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District of Columbia REGISTER

HIGHLIGHTS

- D.C. Council passes Resolution 21-97, Foster Youth Statement of Rights II Approval Resolution of 2015
- D.C. Council passes Resolution 21-102, Youth Employment and Work Readiness Training Emergency Declaration Resolution of 2015
- Office of the Secretary announces funding availability for the Grant to Promote District of Columbia, Self-Determination, Voting Rights, or Statehood
- Office of the Chief Financial Officer announces an increase in the Tax Year 2016 surtax for cigarette packages in the District of Columbia
- District Department of the Environment proposes construction and maintenance standards for wells
- D.C. Housing Authority proposes site-based housing waiting lists
- Contract Appeals Board publishes opinions issued between May 2013 and May 2015

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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DISTRICT OF COLUMBIA
OFFICE OF DOCUMENTS AND ADMINISTRATIVE ISSUANCES

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MURIEL E. BOWSER
MAYOR

VICTOR L. REID, ESQ.
ADMINISTRATOR

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ADDENDUM

ENROLLED ORIGINAL

AN ACT

D.C. ACT 21-50

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 6, 2015

To amend the Pre-k Enhancement and Expansion Amendment Act of 2008 to prohibit the suspension or expulsion of a student of pre-kindergarten age from any publicly funded pre-kindergarten program; and to amend Title II of the Attendance Accountability Amendment Act of 2013 to establish annual reporting requirements for each local education agency or an entity operating a publicly funded community-based organization on suspensions and expulsions data for all grades.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Pre-K Student Discipline Amendment Act of 2015".

Sec. 2. The Pre-k Enhancement and Expansion Amendment Act of 2008, effective July 18, 2008 (D.C. Law 17-202; D.C. Official Code § 38-271.01 *et seq.*), is amended as follows:

(a) Section 101 (D.C. Official Code § 38-271.01) is amended as follows:

(1) A new paragraph (5A) is added to read as follows:

"(5A) "Out-of-school suspension" means the removal of a student from school attendance for an entire school day or longer.".

(2) A new paragraph (11A) is added to read as follows:

"(11A) "Serious bodily injury" means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.".

(b) A new section 303 is added to read as follows:

"Sec. 303. Restriction on out-of-school discipline for pre-k age students.

"(a) Beginning in school year 2015-2016, no student of pre-k age may be expelled from any publicly funded community-based organization, school in the District of Columbia Public Schools system, or public charter school that provides pre-k care and education services to pre-k age children.

"(b) Beginning in school year 2015-2016, no student of pre-k age may receive an out-of-school suspension from any publicly funded community-based organization, school in the District of Columbia Public Schools system, or public charter school that provides pre-k care and education services to pre-k age children, unless it is determined by a school or program administrator that the student has willfully caused or attempted to cause bodily injury, or

ENROLLED ORIGINAL

threatened serious bodily injury to another person, except in self-defense. No student of pre-k age may be suspended for longer than 3 days for any individual incident.".

Sec. 3. Title II of the Attendance Accountability Amendment Act of 2013, effective September 19, 2013 (D.C. Law 20-17; D.C. Official Code § 38-235), is amended by adding a new section 202 to read as follows:

"Sec. 202. Annual reporting requirements.

"(a) Each local education agency and entity operating a publicly funded community-based organization shall maintain data for each student that includes:

"(1) Demographic data including:

"(A) The campus attended by the student;

"(B) The student's grade level;

"(C) The student's gender identification;

"(D) The student's race;

"(E) The student's ethnicity;

"(F) Whether the student receives special education services;

"(G) Whether the student is classified as an English language learner; and

"(H) Whether the student is considered at-risk as defined in section 102(2A) of the Uniform Per Student Funding Formula for Public Schools and Public Charter Schools Act of 1998, effective March 26, 1999 (D.C. Law 12-207; D.C. Official Code § 38-2901(2A)); and

"(2) Discipline data including:

"(A) Total number of out-of-school suspensions and in-school suspensions experienced by the student during each school year;

"(B) Total number of days excluded from school;

"(C) Whether the student was referred to an alternative education setting for the duration of a suspension;

"(D) Whether the student was expelled during the school year;

"(E) Whether the student voluntarily or involuntarily transferred or withdrew from the school during the school year; and

"(F) For each suspension or expulsion, a description of the action that led to the suspension or expulsion.

"(b) By August 15 of each year, each local education agency or entity operating a publicly funded community-based organization shall submit a report to the Office of the State Superintendent of Education disaggregated by each of the demographic categories identified in subsection (a)(1) of this section. The report shall include:

"(1) The students suspended for at least one and no more than 5 days;

"(2) The students suspended for at least 6 and no more than 10 days;

"(3) The students suspended for more than 10 days total;

"(4) The students who received more than one suspension in a school year;

"(5) The students who were referred to an alternative educational setting for the course of a suspension;

"(6) A description of the types of actions that led to the suspension or expulsion;

"(7) The students expelled; and

"(8) The students who voluntarily or involuntarily transferred or withdrew from the school during the school year.

"(c) Each local education agency or entity operating a publicly funded community-based organization shall provide the requested data in subsection (b) of this section in a form and manner prescribed by the Office of the State Superintendent of Education.

"(d) By October 1 of each year, beginning in 2016, the Office of the State Superintendent of Education shall publicly report on the suspensions and expulsions that were imposed in local education agencies and publicly funded community-based organizations during the preceding school year, including a relevant trend analysis.

"(e) For the purposes of this section, the term:

"(1) "Community-based organization" shall have the same meaning as provided in section 101(1A) of the Pre-k Enhancement and Expansion Amendment Act of 2008, effective July 18, 2008 (D.C. Law 17-202; D.C. Official Code § 38-271.01(1A)).

"(2) "Local education agency" means the District of Columbia Public Schools system or any individual public charter school or group of public charter schools operating under a single charter.".

Sec. 4. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report 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), a 30-day period of congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December

ENROLLED ORIGINAL

24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

Chairman
Council of the District of Columbia

Mayor
District of Columbia
APPROVED
May 6, 2015

ENROLLED ORIGINAL

AN ACT

D.C. ACT 21-51

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 6, 2015

To amend the Health Benefit Exchange Authority Establishment Act of 2011 to provide for the financial sustainability of the Health Benefit Exchange Authority by assessing, on an annual basis, all health insurance carriers.

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 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 the date of the Notice of Assessment.

"(4) 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

ENROLLED ORIGINAL

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 in the committee report 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), a 30-day period of congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

Chairman
Council of the District of Columbia

Mayor
District of Columbia
APPROVED
May 6, 2015

ENROLLED ORIGINAL

AN ACT

D.C. ACT 21-52

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 6, 2015

To amend, on an emergency basis, the Workforce Job Development Grant-Making Authority Act of 2012 to continue the legal authority for the Director of the Department of Employment Services to issue grants from funds appropriated to or received by the Department of Employment Services for workforce job development purposes by repealing a sunset provision.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Workforce Job Development Grant-Making Reauthorization Emergency Amendment Act of 2015".

Sec. 2. Section 3 of the Workforce Job Development Grant-Making Authority Act of 2012, effective April 23, 2013 (D.C. Law 19-269; D.C. Official Code § 1-328.05, note), is repealed.

Sec. 3. Applicability.

This act shall apply as of April 23, 2015.

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 no longer than 90 days, as provided for emergency acts of the Council of the District of Columbia in section 412(a)

ENROLLED ORIGINAL

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
May 6, 2015

ENROLLED ORIGINAL

AN ACT

D.C. ACT 21-53

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 6, 2015

To amend, on an emergency basis, the Legalization of Marijuana for Medical Treatment Initiative of 1998 to increase the number of living marijuana plants that a cultivation center can possess at any time.

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

Sec. 2. Section 7(e)(2) of the Legalization of Marijuana for Medical Treatment Initiative of 1998, effective February 25, 2010 (D.C. Law 13-315; D.C. Official Code § 7-1671.06(e)(2)), is amended by striking the number "500" and inserting the number "1000" 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. 788; D.C. Official Code § 1-204.12(a)).

Chairman
Council of the District of Columbia

Mayor
District of Columbia
APPROVED
May 6, 2015

ENROLLED ORIGINAL

AN ACT

D.C. ACT 21-54

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 7, 2015

To exempt, on an emergency basis, Jubilee Maycroft, LLC from the notice requirements of the Tenant Opportunity to Purchase Act of 1980 with respect to the real property located at 1474 Columbia Road, N.W., also known as The Maycroft.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Jubilee Maycroft TOPA Notice Exemption Emergency Act of 2015".

Sec. 2. (a) The transfer of an interest, pursuant to section 402(c)(2)(H) of the Tenant Opportunity to Purchase Act of 1980, effective September 10, 1980 (D.C. Law 3-86; D.C. Official Code § 42-3404.02(c)(2)(H)) ("TOPA"), in Jubilee Maycroft, LLC, which owns Lots 2010 - 2072 in Square 2669, located at 1474 Columbia Road, N.W., also known as The Maycroft ("Property"), from Jubilee Housing, Inc. to one or more entities controlled directly or indirectly by Jubilee Housing, Inc. shall be exempt from the notice requirements of section 402(d) of TOPA with respect to the Property.

(b) No tenant or tenant organization shall have a right to challenge, under sections 503 or 503a of TOPA, the application of section 402(c)(2)(H) of TOPA to the transfer of interests in Jubilee Maycroft, LLC.

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 Rue Act, approved December 24, 1973 (87 Stat. 788; D.C. Official Code § 1-204.12(a)).

Chairman
Council of the District of Columbia

UNSIGNED
Mayor
District of Columbia
May 6,2015

ENROLLED ORIGINAL

AN ACT

D.C. ACT 21-55

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 8, 2015

To approve, on an emergency basis, Change Order No. 10 to Contract No. GF-2010-C-0030 with Parkinson/Forrester UDC Student Center JV, LLC for work on the construction of the New Student Center, University of the District of Columbia, Van Ness Campus, and to authorize payment for the goods and services received and to be received under the change order.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Change Order No. 10 to Contract No. GF-2010-C-0030 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 of the Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code §2-352.02), the Council approves Change Order No. 10 to Contract No. DCAM-12-CS-0165 with Parkinson/Forrester UDC Student Center JV, LLC for work on the construction of the New Student Center, University of the District of Columbia, Van Ness Campus, and authorizes payment in the aggregate amount of $3,975,633 for the goods and services received and to be received under the change order.

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

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
May 8, 2015

ENROLLED ORIGINAL

AN ACT

D.C. ACT 21-56

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 8, 2015

To approve, on an emergency basis, Modifications No. 2 and No. 3 to Contract No. CW26186 with Fleetpro, Inc. to provide on-site vehicle maintenance services and to authorize payment for the goods and 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 "Modifications No. 2 and No. 3 to Contract No. CW26186 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 of the Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code § 2-352.02), the Council approves Modifications No. 2 and No. 3 of Contract No. CW26186 with Fleetpro, Inc. to provide on-site vehicle maintenance services, and authorizes payment in the not-to-exceed amount of $1,174,921.21 for the goods and services received and to be received under the contract from February 12, 2015 through February 11, 2016.

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

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
May 8, 2015

ENROLLED ORIGINAL

AN ACT

D.C. ACT 21-57

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 8, 2015

To approve, on an emergency basis, Modification Nos. M14 and M16 to Contract No. CW25961 with Science Applications International Corporation to provide man-based telephony services and to authorize payment for the goods and 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. CW25961 Modification Nos. M14 and M16 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 of the Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code § 2-352.02), the Council approves Modification Nos. M14 and M16 to Contract No. CW25961 with Science Applications International Corporation to provide man-based telephony services, and authorizes payment in the not-to-exceed amount of $20,000,000 for the goods and services received and to be received under the contract from March 1, 2015 through February 28, 2016.

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)

ENROLLED ORIGINAL

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
May 8, 2015

ENROLLED ORIGINAL

AN ACT

D.C. ACT 21-58

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 8, 2015

To approve, on an emergency basis, Change Orders Nos. 001 through 004 to Contract No. DCAM-14-CS-0102 with Tompkins Builders, Inc. for design-build services for the Stanton Elementary School modernization and addition, and to authorize payment for the goods and services received and to be received under the change orders.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Change Orders Nos. 001 through 004 to Contract No. DCAM-14-CS-0102 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 of the Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code § 2-352.02), the Council approves Change Orders Nos. 001 through 004 to Contract DCAM-14-CS-0102 with Tompkins Builders, Inc., for design-build services for the Stanton Elementary School modernization and addition, and authorizes payment in the aggregate amount of $17,413,283 for the goods and services received and to be received under the change orders.

Sec. 3. Fiscal impact statement.

The Council adopts the fiscal 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

ENROLLED ORIGINAL

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
May 8, 2015

ENROLLED ORIGINAL

AN ACT

D.C. ACT 21-59

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 8, 2015

To amend, on an emergency basis, the Soccer Stadium Development Act of 2014 to add a new definition, clarify findings, make technical and clarifying changes regarding the transmission of documents to the Council for approval, allow for the negotiation of enhanced performance, and make other technical and conforming changes.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Soccer Stadium Development Technical Clarification Emergency Amendment Act of 2015".

Sec. 2. The Soccer Stadium Development Act of 2014, effective March 11, 2015 (D.C. Law 20-233; to be codified at D.C. Official Code § 10-1651.01 *et seq.*), is amended as follows:

(a) Section 101 (to be codified at D.C. Official Code § 10-1651.01) is amended to read as follows:

"Sec. 101. Definitions.

"For the purposes of this title, the term:

"(1) "Northwest portion of Lot 24 in Square 665" means the northwest portion of Lot 24 in Square 665 as described in the letter of intent between the District and Potomac Electric Power Company dated December 27, 2013.

"(2) "Soccer stadium site" means the real property described as Squares 603S, 605, 607, 661, and 661N, and the northwest portion of Lot 24 in Square 665, and all public alleys and streets to be closed within these squares.".

(b) Section 102 (to be codified at D.C. Official Code § 10-1651.02) is amended as follows:

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

"(1A) The acquisition of land for, construction of, and operation of a new stadium for D.C. United in itself serves a public purpose, in particular because the stadium will promote the recreation, entertainment, and enjoyment of the public.".

(2) Paragraph (2) is amended by striking the phrase "Without the development" and inserting the phrase "In addition, without the development" in its place.

(c) Section 103 (to be codified at D.C. Official Code § 10-1651.03) is amended as follows:

(1) Subsection (a)(2) is amended as follows:

(A) Strike the phrase "shall acquire" and insert the phrase "is authorized to acquire" in its place.

ENROLLED ORIGINAL

(B) Strike the phrase "as described in the letter of intent between the District and Potomac Electric Power Company ("PEPCO") dated December 27, 2013".

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

"(d) The Mayor shall transmit to the Council any agreement to acquire any portion of Squares 605, 607, or 661, or the northwest portion of Lot 24 in Square 665 that requires the approval of the Council 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), not later than 30 days before the effective date of the agreement. Any such agreement shall be exempt from section 202(c) of the Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code § 2-352.02(c)).".

(3) Subsection (e) is amended by striking the phrase "as described in the letter of intent between the District and PEPCO dated December 27, 2013".

(d) Section 104 (to be codified at D.C. Official Code § 10-1651.04) is amended as follows:

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

"(a) Notwithstanding An Act Authorizing the sale of certain real estate in the District of Columbia no longer required for public purposes, approved August 5, 1939 (53 Stat. 1211; D.C. Official Code § 10-801 *et seq.*), the Mayor may enter into a ground lease ("revised ground lease") between the District of Columbia and DC Stadium LLC; provided, that:

"(1) The revised ground lease amends the ground lease between the District of Columbia and DC Stadium LLC, dated May 23, 2014 ("original ground lease") to:

"(A) Not contain any provision to abate District sales tax;

"(B) Include the labor peace provisions set forth in subsection (c) of this section; and

"(C) Contain modifications to conform the terms of the original ground lease to the provisions of this act;

"(2) The Mayor transmits the revised ground lease to the Council for its review not later than 30 days before the effective date of the revised ground lease;

"(3) The Mayor transmits simultaneously to the Council for its review 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), a revised development agreement ("revised development agreement") that amends the development agreement between the District of Columbia and DC Stadium LLC, dated May 23, 2014 ("original development agreement"), for the development of the soccer stadium site and that:

"(A) Extends the date by which the District shall acquire control of the soccer stadium site to September 30, 2015;

"(B) Extends the dates by which the District shall close streets and alleys, acquire fee title, demolish existing structures, perform infrastructure work (including all District obligations under article V of the original development agreement), and perform environmental remediation work (including all District obligations under article VI of the original development agreement), as such actions are described in articles III, IV, V, and VI of the original development agreement and may be described or referenced in other provisions of the original development agreement, each by 6 months;

"(C) Sets a date by which DC Stadium LLC shall complete the construction

of a soccer stadium at the soccer stadium site;

"(D) Extends other dates as negotiated between the District and DC Stadium, LLC;

"(E) Amends section 5.9 of the original development agreement to read as follows: "Land Contribution. Within 30 days of the District's acquisition of either Lot 7 or Lot 802 in Square 605, the Stadium Developer shall pay to the District, or its designee, Two Million Five Hundred Thousand Dollars ($2,500,000.00) to offset Land acquisition costs, unless the District acquires either Lot 7 or Lot 802 in Square 605 by the use of eminent domain and the aggregate price paid by the District for Lot 7 and Lot 802 is less than $25,148,760.";

"(F) Amends section 9.1(c) of the original development agreement to read as follows: "Designated Entertainment Area. The District shall grant to the Developer 'signage rights' with respect to the Land, such signage rights to be those rights described in the proposed Chapter 8 of Title 13 of the District of Columbia Municipal Regulations published in the DC Register on August 17, 2012.";

"(G) Provides that no fees, proffers, or deposits shall be borne or waived by the District pursuant to section 7.6 of the original development agreement before October 1, 2015."; and

"(H) Includes the labor peace provisions set forth in subsection (c) of this section; and

"(4) The Council does not adopt a resolution of disapproval pertaining to the ground lease within 30 days beginning on the day on which the ground lease is submitted to the Council, excluding days of Council recess.".

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

"(b)(1) The revised ground lease and the revised development agreement each may provide an enhanced "Performance Assurance" without increasing the District's financial obligations.

"(2) The revised development agreement shall be exempt from section 202(c) of the Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code § 2-352.02(c)).".

(3) Subsection (c) is amended by striking the phrase "DC Stadium, LLC and the District shall agree" and inserting the phrase "The District is authorized to agree" in its place.

(e) Section 107(b) (to be codified at D.C. Official Code § 10-1651.07(b)) is amended as follows:

(1) Paragraph (1) is amended by striking the phrase "September 4, 2014;" and inserting the phrase "December 15, 2014;" in its place.

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

"(2A) Any payment made by D.C. United to the District government pursuant to the revised ground lease;".

(f) Section 108 (to be codified at D.C. Official Code § 10-1651.08) is amended as follows:

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

"(a) The Mayor shall implement the Convention Center – Southwest Waterfront corridor as described in the "DC Circulator 2014 Transit Development Plan Update" dated September 2014.".

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

ENROLLED ORIGINAL

"(c) The Mayor shall make capital improvements of at least $250,000 to the Randall Recreation Center in Ward 6.".

(3) Subsection (d) is amended by striking the phrase "provide ongoing operations and programming funding for" and inserting the phrase "operate and provide programmed activities for" in its place.

(4) A new subsection (e) is added to read as follows:

"(e) The Mayor is authorized to negotiate other community-benefit commitments from D.C. United and its affiliated entities, including those that promote youth soccer, education, employment opportunities, and job training programs.".

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
May 8, 2015

ENROLLED ORIGINAL

AN ACT

D.C. ACT 21-60

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 8, 2015

To amend, on a temporary basis, the Legalization of Marijuana for Medical Treatment Initiative of 1998 to increase the number of living marijuana plants that a cultivation center can possess at any time.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Medical Marijuana Supply Shortage Temporary Amendment Act of 2015".

Sec. 2. Section 7(e)(2) of the Legalization of Marijuana for Medical Treatment Initiative of 1998, effective February 25, 2010 (D.C. Law 13-315; D.C. Official Code § 7-1671.06(e)(2)), is amended by striking the number "500" and inserting the number "1000" 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.

(a) 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), a 30-day period of congressional review as provided in section 602(c)(l) of the District of Columbia Home Rule Act, approved

ENROLLED ORIGINAL

(b) Section 218 (D.C. Official Code § 10-1202.18) is repealed.

Sec. 3. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report for the Events DC Technical Clarification Amendment Act of 2015, passed on 1st reading on April 14, 2015 (Engrossed version of Bill 21-76), 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
May 8, 2015

ENROLLED ORIGINAL

A RESOLUTION

21-91

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

May 5, 2015

To amend, on an emergency basis, due to congressional review, the Minimum Wage Act Revision Act of 1992 to exempt an employer from keeping precise time records for bona fide executive, administrative, and professional, as well as certain other, employees; to require an employer or a temporary staffing firm to provide notice regarding payment to an employee in a second language if the Mayor has made available a translation of the sample notice template in that second language and the employer knows that second language to be the employee's primary language or the employee requests notice in that second language; and to require the Mayor to make available, in any language required for a vital document under the Language Access Act of 2004, a translation of the sample template to be used by an employer or a temporary staffing firm when providing notice to an employee regarding payment; and to amend section 2 of An Act To provide for the payment and collection of wages in the District of Columbia to continue to exempt an employer from paying wages to bona fide executive, administrative, and professional employees at least twice during each calendar month; provided, that the employer pays wages to such employees at least once per month.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Wage Theft Prevention Clarification Congressional Review Emergency Declaration Resolution of 2015".

Sec. 2. (a) In 2014, the Council passed the Wage Theft Prevention Amendment Act of 2014, effective February 26, 2015 (D.C. Law 20-157; 62 DCR 3603)("Act").

(b) Subsequently, the Council passed clarifying and technical corrections to the Act through an emergency measure, the Wage Theft Prevention Correction and Clarification Emergency Act of 2014, effective December 29, 2014 (D.C. Act 20-544; 62 DCR 243), and corresponding temporary legislation, the Wage Theft Prevention Correction and Clarification Temporary Amendment Act of 2014, effective March 13, 2015 (D.C. Law 20-240; 62 DCR 4511).

(c) Since passage of these measures, several unintended consequences impacting salaried workers have been identified, including the requirement that all employees, including white-collar, salaried employees, be paid at least twice per month, the requirement that employers keep records of the "precise time worked" each day and each workweek by all employees, including those not compensated on an hourly or other unit-of-time basis, and the requirement that an

employer provide notice to an employee regarding payment in an employee's primary language, without providing a limit on the languages in which that notice must be furnished.

(d) It was not the Council's intent to require that white-collar, salaried employees be paid at least twice a month or to require an employer to keep records of the precise time worked by all employees, including those not compensated on an hourly or other unit-of-time basis. Further, requiring notice to be furnished in any language that might be an employee's primary language will be unnecessarily burdensome and costly.

(e) In response, the Council passed further clarifying and technical corrections through an emergency measure, the Wage Theft Prevention Clarification Emergency Amendment Act of 2015, effective February 26, 2015 (D.C. Act 21-8; 62 DCR 2669) (the "emergency legislation") and corresponding temporary legislation, the Wage Theft Prevention Clarification Temporary Amendment Act of 2015, enacted on March 27, 2015 (D.C. Act 21-38; 62 DCR 4552) (the "temporary legislation").

(f) The emergency legislation is set to expire on May 27, 2015. The temporary legislation is not projected to become law until June 4, 2015.

(g) It is important that the provisions of the emergency legislation continue in effect, without interruption, until the temporary legislation is law.

Sec. 3. The Council of the District of Columbia determines that the circumstances enumerated in section 2 constitute emergency circumstances making it necessary that the Wage Theft Prevention Clarification Congressional Review Emergency Amendment Act of 2015 be adopted after a single reading.

Sec. 4. This resolution shall take effect immediately.

ENROLLED ORIGINAL

A RESOLUTION

21-92

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

May 5, 2015

To declare the existence of an emergency, due to congressional review, with respect to the need to amend the Retail Incentive Act of 2014 to modify the boundaries of the Bladensburg Road, N.E., Retail Priority Area; and to amend the H Street, N.E., Retail Priority Area Incentive Act of 2010 to clarify that restaurants whose annual alcohol sales exceed 20% are not eligible for retail development project grants and to clarify the location of businesses that are eligible to receive retail development project grants.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "H Street, N.E., Retail Priority Area Clarification Congressional Review Emergency Declaration Resolution of 2015".

Sec. 2. (a) In February 2015, the Council passed the H Street, N.E., Retail Priority Area Clarification Emergency Amendment Act of 2015, effective February 23, 2015 (D.C. Act 21-0006; 62 DCMR 2474) ("emergency legislation"). This bill would modify the boundaries of the Bladensburg Road, N.E., Retail Priority Area. In addition, this bill would amend the H Street, N.E., Retail Priority Area Incentive Act of 2010 to clarify that restaurants whose annual alcohol sales exceed 20% are not eligible for retail development project grants and to clarify the location of businesses that are eligible to receive retail development project grants.

(b) The emergency legislation expires on April 22, 2015, before the temporary legislation, the H Street, N.E. Retail Priority Area Clarification Temporary Amendment Act of 2015, enacted on March 30, 2015 (D.C. Act 21-0037; 62 DCR 4550), is projected to become law, on June 4, 2015.

(c) It is important to prevent a gap in the law until the temporary legislation is in effect.

Sec. 3. The Council of the District of Columbia determines that the circumstances enumerated in section 2 constitute emergency circumstances making it necessary that the H Street, N.E., Retail Priority Area Clarification Congressional Review Emergency Amendment Act of 2015 be adopted after a single reading.

Sec. 4. This resolution shall take effect immediately.

ENROLLED ORIGINAL

A RESOLUTION

21-94

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

May 5, 2015

To confirm the appointment of Mr. Max Brown to the Washington Convention and Sports Authority Board of Directors.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Washington Convention and Sports Authority Board of Directors Max Brown Confirmation Resolution of 2015".

Sec. 2. The Council of the District of Columbia confirms the appointment of:

Mr. Max Brown
475 H Street, N.W.
Washington, D.C. 20001
(Ward 2)

as a public member and chairperson of the Washington Convention and Sports Authority Board of Directors, established by section 205 of the Washington Convention Center Authority Act of 1994, effective September 28, 1994 (D.C. Law 10-188; D.C. Official Code § 10-1202.05), for a term to end May 16, 2019.

Sec. 3. The Council shall transmit a copy of this resolution, upon its adoption, to the nominee and to the Office of the Mayor.

Sec. 4. This resolution shall take effect immediately.

ENROLLED ORIGINAL

A RESOLUTION

21-95

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

May 5, 2015

To confirm the reappointment of Ms. Miriam "Mimsy" Huger Lindner to the Washington Convention and Sports Authority Board of Directors.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Washington Convention and Sports Authority Board of Directors Miriam Huger Lindner Confirmation Resolution of 2015".

Sec. 2. The Council of the District of Columbia confirms the reppointment of:

Ms. Miriam "Mimsy" Huger Lindner
1525 33rd Street, N.W.
Washington, D.C. 20007
(Ward 2)

as a public member of the Washington Convention and Sports Authority Board of Directors, established by section 205 of the Washington Convention Center Authority Act of 1994, effective September 28, 1994 (D.C. Law 10-188; D.C. Official Code § 10-1202.05), for a term to end May 16, 2019.

Sec. 3. The Council shall transmit a copy of this resolution, upon its adoption, to the nominee and to the Office of the Mayor.

Sec. 4. This resolution shall take effect immediately.

ENROLLED ORIGINAL

A RESOLUTION

21-96

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

May 5, 2015

To confirm the appointment of Mr. Alan Bubes to the Washington Convention and Sports Authority Board of Directors.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Washington Convention and Sports Authority Board of Directors Alan Bubes Confirmation Resolution of 2015".

Sec. 2. The Council of the District of Columbia confirms the appointment of:

Mr. Alan Bubes
1601 31st Street, N.W.
Washington, D.C. 20007
(Ward 2)

as a public member of the Washington Convention and Sports Authority Board of Directors, established by section 205 of the Washington Convention Center Authority Act of 1994, effective September 28, 1994 (D.C. Law 10-188; D.C. Official Code § 10-1202.05), for a term to end May 16, 2019.

Sec. 3. The Council shall transmit a copy of this resolution, upon its adoption, to the nominee and to the Office of the Mayor.

Sec. 4. This resolution shall take effect immediately.

ENROLLED ORIGINAL

A RESOLUTION

21-97

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

May 5, 2015

To approve the proposed rules amending section 6004 of Title 29 of the District of Columbia Municipal Regulations to add to the statement of rights and responsibilities for youth in foster care.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Foster Youth Statement of Rights Rules II Approval Resolution of 2015".

Sec. 2. Pursuant to section 372 of the Prevention of Child Abuse and Neglect Act of 1977, effective April 23, 2013 (D.C. Law 19-276; D.C. Official Code § 4-1303.72), the Mayor transmitted to the Council on March 24, 2015, proposed rules to amend the statement of rights and responsibilities for youth in foster care. The Council approves the proposed rules, published at 62 DCR 3419, to amend section 6004 of Title 29 of the District of Columbia Municipal Regulations.

Sec. 3. Transmittal.

The Council shall transmit a copy of this resolution, upon its adoption, to the Mayor and the Director of the Child and Family Services Agency.

Sec. 4. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report 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 resolution shall take effect immediately.

ENROLLED ORIGINAL

A RESOLUTION

21-98

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

May 5, 2015

To declare the existence of an emergency with respect to the need to approve Human Care Agreement No. RM-15-HCA-MHRS-107-AMH-BY4-SC with Anchor Mental Health Association, Inc. for mental health rehabilitation services and to authorize payment for the services received and to be received under the agreement.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Human Care Agreement No. RM-15-HCA-MHRS-107-AMH-BY4-SC Approval and Payment Authorization Emergency Declaration Resolution of 2015".

Sec. 2. (a) There exists an immediate need to approve Human Care Agreement ("HCA") No. RM-15-HCA-MHRS-107-AMH-BY4-SC with Anchor Mental Health Association, Inc. ("Anchor") for mental health rehabilitation services for eligible District residents, and to authorize payment for the services received and to be received under the agreement.

(b) On October 1, 2014, the Department of Behavioral Health awarded HCA No. RM-15-HCA-MHRS-107-AMH-BY4-SC to Anchor for a base-year period of October 1, 2014 through September 30, 2015 and 4 option years, in the not-to-exceed amount of $695,500.00 for the base year.

(c) Due to higher than anticipated demand for services, especially Supported Employment services, an additional $490,075.00 in services is required during the base year.

(d) The aggregate value of the services provided and to be provided during the base year of HCA No. RM-15-HCA-MHRS-107-AMH-BY4-SC exceeds the $1 million threshold under section 451 of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 803; D.C. Official Code § 1-204.51).

(e) Approval of HCA No. RM-15-HCA-MHRS-107-AMH-BY4-SC is necessary to allow mental health rehabilitation services to continue uninterrupted and to avoid disruption in care from transferring individuals to other mental health providers.

Sec. 3. The Council of the District of Columbia determines that the circumstances enumerated in section 2 constitute emergency circumstances making it necessary that the Human Care Agreement No. RM-15-HCA-MHRS-107-AMH-BY4-SC Approval and Payment Authorization Emergency Act of 2015 be adopted after a single reading.

Sec. 4. This resolution shall take effect immediately.

ENROLLED ORIGINAL

A RESOLUTION

21-99

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

May 5, 2015

To declare the sense of the Council to call upon Gerawan Farming to cease violating California state and federal laws relating to labor relations, anti-discrimination, and minimum wage/hour compliance.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Sense of the Council Regarding Gerawan Farming Resolution of 2015".

Sec. 2. The Council finds that:

(1) The violations of California and federal labor laws by the 5,000 employee Gerawan Farming agricultural corporation, one of the nation's largest grape and tree fruit producers, epitomizes the agricultural industry's defiance of farm workers' rights to organize and negotiate union contracts, despite California's 1975 Agricultural Labor Relations Act that guarantees those rights.

(2) Since 1990, when Gerawan Farming farm workers voted in favor of the United Farm Workers of America ("UFW") in a state-conducted secret-ballot election, the last major organizing drive under the leadership of Cesar Chavez, Gerawan Farming has thwarted farm worker efforts to negotiate a union contract.

(3) In 2013, farm workers at Gerawan Farming invoked a California law that allows neutral, state-appointed mediators to decide union contracts when employers refuse to sign them, and in late 2013, the state Agricultural Labor Relations Board ("ALRB") ordered that the three-year contract was to take immediate effect.

(4) Since farm workers requested a state mediator, the ALRB general counsel has filed five complaints – tantamount to indictments – accusing Gerawan Farming of "illegally excluding some of its farm workers from the benefits of a [union contract]", illegally "instigating and encouraging the gathering of signatures" on petitions to decertify the UFW, "unlawfully interrogating workers about their union activities" and conducting surveillance of workers, "failing to bargain in good faith with its employees' union", "intimidating [employees] in the exercise of their right to participate in negotiations", and "failing" to implement the state-issued union contract.

ENROLLED ORIGINAL

(5) Under the contract terms set by the state mediator, between July 2013 and July 2014 most Gerawan Farming farm workers would have earned approximately $1,480 in additional money each, based on a 54-hour work week, plus additional pay increases and benefits scheduled to take effect over the duration of the agreement.

(6) Gerawan Farming's refusal to implement the union contract means its roughly 5,000 employees have not been paid many millions of dollars they are owed from July 2013 to July 2014, and many millions of dollars more over the duration of the contract

(7) Gerawan Farming's first attempt to decertify the UFW in September 2013 was dismissed by the ALRB regional director after an investigation exposed "a large number of forged signatures" and "significant unlawful assistance by the employer in the circulation of the petition." A second petition was dismissed by the regional director, who cited recent outstanding complaints against Gerawan Farming for serious and repeated violations of the law, so much so that "a free and uncoerced" election was "impossible."

(8) Gerawan Farming products are readily available in grocery stores across the District.

Sec. 3. It is the sense of the Council that:

(1) Gerawan Farming meet such basic standards of conduct as refraining from violating state and federal laws regarding labor relations, anti-discrimination, and minimum wage and hour requirements, and to respect the legal rights of its employees.

(2) Gerawan Farming come into compliance with the laws of the State of California and the federal government with respect to all business conducted with any District government agency, commission, or office.

Sec. 4. The Chairman shall transmit copies of this resolution, upon its adoption, to the Governor of the State of California, the Attorney General of the State of California, the Fresno County District Attorney, and the California Agricultural Labor Relations Board.

Sec. 5. This resolution shall take effect immediately upon the first date of publication in the District of Columbia Register.

ENROLLED ORIGINAL

A RESOLUTION

21-100

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

May 5, 2015

To declare the existence of an emergency with respect to the need to amend the Legalization of Marijuana for Medical Treatment Initiative of 1999 to provide an exception to allow a cultivation center to operate in a Retail Priority Area if the applicant had an application pending or approved before to the effective date of the law establishing or expanding a Retail Priority Area.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Medical Marijuana Cultivation Center Exception Emergency Declaration Resolution of 2015".

Sec. 2. (a) Since January 2015, there have been more than 6 news articles discussing the shortage of medical marijuana in the District of Columbia. Specifically, in February 2015, the Washington Post ran a story called "D.C.'s medical marijuana shortage: A little noticed crisis amid legalization." The article brought media attention to the fact that while the District of Columbia permits medical marijuana usage that allowance is of no value for the roughly 2700 patients whose physicians have recommended its usage. As the article states, "[t]here isn't enough pot to go around."

(b) The Legalization of Marijuana for Medical Treatment Initiative of 1999 placed reasonable, albeit strict, limitations on where cultivation centers could open and operate.

(c) The chronic shortage is due, in part, to the limited number of cultivation centers operating in the District.

(d) Only 3 cultivation centers have been able to provide medical marijuana to dispensaries despite the fact that 10 licenses have been awarded.

(e) In 2012, the Council further limited choice when it prohibited cultivation centers from opening in a Retail Priority Area ("RPA"). Since the Medical Marijuana Cultivation Center Emergency Amendment Act of 2012, the Council has approved 4 new RPAs and, as a result, has unintentionally compounded the medical marijuana supply problem by barring cultivation centers from opening and operating.

(f) There is an affected cultivation center operator seeking to open and operate at 6523 Chillum Place, N.W. That cultivation center operator sought and applied for a Certificate of Occupancy from the Department of Consumer and Regulatory Affairs ("DCRA"). On June 18, 2013, the operator was informed by DCRA's Office of the Zoning Administrator that its proposed medical marijuana cultivation center "is allowed as a matter of right use" because it was located in a C-M-1 Industrial District.

ENROLLED ORIGINAL

(g) Unbeknownst to the cultivation center, the Zoning Administrator's June 18, 2013, letter only referred to the legal conditions of zoning at the time of its issuance and only applied to zoning regulations, not those of the Department of Health, which delegated to DCRA the responsibility of determining whether an application complies with the RPA requirement of the medical marijuana program.

(h) In 2013, 6523 Chillum Place, N.W., was not located in a RPA. The change in designation did not occur until December 17, 2014, when the Council approved Bill 20-721, the U Street/14th Street, N.W., and Georgia Avenue Great Streets Neighborhood Retail Priority Amendment Act of 2014, which became law on May 2, 2015.

(i) Requiring the cultivation center operator to identify another location and to begin the Certificate of Occupancy process again would further exacerbate the District's medical marijuana supply problem given that it takes up to 23 weeks to bring a marijuana plant from cutting to harvest-ready bud.

(j) The proposed amendment allows cultivation centers that find themselves in a similar legislative or regulatory posture to open and operate a cultivation center in a Retail Priority Area only if their application was approved before the establishment or expansion of a Retail Priority Area. This is a narrow exception to the prohibition against cultivation centers opening and operating in Retail Priority Areas.

Sec. 3. The Council of the District of Columbia determines that the circumstances enumerated in section 2 constitute emergency circumstances making it necessary that the Medical Marijuana Cultivation Center Exception Emergency Amendment Act of 2015 be adopted after a single reading.

Sec. 4. This resolution shall take effect immediately.

ENROLLED ORIGINAL

A RESOLUTION

21-101

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

May 5, 2015

To declare the existence of an emergency with respect to the need to approve Delivery Order No. CW33024 under Montgomery County, Maryland Contract No. 1041647 with Morton Salt, Inc. ("Morton") and to authorize payment for the goods received and to be received under the delivery order.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Delivery Order No. CW33024 under Montgomery County, Maryland Contract No. 1041647 Approval and Payment Authorization Emergency Declaration Resolution of 2015".

Sec. 2. (a) There exists an immediate need to approve Delivery Order No. CW33024 and modifications thereto (including all associated Purchase Orders) issued by the District Office of Contracting and Procurement ("OCP"), on behalf of the District Department of Public Works ("DPW"), under a Montgomery County, Maryland under Montgomery County, Maryland Contract No. 1041647 and to authorize payment for the goods received and to be received under the delivery order.

(b) DPW is responsible for administering the District's Snow Removal and Deicing Program. Each year, the District participates with other local jurisdictions in Maryland and Virginia in a Cooperative Purchase Agreement ("Agreement") to purchase its supply of road deicing salt. Under the Agreement, the Montgomery County, Maryland Department of General Services ("Montgomery County") serves as the lead entity. Each jurisdiction submits its anticipated annual requirements to Montgomery County and, during the procurement process, Montgomery County acts as the soliciting agent for the participating jurisdictions. Participating jurisdictions are grouped in zones and Montgomery County awards the contracts by zone. Upon award of the contracts, each participating jurisdiction can either: (1) place orders for road deicing salt under the Montgomery County contract directly with an awarded contractor; or (2) enter into and administer its own contract with an awarded contractor for the purchase and delivery of its annual requirements.

(c) On July 28, 2014, Montgomery County issued an Invitation for Bids on behalf of the members of the Metropolitan Washington Council of Governments Purchasing Group for the purchase of their respective estimated known and future annual requirements for road deicing salt.

(d) On October 2, 2014, Montgomery County awarded Contract No. 1041647 to Morton for the District's requirements for the base period of one year, from October 2, 2014, through October 1, 2015, with 3 one-year option periods, in the total estimated contract amount of $2,222,000.00.

(e) Between November 2014 and February 2015, OCP issued purchase orders totaling $1,644,120.00 under Montgomery County Contract No. 1041647. OCP anticipates spending the remaining $577,880.00 of the estimated contract amount for road deicing salt during Fiscal Year 2015.

(f) Council approval is required 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), because the expenditures under the contract are in an amount in excess of $1 million during a 12-month period.

(g) Approval is necessary to allow the continuation of these vital services. Without this approval, Morton cannot be paid more than $1 million for the goods received or to be received under the delivery order.

Sec. 3. The Council of the District of Columbia determines that the circumstances enumerated in section 2 constitute emergency circumstances making it necessary that the Delivery Order No. CW33024 under Montgomery County, Maryland Contract No. 1041647 Approval and Payment Authorization Emergency Act of 2015 be adopted after a single reading.

Sec. 4. This resolution shall take effect immediately.

ENROLLED ORIGINAL

A RESOLUTION

21-102

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

May 5, 2015

To declare the existence of an emergency with respect to the need to amend the Youth Employment Act of 1979 to authorize the Mayor to provide employment or work readiness training for no fewer than 10,000 and no more than 21,000 youth participants 14 to 24 years of age.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Youth Employment and Work Readiness Training Emergency Declaration Resolution of 2015".

Sec. 2. (a) The economy of the District of Columbia continues to show improvement, but, as of December 2014, the District's 7.3% unemployment rate for adults remains one of the highest in the nation.

(b) Many District youth continue to face barriers to employment and lack the skills to secure sustainable, long-term jobs.

(c) The Mayor is committed to investing in young people and part of that commitment is building a better pathway for young people to secure skills training for sustainable jobs in the District of Columbia.

(d) District youth up to the age of 24 continue to struggle to find employment in the District of Columbia, particularly in economically distressed wards and communities.

(e) Expanding jobs and job training opportunities for District youth will do much to strengthen the District's local economy.

(f) The District's youth employment programs have demonstrated that a job can be a life-changing experience that teaches a youth the responsibility of work, shapes attitudes, and leads to a productive work life.

(g) For the youth employment program to succeed in program year 2015, which is to begin in June 2015, it is desirable to extend enrollment to youth ages 14 to 24 years old.

Sec. 3. The Council of the District of Columbia determines that the circumstances enumerated in section 2 constitute emergency circumstances making it necessary that the Youth Employment and Work Readiness Training Emergency Amendment Act of 2015 be adopted after a single reading.

Sec. 4. This resolution shall take effect immediately.

ENROLLED ORIGINAL

A RESOLUTION

21-103

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

May 5, 2015

To declare the existence of an emergency with respect to the need to approve Modification No. M0005, the extension of the sole source contract, to Contract No. CW26699 between the Department of Corrections and Unity Health Care, Inc. for comprehensive medical, mental health, pharmacy, and dental services for an estimated population of 1,180 inmates housed in the Central Detention Facility and the Correctional Treatment Facility and to authorize payment for the services received and to be received under the contract modification.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Modification No. M0005 to Sole Source Contract No. CW26699 Approval and Payment Authorization Emergency Declaration Resolution of 2015".

Sec. 2. (a) There exists an immediate need to approve Modification No. M0005, for a period of performance from April 1, 2015, through June 30, 2015, in an amount totaling $5,900,145.00, to Contract No. CW26699 between the Department of Corrections and Unity Health Care, Inc. for comprehensive medical, mental health, pharmacy, and dental services for inmates housed at the Central Detention Facility and the Correctional Treatment Facility, and to exempt the purchase of these services from section 2346 of the Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005, effective October 20, 2005 (D.C. Law 16-33; D. C. Official Code § 2-218.46).

(b) Due to the current contract's expiration on March 31, 2015, and to maintain continuity of these vital services, the extension of Contract No. CW26699 from April 1, 2015, through June 30, 2015, in the amount of $5,900,145.00 is needed until a long-term contract can be put in place. Unity Health Care, Inc. is the only company available that requires no start-up time and is capable of continuing these services without interruption, thereby necessitating Council approval.

(c) Approval of the Modification No. M0005 is required to ensure continuity and avoid interruption of the comprehensive medial, mental health, pharmacy, and dental services for inmates.

Sec. 3. The Council of the District of Columbia determines that the circumstances enumerated in section 2 constitute emergency circumstances making it necessary that the

ENROLLED ORIGINAL

Modification No. M0005 to Sole Source Contract No. CW26699 Approval and Payment Authorization Emergency Act of 2015 be adopted after a single reading.

Sec. 4. This resolution shall take effect immediately.

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**

BILLS

B21-189	Police and Criminal Discovery Reform Amendment Act of 2015 Intro. 5-5-15 by Councilmembers Cheh and Bonds, and Chairman Mendelson and referred to the Committee on Judiciary
B21-190	Debt Buying Limitation Amendment Act of 2015 Intro. 5-5-15 by Councilmembers Cheh and Bonds and referred to the Committee on Business, Consumer, and Regulatory Affairs
B21-191	Caring for Our Homeless Heroes and Seniors Amendment Act of 2015 Intro. 5-5-15 by Councilmembers Bonds, Allen, Evans, Alexander, Orange, and Cheh and referred to the Committee of the Whole with comments from the Committee on Health and Human Services and the Committee on Housing and Community Development
B21-192	Medical Marijuana Laboratory Testing Amendment Act of 2015 Intro. 5-5-15 by Councilmember Alexander and referred sequentially to the Committee on Health and Human Services and Committee on Judiciary

B21-193	Ballot Access Modernization Amendment Act of 2015 Intro. 5-5-15 by Councilmembers Allen, Grosso, Bonds, Silverman, and Orange, and Chairman Mendelson and referred to the Committee on Judiciary with comments from the Committee on Transportation and the Environment
B21-194	Automatic Voter Registration Amendment Act of 2015 Intro. 5-5-15 by Councilmembers Allen, Cheh, Evans, Orange, Silverman, Bonds, and Nadeau and referred to the Committee on Judiciary with comments from the Committee on Transportation and the Environment
B21-195	Lobbyist Activity Reporting Transparency Amendment Act of 2015 Intro. 5-5-15 by Councilmembers Allen, Cheh, and Silverman, and Chairman Mendelson and referred to the Committee on Judiciary
B21-196	Nightlife Regulation Amendment Act of 2015 Intro. 5-5-15 by Councilmember Orange and referred to the Committee on Business, Consumer, and Regulatory Affairs
B21-197	Small Business Job Creation Tax Credit Act of 2015 Intro. 5-5-15 by Councilmember Orange and referred to the Committee on Finance and Revenue with comments from the Committee on Business, Consumer, and Regulatory Affairs
B21-199	Domestic Partnership Termination Recognition Amendment Act of 2015 Intro. 5-5-15 by Councilmembers Allen, Evans, Silverman, Grosso, McDuffie, Cheh, and Orange, and Chairman Mendelson and referred to the Committee on Judiciary
B21-200	Closing of Public Streets adjacent to Squares S-603, N-661, 605, 661, 607 and 665, and in U.S. Reservations 243 and 244, S.O. 13-14605, Act of 2015 Intro. 5-6-15 by Chairman Mendelson at the request of the Mayor and referred to the Committee of the Whole

B21-201 1351 Nicholson Street, N.W. Old Brightwood School Lease Amendment Act of 2015

Intro. 5-6-15 by Chairman Mendelson at the request of the Mayor and referred to the Committee on Transportation and the Environment with comments from the Committee on Education

PROPOSED RESOLUTION

PR21-152 965 Florida Ave., N.W., Disposition Extension Approval Resolution of 2015

Intro. 5-11-15 by Chairman Mendelson at the request of the Mayor and referred to the Committee of the Whole

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

5/7/2015

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 Office of the Senior Advisor
4/15/2015	4/20/2015	Housing Finance Agency (Housing)
4/15/2015	4/23/2015	DC Housing Authority (Housing)
4/17/2015	4/30/2015	DC Board of Elections (Judiciary)
4/17/2015	4/30/2015	Office of Campaign Finance (Judiciary)
4/17/2015	4/20/2015	District of Columbia Auditor (COW)
4/21/2015	4/24/2015	District Department of Transportation
4/22/2015 - Room 412	4/22/2015	Committee on Health and Human Services
4/22/2015 - Room 120	4/22/2015	Committee on Education
4/23/2015	4/15/2015	Office of Aging (Housing)
4/23/2015	5/6/2015	Office of Women's Policy and Initiatives (Housing)
Cancelled	4/27/2015	Workforce Investment Council (BCRA)
4/29/2015 (F&R-new insert)		Washington Metropolitan Area Transit Authority (Finance)
4/30/2015 (BCRA-new insert)		Office of the Deputy Mayor of Greater Economic Opportunity
5/6/2015	4/23/2015	Office of Veteran Affairs (Housing)
Cancelled	4/29/2015	Access to Justice Initiative (Judiciary)
5/12/2015	5/14/2015	Committee on the Judiciary (Mark-up)
5/14/2015	5/12/2015	Committee on Health and Human Services (Mark-up)

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
	Office of the Senior Advisor

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
	DC Housing Authority

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**
12:00 p.m. - 6:00 p.m.	Council of the District of Columbia
	District of Columbia Auditor
	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.- End	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

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 HEALTH & HUMAN SERVICES **Chairperson Yvette Alexander**

WEDNESDAY, APRIL 22, 2015; Room 412	
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 ON EDUCATION **Chairperson David Grosso**

WEDNESDAY, APRIL 22, 2015; Room 120	
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 OF THE WHOLE **Chairman Phil Mendelson**

THURSDAY, APRIL 23, 2015; COUNCIL CHAMBER (Room 500)	
Time	**Agency**
11:00 a.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 Evan Cash, ecash@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	Office of Religious Affairs/Interfaith Council
	Office of Aging
	Advisory Neighborhood Commission
	Office of Women's Policy and Initiatives

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

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**
9:00 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

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 the Deputy Mayor for Greater Economic Opportunity
	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
	Office of Gay, Lesbian, Bisexual, and Transgender Affairs
	Office on Asian and Pacific Islander Affairs
	Office of Veteran Affairs
	Office of African Affairs
	Office of African American Affairs
	Office of Latino Affairs
	DC Youth Advisory Council

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
12:00 p.m. - 2:00 p.m.	Committee on the Judiciary
2:00 p.m. - 4:00 p.m.	Open

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

Time	Committee
10:00 a.m. - 12:00 p.m.	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 Health and Human Services
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

EXCEPTED SERVICE APPOINTMENTS AS OF APRIL 30, 2015

NOTICE OF EXCEPTED SERVICE EMPLOYEES

D.C. Code § 1-609.03(c) requires that a list of all new appointees to Excepted Service positions established under the provisions of § 1-609.03(a) be published in the D.C. Register. In accordance with the foregoing, the following information is hereby published for the following positions.

COUNCIL OF THE DISTRICT OF COLUMBIA			
NAME	**POSITION TITLE**	**GRADE**	**TYPE OF APPOINTMENT**
Grant, Silas	Special Assistant	6	Excepted Service - Reg Appt

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. 21-43: Request to reprogram $1,553,953 of Capital funds budget authority and allotment within the Department of Behavioral Health (DBH) was filed in the Office of the Secretary on April 27, 2015. This reprogramming is needed to support capital repairs and upgrades to District-owned facilities for DBH.

RECEIVED: 14 day review begins April 28, 2015

Reprog. 21-49: Request to reprogram $8,302 of Capital Funds budget authority and allotment from the District of Columbia Public Schools (DCPS) to the Reverse Pay-As-You-Go (Paygo) capital project and subsequently to the Local funds budget of the Department of General Services (DGS) was filed in the Office of the Secretary on May 8, 2015. The reprogramming will support the cost of installing security cameras at Stuart Hobson Middle School.

RECEIVED: 14 day review begins May 11, 2015

Reprog. 21-50: Request to reprogram $500,000 of Fiscal Year 2015 Special Purpose Revenue funds budget authority from the Department of Housing and Community Development (DHCD) to the Department of Consumer and Regulatory Affairs (DCRA) was filed in the Office of the Secretary on May 8, 2015. This reprogramming ensures that DCRA is able to streamline the administrative green building processes, improve sustainability performance outcomes, and continually promote the sustainability of green building practices in the District.

RECEIVED: 14 day review begins May 11, 2015

Reprog. 21-51: Request to reprogram $2,957,285 of Capital funds budget authority and allotment within the District Department of Transportation (DDOT) was filed in the Office of the Secretary on May 8, 2015. This reprogramming is required to align the budget with the approved modifications to the TIGER Grant made by the Metropolitan Washington Council of Governments (MWCOG).

RECEIVED: 14 day review begins May 11, 2015

Reprog.21-52: Request to reprogram $549,000 of Fiscal Year 2015 Special Purpose Revenue funds budget authority within the Public Service Commission (PSC) was filed in the Office of the Secretary on May 8, 2015. This reprogramming ensures that the budget is aligned with revised spending plans for FY 2015.

RECEIVED: 14 day review begins May 11, 2015

Reprog. 21-53: Request to reprogram $1,222,652 of Capital funds budget and allotment within the District of Columbia Public Schools (DCPS) was filed in the Office of the Secretary on May 8, 2015. This reprogramming will support the capital budget for the Roosevelt High School Modernization.

RECEIVED: 14 day review begins May11, 2015

Reprog. 21-54: Request to reprogram $330,600 of Capital funds budget authority and allotment from the Council of the District of Columbia (Council) to the Reverse Pay-As-You-Go (Paygo) capital project to the Council's Local funds budget was filed in the Office of the Secretary on May 8, 2015. This reprogramming is needed to realign resources to facilitate the upgrade of various technologies that do not qualify for capital budget.

RECEIVED: 14 day review begins May 11, 2015

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

NOTICE OF PUBLIC HEARING

Posting Date:	May 15, 2015
Petition Date:	June 29, 2015
Hearing Date:	July 13, 2015
Protest Date:	September 23, 2015

License No.:	ABRA-098919
Licensee:	9th Street Pizzeria, LLC
Trade Name:	All Purpose Pizzeria
License Class:	Retailer's Class "C" Restaurant
Address:	1250 9th St., N.W.
Contact:	Stephen O'Brien, Esq.: 202-625-7700

WARD 2 ANC 2F SMD 2F06

Notice is hereby given that this applicant has applied for a 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 1:30 pm on September 23, 2015.

NATURE OF OPERATION

A fast food casual and café style restaurant with bar which shall serve pizza and Italian food with 94 seats and total occupancy load of 125. Sidewalk Café with 16 seats. Recorded music will be provided and no nude dancing.

HOURS OF OPERATION AND ALCOHOLIC BEVERAGE SALES/SERVICE/CONSUMPTION

Sunday through Thursday 8 am – 1 am and Friday & Saturday 8 am – 2 am

HOURS OF OPERATION AND ALCOHOLIC BEVERAGE SALES/SERVICE/CONSUMPTION FOR SIDEWALK CAFE

Sunday through Thursday 8 am – 11 pm and Friday & Saturday 8 am – 12 am

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

NOTICE OF PUBLIC HEARING

Posting Date:	May 15, 2015
Petition Date:	June 29, 2015
Hearing Date:	July 13, 2015
License No.:	ABRA-094621
Licensee:	Bodega Market, LLC
Trade Name:	Bodega Market
License Class:	Retailer's B
Address:	1136 Florida Avenue, N.E.
Contact Information:	Yared Demissie: 202-494-6237

WARD 5 ANC 5D SMD 5D06

Notice is hereby given that this licensee who has applied for a substantial change to his 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, 2000 14th Street, N.W., 400 South, Washington, DC 20009. A petition or request to appear before the Board must be filed on or before the petition date.

NATURE OF SUBSTANTIAL CHANGE:
Class Change from a Retailer B to a Retailer A.

CURRENT HOURS OF OPERATION AND ALCOHOLIC BEVERAGE SALES/SERVICE/CONSUMPTION
Sunday through Saturday 7am-12am

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

ON

5/15/2015

Notice is hereby given that:

License Number: ABRA-005018 **License Class/Type: A Retail - Liquor Store**
Applicant: Cyril W Smith and Warren J Smith
Trade Name: California Liquors **ANC: 1C01**
Has applied for the renewal of an alcoholic beverage license at the premises:

2100 18TH ST NW

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

6/29/2015

A HEARING WILL BE HELD ON:

7/13/2015

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 - 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

NOTICE OF PUBLIC HEARING

****CORRECTION**

**Posting Date:	May 15, 2015
**Petition Date:	June 29, 2015
**Hearing Date:	July 13, 2015

License No.:	ABRA-087574
Licensee:	District Kitchen, LLC
Trade Name:	New District Kitchen
License Class:	Retailer's Class "C" Restaurant
Address:	2606 Connecticut Ave., N.W.
Contact:	Jawad Saadaoui: 202-238-9408

WARD 3 ANC 3C SMD 3C02

Notice is hereby given that this licensee has applied for a substantial change to its 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.

NATURE OF SUBSTANTIAL CHANGE
Applicant requests a Change of Hours.

CURRENT HOURS OF OPERATION AND ALCOHOLIC BEVERAGE SALES/SERVICE/CONSUMPTION
Sunday through Thursday 11 am – 2 am, Friday & Saturday 11 am – 3 am

CURRENT HOURS OF OPERATION AND ALCOHOLIC BEVERAGE SALES/SERVICE/CONSUMPTION FOR SIDEWALK CAFE
Sunday through Saturday 11:30 am – 11:30 pm

HOURS OF OPERATION AND ALCOHOLIC BEVERAGE SALES/SERVICE/CONSUMPTION FOR PREMISES AND SIDEWALK CAFE
Sunday 9 am – 2 am, Monday through Thursday 11 am – 2 am, Friday 11 am – 3 am
Saturday 9 am – 3 am

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

NOTICE OF PUBLIC HEARING

****RESCIND**

**Posting Date:	May 1, 2015
**Petition Date:	June 15, 2015
**Hearing Date:	June 29, 2015

License No.:	ABRA-087574
Licensee:	District Kitchen, LLC
Trade Name:	New District Kitchen
License Class:	Retailer's Class "C" Restaurant
Address:	2606 Connecticut Ave., N.W.
Contact:	Jawad Saadaoui: 202-238-9408

WARD 3 ANC 3C SMD 3C02

Notice is hereby given that this licensee has applied for a substantial change to its 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.

NATURE OF SUBSTANTIAL CHANGE
Applicant requests a Change of Hours.

CURRENT HOURS OF OPERATION AND ALCOHOLIC BEVERAGE SALES/SERVICE/CONSUMPTION
Sunday through Thursday 11 am – 2 am, Friday & Saturday 11 am – 3 am

CURRENT HOURS OF OPERATION AND ALCOHOLIC BEVERAGE SALES/SERVICE/CONSUMPTION FOR SIDEWALK CAFE
Sunday through Saturday 11:30 am – 11:30 pm

HOURS OF OPERATION AND ALCOHOLIC BEVERAGE SALES/SERVICE/CONSUMPTION FOR PREMISES AND SIDEWALK CAFE
Sunday 9 am – 2 am, Monday through Thursday 11 am – 2 am, Friday 11 am – 3 am
Saturday 9 am – 3 am

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

NOTICE OF PUBLIC HEARING

Posting Date: May 15, 2015
Petition Date: June 29, 2015
Hearing Date: July 13, 2015
Protest Date: September 23, 2015

License No.: ABRA-098593
Licensee: RPM DC, LLC
Trade Name: RPM Italian/Café 110
License Class: Retailer's Class "C" Restaurant
Address: 601 Massachusetts Ave, N.W.
Contact: A. Kline: 202-686-7600

WARD 6 ANC 6E SMD 6E05

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 4:30 pm on September 23, 2015.

NATURE OF OPERATION
Restaurant serving modern and classic cuisine with 300 seats and a Total Occupancy Load of 350. Requesting a Sidewalk Cafe with 90 seats and a Summer Garden with 60 seats.
No entertainment. No dancing. No nude performances.

HOURS OF OPERATION FOR INSIDE PREMISES AND OUTSIDE SIDEWALK CAFÉ AND SUMMER GARDEN
Sunday through Thursday 7am-2am, Friday and Saturday 7am-3am

HOURS OF ALCOHOLIC BEVERAGE SALES/SERVICE/CONSUMPTION FOR INSIDE PREMISES AND OUTSIDE SIDEWALK CAFÉ AND SUMMER GARDEN
Sunday through Thursday 8am-2am, Friday and Saturday 8am-3am

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

NOTICE OF PUBLIC HEARING

Posting Date:	May 15, 2015
Petition Date:	June 29, 2015
Hearing Date:	July 13, 2015
Protest Date:	September 23, 2015

License No.:	ABRA-098875
Licensee:	Olliejack DC, LLC
Trade Name:	The Grilled Oyster Company
License Class:	Retailer's Class "C" Restaurant
Address:	3401 Idaho Ave., N.W.
Contact:	Andrew Kline, Esq.: 202-686-7600

WARD 3 ANC 3C SMD 3C06

Notice is hereby given that this applicant has applied for a 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 4:30 pm on September 23, 2015.

NATURE OF OPERATION

A restaurant serving American food with 125 seats and a total occupancy load of 153. Summer garden with 30 seats. No entertainment, no dancing and no nude dancing.

HOURS OF OPERATION FOR INSIDE PREMISES AND OUTSIDE SUMMER GARDEN

Sunday through Thursday 7 am – 2 am and Friday & Saturday 7 am – 3 am

HOURS OF ALCOHOLIC BEVERAGE SALES/SERVICE/CONSUMPTION FOR INSIDE PREMISES AND OUT SUMMER GARDEN

Sunday through Thursday 8 am – 2 am and Friday & Saturday 8 am – 3 am

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

NOTICE OF PUBLIC HEARING

Posting Date:	May 15, 2015
Petition Date:	June 29, 2015
Hearing Date:	July 13, 2015
Protest Hearing:	September 23, 2015

License No.:	ABRA-098846
Licensee:	CZ-National, LLC
Trade Name:	The National by Geoffrey Zakarian
License Class:	Retailer's Class "C" Restaurant
Address:	1100 Pennsylvania Avenue, N.W.
Contact:	Andrew Kline: 202-686-7600

WARD 2 ANC 2C SMD 2C01

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 hearing date at 10:00 am, 2000 14th Street, N.W., 400 South, 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 on September 23, 2015 at 1:30 pm.

NATURE OF OPERATION
New Restaurant serving American and French cuisine. Total occupancy load is 350. Summer Garden with 60 seats.

HOURS OF OPERATON FOR PREMISES AND SUMMER GARDEN
Sunday through Thursday 7 am-2 am, Friday and Saturday 7 am –3 am

HOURS OF ALCOHOLIC BEVERAGE SALES/SERVICE/CONSUMPTION AND SUMMER GARDEN
Sunday through Thursday 8 am-2 am, Friday and Saturday 8 am –3 am

BOARD OF ZONING ADJUSTMENT
PUBLIC HEARING NOTICE
TUESDAY, JULY 7, 2015
441 4TH STREET, N.W.
JERRILY R. KRESS MEMORIAL HEARING ROOM, SUITE 220-SOUTH
WASHINGTON, D.C. 20001

TO CONSIDER THE FOLLOWING: The Board of Zoning Adjustment will adhere to the following schedule, but reserves the right to hear items on the agenda out of turn.

TIME: 9:30 A.M.

WARD SIX

19026 ANC-6A **Application of 1300 H Street NE, LLC**, pursuant to 11 DCMR §§ 3103.2 and 3104.1, for a variance from the off-street parking requirements under § 2101.1, and special exceptions from the roof structures requirements under §§ 411.5 and 770.6, the HS-A Overlay requirements under § 1320.4(f), and the HS Overlay Design and Special Exception requirements under §§ 1324.10 and 1325.1, to construct a new four-story, mixed-use building with ground floor retail containing 36 residential dwelling units in the HS-A/C-2-A District at premises 1300 H Street, N.E. (Square 1026, Lots 97 and 103).

WARD SIX

19031 ANC-6B **Application of Maurice Landes**, pursuant to 11 DCMR § 3104.1 for a special exception under § 223, not meeting the lot width requirements under § 401, the court width requirements under § 406, and the non-conforming structure requirements under § 2001.3, to construct a two-story rear addition with basement to an existing one family dwelling in the R-4 District at premises 1329 East Capitol Street S.E. (Square 1036, Lot 104).

WARD SIX

19032 ANC-6C **Application of Tony Goodman and Norah Rabiah**, pursuant to 11 DCMR §§ 3103.2 and 3104.1, for a variance from the lot occupancy requirements under § 401.3, and a special exception under § 223, not meeting the lot area requirements under § 401, and the rear yard requirements under § 406, to construct a third-story addition and deck to an existing one-family dwelling in the R-4 District at premises 1152 4th Street N.E. (Square 773, Lot 61).

WARD THREE

19033 ANC-3G **Application of Martin Block**, pursuant to 11 DCMR § 3104.1 for a special exception under § 223, not meeting the rear yard requirements under § 404.1, to construct a one-story rear addition to an existing one-family dwelling in the R-1-B District at premises 3348 Military Road N.W. (Square 1991, Lot 35).

WARD SIX

19037
ANC-6B

Application of Derek S. Mattioli, pursuant to 11 DCMR § 3103.2, for variances from the lot occupancy requirements under § 403, the rear yard requirements under § 404.1, the open court requirements under § 406.1, and the non-conforming structure requirements under § 2001.3, to allow the construction of a two-story rear open deck to an existing one-family dwelling in the R-4 District at premises 1375 Massachusetts Avenue S.E. (Square 1037, Lot 102).

WARD TWO

19043
ANC-2B

Application of The Phillips Collection, pursuant to 11 DCMR § 3104.1, for a special exception from the rooftop structures requirements under § 411.11, to allow the replacement of hearing and cooling equipment on the roof of an existing structure in the DC/R-5-B and SP-1 Districts at premises 1600 21st Street N.W. (Square 66, Lot 80).

PLEASE NOTE:

Failure of an applicant or appellant to appear at the public hearing will subject the application or appeal to dismissal at the discretion of the Board.

Failure of an applicant or appellant to be adequately prepared to present the application or appeal to the Board, and address the required standards of proof for the application or appeal, may subject the application or appeal to postponement, dismissal or denial. The public hearing in these cases will be conducted in accordance with the provisions of Chapter 31 of the District of Columbia Municipal Regulations, Title 11, and Zoning. Pursuant to Subsection 3117.4, of the Regulations, the Board will impose time limits on the testimony of all individuals. Individuals and organizations interested in any application may testify at the public hearing or submit written comments to the Board.

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 Board, not less than 14 days prior to the date set for the hearing, a Form 140 – Party Status Application Form**. This form may be obtained from the Office of Zoning at the address stated below or downloaded from the Office of Zoning's website at: www.dcoz.dc.gov. All requests and comments should be submitted to the Board through the Director, Office of Zoning, 441 4th Street, NW, Suite 210, Washington, D.C. 20001. Please include the case number on all correspondence.

FOR FURTHER INFORMATION, CONTACT THE OFFICE OF ZONING AT (202) 727-6311.

LLOYD J. JORDAN, CHAIRMAN, MARNIQUE Y. HEATH, VICE CHAIRPERSON, JEFFREY L. HINKLE, ONE BOARD SEAT VACANT, AND A MEMBER OF THE ZONING COMMISSION, CLIFFORD W. MOY, SECRETARY TO THE BZA, SARA A. BARDIN, DIRECTOR, OFFICE OF ZONING.

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF PUBLIC HEARING

TIME AND PLACE: **Thursday, July 9, 2015, @ 6:30 p.m.**
Jerrily R. Kress Memorial Hearing Room
441 4th Street, N.W., Suite 220
Washington, D.C. 20001

FOR THE PURPOSE OF CONSIDERING THE FOLLOWING:

Z.C. Case No. 14-19 (M Street Development Group, LLC and Square 772 Development Group, LLC – Consolidated PUD and Related Map Amendment @ Square 772, Lots 1, 2, 6, 7, 19, 801 and 802)

THIS CASE IS OF INTEREST TO ANC 6C

On October 14, 2014, the Office of Zoning received an application from M Street Development Group, LLC and Square 772 Development Group, LLC (together the "Applicant") requesting approval of a consolidated planned unit development ("PUD") and related zoning map amendment from the C-M-1 Zone District to the C-3-C Zone District for property located at 300 M Street, N.E. (Square 772, Lots 1, 2, 6, 7, 19, 801, and 802) (the "Property"). The Office of Planning submitted a report to the Zoning Commission, dated January 30, 2015. At its February 9, 2015 public meeting, the Zoning Commission voted to set down the application for a public hearing. The Applicant provided its prehearing statement on April 21, 2015.

The Property that is the subject of this application is bounded by a public alley and private property to the north, 4th Street, N.E. to the east, M Street, N.E. to the south, and 3rd Street, N.E. to the west. The Property has a land area of approximately 67,446 square feet. The Property is located in Ward 6 and is within the boundaries of Advisory Neighborhood Commission ("ANC") 6C.

The Property is currently improved with a non-historic warehouse building, which the Applicant proposes to raze in connection with redevelopment of the Property to construct a mixed-use building composed of retail and residential uses. The building will have a density of 6.14 floor area ratio ("FAR") and will include a total of approximately 414,118 square feet of gross floor area. Approximately 401,218 square feet of gross floor area will be devoted to residential use and approximately 9,000 to 12,900 square feet of gross floor area will be devoted to retail use. The building will include 401 residential units (plus or minus 10%) and a total of 175 off-street parking spaces located in a below-grade garage. The building will be constructed to a maximum height of 110 feet at its highest point, and will step down to approximately 80 feet and 50 feet from west to east.

The public hearing will be conducted in accordance with the contested case provisions of the Zoning Regulations, 11 DCMR § 3022.

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 § 3022.3.

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) intends to participate at the hearing, the ANC shall submit the written report described in § 3012.5 no later than seven (7) days before the date of the hearing. The report shall contain the information indicated in § 3012.5 (a) through (i).

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. The public is encouraged to submit written testimony through the Interactive Zoning Information System (IZIS) at http://app.dcoz.dc.gov/Login.aspx; however, written statements may also 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.

DISTRICT DEPARTMENT OF THE ENVIRONMENT

NOTICE OF FINAL RULEMAKING

The Director of the District Department of the Environment (DDOE), pursuant to the authority set forth in Section 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 § 8-151.07(4) (2012 Repl.)); and Mayor's Order 2006-61, dated June 14, 2006, hereby gives notice of the adoption as final of the following amendments to the text of chapter headings in Title 20 (Environment) of the District of Columbia Municipal Regulations (DCMR).

The amendments make non-substantive changes to the text of chapter headings, to include the applicable subject matter in the title. When the DCMR was reorganized for online publication, the subtitles in the hard-copy publications were removed. As a result, members of the regulated community have had difficulty navigating the numerous environmental regulations implemented by DDOE. Therefore, DDOE is adopting these amendments to clarify which chapters, previously organized by subtitle, are grouped together and concern the same subject matter. These changes do not alter the meaning, intent, or application of the rules.

A Notice of Proposed Rulemaking was published in the *D.C. Register* on May 23, 2014 (61 DCR 5266). The thirty-(30) day comment period ended on June 23, 2014. No comments on the proposed rules were received during the public comment period, and no substantive changes have been made to the regulations as proposed. These final rules will become effective upon publication of this notice in the *D.C. Register*.

The following chapter headings in Title 20 DCMR, ENVIRONMENT, are amended by adding the applicable subject matter to the text of the chapter heading, to read as follows:

The heading of Chapter 1 is amended to read "Air Quality - General Rules;"
The heading of Chapter 2 is amended to read "Air Quality - General and Non-Attainment Area Permits;"
The heading of Chapter 3 is amended to read "Air Quality - Operating Permits and Acid Rain Programs;"
The heading of Chapter 4 is amended to read "Air Quality - Ambient Monitoring, Emergency Procedures, and Chemical Accident Prevention;"
The heading of Chapter 5 is amended to read "Air Quality - Source Monitoring and Testing;"
The heading of Chapter 6 is amended to read "Air Quality - Particulates;"
The heading of Chapter 7 is amended to read "Air Quality - Volatile Organic Compounds and Hazardous Air Pollutants;"
The heading of Chapter 8 is amended to read "Air Quality - Asbestos, Sulfur, Nitrogen Oxides, and Lead;"
The heading of Chapter 9 is amended to read "Air Quality - Motor Vehicular Pollutants, Lead, Odors, and Nuisance Pollutants;"
The heading of Chapter 10 is amended to read "Air Quality - Nitrogen Oxides Emissions Budget Program;"

The heading of Chapter 15 is amended to read "Air Quality - General and Transportation Conformity;"

The heading of Chapter 22 is amended to read "Pesticide Control - General Rules;"
The heading of Chapter 23 is amended to read "Pesticide Control - Applicators;"
The heading of Chapter 24 is amended to read "Pesticide Control - Operators;"
The heading of Chapter 25 is amended to read "Pesticide Control - Administration and Enforcement;"

The heading of Chapter 42 is amended to read "Hazardous Waste Management - Standards for the Management of Hazardous Waste and Used Oil;"
The heading of Chapter 43 is amended to read "Hazardous Waste Management - Administration and Enforcement;"

The heading of Chapter 55 is amended to read "Underground Storage Tanks - General Provisions;"
The heading of Chapter 56 is amended to read "Underground Storage Tanks - Tank Notification and Registration, Recordkeeping, Reports, and Notices;"
The heading of Chapter 57 is amended to read "Underground Storage Tanks - New Tank Performance Standards;"
The heading of Chapter 58 is amended to read "Underground Storage Tanks - Upgrades of Existing USTs;"
The heading of Chapter 59 is amended to read "Underground Storage Tanks - Operation and Maintenance of USTs;"
The heading of Chapter 60 is amended to read "Underground Storage Tanks - Release Detection;"
The heading of Chapter 61 is amended to read "Underground Storage Tanks - Out-of-Service and Closure of UST Systems;"
The heading of Chapter 62 is amended to read "Underground Storage Tanks - Reporting of Releases, Investigation, Confirmation, Assessment, and Corrective Action;"
The heading of Chapter 63 is amended to read "Underground Storage Tanks - Right of Entry for Inspections Monitoring, Testing and Corrective Action;"
The heading of Chapter 64 is amended to read "Underground Storage Tanks - District of Columbia UST Trust Fund, District Initiated Corrective Actions and Cost Recovery;"
The heading of Chapter 65 is amended to read "Underground Storage Tanks - Licensing and Certification of Tank Installers, Removers, Testers, and Operator Training Requirements;"
The heading of Chapter 66 is amended to read "Underground Storage Tanks - Enforcement Procedures;"
The heading of Chapter 67 is amended to read "Underground Storage Tanks - Financial Responsibility;" and

The heading of Chapter 70 is amended to read "Underground Storage Tanks - Definitions."

DISTRICT DEPARTMENT OF THE ENVIRONMENT

NOTICE OF PROPOSED RULEMAKING

Wells and Borings Regulations

The Director of the District Department of the Environment (DDOE or Department), pursuant to the authority set forth in the District Department of the Environment Establishment Act of 2005, effective February 15, 2006 (D.C. Law 16-51; D.C. Official Code §§ 8-151.01 *et seq*. (2013 Repl.)); the Water Pollution Control Act of 1984, effective March 16, 1985 (D.C. Law 5-188; D.C. Official Code §§ 8-103.01 *et seq*. (2013 Repl.)) (the Water Pollution Control Act); and Mayor's Order 2006-61, dated June 14, 2006, hereby gives notice of intent to amend Title 21 (Water and Sanitation) of the District of Columbia Municipal Regulations (DCMR) by adopting a new Chapter 18, Well Construction, Maintenance, and Abandonment Standards, which would establish the standards and procedures for the construction, maintenance, and abandonment of wells in the District of Columbia.

A "well" is defined in § 8-103.01(26A) of the Water Pollution Control Act as "any test hole, shaft, or soil excavation created by any means including, but not limited to, drilling, coring, boring, washing, driving, digging, or jetting, for purposes including, but not limited to, locating, testing, diverting, artificially recharging, or withdrawing fluids, or for the purpose of underground injection." By the nature of their design, wells provide a direct conduit between the ground surface and the subsurface and therefore may present a pathway for the migration of solids, liquids, and vapors, which may pose a hazard to public health, safety, and the environment, and the present and future beneficial uses of the waters of the District. The proposed well regulations have been developed to ensure that well construction, maintenance, and abandonment are undertaken in a consistent manner that protects public health and safety and the environment.

These rules describe the process for the responsible party or owner to apply for a well construction permit in the District. The regulations detail the standards and procedures of proper well construction, including the specific components of a well such as the well casing, the well screen, the filter pack, and grout. The rules also outline the proper procedures for handling derived waste and drilling fluid.

The proposed well regulations address the requirements for all types of wells, including, but not limited to, dewatering wells, monitoring wells, observation wells, piezometers, soil borings, industrial supply wells, irrigation water supply wells, domestic water supply wells, injection wells, recovery wells, ground freeze wells, and ground source heat pump wells. Although the regulations detail the construction, maintenance, and abandonment of ground source heat pump wells, the installation of ground source heat pump wells may not be possible in all areas of the District due to site contamination, space, access, and other issues.

The proposed well regulations provide direction for individuals and businesses that own, construct, maintain, or abandon wells in the District and for those who seek to engage in these activities. Unless specifically exempted, the registration, maintenance, and abandonment requirements apply to all wells, regardless of prior permit status, date of construction, or current use. Well registration is initiated when an applicant obtains a permit to construct a new well. By January 1, 2019, unpermitted or unused wells must either be abandoned using acceptable practices described in these regulations or brought into compliance through the registration

system. Well registrations shall be valid for a period of two (2) years, except for ground source heat pump wells, which shall be valid for a period of five (5) years.

The Department recognizes that wells will be constructed as part of a Department regulatory action. Department regulatory actions may be directed by separate divisions within DDOE under various statutory and regulatory authorities. In an effort to create a practical and efficient procedure for reviewing and approving a well construction permit application and well construction work plan for wells constructed under a Department regulatory action, these reviews and approvals will be conducted and approved by the DDOE branch or division with regulatory oversight.

Water supply wells, including industrial supply, irrigation supply, and domestic supply wells may be constructed under these regulations; however, these rules are not designed to protect potable uses of a well. Well owners are individually responsible for meeting the requirements associated with the protection and maintenance of any well constructed for potable use.

The Director also gives notice of intent to take final rulemaking action to adopt these rules not less than sixty (60) days from the date of publication of this notice in the *D.C. Register*.

Title 21 DCMR, WATER AND SANITATION, is amended by adding a new Chapter 18, entitled WELL CONSTRUCTION, MAINTENANCE, AND ABANDONMENT STANDARDS, to read as follows:

CHAPTER 18 WELL CONSTRUCTION, MAINTENANCE, AND ABANDONMENT STANDARDS

1800 PURPOSE AND SCOPE

1800.1 The provisions of this chapter shall be applicable to the construction, maintenance, and abandonment of wells in the District of Columbia, pursuant to the Water Pollution Control Act of 1984, effective March 16, 1985 (D.C. Law 5-188; D.C. Official Code §§ 8-103.01 *et seq*.).

1800.2 The purpose of this chapter is to ensure that the construction, maintenance, and abandonment of a well is undertaken in a manner that protects public health and safety and the environment.

1801 APPLICABILITY

1801.1 A person engaged in the construction, maintenance, and abandonment of a well in the District shall comply with the requirements set forth in this chapter.

1801.2 A person shall not construct, maintain, or abandon a well in a manner that may create a point source or non-point source of pollutants to waters of the District, impair the beneficial uses of waters of the District, or pose a hazard to public health and safety or the environment.

1801.3 A well owner shall ensure that, as applicable:

(a) The construction of the well is conducted in accordance with §§ 1809 through 1826;

(b) The use and maintenance is conducted in accordance with §§ 1827 through 1829; and

(c) The abandonment of the well is conducted in accordance with §§ 1830 and 1831.

1801.4 If a well was constructed prior to March 31, 2016, the well owner shall ensure that:

(a) The well does not pose a hazard to public health and safety or the environment and does not impair the beneficial uses of waters of the District;

(b) The well, well cap, upper terminus, and well labeling meet the requirements in §§ 1820 and 1821; and

(c) By January 1, 2019, the well is registered with the Department in accordance with the requirements of § 1806; or

(d) By January 1, 2019, the well is abandoned in accordance with the requirements of §§ 1830 and 1831.

1802 WELL CONSTRUCTION BUILDING PERMIT EXEMPTIONS

1802.1 An infiltration test well constructed and used in accordance with Chapter 5 of Title 21 of the District of Columbia Municipal Regulations (DCMR) and the Stormwater Management Guidebook shall be exempt from the requirements of this chapter.

1802.2 A well constructed for use in a best management practice in accordance with Chapter 5 of Title 21 DCMR and the Stormwater Management Guidebook shall be exempt from the requirements of this chapter.

1802.3 A well construction building permit shall not be required for a well which meets all of the following conditions:

(a) The well is constructed to a depth of ten feet (10 ft.) or less;

(b) The lower terminus of the well does not intersect the seasonal water table;

(c) The well is not sited within twenty-five feet (25 ft.) of the mean high watermark of District surface waters;

(d) The well is not sited within twenty-five feet (25 ft.) of wetland;

(e) The construction and maintenance of the well is performed in accordance with the requirements of this chapter; and

(f) The well is abandoned within five (5) business days of completion of construction in accordance with § 1830.1.

1802.4 If, during the construction of a well for which no building permit was required, field conditions or new information indicate that any condition in § 1802.3 will not be met, the well owner shall:

(a) Stop all well construction work and related activities;

(b) Notify the District Department of the Environment (Department) within twenty-four (24) hours of the discovery;

(c) Propose immediate corrective actions;

(d) Implement Department-ordered corrective actions to prevent an imminent hazard to public health and safety or the environment; and

(e) If additional action is necessary to meet the requirements of this chapter, or if requested by the Department, submit a well construction building permit application in accordance with § 1803.

1802.5 A well construction building permit shall not be required for the maintenance of a registered well, provided that the maintenance does not include a modification or material change in the original permitted design, specifications, or construction of the well.

1802.6 The Department may allow a well owner to delay submitting a well construction building permit application if:

(a) The well owner immediately notifies the Department of an emergency circumstance that may impact a well, the environment, or public health and safety, which requires immediate corrective action;

(b) The Department deems an emergency circumstance to exist, where obtaining a work plan approved by the Department for the maintenance or abandonment of a well would result in a delay that could pose an immediate hazard to public health and safety or the environment;

(c) The well owner complies with the application procedures in § 1803 within seventy-two (72) hours after the emergency is identified; and

(d) All work is conducted in accordance with applicable construction, maintenance, and abandonment requirements.

1802.7 A well abandonment permit shall not be required if:

(a) The well is abandoned within thirty (30) days following the completion of construction of the well; and

(b) A well abandonment work plan developed in accordance with §§ 1830 and 1831 is submitted with the initial well construction building permit application.

1803 WELL CONSTRUCTION PERMIT APPLICATION PROCEDURE

1803.1 Except as provided in § 1802, no person shall construct a well in the District without a well construction work plan conforming to the requirements of § 1803.3 approved by the District Department of the Environment (Department), and a well construction building permit approved by the Department and issued by the Department of Consumer and Regulatory Affairs (DCRA).

1803.2 The well owner shall apply to the DCRA for a well construction building permit, which shall be issued by DCRA subject to the requirements of this chapter.

1803.3 Beginning on September 1, 2015, a well construction building permit application shall include a well construction work plan containing the following information, which shall be submitted to the Department for review and approval:

(a) The well owner's name, mailing address, telephone number, and electronic mailing address;

(b) The property owner's name, mailing address, telephone number, and electronic mailing address, if different from the well owner information provided pursuant to § 1803.3(a);

(c) The well driller's name, address, telephone number, and electronic mailing address, a copy of the pertinent DCRA license(s), and a copy of the well driller's current driller's license;

(d) The physical location of the property on which the well is sited, including the physical address, a square, suffix, and lot, or closest physical location identifier;

(e) The intended use of the well;

(f) A description of the well construction details;

(g) A well design diagram or schematic detailing how the well will be constructed;

(h) The topographic description of the site;

(i) The geology underlying the property where the well is sited;

(j) The proximity to the 100-year floodplain;

(k) The name of the aquifer that will be penetrated;

(l) The name of the aquifer that will be screened, if applicable;

(m) The proximity to and details of recognized environmental conditions identified on or adjacent to the property where the well will be sited;

(n) Methods to prevent aquifer cross-contamination where a recognized environmental condition has been identified on or adjacent to the property where the well will be sited;

(o) A site map, plat, or plan depicting:

(1) The lot and square;

(2) The geographical location of the well within the property boundaries;

(3) The geographical location of the well in relation to the nearest street intersection;

(4) The setback distances from property lines;

(5) The setback distances from recognized environmental conditions identified on the property where the well is sited;

(6) The identification of public spaces;

(7) The identification of structures and driveways;

(8) The extents of the land disturbing activities including any construction entrance and stockpile area(s);

(9) The identification of waters of the District of Columbia on or adjacent to the property where the well will be sited;

(10) Compass directions;

(11) A scale bar; and

(12) A key or legend;

(p) A description of the well construction activity including:

(1) The well construction materials and well installation equipment to be used;

(2) The well construction methods including drilling methods and procedures, and drilling fluids to be used; and

(3) Details of decontamination procedures, if applicable;

(q) The plan for handling, analyzing, and disposal of derived waste; and

(r) A description of any equipment or materials that shall or may be placed in the well such as:

(1) Pumps;

(2) Pipes;

(3) Loops;

(4) Packers; or

(5) Liners.

1803.4 In addition to the requirements of § 1803.3, the well construction work plan for the construction of a closed-loop ground source heat pump well shall include:

(a) The type of closed-loop ground source heat pump system;

(b) The design capacity of the proposed closed-loop ground source heat pump system;

(c) The total number of loops in the well, loop configuration, the total number of loops in the system, the angles of the loops to the vertical plane and the depth to which they will be placed in the subsurface;

(d) The pipe dimensions, type of pipe, and pipe material;

(e) Details of the proposed circulation fluid, including;

(1) The type of circulation fluid;

(2) The concentration of the circulation fluid;

(3) The manufacturer's specifications and product details including any additives or anti-corrosive agents;

(4) The applicable Safety Data Sheets for the chemicals used in the circulation fluid; and

(5) Any known or potential environmental or public health and safety concerns or issues related to the use of the material as a circulation fluid for a closed-loop ground source heat pump system;

(f) The type, mix ratios, and permeability of the grout, including how the grout will be inserted and the grout manufacturer's specifications for using the grout;

(g) The type, length, placement, and reason for using any outer casing material;

(h) The types of fittings and joints, and the procedures for sealing fittings and joints;

(i) The footprint of a proposed structure that shall be placed on top of a closed-loop ground source heat pump system must be clearly shown on the site plan; and

(j) Identification of any structure or operation that may impact or be impacted by the closed-loop ground source heat pump system.

1803.5 In addition to the requirements of § 1803.3, the well construction work plan for construction of a dewatering well shall include:

(a) The proposed volume of water to be pumped and the estimated flow rate;

(b) The quality of water to be pumped and supporting analytical data;

(c) The details of any proposed treatment of recovered water containing known or suspected contaminants;

(d) A copy of any required District or federal permit(s) issued or the status of a pending application for the required District or federal permit(s);

(e) The purpose of dewatering;

(f) The type, make, and model of pump used, including the horsepower;

(g) The type and placement of the well screen;

(h) The depth of pump intake;

(i) The location of effluent discharge;

(j) A description of discharge location such as, combined sewer system, public or private storm sewer system, water body, or licensed offsite facility;

(k) The available analytical data for the property where the well will be sited, if a recognized environmental condition has been identified;

(l) The proximity of the dewatering well to known sensitive receptors including, surface water bodies, wetlands, groundwater recharge areas, wellhead protection areas, and recognized environmental conditions located on the property and on properties adjacent to where the well will be sited;

(m) A pollution prevention plan and spill response plan for a site with a proposed discharge to a water body or public storm sewer system;

(n) The name of the aquifer(s) to be dewatered;

(o) The expected decrease in potentiometric surface; and

(p) The duration of dewatering expressed as start and end dates and the total dewatering period.

1803.6 In addition to the requirements of § 1803.3, the well construction work plan for construction of a ground freeze well shall include:

(a) The purpose or application of the ground freeze well and ground freeze well system;

(b) The proposed or anticipated radius and depth of influence of each ground freeze well;

(c) The configuration or geometry of the ground freeze well system;

(d) Proximity of ground freeze well system to underground utilities and means of protecting potentially affected utilities;

(e) The type of refrigerant system to be used;

(f) The type of refrigerant or coolant fluid to be circulated or used;

(1) The type of circulation fluid;

(2) The concentration of the circulation fluid;

(3) The manufacturer's specifications and product details including any additives or anti-corrosive agents;

(4) The applicable Safety Data Sheets for the chemicals used in the circulation fluid; and

(5) Any known or potential environmental or public health and safety concerns or issues related to the use of the material as a circulation fluid for a closed-loop ground source heat pump system;

(g) The loop or circulation configuration within the well;

(h) The circulation pipe dimensions, type of pipe, and pipe material;

(i) The type, mix ratios, and permeability of the grout, including how the grout will be inserted and the grout manufacturer's specifications for using the grout;

(j) The distribution manifold configuration and materials to be used;

(k) The proposed or anticipated flow of refrigerant or circulating fluid;

(l) The type, length, placement, and reason for using any outer casing material;

(m) A pollution prevention plan and spill response plan to address the storage, handling, and management of the refrigerant or coolant fluid; and

(n) If additional water will be introduced to supplement the ground freeze system, the method the water will be introduced into the formation.

1803.7 In addition to the requirements of § 1803.3, the well construction work plan for construction of an injection well shall include;

(a) A copy of the EPA Underground Injection Control Permit or identification of an applicable exemption of this permit;

(b) The volume of fluid to be injected;

(c) The chemical, biological, physical, and radiological quality of the fluid to be injected;

(d) The Technical Information Sheet and Safety Data Sheet for each treatment material to be used;

(e) The proposed injection rate or feasible range;

(f) The proposed or anticipated radius and depth of influence;

(g) The injection method;

(h) The location and maximum number of injection points;

(i) The details of any proposed pilot testing;

(j) The location and number of observation wells;

(k) The proposed monitoring plans and monitoring protocols;

(l) The duration of injection;

(m) The identification of receiving aquifer(s);

(n) Any expected impact to the subsurface;

(o) Any expected impact to adjoining properties;

(p) The proximity to surface water and potential ecological receptors;

(q) Any expected impact to the closest surface water and potential ecological receptors;

(r) The volume of the water to be treated;

(s) The quality of the water to be treated;

(t) The source of the contaminants;

(u) The proposed implementation schedule;

(v) The compliance schedule;

(w) The compliance monitoring program;

(x) A copy of any previous report or data related to the investigation and feasibility of the proposed action;

(y) A map or series of maps showing the following:

(1) The topography;

(2) The geology;

(3) The location of on-site and nearby utility lines;

(4) The type and extent of the contaminants;

(5) The location of the proposed treatment system;

(6) The location of any existing contaminant treatment system; and

(7) The location of compliance monitoring wells;

(z) The expected short-term and long-term effects on the environment and public health; and

(aa) Any other relevant information.

1803.8 In addition to the requirements of § 1803.3, the well construction work plan for construction of a water supply well shall include:

(a) The intended use of the water supply well;

(b) The proposed withdrawal method;

(c) The make and model of the pump;

(d) The proposed drawdown on the aquifer(s);

(e) The proposed groundwater withdrawal rates;

(f) The proposed aquifer pump test;

(g) The aquifer pump test data from a nearby test well or existing supply well;

(h) The aquifer water quality data;

(i) The size of the population that will be served by the withdrawal; and

(j) The operation and maintenance details of the well.

1803.9 In addition to the requirements of §§ 1803.3 through 1803.8, the Department may require supplemental information related to the construction, maintenance, or intended use of a soil boring, recovery well, monitoring well, observation well, piezometer, industrial supply well, irrigation supply well, domestic supply well, or any other type of well.

1803.10 A well owner may request a special compliance standard or the modification of a requirement of this chapter, if conditions or circumstances exist such that compliance will result in poor construction, maintenance, or abandonment of a well or will preclude the construction of the well.

1803.11 A request for a special compliance standard or modification under § 1803.10 shall be submitted in writing to the Department for review and approval, and shall include:

(a) A description of the circumstances or site conditions that warrant special consideration;

(b) The proposed special compliance standard or modification request;

(c) Documentation establishing that the proposed special compliance standard or modification is adequate and protective of public health and safety and the environment; and

(d) The signature of the well owner certifying that the information in the request for the special standard is accurate and complete to the best of the owner's knowledge.

1803.12 Prior to construction of a well, a Department-approved well construction building permit application and well construction work plan may be modified provided the proposed modification is submitted to the Department and to the DCRA for review and approval in accordance with the requirements of §§ 1803.10 and 1803.11.

1803.13 During the construction of a well, a Department-approved well construction building permit application and well construction work plan may only be modified if:

(a) The well owner immediately notifies the Department and the DCRA in writing; and

(b) The modification of the well construction building permit and well construction work plan does not violate District or federal laws or regulations.

1804 DEPARTMENT REVIEW

1804.1 The District Department of the Environment (Department) shall review each well construction building permit application submitted to the Department of Consumer and Regulatory Affairs (DCRA) and each well construction work plan to ensure that it meets the standards and requirements of this chapter.

1804.2 The Department may conduct the review and approval of a complete well construction building permit application and well construction work plan as part of the following remedial or removal actions or programs:

(a) The Voluntary Remedial Action Program, pursuant to Section 6213 of Title 20 of the District of Columbia Municipal Regulations (DCMR);

(b) An enforcement corrective action taken pursuant to the District of Columbia Underground Storage Tank Management Act of 1990, as amended, D.C. Official Code §§ 8-113.01 *et seq*., and its implementing regulations in Chapters 55-70 of Title 20 DCMR;

(c) The Voluntary Cleanup Program, pursuant to D.C. Official Code §§ 8-633.01 *et seq*.; or

(d) An enforcement action taken pursuant to the District of Columbia Brownfield Revitalization Amendment Act of 2000, as amended; D.C. Official Code §§ 8-631.01 *et seq*.

1804.3 The Department may reject an incomplete well construction building permit application or well construction work plan.

1804.4 If the Department rejects an incomplete well construction building permit application and well construction work plan, the Department shall notify the well owner in writing of the reason for the rejection.

1804.5 The Department shall reject the well construction building permit application and well construction work plan if the proposed well violates any District or federal laws or regulations, or poses a hazard to the environment, public health and safety, or otherwise interferes with the designated or beneficial uses of the waters of the District.

1804.6 The Department may consider the following when reviewing the well construction building permit application and well construction work plan:

(a) The effects of the geology, topography, hydrology, hydrogeology, and hydraulics of the area of interest;

(b) The population density and water use;

(c) The potential to impact or be impacted by nearby properties;

(d) The conditions of the surface and subsurface;

(e) The current and future water quality;

(f) The designated and beneficial uses of the waters of the District;

(g) The depletion rate of the water resources;

(h) The on-site and nearby recognized environmental conditions; and

(i) Public health and safety and the environment.

1804.7 The Department's approval of a well construction building permit application and well construction work plan may be subject to additional conditions to ensure compliance with District or federal laws or regulations and the protection of the public health and safety, and the environment, including:

(a) Requirements for the use of outer-casing during the construction of a soil boring;

(b) Requirements for the construction of a double-cased well;

(c) Limits on pumping rates and pumping duration;

(d) Special grouting requirements;

(e) Special use restrictions;

(f) Restrictions on well dimensions;

(g) Restrictions on well locations within the property boundary;

(h) Restrictions on well construction methods;

(i) Special drilling requirements;

(j) Special requirements for construction in various geologic formations;

(k) Special requirements for construction in various ecological environments;

(l) Special well construction material requirements;

(m) Special monitoring requirements;

(n) Special maintenance requirements;

(o) Restrictions on well operation; and

(p) Special abandonment requirements.

1804.8 The Department may require that a well owner submitting a well construction building permit application collect data or conduct analyses to determine if the proposed well impacts the District's water resources, including the following information:

(a) Lithological and geophysical boring logs;

(b) Grain size analysis;

(c) Land survey data;

(d) Groundwater elevation data;

(e) Groundwater quality data including field parameters;

(f) Hydrogeological tests such as, pump or slug tests;

(g) Modeling of groundwater, heat or contaminant flow; and

(h) Leachability testing and modeling.

1805 FEE SCHEDULE

1805.1 Fees shall be paid in full at the time an application for well construction or well registration is made, as specified in Table 1.

Table 1: Well Fee Schedule

ITEM	FEE
Well Permit Review and Registration Origination	
a. Closed-Loop Ground Source Heat Pump Well	$15.00 per well or $150.00 per lot
b. Temporary Construction Dewatering Well and Ground Freeze Well	$5.00 per well or $125.00 per lot
c. Monitoring Well, Observation Well, Piezometer/Soil Boring, Injection Well, and Recovery Well	$10.00 per well or $100.00 per lot
d. Water Supply Well	$75.00 per well
Well Registration Renewal	
a. Biennial well(s) registration renewal	$25.00 per lot
b. Five-Year Closed-Loop Ground Source Heat Pump Well(s) registration renewal	$25.00 per lot
Changes to Well Registration	
a. Change-in-Ownership	$25.00 per lot
b. Change-in-Well-Use	$25.00 per lot

1805.2 The District Department of the Environment (Department) may adjust the fees for inflation once every calendar year beginning on March 31, 2015, using the Urban Consumer Price Index published by the United States Bureau of Labor Statistics.

1806 WELL REGISTRATION

1806.1 The District Department of the Environment (Department) shall issue a unique well registration number for each well included in an approved well construction building permit application and well construction work plan or registered with the Department.

1806.2 By January 1, 2019, a well owner of any well constructed prior to March 31, 2016, shall:

(a) If the well was permitted by the Department, submit a well completion report in accordance with § 1826;

(b) If the well was not permitted by the Department, submit a registration application in accordance with § 1806.3; or

(c) Abandon the well in accordance with the procedures in §§ 1830 and 1831 of this chapter.

1806.3 The well registration application required by § 1806.2 shall include:

(a) The well owner's name, mailing address, telephone number, and electronic mailing address;

(b) The property owner's name, mailing address, telephone number and electronic mailing address, if different from the information provided pursuant to § 1806.3(a);

(c) The well driller's name, address, telephone number, electronic mailing address, and a copy of the pertinent Department of Consumer and Regulatory Affairs (DCRA) license(s);

(d) The physical location of the property on which the well is sited, including the physical address, the square, suffix, and lot number, or the closest physical location identifier;

(e) The specifications of the well such as the well diameter, depth, and construction materials, if known;

(f) The well construction as-built schematic detailing the well construction, if available;

(g) The well boring logs, if available;

(h) The well construction method and procedures, if known;

(i) The well construction completion date, if known;

(j) The well use and corresponding application information for the following types of wells:

(1) Ground source heat pump, including well information required in § 1803.4;

(2) Dewatering well, including information required in § 1803.5;

(3) Ground freeze well, including information required in § 1803.6; and

(4) Injection well, including information required in § 1803.7.

(k) If the well is in the public right of way or public space, a copy of the Public Space Permit;

(l) The horizontal location of the well using either the Maryland State Plane Coordinate System or latitude and longitude;

(m) The vertical elevation of the top of the well casing based upon North American Datum 1988 (NAVD88);

(n) A site map, plat, or plan depicting:

(1) The lot and square;

(2) The geographical location of the well within the property boundaries;

(3) The geographical location of the well in relation to the nearest street intersection;

(4) The setback distances from property lines;

(5) The setback distances from recognized environmental conditions identified on the property where the well is sited;

(6) The identification of public spaces;

(7) The identification of structures and driveways;

(8) The identification of waters of the District of Columbia on or adjacent to the property;

(9) Compass directions; and

(10) A scale bar;

(o) A key or legend;

(p) The last measured depth to water and the recording date;

(q) The well yield for supply wells;

(r) The well development log, if available;

(s) Any information that suggests or indicates that there is or may be negative impacts to the waters of the District due to the construction, operation, or maintenance of the well;

(t) The structural integrity of the well;

(u) The condition of the well surface completion;

(v) The presence and condition of the well cap, lock, and cover, and whether or not they meet the requirements of § 1820;

(w) An attestation signed by the well owner that the information provided is accurate and complete to the best of the owner's knowledge; and

(x) Any other relevant information.

1806.4 The Department may require submission of additional information as part of the well registration application as it relates to the intended use of the well, including the use of a recovery well, monitoring well, observation well, piezometer, industrial supply well, irrigation supply well, or domestic supply well.

1806.5 The Department shall cancel the registration of a well that has not been constructed or is not in the process of being constructed within the period covered by the well construction building permit.

1806.6 Except for a well constructed under a Department regulatory action and a closed-loop ground source heat pump well, the owner of an existing and permitted well shall renew the well registration every two (2) years.

1806.7 The owner of a closed-loop ground source heat pump well shall renew the well registration every five (5) years.

1806.8 The well registration renewal required by §§ 1806.6 and 1806.7 shall include the unique well registration number provided by the Department for each well and any changes to the information specified in § 1806.3.

1806.9 A well owner who fails to submit a well registration or well registration renewal request by the required deadline shall abandon the well in accordance with §§ 1830 and 1831 within sixty (60) days.

1807 CHANGE OF WELL USE OR OWNER

1807.1 Upon the transfer of ownership of a well, the new well owner shall register the well with the District Department of the Environment (Department) by March 31 of the calendar year following the transfer of the well ownership.

1807.2 The use of a well as specified and approved by the Department in a well construction building permit application, well construction work plan, or well registration shall not be changed, except in accordance with § 1807.3.

1807.3 A well owner who proposes to change the use of a well shall submit an application with the following information:

(a) The well owner's name, mailing address, telephone number, and electronic mailing address;

(b) The property owner's name, mailing address, telephone number, and electronic mailing address, if different from the information provided pursuant to § 1807.3(a);

(c) The physical location of the property on which the well is sited, in the form of a physical address, a square, suffix, and lot, or closest physical location identifier;

(d) The well construction building permit number for the well;

(e) A description of the specific proposed change(s) in use;

(f) A statement of how the change(s) will be achieved;

(g) If a licensed well driller is required as part of the change(s) in use, the licensed well driller's name, address, telephone number, electronic mailing address, a copy of the pertinent Department of Consumer and Regulatory Affairs (DCRA) license(s), and a copy of the well driller's current driller's license; and

(h) A description of any potential impacts to the waters of the District as a result of the proposed change(s) in use.

1808 WELL DRILLERS IN THE DISTRICT

1808.1 Except in accordance with §§ 1808.3 and 1808.4, no person shall construct, maintain, or abandon a well within the District unless that person is a licensed well driller and possesses a current Department of Consumer and Regulatory Affairs business license.

1808.2 A well owner shall ensure the construction, maintenance, and abandonment of a well is performed under the direct supervision of a licensed well driller.

1808.3 A licensed well driller shall not be required for the construction of a well using hand operated or hand driven tools, including hand-augers, soil probes, and hand shovels.

1808.4 A licensed well driller shall not be required for the maintenance of a well, provided that the maintenance does not require a material change in the original permitted design, specification, or construction of the well.

1809 WELL CONSTRUCTION REQUIREMENTS: GENERAL

1809.1 A well shall be constructed in accordance with a well construction work plan approved by the District Department of the Environment (Department) and a well construction building permit issued by the Department of Consumer and Regulatory Affairs (DCRA).

1809.2 A well owner shall provide a minimum of two (2) business days' notice to the Department prior to commencing the construction of a well.

1809.3 A well owner shall obtain public utility clearance pursuant to the Underground Facilities Protection Act of 1980, effective March 4, 1981 (D.C. Law 3-129; D.C. Official Code §§ 34-2701 *et seq.*), as amended.

1809.4 A well owner shall obtain clearance of underground facilities with non-utility operators, including the Washington Metropolitan Area Transit Authority (WMATA).

1809.5 A soil boring shall not be subject to the construction standards of § 1809.6, and §§ 1815 through 1826, provided that all the following conditions are met:

(a) The intended use of the well as a soil boring is identified in the Department-approved well construction permit application and well construction work plan; and

(b) The soil boring is abandoned in accordance with §§ 1830 and 1831 within twenty-four (24) hours of starting construction of the borings.

1809.6 A well shall be constructed from the bottom of the boring to the top of the well using materials free of contaminants and compatible with the intended well use and the surrounding surface and subsurface conditions and shall include the following components:

(a) A well casing;

(b) A well point or plug;

(c) A well screen;

(d) A filter pack;

(e) A low-permeability seal; and

(f) Grout within the annulus between the borehole wall and well casing.

1809.7 A well shall not hydraulically connect otherwise confined aquifers, causing aquifer cross-contamination, or hydraulically connect those portions of a single aquifer where contaminants exist in separate and definable layers within the aquifer.

1810 WELL CONSTRUCTION REQUIREMENTS: SITING

1810.1 A well shall be constructed so that it is accessible for cleaning, treatment, repair, testing, inspection, abandonment, and any other work that may be necessary.

1810.2 A well shall not be constructed within or under any building other than a separate structure constructed specifically for the housing of pumping equipment, unless otherwise approved in writing by the District Department of the Environment (Department) and specifically noted in the approved well construction work plan.

1810.3 A well housed in a separate structure in accordance with § 1810.2 shall be properly marked to indicate the category of the well and the well registration number.

1810.4 Except as provided by § 1810.5, buildings or other structures shall not be constructed on top of a registered and permitted well, unless the well has been abandoned in accordance with §§ 1830 and 1831, or unless otherwise approved by the Department.

1810.5 Buildings or other structures may be constructed on top of ground source heat pump wells, provided that adequate access is available to the loops to allow attachment to the building headers and for well operation, repair, maintenance, and abandonment.

1810.6 A well shall not be constructed or maintained in a manner that interferes with or damages any pre-existing subsurface structures, including utility lines, long-term combined sewer control shafts, diversion structures, diversion sewers, diversion tunnels, and Washington Metropolitan Area Transit Authority (WMATA) transit tunnels.

1810.7 A well sited within the 100-year floodplain or a low-lying area prone to flooding shall be constructed in accordance with § 1820.2.

1810.8 A well shall be located a minimum of twenty-five feet (25 ft.) from the mean high watermark of waters of the District or waters of the United States of America and a minimum of twenty-five feet (25 ft.) from a wetland, unless authorized in writing by the Department.

1810.9 A domestic supply well shall be sited a minimum of one hundred feet (100 ft.) from a recognized environmental condition.

1810.10 A closed-loop ground source heat pump well shall be sited in accordance with the following standards:

(a) A closed-loop ground source heat pump well shall not be constructed within five hundred feet (500 ft.) of a recognized environmental condition without prior written approval of the Department;

(b) A closed-loop ground source heat pump well shall be located at least twenty-five feet (25 ft.) away from a water supply well;

(c) A closed-loop ground source heat pump well with a capacity of two (2) tons or less shall be sited a minimum of eight feet (8 ft.) from the property boundary;

(d) A closed-loop ground source heat pump well with a capacity greater than two (2) tons, but less than or equal to four (4), tons shall be sited a minimum of ten feet (10 ft.) from the property boundary; and

(e) The setback distance for a closed-loop ground source heat pump well with a capacity greater than four (4) tons or a commercial closed-loop ground source heat pump system shall be determined based on the following criteria:

(1) The geology, topography, hydrology, hydrogeology, and hydraulics of the area of interest;

(2) The design of the closed-loop ground source heat pump system;

(3) The closed-loop ground source heat pump system's heating and cooling capacity;

(4) The closed-loop ground source heat pump system's proximity to other ground source heat pump wells; and

(5) The closed-loop ground source heat pump system's proximity to property boundaries.

1810.11 If a proposed closed-loop ground source heat pump well does not meet the siting criteria outlined in § 1810.10, the well owner may submit a request to the Department for a special compliance standard in accordance with the requirements of §§ 1803.10 and 1803.11.

1811 WELL CONSTRUCTION REQUIREMENTS: RELOCATION DURING CONSTRUCTION

1811.1 Except as set forth in § 1811.2, a well may be relocated during construction for the avoidance of utility lines, building footings, or other sub-surface obstructions provided that:

(a) The well is not relocated more than ten feet (10 ft.) from the approved and permitted location identified in the well construction building permit application;

(b) The new well location meets the requirements of this chapter;

(c) The new well location is situated on the same lot and square number listed on the well construction building permit application;

(d) The unsuccessful well, cased or uncased, is abandoned in accordance with the requirements of §§ 1830 and 1831 of this chapter; and

(e) The Department has not prohibited well relocation in the approved well construction work plan.

1811.2 A closed-loop ground source heat pump well shall not be relocated from the position shown on the well construction building permit and the Department-approved well construction work plan, without written approval by the Department.

1812 WELL CONSTRUCTION REQUIREMENTS: SANITARY PROTECTION

1812.1 A well owner is responsible for sanitary protection of the well during construction, maintenance, and abandonment.

1812.2 During well construction, the well and any water-bearing formation shall be protected against contaminants from any source, including surface water drainage.

1812.3 If construction of a well is suspended for any period of time prior to the completion of the well, the well annulus or open borehole shall be covered and protected from surface water drainage and the vertical migration of contaminants and other materials through the well casing and well annulus, and the well casing capped in accordance with the requirements of § 1820.1.

1812.4 A soil boring or well meeting the requirements of § 1818.2 shall be covered and protected from surface water drainage and the vertical migration of contaminants and other materials when not in use.

1812.5 In the event that contaminants not addressed in the well construction building permit are encountered during the construction, maintenance, or abandonment of a well, the well owner shall:

(a) Stop all well construction work and related activities;

(b) Immediately notify the District Department of the Environment (Department) and other applicable emergency personnel;

(c) Propose immediate corrective action;

(d) Implement Department-approved corrective actions to prevent an imminent hazard to the public health and safety, or the environment; and

(e) If additional action is necessary to investigate or remediate the contaminants, or is required by this chapter or requested by the Department, develop and submit a well construction work plan to the Department for review and approval.

1812.6 In the event that contaminants not addressed in the well construction building permit are encountered during the construction, maintenance, or abandonment of a well under a Department regulatory action, the well owner shall notify the Department and other applicable emergency personnel and take necessary measures to contain and minimize the spread of contaminants.

1812.7 All materials, including drilling fluids or muds, used in the construction of a well shall be free of contaminants and shall not cause the groundwater to become polluted in violation of District or ffederal laws and regulations.

1813 WELL CONSTRUCTION REQUIREMENTS: DERIVED MATERIAL FROM WELL CONSTRUCTION, MAINTENANCE, AND ABANDONMENT

1813.1 A well owner shall ensure all derived waste from the construction, maintenance, or abandonment of a well is managed and handled in accordance with this chapter and all District and federal laws and regulations.

1813.2 A well owner shall take the following measures with regard to derived waste from the construction, maintenance, or abandonment of a well sited on a property where a recognized environmental condition has been identified:

(a) Representative sample(s) of the derived waste shall be collected and analyzed for known or suspected contaminants by a National Environmental Laboratory Accreditation Conference-certified laboratory using appropriate EPA-approved procedures;

(b) All derived waste shall be stored and transported in United States Department of Transportation-approved containers; and

(c) All derived waste shall be permanently removed from the site for disposal in accordance with all District and federal laws and regulations.

1813.3 No person shall place, use, store, or dispose of derived waste from the construction, maintenance, or abandonment of a well in a manner that the derived waste may come into contact with or leach into the waters of the District, thereby violating the District Water Quality Standards in Chapter 11 of Title 21 of the District of Columbia Municipal Regulations (DCMR), or resulting in acute or chronic exposure to aquatic biota or otherwise posing a hazard to public health and safety or the environment.

1813.4 Soil or sediment derived from the construction, maintenance, or abandonment of a well may be placed on the site or stockpiled, provided it meets the following requirements:

(a) The soil or sediment is characterized as non-hazardous waste in accordance with § 1813.2(a);

(b) The soil or sediment contains a concentration of total petroleum hydrocarbons (TPH) of less than one hundred parts per million (100 ppm); and

(c) The soil and sediment stockpile or placement complies with the District's erosion and sediment control requirements in Chapter 5 of Title 21 DCMR.

1813.5 No person shall discharge the following into a separate stormwater sewer or waters of the District without obtaining applicable District and federal permits:

(a) Dewatering effluent;

(b) Groundwater treatment system effluent;

(c) Process water; or

(d) Derived waste.

1813.6 A person may include in a well construction work plan request for approval of the placement of fluid waste derived from the construction, maintenance, or abandonment of a well, on the ground surface or in an unlined pit provided:

(a) Representative analytical data indicates compliance with the District Water Quality Standards in Chapter 11 of Title 21 DCMR and all other applicable federal standards or regulations;

(b) The fluid waste is free of solids;

(c) The fluid waste does not have an observable sheen or free product;

(d) The fluid waste is characterized in accordance with § 1813.2(a) and has a total petroleum hydrocarbons (TPH) concentration of less than one part per million (1 ppm); and

(e) The fluid waste meets the following infiltration requirements:

(1) Erosion and sediment control requirements in Chapter 5 of Title 21 DCMR;

(2) Does not create surface ponding;

(3) Does not discharge onto an adjacent property, a nearby surface water body, or stormwater sewer; and

(4) Does not create or constitute a public nuisance or a hazard to the public health and safety, and the environment.

1814 WELL CONSTRUCTION REQUIREMENTS: DRILLING FLUIDS

1814.1 Only potable water shall be used to create a water-based drilling fluid.

1814.2 The use of a drilling fluid containing additives shall only be permitted if:

(a) Use of the additive is in an approved well construction work plan;

(b) The additive is used in accordance with manufacture's recommendations; and

(c) The additive does not pose a hazard to public health and safety or the environment.

1815 WELL CONSTRUCTION REQUIREMENTS: WELL CASING

1815.1 No person shall use well casing materials, well fittings, or well equipment that creates a condition which poses a hazard to public health and safety or the environment or results in violations of District or federal laws or regulations.

1815.2 Materials to be used for well casing must be appropriate for on-site application and approved by the American Society for Testing and Materials (ASTM), the American Water Works Association, or the National Sanitation Foundation.

1815.3 A well casing shall be strong enough to withstand the structural load imposed by conditions inside and outside the well during and after construction.

1815.4 A well casing shall be in good condition, free of pits, breaks, or cracks that may compromise the structural integrity or water-tightness of the well casing.

1815.5 Except for pre-packed wells installed using direct push technology, the diameter of the borehole shall be sized to accommodate the well casing and the well annulus requirements specified in § 1818.4.

1815.6 A plastic well casing shall be manufactured of polyvinylchloride (PVC) material and shall have a minimum standard dimension ratio of twenty-one (21).

1815.7 The maximum depth limit for a plastic well casing with the standard dimension ratio of twenty-one (21) is one hundred and fifty feet (150 ft.).

1815.8 If steel casing is used:

(a) The casing shall be new, seamless or electric-resistance welded, galvanized, or black steel. Galvanizing shall be done in accordance with the requirements of ASTM A53/A53M-07, as amended;

(b) The casing, threads, and couplings shall meet or exceed the specifications of ASTM A53/A53M-07 or A589/589M-06, as amended; and

(c) The casing thickness shall meet or exceed the following specifications, unless an alternative thickness is approved in the well construction work plan:

(1) Steel well casing up to and including a nominal size of six inches (6 in.) in diameter shall be at minimum Schedule 40; or

(2) Steel well casing larger than six inches (6 in.) in diameter shall be at the minimum 0.280 inches.

1815.9 If thermoplastic casing is used:

(a) The casing shall be new; and

(b) The casing and joints shall meet or exceed all the specifications of ASTM F480-06b, except that the outside diameters shall not be restricted to those listed in ASTM F480-06b.

1815.10 A steel casing shall be used for a well constructed in crystalline rocks, unless an alternative casing is approved in the well construction work plan.

1815.11 Joints for a well casing shall meet the following requirements:

(a) All joints shall be water tight;

(b) All joints shall be joined in accordance with the manufacturer's recommendations;

(c) Joints for steel well casing shall be electrically welded or threaded; and

(d) Joints for plastic well casing shall be threaded and not glued.

1815.12 A temporary well casing and liner shall be of such minimum thickness as required to withstand the structural load imposed by conditions inside and outside the well.

1816 WELL CONSTRUCTION REQUIREMENTS: WELL SCREENS

1816.1 No person shall construct a well in which the well screen extends across more than one aquifer, unless:

(a) A special compliance standard request was submitted in accordance with §§ 1803.10 and 1803.11;

(b) Adequate justification is provided to support the request;

(c) The cross-contamination of aquifers is prevented; and

(d) The request is approved by the Department in the well construction work plan.

1816.2 A well that derives water from an unconsolidated aquifer shall be equipped with a well screen that limits the entrance of sediment material into the well following well development.

1816.3 Only a machine-manufactured well screen shall be used in the construction of a well, unless otherwise approved by the Department.

1816.4 A well screen shall have sufficient structural strength to support the intended use of the well.

1816.5 A well screen shall be installed with fittings necessary to seal the well screen to the well casing.

1816.6 A lead packer and lead swedge shall not be used to seal a well screen to the well casing.

1816.7 A fitting shall be provided to close the bottom of the well screen and to cap, plug, or otherwise close the bottom of the well.

1816.8 A well screen of a well sited on a property where a recognized environmental condition has been identified shall be constructed to prevent structural degradation.

1817 WELL CONSTRUCTION REQUIREMENTS: FILTER PACK IN WELL

1817.1 Except for a pre-packed well, a filter pack shall be placed in the well annulus surrounding the well screen.

1817.2 A filter pack shall extend a minimum of two feet (2 ft.), but no further than three feet (3 ft.) above the well screen.

1817.3 A filter pack shall be comprised of sand or gravel that has been washed with water and is free of clay, silt, and organic material.

1817.4 A filter pack shall not contain iron or manganese in concentrations greater than that in the ground when the well is installed or adversely affect the quality of water withdrawn from the well or the groundwater that comes into contact with the filter pack.

1817.5 A filter pack material stored at the drilling site shall be stored on a clean surface or in a clean container to prevent any on-site contaminants from mixing with the filter pack materials.

1817.6 A filter pack shall be inserted by one of the following methods:

(a) By placing the filter pack down the annulus;

(b) By placing a water-filter pack mix down the annulus; or

(c) By using a tremie pipe to insert a water-filter pack mix at the bottom of the annulus and slowly raising the tremie pipe.

1817.7 A pre-packed well screen shall:

(a) Be used in accordance with the manufacturer's specifications and recommendations;

(b) Not pose a hazard to the environment or public health and safety; and

(c) Be pre-approved in writing by the District Department of the Environment (Department) prior to installation.

1817.8 The well filter pack material shall not hydraulically connect otherwise confined aquifers, without prior written approval from the Department.

1818 WELL CONSTRUCTION REQUIREMENTS: WELL GROUTING

1818.1 Except as provided in §§ 1818.2 and 1818.3, a person constructing a well with an annulus shall pressure grout the well in accordance with the grouting standards of this chapter.

1818.2 The grouting of a monitoring well, observation well, piezometer, injection well, or recovery well shall not be required if all the following conditions are met:

(a) The un-grouted annulus exists above the anticipated water table;

(b) A low-permeable seal a minimum of two feet (2 ft.) thick is installed atop the filter pack;

(c) The upper terminus of the well is protected in accordance with § 1812.3;

(d) The well is not constructed or maintained in a manner that allows the vertical migration of contaminants in the aquifer;

(e) The well penetrates a single aquifer; and

(f) The well is abandoned within thirty (30) business days of well completion in accordance with §§ 1830 and 1831.

1818.3 The grouting of a dewatering well shall not be required if all the following conditions are met:

(a) The well is constructed to a maximum depth of twenty feet (20 ft.) below ground surface;

(b) The well penetrates a single aquifer;

(c) The well is constructed and maintained in a manner that does not allow the vertical migration of contaminants in the aquifer; and

(d) The well is abandoned within one-hundred and eighty (180) days of well completion in accordance with §§ 1830 and 1831.

1818.4 The annulus of a well to be grouted shall be a minimum of one and one-half inches (1.5 in.) wide, or the diameter of the annulus shall be a minimum of three inches (3 in.) greater than the outside diameter of a well casing.

1818.5 A low-permeability seal a minimum of two feet (2 ft.), but no greater than three feet (3 ft.) thick, shall be placed atop the filter pack to prevent surface water from entering the screened interval.

1818.6 A sodium-based bentonite-cement grout shall be placed on top of the low-permeability seal and extend towards the ground surface with sufficient space to install the upper well terminus.

1818.7 A request may be made to the District Department of the Environment (Department) in accordance with §§ 1803.10 and 1803.11 to deviate from the grouting standards of this chapter, provided the deviation does not result in a less protective standards than those set forth in this chapter.

1818.8 A well shall be grouted as soon as feasible, but not later than twenty-four (24) hours after the well casing has been set in place, unless otherwise specified in the well construction building permit or well construction work plan authorized in accordance with the requirements of §§ 1803.10 and 1803.11.

1818.9 If pressure grouting the annulus is not feasible during the construction of a monitoring well, observation well, or a piezometer, the well shall be grouted by pouring medium-size, sodium-based bentonite chips or pellets down the well annulus in a manner that prevents the bridging of the bentonite chips or pellets.

1818.10 A well in which a permanent outer casing is installed shall be grouted in a manner that will allow the grout to set prior to the top of the inner casing being terminated below ground surface.

1818.11 A low-permeability seal shall be equal to or less than $1x10^{-7}$ centimeters per second ($1x10^{-7}$ cm/s) and comprised of:

(a) Sodium-based bentonite slurry:

(1) At a ratio of two (2) pounds of sodium-based bentonite powder to one (1) gallon of water; or

(2) At a mix ratio according to the manufacturer's specifications, provided that the grout results in a low permeability seal with a hydraulic conductivity equal to or less than 1×10^{-7}cm/s;

(b) Hydrated, medium-size bentonite chips at a ratio of one (1) gallon of potable water to twelve and one-half pounds (12.5 lbs.) of medium-size, sodium-based bentonite chips or pellets; or

(c) Hydrated, specially-coated, medium-size bentonite pellets which allow a time-delayed reaction at a ratio of one (1) gallon of potable water to twelve and one-half pounds (12.5 lbs.) of medium-size, sodium-based bentonite chips or pellets.

1818.12 Standards for grouting shall be as follows:

(a) Well grouting shall be performed to provide a water-tight seal against downward fluid migration along the well annulus into the filter pack, well screen, and surrounding aquifer;

(b) A sodium-based bentonite slurry mixture shall be installed by pumping the slurry mixture through a tremie pipe at least one inch (1 in.) in diameter using a positive placement technique;

(c) If a borehole diameter is not wide enough for a slurry mixture to be emplaced using a tremie pipe, the following sodium-based bentonite chips shall be used:

(1) Uncoated, sodium-based bentonite chips shall be used above the potentiometric surface, with a sufficient amount of potable water added to fully hydrate the chips; or

(2) Specially coated, time-release sodium-based bentonite pellets shall be used when several layers of pellets must be emplaced below the potentiometric surface of the well, with a sufficient amount of potable water shall be added to fully hydrate the pellets if there is insufficient groundwater entering the well;

(d) Sodium-based bentonite chips and pellets shall be sized according to the well diameter to be filled, and the chips or pellets shall be less than one fifth (1/5) the radial thickness of the annulus into which they are to be placed, except that medium or coarse sized chips may be used in well diameters from four inches (4 in.) to ten inches (10 in.);

(e) Sodium-based bentonite chips and pellets shall be placed within the borehole in a manner that prevents the bridging of the bentonite chips or pellets;

(f) Medium-size, sodium-based bentonite chips or pellets shall be used at a ratio of one (1) gallon of potable water to twelve and one-half pounds (12.5 lbs.) of medium-size, sodium-based bentonite chips or pellets as follows:

(1) The chips or pellets shall be pre-screened to remove fragments; and

(2) The chips or pellets shall be hydrated in accordance with the manufacturer's specifications to ensure that the chips or pellets

achieve a low permeability seal with a hydraulic conductivity equal to or less than $1x10^{-7}$ cm/s;

(g) If an outer casing is required for a well penetrating a confined or multi-layer aquifer with the potential for aquifer cross-contamination, the space between the open borehole wall and the outer casing shall be pressure grouted, and the following shall be required:

(1) The annulus between the open borehole wall and the outer casing shall be pressure grouted;

(2) The outer casing shall be installed and pressure grouted a minimum of ten feet into the uppermost confining layer; and

(3) In the event the confining layer is less than ten feet (10 ft.) in thickness, the outer casing shall be pressure grouted entirely through the uppermost confining layer;

(h) All grout materials placed in the borehole shall be free of contaminants;

(i) All sand and gravel placed in the borehole shall be silica based and inert, unless a material other than silica is used in a commercially available product that is inert and meets all other grouting requirements;

(j) Drill cuttings or muds shall not be left in boreholes, or placed in the borehole as fill material and shall not be used as a grouting material; and

(k) All grout inserted into a well annulus for sealing purposes shall not be disturbed until the grout has fully set.

1818.13 Grouting materials for unconsolidated formations shall meet the following requirements:

(a) Grout shall be fully hydrated and comprised of sodium-based bentonite, or a sodium-based bentonite-cement mixture comprised of a minimum of five percent (5%) and a maximum of ten percent (10%) sodium-based bentonite, and a minimum of ninety percent (90%) and a maximum of ninety-five percent (95%) cement;

(b) Cement shall be hydrated consistent with § 1818.14(a) of this chapter; and

(c) A sodium-based bentonite clay shall not be used if it may come into contact with groundwater with a known pH below five (5.0) or groundwater having a total dissolved solids content greater than one thousand milligrams per liter (1,000 mg/L).

1818.14 Grouting materials for consolidated formations shall consist of the following:

(a) Portland cement or quick-setting cement in a ratio of no greater than six (6) gallons of water per ninety-four pound (94 lb.) sack of cement or as

otherwise authorized by the Department in the well construction work plan;

(b) Sodium-based bentonite powder may be added to the cement grout in an amount of five pounds (5 lbs.) for each ninety-four pound (94 lb.) sack of cement; and

(c) When adding sodium-based bentonite clay to neat Portland cement grout, additional water shall be allowed at a rate of one (1) gallon of water to two pounds (2 lb.) of sodium-based bentonite powder.

1818.15 The grouting of a closed-loop ground source heat pump well shall meet the following requirements:

(a) Approved sealing and filling materials shall include fully hydrated high solids sodium-based bentonite grout comprised of a minimum twenty percent (20%), but no greater than thirty percent (30%) of solids by weight, or approved high efficiency, thermally-enhanced grouts comprised of a maximum twenty percent(20 lb.) by weight silica sand;

(b) All grout shall meet the manufacturer's specifications and shall result in a low-permeability seal equal to or less than 1×10^{-7} cm/s;

(c) The permeability value shall be derived by using American Society for Testing and Materials (ASTM) D-5084 and verified by an independent testing facility certified by American Association of State Highway & Transportation Officials, Materials Reference Laboratory to perform ASTM D5084 at the time of verification;

(d) The entire length of the borehole shall be grouted from bottom to top with sodium-based bentonite or thermally enhanced grout specifically designed to facilitate heat transfer and provide a low-permeability seal;

(e) Grouting shall be completed immediately after installing the geothermal loop or in case of extenuating field conditions, no later than twenty-four (24) hours after installing the geothermal loop;

(f) Open boreholes shall be protected as necessary to prevent the entry of surface water or pollutants;

(g) Boreholes with temporary casing shall be grouted during or before removal of casing depending on borehole stability;

(h) Boreholes with permanent outer casing shall be grouted and the grout shall be allowed to set before the top of the casing is terminated below ground level;

(i) Boreholes with no casing shall be looped and grouted immediately after drilling;

(j) When voids are encountered, including fractures in bedrock and degraded bedrock, the borehole shall be cased from below the void to the surface; and

(k) Boreholes drilled with a mud rotary drilling system in unconsolidated formations shall be looped and grouted immediately after drilling.

1818.16 If the annulus cannot be grouted in accordance with this chapter, the well shall be abandoned in accordance with §§ 1830 and 1831.

1818.17 The Department may impose additional requirements pertaining to the grouting of a well in the well construction building permit to ensure the protection of public health and safety and the environment.

1819 WELL CONSTRUCTION REQUIREMENTS: WELL DEVELOPMENT

1819.1 A well constructed for the purpose of determining the physical or chemical characteristics of groundwater shall be developed in accordance with the requirements of this section.

1819.2 Well development shall consist of cyclic or intermittent pumping, surging, or both, either mechanically or by using potable water or air under pressure.

1819.3 Well development shall continue until formation cuttings, mud, drilling fluids and additives are removed from the well.

1819.4 Well development shall occur as soon as feasible following installation and after grout is firmly set, but no sooner than twenty-four (24) hours.

1819.5 A well shall be developed to remove the fine sands, silts, clays, and rock particles from the aquifer surrounding the well screen or intake interval, to meet the following requirements:

(a) The water recovered from the well shall contain less than five milligrams (5 mg) of sand or larger particles per liter of water. Particles with a diameter between 0.0625 and 2.0 millimeters shall be considered sands;

(b) The water recovered from the well shall have a turbidity of less than twenty (20) NTU (Nephelometric Turbidity Units), except when the turbidity is due to the oxidation of dissolved iron or manganese naturally occurring in the water; and

(c) The pH, specific conductivity, temperature, and turbidity of the water recovered from the well are determined to be within a ten percent (10%) range and considered at equilibrium.

1820 WELL CONSTRUCTION REQUIREMENTS: WELL CAPS AND UPPER TERMINUS OF WELL

1820.1 Except as provided in §§ 1820.3 and 1820.4, the upper terminus of a well shall meet the following requirements, unless otherwise approved in writing by the District Department of the Environment (Department) in accordance with §§ 1803.10 and 1803.11;

(a) A well shall be covered with a secure and locking well cap, meeting the following requirements:

(1) A well cap shall be constructed to prevent the introduction of contaminants, or any other foreign material including surface runoff;

(2) A vented capping device shall be screened so as to prevent the entry of insect and animals; and

(3) The well cap shall be locked or incapable of removal without the use of tools;

(b) The surface completion shall be set in a cement well pad with minimum dimensions of two feet (2 ft.) by two feet (2 ft.) and domed to prevent water from entering the well;

(c) A protective metal casing with a locking cap shall be installed around a well completed at or above ground surface, extending at least six inches (6 in.) above the top of the well and cemented into place at least one foot (1 ft.) below ground surface; and

(d) A metal housing shall be installed on top of the well completed below ground surface and a limited-access water tight protective cover shall be installed to prevent the inflow of surface water, or the metal housing shall be provided with drains to keep water out of the well and below the well cap.

1820.2 For a well sited within the 100-year floodplain or low lying areas prone to flooding, the top of the well head shall not terminate less than twenty-four inches (24 in.) above the finished ground surface and shall be fully protected from surface water intrusion, unless otherwise approved in accordance with §§ 1803.10 and 1803.11.

1820.3 A dewatering well or ground freeze well constructed for temporary construction applications shall be exempt from § 1820.1, provided all the following conditions are met:

(a) The well is sited within a secured perimeter not accessible to the public;

(b) The well meets the requirements of §§ 1812.1 through 1812.4; and

(c) The well is abandoned within one-hundred and eighty (180) days of well completion in accordance with §§ 1830 and 1831.

1820.4 A monitoring well, observation well, piezometer, injection well or recovery well shall be exempt from §§ 1820.1(b) through 1820.1(d) provided all the following conditions are met:

(a) The well meets the requirements of §§ 1812.1 through 1812.4; and

(b) The well is abandoned within thirty (30) days of well completion in accordance with §§ 1830 and 1831.

1820.5 The upper terminus of an industrial supply well, irrigation supply well, and a domestic supply well shall be required to meet the following standards:

(a) The well shall be constructed with an access port with a minimum inside diameter of one-half inch (0.5 in.), allowing for a water level measurement by a steel or electric tape;

(b) The access port shall be constructed with a removable cap and seal to protect from entry of water, dust, insects, animals, or other foreign material, but allows access for water level measurements;

(c) If a pump motor is not installed directly over the well, an access port shall be constructed atop the well; and

(d) If a pump motor is installed directly over the well, an access port shall be installed through the pump base or outside the well casing at some accessible point below the base of the pump.

1820.6 A closed-loop ground source heat pump well shall not require a secure and locking well cap provided the closed-loop ground source heat pump well is constructed in accordance with § 1823.

1820.7 The cover of a well completed below ground surface shall be designed to withstand the maximum expected loadings.

1820.8 The construction and use of a well pit, pump pit, or other facility installed or constructed below ground surface are prohibited, unless prior written approval has been granted by the Department in accordance with §§ 1803.10 and 1803.11.

1821 WELL CONSTRUCTION REQUIREMENTS: WELL LABELING

1821.1 A well registration number issued by the District Department of the Environment in accordance with § 1806 shall be attached at a visible location to the terminal surface of a well.

1821.2 For closed-loop ground source heat pump wells, the well registration number shall be attached at a visible location on one loop of the high density polyethylene (HDPE) pipe attached to the heat exchanger.

1821.3 A dewatering well or ground freeze well constructed for temporary construction applications shall not require a well label, provided all the following conditions are met:

(a) The well is sited within a secured perimeter not accessible to the public;

(b) The well construction building permit and well completion details are maintained at the property where the well is sited; and

(c) The well is abandoned within one-hundred and eighty (180) days of well completion in accordance with §§ 1830 and 1831.

1822 WELL CONSTRUCTION REQUIREMENTS: MONITORING WELL, OBSERVATION WELL, AND PIEZOMETER

1822.1 The construction of a monitoring well, observation well, or piezometer shall be conducted by a method that allows for the determination of characteristics of the geologic materials under the site, unless otherwise approved by the District Department of the Environment in the well construction work plan.

1822.2 A monitoring well, observation well, or piezometer's uncompleted borehole shall not penetrate to a depth greater than the depth to be monitored, and any portion of the borehole that extends to a depth greater than the depth to be monitored shall be grouted completely to prevent vertical migration of contaminants.

1823 WELL CONSTRUCTION REQUIREMENTS: CLOSED-LOOP GROUND SOURCE HEAT PUMP WELL

1823.1 A closed-loop ground source heat pump system shall contain pipes, loops, or loop configurations that meet the requirements of this chapter.

1823.2 Closed-loop ground source heat pump well exchanger pipe and fitting materials shall meet the standards and specifications in the document *Closed-Loop/Geothermal Heat Pump Systems Design and Installation Standards*, Revised Edition 2008, published by the International Ground Source Heat Pump Association, Oklahoma State University, which is adopted and incorporated by reference.

1823.3 All closed-loop ground source heat pump well exchanger pipe and fitting materials shall be stenciled with the applicable American Society for Testing and Materials (ASTM) standard.

1823.4 If a closed-loop ground source heat pump well exchanger pipe and fitting materials do not meet the requirements of § 1823.2, the proper documentation of manufacturer specifications shall be supplied to the District Department of the Environment in the well construction work plan for approval.

1823.5 A closed-loop ground source heat pump system installer and licensed well driller shall be experienced, trained, certified, or accredited by a recognized professional organization specializing in the installation of ground source heat pump systems.

1823.6 A closed-loop ground source heat pump well and system shall not be designed or operated in a manner to allow system heating or cooling of soil, rock, or water beyond the property line where the well is sited.

1823.7 Permanent casing shall be used for a closed-loop ground source heat pump well sited on a property where a recognized environmental condition has been identified.

1823.8 Permanent casing for closed-loop ground source heat pump wells shall be constructed of new steel where organic contaminants are present.

1823.9 A closed-loop ground source heat pump well shall be constructed with a high density polyethylene (HDPE) factory manufactured pipe forming a loop, and shall be grouted in accordance with § 1818.15.

1823.10 Pipe joints and fittings installed and buried shall be socket or butt thermally fused or electro-fused according to the pipe manufacturer's specifications.

1823.11 Glued or clamped pipe joints shall not be used below ground.

1823.12 Dimensions for closed-loop ground source heat pump systems shall meet the following requirements:

(a) A pipe with a diameter of less than one and one quarter inch (1.25 in.) (3.175 cm) (nominal) shall be manufactured in accordance with ASTM D-3035 with a minimum (based on pressure rating) dimension ratio of 11;

(b) A pipe with a diameter from one and one quarter inch (1.25 in)(3.175 cm) (nominal) up to three inches (3 in.) (7.62 cm) in diameter shall be manufactured in accordance with ASTM D-3035 with a minimum (based on pressure rating) dimension ratio of 11; and

(c) A pipe with a diameter of three inches (3 in.) (7.62 cm) (nominal) and larger shall be manufactured in accordance with ASTM D-3035, with a minimum (based on pressure rating) dimension ratio of 17 or D-2447 (Schedule 40).

1823.13 The closed-loop ground source heat pump boring diameter shall be a minimum of four inches (4 in.) to sufficiently allow the placement of grout using a tremie pipe and the heat exchanger loop piping.

1823.14 Flushing, purging, pressure, and flow testing of closed-loop ground source well and system components shall meet the following requirements:

(a) The loops shall be pressure tested before installation;

(b) All horizontal components of the ground heat exchanger shall be flushed, pressure tested, and flow tested prior to backfilling;

(c) The heat exchangers shall be tested hydrostatically at one hundred and fifty percent (150%) of the pipe design rating or three hundred percent (300%) of the system operating pressure, if this value is the smaller of the two; and

(d) No visible leaks shall occur within a thirty (30) minute period.

1823.15 All buried pipes and plumbing shall be marked with underground warning tape at a depth of twenty-four inches (24 in.).

1823.16 All closed-loop ground source heat pump system piping shall be capped and protected until the manifold piping is ready to be connected.

1823.17 All closed-loop ground source heat pump system piping shall be connected to the building in accordance with the manufacturer's recommendations and all local building and plumbing codes.

1823.18 The solution contained in a closed-loop ground source heat pump well piping system shall not contain any substances that pose a hazard to the public health and safety or the environment and shall be:

(a) Potable water; or

(b) A food-grade quality antifreeze solution that is non-toxic, non-corrosive, long-lasting, and that does not exceed twenty percent (20%) antifreeze in solution.

1823.19 Pressure testing of the closed-loop ground source heat pump system network shall be conducted prior to putting the system into operation.

1823.20 No person shall install any other type of ground source heat pump system not specified in this chapter unless approved by the Department in the well construction work plan.

1823.21 A person requesting the use of materials or procedures that differ from those provided in this section shall provide documentation demonstrating that the substitute materials or procedures are in compliance with relevant District construction codes and International Ground Source Heat Pump Association standards, and that such use would provide an equivalent material strength and durability.

1823.22 The construction of an open-loop ground source heat pump system shall be prohibited.

1824 WELL CONSTRUCTION REQUIREMENTS: GROUND FREEZE WELL

1824.1 The American Society for Testing and Materials (ASTM) standard A-120/A-53 steel shall be used for subsurface freeze pipes, unless otherwise approved unless otherwise approved in a well construction work plan by the District Department of the Environment in accordance with §§ 1803.10 and 1803.11.

1824.2 The subsurface connections of freeze pipes installed in a ground freeze well shall be welded.

1824.3 A threaded coupling shall not be used below ground within a ground freeze well.

1824.4 A ground freeze well system shall be installed by a licensed well driller experienced in installing ground freeze well systems or trained, certified, or accredited by a recognized professional organization specializing in the installation of ground freeze well systems.

1824.5 Flushing, purging, pressure, and flow testing of a ground freeze well and system components shall meet the following requirements:

(a) The loops shall be pressure tested before installation; and

(b) All horizontal components of the ground freeze distribution manifold shall be flushed, pressure tested, and flow tested prior to backfilling.

1824.6 No coolant fluid or refrigerant used in a ground freeze well system shall contain any substances that pose a hazard to public health and safety or the environment.

1824.7 Pressure testing of the ground freeze well system shall be conducted prior to putting the system into operation.

1825 WELL CONSTRUCTION REQUIREMENTS: RECOVERY WELL

1825.1 The materials and the methods used to construct, maintain, and abandon a recovery well shall be compatible with the chemical and physical properties of the pollutants known to exist or potentially exist where a well will be sited.

1825.2 A recovery well borehole shall not penetrate to a depth greater than the depth from which contaminants are to be recovered.

1825.3 If a well or borehole extends to a depth greater than the depth from which contaminants are to be recovered, the well or borehole shall be grouted in accordance with § 1818 to prevent vertical migration of contaminants.

1825.4 No person shall discharge the effluent of a recovery well to the waters of the District prior to obtaining all applicable District and federal permits.

1826 WELL CONSTRUCTION REQUIREMENTS: REPORTING

1826.1 Within sixty (60) calendar days of construction of a new well, a well owner shall provide a well completion report to the District Department of the Environment (Department) in accordance with the reporting requirements of § 1826.3.

1826.2 A well completion report shall not be required for a well currently under a Department regulatory action, or for a well that is exempt from the well construction building permit requirement pursuant to § 1802.

1826.3 A well completion report submitted to the Department shall include the following details:

(a) The well owner's name, mailing address, telephone number, and electronic mailing address;

(b) The property owner's name, mailing address, telephone number, and electronic mailing address, if different from the information provided pursuant to § 1826.3(a);

(c) The physical location of the property on which the well is sited, in the form of a physical address, a square, suffix, and lot, or closest physical location identifier;

(d) The well construction as-built schematic detailing the well construction;

(e) The intended use of the well;

(f) The building permit number;

(g) The well registration number;

(h) The well construction completion date;

(i) The horizontal location of the well using either the Maryland State Plane Coordinate System or latitude and longitude;

(j) The vertical elevation of the well casing based upon the North American Datum 1988 (NAVD88), if required;

(k) The placement and description of any equipment or materials that were or could be placed in the well such as, pumps or liners, or any water-impacting activities;

(l) The geological boring logs;

(m) The well development logs;

(n) A statement signed by the well owner that the well was constructed in accordance with well construction building permit issued by DCRA, the

well construction work plan, the well registration, and in accordance with the well construction procedures of this chapter; and

(o) Any other relevant information not included in the well construction building permit application or the well registration application.

1827 WELL USE AND MAINTENANCE: GENERAL

1827.1 A well owner shall maintain a well in a manner that does not pose a hazard to public health and safety or the environment.

1827.2 The well owner shall ensure that the use and maintenance of a well is conducted in accordance with the well construction building permit, the well construction work plan, the well registration conditions, and all District and federal laws and regulations.

1827.3 If a well owner is unable or unwilling to use or maintain a well in accordance with § 1827.2, the well owner shall:

(a) Submit a request to the District Department of the Environment (Department) for special standards in accordance with the requirements of §§ 1803.10 and 1803.11; or

(b) Abandon the well in accordance with §§ 1830 and 1831.

1827.4 If the maintenance of a well requires a modification or material change to the original permitted design, specifications, use, or construction of the well, a well owner shall submit a well construction work plan for review and approval by the Department.

1827.5 Within sixty (60) days of work completed in accordance with § 1827.4, the well owner shall submit to the Department a report detailing the work that was performed with supporting documentation.

1827.6 No person shall use or maintain a well that may significantly deplete or degrade groundwater resources or significantly interfere with groundwater recharge.

1827.7 No person shall discharge fluids withdrawn from a well to a separate stormwater sewer or waters of the District that may cause a violation of the District Water Quality Standards in Chapter 11 of Title 21 of the District of Columbia Municipal Regulations (DCMR), result in acute or chronic exposure to aquatic biota, or pose a hazard to the public health and safety or the environment, without obtaining applicable District and federal permits.

1827.8 A well owner shall ensure that sampling equipment used in a well is free of contaminants and that decontamination procedures are performed in accordance with EPA-approved procedures.

1827.9 A well owner shall ensure that dedicated sampling equipment used in a well is maintained in accordance with the manufacturer's specifications and does not pose a hazard to public health and safety or the environment.

1827.10 A well owner shall use materials for the maintenance of a well that meets the requirements for new construction, in accordance with §§ 1815 through 1826.

1827.11 A well owner shall notify the Department within twenty-four (24) hours of discovery of damage to a well or a well not operating in accordance with its approved use.

1827.12 No person shall maintain a well through the use of chemical treatment prior to Department review and approval in accordance with the requirements of §§ 1803.10 and 1803.11.

1827.13 A well owner shall repair or replace broken, punctured, or otherwise defective or unserviceable well casing, well screen, fixtures, seals, or any part of the well head, or the well owner shall properly abandon and seal the well as specified in §§ 1830 and 1831.

1828 WELL USE AND MAINTENANCE: MONITORING OR OBSERVATION WELL

1828.1 When conducting the well development of a monitoring or observation well, a well owner shall allow groundwater flow conditions to equilibrate prior to purging the well.

1828.2 If the well construction or well development methods introduced fluids, a well owner shall allow the well to rest at least seven (7) days prior to purging.

1828.3 Prior to sampling a monitoring or observation well, a person shall purge the well to facilitate collection of an accurate, reproducible, and representative groundwater sample, in accordance with appropriate EPA-approved sampling procedures.

1828.4 An owner of a monitoring or observation well shall maintain the well to ensure that any testing procedures are appropriate for the intended use as stated on the well construction building permit and in the well construction work plan.

1828.5 An owner of a monitoring or observation well shall comply with the data collection requirements of the District's Water Quality Monitoring Regulations in Chapter 19 of Title 21 DCMR if the results are to be submitted to the District Department of the Environment for regulatory and applicable decision-making purposes.

1829 WELL USE AND MAINTENANCE: INJECTION WELL

1829.1 A well owner shall obtain written approval from the District Department of the Environment in accordance with the requirements of this chapter for the injection of a substance into a well or an injection system within the District.

1829.2 A well owner shall obtain an EPA Underground Injection Control Permit or an exemption from such permit for the injection of a substance into a well or an injection system within the District.

1829.3 A well owner or a person responsible for injecting a fluid into a well by active or passive means shall prevent, to the maximum extent possible, the migration of a hazardous substance, a hazardous waste, or a pollutant beyond the boundary of the property where the well is sited, to a human or ecological receptor, or to the waters of the District.

1829.4 A well owner or a person responsible for injecting a fluid into a well shall minimize any negative impact to the natural degradation of a contaminant not targeted for treatment by the injection system.

1829.5 A person responsible for injecting water into a well for testing purposes, including determining soil hydraulic conductivity, shall ensure that the water is clean, potable, and meets the District Water Quality Standards in Chapter 11 of Title 21 of the District of Columbia Municipal Regulations.

1830 WELL ABANDONMENT REQUIREMENTS: GENERAL

1830.1 Except in accordance with §§ 1802.3 and 1802.7, at least thirty (30) days prior to abandoning a well, a well owner shall submit to the District Department of the Environment (Department) a well abandonment work plan for review and approval by the Department.

1830.2 A well abandonment work plan submitted to the Department shall include the following details, in addition to the information provided in § 1826.3:

(a) The reason(s) for abandonment;

(b) The depth and diameter of the well;

(c) The well abandonment details, including the procedures and materials used;

(d) The details describing how any waste materials from the abandoned well or derived from well abandonment will be collected and disposed of in accordance with District and federal laws and regulations;

(e) The details regarding the well's condition and whether or not any obstructions exist that may potentially interfere with the abandonment processes;

(f) The well driller's name, address, telephone number, electronic mailing address, a copy of the pertinent Department of Consumer and Regulatory Affairs licenses, and a copy of the well driller's license;

(g) A statement signed by the well owner that the well will be abandoned in accordance with the well abandonment requirements of this chapter; and

(h) Any other relevant details.

1830.3 A well shall be abandoned in accordance with the approved well abandonment work plan within sixty (60) days of Department approval of the plan.

1830.4 During the abandonment of a well, a Department-approved well abandonment work plan may be modified only if:

(a) The well owner immediately notifies the Department;

(b) The modification of the well construction building permit, and well construction work plan, or well abandonment work plan does not violate District or federal laws or regulations; and

(c) A well abandonment report is submitted to the Department detailing the modifications or revisions to the well abandonment work plan.

1830.5 If additional time is required to abandon a well a request may be submitted to the Department in accordance with §§ 1803.10 and 1803.11.

1830.6 A dewatering well shall be permanently abandoned in accordance with the requirements of this Chapter as soon as the dewatering period ends, but no later than seven (7) calendar days following the termination of pumping.

1831 WELL ABANDONMENT PROCEDURES

1831.1 A person abandoning a well shall, if feasible, remove all obstructions that may interfere with the effective sealing operations by cleaning out the borehole or re-drilling.

1831.2 A person abandoning a well shall remove all well upper terminus completion structures and well casing.

1831.3 If the removal of the well casing or obstructions is not feasible, the following shall be performed to ensure that the well casing and annulus or voids are filled with sealing or fill materials:

(a) Rip or perforate the well casing below ground surface;

(b) Over-drill the well casing for removal; or

(c) Submit an alternate abandonment procedure to the District Department of the Environment (Department) for approval in accordance with §§ 1803.10 and 1803.11.

1831.4 The abandoned well shall be completely filled and sealed in such a manner that vertical fluid migration within the well, including the annulus surrounding the well casing, is effectively and permanently prevented.

1831.5 The following materials shall be used for filling and sealing a well for abandonment:

(a) A sodium-based bentonite slurry; or

(b) Hydrated, medium size, sodium-based bentonite chips or pellets, if:

(1) The diameter of the well casing is less than one and one-quarter inches (1.25 in.) and the well is not over-drilled for abandonment; or

(2) The well is no more than ten (10) feet below ground surface; and

(i) The terminus of the well does not intersect the water table; and

(ii) The well is sited greater than twenty-five feet (25 ft.) from the mean high watermark of a waters of the District or waters of the United States of America and twenty-five feet (25 ft.) from a wetland.

1831.6 In the event the diameter of a well does not allow for a slurry mixture to be emplaced using a tremie pipe, sodium-based chips or pellets shall be used in accordance with § 1818.

1831.7 Clay, silt, sand, gravel, crushed stone, and mixtures of these materials are considered fill material, and shall only be used under the following conditions:

(a) In soil borings in areas where no known or suspected, historic or current, groundwater or soil contamination exists;

(b) In a manner that shall mimic the original, stratigraphic layering of geologic units;

(c) In a manner that shall not create a conduit between aquifers;

(d) In a manner that shall not cause negative impacts to groundwater quantity or quality; and

(e) With prior written approval of the Department in accordance with §§ 1803.10 and 1803.11 or 1830.1.

1831.8 A well shall be abandoned by filling it with the appropriate sealing materials introduced at the bottom of the well by using a tremie pipe and placed progressively upward to at least two feet (2 ft.) below ground surface.

1831.9 The abandoned well shall be furnished with suitable materials to create a final cover similar to that of the surrounding area, such as a cold patch, or a non-coal tar based hot patch, or native soils or a combination of these materials.

1831.10 All abandonment sealing material shall be placed in one continuous operation using methods that prevent free fall, bridging, dilution, or separation of aggregates from cementing materials, unless otherwise approved by the Department.

1831.11 A well in a consolidated formation shall be filled by placing gravel in the water producing zones, and cement sodium-based bentonite grout in the non-water producing zones to the ground surface. A suitable packer shall be placed between the gravel and the sealing material.

1831.12 A well penetrating a confined and multiple aquifer formation shall be abandoned by placing sealing materials throughout the confining horizon and water producing zone(s).

1831.13 In a well penetrating a consolidated formation where known contaminants exist, only gravel fill with a suitable packer shall be used to seal and abandon a well.

1831.14 In a multiple aquifer well, the well shall be filled and sealed in such a way that exchange of water from one aquifer to another is prevented and all fluids are permanently confined to the specific strata in which they were first encountered.

1831.15 A person abandoning a closed-loop ground source heat pump well shall comply with the following procedure:

(a) Pressure test the closed-loop system including the well and header piping, to identify any leaks and isolate and seal them with high solids, low-permeability grout equal to or less than 1×10^{-7} cm/s;

(b) Capture any circulation fluids and flush the loop piping with potable water to remove all contaminants in non-leaky piping systems;

(c) Conduct a laboratory analysis of the final flush (abandonment solution) and submit the results to the Department;

(d) After pressure testing and flushing the system, fill the loops with potable water;

(e) Cut off the piping in the well at least five feet (5 ft.) below the ground surface and seal it with a permanent fusion cap;

(f) If gaps are found in the annulus grout seal during the decommissioning process, pump grout into the deficient borehole annulus in a continuous operation until undiluted grout returns to the surface;

(g) If there is visual evidence of subsidence greater than one foot (1 ft.) at a well, excavate the ground to the top of the well, and grout the open well using a tremie pipe or by surface methods consistent with the requirements of § 1818;

(h) If a previously decommissioned closed-loop ground source heat pump system is breached and no known contaminant is present, reseal the system using a permanent fusion cap; and

(i) If contaminants are known or suspected to have entered a damaged pipe, purge the pipe again, fill it with potable water, and reseal.

1832 INSPECTION

1832.1 Upon the presentation of appropriate credentials to the well owner and the property owner where a well is sited, the District Department of the Environment (Department) may:

(a) Access the property where a well is sited;

(b) Inspect and copy any records kept in accordance with this chapter, including any reports, information, or analytical data; and

(c) Inspect and collect a sample of any soil or water to assist in regulating the quality of waters of the District and ensuring compliance with this chapter, or with conditions stated in the well construction building permit or well registration.

1832.2 If the construction, maintenance, or abandonment of a well is conducted contrary to the approved well construction building permit or work plan or in a manner that poses or causes a hazard to the public health and safety or the environment, the well owner shall immediately stop all work and immediately notify the Department.

1832.3 A well owner shall ensure that the Department-approved well construction building permit and work plan are present at the site during well construction activities and available to the Department's site inspector upon request.

1833 ENFORCEMENT AND PENALTIES

1833.1 The District Department of the Environment (Department) may issue an order requiring compliance with this chapter or elimination of any violation.

1833.2 The Department may order a well owner to abandon a well in accordance with §§ 1830 and 1831 if the Department determines that any of the following conditions apply:

(a) The well poses a hazard to public health and safety or the environment; or

(b) The well is not constructed in accordance with the standards of this chapter.

1833.3 No person shall continue any work related to the construction, maintenance, or abandonment of a well for which a stop work order has been served, except such work as the person has been directed by the Department to perform to correct a violation.

1833.4 Each instance or day of a violation of each provision of this chapter shall be a separate violation.

1833.5 The Department may seek criminal prosecution if a person violates a provision of this chapter, pursuant to the Water Pollution Control Act of 1984, effective March 16, 1985 (D.C. Law 5-188; D.C. Official Code § 8-103.16 (2013 Repl.)).

1833.6 The Department may bring a civil action in the Superior Court of the District of Columbia, or any other court of competent jurisdiction, for civil penalties, damages, and injunctive or other appropriate relief, pursuant to the Water Pollution Control Act of 1984, effective March 16, 1985 (D.C. Law 5-188; D.C. Official Code §§ 8-103.17 and 8-103.18 (2013 Repl.)).

1833.7 As an alternative to a civil action, the Department may impose an administrative civil fine, penalty, and order for costs and expenses pursuant to the Department of Consumer and Regulatory Affairs Civil Infractions Act of 1985, effective October 5, 1985 (D.C. Law 6-42; D.C. Official Code §§ 2-1801 *et seq.*(2012 Repl. & 2014 Supp.)).

1833.8 When civil infraction fines are the only penalties pursued in a particular case, the Department of Consumer and Regulatory Affairs Civil Infractions Act of 1985, effective October 5, 1985 (D.C. Law 6-42; D.C. Official Code §§ 2-1801.01 *et seq.*(2012 Repl. & 2014 Supp.)) and the regulations adopted thereunder shall govern the proceedings in lieu of this chapter, and where there is a violation, a notice of infraction may be issued without first issuing a notice of violation or threatened violation.

1833.9 Except when otherwise provided by statute, a person violating a provision of this chapter shall be fined according to the schedule set forth in Title 16 of the District of Columbia Municipal Regulations.

1833.10 Neither a criminal prosecution nor the imposition of a civil fine or penalty shall preclude an administrative or judicial civil action for injunctive relief or damages, including an action to prevent unlawful construction or to restrain, correct, or abate a violation on or about any premises, or to recover costs, fees, or money damages, except that a person shall not, for the same violation of this chapter, be assessed a civil fine and penalty through both the judicial and the administrative processes.

1834 ADMINISTRATIVE APPEALS AND JUDICIAL REVIEW

1834.1 With respect to a matter governed by this chapter, a person adversely affected or aggrieved by an action of the District Department of the Environment (Department) shall exhaust administrative remedies by timely filing an administrative appeal with, and requesting a hearing before, 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.*), or OAH's successor.

1834.2 For the purposes of this chapter, an action of the Department taken with respect to a person includes:

(a) An approval;

(b) A denial;

(c) A modification;

(d) An order;

(e) A notice of infraction;

(f) A determination; or

(g) Any other action of the Department which constitutes the consummation of the Department's decision-making process and is determinative of a person's rights or obligations.

1834.3 A person aggrieved by an action of the Department shall file a written appeal with OAH within the following time period:

(a) Within fifteen (15) calendar days of service of the notice of the action; or

(b) Within another period of time, if expressly provided in a section of this chapter governing a particular Department action.

1834.4 Notwithstanding another provision of this section, the Department may toll a period for filing an administrative appeal with OAH if it does so explicitly in writing before the period expires.

1834.5 OAH shall:

(a) Resolve an appeal or Notice of Infraction by:

(1) Affirming, modifying, or setting aside the Department's action complained of, in whole or in part;

(2) Remanding for Department action or further proceedings, consistent with OAH's order; or

(3) Providing such other relief as the governing statutes, regulations, and rules support;

(b) Act with the same jurisdiction, power, and authority as the Department may have for the matter currently before OAH; and

(c) By its final decision render a final agency action which will be subject to judicial review.

1834.6 The filing of an administrative appeal shall not in itself stay enforcement of an action, except that a person may request a stay according to the rules of OAH.

1834.7 The burden of proof in an appeal of an action of the Department shall be allocated to the person who appeals the action, except the Department shall bear the ultimate burden of proof when it denies a right.

1834.8 The burden of production in an appeal of an action of the Department shall be allocated to the person who appeals the action, except that it shall be allocated:

(a) To the Department when a party challenges the Department's suspension, revocation, or termination of a:

(1) Permit; or

(2) Other right;

(b) To the party who asserts an affirmative defense; and

(c) To the party who asserts an exception to the requirements or prohibitions of a statute or rule.

1834.9 The final OAH decision on an administrative appeal shall thereafter constitute the final, reviewable action of the Department, and shall be subject to the applicable statutes and rules of judicial review for OAH final orders.

1834.10 Nothing in this chapter shall be interpreted to:

(a) Provide that a filing of a petition for judicial review stays enforcement of an action; or

(b) Prohibit a person from requesting a stay according to the rules of the court.

1899 DEFINITIONS

1899.1 When used in this chapter, the following terms shall have the meanings ascribed (definitions that are codified in the relevant Acts are indicated as [Statutory], and are reprinted below for regulatory efficiency):

Abandonment - The act of properly sealing a well.

Annulus - The space between two cylindrical objects one of which surrounds the other, such as the space between a drill hole and a well casing pipe or between two well casings.

Aquifer - A geologic unit or formation that is water bearing and yields water.

Aquifer cross-contamination - A hydraulic connection between two aquifers that allows contamination to move from one aquifer to another.

ASTM - American Society for Testing Materials.

Casing - The pipe or tubing, constructed of specific materials with specified dimensions and weights, which is installed in a borehole during or after completion of a well, to prevent formation material from entering the well, and to prevent entry of undesirable substances into the well.

Closed-loop ground source heat pump system - A ground source heat pump system that utilizes closed-loop ground source heat pump wells.

Closed-loop ground source heat pump well - A well in which fluid is circulated in a continuous closed-loop fluid system, installed beneath the surface of the earth or in a medium where the system can obtain sufficient cooling or heat exchange.

Confined aquifer - An aquifer bounded above and below by confining units.

Confining unit - A body of impermeable or distinctly less permeable material above or below an aquifer.

Consolidated formation - Any geologic formation in which the earth materials have become firm and coherent through natural rock forming processes.

Contaminant - A biological, chemical, physical, or radiological material that poses a hazard to public health and safety or the environment, or interferes with a designated or beneficial use of the District of Columbia's waters.

DCRA - District of Columbia Department of Consumer and Regulatory Affairs.

Department - District Department of the Environment.

Department regulatory action - A Department action(s), including remedial or removal actions, performed under the Voluntary Remedial Action Program, pursuant to Section 6213 of Title 20 of the District of Columbia Municipal Regulations (DCMR); the District of Columbia Underground Storage Tank Management Act of 1990, as amended, D.C. Official Code §§ 8-113.01 *et seq.*, and its implementing regulations in Chapters 55-70 of Title 20 DCMR; the Voluntary Cleanup Program, pursuant to D.C. Official Code §§ 8-633.01 *et seq.*; or the District of Columbia Brownfield Revitalization Amendment Act of 2000, as amended; D.C. Official Code §§ 8-631 *et seq.*

Derived waste - Any unwanted, or discarded material, solid, liquid, or gas, that is derived from well construction, operations, maintenance, and abandonment activities including drill cuttings, drilling fluids, mud slurries, or well decontamination, development or purge waters.

Dewatering well - A well used to lower groundwater levels for construction such as for footings, sewer lines, building foundations, elevator shafts, or parking garages.

Discharge - spilling, leaking, releasing, pumping, pouring, emitting, emptying, or dumping of any pollutant or hazardous substance, including a discharge from a storm sewer, into or so that it may enter District of Columbia waters. [Statutory]

District - The District of Columbia. [Statutory]

Domestic supply well - A water supply well used for potable water supply purposes, including drinking, bathing, and cooking.

Drill cuttings - Any material, typically solids, removed from a borehole during drilling activities.

Drilling fluid - Water or air-based fluid used in a well drilling operation.

EPA - United States Environmental Protection Agency.

Filter pack - Clean, well-rounded, smooth, uniform sand or gravel, which is placed in the annulus of the well between the borehole wall and the well screen to prevent formation material from entering the well.

Floodplain - a relatively flat or low land area which is subject to partial or complete inundation from an adjoining or nearby stream, river, or watercourse; or any area subject to the usual and rapid accumulation of surface waters from any source; as depicted in the Flood Insurance Rate Map and Flood Insurance Study for the District prepared by the Federal Emergency Management Agency.

Formation - A distinct assemblage of earth materials, consolidated or unconsolidated, grouped together into a unit that is convenient for description or mapping.

Gravel - Any loose rock that is larger than two millimeters (2 mm).

Ground freeze well – A well constructed for the installation of subsurface freeze pipes designed to freeze the surrounding soil and groundwater to increase their combined strength and create an impervious strata; ground freezing is typically used for construction of shafts, deep excavations, tunnels, groundwater control, structural underpinning, and containment of hazardous waste.

Ground source heat pump system - A mechanical system for heating and cooling that utilizes the naturally occurring, ambient ground temperature and the transfer of thermal energy to or from the earth.

Groundwater - Underground water, except for water in pipes, tanks, and other containers created or set up by people.

Grout - Any stable, impervious, bonding material reasonably free of shrinkage which is capable of providing a water-tight seal in the annular spaces of a well.

Hazardous Substance - Any toxic pollutant referenced in or designated in or pursuant to §307(a) of the Federal Water Pollution Control Act; any substance designated pursuant to §311(b)(2)(A) of the Federal Water Pollution Control Act; or any hazardous waste having the characteristics of those identified under or listed pursuant to the District of Columbia Hazardous Waste Management Act of 1977, as amended.

Hazardous waste - Any waste or combination of wastes of a solid, liquid, contained gaseous, or semisolid form which, because of its quantity, concentration, or physical, chemical, or infectious characteristics may cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed. Such wastes include, but are not limited to, those which are toxic, carcinogenic, flammable, irritants, strong sensitizers, or which generate pressure through decomposition, heat or other means, as well as containers and receptacles previously used in the transportation, storage, use or application of the substances described as a hazardous waste.

Industrial supply well - A non-potable water supply well used to supply water to an industrial or commercial facility for use in the production of goods and services.

Infiltration test - Any method used to measure the rate of stormwater as it moves vertically through the soil profile.

Infiltration/Exfiltration well - Below ground surface device primarily used to detain stormwater runoff before allowing it to infiltrate the device's sidewalls and bottom prior to treatment and release to the surrounding soil.

