW's proposal justified the additional cost of the 'most advantageous,' best value procurement." (Comments on AR 18.) While the protester is correct that the terms of the solicitation called for the District to award a contract "to the responsive and responsible Offeror whose offer is most advantageous to the District," (AR at Ex. 1, § M.1) its argument that the District failed to recognize PIW's proposal as the most advantageous despite its significantly higher cost is illogical. The record shows that PIW failed to comply with key requirements of the solicitation. PIW's staffing strengths did not overcome its major technical deficiencies, as noted by the

Committee, in other aspects of its proposal. Accordingly, the Committee properly awarded PIW's proposal lower scores for some technical evaluation factors. (AR at Ex. 16.) Ultimately, after the BAFOs were submitted, evaluated, and scored, PIW's offer had a lower technical and price score than Pathways', (AR at Ex. 16) while Pathways' proposal offered a better technical product at a lower price, according to the terms of the solicitation. (*Id.*). Therefore, the District acted reasonably in making its best value procurement decision when it chose to award the contract to the offeror that submitted the best technical proposal at the lowest cost to the District.

Issue Two: Did the District Treat the Offerors Unequally and Thereby Act Unlawfully?

The protester alleges that the District failed to engage in meaningful discussions during negotiations and treated the offerors unequally by allowing Pathways additional opportunities to engage in discussions. (Comments on AR 5, 15.) Specifically, protester noted that the District failed to inform PIW of certain proposal weaknesses including, that (i) PIW was not DMH certified, and (ii) the referral system seemed complicated to evaluators. (Comments on AR 6.) The protester also alleges that the District treated offerors unequally by allowing Pathways "at least three opportunities after it submitted its BAFO to address DMH's remaining concerns, including serious concerns regarding Pathways' organization and staffing." (Comments on AR 15.) The protester claims that this resulted in prejudice because "PIW's scores would have been higher had PIW been given the same chance as Pathways to address all of the deficiencies noted in its initial proposal." (Comments on AR 9.)

"The District's procurement regulations require that the contracting officer point out deficiencies in proposals, resolve uncertainties and mistakes in proposals, and allow all offerors an opportunity to supplement or revise proposals." *Med. Extension Servs., Inc.*, CAB No. P-0378, 41 D.C. Reg. 3918, 3921 (Jan. 14, 1994). Specifically, the District's procurement regulations provide that during negotiations, discussions must:

* * *

(b) Advise the offeror of deficiencies in its proposal so that the offeror is given an opportunity to satisfy the District's requirements;
(c) Attempt to resolve any uncertainties concerning the technical proposal and other terms and conditions of the proposal;
(d) Resolve any suspected mistakes by calling them to the offeror's attention as specifically as possible without disclosing information concerning the other offerors' proposals or the evaluation process; and
(e) Provide the offeror a reasonable opportunity to submit any cost or price, technical or other revisions to its proposal that may result from discussions.

D.C. Mun. Regs. tit. 27, § 1621.2.

The District opened discussions with both offerors on December 16, 2011.[7] (*See* AR at Exs. 7, 9.) In the "Notification of Deficiencies" and request for BAFO sent to PIW, the District stated:

> Psychiatric Institute of Washington's (PIW) proposal lacks detail about peer involvement, peer empowerment. PIW proposal lacks discussion on management data or QI mechanisms. PIW shall provide reason for inability to bill MHRS and discuss in more detail about PIW's client centered approach.
>
> (AR at Ex. 7.)

PIW claims that it was prejudiced by "DMH's failure to disclose all its evaluated deficiencies in PIW's initial proposal" including that PIW was "not DMH certified" and that "the referral system seems complicated." (Comments on AR 6.) However, consistent with the procurement regulations, the District made PIW aware of the significant weaknesses in its proposal that had an adverse impact on the proposal's technical rating, and there is no evidence that the particular deficiencies alluded to by PIW carried any significant weight such that overcoming them could have enabled PIW to reverse its considerable scoring disadvantage. It bears mentioning again that the District directed PIW to discuss peer involvement, a significant subfactor of the second technical evaluation factor, and billing issues, which were highly relevant to the fourth technical evaluation factor. Yet, despite the District's directive to address those proposal deficiencies, PIW failed to revise its proposal to answer those concerns and instead disputed the solicitation requirement for peer involvement and declared that to use the required MHRS billing would result in costs "beyond the scope of the current contract." (*See* AR at Ex. 8.) Under these circumstances, it was reasonable for the committee to have given PIW lower technical evaluation scores.

The "contracting officer shall not assist an offeror to bring its proposal up to the level of other proposals through successive rounds of discussion, such as pointing out weaknesses resulting from the offeror's lack of diligence, competence, or inventiveness in preparing the proposal." D.C. Mun. Regs. tit 27, § 1621.3. Accordingly, this Board has held that "[a]gencies are required to discuss weaknesses in an offeror's proposal where the weaknesses have a significant adverse impact on the proposal's technical rating." *Health Right, Inc., D.C. Health Coop., Inc., & The George Washington Univ.*, CAB Nos. P-0507, P-0510, P-0511, 45 D.C. Reg. at 8645. But "[a]gencies need not afford offerors all-encompassing discussions, or discuss every element of a technically acceptable proposal that received less than the possible maximum rating; rather agencies need only lead offerors into the areas of their proposal which require amplification." *Koba Assocs., Inc.*, CAB No. P-0350, 41 D.C. Reg. 3446, 3472 (June 16, 1993) (citing *Signal Corp.*, B-241849.2, B-241849.3, 91-1 CPD ¶ 218 (Feb. 26, 1991)).

[7] Pursuant to RFP section L.17 entitled "Best and Final Offers", which required the District to issue BAFO requests "to all Offerors still within the competitive range," (AR at Ex. 1, § L.17) the District issued both offerors a "Notification of Deficiencies" request for BAFO (AR at Exs. 7, 9).

On January 9, 2012, the Committee unanimously recommended the contract award to Pathways. (AR at Ex. 11, § 5.) The CCO followed up with a January 12th letter to Pathways seeking clarification on (1) the methodology for billing both MHRS and non-MHRS services; (2) the role of subcontractor Neighbors Consejo; (3) the plan to minimize staff turnover; (4) the methodology to provide in-kind services; and (5) the plan to obtain qualified individuals to provide quality service. (AR at Ex. 12.) On January 17th, Pathways provided additional responses. (AR at Ex. 13.) The CCO then met with Pathways on January 18th and raised additional questions. (AR at Ex. 14.) Pathways' response to the additional information request was submitted on January 23rd. (AR at Ex. 14.) On January 25th, the Committee again recommended unanimously that the contract be awarded to Pathways. (AR at Ex. 15, § 5.1.)

The protester alleges that had it been given additional opportunities to submit clarifications, it could have raised its score. However, in its BAFO submission the protester was clearly nonresponsive to specific requirements of the RFP despite the fact that the Committee explicitly raised many of these deficiencies with the protester prior to its BAFO submission. (AR at Ex. 8.) Thus, the record shows that after the Committee evaluated and scored the BAFOs of both offerors, it reasonably recommended that award be made to Pathways because it ultimately received the highest evaluation score. At no time thereafter was Pathways proposal rescored by the Committee. (AR at Exs. 15, 16.) Instead, the CCO entered into negotiations with Pathways pursuant to section 2-354.03 (h)(1)and (2) of the D.C. Code which permits a contracting officer to enter into negotiations with the highest-ranked offeror. The statutory provision states:

> (h)(1) After ranking the prospective contractors, the contracting officer may elect to proceed with negotiations in accordance with paragraph (2) of this subsection. The contracting officer's decision shall not be subject to review.
>
> (2) If the contracting officer elects to proceed with negotiations, the contracting officer shall negotiate with the highest-ranked prospective contractor on price or matters affecting the scope of the contract, so long as the terms of the final contract are within the scope of the request for proposals.
>
> D.C. Code § 2-354.03.

Accordingly, the Board views the CCO's request for the referenced clarifications from Pathways as part of the overall process of commencing negotiations with the highest ranked offeror.[8] Therefore, notwithstanding the protester's allegation that the District treated offerors unequally when it sought answers to several questions despite having made the decision to award the contract to Pathways, the District acted lawfully and consistent with the relevant statutory provision. The Board finds that the District's actions were reasonable, in accord with the

[8] Under D.C. Code § 2-351.04(41), negotiations are defined as "discussions to determine the terms and conditions of a contract or procurement." Hence, the discussions between the CCO and Pathways following the recommendation to award the contract to Pathways serve to clarify that Pathways' proposed services are consistent with the requirements of the RFP and such discussions are appropriate as long as the terms of the final contract are within the scope of the RFP. D.C. Code § 2-354.03(h)(2).

evaluation and selection criteria identified in the solicitation, and that there is no evidence in the record of any violations of procurement laws or regulations in the conduct of this solicitation. For these reasons, the protest is denied.

III. SECOND D&F

In light of the Board's preceding discussion denying the protest on the merits, the protester's motion challenging the Second D&F is also denied as moot. However, the protester has raised an issue related to the Second D&F that warrants further discussion herein.

The protester contends that the Second D&F was unlawfully executed by DMH's CCO instead of the District's Chief Procurement Officer. (Mot. to Challenge Dep't of Mental Health Director's Revised Determination to Proceed with Performance § I, July 16, 2012.) The Procurement Practices Reform Act of 2010 ("PPRA") provides:

> Performance under a protested procurement may proceed, or award may be made, while a protest is pending only if the CPO makes a 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.
>
> D.C. Code § 2-360.08(c)(2).

In this regard, the Board has previously opined on this staturoty requirement that the CPO must execute any formal determination that urgent and compelling circumstances exist such that a contract award cannot be stayed during the pendency of a protest before our Board. Specifically, in *Arrow Construction, Co., LLC*, CAB No. P-0692, 52 D.C. Reg. 4233, 4234 (Oct. 6, 2004), the Board noted that the "[District of Columbia Public Schools] Chief Procurement Officer did not have the power to prepare the written determination" required by this section of the code. In *Arrow*, the Board held that D.C. Code § 2-309.08(c)(2)[9] "required the Chief Procurement Officer (CPO) of the District of Columbia to make a written determination." *Arrow Constr., Co., LLC*, CAB No. P-0692, 52 D.C. Reg. at 4234. However, this same principle cannot be applied in this case as it relates to DMH. Under the PPRA, DMH's chief procurement officer has the express authority to exercise CPO authority, at least until October 1, 2015. The PPRA provides:

> [U]ntil October 1, 2015, the following agencies, through their chief procurement officers, shall exercise the duties of the CPO for their respective agencies:
>
> * * *

[9] This statutory provision has since been repealed; however, an identical provision is now codified in D.C. Code § 2-360.08(c)(2) (2011).

(B) The Department of Mental Health[10]

D.C. Code § 2-352.01(a)(3).

The Second D&F was executed by the CCO who is the chief procurement officer for DMH. Accordingly, the Second D&F was issued by the appropriate District contracting authority. And although moot, the Board finds it helpful to clarify for the protester's benefit, the actual procurement authority of DMH's CCO under law.

CONCLUSION

In conclusion, the Board finds that the protester has not met its burden of proof to establish that the District acted unreasonably, in violation of procurement law or regulation, or inconsistently with the evaluation and selection criteria set forth in the RFP. Accordingly, the protest is denied. Protester's motion to override the Second D&F is also denied as moot.

SO ORDERED.

DATED: August 1, 2012

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

CONCURRING:

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

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

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[10] The entire section provides "The Department of Mental Health, if a court order no longer requires the agency to be exempt from the CPO's authority." D.C. Code § 2-352.01(a)(3)(B). The D.C. Council's final report on the PPRA indicates that this language refers to the fact the DMH is currently operating under a court order that specifically requires it to be exempt from CPO authority. Accordingly, the D.C. Council anticipated that, by Fiscal Year 2016 at the earliest, DMH may be moved under the District CPO's authority. However, the D.C. Council also contemplated that DMH's authorization to exercise CPO duties could extend beyond October 1, 2015. Rep. on Bill 18-610, the "Procurement Practices Reform Act of 2010" Attach. I. (Oct. 21, 2010).

Psychiatric Institute of Washington, Inc.
CAB No. P-0905

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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:
HORTON & BARBER CONSTRUCTION SERVICES, LLC)
)
Solicitation No.: DCKA-2012-B-0037) CAB No. P-0907
)

For the Protester: Herman W. Barber, pro se. For the District of Columbia Government: Alton E. Woods, Esq., Assistant Attorney General.

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

OPINION
Filing ID 45740397

Horton & Barber Construction Services, LLC ("H&B" or "protester") filed a protest on March 8,
2012, challenging the requirements set forth in the Invitation for Bids Solicitation No. DCKA-2012-B-
0037 ("IFB" or "Solicitation"). The Office of Contracting and Procurement ("OCP") for the District's
Department of Transportation ("DDOT") issued the IFB for "construction services to replace and repair
sidewalk pathways throughout the District in all eight Wards." (District's Mot. to Dismiss 2.) H&B
alleges that it is unreasonable and contrary to the District's procurement practices to include the requirement for a bid bond in the Solicitation. (Protest 1.) The District contends that the protest is untimely because – although it alleges improprieties in the Solicitation which were apparent prior to bid
opening – the protest was filed after the time set for receipt of bids on March 2, 2012. (District's Mot. to
Dismiss 4.) The Board finds that the protest was in fact untimely filed and, for this reason, we dismiss the
protest.

BACKGROUND

On February 9, 2012, OCP issued an IFB for "a contractor to provide emergency sidewalk repair/
replacement." (District's Mot. to Dismiss Ex. 1, § B.1.) The Solicitation was advertised on OCP's
website and in the Washington Examiner. (District's Mot. to Dismiss Ex. 9.) The advertisement in the
Washington Examiner included notice that a 5% bid guarantee would be required with each bid. (Id.)

The IFB was revised twice prior to the deadline for receipt of bids: (i) on February 15, 2012, the District extended the bid submission date from February 29, 2012, to March 2, 2012, (District's Mot. to Dismiss Ex. 1(a)) and (ii) on February 16, 2012, the IFB was amended to include the unit amounts for certain quantities (District's Mot. to Dismiss Ex. 1(b)).

In sections C.1.1 and I.2, the IFB incorporated DDOT's "Standard Specifications for Highways and Structures" ("SSHS"). (District's Mot. to Dismiss Ex. 1, §§ C.1.1, I.2.) Article 12 (A) of the SSHS states, "[o]n all bids of $100,000 or more, security is required to insure the execution of the contract. No bid will be considered unless it is so guaranteed." (District's Mot. to Dismiss Ex. 2.) Horton & Barber Construction Services, LLC

On February 15, 2012, the Contracting Officer ("CO") held a pre-bid conference wherein he discussed the requirement for a bid guarantee. (District's Mot. to Dismiss Ex. 8.) Herman Barber, CEO of H&B, attended the pre-bid conference. (District's Mot. to Dismiss Ex. 10.) On March 2, 2012, ten bidders, including protester, responded to the IFB. (District's Mot. to Dismiss Ex. 4.) Protester and six other bidders failed to include a bid guarantee in their bid submission. (District's Mot. to Dismiss Exs. 4, 8.)

On March 5, 2012, H&B sent an email to Bernetha Armwood, an employee of the Department of Public Works ("DPW"), to protest the Solicitation's requirement that each offeror's bid include a bid guarantee. (District's Mot. to Dismiss Ex. 5.) In its email, H&B argued that a bid guarantee should not be required because the proposed contract was a requirements contract with no specified amounts. (Id.) The CO forwarded H&B's email to the Contract Appeals Board ("CAB") where the protest was acknowledged and docketed on March 8, 2012. (District's Mot. to Dismiss Exs. 6, 7.) On April 4, 2012, the District filed a "Determination and Findings to Proceed with Contract Award while a Protest is Pending" ("D&F"). Protester challenged the D&F in a motion filed April 9, 2012.[1] (See H&B Mot. to

[1] The present Order renders moot the April 4, 2012, D&F and protester's challenge of April 9, 2012.

Dismiss D.C. Request to Proceed [hereinafter "H&B Mot. to Dismiss"].)

DISCUSSION

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

One of the threshold issues for this Board to examine prior to considering the merits of a protest is whether the protest has been filed timely in accordance with the statutory requirements and Board Rules. The statutory requirements pertaining to timeliness are codified in D.C. Code § 2-360.08(b)(1) and (2) and are similar to those contained in the Board Rules as set forth in D.C. Mun. Regs. tit. 27, §§ 302.2(a), 302.2(b) (2002). The statute provides:

> (b)(1) A protest based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals.
>
> (2) In cases other than those covered in paragraph (1) of this subsection, protests shall be filed not later than 10 business days after the basis of the protest is known or should have been known, whichever is earlier.

D.C. Code § 2-360.08.

In its protest, H&B alleges that the IFB's bid bond requirement was improper because "it is a requirements contract, and the actual total of work to be provided has not yet been determined." (Protest 1.) However, the District claims that the protest is untimely because, from the onset, H&B was aware of any alleged irregularities contained in the Solicitation. (District's Mot. to Dismiss) First, the Solicitation included a bid guarantee requirement in Article 12(A) of the SSHS which states that "no bid will be considered unless it is so guaranteed." (District's Mot. to Dismiss Ex. 2.) Second, the advertisement in the Washington Examiner included notice that a 5% bid guarantee would be required with each bid. (District's Mot. to Dismiss Ex. 9.) Third, the CO discussed the requirement for a bid guarantee during the pre-bid conference, (District's Mot. to Dismiss Ex. 8) which was attended by H&B's CEO (District's Mot. to Dismiss Ex. 10). Therefore, prior to the March 2, 2012, deadline for submission of bids, it was clearly apparent to the protester that the Solicitation included a requirement for a bid guarantee. That being the case, H&B needed to file its protest prior to bid opening on March 2, 2012. Instead, on March 5th, H&B emailed a protest to DPW which was docketed by CAB on March 8th. As a result, protester failed to meet the referenced statutory requirement concerning timeliness as set forth in D.C. Code § 2-360.08(b)(1).

In NetSystems Corp., CAB No. P-0841, 2010 WL 3947582 (Apr. 28, 2010), the Board held that where the protest was based upon the solicitation's alleged contradictions to the D.C. Code, the District properly rejected the bid as untimely because protester did not file the protest

until after bid opening. "NetSystems' protest relates specifically to the terms of the solicitation, and should have been filed prior to bid opening." Id. Similarly, in Nation Capital Builders, LLC, CAB No. P-0761, 57 D.C. Reg. 000741, 000743 (Nov. 20, 2007), the Board held that, "[t]he protester should have sought clarification of this alleged impropriety in the IFB by filing a protest before bid opening" (in response to protester's question concerning whether sealed bids for construction IDIQ type contracts require bid bonds at bid opening). More recently, this Board held that, "protests challenging the propriety of a solicitation term that is apparent prior to bid opening must be filed prior to bid opening." Elite People Protective Services, Inc., CAB No. P-0898, 2012 WL 554445 (Jan. 9, 2012).

In its challenge to the D&F, protester asserts that it does not object to any of the terms issued in the Solicitation. (H&B Mot. to Dismiss.) Protester claims instead that the "protest is based on the Districts use of DCMR 27-2416 and its incorrect determination of the evaluated bid price being utilized as the actual bid price." (Id.) However, the protest is very clearly based on the Solicitation's bid requirement. As such, "protester's failure to protest this matter prior to the deadline for submission of proposals renders the present protest untimely." Enterprise Info. Solutions, Inc., CAB No. P-0901, 2012 WL 554446 (Feb. 9, 2012). Finding that the protest allegations are untimely filed, the Board will not determine the merits of this protest.

CONCLUSION

For the reasons discussed above, we dismiss the present protest as untimely.

SO ORDERED.

DATED: August 6, 2012

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

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

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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

Alliance for Equity and Diversity in Education)
) CAB No. P-0913
Under Solicitation No. DCGD-2012-Q-5946)

For the protester: Lawrence Bussey, *pro se*. For the District of Columbia: Jody Harrington, Assistant Attorney General, Office of the Attorney General

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

OPINION

Filing ID #45966907

Alliance for Equity and Diversity in Education ("Alliance" or "protester") has filed a protest challenging the District's decision to close solicitation number DCGD-2012-Q-5946 (the "Solicitation") on Friday, May 11, 2012, at 2:00 p.m. and, in doing so, not accept its proposal which was submitted on Monday, May 14th at 12:25 p.m. In a protest filed on Monday, May 14th at 3:16 p.m., Alliance challenged an ambiguous provision in the Solicitation concerning the closing date. However, the District contends that the protest is untimely because – although it alleges improprieties in the Solicitation which were apparent prior to bid opening – the protest was filed after the time set for receipt of proposals on May 11, 2012, at 2:00 p.m. (Mot. to Dismiss 3.) The Board finds that the protest was in fact untimely filed and, for this reason, we dismiss the protest.

BACKGROUND

On May 7, 2012, the District's Office of Contracting and Procurement ("OCP"), on behalf of the Office of the State Superintendent of Education ("OSSE"), issued the Solicitation seeking a contractor to provide federal grants management consulting and technical assistance services. (Mot. to Dismiss Ex. 1, 1.) The contracting officer followed small purchasing procedures since the services sought were estimated to cost less than $100,000. (Mot. to Dismiss 2.) The Solicitation requested a quote with technical evaluation criteria, and it contained four references to the closing date and time. (Id.) Three of the four closing dates and time were referenced as Monday, May 11, 2012 – 2:00 P.M., (Mot. to Dismiss Ex. 1, 1-3) and one of the four closing dates and time was referenced as "May 11, 2012 2:00 P.M." (Mot. to Dismiss Ex. 1, 1). However, May 11, 2012, was a Friday, not a Monday.

OCP received four proposals prior to 2:00 p.m. on Friday, May 11, 2012. (Mot. to Dismiss 2.) On Monday, May 14, 2012, at 12:25 p.m., Alliance submitted its proposal in response to the Solicitation. (Mot. to Dismiss Ex. 4, 2.) The Contract Specialist informed the protester via email that the "solicitation closed on May 11, 2012 at 2:00pm." (Mot. to Dismiss Ex. 4, 1.) On Monday, May 14, 2012, at 3:16 p.m., Alliance filed a protest challenging the

District's decision to close the Solicitation on Friday, May 11th. (Protest; Mot. to Dismiss Ex. 5, 1-2.)

DISCUSSION

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

Protester states that "[t]he solicitation required submission by "Monday, May 11, 2012"." (Protest; Mot. to Dismiss Ex. 5, 2.) As such, its proposal was submitted on Monday, May 14th before 2:00 p.m. (Id.) Protester alleges that it "would have submitted the proposal on Friday, May 11, 2012 if properly notified of the solicitation error." (Id.)

There is no dispute that the Solicitation contained an ambiguous term. In three places the Solicitation referred to the closing date as Monday, May 11, 2012, even though May 11, 2012, was a Friday, not Monday. However, in order to challenge the Solicitation's ambiguity, the protest must be filed timely, in accordance with the statutory requirements and Board Rules. The statutory requirements pertaining to timeliness are codified in D.C. Code § 2-360.08(b)(1) and (2) and are similar to those contained in the Board Rules as set forth in D.C. Mun. Regs. tit. 27, §§ 302.2(a), 302.2(b) (2002). The statute provides:

> (b)(1) A protest based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals.
>
> (2) In cases other than those covered in paragraph (1) of this subsection, protests shall be filed not later than 10 business days after the basis of the protest is known or should have been known, whichever is earlier.
>
> D.C. Code § 2-360.08.

Following the District's non-acceptance of its proposal for failing to meet the Solicitation's closing date of May 11th, Alliance filed the present protest on May 14th at 3:16 p.m. (Mot. to Dismiss Ex. 5, 1.) In doing so, protester stated, "[t]he relief that I seek is that my proposal be accepted." (Protest; Mot. to Dismiss Ex. 5, 2.) However, although the protest is based on an ambiguity in the Solicitation, it was filed after the time set for receipt of proposals on May 11, 2012 at 2:00 p.m. As shown above in sub-section (b)(1) of D.C. Code § 2-360.08, there is a clear requirement that "[a] protest based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals." Thus, Alliance needed to file its protest prior to May 11th at 2:00 p.m. Even under protester's unsupported interpretation of Monday, May 14, 2012, at 2:00 p.m. as the Solicitation's closing date and time, the protest is untimely because it was filed on May 14th at 3:16 p.m., after the alleged submission deadline.

In cases where the Board has ruled on the issue of discrepancies found within the solicitation, we have consistently held that a protest must be filed prior to the time set for receipt of initial proposals. In a recent case where the protester argued that multiple modifications to the submission due date created an ambiguity, we held that "protester's failure to protest this matter prior to the deadline for submission of proposals renders the present protest untimely." *Enterprise Info. Solutions, Inc*., CAB No. P-0901, 2012 WL 554446 (Feb. 9, 2012). In *Nation Capital Builders, LLC*, CAB No. P-0761, 57 D.C. Reg. 000741, 000743 (Nov. 20, 2007), the Board held that, "[t]he protester should have sought clarification of this alleged impropriety in the IFB by filing a protest before bid opening." We have also held that, "protests challenging the propriety of a solicitation term that is apparent prior to bid opening must be filed prior to bid opening." *Elite People Protective Services, Inc.*, CAB No. P-0898, 2012 WL 554445 (Jan. 9, 2012). In this case, the protest was not timely filed in accordance with the statute and case law precedent.

CONCLUSION

For the reasons discussed above, we dismiss the present protest as untimely.

SO ORDERED:

Date: August 17, 2012

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

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

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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

24/7 Computer Doctors, LLC	)	
	)	CAB No. P-0909
Solicitation No.: DCPO-2012-R-0342	)	

For the Protester: Chinelo Y. Cambron, *pro se*. For the District of Columbia: Jon N. Kulish, Assistant Attorney General, Office of the Attorney General.

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

ORDER ON MOTION TO DISMISS

Filing ID #46479817

24/7 Computer Doctors, LLC ("Computer Doctors" or "protester") has filed a protest alleging improprieties committed by two companies, Charge Anywhere, LLC ("Charge Anywhere") and New Columbia Technologies, LLC ("New Columbia"), in responding to the Request for Proposals for Solicitation No. DCPO-2012-R-0342 ("RFP"). On behalf of the District of Columbia Taxicab Commission ("DCTC"), the Office of Contracting and Procurement ("OCP") issued the RFP for the development, installation, and operation of a Taxicab Smart Meter System ("TSMS"). Protester alleges that in a Subcontract Agreement ("Agreement") between itself, Charge Anywhere, and New Columbia, the parties all agreed to collaborate and submit a proposal in response to the RFP. Although ultimately, protester did not submit a proposal and does not allege any wrongdoing on the part of the District, it alleges that Charge Anywhere and New Columbia breached the Agreement when they "refused to continue working as a team for a final proposal submission to the District." (Protest 3.)

The District has filed a motion to dismiss contending that Computer Doctors' protest grounds are so peripheral to the solicitation that they are insufficient to confer standing upon the protester. (Mot. to Dismiss 1.) We agree that Computer Doctors does not have standing to bring this protest before the Board and grant the District's motion to dismiss.

BACKGROUND

On January 25, 2012, OCP issued the RFP seeking a contractor to develop, install, and operate a TSMS in approximately 6,500 taxicabs licensed to operate in the city. (Mot. to Dismiss Ex. 1, § C.1.) The RFP contemplated that the resulting contract would consist of a base term of five years, with up to three one-year option periods. (Mot. to Dismiss Ex. 1, §§ F.1-F.2.) It included a requirement for 35% Certified Business Enterprise ("CBE") subcontracting set-aside. (Mot. to Dismiss Ex. 3, ¶ 4.)

On February 8, 2012, OCP held a pre-proposal conference for prospective offerors. (Mot. to Dismiss Ex. 3, ¶ 6.) Computer Doctors is not listed among the conference attendees on the required sign-in sheet. (Mot. to Dismiss Ex. 3, ¶ 6.) By March 26, 2012, the deadline for receipt of proposals, Computer Doctors did not submit a proposal as a prospective prime

contractor, nor did Charge Anywhere or New Columbia. (Mot. to Dismiss Ex. 3, ¶ 8.) However, Charge Anywhere and New Columbia were included as prospective subcontractors in the proposal submitted by Telecommunications Development Corporation. (Mot. to Dismiss Ex. 3, ¶ 8.) Computer Doctors filed the present protest and, in response, the District filed a motion to dismiss for lack of standing. On August 2, 2012, the District then filed a "Determination and Findings to Proceed with Contract Award While a Protest is Pending" ("D&F").[1]

The Protest

Computer Doctors alleges that Charge Anywhere and New Columbia breached the Agreement by refusing to continue working with protester to prepare a proposal in response to the RFP. (Protest 3.) It contends that the principals of all three companies held a meeting on February 16, 2012, "to discuss the formation of a Team Agreement to facilitate the requirements of this solicitation." (Protest 2.) The "Team Agreement" evolved into a "Subcontract Agreement" whereby Computer Doctors was the intended prime contractor and Charge Anywhere and New Columbia were designated subcontractors. (Protest 2.) According to protester, the parties intended to use protester's "CBE status to position our company as the "General Contractor" for this solicitation . . . and [sic] expecting our business to pretend that it is a primary participant." (Protest 1.) It also claims that Computer Doctors' participation was solicited "as a prime contractor for the Project to facilitate 14 additional preference points in the ranking of our team proposal." (Protest 2.)

However, protester alleges that Charge Anywhere and New Columbia cancelled the Agreement "within minutes after receiving an electronic copy of the draft proposal" that they helped develop, (Protest 1) and on March 25, 2012, Charge Anywhere and New Columbia "breached their Subcontract Agreement [by] not completing work and threatening to bid without us" (Protest 2). Protester further states that it is "seeking legal counsel to recoup damages done by Charge [Anywhere] and New Columbia." (Protest 3.) Protester does not allege that the District violated any procurement law, regulation or the terms of the solicitation.

DISCUSSION

Prior to considering the merits of this protest, the Board must examine whether the case at issue is subject to our jurisdiction. The Board's jurisdiction to hear protest cases is set forth in D.C. Code 2-360.03(a)(1)(2011) and is similar to the Board Rules as set forth in D.C. Mun. Regs. tit. 27, § 300.1 (2002). The statute provides:

> (a) The Board shall be the exclusive hearing tribunal for, and shall review and determine de novo:
>
> (1) Any protest of a solicitation or award of a contract addressed to the Board by any actual or *prospective bidder*, offeror, or the contractor who is *aggrieved* in connection with the solicitation or award of a contract;

[1] Protester did not challenge the D&F. If the protester had, however, the present Order would render any such challenge moot.

D.C. Code §2-360.03(a)(1) (emphasis added.)

Therefore, the jurisdictional issue presented for the Board in this case is whether protester is a prospective bidder who is aggrieved under the statute. We conclude that the protester is not a prospective bidder who is aggrieved and hence lacks standing herein.

Protester is not a Prospective Bidder within the meaning of the Statute

Protester does not claim to be an actual bidder to the RFP and, according to the District, protester did not submit a proposal as a prospective prime contractor. (Mot. to Dismiss Ex. 3, ¶ 8.) However, protester alleges that it was initially involved in a collaborative effort, along with Charge Anywhere and New Columbia, to submit a proposal in response to the RFP. (Protest 2.) Protester alleges that the parties together intended to contribute their relative technical and administrative expertise to develop a winning proposal. (Protest 2.) It also claims that Charge Anywhere and New Columbia intended to use protester's CBE status to position the company as a "General Contractor" and primary participant solely in order to obtain 14 additional preference points. (Protest 2.) Therefore, at issue is whether protester is a prospective bidder within the meaning of the statute.

In *Schwing Am., Inc.,* CAB No. P-0156, 38 D.C. Reg. 2963, 2967 (Sept. 11, 1989), the Board held that the protester was "neither an actual or prospective bidder because it does not have the capability to perform the prime contract at issue." In this case, although protester claims that it was the intended prime contractor under the Agreement, in actuality, Computer Doctors was more akin to being a subcontractor. There is no evidence in the record to suggest that protester had the capability to perform the services sought under the RFP as a prime contractor. And, by protester's own admission, the purpose of positioning Computer Doctors as a prospective prime contractor was merely to increase the proposal's preference points. Lacking the capability to perform as a prospective prime contractor, protester cannot be considered a prospective bidder within the meaning of the statute.

In *Tyrone F. General,* CAB No. P-0357, 40 D.C. Reg. 4996, 4999 (Feb. 19, 1993), the Board held that the protester did not stand in any position to assert any right cognizable by the PPA and implementing regulations despite protester's assertion that he was, in fact, a prospective bidder having spent thousands of hours in research and development in order to provide services to the District.[2] The Board opined that ". . . we are constrained to find from the facts extant that protestor has shown that he, in any way, was a potential competitor with sufficient economic interest in the procurements at issue. He certainly did not participate in the procurements, and he has not shown that he had the capacity to do so." *Id.* The facts in this case – protester did not submit a bid or even attend the pre-proposal conference – lead to a similar conclusion. Despite protester's initial plan to submit a bid together with Charge Anywhere and New Columbia, the parties abandoned that effort and ultimately protester did not submit a bid to the RFP. Having failed to submit a bid or establish itself as a prospective bidder, protester cannot be considered to have a sufficient economic interest in the outcome of the procurement.

[2] The PPA (Procurement Practices Act of 1985) refers to D.C. Code §§ 1-1181.1, *et seq*. (1986), as later amended by the Procurement Reform Amendment Act of 1996, D.C. Code §§ 2-301.01, *et seq*. (1997) and repealed and replaced by the Procurement Practices Reform Act of 2010, D.C. Code §§ 2-351.01, *et seq*. (2011).

Furthermore, protester is not an "aggrieved" person as set forth in D.C. Code §2-360.03(a)(1) or the corresponding Board Rules. Board Rule 100.2(a) defines an aggrieved person as an actual or prospective offeror "(i) whose direct economic interest would be affected by the award of a contract or by the failure to award a contract, or (ii) who is aggrieved in connection with the solicitation of a contract." We have held that a "protestor who is not an actual or prospective bidder is not an aggrieved person or an interested party because the protestor will not suffer any direct economic injury." *Tyrone F. General* at 4999. Therefore, in order to have standing before this Board as an aggrieved person, the protester must be an actual or prospective bidder and show that it has suffered, or will suffer, direct economic injury as a result of the adverse agency action. "The most common form of injury in government contract cases is the economic loss which would result from loss of the contract." *Micro Computer Co., Inc.*, CAB No. P-0226, 40 D.C. Reg. 4418 (May 12, 1992). *See, Anne Robertson Sellin*, CAB No. P-0238, 38 D.C. Reg. 4247, 4249 (July 2, 1991) (finding that a protester who did not submit an expression of interest pursuant to the agency's advertisement was ineligible for award and therefore was not an interested or aggrieved party who could invoke the jurisdiction of the Board).

Therefore, we find that Computer Doctors does not have standing in this protest because it is neither an actual nor prospective bidder who has been aggrieved in connection with the RFP. In addition, even though the Board will not consider the merits of this case due to protester's lack of standing, we are mindful that the protester does not allege any violation of procurement law or regulation on the part of the District.

CONCLUSION

For the reasons discussed above, we dismiss the present protest with prejudice.

SO ORDERED.

DATE: September 17, 2012

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

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

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

HARRIS RESOURCES, PC	)	
	)	CAB No. P-0894
Solicitation No. DCRK-2011-R-0219	)	

For the Protester: Mr. Curtis Harris, *pro se*. For the District of Columbia Government: Robert Schildkraut, Esq., Assistant Attorney General, Office of the Attorney General.

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

OPINION
Filing ID #46901459

Harris Resources, PC (protester or Harris) failed to submit a bid on a solicitation issued by the D.C. Office of Contracting and Procurement (District) after allegedly encountering difficulties logging on and experiencing other delays with the District's online procurement message board. Harris thereafter filed a protest with the Board asserting that the District erred by not allowing it to file a late proposal. The District filed an unopposed motion to dismiss on jurisdictional grounds. We find that the protester does not meet the lawful requirements for submission of a late proposal and dismiss this matter with prejudice.

BACKGROUND

In pertinent part, the record herein reveals that the District issued Request for Proposals No. DCRK-2011-R-0219 on the District's Ariba Spin Manage Website (Ariba) on September 1, 2011, for actuarial services related to worker's compensation and tort liability claims. (District's Combined Mot. to Dismiss and Agency Report (hereafter Mot. To Dismiss), Ex. 2, §B.1., Ex. 4, ¶4.) The solicitation identified September 15, 2011, at *2:00 p.m.* as the submission deadline. (Mot. To Dismiss, Ex. 4, ¶4.) The District later changed the submission deadline to September 15, 2011, at *4:00 p.m.* (Mot. To Dismiss Ex. 4, ¶9.) The protester requested that the deadline be changed to September 15, 2011, at *5:00 p.m.*, but the District denied the request. (Protest 2.) The protester does not dispute that it failed to submit a timely proposal to the solicitation[1]. (Protest 1-2.)

The two-page *pro se* protest submitted herein lacks a coherent narrative of protest grounds, and is replete with factual discrepancies. For example, there are internal contradictions

[1] The protester concedes that it was "unable to get our submission in before the deadline" and that the District "closed the bid just minutes before we were ready to submit". (Protest 1-2.)

between key dates referenced in the protest,[2] solicitation provisions cited therein,[3] and arguments advanced to support the protest.[4] Notwithstanding those inherent deficiencies, the Board discerns that the protester is seeking to link its failure to submit a timely bid to three factors allegedly caused by the District.

First, the protester contends that the District's Ariba system prevented the protester from logging on until six days after the solicitation was issued. (Protest 1, ¶2.) The solicitation was issued on September 1, 2011, and the protester contends that it was not able to logon to Ariba until September 7, 2011.[5] (*Id.*) By implication then (although not stated expressly), the protester apparently contends that it was prejudiced by the truncated period within which it was forced to prepare a proposal.

Second, the protester contends that the District failed to issue responses to its solicitation questions until the day that proposals were due from all bidders. (Protest 2, ¶2.) In this regard, the record shows that the protester emailed questions to the District on September 13, 2011. (Protest 2; Mot. to Dismiss Ex. 4, ¶6, Ex. 5.) The protester emailed the District two additional questions on September 14, 2011. (Protest 2; Mot. to Dismiss Ex. 5.) The protester contends that it did not receive answers to its first set of questions until September 15, 2011, when the District issued Amendment Two[6] containing said answers. (Protest 2; Mot. to Dismiss Exs. 3, 4 ¶8.) The District contends that it sent an email to the protester containing answers to the questions on September 14, 2011, which the protester contends it never received. (Mot. to Dismiss Ex. 4, ¶7, Ex. 5; Protest 2.) The protester contends that the District should have extended the deadline for bid submission to *5:00 p.m.* to "allow us to incorporate the required changes to our submission." (Protest 2.)

Lastly, the protester appears to contend that the District violated §L.6 of the solicitation by (1) failing to "promptly answer" bidder questions on the Ariba message board, and (2) allowing a competing bidder to submit solicitation questions within nine days of the closing date. (Protest 1.) In this regard, the protester merely repeats its above argument regarding the District's alleged delay in posting responses on the Ariba message board to the protester's September 13 questions. Separately, however, the protester also appears to argue that ambiguous solicitation language resulted in the protester not submitting solicitation questions until two days before the closing date. It appears (although not expressly stated) that the protester is arguing that

[2] For example, the protester contends that it "requested that the due date time be extended to 5:00 p.m." on September 20, but on the same page states that it "requested a two-hour extension" on September 15, 2011. (Protest 2.)

[3] For example, the protester refers to solicitation §L.6 as containing a requirement to promptly post all bid questions on the Ariba website, but later refers to §L.16 as containing the requirement. (Protest 1-2.)

[4] For example, the protester contends that it believed the submission deadline was 2 p.m. and "closed just minutes before we were ready to submit". (Protest 2.) However, the actual submission deadline was 4:00 p.m. and protester's proposal would have been timely had it been submitted "just minutes" after 2:00 p.m. (Mot. to Dismiss Ex. 4, ¶9.)

[5] On September 7, 2011, Harris sent an email to the OCP Help Desk requesting assistance with registering, and received an invitation to participate in the procurement. (Mot. to Dismiss Ex. 5.) Later that same day, the protester emailed the solicitation's contract specialist stating that the problem had been solved. (*Id.*)

[6] Neither the questions presented nor the responses given by the District in Amendment Two are germane herein because we find that the protester does not meet the requirement to submit a late proposal.

but for §L.6's alleged ambiguous language, the protester would have submitted its questions prior to September 13 and have had sufficient time thereafter to incorporate any needed changes into a timely final proposal to the District. (Protest 2.)

The District has filed an unopposed motion to dismiss.[7] First, the District argues that, consistent with his broad discretionary authority, the contracting officer herein was under no duty to extend the submission deadline to 5:00 p.m. (Mot. to Dismiss 9.) Second, the District argues that the remaining protest grounds asserted by Harris are untimely because Harris knew of the alleged improprieties regarding logon difficulties, ambiguous solicitation language, and delayed message board posts prior to the time set for receipt of proposals, but filed its protest beyond the permissible time-period stated in D.C. Mun. Regs. tit. 27, §302.2(a) (2002). (Mot. to Dismiss 4.)

DISCUSSION

The Board exercises jurisdiction over this protest pursuant to D.C. CODE §2-360.03(a)(1) (2011).

The threshold issue presented for the Board's consideration is whether the District erred by not allowing the protester to submit a late proposal following the alleged failure of the Ariba system to function properly. The pertinent regulations regarding submission of late proposals are found at D.C. Mun. Regs. tit. 27, §1609 *et seq.* and provides:

27-1609. LATE PROPOSALS, LATE MODIFICATIONS, AND LATE WITHDRAWALS

1609.3 Proposals and modifications to proposals that are received in the designated District office after the exact time specified in the RFP . . . are "late" and shall be considered only if they are received before the award is made and one (1) or more of the following circumstances apply:

(a) The proposal or modification was sent by registered or certified mail not later than the fifth (5th) calendar day before the date specified for receipt of offers;

(b) The proposal or modification was sent by mail and it is determined by the contracting officer that the late receipt at the location specified in the RFP was caused by mishandling by the District after receipt; or

(c) The proposal is the only proposal received.

In the instant matter, neither the Board nor the contracting officer can authorize the untimely submission of protester's proposal unless the requirements of the above regulation are met. *See, e.g., Protest of Wallace C. Wilson*, CAB No. P-0484, 44 D.C. Reg. 6879 (August 4, 1997); *Protest of Planning and Development Intern, Inc.*, CAB No. P-0336, 41 D.C. Reg. 3491 (June 22, 1993). In this case, the protester has not met any of the requirements of the rule regarding late proposals. In particular, a late proposal can only be considered if, at a minimum, it

[7] The District also filed a Determination and Findings to Proceed with Contract Award While a Protest is Pending (D&F to Proceed). The protester did not challenge the District's D&F under D.C. Mun. Regs. tit. 27, §304.4 (2002). The protester also failed to file Comments to the District's Agency Report under D.C. Mun. Regs. tit. 27, §307 (2002). The protester's failure to oppose the District's motion to dismiss, file Comments to the Agency Report, and challenge the District's D&F suggests that the protester may have abandoned its protest. The Board is authorized to treat an unopposed motion as conceded under D.C. Mun. Regs. tit. 27, §110.5 (2002). Further, where a protester fails to file Comments to the Agency Report, the Board may dismiss the matter and/or treat as conceded facts not otherwise contradicted by the protest or documents in the record. D.C. Mun. Regs. tit. 27, §§307.3, 307.4 (2002).

was received *before* contract award. In this case, the protester has conceded that it did not submit a proposal.