Injection well - A well through which liquid or gas is injected, under pressure or gravity flow, into the subsurface for the purpose of maintaining formation pressure, recharging the aquifer, or the treatment of contaminants.

Installation - Any structure, equipment, facility, or appurtenances thereto, operation, or activity which may be a source of pollution.

Irrigation supply well - A non-potable water supply well used for irrigating land, crops, or other plants other than household lawns and gardens.

Licensed well driller - A person licensed by a state or federal district to be responsible for on-site work relating to the drilling, construction, development, testing, maintenance or abandonment of a well; well rehabilitation and repair; and the installation, modification, or repair of a well pump or related equipment.

Lot - a lot recorded on the records of the Surveyor of the District of Columbia.

Maintenance - Any action undertaken to prevent the deterioration of a well from its original permitted and registered specifications or any action undertaken to restore a well to its original permitted and registered specifications, enabling a well to operate according to its intended use.

Modification - The alteration or rework of a well involving a material change in the original permitted design or construction, including but not limited to deepening, increasing the diameter, casing, perforating, and screen removal.

Monitoring well - A well installed for the sole purpose of assessing subsurface conditions and collecting groundwater samples.

Multi-layer aquifer – An aquifer containing unconsolidated units of varying permeability or zones bound by confining units.

Non-point source - any source from which pollutants are or may be discharged other than a point source.

Observation well - A well used for the sole purpose of determining groundwater levels.

Open-loop ground source heat pump system - A ground source heat pump system that withdraws groundwater from a well for use in the heat exchange unit of the system and then discharges the groundwater to the aquifer via a return well or standing column well or to a surface water body.

Person - Any individual, including any owner or operator as defined in this chapter; partnership; corporation, including a government corporation; trust association; firm; joint stock company; organization; commission; the District or federal government; or any other entity. [Statutory]

Piezometer - A non-pumping, non-potable well used for measuring ground water levels or potentiometric surface.

Point source - Any discrete source of quantifiable pollutants, including but not limited to a municipal treatment facility discharge, residential, commercial

or industrial waste discharge or a combined sewer overflow; or any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. [Statutory]

Pollutant - Any substance which may alter or interfere with the restoration or maintenance of the chemical, physical, radiological, and biological integrity of the waters of the District; or any dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemicals, chemical wastes, hazardous wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, oil, gasoline and related petroleum products, and industrial, municipal, and agricultural wastes. [Statutory]

Potable - Water that is free from impurities in amounts sufficient to cause disease or harmful physiological effects and that conforms with the maximum contaminant levels as listed in 40 C.F.R. Part 141, Subpart G.

Potentiometric surface - A surface representing the hydraulic head of ground water, represented by the water-table altitude in an unconfined aquifer or by the altitude to which water will rise in a properly constructed well in a confined aquifer.

Pressure grouting - A process by which grout is confined within the borehole or casing and by which sufficient pressure is applied to drive the grout into and within the annular space or zone to be grouted.

Property owner - A person listed as the legal titleholder of record of real property.

Purge - The act of removing groundwater from a well to collect groundwater samples that are representative of aquifer conditions, commonly accomplished by using a pump, prior to collecting accurate, reproducible, and representative groundwater samples for field and/or laboratory analysis.

Recognized environmental condition - The presence or likely presence of any hazardous substances or petroleum products on a property under conditions that indicate an existing release, a past release, or a material threat of a release of any hazardous substances or petroleum products into structures on the property or into the ground, ground water, or surface water of the property. The term includes hazardous substances or petroleum products even under conditions in compliance with laws and regulations.

Recovery well - A well used to withdraw groundwater for disposal or treatment of contaminants contained within the groundwater.

Remediation - An activity performed with the intent to recover, dispose of, clean up, or treat pollutants or contaminants.

Sanitary protection - Any means of protecting groundwater from contaminants from entering a well.

Separate stormwater sewer - A system of pipes or other conduits, including road drainage systems, catch basins, curbs, gutters, ditches, man-made channels, and storm drains, used to convey untreated stormwater directly to waters of the District and not part of a combined or sanitary sewer systems.

Site - A tract, lot, or parcel of land, or a combination of tracts, lots, or parcels of land for which development is undertaken as part of a unit, sub-division, or project.

Sodium-based bentonite - A plastic, colloidal clay derived from volcanic ash consisting of at least eighty-five percent (85%) montmorillonite, with an ability to absorb fresh water and swell in volume.

Soil Boring - A well constructed without the installation of a well casing, well screen, or the placement of other construction materials down hole, for the purpose of determining the physical or chemical characteristics of soil or groundwater.

Standard Dimension Ratio (SDR) - The quotient obtained when the outside diameter of thermoplastic well casing is divided by the wall thickness.

Stormwater Management Guidebook - The current manual published by the Department containing design criteria, specifications, and equations to be used for planning, design, and construction, operations, and maintenance of stormwater and best management practices.

Surface water - All of the rivers, lakes, ponds, wetlands, inland waters, streams, and all other water and water courses within the jurisdiction of the District of Columbia.

Temporary well casing - A durable pipe placed or driven into a borehole to maintain an open annular space around the permanent casing during construction of a well.

Unconfined aquifer - An aquifer in which no relatively impermeable layer exists between the water table and the ground surface and an aquifer in which the water surface is at atmospheric pressure.

Unconsolidated formation or aquifer - Any loosely cemented or poorly indurated earth material including such materials as uncompacted gravel, sand, silt and clay. Alluvium, soil, and overburden are terms frequently used to describe such formations.

Waters of the District - Flowing and still bodies of water, whether artificial or natural, whether underground or on land, so long as in the District of Columbia, but excludes water on private property prevented from reaching underground or land watercourses, and also excludes water in closed collection or distribution systems. [Statutory]

Water Quality or Quality of Water – Refers to the chemical, physical, biological, and radiological characteristics of water.

Water supply well - A potable or non-potable well used to supply water for industrial, irrigation, or domestic purposes.

Well - Any test hole, shaft, or soil excavation created by any means including, but not limited to, drilling, coring, boring, washing, driving, digging, or jetting, for purposes including, but not limited to, locating, testing, diverting, artificially recharging, or withdrawing fluids, or for the purpose of underground injection. [Statutory]

Well casing - A pipe placed in a borehole to provide unobstructed access to the subsurface or to provide protection of groundwater during and after well installation, or both. Inner well casing (also known as riser pipe) which extends from the well screen to or above the ground surface provides access to groundwater from the surface and outer well casing is used to prevent migration of contaminants from one aquifer to another.

Well construction building permit - A building permit issued by DCRA with a well construction work plan approved by the Department.

Well development - The act of removing fine particulate matter or fluids used during the construction of a well to clear the well and establish a good hydraulic connection with the surrounding aquifer by any means, including surging, jetting, overpumping, and bailing.

Well owner - A person who has the legal right to construct a well for personal use or for the use of another person. [Statutory]

Well screen - A structural device which supports the well excavation, allows entrance of sub-surface fluids into a well or exit from a recharge well, and which acts as a filter to keep sediment from entering a well.

Wetland - A marsh, swamp or other area periodically inundated by tides or having saturated soil conditions for prolonged periods of time and capable of supporting aquatic vegetation. [Statutory]

The proposed regulations are available for viewing at http://ddoe.dc.gov. Additionally, a copy of these proposed regulations will be on file for viewing at the Martin Luther King, Jr. Library, 901 G St., NW, Washington, D.C. 20001 during normal business hours. The public may also present

its views on the proposed regulations to establish standards and procedures for the construction, maintenance, and abandonment of wells at a public hearing. Notice of this public hearing will be published in this *D.C. Register* and on DDOE's website.

All persons desiring to comment on the proposed regulations should file comments in writing not later than sixty (60) days after the publication of this notice in the *D.C. Register*. Comments should identify the commenter and be clearly marked "DDOE Well Regulations, Proposed Rule Comments." Comments may be (1) mailed or hand-delivered to DDOE, Water Quality Division, 1200 First Street NE, 5th Floor, Washington, D.C. 20001, Attention: DDOE Well Regulations, or (2) sent by e-mail to DDOE.WellRegulations@dc.gov, with the subject indicated as "DDOE Well Regulations, Proposed Rule Comments."

THE DISTRICT OF COLUMBIA HOUSING AUTHORITY

NOTICE OF PROPOSED RULEMAKING

The Board of Commissioners of the District of Columbia Housing Authority (DCHA), pursuant to the District of Columbia Housing Authority Act of 1999, effective May 9, 2000 (D.C. Law 13-105; D.C. Official Code § 6-203 (2012 Repl.)), hereby gives notice of its intent to adopt the following proposed amendments to Chapter 61 (Public Housing: Admission and Recertification) of Title 14 (Housing) of the District of Columbia Municipal Regulations (DCMR), in not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*.

The purpose of the proposed amendments is to create a site-based waiting list and improve the overall management and administration of DCHA's waiting list(s).

Chapter 61, PUBLIC HOUSING: ADMISSION AND RECERTIFICATION, of Title 14 DCMR, HOUSING, is amended as follows:

Section 6100, INTRODUCTION TO THE APPLICATION PROCESS, is amended to read as follows:

6100 INTRODUCTION TO THE APPLICATION PROCESS

6100.1 The District of Columbia Housing Authority (DCHA) owns and operates public housing for low to moderate income families in the District of Columbia and administers the Housing Choice Voucher and Moderate Rehabilitation Programs.

6100.2 In order to provide subsidized housing, DCHA shall maintain a waiting list(s) of all families seeking housing assistance from one of the housing programs owned, operated or administered by DCHA. The waiting list(s) shall open for new Applicants when DCHA has exhausted existing Applicants on its current waiting list(s) for a specific property bedroom size and/or unit type.

6100.3 When DCHA opens its waiting lists(s) pursuant to Section 6104, DCHA shall notify the public of its method for taking applications. DCHA may take applications in person, via US mail, by telephone, on-line or through other methods as determined by DCHA.

6100.4 DCHA shall maintain its waiting list(s) in accordance with the provisions of this chapter.

Section 6101, APPLICATION, is amended to read as follows:

6101 APPLICATION FOR ASSISTANCE

6101.1 DCHA maintains the following waiting lists:

(a) Public Housing;

(1) First Available Waiting List; and

(2) Site-based Waiting List;

(b) Housing Choice Voucher Program; and

(c) Moderate Rehabilitation Program.

6101.2 Each Applicant seeking public housing assistance owned, operated or administered by DCHA, or rental assistance through the Housing Choice Voucher and Moderate Rehabilitation Programs must submit a completed application with DCHA.

6101.3 Applications must be returned to DCHA via the methods as determined by DCHA at the time of the opening of the waiting list(s) pursuant to Section 6104.

6101.4 An Applicant may apply for one, some or all of the programs that DCHA owns and operates or administers.

6101.5 If an Applicant applies for public housing, the Applicant shall select to be on the First Available Waiting List or the Site-Based Waiting list.

6101.6 If an Applicant chooses to be on the First Available Waiting List then his or her application shall be considered for a vacancy at any public housing property.

6101.7 If an Applicant chooses to be on the Site-Based Waiting List, Applicants shall select up to three (3) individual public housing developments where they wish to reside.

6101.8 As part of the Housing Choice Voucher and Moderate Rehabilitation Programs application process, Applicants shall be given the opportunity to select the Housing Choice Voucher Program and/or the Moderate Rehabilitation Program for housing assistance.

6101.9 A review of all applications shall be conducted by DCHA based on the data contained in the application. This review is limited to determining the completeness of the application.

6101.10 Only completed applications will be accepted by DCHA for processing.

6101.11 If DCHA determines that an application is incomplete, DCHA shall return the incomplete application to the Applicant to the address listed on the application and advise the Applicant that the application is incomplete and what missing information is required to complete the application.

6101.12 Once the completed application is submitted to DCHA, the Applicant shall receive a confirmation of receipt either electronically, in person or via first class mail.

6101.13 DCHA shall record the date and time that the completed application was received.

6101.14 Applicants shall be placed on the DCHA waiting list(s) based on date and time of their completed application and any program preferences selected on the application pursuant to Sections 6102, 6103, and 6111 of this chapter.

6101.15 A person with a disability may request a reasonable accommodation at any time during the application process pursuant to Chapter 74 of Title 14.

Section 6102, APPLICATION REVIEW, is amended to read as follows:

6102 APPLICATION PROCESS AND REVIEW

6102.1 Upon receipt of a completed application, DCHA shall place the Applicant on the selected waiting list(s) based on the date and time that the application was received, the type and unit size required based on occupancy guidelines and applicable Special Programs and/or allocations, and any preference(s) established by DCHA.

6102.2 Each Applicant shall be assigned a unique Client Identification Number (CIN) for identification purposes.

6102.3 Placement on DCHA's waiting list(s) does not guarantee the family admission to public housing, the Housing Choice Voucher, or the Moderate Rehabilitation Program.

6102.4 Periodically, as vacancies occur or are anticipated at DCHA owned and operated public housing developments or as Housing Choice Vouchers become available or units become available in the Moderate Rehabilitation Program, Applicants near the top of the applicable waiting list(s) shall be interviewed in order to obtain and verify any and all information necessary to make an

eligibility determination in accordance with Sections 6106, 6107, 6108, and 6109.

6102.5 Public housing and Moderate Rehabilitation Applicants who have been deemed eligible shall be placed in the selection pool.

6102.6 DCHA shall review the application for any current debt owed to any public housing authority or Housing Choice Voucher programs via the HUD Enterprise Income Verification system "EIV" or any other income or debt verification source.

6102.7 If a current debt is found, DCHA shall notify the Applicant of the debt amount, to whom it is owed and the consequences of an unresolved debt at the time of the eligibility determination.

6102.8 If the debt is unresolved at the time of the eligibility determination the Applicant may be deemed ineligible.

6102.9 The Applicant shall be allowed to submit mitigating circumstances to demonstrate an Applicant's suitability to receive housing assistance.

6102.10 Applicants in the public housing selection pool shall be offered housing units that meet their occupancy and accessibility needs as the appropriately sized units become available, pursuant to Sections 6112 and 6113.

6102.11 Eligible Applicants for the Housing Choice Voucher Program are offered a voucher as vouchers become available.

6102.12 Eligible Applicants for the Moderate Rehabilitation Program shall be placed in a selection pool and offered a unit as units become available.

6102.13 The determination of eligibility and the process for the ultimate determination of ineligibility, including the informal conference and the option to request a review by an independent third party reviewer, are found in Section 6107 of this chapter.

Section 6103, WAITING LISTS, is amended to read as follows:

6103 MAINTENANCE OF THE WAITING LIST(S)

6103.1 The waiting list(s) shall be maintained to ensure that Applicants are referred to appropriate developments, unit types (for example for public housing, Mixed Population, General Population or accessible) and sizes or housing programs.

6103.2 Applicants are responsible for updating their application when there are changes in the family composition, income, address, telephone number, and acceptance of housing assistance. Failure to update the application timely may result in a delay in housing or the Applicant being withdrawn from the waiting list(s).

6103.3 DCHA shall update its waiting list(s) periodically and to meet the needs of those requiring housing assistance as needed.

(a) The request for an update to a housing application shall provide a deadline by which the Applicant must respond and shall state that failure to respond shall result in the Applicant's being withdrawn from the waiting list(s).

(b) Applicants must complete an update form electronically, by telephone or mail, or by any other means established by DCHA within the time frame specified in the request for update package. Once the update is received the appropriate changes shall be made to the Applicant's file and the Applicant shall maintain their application date and time.

6103.4 Applicants who do not return the completed update form within the specified time frame shall have their waiting list status changed to inactive:

(a) An Applicant whose status is inactive will not be actively considered for DCHA housing assistance.

(b) If an inactive Applicant submits a completed update form at any time after the expiration of the specified update time frame, then the Applicant shall be restored to an active status on the waiting list based on the Applicant's original application date and time provided that the Applicant was deemed inactive after October 1, 2003.

6103.5 Changes in an Applicant's circumstances while on any of DCHA's waiting list(s) may affect the family's qualification for a particular development, bedroom size or entitlement to a preference. When an Applicant reports a change that affects their placement on the waiting list(s), the waiting list(s) shall be updated accordingly.

6103.6 When selecting Applicants from the waiting list(s) for public housing, DCHA shall use the Applicant's family composition and any reasonable accommodations requests to determine the appropriate bedroom size and unit characteristics.

6103.7 Applicants on the Waiting List who have requested a fully accessible unit, a

unit with accessible features of any other reasonable accommodation through the reasonable accommodation process must meet all requirements of the accommodation prior to being deemed eligible. All reasonable accommodations shall be verified and approved by the Office of the ADA/504 Coordinator prior to a unit offer.

6103.8 Applicant families with members with disabilities who have verified and approved reasonable accommodations for fully accessible units or units with accessible features shall receive priority for those units that are designated as fully accessible units or designed with specific accessibility features.

6103.9 The only other system for assigning priority to eligible public housing Applicants is date and time of application, unless otherwise specified in this chapter including Sections 6111, 6112, and 6113 of this chapter.

6103.10 Applicant's housed in public housing, Housing Choice Voucher or Moderate Rehabilitation programs do not qualify for the "homeless" preference category and shall have the preference removed.

6103. 11 SELECTION FOR PUBLIC HOUSING

(a) Applicants seeking housing assistance in the public housing program shall choose either the Public Housing First Available Unit Waiting list or the Site-based Waiting list.

(b) Applicants shall not be placed on the First Available Unit waiting list and the Site-based Waiting List at the same time. Applicants who select both shall be listed only on the Site-based Waiting lists that the Applicant selected.

(c) Applicants shall only be listed at developments that have bedroom size and unit characteristics for which the family is authorized to occupy based on family composition and any reasonable accommodation requests.

(d) Applicants may select up to three (3) developments on the Site-based Waiting list. An Applicant who has selected multiple developments on the Site-based Waiting List, and has the earliest application date and time, shall be offered the first available unit of their site(s) selection.

(e) Applicants who do not select developments on the Site-based waiting list or the First Available Waiting Unit Waiting List shall be placed automatically on the First Available Unit Waiting list.

(f) An Applicant who has selected the Site-based Waiting List may not change his/her development selection after the application is received unless there is a change in their family circumstances that would require a change in bedroom size or unit characteristics. However, if the site selected can accommodate the required change DCHA shall not approve a change in the site selection.

(g) An Applicant on the Site-based Waiting List may elect to voluntarily remove their placement from the Site-based Waiting List to the First Available Waiting List and maintain their original application date and time.

(h) Any Applicant on the First Available Waiting List may not change their selection from the First Available Waiting List to the Site-Based Waiting List.

Section 6111, TENANT ASSIGNMENT, is amended to read as follows:

6111 TENANT ASSIGNMENT

6111.1 When an Applicant has been deemed eligible and a unit has become available for offer, DCHA shall review the Applicant's file to determine whether the information is current and correct. Information shall be considered current if it was verified by DCHA within no more than one hundred eighty (180) days prior to tenant assignment.

6111.2 If updated information is required, the Applicant shall be required to submit information in accordance with Section 6106 of this chapter before a unit is offered.

6111.3 Eligible Applicants shall be offered an appropriate unit, when available, consistent with the priorities and requirements of this title.

6111.4 Unit offers shall be made to Applicants with the earlier application date and time regardless of whether the Applicant selected the First Available Waiting List or a Site-Based Waiting List for the particular site selected.

6111.5 Suitable vacancies arising at a given time at any location shall be offered to the selected Applicant first in sequence at the time of vacancy; provided, that referrals may be made out of sequence in the following situations:

(a) For Applicants with a preference or in the emergency category, assignments shall be made to units in sequence based upon the date and time of application, as indicated in Section 6105;

(b) For low income families, pursuant to Section 6105;

(c) For disabled families, pursuant to Section 6112; and

(d) For comprehensive modernization properties and new developments, pursuant to Section 6113.

6111.6 Each Applicant shall be assigned an appropriate unit in sequence based upon the date and time of application, suitable type or size or unit, preference, consistent with the objectives of Title VI of the Civil Rights Act of 1964, and applicable HUD regulations and requirements.

6111.7 SELECTION FROM THE FIRST AVAILABLE WAITING LIST

(a) Applicants selecting a First Available Unit shall be offered the next available unit that matches the family bedroom size and required needs regardless of the development pursuant to this section.

(b) When an Applicant is offered a unit from the First Available Unit waiting list, DCHA shall send the Applicant an offer letter and identify the development where the unit is available. The Applicant must contact the property and view the unit within ten (10) calendar days of the offer letter.

(c) If the Applicant fails to show up at the appointment or refuses the unit offer, the Applicant shall be offered one (1) additional unit for selection. If the Applicant refuses the second unit offer, the Applicant shall be removed from the public housing waiting list(s) but shall remain on the Housing Choice Voucher Program and Moderate Rehabilitation Program waiting lists.

(d) If an Applicant fails to show up at an appointment or refuses a unit offer, DCHA shall offer the unit to the next Applicant on the public housing waiting list(s) in accordance with this section.

(e) If the Applicant accepts an offered unit, the Applicant shall be removed from all public housing waiting lists but shall remain on the Housing Choice Voucher and Moderate Rehabilitation Waiting Lists.

6111.8 SELECTION FROM THE SITE-BASED WAITING LIST

(a) Applicants selecting a Site-Based Waiting List unit shall be offered the next available unit that matches the family bedroom size and unit

characteristics pursuant to this section.

(b) When an Applicant is offered a unit from the Site-Based Waiting List, DCHA shall send the Applicant an offer letter and identify the development where the unit is available. The Applicant must contact the property and view the unit within ten (10) calendar days of the offer letter.

(c) If the Applicant fails to show up at the appointment or refuses the unit offer, the Applicant shall be offered one (1) additional unit for selection at any of their selected sites when their name reaches the top of the waiting list(s). If the Applicant refuses the second unit offer, the Applicant shall be removed from all DCHA public housing waiting list(s).

(d) If an Applicant fails to show up at an appointment or refuses a unit offer, DCHA shall offer the unit to the next Applicant on the public housing waiting list(s) in accordance with this section.

(e) If the Applicant accepts an offered unit, the Applicant shall be removed from all public housing waiting lists but shall remain on the Housing Choice Voucher and Moderate Rehabilitation Waiting Lists.

6111.9 If the Applicant is willing to accept the unit offered but is unable to move at the time of the offer, and presents clear evidence to DCHA's satisfaction of his or her inability to move, refusal of the offer shall not count as one of the number of allowable refusals permitted the Applicant before removing the Applicant from the public housing waiting list(s).

6111.10 If the Applicant presents evidence to the satisfaction of DCHA that acceptance of a given offer of a suitable vacancy may result in undue hardship not related to considerations of race, sex, color, or national origin, such as inaccessibility to employment, children's day care, refusal of such an offer shall not be counted as one of the number of allowable refusals permitted an applicant before removing the Applicant from the public housing waiting list(s).

6111.11 If a non-disabled family refuses to accept a vacancy in an accessible unit, the refusal shall not be counted as one of the allowable refusals.

6111.12 The following requirements shall be applicable to any offered vacancies:

(a) The unit offer shall be in writing and shall include the following:

(1) Identification of the property;

(2) Address and phone number of the property management office;

(3) The bedroom size and unit characteristics; and

(4) The time to view the unit.

(b) The Applicant must contact the property in accordance with this section; and

(c) After the Applicant has viewed the offered unit, the Applicant shall accept or reject the unit at that time.

6111.13 Applicants with preferences who decline a unit for reasons other than those allowed in this section shall be removed from the public housing waiting list(s).

6111.14 Applicants with preferences who decline a unit for reasons other than those allowed in this chapter shall lose their preference provided in Subsection 6105.2, and shall be placed on the regular waiting list in accordance with their date and time of application.

6111.15 SELECTION FROM THE HOUSING CHOICE VOUCHER PROGRAM WAITING LIST

(a) Applicants seeking a Housing Choice Voucher shall be placed on the Housing Choice Voucher Program waiting list according to the date and time of the application and any application preferences selected by the Applicant on the application pursuant to Chapter 76 of this title.

(b) When selecting Applicants from the waiting list for a Housing Choice Voucher, Applicants who have been deemed eligible shall be issued a voucher pursuant to Chapter 76 of this title.

6111.16 SELECTION FROM THE MODERATE REHABILITATION PROGRAM WAITING LIST

(a) Applicants seeking admission to the Moderate Rehabilitation Program shall be placed on the Moderate Rehabilitation Program waiting list according to the date and time of the application, and any application preferences selected by the Applicant on the application pursuant to Chapter 76 of this title.

(b) When selecting Applicants from the waiting list for the Moderate Rehabilitation Program, Applicants who have been deemed eligible

shall be referred to the next available unit based on the family composition, pursuant Chapter 76 of this title.

Section 6099, DEFINITIONS, is amended to include the following definitions:

First Available Unit - An Applicant with an application date earlier than an Applicant on a Site-Based Waiting List at a development with an available unit shall be selected from the waiting list for a unit at that property. For example, an Applicant with an application date of March 1, 2008 who has selected the "1st Available Unit Option" shall be selected from the waiting list before any Applicant on the Site-based Waiting List with an application date and time after March 1, 2008. (This assumes that the selection is for the appropriate bedroom size and any other relevant unit features).

Site-Based Waiting Lists - An Applicant who has applied to be placed on the Site-Based Waiting List at multiple developments will be selected from those respective lists by date and time of application. (This assumes that the selection is for the appropriate bedroom size and any other relevant unit features)

Complete Applications – A complete application shall include the Applicant's name, date of birth, social security number, address, preference, income, and waiting list(s) selection.

Interested persons are encouraged to submit comments regarding this Proposed Rulemaking to DCHA's Office of General Counsel. Copies of this Proposed Rulemaking can be obtained at www.dcregs.gov, or by contacting Karen Harris at the Office of the General Counsel, 1133 North Capitol Street, NE, Suite 210, Washington, DC 20002-7599 or via telephone at (202) 535-2835. All communications on this subject matter must refer to the above referenced title and must include the phrase "Comment to Proposed Rulemaking" in the subject line. There are two methods of submitting Public Comments:

1. Submission of comments by mail: Comments may be submitted by mail to the Office of the General Counsel, 1133 North Capitol Street, NE, Suite 210, Washington, DC 20002-7599.

2. Electronic Submission of comments: Comments may be submitted electronically by submitting comments to Karen Harris at: PublicationComments@dchousing.org.

3. No facsimile will be accepted.

Comments Due Date: June 15, 2015

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The Director of the Department of Consumer and Regulatory Affairs, pursuant to the authority set forth in Sections 2 and 3 of the Streamlining Regulation Act of 2003, effective October 28, 2003 (D.C. Law 15-38; D.C. Official Code §§ 47-2851.20 and 47-2836(b) (2012 Repl.)) hereby gives notice of the intent to adopt of amendments to Chapter 12 (Sightseeing Tour Companies and Guides) of Title 19 (Amusements, Parks, and Recreation) of the District of Columbia Municipal Regulations (DCMR).

This emergency rulemaking is necessary to formally eliminate content-based testing requirements for tour guides and to amend the definition of tour guide in light of the United States Court of Appeals' decision in *Edwards v. District of Columbia*, *755 F.3d 996* (D.C. Cir. 2014).

The emergency rules were adopted on April 21, 2015 and became effective on that date. They shall remain in effect for up to one hundred and twenty (120) days or until August 19, 2015, unless earlier superseded by publication of a Notice of Final Rulemaking in the *D.C. Register*.

The Director also gives notice of intent to take final rulemaking action to adopt these rules in not less than thirty (30) days after the date of publication of this notice in the *D.C. Register*.

Chapter 12, SIGHTSEEING TOUR COMPANIES AND GUIDES, of Title 19 DCMR, AMUSEMENTS, PARKS, AND RECREATION, is amended as follows:

Section 1200 is amended to read as follows:

1200 GENERAL DEFINITIONS

1200.1 Whenever used in this chapter, the term "tour guide" or "sightseeing tour guide" shall mean any person who engages primarily in the business of guiding or directing people to any place or point of interest in the District.

1200.2 Whenever used in this chapter, the term "sightseeing tour company" shall mean a business that employs a sightseeing tour guide.

Section 1203 is amended by repealing Subsection 1203.3.

Section 1204 is amended to read as follows:

1204 REQUIREMENTS FOR SIGHTSEEING TOUR COMPANIES

1204.1 A sightseeing tour company licensee engaged in the operation of sightseeing tour vehicles in the District shall obtain the necessary approvals of the District

Department of Transportation, the District Department of Motor Vehicles, and the Washington Metropolitan Area Transit Commission.

1204.2 The approval of sightseeing tour vehicles required by § 1204.1 shall be evidenced by the display on each vehicle of the applicable license(s) or certificate(s) issued by the relevant government agencies.

1204.3 A vehicle operated by a licensed sightseeing tour company shall have at least one (1) licensed sightseeing tour guide on board the vehicle during its sightseeing tours in the District.

1204.4 Each sightseeing tour company shall ensure that its sightseeing tour vehicles comply with all District parking and traffic regulations.

1204.5 A sightseeing tour company licensee shall notify the Department within thirty (30) days after any change to the information provided on the application required by § 1202, including a change to the business address or telephone number of the licensee.

1204.6 The Director may, in connection with the consideration of a sightseeing tour company license application and from time to time during the license term, during regular business hours, require an applicant or licensee to make available to the Director, or the Director's agent, such information as the Director considers necessary to determine or verify whether the applicant or licensee has or retains the qualifications necessary for obtaining or retaining a license, or has violated or failed to comply with an applicable statute or regulation.

1204.7 Failure to make information available to the Director, failure to furnish to the Director information the Director is authorized to request by this chapter, or failure to furnish to the Director or to permit the Director to make copies of such records maintained by the applicant or licensee as the Director may specify, shall be grounds for denial, suspension, or revocation of a license.

All persons desiring to comment on these emergency and final regulations should submit comments in writing to Matt Orlins, Legislative and Public Affairs Officer, Department of Consumer and Regulatory Affairs, 1100 4th Street, S.W., 5th Floor, Washington, D.C. 20024, or by e-mail to matt.orlins@dc.gov, not later than thirty (30) days after publication of this notice in the *D.C. Register*. Copies of the proposed rules can be obtained from the address listed above. A copy fee of one dollar ($1) will be charged for each copy of the proposed rulemaking requested. Free copies are available on the DCRA website at dcra.dc.gov by going to the "About DCRA" tab, clicking "News Room", and clicking on "Rulemaking."

DEPARTMENT OF HEALTH CARE FINANCE

NOTICE OF THIRD 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. 774; 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, on an emergency basis, of an amendment to Section 1916, entitled "In-Home Supports," of Chapter 19 (Home and Community-Based Services Waiver for Individuals with Intellectual and Developmental Disabilities) of Title 29 (Public Welfare) of the District of Columbia Municipal Regulations (DCMR).

These third emergency and proposed rules establish standards governing reimbursement of in-home supports provided to participants in the Home and Community-Based Services Waiver 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 (Council) and renewed by the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, for a five (5) year period beginning November 20, 2012. An amendment to the ID/DD Waiver was approved by the Council through the Medicaid Assistance Program Emergency Amendment Act of 2014, signed July 14, 2014 (D.C. Act 20-377; 61 DCR 007598 (Aug. 1, 2014)).

In-home supports services are essential to ensuring that persons enrolled in the ID/DD Waiver continue to receive services and supports in the comfort of their own homes or family homes. The current Notice of Final Rulemaking for 29 DCMR § 1916 (In-Home Supports Services) was published in the *D.C. Register* on March 21, 2014, at 61 DCR 002464. A Notice of Emergency and Proposed Rulemaking was published in the *D.C. Register* on October 3, 2014, at 61 DCR 010388, amending the previously published final rules by increasing the rates, using the approved rate methodology, to reflect the increase in the D.C. Living Wage 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.)). DHCF received and considered comments in response to the first emergency and proposed rulemaking and promulgated a Notice of Second Emergency and Proposed Rulemaking, which was published in the *D.C. Register* on March 20, 2015, at 62 DCR 003436. The second emergency and proposed rules amended the previously published emergency and proposed rules by: (1) increasing the rates, using the approved rate methodology, to reflect the anticipated increase in the D.C. Living Wage for 2015 to comply with the Living Wage Act of 2006; (2) changing language in Subsection 1916.8(a)(1) to clarify that providers of in-home supports services shall "provide evidence" of the community activities a person attends; (3) clarifying that daily progress notes should provide information to incoming staff about any follow-up needed at end of a shift; (4) clarifying language regarding the maximum daily hours and calendar year timeframe for in-home supports; and (5) adding a new subsection to provide

clarity on rates for in-home supports services if they are extended in the event of a temporary emergency. The second emergency and proposed rulemaking was adopted on January 7, 2015, became effective on that date, and will remain in effect until May 7, 2015. No comments were received. These third emergency and proposed rules further amend the previously published second emergency and proposed rules by: (1) clarifying words and/or phrases to reflect more person-centered language and to simplify interpretation of the rule; (2) clarifying service definitions; (3) requiring the use of Department of Disability Servcies (DDS)-approved person-centered thinking and discovery tools; (4) requiring that supports are aimed at skill building and include opportunities for community integration and competitive integrated employment; (5) adding requirements for the In-Home Supports Plan; (6) removing references to Shared Living services; and (7) adding that n-home supports can be provided with, but not at the same time as, Companion services.

Emergency action is necessary for the immediate preservation of the health, safety, and welfare of ID/DD Waiver participants who are in need of in-home support services. The ID/DD Waiver serves some of the District's most vulnerable residents. The cumulative changes include a rate increase that is necessary to ensure a stable workforce and provider base. In order to ensure that the person's health, safety, and welfare are not threatened, it is necessary that that these rules be published on an emergency basis.

The emergency rulemaking was adopted on May 4, 2015, but these rules shall become effective for services rendered on or after May 4, 2015, if the corresponding amendment to the ID/DD Waiver has been approved by CMS with an effective date of May 4, 2015, or on the effective date established by CMS in its approval of the corresponding ID/DD Waiver amendment, whichever is later. The emergency rules shall remain in effect for not longer than one hundred and twenty (120) days from the adoption date or until September 1, 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 1916, IN-HOME SUPPORTS SERVICES, of Chapter 19, HOME AND COMMUNITY-BASED SERVICES WAIVER FOR INDIVIDUALS WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, of Title 29 DCMR, PUBLIC WELFARE, is deleted in its entirety and amended to read as follows:

1916 IN-HOME SUPPORTS SERVICES

1916.1 The purpose of this section is to establish standards governing Medicaid eligibility for in-home supports services for persons enrolled in the Home and Community-Based Services Waiver for Individuals with Intellectual and Developmental Disabilities (Waiver), and to establish conditions of participation for providers of these services.

1916.2 In-home supports are services provided to people enrolled in the Waiver who have an assessed need for assistance with acquisition, retention or improvement in skills related to activities of daily living that are necessary to enable the person to

reside successfully at home in their community and participate in community activities based upon what is important to and for the person as documented in his or her Individual Support Plan (ISP) and reflected in his or her Person-Centered Thinking and Discovery tools. Services may be provided to people in the home or community, with the place of residence as the primary setting.

1916.3 To be eligible for reimbursement, in-home supports services shall be:

(a) Included in a person's ISP and Plan of Care and related to the person's ISP goals;

(b) Habilitative in nature; and

(c) Provided to a person living independently or with family or friends and not receiving other residential supports such as supported living, supported living with transportation, residential habilitation, or host home support services.

1916.4 In-home supports services include a combination of hands-on care, habilitative supports, skill development and assistance with activities of daily living. Supports provided shall be aimed at teaching the person to increase his or her skills and self-reliance.

1916.5 In-home supports eligible for reimbursement shall include the following:

(a) Training and support in activities of daily living and independent living skills;

(b) Support to enhance opportunities for meaningful adult activities and skills acquisition that support community integration and a person's independence, including management of financial and personal affairs and awareness of health and safety precaution;

(c) Support to enhance opportunities for community exploration aimed at discovery of new and emerging interests and preferences, including activities aimed at supporting the person to have one or more new relationships;

(d) Support to build community membership;

(e) Training on, and assistance in the monitoring of health, nutrition, and physical wellness;

(f) Implementation of a home therapy program under the direction of a licensed clinician;

(g) Training and support to coordinate or manage tasks outlined in the Health Care Management Plan, if applicable;

(h) Assistance in performing personal care, household, and homemaking tasks that are specific to the needs of the person, except that this may not comprise the entirety of the service;

(i) Assistance with developing the skills necessary to reduce or eliminate behavioral episodes by implementing a Behavioral Support Plan (BSP) or positive strategies;

(j) Opportunities for the person to seek employment and vocational supports to work in the community in a competitive and integrated setting;

(k) Assistance with the acquisition of new skills or maintenance of existing skills based on individualized preferences and goals identified in the In-Home Supports Plan, ISP, and Plan of Care; and

(l) Coordinating transportation to participate in community events consistent with this service.

1916.5 Each provider rendering in-home supports services shall:

(a) Be a Waiver provider agency; and

(b) Comply with Sections 1904 (Provider Qualifications) and 1905 (Provider Enrollment Process) of Chapter 19 of Title 29 DCMR.

1916.6 Each Direct Support Professional (DSP) rendering in-home supports services shall comply with Section 1906 (Requirements for Direct Support Professionals) of Chapter 19 of Title 29 DCMR.

1916.7 In-home support services shall be authorized in accordance with the following provider requirements:

(a) The Department on Disability Services (DDS) shall provide a written service authorization before the commencement of services;

(b) The service name and provider delivering services shall be identified in the ISP and Plan of Care;

(c) The ISP and Plan of Care shall document the amount and frequency of services to be received;

(d) The In-Home Supports Plan, ISP, and Plan of Care shall be submitted to and authorized by DDS annually or as needed; and

(e) The provider shall submit each quarterly review to the person's DDS Service Coordinator no later than seven (7) business days after the end of the first quarter, and each subsequent quarter thereafter.

1916.8 Each provider shall comply with the requirements under Section 1908 (Reporting Requirements) of Chapter 19 of Title 29 DCMR, Section 1909 (Records and Confidentiality of Information) of Chapter 19 of Title 29 DCMR, Section 1911 (Individual Rights) of Chapter 19 of Title 29 DCMR and Section 1938 (HCBS Setting Requirements) except that the progress notes as described in Subsection 1909.2(m) shall be maintained on a per visit basis.

1916.9 Each provider of Medicaid reimbursable in-home support services shall assist each person in the acquisition, retention, and improvement of skills related to activities of daily living, such as personal grooming, household chores, eating and food preparation, and other social adaptive skills necessary to enable the person to reside in the community. To accomplish these goals, the provider shall:

(a) Use the DDS-approved person-centered thinking tools and the person's Positive Personal Profile and Job Search and Community Participation Plan to develop a functional assessment that includes what is important to and for the person, within the first thirty (30) calendar days of providing services. This assessment shall be reviewed and revised annually or more frequently as needed;

(b) Assist with and actively participate in the development of the person's In-Home Supports Plan, ISP, and Plan of Care, at the person's preference;

(c) Review the person's In-home Supports Plan, ISP and Plan of Care goals, DDS-approved person-centered thinking tools, Positive Personal Profile and Job Search and Community Participation plan, objectives, and activities at least quarterly, and more often as necessary and submit quarterly reports to the person, family or representative, as appropriate, guardian, and the DDS Service Coordinator no later than seven (7) business days after the end of the first quarter or each subsequent quarter thereafter and in accordance with the requirements described under Section 1908 (Reporting Requirements) and Section 1909 (Records and Confidentiality of Information) of Chapter 19 of Title 29 of the DCMR.

1916.10 An In-Home Supports Plan shall be maintained in the home where services are provided with a copy also maintained at the Provider's main office. The In-Home Supports Plan shall include:

(a) Activities and supports that will be provided during the service, based upon what is important to and important for the person, as identified in the

Person Centered Thinking and Discovery tools and reflected in the person's ISP;

(b) A staffing plan and schedule;

(c) A list of licensed non-medical professionals who will be providing services, if applicable; and

(d) Emergency and contingency plans to address potential behavioral, health or emergency events.

1916.11 In-home supports services shall only be provided for up to eight (8) hours per day unless there is a temporary emergency. In the event of a temporary emergency, DDS may authorize up to sixteen (16) hours per day for up to one hundred and eighty (180) days, during the person's ISP year.

1916.12 In the event of a temporary emergency, a written justification for an increase in hours shall be submitted with the In-Home Supports Plan, ISP, and Plan of Care by the provider to DDS. The written justification must include:

(a) An explanation of why no other resource is available;

(b) A description of the temporary emergency;

(c) An explanation of how the additional hours of in-home supports services will support the person's habilitative needs;

(d) A revised copy of the in-home Supports Plan, ISP, and Plan of Care reflecting the increase in habilitative supports to be provided; and

(e) The service authorization from the Medicaid Waiver Supervisor or other Department on Disability Services Administration designated staff.

1916.13 All Direct Support Professionals, including family members, who provide in-home supports services shall comply with Section 1906 (Requirements for Direct Support Professionals) of Chapter 19 of Title 29 DCMR.

1916.14 Family members who provide in-home supports services and reside in the same home as the person receiving services may only be paid for in-home support services that are in accordance with the person's ISPs goals.

1916.15 In-home supports services shall not be provided to persons receiving the following residential services:

(a) Host Home;

(b) Residential Habilitation;

(c) Supported Living; and

(d) Supported Living with Transportation.

1916.16 In-home supports services may be used on the same day, or in combination with Medicaid State Plan Personal Care Aide (PCA) services, ID/DD PCA services, and Companion services, provided the services are not rendered at the same time.

1916.17 In-home supports services shall not be used to provide supports that are normally provided by medical professionals.

1916.18 In-home supports services, including those provided in the event of a temporary emergency shall be billed at the unit rate. The reimbursement rate shall be twenty-three dollars and twenty-eight cents ($23.28) per hour, billable in units of fifteen (15) minutes at a rate of five dollars and eight-two cents ($5.82), and shall not exceed eight (8) hours per twenty-four (24) hour day. A standard unit of fifteen (15) minutes requires a minimum of eight (8) minutes of continuous service to be billed. Reimbursement shall be limited to those time periods in which the provider is rendering services directly to the person.

1916.19 Reimbursement for in-home supports services shall not include:

(a) Room and board costs;

(b) Routine care and general supervision normally provided by the family or unpaid individuals who provide supports, or for services furnished to a minor by the child's parent or step-parent or by a person's spouse;

(c) Services or costs for which payment is made by a source other than Medicaid;

(d) Travel or training of travel skills to Supportive Employment, Day Habilitation, Individualized Day Supports, or Employment Readiness; and

(e) Costs associated with the DSP engaging in community activities with the people they support.

Section 1999, DEFINITIONS, is amended by adding the following:

Medical Professionals- Individuals who are trained clinicians and deliver medical services.

Temporary Emergency – A sudden change in the medical condition or behavioral status of a person receiving in-home supports services or their caregiver that warrants additional hours of in-home supports services.

Comments on the emergency and proposed rule shall be submitted, in writing, to Claudia Schlosberg, Senior Deputy Director/State Medicaid Director, Department of Health Care Finance, 441 4th Street, NW, 9th Floor South, 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 emergency and proposed rule may be obtained from the above address.

OFFICE OF MOTION PICTURE AND TELEVISION DEVELOPMENT

NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The Office of Motion Picture and Television Development (MPTD), pursuant to authority set forth in the Film DC Economic Incentive Act of 2006, effective March 14, 2007 (D.C. Law 16-290; D.C. Official Code § 39-502 (2012 Repl.)); and Mayor's Order 2009-213, dated December 8, 2009, hereby gives notice of emergency and proposed rulemaking action to adopt amendments to Chapter 31 (Film DC Economic Incentive Grant Fund Program), of Title 1 (Mayor and Executive Agencies) of the District of Columbia Municipal Regulations (DCMR).

These amendments would place the MPTD's rulemakings in conformity with the Film DC Economic Incentive Act of 2006 (Act), effective March 14, 2007 (D.C. Law 16-290; D.C. Official Code §§ 39-501 *et seq.* (2012 Repl.)). This emergency rulemaking is necessary to ensure that the MPTD can administer the program in fiscal year 2015.

The emergency and proposed rulemaking was adopted on April 21, 2015 and became effective on that date. The emergency rules shall remain in effect for one hundred twenty (120) days or until August 21, 2015, unless superseded by publication of a Notice of Final Rulemaking in the *D.C. Register*.

Chapter 31, FILM DC ECONOMIC INCENTIVE GRANT FUND PROGRAM, of Title 1 DCMR, MAYOR AND EXECUTIVE AGENCIES, is amended in its entirety to read as follows:

CHAPTER 31 FILM DC ECONOMIC INCENTIVE FUND PROGRAM

3100 AUTHORITY AND SCOPE

3100.1 Subject to the Film DC Economic Incentive Act of 2006, effective March 14, 2007 (D.C. Law 16-290; D.C. Official Code §§ 39-501 *et seq.*) (Act), the Film DC Economic Incentive Fund Program is administered by the Office of Motion Picture and Television Development (MPTD). The Film DC Economic Incentive Fund Program is intended to encourage the use of the District of Columbia as a site for movies, television shows, and other video productions as well as film and digital media infrastructure projects; to encourage the hiring of District residents as cast and crew; and to encourage the use of District-based service and equipment companies in support of these productions. These rules describe the standards and procedures under which the MPTD shall determine whether to

provide production support funding to the Film DC Economic Incentive Fund Program applicant.

3101 DETERMINATION OF FILM DC ECONOMIC INCENTIVE FUND PROGRAM ELIGIBILITY

3101.1 Subject to D.C. Official Code § 39-501.01, the Director of the Office of Motion Picture and Television Development (MPTD) determines whether individual movie, television, and other video productions, and the expenditures associated with those projects, qualify for incentives under the Act. Subject to D.C. Official Code § 39-501.01 and the availability of funds, the recipient of the incentive may receive an amount equal to the following:

(a) The sum of forty-two percent (42%) of the company's qualified production expenditures that are subject to taxation in the District;

(b) The sum of twenty-one percent (21%) of the company's qualified production expenditures that are not subject to taxation in the District;

(c) The sum of thirty percent (30%) of the company's qualified personnel expenditures;

(d) The sum of fifty percent (50%) of the company's qualified job training expenditures; and

(e) The sum of twenty-five percent (25%) of the company's base infrastructure investment; provided, that if the base infrastructure investment is in a facility that may be used for purposes unrelated to production or postproduction activities, then the base infrastructure investment shall be eligible for the twenty-five percent (25%) incentive payment only if the Director of the MPTD determines that the facility will support and be necessary to secure production or postproduction activity.

Incentive payment funds will be disbursed following the MPTD's receipt and approval of the final certified accounting and cost report of production expenditures prepared by the production company as required by § 3101.7(d).

3101.2 Subject to D.C. Official Code § 39-501.02, the Director of the MPTD determines whether individual film and digital media infrastructure projects qualify for an incentive to support the creation of production and postproduction facilities in the District. Subject to the availability of funds, the recipient of the incentive may receive:

(a) A payment of twenty-five percent (25%) of the taxpayer's base infrastructure investment; provided, that if all or a portion of the base infrastructure investment is in a facility that may be used for purposes

unrelated to production or postproduction activities, then the base infrastructure investment shall be eligible for the twenty-five percent (25%) payment only if the Director of the MPTD determines that the facility will support and be necessary to secure production or postproduction activity.

3101.3 In evaluating whether a production or infrastructure project is eligible for incentive funding, the Director of the MPTD will take into consideration the mandatory and discretionary criteria set forth in this section. The MPTD shall require all applicants to meet the mandatory criteria. The Director of the MPTD will be entitled to give priority, or more or less weight, to any of the discretionary criteria based on the MPTD's assessment of the current needs of the District of Columbia. The discretionary criteria are not intended to be used in a mathematical equation; consequently, mere compliance with a majority of these discretionary criteria does not guarantee receiving Film DC Economic Incentive Fund Program funds. The MPTD may also consider other factors in determining whether a particular project is eligible for incentive payment funding, provided that the additional factors are reasonably related to the goals of the Act.

3101.4 MANDATORY CRITERIA

To be eligible to receive production incentive funding under D.C. Official Code § 39-501(b) or infrastructure incentive funding under D.C. Official Code § 39-501(c), the applicant must:

(a) Spend at least two hundred fifty thousand dollars ($250,000) in the District for the development, preproduction, production, or postproduction costs of a qualified production, or invest and expend at least $250,000 for a qualified film and digital media infrastructure project in the District;

(b) File an application with the MPTD;

(c) Enter into an incentive agreement with the MPTD;

(d) Comply with the terms of the agreement; and

(e) Not be delinquent in a tax or other obligation owed to the District or be owned or under common control of an entity that is delinquent in a tax or other obligation owed to the District.

3101.5 DISCRETIONARY CRITERIA

(a) To determine whether to enter into an incentive agreement with the applicant under D.C. Official Code §§ 39-501(b)-(c), the MPTD may consider:

(1) Written documentation, verification, and proof that the production or film and digital media infrastructure project has the necessary financing in place to begin and complete project;

(2) The record of the applicant in completing commitments to engage in a production or film and digital media infrastructure project;

(3) The extent to which the production or film and digital media infrastructure project will attract motion picture, television, and video production to the District;

(4) The extent to which the production or film and digital media infrastructure project will create contracting and procurement opportunities for certified business enterprises (CBE) and registered District business entities, including written assurances of the number of CBEs and District businesses agreed to use, and the establishment of production support vendor agreements with registered District business entities;

(5) The extent to which the production or film and digital media infrastructure project will create jobs, job training opportunities, and apprenticeships for District residents;

(6) The extent to which the production or film and digital media infrastructure project will produce employment opportunities for District youth;

(7) The extent to which the production or film and digital media infrastructure project will promote economic development and neighborhood revitalization in the District;

(8) The potential that, in the absence of a payment under D.C. Official Code § 39-501.02(a), the production or film and digital media infrastructure project will be produced or constructed in a location other than the District;

(9) In the case of a film and digital media infrastructure project, the extent to which an incentive payment will attract private investment for the production of other productions or base infrastructure investments in the District;

(10) The amount and percentage of the production budget that will be spent in the District;

(11) The extent to which the production will promote the District as a tourist destination;

(12) In the case of a production, how many days the production will film in the District;

(13) In the case of a production, the percentage of the production to be filmed in the District;

(14) In the case of a production, the extent to which the production has a *bona fide* film distribution plan, including the date the completed content will be released for distribution, or has the secured financing in place to effectively self-distribute the content;

(15) The extent to which the production schedule follows a reasonable timeline leading to completion of the project;

(16) Whether the production will establish temporary hotel or other occupancy arrangements in the District for its principals and out-of-state crew;

(17) The credentials and references of the production company and its principals and producers;

(18) Whether the applicant or its principals have or plan to establish a long-term, sustainable media production footprint in the District;

(19) Whether the applicant will locate its permanent or temporary production offices in the District;

(20) The existence of an acceptable completion bond and insurance policy in place with industry recognized providers;

(21) The extent to which the applicant has complied with MPTD application and information disclosure requirements;

(22) That the applicant has not applied for or received any incentive support from a different District agency for the same project;

(23) In the case of a qualified production, agree to contain a five (5)-second long "Filmed in the District of Columbia" credit and logo(s) provided by the MPTD in the final production, and a link to the District of Columbia and Destination DC on the project's web page, as directed by the MPTD. In lieu of this recognition, the qualified production company may offer alternative marketing opportunities to be evaluated by the MPTD to ensure that those opportunities offer equal or greater promotional value to the District of Columbia; and

(24) Any other factor considered appropriate by the MPTD.

(b) Priority will be given to eligible production companies and infrastructure projects that hold the most promise for benefiting the District by hiring District residents, using local suppliers, being bonded and insured, and having a bona fide distribution plan in place.

3101.6 STATUTORY DISQUALIFICATION

Any production company shall be statutorily disqualified from receiving incentive payment funds if it:

(a) Fails to spend, or any film and digital media infrastructure project that fails to invest and expend, at least two hundred fifty thousand dollars ($250,000) in the District;

(b) Fails to comply with the terms of the incentive agreement with the MPTD; or

(c) Is delinquent in a tax or other obligation owed to the District or is owned or under common control of an entity that is delinquent in a tax or other obligation owed to the District.

3101.7 PROGRAMMATIC DISQUALIFICATION

Any production company or film and digital media infrastructure project applicant may be disqualified from the Film DC Economic Incentive Fund Program during the application process or after the incentive has received preliminary approval, based on programmatic considerations, at the discretion of the MPTD, including, but not limited to:

(a) Failure to begin qualifying project activity within same fiscal year as the date on the Qualifying Project Letter, unless a waiver is granted by the MPTD;

(b) Failure to file any required reports;

(c) Failure to pay industry standard wages;

(d) Failure to submit, upon the conclusion of filming in the District, a certified accounting and cost report of project expenditures, prepared in accordance with generally accepted accounting principles, that is performed by an independent certified public accountant selected and paid for by the Incentive Awardee (Awardee) prior to the reimbursement of qualified expenditures. The Awardee is not precluded from engaging its regular

independent certified public accountant, if applicable, to perform this activity;

(e) Engaging in economic transactions, business relationships and business structures without substance for the purpose of increasing the amount of the incentives or altering the appearances of expenditures or vendors in order to meet the qualifications for the incentives;

(f) Violation of any agreement made with the District with regard to residency, District resident employment, or job development programs;

(g) Failure to practice responsible production practices or adhere to the Code of Conduct as specified in the California Film Commission's Filmmaker's Code of Professional Responsibility, which the District has adopted as a guiding standard of conduct for its incentive fund;

(h) Loss of funding required to complete the project as originally represented to the MPTD during the application process;

(i) Failure to disclose applicant's application for additional incentive funds from a different District agency for the same project; or

(j) In the case of a production company, fails to provide a five (5)-second long "Filmed in the District of Columbia" credit and logo(s) provided by the MPTD in the final production, and a link to the District of Columbia and Destination DC on the project's web page, as directed by the MPTD. In lieu of this recognition, the qualified production company may offer alternative marketing opportunities to be evaluated by the MPTD to ensure that those opportunities offer equal or greater promotional value to the District of Columbia.

3102 APPLICATION PROCEDURES

3102.1 The Office of Motion Picture and Television Development (MPTD) will provide application forms upon request to parties wishing to apply for a production or infrastructure incentive under the Film DC Economic Incentive Fund Program. The application will require that specific information be submitted concerning the production company, production, production timelines, film and digital media infrastructure project, construction timeline, total anticipated expenditures, anticipated District expenditures, and other pertinent information.

3102.2 All financial reports submitted to the MPTD must be prepared in accordance with generally accepted accounting principles and certified by an authorized representative of the production company or film and digital media infrastructure project.

3102.3 The MPTD will notify the applicant of its incentive funding determination in writing within twenty (20) business days from the date the MPTD receives the Film DC Economic Incentive Fund application by sending a Qualifying Project Letter to the applicant. The Qualifying Project Letter must be signed by a person authorized to sign on behalf of the applicant and returned to the MPTD within fourteen (14) business days of the date of the letter.

3102.4 In the event an applicant does not meet the minimum program requirements, or the incentive payment application is not accepted or approved for any reason, the MPTD will notify the applicant in writing of its disapproval of the incentive support application by sending a Disapproval Letter within twenty (20) business days from the date the MPTD receives the Film DC Economic Incentive Fund application.

3102.5 If the MPTD requires additional information from the applicant in order to make a final determination of an incentive award, the MPTD will make a formal request for additional information or deliverables by sending a Request for Supplementary Information Letter within fourteen (14) business days from the date the MPTD receives the Film DC Economic Incentive Fund application.

3102.6 The applicant must submit to the MPTD the additional information or deliverables for further consideration and review within fourteen (14) business days of the postmarked date on the Request for Supplementary Information Letter.

3102.7 If the applicant does not submit the supplemental information within fourteen (14) business days of the Request for Supplementary Information Letter, the MPTD will notify the applicant of its incentive funding determination in writing within seven (7) business days.

3102.8 If the applicant does submit the supplemental information within fourteen (14) business days, the MPTD will notify the applicant of its final incentive funding determination in writing within seven (7) business days from the receipt of the supplementary deliverables.

3102.9 In order for the government of the District to reserve incentive payment funds for the Incentive Awardee, the Awardee must begin verifiable production activity or infrastructure construction in the District during the same fiscal year as the date on the Qualifying Project Letter, unless the Awardee is granted an "Extension Waiver" from the MPTD.

3102.10 The MPTD will schedule a production planning meeting between the Incentive Awardee and the MPTD as soon as possible after it receives a signed copy of the Qualifying Project Letter.

3103 INCENTIVE FUND AWARD DISBURSEMENT PROCEDURES

3103.1 Production and film and digital media infrastructure incentive fund awards will not be released to the Incentive Awardee until after the production period or construction project is completed and the qualifying Incentive Awardee has provided the Office of Motion Picture and Television Development (MPTD) all required receipts and proof of local qualifying expenditures subject to D.C. Official Code §§ 39-501.01-39.501.03.

3103.2 The MPTD, or its accounting agent, will have up to ninety (90) business days to verify and certify the Incentive Awardee's request for the incentive award after the submission of all receipts and proof of qualifying expenditures. The MPTD will send the Incentive Awardee an itemized accounting of all certified eligible spending in the form of a Certified Qualifying Spend Letter for the Awardee to review and execute. The Certified Qualifying Spend Letter must be signed by a person authorized to sign on behalf of the Incentive Awardee and returned to the MPTD within fourteen (14) business days of the postmarked date of the Certified Qualifying Spend Letter. After the MPTD receives that signed letter, the incentive award payment will be sent to the Incentive Awardee within forty-five (45) business days.

3103.3 If the Incentive Awardee wishes to appeal or dispute any of the submissions that have been disqualified or have any other dispute with regard to the findings in the Certified Qualifying Spend Letter, the Incentive Awardee must alert the MPTD by mail within fourteen (14) business days of the date on the Certified Qualifying Spend Letter that the Incentive Awardee wishes to dispute, after which the Incentive Awardee will have up to thirty (30) business days to prepare its dispute or appeal response and forward it to the MPTD in the form of a Request for Reconsideration Letter. In this letter, the Incentive Awardee can itemize and substantiate any disputed qualifying spends and make a case for reconsideration. If the MPTD does not receive the dispute or appeal letter within the designated time period, the Incentive Awardee waives all rights to dispute and will agree to receive only the incentive awards outlined in the MPTD’s original Certified Qualifying Spend Letter.

3103.4 If the Incentive Awardee submits its Request for Reconsideration Letter within the designated time period, the MPTD will have thirty (30) business days to review the appeal and make its final determination. A Final Certified Qualifying Spend Letter will be sent to the Incentive Awardee by the MPTD indicating the final determination of all issues in question. This determination will be final. The Final Certified Qualifying Spend Letter must be signed by a person authorized to sign on behalf of the Incentive Awardee and returned to the MPTD within fourteen (14) business days of the date of the Final Certified Qualifying Spend Letter. After the MPTD receives that signed letter, the incentive award payment will be sent to the Incentive Awardee within forty-five (45) business days. If the Incentive Awardee fails to sign the Final Certified Qualifying Letter, the Incentive Awardee waives all rights to any set aside incentive funds.

3199 DEFINITIONS

3199.1 For purposes of this section, the following terms shall have the meanings ascribed:

(a) **"Above-the-line Crew"** means a person or persons employed by an eligible production company for a qualified production such as producers, directors, cinematographers, writers, and actors, excluding "below-the-line" crew.

(b) **"Act"** means the Film DC Economic Incentive Act of 2006, effective March 14, 2007 (D.C. Law 16-290; D.C. Official Code §§ 39-501 *et seq.*).

(c) **"Base Infrastructure Investment"** means the cost, including renovation, rehabilitation, fabrication and installation, expended by a person in the development of a qualified film and digital media infrastructure project for tangible assets of a type that are, or under the United States Internal Revenue Code will become, eligible for depreciation, amortization, or accelerated capital cost recovery for federal income tax purposes that are physically located in the District for use in a business activity in the District and that are not mobile tangible assets. The term "base infrastructure investment" does not include qualified production expenditure or qualified personnel expenditure.

(d) **"Below-the-line Crew"** means a person or persons employed by an eligible production company for a qualified production after production begins and before production is completed, excluding above-the-line crew such as a producer, director, writer, actor, or other person in a similar position.

(e) **"Certified Qualifying Expenditure Letter"** means a letter drafted by the Office of Motion Picture and Television Development (MPTD) that itemizes all of the approved qualified spend made by the Incentive Awardee and indicates the final total award amount due to the Incentive Awardee pursuant to the Film DC Economic Incentive Fund Program.

(f) **"Digital Interactive Media Production"** means any interactive entertainment intended for commercial exploitation, including, but not limited to:

(1) Video game projects;

(2) Console games;

(3) Handheld console games;

(4) Mobile electronic device games; and

(5) Massively multi-player online video games and virtual worlds thatmeet the requirement of multi-market distribution via the Internet or any other channel of exhibition.

(g) **"Disapproval Letter"** means a letter to the program applicant from the MPTD that contains a final determination that the production company does not qualify for incentive funding through the Film DC Economic Incentive Fund Program.

(h) **"Eligible Production Company"** means an entity in the business of producing qualified productions.

(i) **"Extension Waiver"** means a waiver issued to the Incentive Awardee allowing an extension to the rule mandating all approved incentive qualifying project activity begin within the same fiscal year as the issuance of the Qualifying Project Letter.

(j) **"Film DC Economic Incentive Fund Program"** means the economic incentive fund program established by the Act.

(k) **"Final Certified Qualifying Expenditure Letter"** means a letter from the MPTD to the Incentive Awardee in response to the Awardee's formal dispute or request for reconsideration in response to the MPTD's original Certified Qualifying Expenditure Letter.

(l) **"Fiscal Year"** means the budget and accounting year of the District, commencing on the first day of October of each year and ending on the thirtieth (30^{th}) day of September of the succeeding calendar year.

(m) **"Incentive Awardee"** means a qualifying applicant that has received a Qualifying Project Letter indicating a preliminary determination by the MPTD that the incentive program applicant qualifies for incentive funding pursuant to the Film DC Economic Incentive Fund Program.

(n) **"Preproduction Expenditure"** means a direct expenditure in the process of preparation for actual physical production, which includes, but is not limited to, activities such as location scouting, hiring of crew, construction of sets, and the establishment of a dedicated production office.

(o) **"Postproduction Expenditure"** means a direct expenditure for editing, Foley recording, automatic dialogue replacement, sound editing, special or visual effects, including computer-generated imagery or other effects, scoring and music editing, beginning and end credits, negative cutting,

soundtrack production, dubbing, subtitling, addition of sound or visual effects, advertising, marketing, distribution, and related expenses.

(p) **"Production Company"** means any individual, partnership, corporation or other business entity that is primarily responsible for the production of a film or television project.

(q) **"Qualified Film and Digital Media Infrastructure Project"** means a film, video, television, or digital media production or postproduction facility located in the District, movable and immovable property and equipment related to the facility, and any other facility that is a necessary component of the primary facility. The term "qualified film and digital media infrastructure project" does not include a movie theater or other commercial exhibition facility.

(r) **"Qualified Job Training Expenditure"** means salary and other expenditures paid by an eligible production company to provide qualified personnel with on-the-job training to upgrade or enhance the skills of the qualified personnel as a member of the below-the-line crew for a qualified production.

(s) **"Qualified Personnel"** means a District resident that is legally eligible for employment.

(t) **"Qualified Personnel Expenditure"** means an expenditure made in the District directly attributable to the production or distribution of a qualified production that is a transaction subject to taxation in the District and is a payment of wages, benefits, or fees to below-the-line crew members who are not residents of the District and includes a payment to a personal services corporation or professional employer organization for the services of qualified personnel as below-the-line crew members who are not residents of the District.

(u) **"Qualified Production"** means motion picture, television, or video content created in whole or in part in the District, intended for nationwide distribution or exhibition by any means, including by motion picture, documentary, television programming, commercials, or internet video production and includes a trailer, pilot, or any video teaser associated with a qualified production. A motion picture film production shall include digital interactive media production. The term "qualified production" does not include production that:

(1) Consists primarily of televised news or current events;

(2) Consists primarily of a live sporting event, except boxing;

(3) Consists primarily of political advertising;

(4) Primarily markets a product or service other than a qualified production; or

(5) Is a radio program.

(v) “Qualified production expenditure" means a development, preproduction, production, or postproduction expenditure made in the District that is:

(1) Directly attributable to the production or distribution of a qualified production;

(2) Is for the production or distribution of a qualified production;

(3) In accordance with generally accepted entertainment industry practices; and

(4) Not a qualified personnel expenditure.

(5) Qualified production expenditure includes the purchase of tangible or intangible personal property or services related to producing or distributing a qualified production, production work, production equipment, production software, development work, postproduction work, postproduction equipment, postproduction software, set design, set construction, set operations, props, lighting, wardrobe, catering, lodging, use of facilities or equipment, use of soundstages or studios, location fees, and related services, excluding services provided by the District government, and materials, use of vehicles directly attributable to the production or distribution of a qualified production, and any purchase of equipment relating to the duplication or market distribution of any content created or produced in the District, and payment of wages, benefits, or fees to any contractual or salaried employee, including above-the line crew such as producers, directors, writers, and actors, and below-the-line crew who are residents of the District, and excluding below-the-line crew who performs [sic] services in the District, including a payment to a personal services corporation or professional employer organization for the services of qualified personnel.

(w) “Qualifying Project Letter” means a letter to the program applicant from the MPTD that contains a preliminary determination that the project qualifies for incentive funding pursuant to the Film DC Economic Incentive Fund Program.

(x) "Request for Reconsideration Letter" means a letter that itemizes any formal dispute the Incentive Awardee has with any of the findings within the MPTD's Certified Qualifying Expenditure Letter and determination of final incentive award.

(y) "Request for Supplementary Information Letter" means a letter to the program applicant from the MPTD that contains a formal request for the program applicant to submit additional information to the MPTD as part of a continuation of the application consideration process.

Comments on these rules should be submitted to Herbert Niles, Deputy Director, Office of Motion Picture and Television Development, Government of the District of Columbia, 200 I Street, SE, Suite 1800, Washington, DC 20003, via telephone at (202) 727-6608, via email at herbert.niles@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 2015-126
May 4, 2015

SUBJECT: Establishment – District of Columbia Emancipation and Sesquicentennial Celebration of the Close of the American Civil War Commemorative Commission

ORIGINATING AGENCY: Office of the Mayor

By virtue of the authority vested in me as the 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), (11) (2014 Repl.), it is hereby **ORDERED** that:

I. ESTABLISHMENT

There is established a District of Columbia Emancipation and Sesquicentennial Celebration of the Close of the American Civil War Commemorative Commission (hereinafter referred to as the **"Commission"**) in the Executive Branch of the Government of the District of Columbia.

II. PURPOSE

The Commission shall advise the Mayor on (i) programs, projects, activities, and forums to celebrate and commemorate April 16th as a public legal holiday in District of Columbia that recognizes the District of Columbia Compensated Emancipation Act **("Act")**, approved by Congress and signed by President Abraham Lincoln on April 16, 1862 to abolish slavery in the District of Columbia; and (ii) strategies to garner support, local participation and establish the District's response to the Sesquicentennial Close of the end of the American Civil War which saved the Nation and set all enslaved Americans "Forever Free".

III. FUNCTIONS

The Commission shall:

A. Commemorate the emancipation of more than 3,100 formerly enslaved persons in the District of Columbia as the first freed, through legislation passed by the Thirty-Seventh Congress that approved the District of Columbia Compensated Emancipation Act, which abolished slavery in the District of Columbia on April 16, 1862;

B. Develop and implement plans, programs, projects, and activities to celebrate the commemorative history, culture, heritage, customs, and traditions that highlight the struggle to overcome the institution of slavery, and to profile the African-American experience in the struggle for freedom, justice, and equality;

C. Commemorate historical events in the District of Columbia that highlight the Sesquicentennial celebration of the close of the American Civil War;

D. Coordinate and plan major events leading up to the Grand Review on May 17, 2015. These events will be educational, and are designed to honor those who gave their last full measure for what this nation is and can be;

E. Undertake other duties as are assigned by the Mayor; and,

F. Submit a report to the Mayor through the Secretary of the District of Columbia on the events, activities, and accomplishments of the Commission.

IV. APPOINTMENTS

A. The Commission shall have a maximum of twenty-five (25) members. The members shall be appointed by the Mayor and shall serve until December 31, 2015.

B. Members of the Commission shall be residents of the District, or shall have some resident business, educational, social or cultural nexus to the District.

VI. COMPENSATION

Members of the Commission shall serve without compensation.

VII. ORGANIZATION

A. The Commission may establish subcommittees as needed. Subcommittees may include individuals who are not members of the Commission, provided that each subcommittee is chaired by a member of the Commission.

B. Meetings of the Commission shall be scheduled at the discretion of the Chairperson.

C. The Commission may establish its own by-laws and rules of procedure, subject to the approval of the Chairperson, or her designee.

VIII. ADMINISTRATION

A. The Office of the Secretary of the District of Columbia and the Office of Public Records shall provide administrative support for the Commission.

B. Each department, agency, instrumentality, or independent agency of the District shall cooperate with the Commission and provide any information, in a timely manner, which the Commission requests to carry out the provisions of this Order.

IX. SUNSET

The Commission shall sunset on December 31, 2015.

X. RESCISSIONS

This Order shall supersede any previous Mayor's Order.

XI. 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 2015-127
May 4, 2015

SUBJECT: Appointments – District of Columbia Emancipation and Sesquicentennial Celebration of the Close of the American Civil War Commemorative Commission

ORIGINATING AGENCY: Office of the Mayor

By virtue of the authority vested in me as the 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), (11) (2014 Repl.), and pursuant to Section 4(a) of Mayor's Order 2015-126, effective May 4, 2015, establishing the District of Columbia Emancipation and Sesquicentennial Celebration of the Close of the American Civil War Commemorative Commission (the **"Commission"**), it is hereby **ORDERED** that:

1. **MURIEL E. BOWSER,** is appointed as member of the Commission and shall serve until December 31, 2015;

2. **HONORABLE ANTHONY A. WILLIAMS,** is appointed as member of the Commission and shall serve until December 31, 2015;

3. **LAUREN C. VAUGHAN**, is appointed as member of the Commission and shall serve until December 31, 2015;

4. **HONORABLE VINCENT B. ORANGE, SR.**, is appointed as member of the Commission and shall serve until December 31, 2015;

5. **HONORABLE ANITA BONDS**, is appointed as member of the Commission and shall serve until December 31, 2015;

6. **HONORABLE BRIANNE NADEAU**, is appointed as member of the Commission and shall serve until December 31, 2015;

7. **FRANK SMITH, PHD.**, is appointed as member of the Commission and shall serve until December 31, 2015;

8. **CHARLES (CHUCK) HICKS**, is appointed as member of the Commission and shall serve until December 31, 2015;

9. **AUDREY HINTON**, is appointed as member of the Commission and shall serve until December 31, 2015;

10. **BERNARD DEMCZUK, PHD.**, is appointed as member of the Commission and shall serve until December 31, 2015;

11. **JAMES L. HUDSON, ESQ.**, is appointed as member of the Commission and shall serve until December 31, 2015;

12. **MALCOLM BEECH**, is appointed as member of the Commission and shall serve until December 31, 2015;

13. **DOTTIE WADE**, is appointed as member of the Commission and shall serve until December 31, 2015;

14. **ROSE DAWSON**, is appointed as member of the Commission and shall serve until December 31, 2015;

15. **CHRISTINE BENNETT**, is appointed as member of the Commission and shall serve until December 31, 2015;

16. **TERRY LYNCH**, is appointed as member of the Commission and shall serve until December 31, 2015;

17. **DR. E. FAYE WILLIAMS**, is appointed as member of the Commission and shall serve until December 31, 2015;

18. **JERRY CLARK**, is appointed as member of the Commission and shall serve until December 31, 2015;

19. **STANLEY WILLIAMS**, is appointed as member of the Commission and shall serve until December 31, 2015;

20. **LORETTA NEUMANN**, is appointed as member of the Commission and shall serve until December 31, 2015;

21. **DENISE ROLARK BARNES**, is appointed as member of the Commission and shall serve until December 31, 2015;

22. **CRAIG HOWELL**, is appointed as member of the Commission and shall serve until December 31, 2015;

23. **CYNTHIANA LIGHTFOOT**, is appointed as member of the Commission and shall serve until December 31, 2015;

24. **HONORABLE A. ANTHONY WILLIAMS** shall serve as Chairperson of the Commission.

25. **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 2015-128
May 7, 2015

SUBJECT: Appointment – Acting Director, Office of Veterans Affairs

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 703 of the Office of Veterans Affairs Establishment Act of 2001, effective October 3, 2001, D.C. Law 14-28, D.C. Official Code § 49-1002 (2014 Repl.), it is hereby **ORDERED** that:

1. **TAMMI LAMBERT** is appointed Acting Director, Office of Veterans Affairs, and shall serve in that capacity at the pleasure of the Mayor.

2. This Order supersedes Mayor's Order 2012-12, dated January 20, 2012, and any other Mayor's Order or appointment to the extent of any inconsistency.

3. **EFFECTIVE DATE**: This Order shall be effective May 11, 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 2015-129
May 7, 2015

SUBJECT: Appointment – Acting Fire Chief, District of Columbia Fire and Emergency Medical Services Department

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(a-1) of An Act to classify the officers and members of the fire department of the District of Columbia, and for other purposes, approved June 20, 1906 (34 Stat. 314; D.C. Official Code § 5-402(a-1) (2012 Repl.), it is hereby **ORDERED** that:

1. **GREGORY DEAN** is appointed Acting Fire Chief, District of Columbia Fire and Emergency Medical Services Department, and shall serve in that capacity at the pleasure of the Mayor.

2. This Order supersedes Mayor's Order 2015-080, dated March 2, 2015.

3. **EFFECTIVE DATE**: This Order shall be effective *nunc pro tunc* to May 1, 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 2015-130
May 7, 2015

SUBJECT: Appointment - Acting Chief Procurement Officer, Office of Contracting and Procurement

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, Pub. L. 93-198, 87 Stat. 790, D.C. Official Code § 1-204.22(2) (2014 Repl.), and in accordance with section 203 of the Procurement Practices Reform Act of 2010, effective April 8, 2011, D.C. Law 18-371, D.C. Official Code § 2-352.03 (2012 Repl.), it is hereby **ORDERED** that:

1. **GEORGE SCHUTTER** is appointed Acting Chief Procurement Officer, Office of Contracting and Procurement, and shall serve in that capacity at the pleasure of the Mayor.

2. This Order supersedes Mayor's Order 2015-049, dated January 29, 2015, and Mayor's Order 2011-125, dated July 26, 2011.

3. **EFFECTIVE DATE**: This Order shall be effective May 13, 2015.

MURIEL E. BOWSER
MAYOR

ATTEST:
LAUREN VAUGHAN
ACTING SECRETARY OF THE DISTRICT OF COLUMBIA

GOVERNMENT OF THE DISTRICT OF COLUMBIA

ADMINISTRATIVE ISSUANCE SYSTEM

Mayor's Order 2015-131
May 7, 2015

SUBJECT: Appointment – Acting Director, District of Columbia Child and Family Services Agency

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 302a of the Prevention of Child Abuse and Neglect Act of 1977, D.C. Law 2-22, effective September 23, 1977, as amended by section 2 of the Child and Family Services Agency Establishment Amendment Act of 2000, effective April 4, 2001, D.C. Law 13-277, D.C. Official Code § 4-1303.02a (2012 Repl.), it is hereby **ORDERED** that:

1. **RAYMOND DAVIDSON** is appointed Acting Director, District of Columbia Child and Family Services Agency, and shall serve in that capacity at the pleasure of the Mayor.

2. This Order supersedes Mayor's Order 2015-042, dated January 14, 2015.

3. **EFFECTIVE DATE**: This Order shall be effective *nunc pro tunc* to May 1, 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 2015-132
May 7, 2015

SUBJECT: Appointment – Acting Chairperson, D.C. Taxicab Commission

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. No. 93-198, D.C. Official Code § 1-204.22(2) (2014 Repl.), and in accordance with Section 6 of the District of Columbia Taxicab Commission Establishment Act of 1985, effective March 25, 1986, D.C. Law 6-97; D.C. Official Code § 50-305 (2014 Repl.), it is hereby **ORDERED** that:

1. **ERIC ROGERS** is appointed Acting Chairperson of the D.C. Taxicab Commission, and shall serve in that capacity at the pleasure of the Mayor.

2. This Order supersedes Mayor's Order 2015-077, dated February 10, 2015.

3. **EFFECTIVE DATE**: This Order shall be effective *nunc pro tunc* to May 1, 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 2015-133
May 7, 2015

SUBJECT: Appointment – Acting Director, Department of Consumer and Regulatory Affairs

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.), it is hereby **ORDERED** that:

1. **MELINDA BOLLING** is appointed Acting Director of the Department of Consumer and Regulatory Affairs, and shall serve in that capacity at the pleasure of the Mayor.

2. This Order supersedes Mayor's Order 2015-019, dated January 8, 2015.

3. **EFFECTIVE DATE:** This Order shall be effective *nunc pro tunc* to May 1, 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 2015-134
May 7, 2015

SUBJECT: Appointment – Acting Director, Office of Disability Rights

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 4(c)(1) of the Disability Rights Protection Act of 2006, effective March 8, 2007, D.C. Law 16-239, D.C. Official Code § 2-1431.03(c)(1) (2012 Repl.), it is hereby **ORDERED** that:

1. **ALEXIS TAYLOR** is appointed Acting Director, Office of Disability Rights, and shall serve in that capacity at the pleasure of the Mayor.

2. This Order supersedes Mayor's Order 2015-054, dated January 29, 2015.

3. **EFFECTIVE DATE:** This Order shall be effective *nunc pro tunc* to May 1, 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 2015-135
May 7, 2015

SUBJECT: Appointment – Director, Department of Employment 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 pursuant to the Director of the Department of Employment Services Deborah Carroll Confirmation Resolution of 2015, effective April 14, 2015, Res. 21-0068, it is hereby **ORDERED** that:

1. **DEBORAH CARROLL** is appointed Director, Department of Employment Services, and shall serve in that capacity at the pleasure of the Mayor.

2. This Order supersedes Mayor's Order 2015-044, dated January 14, 2015.

3. **EFFECTIVE DATE**: This Order shall be effective *nunc pro tunc* to April 14, 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 2015-136
May 7, 2015

SUBJECT: Appointment — Interim Director, Department of Forensic Sciences

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 pursuant to section 4 of the Department of Forensic Sciences Establishment Act of 2011, effective August 17, 2011, D.C. Law 19-18, D.C. Official Code § 5-1501.03(a) (2012 Repl.), it is hereby **ORDERED** that:

1. **ROGER A. MITCHELL, JR., M.D., FASCP,** is appointed Interim Director, Department of Forensic Sciences and shall serve in that capacity at the pleasure of the Mayor. Dr. Mitchell shall carry out these duties simultaneously with his duties as Chief Medical Examiner; however, he will not receive a second salary for these additional duties.

2. This Order supersedes Mayor's Order 2015-058, dated January 29, 2015.

3. **EFFECTIVE DATE**: This Order shall be effective *nunc pro tunc* to April 30, 2015.

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, MAY 20, 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-00019; Alamac, Inc., t/a The River Inn/Dish, 924 25th Street NW, License #1782, Retailer CH, ANC 2A
Substantial Change (Sidewalk Café with 28 Seats)

Show Cause Hearing (Status) **9:30 AM**
Case # 15-AUD-00017; P.J. Clarke's Washington, LLC, t/a P.J. Clarke's And SideCar, 1600 K Street NW, License #84688, Retailer CR, ANC 2B
Failed to File Quarterly Statements (3rd Quarter 2014)

Show Cause Hearing (Status) **9:30 AM**
Case # 15-AUD-00015; Café Europa, Inc., t/a Panache, 1725 Desales Street NW License #60754, Retailer CR, ANC 2B
Failed to File Quarterly Statements (3rd Quarter 2014)

Show Cause Hearing (Status) **9:30 AM**
Case # 14-AUD-00120; AAK Investments, Inc., t/a Pasta Italiana, 2623 Connecticut Ave NW, License #60483, Retailer CR, ANC 3C
Failed to Qualify as a Restaurant, Failed to Maintain Books and Records

Show Cause Hearing (Status) **9:30 AM**
Case # 14-AUD-00083; Paul Penn, LLC, t/a Paul Bakery, 801 Pennsylvania Ave NW, License #86639, Retailer DR, ANC 2C
Failed to File Quarterly Statements (2nd Quarter 2014)

Board's Calendar
May 20, 2015

9:30 AM

Show Cause Hearing (Status)
Case # 15-AUD-00011; Sunstone K9 Lessee, t/a Renaissance Hotel Washington DC Downtown, 999 9th Street NW, License #85654, Retailer CH, ANC 2C
Failed to File Quarterly Statements (3rd Quarter 2014)

Show Cause Hearing (Status) **9:30 AM**
Case # 15-251-00008; MDM, LLC, t/a Takoma Station Tavern, 6914 4th Street NW, License #79370, Retailer CT, ANC 4B
Failed to Follow Security Plan, Failed to Post License Conspicuously in the Establishment

Show Cause Hearing (Status) **9:30 AM**
Case # 15-AUD-00018; GBP, LLC, t/a Tackle Box, 3245 M Street NW, License #84952, Retailer CR, ANC 2E
Failed to File Quarterly Statements (3rd Quarter 2014)

Fact Finding Hearing* **9:30 AM**
Michael D. Herz
Manager's Application

Show Cause Hearing* **10:00 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* **11:00 AM**
Case # 14-AUD-00074; Dahlak Restaurant, Inc., t/a Dahlak Restaurant, 1771 U Street NW, License #74433, Retailer CR, ANC 1C
Failed to Maintain Books and Records (three counts)

Show Cause Hearing* **1:30 PM**
Case # 14-CMP-00739; Hwang & Hyun O. Kim, t/a D & B Deli Carryout, 3412 Georgia Ave NW, License #26649, Retailer B, ANC 1A
Sold Go-Cups

Show Cause Hearing* **2:30 PM**
Case # 14-CMP-00682; Mimi and D, LLC, t/a Vita Restaurant & Lounge, 1318 9th Street NW, License #86037, Retailer CT, ANC 2F
Violation of Settlement Agreement

Board's Calendar
May 20, 2015

3:30 PM

Show Cause Hearing*
Case # 14-CC-00177; Sami Restaurant, LLC, t/a Bistro 18, 2420 18th Street NW, License #86876, Retailer CR, ANC 1C
No ABC Manager on Duty

Show Cause Hearing* **4:30 PM**
Case # 14-CMP-00473; Restaurant Enterprises, Inc., t/a Smith Point, 1338 Wisconsin Ave NW, License #60131, Retailer CT, ANC 2E
Provided Entertainment Without an Entertainment Endorsement

***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
INVESTIGATIVE AGENDA

WEDNESDAY, MAY 20, 2015
2000 14TH STREET, N.W., SUITE 400S, WASHINGTON, D.C. 20009

On May 20, 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-CMP-00212 Beacon Hotel & Corporate Quarters, 1615 RHODE ISLAND AVE NW Retailer C Hotel, License#: ABRA-077109

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2. Case#15-251-00080 Green Island Cafe/Heaven & Hell (The), 2327 18TH ST NW Retailer C Tavern, License#:ABRA-074503

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3. Case#15-CMP-00213 Pizza No. 17, 1523 17TH ST NW Retailer C Restaurant, License#: ABRA-072743

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4. Case#15-CMP-00214 TGI Friday, 2100 PENNSYLVANIA AVE NW Retailer C Restaurant, License#: ABRA-060813

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5. Case#15-CMP-00217 Brentwood Liquors, 1319 RHODE ISLAND AVE NE Retailer A Retail - Liquor Store, License#:ABRA-060622

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6. Case#15-CMP-00208 Smith Point, 1338 WISCONSIN AVE NW Retailer C Tavern, License#: ABRA-060131

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7. Case#15-CMP-00220 Awash, 2218 - 2220 18TH ST NW Retailer C Restaurant, License#: ABRA-020102

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8. Case#15-CMP-00216 One Fish Two Fish, 2423 PENNSYLVANIA AVE NW Retailer D Restaurant, License#: ABRA-086425

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9. Case#15-CMP-00215 La Morenita, 3539 Georgia AVE NW Retailer C Restaurant, License#: ABRA-086595

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10. Case#15-251-00084 Heist, 1216 18TH ST NW Retailer C Nightclub, License#: ABRA-087101

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11. Case#15-CMP-00252 Noodles & Company, 1815 WISCONSIN AVE NW Retailer C Restaurant, License#: ABRA-091044

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12. Case#15-251-00086 Busboys & Poets - Takoma, 235 CARROLL ST NW Retailer C Restaurant, License#:ABRA-092008

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13. Case#15-CMP-00209 Mesobe Restaurant and Deli Market, 1853 7TH ST NW Audit , License#: 14-AUD-00108

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ALCOHOLIC BEVERAGE CONTROL BOARD

NOTICE OF MEETING
LICENSING AGENDA

WEDNESDAY, MAY 20, 2015 AT 1:00 PM
2000 14th STREET, N.W., SUITE 400S, WASHINGTON, D.C. 20009

1. Review Request for Transfer into Safekeeping Status – Original Request. ANC 2A. SMD 2A02. This license is suspended until transfer. Please see attached Offer-in-Compromise. No conflict with Settlement Agreement. ***McFaddens***, 2401 Pennsylvania Avenue NW, Retailer CR, License No. 098988.

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2. Review Request for Change of Hours. ***Approved Hours of Operation and Alcoholic Beverage Sales and Consumption:*** Monday-Saturday 9am to 12am. ***Proposed Hours of Operation and Alcoholic Beverage Sales and Consumption:*** Sunday-Saturday 9am to 12am. ANC 2C. SMD 2C01. No outstanding fines/citations. No outstanding violations. No pending enforcement matters. No Settlement Agreement. ***Central Liquors***, 625 E Street NW, Retailer A Liquor Store, License No. 086268.

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3. Review Request for Change of Hours. ***Approved Hours of Operation and Alcoholic Beverage Sales and Consumption:*** Sunday-Saturday 8am to 10pm. ***Proposed Hours of Operation and Alcoholic Beverage Sales and Consumption:*** Sunday-Saturday 8am to 11:30pm. ANC 7F. SMD 7F06. No outstanding fines/citations. No outstanding violations. No pending enforcement matters. No Settlement Agreement. ***Greenway Liquors***, 3700 Minnesota Avenue NE, Retailer A Liquor Store, License No. 075614.

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4. Review Request for Change of Hours. ***Approved Hours of Operation and Alcoholic Beverage Sales and Consumption:*** Sunday-Thursday 11am to 9pm, Friday-Saturday 11am to 2am. ***Proposed Hours of Operation and Alcoholic Beverage Sales and Consumption:*** Sunday-Thursday 11am to 10pm, Friday-Saturday 11am to 2am. ANC 6C. SMD 6C05. No outstanding fines/citations. No outstanding violations. No pending enforcement matters. No conflict with Settlement Agreement. ***Micho's***, 500 H Street NE, Retailer CR, License No. 094784.

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5. Review Request for Change of Hours. ***Approved Hours of Operation and Alcoholic Beverage Sales and Consumption:*** Monday-Saturday 10am to 12am. ***Proposed Hours of Operation and***

Alcoholic Beverage Sales and Consumption: Sunday 12pm to 6pm, Monday-Saturday 10am to 12am. ANC 6E. SMD 6E07. No outstanding fines/citations. No outstanding violations. No pending enforcement matters. No Settlement Agreement. ***Tunnel Fine Wines & Spirits***, 311 H Street NW, Retailer A Liquor Store, License No. 077663.

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6. Review Application for Manager's License. ***Dominic T. Bueno***–ABRA 098907 .

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7. Review Application for Manager's License. ***Abdelilah Baraka***–ABRA 098915.

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***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.**

CARLOS ROSAIO PUBLIC CHARTER SCHOOL

REQUEST FOR QUOTES

FURNITURE: Carlos Rosario PCS seek quotes to supply furniture for 2 resource rooms at 1100 Harvard Street NW. Please contact Gwen Ellis via email gellis@carlosrosario.org. All quotes are due by 4:00pm, Friday May 22, 2015.

HP SERVER: Carlos Rosario International Public Charter School (CRIPCS) is an adult education public charter school operating in the District of Columbia. CRIPCS is interested in the purchase of 6 servers for its Harvard campus. Responses are required by 4:00pm, Friday May 22, 2015. For a full copy of the RFQ please contact Gwen Ellis, Business Manager at 202-797-4700 or gellis@carlosrosario.org; Subject: Server RFQ

INFRASTRUCTURE EQUIPMENT: Carlos Rosario International Public Charter School (CRIPCS) is an adult education public charter school operating in the District of Columbia. CRIPCS is interested in the purchase of network infrastructure equipment for its Harvard campus. This includes Enterasys/Extreme Networks brand switches, wireless access points, hardware replacement and support warranties/contracts. Responses are required by 4:00pm, Friday, May 22, 2015. For a full copy of the RFQ please contact Gwen Ellis, Business Manager at 202-797-4700 or gellis@carlosrosario.org; Subject: Infrastructure Equipment RFQ

OFFICE OF THE CHIEF FINANCIAL OFFICER
Office of Revenue Analysis

NOTICE OF CHANGE IN TAX YEAR 2016
TAX ON OTHER TOBACCO PRODUCTS

Pursuant to D.C. Code §47-2402.01, the District of Columbia shall provide notice of the tax rate on other tobacco products on or before September 1st of each year for the upcoming tax year that begins on October 1st. The tax for other tobacco products shall be equal to the cigarette tax and surcharge on a pack of 20 cigarettes under §47-2402 a.(1)-(2), expressed as a percentage of the average wholesale price of a package of 20 cigarettes for the March 31, preceding the September 1st announcement of the change in rates.

The Office of Revenue Analysis collected wholesale price data from the United States Department of Labor: Bureau of Labor Statistics. Based on the analysis of the data, the Office of Revenue Analysis has determined that the average wholesale price of a package of 20 cigarettes in the District as of March 31, 2015 was $4.33, and the calculated tax applicable to other tobacco products for tax year 2016 shall be 67 percent.

Calculated Tax on Other Tobacco Products for Tax Year 2016

2014 Average Wholesale Price for a Package of 20 Cigarettes	$4.33
Tax on a Package of 20 Cigarettes	$2.50
Surtax on a Package of 20 Cigarettes	$0.41
Total Tax on a Package of 20 Cigarettes	$2.91
Total Tax on a Package of Cigarettes as a Percent of Wholesale Price	67%

OFFICE OF THE CHIEF FINANCIAL OFFICER
Office of Revenue Analysis

NOTICE OF INCREASE IN THE TAX YEAR 2016 SURTAX FOR CIGARETTE PACKAGES IN THE DISTRICT OF COLUMBIA

Pursuant to D.C. Code §47-2402(a)(3)(A), the District of Columbia shall provide notice of the appropriate calculated surtax on a package of cigarettes on or before September 1st of each year for the upcoming tax year that begins on October 1st. The calculated surtax levy shall be equivalent to a levy of the general sales tax rate in effect for the upcoming tax year.

In March 2014, the Office of Revenue Analysis collected retail sale price data on packages of 20 cigarettes from a cross section of retail outlets in the city. In 2015, we used the Bureau of Labor Statistics' Consumer Price Index (CPI) for all urban consumers' data to compare prices of cigarettes in February 2014 and February 2015. Based on analysis of the data, with respect to the aforementioned legislation, the Office of Revenue Analysis has determined that the 2015 average retail sale price of a package of 20 cigarettes in the city is $8.26, and the calculated surtax for tax year 2016 shall be $0.41 per pack of cigarettes, up from $0.40 for tax year 2015.

A package of cigarettes is defined as one with 20 or fewer cigarettes. However, if a package of cigarettes sold in tax year 2016 contains more than 20 cigarettes, the surtax per pack must be incrementally increased by $0.020 per each cigarette above 20.

Calculated Surtax on a Package of 20 Cigarettes (or Fewer)
For Tax Year 2016

2015 Average Retail Sale Price for a Package of 20 Cigarettes	$8.26
Less Current Surtax & Estimated Costs of Business	-$1.19
Adjusted Average Retail Sales Price	$7.08
Calculated Surtax (5.75% Sales Tax Equivalent) Effective October 1, 2015	**$0.41**

Effective October 1, 2015, the above surtax of $0.41 per pack of cigarettes is in addition to the cigarette excise tax of $2.50 per pack. Thus, the total tax levy for cigarettes in the District of Columbia for tax year shall be $2.91 per pack of 20.

EAGLE ACADEMY PUBLIC CHARTER SCHOOL

NOTICE OF INTENT TO AWARD SOLE SOURCE CONTRACT

Teacher Quality Improvement Services

Eagle Academy Public Charter School is awarding a sole source contract to Howard University under the OSSE Teacher Quality Improvement (TQI) Grant Program. The TQI is a partnership grant. Eligible applications were required to include the following principal partners: (1) a private or State institution of higher education (IHE) and the division of the institution that prepares teachers and principals; (2) its school of arts and sciences; and (3) a high need LEA. Howard University helped to develop the grant and is required to be part of the grant implementation. Howard University will provide educational training and assessment services as part of the grant. The grant is a reimbursement grant and the reimbursement to Howard University is limited to a maximum of $120,000.00 during the grant period of 4/20/2015 – 9/30/2016.

This is NOT a request for quotes or proposals.

Questions or comments to this Notice of Intent should be directed to **Mayra Martinez-Fernandez, mmartinez@eagleacademypcs.org** via e-mail only. Please indicate in the subject of your email: Notice of Intent Question Submission.

EAGLE ACADEMY PUBLIC CHARTER SCHOOL

NOTICE OF REQUEST FOR PROPOSALS

PROFESSIONAL EDUCATIONAL CONSULTING SERVICES

Project Summary: Your firm is invited to submit qualifications to provide professional educational consulting services, including leadership coaching and instructional coaching, strategic planning support, support in the development of systems and protocols, and other related activities as agreed upon by Eagle Academy PCS and the Consultant.

Date and Location Submittal is Due: Friday, May 22, 2015 by 5:00 p.m.

For submittal requirements, send request to the attention of Mayra Martinez-Fernandez, mmartinez@eagleacademypcs.org

JANITORIAL AND CLEANING SERVICES

Project Summary: Eagle Academy Public Charter School is soliciting written proposals from qualified firms for Janitorial and Cleaning Services for our School Campus located at 3400 Wheeler Rd., SE Washington, DC 20032.

Date Submittal is Due: Friday, May 22, 2015 by 5:00 p.m.

For submittal requirements, send request to the attention of Chris Lawson, clawson@eagleacademypcs.org

BOARD OF ELECTIONS

CERTIFICATION OF ANC/SMD VACANCY

The District of Columbia Board of Elections hereby gives notice that there is a vacancy in one (1) Advisory Neighborhood Commission office, certified pursuant to D.C. Official Code § 1-309.06(d)(2); 2001 Ed; 2006 Repl. Vol.

VACANT: 3C04

Petition Circulation Period: **Monday, May 18, 2015 thru Monday, June 8, 2015**
Petition Challenge Period: **Thursday**, **June 11, 2015 thru Wednesday, June 17, 2015**

Candidates seeking the Office of Advisory Neighborhood Commissioner, or their representatives, may pick up nominating petitions at the following location:

D.C. Board of Elections
441 - 4th Street, NW, Room 250N
Washington, DC 20001

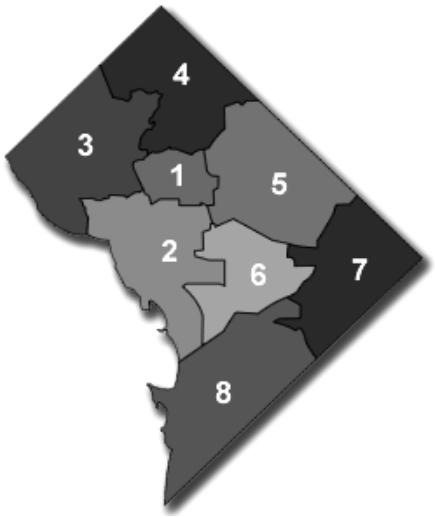
For more information, the public may call **727-2525**.

D.C. BOARD OF ELECTIONS
MONTHLY REPORT OF VOTER REGISTRATION STATISTICS
CITYWIDE REGISTRATION SUMMARY
As Of April 24, 2015

WARD	DEM	REP	STG	LIB	OTH	N-P	TOTALS
1	43622	2,826	758	116	130	11,836	**59,288**
2	29,535	5,705	219	158	114	11,030	**46,761**
3	36,378	6,734	369	108	101	11,340	**55,030**
4	47,632	2,254	545	68	132	9,138	**59,769**
5	50,246	2,092	576	80	152	8,831	**61,977**
6	51,647	6,529	576	160	166	12,977	**72,005**
7	49,071	1,273	437	25	121	7,121	**58,048**
8	43,209	1,169	380	24	142	7030	**51,954**
Totals	351,340	28,582	3,810	739	1,058	79,303	**464,832**
Percentage By Party	**75.58%**	**6.15%**	**.82%**	**.16%**	**.23%**	**17.06%**	**100.00%**

DISTRICT OF COLUMBIA BOARD OF ELECTIONS MONTHLY REPORT OF
VOTER REGISTRATION STATISTICS AND REGISTRATION TRANSACTIONS
AS OF APRIL 24, 2015

COVERING CITY WIDE TOTALS BY:
WARD, PRECINCT AND PARTY



ONE JUDICIARY SQUARE
441 4TH STREET, NW SUITE 250N
WASHINGTON, DC 20001
(202) 727-2525
http://www.dcboee.org

D.C. BOARD OF ELECTIONS
MONTHLY REPORT OF VOTER REGISTRATION STATISTICS
WARD 1 REGISTRATION SUMMARY
As Of April 24, 2015

PRECINCT	DEM	REP	STG	LIB	OTH	N-P	TOTALS
20	1,409	33	7	2	7	220	**1,678**
22	3,747	347	30	10	10	1,002	**5,146**
23	2,821	185	54	9	5	754	**3,828**
24	2,410	255	35	10	6	783	**3,499**
25	3,787	422	63	10	6	1,150	**5,438**
35	3,409	215	62	12	5	960	**4,663**
36	4,229	267	75	7	9	1,160	**5,747**
37	3,159	137	55	8	8	757	**4,124**
38	2,752	130	62	11	11	732	**3,698**
39	4,132	224	84	8	15	1,032	**5,495**
40	3,961	209	104	10	16	1,131	**5,431**
41	3,365	189	70	11	16	1,068	**4,719**
42	1,771	69	32	3	8	484	**2,367**
43	1,686	71	18	3	4	378	**2,160**
137	984	73	7	2	4	225	**1,295**
TOTALS	**43,622**	**2,826**	**758**	**116**	**130**	**11,836**	**59,288**

D.C. BOARD OF ELECTIONS
MONTHLY REPORT OF VOTER REGISTRATION STATISTICS
WARD 2 REGISTRATION SUMMARY
As Of April 24, 2015

PRECINCT	DEM	REP	STG	LIB	OTH	N-P	TOTALS
2	760	169	10	10	9	480	**1,438**
3	1,443	364	16	10	13	658	**2,504**
4	1,704	481	7	12	4	793	**2,999**
5	2,125	659	15	12	7	822	**3,640**
6	2,182	865	21	9	16	1,226	**4,319**
13	1,286	251	7	4		431	**1,979**
14	2,812	475	20	16	9	1,014	**4,346**
15	3,001	341	25	14	11	920	**4,312**
16	3,532	402	25	13	11	940	**4,923**
17	4,751	661	37	22	20	1,606	**7,097**
129	2,066	345	13	14	4	806	**3,248**
141	2,281	292	13	14	8	706	**3,314**
143	1,594	400	10	8	2	628	**2,642**
TOTALS	**29,535**	**5,705**	**219**	**158**	**114**	**11,030**	**46,761**

D.C. BOARD OF ELECTIONS
MONTHLY REPORT OF VOTER REGISTRATION STATISTICS
WARD 3 REGISTRATION SUMMARY
As Of April 24, 2015

PRECINCT	DEM	REP	STG	LIB	OTH	N-P	TOTALS
7	1,250	408	20	2	2	582	**2,264**
8	2,394	622	28	4	7	774	**3,829**
9	1,118	477	8	9	7	490	**2,109**
10	1,746	419	18	6	8	659	**2,856**
11	3,338	957	43	13	10	1,406	**5,767**
12	457	188	1	0	2	209	**857**
26	2,779	347	22	9	4	902	**4,063**
27	2,439	280	19	9	3	625	**3,375**
28	2,187	500	34	8	5	720	**3,454**
29	1,231	251	11	4	7	399	**1,903**
30	1,255	217	15	3	4	281	**1,775**
31	2,335	321	21	4	8	583	**3,272**
32	2,658	316	24	4	5	608	**3,615**
33	2,805	326	31	8	7	708	**3,885**
34	3,463	438	31	11	7	1,087	**5,037**
50	2,055	273	16	5	9	479	**2,837**
136	792	116	7	2	1	310	**1,228**
138	2,076	278	20	7	5	518	**2,904**
TOTALS	**36,378**	**6,734**	**369**	**108**	**101**	**11,340**	**55,030**

D.C. BOARD OF ELECTIONS
MONTHLY REPORT OF VOTER REGISTRATION STATISTICS
WARD 4 REGISTRATION SUMMARY
As Of April 24, 2015

PRECINCT	DEM	REP	STG	LIB	OTH	N-P	TOTALS
45	2,213	75	38	5	5	447	**2,783**
46	2,845	85	39	5	10	548	**3,532**
47	3,001	149	41	6	11	737	**3,945**
48	2,742	131	31	7	5	557	**3,473**
49	825	43	16	0	4	199	**1,087**
51	3,257	538	22	6	6	644	**4,473**
52	1,276	176	5	0	3	223	**1,683**
53	1,233	75	21	1	5	265	**1,600**
54	2,342	90	29	2	5	493	**2,961**
55	2,406	70	23	1	9	444	**2,953**
56	3,089	91	36	6	11	681	**3,914**
57	2,515	76	38	6	14	464	**3,113**
58	2,269	58	18	2	4	371	**2,722**
59	2,563	90	32	6	9	417	**3,117**
60	2,151	79	23	3	5	687	**2,948**
61	1,594	53	11	1	2	282	**1,943**
62	3,117	123	29	2	2	374	**3,647**
63	3,482	131	53	1	11	658	**4,336**
64	2,226	56	18	4	5	330	**2,639**
65	2,486	65	22	4	6	314	**2,900**
Totals	**47,632**	**2,254**	**545**	**68**	**132**	**9,138**	**59,769**

D.C. BOARD OF ELECTIONS
MONTHLY REPORT OF VOTER REGISTRATION STATISTICS
WARD 5 REGISTRATION SUMMARY
As Of April 24, 2015

PRECINCT	DEM	REP	STG	LIB	OTH	N-P	TOTALS
19	4,132	193	67	10	6	963	**5,371**
44	2,852	224	30	4	16	681	**3,809**
66	4,460	111	41	4	8	521	**5,145**
67	2,928	96	23	1	7	401	**3,456**
68	1,899	134	31	9	7	400	**2,480**
69	2,093	73	15	2	11	270	**2,464**
70	1,443	71	22	1	3	214	**1,744**
71	2,370	64	26	2	9	332	**2,803**
72	4,369	119	26	3	17	751	**5,285**
73	1,900	88	28	5	5	346	**2,372**
74	4,189	218	60	8	10	821	**5,306**
75	3,440	162	63	14	6	813	**4,498**
76	1,345	60	15	2	4	263	**1,689**
77	2,795	99	25	4	10	480	**3,413**
78	2,880	78	35	3	8	459	**3,463**
79	1,976	75	17	3	10	332	**2,413**
135	3,017	182	44	4	11	546	**3,804**
139	2,168	45	8	1	4	236	**2,462**
TOTALS	**50,426**	**2,092**	**576**	**80**	**152**	**8,831**	**61,977**

D.C. BOARD OF ELECTIONS

MONTHLY REPORT OF VOTER REGISTRATION STATISTICS

WARD 6 REGISTRATION SUMMARY

As Of April 24, 2015

PRECINCT	DEM	REP	STG	LIB	OTH	N-P	TOTALS
1	4,132	448	45	14	15	1,077	**5,731**
18	4,397	296	40	12	11	977	**5,733**
21	1,177	59	16	2	2	269	**1,525**
81	4,714	386	44	7	18	973	**6,142**
82	2,567	253	27	11	8	589	**3,455**
83	4,177	524	39	20	10	1,116	**5,886**
84	1,993	432	27	8	6	547	**3,012**
85	2,667	507	23	10	9	755	**3,971**
86	2,202	280	28	4	8	490	**3,012**
87	2,727	239	19	3	10	570	**3,568**
88	2,190	315	15	3	8	553	**3,084**
89	2,604	664	25	112	7	772	**4,084**
90	1,616	268	11	5	7	473	**2,380**
91	4,065	372	40	13	15	986	**5,491**
127	3,979	294	56	12	12	841	**5,194**
128	2,338	209	35	6	7	651	**3,246**
130	794	330	9	3	3	301	**1,440**
131	1,951	482	12	13	6	646	**3,110**
142	1,357	171	15	2	4	391	**1,940**
TOTALS	**51,647**	**6,529**	**526**	**160**	**166**	**12,977**	**72,005**

D.C. BOARD OF ELECTIONS
MONTHLY REPORT OF VOTER REGISTRATION STATISTICS
WARD 7 REGISTRATION SUMMARY
As Of April 24, 2015

PRECINCT	DEM	REP	STG	LIB	OTH	N-P	TOTALS
80	1,490	82	13	1	4	271	**1,861**
92	1,621	37	11	2	6	246	**1,923**
93	1,602	46	19	2	6	229	**1,904**
94	2,056	50	20	0	3	300	**2,429**
95	1,699	43	18	0	2	303	**2,065**
96	2,402	67	22	0	9	381	**2,881**
97	1,485	38	17	1	4	210	**1,755**
98	1,834	43	22	2	5	260	**2,166**
99	1,426	39	14	1	5	234	**1,719**
100	2,251	44	16	1	4	285	**2,601**
101	1,644	31	17	1	5	180	**1,878**
102	2,501	53	23	0	6	334	**2,917**
103	3,669	95	36	2	13	591	**4,406**
104	3,126	85	22	2	13	455	**3,703**
105	2,404	65	23	3	4	398	**2,897**
106	2,998	63	23	0	8	446	**3,538**
107	1,907	58	18	1	5	299	**2,288**
108	1,126	27	7	1		127	**1,288**
109	956	33	7	0	1	98	**1,095**
110	3,789	91	25	3	6	431	**4,345**
111	2,595	61	28	0	6	388	**3,078**
113	2,230	60	21	1	3	281	**2,596**
132	2,260	62	15	1	3	374	**2,715**
TOTALS	**49,071**	**1,273**	**437**	**25**	**121**	**7,121**	**58,048**

D.C. BOARD OF ELECTIONS
MONTHLY REPORT OF VOTER REGISTRATION STATISTICS
WARD 8 REGISTRATION SUMMARY
As Of April 24 2015

PRECINCT	DEM	REP	STG	LIB	OTH	N-P	TOTALS
112	2,045	57	11	0	9	296	**2,418**
114	3,078	99	24	1	19	507	**3,728**
115	2,726	64	23	6	8	595	**3,422**
116	3,735	93	35	2	13	579	**4,477**
117	1,867	42	18	0	6	307	**2,240**
118	2,535	62	27	0	6	409	**3,039**
119	2,765	106	36	0	11	526	**3,444**
120	1,851	30	15	2	4	290	**2,192**
121	3,103	71	27	1	8	455	**3,665**
122	1,653	37	13	0	5	237	**1,945**
123	2,175	95	25	4	12	339	**2,650**
124	2,503	56	13	1	4	338	**2,915**
125	4,445	114	33	1	13	729	**5,335**
126	3,561	114	36	5	11	692	**4,419**
133	1,313	39	13	0	2	181	**1,548**
134	2,047	35	23	1	4	281	**2,391**
140	1,787	55	8	0	7	269	**2,126**
TOTALS	**43,209**	**1,169**	**380**	**24**	**142**	**7,030**	**51,954**

D.C. BOARD OF ELECTIONS

MONTHLY REPORT OF VOTER REGISTRATION STATISTICS

CITYWIDE REGISTRATION ACTIVITY

For voter registration activity between 3/31/2015 and 4/24/2015

NEW REGISTRATIONS	DEM	REP	STG	LIB	OTH	N-P	TOTAL
Beginning Totals	**352,801**	**28,774**	**3,809**	**715**	**1,069**	**79,760**	**466,928**
Board of Elections Over the Counter	67	6	0	1	0	30	**104**
Board of Elections by Mail	43	0	0	0	1	7	**51**
Board of Elections Online Registration	2	1	0	1	0	0	**4**
Department of Motor Vehicle	960	194	15	24	1	338	**1,532**
Department of Disability Services	4	0	0	0	0	1	**5**
Office of Aging	0	0	0	0	0	0	**0**
Federal Postcard Application	0	0	0	0	0	0	**0**
Department of Parks and Recreation	0	0	0	0	0	0	**0**
Nursing Home Program	2	0	0	0	0	2	**4**
Dept. of Youth Rehabilitative Services	0	0	0	0	0	0	**0**
Department of Corrections	7	0	0	0	0	2	**9**
Department of Human Services	4	1	0	0	0		**5**
Special / Provisional	12	0	1	0	0	1	**14**
All Other Sources	43	2	0	1	0	13	**59**
+Total New Registrations	**1,144**	**204**	**16**	**27**	**2**	**394**	**1,787**

ACTIVATIONS	DEM	REP	STG	LIB	OTH	N-P	TOTAL
Reinstated from Inactive Status	162	12	5	0	0	47	**226**
Administrative Corrections	5	10	0	0	12	174	**201**
+TOTAL ACTIVATIONS	**167**	**22**	**5**	**0**	**12**	**221**	**427**

DEACTIVATIONS	DEM	REP	STG	LIB	OTH	N-P	TOTAL
Changed to Inactive Status	2,181	327	17	8	5	855	**3,393**
Moved Out of District (Deleted)	9	5	0	0	0	3	**17**
Felon (Deleted)	0	0	0	0	0	0	**0**
Deceased (Deleted)	64	8	6	0	0	6	**78**
Administrative Corrections	591	66	10	11	4	140	**822**
-TOTAL DEACTIVATIONS	**2,845**	**406**	**27**	**19**	**9**	**1,004**	**4,310**

AFFILIATION CHANGES	DEM	REP	STG	LIB	OTH	N-P	
+ Changed To Party	285	47	14	18	3	223	
- Changed From Party	-212	-59	-7	-2	-19	-291	
ENDING TOTALS	**351,340**	**28,582**	**3,810**	**739**	**1,058**	**79,303**	**464,832**

DISTRICT DEPARTMENT OF THE ENVIRONMENT

FISCAL YEAR 2015

PUBLIC NOTICE

AIR QUALITY TITLE V OPERATING PERMIT AND GENERAL PERMIT FOR THE GEORGE WASHINGTON UNIVERSITY

Notice is hereby given that The George Washington University has applied for a facility-wide Title V air quality permit pursuant to the requirements of Title 20 of the District of Columbia Municipal Regulations, Chapters 2 and 3 (20 DCMR Chapters 2 and 3) to operate the following emission units and miscellaneous sources of air emissions at the university:

- Twenty-one (21) large boilers (greater than 5 MMBTU/hr): including five (5) dual fuel boilers permitted to fire natural gas and No. 2 fuel oil, nine (9) dual fuel boilers classified as "gas-fired" and burning No. 2 fuel oil in the event of gas service interruptions; and seven (7) natural gas fired only;
- One (1) natural gas fired cogeneration system consisting of a 52.9 MMBTU/hr combustion turbine, a heat recovery steam generator, and one (1) 16.8 MMBTU/hr duct burner;
- Eighty-one (81) natural gas small boilers (less than 5 MMBTU/hr): including five (5) dual fuel boilers operating as "gas-fired" and burning No. 2 fuel oil in the event of gas interruptions. The other small boilers burn only natural gas;
- Seventy-seven (77) natural gas hot water heaters;
- Forty-five (45) emergency generators, including forty (40) diesel and five (5) natural gas generators;
- Three (3) natural gas fired air handler units;
- Three (3) natural gas fired humidifiers;
- Two (2) steamed humidifiers;
- One (1) diesel fired pump engine;
- One-hundred five (105) above ground storage tanks;
- Twelve (12) underground storage tanks;
- One-hundred twenty-eight (128) laboratory fume hoods;
- Two (2) solvent storage areas;
- Six (6) space heater/furnaces;
- Four (4) natural gas kilns;
- One-hundred twenty-six (123) natural gas dryers;
- Thirty-two (32) packaged heating ventilation and cooling units;
- Natural gas kitchen equipment;
- Laboratory fume hoods, solvent storage area(s), and painting operations;
- Woodworking operations;
- Cooling towers;

The above listed sources of emissions and insignificant activities are located at the George Washington University (GWU) located at 2025 F Street, NW, Washington, DC. The contact person for the facility is Ms. Alicia Knight, Senior Associate Vice President for Operations, at (202) 994-2371.

The George Washington University (GW) has the potential to operate twenty-four (24) hours per day, seven (7) days per week, fifty-two (52) weeks per year. In this capacity the facility has the potential to emit (PTE) approximately 473 tons per year (TPY) of nitrogen oxides (NO_x), 746 TPY of oxides of sulfur (SO_x), and 233 TPY of carbon monoxide (CO). The values for these criteria pollutants exceed the major source threshold in the District of Columbia of 25 TPY of NO_x or VOC, and/or 100 TPY of any other criteria pollutant. Because potential emissions of NO_x, SO_x, and CO exceed the relevant major source thresholds, pursuant to 20 DCMR 300.1(a), the source is subject to Chapter 3 and must obtain an operating permit in accordance with that regulation and Title V of the federal Clean Air Act. The facility also has approximate PTEs of total particulate matter of 46.9 TPY and volatile organic compounds (VOCs) of 23.6 TPY, values below the respective major source thresholds for these pollutants.

Description and Emission Information for a Modification to Permitted Equipment

Combined heat and power emission units are part of GW's cogeneration facility at Ross Hall. The cogeneration facility was issued a pre-construction Permit No. 6618-C on January 3, 2013. However, since that permit was issued, the permitted duct burner was changed from a NATCOM duct burner to a COEN brand rated at a lower capacity than the NATCOM model. Consequently, this change resulted in minor differences in potential emissions criteria pollutants.

Specifically, potential emissions of carbon monoxide have increased by 0.1 TPY while potential emissions of total particulate matter decreased by 2.34 TPY, sulfur dioxide decreased by 0.08 TPY, VOC decreased by 0.12 TPY, and NO_x decreased by 1.7 TPY.

The PTE of this cogeneration facility as modified is reflected by the emission limits in Table 1 below.

The following represent the emission limits placed upon the cogeneration facility, as revised by this permitting action:

The Permittee shall not exceed the emission limits in the following tables as applicable:

Table 1: Total 12-Month Rolling Emission Limits from Permitted Equipment[1]

Pollutant	12-Month Rolling Emissions Limit (tons/12 mo. rolling period)
Particulate Matter (PM) (Total)[2,3]	4.96
Oxides of Sulfur (SOx)	1.12
Oxides of Nitrogen (NOx)	21.3
Volatile Organic Compounds VOC)	2.28
Carbon Monoxide (CO)	21.5

1. The equipment covered consists of one Solar Centaur 50 gas turbine and one HRSG/duct burner.

2. PM Total is the sum of the filterable PM and condensable PM.
3. All PM is expected to be smaller than 2.5 microns, so PM (Total) equals $PM_{2.5}$. The manufacturer specifications note PM as PM_{10} and $PM_{2.5}$ for the gas turbine but PM10 for the duct burner.

Table 2- Maximum Hourly Emissions (lbs/hr) when Operating Between 50% and 100 % Load, Inclusive

Pollutants	Solar Centaur 50 Gas Turbine (CT) and HRSG/Duct Burner (HDB)
PM Total	1.13
SOx	0.26
NOx	4.87
VOC	0.52
CO	4.91

The proposed emission limits for the separate parts of the cogeneration equipment (one gas turbine and one HRSG/duct burner) are as follows:

a. Combustion Gas Turbine CT: One (1) Solar Centaur 50 combustion gas turbine (CT) rated at a heat input capacity of 52.9 MMBtu/hr, natural gas (NG).

1. Emission Limitations:

A. The gas combustion turbine shall not emit pollutants in excess of those specified in Tables 1 and 2. [20 DCMR 201]

B. Total Suspended Particulate (TSP) emissions (i.e. total filterable only) from the gas combustion turbine shall not exceed 0.07 pounds per million Btu. [20 DCMR 600.1]

C. Sulfur dioxide (SO_2) emissions from the gas turbine shall not exceed 0.060 lb SO_2/MMBtu heat input for each calendar month when natural gas is burned. [40 CFR 60.4330]:

D. NOx emissions from the turbine without supplemental firing shall not exceed 15 ppmvd at 15% O_2. [40 CFR 60.4320 and 60.4325 and 20 DCMR 201] *Note that this is a streamlined emission rate limit, and is more stringent than the limits found in 40 CFR 60, Subpart KKKK for NOx emissions cited above. Compliance with this condition will ensure compliance with both requirements.*

E. NOx emissions from the turbine when fired with supplemental duct burner firing shall not exceed 18 ppmvd at 15% O_2. [40 CFR 60.4320 and 60.4325 and 20 DCMR 201] *Note that this is a streamlined emission rate limit, and is more stringent than the limits found in 40 CFR 60, Subpart KKKK for NOx emissions cited above. Compliance with this condition will ensure compliance with both requirements.*

b. HRSG/Duct Burner HDB: One (1) 16.8MMBtu/hr heat input (natural gas) Rentech Boiler Services Heat Recovery Steam Generator/Duct Burner (HDB).

1. Emission Limitations:

   A. The HRSG/Duct Burner (HDB) shall not emit pollutants in excess of those specified in the tables 1 and 2 above.

   B. The HDB shall not emit pollutants in excess of 0.1 lb NO_x/MMBtu. [20 DCMR 201]

   C. Total Suspended Particulate (TSP) emissions (i.e. total filterable only) from the HDB shall not exceed 0.091 pounds per million Btu. [20 DCMR 600.1]

   D. Sulfur dioxide emissions shall not exceed 0.060 lb SO_2/MMBtu heat input. [40 CFR 60.4305 and 40 CFR 60.4330(a)(2)]

   E. NOx emissions from the Combustion Turbine/HDB (CT/HDB) train exhaust (while supplemental firing with duct burner) shall not exceed 18 ppmvd at 15% O_2 as required by Condition (a)(1)(E). [20 DCMR 201 and 40 CFR 60.4320] *Note that this is a streamlined permit condition and is more stringent than the requirements of 40 CFR 60.4320, therefore compliance with the limit established pursuant to 20 DCMR 201 will ensure compliance with 40 CFR 60.4320.*

   F. NOx emissions from CT/HDB train shall not exceed 4.87 lb/hr (the cumulative lb/hr emission rate contained in Condition Table 2 above) as measured at the HRSG exhaust. [20 DCMR 201]

The District Department of the Environment (DDOE) has reviewed the permit application and related documents and has made a preliminary determination that the applicant meets all applicable air quality requirements promulgated by the U.S. Environmental Protection Agency (EPA) and the District. Therefore, draft permit #020-R2 has been prepared.

The application, the draft permit, and all other materials submitted by the applicant [except those entitled to confidential treatment under 20 DCMR 301.1(c)] considered in making this preliminary determination are available for public review during normal business hours at the offices of the District Department of the Environment, 1200 First Street NE, 5th Floor, Washington DC 20002.

A public hearing on this permitting action will not be held unless DDOE has received a request for such a hearing within 30 days of the publication of this notice. Interested parties may also submit written comments on the permitting action. Hearing requests or comments should be directed to Stephen S. Ours, DDOE Air Quality Division, 1200 First Street NE, 5th Floor, Washington DC 20002. Questions about this permitting action should be directed to John C. Nwoke at (202) 724-7778 or john.nwoke@dc.gov. Comments or hearing requests submitted after June 15, 2015 will not be accepted.

DISTRICT DEPARTMENT OF THE ENVIRONMENT

FISCAL YEAR 2015

PUBLIC NOTICE

AIR QUALITY TITLE V OPERATING PERMIT AND GENERAL PERMIT FOR PROVIDENCE HOSPITAL

Notice is hereby given that Providence Hospital has applied for a Title V air quality permit pursuant to the requirements of Title 20 of the District of Columbia Municipal Regulations, Chapters 2 and 3 (20 DCMR Chapters 2 and 3) to operate five (5) boilers, five (5) diesel emergency generators, one (1) diesel fire pump, one (1) natural gas emergency generator, and several miscellaneous units at its facility located at 1150 Varnum Street NE, Washington, DC 20017. The contact person for the facility is Marc Edelman; Senior Vice President of Operations at (202) 534-4249.

Providence Hospital has the potential to emit approximately 85.11 tons per year (TPY) of oxides of nitrogen (NO_x), 7.19 TPY of particulate matter (PM), 44.15 TPY of carbon monoxide (CO), 3.46 TPY of volatile organic compounds (VOC), and 0.60 TPY of oxides of sulfur (SO_x). With the potential to emit approximately 85.11 tons per year of NO_x, the source has the potential to emit greater than the District's major source threshold of 25 tons per year of NO_x. Therefore, the facility is classified as a major source of air pollution and is subject to 20 DCMR Chapter 3 and must obtain an operating permit under that regulation.

Description and Emission Information for Unit being Permitted for the First Time:

Non NSPS Fire Pump: One (1) 138 kW Caterpillar 3208 Diesel Fire Pump Engine

Maximum annual potential emissions from the unit are expected to be as follows:

Pollutants	Potential-to Emit for Fire pump (Tons/year)
PM (total)	0.1012
SOx	0.0001
NOx	1.4260
VOC	0.1136
CO	0.3073

The proposed emission limits for the Fire Pump are as follows:

A. Visible emissions shall not be emitted into the outdoor atmosphere from these generators and fire pump, 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 24-hour period during start-up, cleaning, adjustment of combustion controls, or malfunction of the equipment [20 DCMR 606.1].

B. 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 District Department of the Environment (DDOE) has reviewed the permit application and related documents and has made a preliminary determination that the applicant meets all applicable air quality requirements promulgated by the U.S. Environmental Protection Agency (EPA) and the District. Therefore, draft permit #008-R2 has been prepared.

The application, the draft permit, and all other materials submitted by the applicant [except those entitled to confidential treatment under 20 DCMR 301.1(c)] considered in making this preliminary determination are available for public review during normal business hours at the offices of the District Department of the Environment, 1200 First Street NE, 5th Floor, Washington DC 20002. Copies of the draft permit and related fact sheet are available at http://ddoe.dc.gov.

A public hearing on this permitting action will not be held unless DDOE has received a request for such a hearing within 30 days of the publication of this notice. Interested parties may also submit written comments on the permitting action. Hearing requests or comments should be directed to Stephen S. Ours, DDOE Air Quality Division, 1200 First Street NE, 5th Floor, Washington DC 20002. Questions about this permitting action should be directed to Olivia Achuko at (202) 535-2997 or olivia.achuko@dc.gov. Comments or hearing requests submitted after June 15, 2015 will not be accepted.

DISTRICT DEPARTMENT OF THE ENVIRONMENT

NOTICE OF PUBLICATION FOR PUBLIC COMMENT

Municipal Separate Storm Sewer System (MS4) Permit
Consolidated Total Maximum Daily Load (TMDL) Implementation Plan

The District Department of the Environment (the Department) is soliciting comments on a draft Municipal Separate Storm Sewer System (MS4) Permit Consolidated Total Maximum Daily Load (TMDL) Implementation Plan. Section 4.10.3 of the National Pollutant Discharge Elimination System permit for the District's Municipal Separate Storm Sewer System (NPDES Permit No. DC 0000221) directs the District to develop a Consolidated TMDL Implementation Plan, and to make this plan available for public review and comment. In accordance with this requirement, the Department has developed a draft Consolidated TMDL Implementation Plan, which is available on the Department's website at http://ddoe.dc.gov/tmdlplan, or upon request by contacting the Department's Stormwater Management Division at (202) 741-2136.

The Department is committed to considering the public's comments while finalizing this Plan. Interested persons may submit written comments on the draft Plan, which must include the person's name, telephone number, affiliation, if any, mailing address, a statement outlining their concerns, and any facts underscoring those concerns. All comments must be submitted within ninety (90) days after the date of publication of this notice in the *D.C. Register*. Comments should be clearly marked "Municipal Separate Storm Sewer System (MS4) Permit Consolidated TMDL Implementation Plan" and either (1) mailed or hand-delivered to DDOE, Stormwater Management Division, 1200 First Street, N.E., 5th Floor, Washington, DC 20002, Attention: Consolidated TMDL Implementation Plan, or (2) e-mailed to jonathan.champion@dc.gov.

The Department will consider all timely received comments before finalizing the plan. All comments will be treated as public documents and will be made available for public viewing on the Department's website. When the Department identifies a comment containing copyrighted material, the Department will provide a reference to that material on the website. If a comment is sent by e-mail, the email address will be automatically captured and included as part of the comment that is placed in the public record and made available on the Department's website. If the Department cannot read a comment due to technical difficulties, and the email address contains an error, the Department may not be able to contact the commenter for clarification and may not be able to consider the comment. Including the commenter's name and contact information in the comment will avoid this difficulty.

DISTRICT DEPARTMENT OF THE ENVIRONMENT

SUBMITTAL OF A NEGATIVE DECLARATION TO EPA AS A SIP REVISION

Public Comment Period and Hearing on Interstate Transport Provisions for the 1997 Ozone and the 1997 and 2006 Fine Particulate Matter Standards

Notice is hereby given that a public hearing will be held on June 22, 2015, at 5:00 p.m. in Room 555 at 1200 First Street, N.E., 5th Floor, in Washington, D.C. The District is proposing to submit a negative declaration to the U.S. Environmental Protection Agency (EPA) to address the interstate transport of pollution to meet "infrastructure" requirements of the 1997 ozone and the 1997 and 2006 fine particulate matter ($PM_{2.5}$) national ambient air quality standards (NAAQS). The District Department of the Environment (DDOE) will accept comments on the proposed negative declaration until the public hearing date on June 22, 2015. This hearing provides interested parties an opportunity to comment on the proposed negative declaration as well as the proposed submittal of the negative declaration to EPA as a State Implementation Plan (SIP) revision. Once finalized, the negative declaration will be submitted to the EPA as a SIP Revision in accordance with 40 C.F.R. Part 51.

The proposed negative declaration is available for public review during normal business hours at the offices of the District Department of the Environment (DDOE), 1200 First Street, NE, Washington, D.C. 20002, and on-line at http://ddoe.dc.gov. Interested parties wishing to testify at this hearing must submit in writing their names, addresses, telephone numbers, and affiliation, if any, to Mr. William Bolden at DDOE by 4:00 p.m. on June 22, 2015. Interested parties may also submit written comments to Ms. Jessica Daniels, DDOE Air Quality Division, at 1200 First Street, NE, 5th Floor, Washington, DC 20002, or by email at jessica.daniels@dc.gov. No written or email comments will be accepted after June 22, 2015. For more information or to find out if the public hearing has been canceled, contact Ms. Jessica Daniels at 202-741-0862 or by email.

FRIENDSHIP PUBLIC CHARTER SCHOOL

REQUEST FOR PROPOSALS

Friendship Public Charter School is seeking bids from prospective vendors to provide;

Voice Over IP Migration; Friendship Public Charter School seeks a **qualified vendor to provide Voice Over IP Migration**. The competitive Request for Proposal can be found on FPCS website at http://www.friendshipschools.org/procurement. The deadline has been extended and proposals are due no later than 4:00 P.M., EST, May 29th 2015. Questions can be addressed to: ProcurementInquiry@friendshipschools.org

DEPARTMENT OF HEALTH

HEALTH REGULATION AND LICENSING ADMINISTRATION

NOTICE OF MEETING

Board of Chiropractic
May 12, 2015

On May 12, 2015 at 1:00 pm, the Board of Chiropractic will hold a meeting to consider and discuss a range of matters impacting competency and safety in the practice of medicine.

In accordance with Section 405(b) of the Open Meetings Amendment Act of 2010, the meeting will be closed from 1:00 pm until 2:30 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 open to the public from 2:30 pm to 3:30 pm to discuss various agenda items and any comments and/or concerns from the public. After which the Board will reconvene in closed session to continue its deliberations until 4:30 pm.

The meeting location is 899 North Capitol Street NE, 2nd Floor, Washington, DC 20002.

Meeting times and/or locations are subject to change – please visit the Board of Chiropractic website www.doh.dc.gov/boc and select BOC Calendars and Agendas to view the agenda and any changes that may have occurred.

Acting Executive Director for the Board – Robin Jenkins, (202) 442-8336.

INGENUITY PREP PUBLIC CHARTER SCHOOL

REQUEST FOR PROPOSALS

Furniture Vendor

Ingenuity Prep Charter School is soliciting proposals from furniture vendors that can provide us with the following services:

1. Supply Ingenuity Prep with new furniture that meets our school needs
2. Delivery of the furniture to the school building and to each classroom (2nd Floor)
3. Assembly and setup of the furniture within each classroom

Please email us at bids@ingenuityprep.org to receive the RFP or if you have any questions.

DISTRICT OF COLUMBIA COMMISSION ON JUDICIAL DISABILITIES AND TENURE

Judicial Tenure Commission Begins Reviews Of Judges Ann O'Regan Keary and James A. Belson

This is to notify members of the bar and the general public that the Commission is reviewing the qualifications of **Judge Ann O'Regan Keary** of the Superior Court of the District of Columbia, who is retiring and has requested a recommendation for an initial appointment as a Senior Judge. In addition, the Commission is reviewing the qualifications of **Judge James A. Belson** of the District of Columbia Court of Appeals, who has requested a recommendation for reappointment as a Senior Judge.

The District of Columbia Retired Judge Service Act P.L. 98-598, 98 Stat. 3142, as amended by the District of Columbia Judicial Efficiency and Improvement Act, P.L. 99-573, 100 Stat. 3233, §13(1) provides in part as follows:

> "…A retired judge willing to perform judicial duties may request a recommendation as a senior judge from the Commission. Such judge shall submit to the Commission such information as the Commission considers necessary to a recommendation under this subsection.
>
> (2) The Commission shall submit a written report of its recommendations and findings to the appropriate chief judge of the judge requesting appointment within 180 days of the date of the request for recommendation. The Commission, under such criteria as it considers appropriate, shall make a favorable or unfavorable recommendation to the appropriate chief judge regarding an appointment as senior judge. The recommendation of the Commission shall be final.
>
> (3) The appropriate chief judge shall notify the Commission and the judge requesting appointment of such chief judge's decision regarding appointment within 30 days after receipt of the Commission's recommendation and findings. The decision of such chief judge regarding such appointment shall be final."

The Commission hereby requests members of the bar, litigants, former jurors, interested organizations, and members of the public to submit any information bearing on the qualifications of Judges Keary and Belson which it is believed will aid the Commission. The cooperation of the community at an early stage will greatly aid the Commission in fulfilling its responsibilities. The identity of any person submitting materials will be kept confidential unless expressly authorized by the person submitting the information.

All communications should be mailed, faxed, or e-mailed by **July 13, 2015**, and addressed to:

District of Columbia Commission on Judicial Disabilities and Tenure
Building A, Room 246
515 Fifth Street, N.W.
Washington, D.C. 20001
Telephone: (202) 727-1363
FAX: (202) 727-9718
dc.cjdt@dc.gov

The members of the Commission are:

Hon. Gladys Kessler, Chairperson
Jeannine C. Sanford, Esq., Vice Chairperson
Michael K. Fauntroy, Ph.D.
Hon. Joan L. Goldfrank
William P. Lightfoot, Esq.
David P. Milzman, M.D.
Anthony T. Pierce, Esq.

BY: /s/ Gladys Kessler
Chairperson

KIPP DC PUBLIC CHARTER SCHOOLS

NOTICE OF INTENT TO ENTER SOLE SOURCE CONTRACTS

Administrative Tech Licenses

KIPP DC intends to enter into sole source contracts with PowerSchool, Box, Microsoft, Illuminate, and E-Folder Inc. for administrative tech licenses. The cost of these contracts will be approximately $34,667, $50,400, $41,785, $28,639, and $51,600 respectively. The decision to sole source is due to the fact that these vendors are the exclusive providers of these licenses.

MAYA ANGELOU PUBLIC CHARTER SCHOOL

REQUEST FOR PROPOSALS

Chromebooks

The Maya Angelou Public Charter School – High School (hereafter the "MAPCS") is requesting proposals for approximately 225 Chromebooks that meet the specifications described herein.

Specifications

Interested vendors must submit written evidence and documentation in their proposals to verify that the following specifications are met in order to be considered for selection:

Model: Chromebook (13.3 inch display only)

System Requirements: Gigabit Dual-Band 802.11AC ultra-fast Wi-Fi, Intel Dual-Core Processor with 4 GB RAM, 13.3" HD Display, USB 3.0, USB 2.0, HDMI, SD Card Reader, and a Google Apps management license for each machine. All standard manufacturer warranties apply.

Units Needed: 225

Additional Services Needed: The vendor will unbox the units; apply a MAPCS asset tag; inventory their serial number, MAC address; and enroll them in the MAPCS Google Apps domain. This is also known as "white glove service." The vendor will deliver the units to MAPCS located at 5600 E. Capitol St NE, Washington DC 20019, Attention: Marvin Harden, IT Director.

Submission Requirements and Deadline

If you are interested in being considered as a vendor for this RFP, please apply through the following link:

http://bit.ly/1IO0gsN

Deadline to submit a proposal is 3:00 p.m. on May 27, 2015.

This RFP sets forth the intent of MAPCS as to the procedure and criteria through which a vendor will be selected, but is not to be construed as setting forth specific terms of a contract between any vendor and MAPCS. Neither MAPCS nor its representatives will be liable for any expenses incurred in connection with preparation of a response to this invitation. MAPCS, through its duly authorized officials, reserves the right to reject any, part of, or all proposals and to waive any formality pertaining to any proposal, without the imposition of any form of liability.

MONUMENT ACADEMY PUBLIC CHARTER SCHOOL

REQUEST FOR PROPOSALS

Financial, Accounting, and Human Resource Services

Monument Academy Public Charter School invites all interested and qualified companies to submit proposals to provide financial, accounting and human resource services for the 2015-2016 school year.

Proposals are due no later than 5:00pm on 5/25/15.

The RFP with bidding requirements and supporting documentation can be obtained by emailing Joseph.Dickerson@monumentacademydc.org.

DISTRICT OF COLUMBIA RETIREMENT BOARD

INVESTMENT COMMITTEE

NOTICE OF CLOSED MEETING

May 21, 2015
10:00 a.m.

DCRB Board Room
900 7th Street, N.W.
Washington, D.C 20001

On Thursday, May 21, 2015 at 10:00 a.m., the District of Columbia Retirement Board (DCRB) will hold a closed investment committee meeting regarding investment matters. In accordance with D.C. Code §2-575(b)(1), (2), and (11) and §1-909.05(e), the investment committee meeting will be closed to deliberate and make decisions on investments matters, the disclosure of which would jeopardize the ability of the DCRB to implement investment decisions or to achieve investment objectives.

The meeting will be held in the Board Room at 900 7th Street, N.W., Washington, D.C 20001.

For additional information, please contact Deborah Reaves, Executive Assistant/Office Manager at (202) 343-3200 or Deborah.Reaves@dc.gov.

DISTRICT OF COLUMBIA RETIREMENT BOARD

NOTICE OF OPEN PUBLIC MEETING

May 21, 2015
1:00 p.m.

900 7th Street, N.W.
2nd Floor, DCRB Boardroom
Washington, D.C. 20001

The District of Columbia Retirement Board (DCRB) will hold an Open meeting on Thursday, May 21, 2015, at 1:00 p.m. The meeting will be held at 900 7th Street, N.W., 2nd floor, DCRB Boardroom, Washington, D.C. 20001. A general agenda for the Open Board meeting is outlined below.

Please call one (1) business day prior to the meeting to ensure the meeting has not been cancelled or rescheduled. For additional information, please contact Deborah Reaves, Executive Assistant/Office Manager at (202) 343-3200 or Deborah.reaves@dc.gov.

AGENDA

I.	Call to Order and Roll Call	Chairman Bress
II.	Approval of Board Meeting Minutes	Chairman Bress
III.	Chairman's Comments	Chairman Bress
IV.	Executive Director's Report	Mr. Stanchfield
V.	Investment Committee Report	Ms. Blum
VI.	Operations Committee Report	Mr. Ross
VII.	Benefits Committee Report	Mr. Smith
VIII.	Legislative Committee Report	Mr. Blanchard
IX.	Audit Committee Report	Mr. Hankins
X.	Other Business	Chairman Bress
XI.	Adjournment	

WASHINGTON GLOBAL PUBLIC CHARTER SCHOOL

REQUEST FOR PROPOSALS

Special Education Consultant

Washington Global Public Charter School solicits proposals for the following:

- Special Education Consultant offering the following services:
  - Physical Therapy
  - Occupational Therapy
  - Psychological Assessments
  - Social Work
  - Speech Language Services

Please direct questions and proposals to **rfp@buildinghope.org.**

Proposals shall be received no later than 5:00 P.M., Friday, May 29, 2015.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 18651 of Peter J. Fitzgerald, pursuant to 11 DCMR § 3103.2, for variances from lot area (§ 401), lot occupancy (§ 403), rear yard (§ 404), off-street parking (§ 2101.1), and alley width (§ 2507.2) requirements for a subdivision allowing an existing apartment building and construction of a new one-family dwelling on an alley lot in the CAP/R-4 District at premises 319 A Street, N.E. and rear of 319 and 321 A Street, N.E. (Square 786, Lot 827, part of Lot 827 and Lot 22).[1]

HEARING DATES: November 5, 2013 and January 29, 2014
DECISION DATE: March 11, 2014

DECISION AND ORDER

This application was submitted on August 25, 2013 by Peter J. Fitzgerald (the "Applicant"), the owner of the property that is the subject of the application. The application requested use and area variances to allow the subdivision of two adjoining parcels so as to permit an existing apartment house on one lot and a new one-family dwelling on an adjoining alley lot, in the CAP/R-4 District at 319 A Street, N.E. and rear of 319 and 321 A Street, N.E. (Square 786, Lot 827, Lot 22 and part of Lot 827). Following a public hearing, the Board of Zoning Adjustment (the "Board" or "BZA") voted to deny the application.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated August 20, 2013, the Office of Zoning provided notice of the application to the Office of Planning ("OP"); the District Department of Transportation; the Councilmember for Ward 6; Advisory Neighborhood Commission ("ANC") 6C, the ANC in which the subject property is located; and Single Member District/ANC 6C01. Pursuant to 11 DCMR § 3112.14, on August 29, 2013, the Office of Zoning mailed letters providing notice of the hearing to the Applicant, ANC 6C, and the owners of all property within 200 feet of the subject property. Notice was also published in the *D.C. Register* on August 30, 2013 (60 DCR 12378) and on November 15, 2013 (60 DCR 15854).

Party Status. The Applicant and ANC 6C were automatically parties in this proceeding. The Board received an application for party status in support of the application from Elliot Eisenberg, a resident of the 300 block of A Street, who was deemed a person in support instead. The Board granted requests for party status in opposition to the application from a group of residents living on A or 4th Street near the subject property: Janet Schmidt, John and Sheila Hollis, and Brian Stansberry.[2]

[1] The caption was amended slightly to eliminate the unneeded duplicate recitation of the square of the property.
[2] The request for party status in opposition to the application submitted by Brian Stansberry was subsequently withdrawn. (Exhibit 47.)

Motion to dismiss. The party in opposition made a preliminary motion to dismiss or, in the alternative, to stay the proceeding because the application was not signed by the owner of record of the subject property. The party in opposition alleged that Peter J. Fitzgerald, who signed the authorization letter (Exhibit 6), was not the titled owner of the property. According to the party in opposition, the actual owner was a testamentary trust created under the will of Joseph Fitzgerald. The Applicant asserted that Peter J. Fitzgerald, the son of Joseph Fitzgerald, had ownership and control of the subject property in his personal and trustee capacity, and that Peter J. Fitzgerald, in turn, authorized his son John H. Fitzgerald to act on his behalf with respect to the request for zoning relief.

Applicant's Case. The Applicant provided evidence and testimony describing a plan to subdivide the lots comprising the subject property by combining the area now occupied by the accessory garage behind the apartment house on Lot 827 with the area designated Lot 22 to create a new lot, where the Applicant proposed to construct a new one-family dwelling. According to the Applicant, the costs of renovating the garage structures for use either as garages or as artist studios – that is, uses that would be permitted as a matter of right on an alley lot – made those uses financially infeasible for development on new Lot 22, and use as a one-family dwelling was required to obtain a sufficient return on investment. The Applicant proposed certain requirements, concerning especially the construction process, as conditions of approval of the requested zoning relief.

OP Report. By memorandum dated October 22, 2013, the Office of Planning recommended denial of the requested variances, stating that the application had not satisfied any part of the test for variance relief. (Exhibit 35.)

DDOT. By memorandum dated October 23, 2013, the District Department of Transportation ("DDOT") indicated no objection to approval of the application. (Exhibit 33.)

ANC Report. By letter dated September 16, 2013, ANC 6C indicated that, at a properly noticed public meeting, held September 12, 2013 with a quorum present, the ANC voted 6-0-0 to support the application. The letter noted that "[n]eighbors have expressed support for this project, conditioned on the applicant limiting construction to the hours of 9 am to 5 pm on weekdays," and that the Applicant had agreed to that restriction. (Exhibit 27.)

Party in opposition. The party in opposition argued that the zoning requirements, such as minimum lot area and maximum lot occupancy, should not be disregarded and that approval of the requested variance relief would have a detrimental effect on nearby properties due to the increased density of buildings in the alley, increased demand for parking, and impeded vehicular access in the alleys, especially for emergency vehicles. (Exhibits 30, 31, 54, 55, 56, and 63.)

Persons in support. The Board received letters in support of the application from the zoning committee of the Capitol Hill Restoration Society (Exhibit 38) and from Elliot Eisenberg (Exhibit 28), who lives near the subject property.

Persons in opposition. The Board received letters in opposition to the application from persons living in the vicinity of the subject property. The letters cited concerns related to the density and lot occupancy of the planned one-family dwelling, increased traffic in the alley and the demand for parking, adverse impacts on light and air, the lack of undue hardship to the Applicant, and safety concerns pertaining to the alley.[3] (Exhibits 34, 42, 43, and 45.)

FINDINGS OF FACT

The Subject Property

1. The subject property is currently designated Lot 827 and Lot 22 in Square 786. Lot 827 is a long, rectangular lot approximately 17 feet wide and 128 feet deep. Lot 827 fronts onto A Street and is bounded by public alleys on the west and to the south. Lot 22 abuts Lot 827 to the east at the rear of Lot 827, so that Lot 22 is bounded by Lot 827 on the west and public alleys to the south and on a portion of its eastern property line. Lot 22 is slightly irregular but generally rectangular, 20 feet wide along the southern alley and 26 feet deep.

2. Lot 827 is improved with a three-story apartment house, built in 1890, which contains three apartments. A one-story accessory garage is located at the rear of the lot. Lot 22 is improved with a one-story garage, which adjoins the accessory garage on Lot 827.

3. The subject property was purchased in the early 1960s by Joseph Fitzgerald from a plumbing contractor, who used the garages to store plumbing supplies. The Applicant's property management company has used the garages for storage since the 1970s. The Applicant described the garages as "dilapidated" and in poor condition due to their age and the effects of attempted break-ins and vandalism. Structural concerns include leaks in the roofs, cracks in the concrete floor of one garage, one garage door is inoperable, and the buildings lack electricity and other utilities.

4. The alley to the west of Lot 827 is 15 feet wide and provides access to both A Street (to the north) and South Capitol Street (to the south). The alley to the south of both Lots 827 and Lot 22 is 30 feet wide. The southern alley connects to other portions of the alley system, ranging from 10 to 24 feet wide, to provide access to 4th Street (to the east).

5. The subject property and surrounding properties are located in the R-4 zone within the Capitol Interest overlay (CAP/R-4). Properties in the vicinity of the subject property contain primarily row dwellings and small apartment houses, with some institutional uses.

[3] The Board also received an "emergency motion to stay" the application, submitted by Dr. Michael Kim and Grubbs' Care Pharmacy, which is located within 200 feet of the subject property. (Exhibit 44.) The motion argued that the Applicant's proposal would require the relocation of a telecommunications and utility pole serving Square 786, thereby resulting in "significant interruption of utility and telecommunications services" to the pharmacy. The motion was denied on grounds that it was not submitted by a party in this proceeding and did not address the criteria for a stay or matters within the Board's purview.

A six-story apartment building is located on the eastern side of the square. The widest portion of the alley system in Square 786, designated Millers Court, contains several alley dwellings.

The Applicant's Project

6. The Applicant proposes to subdivide the subject property by allocating the rear portion of Lot 827, currently the location of the accessory garage, to Lot 22. The planned subdivision would reduce the depth of Lot 827, and consequently reduce its lot area from 2,204 square feet to 1,722 square feet and its lot occupancy from 78% to 72%. New Lot 22 would increase in size from 489 square feet to 971 square feet.

7. The Applicant proposes to maintain the existing apartment house on Lot 827, and to construct a new one-family dwelling on Lot 22. The planned dwelling would occupy 100% of the alley lot and would provide approximately 1,900 square feet of gross floor area on two floors. The building would be approximately 22 feet in height. One parking space would be provided in an enclosed garage.

8. For Lot 827, the Applicant's proposal requires: (a) an area variance from § 401.3 to allow a lot subdivision that would further noncompliance with the required minimum lot area, since the lot would provide less than 900 square feet per apartment unit; (b) an area variance from § 403.2 to allow a lot subdivision that would further noncompliance with maximum allowable lot occupancy; and (c) a parking variance from § 2101.1 to allow a lot subdivision that would create noncompliance with required parking spaces.

9. By reducing the lot area on Lot 827, the planned subdivision would increase its noncompliance with the minimum lot area required by the Zoning Regulations by allowing less than 900 square feet of lot area per apartment unit. A minimum of 2,700 square feet would be required under § 401.3 for a three-unit apartment house, but the Applicant's proposal would reduce the lot area to 1,722 square feet, a variance of 978 square feet.

10. The Applicant's proposal would also increase the noncompliance of Lot 827 with the maximum lot occupancy permitted under the Zoning Regulations. After the proposed subdivision, the lot occupancy would be 72.3%, where the maximum permitted as a matter of right is 60%, requiring a variance of 12.3%.

11. The Applicant's proposal would also create noncompliance on Lot 827 with the minimum number of off-street parking spaces required in the R-4 zone. While the lot currently contains an accessory parking garage at the rear of the lot, the proposed subdivision would remove the one existing space from Lot 827 and eliminate the ability to provide any off-street parking on-site. At least one space is required under the Zoning Regulations for the apartment house use.

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12. The proposed subdivision and one-family dwelling on new Lot 22 also requires variance relief.

    a) An area variance from § 401.3 to allow a new one-family dwelling on a lot that does not comply with the required minimum lot area: New Lot 22 would provide 971 square feet where a minimum of 1,800 square feet is required for a one-family dwelling, a variance of 829 square feet.

    b) An area variance from § 403.2 to allow a one-family dwelling that would exceed the maximum allowable lot occupancy: The proposed building on new Lot 22 would occupy 100% of the lot where a maximum of 60% is permitted as a matter of right, a variance of 40% (388 square feet).

    c) An area variance from § 404.1 to allow a one-family dwelling that would not comply with required minimum rear yard: The proposed building on new Lot 22 would not provide a rear yard where a minimum of 20 feet is required, a variance of 100%.

    d) A use variance from § 2507.2 to allow a new one-family dwelling on an alley lot that does not comply with minimum alley width: New Lot 22 would face an alley 30 feet wide, but the alleys providing access to the street are 15 feet wide, half of the required minimum of 30 feet.

13. The subject property is located in the Capitol Hill historic district. A staff report prepared for the Historic Preservation Review Board ("HPRB") described Millers Court as an "important historic alley, as it features inhabited alley dwellings and several early carriage houses." (Exhibit 9, p. 1) The staff report concluded that HPRB could reasonably grant approval for the demolition of the garage structures for the Applicant's project, and stated that the Applicant's "proposal to join together the parcels formerly occupied by the garages is consistent with the pattern of development" in the square. (Exhibit 9, p. 2.) The report also stated that the project would be "compatible with the character of Millers Court and with the Capitol Hill Historic District as a whole." (Exhibit 9, p. 3.) On November 29, 2012, HPRB found the proposed demolition, new construction, and subdivision to be consistent with the purposes of the historic preservation act and delegated final approval to the staff.

Harmony with Zoning

14. The R-4 District is designed to include those areas now developed primarily with row dwellings, but within which there have been a substantial number of conversions of the dwellings into dwellings for two or more families. (11 DCMR § 330.1.)

CONCLUSIONS OF LAW AND OPINION

The Applicant seeks area and use variances to allow the subdivision of two adjoining parcels so as to permit an existing apartment house on a new smaller lot and a new one-family dwelling on an adjoining alley lot, in the CAP/R-4 District at 319 A Street, N.E. and rear of 319 and 321 A Street, N.E. (Square 786, Lot 827, part of Lot 827 and Lot 22). The Board is authorized under § 8 of the Zoning Act to grant variance relief where, "by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition of a specific piece of property," the strict application of the Zoning Regulations would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property, provided that 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. (*See* 11 DCMR § 3103.2.) A showing of "practical difficulties" must be made for an area variance, while the more difficult showing of "undue hardship," must be made for a use variance. *Palmer v. D.C. Board of Zoning Adjustment*, 287 A.2d 535, 541 (D.C. 1972). The use variance inquiry focuses on whether "the property can be put into any conforming use with a fair and reasonable return to the owner." *Id.* at 542.

In this case the Applicant is requesting area variances from the lot area (§ 401), lot occupancy (§ 403), rear yard (§ 404), and off-street parking (§ 2101.1) requirements. The Applicant also seeks a use variance from § 2507.2 of the Zoning Regulations to permit the construction of five one-family dwellings on alley lots in the R-4 District where the alleys are less than 30 feet in width.

As a preliminary matter, the Board denies the motion by the party in opposition to dismiss the application on the ground that the application was not signed by the owner of record of the subject property. The Applicant adequately demonstrated that the application was submitted by the person with ownership and control of the subject property, who was represented before the Board by a duly authorized representative.

Based on the findings of fact, the Board finds that the application does not satisfy the requirements for the requested variance relief. The Board concurs with the Office of Planning that the subject property is not faced with any exceptional situation or condition. Lot 827 is a typical lot for its neighborhood, exceptional only in that the parcel abuts another property also owned by the Applicant, which the Applicant seeks to redevelop. Similarly, Lot 22 is not unusual for an alley lot. The Applicant argued that the subject property faced an exceptional situation due to a confluence of factors, especially that both garages are no longer suitable or usable for garage or other permitted purposes, and have received approval for demolition but could not be replaced "given existing zoning limits." The Board does not agree that the garages could not be replaced[4] or that the garages could not be devoted to a use permitted under the Zoning Regulations. Despite their poor condition, the garages have remained in use for storage by the Applicant's property management company; they are not vacant. Nor does the Board find

[4] The Office of Planning indicated that the Zoning Administrator permits the replacement of existing dilapidated accessory structures even if they contribute to a nonconformity such as lot occupancy.

an exceptional situation in the dilapidated conditions of the two garages, which are relatively old structures that have been owned by the Applicant for decades; the owner's lack of maintenance does not provide a justification for variance relief. *See, e.g., Foxhall Community Citizens Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 524 A.2d 759 at 763 (D.C. 1987) (court vacated a Board finding that property faced an exceptional situation due in part to "problems with the heating, cooling and bathroom facilities," stating that "[t]hese observations beg the question because they ignore that [the property owner] itself is responsible for the 'extraordinary or exceptional situation or condition' the BZA described." *Id*. at 753. Other factors cited by the Applicant as indicative of an exceptional situation – e.g. the nonconforming aspects of each lot, the lack of street frontage for Lot 22, the absence of an alley 30 feet wide, location in a historic district – are similarly unpersuasive as grounds for the grant of a variance. Many properties, especially within the Capitol Hill historic district, face similar circumstances.

Even if these were exceptional conditions, the Board does not find that as a result of such conditions the Applicant faces any practical difficulty or undue hardship arising from the strict application of the Zoning Regulations. The properties are currently in use as storage and could also, consistent with the Zoning Regulations, be devoted to use as an artist studio or used as parking. The Board agrees with the party in opposition that the lots would be useful as storage or for parking by nearby residents, citing the demand for parking in the densely developed square. Contrary to the Applicant's claims, existing Lot 22 is not "too small to be useful on its own," as the lot, which is at least 20 feet wide, could accommodate two parking spaces.

The Board was not persuaded by the Applicant's claims that a result of the strict application of the Zoning Regulations would be elimination of any reasonable use of a substantial portion of the property absent a grant of variance relief due to the numerous unique conditions and circumstances for Lot 22 and its physical relationship to Lot 827 and the existing garages. Especially with respect to new Lot 22, where a use variance is required to allow its development with a new one-family dwelling, the Applicant's claim of deterioration describes a self-created hardship. Although "self-created hardship is not a factor to be considered in an application for an area variance," *Ass'n For Pres. of 1700 Block of N St., N.W., & Vicinity v. D.C. Bd. of Zoning Adjustment*, 384 A.2d 674, 678 (D.C. 1978), it "will not support the grant of a use variance." *Salsbery v. D.C. Bd. of Zoning Adjustment*, 357 A.2d 402, 404 (D.C. 1976) *See, e.g., Foxhall Community Citizens Ass'n*, 524 A.2d at 761 (hardship related to configuration of existing structure was not grounds for use variance where the configuration was created by the owner of the property), quoting 3 A. Rathkopf and D. Rathkopf, THE LAW OF ZONING AND PLANNING, § 39-01 (4th ed. 1986); *accord,* 3 R. Anderson, AMERICAN LAW OF ZONING, § 20.44, -.45, -.46 (3d ed. 1986) (If the peculiar circumstances which render the property incapable of being used in accordance with the restrictions contained in the ordinance have themselves been caused or created by the property owner, ... the essential basis of a variance – that is, that the hardship be caused solely through the manner of operation of the ordinance upon the particular property – is lacking. In such a case, a variance may not be granted.)

The Board does not agree with the Applicant's assertion that approval of the requested zoning relief would not cause substantial detriment to the public good on the grounds that development of a new one-family dwelling would be consistent with the residential purposes of the R-4 zone and in keeping with the character of the historic district and specifically with Millers Court. New Lot 22 would be little more than half the minimum size required under the Zoning Regulations for a one-family dwelling, and the proposed design of the dwelling does not include any yard setbacks as the dwelling would occupy the entire substandard lot. As noted by the party in opposition, Square 786 is already densely developed, and construction of a new dwelling on an alley lot would further increase the density and contribute to parking and traffic congestion issues within the alley system. In addition, as noted by the Office of Planning, the lack of rear yard or other setbacks could affect the availability of light and air to adjacent properties, including the apartment house on Lot 827 and other nearby residences.

The Board concurs with the Office of Planning that granting the requested zoning relief would substantially impair the intent, purpose, and integrity of the Zoning Regulations and Map. The application requests a use variance, a parking variance, and five area variances. Each of the variances would continue or increase an existing nonconforming aspect of the subject property, or create a new nonconforming aspect that does not now exist (e.g. the elimination of an area suitable for parking on Lot 827). Two of the variances would entail 100% variance relief (to eliminate the rear yard requirement on new Lot 22 and parking for Lot 827). Moreover, approval of a use variance to allow a new dwelling on an alley lot would be inappropriate where the property could be devoted to other viable uses consistent with the Zoning Regulations. The substantial degree of variance relief requested was not supported by any exceptional situation, practical difficulty, or undue hardship to the owner. *Cf. Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164 (D.C. 1990) (where a requested variance is *de minimis* in nature, a correspondingly lesser burden of proof might rest on the property owner).

The Board is required to give "great weight" to the recommendation of the Office of Planning. (D.C. Official Code § 6-623.04 (2001).) In this case, as discussed above, the Board concurs with OP's recommendation that the application should be denied.

The Board is also required to give "great weight" to the issues and concerns raised by the affected ANC. (Section 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d) (2001)).) In this case, ANC 6C voted to support the application. However, the ANC's report noted only that neighbors had expressed support for the project, subject to the Applicant's agreement to restrict the hours of construction. The ANC's report did not offer persuasive advice with respect to the criteria for granting variance relief that the Board must consider.

Based on the findings of fact and conclusion of law, the Board concludes that the Applicant has not satisfied the burden of proof with respect to the request for use and area variance relief necessary to allow the subdivision of Lot 827 and Lot 22 and the location of a three-unit apartment house, without off-street parking, on Lot 827, or a one-family dwelling on Lot 22, an

alley lot not served by an alley 30 feet wide to the street in the CAP/R-4 zone at 319 A Street, N.E. and rear of 319 and 321 A Street, N.E. (Square 786, Lot 827, part of 827, and Lot 22). Accordingly, it is **ORDERED** that the application is **DENIED**.

VOTE: **3-0-2** (Lloyd J. Jordan, S. Kathryn Allen, and Robert E. Miller (by absentee ballot) voting to Deny the application; Jeffrey Hinkle and Marnique Y. Heath not participating.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of Board members approved the issuance of this order.

FINAL DATE OF ORDER: April 30, 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.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Order No. 18903-A in Application No. 18903 of Distance Education and Training Council, pursuant to 11 DCMR § 3104.1, for a special exception under § 508 to allow office use as a replacement for a private club use in a condominium unit (Unit 2A)[1] within an existing mixed-use building in the DC/SP-1 District at premises 1601 18th Street, N.W. (Square 155, Lot 2288).

HEARING DATE: January 27, 2015
DECISION DATE: January 27, 2015

CORRECTED SUMMARY ORDER[2]

SELF-CERTIFIED

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR § 3113.2 (Exhibit 5).

The Board of Zoning Adjustment ("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. ANC 2B submitted a resolution in support of the application. (Exhibit 41.) The ANC indicated that at its duly noticed January 14, 2015 meeting, at which a quorum was present, the ANC voted 9-0 to support the application.

The Office of Planning ("OP") submitted a timely report on January 13, 2015, recommending approval of the application (Exhibit 38) and testified in support of the application at the hearing. The Department of Transportation did not file a report related to the application. One letter of support from the Imperial House Board of Directors was filed in the record. (Exhibit 39.)

As directed by 11 DCMR § 3119.2, the Board required the Applicant to satisfy the burden of

[1] This order corrects BZA Order No. 18903 in which the lot number was erroneously cited as Lot 2**1**88. The purpose of this Corrected Order is to correct the lot number cited and provide clarification regarding the lot numbers related to this application. The subject property is a condominium unit within a building. The lot number for the building at 1601 18th Street, N.W. is Lot 0054 in Square 155. The lot number for the individual condominium unit – Unit 2A – is Lot 2**2**88 in Square 155. The Office of Zoning notes that when searching for individual condominium units on the Official Zoning Map using the square and lot number search, the following note appears: "When performing a specific square and lot search for a condominium lot, please be advised that because condominium lots have no defined polygons, the underlying record or tax lot that host the condominium lot will be displayed in the info window and highlighted on the map."

[2] The correct lot number is Lot 2**2**88. In all other respects, BZA Order No. 18903 remains unchanged.

proving the elements that are necessary to establish the case for a special exception pursuant to § 3104.1 for a special exception under 11 DCMR § 508. 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 and ANC 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 508, 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.**

VOTE: **4-0-1** (Lloyd J. Jordan, Jeffrey L. Hinkle, Marnique Y. Heath, and Peter G. May to APPROVE; S. Kathryn Allen not present not voting)

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: May 5, 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 SIX MONTHS AFTER IT BECOMES EFFECTIVE UNLESS THE USE APPROVED IN THIS ORDER IS ESTABLISHED WITHIN SUCH SIX-MONTH PERIOD.

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. 18960 of Mark and Matthew Medvene, pursuant to 11 DCMR § 3104.1 for a special exception under § 223, not meeting the lot occupancy requirements under § 403, the side yard requirements under § 405, the court width requirements under § 406, and the nonconforming structure requirements under § 2001.3, to allow the construction of a third-story addition to an existing flat in the R-4 District at premises 2807 Sherman Avenue, N.W. (Square 2886, Lot 337).

HEARING DATE: April 21, 2015
DECISION DATE: April 7, 2015[1] and April 21, 2015

SUMMARY ORDER

SELF-CERTIFIED

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR § 3113.2. (Exhibit 32.)[2]

The Board of Zoning Adjustment ("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") 1B and to owners of property within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 1B, which is automatically a party to this application. ANC 1B submitted a report noting that at a properly noticed public meeting on March 10, 2015, with a quorum present, it voted 10-0-0 in support of the application. (Exhibit 37.) The Office of Planning ("OP") also submitted a timely report and testified at the hearing in support of the application. (Exhibit 35.) The District Department of Transportation submitted a timely report of no objection to the application. (Exhibit 34.)

Party status applications were filed by Jeremy Hessler and Justine Sarver; however, party status was denied because of the party status applicants' failure to appear on either of two occasions when the case was called at the hearing. (Exhibits 24 and 25.) One of the party status applicants filed written testimony in opposition to the application (Exhibit 38) and each of them filed an opposition letter into the record. (Exhibits 26 and 27.) A letter of support was filed by an adjacent neighbor. (Exhibit 28.)

[1] Due to the filing of two requests for party status in opposition to the application, the application was removed from the Expedited Review Calendar of the April 7, 2015 public meeting and scheduled for a hearing on April 21, 2015.

2 Although the Applicants filed a memorandum from the Zoning Administrator which cited special exception relief as indicated in the caption above as well as variance relief from § 400.1 related to maximum height/stories, (Exhibit 9), the Applicants decided to self-certify for the special exception relief under § 223 only. The Applicants maintain that portions of the construction exceeding the allowable height have been removed and that height variance relief is not needed. (See Applicant's Prehearing Statement, Exhibit 29, and Self-Certification form, Exhibit 32.)

As directed by 11 DCMR § 3119.2, the Board has required the Applicants to satisfy the burden of proving the elements that are necessary to establish the case pursuant to § 3104.1, for special exception relief under §§ 223, 403, 405, 406, and 2001.3. The only parties to the application were the Applicants and the ANC which expressed support for the application. No parties appeared at the public hearing in opposition to this 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 and ANC reports, the Board concludes that the Applicants have met the burden of proof, pursuant to 11 DCMR §§ 3104.1, 223, 403, 405, 406, and 2001.3, that the requested relief can be granted, 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 REVISED PLANS IN THE RECORD AT EXHIBITS 30 AND 31.**

VOTE: 3-0-2 (Lloyd J. Jordan, Jeffrey L. Hinkle, and Marcie I. Cohen to Approve; Marnique Y. Heath not present, 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: May 1, 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.

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. 18986 of Gigi Matthews, pursuant to 11 DCMR § 3103.2, for variances from the lot occupancy requirements under § 403.2, the rear yard requirements under § 404.1, and the non-conforming structure requirements under § 2001.3, to allow the construction of a rear deck addition to an existing one-family row dwelling in the R-4 District at premises 1000 Kenyon Street, N.W. (Square 2846, Lot 104).

HEARING DATE: April 28, 2015
DECISION DATE: April 28, 2015

SUMMARY ORDER

REVIEW BY THE ZONING ADMINISTRATOR

The application was accompanied by a memorandum, dated February 2, 2015, from the Zoning Administrator certifying the required relief. (Exhibit 8.)

The Board of Zoning Adjustment (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 the Applicant, Advisory Neighborhood Commission ("ANC") 1A, and to owners of property within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 1A, which is automatically a party to this application. The ANC submitted a report indicating that at its regularly scheduled and properly noticed public meeting of April 8, 2015, at which a quorum was in attendance, ANC 1A voted 3-0-7 to support the application. (Exhibit 25). The affected Single Member District 1A11, who was authorized to speak on behalf of the ANC, testified at the hearing and explained that at the time of the vote, the ANC voted to support the application, but seven of the ANC Commissioners were brand-new to the ANC and did not have sufficient information to fully evaluate the case and therefore voted to abstain. The Office of Planning ("OP") submitted a timely report and testified at the hearing in support of the application. (Exhibit 22.) The District Department of Transportation ("DDOT") filed a timely report expressing no objection to the approval of the application. (Exhibit 24.) A letter of support was submitted for the record by a neighbor residing at 1003 Kenyon Street, N.W. (Exhibit 27)

A letter in opposition from an abutting neighbor, Friendly Neighbors Cooperative, was submitted to the record. (Exhibit 26.)

During the hearing, an adjacent neighbor abutting west of the property testified in opposition to the application. He objected to the vertical extension of the applicant's deck because that would block him from getting light. He also voiced the concern that the applicant did not reach out to inform him regarding his project. The Board emphasized the importance of the need on the part of applicants to inform their neighbors adequately regarding the cases they bring for hearing.

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 variances under § 3103.2, from the strict application of the lot occupancy requirements under § 403.2, the rear yard requirements under § 404.1, and the non-conforming structure requirements under § 2001.3, to allow the construction of a rear deck addition to an existing one-family dwelling in the R-4 District. The only parties to the case were the ANC which was in support and the Applicant. No parties appeared at the public hearing in opposition to this 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, the Board concludes that the Applicant has met the burden of proof, pursuant to 11DCMR §§ 3103.2, 403.2, 404.1, and 2001.3, that there exists an exceptional or extraordinary situation or condition related to the property that creates a practical difficulty or undue hardship for the owner in complying with the Zoning Regulations, and that the requested 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 this application is hereby **GRANTED, SUBJECT TO THE APPROVED PLANS AT EXHIBIT 5.**

VOTE: **4-0-1** (Peter G. May, Marnique Y. Heath, Lloyd J. Jordan, 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: May 1, 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 TWOYEAR 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.

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.

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 11-07C
Z.C. Case No. 11-07C
American University
(Modification of an Approved Further Processing Application @
American University's East Campus)
February 2, 2015

Application of The American University (the "University," "AU," or "Applicant"), pursuant to § 3129 of the Zoning Regulations, requesting approval of a modification to an approved further processing application for the development of the AU East Campus. In accordance with § 3035.4 of the Zoning Regulations, this case was heard and decided by the Zoning Commission for the District of Columbia ("Commission") using the rules of the D.C. Board of Zoning Adjustment at 11 DCMR §§ 3100 *et seq*. For the reasons stated below, the Commission hereby approves the modification application, subject to conditions.

HEARING DATE: February 2, 2015

DECISION DATE: February 2, 2015

FINDINGS OF FACT

Application, Parties, and Hearing

1. The Commission approved the AU Campus Plan and East Campus Further Processing application pursuant to Z.C. Order No. 11-07. Z.C. Order No. 11-07 approved the American University Campus Plan for the period from 2011-2022 and approved a Further Processing application for the construction of six buildings on the East Campus. The East Campus is located across Nebraska Avenue, N.W. from the central campus, and is bounded by Nebraska Avenue, NW, Massachusetts Avenue, N.W., a shared property line with the Westover Place Townhomes, and New Mexico Avenue, N.W.

2. For the East Campus, the Commission approved the development of 590 residential beds in three buildings, three additional academic and administrative buildings, and 150 parking spaces and loading facilities in an underground garage, pursuant to the special exception standards of 11 DCMR § 210. (Exhibit ["Ex."] 1.)

3. On November 20, 2014, AU filed an application to modify the underground parking garage on the East Campus to construct two below-grade parking levels rather than one level. AU sought approval of the application as a minor modification under the Commission's Consent Calendar procedures (11 DCMR § 3030), noting that the same number of underground parking spaces (150) will be provided. The modification application also requested the ability to remove a below-grade bus turnaround which was depicted in the plans approved by the Commission. AU requested that the Commission review the application at the Commission's December 8, 2014 public meeting. (Ex. 1.)

4. On December 1, 2014, Advisory Neighborhood Commission ("ANC") 3D filed a letter in opposition to the minor modification application which noted the following issues: (i) AU's request for a decision on December 8, 2014 denies ANC 3D sufficient time to review and assess the merits of the application; (ii) AU's modification application was incomplete because it did not address above-grade modifications to the plans, including changes in the gross floor area, height of the buffer buildings, and relocation of the AU Public Safety Office to the East Campus; (iii) AU's request for a minor modification was not timely; and (iv) AU's proposed changes are not minor modifications. (Ex. 4.)

5. On December 1, 2014, the Spring Valley-Wesley Heights Citizens Association ("SVWHCA") filed a letter in opposition to the minor modification application which noted the following issues: (i) AU's request for a minor modification was not timely; (ii) AU's proposed changes are not minor modifications and require a public hearing; and (iii) AU's request for a minor modification was improper given its Intervention in BZA Appeal No. 18857. (Ex. 6.)

6. At the Commission's December 8, 2014 public meeting, the Commission removed the modification application from the Consent Calendar and scheduled this application for a public hearing.

7. Notice of the public hearing was published in the *D.C. Register* on December 19, 2014 and was mailed to ANC 3D and ANC 3E and to owners of all property within 200 feet of the East Campus.

8. The public hearing on the application was conducted on February 2, 2015. The hearing was conducted in accordance with the provisions of 11 DCMR § 3129.8, which notes that the scope of the hearing is limited to the impact of the modification on the subject of the original application, and shall not permit the Commission to revisit its original decision.

9. In addition to the Applicant, ANCs 3D and 3E were automatically parties in this proceeding. ANC 3D submitted a report and resolution in support of the application with conditions. (Ex. 18.) ANC 3D also provided oral testimony at the public hearing. (Ex. 74.) ANC 3E did not participate in this application.

10. The Commission received a timely party status request from the Westover Place Homes Corporation ("Westover Place") in support of the application. (Ex. 14.) At the public hearing, the Commission granted party status to Westover Place as a Party in Support.

11. At the February 2, 2015 hearing, the University presented evidence and testimony from David Dower, Assistant Vice President for Planning and Project Management at American University; and Linda Argo, Assistant Vice President, External Relations and

Auxiliary Services at American University. Mr. Dower and Ms. Argo answered questions from the Commission and ANC 3D.

12. At the public hearing, the Commission heard testimony from the Office of Planning ("OP") which addressed their report which supported the application. (Ex. 7.)

13. The District Department of Transportation ("DDOT") filed a report in this case which was supportive of the application. (Ex. 17.)

14. At the conclusion of the public hearing on February 2, 2015, the Commission took final action to approve the application in Case No. 11-07C, subject to conditions.

Proposed Modification Application and Condition Regarding Charter Buses and Motorcoaches

15. After the Commission approved the Further Processing application for the East Campus, the University commenced preparation of the construction drawings necessary for building permits. Based upon further engineering and structural analysis, AU realized that it would not be possible to provide 150 below-grade parking spaces in a single level of parking and to provide a bus turn-around area below-grade. Instead, AU submitted plans that provide the required 150 below-grade parking spaces and loading facilities in two below-grade levels. The second below-grade level will be only a partial level and will not cover the same footprint as the first below-grade level. (Ex. 1.)

16. The requested modification changes the underground location of some of the parking spaces. However, the same number of parking spaces (150) will be provided in an underground garage, and the entry/exit will still be from New Mexico Avenue, as the Commission approved in the order. In addition, the proposed modification will not be publicly perceptible in any way since it will be entirely below grade. The change to the number of levels will have no effect on the location, height, or bulk of the buildings. (11 DCMR § 210.4.) Similarly, because it will be consistent with the order's requirement for 150 underground parking spaces, the modification will not be objectionable to neighboring property because of noise, traffic, number of students, or other objectionable conditions. (11 DCMR § 210.2.) (Ex. 1.)

17. In regard to the removal of the below-grade bus turnaround, the University proposed a condition to the order (proposed Condition No. 42) which states:

> 42. The University will not allow any charter buses or motor coaches to enter the East Campus property, including the surface parking lot.

AU argued that this proposed condition addresses any issues or concerns that may be raised by any Parties regarding adverse impacts related to noise or odors from charter

buses or motor coaches, as they will not be permitted to come to the East Campus property. (Ex. 1.)

18. At the public hearing, AU's representatives presented testimony and answered questions from the Commission regarding: the proposed second level of below-grade parking spaces; the clearance provided in the garage to allow trucks and some emergency vehicles to access the garage and loading areas; the circulation pattern for the AU shuttle bus; and the permits that have been obtained for developing the East Campus, including dewatering permits. AU's representatives also presented testimony and answered questions regarding the Zoning Administrator's approval of the building permit for the East Campus buildings and the Zoning Administrator's determination that the gross floor area of the buildings on the East Campus and building height of the buffer buildings were consistent with the Commission's approval of Z.C. Order No. 11-07. (Transcript ["Tr."] of 2/2/15 public hearing.)

19. In response to questions from the Commission, AU's representatives testified that they agreed to ANC 3D's revisions to proposed Condition No. 42 regarding the prohibition of charter buses and motor coaches from entering the East Campus property. The AU representatives also testified that no modifications were being proposed to Condition No. 41(b) of Z.C. Order No. 11-07, which requires the University to repair, at its own expense and as promptly as reasonably possible, any damage to the properties of an adjacent property owner, and any improvements thereon, caused by and resulting from the construction work conducted on the East Campus.

20. The AU representatives also agreed, in response to the request of Westover Place, to hold a discussion with the community regarding East Campus traffic routes at the next regularly scheduled construction update meeting. (Tr. of 2/2/15.)

Office of Planning

21. By report dated December 3, 2014, and by testimony at the public hearing, OP recommended approval of the University's modification application. OP's report noted that: "Order No. 11-07 does not include any discussion of the number of below-grade parking levels relative to the approval of the East Campus further processing application. The number of parking levels is not discussed as a Finding of Fact nor included as a Condition of Approval. The provision of the parking spaces on the East Campus was discussed relative to the number of spaces (Finding of Fact #145, page 31) and vehicular access from New Mexico Avenue, N.W. (Finding of Fact #144, page 31). There are no changes proposed to the number of vehicle parking spaces, the provision of below-grade parking loading, or the access from New Mexico Avenue." (Ex. 7.)

22. The OP report also noted that it did a word search of the public hearing transcripts for the words "below-grade," "underground," "parking," and "East Campus" and such search did

not reveal any discussion or testimony by any parties, individuals or the Commission regarding the number of below-grade levels of parking. The OP report concluded that, "it does not appear that the issue of the number of below-grade parking levels was a material fact upon which the Commission based its original approval of the 2011 American University Campus Plan or the further processing of the East Campus. (Ex. 7.)

23. The OP report also noted that "the below-grade bus turnaround provided a means to mitigate any impact of the buses on neighboring properties. The same purpose is achieved, if not exceeded, by the proposed condition to 'not allow any charter buses or motor coaches to enter the East Campus property, including the surface parking lot'". (Ex. 7.)

District Department of Transportation

24. By report dated January 21, 2015, DDOT concluded that "the proposed modification will have no adverse impacts on the travel conditions of the District's transportation network. The transportation impacts of the 150 parking spaces were reviewed as part of the Campus Plan and appropriately mitigated during that process. In addition, DDOT agrees with the Applicant's proposed condition to prohibit motor coaches and charter buses to come to the East Campus, in order to reduce noise idling impacts." (Ex. 17.)

ANC 3D

25. In a letter dated January 23, 2015, ANC 3D noted that at a meeting held on January 14, 2015, with a quorum present at all times, by a vote of 8-2 ANC 3D voted to support the application with conditions. With regard to the Applicant's proposed Condition No. 42, ANC 3D suggested the following language:

- AU shall not allow any charter buses or motor coaches (defined by AU as large capacity buses that transport visitors to campus and excluding AU-owned and operated shuttle buses) to enter the East Campus property, including the surface parking lot, and shall not allow any loading or unloading of buses or motor coaches on public streets, including, but not limited to, New Mexico, Nebraska, or Massachusetts Avenue; and
- AU shall require all charter buses or motor coaches (defined by AU as large capacity buses that transport visitors to campus and excluding AU-owned and operated shuttle buses) to load, unload, and park at the AU Transportation Center on the main campus.

(Ex. 18.)

26. ANC 3D also voted unanimously (10-0) at its January 14, 2015 meeting to offer the following additional recommendations to the ZC:

- The language in ZC Order No. 11-07 is not always clear and concise and has potential for interpretation which has led to ongoing disputes and/or misinterpretations of the Zoning Commission's decisions. ANC 3D recommends that Zoning Orders be written more clearly to reflect the Zoning Commission's decisions.
- ZC Case No. 11-07C demonstrates the need for a more formalized definition of the role of the Zoning Administrator, which clarifies the scope of responsibility assigned to the position. This definition should be included in the DC Zoning Regulations.

(Ex. 18.)

27. At the February 2, 2015 public hearing, the Secretary of ANC 3D provided oral testimony. In addition to the condition and recommendations noted in Finding of Fact Nos. 25 and 26, the Secretary of ANC 3D noted that many residents expressed concerns at the January 14, 2015 ANC meeting that the deeper excavation required for the two-story garage may have unintended consequences from underground water flow that would result in damage to the foundations of adjacent homes. AU indicated that such damage was unlikely and cited DC agency review of the permit application. The Secretary of ANC 3D stated that AU offered no evidence for its assertion that DC agencies had considered this specific issue; and, staff of the District Department of the Environment ("DDOE"), in several meetings with ANC 3D representatives about groundwater issues at the site, indicated its permit review process was limited and did not include an assessment of potential changes in underground flow stemming from the construction.

28. ANC 3D consequently considered recommending additional language for Condition No. 41(b) of Z.C. Order No. 11-07, which, as noted, requires AU to repair damage to the properties of adjacent property owners "caused by and resulting from the construction work conducted on the East Campus." After extensive discussion, ANC 3D affirmed its view that based on the existing language of Condition No. 41(b), AU would be responsible for repairing damage related to underground water flow, and asks the ZC to affirm the ANC's position on this issue. ANC 3D also expressed concern that the modification requested by AU could impact access to the East Campus by emergency and service vehicles as lower height levels in the two-story underground parking garage might prevent ambulances and service vehicles from accessing the site, as originally proposed in the Campus Plan Further Processing proceeding; and, as a means of ensuring low intensity use of the site given it borders a townhome complex. At the ANC's January 14, 2015 meeting, AU representatives outlined alternative plans for ambulances and large service vehicles to access the site that did not appear objectionable to neighbors and, consequently, to ANC 3D. (Ex. 74.)

Party in Support

29. In oral testimony and written submission to the Commission, the President of the Board of Directors of Westover Place stated that Westover Place has a vested interest in ensuring that the East Campus fits into the existing neighborhood and that Westover Place is currently dealing with all the ramifications of an active construction site: noise, dust, and ground vibrations to name just a few concerns. The Westover Place representative noted Westover Place's support for the request for the modification subject to the presentation of further detail on traffic management. Westover Place requested that in its deliberations regarding this request, the Commission should resist any actions that may cause further delay to the schedule as outlined in Z.C. Order No. 11-07, as any delay, even a minor one, stretches out the inconvenience and disruption to our community. (Ex. 76.)

30. Westover Place noted that in its review of the voluminous filings in Z.C. Case No. 11-07, the University offered a number of documents on the underground garage proposing several different garage capacities. Westover Place noted that during the further processing application, the University testified that the garage would provide underground parking for the East Campus, and would be the method for service vehicles and buses to serve retail, academic, administrative and housing on East Campus. This included an underground bus turnaround. OP, in their report to the Commission, endorsed the 150 car garage and the Commission included it as part of Z.C. Order No. 11-07. Westover Place supported the enlarged garage during its Campus Plan testimony and still supports the concept. The Westover Place representative noted that there are concerns in the community about the garage disrupting ground water flow and possibly impacting Westover homes. The Westover Board of Directors does not believe that the University would intentionally construct East Campus in a manner which would imperil Westover Place homes and structures, and knowing that a Condition in the original order (Condition No. 41(b) of Z.C. Order No. 11-07) clarifies the responsible party if any property damage results, Westover Place concluded that this portion of the request should be approved. (Ex. 76.)

31. Westover Place also testified that American University's offer to prohibit charter buses or motor coaches from entering the East Campus property was a step in the right direction as any action that reduces traffic and its ensuing noise on East Campus reduces a potential objectionable condition and thus has a positive impact on the Westover Place community. The Westover Place Board of Directors supported the University's request to prohibit charter buses and motor coaches from entering East Campus. (Ex. 76.)

32. The Westover Place representative testified that there are still some concerns regarding the traffic into and out of East Campus. To address this issue, Westover Place requested that the University agree to hold a discussion with the community on East Campus traffic routes during its next construction update meeting. The University should review

planning regarding traffic into and out of East Campus, as well as, the impact of traffic on adjacent arteries and surrounding neighborhood streets. The Westover Place representative testified that since traffic management addresses post-construction activity, this request should not further delay the ongoing construction. (Ex. 76.)

Testimony and Letters in Support

33. David Fehrmann, a resident of Westover Place, presented testimony in support of the modification application. Mr. Fehrmann noted that he participated in all of the Campus Plan meetings and public hearings regarding the development of the East Campus. He testified that further delay of East Campus construction is not in the best interest of Westover Place or the greater neighborhood. (Ex. 77.)

34. Numerous letters in support of the application, from residents of Westover Place and the surrounding community, were submitted into the record. These letters noted support for the two-level parking garage and the prohibition of buses entering the East Campus. These letters also noted that any delays to the construction schedule for the East Campus is not in the best interest of the community and only extends the period of construction impacts on Westover Place and the surrounding community. (Ex. 19-29, 31, 32, 50, 62, 69.)

Testimony in Opposition

35. Three residents of Westover Place (Teresa Guzman, Charles Privot, and Benjamin Tessler) presented testimony in opposition to the application. Ms. Guzman cited the following reasons for her opposition to the modification application: emergency vehicles (such as ambulances) would not be able to access the East Campus via the garage and will create noisy conditions; increased traffic impacts will occur with the revised loading berths; the deeper excavation could potentially affect groundwater flow and the original language in the Commission order is too vague about AU's responsibility to repair damage; the location of the AU Office of Public Safety on the East Campus will add to the noise and disturbance of the adjacent neighbors; and the AU shuttle buses accessing the East Campus is contradictory to the original approval of the East Campus. (Ex. 53; Tr. 2/2/15, pp. 62-65.)

36. In testimony in opposition to the modification application, Mr. Privot noted his concerns about the excavation's impact on the high water table on the site and the potential for water damage to Westover homes. Mr. Privot also raised questions about traffic congestion in the area and the need for AU to provide 150 below-grade parking spaces. (Ex. 73; Tr. 2/2/15, pp. 65-74, 80-87.)

37. Mr. Tessler's opposition to the modification was based on the increased intensity of the use of the East Campus and the need to clarify responsibility for any damage that may

occur to Westover Place homes. Mr. Tessler noted the inability for emergency vehicles to access the site, the location of the Office of Public Safety on the East Campus, and the ability of AU shuttle buses to access the East Campus as examples of the increased intensity of use of the East Campus property. Mr. Tessler also noted the potential for water damage of Westover Place homes and the inadequacy of the existing language in Z.C. Order No. 11-07 to protect the property interests of Westover Place residents. (Ex. 78; Tr. 2/2/15, pp. 74-87.)

Letters in Opposition

38. Numerous letters in opposition to the application were submitted into the record. In general, these letters opposed the modification for the following reasons: emergency vehicles would not be able to access the East Campus via the garage; increased traffic impacts will occur with the revised loading berths as larger trucks will come to the main campus and then smaller delivery trucks will come to the East Campus; the deeper excavation could potentially affect groundwater flow; the original language in the Commission's order is too vague about AU's responsibility to repair damage; the location of the AU Office of Public Safety on the East Campus will add to the noise and disturbance of the adjacent neighbors; and the AU shuttle buses accessing the East Campus is contradictory to the original approval of the East Campus. (Ex. 33-49, 51-61, 63-68, 70.)

CONCLUSIONS OF LAW

The Applicant requested that the Commission approve an application to modify approved plans, pursuant to 11 DCMR § 3129. Based upon the record in this case, the Commission concludes that the University has satisfied the filing and notice requirements of 11 DCMR §§ 3129. The parties to the original application were served a copy of the modification application, and ANC 3D and The Westover Place Homes Corporation acted as parties in the modification application.

The Commission also concludes that the Applicant has satisfied the burden of proof, that the "impact of the modification on the subject of the original application," 11 DCMR 3129.9, would not cause the university use "to become objectionable," (11 DCMR § 210.2.) The Commission concludes that the proposal to create two levels of below-grade parking, rather than the one level of below-grade parking, while maintaining the same number of below-grade parking spaces (150) and the same point of access from New Mexico Avenue will in and of itself have no discernable impact. As to the elimination of the below-grade bus turnaround, the Commission notes the purpose of the turnaround was to mitigate impacts of larger vehicles coming to the East Campus, such as noise and fumes from idling buses, on neighboring properties. The Commission concludes that the revised Condition No. 42 will mitigate those same potential adverse impacts by prohibiting charter buses and motor coaches from coming to the East Campus. The Commission finds that no adverse impacts or dangerous conditions will result from AU's shuttle bus entering the East Campus, picking-up and dropping-off students, and then exiting the East Campus.

The Commission also notes the testimony of the Applicant regarding the Zoning Administrator's approval of the building permit application for the above-grade structures on the East Campus. In particular, the Applicant described the gross floor area of the approved buildings on the East Campus and the heights of the "buffer buildings" on the East Campus. The Commission has no concerns with the Zoning Administrator's approval of the building permit application with regard to these two issues.

The Commission accorded the written recommendation of OP the "great weight" to which it was entitled pursuant to D.C. Official Code § 6-623.04 (2001). As discussed in this Order, the Commission concurs with the recommendation of OP to grant the University's modification of the Further Processing application.

The Commission is required under § 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d)) to give "great weight" to the issues and concerns raised in the written report of the affected ANC To satisfy the great weight requirement, District agencies must articulate with particularity and precision the reasons why an affected ANC does or does not offer persuasive advice under the circumstances. The Commission accepted the ANC's revisions to the Applicant's proposed new Condition No. 42 and found its advice persuasive in that regard. As to the ANC's recommendations that the Commission should add clarity to its orders and to the scope of the Zoning Administrator's role, neither of these issues is relevant to this modification. Nevertheless, the Commission notes that it rigorously reviews its orders for clarity. As to clarifying the scope of the Zoning Administrator's authority, if such a need exists it that can only be accomplished through the Mayor's submission and the Council's adoption of an amendment to the last reorganization plan setting forth the ZA's functions.

The Commission received testimony, both in support and opposition to the application, from residents of Westover Place. The Commission recognizes the comments of those people in support of the application that they want construction activity to move forward as expeditiously as possible. The Commission's approval of this modification application is consistent with those desires from Westover Place residents. The Commission also notes the concerns that were raised by some Westover Place residents regarding potential below-grade water damage to Westover Place Homes, as well as ANC 3D's analysis of Condition No. 41(b) of Z.C. Order No. 11-07. The Commission finds that there is no need to place any additional conditions on its approval of the East Campus project. The Commission finds that the existing conditions of approval in Z.C. Order No. 11-07, including Condition No. 41(b), adequately address the issue of any damage caused by and resulting from construction activity on AU's East Campus. The Commission also acknowledges the concerns that were raised by some residents of Westover Place regarding the ability of some emergency vehicles, such as ambulances, to access the below-grade parking level. The Commission notes the testimony of the AU representative that there is sufficient clearance to allow an ambulance to access the below-grade parking level. However, the Commission believes that emergency vehicles will likely access the site in the most appropriate manner to address the emergency situation that is presented. In regard to AU's proposal to

locate the Office of Public Safety on the East Campus, the Commission finds that such a use is consistent with the academic/administrative functions that were approved on the East Campus.

DECISION

In consideration of the Findings of Fact and Conclusions of Law contained in this Order, the Zoning Commission for the District of Columbia concludes that the Applicant has met the burden of proof pursuant to 11 DCMR § 3129 and it is therefore **ORDERED** that American University's proposed modification to the approved plans for the East Campus be **GRANTED**, subject to the following conditions:

1. The below-grade parking for the East Campus shall be constructed in accordance with the plans included with the Applicant's November 20, 2014 submission and presentation to the Zoning Commission on February 2, 2015. (Ex. 1, 2B-2C, 72.)

2. A new condition, Condition Number 42, shall be added to Z.C. Order No. 11-07 as follows:

   42. AU shall not allow any charter buses or motor coaches (defined by AU as large capacity buses that transport visitors to campus and excluding AU-owned and operated shuttle buses) to enter the East Campus property, including the surface parking lot, and shall not allow any loading or unloading of buses or motor coaches on public streets, including, but not limited to, New Mexico, Nebraska, or Massachusetts Avenue; and AU shall require all charter buses or motor coaches (defined by AU as large capacity buses that transport visitors to campus and excluding AU-owned and operated shuttle buses) to load, unload, and park at the AU Transportation Center on the main campus.

3. The Applicant, at its next construction update meeting, will hold a discussion with the community regarding East Campus traffic routes.

4. 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.

VOTE: **5-0-0 (Robert E. Miller, Anthony J. Hood, Marcie I. Cohen, Peter G. May, and Michael G. Turnbull to approve).**

BY ORDER OF THE D.C. ZONING COMMISSION
Each concurring member approved the issuance of this Order.

FINAL DATE OF ORDER: May 7, 2015

CONTRACT APPEALS BOARD
Opinions Issued Between June 14, 2014 and October 09, 2014

COMPANY NAME	CAB No.	DATE ISSUED
M.C. DEAN, INC.	P-0955	06-02-2014
M.C. DEAN, INC.	P-0955	10-09-2014

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

M.C. DEAN, INC.	)	
	)	CAB No. P-0955
Solicitation No.: DCKA-2011-R-0150	)	

For the protester: Phillip J. Davis, Esq., Craig Smith, Esq., and Samantha Lee, Esq., Wiley Rein LLP. For the intervenor: Douglas Proxmire, Esq. and Elizabeth Gill, Esq., Patton Boggs, LLP. For the District of Columbia: Howard Schwartz, Esq., Senior Assistant Attorney General, and Alton Woods, 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 #55531585

On December 16, 2013, M.C. Dean, Inc. ("Dean" or "protester") filed this post-award protest challenging the District's award of a Citywide Streetlight Asset Management Services ("SLAM") contract to Citelum DC, LLC ("Citelum" or "intervenor"). Dean's protest is the third in a series of protests arising from this procurement. In its protest, Dean alleges various improprieties in the evaluation process, including that the District (1) improperly evaluated Dean's past performance data; (2) improperly concluded that Citelum was a responsible offeror; and (3) unfairly excluded Dean from pre-award discussions. In two supplemental protests filed after the District issued its Agency Report, Dean additionally alleges that the District (4) failed to conduct a price realism analysis of the offers; (5) failed to treat all offerors equally; (6) improperly evaluated certain components of the offerors' technical proposals; and (7) improperly assessed weaknesses against Dean's technical proposal, notwithstanding the terms of the solicitation and District procurement law. The District disagrees, arguing that the contracting officer (1) conducted an independent evaluation following proper evaluation procedures; (2) negotiated with both offerors equally; (3) properly found Citelum's proposed pricing to be both reasonable and realistic; and, in any event, (4) was not obligated to evaluate the price realism of the offerors' proposals.

The Board finds that despite its unambiguous Order sustaining the second protest concerning this solicitation,[1] remarkably, the District has again committed some of the very same procurement improprieties in the conduct of this most recent procurement. Consequently, after a thorough review of the record,[2] we sustain the present protest. We conclude that the District failed to comply with District

[1] *See generally Citelum DC, LLC*, CAB No. P-0922, 2013 WL 1952320 (Mar. 1, 2013).
[2] The documents filed in connection with this protest include: M.C. Dean's Bid Protest ("Protest"); District of Columbia's Revised and Corrected Agency Report ("Agency Report" or "AR"); M.C. Dean's First Supplemental Bid Protest ("1st Supp. Protest"); M.C. Dean's Comments on the Agency Report and Second Supplemental Bid Protest ("2d Supp. Protest"); District of Columbia's Consolidated Response to Dean's Comments to the Agency

procurement law and regulations when (1) the contracting officer failed to conduct a reasonable price realism analysis of the offerors' proposals; (2) the District impermissibly held discussions with only one offeror, Citelum; (3) the District improperly penalized Dean, but not Citelum, for its proposed remote monitoring system, [redacted]; (4) the District improperly evaluated Dean's proposal using evaluation factors not stated in the solicitation; (5) the contracting officer failed to exercise independent judgment in evaluating the offerors' proposals; and (6) the District improperly credited Citelum for the past performance of its affiliates. Accordingly, the Board hereby orders the District to undertake the following corrective action:

(1) withdraw any proposed award to Citelum;
(2) provide the offerors an opportunity to submit revised proposals;
(3) reevaluate the offerors' technical proposals utilizing only those evaluation factors expressly enumerated in the solicitation; and
(4) reevaluate the offerors' final proposed prices for realism, in a reasonable manner consistent with both District procurement law and regulations and the terms of the solicitation.

BACKGROUND

A. Procurement History and Previous Protests

On or about August 9, 2011, the District's Office of Contracting and Procurement ("OCP"), on behalf of the District Department of Transportation ("DDOT"), issued Solicitation No. DCKA-2011-R-0150 for asset management services (the "2011 Solicitation").[3] In February 2012, DDOT awarded the contract to Citelum and Dean protested the award (CAB No. P-0906). *See Citelum DC, LLC*, CAB No. P-0922, 2013 WL 1952320 (Mar. 1, 2013) (discussing CAB No. P-0906). Following the District's decision to take corrective action, amend the 2011 Solicitation, and invite offerors to submit best and final offers ("BAFOs"), the Board dismissed Dean's protest at the request of the parties. *See M.C. Dean, Inc.*, CAB No. P-0906, 2012 WL 4753870 (Mar. 23, 2012); *Citelum*, 2013 WL 1952320.[4]

Pursuant to its corrective action plan stemming from CAB No. P-0906, on April 12, 2012, the District requested BAFOs from the offerors. *Citelum*, 2013 WL 1952320. Following its review of the offeror proposals, on July 6, 2012, the District selected Dean for contract award. *Id*. In turn, Citelum protested the award. *Id*. Its protest was docketed at the Board as CAB No. P-0922. *Id.* On March 1, 2013, the Board sustained Citelum's protest on three separate grounds. *See id.* The Board held that (i) the District had failed to identify the contracting officer responsible for conducting the procurement; (ii) the contracting officer had not performed a cost realism analysis prior to the proposed contract award; and

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Report, First Supplemental Protest and Second Supplemental Protest ("District's Consol. Resp."); M.C. Dean's Comments on the Consolidated Response to M.C. Dean's Comments to the Agency Report, First Supplemental Protest and Second Supplemental Protest ("Dean Comments"); District of Columbia's Motion to Dismiss ("Mot. to Dismiss"); M.C. Dean's Response to District of Columbia's Motion to Dismiss ("Resp. to Mot. to Dismiss").

[3] The Board notes that in its agency report filed in response to CAB No. P-0922, the District states that the 2011 Solicitation was issued on August 9, 2011. *Citelum*, 2013 WL 1952320. However, in its Agency Report for the instant protest, the District states that the 2011 Solicitation was issued on August 5, 2011. (*See* AR at 4, ¶ 1.)

[4] The publicly-available portions of the records in CAB Nos. P-0906, P-0922, and P-0955, including the Board's orders and opinions, can be accessed through a docket number search on the Board's website: http://app.cab.dc.gov/WorkSite/Docket_Case_Number.asp.

(iii) the District had failed to treat all offerors equally by allowing Dean to take exception to the LED[5] requirements set forth in the Request for Proposals.[6] *Id.*

B. The Revised Solicitation

Following the Board's holding in CAB No. P-0922, on April 24, 2013, the District revised the solicitation in its entirety and issued Solicitation Amendment 9 (the "Solicitation" or "RFP"). (AR 2; *see also* AR Ex. 1; Protest Ex. 1, at 2.) The Solicitation sought an asset management services contractor to maintain, rehabilitate, and preserve over 70,000 streetlights and other assets throughout the District of Columbia.[7] (AR Ex. 1, at 63, §§ B.1-B.1.1.)[8] In addition, the awardee would be required to operate and manage the Frederick Douglass Memorial Bridge, a moveable bridge which the Solicitation also referred to as the "South Capitol Street Bridge." (AR Ex. 1, at 63, § B.1.1.) The District contemplated award of a firm-fixed-price-plus-incentive-fee contract consisting of a base year and four one-year option periods. (AR Ex. 1, at 65-67, §§ B.2.1-B.2.3.) The awardee would be selected on a best value basis, taking into account energy and cost savings that could be achieved under its proposal. (*See* AR Ex. 1, at 65, § B.2.1.)

The Solicitation stated that "[t]he District is interested in proposals which will allow for a rapid initial implementation of 32,500 LED fixture upgrades throughout the District. A minimum of 17,500 LEDs shall be installed which will include a minimum of 2,500 replacements of Mercury Vapor (MV) and Incandescent lights (INC) in the Base Year of the Contract."[9] (AR Ex. 1, at 64, § B.1.3.) In addition, the awardee would be required to install and maintain a remote monitoring system (also referred to herein as "RMS") that included "photo control communications nodes" for individual SLAM assets.[10] (*See* AR Ex. 1, at 63-64, §§ B.1.1-B.1.4; AR Ex. 1, at 83, § C.1.1; AR Ex. 1, at 101-108, § C.6.2; AR Ex. 1, at 114-115, § C.6.7.)

In order to achieve its LED installation target, the District allowed offerors to choose one of two SLAM methodologies. (AR Ex. 1, at 63-65, §§ B.1.2-B.2.1.2.) The first option was a "ward-based" approach, under which offerors would propose a separate firm-fixed price for SLAM in each of the

[5] LED is an acronym for "light-emitting diode." (*See* Protest at 4.)
[6] During the pendency of this RFP, through emergency contracts, both Citelum and Dean have performed the same types of maintenance services DDOT seeks to procure as a result of this Solicitation. (AR 2 (citing AR Ex. 17); *see also* AR Ex. 16.) Citelum performed the services via an emergency contract from October 25, 2012, to March 23, 2013, following which Dean performed the services under an emergency contract from March 24, 2013, to December 17, 2013. (The Board notes the existence of a typographical error in the record wherein the emergency contract performance dates in March 2013 are referenced as March 2012.) (AR 2 (citing AR Ex. 17); *see also* Protest at 5.) Following a December 20, 2013, determination and findings to proceed with performance after receipt of a protest, Citelum is currently performing emergency SLAM services only, pending the outcome of this protest. (*See* AR Ex. 16 (the Board notes that this document is erroneously labeled as Exhibit 17 in the Board's electronic docket.)
[7] The other assets included lighting support systems, manholes, handholes, "Welcome to Washington" signs, electrical panels, and junction boxes. (*See* AR Ex. 1, at 63, § B.1.1.)
[8] For exhibits lacking Bates numbers or consistent internal page numbering, *e.g.*, Agency Report Exhibit 1, we refer to the PDF page number.
[9] The LED streetlights that the District sought to obtain would ostensibly use less electricity, produce less heat, and render color more accurately than the District's current MV and INC streetlights. (*See* Protest at 4, 11.)
[10] The RFP noted that the District had already installed ROAM® brand RMS components in some locations. (AR Ex. 1, at 114-115, § C.6.7.)

District's eight wards (Contract Line Item Numbers ("CLINs") 1-8),[11] and to operate the Frederick Douglass Bridge (CLIN 9). (*Id.*)

The second option was an "innovative" approach (CLIN 10), under which offerors were required to submit an "innovation plan" showing how they would increase the District's efficiency city-wide and reduce costs by upgrading technology and agreeing to pay the District's SLAM electricity costs, while simultaneously managing the city's existing lighting assets. (AR Ex. 1, at 63-65, §§ B.1.2-B.2.1.2.) The RFP also stated that the offerors' innovation plans under CLIN 10 "should provide enough detail for DDOT to assess the price realism of the suggestions, and shall be based on 32,500 LED fixture upgrades."[12] (AR Ex. 1, at 65-66, § B.2.1.2.3.) Finally, regardless of the approach taken, the offerors were additionally required to propose prices for three "optional service batches," consisting of CLIN 11 ("paint poles per 100"), CLIN 12 ("convert/upgrade lighting fixture per 100"), and CLIN 13 ("install remote monitoring system per 100"). (*See* AR Ex. 1, at 67, § B.2.1.3; AR Ex. 1, at 80, § B.3.3.)

The Solicitation instructed offerors to arrange their proposals into three parts: (1) Technical/Innovation Proposal, (2) Performance/Staffing/Management/QA&QC/Facilities Proposal, and (3) Price Proposals. (*See* AR Ex. 1, at 162, § L.2.3; AR Ex. 1, at 163-169, §§ L.2.5-L.2.7.) The offerors' technical proposals were to include a work plan summary detailing "resources, including equipment, materials, and staff, necessary and available to conduct the work," and "techniques and practices that will be used to conduct the work, including any innovative techniques and practices that may be used over the life of the contract." (*Id.* at 163-164, § L.2.5.B.2.) Similarly, the offerors' innovation plans were to describe the (1) feasibility and main outcome of the plan implementation, (2) techniques and practices to implement the plan, (3) resources, including equipment, materials, and staff, necessary and available to implement the plan, (4) assumptions, deviations, or exceptions to the RFP, and (5) any technical uncertainties along with specific proposals for resolving those uncertainties. (*Id.* at 164-165, § L.2.B.5.)

The RFP required each offeror to submit its price proposal in a separate pricing volume and to "provide supporting detail on its price submission for each CLIN which includes a break-down of the Offeror's price by major cost category, including, but not limited to, labor, overhead, travel, subcontractor, equipment, materials, supplies, general and administrative expenses and profit." (AR Ex. 1, at 169, § L.2.7.) The Solicitation instructed offerors to review a cost/price data requirements document incorporated as Attachment J.8. (*Id.*; *see also* 1st Supp. Protest Ex. 2.) Attachment J.8 required the offerors' cost/price proposal to "represent the offeror's understanding of the RFP's requirements and the offeror's ability to organize and perform those requirements effectively and efficiently." (1st Supp. Protest, Ex. 2, at 2, § 1.3.) Attachment J.8 also provided that the evaluation of the offerors' cost/price proposal would "be based on an analysis of the realism and completeness of the cost data, the conformity of the cost to the offeror's technical data and the proposed allocation of labor-hours and skill sets." (*Id.*) Finally, Attachment J.8 informed the offerors that "[i]f the District considers the proposed costs to be

[11] Although the Solicitation assigned two leading digits to each CLIN to represent the contract year (e.g., 0001 (the base year for CLIN 1) and 4010 (option year four for CLIN 10)), in the interest of clarity, the Board has omitted the two leading digits.

[12] The RFP also noted that the offerors' innovation plans would be "assessed for feasibility, cost reductions to the District, and specificity regarding improvements, innovations, and modifications." (AR Ex. 1, at 65-66, § B.2.1.2.3; *see also* AR Ex. 1, at 92-93, § C.5.9.)

unrealistic, the Offeror should adjust its proposed costs accordingly. [. . .] The burden of proof for cost credibility rests with the Offeror." (*Id.*)

The Solicitation did not include a deadline for proposal submissions; however, it stated that (1) the offerors' questions concerning the RFP were due by May 1, 2013; and (2) OCP would issue a request for BAFOs after the offerors' questions had been addressed. (*See* AR Ex. 1, at 2.) The contracting officer for the procurement was identified as Courtney B. Lattimore, who also served as the Acting Chief Contracting Officer for DDOT. (AR Ex. 1, at 2; District's Consol. Resp. Ex. 2, ¶ 1.)

The Solicitation was subsequently amended as follows: (i) Amendment 10, issued April 25, 2013, replaced the first page of the Solicitation; (*see* AR Ex. 2, at 2) (ii) Amendment 11, issued June 1, 2013, revised the RFP's bonding and proposal submission requirements;[13] (AR 6, ¶ 13; AR Ex. 2, at 3) (iii) Amendment 12, issued June 13, 2013, extended the BAFO deadline; (AR 7, ¶ 15 (citing AR Ex. 2))[14] and (iv) Amendment 13, issued June 24, 2013, established a June 28, 2013, deadline for BAFOs, and attached DDOT's responses to the offerors' questions (AR 7, ¶ 16; *see also* AR Ex. 2, at 4-25). The protester and intervenor each submitted timely BAFOs by the deadline. (*See* AR at 8, ¶ 20.) The District rejected the BAFO of the third offeror, W.A. Chester LLC, as nonresponsive. (*See* AR at 8-9, ¶ 21; *see also* AR Ex. 6.)

C. Evaluation Process

Section M.4 of the RFP described how the District would score the offerors' proposals under the innovative approach. (*See* AR Ex. 1, at 178-182, §§ M.4-M.5; *see also* AR at 7-8, ¶ 19.) The Solicitation stated that DDOT would evaluate innovative proposals on a 100-point scale consisting of the following categories and sub-categories:

§ M.4.1 Technical/Innovation (Total 30 points)
A. Experience and Understanding (10 points)
B. Technical (10 points)
C. Plan (10 points)

§ M.4.2 Past Performance/Staffing/Management/QA&QC/Facilities (Total 40 points)
A. Past Performance (10 points)
B. Staffing (10 points)
C. Management (10 points)
D. Quality Assurance and Quality Control (6 points)
E. Facilities (4 points)

§ M.4.3 Price Criteria (Total 30 points)[15]

[13] Although Amendments 10 and 11 did not establish a deadline for BAFO submissions, in a letter to Citelum dated June 1, 2013, the contracting officer stated that BAFOs would be due on June 14, 2013. (*See* AR Ex. 3, at 2-3.)
[14] The Board notes that although the District cites Agency Report Exhibit 2 for the above information, the exhibit does not contain a copy of Amendment 12, nor does the amendment appear elsewhere in the record. (*Compare* AR at 7, ¶ 15, *with* AR Ex. 2.)
[15] Under Price Criteria, the total costs (including option years) of CLINs 10-13 were added to the assigned points of each offeror based on the following formula: (i) the offeror with the lowest proposed price: 30 points, and (ii) all other offerors: (1 – ((offeror's price – lowest price) / lowest price)) x 30. For example, if the lowest offeror's price

§ M.4.4 TOTAL (Overall Total 100 Points)

(*See* AR Ex. 1, at 178-182, §§ M.4-M.5; *see also* AR Ex. 2, at 23 (stating pricing formula).)

Amendment 13 included a flow chart that provided additional details on the District's evaluation process. (*See* AR Ex. 2, at 23.) Although the flow chart depicted a two-pronged evaluation process—one prong for ward-based approaches and one prong for innovative approaches—the process was reduced to a single prong because the District did not receive any ward-based proposals. (*Id*.; *see also* AR at 7-8, ¶ 19.) Following receipt of the proposals, the District's evaluation process consisted of the following steps:

(1) Evaluate and score the…
   a. Technical/Innovation and
   b. Past Performance/Staffing/Management/QA&QC/Facilities components of each proposal;
(2) Evaluate and score the cost/price of each proposal;
(3) Negotiate with offerors in the competitive range;
(4) Calculate total scores for each offeror's proposal; and
(5) Select the awardee.

(*See* AR Ex. 2, at 23.)

1. The Technical Evaluation Panel Consensus Report

Between July 3 and July 18, 2013, a Technical Evaluation Panel ("TEP") convened to review the offerors' BAFOs. (*See* AR at 8, ¶ 20.) The panel consisted of four technical experts from the District's Transit Operation Administration—and two non-voting consultants from an outside contractor, SAIC. (*See* AR Ex. 8, at 1.) The following chart shows a summary of the TEP's consensus scores for Citelum and Dean, respectively:

Offerors	**Average Total Score for Technical Qualifications/Innovative Plan (Max 70)**	**Rank**
Citelum DC, LLC	52.8	1
M.C. Dean, Inc.	[redacted]	2

(AR Ex. 8, at 2; *see also* AR at 9-10, ¶ 22.)

On or about July 25, 2013, the TEP's chair sent a memorandum to the contracting officer summarizing the TEP's findings and recommendations. (*See* AR Ex. 8.) The TEP's consensus report stated that although the TEP had found both Citelum's and Dean's offers to be technically acceptable, it recommended award of the contract to Citelum "from a technical perspective."[16] (AR Ex. 8, at 8.) In

was $100 and the next lowest offeror's price was $150, then the next lowest offeror's price score would be calculated in the following manner: (1 – ((150 – 100) / 100)) x 30 → (1 – (50 / 100)) x 30 → (1 – 0.5) x 30 → 0.5 x 30 = 15 points.

[16] In reviewing the TEP's individual score sheets, the Board notes that numerous strengths (and at least one weakness) were duplicated across various categories for each offeror. (*See generally* AR Ex. 7.) As the Board has previously held, it is impermissible to repeatedly penalize (or reward) an offeror for the same weakness (or

explaining its rationale, the TEP noted that although Citelum's [redacted], Citelum had [redacted] and would utilize "[redacted]"[17] software, which [redacted]. (*See* AR Ex. 8, at 6, 8.) Regarding Citelum's past performance, the TEP wrote, [redacted] (AR Ex. 8, at 6.)

With regards to Dean's technical proposal, the TEP's consensus report stated that while Dean had proposed installing [redacted] LED streetlights than the RFP had required, and was an "experienced local contractor," Dean's proposal had explicitly [redacted]—a weakness in the TEP's view. (*See* AR Ex. 8, at 7.) The TEP also noted its concerns (1) that Dean's proposal contained inconsistent and missing data concerning energy savings; and (2) regarding whether the lights to be converted to LED may create a mixture of white and yellowish light. (AR Ex. 8, at 7.) Regarding Dean's proposed RMS, the TEP's consensus report stated that Dean's proposal to install the first [redacted] RMS devices, and test them before installing the remaining [redacted], indicated that Dean had not tested or used the same RMS on streetlights before. (AR Ex. 8, at 7.) Finally, under the weakness category "risks of LED installation plan," the TEP noted Dean's "[p]otential change order for [redacted]." (AR Ex. 8, at 7.)

The TEP's statement concerning Dean's "potential change order" appears to refer to an assumption that Dean stated in its proposal:

[redacted]

(AR Ex. 4 (Dean Technical Proposal) 15-16, ¶ 1.1.2(3).)

2. First Cost/Price Analysis Report

After the TEP completed its technical evaluation of the proposals, an analyst for OCP prepared a "Cost/Price Analysis Report" dated October 2, 2013. (*See* AR Ex. 13.) The report noted the offerors' proposed prices: Citelum's base year and total prices of [redacted], respectively; and Dean's base year and total prices of [redacted], respectively. (AR Ex. 13, at 1.)

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strength). *See, e.g., Martha's Table, Inc.*, CAB No. P-0896, 2012 WL 4753865 (May 10, 2012) (finding that repeatedly penalizing an offeror for the same proposal deficiency constituted an impermissible application of the solicitation's evaluation criteria). In this case, however, although the net result of the duplications slightly favored Citelum, it is far from clear to the Board that they affected the outcome of the TEP's evaluation in any meaningful way.

[17] According to Citelum's proposal, [redacted] (*See* AR Ex. 4 (Citelum Data Plan), at 1.) However, Citelum's proposal does not describe [redacted] as an RMS, stating instead that [redacted] (*See, e.g.,* AR Ex. 4 (Citelum Data Plan), at 1, 6.)

The cost/price analyst then considered the electricity costs and savings proposed by each offeror. (*See* AR Ex. 13, at 2.) The analyst noted that Citelum's proposal anticipated electricity costs [redacted] than Dean's. (*Id.*) He questioned, [redacted][18] (*Id.*) He also expressed concern regarding the District's decision to require innovative offerors to assume the financial responsibility for SLAM electricity costs, stating, "[t]his is a risky arrangement, as the District has to rely on a contractor to pay the bills for its electricity—putting the District as risk should the bill not be timely-paid. In addition, a contractor may not get the same rate per KwH [sic] as the District." (*Id.*) The analyst remarked that Citelum "[d]id not provide detailed support or discussion for their proposed costs." (AR Ex. 13, at 3.) He asked, "[w]hat is the basis for these amounts? How were they determined?" (*Id.*)

In short, the analyst noted that Citelum had [redacted] amortization methodology [redacted] (*See* AR Ex. 13, at 3-4.)

As for Dean's proposal, the analyst noted that Dean had (1) estimated that it would receive a profit that was [redacted] lower than the amount of its incentive fees (potentially suggesting that Dean would [redacted]); (2) proposed an unrealistically low profit margin ([redacted]); (3) proposed interest costs that appeared unrealistically low ([redacted]); and (4) not specified the number of annual subcontractor labor hours in its proposal. (*See* AR Ex. 13, at 4-5.)

Finally, OCP's cost/price analyst found "significant unsupported costs" in the proposals of both offerors—[redacted] in Citelum's, and [redacted] in Dean's. (*Id.* at 3, 5.) OCP's analyst did not make a recommendation as to which offeror the District should award the contract. (*See generally* AR Ex. 13.)

3. Requests for Clarification and Responses

On October 10, 2013, the District sent letters to Citelum and Dean requesting clarifications to their proposals. (*See* AR Ex. 14, at 14; *see also* AR Ex. 10.) The District requested the following information from the offerors[19]:

[18] It is unclear whether OCP's analyst was aware that Citelum had proposed to upgrade [redacted] streetlights than Dean, as noted above. (*See generally* AR Ex. 13.)

[19] Although the District's Agency Report did not include a copy of the requests sent to the offerors, the questions are restated in the contracting officer's Business Clearance Memorandum and in the offerors' responses. (*See* AR Ex. 14, at 14; AR Ex. 10, at 2-3.)

Citelum

1. Please confirm the price proposal will remain valid [until] November 1, 2013.
2. In reviewing your price proposal, we have discovered an error in the calculation of incentives. The maximum incentive amount, as per the RFP, is three percent (3%). Please revise the proposed incentive amount OR clarify that [redacted].
3. Please define [redacted] and provide a brief explanation of its relevance in your pricing proposal.

M.C. Dean

1. Please confirm that your price proposal will remain valid through November 1, 2013.
2. Your firm's price proposal reflects proposed interest as [redacted], fixed over the life of the contract. Please provide supporting documentation which explains how this was calculated.
3. Please provide cost and pricing data for your proposed subcontractors. Submissions forwarded directly from the respective subcontractors will not be accepted.

(AR Ex. 14, at 14.)

Citelum and Dean provided their clarification responses to the contracting officer on October 15 and October 17, 2013, respectively. (*See* AR Ex. 10, at 2-3.) Citelum's one-page response (1) confirmed that its proposed price was valid through November 1, 2013; (2) [redacted] (resulting in a revised total contract price of $73,449,608.20); and (3) clarified the meaning of its acronym [redacted] (*See* AR Ex. 10, at 2.) In its response, Dean (1) confirmed that its proposed price was valid through November 1, 2013; and (2) provided approximately 81 pages of material purporting to substantiate its proposed interest rates and subcontractor costs. (*See* AR Ex. 10, at 3-85.) The record does not contain any documentation showing that the District requested clarification of any of the remaining discrepancies identified in the analyst's October 2, 2013, report such as, for example, [redacted] or an explanation of both offerors' "significant unsupported costs." (*See generally* AR Ex. 10, at 1-4; AR Ex. 14, at 14.)

4. DDOT's Engineer's Estimate

On or about November 7, 2013, the TEP's chair sent an engineer's estimate to the contracting officer. (*See* Mot. to Dismiss Ex. 2, at 2.) This 42-page document bears the signatures of both a DDOT Transit Operation Administrator and the Lead Estimator for SAIC, the District's outside consultant.[20] (*See id*.) DDOT's Engineer's Estimate stated that the contract's costs are projected at $23,814,111.31 in the base year, and total $93,096,791.61, including all option years. (*See* Mot. to Dismiss Ex. 2, at 4-5.)

[20] The signature of the SAIC Lead Estimator appears as [redacted] whereas the Leidos Estimate, which was produced on the same day, is co-authored by [redacted]. (*Compare* Mot. to Dismiss Ex.2, at 2, *with* District's Resp. to CAB Order Ex. 1, at 1.)

These figures from DDOT's Engineer's Estimate appear in the Business Clearance Memorandum and in OCP's Second Cost/Price Analysis Report, as also described below. (*See* AR Ex. 14, at 16; District's Consol. Resp. Ex. 3, at 2.)

5. The Leidos Estimate

In response to an Order issued by the Board requesting, among other documents, the District's complete analysis of the realism of the offerors' proposed prices, on April 18, 2014—nearly three months after filing the Agency Report—the District belatedly provided an estimate prepared by its consultant, Leidos,[21] "to assist in the evaluation of CLIN 0010 of Citelum's technical proposal." (*See* District's Resp. to CAB Order at 2; District's Resp. to CAB Order Ex. 2, at 1-2.) The Leidos Estimate is dated November 7, 2013. (District's Resp. to CAB Order Ex. 1, at 1.)

The Leidos Estimate projects a base year cost to the District of $36,392,722.08, and a total contract cost of $88,002,503.38. (*See* District's Resp. to CAB Order Ex. 1, at 2.) However, the Leidos Estimate does not appear to have included the costs for CLIN 12 ("convert/upgrade lighting fixture per 100"). (*See generally* District's Resp. to CAB Order Ex. 1.)

In addition, the Leidos Estimate stated that "[i]n order to meet DDOT's turn-around requirements, the Leidos team developed the CLIN 0010 Engineer's estimate as a series of adjustments to the previous, Ward-by-Ward estimate."[22] (*See* District's Resp. to CAB Order Ex. 1, at 1.) It also noted that Leidos "was unable to get quotes for materials due to the quick turnaround time," and instead simply adopted the assumption that Citelum would be able to purchase LED fixtures at [redacted].[23] (*Id.*) Leidos did not provide a basis for any of its other stated assumptions, which concerned (1) [redacted]; (2) [redacted]; (3) [redacted]; and (4) the [redacted].[24] (*Id.*)

The Board notes that the Leidos Estimate includes several comparisons between Leidos' estimated costs and Citelum's proposed costs, but contains no discussion of Dean's proposed costs. (*See generally* District's Resp. to CAB Order Ex. 1, at 1-3.) For example, after noting that Citelum's proposed costs were 28% lower than Leidos' estimate,[25] Leidos wrote that Citelum's "experience supporting programs of this scope and assumed industry ties/buying power likely yield cost savings and efficiencies Leidos was not able to anticipate in [its] estimate." (District's Resp. to CAB Order Ex. 1, at 3.) The

[21] Leidos was formerly a division of SAIC, which, as described *supra*, also served as a District consultant on this procurement. (*See* District's Resp. to CAB Order at 1.)

[22] Although the Leidos Estimate appears to have been formulated using adjustments to a previous ward-based estimate, neither Citelum nor Dean offered a ward-based proposal. (*See* AR at 7-8, ¶ 19.)

[23] The record does not contain any information to show that Citelum was asked to provide supporting documentation in support of the favorable assumptions. (*See generally* District's Resp. to CAB Order Ex. 1.)

[24] In the absence of any supporting documentation, these assumptions appear to undermine the accuracy of the Leidos Estimate.

[25] Confusingly, on the same page, Leidos stated that Citelum's proposed costs for CLIN 10 were both [redacted] and [redacted] lower than Leidos' estimate. (*See* District's Resp. to CAB Order Ex. 1, at 3.)

Leidos Estimate does not appear to conclusively determine that Citelum could perform the contract work at the proposed price. (*See generally id.* at 1-3.) Even so, Leidos noted that the high percentage of [redacted] make it vital to insulate DDOT from any financial risk if the program falls behind." (*Id.* at 3.)

Finally, neither the Second Cost/Price Analysis Report nor the Business Clearance Memorandum, discussed *infra*, contain any reference to the Leidos Estimate. (*See generally* District's Consol. Resp. Ex. 3; AR Ex. 14.) Furthermore, the Board is unable to find an explanation in the record for the discrepancy between DDOT's Engineer's Estimate and the Leidos Estimate.

In summary, as of November 7, 2013, the District had obtained the following price proposals and estimates for the proposed SLAM services contract:

	Base Year Price	Total Contract Price
Citelum DC, LLC*	[redacted]	$73,449,608
M.C. Dean, Inc.	[redacted]	[redacted]
DDOT's Engineer's Estimate*	$23,814,111	$93,096,792
Leidos Estimate*	$36,392,722	$88,002,503

*Numbers have been rounded to the nearest dollar amount.

We provide the following table to illustrate the percentile difference between the offerors' price proposals and the two District estimates (DDOT's Engineer's Estimate and the Leidos Estimate):

	Base Year Price	Total Contract Price
Citelum DC, LLC's price proposal (Compared to DDOT's Engineer's Estimate)	[redacted]	21% less
Citelum DC, LLC's price proposal (Compared to the Leidos Estimate)	[redacted]	17% less
M.C. Dean, Inc.'s price proposal (Compared to DDOT's Engineer's Estimate)	[redacted]	[redacted]
M.C. Dean, Inc.'s price proposal (Compared to the Leidos Estimate)	[redacted]	[redacted]

Note: All percentages have been rounded to the nearest whole percentage amount.

6. The District's November 7, 2013, Meeting with Citelum

On November 7, 2013—the very date of the two estimates discussed above—the contracting officer states that she convened a meeting at DDOT's offices "with representatives of Citelum and the District's Office of Attorney General (OAG) to review the contract with Citelum before it was signed." (*See* AR Ex. 17, at 2, ¶ 8.) She further states, "[d]uring this meeting we read the contract and explained each section of the contract. DDOT answered questions concerning the contract['s] provisions such as what was meant by certain sections, but did not discuss or revise anything in Citelum's proposal." (*Id.*)

Citelum similarly states that, together with the District, they "read through and finalized certain terms of DDOT's proposed contract which DDOT intended to issue under [the RFP]." (Citelum's Comments on the AR Attach. 1, at 2, ¶ 3; *see also* Citelum's Comments on the AR at 18-19.) "At no time during this meeting did any of the parties discuss any part of [Citelum's] technical or price proposal submitted in response to the DDOT [RFP] and amendments thereto. Further, at no time during this meeting, did [Citelum] offer to, nor did DDOT request that [Citelum] amend, revise or otherwise change its proposal seeking contract award." (*Id*.) The meeting appears to have occurred sometime shortly after 10:40 AM—the approximate time at which an employee of Dean observed Citelum's representatives in DDOT's lobby. (*See* Protest at 13-15; Protest Ex. 5.)

The District did not hold a similar meeting with Dean. (*See generally* AR Ex. 17; *see also* 2d Supp. Protest at 20-22.) The Board also notes that the District has not provided any contemporaneous documentation to shed light on the true purpose of its November 7th meeting with Citelum. Yet, it appears that by November 7, 2013, notwithstanding the unanswered questions from the First Cost/Price Analysis Report which cast doubt upon the realism of Citelum's pricing proposal, the contracting officer had decided to award the contract to Citelum.

7. Second Cost/Price Analysis Report

Almost a week after the District met with Citelum, purportedly to discuss contract terms, on November 13, 2013, OCP's cost/price analyst produced a new analysis of the offerors' proposals. (*See* District's Consol. Resp. Ex. 3.) This second analysis is largely focused on Citelum's proposal only.[26] (*See generally id*.) The analyst stated that, on November 6, he "met with the Contracting Officer and DDOT's lead engineer, . . . *to discuss and develop a strategy for addressing and resolving some of the deficiencies found in [the] previous analyses of Citelum's cost proposal*." (District's Consol. Resp. Ex. 3, at 2. (emphasis added).) He also noted that "the contracting officer was unable to obtain additional supporting cost data from the contractor." (District's Consol. Resp. Ex. 3, at 3.) Nonetheless, the analyst concluded that the contracting officer's correspondence with Citelum had "satisfactorily" addressed his prior questions concerning terminology, incentive payments, and amortization expenses [redacted] (*See generally id.;* AR Ex. 10, at 2.) Without more, the second report concluded that "Citelum's pricing appears reasonable, as well as favorable, when compared with both the government's [i.e., DDOT's] estimate and with the other offer received." (District's Consol. Resp. Ex. 3, at 3.) The second analysis does not appear to have considered whether Citelum's pricing offer was realistic, or whether Citelum was capable of performing the contract work at the proposed price. (*See generally* District's Consol. Resp. Ex. 3.)

[26] The Board notes that, in conjunction with its submission of the Second Cost/Price Analysis Report, the District submitted a spreadsheet that appears to have been created by OCP's cost/price analyst and may pertain to the analyst's October 2, 2013, report rather than the November 13, 2013, report. (*See generally* District's Consol. Resp. Ex. 4.)

8. Contracting Officer's Determination and Findings

On November 26, 2013, the contracting officer issued a Determination and Findings for Contractor Responsibility indicating that (1) the proposed SLAM contract was necessary to meet the District's minimum needs, and (2) Citelum was a responsible contractor. (*See* AR Ex. 15.) The Determination and Findings also stated that the "estimated fair and reasonable price" for the contract was [redacted].[27] (*See* AR Ex. 15, at 2.) Finally, finding that Citelum "[h]as a satisfactory performance record," the contracting officer appears to have largely attributed to Citelum the performance of its [redacted] in stating, [redacted]." (AR Ex. 15, at 3.)

9. Contracting Officer's Review

On December 6, 2013, the contracting officer signed her "unconditional approval" to the Business Clearance Memorandum, recommending contract award to Citelum.[28] (*See* AR Ex. 14, at 2.) It was prepared by contract specialist, Cora Boykin. (*See id*.)

The Business Clearance Memorandum stated that the contracting officer had "independently reviewed each Offeror's 3rd [sic] BAFO response as well as the findings of the Technical Evaluation Panel." (AR Ex. 14, at 13.) Concerning the TEP's rating of Citelum, the Business Clearance Memorandum stated: "[w]hile the [contracting officer] agrees with the average ratings given for M.4.2, the Panel's comments related to the weaknesses for the subcategories of [redacted] are not consistent with those ratings." (*Id*.) Unlike the TEP, the contracting officer found that Citelum's staffing plan met the RFP's requirements "without deficiency," although she did not provide her basis for reaching this conclusion. (*See id*.) With regards to the TEP's rating of Dean, the Business Clearance Memorandum similarly stated that "the [contracting officer] agrees with the panel's rating [of the factors under the RFP's § M.4.2] but disagrees with the TEP's noted weaknesses for [redacted] (*Id.*)

Regarding the requests for clarification sent to the offerors, the Business Clearance Memorandum stated that the offerors' responses were reviewed by the TEP, which "confirmed that the issues had been sufficiently addressed."[29] (*See* AR Ex. 14, at 14.) After applying the formula set forth in the RFP, Citelum and Dean were assigned 30.0 and [redacted] points, respectively, based on their price proposals. (*See* AR Ex. 14, at 16.) Out of a possible 100 points combined for technical plan and pricing, the contracting officer awarded a total of 82.8 points to Citelum and [redacted] points to Dean. (*Id*.)

The Business Clearance Memorandum concluded that "it is the [contracting officer's] and the Panel's determination that Citelum [sic] proposed price is fair, reasonable, and realistic." (AR Ex. 14, at

[27] The Determination and Findings does not clarify whether this figure consists of base year costs only.
[28] Although the first page of the Business Clearance Memorandum is dated November 5, 2013, the second page is dated October 31, 2013, and the signatures of the contracting officer and contract specialist are dated December 6, 2013. (*See* AR Ex. 14, at 1-3.)
[29] The Board notes that the record does not contain documentation of this review by the TEP. (*See generally* AR Exs. 7-8.)

14.) Also, according to the Business Clearance Memorandum, the contracting officer considered (1) the "government's estimate" (presumably referring to DDOT's Engineer's Estimate); (2) the Second Cost/Price Analysis Report; (3) the offerors' proposals; and (4) the offerors' past performance. (*See* AR Ex. 14, at 14-16.)

D. Post-Selection Procedural History

On December 6, 2013, the contracting officer notified Dean that the District had decided to award the contract to Citelum. (*See* AR at 17, ¶ 38.) On December 17, 2013, Dean timely filed the instant protest which the Board docketed as CAB No. P-0955.[30] (*See generally* Protest.) In its protest, Dean alleged "three distinct, prejudicial errors" in the District's evaluation process: (1) "DDOT either ignored or unreasonably discounted [Dean's] superior" past performance in the evaluation and scoring of the proposals; (2) DDOT lacked sufficient information to find that Citelum was a responsible offeror pursuant to D.C. Mun. Regs. tit. 27 §§ 2200.1-2200.2; and (3) DDOT's actions in holding discussions only with Citelum, "unfairly advantaged" Citelum. (Protest 2.) On December 19, 2013, Citelum filed a motion to intervene pursuant to Board Rule 100.2(1), which the Board granted on January 2, 2014. (*See* Order Granting Mot. to Intervene.)

On January 23, 2014, the District filed the Agency Report. (*See generally* AR.) In response, on January 29, 2014, Dean filed its First Supplemental Bid Protest, arguing that the District failed to conduct a reasonable price realism analysis of Citelum's proposal. (*See* 1st Supp. Protest at 1-2.) On February 3, 2014, Dean filed additional comments on the Agency Report and a Second Supplemental Bid Protest. (*See* 2d Supp. Protest.) In its Second Supplemental Protest, Dean alleges that DDOT (1) failed to treat the offerors equally in its evaluation of each offerors' proposed RMS; (2) applied an unstated evaluation criterion when it assigned a weakness to Dean for excluding certain types of streetlight fixtures from its proposal; (3) failed to evaluate the proposals in accordance with the Solicitation when it counted the same strengths and weaknesses multiple times across evaluation categories; (4) improperly assessed a weakness against Dean for Dean's statement that it might [redacted]. (*Id.* at 2-3.) In addition, Dean argued that the contracting officer's Business Clearance Memorandum analysis had been unreasonable and inconsistent with the evaluation record. (*See* 2d Supp. Protest at 3.)

[30] In response to Dean filing this protest, on December 23, 2013, the District filed a determination and findings to proceed with performance. (*See* D&F to Proceed with Performance after Receipt of a Protest ("D&F to Proceed").) The District argued that it was necessary to override the automatic stay resulting from the protest, and that contract performance by Citelum should proceed because properly functioning streetlights are critical to DDOT's mission to provide safer streets and sufficient access for pedestrian and vehicular traffic. (D&F to Proceed at 1.) In addition, the District asserted that it does not have staffing capacity to maintain and operate the Frederick Douglass Bridge. (*Id*. at 1-2.) On December 30, 2013, Dean filed its opposition to the D&F to Proceed. (Dean Mot. Opposing D&F to Proceed 1.) On January 15, 2014, the Board granted the District's motion in part, finding that the District had demonstrated an urgent and compelling need but only with respect to emergency services and streetlight maintenance. The Board denied the D&F to Proceed in part, as it relates to contract performance for LED or other technological upgrades. On January 17, 2014, the District filed a Notice of Contract Modification indicating that DDOT had entered into a contract with Citelum to provide emergency SLAM services to the extent that there exists an urgent and compelling need during the pendency of this Protest. (District's Notice of Modified Citelum Contract in Accordance with CAB Ruling at 1.)

In its Agency Report and supplements thereto, the District asserts that (1) DDOT properly applied the RFP's evaluation criteria; (2) the contracting officer properly determined Citelum to be responsible; (3) the District did not conduct separate, unequal discussions with Citelum; (4) the contracting officer conducted an independent evaluation of both proposals; (5) the contracting officer properly determined that Citelum's prices were reasonable; and, in any case, (6) the contracting officer was not required to conduct a price realism analysis. (*See* AR at 18-27; District's Consol. Resp. at 5-16.)

On March 21, 2014—nearly two months after filing its Agency Report—the District moved to dismiss Dean's protest. (*See* Mot. to Dismiss.) In its motion to dismiss, the District argues that Dean lacks standing to protest because it took exception to certain terms of the RFP, including the RFP requirement to upgrade streetlights, and therefore has no reasonable chance of award. (*See* Mot. to Dismiss at 2-9.)

Finding the contemporaneous source selection record inadequate, on April 11, 2014, the Board ordered the District to submit any remaining documents relevant to the instant protest (concerning the District's estimates or its price realism analysis). (*See* Order to Supplement AR.) In response, the District filed the Leidos Estimate (discussed *supra*) and a declaration by the TEP chair confirming the provenance of the Leidos Estimate. (*See* District's Resp. to CAB Order Exs. 1-2.) On May 1, 2014, the Board closed the record in this case. (*See* Order Closing the Record.)

JURISDICTION AND STANDARD OF REVIEW

A. The Board Possesses Jurisdiction to Decide Dean's Protest

The Board possesses jurisdiction to "review and determine de novo . . . [a]ny protest of a solicitation or award of a contract . . . by any actual or prospective bidder, offeror, or the contractor who is aggrieved in connection with the solicitation or award of a contract." D.C. CODE § 2-360.03(a)(1).

In its motion to dismiss—filed three months after Dean filed this protest and two months after the District filed its Agency Report—the District contends that the Board lacks jurisdiction to decide this matter because Dean does not have standing to protest. Under this theory, which the District adopted only recently, Dean has no reasonable chance for award and, therefore, lacks standing. This is so, the District avers, because Dean conditioned its offer by taking exception to several terms of the RFP. (*See* Mot. to Dismiss at 2-10.) The District states that Dean (1) took exception to the RFP's alleged requirement to upgrade all streetlight assets, including [redacted]; (2) took exception to the requirement to accept all liability under the contract, irrespective of the minimum insurance requirements; and (3) stated that it might [redacted], as discussed *supra*. (*See* Mot. to Dismiss at 2-9.)

However, the Board finds the District's arguments to be both inconsistent with the contemporaneous source selection record, and wholly unavailing. The contemporaneous source selection records do not indicate that Dean was ineligible for contract award. Indeed, the record suggests the opposite: that Dean's technical proposal [redacted] to Citelum's technical proposal. In *ACS State and Local Solutions, Inc.*, CAB No. P-0691, 52 D.C. Reg. 4227 (Aug. 31, 2004), we considered the

standing of a protester challenging an award on the basis of the District's allegedly improper evaluation of the proposals. In that case, the District argued that the protester lacked standing because it had been deemed to be non-responsive and, therefore, could not be next in line for award. *See id*. at 4227-28. The Board held that the protester had standing because "its proposal was not clearly non-responsive and was treated as responsive by the contracting officer." *See id*. at 4228. We hold similarly here. The District has not treated Dean's proposal as clearly non-responsive and Dean was treated as responsive by the contracting officer. As a result, Dean has standing to protest.

Finding no merit in the District's argument, the Board denies the District's motion to dismiss the protest. Accordingly, we exercise jurisdiction pursuant to D.C. Code § 2-360.03(a)(1).

B. **Standard of Review**

We review the propriety of an agency's award decision to ensure that it is reasonable, consistent with the evaluation criteria listed in the solicitation, and to determine whether there were any violations of procurement law or regulation. *Trifax Corp.*, CAB No. P-0539, 45 D.C. Reg. 8842, 8847 (Sept. 25, 1998) (citing *Health Right, Inc*., CAB Nos. P-0507 et al., 45 D.C. Reg. 8612, 8635 (Oct. 15, 1997)); *see also Recycling Solutions, Inc*., CAB No. P-0377, 42 D.C. Reg. 4550, 4578 (Apr. 15, 1994) (citing *Silver Spring Ambulance Serv., Inc.*, CAB No. P-0218, 40 D.C. Reg. 4913, 4920 (Jan. 15, 1993)). Implicit in the foregoing is that an agency's judgments must be documented in sufficient detail to show that the decisions were not arbitrary. *Health Right, Inc*., 45 D.C. Reg. 8612, 8635 (citations omitted). While the Board reviews the entire record in each protest, we accord greater weight to contemporaneous documents, rather than those prepared in the heat of litigation. *See id*. at 8636; *see also Nexant, Inc.*, B-407708 et al., 2013 CPD ¶ 59 (Comp. Gen. Jan. 30, 2013) (citations omitted). Thus, although an agency need not save *every* document or worksheet generated during the source selection process, the Board will not blindly accept final evaluation findings or award decisions that are not reasonably supported by the evaluation record. *See Urban Alliance Found.*, CAB Nos. P-0886 et al., 2012 WL 4775002 (Feb. 15, 2012).

DISCUSSION

In support of its protest, Dean contends that the District's evaluation of the submitted proposals and its subsequent decision to award the contract to Citelum were plagued by "serious shortcomings." These alleged shortcomings include, *inter alia*, the following: (1) the unreasonable evaluation of Citelum's past performance record; (2) an improper meeting between Citelum personnel and DDOT officials; (3) a nonexistent or unreasonable price realism analysis; (4) the imposition of an evaluation factor not stated in the Solicitation; (5) the contracting officer's failure to exercise independent judgment in evaluating the offeror proposals thereby resulting in an unreasonable award decision; and (6) an improper conclusion that Citelum was a responsible offeror. (*See generally* Protest; 1st Supp. Protest; 2d Supp. Protest.)

Following a detailed review of the record, we conclude that there were material and pervasive improprieties in the District's evaluation of the submitted proposals and conduct of this procurement. As such, for the reasons set forth below, we sustain this protest.

A. The Contracting Officer Failed to Perform a Meaningful Price Realism Analysis

1. The District's Procurement Regulations and the Express Terms of the Solicitation Required the Contracting Officer to Evaluate the Offerors' Proposals for Price Realism

Dean argues that the record reveals that the contracting officer did not perform a price realism analysis during the evaluation process as required by the Solicitation and the District's procurement regulations. However, the District responds that "[n]either the solicitation nor the Procurement Regulations require the Contracting Officer to conduct a cost-price realism analysis." (District's Consol. Resp. 13.) Undoubtedly, the District misses the mark. Both the District's procurement regulations and the express terms of the Solicitation required the contracting officer to assess the proposals for price realism.

We previously held that a contracting officer's "failure to conduct and document a cost realism analysis of the offerors' proposals prior to contract award constituted a violation of procurement law." *Citelum*, 2013 WL 1952320.[31] Indeed, the District's procurement regulations *require* a cost/price realism analysis, in that they direct the contracting officer to "evaluate the cost estimate or price, not only to determine whether it is reasonable, but also *to determine the offeror's understanding of the work and ability to perform the contract*."[32] D.C. Mun. Regs. tit. 27 § 1630.2 (emphasis added). In other words, the contracting officer must evaluate price proposals to determine whether the offeror is realistically able to perform the services contemplated by the RFP, or whether the offeror's price proposal consists of prices that are unrealistically low for the services requested. *See Navarro Research & Eng'g, Inc.*, Nos. B-299981 et al., 2007 CPD ¶ 195 (explaining that agencies may employ price realism analyses for the purpose of "measuring an offeror's understanding of the solicitation's requirements and for assessing the risk inherent in an offeror's proposal").[33]

[31]In *Citelum*, we cited several District procurement regulations to support our finding that a price realism analysis was required. *Citelum*, 2013 WL 1952320. Some of those regulations have since been repealed. *Compare* D.C. Mun. Regs. tit. 27 § 1618.2 (requiring the contracting officer to "evaluate the cost estimate or price, not only to determine whether it is reasonable, but also to determine the offeror's understanding of the work and ability to perform the contract") (repealed Feb. 1, 2013), *with* D.C. Mun. Regs. tit. 27 § 1630.2 (stating the same requirement as the repealed provision). Notwithstanding, as we explain above, the regulatory language requiring the contracting officer to "evaluate the cost estimate or price, not only to determine whether it is reasonable, but also to determine the offeror's understanding of the work and ability to perform the contract," D.C. Mun. Regs. tit. 27 § 1630.2, necessitates that the contracting officer perform a price realism analysis of the offerors' proposals.

[32] The Board notes that the terms "price realism" and "cost realism" are often used interchangeably, or conflated together, such as in the course of this procurement. Both cost and price realism analyses are used in order (1) to determine "whether a proposed estimated cost or a proposed fixed price is high enough to cover the costs of performance[;]" and (2) to analyze whether an offeror understands the work. *See Price Realism, A Primer*, 28 No. 1 NASH & CIBINIC REP. NL ¶ 1. However, a cost realism analysis is used to determine the probable cost of each offer in the context of a cost-reimbursement procurement. *See Koba Assocs., Inc.*, P-0350, 41 D.C. Reg. 3446 (June 16, 1993). By contrast, a price realism analysis can be used, for example, to make performance risk assessments in the context of fixed-price procurements. *See Price Realism, A Primer*, 28 No. 1 NASH & CIBINIC REP. NL ¶ 1.

[33] A price realism analysis is distinct from a price reasonableness analysis. *See OMNIPLEX World Servs. Corp.*, B-291105, 2002 CPD ¶ 199 (Comp. Gen. Nov. 6 2002) (explaining that "[t]he two types of analysis have two very different purposes and are not interchangeable"). *See also Logistics 2020, Inc.*, B-408543, 2013 CPD ¶ 258 ("[P]rice reasonableness and price realism are distinct concepts. The purpose of a price reasonableness analysis is to

In this case, the Solicitation expressly stated that DDOT's evaluation of the offerors' cost/price proposals would include an evaluation for realism. First, the Solicitation instructed offerors submitting proposals with an Innovation Plan to "provide enough detail for DDOT to assess the price realism of the suggestions…" (AR Ex. 1, at 65-66, § B.2.1.2.3.) Second, Attachment J.8 to the Solicitation informed prospective offerors that their cost/price proposals "will represent the offeror's understanding of the RFP's requirements" – a core purpose of a price realism analysis. (1st Supp. Protest Ex. 2, at 2 § 1.3.) And lastly, it further provided that "[t]he evaluation of the Offeror's cost/price proposal will be based on an analysis of the *realism* . . . of the cost data…" (*Id.*)

The above-mentioned regulation, together with the express terms of the Solicitation, unequivocally required the contracting officer to conduct a price realism analysis of the offerors' price proposals.[34]

2. The District's Price Realism Analysis was Unreasonable and is Unsupported by the Contemporaneous Source Selection Documentation in the Record

Despite insisting that a price realism analysis was not required, the District nonetheless states that it performed a price realism analysis, writing, "[t]he TEP and [contracting officer] both determined that Citelum's proposed price was fair, reasonable and realistic[. . .]" (AR at 15, ¶ 32 (citations omitted).) However, where "an agency elects to conduct a price realism evaluation, we will review that evaluation for reasonableness." *Solers, Inc.*, B-409079.2, 2014 CPD ¶ 74 (Comp. Gen. Jan. 27, 2014) (citations omitted).

In *Koba Assocs., Inc.*, CAB No. P-0350, 41 D.C. Reg. 3446, 3473 (June 16, 1993), we held that "the agency must conduct a cost realism analysis to determine the extent to which an offeror's proposed costs represent what the contract should cost, assuming reasonable economy and efficiency." The Board further explained that we review "whether the agency's cost evaluation was reasonably based and was not arbitrary, capricious and in violation of statute and regulation."[35] *Id.* Therefore, while a price realism analysis "need not achieve scientific certainty," it must (1) be "reasonably adequate," and (2) "provide some measure of confidence that the rates proposed are reasonable and realistic in view of other cost information reasonably available to the agency as of the time of its evaluation." *See Solers, Inc.*, 2014 CPD ¶ 74.

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determine whether the prices offered are too high, as opposed to too low. Arguments that an agency did not perform an appropriate analysis to determine whether prices are too low, such that there may be a risk of poor performance, concern price realism, not price reasonableness.") (citations omitted).

[34] The District argues that because the words "price realism" do not appear in section M of the Solicitation, the section that enumerated the evaluation factors, it was not required to conduct such an analysis. In support of this dubious proposition, it cites to the Comptroller General's decision in *Alamo City Eng'g Servs., Inc.*, B-409072, Jan. 16, 2014, 2014 CPD ¶ 32. However, as Dean notes, the *Alamo City* decision does not stand for the proposition that the District was bound by the evaluation criteria enumerated in Section M of the Solicitation only. Indeed, *Alamo City* reaffirms the long-settled principle that agencies must evaluate proposals consistent with the terms contained within the entire solicitation. *See id.*

[35] Although *Koba* involved the propriety of an agency's cost realism analysis in a procurement for a cost-reimbursement contract, we will apply the standard enunciated in *Koba* to our review of an agency's price realism analysis of proposals submitted in response to a solicitation for a fixed-price contract.

We have carefully reviewed the two cost/price analyses prepared by OCP, the determination and findings for contractor responsibility, the Business Clearance Memorandum, and declarations by the contracting officer and the cost/price analyst. We find that the record does not support the District's contention that it conducted a reasonable price realism analysis. In the First Cost/Price Analysis Report, dated October 2, 2013, the cost/price analyst raised questions about [redacted] in significant unsupported costs identified in Citelum's proposal. (AR Ex. 13, at 3.) The analyst also noted a [redacted] between the two offerors' projected [redacted]. He wrote, [redacted] ?"[36] (*Id.* at 2.) Even in his Second Cost/Price Analysis Report the analyst noted that "the contracting officer was unable to obtain additional supporting cost data from the contractor." (District's Consol. Resp. Ex. 3, at 3.) These questions and concerns all relate to the realism of Citelum's proposed prices. Yet, a thorough examination of the contemporaneous evaluation record reveals that many pertinent questions were left unanswered.[37]

In a *post hoc* attempt to fill gaps left in the contemporaneous source selection record, the District points to declarations of the contracting officer and the cost/price analyst in support of the proposition that the District reasonably evaluated Citelum's proposal for price realism. In a February 18, 2014, declaration, the cost/price analyst states that he "considered every aspect of Citelum's price Proposal including the price for Citelum's [redacted] LED fixtures [redacted] of the contract." (District's Consol. Resp. Ex. 1, at 2, ¶ 5.) In a February 24, 2014, declaration, the contracting officer states that she "considered whether the cost proposed by Citelum, which included the purchase and install [sic] the [redacted] LED lights [redacted] of the contract, was realistic and reasonable." (*See* District's Consol. Resp. Ex. 1, at 2 ¶ 5.) She also states that "she considered the "several cost related questions" raised in the cost/price report dated October 2, 2013, and concluded that those questions "were satisfactorily addressed before the Analyst's final report was issued on November 13, 2013." (*Id.* at ¶ 6.)

Yet, the record contains no documentation—of highly relevant analysis—in support of the above assertions. For example, in her Business Clearance Memorandum, the contracting officer offered no analysis to explain why Citelum's proposed price was realistic, despite being [redacted] than the District's estimates. (*See generally* AR Ex. 14, at 14-16.) We recognize that the contracting officer has broad discretion over the manner (and depth) in which a price realism analysis is conducted. *See, e.g., Afghan Am. Army Servs. Corp. v. United States*, 90 Fed. Cl. 341, 356-58 (Fed. Cl. 2009) (citations omitted). However, the analysis must still be adequate. In *Citywide Managing Services of Port Washington*, for example, the GAO found a price realism analysis to be adequate where the government

[36] Given that Citelum proposed to [redacted] than Dean, at prices that the analyst concluded were [redacted] than Dean's, questions concerning the realism of Citelum's proposed prices needed to be answered prior to contract award. (*See* AR Ex. 14, at 3.)

[37] Although the contracting officer's Business Clearance Memorandum does not cite the Leidos Estimate, we also note the Leidos Estimate's favorable assumptions for Citelum, including that Citelum (in the absence of any supporting documentation) would be able [redacted]. (*See* District's Resp. to CAB Order Ex. 1, at 1.)

had (1) compared each offeror's price to both a government estimate and the prices of competitors; (2) determined on an item-by-item basis whether prices appeared significantly high or low; and (3) requested offerors to verify their prices and confirm whether they could perform the proposed work at the low proposed prices. *See Citywide Managing Servs. of Port Washington, Inc.*, B-281287.12 et al., 2001 CPD ¶ 6 (Comp. Gen. Nov. 15, 2000). In this case, the contracting officer's price realism analysis needed to include a rational explanation of how Citelum would be able to perform the contract services despite its proposed total contract price being 21% below DDOT's Engineer's Estimate, and almost 17% below the Leidos Estimate. *See Accord Esegur-Empresa de Segurança, S.A.*, B-407947 et al., 2013 CPD ¶ 109 (Comp. Gen. 2013) (sustaining a protest where the government failed to contemporaneously evaluate whether an offer 17% below the government's estimate was realistic).

Furthermore, we have held that, "[w]hile the Board will afford some weight to declaration statements from contracting officials . . . , the Board continues to afford the greatest weight to the contemporaneous record rather than to arguments and documentation prepared in response to protest contentions." *Ridecharge*, 2012 WL 8021681 (citing *Trifax*, 45 D.C. Reg. 8842, 8847; *Health Right, Inc.*, CAB Nos. P-0507 et al., 45 D.C. Reg. 8612, 8636 (Oct. 15, 1997)).

Thus, we find the declarations of the contracting officer and the cost/price analyst insufficient to render a conclusion that the District engaged in a meaningful price realism analysis, let alone provide "confidence that the rates proposed are reasonable and realistic in view of other cost information reasonably available to the agency as of the time of its evaluation." *Solers*, 2014 CPD ¶ 74. Here, the contracting officer merely stated, without explanation, that she believed Citelum's prices to be realistic, without ever adequately addressing the significant concerns about pricing that were raised during the evaluation of Citelum's proposal. (*See* AR Ex. 14, at 14.) In the absence of any documentation to support a meaningful price realism analysis, we sustain the protest on the ground that the District unreasonably evaluated the offerors' proposals for price realism.

B. The District Failed to Extend Equal Treatment to the Offerors

Enacted to "ensure fair and equitable treatment of all persons who deal with the procurement system of the District government," D.C. CODE § 2-351.01(b)(4), the Procurement Practices Reform Act of 2010 ("PPRA"), and its implementing regulations, impose an obligation on all contracting officials to conduct the District's procurement business in a "manner above reproach" and "with complete impartiality and with preferential treatment for none," D.C. Mun. Regs. tit. 27 § 1005.1. Thus, it goes without saying that the District cannot engage in conduct that unfairly favors one offeror over another. *Citelum*, 2013 WL 1952320 ("[T]he unequal treatment of offeror proposals violates District law and greatly undermines the integrity of the procurement process."). Nonetheless, we find that the District failed to treat the offerors equally when it (1) met with Citelum personnel on November 7, 2013; and (2) penalized Dean but not Citelum for proposing an allegedly unproven remote monitoring system [redacted]. We discuss each of these improprieties *seriatim*.

1. The District Improperly Met with Citelum on November 7, 2013

Among the improprieties that the District committed during the conduct of this procurement, perhaps none demonstrates more clearly the flawed nature of the District's source selection process than the contracting officer's decision to meet with Citelum personnel on November 7, 2013. The District maintains that the parties met only to "review the final language of the contract before they signed it," and also that the "District customarily reviews the language of a proposed contract with the proposed awardee…" (AR 25; *accord* AR Ex. 17, at 2, ¶ 8.) The intervenor additionally argues that the meeting was permissible pursuant to D.C. Mun. Regs. tit. 27 § 1634, which states that the contracting officer may negotiate with the "highest-ranked offeror on price or technical matters within the scope of the RFP." (*See* Citelum's Comments on Supp. AR at 20-21.) The protester responds, however, that the November 7th meeting "occurred weeks *before* the [contracting officer] found Citelum DC to be either responsible or the top-rated offeror, and thus before DDOT and Citelum DC could have properly met" pursuant to D.C. Mun. Regs. tit. 27 § 1634. (Dean Comments 25.) We agree.

Consistent with District procurement law and regulation, the contracting officer may negotiate with the highest ranked offeror "on price or technical matters within the scope of the RFP." D.C. CODE § 2-354.03(h); *see also* D.C. Mun. Regs. tit. 27 § 1634.[38] Thus, the District may conduct negotiations with one prospective offeror, to the exclusion of all other offerors, *only after* it reasonably evaluates all offeror proposals, pursuant to the terms of the Solicitation, and ranks each offeror accordingly.[39] As we further explain herein, that did not happen here.

The contracting officer states that District officials met with Citelum to review the terms of the "proposed contract."[40] However, by November 7, 2013, the District could not have reasonably determined Citelum to be the highest-ranked offeror consistent with the Solicitation's requirement that the District award the contract "to the responsible offeror whose offer, conforming to the solicitation, will be the most advantageous to the District, cost or price, technical and other factors, . . . considered." (AR Ex. 1, at 162, § L.1.1.) By arguing otherwise, the District appears to concede that the contracting officer made the award decision without the additional insight of the Second Cost/Price Analysis Report which appears to have been requested—on November 6, one day prior to the meeting, and delivered on

[38]The D.C. Code provides that: "After ranking the prospective contractors, the contracting officer may elect to proceed with negotiations in accordance with paragraph (2) of [the] subsection. The contracting officer's decision shall not be subject to review." D.C. CODE § 2-354.03(h). In other words, subject to the contracting officer having ranked the offerors, the contracting officer may enter into negotiations with the highest-ranked offeror and those negotiations shall not be subject to review. Section 2-354.03(h) of the D.C. Code does not, however, limit the Board's ability to review whether the contracting officer possesses the *authority* to enter into those negotiations.

[39] Ranking of the offerors requires the contracting officer's independent assessment of the offeror proposals, taking into account the combination of each offeror's technical and pricing scores and resulting total score. (*See, for example,* AR Ex. 14, at 16.)

[40] In a separate declaration, the contracting officer states that she performed an independent assessment of whether Citelum's proposal "was realistic and allowed Citelum a reasonable profit." (*See* District's Consol. Resp. Ex. 2, at 1-2, ¶ 1.) However, in order to have performed an independent assessment that utilized either of the cost estimates for CLIN 10, discussed *supra*, the contracting officer would have been required to (1) receive DDOT's Engineer's Estimate and/or the Leidos Estimate on the date that they were produced; (2) analyze the offerors' proposed prices in light of the District's cost estimate; (3) decide to award the contract to Citelum based on her independent assessment; and (4) contact representatives of DDOT, OAG, and Citelum (which included its legal counsel) to schedule a meeting for that same morning—all prior to 10:40 AM on November 7, 2013.

November 13—in order to address and resolve some of the deficiencies identified in the First Cost/Price Analysis Report. (*See* District's Consol. Resp. Ex. 3, at 1.)

Given the paucity of price analysis available on November 7 (and the fact that the District's price estimates were not produced until that very date), not only was it unreasonable for the contracting officer to have determined that Citelum was the highest-ranked offeror at that time, it strains credulity to accept a version of events whereby the District convened a meeting with two District agencies and Citelum, and the parties entered into contract negotiations without discussing Citelum's proposal, notwithstanding the deficiencies in the price proposal. Alternatively, if, as the contracting officer states, "[t]here were no discussions or requests for clarification conducted by DDOT with either offeror after responses were received on October 17, 2013," (AR Ex. 17, at 2, ¶ 7) despite the many remaining questions concerning the offerors' pricing proposals, the District's conduct in convening a meeting with Citelum only, raises just as much cause for concern.

Indeed, the Business Clearance Memorandum, dated December 6, 2013—nearly one month after the contracting officer met with Citelum personnel—relies extensively on the Second Cost/Price Analysis Report to justify the contracting officer's contention that Citelum offered the best value to the District, price and other factors considered (further evincing that the District had not completed a price realism analysis so as to rank the offerors by November 7). (*See* AR Ex. 14, at 15.)[41]

Certain comments in the Second Cost/Price Analysis Report raise additional concerns of unequal treatment of the offerors. For example, in that report the cost/price analyst states that he "met with the Contracting Officer" and DDOT's "lead engineer" "to discuss and develop a strategy for addressing and resolving some of the deficiencies [he] found in previous analyses of Citelum's cost proposal." (District's Consol. Resp. Ex. 3, at 2.) It is unclear whether the analyst was referring to the more than [redacted] in "significant unsupported costs" that he identified in his first report. (*See* AR Ex. 13, at 3.) Most troublingly, however, the analyst's second report made no mention of any similar attempt to resolve any perceived deficiencies in Dean's price proposal. (*See generally* District's Consol. Resp. Ex. 3.) Indeed, the Second Cost/Price Analysis Report as well as the Leidos Estimate focus almost exclusively on Citelum's proposal, even though the First Cost/Price Analysis Report found that *both* proposals required further clarification on pricing.

In reality, the only evidence in the record to support the proposition that the contracting officer resolved the questions concerning Citelum's pricing, as identified in the analyst's first report, is the contracting officer's own *post hoc* statement that these significant issues were discussed and resolved. But, as we noted earlier, "[w]e accord greater weight to contemporaneous evaluation and source selection material than to arguments and documentation prepared in response to protest contentions." *Trifax,* CAB No. P-0539, 45 D.C. Reg. 8842, 8847 (citations omitted). Here, in the absence of any contemporaneous documentation to support a finding that the contracting officer properly evaluated the pricing of the offerors' proposals, and ranked the proposals accordingly, we find that the November 7, 2013, meeting

[41]The question that Dean raises is: Was the evaluation record "completed over the next four weeks [following the District's meeting with Citelum] to *justify* an award to Citelum rather than to *analyze* whether Citelum was responsible and had submitted a realistic price and top-rated proposal." (*See* Dean Comments at 25-26.)

between the District and Citelum was impermissible, in direct violation of the District's procurement laws and regulations which require "complete impartiality" and "preferential treatment for none."

2. The District Penalized Dean, But Not Citelum, For Proposing An Allegedly Unproven Remote Monitoring System [redacted]

Dean alleges that DDOT "repeatedly favored Citelum by applying evaluation factors unequally such that only Dean was penalized for perceived weaknesses in its proposal," thereby "artificially inflat[ing] Citelum's technical evaluation and scoring relative to Dean's, allowing Citelum to edge out Dean in the technical evaluation." (2d Supp. Protest 6.) The District responds that the contracting officer complied with the PPRA, the procurement regulations and the Solicitation. (*See generally* District's Consol. Resp.)

The Solicitation required offerors with proposals using the innovative approach option to submit an Innovation Plan detailing "innovative alternative methodologies for maintaining, upgrading, and managing District's lighting assets." (*See* AR Ex. 1, at 65, § B.2.1.2.) Both Dean and Citelum proposed implementing a remote monitoring system, and each proposed incremental implementation of their respective systems. In an outline of its RMS approach, Dean stated, among other things, that it would "deploy all [RMS] units [redacted]" (AR Ex. 4 (Dean Technical Proposal), at 45 § 1.2.5.3.) Citelum's proposal stated that [redacted] (AR Ex. 4 (Citelum Innovation Plan), at 22 § 5.4.3; [redacted] After a discussion of various pilot remote monitoring systems, Citelum's proposal also stated that [redacted] (*Id*.)

The TEP assessed a weakness in Dean's proposal for an allegedly [redacted] RMS but awarded Citelum a strength for its RMS, citing to Citelum's proposal's [redacted]; The use of [redacted] (AR Ex. 8, at 6.) The contracting officer adopted this weakness without question, finding that "M.C. Dean's proposed Remote Monitoring System, [redacted]." (AR Ex. 14, at 13.) On the other hand, the contracting officer's independent assessment says virtually nothing concerning Citelum's proposed RMS. (*See generally* AR Ex. 14, at 13.)

Even so, it is important to note that although the TEP's comments describe Citelum's proposed [redacted] an RMS, [redacted] Specifically, section 5.4.1 of Citelum's proposal describes [redacted] AR Ex. 4 (Citelum Data Plan), at 1; *see also* AR Ex. 4 (Citelum Innovation Plan), at 22, § 5.4.1; AR Ex. 1, at 90, § C.3.3.X [redacted]

[redacted][42] According to the Solicitation, a maintenance management system is intended "to record information regarding assets, including their composition, condition, and location, in addition to recording details on all resources (labor, material, etc.) utilized to maintain them." (AR Ex. 1, at 90, § C.3.3.X.) Thus, the functions of an MMS appear to be distinct from those of an RMS. For example, the Solicitation stated that the District uses CityWorks software as its MMS, and ROAM as its RMS—which would presumably be unnecessary if the functionality of the two products was identical. (*Compare* AR Ex. 1, at 90, § C.3.3.X, *with* AR Ex. 1, at 114-115, § C.6.7.) Similarly, rather than describing [redacted] Citelum's proposal stated that [redacted] Finally, while Citelum's innovation plan stated that Citelum would [redacted]. (*See generally* AR Ex. 4 (Citelum Innovation Plan), at 22-23, ¶ 5.4.3.)

In light of the above, we conclude that the District failed to treat the offerors equally when it assigned Dean a weakness for proposing an [redacted], but failed to assign a weakness to Citelum's proposal for also proposing an [redacted]. Moreover, it appears that the District could potentially have assigned *additional* weaknesses to Citelum's proposal for [redacted].

Because of the unequal treatment of the offerors, we sustain the protest.

C. The District Imposed an Unstated Evaluation Criterion When It Penalized Dean for Failing to Upgrade Certain Lighting Fixtures

The Solicitation required offerors to submit proposals "which will allow for a rapid initial implementation of 32,500 LED fixture upgrades throughout the District." (AR Ex. 1, at 64, § B.1.3.) The Solicitation further required offerors to (1) install at least 17,500 fixtures in the first year and the remainder in the second year; (2) upgrade 2,500 mercury vapor and incandescent fixtures; and (3) use only DDOT-approved LEDs for the upgrades. (*See generally* AR Ex. 1.) Yet, in its consensus report, the TEP and the contracting officer assigned Dean's proposal a weakness because it [redacted] (AR Ex. 8, at 6.)

Because the Solicitation did not expressly require the offerors' proposals to include plans to [redacted], at issue is whether [redacted] is "logically encompassed or related to" the evaluation criterion enumerated in the Solicitation. In other words, if [redacted] fixtures comprised such a large portion of the District's lighting inventory that their exclusion would result in fewer than 32,500 fixtures remaining eligible for upgrade, then it would have been reasonable to conclude that a proposal excluding [redacted] fixtures would not meet the District's needs. However, neither the record nor the District's pleadings address the substance of this matter. Furthermore, since we do not have a basis upon which to conclude

[42] Because the District's Agency Report includes more than two dozen documents labeled as "Exhibit 4," the Board has included a brief description of the document to which it is referring each time Agency Report Exhibit 4 is referenced.

that there exists a clear nexus between (1) the RFP's stated requirements, and (2) the unstated requirement that offerors not exclude [redacted] from their proposal, we find that the District improperly imposed an unstated evaluation criterion in its evaluation of Dean's proposal.

It is well-established that the government's evaluation is improper when source selection officials do not comply with the evaluation scheme set forth in the RFP. *See* D.C. Mun. Regs. tit. 27 § 1630 ("The contacting officer shall evaluate each proposal using only the evaluation criteria stated in the RFP and in accordance with the weightings provided in the RFP."); *see also e.g., Banknote Corp. of Am. v. United States*, 56 Fed. Cl. 377, 386 (2003), *aff'd*, 365 F.3d 1345 (Fed. Cir. 2004) (noting that it is "beyond peradventure that the government may not rely upon undisclosed evaluation criteria in evaluating proposals"). Nonetheless, in the exercise of their broad discretion, source selection officials are permitted to broaden the scope of the evaluation by considering "specific, albeit not expressly identified, matters that are logically encompassed by or related to the stated criteria." *Bank St. Coll. of Educ.*, B-213209, 63 Comp. Gen. 393, 84-1 CPD ¶ 607 (Comp. Gen. June 8, 1984); *see also Banknote*, 56 Fed. Cl. at 387 ("it is well-settled that a solicitation need not identify each element to be considered by the agency during the course of the evaluation where such element is intrinsic to the stated factors") (internal quotations omitted). However, there must be a "clear nexus between the stated evaluation criteria and the unstated criteria." *Global Analytic Info. Tech. Servs., Inc.*, B-298840.2, 2007 CPD ¶ 57.

We note that it was permissible for the District to evaluate Citelum's proposal as superior to Dean's precisely because it proposed [redacted]—that is, Citelum's proposal exceeded the District's minimum requirements. But, having identified its minimum requirements, the District was not permitted to penalize Dean for its technically acceptable proposal—that is, for failing to exceed the District's minimum requirements. In short, having found both proposals to be technically acceptable, the District was permitted to praise the proposal that exceeded its requirements, but not to penalize the proposal that did not excel in the same manner.

Because the District imposed an unstated evaluation criterion in evaluating Dean's proposal, and impermissibly penalized Dean, we sustain the protest.

D. The Contracting Officer Failed to Exercise Independent Judgment in Evaluating the Offerors' Proposals

Without deviation, the contracting officer adhered to the scores assessed by the TEP during the course of her evaluation, even as she indicated that she disagreed with the basis for those scores. (*See* AR Ex. 14, at 13 (stating that the contracting officer "agrees with the [TEP's] scoring [of Citelum's proposal] but not the weaknesses cited by the [TEP]," and that the contracting officer "agrees with the [TEP's] rating [of Dean's proposal] but disagrees with the noted weaknesses for the Staffing and Past Performance").)

Without explanation, the Business Clearance Memorandum noted that the contracting officer "agrees with the average rating given for M.4.2," but that the "Panel's comments are not consistent with those ratings." (AR Ex. 14, at 13.) The contracting officer also stated that she had reviewed Citelum's proposal and found "the staffing plan to meet the requirement without deficiency." (*Id.*) (*Compare* AR

Ex. 14, at 13, *with* AR Ex. 8, at 6 (where the TEP, noting weaknesses in Citelum's proposal, stated that Citelum's [redacted]) Yet, the Business Clearance Memorandum does not explain how the contracting officer came to her conclusion, or offer an explanation of why the TEP came to the opposite conclusion in its consensus report.

It bears mentioning that the contracting officer is solely responsible for the source selection decision. *See* D.C. Mun. Regs. tit. 27 § 1612.2. When evaluating proposals and selecting contract awardees, the contracting officer "must exercise independent judgment in assessing the relative merits of the competing proposals, even when relying on technical expertise of delegated evaluators." *B&B Security Consultants, Inc.*, CAB Nos. P-0583 et al., 46 D.C. Reg. 8637, 8648 (June 18, 1999). It is thus improper for the contracting officer to make a source selection decision based on a "purely mechanical application" of numerical scores provided to her by technical evaluation specialists. *Id.* Indeed, when a contracting officer merely adopts point scores provided to her by others, she does not exercise independent judgment. *See Urban Alliance Found, et al*., CAB Nos. P-0886 et al., 2012 WL 4775002; *Ridecharge*, CAB Nos. P-0921 et al., 2012 WL 8021681 (Nov. 9, 2012). *Accord Dyncorp Int'l, LLC*, No. B-289863, 2002 CPD ¶ 83 (Comp. Gen. May 13, 2002) ("Although source selection officials may reasonably disagree with the ratings and recommendations of evaluators, they are nonetheless bound by the fundamental requirement that their independent judgments be reasonable, consistent with the stated evaluation scheme and adequately documented."). Accordingly, if there is not "sufficient documentation in the record" to support the contracting officer's independent review, we "cannot conclude that the evaluation is reasonable or rationally related to the solicitation criteria." *Ridecharge,* CAB Nos. P-0921 et al. (internal citations omitted).

In this case, it appears that the contracting officer merely adopted (1) the numerical scores furnished to her by the TEP, and (2) the conclusions of the TEP Consensus Evaluation Report and the two OCP Cost/Price Analysis Reports. Most troublingly, the contracting officer appears to have accepted the TEP's scores, which were based, in part, on the assessed weaknesses that the TEP had identified in the proposals, even as she expressed disagreement with the basis for those scores. We therefore have no basis in the contemporaneous record (beyond the Business Clearance Memorandum's inadequate description of the contracting officer's evaluation process) to assess the reasonableness of the District's evaluation nor the extent to which the contracting officer exercised independent judgment in her evaluations.

E. The District Failed to Determine whether Citelum's Affiliates will have Meaningful Involvement in the SLAM Services Contract

Dean argues that the District erred when it evaluated the past performance information contained in Citelum's proposal by improperly crediting Citelum with the experience and past performance of its affiliates. Dean contends that it was unreasonable for the District "to attribute the Past Performance of Citelum affiliates to Citelum DC, without knowing what meaningful contributions the affiliates would make to Citelum DC's performance of the contract." (2d Supp. Protest 26.) The District disagrees, claiming that, having reviewed Citelum's Operating Agreement, both the TEP and the CO properly relied on the experience of Citelum's affiliates in their evaluation of Citelum's past performance. (*See* District's Consol. Resp. at 7-8.) That agreement, the District avers, "provided Citelum DC LLC with the

substantial assets of three major companies: [redacted] (District's Consol. Resp. 7 (citations omitted).) Each of these companies, the District claims, "had particular expertise which were united for the purpose of performing the citywide streetlight management contract." (*Id.* (citations omitted).)

The Board has not previously addressed the merits of whether an agency may attribute the experience or past performance of an offeror's parent or affiliated company when evaluating past performance. Therefore, as we have done before, we look to decisions by the Comptroller General for guidance. *See Potomac Techs., Inc.*, 36 D.C. Reg. 4045, 4052 (Feb. 13, 1989) ("While the Board is not bound by decisions of the Comptroller General, this large body of federal government contract law frequently is helpful and persuasive when we are confronted with similar factual situations.").

The Comptroller General has stated that "[a]n agency properly may attribute the experience or past performance of a parent or affiliated company to an offeror where the firm's proposal demonstrates that the resources of the parent or affiliate will affect the performance of the offeror." *Humana Military Healthcare Servs.*, B-401652.2, 2009 CPD ¶ 219 (Comp. Gen. Oct. 28, 2009). The "relevant consideration is whether the resources of the parent or affiliate company—its workforce, management, facilities or other resources—will be provided or relied upon for contract performance, such that the parent or affiliate will have meaningful involvement in contract performance." *Ecompex, Inc.*, B-292865.4 et al., 2004 CPD ¶ 149 (Comp. Gen. Jun. 18, 2004) (citations omitted). If the record does not show that the resources of an offeror's parent or affiliate corporations will be provided or relied upon for contract performance, and an agency credits the offeror with the corporate experience and past performance of its parent or affiliate corporations, then a protest challenging the reasonableness of that action will be sustained. *Id.*

In applying that standard to Citelum's proposal, we find that the contemporaneous evaluation record does not adequately document the basis upon which the District concluded that Citelum's proposal establishes that the resources of its parent or affiliate companies would have "meaningful involvement" in contract performance. This is significant because the Solicitation stressed "past performance [as] a key evaluation criterion," (AR Ex. 1, at 165, § L.2.6.C) and it attributed 40 points to the category of "Past Performance /Staffing /Management /QA&QC/Facilities" (*id.* at 179-81, § M.4.2).

As explained in its Operating Agreement, Citelum DC, LLC is a limited liability company formed by [redacted] (*See* AR Ex. 4 (Citelum Teaming Agreement), at 7 § 2.3.) The three entities that are the [redacted]

In its proposal, Citelum appears to [redacted], stating that [redacted] and that [redacted] (AR, Ex. 4 (Citelum Reference Matrix), at 1 § 11.1.) And the District appears to have accepted Citelum's

claims, crediting Citelum with the "expertise" of its parents and affiliates.[43] But the contemporaneous source selection documents indicate that the District gave credit to the performance of Citelum's affiliates without considering whether, and to what extent, those affiliates would have meaningful involvement in Citelum's performance in this contract. For example, in the Business Clearance Memorandum, the contracting officer determined that Citelum has a satisfactory performance record because [redacted] (*See* AR Ex. 15, at 2.) However, there is no documentation to establish that the District attempted to determine whether Citelum's parent company or affiliates would have meaningful involvement or share resources with Citelum during its performance of the contract. In light of the above-mentioned authority, this was improper. And while this impropriety, by itself, would not necessarily void the award decision (because the contracting officer also relied upon past performance as demonstrated by Citelum during its provision of SLAM services under an emergency contract), the impropriety further undermines the reasonableness of the District's evaluation process.

CONCLUSION

For the above stated reasons, we sustain this protest.[44] We find that the violations of District procurement law and regulations were sufficiently material and pervasive so as to irreparably compromise the integrity of the selection process and require a resubmission and reevaluation of the offerors' proposals. Accordingly, the Board hereby orders the District to undertake the following corrective action:

(1) withdraw any proposed award to Citelum;
(2) provide the offerors an opportunity to submit revised proposals;
(3) reevaluate the offerors' technical proposals utilizing only the evaluation factors expressly enumerated in the Solicitation; and
(4) reevaluate the offerors' final proposed prices for realism, in a reasonable manner consistent with District procurement law and regulations and the terms of the Solicitation.

SO ORDERED:

DATED: June 2, 2014

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

[43] Arguably, if the District's evaluation of Citelum's past performance had excluded the performance of Citelum's affiliates, and been limited to its performance under the emergency services contracts, Citelum may have received a lower past performance rating.
[44] Because we sustain the protest on the grounds set forth herein, the Board finds it unnecessary to address any of the protester's remaining allegations.

CONCURRING:

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

/s/ Monica C. Parchment
MONICA C. PARCHMENT
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Redacted Version

THE DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

M.C. DEAN, INC.	)	
	)	CAB No. P-0955
Solicitation No.: DCKA-2011-R-0150	)	

For the protester: Philip J. Davis, Esq., Craig Smith, Esq., and Samantha Lee, Esq., Wiley Rein LLP. For the intervenor: Douglas Proxmire, Esq. and Elizabeth Gill, Esq., Squire Patton Boggs, LLP. For the District of Columbia: Howard Schwartz, Esq., Senior Assistant Attorney General, and Alton Woods, Esq., Assistant Attorney General.

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

ORDER DENYING CITELUM'S MOTION
FOR RECONSIDERATION OF CORRECTIVE ACTION
Filing ID #56173435

On June 12, 2014, Citelum DC, LLC ("Citelum"), the intervenor in the instant protest, filed a motion for reconsideration of corrective action pursuant to the Board's June 2nd Opinion ("Opinion") sustaining the protest of M.C. Dean, Inc. ("Dean") in Solicitation No. DCKA-2011-R-0150 (the "Solicitation"). (*See* Mot. for Recons. of Corrective Action ("Mot. for Recons.").) Through the Solicitation, the District sought a Citywide Streetlight Asset Management Services ("SLAM") contractor to maintain, rehabilitate, and preserve over 70,000 streetlights and other assets throughout the District. *M.C. Dean, Inc.*, CAB No. P-0955, 2014 WL 2993557 (June 2, 2014) ("Op."). In addition, the selected contractor was required to operate and manage the Frederick Douglass Memorial Bridge. Op. 3.[1] The District contemplated the award of a firm-fixed-price-plus-incentive-fee contract consisting of a base year and four one-year option periods. *Id*. Both Citelum and Dean submitted timely proposals in response to the Solicitation, while the proposal of the third and only other offeror, W.A. Chester, LLC, was rejected as nonresponsive. *Id*. at 5. Notably, this protest was the third in a series of protests arising from this procurement. *See id*. at 1-3.

Following a thorough review of the record, the Board determined that the District's evaluation of the offerors' proposals was replete with procurement improprieties and irregularities. As a result, we sustained Dean's protest and ordered that the District undertake corrective action to:

(1) withdraw any proposed award to Citelum;
(2) provide the offerors an opportunity to submit revised proposals;
(3) reevaluate the offerors' technical proposals utilizing only those evaluation factors expressly enumerated in the Solicitation; and

[1] All pinpoint citations to the Board's Opinion refer to the version published on the Board's website, which may be accessed via a docket number search: http://app.cab.dc.gov/WorkSite/Docket_Case_Number.asp.

(4) reevaluate the offerors' final proposed prices for realism, in a reasonable manner consistent with both District procurement law and regulations and the terms of the Solicitation.

See Op. at 2.

Citelum does not seek reconsideration of the merits of the Board's decision; rather, its motion concerns the corrective action ordered by the Board. (*See generally* Mot. for Recons.) Specifically, Citelum requests that the Board remove from its order the second corrective action item requiring the District to provide offerors an opportunity to submit revised proposals. (*Id*.) For the reasons set forth below, the Board denies Citelum's motion.

(A) Motion for Reconsideration

Under the District's procurement regulations and Board Rule 117.1, a party may request that the Board reconsider its decision (a) to clarify the decision; (b) to present newly discovered evidence; (c) if the decision contains typographical, numerical, technical, or other clear errors; or (d) if the decision contains errors of fact or law. D.C. Mun. Regs. tit. 27 § 117.1 (2002). Citelum has framed its motion as a request that the Board "clarify the corrective action" ordered in the Opinion. (*See* Mot. for Recons. at 1.) In actuality however, Citelum is not seeking clarification of the Board's decision, or attempting to satisfy any other criteria for reconsideration of the Opinion. Citelum, disagreeing with the Board's remedy, simply seeks to overturn one of four corrective action items ordered by the Board.[2] In doing so, Citelum suggests a piecemeal approach to remedying the flagrant procurement improprieties evident in the conduct of this procurement. (*See id.* at 2-3.) But, as we noted in the Opinion, these improprieties were so material and pervasive as to irreparably compromise the integrity of the solicitation process. *See* Op. at 16, 28.

We find that Citelum has failed to meet any of the criteria for reconsideration of the Board's decision. Furthermore, in light of the findings set forth in the Board's decision, the District's evaluation of proposals is irreversibly tainted such that each and every corrective action item set forth in the Opinion is necessary to restore integrity to the procurement process. Notwithstanding, we address the merits of Citelum's reconsideration arguments below.

(B) The Board's Remedy is Consistent with Federal Jurisprudence Concerning Comparable Violations of Procurement Law[3]

The Board sustained Dean's protest on six separate grounds. *See* Op. at 2. Specifically, we held that (1) the contracting officer failed to conduct a reasonable price realism analysis of the offerors'

[2] Mere disagreement with the Board's remedy is not a valid basis on which to seek reconsideration. *See, e.g., Tito Contractors, Inc.*, CAB No. P-0363, *et al*., 41 D.C. Reg. 3916, 3917 (Jan. 12, 1994) (denying reconsideration where protester merely disagreed with the Board's decision to deny the protester's proposal preparation costs) (citations omitted).

[3] Although the Board is not bound by the decisions of the Comptroller General, we have long viewed the Government Accountability Office ("GAO") as a persuasive authority when reviewing cases with similar factual situations. *See, e.g., Potomac Techs., Inc.*, 36 D.C. Reg. 4045, 4052, 1989 WL 508650 (Feb. 13, 1989).

proposals; (2) the District impermissibly held discussions with only one offeror, Citelum; (3) the District improperly penalized Dean, but not Citelum, for its proposed remote monitoring system, [redacted]; (4) the District improperly evaluated Dean's proposal using evaluation factors not stated in the Solicitation; (5) the contracting officer failed to exercise independent judgment in evaluating the offerors' proposals; and (6) the District improperly credited Citelum for the past performance of its affiliates. *Id.* Consequently, we ordered the District to (1) withdraw any proposed award to Citelum; (2) *provide the offerors an opportunity to submit revised proposals*; (3) reevaluate the offerors' technical proposals utilizing only those evaluation factors expressly enumerated in the Solicitation; and (4) reevaluate the offerors' final proposed prices for realism, in a reasonable manner consistent with both District procurement law and regulations and the terms of the Solicitation. *See* Op. at 2.

Protests concerning comparably significant procurement violations have resulted in similar remedial action. For example, in *Contingency Management Group, LLC; IAP Worldwide Services, Inc*., which concerned the Army's award of a contract for global logistics services, the GAO found that the Army had improperly evaluated proposals and treated the offerors unequally by (i) allowing an awardee to use different assumptions than those stated in the solicitation, (ii) misunderstanding an awardee's technical approach while penalizing another offeror for the same approach; (iii) not accounting for negative audit findings that were submitted as part of the proposal evaluation process; and (iv) unreasonably evaluating the offerors' proposals due to unsupported or inconsistent explanations of acceptable staffing levels of non-U.S. citizens. *See Contingency Mgmt. Grp., LLC; IAP Worldwide Servs., Inc*., B-309752, *et al.*, 2008 CPD ¶ 83 (Comp. Gen. Oct. 5, 2007) *aff'd on recons. Kellogg, Brown & Root Servs., Inc.*, B-309752.8, 2008 CPD ¶ 84 (Comp. Gen. Dec. 20, 2007). As a result, the GAO recommended that the Army reopen discussions, and request revised proposals for reevaluation in light of those discussions. *Id*.

In response to a subsequent motion for reconsideration from *Kellogg, Brown & Root Services, Inc.*, a recipient of the Army's global logistics contract at issue in the *Contingency Management Group* protest, the GAO again held that "the reopening of discussions and the request for, and the evaluation of, revised proposals, continues to be the appropriate remedy because it will allow the agency to correct a material and prejudicial flaw in its conduct of the procurement." *Kellogg, Brown & Root Servs., Inc.*, 2008 CPD ¶ 84. The GAO therefore denied the motion for reconsideration. *Id.*; *see also GAI, Inc.*, B-247962, *et al.*, 92-2 CPD ¶ 10 (Comp. Gen. July 8, 1992) (holding that the appropriate corrective action for a procurement that had been improperly converted from an IFB to a negotiated procurement was to terminate contract award and resolicit bids); *Unisys Corp*., B-230019, *et al*., 67 Comp. Gen. 512 (July 12, 1988) (holding that where there existed a "reasonable possibility" that the solicitation had failed to advise offerors of the actual basis for award, the government's decision to reopen negotiations was proper, notwithstanding the prior disclosure of the offerors' proposed costs).

By contrast, it bears mentioning that the cases cited by Citelum in support of its motion for reconsideration are readily distinguished from the present protest. (*See generally* Mot. for Recons. (citations omitted).) In *Sheridan Corporation v. United States*, the agency decided to take corrective action rather than oppose a bidder's protest. *Sheridan Corp. v. United States*, 95 Fed. Cl. 141, 145 (Fed. Cl. 2010). Through corrective action, the contracting officer had suspended award of the contract,

resolicited proposals, and enlarged the competitive range by including additional offerors that had been previously unsuccessful in their initial submissions. *See* 95 Fed. Cl. at 144-45. The court held that the agency's corrective action was not reasonable because it was not rationally related to any identifiable defect in the procurement. *Id*. at 151-52. It stated that "[a] careful review of the administrative record [did] not reveal *any* errors that required corrective action [emphasis added]." *Id*. at 153. The court further concluded that the "only conceivable reason to permit resolicitation would be to allow the unsuccessful offerors an opportunity to beat the now disclosed price of the winning proposal." *Id*. at 154. The facts in *Sheridan* are, therefore, significantly at odds with the facts in the present protest wherein the Board performed a thorough review of the record, and found material and pervasive improprieties throughout the conduct of the procurement.

In *Amazon Web Services, Inc. v. United States*, another case cited by Citelum, the Court of Federal Claims considered an appeal of a GAO protest decision which recommended that the government resolicit proposals for a cloud computing services contract, amend the solicitation as necessary, and make a new award decision. *Amazon Web Servs., Inc. v. United States*, 113 Fed. Cl. 102, 105 (Fed. Cl. Oct. 31, 2013) (citing *IBM-U.S. Federal*, B-407073.3, *et al.*, 2013 CPD ¶ 142 (Comp. Gen. June 6, 2013)). The court stated that the two discrete defects in the procurement – (i) a price evaluation error, and (ii) the waiver of a material solicitation requirement for a single offeror after the selection decision was made – did not warrant reopening the entire competitive process. 113 Fed. Cl. at 115. Instead, the corrective action ordered by GAO should have been limited to remedying those two specific defects. *See id*. Additionally, the court held that since the protester, (IBM-U.S. Federal), had no chance of winning the competition, it had not been prejudiced by the procurement defects. *Id*. at 112-113. Finally, the court found that although no prejudice had accrued to the protester, the GAO's corrective action would have prejudiced the winning bidder by forcing it to bid against its own now-public price. *See id*. at 116-117. Hence, *Amazon Web Services* is also distinctly different from the instant protest because, unlike Dean (which was substantially prejudiced by the District's actions), the original protester in *Amazon* (i.e., IBM-U.S. Federal) failed to show that it had suffered any prejudice as a result of the procurement defects.

(C) Prejudice to the Public Interest Greatly Outweighs any Potential Prejudice to Citelum

Citelum has argued that "the Board must consider the prejudice to the parties and the best interest of the District government when crafting remedies." (Mot. for Recons. 4.) We agree. However, in doing so, we found that the prejudice to the public interest greatly outweighed any potential prejudice to Citelum. As noted above and explained further in the Opinion, the District's evaluation of the offeror proposals was unequal in that (1) the District improperly penalized Dean, but not Citelum, for its proposed remote monitoring system ([redacted]); and (2) the District improperly evaluated Dean's proposal using evaluation factors not stated in the Solicitation. Op. 23-25. However, "[a]mong the improprieties that the District committed during the conduct of this procurement, perhaps none demonstrates more clearly the flawed nature of the District's source selection process than the contracting officer's decision to meet with Citelum personnel on November 7, 2013." Op. 21. The District's conduct undermined the presumption of impartiality and the resulting unfairness to Dean cannot be remedied *post hoc*.

District officials met with Citelum shortly after 10:40 AM on November 7, 2013. *See* Op. at 11-12. The District did not schedule or hold a similar meeting with Dean. *Id*. at 12. Although the meeting was attended by many parties including representatives from Citelum, the Department of Transportation ("DDOT"), and the Office of Contracting and Procurement ("OCP"), there is no information in the record regarding when the meeting was scheduled, and there is no contemporaneous evidence to shed light on the true purpose of the meeting. *See id.* at 11-12.

The record also shows that one day earlier, on November 6, 2013, OCP's cost/price analyst met with the contracting officer and DDOT's engineer "to discuss and develop a strategy for addressing and resolving some of the deficiencies found in . . . Citelum's cost proposal." *See* Op. at 12 (citing District's Consol. Resp. Ex. 3). There is no mention of a similar attempt to resolve deficiencies in Dean's price proposal even though Dean's proposed price was more comparable to the District's own estimates (and potentially more realistic).[4] *See generally* Op. at 11-12.

The District and Citelum have provided varying explanations of the purpose of the November 7 meeting. For example, the contracting officer asserted that the meeting occurred in order for the parties to review the contract between Citelum and the District "before it was signed." *Id*. at 11 (citing Agency Report "AR" Ex. 17, at 2, ¶ 8). On the other hand, Citelum initially stated that the parties had not discussed any part of Citelum's proposal during the meeting, but now argues that the parties met for "clarification" purposes. (*Compare* Citelum's Comments on the AR Attach. 1 (Citelum's affidavit), *with* Reply at 2-4.) Regardless, the November 6 meeting between OCP's cost/price analyst and the contracting officer, as well as the District's own November 7 estimates,[5] make clear that the contracting officer's review of Citelum's proposal was wholly incomplete as of November 7 and decidedly not set for contract review. *See generally* Op. at 9-12. Given the ongoing, still incomplete evaluation of proposals as of that date, there was no justifiable reason for the District to meet with just one offeror, Citelum, at that time.

As the Board held in *Health Right, Inc., et al.*, "[i]f the District cannot be counted on promptly to deliver effective remedies for serious and material violations of law in the way offerors are treated in a major procurement like this one, firms will be discouraged from participation in District procurements." *Health Right, Inc., D.C. Health Coop., Inc., George Washington Univ. Health Plan*, CAB Nos. P-0507, *et al.*, 45 D.C. Reg. 8650, 8662 (Nov. 12, 1997). Where the violations of procurement law are egregious, but not appropriately remedied, fewer companies will participate in the procurement process and,

[4] The Opinion included the following table comparing the offerors' prices to the District's two estimates:

	Base Year Cost	Total Contract Cost
Citelum DC, LLC*	[redacted]	$73,449,608
M.C. Dean, Inc.	[redacted]	[redacted]
DDOT's Rev. Engineer's Estimate*	$23,814,111	$93,096,792
Leidos Estimate*	$36,392,722	$88,002,503

*Numbers have been rounded to the nearest dollar amount.

See Op. at 11.

[5] Both of the District's estimates—one prepared by DDOT's engineer and the other prepared by the District's consultant, Leidos—were dated November 7, 2013. *See* Op. at 9-10.

ultimately, decreased competition will result in increased costs for the District of Columbia. *See also C&D Tree Serv., Inc.*, CAB No. P-0440, 44 D.C. Reg. 6426, 6439 (Mar. 11, 1996) (noting that "[t]he integrity of the procurement system . . . depends on bidders receiving lawful evaluations of their bids").

(D) The Board Rejects Citelum's Contention that Recompetition will Result in an "Improper Reverse Auction," and finds Citelum's Concerns Secondary to the Public Interest

Citelum has stated that "[i]f Dean is allowed the opportunity to submit a revised technical proposal, this would constitute a classic case of technical leveling, as Dean would then have the chance to revise its technical solution to attempt to bring it up to the superior technical level of the Citelum's previous technical proposal." (Mot. for Recons. 4-5.) It further contends that "DDOT revealed Citelum's price upon contract award, and if Dean is given the opportunity to revise its price this will create an improper reverse auction of prices." (*Id*. at 5.)

Indeed, Citelum speaks of its "superior technical proposal" and makes much ado of its [redacted] proposal. (*See generally* Mot. for Recons. at 4-6.) Yet, it remains unknown whether Citelum or Dean had the superior technical proposal so as to merit receiving a higher technical score precisely because the District improperly evaluated the offerors' technical proposals.[6] *See generally* Op. at 23-28. In addition, since the District failed to perform a reasonable price realism analysis, Citelum's pricing proposal was not properly analyzed or validated by the District and even lacked supporting cost data. *See id*. at 12, 18-20. As noted in the Opinion, [redacted] itself can be a basis for sustaining the protest given the District's failure to evaluate whether Citelum's proposed pricing was even realistic. *Id.* at 20.

Similar to Citelum, in *GAI, Inc.*, the protester contended that it would be unfairly prejudiced if the Army Corps of Engineers terminated its contract and resolicited the requirement pursuant to corrective action because its price had been exposed and resolicitation would result in a reverse auction. *GAI, Inc.*, B-247962, *et al.*, 92-2 CPD ¶ 10. The GAO identified factors that it considered in determining whether an improperly awarded contract should be terminated, including "the seriousness of the procurement deficiency, [and] the degree of prejudice to other offerors or to the integrity of the competitive procurement system." *Id.* (citations omitted). In doing so, the GAO held that "the risk of an auction is secondary to the need to preserve the integrity of the competitive procurement system through appropriate corrective action." *Id*. (citing *Cubic Corp.—Recons.*, B-228026, *et al.*, 88-1 CPD ¶ 174 (Comp. Gen. Feb. 22, 1988)).

Likewise, in *Patriot Contract Services, et al.*, the protesters argued that "because offerors were informed of the awardees' prices during the agency's debriefings, rescinding the original award and reopening the competition [would] foster an improper auction." *Patriot Contract Servs., LLC; Keystone Shipping Servs., Inc.; MTL Ship Mgmt.; V-Ships Marine, Ltd.*, B-278276.11, 98-2 CPD ¶ 77 (Comp. Gen. Sept. 22, 1998). There, the GAO also found that "[t]he possibility that the contracts may not have been awarded based on a true determination of the best value has a more harmful effect on the integrity of the

[6] While the Board noted that Citelum's technical proposal appeared superior in one respect, i.e., Citelum's proposal to [redacted], the overall record suggests that Dean's and Citelum's technical proposals were nearly equal. *See id*. at 15, 24-25.

competitive procurement system than the fear of an auction." *Id*. (citing *Unisys Corp.*, B-230019, *et al*., 67 Comp. Gen. 512) (citations omitted); *see also Fisher-Cal Indus., Inc.*, B- 285150.2, 2000 CPD ¶ 115 (Comp. Gen. July 6, 2000) (holding that "[w]here . . . the corrective action proposed by the agency is not improper, the prior disclosure of information in an offeror's proposal does not preclude the corrective action, and the resolicitation of the same requirement is not improper") (citations omitted).

Using this very rationale presented in the protest decisions referenced herein, we reject Citelum's argument. We find Citelum's concern that it may be prejudiced due to an improper reverse auction secondary to the public interest in maintaining the integrity of a competitive procurement system.

(E) The D.C. Municipal Regulations require the District to Obtain New Proposals

In its motion for reconsideration, Citelum argues that the "appropriate corrective measure" for the Board's finding that the District conducted discussions with only one offeror is simply to "open and conduct discussions with all offerors." (Mot. for Recons. 2.) It even states, "[t]o the extent that additional information is required of the offerors . . . the District may engage in discussions and/or seek clarifications from the offerors as part of the reevaluation process." (Mot. for Recons. 4.) Citelum then incorrectly concludes that the reevaluation process "does not require the submission of revised proposals." (*Id.*)

The District's procurement regulations are unambiguous in stating that "[u]pon completion of discussions, the contracting officer shall issue to all offerors within the competitive range a request for best and final offers." *See* D.C. Mun. Regs. tit. 27 § 1639.1 (2013). In addition, the Solicitation required that "[i]f discussions are reopened, the Contracting Officer shall issue an additional request for best and final offers to all technically acceptable Offerors." (AR Ex. 1, at 172, § L.14.) Both of these provisions mandate that, following any discussions, the District must provide offerors within the competitive range with an opportunity to submit revised proposals.

Belatedly, in response to Dean's opposition to the motion for reconsideration, Citelum revised its previous argument to assert that the District and Citelum never engaged in "discussions," as defined in D.C. Mun. Regs. tit. 27 § 1638.[7] (*See* Reply at 2-4.) However, for protests, a motion for reconsideration must be filed within fifteen days. *See* D.C. Mun. Regs. tit. 27 §§ 117.2, 313.2 (2002). Therefore, Citelum's shifting position regarding its November 7, 2013, meeting with the District and challenge to the Board's characterization of the meeting as a "discussion," is untimely, having been filed after the June 17, 2014, deadline and will not be further considered. Accordingly, at the conclusion of discussions, the District shall provide the offerors an opportunity to submit revised proposals pursuant to D.C. Mun. Regs. tit. 27 § 1639.1 and the express terms of the Solicitation.

(F) The Board has the Express Authority to Order the District to Obtain Revised Technical and Cost Proposals

[7] Although Citelum's Reply, in error, initially cited D.C. Mun. Regs. tit. 27 § 1638 as "27 DCMR § 1621" (*see* Reply at 1-4), Citelum subsequently corrected its mistake by filing an errata sheet (*see* Errata to Reply).

As further explained in our decision denying the District's motion for reconsideration in *Urban Alliance Foundation, et al.*, a Board order for the District to obtain revised technical and cost proposals clearly falls within the scope of the authority of the Board. *See Urban Alliance Found., et al.*, CAB Nos. P-0886, *et al*., 2012 WL 4775027 (Apr. 13, 2012).

CONCLUSION

We find no merit in Citelum's argument that the Board should modify its June 2, 2014, order which requires the District to provide the offerors an opportunity to submit revised proposals. Accordingly, we deny Citelum's motion for reconsideration.

SO ORDERED:

DATED: October 9, 2014

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

CONCURRING:

/s/ Marc D. Loud Sr.
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Chief Administrative Judge

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CONTRACT APPEALS BOARD

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Tree Services, Inc.	P-0982	05-01-2015

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

CAPITOL ENTERTAINMENT SERVICES, INC.	)	
	)	CAB No. P-0932
	)	
Solicitation No. DCKA-2012-R-0115	)	

For the protester, Capitol Entertainment Services, Inc.: John S. Best; *pro se*. For the District of Columbia: Alton E. Woods, 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 #52424188

The protester, Capitol Entertainment Services, Inc., challenges the District's award of a contract to EPark-DTPC for the procurement of bus parking management services for the 2013 Presidential Inauguration, which took place in the District of Columbia in January 2013. The protester contends that the terms of the underlying solicitation were unreasonable, and also asserts that the District ultimately evaluated proposals in a manner that was inconsistent with the original solicitation requirements and procurement law. However, beyond the filing of its initial protest, the protester failed to further challenge the evidence that the District submitted in response to the protest, supporting the reasonableness of the award decision.

The Board finds that the protester's challenges to the solicitation provisions are untimely, and, accordingly, dismisses the above protest grounds. We also find that the District provided sufficient evidence, unrebutted by the protester, establishing that the protester was properly prevented from receiving the contract award based upon a reasonable evaluation and determination that its proposal was technically unacceptable.[1] Accordingly, the Board denies the protest on these remaining grounds.

FACTUAL BACKGROUND

On October 3, 2012, the District of Columbia Office of Contracting & Procurement, on behalf of the District Department of Transportation, issued Request for Proposals No. DCKA-2012-R-0115 (the "Solicitation"). The Solicitation sought offers to provide bus parking management services for the January 21, 2013, Presidential Inauguration. (Agency Report ("AR")

[1] While neither the Agency Report nor the Contracting Officer appear to have used the phrase "technically unacceptable," the Contracting Officer states in her Business Evaluation Memorandum that protester "does not have the technical expertise needed to manage a requirement of this size. Thus, their proposal was removed from further consideration." (Agency Report ("AR") Ex. 20 at 17.)

Ex. 1 ¶¶ B.1, C.1.) The Solicitation anticipated that the successful offeror would route, manage, and park approximately 2,500 buses traveling to inauguration related events. (*Id.* ¶¶ C.1, C.4.) The successful offeror would also be required to identify and secure on-street and off-street parking in the District of Columbia and surrounding jurisdictions to accommodate the anticipated 2,500 buses that would arrive in the city for these activities. (*Id.* ¶ C.5.2.) Finally, the successful offeror would be required to establish a bus parking reservation system, implement a communication plan to inform bus carriers about the parking operations, provide adequate staffing at bus parking facilities, and ensure proper operation of bus parking services for the Presidential Inauguration.[2] (*Id.* ¶¶ C.5.3-C.5.5.)

The Solicitation anticipated awarding a single fixed price contract based on the offer determined to be the most advantageous to the District, considering price and technical factors. (*Id.* ¶¶ B.2, L.1.1, M.1.) The evaluation criteria in the Solicitation consisted of four factors: Past Experience with large, high profile special events (30 pts.) (the "Experience" factor), Past Performance (20 pts.), Technical Approach (40 pts.), and Price (10 pts.). (*Id.* ¶ M.3.) An offeror could also receive additional preference points for its status as a Certified Business Enterprise.[3] (*Id.* ¶¶ M.3.3, M.5.) The technical evaluation factors (Experience, Past Performance, and Technical Approach) would be rated according to the following scale:

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.2.1.) The scores would then be weighted according to the point value for each factor. (*Id.* ¶ M.2.2.) Under the Experience factor, offerors would be evaluated based on their previous involvement and parking management of large scale events. (*Id.* ¶ M.3.1.1.) Offerors would also be evaluated on the success of their previous events, including consideration of the size, duration, and magnitude of services provided, under the Past Performance factor. (*Id.* ¶ M.3.1.2.) Offerors would be further evaluated on the soundness of their technical approach and the offerors' understanding of the Solicitation requirements. (*Id.* ¶ M.3.1.3.) Lastly, under the Price evaluation factor, the offeror with the lowest price would receive maximum price points with all other proposals receiving a proportionately lower total score. (*Id.* ¶ M.3.2.)

[2] This opinion herein generally refers, collectively, to these services as the "management services" required by Section C of the Solicitation.

[3] A maximum of 12 points were available for various types of Certified Business Enterprises pursuant to the Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005, D.C. CODE § 2-218.01, *et seq.* (AR Ex. 1 ¶¶ M.5, M.5.2.)

Evaluation of Proposals

Under the Solicitation, proposals were due on October 17, 2012, by 2:00 p.m. (*Id.* at 1.) Three offerors submitted timely proposals[4] in response to the Solicitation: Capitol Entertainment Services, Inc. ("CES" or "protester"); EPark-DTPC ("EPark"), the awardee; and SP Plus Gameday.[5] (AR Ex. 20 at 6.) The Contracting Officer ("CO"), Courtney Lattimore, determined, on October 19, 2012, that SP Plus Gameday's proposal was non-responsive because it failed to include a required subcontracting plan and failed to provide a technical approach. (AR Ex. 3.)

A technical evaluation panel ("TEP") composed of three members evaluated the proposals of the protester and EPark in early November 2012. (*See* AR Ex. 7.) The TEP assigned scores according to the five-point rating scale in the Solicitation for each of the three technical evaluation factors.[6] (*Id.*) The panel members initially assigned the following scores to each offeror's proposal:

	Capitol Entertainment Services			**EPark**		
Experience	3	2	2	4	3	3
Past Performance	2	3	2	4	3	4
Technical Approach	3	3	3	4	4	4

(*See generally id.*)

The CO independently reviewed both proposals, and assigned ratings and weighted point scores as follows:

	Capitol Entertainment Services		**EPark**	
	Rating	Score	Rating	Score
Experience	0	0	3	18
Past Performance	1	4	3	12
Technical Approach	2	16	3	24
Total		**20**		**54**

(AR Ex. 8 at 1.) With regard to CES' proposal, the CO observed that while the proposal indicated a "willingness to provide the services" required by the Solicitation, the proposal provided "very few specifics" as to the protester's technical approach. (*Id.*) The CO also noted that the protester failed to provide examples "of its successful management of large scale events." (*Id.*) EPark's proposal, on the other hand, highlighted existing protocols that had been implemented previously and provided detail on its methodologies. (*Id.* at 2.) The CO stated that EPark's proposal demonstrated management experience over a "broad spectrum of events," and the capacity to manage high volume events, though EPark provided no examples of any prior events matching the size of the Presidential Inauguration. (*Id.*)

[4] A fourth offeror, AF Development, submitted an untimely proposal, which was not considered by the District. (AR Ex. 20 at 6.)
[5] In its protest, the protester erroneously states that EPark was "the only other offeror responding to the solicitation." (Protest 1.)
[6] The panel originally assigned points to each proposal based upon the total technical points possible under the Solicitation for each technical factor instead of based upon the Solicitation's 5-point rating scale. (Ex. 4.) On November 19, 2012, the CO instructed the panel to assign scores according to the rating scale. (Ex. 6.)

BAFOs and the District's Selection Decision

The CO determined that additional information would be required to make an award. (*Id.*) On December 3, 2012, the CO sent written discussion questions and Best and Final Offer ("BAFO") requests to both CES and EPark. (AR Ex. 10.) The District listed several "deficiencies" (i.e., discussion questions) for CES to address, primarily seeking more specific examples of larger scale special events that CES had managed in the past pursuant to the requirements of the Solicitation. (*Id.* at 3-4.) The deficiencies also evidenced the District's concern that the protester would be unable to secure sufficient locations to park the anticipated 2,500 buses that would arrive in the District of Columbia for the Presidential Inauguration. (*Id.* at 4.)

BAFOs were due by noon on December 6, 2012. (*Id.* at 2, 5.) Offerors were to ensure that BAFOs complied with Amendment 2 to the Solicitation which requested revised pricing. (*Id.*; *see also* AR Ex. 9.) The BAFO requests also stated that if an offeror did not submit a BAFO, the District would consider the offeror's original proposal as its BAFO. (AR Ex. 10 at 2, 5.) Only CES submitted a BAFO. (AR Ex. 20 at 15.)

The TEP evaluated the protester's BAFO; however, since EPark did not submit a BAFO, the District carried forward the evaluation score that it assigned to EPark's original proposal. (*Id.*) The TEP, in several instances, assigned lower scores to CES' two-page BAFO than to its original 30-page proposal.[7] (*Compare* AR Ex. 12, *with* AR Ex. 7 at 2-7.) In assigning these lower scores, the TEP noted, again, that CES had expertise in providing transportation services, but not in large scale parking management services as required by the Solicitation. (*See generally* AR Ex. 12.) The CO concurred with the concerns raised by the TEP regarding CES' lack of proven experience handling large scale parking management contracts consistent with the requirements of the Solicitation. (AR Ex. 13.) Additionally, the CO noted that CES, in its BAFO, had not shown its ability to accommodate parking for the 2,500 buses anticipated by the Solicitation.[8] (*Id.*) Ultimately, the CO assigned the following ratings and scores to CES' BAFO:

	Original Rating	**BAFO Rating**	**BAFO Score**
Experience	0	0	0
Past Performance	1	3	12
Technical Approach	2	1	8
Total			**20**

(*Id.*)

Based on her review of CES' BAFO, the CO determined that the protester did not meet the evaluation criteria established in the Solicitation and, therefore, would not be considered

[7] Curiously, the Board notes that in several instances the TEP members comments are nearly identical to each other with respect to the lack of technical merits in the protester's proposal suggesting that certain TEP members may have been simply "cut and pasting" comments from each other's scoring sheets even including the same misspelled words (e.g., "vehilces [sic]"). (*Compare* AR Ex. 7 at 1-2, *with* AR Ex. 12 at 1-6.) Nonetheless, as set forth herein, the Board still finds that the CO properly conducted an independent assessment in support of the ultimate award decision. (*See* AR Exs. 8, 13, 20.)

[8] The CO, however, recognized the positive past performance remarks which the District received on behalf of the protester and took account of them during the evaluation. (AR Ex. 13.)

further to receive the contract award. (AR Ex. 13.) The District notified the protester that it was no longer being considered for award by letter dated December 13, 2012. (AR Ex. 14.) After conducting negotiations with EPark, the District awarded the contract to EPark on December 31, 2012. (AR Ex. 19; AR Ex. 20 at 18-19.)

CES' Protest

After receiving a debriefing regarding the basis for the District's award decision,[9] the protester filed the instant protest with the Board. This action raises five protest grounds. First, the protester challenges the propriety of the "Past Experience" evaluation factor on the grounds that no offeror could meet the technical aspects of this criterion because the District had no documented information concerning events of the same magnitude as the Presidential Inauguration that could be used as a basis for evaluating proposals. (Protest 3.) Second, the protester claims that, without a published Solicitation amendment, it was disadvantaged by the Solicitation's change from task pricing to per hour pricing. (*Id.*) Third, the protester challenges the District's evaluation of EPark's proposal under the Experience factor because EPark's claimed experience is that "of its parent and/or affiliate company, Colonial parking." (*Id.*) Fourth, the protester challenges the assignment of points awarded to the proposals of its company and EPark, respectively, under the Technical Approach factor and, further, argues that it should have been rated higher under the Past Performance factor. (*Id.*)

The District subsequently filed its Agency Report in response to the protest whereby it asserts that proposals were evaluated properly, and consistent with the evaluation criteria in the Solicitation. (AR 13.) The District also contends that the protester was properly excluded from the competition because the protester failed to demonstrate that it had any experience with large, high-profile events and also because its proposal did not evidence that it could accommodate parking for the expected 2,500 buses for the Presidential Inauguration.[10] (AR 15.)

DISCUSSION

The Board exercises jurisdiction over the instant protest pursuant to D.C. CODE § 2-360.03(a)(1) (2011).

Untimely Protest Grounds

As a preliminary matter, the Board finds that the two protest grounds asserted by the protester, challenging the propriety of the terms of the Solicitation's Experience evaluation factor and Amendment 2, are untimely. Pursuant to District of Columbia statutory law, a protest "based upon alleged improprieties in a solicitation which are apparent prior to…the time set for receipt of initial proposals shall be filed prior to…the time set for receipt of initial proposals." D.C. CODE §2-360.08(b)(1); D.C. MUN. REGS. tit. 27, § 302.2(a). Thus, the Board has held that

[9] The protester requested a debriefing from the District on December 14, 2012. (AR Ex. 16.) The District debriefed the protester on January 14, 2013. (AR Ex. 17 at 1.) For inexplicable reasons, however, the debriefing slides seemingly reflect evaluation technical scores for the protester different than those reflected in the actual contemporaneous source selection record which are discussed extensively in this opinion. (*Compare* AR Ex. 17 at 9, *with* AR Exs. 7, 8, 12, 13.)

[10] The protester did not file Comments in response to the District's Agency Report to attempt to refute the matters asserted by the District.

"protests challenging solicitation provisions must be filed *prior* to the specific time set for receipt of proposals and no later." *Enhancement Grp., Inc.*, CAB No. P-613, 48 D.C. Reg. 1533, 1535 (May 2, 2000) (emphasis in original). Further, where an alleged impropriety does not exist in the initial solicitation, but is subsequently incorporated into the solicitation, the alleged impropriety must be protested prior to the time set for receipt of proposals following incorporation of the impropriety. D.C. CODE § 2-360.08(b)(1); D.C. MUN. REGS. tit. 27, § 302.2(a).

The protester challenges the propriety of the Experience evaluation factor under the original Solicitation terms, as well as the change in contract pricing that was, in fact, initially implemented by publication to offerors of Amendment 2 to the Solicitation.[11] (Protest 3.) Initial proposals were due on October 17, 2012, and BAFOs were due on December 6, 2012. (AR Ex. 1 at 1; AR Ex. 10 at 2, 5.) The protester did not raise its protest grounds challenging the reasonableness of the technical evaluation criteria and the propriety of the terms of Amendment 2 until January 22, 2013, after it had already been eliminated from consideration for award. Indeed, the improprieties alleged by the protester concerning the Experience factor were clear on the face of the original Solicitation terms, and any issue related to the propriety of the terms of Amendment 2 would have also been apparent to the protester at the time that this amendment was issued and before BAFO's were due. Accordingly, the Board dismisses these protest grounds as untimely.

District's Evaluation of CES' Proposal was Reasonable

In its remaining three protest grounds, the protester argues that its proposal was superior to EPark's, and that it should have been awarded the underlying contract. (*See* Protest 4.) However, as noted above, beyond filing its initial protest allegations, the protester has presented no further information or argument to the Board to substantiate these claims as required by our Board rules. *See* D.C. MUN. REGS. tit. 27, § 307.

Nonetheless, in reviewing the propriety of an evaluation decision, the Board reviews the record to ensure that the evaluation was reasonable and consistent with procurement law and the evaluation criteria stated in the solicitation. *FEI Constr. Co.*, CAB No. P-902, 2012 WL 6929394 at *6 (Dec. 14, 2012); *RideCharge, Inc.*, CAB Nos. P-920, P-921, 2012 WL 8021681 at *8 (Nov. 9, 2012). However, it is not the function of this Board to evaluate proposals *de novo*. *RideCharge, Inc.*, CAB Nos. P-920, P-921, 2012 WL 8021681 at *9; *Busy Bee Envtl. Servs., Inc.*, CAB No. P-617, 48 D.C. Reg. 1564, 1567 (July 24, 2000). The evaluation of technical proposals is a matter of agency discretion and the Board will not substitute our judgment for that of the agency. *RideCharge, Inc.*, CAB Nos. P-920, P-921, 2012 WL 8021681 at *9; *Grp. Ins. Admin., Inc.*, CAB No. P-309, 40 D.C. Reg. 4485, 4508 (Sept. 2, 1992); *Visual Connections, LLC*, B-407625, 2013 CPD ¶ 18 at 3-4 (Dec. 31, 2012). A protester's mere disagreement with the agency's judgment does not, by itself, render an agency's evaluation unreasonable. *FEI Constr. Co.*, CAB No. P-902, 2012 WL 6929394 at *6; *Lorenz Lawn & Landscape, Inc.*, CAB No. P-869, 2011 WL 7402964 at *7 (Sept. 29, 2011).

[11] Amendment 2 to the Solicitation, requiring offerors to provide the District with revised pricing under the Solicitation based on the distribution of hours per task, was issued on December 3, 2012. (AR Ex. 9.)

It is well established that a proposal that fails to meet a material requirement of the solicitation is technically unacceptable and may not form the basis of award. *Gen. Dynamics C4 Sys., Inc.*, B-406965, B-406965.2, 2012 CPD ¶ 285 at 6 (Oct. 9, 2012); *PricewaterhouseCoopers LLP*, B-406708, 2012 CPD ¶ 227 at 6 (Aug. 3, 2012); *Compressed Air Equip.*, B-246208, 92-1 CPD ¶ 220 at 3 (Feb. 24, 1992). An offeror has the responsibility to submit an adequately detailed proposal that demonstrates the merits of its approach and compliance with the solicitation. *LC Eng'rs, Inc.*, B-407754, 2013 CPD ¶ 46 at 5 (Jan. 31, 2013); *XtremeConcepts Sys.*, B-402438, 2010 CPD ¶ 99 at 5 (Apr. 23, 2010). In this regard, an offeror risks having its proposal rejected as technically unacceptable if it fails to demonstrate that it can meet the agency's minimum needs. *XtremeConcepts Sys.*, B-402438, 2010 CPD ¶ 99 at 5; *Compressed Air Equip.*, B-246208, 92-1 CPD ¶ 220 at 3.

Here, as an initial matter, the District determined that CES' proposal was technically unacceptable as the primary basis for its rejection from receiving the contract award. As it relates to the evaluation of CES' proposal under the Solicitation's Past Experience criteria, the CO first noted CES' lack of experience with large scale parking management and logistics contracts after reviewing its initial proposal. (AR Ex. 8 at 1.) Accordingly, in its BAFO request to CES, the District requested in various instances that CES provide examples of past projects where it had successfully managed large scale special events essentially as evidence that it could also successfully perform similar requirements under the Solicitation. (AR Ex. 10 at 3-4.) CES responded to the District's inquiries in this regard by providing examples in which it had provided "bus transportation services" and not parking management services. (AR Ex. 11 at 1.) Thus, after reviewing CES' BAFO, all three TEP members still noted that CES had experience in transportation services but that it had not identified any instances where it had provided bus parking management services and logistics for large scale events comparable to what was required by the Solicitation. (*See generally* AR Ex. 12.) The CO concurred, stating that CES had not "provided any indication of its experience providing management of large scale events." (AR Ex. 13 at 1.) Based upon our review of the contents of CES' initial proposal and BAFO response along with the evaluation record, the Board finds that the CO reasonably determined that CES' proposal was technically unacceptable because it failed to show that it had the requisite experience performing bus parking management services for large scale events, as required by the Solicitation criteria.

Additionally, after reviewing CES' BAFO, the CO also reasonably determined that CES failed to meet the Solicitation criteria requiring that it demonstrate the capacity to accommodate parking for the projected 2,500 buses expected to arrive in the District of Columbia for the Inauguration. While CES' initial proposal generally stated that it would secure locations required to accommodate 2,500 buses, its proposal only offered specifics on how it could actually accommodate 30 buses. (AR Ex. 2 at 4, 7.) Consequently, in its December 3, 2012, BAFO request to CES, the District requested that CES confirm its ability to secure parking locations to accommodate 2,500 buses. (AR Ex. 10 at 4.) Because in its BAFO response CES acknowledged that it would be unable to meet the Solicitation's high volume parking capacity requirement, the District, again, properly determined that CES' proposal was technically unacceptable and ineligible for contract award. (AR Ex. 11 at 2.)

The remainder of CES' initial protest allegations essentially concern its disagreement with the evaluation scoring ascribed to its proposal and the proposal of the awardee. However,

given CES' failure to even attempt to substantiate these allegations by responding to the District's evidence of its reasonable evaluation as discussed herein, the protester's mere disagreement with the District's evaluation is insufficient to render this evaluation and award decision unreasonable. *See FEI Constr. Co.*, CAB No. P-902, 2012 WL 6929394 at *6; *Lorenz Lawn & Landscape, Inc.*, CAB No. P-869, 2011 WL 7402964 at *7.

CONCLUSION

As stated herein, the Board dismisses the protester's challenge to the Solicitation's original and amended terms as untimely. Additionally, the Board finds that the District reasonably rejected CES' proposal from further consideration for award because it was deemed to be technically unacceptable. CES' remaining protest allegations are, therefore, denied.

SO ORDERED.

Date: May 22, 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
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GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

QUALIS HEALTH	)	
	)	CAB No. P-0934
	)	
Solicitation No. DCHT-2012-R-0002	)	

For the Protester, Qualis Health: Kristen E. Ittig, Steffen Jacobsen, and Caitlin K. Cloonan, Arnold & Porter LLP. For the District of Columbia: Talia S. Cohen, Office of the Attorney General. For the Intervenor, Delmarva Foundation for Medical Care, Inc.: Alexander J. Brittin, Brittin Law Group, PLLC; Jonathan D. Shaffer, Mary Pat Buckenmeyer, Smith Pachter McWhorter, PLC.

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

OPINION

Filing ID #53020812

This protest arises from a solicitation for quality improvement and utilization review services by the District of Columbia Office of Contracting and Procurement ("OCP"), on behalf of the District of Columbia Department of Health Care Finance ("DHCF"). The protester, Qualis Health ("Qualis"), contends that the District improperly canceled its solicitation four months after issuing a notice of intent to award a contract to Qualis. In a supplemental protest, Qualis also argues that the District failed to follow proper sole source contracting procedures when it extended the term of a previously-awarded sole source contract with one of Qualis' competitors, the Delmarva Foundation for Medical Care, Inc. ("Delmarva"), shortly before canceling the solicitation. The District counters that it (1) acted reasonably in canceling the solicitation after it determined that its requirements had changed substantially; and (2) has taken all necessary corrective action to remedy any improprieties in its original sole source award to Delmarva.

For the reasons stated herein, the Board finds that the District properly canceled the solicitation. However, we find that the District acted improperly when it recently awarded a long-term sole source contract to Delmarva without the use of full and open competition given that this act was necessitated because of the District's inadequate procurement planning for the required services. We sustain the protest, in part.

FACTUAL BACKGROUND

On October 14, 2011, the District of Columbia Office of Contracting and Procurement issued Request for Proposals No. DCHT-2012-R-0002 (the "RFP" or "Solicitation") on behalf of the DHCF. (Agency Report ("AR") Ex. 1.) The Solicitation sought a "Quality Improvement

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Organization" to provide the services that the District had heretofore received under an April 2005 contract with the intervenor, Delmarva.[12] (*See id.* ¶ C.2.3.) Specifically, the District sought a certified quality improvement organization to perform utilization reviews and quality improvement activities for the approximately 73,000 participants in the District's Medicaid program. (*Id.* ¶¶ B.1, C.1.) The services provided by the contractor would aim to ensure the provision of appropriate medical care, validate the appropriateness of requested medical services, implement "improved safeguards against unnecessary or inappropriate use of Medicaid services," and identify fraud, waste and abuse in the Medicaid program. (*Id.* ¶¶ C.2.2.1, C.2.2.2.)

The District planned to award a requirements type contract with fixed unit prices for a one-year base period, and four one-year option periods. (AR Ex. 1 ¶¶ B.2.1, F.1, F.2.1.) The RFP contained 53 different contract line items ("CLINs"),[13] among 7 categories of services,[14] which the contractor would be required to perform. (*Id.* ¶ B.3.1.) The RFP provided estimated quantities for 37 of the 53 CLINs, but only for the base year. (*See id.*) The RFP stated that the contract would be awarded on a best value basis to the offeror whose proposal was determined to be most advantageous to the District, considering price and other factors. (*Id.* ¶¶ L.1.1, M.1.) Proposals were to be scored based on several technical factors, past performance, price, and preference points for small, local, and/or disadvantaged businesses.[15] (*Id.* at ¶¶ M.3.1-M.3.3, M.5.2.)

Proposals in response to the Solicitation were originally due on November 14, 2011. (AR Ex. 1 at ¶ A.9.) Amendments A0001 through A0004 to the Solicitation collectively extended the due date for submission of proposals until January 11, 2012. (*Id.* at 162-65.) Amendment A0004 further provided the District's responses to offeror questions regarding the Solicitation. (*See* Protest Ex. G.[16]) Amendment A0004 also made various amendments to the Solicitation in response to the offerors' questions. (*See id.*; AR Ex. 1 at 166-72.) Of the 16 CLINs that lacked estimates under the original RFP, Amendment A0004 added estimates for 8 CLINs and deleted the remaining 8 CLINs. (AR Ex. 1 at 166.) Amendment A0004 also provided the offerors with a copy of Delmarva's Fee-for-Service Provider Manual. (*Id.* at 175-201.)

The District issued Amendment A0005 on January 6, 2012. (*Id.* at 202.) Amendment A0005 provided responses to additional offeror questions and extended the proposal submission

[12] In response to an offeror's question regarding the Solicitation, the District indicated that the services required by the solicited contract would be substantially the same as those required by the District's April 2005 contract with Delmarva. (Protest Ex. G at 2 (question 10).)

[13] Sample CLINs included "0004AD Non-DRG Acute Care Hospitals" and "0006AA Level of Care Determinations." AR Ex. 1 ¶ B.3.1)

[14] In order, the categories were: "0001 Prior Authorization (PA) Reviews," "0002 Pre-Admission Reviews," "0003 Emergency Admission Reviews," "0004 Continued Stay Reviews," "0005 Retrospective Reviews," "0006 Long Term Care Reviews," and "0007 Miscellaneous and Other Reviews." (AR Ex. 1 ¶ B.3.1)

[15] The three technical factors under the Solicitation included the offeror's (1) Technical Approach, Methodology, and Narratives (25 pts.), (2) Technical Expertise, Capacity, and Organizational Narrative (35 pts.), and (3) Past Performance and Previous Experience (20 pts.). (AR Ex. 1 ¶ M.3.1.) Price constituted the fourth evaluation factor worth 20 points. (*Id.* ¶ M.3.2.).

[16] The District's responses to offeror questions provided as Protest Exhibit G were not included with the District's Agency Report. The document, however, identifies itself as Attachment A to Amendment A0004. (Protest Ex. G at 1-2.) Further, the document refers to changes made to the Solicitation throughout, which were included with the Agency Report. (*See* AR Ex. 1 at 166-72.)

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deadline until January 25, 2012. (*Id.* at 202-04.) Amendment A0005 replaced the price schedule, previously amended by Amendment A0004, in its entirety because the District had revised its estimates based on Delmarva's performance during the contract period ending April 30, 2011. (*Id.* at 203-09.) The revised price schedule contained 51 CLINS, though 7 CLINs had estimated quantities of 0. (*Id.* at 205-09.)

Evaluation & Award Decision

According to Contracting Officer ("CO") Patricia Tarpley's procurement chronology,[17] prepared in response to the protester's original protest, only two offerors submitted timely proposals in response to the RFP; the protester, Qualis Health, and the incumbent, Delmarva. (AR Ex. 2 at 2.) Following evaluation by a Technical Evaluation Panel ("TEP"), CO O'Linda Fuller requested Best and Final Offers ("BAFO"s) from the offerors on May 3, 2012. (*Id.*; Protester Comments Ex. B at 1-2.) Also on May 3, 2012, CO Fuller issued Amendment A0006 to the Solicitation, which deleted 6 CLINs and required offerors to provide a transition plan. (AR Ex. 1 at 211-12.) BAFOs were due on May 9, 2012, and were to incorporate the changes made by Amendment A0006. (Protester Comments Ex. B at 1.) After reviewing initial BAFOs, the District requested a second round of BAFOs from the offerors, which were due on June 8, 2012.[18] (AR Ex. 2 at 2; Protester Comments Ex. B at 5-7.)

On October 15, 2012, CO Fuller issued the District's notice of intent to award the solicited contract to Qualis. (AR Ex. 7.) The notice of intent to award stated that Qualis' second BAFO was found to be the most advantageous to the District. (*Id.* at 1.) The District asked Qualis to clarify some aspects of its cost proposal by October 18, 2012. (*Id.*) The District further stated that the contracting agency sought to submit the proposed award to the Council of the District of Columbia for approval by November 16, 2012. (*Id.* at 2.) On December 11, 2012, Lillian Beavers, a contract specialist working on this procurement, sent Qualis a draft contract. (Protest Ex. C.) Contract Specialist Beavers further sought confirmation that the District would not be liable for costs incurred during the transition period. (*Id.*) The protester asserts that through mid-February 2013, the District continued to contact Qualis in an effort to finalize this contract. (Protest 4, 6.)

[17] Courtney Lattimore is identified as the contracting officer for this procurement in the original solicitation and the early amendments to the RFP. (*See* AR Ex. 1 ¶ G.7.1.1; *id.* at 162-65, 202.) At some point thereafter, O'Linda Fuller became contracting officer for this procurement. (*See id.* at 211; AR Ex. 2 at 2; AR Ex. 7 at 2; Protester Comments Ex. B.) Patricia Tarpley states that she became the contracting officer for this procurement on December 15, 2012. (AR Ex. 5 ¶ 3.) Tarpley is listed as such in the Determination and Findings to cancel the Solicitation, discussed *infra*. (AR Ex. 3 at 5.) However, in the letter Tarpley sent informing the protester of the decision to cancel the Solicitation, she identifies O'Linda Fuller as the contracting officer. (Protest Ex. D at 3.)

[18] CO Tarpley's procurement chronology states that this second round of BAFOs were requested on May 30, 2012, and due on June 5, 2012. (AR Ex. 2 at 2.) The District's request to the protester, however, was issued on June 4, 2012, and stated that BAFOs were due on June 8, 2012. (Protester Comments Ex. B at 5-6.)

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Cancellation of the RFP

At some point in December 2012, Contract Specialist Beavers submitted a business clearance package to the contracting officer for review and approval.[19] CO Tarpley met with Contract Specialist Beavers on January 4, 2013, to discuss the procurement. (AR Ex. 2 at 3.) According to Tarpley, during this meeting and subsequent discussions with DHCF personnel, Tarpley learned that the procuring agency's requirements had changed. (*See* AR Ex. 2 at 3; AR Ex. 5 ¶ 4.) Tarpley states that she then requested DHCF provide a list of proposed changes to determine whether the changes were so substantial as to warrant canceling the Solicitation. (AR Ex. 5 ¶ 5.) On January 22, 2013, a DHCF official sent Tarpley an email describing the necessary changes to the RFP. (AR Ex. 3 at 59-61.) The email stated that the estimated number of Medicaid participants had decreased from 73,000 to 67,000. (*Id.* at 59) The email also described in broad terms the various CLINs that would be increased, decreased, or deleted. (*Id.* at 59-60.)

CO Tarpley states that a Determination & Findings ("D&F") to Reject Proposals and Cancel Solicitation was drafted on January 23, 2013. (AR Ex. 2 at 3.) The D&F was signed by Contract Specialist Beavers and Wayne Turnage, Director of DHCF, on February 5, 2013. (AR Ex. 3 at 5.) Tarpley signed the D&F on February 12, 2013, and the D&F was finally executed by the Chief Procurement Officer ("CPO") of OCP on February 15, 2013. (*Id.*) According to the D&F, the CO[20] had determined on October 31, 2012, that the offerors' price proposals had previously expired on October 6, 2012. (*Id.* at 3.) The D&F further stated that the CO had determined that the District's needs had changed significantly. (*Id.*) In describing these changes, the D&F essentially restated the changes discussed in DHCF's January 22, 2013, email that was previously sent to Tarpley. (*Compare id.* at 4, *with id.* at 59-61.) Due to both reasons, the District stated that it would re-solicit the RFP at a later date. (*Id.* at 4.)

On February 15, 2013, CO Tarpley emailed Qualis a letter[21] stating that the District was canceling the RFP and rejecting all offers. (Protest Ex. D.) The letter only cited the changes in the District's requirements as the reason for canceling the solicitation. (*Id.* at 2.) The letter further rescinded the District's earlier Notice of Intent to Award. (*Id.*)

In response to the District's decision to cancel the Solicitation, Qualis contacted the CPO by letter dated February 20, 2013. (Protest Ex. H.) Noting that D.C. MUN. REGS. tit. 27, § 1644[22] requires a determination to cancel an RFP to be in writing, Qualis requested a copy of the District's written determination. (*Id.*) On February 22, 2013, the CPO provided Qualis with a redacted version of the D&F to Reject Proposals and Cancel Solicitation with its supporting

[19] The exact date on which this was sent is unclear from the record. CO Tarpley's procurement chronology states that this occurred on December 28, 2012. (AR Ex. 2 at 3.) However, the Determination and Findings to cancel the Solicitation states that this occurred on December 11, 2012. (AR Ex. 3 at 3.) The D&F then states, in another instance, that the Contract Specialist forwarded this package to the CO on October 31, 2012. (*Id.*)
[20] Presumably, CO Fuller made this determination given the date the determination was made. *See*, *supra*, note 17.
[21] While the email was sent on February 15, 2013, the letter itself was dated February 12, 2013. (Protest Ex. D at 2.)
[22] Section 1644 was first adopted as an emergency rule on November 15, 2012, as part of the District's rewrite of chapter 16 of the District's procurement regulations. 59 D.C. Reg. 14,039, 14,066-67 (Dec. 7, 2012). The District adopted the emergency rule as final, without amendment, on January 22, 2013. 60 D.C. Reg. 1136, 1163-64 (Feb. 1, 2013).

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attachments. (*See generally* Protest Exs. I, J.) After receiving the D&F, Qualis timely protested the cancellation of the RFP on March 1, 2013.