In addition, it was not an abuse of discretion for the District to refuse to extend the deadline herein to *5:00 p.m.* as requested by the protester. There is every indication from this record that the problems that the protester allegedly experienced with the Ariba system might very well have been user error. For example, the contracting officer noted that the protester "was unable to review the Solicitation on the Ariba system until September 7, 2011, because Harris had originally provided Ariba with an incorrect email address." (Mot. to Dismiss, Ex. 4, ¶11.[8]) It was not an abuse of discretion for the contracting officer to refuse to extend the submission deadline solely to accommodate an offeror whose own errors may have been responsible for its inability to make the initial deadline.

Notwithstanding the contracting officer's refusal to extend the deadline to 5:00 p.m., the contracting officer did extend the submission deadline to 4:00 p.m. (Mot. to Dismiss, Ex. 4, ¶12.) Notice of the two-hour extension was posted for all to see on the Ariba website on September 15 at the same time that Amendment Two was posted. (Mot. to Dismiss, Ex. 4, ¶13.) A contracting officer's refusal to extend a closing date is appropriate unless the record supports a finding that her decision is arbitrary and capricious. *Protest of Wallace C. Wilson*, 44 D.C. Reg. at 6881. The record herein does not support a finding that the contracting officer's refusal to extend the deadline to 5:00 p.m. was arbitrary and capricious.

Therefore, the Board dismisses the present matter with prejudice for the reasons set forth herein. The protester did not submit a timely proposal, has not established that it was an abuse of discretion for the contracting officer to deny its request to accept a late proposal, and has not met the requirements of §1609.3 for submission of a late proposal. We have reviewed the other arguments raised by the protester and find them to be either tangential to the main issues herein, or without merit.

SO ORDERED.

DATED: October 10, 2012

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

CONCURRING:

[8] Given the number of errors contained in the protester's submission to the Board, it is conceivable that the protester's lack of attention to detail may have caused or contributed to its inability to navigate the Ariba system properly.

Harris Resources PC
CAB No. P-0894

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

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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

Commonwealth Service Operations, Inc.	)	
	)	CAB No. P-0915
Solicitation No. Doc61044	)	

For the protester: David A. Damiani, Esq., Damiani & Damiani, P.C. For the District of Columbia Government: Talia Sassoon Cohen, Assistant Attorney General, Office of the Attorney General.

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

OPINION

Filing ID # 47253613

On June 13, 2012, the Contract Appeals Board ("CAB" or "Board") received the protest of Commonwealth Service Operations, Inc. ("protester" or "Commonwealth") concerning Solicitation No. Doc61044. The filing consisted of a letter dated June 12, 2012, in which Commonwealth referenced a contract between itself and the District, identified as number DCGO-2011-B-0008, and registered the "protest of its termination as contractor under the Agreement." (Protest 1.) Attached to the June 12th letter were a number of supplemental documents ("Supplemental Documents"). In its letter, protester alleges that on May 23, 2012, "a formal appeal" had been hand delivered at CAB's former address at 717 14th Street, N.W., Suite 430. (*Id.*) It also requests that the Board investigate "its termination as Contractor for the Agreement and the subsequent award of the school bus maintenance contract to third parties." (*Id.*) The letter does not include any specific reference to Solicitation No. Doc61044. On July 2, 2012, the District filed a motion to dismiss due to the untimely filing of the protest. For the reasons discussed herein, the Board grants the District's motion and dismisses the instant protest with prejudice.

BACKGROUND

On March 1, 2011, the District's Office of Contracting and Procurement ("OCP") awarded the protester Contract No. DCGO-2011-C-0008-E01[1] ("Contract") on behalf of the Department of Transportation for the Office of the State Superintendent of Education. (District's Mot. to Dismiss Exs. 1, 2.) The Contract required protester to provide maintenance and repair

[1] Solicitation DCGO-2011-B-0008 was issued on November 5, 2010, pursuant to which an award was made to the protester under Contract No. DCGO-2011-C-0008-E01.

of certain school buses within the District. (District's Mot. to Dismiss 2.) It contained a one-year base period and four option year periods. (*Id.*) On January 3, 2012, the Program Manager for the Contract notified Ms. Gena Johnson, the Contracting Officer ("CO"), that the District would not exercise its option to renew the Contract. (*Id.*) On February 29, 2012, the Contract expired at the end of the base term without the District exercising its first option year period. (District's Mot. to Dismiss 2; Ex. 1.)

Prior to the expiration of the Contract, on February 17, 2012, the District issued Solicitation No. Doc61044 ("Solicitation") for school bus maintenance services. (District's Mot. to Dismiss Exs. 1, 3.) The Solicitation contemplated that the District would award multiple contracts for five Award Groups. (*See id.*) The Solicitation provided notice to prospective bidders that bid protests were to be filed with CAB at 414 4th Street, N.W., Suite 350N. (District's Mot. to Dismiss Ex. 9, at ¶ 4.) At the time of bid opening, on March 12, 2012, the protester was the lowest responsive bidder for Award Group 1. (District's Mot. to Dismiss 3.) However, on May 14, 2012, the CO e-mailed protester a "Notice of Determination of Non-Responsibility – Solicitation No. Doc61044" ("Non-Responsibility Determination") which stated that the District determined protester to be non-responsible due to its poor past performance under the Contract. (District's Mot. to Dismiss Exs. 4, 5.) Consequently, protester was deemed not eligible for award under the Solicitation. (*Id.*)

On May 23, 2012, protester alleges that it hand delivered "a formal appeal" at CAB's former address, 717 14th Street, N.W., Suite 430. Protester states, "[p]ursuant to Section L.11 of DCGO-2011-B-0008 (the 'Agreement'), please accept this letter as notice that Commonwealth Service Operations' protest of its termination as contractor under this Agreement." (Protest 1.) However, despite having claimed that its letter was hand delivered to CAB, protester acknowledges being unaware of CAB's changed location. (District's Mot. to Dismiss Ex. 8.)

The CO, whose office is located at 2000 14th Street, N.W., confirms receipt of protester's letter dated May 21, 2012, on or about May 23rd. (District's Mot. to Dismiss Ex. 9, at ¶ 6.) Ms. Johnson is the CO for Solicitation Nos. DCGO-2011-B-0008 (under which Commonwealth performed the Contract) and Doc61044. (District's Mot. to Dismiss Ex. 9, at ¶ 2.) She indicates that she "received a copy of a letter addressed to the Contract Appeals Board indicating that the bidder was filing a protest of its termination under the previous solicitation DCGO-2011-B-0008." (District's Mot. to Dismiss Ex. 9, at ¶ 6.) She also states that "[b]ecause the letter appeared to be a copy, I accepted it as such and assumed the original had been delivered to the Contract Appeals Board." (*Id.*) It appears that the CO received only a copy of the May 21st letter, without any Supplemental Documents. Although the letter references the Contract between Commonwealth and the District, it does not include any reference to the Solicitation. (*See* Protest 1.)

On June 11, 2012, the CO received via email from Mr. Scott Bean, Commercial Fleet Manager, an inquiry on the status of protester's letter which he indicated had been delivered to the CO's office on May 23, 2012, and signed for by someone with the initials "BA." (District's Mot. to Dismiss Ex. 8.) The CO advised Mr. Bean that the letter should have been sent directly to CAB. (District's Mot. to Dismiss Ex. 9, at ¶ 6.[2]) According to the CO, "[t]here is an Office of Contracting and Procurement employee with the initials of BA . . . located at 2000 14th Street, N.W., 3rd Floor." (District's Mot. to Dismiss Ex. 9, at ¶ 5.[3]) On June 13, 2012, CAB received and docketed the instant protest.[4]

On June 19, 2012, the District filed a "Determination and Findings to Proceed with Contract Performance while a Protest is Pending" ("D&F"). On June 20, 2012, protester filed a response challenging the D&F.[5] On July 2, 2012, the District filed a motion to dismiss alleging that the protest had been filed untimely. Protester filed its response to the District's motion on July 6, 2012. (Commonwealth Serv. Operations, Inc.'s Opp'n & Req. to Deny District's Mot. to Dismiss.)

DISCUSSION

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

One of the threshold issues for this Board to examine prior to considering the merits of a protest is whether the protest has been filed timely in accordance with the statutory requirements and Board Rules. The statutory requirements pertaining to timeliness are codified in D.C. Code §§ 2-360.08(b)(1)- (2) and are similar to those contained in the Board Rules as set forth in D.C. Mun. Regs. tit. 27, §§ 302.2(a)-(b) (2002). The statute provides:

[2] The Board notes the existence of a typographical error in the District's motion to dismiss, Ex. 9, wherein paragraph numbers 5 and 6 are inadvertently repeated. In actuality, the correct numbering for this paragraph should have been paragraph 8.

[3] Due to the typographical error discussed in footnote 2, the correct numbering for this paragraph should have been paragraph 7.

[4] The filing with CAB consisted of a letter dated June 12, 2012, protesting the termination of the Contract along with the following Supplemental Documents: (i) a letter dated May 21, 2012, protesting Commonwealth's termination as Contractor under the Agreement, addressed to CAB at its current address of 441 4th Street, N.W., Suite 350N (however, if this letter and accompanying documents had in fact been sent to CAB at its current address on or about that date, upon its receipt, the Board would have immediately accepted the filing and docketed the protest in accordance with Board Rule 303.1(a)); (ii) an undated 4-page letter also contesting the purported termination of the Contract; (iii) a copy of the envelope addressed to CAB which had been signed for by an individual with the initials "BA"; (iv) the Non-Responsibility Determination notice letter; (v) the Contractor Performance Evaluation Form 4001; and (vi) a copy of the envelope containing the protest sent to CAB via certified return receipt dated June 12, 2012.

[5] This Order renders moot the D&F and protester's challenge thereto.

> (b)(1) A protest based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals.
>
> (2) In cases other than those covered in paragraph (1) of this subsection, protests shall be filed not later than 10 business days after the basis of the protest is known or should have been known, whichever is earlier.
>
> D.C. Code § 2-360.08.

On May 14, 2012, protester received a Non-Responsibility Determination which resulted in its ineligibility for award under the Solicitation. As a result of this adverse action, Commonwealth was required to file its protest by May 29, 2012, within ten business days after receipt of the District's Non-Responsibility Determination. Failure by Commonwealth to file its protest by May 29th renders the Board without jurisdiction to adjudicate the merits of its claims.

In its filing with the Board dated June 12, 2012, protester alleges that on May 23, 2012, it hand delivered its May 21st letter at CAB's former address, 717 14th Street, N.W.[6] Protester also alleges that an individual with the initials "BA" signed for receipt of the letter which was addressed to CAB. The CO confirms receipt of the letter on or about May 23rd; however, she indicates that because the letter appeared to be a copy, she assumed that the original had been delivered to CAB.[7]

The District alleges that the protest is untimely because it was filed with the Board on June 13, 2012, well after the applicable May 29th deadline. Consistent with the relevant statutory and regulatory provisions on time limitations when filing a protest, this Board has routinely held that a protest must be filed within 10 business days after the basis of the protest is known or should have been known. *See, Clothes Barn*, CAB No. P-0121, 38 D.C. Reg. 2980 (Oct. 3, 1989); *Sigal Constr. Corp.*, CAB No. P-0690, *et al.*, 52 D.C. Reg. 4243 (Nov. 24, 2004); *Prof'l Recruiters, Inc.* CAB No. P-0700, 52 D.C. Reg. 4258 (Dec. 21, 2004); *Our Future, Inc.*, CAB No. P-0860, 2011 WL 7402960 (Jan. 20, 2011). Therefore, at issue is whether protester's earlier May 21st letter which ostensibly was delivered at 2000 14th Street, N.W., on May 23, 2012, constitutes a protest of the Solicitation.

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[6] Protester's claim that it hand delivered the May 21st letter to CAB on May 23, 2012, strains credulity since CAB relocated from 717 14th Street, NW., Suite 410 in September 2010, and, therefore, any attempt at hand delivery at CAB's former address would have been unsuccessful.

[7] In an e-mail to the CO dated June 11, 2012, protester appears to contradict its own account of where the May 21st letter had been submitted. In that instance, protester's Commercial Fleet Manager stated that the letter was delivered at the CO's office [located at 2000 14th Street, N.W.] and that they were told that the letter would be forwarded to CAB. (District's Mot. to Dismiss Ex. 8.)

Protester has argued that its May 21st letter which was addressed to (but not delivered at) CAB and signed for by an individual with the initials "BA" on May 23, 2012, should serve to meet the protest's filing requirements. In that vein, protester cites *Fort Myer Construction Corp.*, CAB No. P-0452, 44 D.C. Reg. 6476 (July 23, 1996), to support its contention that the CO's receipt of a copy of the May 21st letter should constitute notice of the protest. However, the facts in *Fort Myer* are readily distinguishable from the facts in the present case. In *Fort Myer*, the protester "submitted a 5-page letter addressed to DPW's contracting officer, entitled 'PROTEST' . . . DPW's contracting officer acknowledged receipt of the . . . protest letter and advised Fort Myer that '[a]ll protests are to be filed with the District of Columbia Contract Appeals Board.'" *Id.* at 6477. When Fort Myer later refiled the identical protest with the Board, the District then filed a motion to dismiss the protest as untimely. The Board held that "[t]reating an otherwise proper protest directed to the contracting officer within the 10-working-day statutory period as functionally equivalent to filing with the Board, and resolving the protest on its merits, promotes fair and equitable treatment of all participants while safeguarding and maintaining a procurement system of quality and integrity." *Id.* at 6479. Critical to the Board's analysis and holding was that "Fort Myer's letter was unambiguously a protest from the standpoint of form and content." *Id.* at 6481.

By contrast, protester's May 21st letter was clearly not an unambiguous protest. The letter stated that it was providing notice of Commonwealth's protest of its termination as contractor under the Agreement.[8] It was also delivered at 2000 14th Street, N.W., despite the Solicitation's specific instruction that bid protests were to be filed with CAB at 441 4th Street, N.W., Suite 350N. The letter was not addressed to the CO and it did not contain any reference to the present Solicitation or any language signaling a challenge to the Non-Responsibility Determination. Therefore, upon receiving a copy of the May 21st letter, the CO was justifiably unaware that Commonwealth intended to protest the Solicitation. Indeed, it was logical for the CO to assume that she was merely in possession of a copy of a contractor's appeal letter which had been sent to CAB. *See, e.g., Respiratory Therapy Specialists of America, Inc.*, CAB No. P-0662, 50 D.C. Reg. 7472 (Dec. 6, 2002) (an untimely Board protest is not made timely where the letters relied upon by the protester as functionally equivalent to a protest are ambiguous); *see also Mont "T" Que Inc.*, CAB No. P-0911, 2012 WL 4753875 (Aug. 29, 2012) (protester's failure to provide a clear and concise statement of the legal and factual protest grounds resulted in dismissal of the protest). Protester's May 21st letter did not meet the standards set forth in Board Rule 301.1 which details the requirements for form and content of a protest:

[8] To the extent that Commonwealth seeks to appeal the CO's decision to not exercise the option under the Contract, pursuant to Board Rule 200.1, CAB's jurisdiction to hear the appeal and issue a decision on the merits can only occur following contractor's request to the CO for a final decision. Contractor may then file an appeal of the CO's decision with the Board following receipt of a final decision or if there is a deemed denial of contractor's claims.

> All protests shall be in writing, addressed to the Board, and shall include the following:
>
> (a) the name, address, and telephone and facsimile numbers of the protester;
> (b) *the identity of the contracting agency, the number and date of the solicitation*, . . . ;
> (c) *a clear and concise statement of the legal and factual grounds of the protest*, including copies of relevant documents, and citations to statutes, regulations, or solicitation provisions claimed to be violated;
> (d) information establishing the timeliness of the protest . . . ;
> (e) information establishing that the protester is an aggrieved person for the purpose of filing the protest . . . ; and
> (f) the relief sought by the protester.
>
> Board Rule 301.1. (emphasis added)

The chronology of events in the present protest makes clear that the District did not receive timely notice due to the May 21st letter's deficiency in form and content and Commonwealth's delivery of it to a location other than the offices of the CAB. Indeed, if the Board were to recognize Commonwealth's misdelivered and ambiguous May 21st letter as a protest, it would serve to undermine the administration of justice by depriving the District of timely and proper notice. As such, we find that protester's letter which was forwarded to the CO on or about May 23, 2012, did not constitute timely submission of a protest to the Solicitation. As a result, Commonwealth did not file a protest of sufficient form and content until June 13, 2012, when CAB received and docketed the instant untimely protest.

CONCLUSION

For the reasons set forth herein, the Board finds that the protester failed to file a protest, in sufficient form and content, within 10 business days as required by D.C. Code § 2-360.08 (b)(2) (2011). The District's motion is sustained and the Board dismisses the present protest with prejudice.

SO ORDERED:

DATED: October 23, 2012

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

CONCURRING:

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

/s/ Monica C. Parchment
MONICA C. PARCHMENT
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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD
REDACTED

PROTEST OF:

RIDECHARGE, INC.	)	
CREATIVE MOBILE TECHNOLOGIES, LLC	)	
	)	CAB Nos. P-0920 and P-0921 CONS
Solicitation No: DCPO-2012-R-0342	)	

For the Protester, RideCharge, Inc.: Bruce J. Klores, Esq., Scott M. Perry, Esq., Andrea E. Allen, Esq., Klores Perry Mitchell, P.C. For the Protester, Creative Mobile Technologies, LLC: A. Scott Bolden, Esq., Lawrence S. Sher, Esq., Gunjan R. Talati, Esq., Joelle E.K. Lazlo, Esq., Reed Smith LLP. For the District of Columbia: Howard Schwartz, Esq., Assistant Attorney General. For the Intervenor, VeriFone, Inc.: Richard L. Moorhouse, Esq., William M. Jack, Esq., Ryan G. Bradel, Esq., Greenburg Traurig, LLP.

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

OPINION
Filing ID #47660551

The protesters, RideCharge, Inc. ("RideCharge") and Creative Mobile Technologies, LLC, ("CMT") challenge the District's award of a contract to VeriFone, Inc. ("VeriFone"), for the procurement of a Taxicab Smart Meter System for implementation in the District's fleet of taxicab vehicles, which are regulated by the District of Columbia Taxicab Commission. The protesters contend that several aspects of the District's price and technical evaluation, as well as its discussion with offerors, were improperly conducted and resulted in an improper decision that VeriFone was the only offeror qualified to remain in the competitive range and receive the contract award. The protesters also argue that the District awarded a contract to VeriFone that exceeded the original scope of the Solicitation requirements and was, therefore, in violation of procurement law.

We sustain the protests. First, the meager source selection record herein does not provide a credible contemporaneous record which establishes that the award to VeriFone was reasonable and consistent with evaluation criteria and procurement law. In particular, there is no written explanation or justification in the record from the Contracting Officer explaining why the protester, CMT, was excluded from the competitive range, and denied an opportunity for meaningful discussions with the Contracting Officer prior to its exclusion.

Additionally, the Board finds that the record clearly establishes that the Contracting Officer violated the terms of the solicitation and procurement law by failing to perform an independent analysis of offeror proposals in the competitive range, including the proposals of

CMT and RideCharge, prior to making an award decision. Specifically, the record establishes that the Contracting Officer's Determination and Findings of Competitive Range pertaining to RideCharge and VeriFone was copied nearly verbatim from the Technical Evaluation Panel's consensus report and, in other cases, erroneously copied as it pertains to CMT. The Contracting Officer's failure to also conduct an independent analysis of the offerors' best and final offers and oral presentations violated § M.1.1 of the Request for Proposals and D.C. MUN. REGS. tit. 27, §§ 1618.1, 1622.6 (2002).

For the above reasons, the Board finds that the Contracting Officer's decision to award the disputed contract to VeriFone, was without reasonable basis, and was made in a manner inconsistent with the evaluation criteria and procurement law.

FACTUAL BACKGROUND

The present protest arises from the District's June 29, 2012, award of a $34.9 million contract to VeriFone to implement a Taxicab Smart Meter System ("TSMS") in the city's approximately 6,500 licensed taxicabs. (Agency Report ("AR"), Ex. 2 § B.1.) This effort to overhaul and modernize the city's taxicab fleet is intended to strengthen the District of Columbia Taxicab Commission ("DCTC"), upgrade licensure requirements, and address what city leaders have described as an "absence of modern vehicles, quality services and innovative technology." Taxicab Service Improvement Amendment Act of 2012, D.C. CODE §50-301(3) (2012 Supp.). The protesters, RideCharge and CMT, participated in the competition for the award of the disputed contract and subsequently challenged the reasonableness of the District's evaluation of proposals in this procurement, as well as the propriety of the award decision to VeriFone.

The Solicitation

The District of Columbia Office of Contracting and Procurement ("OCP"), on behalf of the DCTC, issued Request for Proposals No. DCPO-2012-R-0342 (the "Solicitation") on January 25, 2012, seeking a contractor to develop, install, and operate a TSMS for approximately 6,500 taxicabs in Washington, D.C. (AR Ex. 2 § B.1; *see also* AR Ex. 3, Attach. A at 2, 5 (District responses to Solicitation questions).) The Solicitation contemplated the award of a five-year fixed price contract with three possible one-year option periods. (*Id.* §§ B.1, F.1, F.2.) Implementation of the TSMS was required to be completed within 90 days after the date of award. (*Id.* §§ C.3.2.)

The Solicitation specifications further established that the TSMS would require strong authentication, include electronic trip reporting, offer credit card payment processing, and display news and other programming through a back-seat Personal Information Monitor ("PIM") and Driver Information Monitor ("DIM").[1] (*Id.* § B.1.) The TSMS would, thus, be required to

[1] Recognizing that some taxicab companies and drivers might choose to purchase their own TSMS equipment, the Solicitation specified that such independently purchased equipment must meet the same requirements as the Solicitation's TSMS equipment requirements and also be compatible with the ultimate awardee's TSMS Back Office Management Information System technology. (AR Ex. 2 § C.3.5.) The reference to "authentication" in the

accept fare payment from all major credit and debit cards through the PIM, and to collect a per ride surcharge. (*Id.* §§ C.4.4.1, C.4.4.6.) The contractor would also be responsible for securing and placing advertisements to run on the PIM. (*Id.* § C.3.7.6.1.)

Additionally, the TSMS was required to incorporate safety devices for drivers and passengers, require management of all aspects of in-cab advertising, and provide a fully integrated Back Office Management Information System ("BOMIS") for automated trip reporting and GPS tracking. (*Id.* § B.1.) Based upon these specifications, offerors were required to price their proposals for both the five year contract period and the three one-year option periods according to the price schedule identified in the Solicitation (which included upfront installation costs, ongoing operation and maintenance costs under 22 separate contract line item numbers ("CLINs")). (*Id.* § B.4.) The original Solicitation terms also required offerors to subcontract at least thirty-five percent of the dollar volume of the contract to certified small business enterprises ("CBE"), as required by law.[2] (*Id.* §§ B.3, H.9.)

Evaluation Criteria

The Solicitation listed the following evaluation criteria: Relevant Experience (25%), Approach and Methodology (25%), Technical Requirements (20%), and Cost/Cost and Revenue Proposal (30%). (*Id.* § M.5.) The Relevant Experience factor included consideration of having developed and implemented a TSMS in a major metropolitan area; operating, maintaining, and managing another TSMS; developing opportunities and generating revenue from the TSMS component; and knowledge of, and access to, the local subcontracting market. (*Id.* § M.5.1.) Under the Approach and Methodology factor, the offerors were required to submit a Project Management Plan that demonstrated a knowledge of the process and impediments that must be overcome, and ensure that sufficient staffing would be provided. (*Id.* § M.5.2.) The Technical Requirements factor requested that the offerors demonstrate their overall capabilities to fulfill, and their technical and technological advantages to satisfy, the requirements in Section C of the Solicitation.[3] (*Id.* § M.5.3.) The Solicitation provided that each offeror's compliance with the technical requirements would be rated according to the following scale:

specifications refers to ensuring that the driver is authorized to drive a taxi and operate the fare meter through the use of a personal identification number. (*Id.* § C.4.1.1.)

[2] The District of Columbia Department of Small & Local Business Development, pursuant to D.C. CODE § 2-218.51, granted the agency's request for a waiver of the thirty-five percent small business subcontracting requirement on April 26, 2012. (AR Ex. 5.) The requirement was later removed per the District's May 1, 2012, Solicitation amendment. (AR Ex. 6.)

[3] Section C of the Solicitation detailed all of the specifications that an offeror's proposed TSMS solution was required to meet.

Numeric Rating	**Adjective**	**Description**
0	Unacceptable	Failed to meet minimum requirements; e.g., no demonstrated capacity, major deficiencies which are not correctable; offeror did not address the factor.
1	Poor	Marginally meets minimum requirements; major deficiencies which may be correctable.
2	Minimally Acceptable	Marginally meets minimum requirements; minor deficiencies which may be correctable.
3	Acceptable	Meets requirements; no deficiencies.
4	Good	Meets requirements and exceeds some requirements; no deficiencies.
5	Excellent	Exceeds most, if not all requirements; no deficiencies

(*Id.* § M.4.1.)

The Solicitation requested two separate pricing proposals—for a "cost and acquisition model" and also for a "cost and revenue model"—under the Solicitation's "Cost" evaluation factor, from which the District would ultimately elect to evaluate only one of these models as its preferred model for price evaluation purposes. (*Id.* § M.5.4.) With respect to the cost and acquisition model, the District indicated that it would allocate 20 points to upfront costs, and 10 points would be allocated to operating and maintenance costs. (*Id.*) The Solicitation specified that under this model, the offeror with the lowest upfront costs and, likewise, the offeror with the lowest operating and maintenance cost proposal, would be allocated the maximum price points with all other proposals receiving fewer proportional points. (*Id.*) Under the cost and revenue model proposal, on the other hand, that was also requested by the District, the upfront costs would be allocated 10 points, operating and maintenance costs would be allocated 5 points, and revenue generation would be allocated 15 points.[4] (*Id.*)

The Contracting Officer & the Technical Panel

The Solicitation advised offerors that a Technical Evaluation Panel ("TEP") would also be utilized during the contract competition to evaluate each technical proposal submission and prepare a written report summarizing the TEP's findings that would be submitted to the Contracting Officer ("CO"). (*Id.* § M.2.) Notwithstanding the role of the TEP, however, the Solicitation made clear that the CO was responsible for independently determining the offeror whose proposal was most advantageous to the District after assessing the technical point scores of each offeror to determine whether the point differentials between the offerors represented an

[4] The Solicitation, however, did not specify how cost evaluation points would be allocated to the lowest priced offeror under the cost and revenue model.

actual significant difference in technical merit between the proposals.[5] (*Id.* § M.1.1.) The Solicitation also stated that offerors in the competitive range would be required to make oral presentations, which would also be a basis for the TEP to re-score proposals at the conclusion of these presentations.[6] (*Id.* § M.3.)

The Evaluation Process and Award Decision

On March 26, 2012, the District received proposals from eight offerors in response to the Solicitation, including proposals from the protesters, RideCharge and CMT, and the ultimate awardee, VeriFone.[7] (AR Ex. 8.) As detailed below, a very limited amount of contemporaneous documentation was provided to the Board to reflect the actual evaluation factors that were analyzed by the CO in conjunction with the initial evaluation scores assessed by the TEP.

Initially, the contemporaneous record indicates that the seven individual evaluators from the TEP reviewed each offeror's proposal in early April 2012. (*See generally* Supplemental AR Exs. 18, 19, 28 (individual scoring sheets for VeriFone, CMT, and RideCharge, respectively).) Each evaluator scored the proposals under the Relevant Experience, Approach and Methodology, and Technical Requirements factors, according to the 5-point scale stated in the Solicitation, and provided personal comments related to their evaluation of particular offerors in connection with these criteria. (*See* Supplemental AR Exs. 18, 19, 28.) After the individual evaluators scored the proposals, the TEP developed a written Consensus Report whereby the panel collectively attributed "consensus" strengths and weaknesses to each offeror's proposal under the three technical evaluation factors, and assigned final consensus numerical scores to each offeror under the foregoing evaluation factors.[8] (AR Ex. 11.) The initial technical scores assigned to offerors by the TEP appear to have subsequently been given additional weight, and increased numerical value, consistent with the technical value scale for each criteria set forth in the Solicitation.[9]

As a result of the TEP's initial evaluation of proposals, CMT, VeriFone, and RideCharge were scored as follows:[10]

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[5] In making the award decision, the Solicitation provided that the CO could award the contract to a lower-rated, lower-priced offeror, if the CO reasonably determined that the higher scored offeror was not worth an associated price premium. (AR Ex. 2 § M.1.1.)

[6] Prior to the receipt date for proposals, the District made several minor administrative amendments to the Solicitation including changing the locations for the pre-proposal conference, responding to questions from offerors, and extending the deadline for receipt of proposals until March 26, 2012. (AR Ex. 3.)

[7] The initial eight offerors submitting proposals were CabConnect, MELE, TaxiPass, TDC, Wireless Edge, CMT, RideCharge, and VeriFone.

[8] The initial consensus scores, before being weighted, appear to simply be an average of the scores assigned by the individual evaluators. (*See* AR Ex. 11.)

[9] The Board notes the existence of a relatively minor numerical difference between the final technical scores contained in the TEP Consensus Report for each offeror and final technical scores for the same offerors that are included in an undated scoring summary, including price scores, which was provided by the District during these proceedings. (*Compare* AR Ex. 11, *with* AR Ex. 25.) The reason for this minor discrepancy has not been explained by the District in this protest. Additionally, the same foregoing scoring summary inexplicably describes two of the evaluation criteria as "Technical Expertise" and "Past Performance" instead of the proper technical criteria of "Approach and Methodology" and "Technical Requirements." (AR Ex. 25.)

[10] The scores of the other five offerors that initially submitted proposals along with CMT, RideCharge, and VeriFone, that were later excluded from the competitive range, have been omitted as they are not parties to this

	CMT	VeriFone	RideCharge
Relevant Experience	[redacted]	[redacted]	[redacted]
Approach and Methodology	[redacted]	[redacted]	[redacted]
Technical Requirements	[redacted]	[redacted]	[redacted]
TOTAL POINTS	[redacted]	[redacted]	[redacted]
RANK	[redacted]	[redacted]	[redacted]

(*Id.*)

Oral Presentations and BAFOs

After receipt of initial proposals, on May 14, 2012, the District invited VeriFone, CMT, and RideCharge to give oral presentations on May 22, 2012. (*See* CMT Protest Ex. H; RideCharge Protest Ex. A-5; AR Ex. 1.) Oral presentations were limited to VeriFone, CMT and RideCharge based upon the CO's determination, at some point prior to May 14, 2012, that the competitive range would only include these three offerors.[11] (AR Ex. 4 ¶ 8.) Further, while the Solicitation indicated that proposals would be re-scored at the conclusion of oral presentations, proposals were not re-scored immediately thereafter as prescribed by the Solicitation.[12] (AR Ex. 2 § M.3.) There is also no contemporaneous record of the matters which these offerors discussed at oral presentations or any record that describes the extent to which the CO assessed or analyzed the information discussed at these sessions with the competitive range offerors.

On May 25, 2012, the CO requested best and final offers ("BAFOs") from these same three offerors, and directed that BAFO responses be submitted to the District by June 6, 2012.[13] (CMT Protest Ex. I; RideCharge Protest Ex. A-6; AR Ex. 1.) VeriFone, CMT, and RideCharge each submitted timely BAFOs. (AR at 4.) However, again, the record is devoid of any contemporaneous documentation showing either: (1) when a specific review by the CO of BAFOs may have actually taken place; or (2) the factors or information which the CO or TEP considered when evaluating the BAFOs of CMT, RideCharge, and VeriFone, particularly as these considerations may have addressed the issue of whether each offeror adequately responded to the proposal issues or concerns raised by the District in the initial BAFO request. Instead of

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action. The Board notes, however, that the May 24, 2012, competitive range determination that eliminated these five offerors from the competitive range, again, erroneously misstates the technical criteria under which the offerors were to be evaluated in this procurement. Specifically, this first May 24, 2012, competitive range determination misstates the Solicitation's technical criteria as "Technical Capacity and Expertise," "Technical Approach," and "Past Performance." (AR Ex. 8.) Again, the *correct* criteria to be applied under the Solicitation, as set forth earlier, were "Relevant Experience," "Approach and Methodology," and "Technical Requirements." (AR Ex. 2 § M.5.)

[11] Under the Solicitation, oral presentations were to be conducted with each offeror in the competitive range. (AR Ex. 2 § M.3.) The D&F limiting the competitive range was actually executed on May 24, 2012, after oral presentations. (AR Ex. 8.) The new CO for this procurement asserts that although the D&F was executed on May 24, 2012, the determination to limit the competitive range was made before oral presentations were requested on May 14, 2012. (AR Ex. 4 ¶ 8.)

[12] As noted below, the District contends that the information received from oral presentations was considered when reviewing the offerors' BAFOs. (Supplemental AR Ex. 26 ¶ 5, Ex. 27 ¶ 8.)

[13] The original BAFO due date of June 1, 2012, was later modified by the District to June 6, 2012. (CMT Protest Ex. J; RideCharge Protest Ex. A-6.)

providing the Board with such contemporaneous documentation particularly as it relates to the CO's assessments of these issues, the District has, alternatively, provided the Board with declarations in this proceeding from its Contracting Specialist and TEP Chairman, stating that members of the TEP and the CO reviewed the offerors' BAFOs on June 8, 2012, and discussed oral presentations as well. (Supplemental AR Ex. 26 ¶ 4, Ex. 27 ¶ 7.) Further, these individuals represent in their declarations that the CO concurred with the TEP's finding that the BAFO responses did not result in any changes to the scores previously assigned to the proposals of RideCharge, CMT, and VeriFone. (Supplemental AR Ex. 26 ¶ 5, Ex. 27 ¶ 8.)

Award to VeriFone

The CO first documented his exclusion of CMT and RideCharge from the competitive range on June 11, 2012, with a rather scant, two-page, explanation of this decision. (AR Ex. 9.) The CO issued a second document, a July 5, 2012, Determinations and Finding of Competitive Range ("July 5, 2012 D&F") which provided a more extensive explanation of the CO's basis for excluding all seven competing bidders, other than VeriFone, from the competitive range in making the award decision to VeriFone.[14] (AR Ex. 10.) As it relates to the two protesters and the awardee, the CO's discussion of each offeror's proposal weaknesses or strengths is largely a restatement, at times verbatim, of the weaknesses or strengths found by the TEP in its Consensus Report for these same proposals.[15] (*Compare id.* at 5-6, *with* AR Ex. 11.) The July 5, 2012 D&F is the only contemporaneous document in the evaluation record written by the CO that discusses the basis for the award decision to VeriFone after the exclusion of all other offerors from the competitive range. On or about July 17, 2012, the CO for this procurement, Mr. John R. Dean, separated from his employment with the District.[16] (*See* Dist. Resp. to Sua Sponte Order, Oct. 9, 2012; AR Ex. 4 ¶ 3.)

The Protest Allegations

After being notified by the District of their exclusion from the competitive range, both CMT and RideCharge filed protests challenging this competitive range decision as well as the propriety of the manner in which the District conducted its evaluation of proposals.

The protester CMT filed an initial protest with the Board alleging that: (1) there was no rational basis for its exclusion from the competitive range and that the resulting award to VeriFone was a *de facto* sole source award; (2) the District failed to engage in meaningful discussions with CMT; (3) the contracting officer erred in finding VeriFone a responsible contractor; and (4) the District improperly removed the subcontracting requirement applicable to this procurement. (CMT Protest 15-25.) CMT's supplemental protest allegations also challenge

[14] In conjunction with its award decision, the CO also made separate findings that VeriFone was a responsible bidder and that its price of $[redacted] was fair and reasonable. (AR Ex. 7; Supplemental AR Ex. 24.)

[15] On the same day that the CO executed this July 5, 2012 D&F, the District also notified RideCharge and CMT in writing that they were no longer in the competitive range. (AR Ex. 15.)

[16] On July 6, 2012, the District submitted a Contract Summary for approval to the Council of the District of Columbia, as required by D.C CODE § 1-204.51(c)(3). (CMT Protest Ex. O.) The new Contracting Officer, Derrick White, who replaced John R. Dean, executed the contract on behalf of the District on August 1, 2012. (AR Ex. 17.)

the sufficiency of the CO's independent assessment of proposals and documentation of the same, as well as various aspects of the technical and price evaluations which it argues were unreasonable. (CMT Supplemental Protest 14-31.) Both CMT and RideCharge also contend that the terms of the contract as awarded to VeriFone differed materially from the contract contemplated by the terms of the Solicitation. (*Id.* at 36-41; RideCharge Comments on AR 7-8.)

RideCharge's protest allegations also arise from its contention that the District: (1) violated procurement law by failing to normalize assumptions in evaluating prices under specific CLIN requirements; (2) improperly allowed VeriFone to pass the costs of installing the TSMS equipment to the taxicab owners; and (3) may have improperly considered car-top advertising revenue, which was not a proposal requirement, in violation of the Solicitation terms.[17] (RideCharge Protest 8-11.)

The Decision to Override the Statutory Stay

On August 1, 2012, after this protest was filed, the OCP Chief Procurement Officer ("CPO") executed a D&F to Proceed with Contract Award While a Protest Is Pending pursuant to D.C. CODE § 2-360.08(c)(2), which was opposed by the protesters. (D&F to Proceed with Contract Award.) In attempting to override the statutory contract stay arising from this protest, the CPO represented that immediate performance of the contract was required to (1) protect the public safety and welfare; (2) allow implementation prior to the 2013 Presidential Inauguration; (3) collect data to determine whether there is adequate service in traditionally underserved neighborhoods; and (4) to collect a surcharge for each taxicab transaction. (*Id.* at 2-3.) After considering the factors presented by the CPO in this D&F, the Board overruled the D&F upon determining that the District failed to provide substantial evidence of the existence of urgent and compelling circumstances that required performance of the contract during the pendency of this protest. Accordingly, the Board ordered that the contract stay be reinstated by the District.

DISCUSSION

The Board exercises jurisdiction over this protest and its underlying allegations pursuant to D.C. CODE § 2-360.03(a)(1). As set forth above, the allegations that have been presented to the Board for adjudication largely surround the issue of whether the District's award decision was based upon a proper evaluation of the price and technical proposals of the protesters, CMT and RideCharge, and of the awardee, VeriFone, as well as whether the award decision was consistent with the terms of the Solicitation.

The Board will review the propriety of an agency's award decision to ensure that it is reasonable and consistent with the evaluation criteria and procurement law based upon the source selection record presented to the Board for review. *See RGII Techs., Inc.*, CAB Nos. P-0664 et al., 50 D.C. Reg. 7475, 7477 (Mar. 6, 2003). The Board will first look to the contemporaneous evaluation record for the most accurate explanation of the source selection events that occurred, and to determine the reasonableness of the basis for the contract award.

[17] The District has moved to dismiss all of RideCharge's protest grounds as either untimely or moot. (AR 5-8.)

While the Board will afford some weight to declaration statements from contracting officials that are drafted and provided to the Board by the District during protest proceedings, the Board continues to afford the greatest weight to the contemporaneous record rather than to arguments and documentation prepared in response to protest contentions. *Trifax Corp.*, CAB No. P-0539, 45 D.C. Reg. 8842, 8847 (Sept. 25, 1998); *Health Right, Inc. et al.*, CAB Nos. P-0507 et al., 45 D.C. Reg. 8612, 8636 (Oct. 15, 1997).

While an agency is not required to keep every document or worksheet generated during its evaluation of proposals, *Health Right*, CAB Nos. P-0507 et al., 45 D.C. Reg. at 8636, the Board cannot blindly accept final evaluation findings and an award decision by an agency that are not reasonably supported by the evaluation record, *Urban Alliance Found. et al.*, CAB Nos. P-0886 et al., 2012 WL 4775002 (Feb. 15, 2012). It is axiomatic that contracting agencies must document the evaluation of proposals to provide an explanation of the basis for the evaluation, including an assessment of each offeror's ability to accomplish the technical requirements, and the relative differences among the proposals as it relates to proposal strengths, weaknesses, and risks in connection with the evaluation criteria. D.C. MUN. REGS. tit. 27, §§ 1618.5, 1622.7; *Health Right*, CAB Nos. P-0507 et al., 45 D.C. Reg. at 8636 (citation omitted). It has been held by the Government Accountability Office ("GAO") that an agency that fails to properly document its source selection decision through contemporaneous records bears the risk that there may be inadequate supporting rationale to support the reasonableness of the agency's award decision. *See, e.g., Clark Foulger-Pratt JV*, B-406627, B-406627.2, 2012 CPD ¶ 213 at 10 (July 23, 2012); *Acepex Mgmt. Corp.*, B-283080 et al., 99-2 CPD ¶ 77 at 5 (Oct. 4, 1999).

Notwithstanding our broad grant of protest jurisdiction over this matter, we have long held that the Board's function is not to evaluate proposals de novo. *Scrupples, Inc.*, CAB No. P-0622, 48 D.C. Reg. 1596, 1598 (Sept. 18, 2000); *Busy Bee Envtl. Servs., Inc.*, CAB No. P-0617, 48 D.C. Reg. 1564, 1567 (July 24, 2000). Indeed, the relative merit of competing proposals is primarily a matter of agency discretion and we will not substitute our judgment for that of the agency. *Group Ins. Admin., Inc.*, CAB No. P-0309, 40 D.C. Reg. 4485, 4508 (Sept. 2, 1992).

As applied to the instant facts, the very limited contemporaneous source selection record that has been provided to the Board for this procurement and the supplemental statements provided by the District fail to establish that the CO's award decision was reasonable and consistent with evaluation criteria and procurement law. For this reason and as discussed further below, we sustain the instant protests.

There is an Extremely Limited Contemporaneous Evaluation Record, and an Inexplicable Absence of any Supplemental Statements from the CO, in this Procurement to Support the Award Decision.

In light of the complexity of the contract requirements, the extended source selection process including oral presentations and BAFOs, the voluminous proposals that each offeror submitted to describe their overall technical approach and price (AR Ex. 2; Supplemental AR Exs. 20, 21, 29), and the city's much publicized commitment to modernize taxicab transportation operations, the Board would expect that the contemporaneous evaluation record for this

procurement would be fairly extensive, particularly with respect to the CO's progressive assessment of the relative strengths of each offeror's proposal throughout the entire evaluation process.

However, as detailed below, *inter alia,* the CO only drafted a single document during the entire evaluation which purports to provide a detailed basis for the CO's decision to exclude all offerors, other than VeriFone, from the competition. (*See* AR Ex. 10.) Additionally, on its face, this document does not even mention the manner in which the CO evaluated the merits of the offerors' oral presentations or BAFO responses, much less note that these events took place, and were considered by the CO, as part of making the source selection decision. (*See id.*) Moreover, there are no contemporaneous materials which document a single meeting that the TEP and/or CO may have conducted (e.g., meeting minutes, notes, e-mail correspondence) during the evaluation to even partially corroborate the District's protest allegations that progressive meetings occurred between the CO and TEP during the evaluation to discuss the merits of each competitive range proposal before the award decision was made. (*See, e.g.*, Supplemental AR 7 ("The reviews of the BAFOs from RideCharge, CMT, and VeriFone were conducted during a meeting that included the Contracting Officer and some members of the original TEP team.").)

Further, in lieu of providing the Board with a complete and contemporaneous evaluation record, the District has instead relied heavily upon the submission of declaration testimony from individual members of the TEP and contracting officials ***other than*** the CO, created during this protest, to attempt to prove that the CO's ultimate July 2012 award decision was allegedly reasonable and consistent with procurement law. (*See generally* AR Ex. 4; Supplemental AR Exs. 26, 27.)