Sole-Source Extensions to Delmarva

During the course of this protest, Delmarva has continued to provide the required quality improvement services for the District. The final option period for Delmarva's 2005 contract for quality improvement services ended on April 26, 2011, after which the contract should have expired by its terms. (Supplemental AR Ex. 5 at 1.) Notwithstanding the lack of additional options under the contract, the District twice extended the 2005 contract through July 15, 2011. (*Id.*) Thereafter, the District authorized Delmarva to continue providing quality improvement services through a series of nine sole source contract actions, including new contract awards, extensions and after-the-fact ratifications. (*Id.* at 1-2.)

As relevant here, the District entered into Contract No. DCHT-2012-C-0023 on November 30, 2012. (Supplemental AR Ex. 1 at 1.) Under the contract, Delmarva was to provide the quality improvement services on a requirements basis through January 31, 2013. (*Id.* ¶¶ F.1, F.2.) The contract included one two-month option period, and was not to exceed a total duration of four months. (*Id.* ¶¶ F.2.1, F.2.4.) On January 31, 2013, the District issued Modification M0002 to the contract, which extended the contract for six months through July 31, 2013, at an estimated cost of $2,273,567.88.[23] (Supplemental AR Ex. 3 at 1-2.) The CPO executed a D&F for Sole Source Contract Extension on February 1, 2013. (Supplemental AR Ex. 5 at 4.) The sole source D&F described the history of sole source awards to Delmarva and stated the sole source extension was necessary to "ensure continued compliance with Federal Medicaid rules without interruption," pending completion of a competitive award. (*Id.* at 1-3.)

Despite having already effected an extension of Delmarva's prior sole source contract on January 31, 2013, on February 15, 2013,[24] the District posted a notice of its intent to extend this same sole source (Contract No. DCHT-2012-C-0023) on the OCP website. (Protest Ex. E.) This notice proposed to extend the sole source contract for a period of six months, through July 31, 2013. (*Id.* at 1.) The notice stated that such an extension was required for the District to continue to receive services pending the award of a contract under the Solicitation No. DCHT-2012-R-0002, even though the District had already canceled the Solicitation. (*Id.*) The notice further requested responses by February 25, 2013. (*Id.*) The notice also included a draft, unsigned, D&F for the sole source extension, despite the D&F having been executed on February 1, 2013. (Protest Ex. F.)

Qualis responded in opposition to the February 15, 2013, notice to extend Delmarva's sole source contract on February 25, 2013. (Protest Ex. K at 3-7.) First, Qualis argued that there was more than a single source available to provide the District's minimum needs, as demonstrated by the recently canceled procurement. (*Id.* at 3-4.) Qualis then argued that the award to Delmarva was not in the best interests of the District because, comparing Qualis previously offered prices to the District's estimated requirements, an award to Qualis would save

[23] It is unclear from the record whether the District obtained approval from the Council of the District of Columbia for this extension as required by D.C. CODE §§ 1-204.51(b), 2-352.02.
[24] This is also the same date that the District canceled the RFP for the follow-on contract.

the District approximately $ per month. (*Id.* at 4-5.) Lastly, after noting the history of sole source awards to Delmarva, Qualis argued that the intended sole source extension was improper because it was driven by the District's lack of procurement planning. (*Id.* at 5-7.)

Qualis maintains that it received a copy of the executed D&F to make the sole source extension to Delmarva on March 18, 2013. (Supplemental Protest 3.) Accordingly, Qualis filed a supplemental protest challenging the sole source extension on March 20, 2013. Delmarva moved to intervene in this matter on March 28, 2013, which the Board granted on April 4, 2013. (*See* Order on Mot. to Intervene.)

On April 2, 2013, CO Fuller responded to the protester's February 25, 2013, letter. (Supplemental AR Ex. 7.) Fuller stated that the District intended to cancel the sole source award to Delmarva and issue a new notice of intent to make a sole source award. (*Id.*) According to Fuller's procurement chronology, the District posted this new notice and a revised D&F for Sole Source Award on April 3, 2013. (Supplemental AR Ex. 4 ¶ 10.) In the revised sole source D&F, the District justified the intended sole source award on the basis that Delmarva could provide the required services without needing a transition period prior to beginning work.[25] (Supplemental AR Ex. 6 at 1-3.) The District terminated its sole source contract with Delmarva, Contract No. DCHT-2012-C-0023, for convenience on April 24, 2013, with an effective date of April 30, 2013. (Dist. April 25, 2013, Letter to Board Ex. 1.) On April 30, 2013, Fuller executed a letter contract with Delmarva to provide these services for a 60 day period beginning May 1, 2013. (Dist. May 2, 2013, Letter to Board Ex. 1 at 1-2.) The District stated that it intends to definitize the letter contract within this 60 day period, with the definitized contract expiring on January 31, 2014. (*Id.* at 1.)

Contentions of the Parties

The protester argues that the District's decision to cancel the RFP was improper. (*See generally* Protest 11-20.) The protester contends that the District's proposed changes are not significant and do not support cancellation. (*Id.* at 12-14; Protester's Comments 3-6.) Along these lines, the protester argues that the change does not alter the nature of the quality improvement services and that resolicitation would not result in increased competition or cost savings. (Protest 19; Protester's Comments 7.) The protester further argues that the expiration of its offer cannot sustain the District's cancellation decision because Qualis had not attempted to alter its pricing terms in its attempt to finalize a contract with the District. (Protest 14-16.) Lastly, the protester argues that cancellation was not in the best interests of the District because an award to Qualis would have saved the District an approximate $ per month[26] compared to extending the contract with Delmarva, pending resolicitation. (*Id.* at 17, 19-20.)

Further, with regard to the original sole source extension to Delmarva, Qualis argues that the District violated D.C. Mun. Regs. tit. 27, § 1304.2 and D.C. CODE § 2-354.04 when it awarded the extension to Delmarva "without first posting a notice of intent to award on OCP's website." (Supplemental Protest 3.) In its supplemental protest, Qualis also incorporates its

[25] This revised D&F omitted the history of sole source procurements with Delmarva that had been set forth in the previous sole source D&F. (*See generally* Supplemental AR Ex. 6.)

[26] It is not clear from Qualis' protest whether this figure takes into account the District's changed requirements.

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previous objections to the sole source award made in its February 25, 2013, letter to the District challenging the earlier notice of intent to award. (*Id.* at 2-3.) Additionally, Qualis also maintains that the sole source award to Delmarva was an improper emergency contract. (*Id.* at 3 n.1.) The protester also challenges the District's corrective action with regard to the original sole source contract as arbitrary, capricious and an abuse of discretion. (Protester's Comments 9-11.)

The District maintains that it acted reasonably in canceling the RFP. (*See generally* AR 4-6; Dist. Resp. 2-4.) The District asserts that the changes to the District's requirements, cumulatively, are substantial and provide a reasonable basis for cancellation.[27] (AR 5-6; *see also* Dist. Resp. 3 (noting changes to 26 CLINs and the elimination of 5 CLINs).) Additionally, while the District concedes that the original sole source award was procedurally defective, it asserts that its corrective action (i.e., canceling Delmarva's sole source extension while "simultaneously award[ing] a new sole source extension contract") cures the procedural defect. (Supplemental AR at 5; Dist. Resp. 4-5.) The District further argues that a sole source award to Delmarva is justified because only Delmarva can meet the District's minimum needs by providing the required services without a transition period. (Supplemental AR 6-7.) This fact, according to the District, provides a reasonable basis for the sole source award. (*Id.* at 6.)

DISCUSSION

The Board exercises jurisdiction over Qualis Health's original and supplemental protests pursuant to D.C. CODE § 2-360.03(a)(1) (2011).

The District Properly Canceled RFP No. DCHT-2012-R-0002

The parties dispute whether the District's change in CLIN estimates justified the District's decision to cancel RFP No. DCHT-2012-R-0002.[28] Our standard of review in this area is well settled. The District's procurement statutes provide that a request for proposals or other solicitation may be canceled if the CPO makes a written determination that such cancellation is in the best interests of the District government. D.C. CODE § 2-354.14 (2011). With regard to a negotiated procurement, such as the one at issue here, the CPO need only have a reasonable basis for canceling a solicitation. *Am. Consultants & Mgmt. Enters., Inc.*, CAB No. P-683, 52 D.C. Reg. 4176, 4178 (May 17, 2004); *Shannon & Luchs Commercial D.C., Inc.*, CAB No. P-415, 42 D.C. Reg. 4851, 4859; *see also Jenkins Sec. Consultants, Inc.*, CAB No. P-846, 2010 WL 3947583 at *2 (Aug. 3, 2010); *Corr. Med. Care, Inc.*, CAB No. P-722, 54 D.C. Reg. 2005, 2007 (Mar. 20, 2006). If there is a reasonable basis for cancellation, an agency may cancel a solicitation regardless of when the information providing this reasonable basis arises, even after proposals have been evaluated. *Blue Rock Structures, Inc.*, B-400811, 2009 CPD ¶ 26 at 3 (Jan. 23, 2009); *VSE Corp.*, B-290452.2, 2005 CPD ¶ 111 at 6 (Apr. 11, 2005).

[27] In doing so, the District refers to Exhibits 3 and 4 to the Agency Report. (AR 5-6.) Exhibit 3 is the D&F to cancel the RFP, which speaks generally as to the changes to be made, but does not provide any details regarding the specific changes. (AR Ex. 3 at 4.) Exhibit 4 is a chart prepared by CO Tarpley on March 21, 2013, in response to this protest, which details the precise changes to the CLIN estimates. (*See* AR Ex. 4.)

[28] The D&F supporting the cancellation also cited the expiration of the offers as a basis for cancellation. (AR Ex. 3 at 3.) The protester challenged this basis in its protest. (Protest 14-16.) The District has not asserted this argument in defense of its cancellation decision in this matter. We therefore treat the point as conceded by the District.

A reasonable basis to cancel a solicitation exists where the solicitation fails to accurately reflect the agency's needs, *Trujillo/AHW, JV*, B-403958.4, 2011 CPD ¶ 218 at *2 (Oct. 13, 2011), particularly where resolicitation presents the opportunity for increased competition or cost savings, *Xactex Corp.*, B-247139, 92-1 CPD ¶ 423 at 3 (May 5, 1992). For example, we have found a reasonable basis for a District decision to cancel a solicitation for substance abuse treatment for male youth, and to issue a new solicitation, where the District had increased the number of youth from 20 to 40, increased the staff ratio from 1:10 to 1:5, and altered the treatment method. *Am. Consultants & Mgmt. Enters., Inc.*, CAB No. P-683, 52 D.C. Reg. at 4177-79.[29]

Further, even under requirements type contracts such as the protested procurement, where the government is generally not obligated to purchase any particular quantity of goods or services, an agency may be justified in canceling a solicitation and resoliciting its requirements to correct solicitation estimates that differ significantly from the agency's actual needs. *See Platinum Servs., Inc.*, B-402718.2, B-402923, 2010 CPD ¶ 201 at 4 (Aug. 27, 2010). Indeed, quantity estimates in a solicitation should reasonably provide an accurate representation of the agency's anticipated actual needs as a basis for an offeror's formulation of its proposed unit prices. *See id.*; *C-Cubed Corp.*, B-289867, 2002 CPD ¶ 72 at 3 (Apr. 26, 2002).

Having reviewed the record, the Board finds that, prior to the cancellation of the Solicitation, the District reasonably concluded that many of the original RFP's CLIN estimates changed significantly. For instance, according to the District's justification that is a part of this record, the District has increased its estimate for reviews for extended personal care aides under CLIN 001AF from 1,782 reviews to 9,791 reviews, and increased its out of state nursing home placement estimate under CLIN 0001AO from 0 reviews to 105 reviews. (AR Ex. 4 at 1.) Among other changes, the District also decreased its estimated reviews of intellectual and developmental disability waivers under CLIN 0001AK from 10,000 to 5,000, decreased the estimated pre-admission reviews for specialty hospitals under CLIN 0002AA from 1,316 to 502, decreased the estimate of emergency admission reviews for acute care hospitals under CLIN 0003AA from 11,829 to 9,805, and decreased its estimated out of state Prospective Payment System hospital reviews from 1,500 to 5. (*See generally id.*) Based upon these factors, we, therefore, find that the District's determination that the original Solicitation was not the most accurate reflection of its needs was reasonable and justified the cancellation of the Solicitation.

The District Was Not Justified in Extending Delmarva's Prior Sole Source Contract.

As stated earlier, the District essentially concedes that its February 1, 2013, sole source award was procedurally defective. However, the District maintains that it cured the only impropriety in the original sole source extension, a procedural defect, when it took corrective action by (1) issuing a new notice of intent to award sole source contract; (2) canceling the original sole source award; and then (3) issuing a new sole source award. (Dist Resp. 4-5.) While an agency has broad discretion in taking corrective action, the Board will review the

[29] In this regard, we also note that the District's procurement regulations require the cancellation of a solicitation where a change in the District's needs is "so substantial that it warrants complete revision of the solicitation." D.C. MUN. REGS. tit. 27, § 1622.3 (2013). As noted above, the District recently revised Chapter 16 of its procurement regulations. *See*, *supra*, note 22. However, the cited provision is substantially similar to its predecessor. *See* D.C. MUN. REGS. tit. 27, § 1615.3 (1988).

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proposed corrective action to determine "whether the agency's discretion is exercised reasonably in a manner that remedies the procurement impropriety." *Citelum DC, LLC*, CAB No. P-922, 2013 WL 1952320 at *8 (Mar. 1, 2013).

The District's procurement statutes aim to promote full and open competition in government contracting. D.C. CODE § 2-351.01(b)(3) (2011); *Duane A. Brown*, CAB No. P-0914, 2012 WL 6929395 at *3 (Dec. 13, 2012). Given this mandate for competition, the Board will closely scrutinize protested sole source procurements in order to ensure that they were made in compliance with the District's procurement statutes and regulations. *See AA Pipeline Cleaners, Inc.*, CAB No. P-315, 40 D.C. Reg. 4687, 4694, 4696 (Nov. 5, 1992) ("In sum, a sole source award must be reasonably justified and made in compliance with statute and regulations."); *Beretta U.S.A. Corp.*, CAB No. P-177, 38 D.C. Reg. 3098, 3121 (Aug. 23, 1990). Thus, although the District seems to focus on primarily addressing whether its most recent and "corrected" April 30, 2013, sole source award properly addressed a procedural defect (i.e., lack of notice) in its earlier sole source decision, the Board must also review the propriety of the District's justification for the original sole source decision which was also challenged by the protester.

A noncompetitive, or sole source, contract award may be proper where there is only a single source available to provide the required good or service. D.C. CODE § 2-354.04(a); *see also* D.C. CODE § 2-351.04(59) ("'Sole source' means that a single source in a competitive marketplace can fulfill the specifications of a contract."). Similarly, this Board has repeatedly held that a sole source award is not justified where there is more than one available source to meet the District's requirements. *Atl. Transp. Equip., Ltd.*, CAB Nos. P-678, P-680, 52 D.C. Reg. 4180, 4186-88 (June 3, 2004); *Answer Temps., Inc.*, CAB Nos. P-564, P-567, 46 D.C. Reg. 8549, 8553 (Jan. 28, 1999); *AA Pipeline Cleaners, Inc.*, CAB No. P-315, 40 D.C. Reg. at 4694-96; *Tri-Continental Indus., Inc.*, CAB No. P-297, 39 D.C. Reg. 4456, 4460-61 (Mar. 6, 1992). In *Answer Temporaries*, we rejected the District's argument that only a single contractor could satisfy the District's minimum needs where the District had recently canceled a solicitation for a substantially greater amount of services, to which four other bidders had responded, but had failed to contact any of the four other bidders regarding the lowered requirements. *Answer Temps., Inc.*, CAB Nos. P-564, P-567, 46 D.C. Reg. at 8553; *cf. Corr. Med. Care, Inc.*, CAB No. P-722, 54 D.C. Reg. 2005, 2007 (Mar. 20, 2006) (questioning the District's alleged inability to compete an interim contract where two offerors had responded to the canceled solicitation).[30]

By the same token, the use of a sole source procurement is not justified where the need for the sole source award arises from the agency's failure to adequately perform advanced procurement planning, or by issues such as administrative delays or lack of sufficient procurement personnel. D.C. MUN. REGS. tit. 27, § 1700.3(a) (2012); *accord Chapman Law Firm Co., LPA*, B-296847, 2005 CPD ¶ 175 at 3 (Sept. 28, 2005) ("[N]oncompetitive procedures are not justifiable where the agency created the need for the sole-source award through a lack of advance planning."); *Techno-Sciences, Inc.*, B-257686.2, 94-2 CPD ¶ 164 at 8 (Oct. 31, 1994)

[30] In *Correctional Medical Care*, the Board nonetheless upheld the sole source award because the protester had failed to file comments in response to the District's Agency Report, and had thus "conceded the factual bases for the District's actions." CAB No. P-722, 54 D.C. Reg. at 2007.

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("[U]nder no circumstances may noncompetitive procedures be used owing to a lack of advance planning.").

In the instant protest, there is clearly more than one available source for the quality improvement services sought by the District, other than Delmarva, as the present protest primarily stems from a 16-month long competition between two qualified offerors, including the protester, that were capable of providing these same services. Indeed, the District initially sought to award the subject contract to the protester, and not Delmarva, prior to its subsequent decision to cancel the Solicitation. Nonetheless, the District argues that the subject sole source award was justified because only Delmarva could meet the District's immediate requirements without an interruption of services given that a 90-day transition period would be required with any other offeror. (Supplemental AR 6-7.)

While the Board in no respect seeks to minimize the importance of the health related services involved in this procurement or any of the District's transition considerations in making a follow-on contract award for these services, the Board must still consider whether the District has properly utilized a non-competitive sole source contract vehicle in this case given the underlying facts surrounding this procurement. The record in this matter reflects that Delmarva's incumbent base contract, with options, for the services at issue expired on April 26, 2011 – over two years ago. The District, however, failed to issue a solicitation for a follow-on contract until October 14, 2011, which was nearly six months after Delmarva's 2005 contract had expired on April 26, 2011. Since the expiration of the 2005 contract, the District has conducted a series of short-term sole source and emergency extensions to Delmarva, extending Delmarva's performance a few months at a time in a piecemeal fashion. (Supplemental AR Ex. 5 at 1-2.) The District's attempted January 31, 2013, six-month extension, which gave rise to the initial supplemental protest, would have extended Delmarva's sole source contract through July 31, 2013. (Supplemental AR Ex. 3 at 2.) Similarly, under the most recent "corrected" sole source award, Delmarva would, again, exclusively be designated to provide quality improvement services through January 31, 2014. (Dist. May 2, 2013, Letter to Board Ex. 1 at 1.)

In the foregoing regard, there appears to be no reasonable explanation as to why the District did not undertake the appropriate steps to plan to competitively award a follow on contract for the Delmarva's incumbent contract that would take effect when this incumbent contract initially expired on April 26, 2011, or even shortly thereafter. As stated earlier, the District did not even issue a competitive solicitation for a follow-on contract for these services until almost six months after the base contract award to Delmarva had expired. The District's procurement regulations require that an agency undertake procurement planning "as soon as an agency need is identified and preferably well in advance of the fiscal year in which the contract award is necessary." D.C. MUN. REGS. tit. 27, § 1009.4 (2011). Instead of meeting this planning requirement, the District has, for more than two years, inexplicably relied as its alternative on a series of short-term non-competitive emergency and sole source awards to Delmarva. Consequently, it appears that the District's current need to make a sole source award arises from its failure to adequately perform advanced procurement planning in lieu of a reasonable determination that there is only one source available to meet its current requirement for services.

Moreover, even assuming that the District needed an interim, short term contract vehicle put in place during the evaluation process under the newly issued solicitation for these services

after its last sole source contract with Delmarva expired on January 31, 2013, an emergency, and not a long-term sole source, contract, should have been the procurement vehicle utilizing as much competition as practicable under the circumstances.[31] D.C. CODE § 2-354.05(b). Under similar time constraints, we have found that the District could have performed some limited competition and awarded an emergency contract while still obtaining its required services. *See Answer Temps., Inc.*, CAB Nos. P-564, P-567, 46 D.C. Reg. at 8554 (finding that the District could have awarded an emergency contract with some limited competition between September 25 and October 1).

For the foregoing reasons, the Board finds that the District's recent decision to make a sole source award to Delmarva was improper.

CONCLUSION

As stated above, we find that the District acted reasonably in canceling the Solicitation, which the Board understands has been recently reissued under solicitation No. DCHT-2013-R-0030. Additionally, given the improper sole source award to Delmarva discussed herein, the Board hereby orders the District to terminate its sole source contract with Delmarva no later than July 31, 2013. The District shall make every effort to award a contract under the new solicitation No. DCHT-2013-R-0030 for these services by July 31, 2013. However, given both the District's continuing need to comply with federal law and regulations concerning Medicaid, and the need to continue services uninterrupted, the District may, in accordance with D.C. CODE § 2-354.05, award an emergency contract to cover any necessary short term transition period utilizing as much competition as practicable after the improper sole source is terminated and until the impending contract award under the new solicitation can be made.

SO ORDERED.

Date: June 26, 2013

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

CONCURRING:

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

[31] The District objects to the protester's characterization of the sole source extensions as emergency contracts. (Supplemental AR 5 n.4.) Yet it argues that the sole source extensions were necessary to "assure the continuity of the critical medical health care services during the transition period." (*See id.* at 6.) This need to prevent the "serious disruption" of District services is one of the defining features of an emergency procurement. *See* D.C. CODE § 2-354.05(a); D.C. MUN. REGS. tit. 27, § 1702.1 (2012).

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

C&D TREE SERVICE, INC.	)	
	)	CAB No. D-1347
	)	
Under Contract No. 02-0014-AA-2-0-KA	)	

For the Appellant, C&D Tree Service, Inc.: Richard L. Morehouse, Esq., Greenberg Traurig, LLP. For the District of Columbia: Darnell E. Ingram, Esq., Office of the Attorney General.

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

OPINION

Filing ID #53566428

This appeal arises from the Appellant's request for an equitable adjustment under its contract for tree trimming services with the District of Columbia. During the course of contract performance, the District changed the way that it ordered tree trimming services from block-by-block orders to tree-by-tree orders, which the Appellant contends was a constructive change to the contract entitling it to an equitable adjustment in the contract price. For the reasons stated herein, the Board holds that the Appellant is not entitled to an equitable adjustment for a constructive change, and the appeal is denied.

FINDINGS OF FACT

1. The Appellant, C&D Tree Service, Inc. ("C&D"), and the District of Columbia Department of Public Works entered into Contract No. 02-0014-AA-2-0-KA on May 15, 2002. (Appeal File ("AF") Ex. A.) The contract was for tree trimming services at various sites throughout the District of Columbia. (AF Ex. A ¶ B).

2. The original solicitation sought up to four separate contracts to trim trees of all sizes in four award groups: District Wards 1 and 2 constituted the first award group; Wards 3 and 4, the second; Wards 5 and 6, the third; and Wards 7 and 8, the fourth. (*Id.* ¶ I.9; Undisputed Material Facts[32] ("UMF") ¶ 3.) Appellant's bid prices were the lowest on all four award groups, resulting in the award to Appellant of a single contract for all four segments. (UMF ¶ 4.)

3. The contract was an indefinite delivery/indefinite quantity ("IDIQ") contract for tree trimming services, with fixed unit prices based on the size of the trees trimmed. (AF Ex. A ¶¶ B.1.1, F.1; UMF ¶ 2.) The contractor was required to furnish the specified trimming

[32] See section D of the Joint Pretrial Statement, pages 5-7.

services to the District, "when and if ordered," and the District would order a minimum of $10,000.00 worth of services.[33] (AF Ex. A ¶ B.1.2.)

4. The contract's period of performance was one year from the date of award. (AF Ex. A ¶ F.2.1.) The contract also allowed the District to extend the term of this contract by exercising up to four one-year option periods with the total contract duration not to exceed five years. (AF Ex. A ¶ F.2.) Thus, the last option year terminated on May 15, 2007. (Hr'g Tr. vol. 1, 97:17-19, May 29, 2012.)

5. The parties agree that the contract did not "dictate the manner in which the District was required to assign tree trimming work to Appellant." (UMF ¶ 6.) Under paragraph B.1.2 of the contract, delivery or performance was to be made "only as authorized by orders issued in accordance with the Ordering Clause."[34] (AF Ex. A ¶ B.1.2.)

6. Further, as it relates to the Appellant's contract performance, paragraph B.1.3 of the contract states, "[t]here is no limit on the number of orders that may be issued. The District Government may issue orders requiring tree trimming services to multiple destinations or performance at multiple locations." (AF Ex. A ¶ B.1.3.) Paragraph C.1.1 further states that the "contractor shall furnish all labor, material, and equipment necessary to trim street line trees located at various sites in the District. The location of the trees will be issued when the contract is awarded." (*Id.* ¶ C.1.1.)

7. Addendum No. 3 to the solicitation, incorporated into the contract, consists of responses to the questions raised by the bidders during the procurement process. (AF Ex. A, Addendum #3.) In its responses to Questions Nos. 5 and 6, the District reserved the right to issue, on rare occasion, emergency work orders that would require that tree trimming services be performed by the contractor within 48 hours. (*Id.*) It also specified that the Appellant must provide at least two tree trimming crews on a daily basis. (*Id.*)

C&D's Predecessor Contract Before November 2006

8. The Appellant claims that, in compiling its bid for the disputed contract, it relied upon the District's prior ordering practices under C&D's earlier tree trimming contracts, where the District used a block-by-block ordering process. (Hr'g Tr. vol. 1, 67:10-19.) In this regard, the Appellant testified that it relied upon the historical labor, equipment, and overhead costs under the District's prior ordering method in calculating its cost per tree when it bid for the current contract. (Hr'g Tr. vol. 1, 67:15-19.)

[33] Based on the solicitation's expectation that multiple contracts would be awarded based on four Ward groups, the Appellant interpreted the contract to require the District to order a minimum of $40,000.00 in tree trimming services. (Hr'g Tr. vol. 2, 167:7-14, 213:4-214:7, May 30, 2012.) In either case, the parties have stipulated that the contract's minimum order was $40,000.00. (*See, e.g.*, Joint Pretrial Statement 1; UMF ¶ 14.)

[34] The Board finds, however, that although paragraph B.1.2 references an ordering clause, the contract does not appear to contain a *per se* "Ordering Clause."

9. The Appellant contends that the District had ordered tree trimming services from the Appellant on a block-by-block basis since at least 1989.[35] (Hr'g Tr. vol. 1, 53:20-54:8, 67:13-69:3.) To support this contention, the Appellant introduced its 1997[36] tree trimming contract with the District (Contract No. OMS-5160-AA-DB, dated March 4, 1997).[37] (*See* Appellant's Hr'g Ex. 1B.) Although, the 1997 contract was a requirements contract, rather than an IDIQ (*id.* at 13), it included a clause identical to paragraph C.1.1 of the current contract (*id.* at 7).[38] The Appellant's CEO, Scott F. Nelson, testified that prior to the disputed contract, the District had never ordered the Appellant to trim trees on a tree-by-tree basis as its standard practice. (Hr'g Tr. vol. 1, 69:9-71:10.) He also testified that individual tree ordering was "very rare" prior to November 2006. (Hr'g Tr. vol. 1, 69:18-72:16.)

10. Under the 1997 contract, the District's standard way of issuing work orders was the "block-by-block" method, under which it assigned tree trimming work by identifying city blocks where multiple trees required trimming. (UMF ¶ 7.) The Appellant's CEO testified that after a District employee identified streets that required tree trimming, the District would then issue work orders to C&D to trim all the trees on a designated block. (Hr'g Tr. vol. 1, 58:6-59:4.) Nelson also testified that C&D's own arborists would sometimes "identify subject streets that were in need of tree care." (Hr'g Tr. vol. 1, 58:6-9.)

11. The Contracting Officer's Technical Representative ("COTR") for the disputed contract, John P. Thomas, testified that under the block-by-block ordering method District employees would "comb the city" to identify trees that needed trimming. (Hr'g Tr. vol. 3, 576:4-578:18, May 31, 2012.) When the District's field inspectors identified trees that required trimming, they took the information down on hand-written lists, which would later be transferred to Excel spreadsheets back at their offices. (Hr'g Tr. vol. 3, 582:14-20.) The District would identify trees according to its old MISTRE electronic inventory system, which assigned a unique 16-digit identifier to each tree, helping to identify its location within the District. (Hr'g Tr. vol. 1, 60:11-61:10; Hr'g Tr. vol. 3, 578:19-579:19.)

12. After the District determined which block(s) contained trees that required trimming, the Appellant would post "no parking" signs on the block designated for tree trimming work approximately 72 hours prior to working on that block. (Hr'g Tr. vol. 1, 58:12-16.) Using teams that consisted of a six person crew, two aerial lifts, and a chipper truck, the Appellant would perform tree trimming work up one side of the designated block and then back down the other side of the same block. (Hr'g Tr. vol. 1, 58:16-59:4.)

The District's Work Ordering Method After November 2006

[35] The Appellant had filled tree-trimming orders under the District's predecessor contracts as both a prime contractor and a subcontractor. (Hr'g Tr. vol. 1, 53:20-54:3.)
[36] The 1997 contract was solicited on December 18, 1996, and is consequently referred to as the "1996 contract" in the record. (*See* Appellant's Hr'g Ex. 1B at 1.)
[37] Only pages 1, 7, and 13 of the 1997 contract were admitted into evidence. (Hr'g Tr. vol. 2, 192:7-8, 326:18-19)
[38] *See supra* Finding 6.

13. During the last option year of the contract which is the subject of this appeal, around November of 2006, the District changed the way in which it ordered tree trimming work from C&D.[39] (UMF ¶ 7.) Instead of directing the Appellant to trim all (or most) trees on a city block, the District started directing the Appellant to trim specific, individual trees throughout the city. (UMF ¶ 7.)

14. This change in the way the District ordered tree trimming services from the Appellant coincided with the city's implementation of the "City Works" program. (Hr'g Tr. vol. 3, 581:18-582:10.) The COTR, however, testified that, while the City Works program was not fully implemented until November 2006, this software had actually been procured by the District a few years earlier. (Hr'g Tr. vol. 3, 582:1-8.)

15. The City Works program allowed the District to manage its workload and tree inventory more efficiently by allowing the District to input various data into a searchable format and create work orders from these data sets. (Hr'g Tr. vol. 1, 77:2-8; Hr'g Tr. vol. 3, 582:13-583:21.) Because the City Works program was connected to the Mayor's call center,[40] citizen complaints began to drive more of C&D's assignments to prune certain trees in the District. (Hr'g Tr. vol. 3, 582:21-583:6, 588:20-589:4.) However, the COTR testified that, even after the City Works implementation, the District did not solely rely on citizen complaints to determine which trees to trim. Field inspectors from the District, who were now equipped with tablet computers running City Works, continued to independently select trees for trimming services by the Appellant including, for example, varying species of trees that were required to be trimmed at certain seasonal timeframes across the city. (Hr'g Tr. vol. 3, 585:7-588:18, 604:7-609:4; *see also id.* at 575:15-578:18.)

16. The written record in this case also reflects that after the District began to order tree trimming services on an individual tree basis under City Works, the District would still periodically order tree trimming services for multiple trees on a city block. (*See* Dist. Hr'g Ex. 7 at 1762-67, 1776-78, 1783-84; *see also* Hr'g Tr. vol. 2, 267:10-12, 282:3-20, May 30, 2012.)

17. The Appellant testified that the cost of performance when orders were made on a tree-by-tree basis was significantly greater than it had been under the block-by-block ordering system. (Hr'g Tr. vol. 1, 66:8-16.) According to the Appellant, productivity decreased because workers had to move far more often, and the condition of trees assigned to the

[39] Previously, around November 2005, the disputed contract ran out of funding and the District made the decision to competitively solicit a new contract for these same tree trimming requirements that had been performed by the Appellant. (Hr'g Tr. vol. 1, 72:17-75:1.) The Appellant subsequently protested this solicitation and corrective action was taken by the District to reinstate the second half of the 4th contract option year and the 5th option year of the Appellant's 2002 contract. (Hr'g Tr. vol. 1, 75:3-9.) During the course of these events, the Appellant provided no tree trimming services to the District until the District began ordering from the Appellant under the contract again in November 2006. (Hr'g Tr. vol. 1, 72:11-16.)

[40] The Mayor's call center allows District residents to directly contact the city government to request that varying services be performed by District agencies. (Hr'g Tr. vol. 3, 582:21-583:3, 601:18-602:3.)

Appellant for individual trimming were "the worst of the worst." (Hr'g Tr. vol. 1, 66:21-67:9, 116:2-117:1, 136:15-20.) The Appellant claims that it suffered increased labor and fuel costs, higher dumping fees, and increased costs of performance due to the poor condition of the assigned trees. (Hr'g Tr. vol. 1, 113:16-117:4.)

18. Both Nelson and the COTR testified, however, that while the District would periodically prioritize certain tree assignments as requiring the most immediate attention, the Appellant largely had discretion to prioritize the manner and order in which it completed its tree trimming tasks. (Hr'g Tr. vol. 2, 293:4-17; Hr'g Tr. vol. 3, 592:4-20.) This, in turn, allowed the Appellant to coordinate trimming any number of trees within the same part of the city to improve its efficiency. (Hr'g Tr. vol. 2, 293:22-294:3.)

19. The parties do not dispute that in the course of the contract the District issued orders for at least $40,000.00 worth of tree trimming work from Appellant, and thus ordered the minimum quantity expressly required under the contract. (UMF ¶ 14; Hr'g Tr. vol. 2, 214:1-9.)

Contract Extension and Proposed Price Adjustment

20. On May 7, 2007, the Contracting Officer's assistant, Kathy Hatcher, emailed the Appellant to schedule a meeting to discuss a possible 6 month extension to the contract, as well as issues related to a separate tree removal contract that was also being performed by the Appellant. (Appellant's Hr'g Ex. 1 at 19.) The disputed contract was set to expire in May 2007 at the time the parties were arranging to conduct this meeting. (Hr'g Tr. vol. 2, 227:11-228:18.)

21. On or about May 11, 2007, the Appellant met with District contracting officials, including Contracting Officer ("CO") Jerry Carter, COTR Thomas, and Hatcher. (Hr'g Tr. vol. 1, 93:18-19; Hr'g Tr. vol. 3, 547:2-6, 592:21–593:6; UMF ¶ 8.) At the meeting, in addition to discussing its separate tree removal contract, the Appellant's CEO hand-delivered a letter to the CO dated May 9, 2007, which claimed that the Appellant had suffered damages associated with the District's shift from block-by-block orders to tree-by-tree orders under its tree trimming contract. (Appellant's Hr'g Ex. 1 at 23-25; Hr'g Tr. vol. 1, 93:12-19.) The letter stated that more work was required to trim trees under the individual tree ordering approach due to the poor condition of the trees selected for individual trimming and complained of the decrease in the amount of the trees trimmed. (Appellant's Hr'g Ex. 1 at 25.) The letter therefore requested a return to the block-by-block approach by the District or an equitable price adjustment under the contract. (*Id.*)

22. At the meeting the CO agreed to extend the disputed contract by a period of 6 months beyond its original expiration date of May 2007. (Hr'g Tr. vol. 1, 98:1-9.) The CO also agreed to consider an adjustment to the pricing under the contract. (Hr'g Tr. vol. 3, 434:13-

435:13; 552:8-15.) The CO and the COTR, however, testified that the District did not agree at the May 11, 2007, meeting that the District would definitively alter the contract pricing for the 6 month extension period or grant an equitable adjustment to the contract. (Hr'g Tr. vol. 3, 437:2-14, 594:2-22.) Following this meeting, the CO directed the COTR to undertake the necessary administrative work to prepare for the funding of the Appellant's contract for an additional 6 month period. (Hr'g Tr. vol. 3, 595:4-17.)

23. Following the foregoing meeting,[41] the CO issued a unilateral modification to the contract that extended the term by six months, through November 14, 2007, expressly at no additional cost.[42] (Appellant's Hr'g Ex. 1 at 27.) Hatcher admitted that she independently assumed that the District would negotiate new prices with the Appellant in connection with the 6 month extension period and informed the Appellant that the District would issue a bilateral modification in the future reflecting negotiated pricing for this extension period.[43] (*See id.* at 26; Hr'g Tr. vol. 3, 552:19-22.) No evidence was presented at the hearing which established that the CO directed Hatcher to engage in these price discussions, or knew that these discussions were taking place.

24. Following the District's issuance of the 6 month contract extension, on September 4, 2007, the Appellant submitted new proposed unit prices to Hatcher to be applied in this extension period.[44] (Appellant's Hr'g Ex. 1 at 31-32.) The Appellant's new proposed unit pricing for the extension period included an additional $150.00 fee per tree. (Hr'g Tr. vol. 1, 105:14-17.) The District, however, never formally responded to, or accepted, this proposed pricing. (Hr'g Tr. vol. 1, 118:12-15.) On December 27, 2007, the Appellant sent an additional letter to CO Carter requesting a response to its proposed price adjustment to the contract during the extension period to which the CO never replied.[45] (Appellant's Hr'g Ex. 1 at 35-36; Hr'g Tr. vol. 1, 120:3-19.)

The Appellant's Request for Equitable Adjustment

25. The Appellant subsequently submitted a Request for Equitable Adjustment ("REA") to CO Carter in the amount $613,500.00 as damages for an alleged constructive change resulting from the District's shift from ordering tree trimming service on a block-by-block basis to an

[41] While the modification itself is dated May 10, 2007, it was forwarded to C&D on May 11, 2007. (*See* Appellant's Hr'g Ex. 1 at 26.)

[42] Although the modification extending the contract term was unilaterally executed by the District, the Appellant still signed and returned the modification document to the District on May 14, 2007. (*Id.* at 28; Hr'g Tr. vol. 1, 99:19-100:2.)

[43] CO Carter testified that he had not seen Hatcher's email prior to testifying. (Hr'g Tr. vol. 3, 427:16-428:7.) His testimony further reveals that Hatcher took the lead in administering the contract and could subsequently make recommendations to him on contract pricing matters. (*See, e.g.*, Hr'g Tr. vol. 3, 439:4-21; 447:19-449:9; 488:2-489:4.)

[44] The Appellant testified at the hearing that it was its understanding that the District was planning to renegotiate unit prices with the Appellant for this extension period. (Hr'g Tr. vol. 1, 98:1-9.)

[45] The District did not respond to this and subsequent inquiries regarding the price adjustment requested by the Appellant. (Hr'g Tr. vol. 1, 120:20-123:22.)

individual tree-by-tree system on April 29, 2008. (Appellant's Hr'g Ex. 1 at 6–14; UMF ¶ 11.)

26. In calculating its damages in the REA, the Appellant began by determining the monthly average revenue generated under the previous block-by-block ordering method. (Appellant's Hr'g Ex. 1 at 10.) After making various adjustments in this calculation,[46] the Appellant determined that there was a "net underage of payment" in the amount of $444,538.33 for the extension period.[47] (*Id.*) The Appellant then added a 30% mark-up for costs unrelated to the change to individual tree ordering, which included increased fuel and labor costs and increased dump fees. (*Id.*; Hr'g Tr. vol. 1, 133:16-134:15.) The Appellant then added another 10% mark-up to reflect the poor condition of the trees. (Appellant's Hr'g Ex. 1 at 10.) Altogether, the Appellant determined that it was entitled to an additional $635,688.82 in additional compensation. (*Id.*) The Appellant, however, only requested an equitable adjustment in the amount of $613,500.00 consistent with the $150.00 per tree price increase in its September 4, 2007, request to the District for an increase in unit pricing under the contract. (*Id.*; Hr'g Tr. vol. 1, 137:8-138:21.)

27. CO Carter denied the Appellant's REA in a May 8, 2008, Contracting Officer's Final Decision. (AF Ex. D.1; UMF ¶ 12.) The CO determined that no constructive change had occurred because the contract specifications did not dictate the manner in which the District would order tree trimming work to be performed on either an individual tree basis or a block-by-block basis. (AF Ex. D.1 at 4.) The CO further determined that the Appellant had failed to adequately support its claim with cost and price data. (*Id.* at 4-5.)

28. The Appellant filed its Notice of Appeal with the Board on July 16, 2008, which appealed the CO's May 8, 2008, final decision denying its REA. The Board conducted a four-day hearing on the merits in this matter from May 29, 2012 through May 31, 2012, and on June 22, 2012.

Contentions of the Parties

29. The Appellant claims entitlement to an equitable adjustment because the District allegedly constructively changed the contract when it shifted from ordering on a block-by-block basis to a tree-by-tree basis based upon the manner in which the District historically ordered tree trimming services from the Appellant. (Appellant's Post Hr'g Br. 15-18.)

[46] The Appellant made adjustments to reflect the increased size of the trees and a 30 percent decrease in costs related to a change in C&D's operations. (Hr'g Tr. vol. 1, 129:3-132:15.)

[47] In calculating the REA, the Appellant used 10 months as the extension period. (Hr'g Tr. vol. 2, 245:12-17; Appellant's Hr'g Ex. 1 at 10.) In its complaint, the Appellant states that the amount claimed in the REA is based on work that was performed "during the six-month extension period." (Compl. ¶ 22.) Similarly, the parties stipulated that the period in dispute is "the six-month extension period." (UMF ¶ 9.) (Appellant's Post Hr'g Br. 27.) Addressing this discrepancy, Nelson testified that he used 10 months because the District continued to order work under the contract though no formal extension was issued. (Hr'g Tr. vol. 1, 127:4-11.)

30. The Appellant, therefore, asserts that it is entitled to recover an equitable adjustment in the amount of $613,500.00 because of the District's alleged constructive change to the contract when it switched from ordering tree trimming services on a block-by-block basis to a tree-by-tree basis. (Appellant's Post Hr'g Br. 21-23.) Alternatively, the Appellant claims $387,548.00 based on the report of its expert, Ernest Agresto.[48] (*Id.* at 23-26.) In arriving at his damages figure, Agresto first determined the Appellant's lost revenue during the extension period by essentially comparing the monthly average revenue before the change in ordering methodology and then separately during the extension period.[49] (Hr'g Tr. vol. 4, 664:19-668:18, June 22, 2013; Appellant's Hr'g Ex. 3 at 9.) Agresto's analysis also incorporated an assessment of additional labor and other fixed costs allocable to the contract based upon revenue amounts in ultimately determining that the Appellant was owed an additional $352,316.00. (Appellant's Hr'g Ex. 3 at 6-11; Hr'g Tr. vol. 4, 667:3-687:13.) Lastly, Agresto added a 10% mark-up for profit to arrive at the $387,548.00 figure. (Appellant's Hr'g Ex. 3 at 6.)

31. The District denies the Appellant's right to any additional compensation under the contract. The District maintains that its obligation under this IDIQ contract, which it satisfied, was to order the contract minimum of $40,000.00 in services from the Appellant. (Dist. Post Hr'g Br. 17-18.)

32. Further, the District also argues that its shift in the manner in which it ordered tree trimming services—from block-by-block to tree-by-tree—did not constitute a constructive change to the contract because the contract is silent as to the manner in which the District would order tree trimming services. (*Id.* at 19-20.) The District further contends that the contract itself prohibits constructive changes because changes were required to be in writing and signed by the CO. (*Id.* at 20.) The District also maintains that the Appellant has provided no data to support its claimed damages.[50] (Dist. Post Hr'g Br. 22-24, 28-30.)

DISCUSSION

We exercise jurisdiction over this matter pursuant to D.C. Code § 2-360.03(a)(2) (2011).[51]

[48] Agresto testified that his calculations were limited to considering C&D's accounting data and that he did not consider technical issues that would be outside his accounting expertise. (Hr'g Tr. vol. 4, 652:4-16, June 22, 2013.) Agresto also testified that this limitation on accounting data led to differences from the REA's damages calculation because Nelson was able to use his technical expertise and rely on more contract specific data. (Hr'g Tr. vol. 4, 696:19-698:17.)

[49] Agresto also used a 10 month extension period in his calculations. (Appellant's Hr'g Ex. 3 at 9.)

[50] Along these lines, the District also faults the Appellant's damage calculations for using a 10 month period instead of the stipulated 6 months. (Dist. Post Hr'g Br. 26-27.)

[51] Prior to April 8, 2011, the Board exercised jurisdiction pursuant to D.C. Code § 2-309.03(a)(2) (2001). The Procurement Practices Reform Act of 2010 repealed and replaced the District's procurement statutes, including the Board's previous jurisdictional statute. D.C. Law No. 18-371, 58 D.C. Reg. 1185 (Feb. 11, 2011). This appeal was filed on July 16, 2008, under our previous jurisdictional statute. (*See* Notice of Appeal.)

The central issue in this case is whether the District constructively changed the contract when it began ordering tree trimming on a tree-by-tree basis thereby entitling the Appellant to an equitable adjustment under the contract. Equitable adjustments are corrective measures to make a contractor whole when the government modifies a contract. *Int'l Data Prods. Corp. v. United States*, 492 F.3d 1317, 1325 (Fed. Cir. 2007) (citing *Ets-Hokin Corp. v. United States*, 420 F.2d 716, 720 (Ct. Cl. 1970)). An equitable adjustment is due under both formal changes and constructive changes. *District of Columbia v. Org. for Envtl. Growth, Inc.*, 700 A.2d 185, 203 (D.C. 1997), *on remand*, CAB No. D-850, 49 D.C. Reg. 3353 (Apr. 13, 2001), *rev'd on other grounds sub nom. Abadie v. Org. for Envtl. Growth, Inc.*, 806 A.2d 1225 (D.C. 2002); *see also Aydin Corp. v. Widnall*, 61 F.3d 1571, 1577 (Fed. Cir. 1995) ("Where [the Government] requires a constructive change in a contract, the Government must fairly compensate the contractor for the costs of the change.").

"A constructive change occurs where a contractor performs work beyond the contract requirements without a formal order, either by an informal change order or due to the fault of the government." *Weigel Hochdrucktechnik GmbH & Co. KG*, ASBCA No. 57207, 12-1 BCA ¶ 34,975 at *4 (Mar. 15, 2012); *Advanced Eng'g & Planning Corp.*, ASBCA Nos. 53366, 54044, 05-1 BCA ¶ 32,806 at *23 (Nov. 19, 2004); *see also Org. for Envtl. Growth*, 700 A.2d at 203 (defining constructive changes as those "informally ordered by the government or required by government fault despite the absence of a formal change order.").

To prove entitlement under a constructive change theory, a contractor must show a bona fide "change" and the issuance of an "order" under the relevant contract. *Org. for Envtl. Growth*, 700 A.2d at 203. To meet the "change" component, the contractor must have performed work in addition to, or different from, that required under the contract. *Id.*; *LB&B Assocs., Inc. v. United States*, 91 Fed. Cl. 142, 154 (2010).

Additionally, to establish the "order" component under a constructive change theory, the added work must not have been volunteered by the contractor, but rather directed by a government official with the requisite authority. *See LB&B Assocs.*, 91 Fed. Cl. at 154; *Northrop Grumman Sys. Corp. Space Sys. Div.*, ASBCA No. 54774, 10-2 BCA ¶ 34,517 at *73 (July 22, 2010); *Intercontinental Mfg. Co.*, ASBCA No. 48506, 03-1 BCA ¶ 32,131 at *50 (Jan. 3, 2003). The contractor must also demonstrate that the constructive change increased its costs of performance. *See Intercontinental Mfg. Co.*, ASBCA No. 48506, 03-1 BCA ¶ 32,131 at *50; *Blood*, AGBCA Nos. 2000-102-1 et al., 02-1 BCA ¶ 31,726 at *13 (Dec. 21, 2001).

A. Appellant Has Failed to Establish a Prior Course of Dealing that Required the District to Order Tree Trimming Services on a Block-by-Block Basis Under the Disputed Contract.

The parties agree that the contract was silent as to any particular methodology that would be used by the District to order services under the contract. (Finding 5.) Nevertheless, the Appellant argues that its prior course of dealing with the District—under its earlier 1997 tree trimming contract—established that the District would continue to order tree trimming on a block-by-block basis under the instant (2002) contract. (Appellant's Post Hr'g Br. 17-19.) As such, the Appellant essentially argues that the District's block-by-block ordering methodology under its prior contract(s) effectively became a term of the present contract. (*Id.* at 17-18.) Accordingly, the Appellant contends that the District constructively changed the instant contract

when it switched from ordering tree trimming services from the Appellant on a block-by-block basis to a tree-by-tree basis. (*Id.* at 16.)

A prior course of dealing is defined as "a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct."[52] *DeLeon Indus., LLC v. Dep't of Veterans Affairs*, CBCA No. 986, 12-1 BCA ¶ 34,904 at *11 (July 12, 2011) (citations omitted); *C.R. Pittman Constr. Co.*, ASBCA No. 54901, 08-1 BCA ¶ 33,777 at *11 (Jan. 22, 2008) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 223(1) (1981)). A prior course of dealing may "establish the intent of the parties with respect to the proper interpretation of contract language." *Prods. Eng'g Corp. v. Gen. Servs. Admin.*, GSBCA Nos. 12503, 13051, 98-2 BCA ¶ 29,851 (June 30, 1988). However, to establish an enforceable term of a contract, the conduct establishing the course of dealings must reflect the joint or common understanding of the parties. *Sperry Flight Sys. v. United States*, 548 F.2d 915, 922 (Ct. Cl. 1977). If the prior course of dealing cannot "reasonably be construed as indicative of the parties' intentions," then that course of dealings will not establish an enforceable contract term. *Id.* Accordingly, the proponent of a prior course of dealing argument must demonstrate "actual knowledge by both parties of the prior course of dealings *and its significance to the contract*." *Anchor/Darling Valve Co.*, ASBCA No. 46109, 95-1 BCA ¶ 27,595 at *5 (Mar. 20, 1995) (emphasis added); *Yamin*, ASBCA No. 35373, 90-2 BCA ¶ 22,657 at *10 (Jan. 31, 1990).

Thus, under this foregoing jurisprudence, federal courts and boards of contract appeals have extensively considered the evidence which is required to establish that there was a prior course of dealing between contractual parties which altered or defined the contract terms. For instance, in *Products Engineering Corp.*, the contractor argued that the government's previous approval of its quality control system and methods of testing for compliance with specifications barred the government's use of a different method during the contract. GSBCA Nos. 12,503, 13,051, 98-2 BCA ¶ 29,851. In this regard, much like the Appellant in the present case, the contractor argued that there was an established prior course of dealing under previous contracts with the government, lasting several years, whereby the government had repeatedly accepted the contractor's same equipment and quality control procedures. *Id.* For these reasons, the contractor argued that the government was later precluded from imposing its own independent quality control measures which found the contractor's parts to be nonconforming. *Id.* Ultimately, the General Services Board of Contract Appeals found that the circumstances did not warrant extending the prior course of dealing doctrine to bar the government from using different test instruments from those used by the contractor without notification so long as the government's standards were not contrary to the contract provisions. *Id.* Moreover, in effectively underscoring the requirement that both parties have knowledge of the significance of a prior course of dealing, the board found that there was insignificant evidence in that case to

[52] The Board has addressed a prior course of dealing legal theory only once before in *Jet Blast, Inc.*, CAB No. D-1039, 52 D.C. Reg. 4217 (Aug. 3, 2004). However, in that case, we summarily rejected the appellant's argument, holding that a prior course of dealing consistent with the express terms of the contract could not modify the contract. *Id.* at 4222. Because the Board has not extensively dealt with this legal theory in prior decisions, we look to the jurisprudence of the federal courts and boards of contract appeals for guidance, as we have traditionally done. *See, e.g., Keystone Plus Constr. Corp.*, CAB No. D-1358, 2012 WL 554443 at *7-*8 (Jan. 27, 2012) (citing multiple federal cases); *K.B. Hom & Assocs.*, CAB No. P-154, 38 D.C. Reg. 3237, 3239 (Mar. 5, 1991) (stating that the Board looks to federal case law for guidance); *see also Abadie v. D.C. Contract Appeals Bd.*, 916 A.2d 913, 919 (D.C. 2007) ("Because District contracting practice parallels federal government contract law, we also look to the relevant decisions of federal tribunals with particular expertise in this area." (internal quotation marks omitted)).

establish that the government knowingly accepted nonconforming equipment or indicated its willingness to waive the equipment specification requirements. *Id.*

Similarly, in *DCX-CHOL Enterprises*, the Armed Service Board of Contract Appeals considered a contractor's claim that it had a prior course of dealing with the government whereby the contractor was permitted to supply its shipments without the complete traceability documentation required under the contract. ASBCA No. 54,707, 08-2 BCA ¶ 33,889 at *11 (June 18, 2008). However, the board rejected this argument finding that the missing element in the contractor's claim of prior course of dealing was "mutuality" which requires evidence of "actual knowledge by both parties of the prior course of dealing and its significance to the contract." *Id.*

Additionally, in *Sperry Flight Systems*, the United States Court of Federal Claims dealt with a situation somewhat analogous to the present case where the contractor argued that, by virtue of its prior course of dealing with the agency where its higher catalogue prices had been accepted by the government without requiring cost and pricing data, a practice was established between the parties that the government would continue to accept these same catalogue prices in the future. 548 F.2d 915, 922-23 (Ct. Cl. 1977). Specifically, in that case, while the government had previously paid the contractor for certain parts based upon its catalogue prices and without requiring cost and pricing data, it was later required to submit cost and pricing data to the contracting officer to substantiate its catalogue prices before they would be accepted by the government. *Id*. at 917. Ultimately, the government determined that the contractor's catalog prices for the parts at issue were not substantiated and reduced the amount that it would agree to pay for them below the contractor's catalogue prices. *Id.* at 917-18. In ultimately rejecting the contractor's argument of a prior course of dealing with the government in accepting its higher catalogue prices, the court stated that the factual record did not "even allow an inference that the Government, by having accepted plaintiff's catalog prices on past occasions, thereby intended to commit itself to continue such a practice into the future." *Id.* at 923. Rather, the contractor's argument amounted to "only a statement of its own unilateral assumptions concerning the Navy's expected future conduct" in accepting a higher priced product. *Id.*

In the instant case, the Appellant alleges that a prior course of dealing was established between the parties by virtue of the fact that, under earlier contracts between these same parties, the District always ordered block-by-block tree trimming services from the Appellant and thus was essentially required to continue to do so under the disputed contract. Only one prior 1997 tree trimming contract between the parties was introduced by the Appellant at trial but, nonetheless, the Appellant seemingly argues that this one contract established an understanding between the parties that future tree trimming contracts would implicitly include a requirement that the District order tree trimming services from the Appellant on a block-by-block basis.

The facts elicited at trial, however, evidence that the District's methodology for ordering tree trimming service from the Appellant under the 1997 contract, as well as the disputed 2002 contract, was primarily based upon the internal ordering technology that was available to the District. Initially, under the 1997 contract relied upon by the Appellant, the District's somewhat basic mechanism for identifying trees in need of service was to simply have its inspectors drive around the city and visually inspect blocks where multiple trees were in need of service, take hand written notes on the trees needing service, and then enter those notes into an Excel spreadsheet. (Finding 11). The District would identify trees in need of service according to its prior MISTRE electronic inventory system, which assigned a unique 16-digit identifier to each

tree, helping to identify its location within the District. (*Id.*) In turn, the District would notify the Appellant of trees in need of service on specific city blocks leading to block-by-block tree trimming orders being issued by the District. (Finding 10.)

However, there was no evidence introduced at the hearing which showed that the parties both mutually acknowledged, or understood, that the District intended to always order tree trimming service on a block-by-block basis in this manner. In fact, the evidence seems to suggest, to the contrary, that the District had intended for some time to improve the efficiency of its tree ordering process by virtue of the fact that it had procured the City Works software a few years in advance of its actual implementation in Year 2006. (*See* Finding 14.)

Moreover, while the Appellant argues that the change in the ordering methodology was, in fact, a "change" admitted by the District to have occurred, the facts establish that this change was essentially a byproduct of the City Works software implementation by the District that allowed the city to overall more efficiently manage its workload and tree inventory. (Findings 14-15.) There is simply no evidence that the District understood, or even implicitly agreed, that it would not seek to improve upon the efficiency of its tree inventory management process by making no alterations in its ordering methodology with the Appellant for tree trimming services after the 1997 contract was performed. The fact that block-by-block ordering may have allowed the Appellant to presumably perform its services in a more efficient manner did not commit the District to always utilize this ordering process on future contracts.

Thus, the Board finds that the facts underlying this case do not show that there was "mutuality" between the parties to agree to bind themselves to a block-by-block ordering requirement over the entire term of the disputed contract based upon a prior course of dealing under an earlier contract. In short, similar to facts in *Sperry Flight Systems*, *supra*, the Appellant's reliance on a prior course of dealing theory in the instant case is based upon its "unilateral assumption" that the District would continue to order services using a block-by-block ordering process as it had before. Accordingly, the Appellant has also failed to establish that the District's shift in ordering methodology constructively changed the contract's terms.

B. The District Met Its Ordering Obligations Under the Contract.

Having found that the Appellant is not entitled to damages arising from an alleged constructive change to the contract ordering process as discussed above, the Board must also consider whether the District otherwise met, or altered, its overall ordering requirements under the disputed contract, as this issue was raised by the District. In this regard, the parties agree that the contract was an IDIQ contract with a minimum purchase obligation of either $10,000.00 (the plain language of the contract) or $40,000.00 (the parties' stipulation). (Finding 3.) The parties also agree that the District ordered at least $40,000.00 in services under the contract. (Finding 19.)

An IDIQ contract only requires that the government order a stated minimum quantity of supplies or services. *Travel Ctr. v. Barram*, 236 F.3d 1316, 1319 (Fed Cir. 2001); *see also DynCorp*, ASBCA No. 38862, 91-2 BCA ¶ 24,044 at *4 (May 1, 1991) ("Under an indefinite quantity contract, the Government is only obligated to order the minimum quantity stated."). Once the government purchases the minimum stated in the contract its purchasing obligation under the contract is satisfied. *Travel Ctr.*, 236 F.3d at 1319.

The Appellant's measure of its alleged monetary damages in this case appears to be based upon its contention that it received less revenue after the District switched to individual tree ordering. For example, the Appellant argues that the switch to individual tree ordering "resulted in a severe 87% decrease in the amount of tree locations serviced by C&D." (Appellant's Post Hr'g Br. 18-19.) Similarly, both the Appellant's REA and the Appellant's expert report begin their damage calculations by determining the Appellant's lost revenue during the extension period. (Findings 26, 30.)

Appellant's lost revenue claim, however, is without basis as the District was not obligated to procure services from the Appellant "beyond the minimum contract price." *See Travel Ctr.*, 236 F.3d at 1319. Indeed, even if the Appellant anticipated that ultimately the District would order a greater amount of work under the contract, that did not alter the fact that the District was only obligated to purchase the specified contract dollar minimum. *Varilease Tech. Grp., Inc. v. United States*, 289 F.3d 795, 799 (Fed. Cir. 2003). As stated above, it is not disputed that the District ordered more than the required minimum $40,000.00 in tree trimming services under the contract. (Finding 19.) Because the District satisfied its purchasing obligations under the contract, the Appellant is not entitled to any relief from the Board beyond the requirements previously ordered and paid for by the District.[53] *See Travel Ctr.*, 236 F.3d at 1319.

CONCLUSION

Based upon the matters discussed herein, the Board finds that Appellant has not established that the District constructively changed the disputed contract by modifying its ordering methodology for tree trimming services and, therefore, Appellant is not entitled to an equitable adjustment to the contract. Further, the Board finds that the District met the minimum ordering requirements under the contract as it relates to the service amounts which it procured from the Appellant. The appeal is denied.

SO ORDERED.

DATED: August 8, 2013

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

CONCURRING:

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

[53] By way of analogy, the Armed Services Board of Contract Appeals addressed a similar constructive change argument under a requirements contract for mowing services. *See Maggie's Landscaping, Inc.*, ASBCA Nos. 52462, 52463, 04-2 BCA ¶ 32,647 (June 2, 2004). In *Maggie's Landscaping*, the government ordered less mowing than its monthly estimates due to dry and wet conditions that affected the growth and health of the grass. *Id.* at *5-6. The board held that even if the variance in ordering from the estimated amounts was significant, such variance did not constitute a constructive change because "a change in operations by a contracting entity made independent of the contract that results in a reduction in requirements will not constitute a breach or a constructive change." *Id.* at *16.

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

APPEAL OF:

ADSYSTECH, INC.	)	
	)	CAB No. D-1210
Under Contract No. 9066-AA-NS-2-MT	)	

For the Appellant: Lloyd J. Jordan, Esq. For the Appellee: Robert Dillard, Esq., Assistant Attorney General, Office of the Attorney General, Matthew Lane, Esq. (entered appearance after post-hearing briefs)

Opinion By: Chief Administrative Judge Marc D. Loud, Sr., with Administrative Judge Maxine E. McBean, concurring.

DECISION AND MEMORANDUM OPINION

Filing ID 53755235

This is a dispute action brought by Adsystech, Inc. (Adsystech or appellant) against the District (District or appellee) alleging the non-payment of $757,470 for services rendered to upgrade the D.C. Department of Consumer and Regulatory Affairs' (DCRA) information technology systems with the "Hansen Version 7 PERMITS" software (Hansen or Hansen upgrade). Appellant seeks an equitable adjustment on the grounds that constructive changes were directed and/or ratified by authorized District officials. The appellant also seeks recovery under common law theories of promissory estoppel and quantum meruit. The District contends that (i) the Anti-Deficiency Act bars payment, (ii) the mandatory ratification procedures required by former D.C. Code § 2-301.05(d)(5) were not followed herein, (iii) former D.C. Code § 2-301.05(d)(3) bars oral contracts, (iv) equitable adjustment cannot be invoked to authorize a payment exceeding a District purchase order, and (v) the Board lacks jurisdiction over quantum meruit claims. The Board conducted a trial from June 21-22, 2010, hearing testimony from five witnesses called by the parties.[54]

Upon review of the record herein, and for the reasons set forth more fully below, the Board finds that the appellant is entitled to an equitable adjustment for services it performed in excess of the parties' contract at the request of authorized District officials. This case is remanded to the appellee for a determination of quantum. The Board directs the parties to negotiate in good faith, and to inform the Board of the disposition status within 30 days.

BACKGROUND

The backdrop to the instant dispute is as follows. During the latter part of 1999, the

[54] 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.

DCRA sought to acquire a new information technology system to replace its antiquated department hardware and applications as part of the District's Y2K initiative.[55] Hr'g Tr. vol. 2, 448:15-452:20, June 22, 2010. Based on a KPMG study of commercial-off-the-shelf products and the results of a pilot program with Adsystech, DCRA decided that the Hansen software was the best available product. Hr'g Tr. vol. 1, 17:4-19:7, June 21, 2010. The Hansen software was a suite of municipal government products which offered a permit and licensing function sought by DCRA. Hr'g Tr. vol. 1, 18:15-20. Adsystech's CEO described the software as a "blank sheet of paper" which provides a "framework and a structure" that a vendor develops into a workable product for a particular client. Hr'g Tr. vol. 243:1-244:10.

From the outset, the parties agreed that DCRA's total system upgrade would entail the implementation of 221 processes within DCRA at an estimated cost that exceeded $2 million dollars. Hr'g Tr. vol. 1, 19:8-22:5; Hr'g Tr. vol. 2, 459:6-463:7. The 221 processes were derived from the KPMG study. Hr'g Tr. vol. 1, 228:22-231:13. The record denotes the 221 processes were divided among DCRA's internal administrations as follows: Building Land Regulation Administration (BLRA)(78 processes), Business Regulation Administration (BRA)(102 processes), and Housing Regulation Administration (HRA)(41 processes). Appellee's Hr'g Ex. 3; *see also* Hr'g Tr. vol. 2, 231:3-232:18.

Because DCRA only had $711,000 in funding, the parties decided to procure the Hansen upgrade through two contracts issued across separate fiscal years.[56] Hr'g vol. 1, 24:19-25:8; 26:18-46:1; 60:2-62:22; Hr'g Tr. vol. 2, 464:10-465:4. The first contract was entered into on June 18, 1999, for $711,039 (first contract or June 18 contract).[57] Appellant's Hr'g Ex. 6; *see also* Hr'g Tr. vol. 1, 16:1-18:3; 22:20-25:8. The parties agreed that Adsystech would only implement 11 of the 221 processes under the first contract. Hr'g Tr. vol. 1, 22:20-25:8; 58:2-59:4, 59:15-60:6. *See also* Appellee's Hr'g Ex. 3, Task 7. Neither party has presented the Board with a complete original or copy of the June 18 contract. The contract originally consisted of 10 pages, yet only the first page has been entered into our record.

The second contract was entered into on October 25, 1999 (second contract or October 25 contract) through a "Purchase Notification" for $476,317.[58] Appellant's Hr'g Ex. 7; *see also* Hr'g Tr. vol. 1, 61:12-63:1. The appellant contends that the second contract was a "time and materials" contract. Appellant's Post Hr'g Br. 7-8, Proposed Finding of Fact 21. The District's

[55] Y2K refers to the Year 2000. As Y2K approached during 1998-2000, most public and private sector entities were undertaking massive computer system upgrades to prevent service lapses as they anticipated that most computers would not recognize dates beyond the year 1999. *See* discussion *infra* at p.19.

[56] Adsystech's Director of business development offered an alternative explanation for why the Hansen procurement was done in "bite-size chunks." He testified that the procurement was separated in "order to not take it to the Control Board[,]" which he testified was a requirement for contracts over $1 million dollars. Hr'g Tr. vol. 2, 463:9-464:9.

[57] Adsystech's CEO testified that the June 18 contract was a firm-fixed price contract. Hr'g Tr. vol. 1, 71:12-13. This contention is not disputed by the District. Appellee's Post Hr'g Br. 7, Proposed Finding of Fact 3.

[58] The Board defines the "purchase notification" herein as a contract. At all times material to the instant dispute, the definition of "contract" included "task order" and "purchase order." D.C. Code § 2-301.07(13)(B),(D) (repealed Apr. 8, 2011). Interestingly, the District identifies the purchase notification as a "contract" in its October 25, 1999, transmittal to the Council of the District of Columbia. *See* Appellee's Hr'g Ex. 5. Per the record, "purchase notification" is described as a term used interchangeably with "purchase order." Hr'g Tr. vol. 2, 501:8-502:2. District witness Bruce Witty, the contracting officer herein, stated that a purchase notification becomes a "contract" once performance begins. Hr'g Tr. vol. 2, 506:13-507:15.

post-hearing brief disputes this, but at trial its key witness testified that in paying Adsystech's invoices, the District had treated the contract as a time and materials one. Hr'g Tr. vol. 2, 508:16-509:14. The parties agreed that Adsystech would implement the remaining 210 processes under the second contract. Hr'g Tr. vol. 1, 61:12-63:1.[59] The second contract consists of only one-page, and provides very minimal scope, stating that Adsystech's services are for "continuation of [s]ervices for Task #2 on Enterprise Systems to complete [a]ll departments." Appellant's Hr'g Ex. 7; AF Ex. 2; Hr'g Tr. vol. 1, 61:12-63:1.

Before proceeding further with a detailed discussion of contract terms and performance, it is important to note that Adsystech's required performance under both contracts was grounded upon the statement of work developed for the June 18 contract. Hr'g Tr. vol. 1, 22:6-24:7; 41:9-16; vol. 2, 311:21-313:11; 501:8-503:2. We have relied on the June 18 statement of work for that purpose as well because the original contract has been lost. It is well settled that parol evidence is admissible to establish the terms of a lost or missing contract (or instrument), where a party testifies that the contract has been lost, and the substance of the agreement is proved satisfactorily by the parol evidence. *See Tayloe v. Riggs*, 26 U.S. 591 (1828); *Edmunds v. Jelleff*, 127 A.2d 152 (D.C. 1956). In this case, it is clear that the contract has been lost. Hr'g Tr. vol. 2, 500:2-505:14. Moreover, we believe that the statement of work for the June 18 contract sufficiently proves the contract terms herein, and note that the appellee has not disputed such. Appellee's Hr'g Ex. 3.

Thus, we find the statement of work admissible and competent to establish the contract terms entered into by the parties herein. The referenced statement of work outlines 10 Tasks that Adsystech was to perform to complete DCRA's upgrade to the Hansen system. Appellee's Hr'g Ex. 3. These tasks included, but were not limited to, a kick-off meeting, the development of a project implementation plan, acquisition of licenses for the Hansen software, training, Adsystech's review and validation of DCRA delivered "as is" process flows,[60] data conversion, etc. *Id.*

Following the parties execution of both contracts, Adsystech was able to begin performance on DCRA's system overhaul.[61] Once performance began, however, Adsystech was advised by DCRA official "Theresa Lewis" (Lewis) not to use the KPMG study to complete the "to-be" processes of the Hansen upgrade.[62] Hr'g Tr. vol. 1, 52:16-53:11, 55:16-56:8; 63:19-65:4; 219:5-220:20; 233:22-234:20. The KPMG study was deemed "horrible" as to the Business Regulation Administration, "fair" as to the Housing Regulation Administration, and "very reasonable" as to the Office of Adjudication's requirements. Hr'g Tr. vol. 2, 358:18-362:11.

The record suggests that there were numerous District officials with whom Adsystech

[59] *See also* Appellant's Post Hr'g Br. 7-8, Proposed Finding of Fact 21; Appellee's Post Hr'g Br. 7, Proposed Finding of Fact 4.

[60] An "as-is" process flow is one that documents how DCRA conducted business prior to the Hansen implementation. Hr'g Tr. vol. 2, 227:18-228:3 (testimony of the Adsystech project manager).

[61] Adsystech's project manager testified that prior to execution of the second contract, Adsystech's performance consisted of procuring the Hansen licenses, tools, and maintenance agreement. Hr'g Tr. vol. 2, 320:11.

[62] A "to be" process identified how DCRA wanted to conduct its business operations in the future. Hr'g Tr. vol. 1, 234:21-235:10 (Adsystech project manager). As context, the Adsystech project manager explained that DCRA did not want to pay Adsystech to implement a system that needed to be changed in later years. *Id.* at 235:7-9.

dealt during the life of the contract. The parties' June 18 contract was signed by "Richard P. Fite" as contracting officer, although Fite disappears from the record completely thereafter. Appellant's Hr'g Ex. 6. The parties' October 25 contract was signed by "Suzanne J. Peck" as contracting officer. Appellant's Hr'g Ex. 7. At the time, Peck was also the District's Chief Technology Officer. *Id*. Bruce Witty is also identified as a contracting officer herein but testified that he "struggl[ed] with that role because he signed no contracts[.]" Hr'g Tr. Vol. 2, 491:3-15. Adsystech's project manager[63] testified that no one identified themselves as contracting officer on the DCRA contract. Hr'g Tr. vol. 2, 440:6-13.

The above notwithstanding, Theresa Lewis emerges as the one District official exercising day-to-day authority over all aspects of the Hansen upgrade contract. Although she did not testify at the hearing, she is described by appellant's and appellee's witnesses alike as the singular District official in charge of the upgrade. Adsystech's project manager described Lewis as "the one point person appointed by the [DCRA] Director" for the project, "the key person in charge of all of the various DCRA divisions" acquiring the Hansen system, and the person exercising "direction or control" over the parties' contract. Hr'g Tr. vol. 2, 238:10-17; 438:22-442:20. Adsystech's project manager further testified that contracting officer Bruce Witty "confirmed Theresa Lewis as the person for all requirements[.]" Hr'g Tr. vol. 1, 239:13-240:19. Adsystech's business development director testified that "Theresa knew DCRA like the back of her hand. She understood all the applications… knew exactly how things were managed, run. She was just a wealth of knowledge[.]" Hr'g Tr. vol. 2, 465:15-466:8. He also described Lewis as the "gatekeeper" and the "one that knew and approved everything[.]" *Id*.

Ms. Lewis was similarly described by the District's two witnesses, contracting officer Bruce Witty and former DCRA Deputy Director and Interim Director Carlynn Fuller (Fuller or Interim Director).[64] Witty testified that Lewis was the contracting officer's technical representative. Hr'g Tr. vol. 2, 536:16-537:3. Fuller testified that, "because of the nature of the project and the areas that were being affected by the project, it was Theresa Lewis' project because most of the areas with the exception of one fell under her role as Deputy Director[.]" Hr'g Tr. vol. 2, 536:16-538:22; 592:1-19.

In lieu of the KPMG study, Adsystech was directed by Lewis to work directly with designated DCRA staff to "extract and develop" the requirements of DCRA's system through incremental mapping. Hr'g Tr. vol. 1, 65:5-67:4; 240:20-242:22. The project manager testified that implementation of the Hansen system using the KPMG study would have been inadequate, and that the input of DCRA employee stakeholders was required for "additional extraction work." *Id*. at 228:14. Adsystech testified that mapping DCRA's system in this manner added more work and cost/scheduling changes. *Id*., 67:14-71:1. For example, Adsystech's project manager testified that DCRA stakeholders "had full time job[s] providing and delivering licenses" and were not available to fill in mapping details. Hr'g Tr. vol. 1, 243:1-244:21. The

[63] Roland Gillis testified that he was Adsystech's "chief person, officer over the whole contract[.]" Hr'g Tr. vol. 1, 246:3-9. For ease of reference, Mr. Gillis is referred herein as Adsystech's project manager.

[64] Carlynn Fuller served as DCRA's Interim Director from September 2000 to April 2001. Hr'g Tr. vol. 2, 590:11-591:5. Prior to that, she served a variety of roles at DCRA, including Chief of Staff and Deputy Director for Operations. *Id*. Fuller became involved in the Adsystech contract matter around March 2000 as a result of Adsystech "running out of money." Hr'g Tr. vol. 2, 592:20-593:14.

project manager also testified that DCRA stakeholders either did not show up for meetings, or that the "wrong people" were at meetings. Hr'g Tr. vol. 2, 362:17-363:16. Thus, the project manager testified that Adsystech's work with line staff required "more labor" than anticipated. Hr'g Tr. Vol. 1, 244:7-10; Hr'g Tr. vol. 2, 356:15-19 (the District's failure to deliver to-be processes in an efficient manner caused Adsystech to perform extra work).

By January 2000, Adsystech became aware that its Hansen upgrade contract was running out of funds. Hr'g Tr. vol. 1, 69:2-10; 88:3-89:14; 89:19-90:19. Hr'g Tr. vol. 2, 467:17-469:5. During the course of the contract, Adsystech officials had direct communications regarding the funding shortage with contracting officer Peck, the DCRA Director, Lewis, and Witty (who had been tasked by Peck to address the funding issue). Hr'g Tr. vol. 1, 89:5-92:5; Hr'g Tr. vol. 2, 472:8-473:7. The Adsystech CEO also testified that Adsystech made bi-weekly status reports to DCRA after he alerted them to the concern about the funding shortage. Hr'g Tr. vol. 1, 84:12-85:3; *see also* Appellee's Hr'g Exs. 19-21.

Notwithstanding the funding shortage, Adsystech was requested by various District officials to continue performance because the Hansen upgrade had not been fully implemented as of January 2000. Adsystech's business development director testified that contracting officer Peck and DCRA official Lewis told Adsystech to stay on the job. Hr'g Tr. vol. 2, 482:12-17; 482:22-483:1. Neither Peck nor Lewis testified at the hearing. Adsystech's business development director testified that other District officials requested it to stay on the job as well including, contracting officer Witty, the DCRA Director, its Interim Director, and James Brady (a District official designated as contracting "specialist" before Witty assumed the role of contracting officer). Hr'g Tr. vol. 2, 472:8-473:7; 481:11-484:2.

Other hearing evidence established that several District officials with knowledge of the funding shortage failed to direct Adsystech to stop work. Adsystech's business development director testified that contracting officer Witty knew that Adsystech worked on the DCRA project throughout 2000. Hr'g Tr. vol. 2, 483:6-484:2. Witty himself testified that in "August, September of 2000[,]" contracting officer Peck asked him to "get involved in the [DCRA Hansen] contract to find out where it is going at the time they were running without funds and I was to see what I could do to help out…" Hr'g Tr. vol. 2, 491:16-492:8. Witty testified further that he was aware that Adsystech was "definitely performing work" at DCRA in August 2000[65]. Hr'g Tr. vol. 2, 531:3-18. Nonetheless, Witty testified that he did not issue a stop work order because, I'm not in a position to say absolutely stop work and then have my butt kicked because I stopped something that was in process or ready to go[.]" Hr'g Tr. vol. 2, 527:9-528:4. Witty testified further that, "[t]here are ways, at that time especially, to do a ratification to cover that, so I didn't want to be the person to stop it at that point[.]" *Id*.; 528:5-8.

Adsystech's project manager also testified that Lewis never instructed Adsystech to stop work because the contract funds were exhausted. Hr'g Tr. vol. 1, 265:9-20.[66] Further, DCRA's

[65] Witty acknowledges that he worked on two Adsystech contracts during this period but his testimony is clear that he was aware of the instant contract during the August 2000 period. *Id*.

[66] In fact, the Adsystech project manager testified that no District official ever advised Adsystech to stop contract performance, including Lewis, contract officers Peck and Witty, Office of Contracting and Procurement contracting specialist James Brady, and DCRA senior official Carlynn Fuller. Hr'g Tr. vol. 1, 265:9-20.

Interim Director conceded that she too "never told them to stop working" although she knew Adsystech employees were working on site at DCRA. Hr'g Tr. vol. 2, 612:1-614:3.[67]

In addition to the record showing that various District officials requested Adsystech to continue performance (and/or failed to direct Adsystech to stop performance), the record also shows that contracting officer Peck, contracting officer Witty, Lewis, and the DCRA Director promised Adsystech *payment* for work undertaken after contract funds were exhausted. For example, the Adsytech CEO testified that Peck stated that she would request that Witty resolve the funding issue. Hr'g Tr. vol. 1, 98:18-102:4. Although uncertain of the date that Peck made the above representation, Adsystech's CEO testified that he believed it was before the April 2001 stop work order was issued.[68] *Id.* The record also indicates that Witty informed Adsystech in an October 2000 email that "I am working on your back payment issues and expect the process to take to [m]id November to find and obligate the funds. Payment is likely to be made no sooner than January even if I pushed hard." Appellant's Hr'g Ex. 14.

Adsystech's project manager also testified that he was in attendance at meetings with Lewis where she assured Adsystech of payment. Hr'g Tr. vol. 1, 260:1-18; 263:3-8. The District's witnesses did not contradict this statement. Rather, the Interim DCRA Director testified that she attended a March 2, 2000, meeting with Adsystech, Lewis and others. When asked whether "anyone, yourself or Theresa Lewis, or anyone else" [at the meeting] promised to secure additional money for Adsystech, the Interim Director testified only that "I know I didn't[.]" Hr'g Tr. vol. 2, 593:15-597:10. Her testimony was silent as to any payment representations that Lewis may have made.

Further, the DCRA Director met with Adsystech representatives in or around July 2000. In a September 13, 2000, follow up letter, the Director wrote:

> "[b]y this letter, I am authorizing payment once we receive and accepted [*sic*] these deliverables, and have been provided with a demonstration [of] the system designed for the Office of Adjudication, as well as any additional deliverables discussed during [our]meeting."
>
> Appellee's Hr'g Ex. 7; Hr'g Tr. vol. 1, 161:14-163:14.

In addition to the inadequacy of the KPMG study, there were two other factors leading to Adsystech's performance of additional contract work herein: problems with final data conversion, and the development of DCRA's Master Business License (MBL) permit, and problems encountered with final data conversion. As regards the MBL development, Adsystech's scope enlarged significantly during the contract due to Theresa Lewis' request that it develop a MBL as part of the upgrade. A MBL is a license that replaces a merchant's

[67] The former official testified, however, that her understanding was that Adsystech was "finishing up the contract" and not doing any "new work." Hr'g Tr. vol. 2, 612:1-614:3. We do not see the significance in the distinction for purposes of determining whether District contract officials authorized (directly or through ratification) Adsystech to continue performance after contract funds had been exhausted. Neither party contends herein that work performed by Adsystech after exhaustion of contract funds was for "new work" unrelated to the parties' June 18 and October 25 contracts.

[68] The stop work order issued herein is discussed *infra* at pp. 7-8.

obligation to apply separately for multiple licenses, with a simplified process whereby a single license is issued authorizing all of a merchant's regulated activity. Hr'g Tr. vol. 1, 266:10-267:18. The MBL was not originally a part of the parties' contract scope. Hr'g Tr. vol. 1, 209:15-210:18; 236:17-238:9. Their original scope called for separately-issued multiple business licenses. *Id*. But Theresa Lewis learned about the MBL concept during a visit to Washington state, and "thought it could work in the District[.]" Hr'g Tr. vol. 2, 664:16-665:21. There was no written guidance to Adsystech, however, as to development of the MBL because the KPMG study did not address it, and much of the concept was "in [Lewis'] head." Hr'g Tr. vol. 1, 234:4-238:9; 309:21-310:21.

Lewis assigned a key person to provide Adsystech with DCRA's business logic, and in reliance thereon, Adsystech spent "numerous hours and weeks" developing a MBL that met with the assigned staffer's approval. Hr'g Tr. vol. 1, 249:5-21. When presented with Adsystech's initial MBL, however, Lewis rejected it stating that her staff had provided Adsystech with the wrong requirements. *Id*. 249:5-250:4. As a result, Adsystech informed Lewis that the changes would require additional work, and add to the cost. *Id*. 250:18-22. Ultimately, Adsystech put in the additional work to create an acceptable MBL which was used by Lewis in a demonstration for businesses of how the new licensing process would work. *See* Appellant's Supp. Ex. 38; *see also* Hr'g Tr. vol. 1, 270:7-272:19; vol. 2, 384:10-385:8.

With respect to final data conversion, Adsystech performed additional work because of DCRA's inability to provide the final data required for conversion. Adsystech testified that data conversion consisted largely of three steps: (1) selection of data to migrate, (2) Adsystech's development of the "tool" to take data from the old system to the Hansen system, and (3) the user-community's clean-up of the migrated data afterward. Hr'g Tr. vol. 2, 365:12- 368:14. Adsystech testified that DCRA staff failed to and/or were untimely delivering data from its various databases to Adsystech for ultimate conversion to the Hansen system. Hr'g Tr. vol. 1, 244:11-21. As a result, Adsystech testified that it ended up "putting development staff on there to actually get certain information that they were supposed to provide themselves, the [DCRA] IT staff[.]" Hr'g Tr. vol. 2, 368:16-369:5. Consequently, Adsystech testified that it performed more work on data conversion than intended under the parties' contract. Hr'g Tr. vol. 2, 368:15-369:16.

In total, Adsystech continued to perform services and bill therefore for 13 months following the point at which the parties were aware that contract funds were exhausted. During the 13 month period in question, Adsystech submitted 9 invoices to the appellee totaling $713,305. Adsystech's invoices were submitted at the approximate rate of one per month.[69]

The District issued a Stop Work Order (SWO) on April 3, 2001. Appellant's Hr'g Ex. 11. The SWO was issued by contracting officer Witty who testified that he issued the order because he "was told by [DCRA's IT official], the day before, that he would like to have the stop order[.]" Hr'g Tr. vol. 2, 509:15-510:4. Witty testified that he didn't think the DCRA IT person gave a reason. *Id*. 510:7-11. Witty went on to testify that his personal belief was that the order

[69] Appellant submitted one invoice on June 2, 2000, covering the four month period February 1, 2000, to May 31, 2000. Thereafter appellant submitted one invoice per month until April 12, 2001. Hr'g Supp. Ex. 36a.

came about because a newly-hired OCTO consultant[70] wanted Adsystech's contract stopped because of a funding shortage, and Adsystech's purported use of "triggers" instead of the Hansen system.[71] Hr'g Tr. vol. 2, 510:12-516:3.

The District's stated reason for issuing the SWO, however, was very different. An email sent by Witty to the Adsystech CEO approximately one month after the District issued the SWO, indicates that it was issued due to allegations that the District did not receive services they paid for and, therefore, was conducting "a routine review of all deliverables under the contract[.]"[72] The email also noted that the SWO would be released "[i]f the review finds nothing." Appellant's Hr'g Ex. 13.

At the time that the SWO was issued, Adsystech testified that the Hansen system had not gone "live" in any of the DCRA administrations,[73] but that Adsystech had completed its contractual performance and was awaiting DCRA's clean up of data redundancies so that Adsystech could do a final data conversion and go live. *See* Hr'g Tr. vol. 1, 266:4-266:9; Hr'g Tr. vol. 2, 351:16-353:2; Hr'g Tr. vol. 2, 354:3-21; Hr'g Tr. vol. 2, 369:17-370:18; Hr'g Tr. vol. 2, 383:7-22; 389:4-8; Hr'g Tr. vol. 2, 391:20-392:7.[74]

Evidence adduced at the hearing regarding the status of Adsystech's contract completion at the time of the SWO included (1) very detailed testimony by Adsystech's project manager regarding its contract performance, and (2) three contemporaneous written documents prepared between January 3, 2001, and April 6, 2001 (two prepared by Adsystech and the third by a District consultant). We briefly summarize the evidence below.

Adsystech's project manager provided very detailed testimony during which he concluded that each of the 10 tasks outlined in the parties' agreed upon statement of work was completed. He also testified that the District did not reject any Adsystech deliverables required by the contract. Hr'g Tr. vol. 2, 353:21-354:2. His testimony was not contradicted by the District's two witnesses, neither of whom appeared to be familiar with the technical nature of the contract's performance requirements, nor engaged in contract oversight or administration.[75]

The Adsystech project manager's testimony regarding its completion of each contract

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[70] The newly-hired official was "Kim Henderson." Witty testified that "if [he] had to guess", Kim Henderson joined OCTO in January 2001 (or later) and that the DCRA contract was one of his projects. Hr'g Tr. vol. 2, 513:1-515:19.

[71] Triggers are programming code that directs the system to automatically take data entered on one screen, and store or enter it elsewhere in the system. Hr'g Tr. vol. 1, 297:4-17.

[72] Mr. Witty also stated that, "[t]here are allegations that [the District has] not received all of the deliverables under the contract." Appellant's Hr'g Ex. 13.

[73] He testified that the MBL was "on the verge of going live" and was so close to going "live" that Ms. Lewis "had a public showing with businesses…[on] how it was going to change and … benefit" them, and that "[Adsystech had] already loaded it in the production one stop environment for them to showcase it[.]" Hr'g Tr. vol. 2, 384:10-385:8. He also testified that some processes in BRA were live, and that Hansen was "at some level of operation" at BLRA. Hr'g Tr. vol. 2, 384:10-390:4.

[74] Adsystech's project manager also testified that it had not completed integration of the Hansen system into the District's larger citywide Call Center program at the time of the SWO. Hr'g Tr. vol. 2, 370:19-372:15. We discuss this issue under "Task 9" *infra* at p. 10.

[75] Witty did not appear to understand the technical nature of the services provided under the contract. *See, e.g.*, Hr'g Tr. vol. 2, 513:20-514:21. Similarly, Fuller's lack of technical depth is noted herein at pp. 12-13.

task can be summarized as follows:

> TASK 1 is identified as "Project Kick-off," which is defined as a meeting between Adsystech and DCRA management and other key staff. Appellee's Hr'g Ex. 3, p.2. The project manager testified that the meeting was held in July 1999. Hr'g Tr. vol. 2, 313:12-17.
>
> TASK 2 is identified as "Project Implementation Plan," which Adsystech's project manager testified was delivered to DCRA on or before December 9, 1999. Appellee's Hr'g Ex. 3, p.2. Hr'g Tr. vol. 2, 322:7-323:1. Additionally, contracting officer Peck corroborated Adsystech's completion of the plan in her October 25, 1999, "Council Contract Summary," transmitting the October 25 contract to the Council of the District of Columbia for review. Appellee's Hr'g Ex. 5.
>
> TASK 3 is identified as "Implementation Priorities" for the Hansen upgrade, which the project manager testified was completed when Adsystech submitted the project plan to DCRA (i.e., on or before December 9, 1999). Appellee's Hr'g Ex. 3, p.2. Hr'g Tr. vol. 2, 327:7-8; 331:10-22. The project manager testified that BLRA/Group 1 was prioritized. *Id*. 327:7-329:3. He testified further that this task involved identification of over 300 new tables that Adsystech needed to build in furtherance of the upgrade. [76] *Id*. 329:4-330:9.
>
> TASK 4 is identified as "Software and Training," which included software licenses, a maintenance contract for 150 concurrent users, installation rights, a training plan, training, and a user acceptance test. Appellee's Hr'g Ex. 3, p.3. The project manager testified that the training plan and training deliverable were provided. Hr'g Tr. vol. 2, 346:5-7; 347:3-348:15. He also testified that the required software, licenses and maintenance plan were acquired per the statement of work. Hr'g Tr. vol. 2, 319:4-320:18. Finally, he testified that all of the user tests were completed. *Id*. 372:16-373:22.
>
> TASK 5 is identified as "Develop System Implementation Specifications," which the project manager testified meant creation of the tables, databases, screens, work flow processes, and reports (i.e., permits) printed out by the system. Appellee's Hr'g Ex. 3, p.4; Hr'g Tr. vol. 2, 348:16-349:16. More specifically, the project manager testified that its deliverable was to provide a template by which DCRA could print the various licenses, permits, vouchers, etc. that it issued. *Id*. 349:17-352:14. The project manager testified that Adsystech delivered templates for all of the required processes. Hr'g Tr. vol. 2, 352:16-353:2.
>
> TASK 6 is identified as "Review and Validate Process Flows," which the

[76] A table is akin to a spreadsheet that stores user data entered at a particular screen. Hr'g Tr. vol. 1, 297:18-298:20.

record indicated was not an Adsytech task, but rather a DCRA one. Appellee's Hr'g Ex. 3, p.4 ("DCRA will deliver documentation and process flows of "as is" processes to the Contractor…"); *see also* Hr'g Tr. vol. 2, 355:4-17. The project manager testified that the KPMG study was a part of this task, but that certain "content," "fields" and "business logic" information had to be gotten from the [DCRA] focus group members[.]" Hr'g Tr. vol. 2, 355:22-356:14. The project manager testified that DCRA failed to complete Task 6 in an efficient manner. *Id.* 356:15-19.

TASK 7 is identified as "Implementation Processes," which the record indicates, and the Adsystech project manager testified, meant selecting the 11 core processes that were to be implemented under the June 18 contract. Appellee's Hr'g Ex. 3, p.5; Hr'g Tr. vol. 2, 356:20-358:10.

TASK 8 is identified as "Data Conversion," which the record indicates and the project manager testified, meant delivery of a data conversion standards document to DCRA, Appellee's Hr'g Ex. 3, p.5, Hr'g Tr. vol. 2, 363:17-364:5, analysis of existing raw data for the purposes of determining whether DCRA wanted to migrate it to the new system, *id*. 366:2-10, writing "the tool" to migrate data from the old to the new system, *id*. 366:21-367:9, and data clean-up (removal of duplicates, identification of missing information, etc.). *Id*. 366:11-20. The project manager testified that Adsystech provided the conversion document to DCRA, *id*. 363:17-364:5, and completed the data conversion, except for master license duplicates as to which DCRA was responsible. *Id*. 367:10-368:14; 369:17-370:18. The project manager went on to testify that Adsystech performed more work under Task 8 than contemplated under the original contract. *Id*. 368:15-369:10. He testified that this work included the assignment of Adsystech "development staff" to work on "get[ting] certain information that they [DCRA] were supposed to provide themselves[.]" *Id*.

TASK 9 is identified as "System Interfaces and Integration," which the record indicates and the Adsystech project manager testified, meant building interfaces between the Hansen system and other District systems, including, but not limited to, the citywide Call Center and the Rapid System (a remote device for inspector data-entry). Appellee's Hr'g Ex. 3, p.6; Hr'g Tr. vol. 2, 370:19-371:18. The project manager testified that Adsystech did not complete the Call Center interface, and that he did not remember if it completed the Rapid System one. *Id.* 371:19-372:15. He testified that a meeting with Theresa Lewis to discuss the interface did not result in any decisions, and that the interface task remained unresolved at the time of the SWO. *Id*. 371:19-372:15.

TASK 10 is identified as "Customized Training Guide." Appellee's Hr'g Ex. 3, p.6. Adsystech did not provide testimony indicating whether it completed this task, nor did it submit a copy of the guide as an exhibit into our record.

In addition to the project manager's testimony regarding task completion, the record

includes an email sent by Adsystech's project manager to a District official on January 10, 2001, that references an attached Adsystech report addressing the creation of an interface between the Hansen system and a web portal under consideration.[77] Appellant's Hr'g Ex. 49. During this period, DCRA realized that it could not manually process all of the expected master business license renewals, and sought to work with Adsystech to "create a self-help web interface portal where people could go online …and they could then self-create their…license and pay for it[.]" Hr'g Tr. vol. 1, 272:20-274:5. The significance of the attachment is that it purports to summarize work *already* completed by Adsystech as of January 3, 2001 (the date on the report).[78]

Adsystech's project manager testified that the report documented the methodology by which Adsystech completed the Hansen implementation, provided a description of the completed system, and listed an inventory matrix itemizing the "sheer volume of work that [Adsystech] had to do to implement the full solution that was currently in use within DCRA[.]" Hr'g Tr. vol. 1, 284:17-299:14. The document itself portrays the Hansen implementation as having been completed, and includes a narrative that summarizes numerous components of the completed system (e.g., an Oracle Enterprise Server 8.0.3 relational database, over 1,400 tables (including 400 custom tables to support DCRA's unique business processes), over 300 triggers and stored procedures, and, functions to organize/schedule inspections and calculate fees based on application type). Appellant's Hr'g Ex. 49. In short, Exhibit 49 portrays Adsystech's performance as being complete or nearly complete as of January 3, 2001.[79]

Further, a second Adsystech contemporaneous document, dated February 8, 2001, also shows that Adsystech's performance was complete or substantially complete as of its date. Appellant's Hr'g Ex. 31. The document is a de facto punch list, and appellant's project manager testified that he and Theresa Lewis agreed that the schedule of items in the document reflected their final list of contract items requiring completion. Hr'g Tr. vol. 2, 379:2-380:22. The project manager also testified that DCRA was presented with the document one month before it issued the SWO. Hr'g Tr. vol. 1, 268:5-269:1. The document lists three categories of remaining work items as of February 8, 2001. Appellant's Hr'g Ex. 31. The Adsystech project manager provided the following testimony regarding Adsystech's eventual completion of these items:

> Master License Deployment Schedule: The project manager testified that it completed most tasks required for the final data conversion of the Master Business License, including "providing

[77] Adsystech was asked by OCTO Deputy Director Jack Pond to become involved in connecting the Hansen system to the DCRA website and, by January 2001, Adsystech was "heavily engaged" in the project. *Id*. According to Adsystech's project manager, the project eventually "subsided" and "everything stopped." Hr'g Tr. vol. 1, 290:1-17.

[78] The report is titled, "Technical Overview For Department of Consumer and Regulatory Affairs eBusiness Center Interface to the DCRA Permits and Licensing Hansen Enterprise Solution[.]" Appellant's Hr'g Ex. 49.

[79] The District did not challenge the accuracy of the report on cross-examination. Additionally, its witnesses did not challenge the accuracy of the Adsystech report in the District's case-in-chief. Finally, the District's post-hearing brief does not specifically challenge the accuracy of the report. At the hearing, however, the District objected to introduction of Appellant's Hr'g Ex. 49 because it was not produced during discovery. Hr'g Tr. vol. 2, 278:17-280:22. The Presiding Judge agreed to allow questioning on Ex. 49, but ruled that the decision on its admissibility would be determined later. *Id*. The record is unclear as to whether the Presiding Judge eventually allowed Ex. 49 into evidence.

the document, providing the mapping, actually writing the code that had to do the actual conversion process[,]" but never received DCRA's final version of the data needed to go into final production. Hr'g Tr. vol. 2, 381:1-383:15. The project manager testified that if the DCRA data had been delivered timely, Adsystech could have gone into final production on March 6, 2001. Hr'g Tr. vol. 2, 383:16-384:9. Nonetheless, the project manager testified that Adsystech provided DCRA with a system that produced master licenses. Hr'g Tr. vol. 1, 270:7-272:19. The appellant also provided an example of a completed MBL for our record. Appellant's Hr'g Ex. 38a.

OAD Deployment Schedule: The project manager testified that "there were no issues with closing out OAD. It was minor things[.]" Hr'g Tr. vol. 2, 387:2-389:3. As a whole, the project manager appeared to have very little recollection as to whether it completed OAD's Hansen implementation punch list. *Id.*

6 Remaining Adsystech Work Items: The project manager testified that one outstanding item was creation of a "flag" notifying the Office of Tax and Revenue of certain tax information before issuance of a license. Hr'g Tr. vol. 2, 390:5-22. The project manager testified that it was completed. *Id.* 391:5-13. A second outstanding item pertained to corporations, which the project manager also testified was done. *Id.* 391:14-19. A third outstanding item was described as matching addresses in DCRA's legacy database to business licenses in the Hansen system. *Id.* 391:20-393:19. The project manager testified that the conversion of the legacy database addresses to Hansen never occurred because DCRA was "not capable of doing" it. *Id.* A fourth outstanding item was Adsystech's receipt of final DCRA feedback on the MBL templates that appellant developed. *Id.* 394:13-396:16. The project manager testified that it received final feedback from Theresa Lewis on MBL templates. *Id.* 395:12-396:16. A fifth remaining work item entailed revisions Adsystech was supposed to make to DCRA's renewal bill report. *Id.* 396:17-398:5. However, the project manager testified that DCRA needed to provide Adsystech with data, and then Adsystech would make the final revisions. *Id.* The project manager testified that he could not remember if the fifth item was finalized. *Id.* A sixth remaining Adsystech work item was data clean-up. Hr'g Tr. vol. 1, 268:5-270:6. The project manager testified that data conversion was complete by this time (i.e., February 8, 2001) because data clean up would only occur after conversion. *Id.* He also testified that DCRA was given two weeks to review data in the Hansen system, and then tell Adsystech "what to clean up." *Id.* Adsystech helped

> DCRA identify problems by providing them with "statistics[,]" "the types of problems[,]" and the "total numbers" of problems. Hr'g Tr. vol. 2, 398:6-400:13.

At the hearing, the District attempted to use the former DCRA Interim Director as a witness to dispute Adsystech's evidence regarding contract completion. In this regard, the District sought to have the Interim Director validate statements made in an independent consultant's two written reports that were critical of Adsystech's performance. Neither the author of the reports, nor the District officials to whom they were submitted, testified at the hearing.[80] The Interim Director, however, did not appear to have sufficient personal knowledge of Adsystech's performance, nor the technical mastery of the reports' subject matter to discredit Adsystech's performance.

Specifically, the Interim Director testified that "at some point" there were user complaints about the Adsystech system "not doing what they thought … it should do", Hr'g Tr. vol. 2, 626:20-629:17, and that DCRA then retained Hansen Information Technologies (the consultant) to "find out does [Adsystech's Hansen implementation] do what it is supposed to do[.]" *Id*. This development led to the consultant's issuance of two critical reports on Adsystech's implementation, and the consultant's correction of the purported deficiencies. The consultant was paid $73,020 to correct 81 purported deficiencies noted in its first report dated April 6, 2001. Appellee's Hr'g Ex. 10; Hr'g Tr. vol. 2, 632:8-635:5.[81] The consultant was paid an additional $259,692 to correct 44 problems identified in a second report dated April 30, 2001. Appellee's Hr'g Ex. 69; Hr'g Tr. vol. 2, 631:10-632:4; 648:1-18; Appellee's Hr'g Ex. 73.

However, the Interim Director did not appear knowledgeable regarding the deficiencies noted in the first or second report. For example, the Interim Director testified that she didn't know whether the consultant did any of the initial work (i.e., relating to the 81 identified first set of problems) because, "I don't have the technical knowledge to go through each of these to say what was work and what was just an assessment[.]" Hr'g Tr. vol. 2, 648:19-649:7. On cross-examination the former Interim Director testified that she was not DCRA's technical person, and conceded that the services performed by the consultant pursuant to the second contract may have been beyond the scope of Adsystech's contract. Hr'g Tr. vol. 2, 653:6-654:16. Her latter testimony appears consistent with that of Adsystech's project manager, whose testimony noted that the consultant's criticism of Adsystech pertained to DCRA's upgrade from Hansen Version 7.0 to Version 7.5, which exceeded Adsystech's contractual obligation to implement Version 7.0. Hr'g Tr. vol. 2, 429:11-430:12. The parties' June 18 statement of work specified an upgrade to Hansen Version 7.0. Appellee's Hr'g Ex. 3.

In contrast to the former Interim Director's testimony, the Adsystech project manager provided an item-by-item response to the 81 purported deficiencies noted in the consultant's first

[80] The first report was signed by the consultant's Chief Operating Officer "Kent Johnson," based on analyses performed by employees "Keith Hobday" and "Terry Dunn." Appellee's Hr'g Ex. 10. It was addressed to "Kim Henderson," an OCTO contractor dispatched to DCRA for help on some of its problems. Hr'g Tr. vol. 2, 628:17-629:2; 649:21-650:19. Neither Johnson, Hobday, Dunn nor Henderson testified at the hearing.

[81] The purchase requisition is signed by the Interim Director on April 17, 2001, and by the contracting officer (name unclear) on April 18, 2001. Appellee's Hr'g Ex. 68.

report. Hr'g Tr. vol. 2, 375:10-431:13. The essence of the project manager's testimony was that the consultant's noted deficiencies were either things Adsystech was not tasked to do (contract "enhancements" requiring a modification, items not on the parties agreed-to punch list, etc.), or minor issues like training. *Id*. Moreover, the Board notes that none of the 81 purported deficiencies appear on the parties' February 8, 2001, punch list. Appellant's Hr'g Ex. 31 (discussed infra at pp. 11-12). Finally, the Board notes that the consultant's April 6 report corroborates Adsystech's contention that there were considerable data redundancy problems in DCRA's database. *See, e.g*., Hr'g Tr. vol. 2, 425:13-18; 428:11-16 (noting that the consultant's report mentions the same data redundancies at items H.2, H.4, and H.12 that Adsystech complained of in its communications with DCRA).

The SWO was never released, nor did Adsystech ever receive a cure notice, termination letter, or similar notification from the District. Hr'g Tr.vol. 1, 133:19-135:10. Adsystech's instant claim is for the $44,165 balance remaining on its June 18, 1999, contract, and the $713,305 in nine unpaid invoices under its October 25, 1999, contract. Therefore, in all, appellant seeks an equitable adjustment in the amount of $757,470 under the theory of constructive change (implied ratification). Alternatively, the appellant seeks recovery under the theories of promissory estoppel and quantum meruit.

Conversely, the appellee contends that the Anti-Deficiency Act bars payment because Adsystech's billings exceed the contract ceiling price, and/or that the parties' agreement to continue services after funds exhaustion embodies an impermissible oral agreement. Appellee's Post Hr'g Br. 11-14. The appellee also denies that District contracting officials ratified Adsystech's provision of services, asserting that ratification is valid only when it follows the "official ratification procedure" set forth in former D.C. Code § 2-301.05(d)(5) and the District's *Procurement Policy and Procedure Directive No. 1800.00* (each discussed below). *Id*. 14-20. Finally, the District contends that the Board lacks jurisdiction over quantum meruit claims, that equitable estoppel does not apply because its agents were not authorized to enter a contract with Adsystech, and that equitable adjustment cannot be invoked to authorize a payment that exceeds a District purchase order. *Id*. 20-26.

DISCUSSION

We exercise jurisdiction over this matter pursuant to D.C. Code §2-360.03(a)(2) (2011).[82] The Board's jurisdiction herein is not disputed by the appellee. Appellant submitted claims to contracting officer "James Brady" pertaining to the above on December 9, 2002. AF Ex. 18. In a letter dated December 20, 2002, Brady informed the appellant that "Bruce Witty is the correct Contracting Officer[,]" and that the claim would be forwarded to Witty. *Id*. Our record does not indicate when, or whether, Brady forwarded appellant's claims to Witty. No decision was ever forthcoming from Witty. As a result, the appellant filed its Notice of Appeal with the Board on June 20, 2003, noting that its claim had been "pending, without decision…since late December 2002[.]" AF, Notice of Appeal, June 20, 2002. Under these circumstances, we conclude that the Board's jurisdictional prerequisites have been met in this case.

The recitation of facts stated in the background, discussion, and conclusion sections

[82] Prior to April 8, 2011, the Board exercised jurisdiction pursuant to D.C. Code § 2-309.03(a)(2)(2001).

constitute 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.

There are four issues presented in this case. The first issue is whether the appellant is entitled to an equitable adjustment under the theory of constructive changes. The second issue is whether Adsystech performed its contractual obligations herein. The third issue is whether the Anti-Deficiency Act bars appellant's recovery. Finally, the fourth issue is whether appellee's oral requests that Adsystech continue performance on the instant contract after the depletion of contract funds constitutes an impermissible oral contract.

Based upon our review of the record, we conclude that Adsystech is entitled to an equitable adjustment for constructive changes ordered and/or ratified by District contracting officials. We also conclude that Adsystech completed its contractual obligation to implement DCRA's Hansen upgrade. Further, we conclude that the Anti-Deficiency Act does not apply instantly, and thus is not a bar to appellant's recovery. Finally, we conclude that former D.C. Code §§ 2-301.05(d)(5) (ratification procedures) and 2-301.05(d)(3) (barring oral contracts) do not apply instantly. We remand this matter to the appellee for a determination of quantum. The parties shall notify the Board within 30 days of the status of negotiations. We address the merits issues below.

Appellant Is Entitled To An Equitable Adjustment Due To Constructive Changes

An equitable adjustment is "simply [a] corrective measure utilized to keep a contractor whole when the Government modifies a contract[.]" *Appeal of Grunley Const., Inc.,* CAB No. D-910, 41 D.C. Reg. 3622, 3638 (Sept. 14, 1993)(citing *Construction Corporation v. United States*, 163 Ct. Cl. 97 (1963)). In order to establish eligibility for an adjustment based on a constructive change, a contractor must demonstrate the occurrence of two events: a bona fide "change" and the issuance of an "order." *D.C. v. Org. for Envtl. Growth* , 700 A.2d 185, 203 (D.C. 1997) *rev'd on other grounds sub nom, Abadie v. Org. for Envtl. Growth,* 806 A.2d 1225 (D.C. 2002); *Appeal of Technical Construction, Inc.,* CAB No. D-730, 36 D.C. Reg. 4067, 4085 (Mar. 14, 1989). A "change" is established when the actual performance goes beyond the minimum standards required by the contract. *Org. for Envtl. Growth* at 203. An "order" can be shown whenever a government representative, by words or deeds that go beyond mere advice, comment, suggestion, or opinion, requires the contractor to perform work which is not a necessary part of the contract. *Id.*

In the instant case, Adsystech has established both the "change" and "order" elements required to warrant an equitable adjustment. With respect to contract changes, the record shows that Adsystech's actual performance went beyond the contract's minimum standards in four ways. First, District contracting officials directed Adsystech to continue contract performance beyond the point at which contract funds became depleted. This was done to secure Adsystech's performance in *completing* "to be" systems mapping, MBL development, and final data conversion. Thus, contracting officers Peck and Witty directed Adsystech to finish the Hansen upgrade. Peck directed Adsystech to continue performance through a direct request. Witty, through his failure to *stop* Adsystech's performance, also "directed" Adsystech to continue

performance. The evidence shows that Peck told Adsystech directly to stay on the job. Hr'g Tr. vol. 2, 482:12-17; 482:22-483:1. The evidence also shows that Witty knew as early as "August, September of 2000" that lapsed contract funds were an issue and that Adsystech was "definitely" still performing, yet he did not order them to stop performance. Hr'g Tr. vol. 2, 531:3-18; 527:9-528:4.

Second, Adsystech performed additional contract work prompted by the inadequacy of KPMG's study of DCRA's "to be" processes. Hr'g Tr. vol. 2, 355:4-356:19. In this regard, TASK 6 of the contract required DCRA to "deliver documentation and process flows of as is processes" to Adsystech. Appellee's Hr'g Ex. 3, 4; *see also* Hr'g Tr. vol. 2, 355:4-17. As we noted, deficiencies in the KPMG study caused Adsystech to work directly with designated DCRA staff to "extract and develop" system requirements through incremental mapping. Hr'g Tr. vol. 1, 65:5-67:4; 240:20-242:22. This was a lengthy and tedious process, with dysfunctional meetings and reluctant DCRA stakeholders. Hr'g Tr. vol. 1, 243:1-244:21; Hr'g Tr. vol. 1, 243:1-244:21. Moreover, this incremental approach to mapping DCRA's system requirements resulted in additional work, as well as changes to contract cost and scheduling. Hr'g Tr. vol. 1, 67:14-71:1.

Third, Adsystech performed additional work prompted by DCRA's request for development of a MBL, and the multiple and differing requirements communicated to Adsystech regarding MBL development. In this regard, we noted that the MBL was not originally part of the parties' contract scope. Appellee's Hr'g Ex. 3, p.4; Hr'g Tr. vol. 1, 209:15-210:18; 236:17-238:9. The MBL concept "started out in Lewis' head," and was developed largely from scratch because the KPMG study was not useful guidance for developing MBL requirements. Hr'g Tr. vol. 1, 234:4-238:9; 309:21-310:21. Although TASK 5 of the parties' contract called for the development of licenses, termed "reports" in the statement of work, there is no mention of a MBL, nor of a "report" with the functionality of the MBL. Appellee's Hr'g Ex. 3, p.4; Hr'g Tr. vol. 2, 348:16-349:16. That notwithstanding, Adsystech eventually spent "numerous hours and weeks" developing a MBL according to requirements provided by DCRA staff, Hr'g Tr. vol. 1, 249:5-21, only to have Lewis reject its work because she disagreed with how DCRA staff identified MBL requirements. *Id*. 249:5-250:4. This led to even more MBL development work and the additional costs associated therewith. *Id*. 250:18-22.

Finally, Adsystech performed additional work helping DCRA complete internal data conversion. In this regard, TASK 8 of the parties' contract required, *inter alia*, Adsystech to deliver a Data Conversion Standards Document to DCRA, Appellee's Hr'g Ex. 3, 5; Hr'g Tr. vol. 2, 363:17-364:5, analyze raw data with DCRA for the purpose of allowing DCRA to determine the data to be migrated to the new system, *id*. 366:2-10, and perform data clean-up (removal of duplicates, identification of missing information, etc.). *Id*. 366:11-20. While Adsystech provided the conversion document to DCRA, *id*. 363:17-364:5, DCRA failed to complete data clean-up for the MBL. *Id*. 367:10-368:14; 369:17-370:18. DCRA staff also failed and/or were untimely delivering data from its various databases to Adsystech for ultimate conversion to the Hansen system. Hr'g Tr. vol. 1, 244:11-21. This required Adsystech to assume more work under Task 8 than was contemplated under the original contract. *Id*. 368:15-369:10. This additional work included the assignment of Adsystech "development staff" to work on "get[ting] certain information that they [DCRA] were supposed to provide themselves[.]" *Id*. It

also included Adsystech's development of "routines" to assist DCRA with identifying bad and duplicative data. *See* Hr'g Tr. vol. 2, 367:10-368:14.

With respect to the "order" element required for an equitable pricing adjustment, the record shows that District contracting officials Peck and Witty directed Adsystech to "stay on the job" to complete DCRA's upgrade. The officials' request that Adsystech remain on the job necessarily implied that Adsystech was directed by them to "finish" incomplete tasks, i.e., "to be" systems mapping, MBL development, and final data conversion. Thus, we conclude that authorized District officials ordered Adsystech to "stay on the job" to finish DCRA's upgrade, and directed them to perform the additional work under Tasks 5, 6 and 8 as noted above.

The District's manner of "ordering" these changes included contracting officer Peck's direct request that Adsystech stay on the job, contracting officer Witty's conduct consistent with a request that Adsystech continue performance, and Peck and Witty's ratification of requests made by DCRA's former Director and Lewis (the COTR) that Adsystech continue performance. As regards the contracting officer Peck's direct request that Adsystech continue contract performance after funds depletion, she told Adsystech to stay on the job. Hr'g Tr. vol. 2, 482:12-17; 482:22-483:1. Peck was clearly mindful of the funding shortage when she directed Adsystech to continue working. For example, Adsystech's CEO testified that Peck stated that she would request that Witty resolve the funding issue. Hr'g Tr. vol. 1, 98:18-102:4. This was corroborated by Witty himself, who testified that in "August, September of 2000," contracting officer Peck asked him to "get involved in the [DCRA Hansen] contract to find out where it is going at the time they were *running without funds* and I was to see what I could do to help out…" Hr'g Tr. vol. 2, 491:16-492:8 (emphasis added).

In addition to contracting officer Peck's direct request, the *conduct* of contracting officer Witty amounted to an implied order to Adsystech to remain on the job notwithstanding the funding shortage. For example, Witty knew as early as "August, September of 2000" that lapsed contract funds were an issue, and that Adsystech was "definitely" still performing. Hr'g Tr. vol. 2, 531:3-18. Nonetheless, by his own testimony, Witty took no action to stop Adsystech's performance because he did not want to "have my butt kicked because I stopped something that was in process or ready to go[.]" Hr'g Tr. vol. 2, 527:9-528:4.

Witty even took matters a step further. An October 19, 2000, email that he sent to Adsystech's CEO states that, "I am working on your back payment issues and expect the process to take to [m]id November to find and obligate the funds. Payment is likely to be made no sooner than January even if I pushed hard." Appellant's Hr'g Ex. 14. Adsystech's CEO testified that it was "more likely" than not that the October 2000 email referred to the instant contract, as well as a separate Adsystech contract not at issue in this case. Hr'g Tr. vol. 1, 182:17-183:9.[83] Even though Witty never secured Adsystech's payment, it appears that his email amounts to an acknowledgement that the appellee was well aware of, and accepted responsibility for, Adsystech's continued performance.

[83] Witty's testimony that he did not learn about Adsystech's funding problem on the instant contract until after the stop work order is not convincing. *See* Hr'g Tr. vol. 2, 579:3-580:11; see also Appellee's Hr'g Ex. 13. There are too many instances in the record where Witty's testimony plainly contradicts such an assertion. For example, Witty testified that he knew about the funding problem in "August, September of 2000[.]" Hr'g Tr. Vol. 2, 491:16-492:8.

Finally, the evidence also showed that contracting officials Peck and Witty *ratified* the conduct of DCRA agency representatives Theresa Lewis and the DCRA Director, both of whom requested continuing performance by Adsystech and promised payment therefore. As we have noted, ratification may be found where the ratifying government official has actual or constructive knowledge of a representative's unauthorized act and expressly or impliedly adopts the act. *Appeal of Chief Procurement Officer*, CAB No. D-1182, 50 D.C. Reg. 7465, 7468-7469 (Nov. 29, 2002) (*citing Appeal of W.M. Schlosser*, CAB No. D-903, 42 D.C. Reg. 4824, (Sept. 13, 1994)). Moreover, a contracting official's action to obtain funding for changes ordered by unauthorized representatives constitutes ratification of the unauthorized changes. *Id*. at 7469 (citing *Reliable Disposal Company, Inc.* ASBCA 40100, 91-2 BCA ¶ 23,895 at 119,718). A contracting officer's silence and/or failure to stop contract performance may also constitute ratification. *Id*. In this case, DCRA's then Director and Lewis requested Adsystech to perform additional work, to continue working beyond the funding lapse, and promised them payment therefore. Peck and Witty ratified these agency representatives' conduct.

For example, Adsystech's project manager attended meetings with Ms. Lewis where she assured Adsystech of payment. Hr'g Tr. vol. 1, 260:1-18; 263:3-8. Ms. Lewis told Adsystech's business development director to stay on the job. Hr'g Tr. vol. 2, 482:12-17. Ms. Lewis never informed Adsystech that it should stop work because the contract funds were exhausted. Hr'g Tr. vol. 1, 265:9-20. Similarly, the DCRA Director promised Adsystech payment in the aforementioned September 13, 2000, letter, stating, "By this letter, I am authorizing payment once we receive and accepted [*sic*] these deliverables, and have been provided with a demonstration [of] the system designed for the Office of Adjudication, as well as any additional deliverables discussed during [our] meeting." Appellee's Hr'g Ex. 7; Hr'g Tr. vol. 1, 161:14-163:14. Rather than reject the DCRA representatives' conduct, contracting officers Peck and Witty enabled it. As noted, Peck ratified the DCRA agency representatives' conduct by directing Adsystech to stay on the job, and promising Adsystech payment for its continued services. Hr'g Tr. vol. 2, 482:12-17; 482:22-483:1; 491:16-492:8; Hr'g Tr. vol. 1, 98:18-102:4. Similarly, Witty ratified the DCRA agency representatives' conduct because he was aware of the work progress yet he did not order Adsystech to stop work at any point prior to his April 3, 2001, SWO. Hr'g Tr. vol. 2, 527:9-528:4.

Thus, we conclude that Adsystech has met the requirements for an equitable adjustment due to constructive contract changes. Adsystech has shown that District contract officials changed and/or ratified changes to the parties' contract. Adsystech has also showed that the changes were ordered by authorized District contracting officials.

We reject the District's erroneous argument that lawful ratification did not occur here. The District asserts that ratification would only have been valid if contracting officers Peck and Witty followed the "official ratification procedure" set forth in former D.C. Code § 2.301.05(d)(5) and the District's *Procurement Policy and Procedure Directive No. 1800.00*.[84] In pertinent part, §2-301.05(d)(5) provided:

(5) The Chief Procurement Officer, or a designee, may authorize payment for

[84] These provisions were in effect at all times material to the instant dispute.

supplies or services received without a valid written contract if:

(A) Supplies or services have been provided to and accepted by the District government, or the District government otherwise has obtained or will obtain a benefit resulting from provision of supplies or services without a valid written contract;

(B) An agency contracting officer determines that the price for the supplies or services provided without a valid written contract is fair and reasonable;

(C) An agency contracting officer recommends payment for the supplies or services provided without a valid written contract;

(D) The Chief Financial Officer, or a designee, certifies that appropriated funds are available; and

(E) The request for authorization for payment for supplies or services received without a valid written contract is in accordance with any other procedures or limitations prescribed by the Chief Procurement Officer; and

(F) (i) The amount for supplies or services provided to and accepted by the District government does not exceed $100,000; and (ii) If an agency exceeds the specified threshold, the Chief Procurement Officer shall forward the request, by act transmitted by the Mayor, to the Council for review and approval.

Former D.C. Code § 2-301.05(d)(5).

In addition, the appellee argues that the Office of Contracting and Procurement (OCP) issued a Procurement Policy & Procedure Directive for the ratification of unauthorized commitments. AF Ex. 86, *Procurement Policy and Procedure Directive No. 1800.00*. The appellee contends that the directive required that a request for the ratification of an unauthorized commitment be approved by the District's Chief Procurement Officer, Chief Financial Officer, agency head, agency chief contracting officer, and the agency corporation counsel. AF Ex. 86.

Appellee's attempted application of §2-301.05(d)(5) and OCP's internal administrative issuance to the instant matter is erroneous because Peck and Witty, as Chief Technology Officer and contracting chief within the Office of the Chief Technology Officer, respectively, were exempt from the Procurement Practices Act (PPA) as to Year 2000 procurements during the period in question. During the years 1998-1999, nearly all public and private-sector entities were preparing for massive computer system upgrades to prevent disruption anticipated by the onset of calendar year 2000. The Y2K problem, as the crisis came to be known, resulted from the inability of most computers to recognize dates beyond the year 1999.

In the District, computer systems supporting public safety, revenue collection, traffic control, payroll, social welfare benefits, pensions and more were identified as requiring emergency remediation to avoid Y2K service lapses/chaos. Reports issued by the General

Accounting Office (GAO) in October 1998 and February 1999 noted that District efforts to become Y2K compliant were "significantly behind" and "far behind." *GAO, Year 2000 Computing Crisis, The District Faces Tremendous Challenges in Ensuring Vital Services Are Not Disrupted*, Statement of Jack L. Brock, Director, Governmentwide and Defense Information Systems, Oct. 2, 1998; *GAO, Year 2000 Computing Crisis, The District Remains Behind Schedule*, Statement of Jack L. Brock, Director, Governmentwide and Defense Information Systems, February 19, 1999.

In response to the Y2K crisis, the District enacted the "Chief Technology Officer Year 2000 Remediation Procurement Authority Temporary Amendment Act of 1999." D.C. Law 13-17, 46 D.C. Reg. 6314 (July 17, 1999). The Act specifically added new subsection (m) to §320 of the PPA as follows:

> (m)(1) Nothing in this act shall affect the authority of the Office of the Chief Technology Officer to execute Year 2000 remediation contracts. For the purpose of the section, the term "Year 2000 remediation contracts" means procurement for the correction of computers, computer-operated systems, and equipment operated by embedded computer chips, to ensure the proper recognition and processing of dates on or after January 1, 2000.

The new provision was added to the section of the PPA exempting a variety of District agencies from PPA coverage. *See* former D.C. Code §1183.20 (1981).

The instant October 25, 1999, Hansen upgrade contract was specifically noted as a Y2K contract by the Chief Technology Officer in correspondence transmitting the contract to the Council for review. Appellee's Hr'g Ex. 5; *see also* Hr'g Tr. vol. 1, 80:19-83-16. The statement of work for the Hansen upgrade also stated that "the system must be Year 2000 compliant[.]" *See* Appellee's Hr'g Ex. 3, General Requirements, 8. Thus, we conclude that §2-301.05(d)(5) was not applicable to the DCRA Hansen upgrade contract discussed herein, and is not a bar to appellant's entitlement claim.

Adsystech Performed The Change Order Work

The District's post hearing brief does not appear to dispute that Adsystech delivered all deliverables required by the contracts. Appellee's Post Hr'g Br. 2-4, 6-10. The Board concludes that the record shows by a preponderance of the evidence that Adsystech has completed its performance of eight of the 10 tasks identified in the parties' statement of work. Thus, Adsystech has completed Tasks 1-8. *See* discussion infra at pp. 9-10. The record is inconclusive as to whether Adsystech completed Tasks 9-10.

As to the 10 tasks stated in the parties' statement of work, Adsystech's project manager provided detailed testimony noting its completion of eight of the 10 required tasks, which we have summarized infra at pp. 9-10. *See also* Hr'g Tr. vol. 2, 375:10-396:16. The District's witnesses did not discredit Adsystech's testimony regarding completion of tasks, and appeared to lack knowledge regarding the technical nature of contract performance. Hr'g Tr. vol. 2, 513:20-514:13 (Witty); Hr'g Tr. vol. 2, 648:19-649:7; 653:6-654:16 (Fuller). Similarly, Adsystech's

witness testified that it completed the six punch list items submitted to the District on February 8, 2001. The District's witnesses have not discredited this testimony either. Adsystech's testimony that it finished tasks herein is corroborated by Appellant's Hr'g Ex. 49, which shows that as of January 8, 2001, most, if not all, of the Hansen upgrade implementation tasks had been completed. Appellant's Hr'g Ex. 49. There was also testimony that the MBL was used by Lewis in a demonstration for businesses of how the new licensing process would work. Hr'g Tr. vol. 1, 270:7-272:19; vol. 2, 384:10-385:8, and the record included a sample of a completed MBL. Appellant's Hr'g Ex. 38a.

The District's sole witness to testify regarding contract performance, former Interim Director Fuller, testified that she thought Adsystech had completed the Hansen upgrade for most of the Business Land Regulation Administration and the Housing Regulation Administration as early as March 2000. Hr'g Tr. vol. 2, 602:2-603:15. Fuller also testified that she was unsure of how much work Adsystech had completed in the Office of Adjudication division as of March 2000. *Id*. 602:6-609:19. Taken as a whole, the appellant has met its burden regarding substantial completion of tasks required to finalize DCRA's Hansen implementation. Adsystech's evidence includes the detailed testimony of its project manager regarding each task, as well as the project manager's testimony regarding Adsystech's completion of the punch list items remaining as of February 8, 2001. *See* discussion *infra* at pp. 11-12. *See also* Appellant's Hr'g Ex. 31. We conclude that Adsystech has met its burden regarding substantial completion of performance herein.

The Anti-Deficiency Act Does Not Bar Appellant's Recovery

The District argues that the Anti-Deficiency Act, 31 U.S.C. § 1341, bars recovery herein because once the "depletion of the funds encumbered by the [October 25] Purchase Order" occurred, there was no valid written agreement between the parties. Appellee's Post Hr'g Br. 11-12. In other words, the District contends that once contract funds were depleted, any agreement between Adsytech and the District for further work would have been a contract for the "future payment of money, in advance of or in excess of existing appropriations" and thus void *ab initio*. *Id*.

In support of its argument, the District contends that the purchase order became depleted once Adsystech submitted bills totaling $1,175,086.47 against a contract ceiling of $476,317. Appellee's Post Hr'g Br. 11. The record shows that this "depletion" would have occurred (if at all) on or around June 2, 2000, with Adsystech's submission of Invoice No. 4 for $405,717.31. *See* Appellant's Hr'g Ex. 35. If paid, the parties would have exceeded the $476,317 contract price by $285,558.96. We do not agree with the District's analysis. From an Anti Deficiency standpoint, there were sufficient appropriations during FY2000 and FY2001 to support Adsystech's continuing contract performance as noted herein.

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).

In *Appeal of Advantage Energy LLC*, CAB No. D-1199 (Dec. 3, 2010), http://app.cab.dc.gov/Worksite/download.asp?filepath=Opinion.PDF&minLevel=0[85], we noted the well settled rule 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[.]" *Id.* (*citing Cherokee Nation v. Leavitt*, 543 U.S. 631, 637-38 (2005).

The FY 2000 District of Columbia Appropriations Act authorized $190,335,000 as an appropriation to the District "for the current fiscal year out of the general fund of the District of Columbia" for agencies within the Economic Development and Regulation cluster.[86] Public Law No. 106-113, Nov. 29, 1999, 113 Stat. 1501, 1505-08. Apart from a restriction directing $15,000,000 to District Business Improvement Districts, the remaining funds are unrestricted.[87] Based on the federal appropriation, the District enacted its own FY2000 budget, which included a lump sum appropriation of $3,597,000 in the DCRA contractual services line item. *Government of the District of Columbia, Proposed FY2001 Budget and Financial Plan*, B-100. Both figures noted above clearly exceed the $757,470 in outstanding invoices at issue here.

Additionally, the FY2001 District of Columbia Appropriations Act authorized $205,638,000 in appropriated funds within the Economic Development and Regulation cluster, with no restrictions germane to the instant case. Public Law No. 106-553, December 26, 2000, 114 Stat. 2762. Based on the FY 2001 federal appropriation, the District enacted its own budget which included a lump sum appropriation of $3,087,000 in the DCRA contractual services line item. *Government of the District of Columbia, Proposed FY2002 Budget and Financial Plan*, March 12, 2001, B-43. Similarly, it is clear that sufficient funds were appropriated to cover the claimed Adsystech amount. Thus, the Board's review of appropriations for fiscal years 2000 and 2001 leads us to conclude that the Anti-Deficiency Act does not bar Adsystech's entitlement claim herein.

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[85] *Advantage Energy, LLC* is currently pending publication in the D.C. Register and in commercial databases. In the interim, we have cited to the Board's website, which is an acceptable alternative citation.

[86] The Board takes judicial notice that DCRA is within the Economic Development Regulation cluster of agencies.

[87] As to appropriation restrictions, there are a number of general restrictions that have no relevance instantly. For example, there are restrictions against the use of the appropriation for partisan political activity, or for publicity or propaganda to support or defeat congressional legislation. Public Law No. 106-113, §§110, 112, Nov. 29, 1999, 113 Stat. 1501.

The Provisions of Former D.C. Code §2-301.05(d)(3) Do Not Apply

Finally, the District argues that Adsystech's recovery is barred by former D.C. Code §2-301.05(d)(3). In pertinent part, the cited provision states as follows:

> (3) Except as authorized under paragraph (4) or (5) of this subsection, any vendor who, after April 12, 1997, enters into an oral agreement with a District employee to provide supplies or services to the District government without a valid written contract shall not be paid. If the oral agreement was entered into by District employee at the direction of a supervisor, the supervisor shall be terminated. The Mayor shall submit a report to the Council at least 4 times a year on the number of person cited or terminated under this paragraph.

Former D.C. Code §2-301.05(d)(3).

We reject appellee's argument regarding the above statutory provision for the same reason that we rejected its argument regarding former §2-301.05(d)(5): the Chief Technology Officer's Year 2000 contracts were exempt from PPA coverage during this period.

CONCLUSION

For the reasons noted herein, the Board finds that Adsystech is entitled to an equitable adjustment against the District. District contracting officers issued and/or ratified constructive change orders directing Adsystech to continue contract performance after the depletion of funds for the purpose of completing DCRA's Hansen upgrade. Because we have concluded that Adsystech is entitled to an equitable adjustment, we will not consider appellant's quantum merit and equitable estoppel theories of recovery. The case is remanded to the appellee for a determination of quantum. The parties are instructed to inform the Board regarding the status of quantum discussions within 30 days.

SO ORDERED.

DATED: August 15, 2013

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

CONCURRING:

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

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

PHOENIX CAPITAL PARTNERS, LLC	)	
	)	CAB No. P-0938
	)	
Solicitation No. CFOPD-13-RFQ-025	)	

For the Protester, Phoenix Capital Partners, LLC: Edward J. Tolchin, Ira E. Hoffman; Offit Kurman, P.A. For the District of Columbia, Office of the Chief Financial Officer: Robert Schildkraut, Jody Harrington; Office of the Attorney General.

Opinion by Administrative Judge Monica C. Parchment with Administrative Judge Maxine E. McBean concurring.

OPINION

Filing ID 54008345

This protest arises from the District of Columbia Office of the Chief Financial Officer ("OCFO") contracting officer's refusal to consider a Statement of Qualifications ("SOQ") submitted 24 minutes after the submission deadline by the Phoenix Capital Partners, LLC ("Phoenix") in response to Request for Qualifications No. CFOPD-13-RFQ-025 (the "RFQ"). The protester contends that the OCFO should have considered its SOQ despite its late submission. The OCFO maintains that the contracting officer properly rejected Phoenix's SOQ as late. For the reasons set forth herein, we deny the protest.

FACTUAL BACKGROUND

The Office of Contracts of the OCFO issued Request for Qualifications No. CFOPD-13-RFQ-025 on April 25, 2013, in an effort to prequalify prospective contractors for future procurements of financial advisory services on behalf of the Office of Finance and Treasury. (Agency Report ("AR") Ex. 2, at 1-3.) The RFQ sought to prequalify prospective contractors in four different categories of financial advisory services.[88] (*Id.* ¶¶ B.1.1, C.1, C.2.) Along these lines, the RFQ provided detailed requirements that any prequalified vendor would be expected to meet for each of the four categories of services. (*See generally id.* ¶¶ C.3.1-C.3.4.) The RFQ made clear, however, that prequalification alone would not commit the OCFO to purchase any quantity of services from a vendor. (*Id.* ¶¶ B.2.3, B.2.5.) Rather, the OCFO would acquire services through subsequent procurements, participation in which would be limited to prequalified vendors. (*Id.* ¶¶ B.2.2, B.2.4.)

[88] The four categories listed in the RFQ were: (1) Debt Obligations; (2) Economic Development Financings; (3) Management of Real Property, Economic Development and Other Financing Programs; and (4) General Advisory Services. (AR Ex. 2 ¶ C.1.2.)

The RFQ directed vendors to submit technical proposals in response to the RFQ that identified the categories of services for which the vendor was seeking prequalification. (*Id.* ¶¶ L.3.2, L.3.3.1.) The RFQ also specified that offerors that submitted technical proposals were required to meet the specific technical criteria set forth in Section M of the RFQ. (*Id.* ¶¶ L.3.3.2, M.3.1.) The initial cover page to the RFQ stated that responses would be received by the District until 2:00 p.m. on May 16, 2013. (*Id.* at 1.) The delivery instructions for proposals in response to the RFQ further stated that responses were due "not later than *proposal due date as specified on page 1 of this solicitation or as amended.*" (*Id.* ¶ L.12.2.C (emphasis in original).) Additionally, under the express terms of the RFQ, the District would not consider a late proposal unless one of three exceptions applied. (*Id.* ¶¶ L.8.1, L.8.3.)[89] The OCFO amended the RFQ twice; however, neither of those amendments modified the May 16, 2013, submission deadline. (*See generally* AR Ex. 3.)

Phoenix submitted its SOQ in response to the RFQ at 2:24 p.m. on May 16, 2013 -- 24 minutes after the submission deadline. (AR Ex. 5.) On May 23, 2013, the OCFO contracting officer informed Phoenix that the District would not consider its SOQ because it was submitted after the submission deadline. (AR Ex. 4 ¶ 9.) Phoenix timely protested the OCFO's refusal to consider its submission by filing the present protest with the Board on May 31, 2013.

Contentions of the Parties

Phoenix does not dispute that it submitted its SOQ after the submission deadline, nor does Phoenix argue that the late submission was caused by some act on the part of the OCFO. (*See* Protest 2 ("Phoenix was inadvertently delayed in delivering its SOQ.").) Instead, Phoenix maintains that the OCFO should have considered its SOQ despite its late submission. Phoenix argues that the RFQ late proposal provisions as well as the District's procurement regulations governing the rejection of late bids and proposals are inapplicable to this case because an SOQ is neither a bid nor a proposal for a contract award. (Protester Comments 1-7; Protest 3.) Phoenix further argues that the OCFO is not bound by the late proposal regulations, promulgated by the District's Chief Procurement Officer ("CPO"), because the OCFO is not subject to the CPO's authority. (*Id.*) Phoenix also contends that principles of law and equity require that the OCFO consider its SOQ to satisfy the mandate for full and open competition. (*Id.* at 4.)[90]

The District, on the other hand, asserts that even though the OCFO is exempt from the CPO's authority, the OCFO is not exempt from the CPO's procurement regulations, including those concerning late proposals. (AR 3-4.) The District further argues that the late proposal provisions in the RFQ apply to preclude acceptance of Phoenix's late SOQ. (*Id.* at 4-5.) The

[89] The exceptions for accepting a late proposal included: 1) the proposal was sent by registered or certified mail not later than the 5th calendar day before the date specified for receipt of proposals; 2) the proposal was sent by mail and it is determined by the contracting officer that the late receipt at the location specified in the solicitation was caused by mishandling by the District; or 3) the proposal was the only proposal received. (*Id.*) None of the foregoing exceptions have been cited by the protester, or recognized by the Board, as applying to the underlying facts in the present case.

[90] Phoenix also argues that the RFQ did not provide a firm closing date for receipt of responses. (Protester Comments 1-2.)

District also contends that principles of law and equity mandate rejection of Phoenix's late SOQ in order to protect the integrity of the procurement process. (*Id.* at 5-6.)

DISCUSSION

The Board exercises jurisdiction over the present protest matter pursuant to D.C. CODE § 2-360.03(a)(1) (2011).

The central issue in this protest primarily concerns whether the District violated procurement law or regulation by improperly refusing to accept the protester's SOQ, which was submitted late, since the SOQ is not a formal proposal for a contract award.[91] In this regard, and as noted above, the protester principally argues that there was no requirement in the RFQ, or any applicable law, that precluded the District from accepting its SOQ even though it was delivered after the submission deadline.

In addressing the protester's contentions, we first look to the terms of the RFQ to determine whether any express submission deadline provisions are contained therein. We have recognized in our earlier decisions that where the protester and the contracting agency disagree as to the meaning of solicitation provisions, the Board will interpret the solicitation as a whole and in a manner so as to give effect to all of its provisions. *See Koba Assocs., Inc.*, CAB No. P-350, 41 D.C. Reg. 3446, 3470 (June 16, 1993); *NCS Techs., Inc.*, B-406306.3, 2012 CPD ¶ 259 at 3 (Sept. 17, 2012); *Colt Def., LLC*, B-406696, 2012 CPD ¶ 302 at 7 (July 24, 2012). Accordingly, the same contract interpretation principle must apply in analyzing the parties' disagreement over the existence of any applicable submission deadline provisions that may be present in the RFQ given that its terms and conditions for offerors are very comparable to those of a solicitation for a contract award.

Here, the cover page (page 1) to the RFQ unequivocally states that responses to the RFQ would be received by the District until 2:00 p.m. on May 16, 2013. (AR Ex. 2, at 1.) Similarly, the supplemental delivery instructions for proposals in response to the RFQ further stated that responses were due "not later than *proposal due date as specified on page 1 of this solicitation or as amended.*" (*Id.* ¶ L.12.2.C (emphasis in original).) The RFQ further stated that it would not consider proposals submitted after the submission deadline unless a specific exception applied. (*Id.* ¶¶ L.8.1, L.8.3.)

Thus, it is fairly evident that all of the foregoing provisions, read together as a whole, *consistently* reiterate to vendors that there was a firm deadline for technical submissions to be received and, further, that late submissions in response to the RFQ would not be accepted by the OCFO, with very limited exceptions. In other words, it was clearly the intention of the OCFO to impose a deadline on submissions in response to the RFQ by repeatedly requiring that offerors submit proposals by 2:00 p.m. on May 16, 2013. This established deadline in the RFQ is consistent with governing procurement law which requires contracting agencies to establish

[91] *See* D.C. Mun. Regs. tit. 27, §§ 1524.1, 1524.3 (2012); D.C. Mun. Regs. tit. 27, §§ 1627.1, 1627.3 (2013). These provisions generally provide that bids and proposals received after the time and date designated in the solicitation are late and cannot be considered by the contracting agency absent limited exceptions.

deadlines for submissions in response to an RFQ. D.C. CODE § 2-354.03(f)(2); D.C. Mun. Regs. tit. 27, § 1615.4(e) (2013).

The protester's attempt to disregard the unambiguous language in the RFQ imposing a submission deadline because these submissions are not, in fact, proposals for an actual contract award is unpersuasive. The RFQ, interpreted as a whole, notified offerors of the District's clear intent to impose a firm deadline on its acceptance of technical qualification submissions. Consequently, based upon a strict reading of the terms of the RFQ alone, the District properly rejected the protester's SOQ when it was delivered after the submission deadline.

Moreover, in further addressing the protester's general contention that the SOQ should not be treated the same as a late proposal for a contract award requiring rejection, we also look to our federal bid protest tribunal counterpart, the Government Accountability Office ("GAO"), for guidance. In analogous situations, GAO case law has applied the well-established rule generally requiring rejection of late proposals to contract related submissions other than bids and proposals for a contract award. *See, e.g.*, *Nw. Heritage Consultants*, B-299547, 2007 CPD ¶ 93 at 4 (May 10, 2007) (applying the late proposal rule in finding that agency properly declined to accept Architect-Engineer ("A-E") Qualification Statements submitted after deadline)[92]; *Zebra Techs. Int'l, LLC*, B-296158, 2005 CPD ¶ 122 at 3 (June 24, 2005) (applying the late proposal rule to past performance submissions in holding that protester's late submission was properly rejected by the agency given the solicitation's mandatory requirement for an earlier submission date). In the foregoing cases, GAO opined as to the necessity of applying the late proposal rule to other material procurement related submissions, that are not proposals, primarily to alleviate confusion, ensure equal treatment of all competitors, and prevent any unfair competitive advantage that might accrue where only one firm is allowed additional time to prepare its submission. *Id*. We are persuaded by GAO's reasoning in this regard, as applied to the instant case, and find that it would also be unfair to the other offerors in this disputed procurement to allow the protester additional time to prepare and submit its response to the RFQ where all offerors responding to the RFQ were equally notified in advance of the submission deadline and all but the protester complied with this requirement.

Thus, while the protester argues that public policy considerations require that the OCFO accept its late SOQ submission, we find the opposite to be the case. Specifically, our case law has long held that a prospective contractor bears the responsibility for ensuring timely delivery of its bid or proposal. *See, e.g.*, *Tri Gas & Oil Co.*, CAB No. P-867, 2010 WL 5776583 at *2 (Dec. 10, 2010); *Ctr. on Juvenile & Criminal Justice*, CAB No. P-488, 44 D.C. Reg. 6834, 6836 (June 16, 1997). Indeed, the Board has recognized that a contrary rule, which would allow a prospective contractor to file a late bid or proposal by even a few minutes, would inevitably lead to unequal treatment and subvert the procurement process. *Denville Line Painting, Inc.*, CAB No. P-292, 40 D.C. Reg. 4640, 4643 (Oct. 22, 1992); *Prison Health Servs., Inc.*, CAB No. P-610, 48 D.C. Reg. 1540, 1544 (May 24, 2000) (quoting *Unitron Eng'g Co.*, 58 Comp. Gen. 748, 749 (1979)). Accordingly, we have stated that although the government may lose the benefit of a more advantageous proposal under this late submission rule, maintaining the integrity of the

[92] Similar to the present protester, the protester in *Northwest Heritage Consultants* unsuccessfully argued that since its submissions were not proposals for a contract award, but merely A-E Statements, acceptance and evaluation of its submission despite its late receipt caused no hardship to other offerors. *Id*.

procurement process is of more importance than any advantageous terms the government may receive by considering a late proposal in any single procurement. *Denville Line Painting, Inc.*, CAB No. P-292, 40 D.C. Reg. at 4643. Hence, given this precedent, we reject the protester's contention that the District violated public policy by disqualifying its late SOQ.

Lastly, the parties dispute the applicability of the CPO's procurement regulations encompassing the late proposal rules, to the OCFO. The protester argues that the OCFO's statutory exemption from the CPO's authority also exempts the OCFO from the late proposal rules promulgated by the CPO as codified in title 27 of the District of Columbia Municipal Regulations.[93] (Protester Comments 5.) However, we find it unnecessary to opine on the matter of the applicability of CPO's procurement regulations, in particular, to the procuring agency as the Board has otherwise found that the terms of the RFQ and procurement law support the OCFO's rejection of the protester's late SOQ submission as set forth above. [94]

CONCLUSION

For the reasons set forth herein, the Board finds that the District did not violate procurement law or regulation when it properly rejected the protester's response to the subject RFQ due to its untimely submission. The present protest is, therefore, denied.

SO ORDERED.

Date: September 4, 2013

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

CONCURRING:

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

[93] Under District statute, the OCFO, though subject to the provisions of the Procurement Practices Reform Act ("PPRA"), is expressly exempt from the authority of the CPO. D.C. CODE § 2-352.01(b)(1).

[94] The Board notes, nonetheless, that the OCFO itself has acknowledged the procurement regulations codified in title 27 of the District of Columbia Municipal Regulations govern its procurements. *See* OFFICE OF THE CHIEF FINANCIAL OFFICER, OFFICE OF CONTRACTS, http://cfo.dc.gov/page/office-contracts (last visited September 4, 2013).

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

MWJ SOLUTIONS, LLC	)	
	)	CAB No. P-0940
	)	
Solicitation No. CFOPD-13-F-029	)	

For the Protester, MWJ Solutions, LLC: M. Mickey Williams; *pro se*. For the District of Columbia, Office of the Chief Financial Officer: Talia S. Cohen Esq., Howard Schwartz Esq.; Office of the Attorney General.

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

OPINION

Filing ID #54292876

MWJ Solutions, LLC ("MWJ") protests the Office of the Chief Financial Officer's ("OCFO") award of Task Order No. CFOPD-13-F-029 to ImmixTechnology, Inc. ("ImmixTechnology"), under a General Services Administration ("GSA") Schedule contract,[95] for the procurement of Oracle Software Maintenance Support Services. MWJ challenges both the OCFO's use of a GSA Schedule to procure these services and the award to ImmixTechnology. The OCFO maintains that MWJ lacks standing to bring the present protest and that its award decision in this procurement was in accordance with procurement law.

We find that MWJ has standing to challenge the propriety of OCFO's use of the GSA Schedule as the vehicle to solicit and award the present contract, but that MWF lacks standing to maintain its remaining allegations in this matter. Additionally, the Board finds that the record reflects that the District properly justified its use of the GSA Schedule to conduct this procurement. Accordingly, we dismiss the protest in part and deny the protest in part.

FACTUAL BACKGROUND

On April 11, 2013,[96] the OCFO Office of the Chief Information Officer requested that the OCFO Office of Contracts issue a solicitation for Oracle software maintenance and support services. (Agency Report ("AR") Ex. 15, Attach. A at 1-4; *see also* AR Ex. 15 ¶ 4.) The OCFO Office of the Chief Information Officer estimated that it would cost $601,944.64 to procure the needed Oracle software support services. (AR Ex. 15, Attach. A at 2.) In making this request for procurement action, the OCFO Office of the Chief Information Officer also provided the OCFO Office of Contracts with the names of four known vendors that could potentially provide

[95] The GSA Schedule program is also known as the Federal Supply Schedule program or the Multiple Award Schedule program. FAR 8.402(a).

[96] While this written request is dated April 4, 2013 (AR Ex. 15, Attach. A at 1), this document was not signed by an agency official until April 11, 2013. (*Id.* at 4.)

the required services including: MVS Consulting, DLT Solutions, ImmixGroup, and Mythics. (*Id.*) The OCFO Office of the Chief Information Officer, however, noted that MVS Consulting was its preferred vendor. (*Id.*)

According to the contracting officer, the OCFO Office of Contracts subsequently determined that procuring the Oracle software support services through the GSA Schedule 70 would best allow for timely competition given the OCFO Office of the Chief Information Officer's "immediate service needs." (AR Ex. 15 ¶ 5.) Of the four vendors identified by the OCFO Office of the Chief Information Officer, DLT Solutions, ImmixGroup, and Mythics were GSA Schedule 70 contractors. (AR Ex. 3, at 1-3.) MVS Consulting, a certified business enterprise ("CBE") and the preferred vendor identified by the OCFO Office of the Chief Information Officer, was not a GSA Schedule 70 contractor. (AR Ex. 15 ¶ 15.) However, the OCFO Office of Contracts also discovered that another local vendor, Networking for Future, Inc., was an eligible GSA Schedule 70 contractor. (AR Ex. 3, at 4; AR Ex. 15 ¶ 5.)

Solicitation & Award

On May 3, 2013, the OCFO issued Request for Task Order Bids No. CFOPD-13-F-029 (the "RFTOB") for the procurement of the subject Oracle software maintenance support services. (AR Ex. 2, at 1.)[97] The OCFO sent a copy of the RFTOB to four GSA Schedule 70 contractors: DLT Solutions, ImmixGroup, Mythics, and Networking for Future, Inc. (AR Ex. 4; AR Ex. 15 ¶ 7.)

The RFTOB contemplated a firm fixed-price task order contract with a one-year base period and four one-year option periods. (AR Ex. 2 ¶¶ B.2, F.1.1, F.2.1.) The RFTOB sought pricing for 32 contract line items ("CLINs") among three groups of services. (*Id.* ¶ B.3.) Under the RFTOB, OCFO would award the contract to the lowest-priced, responsive and responsible vendor. (*Id.* ¶ M.1.1.)

Vendors were originally required to submit bids in response to the RFTOB by 2:00 p.m. on May 13, 2013. (*Id.* at 1; AR Ex. 4, at 1.) The OCFO extended the submission deadline—via two amendments to the RFTOB—until 2:00 p.m. on May 14, 2013. (AR Ex. 5, at 2, 4.) The OCFO only received one bid in response to the RFTOB from ImmixTechnology.[98] (AR Ex. 15 ¶ 8.) ImmixTechnology bid $596,892.09 for the first year, with its price increasing each option year. (AR Ex. 6, at 1-14.) DLT Solutions and Mythics both notified the OCFO that they would not bid on the RFTOB.[99] (AR Ex. 7, at 1-2.)

[97] The copy of the RFTOB submitted as Exhibit 2 to the OCFO's Agency Report only contained odd-numbered pages. The OCFO resubmitted a complete copy of the document on July 18, 2013. All references to the RFTOB in this Opinion are to the complete copy submitted on July 18, 2013.

[98] ImmixTechnology appears to be a different entity than ImmixGroup, which was originally identified by the OCFO Office of the Chief Information Officer as a potential vendor for this contract. ImmixGroup holds GSA Schedule Contract No. GS-35F-0901N (AR Ex. 3, at 2), while ImmixTechnology holds GSA Schedule Contract No. GS-35F-0265X (AR Ex. 12, at 1). According to the OCFO, ImmixTechnology is wholly owned by ImmixGroup. (AR at 3 n.2.)

[99] It appears that Networking for Future, Inc. also did not respond to the RFTOB.

On May 30, 2013, the contracting officer ("CO") executed three separate Determination and Findings ("D&Fs"). First, the CO executed a written D&F for GSA Supply Schedule Procurement pursuant to D.C. Mun. Regs. tit. 27, § 2103.4, in which the CO determined that procurement of the required services through the GSA Schedule would meet the District's minimum needs at a price lower than can be attained through a new contract, and would be in the best interests of the District. (AR Ex. 8.) Second, the CO executed a D&F for Contractor's Responsibility, finding ImmixTechnology to be a responsible contractor. (AR Ex. 9, at 2.) Lastly, the CO executed a D&F for Price Reasonableness, in which the CO determined that ImmixTechnology's bid of $596,892.09 was a reasonable price. (AR Ex. 10, at 1-2.)

The OCFO awarded Task Order No. CFOPD-13-F-029 to ImmixTechnology,[100] under GSA Contract No. GS-35F-0265X, on May 30, 2013. (AR Ex. 12, at 1.) The OCFO publicized the task order award and accompanying D&Fs on its procurement website on June 3, 2013. (*FY13 Contract Awards*, OFFICE OF THE CHIEF FINANCIAL OFFICER, OFFICE OF CONTRACTS, https://sites.google.com/a/dc.gov/ocfo-procurements/fy13-contract-awards (last visited September 26, 2013).) MWJ timely protested the procurement on June 14, 2013, within 10 business days of this public notice.[101] D.C. CODE § 2-360.08(b)(2) (2011).

MWJ's Protest

MWJ's protest is divided into 10 numbered paragraphs challenging the OCFO's procurement of the subject Oracle software maintenance support services. The first category of MWJ's protest allegations generally include challenges to the awardee's eligibility to receive the subject contract award, specifically, that the awardee lacks a GSA Schedule contract, and is not licensed to conduct business in the District. (Protest ¶¶ 1-2.) In another category of allegations, the protester contends that the award was procedurally defective for several reasons. In particular, MWF argues that the disputed contract award was improper because: (1) the contract was awarded without inclusion of the mandatory CBE subcontractor participation requirement or a granted waiver of this requirement[102]; (2) the underlying solicitation was not publicized on any of the District's procurement websites; (3) the contract was awarded without required approval by the City Council; and (4) the contract was awarded without a pricing list and, therefore, the District did not properly determine that the government was receiving competitive discounted pricing in making the contract award. (*Id*. ¶¶ 3, 5, 8-9.)

The protest also includes a third category of allegations which challenge the District's use of the GSA Schedule as an improper contract vehicle to award the contract. Specifically, the protester contends that there are several other local CBE and resellers in the District of Columbia area that were capable of meeting the contract requirement, and suggests that the District did not make appropriate efforts to research alternative companies as possible sources to perform the contract. (*Id*. ¶¶ 6-7.) Further, the protester asserts that the contract was not subject to a formal

[100] The original award erroneously named the contractor as "ImmexTechnology, Inc." (AR Ex. 12, at 1.) Modification 2 to the task order corrected this error on June 4, 2013. (AR Ex. 13, at 2.)

[101] We find MWF's post-award protest to be timely filed even though it contains challenges to the terms of the solicitation because the District did not initially publish notice of its solicitation of this requirement to any parties other than the solicited GSA Schedule 70 contractors, which did not include the protester. (AR 9.)

[102] The Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005 contains relevant provisions governing mandatory set-asides for CBEs. D.C. CODE § 2-218.46(a)(2)(A) (2001).

competitive bidding process which was required because it exceeded $100,000 in value. (*Id.* ¶ 4.) The protester also argues that, by using the GSA Schedule vehicle, the awardee was allowed to bypass the requirement to pay sales tax to the District. (*Id.* ¶ 10.)

The OCFO filed a combined Motion to Dismiss and Agency Report (the "Agency Report") on July 8, 2013. The OCFO seeks to dismiss the present protest, arguing that MWJ lacks standing because MWJ is not a GSA Schedule contractor and would not be in line for award even if the Board sustained its protest. (AR at 4-6.) As to the merits of MWJ's protest, the OCFO generally maintains that it properly awarded the task order to ImmixTechnology in accordance with District procurement law under D.C. CODE § 2-354.10 (2011). (AR at 6-11.) In defending its award decision, the OCFO relies upon the contents of its written justification for use of GSA Supply Schedule which determined that the services on the federal schedule would meet the District's needs, that awardee's prices were fair and reasonable, and was justified and in the best interests of the District. (*See generally id.*)

The Board notes that MWJ failed to file comments in response to the OCFO's Agency Report. Pursuant to the Board's Rules, a protester is required to file comments in response to the Agency Report within 7 business days. D.C. Mun. Regs. tit. 27, § 307.1 (2002). A protester's failure to file comments results in a closing of the record, and the Board may treat as conceded factual allegations made in the Agency Report not otherwise contradicted by the protest or other documents in the record. *Seagrave Fire Apparatus, LLC*, CAB No. P-0928, 2012 WL 6929400 at *2-*3 (Dec. 20, 2012); *FEI Constr. Co. (A Div. of Forney Enters., Inc.)*, CAB No. P-0902, 2012 WL 6929394 at *5 (Dec. 14, 2012); Board Rules 307.3, 307.4 (D.C. Mun. Regs. tit. 27, §§ 307.3, 307.4). Accordingly, because MWJ failed to file any comments or other reply, we treat as conceded the factual assertions contained in the OCFO's Agency Report that are not otherwise contradicted by the record. *See FEI Constr. Co.*, CAB No. P-0902, 2012 WL 6929394 at *6.

DISCUSSION

The Board exercises jurisdiction over the instant protest pursuant to D.C. CODE § 2-360.03(a)(1) (2011).

MWJ Has Standing to Challenge the OCFO's Use of the GSA Schedule

As a threshold matter, we address MWJ's standing to bring its protest. The Procurement Practices Reform Act of 2010 grants the Board jurisdiction over protests filed by protesters that are "aggrieved in connection with the solicitation or award of a contract." D.C. CODE § 2-360.03(a)(1). Although undefined by statute, our rules define an aggrieved person 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." D.C. Mun. Regs. tit. 27, § 100.2(a).

Accordingly, we have long held that in order to have standing, a protester must have a direct economic interest in the protested procurement. *See, e.g., U.S. Sec. Assocs., Inc.*, CAB No. P-0910, 2012 WL 4753874 at *3 (July 25, 2012); *W.S. Jenks & Sons*, CAB No. P-644, 49 D.C. Reg. 3374, 3376 (Aug. 14, 2001); *Wayne Mid-Atlantic*, CAB No. P-227, 41 D.C. Reg. 3594, 3595 (Aug. 12, 1993); *see also Barcode Techs., Inc.*, CAB No. P-524, 45 D.C. Reg. 8723,

8726 (Feb. 11, 1998) ("To have standing to protest, a party must be aggrieved. In other words, the protester must have a direct economic interest in the procurement."). Therefore, to establish standing, a protester must show that it "has suffered, or will suffer, a direct economic injury resulting from the alleged adverse agency action." *MorphoTrust USA, Inc.*, CAB No. P-0924, 2012 WL 6929398 at *4 (Nov. 28, 2012); *Recycling Solutions, Inc.*, CAB No. P-377, 42 D.C. Reg. 4550, 4575 (Apr. 15, 1994).

Thus, under the foregoing legal standard, our cases have generally found that a protester lacks standing if it would not be in line for award, even if its protest were upheld. *See U.S. Sec. Assocs.*, CAB No. P-0910, 2012 WL 4753874 at *3-*4 (citing multiple cases); *see also Barcode Techs.*, CAB No. P-524, 45 D.C. Reg. at 8726. Notwithstanding, we have also recognized that a protester has suffered sufficient economic injury to establish standing where the protester is denied an opportunity to compete or where the government's specifications preclude the consideration of the protester's product or services. *MorphoTrust*, CAB No. P-0924, 2012 WL 6929398 at *4; *Micro Computer Co.*, CAB No. P-226, 40 D.C. Reg. 4388, 4390-91 (May 12, 1992).

In the present matter, the OCFO argues that MWJ lacks standing because MWJ is not a GSA Schedule contractor and therefore was not eligible to compete for the contract, or receive that contract award, which precludes it from obtaining relief from the Board. (AR at 6.) However, as discussed above, MWJ's allegations specifically include a challenge to the overall propriety of the District's use of the GSA Schedule, instead of a formal competitive bidding process, as its means to procure Oracle software maintenance support services.[103] (Protest ¶ 4.) In other words, MWF essentially argues that it was denied an opportunity to compete for the contract because the District's improper use of the GSA schedule contract was not an open competitive bidding process. Thus, were the Board to sustain MWJ's protest allegations that using the GSA Schedule vehicle was improper, MWJ would have a possibility of bidding for, and receiving, the ultimate award through an open competitive bidding process, which gives MWJ standing to challenge the OCFO's use of the GSA Schedule. *B&B Sec. Consultants, Inc.*, CAB No. P-630, 49 D.C. Reg. 3340, 3344 (Mar. 7, 2001) ("Were the Board to decide that the District's use of the [GSA Schedule] was illegal, the District would have to procure its service needs either by exercising its option with [the protester] or resoliciting the contract in the open market. In either case, [the protester] would have a possibility of receiving the award.").

However, on the other hand, the Board finds that the protester does not have standing to pursue its category of protest allegations which contend that the District failed to follow certain procedural requirements in awarding the contract. Indeed, even if the Board was to find merit in these particular allegations and the contract had to be resolicited, the protester would still be ineligible to participate in this procurement to receive the award because it is not on the GSA Schedule for the subject services. *B&B Sec. Consultants*, CAB No. P-630, 49 D.C. Reg. at 3344-45 (holding that protester who is not a GSA Schedule contract holder lacks standing to challenge the procedures that the District used in awarding a contract under a GSA Schedule). Under this same rationale, MWJ also lacks standing to maintain its direct challenge to the awardee's qualifications to receive the contract award because, again, the protester would not be in line to

[103] As set forth above, the protester's challenge to the terms of the solicitation was timely filed after first receiving published notice of the subject contract award. *See supra* n.7.

receive the contract award if the awardee were disqualified because the protester is not a GSA Schedule holder that participated in this procurement.

For the foregoing reasons, the Board finds that MWJ has standing to raise the protest grounds challenging the OCFO's use of the GSA schedule, raised in paragraphs 4, 6-7, and 9 of its protest. Nonetheless, we dismiss for lack of standing paragraphs 1-3, 5, 8 and 10 of MWJ's protest, challenging the eligibility of the awardee to receive the contract and any procedural requirements which the District may have failed to follow in awarding the contract.

The OCFO Justified Its Use of the GSA Schedule in Accordance with District Law

The Procurement Practices Reform Act of 2010 requires District agencies to use one of several listed methods of procurement to award government contracts, unless otherwise authorized by law. D.C. CODE § 2-354.01(a)(1) (2011). These laws also specifically authorize District contracting agencies to procure goods or services through a GSA Schedule. D.C. CODE § 2-354.10. Moreover, District contracting agencies are, in fact, required to procure goods and services through a GSA Schedule when the contracting officer determines (a) that the goods or services on the schedule will meet the District's minimum requirements, and (b) that the price for the goods or services under the schedule is lower than the price that would be attained through a new contract.[104] D.C. Mun. Regs. tit. 27, § 2103.4 (1988).

In the present procurement, the contracting officer executed a written justification for use of GSA Supply Schedule Procurement pursuant to D.C. Mun. Regs. tit. 27, § 2103.4 on May 30, 2013. (AR Ex. 8.) In this justification, and in accordance with the foregoing regulation, the CO determined that the GSA Schedule would meet the OCFO's needs and that ImmixTechnology's price of $596,892.09 is a lower price than could be obtained through a new contract and, thus, was in the best interests of the District. (*Id.*) This written justification forms the basis of, and substantiates, the District's contention that its use of the GSA Schedule was reasonable and in accordance with procurement law. (*See* AR at 9-11.)

As stated above, MWJ failed to file comments in response to the OCFO's Agency Report refuting the District's contention that its use of the GSA Schedule was justified. Consequently, because MWJ failed to refute the District's procurement justification for use of the GSA Schedule, and the Board finds no other basis in the record for disputing the District's justification in this regard, the Board finds reasonable the District's decision to use the GSA Schedule in this procurement. *See Seagrave*, CAB No. P-0928, 2012 WL 6929400 at *3 (finding that due to its failure to file comments, the protester failed to contradict the assertions in the District's Agency Report).

CONCLUSION

The Board finds that MWJ has standing to challenge the OCFO's use of a GSA Schedule in order to procure the services required under the disputed contract. (Protest ¶¶ 4, 6-7, and 9.) However, for the reasons set forth herein, the protester does not have standing to challenge the

[104] The regulations refer to the federal supply schedules instead of GSA Schedules, but as noted above, the terms are interchangeable. *See supra* n.1.

protester's eligibility to receive the contract award or the propriety of the procedural formalities followed by the District in making its award decision (Protest ¶¶ 1-3, 5, 8 and 10) and these protest grounds are dismissed. With respect to the protester's remaining allegations, however, the Board finds no basis provided by the protester, or reflected in the record, to establish that the District's decision to utilize the GSA Schedule in this procurement was unreasonable or otherwise contrary to procurement law. The protest is, therefore, denied.

SO ORDERED.

Date: September 26, 2013

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

CONCURRING:

/s/ Marc D. Loud, Sr.
MARC D. LOUD, SR.
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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

APPEAL OF:

ADSYSTECH, INC.	)	
	)	CAB No. D-1210
Under Contract No. 9066-AA-NS-2-MT	)	

ORDER DENYING APPELLEE'S MOTION FOR RECONSIDERATION

Filing ID #54293592

In this dispute action brought by Adsystech, Inc. (Adsystech or appellant) against the District (District or appellee), the Board ruled on August 15, 2013, that the appellant is entitled to an equitable adjustment because authorized District officials approved and/or ratified constructive changes to the parties' contract to upgrade the Department of Consumer and Regulatory Affairs' technology systems with Hansen software. In so ruling, the Board found inapplicable the District's contentions that (i) the mandatory ratification procedures required by former D.C. Code § 2-301.05(d)(5) were not followed herein, and (ii) that former D.C. Code § 2-301.05(d)(3) barred the instant contract.

The Board found D.C. Code §§ 2-301.05(d)(5) and 2-301.05(d)(3) inapplicable to the instant matter pursuant to the "Chief Technology Officer Year 2000 Remediation Procurement Authority Temporary Amendment Act of 1999" (the Chief Technology Officer Act). D.C. Law 13-17, 46 D.C. Reg. 6314 (July 17, 1999). The Chief Technology Officer Act provided as follows:

> (m)(1) Nothing in this act shall affect the authority of the Office of the Chief Technology Officer to *execute* Year 2000 remediation contracts. For the purpose of the section, the term "Year 2000 remediation contracts" means procurement for the correction of computers, computer-operated systems, and equipment operated by embedded computer chips, to ensure the proper recognition and processing of dates on or after January 1, 2000 (emphasis added).

(46 D.C. Reg. 6314.)

In a September 13, 2013, Motion for Reconsideration, the appellee argues that the Board "must find that it does not have jurisdiction to decide the Appeal" because the Board's ruling finds that "the Procurement Practices Act ("PPA") does not apply to the Contract at issue." (Appellee's Mot. for Recons., 1-2.) The District's characterization of the Board's ruling is overly broad and erroneous.

The Board's August 15, 2013, ruling concluded that the instant contract was exempt from §§ 2-301.05(d)(5) and 2-301.05(d)(3) of the Procurement Practices Act (PPA). However, the Chief Technology Officer Act does not operate so as to divest the Board of jurisdiction herein

because the Act lacks an express provision to that effect. The argument that the Chief Technology Officer Act suspends application of the PPA entirely to Year 2000 remediation contracts of the type presented instantly, has previously been rejected by the D.C. Court of Appeals.[105]

To the extent that the Board's August 15, 2013, ruling was not clear on the above distinction, we acknowledge the District's request for clarity. Having clarified the August 15 ruling herein, however, we hereby deny the District's motion for reconsideration.[106]

SO ORDERED.