The CO who presided over the award to VeriFone, now separated from employment with the District, has inexplicably refused to provide any supplemental or sworn statement to the Board to clarify the evaluation record in this matter or to attempt to establish that his award decision was reasonable. (Dist. Additional Resp. to Sua Sponte Order, Oct. 10, 2012.) More notable is the fact that the record is silent as to whether the District even attempted to obtain a supplemental statement from the CO to support the District's defense of the subject award before the Board inquired about the District's ability to obtain such a statement. (*See* Board's October 2, 2012 Sua Sponte Order ("The Boards notes, however, that the District has not similarly produced declaration or affidavit testimony from the former Contracting Officer, John R. Dean, who is identified in the District's filings in this matter as having had primary responsibility over the source selection process particularly as it relates to the activities of the TEP."); *see also* (Dist. Resp. to Sua Sponte Order, Oct. 9, 2012 ("On October 4, 2012, the District contacted Mr. Dean and requested that Mr. Dean provide a declaration as it relates to his activities concerning the evaluation and award decision.").) [18]

[18] In short, the Board inquired as to the notable absence of a declaration from the former CO on October 2, 2012. (Board's October 2, 2012 Sua Sponte Order.) The District did not attempt to obtain such a declaration until October 4, 2012, two days after the Board's inquiry. (Dist. Resp. to Sua Sponte Order, Oct. 9, 2012.)

The fact that the former CO has separated from employment with the District of Columbia government makes the need for a meaningful and contemporaneous evaluation record even more critical for purposes of the Board's assessment of the propriety of the CO's decision. Consequently, the failure of the District's contracting officials to properly and contemporaneously document their evaluation of proposals, or even to actively pursue obtaining a supplemental testimonial statement from the former CO to clarify the evaluation record, limits the available evidence to support the award decision to "arguments and documentation prepared in response to protest contentions" as opposed to the contemporaneous record as to which we afford the greatest weight. *Trifax Corp.*, CAB No. P-0539, 45 D.C. Reg. at 8847. Furthermore, the District's failure to contemporaneously document its evaluation of proposals is an obvious violation of the evaluation documentation requirements required by D.C. MUN. REGS. tit. 27, § 1622.7.

The Written Competitive Range Determination Failed to Include Any Discussion of the Basis for Excluding the Protester CMT From the Competitive Range.

The present protest also largely stems from protester CMT's contention that the CO's decision to exclude its proposal from the competitive range was unreasonable and in violation of procurement law. (CMT Protest 15-16.) More specifically, CMT alleges that the District's July 5, 2012, written competitive range determination does not address, or provide, the basis for the District's exclusion of CMT from the competitive range. (*Id.* at 15; CMT Supplemental Protest 10-11.) In particular, CMT argues that the CO's only written determination to exclude CMT from the competitive range—in the July 5, 2012 D&F—includes a discussion of another offeror's proposal weaknesses in the portion of the document supposedly designated by the CO to discuss the merits of CMT's proposal and, thus, provides no explanation for CMT's exclusion. (CMT Supplemental Protest 11-13.)

In addressing the protester's challenge to the competitive range determination, the Board initially notes that the competitive range generally consists of "all proposals that have a reasonable chance of being selected for award," in accordance with the evaluation criteria as stated in the solicitation. D.C. MUN. REGS. tit. 27, § 1620.1; *Busy Bee Envtl. Servs.*, CAB No. P-0617, 48 D.C. Reg. at 1566. The determination of the competitive range is primarily a matter of agency discretion. *Educ. In-Roads*, CAB No. P-0552, 46 D.C. Reg. 8519, 8525 (Oct. 27, 1998); *see also Main Bldg. Maint., Inc.*, B-406615 et al., 2012 CPD ¶ 212 at 4 (July 23, 2012) ("The determination of whether a proposal is in the competitive range is principally a matter within the judgment of the contracting agency.") (citing *Dismas Charities, Inc.*, B-284754, 2000 CPD ¶ 84 at 3 (May 22, 2000)).

Accordingly, the Board treats the competitive range determination as it does other evaluation decisions, and will not disturb the agency's determination if it "is not arbitrary and appears reasonable and in accord with the evaluation criteria listed in the solicitation." *RGII Techs.*, CAB Nos. P-0664 et al., 50 D.C. Reg. at 7477; *accord Data Solutions & Tech., Inc.*, B-405077.2, 2011 CPD ¶ 215 at 4 (Oct. 12, 2011) ("In reviewing an agency's evaluation of proposals and subsequent competitive range determination, … [GAO] will examine the record to

determine whether the documented evaluation was fair, reasonable, and consistent with the evaluation criteria.").

On the other hand, however, where a competitive range determination is based upon a flawed evaluation, the decision to exclude an offeror from the competitive range may be deemed unreasonable. *See Educ. In-Roads*, CAB No. P-0552, 46 D.C. Reg. at 8525-26 (finding that a flawed cost evaluation rendered the protestor's exclusion from the competitive range unreasonable); *see generally Wilson Beret Co.*, B-289685, 2002 CPD ¶ 206 (Apr. 9, 2002) (sustaining a protest challenging the protester's exclusion from the competitive range due to an unreasonable evaluation under one of the technical factors).

Because of the limited evaluation record produced in this matter, there are only two contemporaneous evaluation documents that address the CO's decision to exclude CMT from the competitive range. The first document is a two-page June 11, 2012, D&F that deems all offerors except VeriFone, as excluded from the competitive range. (AR Ex. 9.) This document in no way details the CO's particular findings regarding the strengths and/or weaknesses of CMT's proposal, or any other offeror's proposal, as part of making this competitive range determination. (*See id.*) At best, this document simply states that CMT and RideCharge were excluded from the competitive range after evaluation of their BAFOs, without further explanation, while the CO generally noted that VeriFone was still in the competitive range because of several positive features found in its technical and price proposal. (*Id.* at 2.)

The second document drafted by the CO to explain his competitive range determination that all offerors except for VeriFone were to be excluded is the July 5, 2012 D&F which purports to provide facts and analysis which justify the CO's competitive range determination. (AR Ex. 10.) This July 5, 2012 D&F document is divided into eight separate written sections, with eight corresponding section title headers identifying the names of the eight companies that competed for the contract award: (1) CabConnect; (2) MELE; (3) TaxiPass; (4) TDC; (5) Wireless Edge; (6) CMT; (7) RideCharge; and (8) VeriFone, the awardee. (*See generally id.*)

Upon the Board's review of the July 5, 2012 D&F, the stated basis for CMT's exclusion from the competitive range is problematic.[19] First, the paragraph specifically designated for "CMT," never specifically references, or names CMT at any time in its narrative text when referring to proposal weaknesses identified by the CO. (*See id.* at 5.) Instead, the paragraph supposedly designated for CMT only identifies by name the offeror "Wireless Edge" in the narrative concerning identified proposal weaknesses as a basis for exclusion from the competitive range.[20] (*Id.*) More striking to the Board, is the fact that this paragraph designated by title for a discussion about CMT, with only narrative references to Wireless Edge and not CMT, is almost identical in wording to another section of the July 5, 2012 D&F that is expressly

[19] The July 5, 2012 D&F discussion paragraph attributed to CMT is titled: "6. CMT – BAFO Technical Score [redacted]; Price Score [redacted]; Total Point Score [redacted]; Base Price $[redacted], plus option price $[redacted], total price $[redacted]." (AR Ex. 10 at 5.)

[20] Wireless Edge was one of the first five offerors excluded by the CO from the competitive range in this procurement on May 24, 2012.

designated by title for a discussion about the proposal of Wireless Edge."[21] (*Id.* at 4-5.) In other words, the narrative in the July 5, 2012 D&F regarding CMT is identical to the narrative in the same document regarding Wireless Edge. The CO has presumably excluded CMT from the competition for deficiencies found in the Wireless Edge proposal.

Through declaration testimony, the District's current CO, who was uninvolved with the award decision, attempts to explain that there is no duplicative Wireless Edge passage for CMT in the July 5, 2012 D&F. In particular, this new CO simply states that the designated CMT narrative in the July 5, 2012 D&F simply contains a typographical error and that all of the references to "Wireless Edge," in this discussion should have referred to "CMT" instead. (AR Ex. 4 ¶ 10.) This rather basic attempt at an explanation, however, does not explain why the substantive content of both the CMT and Wireless Edge passages in the July 5, 2012 D&F are almost exactly identical in content. Consequently, given that the CMT titled section of the document, on its face, seemingly includes a discussion of the merits of Wireless Edge's proposal and not CMT's proposal, the July 5, 2012 D&F in no way articulates a reasonable basis for CMT's exclusion from the competitive range to support the propriety of that decision by the CO.

Further supporting the conclusion that the July 5, 2012 D&F contains a duplicative narrative entry for Wireless Edge under the section intended for CMT, is the fact that the TEP Consensus Report describes almost identically the same weaknesses for Wireless Edge that are included in the July 5, 2012 D&F for both CMT and Wireless Edge. (*Compare* AR Ex. 10 at 4-5, *with* AR Ex. 11.) Given that both documents—the July 5, 2012 D&F and the TEP Consensus Report—describe exactly the same weaknesses for Wireless Edge, the District's attempt to dismiss the error in the July 5, 2012 D&F regarding CMT as merely a small typographical error is without basis and troubling. The Board is concerned that the District did not simply acknowledge this glaring error much earlier in this proceeding rather than attempt to defend its allegation that the July 5, 2012 D&F in any way provides a basis, or explanation, for excluding CMT from the competition, which it clearly does not. Consequently, the Board finds that neither the July 5, 2012 D&F, on its face, nor any other contemporaneous evaluation document, articulates a reasonable explanation or basis for the CO's decision to exclude CMT from the competitive range based upon any perceived strengths or weaknesses in its proposal. The unjustified decision to exclude CMT from the competitive range was, therefore, arbitrary, capricious and in violation of procurement law.

The Contracting Officer Failed to Conduct an Independent Assessment of the Protesters' Proposals and Unreasonably Relied Exclusively Upon the Findings of the Technical Panel.

Protester CMT also contends that the CO did not conduct the legally required independent review of the proposals in this procurement, or properly document his source selection decision as required by D.C. MUN. REGS. tit. 27, § 1618.1. (CMT Supplemental Protest 19-20.) As it relates to this allegation, the Board has previously held that the contracting officer

[21] The fifth section of the July 5, 2012 D&F attributed to Wireless Edge is titled: "5. Wireless Edge – Technical Score [redacted], price and technical score [redacted], Price $[redacted] for base period and the total for base and options is $[redacted]." (AR Ex. 10 at 4.)

has "a critical and unique role" in the evaluation and selection process, and as such, is ultimately responsible for the evaluation and for determining the relative merits of competing proposals. *Health Right*, CAB Nos. P-0507 et al., 45 D.C. Reg. at 8636. Although a technical evaluation panel can assist the contracting officer in his decision, the contracting officer ultimately remains responsible for the evaluation of the proposals and, accordingly, must actually conduct his own independent review. *See* D.C. MUN. REGS. tit. 27, § 1618.1; *Urban Alliance Found. et al.*, CAB Nos. P-0886 et al., 2012 WL 4775002; *see also B&B Sec. Consultants, Inc.*, CAB No. P-0583, P-0585, 46 D.C. Reg. 8637, 8647 (June 18, 1999) (finding that the contracting officer must exercise independent judgment in assessing the relative merits of the proposals, even when relying on technical expertise of delegated evaluators).

The contracting officer must prepare documentation supporting his selection decision and demonstrating the relative differences among the merits of the proposals. D.C. MUN. REGS. tit. 27, §1622.7. While the contracting officer may properly base his independent judgment on reports and analyses prepared by others, the contracting officer cannot merely adopt those findings. *Urban Alliance Found. et al.*, CAB Nos. P-0886 et al., 2012 WL 4775002 (noting that mere adoption of the TEP's average point scores does not constitute a valid exercise of judgment). Hence, while the contracting officer may ultimately concur with the TEP findings, he must still have a well-documented and reasonable basis for the decision to concur with these findings. *See, e.g.*, *Health Right*, CAB Nos. P-0507 et al., 45 D.C. Reg. at 8637 (holding that the contracting officer may not abdicate his legal duty to make a substantive evaluation). Without sufficient documentation in the record supporting the CO's independent review, the Board cannot conclude that the evaluation is reasonable or rationally related to the solicitation criteria. *See Urban Alliance Found. et al.*, CAB Nos. P-0886 et al., 2012 WL 4775002.

As set forth herein, the CO in this case initially utilized a seven person TEP to individually score the proposals of the eight offerors involved in the competition for the contract award. The TEP members independently evaluated these proposals and assigned each proposal a numerical score under each evaluation factor based upon the perceived relative strengths and weaknesses of each proposal. (*See generally* Supplemental AR Exs. 18, 19, 28.) The TEP used the averages of these individual point scores to calculate each offeror's overall scores which are summarized in the TEP Consensus Report. (*See* AR Ex. 11.) The TEP Consensus Report also contains supplemental narrative comments concerning particular proposal strengths and weaknesses that were identified by the TEP.[22] (*Id.*)

Consistent with our prior holdings, while the CO could have relied to a certain extent upon the findings of the TEP with respect to the merits that the TEP found in each offeror's proposal, the CO was still required to undertake his own independent analysis of the relative strengths and weaknesses of each proposal prior to making an award decision, and to document the results of this independent assessment. As the District has been unable to produce declaration or affidavit testimony from the former CO to even supplement the contemporaneous

[22] The District initially provided the Board with a scoring summary for each offeror's proposal. (AR Ex. 16.) Subsequently, however, the District submitted a second version of the same scoring summary to correct an alleged typographical error in the first version. (AR Ex. 25.)

evaluation record herein, or lack thereof, the Board finds that the July 5, 2012 D&F is the only document drafted by the CO which provides some expanded level of detail regarding technical and price factors which led to the CO's decision to award the contract to VeriFone after excluding all other offerors from the competitive range. No other document appears to have been drafted by the CO that discusses the merits of each competitive range proposal, or BAFO, in any further detail.

The Board has already held, *inter alia*, that the CO failed to provide any basis for his exclusion of CMT from the competitive range and, thus, there is similarly no evidence that the CO performed an independent analysis of this offeror's proposal strengths and weaknesses in making the final award decision. In addition, with respect to RideCharge and VeriFone's proposal features, the Board's review of the July 5, 2012 D&F, in conjunction with the TEP Consensus Report, unequivocally reveals that the July 5, 2012 D&F is largely a "cut and paste" of the TEP's exact findings regarding RideCharge's proposal weaknesses, and VeriFone's proposal strengths. (*Compare* AR Ex. 10 at 5-6, *with* AR Ex. 11.) At no point in the July 5, 2012 D&F does the CO make any additional meaningful statements, observations, or findings to indicate how he independently assessed and documented the merits or weaknesses of each of these offeror's proposals, in addition to relying upon the findings of the TEP, as a basis for his award decision. Thus, the July 5, 2012 D&F does not mention or analyze the potential value of any proposal strengths recognized independently by the CO, that were considered as part of the award decision. (*See generally* AR Ex. 10.)

Moreover, the integrity of the CO's award decision is further undermined by the fact that even the costs which the CO identifies in the July 5, 2012 D&F as being CMT's final offer for the base and option years of the contract are incorrect. In particular, the July 5, 2012 D&F identifies CMT's proposed base year cost as $[redacted]; $[redacted] for the option years; with a total contract price of $[redacted]. (AR Ex. 10 at 5.) These, however, were not the amounts which CMT offered to the District in its final BAFO. CMT's BAFO, in fact, offered $[redacted] for the base year period of the contract; $[redacted] for the option period; for a total contract price of $[redacted]. (*See* Supplemental AR Ex. 23, Volume II.) This error is further highlighted by the fact that the District has submitted two different sets of scoring summaries in the protest for the offerors in the competitive range—one summary with the erroneous contract costs for CMT that the CO presumably used in the July 15, 2012 D&F, and then a later scoring summary, filed after this protest was instituted, which correctly includes CMT's actual final BAFO price. (AR Ex. 16; Supplemental AR Ex. 25.) This glaring error is further underscored by the lack of any further written documentation from the CO explaining the actual cost figures that he relied upon in making the award decision to VeriFone.

While the District has provided protest declaration testimony from various contracting officials asserting that the CO and TEP performed a proper evaluation of proposals, these statements do not provide sufficient and convincing evidence that the CO performed the required independent analysis absent at least some form of basic corroboration from the CO himself in the contemporaneous record or in a supplemental statement. Moreover, it would be inappropriate for the Board to solely accept the statements of TEP members as conclusive evidence about the

particular proposal factors that the CO analyzed or considered given the extent of the inconsistencies and errors that the Board has found in the record.

Therefore, because the CO simply copied verbatim the findings of weaknesses and strengths by the TEP, for RideCharge and VeriFone, in making his award decision without any evidence of a further analysis by the CO of the merits of these competitive range proposals, the Board finds that the CO failed to perform the legally required independent analysis of these offerors' proposals prior to making the final award decision in violation of procurement law. Similarly, because the record is void of any documentation written by the CO which describes his evaluation of CMT's proposal, we find that the CO also failed to perform the required independent analysis of the merits of this proposal in violation of procurement law.

a. The CO Failed to Confirm, Through an Independent Analysis, That the TEP's Findings Were Reasonable and Consistent with the Solicitation Criteria.

Protester CMT also challenges the TEP's assignment of point scores and of relative strengths and weaknesses of the proposals. (CMT Supplemental Protest 20-28.) In particular, CMT argues that, based on the strengths and weaknesses of the proposals, its point scores should have been higher under the "Relevant Experience," "Approach and Methodology," and "Technical Requirements" evaluation factors, and that VeriFone should have received lower scores under the "Relevant Experience" and "Approach and Methodology" evaluation factors. (*Id.* at 23-28.) CMT points to, what it deems to be, various inconsistencies in the comments made by individual evaluators which it contends evidence an inconsistent application of the Solicitation criteria. For example, CMT contends that:

It is not the role of the Board to re-evaluate proposals where a protester disagrees with the findings of a technical panel and we, therefore, decline to do so in this instance. *Group Ins. Admin.*, CAB No. P-0309, 40 D.C. Reg. at 4508-09. It was the unique responsibility of the CO

to independently analyze, and validate, the evaluation findings of the TEP as part of the final award decision to ensure that their evaluation was performed in a manner consistent with the Solicitation requirements and procurement law. For this reason, the Board finds that due to the CO's failure to conduct such an independent assessment of proposals, including a reasonable independent assessment of the TEP's initial evaluation scoring of the competitive range offerors, there is no basis for validating the TEP's scores as reasonable and consistent with the Solicitation criteria. *Cf. Health Right*, CAB Nos. P-0507 et al., 45 D.C. Reg. at 8639 (holding that a contracting officer cannot reasonably adopt inadequate panel evaluation findings as a substitute for his independent judgment).

The Record Does Not Conclusively Establish That Meaningful Discussions Took Place.

CMT also contends that the District failed to conduct meaningful discussions with the firm. (CMT Protest 18-19; CMT Supplemental Protest 31-34.) In particular, CMT argues that the District failed to identify, during discussions, weaknesses that it had found in CMT's proposal particularly concerning its proposed [redacted]. (CMT Protest 19; CMT Supplemental Protest 31-33.)

The District's procurement regulations require that discussions, if held, must be conducted with every offeror in the competitive range.[23] D.C. MUN. REGS. tit. 27, § 1621.1. Though discussions need not be all encompassing, discussions must be meaningful. *See Health Right*, CAB Nos. P-0507 et al., 45 D.C. Reg. at 8645 (discussing "the need for meaningful discussions"); *Koba Assocs., Inc.*, CAB No. P-0350, 41 D.C. Reg. 3446, 3472-74 (June 16, 1993) (finding that no meaningful discussions were conducted); *accord Creative Info. Tech., Inc.*, B-293073.10, 2005 CPD ¶ 110 at 6 (Mar. 16, 2005) ("When contracting agencies conduct discussions with offerors…, such discussions must be meaningful."). Discussions need not address every aspect of a proposal that receives less than a perfect score. *Health Right*, CAB Nos. P-0507 et al., 45 D.C. Reg. at 8645; *Raytheon Co.*, B-404998, 2011 CPD ¶ 232 at 6 (July 25, 2011). However, agencies must point out deficiencies and resolve mistakes and uncertainties in proposals, and allow offerors an opportunity to revise proposals. D.C. MUN. REGS. tit. 27, § 1621.2; *Psychiatric Inst. of Wash., Inc.*, CAB No. P-0905, 2012 WL 4753869 (Aug. 1, 2012); *Med. Extension Servs., Inc.*, CAB No. P-0378, 41 D.C. Reg. 3918, 3921 (Jan. 14, 1994). Accordingly, agencies are required to discuss weaknesses in an offeror's proposal that have a significant adverse impact on its technical rating. *Psychiatric Inst. of Wash., Inc.*, CAB No. P-0905, 2012 WL 4753869; *Health Right*, CAB Nos. P-0507 et al., 45 D.C. Reg. at 8645.

The difficulty in assessing the sufficiency of discussions in the instant matter arises from the fact that there were other flaws in the technical evaluation noted earlier. In similar cases, the

[23] The District argues that it was not required to conduct discussions pursuant to D.C. CODE § 2-354.03(h)(2) (2011), and could have simply conducted negotiations with the highest ranked offeror. (Supplemental AR 10.) Such discussions with the highest ranked offeror, however, may be conducted only after the contracting officer has ranked proposals from most advantageous to least advantageous. *See* D.C. CODE §2-354.03(g)(2), (h)(1) (2011). At the time that discussion were alleged to have taken place in the procurement, there is no evidence that the CO had conclusively established that VeriFone was the highest ranked offeror as the District was in the process of requesting BAFOs from all three competitive range offerors during this time period.

Board has found that evaluations can be performed so improperly as to make meaningful discussions impossible. *See Koba Assocs.*, CAB No. P-0350, 41 D.C. Reg. at 3473 ("evaluations were performed so improperly that no meaningful discussions were (or could have) been conducted"). Here, we have found that the evaluation record was insufficiently documented; the competitive range determination was flawed as it relates to CMT's exclusion, and the CO failed to conduct a proper independent evaluation of proposals to independently confirm that the TEP's initial proposal evaluation findings were reasonable and consistent with the Solicitation and procurement law.

As a result of these pervasive improprieties already found to have occurred in the evaluation, the Board is unable to conclude, as a practical matter, that the CO reasonably and independently determined the existence of weaknesses in CMT's proposal and conducted proper discussions based upon such reasonable findings. Indeed, because the competitive range determination was flawed and the record lacks any written justification from the CO to exclude CMT from the competition, we cannot reasonably determine the factors that the CO relied upon in excluding CMT from the competitive range. Consequently, the Board finds that the record does not demonstrate that the District engaged in meaningful discussions with CMT during the evaluation.

CONCLUSION

For the reasons stated above, the Board finds that the District conducted an improper and insufficiently documented technical evaluation of proposals in this matter. The CO appears to have completely abdicated his responsibility to conduct an independent analysis of proposals, issued a flawed competitive range determination, and failed to provide contemporaneous documentation of key proposal evaluation decisions pertaining to oral presentations, BAFOs, and the conduct of meaningful discussions with the protesters. Moreover, the Board is troubled by the numerous unexplained and glaring errors, inconsistencies, and oversights that clearly occurred during this evaluation.

Therefore, in light of these improprieties, the Board hereby directs the District to take corrective action including: (1) terminate the contract awarded to VeriFone; (2) re-issue the Solicitation only insofar as it is necessary to reflect any alteration in performance level requirements based upon the fact that VeriFone has performed limited TSMS installations during the pendency of this protest; (3) request that the offerors in the initial competitive range, including CMT, RideCharge, and VeriFone, submit revised proposals that are responsive to the Solicitation; (4) conduct proper meaningful discussions, if necessary, with offerors in the competitive range; (5) request BAFOs from the offerors in the competitive range; and (6) re-evaluate proposals in a manner that is consistent with the Solicitation and procurement law.

To the extent that the District intends to utilize a technical panel as part of the re-evaluation required by the Board in the foregoing corrective action, the panel shall prepare a written evaluation report per D.C. MUN. REGS. tit. 27, § 1618.5 that contains (1) the basis for the evaluation; (2) an analysis of the technically acceptable and unacceptable proposals, including an assessment of each offeror's ability to accomplish the technical requirements set forth in the

Solicitation; (3) a summary, matrix, or quantitative ranking of each technical proposal in relation to the best rating possible; and (4) a summary of the findings of the technical panel. Further, pursuant to D.C. MUN. REGS. tit. 27, §§ 1622.6, 1622.7, prior to making an award decision, the new Contracting Officer shall independently evaluate, and detail in writing, each proposal in the competitive range in a manner which meaningfully explains: (1) the basis for the award decision; (2) the relative differences among the proposals as independently determined by the Contracting Officer; (3) the Contracting Officer's determination of any proposal strengths, weaknesses, and risks for each competitive range proposal as they correspond to the evaluation factors; and (4) any other factors leading the Contracting Officer to determine that one proposal is most advantageous to the District and should receive the contract award.

Because we have ordered the corrective stated herein, we do not address the remaining protest grounds raised by the protesters in further detail. We generally note, however, that the protesters' additional grounds are without merit.

SO ORDERED.

DATED: November 9, 2012

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

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

CONCURRING
(Marc D. Loud, Sr., Chief Administrative Judge):

The single greatest mystery in this procurement is the role played by the District's contracting officer. He is portrayed by the District as *leading* this $35 million dollar procurement, but emerges from our record as a far more peripheral figure. The source selection materials portray the contracting officer as opting to cut and paste lower level evaluator recommendations rather than analyzing proposals himself. The contracting officer also failed to contemporaneously document the progression of this procurement, and declined an opportunity to clarify whether an independent evaluation was done through submission of a post-litigation declaration.

While others have attempted to plug the evidentiary gap with purported *eyewitness* accounts of the contracting officer's independent proposal evaluations[24], the contracting officer himself is silent and the record is clear that no such independent evaluations occurred. The contracting officer's July 5, 2012, competitive range D&F was excerpted verbatim from an April

[24] AR Ex. 4, ¶¶14-17, Declaration of Derrick White; Supp. AR, Ex. 26, ¶¶ 4, 6-7; Declaration of Leslie Ramdat; Supp. AR, Ex. 27, ¶ 8, Declaration of Ron Linton.

17, 2012, Technical Evaluation Panel report. AR, Ex. 10, Determination and Findings of Competitive Range; AR, Ex. 11, Technical Evaluation Consensus Report for Original Proposals. Moreover, the July 5 D&F purports to evaluate *BAFOs* for CMT and RideCharge, but uses the exact language that the panel used in evaluating *initial* (i.e., pre-BAFO) offeror proposals. AR, Ex. 10, ¶¶ 6-8; AR, Ex. 11, Evaluation Form/RideCharge; AR, Ex. 11 Evaluation Form/Wireless Edge.

It is impossible for the District to conduct a lawful procurement where, as here, the contracting officer is a virtual no-show in the proposal evaluation stage. Our cases are clear that a contracting officer's *independent* evaluation is the determining element in a final selection. *B&B Security Consultants*, 46 D.C. Reg. 8637, 8648; *Health Right*, 45 D.C. Reg. 8612. In this case, there is no credible direct evidence from the contracting officer that such an independent evaluation took place, no contemporaneous records from the contracting officer or other procurement officials that such an independent evaluation took place, and no credible post-litigation evidence leading to that conclusion.

In a footnote discussion in *Health Right*, our Board took note of contracting officer conduct that exemplified an independent evaluation. *Health Right* at 8637 n.11. While there is no formulaic rule regarding acceptable conduct, the following factors were noted in the *Health Right* decision: (1) independent review of technical proposals, (2) conversations with the technical board's chair regarding the process of the board's initial evaluation and its initial findings, (3) review of an early draft of the board's evaluation report, (4) reviewing the technical board's final evaluation report, and spending a week comparing and validating the evaluation findings against the contracting officer's own review of the technical proposals. It would prove helpful for the District's current TSMS contracting officer to take note of the above factors.

I concur with the panel's findings and conclusions herein.

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD
REDACTED

PROTEST OF:

MORPHOTRUST USA, INC.	)	
	)	CAB No. P-0924
Solicitation No. DOC-62682	)	

For the Protester: Daniel E. Chudd, James C. Cox, and Damien C. Specht, Jenner & Block LLP. For the Intervenor: Warren W. Hamel and Dismas N. Locaria, Venable LLP, and Andrea Leahy-Fucheck and Steven DeSmet, Leahy & DeSmet, LLC. For the District of Columbia Government: Howard Schwartz and Janice N. Skipper, Assistant Attorneys General.

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

OPINION

Filing ID #48009987

MorphoTrust USA, Inc. ("MorphoTrust" or "protester") has filed a protest alleging that the specifications set forth in Solicitation No. DOC-62682 (the "Solicitation" or "RFP") for a centralized security credentialing system to produce drivers' licenses for the Department of Motor Vehicles ("DMV") are overly restrictive because they exceed the District's minimum needs and would likely result in a de facto sole source award. The District denies MorphoTrust's allegations and contends that the specifications set forth in the RFP by the District's Office of Contracting and Procurement ("OCP") are necessary to meet the District's legitimate minimum requirements.

The Board rejects protester's arguments for the following reasons. First, MorphoTrust has failed to demonstrate that the District's minimum requirements in the Solicitation were unreasonable. Second, the Solicitation did not result in a de facto sole source award as shown by the fact that [redacted] offerors submitted responsive proposals. Finding that the District did not violate procurement laws or regulations in establishing the Solicitation's minimum requirements, the Board denies the instant protest.

BACKGROUND

On May 18, 2012, OCP, on behalf of the DMV, issued the Solicitation for "an Offeror to provide a Centralized Security Credentialing System ("System") for update and production of secure digitized drivers' licenses (DL) and identification (ID) cards." (Agency Report ("AR") at Ex. 1, § 3.1.1.) The stated purpose of the centralized security credentialing system was "to improve and increase card security to deter fraud and deter attempts to illegally duplicate identity credentials by criminals and counterfeiters." (AR at Ex. 1, § 3.2.1.1.) Initially, the deadline to submit proposals was June 8, 2012, with contract performance to begin on December 15, 2012.

(AR 3.) After a number of amendments, the deadline to submit proposals was extended to August 17, 2012, with [redacted] offerors submitting proposals. (AR 3-4.)[1]

On July 27, 2012, prior to the deadline for receipt of proposals, MorphoTrust timely filed the present protest with the Board, in accordance with Board Rule 302.2(a), alleging improprieties in the Solicitation. Protester is the incumbent provider of drivers' licenses and identification cards in the District. (Protest 2.) According to protester, the specifications contained in the Solicitation are overly restrictive so as to prevent it from submitting a "compliant proposal." (Protest 1.) It argues that the specifications exceed the District's minimum needs and, further, would likely result in a de facto sole source award to [redacted] (Protest 19-21.) The protest focuses on the secure card requirements and the secure facility requirements contained in the RFP's Sections 3.4.12 and 3.4.16 respectively. (Protest 5-7.)

I. Requirements of the Solicitation

A. Secure Card Requirements

The Solicitation's secure card features, as required by the DMV, are described in Section 3.4.12. (AR at Ex. 1.) Offerors were required to "propose and price seventeen (17) security features outlined in section 3.4.12.[14]." (AR at Ex. 1, § 3.4.12.3.) Offerors were also given "the option to propose and price up to 10 additional security features." (*Id.*) The 17 required secure card features are as follows:

1. *Solid Polycarbonate Card*
2. *Laser Engraved Primary Photo Image*
3. *Integrated window with clear Laser Engraved Secondary Ghost image of the customer*
4. 2-D/3-D barcodes
5. *Laser Engraved Tactile data fields including signature image*
6. *Laser Engraved Clear Tactile Feature*
7. Non-Linear Wave Feature
8. Redundant Data
9. Micro lettering
10. Rainbow printing
11. Card inventory #s
12. Real-ID compliant feature (Logo)
13. Custom-formulated colors
14. Fine-line guilloche patterns
15. Reverse micro lettering & Deliberate error in micro lettering
16. IR Transparent and opaque inks

[1] According to the District, the deadline to submit proposals was extended after prospective vendors initially declined to submit proposals for the following reasons unrelated to the specification requirements at issue: (a) the short timeframe within which to submit proposals; (b) an aggressive implementation deadline; and (c) a challenging LSDBE subcontracting requirement. (AR 3.)

[2] [redacted] was one of [redacted] offerors to the Solicitation. (Status of Procurement at Exs. A-D.)

17. UV Patterns with fluorescence

(AR at Ex. 1, § 3.4.12.14 (emphasis added).)

MorphoTrust challenges the above list of 17 secure card requirements for allegedly being overly restrictive, in particular, the first, second, third, fifth, and sixth requirements. (Protest 4-6, 13-18.) Protester asserts that the District should have permitted offerors to propose alternative methods of producing an equally, if not more, secure card. (*Id.*) MorphoTrust also alleges that the District merely "[redacted]." (Protest 17.) In other words, protester alleges that the Solicitation's requirements are uniquely tailored for [redacted]. (Protest 19.)

B. Secure Facility Requirements

In Sections 3.4.8 and 3.4.16, the Solicitation details the secure facility requirements. (AR at Ex. 1.) Section 3.4.8 lists the primary facility requirements whereby offerors need to provide "a 'hardened' facility with security procedures for all modes of physical and technical access." (AR at Ex. 1, § 3.4.8.4.) Proposed facilities are also required to "be either ISO/IEC 27001 certified or NASPO certified." (AR at Ex. 1, § 3.4.8.3.) Section 3.4.16 of the RFP includes the following additional secure facility requirements:

1. Physical security (live monitoring on site, live video monitoring);
2. Key card access entries per sections;
3. *Outside security to include fences, distance from entrance to parking, etc.;*
4. Access to printers must be secure and hardened (refer to Real ID act for further information);
5. Access control systems to limit access to its central card processing facility to authorized personnel and authorized visitors;
6. The Contractor shall control and secure hardware, software and cardstock; and
7. The Contractor shall notify the District of any breach in security. Any costs incurred by DMV in responding to and providing assistance to resolve the breach . . . shall be the responsibility of the Contractor.

(AR at Ex. 1, § 3.4.16.1 (emphasis added).)

MorphoTrust alleges that these seven additional secure facility requirements, in particular the third feature, are overly restrictive. (Protest 6-8, 18-19.) In fact, the protester argues that these additional secure facility features are not actually required by the District but, instead, "notably mirror the security features of [redacted]." (Protest 18.)

II. Agency Report

On August 20, 2012, the District submitted the Agency Report in response to MorphoTrust's protest. In its report, the District argues that the specifications contained in the RFP are reasonably necessary to satisfy the District's legitimate minimum needs for a centralized

security credentialing system. (AR 4-5.) It contends that "the security needs of DMV are justified based on the singular status of the District of Columbia as the nation's capital." (AR 9.) The District states that it received [redacted] proposals in response to the RFP. (AR 4.)

The District also explains that DMV had "conducted extensive market studies over a three year period in order to determine the District's minimum needs." (AR 5.) Moreover, it justified the secure card requirements by describing the non-delaminable and durable nature of polycarbonate cards. (AR 6-7.) The District stated that the laser engraving and ghost window requirements are "concomitant features of the polycarbonate card." (AR 6.) With respect to the secure facility requirements, the District responded that "the variety of private information obtained from individuals and used in the manufacture of ID cards mandate a production facility that is at least as secure as the District's own DMV facilities." (AR 7.)

III. Other Filings

In response to the Board's inquiry concerning the status of the [redacted] offers to the Solicitation, on October 9, 2012, the District provided the Board with an update on the evaluations stating that "[t]he Technical Evaluation Committee and the contracting officer evaluated the [redacted] offers and concluded that all [redacted] offers were technically compliant with the scope of work and within the competitive range." (Letter from the District (Oct. 9, 2012).)

The Board requested additional information, such as reports and bid tabulation spreadsheets from the contracting officer and the Technical Evaluation Panel and, in response, on October 19, 2012, the District submitted contemporaneous and other documents which demonstrated that the [redacted] offers had been evaluated and found to be technically compliant and within the competitive range. (*See* Status of Procurement at Exs. A-D.)

MorphoTrust argues that the documents submitted by the District on October 19, 2012, do not provide the Board with "sufficient information to confirm that the offerors meet the requirements of the RFP." (MorphoTrust's Mot. for Leave to File Resp. to District's "Status of Procurement Filing" 3.) It further contends that the documents submitted by the District "indicate[] that none of the offerors' proposals met all the Solicitation requirements" (*Id.* (emphasis removed).) MorphoTrust challenges the evaluation scores assigned to the offerors by the Technical Evaluation Panel. (*Id.* 5-7.) However, it did not submit a proposal in response to the RFP.[3] (District's Mot. for Leave to Reply to Protester's Mot. for Leave to File a Resp. to District's "Status of Procurement Filing" 1.)

DISCUSSION

I. Jurisdiction

[3] Protester does not claim to be an actual or prospective offeror, having asserted that it lacks the capability to provide the services requested under the RFP; therefore, it lacks standing to challenge the scores of the actual offerors. *24/7 Computer Doctors, LLC*, CAB No. P-0909, 2012 WL 4753873 (Sept. 17, 2012).

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

II. Standing

MorphoTrust asserts that it has been aggrieved in connection with the solicitation of the contract and therefore requests that the District change the terms of the Solicitation. (*See* Protest 21.) Under Board Rule 100.2(a), an aggrieved person is defined as "an actual or prospective bidder or offeror (i) whose direct economic interest would be affected by the award of a contract or by the failure to award a contract, or (ii) who is aggrieved in connection with the solicitation of a contract." The Board recognizes that the rule imposes different standards in analyzing whether a protester has standing: (i) the standard for protests of awards, and (ii) the standard for protests of alleged improprieties in the solicitation. *See M.C. Dean, Inc.*, CAB No. P-0528, 45 D.C. Reg. 8746, 8750 (Apr. 16, 1998). As such, MorphoTrust, in challenging alleged improprieties in the Solicitation, "must show that it has suffered, or will suffer, a direct economic injury as a result of the alleged adverse agency action." *(Id.)*

"Sufficient injury can be found, for example, in an adverse agency action which . . . denies the person the opportunity to compete, or precludes the person's product or services from being considered due to defects in the government's specifications." *Recycling Solutions, Inc.*, CAB No. P-0377, 42 D.C. Reg. 4550, 4575 (Apr. 15, 1994); *see also Micro Computer Co.*, CAB No. P-0226, 40 D.C. Reg. 4388, 4391 (May 12, 1992). MorphoTrust, the current provider of drivers' licenses/ID cards in the District, contends that it would have submitted a proposal if the specifications contained in the Solicitation were not overly restrictive. (Protest 2.) Thus, MorphoTrust has standing because it was allegedly denied the opportunity to compete for the contract, and thereby continue to provide services to the District, due to the purportedly overly restrictive specifications in the Solicitation.

III. Standard of Review

The protester alleges that the District failed to promote competition by setting forth solicitation requirements that exceeded the minimum needs of the District. In support of its argument, protester cites D.C. Mun. Regs. tit. 27, § 2500.1 (2002) which states that the District "shall specify [its] procurement needs in a manner designed to promote competition to the maximum extent possible." Accordingly, solicitations may only include restrictive specifications "to the extent necessary to satisfy the *minimum needs* of the District." *Id.* § 2500.3 (Emphasis added.)

When protesters allege that the specifications contained in a solicitation are overly restrictive, the Board applies a *de novo* standard of review. *KOBA Associates, Inc.*, CAB No. P-0325-A, 40 D.C. Reg. 5023, 5031-5032 (Mar. 12, 1993). And although the Board "will not take issue with an agency's narrowing of competition in pursuit of legitimate agency needs, . . . we will overturn those requirements that improperly limit competition." *Id.* at 5032.

The Board also recognizes that "[t]he determination of the agency's minimum needs and the best method of accommodating them are business judgments primarily within the agency's discretion and we will not question such a determination unless the record clearly shows that the determination was made without a reasonable basis." *Recycling Solutions, Inc.*, CAB No. P-

0434, 42 D.C. Reg. 4990, 4995 (June 30, 1995); *see also Silver Spring Ambulance Service, Inc.*, CAB No. P-0218, 40 D.C. Reg. 4913, 4922 (Jan. 15, 1993) (holding that the determination of what constitutes the minimum needs of the government is a matter primarily within the jurisdiction of the procuring agency); *Beretta U.S.A. Corp.*, CAB No. P-0177, 38 D.C. Reg. 3098, 3120 (Aug. 23, 1990). Therefore, the Board will defer to the agency's determination so long as the restrictive specifications "are reasonably related to achieving the government's actual minimum needs." *See JBH Associates*, CAB No. P-0228, 39 D.C. Reg. 4333, 4334 (Sept. 30, 1991).

As a result, the protester bears a "heavy burden," *American Motohol*, 38 D.C. Reg. 2998, 3002 (DCCAB Nov. 21, 1989),[4] of demonstrating, "by a preponderance of the evidence, that the agency has impermissibly narrowed competition," *KOBA*, CAB No. P-0335-A, 40 D.C. Reg. at 5032. In other words, the protester must establish that the "allegedly excessive restrictions" are unreasonable. *See General Oil Corp.*, CAB No. P-0181, 38 D.C. Reg. 3059, 3060-3061 (Apr. 20, 1990). And, in particular, if the protester can show that the specifications will result in a sole source award, the Board will more closely scrutinize the agency's determination of its minimum needs. *See Beretta U.S.A. Corp.*, CAB No. P-0177, 38 D.C. Reg. at 3121.

IV. The Specifications Contained in the Solicitation Are Not Overly Restrictive

The Board finds that the protester has not established that the specifications contained in the Solicitation are overly restrictive so as to constitute a violation of the District's procurement regulations. We have previously held that "the determination of what constitutes the government's actual minimum needs is one which allows [the District] great discretion." *American Motohol*, 38 D.C. Reg. at 3002. In light of that standard, protester has failed to meet its burden of demonstrating, by a preponderance of the evidence, that the specifications contained in the RFP are unreasonable. *See KOBA*, CAB No. P-0325-A, 40 D.C. Reg. at 5032.

A. Secure Card Requirements

1. *List of Seventeen Requirements*

MorphoTrust challenges the Solicitation's 17 secure card requirements. (Protest 11-13.) Protester provides examples of similar secure card solicitations in Maryland and New York to illustrate that other states generally allow offerors greater flexibility in their proposals for comparable services. (Protest 11-12.) MorphoTrust argues that the District should permit offerors to propose alternative methods of producing secure cards, rather than require offerors to produce one particular type of secure card. (Protest 12-13; Comments on the Agency Report [hereinafter, Comments] 3-4.) MorphoTrust contends that the District should specify "the level of security necessary" rather than require "specific methods of producing ID cards." (*See* Comments 4 (emphasis removed).)

[4] Citing Government Accountability Office ("GAO") precedent, protester argues that the District bears the burden of proving that the requirements of the RFP are consistent with its "minimum needs" without being duly restrictive. (Protest 9.) Notwithstanding, this Board has consistently held that it is the protester that bears the burden of proving that the District, by a preponderance of the evidence, has impermissibly narrowed competition. *See, American Motohol*, 38 D.C. Reg. at 3002; *Beretta U.S.A. Corp.*, CAB No. P-0177, 38 D.C. Reg. at 3120.

In response, the District maintains that it developed the specifications "after an extensive technical market study of available security devices and the availability of companies that could perform a contract based on the specifications." (AR 5.) After three years of research, including attendance at networking events and conferences, the District determined that its minimum need for the most secure credentials could only be met by the 17 identified secure card requirements. (AR 6.) The District also asserts that, as the nation's capital, it has a heightened need for security. (AR 5.)

While it may be true that other states provide offerors with greater flexibility in proposing secure card features, nevertheless, the District is allowed to determine at the outset which security card features will best meet its minimum needs. Thus, the District may specify certain required specifications as long as they are reasonable. *See American Motohol*, 38 D.C. Reg. at 3001. And, in fact, the regulations state that in developing these specifications, the District shall rely on "market research." D.C. Mun. Regs. tit. 27, § 2500.2 (2002). In this case, the District undertook the requisite market research to determine that this particular type of secure card would be its desired method of achieving the District's minimum needs.

2. *Specific Requirements: Polycarbonate Card and Laser Features*

MorphoTrust specifically challenges five of the 17 required features for being overly restrictive. (Protest 13-18.) These five features are: (i) solid polycarbonate card, (ii) laser engraved primary photo image, (iii) integrated window with clear laser engraved secondary ghost image, (iv) laser engraved tactile data fields including signature image, and (v) laser engraved clear tactile feature. (*See* AR at Ex. 1, § 3.4.12.14.) In sum, protester has argued that these specifications "are far more restrictive than the District's actual minimum need for production of a very secure ID Card." (Comments 6.)

With respect to the solid polycarbonate card requirement, protester argues that "[p]olycarbonate is not the only material that provides for a secure ID card" and asserts that Virginia is the only state that currently uses polycarbonate ID cards.[5] (Protest 13.) Protester also challenges the market research upon which the District relied in determining that it required polycarbonate cards. (*See* Comments 7-9 (arguing that the research was not evenhanded); Opp'n to District's Mot. for Leave to File a Response to Comments 4-6 (arguing that documents cited in District's Reply to Protester's Comments were impermissible post hoc rationalizations).) On the matter of the four laser requirements, protester contends that these requirements are not truly security features and that at least one of the requirements could only be produced by a single firm, [redacted]. (Protest 15-18.) In addition, protester maintains that these features do not provide any additional security because they are, in effect, design features that can be counterfeited. (Comments 13-17.)

In rebuttal, the District contends that the polycarbonate card requirement is "reasonably justified as the District's minimum need and that the inclusion of laser engraving . . .

[5] According to protester, [redacted]. (Protest 17, 21.)

constitute[s] concomitant features of the polycarbonate card." (AR 6.) It also claims that polycarbonate cards are necessary because of their non-delaminable nature, meaning that it is impossible to separate the layers of the card. (AR 6-7.) Through market research, the District ascertained that polycarbonate cards are "the most secure and durable cards." (AR at Ex. 5.) Furthermore, the District determined that "most new-generation identity documents . . . now use or are preparing to use polycarbonate cards." (*Id.*) Thus, the District concluded that polycarbonate cards, with their additional security features, are necessary to meet the District's unique security needs. (*See* District's Reply to Protester's Comments 5.)

When reviewing solicitation requirements, the Board will defer to the District as long as it has a "reasonable basis" for achieving the District's minimum needs. *See Beretta*, CAB No. P-0177, 38 D.C. Reg. at 3121. In this case, the District provided sufficient justification to support its need for state-of-the-art polycarbonate cards and laser engraving features. According to the District, "polycarbonate cards are the gold standard in the secured credentialing industry and it is the card of the future that will be used by an increasing number of jurisdictions world-wide." (District's Reply to Protester's Comments 4.) Moreover, 14 national identity card programs, 10 national passport programs and 13 national driving license programs utilize polycarbonate. (*Id.* at Ex. 2.) Therefore, having conducted its own market research, the District determined that such cards are "the most secure and durable." (*See* AR at Ex. 5.)

Conversely, the protester failed to demonstrate that the District impermissibly narrowed the competition due to unreasonable solicitation requirements as underscored by the fact that at least [redacted] offerors submitted responsive proposals to the RFP. Therefore, protester's argument that alternative card features may be as secure, if not more secure, than the card features required by the District is unavailing. Finding the District's requirements reasonable, the Board will not second guess the District's determination of its minimum needs.

B. Secure Facility Requirements

1. List of Seven Requirements

Protester challenges the list of seven secure facility requirements in the RFP. (*See* Protest 18.) It argues that "most states [only] identify International Organization for Standardization ("ISO") or North American Security Products Organization ("NASPO") standards as the basis for determining if a facility is secure." (*Id.*) MorphoTrust alleges that by listing additional secure facility requirements the District exceeded its minimum needs. (Protest 18-19.)

The District defends its secure facility requirements as being necessary to meet its minimum needs and explains that "the variety of private information obtained from individuals and used in the manufacture of ID cards mandate a production facility that is at least as secure as the District's own DMV facilities." (AR 7.) It further states that the District's DMV facilities meet the heightened security requirements set forth by the American Society of Industrial Security ("ASIS"). (*Id.*) The Board finds that while other states may require ISO or NASPO certification for its facilities, the District may reasonably impose heightened secure facility requirements given the sensitivity of the information contained at such facilities.

2. *Specific Requirement: Fencing*

Protester specifically challenges the secure facility requirement for "outside security to include fences, distance from entrance to parking." (*See* AR at Ex. 1, § 3.4.16.1; Protest 18-19.) MorphoTrust alleges that this feature, in particular, is overly restrictive and states that "[t]his is the first time that [it] is aware of a state RFP requiring fencing from the facility parking lot." (Protest 19.) MorphoTrust also asserts that the requirement is unreasonable because "there is more than one way to have a secure facility." (Comments 18.) According to protester, the District should not have required this specific security feature but, instead, should have allowed offerors to propose different ways of achieving secure facilities. (Comments 20.)

The District contends that all of the secure facility requirements listed in the RFP are "the same/similar type of standards that DMV has implemented in [its] own buildings." (AR at Ex. 5.) The District states that "current DMV employees who have significant knowledge in facility security were consulted" in writing the specifications. (*Id.*) Furthermore, the District asserts that the secure facility requirements "can be easily met" and, based on its own market research, it believes that "there are multiple vendors which can meet these requirements or are willing to meet these requirements." (*Id.*)

The Board finds the fencing requirement reasonable particularly because the manufacturing facilities will contain confidential information and the District may rationally require the same level of security at the proposed manufacturing facility as exists currently at its DMV facilities. In drafting this requirement, the District relied upon internal and external market research as well as consultations with potential contractors. Thus, we defer to the District using its business judgment to conclude that fencing from the entrance to the parking lot is required to meet the District's minimum security needs.

V. The Specifications Contained in the Solicitation Do Not Result in a Sole Source Award

Finally, MorphoTrust alleges that the specifications contained in the Solicitation would result in a de facto sole source award to [redacted]. (Protest 19-21.) Yet, the District received [redacted] proposals in response to the RFP. (AR 4.) OCP, through the contracting officer and the Technical Evaluation Panel, determined each of these proposals to be technically compliant and within the competitive range. (Letter from the District (Oct. 9, 2012); Status of the Procurement at Exs. A-D.) The protester disputes the merit of the District's evaluations. (MorphoTrust's Oct. 21 Mot.) In addition, protester argues that the specifications may still be overly restrictive and unreasonable, even if the [redacted] proposals are found to be responsive to the Solicitation. (MorphoTrust's Oct. 21 Mot. 3 fn. 2.)

The Board rejects protester's arguments. We find that the proposal evaluations submitted by the District adequately document its finding that the [redacted] offeror proposals are technically compliant and within the competitive range. (Status of Procurement at Exs. A-D.) These evaluations undermine protester's contention that the Solicitation's requirements would result in

a de facto sole source award to [redacted].[6] Moreover, the very fact that the District received [redacted] responsive proposals bolsters the reasonableness of the specifications contained in the RFP.

CONCLUSION

For the reasons discussed above, we hold that the District did not violate procurement law by requiring overly restrictive specifications in the Solicitation. Accordingly, the present protest is denied.

SO ORDERED.

DATED: November 28, 2012

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

CONCURRING:

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

/s/ Monica C. Parchment
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[6] The Technical Evaluation Panel [redacted]. (Status of Procurement at Ex. B.)

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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

FEI CONSTRUCTION COMPANY	)	
(A Division of Forney Enterprises, Inc.)	)	CAB No. P-0902
	)	
Under Solicitation No. DCFB-2011-B-0167	)	
(Formerly DCAM-2011-B-0167)	)	

For the Protester: Keith Forney, *pro se*. For the District of Columbia: Jon Kulish, Assistant Attorney General, Office of the Attorney General.

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

OPINION

Filing ID #48443291

Forney Enterprises, Inc. ("FEI" or "protester") challenged, pre award, the District's ability to award a contract to any of the following offerors: Consys, Inc. ("Consys"), Specialty Construction Management, Inc. ("Specialty Construction") and Benaka, Inc. ("Benaka") under Solicitation No. DCFB-2011-B-0167. The three offerors were all evaluated as lower responsive bidders than protester. Initially, the protester alleged that each offeror failed to provide one or more required bid documents with its submission. However, in its Agency Report ("AR"), the District rebutted the protester's initial protest grounds by showing that Consys, the lowest bidder and proposed contract awardee, had, in fact, submitted the disputed documents. Subsequently, FEI submitted two supplemental protests to challenge Consys for allegedly being nonresponsive due to the inadequacy of its subcontracting plan and its failure to meet certain work experience requirements set forth in section L.23 of the Solicitation. The District responded with a supplemental AR to explain that the proposed awardee had met each of the requirements at issue. Protester did not file comments to, or otherwise contradict, the District's supplemental AR thereby conceding the factual allegations therein. Those allegations support a finding that Consys was the lowest evaluated responsive and responsible bidder.

The record before the Board shows that the contracting officer reasonably determined that Consys submitted the lowest responsive and responsible bid. Finding no evidence to support protester's allegations and, therefore, no violation of procurement law or regulation on the part of the District, the Board denies the instant protest.

BACKGROUND

On August 24, 2011, the District's Department of General Services ("DGS") issued IFB No. DCFB-2011-B-0167[1] ("IFB" or "Solicitation") on behalf of the Fire and Emergency Medical Services Department. (*See* AR at Ex. 1.) The IFB sought a contractor to "provide all labor, materials, equipment and supervision for the complete renovation and modernization of Engine Company No. 28 . . . and Engine Company No. 29." (AR at Ex. 1, § B.1.) The IFB was designated for the Open Market with a 35% SBE subcontracting set aside for contracts over $250,000. (AR at Ex. 1, § B.2.) The IFB was revised six times prior to the deadline for receipt of proposals. The revisions are as follows: (i) on August 24, 2011, (Amendment No. 0001), the pre-bid conference date was changed; (ii) on September 14, 2011, (Amendment No. 002), the IFB number was changed, responses to questions by prospective bidders were provided and attached to the IFB, and certain sections of the IFB were amended; (iii) on October 7, 2011, (Amendment No. 003), the bid opening date was extended from October 11, 2011, to October 17, 2011; (iv) on October 13, 2011, (Amendment No. 004), the bid opening date was extended to November 7, 2011; (v) on November 7, 2011, (Amendment No. 005), the bid opening date was again extended to November 21, 2011; and (vi) on October 18, 2011, (Amendment No. 006), four attachments were added to the Solicitation including answers to additional questions from prospective bidders, additional specifications, and Special Responsibility Standards under Section L.23. (AR at Ex. 2.)

Relevant Terms of the IFB

Section B.2 of the IFB required a 35% SBE subcontracting set aside for contracts over $250,000.

> § B.2 A bidder responding to this solicitation, unless exempted by Section H.13, must submit with its bid, a notarized statement detailing its subcontracting plan. Bidders responding to this IFB shall be deemed nonresponsive if and shall be rejected if the bidder fails to submit a subcontracting plan that is required by law. For construction contracts in excess of $250,000, at least 35% of the dollar volume of the contract shall be subcontracted in accordance with Section H.13. The Subcontracting Plan shall meet the requirements described under Section H.17 of this solicitation.

(AR at Ex. 1.)

Section H.13 entitled "Mandatory Subcontracting Requirement" expands on this requirement:

[1] The IFB was originally issued by the Department of Real Estate Services, predecessor to the Department of General Services, as No. DCAM-2011-B-0167. (AR at Ex. 5, ¶ 2.)

§ H.13.1 For contracts in excess of $250,000.00, at least 35% of the dollar volume shall be subcontracted to certified small business enterprises; provided, however, that the costs of materials, goods, and supplies shall not be counted towards the 35% subcontracting requirement unless such materials, goods, and supplies are purchased from certified small business enterprises.

§ H.13.2 If there are insufficient qualified small business enterprises to completely fulfill the requirement of paragraph H.13.1, then the subcontracting may be satisfied by subcontracting 35% of the dollar volume to any certified business enterprises; provided, however, that all reasonable efforts shall be made to ensure that qualified small business enterprises are significant participants in the overall subcontracting work.

(AR at Ex. 1.)

Section H.17 details the requirements of a responsive subcontracting plan, stating most pertinently that failure to submit a compliant subcontracting plan would result in the bid being nonresponsive:

> The prime contractor responding to this solicitation which is required to subcontract shall be required to submit with its bid, a notarized statement detailing its subcontracting plan. Bids responding to this IFB shall be deemed nonresponsive and shall be rejected if the bidder is required to subcontract in accordance with the provisions of Section H.13, H.14 or H.15, but fails to submit a subcontracting plan with its bid.

(AR at Ex. 1.)

Section L.23 – Special Standards of Responsibility – required offerors to demonstrate that they or their subcontractors had particular experience in the areas of placement of formwork, steel reinforcement, and masonry restoration. Section L.23, as revised by Amendment 0006, contains the following language:

§ L.23.6 For the cast-in-place requirement the contractor or its subcontractor shall provide evidence with its bid that it or its subcontractor specializes in placement of formwork, reinforcing steel, and concrete with a minimum of 3 years' experience on projects of similar size and scope.

§ L.23.7 For clay masonry restoration and cleaning the contractor or its subcontractor shall provide evidence with its bid that it

> or its subcontractor is an experienced, preapproved masonry restoration and cleaning firm. Evidence that the company has completed work similar in material, design, and extent to that indicated for this Project with a record of successful in-service performance. Experience installing standard unit masonry is not sufficient experience for masonry restoration work.
>
> § L.23.8 Bids submitted in response to this IFB shall be deemed non-responsible and shall be rejected of [sic] the bidder fails to submit with its bid the above information required by Paragraph L.23.
>
> (AR at Ex. 2.)

Bid Evaluations and the Protest

On November 21, 2011, DGS publicly opened the eight bids that it received in response to the IFB. (AR at Ex. 5, ¶ 7.) During the bid opening process, "bid prices were publicly read out aloud and recorded on the Bid Tabulation Sheet." (*Id.*; *see also* AR at Ex. 4.) Also during the public opening, LSDBE/CBE (Certified Business Enterprise) preference points for each bidder were recorded and the appropriate percentage reductions were applied to calculate the evaluated prices. (AR at Ex. 5, ¶ 7.) The District determined that Consys was the lowest responsive bidder after the appropriate price reductions were applied. (*See* AR at Ex. 4.) Specialty Construction and Benaka were ranked second and third, respectively. (AR at Ex. 4.)

FEI filed the instant protest with the Board on November 23, 2011, in advance of the actual award notification by the District, to challenge any award to Consys, Specialty Construction or Benaka. (Protest 1, Nov. 23, 2011.) The District responded by filing the AR on December 15, 2011. Protester filed a Supplemental Protest on December 16, 2011, (Project Award Protest – Supplemental [hereinafter 1st Supplemental Protest]), and a Supplemental Submission II on January 17, 2012, (Project Award Protest – Supplemental Submission II [hereinafter 2nd Supplemental Protest]). The District filed a Supplemental AR in opposition to the first and second supplemental protests. (District's Supplemental AR in Opp'n to First and Second Supplemental Protests and Protest of FEI Constr. Co. dated Jan. 23, 2012 [hereinafter Supplemental AR].) Protester did not file comments to the Supplemental AR.

On February 15, 2012, the District completed its evaluation of the "responsibility of Consys pursuant to IFB Section L.22 *Standards of Responsibility*, and L.23 *Special Standards of Responsibility*" and found that Consys, the proposed awardee, had the capacity to perform the contract. (Letter to the Board, Feb. 16, 2012.) The District then filed a "Determination and Findings of Responsibility" on February 16, 2012, and a "Determination and Findings to Proceed with Contract Award While a Protest is Pending" on March 15, 2012, (together, the "D&Fs"). Protester did not file comments challenging the D&Fs.

DISCUSSION

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

In its initial protest, FEI alleged that Consys, Specialty Construction and Benaka had failed to include one or more documents that each offeror was required to submit with its bid. (Protest 1.) In particular, FEI cited the requirement for a subcontracting plan in Section B.2 and the requirement for cast-in-place and masonry restoration experience in Section L.23. (*Id.*) However, after FEI filed the protest, the District's responding AR indicated that Consys had, in fact, submitted a subcontracting plan and other documents to establish its compliance with Section L.23. (AR 5, ¶ 11, AR 7.) According to the District, DGS was processing Consys, as the lowest responsible bidder, for contract award. (AR 4, ¶ 8.)

As a result, FEI subsequently challenged any contract award to Consys specifically. (*See* 1st Supplemental Protest.) And, although it no longer asserted that Consys had failed to include a subcontracting plan in its bid, the protester nonetheless alleged that the inadequacy of the subcontracting plan rendered Consys' bid nonresponsive. (*Id.*) For example, protester contended that Consys' subcontracting plan (i) consisted of unrealistic pricing for the interior renovation work, (ii) included subcontractors for demolition and waste management that were not properly certified to perform the proposed work, (iii) was mathematically unsustainable, and (iv) was not certified due to the absence of a notary seal. (1st Supplemental Protest 1-2; 2nd Supplemental Protest, ¶ 1.a.) In addition, protester alleged that Consys failed to meet the special standards of responsibility under Amendment 6 which required each bidder to demonstrate that its designated subcontractor possessed "a minimum of three years' experience on projects of similar size and scope for cast-in-place concrete." (1st Supplemental Protest 3; 2nd Supplemental Protest, ¶ 1.b.) Because protester has ceded one of its initial protest grounds by acknowledging that Consys had submitted a subcontracting plan, the Board's review of the record is therefore narrowed to the remainder of protester's allegations concerning (A) the adequacy of Consys' subcontracting plan, including whether it was properly certified, and (B) Consys' compliance with the requirements set forth in Section L.23 of the IFB.

The Board notes that protester has not filed an opposition to the Supplemental AR or challenged the D&Fs. The Board rules provide, in pertinent part:

> 307.3 Failure of the protester to file comments, or to file a statement requesting the case be decided on the existing record, or to request an extension of the time for filing, shall result in the closing of the record of the case and may result in dismissal of the protest.
>
> 307.4 When a protester fails to file comments on an Agency Report, factual allegations in the Agency Report's statement of facts not otherwise contradicted by the protester, or the documents in the record, may be treated by the Board as conceded.

Pursuant to Board Rule 307.4, we will therefore treat as conceded statements of facts in the Supplemental AR not otherwise contradicted by the protester or by any other documents in the record.

A. The Subcontracting Plan

FEI claimed that the subcontracting plan submitted by Consys as part of its bid was mathematically unsustainable, incomplete, and failed to satisfy the Solicitation's CBE requirement. (1st Supplemental Protest 1-2.) Since the District determined Consys to be the lowest responsive bidder, protester is therefore challenging the validity of the District's evaluation of the bids. "In reviewing a protest which challenges the propriety of an agency's evaluation of proposals, it is not the function of the Board to independently evaluate proposals and to substitute the Board's judgment for that of the agency." *Emergency Assocs. of Physician's Assistants & Nurse Practitioners, Inc.*, CAB No. P-0500, 46 D.C. Reg. 8527, 8532 (Dec. 15, 1998). However, we will "examine the record to determine whether the judgment was reasonable and in accord with the evaluation criteria listed in the solicitation and whether there were any violations of procurement laws or regulations." *Health Right, Inc., D.C. Health Coop., Inc., & The George Washington Univ.*, CAB Nos. P-0507, P-0510, P-0511, 45 D.C. Reg. 8612, 8635 (Oct. 15, 1997); *Trifax, Corp.*, CAB No. P-0539, 45 D.C. Reg. 8842, 8847 (Sept. 25, 1998). Yet, "the protester has the burden of affirmatively proving its case and the fact that the protester does not agree with the agency's technical conclusions does not itself render the evaluation unreasonable." *Emergency Assocs. of Physician's Assistants & Nurse Practitioners, Inc.*, CAB No. P-0500, 46 D.C. Reg. at 8532.

In this case, protester's allegations concerning the acceptability of Consys' subcontracting plan have been refuted by the District in its initial AR and the subsequent Supplemental AR. First, protester's assertion that Consys had failed to include a subcontracting plan in its bid was disproven by the District in the initial AR. (*See* AR 5, 7.) Second, in the Supplemental AR, the District explained that Consys was deemed responsible having satisfied the relevant CBE subcontracting requirements. (*See* Supplemental AR 6-12.) And, inasmuch as FEI failed to provide the Board with comments to the District's Supplemental AR, or evidence contradicting it, protester failed to meet its burden of affirmatively proving that Consys' subcontracting plan did not satisfy the Solicitation's requirements. As a consequence, the Board will treat as conceded the District's factual allegations in the Supplemental AR, including the finding of adequacy regarding Consys' subcontracting plan.

FEI has also alleged that Consys' bid was not properly notarized and therefore not properly certified. In fact, protester specifically questioned the expiration date of the notary's commission in Consys' bid. (2nd Supplemental Protest ¶ 1.a.ii.3.) The bid was notarized by Ms. Kelly Hayes and, according to the certificate of appointment, the State of Maryland issued her a commission effective October 12, 2010, through October 12, 2014. (AR at Ex. 9.) As such, Ms. Hayes' commission was inarguably valid when she notarized Consys' bid. For the aforementioned reasons, the Board denies FEI's protest grounds concerning both the adequacy and certification of Consys' subcontracting plan.

B. Special Standards of Responsibility

The protester has claimed that in order to meet the IFB's cast-in-place experience requirement, Consys relied on a subcontractor that does not have the requisite experience on projects of similar size and scope. (2nd Supplemental Protest ¶ 1.b.ii.) FEI therefore asserts that Consys must be deemed nonresponsive[2] for failing to meet the IFB's special standards of responsibility. (*Id.*)

We have held that definitive responsibility criteria or special standards of responsibility are specific and objective standards designed to measure a prospective contractor's ability to perform the contract. *M.C. Dean*, CAB No. P-0505, 45 D.C. Reg. 8664, 8669 (Dec. 3, 1997). As a result, "[w]here an allegation is made that definitive responsibility criteria have not been satisfied, we will review the record to ascertain whether evidence of compliance has been submitted from which the contracting officer could reasonably conclude that definitive criteria have been met." *(Id.)* In *Cent. Armature/Fort Meyer Joint Venture*, CAB No. P-0478, 44 D.C. Reg. 6823, 6828-29 (June 6, 1997), the Board clearly stated the scope of the Board's review of a responsibility determination involving special standards of responsibility.

> It is well settled that the Board will not overturn an affirmative responsibility determination unless a protester can show fraud or bad faith on the part of the contracting officials, a bidder's failure to adhere to definitive responsibility criteria, or that such a determination lacked any reasonable basis. A contracting agency has broad discretion in determining whether bidders meet definitive responsibility criteria since the agency must bear the burden of any difficulties experiences in obtaining the required performance. When a solicitation contains definitive responsibility criteria, which are specific and objective standards established by an agency to measure a bidder's ability to perform a particular contract, the agency must obtain evidence that the bidder meets those criteria.
>
> * * *
>
> The scope of our review is focused on ascertaining whether evidence of compliance has been submitted from which the contracting officer reasonably could conclude that the definitive responsibility criteria had been met. The relative quality of the evidence is a matter for the judgment of the contracting officer. Nevertheless, we also insist on the presence of objective evidence

[2] Protester describes this alleged deficiency as an issue of responsiveness because it claims that Consys failed to submit the required documentation under Section L.23. (*See* 2nd Supplemental Protest ¶ 1.b.ii.) However, Section L.23.8 describes the above as a responsibility matter. The Board has also clarified that information concerning contractor experience and the ability to perform fully the contract requirements relate to bidder responsibility, not bidder responsiveness. *See Space Master Internat'l, Inc.*, CAB No. P-0380-A, 41 D.C. Reg. 3687, 3689 (Oct. 20, 1993).

> demonstrating compliance with the definitive responsibility criteria.
>
> *Id.*

The IFB stated that "[f]or the cast-in-place requirement the contractor or its subcontractor shall provide evidence with its bid that it or its subcontractor specializes in placement of formwork, reinforcing steel, and concrete with a minimum of 3 years' experience on projects of similar size and scope." (AR at Ex. 2 § L.23.6.) Consys proposed G & D Construction, LLC ("G&D") as its subcontractor for all cast-in-place work and provided three past performance evaluations of G&D. (AR at Ex. 13C, at Exs. 16,17.) The performance evaluations provided evidence that G&D has been performing cast-in-place work from, at least, May 2008 to January 2012.

Based on the foregoing,[3] the contracting officer's conclusion that Consys' bid satisfied the experience requirements set forth in Section L.23.6 was reasonable. Moreover, since the protester has not alleged or established fraud or bad faith on the part of the contracting officer, there is no basis for this Board to invalidate the contracting officer's responsibility determination of Consys.

CONCLUSION

The Board finds that the protester has not shown that the contracting officer wrongly determined that Consys submitted the lowest responsive and responsible bid to the Solicitation. Having found no violation of procurement law or regulation on the part of the District, we deny the instant protest.

SO ORDERED.

DATED: December 14, 2012

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

CONCURRING:

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

[3] Protester has also alleged that TPM Group, LLC (Consys' proposed subcontractor for demolition and waste management) lacks the requisite demolition and waste management experience to meet its obligations under the subcontracting plan. (1st Supplemental Protest ¶ 1.b.) However, waste management and demolition are not listed under Section L.23 as tasks requiring any specific certification or work experience.

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

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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

DUANE A. BROWN	)	
	)	CAB No. P-0914
Under Solicitation No. 0014-2012	)	

For the Protester: Duane A. Brown; *pro se*. For the District of Columbia Housing Authority: Qwendolyn N. Brown and Mashanda Y. Mosley; District of Columbia Housing Authority, Office of the General Counsel.

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

OPINION

Filing ID #48419099

The protester, Duane A. Brown, challenges the terms of Solicitation No. 0014-2012 issued by the District of Columbia Housing Authority ("DCHA") which, as it relates to this protest, prohibits individuals who are landlords under the DCHA Housing Choice Voucher Program ("HCVP") from simultaneously serving as an Administrative Hearing Officer ("AHO") for HCVP matters. Because the protester is both a HCVP landlord and a prospective contractor seeking to perform the subject AHO contract, it contends that the Solicitation's prohibition on maintaining this dual role is unreasonable and arbitrarily restrictive.

The Board, having reviewed the record in this matter, finds the protest to be without merit. The protest is, therefore, denied.

FACTUAL BACKGROUND

On May 7, 2012, DCHA issued Solicitation No. 0014-2012 ("Solicitation"), seeking individuals who are members of any attorney bar to serve as AHOs and primarily to preside over low-income public housing hearings, including HCVP informal hearings pursuant to D.C. MUN. REGS. tit. 14, ch. 89, in addition to other related responsibilities. (Agency Report ("AR") Ex. 1 at 2-5.) DCHA is a large, public housing authority that manages over 8,000 public housing units for purposes of providing quality, affordable housing for individuals within the District of Columbia. (AR 3.) In this regard, the ultimate awardees under the Solicitation were required to conduct administrative hearings in the areas of federal housing and/or landlord tenant laws as administered by DCHA's Office of Fair Hearings.[1] (AR Ex. 1 at 2.)

The Solicitation contemplated a one-year fixed-price contract for each awardee with two one-year option periods after completion of the base contract year. (AR Ex. 1 at 7.) The closing

[1] DCHA's Office of Fair Hearings provides a forum to hear grievances brought by residents of Low Income Public Housing ("LIPH") and the participants of the HCVP. (AR Ex. 1 at 2.)

date for the Solicitation was on June 6, 2012, and the protester submitted a timely proposal in response to the Solicitation. (*Id.* at 9; AR 3.)

On June 4, 2012, before the closing date for receipt of proposals, the protester filed the present protest with the Board.[2] (Acknowledgement of Receipt of Notice of Protest Filing and Request for Agency Report 1.) The initial protest filed with the Board primarily challenged the language of the Solicitation which prohibits individuals who are HCVP landlords from providing AHO services adjudicating HCVP cases. (Protest 4.) The contested Solicitation provision states as follows:

> To prohibit impermissible conflicts of interest, Contractor shall be strictly prohibited from participating in DCHA's [HCVP] as a participant, applicant, and/or landlord…. Failure of the Contractor to comply with the aforementioned requirements may be grounds for either a reduction in cases or termination of the Contract, in accord with the Termination Clause.[3]

(AR Ex. 1 at 4.)

The protester largely takes issue with the District's assertion in the Solicitation that it is an "impermissible conflict of interest" for AHOs to also act as HCVP landlords.[4] (*See* Protester's Comments on AR 2-5.) The protester's challenge to this provision primarily stems from its contention that it has historically acted in this dual capacity for DCHA without any resulting inconvenience or impropriety to the agency, and also because of the protester's belief that acting in this dual capacity for DCHA – as HCVP AHO and landlord – does not, in fact, present a conflict of interest situation because the protester does not receive federal assistance through DCHA. (*Id* at 3-5; Protest 3.) The protester also argues that eliminating its ability to act as an AHO under the disputed contract will substantially impact the protester's potential revenue. (Protest 4.)

In response to these allegations, the District contends that the Solicitation's conflict of interest provision that is at issue in this matter is consistent with the Solicitation's conflict of interest certification requirement. (AR 4.) This certification requirement mandates that offerors must represent, amongst other things, that they are not a DCHA contractor with a financial or ownership interest in real property whereby the owner receives a subsidy payment through

[2] Subsequent to the filing of this protest, the District moved the Board for summary dismissal of this matter on jurisdictional grounds. The Board denied the motion on September 26, 2012, and ordered the District to immediately file its Agency Report in response to the original protest allegations.

[3] This provision also includes ancillary language prohibiting the awardee from being a resident or applicant of the HCVP and LIPH. (AR Ex. 1 at 4.) The initial protest, however, only challenges the HCVP conflict of interest provisions, and not the LIPH related restrictions.

[4] The protester also contends that it was given an ambiguous definition of an "impermissible conflict of interest" during the pre-bid question period. (Protest 2-3; Protester's Comments on AR 2-4.) However, the Board finds that, in more than one instance in the District's pre-bid question exchange with offerors, it made clear that the Solicitation would unquestionably prohibit AHOs from also being landlords in the HCVP. (AR Exhibit 1, Addendum No. 1.)

DCHA.[5] (AR Ex. 1, Attachment K.) More specifically, offerors were required to certify that they complied with the following statement:

> ***No officer, employee, contractor or agent of DCHA, or its subsidiaries, may have a financial or ownership interest***, direct or indirect, in any real property included, or proposed to be included, in any real estate development or redevelopment project of DCHA, or its subsidiaries, **or *in any real property whereby the owner receives a federal or local housing subsidy administered by DCHA***.

(*Id.* (emphasis added).)

While DCHA effectively admits that in the past offerors were not required to certify compliance with these types of conflicts of interest in their proposals for similar AHO services, it, nonetheless, maintains that this new disclosure requirement is reasonable and consistent with the Solicitation's prohibition on "impermissible conflicts of interest" for all offerors. (AR 5-6.) Accordingly, DCHA argues that the Solicitation's prohibitions precluding the contract awardee from being a landlord and/or having a financial interest in property whereby the owner receives a subsidy rent payment from DCHA are directly applicable to protester. (AR 5.)

By way of background, DCHA notes that it receives housing subsidy funding from the U.S. Housing and Urban Development ("HUD"), which is administered by DCHA on behalf of HUD. (AR 3-4.) DCHA, in turn, contracts with hundreds of landlords, such as the protester, within the District of Columbia to provide affordable housing through a contractual arrangement which establishes the rent subsidy payment that the landlord will receive from DCHA for providing housing under the HCVP. (AR 4.) The HCVP landlord continues to receive these federal housing subsidy payments from DCHA on a monthly basis for the term of its contract with DCHA so long as its housing unit remains occupied by an HCVP tenant. (AR 4.) As a result, the District maintains that the protester's personal financial interest in the HCPV program as a landlord impairs its ability to act, or be viewed, as a fair and neutral arbiter of HCVP related cases for DCHA. (AR 7-8.)

As detailed below, the Board finds that the Solicitation terms, seeking a neutral arbiter of HCVP related claims, reasonably restricted the contract from being performed by individuals that have a personal financial interest in the HCVP activities.

DISCUSSION

The Board exercises jurisdiction over this protest and its underlying allegations pursuant to D.C. CODE § 2-360.03(a)(1).

[5] DCHA contends that the protester provided a material misrepresentation in this certification by failing to disclose his HCVP landlord status when certifying that no real or apparent conflict of interest existed. (AR 6.) The protester denies making such a misrepresentation as it does not believe that its landlord status constitutes a conflict of interest with regard to this procurement. (Protester's Comments on AR 6-7.)

As set forth herein, the present protest involves a challenge by the protester to the terms of the Solicitation which specifically preclude the ultimate awardee from simultaneously participating in DCHA's HCVP program as a landlord while performing contractual services for DCHA as an AHO. The protester argues that these conflict of interest provisions are, therefore, unreasonable and unduly restrictive in limiting its ability to compete for the subject contract. (Protester's Comments on AR 5.)

District of Columbia procurement statutes aim to provide bidders with adequate opportunities to bid by promoting full and open competition, to the extent possible, in government procurement. D.C. CODE § 2-351.01(b)(3); *see also* D.C. MUN. REGS. tit. 27, §§ 2500.1, 2500.2 (2002). Notwithstanding, solicitation provisions that restrict competition may still be deemed permissible if they are necessary to meet the District's minimum needs. *Gen. Oil Corp.*, CAB No. P-0181, 38 D.C. Reg. 3059, 3060 (Apr. 20, 1990) (citing *Am. Motohol Supply Corp.*, 38 D.C. Reg. 2998, 3001 (Nov. 21, 1989)).

In determining whether a solicitation provision unduly restricts competition, the Board looks to whether the challenged provisions are a reasonable element in obtaining the District's actual minimum needs. *Am. Motohol Supply Corp.*, 38 D.C. Reg. at 3001. The determination of an agency's minimum needs involves great discretion, *Am. Motohol Supply Corp.*, 38 D.C. Reg. at 3002, and, accordingly, the Board will give deference to the agency's technical judgment, *Koba Assocs., Inc.*, CAB No. P-0325, 40 D.C. Reg. 5023, 5032 (Mar. 12, 1993). *See also, Beretta U.S.A. Corp.*, CAB No. P-0144, P-0177, 38 D.C. Reg. 3098, 3120-21 (Aug. 23, 1990) (stating that government contracting officials are in the best position to know the government's actual needs when making decisions to limit competition). The Board will uphold the agency's determination of its actual minimum needs unless the decision is arbitrary or unreasonable. *Beretta U.S.A. Corp.*, CAB No. P-0144, P-0177, 38 D.C. Reg. at 3121 (citations omitted).

This foregoing standard applies to challenges to definitive responsibility criteria as well as to performance specifications. *See Am. Motohol Supply Corp.*, 38 D.C. Reg. at 3002. The protester bears the burden of showing, by a preponderance of the evidence, that the agency has impermissibly restricted competition. *Koba Assocs.*, CAB No. P-0325, 40 D.C. Reg. at 5032; *see also Am. Motohol Supply Corp.*, 38 D.C. Reg. at 3002 ("Any contractor attempting to prove the government's determination [of its minimum needs] objectionable bears a heavy burden.").

In the instant case, the Solicitation seeks licensed attorneys to act as impartial arbiters, or AHOs, to adjudicate administrative disputes related to federal housing and landlord/tenant law as administered by DCHA's Office of Fair Hearings, which necessarily includes DCHA's administration of the HCVP. (AR Ex. 1 at 2-4.) Given that the contract awardees are required to assume an impartial adjudicatory role, the Board finds it reasonable that the terms of the Solicitation bar from the competition offerors that have a conflict of interest, or the appearance of a conflict of interest, or who otherwise compromise the integrity of the HCVP decisions which they would render while performing the contract, as the District contends is the case with the protester.

The parties do not dispute that the protester is, in fact, a landlord having a contractual relationship with DCHA to provide low income housing to DCHA-approved tenants. (*See*

Protest 1.) The protester, in this capacity, receives monthly payments originating from HUD, which are ultimately administered and paid to the protester directly by DCHA in the form of a rent subsidy payment, in addition to any additional amounts required to be paid to the protester directly from the tenant. (AR 4.) By all accounts, these facts undeniably lead to the conclusion that the protester has a personal financial interest in the housing activities of the HCVP. Furthermore, the protester would also be responsible for adjudicating complaints by HCVP tenants, applicants, and community members lodged against the very agency (DCHA) from which the protester receives monthly payments.[6] *See* D.C. MUN. REGS. tit. 14, § 8901.1. Given these circumstances, protester's status as an HCVP landlord was reasonably deemed by DCHA to be a conflict of interest given the nature of the impartial adjudicatory services required by the Solicitation for individuals providing AHO services involving HCVP and DCHA.

Indeed, as the Board has previously held, "[i]t is well settled that a contracting agency may impose a variety of restrictions, not explicitly provided for in [statutes] or other applicable regulations, when the needs of the agency or the nature of the procurement dictates the use of such restrictions." *American Motohol Supply Corp.*, 38 D.C. Reg. at 3002. Consequently, in light of this legal standard and the facts in this case, the Board finds that the challenged restriction in the Solicitation which precluded an awardee from having a simultaneous outside financial interest in the HCVP program, as property owner or landlord, was a reasonable restriction imposed by the agency in meeting its need to award the contract to individuals that would act, and be viewed, as neutral arbiters in rendering HCVP administrative decisions.[7] In short, the protester has not met its burden of showing that the Solicitation's conflict of interest restrictions are not, in fact, reasonably related to the District's actual minimum needs. *See, e.g.*, *Gen. Oil Corp.*, CAB No. P-0181, 38 D.C. Reg. at 3060 ("[a]ny Contractor attempting to prove the government's determination objectionable bears a heavy burden.").

CONCLUSION

For the reasons discussed above, the Board finds that the District's conflict of interest provision in the Solicitation, which is the subject of this protest, was reasonably included in the Solicitation by the agency to meet the necessary contract performance requirements for AHO services and did not constitute an improper restriction on competition.[8] The protest is, therefore, denied.

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[6] The District also asserts that, as an AHO, the protester would also have the authority to render decisions against tenants which could ultimately impact the overall financial interests of HCVP landlords including protester thereby potentially impacting his impartiality. (AR 7-8.)

[7] The protester attempts to argue that HCVP landlords were not intended to be covered by DCHA's conflict of interest provisions in the Solicitation. (Protester's Comments on AR 2-5.) However, this contention is clearly refuted by the express terms of the Solicitation which clearly identify HCVP landlords and property owners receiving subsidy rent payments from HCVP as having a conflict of interest that must be disclosed to DCHA in their proposal submission. (AR Ex. 1 at 4.)

[8] The Board makes no findings in response to the District's allegation that the protester materially represented its possible conflict of interest in connection with its HCVP landlord activities in its proposal as this is an administrative issue outside of the jurisdiction of the Board.

SO ORDERED.

DATED: December 13, 2012

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

CONCURRING:

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

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

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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

SEAGRAVE FIRE APPARATUS, LLC)
) CAB No. P-0928
Solicitation No: DCFB-2011-R-0093A&B)

For the Protester: A. Joseph Neiner; *pro se*. For the District of Columbia: Talia Sassoon Cohen, Esq., Assistant Attorney General.

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

ORDER DISMISSING PROTEST
Filing ID #48536195

The protester, Seagrave Fire Apparatus, LLC ("Seagrave"), challenges the District's decision to reject its proposal from receiving the contract award for allegedly not offering to meet the Solicitation's warranty requirements. In response to the protest, the District timely filed an Agency Report in this matter contending that the rejection of the protester's offer was proper because it was noncompliant in failing to meet the mandatory warranty requirements in the Solicitation. The protester has repeatedly failed to refute the assertions in the Agency Report that its proposal was properly rejected for being noncompliant after having been given two opportunities by the Board to further respond to these matters. Moreover, the protester seemingly concedes in its initial protest filing that its proposal did not offer to meet the Solicitation's warranty requirement.

Consequently, based upon the protester's failure to prosecute this matter beyond the filing of the initial protest, coupled with the fact that the protester also has not refuted the assertions made in the Agency Report, the Board hereby closes the record in this matter and dismisses the present protest.

DISCUSSION

Seagrave filed the present action on October 5, 2012, challenging the District's determination that its proposal was technically unacceptable for award because it did not meet the product warranty requirements in the subject Solicitation. (Protest 2-4.) By way of background, Solicitation No. DCFB-2011-R-0093A&B (the "Solicitation") was issued on behalf of the District of Columbia Fire and Emergency Services agency ("FEMS") seeking a contactor(s) to provide Pumper and Aerial Trucks to FEMS according to specifications set forth in the Solicitation. (Agency Report ("AR") 2.) The District utilized a two-step bidding process under the Solicitation whereby the District first evaluated initial proposals and then subsequently requested that offerors submit a second sealed priced bid for further evaluation, if their initial proposal was determined to be acceptable. (*Id.*) The protester responded to the Solicitation with

an offer to provide the District with the required Aerial Trucks which was later rejected for award. (*Id.* at 3-5.)

The protester contends in its protest that, before the ultimate rejection of its proposal, it was originally notified by the District that it had received the contract award after completion of the two-step Solicitation process. (Protest 3.) The protester expressly requests reinstatement of that alleged original award decision. (*Id.* at 4.) Nonetheless, the protester effectively appears to concede in its protest that its proposal did not meet the Solicitation's extended warranty requirement by noting that it subsequently advised the District that it would "pick up the [warranty] coverage" through a September 24, 2012, letter to the District, after the submission of its original proposal. (*Id.* at 4.)

In response to the protest, on October 31, 2012, the District filed its Agency Report under seal due to the governing protective order in this case which does not allow the unrepresented protester to have access to the District's confidential source selection information related to this procurement. The District also provided the protester with notice that it had filed the Agency Report on October 31, 2012. The Agency Report contends that the District's ultimate decision to exclude the protester from receiving the contract award was reasonably based upon the fact that the protester's proposal took exception to, and did not comply with, the five-year warranty requirement. (AR 5-6.)

The District further asserts that, due to a minor administrative error, the protester was erroneously notified that it had received the contract award although the agency had not yet received authorization from the Office of the Attorney General ("OAG") and the District of Columbia Council to award the contract to any company.[1] (*Id.* at 4 n.2.) Additionally, the District contends that the protester's proposal should have been formally rejected for award, before the second bidding phase, because of its noncompliance with the Solicitation's warranty requirements, although this did not occur because of some other administrative error that occurred within the agency during the bidding process.[2] (*Id.* at 3-4.)