DATED: September 26, 2013

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

CONCURRING:

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

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[105] *See D.C. v. Verizon South, Inc.*, No. CA8563-01 (D.C. Dec. 16, 2002) (order denying petition for rehearing) (concluding that although the Chief Technology Officer Act amended the PPA "such that it would not affect the authority of the Chief Technology Officer to execute Year 2000 remediation contracts, the court is not persuaded that . . . this amendment expresses the intent of the Council to suspend application of the PPA entirely to such contracts, specifically the law's commitment to the Contract Appeals Board of exclusive authority to hear disputes arising under government contracts, unless express exemption is made by the PPA.")

[106] The Board's action herein is taken pursuant to D.C. Mun. Regs. tit. 27, §110.8, which provides (in pertinent part) that "for good cause shown, the Board may act upon a motion at any time without waiting for a response to the motion by the opposing party." The Board finds "good cause" to invoke §110.8 herein because permitting a "response" and "reply" will needlessly increase the already tremendous litigation costs borne by both parties in this 10 year old proceeding.

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

NOBEL SYSTEMS, INC.	)	
	)	CAB No. P-0937
Solicitation No. Doc93362	)	

For the Protester: Levon Baghdassarian, *pro se*. For the District of Columbia: Robert Schildkraut, Esq., 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 #54334548

This protest arises from a solicitation for a "Dispatch and Lot Management System" issued by the District's Office of Contracting and Procurement ("OCP") on behalf of the Department of Public Works, Parking Enforcement Management Administration ("PEMA"). The protester, Nobel Systems, Inc. ("Nobel" or "protester"), alleges that there have been unspecified "improprieties" in OCP's solicitation process, as evidenced by the District's failure to notify the protester that the solicitation had been issued. In its Agency Report ("AR"), the District counters that it did not "deliberately or consciously" exclude protester from receiving notice of the publicly-advertised solicitation, and that it "followed all proper procedures in publicizing" the solicitation. (AR 3, 4.) The protester did not respond to the AR or the Determination and Findings to Proceed with Contract Award ("D&F") filed by the District. Finding no violation of procurement law or regulation on the part of the District, we deny the instant protest and dismiss it with prejudice.

BACKGROUND

The Solicitation

On January 18, 2013, OCP issued Solicitation No. Doc93362 (the "Solicitation" or "RFP") on behalf of PEMA. (*See* AR, Ex. 2, ¶ B.1.)[107] The Solicitation called for offerors to implement a "Dispatch and Lot Management System including [a] customized COTS system, installation, training, perpetual license and maintenance." (*Id.*, ¶ B.3.1.) The RFP stated that the District contemplated award of a one-year fixed price contract, with four option years, during which the awardee would provide annual maintenance, "including hardware/software support and call center support." (*Id.*, ¶¶ B.2-B.3.)

The District advertised the Solicitation in the Washington Examiner newspaper on January 18,[108] and on the District's eSourcing website on January 22.[109] (*See* AR 3-4; AR, Exs. 4-5.) The advertisement

[107] We note a discrepancy between the solicitation number stated in the AR ("Doc693362") and the solicitation number stated in the various exhibits to the AR ("Doc93362"). (*Compare* AR 1 *with* AR, Ex. 2, ¶ A.3.) Given that all evidentiary documents cited by the AR—with the exceptions of the unsigned chronology at Exhibit 1 and the Washington Examiner advertisement at Exhibit 4—consistently reference "Doc93362," we assume that this is the correct solicitation number. (*See, e.g.,* AR, Exs. 2, 3, 5, 6.)

[108] The Washington Examiner advertisement referenced a different solicitation number than that which had been printed on the Solicitation. (*Compare* AR, Ex. 4 at 2-3 (referencing "IFB No. DOC693362") *with* AR, Exs. 2-3, 5 (referencing "Solicitation Number Doc93362").)

in the Washington Examiner included (1) the name and number of the solicitation, (2) name, phone number, and email address of the individual, Oluwatobi Meduoye, to be contacted "[f]or technical information," and (3) OCP's website address. (AR, Ex. 4 at 2-3.) Proposals to the Solicitation were initially due on February 12, 2013. (AR 2; *see also* AR, Ex. 1.) On February 8, the Solicitation was amended to extend the due date to February 19. (*Id.*; *see also* AR, Ex. 3 at 2.) It was amended a second time on February 19, to extend the due date to March 5. (AR 2 (citing AR, Ex. 3).)[110] Finally, on March 4, the Solicitation was amended to extend the due date to March 19. (AR 2; AR, Ex. 3 at 8.) Therefore, the District advertised the Solicitation for "more than 21 days prior to the receipt of proposals." (AR, Ex. 6, ¶ 5.)

The Contracting Officer ("CO"), Gena Johnson, also selected a National Institute of Government Purchasing ("NIGP") commodity code to include with the Solicitation's listing on the eSourcing website.[111] (*See* AR 4; AR, Ex. 6, ¶ 7.) The CO stated that her "understanding" of the system was that when she posted the Solicitation on the eSourcing website, the website would automatically notify all vendors who had registered under the selected NIGP commodity code. (AR, Ex. 6, ¶ 7.) After the list of potential vendors was compiled, it was reviewed by the contract specialist who then added the names of "any additional, registered vendors that the specialist was aware of." (*Id.*) The CO additionally requested that PEMA provide her with a list of potential suppliers to supplement the list assembled through the eSourcing website. (AR, Ex. 6, ¶ 8.) PEMA provided the CO with the names of two vendors that were not on the list. (*Id.*) However, "neither of the two vendors were NOBEL Systems." (*Id.*) The District also states that OCP sent the Solicitation to 63 potential vendors. (*See* AR 5.) The District received two proposals as of the Solicitation's closing date. (AR 3; *see also* AR, Ex. 6, ¶ 9.)

The Protest

Nobel filed its protest with the Board on May 10, 2013. (Protest 1.) It states that "[a]t all times since 2002, NOBEL has been properly registered to receive solicitations from the [OCP]." (*Id.*) Protester also claims that it had previously demonstrated its products to OCP, and met with multiple OCP representatives "in furtherance of providing the exact product that OCP has *inexplicably* solicited without notice [to] NOBEL" (emphasis in original). (*Id.*) Nobel alleges that it did not learn of the Solicitation's existence until May 6, 2013. (*Id.*)

Despite failing to provide specific allegations of impropriety, the protester states that "[i]t is utterly impossible for proposals for the 'Dispatch & Lot Management System' to have been properly solicited without NOBEL receiving notice of the same. Therefore, improprieties in the OCP's solicitation process are the only conceivable explanation for NOBEL's loss of the opportunity to submit a proposal." (Protest 1.) As a result, the protester requests that OCP re-open the Solicitation to enable it to submit a proposal, or, in the alternative, that OCP reject "all pending proposals in order to start the solicitation process anew and in [a] manner that is appropriate, fair, and in compliance with the law—and, of course, devoid of the improprieties that have infected the solicitation at issue." (*Id.*)

The Agency Report

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[109] Due to "an internal information technology problem," the Solicitation was not available on the eSourcing website until January 22, 2013. (AR 2.)

[110] The second amendment to the Solicitation does not appear in the record contrary to the District's citation to the AR, Exhibit 3.

[111] The CO does not state which NIGP commodity code she used, nor does it appear on the Solicitation. (*See generally* AR, Exs. 6, 2.)

In response to the protest, on May 29, 2013, the District filed the AR wherein it argues that the District "followed proper procedures in publicizing and soliciting" PEMA's requirements, and did not "deliberately or consciously exclude" Nobel from competition. (AR 3-4.) On September 10, 2013, the District filed the D&F to proceed with contract award.

DISCUSSION

Board Jurisdiction

The Board exercises jurisdiction over the instant protest pursuant to D.C. Code § 2-360.03(a)(1) (2011).

I. The Protester's Allegations are Without Merit

Nobel alleges that it was "properly registered to receive solicitations from the District of Columbia," yet, the District failed to provide it with notice of the Solicitation. (Protest 1.) Protester claims that that failure to notify is, in and of itself, evidence of procurement improprieties on the part of the District. (*Id.*) However, the Board has long held that "prospective bidders have a duty to avail themselves of every reasonable opportunity to obtain solicitation documents. *Brooks & Brooks Servs., Inc.*, CAB No. P-0605, 48 D.C. Reg. 1477, 1478 (Jan. 6, 2000) (quoting *Potomac Airgas*, CAB No. P-0450, 44 D.C. Reg. 6810, 6812 (Mar. 12, 1997)). In *Brooks & Brooks Services, Inc.*, the District failed to mail a copy of a solicitation for city-wide janitorial services to an incumbent janitorial services contractor. *Id.* We denied the contractor's protest, finding that "unless there is evidence (beyond mere nonreceipt) establishing, for example, that: (1) the contracting agency deliberately or consciously intended to exclude the prospective bidder from the competition, (2) the potential bidder did not neglect reasonable opportunities to obtain the documents *and* the agency failed to comply with notice requirements for the solicitation documentation at issue, or (3) the agency did not obtain adequate competition or reasonable prices," the risk of nonreceipt rests with the potential bidder. *Id.* at 1478 (citing *Technical Resolution Corp.*, CAB No. P-0393, 41 D.C. Reg. 4138, 4139 (Mar. 22, 1994)). Stated more simply, the District has "no obligation to inform every prospective bidder of a pending procurement." *Sys. Prods., Inc.*, CAB No. P-0149, 39 D.C. Reg. 4329, 4330 (Sept. 27, 1991) (citing *Fast Elec. Contractors, Inc.*, B-223823, 86-2 CPD ¶ 627 (Dec. 2, 1986)).

In addition, there is no evidence in the record to support protester's allegation that because it was registered to receive solicitations, "improprieties in the OCP's solicitation process are the only conceivable explanation for NOBEL's loss of opportunity to submit a proposal." (Protest 1.) To the contrary, it is the protester's responsibility to obtain solicitation documents and, furthermore, since the protester has the burden of proof, the Board has held that "we will not attribute improper motives to procurement personnel on the basis of inference or supposition." *Grp. Ins. Admin, Inc.*, CAB No. P-0309-A, 40 D.C. Reg. 4428, 4432 (June 15, 1992) (citing *Granite Diagnostics, Inc.*, B-211711, 83-1 CPD ¶ 620 (June 7, 1983) (internal quotation marks omitted)). Therefore, the Board denies the protester's claim that the District's failure to provide it with notice of the Solicitation constitutes evidence of procurement irregularities on the part of the District.

II. The District met the Requisite Notice Requirements

The District advertised the Solicitation in the Washington Examiner on January 18, and posted it on its eSourcing website on January 22. Since proposals were due on March 19, advance notice of the Solicitation was issued at least 60 days prior to the deadline for receipt of proposals. Therefore, the District met (and exceeded) the 21-day advertisement period required under D.C. Code § 2-354.03(c)

(2011)[112] and D.C. Mun. Regs. tit. 27, § 1303.1 (2011).[113] (AR, Ex. 6, ¶ 5.) We also note that the protester has not argued that the public notice was insufficient—merely that the protester should have been notified directly when the Solicitation was released. (Protest 1.) Therefore, we conclude that the protester had a duty to avail itself of every reasonable opportunity to find out about the Solicitation, yet failed to do so.

III. The Solicitation's Competition was Adequate

In addition to publicly advertising the Solicitation and posting it on the eSourcing website, the District states that it sent the Solicitation to 63 vendors. (AR 5.) These efforts to publicize the Solicitation resulted in the District's receipt of two proposals. (AR 3.) According to the District, it "will be able to award the requirement to a vendor that offered a reasonable price." (AR 6.)

The Board has previously stated that "the propriety of a particular procurement is judged not on whether every potential contractor was included, but from the perspective of the government's interest in obtaining reasonable prices through adequate competition." *Grp. Ins. Admin., Inc.*, CAB No. P-0309-A, 40 D.C. Reg. at 4432 (internal citations omitted). In the instant case, although only two proposals were received, the competition was adequate and the District was offered a reasonable price. *See also Potomac Airgas, Inc.*, CAB No. P-0450, 44 D.C. Reg. at 6813 (holding that the incumbent contractor's failure to receive the solicitation is an insufficient basis for resolicitation of bids since "the District obtained full and open competition and fair and reasonable prices").

IV. The Protester Failed to File Comments to the Agency Report

Lastly, the protester failed to file comments to the AR within seven business days, pursuant to D.C. Mun. Regs. tit. 27, § 307.1.[114] As such, the Board considers the facts presented in the AR and its accompanying exhibits as conceded, except where directly contradicted by the protest. *See* D.C. Mun. Regs. tit. 27, § 307.4;[115] *see also Vibalign, Inc.*, CAB No. P-0417, 42 D.C. Reg. 4968 (Apr. 3, 1995) ("when a Protestor fails to file comments on an agency report . . ., the factual allegations in the protest that are not admitted by the District, or otherwise corroborated on the record, may be disregarded"); *accord Vair Corp.*, CAB No. P-0428, 42 D.C. Reg. 4966 (Apr. 3, 1995). Since the protester failed to file comments to the AR, the Board will thereby treat as conceded the District's arguments in the AR.[116]

CONCLUSION

Finding no evidence of violation of procurement law or regulation on the part of the District, the Board denies the instant protest and dismisses it with prejudice.

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[112] "Proposals shall be solicited through a request for proposals. The CPO shall provide public notice of the RFP of not less than 21 days, . . ." D.C. Code § 2-354.03(c).

[113] "A Request for Proposals (RFP) shall be advertised for at least twenty-one (21) days before the date set for the receipt of proposals, . . ." D.C. Mun. Regs. tit. 27, § 1303.1.

[114] "Within seven (7) business days after receipt of the Agency Report . . . the protester and interested parties may file a reply . . . which shall state the party's factual and legal agreement or opposition to the Agency Report or motion." *Id.*, § 307.1

[115] "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 protest, or the documents in the record, may be treated by the Board as conceded." *Id.*, § 307.4.

[116] The protester also failed to challenge the D&F which the present Order hereby renders moot.

SO ORDERED.

DATED: October 4, 2013

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

CONCURRING:

/s/ Marc D. Loud, Sr.
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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

BRENTWORKS, INC.	)	
	)	CAB No. P-0943
Solicitation No.: DCKA-2013-B-0035	)	

For the Protester: Doris H. Brent, *pro se*. For the District of Columbia Government: Alton E. Woods, Esq., Assistant Attorney General.

Opinion by Administrative Judge Maxine E. McBean with Administrative Judge Monica C. Parchment, concurring.

OPINION

Filing ID #54359083

Brentworks, Inc. ("Brentworks" or "protester") filed a protest on July 9, 2013, challenging the District's decision to award a contract to Premier Office & Medical Suppliers, LLC ("Premier") under Solicitation No. DCKA-2013-B-0035 ("IFB" or "Solicitation"). The protester challenges the award on the grounds that the Office of Contracting and Procurement ("OCP") incorrectly awarded preference points to Premium Suppliers, LLC and designated them, instead of Brentworks, the lowest responsible bidder. However, the District contends that Brentworks mistakenly identified a company other than Premier as the awardee and, in fact, OCP correctly applied preference points to Premier's bid. In addition, the District argues that since the contract work was completed by the time the protest was filed, the protest should be denied. Having reviewed the record, the Board finds that OCP correctly evaluated and applied preference points to the submitted bids, which resulted in Premier having the lowest responsible bid. Furthermore, since the scope of work under the Solicitation was completed by the time the protest was filed, the Board dismisses the protest as moot.

BACKGROUND

On June 18, 2013, OCP issued IFB No. DCKA-2013-B-0035 for a contractor to provide 16,000 20-gallon Treegator watering bags for the District's Department of Transportation ("DDOT") on behalf of the Urban Forestry Administration ("UFA"). (AR 3.) The IFB was posted in the Washington Times newspaper and on OCP's website. (*Id*.) The IFB was designated for certified small business enterprise ("SBE") bidders only pursuant to the provisions of the "Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005," (the "Act"). D.C. Code § 2-218.01, *et seq.* (AR, Ex. 1, § B.2.) Due to time-sensitivity,

the IFB included a shortened advertising period of 5 days, and required the contractor to deliver the items within two business days upon receipt of an order. (AR 3; AR, Ex. 1, § C.3.2.) Proposals were due by 2:00 p.m. on June 24, 2013. (AR, Ex. 1, § L.5.)

Four contractors submitted bids by the deadline: (1) Swann Construction, Co., Inc. ("Swann Construction") in the amount of $560,000.00; (2) Brentworks in the amount of $266,720.00; (3) C&E Services, Inc. of Washington ("C&E") in the amount of $253,920.00; and (4) Premier in the amount of $280,000.00 (AR, Ex. 4). Under the provisions of the Act, certified businesses receive a reduction in price for a bid submitted in response to the IFB. (AR, Ex.1, § M.1.) The District has to apply the following preferences in evaluating bids from businesses certified as: small (3%), resident-owned (5%), longtime resident (5%), local (2%), local with a principal office located in an enterprise zone (2%), disadvantaged (2%), veteran-owned (2%), or local manufacturing (2%). (*Id.*) Twelve percent (12%) is the maximum number of preference points to which a certified business enterprise may be entitled. D.C. Code § 2–218.43(b). (AR, Ex.1, § M.1.2.)

Based on the criteria delineated by the Act, the bidders were entitled to the following preference point deductions: Swann Construction was entitled to a 9% discount, resulting in a bid total of $509,600.00; Brentworks was entitled to a 7% discount, resulting in a bid total of $248,049.00; C&E was entitled to a 7% discount, resulting in a bid total of $236,156.60; and Premier was entitled to a 12% discount, resulting in a bid total of $246,400.00. (AR, Exs. 4, 5.) After the preference point deductions, C&E was the apparent low bidder; however, C&E is listed as "Ineligible" on the General Services Administration's Excluded Parties List System ("EPLS").[117] (AR, Ex. 7.) Therefore, C&E was precluded from being awarded the contract. *See* (*Id.*); 27 D.C. Mun. Regs. tit. 27, § 2212 (1988).

Consequently, on June 27, 2013, OCP awarded the contract to the next lowest bidder, Premier, and issued a Determination and Findings for Award to Other Than Low Bidder. (AR, Ex. 6.) Premier completed the contract by delivering 5,905 Treegator bags on June 28, 2013, and 10,095 Treegator bags on July 3, 2013. (AR, Ex. 11, ¶ 7.) OCP sent a letter to Brentworks on July 3, 2013, notifying it that Premier, with its estimated bid of $280,000.00 (the price before preference points were applied to the bid), had been awarded the contract having submitted the lowest responsive bid. (AR, Ex. 8.)

After receiving the letter from OCP, Brentworks contacted DDOT to question the award, claiming that "Premium Supplier, LLC" is not a DC Certified Business Enterprise. (Protest 1.) On July 9, 2013, Brentworks filed the instant protest with the Board. (*Id.*)

[117] The Board notes that although the District cites EPLS as the source for its information concerning C&E, the District actually obtained the information from the System for Award Management which replaced EPLS for suspension and debarment information effective November 21, 2012. System for Award Management, *Exclusion Summary, C&E Services, Inc. of Washington*, https://www.sam.gov/portal/public/SAM/ (accessed June 25, 2013).

DISCUSSION

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

In its protest, Brentworks alleges that "Premium Suppliers, LLC" is not a "DC Certified Business Enterprise." (Protest 1.) However, it appears that Brentworks mistook "Premium Suppliers, LLC" as the contract awardee instead of "Premier Suppliers, LLC," the company identified in OCP's July 3, 2013, letter to Brentworks. (AR 6; AR, Ex. 8.) In the Certified Contractors database for the Department of Small and Local Business Development ("DSLBD"), "Premium Suppliers, LLC" does not produce any results; however, "Premier Office & Medical Suppliers, LLC," the full business name of Premier, is actively listed in the database. (AR 6; AR, Ex. 5.) Furthermore, information from the DSLBD website confirms that Brentworks' bid was entitled to receive a 7% preference point deduction, but Premier was entitled to receive a 12% preference point deduction. (AR, Ex. 5.)

The District's procurement regulation provides that, "[t]he contracting officer shall award each contract to the responsible and responsive bidder whose bid meets the requirements set forth in the IFB, and is the lowest bid price or lowest evaluated bid price, considering only price and price-related factors included in the IFB." 27 D.C. Mun. Regs. tit. 27, § 1541.1. The contracting officer correctly applied the evaluation criteria and preference factors as specified in the IFB, discounting Brentworks' bid from $266,720.00 to $248,049.60 and discounting Premier's bid from $280,000.00 to $246,400.00. (AR 7; AR, Ex. 1, § M; AR, Ex. 4.) The contracting officer then chose Premier as the responsible and responsive bidder with the lowest evaluated bid price. (AR 7; AR, Ex. 1, § M.)

In determining the propriety of an evaluation decision, "we examine the record to determine whether the decision was properly documented, reasonable and in accord with the evaluation criteria listed in the solicitation and whether there were any violations of procurement laws or regulations." *Busy Bee Envtl. Servs., Inc.*, CAB No. P-0617, 48 D.C. Reg. 1564, 1567 (July 24, 2000) (citing *Trifax Corp.*, CAB No. P-0539, 45 D.C. Reg. 8842, 8847 (Sept. 25, 1998)). Implicit in the foregoing is that the evaluation and selection decision must be documented in sufficient detail to show that it is not arbitrary. *Health Right, Inc., D.C. Health Coop., Inc., George Washington Univ.*, CAB Nos. P-0507, P-0510, P-0511, 45 D.C. Reg. 8612, 8635 (Oct. 15, 1997). Based on the above calculations, OCP's award to Premier was reasonable, consistent with the criteria listed in the Solicitation, and the record contains sufficient documentation on the bids and selection decision to support the District's contract award.

Moreover, although the protest was timely filed on July 9, 2013, within 10 days of notice of contract award, the issues raised in this protest are now moot because Premier completed the IFB's scope of work on July 3, 2013. (AR 8.) A case is moot when the issues are academic and there is no possible remedy which the Board could order were it to grant the protest. *Fort Myer Constr. Corp.*, CAB No. P-0641, 49 D.C. Reg. 3378, 3380 (Aug. 16, 2001) (citing *C & E Services, Inc.*, CAB No. P-0360, 40 D.C. Reg. 5020, 5022 (Mar. 12, 1993)). Per the IFB, the Treegator bags were to be delivered within two business days of receipt of contract award. (AR, Ex. 1, § C.3.2.) Although Premier did not complete delivery until July 3rd, six days after contract award, the Treegator bags were "immediately used by the District." (AR 8.) DDOT has also indicated that it will not purchase any additional bags. (AR 8; AR, Ex. 11, ¶ 8.) Because the scope of work under the Solicitation has been performed, eliminating any further need for the services solicited, the issue is moot as there is no available remedy to the protester. *Fort Myer Constr. Corp.*, CAB No. P-0641, 49 D.C. Reg. at 3380.

CONCLUSION

For the reasons discussed herein, we find that OCP correctly applied the certified business preference points to each bidder and properly awarded the contract to Premier, the responsible and responsive bidder with the lowest evaluated bid price. In addition, the contract work was already completed by the time Brentworks filed the instant protest. Accordingly, we dismiss the protest as moot.

SO ORDERED.

DATED: October 9, 2013

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

CONCURRING:

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

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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

THE PITTMAN GROUP, INC.	)	
	)	CAB No. P-0939
Solicitation No.: DLMS DOC93362	)	

For the Protester: Ken Pittman, *pro se*. For the District of Columbia Government: Robert Schildkraut, 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 #54417189

The Pittman Group, Inc. ("Pittman" or "protester") filed the present protest on June 12, 2013, challenging the District's "evaluation and due diligence" of proposals submitted in response to Solicitation No. Doc 93362 (the "Solicitation"). (Protest 1.) Specifically, the protester alleges that, in evaluating the proposals, the District may not have complied with the subcontracting plan requirements set forth in D.C. Code § 2-218.46 and section H.9 of the Solicitation. (*Id.*) However, the District contends that the bid of the only other offeror, UR International, Inc. ("URI"), was not subject to the subcontracting plan requirements of the D.C. Code or the Solicitation and, therefore, the District was not required to deem URI's price proposal nonresponsive. (Agency Report ("AR") 2-3.) The Board concurs with the District. Finding no violation of procurement law or regulation, the Board denies the instant protest and dismisses it with prejudice.

BACKGROUND

On January 18, 2013, the District's Office of Contracting and Procurement ("OCP"), on behalf of the Department of Public Works, Parking Enforcement Management Administration ("DPW"), issued the Solicitation for a contractor to install a dispatch and lot management system. (AR 2.) The Solicitation's original due date for proposals was February 12, 2013; however, amendments were issued to extend the deadline to March 19, 2013. (*See* AR at Exs. 3, 4.) In response to the Solicitation, the District received timely proposals from two offerors: Pittman and URI. (AR 2.)

Following discussions with the two offerors, on April 18, 2013, the District requested that they submit Best and Final Offers ("BAFO") by 3:00 p.m. on April 30, 2013. (*Id.*) Although both offerors submitted their BAFOs by the due date, the protester did not submit its BAFO until ten minutes after the deadline at 3:10 p.m. (*Id.*) However, the Contracting Officer ("CO") "executed a D&F for acceptance of a late proposal in order to accept [the protester's] late BAFO." (*Id.*) The protester's BAFO consisted of a base year price of $752,192; URI's BAFO consisted of a base year price of $162,400. (AR 3.)

Although the District had not yet made an award, on June 12, 2013, Pittman filed the instant protest in which it alleges that the District may not have complied with the subcontracting plan requirements set forth in D.C. Code § 2-218.46 as well as in section H.9 of the Solicitation. (Protest 1.) On September 10, 2013, the District filed a "Determination and Finding to Proceed with Contract Award In Spite of Protest" ("D&F") to override the mandatory stay of contract performance arising from this protest.[118]

DISCUSSION

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

The protester has alleged that the District, in evaluating the bids to the Solicitation, may not have complied with the subcontracting plan requirements pursuant to D.C. Code § 2-218.46 and section H.9 of the Solicitation. The D.C. Code requires that, "[a]ll non-construction contracts in excess of $250,000 . . . , shall include the following requirements: At least 35% of the dollar volume shall be subcontracted to small business enterprises; . . ." D.C. CODE § 2-218.46(a)(2)(A).[119] It further states, in relevant part, that "[b]ids or proposals responding to a solicitation, including an open market solicitation, shall be deemed nonresponsive and shall be rejected *if the law requires subcontracting* and the prime contractor fails to submit a subcontracting plan as part of its bid or proposal." § 2-218.46(d). (emphasis added)

In the Solicitation, the pertinent subcontracting plan requirements are as follows:

> Mandatory Subcontracting Requirements
>
> For contracts in excess of $250,000, 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.
>
> (AR at Ex. 2, § H.9.1.1.)
>
> If the prime contractor is required by law to subcontract under this contract, it must subcontract at least 35% of the dollar volume of this contract in accordance with the provisions of section H.9.1. The prime contractor responding to this solicitation which is required to subcontract shall be required to submit with its proposal, a notarized statement detailing its subcontracting plan. Proposals responding to this RFP shall

[118] The protester failed to challenge the D&F which the present Order hereby renders moot.
[119] The Board notes that although the protester cites "DC Official Code 2-218.46, subsection (2)(D)," (Protest 1) it appears that the protester intended to reference § 2-218.46(a)(2)(A) of the Code.

> be deemed nonresponsive and shall be rejected if the offeror is required to subcontract, but fails to submit a subcontracting plan with its proposal.
> …
>
> (*Id.* at § H.9.2.)

The protester alleges that "proposals deemed technically acceptable and fairly priced" were not properly evaluated by the District so as to ensure that such proposals included the required notarized "Subcontracting Plan." (Protest 1-2.) However, the District argues that protester and URI were the only two offerors to submit timely proposals and URI's proposed base year price of $162,400 was not in excess of $250,000, the threshold amount that would subject it to the subcontracting plan requirements of D.C. Code §2-218.46(a)(2)(A) and section H.9 of the Solicitation. (AR 2-3.) We agree. The statutory provision cited by protester applies to non-construction contracts such as the one contemplated by the Solicitation. However, URI's bid was not in excess of $250,000 and, since the law did not require URI to submit a subcontracting plan, the District was not required to deem URI nonresponsive for failure to include a subcontracting plan in its BAFO.

CONCLUSION

Finding no violation of procurement law or regulation on the part of the District, the Board denies the instant protest and dismisses it with prejudice.

SO ORDERED.

DATED: October 21, 2013

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

CONCURRING:

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

/s/ Monica C. Parchment
MONICA C. PARCHMENT
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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

APPEAL OF:

A&M CONCRETE CORPORATION, INC.	)	
	)	CAB Nos. D-1314, D-1330, D-1401
	)	& D-1402
Under Contract No. POKA-2004-B-0036-FH	)	

For the Appellant: Dirk Haire, Esq., Farah Shah, Esq., For the Appellee: Carlos Sandoval, Esq., Assistant Attorney General, Office of the Attorney General.

Opinion By: Chief Administrative Judge Marc D. Loud, Sr., with Administrative Judge Monica C. Parchment, concurring.

DECISION AND MEMORANDUM OPINION

Filing ID #54678134

These consolidated appeals arise under a contract that the District of Columbia (District or appellee) awarded to A&M Concrete Corporation (appellant or A&M) for rehabilitation of the historic Connecticut Avenue Bridge over Klingle Valley. Payment for structural steel repairs under the contract was based on the weight of the steel employed, and the contract identified two separate per-pound rates. The District directed appellant to perform repairs not shown on the initial contract drawings, and the parties disagree about which per-pound rate should apply. Appellant has appealed the contracting officer's deemed denials of (1) its claim for payment for all additional repair work at the higher contract unit price (Appeals D-1314, D-1330), (2) its claim for final payment under the contract (D-1401), and (3) its claim for release of the contract retainage (D-1402). The District has filed counterclaims in D-1314 and D-1330 to recover what it contends are overpayments it mistakenly made at the higher contract rate. The Board held a Rule 119 hearing from January 26-27, 2012, on entitlement only. The Board finds that the appellant is entitled to recovery on all of its claims, and that we lack jurisdiction over the District's counterclaims.

I. BACKGROUND

On May 18, 2006, the District awarded Contract No. POKA-2004-B-0036-FH (Contract) to A&M Concrete Corporation for "rehabilitation of the Connecticut Avenue Bridge over Klingle Valley." (Appellee's Hr'g Ex. 4.) The total contract price was $9,897,224. (*Id.*) There are several claims presently before the Board which arise out of the parties' contract. We address the claims separately below.

A. Appellant's Claims and Appellee's Counterclaims for Payments Due To Structural Steel Repairs Directed By the District Engineer (D-1314, D-1330)

1. Appellant's Claims That the District Underpaid Structural Steel Repair Work

A significant component of the contract, and the part which concerns cases D-1314 and D-1330, called for the appellant to repair and/or replace as needed the structural steel floor beams and stringers supporting the Connecticut Avenue Bridge's concrete deck.[120] At least some of the structural steel floor beams supporting the deck required repair because they had experienced corrosion damage over the years due to leaks or condensation from an adjoining water main. (Hr'g Tr. vol. 1, 281:16-283:21, Jan. 26, 2012; Appellee's Hr'g Ex. 7 (Contract Sheet 61.)) The corroded sections of such damaged floor beams were about "three or four feet long." (*Id.*, 285:8-19.) The steel floor beams themselves were "70 or 80 feet long." *Id.*

As to the above type of corroded floor beams, the contract called for A&M to clean and strengthen them by attaching small steel plates to the floor beam's top and bottom flanges.[121] (Hr'g Tr. vol. 1, 282:16-283:21; *see also* Appellee's Hr'g Ex. 7.) Specifically, the repair methodology called for attachment of a single steel plate to the top flange, and two steel plates to "sandwich" the bottom flange. (Hr'g Tr. vol. 1, 284:17-286:4; Hr'g Tr. vol. 2, 428:14-430:5, January 27, 2012; Appellee's Hr'g Ex. 7.) The contract drawings refer to the steel plate/flange repair method described above as either a "Floor Beam Repair Detail Type 1" or "Floor Beam Repair Detail Type 2" (Type 1/Type 2 repairs).[122] (*Id.*; Appellee's Hr'g Ex. 7.) The only difference between the two repair types is that Type 1 repairs were undertaken on previously repaired beams, while Type 2 repairs were undertaken on beams for the very first time.[123]

There were a total of five known corroded floor beams identified by the District at contract execution that required the Type 1/Type 2 repair methods noted above. (Hr'g Tr. vol. 1, 293:8-14; 332:18-333:22; Appellee's Hr'g Exs. 7-9.) In order to facilitate the repair of these five floor beams, the District prepared framing plans and contract drawings depicting their locations

[120] The appellant's chief estimator and senior project manager for the contract was Fariborz Navidi Kasmai. (Hr'g Tr. vol. 1, 53:10-14; 58:2-6.) Mr. Kasmai testified that structural steel is "underneath the concrete [bridge] deck supporting the concrete deck." (Hr'g Tr. vol. 1, 106:9-16; 125:21-126:12.) The floor beam is structural steel that carries the bulk of the weight of a concrete bridge deck. (Hr'g Tr. vol. 1, 123:7-18.) A stringer is a structural steel beam that is smaller than a floor beam, and sits on top of it. (Hr'g Tr. vol. 1, 123:4-18, 125:17-22.) Floor beams and stringers run perpendicular to each other. (*Id.*) Further, stringers run parallel to vehicular traffic. (Hr'g Tr. vol. 1, 148:9-17.)

[121] A flange is the flat part at the top and bottom of a structural steel beam. (Hr'g Tr. vol. 1, 284:13-19.) The beam itself looks like the letter "H" or "I", and the section between the flanges is called the "web." (Hr'g Tr. vol. 2, 503:5-504:3; 506:1-22.)

[122] Throughout our decision we refer to the repair method herein interchangeably as the steel plate/flange method or the Type 1/Type 2 repair.

[123] The Type 1/Type 2 repairs were essentially the same. The District's design engineer testified that some floor beams had been previously repaired about "20 or 25 years ago." (Hr'g Tr. vol. 1, 337:2-339:19.) Repairs to the previously repaired beams constituted one type of repair, while repairs being undertaken to beams for the first time constituted the second type of repair. (*Id.*) The contract drawings suggest that Floor Beam Repair Detail Type 1 pertained to previously-repaired beams because instructions thereto direct the contractor to "match existing bolt holes," which presumably would have been drilled during the previous repair. (*See* Appellee's Hr'g Ex. 7.)

and noting whether the Type 1 or Type 2 repair was required.[124] As regards the instant dispute, three drawings were of paramount importance: Contract Framing Plans 54-55, and Contract Sheet 61. (*See* Appellee's Hr'g Exs. 7-9.) Contract Framing Plans 54-55 identify the five known locations on the north and south ends of the bridge where corroded floor beams required the steel plate/flange method of repair. (Appellee's Hr'g Exs. 8-9.) Contract Sheet 61 details the steel plate/flange repair *method*, and identifies the total number of such repairs to be undertaken (five) as of contract execution. (Appellee's Hr'g Ex. 7; *see also* Hr'g Tr. vol. 2, 426:14-427:21.)

Although only five known locations for corroded beams were identified at contract execution, the parties contemplated that the number of structural steel members needing Type 1/Type 2 *or other repairs* might increase during contract performance. (Hr'g Tr. vol. 1, 108:2-110-3.) There were two contractual provisions directly addressing this possibility. First, a note on Contract Sheet 61 allows the Engineer to increase the number and location of floor beam repairs at his discretion.[125] (Appellee's Hr'g Ex. 7.) Specifically, "Note 2" to Sheet 61 states that "[T]HE NUMBER AND LOCATIONS OF FLOOR BEAM REPAIR DETAILS ARE ESTIMATED AT THE TIME OF FIELD INSPECTION AND MAY CHANGE AT THE DESCRETION [sic] OF THE ENGINEER." (*Id*.) Second, the parties' contract included Special Provision 113 (SP113) authorizing additional structural steel repairs "as directed by the Engineer." (Appellant's Hr'g Ex. 1; *see also*, Hr'g Tr. vol. 1, 108:2-109:7; 136:8-138:4.) In relevant part, SP113, captioned STRUCTURAL STEEL-FLOORBEAM REPAIR, provides as follows:

> (A) GENERAL – Work under this item includes fabricating, furnishing, installing or erecting structural steel for floor beam repair as shown on the Contract Drawings and/or as directed by the Engineer.
>
> (B) MATERIALS – Metal shall conform to the following specifications:
>
> 1. Steel Plates and Bars – AASHTO M270 Grade 36
> 2. High strength bolts – ASTM A325
>
> (C) MEASURE AND PAYMENT – The unit of measure for STRUCTURAL STEEL – FLOORBEAM REPAIR will be the pound. Payment will be made at the contract unit price per pound, which payment will include furnishing all materials, labor, tools, equipment and incidentals to accomplish the work specified and shown.

(Appellant's Hr'g Ex. 1.)

Insofar as the instant dispute is concerned, the parties' Pay Item Schedule contained contract unit prices which required the appellant to bill structural steel repair work under one of two mutually exclusive pay items. (Appellee's Hr'g Ex. 4.) While both pay items addressed structural steel repairs, Pay Item 1510 7006991 706005 (hereafter Pay Item 005) allowed the appellant to bill at the rate of $55.00 per pound of structural steel. The second provision, Pay

[124] As regards steelwork, a framing plan is a top view of the structure which shows repair locations. (Hr'g Tr. vol. 1, 105:10-107:5.) A contract drawing depicts the nature of the repair to be undertaken. (*Id*.)
[125] The District's "Engineer" in this case was identified as "Stanley Freeman." (Hr'g Tr. vol. 1, 266:21-267:17.) Mr. Freeman did not testify at the hearing.

Item Schedule 1500 706004 (hereafter Pay Item 004), limited A&M's billing rate to $18.25 per pound of structural steel. (Appellee's Hr'g Ex. 4.)

Further, each pay item carried its own supplemental "special contract provision" which *described* the type of repair allowable at the specified pay rate. (Appellant's Hr'g Ex. 1.) Thus SP113, which allowed the Engineer to direct additional structural steel repair work, supplemented Pay Item 005, and described the scope of repairs allowable under the contract to qualify for the $55.00 per pound rate. The second special contract provision, Special Provision 112 (SP112), supplemented Pay Item 004, and described the repairs as to which the $18.25 per pound rate applied. In relevant part, Special Provision 112 (SP112), captioned STRUCTURAL STEEL-AASHTO M270, GRADE 36, provided:

> (A) GENERAL – Work under this item includes fabricating, furnishing, installing or erecting all steel for superstructure construction including longitudinal beams, floor beams, diaphragms, conduit and scupper support beams, connection and splice plates, other structural steel items and miscellaneous metal work specified for use in various special provisions in this document and in the Contract Drawings unless noted as other 706 pay items.
>
> (B) MATERIALS – Metal shall conform to the following specifications:
>
> 1. Steel shapes, Plates and Bars – AASHTO M270 Grade 36

(Appellant's Hr'g Ex. 1.)

In the course of contract performance herein, the District discovered substantially more steel members in need of repair/replacement than the five floor beams originally identified as needing Type 1/Type 2 repairs.[126] As a result, the District's Engineer directed A&M to complete significantly more structural steel repairs than originally anticipated at contract execution. (*See generally* Hr'g Tr. vol. 1, 109:14-113:11; Appellant's Hr'g Exs. 8-11.) The structural steel repairs directed by the Engineer included both floor beams and stringers. (Hr'g Tr. vol. 2, 435:8-21; *see also* July 12, 2011 AF, Ex. 15 at DC000707-709.) The appellant's project manager and estimator testified that because deterioration of the floor beam is often where it connects to a stringer, it is not really possible to repair just the floor beam. (Hr'g Tr. vol. 1, 123:21-124:5.) The entirety of the dispute in D-1314 and D-1330 centers on whether the additional structural steel repairs directed by the Engineer are to paid under SP113 at $55.00 per pound, or under SP112 at $18.25 per pound.

Prior to directing that additional repairs be completed, the parties followed an established procedure to determine the types of repairs to be done, with the District exercising ultimate approval authority over each additional repair. The procedure included bringing the Engineer's designee to the job site for a field inspection of the exposed steel; bringing the structural steel fabricator onsite to review repair dimensions and expedite preparation of shop drawings; submission of the drawings to the District Engineer for approval; and (upon the Engineer's approval) A&M's proceeding forward with steel fabrication and the completion of repairs. (Hr'g Tr. vol. 1, 109:14-110:15; 111:13-113:11; 138:6-141:1; 262:9-263:14; 265:10-266:14.)

[126] The additional repairs became apparent once the bridge's concrete deck was removed, and "the structural steel […] framing of the bridge [became] exposed." (Hr'g Tr. vol. 1, 111:13-113:12.)

Following the above procedure, the District Engineer directed A&M to repair an additional 18,534.68 pounds of structural steel as to which the appellant contends it was underpaid at the $18.25 per pound Pay Item 004 rate.[127] Between November 2006 and November 2007, the appellant submitted five pay applications regarding the above for which the District refused compensation at the Pay Item 005 rate ($55.00 per pound). Specifically, A&M submitted pay application No. 7 (partial) on March 19, 2007, for 3,954.54 pounds covering the period February 10, 2007, to March 10, 2007; pay application No. 9 on May 18, 2007, for 4,434.94 pounds covering the period April 11, 2007, to May 10, 2007; pay application No. 10 on June 18, 2007, for 779.14 pounds covering the period May 11, 2007, to June 10, 2007; pay application No. 14 on October 18, 2007, for 6,601.32 pounds covering the period September 11, 2007, to October 10, 2007; and pay application No. 15 on November 19, 2007, for 2,764.74 pounds covering the period October 11, 2007, to November 10, 2007. (October 22, 2007, AF, Ex. 5; July 12, 2011 AF, Ex. 15; Notice of Appeal, D-1330, May 8, 2008.)

At issue presently are A&M's claims totaling $695,729.64 for amounts allegedly due on the five pay applications noted above. Appellant filed claims with the contracting officer as to these disputed amounts on March 27, 2007 (D-1314) and November 29, 2007 (D-1330), respectively. Appellant's March 27, 2007, claim seeks $145,329.35 as the amount due under pay item 005 on its D-1314 claim. Appellant seeks $535,820.15 as the amount due under pay item 005 in its D-1330 claim. The contracting officer did not issue decisions in the above, and the appellant timely appealed the deemed denial of both claims to the Board.

2. Appellee's Counterclaims That Structural Steel Repair Work Was *Overpaid*

As we have noted herein, the District generally declined to pay A&M the $55.00 per pound Pay Item 005 rate for all additional structural steel repairs directed by the Engineer during the course of the contract. There were, however, two exceptions to the above. First, the District approved appellant's pay application No. 4, dated December 18, 2006, for 13,245 pounds of structural steel at the Pay Item 005 rate for the period November 10, 2006, through December 10, 2006. (Appellant's Hr'g Ex. 4, D-1314 Countercl., Ex. 3; Hr'g Tr. vol. 1, 142:13-17; vol. 2, 469:13-20; July 12, 2011 AF, Ex. 20 at DC001072.) Second, the District approved appellant's pay application No. 5, dated January 24, 2007, for 1,894 pounds of structural steel at the Pay Item 005 rate for the period December 11, 2006, through January 10, 2007. (Appellant's Hr'g Ex. 4, D-1314 Countercl., Ex. 3; Hr'g Tr. vol. 1, 142:13-17; vol. 2, 469:21-470:4; July 12, 2011 AF, Ex. 22 at DC001089; August 30, 2007 Compl., ¶ 7; October 22, 2007 Answer of Appellee, ¶ 7.) Some of the repairs billed under pay requests 4 and 5 were Type 1 or Type 2 repairs as shown on Sheet 61, and some repairs were not, but all were paid by the District under Pay Item 005. (Hr'g Tr. vol. 2, 435:8-436:9.)

On August 6, 2008, the District filed two counterclaims with the Board pertaining to its payment of pay applications Nos. 4 and 5. In the aggregate, the counterclaims seek recovery against appellant in the amount of $549,704.56, on the grounds that the District erroneously

[127] The District Engineer also directed the appellant to repair 15,139 pounds of structural steel as to which the appellant has not asserted a payment claim. The District has asserted a counterclaim as to the above structural steel repairs, which is discussed *supra*.

overpaid appellant on two occasions (noted above) for structural steel repair. The District contends that appellant should have billed only repair work as shown on Contract Sheet 61 at $55.00, and that all other structural steel work should have been billed under Pay Item 004 at $18.25 per pound. (Appellant's Hr'g Exs. 4, 5.) The contracting officer has not issued a final decision asserting the claim addressed in the District's counterclaims, nor were claims submitted to the contracting officer. (Hr'g Tr. vol. 2, 404:1-4.)

The Board conducted a hearing on the merits from January 26-27, 2012. At the hearing, both parties' witnesses provided extensive testimony on their differing interpretations of SP113. For example, the appellant's senior project manager testified that he billed all structural steel repair work at the $55.00 per pound rate if it was shown on contract drawings 54, 55, or 61, *or* if it "was directed by the Engineer." (*See generally* Hr'g Tr. vol. 1, 62:11-21; 113:12-114:6; 115:3-116:5.) The senior project manager also testified that he believed that Note 2 on Sheet 61 authorized the District Engineer to direct additional repair work not shown on the plans and specifications, and that any structural steel repair work not shown on the plans and directed by the Engineer was billable under Pay Item 005 at $55.00 per pound. (Hr'g Tr. vol. 1, 62:11-18; 77:1-6; 113:12-114:6; 129:22-132:16; 154:9-16; 224:8-11; 225:9-13.) In the senior project manager's view, all Pay Item 004 work was already shown on the plans, and any additional work directed by the Engineer was to be paid under Pay Item 005. (*Id*.)

The appellee's project manager, however, testified that repairs under Pay Item 005 were limited to the Type 1/Type 2 repairs shown in the initial contract drawings, or subsequent repairs directed by the District Engineer which were similar to those in the original drawing (i.e. Contract Sheet 61).[128] (Hr'g Tr. vol. 1, 308:14-311:1; 324:8-325:18.) He testified further that a Type 1/Type 2 repair could be done on both stringers and floor beams. (Hr'g Tr. vol. 1, 331:1-3.) The project manager also testified that a Pay Item 005 repair should follow the Type 1/Type 2 method on Sheet 61, whether to a stringer or floor beam. (Hr'g Tr. vol. 1, 278:4-281:15.) He believed that only repairs of this specific methodology were allowable under Pay Item 005. (*Id*.) The project manager testified that to be within Pay Item 005, the repair did not have to be exactly as shown on Contract Sheet 61, i.e. same dimensions, but it had to be the same repair type: "small plates, drilled holes, [plates bolted to flanges], and no cutting big sections or replacing and splicing." (Hr'g Tr. vol. 1, 299:7-302:5.)

At issue presently is whether the additional structural steel repair work performed by A&M at the direction of the Engineer as noted above is payable at the $55.00 per pound rate. Both parties rely on Pay Item 005 and SP113 to assert that their preferred contract interpretation is correct.

B. Appellant's Claim for the Balance Due Under Payment Application No. 23 (D-1401)

On May 29, 2009, the appellant submitted Payment Application No. 23 to the appellee in the amount of $243,542.70 for work performed and completed during the period December 11,

[128] Mr. Ahmad Khashan served as a project manager for the instant contract on behalf of Parsons Transportation Group. (Hr'g Tr. vol. 1, 240:10-242:13.) In that capacity, Khashan visited the bridge site during construction "to observe the deterioration on [sic] the steel," and also assist with the approval of shop drawings needed for steel fabrication. (*See generally*, Hr'g Tr. vol. 1, 262:16-269:3.)

2008, to February 20, 2009.[129] To date, the appellee has not paid payment request No. 23. (Hr'g Tr. vol. 1, 178:11-179:8.) The contracting officer concedes that the District has not paid the balance due under request No. 23 and does not dispute that the work covered by payment request No. 23 was completed. Rather, the District has held up payment because it believes the Board should resolve the parties' structural steel repair claims and counterclaims first. According to the contracting officer, "[t]he payment was withheld pending file [sic] outcome of the dispute regarding the overpayment on the steel items. We felt that we needed to retain those [contract balance] funds to protect the District." (Hr'g Tr. vol. 2, 520:5-16; 528:18-529:2.)

On March 8, 2010, appellant sent the contracting officer a claim for the unpaid contract balance. (Appellant's Hr'g Ex. 15.) The claim listed the amounts owed under the listed Pay Items totaling $243,542.70. (Appellant's Hr'g Ex. 15; Hr'g Tr. vol. 1, 182:14-183:7.) The contracting officer failed to decide the claim within 90 days of receipt, and the appellant filed an appeal from the deemed denial. (August 26, 2010, Notice of Appeal and Compl., D-1401.)

C. Appellant's Claim for Contract Retainage (D-1402)

Under Article 9 of the parties' contract, the District was required to make monthly progress payments and authorized to retain up to 10% of contract payments "to protect the interests of the District of Columbia." (Appellant's Hr'g Ex. 17, Ex. 3.) Release of the retainage could be made upon substantial completion of the project:

> Also, whenever work is substantially complete, the Contracting Officer, if he considers the amount retained to be in excess of the amount adequate for the protection of the District, at his discretion, may release to the Contractor all or a portion of such excess amount.
>
> * * *
>
> Upon completion and acceptance of all work, the amount due the Contractor under the Contract shall be paid upon presentation of a properly executed voucher and after a release, if required, of all claims against the District arising by virtue of the Contract, other than claims in stated amounts as may be specifically excepted by the Contractor from the operation of the release.

(Appellant's Hr'g Ex. 17, Ex. 3; Appellant's Hr'g Ex. 19.) As stated in partial payment request No. 23, which covered the period of December 11, 2008, through February 20, 2009, the total amount retained by the District was $477,900.43. (Appellant's Hr'g Ex. 17, Ex. 5.)

On May 19, 2010, appellant sent a claim by United Parcel Service (UPS) to the contracting officer demanding payment of the $477,900.43 in retainage. (Appellant's Hr'g Ex. 17; Hr'g Tr. vol. 1, 191:3-194:3.) The claim was addressed to "Jerry Carter, Chief Contracting Officer, Government of the District of Columbia, Department of Transportation, Infrastructure Project Management Administration, Reeves Center, 3rd Floor, 2000 14th Street, NW, Washington, DC 20009." (Appellant's Hr'g Ex. 17.) The claim was received on May 24, 2010, by a person

[129] Appellant's original payment application No. 23 was submitted on February 27, 2009, but rejected by the D.C. Department of Transportation (DDOT) on March 23, 2009. (Appellant's Hr'g Ex. 15.) The appellant thereafter revised the pay application as requested by DDOT and resubmitted it on May 29, 2009. (*Id.*) The revisions are not germane to the instant matter.

identified as "Mowel" in the record, who appears to be a District government employee. (Appellant's Hr'g Ex. 17.) The contracting officer failed to decide the claim within 90 days of receipt, and Appellant filed an appeal from the deemed denial on August 26, 2010. (August 26, 2010, Notice of Appeal and Complaint (regarding contract retainage).) The appeal was docketed as D-1402. (August 30, 2010, Acknowledgement.)

On February 4, 2011, Appellant also submitted partial payment request No. 24 seeking payment of $477,900.44, the amount of retainage held by the District according to A&M's calculations. (Appellant's Hr'g Ex. 18; Hr'g Tr. vol. 1, 188:15-189:4; 194:8-195:3.) As of the date of the Board's January 27, 2012, hearing, the District had not paid appellant the contract retainage. (Hr'g Tr. vol. 2, 520:17-521:6.)

The record regarding the appellant's submission of as-built drawings is inconclusive. The appellant's project manager testified that A&M provided as-built drawings in 2008, (Hr'g Tr. vol. 2, 547:17-548:16), but that he was not the one who personally transmitted the documents, (Hr'g Tr. vol. 2, 551:3-13). However, other record evidence submitted by the appellant contradicts the testimony. (*See*, A&M Concrete Corporation, Inc.'s Statement Regarding Transmission of As-Built Drawings, February 6, 2012.) The contracting officer testified that he did not believe that the as-built drawings had been delivered and that he would not release retainage without receiving them from the contractor. (Hr'g Tr. vol. 2, 528:8-17; 544:15-545:2.) The contract listed the value of as-built drawings as $6,000. (*See* Appellee's Hr'g Ex. 4.)

The appellant was never asked by District officials, nor did it submit a final release of claims to the District. (Hr'g Tr. vol. 1, 203:3-8; 207:4-13; 213:3-13; 228:16-21; 544:15-545:2; 554:14-555:17.) The appellant's senior project manager (Fariborz Navidi-Kasmai) testified that the District Engineer (Stanley Freeman) and the contracting officer's technical representative (Muhammed Khalid) "abandoned" the project insofar as payment of the retainage was concerned, and told him "that they were assigned to a different department." (Hr'g Tr. vol. 1, 187:22-190:22.) The District did not challenge Mr. Navidi-Kasmai's characterization of the District as having abandoned the project on cross-examination, nor did the contracting officer contradict such characterization in his testimony. (Hr'g Tr. vol. 2, 516:16-545:2.) The contracting officer testified that he has "never seen a partial release and a payment made to a contractor with claims still pending." (Hr'g Tr. vol. 2, 541:10-12.)

The District sought to establish a connection between payment of the retainage herein, and appellant's alleged failure to repair a bridge leak. In a September 3, 2008, letter to A&M, the District advised that there were cracks in the bridge deck and that water was leaking through them. It noted that Appellant's application of epoxy to cracks in the deck had not corrected the condition. The District's letter requested A&M to advise of corrective measures to be taken. (July 12, 2011 AF, Ex. 17 (Bates DC000760).)

In a letter of January 8, 2009, Appellant requested payment of the cost of sealing the bridge deck as a change order. The letter recites that DDOT selected the sealant, that the District had agreed to pay for half of the sealing, and that A&M applied the sealant according to the manufacturer's directions. Appellant asserted that it had completed its contract obligation and

complained of the District's refusal to pay half of the cost as agreed. (December 17, 2010, Opposition to the Appellant's Motion for Partial Summ. J., Ex. 1.)[130]

The District has not begun the closeout process for this project, and the contracting officer testified that he would not initiate the closeout process and pay remaining amounts or send a final punch list to Appellant until the appeals before the Board are resolved. (Hr'g Tr. vol. 2, 519:5-520:4; 522:17-523:19.) He also testified that the Office of the Chief Financial Officer (OCFO) sends a release form to contractors for their execution as a final release of liens and claims, but that the OCFO did not send a release to the appellant in this case because of the pending CAB claims. (Hr'g Tr. vol. 2, 518:16-519:4; 526:10-527:11.) The contracting officer also testified that the contractor must sign a final release of liens and claims in order to receive retainage pay. (Hr'g Tr. vol. 2, 525:12-526:4.)

II. DISCUSSION

A. Appeal Nos. D-1314 and D-1330

At all times material to the instant dispute, the Board exercised jurisdiction over an appeal by a contractor from a final decision of the contracting officer under D.C. Code § 2-309.03 (a)(2) (2001).[131] As noted above, the appellant filed claims with the contracting officer on March 27, 2007, and November 29, 2007, respectively, seeking payment at the rate of $55.00 per pound for the additional structural steel work ordered by the District Engineer. The contracting officer failed to decide either claim within the statutorily required 90 days after submission, and appellant filed timely appeals from the resulting deemed denials. Accordingly, the Board has jurisdiction over appellant's claims in D-1314 and D-1330.[132]

Although we have often stated that "the first step in contract interpretation is determining what a reasonable person in the position of the parties would have thought the disputed language meant," *Appeal of the Ambush Group*, CAB No. D-1014, 52 D.C. Reg. 4200, 4208 (July 8, 2004); *Appeal of Transwestern Carey Winston*, CAB No. D-1193, 52 D.C. Reg. 4166 (April 9, 2004), the practical starting point in our cases has been to acknowledge and review each party's proffered interpretation. *See Ambush Group* at *4207*; *Transwestern Carey Winston* at 4168; *see also, ANA Towing and Storage*, CAB No. D-1176, 50 D.C. Reg. 7514, 7515 (June 25, 2003); *A.S. McGaughan Co.*, CAB No. D-884, 41 D.C. Reg. 4130, 4136 (March 16, 1994); *Appeal of Grunley Construction*, CAB No. D-910, 41 D.C. Reg. 3622, 3633-34 (Sept. 14, 1993).

In reviewing party proffers, we are guided by several well-settled principles which are relevant to the instant case. First, we note the aforementioned "first step", which requires that the disputed language be interpreted against the "reasonable person" standard. *Ambush*, 52 D.C. Reg. at 4208. Second, we consider the entire contract, following the rule that "all parts of the

[130] This claim is the subject of CAB No. D-1399, which is not presently before us.
[131] This contract was awarded on May 18, 2006, prior to adoption of the District's current governing procurement statute, the Procurement Practices Reform Act of 2010 (PPRA), codified at D.C. Code §2-359 et al. As a result, the Board's predecessor jurisdictional provision governs the instant dispute because the contract was executed, and these appeals were filed prior to enactment of the PPRA.
[132] We note further that the District has not contested jurisdiction in cases D-1314 and D-1330. (Hr'g Tr. vol. 1, 173:15-17.)

contract are to be read together and harmonized if at all possible." *See A.S. McGaughan*, 41 D.C. Reg. at 4136 (citations omitted); *Grunley*, 41 D.C. Reg. at 3634. Further, in resolving an interpretation dispute, we will not render any contract provision meaningless. *Grunley*, 41 D.C. Reg. at 3634; *A.S. McGaughan*, 41 D.C. Reg. at 4136 ("consequence is to be given to all [contract] clauses"). In addition, we consider the plain meaning of contract terms. *Id*. Finally, we note that if the Board finds that only one reasonable interpretation of the contract is possible, the Board's inquiry is at an end, and the single reasonable interpretation will be applied. *ANA Towing*, 50 D.C. Reg. at 7515.

We have conducted a proper review of the record before us and conclude that the sole reasonable interpretation of SP113 is that all repairs that A&M performed to structural steel floor beams herein are payable at $55.00 per pound, including repairs that follow the steel plate/flange methodology depicted in Contract Sheet 61, but also other types of repairs directed by the Engineer that do not follow the Type 1/Type 2 methodology. The key consideration herein is that structural steel repairs payable under Pay Item 005 must have been undertaken at the direction of the Engineer, and for the purpose of *repairing structural steel floor beams*. Furthermore, we conclude that the phrase "floor beam repair" is to be construed broadly to also include repairs to all stringers whose repair was necessary to facilitate an adjoining floor beam repair. Because our record is inconclusive as to whether the repairs depicted in appellant's hearing exhibits 8-11 were for structural steel floor beams, we remand the case to the parties to quantify which repairs therein were for structural steel floor beams (emphasizing that "repair" is to be construed broadly). Further, because the hearing on this matter was conducted as a Rule 119 hearing, we remand the case to the parties to negotiate the amount of quantum due appellant.

Thus, we begin with each party's proffered interpretation of the disputed contract language. We note that the parties agree that interpretation of contract SP113, STRUCTURAL STEEL – FLOORBEAM REPAIR, Item 706 005 is pivotal in resolving the dispute. As noted, SP113 reads, in pertinent part:

> (A) GENERAL - Work under this item includes fabricating, furnishing, installing or erecting structural steel for floor beam repair as shown on the Contract Drawings and/or as directed by the Engineer.
>
> * * *
>
> (C) MEASURE AND PAYMENT – The unit of measure for STRUCTURAL STEEL – FLOORBEAM REPAIR will be the pound. Payment will be made at the contract unit price per pound, . . .

(Appellant's Hr'g Ex. 1.)

Under the District's contract interpretation, the only type of structural steel repairs that are payable under SP113 and Pay Item 005 are the "Type 1 and Type 2 repairs that are illustrated on [Contract] Sheet 61." (Appellee's Post Hr'g Br. 3, 6.) The District contends that its interpretation is supported by the testimony of its COTR and senior project manager. (*Id*. at 7; *see also*, Hr'g Tr. vol. 1, 278:4-281:15; 299:7-302:5; 308:14-311:1; 324:8-325:18; 331:1-3.) The District contends that Note 2 on Sheet 61 makes its interpretation all the more correct because

note 2 is limited to an illustration of Type 1 and Type 2 repairs only, which appellee contends limits the District's flexibility to add additional floor beam repair locations to the specified Type 1/Type 2 detail. (Appellee's Post Hr'g Br. 6.) Thus, in summary, under the District's interpretation, SP113 reads as follows: Work under this item includes fabricating, furnishing, installing or erecting structural steel for floor beam repair *only* as shown on contract drawing *61 and only such* additional floor beam repair as directed by the Engineer *that is consistent with drawing 61*.

Further, the District adds that because SP113 does not apply instantly, that appellant's structural steel repairs herein are payable under SP112 and Pay Item 004 at $18.25/lb. (Appellee's Post Hr'g Br. 7.) SP112 provides, in pertinent part:

> Work under this item includes fabricating, furnishing, installing or erecting all steel for superstructure construction including longitudinal beams, floor beams, diaphragms, conduit and scupper support beams, connection and splice plates, other structural steel items and miscellaneous metal work specified for use in various special provisions in this document and in the Contract Drawings unless noted as other 706 pay items.

(Appellant's Hr'g Ex. 1.)

The appellant, however, contends that "any structural steel work for floor beam repair directed by the Engineer and approved on A&M shop drawings should be paid under Pay Item 706 005 at $55.00/lb." (Appellant's Post Hr'g Br. 12; s*ee also* Hr'g Tr. vol. 1, 62:11-21, 77:1-6; 113:12-114:6, 115:3-116:5; 129:22-132:16, 154:9-16, 224:8-11, 225:9-13.) The appellant contends that its interpretation "relies on the actual text of the Contract Specifications, without resorting to inferences and meanings that do not exist in the Contract Specifications." (Appellant's Post Hr'g Br. 12.) The appellant contends further that its interpretation is correct because the District "agreed with A&M's interpretation and made payments to A&M consistent with this interpretation" prior to initiation of the dispute herein.[133] (Appellant's Post Hr'g Br. 15.)

We agree with the appellant that any structural steel work for floor beam repair directed by the Engineer is payable under Pay Item 005. The plain language of SP113 establishes that floor beam "*repairs*" are the focus of its coverage. It is only in SP113 that the phrase "floor beam repair" is used, and it is used three times therein. By contrast, neither the word "repair" nor the phrase "floor beam repair" are found in SP112. The absence of the phrase "floor beam repair" in SP112, coupled with its usage three times in SP113, suggests that the sole reasonable interpretation herein is that the parties intended for structural steel floor beam repairs to be payable under SP113, and not under SP112.[134] In addition, the District's SP112 interpretation implies that the Engineer could direct changes under Pay Item 004. This interpretation, however, would render the contract's Article 3 Changes Clause meaningless as to the Engineer. Changes under the instant contract are authorized under the Article 3 Changes Clause and under Pay Item

[133] In support of this latter proposition, the appellant cites *TKC Aerospace, Inc., v. Dept. of Homeland Security*, CBCA No. 2119, Jan. 31, 2012, 2012 WL 443516, as standing for the proposition that "the interpretation of the contract given by the parties prior to the dispute arising is of great if not controlling weight."

[134] "(W)here a term is carefully employed in one place and excluded in another, it should not be implied where excluded." *Diamond Roofing Co. v. Occupational Safety & Health Review Comm'n*, 528 F.2d 645, 648 (5th Cir. 1976); *Marathon Oil Co. v. Kleppe*, 556 F.2d 982, 985 (10th Cir. 1977).

005 exclusively.

Furthermore, we find no limiting language in SP113 that would restrict payable repairs to the Type 1/Type 2 methodology detailed in Contract Sheet 61. To the contrary, SP113 grants the Engineer broad authority to direct repairs, as is indicated by the following language: "and/or as directed by the Engineer." The District's restrictive interpretation of SP113 would render the above seven words void of meaning. And we have noted that interpretations which render terms meaningless are to be avoided. *A.S. McGaughan,* 41 D.C. Reg. at 4136.

Thus, all structural steel floor beam repair work is payable at $55.00 per pound. But the question remains as to whether the repair of a floor beam can include a "stringer." Our record indicates that the end sections of floor beams sit directly underneath a stringer. (Hr'g Tr. vol. 1, 123:12-18.) Thus, it is clear that floor beams and stringers share common junction points. (*See, e.g.,* Appellant's Hr'g Ex. 6 (picture of exposed floor beam and stringer).) Given that the integrity of a floor beam can be compromised by corrosion at the junction point, (*see* Hr'g Tr. vol. 1, 114:7-115:2), we conclude that it is reasonable for the phrase "floor beam repair" to include those corroded stringers whose repair at the junction with a floor beam strengthens the adjoining floor beam. The purpose of the contract was to procure the repair and rehabilitation of the Connecticut Avenue Bridge, including establishing a streamlined method for the District to order and pay for additional structural steel floor beam repair work directed by the Engineer *without requiring issuance of a change order for each additional repair*.[135] Our interpretation recognizes that purpose by considering all of the applicable terms of the contract and reaching an interpretation that permits defective stringers which abut floor beams to be repaired following the same Engineer directed change procedure as used for floor beam repair. This interpretation does not "subvert the spirit and purpose of the contract clause." *Applied Cos.,* ASBCA No. 50593, 05-2 BCA ¶ 32,986 *citing Global Van Lines, Inc. v. United States*, 177 Ct. Cl. 829, 835 (1966). We do not believe that the parties intended for structural steel floor beams to be repaired at the direction of the Engineer as defects were discovered, whilst sections of the abutting stringers on top of the floor beams remained in a corroded state until such time as the contracting officer issued a change order.

Read reasonably, SP113 can be summarized as follows: Work under this item includes fabricating, furnishing, installing or erecting structural steel (1) for floor beam repair as shown on the contract drawings, and/or (2) for floor beam repair as directed by the Engineer. Under this reading, furnishing or installing structural steel as directed by the Engineer would not be limited to repairs consistent with Sheet 61 details, and would be compensable under SP113 and Pay Item 005, but repairs would be limited to floor beams and those stringers whose repairs at the junctions strengthens an adjoining floor beam. This is the only reasonable interpretation of SP113; one that confers upon words their plain meaning, and harmonizes the various contract provisions addressing the addition of work to the contract. The language of the contract does not support the District's position, and the Board would have to, inter alia, render key contract language meaningless to accept its interpretation. Whether the District in drafting the solicitation

[135] Although inapplicable to SP113 changes, the contract's changes clause (Article 3) conferred authority to the contracting officer to issue written change orders. (December 17, 2010, Opp'n to the Appellant's Motion for Partial Summ. J., Ex. 3.)

intended this interpretation of the contract is disputed.[136] However, under an objective approach to contract interpretation the written language controls.

The District's argument that an overlap between the provisions in SP112 and SP113 requires that appellant be compensated at the lower rate is without merit. (Appellee's Post Hr'g Br. 8.) The District's *Standard Specifications for Highways and Structures, 1996*, provides, at section 109.02, "Where 2 or more pay item areas overlap either by discrepancy in definition or by the intricate nature of work, payment will be made at the lowest contract unit price of overlapping pay items involved." (Appellant's Ex. 5, August 6, 2008 Countercl. in D-1330, Ex. 5; Stipulation 7.) In this case, however, there is no overlap between the two provisions. The final clause of SP112 excludes from its ambit "steel fabrication, furnishing, installing or erecting *noted as other 706 pay items*." Pay Item 005 falls into the category of an "other" pay item. As we have found that SP113 governs additional structural steel floor beam repair work ordered by the Engineer and requires payment under Pay Item 005, this final clause harmonizes SP112 and SP113 for purposes of determining the Pay Item applicable to the Engineer-directed work. *Grunley Constr., Inc.*, 41 D.C. Reg. at 3634 ("all parts of the contract are to be read together and harmonized if at all possible."). Thus as noted above, the "other" Pay Item referred to at the end of SP112 specifically gives way to SP113, and there is no *overlap* between the sections.

Further, although we have no need to rely on extrinsic evidence because the plain meaning of SP113 is clear on its face, we note that the extrinsic evidence in the record is consistent with the plain meaning of the contract as we find above. *See Beta Sys., Inc. v. United States,* 838 F.2d 1179, 1183 (Fed. Cir. 1988) ("Extrinsic evidence will not be received to change the terms of a contract that is clear on its face."); *Coast Federal Bank, FSB v. United States*, 323 F.3d 1035, 1040 (Fed. Cir. 2003). The District allowed payment at the Pay Item 005 rate in pay application requests 4 (December 18, 2006) and 5 (January 24, 2007) for additional Engineer-directed steel repair work other than that shown on Contract Sheet 61. This is evidence that the District initially shared appellant's interpretation of the Pay Items by paying for additional structural steel work by appellant that was not of the Type 1/Type 2 repair methodology. *See Blinderman Constr. Co. v. United States,* 695 F.2d 552, 558 (Fed. Cir. 1982) ("It is a familiar principle of contract law that the parties' contemporaneous construction of an agreement, before it has become the subject of a dispute, is entitled to great weight in its interpretation."); *see also, Fort Myer Constr. Corp.*, CAB No. D-1195, 50 D.C. Reg. 7479, 7483-85 (Mar. 24, 2003); *Transwestern Carey*, 52 D.C. Reg. at 4168-70.

The evidence of a shared interpretation of SP113 may be even more persuasive under the circumstances of these appeals because at the time of the District's payment of pay requests 4 and 5, the dispute had already surfaced. In correspondence exchanged by the parties before the pay requests were submitted, the appellant stated its intention to claim Engineer-directed repairs under Pay Item 005. (July 12, 2011, AF, Ex. 15 (Bates DC000698).) Mr. Khashan advised the District that appellant's interpretation of the contract's pay provisions was contrary to his

[136] We give no weight to Mr. Khashan's explanation regarding the intent of the contract provisions he drafted or reviewed before their inclusion in the solicitation for the bridge rehabilitation contract. (Hr'g Tr. vol. 1, 247:1-249:3; 272:4-273:11.) *See, e.g., Hoffman Constr. Co.*, VABCA 3833, 3834, 3676, 93-3 BCA ¶ 26,110 (subjective intent of drafter of specification is not relevant to contract interpretation); *Hill Bros. Constr. Co.*, ENGBCA No. 5673, 90-1 BCA ¶ 22,630. Our decision turns on an objective analysis of the language of the contract.

understanding of the contract requirements. (July 12, 2011, AF, Ex. 15 (Bates DC00700).) Nevertheless, armed with knowledge of the dispute and aware of Mr. Khashan's advice, the District made payments consistent with appellant's interpretation, which we have found reasonable. It was not until February 2007 that the District raised the issue officially. (Appellant's Hr'g Ex. 5, August 6, 2008, Countercl. in D-1330, Ex. 4; July 12, 2011, AF, Ex. 17 (Bates DC000733).) The District claims that a mistake was made in processing pay requests 4 and 5 in this manner, but we would expect that after receiving Mr. Khashan's opinion the District would have been vigilant and refused payment had it disagreed with appellant's position.

Lastly, even if the District's interpretation were also reasonable, an ambiguous clause will be read against the District as the sole drafter of the contract language. *See MCI Constructors, Inc.*, CAB No. D-1056, 50 D.C. Reg. 7412, 7417 (Mar. 27, 2002) (citing Restatement (Second) of Contracts § 206 (1979)); *Transwestern Carey*, 52 D.C. Reg. 4169 (citing *Affordable Elegance Travel, Inc. v. Worldspan, L.P.*, 774 A.2d 320, 328 (D.C. 2001)). In this case, the record shows that SP113 and SP112 were drafted by the District's agent Kowng Tse, who reported to Mr. Khashan, a project manager and supervising engineer for the District's third-party design firm. (Hr'g Tr. vol. 1, 242:10-243:4; 244:14-245:1; 247:1-249:4.)

B. Appellee's Counterclaims That Structural Steel Repair Work Was *Overpaid*

As noted herein, the District filed counterclaims in D-1314 and D-1330 with the Board, seeking an affirmative recovery against the appellant for what it contended were erroneous overpayments at the Pay Item 005 rate relative to pay requests Nos. 4 and 5. The appellee contends that only part of the payments were justified under the contract as Pay Item 005 and that much of the additional work should have been paid only under Pay Item 004. (Appellee's Post Hr'g Br. 8.) In these counterclaims, the District seeks recovery of $549,704.56 against appellant for the difference between what it concedes was due and what it paid by mistake.

It is well settled that the government has inherent authority to recover sums erroneously paid. *Aetna Casualty & Surety Co. v. United States*, 526 F.2d 1127, 1130 (Ct. Cl. 1975); *Heritage Reporting Corp.*, ASBCA No. 51755, 99-2 BCA ¶ 30474. In these appeals, however, the District concedes that its counterclaims were not submitted to the contracting officer, nor were they the subject of a final decision issued by the contracting officer. (Hr'g Tr. vol. 2, 404:1-4.)

At all times material hereto, the Procurement Practices Act provided that "[a]ll claims by the District government against a contractor arising under or relating to a contract shall be decided by the contracting officer who shall issue a decision in writing, and furnish a copy of the decision to the contractor." D.C. Code § 2-308.03(a)(1). As we stated in *Prince Constr. Co.*, CAB No. D-1173, 50 D.C. Reg. 7494, 7495 (May 6, 2003), "In the absence of a final decision by the contracting officer the Board has no jurisdiction to consider a demand of the District whether as a claim, counterclaim or defense." In this case, it is abundantly clear that the contracting officer failed to issue a final decision on the District's putative counterclaims. Accordingly, we are without jurisdiction to consider the counterclaims, and they are dismissed. *See Keystone Plus Constr. Corp.*, CAB No. D-1358, 2012 WL 554443 (Jan. 27, 2012). Were jurisdiction to attach, however, our conclusion would be the same: SP113 requires payment herein at the $55.00 per pound rate for the Engineer directed structural steel floor beam repairs performed herein, and the

District is not entitled to recovery for the payments it made on pay application Nos. 4 and 5 at the higher rate.

C. Appellant's Claim for the Balance Due Under Pay Estimate No. 23 (D-1401)

Appellant seeks a contract balance payment of $243,542. On May 29, 2009, appellant submitted pay request No. 23 seeking payment of the final balance due under the contract. On March 8, 2010, appellant sent the contracting officer a claim for the balance. Appellant filed this appeal from the Contracting Officer's failure to issue a final decision on the claim within 90 days of its submission. We exercise jurisdiction pursuant to former D.C. Code § 2-308.05(d).[137]

The District opposes payment because it alleges entitlement to overpayments for structural steel repairs that are the subject of its counterclaims. (Appellee's Hr'g Br. 8.) As discussed above, however, the District's overpayment claim has not been the subject of a contracting officer's final decision. Accordingly, we are without jurisdiction to consider it as a defense to the claim for final payment. *Prince Constr. Co.*, CAB No. D-1173, 50 D.C. Reg. 7494 (May 6, 2003). Additionally, the District's claim for recovery due to deficient work has not been presented to the contracting officer and has not been the subject of a contracting officer's final decision. Accordingly, that claim may not serve as a defense to appellant's claim for payment of the final balance of the contract. *Id.*

However, as this is a Rule 119 liability only case, we do not determine whether the contract balance alleged by appellant is correct. However, the District has demonstrated no reason why appellant should not collect final payment, whatever the amount may be. The amount of final payment is remanded to the parties for determination. The appeal is granted.

D. Appellant's Claim for Contract Retainage (D-1402)

In this appeal, appellant seeks recovery of the retainage held by the District from previous progress payments. Appellant sent a claim to the contracting officer on May 19, 2010. (Appellant's Hr'g Ex. 17; Hr'g Tr. vol. 1, 193:3-194:3.) The appellee failed to decide the claim within 90 days, and A&M appealed the deemed denial to the Board. (*Id*.) Although the District's counsel represented that appellant's retainage claim letter did not reach the contracting officer, there was no corroborating evidence or testimony introduced by the District on this point. (Hr'g Tr. vol. 1, 191:9-192:1.) In fact, when asked by the District counsel "why has the District not paid the retainage," the contracting officer testified that "we felt that we needed to, again, withhold as much as was necessary to protect the District from potential loss." (Hr'g Tr. vol. 2, 520:17-521:1.) The Board is satisfied that if the appellant's claim had never been presented to

[137] As with each of the four consolidated appeals herein, case No. D-1401 appeals from a deemed denial by the contracting officer for his failure to issue a decision within 90 days after appellant submitted its claim. At the hearing, the District's counsel stated that the claim letter, which was addressed to the contracting officer, never reached him because it was delivered to him on the wrong floor of the contracting officer's building. (Hr'g Tr. vol. 1, 184:9-185:18, 395:5-7.) Neither the District's project manager nor the contracting officer confirmed counsel's representation during their testimony. The District in its brief has not challenged the jurisdiction of the Board, and given the absence of supporting evidence or testimony and the failure of the District to challenge jurisdiction, we presume the claim was delivered to the contracting officer, and we are satisfied that the Board has jurisdiction to consider the appeal.

the contracting officer, the contracting officer would have provided testimony indicating this fact to the Board. We have jurisdiction.

The District contends that because of the overpayment issue, its interests would not be protected in the event it released the retainage. (Appellee's Post Hr'g Br. 8.) As discussed above, however, the District's claim for overpayment has not been the subject of a contracting officer's final decision. Accordingly, we are without jurisdiction to consider it as a defense to the claim for payment of the retainage. *Prince Constr. Co.*, CAB No. D-1173, 50 D.C. Reg. at 7495.

As a further reason to withhold the retainage, the District alleges that appellant has not satisfied preconditions to its release because it has (1) failed to submit a release of claims, (2) failed to supply as-built drawings, and (3) failed to correct defects in the work: a leak in the deck and deteriorating asphalt paving in one location on the bridge deck. (Appellee's Post Hr'g Br. 9.)

Article 9 of the contract authorizes the District to retain 10% of contract payments as a retainage to protect the interests of the District. (Appellant's Hr'g Ex. 19.) That provision allows release of all or a portion of the retainage upon substantial completion. The provision continues:

> Upon completion and acceptance of all work, the amount due the Contractor under the Contract shall be paid upon presentation of a properly executed voucher and after a release, *if required*, of all claims against the District arising by virtue of the Contract, other than claims in stated amounts as may be specifically excepted by the Contractor from the operation of the release. (Emphasis added)

(*Id*.)

Appellant submitted a pay request to the contracting officer in the form of a May 19, 2010, claim for the retainage, and followed that with partial pay request 24 submitted on February 4, 2011, seeking payment of the retainage. (Appellant's Hr'g Exs. 17-18.) The District has not pointed to any particular form necessary to request release of the retainage. Moreover, the provision contemplates appellant submitting a release *if required.* There is no evidence the District ever requested or required appellant to submit a release of claims. (Hr'g Tr. vol. 1, 203:3-8; 207:4-13.)

The District alleges that appellant has not completed work and that deficiencies remain uncorrected. (Appellee's Post Hr'g Br. 9.) The first deficiency noted by the District is an allegedly leaking deck. (*Id*.; *see also*, Hr'g Tr. vol. 2, 446:8-17; 447:3-7.) However, the record reflects that appellant completed an application of an epoxy sealant to the leaks in the bridge under agreement with the District, which, according to appellant, contemplated the District's payment of half of the cost of the repair. (Notice of Appeal and Compl., CAB No. D-1399.) Appellant completed the repairs according to the manufacturer's instructions and has demanded that the District pay what appellant says is its agreed share of the repair costs. (*Id*.)

However, the bridge is usable for the purpose intended and the District opened it to traffic over four years ago, so it is substantially complete. (Hr'g Tr. vol. 1, 231:18-232:8.) *Thermodyn Contractors, Inc. v. General Services Admin.*, GSBCA No. 12510, 94-3 BCA ¶ 27,071 (whether

a construction contract is substantially complete is determined by whether the facility in question is "occupied and used by the Government for the purposes for which it was intended") (citation omitted). The District has not demonstrated that the bridge is in need of further repair nor has it established any reasonable amount needed to protect its interest regarding the condition of the bridge. The District has not shown a basis for withholding the entire $477,900.43 retainage on a bridge that has been open to traffic for more than four years based on a doubtful claim of bridge leaks.

The evidence was inconclusive as to whether the appellant submitted as-built drawings. (Hr'g Tr. vol. 2, 547:17-548:16; 551:3-13; A&M Concrete Corporation, Inc.'s Statement Regarding Transmission of As-Built Drawings, February 6, 2012.) The contracting officer testified that he would not release retainage without receiving the as-built drawings. (Hr'g Tr. vol. 2, 528:8-17; 544:15-545:2.) The contract listed the value of as-built drawings as $6,000. (*See* Appellee's Hr'g Ex. 4.) Accordingly, withholding at least a part of the retainage for this reason would be reasonable to protect the interests of the District. *See JP, Inc.*, ASBCA Nos. 38426, 38427, 90-1 BCA ¶ 22,348 (upholding contracting officer's refusal to release retainage pending receipt of as-built drawings and air balance report required by contract after completion of performance).

However, while the District may withhold retainage if deficiencies remain in appellant's performance, *see M.C. & D. Capital Corp. v. United States*, 948 F.2d 1251, 1257 (Fed. Cir. 1991), excessive retention may be found improper when the amount of the retainage is not calculated to protect the District's interests. *See Columbia Eng'g Corp.*, IBCA No. 2351, 88-2 BCA ¶ 20,595. In this appeal, the District has made no effort to establish an amount necessary to protect its interests and has shown no basis for keeping the entire retainage since substantial completion of the bridge in 2009. Not only has the District failed to calculate the amount of retainage actually necessary to protect its interests, but the contracting officer in his hearing testimony made clear that he planned to take no steps towards closing out the contract and paying the retainage until the claims in these appeals were resolved by the Board. (Hr'g Tr. vol. 2, 528:8-17.) The District has provided no regulatory or contractual authority for declining to release the retainage until all contractor claims before the Board are resolved. Moreover, in this case the District's interests are protected because we have found in the appellant's favor on the structural steel underpayment claims (D-1314 and D-1330). In fact, Article 9 permits a contractor to submit a release of claims that reserves claims "specifically excepted by the Contractor from the operation of the release." (Appellant's Hr'g Ex. 19.)

Appellant has demonstrated entitlement to the retainage, and the District has shown no reason why it should not be released. Accordingly, retainage, subject to reasonable withholdings determined by the contracting officer to be necessary to protect the interest of the District, must be released.

This is a liability decision only, so the matter is remanded to the contracting officer to calculate a reasonable amount necessary to protect the interests of the District in view of the failure of appellant to furnish as-built drawings. Any remaining amount must be released to appellant.

III. CONCLUSION

As noted herein, appellant has established that the proper interpretation of SP113 authorizes payment at $55.00 per pound for all structural steel floor beam repair work that is not shown on the contract drawings and is ordered by the District Engineer. Accordingly, the appeals of D-1314 and D-1330 are granted as to liability. The counterclaims in both appeals are dismissed for lack of jurisdiction. Further, the appellant is entitled to final payment of the contract balance, and appeal D-1401 is granted as to liability. Finally, the appellant is entitled to the retainage less an amount calculated by the contracting officer to be necessary to protect the interests of the District regarding obtaining as-built drawings. To this extent Appeal D-1402 is granted as to liability. The Board remands these appeals to the District for the reasons noted above, and orders the parties to submit a status report within 30 days of our decision herein.

SO ORDERED.

DATED: December 9 , 2013

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

CONCURRING:

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

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

PRINCE CONSTRUCTION CO., INC./	)	
W.M. SCHLOSSER CO., INC., JOINT VENTURE	)	CAB Nos. D-1369, D-1419
	)	and D-1420
Under Contract No. POKT-2005-B-008-CM	)	

For the Appellant, Prince Construction Co./W.M. Schlosser Co., Joint Venture: Michael J. Cohen. For the District of Columbia: Brett A. Baer, Office of the Attorney General.

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

OPINION

Filing ID #54678022

These three consolidated appeals arise under Contract No. POKT-2005-B-0085-CM, for alterations and repairs at the Fort Totten Solid Waste Transfer Station Facility (the "Contract"). Performance of the Contract was not completed until approximately 261 days after the Contract's original period of performance expired. Appellant, Prince Construction Co., Inc./W.M. Schlosser, Inc., a joint venture ("Prince/Schlosser"), argues that it is entitled to a compensable time extension of 261 days, as well as an equitable adjustment for increased costs incurred resulting from two alleged constructive changes by the District. The District counters that Appellant has failed to establish entitlement, arguing that (1) Appellant's claim failed to comply with Contract requirements; (2) Appellant failed to submit certified cost and pricing data with its claim; and (3) Appellant has not provided sufficient evidence to justify its increased costs.

We sustain the appeals, in part, and find that Appellant is entitled to an equitable adjustment for its extended performance costs for 250 days of delay as discussed herein (D-1369), and for Appellant's increased costs resulting from the two constructive changes (D-1419, D-1420). The District shall compensate the Appellant for these costs, including interest, in accordance with the damage amounts awarded by the Board herein.

FINDINGS OF FACT

I. Overview of the Contract

1. On or about September 13, 2006, the District awarded Contract No. POKT-2005-B-0085-CM, in the amount of $13,266,000, to Prince/Schlosser for the renovation of an existing building at the District's Fort Totten Solid Waste Transfer Station ("Transfer Station"). (Appeal File ("AF") Ex. 2, at 40; Stipulated Facts[138] ("SF") ¶¶ 1-2.) Under the Contract, Prince/Schlosser

[138] *See* Section E of the parties' Joint Pretrial Statement.

was required to complete the project within 275 calendar days. (SF ¶ 4; *see also* Post Hearing Appeal File[139] ("PH AF") 30.)

2. The Transfer Station is a light industrial facility where garbage collection trucks unload trash, which is then compacted and loaded onto larger trucks for final disposal (typically at a landfill). (*See* Hr'g Ex. 119, at 1 (Expert Report of Paul Krogh, K2 Constr. Consultants, Inc.)[140]; Hr'g Tr. vol. 4, 818:13-819:2, July 13, 2012.)

3. During the 275 day period of performance, Prince/Schlosser was to perform construction work that included (1) construction of a building addition, including building foundations and truck ramps; (2) building a new "tipping floor" (where incoming trucks would dump trash into larger trucks waiting below) plus walls and a roof enclosing the new tipping floor; (3) installing new truck scales and a scale house; (4) building a new "Truck Wash facility;" and (5) providing temporary offices as directed by the Contracting Officer's Technical Representative ("COTR"). (PH AF 214; *see also* SF ¶ 3.) The Contract required that the existing Transfer Station facilities remain in operation throughout the construction process. (*See* PH AF 195, 214.)

4. The COTR, Ahmed Eyow, was the District's primary manager for the project and was responsible for the "day-to-day" supervision of the project. (Hr'g Tr. vol. 4, 930:6-9; PH AF 35.) The COTR was further responsible for advising the contracting officer ("CO") on the status of the project and Prince/Schlosser's compliance with the contract. (Hr'g Tr. vol. 4, 930:10-18; PH AF 35.)

5. SCS Engineers, Inc. ("SCS") prepared the plans and project specifications for the project on behalf of the District. (Hr'g Tr. vol. 4, 817:13-17; Hr'g Tr. vol. 6, 1083:11-19, July 30, 2012.) SCS was responsible for drafting the Project Drawings, for resolving problems that came up in the construction process that required an engineering solution, and for answering Requests for Information issued by Prince/Schlosser to obtain design information and clarifications. (Hr'g Tr. vol. 4, 820:2-16; Hr'g Tr. vol. 6, 1081:2-1083:19; *see also* Hr'g Tr. vol. 3, 539:2-19, July 12, 2012; Alterations & Repairs to Fort Totten Solid Waste Transfer Facility, Including Recycling & Drop-off Center: Part II - Transfer Station Modifications (hereinafter "Project Drawings") at cover page (identifying "SCS Engineers" as the drafter).)

II. Relevant Contract Provisions

A. Permits

[139] On February 14, 2013, the Board ordered the parties to supplement the Appeal File because various required documents were not included in the original submission. (Order to Supplement Appeal File 1.) Throughout our decision, we refer to exhibits in the Post Hearing Appeal File by their abbreviated Bates number.

[140] All specific references to hearing exhibits throughout this opinion refer only to the Appellant's hearing exhibits presented at trial.

6. Section H.3 of the Contract required Prince/Schlosser to obtain all required permits, including the building permit, from the District Department of Consumer and Regulatory Affairs ("DCRA"). (PH AF 36-37.) The Contract required Prince/Schlosser to acquire any needed permits prior to commencing work requiring such permits. (*Id.* at 36.) Additionally, the COTR was required to assist Prince/Schlosser if it experienced difficulty in obtaining a permit. (*Id.*)

B. Changes, Requests for Equitable Adjustment

7. The procedures for changes to the Contract were governed by the Changes clause in Article 3 of the District's 1973 Standard Contract Provisions for Use with Specifications for District of Columbia Government Construction Projects (the "Standard Contract Provisions"), as modified by section H.33 of the Contract. (*See* PH AF 55-60, 69, 906-07.) Article 3 of the Standard Contract Provisions allowed the CO to make any change in the work, within the general scope of the Contract, at any time, through a designated written change order, including changes to (1) the specifications; (2) method or manner of performance; (3) the District furnished facilities, equipment, materials, or services; and (4) the work schedule (i.e., acceleration). (PH AF 906.)

8. Pursuant to Article 3, subsection B, any other written or oral order by the CO that effectively changed the Contract would be treated as a change order, provided that the contractor give the CO written notice stating the date, circumstances and sources of the order. (PH AF 906-07.)

9. Subsection C of Article 3 provided for an equitable adjustment to the Contract where any such changes to the contract work increased or decreased the cost or time of performance. (PH AF 907.) Subsection C required the contractor to submit to the CO, in writing, a statement of the general nature and extent of any claim it intended to file within 30 days after receiving a change order or providing notice that it considered another order to be a change. (*Id.*) Furthermore, subsection C barred any claim by the contractor for an equitable adjustment under the Article 3 if asserted after final payment. (*Id.*)

10. Finally, pursuant to Article 3, subsection D, it was the contractor's responsibility to assemble a "complete cost breakdown that lists and substantiates each item of work and each item of cost," including labor, bond, materials, equipment, subcontractor, and other miscellaneous costs, in the event that the parties failed to agree on an equitable adjustment. (PH AF 907.)

11. Section H.33 of the Contract modified the Changes provisions in Article 3. (*See* PH AF 55-60.) Pursuant to subsection H.33.B.1, in the event the nature of a change was known to the parties "sufficiently in advance […] to permit negotiation," the parties should attempt to agree on an equitable adjustment. (*Id.* at 55.) Prior to negotiating an equitable adjustment for a change order, the contractor was required to submit "cost or pricing data and [a] certification that, to the

best of the Contractor's knowledge and belief, the cost or pricing data submitted was accurate, complete, and current as of the date of negotiation of the change order or modification." (*Id.* at 59.)

12. Pursuant to subsection H.33.C.1, Prince/Schlosser was required to submit a proposal within 15 calendar days of the date a change was "proposed or directed," rather than the 30 days allowed under Article 3. (PH AF 56.) Requests for equitable adjustments to the contract price could be based on either actual costs (provided that such costs were "reasonable and predicated on construction procedures normally utilized for the work in question") or "standard trade estimating practice." (*Id.*)

13. In the event that the parties could not "reach agreement regarding equitable adjustment," the CO could issue a change order under Article 3. (PH AF 56.) Further, if agreement on the price for a change could not be reached before the changed work was performed, a price adjustment would be based upon the contractor's reasonable, actual costs. (*Id.*) Subsection H.33.C.2 limits the contractor's allowable overhead, profit, and commission to the percentages shown in the following table[141]:

	Overhead[142]	Profit	Commission
To Contractor on work performed other than his/her own forces.	-	-	10%
To Contractor and/or Subcontractor for Portion of work performed By their respective forces.	10%	10%	-

(*Id.* at 56-57.)

14. Section H.33 also specified how the parties would handle changes to the Contract's period of performance. (*See* PH AF 57-59.) Pursuant to subsection H.33.C.3, where a change affects the time required for the performance of the contract, the contractor was required to describe "how such change affects the specific contract work activities, current critical path, overall performance of work, concurrency with other delays, and the final net impact on the contract milestone(s)." (*Id.*) The contractor was further required to incorporate new durations for changed work activities into its work schedules. (*Id.* at 57-58.) In the event that the contractor and COTR failed to agree on the duration of an extension, the COTR would "assign a reasonable duration to be used in determination of job progress." (*Id.* at 58.)

15. Under subsection H.33.D of the Contract, a contract time extension "may be justified" for any of the causes of excusable delays listed in Article 5 of the Standard Contract Provisions.

[141] While the format of the table has been slightly altered, the text is identical to the original. (*See* PH AF 57.)
[142] The percentage for overhead, profit and commission "shall be considered to include . . . field and office supervisor and assistants above the level of foreman, incidental job burdens and general office expenses, including field and home office." (PH AF 56-57.)

(PH AF 58.) Article 5 defined excusable delays[143] as those arising "from unforeseeable causes beyond the control and without the fault or negligence of the Contractor," including acts of (1) God, (2) the public enemy, (3) the District in either its sovereign or contractual capacity, and (4) another contractor in the performance of a contract with the District. (PH AF 908.) Finally, subsection H.33.D.2 of the Contract specified that the contractor would be "entitled only to the additional number of days the project is delayed which is not concurrent with another delay for which a time extension is granted or for which a valid request has been submitted." (PH AF 58 (emphasis in original).)

C. Differing Site Conditions

16. Article 4 of Standard Contract Provisions provided procedures for the parties to follow in the event that the contractor encountered differing site conditions. (PH AF 908.) Pursuant to Article 4, the contractor was required to promptly notify the CO in writing in the event it discovered either (1) "Subsurface or latent physical conditions at the site differing materially from those indicated in the Contract;" or (2) "Unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered or indicated in the Contract." (*Id.*) The contractor was required to provide such notice prior to disturbing any such conditions. (*Id.*)

17. Under Article 4, the contractor is entitled to an equitable adjustment if it demonstrates the existence of a differing site condition and the condition causes an increase in its cost of, or the time required for, performance of any part of the work. (PH AF 908.) However, Article 4 barred any claim for equitable adjustment asserted after final payment. (*Id.*)

D. Shop Drawings

18. The Contract provided that the COTR would review and give approval of required shop drawings. (PH AF 39.) However, approval of shop drawings merely indicated that the contractor's general method of construction is satisfactory and did not permit any "departures from contract requirements except as specifically stated in the approval." (*Id.*)

III. Notice to Proceed and Contract Schedule

19. On October 12, 2006, the CO issued a Notice to Proceed, which stated that work on the project was to commence on October 16, 2006, and conclude by July 17, 2007 (a period of 275 calendar days). (Hr'g Ex. 4; SF ¶ 5.)

[143] While the Standard Contract Provisions do not use the phrase "excusable delay," Article 5 states that a Contractor shall not be subject to termination for delay (i.e., will be excused for the delay), if the delay is due to any of the causes described above, and the contractor notifies the CO within 10 days of the start of the delay. (PH AF 908.)

20. As part of its project plan, Prince/Schlosser was required to submit an as-planned schedule showing the sequence and duration of each part of the work. (PH AF 47-48.) Prince/Schlosser submitted its first "As-Planned Schedule" to the District on October 24, 2006, and provided monthly updates thereafter. (*See* Hr'g Exs. 11, 12; *see also* Hr'g Tr. vol. 1, 128:5-13, July 10, 2012; Hr'g Tr. vol. 4, 820:17-821:21; SF ¶ 7.)

21. The first as-planned schedule was formatted as a 14-page spreadsheet, and listed the following categories of activity: (i) "General Activities,"[144] (ii) "Submittal/Procurement Activities," (iii) "Demolition," (iv) "Site Work,"[145] and (v) "Building." (*See generally* Hr'g Ex. 12.) Prince/Schlosser's initial schedule projected a completion date of July 12, 2007—five days before the period of performance ended. (*See* Hr'g Ex. 12, at 1; *see also* Hr'g Tr. vol. 2, 435:13-19, July 11, 2012.)

22. During the project, Appellant submitted monthly CPM schedule updates reflecting its planned schedule and the projected completion date as affected by alleged delays occurring on the project. (Hr'g Ex. 119, Attachs. 1-32.) Throughout the period of performance, the District did not reject any of the monthly schedule updates submitted by Prince/Schlosser. (Hr'g Tr. vol. 1, 128:14-18.)

IV. Claimed Delaying Events

A. Master Building Permit and Pre-Construction Activities

23. Before any construction or earth-disturbing activities could commence, Prince/Schlosser was required to obtain a Master Building Permit ("MBP") from DCRA.[146] (*See* Hr'g Tr. vol. 1, 62:15-63:11, 69:1-13; PH AF 36-37.) The MBP stated the location of the project, provided a brief description of the work; identified the individuals involved in the work, and listed any conditions or restrictions that DCRA had placed on the project.[147] (Hr'g Ex. 15.)

24. As part of the permit process, Prince/Schlosser submitted contract drawings for review by multiple District representatives, including representatives of the D.C. Water and Sewer Authority ("DC WASA"), which was responsible for approving the design of sewer, water, and storm drains affected by the project. (*See* Hr'g Tr. vol. 1, 62:15-20, 66:15-67:2.)

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[144] Sample tasks included "Preconstruction Site Survey/Photograph," "Deliver & Setup Temp Office Trailer," and "Final Site Inspection." (*See* Hr'g Ex. 12.)

[145] Sample tasks included "Relocate existing 6 [inch] water line," "Excavate footings for new site retaining wall," and "Landscape & seeding (area 3)." (*See* Hr'g Ex. 12.)

[146] While the COTR testified that, in practice, contractors could mobilize the project site (e.g., put a trailer on the site), and pre-position steel reinforcement bar where concrete would be poured without an MBP, he agreed that a contractor could not break ground or pour concrete without an MBP. (Hr'g Tr. vol. 4, 824:22-832:11.)

[147] As-issued, the only restrictions that the MBP placed on the Project were that all construction was to be performed in accordance with the then-current regulations, and that separate permits be obtained for electrical, plumbing, and mechanical work. (Hr'g Ex. 15.)

25. DCRA also required that Prince/Schlosser meet with a Soil Conservation Inspector from the District of Columbia Department of the Environment after the MBP was issued, but before construction began.[148] (Hr'g Tr. vol. 1, 69:1-13.) As of October 11, 2006, Prince/Schlosser had attempted to schedule a meeting with the Soil Conservation Inspector, but was unable to do so because the MBP had not yet been issued. (Hr'g Tr. vol. 1, 69:14-19.)

26. Also on October 11, 2006, John Andrew, a Senior Project Manager for Prince/Schlosser emailed the COTR, noting that "[w]e must know today if the Master Permit will be issued by Friday or if you will direct the joint venture to proceed without the Permit. Subcontractors have to schedule their crews! This is urgent. Please respond immediately." (*See* Hr'g Ex. 14.)

27. Although the COTR does not appear to have responded to Andrew's October 11, 2006 email, an employee of Prince/Schlosser, Anthony Ekwenye, did respond. (*See* Hr'g Ex. 14; *see also* Hr'g Tr. vol. 1, 61:13-15 (stating that Ekwenye was a "project executive for the joint venture").) Ekwenye wrote that he had spoken "at length" with the COTR concerning the Notice to Proceed, wage rates, the results of an asbestos study, and DC WASA approval of the project plans (a requirement for the MBP). (Hr'g Ex. 14.) In his summary of the conversation, Ekwenye wrote, WASA approval and the MBP were expected "on or before October 16." (*See id*.)

28. Although it was Prince/Schlosser's responsibility to perform under the Contract, the District paid the permit fee and obtained the MBP on or about October 23, 2006—seven days after the Notice to Proceed indicated that work should have begun. (*See* Hr'g Ex. 15; Hr'g Tr. vol. 4, 836:20-22.) When asked why the District, rather than Prince/Schlosser, had acquired the MBP, the COTR testified that the District believed it was its obligation, noting that "sometimes the District gets the permit, sometimes the contractor gets the permit." (Hr'g Tr. vol. 4, 837:1-16.)

29. A Soil Conservation Inspector from the Department of the Environment was not available to meet with Prince/Schlosser until October 27, 2006. (Hr'g Tr. vol. 1, 70:6-19; Hr'g Tr. vol. 2, 303:2-21.) On that date the pre-construction meeting required by DCRA was held at the site, and Prince/Schlosser began work at the Transfer Station. (Hr'g Tr. vol. 2, 302:20-303:7; Hr'g Ex. 18.) This was 11 days after the start date specified in the Notice to Proceed.

B. Subsurface Concrete Obstructions

30. Before building the new foundations at the Transfer Station, Prince/Schlosser planned to excavate the underground utilities including the sanitary sewer. (Hr'g Tr. vol. 1, 72:9-12; *see also* Hr'g Tr. vol. 2, 426:1-16 (describing the general sequence of construction activities).)

[148] Although this was discussed at length at trial, this condition was not stated in the MBP itself. (*See generally* Hr'g Ex. 15.)

31. On December 4, 2006, in the course of excavating for the sanitary sewer, Prince/Schlosser discovered a series of subsurface concrete obstructions within the footprint of the planned building addition. (Hr'g Tr. vol. 1, 72:13-16; Hr'g Ex. 20.) The obstructions spanned an area approximately 250 feet long and 30 feet wide, and appeared to be the remnants of an earlier building foundation. (Hr'g Tr. vol. 1, 73:14-74:8, 82:7-16.)

32. David Bourdeau, Prince/Schlosser's Project Superintendent, testified that Prince/Schlosser determined that the obstructions were "buried below grade, and there was asphalt pavement over the top of it, so [there was] no indication that it existed until we began excavating." (Hr'g Tr. vol. 1, 73:21-74:3.) The COTR likewise testified that the subsurface concrete obstructions were "unbeknownst to anybody" prior to their discovery by Prince/Schlosser. (Hr'g Tr. vol. 4, 862:2-18, 864:9-11.)

33. John Andrew, Prince/Schlosser's Senior Project Manager, notified the COTR of the subsurface concrete obstructions in a letter dated December 5, 2006, writing that the District's field inspector had been notified of the differing site condition. (Hr'g Ex. 20.) Andrew further expressed Prince/Schlosser's concern that the obstructions would conflict with the contract work and requested that "the Engineer evaluate the possible impact of this obstruction." (*Id.*) Andrew stated that Prince/Schlosser was nonetheless immediately proceeding with the changed work "in order to mitigate the delay." (*Id.*) Lastly, Andrew stated that Prince/Schlosser had designated the issue as PCO 11,[149] and that it would submit a request for an equitable adjustment "as soon as pertinent data can be accumulated." (*Id.*)

34. Bourdeau testified that Prince/Schlosser had "needed to employ more extreme means of excavating, rented demolition equipment, equipment to break and remove the concrete from the path of the new construction work." (Hr'g Tr. vol. 1, 74:13-18.) Prince/Schlosser's daily report from January 12, 2007, indicates that Prince/Schlosser employed a subcontractor to clean and prepare the footing subgrade for area C of the project site. (Hr'g Ex. 22; *see also* Hr'g Tr. vol. 1, 77:8-78:9.) Bourdeau testified that this daily report indicates that Prince/Schlosser did not complete removal of the subsurface concrete obstructions until January 12, 2007. (Hr'g Tr. vol. 1, 81:3-82:3.)

C. Fire Sprinkler Pump

35. Specification 13921 of the Contract, "Electric-Drive Centrifugal Fire Pumps," provided detailed performance requirements, and a list of approved manufacturers for various types of fire

[149] During the course of the project, when Prince/Schlosser encountered a condition not reflected in the contract documents that it considered to be a change in scope or an unforeseen condition, it assigned a PCO ("Proposed Change Order") number for purposes of tracking . (Hr'g Tr. vol. 1, 57:1-11.)

suppression pumps.[150] (*See* PH AF 844-57.) However, Project Drawings F-1 and F-2 did not state that a fire pump would be required for the dry-pipe sprinkler system. (*See generally* Project Drawings F-1, F-2.)

36. On July 20, 2006, approximately three months before the District issued the Notice to Proceed,[151] Prince/Schlosser submitted Request for Information ('RFI") 2. (*See* Hr'g Ex. 55.) In the RFI, Prince Schlosser noted that the District of Columbia Water and Sewer Authority ("DC WASA") lacked recent Flow Test data, which were required in order to design the fire sprinkler system.[152] (*Id.*) Prince/Schlosser therefore requested confirmation "that a Fire Pump per Specification Section 13921 in Addendum #2 is not required if the Fire Sprinkler performance requirements in Specification Section 13915 para 1.5 can be met with available water supply." (*Id.*)

37. Bourdeau testified that Prince/Schlosser had issued RFI 2, even though the fire pump was not a contract requirement, so it would have necessary information should a fire pump later prove essential. (Hr'g Tr. vol. 1, 148:7-12.) Accordingly, the RFI stated, "[i]f fire pump is required, please provide the following information for the Fire Sprinkler Pump: 1. Location of fire pump[;] 2. Location of jockey pump[;][153] 3. Connection point at electrical service[; and] 4. Feeder[154] Size." (Hr'g Ex. 55.)

38. SCS responded to RFI 2 on September 15, 2006, confirming that a fire pump was not required if the sprinkler performance requirements could be met with the existing water flow. (Hr'g Ex. 55.) SCS further stated that it would coordinate the location and electrical connection of any fire pump if a fire pump was required. (*Id.*; Hr'g Tr. vol. 6, 1089:5-8.)

39. DC WASA conducted water flow testing for the fire suppression equipment on October 22, 2006. (Hr'g Ex. 54; Hr'g Tr. vol. 1, 153:2-11.) Prince/Schlosser's fire suppression subcontractor, Radius Services Fire Protection ("Radius") evaluated the DC WASA data, and informed Prince/Schlosser in a December 8, 2006, letter that it had determined that the water supply could not "provide the required pressure and flow at the system." (Hr'g Ex. 56, at 1.) Radius therefore recommended a fire pump rated for "1,000 gpm @ 85 psi boost." (*Id.*)

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[150] While the Contract included specifications for various types of fire pumps, Prince/Schlosser's Project Superintendent, David Bourdeau, testified that the Contract did not originally include a fire pump in its requirements. (Hr'g Tr. vol. 1, 145:5-8.)

[151] Bourdeau testified that Prince/Schlosser submitted this RFI prior to the Notice to Proceed because rince/Schlosser "wanted to be proactive and timely on the project, and bring to the attention of the project owner and designer any conditions or issues which could impact progress." (Hr'g Tr. vol. 1, 146:2-9.)

[152] The RFI indicated that Radius Services Fire Protection, a subcontractor, had requested the Flow Test from DC WASA. (Hr'g Ex. 55.)

[153] A "jockey pump" is a type of auxiliary pump used in conjunction with, and typically located near a standard fire pump. (Hr'g Tr. vol. 1, 149:10-21.)

[154] The "Feeder" refers to the wiring for the fire pump—more powerful pumps typically requiring more electric current. (Hr'g Tr. vol. 1, 150:10-15.)

40. Prince/Schlosser submitted product data for the required fire pump to SCS for approval on January 19, 2007. (Hr'g Tr. vol. 1, 154:5-20.) On January 26, 2007, Prince/Schlosser submitted RFI 61 to SCS, seeking direction on the location of the fire pump, and the necessary electrical connections. (Hr'g Ex. 57.) In the RFI, Prince/Schlosser identified this issue as PCO 15. (*Id.*)

41. In its January 31, 2007, response to RFI 61, SCS stated that it was Prince/Schlosser's responsibility, as the fire protection designer, to provide a design for the entire fire protection system including the pump room layout. (Hr'g Ex. 57.) Michael Kalish, SCS's director for the project, testified that SCS could not provide an electrical schematic until Prince/Schlosser submitted the design for the overall fire sprinkler system. (Hr'g Tr. vol. 6, 1099:4-1100:8.)

42. In this regard, Specification 13921, paragraph 2.2.G.1.a, provides:

> 1. Fire-Pump:
>
> a. Characteristics as calculated by fire protection contractor. Installer's responsibilities include designing, fabricating, and installing fire-suppression systems and providing professional engineering services needed to assume engineering responsibility. Preparation of working plans, calculations, and field test reports by a qualified professional engineer.

(PH AF 849)

43. Bourdeau testified that because of SCS's lack of guidance in response to RFI 61, Prince/Schlosser determined the location of the fire pump and submitted revised product data on March 28, 2007. (Hr'g Tr. vol. 1, 159:3-18; *see also* Hr'g Ex. 58.) Prince/Schlosser also submitted a draft design for the overall fire sprinkler system to SCS on March 28, 2007. (*See* Hr'g Ex. 59, at 1.) On April 5, 2007, Prince/Schlosser issued RFI 71, requesting that SCS provide an electrical design based on the March 28th submissions, noting "[u]nlike the 'design-build' Fire Protection work, the Electrical work under this Contract is to be performed per plans and specs." (*Id.* at 1-2.)

44. On June 19, 2007, SCS responded to RFI 71 with electrical design information and schematics, including an electrical riser diagram for the fire pump. (Hr'g Ex. 59, at 2, 4-5; Hr'g Tr. vol. 1, 162:16-163:20; Hr'g Tr. vol. 6, 109:20-1097:20.) The riser diagram specified a 600 volt, 200 amp fused safety switch for the fire pump. (Hr'g Ex. 59, at 5.)

45. The District's COTR testified that he was aware of the communications between SCS and Prince/Schlosser concerning which party was responsible for designing the electrical connections for the fire pump but had decided to "wait it out" while the parties worked to resolve the issue. (Hr'g Tr. vol. 4, 931:12-932:2.)

46. On December 21, 2007 (approximately five months after the Contract's originally-specified completion date), the CO issued Basic Change Directive ("BCD") No. 8, pursuant to Article 3 of the Standard Contract provisions, directing Prince/Schlosser to furnish and install the fire pump. (Hr'g Ex. 60.) [155]

47. On January 16, 2008,[156] while installing the fire pump, Prince/Schlosser's electrical subcontractor, John E. Kelly & Sons ("Kelly"), discovered that the fire pump system's electrical fuse, which had been specified by SCS, was undersized. (Hr'g Tr. vol. 1, 170:15-171:5; Hr'g Ex. 54, at 3.) Prince/Schlosser notified SCS of the issue in RFI 117 on January 18, 2008.[157] (*See* Hr'g Ex. 61, at 1-2, 6.) In the RFI, Prince/Schlosser noted that its electrical subcontractor recommended a 600 amp fused safety switch, and sought advice as soon as possible. (*Id.* at 2.) Prince/Schlosser also sought confirmation that the extra work associated with the change in fused safety switches was within the scope of BCD No. 8. (*Id.* at 1.)

48. In response to RFI 117, the COTR directed Prince/Schlosser to use a 600 amp fuse instead of a 200 amp fuse on January 25, 2008. (Hr'g Ex. 61, at 5.) Replacement of the fuse also entailed removing and replacing an electrical cabinet (containing the larger fuse and related components). (Hr'g Tr. vol. 1, 173:7-11.)

49. In a "Time Impact Analysis" the Appellant created to address the delays associated with the fire pump and alarm system,[158] Prince/Schlosser stated that Kelly had already come to the same conclusion as SCS, and had installed a 600 amp fuse three days earlier, on January 22, 2008. (*See* Hr'g Ex. 54, at 3.)

50. Kelly completed the wiring of the pump on January 23, 2008, and obtained the necessary electrical permits from DCRA on February 1, 2008. (Hr'g Ex. 54, at 3.) A DCRA electrical inspector approved the fire pump electrical equipment and wiring on February 11, 2008, allowing the March 28, 2008, connection of the pump to the electric utility. (*Id.*; *see also* Hr'g Ex. 63.) Kelly completed preliminary testing of the fire pump on March 28, 2008. (Hr'g Ex. 54, at 4.)

D. Replacement of Storm Drainage Pipe

51. In preparing the Project Drawings, SCS knew that there was an existing underground storm drainage pipe in the vicinity of the project site. (Hr'g Tr. vol. 6, 1105:14-18.) SCS used data from a utility locator company and drawings from the original construction of the Transfer

[155] The record indicates the Prince/Schlosser did not receive BCD No. 8 until January 3, 2008. (*See* Hr'g Ex. 60, at 1.)
[156] The COTR testified that he believed it was inappropriate for a contractor to proceed with changed work prior to receiving a BCD. (Hr'g Tr. vol. 4, 949:12-15.)
[157] Although RFI 117 is dated January 17, 2008 (Hr'g Ex. 61, at 1), it appears that Prince/Schlosser did not notify the COTR and SCS of the issue until January 18, 2008. (*id.* at 6; Hr'g Ex. 54, at 3.)
[158] *See infra* section IV.E, Fire Alarm System Design Revisions.

Station to best determine the location of the pipe in drafting the Project Drawings. (*Id.* at 1105:18-1107:4.) However, SCS did not have information on the precise location of the existing pipe. (*Id.* at 1111:21-1112:8.)

52. On November 28, 2006, Prince/Schlosser discovered that the location of the underground 24-inch reinforced concrete storm drainage pipe was different from that indicated on the Project Drawings. (Hr'g Tr. vol. 1, 85:17-20, 86:21-87:12.) The pipe's actual location interfered with the construction of the concrete footing at the north end of the project. (*Id.* at 85:21-86:2.) Because the pipe was part of an active storm line, Prince/Schlosser had to cap and abandon the existing pipe and reroute the storm line before it could proceed with pouring the drive-over truck ramps for entry of the transport trucks below the tipping floor level. (*Id.* at 87:18-91:19; *see also* Hr'g Tr. vol. 4, 909:17-910:3.)

53. On January 26, 2007, Prince/Schlosser issued RFI 63, requesting information from SCS concerning how and where to move the pipe.[159] (Hr'g Ex. 25, at 1; Hr'g Tr. vol. 1, 87:15-87:18.) SCS responded on January 30, 2007, providing a diagram showing where to install a new drainage pipe. (Hr'g Ex. 25, at 1-4.)

54. On February 26, 2007, the CO issued BCD No. 03, instructing Prince/Schlosser to proceed with the additional work required to relocate the storm drainage pipe "[i]mmediately upon receipt." (Hr'g Ex. 26.)

55. Prince/Schlosser finished installing the replacement storm drainage pipe on April 2, 2007. (*See* Hr'g Ex. 27.)

E. Fire Alarm System Design Revisions

56. Specification 13915 of the Contract, "Fire-Suppression Piping," in conjunction with Project Drawings F-1 and F-2, gave the specifications for fire sprinklers and alarm devices to be installed at the Transfer Station. (*See* PH AF 814-43; Project Drawings F-1, F-2.) While no specific system design was provided, the contractor was required to provide a "dry pipe sprinkler system" for the tipping floor, the basement area, the truck scale drive through, the forklift tunnel, the access way, and the area under truck scale drive through in accordance with applicable national guidelines. (Project Drawing F-1; *see also* PH AF 814-17.) The Project Drawings, however, provided locations where new fire alarms were to be installed in at least a portion of the Transfer Station. (Project Drawing F-2.)

57. The Contract specified the characteristics that any fire suppression system installed by the contractor was required to achieve, including fire suppression performance requirements and quality assurance milestones, and provided an extensive list of approved component types and

[159] At some point, Prince/Schlosser appears to have designated this issue as PCO 20. (*See* Hr'g Ex. 25, at 1.)

manufacturers and instructions for installation of system components. (*See generally* PH AF 814-43.)

58. Project Drawings F1, Fire Protection, and F2, Basement Fire Protection, depicted the riser diagram and certain features of the fire protection system. (Project Drawings F1, F2.) Project Drawing F-2 depicted the "Basement Plan – Fire Alarm" for the Transfer Station, and provided the locations where fire alarms were to be installed in the basement. (Project Drawing F-2.) Project Drawing F-2 also depicted several areas of the basement that would no longer be occupied or used by Transfer Station personnel upon completion of the project (i.e., the "tractor maintenance area," "collection personnel facilities," and "collection vehicle maintenance area"). (*See* Hr'g Tr. vol. 1, 189:17-191:14.) These areas of the basement had been abandoned before the station renovation began (Hr'g Tr. vol. 1, 190:14-16), and were to remain unoccupied.

59. The Contract required Appellant to submit product information regarding the alarm system and shop drawings diagramming power, signal, and control wiring. (PH AF 815-16.) Kelly, Prince/Schlosser's electrical subcontractor, submitted the required information to SCS on November 2 and December 1, 2006. (Hr'g Ex. 68.) SCS approved the fire alarm submittal on December 4, 2006. (*Id.*)

60. Prince/Schlosser was responsible for obtaining a fire alarm system permit from the DCRA, Building & Land Regulation Administration, Fire Protection Branch ("Fire Marshal"). (Finding of Fact ("FF") 6; *see also* Hr'g Tr. vol. 6, 1148:9-19.)

61. Prince/Schlosser submitted its fire alarm permit application on February 5, 2007. (Hr'g Ex. 68, at 1.) Prince/Schlosser submitted Project Drawing F-2 as part of its permit application. (Hr'g Tr. vol. 1, 185:17-186:3, 191:15-21.)

62. The Fire Marshal rejected Prince/Schlosser's initial fire alarm permit application on February 23, 2007, and requested that Prince/Schlosser (1) add a smoke detector at the fire alarm control panel (in the basement); (2) provide interior and exterior fire notification devices; (3) revise the "riser diagram" (i.e., drawing F-2) to reflect the changes; and (4) amend its permit to show compliance with the foregoing. (*See* Hr'g Ex. 71; Hr'g Tr. vol. 1, 192:14-195:20.) The revisions requested by the Fire Marshal's office appear to have been predicated on the belief that the "tractor maintenance area" and "collection personnel facilities" in the basement of the Transfer Station would remain in use. (*See* Hr'g Tr. vol. 6, 1154:3-1156:6.)

63. Prince/Schlosser notified SCS that the Fire Marshal's office had rejected its permit application on February 23, 2007—the same day it received the rejection. (Hr'g Tr. vol. 1, 196:3-13; Hr'g Ex. 68, at 1.) Prince/Schlosser discussed the rejection of the fire permit, and the requested change, with the COTR and SCS during two progress meetings on March 15 and April 5, 2007. (Hr'g Ex. 68, at 1; Hr'g Tr. vol. 1, 196:19-198:8.)

64. Prince/Schlosser subsequently issued RFI 72 on April 6, 2007. (Hr'g Ex. 72, at 1.) After providing the list of requested changes, Prince/Schlosser requested that SCS provide revised Project Drawings so that it could reapply for the fire permit. (*Id*. at 1-2.)

65. SCS responded on May 2, 2007 with a revised version of Project Drawing F-2 (now labeled E-10). (*See* Hr'g Ex. 72, at 2-3;[160] Hr'g Ex. 136; *see also* Hr'g Tr. vol. 1, 199:18-202:3.) While the revised Project Drawing "for the most part" reflected the changes requested by the Fire Marshal (e.g., by adding several new alarm devices), the vacant, former work areas in the basement were still mislabeled. (Hr'g Ex. 136; Hr'g Tr. vol. 1, 203:1.) The revised Project Drawing also failed to include the engineer of record's stamp and seal. (Hr'g Ex. 136; Hr'g Tr. vol. 1, 202:4-13.)

66. Two days later, on May 4, 2007, Prince/Schlosser issued RFI 83, advising SCS that it still did not believe the design was compliant, and requested that SCS contact the Fire Marshal to discuss design compliance.[161] (Hr'g Ex. 73, at 1.) SCS replied, on June 19, 2007, writing, "Engineer has reviewed the code requirements with electrician and revised drawings have been submitted," but did not include any new Project Drawings. (*Id.*; Hr'g Tr. vol. 1, 204:18-205:22.)

67. Between June 19 and August 13, 2007, Prince/Schlosser had discussions with SCS and District representatives about Prince/Schlosser's reservations with submitting another permit application based on the revised drawing that SCS had provided. (Hr'g Tr. vol. 1, 208:11-19; Hr'g Tr. vol. 2, 363:2-14.) Prince/Schlosser made its second permit application on August 13, 2007. (Hr'g Ex. 75.)

68. The Fire Marshal rejected Prince/Schlosser's second permit application on August 25, 2007, and provided a hand-written list of "changes required on plans prior to approval." (Hr'g Ex. 77.) The corrections consisted of the following: "1.) Provide plans at proper scale […] 2.) Provide more detail [sic] scope of work[;] 3) Provide Key Plan[;] 4) Name and label all rooms and areas on Plans[;] 5) Provide audio/visual [fire warning equipment] in Tractor Maintenance Area[; and] 6) Provide Plans with original signatures of Engineer [all capitalization original]." (*Id.*)

69. On September 7, 2007, Prince/Schlosser emailed SCS to request that an SCS representative meet with the Fire Marshal's office to discuss changes to the fire alarm plans. (Hr'g Ex. 78, at 1-2.) An SCS employee responded on the same day that SCS would "try and set

[160] Hearing Exhibit 72 depicts only a cropped version of the revised Project Drawing. (Hr'g Ex. 72, at 3.)

[161] Prince/Schlosser wrote, "The referenced drawing provided by SCS Engineers shows two horns at the Lower Exit Door near the new Fire Alarm Control Panel (FACP). These devices must meet ADA A/V requirements and include strobe capability. The rest of the building has no notification devices where people will occupy the facility. We don't feel this will satisfy the Fire Marshal's Office, and don't want to re-submit based on this current design. Please have the Engineer contact the DC Fire Marshal's Office to verify their 'notification' requirements, as requested in the comments to the previous submission for FA permit for this type of structure and use[.]" (Hr'g Ex. 73, at 1.)

up a meeting with the Fire Marshal for next week." (*Id.* at 1.) However, SCS's Project Manager, Michael Kalish, testified that SCS did not directly interface with the Fire Marshal's Department. (Hr'g Tr. vol. 6, 1103:4-14; *see also* Hr'g Tr. vol. 1, 214:20-215:2.)

70. SCS, through its subcontractor, Grotheer & Co., sent Prince/Schlosser a revised version of Project Drawing F-2/E-10 on November 7, 2007—approximately six weeks after Prince/Schlosser received the second permit rejection. (*See* Hr'g Ex. 82.) The next day, November 8, 2007, Prince/Schlosser responded that many of the same errors were present in the new drawings (for example, one basement room was still misidentified as the "tractor maintenance area"). (*See* Hr'g Ex. 82 (stating that Prince/Schlosser's response was sent to Dana Murray (an SCS employee) on Nov. 8, 2007).)

71. SCS, through Grotheer & Co., transmitted a corrected version of the drawing on November 20, 2007. (*See* Hr'g Ex. 83.; Hr'g Tr. 222:18-225:10.)

72. Prince/Schlosser submitted a third permit application to the Fire Marshal on December 7, 2007. (*See* Hr'g Ex. 85.) The Fire Marshal rejected the application on January 2, 2008. (Hr'g Ex. 68, at 4.)

73. Prince/Schlosser then asked its electrical subcontractor, Kelly, to meet with the Fire Marshal to discuss the reasons for rejection—a meeting which took place on January 11, 2008. (Hr'g Ex. 68, at 4.) Prince/Schlosser notified the COTR of its concerns that the fire alarm system design was still defective in a letter dated January 14, 2008. (*See* Hr'g Ex. 85.) Prince/Schlosser designated the fire alarm system revisions as PCO 25. (*See id.*)

74. SCS and Prince/Schlosser subsequently participated in a telephone conference with the Fire Marshal on February 8, 2008. (*See* Hr'g Ex. 87, at 2-3 (an email summarizing the conversation).) Prince/Schlosser and SCS then collaborated on a revised design, conducting a building code analysis of the system between February 8 and February 19, 2008. (*See* Hr'g Tr. 232:7-236:11; *see generally* Hr'g Ex. 87.)

75. Prince/Schlosser submitted its fourth permit application on February 25, 2008. (Hr'g Tr. vol. 1, 238:16-20.) The Fire Marshal approved the permit application on March 5, 2008. (*See* Hr'g Ex. 89, at 1; Hr'g Tr. vol. 1, 239:12-16.)

76. The CO issued BCD No. 9 on March 12, 2008,[162] which instructed Prince/Schlosser to install the new systems required by the permit. (Hr'g Ex. 90.) The CO also requested that Prince/Schlosser submit its proposal for an equitable adjustment within 20 days of receiving the letter. (*Id*. at 1.)

[162] The COTR testified that the District had been waiting for the Fire Marshal to approve the permit before issuing the BCD. (Hr'g Tr. vol. 4, 961:9-13.)

77. Prince/Schlosser completed installation of the revised fire alarm system on or about March 30, 2008, following which the fire alarm was tested and found to be working on April 4, 2008. (*See* Hr'g Ex. 91, at 1; Hr'g Ex. 93.) The site was also demobilized on that same day, April 4, 2008. (*See* Hr'g Tr. vol. 1, 249:8-12.)

F. Roof Deck Modification

78. On July 16, 2007, during installation of the roof deck over the tipping floor, Prince/Schlosser identified a discrepancy between the roof elevations of the new roof, installed according to the plans and specifications, and existing structures. (*See* Hr'g Tr. vol. 1, 96:20-98:18, 100:15-22; Hr'g Ex. 28, at 1.) On the same date, Prince/Schlosser contacted the deck manufacturer to determine whether a simple span between the gamble framing and the adjacent joist would solve the problem. (Hr'g Ex. 29.)

79. Two days later, on July 18, 2007, Prince/Schlosser issued RFI 104 to SCS, which described the roof elevation discrepancy and noted that the issue would have impact on the schedule. (Hr'g Ex. 30, at 1.) Prince/Schlosser noted that it had consulted with the deck manufacturer and proposed "cutting the top rib, bending the deck over[,] and creating a single span." (*Id.*)

80. SCS approved Prince/Schlosser's proposed solution with minor modifications on July 30, 2007. (Hr'g Ex. 30, at 2.)

81. Prince/Schlosser finished implementing the solution approved by SCS on August 29, 2007, which was inspected and approved the next day. (Hr'g Ex. 28, at 2.) However, resolution of the roof elevation discrepancy delayed the installation of the sprinkler system, which was to be connected to the roof deck. (*See* Hr'g Tr. vol. 1, 104:7-105:21.)

G. Relocation of Fire Sprinkler Pipe

82. On August 22, 2007, Michael Kalish, SCS's Project Manager, sent a letter to Prince/Schlosser stating that the height of recently-installed fire sprinkler pipe was "unacceptably too low[163] and will be damaged by trash trucks." (Hr'g Ex. 34.) Kalish noted that the shop drawings showed the sprinkler pipe above the bottom of the bar joists,[164] while the installation hung the pipe below the bar joists. (*Id.*) Kalish then stated that because the sprinkler pipe installation was "not in conformance with the approved shop drawing detail," the pipe would need to be reinstalled "above the bottom of the joists." (*Id.*)

83. After receiving SCS's letter, Prince/Schlosser instructed its subcontractor, Radius, to verify that the installation of the sprinkler pipe had been performed correctly. (Hr'g Ex. 35, at

[163] The letter stated that the low point of the pipe was 24 feet above the tipping floor. (Hr'g Ex. 34.)
[164] The approved shop drawings themselves do not appear in the record.

1.) Radius responded on August 27, 2007, stating that it had confirmed that the piping was 24 feet above the tipping floor and that the height of the sprinkler pipe conformed to the height shown in the shop drawings that had been approved by SCS. (*Id.* at 2.) Radius further maintained that it did not indicate anywhere on the shop drawings that the piping was to be above the bottom of the joists. (*Id.*) In an email to SCS dated August 29, 2007, which was forwarded to the COTR, Prince/Schlosser concurred with Radius's assertions. (Hr'g Ex. 36, at 1.)

84. Prince/Schlosser made further measurements of the piping at the request, and in the presence, of the COTR. (Hr'g Tr. vol. 1, 119:20-120:16.) Those measurements confirmed that the piping height met the requirements of the approved shop drawings, and, thereafter, the COTR asked Prince/Schlosser to submit a price proposal to relocate the piping. (*Id.* at 119:21-121:2; *see also* Hr'g Tr. vol. 4, 895:19-896:6.)

85. The COTR testified there had been "an unknown latent condition" with the drawings, which had not been updated to reflect that newly-purchased District trash trucks had higher beds that could raise several inches above 24 feet and possibly hit the sprinklers when tilting to dump trash. (*See generally* Hr'g Tr. vol. 4, 895:3-900:10.)

86. Approximately three weeks later, on September 10, 2007, the CO issued BCD No. 7, instructing Prince/Schlosser to remove and raise the sprinkler pipe. (*See* Hr'g Ex. 38.) Prince/Schlosser completed relocating the sprinkler pipe (which it had designated as PCO 38) on September 25, 2007. (Hr'g Tr. vol. 1, 124:7-15.)

V. Change Orders

87. As noted above, the site demobilized on April 4, 2008 (approximately 261 days after the originally-projected Contract completion date of July 17, 2007). (FF 77.) Throughout its performance of the Contract, Prince/Schlosser drafted at least 39 PCOs. (*See* Hr'g Ex. 10 (referencing PCO 39).)

88. During the course of performance, the District issued five change orders. (*See* AF Ex. 4, Hr'g Exs. 6, 8, 9, 10.) Change Order No. 1, dated October 12, 2006, replaced the Wage Determination included in the Contract with a more recent version. (*See* AF Ex. 4.)

89. Change Order No. 2, dated April 25, 2007, incorporated BCD Nos. 1 and 2, and PCOs 5, 9, and 17 (none of which are relevant to the instant appeal), and increased the Contract price by $569,226.83. (*See generally* Hr'g Ex. 6.)

90. Change Order No. 3, dated September 19, 2007, incorporated BCD Nos. 3, 4, and 5, and PCOs 10, 13, 14, 18, 19, 21, 22, 23, and 28 (none of which are relevant to the instant appeal). (*See* Hr'g Ex. 8.) Change Order No. 3 also increased the Contract price by $181,555, and

extended the period of performance by one calendar day. (*Id.* at 1.) Change Order No. 3 also contained a release signed by Appellant, which stated:

> It is mutually agreed that in exchange for this Change Order and other considerations, the Contractor hereby releases the District, without any reservations, from any and all actual or potential claims and demands for delays and disruptions, additional work which the contractor, or any person claiming by through or under the contractor, may now have, or may in the future, have against the District of Columbia Government, for, by reason of, or in any number based on or upon or growing out of or *in any manner connected with the subject Change Order or the prosecution of the work hereunder*.

(*Id.* (emphasis added).)

91. The Board notes that while Change Order No. 3 contains a description of the work required under PCO 11 (for the removal of the subsurface concrete obstructions discussed above), it does not expressly list PCO 11 as an incorporated PCO in the change order. (*See* Hr'g Ex. 8, at 2.) In this regard, an earlier draft version of Change Order No. 3, signed solely by Appellant, included PCO 11; however, Appellant had struck the "from any and all actual or potential claims and demands for delays and disruptions" language from the release.[165] (*See* Hr'g Ex. 138.)

92. Change Order No. 4, also dated September 19, 2007, incorporated only PCO 11. (Hr'g Ex. 9.) Change Order No. 4 increased Contract funding in the amount of $28,265 for the additional work, but did not include the "release" language that was contained in Change Order No. 3. (*See id.*) While Change Order No. 4 makes no mention of compensating Prince/Schlosser for overhead, other indirect costs, delay, or profit, it does state, "The contractor shall furnish all labor, materials, tools, equipment, etc., for various renovation work as indicated in [the three-line description of work]." (*See id.*)

93. Change Order No. 5, issued unilaterally by the District on July 6, 2009, incorporated PCOs 2, 12, 15, 20, 25, 27, 29, 31, 33, 34, 36, 37, 38, and 39, and increased the Contract price in the amount of $249,132, but did not provide an extension to the period of performance. (*See* Hr'g Ex. 10.) Of the PCOs incorporated into Change Order No. 5, the following are relevant to this appeal: PCO 2, Master Building Permit (-$24,795),[166] PCO 15, Fire Sprinkler Pump System ($108,224), PCO 20, Storm Drain Relocation ($28,769), PCO 25, Incorporate DCRA Fire Alarm Permit Requirements ($7,726), PCO 36, Roof Deck Modification ($5,774), and PCO 38, Raise

[165] Appellant's transmittal of the signed Change Order No. 3 to the District noted, "As explained to you at our meeting on July 27, PCO numbers 11 and 21 include a time extension request of 29 and 1 day respectively. While we are in agreement with the direct costs as presented in the change order, we cannot agree to release the District from any and all delay damages caused by PCOs 11 and 21." (Hr'g Tr. vol. 5, 1027:6-18, July 16, 2012.)

[166] While negotiating Change Order No. 5, Prince/Schlosser agreed that it should have been responsible for obtaining the MBP, and agreed to credit the District the $24,795 that the District had paid for the permit. (*See* Hr'g Tr. vol. 4, 796:18-798:4, 846:5-847:22.)

Sprinkler Piping ($51,841). (*Id.* at 2.) The parties had met and negotiated regarding these PCOs, but although they reached agreement on the direct costs of the changed work, they could not reach agreement on Appellant's claim for extended performance costs, which claim was considered to remain outstanding. (Hr'g Tr. vol. 4, 791:22-795:21, 850:1-851:13.)

94. Collectively, the District's Change Orders increased the Contract price by approximately $1,028,178 and added one day to the period of performance. (SF ¶¶ 8-9.) The District has paid the adjusted contract price, including the change orders, except for approximately $5,000 to $10,000, which remains outstanding and unpaid by the District in order to keep the contract open. (Hr'g Tr. vol. 4, 804:5-12.)

VI. Prince/Schlosser's Appeal in CAB No. D-1369

95. On April 23, 2009, Prince/Schlosser submitted a claim to the CO, requesting for a final decision on the following items: (1) "changes to the fire alarm system," (2) "the District's failure to provide dedicated phone lines," (3) "the District's delays in providing the Master Building Permit," (4) "unforeseen and undocumented subsurface concrete debris," (5) "design issues related to the replacement of the existing 24 [inch] storm drain," (6) "design issues and conflicts related to existing steel," (7) "roof deck modifications," (8) "the repair and replacement of girt siding," (9) "changes to the sprinkler mains above the Project's tipping floor," and (10) "the addition of a fire pump." (Hr'g Ex. 125.) Prince/Schlosser sought a compensable time extension of 287 days, and extended performance costs totaling $1,099,325. (*Id.* at 2.) Prince/Schlosser noted that it had previously attempted to negotiate compensation for these items with the District in May and November of 2008. (*Id.*)

96. After a deemed denial of its claim by the CO, Prince/Schlosser filed its first Notice of Appeal and Complaint with the Board on July 31, 2009. (Notice of Appeal, July 31, 2009.) The Board docketed the appeal as CAB No. D-1369, and subsequently consolidated the matter with two other appeals arising from the Contract—CAB Nos. D-1419 and D-1420—which are discussed below. In CAB No. D-1369, the Appellant seeks to recover extended performance costs of $660,686 for 261 days of delay allegedly caused by the District. (*See* Appellant's Post Hr'g Br. 6.)

A. Extent of Delay

97. To demonstrate the delay days to which it is entitled, Appellant presented at trial the testimony of Paul Krogh of K2 Construction Consultants, Inc. (*See generally* Hr'g Tr. vol. 2, 407-79.) Krogh was qualified at the trial as an expert in planning and scheduling construction projects and delay claim analysis related to construction projects. (*Id.* at 422:5-15.)

98. Krogh evaluated the Transfer Station project through Appellant's project records to determine responsibility for delays. (Hr'g Tr. vol. 2, 423:12-15.) He prepared a report of his findings that was admitted into the record. (*See id.* at 432:8-12; *see* generally Hr'g Ex. 119.)

99. In conducting his analysis, Krogh reviewed the Contract plans and specifications, meeting minutes, daily reports, RFIs, payment applications, email and other correspondence. (Hr'g Tr. vol. 2, 423:16-424:9.) Additionally, Krogh reviewed Appellant's initial as-planned CPM schedule and the monthly updates to the schedule reflecting project progress and, specifically, the impact on the schedule of changes to the work reflected in the records and issued change orders. (*Id.* at 423:22-424:2, 456:4-457:17.) The updates reflected the effect of delaying events on the projected completion date of the Contract. (*Id*. at 456:22-457:17; s*ee generally* Hr'g Ex. 19, Attachs. 1-32.) Appellant's periodic schedule updates were consistent with the contract requirements and conformed to industry practice. (Hr'g Tr. vol. 2, 431:7-20.) The District rejected none of the schedules. (FF 22.)

100. Although Krogh examined Appellant's monthly schedule updates, all of which were in the record of this appeal, he also reworked them, analyzing the reasonableness of the schedule and updates, given the events reflected in Appellant's records, and made his own determinations of the extent of project delay. (Hr'g Tr. vol. 2, 446:15-447:14.)

101. Krogh concluded that Appellant's as-planned schedule was reasonable and constructible, and that but for delays caused by the District, Appellant could have completed the project on time, or possibly early. (Hr'g Tr. vol. 2, 425:5:-22, 435:4-12; Hr'g Ex. 119, at 2-3.)

102. Krogh determined that the following events were the responsibility of the District[167] and caused a total of 277 days of delay to the project, attributed to the PCOs below:

PCO 2: Master Building Permit	11 Days
PCO 11: Subsurface Concrete Obstructions	27 Days
PCO 20: Relocation of Storm Drainage Pipe	38 Days
PCO 36: Roof Deck Modifications	19 Days
PCO 38: Relocation of Fire Sprinkler Pipe	15 Days
PCO 15: Fire Sprinkler Pump	
PCO 25: Fire Alarm System Design Revisions	167 Days[168]

[167] Krogh assumed that if the parties had agreed to a formal change, the District was responsible for any delays resulting from the change. (Hr'g Tr. vol. 2, 430:15-431:3; Hr'g Ex. 119, at 4-5.) Responsibility for the delays is an issue for the Board to decide, and although we acknowledge Krogh's assumption, the Board does not accept it as proof of responsibility for the delays.

(*See* Hr'g Ex. 119, at 4 & Attach. H; Hr'g Tr. vol. 2, 442:10-16.)

103. Krogh examined the records to determine if there were concurrent delays not caused by the District. (Hr'g Tr. vol. 2, 450:18-451:13.) He found a few instances of contractor-caused delay, but through other efficiencies, Appellant made up all those days of its own delay. (*Id.* at 451:14-22; *see also* Hr'g Ex. 119, Attach. H.)

104. Over the course of the project, Krogh found that Prince/Schlosser also saved 15 days of expected performance time, reducing the delay to the project to 262 days. (Hr'g Ex. 119, Attach. H; Hr'g Tr. vol. 2, 443:4-7.) The one-day extension of time granted by the District in Change Order 3 (FF 90) reduced the total project delay to 261 days, according to Krogh. (Hr'g Tr. vol. 2, 443:7-9.)

B. Impact Costs

1. John E. Kelly & Sons

105. Appellant's electrical subcontractor, John E. Kelly & Sons, submitted a claim for its costs of extended performance. (*See* Hr'g Ex. 96.) Kelly calculated its delay period to be from July 17, 2007, the original completion date, when it expected to complete the project, until April 4, 2008, Kelly's last day on the project. (Hr'g Tr. vol. 3, 566:5-567:4.)

106. To calculate the amount of impact cost due to the delay, Clancy March, Kelly's Project Manager, considered the additional labor costs incurred for Kelly's project manager, senior project managers, superintendent, and foreman, as well as additional costs related to the foreman's telephone, and an escalation in the costs of materials, with an allowance for home office expenses and profit. (Hr'g Tr. vol. 3, 560:4-12.)

107. In determining the additional costs for the project manager, March determined the project manager's total contract billings on all projects, and then calculated the total billing for the Transfer Station project minus change order costs during the delay period to determine a percentage of its Transfer Station billings to all company billings for the project manager on all projects, which March calculated as 8.93 percent.[169] (Hr'g Ex. 96, at 1; Hr'g Tr. vol. 3, 561:11-564:8.) Applying the derived 8.93 percent to the total company cost for the project manager, he arrived at a cost for the project manager for the delay period of $8,925.71. (Hr'g Tr. vol. 3, 564:9-15; Hr'g Ex 96, at 1.)

108. March used the same method to calculate the delay period costs for the senior project manager ($2,814.17), and labor superintendent ($2,527.87). (Hr'g Tr. vol. 3, 564:17-568:7; Hr'g

[168] Krogh considered PCOs 15 and 25 together as they occurred concurrently. (*See* Hr'g Ex. 119, Attach. H.)
[169] The formula, restated: ((total billings for Transfer Station) – (change order costs during delay period)) / (total contract billings on all projects) = (percentage of Kelly's total billings that apply to the Transfer Station).

Ex. 96, at 1.) March supported these calculations with excerpts from Kelly's cost accounting records demonstrating the pay of the project manager, senior project manager and superintendent. (Hr'g Ex. 96, at 2-4.)

109. March determined the additional costs related to the foreman and the foreman expenses by examining the company's payroll and cost records. (Hr'g Tr. vol. 3, 568:16-570:16.) During the delay period, Kelly expended $9,240.77 in direct wages for the foreman with an additional $5,433.57 in burdened labor costs. (Hr'g Ex. 96, at 1.) Kelly also incurred $2,160.00 in costs for the foreman's truck and $513.00 for the foreman's telephone. (*Id.*)

110. To quantify the amount by which cost of materials increased during the delay period, March obtained from company records all project material costs during the delay period, $53,727.73. (Hr'g Tr. vol. 3, 570:17-571:19; Hr'g Ex. 96, at 1; Hr'g Ex. 99.) From that, March subtracted $14,783.00, the cost of materials used in change order work for which Kelly had been paid through the change orders. (Hr'g Tr. vol. 3, 571:20-572:22.) March then multiplied the resulting $38,944.73 in materials cost by a factor of 37 percent, which March obtained from Mundi Index, an Internet provider of commodity price information, to determine a price escalation of $14,409.55 during the delay period. (*Id.* at 573:1-574:19.) The Mundi Index chart Kelly relies upon is purportedly excerpted from the Internet site and is labeled "Commodity Price Index – Monthly Price," with monthly percentages for each month, including those from July 2007 to April 2008. (Hr'g Ex. 103.) The locale of the commodity information is not indicated. (*See generally id.*)

111. Finally, March added an additional 18 percent, $8,283.96, representing home office expenses (omitting direct wages of project managers and executives). (Hr'g Tr. vol. 3, 576:21-578:6.) The final total of Kelly's claim for the delay period was $57,363.47, after adding ten percent for profit and overhead. (Hr'g Tr. vol. 3, 578:7-13; Hr'g Ex. 96, at 1.)

2. <u>Prince/Schlosser</u>

112. Appellant maintained separate books for the joint venture and created a Job Cost Ledger solely for tracking costs incurred by the joint venture on the Transfer Station project. (Hr'g Tr. vol. 3, 683:5-19; *see generally* Hr'g Ex. 122.) The computer Job Cost Ledger recorded every cost incurred by the joint venture under separate coded categories, such as labor, materials, and utilities. (Hr'g Tr. vol. 3, 687:20-694:13.) Costs were recorded at or about the time they were incurred. (*Id.*)

113. Appellant recorded each out-of-pocket, direct cost under the codes established at the beginning of the project, recorded from employee time cards, invoices, and utility bills. (Hr'g Tr. vol. 3, 690:19-691:9, 692:9-694:13.) Separate codes were established for change order work as it occurred during the project. (*Id.* at 691:9-18, 712:12-713:8.)

114. Appellant separately recorded all costs for three different time periods to reflect the joint venture's declining engagement as the job wound down. (Hr'g Tr. vol. 3, 686:18-22, 696:13-697:12.) The first period was from the beginning of the project until October 31, 2007; the second period was from November 1 to December 1, 2007; and the third period was from January 1, 2008 through April 30, 2008. (*Id.* at 686:10-17.)

115. Appellant prepared a summary of all costs it incurred that were time-related, such as the project manager, and project engineer, taking the data directly from the joint venture's job cost reports. (Hr'g Tr. vol. 3, 694:14-695:13; Hr'g Ex. 121.)

116. Appellant took the total of all time-related costs, including on-site management (FF 115), temporary utilities, telephones, field offices/shed, clean-up, and other regular construction project needs, incurred during each of the three periods and divided by the number of days in the period to derive a per diem rate for costs during each of the periods. (Hr'g Ex. 121; Hr'g Tr. vol. 3, 715:7-717:16.) For the first period, beginning of project through October 31, 2007, the daily rate was $2,310; for the second period, through December 31, 2007, the daily rate was $2,100; and for the third period, through the end of the project, the daily rate was $824. (Hr'g Ex. 121; Hr'g Tr. vol. 3, 715:7-717:16.)

117. Appellant calculated the number of days of alleged District delay for each of the three periods and multiplied that number by the corresponding per diem rate for that time period. For the first period, Appellant calculated its delay costs by multiplying the daily rate of $2310 times the number of delay days it claims are compensable during the first period, 135, to derive the amount claimed for the joint venture delay during the first period at $311,638.[170] (Hr'g Ex. 121, Hr'g Tr. vol. 3, 715:7-20.)

118. Calculations for the second and third periods were done the same way. For period 2, Appellant claims 53 days of compensable delay, and by multiplying that by the per diem rate of $2,100 derived its claimed extended costs of $111,296. (Hr'g Ex. 121; Hr'g Tr. vol. 3, 716:4-20.) The third period claim was 73 days of claimed delay multiplied by the daily rate of $824 to arrive at claimed extended field performance costs of $60,118. (Hr'g Ex. 121, Hr'g Tr. vol. 3, 717:2-16.) Adding the extended costs for the three periods equals $483,252. (Hr'g Ex. 121, Hr'g Tr. vol. 3, 717:17-22.)

119. To calculate its total claim, Appellant continues the calculation as follows:

Prince/Schlosser Extended Field Costs	$483,252

[170] The computer calculations leading to the claimed costs of the extended performance take the figures out to several decimal places, meaning that the arithmetic described above is off by a few dollars due to interim rounding of the figures used. This difference is immaterial.

Kelly Electric Extended Performance Costs	57,363[171]
Total Extended Performance Costs	$540,615
Prince/Schlosser Overhead (10%)	54,062
Subtotal	$594,677
Prince/Schlosser Profit (10%)	59,468
Subtotal	$654,144
Additional Bond Costs (1%)	6,541
Total Costs	$660,686

(Hr'g Ex. 121; Hr'g Tr. vol. 3, 718:6-720:12.)

VII. CAB No. D-1419

120. Specification 11145 of the Contract required Prince/Schlosser to install five "platform motor truck scales and associated electronic controls." (PH AF 490.) Two of the scales were to weigh inbound loads, and three to weigh outbound trucks. (Hr'g Tr. Vol. 3, 650:17-651:2; Project Drawing E6.)

121. The specifications identified the performance characteristics of the scale system, including the capacity of the scales, their method of operation, the requirement that the scales be able to connect to the Internet and local area network, and the requirement that the data from the scales be transmitted to remote display units and to the scale house of the facility for record keeping. (PH AF 494-502.) The system was to be interconnected to track the amount of material coming in and going out of the facility. (Hr'g Tr. vol. 6, 1178:12-1179:9.)

122. Appellant was to submit as shop drawings for the District's approval the manufacturer's literature describing the scales and accessories and "scale detail drawings indicating . . . number and sizes of conduit, wiring for operation, electrical characteristics of various items, etc." (PH AF 492.)

123. The Contract required that Appellant provide[172] three remote display scoreboards in the area of the cranes at the three outbound truck scales. (PH AF 501-502.) Although the exact location was not specified, the Contract stated that the remote displays should be mounted on the

[171] See FF 111.
[172] Under the Contract, the term "provide" means "to furnish and install, complete[,] and ready for intended use." (PH AF 222.)

tipping floor near the loading cranes where they would be visible to the loader operator. (Hr'g Tr. vol. 3, 594:9-12; PH AF 501-02.)

124. Although the Contract stated that the "remote display shall be interfaced to the scale instrument," (PH AF 501), neither the Contract nor the Project Drawings included schematics for installing the power and signal wiring for the outbound scales or from the scales to the remote display or to the scale house. (Hr'g Tr. vol. 3, 588:6-18, 594:3-7; Hr'g Tr. vol. 6, 1158:2-11.)

125. A question submitted to the District during the solicitation process addressed the absence of wiring in ducts shown on Project Drawing E6. Noting that the drawing included one circuit for traffic lights in the area of the two inbound scales, the question continued, "All other new site duct banks shown on that drawing are identified as empty. Drawing C2 shows four traffic signal poles and a camera pole at the new aboveground truck scales. There are no power circuits or control cables shown to the signals, camera or scales. What is the design intention for these installations?" (*See* Hr'g Ex. 104; Hr'g Tr. vol. 3, 584.)

126. The District's response, which was incorporated into the Contract as part of Addendum 2 to the Solicitation, stated, "These ductbanks will be used by others to automize [sic] the operations of the two new scales." (Hr'g Ex. 104.) At trial, the project manager for SCS testified that this response meant that other individuals "outside the contract" would be responsible for the wiring, rather than Prince/Schlosser or its subcontractors. (Hr'g Tr. vol. 6, 1172:14-1173:8.)

127. Subsequently, on January 31, 2007, Prince/Schlosser emailed SCS and the COTR to inquire about the District's plan for wiring the new scales. (Hr'g Ex. 130.) In its response on the same day, SCS agreed that the specifications describe "the operation of the signals and scale readouts, but [do not] account for powering them." (*Id.* at 1.) SCS further directed Prince/Schlosser to "take the necessary steps for providing power to the signals and scale readouts." (*Id.*)

128. On June 16, 2007, Prince/Schlosser sent a letter to the District stating Prince/Schlosser's position that the power and signal wiring of the scales was not part of the original Contract, and that the instruction to provide the power and signal wiring constituted a change.[173] (*See* Hr'g Ex. 109, at 1.)

129. On October 9, 2007, the CO responded, stating that the wiring of the scales and remote displays was within the scope of the Contract pursuant to Specification 11145. (Hr'g Ex. 109, at 1.) The CO further directed Prince/Schlosser to provide the power and cabling in accordance with paragraph 2.7 of the specification. (*Id.*)

[173] While Prince/Schlosser's June 16, 2007 letter, does not appear in the record, the District's response, dated October 7, 2007, includes the date and a brief description of the June 16 letter. (*See* Hr'g Ex. 109.)

130. Prince/Schlosser instructed its electrical subcontractor, Kelly, to install the necessary wiring, "shortly after" receiving the CO's October 9, 2007 letter. (Hr'g Tr. vol. 3, 621:9-14.) The additional work included installation of a 3,000-foot wiring conduit between the farthest crane and scale, and the use of a 25-foot scissor lift to install cable above a truck tunnel and wiring the remote displays in the outbound tunnel and the scale house. (*See* Hr'g Tr. vol. 3, 580:16-22, 604:17-607:21; Hr'g Ex. 112, at 9-28.)

131. Kelly, Appellant's electrical subcontractor, submitted a change order proposal to Prince/Schlosser for the additional wiring work on April 25, 2008. (*See generally* Hr'g Ex. 112.) Kelly's claim included records of its labor and material as well as job tickets for each day that the alleged additional work was performed, identifying labor, equipment, and materials used. (*See generally id.*) Kelly's project manager testified extensively about Kelly's claim and the method he used in calculating the claim figure. (*See generally* Hr'g Tr. vol. 3, 580-619.) Work tickets and other documents in the record demonstrate Kelly incurred labor, material and equipment costs totaling $23,856.39 in complying with the District's directive to perform the wiring of the truck scales. (Hr'g Ex. 112, at 3-8.) Kelly further added a 10 percent markup for overhead in the amount of $2,358.64, an additional 10 percent markup representing profit in the amount of $2,594.50, and $368.76 in additional bonding costs, raising its total to $29,178. (*Id.* at 2, 4-5.)

132. Appellant submitted a claim in the amount of $32,280.67, representing Kelly's claim plus a markup and bonding costs, to the CO for a final decision on June 24, 2009. (Hr'g Ex.126, at 1-2.) Appellant appealed from the CO's deemed denial of the claim on December 10, 2010. (Notice of Appeal, December 10, 2010.) The Board docketed this appeal as CAB No. D-1419.

VIII. CAB No. D-1420

133. Pursuant to Specification 03300, the Contract required Prince/Schlosser to "place all concrete, reinforcing steel, forms and miscellaneous related items." (PH AF 367.)

134. The Contract did not specify a particular mix of concrete but stated the following:

> The actual acceptance of aggregates and development of mix proportions to produce concrete conforming to the specific requirements shall be determined prior to the placement of concrete by means of laboratory tests. The concrete mix designs presented herein is [sic] intended to be a guide only and does not relieve the CONTRACTOR of his responsibility to provide mix design, laboratory test results, and history of mix used on similar projects, with test results to the COTR for review and approval.

(PH AF 367.)

135. Project Drawing S13 required the contractor to test the soils at the project site for sulfate content prior to placing any concrete or designing any concrete mixes. (Project Drawing S13 (Foundation ¶ 5).) The drawing further states that the "Engineer shall be notified of the results of these tests and the foundation concrete mix designs adjusted accordingly." (*Id.*)

136. While the Project Drawings required that all concrete mix designs be submitted to SCS for review, they did not specify that acid- or sulfate-resistant concrete formulations would be required. (*See generally* Project Drawing S13 (Reinforced Concrete ¶¶ 1-25); *see also*, Hr'g Tr. vol. 3, 537:1-5, 541:17-20.)

137. The original concrete strength specifications in Project Drawing S13 ranged from a minimum of 3,250 psi (for "slab on grade and wall footings" and "abutments & wingwalls") up to a minimum of 4,000 psi (for "concrete columns" and "structural slabs, beams and push walls"). (Project Drawing S13 (Reinforced Concrete ¶ 5); *see also* Hr'g Tr. vol. 3, 537:6-12, 541:13-16.)

138. On or before October 18, 2006,[174] Prince/Schlosser tested the soil at the Transfer Station, pursuant to the requirements of Project Drawing S13. (*See generally* Hr'g Ex. 115.) Prince/Schlosser submitted the soil test results to SCS through RFI 20 on October 18, 2006,[175] writing that "the Sulfate level is indicates [sic] too much acid in the soil, which will deteriorate the concrete over time." (Hr'g Ex. 115; *see also* Hr'g Tr. vol. 3, 533:18-534:18.)

139. SCS responded to RFI 20 on October 25, 2006, stating that the soil test revealed a very severe sulfate exposure. (Hr'g Ex. 115, at 1.) SCS further directed that "[c]oncrete exposed to sulfate containing solutions shall have its mix design [sic] in accordance with the enclosed table, *regardless of what is specified in structural plans or project specifications*. […] Concrete mix design shall incorporate this information for all concrete in contact with soil." (*Id.* at 1 (emphasis added).) Sulfate-resistant concrete is typically more expensive than standard types of concrete. (Hr'g Tr. vol. 3, 533:10-13, 542:6-13.)

140. While the original soil test results do not appear in the record, based on the chart that SCS provided with its response, a "Very Severe sulfate exposure" signified that the soil at the Transfer Station contained more than 2.00% water-soluble sulfate by weight. (*See* Hr'g Ex. 115, at 2.) This chart states that soil with a "very severe" level of sulfates requires "V plus

[174] The precise date of the first soil test is not clear from the documents in the record.
[175] While the copy of RFI 20 in the record includes the response from SCS, the original soil test results were omitted. (*See* Hr'g Ex. 115.)

pozzolan"[176] cement, with a maximum water-to-cementitious materials ratio of 0.45, and a compressive strength of at least 4,500 psi.[177] (*Id*.)

141. At trial, William J. Mizerek, the chief estimator for Aggregate Placement Corp. ("APC"), the Appellant's cement subcontractor, testified that concrete can be strengthened to resist sulfates "by increasing the amount of portland cement and/or slag in the concrete." (Hr'g Tr. vol. 3, 543:12-18.)

142. V plus pozzolan cement is a special portland pozzolan cement mixture which was not available in the project area. (Hr'g Tr. vol. 3, 543:19-544:1.)

143. To meet the sulfate-resistance, the cement in the mix was increased and a portion of the cement was changed "to a slag or a NewCem which mitigates a lot of the problems associated with alkalinity." (Hr'g Tr. vol. 3, 544:2-13.)

144. On December 17, 2007, Prince/Schlosser sent a letter to the COTR explaining the findings of the soil tests, the specific changes that SCS had made to the concrete mix design, and the cost impact of those changes.[178] (*See* Hr'g Ex. 118, at 1-2.) Prince/Schlosser further stated that it had performed additional soil tests at SCS's request. (*Id.* at 1.) Mr. Chatard, Appellant's employee, stated that the change in the concrete mixes resulted in increased costs of $3.00 per cubic yard of concrete.[179] Finally, Appellant requested a change order for the change in concrete, listing the following costs incurred by Prince/Schlosser, and its concrete subcontractor, APC.[180]

Subcontractor (Aggregate Placement Corporation) Costs

[176] The chart contains a footnote next to the word "pozzolan." (*See* Hr'g Ex. 115, at 2.) The footnote states that "V plus pozzolan" means "[p]ozzolan that has been determined by test or service record to improve sulfate resistance when used in concrete containing Type V cement." (*Id.*)

[177] Compared to a minimum of 3250-4000 psi in the Project Drawings. (FF 137.)

[178] The letter refers to an attached October 19, 2007 detailed cost breakdown of the direct costs incurred by Appellant's subcontractor, APC. (Hr'g Ex. 118, at 2.) That attachment is not in the record. Mizerek testified that the claimed materials cost was the additional cost of the sulfate-resistant concrete compared to that intended. (Hr'g Tr. Vol. 3, 545:5-546:7.) The Board accepts this testimony as evidence that the direct materials cost to the subcontractor of supplying the sulfate resistant concrete was $5,967, as set forth in Appellant's claim.

[179] We note that there is some ambiguity in the record concerning both the price per cubic yard and how the adjustment was calculated. At trial, Mizerek testified that the increased materials cost was based on a $1/cy increase in the price of concrete. (*See* Hr'g Tr. vol. 3, 546:1-7.) However, Appellant's letter contradicts this. (*See* Hr'g Ex. 118, at 1.) Likewise, the record does not state how many cubic yards of concrete were actually required. (*See generally* Hr'g Exs. 115, 118.) While Appellant's letter indicates that materials costs increased by $5,967 (which might suggest that ~1,989cy of concrete were used, assuming an increase of $3/cy), it is not clear that only concrete costs are included in this amount. (*See* Hr'g Ex. 118.) The District's post-hearing brief concedes that $7,328.00 of the change costs were validly incurred, while only disputing the additional soil testing costs. (*See* District's Post Hr'g Br. 17, ¶ 47 ("The total amount of the increase [sic] cost to Aggregate Placement Corporation for the modification to the concrete mixture was $7,328.00.").)

[180] While the formatting has been slightly altered, this data is identical to what was presented in Appellant's letter.

Materials	$5,967.00		
Labor	0.00		
Equipment	0.00		
Subcontractor Direct Costs:		$5,967.00	
	Overhead 20%	$1,253.07[181]	
	Subtotal	$7,220.07	
	P&P Bond (0.15%)	$ 108.30	
	APC Total		$7,328.37

Field Engineering

Sulfate testing: CTI Corp.	$ 472.00
Sulfate testing: Hillis-Carnes[182]	$ 252.00
Subcontracted Cost Total	$8052.37
G.C. Commission 10%	$ 805.24
PSJV Cost Total	$8,857.61
P&P Bond (0.0576%)	$ 51.01
PCO-007 Proposal Total	$8,908.63

(Hr'g Ex. 118, at 2.)

145. Prince/Schlosser requested a CO's final decision on this claim on June 24, 2009. (Hr'g Ex. 127, at 1-2.) On December 10, 2010, Appellant filed a notice of appeal from the CO's deemed denial of the concrete claim. (Notice of Appeal, December 10, 2010.) The Board docketed this appeal as CAB No. D-1420.

CONCLUSIONS OF LAW
CAB No. D-1369

[181] Although identified as overhead, it appears to be calculated as the "10 and 10" allowed for APC's overhead and profit.

[182] While it is not clear from the record which soil testing company Prince/Schlosser employed first, the District states in its brief that "[a]dditional soil testing may have been performed by Hillis-Carnes." (*See* District's Post Hr'g Br. 17, ¶ 48.)

Appellant seeks an equitable adjustment to recover the extended performance costs it claims to have incurred because the District delayed its progress in completing the Fort Totten Solid Waste Transfer Station. It argues that because of District-caused delay of 261 days, Appellant incurred additional performance costs of $660,686. (FF 96.) The District urges the Board to deny recovery because Appellant (1) failed to submit a proper claim supported by certified cost or pricing data, (2) failed to submit a timely claim, and (3) failed to prove its claim in this proceeding. (Dist. Post Hr'g Br. 8-9, 18.)[183]

I. Jurisdiction

A. Cost or Pricing Data

The District contends that Appellant's claims must be denied because when presenting its claims for an equitable adjustment and requesting a contracting officer's final decision, which resulted in issuance of Change Order 5 after negotiations between the parties (*see* FF 93), Appellant failed to submit Cost or Pricing Data to support its claim as required by the Contract's Changes clause. (District's Post Hr'g Br. 20-21.) Submission of current cost or pricing data and execution of a certification when agreement is reached aid the District in reaching a reasonable price when negotiating a modification for changed work in advance of performance. (FF 11.)

However, once Appellant incurred the impact costs by performing changed work, cost or pricing data is no longer the basis of negotiation of the adjustment. *See Civil Constr. LLC*, CAB Nos. D-1294, D-1413, D-1417, 2013 WL 3573982 at *16 (Mar. 14, 2013). The Contract notes that if a price for changed work is not reached in advance of the work, a price adjustment will be based upon the contractor's reasonable, actual costs. (FF 13.) *Cf. Itek Corp., Applied Tech Div.*, ASBCA No. 13528, 71-1 BCA ¶ 8906 (May 26, 1971). Moreover, as the District points out (District's Post Hr'g Br. 19), the preferred method for supporting a claim for completed work is by submission of actual cost data. *District of Columbia v. Org. for Envtl. Growth*, 700 A.2d 185, 203 (D.C. 1997); *see also Cherry Hill Constr., Inc. v. Gen. Servs. Admin.*, GSBCA No. 12087-{11217}-REIN, 93-2 BCA ¶ 25,810 (Feb. 10, 1993) (noting that the contractor "properly amended its claim, once quantum was before the Board, to conform to actual costs").

The District has not demonstrated that the failure of Appellant to submit "cost or pricing data" and a certification violated Contract requirements or interfered with its ability to consider the claims. There is no evidence the District ever requested such data or was hampered in its negotiation of direct costs in the change orders by its lack of cost and pricing data. The District evidently had adequate data to support its award of damages in Change Order Nos. 4 and 5. (FF 92, 93.) Moreover, the District has offered no grounds for denying Appellant's claims in this appeal because Appellant failed to submit cost or pricing data in support of its claims.[184]

B. Timeliness of Claims

[183] On January 7, 2013, the District filed a Motion to Enlarge Time to Submit a Post-Hearing Brief contemporaneously with its Post Hearing Brief. The District's motion is hereby granted.

[184] To the extent that the District argues that the data submitted by Appellant was insufficient to support its claim, the Board finds that the Appellant has provided sufficient evidence to support its claim to the extent granted below.

The District contends that Appellant's claims must be denied because they were not filed within 30 days after the change orders were issued, and thus, Appellant failed to comply with the requirement of the Contract that any claim be submitted within 30 days after issuance of a change order direction. (District's Post Hr'g Br. 18-19.)

Boards and courts have generally not strictly enforced such notice requirements absent a finding that the government is prejudiced by the contractor's failure to provide timely notice.[185] *Civil Constr.*, 2013 WL 3573982 at *26; *Grumman Aerospace Corp.*, ASBCA Nos. 48006, 46834, 51526, 03-1 BCA ¶ 32,203 (Mar. 14, 2003). This liberal interpretation is especially appropriate where the government is aware of the operative facts underlying the eventual claim. *See Ft. Myer Constr. Corp.*, CAB No. D-859, 40 D.C. Reg. 4655, 4677 (Nov. 3, 1992); *Hoel-Stefen Constr. Co. v. United States*, 456 F.2d 760, 767-68 (Ct. Cl.1972). Further, the District bears the burden of showing that it was prejudiced by the alleged lack of notice. *Civil Constr.*, CAB Nos. D-1294 et al., 2013 WL 3573982 at *26; *Ft. Myer Constr. Corp.*, CAB No. D-859, 40 D.C. Reg. at 4677-78.