Board Rule 307.1 requires a protester to file comments within seven business days in response to an agency report filed with the Board in a protest. The protester, however, did not file any comments or response to the October 31, 2012, Agency Report with the Board within this required timeframe. Nevertheless, on November 15, 2012, the Board ordered the District to file a public redacted version of its Agency Report by November 19, 2012, and to provide the protester with a copy of the same. (Nov. 15, 2012, Sua Sponte Order.) The Board's Order further directed the protester to file its comments to the public redacted version of the Agency Report, if any, by November 30, 2012. *(Id.*) This was the protester's second opportunity to

[1] In particular, the District's Agency Report represents that due to an administrative error, the District's contract specialist, through the District's electronic procurement system, issued an automatic email notifying the protester that it had been awarded the contract. (AR 4 n.2.) However, because the subject procurement is valued above $1 million, the proposed contract required a legal sufficiency review and approval by the OAG and the Council before the District could issue a formal award notification to any company. At the time of the filing of this Agency Report, the District represented that the OAG had not approved the proposed award to any offeror and, thus, the District asserts that the original notice of award was issued to Seagrave in error. (*Id.*)

[2] The evaluation record in this matter is consistent with the District's statement that the protester's proposal was immediately identified by the District as being noncompliant with the Solicitation's warranty requirement. (AR Ex. 3.)

respond to the District's Agency Report beyond the original deadline of November 9, 2012, for the protester's comments.

The District ultimately filed a publicly available redacted version of the Agency Report on November 26, 2012, that was made available to the protester on this same date.[3] The protester, however, for the second time, failed to file any comments or response to the redacted Agency Report by November 30, 2012, as ordered by the Board. Additionally, as of the date of the issuance of the present Order, the protester has failed to file any comments although over three weeks have passed since the redacted Agency Report was made available to the protester on November 26, 2012.

Under the Board's rules, upon the protester's failure to file comments to an Agency Report filed in a protest, or to file a statement requesting that the case be decided on the record, or to request an extension of time for filing, it shall result in the closing of the record for the case and may also result in dismissal of the protest. Board Rule 307.3. Further, when the protester fails to file comments on the Agency Report, and the facts in the Agency Report are not otherwise contradicted by the protest, the Board may treat the factual allegations in the Agency Report as conceded by the protester. Board Rule 307.4. Given that the protester has failed twice to respond to the Agency Report to contradict the District's assertions, the Board hereby closes the record in this matter pursuant to Board Rule 307.3, as it relates to the protester's original protest allegations and the District's response thereto.

Moreover, by repeatedly not filing a response to the Agency Report, the protester has in no way contradicted the District's assertion in the Agency Report that its proposal did not comply with the Solicitation's warranty requirements and was, therefore, properly deemed unacceptable for award by the District. Additionally, as noted above, Seagrave, in its initial protest, in at least one instance, seems to admit that it did not meet the Solicitation's warranty requirements.[4] Thus, in light of the protester's failure to even attempt to further refute the District's evidence that its proposal was noncompliant, the Board treats these facts in the Agency Report as conceded by the protester.[5]

The protester has, however, filed a rather vague challenge to the District's recently filed Determination and Findings to Proceed with Contract Award while Protest is Pending ("D&F") pursuant to D.C. CODE § 2-360.08(c).[6] The District contends in this document that it is

[3] The District filed proposed redactions to the Agency Report for public release, under seal, on November 21, 2012, for the Board's approval. A final publicly available version of this same redacted document was filed on November 26, 2012, by the District, after the Board's approval, and was made publicly available to the protester on this same date by service through the Board's Lexis/Nexis electronic filing system.

[4] The pre-award evaluation record also includes correspondences from Seagrave, in response to the District's inquiry requesting more details about the extent of its proposed warranty coverage, confirming that Seagrave's proposed extended five year limited warranty would not cover any component parts once the component parts warranty expired. (AR Ex. 5.) In this regard, Seagrave provided the example of Meritor axles on its proposed Aerial Trucks, which would not have a warranty beyond two years. (*Id.*)

[5] The Board also accepts as conceded by the protester the District's assertion in the Agency Report that, due to an administrative internal error within the agency, the protester was erroneously notified that it had received the contract award before any award decision had been approved by the OAG or Council.

[6] The Board notes that the D&F only discusses the District's urgent need to proceed with the contract performance as it relates to the Aerial Truck portion of the contract presumably because the protester only offered to provide this

necessary for the agency to proceed immediately with the performance of the present contract for Aerial and Pumper Trucks to update, and supplement, its aging fleet of vehicles to ensure the reliability and continuity of fire and emergency medical services that are provided to city residents by the District through the use of these vehicles. (D&F 2-3.) The protester's primary objection to the D&F seems to be its belief that it "nullifies" the protest process at the Board, along with its somewhat confusing assertion that certain dates in the D&F are contrary to the dates in certain exhibits. (Protester's Challenge to D&F.) Nonetheless, by virtue of the explanations included in the D&F, the Board finds that the District has provided substantial evidence of its need to ensure the provision of reliable fire and emergency services, which necessarily requires the periodic, and now immediate, replacement of aging FEMS vehicles under the disputed contract, and that this is an urgent and compelling basis to proceed with its immediate performance.

Accordingly, in light of the factors discussed herein, the protest is dismissed for failure to prosecute this action by the protester beyond the initial filing of its protest. The Board, further, finds that the D&F decision was proper for the reasons set forth herein although this D&F issue is effectively rendered moot by this order of dismissal.

SO ORDERED.

Date: December 20, 2012

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

CONCURRING:

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

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

Electronic Service:

A. Joseph Neiner
Chairman & CEO
Seagrave Fire Apparatus, LLC
105 East 12th Street

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particular equipment, and not the additional Pumper Trucks that could also be offered under the Solicitation at the offeror's option. (*See* D&F 1.)

Seagrave Fire Apparatus, LLC
CAB No. P-0928

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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

NASTOS CONSTRUCTION INC.,	)	
	)	CAB No. P-0883
	)	
Solicitation No: DCKT-2011-B-0016	)	

ORDER DISMISSING PROTEST
Filing ID #48569406

By Order dated June 6, 2011, the Board denied Nastos Construction, Inc.'s ("protester") Motion to Strike the District's Agency Report in the instant protest and approved the May 24, 2011, filing of that Agency Report. Since the Board issued its Order, the protester has not filed a response to the Agency Report. Additionally, the Chief Procurement Officer determined to proceed with award of the contract on November 17, 2011. The protester did not file a motion with the Board to challenge such award. Pursuant to D.C. Mun. Regs. tit. 27, §307.3 (2002), the failure of a protester to file comments to an agency report results in closing of the record, and may result in dismissal.

The protester herein has demonstrated a persistent pattern of failure to prosecute this action. It has since become moot through the District's award of the contract to Forney Enterprises, Inc. on February 13, 2012. Accordingly, we dismiss this matter pursuant to §307.3.

SO ORDERED.

Date: December 21, 2012

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

CONCUR:

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

Electronic Service:

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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

APPEAL OF:

CIVIL CONSTRUCTION, LLC	)	
	)	CAB Nos. D-1294, D-1413, and D-1417
	)	
Under Contract No. POKA-2004-B-0018-JJ	)	

For the Appellant, Civil Construction, LLC: Robert A. Klimek Jr., Esq., Leonard C. Bennett, Esq., Klimek & Casale, P.C.; Christopher M. Kerns, Esq. For the District of Columbia: Brett A. Baer, Esq., Office of the Attorney General.

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

OPINION

Filing ID #51146070

These consolidated appeals arise under a contract for the reconstruction of a six block span of paved street-way, on F Street, in the northwest corridor of the District of Columbia. It is undisputed by the parties that, after the initial contract award, the District subsequently modified the terms of this contract to significantly alter the order in which the Appellant was required to perform the sequence of the project's construction activities under the contract's original traffic maintenance plan. However, the parties dispute the resulting delay impact to the project, and associated quantum of damages incurred by the Appellant, arising from this change order. In this regard, the present action initially arises from the Appellant's appeal of the contracting officer's decision to only grant a 90 day time extension and $204,000.00 in additional compensation to the Appellant in connection with the subject change order issued by the District that modified the sequence of the project construction activities. The Appellant also appeals from the deemed denial of its claims seeking unabsorbed overhead incurred under its extended contract performance in connection with this same contract change.

We sustain the appeal, in part, and find the Appellant entitled to a time extension of 166 days arising from the subject District-ordered change, as well as related damages from the District associated with the Appellant's increased labor, equipment, and overhead costs arising from the same change order. The District shall compensate the Appellant for these cost items in accordance with the damage amounts awarded by the Board herein.

FINDINGS OF FACT

1. On March 1, 2005, the District Department of Transportation ("DDOT") entered into Contract No. POKA-2004-B-0018-JJ with Civil Construction, LLC ("Civil" or "Appellant") for the reconstruction of F Street, N.W., between 17th and 23rd streets (the "F Street Project") in the amount of $4,592,285.72. (Appeal File ("AF") Ex. B.2.) Contract performance was to be completed within one year. (*See* Hr'g Tr. 97:3, 324:19, 881:19.)

2. F Street is a two-lane roadway for eastbound only traffic and is bordered by residential, commercial, educational, and governmental buildings. (Stipulated Fact ("SF") 2.) The F Street Project entailed a full reconstruction effort that included upgrading all of the underground utilities, reconstruction of the street curb and lighting, as well as replacing the landscaping and signage. (Hr'g Tr. 881:7.) The reconstruction effort involved replacement of underground utilities—including water lines, storm drains, and electrical duct banks—along the six city blocks on F Street between 17th and 23rd Streets. (Hr'g Tr. 176:7-178:1.) Additionally, the F Street Project involved reconstruction of the sidewalk, gutter, and roadway structures. (*Id.*)

3. Under the Contract's Maintenance of Traffic specifications, contract drawings 56-61, Civil was directed by the contract terms to restrict access to one lane of traffic at a time. (*See* Appellant's Hr'g Ex. 39.) In particular, the Maintenance of Traffic specifications divided the F Street Project into two phases, with construction work to be completed along the south side of F Street in the first phase followed by the north side in the second phase. (*Id.*)

4. Consistent with the Contract's Maintenance of Traffic specifications, Civil's baseline schedule[1] included a plan to complete the project in four phases: (1) complete the underground utility work along the north side of F Street; (2) complete the underground utility work along the south side of F Street; (3) perform street-level maintenance along the south-side lane; and (4) complete street-level maintenance on the north-side lane. (SF 4; Appellant's Expert Report[2] Ex. 2.) Civil planned to perform work along the north side of F Street first, rather than the south side, in order to accommodate the work required in replacing the water lines. (Hr'g Tr. 107:8-110:20, 173:4-174:3.) This change, however, was a small variance to the contract specifications and did not affect the overall cost or completion date of the contract. (Hr'g Tr. 107:21.)

5. The Appellant further divided each phase of the contract into a sequence of smaller jobs; each to be performed by a different utilities or construction crew. (Hr'g Tr. 176:18-179:22.) The Appellant sequenced the F Street Project so that the first crew would begin work on one city block and consecutively move on to the next block, while another crew would follow suit. (Hr'g Tr. 178:16-180:7.) The crew working on the water line would begin work first, followed by the crew working on the storm drains, and then the electrical crew. (Hr'g Tr. 176:18-179:1.) These crews would be followed by crews working on the sidewalk and curb, the crew excavating the roadway, and lastly the crew doing the asphalt work. (Hr'g Tr. 177:15-179:8.)

6. Under the Appellant's baseline schedule, Civil planned to have multiple crews working simultaneously throughout the entire six blocks of the F Street Project, from 23rd Street to 17th Street as each entire side (north and south) of these streets were, respectively, restricted from traffic access. (Hr'g Tr. 86:13-87:4, 180:3-182:21.) This approach was consistent with, and anticipated by, the Maintenance of Traffic specifications.[3] (*See* Appellant's Hr'g Ex. 39.)

[1] Appellant submitted its initial baseline schedule to the District for approval on May 9, 2005. (SF 3.)
[2] Appellant's Expert Report was entered into evidence as Appellant's Hearing Exhibit 41.
[3] This interpretation of the F Street Project specifications was confirmed through the testimony of Civil's employees (Hr'g Tr. 70:12-20, 86:1-87:21, 169:8-171:5); an employee of Fort Myer Construction (which had been a competing bidder for the contract) (Hr'g Tr. 682:3-18); and the Contracting Officer (Hr'g Tr. 881:6-882:19).

7. The District issued a Notice to Proceed on April 25, 2005, authorizing the Appellant to begin work on May 9, 2005, and establishing an original contract completion date of May 8, 2006. (SF 5, 7.)

8. On May 7, 2005, Civil placed 2,172 linear feet of concrete barrier along F Street in anticipation of contract performance. (SF 6; *see also* Hr'g Tr. 185:1-7.)

Change Order

9. Immediately after Civil placed the concrete barrier, the neighboring community began objecting to the anticipated disruption the planned construction would cause. (Hr'g Tr. 89:10-22, 185:12-186:4, 882:9.) The District verbally instructed Civil to remove most of the concrete barrier that it had erected and only perform the contracted work in two-block increments so that more of F Street would be accessible to traffic as the contract work progressed. (Hr'g Tr. 89:18-22, 186:8-14.) Moreover, on May 19, 2005, less than two weeks after Civil began its contract performance, the Contracting Officer ("CO") issued a written letter, pursuant to Article 3 of the Standard Contract Provisions, limiting the phasing of the F Street Project to only permit the construction work to be performed two blocks at a time for the remaining duration of contract performance (hereinafter "Change Order"). (AF Ex. B.3.) In his letter, the CO specifically referenced the Maintenance of Traffic drawings that were incorporated into the contract terms. (*Id.*)

10. By a letter dated May 24, 2005, the Appellant acknowledged receipt of the CO's May 19, 2005, Change Order. (AF Ex. C.5.) In its acknowledgement letter, the Appellant stated that the two-block restriction would materially change the nature of the project and thus drastically increase the duration and associated costs. (*Id.*) Accordingly, the Appellant requested that a formal change order be negotiated to reflect the increased duration and costs arising from this change mandate. (*Id.*)

11. The new two-block construction restriction in the Change Order limited the work space available to the Appellant's various crews, which in turn reduced productivity as crews had to perform smaller tedious tasks continuously throughout the project instead of consecutively progressing Civil's work through the entire length of F Street (17th to 23rd streets) as originally planned. (Hr'g Tr. 110:12-112:19, 270:1-272:2.) Productivity was also reduced as crews were required to start and stop work along the length of the project in two-block increments, which resulted in additional mobilizations and demobilizations by the Appellant beyond what was anticipated by the baseline schedule. (Hr'g Tr. 190:1-191:3.) These added inefficiencies consequently increased the costs associated with performance. (Hr'g Tr. 240:2-20, 268:1-272:19.)

12. The Appellant submitted a "good faith estimate" of the anticipated cost impact of the two-block restriction on July 15, 2005, along with a revised schedule on July 21, 2005. (Appellant's Hr'g Exs. 4, 5.)[4] In this submission, Civil initially estimated that the two-block restriction would extend the original date of contract completion by 18 months, and thus would result in the contract not being completed until December 24, 2007. (Appellant's Hr'g Ex. 4 at

[4] Appellant's Hearing Exhibits 4 and 5 are also included in the record as Appeal File Exhibits C.6-1 and C.7, respectively.

35; Appellant's Hr'g Ex. 5 at 119.) The Appellant reiterated its May 24, 2005, request that a formal change order be negotiated to reflect the impact of the two-block restriction that had been imposed by the District. (Appellant's Hr'g Ex. 4 at 35.)

13. Furthermore, the Appellant estimated that its contract costs would increase by an additional $2,375,275.18 due to extra costs it would incur in connection with the newly-added two-block construction restriction. (Appellant's Hr'g Ex. 4 at 40.) The estimate included anticipated increased costs for labor, equipment, materials, field supervision, safety, additional work, and other associated costs. (Appellant's Hr'g Ex. 4 at 40-58, 71-75.) Additionally, the estimate included additional subcontractor costs, including Civil's electrical subcontractor, Central Armature Works, Inc. ("Central Armature"), and an unidentified asphalt subcontractor. (Appellant's Hr'g Ex. 4 at 59-62, 68.) The Appellant's estimate, however, specifically did not include extended home office costs. (Appellant's Hr'g Ex. 4 at 35.) In support of its estimate, the Appellant also included a detailed breakdown of its costs as originally bid. (Appellant's Hr'g Ex. 4 at 76-114.)

14. By a letter of August 10, 2005, Civil received a letter from a consultant for the District, Terence Wright, informing Civil that its July 21, 2005, schedule had been rejected, in part because the schedule did not reflect the current as-built status of the F Street Project. (AF Ex. C.9.)

15. Subsequently, on August 12, 2005, almost three months after the Change Order was issued, Civil entered into a subcontract with Fort Myer Construction Corporation ("Fort Myer") to perform the required asphalt work on the F Street Project. (Appellant's Hr'g Ex. 31.) The subcontract contained unit prices and a specified quantity for, *inter alia*, base and surface asphalt. (Appellant's Hr'g Ex. 31 at 359.) The unit prices in this subcontract expressly included the cost of any mobilizations that Fort Myer would incur to complete the project. (Appellant's Hr'g Ex. 31 at 357; Hr'g Tr. 683:14-17, 762:5-22.) The subcontract expressly incorporated Civil's prime contract with the District but, inexplicably, did not incorporate the two-block restriction in the Change Order that the District had previously issued on May 19, 2005.[5] (*See* Appellant's Hr'g Ex. 31 at 363-64.) Fort Myer only anticipated that 10 mobilizations/demobilizations would be required to perform the subcontract. (Hr'g Tr. 687:2-690:12, 762:19.)

16. By September 8, 2005, Civil had completed work on the north side of F Street between 23rd Street and 21st Streets. (AF Ex. C.11 at 3.) Civil completed work along the south side of F Street between 23rd Street and 21st Streets on or about December 12, 2005. (*Id.* at 4.)

17. After finishing work between 23rd Street and 21st Street, Civil began work on the north side of F Street between 20th Street and 18th Street. (Hr'g Tr. 103:11-104:20.) Civil was required to temporarily bypass the block between 21st Street and 20th Street due to dormitory

[5] The subcontract specifically included a provision under which the parties were to indicate any modifications made to the prime contract prior to the execution of the subcontract. (Appellant's Hr'g Ex. 31 at 364.) While this provision referenced wage determinations and equal opportunity requirements, it made no mention of the May 19, 2005, Change Order. (*See Id.*)

construction/renovation work being performed by a third party, Donohoe Construction, on behalf of the George Washington University ("GWU").[6] (Hr'g Tr. 105:2-7.)

Rescission of the Change Order

18. While Civil was performing work on the north side of F Street between 20th and 18th Streets, the CO rescinded the May 19, 2005, Change Order, by a letter dated January 19, 2006, largely as the result of its recognition of the resulting performance impact upon Civil's project schedule. (Appellant's Hr'g Ex. 34; Hr'g Tr. 256:16, 890:5-891:7.) This letter expressly rescinded the two-block restriction immediately, although it still required that Civil submit a revised schedule to the District for review and approval prior to starting work on the 1700 block of F Street. (Appellant's Hr'g Ex. 34.)

19. On March 7, 2006, Civil submitted a revised schedule to the District ("Revised Schedule #3"). (Hr'g Tr. 245:5-246:19, Appellant's Hr'g Ex. 11.) The revised schedule included Civil's actual progress through February 22, 2006, and set a new completion date of June 2, 2007, for the project. (Appellant's Hr'g Ex. 11.)

20. The Appellant did not begin work on the 1700 block of F Street immediately after submitting the March 7, 2006 schedule; rather the Appellant interpreted the CO's January 19, 2006, directive as requiring District approval of the revised schedule prior to proceeding with work on that block.[7] (Hr'g Tr. 246:5-247:19.)

21. The District rejected Civil's Revised Schedule #3 on March 15, 2006. (AF Ex. C.17.) The District took issue with four activities that were added to the critical path and the additional duration of five activities, which added up to an additional 112 working days. (*Id.*) The District also claimed that the schedule did not reflect the current status of activities. (*Id.*)

22. The Appellant resubmitted Revised Schedule #3 on March 20, 2006. (Appellant's Hr'g Ex. 17 at 193-204.) In its resubmission, the Appellant included a narrative defending those elements of its schedule that the District previously found problematic and which were the basis for its rejection of Civil's earlier version of the Revised Schedule #3 that had been submitted on March 7, 2006. (Appellant's Hr'g Ex. 17 at 194.)

23. In response to Civil's resubmission of Revised Schedule #3, on April 5, 2006, another consultant for the District, Alpha Corporation, issued a report (the "Alpha Report") analyzing the propriety of Appellant's Revised Schedule #3. (Appellant's Hr'g Ex. 17.) In summary, the Alpha Report identified 14 different aspects of Civil's revised schedule that it deemed either inaccurate, incomplete, and/or requiring further details. (*Id.* at 183-84.) Moreover, the Alpha Report concluded that, as of February 22, 2006, the F Street Project was delayed 90 calendar days as a result of the Change Order which imposed the two-block construction restriction for

[6] Civil first learned of this ongoing work during an October 12, 2005, progress meeting, according to the meeting minutes. (Appellant's Expert Report Ex. 7 at 65.) At a November 30, 2005, progress meeting, Civil was informed that the dormitory construction for GWU would not be complete until about late April or early May 2006. (Appellant's Expert Report Ex. 8 at 169.)

[7] John Constantino, Civil's general superintendent, testified, however, that the Appellant never stopped work on the F Street Project. (Hr'g Tr. 275:15-276:4.)

the performance of the contract.[8] (*Id.* at 182.) The Alpha Report also created a new performance schedule for the contract with a completion date of August 7, 2006. (*Id.* at 223-31.)

24. On or around April 7, 2006, the Appellant was instructed by District representatives to proceed with work on the 1700 block without an approved schedule. (Hr'g Tr. 119:17-120:15, 250:2-9.)

25. On April 10, 2006, the District rejected Civil's Revised Schedule #3. (AF Ex. C.18.) The District provided numerous bases for rejecting this schedule, which appear to be based upon the conclusions in the Alpha Report, and also included a new contract completion date of August 7, 2006, for the project. (*Cf.* AF Ex. C.18, *with* Appellant's Hr'g Ex. 17 at 183-185.)

26. On April 27, 2006, Civil responded to the District's April 10, 2006, letter and disagreed with the 14 areas of concern raised by the District as the basis for its rejection of Civil's Revised Schedule #3. (AF Ex. C.20.) In this regard, the Appellant advised the District that its rejection of the revised schedule was based upon a lack of background information about the project and an attempt to artificially reduce the duration of the project. (*Id.* at 1.) By way of example, Civil disagreed with the District's conclusion that Civil's revised schedule showed no planned work activities between certain periods of time by pointing to specific work activities that were occurring within the timeframes at issue. (*Id.*) In another instance, Civil defended its claimed winter shutdown periods and claimed that certain activities could not be completed during cold weather. (*Id.*)

Civil's Performance after Rescission of the Change Order

27. At no point during Civil's performance of the F Street Project did the District approve Civil's work schedule. (Hr'g Tr. 152:2, 187:7, 933:9-13.) Civil, however, continued to perform on the F Street Project without stopping work. (Hr'g Tr. 275:7-276:4.) Civil completed construction along the north side of F Street on or about July 10, 2006.[9] (*See* Appellant's Expert Report 14; Hr'g Tr. 443:14-445:2 (Feb. 29, 2012).)

28. Civil also worked on two additional F Street projects concurrent with its work for the District. From July 11 through July 17, 2006, Civil worked on excavating a communications duct bank for GWU between 21st and 20th Streets. (Appellant's Hr'g Ex. 24 at 262-66.) The work for GWU was done under a separate contract and had to be performed concurrently with the F Street Project due to the District of Columbia's five-year moratorium on digging along newly constructed roads that would have otherwise precluded GWU from having this work done for a five year period after the contract was completed. (Hr'g Tr. 260:4-262:17, 282:1-14.)

29. Civil also worked on an additional duct bank under contract with the federal General Service Administration ("GSA") between 17th and 18th Streets because GSA also sought to have this work completed before the five year moratorium on newly constructed roads would

[8] The Alpha Report also speculates that some of the delay may have been due to concurrent delay caused by Civil. (Appellant's Hr'g Ex. 17 at 182.) However, the Alpha Report contains no support for that assertion.

[9] The document supporting this date appears to be taken from a District Inspector's daily report that was not included in the record. However, it is consistent with the daily reports that were included in the record. (*See* Appellant's Hr'g Ex. 24 at 260-62.)

temporarily preclude its ability to have this work done at a later time. (Hr'g Tr. 262:1-17.) This construction lasted from August 17, 2006, through September 27, 2006. (*See generally* Appellant's Hr'g Ex. 24; Hr'g Tr. 267:14-297:12.) This work for GSA was extended beyond its original completion date, in part, due to work stoppages at the direction of the Secret Service. (Hr'g Tr. 241:5-244:12.)

30. Civil substantially completed performance on the F Street Project on December 20, 2006—a project duration of 591 days. (SF 15.)

Civil's Claims

31. On April 27, 2006, the Appellant submitted its first claim to the CO requesting a final decision on its July 15, 2005, request for a formal change order. (AF Ex. C.19.)

32. At some point thereafter, the CO scheduled a meeting with the Appellant to discuss its April 27, 2006, claim. (Hr'g Tr. 129:7, 145:3, 930:2.) The CO subsequently halted this meeting based upon his belief that negotiation efforts with the Appellant regarding its claim would be futile. (Hr'g Tr. 129:7-130:15, 931:2-3.)

33. Subsequently, on June 16, 2006, the CO issued a final decision denying the majority of the Appellant's April 27, 2006, claim. (AF Ex. A.1.) The CO's decision, however, granted Civil a 90 day time extension to complete the contract by August 6, 2006. (*Id.*) The CO also awarded Civil an additional $204,000.00 in compensation for its damages and extended jobsite overhead costs arising from the Change Order.[10] (*Id.*) The CO's decision expressly noted that this time extension and additional compensation to the Appellant were granted as damages resulting from the Change Order that altered the original construction work phasing requirements in the Maintenance of Traffic plans incorporated into the contract. (*Id.*)

34. On June 19, 2006, the CO issued a formal change order reflecting his final decision on Appellant's April 27, 2006 claim, which granted some compensation to Civil in connection with the Change Order. (AF Ex. B.4.) This change order expressly included unabsorbed home office costs (including unabsorbed field and home office costs) in the $204,000.00 compensation awarded to Civil. (*Id.*)

35. Civil appealed the CO's June 16, 2006, final decision to this Board on September 6, 2006. (Sept. 6, 2006, Notice of Appeal.) We docketed the appeal as CAB No. D-1294.

36. On August 23, 2007, Fort Myer submitted a request for an equitable adjustment to Civil in the amount of $40,894.26 seeking damages related to additional mobilizations and demobilizations, which it performed which it claims were beyond the scope of the contract. (Appellant's Hr'g Ex. 40.) Specifically, Fort Myer's request for an equitable adjustment included the cost of 13 additional mobilization/demobilization efforts (in addition to the 10 that Fort Myer had originally anticipated) at $1700.00 per mobilization, additional supervisory expenses, inefficiency expenses, and increased labor and material costs, which it claims to have incurred as the result of the District's Change Order. (*Id.*)

[10] Civil has been paid the $204,000.00 awarded in the CO's final decision. (Hr'g Tr. 146:19-147:7)

37. On August 3, 2010, the Appellant submitted a claim to the CO seeking unabsorbed extended home office overhead costs for the 90 day period between May 8, 2006, and August 6, 2006, in the amount of $108,900.00 using the Eichleay formula.[11] (Nov. 8, 2010 Notice of Appeal.)

38. On August 12, 2010, Civil similarly submitted a second claim for unabsorbed overhead using the Eichleay formula for the 122 day period between August 7, 2006, and December 9, 2006, in the amount of $147,620.00. (Nov. 18, 2010 Notice of Appeal.)

39. Civil appealed to this Board from the deemed denials of both of these overhead claims after the CO failed to issue a final decision on these two claims. (Nov. 8, 2010 Notice of Appeal; Nov. 18, 2010 Notice of Appeal.) We docketed the appeals as CAB No. 1413 and CAB No. D-1417, respectively. We consolidated the Appellant's three appeals relating to the F Street project on June 2, 2011.

40. The Appellant filed an amended complaint with regard to the consolidated appeals on February 21, 2012. The Amended Complaint seeks an equitable adjustment in the amount of $1,033,014.61. (Am. Compl. 6.) This amount includes $324,508.26 for its Field Labor Increase; $198,659.28 for its Equipment Increase; $16,849.80 for Additional Scheduling Requirements; $227,503.26 for Extended Field Overhead Increases; $205,523.58 for Extended Home Office Overhead Increases; and also includes a combined amount of $59,970.43 on behalf of its electrical and asphalt subcontractors (Central Armature and Fort Myer, respectively).[12] (Am. Compl. 6-7.)

The Appellant's Calculation of Delay Impacts

41. The Board conducted a four day hearing on the merits in these consolidated cases beginning on February 28, 2012, based primarily upon the Appellant's appeal from the CO's denial of its April 27, 2006, claim.

42. At the hearing, the Appellant employed an expert, Scott A. Galbraith, to provide a report and various schedules, with his corresponding testimony, to substantiate the Appellant's claimed delay impact and damages arising from the District's issuance of the Change Order immediately after it began performance of the contract. Galbraith relied upon several primary resources in making his delay and impact findings, and his damage calculation. In particular, Galbraith reviewed the following materials to corroborate his findings as to the events that occurred during contract performance: 1) project schedules that Civil submitted to the District; 2) daily contract performance reports internally generated by the District; 3) Civil's July 15, 2005, cost estimate

[11] The Eichleay formula was originally set forth by the Armed Services Board of Contract Appeals in *Eichleay Corp.*, ASBCA No. 5183, 60-2 BCA ¶ 2688 (July 29, 1960) to equitably determine the allocation of unabsorbed overhead incurred due to government-caused delay. *Nicon, Inc. v. United States*, 331 F.3d 878, 882 (Fed. Cir. 2003). "The Eichleay formula requires three steps: 1) to find allocable contract overhead, multiply the total overhead cost incurred during the contract period times the ratio of billings from the delayed contract to total billings of the firm during the contract period; 2) to get the daily contract overhead rate, divide allocable contract overhead by days of contract performance; and 3) to get the amount recoverable, multiply the daily contract overhead rate times days of government-caused delay." *Wicham Contracting Co. v. Fischer*, 12 F.3d 1574, 1577 n.3 (Fed. Cir. 1994).

[12] The Amended Complaint also sought $1,000.00 representing the unpaid balance on the contract. (Am. Compl. 6.)

for the project; 4) the CO's final decision; and 5) documents produced by the District during the course of this litigation. (Appellant's Expert Report 3-4; *see also* Hr'g Tr. 396:10-402:1.) Moreover, Galbraith's report compared, *inter alia*, Civil's original base line schedule (a forward-looking schedule) with as-built data as of February 21, 2006, and with Civil's final as-built schedule. (*Id.* at 266.)

43. As part of his analysis, and as discussed further below, Galbraith identified delays to Civil's performance of the contract within four specific periods of performance using a critical path method ("CPM") time impact analysis. (Appellant's Expert Report 12-18; Hr'g Tr. 409:18-410:15.) Because the CO's Final Decision, and the Alpha Report upon which it was based, covered delays incurred through February 21, 2006, Galbraith's CPM analysis was limited to the period from February 22, 2006 until substantial completion of the project.[13] (*See Id.* at 12.)

Impact Period No. 1 (February 22, 2006 through March 7, 2006)

44. The first delay impact period identified by Galbraith covers the period February 22, 2006, through March 7, 2006, when Civil first submitted Revised Schedule #3.[14] (Appellant's Expert Report 12-13; Hr'g Tr. 535:12-536:22.) As an initial matter, Galbraith determined that, as of February 22, 2006, the F Street Project was already delayed by 140 calendar days.[15] (*Id.* at 11; Hr'g Tr. 408:7-412:15.) This 140 day delay period, as determined by Galbraith, is the numerical difference between when the project was originally scheduled to be completed on May 8, 2006, and the date which Galbraith subsequently projected the contract to be completed on September 25, 2006, as discussed below. (Appellant's Expert Report 11; Hr'g Tr. 412:2-7.) Galbraith attributed the entire 140 day delay as due to the Change Order's two-block restriction. (*Id.* at 19; *see also* Hr'g Tr. 403:11.)

45. In arriving at the determination that there was a 140 day delay, Galbraith began by reviewing Civil's Revised Schedule #3, which contained the as built data through February 21, 2006. (Appellant's Expert Report 7-8; *see also* Hr'g Tr. 413:16-414:5.) For purposes of comparison, Galbraith then recreated the schedule generated by the Alpha Report using the report's seven recommendations, which led the District to determine that the contract's new completion date was August 7, 2006. (*Id.* at 9.) Galbraith, however, found that Alpha's schedule was flawed because it did not restore Civil's original sequencing of performing utility work activities before street level work activities within a given block and on a given side of F Street. (*Id.* at 9-10; *see also* Hr'g Tr. 568:5-570:19.) In particular, the schedule contained in the Alpha Report shows utility work and street-level work being performed at the same time. (Appellant's Hr'g Ex. 17 at 223-24, 229-30.) However, in order to create a schedule consistent with the intent of Civil's original work sequence plan, Galbraith added relationships and predecessors to certain activities in the Alpha schedule to restore Civil's planned sequencing to

[13] At the time of the District's rescission of the two-block work area restriction in January 2006, Civil's work zone was established along the north side of F Street between 20th and 18th Streets. *See supra* finding 18.

[14] The expert noted that by the end of 2005 Civil had completed utilities and street work through base paving activities from 23rd Street to 21st Street on both the north and south sides of F Street. (Appellant's Expert Report 6; *see also* Hr'g Tr. 254:7 (John M. Constantino testifying that this was the first section worked).)

[15] The February 22, 2006, date indicates that the data leading up to this date is based on Civil's as-built schedule, and is the same February 22, 2006 "data date" used in Civil's March 7, 2006, Revised Schedule #3. (Hr'g Tr. 411:9; Appellant's Hr'g Ex. 11.)

complete the contract. (Appellant's Expert Report 10-11; Hr'g Tr. 569:10-570:19.) With these changes, Galbraith established a new schedule showing all work completed on September 25, 2006, 140 days after the original May 8, 2006, completion date. (*Id.* at 11, 255-61; Hr'g Tr. 536:2-536:8.)

46. Galbraith also determined that Civil was delayed an additional 14 days between February 22, 2006, and March 7, 2006, when it was precluded from working between 17th and 18th streets because it was preparing a revised contract performance schedule for approval by the District before it fully mobilized onto the project again, as required by the CO's January 19, 2006, letter. (Appellant's Expert Report 12-13; Hr'g Tr. 416:11-420:20.)

Impact Period No. 2 (March 8, 2006 through July 17, 2006)

47. Galbraith identified a second impact period between March 8, 2006, and July 17, 2006, which covers the period between Civil's submission of its revised schedule and when Civil actually started performing the Phase 2 utility activities on the south side of F Street between 21st Street and 17th Street. (Appellant's Expert Report 13; Hr'g Tr. 430:7-430:10.) In other words, Galbraith defined this impact period to include the completion of the north side of F Street (through base paving) from 21st Street to 17th Street. Galbraith determined that during this time period, Civil had incurred an additional 33 calendar days of delay. (*Id.* at 13-15; *see also* Hr'g Tr. 430:7-430:16.) Galbraith assigned 32 calendar days of delay during this period to Civil for failing to mobilize on the 1700 block of F Street until April 8, 2006, without a District-approved schedule despite having submitted a revised schedule to the District for approval after the Change Order was rescinded. (*Id.* at 15; *see also* Hr'g Tr. 430:20-431:1.)

48. Further, Galbraith determined that during this same time period Civil's progress on the contract was also impacted by many other critical delays, totaling 22 calendar days of delay, for which Civil was *not* responsible including: 1) delay attributable to Secret Service stop work orders (1 calendar day); 2) weather impacts after original contract completion date (13 calendar days);[16] 3) traffic switch from north to south side of F Street (1 calendar day); and 4) additional duct bank work required for GWU (7 calendar days).[17] (Appellant's Expert Report 15; *see also* Hr'g Tr. 435:2-450:13.) Galbraith, however, determined that Civil was able to overcome 21 of these overall 54 calendar days of delay during this period and, therefore, that Civil was only responsible for 11 of the total 33 total critical delay days during this timeframe.[18] (*Id.*) At the hearing on the merits in this matter, this expert testified extensively about his basis for these finding of delays in delay impact period No. 2 that were attributable to Civil and others. (*See generally* Hr'g Tr. 429:17-450:13.)

[16] The 13 days of weather impact include 11 days of adverse weather and 2 days as a conversion from work days to calendar days. (Appellant's Expert Report 14; *see also* Hr'g Tr. 436:12-437:11.)

[17] While Galbraith found that Donohoe Construction's work for GWU delayed Civil's work for 79 days during this period, he determined that this delay was not along the critical path of the project. (Appellant's Expert Report 14; *see also* Hr'g Tr. 431:12.)

[18] Galbraith determined the ultimate 33 delays of delay based upon subtracting Civil 21 day "credit" for overcoming delays during this time period from the original 54 days of delay which Galbraith found to have occurred during this time period. (Appellant's Expert Report 14-15; Hr'g Tr. 448:4-449:7.)

Impact Period No. 3 (July 18, 2006 through September 27, 2006)

49. The third delay impact period identified by Galbraith ranged from the period of July 18, 2006, through September 27, 2006, beginning after Civil completed its prior duct bank work for GWU on the south side of the 2000 block of F Street. (Appellant's Expert Report 15; *see also* Hr'g Tr. 447:19-449:7.) This third period in Galbraith's analysis encompassed Civil's start of Phase 2 utilities activities along the south side of F Street between 21st Street and 17th Street to the start of Phase 3 street-level work along the south side of F Street between 18th and 17th Streets. (*Id.*) During this period, Galbraith attributed 40 days of delay to others because of the additional duct bank installation work that Civil was required to do under a separate contract with the GSA, which was a critical impact to the project schedule.[19] (*Id.* at 16; *see also* Hr'g Tr. 447:19-449:7.) In culmination, as of September 28, 2006, the project was 87 calendar days behind its forecasted critical path, of which 14 calendar days were accounted for in the first impact period, 33 calendar days were accounted for in the second delay impact period, and 40 days of delay were included from delay impact period No. 3. (Appellant's Expert Report 16; *see also* Hr'g Tr. 447:19-449:7.)

Impact Period No. 4 (September 28, 2006 through Substantial Completion)

50. The final period identified by Galbraith, from September 28, 2006, through December 20, 2006, covers Civil's start of Phase 3 street-level activities and concludes with the placement of surface asphalt paving and striping activities for the entire length of the project (i.e., substantial completion of the contract). (Appellant's Expert Report 17-18; *see also* Hr'g Tr. 409:1-409:18.) Galbraith attributed five delay days in this period to the District consisting of a November 8, 2006, weather delay and four days of delay due to the Thanksgiving holiday.[20] (*Id.* at 18; *see also* Hr'g Tr. 539:19-540:19.) However, Galbraith credited Civil with overcoming 6 days of delay, resulting in a net gain of 1 day during this period. (*Id.*)

Total Impact

51. Between the four identifiable delay impact periods on the project noted above, Civil's expert, in referencing findings in his expert report, testified that the project was delayed for a total of 226 days. (Hr'g Tr. 408:7-22, 455:9; *see also* Appellant's Expert Report 19.) Of this total of 226 delay days, Galbraith concluded that 169 of these delay days were attributable to the District as the result of its issuance of the Change Order which changed the original construction traffic sequencing requirements in the contract. (Hr'g Tr. 540:12-541:17.) These 169 days of delay include 140 days of delay which Galbraith determined had been caused by the District after it issued the Change Order on May 19, 2005, through February 21, 2006. (Hr'g Tr. 538:4-541:17.) It also includes the 14 days of delay which Galbraith attributed to the District for requiring that Civil prepare and submit Revised Schedule #3 after the two-block restriction was rescinded before it could resume work on the project, and also another 1 day delay arising from

[19] Although Galbraith determined that issues with Pepco and Washington Gas delayed Civil by 12 days and 11 days, respectively, he concluded that neither of these delays were on the critical path. (Appellant's Expert Report 16-17.)
[20] On cross examination, Galbraith testified that the Thanksgiving holiday delay should be attributed to the additional duct bank work under Civil's contract with the General Services Administration. (Hr'g Tr. 539:19-540:11.)

the requirement that Civil switch the traffic barrier for the work zone from the north side to the south side of F Street on July 10, 2006.[21] (*Id.*; *see also* Appellant's Expert Report Ex. 19 at 266.) Also, Galbraith included in the total 169 delay days attributed to the District another 14 days of delay because of adverse weather conditions which Civil encountered, which stopped work for 14 days, during the extended contract performance period.[22] (Hr'g Tr. 540:1-541:4.)

The Appellant's Damages Calculation

52. Galbraith, in his expert report, ultimately determined that, based upon the delay days attributable to the District, that Civil is entitled to $1,060,273.45[23] in additional compensation resulting from the two-block restriction mandated by the May 19, 2005, Change Order. (Appellant's Expert Report 25; Hr'g Tr. 479:5.) Galbraith arrived at this figure by computing several different areas of costs. (*Id.* at 19-25; *see also* Hr'g Tr. 479:2-480:18.)

53. In calculating increased labor and equipment costs, Galbraith created an estimate based on a daily rate using Civil's as-bid labor costs as submitted in support of its July 15, 2005, good faith estimate. (Appellant's Expert Report 20-22; *see also* Hr'g Tr. 468:9-469:20.) According to Galbraith, the actual costs could not be determined because no portion of the F Street Project was unimpacted by the two-block restriction, which precluded him from alternatively performing a calculation of extended labor damages based upon actual labor costs. (*Id.* at 20.)

Labor Costs

54. With regard to labor costs, Galbraith determined that Civil was entitled to an additional $351,766.83. (Appellant's Expert Report 21; *see also* Hr'g Tr. 465:18-468:2.) Using Civil's as-bid labor and burdened labor costs, Galbraith established a daily labor rate of $2,021.65.[24] (*Id.*) Galbraith multiplied this by the 174[25] delay days he had attributed to the District, resulting in his $351,766.83 estimate in Appellant's alleged increased field labor costs.[26] (*Id.*)

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[21] Galbraith, nonetheless, found that the delays which occurred as the result of Civil performing duct bank work for GWU (7 calendar delay days) and the Secret Service (40 calendar delay days) under separate contracts were non-compensable. (Hr'g Tr. 532:9.)

[22] Galbraith, however, admitted during the hearing that his expert report contained a typographical error in that, in several instances there were narratives stating that the District was responsible for 174 delay days instead of 169 delay days identified in other sections of the expert report. (Hr'g Tr. 541:9-542:9.)

[23] At trial, Galbraith submitted a revised expert report in which he determined that the Appellant was owed $1,060,273.45, an increase from the $1,033,014.61 claimed in his initial expert report. (Appellant's Expert Report 25.) This revision stems from a correction made to his labor cost calculation discussed below. (*See* Hr'g Tr. 394:1-395:1.)

[24] Civil's as-bid labor and burdened labor costs totaled $909,528.86. (Appellant's Hr'g Ex. 4 at 76.) Galbraith subtracted from this amount $201,952, which represents Civil's foreman costs, giving an adjusted as-bid labor costs of $707,576.86. (Appellant's Expert Report 21; *see also* Hr'g Tr. 395:20-396:1.) Galbraith then divided by 350 days for "planned on-site duration" to establish a daily labor rate of $2,021.65. (*Id.*)

[25] See *supra* note 22.

[26] Originally, Galbraith subtracted $256,784.00 as representing foremen labor costs. (Appellant's Expert Report 21; *see also* Hr'g Tr. 465:18-468:2.) This number represents the actual foremen labor costs incurred. (Hr'g Tr. 393:15-394:21.) Upon discovering the error, Galbraith went through Civil's as-bid cost report and totaled the various foremen labor items, which totaled $201,952. (Hr'g Tr. 465:2-466:8.) Using the original figure, Galbraith had calculated a daily labor rate of $1,864.99 and a total amount owed of $324,508.26. (Appellant's Expert Report 21.)

55. On cross examination, the District questioned Galbraith as to why he used 350 days rather than 365 in deriving the daily rate. (Hr'g Tr. 542:10-544:18.) Galbraith testified that he used 350 days because under Civil's original baseline schedule 350 days was the original duration that Civil planned to be on the project until it was completed. (Hr'g Tr. 466:16, 543:5-544:18.)

Equipment Costs

56. Galbraith also determined that Civil was due an additional $198,659.28 in equipment costs. (Appellant's Expert Report 22; *see also* Hr'g Tr. 469:3-470:3.) Using a similar methodology, Galbraith established a daily equipment rate of $1,141.72, utilizing Civil's as-bid equipment costs as a baseline.[27] (*Id.*) Galbraith multiplied the adjusted daily rate by 174[28] calendar delay days, resulting in $198,659.28 for the Appellant's estimated compensable equipment overrun. (*Id.*)

57. The actual cost data, however, which the Appellant introduced at the hearing, set forth that Civil's actual incurred equipment costs for the project were $563,372.88 for owned equipment and $28,126.12 for rented equipment. (Appellant's Hr'g Ex. 25 at 304-05.) Using this actual cost data, the Board calculates that Civil incurred $591,499.00 in equipment costs.

Scheduling Costs

58. Upon Galbraith's request, Daniel Mullally, Civil's Chief Financial Officer, generated its accounts payable report for CPM scheduling. (Hr'g Tr. 306:16; Appellant's Hr'g Ex. 36.) The report showed invoices for CPM scheduling from two subcontractors, Contractors Engineering Services and McDonough Bolyard Peck, Galbraith's employer. (Appellant's Hr'g Ex. 36.) Contractors Engineering Services submitted 12 invoices, approximately 1 per month, beginning April 2005, through September 2006, for a total of $6,790.00. (*Id.*) McDonough, submitted 5 invoices from August 2006 through August 2007, with the first invoice for $10,000.00 and all 5 totaling $18,466.20. (*Id.*)

59. According to Galbraith, Civil anticipated providing the District with 12 schedules throughout the performance period. (Hr'g Tr. 473:11.) Civil estimated the cost of each schedule to be $450.00. (Appellant's Hr'g Ex. 4 at 69.)

60. Galbraith determined that Civil incurred an additional $15,318.00 in scheduling costs. (Appellant's Expert Report 23; *see also* Hr'g Tr. 473:12-473:15.) Galbraith arrived at this amount by adding the Civil Engineering Services invoices and the three 2006 McDonough invoices and subtracting $5,400.00 representing the cost of the 12 schedules planned under the original contract. (Hr'g Tr. 472:12-473:15.)

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[27] Civil's original bid included $449,850.60 in equipment costs. (Appellant's Hr'g Ex. 4 at 76.) Again using 350 days, Galbraith determined a daily rate of $1,285.29. (Appellant's Expert Report 22; *see also* Hr'g Tr. 469:3-470:3.) Galbraith then divided the 350 planned days by the 591 day total duration of the project to arrive at an estimated 59.22% in use rate. (*Id.*; *see also* Hr'g Tr. 469:3-20.) Galbraith multiplied the daily rate by the in use percentage to arrive at a $761.15 in use daily rate. (*Id.*) Galbraith determined an idle rate of half the in use rate, or $380.57. (*Id.*) Galbraith then added the two for an adjusted daily equipment rate of $1,141.72. (*Id.*)

[28] *See supra* note 22.

Field Overhead

61. Galbraith, using a daily rate of $1,307.49,[29] determined that Civil was entitled to an additional $227,503.26 for field overhead by multiplying the daily rate by the 174[30] days of delay he attributed to the District. (Appellant's Expert Report 24; *see also* Hr'g Tr. 467:8.) This calculation was largely based upon internal corporate data that was provided to Galbraith by Civil's Financial Officer, Daniel Mullally.

62. Mullally testified as to various documents he prepared in support of the Appellant's request for field overhead costs. Mullally's testimony described Civil's payroll documents which showed it incurred $580,457.60 for its foremen and project managers.[31] (Hr'g Tr. 302:8-306:19.) Mullally further testified as to the accuracy and completeness of the internal cost data supporting its field office and safety officer costs. (Hr'g Tr. 333:17-336:11.) This cost data established that during the contract period, Civil paid $136,690.56 in salary and benefits for a safety officer. (Appellant's Hr'g Ex. 38 at 1.) Civil, however, only allocated 20 percent of the safety officer's salary, $27,338.11, to the F Street Project. (*Id.*) Civil's cost data further showed that during the contract period Civil incurred $44,165.00 in rent for its field office and other general conditions costs. (*Id.* at 4.)

Extended Home Office Overhead

63. Mullally testified at length as to his calculations concerning Civil's incurred extended home office overhead costs under the Eichleay formula and the data supporting his calculations because the Appellant also seeks to recover these costs. (Hr'g Tr. 323:7-333:2; *see also* Appellant's Hr'g Ex. 37.) Galbraith independently reviewed the same actual billings and overhead cost information provided by Mullally and concluded that extended overhead costs were due to Civil based upon a daily rate of $1,187.17, for a total of $205,523.58. (Appellant's Expert Report 25; *see also* Hr'g Tr. 478:18-479:1.)

Subcontractor Claims

Central Armature Works

64. Central Armature was an electrical subcontractor for Civil in support of the F Street project and is also seeking delay damages in this action through its prime contractor, Civil. Civil's original request to the District for the issuance of a formal Change Order on July 15, 2005, to cover its increased performance costs associated with the two-block construction restriction include estimated increased costs for its electrical subcontractor for the project, Central Armature, in the amount of $101,582.00. (Appellant's Hr'g Ex. 4 at 59-62.) However,

[29] In deriving this figure, Galbraith added 20 percent of the safety officer's salary and benefits, $27,338.11, with the payroll costs of Civil's foremen, superintendents and other supervisors, $580,457.60, for a total of $607,795.71. (Appellant's Expert Report 24; *see also* Hr'g Tr. 476:13-477:7.) Galbraith then applied a 20 percent markup for overhead and profit for a total of $729,354.85. (*Id.*) Galbraith then added $31,959 in rent and $11,412.41 in other field office costs for a total of $772,726.26. (*Id.*) Lastly, Galbraith divided the $772,726.26 figure by 591 days to derive the $1307.49 daily rate.

[30] *See supra* note 22.

[31] The Board received extensive testimony from the witness verifying this cost data, introduced as Appellant's Hearing Exhibit 35, however, this document was not formally moved into evidence by the Appellant.

this original amount being claimed by Central Armature was later significantly reduced to $19,215.11, and then to $15,696.85, as set forth in the expert report. (Appellant's Expert Report 23; *see also* Hr'g Tr. 809:20-810:16.)

65. In outlining Central Armature's claimed damages in his expert report, Galbraith did not perform a detailed analysis of Central Armature's claimed costs, but, instead, seemingly just accepted these claimed costs from Central Armature in the amount of $19,215.11, and only made minor adjustments consistent with Civil's compensable days of delay to arrive at the $15,696.85 figure. (Appellant's Expert Report 23; Hr'g Tr. 471:1-22.)

66. At the hearing in this matter, Charles Redding, an electrical superintendent for Central Armature, provided testimony regarding the basis of this subcontractor claim. Redding, however, could offer no testimony regarding the basis for the downward adjustment in Central Armature's original claim from $101,582.00 to $19,215.11, nor could he identify any contract related documents or other information that could provide the cost details underlying the damages claimed by Central Armature related to the F Street project. (*See generally* Hr'g Tr. 803:2-813:13, 819:1-820:20.)

Fort Myer Construction

67. Fort Myer was another subcontractor that supported the F Street Project by providing asphalt related services. Fort Myer is seeking additional compensation under its subcontract with the Appellant for 13 additional mobilizations, which it alleges that it was required to perform as a result of the Change Order requirements. In determining the amount owed to Fort Myer, Galbraith adjusted the labor and material escalation figures contained in Fort Myer's August 23, 2007, Request for Equitable Adjustment to reflect his finding of 174[32] delay days that were compensable to Civil. (Appellant's Expert Report 23, Hr'g Tr. 471:3-14.) Performing this calculation, Galbraith downwardly adjusted Fort Myer's $40,498.26 claimed amount to $38,821.72. (Appellant's Expert Report 23; *see also* Hr'g Tr. 740:1-16.)

68. Fort Myer's underlying August 23, 2007, Request for an Equitable Adjustment identified 23 days on which it mobilized to perform work on the F Street Project. (Appellant's Hr'g Ex. 40.) Fort Myer requested $1700.00 for each mobilization and corresponding demobilization for 13 of the 23 days, for a total of $22,100.00. (*Id.*) Fort Myer further requested $1,430.00 in additional supervisory costs for the 13 additional days. (*Id.*) Fort Myer also sought $6,045.00 in inefficiency costs. (*Id.*) Fort Myer stated that it incurred a 4% escalation in labor costs, at $3,824.47. (*Id.*) Lastly, Fort Myer sought $7,494.79 as a 3% escalation in material costs. (*Id.*)

69. At the hearing, Ralph Kew, a vice president of Fort Myer, stated that Fort Myer needed to increase its claimed amount from $38,821.72 to $106,217.26. (Hr'g Tr. 740:1-6.) First, Kew testified that Fort Myer had discovered an additional 3 daily reports that showed that Fort Myer mobilized for work on 26 days for the F Street Project, instead of the 23 days used in its August 23, 2007, Request for an Equitable Adjustment. (Hr'g Tr. 695:2-19.) Kew then testified that Fort Myer had audited its finances and determined that the cost of each mobilization was $3,926.76.[33]

[32] *See supra* note 22.

[33] Appellant's Hearing Exhibit 26, however, indicates a mobilization cost of either $3,926.76 or $4,749, depending on the work performed.

(Hr'g Tr. 698:1-703:22; *see also* Appellant's Hr'g Ex. 26.) Kew further stated that Fort Myer was seeking costs for 42 mobilizations, treating mobilizations and demobilizations separately and subtracting the 10 anticipated mobilization/demobilizations. (Hr'g Tr. 707:14-708:8.)

70. Kew further testified that based on audited costs, Fort Myer's additional supervisory costs for the F Street Project were $3,802.56. (Hr'g Tr. 713:13-720:19.) Kew also testified as to a document allegedly supporting labor escalation costs of $3,824.47.[34] (Hr'g Tr. 723:2-727:17.) Lastly, Kew testified, using randomly chosen dates from an asphalt index, that a 3 percent materials cost increase of $7,494.79 was reasonable, which he applied to the amounts being claimed by Fort Myer. (Hr'g Tr. 730:1-738:7; *see also* Appellant's Hr'g Ex. 28.) Based upon these factors, Kew testified that Fort Myer's total mobilization costs should be $91,095.48. (Hr'g Tr. 710:22.)

The District's Contentions

71. The District only offered one witness at the hearing, Contracting Officer Jerry Carter, to discuss the impact to the Appellant in connection with the District's Article 3 Change Order. The CO testified that the Article 3 change to the maintenance of traffic impacted Civil's schedule. (Hr'g Tr. 887:2-8.) The CO, however, testified that the two-block restriction only delayed the project by 90 days. (Hr'g Tr. 887:16-20.) CO Carter also testified that he believed that upon lifting the two-block restriction in his January 19, 2006 letter, Civil was immediately free to begin work on the 1700 block of F Street. (Hr'g Tr. 897:13-898:17, 919:7-920:21.)

72. CO Carter testified that he did not know the basis for computing the $204,000.00 amount that he awarded to the Appellant in his final decision, which assessed the overall delay impact to contract performance caused by the Change Order. (Hr'g Tr. 940:2-20.) The CO, however, did testify that this amount included extended overhead costs. (Hr'g Tr. 908:12.) Moreover, the District offered no additional witnesses at the hearing to validate the basis for its contention that the Appellant was entitled to only $204,000.00 for the Change Order, nor did the District produce any witnesses to present oral or written testimony to refute the expert findings made by Galbraith regarding the cause of critical project delays.

JURISDICTION

The Board has jurisdiction to hear any "appeal by the contractor from a final decision by the contracting officer on a claim by the contractor, when such claim arises under or relates to a contract." D.C. CODE § 2-309.03(a)(2) (repealed 2011).[35] The District argues, however, that the Board lacks jurisdiction because a proper claim was not submitted to the CO. (Dist.'s Post Hr'g Br. 12-15; *see generally* Dist. Trial Mem.) The District's argument rests on the Appellant's failure to certify the claim underlying CAB No. D-1294; the District argues that such failure

[34] However, this document was not introduced into evidence.

[35] The Procurement Practices Reform Act of 2010 ("PPRA") repealed the District of Columbia Procurement Practices Act of 1985 ("PPA"), as amended by the Procurement Reform Amendment Act of 1996 and codified at D.C. CODE § 301.01 *et seq.*, and amended and recodified the District's procurement statutes at D.C. CODE § 2-351.01 *et seq.* effective Apr. 8, 2011. Procurement Practices Reform Act of 2010, D.C. Law. No. 18-371, 58 D.C. Reg. 1185 (Feb. 11, 2011). However, as all the appeals at issue were filed prior to the enactment of the PPRA, the PPA, as amended, applies to all issues in these consolidated appeals, including our jurisdiction.

renders the Appellant's claim defective.[36] (Dist.'s Post Hr'g Br. 12-15; *see generally* Dist. Trial Mem.) According to the District, such certification was required by D.C. CODE § 2-303.08 and by the terms of the contract. (Dist. Trial Mem. 2-4.)

Under federal procurement law, the Contract Disputes Act ("CDA") requires contractors to certify claims over $100,000.00. 41 U.S.C. § 7103(b) (2011 Supp.) (formerly 41 U.S.C. § 605(c)). In interpreting this certification requirement, federal courts and boards have held that lack of a CDA certification deprives the contracting officer and boards of contract appeals of jurisdiction over a claim. *Tecom v. United States*, 732 F.2d 935, 937 (Fed. Cir. 1984); *Red Gold, Inc. v. Dep't of Agric.*, CBCA No. 2259, 12-1 BCA ¶ 34,921 (July 6, 2011); *Tefirom Insaat Enerji Sanayi ve Ticaret A.S.*, ASBCA No. 56,667, 11-1 BCA ¶ 34,628 (Nov. 29, 2010). We have noted, however, that the District's procurement statutes do not include language comparable to the CDA "mandating that contract dispute claims be certified to the CO in the same manner." *Flippo Constr. Co.*, CAB No. D-1422, Order on Mot. to Dismiss 2 (Mar. 29, 2012) (unpublished); *see also* D.C. CODE § 2-308.05 (prescribing the procedure for submission of claims by a contractor against the District).

The District's reliance on D.C. CODE § 2-303.08 is misplaced.[37] D.C. CODE § 2-303.08(a) requires a contractor to submit cost or pricing data for contract awards and modifications over $100,000.00 and to certify that such cost or pricing data is "accurate, complete, and current as of a mutually determined specified date."[38] On its face, the foregoing legal provision explicitly requires a contractor to submit certified cost or pricing data to directly support a contract, a change order, or a contract modification. This provision does not, on the other hand, expressly include, or even address, dispute "claims" within the categories of contract related submissions requiring a supporting cost or pricing certification. *Cf.* D.C. MUN. REGS. tit. 27, § 3899.1 (2004) (defining a claim as a written demand "seeking, as a matter of right, the payment of money in a sum certain the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract."). Consequently, the requirement for certified cost or pricing data in D.C. CODE § 2-303.08 is inapplicable to contractor claims.

For the foregoing reasons, the Board finds that a lack of claim certification does not deprive the Board jurisdiction over the present appeals and the motion to dismiss is denied. Thus, the Board has jurisdiction over the present appeals pursuant to D.C. CODE § 2-309.03(a)(2).

DISCUSSION

The Appellant seeks an equitable adjustment to cover the increased costs that resulted from the District's imposition of the two-block restriction to the F Street Project in the CO's May 19, 2005, Change Order. (Appellant's Post Hr'g Br. 3.) To receive an equitable adjustment, a contractor must show three elements—liability, causation, and resultant injury. *Wilner v. United*

[36] The Board notes that the contested certification appears in the Appellant's claims underlying CAB Nos. D-1413 and D-1417.
[37] The District also relies on Article 7(A)(a)(5) of the Standard Contract provisions; however, the District notes that this provision is derived from the certification requirement in D.C. CODE § 2-303.08(a). (Dist. Trial Mem. 2.)
[38] We have recognized that this requirement is derived from the federal Truth in Negotiations Act, 10 U.S.C. § 2306a. *See Careers & Co.*, CAB No. P-0525, 45 D.C. Reg. 8734, 8737-38 (Feb. 13, 1998).

States, 24 F.3d 1397, 1401 (Fed. Cir. 1994); *Servidone Constr. Corp. v. United States*, 931 F.2d 860, 861 (Fed. Cir. 1991). The Appellant has the burden of proving its entitlement to an equitable adjustment by a preponderance of the evidence. *A.S. McGaughan Co.*, CAB No. D-884, 41 D.C. Reg. 4130, 4135 (Mar. 16, 1994). The Board considers the contracting officer's final decision in reviewing a contractor's claim, but the Board's review is de novo and the factual findings of the contracting officer are not attributed any presumed validity. *See Ebone, Inc.*, CAB Nos. D-971, D-972, 45 D.C. Reg. 8753, 8773 (May 20, 1998).

Entitlement

Under the original Maintenance of Traffic Specifications in the contract, Civil was permitted to work on all six blocks of the F Street Project concurrently. (Findings of Fact ("FF") 3, 6.) In accordance with these specifications, Civil planned to utilize multiple crews simultaneously progressing through all six blocks of F Street, largely one side of the street at a time. (FF 5-6.) By restricting the Appellant to a construction sequence of activities of two blocks at a time, the District substantially disrupted the Appellant's originally planned sequence of work, which led to performance inefficiencies and delays. (FF 11.) Indeed, the CO admitted that this change in the maintenance of traffic specifications in the contract impacted the Appellant's schedule, which ultimately led the District to issue a formal change order granting some relief to the Appellant. (FF 71.) Thus, these basic facts alone are sufficient for the Appellant to be entitled to an equitable adjustment under the Changes Clause. *See H.E. Johnson Co.*, ASBCA No. 48248, 97-1 BCA ¶ 28,921 (Oct. 9, 1996) (disruption to contractor's sequence of work sufficient for entitlement to an equitable adjustment.)

Nonetheless, while the District concurs that there was an impact to Civil resulting from the Article 3 Change Order, to recover delay damages, Civil must demonstrate the extent of the delay and the causal link between the District's actions and the extended delay period claimed by the contractor. *Essex Electro Eng'rs, Inc. v. Danzig*, 224 F.3d 1283, 1295 (Fed. Cir. 2000). In determining the length of the delay resulting from the two-block restriction, we are cognizant of the fact that the Appellant performed the entirety of the contract without an approved schedule. (FF 27.) The District argues that the absence of an approved schedule precludes the Appellant from recovery.[39] (Dist. Post Hr'g Br. 17-18.)

Typically, to properly demonstrate delay on a project, a CPM schedule must be kept current and reflect delays as they occur. *Preston-Bradley Co.*, VABAC Nos. 1892 et al., 87-1 BCA 19,649 (Mar. 3, 1987). The critical path method is an efficient means of organizing and scheduling a complex project consisting of numerous but interrelated smaller projects. *Haney v. United States*, 676 F.2d 584, 595 (Ct. Cl. 1982). The subprojects are classified as to duration and order of precedence. *Id.* Items determined to be on the critical path are those that if not performed on schedule will delay the entire project. *Id.* Accordingly, determining the critical path is crucial because only work along the critical path has an impact on project completion. *Fortec Constructors v. United States*, 8 Cl. Ct. 490, 505 (1985) (quoting *G.M. Shupe, Inc.*, 5 Cl. Ct. 662, 728 (1984)).

[39] In support of its argument, the District cites a clause in the contract requiring Civil to submit and regularly update a CPM schedule. (Dist. Post Hr'g Br. 18.)

While the Board recognizes that Civil did not maintain an up to date CPM schedule at any point during contract performance, this failure largely stemmed from the disagreement between the parties as to the impact of the two-block restriction. (*See* FF 19-26.) Without an approved baseline schedule reflecting the two-block restriction's impact on the phasing for the project, we fail to see how Civil could have provided the updates that the District argues were necessary for Civil to support its claim. Accordingly, Civil's inability to get an approved schedule does not automatically preclude its entitlement to compensatory delay damages, particularly where Civil's expert presented the Board with a detailed CPM analysis through an expert report. *See Fortec Constructors*, 8 Cl. Ct. at 506.

In preparing this CPM analysis, the Appellant's expert reviewed Civil's original baseline schedule as well as as-built data. (FF 42.) His analysis took into account numerous categories of contemporaneous contract and performance documents to corroborate his findings. (FF 42.) Further, the expert's analysis accounted for all delays to the project (critical and non-critical), not simply those caused by the District. (FF 44-51.) Accordingly, the Board finds that the Appellant's expert presented credible evidence and testimony, as part of his CPM analysis, to explain many of the events that occurred during the performance of the contract that resulted in delays after the issuance of the May 19, 2005, Change Order. *See SAE/Americon-Mid Atlantic, Inc. v. Gen. Servs. Admin.*, GSBCA Nos. 12,294 et al., 98-2 BCA ¶ 30,084 (Oct. 23, 1998) ("the device of comparing the as-built progress with the original planning is a worthy and time-honored method of identifying critical delays"); *see also States Roofing Corp.*, ASBCA No. 54,860, 10-1 BCA ¶ 34,356 (Jan. 12, 2010) ("A credible CPM time impact analysis should take into account all of the impacts to the project.").

More strikingly, the District elicited no testimony from this expert on cross examination, or testimony from the District's single witness, that contradicted or refuted any of the expert's findings regarding the delay period that occurred, and the party that was responsible for the delay. The District's sole witness, Contracting Officer Jerry Carter, was even unable to testify as to the basis for his conclusion that the Appellant should only be given a 90 day extension in connection with the performance impact arising from the Change Order. Consequently, based upon the Board's review of the expert findings, as corroborated by the record in this case, we also find that Appellant is entitled to compensable delay damages beyond the 90 days granted by the District in the June 16, 2006, Contracting Officer's Final Decision, as discussed further below.

Actual Delay Days[40]

Both the Appellant's Expert Report and the Alpha Report (prepared on behalf of the District prior to this litigation) treat the overall delay to the Appellant's performance of the contract up until February 22, 2006, as resulting from the two-block restriction imposed by the Change Order. (FF 23, 44.) Pursuant to the District's directive following its rescission of the two-block restriction, the Appellant submitted Revised Schedule #3 on March 7, 2006. However, as the expert determined based upon the as-built data, the contract was already delayed by 140 days at the time that Civil was told to submit this revised schedule in connection with the

[40] Though we use the term "delay" in discussing the time extension that the Appellant is entitled to, we reiterate that the Appellant's entitlement derives from the Changes Clause.

rescission of the two block restriction. (FF 44-45.) Therefore, as a preliminary matter, the Appellant attributes an initial 140 day delay to the District's Change Order requirement.

As described herein, the District's consultant issued the Alpha Report which rejected the Appellant's Revised Schedule #3 and, alternatively, asserted that the project was only delayed by 90 days, up until February 22, 2006, as the result of the Change Order. (FF 23.) This assessment by Alpha of only a 90 delay appears to be the basis for the formal change order granting Civil a 90 day extension of time, and $204,000.00 in delay costs associated with the Change Order. (FF 25, 33.) The District, however, provided no further testimony or evidence to support the conclusory statements in the Year 2006 Alpha Report, which appears to be the only basis for limiting Civil's recovery for compensable delay days arising from the Change Order. Moreover, we find merit to the expert's findings that the Alpha Report was flawed in that it did not adhere to Civil's original sequencing of work in determining the extent of the delay caused by the two-block restriction. While the Appellant was to perform underground utility work prior to any street-level work under its original phasing plan, the Alpha Report scheduled utility and street-level work concurrently. (FF 4, 45.) The Appellant's expert, on the other, reviewed the Appellant's Revised Schedule #3 and established a projected, remaining schedule for the project which restored the original sequence of work activities. (*See* FF 45.) We, therefore, accept the Appellant's contention that the contract was delayed 140 days by the District by the time it was asked to prepare a new schedule after the District rescinded the two-block restriction.

The Alpha Report also suggested that Civil may have concurrently delayed the project, but the District provided no further evidence or testimony at the hearing to support this claim. (Appellant's Hr'g Ex. 17 at 182.) Because concurrent delay is in the nature of an affirmative defense, the District bears the burden of establishing a concurrent delay. *MCI Constructors, Inc.*, CAB No. D-924, 44 D.C. Reg. 6444, 6458 (June 4, 1996). The Alpha Report's purely speculative suggestion regarding a contractor caused delay is insufficient to establish a concurrent delay defense. *John Driggs Co.*, ENGBCA Nos. 4926 et al., 87-2 BCA ¶ 19,833 (May 18, 1987).

In addition to the 140 days of delay caused by the District, and as discussed above, we also agree with the Appellant's expert in attributing an additional 14 days of delay to the two-block restriction to reflect the period that the District prevented Civil from fully mobilizing on the project by first requiring that it develop and submit Revised Schedule #3 to the District after the two-block restriction was rescinded. (FF 46.) Despite the CO's testimony to the contrary, (FF 71,) a plain reading of CO's January 19, 2006, letter rescinding the two-block restriction shows that Civil was required to submit a revised schedule to the District before progressing forward with work on the 1700 block of F Street. (FF 18.) Civil submitted its revised schedule on March 7, 2006. (FF 19.) There is no allegation by the District that Civil unduly delayed in submitting its schedule.

The Appellant also claims 14 additional delay days due to adverse weather conditions that occurred during the extended period that Civil was required to work on the project because of District-caused delays. (FF 48, 50.) Where government-caused delays push a contractor into periods of adverse weather, the contractor may recover damages for such weather delays. *J.D. Hedin Constr. Co. v. United States*, 347 F.2d 235, 253-55 (Ct. Cl. 1965); *DTC Engineers & Constructors, LLC*, ASBCA No. 57,614, 12-1 BCA ¶ 34,967 (Mar. 9, 2012); *Charles G.*

Williams Constr., Inc., ASBCA No. 42,592, 92-1 BCA ¶ 24,635 (Dec. 9, 1991). We have already found that the two-block restriction delayed the F Street Project and pushed back the completion date until September 25, 2006. The Appellant presented evidence through its expert establishing that it was delayed for 11 days due to adverse weather between the original May 8, 2006, completion date and the new projected completion date of September 25, 2006. (FF 48 note 15.) These weather impacts were corroborated by the daily inspector report which were presented by the Appellant and made part of the record at trial.[41] We, however, find that the expert's opinion that the Appellant should be granted an additional 2 days of delay for weather because of the need to convert 4 individual weather impact days—May 15, 2006, June 12, 2006, and July 5-6, 2006—from workdays to calendar days is unfounded. The delay period in this matter is being calculated based upon calendar days and, thus, there is no basis for creating a distinction, and additional recovery, to the Appellant by creating an additional conversion based upon any of the 11 weather impact days which the Board has recognized herein as a District caused delay. We also find that the District's Change Order is not the proximate cause of the November 8, 2006, weather delay as the Appellant offered no meaningful evidence that this was the case.

Additionally, we find that the Appellant is further entitled to an additional day of delay resulting from the July 10, 2006, switch from the north to the south side of F Street. The Appellant originally planned to complete all work on the north side before switching to the south side. (FF 4.) Due to the two-block restriction, on or about September 8, 2005, Civil shifted from the north to the south side between 23rd and 21st Streets. (FF 16.) But for the two-block restriction, the Appellant would not have incurred the additional July 10, 2006, delay day resulting from this switch.

In summary, the Board finds that the Appellant is entitled to 166 compensable days of delay resulting from the two-block restriction. We accept: (1) the Appellant's attribution of 140 days of delay, through February 22, 2006, to the District; (2) the additional 14 days of delay between February 22 and March 7, 2006, resulting from the schedule restriction on the Appellant prior to commencing work on the 1700 block of F Street; (3) 11 days for the Appellant's claim of weather delay; and (4) the Appellant's claim of 1 day of delay for the July 10, 2006, additional switch from the north to south side of F Street. The Board finds that these are the only delay days which the Appellant has proven are attributable to the actions of the District.

Delay Damages

Equitable adjustments are corrective measures that serve to keep a contractor whole when the District modifies a contract. *Perdomo & Assocs., Inc.*, CAB No. D-802, 41 D.C. Reg. 3898, 3908 (Jan. 10, 1994); *Grunley Constr., Inc.*, CAB No. D-910, 41 D.C. Reg. 3622, 3638 (Sept. 14, 1993). An equitable adjustment should reflect "the difference between what it would have reasonably cost to perform the work as originally required and what it reasonably cost to perform the work as changed." *District of Columbia v. Org. for Envtl. Growth, Inc.*, 700 A.2d 185, 203 (D.C. 1997); *Gilbane-Smoot/Joint Venture*, CAB No. D-885, 40 D.C. Reg. 4954, 4983 (Feb. 18, 1993). The Board has held that this requires that the contractor's costs be reasonable; however, the standard of reasonable costs must be viewed in light of the particular contractor's costs.

[41] *See* Appellant's Hr'g Ex. 24 at 253-61.

Grunley Constr., Inc., CAB No. D-910, 41 D.C. Reg. at 3639. The party claiming entitlement to an equitable adjustment has the burden of proving the amount to which it is entitled. *Org. for Envtl. Growth*, 700 A.2d at 203; *Reliable Contracting Grp., LLC v. Dep't of Veterans Affairs*, CBCA No. 1539, 11-2 BCA ¶ 34,882 (Nov. 16, 2011). The party must prove the amount with sufficient certainty such that the determination of the amount will be more than mere speculation. *Reliable Contracting*, CBCA No. 1539, 11-2 BCA ¶ 34,882. While the proof of damages need not be exact, some convincing, reasonable basis must be advanced. *Twigg Corp. v. Gen. Servs. Admin.*, GSBCA Nos. 14,386 et al., 00-1 BCA ¶ 30,772 (Feb. 11, 2000).

The preferred method of establishing the amount of an adjustment is through the submission of actual costs. *Org. for Envtl. Growth*, 700 A.2d at 203; *Perdomo & Assocs.*, CAB No. D-802, 41 D.C. Reg. at 3908. However, where the contractor does not accumulate actual cost data and the actual costs attributable to a change cannot be reasonably identified, the contractor may use estimates to quantify its increased costs. *Perdomo & Assocs.*, CAB No. D-802, 41 D.C. Reg. at 3908; *Reliable Contracting*, CBCA No. 1539, 11-2 BCA ¶ 34,882; *Envtl. Safety Consultants, Inc.*, ASBCA No. 53,485, 05-1 BCA ¶ 32,903 (Mar. 8, 2005). The Appellant's Amended Complaint lists 6 areas of costs. (FF 40.) We address each *ad seriatim*.

a. Labor

As discussed herein, the Appellant's expert report and testimony established the ongoing impact resulting from the two-block restriction mandated by the May 19, 2005, Change Order. These facts were also corroborated by the testimony of the Appellant's witnesses, Steve Salehi and John Constantino. In totality, the facts confirm for the Board that the District imposed the two-block restriction at the very start of the performance period. (FF 7-9.) The Change Order did not change the work to be done, but it altered the way that Civil was allowed to perform the required work. (FF 3, 5-6, 9, 11.) Rather than working on 6 blocks concurrently as planned, the two-block restriction added inefficiencies resulting in multiple additional demobilizations. (FF 6, 11.) The expert's report explains that the general difficulty in establishing actual labor costs for this project arises when attempting to determine whether specific periods of labor should be viewed as deriving from the original contract work or from the two-block restriction. (FF 53.) In this regard, the expert report provided several reasons why Civil was unable to calculate its actual labor costs arising from the two-block restriction, largely due to inefficiencies in the manner in which work was performed because of the Change Order requirements. (Appellant's Expert Report 20.)

In light of the lack of information on actual labor costs incurred on the project, the Appellant's expert prepared an estimate of the increased labor costs resulting from the delay period. (FF 53-54.) The Appellant's expert derived the estimate by taking the total as-bid labor costs divided by 350 days to arrive at a daily rate, which he then multiplied by the number of delay days that the expert found that the Appellant had incurred due to the actions of the District. (FF 54.) The Board has previously held that the computation of daily rates is a recognized measure of direct costs where it is impractical to derive actual cost data. *MCI Constructors*, CAB No. D-924, 44 D.C. Reg. at 6462-64.

The Board finds that the formula which the expert applied in this case to derive an appropriate daily labor rate was acceptable given the lack of actual cost data related to additional

labor hours incurred by the Appellant as a result of the two-block restriction. However, the Board finds that the expert's use of 350 days instead of 365 days as the originally planned contract performance period is an inaccurate baseline for the formula. In this regard, we find that utilizing the full original contract term is a fairer measure of the Appellant's costs. Using the 365 days originally allotted for Civil's contract performance, we derive a burdened labor daily rate of $1,938.57,[42] which should be multiplied by the compensable delay period (166 days) caused by the District to calculate the additional, and total, labor compensation to which Civil is entitled to recover from the District. Accordingly, the District shall compensate the Appellant $321,802.62 for additional labor costs incurred by the Appellant due to the Change Order.

b. Equipment

Similarly, based upon the delays caused by the District on this project, the expert derived a daily rate for the Appellant's equipment costs by using Civil's as-bid daily equipment rate costs as a baseline for this methodology. A contractor is entitled to recover additional equipment costs incurred in performing work for an additional period beyond what it would have had to perform but for a government-caused delay. *MCI Constructors*, CAB No. D-924, 44 D.C. Reg. at 6464. The Appellant's expert estimated its daily equipment rate to be $1,141.72 for the delay period by using Civil's as-bid daily equipment rate as the baseline for this calculation, but then adjusting that rate to account for time during which the project equipment would be in use or idle. (FF 56.)

In the case of the Appellant's project equipment, however, the Appellant introduced evidence at the hearing that showed the actual equipment costs that it incurred for the project. Specifically, the Appellant's own cost accounting data shows that throughout the project Civil incurred $591,499.00 in equipment costs and its Project Superintendent testified at the hearing that these were, in fact, its actual equipment costs. (FF 57.) As noted above, the actual cost method is the preferred method of proving the amount of an adjustment. *Org. for Envtl. Growth*, 700 A.2d at 203. The actual cost method provides the Board with a contractor's documented expenses and therefore ensures that the amount of an adjustment is equitable and not a windfall for the contractor or government. *Advanced Eng'g & Planning Corp.*, ASBCA Nos. 53366, 54044, 05-1 BCA ¶ 32,806 (Nov. 19, 2004) (citing *Dawco Constr., Inc. v. United States*, 930 F.2d 872, 882 (Fed. Cir. 1991)). While using estimates is an acceptable method, estimates are generally only accepted in the absence of actual cost data. *Bergman Constr. Corp.*, ASBCA No. 15,020, 72-1 BCA ¶ 9411 (Apr. 13, 1972) ("[E]stimates are a preferred method of pricing equitable adjustments only where actual costs are not available."); *see also Reliable Contracting*, CBCA No. 1539, 11-2 BCA ¶ 34,882 (noting that "evidence of actual costs is more compelling proof of damages" than estimated costs). Accordingly, actual costs should be used where available. *See Advanced Eng'g & Planning Corp.*, ASBCA Nos. 53366, 54044, 05-1 BCA ¶ 32,806 (accepting the contractor's estimate for a portion of its claim, but using actual cost rates derived from a DCAA audit where such rates were provided); *see also Bergman Constr. Corp.*, ASBCA No. 15,020, 72-1 BCA ¶ 9411 (rejecting both contractor and government estimates where the estimates did not conform to the available actual cost data).

[42] We arrived at this figure by dividing the $707,576.86 in as-bid labor costs (*see supra* note 24) by the original 365 day duration of the project.

Because actual cost data is available to establish the Appellant's actual equipment costs, we reject its alternative methodology for determining a daily equipment rate based upon the Appellant's as-bid equipment rate. We believe that the actual cost rate is the proper measure in determining Civil's increased equipment costs over the delay period. Consequently, in order to derive the most accurate equipment daily rate, the Appellant's total equipment costs ($591,499.00) must be divided by the entire 591 day duration of the project, which establishes that Civil incurred a daily equipment cost rate of $1,000.84 for the delay period of the contract. Therefore, the Appellant is entitled to recover from the District its equipment costs that it incurred based upon the foregoing equipment rate of $1,000.84 as multiplied by the delay period (166 calendar days) caused by the District on this project. As a result, the District shall compensate the Appellant in the amount of $166,139.44 for these additional equipment costs, which the District caused the Appellant to incur due to the Change Order.

c. Scheduling

The Appellant is not entitled to any additional compensation arising from scheduling costs. The Appellant originally planned on submitting 12 schedules to the District at a cost of $450.00.00 per schedule, or $5,400.00 total. (FF 59.) This function appears to have been satisfied by the Appellant's subcontractor Contractors Engineering Services, which submitted 12 invoices for scheduling services concurrent with Civil's contract performance at a cost of $6,790.00. (FF 58.) The fact that the Appellant may have underestimated its scheduling costs, by not accounting for typical contract changes, cannot be a basis for shifting the resulting loss to the District. *See Org. for Envtl. Growth*, 700 A.2d at 203.

Additionally, the Appellant has not shown that the scheduling services provided by McDonough Boyland Peck were required under the contract. Rather it appears that McDonough was retained in order to prosecute the present appeals. McDonough was not retained until August 2006, well into Civil's performance under the F Street contract and after the CO's final decision. (FF 58.) The first invoice was for $10,000.00, a sum substantially greater than the total amount charged by Contractors Engineering Services. (FF 58.) Moreover, McDonough employs the Appellant's expert. (FF 58.) Professional fees incurred in prosecuting an appeal from a contracting officer's final decision are not allowable costs. *See MCI Constructors*, CAB No. D-924, 44 D.C. Reg. at 6469. Therefore, the Board determines that Civil may not recover for services provided by McDonough Boyland Peck in prosecuting these appeals.

d. Field Overhead

Field overhead costs, also referred to a jobsite overhead or general conditions costs, are direct costs that can be attributed to the performance of a specific contract. *AMEC Constr. Mgmt., Inc. v. Gen. Servs. Admin.*, GSBCA No. 16,233, 06-1 BCA ¶ 33,177 (Jan. 24, 2006); *Young Enters. of Ga., Inc. v. Gen. Servs. Admin.*, GSBCA No. 14,437, 00-2 BCA ¶ 31,148 (Oct. 19, 2000). We have stated that one way to measure such costs is to divide the total general conditions costs incurred on a project by the total number of days on the project in order to derive a daily rate, and then multiply the number of compensable days by the daily rate. *MCI Constructors*, CAB No. D-924, 44 D.C. Reg. at 6464. Using this approach, the Appellant's expert determined that the Appellant was entitled to recover at a daily rate of $1,307.49. (FF

61.) The Board, however, finds that a portion of the Appellant's claim field overhead costs are unsubstantiated and, therefore, do not support recovery at the foregoing daily rate.

The Appellant's expert, in calculating the field overhead rate, found that Civil had incurred a total of $43,371.41 including field office rent cost ($31,959) and field office supplies and phone costs ($11,412.41) for a total field office overhead cost of $43,371.41. (FF 61 note 26.) Notwithstanding, the actual company back-up cost data provided by Civil, and relied upon by the expert, to support these field office overhead costs total an amount higher than what the expert included in the expert report for these same costs items ($44,165.50). (FF 62.) The expert acknowledged this cost discrepancy between his expert report and Civil's internal back-up data, but never explained or reconciled these differing costs so that his report could be fully substantiated on this issue at the hearing:

> And if I look at Page 3 of the Job Cost Detailed Transaction Report, the total shows $44,165.50 which is a little bit more than the $43,371.41 shown in my report. So, presumably there are things in here that were not included in my calculation.

(Hr'g Tr. 475:12-17)

Thus, given the Appellant's failure to clarify the discrepancy between its internal cost records and the ultimate amount set forth in the expert report for its field office overhead costs in the amount of $43,371.41, the Appellant failed to meet its burden of showing the accuracy of these particular costs, which it allegedly incurred.

In order to substantiate its extended field overhead costs, the Appellant also provided the Board with evidence of the payroll costs for project supervision which it incurred for the F Street Project in the amount of $580,457.60, as well as its costs for a field safety officer in the amount of $27,338.11. (FF 62.) The Appellant's Chief Financial Officer provided extensive testimony to explain the basis for these payroll calculations and the total of $607,795.71, which it incurred in field safety officer and field supervision costs, which the Board accepts as valid.[43] (FF 62.) The Board, however, finds that the 20 percent markup, which the Appellant's expert applied to these field safety officer and supervision costs is unallowable as it would improperly result in double recovery to the Appellant based upon the separate overhead recovery being granted to the Appellant below. Dividing the $607,795.71 in field supervision costs by the 591 days of total duration of the F Street Project, we find that the Appellant is entitled to recover from the District its field overhead costs at a daily rate of $1,028.42, which should be multiplied by the 166 days attributable to the District to calculate the total field overhead costs, for which the Appellant is entitled to be compensated by the District. Consequently, the District shall compensate the Appellant in the amount of $170,717.72 for these additional field overhead costs, which the District caused the Appellant to incur due to the Change Order.

[43] While the Appellant did not formally introduce its payroll summary document (Appellant's Hr'g Ex. 35) into evidence at the hearing, it was clearly its intention to do so. Moreover, prior to allowing Appellant's Chief Financial Officer to testify regarding the substance of this document, the Board heard and overruled the District's objections to this document being introduced and relied upon by the Appellant at the hearing for purposes of meeting its burden of proof. (Hr'g Tr. 310:17-322:19) For these reasons, the Board hereby admits the document into the record.

e. Extended Home Office Overhead

1. The Notice Requirement of the Changes Clause Does Not Preclude the Appellant from Recovering Extended Home Office Overhead

The Appellant's claims in D-1413 and D-1417 seek recovery of its home office overhead costs during the extended performance period. (FF 37-38.) The District argues that the Appellant should be barred from recovery because the claims were submitted more than 5 years after the May 19, 2005, Change Order was issued and therefore the Appellant violated the notice requirement of the changes clause. (Dist. Post Hr'g Br. 19-20.)

It is well settled in government contract law that notice provisions are read liberally and will not bar a contractor's claim unless the government is prejudiced by the late notice. *See, e.g., Walsh/Davis Joint Venture v. Gen. Servs. Admin.*, CBCA No. 1460, 11-1 BCA ¶ 34,737 (Apr. 11, 2011); *Flathead Contractors, LLC*, AGBCA Nos. 2005-130-1, 2005-131-1, 06-1 BCA ¶ 33,174 (Jan. 18, 2006); *Grumman Aerospace Corp.*, ASBCA Nos. 48,006 et al., 03-1 BCA ¶ 32,203 (Mar. 14, 2003); *Powers Regulatory Co.*, GSBCA Nos. 4468 et al., 80-2 BCA ¶ 14,463 (Apr. 30, 1980). The government bears the burden of establishing that it was prejudiced; this burden cannot be met by mere allegation but must be supported by evidence in the record. *Grumman Aerospace*, ASBCA Nos. 48,006 et al., 03-1 BCA ¶ 32,203; *see also Walsh/Davis*, CBCA No. 1460, 11-1 BCA ¶ 34,737 ("the claim will be heard unless the Government can prove it was prejudiced by the late notice"); *Big Chief Drilling Co. v. United States*, 15 Cl. Ct. 295, 303 (1988) ("the government has the burden of proving that the untimeliness caused prejudice to its case"). This Board has adopted this federal standard regarding the interpretation of notice requirements. *Org. for Envtl. Growth*, CAB No. D-850, 49 D.C. Reg. 3353, 3354 (Apr. 13, 2001), *rev'd on other grounds*, 806 A.2d 1225 (D.C. 2002).