The claim relating to Appellant's extended performance costs addressed in CAB No. D-1369 was submitted in April of 2009 (FF 95), more than 30 days after the relevant change orders were issued for PCOs 11, 15, 20, 25, 36, and 38, and more than 30 days after Appellant notified the District that it considered the delays related to the Master Building Permit and the fire alarm system design constituted changes. However, the District was well aware of the operative facts underlying each of the PCOs that underlie Appellant's requests for extended performance costs; the record also reflects that as each of the events at issue came to light, Appellant promptly notified the District. (FF 26 (Master Building Permit), 33 (subsurface concrete), 36, 39, 47 (Fire Sprinkler Pump), 52 (Storm Drainage Pipe), 63, 64 (Fire Alarm Design), 79 (Roof Deck), 83, 84 (Fire Sprinkler Relocation)). The District does not allege, and the record does not reflect, that the District was prejudiced in its consideration of Appellant's claims by the time lapse in submitting those claims.

In view of the District's contemporaneous knowledge of each of the delaying events and the absence of prejudice to the District, we find Appellant's claims are not barred by its failure to submit them within 30 days after issuance of the relevant change directives.

C. No Waiver of Claims

The District argues that the release language in bilateral Change Order No. 3 serves to release the District from liability for Appellant's extended general conditions costs arising from the alleged delays. (District's Post Hr'g Br. 21-23.) The District further argues that Appellant's acceptance of a lesser sum for its claims operates as an accord and satisfaction. (*Id.* at 23.)

It is well settled that no additional compensation may be paid where the language of a contract modification unambiguously releases the government from further liability for the changed work. *See MJL Enters., Inc. v. Dep't of Veterans Affairs*, CBCA No. 2708, 12-2 BCA ¶ 35,167 (Oct. 25, 2012); *see also Troy Eagle Grp.*, ASBCA No. 56447, 13-1 BCA ¶ 32,258 (Mar.

[185] Further, where the government has been prejudiced by dilatory notice, the appropriate course is not to deny the claim outright, but rather to apply a higher burden of persuasion. *T. Brown Constructors, Inc. v. Peña*, 132 F.3d 724, 733 (Fed. Cir. 1997) (citing *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1392 (Fed. Cir. 1987)).

4, 2013) (stating that "absent applicable exceptions, an unconditional release bars a contractor from recovering additional compensation based on events occurring before the release was executed"). The absence of release language in other change orders, however, is evidence of the expressed intentions of the parties and is entitled to great weight in determining the meaning of those change orders. *Cf. Aleman Food Servs., Inc. v. United States*, 994 F.2d 819, 822 (Fed. Cir. 1993) (stating that "[w]herever possible, courts should look to the plain language of the contract to resolve any questions of contract interpretation").

In this matter, Change Order No. 3 did not incorporate any of the PCOs at issue in this appeal. (FF 90.) While Change Order No. 3 included language referring to the removal of the subsurface concrete obstructions (PCO 11), Change Order No. 4, which related solely to the subsurface concrete obstruction issue, specifically incorporated PCO 11 and was executed on the same date as Change Order No. 3, did not include similar release language. (FF 92.) Moreover, in the process leading to issuance of Change Order No. 4, Appellant specifically declined to release its delay related claims regarding PCO 11. (FF 91 & n.28.) In the parties' discussions regarding the remaining PCOs at issue in this appeal, they could not reach agreement on extended performance costs even though they agreed on (and included in Change Order No. 5) the direct costs of the changed work. (FF 93.) Accordingly, the Board finds that Appellant did not release the District from its extended performance cost claims.

For similar reasons, the Board finds that Appellant's claims are not barred by accord and satisfaction. A claim is discharged by an accord and satisfaction where a party accepts performance different from that which was claimed as due in full satisfaction of its claim. *England v. Sherman R. Smoot Corp.*, 388 F.3d 844, 849 (Fed. Cir. 2004). An accord and satisfaction binds the parties and precludes further payment on the satisfied claim. *Nat'l Hous. Grp. v. Dep't Hous. & Urban Dev.*, CBCA Nos. 340, 341, 09-1 BCA ¶ 34,043 (Jan. 6, 2009). The District bears the burden of proving an accord and satisfaction as the party asserting the affirmative defense. *Jimenez, Inc.*, ASBCA No. 52825, 01-1 BCA ¶ 31,294 (Feb. 2, 2001). To establish an accord and satisfaction, the District must establish four elements: "(1) proper subject matter, (2) competent parties, (3) *a meeting of the minds of the parties*, and (4) consideration." *Bell BCI Co. v. United States*, 570 F.3d 1337, 1341 (Fed. Cir. 2009) (emphasis added); *see also Nat'l Hous. Grp.*, CBCA Nos. 340, 341, 09-1 BCA ¶ 34,043 (stating that "resolution of a bona fide dispute between the parties" is a fifth element) (citing *American Tel. and Tel. Co.*, DOTCAB No. 2479, 93-3 BCA ¶ 26,250 (July 27, 1993)).

The Board finds that the District has failed to prove a meeting of the minds sufficient to establish an accord and satisfaction. The evidence is plain that by executing Change Order No. 4 Appellant did not relinquish its claim for extended performance costs, and that the District understood that Appellant continued to assert its entitlement to extended performance costs. Moreover, Change Order No. 5 was issued unilaterally by the District and could not be a preclusive waiver of Appellant's claim. (FF 93.)

II. Entitlement – CAB No. D-1369

Appellant has the burden of proving the fundamental facts of its affirmative claim by a preponderance of the evidence. *A.S. McGaughan Co.*, CAB No. D-884, 41 D.C. Reg. 4130,

4135 (Mar. 16, 1994); *George A. Fuller Co.*, CAB No. D-828, 40 D.C. Reg. 5111, 5115 (Apr. 23, 1993). In order to receive an equitable adjustment from the District, Appellant must show three necessary elements - liability, causation and resultant injury. *Servidone Constr. Corp. v. United States*, 931 F.2d 860, 861 (Fed. Cir. 1991); *Eaton Contract Servs., Inc.*, ASBCA No. 54054, 03-2 BCA ¶ 32,273 (May 28, 2003). Appellant must demonstrate the causal link between the District's alleged wrongful actions and the delay, the extent of delay, and the resulting injury. *Essex Electro Eng'rs,, Inc. v. Danzig*, 224 F.3d 1283, 1295 (Fed. Cir. 2000). We address the three elements below, beginning with determining whether the District was responsible for the delays as Appellant contends.

A. Master Building Permit - PCO 2

The Contract's Permits, Licenses and Certificates clause made Appellant responsible for obtaining the building permit issued by the Department of Consumer and Regulatory Affairs. (FF 6.) The District had a duty not to hinder Appellant in the performance of its work, but it had no duty to relieve Appellant of its contractual obligation to obtain the DCRA permit in advance of work on the site. *See AFV Enters., Inc.*, PSBCA No. 2691, 01-1 BCA ¶ 31,388 (Apr. 11, 2001). That the District eventually obtained the permit does not signify that responsibility for obtaining and paying for the permit shifted from Prince/Schlosser to the District.

Thus, delays resulting from the issuance of the permit and from the requirement of DCRA that Appellant meet with a Soils Conservation Inspector before commencing earthwork (FF 25) were not caused by the District. *Cf. Shirley Constr. Corp.*, ASBCA No. 42954, 92-1 BCA ¶ 24,563 (Nov. 14, 1991) (holding that the "Permits and Responsibilities clause requires contractors to comply with laws and regulations issued subsequent to award without additional compensation unless there is another clause in the contract that limits the clause to laws and regulations in effect at the time of award"). In fact, in Change Order 5, the parties negotiated a refund to the District of the amount the District paid for the permit, recognizing that obtaining and paying for the MBP was its responsibility under the Contract. (FF 93 & n.29.) Moreover, Appellant has not shown that any delays to project completion caused by the process of obtaining the Master Building Permit from DCRA were unusual or unforeseeable. Accordingly, project delay associated with issuance of the Master Building Permit is not compensable.

B. Subsurface Concrete Obstructions – PCO 11

The Contract's Differing Site Conditions clause authorizes an equitable adjustment for two types of differing site conditions. (FF 16.) The first, Category 1, addresses subsurface or latent physical conditions at the site that differ materially from those indicated in the Contract; Category 2 conditions are "unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered or indicated in the contract." *James A. Federline, Inc.*, CAB No. D-834, 41 D.C. Reg. 3853, 3861 (Dec. 15, 1993); *Ft. Myer Constr. Corp.*, CAB No. D-859, 40 D.C. Reg. 4655, 4678 (Nov. 3, 1992); *Technical Constr. Inc.*, CAB No. 730, 36 D.C. Reg. 4067, 4077-78 (Mar. 14, 1989). There is no indication in the record that there were any representations in the Contract regarding subsurface conditions. Accordingly, the Board analyzes this claim as a Category 2 differing site condition. *Technical Constr. Inc.*, CAB No. 730, 36 D.C. Reg. at 4079 ("where a contract document is devoid of any indications of subsurface conditions, the necessary postulate for a category one differing site condition fails").

The existence of underground concrete was unknown to the parties until it was discovered on December 4, 2006, during excavation for the sanitary sewer. (FF 31-32.) The concrete remnants of an earlier foundation were buried below grade and asphalt pavement topped the area at issue. (*Id*.) Appellant timely notified the District's on-site inspector, and on December 5, 2006, notified the COTR in writing of the obstructions. (FF 33.) Under these circumstances, the Differing Site Condition clause provides that where the condition causes an increase in the time required for performance of the work, an equitable adjustment shall be made. (FF 17.)

Appellant has demonstrated that any delay resulting from the discovery of subsurface concrete obstructions is compensable under the Differing Site Conditions clause of the Contract.[186]

C. Fire Sprinkler Pump – PCO 15

By preparing the Contract's plans and specifications, the District implicitly warranted that compliance with the plans and specifications, as issued, would produce an acceptable product—in this case an effective fire suppression system. *District of Columbia v. Savoy Constr. Co.*, 515 A.2d 698, 702 (D.C. 1986); *J.D. Hedin Constr. Co. v. United States*, 347 F.2d 235, 241 (Ct. Cl. 1965); *see also United States v. Spearin*, 248 U.S. 132, 136 (1918). The District is responsible for defects and omissions in the contract specifications and drawings. *Kora & Williams Corp.*, CAB No. D-839, 41 D.C. Reg. 3954, 4110 (Mar. 7, 1994); *Ft. Myer Constr. Co.*, CAB No. D-859, 40 D.C. Reg. at 4681. General disclaimers that require the contractor to check plans and determine project requirements do not overcome the implied warranty and do not operate to shift the risk of design defects to contractors. *White v. Edsall Constr. Co.*, 296 F.3d 1081, 1085 (Fed. Cir. 2002). Additionally, where faulty specifications delay completion of the project, the contractor is entitled to recover damages resulting from the delay. *Savoy Constr.*, 515 A.2d at 702; *J.D. Hedin Constr. Co.*, 347 F.2d at 241.

The Contract originally did not include a requirement for a fire pump. (FF 35, 38.) Because of the pressure and flow characteristics of the local water supply, and through no fault of Appellant's, a fire pump turned out to be necessary. (FF 39.) Requiring Appellant to install a fire pump not specified in the Contract constituted a constructive change for which Appellant is entitled to compensation under the Changes clause. *Ft. Myer Constr. Corp.*, CAB No. D-859, 40 D.C. Reg. at 4681. Appellant is therefore "entitled to an equitable adjustment for the increase in cost and time required for performance of the contract work." *Id.* (quoting *Carl J. Bonidie, Inc.*, ASBCA No. 25769, 82–2 BCA ¶ 15,818 (Apr. 23, 1982)). As the faulty specifications delayed Appellant's completion, Appellant is entitled to recover delay damages for the District's breach of its implied warranty. *Savoy Constr.*, 515 A.2d at 702.

D. Replacement of Storm Drainage Pipe – PCO 20

The actual location of the 24 inch reinforced concrete storm drainage pipe was different from that indicated on the plans. (FF 52.) The Board therefore treats the issue as a Category 1 differing site condition. *See Renda Marine, Inc. v. United States*, 509 F.3d 1372, 1376 (Fed. Cir.

[186] The Differing Site Conditions clause bars recovery on a claim asserted after final Contract payment. (FF 17.) However, final payment has not yet occurred under the Contract. (FF 94.)

2007) (noting that "[a] Type I differing site condition arises when the conditions encountered differ from what was indicated in the contract documents").

To prevail on a Category 1 differing site condition, Appellant must show four elements: (1) that a reasonable contractor, reading the contract documents as a whole, would interpret them as making a representation concerning the site conditions, (2) that the actual site conditions were not reasonably foreseeable to the contractor with the information available to the particular contractor outside the contract documents, (3) that the contractor reasonably relied on the contract representations, and (4) that the actual conditions differed materially from those indicated in the contract and that the contractor suffered damages as a result. *See Drennon Constr. & Consulting, Inc. v. Dep't of the Interior*, CBCA No. 2391, 13-1 BCA ¶ 35,213 (Jan. 4, 2013) (quoting *Int'l Tech. Corp. v. Winter*, 523 F.3d 1341, 1348-49 (Fed. Cir. 2008)); *see also James A. Federline*, CAB No. D-834, 41 D.C. Reg. at 3861-64; *Nova. Grp., Inc.*, ASBCA No. 55408, 10-2 BCA ¶ 34,533 (Aug 13, 2010). The Contract further required the Appellant to provide prompt notice to the District prior to disturbing the differing condition. (FF 16.)

The Appellant has established all four elements in this case. As to the first element, the parties do not dispute that the contract documents made representations concerning the location of the storm drainage pipe; SCS knew of the existence of the pipe in the vicinity of the project site and undertook efforts to determine its location in preparing the Project Drawings. (FF 51.)

With regard to the second element, the Board concludes that a reasonable contractor could not reasonably foresee the actual location of the storm pipe. Even though it consulted the Transfer Station's original drawings and utilized the services of a utility locator company (FF 52), SCS did not determine the correct location of the storm pipe.

The Board also concludes that Appellant reasonably relied upon the Contract's representations regarding the storm drainage pipe. The Contract required Appellant to install new truck ramps as part of the project. (FF 3.) The Project Drawings indicated that a storm pipe would be in the vicinity of the project, but in a location that would not interfere with the construction of the new truck ramps. It was reasonable for Appellant to rely on those representations.

Regarding the fourth element, we stated in *James A. Federline* that "[e]vidence as to a material difference is most commonly illustrated by a showing that a larger amount of work was exerted than initially contemplated or that an alternative method of workmanship was needed in order to complete the contractual agreement." 41 D.C. Reg. at 3864. Here, in response to the difference between the Project Drawings and the actual location of the storm pipe, the District required Appellant to abandon the existing drainage pipe in place and install a new drainage pipe along a route that would not interfere with installation of the new truck ramp foundations. (FF 52, 53.) Accordingly, the Board concludes that this difference was material and that the Appellant suffered damages as a result.

Lastly, Appellant provided the District prompt notice of the condition and did not disturb the condition until the District had an opportunity to investigate. (FF 52, 54.) *See also James A. Federline*, 41 D.C. Reg. at 3864.

Appellant has not shown that the District and SCS had reason to know of the error in the plan location of the pipe, but Appellant need not show fault on the part of the District in order to recover for a Category 1 differing site condition; rather, "[t]he test [is] entirely dependent on what is indicated in the contract documents and nothing beyond contract indications need be proven." *James A. Federline*, 41 D.C. Reg. at 3863 (citing *Foster Constr. C.A. & Williams Bros. Co. v. United States*, 435 F.2d 873, 881 (Ct. Cl. 1970)). Appellant has demonstrated that the condition indicated in the Contract documents—the location of the storm drainage pipe—was materially different from that encountered during performance entitling it to an equitable adjustment for additional time required for performance as well as the extra costs incurred. (*See* FF 17.)

E. Fire Alarm System Design Revisions – PCO 25

The specification for the fire alarm system was a mix of performance and design specifications, apportioning responsibility for the system between the District, and its designer SCS, and Appellant. SCS provided the electrical riser diagram (Project Drawing F2), which was to be used in Appellant's application for a permit from the Fire Marshal. (FF 58, 60.) Using that diagram, Appellant prepared shop drawings and submitted them to SCS, which approved them promptly, on December 4, 2006. (FF 59.) However, when Appellant submitted the plans, including Drawing F2, for approval, the Fire Marshal rejected the permit application on February 23, 2007. (FF 62.)

Project Drawing F2 erroneously identified three areas in the basement in a manner that would indicate that the spaces would be occupied by employees, and need fire protection, when, in fact, those areas were to remain unoccupied, and therefore needed lower levels of fire protection. (FF 58.) The Fire Marshal's rejection appears to have been based on a belief that employees would occupy those areas of the basement. (FF 62.) The mislabeling in Project Drawing F2 resulted from SCS's erroneous reliance on existing "as-built" drawings of the Transfer Station. (FF 58.) The Fire Marshal noted on the rejection that a resubmission would require an additional smoke detector in the basement, additional fire notification devices, and revisions to the riser diagram (Project Drawing F2). (FF 62.)

Appellant asked SCS to revise Project Drawing F2 on April 6, 2007, which it did, on May 2, 2007. (FF 64-65.) However, after Appellant questioned certain aspects of SCS's drawing (FF 66), discussions between the parties continued until about August 13, 2007, when Appellant made its second application to the Fire Marshal (FF 67). The Fire Marshal rejected the second application, noting the need to provide more detail, label all rooms, and provide A/V fire warning equipment in one of the basement areas mislabeled as occupied. (FF 68.) Although Appellant asked SCS to meet with the Fire Marshal and SCS indicated that it would (FF 69), it never did. Six weeks later SCS supplied a revised Project Drawing F2, now designated as E10, that still failed to address the concerns of the Fire Marshal, and SCS eventually issued a revision to the E10 drawing that properly identified the basement rooms as "unoccupied." (FF 70, 71.)

After a third application was rejected by the Fire Marshal, SCS worked with Appellant on a revised design and conducted a building code analysis of the system, which it completed on February 19, 2008. (FF 74.) With the drawings corrected and the building code analysis completed, Appellant submitted the revised drawings on February 25, 2008, and the Fire Marshal

approved the application on March 5, 2008, after more than a year in processing. (FF 74, 75.) It was only then that the District issued BCD No. 9, on March 12, 2008, permitting Appellant to begin work on the fire alarm, which it completed on or about April 4, 2008, the date the job demobilized. (FF 76, 77.)

In every government contract the government warrants to the contractor that: (1) it will cooperate and refrain from hindering the contractor's performance; and (2) it will render timely and appropriate administrative decisions. *See Kora and Williams Corp.*, CAB No. D-839; *Sterling Millwrights, Inc. v. United State*s, 26 Cl. Ct. 49, 67–68 (1992); *Mega Constr. Co. v. United States*, 25 Cl. Ct. 735 (1992). This duty imposed on the District an affirmative obligation to do what is reasonably necessary to enable Appellant to perform. *See Coastal Governmental Servs., Inc.*, ASBCA No. 50283, 01-1 BCA ¶ 31,353 at 154,833, *aff'd*, 32 Fed. Appx. 584 (2002) ("the gravamen of the...inquiry in cases involving a breach of the duty of cooperation is the reasonableness of the government's action considering all the circumstances") (citing *PBI Electric Corp. v. United States*, 17 Cl. Ct. 128, 135 (1989)); *Solar Turbines, Inc. v. United States*, 23 Cl. Ct. 142, 156 (1991) ("[t]he underlying principle is that there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract").

The Permits, Licenses and Certificates clause, required Appellant to obtain the permit, but to do so it proved necessary for SCS and its subcontractors to correct Contract drawings that had to be part of the permit application. (FF 43, 74.) The Permits, Licenses and Certificates clause further instructed Appellant to immediately request assistance from the COTR if it experienced difficulty in obtaining a permit. (FF 6.) This implies that the COTR would render assistance in the process. In this case however, despite being aware of the problems in obtaining the Fire Marshal's approval, the District and its subcontractor, SCS, showed no urgency in the matter. (*See* FF 45.) Throughout the approval process, despite Appellant's repeated requests, SCS was slow to provide effective help in gaining approval of the fire alarm system. (FF 63-74.) SCS representatives declined to speak to the Fire Marshal until pushed to do so and then only in a telephone conference with the Fire Marshal on February 8, 2008, shortly after which the Fire Marshal's approval was achieved, albeit long after the scheduled Contract completion date. (FF 74, 75.)

The District's failure to finalize the electrical connections and locations for the fire alarm system in a timely manner when it and SCS knew the condition of SCS's plans was delaying finalization of the plans for permit purposes violated its duty to cooperate. This failure to provide timely, effective and necessary assistance in obtaining the permit had the foreseeable effect of delaying Appellant's installation of the fire protection system. The District's action unreasonably impeded Appellant's performance, and the District is therefore liable for Appellant's extended performance costs, to the extent they can be shown to stem from the delays in obtaining the Fire Marshal's approval and the District's authorization for Appellant to proceed on the fire alarm system on March 12, 2008. *See R&B Bewachungsgesellschaft mbH*, ASBCA Nos. 42213, 42220, 42222, 91-3 BCA ¶ 24,310 (Aug. 20, 1991) (stating that "[i]t is axiomatic that the Government will not prevent, interfere with or unreasonably delay a contractor's performance and that, if it breaches this implied duty, the Government can be held liable under the theory either of constructive change or of breach of contract").

F. Roof Deck Modifications – PCO 36

The plans and specifications for the connection between the roof of the new addition and the old roof were defective; the elevations of the new and existing were not the same due to the camber of the joists.[187] (FF 78.) Construction according to the plans and specifications without modification would have resulted in an unacceptable elevation difference. (FF 78.) "The implied warranty, however, does not eliminate the contractor's duty to investigate or inquire about a patent ambiguity, inconsistency, or mistake when the contractor recognized or should have recognized an error in the specifications or drawings." *White v. Edsall Constr. Co*, 296 F.3d 1081, 1085 (Fed. Cir. 2002). However, the defect regarding the roof deck design was not one Appellant could have reasonably discovered through investigation in advance of bidding.

Appellant offered a solution that called for additional work, and on July 30, 2007, SCS approved it. (FF 79-80.) As discussed above, the government warrants the sufficiency of its contract specifications, and should respond in damages (including costs "attributable to any period of delay that results from the defective specifications")[188] or an equitable adjustment, should the specifications prove to be defective. *Hol–Gar Mfg. Corp. v. United States*, 175 Ct. Cl. 518, 525, 360 F.2d 634, 638 (1966); *Corner Constr. Co.*, ASBCA No. 20156, 75–1 BCA ¶ 11,326 (June 10, 1975). Appellant completed the corrective work on August 29, 2007, but the roof work delayed work on the installation of fire sprinkler piping that was to attach to the roof deck. (FF 81.)

The Board finds that the roof deck specifications were defective, and that Appellant was required to perform extra work to achieve a satisfactory roof connection between the buildings. Any delay shown to have resulted from these defects is compensable.

G. Relocation of Sprinkler Pipe – PCO 38

The Contract placed responsibility for accurate shop drawings on Appellant. (FF 18.) The District would not be responsible for shop drawing errors. *See Westerchil Constr. Co.*, ASBCA No. 35191, 88–2 BCA ¶ 20,528 (Feb. 4, 1988); *Berry Constr., Inc.*, ASBCA No. 26924, 83–1 BCA ¶ 16,330 (Feb. 9, 1983), *aff'g on recons.*, 82–2 BCA ¶ 16,031 (Aug. 24, 1982). However, the District has not shown that Appellant's shop drawings were in error

Approval of shop drawings did not serve to waive any requirement of the Contract (FF 18), but no requirement of the Contract established a height for the piping higher than 24 feet. Appellant submitted shop drawings showing the proposed installation of the fire sprinkler piping to the roof above the tipping floor. (*See* FF 82.) The approved shop drawings indicated a height of 24 feet for the piping, but new trucks used by the District could raise several inches above 24 feet when dumping trash onto the tipping floor. (FF 82-85.) SCS was not aware of the new trucks, and SCS' plans contained no height requirement for the fire sprinkler piping. (FF 84-85.) Appellant was unaware of the height of the new trucks when it provided and SCS approved shop drawings showing a 24-foot height for the sprinkler piping.

Thus, the facts in the record establish that Appellant is entitled to a recovery for the District's failure to disclose superior knowledge it held regarding the height of the new trash

[187] That is, the arching or curvature of the joists.
[188] *See Essex Electro Eng'rs, Inc. v. Danzig*, 224 F. 3d 1283, 1289 (Fed. Cir. 2000).

trucks because the elements of such a theory of recovery are present in the record: (1) Appellant undertook to perform without information regarding the height of the new trucks and that lack of information led to installation of the sprinkler piping at 24 feet; (2) the District knew Appellant had no knowledge of the height of the new trucks; (3) the Contract did not put Appellant on notice that taller trucks would be in use; and (4) the District failed to provide the necessary information. *See Hercules Inc. v. United States*, 24 F.3d 188, 196 (Fed. Cir. 1994); *UniTech Servs. Group*, ASBCA No. 56482, 12-2 BCA ¶ 35,060 (May 22, 2012).

In short, the District did not provide Appellant information that the height shown in the shop drawings was insufficient for the newer trucks the District planned to use. It was the lack of coordination between the District and SCS that led to approval of shop drawings that, as it turned out, did not meet the unexpressed requirements of the District. On September 10, 2007, the District issued BCD 7, instructing Appellant to remove and raise the sprinkler pipe, and Appellant did so on September 25, 2007. (FF 86.) In Change Order No. 5, the District awarded Appellant $51,841 for its costs of removing and raising the sprinkler piping. (FF 93.)

Appellant has shown by a preponderance of the evidence that the District was responsible for the relocation of the sprinkler piping, and any delay resulting from the relocation was compensable.

III. Effect of Grant of Compensation in Change Orders for Underlying Changed Work

Appellant appears to argue that it is not required to prove that the District is liable for damages related to the above events because the District, by granting change orders awarding compensation to Appellant for the events at issue in this proceeding, conceded that the delaying events were the District's fault and the Board must so find. (Appellant's Post Hr'g Br. 39.)

In *Robert McMullan & Son, Inc.*, the Armed Services Board of Contract Appeals concluded that the government's granting by contract modification of a time extension amounted to an acknowledgement that the delay was not due to the fault or negligence of the contractor and gave rise to a rebuttable presumption that the Government was responsible for the delay. ASBCA No. 19023, 76-1 BCA ¶ 11,728 (Jan. 22, 1976). That decision was eventually overturned by the United States Court of Appeals for the Federal Circuit. The Court determined that application of a presumption, even a rebuttable presumption, based on an action by the contracting officer that, while not a final decision, addressed a matter at issue in the appeal was inconsistent with the statutory edict that matters before a board of contract appeals are to be decided *de novo* under the federal Contract Disputes Act (CDA). *England v. Sherman R. Smoot Corp.*, 388 F.3d 844, 856-57 (Fed. Cir. 2004).[189] (stating that the *McMullan* presumption "is at odds with" the CDA because it does not permit the court or board to decide the appeal completely de novo).

Although not subject to the Contract Disputes Act, this Board's grant of jurisdiction also requires that it decide contract claims *de novo*. D.C. Code § 2-360.03(a)(2) (2011) (formerly D.C. Code § 2-309.03(a)(2)). "To review and determine an appeal *de novo* means that the Board

[189] In *Smoot*, the contracting officer had allowed damages and a time extension but both were less than the contractor had claimed. No final decision was issued, and the contractor appealed from the contracting officer's deemed denial. 388 F.3d at 846-847.

makes findings of fact, based on a factual record created through Board proceedings, and makes legal conclusions, based on its findings of fact and the applicable law." *Ebone, Inc.*, CAB No. D-971, D-972, 45 D.C. Reg. 8753, 8773 (May 20, 1998). Giving determinative effect to the District's issuance of change orders may be inconsistent with the requirement that the Board decide appeals *de novo*.

The parties have not addressed this issue, and under the circumstances of this appeal we need not decide the evidentiary value, if any, of the District's grant of compensation through a change order for the direct costs of work done under the pertinent change orders. As discussed above, we have considered each of the alleged delaying events *de novo* and have determined in each instance, except for the Master Building Permit, that the delaying event was the District's fault. To the extent Appellant proves delay and resulting costs, it may recover without a need to apply any evidentiary value to the previous change orders.

This Board has relied on the *McMullan* presumption at least once in the past to hold that the District's compensable change orders create a presumption of District responsibility. *See Kora & Williams Corp.*, CAB No. D-839, 41 D.C. Reg. 3954, 4103 (Mar. 7, 1994). However, that was before the *McMullan* decision was overturned. Accordingly, we decline to follow that determination in this appeal and find no reason to further consider at this time the issue of the evidentiary value, if any, to be given to a change order granting damages to a contractor under the circumstances of this appeal.

IV. Evaluation of Delay

It is Appellant's burden to prove entitlement to a time extension by showing that actions of the District delayed overall project completion. *See Civil Constr. LLC*, CAB Nos. D-1294 et al., 2013 WL 3573982 at *17-18. Appellant must show that the delaying events were critical to and impacted overall contract completion. *See Sauer Inc. v. Danzig*, 224 F.3d 1340, 1345 (Fed. Cir. 2000). It is not enough for the contractor to show that the District was responsible for delay to a particular segment of the work; Appellant must also establish that completion of the entire project was delayed by reason of the delay to the segment. *See Donohoe Constr. Co.*, 99-1 BCA ¶ 30,387 (May 13, 1999) (citing *Rivera Constr. Co.*, ASBCA Nos. 29391, 30207, 88-2 BCA ¶ 20,750 (Apr. 12, 1988)).

Appellant provided substantial contemporaneous, documentary evidence and testimony of witnesses who were present on the project demonstrating the delays Appellant encountered and their effect on progress. Further, through credible evidence, Appellant demonstrated that, with the exception of the Master Building Permit delay, the delays were compensable under the Contract and applicable contract law. To quantify the impact of the delaying events, Appellant presented the testimony and report of Paul Krogh, who was qualified at the hearing as an expert in planning and scheduling construction projects and delay claim analysis related to construction projects. (FF 97.)

Krogh reviewed Appellant's contact documents, including correspondence and RFIs, meeting minutes, and daily reports. (FF 99.) Many of the documents were in the record, but others, such as daily reports and meeting minutes, were not, except for a few particularly relevant to the changes. (*See* FF 99.) Krogh examined Appellant's original as-planned schedule submitted to the District as required by the Contract, and Appellant's monthly updates of its

CPM schedule. (FF 99.) Importantly, the as-planned schedule and the monthly CPM updates were in the record. The updates identified and incorporated delays occurring on the project and reflected the impact each change had on the schedule and showed the adjusted completion date as affected by delays occurring since the last update. (FF 22, 99.) It is possible to identify in the schedules the effect of particular delaying events and the effect each activity had on the performance schedule month-by-month. Month-by-month, the schedules show the expected completion date slipping further into the future as delaying events occurred. Krogh concluded that the schedule was reasonable and that the updates to the schedule accurately reflected events in the progress of the project. (FF 100-101.)

Krogh examined the project documents to ascertain the existence of concurrent delay. He found a few instances, but concluded that Prince/Schlosser had managed to make up all of its delays by other efficiencies of performance. (FF 103.) The District did not meet its burden of proving, as an affirmative defense to liability, that there were critical path delays not the fault of the District that were concurrent with those found to be the District's responsibility. *See MCI Constructors, Inc.*, CAB No. D-924, 44 D.C. Reg. 6444, 6458 (June 4, 1996) ("The District bears the burden of proving concurrency because it is in the nature of an affirmative defense to liability for delay damages."); *Williams Enters., Inc. v. Strait Mfg. & Welding, Inc*., 728 F. Supp. 12, 16 (D.D.C. 1990), *aff'd sub nom. Williams Enters., Inc. v. Sherman R. Smoot Co.*, 938 F.2d 230 (D.C. Cir. 1991).[190] The District made no showing of concurrent delays caused by Appellant or its subcontractors, and Krogh's assessment of the contract documents led him to conclude there were no concurrent delays that would serve to reduce the 261 days of delay claimed by Appellant. With the exception of the Master Building Permit, we accept Krogh's conclusion that there was no concurrent delay of Appellant's making during the period covered by its delay claim.

Notably, during the project, with knowledge of the events underlying the claimed delays, the District did not object to any of the schedules. (FF 22.) Similarly, in this proceeding, the District has not challenged Appellant's schedules or analysis, which was based heavily on the updated schedules maintained during the project. The District did not offer its own scheduling expert or any expert analysis of Appellant's claim for a time extension and did not, through evidence or cross examination of Krogh, diminish the weight that the Board accords to his report and testimony.

As noted above, we have rejected Appellant's argument that the District was responsible for delay resulting from the process of obtaining the Master Building Permit. Accordingly, we delete from Krogh's calculation of project delay the 11 days attributable to the Master Building Permit. We find the expert report and testimony persuasive, and we find the District responsible

[190] Placing the burden on the District to prove concurrency differs from the general application in Federal contracting, which places the burden on the appellant to show that the claimed delay was not concurrent with other delays for which it was responsible. *See William F. Klingensmith v. United States*, 731 F.2d 805, 809 (Fed. Cir. 1984); *Contel Advanced Systems, Inc.*, ASBCA No. 49075, 04-2 BCA ¶ 32664; *Essex Electro Eng'rs, Inc.*, 224 F.3d 1283, 1295 (Fed. Cir. 2000). Generally, for an appellant to recover for a compensable delay, it must prove that the government was the sole cause of the delay and that the appellant did not contribute to or concurrently cause such delay. *Insulation Specialties, Inc.*, ASBCA No. 52090, 03-2 BCA ¶ 32,361; *see also J.A.K. Constr. Co., Inc.*, ASBCA No. 43099, 94-1 BCA ¶ 26,536.

for the following delays, as set forth in the expert report and its attachment H:

PCO 11:	Subsurface Concrete Obstructions	27 Days
PCO 20:	Relocation of Storm Drainage Pipe	38 Days
PCO 36:	Roof Deck Modifications	19 Days
PCO 38:	Relocation of Fire Sprinkler Pipe	15 Days
PCO 15:	Fire Sprinkler Pump and	
PCO 25:	Fire Alarm System Design Revisions	167 Days

Subtracting the 15 days recovered by Appellant and the one day extension granted by the District (FF 104), the Board finds that Appellant is entitled to recovery for 250 days of delay.

V. Damages

Appellant has the burden of proof on the issue of compensable delays. *See Jennie-O Foods, Inc. v. United States*, 217 Ct. Cl. 314, 330, 580 F.2d 400, 410 (1978); *Wunderlich Contracting Co.* v. *United States,* 173 Ct. Cl. 180, 351 F.2d 956 (1965); *WBM Building Maint., Inc.*, ASBCA No. 39560, 90-2 BCA ¶ 22,929. To carry this burden of proof, Appellant must establish both the reasonableness of the costs claimed and the causal connection to the alleged event on which the claim is based. *See S.W. Electronics & Mfg. Corp.,* ASBCA No. 20698, 77–2 BCA ¶ 12,631, *aff'd*, 655 F.2d 1078 (Ct. Cl.1981). The standard to be used in deciding whether that burden has been met is the "preponderance of the evidence" test. *George A. Fuller Co. and Sherman R. Smoot Corp.,* CAB No. D–828, 40 D.C. Reg. 5111 (Apr. 23, 1993); *see also Gilbane–Smoot, Joint Venture*, CAB No. D–885, 40 D.C. Reg. 4954 (Feb. 18, 1993); *Org. for Envtl. Growth, Inc.* CAB No. D-850, 41 D.C. Reg. 3539 (Aug. 11, 1993).

A. Kelly's Costs of Extended Performance

Kelly provided testimony and evidence taken from its records to calculate its claim for the extended performance period, which it calculated to be 261 days, the difference between the original completion date and the date it completed its work and demobilized, April 4, 2008. For the project manager, senior project manager and labor superintendent, Kelly determined the percentage of their total cost to be attributed to the Transfer Station project by comparing the total company billings attributed to each, to the billings to the Transfer Station project. (FF 107, 108.) Other costs were taken from the company's payroll and cost records to establish the costs Kelly incurred during the delay period, July 17, 2007, the original completion date, to April 4, 2008. (FF 103, 106.)

The testimony of Kelly's project manager was credible and supported by data taken from Kelly's records. We accept the information he provided with only a few exceptions.

First, Appellant did not demonstrate that it is entitled to $14,409.55 for the increased cost of materials purchased by Kelly during the delay period. Although, when delay is established, the contractor is entitled to include in the adjustment the impact of higher material costs, *see*

Excavation-Constr. Inc. ENGBCA No. 3858, 82-1 BCA ¶ 15,770, *recons. denied*, 83-1 BCA p16,338; J. Cibinic, Jr., R. Nash, Jr., J. Nagle, Administration of Government Contracts 733 (4th ed. 2006), it remains Appellant's burden to demonstrate that the claimed escalation figure is correct and reliable.

Kelly determined a 37% factor for the increase of its cost of materials during the period of extended performance by using an online source that, according to Kelly's project manager, regularly provides information regarding commodity prices and escalation of commodity prices. Appellant provided a page of general information and a chart showing percentages of commodity price changes during the period of the delay. (FF 110.) The pages, ostensibly from the Internet source, contain a chart that is identified as the "Commodity Price Index" that purports to cover all countries, and not a particular locale to which it pertains. For lack of authentication and proven reliability, we will not rely on this document to establish Kelly's increased costs of materials. No other evidence of materials escalation costs being available, Schlosser may not recover for Kelly's claimed materials escalation costs in this appeal.

Home office overhead costs incurred during an extended performance period may be shown by a fixed percentage mark-up of the direct costs incurred. *See C.B.C. Enterprises, Inc. v. United States*, 978 F.2d 669, 671-72, 675 (Fed. Cir. 1992); *Community Heating & Plumbing Co., Inc. v. Kelso*, 987 F.2d 1575, 1581-82 (Fed. Cir. 1993). Kelly's home office expense markup of 18% of direct costs is acceptable. The figure was determined from the cost accounting records of the company and was calculated after eliminating the costs of the project manager, senior project manager, and superintendent (FF 111), so there is no duplication of the home office overhead costs. However, the items listed in the claim, including management salaries, are overhead items. (*See* FF 13, n.4) Accordingly, Kelly may not recover additional overhead and profit on them. *See Tromel Constr. Corp.*, PSBCA No. 6303, (June 27, 2013) 2013 WL 3227344 (P.S.B.C.A.); *Stephenson Assoc., Inc.*, GSBCA Nos. 6573, 6815, 86-3 BCA ¶ 19,071.

Therefore, we calculate Kelly's claim for the 261 days of delay claimed as follows:

Project Manager	$ 8,925.71
Senior Project Manager	$ 2,814.17
Labor Superintendent	$ 2,527.87
Foreman Wages, Burden, and Expenses	$17,347.34
Subtotal	$31,615.09
Home Office Expense (18%)	$ 5,690.72
Total	$37,305.81

(FF 106-111.) This figure will be reduced to reflect the 11 days of the total claimed delay found not to be compensable. As Kelly did not calculate a daily rate for extended performance costs, we reduce it proportionally: (250 (days of compensable delay) / 261 (total days of claimed

delay)) x $37,305.81 = $35,733.53.[191] This is the amount of Kelly's delay costs that are compensable as part of Schlosser's claim.

B. Prince/Schlosser's Claim

Appellant calculated a daily rate of all costs incurred on the project by obtaining from its job cost records every direct cost incurred on the project, such as labor, materials, utilities, as well as project manager, project engineer, and other related costs. From this information, Appellant calculated a daily performance rate for each of the three periods identified in Finding of Fact 114. We accept these calculations, but adjust the overall calculation as follows:[192]

Prince/Schlosser Extended Field Performance Costs	$457,842.00[193]
Profit 10%	$ 45,784.20
Subtotal	$503,626.20
Kelly Electric Extended Performance Costs	$ 35,733.53
Commission on Kelly's Costs 10%	$ 3,573.35
Extended Performance Costs	$542,933.08
Bond Costs 1%	$ 5,429.33
Total Recoverable Costs	$548,362.41

The party seeking the recovery of incurred costs has "the burden of proving the amount [. . .] with sufficient certainty so that the determination of the amount of damages will be more than mere speculation." *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 767 (Fed. Cir. 1987) (quoting *Willems Indus., Inc. v. United States*, 295 F.2d 822, 831 (Ct. Cl.1961)). Appellant has proven the above amount of incurred costs.

Where a contractor has established its actual costs and correlated them to a particular modification of the contract, it is error to disallow, increase, or otherwise adjust those costs in the absence of specific evidence. *Teledyne McCormick-Selph v. United States*, 588 F.2d 808, 810 (Ct. Cl. 1978); *Dawson Constr. Co.*, GSBCA No. 5364, 82-1 BCA ¶ 15,701; *Reliable Contracting Group, LLC v. Dep't of Veterans Affairs*, CBCA No. 1539, 11-2 BCA ¶ 34,882. The District failed to provide compelling evidence to rebut Appellant's prima facie case. Other than claiming the invoiced costs were excessive, the District has provided no competing estimate of costs.

[191] Utilizing a daily rate would yield the same result.
[192] As discussed in the previous section, Appellant may not apply its standard overhead charge of 10% to claim elements that themselves are overhead.
[193] Appellant's claimed figure of $483,252 was reduced by $25,410, which is the per diem cost rate for the first of the three periods Appellant calculated for the performance period—$2,310 multiplied by the 11 days of its delay claim that are not compensable.

Conclusion – CAB No. D-1369

CAB No. D-1369 is granted to the extent indicated above, and is otherwise denied. Appellant is entitled to $548,362.41.

CONCLUSIONS OF LAW
CAB NO. D-1419

Appellant claims that the District directed it to install power and signal wiring for the new truck scale system in the Transfer Station although the Contract did not require it. Appellant installed the wiring and claims the additional costs it incurred in performing the work. The District argues that the Contract established performance requirements of the scale system and that it was up to Appellant to design and install a system that met those performance requirements, including installing wiring necessary to the system's operation. (Hr'g Tr. 1246-1248) The District contends that Appellant is not entitled to additional compensation for the work.

There is support for the District's argument. Contracts may present a composite of design and performance specifications with elements of each. *See, e.g., W.M. Schlosser Co, Inc.*, CAB No. D-894, 41 D.C. Reg. 3528, 3531-33 (July 28, 1993); *Blake Constr. Co. v. United States*, 987 F.2d 743 (Fed. Cir. 1993). Although much of the Contract specifies in detail the design of the building renovations, giving dimensions and products to a certain degree, the specifications set forth in Section 11145 of the Contract for the truck scale system are in the nature of performance specifications. They set forth the "operational characteristics" of the truck scales, including the display and data interface requirements. (FF 121.) *See Blake Constr. Co. v. United States*, 987 F. 2d 743 (Fed. Cir. 1993). The Contract specifications required Appellant to "furnish and install" a functional truck scale system including "associated electronic controls," meeting the performance standards set forth in the specifications. (FF 120.)

In *W.M. Schlosser*, the Board quoted with approval from *Monitor Plastics Co.*, ASBCA No. 14447, 72-2 BCA ¶ 9626 (1972):

> PERFORMANCE specifications set forth operational characteristics desired for the item. In such specifications design, measurements and other specific details are not stated nor considered important so long as the performance requirement is met. Where an item is purchased by a performance specification, the contractor accepts general responsibility for design, engineering, and achievement of the stated performance requirements.

See 41 D.C. Reg. at 3531-32. That the Contract, as written, and Project Drawings did not detail the scale system display wiring would be consistent with performance specifications, and the District argues that it was Appellant's responsibility to achieve the stated performance requirements through its design and installation, including the wiring of the electronic components of the system. *See Revenge Advanced Composites*, ASBCA No. 57111, 11-1 BCA ¶ 34,698, 2011 WL 798655 (A.S.B.C.A.). The District argues that the Contract obligated Appellant to furnish an operational scale system, not simply a collection of unconnected

electronic devices, unable to provide the performance obviously required by the Contract. (District's Post Hr'g Br. 15, ¶¶ 36-37.)

Notwithstanding the above, however, Appellant argues that through the District's answer to the pre-award inquiry about empty ductways and inclusion of that answer in the Contract through Addendum 2 (FF 125, 126), the District removed from the contractor's responsibility the power and signal wiring for the cranes and remote displays at the three outbound scales.

We agree. The pre-bid question answered in Addendum 2 addressed traffic lights and cameras unrelated to the remote displays at the three outbound scales, but the District's response reasonably led Appellant to the conclusion that other entities, not it or its subcontractor, would be providing the power and signal wiring for the scales. (FF 126.) When faced with the question about the failure of the drawings to show required wiring for the scales system, the District had the opportunity to advise bidders of the view expressed in its October 9, 2007, letter to Appellant that the specifications required Appellant to provide a functioning scale and data system, including providing wiring admittedly not shown in the plans. (FF 129.) At that time, bidders could have taken the expense of the wiring into account in their bids. However, by advising bidders that the wiring would be done outside the scope of the Transfer Station renovation contract, bidders had no reason to include the cost of wiring in their bids.

Even if we were to assume that the issuance of Addendum 2 advising that certain wiring would be performed "by others" created an ambiguity in the Contract, given the performance nature of the specifications for the truck scale system as a whole, Appellant would still prevail. "It is a generally accepted rule, which requires no citation of authority, that if a contract is reasonably susceptible of more than one interpretation, it is ambiguous." *Edward R. Marden Corp. v. United States*, 803 F.2d 701, 705 (Fed. Cir. 1986). Here, given the advice provided by the District regarding wiring "by others" in the solicitation modification, any ambiguity was not so glaring as to require even further inquiry in the bidding process and where such a latent ambiguity exists, the Board will construe the ambiguous term against the District as the drafter of the contract because Appellant's reading of the solicitation, as modified by Addendum 2, is reasonable. *See Fort Vancouver Plywood Co. v. United States*, 860 F.2d 409, 414 (Fed. Cir. 1988). This promotes care and completeness by drafters of contracts. *United States v. Turner Constr. Co.*, 819 F.2d 283, 286 (Fed. Cir. 1987).

The claim at issue is essentially that of the subcontractor, Kelly & Son Electrical. Kelly's witness, Mr. March, presented company records of the work, including job tickets for each day Kelly worked on the installation of signal and power wiring to the displays, cranes, and scale house. The job tickets detailed the work being done, the labor hours expended, and equipment used. Materials used for the work were separately priced and a printout from the company's records detailed all materials used in the extra work. Through Kelly's evidence, Appellant has demonstrated it incurred costs for Kelly's subcontract work in the amount of $29,178. (FF 131.)

Appellant's claim sought $32,280.67. (FF 132.) The difference between the claimed figure and Kelly's proven costs is unexplained, and on this record Appellant has shown entitlement to only $29,178.

Conclusion – CAB No. D-1419

Appeal D-1419 is granted in the amount of $29,178.

CONCLUSIONS OF LAW
CAB NO. D-1420

The District required Appellant to use a sulfate-resistant concrete mix that Appellant contends was not specified in the Contract, and Appellant seeks the additional costs it claims to have incurred in supplying concrete. The District argues that Appellant waived its claim by agreeing to a change order that contained claim release language. Additionally, the District argues that Appellant has failed to prove its entitlement to additional costs.

Before reaching the merits of the claim for concrete mix changes, we address the District's contention that this claim is barred by the release included in Change Order No. 3. (District's Post Hr'g Br. 21-22.) Although Change Order No. 3 includes broad waiver of claim language (FF 90), our review reveals no connection between a change requiring use of sulfate-resistant concrete and that change order. Appellant identified the concrete mix issue as PCO 7. (FF 144.) PCO 7 is not included in Change Order No. 3, nor does the description of the matters included in Change Order No. 3 refer to the concrete mix issue. (FF 90.) The District has not met its burden of proving the affirmative defense of accord and satisfaction. *See, e.g., Southwest Marine, Inc.,* ASBCA No. 39472, 93-2 BCA ¶ 25,682.

Appellant argues that the Contract required only that it use standard concrete mixes meeting the strength standards set forth in the Contract and that the order that it supply more expensive, sulfate-resistant concrete constituted a constructive change to the Contract entitling it to additional compensation. (Appellant's Post Hr'g Br. 49.)

We agree. Appellant's subcontractor, APC, could have met the strength specifications in the Contract (3,250 psi (for "slab on grade and wall footings" and "abutments & wingwalls") up to 4,000 psi (for "concrete columns" and "structural slabs, beams and push walls") by supplying less expensive concrete of a non-sulfate-resistant mix. (FF 137.) However, complying with SCS's direction to provide a mix meeting the sulfate-resistance requirements of the table SCS provided "regardless of what is specified in structural plans or project specifications" (FF 139) increased Appellant's subcontractor's costs.

It is Appellant's burden to present evidence sufficient to persuade the Board that it is entitled to additional compensation, *see Fort Myer Constr. Corp.*, CAB No. D-859, and it has offered proof set out in tabular form in Finding of Fact 144. Our calculation of recovery, based on the evidence in the record is as follows:

APC's direct costs	$5,967.00
APC's overhead (10%)	596.70
APC's profit (10%)	656.37

APC's payment and performance bonds (.15%)	10.83[194]
APC's Total	$7,230.90
Appellant's G.C. Commission (10%)	723.09
Appellant's bonds (.0576%)	4.58
Appellant's recovery	$7,958.57

The initial soil testing was Appellant's responsibility under the Contract specifications (FF 135), and Appellant is not entitled to recover the cost. The alleged retest required by SCS was not proved. The only testimony regarding that retesting was offered by APC's employee, who noted that it was not APC that performed the testing. There is mention in Mr. Chatard's letter (FF 144) of a SCS-directed second soils test, but no further evidence of it has been supplied, and we find it inadequately proved.

Conclusion – CAB No. D-1420

Appeal of D-1420 is granted to the extent that Appellant may recover $7,958.57, and is otherwise denied.

SUMMARY

D-1369 – Appellant has demonstrated that it encountered 250 days of delay in its performance of the Transfer Station project, that the delays were compensable, and that it incurred extended general conditions costs of $548,362.41. Appeal D-1369 is granted to that extent and is otherwise denied.

D-1419 – Appellant demonstrated that it experienced a constructive change when the District directed it to provide and install wiring for the truck scale system. It incurred costs in the amount of $29,178.00, which it is entitled to recover. Appeal D-1419 is granted to that extent and is otherwise denied.

D-1420 – Appellant demonstrated that the District's direction that it use sulfate-resistant concrete in certain areas of the project constituted a constructive change to the Contract, entitling it to recover its increased costs of performance that resulted. Appellant proved entitlement to $7,958.57. Appeal D-1420 is granted to that extent and is otherwise denied.

The District shall also pay Appellant interest in accordance with D.C. Code § 2-359.09 (2011) (formerly D.C. Code § 2-308.06), on amounts required to be paid in connection with this award of damages by the Board.

[194] The claim incorporated multiplication errors regarding the subcontractor's and Appellant's bond costs, which have been corrected in the calculation above.

SO ORDERED.

DATED: December 9, 2013

/s/ Monica C. Parchment
MONICA C. PARCHMENT
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:

ADVANTAGE HEALTHPLAN, INC.	)	
	)	CAB No. D-1097
Unnumbered 1994 Provider Agreement	)	

For the Appellant: Oliver Garcia, Esq., Michael Ross, Esq., Jonathon Jacobs, Esq., Aegis Law Group. For the Appellee: Carlos Sandoval, Esq., Steven N. Blivess, Esq.

Opinion By: Chief Administrative Judge Marc D. Loud, Sr., Administrative Judge Monica C. Parchment, concurring.

OPINION

Filing ID #55076020

This appeal arises from two Capitated Provider Agreements entered into by the Commission on Healthcare Finance, D.C. Department of Human Services ("District") and Advantage Health Plan, Inc. ("Advantage" or "Appellant") for managed medical services to be provided to Medicaid participants. The first agreement was entered into on August 1, 1996, and extended twice for performance through July 30, 1997. The second agreement was entered into on July 30, 1997, and also extended twice through March 1998. In total, the agreements covered the last two months of Fiscal Year 1996, all of Fiscal Year 1997 and the first six months of Fiscal Year 1998 (a total of 20 months). At issue presently are Appellant's contentions that the District (i) paid Advantage incorrectly during the entire 20 month period of the agreements, and (ii) prevented eligible Medicaid recipients from enrolling in, or being randomly assigned to, Advantage's health plan during the Second Agreement.

A hearing on the merits was held from July 17-20, 2012. For the reasons stated more fully below, we sustain Appellant's appeal on both of its claims now before the Board. We find that Advantage (i) is entitled to judgment of $542,262.57, plus statutory interest, for its claim that the District paid it incorrectly during the 20 month period of their agreements, and (ii) is entitled to judgment, plus statutory interest, for its claim that the District prevented direct or randomly assigned enrollee participation in Advantage's health plan under the Second Agreement. We remand to the parties to determine the damages due Appellant under its enrollment claim based on our instructions herein. In addition, the Board lacks jurisdiction over the District's counterclaim for alleged contract overpayments because the District failed to submit its claim to the contracting officer (although it had been known to the District for over 10 years). The Board notes that since it has found for Appellant that the District underpaid the contract rate, the District's counterclaim would have been denied even if Board jurisdiction were proper.

BACKGROUND

In 1981, in order to promote efficiency and more predictable costs, Congress enacted legislation to encourage states to contract with private Health Maintenance Organizations (HMOs) to arrange for and manage medical service for Medicaid participants and to guarantee

the total cost of all necessary care to the states.[195] In such managed care contracts, state Medicaid programs contracted with HMOs to provide all necessary covered health care to eligible Medicaid recipients for a fixed monthly payment ("Capitation Rate" or "per-member-per-month (PMPM)" rate), regardless of the medical care required and costs actually incurred. *See* Pub. L. No. 97-35, §2178, 95 Stat. 357, 483 (1981). The claims before the Board grow out of the District's two agreements with Advantage (an HMO) to deliver managed medical care services to eligible District Medicaid participants. As noted above, Advantage makes two claims in its appeal now before the Board. Before proceeding to the Board's Findings of Fact and Discussion sections herein, we briefly (and separately) summarize both claims.

The Rate Claim

In its first claim, Advantage contends that the District breached both the August 1996 and July 1997 agreements by failing to fix "actuarially sound capitation rates" for each fiscal year of their agreement in violation of applicable law and Article 8 of the parties' contract (hereafter "the Rate Claim"). (*See* FF 16, 19, 20.) Rather than establish a contract price, these unique provider agreements contained an agreed upon "process" that the District was to follow to set Advantage's payment rate (referred to as the "capitation rate"). (*Id*.) The District was to commence this process and establish the first capitation rate prior to entering into its first contract with Advantage. (*Id*.)

The process to be followed required the District to use certain Medicaid data to help establish the capitation rate. (FF 16.) The data had to meet the following criteria: (i) the data must have been for a full fiscal year, (ii) it must only include cost information for "actuarially adjusted fee for service" costs to Medicaid recipients for the said fiscal year, and (iii) the data had to be reported through the D.C. Department of Human Services' Medicaid Management Information System (MMIS). (*Id*.) The District was only allowed to use the most recent MMIS completed fiscal year data as the basis for preparation of its capitation rate. (*Id*.)

Once in possession of the qualifying data, the District was to establish an "actuarially sound" capitation rate for payment to Advantage. (FF 20.) The computation of an actuarially sound capitation rate for purposes of the instant matter, requires the expertise of an actuary or other qualified consultant familiar with industry requirements (which includes, but is not limited to, specific population data, industry trends, actuarial sciences, the federal upper payment limit, and local provisions). With the above as a backdrop, the very clear issue presented by Advantage's first claim is whether the District applied the correct capitation rate to Advantage's August 1996 and July 1997 managed care agreements. For the referenced agreements, the District paid Advantage a capitation rate of $134 per member, per month. (FF 29, 34.)

The Enrollment Claim

While Advantage's first claim contends that the District breached both of the managed care agreements between the parties (i.e., the August 1996 and July 1997 agreements), Advantage's second claim contends only that the District breached the second of the two

[195] Under "risk" contracts, the cost to the District is predictable because the risk of unexpected medical expenses for Medicaid participants shifted from the government to the HMO. (Hr'g Tr. vol. 2, 500:10-501:21, July 18, 2012.)

agreements. Advantage contends that the District breached the July 1997 agreement (and extensions thereto) by failing to permit newly eligible Medicaid participants to voluntarily enroll in the Advantage plan and/or be randomly assigned thereto for those eligible Medicaid participants who failed to choose either a managed healthcare provider, or primary care physician (hereinafter "Enrollment Claim").

Under the parties' 1997 contract, a newly enrolling Medicaid participant was asked to choose a traditional fee-for-service medical program managed by a primary care physician, or to select any one of the several contracted HMO plans.[196] If a Medicaid participant did not choose either a fee-for-service primary care provider or a specific HMO plan, he or she would be assigned randomly to one of the contracted HMO providers. Since the choice of fee-for-service or a specific HMO plan was left to the individual Medicaid participant, the Agreements do not, and cannot, guarantee that a minimum number of participants would enroll with Appellant.

As to Appellant's enrollment claim, the District concedes that during the extensions of the 1997 agreement from October 1, 1997, through March 31, 1998, it did not permit newly eligible Medicaid participants to voluntarily choose Advantage, nor were eligible participants randomly assigned to Appellant. The District, however, contends there was no breach of the 1997 agreement because the contract extensions executed by Advantage provided the following language (in pertinent part):

> [The District] is not obligated by either the Provider Agreement or this Extension Agreement to provide for voluntary selections for Medicaid recipients to Advantage or to make any new assignments of Medicaid recipients to [Advantage] during the Extension Period.

(FF 9.)

The issue presented on Appellant's second claim is whether the contract extension language cited above authorized the District to prevent new Medicaid enrollees from choosing Advantage's plan, and further authorized the District to ignore Appellant in making random assignments of eligible Medicaid participants to HMO providers.

Having sufficiently set forth the claims herein, we turn now to the Findings of Fact.

FINDINGS OF FACT

The Agreements

1. This matter involves participation in "the D.C. Medicaid Managed Care for AFDC and AFDC related recipients," established pursuant to the authority set forth in the Medicaid Managed Care Amendment Act of 1992, D.C. Law 9-247, D.C. Code, §1-359(d) [1981 ed.] and Mayor's Order No. 93-218." (Appellant's Hr'g Ex. 3.1; 4.)

[196] Newborn infants were assigned to their mother's plan and procedures were provided for participants to change their initial choices.

2. On August 1, 1996, the Commission on Health Care Finance of the District of Columbia Department of Human Services entered into an unnumbered contract entitled a "Prepaid, Capitated Provider Agreement," ("First Agreement"), with the D.C. Health Cooperative, Inc. (now known as Advantage Healthcare, Inc.) to provide specified medical services to enrolled Medicaid recipients for a period of six months through January 31, 1997. (Appellant's Hr'g Ex. 3.1, Art. 23.)

3. On February 10, 1997, effective February 1, 1997, the First Agreement was unilaterally extended by the District to April 30, 1997, pursuant to Article 23 ¶B of the Agreement. (Appellant's Hr'g Ex. 7.)

4. On April 18, 1997, effective May 1, 1997, the First Agreement was extended by agreement to July 31, 1997. (District's Hr'g Ex. 8.)

5. On July 30, 1997, the Commission on Health Care Finance of the District of Columbia Department of Human Services entered into an unnumbered contract entitled a "Prepaid, Capitated Provider Agreement," ("Second Agreement"), with [Advantage Healthcare, Inc.] to provide specified Medicaid services to enrolled eligible Medicaid recipients for a period of three months through October 31, 1997. (Appellant's Hr'g Ex. 4, Art. 23.)

6. On October 31, 1997, the parties executed a Temporary Extension and Addendum, ("First Extension"), to the Second Agreement, effective November 1, 1997, extending the agreement through January 31, 1998. (Appellant's Hr'g Ex. 6.)

7. On January 29, 1998, the parties executed a Temporary Extension and Addendum, ("Second Extension"), to the Second Agreement, effective February 1, 1998, extending the agreement through April 30, 1998. (Appellant's Hr'g Ex. 5.)

8. The First Extension provided that:

> During the extension period, [the District] agrees to continue to pay the capitation rates in existence as of the date of this Extension Agreement. [The District and Advantage] agree to abide by the terms and conditions of *the federal and District regulations* governing the D.C. Medicaid and Managed Care Programs. (Emphasis added).
>
> [The District] is not obligated by either the Provider Agreement or this Extension Agreement to provide for voluntary selections for Medicaid recipients to [Advantage] or to make any new assignments of Medicaid recipients to [Advantage] during the Extension Period. (Appellant's Hr'g Ex. 6.)

9. The Second Extension provided that:

> During the extension period, [the District] agrees to pay the capitation rates *specified in the Provider Agreement and* in existence

> on the date of this Extension Agreement. [The District] and Advantage agree to abide by the terms and conditions *of the Provider Agreement* and of the federal and District regulations governing the D.C. Medicaid and Managed Care Programs.
>
> [The District] is not obligated by either the Provider Agreement or this Extension Agreement to provide for voluntary selections for Medicaid recipients to Advantage or to make any new assignments of Medicaid recipients to [Advantage] during the Extension Period. [Italics show changed language]
>
> (Appellant's Hr'g Ex. 5.)

10. The First Agreement was executed by Willard Walton, Jr., as Contracting Officer. (Appellant's Hr'g Ex. 3.1, p.25.)

11. The Second Agreement was executed by Paul Offner, as the authorized signer functioning as a contracting officer. (Appellant's Hr'g Ex.4, p.26.)

12. Mr. Offner, executed the First and Second extensions as Commissioner of Health Care Finance, Department of Health functioning as a contracting officer. (Appellant's Hr'g Exs. 5, 6.)

13. The Agreements are form Prepaid, Capitated Provider Agreements required by the District to be executed to participate in the D.C. Medicaid Managed Care Program. (Appellant's Hr'g Ex. 3.1, Recitals and Art. I. ¶A; Appellant's Hr'g Ex. 4, Recitals and Art. I, ¶A.)

14. The terms and conditions are identical in the First and Second Agreements.

15. Article 5 -Marketing provides:

> A. The Provider shall submit to the Department for its prior written approval all marketing plans, procedures, and materials including the following:
>
> (1) Marketing policies and manuals;
> (2) A written description of proposed marketing approaches;
> (3) Marketing brochures and fliers;
> (4) Advertising copy and public service announcements;
> (5) Enrollment training guidelines;
> (6) A written description of the basis on which marketing personnel will be compensated; and
> (7) Nominal value marketing gifts.
>
> * * *
>
> C. Marketing materials distributed to Medicaid recipients for use in selecting a primary care provider, as defined in section 5599 of the Managed

Care Regulations, shall be clear and shall include at least the following:

(1) A statement that enrollment in the Provider's plan is voluntary;
(2) A statement that all necessary health care, except services excluded under managed care must be obtained through the Provider;
(3) A description of the benefits package and excluded services;
(4) The days and hours of service;
(5) The address of each facility or service site;
(6) A description of the procedures to follow to receive services after hours;
(7) Telephone numbers to access emergency care services;
(8) A statement that disenrollment from the Provider's plan is subject to the limitations described in Chapter 53 of the Managed Care Regulations;
(9) A description of the Provider's grievance process, including methods for filing grievances and the right of a member to receive assistance from the personal representative of the member's choice; and
(10) A statement of the member's rights and responsibilities.

* * *

G. Each eligible AFDC and AFDC-related Medicaid recipient in the category or categories covered under the Managed Care provider agreement shall be considered a potential enrollee and may not be discriminated against on the basis of health status or need for health care services.

16. Article 8, Payment for Services, provides, in part:

* * *

B. The Provider shall be paid by the Department on a monthly fixed, per capita basis for the covered services it provides to Enrollees.

C. Subject to section F below, the capitation rates shall be based on the actuarially adjusted per capita fee-for-service cost of providing services covered by the Medicaid Managed Care provider agreement to the eligible population for the most recent completed fiscal year as reported through the Department's Medicaid Management Information System, which constitutes the base year.

D. The Department shall calculate a separate rate for adults and for children.

* * *

E. No Provider shall be paid a monthly capitation rate in excess of ninety-two and one-half percent (92.5%) of historical Medicaid

program costs for the eligible Medicaid population inflated forward from the base year.

F. Reimbursement to providers shall not exceed the upper limits defined by 42 CFR 447.361 for services provided under a risk contract….

* * *

H. If the Medicaid program institutes a change in Medicaid services that leads to an increase or decrease of three (3) percent or more in the total cost of care within the term of the Medicaid Managed Care provider agreement, notice will be provided to the provider and the capitated rate shall be recalculated within thirty (30) days of the date of notice. The effective date of the change in Medicaid services shall be the effective date of the rate change.

* * *

J. The Department shall, at the written request of the managed care organization make available data utilized to compute the capitation rates.

* * *

17. "Capitation Rate" is defined in the Agreements as:

A fixed, monthly rate per covered person *established by the Department [of Human Services]* payable to a prepaid, capitated provider for providing covered services to a covered person. [Emphasis supplied]

(Appellant's Hr'g Ex. 3.1, Addendum II, p. 7.)

18. Article 22—Enrollment and Disenrollment provides, in part:

The Provider shall accept and enroll each eligible AFDC and AFDC-related Medicaid recipient who applies for or is assigned to the plan, subject to the requirements of Article 22, Section E.

* * *

B. Except as provided in section C below, enrollment by a Medicaid recipient in a Providers plan shall be voluntary.

C. There will be an open enrollment period during which the Provider will

accept individuals who are eligible to be covered under the contract.

(1) In the order in which they apply;
(2) Without restriction, unless authorized by the Regional Administration; and
(3) Up to the limits set under the contract.

D. An AFDC or AFDC-related Medicaid recipient who does not voluntarily select a primary care provider within fifteen (15) days of notification by the Department shall be assigned to a health maintenance organization or a primary care provider that is an employee or entity of the District government using an automated random assignment process.

* * *

F. The Provider may limit total Medicaid enrollment by including in its application for a Medicaid managed care agreement the total maximum number of Enrollees that the organization will accept. Acceptance of the enrollment ceiling by the Department shall not obligate the Department to assign or otherwise ensure that the primary care provider shall receive that number of enrollees.

District Regulations

19. 29 D.C.M.R. Chapter 53. Standards for Managed Care Providers That Are Paid on a Fixed, Prepaid, Capitated Basis for Services Rendered to AFDC and AFDC-related Medicaid Recipients

5308 PAYMENT FOR SERVICES

* * *

5308.2 Each prepaid, capitated provider's Medicaid managed care provider agreement with the Department shall be for a twelve (12) month period.

5308.3 Each prepaid, capitated provider shall be paid by the Department on a monthly fixed, per capita basis for the covered services it provides to AFDC and AFDC-related Medicaid enrollees.

5308.4 Subject to §5308.6, the capitation rates shall be based on the actuarially adjusted per capita fee-for-service cost of providing services covered by the Medicaid managed care provider agreement to the eligible population for the most recent completed fiscal year as reported through the Department's Medicaid Management Information System.

5308.5 The monthly rate paid to District of Columbia Medicaid Managed Care Providers, on a prepaid, capitated basis, for all Medicaid Managed Care recipients shall be:

(a) For all adults, one hundred and eighty-two dollars and thirty-seven cents ($182.37); and

(b) For all children, one hundred and fourteen dollars and eighty-three cents ($114.83).

5308.6 No prepaid, capitated provider shall be paid a monthly capitation rate in excess of ninety-two and one-half percent (92.5%) of historical Medicaid program costs for the eligible Medicaid population inflated forward from the base year.

5308.7 Risk comprehensive, other risk and non-risk contracts shall be paid an interim payment that is a monthly fixed, per capita fee for the covered services provided under the contract.

5308.8 Reimbursement to prepaid, capitated providers shall not exceed the upper limits defined in 42 C.F.R. §447.361 for services provided under a risk contract, or the upper limit defined in 42 C.F.R. §447.362 for services provided under a non-risk contract.

* * *

5308.15 If the Medicaid program institutes a change in Medicaid services that leads to an increase or decrease of three percent (3%) or more in the total cost of care within the term of the Medicaid managed care provider agreement, the capitated rate shall be recalculated within thirty (30) days of the effective date of change, and increased or decreased accordingly.

5308.16 No capitation rate increase or decrease shall be effective until thirty (30) days after the notice of the rate change has been published in the D.C. Register.

5308.17 The Department shall, at the written request of the managed care organization, make available to the organization data utilized to compute the capitation rates and reports that attest to the actuarial soundness of the method.

* * *

5308.19 Each capitation rate specified in the contract shall be in effect for the entire twelve (12) month term of the Medicaid managed care provider agreement, except as provided in §5308.15.

***

SOURCE: Final Rulemaking published at 42 DCR 1566, 1577 (March 31, 1995); as amended by Final Rulemaking published at 44 DCR 5834 (October 10, 1997).

Federal Regulations (as of date of agreements)

20. 42 C.F.R. § 434.61 entitled "Computation of capitation fees" provides:

> The agency must determine that the capitation fees and any other payments provided for in the contract are computed on an actuarially sound basis.

21. 42 C.F.R. 447.361 entitled "Upper limits of payment: Risk contract" provides:

> Under a risk contract, Medicaid payments to the contractor, for a defined scope of services to be furnished to a defined number of recipients, may not exceed the cost to the agency of providing those same services on a fee-for-service basis, to an actuarially equivalent nonenrolled population group.

Rate Claim

Establishment of Capitation Rates

22. In early 1996, the District determined that its capitation rate setting process for the fiscal years through Fiscal Year 1996 had not been actuarially sound due to serious inadequacies in the baseline data. (Appellant's Hr'g Ex. 84, p. 1.)

23. The Commission on Healthcare Finance contracted with the firm of Engquist, Pelrine & Powell to "prepare a clean database of historical Medicaid claims for fiscal years 1994 through 1996." (Appellant's Hr'g Ex. 97, p. 1.)

24. The Engquist firm performed a massive replacement of data to correct historical errors in the database in July and September 1996. (*Id.* at p. 6.)

25. In order to establish actuarially sound capitation rates for contracts to begin August 1, 1996, the District hired a consultant, Diane Plumb, to set HMO rates for the last two months of Fiscal Year 1996, Fiscal Year 1997 and Fiscal Year 1998 using Fiscal Year 1994 as the base year. (Appellant's Hr'g Exs. 83, p.1; 84, p.2.)

26. The consultant "constructed" data files of Fiscal Year 1994 fee-for-service claims to calculate a capitation rate to compute a base-year indicated capitation rate. (Appellant's Hr'g Ex. 84, pp. 1-2.)

27. To establish an August 1996 Capitation Rate, the consultant inflated the base year indicated capitation rate by 4.037% and applied a 4.5% administrative add-on and 7.5% savings rate, (Appellant's Hr'g Exs. 3.1; 4, Art. 8(E); D.C. Mun. Regs. tit. 29, § 5308.6), to yield a final Capitation Rate of $135.26. (Appellant's Hr'g Ex. 84, p.2.)

28. The consultant computed separate capitation rates for Fiscal Year 1997 and Fiscal Year 1998, which, as required by D.C. Mun. Regs. tit. 29, § 5308.1 and Article 8, ¶ J of the Agreements, made an adjustment to reflect contract revisions[197] which brought under the Agreement previously carved out dental and transportation claims and inflated the Fiscal Year 1996 Capitation Rate to $146.69 and $149.43, respectively. (*Id.*)

29. On June 28, 1996, as part of a letter extending its previous contract, the District advised Advantage that the contract Capitation Rate would be set at a single rate[198] per participant of $134.00 beginning August 1, 1996, with the inception of the new agreement then being negotiated. (Appellant's Hr'g Ex. 9.)

30. The rate was established solely and exclusively by the District of Columbia without the assistance or input of Advantage. The District advised that:

> For the last six months the Commission has had consultants, as well as actuaries with Ernst and Young, working on developing more accurate cost figures for the Medicaid program. Based on the analysis, we believe $134.00 accurately reflects the upper payment limit reduced by 7.5%.

(*Id.*)

31. No report was introduced that attests to the actuarial soundness of the $134.00 Capitation Rate for all Medicaid participants.

32. The determination of the initial Capitation Rate could not have utilized accurate MMIS data as required by the Agreements since the rate was announced prior to the "massive replacement of data to correct historical errors in the database." (*See* FF 24.)

33. There was no evidence that the $134.00 Capitation Rate was published in the District of Columbia Register as required by D.C. Mun. Regs. tit. 29, § 5308.16.

The Rate Established for Fiscal Year 1996 Services was Paid without Adjustment for Fiscal Year 1997 and 1998 Services

34. The Capitation Rate announced June 28, 1996, effective August 1, 1996, was paid for the remainder of Fiscal Year 1996, all of Fiscal Year 1997 and the first half of Fiscal Year 1998.[199] (Hr'g Tr. vol. 2, 400:6-11.)

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[197] There is no indication in the record as to whether the revision was published in the D.C. Register.

[198] A single rate was set notwithstanding Article 8 ¶ D of the agreement then being negotiated which required that "[t]he Department shall calculate a separate rate for adults and for children." (FF 15.)

[199] The District's initial 1996 capitation rate is referred to interchangeably as "$133.70" or "$134". (Hr'g Tr. vol. 2, 397:5-10; 400:6-11.) For consistency's sake we refer to the initial 1996 capitation rate as "$134".

35. Although not explicitly stated, computations proffered by both the Appellant and the District through their respective expert witnesses and consultant reports interpreted the agreements as providing for separately determined capitation rates for each of the Fiscal Years 1996, 1997 and 1998.

36. In setting the initial capitation rate prior to execution of the First Agreement; the District retained Diane Plumb, and actuaries, Ernst and Young. (Appellant's Hr'g Ex. 9.)

37. Diane Plumb computed separate rates for each fiscal year. (Appellant's Hr'g Ex. 84.)

38. Ernst and Young computed a separate Capitation Rate for Fiscal Year 1997. (Appellant's Hr'g Ex. 94, Bates 382.)

39. Timothy Harris of Milliman & Robertson, the District's expert, computed separate yearly capitation rates for FY 1995 through FY 1998. (District's Hr'g Ex., 21, Bates 390.)

40. Appellant's expert witness, Stephen Meskin, computed separate capitation rates for Fiscal Years 1997 and 1998.[200] (Hr'g Tr. vol. 2, 597:5-598:1.)

41. The First Agreement, effective August 1, 1996, was for a term of six months including two months of FY 1996 and four months of FY 1997. (FF 2, District's Hr'g Ex. 6, Bates 79.)

42. The First Agreement expired January 31, 1997, and on February 10, 1997, was extended, effective February 1, 1997, for three months in Fiscal Year 1997 to April 30, 1997. (FF 3.)

43. The First Agreement was further extended on April 18, 1997, for an additional three months in Fiscal Year 1997 to July 31, 1997. (FF 4.)

44. The Second Agreement, effective August 1, 1997, was for a term of three months ending October 31, 1997, including two months of Fiscal Year 1997 and one month of Fiscal Year 1998. (FF 5.)

45. The second agreement was extended twice for three month periods ending January 31 and April 30, 1998, including six months in Fiscal Year 1998. (FF 6-7.)

The Consultant whose Analysis Formed the Basis of Establishing the Capitation Rate Used Data Sources Other than the Department's Medicaid Management Information System (MMIS)

46. The MMIS paid claims history initially available to the consultant for the years prior to FY 1996 was significantly flawed and incapable of supporting an actuarially sound rate determination. (Appellant's Hr'g Ex. 97, pp. 1-3.)

[200] Appellant's expert witness acknowledged that he should have computed a separate Capitation Rate for Fiscal Year 1996. (Hr'g Tr. Vol. 2, 511:7-19.)

47. Data files were constructed by extracting records for individuals enrolled as fee-for service beneficiaries (i.e. not enrolled in an HMO). (*Id.,* 1-8.)

48. MMIS eligibility data was not utilized. (Appellant's Hr'g Ex. 97, p. 6.)

49. In the base year, Fiscal Year 1994, the MMIS did not contain hospital costs attributable to individual claimants, resulting in the consultant using individual hospital cost reports and individual hospital cost-to-charge ratios to estimate claims for hospital costs. (Appellant's Hr'g Ex. 83, pp. 6-7.)

Consultant Failed to Consider and Give Effect to Necessary Actuarial Adjustments.

50. The consultant failed to consider incomplete claims which are incurred but not paid within 18 months of the base year. (Hr'g Tr. vol. 2, 551:6-556:5.)

51. The consultant failed to consider the effects of Primary Care Case Management (PCCM), a mild managed care system instituted in Fiscal Year 1994 to reduce claim costs. (Hr'g Tr. vol. 2, 562:12-564:13.)

52. The consultant failed to consider the effects of Early Periodic Screening, Diagnosis and Treatment (EPSDT) which provided for regular pediatric health, dental and vision care. (Hr'g Tr. vol. 2, 557:13-561:4.)

In addition to the consultant's report upon which the District relied in setting the capitation rates, three other studies were prepared for the District showing Fiscal Years 1996 through 1998.

Ernst and Young

53. Ernst and Young prepared a report based on Fiscal Year 1994 fee-for-service data regarding the capitation rate for health care services under a mandatory managed care program for the AFDC[201] population, (Appellant's Hr'g Ex. 94), proposing a capitation rate for Fiscal Year 1997 ranging from a low of $135.54 per person per month to a high of $152.22 per person per month. (*Id*., at Bates 382.)

54. The Ernst and Young report was prepared with the expectation that "the Medicaid managed care program will be mandatory" as opposed to voluntary, as is the subject program. (Appellant's Hr'g Ex. 94, Bates 379.)

Milliman & Robertson, Inc.

55. In early 2001, during the course of this proceeding, the firm of Milliman & Robertson, consulting actuaries, was retained to calculate HMO upper payment limits (UPL) for the District's Medicaid for Fiscal Years 1995, 1996, 1997 and the first half of Fiscal Year 1998

[201] Aid for Families with Dependent Children.

in order to verify the actuarial soundness of the capitation rates for the subject agreements. (District's Hr'g Ex. 20, Bates 357; Hr'g Tr. vol. 4, 1043:17-1045:1.)

56. Timothy Harris of Milliman & Robertson was qualified by the Board as an expert, and offered testimony as an expert on behalf of the District. (Hr'g Tr. vol. 4, 1042:15-1043:15.)

57. The agreements which are the subject of this appeal require, as is typically done, that the Upper Payment Limit (UPL) be determined *prospectively* by "project[ing] … recent per capita costs using anticipated trends and changes in the benefits provided. …" (District's Hr'g Ex. 20, Bates 359.) Of necessity, the District computed the capitation rate to be paid under the agreements before the effective date of the agreement using data for the most recently *completed* fiscal year, the base year, inflated to the current year. The District used 1994 as the base year. (Appellant's Hr'g Ex. 84.)

58. The Milliman report stated that "[t]he UPL calculation method used in this report does not follow the typical UPL calculation process.... It is a fully retrospective calculation based on F[ee] F[or] S[ervice] claims and eligibility information for the given time periods." (District's Hr'g Ex. 20, Bates 360.) The Milliman report did not rely on any claim data from the base year designated in the Agreement, 1994, but rather used actual claim data from 1995, 1996, 1997 and partial 1998, which did not exist when the District set the capitation rate, to establish the capitation rates for those years. (*Id.*, at Bates 363-364, 369.)

59. The District's expert described his analysis as follows:

> And so it's essentially-some of it, I guess for the District, it was new to them. It was new to some of the consultants that they were using. So the methods that were used, the process that was used, the calculations that were made were not accurate, were not correct. *And when we come in after the fact and apply the current state of the art, we see what the rates should have been.* (Hr'g Tr. vol. 4, 1053:12-22.)(emphasis added.)

60. The District's expert utilized the "HCFA checklist" in performing his analysis. (Hr'g Tr. vol. 4, 1080:10-1081:5.) He testified that HCFA used the list to review the rate-setting process. (Id., at 1026:20-1027:3.)

Dr. Stephen Meskin

61. The Appellant retained Dr. Stephen Meskin, an independent actuary, to give his opinion on the actuarial soundness of capitation rates paid by the District to Advantage, in Fiscal Year 1997 and the first half of Fiscal Year 1998. (Hr'g Tr. vol. 2, 511:7-19.) The Board qualified Dr. Meskin as an expert. (Hr'g Tr. vol. 2, 527:5-528:17.)

62. Because Medicaid capitation rates are required to be determined prospectively, Dr. Meskin "put [himself] in the shoes of an actuary at that time reviewing the work that was done

by those people who were on the ground trying to create a capitation rate ". (Hr'g Tr. vol. 2, 528:17-531:10.)

63. In order for his analysis not to rely on data not available at the time of the original computation of the capitation rate under the contract, Dr. Meskin used the data relied upon and the analysis done in establishing the capitation rate established by the District's consultant, Diane Plumb, as a starting point. (Hr'g Tr. vol. 2, 535:12-16.)

64. Although Ernst and Young was hired by the District to develop capitation rates for a different program, Ernst and Young also utilized Ms. Plumb's data. Ernst and Young expressed their view that they "appreciate[d] the accomplishments of Diane Plumb in producing data and the confidence that Ernst and Young was able to assign to [the data] because of her efforts." (Appellant's Hr'g Ex. 94.)

65. Dr. Meskin determined that a reasonable range of actuarially sound capitation rates for Advantage would have been between $142.85 and $146.81 for Fiscal Year 1997, and $149.99 and $154.15 for the first six months of Fiscal Year 1998. (Hr'g Tr. vol. 2, 597:11-598:1.)

Enrollment claim

Extension of July 31, 1997, Provider Agreement

66. Article 23 of the Provider Agreement permitted extensions of the agreement providing as follows:

> A. The term of the agreement shall be from August l, 1997 through October 31, 1997.
>
> B. Except as provided in section C., the term of the agreement may be extended beyond October 31, 1997 for periods not to exceed three (3) months if the Department and the Provider are unable to complete negotiations on a succeeding agreement prior to the expiration date of this agreement.
>
> C. In no event, shall the term of this agreement extend beyond twelve (12) months.

Denial of New Voluntary Enrollments and Default Assignments

67. The D.C. Medicaid Managed Care program for AFDC and AFDC-related recipients was established pursuant to the authority set forth in the Medicaid Managed Care Amendment Act of 1992, D.C. Law 9-247, D.C. Code § 1-359(d) (1981 ed.). (Appellant's Hr'g Ex. 3.1.)

68. The Medicaid Managed Care Amendment Act of 1992 which authorized the District to enter into contracts with the Appellant provided, in part:

(d)(2) The Mayor shall establish a plan to mandate enrollment of AFDC and AFDC-related Medicaid recipients in a managed care program for the purpose of providing access to comprehensive and coordinated health care in an efficient and cost effective manner. The plan shall provide the following:

(A) AFDC and AFDC-related Medicaid recipients shall select 1 of the following managed care providers:

(i) Any health maintenance organization with a current contract with the District of Columbia to provide managed care services to AFDC and AFDC-related Medicaid recipients on a capitated method of payment;

* * *

69. On October 17, 1997, the District sent enrollment packages to new Medicaid participants which did not mention Advantage as a healthcare provider that could be chosen by the participant. (Appellant's Hr'g Ex. 27, pp.9-11; Hr'g Tr. vol. 1, 174:17-175:11.)

70. At about the same time the District advised the enrollment broker to inform new Medicaid participants that the participants could not select Advantage. (Appellant's Hr'g Ex. 32, pp. 51:15-52:15.)

71. Advantage received no voluntary enrollments between October 1, 1997, and March 31, 1998. (Appellant's Hr'g Ex. 136.)

72. From May 1997 to September 1997, Advantage received 1,403 new Medicaid enrollees. (Appellant's Hr'g Ex. 136.)

73. The average new enrollee in the Advantage plan during the years in question remained with the plan for 27.7 months. (Appellant's Hr'g Ex. 58; Hr'g Tr. vol. 2, 347:9-348:17.)

74. The appellant was awarded a two-year contract with the District on April 1, 1998, to provide managed health care services to eligible District Medicaid recipients. (District's Hr'g Ex. 17, Bates 327; Unnumbered Ex., Contract No. 7010-AG-NS-2-CW, entered into the hearing record on July 20, 2012.)

75. In Calendar Year 1997 from January 1997 to April 1997, six HMOs participated in the District's Prepaid, Capitated Provider program and were randomly assigned automatic enrollment Medicaid eligibles. (Appellant's Hr'g Ex. 136.).

76. In Calendar 1997 from May 1997 to September 1997, five HMOs participated in the District's Prepaid, Capitated Provider program and were randomly assigned automatic enrollment Medicaid eligibles. (Appellant's Hr'g Ex. 136.)

77. From June 1998 to May 2000, seven HMOs participated in the District's Prepaid, Capitated Provider program and were randomly assigned automatic enrollment Medicaid eligibles. (Appellant's Hr'g Ex. 136.)

JURISDICTION

Appellant's Claims

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).[202]

On September 18, 1998, Advantage submitted a claim for additional payment under the contract to Richard Fite, Chief Procurement Officer. (Appellant's Hr'g Ex. 22.) Mr. Fite responded on October 13, that the proper contract authority for the claim was the Department of Health, as contracting agency. (Appellant's Hr'g Ex. 21.) On October 26, 1998, Advantage submitted the claim to the Commission of Health Care Finance of the Department of Health. (Appellant's Hr'g Ex. 20.) On December 15, 1998, Paul Offner, Deputy Director, Medical Assistance Administration, Department of Health, on behalf of the contracting agency issued a final decision on both Appellant's Rate Claim and Enrollment Claim. (Appellant's Hr'g Ex. 19.) The Board therefore has jurisdiction to hear the appeal from the denial of Appellant's claims.

District's Counterclaim

The Board is not a tribunal of general jurisdiction, but possesses only the jurisdiction granted to it by the Procurement Practices Act ("PPA"). *Claim of Chief Procurement Officer*, CAB No. D-1182, 50 D.C. Reg. 7765 (Nov. 29, 2002). The Procurement Practices Act provided in D.C. Code § 2-308.03(a)(1) that:

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

The District has asserted a counterclaim for $2,681,910 due to its alleged overpayment of the capitation rate. (Appellee's Post Hr'g Br. 17-23.) There is no evidence that the District ever presented its claim against Advantage to the contracting officer or any person acting in the role of contracting officer for a final decision. This Board therefore lacks jurisdiction to consider the counterclaim. The District, however, asserts in its post-hearing brief that:

[202] 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 § 2-301.01 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 the appeal at issue was filed prior to the enactment of the PPRA, the PPA, as amended, applies to all issues in this appeal, including Board jurisdiction

> Even if there [is] not a final decision by the contracting officer the proper course of action would be to stay its decision on the counterclaim until a final decision could be issued. See *Appeal of Prince Construction Co., Inc*., CAB D-1173, Order of May 6, 2003, citing *Beck Associates,* ASBCA No. 24494, 85-2 BCA ¶ 18134; *Appeal of Keystone Plus Construction Co*., CAB D-1410, Order of July 1, 2011.

(District's Post-Hr'g Br. 17, n.1.)

In the *Appeal of Prince Construction Co., Inc.*, cited by the District, the Board stated that:

> It is the opinion of the Board that it is not a permissible procurement practice to withhold a Contracting Officer's decision on a known, but unasserted, unliquidated claim by the District against the contractor for an unreasonable length of time. If the District is aware of a claim and the contracting officer fails to determine the claim when it reasonably should be determined, the District shall be deemed to have waived the claim and the claim shall be barred as either a claim or defense before the Board.

The District received the Milliman & Robertson Report upon which it relies for its counterclaim on or around April 24, 2001, which was over 10 years before the hearing in this matter. (District Hr'g Ex. 20.) Ten years is an unreasonable length of time for the District to delay asserting its alleged rights. The Board lacks jurisdiction over the counterclaim.

DISCUSSION

Appellant seeks damages for two separate alleged breaches of contract by the District. On the first breach, the Rate Claim, Appellant asserts that the District failed to establish and pay actuarially sound capitation rates for the last two months of Fiscal Year 1996, all of Fiscal Year 1997 and the first six months of Fiscal Year 1998 as required by Article 8 of the Agreements. On the second breach, the Enrollment Claim, Appellant asserts that beginning in October 1997, the District failed to permit eligible Medicaid recipients to choose to join the Advantage HMO program and further failed to randomly assign eligible Medicaid participants who failed to choose either a specific HMO or a primary care physician. We find for the Appellant on both claims.

On Appellant's Rate Claim, we conclude that the District breached the terms of the Provider Agreements as follows: first, that the District's determination of the Capitation Rate to be paid Appellant was not actuarially sound as required by the contract and District and Federal Medicaid regulations; second, that the initially computed Capitation Rate was arbitrarily reduced by the District to $134 per member, per month; and third, that the District failed to adjust the Capitation Rate for each fiscal year of the term of the agreements in accordance with both parties' interpretation of the Agreements. The Board finds that, as a result of the Rate Claim breach, the amount paid to Advantage was less than would have been paid to Advantage

had the capitation rates been determined in accordance with the contract. Advantage is entitled to damages of $542,262.57, determined as the difference between the amount paid and the amount that should have been paid as shown by the evidence presented in this matter, plus interest at the statutory rate.

On Appellant's Enrollment Claim, we conclude that the District breached its obligation to allow new Medicaid participants to choose Advantage's plan as the participant's service provider during the extension period of the 1997 Agreement, and further breached the Agreement by failing to include Appellant in making random assignments to HMO providers of Medicaid participants who failed to choose either a fee-for-service provider or a specific HMO plan. The Board remands the Enrollment Claim to the parties to determine the correct compensation due Appellant per our guidance below. We discuss our holding below.

In order to prevail on either breach claim, Appellant must first prove three elements of entitlement: (1) a valid contract between the parties, (2) an obligation or duty arising out of the contract, (3) a breach of that duty. If entitlement is proved, in order to recover, Appellant must prove the amount of damages, if any, directly attributable to the breach. *See, San Carlos Irrigation & Drainage District v. United States*, 877 F.2d 957, 959 (Fed.Cir.1989).

Validity of the Contracts

The contracts which are the subject of this appeal were titled Provider Agreements and, with extensions, covered the period from August 1, 1996, through March 31, 1998. (FF 2-7). The District concedes the validity of the agreements and extensions acknowledging that both of Appellant's claims are "covered by the capitated provider agreements dated August 1, 1996 and July 30, 1997 and the extensions thereto, ("Contract")." (District's Post Hr'g Br. 1). The Provider Agreements and extensions created valid contracts for the period from August 1, 1996 through April 30, 1998.

Entitlement to Recover on Rate Claim

Appellant asserts that the District breached its agreements by failing to properly determine the Capitation Rate to be paid to Advantage under the agreements. The Provider Agreements were form contracts drafted entirely by the District of Columbia. (FF 13.) As such, the terms of the agreements must be strictly read against the District. *Transwestern Carey Winston, L.L.C.*, CAB No. D-1193, 54 D.C. Reg. 4166 (Apr. 9, 2004).

Prior to the execution of the First Agreement, the Capitation Rate was unilaterally established by the District without input from the Appellant. (Appellant's Hr'g Ex. 9.) The Capitation Rate was established at $134.00 per-person-per-month in a notice given to Appellant, and assumedly others, one month before the effective date of the not yet executed First Agreement. (FF 29.) No evidence was presented in this matter showing that the rate was announced in any other fashion, nor does it appear that there was any contractual documentation memorializing the rate or incorporating it by reference. The rate continued in effect during the extensions of the First Agreement, the follow-on Second Agreement and its extensions (FF 34.) without any reference to it in the contract documents. There is no record before the Board of any

formal documentation of the rate, nor is there any indication of for how long the rate was intended to be effective.

Appellant claims that the District's projection of base year historical Medicaid costs to set the initial Capitation Rate was not actuarially sound, breaching the District's obligations under the Agreements. The Appellant further contends that the Capitation Rate should not have remained constant during the successive contracts and extensions, but should have been adjusted for each fiscal year.

Failure to Establish an Actuarially Sound Capitation Rate

In the subject Capitated Provider Agreements, it is the government, not the provider, which is required to produce the cost data for contract pricing. Based on the specified historic cost data, the contract permits the District to unilaterally determine the price which will be received by the contractor. Just as a contractor may be required to certify the cost and pricing data given to the government, the District regulations authorizing the use of Capitated Provider Agreements contemplate that the government will have had prepared "reports that attest to the actuarial soundness of the method" used by the District to determine the Capitation Rate. (FF 19.) D.C. Mun. Regs. tit. 29, § 5308.17. Analogous to ordinary defective pricing cases, the contractor should therefore be entitled to additional payments if the price determination by the District was erroneous.

Federal regulations governing the Medicaid program require that:

> The agency must determine that the capitation fees and any other payments provided for in the contract are computed on an *actuarially sound* basis.
>
> [Emphasis supplied] (42 C.F.R. § 434.61, FF 20)

Since the Federal requirement of an actuarially sound determination is also written into the Provider Agreements, failure by the District to make an actuarially sound determination of the Capitation Rate becomes a breach of contract. Article 8 C of the Agreement provides that:

> the capitation rates shall be based on the *actuarially adjusted* per capita fee-for-service cost of providing services covered by the Medicaid Managed Care provider agreement to the eligible population for the most recent completed fiscal year as reported through the Department's Medicaid Management Information System, which constitutes the base year.
> (emphasis added.)

(FF 16.)

29 D.C.M.R § 5308.17 provides that "The Department shall, at the written request of the managed care organization, make available to the organization data utilized to compute the capitation rates and reports that attest to the actuarial soundness of the method." (FF 19.) Article 8 J of the contract restates the data requirement of the regulation. (FF 16.) In its certified claim to the District in this matter, Appellant raised the issue of the actuarial soundness of the

determination of the Capitation Rate and the absence of reports to attest the actuarial soundness of the rate. (Appellant's Hr'g Ex. 22.) The District's denial of the claim merely stated:

> The capitation rates paid under the contracts in question meet the standard of actuarial soundness as required by the contracts and federal law.

(Appellant's Hr'g Ex. 19.)

The District has not attempted in this matter to justify the actuarial soundness of the rate paid to Advantage.

As required by the contract and regulations, it is incumbent upon the District to introduce evidence before the Board of the data used to compute the capitation rate, as well as evidence supporting the actuarial soundness of the method. The District has done neither. The letter announcing the rate, (FF 29), stated:

> For the last six months the Commission has had consultants, as well as actuaries with Ernst and Young, working on developing more accurate cost figures for the Medicaid program. Based on the analysis, we believe $134.00 accurately reflects the upper payment limit reduced by 7.5%,

The $134 rate is less than the Capitation Rates computed by either Ms. Plumb, the consultant, or Ernst and Young, actuaries, which have been entered into evidence and are alleged to be the basis for the $134 figure. Ms. Plumb computed a Capitation Rate of $135.26 to be effective August 1, 1996. (FF 27.) Ernst and Young computed a Capitation Rate range from $135.54 to $152.22 to be effective two months later, October 1, 1996. (FF 53.) The District has not indicated any rationale for choosing the $134 Capitation Rate, as opposed to a rate recommended by either of the analyses upon which the announced rate was allegedly based. Nor has the District supported the soundness of the rates computed by its consultant, Diane Plumb. To the contrary, the District's expert witness questioned the actuarial soundness of the consultant's analysis. (FF 50-52.)

The District's defense to Appellant's Rate Claim is not that the Capitation Rate paid meets the actuarial soundness requirement of the contract, but rather that the District's own erroneous computation of the Capitation Rate caused the District to overpay, [203] rather than underpay, Advantage and that Advantage is thus not entitled to damages. In the absence of any evidence supporting the propriety of the District's rate setting process, the Board concludes that the rate is actuarially unsound in breach of the Provider Agreements entitling Advantage to damages, if any, caused by the District's breach.

Failure to Update the Capitation Rate for New Fiscal Years

[203] The Board found that it lacked jurisdiction to hear the District's counterclaim to recoup its alleged overpayment. Although we make no finding on the legitimacy of such a claim, the District's counterclaim is analogous to a contractor claiming an increased price or damages resulting from the contractor's own errors in submitting erroneously low cost and pricing data.

As part of its Rate Claim, Appellant further asserts that the District improperly continued the initial Capitation Rate for the entire 20 month period of performance under successive agreements in parts of three fiscal years. The terms of the contract are silent as to how long the initially established Capitation Rate may continue unchanged. The Provider Agreements appear to relate rates to fiscal years, stating that rates shall be computed based on historic costs "for the most recently completed fiscal year," (FF 16, ¶ C.) That provision is consistent with the District regulations which provide that "Each prepaid capitated providers Medicaid managed care provider agreement with the Department shall be for a twelve (12) month period" (D.C. Mun. Regs. tit. 29, § 5308.2) and that "Each capitation rate specified in the contract shall be in effect for the entire twelve (12) month term of the Medicaid managed care provider agreement, except as provided in §5308.15. (FF 19.) The regulations are inconsistent, however, with the six and three month terms of the subject Provider Agreements. (FF 2, 5.) Neither regulation, however, explains why a new Capitation Rate was not computed for the Second Agreement, which was effective a year after the effective date of the First Agreement.

Where, prior to the time that a dispute as to contract interpretation arises, the parties express their understanding of the contract through words or conduct, that interpretation will be given "great, if not controlling weight." *Max Drill, Inc. v. United States*, 192 Ct.Cl. 608, 620, 427 F.2d 1233, 1240 (1970). Contemporaneous interpretations over those which arise in the heat of dispute are favored. *Honeywell, Inc*., ASBCA No. 25556, 83–2 BCA ¶ 16,551.

Prior to entering into the two subject agreements, the District retained two Medicaid experts to assist the Department in establishing the Capitation Rate. (FF 23, 25.) Each of these experts computed Capitation Rates to be paid for performance in individual fiscal years. Ms. Plumb reported separate Capitation Rates to be applied in Fiscal Years 1996, 1997 and 1998. (FF 27, 28, 37.) Ernst and Young projected an expected range for the Capitation Rate to be paid solely in Fiscal Year 1997. (FF 38.) In addition, the expert witnesses testifying on behalf of the District and the Appellant at the hearing in this matter both testified to separate Capitation Rates to be applied in each fiscal year of performance, apparently with the understanding that this was industry practice. (FF 39, 40.) The District, in stating its counterclaim, assumed, without comment, that separate Capitation Rates should apply to performance in each of the three fiscal years covered. (FF 39.) No evidence was introduced asserting the single rate could properly be applied over several fiscal years.

The Board concludes that the District also breached the agreements by failing to initially establish an actuarially sound Capitation Rate at the inception of the First Agreement and to establish actuarially sound Capitation Rates for each succeeding fiscal year of performance entitling Advantage to recover damages as appropriate.

Entitlement to Recover on Enrollment Claim

In the Enrollment Claim, Appellant asserts that the District breached the extended July 30, 1997, agreement by not permitting Medicaid participants to choose to enroll in the Advantage plan between October 1, 1997, and March 30, 1998, and by further not assigning participants to the Advantage plan who failed to choose either a primary care provider or an HMO provider during the same period.

The District opposes Appellant's Enrollment Claim asserting that:

> The July 30, 1997 Agreement is devoid of any language that obligates the District to provide assignments and enrollments in Appellant's plan. Absent such an obligation, Count III must fail. Assuming arguendo, that the July 30, 1997 Agreement obligated the District to provide assignments and enrollments in Appellant's plan, Appellant executed two extensions to that Agreement in which it agreed that it would not have a right to receive assignments and enrollments in its plan.

(District's Post Hr'g Br. 7.)

"As a general rule of construction, the law presumes the validity of contracts. 6A A. Corbin, *Contracts* §§ 1499, 1533 (1962). Ambiguously worded contracts should not be interpreted to render them invalid where the wording lends itself to a logically acceptable construction that renders them valid. *Walsh v. Schlecht*, 429 U.S. 401, 408 (U.S., 1977); *see also*, Restatement, Second, Contracts, § 203. It is a rule of interpretation that, where a contract is fairly open to two constructions, by one of which it would be valid and the other invalid, the former must be adopted. *Appeal of AnA Towing and Storage, Inc.*, CAB No. D-1176, 54 D.C. Reg. 1919 (May 27, 2005).

The Agreement, as is expressly stated in the preamble, implements:

> the D.C. Medicaid Managed Care program for AFDC and AFDC-related recipients established pursuant to the authority set forth in the Medicaid Managed Care Amendment Act of 1992, D.C. Law 9-247, D.C. Code § 1-359(d)(2) (1981 ed.)).

The Board must therefore, if possible, interpret the Agreements to meet the requirements of the authorizing Act. The Act is quite clear that a managed care program authorized by the Act shall permit a Medicaid recipient to select:

> (i) *any* health maintenance organization with a current contract with the District of Columbia to provide managed care services to AFDC and AFDC-related Medicaid recipients on a capitated method of payment." [emphasis supplied]

D.C. Code § 1-359(d)(2) (1981 ed.)

It is undisputed that Advantage was a health maintenance organization with a valid contract to provide managed care services to AFDC and AFDC-related Medicaid recipients on a capitated method of payment. (FF 5-7.) If the Agreement is interpreted as the District suggests, the District's Medicaid managed care program would be in violation of the 1992 Act, since a Medicaid participant could not choose "any" contracted provider. We must presume that the District intended to comply with the Act authorizing the Medicaid HMO program and would not write a contract which would violate the authorizing statute. Therefore, the contract must be interpreted consistently with that Act to obligate the District to allow AFDC Medicaid recipients

to freely choose any qualified health maintenance provider having a contract with the District, including Advantage.

Our interpretation must also be guided by the basic common law rule of contract interpretation that the contract be read as a whole. "It is an elementary rule of contract interpretation that all parts of a contract must be read together and harmonized if at all possible. *Appeal of A&M Concrete Corporation, Inc*,. CAB No. D-1314 et al. 2013 WL 7710333 (Dec. 9, 2013) (citing *Appeal of A.S. McGaughan*, CAB No. D-884, 41 D.C. Reg. 4130, 4136 (March 16, 1994)). A corollary to this general rule of law is the principle that all provisions of a contract are to be given effect and no provision is to be rendered meaningless. *W.M. Schlosser Co., Inc.*, CAB Nos. D-823, D-824, 40 D.C. Reg. 4719 (Nov. 18, 1992).

Article 5 G of Advantage's Second Agreement provides that:

> [e]ach eligible AFDC and AFDC-related Medicaid recipient in the category or categories covered under the Managed Care provider agreement shall be considered a potential enrollee [of the plan] …" (FF 15).

The District's interpretation would render this provision of the contract meaningless and is therefore unreasonable.

Finally, where an agreement contains general and specific provisions which are in any respect inconsistent, "the provision directed to a particular matter controls over the provision which is general in its terms." *In re Urban Service Systems Corp*., CAB No. D-901, 48 D.C. Reg. 1518 (Apr. 18, 2000). With regard to the assignment of participants who fail to choose a primary care physician or HMO plan, Article 22 D of the Second Agreement specifically provides:

> An AFDC or AFDC-related Medicaid recipient who does not voluntarily select a primary care provider within fifteen (15) days of notification by the Department shall be assigned to a health maintenance organization or a primary care provider that is an employee or entity of the District government using an *automated random assignment process.* ([Emphasis supplied] FF 18.)

Random is defined as "without definite aim, direction rule, or method." (Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/random.) A random assignment is defined in the *Health Insurance Reform Requirements for the Group and Individual Health Insurance Markets* regulations as a "method of assignment that assures the independence and impartiality of the assignment process (such as rotational assignment)." 45 CFR § 147.136(c)(2)(vii). Selectively dropping a particular provider from a rotational process destroys the required randomness of the assignment process since it interferes with and directs the selection. By not permitting Medicaid participants to choose the Advantage plan and by removing Advantage from the pool of providers to which random assignments are made the District has breached the July 30, 1997, agreement entitling Appellant to damages as appropriate.

Damages Resulting from Breach Under the Rate Claim

Establishment of Initial Capitation Rate

With regard to the Rate Claim, the District breached the Provider Agreements by failing to pay the proper rates to Advantage for each fiscal year of performance of the two agreements and their extensions. Appellant does not claim that it was not paid for the services it provided, rather that it was paid less than the amount expressed in the payment term of the agreements.

The subject Provider Agreements are unique. No price is stated in the agreement. Instead, the agreements state a process for determining the rate to be paid. The process itself is not stated as a formula, but relies on generally accepted actuarial practice. In an ordinary contract, the amount of payments is determined from an invoice submitted by the contractor. On the invoice, the contractor shows the work performed or items delivered, the unit price provided in the contract and the total payment requested. The ordinary practice was not followed in this matter. Pursuant to the subject Provider Agreements, the District, not the provider, prepared a list of covered Medicaid participants enrolled in Appellant's plan on the first of each month, and paid Appellant on the 15th of the month an amount equal to the number of Medicaid participants on the final monthly list multiplied by the per-person-per-month Capitation Rate established annually using the specified process. (Appellant's Hr'g Ex. 3.1, Art. 8.)

No analysis was given supporting the soundness of the District's consultant's (Ms. Plumb) computations or of the Department's reduction of the consultant's rate when the new FY 1996 Capitation Rate for the First Agreement was announced. Nor was any evidence submitted as to the rate's soundness in this proceeding. To the contrary, both the District's and the Appellant's expert witnesses testified that the consultant's proposed rate and the rate the District actually paid did not conform to the requirement of the contract that the rate be actuarially sound. Thus, there is no evidence to support a finding that the District's initial capitation rate of $134 per-member, per-month is actuarially sound. This amounts to a breach of contract as alleged in Appellant's Rate claim. The Board must therefore determine whether Appellant was damaged by the breach.

As a general rule, in a breach of contract action "the measure of damages … is the amount necessary to place the non-breaching party in the same position … [it] would have been in had the contract been performed." *Mashack v. Superior Mgmt. Servs., Inc.*, 806 A.2d 1239, 1241 (D.C. 2002). On the Rate Claim, Appellant is entitled to the difference between the amount it received and the amount Appellant would have received in the first and succeeding fiscal years if the Capitation Rate had been initially computed in accordance with the Agreements and adjusted for future fiscal years. *See In re Urban Service Systems Corp*., CAB No. D-901, 48 D.C. Reg. 1518 (Apr. 18, 2000).

To determine if Appellant was damaged, the Board must determine from evidence in the record what an actuarially sound Capitation Rate computed in accordance with the Agreement *would have been at the time the contract* was *executed*. "The typical … capitation rate setting process is one that projects current or recent per capita costs using anticipated trends and changes in benefits provided." (District's Hr'g Ex. 20; *see also* Hr'g Tr. vol. 2, 528:17-529:11.)

Each party retained its own expert witness to present evidence to the Board. The two experts used considerably different approaches to arrive at their opinions of the actuarially sound

rates which should have been paid at the inception of the Agreement and for performance during succeeding Fiscal Years.

Expert Methodology

Appellant's Expert's Methodology

Appellant's expert, Dr. Stephen Meskin, used a typical *prospective* approach by putting himself "in the shoes" of the District's consultant and correcting the consultant's adjustments to the Base Year data to reach an actuarially sound Capitation Rate. (Hr'g Tr. vol. 2, 528:17-531:10.) By using the consultant's actuarial adjustments of the Base Year (Fiscal Year 1994) data as a starting point, Appellant's expert relied, by definition, on data which was available before the inception of the First Agreement when the contract required the computation to be made. Dr. Meskin did not use additional data in reaching his expert opinion.

District's Experts' Methodology

The District's expert, Milliman & Robertson, Inc., represented at the hearing by Timothy Harris, used a *retrospective* approach. Milliman, in its report submitted to the District described its method as follows:

> The … calculation method used in this report does not follow the typical … calculation process…. It is a fully retroactive calculation based on [fee-for-service] claims and eligibility information for the given time periods. (District's Hr'g Ex. 20, p.3.)

In other words, Milliman computed annual Capitation Rates by retroactively looking at fee-for-service claims data from the same time periods as the time period for which the rate was being set. (Hr'g Tr. vol. 4, 1047:12-1048:4.) In so doing there was no need to "inflate the data forward from the base year."

The report detailed the data sources utilized in reaching its expert opinion:

> M&R has relied on the following data sources as provided by the [Department of Health]:
>
> Medicaid Fee-for-service (FFS) data generated by First Health – FY 1995, FY 1996, FY 1997, partial FY 1998.
>
> Medicaid eligibility data generated by First Health – FY 1995, FY 1996, FY 1997, partial FY 1998.
>
> Various District Medicaid program documentation.

(District's Hr'g Ex. 20, 2.)

In making its analysis, Milliman also reviewed:

> …published financial information for Advantage Healthplan, Inc. (AHI). …[including] financial information filed with the District's Insurance Department for the calendar year ending December 31, 1998 …. We were not able to review any earlier information as AHI was not required to file information with the Insurance Department prior to 1998. (District Hr'g Ex. 20, p. 3.)

There are several factors underlying the report of the District's expert. First, it was "fully retroactive." That is, it reviewed data actually incurred during the fiscal year of performance *after* that year was completed. Rather than attempting to determine what the Capitation Rate would have been if it were accurately computed before inception of the First Agreement based on trending the most recently completed previous year's fee-for-service-claims for a similar population, the Milliman report, in effect, waited until after performance was completed and then computed the rates based on the District's fee-for-service claims experience of the same year for which the rate is being set. We reject the retroactive approach.

Second, the Milliman report ignored the Base Year requirement of Federal and District regulations as the benchmark for determining the Capitation Rates. It is undisputed that the District, in accordance with the regulations and contract (Art. 8 F) determined Fiscal Year 1994 to be the Base Year from which to determine Fiscal Year 1996 rates. No claim has been made or evidence presented in this matter suggesting that Fiscal Year 1994 was an inappropriate base year. The Board must therefore presume that Fiscal Year 1994 was the proper initial base year. Had the District not breached the contract, it would have relied *solely* on Fiscal Year 1994 claims data to arrive at an actuarially sound Capitation Rate. The Milliman report, on the other hand, did not use any Fiscal Year 1994 claims data. By the Milliman Report's own description, it did not request or receive *any* data from Fiscal Year 1994. (District's Hr'g Ex.20, p. 2).[204] Milliman did not use Base Year 1994 data upon which the rates were to have been based for any purpose. Milliman used data only from Fiscal Years 1995, 1996, 1997 and 1998. If the District had made an actuarially sound projection of the Capitation Rates prior to the start of performance of the First Agreement, it could not have used any of the data upon which Milliman relied because the data used by Milliman did not exist in July 1996 when the contract required setting the initial Capitation Rate.

[204] The First Agreement was effective August 1, 1995, with only two months of Fiscal Year 1996 remaining. Because the Capitation Rate initially computed for Fiscal Year 1996 was determined to be unsound, the District abandoned the rate paid on the preceding contract and retained a consultant to recompute a Fiscal Year 1996 rate for the last two months of the year. The original Fiscal Year 1996 rate was computed prior to the beginning of that year. Of necessity, the computation would thus have been made before the end of Fiscal Year 1995. The agreements require that the rate computation be based on "the most recently completed Fiscal Year." During Fiscal Year 1995, when the Fiscal Year 1996 rate was originally computed, the most recently computed Fiscal Year (the "Base Year") was Fiscal Year 1994. In computing the revised Fiscal Year 1996 rate to be applied at the inception of the First Agreement, the consultant used the same Base Year as the original Fiscal Year 1996 rate computation. An argument could be made that the Fiscal Year 1997 rates should have been computed using Fiscal Year 1995 as the Base Year. Milliman did receive Fiscal Year 1995 data and could have used Fiscal Year 1995 data to *project* sound Fiscal Year 1997 rates. Milliman, however, did not do such a projection. In fact, Milliman made no projections at all. The Milliman rates were "fully retroactive" and computed based on claim data from the same year as the rate purportedly applied.

Third, Milliman reviewed published Advantage financial information for the calendar year ending December 31, 1998. Certainly reviewing financial results achieved by a provider to establish rates for that provider in order to retroactively alter rates for the period Advantage reported on destroys any notion of a risk contract. It would also violate any concept of fairness to challenge the soundness of a rate setting process with information that did not exist for another two and a half years.

It is well established that even the uncontradicted testimony of an expert witness is not conclusive and may be rejected if it is found to be unconvincing. *Appeal of: Gilbane–Smoot/Joint Venture,* CAB No. D-885, 40 D.C. Reg. 4954 (Feb. 18, 1993). In this regard, it has been noted that:

> In deciding a case involving conflicting expert witness testimony, we are not obligated to adopt any particular conclusion or opinion reached by an expert witness. *Reflectone*, Inc., ASBCA 42363, 98-2 BCA ¶ 29,869, at 147,829 (citing *Del Mar Avionics, Inc. v. Quinton Instrument Co*., 836 F.2d 1320, 1325 (Fed. Cir. 1987)). Indeed, we are free to reject expert testimony which we find intrinsically unpersuasive. *Id*. (citing *Granite Construction Co. v. United States*, 962 F.2d 998, 1006 (Fed. Cir. 1992); Gulf Contracting, Inc., ASBCA 30195, et al., 90-1 BCA ¶ 22,393, at 112,521 (Board not bound by expert testimony and may substitute its own common sense)). And we are justified in choosing one expert opinion over another unless the evidence is inherently improbable or discredited by uncontrovertible evidence. *Id*.; *Cochran Construction Co*., ASBCA 40294, 90-3 BCA ¶ 23,239, aff'd, 937 F.2d 624 (Fed. Cir. 1991).
> *All Star Metals, LLC, Appellant, V. Department Of Transportation, Respondent*, 09-1 BCA P 34039, CBCA 53, 2008 WL 5539746.

We reject the testimony of the District's expert witness and the underlying Milliman report. As noted above, it is the role of the Board, having found that the District breached the contract, to award damages to put the Appellant into the same position that it would have been in had the District complied with the terms of the contract. The ultimate question before the Board in this matter therefore is, 'What would an actuarially sound Capitation Rate to be effective August 1, 1996, have been if set in July 1996 based on fee-for-service claims data incurred in Fiscal Year 1994?"

The Milliman methodology does not replicate the rate setting process mandated by Federal and District regulations which govern the terms of the Provider Agreements. Rather than using past year data to project future year rates, Milliman retroactively used FY 1996 fiscal year's fee-for-service claim data to set the rate for FY 1996. Since the Milliman methodology does not follow the requirements of the Provider Agreements, it cannot inform the Board as to what rate Appellant was entitled to receive in accordance with the contract terms executed in July 1996.

The Provider Agreements require that a *prospective* rate be set prior to inception of the Provider Agreement. That is, a rate must be computed to apply *in the future* based on claims experience *in the past*. Because the initial Capitation Rate must be determined *before* the

inception of the Provider agreement, the time periods of the historic data (Base Year) and the performance period (contract term) do not overlap. The Milliman methodology violates this requirement. The report itself states that the rates it proposes are not prospective, but "fully retroactive." (District's Hr'g Ex. 20, p.2.) Milliman thus ignored the requirement of the contract that the 1996 Capitation Rate be based on Fiscal Year 1994 data (the most recently completed fiscal year) adjusted for inflation to Fiscal Year 1996. Milliman totally ignored Fiscal Year 1994 claims data. Its analysis did not use Fiscal Year 1994 data for any purpose whatsoever, and indeed Milliman does not claim to even have had access to 1994 data. (*Id.*)

Milliman's error in using a retroactive approach not contemplated by the agreements becomes clear because it makes meaningless the contractual requirement that the Capitation Rate not exceed 92.5% of "historical Medicaid program costs for the eligible Medicaid population inflated forward from the base year." If the costs were to be "inflated forward from the base year," the contractually specified base year must have been prior to the year for which the capitation rate was set. The Milliman analysis made the base year and the year for which the Capitation Rate was set the same. As a result, Milliman's methodology ignores the contractual requirement to inflate the base data forward.

In order to put the contractor in the position it would have been in had the agreement not been breached, the Board must reconstruct the position of the parties in July 1996 when the Capitation Rate was determined. Prior to setting the Fiscal Year 1996 Capitation Rate, the District could not have known what the fee-for-service claim experience for Fiscal Year 1996 would ultimately be. Ordinarily, when a fiscal year Capitation Rate is set, the fiscal year has not even begun.

Since the Milliman methodology used future data which could not possibly have been possessed by the District in July 1996 when the Capitation Rate was set, and did *not* use historic data *mandated* by the Provider Agreement to be used in setting the rate, it cannot possibly inform the Board as to the actuarially sound Capitation Rate which should have been set by the District at that time.

Reasonableness of the Expert Opinion of Dr. Steven Meskin

As noted above, the opinion given by Appellant's expert witness, Dr. Stephen Meskin, as to actuarially sound Capitation Rates did not have the timing defect which has caused the Board to reject the Milliman report and Mr. Harris's testimony. By using the Fiscal Year 1994 claims data which the District consultant had used in 1996, Dr. Meskin, by definition, only used data which was available to determine sound rates prior to the beginning of the First Agreement. Dr. Meskin made further actuarial adjustments to the data to arrive at his opinion of actuarially sound Capitation Rates for Fiscal Year 1997 and 1998 performance.

The Board concludes that the opinion as to actuarially sound Capitation Rates given by Dr. Meskin is not unreasonable and is accepted as evidence of a range of Capitation Rates for Fiscal Years 1997 and 1998 which were actuarially sound pursuant to the Provider Agreements. Dr. Meskin determined a range of $142.85 to $146.81 to be actuarially sound for Fiscal Year 1997 and a range of $149.99 to $154.15 to be actuarially sound for Fiscal Year 1998. (Hr'g Tr. vol. 2, 597:15-598:1.) Dr. Meskin did not determine actuarially sound rates for Fiscal Year 1996.

Had the District paid the lowest Capitation Rate of each year's rate range determined by Dr. Meskin, it would have complied with the terms of the agreements. To put Appellant in the position it would have been in had the District complied with the Agreements, the Board finds that under the terms of the agreement Appellant was entitled to the difference between the lowest sound rate for each year and the $134.00 that Appellant was paid or $8.85 more for each member for each month ("member-month") of Fiscal Year 1997 and $15.99 more for each member-month of Fiscal Year 1998. The Board has no evidence to make a determination for Fiscal Year 1996.

Appellant was paid for 36,966 member-months in Fiscal Year 1997 and 13,453 member-months in Fiscal Year 1998.[205] (Appellant's Hr'g Ex. 50.) On the Rate Claim the Board awards Appellant $327,149.10 for Fiscal Year 1997 and $215,113.47 for Fiscal Year 1998 totaling $542,262.57.

The above notwithstanding, the District challenges Dr. Meskin's opinion as to sound rates on the grounds that:

> Meskin's methodology utilized in calculating his rates is improper. Meskin fails to properly utilize the HCFA/CMS checklist and as such fails to comply with industry standard for setting Medicaid capitation rates.

(District's Post Hr'g Br. 6.)

Although the challenge to Dr. Meskin's testimony is based on a specific document, the "HCFA/CMS checklist" asserted to be critical[206] to the District's position that Dr. Meskin's opinion is unsound; the document is not dispositive. Whether the "checklist" was available at

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[205]

Fiscal Year 1997		Fiscal Year 1998	
Month	Number of members	Month	Number of members
Oct. 1996	2,940	Oct. 1997	2,798
Nov.	2,934	Nov.	2,501
Dec.	3,007	Dec.	2,239
Jan. 1997	3,003	Jan.	2,119
Feb.	3,168	Feb.	1,977
Mar.	3,056	Mar.	1,819
Apr.	2,970	TOTAL	13,453
May	3,224		
June	3,162		
July	3,176		
Aug.	3,179		
Sept.	3,147		
TOTAL	36,966		

(Appellant's Hr'g Ex. 50.)

[206] The "checklist" is mentioned over 30 times in the District's post-hearing brief. The District's expert testified that he "supplemented" Dr. Meskin's opinion by "adjusting his calculations to comply with the HCFA checklist." (Hr'g Tr. vol. 4, 1124:9-11.) But elsewhere, the District's expert appears to testify that compliance with the HCFA checklist is not currently mandatory. (*See* Hr'g Tr. vol. 4, 1027:13-21.)

the time of performance of the Provider Agreement is not clear.[207] In order to determine what the Capitation Rates should have been between 1996 and 1998, the Board must review the rates in accordance with what was industry standard at that time.

Since the actual checklist was not introduced as evidence, nor was an actual document relied upon by Mr. Harris' at the hearing, it is difficult to give weight to details in testimony based on a memory of a document allegedly existing 19 years ago. This is particularly true since the CMS checklist currently used for Medicaid rate-setting does not have its origin in any checklist which might have existed in 1996. The current CMS checklist dates from 2002 and provides guidance for compliance with a different regulation than governed the subject Provider Agreements. The subject Provider Agreements explicitly state that Capitation Rates shall be subject to "the upper [payment] limits defined by 42 CFR 447.361."

In August 2005, the American Academy of Actuaries issued a Practice Note[208] entitled *Actuarial Certification of Rates for Medicaid Managed Care Programs*, (Health Practice Note 2005-1) developed by its Medicaid Rate Certification Work Group[209]. The Practice Note was "intended to provide nonbinding guidance to the actuary when certifying rates or rate ranges as meeting the requirements of 42 CFR 438.6(c)." (*Id.,* Introduction).

The Introduction to the Practice Note expressed the need for its new guidance:

> …During the late 1990s, the UPL [upper payment limit] requirement was seen as problematic….
> In recognition of the problem with the UPL requirement, the new 42 CFR § 438.6 was enacted in June 2002 to be effective for rates covering periods of August 2003 and later (see Federal Register, Vol. 67, No 115), § 447.361 was repealed….

Section IV of the Practice Note devoted six pages to a detailed discussion of specific provisions of the July 2003 checklist stating that the checklist is:

> …One of the tools … to be used by the regional offices in reviewing and approving the rates under 42 CFR 438.6(c) for all Medicaid managed care programs.... An actuary preparing rates for use in Medicaid managed care programs would usually review and become familiar with the most recent version of the checklist. This section of the practice note provides a general overview of the checklist, as well as an outline of areas of the checklist that may have a potential for misrepresentation or may be counter to generally accepted actuarial practice. …

[207] The District's expert witness testified as to Milliman's use of the checklist stating that "[w]e include a description of our responses to the items on the checklist in our Medicaid rate-setting reports." (Hr'g Tr. vol. 4, 1027:9-12.) Significantly, the Milliman report introduced in this matter dated April 24, 2001, dealing with evaluating rate-setting made no mention of any such checklist. (District's Hr'g Ex. 20.)

[208] A Practice Note, as opposed to Actuarial Standards of Practice, is nonbinding guidance to the actuary.

[209] Timothy Harris, the District's expert witness, was a member of the Work Group.

Strikingly, the Practice Note, while making reference to sections "which may be counter to generally accepted actuarial practice" makes no reference to changes from any previous checklist. Certainly, if the Board is to give weight to violations of a checklist, the Board, as recommended by the checklist, should be familiar with the version of any checklist which was current at the time the District was required to determine the Capitation Rate.

At the hearing in this matter, Appellant's expert witness testified on the second and third days of the hearing and the District's expert testified on the fourth day of the hearing. After hearing Dr. Meskin's testimony, the District's expert acknowledging that his retroactive analysis could not be directly compared to Dr. Meskin's prospective analysis, hastily attempted to duplicate and critique Dr. Meskin's prospective adjustments to the District's original consultant's work. (Hr'g Tr. vol. 4, 1134:2-1136:11.) Referring to his own testimony, the District's expert witness later stated, "These numbers were, you know, early this morning, late last night. They would need to be refined." (Hr'g Tr. vol. 4, 1137:16-18.)

In questioning Dr. Meskin's work with his own calculations, the District's expert reintroduced the same timing incongruity as his previous retroactive analysis. (Hr'g Tr. vol. 4, 1145:14-19.) For example, since there is a lag between the incurrence of medical service and the payment of a claim by the District, it is likely that even in 1996, when rates were calculated by the District's consultant, all of the 1994 incurred claims had not been paid. (*See, e.g*., Hr'g Tr. vol. 4, 1125:13-21.) The District's consultant had not made an adjustment for the completing claims still to be paid and thus not included in the data available. Dr. Meskin made an estimate of this amount and set a range of between 4.24 to 6.36. (Hr'g Tr. vol. 4, 1126:4-6.) The District's expert challenged Dr. Meskin's estimated figure instead setting a range of between 1.60 and 1.73. (*Id*.) But this analysis was not on the basis that Dr. Meskin's estimate was unreasonable based on information that would have been available to the District in July 1996 when the rates were set, but rather based on *retroactively* using data gathered well after the contract was in force. The estimates "on completion were based upon … actual review of the data that came in from the District." (Hr'g Tr. vol. 4, 1126:8-14.) Since Milliman had not received any data from the District on Fiscal Year 1994 data, the estimate must have been made by retroactive use of the actual Fiscal Year 1996 claims experience. As noted above, rates are a "projection of future events [… and] actual experience [is expected to] vary from the experience assumed in the rates." To evaluate the projected rates by actual fiscal year experience developed years later is not what the contract process for price-setting contemplated.

Both of the expert witnesses are Members of the American Academy of Actuaries and Fellows of the Society of Actuaries and have held senior actuarial positions. (Appellant's Hr'g Ex. 92; District's Hr'g Ex. 18.) Both experts were qualified as expert witnesses. Although one may have had more direct Medicaid actuarial experience than the other, since both are highly qualified, the opinion of neither is entitled to greater weight. As noted above, we find that Dr. Meskin's prospective approach to setting Capitation Rates is actuarially sound in this matter. We reject the retroactive approach to setting Capitation Rates taken by the District's expert witness.[210]

[210] The District's expert also appeared uncertain at times as to whether retrospective rate-setting is typical in the industry. (*See* Hr'g Tr. vol. 4, 1157:22-1153:2.)

Damages Resulting from Breach Under the Enrollment Claim

Damages Resulting from Breach for the Period October 1997 to March 1998

As we have noted, the District breached the Second Agreement by failing to allow new Medicaid participants to choose the Advantage plan, and further failing to include Advantage in the random assignment of participants who made no choice. The evidence cited by Appellant shows that it enrolled an average of 287.5 new members per month during the May-August 1997 four-month period immediately preceding implementation of the Second Agreement. (Appellant's Hr'g Ex. 136; Appellant's Post Hr'g Br. 76.) The Appellant cites the four-month average as the basis for concluding that it is entitled to an average of 287.5 members lost *each* month for the six-month duration of the Second Agreement (i.e., October 1997-March 1998). Moreover, the Appellant contends that the shortage compounds in each of those six months starting at a decreased member count of 287.5 in October 1997 and rising by an additional 287.5 lost members each month until the cumulative decreased monthly member count reaches 1,725 by the expiration of the Second Agreement in March 1998.

In addition, the Appellant introduced unchallenged evidence based on its filings with the D.C. Department of Insurance, Securities and Banking (Hr'g Tr. vol. 2, 360:16-21) showing that its average profit per participant per month was $88.50 in Calendar Year 1998; $70.60 in Calendar Year 1999 and $54.20 in Calendar Year 2000. (Appellant's Hr'g Exs. 62, 63 and 64.) No evidence was introduced as to the average profit per-member-per-month for October 1997 through December 1997 because the Department of Insurance reporting requirement did not exist prior to Calendar Year 1998. Based on its evidence as noted above, the Appellant contends that its October 1997 to March 1998 damages total $534,318.75 (6,037.5 lost member months multiplied by the $88.50 Calendar Year 1998 profit rate). (*See* Appellant's Post Hr'g Br. 78, 81.) We disagree, and remand the issue of Appellant's proper damages for the period October 1, 1997, to March 31, 1998, to the parties.

We reject two erroneous assumptions embedded in Appellant's computation which render its damages calculation on the enrollment claim invalid. First, the automatic enrollments randomly assigned to Appellant between May 1997 through August 1997 were based on the existence of five HMOs in the District's program (FF 76.) The District expanded its pool of HMOs from five to seven beginning in, or near the beginning of, FY 1998. (FF 77.) It is not logical to extrapolate that Appellant's automatic enrollment numbers would remain steady through March 1998 because the automatic enrollments would have been shared among a larger pool than five HMOs. It stands to reason that as the District's pool of HMO providers increased from five to seven, that each provider's proportionate share of automatic enrollments was likely to decline rather than remain steady. Thus on remand, the parties are to determine the proportionate share of automatic enrollments that the Appellant would have received commencing October 15, 1997; once seven HMOs were providing Medicaid services to eligible District residents.

Second, Appellant concludes erroneously that using the May 1997-August 1997 four month period to derive the 287.5 average decreased monthly membership figure is correct. The Board believes that Appellant should have used the five-month period from May 1997 to

September 1997 to compute its average decreased monthly membership figure. Appellant did not use September 1997 data because it contended that the District's exclusion of Advantage from enrollment packages sent to new enrollees was already being felt in September 1997. (Hr'g Tr. vol. 2, 344:1-346:1.) We reject this contention because we have found that the enrollment packages sent by the District which omitted Advantage's name were not sent until *October 17, 1997*. (FF 69.) Based on the Board's noted five-month period, the Appellant enrolled a total of 1,403 new enrollees from May 1997 to September 1997, which results in an average monthly new enrollment figure during that period of 280.6. (Appellant's Hr'g Ex. 136.) Thus, the correct decreased monthly membership figure for Appellant to use in its calculations is 280.6. That is, we remand to the parties to compute the relative monthly membership lost among seven providers which would be the equivalent of the 280.6 lost members that Appellant would have experienced among five providers.

Further we direct that the Appellant is entitled to an FY 1998 profit rate of $88.50 per member based on its unchallenged evidence. We do not award Appellant any damages on lost enrollment for the period October 1997 to December 1997 because there is no evidence of its profit rate (if any) for that year. We will not apply Calendar Year 1998 profit rates to 1997 data.

Damages Resulting from the Breach for the Period April 1, 1998, to May 2000

As we have concluded herein, the District breached the parties' contract as to Appellant's enrollment claim. We have further found that the Appellant's enrollment was decreased by an average of 280.6 members each month from October 1997 to March 1998, as among five providers. Appellant further introduced unchallenged evidence that the average new enrollee remained with the Advantage plan for 27.7 months[211]. (FF 73; Hr'g Tr. vol. 2, 347:19-348:3; Appellant's Hr'g Ex. 58.) Because of this sustained enrollment period, the Appellant contends that it is entitled to additional damages for the 27.7 months that its unenrolled members would have remained with Advantage but for the District's breach, and for which Advantage would have received capitation payments. (Appellant's Post Hr'g Br. 76-79.) We agree with the Appellant.

The record herein demonstrates that the Appellant entered into a two-year contract with the District effective April 1, 1998, which effectively continued its status as an HMO provider for eligible District Medicaid participants through April 2000. (FF 74.) By the time this contract was awarded to Appellant, however, it had already been wrongfully deprived of at least six months worth of compounded membership loss. Inasmuch as we have found that the District's breach caused Appellant's membership loss, we also conclude that the members lost to Advantage by the District's breach would have remained in the Advantage plan for 27.7 months.

We remand to the parties the issue of the appropriate damages due Appellant for the period April 1, 1998, to May 2000. Further we direct that the Appellant is entitled to an FY 1999 profit rate of $70.60 per member and an FY 2000 profit rate of $54.20 per member based on its unchallenged evidence. We instruct the parties to compute the total membership months lost

[211] This represents continuous months after first enrollment as well as membership months of reactivating enrollees after losing and regaining Medicaid eligibility. (Hr'g Tr. vol. 2, 348:4-17.)

from April 1, 1998, to May 2000 by (1) calculating Appellant's average monthly membership loss of 280.6 members in a pool of five HMOs, to its equivalent average monthly membership loss among seven providers beginning October 15, 1997.

We are mindful in reaching the above conclusion that Appellant was not originally selected as a vendor in the procurement which ultimately led to Appellant's April 1, 1998, contract. *See* CAB No. P-507, P-510, P-511 CONS., 45 D.C. Reg. 8612 (Dec. 4, 1998). The solicitation sought "at least four contractors to provide Medicaid services." (*Id.*) The District received seven proposals. After a lengthy solicitation and evaluation process the contracting officer entered into proposed agreements with four proposers, not including Advantage. (*Id*.) The proposed agreements were approved by the District of Columbia Council and the Control Board on July 30 and July 31, 1997, respectively. (*Id.*) Protests against award of the contracts were filed by the three unsuccessful bidders, including Advantage. (*Id.*) Thus, the District may have believed its actions preventing new enrollees from selecting or being assigned randomly to the Appellant was reasonable, because it saw no purpose in allowing new enrollees to align with a vendor whose Second Agreement was slated to expire on March 31, 1998.

This position is not tenable. On October 15, 1997, the Board issued its decision in the protest, which permitted the four winning bidders to proceed, but also ordered the District to negotiate a similar contract with Advantage. CAB Nos. P-507, P-510, P-511 CONS., 45 D.C. Reg. 8612 (Dec. 4, 1998). We also denied the District's motion to stay our Order on November 15, 1997. Although during this period the Second Agreement with Advantage was extended, the Board noted that "[t]he District does not dispute that it has already taken actions against … [Advantage] under their current Medicaid contracts by denying them voluntary enrollments and default assignments. … The records show that … [Advantage] will lose all or most of [its] current Medicaid enrollees if the stay is granted." (Appellant's Hr'g Ex. 33, pp. 12-13.) In addition, the Board recognized that, contrary to the interests of Medicaid participants whom the agreements are intended to benefit, by refusing to allow newly eligible participants to choose Advantage, it denied them "full notice of all of their …options." (*Id.*) Clearly then, at least as early as the Board's October 15, 1997, Order, the District was on notice that its actions were causing damage to Appellant.

We have found that the agreements which are the subject of this appeal required the District to allow new voluntary enrollments in the Advantage plan and make random assignments of non-choosing Medicaid participants regardless of whether Advantage would be a follow-on provider. The District was also on notice that these damages would be larger if Advantage was a follow-on provider. The District was on notice by this Board's aforementioned October 15, 1997, Order that follow-on damages were foreseeable as to the applicable period beyond March 1998.

The District's other responses to Enrollment Claim damages are disingenuous. First, it argues that Advantage "did receive selections and assignments between October 1997 through March 1998." (District's Post Hr'g Br. 34.) Second, it argues that "[i]n order to prove that the District caused Appellant any damages it would first have to prove that there was a person or persons that actually chose to enroll in Appellant' plan and that the District prevented these individuals from enrolling." (*Id.*, p. 35.) Neither response has merit.

The testimony upon which the District relies to show that Advantage received selections and assignments is clear that these were not new enrollees, but rather reactivating enrollees who lost and then regained Medicaid eligibility[212] and children born to enrolled mothers medical expenses for the birth was covered by Advantage. (Hr'g Tr. vol. 3, 890:17-892:1; 896:12-897:4.) No evidence showed that the Advantage plan was offered to any newly eligible participant nor has the District shown any enrollment or assignment with Advantage between October 1997 through March 1998 of a participant not previously enrolled with Advantage.

The District cannot rely on a lack of evidence of a specific participant who desired Advantage enrollment but was prevented from choosing Advantage, since the District affirmatively prevented all new enrollees for choosing or being assigned to the Advantage plan.

Thus, we remand to the parties for calculation of the damages due Appellant under the Enrollment Claim in accordance with our guidance herein. Statutory interest shall be added to the amount of damages due Appellant on the Enrollment Claim.

CONCLUSION

Appellant's appeal is sustained on its rate claim and enrollment claim. The District is ordered to pay damages in the amount of $542,262.57, plus statutory interest, on Appellant's rate claim. We find that the Appellant is entitled to damages on its Enrollment Claim, and remand the issue of damages to the parties for determination in accordance with our instructions herein. Statutory interest shall be added to the final damages due under Appellant's Enrollment Claim. Statutory interest is authorized by D.C. Code § 2-359.09 (2011) (formerly D.C. Code § 2-308.06). The District's counterclaim is dismissed with prejudice. The parties shall inform the Board within 30 days of the status of determination of Appellant's damages due on the Enrollment Claim.

SO ORDERED.

Date: February 28, 2014

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

CONCURRING:

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

[212] District policy attempted to preserve preexisting relationships between Medicaid recipients and their medical providers by automatically reenrolling Medicaid participants who lost and then regained Medicaid eligibility. (Hr'g Tr. vol. 2, 349:3-10.)

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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

APPEAL OF:

PRINCE CONSTRUCTION COMPANY, INC.	)	
	)	CAB Nos. D-1120, D-1126,
	)	D-1168, D-1173, D-1203
Under Contract No. 96-0023-AA-2-0-CC	)	

For the Appellant: Robert A. Klimek, Jr., Klimek Kolodney & Casale, P.C. For the District: Robert Dillard, Esq.

Opinion By: Chief Administrative Judge Marc D. Loud, Sr., with Administrative Judge Maxine E. McBean, concurring.

OPINION

Filing ID #55072655

These five consolidated appeals arise under a contract the District of Columbia ("District" or "appellee") awarded to Prince Construction Company, Inc. ("appellant" or "Prince") for renovations to the Chevy Chase Community Center. In the three primary appeals, the appellant seeks to recover $151,226 as the alleged contract balance due (D-1173), and to reverse $316,947 in credits assessed against it in two contracting officer final decisions (D-1168 and D-1203). A hearing on the merits was held from April 10-12, 2012.

Upon review of the entire record herein,[213] the Board determines that the appellant is entitled to the contract balance, plus statutory interest, due in D-1173, but remands the case to the parties to determine the proper amount thereof. In so doing, we conclude that the District is entitled to a $22,751 credit against the contract balance for unfinished HVAC work in D-1168, and the District is entitled to a $85,363.22 credit for certain unfinished punch list work items in D-1203. Finally, the Board dismisses two additional cases consolidated herewith for lack of jurisdiction (D-1120 and D-1126).

[213] The record includes two appeal files submitted by appellee, and six supplements to the appeal file submitted by appellant. The District's appeal file submitted on April 28, 2003, consisted of 21 tabs, and the District supplemented that file on July 31, 2006, adding documents tabbed as 22 through 31. This appeal file will be referred to as "AF," followed by the tab number. The District's second appeal file, submitted May 9, 2003, consists of 18 tabs and will be referred to as "AF2." Appellant's Fourth through Sixth Supplements were included in its trial exhibits as tabs 1 through 3, and will be referred to as "Appellant's Hearing Exhibits (Appellant's Hr'g Ex.)" followed by the exhibit number. The appellant also submitted contract drawings in digital and paper versions as its Fifth Supplement and we will refer to them as "Appellant's Hearing Exhibit 2 (Appellant's Hr'g Ex. 2)," followed by the contract drawing number. (Hr'g Tr. vol. 2, 242:3-7.) Many documents in the record bear "Bates" stamped page numbers. Where helpful, those Bates numbers are also noted.

I. BACKGROUND

On October 18, 1998, the District awarded appellant Contract No. 96-0023-AA-2-0-CC for renovation of the Chevy Chase Community Center (the "Center") in accordance with plans and specifications issued along with the District's solicitation for the project. The contract price was $1,594,000, and the project was to be completed within 180 days. (AF 2, 3, Specification 1.4, Special Conditions 3.01, Bates 67.) The five consolidated cases discussed herein stem from the aforementioned contract. We discuss each appeal separately below.

Case D-1168: The District's $191,036 Credit Against Prince For Allegedly Insufficient Heating/Cooling System Work.

In pertinent part, the subject contract at issue required the appellant to perform significant work to the Center's heating, ventilation, and air-conditioning ("HVAC") system. Although the nature and scope of the contract's full HVAC requirements is both voluminous and technical, the specific HVAC dispute at issue is far narrower. The instant dispute concerns two principal HVAC components as to which the District contends that Prince's performance was insufficient: the "cooling tower" and the "chiller." We explain these components below, and trace the developments leading up to the District's award of a $191,036 credit against the appellant for its alleged insufficient work pertaining (largely) to the Center's cooling tower and chiller.

Insofar as it is material to the instant dispute, the parties' original contract contained several pertinent provisions related to the cooling tower and chiller. The contract work called for rebuilding the existing "cooling tower." (AF 3, Specification 15.6, subsection 2.46, Bates 259; Hr'g Tr. vol. 2, 180:7-181:13; 182:21-183:8.) The appellant's project manager[214] testified that a cooling tower is the part of an HVAC system "that allows the heat to be dispersed into the atmosphere from the inside of the building." (Hr'g Tr. vol. 2, 180:13-181:5.) As its name implies, the cooling tower is "primarily for cooling purposes." (*Id*., 181:3-5.) The cooling tower is located on the building roof. (Appellant's Hr'g Ex.2, E-13.)

With respect to the chiller, the contract specifications required the appellant to install a new 110-ton chiller. (AF 3, Specification 15.6, subsection 2.46, Bates 259; Hr'g Tr. vol. 2, 183:9-184:6.) A chiller is a very large HVAC component that is responsible for chilling the water that circulates through an air conditioning system. (*Id*., 184:1-10.) In particular, chilled water circulates through the chiller's "air handling units," which have fans and blow cold air. (*Id*.) A chiller is located in a building's basement utility room. (*Id*., 184:1-4.)

[214] Michael Bullock served as Prince's superintendent/project manager starting from about four weeks into the project until the end of 1999 when he left to become an employee of the District. (Hr'g Tr., vol. 2, 108:13-110:22; 176:4-6; 179:1-8.) He is referred to herein alternatively as appellant's project manager or Mr. Bullock.

The contract specifications also required the appellant to test and "balance" the HVAC system so that all components were adjusted to perform as required by the drawings and specifications. (AF 3, Specification 15.6, sub. 2.44, Bates 247-258.) Appellant's project manager testified that "balance" referred to the requirement that "each room [in the building] must have the same temperature within a few degrees of the other room when you turn and test the unit." (Hr'g Tr. vol. 2, 196:7-11.) The appellant was also required to vent chiller refrigerant to the outside, and to furnish chemicals for water treatment of the HVAC system. (AF 3, Specification 15.6, sub. 2.35, Bates 233; AF 3, Specification 15.6, subsection 2.42, Bates 244-45.) Finally, the specifications also provided that:

> All equipment shall be installed as recommended by the manufacturer to conform with the particular application involved in accordance with details shown on the drawings. Installation of equipment and connections to equipment shall be completed in every detail in a first class workmanlike manner.

(AF 3, Specification 15.6, subsection 3.02, Bates 262.)

As noted, the original contract required a new chiller but only a rebuilt cooling tower. In addition to a new chiller, the contract called for several other new parts, including pipings, a cooling car, air-handler units and controls for the air-handler units. (Hr'g Tr. vol. 2, 183:9-:22.) As understood by the appellant's project manager, the new parts (i.e., chiller, pipings, air-handler units, etc.) were to be connected to the existing cooling tower. (*Id*., 183:16-22.) Appellant's project manager testified that Prince completed installation of the required new HVAC parts, and connected them to the *existing* cooling tower. (*Id*., 181:15-182:14; 191:5-11.) Once the various parts were connected, the appellant used the services of subcontractor Joseph T. Fama, Inc. ("Fama") to successfully "start" the system because a contractor is only "allowed to put the system together, but you're not allowed to start it […]." (*Id*., 181:22-182:18; 183:16-22; 191:9-11.)

In late summer/early fall of 1999, appellant considered the project to be completed but for punch list items. (Hr'g Tr., vol. 2, 193:10-20.) Appellant's project manager testified that the project was "pretty much … completed" other than installing the handicap chair lift in the lobby, stage curtains and the stage lighting system. (*Id*., 193:14-20.) The HVAC system had also been balanced, was cooling the building, and District employees had moved back into the building. (Hr'g Tr., vol. 2, 191:5-8; 194:11-21; 196:10-11; 199:22-200:3.)

Around this time, however, District employees in the building complained about inconsistent heating and cooling. The appellant's project manager received complaints that "one person's hot and one person's cold." (Hr'g Tr. vol. 2, 191:16-20; 194:22-195:6.) The record indicates that around this time, appellant's project manager recommended that the existing cooling tower be replaced with a new one. (Hr'g Tr. vol.

2, 185:13-18.) He noted that the existing tower lacked maintenance, "showed a lot of signs of rust," and its "fins … which helps dissipate the heat from the building were (sic) in disarray." (*Id*., 186:3-8.)

District officials thereafter decided to replace the cooling tower because it was old and deteriorated. (AF 13, Hr'g Tr., vol. 2, 181:6-13; 185:13-186:8.) On August 26, 1999, the contracting officer issued a change directive requiring Appellant to replace the cooling tower: "In lieu of repairing the cooling tower replace the existing cooling tower with a new tower, model VTO-107-L, with a capacity of 317 gpm or equal."[215] (AF 13; Hr'g Tr., vol. 2, 115:17-21.) Prince's subcontractor performed the cooling tower replacement.[216] (Hr'g Tr., vol. 2, 116:20-117:15; 187:15-22.)

Per the record, the problems with the HVAC system did not abate; therefore, the District, the appellant and HVAC subcontractor Fama participated in discussions to identify "different ways to rectify the problems." (Hr'g Tr. vol. 2, 191:12-193:9.) It appears from the project manager's testimony that these discussions lasted from sometime in the fall of 1999 to December 1999. (*Id*., 192:13-19.) Then, in December 1999, the appellant's project manager left Prince in order to begin working for the District. (Hr'g Tr. vol. 2, 200:6-15.) In the former project manager's absence, HVAC subcontractor Fama emerged as a key resource to the District for addressing the insufficient HVAC performance.

On January 20, 2000, Fama submitted a $22,751 proposal to Prince to address the problems with the HVAC system. "As a result of our meeting of Tuesday, January 18, we have prepared the following proposals that address the remaining problems we know of with the mechanical systems at the [Chevy Chase Community Center]." (AF 7, Bates 367-369, 371-377; AF 12; Hr'g Tr., vol. 2, 118:20-119:20.)[217] Fama's January 20, 2000, letter identified a number of problems in the HVAC system and included specific prices to correct them:

a. Check all fan coil units and unit ventilators for proper location and installation techniques for a price of $2,865.72. (AF 12, Bates 415.)

[215] Installation of the new cooling tower was included in bilateral Change Order 9 dated February 3, 2000, and priced at $8,000. (Exhibit B to May 21, 2002 Mot. for Summ. J.)

[216] Appellant's principal, Alberto Gomez, testified that Fama installed the new cooling tower. (Hr'g Tr., vol. 2, 116:20-117:15.) However, Prince's project manager testified that a subcontractor, Specialty Construction Management, installed the replacement cooling tower. (Hr'g Tr., vol. 2, 187:19-22; 188:19-22.)

[217] As noted, Fama's January 20, 2000, letter was written after Prince's former project manager left to begin working for the District. (Hr'g Tr., vol. 2, 190:4-10.) However, Mr. Bullock remained peripherally involved in the project working on behalf of the District, including preparing some estimates for the HVAC work performed by others and for the rental of a temporary chiller in the summer of 2000. (Hr'g Tr., vol. 2, 214:8-11, 217:7-22.)

b. The new cooling tower had no operating controls. Fama priced the cost of adding a new thermostat and associated controls at $1,462.50. (AF 12, Bates 416.)

c. In order to comply with the manufacturer's instructions, the new chiller required interlock wiring. The solution was to provide the interlock wiring per the manufacturer's specifications at a price of $1,858.45. (AF 12, Bates 417.)

d. The air-handling units required low discharge temperature controls and the outside air dampers needed adjustment. To resolve these issues, Fama proposed installing the required controls and installing damper travel limits at a price of $5,595.04. (AF 12, Bates 418.)

e. The existing time clock was old and not functioning and, in earlier construction, Prince had damaged the communication wiring to the air-handling units. The solution Fama proposed was to install new programmable thermostats at a price of $10,969.04.

(AF 12, Bates 413, 419.)

After receiving a copy of Fama's proposal, the District issued a January 24, 2000, letter instructing Prince to "complete all the referenced items above as listed in [Fama's] letter on or before February 22, 2000, [… and] you shall submit your proposed start date for the work on or before January January (sic) 31, 2000." (AF 7, Bates 366.) After Prince failed to comply with the terms of the January 24 letter, the District's contracting officer issued Prince a letter on February 4, 2000, stating "I have determined to have the [Fama] items of work accomplished by others." (AF 10, Bates 409.) The letter also stated that the contracting officer "decided to issue a credit change order for the dollar amount that the District incurs in having the referenced work accomplished by others." (*Id*.)

Consistent with its declaration to have the HVAC corrective work "accomplished by others," the District retained numerous vendors between May-September 2000 as regards the HVAC problems. (Appellant's Hr'g Ex. 3, Bates 10-113.) In total, the District incurred $191,036 in expenses for corrective HVAC work during the above period, far exceeding the scope and amounts listed in Fama's January 24, 2000, proposal (totaling $22,751). Although the District did not provide a witness at the hearing familiar with the scope of services provided to account for the $191,036 price total, the written record before the Board itemizes the services and costs as follows:

a. Provide sensors for new chiller in water lines by providing Taps, for cooling tower water treatment, in the condenser water piping and connect the chiller's refrigerant relief valves to the outside of the building. Check the cooling tower operation. Start pumps and bleed air from the system. After the system is ready for operation, start the chiller, including the placement of the high-pressure safety and moisture indicators. Provide refrigerant monitoring

system for the chiller, including audible and visual alarms at the boiler room entrances. Extend the boiler room exhaust fan duct to the floor and interlock fan with the alarm panel to operate if refrigerant is detected, $13,600.

b. Provide additional mechanical repairs as follows:

Check all heating units for proper installation and repair or modify as needed. Provide a new thermostat and associated controls in the cooling tower pump, to cycle the cooling tower fan. Provide interlock wiring in accordance with the manufacturer's specifications. Provide discharge low limit controls and wiring. Provide damper travel limit. Provide new programmable thermostats, with night setback and communications capability, for all the air-handling units. Use output from one programmable thermostat to operate exhaust fans, $24,867.

c. Provide temporary chiller to cool the building during the summer of 2000, $92,036.

d. Provide Miscellaneous Mechanical Work as follows:

Drain water and recharge the system. Install 2 – 4" weld T to piping at the temporary chiller (chiller installed by other) and reinsulate. Also, install 2 – 4" flanged gate valve with bolt and gasket kit. Provide twelve (12)-2" threaded T for eight (8) air handling units with twelve (12)-2" unions, twelve (12) automatic air vent and twelve (12)-1/4" threaded ball valve. Align pulleys and provide new bolts. Also, provide pulleys at Air Handling Units. Replace existing flexible condensate line to type L copper line. Level twelve (12) fan coil units and install two (2) new, two-way valves. Remove damaged insulation at five (5) places on fan coil units and reinsulate them. Provide where vent is required. Provide air and water Balancing. Provide training for Equipment operation, $24,000.

e. Provide Pulleys as follows:

Remove four (4) existing pulleys and provide new sets of pulleys (small for motor and large for fan). Provide gas drain, regulator and solenoid valve. Provide four (4) new drains to Fan Coil Unit, $18,360.

f. Provide a 500-amp circuit breaker in the existing main distribution panel, a 500 amp time delay fuses and 3 ½" conduit with three (3)-500 MCM and one (1)-I/O conductors from existing 400 amp disconnect switch, $18,200.

(AF 1, Bates 1-6, Appellant's Hr'g Ex. 3, Bates 10-113.)

Generally speaking, the appellant has not challenged the District's contention that it incurred $191,036 in expenses to perform needed repairs to the Center's HVAC system. (Hr'g Tr., vol. 1, 28:3-12.) However, the appellant contends that the HVAC

repair work undertaken by the District exceeded the scope of the parties' contract, that the District directed the appellant not to perform any additional HVAC repair work as of February 2000, and that several of the District's expenditures were either unnecessary (i.e., the chiller rental), not validated by an independent government estimate (i.e., the Fama proposal), or the result of inadequate specifications (i.e., provision for a 500 amp circuit). The evidence regarding appellant's contentions is summarized below.

First, the appellant's principal testified that the work specified in Fama's January 20, 2000, letter was not within the scope of Prince's contract. (Hr'g Tr., vol. 2, 161:13-15.) In this regard, the appellant's principal testified that the District denied its Request for an Equitable Adjustment ("REA") that had been submitted pertaining to the Fama proposal. (Hr'g Tr. vol. 2, 123:3-19.) The record includes the contracting officer's March 23, 2000, denial of Prince's REA. (AF 7, Bates 362-63.)

Second, the record indicates that the appellant was directed not to perform the HVAC work per the February 4, 2000, letter noted above. (AF 10; *see also* Hr'g Tr. vol. 2, 204:8-17.) Appellant's principal also testified that he understood the March 23, 2000, letter referenced above to mean that "there is nothing else [Prince] can do." (Hr'g Tr. vol. 1, 174:12-21.) In pertinent part, the March 23 letter stated that "all the mechanical work related to (sic) heating system have been accomplished by other means and no further action is needed by your office." (AF 7, Bates 363.)

Third, the appellant's project manager testified that the $92,036 that the District paid for a temporary chiller rental was a needless expense. (Hr'g Tr., vol. 2, 216:7-22; 217:1-221:5.) He testified that the District's rental of the chiller was based on an erroneous assumption that the HVAC did not work in the entire Center building because it failed to cool an auditorium during a play by a local theatre group. (*Id.*) When the project manager inspected the auditorium, he learned that the HVAC failed to cool the auditorium because its "20 foot high ceilings take a while to cool" and thusly, the HVAC should have been turned on "the day before" to allow sufficient cooling time. (*Id.*, at 218:3-22.) The appellant's project manager also questioned the accuracy of Fama's $22,711 corrective repair estimate, testifying that he had been instructed by his superior in the District "to prepare the government estimate to validate Joseph Fama's proposal that I was given." (Hr'g Tr. vol. 2, 215:4-15; *see also Id.*, 206:4-14; 208:19-209:17.)

Lastly, the appellant's project manager testified that the District's $18,200 expense for a "500 amp circuit breaker" and related parts was not identified as a requirement in the parties' contract specifications or contract drawings. (Hr'g Tr. vol. 2, 244:2-247:1.) According to the project manager, Contract Drawing E-13 required Prince to replace a chiller *compressor* (not the entire chiller), and power it through an existing 400 amp circuit breaker. (*Id.*, 246:10-14, *see also* Appellant's Hr'g Ex.2, E-13.) The project manager testified further that the contract specifications, on the other hand, required the entire chiller to be replaced (not just the compressor). (Hr'g Tr. vol. 2, 246:17-247:1, *see also* AF 3, Spec. 15.6, subsection 2.46, Bates 259.) The project manager testified that Prince followed the specifications and provided a new chiller (in lieu of a chiller compressor), but went with the existing 400 amp breaker identified in

Contract Drawing 13. (*Id*., 251:3-8; Appellant's Hr'g Ex.2, E-13.) Later, the District decided to upgrade the amperage from 400 to 500 after it was "brought to the District's attention that the chiller was sitting in Chevy Chase Community Center … connected to the wrong sized panel and fuse box." (Hr'g Tr. vol. 2, 248:9-15; 249:2-6.)

On February 28, 2001, appellant submitted Payment Request 18 in which it represented that the contract work was 100% complete and it therefore sought payment of $272,925, representing the final payment under the contract according to appellant's calculations. (AF2 10.) On March 14, 2001, Andrew Lee wrote to appellant regarding Payment Request No. 18.[218] Mr. Lee responded that because of liquidated damages for late performance and the cost of uncompleted work, including HVAC, the District would retain funds to protect its interest and so would not make any payment. (AF2 10.)

Finally, on September 17, 2001, the contracting officer sent appellant the contracting officer's final decision in this matter. (AF 1.) In the final decision, the contracting officer provided a cost breakdown of work performed by others related to the heating and cooling system at the Community Center. (*Id*.) As noted, the costs identified by the contracting officer totaled $191,063. The letter said, "[a]s stated in the [February 4 2000] Final Decision, this amount has been deducted from your contract and the contract amount has been reduced." (AF 1.)

The contracting officer's September 17 decision identified the basis for the District's $191,036 credit (as noted above), and described it as necessary to make the HVAC System functional. (AF 1.) For the work performed, the contracting officer identified the reason for each task, identified the contractor that performed each category of work, and advised that all the work had been completed. Attached to the letter were copies of the various contracts and purchase orders whereby the District obtained the work. (Appellant's Hr'g Ex. 3, Bates 10-110.)

On September 25, 2001, appellant appealed the contracting officer's September 17, 2001, final decision asserting the District's contract reduction of $191,063. (September 25, 2001, Notice of Appeal.) The appeal was docketed on September 26, 2001, as D-1168.

Case D-1203: The District's $125,911Credit Against Prince For Allegedly Incomplete Miscellaneous Punch List Items[219]

The second claim to be addressed herein, D-1203, also consists of a District credit assessed against the appellant for insufficient contract performance. Whereas the District's $191,036 credit claim was limited exclusively to HVAC issues, the instant

[218] Mr. Lee is identified in the record as the "Acting Chief, Construction Management Division" within the D.C. Office of Property Management. (AF2 10.)

[219] The April 11, 2003, contracting officer final decision crediting the District $125,911 against Prince for incomplete punch list items, also awarded the District $232,000 in liquidated damages. The liquidated damages component of the District's claim has been settled and will not be addressed herein. (Hr'g Tr. vol. 1, 19:18-22.)

claim covers 14 miscellaneous punch list items as to which the contracting officer issued a final decision awarding the District a $125,911 credit. The backdrop to the District's award of the $125,911 credit, and the procedural history upon which it remains before our Board, is noted below.

As is pertinent to the D-1203 appeal, the contracting officer issued a final decision on April 11, 2003, awarding the District $125,911 for the appellant's alleged failure to complete 14 punch list items. (AF2 1.) Per the contracting officer's decision and valuation of punch list items, the appellant allegedly failed to complete the following items:

1. Provide fence and gates, $15,961.60.[220]

2. Provide a watchperson for duration of contract, $22,688.64.

3. Provide a construction trailer, phone, and water for the District's inspector, $6,408.13.

4. Cost differential as agreed in an April 13, 1999, memorandum between the chiller appellant provided, which, according to the contracting officer's letter, did not meet specification requirements, and the specified chiller, $1,400.[221]

5. Appellant refurbished existing interior doors and frames in lieu of replacing doors and frames as called for in the contract, $25,302.38.

6. Provide exhaust fan EF-7 on the roof, $4,819.47.

7. Provide sheet piling as shown on drawing S-2, $3,621.53.

8. Provide finished project photos, $969.60.

9. Provide inertia pads for pumps, $339.69.

10. Provide as-built construction drawings, $25,000.[222]

11. Provide operation and maintenance manuals, $4,000.00.[223]

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[220] For each of the line items considered in the estimate, a surcharge of 1%, representing the bond fee appellant would have paid had it performed the work, was added and that fee is included in the amount claimed by the contracting officer. (Appellant's Hr'g Ex. 3, Bates 134-143.)

[221] The underlying estimate noted that the chiller appellant provided was permitted under the contract and that the "credit is invalid – but already agreed!" (Appellant's Hr'g Ex. 3, Bates 138.)

[222] The estimated cost to provide as-built drawings was shown as $12,000 in the backup estimate. (Appellant's Hr'g Ex. 3, Bates 134.)

l2. Provide 10-year warranty on roof, $10,000.00.

13. Provide perforated pipe at base of elevator shaft, $5,400.00.

14. Provide photographs of mechanical equipment, included in "8" above.

(AF2 1.)

Although the contracting officer issued the final decision on April 11, 2003, the 14 deficiencies noted above were well known to the District at least three years earlier. When the District took beneficial occupancy of the Center on February 11, 2000, it issued a 17-page deficiencies list that included each of the 14 punch list items. (AF 19.) The letter transmitting the punch list set a 30-day deadline to correct the punch list items by March 17, 2000. (*Id*.) Shortly after that deadline passed, Prince requested a decision of the contracting officer as to any remaining problems. (CAB No. D-1173, Order On Cross Mots. for Summ. J., April 14, 2003.) The contracting officer never responded to Prince's request. (*Id*.) Because of the District's three-year delay in asserting its known punch list claims, the claims were initially excluded from Board jurisdiction. In its May 6, 2003, ruling on the matter, the Board noted the following (in pertinent part):

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

(CAB No. D-1173, Order on Cross Mots. for Summ. J., April 14, 2003.)

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[223] The backup estimate does not include the cost of providing the operation and maintenance manuals or for providing perforated pipe at the base of the elevator shaft.

Thus, the District's punch list claims would not be at issue before the Board presently save for a subsequent reversal by the Board. In a Status Conference Order dated March 7, 2006, the Board reversed its April 14, 2003, Order and noted the following:

> The Board also discussed the pending motion for reconsideration of the Board's April 14, 2003 order granting partial summary judgment. In light of the Board's decision to schedule consolidated appeals for hearing, the Board believes that the best course is to hear evidence on the punch list claim by the District, keeping in mind that the burden of proof rests with the District and the Board will not allow Prince to be prejudiced by evidentiary problems caused by the District's delay in asserting its claims.

(Status Conference Order, March 7, 2006)

Accordingly, as relates to case D-1203, the hearing conducted by the Board herein was for the purpose of giving the District an opportunity to present "evidence on the punch list claim […] keeping in mind that the burden of proof rests with the District." In that regard, we note that the District did not present any witnesses with respect to its claim for a $125,911 credit against the appellant for allegedly unfinished punch list items. We recite below the evidence presented at the hearing regarding the District's punch list claim, which were addressed largely through the testimony of the appellant's project manager.

1. Provide fence and gates, $15,961.60. Appellant did not provide a fence and gates. The Center was still at least partially in use, and members of the community complained that a fence would have restricted movement around the center. Appellant discussed this with Office of Property Management ("OPM") officials in the context of a number of tasks, some beyond the scope of Prince's contract, and it was mutually agreed, according to Mr. Bullock, that the pluses and minuses were a wash and that Prince would not be required to install the fence. (Hr'g Tr., vol. 3, 96:13-98:14.) The fence would have secured the site but would have closed off the parking lot to use. No change order was issued regarding the fence and gates. (Hr'g Tr., vol. 3, 140:4-142:4.) Before beginning construction, appellant was required to install an 8-foot high, 3/8-inch plywood, painted board fence at the periphery of the construction site with sufficient gates to permit access to the site. (AF 3, Special Conditions 23.01, Bates 87.)

2. Provide a watchperson for duration of contract, $22,688.64. Appellant never provided a watchperson, and no one from the District directed appellant to do so. (Hr'g Tr., vol. 3, 98:15-99:22.) Most of appellant's equipment was inside the Center so appellant saw no need for a watchperson. (Hr'g Tr., vol. 3, 143:9-146:2.) During construction, appellant was required to hire watchpersons in adequate numbers to safeguard the work site. Watchpersons were to be employed during all periods in which actual site work was not being performed. (AF 3, Special Conditions 23.01, sub. I 1, Bates 88.)

3. Provide a construction trailer, phone, and water for the District's inspector, $6,408.13. Appellant provided a telephone and office for the inspector inside the building so Mr. Bullock believed there was no need for a trailer. The community objected to a trailer taking up spaces in the parking lot. (Hr'g Tr., vol. 3, 101:6-103:22; 149:9-151:10.) Prince provided drinking water for the inspector. (Hr'g Tr., vol. 3, 152:13-21.) Appellant was required to provide an office, including telephone service and drinking water, for use by the District's project inspector. A trailer in good condition outfitted as an office, "may be furnished for the office." (AF 3, Special Conditions 26.01, sub. 9.01, Bates 70-71.)

4. Cost differential, as agreed to in an April 13, 1999, memorandum, between the chiller appellant provided, which, according to the contracting officer's letter, did not meet specification requirements, and the specified chiller, $1,400. Mr. Bullock had no knowledge of any agreement regarding installation of a substitute chiller. (Hr'g Tr., vol. 3, 104:1-17.)

5. Appellant refurbished existing interior doors and frames in lieu of replacing doors and frames as called for in the contract, $25,302.38. The existing doors were mortared into the cinderblock walls and removing the frames would have seriously damaged the walls. By agreement with District officials, Prince did not remove the frames and provide new doors and frames. Instead, Prince refinished the existing metal doors to like-new condition and replaced the hardware. (Hr'g Tr., vol. 3, 106:13-109:2, 110:19-111:1, 153:13-158:12.) The contract required appellant to replace interior doors and frames with new. (Appellant's Hr'g Ex.2, A-1 through A-5.)

6. Provide exhaust fan EF-7 on the roof, $4,819.47. Mr. Bullock concluded that a fan was never intended as shown on the drawings, and Prince informally worked with District officials considering tasks appellant performed beyond the scope of the contract to offset the value of exhaust fan EF-7. (Hr'g Tr., vol. 3, 114:16-116:13; 159:7-160:7.) Drawing M-4 required appellant to provide a number of exhaust fans on the roof, including Exhaust Fan EF-7. (Appellant's Hr'g Ex.2, M-4.)