In the seminal case of *Hoel-Steffen Construction Co. v. United States*, the Court of Claims stated that to adopt a "severe and narrow application of the notice requirements … would be out of tune with the language and purpose of the notice provisions, as well as [a] concern that notice provisions … not be applied too technically and illiberally where the Government is quite aware of the operative facts." 456 F.2d 760, 767-68 (1972). Accordingly, the government can be placed on notice where the contracting officer has actual or imputed knowledge of the pertinent facts. *See CATH-dr/Balti Joint Venture*, ASBCA Nos. 53,581, 54,239, 05-2 BCA ¶ 33,046 (Aug. 17, 2005); *A.R. Mack Constr. Co.*, ASBCA No. 50,035, 01-2 BCA ¶ 31,593 (Sept. 18, 2001).

The Board finds that the District was on notice of the Appellant's claims in two ways. First, soon after the Appellant had placed concrete barriers along the entire six blocks of the F Street Project, the neighboring community began objecting to the anticipated disruption the construction would cause. (FF 8-9.) In response to the complaints, the CO imposed the two-block restriction, specifically citing the Changes Clause. (FF 9.) Therefore, the District knew (or at least should have known) that it was altering the Appellant's sequence of work, which could give rise to a claim. Indeed, within five days of the CO's imposition of the two-block restriction, the Appellant furnished the CO with written notice that the change would materially alter the nature of the project and drastically increase costs and requested a formal change order to reflect the additional costs. (FF 10.) This notice was followed by a July 15, 2005, estimate of

costs arising from the two-block restriction, in which the Appellant estimated that direct costs would increase by $2,375,275.18. (FF 12-13.) Though the Appellant stated that extended home office costs were not included in the estimate, (FF 13,) the Appellant did not waive its right to recover those costs.

Further, assuming *arguendo* that the Appellant was required to specifically notify the District that it was seeking extended home office overhead costs, the District has not alleged, much less shown, any prejudice. In the formal modification issued three days after his final decision, the CO stated that the $204,000.00 in additional compensation included unabsorbed home office costs. (FF 34.) At the hearing, the CO reiterated that the $204,000.00 he awarded to the Appellant included extended overhead costs. (FF 72.) Absent any prejudice to the District, the Appellant is not precluded from asserting its claims for extended overhead costs in this action.

2. The Eichleay Formula is Not the Appropriate Method of Determining the Appellant's Recoverable Extended Overhead Costs

The Appellant seeks to recover its unabsorbed home office overhead costs for the extended project period pursuant to the Eichleay formula. (FF 37-38, 63.) The Eichleay formula was first introduced by the Armed Services Board of Contract Appeals in *Eichleay Corp.*, ASBCA No. 5,183, 60-2 BCA ¶ 2,688 (July 29, 1960). The Eichleay formula allocates overhead costs "pro-rata because they cannot ordinarily be charged to a particular contract." *Wickham Contracting Co. v. Fischer*, 12 F.3d 1574, 1579 (Fed. Cir. 1994) (citing *Eichleay Corp.*, ASBCA No. 5,183, 60-2 BCA ¶ 2,688) (quotation marks omitted). Use of the Eichleay formula is appropriate where a government caused-delay has "reduced the stream of direct costs in a contract." *C.B.C. Enters., Inc. v. United States*, 978 F.2d 669, 674 (Fed. Cir. 1992).

However, the Eichleay formula does not automatically apply to all claims for unabsorbed or extended home office overhead costs. Rather, both the Board and the Federal Circuit have held that a contractor must satisfy certain prerequisites before the Eichleay formula may be applied. *See, e.g.*, *MCI Constructors, Inc.*, CAB No. D-924, 44 D.C. Reg. 6444; *Melka Marine, Inc. v. United States*, 187 F.3d 1370 (Fed. Cir. 1999); *P.J. Dick, Inc. v. Principi*, 324 F.3d 1364 (Fed. Cir. 2003). For example, in *MCI Constructors*, the Board held that in order to justify using the Eichleay formula for calculating its daily rate of unabsorbed home office expenses, a contractor must show that: "(1) the government has caused a compensable delay or suspension; (2) the delay or suspension interrupts or reduces the stream of income from payments for contract direct costs; and (3) it was unable to absorb a fair share of its home office overhead costs during the delay or suspension period."[44] *MCI Constructors*, CAB No. D-924, 44 D.C. Reg. 6444 at 6456. Similarly, the Federal Circuit has held that calculating extended home office overhead costs using a daily rate, pursuant to the Eichleay formula, is an "extraordinary remedy which is specifically limited to contracts affected by government caused suspensions, disruptions and delays of work." *C.B.C. Enters.*, 978 F.2d at 675.

[44] The Board notes, however, that, in the past, it has not consistently analyzed whether the above (or similar elements) have been met before applying the Eichleay formula to calculate a contractor's unabsorbed home office costs. *See, e.g., Prince Constr. Co., Inc.*, CAB No. D-1127, 50 D.C. Reg. 7498 (May 12, 2003); *A.A. Beiro Constr. Co.*, CAB No. D-822, 50 D.C. Reg. 7349 (Jan. 3, 2002).

In the years since *MCI Constructors*, the Federal Circuit has held that, "before using the Eichleay formula to *quantify damages*," the contractor must meet three prerequisites.[45] *Nicon, Inc. v. United States*, 331 F.3d 878, 883 (Fed. Cir. 2003) (emphasis added). First, the contractor must show that there was a government-caused delay of uncertain duration. *Id.*; *Melka Marine*, 187 F.3d at 1375. Second, the contractor must also show that the delay extended the time of performance (or alternatively that it incurred additional costs because it would have completed its performance earlier). *P.J. Dick*, 324 F.3d at 1370. Third, the contractor must show that it was required to remain on standby, and thus unable to take on additional work to mitigate damages. *Melka Marine*, 187 F.3d at 1375; *Interstate Gen. Gov't Contractors, Inc. v. West*, 12 F.3d 1053, 1056 (Fed. Cir. 1993). Where the contractor makes a *prima facie* showing that it meets these prerequisites the burden of production shifts to the government to show that "it was not impractical for the contractor to take on replacement work." *P.J. Dick*, 324 F.3d at 1370; *Melka Marine*, 187 F.2d at 1375.

Although neither party questions the propriety of using the Eichleay formula, the Board finds it inappropriate to use the Eichleay formula to calculate the Appellant's recoverable overhead costs. Specifically, the Appellant fails to meet the third prerequisite for using the Eichleay formula—that is, the standby prong. The Federal Circuit has stated that the standby prong, properly understood, focuses on "suspension of work on the contract." *Interstate Gen.*, 12 F.3d at 1057. Here, the record shows that while work was delayed due to the Change Order, it does not show that the Appellant was forced to suspend performance.[46] In addition, the Appellant has not alleged that it was required to standby for any indefinite extended period of time as a result of the District's May 19, 2005, Change Order. Rather, the Appellant asserts that at no point did it stop work on the contract. (FF 27.) When a contractor continues to perform a substantial amount of work on a contract, the contractor is not on standby and use of the Eichleay formula is improper. *P.J. Dick*, 324 F.3d at 1373-74. Accordingly, use of the Eichleay formula here is inappropriate.

The Eichleay formula is simply a method of allocating overhead costs and is not a matter of legal entitlement. *Nicon*, 331 F.3d at 889 (Newman, J., concurring); *see also id.* at 883 (discussing the use of the Eichleay formula to *quantify* damages). Where a contractor meets the Eichleay prerequisites, the Eichleay formula is the exclusive method for calculating extended home office overhead costs.[47] *Young Enters.*, GSBCA No. 14,437, 00-2 BCA ¶ 31,148 (citing *Melka Marine*, 187 F.3d. at 1374-75; *Wickham Contracting*, 12 F.3d at 1574). But, where contract changes do not require a contractor to suspend work, the contractor may recover a fixed percentage markup of direct costs incurred. *Cmty. Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1581-82 (Fed. Cir. 1993).

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[45] This number has varied somewhat between cases, though there is broad agreement as to the particulars. For example, *P.J. Dick*, *supra*, expands the three elements to four, while *Melka Marine*, *supra*, compresses the analysis to a mere two elements.

[46] On the contrary, Appellant worked on duct banks for both GWU and GSA concurrently with portions of the F Street Project. (FF 28-29)

[47] The language of some Federal Circuit decisions suggests greater exclusivity in using the Eichleay formula. *See, e.g.*, *Melka Marine*, 187 F.3d at 1374-75 ("The Eichleay formula is the only means approved in our case law for calculating recovery of unabsorbed home office overhead."); *Wickham Contracting.*, 12 F.3d at 1575 (the Eichleay formula "is the only proper method of calculating unabsorbed home office overhead. No other formula may be used."). We note, however, that this language is to be read "in light of the factual context in which they arose." *Nicon*, 331 F.3d at 884.

While we have used the term "delay" as a term of convenience throughout this opinion, the Appellant's entitlement to additional costs derives from the Changes Clause of the contract; and our granting the Appellant an additional 166 days is a pure contract extension. With regard to pure contract extensions, use of a percentage markup to calculate recoverable overhead costs is appropriate.[48, 49] *See Cmty. Heating & Plumbing*, 987 F.2d at 1582; *Program & Constr. Mgmt. Grp., Inc. v. Gen. Servs. Admin.*, GSBCA No. 14,149, 99-2 BCA ¶ 30,579 (Sept. 30, 1999) (citing *C.B.C. Enters.*, 978 F.2d 669), *aff'd on reconsideration*, 00-1 BCA ¶ 30,771 (Jan. 27, 2000). Therefore, we grant the Appellant's entitlement to also recover a reasonable percentage markup on its direct costs, as recoverable overhead, and remand the issue of quantum for these overhead costs to the parties to negotiate a reasonable fixed percentage markup formula according to which the Appellant shall be compensated by the District.

Subcontractor Claims

1. Central Armature Works Has Failed to Demonstrate Its Claimed Costs

The Appellant has failed to prove the amount to which it is entitled in regard to the Appellant's claim on behalf of Central Armature. The Appellant seeks $15,696.85 in recovery, which is a downward adjustment from $19,215.11, consistent with Appellant's days of delay. (FF 64.) This $19,215.11 figure is, in turn, a downward adjustment from Central Armature's original $101,582.00 July 6, 2005, estimate. (FF 65.) During its testimony, Central Armature was unable to provide the Board with details on how any of these amounts were calculated or what cost factors were included in these calculations. For this reason, the Board finds that the Appellant's claim for costs on behalf of Central Armature are unsubstantiated and cannot be a basis for recovery in this matter.

2. *The District is Not the Cause of Fort Myer's Claimed Costs.*

With regard to the Appellant's claim on behalf of Fort Myers, the Board notes that the Appellant did not enter into its subcontract with Fort Myer until August 12, 2005, almost three months after the District's May 19, 2005, Change Order, yet it did not incorporate the Change Order into this subcontract. (FF 15.) Information pertaining to the Change Order was available to Fort Myer before it executed its subcontract agreement with the Appellant so as to put it on notice that the Contract had been modified to include a two-block restriction on construction work. Nonetheless, Fort Myer's inexplicably appears to have negotiated subcontractor rates with the Appellant based upon a minimal number of mobilizations and demobilizations that obviously did not account for the Change Order that was issued by the District several months earlier.

[48] In at least one previous decision, the Board has allowed a contractor to recover overhead costs of 10%, using a fixed percentage markup of direct costs. *See A.A. Beiro Constr. Co., Inc.* CAB No. D-822, 40 D.C. Reg. 4574 (Oct. 15, 1992) (granting appellant a 10% fixed markup for overhead). Similarly, the ASBCA has allowed home office overhead costs ranging from 5.87 to 12.3%. *See, e.g.*, *Fru-Con Constr. Corp.*, ASBCA No. 55197, 07-2 BCA ¶ 33,197 (October 4, 2007) (upholding a home office overhead rate of 5.87% as reasonable on appeal); *C.E.R., Inc.*, ASBCA No. 41767, 96-1 BCA ¶ 28,029 (October 30, 1995) (finding that a 10% fixed overhead markup was more appropriate for calculating extended overhead costs than the Eichleay formula); *Haskell Corp.*, ASBCA Nos. 54262, 54263, 06-2 BCA ¶ 33,422 (October 19, 2006) (granting home office costs of 12.3%).

[49] Here, the Appellant's requested Eichleay overhead costs of $205,523.58 represent approximately 19.9% of Appellant's total requested adjustment of $1,033,014.61. (FF 40.) However, the addition of $205,523.58 in home office overhead to the $658,659.78 already granted by the Board would represent a markup of approximately 31.2%.

Thus, the Board finds that it was the failure of Fort Myer and the Appellant to negotiate and execute a subcontract based upon the revised contract terms that resulted in any alleged additional costs claimed by Fort Myer from additional mobilizations/demobilizations as opposed to the actions of the District in issuing the Change Order.

Additionally, the Board denies Fort Myer's claim because Fort Myer failed to prove its costs. Fort Myer provided unit pricing for its subcontract, which incorporated the costs of mobilizations. (FF 15.) However, Fort Myer's August 23, 2007, Request for Equitable Adjustment sought to recover the costs for additional mobilizations, as well as other costs. (FF 36, 67-68.) At the hearing, Fort Myer attempted to substantially increase its costs through calculations performed on the witness stand, purportedly on the basis of newly audited costs. (FF 69-70.) However, Fort Myer did not provide the detailed underlying cost data to sufficiently verify its most current estimates, nor did Fort Myer provide testimony to prove the accuracy of its allegedly audited costs to meet its burden of proof. Accordingly, we deny Fort Myer's claim.

CONCLUSION

The record in this matter unequivocally establishes that, at the outset of the F Street Project, the District issued a Change Order that significantly altered the manner and sequence in which the Appellant was able to perform the contract work, as compared to the original contract requirements. The District's Change Order delayed the project by 166 days. The Change Order also caused damages to the Appellant beyond what the District had previously granted and paid to the Appellant in connection with the Change Order. Consequently, the District is hereby ordered to compensate the Appellant in the amount of $658,659.78 for Appellant's additional labor, equipment, and field overhead costs. This amount shall be used as the basis for the parties' negotiation of Appellant's extended home office overhead costs, which shall be calculated as a reasonable percentage markup to the above amount. The District may then deduct any damage amount previously paid to the Appellant in connection with the Change Order in calculating the remaining damage amount still owed to the Appellant pursuant to this Order. The District shall also pay the Appellant interest, in accordance with D.C. CODE § 2-359.09 (2011) (formerly D.C. CODE § 2-308.06), on any outstanding amounts required to be paid to the Appellant in connection with this award of damages by the Board.

SO ORDERED.

DATED: March 14, 2013

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

CONCURRING:

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

/s/Maxine E. McBean
MAXINE E. MCBEAN
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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

APPEAL OF:

UNFOLDMENT, INC.	)	
	)	CAB No. D-1062
Under Contract No. 7KGC09	)	

For the Appellant: Kemi Morten, Esq., and Brian Lederer, Esq. For the Appellee: Chad Copeland, Esq., Assistant Attorney General, Office of the Attorney General.

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

DECISION AND MEMORANDUM OPINION
Filing ID #51151706

This is a dispute action brought by Unfoldment, Inc. (Unfoldment or appellant) against the D.C. Child and Family Services Agency (CFSA or appellee) alleging bad faith failure to pay contract minimums, bad faith racial animus, and termination for convenience. The allegations pertain to appellant's 1997 contract with CFSA to provide residential group home services to District youth. The Board conducted a trial from March 23-31, 2010, eliciting testimony from over a dozen witnesses called by the appellant[1]. The District did not call any witnesses. Upon review of the entire record herein, and for the reasons set forth more fully below, appellant's claims are dismissed for lack of merit.

BACKGROUND

This case has a long and convoluted 15 year history of litigation before our Board, on appeal to the D.C. Court of Appeals, in federal district court, and back on remand to our Board. During this period, the parties have litigated numerous claims, and have also settled much of their original dispute[2]. Before the Board presently are appellant's three surviving claims. Although the history of this case has been set forth previously in *Unfoldment, Inc. v. D.C. Contract Appeals Bd.*, 909 A.2d 204 (D.C. 2006), such additional background and procedural posture as requires retelling for purposes of disposition is set forth below.

[1] The trial was conducted by a previous Board panel; none of whom are presently members of the Board. The present Board panel has reviewed the trial transcript, appeal file, appeal file supplement, hearing exhibits, post hearing briefs, and the entire record herein in rendering this decision.

[2] To date, the parties have settled appellant's original claims for unpaid invoices and contract minimums. Notice of Dismissal With Prejudice Regarding Unfoldment's Claim For Unpaid Invoices (Aug. 21, 2003); Notice of Dismissal With Prejudice Regarding Unfoldment's Contract Minimums Claim (Sept. 11, 2007).

In June 1997, Unfoldment and CFSA[3] entered into a $1.8 million contract, the terms of which required the appellant to provide continuing residential group home care services to District youth between the ages of nine to 21. *Unfoldment,* 909 A.2d at 206; Appeal File 1 (AF). The base year contract term was July 1, 1997, to June 30, 1998. *Id.* at 206, n.1. The contract included four possible one-year options. *Appeal of Unfoldment*, CAB No. D-1062, 50 D.C. Reg. 7404 (Mar. 20, 2002); AF 1, 16-17. After two brief contract extensions at the end of the base year, CFSA notified Unfoldment in an October 28, 1998, letter that "we will not renew the option to contract for further services through your agency effective 60 days from the date of this letter." 909 A.2d. at 207; AF 6. Unfoldment appealed CFSA's non-renewal (and other matters described below) to our Board on October 30, 1998. Appeal File Supplement (AFS) 137.

The enduring longevity of this case can be attributed to two central issues disputed by the parties from the very beginning. First, the parties have championed directly opposite theories regarding *how* their contract ended in 1998 (termination versus expiration). Second, the parties have contested the issue of whether monies were due on the contract for "unpaid invoices" at the time of the termination/expiration.

In particular, Unfoldment has consistently disputed that the parties' contract "expired" at the end of the base year. Appellant has always contended that its contract was terminated by CFSA for default after a June 1998 performance evaluation concluded that Unfoldment performed the contract poorly.[4] In this regard, appellant's key claims have been for default[5] and convenience terminations,[6] as well as for bad faith.[7] CFSA, on the other hand, has always asserted that the parties' contract expired under its own terms. Mot. To Dismiss The Compl., Or In The Alt., For Summ. J. 3, 6-10 (Nov. 30, 2001); Resp't District of Columbia's Trial Mem. 6, 31-34 (Aug. 2, 2010).

Further, from the very beginning, Unfoldment has asserted claims for unpaid invoices of two types: "actual" and "adjusted." By "actual" invoices, appellant refers to invoices it submitted during the contract period for services provided to youth *actually* placed in Unfoldment's care. The total amount claimed by appellant for these invoices fluctuated over time, but ranged from a low of "$100,000" to a high of "$350,000."[8] By "adjusted" invoices, appellant refers to invoices it submitted during the contract period for contract minimum payments.[9] Similarly, the amount claimed by appellant for adjusted invoices has fluctuated over

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[3] At all times material hereto, CFSA was an independent receivership of the D.C. government. On October 1, 2001, CFSA's status reverted back to an agency of the District government. *Appeal of Unfoldment*, CAB No. D-1062, 50 D.C. Reg. 7404, 7405 (March 20, 2002).

[4] Compl. ¶ 40 (Dec. 4, 1998); Am. Compl. ¶¶ 15, 44, 45, 55 (Oct. 17, 2001); Third Am. Compl. ¶¶ 107-109, 120, 125 (Oct. 29, 2008).

[5] Compl. ¶40; Am. Compl. ¶21.

[6] Am. Compl. ¶80; Third Am. Compl. ¶140.

[7] Compl. ¶67; Am. Compl. ¶90; Third Am. Compl. ¶139.

[8] Appellant's claim letter alleged unpaid invoices and interest claims totaling $350,000. AFS 137. Appellant's initial complaint alleged unpaid invoices and interest totaling $220,000. Compl. ¶¶ 65, 67. Appellant's amended complaint alleged damages for unpaid invoices and interest "in an amount as yet undetermined in excess of $100,000". Am. Compl. ¶73.

[9] The Appellant's claim for adjusted invoices/ contract minimums is found as follows: Compl. ¶24; Am. Compl. ¶27; Third Am. Compl. ¶¶66, 67, 137(b); s*ee also* Appellant's Opp'n to Gov't Mot. to Dismiss, or, in the Alt., for Summ. J. ¶28 (Dec. 19, 2001); Appellant's Post Trial Br. 32-33. We use the terms "adjusted" invoices and "contract

the years.[10] CFSA, on the other hand, historically denied that it owed payments on either invoice type (actual or adjusted). Agency Answer and Mot. To Dismiss 13 (Jan. 22, 1999).

In 2002, the Board took its first step toward resolving the case upon issuance of its decision in *Unfoldment*, 50 D.C. Reg. 7404. In *Unfoldment*, our ruling addressed both key issues, i.e., whether unpaid invoices were due appellant at the time the contract ended, and whether the parties' contract expired or was terminated by appellee. With respect to unpaid invoices, we ruled that Unfoldment had a right to pursue its claim for *actual* unpaid invoices, but not for the *adjusted* ones, i.e., the contract minimum invoices. *Id.* at 7409. With respect to appellant's adjusted invoices, the Board ruled that "the contract had no minimum, only a maximum, and the contract only permits payment for the actual number of youth who were placed in Unfoldment's facilities" *Id.*

With respect to contract expiration, we dismissed appellant's claims for default and/or convenience terminations, holding that "the contract expired under its own terms". *Id.* at 7409. In addition, we dismissed *all* of appellant's other claims, noting that "[n]o other claims which Unfoldment has presented hold any merit." *Id.* at 7411. Thus, appellant's bad faith claims and a host of marginal claims were dismissed as "irrelevant to what is material in the case." *Id.* at 7408-7410 (also dismissing appellant's claims for mitigation of damages, close out costs, refusal to pay settlement costs, defamation, interference with contractual relations, and attorneys' fees).

The immediate effect, therefore, of the Board's 2002 decision was to reduce appellant's entire action to a single claim for recovery of its "actual" unpaid invoices. The Board's simplification of claims was only temporary, however, because Unfoldment filed an immediate petition for review with the D.C. Court of Appeals. The case remained on appeal for the next four years. While pending appellate review, the parties settled appellant's "actual" invoices claim but not its claims for the adjusted invoices, contract termination, and bad faith.[11]

In 2006, the D.C. Court of Appeals issued a twofold ruling on the Board's 2002 decision. First, the court rejected our dismissal of appellant's contract minimum claim. 909 A.2d 204, 206. Second, the court *affirmed* our dismissal of appellant's remaining claims, including its claims for contract termination, and all of its bad faith claims except as to contract minimums. *Id.* ("we affirm the CAB's decision regarding Unfoldment's other claims"). As regards appellant's contract minimum claim, the Court remanded it to the Board to determine the exact minimum placement requirement under the 1997 contract, the compensation due appellant based on the minimum, and whether CFSA's failure to pay contract minimums amounted to bad faith.[12] In

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minimums" interchangeably herein. The appellant uses the terms interchangeably in its pleadings, and the Board's March 20, 2002, decision discusses "minimum contract payments" under the heading titled, "Adjusted invoices".

[10] The adjusted invoices that appellant purportedly submitted to CFSA during the 17 month contract period averaged $108,554 per month. AFS 19-35. Appellant's post-hearing brief identifies $89,450/monthly as the minimum required payment under the contract. Appellant's Post Trial Br. 32-33.

[11] In 2003, appellant's claims for the actual unpaid invoices and interest were dismissed by the Board with prejudice following settlement by the parties. Notice of Dismissal with Prejudice Regarding Unfoldment's Claim for Unpaid Invoices (Aug. 21, 2003).

[12] Explaining its reasoning, the court noted the following: "It is clear from these documents [RFP, etc.], which are incorporated into and made part of the contract, that the contract stated a minimum placement requirement, that CFSA was bound to pay Unfoldment at least for that minimum, and that CFSA should have obligated the amount of

2007, the parties settled the contract minimum claim, but expressly excluded its bad faith component from the settlement.[13] As a result, the sole remand issue before our Board as of 2007 was whether CFSA's failure to pay the contract minimum amounted to bad faith.

In 2008, however, the appellant filed a third amended complaint containing five counts of alleged breach by appellee. Appellant's Third Am. Compl. (Oct. 29, 2008). Since appellant's third amended complaint largely reasserted claims already dismissed by the Board in 2002, we dismissed most of the counts as either previously "settled," "abandoned," or "dismissed" by the Board … and affirmed by the Court [of Appeals]." Order on The District's Mot. to Dismiss Unfoldment's Third Am. Compl., CAB No. 1062, September 24, 2009. However, the Board allowed appellant to revive two previously dismissed claims: convenience termination and bad faith breach of contract. As to each, we ruled that new evidence not available prior to 2008 warranted an additional review. *Id.*

The "new evidence" allegedly uncovered by appellant in 2008 consisted of two types. The first category of new evidence related to appellant's contract termination claim. As to such, appellant contended that two December 2000 CFSA staff documents and a 2008 affidavit by CFSA's former Deputy Receiver corroborated its theory of a default termination that was later converted by CFSA into a convenience termination. Appellant's Opp'n to Gov't Mot. to Dismiss, Mot. for Partial Summ. J. and Mem. of P. & A. in Support Thereof and Mot. for Rule 11 Sanctions 5 (Dec. 20, 2008) (hereafter "Appellant's Opp'n to Gov't Mot. to Dismiss"). Appellant contended that the above information became available for the first time in 2008.[14]

The second type of "new evidence" relied upon by the appellant pertained to its previously dismissed bad faith claims. As to such, appellant contended that two white former CFSA contract officials with responsibility for Unfoldment's contract acted with "racial animus" toward it. Appellant's Opp'n to Gov't Mot. to Dismiss 8. Appellant asserted that it discovered the alleged racial animus sometime "[f]ollowing the Court of Appeals remand" through the case of *Mintz v. D.C.*, C.A. No. 00-0539 (D.D.C. May 30, 2006).[15] Appellant's Opp'n to Gov't Mot. to Dismiss 8. Appellant asserted that Mintz established that the two officials were found to have held "racial animus" against two of their African American co-workers in an unrelated employment discrimination lawsuit. *Id.* As a result, the Board allowed Unfoldment's renewed bad faith claim and noted that the question of whether there was a nexus between the allegations in *Mintz* and the alleged racial animus instantly would be resolved by the Board as part of the merits disposition.[16]

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budget authority needed to cover the minimum placement requirement. Failure to pay the minimum during the initial one-year period of the contract constitutes a breach of Unfoldment's contract". 909 A.2d at 212.

[13] Notice of Dismissal With Prejudice Regarding Unfoldment's Contract Minimums Claim (Sept. 11, 2007).

[14] Appellant's Opp'n to Gov't Mot. to Dismiss 5 ("Unfoldment obtained evidence that [CFSA] terminated Unfoldment's contract for cause; namely for failing to cure the deficiencies cited by John Oppedisano [and] … [i]n September 2008, Unfoldment learned for the first time that [CFSA] converted the default termination to a termination for the government's convenience".) The two CFSA staff documents were written by "Yolanda McKinley" (management analyst to the CFSA Deputy Receiver), and according to appellant were not known until "a December 5, 2008, documents request" to CFSA. *Id.* at 6. The affidavit from the former CFSA Deputy Receiver was executed on September 16, 2008. AFS 109.

[15] *See* http://www.gpo.gov/fdsys/pkg/USCOURTS-dcd-1_00-cv-00539/pdf/USCOURTS-dcd-1_00-cv-00539-0.pdf.

[16] Specifically, the Board stated that "(1) [it] would consider whether the decision in the [*Mintz* case] has any estoppel or preclusive effect on the question of racial discrimination or animus on the part of [the CFSA contract

Therefore, in summary, there are now *three* claims pending before the Board relative to Unfoldment's 1997 contract with CFSA. The first issue (on remand) is whether the appellee's failure to pay mandatory contract minimums amounts to bad faith. The second issue is whether "new evidence," principally the two referenced December 2000 CFSA staff documents, shows that the parties' contract was terminated for convenience as opposed to expiring under its own terms. The final issue is whether CFSA engaged in bad faith racial animus regarding its monitoring, evaluation, and payment under the parties' contract.

DISCUSSION

We exercise jurisdiction over this matter pursuant to D.C. Code § 2-360.03(a)(2) (2011).[17]

The recitation of facts stated in the background, discussion, and conclusion sections constitutes the Board's findings of fact in accord with D.C. Mun. Regs. tit. 27, § 214.2 (2002). Additionally, rulings on questions of law, and mixed questions of fact and law are set forth throughout our decision.

I. Appellant's Remand Claim for Bad Faith Non-Payment of Contract Minimums

On remand from the decision of the D.C. Court of Appeals in *Unfoldment v. D.C.*, the remaining issue is whether appellee's failure to pay the contract minimum amounts to bad faith. Appellant's essential argument is that CFSA refused to pay the contract minimum because of "racial animus." Our review on remand, therefore, focuses solely on whether appellant has established that the government acted with bad faith racial animus in failing to pay contract minimums.

The general rule is that public officials are presumed to act in good faith in the performance of their duties. *See, e.g., AMI Risk Consultants, Inc.*, CAB No. P-0900, 2012 WL 4753867 (May 25, 2012); *C&E Services, Inc.*, CAB No. P-0874, 2011 WL 7402965 (May 19, 2011); *Goel Services, Inc.*, CAB No. P-0862, 2010 WL 5776589 (Sept. 24, 2010). Proof of a public official's bad faith requires "well nigh irrefragable evidence," which requires a showing of some specific intent to injure the appellant. *Goel*, CAB No. P-0862; *C&E*, CAB No. P-0874. Moreover, recovery for bad faith *under a contract* also requires that a contractor show a "direct connection between the alleged bad faith action and an express or implied contractual obligation or contract term." *Innovative (PBX) Tel. Servs., Inc. v. Dep't of Veterans Affairs*, CBCA 44, CBCA 45, CBCA 46, CBCA 576, 08-1 BCA ¶ 33,854 (Apr. 30, 2008); *Innovative (PBX) Tel. Servs., Inc. v. Dep't of Veterans Affairs*, CBCA 12, 07-2 BCA ¶ 33,685 (Sept. 27, 2007). So long as a genuine, reasonable difference exists between the parties, it cannot be said that one party or the other is acting in bad faith. *Innovative Tel Servs.*, 08-1 BCA ¶ 33,854 (addressing

officials], and (2) the District is not precluded from offering evidence to refute any preclusive effect from the Mintz case…" Order on The District's Mot. to Dismiss Unfoldment's Third Am. Compl., *Appeal of Unfoldment, CAB No. D-1062*.

[17] Prior to April 8, 2011, the Board exercised jurisdiction pursuant to D.C. Code § 2-309.03(a)(2) (2001). Prior to 2001, the Board would have exercised jurisdiction pursuant to D.C. Code § 1-1189.3 (1981).

allegations that government officials denied payment to contractor in bad faith and for racially discriminatory reasons).

The burden with respect to proving bad faith is on the appellant and well nigh irrefragable proof, is required to rebut the presumption of governmental good faith.[18] *Goel*, CAB No. P-0862; *C&E*, CAB No. P-0874; *Kora and Williams Corp.*, CAB No. D-839, 41 D.C. Reg. 3954, 4120 (Mar. 7, 1991). Well nigh irrefragable proof amounts to clear and convincing evidence. *Sword & Shield Enterprise Security, Inc. v. Gen. Servs. Admin*., CBCA 2118, 12-1 BCA ¶ 34,922 (Aug. 19, 2011) (citations omitted). Clear and convincing evidence is "evidence which produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is "highly probable." *Sword & Shield*, 12-1 BCA ¶ 34,922; *Innovative (PBX) Tel. Servs*., 08-1 BCA ¶ 33,854.

We turn now to appellant's contention that CFSA's refusal to pay contract minimums during the contract period was due to racial animus. Appellant's evidence in this regard is threefold. First, appellant contends that the two white CFSA contract officers denied Unfoldment's bid on a separate and unrelated 1997 contract due to "race." Appellant's Post Trial Br. 32-33. Second, appellant contends that CFSA paid contract minimums to a white vendor in an unrelated contract for youth assessment services. *Id*. at 32-33. Finally, the appellant cites the racially discriminatory conduct attributed to the two CFSA contract officers in the *Mintz* decision, as well as co-worker testimony that the two men were heard using racially derogatory remarks toward CFSA's African American employees. *Id*. at 9-11, 21-22. We have reviewed the record herein and find that appellant's racial animus evidence is not sufficient to rebut the presumption of good faith as regards the remand claim. We address appellant's three contentions below.

First, Unfoldment contends that CFSA's racial animus is demonstrated by its 1997 award to five white vendors of a contract to provide therapeutic foster care to teen mothers and their babies. Appellant's Post Trial Br. 32-33. In this regard, Unfoldment's Executive Director testified that CFSA awarded the teen mothers contract to five lower ranked white vendors, despite Unfoldment having submitted the "number one ranked" and "best value" bid. Hr'g Tr. vol. 6, 1628:13-1629:13, Mar. 31, 2010. According to appellant, the reason for the award to the white vendors was "racial animus" and "bad faith." *Id*. This argument is completely devoid of merit, as the record does not support a finding that Unfoldment submitted the highest ranked proposal in the teen mothers' procurement.

John Oppedisano, a CFSA contracting official, testified that Unfoldment's proposal made the competitive range and warranted further BAFO (best and final offer) review. Hr'g Tr. vol. 4, 1226:14-1229:9, Mar. 29, 2010. Oppedisano's testimony is consistent with appellant's

[18] Appellant's reliance on *Tecom v. U.S*, 66 Fed. Cl. 736 (2005) is misplaced. Appellant's Post Trial Br. 14-15. *Tecom* held, inter alia, that irrefragable proof is required to prove bad faith only where the government official's alleged conduct is fraudulent or quasi-criminal. *Tecom* at 769. Tecom suggested that all other types of governmental bad faith could be proven by the lower "substantial evidence" test. *Id*. The federal claims court is not an appellate authority over our Board, and numerous post-2005 Board cases have not lowered the evidentiary standard in cases alleging bad faith. *See AMI Risk Consultants, Inc.,*; *C&E Services, Inc.,*; *Goel Services, Inc.* (cited *supra*). Additionally, the federal Civilian Board of Contract Appeals does not follow *Tecom* on this point. *See*, *e.g*., *AFR v. HUD*, CBCA 946, 09-2 BCA ¶ 34,226.

contemporaneous characterization of its proposal as being "within the competitive range" and noting that CFSA requested that it submit a "best and final offer." Compl. ¶5, fn. 1, Dec. 4, 1998. Further, in Unfoldment's formal protest of the teen mothers award, the Board's decision noted that while Unfoldment's proposal was initially ranked within the competitive range, its "BAFO appears to show a reduction in the number of units being offered from 24 to 12" resulting in Unfoldment's non-selection by CFSA. *Unfoldment, Inc.*, CAB No. P-0843, 2010 WL 8444974 (Nov. 2, 2010). Thus, appellant's argument is devoid of such supporting evidence as meets the "clear and convincing" standard required to rebut the presumption of good faith herein.

Unfoldment next contends that CFSA's racial animus is demonstrated by its approval of contract minimum payments of $41,458.33 per month to a white vendor (Managed Health Services) under a separate contract. Appellant's Post Trial Br. 32-33. This argument is both unsupported by the record, and premised upon a false analogy. There is nothing in the record before the Board that demonstrates that CFSA paid Managed Health Services a monthly minimum of $41,458.33 (or any amount). Appellant did not offer *any* testimony on this issue at the hearing.[19] The exhibits to which appellant cites on this point do not address the issue and were apparently cited in error.[20]

Moreover, it is irrelevant to the instant matter that Managed Health Services may have received contract minimum payments. The Managed Health Services contract was a different procurement than the instant group home contract. As represented in appellant's brief, CFSA's Managed Health Services contract entailed conducting assessments of CFSA youth placed in out-of-state residential facilities. Appellant's Post Trial Br. at 32-33. Appellant's comparison of two different contracts without first establishing that each contained the same (or substantially similar) contract minimum clause(s) is meaningless, and falls well below the required "clear and convincing" standard.

Finally, Unfoldment contends that CFSA's racial animus is demonstrated by the allegedly discriminatory conduct of Jim Osborne and John Oppedisano. Appellant's Post Trial Br. 20-21. Osborne and Oppedisano were CFSA staff assigned to the Unfoldment contract. Osborne was hired by CFSA in 1997 and served as contract specialist for the Unfoldment contract. Hr'g Tr. vol. 2, 371:5-373:20, Mar. 24, 2010. Oppedisano was hired by CFSA in September 1996 as a contract specialist on the Unfoldment contract, and served as contract administrator, contract chief, and contract director before leaving CFSA around May 1, 1998. Hr'g Tr. vol. 4, 989:18-20, Mar. 29, 2010; Hr'g Tr. vol. 4, 989:20-990:8, Mar. 29, 2010; Hr'g Tr. vol. 4, 996:7-10, Mar. 29, 2010; Hr'g Tr. vol. 2, 373:15-374:9, Mar. 24, 2010. Appellant contends that due to racial animus, "Oppedisano (and later Osborne) refused to approve the minimum order invoices, insisting that Unfoldment [sic] invoice was entitled to payment only for the actual number of client referrals." Appellant's Post Trial Br. 20-21, 32-33.

[19] The only testimony of record regarding Managed Health Services pertains to whether CFSA paid it $77,500 for start-up costs. Hr'g Tr. vol. 1, 87:14-88:8, Mar. 23, 2010. The issue of CFSA funding start-up costs for Managed Health is irrelevant to the three issues presently before the Board.

[20] Appellant erroneously cites "AFS 168:1662¶A" as support. Appellant's Post Trial Br. 32. The cited reference is a three page report on a meeting held between CFSA officials and Unfoldment to resolve the instant matter. AFS 168. The report does not mention Managed Health Services.

To substantiate its claims that the two officials acted with racial animus, the appellant cites (1) the hearing testimony of Christine Wheeler (Wheeler) and Mary Jo Childs (Childs), and (2) the racial animus allegations lodged against Oppedisano and Osborne in *Mintz v. D.C.*, an unrelated employment discrimination lawsuit. Appellant's Post Trial Br. 20-21, 32-33. Wheeler and Childs served as contract administrator and compliance officer, respectively, during the period of Unfoldment's contract. Hr'g Tr. vol. 1, 201:22-202:1, Mar. 23, 2010; Hr'g Tr. vol. 2, 349:1-13, Mar. 24, 2010. Neither witness, however, offered testimony that substantiates Unfoldment's contention that Oppedisano and Osborne acted with racial animus toward African Americans generally, or toward Unfoldment in particular.

Wheeler testified that she became a contract manager at CFSA sometime in 1997 after Unfoldment had already been awarded the instant contract. Hr'g Tr. vol. 2, 362:10-363:11, Mar. 24, 2010. During her employ as contract manager, Ms. Wheeler supervised two contract specialists (neither of whom had any responsibility for the Unfoldment contract). Hr'g Tr. vol. 2, 363:16-364:18, Mar. 24, 2010. Likewise, Ms. Wheeler did not herself have any responsibility for the Unfoldment contract although she was familiar with it. *Id.*; Hr'g Tr. vol. 2, 362:19-21, Mar. 24, 2010. Wheeler testified that she did not have "firsthand knowledge" of any CFSA officials that either "negatively targeted" Unfoldment or treated it differently because of race. Hr'g Tr. vol. 2, 579:13-580:1, Mar. 24, 2010. Wheeler also testified that during her tenure working with the two men, "[she] did not hear them ever use any inappropriate language." Hr'g Tr. vol. 2, 405:19-406:4, Mar. 24, 2010. Childs testified that she did not see any evidence of racial animus by Osborne, and that she started working at CFSA after Oppedisano had already left the agency. Hr'g Tr. vol. 1, 300:18-20, Mar. 23, 2010. Thus, neither witness' testimony rebuts the presumption of good faith herein, nor substantiates Unfoldment's racial animus contention.

Although neither witness had personal knowledge of any racial misconduct by the two officials, both Wheeler and Childs testified that they were aware of racial animus allegations against the two by third parties. Wheeler testified that she heard one CFSA employee assert that Oppedisano/Osborne had racial animus. Hr'g Tr. vol. 2, 407:2-409:18, Mar. 24, 2010. Childs also testified that she heard "murmurings" about racial animus by Oppedisano and Osborne, and "rumors" of their "bias" against CFSA's African American employees. Hr'g Tr. vol. 1, 284:19-285:6, Mar. 23, 2010; vol. 1, 299:4-7. *See also* Appellant's Post Trial Br. 21. These hearsay accounts do not constitute clear and convincing evidence of racial animus.

Although hearsay can be used to meet the higher "clear and convincing" evidentiary burden required to demonstrate bad faith, the expectation in this jurisdiction is that the hearsay will be "buttressed by otherwise admissible evidence to meet the standard."[21] *Lynch v. U.S.*, 557 A.2d 580, 582 (D.C. 1989). Under the guidance of *Lynch*, we find that the hearsay testimony of Wheeler and Childs fails to establish by clear and convincing evidence that Oppedisano and

[21] In administrative proceedings where the evidentiary burden is substantial evidence, hearsay may meet the required burden depending upon "whether the declarant is biased, whether the testimony is corroborated, whether the hearsay statement is contradicted by direct testimony, whether the declarant is available to testify and be cross-examined, and whether the hearsay statements were signed or sworn". *Compton v. District of Columbia Bd. of Psychology*, 858 A.2d 470, 477 (D.C. 2004)(citations omitted). As noted, however, the evidentiary burden required to prove a public official's bad faith is "clear and convincing."

Osborne exhibited racial animus towards Unfoldment. The hearsay statements were contradicted by live testimony, were not corroborated, and were not sworn. First, Oppedisano testified that he neither treated Unfoldment differently than other contractors nor targeted it. Hr'g Tr. vol. 4, 1209:11-1210:4, Mar. 29, 2010. Second, the hearsay statements were not corroborated, as even Wheeler and Childs did not view Oppedisano and Osborne as having racial animus. Third, the hearsay statements were not sworn, having been described by Childs as "murmurings" and "rumors." Under these circumstances, the hearsay statements are not buttressed by otherwise admissible evidence, and do not meet the required clear and convincing evidentiary standard.

Appellant's final contention as to Wheeler's testimony is that it shows CFSA's bad faith by demonstrating that Oppedisano and Osborne held an "unreasonable hostility" toward Unfoldment. Appellant's Trial Br. 21. We disagree. Wheeler's testimony at the trial on this matter was very inconclusive and short of the required clear and convincing evidentiary standard. At trial, Wheeler adopted a statement in her pretrial affidavit[22] wherein she characterized Oppedisano and Osborne as holding an unreasonable hostility toward Unfoldment. Hr'g Tr. vol. 2, 531:15-16, Mar. 24, 2010. However, Wheeler contradicted herself by also testifying that neither Oppedisano nor Osborne were hostile to Unfoldment. Hr'g Tr. vol. 2, 516:4-10; 532:17-536:4. Wheeler further testified that the hostility her affidavit referred to was manifested in a notice to cure letter to Unfoldment written by a CFSA contract monitor[23] in February 1998. Hr'g Tr. vol. 2, 511:15-516:19, Mar. 24, 2010. In response to a question from the Board, Wheeler further explained that "when I say hostility, I kind of felt as though they [Oppedisano and Osborne] weren't listening." Hr'g Tr. vol. 2, 531:15-533:5. Taken as a whole, Wheeler's numerous and contradictory statements regarding "unreasonable hostility" are not clear and convincing evidence that Oppedisano, Osborne or other CFSA officials exhibited bad faith "unreasonable hostility" toward appellant.

Finally, Unfoldment contends that Oppedisano's and Osborne's racial animus was established in the case of *Mintz v. D.C.*, and that the District is collaterally estopped from refuting the findings.[24] Appellant's Post Trial Br. 21-22. We do not find Unfoldment's argument persuasive, and hold that the doctrine of collateral estoppel does not apply instantly.

In Mintz, two African American CFSA contract specialists alleged that Oppedisano and Osborne engaged in vulgar sexual and racial workplace conduct and retaliation, creating a hostile work environment. *Mintz*, C.A. No. 00-0539 at 1-4 (D.D.C. May 30, 2006). Both employees reported the behavior to Oppedisano's direct supervisor. *Id.* Reginald Mintz, hired by CFSA in September 1996, served as the key complainant and eventually filed a formal EEO complaint. *Id.* 4. Mintz was subsequently terminated by CFSA on November 21, 1996; while still in his three-month probationary period. Mintz filed suit against CFSA in 2000, and later amended the suit in

[22] AFS 110 16, ¶90.
[23] At all times material to Unfoldment's claim, Marvarene Williams served as a CFSA contract monitor assigned to the Unfoldment contract. Hr'g Tr. vol. 3, 903:14-905:7, Mar. 25, 2010. Her duties included, inter alia, conducting weekly inspections of Unfoldment's group homes. Hr'g Tr. vol. 3, 909:3-15, Mar. 25, 2010. Although Wheeler initially testified that Williams' exhibited "hostility", she later re-characterized Williams' report language as "harsh". Hr'g Tr. vol. 2, 493:8-496:10; 518:19-519:4.
[24] Appellant also asserts that the "Board ruled [at a March 2010 pretrial conference] that the Mintz Court's findings of racial animus … are binding under the theory of collateral estoppel" and CFSA is "precluded from refuting them". Appellant's Post Trial Br. 11. We have reviewed the record, but have not found any such Board ruling.

2004 to name the District as a defendant. Mintz's amended complaint contained counts for racial discrimination and retaliatory termination. *Id*.

Selwyn Darbeau was the second CFSA employee and he brought several tort and contract claims alleging that he was retaliated against for supporting Mintz in the alleged workplace incidents. *Id*. 5. In 2005, both plaintiffs moved for summary judgment, and filed the required Statement of Material Facts Not in Dispute containing numerous vulgar racial and sexual comments attributed to Oppedisano and Osborne.[25] *Id*. 1.

The District filed both an opposition to the plaintiff's motion, and its own cross-motion for summary judgment. The District's opposition, however, failed to include a contravening statement of facts in dispute as required by D.D.C. Local R. Civ. P. 56(e).[26] The court construed appellee's failure to file an opposing statement of facts as an admission that Oppedisano and Osborne uttered the racially and sexually reprehensible comments, and granted summary judgment to Mintz on the racial discrimination count. *Id*. 1, 7. Thusly, appellant now seeks to use its favorable *Mintz* summary judgment ruling for preclusive effect herein.

The collateral estoppel doctrine "renders conclusive in the same or a subsequent action determination of an issue of fact or law when (1) the issue is actually litigated and (2) determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the parties or their privies; (4) under circumstances where the determination was essential to the judgment, and not merely dictum." *K.H., Sr. v. R.H.*, 935 A.2d 328 (D.C. 2007) (citations omitted). Where a *plaintiff* seeks to estop a defendant from relitigating issues which the defendant previously litigated and lost against another plaintiff, the doctrine is referred to as *offensive* collateral estoppel. *Id*. at 333 (citing *Newell v. D.C.*, 741 A.2d 28, 36 (D.C. 2009) (other citations omitted). Application of the offensive collateral doctrine requires a two-step inquiry. First, the trial court must determine whether a case meets the traditional requirements for invoking collateral estoppel. *Modiri v. 1342 Rest. Grp., Inc*., 904 A.2d 391, 395 (D.C. 2006). In so doing, the previously resolved issue must be identical to the one presented in the current litigation; similarity between issues is insufficient. *Hutchinson v. D.C. Office of Emp. Appeals*, 710 A.2d 227, 236 (D.C. 1998).

In the second step of the analysis, the court considers the fairness of applying collateral estoppel to the facts of the case. *Modiri*, 904 A.2d at 395. While non-mutual collateral estoppel is permitted in the District, the doctrine is applied with some caution because "it presents issues relating to the potential unfairness to a defendant." *Newell*, 741 A.2d at 36 (citations omitted). In considering whether the doctrine is being applied fairly, the District has developed a variety of factors for consideration:

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[25] For example, Oppedisano is revealed to have used a racial slur to refer to Mintz specifically and to blacks generally. *Mintz*, C.A. No. 00-0539 at 2 (D.D.C. May 30, 2006). Osborne and Oppedisano are also alleged to have made vulgar sexual and pedophilic comments to Mintz. *Id*.

[26] "[…] When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party."

(1) whether the first suit was for a trivial amount while the second was for a large amount;

(2) whether the party asserting the estoppel could have effected joinder between himself and his present adversary, but did not do so;

(3) whether the estoppel is based on one of conflicting judgments, another of which is in defendant's favor;

(4) whether there are significantly different procedural advantages available to the defendant in the second suit which could affect the outcome;

(5) whether application of the doctrine would be unfair to the defendant under the circumstances;

(6) whether the defendant had a full and fair opportunity to litigate;

(7) whether the defendant had the incentive to defend vigorously in the first suit;

(8) whether the defendant had the ability to foresee additional litigation;

(9) Treating the issue as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved;

(10) The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or apparently was based on a compromise verdict or finding;

(11) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;

(12) The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based;

(13) Other compelling circumstances make it appropriate that the party be permitted to relitigate the issue.

K.S., Sr. v. R.H., 935 A.2d 328, 333-334 (D.C. 2007) (*citing Ali Baba, Inc. v. WILCO, Inc.*, 482 A.2d 418, 423 (D.C. 1984); Restatement (Second) of Judgments, § 29 (1982)) (other citations omitted).

Based on consideration of the above, the *Mintz* summary judgment ruling is not entitled to preclusive effect in the instant matter. The traditional requirements for invoking collateral estoppel have not been met, and it would be unfair to apply the doctrine on the facts of this case. First, the issues in the present litigation are not identical to those in *Mintz*. In *Mintz*, the court decided whether Oppedisano and Osborne engaged in employment discrimination against Mintz and Darbeau from September 1996 to November 1996. In the instant matter, the issue is whether the CFSA officials exhibited racial animus against Unfoldment from July 1, 1997, to October 1998, as relates to contract termination, payment, and administration. Neither the facts, the timelines, nor the legal issues in the two cases overlap. In addition, it would be unfair to apply collateral estoppel instantly because the Mintz Court's racial discrimination finding against Oppedisano/Osborne was based on a procedural technicality (i.e., the District's failure to file a Statement of Material Facts In Dispute with its opposition). For these reasons, we rule that the doctrine of collateral estoppel does not apply instantly.

In summary, the appellant has failed to establish that CFSA's non-payment of contract minimums (through its two contract officials) was due to racial animus. Therefore, we conclude that appellant's evidence regarding the teen mothers and babies contract award, its allegations that white vendors received contract minimum payments, its reliance upon the hearsay testimony of Wheeler and Childs, and its failed attempt to apply collateral estoppel through *Mintz*, are insufficient to rebut the presumption of good faith by CFSA. Moreover, as we note below, it appears from our record that CFSA's non-payment of contract minimums was likely based not on "racial animus," but rather on a *genuine* belief that the parties' contract did not include a minimum payment requirement. In other words, a genuine, reasonable interpretation difference appears to have existed between the parties, and neither party was acting in bad faith when pursuing its own understanding of the contract. *Cf. Innovative Tel Servs.*, 08-1 BCA ¶ 33,854.

With respect to contract payment, we note that the parties' agreement included the following Article XIV:

> **ARTICLE XIV. CONTRACT TYPE AND PRICE**
> **A. This is an indefinite quantity contract with fixed unit pricing and a maximum contract ceiling amount, with payments based on the documented delivery of the specified units of service.**
>
> **b. The specified unit of service shall be a child/day for which the Contractor shall be paid a fixed per diem rate for each day that a child is in residence at the Contractor's facility.**

AF 1.

CFSA interpreted the above language to impose a "maximum," but not minimum order requirement. *See, e.g.*, Agency Answer and Mot. to Dismiss 14, (Jan. 29, 1999). Oppedisano testified that he did not know what the minimum payment invoices alluded to. Hr'g Tr. vol. 4, 1097:20-1099:5, Mar. 29, 2010. Similarly, Osborne testified that he was not sure what was

meant by the phrase minimum contractual payment.[27] Hr'g Tr. vol. 4, 1278:22-1279:5, Mar. 29, 2010. That CFSA (Oppedisano/Osborne) did not interpret Article XIV to impose a contract minimum is reasonable, as payments thereunder are expressly tied to the actual performance of services (i.e. "the documented delivery of the specified units of service"). *See also, Unfoldment*, 909 A.2d at 211 (stating that the parties' *contract* "does not mention a minimum placement requirement") (emphasis added).

However, CFSA was not alone in interpreting the instant contract to require payment for *actual* services only. The record suggests that Unfoldment appeared to share this same interpretation. This is evident through Unfoldment's interpretation of the parties' contract to require a "modification" in order for minimum payments to be made. Two letters written by Unfoldment's Executive Director on February 11, 1998, evidence such an interpretation.

In the first letter, Unfoldment's Executive Director asks the agency to "favorably consider a request that will allow us to receive a minimum payment, irrespective of the number of CFSA referrals" pursuant to an attached modification request. AFS 65. The second Unfoldment letter (i.e., the referenced attachment) specifically proposes a "modification of our contract" on terms that would have allowed Unfoldment to bill a minimum monthly order of "80% of the maximum slots or 24 youth". AFS 66. The attachment also notes that the parties' existing contract permits "payments based on the documented delivery of the specified units of service times a fixed per diem rate of $157.89." *Id.* These two letters suggest that Unfoldment did not believe it was entitled to minimum payments under the parties' existing contract, but could receive such payments *if* a modification were approved by CFSA.[28] It follows then, that CFSA's non-payment of contract minimums was consistent with both parties' understanding of their contract *at the time*.[29]

Although the Court of Appeals later found a legal duty to pay contract minimums, the duty arose not from clear language in the parties' contract, but from a synthesis of contract minimum language appearing in several disparate documents incorporated into the contract by the standard contract provisions. *Unfoldment*, 909 A.2d at 209-213. More specifically, these externally incorporated documents included CFSA's Request for Proposals (RFP) language requiring a "minimum number of … one hundred [children]… for the Continuing Care Group Home" at § A.3.b, and appellant's BAFO of "not less than 18 male youth ages 11-21." *Id.* 211. Other source documents that were incorporated into the parties' contract and found to undergird the requirement for a minimum payment included (1) the parties' Standard Contract Provisions,

[27] That Oppedisano and Osborne may not have been knowledgeable regarding the minimum payment requirement is not completely surprising. Ernestine Green, the CFSA General Receiver at all times material hereto, testified further that the decision regarding whether minimum payments were made to Unfoldment was not Oppedisano's [or Osborne's], but rather Milton Grady (the agency Deputy Receiver). Hr'g Tr. vol. 1, 91:10-92:16, Mar. 23, 2010.

[28] There is neither an indication in our record, nor a contention by the appellant, that CFSA ever approved the modification.

[29] At the hearing, neither party fully explored the impact of the February 11, 1998, letter on appellant's claim that bad faith was the reason for CFSA's non-payment of contract minimums. CFSA's then General Receiver was cross-examined by Unfoldment regarding the letter, but Unfoldment's questions pertained to whether Oppedisano had authority to approve the modification request. Hr'g Tr. vol. 1, 90:3 - 92:16, Mar. 23, 2010.

(2) the CFSA Policy Handbook § 10220.00, and (3) the District's procurement regulations at D.C. Mun. Regs. tit. 27, §§ 2103.3, 2416.10, 2416.11. *Id.* [30]

Thus, we conclude that Unfoldment has not established that appellee's non-payment of the contract minimums was done in bad faith. Accrediting CFSA its presumption of good faith and not finding clear and convincing evidence to the contrary, we dismiss appellant's remand claim for bad faith non-payment of contract minimums.

II. New Evidence Regarding Whether CFSA Terminated the Contract For Convenience

The next issue we consider is whether "new evidence" shows that the appellant's contract was terminated for convenience. The Board's March 20, 2002, decision rejected appellant's termination claim and was affirmed in *Unfoldment*, 909 A.2d 204. Thus, the doctrine of res judicata[31] would normally preclude relitigation. Appellant's contention, however, that "new evidence" supports its termination claim has resulted in the Board's reconsideration of this issue.

We construe the Board's Order granting appellant leave to renew its termination claim as an exception to res judicata pursuant to D.C. Mun. Regs tit. 27, § 117.1(b) (2002).[32] Although there is no record of appellant having filed a motion to reconsider based on the newly discovered 2008 evidence, the Board's renewed jurisdiction over previously dismissed claims is properly considered as relief under a Rule 117.1(b) motion. *Cf. Forgotson v. Shea*, 491 A.2d 523, 528 (D.C. 1985).

The legal standard associated with newly discovered evidence requires that by due diligence the evidence could not have been presented to the Board prior to the rendering of its decision. Order on Mot. for Reconsideration, *Unfoldment, Inc.*, CAB No. D-1062, 2002 WL 1839991 (July 30, 2002).[33] Newly discovered evidence does not encompass evidence not previously discovered because of "lack of due diligence" or evidence that "was readily capable of being learned ... in the course of conducting pretrial discovery...." *Forgotson*, 491 A.2d at 528 (citations omitted).

Based on the legal standard noted above, the only evidence proffered by appellant that qualifies as "new" is the two CFSA staff memoranda produced for the first time in discovery in 2008. These memoranda pertain to a December 11, 2000, meeting between the parties, and were

[30] These provisions pertain to indefinite quantity contracts, and generally require (1) the District to order the minimum stated in such contracts, and (2) required the contract officer to obligate sufficient budget authority to cover the minimum requirement.

[31] Res Judicata provides that "a final judgment on the merits of a claim bars relitigation in a subsequent proceeding of the same claim between the same parties or their privies." *EDCare Management, Inc. v. DeLisi*, 50 A.3d 448 (D.C. 2012). The doctrine applies to administrative agency proceedings that are the equivalent of judicial proceedings. *Oubre v. D.C. Dep't of Emp't Servs.*, 630 A.2d 699, 703-704 (D.C. 1993). The Board's proceedings are judicial in nature. *See, e.g.*, Board rules authorizing motions practice, discovery, subpoenas, hearings, decisions, and remedies (inter alia). D.C. Mun. Regs. tit. 27, §§110, 112, 114, 211, 214, 314.

[32] The Board rule is analogous to D.C. Super. Ct. R. Civ. P. 60(b). In construing D.C. Mun. Regs. tit. 27 §117(b) therefore, the Board is guided by our own precedent as well as precedent of the District of Columbia courts construing its analogous rules. D.C. Mun. Regs tit. 27, §100.6 (2002).

[33] The cited Order pertains to appellant's 2002 reconsideration motion regarding the Board's dismissal of the instant claims.

cited by the appellant in persuading our Board to allow limited relitigation of appellant's termination claim.[34] Accordingly, we address Unfoldment's contention that the two CFSA staff documents prepared by Yolanda McKinley (McKinley) demonstrate that Unfoldment's contract was terminated for convenience. The remainder of appellant's proffered evidence will not be considered.[35]

Thus, we address only Unfoldment's contention that the two CFSA staff documents prepared by McKinley demonstrate that Unfoldment's contract was terminated for convenience. McKinley was a management analyst for the CFSA Deputy Receiver, whose duties included taking minutes of certain meetings. Hr'g Tr. vol. 3, 709:12-710:12, Mar. 25, 2010. McKinley took notes of a December 11, 2000, meeting between CFSA officials and Unfoldment. Hr'g Tr. vol. 3, 711:8-16, Mar. 25, 2010. McKinley did not testify at the trial.

The two McKinley memoranda were written following the December 11, 2000, meeting between the CFSA Deputy Receiver, Unfoldment's Executive Director, and members of their respective staffs. The first memorandum is dated December 11, 2000, and is titled, "Meeting Synopsis Report." The memorandum indicates that the meeting was called at the request of Unfoldment to reach agreement to "withdraw her complaint [in CAB No. 1062] filed with the DC Contract Appeals Court" in exchange for CFSA's agreement to "reinstate her [group home] contract with the Agency and pay a revised settlement amount balance of $680,000 to Unfoldment." AFS 168, ¶¶ 3, 5. The background section of the synopsis states, in pertinent part, that the group home contract was "not renewed at an option point, and … later terminated for the convenience of the government [on October 31, 1998]." *Id.* 1.

The second McKinley memorandum references the December 11 meeting and requests that a CFSA staffer schedule a follow-up meeting with the Unfoldment Executive Director to "discuss program services that she is capable of delivering to our client population." AFS 169. This second memorandum states that "[CFSA] terminated the Unfoldment … contract on October 31, 1998, for the convenience of the government." *Id.*

We have reviewed the McKinley memoranda and appellant's arguments relating thereto, and find that they do not meet the evidentiary test as regards appellant's convenience termination

[34] *See* Appellant's Opp'n to Gov't Mot. to Dismiss 5, 8 and discussion *supra* at p.4.

[35] The appellant's post-hearing brief attempts to support its convenience termination claim with numerous documents/affidavits that were available to it *prior* to the Board's March 20, 2002, dismissal decision. Appellant's Post Trial Br. 7-8. We do not consider such as "new evidence," and find that they exceed the scope of our September, 24, 2009, Order ("[w]e will consider Unfoldment's claim that new evidence shows that the contract was terminated for convenience."). Order on the District's Mot. to Dismiss Unfoldment's Third. Am. Compl. 3. For example, appellant has attempted to support its convenience termination claim with affidavits from one of its own attorneys, litigation documents from a lawsuit to which it was a party (*This End Up*), checks made payable to Unfoldment by CFSA, correspondence between CFSA and Unfoldment, and numerous other documents that were either available before our 2002 dismissal decision, or could have been available with due diligence. Thus, except as noted herein, none of the documents referenced in Appellant's Post Trial Br. at 7-8 qualify as "new evidence" under Board Rule 117.1(b). These include AFS 111, 112, 135, 137-139, 141-144, 146-147, 148, 149, 150, 151, 153, 155-159, 160, 161-163.

claim.[36] The December 11 synopsis is an inadmissible settlement proposal, and the December 12 memorandum is of little probative value. Accordingly, appellant's "new evidence" fails to establish that CFSA terminated Unfoldment's contract for default and later converted it to a convenience termination.

It is well settled that a settlement proposal cannot be used to prove liability for a claim or its amount. *Unfoldment v. CAB*, 909 A.2d at 213; *Goon v. Gee King Tong, Inc*., 544 A.2d 277, 280 (D.C. 1988) (other citations omitted). In addition, "statements made by a party during compromise negotiations should also be excluded to encourage unfettered dialogue in such negotiations, as to further the underlying policy favoring out-of-court settlement of disputes." 544 A.2d at 280 (*citing Pyne v. Jam. Nutrition Holdings Ltd.*, 497 A.2d 118, 128 (D.C. 1985). Finally, the substance of the inquiry to determine whether a document is inadmissible is whether the document and the statements therein are made in the context of an "apparent dispute" or "apparent difference of view" as to either the validity or amount of a claim. *Id*.

The December 11 "synopsis" meets all of the criteria of an inadmissible settlement offer, including the fact that the meeting occurred in the context of a very clear "dispute" (i.e., the instant Unfoldment claim filed with our Board on October 30, 1998). In addition, the meeting was convened at Unfoldment's request to explore "resolution of pending claim … for monetary damages and restoration of terminated contract." AFS 168. During the meeting, Unfoldment offered to *withdraw* its Board claim in *exchange* for contract reinstatement and a monetary payment. *Id*. 2 ¶¶ 3,5. Thus, the synopsis records a very clear Unfoldment settlement offer and is not admissible.

The December 12 memorandum does not contain a settlement offer or proposal. The memorandum requests that a CFSA staffer meet with Unfoldment to discuss contract opportunities with the agency, particularly as pertains to "boys with special needs". AFS 169. The memorandum notes the December 11 meeting between CFSA and Unfoldment (discussed above), and states that "the Agency terminated the Unfoldment, Inc. contract on October 31, 1998, for the convenience of the government". *Id*. The statement in the memorandum that the Unfoldment contract was "terminated for convenience" is unsubstantiated and of little probative value.

In determining what weight to give to a piece of evidence, we first assess its probative value, i.e., whether the evidence is reliable and trustworthy. One way to make this determination is to see if there is any contemporaneous documentary evidence corroborating the evidence. In this regard, unsubstantiated assertions do not constitute proof or evidence. *See, e.g., In re* Maggie's Landscaping, Inc., ASBCA Nos. 52462, 52463, 04-2 BCA ¶ 32,647 at 161,569 (June 2, 2004); M.A Mortenson Co., ASBCA Nos. 53105, et al., 04-2 BCA ¶ 32,713 at 161,845 (Aug. 17, 2004); Technocratica, ASBCA Nos. 46567, et al., 99-2 BCA ¶ 30,391 at 150,226 (May 4, 1999); Grady & Grady, Inc., ASBCA No. 48629, 96-1 BCA ¶ 28,025 at 139,917 (Oct. 27, 1995).

[36] Although appellant's bad faith claims must be established by clear and convincing evidence, its convenience termination claim need only meet the lower preponderance of the evidence standard. D.C. Mun. Regs. tit. 27, §120.1 (2002).

We note that McKinley's December 2000 memorandum is not a contemporaneous document, and was written over two years after CFSA's "termination for convenience" allegedly occurred (i.e., October 31, 1998). Moreover, there is no contemporaneous *written* record of (1) Unfoldment ever submitting a convenience termination claim to a CFSA contracting officer, or (2) a CFSA contracting officer issuing a final convenience termination decision. The Board noted in 2001 that Unfoldment never submitted a claim to the CFSA contracting officer. Order on Mot. To Dismiss, *Unfoldment*, CAB No. D-1062 (October 23, 2001) (holding that Board jurisdiction herein did not require that Unfoldment first submit claims to the CFSA contracting officer because "it is quite clear [that] the decision would be "unfavorable"). Additionally, the contracting officer alleged by Unfoldment to have converted its default termination testified that he did not prepare a *written* decision nor was he aware of a written decision. H'rg Tr. vol. 3, 713:19-714:16, Mar. 25, 2010. These record gaps in contemporaneous documentary evidence diminish the probative value of McKinley's December 12 memorandum, and severely undermine its conclusory statement that "the Agency terminated the Unfoldment, Inc. contract on October 31, 1998, for the convenience of the government."

Finally, we note that the appellant called the purported contracting officer to testify at the hearing (former Deputy General Receiver Milton Grady) (hereafter Deputy Receiver). The Deputy Receiver testified that appellant's contract was terminated for default on October 31, 1998, by a letter from CFSA's General Receiver. Hr'g Tr. vol. 3, 688:22-690:20, Mar. 25, 2010. He testified further that he converted the default into a convenience termination sometime on or around December 12, 1998. Hr'g Tr. vol. 3, 688:22-690:5, Mar. 25, 2010; Hr'g Tr. vol. 3, 690:10-692:20; Hr'g Tr. vol. 3, 703:15-704:13. We are neither persuaded by the Deputy Receiver's testimony that Unfoldment's contract was terminated for default, nor convinced that a later conversion to a convenience termination ensued.

First, there is no probative evidence that Unfoldment's contract was terminated for default. The General Receiver[37] testified that she allowed the contract to expire on its own terms. Hr'g Tr. vol. 1, 128:6-140:16, Mar. 23, 2010. The General Receiver's testimony is supported by a contemporaneously issued October 28, 1998, letter bearing her signature, which states that "[W]e will not renew the option to contract for further services through your agency effective 60 days from the date of this letter." *Unfoldment*, 909 A.2d at 207: AFS 98. The General Receiver's letter is clear by its own terms, and was undertaken pursuant to Article XVI(A) of the parties contract (setting a one year contract term and authorizing, but not compelling, the exercise of options thereafter). AF 1, 16-17. By comparison, the Deputy Receiver was on extended sick leave at the time of contract expiration and was not directly involved in CFSA's non-renewal decision. Hr'g Tr. vol. 3, 798:11-17; 803:12-14, Mar. 25, 2010. The Deputy Receiver *would have* recommended renewal had he not been on leave, Hr'g Tr. vol. 3, 817:8-818:7, Mar. 25, 2010, but the decision to allow the contract to expire was taken by his superior, the agency's General Receiver. Hr'g Tr. vol. 1, 128:6-140:16, Mar. 23, 2010.

Second, we have noted the dearth of contemporaneous documentary evidence corroborating the Deputy Receiver's testimony. There is no written default termination. There is no written conversion of the alleged default termination. The CFSA's October 28th non-renewal

[37] The General Receiver's official title was "Federal Court Appointed Receiver". Hr'g Tr. vol. 1, 41:9-11, Mar. 23, 2010.

letter evinces no indicia of having been issued by CFSA as a default termination. AFS 98. For example, it was not preceded by a cure notice, does not use "termination for default" phraseology, and does not reference Article XXII of the parties' contract.[38]

Finally, we note that the Board's jurisdiction over the instant claim vested on October 30, 1998; a full month before the date the Deputy Receiver testified that his determination was made. It is well settled that a contracting officer lacks the jurisdiction to issue a final decision on a claim after it has been appealed to the Board. *See, Keystone Plus Constr. Corp.*, CAB No. D-1358, 2012 WL 554443 (Jan. 27, 2012) (noting that the Federal Circuit has held that filing an appeal divests contracting officers of the jurisdiction necessary to issue a final decision) (*citing Sharman Co. v. U.S.*, 2 F.3d 1564 (Fed. Cir. 1993) (other citations omitted); Fairfield Scientific Corp., ASBCA No. 21151, 78-1 BCA ¶ 13,082. In the instant case, it is conceded that if appellant ever submitted its purported convenience termination claim to CFSA, it occured "*after* Unfoldment's complaint had been filed with the Board" (emphasis added). Hr'g Tr. vol. 6, 1619:20-1620:6, Mar. 31, 2010. Additionally, it is conceded that the CFSA contracting officer made his purported favorable decision thereon after Board jurisdiction vested.[39]

Thus, we have reviewed appellant's termination claim in light of its proffered "new" evidence, and nonetheless find that the parties' contract expired under its own terms. The General Receiver testified that she allowed the contract to expire on its own terms. Hr'g Tr. vol. 1, 128:6-140:16, Mar. 23, 2010. The General Receiver's testimony is supported by a contemporaneously issued October 28, 1998, letter bearing her signature, which states that "[W]e will not renew the option to contract for further services through your agency effective 60 days from the date of this letter." *Unfoldment*, 909 A.2d at 207. The General Receiver's letter is clear by its own terms, and was undertaken pursuant Article XVI(A) of the parties' contract (setting a one year contract term and authorizing, but not compelling, the exercise of options thereafter). AF 1, 16-17.

We find that the two December 2000 CFSA letters do not establish by a preponderance of the evidence that Unfoldment's contract was default terminated and later converted into a convenience termination. Furthermore, we find that the Deputy Receiver's testimony also does not establish that Unfoldment's contract was default terminated and later converted by him into a convenience termination. The parties' contract expired under its own terms.

III. Bad Faith/Racial Animus Claims Pertaining To Contract Payment, Management and Monitoring

Finally, we consider whether CFSA engaged in bad faith racial animus and/or bad faith hostility regarding its monitoring, evaluation, and/or payment under the parties' contract. The Board's September 24, 2009, Order provided that we would consider these allegations pleaded in Unfoldment's third amended complaint expressly as provided below:

[38] Article XXII is titled, "TERMINATION FOR DEFAULT OR CONVENIENCE". AF 1, at 20. The Board expects that the General Receiver would have referred to the contract's default termination clause if she had intended the October 28 letter to be a default termination.

[39] Appellant's third amended complaint alleged that CFSA issued its convenience termination decision on October 13, 2000. Appellant's Third Am. Compl. 13, ¶¶ 125-126.

> 1. Paragraph 139 subparts (a), (b), (c) and (d);
> 139. The Agency exhibited bad faith in its dealings with Unfoldment, as evidenced by…
>
> a. CFSA and its personnel unreasonably exhibited hostility, bad faith and racial animus against Unfoldment;
>
> b. CFSA and its personnel abused their discretion in issuing, managing, monitoring, evaluating and terminating/not renewing Unfoldment's contract;
>
> c. CFSA and its personnel in bad faith issued a legally insufficient and improper cure notice and unreasonably suspended client referrals to Unfoldment;
>
> d. CFSA and its personnel refused to pay Unfoldment's invoices in bad faith creating severe financial hardship for Unfoldment;

As we have noted, public officials are presumed to act in good faith and well-nigh irrefragable proof is required to rebut the presumption. *AMI Risk Consultants, Inc.*, CAB No. P-0900, 2012 WL 4753867 (May 25, 2012). We have reviewed appellant's allegations and record evidence in light of the required evidentiary standard, and find that appellant's additional bad faith claims are without merit. We address each allegation below.

CFSA and its Personnel Unreasonably Exhibited Hostility, Bad Faith and Racial Animus against Unfoldment

We have previously noted that the evidence herein does not establish that CFSA officials committed bad faith toward Unfoldment through either racial animus or unreasonable hostility. *See* discussion *supra* pp. 7-12. We will not repeat our discussion here, but affirm our earlier discussion and holding in this regard.

CFSA and its Personnel Abused their Discretion in Issuing, Managing, Monitoring, Evaluating and Terminating/Not Renewing Unfoldment's Contract

1. Bad Faith Issuance of Unfoldment's Contract

In this regard, the appellant alleges that CFSA (through Osborne) added more onerous provisions to Unfoldment's contract than those of white vendors. Appellant's Post Trial Br. 27, 29. The appellant does not cite to the transcript to identify testimony in support of this assertion. Apart from appellant's conclusory statements, we do not find evidence that CFSA treated the appellant differently than white vendors. Absent clear and convincing evidence to the contrary, the presumption of good faith accorded CFSA prevails.

2. Bad Faith Monitoring of Unfoldment's Contract

Appellant also alleges that CFSA ordered its contract monitor (Marvarene Williams) to conduct weekly, unannounced inspections of Unfoldment's Anacostia group homes. Appellant's Post Trial Br. 38, 39. Appellant further contends that the monitor held a "racial/cultural" bias because she believed that wards should not be placed in "public housing communities." Appellant's Post Trial Br. 38. We do not find in the record before the Board that the appellant has established that CFSA monitored its contract in bad faith. The parties' contract specifically permits CFSA to conduct "announced or unannounced" visits to Unfoldment's facility. AF 1, Article VIII (B). In addition, the parties' contract provides that CFSA "will make routine and random site visits to the Contractor's facilities to check to see that they are maintained in a material condition conducive to the operation as a home" for District children. AF 1, Article IV (D). While weekly monitoring visits probably took place, CFSA (through Oppedisano) testified that it was not unique to Unfoldment. Hr'g Tr. vol. 4, 1112:6-1113:15, Mar. 29, 2010.

3. Bad Faith Evaluation of Unfoldment's Contract

Appellant also alleges that Oppedisano approved bad faith performance evaluations prepared by subordinate CFSA employees Chainie Scott [and others] in April 1998 and June 1998. Appellant's Post Trial Br. 35. Further, appellant alleges that Oppedisano inserted a false April 9, 1998 Evaluation Report into Unfoldment's file. Appellant Post Trial Br. 59. The falsity alluded to by appellant was an alleged paragraph finding that that Unfoldment "consistent[ly] fail[ed] to timely submit Unusual Incident Reports" regarding youths. Appellant's Reply Trial Br. 10. We find that these allegations are not supported in our record. The appellant has not provided clear and convincing evidence to support this allegation. We also note that appellant's post-hearing brief does not direct the Board to transcript testimony or other evidence supporting this allegation.

4. Bad Faith Terminating/Not Renewing Unfoldment's Contract

As noted herein, appellant's longstanding theory of this case is that CFSA terminated its contract for failure to cure deficiencies highlighted in a June 1998 Performance Evaluation Report. Appellant's Post Trial Br. 7-8. We previously dismissed this claim in 2002. In 2006, the Court of Appeals affirmed our dismissal of this claim. In this decision, we have already discussed and concluded that appellant's "new evidence" does not establish that the parties' contract was default terminated. As we noted, the parties' contract expired on its own terms. Similarly, we have concluded that appellant's circumstantial and hearsay evidence does not establish that Oppedisano and Osborne exhibited bad faith racial animus toward Unfoldment. Therefore, we affirm our discussion and holding herein, and conclude that the evidence is not clear and convincing that appellant's contract was terminated in bad faith.

CFSA (and its Personnel) in Bad Faith issued a Legally Insufficient and Improper Cure Notice and Unreasonably Suspended Client Referrals to Unfoldment

1. Legally Insufficient and Improper Cure Notice

As regards the instant allegation, appellant argues that CFSA (acting through Oppedisano) issued a bad faith cure notice to Unfoldment on February 26, 1998, which contained a number of already corrected deficiencies, 67 deficiencies fabricated by Oppedisano, and false accusations that Unfoldment failed to timely file Unusual Incident reports pertaining to two youth.[40] Appellant's Reply Trial Br. 2-3, 6, 10-11, 40, 55. The appellant further contends that the bad faith information in the cure notice was later incorporated into two adverse Performance Evaluations[41] recommending the non-renewal of Unfoldment's contract. Appellant's Reply Trial Br. 2-3, 6, 10-11. In addition, appellant contends that once it corrected all deficiencies, Oppedisano did not rescind the letter or notify Unfoldment that it was in compliance. Appellant's Post Trial Br. 58.

To charge CFSA with manipulating the cure notice process to further a purported hidden agenda of forcing Unfoldment into default is to charge CFSA with bad faith. Per our discussion herein, such a showing requires "well nigh irrefragable proof." In this case, the evidence does not meet the required standard. Apart from Unfoldment's conclusory statement that deficiencies were "fabricated," etc., the record provides no evidence to support Unfoldment's theory of a bad faith termination launched by a hidden agenda cure notice. In this regard, Oppedisano testified that he issued a cure letter in February 1998 with the intent of terminating Unfoldment's contract *if* the deficiencies were not cured. Hr'g Tr. vol. 4, 1006:22-1007:16, Mar. 29, 2010. The deficiencies were cured, however, and Oppedisano did not take steps to terminate Unfoldment's contract during his employment with CFSA. Hr'g Tr. vol. 3, 795:11-796:6, Mar. 25, 2010. Before leaving CFSA employment around May 1998, Oppedisano informed his superiors that Unfoldment had corrected all deficiencies. Hr'g Tr. vol. 3, 795:11-796:6, Mar. 25, 2010.

2. Unreasonable Suspension of Client Referrals To Unfoldment

Appellant also alleges that Oppedisano ordered a freeze in contract referrals in February 1998 and did not lift the freeze until after deficiencies were corrected on March 30, 1998. Appellant's Post Trial Br. 54, 63. Again, there is no record evidence to support a finding of bad faith refusal by Oppedisano to refer clients to Unfoldment during the contract period. In fact, the evidence indicates that a separate CFSA official made program decisions regarding the placement of children with group homes. Sondra Jackson testified that she was the Deputy Receiver for Programs during Unfoldment's contract period, and that she supervised social workers and had responsibility for the placement of children. Hr'g Tr. vol. 1, 163:12-164:3, Mar. 23, 2010. Ms. Jackson testified that she could not remember if she suspended referrals to Unfoldment in 1998. Hr'g Tr. vol. 1, 167:21-168:1, Mar. 23, 2010. There is no evidentiary support for a bad faith finding as to this allegation. We also note that appellant has not directed the Board to the transcript testimony supporting its allegation of bad faith suspension of client referrals.

[40] There were two incidents as to which CFSA contended Unfoldment failed to submit timely reports. The first incident involved a youth allegedly "scratched" by a dog in August 1997. Appellant's Post Trial Br. 40. The second incident involved a youth who was alleged to have been abused sexually by another youth. Appellant's Reply Trial Br. 10. Both the cure notice and the two performance evaluations noted that Unfoldment failed to submit timely reports following the incidences. Whether Unfoldment submitted its incident reports timely was disputed at the hearing. There was no evidence, however, that CFSA's mention of the deficiency in the cure notice and the annual performance report was the product of bad faith.

[41] The adverse evaluation reports were issued on April 9, 1998, and June 9, 1998, respectively.

CFSA and its Personnel Refused to Pay Unfoldment's Invoices in Bad Faith Creating Severe Financial Hardship for Unfoldment

Appellant also alleges that Osborne and Oppedisano ignored requests pertaining to, and failed to pay invoices for, specialized wrap around services for behaviorally challenged youth. Appellant's Post Trial Br. 28, 51; Appellant's Reply Trial Br. 2. We find that the record does not support the allegation that CFSA non-payment of invoices was done in bad faith. Ms. Jackson testified that all of CFSA's vendors were not being paid timely. Hr'g Tr. vol. 1, 170:19-20, Mar. 23, 2010. Similarly, CFSA's General Receiver (Ernestine Green) testified that CFSA's problem with timely payments was agency-wide and not unique to Unfoldment. Hr'g Tr. vol. 1, 156:16-157:7, Mar. 23, 2010. In fact, Ms. Green testified that her tenure resulted in CFSA setting up a process to pay all vendors in a more timely manner. *Id*. Thus, there is no evidence that CFSA targeted Unfoldment for the non-payment of invoices.

With respect to appellant's specific contention that "wraparound services" were not paid, the record is equally void of support for a finding of bad faith. The former CFSA Administrator (Jesse Winston) testified that "wraparound services" are akin to one-on-one babysitting type services for a certain number of hours per day. Hr'g Tr. vol. 3, 888:21-889:8, Mar. 25, 2010. The CFSA Administrator testified that "wraparound services" were not included in Unfoldment's group home contract. Hr'g Tr. vol. 3, 889:17-891:7; Hr'g Tr. vol. 4, 1147:6-8, Mar. 29, 2010 (testimony of Oppedisano corroborating that group home contracts did not include a provision for wrap around services). We find no reference to wraparound services in the parties' contract. AF 1. Thus, to the extent that wraparound invoices were not paid herein, we do not find that bad faith caused the non-payment.

IV. Miscellaneous Claims

In addition to the above, the appellant's post-hearing briefs assert numerous other bad faith claims that are not properly before our Board. Each of the additional claims was pleaded in one or more of appellant's previous complaints and rejected by our Board's September 24, 2009, Order:

> Paragraph 137, containing subparts (a)-(n), constitute Count 1 of Unfoldment's third amended complaint. Unfoldment agrees that the allegations in these subparts have appeared in its original and first amended complaints and that the allegations have either been previously settled or dismissed by the Board in its March 20, 2002 decision and affirmed by the Court of Appeals. To the extent that some of the allegations found in these subparts were raised only in the original complaint and not in the first amended complaint, those allegations were abandoned by Unfoldment and cannot be resuscitated now, 10 years later.

Order at 3. Accordingly, we will not consider numerous allegations that appellant has raised in its briefs. We find that these allegations were either previously settled, dismissed by the Board

and affirmed by the Court of Appeals, or abandoned. Therefore, we will not consider the following allegations raised by the appellant:

(1) Osborne forwarded the cover letter of Unfoldment's contract for signature, but failed to include the Articles containing the scope of work, thus depriving appellant of the opportunity to "negotiate" contract terms. Appellant's Post Trial Br. 30. This previously dismissed allegation was pleaded in ¶137(a) of appellant's third amended complaint, and ¶10 of its original complaint.

(2) Osborne refused to pay Unfoldment's start-up costs while paying a white vendor's $77,500 in start-up costs. Appellant's Post Trial Br. 31, 32. This previously dismissed allegation was pleaded in ¶137(i) of appellant's third amended complaint.

(3) Oppedisano refused to modify Unfoldment's contract to allow it to offer group home services at an eight-bed Virginia location after one of its DC properties was damaged by fire. Appellant's Post Trial Br. 33. We find that this allegation is beyond the scope of the Board's September 24, 2009, Order.

(4) CFSA failed to hold mandatory pre-placement conferences and evaluations concerning youth placed in its care. Appellant's Post Trial Br. 42-43. This previously dismissed allegation was pleaded in ¶137(g) of appellant's third amended complaint, ¶90 of its first amended complaint, and ¶16 of its original complaint.

(5) CFSA placed underage children with Unfoldment requiring specialized treatment without providing necessary services and refused to pay invoices for approved specialized services. Appellant's Post Trial Br. 44. This previously dismissed allegation was pleaded in ¶¶137(d) and 137(j) of the appellant's third amended complaint.

(6) Oppedisano breached the Contract Performance Standards provision and imposed unfair performance standards without Unfoldment's knowledge. Appellant's Post Trial Br. 45. This previously dismissed allegation was pleaded at ¶ 27 of appellant's amended complaint, and exceeds the scope of the Board's September 24, 2009, Order.

(7) CFSA failed to provide "new vendor" training and technical assistance offered to other vendors. Appellant's Post Trial Br. 47. Appellant's previously dismissed "new vendor" training allegation was pleaded at ¶16 of its complaint. Appellant's "technical assistance" allegation exceeds the scope of the Board's September 24, 2009, Order.

(8) Oppedisano retaliated for Unfoldment's request for wraparound services by requesting authority to issue a default termination. Appellant's Post Trial Br. 51. This previously dismissed allegation was pleaded at ¶ 67 of appellant's complaint.

(9) CFSA required Unfoldment to spend $14,000 to replace sound windows and doors. Appellant's Post Trial Br. 56. This previously dismissed allegation was pleaded in appellant's complaint at ¶19 and its first amended complaint at ¶42.

(10) Oppedisano cited Unfoldment for hiring staff with criminal records for whom he'd previously granted waivers. Appellant's Post Trial Br. 60. This allegation is beyond the scope of the Board's September 24, 2009, Order.

(11) spoiliation, retaliation, and equal access to justice act attorneys' fees claims. Appellant's Post Trial Br. 73-75. These previously dismissed allegations were pleaded at ¶¶ 25-26 and 107 of appellant's amended complaint, and/or were previously dismissed by the Board. In addition, these allegations are beyond the scope of the Board's September 24, 2009, Order.

V. Conclusion

We dismiss appellant's claims with prejudice. The appellant has not established that CFSA's non-payment of contract minimums was due to bad faith. The appellant's new evidence, and the record before the Board, does not establish that CFSA terminated appellant's contract for default, and later converted the default into a convenience termination. Rather, the record shows that the parties' contract expired under its own terms. Finally, the appellant did not establish that CFSA acted in bad faith as alleged in ¶139 (a)-(d) of the appellant's third amended complaint.

SO ORDERED.

DATED: March 14, 2013

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

CONCURRING:

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

/s/ Maxine E. McBean
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