7. Provide sheet piling as shown on drawing S-2, $3,621.53. According to Mr. Bullock, Prince provided necessary protection for workers during excavation by using a steel box instead of the sheet piling. Mr. Bullock thought the claim was meritless because, although Prince did not provide the specified sheet piling, it was to be removed after construction in any event. (Hr'g Tr., vol. 3, 118:9-123:8, 162:9-165:20, 168:1-2.) Drawing S-2 required installation of sheet piling adjacent to the elevator. The sheet piling was designated on the plans as "STAY-IN-PLACE STL. SHEET PILES BETWEEN EXIST. COLUMN FOOTING AND NEW ELEV. PIT ACROSS THE WIDTH OF THE FOOTING PLUS 2'-0" BEYOND EACH SIDE." (Appellant's Hr'g Ex.2, S-2.)

8. Provide finished project photos, $969.60. Mr. Bullock provided the District many digital photos over the course of the project so he believed Prince satisfied the requirement. (Hr'g Tr., vol. 3, 123:13-124:10; 168:3-169:10.) The contract

required appellant to provide 8 x 10 ½ inch progress photographs taken as directed by the inspector with suitable labels. Once the building was constructed and the site cleaned up, appellant was required to provide final construction photographs taken by a professional photographer. (AF 3, Special Stipulations 33, Bates 55-57.) Additionally, 20 photographs of the mechanical equipment were required "to be taken at such times and at such points as the Contracting Officer shall select." (AF 3, Specification 15.6, sub. 1.10, Bates 187.)

9. Provide inertia pads for pumps, $339.69. Per Mr. Bullock, Prince supplied spring-loaded feet on the pumps so he determined there was no need for inertia pads to damp vibration. The District's inspector knew of the substitution. (Hr'g Tr., vol. 3, 124:11-127:7; 169:14-170:16.) The contract described various methods to control vibration of the equipment during operation. (AF 3, Specification 15.6, sub. 2.41, Bates 241-244.)

10. Provide as-built construction drawings, $25,000. During the project, Mr. Bullock made notations on construction drawings reflecting changes made but he did not submit them to the District. When he left the project, he told District officials where he had left the drawings in the construction office, along with manuals and a lot of other paperwork. He advised District representatives, "[h]ere's all your stuff right here on this table." (Hr'g Tr., vol. 3, 127:8-130:19; 171:5-175:9.) Upon completion of the work, the contractor was required to forward to the contracting officer a set of "as-built drawings" for the entire CCCC renovation project. (AF 3, Specification 1.4, Special Stipulations 39, Bates 62-65.) "Preliminary as-built drawings" were to be maintained, depicting a daily record of as-built conditions and updated daily. Two copies of the preliminary as-builts were to be delivered to the contracting officer at final inspection for his approval. Once approved, the contracting officer would provide a set of contract Mylar drawings for appellant to use in creating "Final As-Built Drawings." Completed final as-built drawings, which incorporated all changes, were to be provided to the contracting officer within 60 days after final inspection. (*Id.*) As-builts of the mechanical equipment were specifically required to be provided to the contracting officer as well. (AF 3, Specification 15.6, sub. 1.09, Bates 187.)

11. Provide operation and maintenance manuals, $4,000.00. Mr. Bullock testified that he left instruction manuals, one in the mechanical room and two on the table in the office, for District officials to take. (Hr'g Tr., vol. 3, 131:15-18; 178:14-180:21.) The contract required appellant to submit three operation and maintenance manuals for the HVAC system and for each mechanical or electrical system. For mechanical equipment, the contract required appellant to submit six bound copies of an operation and maintenance manual for each mechanical system and for each piece of equipment furnished. (AF 3, Specification 1.4, Bates 60; Specification 15.6, sub. 1.07, Bates 186.)

l2. Provide 10-year warranty on roof, $10,000.00. Mr. Bullock testified that because of changes to the roof required by the District during installation, the roof manufacturer would not issue a warranty. (Hr'g Tr., vol. 3, 131:19-135:14; 180:22-186:6.)

13. Provide perforated pipe at base of elevator shaft, $5,400.00. Mr. Bullock said the drain tile required by the drawings was installed. (Hr'g Tr., vol. 3, 135:20-137:12; 186:7-190:7.) Drawing A-8 depicted a drainpipe in the elevator well, designated as "CONT. DRAIN TILE TO BE TIED INTO EXIST. DRAIN." (Appellant's Hr'g Ex. 2, A-8.)

14. Provide photographs of mechanical equipment, included in "8" above. Mr. Bullock said he provided many photos of all aspects of the construction and sent them to the District by email. (Hr'g Tr., vol. 3, 137:13-138:19.)

On April 11, 2003, (the same day that the final decision was issued), the appellant filed an appeal from the contracting officer's final decision. (April 11, 2003 Notice of Appeal.) None of the items listed in the contracting officer's final decision and testified to by appellant's project manager resulted in the issuance of formal change orders. (Hr'g Tr., vol. 3, 146:7-147:21.)

Case D-1173: The Appellant's Claim For A Contract Balance of $151,226.57

On September 30, 2001, appellant submitted Payment Request 21 in the amount of $151,226.57, which by its calculation was the final balance under the contract less the $191,063 credit asserted by the District. (May 21, 2002 Mot. for Summ. J., ¶8 and Exhibit F.) On October 12, 2001, the District returned the Payment Request 21 without action noting, among other things, that the miscellaneous punch list items discussed herein had not been completed. (AF 4, AF2 7.)

On November 6, 2001, appellant resubmitted its invoice for final payment of $151,226.57 directly to the contracting officer and requested either payment or a final decision. (Appellant's May 21, 2002 Mot. for Summ. J., ¶9 and Exhibit G; April 14, 2003 Amended Complaint, ¶15.) On February 14, 2002, appellant filed an appeal from the contracting officer's failure to decide its claim for payment of $151,226.57. (February 14, 2002 Notice of Appeal). The appeal was docketed as D-1173.

There is no genuine dispute that a balance remains on the contract. There are, however, two questions regarding the balance. The first question requires determining the actual amount of the balance. A spreadsheet attached to Appellant's Second Supplement to the Appeal File lists the remaining balance as $342,000. The Joint Pretrial Statement identifies the remaining balance as $342,279.57. (Hr'g Tr., vol. 2, 103:18-21.) However, appellant's February 28, 2001, Payment Request identifies the remaining balance as $272,925.57. (AF2 10.) In its November 6, 2001, letter to the contracting officer, appellant asserted that the remaining balance under the contract, after credit for the District's $191,063 claim, was $151,226.57, and sought that amount as partial payment under the contract. (May 21, 2002 Mot. for Summ. J., ¶8 and Ex. F.; *see, also,* April 14, 2003 Am. Compl., ¶14.) The contracting officer's letter of April 11, 2003, recites that as of that date, $99,338.60 remained in the contract. (AF2 1.) The second question is whether the District is entitled to credits of $191,036 and $125,911 respectively against the balance.

D-1120: Prince's Appeal From the Contracting Officer's Deletion of HVAC Work

On February 4, 2000, the contracting officer wrote to appellant as follows:

> In our letter dated January 24, 2000, you were directed to rectify several items of work related to the operation of the heating and cooling systems at the Chevy Chase Community Center.
>
> Given the urgent nature of the above-referenced work, you were instructed to furnish OPM with your proposed start date, on or before, January 31, 2000. As of the date of this letter no such information or other related communication, has been received by OPM.
>
> For the above reason and as noted in our January 24, 2000 letter, I have determined to have the referenced items of work accomplished by others. As a consequence, I have decided to issue a credit change order for the dollar amount that the District incurs in having the referenced work implemented by others.
>
> This is a final decision from which you may appeal in writing in accordance with Paragraph 1-1188.5 D.C. Code (1986 Supp.) and any regulations promulgated thereto.

(AF 10; AF2 10.)

On February 9, 2000, appellant filed an appeal from the February 4, 2000, decision, challenging what it considered to be a partial termination for default. (February 9, 2000 Notice of Appeal.) The appeal was docketed as D-1120. Although the matter had been appealed to our Board, the appellant's principal nonetheless, wrote to contracting officer on February 17, 2000, regarding deletion of mechanical items of work and completion of the punch list. Appellant complained that the "owner's plans, designs, and specifications with regard to the heating and cooling systems are flawed and inadequate, and that there must be significant changes made by the owner in order that the new pieces or portions of the system will properly operate." (AF 31.)

Case D-1126: Prince's Appeal of Purported March 23, 2000, Claim

On June 26, 2000, appellant filed a Notice of Appeal based on the contracting officer's failure to decide a claim appellant says it filed on March 23, 2000, requesting a contracting officer's final decision addressing the problems associated with the project (Compl. in D-1126, ¶14; June 26, 2000, Notice of Appeal.) This appeal was docketed as D-1126. Although referred to in the October 20, 2000, Complaint in D-1126, the record does not contain a copy of the March 23, 2000, letter appellant claims to have sent, and there is no other mention of it in the record.

II. DISCUSSION

We exercise jurisdiction over this matter pursuant to D.C. Code § 2-360.03(a)(2) (2011).[224] Based upon our review of the instant appeals, we conclude that the Board has jurisdiction over the appeals in D-1168, D-1203 and D-1173. In D-1168, we conclude that the District is entitled to a credit of $22,751.11 for the cost of performing the HVAC work Prince failed to perform pursuant to its contract. In D-1203, we conclude that the District is entitled to a credit of $85,363.22 for the appellant's incomplete performance of miscellaneous punch list items. Finally, we grant entitlement to the appellant in D-1173, subject to the credits stated herein for D-1168 and D-1203. Because the record reveals uncertainty regarding the balance remaining on the contract, we remand this issue to the parties for resolution. Once the balance is determined, application of the credits discussed above will determine the amount of appellant's entitlement to final payment.

Further, we conclude that the Board lacks jurisdiction in cases D-1120 and D-1126 and, therefore, we dismiss the latter appeals with prejudice. The basis for our decision is further described below and the recitation of facts stated in the background, discussion, and conclusion sections constitute 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.

Appeal D-1168: The District's $191,036 Credit Against Prince

Appeal D-1168, filed September 25, 2001, stems from the contracting officer's final decision crediting $191,063 against the contract price for the District's cost of performing the work it claims to have removed from appellant's contract in the contracting officer's February 4, 2000, final decision. The threshold question is whether the Board has jurisdiction over this matter. The appellee argues that jurisdiction is barred because (i) the appellant failed to submit a cost proposal in connection with the contracting officer's September 17, 2001, final decision, and (ii) the appellant's argument that the September 17, 2001, final decision is a "deductive change order" is a new claim that was never presented to the contracting officer. These arguments, which are without merit, are addressed below. We conclude that the contracting officer's September 17, 2001, final decision is a District claim over which we have jurisdiction.

Appellant's failure to submit a cost proposal within 15 days after receipt of the contracting officer's September 17, 2001, notice of a deductive change does not require denial of its appeal.

Appellee argues that appellant has a contractual obligation to submit a proposal within 15 days if it considers the contracting officer's action to be a change. (Appellee's Post Hr'g Br. 15.) For its failure to do so, the District argues, Prince's challenge to the District's claim for credit of $191,063 should be denied. (*Id.*) The District cites no authority for the premise that a contractor's failure to submit a proposal under the circumstances of this appeal results in forfeiture of its claim.

[224] Prior to April 8, 2011, the Board exercised jurisdiction pursuant to D.C. Code § 2-309.03(a)(2) (2001).

The changes provision in the specifications requires that within 15 days after a change order is directed, the contractor "shall submit a proposal and/or breakdown," and "it should be acted upon promptly by the Contracting Officer." (AF 3, Specification 1.4, Special Stipulations 34.C.(1), Bates 57.) In this case, the appellant did not submit a monetary claim against the District in response to either the February 4, 2000, letter or to the September 17, 2001, final decision, so there would have been no proposal to submit.

Moreover, boards and courts have generally not strictly enforced such notice requirements absent a finding that the government is prejudiced by the contractor's failure to provide timely notice, such as in this case, a proposal. This liberal interpretation is especially appropriate where the government is aware of the operative facts underlying the appeal. *See Fort Myer Constr. Corp.*, CAB No. D-859, 40 D.C. Reg. 4655, 4676 (Nov. 3, 1992); *Hoel-Stefen Constr. Co. v. United States*, 456 F.2d 760, 767-8, (Ct. Cl. 1972).

Because the September 17, 2001, final decision asserted a District claim, the District was well aware of the operative facts at issue in the appeal. The District does not allege and the record does not reflect that the District was prejudiced in its consideration of appellant's challenge to the September 17, 2001, final decision due to appellant's failure to submit a proposal within 15 days.

Appellant's argument that the District's September 17, 2001, claim was a deductive change to the contract after Appellant's initial characterization of the action as a partial termination for default is not a prohibited "new claim."

The District also argues that the appellant's pursuit of the appeal in D-1168 under the theory of a deductive change, as opposed to a partial termination for default, is beyond the Board's jurisdiction because it constitutes a new claim that was not first presented to the contracting officer. (Appellee's Hr'g Br. 10).

We lack jurisdiction over claims not presented to the contracting officer and raised for the first time on appeal. *Keystone Plus Constr. Corp*, CAB No. D-1358, 2012 WL 554443 (Jan. 27, 2012). However, the claim in D-1168 is the District's claim. The District brought the issue before the contracting officer for a final decision on its claim for $191,063. What the District complains of, therefore, is not appellant's pursuit of a claim not first brought before the contracting officer. What the District complains of is the assertion of a defense to the District's claim that is different from that which appellant first asserted. Assertion of a new legal defense or theory, when based on the same operative facts, does not violate the restriction on asserting a "new claim." *See Keystone Plus Constr. Corp*, CAB No. D-1358, 2012 WL 554443; *J. Cooper & Assocs., Inc. v. United States*, 47 Fed. Cl. 280, 285 (2000)(citations omitted).[225]

In D-1168, the same operative facts are present regardless of whether the defense characterizes the final decision as a partial termination for default followed by the

[225] The appellant would be the party objecting to assertion of new claims by the District if the District sought to add new claims to the original claim it asserted in a final decision. *See Southwest Marine, Inc.*, ASBCA No. 54550, 08-1 BCA ¶ 33,786.

District's claim for reprocurement costs or as a unilateral deductive change. In its April 14, 2003, Amended Complaint, appellant challenged the District's claim and sought, among other relief, that the Board "[d]etermine that the contracting officer's assessment of $191,063.00 for costs allegedly incurred by the [District] as a direct consequence of Prince's default was improper and order the contracting office to rescind unilateral change order No. 10 and to immediately pay Prince $191,063.00."

That the work was not appellant's responsibility to perform would have been a defense to reprocurement costs after a partial termination for default, as well as to a unilateral deductive change order. The contracting officer was well aware of the operative facts underlying appellant's challenge to the District's claim. We have jurisdiction over the appeal and reject the District's request for dismissal of D-1168 on procedural grounds. Contrary to the District's contention, appellant is not asserting a new *claim* for the first time on appeal.

Thus, on September 17, 2001, when the contracting officer sought to impose $191,063 in costs against appellant's contract payment, a District claim arose, whether considered as a partial termination for default followed by a reprocurement costs claim, *see Dano Resource Recovery, Inc*., CAB No. D-686, 38 D.C. Reg. 3156 (Dec. 7, 1990), or a deductive change to the contract, *see Nager Elec. Co. v. United States,* 442 F.2d 936, 946 (Ct. Cl. 1971)*; Fru-Con Constr. Corp.*, ASBCA Nos. 53544, 53794, 05-1 BCA ¶ 32,936 at 163,164-65; *Lovering-Johnson, Inc.*, ASBCA No. 53902, 05-2 BCA ¶ 33126. We have jurisdiction over this claim reducing the contract price, and it was timely filed (Sept. 25, 2001 Notice of Appeal.). *See Gilbane-Smoot/Joint Venture*, CAB No. D-885, 40 D.C. Reg. 4954 (Feb. 18, 1993); *Osborne Constr. Co.*, ASBCA No. 55030, 09-1 BCA ¶ 34,083; *Jepco Petroleum*, ASBCA No. 40480, 91-2 BCA ¶ 24,038 (jurisdiction derived from final decision reducing contract price by value of work the Government alleged the contractor had not performed).

Thus, we shift our focus away from jurisdictional issues and to the merits question of whether the District may charge appellant with the cost of performing work the District contends was required under appellant's contract. In this regard, appellant appeals from the contracting officer's determination that a $191,063 downward adjustment to the contract price was warranted by appellant's failure to complete certain work. (AF 1.) The District argues that the adjustment is warranted because the District, by contracts with others, performed work on the HVAC system that it contends was appellant's responsibility to perform.

According to appellant's president and project manager, Prince performed the contract satisfactorily, but due to inadequacies of the plans and specifications issued by the District, the HVAC system, although functional and functioning, did not meet the needs of the District's employees, who had been moved back into the building in the fall of 1999. (Hr'g Tr., vol. 2, 136:9-18; 167:22-168:2; 191:5-8; 194:11-21; 194:22-195:10; 199:22-200:3.) After complaints arose from the building's occupants, the District installed a new water tower under appellant's contract. (Hr'g Tr., vol. 2, 116:20-117:15; 185:13-186:8.) In a January 20, 2000, letter, appellant's subcontractor, Fama, suggested a number of actions that could be taken to address the performance problems of the

HVAC system, and the District directed appellant to take the steps set out in Fama's letter. (AF 11, 12.)

When appellant failed to perform the work Fama recommended, the District purported to remove the HVAC work from appellant's contract and had the work performed by others. (AF 10, AF2 10.) Appellant admits that it did not perform the work comprising the District's $191,063 claim. (Hr'g Tr. vol. 1, 28:3-12.) Further, it concedes that the District contracted and paid $191,063 for performance of the HVAC work. (*Id*.) However, appellant contends the HVAC work at issue was not within the scope of its contract and since the District has not shown otherwise, appellant is not responsible for the costs of such work. (Appellant's Post Hr'g Br. 13.)

According to appellant's project manager, in early 2000 the District directed Prince to correct deficiencies in the system; however, the described work was beyond the scope of appellant's contract. (Hr'g Tr., vol. 2, 136:9-18; 167:22-168:2.) Mr. Gomez, appellant's principal, testified that the plans and specifications for the original HVAC work were inadequate and contained deficiencies. (*Id*.) He stated that Prince performed the work according to the District's requirements but that design flaws caused the system to remain inadequate. (*Id*.) Mr. Gomez and appellant's project manager were the only witnesses who testified that had some familiarity with the project at issue.[226]

The District, as the party seeking a downward adjustment has the burden of establishing its entitlement and must present evidence sufficient to convince us, by a preponderance of evidence, that it is entitled to the downward price adjustment it seeks. *See Perdomo and Associates, Inc.*, CAB No. D-802, 41 D.C. Reg. 3898, 3907-08 (Jan. 10, 1994); *Ft. Myer Construction Corp.,* CAB No. D-859, 40 D.C. Reg. 4655, 4680 (Nov. 3, 1992); *Nager Electric Co. v. United States,* 442 F.2d 936, 946 (Ct. Cl. 1971)*; Fru-Con Constr. Corp.* ASBCA Nos. 53544, 53794, 05-1 BCA ¶ 32,936 at 163,164-65; *Lovering-Johnson, Inc., 05*-2 BCA ¶ 33126. The burden when the District seeks reprocurement costs is the same. *See Dano Resource Recovery, Inc*., CAB No. D-686, 38 D.C. Reg. 3156 (District has burden of proof to establish every element in its claim for excess reprocurement costs).

The District has provided ample evidence of the work performed by others and its cost via copies of the contracting vehicles used to obtain it. Appellant also concedes that the work performed by others cost the District $191,063. (Hr'g Tr. vol. 1, 28:3-12; Appellant's Hr'g Ex. 3, Bates 10-110.) However, the District must establish both the reasonableness of the incurred costs and their causal connection to the alleged event on which the claim is based. *Gilbane-Smoot/Joint Venture*, CAB No. D-885, 38 D.C. Reg. 4954, *supra* (citations omitted). Where the causal relationship is not demonstrated, the District's claim fails. *See Fairchild Indus., Inc*., ASBCA No. 15,272, 74–1 BCA ¶ 10,551 (1974); *Dano Resource Recovery, Inc.*, CAB No. D-686, 38 D.C. Reg. 3156, *supra*. To prevail, the District must prove that the work performed by others was

[226] To a certain degree, their testimony reflected the passage of more than 12 years between performance of the project and the trial. However, the District presented no counter testimony of persons familiar with the project.

Prince's responsibility under its contract. *See Fid. and Deposit Co. of Maryland, Inc.*, ASBCA No. 32710, 87-1 BCA ¶ 19,356 ("[B]ecause the coal deliveries were not within the scope of the contract, the alleged actual damages do not represent either costs incurred to complete the contract or excess reprocurement costs.")

Notwithstanding the HVAC work undertaken by Prince under its contract, the building occupants continued to complain about inconsistent heating and cooling. (Hr'g Tr., vol. 2, 194:22-195:10.) The District's insistence that steps be taken to improve the system was reasonable, however, such insistence does not prove that the steps chosen were required under appellant's contract. The District offered no testimony of someone familiar with the project to support its argument that the work performed by others was within the scope of Appellant's contract. It did not point to evidence in the record or language in the contract from which we could conclude that the work at issue was Appellant's responsibility.

Nevertheless, there is evidence in the record from which we can find that at least part of the work was required under appellant's contract. Fama's letter described checking installation of fan coil units for proper installation (AF 12, Bates 415), adding operating controls for the new cooling tower (AF 12, Bates 416), providing interlock wiring as required by manufacturers for the new chiller, and providing required low discharge temperature controls to the air handling units and adjusting outside air dampers (AF 12, Bates 417). Finally, Fama concluded that the time clock was old and that significant damage had been done during earlier phases of Prince's construction when the time clock for the air-handling units was cut/removed. (AF 12, Bates 413, 419.) Fama proposed installing new programmable thermostats for the air-handling units. (*Id*.)

We find that the scope of work described in Fama's letter was required under appellant's contract. Fama was appellant's subcontractor, and the letter was issued when Fama and appellant were both still working on the project. (AF 12.) In the letter, Fama describes basic requirements to complete the installation of the cooling tower and other equipment according to the manufacturers' recommendations. The contract required appellant to install all HVAC equipment as recommended by the manufacturer and for the installation to be completed in every detail in a first class workmanlike manner. (AF 3, Specification 15.6, sub. 3.02, Bates 262.) Thus, we find that the work described in Fama's letter and substantially included as item "B" of the contracting officer's final decision was part of appellant's contract. (AF 1, Bates 2.)

From the record, we can see similarities between the specifications and the remaining HVAC work performed by others after February 2000 as identified in the contracting officer's September 17, 2001, letter. For example, the specifications required that the chiller refrigerant be vented to the outside, (AF 3, Specification 15.6, sub. 2.35, Bates 233), and in the contracting officer's letter, one item claimed was needed to "connect the chiller's refrigerant relief valves to the outside of the building." (AF 1.) The contract required appellant to balance the system (AF 3, Specification 15.6, sub. 2.44, Bates 247-258), and the work described in the contracting officer's letter included,

"Provide air and water Balancing."[227] (AF 1.) The contract required appellant to provide chemical water treatment for the HVAC system, (AF 3, Specification 15.6, sub. 2.42, Bates 244-245.), and the contracting officer's letter described "providing taps, for cooling tower water treatment." (AF 1.) However, the description of the work to add a new cooling tower in BCD 10 stated only "replace the existing cooling tower with a new tower." (AF 13, Bates 420-22.) It described the model, but no more. (*Id*.) We are unable to ascertain from that change directive, or from the modification itself, the installation instructions that might have come from the manufacturer or the specific instructions the District may have given regarding the installation.

Without testimony explaining the contract requirements or argument by the District identifying and pairing up contract requirements with the requirements set forth in the contracting officer's final decision to counter the uncontradicted testimony of appellant's witnesses that the work was beyond the scope of Prince's contract, the District has not shown by a preponderance of the evidence that the work described, other than that discussed above and included in Fama's letter, was within the scope of appellant's contract. *See Gilbane-Smoot/Joint Venture*, CAB No. D-885, *supra*, at 4983-84 (citations omitted); *Dano Resource Recovery, Inc.*, CAB No. D-686, *supra*, (reprocured services must be similar to those contract services terminated).

Temporary Chiller

A substantial portion of the contracting officer's September 17, 2001, claim ($92,000) relates to the rental of a temporary chiller for the summer of 2000 to provide cooling for the Center. (AF 1.) The contracting officer's letter states that when the District attempted to start the cooling system, it was discovered that appellant had not adequately connected the cooling tower to the system, which thereby prevented its use. (*Id*.) Thus, the District argues that the need to rent a temporary chiller was due to appellant's inadequate performance under the contract.

However, there is no supporting evidence for the contracting officer's conclusory statement regarding the reason temporary cooling was needed, and the final decision itself is not sufficient evidence to establish factually in this proceeding that appellant's failure to connect the system was the reason for renting the temporary chiller. The Board decides appeals de novo based on the factual record created in Board proceedings, and the final decision of the contracting officer is "vacated" once appealed. It is not entitled to presumptive validity. *C.P.F. Corp.*, CAB No. P-413, 42 D.C. Reg. 4902, 4908 (Nov. 18, 1994); *Ebone, Inc.*, CAB No. D-971, D-972, CONS., 45 D.C. Reg. 8753 (May 20, 1998); *cf. Wilner v. United States*, 24 F.3d 1397 (Fed. Cir. 1994) (holding that under the Contract Disputes Act the contractor is entitled to a de novo proceeding, and a contracting officer's decision is not entitled to a presumption of correctness); *Southwest Welding & Mfg. Co. v. United States*, 413 F.2d 1167, 1184-85 (Ct. Cl. 1969) (contracting officer's decision is deemed "vacated" when an appeal is filed with the agency board).

Mr. Bullock (the appellant's project manager) gave another reason for rental of

[227] Mr. Bullock testified that Prince had balanced the HVAC system. (Hr'g Tr., vol. 2, 196:7-11.)

the temporary chiller. He testified that the auxiliary chiller was rented because the Center's auditorium was unusually hot during a drama presentation, and District officials mistakenly assumed that the HVAC system was not working. (Hr'g Tr., vol. 2, 216:20-219:20.) In fact, according to Mr. Bullock, the HVAC system was working properly, but the building operators had improperly shut off the system the night before instead of pre-cooling the auditorium before the event. (*Id*.) He testified that it was unnecessary to order a temporary chiller. (*Id.*)

Mr. Bullock was familiar with the project at issue and even though no longer employed by Prince when the temporary chiller was rented, he was familiar with it and even prepared one of the estimates to validate the cost of rental. (Hr'g Tr., vol. 2, 214:8-11; 217:7-22.) Mr. Bullock was a credible witness and we see no reason to disregard his uncontradicted testimony as to the reason for renting the chiller. The District did not cross-examine him regarding this subject, and we noted nothing in the record or from observing Mr. Bullock at the hearing that reflects unfavorably upon his credibility. *See Belcon Inc. v. District of Columbia Water and Sewer Auth.*, 826 A.2d 380, 386 (D.C. 2003), *citing Chesapeake & Ohio Ry. Co. v. Martin,* 283 U.S. 209, 216, 51 S.Ct. 453, 75 L.Ed. 983 (1931).

Accordingly, we find that the District has failed to demonstrate a causal connection between the rental of the temporary chiller and any failure of performance on appellant's contract. *See Gilbane-Smoot/Joint Venture*, CAB No. D-885, *supra*; *Dano Resource Recovery, Inc.*, CAB No. D-686, *supra*; *Fairchild Indus., Inc.*, ASBCA No. 15272, 74–1 BCA ¶ 10,551. The District has not shown that appellant's non-performance of this work pursuant to its contract prevented operation of the HVAC system during the summer of 2000.

The parties have not addressed appellant's contractual duty to provide adequate cooling for the building during the summer period. (AF 3, Specification 1.4, Bates 79.) The provision was not discussed or mentioned in the contracting officer's February 4, 2000, decision to remove the HVAC work from appellant's contract, cited by the contracting officer in his September 17, 2001 letter, nor raised by the District in this proceeding. The District has not identified its authority for imposing on Appellant the cost of providing air conditioning during *the summer of 2000*.

While cooling the Center during summer months had been a contract requirement, the District took over completion of HVAC work in February 2000. (AF 10, AF2 10.) In response to appellant's March 20, 2000, proposal for performance of the work described in Fama's January 20 letter, (AF 7, Bates 365), the District confirmed to appellant on March 23, 2000, that "all the mechanical works related to heating system have been accomplished by other means and no further action is needed by your office." (AF 7, Bates 363.)

If the District intended to charge costs for cooling the building against appellant, yet at the same time prevent appellant from taking steps to achieve that result, the District was obligated to treat the work required with some urgency in order to mitigate

appellant's damages. *See Dano Resource Recovery, Inc.*, CAB No. 686, *supra*, at 3214-3225; *Churchill Chemical Corp. v. United States*, 602 F.2d 358, 361 (Ct. Cl. 1979); *CAL Inc. v. Dep't of Justice*, CBCA No. 870, 08-1 BCA ¶ 33,745; *WEDJ, Inc.*, ASBCA No. 27067, 86-3 BCA ¶ 19,169. It failed to do so and thus appellant was not responsible for the failure of the system three or four months later when cooling was needed for the summer. Nor was appellant responsible for the District's costs in providing such cooling. For this additional reason, the District may not recover the costs to cool the building for the summer of 2000.

Accordingly, the District may recover damages under D-1168 but only for the work described in Fama's letter and incorporated as item "B" of the contracting officer's September 17, 2001, final decision. (AF 1, Bates 2.)

Damages

Looking at the deletion of HVAC work from appellant's contract as a deductive change, the amount the District may recover is gauged by what the work "would have cost" appellant to perform. *Gilbane-Smoot/Joint Venture*, CAB No. D-885, *supra*, ("Under this basic rule, deleted work is priced at the amount it would have cost the contractor had it not been deleted.") (citations omitted). The standard of reasonable cost "must be viewed in the light of a particular contractor's costs ... and not the universal, objective determination of what the cost would have been to other contractors at large." *Gilbane-Smoot/Joint Venture*, CAB No. D-885, *supra*.

Obtaining the work identified in the Fama letter would have cost appellant $22,751.11 according to the prices Fama included in its letter (FF 31, 32.), which is very near the $24,867 price sought by the District in item "B" of its September 17, 2001 letter. (AF 1, Bates 2.) The latter price was based on the actual costs incurred for performance of the work by another contractor, and this comparison gives us some confirmation of the amount it would have cost appellant to perform the work. *See Nager Elec. Co. v. United States*, 442 F.2d 936, 945-946 (Ct. Cl. 1971). Accordingly, the District is entitled to a credit of $22,751.11 for the cost of performing the HVAC work Prince failed to perform under its contract.[228]

D-1203: District Claim for $125,911 Credit

Appeal D-1203, filed April 11, 2003, stems from the contracting officer's April 11, 2003, final decision deducting $125,911 from the contract price for uncompleted punch list items. (AF2 1.) Jurisdiction has not been challenged in D-1203. As we noted herein, the contracting officer sought to assess appellant for contract work it allegedly did not perform, three years after conclusion of the project. The District contends that the

[228] Reprocurement costs would be only slightly different. *See Cascade Pac. Int'l v. United States*, 773 F.3d 287, 293-294 (Fed. Cir. 1985) (government entitled to recover reasonable costs of reprocurement). The District's cost of performing the work was $24,867. (AF 1, Item "B", Bates 2.) We find Fama's price to Prince to be a reasonable cost for the work, and find the District entitled to set off that amount against the contract price.

tasks identified in the contracting officer's April 11, 2003, letter were required of appellant under its contract and that it failed to perform them. (Appellee's Post Hr'g Br. 16.) As a result, the District contends that payment for those tasks is unwarranted and that the District is entitled to credit against contract payments. (*Id*.)

It is the District's burden to prove that the work listed was required under the contract, was not performed, and with reasonable precision, the amount to which it is entitled. *See Alta Constr. Co.*, PSBCA No. 1334, 87-1 BCA ¶ 19,491. In this proceeding, the District presented no testimonial evidence to demonstrate that appellant failed to perform contract work. The contracting officer's letter of April 11, 2003, asserts that appellant did not perform the listed tasks, but, as discussed above, the final decision itself is not sufficient evidence to establish nonperformance as a fact in this proceeding. *See C.P.F. Corp.*, CAB No. P-413, 42 D.C. Reg. 4902, 4908 (Nov. 18, 1994); *Ebone, Inc.*, CAB No. D-971, *supra*; *see also, Wilner v. United States*, 24 F.3d 1397 (Fed. Cir. 1994); *Southwest Welding & Mfg. Co. v. United States*, 413 F.2d 1167, 1184-85 (Ct. Cl. 1969).

Nevertheless, through the testimony of appellant's witness, Mr. Bullock, it was established that appellant did not perform certain items of work called for by the contract. Mr. Bullock's testimony established that appellant did not provide the fence and gates and exhaust fan EF-7. (Hr'g Tr., vol. 3, 96:13-98:14; 114:16-116:13; 140:4-142:4; 159:7-160:7.) Both were required by the contract. (AF 3, Special Conditions 23.01, Bates 87; Appellant's Hr'g Ex.2, M-4.) Mr. Bullock explained, and appellant argues, that appellant was relieved of the obligation to perform those tasks following discussions with District officials. In those discussions, according to Mr. Bullock, trade-offs occurred in which District officials excused appellant from installing a fence and gates and the exhaust fan in exchange for Prince's performance of other work that would have been additional to its contract. (Hr'g Tr., vol. 3, 96:13-98:14; 114:16-116:13; 140:4-142:4; 159:7-160:7.)

Appellant did not replace the existing doors and frames with new as required by the contract. (Appellant's Hr'g Ex.2, A-1 through A-5; Hr'g Tr., vol. 3, 106:13-109:2; 110:19-111:1; 153:13-158:12.) Mr. Bullock testified that replacing the frames would have damaged the cinderblock walls because the frames were mortared to the wall, and that, as with the fence and exhaust fan, District officials agreed that it would be acceptable if Prince simply refinished the existing metal to like-new condition and replaced the hardware, which is what Prince did. (*Id*.)[229]

Mr. Bullock's testimony regarding discussions with District officials who agreed that Prince would not be required to perform work as regards the fence, gates, exhaust fan, and doors and frames was nonspecific. The dates and circumstances of the meetings were not stated. However, even if the Board were to accept Mr. Bullock's uncontradicted testimony as establishing that the described discussions took place, such testimony does

[229] The District is not obligated to accept non-conforming work, even if the work provides an equivalent or superior result to that which is specified. *C&D Construction, Inc.*, ASBCA Nos. 48590, 49033, 97-2 BCA ¶ 29,283; *C.H. Hyperbarics, Inc.* ASBCA Nos. 53077, et al., 04-1 BCA ¶ 32,568.

not entitle appellant to relief. The difficulty with appellant's argument that it was excused from performing contract-required work is that it has not shown, and the record does not reflect, that any such discussions or agreements were with the contracting officer. Furthermore, none of the above discussions were reduced to a change order. In fact, none of the items listed as not performed in the contracting officer's April 11, 2003, letter were the subject of a change order agreed to by the contracting officer. (Hr'g Tr., vol. 3, 146:7-147:21.)

A formal change order relieving appellant of a contractual obligation issued by the contracting officer will be binding on the District. *ECC, International*, ASBCA 55781, 13-1 BCA ¶ 35,207. However, to obtain such relief, appellant must demonstrate that the person acting for the District had authority to modify the contract. *See A. S. McGaughan, Co.*, CAB No. D-926, 40 D.C. Reg. 4855 (Dec. 10, 1992); *Winter v. Cath-Dr/Balti Joint Venture*, 497 F.3d 1339, 1344 (Fed. Cir. 2007); *Northrop Grumman Sys. Corp. Space Sys. Div.*, ASBCA No. 54774, 10-2 BCA ¶ 34,517; *Henry Burge & Alvin White*, PSBCA No. 2431, 89-3 BCA ¶ 21,910 (project manager had no authority to relax the specifications); *Compare Lovering-Johnson, Inc.*, ASBCA No. 53902, 05-2 BCA ¶ 33,126 (formal bilateral modification by contracting officer included both the addition and deletion of work). Appellant has not shown or alleged that those with whom Mr. Bullock discussed deletion of contract requirements had authority to modify the contract. Therefore appellant has not shown that the contracting officer relieved appellant of its duty to perform the above tasks.

Mr. Bullock conceded that appellant did not engage the services of a watchperson. (Hr'g Tr., vol. 3, 98:15-99:22.) The reasons were that appellant did not perceive a need for one and no one from the District told Prince to engage a watchperson. (Hr'g Tr., vol. 3, 143:9-146:2.) However, the contract required it, whether or not District officials specifically directed appellant to provide watchpersons. (AF 3, Special Conditions 23.01, sub. I 1, Bates 88.) Absent a change by the contracting officer, the District is entitled to strict compliance with the contract requirements. *See Granite Constr. Co. v. United States*, 962 F.2d 998, 1006–07 (Fed. Cir.1992) ("[T]he government generally has the right to insist on performance in strict compliance with the contract specifications); *TEG-Paradigm Envtl., Inc. v. United States*, 465 F.3d 1329, 1342 (Fed. Cir. 2006).

Mr. Bullock conceded that appellant did not provide the sheet piling as shown on Drawing S-2, but testified that the sheet piling was intended to provide temporary protection of appellant's workers during excavation and that Prince provided a steel box frame for that purpose which thereby satisfied the requirement. (Hr'g Tr., vol. 3, 118:9-123:8; 162:9-165:20; 168:1-2.) That interpretation is contradicted by the designation of the sheet piling on Drawing S-2 as "stay-in-place" steel sheet pile. (Appellant's Hr'g Ex.2, Drawing S-2.) We find that appellant failed to provide the sheet piling, which was intended to remain installed at the site, as required by the contract.

Mr. Bullock believed that he had satisfied the contract's requirement for submission of photographs by sending to District officials by email many digital photographs during the course of the project. (Hr'g Tr., vol. 3, 123:13-124:10; 137:13-

138:19; 168:3-169:10.) The requirement for finish photographs and photographs of the mechanical equipment, however, is much more rigorous. (AF 3, Special Stipulations 33, Bates 55-57; AF 3, Specification 15.6, sub. 1.10, Bates 187.) Appellant's submission of numerous digital photographs does not meet the specific requirements of the stated provisions. It was not a just matter of providing digital photographs but complying with the exacting requirements spelled out in the contract. Appellant failed to comply with the contract requirements in this regard.

The same is true of the as-built drawings. Prince did not "submit" as-built drawings and to merely leave plans in the project office upon which Mr. Bullock would make notations of changes during the course of the project does not meet the requirement of the contract. (AF 3, Specification 1.4, Special Stipulations 39, Bates 62-65; AF 3, Specification 15.6, sub. 1.09, Bates 187; Hr'g Tr., vol. 3, 127:8-130:19; 171:5-175:9.) Such plans, as modified by Mr. Bullock's notations, may have met the requirement for preliminary as-built drawings, but did not meet the requirement of the final as-built drawings. *See Cal, Inc. v. Dep't of Justice*, CBCA 870, 08-1 BCA ¶ 33,745.

Mr. Bullock testified that Prince supplied the District with a few copies of the operation and maintenance manuals when he left them in the construction office. (Hr'g Tr., vol. 3, 131:15-18; 178:14-180:21.) This did not meet the standard of the contract, which required manuals for each piece of equipment, including six bound copies for all mechanical equipment. (AF 3, Specification 1.4, Bates 60; Specification 15.6, sub. 1.07, Bates 186.) As such, appellant did not supply the maintenance manuals as required by the contract.

Regarding office space for the District's inspector, Mr. Bullock conceded that appellant did not provide a trailer but testified that office space was provided in the building and that drinking water was available. (Hr'g Tr., vol. 3, 101:6-103:22; 149:9-151:10; 152:13-21.) The specifications did not establish an absolute requirement that appellant provide a trailer: A trailer in good condition outfitted as an office, "*may* be furnished for the office" (emphasis added). (AF 3, Special Conditions 26.01, sub. 9.01, Bates 70-71.) The District has not proved that appellant failed to provide an adequate office for the inspector, with water available, and we find that appellant was not required to provide the office space in a trailer.

The District has not contradicted Mr. Bullock's testimony that the roof manufacturer refused to provide a warranty because the District directed changes to the manufacturer's installation requirements. (Hr'g Tr., vol. 3, 131:19-135:14; 180:22-186:6.) Nor has the District contradicted the project manager's testimony that appellant installed the drainpipe in the elevator shaft excavation. (Hr'g Tr., vol. 3, 135:20-137:12.) Finally, the cost differential regarding the chiller was unexplained except by a note on the District's cost estimate that its claim was invalid. (AF2 1; Appellant's Hr'g Ex. 3, Bates 138.) Finally, the District has not identified a contract requirement that inertia pads be

provided. Accordingly, the District may not recover for these items.[230]

In conclusion, we find that appellant failed to provide the following work required by the contract: install fence and gates, provide a watchperson, install new doors and frames, provide exhaust fan EF-7, provide sheet piling, provide project photographs, provide as-built construction drawings, and provide operation and maintenance manuals. Appellant has not shown that the failure to perform these tasks was excused or excusable or that they were the subjects of a contract change order relieving appellant of the obligation to perform them.

Damages

Appellant is not entitled to payment for contract work that it did not perform, and the District is entitled to receive a credit for such work. *See M & M Elec. Co., Inc.*, ASBCA No. 39205, 90-2 BCA ¶ 22,832; *Soledad Enters., Inc.*, ASBCA Nos. 20423, et al., 77-2 BCA ¶ 12,552. A contractor may not be compensated "for work not performed, whether the non-performance results from termination or from deletion of a severable portion of the work." *J.F. Shea Co. v. United States*, 10 Cl.Ct. 620, 626 (1986); *Mega Constr. Co. v. United States*, 29 Fed. Cl. 396, 475 (Fed. Cl. 1993). Thus, we conclude that appellant is not entitled to be paid for providing the fence and gates, providing a watchperson, providing exhaust fan EF-7, providing sheet piling, providing project and equipment photographs, providing as-built construction drawings, and providing new doors and frames.

It is the District's burden to establish that the amount it seeks to deduct from appellant's contract payments represents a reasonable credit for the work appellant did not perform. *See Soledad Enters., Inc.*, ASBCA Nos. 20423, et al., 77-2 BCA ¶ 12,552; *Alta Constr. Co.*, PSBCA No. 1334, 87-1 BCA ¶ 19,491. Typically, the price of a deductive contract change is based solely upon the costs "the contractor would have incurred had the work not been reduced or deleted." *Olympiareinigung, GmbH*, ASBCA No. 53643, 04-1 BCA ¶ 32,458 at 160,563, *citing Celesco Indus., Inc.*, ASBCA No. 22251, 79-1 BCA ¶ 13,604 at 66,683; *Osborne Constr. Co.*, ASBCA No. 55030, 09-1 BCA ¶ 34,083. Although, in general, actual costs are the preferred method of pricing a contract adjustment:

> [a]s a general rule, the cost of deleted work is usually proven by estimates, "simply because the work was never performed and actual, historical cost experience is unavailable...". *Globe Construction Company*, [ASBCA No. 21069, 78-2 BCA ¶ 13,337] at 65,222. The estimate should be supported by detailed, substantiating data. *See Atlantic Electric Co., Inc.*,[GSBCA No. 6016, 83-1 BCA ¶ 16,484]; *see also S.W. Electronics & Mfg. Corp.*, [ASBCA

[230] As discussed above, the contracting officer's final decision is not sufficient, in and of itself, to prove facts asserted therein. *Wilner v. United States*, 24 F.3d 1397 (Fed. Cir. 1994); *Ebone, Inc.*, CAB No. D-971, *supra* .

> Nos. 20698, 20860, 77-2 BCA ¶ 12,631, *aff'd*, 655 F.2d 1078 (Ct. Cl. 1981)]. Here, because the work was never performed, our determination of the cost of the deleted work revolves around the comparative reasonableness of the estimates presented by each party.

Gilbane-Smoot/Joint Venture, CAB No. D-885, 40 D.C. Reg. at 4987.

The contracting officer's determination of the amount to be credited because of appellant's failure to perform all the work called for under the contract was based on a detailed estimate of the costs that would be incurred to perform the tasks listed in the final decision. (Appellant's Hr'g Ex. 3, Bates 134-143) That estimate calculated the prices for the omitted work as follows: installing fence and gates, $15,961.60; providing a watchperson, $22,688.64; providing exhaust fan EF-7, $4,819.47; providing the required sheet piling, $3,621.53; providing project photographs, $969.60; providing as-built construction drawings, $12,000,[231] and installing new frames and doors, $25,302.38. The estimates were not explained by the District at the hearing, but they constitute the only evidence available to establish the costs appellant would have incurred had it performed the work required of it. Accordingly, we find the estimates sufficient to establish damages on a jury verdict basis.

Where, as here, appellant's failure to perform contract-required tasks is clear and admitted by appellant's representative, compelling reasons exist to provide compensation and to prevent appellant from enjoying a windfall by receiving payment for contract work it did not perform. Under these circumstances, use of a jury verdict to establish the District's recovery is warranted. *See Org. for Envtl.l Growth, Inc.*, CAB No. D-850, 41 D.C. Reg. 3539 (Aug. 11, 1993); *Gilbane–Smoot/Joint Venture*, CAB No. D-885, *supra*. The District's estimate provides sufficient evidence to make a fair and reasonable approximation of damages. *See S. W. Elecs. & Mfg. Corp. v. United States*, 655 F.2d 1078, 1088 (Ct. Cl. 1981); *In re Grumman Aerospace Corp. ex rel. Rohr Corp.*, ASBCA No. 50090, 01-1 BCA ¶ 31,316.

That estimate is sufficient to establish a prima facie case as to the reasonableness of those estimated costs, *Fortec Constr.*, ASBCA Nos. 27238, et al., 85-2 BCA ¶ 17,972; *Fox Constr. Inc.*, ASBCA Nos. 55266, 55267, 08-1 BCA ¶ 33810, and it is appellant's burden to produce evidence, if it has any, to dispute the District's calculation of the "would have cost" figures. If appellant's cost to perform the tasks identified by the contracting officer would have been less than the estimate relied upon, appellant was in the best position to present such evidence, and it was incumbent upon appellant to do so. *See Civil Constr., LLC*, CAB No. D-1294 2013 WL 3573982 (Mar. 14, 2013); *see also, Lindahl v. Office of Personnel Mgmt.*, 776 F.2d 276, 280 (Fed. Cir. 1985).

[231] The contracting officer's letter sought $25,000 for appellant's failure to provide as-built drawings even though the backup estimate calculated the cost to provide them as $12,000. (Appellant's Hr'g Ex. 3, Bates 134.) The District provided no basis for the contracting officer's figure and we accept the amount shown on the estimate.

In this case, although appellant disputed entitlement of the District to recover for the omissions discussed above, it did not challenge the accuracy or reliability of the estimate on which the contracting officer relied. In fact, it was appellant that submitted the estimate into the record. Accordingly, we find the District entitled to a credit in the amounts set forth below for contract work that appellant did not perform. *See Reliable Contracting Group, LLC v. Dep't of Veterans Affairs*, CBCA No. 1539, 11-2 BCA ¶ 34,882.[232]

In D-1203, the District is entitled to a credit of $85,363.22 against the contract balance, calculated as the following sum:

Install fence and gates	$15,961.60
Provide a watchperson	22,688.64
Provide Exhaust Fan EF-7	4,819.47
Provide Sheet Piling	3,621.53
Provide Project Photographs	969.60
Provide As-Built Drawings	12,000.00
Install new frames and doors	25,302.38
	$85,363.22

D-1173: Appellant's Claim for Final Payment

In D-1173, appellant challenges the District's refusal to pay its alleged $151,226.57 contract balance. (Feb. 14, 2002 Notice of Appeal.) The District has not opposed appellant's entitlement to final payment under the contract except to claim credits for $191,063 at issue in D-1168 and $125,911 at issue in D-1203. Given that we have resolved the credit amounts due in D-1168 and D-1203, we conclude that the appellant is entitled to payment of the final contract balance in D-1173, subject to the credits allowed herein. Because the record reveals uncertainty regarding the balance due on the contract, we remand to the parties' for a determination of the amount remaining unpaid.

D-1120: Prince's Appeal From Contracting Officer's February 4, 2000, Final Decision

In D-1120, Prince appeals a February 4, 2000, contracting officer final decision removing from appellant's contract "several items of work related to the operation of the heating and cooling systems" at the Center, and stating the District's intention to issue a credit change order for the amount it incurs "to have the work implemented by others." (AF 10, Bates 409.) We conclude that the February 4, 2000, final decision was premature and its appeal is not within the jurisdiction of the Board.

Viewing the February 4, 2000, "final decision" as addressing a deductive change, issuance of the final decision was premature. Appellant had not submitted a claim that

[232] The District has not met its burden of demonstrating that it would have cost $4,000 to provide the operating and maintenance manuals because that item is not included in the estimate.

the contracting officer was denying, and, at that time, the District had no monetary claim of its own. It had not incurred any damages resulting from appellant's alleged nonperformance of the "heating and cooling" contract requirements. Under those circumstances, the "final decision" was premature. *See Severn Constr. Servs., LLC*, CAB No. D-1409 2013 WL 3291402 (June 24, 2013) (Board lacked jurisdiction to hear indemnification claim before an amount or basis of liability had been determined).

Here, the contracting officer's February 4, 2000, letter, while styled as a "final decision" neither addressed a claim of appellant nor asserted a monetary claim of the District's. Rather, it was a notification that the District intended in the future to seek monetary relief based on the work it alleged appellant had failed to perform. Notwithstanding its characterization as a "final decision," it does not meet the standard of the contract's definition of a claim and, therefore, appeal from that premature action is not within the Board's jurisdiction. As used in the contract's Disputes clause, claim "means a written demand or written assertion by one of the contracting parties seeking as a matter of right, the payment of money, the adjustment or interpretation of contract terms, or other relief arising out of or related to the contract." (AF 3, Specification 1.4, Special Conditions 13.0.A, Bates 73.) *See also, McDonnell Douglas Corp.*, ASBCA No. 50592, 97-2 BCA ¶ 29,199 *clarified on recons.*, 98-1 BCA ¶ 29,504.[233] Accordingly, the appeal is subject to dismissal as beyond the jurisdiction of the Board.[234]

D-1126: Prince's Appeal from the Contracting Officer's Deemed Denial of its March 23, 2000, Claim

On June 26, 2000, appellant filed an appeal from an alleged failure of the contacting officer to decide its March 23, 2000, claim. (D-1126, Compl. ¶14; June 26, 2000, Notice of Appeal.) The record does not contain a copy of a March 23, 2000, claim. As the claimant in D-1126, it is appellant's burden to demonstrate Board jurisdiction. *Total Procurement Serv., Inc.*, ASBCA No. 53258, 01-2 BCA ¶ 31,436 at 155,237; *Factek, LLC*, ASBCA No. 55345, 07-1 BCA ¶ 33568 ("The burden of proof is on appellant as the party seeking to establish jurisdiction."). Appellant's failure to present that letter, or any other evidence to support jurisdiction, precludes us from finding on this record that such a claim was ever filed. Accordingly, we cannot determine that we have jurisdiction. CAB No. D-1126 is dismissed for lack of jurisdiction.

III. CONCLUSION

D-1168 is granted only to the extent that the District may credit $22,511 against the contract price for appellant's failure to perform the work as described in the Fama letter.

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[233] Styling the letter as a "final decision" does not establish a basis for the Board's jurisdiction. *See Sunshine Development, Inc*., PSBCA No. 4200, 99-1 BCA ¶ 30,149; *McDonnell Douglas Corp., supra.*

[234] *See Chapman Law Firm Co. v. Greenleaf Constr. Co.*, 490 F.3d 934, 939 (Fed. Cir. 2007) (Where the issues originally in controversy between the parties are no longer at issue, the case should generally be dismissed.). Our disposition in D-1168 herein moots the purported claim alleged in D-1120.

D-1203 is granted only to the extent that the District may credit $85,363.22 against the contract price for appellant's failure to perform certain miscellaneous punch list work required under the contract.

D-1173 is granted as to entitlement, subject to the credits for D-1168 and D-1203 noted herein, and subject to our remand to the parties' for determination of the amount remaining unpaid under the contract.

D-1120 is dismissed with prejudice.

D-1126 is dismissed with prejudice.

Statutory interest is to be added to the amounts due hereunder. D.C. Code §2-359.09 (2011). The parties shall provide the Board with a status update in 30 days regarding their determination of the amount due in light of the Board's decision.

SO ORDERED.

Date: February 28, 2014

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

CONCURRING:

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

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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

MILESTONE THERAPEUTIC SERVICES, PLLC	)	
	)	
Under DCPS-OSE Request for Information for	)	CAB No. P-0945
Occupational Therapy, Physical Therapy	)	
And Speech-Language Pathology Services	)	

For the protester: Daryle A. Jordan, Esq., Jordan Patrick & Cooley LLP. For the District of Columbia Government: Nancy K. Hapeman, Esq., Chief, Procurement Section; Jon N. Kulish, Esq., Assistant Attorney General, Office of the Attorney General.

Opinion by Administrative Judge Maxine E. McBean with Administrative Judge Monica C. Parchment concurring.

ORDER GRANTING DISTRICT'S MOTION TO DISMISS

Filing ID # 55226582

Milestone Therapeutic Services, PLLC ("Milestone" or "protester") protests a contract award by the District of Columbia Public Schools (the "District" or "DCPS") to a competitor for occupational therapy, physical therapy, and speech language pathology services. In its protest, Milestone alleges bias by DCPS, and a lack of competition in the bidding process. The District, however, moves to dismiss the protest, arguing that the Board lacks subject matter jurisdiction over Milestone's protest because a June 30, 2006, consent decree resulting from a civil rights lawsuit against the District (the "*Jones* Consent Decree")[235] exempts DCPS from the requirements of both federal and District of Columbia procurement law. After reviewing the record and the *Jones* Consent Decree, the Board finds that this procurement is subject to the *Jones* Consent Decree and, as such, the Board lacks jurisdiction over Milestone's protest. We therefore grant the District's motion and dismiss the instant protest with prejudice.

BACKGROUND

On April 12, 2013, DCPS, through its Office of Special Education ("OSE") issued a Request for Information ("RFI") in order to establish a list of pre-qualified vendors to provide speech language pathology services for 600 students, occupational therapy services for 1,849 students, and physical therapy services for 278 students during the 2013-2014 school year. (Protest 5; District of Columbia's Mot. to Dismiss for Lack of Subject Matter Jurisdiction in Response to Protest of Milestone Therapeutic Servs., PLLC ("Mot. to Dismiss") 3-4, ¶ 7-8; *see also* Mot. to Dismiss Ex. 1.) The RFI stated that the

[235] *See Blackman v. District of Columbia*, 454 F. Supp.2d 1 (D.D.C. 2006) (approving the *Jones* Consent Decree). As we discuss below, *Blackman* is a consolidated case that includes *Jones v. District of Columbia*. Since the 2011 dismissal of the *Blackman* portion of the case, only the *Jones* plaintiffs remain. (Mot. to Dismiss Ex. 4 at 2, ¶ 7.)

"target population for these services [would include] special education students across the District of Columbia." (Mot. to Dismiss Ex. 1 at 1.) It also indicated that the contractors being sought would provide services "in accordance with students' needs [as] outlined by federal mandates." *Id.*

Notably, the RFI did not contain reference to either the Procurement Practices Reform Act of 2010 ("PPRA"), which sets forth the statutory requirements for procurements for almost all District of Columbia agencies, including DCPS, or the *Jones* Consent Decree (discussed further *infra*). (*See generally* Mot. to Dismiss Ex. 1.) The RFI did, however, reference an unrelated "2002 *Petties* Order and Consent Decree" issued in *Petties v. District of Columbia*, 298 F. Supp.2d 60 (D.D.C. 2003), which sets forth procedures to ensure prompt payment of DCPS special education contractors (the "*Petties* Decree"). (*See* Mot. to Dismiss Ex. 1 at 1; *see also* Mot. to Dismiss Ex. 9.) Although the RFI contained a general description of the types of services being sought and the required contractor capabilities, it did not include information regarding evaluation criteria. In fact, the RFI expressly stated "[t]his is not a Request for Quote or Request for Proposal." (Mot. to Dismiss Ex. 1 at 1.)

On April 12, 2013, Regina Grimmett, the Director of Related Services Operations at OSE, transmitted the RFI via email to eight potential vendors, including Milestone. (*See* Mot. to Dismiss Ex. 7 at 1-3, ¶¶ 2, 9.) On April 16, 2013, OSE issued a revised RFI to the same group of potential vendors.[236] (Mot. to Dismiss 6, ¶ 15.) According to Ms. Grimmett's declaration, Milestone and seven other offerors submitted timely responses to the revised RFI by the deadline of April 18, 2013. (Mot. to Dismiss Ex. 7 at 4, ¶ 11; Mot to Dismiss 6, ¶ 16.)

After several RFI respondents inquired about the status of the agency's review, on June 6, 2013, Ms. Grimmett emailed all offerors a statement that their RFI responses had been "used for benchmarking informational purposes for OSE." (Mot. to Dismiss Ex. 7 at 4-5, ¶ 13.) Milestone alleges that on June 11, 2013, it contacted Ms. Grimmett to request a meeting. (Protest 5.) During that meeting, Dr. Arthur Fields, DCPS Senior Director of Related Services, advised protester's representatives that DCPS had awarded the contract to Milestone's competitor, Progressus Therapy, LLC ("Progressus"). (Protest 5-6.)[237]

Milestone filed the instant protest with the Board on July 10, 2013. (Protest 1.) In doing so, Milestone alleged the following protest grounds: (1) DCPS's award demonstrated "[a]pparent or actual favored treatment" of Progressus, the employer of "a former high-ranking DCPS employee;" (2) DCPS violated the PPRA requirement for a full and open competition; (3) DCPS's award to Progressus breached the specified contract completion requirements in violation of the procedures for human care procurements set forth in D.C. CODE § 2-354.06 (2011); and (4) DCPS breached its implied duty of good faith and fair dealing through the use of "unfair, deceptive, and misleading contract award procedures." (*See* Protest 3-4.)

[236] According to the District, the RFI was revised only as follows: "add the words 'for school year' to the 'Rate Per Pupil' block" on page three. (Mot. to Dismiss 6, ¶ 15.)

[237] DCPS does not appear to have executed a contract with Progressus until August 20, 2013—almost two months after Milestone met with DCPS. (*See* District of Columbia's Mot. for Leave to File its Reply to Protester's Opp'n to the District of Columbia's Mot. to Dismiss and Reply to Protester's Opp'n in CAB No. P-0945, Aug. 23, 2013 ("Reply") Ex. 11 at 1.)

On August 1, 2013, the District moved for dismissal, arguing that, under the *Jones* Consent Decree, the Board lacked subject matter jurisdiction over Milestone's protest. (*See generally* Mot. to Dismiss.) On August 9, 2013, the District filed a "Protective Determination and Findings to Proceed with Contract Award and Performance While a Protest is Pending" ("D&F").

On August 12, 2013, the protester filed its opposition to the District's motion to dismiss, arguing, *inter alia*, that the procurement provisions of the *Jones* Consent Decree were discretionary, and that DCPS's solicitation had not invoked the decree. (*See* Protester Milestone Therapeutic Services, PLLC's Opp'n to the District of Columbia's Mot. to Dismiss ("Opp'n"). On August 16, protester also filed a "Motion to Set Aside DCPS' Protective Determination and Findings to Proceed with Contract Award and Performance, and Reinstate Stay of Contract Award and Performance Pending Resolution of the Protest" ("Mot. to Set Aside D&F").[238]

On August 16, 2013, DCPS awarded Progressus a contract for services for the 2013-2014 school year.[239] (*See* Reply Ex. 11.) Progressus accepted the contract award on August 21, 2013. (*See* Reply Ex. 12 at 1.) The award letter sets forth per-pupil rates, without a corresponding cap or total estimated contract value; however, the protester alleges that the contract award has an approximate value of over $5,000,000 annually. (Reply Ex. 11; Protest 3.)

DISCUSSION

The Board's Jurisdiction

The Board's remedial powers may only be invoked after its jurisdiction over a protest or appeal is established. *Grp. Ins. Admin., Inc.*, CAB No. P-0309, 39 D.C. Reg. 4491, 4497 (Mar. 25, 1992). The Board's jurisdiction to hear protests is defined by statute—specifically the PPRA, D.C. CODE §§ 2-351.01, *et seq.* The PPRA states that "[t]he Board shall be the exclusive hearing tribunal for, and shall review and determine de novo any protest of a solicitation or award of a contract . . . by any actual or prospective bidder . . . who is aggrieved in connection with the solicitation or award of a contract." *See* D.C. CODE § 2-360.03(a)(1) (2011). The PPRA also provides that the Board shall have jurisdiction over all subordinate agencies and instrumentalities of the District, with the exception of those named in D.C. CODE § 2-351.05(c) (2012). *See* D.C. CODE §§ 2-360.03(b), 2-351.05. Therefore, the Board has jurisdiction over the instant protest only if DCPS's procurement is subject to the requirements of the PPRA.

The *Jones* Consent Decree

As noted above, the RFI stated that services would be provided in accordance with student needs, as outlined by federal mandates, to a target population that included special education students throughout

[238] Finding that the Board lacked jurisdiction in the present protest, on September 24, 2013, the Board denied protester's challenge to the D&F during a telephone conference with the parties.
[239] The Board notes that the record does not contain any information regarding a formal solicitation, contractor proposals, evaluation criteria, or source selection in support of the contract award.

the District. (*See* Mot. to Dismiss Ex. 1 at 1.) However, the RFI did not mention any federal mandates other than the *Petties* Decree, which imposes procedural requirements for the prompt payment of DCPS special education contractors. (*See generally* Mot. to Dismiss Exs. 1, 9.) In particular, the RFI failed to reference the *Jones* Consent Decree which stems from two consolidated class action law suits, *Jones v. District of Columbia* and *Blackman v. District of Columbia*, Case Nos. 97-1629(PLF) and 97-2402(PLF), filed by plaintiffs who alleged violations of their constitutional rights and their right to a free and appropriate public education afforded by the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq.* and 42 U.S.C. § 1983. (*See* Mot. to Dismiss 2; Mot. to Dismiss Exs. 2-4.)

In the *Blackman* and *Jones* consolidated cases, plaintiffs alleged that the District, through DCPS, had failed to (1) "timely respond to students' and parents' requests for administrative due process hearings pursuant to the IDEA" (*Blackman*); and (2) "timely implement Hearing Officer Determinations [. . .] and settlement agreements [. . .] as required by the IDEA" (*Jones*). *Blackman v. District of Columbia*, 454 F. Supp.2d 1, 2-3 (D.D.C. 2006). Although the *Blackman* portion of the consolidated cases was dismissed in 2011, the *Jones* portion was not, and the *Jones* Consent Decree consequently remains in effect. (*See* Mot. to Dismiss Ex. 2, ¶ 150 (the *Jones* Consent Decree provision stating that the decree would cease to be in effect when both the *Blackman* and *Jones* cases had been dismissed);[240] Mot. to Dismiss Ex. 4 at 2, ¶ 7.)

The *Jones* Consent Decree provides, *inter alia*, that for procurements implementing the decree, "the [District of Columbia Government is] not bound by the D.C. Procurement Practices Act ["PPA"], D.C. CODE § 2-301.01, *et seq.*,[241] any District or federal law relating to procurement, and any regulations thereunder." (Mot. to Dismiss Ex. 2, ¶ 139.) In addition, Section XII of the *Jones* Consent Decree stated that the United States District Court for the District of Columbia would "retain jurisdiction over this case for purposes of interpreting, monitoring, and enforcing compliance with all provisions of this Consent Decree, [. . .] and subsequent orders of the Court." (Mot. to Dismiss Ex. 2, ¶ 154.)

Here, the District and the protester appear to agree, as a general matter, that services[242] required by OSE pursuant to the *Jones* Consent Decree are not subject to the PPRA. (*See* Mot. to Dismiss at 4-5, ¶¶ 9-13; Protester Milestone Therapeutic Svcs., PLLC's Opp'n to the District of Columbia's Mot. to Dismiss ("Opp'n") at 1-3.) However, the parties differ as to whether the *Jones* decree applies to the instant procurement. *Id.* Specifically, the protester argues that the *Jones* Consent Decree does not apply because (1) the *Jones* Consent Decree provisions relating to procurement are "discretionary[,] and the District elected not to waive its procurement laws when it enacted" the PPRA; (2) "DCPS did not properly invoke its discretion to waive District procurement law" when it issued the RFI; (3) even if DCPS had invoked the *Jones* Consent Decree in issuing the RFI, it allegedly abused its discretion in

[240] The *Jones* Consent Decree is also available at 2006 WL 2456413.
[241] The Procurement Practices Act of 1995 ("PPA"), D.C. CODE §§ 2-301.01, *et seq*., was the predecessor statute to the Procurement Practices Reform Act of 2010 ("PPRA"), D.C. CODE §§ 2-351.01, *et seq.*
[242] The *Jones* Consent Decree states that "[f]or purposes of the compensatory education provisions of this Consent Decree, the term 'services' includes: . . . (d) related services, 20 U.S.C. § 1401(26); . . . ." (Mot. to Dismiss Ex. 2, ¶ 24.) Under 20 U.S.C. § 1401(26), "[t]he term 'related services' means . . . such developmental, corrective, and other supportive services (including speech-language pathology and . . . physical and occupational therapy . . . ." Education of Individuals with Disabilities, 20 U.S.C. § 1401(26) (2010).

doing so; and (4) the District has taken the *Jones* Consent Decree out of context, and it "should not be construed to completely waive District procurement law." (Opp'n 1-2.)

The Board's Decisions in *Banks* and *Systems Assessment & Research, Inc.*

In support of the above arguments, protester cites the Board's holding in *Terry Banks, Esq., et al.*, CAB Nos. P-0743, P-0744, 54 D.C. Reg. 2060 (Dec. 27, 2006). In *Banks*, a group of incumbent DCPS hearing officers challenged a DCPS procurement for new hearing officers that was issued after the *Jones* Consent Decree took effect.[243] *Id.* Although DCPS argued that the procurement was not subject to the Board's jurisdiction as a result of the *Jones* Consent Decree, we rejected DCPS's argument, finding that the Board had jurisdiction "*only because* DCPS voluntarily chose to make [its] solicitation subject to" District procurement law by incorporating the PPA provisions and the Board's protest jurisdiction by its express terms. *Id.* at 2062 (emphasis added). That is, DCPS had opted into the Board's jurisdiction as a result of its own actions. *See id.*

Similarly, in *Systems Assessment & Research, Inc.* ("*Systems Assessment*"), the Board considered a procurement in which DCPS had incorporated both the *Jones* Consent Decree and some provisions of the PPA in its solicitation. *Systems Assessment*, CAB No. P-0738, 54 D.C. Reg. 2033 (Sept. 21, 2006), *recons. denied*, 2007 WL 5685351 (June 11, 2007). After the Board denied the protest for lack of jurisdiction, the protester moved for reconsideration, arguing that the Board did, in fact, have jurisdiction because DCPS had not elected to waive District procurement law in its solicitation as authorized by the decree. *Id.* at 2007 WL 5685351. The Board again disagreed with the protester that it had jurisdiction over the matter and noted that the *Jones* Consent Decree "unambiguously provides a complete exemption from the PPA, and, therefore, from our jurisdiction pursuant to the PPA."[244] *Id.* Further, in denying the protester's motion, the Board held that DCPS's omission of PPA provisions concerning bid protests, "coupled with the repeated references in the solicitation to implementing the [*Jones*] consent decree, demonstrate the intent of DCPS to be exempt from" the Board's protest jurisdiction. *Id.* But we also recommended that, in the future, DCPS expressly invoke the *Jones* Consent Decree in solicitations that are not intended to be subject to District procurement law. *Id.* We repeat that recommendation here.

In the instant case, protester argues that the *Jones* Consent Decree is discretionary and must be invoked in order to exempt a solicitation from District procurement law. (Mot. to Set Aside D&F 3.) However, this argument is contrary to the Board's holding in *Banks*, *supra*, as the District correctly points out. (Reply 5.) *See Banks*, 54 D.C. Reg. 2060 (finding that the Board has "jurisdiction over the protests because the solicitation *expressly* incorporates the Procurement Practices Act and provides resolution of protests by the Board" (emphasis added)). Given the record before us—which is dearth of any evidence that DCPS intended to invoke the PPRA in this procurement—we find that Milestone's protest is not within the subject matter jurisdiction of this Board. (*See generally* Mot. to Dismiss Ex. 1.)

[243] In *Banks* and *Systems Assessment*, we referred to the *Jones* Consent Decree as the "*Blackman* Consent Decree." *Banks*, 54 D.C. Reg. 2060, and *Systems Assessment*, 54 D.C. Reg. 2033, *recons. denied*, 2007 WL 5685351.
[244] In *Systems Assessment*, the Board stated that the PPA would not apply, if DCPS chose to elect the exemption; however, the *Jones* Consent Decree does not contain an express election requirement. *Cf. System Assessment*, *with* Mot. to Dismiss Ex. 2. ¶ 139.

Milestone Therapeutic Servs., PLLC
CAB No. P-0945

CONCLUSION

For the reasons discussed herein, the Board finds that the RFI and resulting procurement are subject to the *Jones* Consent Decree and, therefore, exempt from the provisions of District procurement law and the jurisdiction of this Board. Accordingly, we grant the District's motion and dismiss the instant protest with prejudice.

SO ORDERED.

DATED: March 31, 2014

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

CONCURRING:

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

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GOVERNMENT OF THE 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.

ORDER DENYING APPELLANT'S MOTION
FOR RECONSIDERATION AND CLARIFICATION
Filing ID #55245223

Before the Board is the request of Appellant, Civil Construction, LLC ("Appellant" or "Civil"), for reconsideration of the Board's March 14, 2013, final opinion in this matter. Specifically, Appellant requests that the Board amend its original opinion in this case to: (1) grant Appellant additional compensation for its scheduling, field, and subcontractor costs, and (2) clarify whether Appellant is entitled to profit on its increased performance costs. The District opposes Appellant's motion on the grounds that it has not satisfied the requirements in the Board Rules necessary to justify the Board's reconsideration of its final opinion on the merits in this case. After review of the assertions in the pending motion, the opposition thereto, and the record in this case, the Board denies the motion for reconsideration upon a finding that the Appellant has not provided the Board with any basis to reconsider and amend its opinion in this matter and, thus, has not proven its entitlement to any compensation beyond that which the Board previously awarded to Appellant. The motion for reconsideration is denied.

BACKGROUND

The Board previously rendered its final decision on the merits of this action on March 14, 2013, in a fairly lengthy 30-page opinion. *See Civil Constr., LLC*, CAB Nos. D-1294, D-1413, D-1417, 2013 WL 3573982 (Mar. 14, 2013) ("Op."). In brief, Civil's appeal arose from a street reconstruction contract in which the contracting officer issued a change order that substantially altered the manner and sequence in which Civil was to perform the required work causing delays and additional costs. *Id.* Civil sought an equitable adjustment of $1,143,730.01, plus interest, for its alleged increased labor, equipment, subcontractor, and related costs, as well as its field and home office overhead costs over the delay period. (*See* Civil Constr. LLC's Post-Hr'g Br. ("Appellant's Post Hr'g Br.") at 16-17.)

After the completion of the hearing on the merits in this case, the Board ultimately found that Appellant had only proven its entitlement to a compensable time extension of 166 days.

Op. 19-21. Based upon these established days of delay, the Board ordered the District to compensate Civil in the amount of $658,659.78, plus interest, for Appellant's increased labor, equipment, and field overhead costs, as well as a reasonable percentage mark-up on its direct costs to be negotiated by the parties. *Id.* at 31. The Board, however, determined that Appellant had not met its burden of proof in showing its entitlement to its claimed subcontractor and scheduling costs because of insufficient evidence that was presented to the Board at the hearing on these issues.

In the present motion for reconsideration, Appellant seeks (1) $1,390.00 in additional scheduling costs that were expressly disallowed by the Board in its opinion; (2) $12,071.51 in additional costs for its engineer's field facility that were expressly disallowed by the Board in its opinion; (3) additional costs allegedly incurred by Appellant's subcontractor, Fort Myer Construction Corp., that were expressly disallowed by the Board in its opinion; and (4) a profit award on Appellant's alleged increased performance costs that were also disallowed by the Board given the Board's separate award of a percentage mark-up to Appellant on its direct costs.[245] (Appellant's Mot. for the CAB's Recons. of its Op. and Req. for Clarification ("Mot. for Recons.") 11-12.)

DISCUSSION

A party may request that the Board reconsider its decision or order in an appeal for the following reasons:

(a) To clarify the decision;
(b) To present newly discovered evidence which by due diligence could not have been presented to the Board prior to the rendering of its decision;
(c) If the decision contains typographical, numerical, technical or other clear errors that are evidence [sic] on their face; or
(d) If the decision contains errors of fact or law, except that parties shall not present arguments substantially identical to those already considered and rejected by the Board.

D.C. Mun. Regs. tit. 27, § 117.1.

In applying the foregoing legal requirements, and as discussed below, the Board finds that the Appellant has provided no basis for the Board to amend its original opinion in this matter and merely expresses its disagreement with several aspects of the Board's decision on the merits in this case. Thus, the present motion is denied in its entirety.

Scheduling Costs

As it relates to Appellant's original claim for its scheduling costs in this action, the Board reviewed the evidence presented by the Appellant at the hearing regarding these alleged costs

[245] The Appellant characterizes its request for profit as a request for "clarification" of the Board's decision regarding the award of profit damages.

and determined that the Appellant was not entitled to additional compensation in connection with its contract performance primarily because it had underestimated its scheduling costs for the contract. Op. 24. The Board also found that the Appellant appeared to be seeking scheduling costs incurred in prosecuting the present appeal which are not permissible. *Id*.

Notwithstanding the Board's findings on Appellant's scheduling costs in the opinion, the present motion argues that the Appellant conclusively established at the hearing that it was entitled to additional scheduling costs that should have been granted by the Board in the amount of $1,390. (Mot. for Recons. 2-3.) However, the Appellant's mere disagreement with the Board's finding that the Appellant was not entitled to these additional costs is not a basis for the Board to reconsider its decision on this issue.

Field Costs

The Board's opinion also found that a portion of the Appellant's claimed field overhead costs were unsubstantiated and did not support its recovery of damages at the daily rate calculated by the Appellant's expert. Op. 24-25. The Board's findings in this regard were primarily based upon a noted and significant discrepancy between the expert's field overhead rate calculation and the Appellant's corporate back-up cost data supposedly underlying this calculation, which the Appellant failed to clarify or explain at the hearing to prove the accuracy of its expert calculations. *Id*.

The Appellant, by virtue of the present motion, attempts to explain or reconcile this field overhead cost discrepancy by pointing the Board to various other extraneous documents in the hearing record, which it claims would have explained or reconciled the discrepancy. (Mot. for Recons. 3-6.) Nonetheless, it was the Appellant's burden to prove its claimed field overhead costs at the hearing and it failed to substantiate the costs calculated by its expert at the hearing with consistent underlying internal corporate data. Additionally, Appellant's contentions in the present motion fail to show that the Board erred in finding the existence of this cost accounting discrepancy as a basis for precluding its recovery of certain field overhead costs that were not directly corroborated, but instead attempts to offer an untimely, and unverifiable, explanation about the discrepancy to the Board after the hearing on the merits has been concluded.

Subcontractor Costs

The Appellant also contends that the Board's decision to deny the subcontractor costs claimed by the Appellant is without a reasonable basis. (Mot. for Recons. 6-10.) The Board's opinion concluded that Appellant was not entitled to recover additional costs on behalf of its subcontractor Ft. Myer because Appellant knowingly negotiated a subcontract with Ft. Myer which did not include the District's previously revised prime contract terms which impacted the work Ft. Myer was to perform. Op. 29-30. Further, based upon the evidence produced at the hearing, the Board determined that the veracity of Ft. Myer's claimed costs had not been established by the Appellant as a basis for also denying this claim. *Id*. The Appellant offers no new evidence in the present motion to show that this decision by the Board was erroneous but essentially just contends that evidence in the hearing record supports its entitlement to compensation for Ft. Myer's claims. Therefore, these arguments are not a sufficient basis for the

Board to reconsider and amend its original decision denying Appellant's entitlement to Ft. Myer's claimed costs.

Profit

Lastly, the Board addresses the Appellant's request for "clarification" of the Board's decision with respect to any award of profit damages to the Appellant, which the Appellant claims that the Board failed to address in its opinion. (Mot. for Recons. 10-11.) However, in its opinion, the Board expressly denied Appellant's request for a 20% mark-up including profit on its field overhead costs, finding that it would result in an impermissible "double recovery" to the Appellant given that the Board was also separately ordering the District to negotiate another percentage mark-up with the Appellant on its direct costs. Op. 25; *see also* Op 14, n.29. Given this background, we find that Appellant's request for "clarification" is simply a request for reconsideration of an issue on which the Board has already ruled, and thus fails to establish a basis to grant the present motion.

CONCLUSION

For the reasons stated herein, the Board denies Appellant's motion for reconsideration.

SO ORDERED.

DATED: April 3, 2014

/s/ Monica C. Parchment
MONICA C. PARCHMENT
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:

TRILLIAN TECHNOLOGIES, LLC	)	
	)	CAB No. P-0954
Under Solicitation No. Doc. 127746	)	

For the protester: Howard A. Toorie, *Pro se*. For the District of Columbia: Robert Schildkraut, 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 #55249044

The instant protest arises from a challenge by Trillian Technologies, LLC ("Trillian" or "protester") to the terms of RFP No. Doc. 127746 (the "Solicitation") issued by the Office of Contracting and Procurement ("OCP") on behalf of the District of Columbia Office of the Chief Technology Officer ("OCTO") for information technology staff augmentation. In particular, Trillian contends that the Solicitation terms are ambiguous, unduly restrictive in numerous respects, and are also drafted in a manner which favors the incumbent contractor. Upon review of the record, the Board sustains the protest in part, finding that the Solicitation's provisions regarding key personnel for the contract are unreasonably ambiguous in that they fail to define the responsibilities or skill level requirements for these positions with any specificity. The Board, however, denies and dismisses the remainder of the protest allegations in this matter for lack of merit.

BACKGROUND

The present dispute concerns the terms of the Solicitation issued by OCP, on behalf of OCTO, on October 30, 2013, seeking a contractor to provide information technology staff augmentation ("ITSA") services for the District.[246] (Dist. Mot. to Dismiss & Agency Report ("AR") Ex. 2 at 1, ¶ 5, Dec. 23, 2013.) The Solicitation contemplated the award of a single, indefinite delivery/indefinite quantity-type contract with a base term of 1 year and 4 one-year

[246] Prior to issuing the Solicitation, the District issued RFP Doc. No. 105096 for the same services, which was also protested by Trillian before the Board. (AR 2.) The District subsequently took corrective action and the matter was dismissed by the Board as moot. (AR 2.)

option periods for the labor categories identified in the Solicitation.[247] (*See* AR Ex. 2 at 2-11, ¶¶ B.1-B.3.) The deadline for proposals was 2:00 p.m. on December 2, 2013. (AR Ex. 2 at 1, ¶ 9.)

Several years prior to issuing the disputed Solicitation, the District awarded a predecessor contract for the same ITSA services (Contract No. DCTO-2008-C-0135) to OST, Inc. ("OST"), on August 19, 2008, as a one-year contract with up to 4 option year periods.[248] (AR 2-3.) As the incumbent contractor, OST continued to provide the required ITSA services under a formal extension of this original ITSA contract executed by the District through January 18, 2014. (AR 3.) Subsequently, the District further extended OST's contract term to extend through the pendency of the instant protest.[249] (AR 3.)

In addition to staff augmentation, the Solicitation required offerors to supply a web-based Vendor Management System ("VMS"), a commercial off-the-shelf software tool that manages staffing requests, creates reports, and "supports the [ITSA] lifecycle." (*See* AR Ex. 2 at 12, ¶¶ C.3.3, C.3.26.) At the time that the Solicitation was issued, the District's incumbent contractor, OST, was using the Peoplefluent VMS (AR Ex. 2 at 14, ¶ C.3.19.); however offerors were permitted to propose any VMS that met the District's specifications, provided that the offeror could migrate all data from the incumbent's VMS to its own within 45 business days of award (*see* AR Ex. 2 at 33-34, ¶¶ C.5.13-C.5.14). The Solicitation's evaluation criteria assigned significant weight to each offeror's VMS, attaching 20 of the 112 available points to the offeror's "Technical/[VMS]/Candidate Staffing Request Module." (*See* AR Ex. 2a at 66, ¶ M.3.2, 69, ¶ M.3.10.) Up to 10 additional points were available for an offeror's implementation plan, which was to address VMS data migration. (AR Ex. 2a at 66, ¶ M.3.1.)

Trillian timely filed the instant protest at 9:36 a.m. on December 2, 2013—approximately 4.5 hours before the Solicitation's deadline for receipt of proposals. (Protest 1.) In its protest, Trillian alleges several improprieties in the Solicitation terms including, (1) failure to fully define requirements for the mandatory key personnel positions (Protest 8-9); (2) unreasonable restrictions on who could attend an offeror's oral presentation, resulting in restricted competition[250] (Protest 9-13); (3) improper consideration of an offeror's experience and past performance under a single "past performance" criterion worth 15 points (Protest 13-15); (4) failure to utilize past performance measures or service level agreements under prior contracts as

[247] The Solicitation stated that the District spent more than $47M on ITSA in fiscal year 2012—the last year for which it had complete, year round data. (AR Ex. 2 at 15, ¶ C.4.)
[248] Contract No. DCTO-2008-C-0135 was set to expire on August 19, 2013, after the exercise of all option years. (AR 2.)
[249] Specifically, on January 16, 2014, the CPO issued a Determination & Findings ("D&F") to proceed with further extending OST Contract No. DCTO-2008-C-0135 beyond its January 18, 2014, expiration date during the pendency of this protest for urgent and compelling circumstances. (Order Sustaining D&F, Feb. 14, 2013.) After due consideration, the Board sustained the D&F. (*Id*.)
[250]The Solicitation stated that offerors were not permitted to include staff from VMS vendors at their presentation. (*See* AR Ex. 2a at 64, ¶ L.20.2.) In its combined agency report and motion to dismiss, the District states that this restriction was necessary to ensure that the prime contractor was "completely familiar" with the proposed VMS software, and could thus meet the District's minimum needs. (*See* AR at 6-8.)

part of the past performance evaluation, or to utilize other meaningful past performance criteria (Protest 15-20); (5) establishment of an unreasonable evaluation scheme for offerors' proposed data migration plans that favored the incumbent, OST (Protest 20-22); and (6) prejudicial errors in the Solicitation's past performance survey forms (Protest 18-20).[251] Trillian also challenges the propriety of two earlier proposed sole source extensions of the incumbent Contract No. DCTO-2008-C-0135 for which the District posted public notice on June 10, 2013, and November 26, 2013, respectively. (Protest 4-5.)

The District filed its response, a combined Motion to Dismiss and Agency Report, on December 23, 2013. (AR 14.) As further discussed *infra*, the District contends, that the challenged terms and evaluation criteria in the Solicitation are proper and reasonably related to meeting the agency's minimum needs under the resulting contract. (AR 7-8, 12.) The District also asserts that the protester's challenges to the proposed sole source extension of the predecessor contract are untimely filed, and without merit, and should be dismissed by the Board. (AR 3-5, 13.)

DISCUSSION

This action is a pre-award protest against the terms of the subject Solicitation. As such, the Board exercises jurisdiction over this protest and its underlying allegations pursuant to D.C. Code § 2-360.03(a)(l) (2011). For the reasons discussed below, we sustain the protest in part and deny the remainder of the protest allegations.

I. Job Descriptions for Key Personnel

The protester contends that the Solicitation terms are improper because they fail to include a specific job description, or a required skill level, for the three key personnel positions required under Section M.3.6 of the Solicitation: Account Manager, Technical Manager, and Customer Service Manager. (Protest 8-9 (citing AR Ex. 2a at 63, ¶¶ L.19.1-L.19.2; *see also* AR Ex. 2a at 67-68, ¶ M.3.6).) In particular, the protester contends that criteria for the key personnel were impermissibly vague because they did not provide offerors with the standards against which the District would measure each offeror's proposed key personnel, thereby increasing the likelihood that the District will apply unstated criteria to this requirement. (Protest 9.)

Although the District disputes protester's contention—arguing that a performance requirement is not vague where the requirement is understood by the industry—in doing so, the District effectively concedes that the Solicitation lacked the relevant information concerning key personnel.[252] (*See* AR 5-6 (citing *Jackson Jordan, Inc.*, B-198072, 80-2 CPD ¶ 104 (Comp. Gen.

[251] Specifically, the instructions attached to the past performance evaluation forms provided both a 0-5 point rating scale and a 0-4 and "++" rating scale, meaning that an offeror could potentially achieve a score of "4++," which could be read as "double-plus good." (*See* AR Ex. 4 at 2.)

[252] Although the District has submitted a declaration by OCTO's ITSA contract administrator, Jan Whitener, stating that, "[w]ithin the software implementation business work[,] the roles of each of these key personnel [listed in the

Aug. 8, 1980); *Indus. Maint. Services, Inc.*, B-207949, 82-2 CPD ¶ 296 (Comp. Gen. Sept. 29, 1982).) As such, the District seemingly contends that because the Solicitation's requirements for key personnel "are generally understood in the industry," no further detail concerning the responsibilities or desired skill level of key personnel is required. (AR 6.)

A solicitation provision is ambiguous if it is susceptible to two or more reasonable interpretations. *Enter. Info. Solutions, Inc.*, CAB No. P-0901, 2012 WL 554446 (Feb. 9, 2012) (citing *Koba Assoc., Inc.*); *see also Ashe Facility Servs., Inc.*, B-292218.3, B-292218.4, 2004 CPD ¶ 80 (Comp. Gen. Mar. 31, 2004) (solicitation was ambiguous as to whether the government intended to evaluate indefinite-quantity prices as part of its total price evaluation, or solely for price reasonableness.)

In the instant case, the Solicitation clearly states that the required key personnel are "*essential* to the work being performed" under the contract. (AR Ex. 2a at 44, ¶ H.5 (emphasis added).) However, the Solicitation is silent as to the duties, education, or years of experience that key personnel are expected to have in order to meet the District's requirements. (*See generally* AR Exs. 2, 2a.) Instead of that specific information, one finds a general statement that key personnel should have "extensive knowledge of the IT industry trends and best practice"—a description that is notable for its sheer lack of detail.[253] (AR Ex. 2a at 63, ¶ L.19.) As such, the Solicitation provides no specific criteria with which the District will use to evaluate an offeror's proposed key personnel. (*See generally* AR Exs. 2, 2a.) Given this absence of detail, the level of experience the District is seeking for the required key personnel is susceptible to multiple interpretations. Under these circumstances, the key personnel provision in the Solicitation is ambiguous.[254]

Further, we reject the District's reliance on *Jackson Jordan, Inc.* and *Industrial Maintenance Services, Inc.* for the proposition that offerors in this case should utilize industry standard terms to define the Solicitation's key personnel position requirements. (*See* AR 5-6.) Both cases concern the basis for defining *performance* related specifications in a solicitation, rather than the qualifications of the individuals responsible for contract performance, such as the terms involved in the present action.[255] *See* 80-2 CPD ¶ 104; 82-2 CPD ¶ 296. Thus, the

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Solicitation] are clearly understood," (AR Ex. 5 at 1 ¶ 4), both Whitener and the District have failed to define the "clear" understanding. (S*ee generally* AR 1-14; AR Ex. 5.)

[253] By contrast, the Solicitation's list of ITSA "job categories" for the contract identifies both the required years of experience and the required functions for each "level" of a given job category. (*See* AR Ex. 2, C.5.4.1.)

[254] The District also contends that the key personnel provisions are not ambiguous because no offerors requested clarification or submitted questions regarding the District's key personnel requirements. (AR 6.) However, the Board's protest procedures do not require a protester to attempt to resolve an ambiguity in a solicitation prior to filing a protest with the Board. *See* D.C. Code § 2-360.08(b)(1) (2011); *accord Friends of Carter Barron Found. of the Performing Arts*, CAB No. P-0888, 2012 WL 554444 (Jan. 12, 2012) (holding that challenges to the terms of a solicitation must be protested before closing date for receipt of proposals); *Int'l Builders, Inc.*, CAB No. P-0661, 50 D.C. Reg. 7461, 7462 (Oct. 11, 2002).

[255] Specifically, *Jackson Jordan* concerned the specifications for a railway tamping machine, while *Industrial Maintenance Services* concerned a requirement that certain work be performed in a manner consistent with "recognized horticultural practices." *See* 80-2 CPD ¶ 104; 82-2 CPD ¶ 296.

District's reliance on these cases is misplaced. For the above reasons, we sustain this protest ground, and find that the Solicitation's requirements for key personnel are impermissibly ambiguous.

II. Attendance at Oral Presentations

Trillian also challenges the Solicitation's limitation on the members of the offerors' team that may attend oral presentations requested by the District. (Protest 9-11.) Specifically, the oral presentation provision which Trillian contests in the Solicitation reads as follows—

> The presentation committee should include the proposed Account Manager, Technical Manager, and Customer Service Manager–and any other Offeror's staff involved in the implementation of its system. If the Prime Contractor plans to subcontract work under this contract to one or more companies, at least one representative from each company must attend. The Offeror may not include staff from its VMS vendor.

(AR Ex. 2a at 64, ¶ L.20.2.)

The protester contends that the above provision is improper because it unreasonably dictates the type of employment relationships that offerors must have with their project team members in order for them to be included (or not) in oral presentations. (Protest 10-11.) The protester further argues that this restriction bears no reasonable relationship to fulfilling the District's actual minimum needs, and that the ban on VMS vendors attending presentations unnecessarily restricts competition. (Protest 10-11.) The District, on the other hand, asserts that the provision only limits the individuals that can attend oral presentations, and does not place limits on the construction of the offerors' project teams. (AR 7.) The District also argues that the limitation on attendees at oral presentations, including the exclusion of VMS vendors, is reasonably designed to require offerors to show their independent knowledge of their proposed VMS software. (AR 7.)

District of Columbia procurement law aims to provide bidders with adequate opportunities to bid by promoting full and open competition, to the extent possible, in government procurement. *See* D.C. Code § 2-351.01(b)(3) (2011); *see also* D.C. Mun. Regs. tit. 27, §§ 2500.1, 2500.2 (2002). Notwithstanding these provisions, a solicitation may restrict competition if the restrictive terms are "a reasonable element in obtaining the District's actual minimum needs." *Duane A. Brown*, CAB No. P-0914, 2012 WL 6929395 (Dec. 13, 2012) (citing *Gen. Oil Corp.*, CAB No. P-0181, 38 D.C. Reg. 3059, 3060 (Apr. 20, 1990); *Am. Motohol Supply Corp.*, 38 D.C. Reg. 2998, 3001 (Nov. 21, 1989)). The Board will uphold an agency's determination of its actual minimum needs unless the decision is arbitrary or unreasonable. *Beretta U.S.A. Corp.*, CAB Nos. P-0144, P-0177, 38 D.C. Reg. 3098, 3121 (Aug. 23, 1990) (citations omitted).

In the instant case, the District has described its need to ensure that the prime contractor is, independent of its subcontractor's knowledge, very familiar with all aspects of its proposed technical approach, including the functionality of its proposed VMS software solution, which is necessary for completing the contract's requirements. We do not find that the District's limitation on oral presentation attendees, for the foregoing reasons, unduly restricts competition in that the protester is not impeded from competing in this procurement but is simply limited in whom it may have attend its oral presentation. Accordingly, we find that the District's limitation on oral presentation attendees in the Solicitation is a reasonable requirement to meet the District's stated minimum needs.

We also reject the protester's related argument that the District's allocation of 20 points under Section M.3.2 of the Solicitation (which included the proposed VMS software) negates the reasonableness of the District's limitation on oral presentation attendees. (Protest 11-13; *see also* AR Ex. 2a at 66, ¶ M.3.2.) It is within the District's discretion to decide how to evaluate proposals, and how to distribute the weight accorded to its selected factors. *See World Mktg. & Trading Corp.*, B-248050, 92-2 CPD ¶ 49 (Comp. Gen. July 27, 1992). Moreover, the fact that the District assigned a technical score to the proposed VMS software does not preclude it from also requiring offerors to demonstrate their VMS knowledge at oral presentations by restricting VMS vendors from attending. The protest ground is denied.

III. Past Performance Evaluation Scheme.

The protester further challenges the Solicitation's past performance evaluation scheme and the allocation of evaluation points thereunder, contending that the District will improperly consider offerors' experience *and* past performance under a single past performance metric worth 15 points. (Protest 13-20; *see also* AR Ex. 2a at 68, ¶ M.3.7.) Specifically, the protester argues that this past performance evaluation scheme will result in the District counting an offeror's "experience" twice, but not counting an offeror's "past performance" at all. (Protest 14-15; *see also* AR Ex. 2a at 68, ¶ M.3.7.) Further, the protester contends that the Solicitation does not provide for the utilization of past performance measures or service level agreements related to an offeror's prior contracts (e.g., OST's current ITSA contract with the District) under the past performance evaluation scheme, or otherwise use meaningful rating criteria.[256] (Protest 13-20.)

As we noted above, it is within the District's discretion to determine what reasonable evaluation factors should be used in order to meet its minimum needs, as well as the relative importance of those factors. *See Southern Recycling, L.L.P.*, B-405446, 2011 CPD ¶ 245 (Comp. Gen. Nov. 3, 2011) (citing *SML Innovations*, B-402667.2, 2010 CPD ¶ 254 (Comp. Gen.

[256] The protester alleges that the District has in its possession records that demonstrate that the incumbent contractor has consistently failed to meet certain service levels outlined in its contract, which the protester believes should be specifically considered under the past performance evaluation criteria. (Protest 15-17.)

Oct. 28, 2010) ("The determination of a contracting agency's needs, including the selection of evaluation criteria, is primarily within the agency's discretion and we will not object to the use of particular evaluation criteria so long as they reasonably relate to the agency's needs in choosing a contractor that will best serve the government's interests.")). We find nothing improper in the past performance evaluation scheme established by the District in the Solicitation. The protester merely speculates that the past performance criteria will not be properly applied during the evaluation, or be useful to the District, in determining whether an offeror's proposal will meet the District's minimum needs.[257] The protest ground is denied.

IV. VMS and Data Migration Requirements

Trillian argues that the Solicitation unreasonably favors offerors that propose using Peoplefluent VMS software, including the incumbent contractor, because of the Solicitation's requirement that data migration and VMS implementation must occur within 45 days after contract award. (Protest 20-22.) Thus, according to the protester, offerors (such as the incumbent) that are already using Peoplefluent will automatically earn the maximum 10 points for this component of the Implementation Planning evaluation factor, as well as receive maximum credit under other evaluation criteria under Section M.3.3 (Technical/Migration and Integration) of the Solicitation related to the evaluation of proposed data migration plans because they will not have to migrate data from Peoplefluent, which is currently being used by the District. (*Id.*; *see also*, AR Ex. 2a at 67, ¶ M.3.3.) The District, on the other hand, states that this 45 day migration period is necessary to mitigate the risk involved in data migration from one system to another which is why the Solicitation includes a data migration plan evaluation factor. (AR 12.)

The protester's mere disagreement with the utility of the District's VMS and Data Migration provision does not render it unreasonable, as the District is in the best position to determine how to meet its agency needs. Moreover, even assuming *arguendo* that OST holds some competitive advantage in responding to this Solicitation by virtue of its incumbency, this does not render the Solicitation improper because the District is not required to discount an incumbent's competitive advantage, unless such advantage was acquired unfairly. *See Navarro Research & Eng'g, Inc.*, B-299981, 2007 CPD ¶ 195 (Comp. Gen. Sept. 28, 2007) ("[T]here is no requirement that an agency equalize or discount an advantage gained through incumbency, provided that it did not result from preferential treatment or other unfair action."). For these reasons, this protest ground is also denied.

[257] As noted *supra*, the protester also takes issue with the past performance survey form (Protest 17-20; AR Exs. 4, 2a) which the District is using to solicit past performance feedback from other outside agencies or entities that have worked with the offerors. (*See* AR Ex. 2a, M.3.7.5.) However, neither the protester's disagreement with the format of the survey form, nor the alleged ambiguity in the instructions are sufficient to cause the Board to find that protester has been prejudiced by the form. *See Dynamic Access Sys.*, B-295356, 2005 CPD ¶ 34 (Comp. Gen. Feb. 8, 2005) ("A protester's mere disagreement with the agency's judgment concerning the agency's needs and how to accommodate them does not show that the agency's judgment is unreasonable.") (citation omitted).

V. Notices of Sole Source Extensions

Finally, the Board dismisses as untimely the protester's challenge to the propriety of the District's proposed notice of an award of an extension of the incumbent contract to OST published on June 10, 2013. (AR 4.) The protester failed to challenge this notice with the Board within the appropriate time period. D.C. CODE § 2-360.08(b)(2) ("… 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.") In addition, we find that the protester's challenge to the District's November 26, 2013, notice of a proposed extension of the incumbent contract to OST to be rendered moot by the Board's previous order sustaining the D&F to allow continued performance of the incumbent contract requirements, beyond January 18, 2014, while the District completes the ongoing competitive procurement process for a new contractor under the Solicitation. (*See* Order Sustaining D&F, Feb. 14, 2013.)

CONCLUSION

For the reasons discussed herein, we find that the District's key personnel provisions challenged by the protester in the Solicitation are unreasonably ambiguous and do not clearly state the basis upon which the District will determine whether any offeror's proposed key personnel are qualified and meet the District's minimum needs. The District is therefore ordered to amend the Solicitation to provide offerors with the designated responsibilities of all required key personnel for the contract, as well as the years of experience and/or education required for each position. After issuing the amended Solicitation in this regard, the District shall then provide a reasonable period of time for offerors to submit revised proposals for evaluation which afford them the opportunity to respond to the new and revised key personnel provisions mandated by this order.

The Board denies the remainder of the protest, and dismisses it with prejudice.

SO ORDERED.

DATED: April 4, 2014

/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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GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

A&A General Contractors, LLC	)	
	)	CAB No. P-0964
Solicitation No. DCKA-2013-B-0147	)	

For the Protester: Algenon Ashford, *pro se,* A&A General Contractors, LLC. For the District of Columbia Department of Transportation: Alton Woods, Esq., Assistant Attorney General, Office of the Attorney General.

Opinion by Administrative Judge Monica C. Parchment with Administrative Judge Maxine E. McBean concurring.

OPINION

Filing ID #55643821

This protest arises from a challenge by A&A General Contractors, LLC ("A&A" or "protester") to the District's rejection of its bid as nonresponsive for failure to submit a proper bid security, as required by the terms of the solicitation. A&A contends that its bid was improperly rejected, despite the fact that it submitted a company check in the amount of $170,000.00 in satisfaction of the solicitation's bid security requirement. In its Agency Report, the District moves to dismiss A&A's protest as untimely. In addition, the District asserts that the contracting officer properly rejected A&A's bid as nonresponsive because its postdated company check was an unacceptable form of surety under District of Columbia law. After reviewing the record in this matter, the Board finds that A&A's protest is untimely and without merit. Accordingly, we deny and dismiss the protest.

BACKGROUND

On November 6, 2013, the District of Columbia Office of Contracting and Procurement ("OCP"), on behalf of the District of Columbia Department of Transportation ("DDOT"), issued Invitation No. DCKA-2013-B-0147 (the "Solicitation"), which sought a contractor to provide services for the reconstruction of First Street, Northeast from Massachusetts Avenue, Northeast to G Street, Northeast.[258] (Agency Report ("AR") Ex. 1 at 11.) The project's scope of work included, but was not limited to: (1) reconstruction of the sidewalk, driveways, and pedestrian ramps; (2) upgrading the storm sewage system; and (3) modifications to traffic signals and street lighting on the project site. (*Id.*) As it relates to the present protest allegations, the Solicitation

[258] The Solicitation stated that its terms supplemented and modified the District of Columbia Department of Transportation Standard Specifications for Highways and Structures (2009), Supplemental Specifications (2007), and Standard Drawings (2009), which were incorporated into the Solicitation by reference. (AR Ex. 1 at v.)

also directed all bidders to provide a bid guaranty along with each company's bid submission which was to be valid for a period of ninety days after bid opening. (*See* AR Ex. 1, at 4.) [259]

Bids were due on December 16, 2013, and six bidders responded to the Solicitation including: the protester, A&A; Capitol Paving of DC; Fort Myer Construction Corp.; Civil Construction; Metro Paving; and Anchor Construction, Inc. (AR 3; *see also* AR Ex. 6.) However, by issuance of a "Determination and Findings for Non-Responsiveness" ("D&F") on December 23, 2013, the District formally rejected the protester's bid as nonresponsive because it failed to provide a bid bond or certified/cashier's check for the 5% bid guaranty, as required by the Solicitation. (*See* AR Ex. 4.) Instead, A&A submitted a company check for $170,000.00, postdated for March 16, 2014, with its December 16, 2013, bid. (*See* AR Exs. 2-3.) The remaining five bidders, on the other hand, were determined to be responsive by the District. (AR Ex. 4, at 2.)

In a letter dated December 23, 2013, the Contracting Officer ("CO") Courtney Lattimore issued notification to the protester that its bid had been deemed nonresponsive for failure to submit the bid guaranty in accordance with D.C. Mun Regs. tit. 27 § 2700.4. (AR Ex. 5.) However, the District appears to have transmitted this December 23, 2013, rejection letter to an email address belonging to the president of another company, CNA, Inc. ("CNA"), rather than to the protester. (*Id*. at 1.) According to a declaration by CO Lattimore, the District sent this correspondence to CNA's president primarily because "he had signed A&A's actual bid in two places as an 'Estimator/Consultant'" for A&A. (AR Ex. 9, at 2, ¶ 8.) The CO also represents that CNA's president had initialed the pricing section of A&A's bid, where handwritten corrections had been made, and had attended the bid opening ceremony as a representative of A&A. (*Id*.)

On February 25, 2014, the District provided A&A with an electronic copy of the bid tabulation sheet listing the bids that offerors had submitted in response to the Solicitation.[260] (AR 4; *see also* AR Exs. 6-7.) The District represents that the bid tabulation sheet for the Solicitation did not list A&A as a competing offeror because the CO had determined that A&A's bid was nonresponsive. (*See* AR Exs. 4, 6.) On February 27, 2014, A&A's president requested

[259] As the Solicitation noted, this bid guaranty provision supplemented Section 102.01, Article 12A (Bond Requirements), of the DDOT Standard Specifications for Highways and Structures (2009) that were incorporated by reference into the Solicitation, which provides that for all bids of $100,000 or more:

> No bid will be considered [by the District] unless it is so guaranteed. Each bidder must furnish with his bid either a bid Bond (Form No. DC 2640-5), with good and sufficient sureties, a certified check payable to the order of the Treasurer of the District of Columbia (uncertified check will not be accepted), negotiable United States bonds (at par value), or an irrevocable letter of credit in an amount not less than five percent (5) of the amount of his bid as a guaranty that he will not withdraw said bid within the period specified therein after the opening of same …

[260] The Agency Report contains minor discrepancies in the stated dates concerning when communications occurred between the District and A&A. The District states that the bid tabulation sheet was provided to the protester on February 27, 2014. However, the copy of the actual email record from the District to A&A indicates that the bid tabulation sheet was provided to A&A on February 25, 2014. (*See* AR Ex. 7 at 2 ("This is the bid tab for DCKA-2013-B-0147 Rehabilitation of 1st Street NE from Massachusetts Ave To G Street.") These email records also show that, subsequently, on February 27, 2014, A&A requested a copy of the "letter stating that A&A General Contractors was disqualified" and did not request a copy of the bid tabulation sheet on this date. These discrepancies, however, are ultimately of no consequence to the Board's holding that A&A's protest is untimely.

that the District provide him with the letter stating that A&A had been disqualified from the competition by the District because it had not previously been sent to A&A. (*See* AR Ex. 7, at 1.) The contemporaneous record further shows that, on February 27, 2014, the same day that A&A requested a copy of its letter of disqualification, the District sent A&A a copy of the CO's December 23, 2013, letter of nonresponsiveness.[261] (*See* AR Ex. 8.)

A&A filed the instant protest on April 15, 2014, challenging the CO's rejection of A&A's bid as nonresponsive. In its protest, A&A alleges that it did not receive the CO's December 23, 2013, letter notifying A&A that its bid was nonresponsive until March 24, 2014. (Protest 1.) A&A also challenges the CO's determination of nonresponsiveness on the grounds that it submitted a company check in the amount of $170,000.00 made payable to the D.C. Treasurer as part of its bid submission. (*Id.*)

In its Agency Report, the District moves to dismiss A&A's protest as untimely because it was filed more than ten business days after the date on which the CO notified A&A that its bid had been rejected as nonresponsive. (AR 2.) In the alternative, the District argues that the CO's rejection of A&A's bid was proper. (AR 2.) A&A has not responded to the District's Agency Report since it was filed with the Board.

DISCUSSION

The Board exercises jurisdiction over protests of a solicitation or award of a contract by any actual or prospective offeror who is aggrieved in connection with the solicitation or award pursuant to D.C. Code § 2-360.03(a)(1) (2011). Notwithstanding, when a protester fails to file comments on the District's agency report, as in the instant case, the Board may treat any of the District's factual statements which are not otherwise contradicted by the protest as conceded.[262] D.C. Mun. Regs. tit. 27 § 307.4 (2002); *see also Nobel Sys., Inc.*, CAB No. P-0937, 2013 WL 6042885 (Oct. 4, 2013); *Seagrave Fire Apparatus, LLC*, CAB No. P-0928, 2012 WL 6929400 (Dec. 20, 2012). For the reasons stated herein, we find that A&A's protest is both untimely and without merit.

A&A's Protest is Untimely

The District contends that A&A's protest is untimely because it was filed several months after the CO's December 23, 2013, letter advising the protester that its bid had been rejected as nonresponsive. D.C. Code § 2-360.08(b)(2) requires that protests be filed no later than ten business days after the basis of the protest is known or should have been known to the protester, whichever is earlier. D.C. CODE § 2-360.08(b)(2) (2011). The protester, however, maintains

[261] The District emailed a copy of this December 23, 2013, letter directly to Mr. Ashford at his A&A company email address, which is the same email address that Mr. Ashford used to send a request to the District for a copy of the letter disqualifying A&A's bid from award.

[262] The protester has similarly failed to oppose the District's motion to dismiss, which was included in the Agency Report. (*See* AR at 4-5.)

that it did not receive notice of the rejection of its bid until March 24, 2014, after making several inquiries regarding the status of its bid. (Protest 1.)

In response, the District asserts that A&A was notified on multiple occasions that its bid was rejected including by: (1) the December 23, 2013, rejection letter sent to CNA's president; (2) the bid tabulation sheet sent to A&A on February 25, 2014, notifying A&A that its bid had been rejected; and (3) a duplicate copy of the December 23, 2013, letter of rejection that was sent by the District to A&A on February 27, 2014. (*See* AR at 3-5.) As such, the District argues that the protest, which was not filed until April 15, 2014, should be dismissed as untimely. (*See* AR at 4-5.)

Based upon the facts in this case, however, we do not accept the District's contention that the protester received actual notice of the rejection of its bid on December 23, 2013. Rather, because the CO's initial December 23rd rejection letter was first sent to the president of CNA, Inc., who was not an employee of the protester, and did not even have an email address affiliated with the protester, actual notice of A&A's rejection cannot be said to have occurred on that date.

Nonetheless, the record before the Board does reflect that, as early as February, 25, 2014, A&A had received notice from the District that its bid had been rejected. Indeed, by February 27, 2014, A&A both knew and acknowledged in writing that the District had disqualified its bid from the competition. (*See* AR Ex. 7, at 1.) Moreover, in response to A&A's request to the District for further details regarding the basis for its bid rejection, on February 27, 2014, the District provided A&A with a duplicate copy of its earlier December 23, 2013, letter explaining the basis for the rejection of its bid for lack of a bid guaranty that was sent directly to the protester's company president. Consequently, the Board finds that A&A's April 15, 2014, protest is untimely because it was filed more than ten days after A&A knew or should have known that it had been disqualified from the competition.

A&A's Bid was Nonresponsive

Although we have dismissed this protest as untimely, the Board also finds that the underlying protest allegations in this matter are without merit. The Board has repeatedly held that in order to be considered responsive to a solicitation, 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). A bid bond, such as the one required by the Solicitation, is a form of guaranty designed to protect the interests of the government in the event of a contractor's default and, as a result, when required by a solicitation, is a material part of the bid which must be furnished at the time of bid submission. *Elite People Protective Servs., Inc.*, CAB No. P-0898, 2012 WL 554445 (Jan. 9, 2012). Thus, in instances where a bidder has a defective bond, the bid itself is rendered defective and may properly be rejected as nonresponsive to the solicitation requirements. *See CNA., Inc.*, CAB No. P-0875, 2011 WL 7402966 (March 14, 2011).

Here, and as articulated above, the Solicitation mandated that a bid guaranty be provided by offerors and further *explicitly* specified the only acceptable forms of bid security that could be submitted by offerors to the District. Indeed, pursuant to D.C. Mun. Regs. tit. 27 § 2700.4, the CO could accept only three types of bid security: (1) a bond; (2) a certified check or irrevocable letter of credit issued by an insured financial institution; or (3) United States government securities assigned to the District and pledging the full faith and credit of the United States. D.C. Mun. Regs. tit. 27 § 2700.4 (1988). A personal or company check, postdated for deposit three months after the date that bids were submitted—such as the one submitted by protester here—was not an acceptable form of bid security under either the terms of the Solicitation or applicable regulations. Consequently, we find that the District properly rejected the protester's bid as nonresponsive for failing to meet this material requirement of the Solicitation.

CONCLUSION

For the reasons set forth herein, the Board hereby denies and dismisses the present protest as it is an untimely protest and without merit.

SO ORDERED:

DATED: June 25, 2014

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

CONCURRING:

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

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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

STOCKBRIDGE CONSULTING LLC	)	
	)	CAB No. P-0963
Solicitation No. Doc142966	)	

For the protester: Jessie Johnson, *pro se*. For the District of Columbia: Talia Sassoon Cohen, Esq., Assistant Attorney General, Office of the Attorney General.

Administrative Judge Maxine E. McBean issued the opinion of the Board, with Chief Administrative Judge Marc D. Loud, Sr., concurring.

OPINION

Filing ID 55955757

Stockbridge Consulting LLC ("Stockbridge" or "protester") protests the District's award of a contract to Tensator, Inc. ("Tensator") resulting from Solicitation No. Doc142966. Following the District's decision to take the corrective action by (i) withdrawing the original solicitation; (ii) issuing a revised solicitation; and (iii) allowing all offerors an opportunity to submit new proposals in response to the revised solicitation, Stockbridge amended its protest to include allegations concerning the revised solicitation.

For the reasons set forth below, we dismiss and deny Stockbridge's protest. Specifically, we find that (i) the District's withdrawal of the original solicitation and termination of the resulting contract award rendered Stockbridge's original protest moot; and (ii) the protester, in its amended protest, failed to establish that the terms of the revised solicitation gave rise to violations of procurement law or regulation on the part of the District.

BACKGROUND

On February 3, 2014, the District of Columbia Office of Contracting and Procurement ("OCP"), on behalf of the Department of Motor Vehicles ("DMV"), issued Request for Proposals ("RFP") No. Doc142966 for a contractor to provide a DMV queuing system (the "original Solicitation" or "original RFP"). (Protest 1-2.) Specifically, the original RFP sought a "centralized, web-based, online schedule capable, and kiosk capable queuing system," consisting of both hardware and software components, for six DMV service centers located throughout the District. (*See* Protest Ex. D.)

On March 4, 2014, Stockbridge submitted a timely proposal in response to the original RFP. (Protest 2.) On March 20, 2014, the contracting officer ("CO") notified the protester of deficiencies in its proposal and requested that it submit a revised proposal to address the identified deficiencies. (Protest Ex. A.) Stockbridge timely submitted its revised proposal on March 24, 2014. (Protest 2.)

On April 4, 2014, the CO informed Stockbridge that the District had awarded Tensator the contract for the DMV queuing system. (Protest Ex. B.) Stockbridge requested a debriefing in a letter dated April 5, 2014, (Protest Ex. C) and, on April 7, 2014, filed the instant protest (Protest 1). In its protest, Stockbridge alleged two protest grounds: (i) that the District's technical evaluation of

Stockbridge's proposal was unreasonable, and (ii) that the District's price evaluation of Stockbridge's proposal was unreasonable. (*See* Protest 3-4.)

On April 10, 2014—three days after Stockbridge filed the instant protest—the District issued purchase order number PO494706 to Tensator, in the amount of $22,210.63, for the installation of a queueing system at the DMV Georgetown Service Center (the "PO to Tensator"). (*See* PO to Tensator.)

On April 14, 2014, the District notified the Board of its corrective action in response to Stockbridge's protest. (*See* Letter to CAB Regarding Corrective Action.) According to the District, the corrective action would include (i) clarifying the original RFP's evaluation factors, and (ii) allowing all offerors[263] to submit new proposals for evaluation. (*Id*.) Accordingly, on April 17, the District issued the revised solicitation which was marked as "Amendment A002" to the original Solicitation (the "revised Solicitation" or "revised RFP").[264] (*See* Am. Protest Ex. F.)

On April 21, 2014, Stockbridge amended its protest to include allegations concerning the revised RFP. (*See generally* Am. Protest ¶¶ 1-34.) Specifically, the protester argued that (i) Stockbridge was unfairly disadvantaged by the District's withdrawal of the original Solicitation; (ii) the revised RFP did not include services to be performed at the DMV Georgetown Service Center location; (iii) the District "may have violated" the stay order issued by the Board on April 8, 2014; (iv) the District "may have violated" the Small and Certified Business Enterprise Development and Assistance Amendment Act which includes a requirement that contracts of $250,000 or less be set aside for a small business enterprise ("SBE") or certified business enterprise ("CBE"); and (v) Stockbridge was "penalized" and "unfairly prejudiced" by the requirements of the revised RFP, which altered both the scope and evaluation criteria of the original RFP. (*See* Am. Protest ¶¶ 13-22; Am. Protest Ex. F.)

On April 22, 2014, the District ordered Tensator to stop work at the DMV Georgetown Service Center. (*See* Letter to CAB Ex. Stop Work Order.) The following day, on April 23, the District terminated for convenience the PO to Tensator. (*Id*.; *see also* Termination for Convenience.)

On July 22, 2014, the District issued a Determination and Findings to Proceed with Contract Award while a Protest is Pending ("D&F").[265] (*See* D&F.)

DISCUSSION

(1) Jurisdiction

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

(2) Stockbridge's Original Protest is Moot

The protester has alleged that the District unreasonably evaluated both the technical and price proposals that protester submitted in response to the original RFP. However, the District decided to withdraw, amend, and recompete the original Solicitation which resulted in a reevaluation of the offerors' proposals. In so doing, the District rendered Stockbridge's original protest grounds moot. *See Doors &*

[263] Six offerors submitted proposals in response to the original Solicitation. (D&F 2; List of Interested Parties.)
[264] Although the revised RFP was dated April 17, 2014, Stockbridge's amended protest notes that the revised RFP was sent to the offerors by electronic mail on April 18, 2014. (Am. Protest ¶ 11.)
[265] This Opinion renders moot the D&F.

More, Inc., CAB No. P-0262, 39 D.C. Reg. 4345, 4346 (Nov. 26, 1991) (finding that cancellation of the solicitation rendered the protest moot); *see also Williams, Adley & Co., LLP*, CAB Nos. P-0666, P-0667, 50 D.C. Reg. 7488, 7491-92 (Apr. 14, 2003). A case is moot when the issues are academic and there is no possible remedy which the Board could order were it to grant the protest. *Ft Myer Constr. Corp.*, CAB No. P-0641, 49 D.C. Reg. 3378, 3380 (Aug. 16, 2001) (citing *C&E Services, Inc.*, CAB No. P-0360, 40 D.C. Reg. 5020, 5022 (Mar. 12, 1993)). Since the protester's original protest grounds were completely nullified by the reevaluation of proposals, the Board finds that Stockbridge's original protest is dismissed as moot.

(3) Stockbridge's Amended Protest is Denied

Following the District's corrective action, Stockbridge amended its protest (i) to challenge the propriety of the District's corrective action; (ii) to contest the scope of work in the revised RFP in that it did not include services to be performed at the DMV Georgetown Service Center location; (iii) to allege that the District may have failed to comply with the mandatory stay resulting from this protest; (iv) to allege that the District may have violated the Small and Certified Business Enterprise Development and Assistance Amendment Act; and (v) to allege that Stockbridge was "being penalized and unfairly prejudiced" by the new RFP requirements, thereby placing it at a significant disadvantage. We address Stockbridge's amended protest grounds *seriatim*.

I. The Protester Has Failed to Show that the District's Corrective Action Was Improper

Protester argues that the District's decision to issue the revised RFP and allow offerors to submit new proposals was "unnecessary," and that the District "has not offered any substantive reason for re-soliciting [proposals] other than taking corrective action." (Am. Protest ¶¶ 22-23.) However, in considering the propriety of an agency's corrective action, the Board will review the corrective action to determine whether the procuring agency reasonably exercised its discretion "in a manner that remedies the procurement impropriety." *Citelum DC, LLC*, CAB No. P-0922, 2013 WL 1952320 (Mar. 1, 2013).

In the instant case, the protester initially alleged that the District improperly evaluated its technical and pricing proposals. (Protest 3-4.) In response, the District undertook the corrective action of clarifying the Solicitation's evaluation factors and allowing offerors to submit new proposals for reevaluation. (*See* Letter to CAB Re Corrective Action.) The District's corrective action represented a reasonable exercise of discretion. It effectively remedied the protester's allegation of a procurement impropriety resulting from the improper evaluation of its proposal. As a result, we find that the protester has failed to demonstrate that the District's corrective action was unreasonable, improper, or an abuse of discretion. This protest ground is denied.

II. The District Has Broad Discretion to Tailor a Solicitation's Specifications to Meet its Minimum Needs

The protester also alleges that the revised RFP did not include work at the DMV Georgetown Service Center, arguing that "[i]f rival technology has already been implemented [at the Georgetown facility], this may compromise [protester's] ability to meet the requirements" of the revised RFP. (Am. Protest ¶ 14.) However, we have long recognized the District's right to exercise its business judgment by tailoring the scope of a solicitation to meet its actual minimum needs. This exercise of business judgment is within the sound discretion of the procuring agency—one that we will overturn only when a protester shows "by a preponderance of the evidence, that the agency has impermissibly narrowed competition." *KOBA Associates, Inc.*, CAB No. P-0325-A, 40 D.C. Reg. 5023, 5032 (Mar. 12, 1993). *See also, Am. Motohol*, 38 D.C. Reg. 2998, 3001-3002 (Nov. 21, 1989); *MorphoTrust USA, Inc.*, CAB No. P-0924,

2012 WL 6929398 (Nov. 28, 2012) (citing *Recycling Solutions, Inc.*, CAB No. P-0434, 42 D.C. Reg. 4990, 4995 (June 30, 1995)) (citations omitted).

In the instant case, the protester has not presented any evidence to establish that the District impermissibly narrowed the competition in devising the revised RFP's scope of work. Finding that the protester has not met its burden of showing by a preponderance of the evidence that the scope of work in the revised Solicitation lacked a reasonable basis, we deny this protest ground.

III. Protester's Allegation that the District Violated the Stay Order is Moot

Stockbridge's amended protest alleges that the District "may have violated" the Board's stay order in issuing the PO to Tensator for work at the DMV Georgetown Service Center. (Am. Protest ¶ 15.) Under the law, "no contract may be awarded in any procurement after the contracting officer has received the notice [of protest] and while the protest is pending." D.C. CODE § 2-360.08(c)(1) (2011). The statute further provides that "[i]f an award has already been made but the contracting officer receives notice within 11 business days after the date of award, the contracting officer shall immediately direct the awardee to cease performance under the contract." *Id.* This automatic stay provision is intended "to provide effective and meaningful review of procurement challenges before the protested procurements become *faits accomplis*." *Whitman-Walker Clinic, Inc*. CAB Nos. P-0672, P-0674, 50 D.C. Reg. 7521, 7524 (July 25, 2003).

Here, the District issued the PO to Tensator on April 10, 2014, three days after Stockbridge filed the instant protest. The record does not establish whether the contracting officer received notice of this protest before issuing the PO to Tensator. However, prior to issuing the PO, the District had not filed a Determination and Findings with the Board to set forth the urgent and compelling circumstances which significantly affected the interests of the District so as to justify proceeding with contract performance. Therefore, the District's award of the PO to Tensator may be considered a *de facto* override of the automatic stay provision of the statute since the PO consisted of work contemplated in the original RFP.[266] While this issue is a matter of first impression for the Board, other courts have remedied a breach of the automatic stay (whether due to an improperly-issued determination and findings to proceed or a *de facto* override of the stay) with a re-imposition of the stay. *See ES-KO, Inc. v. United States*, 44 Fed.Cl. 429, 436-37 (Fed. Cl. 1999) (enjoining further performance of the protested contract until either (i) a decision on the merits of the protest; or (ii) a legally-sufficient determination and findings to proceed).

On April 22, 2014, the District remedied the *de facto* override of the stay when it ordered Tensator to stop work at the DMV Georgetown Service Center and subsequently terminated for convenience the PO to Tensator. As a result, the District's stop work order and termination for convenience rendered this protest ground moot.

IV. Protester Has Not Alleged Sufficient Facts to Establish a Violation of the Small and Certified Business Enterprise Development and Assistance Amendment Act

[266] The Court of Federal Claims has stated that in determining whether the government has entered into a contract which represents a *de facto* override, i.e., the functional equivalent of an override, the relevant question is whether the contract "shares the same character or function as a formal override," and therefore, "could prejudice the plaintiff in its protest . . . or in subsequently performing the work if it is successful in its protest." *Access Sys., Inc. v. United States*, 84 Fed.Cl. 241, 243 (Fed. Cl. 2008).

Protester next argues that, in issuing the revised RFP, the District "may have violated and will to continue to violate the Small and Certified Business Enterprise Development and Assistance Amendment Act of 2014." (Am. Protest ¶ 16.) Protester further states:

> Stockbridge is a certified business enterprise that possesses 12 preference points to include the SBE delineation. Our initial response to the RFP along with our request to be added to the solicitation in the online system should have been enough to substantiate to the District that Stockbridge could meet all requirements identified in the queuing system RFP.
>
> *(Id.)*

However, the protester does not cite any specific provisions of the Act that may have been violated, or allege facts sufficient for the Board to conclude that a violation may have occurred. (*See generally* Am. Protest ¶ 16.) "Under our rules, a protestor has the burden of establishing its case by a preponderance of the evidence." *Capitolcare Inc.*, CAB No. P-0126, 39 D.C. Reg. 4303, 4304 (Sept. 26, 1991). Furthermore, a protester is required to provide a "clear and concise statement of the legal and factual grounds of the protest." D.C. Mun. Regs. tit. 27 § 301.1(c) (2002). Yet, the protester's claim concerning the District's alleged violation of the Act is vague and unclear. As a result, the Board denies this protest ground.

V. Protester Has Failed to Show that the Requirements of the Revised Solicitation Unfairly Prejudiced the Protester or Impermissibly Narrowed Competition

Finally, the protester argues that it has been "penalized and unfairly prejudiced" by the revised RFP which includes "unnecessary requirements specifically with [the District's] hopes of deeming Stockbridge unresponsive." (Am. Protest ¶ 20.) Protester further alleges that the revised RFP contains new evaluation criteria that "specifically negate[s]" the capabilities of the protester and its strategic business partner. (*Id*.) In other words, the protester implies that the District somehow acted in bad faith. However, "[i]t 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 official had a specific, malicious intent to harm the protestor." *Grp. Ins. Admin., Inc.*, CAB No. P-0309-B, 40 D.C. Reg. 4485, 4518 (Sept. 2, 1992). Indeed, we have held that "a claim of bad faith must rise to the level of 'irrefragable proof' showing bad faith 'actuated by animus toward to the plaintiff.'" *See 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). The protester has failed to present any such proof.

Moreover, in order to establish that it has been unfairly disadvantaged by the terms of the revised Solicitation, the protester bears the "heavy burden" of demonstrating that the District has impermissibly narrowed competition. *MorphoTrust USA, Inc.*, 2012 WL 6929398 (citing *Am. Motohol*, 38 D.C. Reg. at 3002; *Koba Assocs., Inc.*, CAB No. P-0325-A, 40 D.C. Reg. at 5032). To that end, a protester must show that any allegedly unnecessary requirements or excessive restrictions are unreasonable. *See id*. (citing *Gen. Oil Corp.*, CAB No. P-0181, 38 D.C. Reg. 3059, 3060-61 (Apr. 20, 1990); *Beretta U.S.A. Corp.*, CAB Nos. P-0144, P-0177, 38 D.C. Reg. 3098, 3121 (Aug. 23, 1990)). But the protester has not provided any evidence to show that the requirements of the revised Solicitation, specifically, the scope of work or evaluation criteria either (i) did not reflect the District's minimum needs, or (ii) otherwise lacked a reasonable basis.

In short, the Board finds no evidence to support the protester's allegation that it has been "penalized" or that the terms of the revised Solicitation have impermissibly narrowed the competition. Accordingly, this protest ground is denied.

CONCLUSION

For the reasons set forth herein, the Board dismisses the original protest as moot and denies protester's amended protest grounds. We hereby dismiss and deny the instant protest with prejudice.

SO ORDERED.

Date: August 28, 2014

/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

APPEAL OF:

DYNAMIC CORPORATION	)	
	)	CAB No. D-1365
Under Contract No. POFB-2005-B-0016EW	)	

For the Appellant, Dynamic Corporation: Michael C. Zisa, Esq., Seeger, P.C., Leonard A. Sacks, Esq., Leonard A. Sacks & Associates, P.C. For the District of Columbia: Darnell E. Ingram, Esq., Brett A. Baer, Esq., Office of the Attorney General.

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

OPINION

Filing ID #56151601

The present action arises from the Appellant's performance of a contract with the District of Columbia for the renovation of the city's Engine Company No. 25 fire station. During performance of this renovation contract, the Appellant submitted five proposed change orders that are addressed in this appeal, and, in a final decision, the contracting officer approved all five. Subsequently, the contracting officer's superior, also a contracting officer, issued a final decision purporting to revise the first decision. That second decision approved two of the proposed change orders but denied two others and reduced a third that had been approved in the first contracting officer's final decision. Further, the second final decision included a determination to hold the contract retainage because of work the District contended Appellant had not completed. Appellant appealed the second contracting officer's final decision which is the subject of the present appeal.

For the reasons stated herein, the Board finds that the second contracting officer's final decision, upon which this appeal is based, is invalid to the extent it purported to amend and/or supersede the previous contracting officer's final decision that approved equitable adjustments to Appellant. However, the issue of the retainage, not addressed in the first final decision, is subject to review in this appeal. The Board finds that the District may hold so much of the retainage as it can demonstrate is necessary to protect the interests of the District, which we have found in this case to be the cost of completing certain punch list work for the contract.

FINDINGS OF FACT

1. Appellant, Dynamic Corporation ("Dynamic"), and the District of Columbia's Office of Contracting and Procurement ("OCP"), on behalf of the District of Columbia Fire and Emergency Medical Services Department ("FEMS"), entered into Contract No. POFB-2005-B-0016EW (the "contract") on August 14, 2006. (Appeal File ("AF") Ex. 1 at (page) DC 4; 2d.

Am. Joint Pretrial Statement, sec. 2, Stipulations of Fact ("SOF"), ¶ 1.) [267] The contract called for the "complete renovation and modernization" of the historic Engine Company No. 25 fire station, located at 3203 Martin Luther King Jr. Avenue, Southeast in the District, for the price of $2,389,500.00. (AF Ex. 1 at DC 1, 2, 3; SOF ¶ 2.) The contract's initial period of performance was 360 calendar days from the contractor's receipt of Notice to Proceed. (AF Ex. 1 at DC 2.)

Scope of Work and Contract Terms

2. In its solicitation, the District provided detailed construction requirements in the "Scope of Work," "Specifications," "Drawings," and other documents which were incorporated into the contract terms. (*See* AF Ex. 1 at DC 4.)

3. The contract drawings and specifications were prepared under a separate contract between the District and Swanke Hayden Connell Architects ("Swanke"), the company that also served as the architect for the contract. (Hr'g Tr. vol. 3 (May 17, 2013), 779:11-14; Hr'g Tr. vol. 6 (June 19, 2013), 2048:9-2050:12, 2053:20-2054:16, 2171:10-2172:12, 2177:17-2178:4, 2181:19-2182:7.) Swanke was responsible for observing construction progress, attending biweekly progress meetings, preparing minutes of those meetings, and responding to Requests for Information ("RFIs") from Dynamic as directed by the contracting officer's technical representative ("COTR"). (Hr'g Tr. vol. 6, 2053:8-19, 2214:5-2215:21.)

4. Although the solicitation identified Karen Hester as the contracting officer ("CO") for the contract, the parties have stipulated that the primary CO was, in fact, Diane Wooden. (*Compare* AF Ex. 1 at DC 3, *with* SOF ¶ 6.) Diane Wooden's supervisor was Wilbur Giles, who served as an Assistant Director at OCP and was also a warranted contracting officer.[268] (Hr'g Tr. vol. 5 (June 18, 2013), 1864:12-1871:7; *see also* Hr'g Tr. vol. 1, 197:14-16.) Geoffrey Mack also served as the CO for some period of time during the contract. (Hr'g Tr. vol. 1 (May 15, 2013), 82:1-6; *see, e.g.*, District Exs. 3 at DC 3; 5 at DC 7.)

5. Section G.7 of the contract stated that the CO was "the only person authorized to approve changes to any of the requirements" of the contract. (Appeal File Supplement ("AFS") Part 1 at 14, sec. G.7.A.) In addition, the contract stated that the contractor "shall not comply with any order, directive or request that changes or modifies the requirements of this contract, unless issued in writing and signed by the [CO]." (*Id.*, sec. G.7.B; sec H.23A.)

6. The COTR for the contract was Ralph Cyrus. (Dynamic Hr'g Ex. 1 at 15, ¶ G.8; Hr'g Tr. vol. 4 (June 17, 2013), 1347:9-14, 1350:5-8.) Pursuant to section G.8 of the contract, the COTR was responsible for monitoring Dynamic's day-to-day performance and advising the CO regarding Dynamic's compliance with the contract. (AFS Part 1 at 14-15, sec. G.8.) Cyrus also acted as a project manager for FEMS. (Hr'g Tr. vol. 4, 1347:9-14, 1355:18-1356:11.) Cyrus provided the CO with government estimates used in the review and negotiation of proposed change orders submitted by Dynamic, although only the CO could finally approve change orders. (*Id., see also* Hr'g Tr. vol. 5, 1611:2-1612:9, 1621:10-18.)

[267] Leading zeroes have been omitted from citations to the pages of bates-numbered documents.
[268] In May of 2009, Giles became the Deputy Director of the District's Office of Property Management Construction (later renamed the Department of Real Estate Services). (Hr'g Tr. vol. 5, 1865:3-1866:18.)

7. Deputy Fire Chief of Facility Maintenance, David Foust, was a facilities manager at FEMS during the contract period of performance. (Hr'g Tr. vol. 7 (June 20, 2013), 2344:17-2345:19.) Although Foust had no contractually assigned role, starting in April 2008, he served as a "subject matter expert" on FEMS equipment and operations affected by the project. (*Id*., 2349:1-10, 2386:11-17.)

8. The contract Specifications included detailed descriptions of work requirements and deliverables. (*See generally* AFS Parts 2-6.) Deliverables relevant to this appeal included the following: interior woodwork, including trim, cabinets, and countertops (sec. 06402); heavy-duty wardrobe lockers (sec. 10500);[269] a refrigerator, dishwasher, food waste disposer, and exhaust hood for the kitchen (secs. 11450, 15870); a fire alarm with control panel (sec. 13851); and fire suppression piping and sprinklers (sec. 13915). (*See id*.)

9. The contract stated that inspection and acceptance of the deliverables would be governed by Article 11 of the Standard Contract Provisions for Use with Specifications for District of Columbia Government Construction Projects, dated 1973 ("Standard Contract Provisions" or "SCP"), which were incorporated by reference. (AFS Part 1 at 9, sec. E.1.) SCP Article 11 stated, in part, that, "[a]cceptance shall be final and conclusive except as regards to latent defects, fraud, or such gross mistakes as may amount to fraud, or as regards the District's rights under any warranty or guaranty." (SCP Art. 11.) In addition, the contract stated that the COTR "may, at his/her option, accept part of the work under [the] contract prior to final acceptance of all the work under the contract when it is considered beneficial to the District of Columbia." (AFS Part 1 at 9, sec. E.2.)

10. The specifications explained project closeout procedures, which included the requirement that Appellant submit written requests for inspection for Substantial Completion and for Final Inspection. (AFS Part 3, sec. 01770.) Appellant was required to "give the COTR written notice at least fourteen (14) days in advance of the date on which project shall be 100% complete and ready for final inspection." (AFS Part 1 at 9, sec. E.3.)

11. Article 8 ("Payments to Contractor") of the 1973 Standard Contract Provisions governed retention of payments and provided, in part, that the contracting officer shall retain 10% of the estimated amount of progress payments "until final completion and acceptance of the Contract work." (SCP Art. 8.) It continued:

> Upon completion and acceptance of all work, the amount due the Contractor under the Contract shall be paid upon presentation of a properly executed voucher and after the Contractor shall have furnished the District with a release, if required, of all claims against the District arising by virtue of the Contract, other than claims in stated amounts as may be specifically excepted by the Contractor from the operation of the release.
> (*Id*.)

[269] Although the Summary of Work originally included "new gear lockers" under interior work, this text was crossed out in the document provided by the District. (*See* AFS Part 2, sec. 01010 at 1, ¶ 1.2.C.) In addition, section 10500, Metal Lockers/Locker Room Benches, of the Specifications made no mention of gear lockers. (*See generally* AFS Part 4, sec. 10500.)

Other Contract Deliverables

12. Section H.21 of the contract stated that, prior to final acceptance, the contractor must submit to the COTR three copies of the operation and maintenance ("O&M") manuals "for each piece of equipment, mechanical, or electrical system" that it installed. (AFS Part 1 at 29-30, sec. H.21, ¶ A.) These O&M manuals were to include instructions on the functions of all equipment and servicing information. (*Id*.) The contractor was required to deliver the O&M manuals "bound separately into appropriate sets"[270] at least one week "before District personnel assume[d] operation of the system." (*Id.* ¶¶ B-C.)

13. Section H.37 of the contract required that the contractor provide the District with as-built drawings "upon completion of all work under" the contract. (*See* AFS Part 1 at 39-41, sec. H.37.) These as-built drawings were to be "a record of the construction as installed and completed by the Contractor," and were to include "all the information shown on the contract set of drawings, and all deviations, modifications, changes from those drawings, however minor . . ." (*Id*. at 39-40, ¶ A.) During the period of performance, the contractor was also required to "maintain a full size set of [as-built] contract drawings" that it updated daily, and made "available for review by the COTR at all times." (*Id*. at 40, ¶ B.)

14. The contractor was also required to deliver warranties for the building systems and components that it installed during the project. (*See generally* AFS Parts 2-6.) Warranted items included, for example, (1) clay roofing tile (AFS Part 3, sec. 07321 at 3, ¶ 1.6); (2) membrane roofing (*Id*., sec. 07531 at 6, ¶ 1.9); (3) various window components (*Id*., sec. 08550 at 5-6, ¶ 1.8); (4) all mechanical work (AFS Part 4, sec. 15010 at 18, ¶ 1.25); and (5) interior and exterior lighting components (AFS Part 6, sec. 16511 at 3, ¶ 1.6; *Id*., sec. 16521 at 4, ¶ 1.7).

Project Commencement

15. CO Geoffrey Mack issued the Notice to Proceed on August 25, 2006—12 days after the contract was awarded to Dynamic. (District Hr'g Ex. 3.) After a six-month delay (the reasons for which are not relevant to this appeal), Dynamic commenced work. (*See* Hr'g Tr. vol. 3, 1073:11-20.)

16. During the course of the project, the District issued three change orders totaling $249,824.96, increasing the contract price to $2,639,324.96. (SOF ¶ 3; Hr'g Tr. vol. 2 (May 16, 2013), 437:15-18.)

a. Change Order No. 1 granted Dynamic $71,634.00 and 70 additional calendar days for delay, additional demolition, repairs, and other items. (*See* Dynamic Hr'g Ex. 3 at Dynamic 170-174.)

b. Change Order No. 2 granted Dynamic $91,728.96 and 150 additional calendar days for various changes. (*See* Dynamic Hr'g Ex. 4 at Dynamic 175.)

[270] The O&M manuals were to be grouped by building system—e.g., HVAC, plumbing, and "special equipment." (AFS Part 1 at 30, sec. H.21, ¶ B.)

c. Change Order No. 3 granted Dynamic $86,462.00 for changed work. (*See* Dynamic Hr'g Ex. 5 at Dynamic 186.)

Proposed Change Orders 12 & 23 and Change Order No. 2, Duct Bank

17. Proposed Change Order ("PCO")[271] 12, submitted September 7, 2007, in the amount of $23,872.36, sought a change for the relocation and installation of a "two way duct bank." (*See* District Hr'g Ex. 6 at DC 35-37.) PCO 12 did not state the intended use of the duct bank. (*See id.*)

18. On February 27, 2008, Dynamic submitted PCO 23,[272] in the amount of $12,876.52, for the relocation of incoming telephone and data lines into the same underground duct bank that was the subject of PCO 12.[273] (Dynamic Hr'g Ex. 8 at Dynamic 315-319; *see also* Hr'g Tr. vol. 2, 451:7-452:21.)

19. On May 2, 2008, CO Wooden issued Change Order No. 2, granting Dynamic $91,728.96 and 150 additional calendar days for various changes. (*See* Dynamic Hr'g Ex. 4 at Dynamic 175.) An attached "Memorandum for the Record" signed by COTR Cyrus and a vice president of Dynamic described the changes included in Change Order No. 2, and the results of on-site March 11, 2008, negotiations between Dynamic and the District for the price of each change. (*See id.* at Dynamic 176-179.) The Memorandum described the duct bank change: "For the relocation of incoming electrical (PEPCO) and telephone service duct banks." (*See generally* Dynamic Hr'g Ex. 4.) Neither Change Order No. 2 nor the attached "Memorandum for the Record" stated which specific Dynamic PCOs were being incorporated into Change Order No. 2. (*Id.*)

20. The District's estimate of the cost for Change Order No. 2 for use in negotiations with Dynamic regarding the duct banks included line items for *Demolition, excavate, backfill, replace conc. for elect. ductbank* and *6-4" dia. PVC conduits, concrete for electric ductbank*, while making no mention of and including no line items for the cost of relocating telephone or data duct banks. (District Hr'g Ex. 6 at DC 39.) The District's pre-negotiation estimated price for the duct bank work was $20,217.32, but the final price agreed to was the $23,872.36 proposed by Dynamic. (District Hr'g Ex. 6 at DC 18, 35, 39.)

21. Dynamic's president testified that the notation that "telephone service" was part of the duct bank described in the "Memorandum for the Record," attached to Change Order No. 2 was the result of an error by COTR Cyrus, and that Change Order No. 2 was only intended to include the duct bank described in PCO 12, which was intended to house two electrical conduits. (Hr'g Tr. vol. 2, 447:20-448:17; Hr'g Tr. vol. 3, 931:6-17, 990:14-18.)

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[271] The parties have also referred to these documents as Change Order Proposals or "COPs." (*See, e.g.,* SOF ¶ 7.)
[272] The parties have also referred to this proposed change order as a component of "PCO 5-C." (*See, e.g.,* SOF ¶ 7.a.)
[273] Based on the testimony of Dynamic's president ("it's a two-line, two-ducted line that is dedicated only for data and telephone service"), the telephone and data lines appear to have been in separate ducts. (Hr'g Tr. vol. 2, 440:13-21.)

22. The COTR, who conducted the March 11, 2008, negotiations on behalf of the District, testified that the negotiations covered both PCOs 12 and 23 as there was only one duct bank dug that was to carry electrical conduit and telephone and data conduit. (Hr'g Tr. vol. 4, 1381:20-1382:10.) He testified that the agreed-upon price in Change Order No. 2, $23,872.00, reflected the costs of bringing in the electrical and telephone/data conduits in the one duct bank dug for relocation of those conduits. (Hr'g Tr. vol. 4, 1373:4-1375:17.)

Proposed Change Order 26, Lead Paint

23. During work in the fire station's mechanical room, Dynamic discovered lead paint that had not been previously detected. (Hr'g Tr. vol. 2, 454:10-455:2.) On November 27, 2007, Dynamic submitted PCO 26 in the amount of $5,506.00 for the removal of the additional lead paint. (*see* Dynamic Hr'g Ex. 9 at Dynamic 320-323.)[274] Under "Reason for Change," Dynamic wrote "requested by owner." (Dynamic Hr'g Ex. 9 at Dynamic 320.)

Proposed Change Order 32, Wooden Stair Railing

24. On February 27, 2008, Dynamic submitted PCO 32,[275] in the amount of $6,995.12, for installation and painting of a wooden stair railing in the fire station's tower.[276] (Dynamic Hr'g Ex. 10; Hr'g Tr. vol. 2, 460:14-461:12.) Under "Reason for Change," Dynamic wrote "not included in original drawings; design omission." (Dynamic Hr'g Ex. 10 at Dynamic 324.)

The Fire Suppression System and Jockey Pump: Proposed Change Order 36

25. The renovations included installation of new fire suppression equipment. The Specifications stated the required materials and properties of fire suppression system components, and required that the contractor provide a submittal of approved sprinkler piping drawings. The contractor was not allowed to deviate from the piping and sprinkler layout working drawings without prior written authorization.[277] (*See* AFS Part 4, secs. 13851, 13915.)

26. Swanke's project manager testified that typically design of a fire suppression system is the contractor's responsibility; that the solicitation drawings give basic, generic information for the design of the fire suppression system but that it is up to the contractor to hire

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[274] Although Dynamic's PCO 26 also sought a compensatory delay of two days for the removal of the lead paint, Dynamic did not include this claim in its post-hearing brief. (*Compare* Dynamic Ex. 9, *with* Appellant Dynamic Corporation's Proposed Finding of Facts and Conclusions of Law ("Appellant's Post Hr'g Br.") 1-3, 8.)

[275] Dynamic has also referred to this proposed change order as a component of "PCO 5-C." (*See, e.g.,* 2d. Am. Pretrial Statement at 5.)

[276] Although Dynamic's PCO 32 also sought a compensatory delay of five days for the installation of the railing, this claim does not appear in Dynamic's post-hearing brief. (*Compare* Dynamic Ex. 10, *with* Appellant's Post Hr'g Br. 1-3, 8-9.)

[277] For example, section 13915 stated, "Drawing plans, schematics, and diagrams indicate general location and arrangement of [fire sprinkler] piping. Install piping as indicated, as far as practical. Deviations from approved working plans for piping require written approval from authorities having jurisdiction. File written approval with Engineer before deviating from approved working plans." (AFS Part 4, sec. 13915 at 7, ¶ 1.18.B.)

a fire suppression subcontractor to design the entire system. (Hr'g Tr. vol. 6, 2065:16-2067:1; District Hr'g Ex. 11 at DC 265.) According to the project manager, the contractor would then submit that design to the architect for review. (Hr'g Tr. vol. 6, 2067:2-5.) Appellant's president testified that the District's architect designed the entire fire suppression system. (Hr'g Tr. vol. 4, 1170:11-17.)

27. Section 13915 of the Specifications ("Fire-Suppression Piping") stated that the minimum working pressure of the fire sprinkler system was to be 175 psig (1,200 kPa). (AFS Part 4, sec. 13915 at 1.) However, the specifications did not indicate the level of water pressure within the building as it related to the required minimum working pressure for the fire sprinkler system. (*See generally* AFS Parts 2-6.) The drawings and specifications also did not identify a booster or jockey pump as being a contract requirement or as necessary to raise the building's incoming water pressure to achieve 175 psig for the fire sprinkler system. (*See generally id.*) (Hr'g Tr. vol. 2, 475:10-17; Hr'g Tr. vol. 5, 1744:19-1745:15.)

28. Dynamic's president testified that Swanke was unable to provide Dynamic with water pressure data for the fire station. (Hr'g Tr. vol. 2, 476:22-477:2, 495:18-496:6.) He stated that when Dynamic had requested this information from the D.C. Water and Sewer Authority ("WASA"), WASA had no record of water flow data for the neighborhood. (Hr'g Tr. vol. 2, 475:18-21, 496:7-15.) Because Dynamic had not been informed that the fire station's water pressure was too low, Dynamic had assumed that the incoming water pressure would be sufficient to support the sprinkler system without a jockey pump. (Hr'g Tr. vol. 2, 476:14-477:7.)

29. After a consultant for Dynamic performed the required water flow test, Dynamic determined that the incoming water pressure was too low to meet the fire sprinkler system's required minimum working pressure of 175 psig. (Hr'g Tr. vol. 3, 1082:8-9; Hr'g Tr. vol. 2, 477:5-7, 496:7-10.) Although the date on which Dynamic performed the flow test is unclear, in an October 17, 2008, letter to CO Wooden, Dynamic's president wrote that Dynamic had first notified FEMS on September 7, 2007, that a fire pump and jockey pump would be required in order for the fire sprinkler system to meet regulatory requirements. (*See* Dynamic Hr'g Ex. 11 at Dynamic 333.) The letter also stated that on that date, COTR Cyrus had asked Dynamic to draft a proposed change order "for furnishing and installing the Fire Pump System." (*Id.*; *see* Dynamic Hr'g Ex. 11 at Dynamic 341.)

30. On December 27, 2007, Dynamic submitted shop drawings and product data for an Aurora-brand inline fire pump to the District. (*See* District Hr'g Ex. 17.) The drawings did not include any product information for a jockey pump. (*See id.*) After Swanke reviewed and rejected the drawings, the District rejected Dynamic's submission on January 9, 2008. (District Hr'g Ex. 17 at DC 318-319.)

31. On February 7, 2008, Dynamic submitted shop drawings and product data for the same Aurora inline fire pump, as well as an MTH jockey pump, and related equipment, to the District. (*See* District Hr'g Ex. 18.) The "Remarks" field of the submission included a hand-written note that stated, "This is a design/build submission. The pump system shall conform to, [sic] be installed & tested in accordance w/ NFPA 20 & NFPA 70." (District Hr'g Ex. 18 at DC

329.) On the following page, a representative of Dynamic appears to have stamped, initialed, and dated a certification that the submission was "in accordance with [. . .] requirements of the Work and Contract Documents." (*Id.* at DC 330.) Dynamic's president testified that this stamp signified that Dynamic had reviewed and complied with the recommendations that the District had made when it rejected Dynamic's initial submission. (*See* Hr'g Tr. vol. 4, 1180:17-1181:9.) After review and approval of the drawings by Swanke, the District approved Dynamic's submission on February 14, 2008. (*Id*. at DC 329-330.)

32. On February 27, 2008,[278] Dynamic submitted PCO 36.[279] (*See* Dynamic Hr'g Ex. 11 at Dynamic 330-337.) Dynamic submitted three proposals for the price of PCO 36: $39,600.00, $43,200.00, and $126,050.10, and all bear the date of submission as February 27, 2008, (Dynamic Hr'g Ex. 11 at 330-339; Hr'g Tr. vol. 4, 1166:3-8.)[280] The $126,050.10 proposal was "for the installation of the jockey pump with the controller as well as the electrical work that needs to be done to upgrade the electrical system for the project." (Hr'g Tr. 501:5-9; 502:3-10)[281] The amount was broken down between Mechanical Work $36,000.00, Electrical Work $78,591.00,[282] and Overhead and Profit $11,459.10. (Dynamic Hr'g Ex. 11 at Dynamic 336.) The $126,050.10 proposal also included "Install Feed to Fire Pump Controller" and "Install Feed to Jockey Pump Controller." (*Id*. at Dynamic 337.) The "Scope of Work" for PCO 36 read, "Furnish and Install New Aurora Jockey Pump, Limited service Comptroller [sic], pump controller and Related Accessories." (*Id.*) Under "Reason for Change," Dynamic had written "Requested by Owner." (*Id.* at Dynamic 336.)

June 18, 2008, Cure Notice and July 9, 2008, COFD

33. On June 18, 2008, CO Wooden sent Dynamic a "Cure/Show Cause Notice," demanding that Dynamic explain within 10 days why it had failed to make progress on the renovation. (*See* District Hr'g Ex. 34.) Wooden wrote that the "incomplete work items which [contributed] to the delay of the project" included (1) as-built drawings, (2) installation of gear lockers, and (3) installation of the fire suppression system. (*Id*. at DC 486-487.) Wooden's cure notice also stated that as of June 17, 2008, Dynamic had completed 85% of the work required under the contract. (*See id.* at DC 486.)

34. Dynamic responded to the District's cure notice in a letter dated June 30, 2008. (*See* Dynamic Hr'g Ex. 35.) After addressing the other items identified in the cure notice,

[278] This was the same day that Dynamic had submitted PCOs 23 and 32. (*See* Finding of Fact ("FF") ¶¶ 18, 24, supra.)

[279] Dynamic has also referred to this proposed changed order as "PCO 5-B." (*See, e.g.,* 2d. Am. Pretrial Statement at 5.)

[280] It is apparent that notwithstanding the date of the PCO version seeking $126,050.10, it was submitted after it was determined on October 21, 2008, that electrical modifications were necessary to accommodate installation of the pumps. (FF ¶ 38.) That error in the date apparently arose because each iteration of the written PCO 36 used the same heading block without revising the date of the document.

[281] Paragraph 7.d. of the SOF identifies change order proposal 36 as being in the amount of $39,600 for the installation of a jockey pump and controller "(mechanical and electrical)" but it is plain from the documents in Dynamic Exhibit 11 that the $126,050.10 proposal included both mechanical and electrical installation and the $39,600 proposal did not. (Dynamic Hr'g Ex. 11 at Dynamic 330-1, 336-7.)

[282] This figure derives from an undated proposal from a Dynamic subcontractor for $78,591.00 to install new electrical service and equipment. (Dynamic Hr'g Ex. 16 at Dynamic 433.)

Dynamic wrote that the fire suppression system had been completed "as per Specification Section 13915,[283] with exception of the [i]nstallation of the 'Jockey Pump,'" and requested that Wooden issue "a written directive regarding this item." (*Id*. at Dynamic 520.)

35. On July 9, 2008, Wooden issued a contracting officer's final decision ("COFD") concerning the jockey pump, writing,

> On February 14, 2008, [the] Department of Consumer and Regulatory Affairs ["DCRA"] approved Dynamic's submittal for design of the Fire Suppression System required by the contract. The design included a jockey pump as part of the complete design solution. It is the [CO's] final decision that the jockey pump is part of Dynamic's design solution and therefore the purchase of the jockey pump is the responsibility of Dynamic. Therefore, you are hereby directed to immediately order the jockey pump and have it delivered and installed within 8 weeks from receipt of this letter.

(District Hr'g Ex. 12.) This decision was consistent with the opinion of Swanke that design of the fire suppression system was Appellant's responsibility, expressed in a June 12, 2008, email to COTR Cyrus, which Cyrus had discussed with CO Wooden on or about June 12, 2008. (District Hr'g Ex. 11 at DC 265; FF ¶ 26; Hr'g Tr. vol. 5, 1757:17-1759:9.) After receiving Wooden's COFD, Dynamic ordered a jockey pump and had it delivered to the fire station. (Hr'g Tr. vol. 2, 478:17-479:11.)

Installation of the Jockey Pump

36. On September 12, 2008, Dynamic issued RFI No. 26 to Swanke and COTR Cyrus (*see* Dynamic Hr'g Ex. 11 at Dynamic 344), writing the following:

> After revision of the Layout of the Water Room, the Fire Department requested that the Water Room be extended to accommodate the Fire and Jockey Pump as per DC Code. As per a meeting on site, one alternative to meet the requirement is removing and relocating the East wall of the Water Room. Please provide Dynamic with a revised layout and specifications for this modification. Please be advised that the lack of prompt direction on this matter will terminate all chances of meeting the 9/23/08 deadline for the installation and final inspection of the Fire Pump System.

(*Id.*) According to Dynamic's president, Dynamic had issued RFI No. 26 after determining that the jockey pump could not be installed in the water room because it did not fit. (Hr'g Tr. vol. 2, 481:2-14, 493:12-17.) Dynamic's proposed solution was to move one wall of the water room outward by three feet.[284] (*Id*., 481:15-16.) Dynamic's president testified that the District

[283] Although the certification implied that section 13915 applied to the entire fire suppression system, it did not. Rather, section 13915 discussed only fire suppression sprinklers and piping.

[284] Dynamic's president testified that this three-foot discrepancy had been the result of a design error. (Hr'g Tr. vol. 4, 1225:7-17.) However, Swanke's project manager testified that (1) although the contract drawings had inaccurately depicted the size of the space, Dynamic, as the fire suppression system designer, should have used its

ultimately hired one of Dynamic's subcontractors to move the wall, after which Dynamic returned to complete the jockey pump's installation.[285] (Hr'g Tr. vol. 4, 1225:17-1226:1.)

37. In an October 17, 2008, letter to CO Wooden, Dynamic requested that Wooden reconsider her July 9, 2008, COFD. (*See* Dynamic Hr'g Ex. 22; FF ¶ 35.) Dynamic's letter argued that: (1) it could not have anticipated the problem because it had been provided no water pressure data when it submitted its bid; (2) the minimum working pressure in the Specifications did not provide sufficient information for Dynamic to determine that a fire pump would be required; and (3) "once this issue was brought [to the District's] attention, we were asked to submit a Change Order." (*Id*.) According to Dynamic's president, as of the date of Dynamic's October 17, 2008, letter, Dynamic had installed the pipes and sprinklers required for the fire suppression system, but had not yet installed the jockey pump. (Hr'g Tr. vol. 2, 509:9-510:21.)

38. On October 21, 2008, as Dynamic was preparing to install the jockey pump, an electrical engineer at the site determined that the fire station's electrical service would be inadequate, and Dynamic advised the contracting officer and the COTR by email on that date that "some significant electrical upgrades will have to be made in order to supply the amount of power that is needed to run the pump system."[286] (Dynamic Hr'g Ex. 23 at Dynamic 489; Hr'g Tr. vol. 2, 479:12-480:10.)

39. Dynamic's president testified that Dynamic completed installation of the "mechanical portion" of the jockey pump, but did not complete the "electrical portion" because it had received "a letter from Mr. Giles that [it] disputed."[287] (Hr'g Tr. vol. 2, 524:8-16.) Dynamic's president testified that the cost of the mechanical portion of the pump installation was $39,600.00. (Hr'g Tr. vol. 2, 533:15-20.)

Punch Lists

40. On or about July 23, 2008, the District provided a "List of Defects and Omissions," (i.e., a punch list) to Dynamic. (*See* Dynamic Hr'g Ex. 36; *see also* Hr'g Tr. vol. 2, 545:4-8; Hr'g Tr. vol. 4, 1440:20-1441:12.) The COTR testified that punch lists were "normally" provided to contractors when a project reaches approximately 90-95% completion, and that this punch list reflected items that the COTR and his assistants believed that Dynamic needed to address in order to complete work under the contract. (Hr'g Tr. vol. 4, 1441:11-1442:11.)

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own drawings, and (2) Dynamic had selected a pump that was too large for the space. (Hr'g Tr. vol. 6 (June 19, 2013), 2205:6-2206:21.)

[285] Although the date on which the District enlarged the water room is unclear, it appears to have done so on or after October 16, 2008. (*See* Dynamic Hr'g Ex. 41 at Dynamic 632-33 (stating that Dynamic could not complete the water room and sprinkler system items listed on the District's September 27, 2008, punch list until the water room was enlarged to make room for the fire pump system).)

[286] Dynamic's president testified that Dynamic had not anticipated the electrical power that would be needed for the fire suppression system and the jockey pump. (Hr'g Tr. vol. 4, 1194:15-1195:4.)

[287] This appears to be a reference to the May 11, 2009, COFD by Giles, discussed below. (*See* FF ¶ 65.) However, Dynamic's president explained that once Dynamic received the letter from Giles, which it disputed, "we had to stop the electrical portion," but he did not explain why Dynamic believed it necessary to stop work after receiving Giles' COFD. (*See generally* Hr'g Tr. vol. 2, 524:1-16.)

41. The July 23, 2008, punch list consisted of 51 pages, with each page listing defects and/or incomplete deliverables for different areas of the project (*see generally* Dynamic Hr'g Ex. 36), and included the following items: (1) incomplete sprinkler piping and valves (*id.* at Dynamic 522); (2) "Fire pump and associated controllers and equipment have not been installed" (*id*.); (3) incomplete and/or improperly installed sprinkler heads (*id.* at Dynamic 524, 526, 531-533, 353); (4) incomplete site cleanup (*id*. at Dynamic 527, 572); (5) incomplete and/or poor work in the foyer and study (*id.* at Dynamic 528, 570); (6) incomplete work in the water room, kitchen, stairs, mechanical room, locker rooms, laundry room, tower (*id*. at Dynamic 529, 536-537, 544, 548, 550, 554-555); (7) heater EH4 as shown on plans not installed in water room (*id.* at Dynamic 522); and (8) "all administrative and procedural steps as outlined in [Specifications sec. 01770] under Closeout Procedures" (*id*. at Dynamic 527).

42. Dynamic's president testified that after receiving the July 23, 2008, punch list, Dynamic began working on the items identified by the District, with the exception of several that it disputed. (Hr'g Tr. vol. 2, 547:10-16.) He also stated that, by this time, Dynamic had completed all work required under the contract, except for the items listed on the District's punch list. (*Id.* at 547:20-548:12.)

43. In its July 30, 2008, request for a 16th progress payment, Dynamic certified that it had completed 94.55% of the contracted work. (*See* District Hr'g Ex. 8 at DC 228.)

44. On September 4, 2008, COTR Cyrus sent Dynamic a revised 26-page punch list, which highlighted items from the original punch list that were still incomplete. (*See* Dynamic Hr'g Ex. 37 at Dynamic 573-584.) The District's revised punch list also included a new requirement for a sliding glass window in the foyer. (*Id*. at Dynamic 580.) Dynamic installed the sliding glass window, as requested. (Hr'g Tr. vol. 2, 551:17-552:12.)

FEMS Reoccupies Engine Company No. 25 Fire Station

45. COTR Cyrus testified that FEMS re-occupied the fire station, and that Dynamic "left the site" in September of 2008.[288] (Hr'g Tr. vol. 5, 1735:21-1736:12.) Similarly, an October 16, 2008, letter from Dynamic to CO Wooden stated that the fire station had been "occupied and in use" since September 16, 2008. (*See* Dynamic Hr'g Ex. 41 at Dynamic 631, 633; *see also* Hr'g Tr. vol. 2, 587:19-588:11.)

46. Based on walkthroughs he performed throughout September 2008, Deputy Fire Chief Foust judged the renovations to be approximately 90% complete. (Hr'g Tr. vol. 7, 2532:3-12; *see also* Hr'g Tr. vol. 8 (June 21, 2013), 2730:12-2731:5.) Foust estimated that when FEMS re-occupied the fire station, there had been "at least 20 items that needed to be changed, added, repaired, or completed." (*Id*. at 2532:13-22.) Foust also testified that while he had reviewed the contract drawings, he had never read the contract or its specifications in forming his belief that Dynamic had not met the contract requirements in numerous respects. (*Id*. at 2554:16-2555:4.)

[288] Despite the COTR's testimony, Dynamic appears to have continued to perform work at the fire station after September of 2008, as further described below.

47. FEMS re-occupied the station notwithstanding the existence of a number of defects, including the absence of a functioning jockey pump for the sprinkler system, because of an urgent need to restore community-based fire service to an area of the District that had long gone without. (Hr'g Tr. vol. 7, 2394:5-17.)

September 27, 2008, Punch List

48. On September 27, 2008, the District produced a revised 15-page punch list, which it transmitted to Dynamic on or about the same day. (Dynamic Hr'g Ex. 39; Hr'g Tr. vol. 2, 553:3-7.) The September 27 punch list included the following items: (1) site clean-up (*see* Dynamic Hr'g Ex. 39 at Dynamic 604); (2) submission of all O&M manuals (*id*.); (3) submission of as-built drawings (*id*.); (4) incomplete "installation of wood blocking" on the front elevation (*id*.); (5) replacement of the sliding glass window in the foyer with a fixed glass window (*id.* at Dynamic 605);[289] (6) a malfunctioning trash basket in the apparatus bay (*id*.); (7) removal and reinstallation of quarry tile in the sitting room and kitchen (*id*. at Dynamic 608, 618); (8) a poorly-fitting door in the laundry room (*id.* at Dynamic 611); (9) a roof leak in the office (*id.* at Dynamic 617); (10) install escutcheon plate on sprinkler in stairway 200 (*id.* at Dynamic 609); and (11) install electric heater (EH4) in water room 118 (*id.* at Dynamic 615).

49. In an October 16, 2008, letter to CO Wooden, Dynamic stated that it considered the following items from the September 27, 2008, punch list complete: (1) the removal of debris from the yard; (2) provision of O&M manuals; (3) installation of wood blocking on the front elevation;[290] (4) repair of the apparatus bay trash basket;[291] and (5) repair of the roof leak. (*See* Dynamic Hr'g Ex. 41 at Dynamic 631-633.) Dynamic also wrote that it would deliver all warranties by October 17, 2008. (*Id*. at Dynamic 631.) Dynamic's letter did not address the as-built drawings. (*See generally id.*)

50. In its October 16, 2008, letter to CO Wooden, Dynamic wrote that it would not (or could not) complete the following punch list items: (1) replacement of the sliding glass window in the foyer with a fixed glass window;[292] (2) removal and replacement of quarry tile in the sitting room and kitchen;[293] and (3) repair of the laundry room door.[294] (Dynamic Hr'g Ex. 41, Dynamic 632-634.) Dynamic confirmed it would patch around the sprinkler in the closet,

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[289] This was a change from the District's September 4, 2008, punch list (FF ¶ 44), which had requested a sliding glass window in the same space—a window that Dynamic had already installed. (*Compare* Dynamic Hr'g Ex. 37 at Dynamic 573-584, *with* Dynamic Hr'g Ex. 39 at Dynamic 604; *see also* Hr'g Tr. vol. 2, 551:17-552:12.)

[290] Dynamic wrote that COTR Cyrus had "refuse[d] to acknowledge" that the wood blocking was complete. (*See* Dynamic Hr'g Ex. 41 at Dynamic 631-32.)

[291] Dynamic alleged that when it had "provided a solution" to the malfunctioning trash basket, COTR Cyrus had "yelled at [its] on-site superintendent and told him to leave the property for no reason." (*See* Dynamic Hr'g Ex. 41 at Dynamic 632.)

[292] Dynamic wrote that since previous punch lists had instructed it to install a sliding glass window in the foyer, it would not install a fixed glass window without a written change order. (Dynamic Hr'g Ex. 41 at Dynamic 632.)

[293] Dynamic stated that it would not complete the quarry tile because the deficiency had not been listed on previous punch lists, and because FEMS had "been in the facility since 9/16/2008 without any complaint on this matter." (*See* Dynamic Hr'g Ex. 41 at Dynamic 633.), However, Appellant did not deny that the quarry tile installation was part of its original contract. (*Id.*)

[294] Dynamic alleged that the door had been damaged by unspecified "on-site personnel"—presumably meaning District personnel. (*See* Dynamic Hr'g Ex. 41 at Dynamic 633.)

install an escutcheon plate at the sprinkler in stairway, and would look into completion of drywall in the study closet. (*Id.* at Dynamic 633-634.) CO Wooden did not respond to the October 16, 2008, letter. (Hr'g Tr. vol. 1, 152:20-154:20.)

Proposed Change Order 41, Kitchen Equipment

51. On October 14, 2008, Dynamic submitted PCO 41, in the amount of $27,285.18,[295] for the provision and installation of gear lockers ($17,180.27), a refrigerator ($1,543.94), an ice maker ($1,744.88), a stainless steel cover for the dishwasher ($484.00),[296] and a Vulcan-brand stove ($3,459.51) to COTR Cyrus.[297] (Dynamic Hr'g Ex. 12.) While Dynamic's president testified that the equipment was additional to contract requirements and had been "requested," by the District, he did not state who had requested it. (*See* Hr'g Tr. vol. 2, 465:14-18; *see also* Hr'g Tr. vol. 3, 1006:16-1009:12.)

52. COTR Cyrus testified that the new gear lockers represented an "upgrade" to the materials required under the contract, and that, therefore the $2,700.00 installation charge from Dynamic's supplier had already been included in the original contract price. (Hr'g Tr. vol. 4, 1386:19-1388:9; *see also* District Hr'g Ex. 27 at DC 430 (documenting the installation charge).) However, the District offered no direct support for Cyrus' statement. Rather, an excerpt from the contract drawings included with Dynamic Hearing Exhibit 12, shows the lockers containing "boots & uniforms" labeled as "N.I.C.," an acronym for "not in contract." (Dynamic Ex. 12 at Dynamic 401-402.) In addition, two Swanke conference reports, dated April 18 and April 30, 2008, included an entry stating that during a meeting on March 6, 2008, FEMS had requested that Dynamic "provide and install the Gear Locker [sic] which were previously being furnished by [FEMS]." (*Id.* at Dynamic 404-405, 406-407.) The conference report also stated that "a change order [would] be approved accordingly." (*Id.* at Dynamic 404-405, 406-407.)

53. While the contract's Specifications included a refrigerator, they did not include an icemaker, stove, or a separate stainless steel cover for the dishwasher. (*See generally* AFS Part 4, sec. 11450.)[298]

54. Dynamic's PCO 41 included approximately $1,265.34 in sales tax—consisting of $912.00 for the gear lockers (*see* Dynamic Hr'g Ex. 12 at 379-382),[299] and at least $353.34 for the kitchen equipment[300] (s*ee* Dynamic Hr'g Ex. 12 at Dynamic 384-392). Dynamic's president

[295] Although Dynamic's PCO 41 also sought a compensatory delay of 35 days for the provision and installation of the additional equipment, this claim does not appear in Dynamic's post-hearing brief. (*Compare* Dynamic Ex. 12, *with* Appellant's Post Hr'g Br. 1-3, 9-10.)
[296] Plus an unspecified amount of sales tax—discussed further *infra*.
[297] PCO 41 also included a 5% fee for the "removal of old items" in the kitchen. (*See* Dynamic Hr'g Ex. 12 at Dynamic 380.) As such, the extended price of the stove was $3,632.49, and the extended price of the remaining kitchen equipment was $3,991.95.
[298] This is also true of Specifications section 15870 ("Commercial Kitchen Hoods"). (*See* AFS Part 5.)
[299] Although the quotation from Dynamic's supplier lists $912.00 as a "freight" charge, Dynamic's purchase order to its supplier lists $912.00 as "sales tax," and leaves "shipping & handling" blank. (*Compare* Dynamic Hr'g Ex. 12 at Dynamic 381, *with* Dynamic Hr'g Ex. 12 at Dynamic 382.)
[300] The tax consisted of $83.95 for the refrigerator (Dynamic Hr'g Ex. 12 at Dynamic 385), $94.88 for the ice maker (*id.* at 386, 388), and $174.51 for the stove (*id.* at 391-392).

testified that Dynamic had included the sales tax because the District had "refused or failed" to provide a sales tax exemption certificate. (Hr'g Tr. vol. 3, 1024:8-1025:9, 1012:4-21, 1016:1-9, 1020:10-1021:21.) COTR Cyrus testified that he did not know whether the District had provided a tax exemption certificate, but "assum[ed]" that it had. (Hr'g Tr. vol. 4, 1385:18-1386:1.)

55. In a November 12, 2008, letter to CO Wooden, Dynamic wrote (1) that it had submitted all O&M manuals, and (2) that warranties and as-built drawings would be delivered to COTR Cyrus on the following day. (*See* Dynamic Hr'g Ex. 42 at Dynamic 641.)

56. On December 1, 2008, Dynamic requested that CO Wooden issue a final decision in the amount of $27,285.18 for what it described as Change Order No. 4, consisting of PCO 41 (kitchen appliance and gear lockers) and "the extension of gas to the patio area." (*See* Dynamic Hr'g Ex. 15 at Dynamic 419.) Although the amount that Dynamic requested for Change Order No. 4 was identical to the amount that it had requested for PCO 41, PCO 41 had not included the extension of gas to the patio in its description of work. (*Compare* Dynamic Hr'g Ex. 12 at Dynamic 379, *with* Dynamic Hr'g Ex. 15 at Dynamic 419.)

57. On December 2, 2008, Dynamic requested that CO Wooden issue a final decision in the amount of $351,068.80 for what it described as Change Order No. 5, consisting of PCOs 5-A, 5-B, and 5-C. (*See* Dynamic Hr'g Ex. 16.) Although PCO 5-A is not relevant to the instant appeal, PCO 5-B ($137,509.20)[301] consisted of the "Fire Suppression System, electrical and mechanical upgrade per latent condition," while PCO 5-C ($32,634.10)[302] consisted of the "Tower Stair Railing, Communication Service Ductbank, [and] Additional Paint Removal at the Mechanical Rm." (*Id*. at Dynamic 420.)

December 19, 2008, Cure Notice

58. On December 19, 2008, CO Wooden sent "Cure/Show Cause Notice No. 2" to Dynamic. (*See* District Hr'g Ex. 39.) In her notice, Wooden stated that punch list items were still incomplete,[303] including the as-built drawings, and the installation of the fire suppression system.[304] (*Id*. at DC 551-552.) Wooden's letter also identified (1) corrective work required on the fire station's front door, and (2) work that needed to be corrected before it could be approved by DCRA. Wooden instructed Dynamic to respond within 10 days with a schedule that would allow it to complete all outstanding deliverables by January 31, 2009, or risk termination of its contract for default. (*Id*.)

59. In an undated reply to CO Wooden's December 19, 2008, cure notice, Dynamic responded that it would complete the punch list once it received the District's response to Dynamic's October 16, 2008, letter regarding disputed punch list items. (*See* Dynamic Hr'g Ex.

[301] Dynamic later reduced the amount it sought for PCO 5-B to $126,050.10 in a January 23, 2009, letter that does not appear in the record. (*See* AF Ex. 2 at DC 71.)
[302] Dynamic later reduced the amount it sought for PCO 5-C to $23,377.64 in a January 23, 2009, letter that does not appear in the record. (*See* AF Ex. 2 at DC 71-72.)
[303] Although Wooden's letter references an attached punch list, no punch list appears in District Hearing Exhibit 39. (*See generally* District Hr'g Ex. 39.)
[304] Specifically, Wooden's letter instructed Dynamic to "[c]orrect work in the water room and repair the masonry wall as specified in the punch list." (District Hr'g Ex. 39 at DC 552.)

43 at Dynamic 643.) With regard to the building's front door and the fire suppression system, Dynamic wrote that it required further information from the District before it could respond. (*Id.* at Dynamic 643-644.) Finally, Dynamic's letter stated that Dynamic would provide all other outstanding deliverables, including the as-built drawings, by January 31, 2009—effectively conceding that it had not yet delivered the as-built drawings. (*Id*.)

March 12, 2009, COFD by CO Wooden

60. On March 12, 2009, CO Wooden issued a final decision on some of Dynamic's outstanding claims. (*See* AF Ex. 2.) In her COFD, Wooden, granted Dynamic adjustments including, (1) $126,050.10 for PCO 5-B (the fire suppression system);[305] (2) $25,377.64 for PCO 5-C (formerly, PCOs 23, 26, and 32);[306] and (3) $27,285.18 for PCO 4, which consisted of PCO 41 and extension of a gas line to the patio area.[307] (*Id*. at DC 71-72.) In total, Wooden approved $347,281.83 "as full compensation" for the claims listed in her letter, which also included Dynamic's payment request nos. 17 and 18.[308] (*Id*. at DC 72.)

61. At the time CO Wooden was preparing the March 12, 2009, COFD compensating Dynamic for changes to the fire suppression system, COTR Cyrus was working with Swanke to develop a scope of work for completing the fire suppression system. (Hr'g Tr. vol. 5, 1649:21-1651:17.) Cyrus testified that additional work on the fire suppression system was necessary because the District could not receive a Certificate of Occupancy until it had been completed. (*Id*. at 1649:14-20.)

Contract Completion and Close-Out

62. On March 16, 2009, Dynamic submitted its revised Request for Partial Payment No. 18, seeking $265,174.88. (*See* District Hr'g Ex. 8 at DC 240.) In its request, Dynamic certified that it had completed 98.62% of the work under the contract. (*Id*.)

63. COTR Cyrus signed Request for Partial Payment No. 18 on April 23, 2009, after making substantial hand-written changes to the document as prepared by Dynamic. (District Hr'g Ex. 8 at DC 240; Hr'g Tr. vol. 5, 1615:21-1617:1.) For example, under "total amount completed," Cyrus deleted 98.62% as entered by Dynamic on the Request and inserted 100%. (*See* District Hr'g Ex. 8 at DC 240.) Cyrus also reduced the amount of the payment due to

[305] Wooden's COFD indicates that she made the decision to grant compensation for the fire suppression system after "further review of Dynamic's letter dated October 17, 2008." (AF Ex. 2 at DC 71; *see also* Dynamic Hr'g Ex. 11 at Dynamic 333-334 (the October 17, 2008 letter requesting that Wooden reconsider her denial of the change order); FF ¶ 37.)

[306] The total for PCO 5-C consisted of (1) $12,876.52 for "Installation of [the] Data/Phone Service duct bank and concrete fill for" the same (formerly, PCO 23); (2) $6,995.12 to furnish, paint, and install a new wooden railing in the tower stairs (formerly, PCO 32); and (3) $5,506.00 for removal of lead paint from two walls of the mechanical room (formerly, PCO 26). (AF Ex. 2 at DC 71-72.)

[307] Extension of gas to the patio area was not listed in the scope of work for Dynamic's PCO 41. (*See* Dynamic Hr'g Ex. 12 at Dynamic 379.) In addition, the compensation awarded by CO Wooden is identical to the amount requested in PCO 41. (*Compare* Dynamic Hr'g Ex. 12, *with* AF Ex. 2.)

[308] Specifically, CO Wooden approved in full "payment request no. 17" in the amount of $82,106.95, and denied in full "payment request no. 18," which had sought $544,989.94. (AF Ex. 2 at DC 72.) No dates were specified for either payment request.

Dynamic from $265,174.88 claimed to $132,326.00, and retained a contract balance of $131,966.25. (*See id*.) The following certification appeared above Cyrus' signature on the payment request:

> D.C. CERTIFICATE: I certify that to the best of my knowledge and belief, this requisition is true and correct statement of work performed and materials supplied by the contractor and that the work and materials comply with the requirements of the contract. I also certify that all of the required certified payroll affidavits have been received.

(*Id*.) When Cyrus was asked at trial if he had intended to "approv[e] Dynamic's work as being 100% complete" by signing the request, he replied, "[t]hat they were supposed to be 100% complete, yes."[309] (Hr'g Tr. vol. 5, 1617:13-17.) Cyrus later stated that he had signed the request because he had been instructed to "release everything but the retention on this project." (*See id*. at 1775:11-14.) The contracting officer did not sign Request for Partial Payment No. 18 with Cyrus' modifications. (District Hr'g Ex. 8 at DC 240.)

64. In a letter dated April 24, 2009, Dynamic provided various contract closeout documents to COTR Cyrus. (*See* District Hr'g Ex. 31; Dynamic Hr'g Ex. 20; Hr'g Tr. vol. 2, 634-636.) According to the included letter, these documents included (1) two copies of the "Record Drawings," (2) six copies of the O&M manuals, and (3) a binder "containing the original Warranties Documents [sic] for the Equipment installed." (*Id.* at DC 474.) However, COTR Cyrus testified that the documents that Dynamic submitted were incomplete and that the binders were difficult to use because they did not include tabs or indices. (Hr'g Tr. vol. 4, 1460:5-1461:12.)

May 11, 2009, COFD by CO Giles

65. In a May 11, 2009, letter to Dynamic, CO Wilbur Giles amended the March 12, 2009 final decision by CO Wooden. (*See* AF Ex. 3; FF ¶ 60.) Specifically, Giles denied Dynamic's request for $126,050.10 for PCO 5-B (the fire suppression system), writing that "Dynamic was fully compensated for this work under Purchase Order No. PO 194623 in the amount of $174,165.00." (AF Ex. 3 at DC 74-75.) For PCO 5-C, Giles approved the wooden railing for the tower stairs (PCO 32) and the removal of lead paint in the mechanical room (PCO 26)—a total of $12,500.12—but denied compensation for installation of the phone/data duct banks, stating that "the CO was unable to verify the location of the work." (*Id*. at DC 75.) For PCO 4 (which consisted of both PCO 41 (the gear lockers and kitchen appliances), and the extension of a gas line), Giles awarded $21,109.27 of the requested $27,285.18, writing that "[u]pon [his] inspection of the patio area, there was no gas line extended to the patio as required by the Change Order." (*Id*.) Giles concluded his letter by advising Appellant of its right to appeal. (*Id.* at DC 78.)

66. In addition to revising the amounts previously awarded to Dynamic, CO Giles wrote in his May 11, 2009, letter (FF ¶ 65) that, after review of the "as-built drawings, O&M

[309] Cyrus was then asked, "You were approving that the work, this payment application says that they were 100% complete, yes?" to which he replied, "Yes, sir." (Hr'g Tr. vol. 5, 1617:18-21.)

manuals[,] and warranty binder forwarded [by Dynamic] on April 29, 2009," (FF ¶ 64) FEMS had determined that "the documentation submitted is not an accurate representation of the as-built conditions, is incomplete[,] and does not comply with the requirements of Volume's [sic] I and II of the Bid Documents. Therefore, the documentation as submitted is hereby rejected in its entirety." (AF Ex. 3 at DC 76.) Giles then listed eight inaccuracies in the as-built drawings,[310] five omitted O&M manuals,[311] and five missing warranties.[312] (*Id*. at DC 76-77.) Giles concluded by stating that the District would withhold "the remaining contract balance of $131,966.25, until the fire suppression system is fully operational,[[313]] all punch list items are complete, receipt of acceptable as-built drawings, and receipt of all O&M manuals and warranties as required by the contract." (*Id*. at DC 77.) However, Giles' COFD did not assign a specific value to any of the incomplete contract deliverables (*see generally* AF Ex. 3), and Giles testified at trial that he never determined a value for the incomplete punch list items, as-built drawings, O&M manuals, or warranties.[314] (Hr'g Tr. vol. 5, 1937:3-12, 1941:21-1942:4, 1943:19-1944:2, 1949:12-16.)

67. At trial, CO Wooden testified that CO Giles had issued the amended COFD as the result of a 2009 site inspection with Wooden and FEMS personnel.[315] (*See* Hr'g Tr. vol. 1, 110:2-114:21, 130:9-135:1, 140:2-142:11.) At trial, CO Wooden also testified that (1) she did not know why CO Giles had issued the COFD instead of requesting that she do so, and (2) Giles had never amended or revised any of her prior COFDs. (*Id*. at 142:22-143:19.)

68. CO Giles testified that prior to issuing his May 11, 2009, COFD, he had visited the fire station and spoken with FEMS personnel about their concerns. (*See* Hr'g Tr. vol. 5 at 1917:2-1918:9, 1919:6-1920:15.) CO Giles also testified that (1) he had the authority as CO Wooden's supervisor to amend her final decisions; (2) he had issued the amended COFD after receiving information from FEMS that Wooden had not considered; and, notably, (3) he had not reviewed the contract drawings or specifications prior to issuing his COFD.[316] (Hr'g Tr. vol. 5, 1870:3-1874:6.)

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[310] For example, Giles wrote that in the drawing of the water room, the "[w]all location [was] shown incorrectly. As built conditions, locations of backflow preventer, fire pump[,] and associated controllers/equipment have not been provided. Two Siamese connections exist, [but] only one is depicted on as-built drawing." (*Id*.)

[311] The omitted O&M manuals were for the (1) overhead doors, (2) sump pump, (3) fire pump and controllers, (4) "backflow preventer's [sic] and water pressure regulators," and (5) electrical equipment and panels. (AF Ex. 3 at DC 77.)

[312] The missing warranties were for (1) clay roof tile, (2) membrane roofing, (3) wood windows, (4) mechanical systems, and (5) electrical systems. (AF Ex. 3 at DC 77.)

[313] Giles' COFD did not specify what components of the fire suppression system were not yet operational. (*See generally* AF Ex. 3; *see also* Hr'g Tr. vol. 5, 1944:9-13.)

[314] Swanke's project manager testified that there was "probably little dollar value" for the O&M manuals. (Hr'g Tr. vol. 6, 2277:12-2278:8.)

[315] Although the date of the site inspection is unclear, it appears to have occurred after CO Wooden issued her March 12, 2009, COFD, and may have occurred on May 5, 2009. (*See* Hr'g Tr. vol. 1, 142:7-11 (Wooden stating that she became aware of errors in her COFD after the site inspection); Hr'g Tr. vol. 5, 1925:1-20 (counsel for Dynamic referencing Giles' deposition, and alternately stating that the site visit took place on May 5, 2011, and May 5, 2005, but presumably meaning 2009 in both instances).)

[316] Giles also testified that prior to issuing his COFD, he had not reviewed Dynamic's October 17, 2008, letter (FF ¶ 37), which Wooden's COFD referenced in granting Dynamic compensation for PCO 5-B (the fire suppression system). (Hr'g Tr. vol. 5, 1921:10-1922:13, 1923:8-13; *see also* AF Ex. 2 at DC 71; FF ¶ 60.)

69. Once Dynamic received Giles' final decision, which it disputed, Dynamic stopped work on the electrical portion of the jockey pump installation. (Hr'g Tr. vol. 2, 524:1-16.)

Further Remedial Work

70. As to whether any damage had been caused by the issues that Giles identified in his COFD, COTR Cyrus testified that, to his knowledge, the alleged deficiencies in the as-built drawings had never interfered with the District's beneficial use and occupancy of the fire station. (Hr'g Tr. vol. 5, 1760:4-10.) Cyrus testified that the District had subsequently received the clay roof tile and membrane roofing warranties from Dynamic, but that he could not recall receiving warranties for the windows, mechanical equipment, or electrical equipment. (Hr'g Tr. vol. 4, 1462:13-1463:3.) Cyrus also testified that, to his knowledge, none of the items for which Dynamic had failed to provide warranties had failed. (Hr'g Tr. vol. 5, 1763:6-10.) Finally, Cyrus stated that while the District had never received the remaining O&M manuals from Dynamic, the District had nonetheless been able to use all of the equipment and systems installed by Dynamic. (Hr'g Tr. vol. 4, 1461:8-16; Hr'g Tr. vol. 5, 1767:11-22.)

71. Deputy Fire Chief Foust testified that although he had never received copies of as-built drawings or warranties, he had never requested copies of these documents from Dynamic, COTR Cyrus, or CO Wooden. (Hr'g Tr. vol. 7, 2578:19-2580:22.) Foust also stated that although FEMS experienced several problems with mechanical equipment and water leakages after it reoccupied the fire station, he had never contacted Dynamic about these issues.[317] (*Id*., 2580:19-2586:22.)

Cost to Complete the Punch List

72. COTR Cyrus testified that after Dynamic had "left the project site," the District hired a consultant to determine the cost of completing the punch list items that Appellant had not completed. (Hr'g Tr. vol. 5, 1733:9-14, 1787:6-1788:9.) On or about December 11, 2008, the District's estimator, Downey & Scott, LLC, produced "Cost Estimate" for "Punch List Completion." (*See* District Hr'g Ex. 40.) The estimate, which had a "total recommended value" of $11,136.91, included the following items from previous District punch lists with line item prices for each: (1) installation of wood blocking on the front elevation, $504.97; (2) replacement of the sliding glass window in the foyer with a fixed glass window, $680.06; (3) tightening of slide pole turnbuckles, $366.84;[318] (4) removal and reinstallation of quarry tile in the kitchen and

[317] For example, when FEMS personnel discovered that water was leaking into the fire station's basement through the attachment holes for bollards that Dynamic had installed in the fire station's parking lot, Foust contacted COTR Cyrus, who hired a third-party contractor to fix the problem. (Hr'g Tr. vol. 7, 2591:5-2597:22.) Similarly, when the HVAC system failed "the first time that air conditioning was needed," Foust did not contact Dynamic, and instead hired a third-party HVAC contractor that had a blanket purchase agreement with FEMS. (*Id*., 2608:4-2611:16.)

[318] The District had included this item in both its July 23 and September 27, 2008, punch lists. (*See* Dynamic Hr'g Ex. 36 at Dynamic 559-560; Dynamic Hr'g Ex. 39 at Dynamic 612.) In its October 16, 2008, letter to CO Wooden (FF ¶ 49, 50), Dynamic wrote that it had already tightened the slide pole turnbuckles twice, and that it had told COTR Cyrus that, "the problem with the play in the pole cannot be addressed by tightening the bolts [. . .] [Rather,] the pole needs to be secured from the attic [. . .] [I]f we continue to adjust the bolts [. . .], the tension will eventually pull the brackets off the wall. We will[,] therefore, not tighten the bolts any further in order to avoid the associated

sitting room, $2,365.29 and $2,577.08, respectively; (5) modification of the apparatus bay trash basket, $1,156.57; (6) reinstallation of the laundry room door, $410.29; and (7) completion of work in the study, $776.85.[319] (*See* District Hr'g Ex. 40 at DC 553.) However, the estimate also included a requirement that had not appeared on previous punch lists: the installation of light switches in the men's and women's shower rooms, valued at $2,298.97. (*Id.*) It is unclear whether the District provided a copy of this estimate to Dynamic prior to commencement of the instant appeal.

73. In April 2009, COTR Cyrus prepared a scope of work for items from the punch list, other than fire suppression system work, that Appellant had not completed, and that scope was issued to a number of contractors. (Hr'g Tr. vol. 5, 1734:9-22.) Three proposals were received, and Cyrus evaluated prices, finding that of ARJ Group, Inc., ("ARJ") to be reasonable. (Hr'g Tr. vol. 5, 1741:4-9.) On July 22, 2009, FEMS issued a purchase order to ARJ Group, Inc., in the amount of its proposal, $12,514.50. (*See* District Hr'g Ex. 42.) Under "Description," the purchase order stated, "This requisition is for ARJ Group, Inc., to complete the punch list for the renovation of Engine 25. Dynamic Corporation failed to complete the work. Work shall be performed in accordance with [the] quote dated [April 20, 2009]." (*Id.* at DC 568.) COTR Cyrus testified that ARJ had written this quote. (Hr'g Tr. vol. 5, 1732:15:1733:1.)

74. The copy of the ARJ purchase order at District Hearing Exhibit 42 does not include either a copy of the referenced quote or an itemized punch list, but the comments section of the purchase order identified the work required as of May 19, 2009: "Complete the installation of the wood blocking on the masonry wall unit. Install fixed glass window at window 118 in room 100. Left side apparatus bay, reconfigure the opening for trash basket in trench line. Install electric heater (EH4) in the water room. Repair wall mounted heater in room 114. Remove tile at floor and wall joint and reinstall quarry tile cove base and floor tile correctly in the kitchen and sitting room. Patch around sprinkler head in closet storeroom commissary. Clear walls and floor from construction debris in the sitting room. Install escutcheon plate at sprinkler head near door in stairs 200. Tighten all turnbuckles and devices at poles from above." (District Hr'g Ex. 42 at DC 569; Hr'g Tr. vol. 5, 1739:8-18.)

Cost to Complete Fire Suppression System

75. On or about April 30, 2009 (i.e., approximately seven days after Cyrus approved Dynamic's Request for Partial Payment No. 18 (FF ¶ 63), the District received a proposal to complete the fire suppression system, in the amount of $64,895.00, from DC USA Technology, LLC. (*See* District Hr'g Ex. 14 at DC 275-280.) The proposal included the following work: (1)

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liability." (Dynamic Hr'g Ex. 41 at Dynamic 632-633.) CO Wooden did not respond to Dynamic's October 16, 2008, letter. (Hr'g Tr. vol. 1, 152:20-154:20.)

[319] This work consisted of completion of drywall in the closet, and removal of a board from a brick wall. (*See* District Hr'g Ex. 40 at DC 553.) Although this specific description of the work had not appeared on previous punch lists, the District's July 23, 2008, punch list had stated that the study was "incomplete," and had included a requirement to "[c]lean/restore all brick surfaces" in the study. (*See* Dynamic Hr'g Ex. 36 at Dynamic 570.) In its November 12, 2008, letter, Dynamic wrote that although it had not completed the drywall in the closet, it had installed wood trim "on the interior side of the [closet] door to match the exterior," and considered the item completed. (*See* Dynamic Hr'g Ex. 42 at Dynamic 642.)

replacement of "all sprinkler heads throughout the entire building[;]"[320] (2) relocation of the jockey pump; (3) installation of valves, sensors, and other components; (4) new sprinklers to cover additional areas of the building; and (5) installation and testing of new fire alarm components. (*See id.*) The attached bills of materials and labor stated that the total cost of the proposed sprinkler work would be $35,128.58, and that the revisions to the fire alarm would cost $17,524.00. (*Id*. at DC 278, 275.) Finally, the proposal stated that the cost of all electrical work on the fire suppression system, including providing "all electrical power needed for the Fire Pump and Dry System equipment"[321] would be $12,243.00. (*Id*. at DC 276.)

76. On January 8, 2010, FEMS issued a purchase order for completion of the fire suppression system to DC USA Technology, LLC, in the amount of $64,895.00. (*See* District Hr'g Ex. 14 at DC 274.) The purchase order incorporated DC USA Technology's April 30, 2009, proposal (discussed *supra*, FF ¶ 75), and listed the "requesting official" as David Foust. (*Id.* at DC 274-280.) COTR Cyrus testified that after the installation of the jockey pump was completed, "we were told by DCRA that the [water] flow to the jockey pump was incorrect. It was installed in the incorrect direction. So [DC USA Technology] had to take it out and [. . .] turned it around to flow correctly." (Hr'g Tr. vol. 4, 1407:15-1408:4.) Cyrus did not recall if the District had ever told Dynamic of this issue. (Hr'g Tr. vol. 5, 1641:21-1643:5.)

77. The District never terminated any portion of Dynamic's contract. (Hr'g Tr. vol. 2, 596:9-11.)

78. The unpaid balance of the contract claimed by Appellant is $131,277.40. (SOF ¶ 5.)

79. On May 13, 2009 (two days after Giles' COFD), Dynamic filed a notice of appeal with the Board. (Notice of Appeal.) Dynamic's Notice of Appeal included a copy of CO Wooden's March 12, 2009, COFD as an exhibit, but did not mention Giles' COFD specifically by name. (*See generally* Notice of Appeal.)[322]

80. On August 8, 2009, Dynamic filed its complaint seeking $509,631.38, which consisted of the contract balance of $131,277.40 and "proposed change orders in the amount of $378,353.98."[323] (Compl. ¶¶ 5-6.) Although Dynamic's complaint did not specify which COFD was being appealed, it stated that "[i]n his final decision, the [CO] denied [Dynamic's claim for the fire suppression system] in its entirety," denied Appellant's duct bank claim, and approved only $21,109.27 of its claim for gear lockers and kitchen equipment. (*See* Compl. ¶¶ 8, 9, 12.)

81. The Board conducted an eight-day hearing on the merits in this matter from May 15 through May 17, 2013, and from June 17 through June 21, 2013.

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[320] COTR Cyrus testified that replacement of all sprinkler heads was necessary because "there was going to be a building code change with the fire sprinkler heads." (Hr'g Tr. vol. 5, 1817:14-1818:7.)

[321] Based on the above description, we conclude that the "Bill of Materials & Labor Electrical" represents the cost of electrical installation of the jockey pump and related equipment. (*See* District Hr'g Ex. 14 at DC 276.)

[322] This notwithstanding the Board's rule that a notice of appeal "shall identify . . . the decision from which the appeal is taken." Board Rules 201.1.

[323] These change orders included Dynamic's delay claim of $180,925.50, which is no longer part of the instant appeal. (*See* Compl. ¶ 7.)

CONCLUSIONS OF LAW

Positions of the Parties

Appellant claims entitlement to compensation in the amount of $223,540.22, plus interest. (Appellant's Post Hr'g Br. 3.) This claim includes $131,277.40 for the contract balance, and a total of $92,262.82 for the PCOs approved by CO Wooden in her March 12, 2009, final decision: 23 ($12,876.52), 26 ($5,506.00), 32 ($6,995.12), 36 ($39,600.00), and 41 ($27,285.18). (*See id*. at 1.)

In arguing that it is entitled to the remaining contract balance, Dynamic alleges that: (1) it "completed 100% of the required contract work" for the fire suppression system; (2) it completed all punch list items "for which it was responsible[;]" and (3) even if the as-built drawings, O&M manuals, and warranties were incomplete, this does not justify withholding the contract balance because "the District did not suffer any damages." (Appellant's Post Hr'g Br. 36-42.) In arguing that it is entitled to payment for the five proposed change orders, Dynamic contends that (1) CO Wooden has already approved the relevant PCOs; and (2) CO Giles' amendment to Wooden's COFD "is a legal nullity and is wrong." (*Id*. at 27-36.)

In opposing Appellant's claim, the District argues that: (1) PCOs 23 and 36 do not represent changes to the contract; (2) Appellant failed to complete the fire suppression system; (3) Appellant has not shown entitlement to PCO 41 because it "erroneously" assessed additional labor charges for installing the equipment "even though it did not perform extra work," in addition to improperly assessing sales tax against the District; (4) Appellant is not entitled to the contract balance because it did not complete the required work and did not receive a substantial completion notice from the District; (5) CO Giles' amendment to CO Wooden's COFD was lawful; (6) the District is entitled to a set-off because it provided notice to Appellant of its defective work before reprocuring that work; and (7) Appellant is not entitled to interest on its claim, pursuant to D.C. CODE §§ 15-108 and 28-3302(a), because it materially breached the contract.[324] (District of Columbia's Post Hr'g Br. ("District's Post Hr'g Br.") 8-37.) The District argues that the Board should grant judgment in its favor, and that Appellant should "take nothing on its claims." (*Id*. at 37.)

Basis of Jurisdiction

The Board exercises jurisdiction over "[a]ny appeal by a contractor from a final decision by the contracting officer on a claim by a contractor" pursuant to D.C. CODE § 2-360.03(a)(2) (2011).[325] Although the instant case concerns final decisions from two contracting officers (FF

[324] Despite the District's statements that Appellant "walked off the job" and has materially breached the contract, the District has not terminated Appellant either for convenience or for default. (FF ¶ 77.)

[325] Prior to April 8, 2011, the Board exercised jurisdiction pursuant to D.C. CODE § 2-309.03(a)(2) (2001). The Procurement Practices Reform Act of 2010 repealed and replaced the District's procurement statutes, including the

¶¶ 60, 65), neither Appellant's Notice of Appeal nor its complaint stated which CO decision, by name, gave rise to this appeal. (FF ¶ 79; *see generally* Compl.) For the reasons stated herein, the Board concludes that this appeal arises from the May 11, 2009, COFD issued by Wilbur Giles.

Appellant filed its Notice of Appeal with the Board on May 13, 2009—two days after Giles issued his COFD, and less than 90 days after Wooden issued her COFD. (FF ¶¶ 60, 65, 79.) Although the Notice of Appeal did not provide any details concerning the identity of the contracting officer or the final decision being appealed, Appellant attached CO Wooden's March 12, 2009, final decision as an exhibit. (FF ¶ 79.) While this suggests that Appellant intended to appeal Wooden's COFD, Appellant's complaint, still without identifying which final decision Dynamic challenges, plainly addresses CO Giles' May 11, 2009, final decision. (*See generally* Compl.)

Appellant complains that the contracting officer in *his* final decision (1) denied Appellant's claim for work on the fire suppression system in its entirety; (2) denied Appellant's claim for work on the underground duct banks in its entirety; and (3) approved $21,109.27 of Appellant's claim for gear lockers and kitchen equipment (FF ¶ 80), actions taken by CO Giles in his final decision but not taken in the Wooden final decision. Finally, as the Wooden final decision was favorable to Appellant, and, in fact, afforded Appellant the relief regarding the change orders it now seeks in this proceeding, Appellant had no reason to appeal her final decision. *See General Elec. Co. v. United States*, 412 F.2d 1215, 1220 n.5 (Ct. Cl. 1969) (noting that, where two COFDs existed, the contractor "obviously" would not have challenged favorable decision).

The instant appeal arises solely from CO Wilbur Giles' May 11, 2009, final decision and is timely. The Board reviews CO Giles' final decision *de novo*. D.C. Mun. Regs. tit. 27, § 101.7 (2002); *see also Ebone, Inc.*, CAB Nos. D-0971, D-0972, 45 D.C. Reg. 8753, 8773 (May 20, 1998).

The Legal Effect of CO Giles' May 11, 2009, COFD

Appellant argues that CO Wilbur Giles' May 11, 2009, final decision "is a legal nullity and is wrong." (Appellant's Post Hr'g Br. 31.) Specifically, Dynamic argues that (1) as of May 11, 2009, CO Diane Wooden was still the CO for the contract, and, as such, was the only person with actual authority to change the contract; (2) even if Giles had been a CO, he lacked authority to revoke or amend Wooden's March 12, 2009, COFD; and (3) Giles' "haphazard and cavalier approach led him to make the wrong decision with regard to PCO 23" and other matters. (*Id*. at 31-36.) The District responds that Giles had the authority necessary to modify or amend Wooden's COFD as both "the contracting officer's supervisor and superior contracting authority." (*See* District's Post Hr'g Br. at 25-30.)

We reject Appellant's suggestion that for the Engine Company No. 25 project there was but one contracting officer—CO Wooden—authorized to act on issues arising under that contract

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Board's previous jurisdictional statute. D.C. Law No. 18-371, 58 D.C. Reg. 1185 (Feb. 11, 2011). This appeal was filed in 2009, under our previous jurisdictional statute. (*See* Notice of Appeal.)

and that, for that reason, the decision by Giles was a nullity. The contract language Appellant relies on (FF ¶ 5) simply cautions contractors not to take direction that modifies the contract from one who is not a contracting officer. Sound advice, but it does not limit contracting officer authority on a project to only one contracting officer. "The requirement for a personal and independent decision generally does not prevent the government agency from replacing the original contracting officer." John Cibinic, Jr., James F. Nagle, & Ralph C. Nash, Jr., Administration of Government Contracts 1306 (4th ed. 2006). Appellant misreads the contract language and ignores that at least one other contracting officer, CO Mack, took contract actions on this project. (FF ¶¶ 4, 15.) Mr. Giles was a warranted contracting officer in the office administering the contract in question as well as CO Wooden's supervisor (FF ¶ 4), and had authority to take contractual actions affecting the project including issuing final decisions.

However, that CO Giles possessed authority to issue final decisions regarding this project does not mean that he had authority to amend or modify CO Wooden's March 12, 2009, final decision to Appellant's detriment. Under the doctrine of finality, the government is bound by the conduct of its authorized agents, such as CO Wooden, when such agents are acting within the scope of their authority—even when their decisions are prejudicial to the government's interests. John Cibinic, Jr., James F. Nagle, & Ralph C. Nash, Jr., Administration of Government Contracts 60-65 (4th ed. 2006) (citing *Bell Helicopter Co.*, ASBCA No. 17776, 74-1 BCA ¶ 10,411; *Trevco Eng'g & Sales*, VABCA No. 1021, 73-2 BCA ¶ 10,096);[326] *see also URS Consultants, Inc.*, IBCA No. 4285-2000, 02-1 BCA ¶ 31,812 ("finality in contract relations is important not only in light of the parties' expectations but as a matter of economic efficiency. It is in the interest of both the contractor and the Government to be able to rely on decisions fairly made.").

> Cases hold that where a successor contracting officer inherits an agreement made by his predecessor that otherwise is enforceable and authorized, he may not "second guess" his predecessor and reject the agreement; the original contracting officer, acting within his authority, has the right to make "correct," as well as "incorrect" decisions that may equally bind the Government.

Folk Constr. Co., Inc., ENGBCA Nos. 5839, 5899, 93-3 BCA 26,094 (citations omitted).

In *Bell Helicopter*, the contractor challenged a contracting officer's decision concerning defective cost and pricing data, arguing that the decision was invalid because it purported to withdraw a previous, contrary decision by the prior contracting officer. The ASBCA sustained the appeal, finding that the prior CO's determination that there had been no defective pricing was "final and binding on the Government," and that the second CO's attempt to withdraw this determination was thus invalid. *Bell Helicopter Co.*, ASBCA No. 17776, 74-1 BCA ¶ 10,411.

In *Steward/Tampke J.V.*, the ASBCA found that the government was bound by a prior contracting officer's settlement agreement to pay interest on a contractor's claim, despite a

[326] "The actions of a government employee acting within the scope of his or her employment are the actions of the government itself, and, as with any contracting party, once the government has taken the final step toward committing a contractual act, it is bound by it." John Cibinic, Jr., James F. Nagle, & Ralph C. Nash, Jr., Administration of Government Contracts 60-61 (4th ed. 2006).

subsequent final decision by a different contracting officer finding that the contractor had not been entitled to interest under the Contract Disputes Act. *Steward/Tampke J.V.*, ASBCA Nos. 48929, 49172, 96-2 BCA ¶ 28,320.

Similarly, this long-standing principle was also discussed in *Liberty Coat* involving a clothing manufacturer that negotiated a series of downward adjustments to its contract based on design changes that lowered its manufacturing costs. *Liberty Coat Co.*, ASBCA No. 4119, *et al.*, 57-2 BCA ¶ 1576. Several years after the first contracting officer had approved the equitable adjustments, another contracting officer determined that the design changes had lowered Liberty Coat's manufacturing costs significantly more than his predecessor had calculated. *Id.* As a result of these findings, the second contracting officer issued a "Findings of Fact and Decision" rejecting the contract's deliverables, and stating that Liberty Coat would be required to reimburse the government for the additional cost savings. *Id.*

The ASBCA disagreed, stating that "[h]aving agreed to the deviation from the specifications [. . .], the Government is in no position, i.e., has no right, to reject the supplies solely because they deviated from the original specifications in the manner agreed to." *Id.* Finding that there had been no showing of fraud, collusion, or mutual mistake, the ASBCA denied the government's claim, despite the fact that the first contracting officer had not issued a formal modification to the contract. *Id.* (citing *P.L.S. Coat & Suit Corp.*, ASBCA No. 4185, 1957 WL 314; *Beaconware Clothing Co.*, ASBCA No. 3979, 57-1 BCA ¶ 1345; *Quality Clothing Co.*, ASBCA No. 4033, *et al.*, 57-2 BCA ¶ 1396); *see also Honeywell Fed. Sys., Inc.*, ASBCA No. 39974, 92-2 BCA ¶ 24,966.

Alleged Mutual Mistake Underlying CO Wooden's Decision

The District argues that CO Wooden's approval of the PCOs addressed in her final decision was the product of mutual mistake and, therefore, not binding on the District. (District's Post Hr'g Br. 28-29.) In order to justify reformation of a contract based on mutual mistake, a party must first show that both parties to a contract "were mistaken in their belief regarding a fact."[327] *C.W. Over & Sons, Inc. v. United States*, 45 Fed.Cl. 502 (Fed. Cl. 1999) (citing *Atlas Corp. v. United States*, 895 F.2d 745, 750 (Fed. Cir. 1990). What the District urges, however, is not a mutual mistake of fact but rather simply that CO Wooden made mistakes in her consideration of the issues before her in deciding the March 12, 2009, COFD. (*See generally* District's Post Hr'g Br. 28-29.)

Absent exceptional circumstances, even allegations that a contracting officer exercised poor judgment or made a bad bargain are insufficient to support the revocation of a contracting officer's decision. *See URS Consultants, Inc.*, IBCA No. 4285-2000, 02-1 BCA ¶ 31,812 ("[T]he correctness of a decision is not a valid measure of a Government official's authority.") (citing *Liberty Coat Co.*, ASBCA No. 4119, 57-2 BCA ¶ 1576) (citations omitted); *Honeywell*

[327] There being no evidence that mutual mistake of fact has occurred here, we need not consider its remaining elements—i.e., whether the mistaken belief was a basic assumption underlying the contract; whether the mistake had a material effect on the bargain; and whether the contract placed the risk of mistake on the party seeking contract reformation. *C.W. Over & Sons, Inc. v. United States*, 45 Fed.Cl. 502 (1999) (citing *Atlas Corp. v. United States*, 895 F.2d 745, 750 (Fed. Cir. 1990)).

Fed. Sys., Inc., ASBCA No. 39974, 92-2 BCA ¶ 24,966. This is true even in cases where a contracting officer's price or wage adjustment is based on an erroneous understanding of the law. *Broad Avenue Laundry and Tailoring v. United States*, 681 F.2d 746, 748 (Ct. Cl. 1982) (noting that when an official is acting within the scope of her authority, "[t]he government can be estopped by the promises" of that official) (citing *George H. Whike Constr. Co. v United States*, 140 F.Supp. 560 (Ct. Cl. 1956)) (citations omitted); *see also General Dynamics Land Sys., Inc.*, ASBCA No. 57293, 11-2 BCA ¶ 34,844.

Indeed, in the instant case, there is conflicting evidence regarding whether CO Wooden's decisions were, in fact, mistaken. For example, Appellant's president testified that PCO 23 reflected duct bank work separate from that of PCO 12 (FF ¶ 21), and the District's estimate for negotiation purposes regarding PCO 12 included line items for electrical work but not for data and telephone work. (FF ¶ 20.) On the other hand, COTR Cyrus testified that the work of both electrical and telephone/data duct banks were negotiated together and included in the price under Change Order 2. (FF ¶ 22.) Thus, it is not confirmed that the telephone/data duct bank PCO 23 which was submitted on February 27, 2008, just a few days before the negotiations on March 11, 2008, (FF ¶¶ 18, 22), was negotiated together with PCO 12.

Likewise, there is conflicting evidence with respect to the addition of fire and jockey pumps to the fire suppression system. The architect testified that typically fire suppression systems are handled as performance specifications with the contractor responsible for complete design of the system. (FF ¶ 26.) However, the District did not identify any provision in the specifications that would support that conclusion with respect to the Engine Company No. 25 project. (FF ¶ 25.) In these specifications, the only submittal requirement was that Appellant submit the sprinkler piping layout drawings. (FF ¶ 25.) The plans and specifications in the solicitation did not call out a requirement for a fire pump and jockey pump (FF ¶ 27), and Appellant's president testified that the architect, not Dynamic, designed the system, that the architect designed it without specifying installation of jockey and fire pumps, and that when pumps became necessary, their addition was an extra to Dynamic's contract. (FF ¶ 28.)

Finally, with respect to PCO 41, the COTR testified that the gear lockers addressed in PCO 41 were upgrades to the lockers already specified and that the installation cost included in PCO 41 duplicated an amount that should have been included in Appellant's bid. (FF ¶ 52.) However, the specifications identified the gear lockers as N.I.C., not in contract, and that FEMS was to provide the lockers. (FF ¶¶ 52.) PCO 41 reflected a District request that Dynamic supply and install gear lockers that had not been included in the original plans and specifications. Dynamic's president testified that installation of the gear lockers under these circumstances was an extra to Appellant's contract. (FF ¶ 51.)

As to inclusion of a small amount of sales tax in PCO 41 (FF ¶ 54), CO Wooden approved a price for the change order without breaking down the award cost separately to include sales taxes. Thus, not only may the government be bound by a decision of an authorized agent who misunderstands applicable regulations, *see Broad Avenue Laundry and Tailoring*, 681 F.2d 746, 748, but once the contracting officer awarded an equitable adjustment based on PCO 41, the adjustment was for a lump sum and did not include essentially an award of interest as argued by the District. *See Southwest Marine, Inc.*, ASBCA No. 54550, 08-1 BCA ¶ 33,786

("Once the modification was signed, the interest element lost its character as interest *per se* and was subsumed in the increased ceiling price agreed to by the parties.") (citing *ReCon Paving, Inc. v. United States*, 745 F.2d 34, 40 (Fed. Cir. 1984)). Again, the District's objection is to the amount awarded to Appellant by CO Wooden, and that amount was within the scope of her authority. Finally, extension of the gas line to the patio area seemed to have no effect on the price of the PCO 41. (*See* FF ¶ 56.)

In conclusion, all the issues the District claims are mistakes by CO Wooden are areas where the underlying facts are in dispute. What the District now questions is not a mistake of fact but a challenge to CO Wooden's judgment in evaluating the conflicting evidence regarding the PCOs. However, as discussed above, she is authorized to be mistaken in her judgments regarding matters within her authority to decide. Given the conflicting evidence in the record regarding the PCOs, the District has not demonstrated by a preponderance of the evidence that CO Wooden's final decision was mistaken. Even if it had, however, that she might have made mistakes in addressing Appellant's PCOs is not a ground for reversing or allowing another contracting officer to revoke her COFD.

Relevant Facts Underlying CO Wooden's Decision.

We also reject the District's related argument that it is permitted to amend CO Wooden's final decision because she lacked "knowledge of all the relevant facts" when she issued it. (*See* District's Sur-Reply at 8 (citing *General Elec. Co. v. United States*, 412 F.2d 1215, 1220.) In *General Electric*, the Court of Claims found that a supervisory agency contracting officer's decision to reimburse a contractor for its cost over-runs could not be reversed by the contracting officer responsible for funds at the contracting agency—a holding that undermines the District argument. 412 F.2d 1215, 1220.

It is the contracting officer's duty to obtain relevant facts before making a final decision. *See General Elec. Co.*, 412 F.2d 1215, 1221 ("as a responsible Government official, he would have duly investigated the matter before indicating his concurrence, as contracting officer, in a recommended course of action. Failure to do so before signing in an official capacity would have been neglect of duty.") It is the contracting officer's role to evaluate the merits of the contractor's claim independently. *Grumman Aerospace Corp. ex rel. Rohr Corp.*, ASBCA No. 50090, 01-1 BCA ¶ 31,316.

CO Wooden may have had staff, and most certainly had a contract architect[328] (FF ¶ 3) available to provide her the information she needed. Moreover, COTR Cyrus was specifically designated under the contract to monitor Dynamic's day-to-day performance and to advise the CO regarding Dynamic's compliance with the contract. (FF ¶ 6.) He was familiar with the circumstances of the project at the time CO Wooden made her final decision. (*See* FF ¶ 61.)

[328] On or about June 12, 2008, CO Wooden became aware of Swanke's view that design of the fire suppression system, including providing a jockey pump, if needed, was Dynamic's responsibility and that in Swanke's view, providing a jockey pump for the fire suppression system was not an extra. (FF ¶ 35.) Although she had agreed with Swanke in at first denying PCO 36 (*id.*), she eventually decided that PCO 36 was meritorious (FF ¶ 60). While the District may argue that the second decision approving the adjustment in the March 12, 2009, final decision was erroneous, it was not made without available information.

Given his knowledge and his responsibilities under the contract, Cyrus' knowledge will be imputed to the contracting officer. *See Ft. Myer Constr. Corp.*, CAB No. D-0859, 40 D.C. Reg. 4655, 4676-77 (Nov. 3, 1992). The District has not demonstrated that CO Wooden lacked relevant facts when issuing her final decision or shown any other basis for granting the District a second chance to address Appellant's PCOs.

District's Attempted Revocation of CO Wooden's Decision

In all of the above cases, the first contracting officer's final decision was in the contractor's favor and the second reversed or diminished the benefit to the contractor afforded in the first decision. This was the case here, and we find that Giles' attempt by final decision to reverse CO Wooden's award of equitable adjustments in her final decision was without effect. Therefore, to the extent the second final decision sought to rescind awards in the first final decision, it is invalid. A proper final decision of a contracting officer in the contractor's favor cannot be reversed by a successor contracting officer. *See* John Cibinic, Jr., James F. Nagle, & Ralph C. Nash, Jr., Administration of Government Contracts 1306 (4th ed. 2006). We decline to re-examine the specifics of CO Wooden's COFD to determine in hindsight if they were correct or incorrect. *Honeywell Fed. Sys., Inc.*, ASBCA No. 39974, 92-2 BCA ¶ 24,966.

Finding that CO Wooden was acting within the scope of her authority when she issued her March 12, 2009, final decision, and that there is no evidence of fraud, mutual mistake, or collusion, or any reason to depart from the doctrine of finality, the Board holds that the District may not subsequently alter or amend Wooden's final decision in this case.

CO Giles' Decision on New Contract Issues

However, Giles could act on issues not addressed in Wooden's final decision, which specifically addressed only the "above outstanding payment issues." (FF ¶ 60.) Her decision does not purport to deal with the entire project. *See Omni Abstract, Inc.* ENGBCA No. 6254, 96-2 BCA ¶ 28,367 (contracting officer need not decide all parts of a claim and may reserve portions of a claim for different or later treatment) (citing *McKnight & Little Contracting Co. & McGinnes Bros., Inc. (JV)*, ENGBCA No. 6055, 94-2 BCA ¶ 26,647). Issues not decided in CO Wooden's final decision are not final and may be decided by her later or by another authorized contracting officer.

Thus, the claims addressed by Giles that did not impinge on CO Wooden's final decision could be interpreted as authorized actions taken independently from the Wooden COFD. Specifically, in addition to amending the Wooden decision, CO Giles' May 11, 2009, decision (1) rejected the as-built drawings, O&M manuals, and warranties provided by Appellant; (2) stated that the fire suppression system and other (unspecified) punch list items remained incomplete, and (3) retained the $131,966.25 contract balance to protect the interests of the District until final completion as a result.[329] (FF ¶ 66.)

The District's Non-Acceptance of the Project

[329] The retainage was subsequently reduced to $131,277.40. (*See* FF ¶ 78.)

Dynamic argues that the retained contract balance must be released because the District has accepted the entire project as complete. It contends that COTR Cyrus' handwritten edit of Request for Partial Payment No. 18, changing Appellant's entry indicating the project was 98.62% complete to an indication that the "Total Amount Completed" was 100% (FF ¶ 63) thereby finally accepted the project on behalf of the District and that, consequently, any deductions from full payment are not authorized.

The doctrine of finality does not apply solely to contracting officer final decisions. In *Texas Instruments*, the government attempted to revoke a price negotiation memorandum after the administrative contracting officer, an authorized government negotiator, had approved it. *Texas Instruments, Inc. v. United States*, 922 F.2d 810 (Fed. Cir. 1990). The Federal Circuit held that the discovery of new (and unverified) information concerning the design of the articles being procured—information that had not been reviewed by the contractor—did not authorize the government to revoke a previously-negotiated (and now final) agreement. *Id.* at 816 (citing *Kurz & Root Co.*, ASBCA No. 17146, 74-1 BCA ¶ 10,543).

The contract stated that COTR Cyrus was authorized to accept portions of the work as Appellant delivered them. (FF ¶ 9.) However, Dynamic has not identified any provision of the contract naming the COTR as authorized to make *final* acceptance of the work. Absent proof that the COTR had such authority, his agreement to the pay request noting project completion at 100% would not signify the District's final acceptance of the project. *G.M. Co. Mfg., Inc.*, ASBCA No. 5345, 60-2 BCA ¶ 2759 (payment action initiated by person without authority to accept or reject work does not constitute government acceptance). In *KiSKA Constr. Corp.-USA and Kajima Eng'g and Constr. Inc., a Joint Venture*, ASBCA No. 54613, 07-1 BCA ¶ 33,445, a contractor with the Washington Metropolitan Area Transit Authority ("WMATA" or the "Authority") sought release of the contract retainage arguing that a signed progress payment request reflected its entitlement to the retainage. The ASBCA disagreed: "It is unclear whether the WMATA engineer, by his signature on the request for progress payment, attested to appellant's entitlement to the retainage, and it is unclear whether he was authorized to make such a determination on behalf of the Authority." *Id.*

Moreover, the District has demonstrated and Appellant has conceded that the work under the contract was not complete at the time Request for Partial Payment No. 18 was approved. (FF ¶¶ 39, 59, 62, 69.) Appellant conceded that it had not done the electrical installation necessary for use of the jockey pump (FF ¶¶ 39, 69), and it would be unreasonable to find final acceptance under such conditions.[330]

Additionally, Appellant has not shown intent on the part of the District to signify its final acceptance of the project by COTR Cyrus' authorization of the pay request reflecting 100% completion. The contract closeout procedures established a specific process for recognizing final acceptance (FF ¶ 10), and Appellant has not shown that it gave notice as it neared 100% completion as required by the closeout procedures. Given Appellant's concession that it had not

[330] Completion of the electrical work became a contract requirement when CO Wooden's COFD, which we have found to be binding, approved Appellant's PCO 36 in the amount of $126,050.10, which included both mechanical and electrical installation of the jockey pump. (FF ¶¶ 32, 60.)

completed the electrical installation for the jockey pump and its entry of less than 100% completion on request for Partial Payment No. 18, Dynamic could not reasonably have considered that Cyrus' signature constituted final acceptance of the project. In fact, Dynamic's president testified that because Dynamic disputed Mr. Giles' COFD, it stopped the electrical installation, thus conceding that it was incomplete. (FF ¶ 69.)

Also, the retainage clause in the contract provided that the contracting officer shall retain 10% of the estimated amount of progress payments "until final completion and acceptance of the Contract work." (FF ¶ 11.) The specific direction given COTR Cyrus not to release the retainage (FF ¶ 63) demonstrates the District's intention not to recognize the project as complete notwithstanding Cyrus' edits to the pay request.

As the ASBCA noted in *G.M. Co. Manufacturing*, mere evidence that payments were made to a contractor may be insufficient to prove government acceptance. *G.M. Co. Mfg., Inc.*, ASBCA No. 5345, 60-2 BCA ¶ 2759. Rather, there must be persuasive evidence demonstrating the government's intent to finally accept the work. *See Labco Constr., Inc.*, ASBCA No. 39995, 92-1 BCA ¶ 24,543 (finding no persuasive evidence of final acceptance where the government had accepted only a small portion of a construction project, and defects remained).

Appellant has not shown persuasive evidence of final acceptance of the project, and, therefore, we find that CO Giles' rejection of the as-built drawings, warranty binders, and O&M manuals was not barred by Cyrus' action in changing the percent complete to 100% when approving Request for Partial Payment No. 18.

The Propriety of the Retainage Decision

The unpaid balance of the contract, not including the adjustments granted in CO Wooden's March 12, 2009, final decision, is $131,277.40. (FF ¶ 78.) The District contends that it is entitled to retain the entire unpaid balance because Appellant failed to complete the contract work and has never received a substantial completion notice or acceptance notice from the District. (District's Post Hr'g Br. 21-22.)

Appellant is not entitled to payment for contract work that it did not perform, and the District is entitled to withhold from retainage a credit for such work. *See Prince Constr. Co.*, CAB No. D-1120, *et al.*, 2014 WL 939942 (Feb. 28, 2014); *M & M Elec. Co.*, ASBCA No. 39205, 90-2 BCA ¶ 22,832.

> However, while the District may withhold retainage if deficiencies remain in appellant's performance, *see M.C. & D. Capital Corp. v. United States*, 948 F.2d 1251, 1257 (Fed. Cir. 1991), excessive retention may be found improper when the amount of the retainage is not calculated to protect the District's interests. *See Columbia Eng'g Corp.*, IBCA No. 2351, 88-2 BCA ¶ 20,595.

A&M Concrete Corp., CAB No. D-1314, *et al.*, 2013 WL 7710333 (Dec. 9, 2013).

It is the District's burden to establish that the amount it seeks to retain from Appellant's

contract balance represents a reasonable amount for contract work Appellant did not perform. *See Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 769 (Fed. Cir. 1987); *Soledad Enters., Inc.*, ASBCA Nos. 20423, *et al.*, 77-2 BCA ¶ 12,552; *Hart's Food Service, Inc*., ASBCA No. 30756, 89–2 BCA ¶ 21,789; *Beach Building Corp*., ASBCA No. 33051, 88–1 BCA ¶ 20,508.

Cost to Complete Punch List Items

The District claims it is entitled to the entire unpaid balance on the contract because Appellant did not complete the punch list items included in the ARJ purchase order. (District Post Hr'g Br. 22, 24.) However, the District has failed to meet its burden to demonstrate that all of the items listed in the ARJ purchase order were Appellant's responsibility under the contract and to establish a value for all those found to have been Appellant's responsibility and left unperformed.

Approximately five months before CO Giles issued his final decision, the District produced an estimate of the item-by-item cost of completing punch list items that remained incomplete as of December 11, 2008—a total of $11,136.91 in repair costs. (FF ¶ 72.) This is the only evidence in the record that ascribes a specific monetary value for the repair costs to complete the punch list work not related to the fire suppression system. As Appellant appears to have performed some work after December 2008 when this government estimate was produced, we conclude that the July 22, 2009, ARJ purchase order is the best evidence of the items that remained incomplete as of April 2009 when the COTR solicited this repair work from ARJ. (*See* FF ¶¶ 58, 59, 72, 73.)

Based upon our review of the present record, we find that an item listed on earlier punch lists, in the December 11, 2008, estimate, and then in the later ARJ purchase order is evidence that the work was not completed by Appellant notwithstanding notice to Appellant from the District of the need for corrective action on certain outstanding work items. The December 11, 2008, estimate and the ARJ purchase order include many of the same items (FF ¶¶ 73, 74) although, unlike the December 11, 2008, estimate, the ARJ purchase order does not break down the cost for each task.

According to our review of the aforementioned evidence in the record, we conclude that certain of the work performed by ARJ under its July 22, 2009, purchase order with FEMS (FF ¶ 73) was within the scope of Appellant's contract and was not completed by Appellant including:

1. Wood blocking at the front of the building (FF ¶ 48). In his October 16, 2008 letter regarding the September 27, 2008 punch list, Appellant's president said wood blocking had been done. (FF ¶ 49.) However, we find that the inclusion of that work in the December 11, 2008, cost estimate (FF ¶ 72) and in the ARJ purchase order (FF ¶ 73, 74), which COTR Cyrus testified included work not completed by Dynamic, demonstrate that it was not completed by Appellant. The December 11, 2008, estimate lists the cost of this work as $504.97. (FF ¶ 72.)

2. Reconfigure opening for trash basket in apparatus bay. In his October 16, 2008, letter regarding the September 27, 2008, punch list, Appellant's president admitted that the work on

the trash basket had not been completed but contended the COTR prevented Dynamic from performing such work. (FF ¶¶ 49, 50.) Appellant has presented insufficient evidence to persuade us that its nonperformance of said work was excused. The estimate lists the cost of that work at $1,156.57. (FF ¶ 72.)

3. Install fixed glass window in room 100. Appellant refused to complete this work because a previous punch list had identified as a contract requirement that Appellant install a sliding glass window, and Appellant had installed it. (FF ¶¶ 44, 50.) Requiring a sliding glass window in the punch list of September 4, 2008, (FF ¶ 44) suggests that such was required by the contract, while changing course and requiring fixed glass (FF ¶ 48) suggests fixed glass was not required by the contract. The District has failed to establish that the fixed glass window was required by the contract, and it may not withhold retainage for installing the fixed glass window.

4. Install electric heater (EH4) in the water room. This was listed in the July 23, 2008, and September 27, 2008, punch lists (FF ¶¶ 41, 48), and Dynamic offered no evidence that it performed it or that it was not required by the contract. However, that item was not included in the estimate, and we have no evidence of its value.

5. Repair wall mounted heater in room 114. (FF ¶ 74.) There is nothing in the record regarding this work to demonstrate that it was part of Appellant's responsibility, nor is there evidence of the value of such work.

6. Repair quarry tile cove base and floor tile in kitchen and sitting room. This was listed in September 27, 2008, punch list. (FF ¶ 48.) Appellant refused to correct this work because the District had never complained of this condition before and because FEMS had occupied the space for about a month before it was noted. (FF ¶ 50.) We find this work was Appellant's responsibility and that it failed to perform it. The estimate values the work at $2,365.29 for the kitchen and $2,577.08 for the sitting room. (FF ¶ 72.)

7. Patch around sprinkler head in storeroom. Appellant acknowledged responsibility for this repair (FF ¶ 50), and there is no evidence Appellant completed it, but as that item was not included in the estimate, we have no evidence of its value.

8. Clear construction debris in sitting room. Appellant claimed to have cleaned the debris from the *yard* (FF ¶ 49), but there is no evidence it cleared construction debris in the sitting room. However, again, as this task was not included in the December 11, 2008, estimate we have no basis for determining the value of that task.

9. Install escutcheon plate at sprinkler head. Appellant stated its intention to perform that work (FF ¶ 50), but there is no evidence of its value.

10. Tighten turnbuckles. Appellant refused to further tighten turnbuckles. (FF ¶ 72 n.53.) We conclude that work was Appellant's responsibility, that it failed to perform it, and the reasonable cost of performing the work was $366.84. (FF ¶ 72.)

For items 1, 2, 6, and 10, above, we have determined that the work was Appellant's

responsibility under the contract, that Appellant did not perform it, and that the record supports the above findings regarding the reasonable cost of completion. Thus, the District may retain from the unpaid contract balance the total amount of $6,970.75 to protect its interests.

Cost to Complete Pump Installation

The District has also established the cost to complete the jockey pump installation and associated electrical service at $64,895.00. (FF ¶¶ 75, 76.) However, in her final decision, which we have found to be binding on the District, CO Wooden approved PCO 36 in the amount of $126,050.10, thus increasing the contract price by that amount that included both the mechanical and electrical installation. (FF ¶¶ 32, 60.) Dynamic seeks only $39,600.00 for the jockey pump work, not asking for anything for the electrical service which it did not install (*See* Appellant's Post Hr'g Br. n. 10.) and, in effect, creating a credit in the approved contract price, as amended, for its failure to install the jockey pump of $86,450.10. As this amount exceeds the $64,895.00 cost of completing the pump installation, the District is entitled to no additional retainage based on Appellant's failure to complete installation of the jockey pump and completion of the fire suppression system.

Alleged Damages Related to As-built Drawings, O&M Manuals and Warranties

The District has failed to show the value of the incomplete as-built drawings, warranties, and O&M manuals—all of which Giles described in his COFD as either incomplete or requiring revision. Of these items, at least one—the O&M manuals—had "probably little dollar value," according to the project manager for the District's architect, suggesting that a failure to deliver these items would be insufficient to justify retaining $131,277.40 of the contract price. (FF ¶ 66 n.48.)

In *PCL Constr. Svcs., Inc. v. United States*, 53 Fed.Cl. 479 (2002), the government retained over $1.35M of the price of a contract to construct a visitor center and parking structure at the Hoover Dam because the contractor had failed to complete "numerous punch-list items" and otherwise had not completed all required work prior to leaving the contract site. (*Id.* at 492.)

The Court of Federal Claims held that because the government never assigned costs to the incomplete punch list items, and had otherwise "failed to provide any basis for the amount of retainage," the government had failed to meet its burden of proof. *Id*. at 492-493 (stating that "[t]here can be no downward adjustment of the contract price by the government when there is no basis on which to calculate the adjustment"); *see also Gilbane-Smoot/Joint Venture*, CAB No. D-0885, 40 D.C. Reg. 4954, 4991-93 (Feb. 18, 1993); *Prince Constr. Co*., CAB No. D-1120, *et al.*

After a careful review of the record, we conclude that except as noted above there is insufficient evidence to support the District's retaining from the contract balance for any failure to supply acceptable as-built drawings, O&M manuals, and warranties. Therefore, we find that the record provides a reasonable basis for allowing the District to withhold from the unpaid contract balance $6,970.75 as its demonstrated reasonable costs of completion of punch list items

that were Appellant's responsibility. The District has failed to show its entitlement to withhold any other part of the contract balance.[331] *See PCL Constr. Svcs., Inc. v. United States*, 53 Fed. Cl. 479, 492 (2002).

The District's Attempted Set off Against Appellant's Recovery

The District argues that it is entitled to set off any amount that the Board may award to Appellant to cover the District's reprocurement costs. (District's Post Hr'g Br. 30-32 (citing *Perdomo & Assocs., Inc.*, CAB No. D-0799, 41 D.C. Reg. 3641, 3653-54, (Sept. 17, 1993). However, the District has not terminated Appellant's contract for default, and no setoff claim was asserted in CO Giles' May 11, 2009, final decision, which is the basis for our jurisdiction in this matter.

At all times material hereto, the Procurement Practices Act provided that "[a]ll claims by the District government against a contractor arising under or relating to a contract shall be decided by the contracting officer who shall issue a decision in writing, and furnish a copy of the decision to the contractor." D.C. CODE § 2-308.03(a)(1). In this case, the contracting officer's final decision before us—CO Giles' COFD of May 11, 2009—does not assert a set off claim, and the District's claim of set off is subject to dismissal as beyond the Board's jurisdiction. *See A&M Concrete Corp.*, CAB No. D-1314, *et al*.; *Keystone Plus Constr. Corp*., CAB No. D-1358, 2012 WL 554443 (Jan. 27, 2012).

CONCLUSION

Having rejected the District's claims against Appellant on their merits except regarding correction of the punch list items, the Board denies the District's retainage claim except to allow retention of $6,970.75 from the contract balance. The District is therefore ordered to pay Appellant the balance owed on the original contract: $131,277.40 less $6,970.75.[332]

Dynamic is also entitled to payment under the contract as changed per CO Wooden's final decision in the amount of $92,262.82. Absent a final decision asserting a set off in this matter, the District's set off claim is dismissed.

The District shall also pay Appellant interest in accordance with D.C. CODE § 2-359.09 (2011) (formerly D.C. CODE § 2-308.06), on amounts required to be paid in connection with this

[331] We also reject the District's argument that Appellant was in material breach of the contract. The record shows that although Appellant received several cure notices throughout the project, it appears to have undertaken corrective action in response to each of those cure notices. In addition, the District has never attempted to terminate its contract with Appellant either for convenience or for default. (FF ¶ 77.)

[332] While we have found the District entitled to retain $6,970.75 for completion of the punch list, it may not retain even that amount indefinitely. Within 60 days from the date of this decision, the District shall submit evidence demonstrating that these costs have been incurred and paid or release the remaining retainage to Appellant. *See L.A. Constr., Inc.*, PSBCA No. 3372, 95-1 BCA ¶ 27,291.

award of damages by the Board.[333] *See Civil Constr., LLC*, CAB Nos. D-1294, *et al.*, 2013 WL 3573982 (Mar. 14, 2013).

SO ORDERED.

Date: October 6, 2014

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

CONCURRING:

/s/ Marc D. Loud, Sr.
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[333] We reject the District's argument in its post-hearing brief that Appellant is not entitled to interest on its claims because it both failed to complete all work on the contract, and was in material breach of the contract. (District Post Hr'g Br. 32-33.) Having already found that the Appellant is not in material breach of the contract, the Board rejects the District's contention.

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

APPEAL OF:

RUSTLER CONSTRUCTION, INC.	)	
	)	CAB No. D-1385
Under Contract No. POKA-2002-B-0023-SH	)	

For the appellant: Robert A. Klimek, Jr., Klimek and Casale, P.C. For the District of Columbia: Robert L. Dillard, Esq., Office of the Attorney General.

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

OPINION

Filing ID 56313773

In this appeal, Rustler Construction, Inc. ("Rustler" or "appellant") seeks an equitable adjustment of $1,227,021.37 for costs and delay arising from four alleged constructive changes to its contract with the District for the "Reconstruction of Bladensburg Road, N.E., from Mt. Olivet Road to New York Avenue." Appellant claims that the constructive changes stem from defective specifications and/or differing site conditions. However, the District denies that appellant is entitled to any contract adjustment, arguing, *inter alia*, that (1) appellant's failure to maintain a critical path method ("CPM") schedule has rendered it impossible to accurately determine the impact of the alleged changes; and, furthermore, (2) appellant has failed to adequately prove its costs.

Upon review of the entire record in this case, and for the reasons set forth more fully below, the Board finds that appellant has proven its entitlement to an equitable adjustment for each of the four constructive changes. The Board hereby instructs the parties to conduct good faith settlement discussions regarding quantum and file a status report with the Board on the results thereof on or before December 10, 2014.

BACKGROUND

Appellant is a general contractor that provides roadway, bridge, and utility construction services. (Hr'g Tr. vol. 1, at 43:21-44:1, Apr. 24, 2012.) On December 5, 2002, appellant and the District of Columbia Department of Public Works, on behalf of the District's Department of Transportation ("DDOT"), entered into Contract No. POKA-2002-B0023-SH in the amount of $5,217,550.00 (the "contract"). (*See* Appellant's Appeal File Supplement ("AFS") Ex. 1, at Rustler 1-3, 6;[334] AFS Ex. 2, at Rustler 92; *see also* Hr'g Tr. vol. 1, at 45:8-11, 47:17-21.) The contract required the reconstruction of an area of high traffic density on Bladensburg Road, N.E. from Mt. Olivet Road to New York Avenue—a distance of approximately 0.75 miles.[335] (*See* Hr'g Tr. vol. 1, at 47:17-48:5; AFS Ex. 2, at Rustler 46.) The contract contemplated that the project would be completed within 360 days after issuance of the notice to proceed. (*See* AFS Ex. 2, at Rustler 54; Appeal File ("AF") Ex. 1, at 265; Hr'g Tr. vol. 1, at 50:2-3.)

[334] The Board has omitted leading zeroes when referencing the pages of bates-numbered documents.

[335] Bladensburg Road was, and continues to be, a six-lane divided highway, with three lanes running in each direction, separated by a median of varying widths. (Joint Stipulations of Fact ("JSF") 1-2; *see also* Hr'g Tr. vol. 1, at 49:8-15.)

The contract specifications enumerated five distinct phases of work with the focal point being the removal and disposal of the entire roadway, and the construction of a new roadway including roadway pavement, median, curbs, gutters, sidewalks, wheelchair ramps, driveways, drainage structures, planting, and roadway resurfacing. (*See generally* AFS Ex. 2.) During Phase I, appellant was required to remove the highway median and install temporary asphalt in its place—enabling two lanes of traffic to move in each direction on either side of the area available for reconstruction. (Hr'g Tr. vol. 1, at 50:3-6.) During Phases II and III, appellant was required to replace the two outside lanes on either side of the two center lanes. (*Id*. at 50:7-51:7) During Phase IV, appellant would rebuild the two inside lanes and the median, then connect the newly-built lanes to the existing lanes at each end of the road. (*Id*, at 51:8-12; *see also* AF Ex. 1, at 265.) Finally, the Phase V work – which appears to have been incorporated into Phase IV – included the removal of construction barriers, asphalt work at selected intersections, lane striping, and final cleanup.[336] (Hr'g Tr. vol. 1, at 51:13-17; *see also* AF Ex. 1, at 265.)

The contract specifications also incorporated various standard clauses and documents, including the District's "Standard Specifications for Highways and Structures, 1996." (AFS Ex. 2, Rustler 44.) Of particular importance to the instant dispute were two provisions pertaining to Equitable Adjustments, and a third provision addressing Construction Scheduling:

> 103.01 GENERAL PROVISIONS (CONSTRUCTION CONTRACT)
> . . .
> ARTICLE 4. EQUITABLE ADJUSTMENT OF THE CONTRACT TERMS.
>
> Pursuant to 23 CFR 635.109, the Contractor is entitled to an equitable adjustment of the contract terms whenever the following situations develop:
>
> *Differing Site Conditions*:
>
> (1) During the progress of the work, if subsurface or latent physical conditions are encountered at the site differing materially from those indicated in the contract or if unknown physical conditions of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the contract, are encountered at the site, the Contractor, upon discovering such conditions, shall promptly notify the Contracting Officer in writing of the specific differing conditions before they are disturbed and before the affected work is performed.
>
> (2) Upon written notification, the Contracting Officer will investigate the conditions, and if he/she determines that the conditions materially differ and cause an increase or decrease in the cost or time required for the performance of any work under the contract, an adjustment, excluding loss of anticipated profits, will be made and the contract modified in writing accordingly. The Engineer will notify the contractor of his/her determination whether or not an adjustment of the contract is warranted.

[336] As we discuss more fully herein, appellant's four instant claims pertain solely to Phases IV (Work Area Width Reduction), III (Working Around PEPCO Manholes, Temporary Tie-In), and II (Catch Basin Revisions).

> (3) No contract adjustment which results in a benefit to the contractor will be allowed unless the contractor has provided the required written notice.
>
> (4) No contract adjustment will be allowed under this clause for any effects caused on unchanged work.

(AFS Ex. 3, Rustler 276-277.)

> 108.03 CONSTRUCTION SCHEDULING. Prior to commencing any work, the Contractor shall submit [its] construction schedule to the Engineer for approval.
>
> GENERAL. Sequence of operations and dates for all major stages of work shall be shown on the schedule. Work under pay items shall not commence until schedule is approved.
>
> . . .
>
> CPM SCHEDULING. When required by the special provisions, the progress schedule shall be based on CPM scheduling . . .
>
> 4. . . .If the contract work falls more than 5 percent or 4 weeks, whichever is longer, behind the approved schedule and when directed by the Engineer, the Contractor shall produce and submit a revised [CPM schedule].

District of Columbia Dept. of Public Works, Standard Specifications for Highways and Structures 138-139, § 108.03 (1996 ed.).

Finally, the contract's special provisions amended "Standard Specifications for Highways and Structures, § 108.03" as follows—

> 17. Construction Scheduling:
> This special provision supplements 108.03 of the Standard Specifications by adding:
>
> (b) the Contractor shall produce and submit a progress schedule, based on the Critical Path Method (CPM) of scheduling, to the Engineer for approval prior to commencing any work.
>
> (c) ORDER OF WORK – The Contractor shall schedule his work so that the requirements of MAINTENANCE OF HIGHWAY TRAFFIC are satisfied.

(AFS Ex. 2, Rustler 54.)

In the instant dispute, appellant seeks an equitable adjustment and delay damages due to the contract's defective specifications and resulting District-directed changes (work area reduction, PEPCO manholes, temporary tie-in) and differing site conditions (catch basin revisions). In total, the appellant seeks $1,227,021.37 in damages, plus interest. Appellant's proposed adjustment includes its alleged

direct costs and compensatory delay, as well as 20.26% in overhead costs, 0.83% in bonding costs, and 10% profit. (Rustler's Post Hr'g Br. 29-36.) Appellant's claims are broken down as follows[337]:

Claim	Amount Sought
Phase IV: Work Area Width Reduction	$751,158.74
Phase III: Working around PEPCO Manholes	$247, 726.05
Phases III-IV: Temporary Tie-In	$67,999.69
Phase II: Catch Basin Revisions	$160,136.89
TOTAL	$1,227,021.37

In defense to appellant's claims, the District argues that appellant failed to maintain an updated CPM schedule (District Post Hr'g Br. 8), without which there is no definite way to determine District caused delays nor calculate the impact of any alleged delays (District's Post Hr'g Br. 16-26). The District also contends that appellant failed to submit proper cost and pricing data in support of its claims. (*Id.*) Finally, the District contends that Articles 17 (Conditions Affecting the Work), 6 (Utilities) and Standard Specification § 108.6 (Utility Delays), in effect, preclude *monetary* compensation for appellant's two utility related claims: working around PEPCO manholes and catch basin relocation due to the location of Washington Gas lines. (*Id*.) Below we address each of appellant's claims and the District's defenses thereto in greater detail.

*Claim One: Appellant claims **$751,158.74** due to a Reduction of the Phase IV Work Area Width*

During all phases of the contract work, appellant was required to implement a traffic control plan[338] that would allow four lanes of traffic to move through the construction zone. (AFS Ex. 2, Rustler 49-50.) Although the parties have stipulated that their originally agreed-upon traffic control plan called for 9ft, 4in travel lanes, various portions of the contract's specifications required 3.0m (i.e., 9ft, 10in) and 10ft lanes.[339] (*Compare* JSF (9ft, 4in lanes), *and* Hr'g Tr. vol. 1, at 75:16-21 (9ft, 4in lanes), *with* AFS Ex. 2, at Rustler 49 (3.0m lanes), *and* AFS Ex. 2, at Rustler 105-106 (10ft lanes).)[340] According to appellant, the initially-proposed work area was sufficiently wide to accommodate appellant's heavy equipment, including excavators, dump trucks, a boom truck, and a concrete paving machine. (Hr'g Tr. vol. 1, at 76:5-12.)

However, on April 23, 2003, prior to beginning contract Phase II, appellant notified Said Cherifi, the District's program manager, that a DDOT representative had issued a stop-work order prohibiting appellant from implementing the parties agreed-upon traffic control plan because of safety concerns. (*See generally* AFS Exs. 16-18, at Rustler 460-63.) In its notification letter, appellant wrote that the interruption of work would result in both delay and additional costs. (AFS Ex. 16, Rustler 461; *see also* AFS Ex. 18.) The CO testified that DDOT's safety concerns had arisen because the District's engineers had "miscalculate[ed]" the required lane widths in the original traffic control plan which provided insufficient space to accommodate city buses. (*See* Hr'g Tr. vol. 4, at 107:15-108:9; *see also* Hr'g Tr. vol. 1, at 73:17-22.)

[337] See the section entitled "Procedural History and Attempts at Settlement," *infra*, for a complete discussion of appellant's claims.
[338] The contract documents also refer to this plan as a "Maintenance of Traffic" plan. (*See, e.g.,* AFS Ex. 2, at Rustler 49.)
[339] The incorporated "Standard Specifications for Highways and Structures, 1996" did not specify any lane widths for traffic control plans. *See generally* District of Columbia Dept. of Public Works, Standard Specifications for Highways and Structures at 88-92, § 104.02 (1996 ed.).
[340] Units converted from metric have been rounded to the nearest inch except where otherwise noted.

In a letter to Cherifi dated May 5, 2003, appellant requested a contract adjustment of $108,367.55 from the District due to DDOT's stop-work order—an amount that included thirteen days of compensable delay. (*See* AFS Ex. 19, at Rustler 466.) In its letter, appellant also expressed concern that any changes to the original traffic control plan might adversely affect its work during contract Phase IV, stating that "[a]s work proceeds, [Rustler] will revisit the issue and if the impact is substantial, we reserve the right to pursue the additional costs." (*Id.*, at Rustler 465-466.)

On or about May 12, 2003, the District provided appellant with a draft of a revised traffic control plan. (*See* AFS Ex. 21, at Rustler 472.) That same day, in a letter to William Jones, DDOT's resident engineer, appellant agreed to the revised plan.[341] (*See id*.) On May 15, 2003, Jones provided appellant with an approved, final version of the revised traffic control plan for contract Phases II-IV. (*See* AFS Ex. 23.) The revised plan increased the minimum required lane width to 10ft for bus-restricted lanes, and to 11ft for all other lanes.[342] (*Id*. at Rustler 476.) This new requirement for bus lanes was at least one foot wider than what had previously been required under the contract's special provisions and sample "Maintenance of Traffic" drawings, and was 1ft, 8in wider than the travel lanes in the parties' original traffic control plan, thereby narrowing appellant's work space by approximately 6ft, 8in. (*See generally* JSF; AFS Ex. 2, at Rustler 49-50, 101-106; Hr'g Tr. vol. 1, at 72:3-16, 81:3-18.)

In a letter to Cherifi dated May 21, 2003, appellant replied that it (1) had received the revised traffic control plan, (2) considered the revised plan to be a "changed condition," and (3) was requesting an equitable adjustment to the contract in an amount to be negotiated. (*See* AFS Ex. 24, at Rustler 484.) On May 22, 2003, the CO sent a letter to appellant instructing it to proceed with work under the revised traffic control plan. (*See* AFS Ex. 25, at Rustler 485.) He also asked appellant to submit a change proposal to Cherifi. (*Id*.) The CO's letter concluded, "Pending settlement[,] a change order will be executed for total compensation for all the work attributable to the change." (*Id*.)

Also on May 22, 2003, appellant met with DDOT to negotiate an equitable adjustment to the contract. (*See* AFS Ex. 33, at Rustler 496.) On June 19, 2003, in response to the CO's May 22, 2003 letter, appellant sent a letter to Cherifi which described the results of its negotiations with DDOT and set forth the amounts appellant sought for the contract changes. (*See id*., at Rustler 497-498.) Appellant's letter stated that it reserved the right to present its full adjustment proposal following the completion of Phase IV, noting the difficulty in assessing the full effect of the contract changes prior to that time. (*See id*.)

Thereafter, the parties executed Change Order No. 1, which compensated appellant $177,937.00 due to changes and delay arising from DDOT's stop-work order and the widening of the travel lanes. (*See* AFS Ex. 6, at 290.) The change order also included the following statement: "The lump sum amount of this change order shall constitute the contractor's full and complete compensation for all cost incurred, including unabsorbed field and home office overhead cost incurred *during the delay period between April 23, 2003 and May 13, 2003* [emphasis added]."[343] (*Id*.) As such, appellant has not been compensated for any delays incurred after May 13, 2003, due to the District's reduction of its work area width. (Hr'g Tr. vol. 1, at 83:5-17.)

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[341] Appellant's letter also noted that "any additional cost to complete Phase IV work will be forwarded to [DDOT]." (*See* AFS Ex. 21, at Rustler 472.)

[342] As noted *supra*, the increase to 10ft lane widths was consistent with sample "Maintenance of Traffic" drawings included in the contract's specifications. (*Compare* AFS Ex. 2, at Rustler 105-106 (depicting "typical" lane closures), *with* AFS Ex. 23 (the revised traffic control plan).)

[343] Although a total of five change orders were issued during the period of performance, only Change Order No. 1 is relevant to the instant appeal. (*See generally* Hr'g Tr. vol. 1, at 83:2-85:19; AF Ex. 4, at 18-33.)

Due to the decreased work area, appellant's concrete trucks could not deliver concrete to rebuild the median of the road during Phase IV.[344] (Hr'g Tr. vol. 1, at 76:22-78:5; *see also* AFS Ex. 13, at Rustler 456 (a photograph dated June 3, 2004, depicting a concrete truck with its wheel hanging off the side of the new roadbed).) In addition, each truck that excavated material during Phase IV required an extra twenty minutes of load time because the truck had to be positioned behind the excavation machine, instead of side-by-side, because of the smaller work area. (Hr'g Tr. vol. 3, at 64:1-21.)

Appellant also had to establish ramps over nineteen manholes located within the Phase IV work area so that its trucks could drive over them. (Hr'g Tr. vol. 3, at 65:10-66:4.) Each ramp required an average of twenty minutes to build, followed by seventy minutes to place and fine-grade the stone around each manhole. (Hr'g Tr. vol. 3, at 65:10-66:4.) Additionally, appellant was unable to use its concrete paving machine due to the narrowed work area and instead resorted to laying the concrete by hand, thereby increasing its crew costs and increasing the number of concrete pouring operations from twelve to thirty-one, each of which was one day in duration.[345] (Hr'g Tr. vol. 2, at 36:1-9, Apr. 25, 2012; Hr'g Tr. vol. 3, at 62:17-63:6, 96:11-99:12.)

Lastly, appellant was unable to use its boom truck to install granite curb segments due to the narrower work area, and instead substituted several smaller pieces of equipment to work in tandem. (*See* Hr'g Tr. vol. 2, at 125:9-126:10) As further described *infra,* appellant now seeks an equitable adjustment of $751,158.74 for its increased costs and delay resulting from the reduction of the Phase IV work area.[346] [347] (Rustler's Post Hr'g Br. 29.)

*Claim Two: Appellant claims **$241,726.05** due to Delay Resulting from the Changed Requirement that Forty-One PEPCO Manholes Originally Marked as "Abandoned" be Kept Live*

The contract's original drawings showed that forty-one PEPCO manholes along the length of the roadway were to be "abandoned" (i.e., destroyed, filled-in, and paved-over). (*See* AF Ex. 1, at 557; Hr'g Tr. vol. 1, at 133:12-134:14; Hr'g Tr. vol. 2, at 127:17-128:6.) On June 2, 2003, appellant discovered that Miss Utility (a service that locates and marks underground utilities prior to excavation) had marked conduits running through the PEPCO manholes as being "live." (*See* Hr'g Tr. vol. 1, at 87:18-88:11, 134:17-135:1.) Upon being contacted, a PEPCO representative arrived at the site and instructed appellant not to destroy the manholes as the conduits they contained were to remain in use. (Hr'g Tr. vol. 1, at 135:2-10; *see also* AFS Ex. 93, at Rustler 807.)

[344] Appellant states that after demonstrating this problem to District officials, it was allowed to make adjustments to facilitate concrete deliveries from the travel lane adjacent to the construction zone. (*See* Hr'g Tr. vol. 2, at 120:6-16, Apr. 25, 2012.)

[345] Appellant required an additional five minutes to hand-measure and cut each of the 233 joint baskets (a device designed to keep concrete cracks from spreading) used in Phase IV. (Hr'g Tr. vol. 2, at 139:1-12; Hr'g Tr. vol. 3, at 66:5-14.)

[346] This amount incorporates a field office overhead rate of $2,633.46/day for the Phase IV work. (*See* AFS Ex. 10, at Rustler 356, 361-362; Hr'g Tr. vol. 3, at 57:7-21, 82:13-84:21.) Appellant's field office overhead was based on appellant's actual costs, and included appellant's Project Manager, Project Engineer, Superintendent and Foreman, as well as equipment rates based on the industry standard blue book value for equipment of the same size, age, etc. (Hr'g Tr. vol. 3, at 45:4-17, 72:8-14, 141:20-142:12.) Similarly, appellant used a 20.26% home office overhead rate for all periods of work discussed herein—a rate based on appellant's actual overhead costs for the period of performance. (Hr'g Tr. vol. 3, at 77:21-79:12, 142:2-12.)

[347] This amount incorporates the cost of a load of concrete that was improperly rejected by the District's inspector because water had been added to the mixture. (Hr'g Tr. vol. 3, at 73:6-74:3.)

On June 6, 2003, appellant notified William Jones, DDOT's resident engineer, that it would not be able to complete pavement work at the north end of the project site "until these manholes are taken care of." (AFS Ex. 29, Rustler 490.) On August 13, 2003, Jones confirmed in writing PEPCO's directive that the manholes should not be destroyed. (*See* AFS Ex. 35, at Rustler 499.) However, because appellant was not on PEPCO's approved list of electrical contractors, it could not perform the work to rebuild the manholes. (Hr'g Tr. vol. 1, at 136:4-11.)

PEPCO therefore engaged Joy Contracting, a third-party contractor, to rebuild the manholes. (Hr'g Tr. vol. 1, at 136:4-137:3.) PEPCO and/or its contractor were intermittently present at the work site for three months, from June 5, 2003, through September 5, 2003. (*Id*.) During this period, appellant had to work around PEPCO and its contractor (who placed material, equipment, and personnel in appellant's work area), which resulted in delay. (*Id*. at 136:4-137:3, 139:6-19; *see also* AFS Ex. 13, at Rustler 446; AFS Ex. 36, at Rustler 500.) There was also delay due to PEPCO having to adjust the final elevation of the rebuilt manholes to that of the completed road surface. (*See* Hr'g Tr. vol. 2, at 152:4-153:22.) As further described *infra*, appellant now seeks an equitable adjustment of $247,726.05 for its increased costs and delay resulting from the manholes being rebuilt instead of abandoned as per the contract's drawings.[348] (Rustler's Post Hr'g Br. 31.)

*Claim Three: Appellant claims **$67,999.69** due to Increased Costs from "Tying Together" the New and Old Roadways during Phases III and IV*

The contract drawings required appellant to install a thin strip of temporary asphalt connecting the new and existing roadbeds along the 0.75 mile length of the project (a "tie-in").[349] (Hr'g Tr. vol. 1, at 169:5-15; Hr'g Tr. vol. 2, at 171:3-15; AF Ex. 1, 266.) The purpose of the tie-in was to ensure that vehicles would have a safe and smooth transition between the new and existing road surfaces. (*See* JSF; Hr'g Tr. vol. 1, at 169:16-20.) Appellant's Vice President estimated that installation of the temporary tie-in, as depicted in the contract drawings, would have required one working day. (*See* Hr'g Tr. vol. 1, at 170:17-19.)

In October 2003, the parties determined that there was a significant elevation discontinuity in that the newly-constructed portions of the roadway were between five and six inches lower than the existing roadway—a distance too great to be bridged by the tie-in shown in the contract drawings. (*See* AFS Ex. 43, at Rustler 510; Hr'g Tr. vol. 1, at 169:16-170:3.) At a progress meeting on October 22, 2003, DDOT representatives verbally instructed appellant to create a wider tie-in by removing asphalt (and, in some cases, the underlying concrete) from the old roadway and then placing a wider asphalt tie-in to connect the old and new roadways.[350] (AFS Ex. 43, at Rustler 510; Hr'g Tr. vol. 1, at 89:19-92:15 (stating that appellant was directed "to take about five to six feet [of the existing roadway] and kind of chisel it out"), 170:9-14.)

In a letter to Cherifi dated November 6, 2003, appellant noted that the work to tie-in the new and old roadways consisted of the "[r]emoval of the existing asphalt . . . in Phase IV" and the "installation of temporary asphalt placement over all excavated areas." (*See* AFS Ex. 43, at Rustler 510.) The tie-in work

[348] Appellant's field office overhead during Phase II was $3,950.27/day. (*See* AFS Ex. 10, at Rustler 356-358; Hr'g Tr. vol. 3, at 82:21-84:21, 96:11-97:8.)

[349] The required width of the asphalt tie-in is unclear. While at least one contract drawing shows a 150mm (i.e., 6in) tie-in, appellant's Vice President testified that the contract required a 250mm (i.e., 10in) tie-in. (*Compare* AF Ex. 1, at 266, *with* Hr'g Tr. vol. 1, at 169:5-15.)

[350] The new tie-in was between five and six feet wide, as opposed to the contract's original design which was between six and ten inches wide. (*Compare* Hr'g Tr. vol. 1, at 91:20-21, *with* AF Ex. 1, at 266, *with* Hr'g Tr. vol. 1, at 169:5-15.)

delayed appellant's job progress "due to the timely excavation and hand work required to install the temporary asphalt." (*Id*.) Appellant requested eleven calendar days of compensable delay for the change.[351] (*Id.*) As further described *infra*, appellant now seeks an equitable adjustment of $67,999.69 for its increased costs and delay resulting from the revised tie-in. (Rustler's Post Hr'g Br. 34-36.)

*Claim Four: Appellant claims **$160,136.89** due to the Changed Requirement to Move the Catch Basins from the Curb to the Center of the Road*

Special Provision No. 24 of the contract, "REPLACE BASINS," required appellant to remove the existing catch basins (i.e., storm drains), and build "new Standard (single), Double or Triple Basins *at the same location* [emphasis added]." (AFS Ex. 2, Rustler 56-57; *see also* Hr'g Tr. vol. 1, at 147:9-14.) Appellant anticipated replacing at least seven catch basins. (Hr'g Tr. vol. 1, at 154:9-10.)

Although appellant was aware that a 12in high-pressure Washington Gas pipeline was located in the vicinity of the existing catch basins, it did not know its precise location. (JSF; Hr'g Tr. vol. 1, at 149:11-21; *see also* AFS Ex. 51, at Rustler 524.) During excavations on December 1, 2003, appellant discovered that one of the existing catch basins was "literally sitting on the gas line."[352] (AFS Ex. 45, Rustler 513; Hr'g Tr. vol. 1, at 88:18-19.)

In a letter to Cherifi dated December 3, 2003, appellant notified the District that it considered the line's close proximity to the existing catch basin to be a differing site condition. (*See* AFS Ex. 45, Rustler 513.) On December 9, 2003, Cherifi instructed appellant (1) to dig test holes at various locations directed by the project engineer to determine the gas line's depth along the length of the work zone; and (2) to submit pricing for an "inlet grate and frame with curb box" (which was a different type of catch basin than appellant had originally proposed in its bid). (*See* AFS Ex. 47, at Rustler 515; AFS Ex. 51, at Rustler 524.)

According to appellant, it took the District "a good two months" to provide instructions on how to rectify the problem. (Hr'g Tr. vol. 1, at 152:1-21; Hr'g Tr. vol. 2, at 75:3-76:8.) Thus, this claim is based upon the two month delay—appellant's theory for recovery being that timely direction on the District's part would have allowed it to place the concrete roadway in conjunction with the relocation of the catch basins, rather than skipping those portions of the roadway and returning to them in an untimely and less efficient manner.[353] (*See id*.)

Subsequently, appellant installed seven units of a more expensive type of catch basin under the center of the road, instead of at the curb, thereby avoiding the gas line. (Hr'g Tr. vol. 2, 71:20-74:17; Hr'g Tr. vol. 1, 164:8-17.) Washington Gas compensated appellant $27,300.00 to relocate the catch basins. (*See id*.)

[351] Appellant now contends that the revised tie-in resulted in thirteen days of delay, rather than eleven. (*See* Rustler's Post Hr'g Br. 34-36.)

[352] This appears to have been a hazardous condition. (*See* Hr'g Tr. vol.1, at 149:8-19.) According to appellant's Vice President, a Washington Gas representative stated that the gas line in question was capable of "blow[ing] up half the city." (*Id*.)

[353] The District's deputy program manager, Abdullahi Mohammad, testified that the catch basin issue took approximately twenty days to resolve, but then he later claimed that no delay resulted from the catch basin revisions. (*See* Hr'g Tr. vol. 5, at 61:22-62:4, May 23, 2012.)

Appellant's Vice President testified that appellant had also ordered seven concrete catch basin tops[354] for the type of catch basins originally proposed prior to the discovery of the gas line. (*See* Hr'g Tr. vol. 1, at 159:4-160:2; *see also* AFS Ex. 53, at Rustler 537.) According to a January 20, 2004, letter from appellant to Cherifi, a DDOT representative verbally agreed to compensate appellant for any restocking fee that it may incur since those catch basin tops were no longer needed and therefore had to be returned to the supplier. (*See* AFS Ex. 53, at Rustler 537.) However, when appellant informed the District that the restocking fee was 25% of the purchase price, a District representative verbally instructed appellant to instead deliver the unused catch basin tops to the District. (*See* Hr'g Tr. vol. 1, at 160:3-21.) The catch basin tops were stored at appellant's on-site staging area which the District took possession of following project demobilization.[355] (*Id*. at 160:15-161:1.) Appellant was never paid for the catch basin tops. (*Id*. at 161:2-5.)

Termination of Contract Work

By August 2004, appellant had (1) substantially completed the contract work, except for some lane striping and other punch list items; and (2) demobilized the work site, except for its staging area. (*See* Hr'g Tr. vol. 1, at 161:13-163:9; Hr'g Tr. vol. 4, at 30:6-13.) By that time, the District lacked sufficient funding to close out the project and therefore requested that appellant demobilize its on-site staging area. (*See* Hr'g Tr. vol. 1, at 161:16-20; Hr'g Tr. vol. 4, 37:2-7.) However, appellant refused to demobilize its staging area unless the District agreed that the contract work was complete. (*See* Hr'g Tr. vol. 1, at 163:1-7; AFS Ex. 82, at Rustler 777.) Following appellant's refusal, the District took possession of the staging area and hired a third-party contractor to clean up. (*See* Hr'g Tr. vol. 1, at 162:17-163:9; Hr'g Tr. vol. 4, at 36:17-37:20.) The District never provided a formal notice of completion to appellant. (Hr'g Tr. vol. 1, 163:10-16.)

Procedural History and Attempts at Settlement

On May 9, 2005, appellant requested that the CO issue a contracting officer's final decision for an equitable adjustment of $1,339.693.02 for various contract changes. (*See* AF Ex. 3, at 609-622.) As it relates to the instant appeal, appellant's May 9, 2005, claim included (1) $321,611.72 in costs and seventy-nine days of delay for the work area width reduction during Phase IV; (2) $185,723.84 in costs and forty days of delay for working around the forty-one PEPCO manholes as they were being rebuilt; (3) $96,013.68 in costs and fourteen days of delay for changes to the temporary tie-in; (4) $32,501.67 in costs and twenty days of delay for concrete paving in the area around the catch basins that were adjacent to the high-pressure gas line; and (5) $8,550.00 for the nineteen unused catch basin lids[356]—a total of $644,400.91 in costs, plus 153 days of delay.[357] (*See generally* AF Ex. 2, at 2-10.) The CO does not appear to have issued a decision regarding these claim elements.

More than four years later, on November 19, 2009, appellant submitted another request to the CO for a contracting officer's final decision. (*See* AF Ex. 1, at 1-2.) Appellant's November 19, 2009, claim included three components: (1) $600,000.00 representing a verbal settlement that the parties negotiated on

[354] Notwithstanding this testimony, the Board notes that appellant claimed costs for nineteen unused catch basin tops. (*See generally* AF Ex. 2, at 7-8.)
[355] It is unclear, however, whether the District actually took possession of the catch basin tops because the CO testified that he did not visit the site and never received an inventory of the supplies that had been left there. (*See* Hr'g Tr. vol. 4, at 36:17-37:20.)
[356] Appellant's claim noted that some catch basins had as many as three separate lids. (*See* AF Ex. 2, at 8.) Appellant's claim for $8,550.00 represented $450.00 per unused lid. (*Id.*)
[357] For change orders, the parties agreed to use a daily rate of 10.5 hours, consisting of 8.0 regular wage hours and 2.5 overtime hours. (Hr'g Tr. vol. 3, at 66:22-68:9.)

December 14, 2007, for the four alleged changes described *supra*;[358] (2) in the alternative, $1,227,021.37 for appellant's "underlying costs" allegedly incurred in the performance of the four constructive changes to the contract, in the event that the $600,000.00 settlement was found to be unenforceable; and (3) $71,933.26 in administrative costs appellant incurred while negotiating the settlement—an amount which included appellant's legal fees. (*See generally* AF Exs. 1-2, at 1-622.) In particular, appellant alleged that its $1,227,021.73 claim for "underlying costs" represented an update to its May 9, 2005, claim, which it reconsolidated and resubmitted on July 27, 2007. (*See* AF Ex. 1, at 209-211.)

Following the District's deemed denial of appellant's November 19, 2009, claim, appellant filed the instant appeal with the Board on April 1, 2010. (*See* Notice of Appeal.) The Board held a five-day hearing on the matter from April 24-27, and on May 23, 2012. (*See generally* Hr'g Tr. vols. 1-5.) Appellant abandoned its claim for $600,000.00 for its alleged December 14, 2007, settlement with the District. (*See* Hr'g Tr. vol. 1, at 35:3-13.) Additionally, in its post-hearing brief, appellant appears to have also abandoned its claim for $71,933.26 in extra-contractual administrative costs, instead focusing solely on its $1,227,021.37 "underlying costs" claim.

The District's Defenses

In its post-hearing brief, the District argues that appellant has failed to prove its entitlement to any contract adjustment. (*See generally* District's Post Hr'g Br. 12-26.) But rather than substantively challenge appellant's factual allegations herein, the District's defense (in its own words) rests largely on the supposition that "[a]ppellant failed to maintain an updated CPM schedule as required by the Contract, which is essential to the determination of whether and to what extent, any changes the District allegedly directed by the District (*sic*) caused a delay in the project's performance." (District Post Hr'g Br. 8.) Specifically, the District argues that without an updated CPM schedule, there is no sure way of calculating the impact of any alleged delays. (District's Post Hr'g Br. 16-26.) The District additionally contends that appellant was required to create and maintain an Arrow Diagram for project scheduling as well as produce biweekly updates to reflect any changes to project activities. (District Post Hr'g Br. 17.) In the District's view, the dispositive question in this appeal is whether the contract required appellant to submit updated/revised CPM schedules to the District as its work progressed.

In that regard, the record provides the following. Appellant submitted a CPM schedule to the District, pursuant to the terms of the contract, prior to commencing work. (Hr'g Tr. vol. 1, at 97:14-16.) However, the District rejected appellant's initial CPM schedule because the project's starting date was incorrect. (*Id*. at 97:17-98:10; *see also* AF Ex. 6, at 38-40.)[359] Following the District's rejection of its CPM schedule, appellant submitted a revised CPM schedule that corrected the starting date. (Hr'g Tr. vol. 1, at 97:17-98:10) The District never accepted or rejected appellant's revised CPM schedule. (*Id.*) However, Jerry Carter, the contracting officer ("CO"),[360] provided appellant with a notice to proceed date of February 3, 2003. (*See* AF Ex. 3, at 16; Hr'g Tr. vol. 1, at 98:1-10.)

Appellant also provided the District with at least two CPM schedule updates during contract performance: the first following the resolution of delays during Phase I, discussed *supra* (*see* AFS Ex. 89, at Rustler 793-795; Hr'g Tr. vol. 1, at 99:9-20), and a second, dated July 7, 2004, covering contract

[358] During these negotiations, appellant provided all of its daily reports to the District. (Hr'g Tr. vol. 3, at 9:1-15:12, 28:4-9, 114:19-117:21; *see also* AFS Ex. 93.)

[359] For documents that do not contain consistent internal page numbering (e.g., AF Exs. 2-31), the Board has referenced the page numbers assigned by Adobe Reader.

[360] Initially, Kevin Green was the CO; however, it appears that Jerry Carter assumed Green's responsibilities as CO sometime in late 2003 or early 2004. (*See* AFS Ex. 1, at Rustler 8; Hr'g Tr. vol. 4, at 116:2-21, Apr. 27, 2012.)

Phases IV and V (*see* AF Ex. 8, at 46-48).[361] Still, for the majority of the period of performance, the parties primarily used a two-week "look-ahead" schedule that appellant provided during progress meetings with the District. (*See id*., at 99:21-100:11.) In addition, appellant produced daily activity reports and sent letters to the District detailing its progress and identifying sources of potential delay throughout the period of performance. (*Id*.; *see also* AFS Exs. 16-19, 21, 24, 29-31, 33-34, 36, 38, 43-45, 48-57, 59, 61, 64, 66, 68-74, 76-77, 79-81, 93.)

For instance, appellant refers to a series of notices that were transmitted to the District Resident Engineer and that discussed the delays that it encountered. For example:

> --Letter No. 62, dated June 6, 2003, which states, in part, that appellant "is currently being delayed due to the existing manhole situation . . ." "We cannot complete this work until the manholes are taken care of. To avoid any further delays, we asked that [DDOT] . . . respond to this issue in a timely manner."
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> --Letter No. 63, dated June 19, 2003, which refers to documentation previously sent to the District regarding the delay caused by, ". . . the leisurely progress of resetting and or restoration of the existing PEPCO manholes." Appellant continues, "we are reiterating this subject due to the fact that the construction of PCC pavement is a critical path item of our schedule and if delayed the entire project will be delayed."
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> --Letter dated August 25, 2003, which states, in part, that due to a, "lack of response from PEPCO, [Rustler] has been delayed in achieving the scheduled concrete placement. . . . Delay claim . . . will be directed to DDOT."

(*See* AFS Exs. 29, 31, 36, at Rustler 490-91, 493-94, 500.)

As we noted above, the District also sets forth identical grounds in opposition to both Claim Two (PEPCO manholes) and Claim Four (catch basins) by referencing, without additional comment, several contract provisions. First, it cites Article 17, "Conditions Affecting The Work" of the General Provisions and, in particular, the following:

> E. Utilities and Vaults – The Contractor shall take necessary measures to prevent interruption of service or damage to existing utilities within or adjacent to the project. It shall be the Contractor's responsibility to determine the exact location of all utilities in the field. . . . No compensation other than authorized time extensions, will be allowed the Contractor for protective measures, work interruptions, changes in construction sequence, changes in handling excavation and drainage, or changes in types of equipment used, made necessary by existing utilities, imprecise utility or vault information, or by others performing work within or adjacent to the project.

The District next cites § 108.06 of the Standard Specifications which provides that:

[361] Although the CO testified that the District's engineers had not received the required CPM schedules, this testimony does not appear to be consistent with the written record, as described above. (*Compare* Hr'g Tr. vol. 4, at 65:12-22 (CO's testimony), *with* AF Ex. 7, at 42-44 (the updated CPM schedule dated July 7, 2004).)

> (C) UTILITY DELAYS. The Contractor shall consider the location of existing utilities in determining contract time. The Contractor is warned that delays of a minor nature, encountered through required utility adjustments by others or imprecise utility location information, have been considered, and delays resulting therefrom may not serve as a basis for time extensions.

And finally, the District includes Article 6 "Utilities" of the special provisions which states that:

> It is understood and agreed that the Contractor has considered in his bid all of the permanent and temporary utility appurtenances in their present or relocated positions, and that no additional compensation will be allowed for reasonable delays, inconveniences, or damage sustained by the Contractor due to any interference from the said utility appurtenances or the operation of moving them.

(District's Post Hr'g Br. 21-22.)

The District concludes by noting that, "[w]hile the District may allow for additional *time* to perform the project in order to avoid interference with the utilities, the Contract specifically provides that [Rustler] is not entitled to additional *compensation* for work related to utilities." (District's Post Hr'g Br. 23) (emphasis added). Lastly, as noted above, the District argues that appellant failed to submit proper cost and pricing data in support of its claims, that its damages calculation is unsupported, and that appellant was contractually responsible for any delay associated with rebuilding the PEPCO manholes. (District Post Hr'g Br. 16-26.) We issue our ruling below on the merits of appellant's claims, quantum, and the adequacy of the District's defenses.

DISCUSSION

The Board exercises jurisdiction over appellant's appeal pursuant to D.C. Code § 2-360.03(a)(2) (2011).[362] The recitation of facts stated in the Background, Discussion, and Conclusion sections constitute 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.

The determinative issue in the instant appeal is whether appellant is entitled to an equitable adjustment of $1,227,021.37 for its costs and delay resulting from four alleged constructive changes to the contract. The constructive changes purportedly stem from "defective and changed specifications, differing site conditions, and other extra contractual activities." (*See generally* Rustler's Post Hr'g Br.) A contractor seeking an equitable adjustment must prove three elements: liability, causation, and resultant injury. *Civil Constr., LLC*, CAB Nos. D-1294, *et al*., 2013 WL 3573982 (Mar. 14, 2013) (citing *Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994); *Servidone Constr. Corp. v. United States*, 931 F.2d 860, 861 (Fed. Cir. 1991)). And the contractor must prove these elements by a preponderance of the evidence. D.C. Mun. Regs. tit. 27 § 120.1 (2002); *see also A.S. McGaughan Co., Inc.*, CAB No. D-0884, 41 D.C. Reg. 4130, 4135 (Mar. 16, 1994) (citations omitted).

Appellant's Claims

[362] Prior to April 8, 2011, the Board exercised jurisdiction pursuant to D.C. Code § 2-309.03(a)(2) (2001).

Before the Board are appellant's claims for equitable contract adjustment due to the contract's alleged defective specifications and resulting District-directed changes (work area reduction, PEPCO manholes, temporary tie-in) and alleged differing site conditions (catch basin revisions). For the reasons set forth below, we conclude that the appellant is entitled to relief on each claim. Because the legal standards necessary to establish entitlement to an equitable adjustment due to defective specifications and differing site conditions are different, each is discussed separately below.

1. Defective Specifications

It is a well-established principle of public contract law that where the government makes positive statements in the specifications or drawings for the guidance of bidders, a contractor has the right to rely on the assumption that those specifications are free from errors. *See generally United States v. Spearin*, 248 U.S. 132 (1918). "[W]hen the government provides a contractor with defective specifications, the government is deemed to have breached the implied warranty that satisfactory contract performance will result from adherence to the specifications, and the contractor is entitled to recover all of the costs proximately flowing from the breach." *Essex Electro Eng'rs,, Inc. v. Danzig*, 224 F.3d 1283, 1289 (Fed. Cir. 2000) (citations omitted). The compensable costs include those attributable to any period of delay that results from the defective specifications. (*Id.*)

In order to recover an equitable adjustment for costs incurred due to defective specifications, a contractor must show that it relied on the defect, and that the defect was not patent. *E.L. Hamm & Assocs., Inc. v. England*, 379 F.3d 1334, 1339 (Fed. Cir. 2004). A defect is patent if it is "so glaring as to raise a duty to inquire." *Metric Constructors, Inc. v. Nat'l Aeronautics & Space Admin.*, 169 F.3d 747, 751 (Fed. Cir. 1999) (citations omitted); *see also E.L. Hamm*, 379 F.3d at 1339 (explaining that a patent defect is a defect that is not an "obvious omission, inconsistency or discrepancy of significance"). If there is a patent error on the face of the solicitation, the bidder "cannot lie in the weeds hoping to get the contract, and then if it does not, blindside the agency about the error in a court suit." *DGR Associates, Inc. v. United States*, 690 F.3d 1335, 1343 (Fed. Cir. 2012) (citations omitted).

Here, we find that appellant has satisfied both elements necessary for an equitable adjustment with respect to three of its four monetary claims. To begin, appellant has established, without contradiction, that it relied on the specification's representations in the following claims: (1) the representation that traffic during Phase IV of the construction project would be maintained in four 9ft, 4in lanes; (2) the representation that the forty-one PEPCO manholes were to be "abandoned"; and (3) the representation, contained in the contract's original "Maintenance of Traffic" plan, that no more than 10in of temporary asphalt would be required to "tie-in" the old and new roadways after Phase III of the construction work.

The District's representations were in error. And because those representations were in error, the specifications were defective. Appellant is therefore entitled to recover for those defects unless the District can affirmatively demonstrate that those defects were patent. That it cannot do. There is no evidence in the record indicating that appellant should have known that those representations in the specifications were defective. And the District has offered no evidence to suggest otherwise.

The District has resorted to relying on Articles 17 and 6 of the General Provisions to make the case that the contract's provisions preclude payment of additional compensation to appellant for the PEPCO manholes and the catch basins, discussed *infra*. (*see* District's Post Hr'g Br. 21-23.) However, neither one of those contract clauses are relevant to the present issue. Article 17 requires appellant to "take necessary measures to prevent interruption of service or damage to existing utilities" and, in that regard, appellant has the responsibility for determining the "exact location" of the utilities. Article 6 sets

forth a contractor's responsibilities should it damage the utilities. In this case, appellant knew precisely where the forty-one manholes were located, and there is no question that it did not "damage" them. Of issue here is the fact that the contract's specifications indicated that the PEPCO manholes were to be abandoned and, instead, they needed to be kept live. Appellant incurred costs and delays resulting from this changed requirement. In our view, neither the "Utility Delays" clause which excludes payments to a contractor for "delays of a minor nature," nor the "Utilities" clause of the special provisions which precludes payment of additional compensation attributable to "reasonable delays, inconveniences, or damage," have any application to appellant's claim regarding the PEPCO manholes or catch basins. Accordingly, we find that appellant is entitled to an equitable adjustment for all damages that "proximately flow" from the contract's defective specifications because appellant relied on the District's erroneous representations in making its bid. *Essex Electro Eng'rs, Inc. v. Danzig*, 224 F.3d at 1289.[363]

As to entitlement, we conclude on the record before us that appellant has established entitlement to relief for Claim One (work area width reduction), Claim Two (PEPCO manholes), and Claim Three (temporary tie-in) pursuant to the Board's findings of fact herein. We also note that the District has not provided any evidence contradicting appellant's entitlement to relief herein.

As to quantum on Claims One, Two and Three, we remand the matter to the parties for further negotiation conducted in accordance with our quantum findings of fact guidance below. In the absence of CPM inputs, appellant's notices to the District regarding delays in the conduct of its work will assist the parties in reaching an equitable accord.[364]

2. Differing Site Conditions

During the hearing, appellant's Vice President stated that although appellant was mindful that a high-pressure gas line was in the vicinity of the road's catch basins, it was not aware that one or more of the catch basins was lying directly on top of the line. (JSF; Hr'g Tr. vol. 1, at 149:11-21; AFS Ex. 45, Rustler 513; Hr'g Tr. vol. 1, at 88:18-19.) As such, appellant found the location of the gas line to constitute a differing site condition.

The purpose of the "Differing Site Conditions" clause is to allow contractors to seek an adjustment for "static physical conditions" existing at the time of contract formation, but not for events occurring during contract performance. *James A. Federline, Inc*., CAB No. D-0834, 41 D.C. Reg. 3853, 3860 (Dec. 15, 1993). "Static physical conditions" include certain human-created conditions encountered on the site, so long as those conditions occurred prior to commencement of contract performance. *See, e.g., Boland & Martin, Inc.*, ASBCA No. 8503, 1963 BCA ¶ 3705 (finding high-strength concrete "crossovers" not shown on demolition plans and not visible during site inspection to be an actionable differing site condition); *Cosmo Constr. Co.*, ENGBCA No. 2785, *et al.*, 67-2 BCA ¶ 6,516, *aff'd in relevant part*, 451 F.2d 602, 606-608 (Ct. Cl. 1971) (finding excavated material that could not be re-used due to the presence of debris to be an actionable differing site condition).

In order to prevail on a differing site conditions claim, a contractor must establish that: (1) "a reasonable contractor reading the contract documents as a whole would interpret them as making a representation as to the site conditions[;]" (2) "the actual site conditions were not reasonably foreseeable to the contractor, with the information available to the particular contractor outside the contract documents[;]" (3) "the contractor in fact relied on the contract representation[;]" and (4) "the conditions

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[363] Appellant's post hearing brief adequately describes the impact of these defects during the course of contract performance. (*See generally* Rustler's Post Hr'g Br.)

[364] (*See, e.g.*, AFS Exs. 16-19, 21, 24, 29-31, 33-34, 36, 38, 43-45, 48-57, 59, 61, 64, 66, 68-74, 76-77, 79-81, 93.)

differed materially from those represented and that the contractor suffered damages as a result." *Int'l Tech. Corp. v. Winter*, 523 F.3d 1341, 1348-49 (Fed. Cir. 2008).

The Board finds that appellant has established the four elements above by a preponderance of the evidence. *First*, the contract documents appear to have contained no indication that one or more of the existing catch basins was "literally sitting on" a high-pressure gas line.[365] (*See generally* AFS Exs. 1-2; AFS Ex. 45, at Rustler 513; Hr'g Tr. vol. 1, at 88:18-19.) *Second*, the actual site conditions were not reasonably foreseeable to the appellant with the information available to it outside of the contract documents. That is, it was necessary to dig the area in order to discover the exact location of the gas line. (*See, e.g.,* AFS Ex. 47, at Rustler 515.) *Third*, appellant relied on the contract documents in making its bid. (*See* Hr'g Tr. vol. 2, at 171:9-173:4.) *Fourth*, appellant has demonstrated that the site conditions differed materially from those represented in the contract documents—that is, the location of the gas line necessitated revising both the type and location of the catch basins, resulting in disruption and delay. (*See, e.g.,* Hr'g Tr. vol. 1, at 164:8-17; Hr'g Tr. vol. 2, at 71:20-74:17.)

Although Washington Gas paid appellant for the cost of installing the revised catch basins, the claim currently before us arises from the District's failure to issue timely instructions regarding the catch basin revisions. (*See* Hr'g Tr. vol. 1, at 152:1-21; Hr'g Tr. vol. 2, at 75:3-76:8.) It is appellant's contention that the District's untimely response caused delay and disrupted appellant's planned work schedule. In response, the District cites certain contractual provisions in arguing that appellant may not recover for any constructive changes relating to underground utilities and vaults (*see* District's Post Hr'g Br. 21-23). But, we find the contract provisions cited by the District to be inapposite. Specifically, the contract documents state that "delays of a minor nature, encountered through . . . imprecise utility information" may not serve as the basis for time extensions. (*Id.*) Similarly, the District cites Article 17.E of its "Standard Contract Provisions" in arguing that appellant may not receive an equitable adjustment for utility-related changes. (*Id.*) However, as noted above, appellant's claim does not concern the circumstances contemplated by these provisions whereby a contractor is required to prevent service interruption or damage to existing utilities, or may incur minor delays in relocating utilities. Appellant's claim is founded in the District's tardiness—it took the District "a good two months"—in issuing a directive regarding the catch basin revisions which led to both delay and alteration to appellant's sequence of work. Accordingly, appellant is entitled to a contract adjustment for its as-yet-uncompensated damages flowing from the catch basin revisions.

As to entitlement, we conclude on the record before us that appellant has established entitlement to relief for Claim Four (catch basin revision). We also note that the District has not provided any evidence contradicting appellant's entitlement to relief herein.

As to quantum on Claim Four, we remand the matter to the parties for further negotiation conducted in accordance with our quantum findings of fact guidance below. In the absence of CPM inputs, appellant's notices to the District regarding delays in the conduct of its work will assist the parties in reaching an equitable accord.[366]

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[365] In addition, the contract's specifications which provided for the installation of the new catch basins at the same locations as the old catch basins would lead a contractor to reasonably believe that the gas line was positioned where it would not interfere with the placement of the new catch basins pursuant to the contract.

[366] It is not necessary for a contractor to establish delay in order to succeed on a constructive change claim arising from disruption of work. *Sauer Inc. v. Danzig*, 224 F.3d 1340, 1348 (Fed. Cir. 2000). In *Sauer*, a Navy construction contractor appealed an ASBCA decision finding, *inter alia*, that it was not entitled to a contract adjustment for delay and disruption caused by the unscheduled work of a Navy crane contractor. *Id.* at 1343-44. On appeal, the Federal Circuit found that the ASBCA had erroneously required the appellant to show that its overall contract completion had been delayed in order to prove its claim for disruption of work. *Id.* at 1348. In remanding the issue to the

The Critical Path Method and Other District Defenses

Notwithstanding the above, the District denies that appellant is entitled to any additional compensation. Yet, the District does not meaningfully contest appellant's factual allegations, nor does the District meaningfully contest appellant's theories for relief. Instead, the District rests its opposition to appellant's claims on the rather unpersuasive argument that appellant's failure to maintain an updated CPM schedule precludes a finding of entitlement. The District also asserts that appellant has not presented adequate cost and pricing data to support its cost claims. (*See generally* District's Post Hr'g Br.)

The contract required appellant to produce a CPM schedule prior to the commencement of work. (*See* AFS Ex. 2, at Rustler 54.) "The critical path method is an efficient means of organizing and scheduling a complex project consisting of numerous but interrelated smaller projects." *Civil Constr., LLC*, CAB No. D-1294, *et al.* (citing *Haney v. United States*, 676 F.2d 584, 595 (Ct. Cl. 1982)). The record shows that appellant produced four CPM schedules—two prior to the start of contract performance, and two during the period of performance. (*See* AF Exs. 6-8, at 37-48; AFS Ex. 89, at Rustler 793-95.) However, the District did not (1) approve or reject appellant's CPM schedule after it had been revised to show the correct starting date; or (2) make any requests that appellant provide an updated CPM schedule during the period of performance. (*See, e.g.*, Hr'g Tr. vol. 1, at 97:17-98:10.) Appellant therefore contends that once it furnished the District with an accurate CPM schedule prior to commencing the work, its contractual duty in this regard was at an end. We agree.

The controlling contractual provision, §108.03 of the "Standard Specifications for Highways and Structures, 1996" entitled "Construction Scheduling," requires that "[p]rior to commencing any work, the Contractor shall submit his construction schedule to the Engineer for approval." Paragraph (B) of § 108.03, entitled "CPM Scheduling," begins by stating that, "[w]hen required by the special provisions, the progress schedule shall be based on CPM scheduling . . ." Subsection (b) of Clause 17 of the contract's special provisions entitled "Construction Scheduling," simply repeats the requirement set forth in the opening sentence of § 108.03, which states that "the Contractor shall produce and submit a progress schedule, based on the Critical Path Method of scheduling, to the Engineer for approval prior to commencing work."

Here, the District did not make any requests for appellant to update its CPM schedule. And despite the absence of an approved CPM schedule, the District analyzed compensable delays and/or granted time extensions in three out of the five change orders issued during contract performance.[367] (*See generally* AF Ex. 4, at 18, 22, 28.) Moreover, as evidenced by appellant's correspondence to the District during the course of contract performance, on several occasions appellant provided the District with notice of the delays attributable to the four changes that are the subject of this appeal.

ASBCA, the court noted that, even without demonstrating that contract completion was delayed, the contractor would be entitled to "any increased costs flowing directly and necessarily" from the Navy's failure to follow the construction schedule—if, that is, the ASBCA found that the Navy's actions constituted a constructive change. *Id.* (citations omitted).

[367] There is no evidence that the District was hampered in its negotiation of change orders by the alleged lack of cost and pricing data. *See Prince Contr. Co, Inc./W.M. Schlosser Co., Inc., Joint Venture*, CAB No. D-1369, *et al.*, 2013 WL 7710334 (Dec. 9, 2013). Moreover, "[f]ailure to show exact loss does not defeat recovery where entitlement has been shown." *Boland & Martin, Inc.*, ASBCA No. 8503, 1963 BCA ¶ 3705.

We share the Court of Claims' "wholesome concern" that "notice provisions in contract-adjustment clauses not be applied too technically and illiberally where the Government is quite aware of the operative facts." *Hoel-Steffen Constr. Co. v. United States*, 456 F.2d 760, 768 (Ct. Cl. 1972). In the instant appeal, it is quite evident that the District was well aware of the operative facts leading to appellant's present claims. We therefore reject the District's argument that the lack of an updated CPM schedule precludes appellant from an equitable adjustment due to constructive changes to the contract.

Finally, as discussed herein, the Board finds that appellant has shown, by a preponderance of the evidence, that the activities which were allegedly delayed were either part of, or otherwise affected the project's critical path. Specifically, appellant's Vice President provided clear, unrebutted testimony that the following activities were on the critical path: (1) traffic maintenance operations, including both maintaining open travel lanes, and operations necessary for changing the flow of traffic prior to each phase of the contract (Hr'g Tr. vol. 1, at 84:11-12, 131:13-21, 169:5-171:2; Hr'g Tr. vol. 3, at 105:16-21); (2) pouring the concrete for, and building the roadway itself (Hr'g Tr. vol. 2, at 39:12-18; Hr'g Tr. vol. 3, at 87:10-12); and (3) relocating the catch basins from the curb to the center of the roadway, which affected both the traffic control plan and roadway concrete pouring operations (Hr'g Tr. vol. 3, at 131:21-132:4). *See Belcon, Inc. v. District of Columbia Water and Sewer Auth.*, 826 A.2d 380, 386 (D.C. 2003) ("Ordinarily, positive testimony which is not inherently improbable, inconsistent, contradicted, or discredited cannot be disregarded by a judge or jury, or, for that matter, by any trier of fact.") (quoting *Perlman v. Chal-Bro, Inc.*, 43 A.2d 755, 756 (D.C. 1945)) (citations omitted).

Based on our review of the record, we conclude that appellant is entitled to an equitable adjustment for constructive changes due to the District's defective specifications (work area width, PEPCO manholes, temporary tie-in) and differing site conditions (catch basin revisions). We do not find that the District's defenses to these claims have merit. We remand this matter to the District for a determination of quantum pursuant to our conclusion below, and instruct the parties to file a status report with the Board on or before December 10, 2014.

3. Quantum Considerations Regarding Appellant's Four Cost Claims

Having set forth the Board's findings and conclusions regarding appellant's entitlement to relief, we provide the following quantum conclusions that will apply, as necessary, to all four claims. In this regard, we find that appellant is entitled to equitable adjustments per the above, including its costs, related to the work area width reduction, working around the PEPCO manholes, the temporary tie-in of the new and old roadways, and relocating and installing the new catch basins. These costs include:[368]

1) Home office overhead calculated at 20.26%, bonding costs of 0.83%, and profit of 10%. (Rustler's Post Hr'g Br. 16, 29, 31, 33-36.)
2) A field office overhead daily rate of $3,921.57 for Phase III. (*Id.* at 17.)
3) A field office overhead daily rate of $3,950.27 for Phase II. (*Id.*)
4) A field office overhead daily rate of $2,633.46 for Phase IV. (*Id.*)
5) Field overhead to include appellant's Project Manager, Project Engineer, Superintendent and Foreman. (*Id.*)
6) Employee work days calculated at 10.5 hours for change orders, with 8 hours calculated at the regular wage rate and 2.5 hours calculated at an employee's overtime rate. (*Id.*)

[368] The following enumerated items reference appellant's post-hearing brief. In so doing, the Board has merely recasted its findings in the Background section and incorporated the evidentiary record related to these points.

7) Thirty-one concrete pours during Phase IV, each requiring one day of work. (*Id.* at 18.)
8) Twenty minutes additional of load time for each truck load of excavated material for Phase IV. (*Id.*)
9) Nineteen ramps which required an additional twenty minutes of work to build for each of the nineteen manholes in Phase IV. (*Id.*)
10) Seventy minutes of work to place and fine-grade the stone around each of the nineteen manholes. (*Id.*)
11) Five minutes for each of the 233 joint baskets in Phase IV which had to be measured and cut. (*Id.*)
12) Additional crew costs to hand pour the concrete roadway in front of the seven catch basins. (*Id.*)
13) One load of concrete improperly rejected by the District's inspector. (*Id.* at 19.)

CONCLUSION

Appellant's appeal is hereby **GRANTED** as to entitlement. The appeal is remanded to the parties for a determination of quantum. We hereby direct the parties to negotiate in good faith—in accordance with our findings—on the quantum to which appellant is entitled and to file a status report with the Board on the result of their negotiations on or before December 10, 2014.

SO ORDERED.

Date: November 10, 2014

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

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

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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

APPEAL OF:

JH LINEN, LLC	)	
	)	CAB No. D-1366
Under Contract No. DCKA-2006-B-0010	)	

For the Appellant: Spencer M. Hecht, Esq., and Jennifer M. Valinski, Esq. For the Appellee: Robert L. Dillard, 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.

DECISION AND MEMORANDUM OPINION
Filing ID #56340444

The D.C. Office of Contracting and Procurement (District or Appellee) awarded a requirements contract to Appellant, JH Linen, LLC ("JH"), for the rental of uniforms for employees of five administrations within the District's Department of Public Works and Department of Transportation. Appellant invoiced the District at the contract rental rate for the uniforms, but the District paid Appellant late and, in many instances, less than the invoiced amount. The contract established unit prices for Appellant to launder the rented uniforms, but only one of the five administrations sent uniforms to Appellant for cleaning. Further, at the conclusion of the contract, the District returned some, but allegedly not all, uniforms to Appellant.

In this appeal, Appellant seeks the amount it contends the District underpaid, $123,704.27. In addition, Appellant seeks interest penalties under the District's Quick Payment Act in the amount of $351,883.22 for late payments. Appellant also claims that the District disregarded its obligation to obtain all its cleaning requirements from Appellant and seeks $68,893.88 as damages based on this alleged breach of contract. Finally, Appellant seeks recovery of the value of unreturned uniforms. A hearing on the merits was held from May 9-11, and 14-15, 2012.

For the reasons discussed below, we award the Appellant $114,822.51 in damages, plus statutory interest pursuant to D.C. CODE § 2-359.09, for the District's underpayment of invoices herein. We dismiss the Appellant's other claims.

FINDINGS OF FACT

The Contract

1. On September 11, 2006, the District definitized a fixed-price requirements contract, DCKA-2006-B-0010, with Appellant for the rental and cleaning of uniforms for employees of five District agencies: Fleet Management Administration; Parking Services Administration; Solid Waste Management Administration; Traffic Services Administration – Field Operations; and Infrastructure Project Management Administration Street and Bridge Maintenance Division.[369] (Appellant's Hr'g Ex. 4, Bates JH 477 ("JH Hr'g Ex.").)[370] The contract consisted of a one-year term effective July 24, 2006, and included four, one-year option periods available to the District. (*Id.*, §§F.1, F.2.1, 484.)

2. By contract modification M0001, dated July 10, 2007, the parties clarified certain contract requirements, including, but not limited to, the timelines for scheduling employee measurements, the frequency of uniform cleaning services, the method for obtaining uniform repairs, and the specific timeframes for completion of requirements. (JH Hr'g Ex. 4, Bates JH 599, Hr'g Tr. vol. 2, 325:12-326:15, May 10, 2012, vol. 5, 1213:13-1215:18, May 15, 2012.)

3. On July 23, 2007, the District exercised the option to extend the contract for another year, and the parties executed contract modification M0002 extending the term of the contract for the period July 24, 2007, to July 23, 2008. (JH Hr'g Ex. 13, Bates JH 6026, Hr'g Tr. vol. 2, 316:5-319:18.)

Uniform Fittings

4. The contract required that Appellant measure each employee and deliver the appropriately-sized uniform to the agencies for distribution to employees. (JH Hr'g Ex. 4, Bates JH 480, §§C.3.1.2, C.3.1.3.)

5. In September 2006, JH began scheduling appointments with the agencies to measure the employees. (Hr'g Tr. vol. 1, 149:21-150:3; 156:20-157:1, May 9, 2012.) JH anticipated the measuring process would take about five weeks, one week per agency. (Hr'g Tr. vol. 1, 180:15-22.) However, the process took two and a half months, much longer than JH expected. (Hr'g Tr. vol. 1, 155:4-11; 184:13-185:10; 199:1-200:15.) The longer period resulted largely from the failure of District employees to show up for measurements when scheduled, requiring the rescheduling of appointments. (Hr'g Tr. vol. 1, 159:9-10; 200:21-204:17.)

6. Appellant provided the employee measurements to its manufacturer, Aramark, for production of the uniforms. (Hr'g Tr. vol. 1, 156:11-18; 173:4-175:17.) The uniforms were produced in two phases to ensure that each employee had at least part of the complete uniform

[369] The definitized contract was preceded by letter contracts containing the same terms executed by the District on July 24, August 24, and August 31, 2006. (JH Hr'g Exs. 1-3.)

[370] The contract also appears in the Appeal File as Tab 7. The Appellant's hearing exhibits include Bates numbers at the bottom left-hand corner denoted as "JH Linen," followed by a six-digit number. For ease of reference, we omit the zeros appearing in each such number and shorten the citation to "Bates JH" followed by the remaining numerals.

package as soon as possible.[371] (Hr'g Tr. vol. 1, 154:9-13.) In Phase 1, Appellant produced enough uniforms so that each employee would get about one half of the complete package. (Hr'g Tr. vol. 1, 157:9-158:20.) During Phase 2, Appellant produced uniforms to complete each employee's uniform package, provide uniforms for new employees and get measurements from employees who did not provide them in Phase I. (Hr'g Tr. vol. 1, 158:21-159:13.)

Delivery of Uniforms

7. In December 2006, Appellant began delivering the uniforms to the agency inventory specialists at locations specified in the contract. (Hr'g Tr. vol. 1, 211:16-217:10, vol. 5, 1138:9-16, JH Hr'g Ex. 22, Bates JH 1746 *et seq.* (Invoice 100003).)

8. The contract required use of a delivery receipt form, included as contract Attachment J.1.8, to evidence delivery of the uniforms to the agency. (JH Hr'g Ex. 4, §C.3.1.8, Bates JH 481, 552.) The form listed columns for employee identification numbers and names, and the number of pants, shirts, jackets, and coveralls received by each, and included a line for the date of delivery and the signature of the agency's inventory specialist acknowledging receipt. (JH Hr'g Ex. 4, §F.3, Bates JH 484, Attach. J.1.8, Bates JH 552.) Appellant used the delivery receipt specified in the contract, or very similar versions of the form, to record uniform deliveries, keeping one copy and providing a copy to the District. (JH Hr'g Ex. 6; Hr'g Tr. vol. 1, 237:1-20, vol. 4, 913:19-914:8, May 14, 2012, vol. 5, 1044:4-1046:14; 1138:17-1139:1.)

9. On most deliveries, the inventory specialist for the agency or the specialist's assistant did not count the delivered uniforms and sign the delivery receipt at the time of delivery. (Hr'g Tr. vol. 5, 987:10-988:17.) The inventory specialists pleaded lack of time or staff to count the several hundred uniforms being delivered. Although the specialists promised to count the uniforms and send JH the signed delivery receipt, they seldom returned a signed copy of the form to Appellant. (Hr'g Tr. vol. 3, 573:14-19, May 11, 2012, vol. 4, 845:14-846:1, 852:17-855:3, vol. 5, 988:13-17; 1138:9-1141:7.)

10. After the uniforms were delivered, the agency inventory specialists were generally slow to issue the uniforms to employees, often accumulating large quantities of uniforms in their offices. (Hr'g Tr. vol. 2, 270:8-271:4, vol. 4, 767:17-768:20, vol. 5, 1062:5-1063:18.)

Contract Performance

11. During the contract, each party had concerns about the performance of the other. On November 21, 2007, the District issued a cure letter complaining of Appellant's failure to deliver all of the complete sets of uniforms on time, practice of delivering defective uniforms, failure to return altered uniforms to the agency promptly, and failure to commence laundry service for the Fleet Management and Parking Services administrations. (JH Hr'g Ex. 14; Hr'g Tr. vol. 2, 342:1-346:3.)

[371] A description of a complete uniform package is found at FF 16.

12. Appellant responded promptly through a letter from its attorney to the contracting officer mentioning failure of District employees to show up for their initial measurement, defective contract specifications, employees requesting unjustified alterations, unjustified claims of non-receipt of uniforms because the agencies did not have a tracking system, and late and short payments. Finally, JH contended it was ready to provide cleaning services, but that the agencies had declined. (JH Hr'g Ex. 15; Hr'g Tr. vol. 2, 346:22-349:3.)

13. The District issued another cure notice on February 20, 2008, complaining of uniforms not delivered, uniforms delivered with the wrong shirt color and emblem affixed, and poorly stitched uniforms. (JH Hr'g Ex. 17; Hr'g Tr. vol. 2, 359:15-361:13.)

14. Again, Appellant responded promptly to the cure letter, denying the accusations of deficient performance and raising issues regarding alleged failures on the part of the District employees administering the contract. (JH Hr'g Ex. 18; Hr'g Tr. vol. 2, 361:17-363:7.)

15. The parties held a number of meetings to address performance issues and to ensure coordination. (JH Hr'g Exs. 9 (December 14, 2006, meeting), 10 (April 4, 2007, meeting), 11 (April 4, 2007, meeting); Hr'g Tr. vol. 2, 277:19-282:22; 295:11-301:3; 349:12-356:20.)

Appellant's Recordkeeping

16. The contract included specifications for the uniform components and listed the number of articles employees were to receive. (JH Hr'g Ex. 4, Attach. J.1.4 – Uniform Specifications, Bates JH 528.) For example, CLIN 0001 described that each employee of the Fleet Management Administration was to receive 11 shirts, 11 pants, 2 summer coveralls, 2 insulated coveralls, 2 jackets, and one smock.[372] (*Id*.) The uniforms for the other agencies varied slightly regarding the number of jackets, coveralls, and smocks, but all employees were to receive 11 shirts and 11 pants. (*Id*., 528-534.)

17. The contract included a price schedule incorporating the per-week, unit prices from Appellant's proposal for each article to be supplied by Appellant for the base year and for each of the four option years. (JH Hr'g Ex. 4, Attach. J.1.3 – Price Schedule, Bates JH 523-526.)[373] The format and column headings were the same for each of the agencies. The first few entries for Fleet Management Administration were typical:

Contract Line Item Number (CLIN)	0001AA	0001BA
Item Description and Specifications	Shirt	Pants
(A) Estimated Number of Employees	100	100
(B) Item Quantity Per Employee	11	11
(C) Total Estimated Quantity	1100	1100
(D) Unit Price Per Week-Rental (only)	$ 0.12	$ 0.15
(E) Unit Price Per Week-Cleaning (only)	$ 0.08	$ 0.08

[372] Supervisors were to receive different shirts from non-supervisors, but the number of articles each employee received was about the same. (JH Hr'g Ex. 4, Attach. J.1.4, Bates JH 528.)
[373] The initial letter contract included a price schedule in Attach. J.1.3 in a slightly different format that contained identical price information. (JH Hr'g Ex. 1, Attach. C, Bates DC 46-57.)

(F) Unit Price Per Week-Rental and Cleaning	$ 0.20	$ 0.23
(G) Total Estimated Price (C x F)	$ 220.00	$ 253.00

(JH Hr'g Ex. 4, Bates JH 523.)

18. JH maintained an automated inventory system to record the number of uniforms in the District's possession. The delivery receipts reflected uniforms delivered to each agency, and Appellant used a uniform returns form to record uniforms returned to Appellant. Appellant's accountant reconciled the delivery and return records weekly to produce an accurate record of the uniforms held by the District. (Hr'g Tr. vol. 3, 544:18-548:5.)

19. The process utilized by JH to verify the accuracy of its inventory and invoicing protocol during contract performance was planned and executed in a reasonable fashion. JH used accounting inventory software "to keep track of all the . . . inventory items," which stored and categorized the inventory data for each of the five agencies. (Hr'g Tr. vol. 3, 544:18-548:5.)

20. JH's accountant testified that audit trials were conducted each week to corroborate the accuracy of the inventory data. When uniforms were returned and the returns entered into JH's inventory software, the system would automatically note the adjusted quantity. (Hr'g Tr. vol. 3, 671:4-675:11.)

Invoices

21. JH's invoices were prepared on a weekly basis and were hand delivered to the District on a monthly basis. Copies were presented to the agency point of contact, as well as to the agency Chief Financial Officer, as required by §G.2 of the contract. (Hr'g Tr. vol. 3, 541:16-542:1; 548:6-9; 609:7-610:13; 623:7-624:14, vol. 5, 1081:4-1082:7.)

22. Appellant's voluminous Exhibit 22 contained Appellant's invoicing records. As an example, the invoice for December 11, 2006, for Fleet Management Administration (Invoice 100003) lists the name and an identification number for each employee, the quantity of each article of uniform that JH delivered for that employee, the rental price per piece as set forth in the contract, and the weekly rental for each employee's uniform. (JH Hr'g Ex. 22, Bates JH 1746.) For the first employee on that form, it notes that the employee had 5 pants at the weekly rental rate of $0.15 each; 10 shirts at the weekly rental of $0.12 each; 2 jackets at the weekly rental of $0.20 each; 2 coveralls at the weekly rental of $0.55 each; and 2 insulated coveralls at a weekly rental rate of $0.85 each. This resulted in a weekly rental charge of $5.15 for that employee's uniform (5 x $.15 + 10 x $.12 + 2 x $.20 + 2 x $.55 + 2 x $.85 = $5.15). (*Id.*) Separate lines with similar entries for 99 listed Fleet Management Administration employees resulted in a total charge for that week, which was then consolidated with the weekly bills for the rest of the month to form the monthly invoice that Appellant submitted to the District for Fleet Management Administration. (*Id.*, Bates JH 1746-1747.) The invoices and the summaries listed at "Page 1 of 5" through "Page 5 of 5" in the bottom right-hand corner of the first six pages of Exhibit 22 detail the monthly billings for each of the five administrations.[374]

[374] The referenced pages do not contain discernible Bates numbers.

23. Many of the invoices Appellant submitted were not paid in full (Hr'g Tr. vol. 2, 441:2-443:19, vol. 3, 557:1-558:8, vol. 5, 1082:17-1084:6), and when Appellant's accountant inquired, the District either gave no explanation for reducing the payments, or mentioned employee transfers and resignations as justifying the reductions to Appellant's invoices. (Hr'g Tr. vol. 3, 558:5-6; 579:11-582:19; 1082:22-1084:12.)

Appellant's Claim For Underpaid Invoices

24. Appellant's accountant prepared an Accounts/Receivable Aging Detail Report as of April 30, 2010, that identified the invoices that were short paid and the amount by which each was underpaid. (JH Hr'g Ex. 22, Bates JH 430 and "Page 1 of 5" through "Page 5 of 5" immediately thereafter.)

25. The headings on the Accounts/Receivable Aging Detail and the first invoice entry are illustrative:[375]

Type	Date	Num	Name	Due Date	Aging [376]	Open Balance
Invoice	12/11/06	10003	ACFO-FMA	12/11/06	1,236	149.00

The remaining pages of Exhibit 22 contain the invoices (most often an invoice is 2 or 3 pages in length) for the entries listed on the 5-page A/R Aging Detail Report.[377] (Hr'g Tr. vol. 3, 669:3-671:11.)

26. The first page of JH Exhibit 22 is an Unpaid Invoices Summary prepared by JH's accountant that summarizes the information in the A/R Aging Detail Report. The Summary shows the total of underpayments claimed by Appellant for each of the five administrations, as follows:

Fleet Management-FMA	$0.00[378]
Field Operation-DDOT	$31,923.88
Parking Services-PSA	$19,922.08
Street & Bridges-SBM	$14,142.48
Solid Waste-SWMA	$57,715.83

[375] Column headings "P.O. #" and "Terms" are not included because they are blank on the aging report.
[376] This entry represents the number of days that an invoice has been past due up to the date the report was run, April 30, 2010. (Hr'g Tr. vol. 4, 860:4-862:5.)
[377] Four of the invoices listed in "Page 5 of 5" in the report were not contained in Exhibit 22. (Hr'g Tr. vol. 5, 969:2-15.) These four invoices were removed from Appellant's claim during the hearing. (*Id.*) The total value of these four invoices is $8,881.76 (Invoice numbers 100734, 100758, 100792, 100793). With the above four invoices removed, Appellant's claim is reduced to $114,822.51.
[378] Fleet Management Administration reached a settlement with JH regarding the amount Fleet Management underpaid on its invoices. (Hr'g Tr. vol. 3, 646:4-14.) Accordingly, the summary of unpaid invoices shows a zero balance due from Fleet Management. (JH Hr'g Ex. 22, Bates JH 430.) Solid Waste Management Administration reached a partial settlement regarding certain invoices, and that partial settlement is reflected in the summary as well. (JH Hr'g Ex. 29; Hr'g Tr. vol. 2, 376:10-380:3, vol. 3, 515:19-523:8.)

Total $123,704.27.

27. On August 13, 2008, Appellant's attorney wrote to the contracting officer. The letter addressed the underpaid invoices, identified evidence the attorney had previously provided regarding underpaid invoices, and made a formal demand for payment in the amount of $170,966.92 for the underpaid invoices. (JH Hr'g Ex. 26; Hr'g Tr. vol.2, 392:11-393:8.)[379] The demand was made during the transition period that followed the end of the contract. Since the agencies still had uniforms, JH continued to invoice for their rental, and the District continued to pay less than the full amount of such invoices. (Hr'g Tr. vol. 2, 393:19-21.)

28. The contracting officer did not respond to Appellant's August 13, 2008, letter. (Hr'g Tr. vol. 2, 392:7-10.)

Quick Payment Act

29. The contract provided that the District would make payments to Appellant on or before the 30th day after receiving a proper invoice, which would have been submitted monthly to the agency's Chief Financial Officer with concurrent copies to the point of contact for each of the agencies. (JH Hr'g Ex. 4, §§G.1, G.2, Bates JH 486.)[380]

30. Appellant submitted proper invoices monthly to the agency's Chief Financial Officer and to the agency point of contact. However, JH was paid only once before the expiration of 60 days, occasionally before the expiration of 90 days, and often JH was paid more than 90 days after submitting the invoice. (Hr'g Tr. vol. 2, 320:7-16, vol. 3, 557:1-13, 586:22-588:2, vol. 5, 1091:5-13.)

31. The contract included The Quick Payment Clause, and described interest penalties at the rate of 1% per month under the Quick Payment Act, D.C. CODE § 2-221.01, *et seq*. (JH Hr'g Ex. 4, §G.6, Bates JH 487.) The clause provided, in part, that the District would pay interest on amounts due Appellant for the period beginning on the day after the required payment due date and ending on the date on which payment of the amount due was made. (*Id.*)

32. The Quick Payment Act requires that "claims for interest penalties which a District agency has failed to pay in accordance with the requirements of [the Quick Payment Act] shall be filed with the contracting officer for a decision." D.C. CODE § 2-221.04 (a) (1). Moreover, interest penalties shall not continue to accrue "(A) after the filing of an appeal for the penalties with the Contract Appeals Board; or (B) for more than one year." (*Id.*) Interest penalties are not required for invoices not paid by reason of a dispute between the District agency and the contractor over the amount of that payment, or other allegations concerning compliance with the

[379] Appellant's attorney had emailed the District's counsel on February 20, 2008, identifying the outstanding balance of short payments as $150,067.11 "for uniform supply and laundry services" and demanding full payment. (JH Hr'g Ex. 16; Hr'g Tr. vol. 2, 388:17-389:9.)

[380] The District employees, along with contact information, designated as points of contact and inventory specialists for their agencies were listed in the contract. (JH Hr'g Ex. 4, Attach. J.1.2 – Locations and Points of Contact, Bates JH 519-520.)

contract. D.C. CODE § 2-221.04 (b). Finally, claims concerning any dispute and any interest which may be payable with respect to the period while the dispute is being resolved, are subject to the ruling of the Contract Appeals Board. (*Id*.)

33. The A/R Aging Detail Report discussed above includes the number of days that have elapsed between the date each of the listed invoices was submitted to the District and the date the report was run, April 30, 2010. (JH Hr'g Ex. 22, Bates JH 430; Finding of Fact ("FF") 25 n.8.)

34. Appellant calculated an amount it believed to be due under the Quick Payment Act by using the date of submission of the invoice from the A/R Aging Detail Report for each agency, except Fleet Management Administration, and calculating the balance of underpayments for each year from 2006 through the first three months of 2009, and applied the 1% per month interest penalty from the Quick Payment Act to reach a total of $351,883.22. (JH Hr'g Ex. 27; Hr'g Tr. vol. 4, 820:11-823:16; 826:8-827:8.)

35. Appellant seeks in this proceeding $351,883.22 as the Quick Payment Act interest penalty on underpaid invoices. (JH Hr'g Ex. 27.) Appellant's calculation included interest through the first three months of 2012. (*Id*., Hr'g Tr. vol. 4, 823:8-15.) However, the contracting officer never received a claim for Quick Payment Act interest penalties from Appellant. (Hr'g Tr. vol. 5, 1238:14-1239:8.)

Laundry Services

36. The contract was a requirements contract and, in pertinent part, provided:

> The District will purchase its requirements of the services included herein from the Contractor. The estimated quantities stated herein reflect the best estimates available. The estimate shall not be construed as a representation that the estimated quantity will be required or ordered, or that conditions affecting requirements will be stable.

(JH Hr'g Ex. 4, §B.3, Bates JH 478.)

37. The contract described Appellant's obligation to provide laundry services: "The Contractor shall provide professional, efficient, and timely cleaning and deliver[y] service to approximately 1500 employees in connection with the specific goods and services herein requested." (JH Hr'g Ex. 4, §C.3.1.1, Bates JH 480.) The contract's scope of work section also stated the number of employees of each of the agencies covered by the contract, which totaled 1500. (JH Hr'g Ex. 4, §C.1, Bates JH 479.)

38. The contract required that Appellant provide receptacles for employees to deposit their uniforms for cleaning and to "be responsible for the pickup, delivery, cleaning, pressing" of the uniforms and to "return all clean uniforms on hangers, neatly hung and not crushed." (JH Hr'g Ex. 4, §§C.3.1.5, C.3.1.6, C.3.1.10, Bates JH 480-481.)

39. When determining its proposal price, JH estimated it would be providing laundry service for about 1500 employees. (Hr'g Tr. vol. 3, 536:2-11.) Appellant did not provide

evidence explaining just how it calculated the expected laundry quantities and unit prices from the overall number of employees at the five agencies, given that the District did not provide specific workload estimates.

40. In anticipation of the increased work represented by the contract and some other new business, JH's President testified that JH moved its operations and equipment to a "bigger space." (Hr'g Tr. vol. 1, 224:4-19.) JH's President testified that JH's proposal was based on rental of uniforms *and* laundry service, and "for us to make money, we have to do both laundry and rental. If we know they're not going to do laundry we would not provide them . . . that [favorable] pricing for rental." (Hr'g Tr. vol. 1, 229:16-230:1.)

41. In the contracting officer's November 21, 2007, cure letter, he alleged that Appellant failed to pick up uniforms for cleaning. (JH Hr'g Ex. 14, Bates JH 6030.) In its November 27, 2007, response, JH's attorney, on JH's behalf, complained that JH had not refused to provide laundry service, but that the agencies were refusing to utilize the laundry services until all of the complete sets of uniforms were delivered. (JH Hr'g Ex. 15, Bates JH 645.) The letter pointed out that "JH Linen is willing and ready to begin the laundry service whenever it is acceptable to the agencies." (*Id*., FF 11, 12.)

42. JH was prepared to provide laundry services after delivery of the Phase 2 complete uniforms beginning in August of 2007, when substantially all uniforms were in the possession of the employees and Appellant had made appropriate preparations to do so.[381] However, the only employees using laundry services were 100 Fleet Management Administration employees. (Hr'g Tr. vol. 4, 741:21-742:7; 887:19-888:2, vol. 5, 1202:11-15.)

43. The other agencies preferred not to use Appellant's laundry service, and some of their employees paid to clean their own uniforms. (Hr'g Tr. vol. 5, 1201:20-1202:21.)

44. Appellant never billed the four administrations not sending uniforms for cleaning for unutilized laundry services during the course of the contract. (Hr'g Tr. vol. 2, 443:20-445:6, vol. 4, 889:15-890:1.) In preparation of its claim, however, Appellant's accountant prepared a chart demonstrating Appellant's view of the amount owed for laundry services not used. (JH Hr'g Ex. 24.) He started the calculation with the period effective August 2007 because, by that time, all uniforms had been delivered. He concluded the calculation period in June 2008. (*Id*., Hr'g Tr. vol. 2, 445:15-446:8, vol. 4, 740:9-742:14.)

45. The accountant's chart calculated the expected payments using the laundry unit price in the contract and applying it to the quantity of uniform articles he believed the District should have sent for laundering. For example, for shirts, the accountant calculated that an employee who had been assigned eleven shirts should have sent five per week for laundering, and thus JH claims the contract price for laundering five shirts each week for each employee. (Hr'g Tr. vol.

[381] Once an employee had a complete set of uniforms, after Phase 2 of the deliveries, JH expected to receive half of the uniform pieces, e.g., five out of the 11 shirts issued, for laundry each week. (Hr'g Tr. vol. 1, 222:18-224:3; 252:2-10.) JH communicated with District agencies at meetings and with e-mails asking that JH be notified of a date and time "to start picking up." (Hr'g Tr. vol. 1, 227:1-228:8.) District contracting staff reiterated a similar request at meetings. (Hr'g Tr. vol. 1, 227:1-228:18.)

2, 445:15-446:8, vol. 4, 753:4-758:2.) He performed a similar calculation for the rest of the uniform parts. (Hr'g Tr. vol. 4, 757:22-758:2.)

46. To calculate the total claim, the accountant used Appellant's inventory records to determine, e.g., the quantity of shirts an agency had received, multiplied that number times the weekly, per shirt laundry price in the contract, and multiplied that number by the four weeks in the billing month to determine the monthly charge for shirts for each agency for unutilized laundry services. (Hr'g Tr. vol. 4, 759:9-761:17.) He made the same calculation for all items of uniform for the agencies not using the laundry service, and then consolidated the total monthly charges for each month from August 2007 to June 2008. (Hr'g Tr. vol. 4, 761:13-17.) Thus, the accountant calculated the amount owed by the District for laundering to be $19,437.22 for Parking Services, $36,110.58 for Solid Waste Management, $7,046.16 for Field Operations, and $6,299.92 for Street and Bridge Maintenance Division, for a total of $68,893.88.[382] (JH Hr'g Ex. 24, Hr'g Tr. vol. 4, 764:14-765:14.)

47. In the August 13, 2008, letter (see FF 27), JH's attorney demanded $373,844.82:

> which amount represents the laundering services which remain unpaid. Under the contract, JH Linen was to provide rental and *laundering* service for employee uniforms, floor mats, and sop cloths. Attachment J.1.3 to the contract delineates separate costs for uniform rental and the cleaning of those uniforms. Throughout the life of the contract, JH Linen has incurred significant expense to ensure laundering capabilities under its contract with the D.C. Government. Those expenses include, but are not limited to, additional labor, equipment, and miscellaneous overhead. Moreover, JH has dutifully appeared at uniform collection locations on a weekly basis since the commencement of the contract only to be rejected by the various agency representatives. The explanations provided for the rejection of laundering services under the contract are simply without merit.

(JH Hr'g Ex. 26, Bates JH 640.) This was the first occasion on which JH billed the District for unutilized laundry services. (Hr'g Tr. vol. 2, 446:17-447:3, vol. 5, 1219:13-1220:22.)

Return of Uniforms

48. The District did not exercise the option for a third year of performance under the contract (Hr'g Tr. vol. 2, 367:4-7), but the contract granted the District the option of continuing rental and cleaning services for a transition period of up to 120 days after the conclusion of the contract term. (JH Hr'g Ex. 4, Modification 0001, §I.10, Bates JH 599-602.)

49. Section I.13.1.5 of Modification 0001 to the contract, provided that if the District exercised its option for transition services, Appellant "agrees to negotiate in good faith a plan with the District to purchase uniforms, if the District so decides. The District is not obligated to purchase any uniforms." (*Id.*, Bates JH 602.)

[382] Fleet Management Administration used the laundry services (Hr'g Tr. vol. 1, 226:3-227:18, vol. 2, 333:11-19), so Appellant did not submit a laundry claim against Fleet Management. (Hr'g Tr. vol. 4, 761:18-762:2.)

50. By letter dated July 23, 2008, the contracting officer advised JH that the District opted to obtain transition services, requiring Appellant to continue providing uniform rental and cleaning services during the transition period. He requested "that JH Linen provide the District with buy-out pricing for each user under the contract no later than July 31, 2008." (JH Hr'g Ex. 19.)

51. On August 13, 2008, Appellant's attorney sent the contracting officer a letter[383] characterized as Appellant's:

> response to your letter dated July 23, 2008, regarding buy-out pricing for uniforms provided to D.C. Government employees pursuant to the above-referenced contract. I have now had an opportunity to discuss this matter with my client and we have concluded that a total purchase price of One Million One Hundred Eighty-Nine Thousand Four Hundred Sixty-Seven Dollars and Forty-Eight Cents ($1,189,467.48) for all uniforms is both reasonable and appropriate.

(JH Hr'g Ex. 28.)

52. The proposed buy-out price was based on the purchase price of the uniforms from Appellant's supplier, a mark-up of 50%, the depreciation value of 30%, plus the cost to fit and deliver the uniforms, including labor, equipment, and delivery costs. The August 13 letter concluded by advising that if the District declined the proposal, JH expected prompt return of all uniforms at the conclusion of the transition period. (JH Hr'g Ex. 28; Hr'g Tr. vol. 2, 366:14-22, 473:28-479:6.)

53. Only two of the five administrations—Fleet Management Administration and Parking Services Administration—entered into buy-out agreements for unreturned uniforms. (Hr'g Tr. vol. 2, 372:22-374:21.)

54. Appellant recorded returned uniforms at the conclusion of the transition period on uniform return reports that were signed by District employees verifying the number of uniforms returned. Appellant reconciled that information with its inventory records to identify the quantity of uniforms not returned. (JH Hr'g Ex. 7; Hr'g Tr. vol. 5, 1095:17-1099:15.) According to Appellant, some, but not all, of the rented uniforms were returned. (Hr'g Tr. vol. 4, 797:18-21; 804:11-15; 813:20-815:4.)

Disputes Clause

55. The contract's Disputes clause described the process for submitting claims:

> A. All disputes arising under or relating to this contract shall be resolved as provided herein.
>
> B. Claims by a Contractor against the District.

[383] Although of the same date, August 13, 2008, this letter was separate from that identified in FF 27 and 47, above, in which Appellant sought to recover for underpaid invoices and laundry services.

> Claim, as used in Section B of this clause, means a written assertion by the Contractor 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 this contract. . . .
>
> (a) All claims by a Contractor against the District arising under or relating to a contract shall be in writing and shall be submitted to the Contracting Officer for a decision. The contractor's claim shall contain at least the following:
>
> (1) A description of the claim and the amount in dispute;
>
> (2) Any data or other information in support of the claim;
>
> (3) A brief description of the Contractor's efforts to resolve the dispute prior to filing the claim; and
>
> (4) The Contractor's request for relief or other action by the Contracting Officer.

(Appeal File, July 23, 2009, Standard Contract Provisions, Bates DC 23-24.)

56. The Disputes clause required the contracting officer to issue a decision on a claim within 90 days of receipt for claims exceeding $50,000, and provided:

> (f) Any failure by the Contracting Officer to issue a decision on a contract claim within the required time period will be deemed to be a denial of the claim, and will authorize the commencement of an appeal to the Contract Appeals Board as authorized by D.C. CODE § 2-309.04.

(*Id*., Bates DC 24.)

Appeals

57. On May 15, 2009, Appellant filed a Complaint in this appeal that also served as its Notice of Appeal. The Complaint identified as Appellant's claim the JH attorney letter of August 13, 2008 (FF 27, 47), in which Appellant sought $170,966.92 for underpaid invoices, and $373,844.82 as damages for the District's failure to use Appellant's laundry services. (Compl., ¶ 3.)

58. Appellant appealed the contracting officer's failure to decide the claim within 90 days of receipt. (Compl., ¶ 4.)

59. In this proceeding, Appellant seeks $123,704.27 for the allegedly underpaid invoices for the period December 11, 2006, through March 30, 2009; $351,883.22 in interest penalties pursuant to the Quick Payment Act, and $68,893.88 for the District's failure to utilize the full laundry services as expected. (JH Post Hr'g Br., 29-30.)

60. At the hearing, the District opposed Appellant's introduction of evidence regarding the value of uniforms not purchased by the District or returned to JH at the conclusion of the contract. (Hr'g Tr. vol. 1, 23:5-12.) The Presiding Judge ruled that evidence of the value of unreturned uniforms was not admissible because Appellant had not submitted a claim to the contracting officer seeking an amount for such uniforms but that evidence regarding the delivery of uniforms and the lack of their return would be admitted to the extent it was relevant to the claims properly before the Board. (*Id*., 67:7-19.)

DISCUSSION

The Board exercises jurisdiction over contractor appeals pursuant to D.C. CODE §360.03(a)(2), which confers 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."[384] In the absence of a final written decision on a contractor claim, the Board has jurisdiction over an appeal from the "deemed denial" of a claim where the contracting officer fails to issue a final decision within 120 days of receiving a proper claim. D.C. CODE § 2-359.08 (c); *Keystone Plus Constr. Corp.*, CAB No. D-1358, 2012 WL 554443 (Jan. 27, 2012); *Verifone, Inc.*, CAB No. D-1473, 2013 WL 3490940 (May 6, 2013).

There are four issues raised by the record before us. *First*, whether the Appellant is entitled to the payment of invoices which it contends were underpaid by the District for the rental of uniforms. *Second*, whether the Appellant is entitled to damages based on the District's alleged failure to fulfill its laundry requirements from Appellant. *Third*, whether the Appellant has met the requirements to pursue a Quick Payment Act claim for interest penalties under D.C. CODE §2-221.04 (a)(1). *Fourth*, whether the Appellant is entitled to damages for the value of uniforms that the District allegedly failed to return at the conclusion of the contract and transition periods.

The Board concludes that it has jurisdiction over Appellant's claims for underpaid invoices, and for the District's alleged failure to fulfill its laundry requirements from the Appellant. The Board finds that the District is liable to Appellant in the amount of $114,822.51, plus statutory interest, for underpaid invoices herein. However, the Board finds that the District is not liable to Appellant for laundry services because Appellant has not met its burden to establish either negligent forecasting of contract estimates, or bad faith by the District in ordering laundry service quantities.

With respect to the Appellant's two additional claims, the Board finds that it lacks jurisdiction. Thus, we dismiss Appellant's Quick Payment Act claim, and its claim for the value of (allegedly) unreturned uniforms. Neither of the aforementioned claims were ever submitted by the Appellant to the contracting officer. As a Board of limited jurisdiction, we are without jurisdiction to review these claims. We discuss our conclusions as to these matters below.

[384] Prior to April 8, 2011, the Board exercised jurisdiction pursuant to D.C. Code § 2-309.03(a)(2) (2001). The Procurement Practices Reform Act of 2010 repealed and replaced the District's procurement statutes, including the Board's previous jurisdictional statute. D.C. Law No. 18-371, 58 D.C. Reg. 1185 (Feb. 11, 2011). This appeal was filed in 2009 (FF 57), under our previous jurisdictional statute. (*See* Notice of Appeal/Compl.)

CLAIM FOR UNDERPAYMENT OF INVOICES

Jurisdiction

The Board concludes that the Appellant submitted an appropriate claim to the contracting officer for the District's underpayment of invoices (FF 27). Further, the Appellant thereafter filed a timely appeal to the Board when the contracting officer failed to decide the claim within 120 days (FF 27, 28, 57.) We thus have jurisdiction over Appellant's claim for underpayment of invoices.[385]

Recovery for Underpaid Invoices

The record before the Board establishes that the Appellant delivered uniforms to the District beginning on or around December 11, 2006, and that these uniforms were rented continuously by the District until March 30, 2009 (a period of approximately 28 months) (FF 7-10, 22, 50). Appellant's delivery and tracking of uniforms during this period was evidenced by an automated inventory system, whose records were then corroborated by weekly audit trials conducted by Appellant. (FF 18-20.) The Appellant submitted invoices to the District on a monthly basis following the procedure outlined in the contract. (FF 21-30, JH Hr'g Ex. 22) The District did not pay Appellant's invoices in full, nor provide an explanation for reducing the payments. (FF 23.) According to JH's accountant, the District never made full payment on an invoice—"there's always a short payment. There's always an adjustment made. . . and even if it's paid, it's probably after 60 or 90 days before we receive the payment." [386]

At the hearing, the Appellant presented detailed and persuasive evidence of the reasonableness of its system for tracking uniform deliveries and returns, and we find that its summary of invoices in JH Hr'g Ex. 22 accurately reflects the payment shortfall JH experienced due to the District's underpayments. (FF 18-26.) We note further that there is no evidence in the record of negative comments as to the accuracy of JH Hr'g Ex. 22 from the District, nor does the District express any other reservations with respect to JH's calculations of the amounts owing as a result of underpaid invoices.

Accordingly, Appellant has established entitlement to recover the difference between the amounts invoiced by Appellant and the amount paid by the District, which Appellant has shown to be $114,822.51. (FF 25, n.9.)[387] Notwithstanding our conclusion above, and despite its failure to dispute Appellant's invoice damages evidence directly, the District asserts a jurisdictional bar over that portion of JH's claim--$17,302.94--accruing after Appellant

[385] Prior to enactment of the Procurement Practices Reform Act of 2010, D.C. Law No. 18-371, 58 D.C. Reg. 1185 (Feb. 11, 2011), a contractor's claim was deemed denied if the contracting officer failed to issue a decision within 90 days after receipt of the claim. D.C. CODE § 2-308.05(c)-(d) (2001). The prior statutory period of 90 days for deemed denial jurisdiction was superseded by the new requirement that 120 days expire before a claim can be deemed denied. D.C. CODE § 2-359.08(b)-(c). *See Verifone, Inc.*, CAB No. D-1473, 2013 WL 3490940 (May 6, 2013). Appellant appealed on May 15, 2009 (FF 57), more than 120 days after it submitted its claim on August 15, 2008 (FF 27, 47), qualifying as a deemed denial appeal under the old or new statutory scheme.

[386] (Hr'g Tr. vol. 3, 557-1:13.)

[387] The invoices listed in Appellant's Accounts/Receivable Aging Detail Report were included in the record except for four invoices at the end of the list. (FF 25, n.9.) As we note herein, these four invoices were removed from the Appellant's claim. (*Id.*)

submitted its claim to the contracting officer (i.e., August 13, 2008). (District Post Hr'g Br. 8-9.) The District contends that the Appellant may only recover that portion of the claim accruing before the date the claim was submitted to the contracting officer. (*Id*.)

While the District correctly notes that the Board lacks jurisdiction over a claim that has not been filed initially with the contracting officer, *Keystone Plus Constr. Corp.*, CAB No. D-1358, 2012 WL 554443, it is incorrect to assert that the Board lacks jurisdiction over the invoices which accrued after August 13, 2008. We conclude that the invoices submitted after August 13, 2008, are based on the same operative facts that applied to the earlier submitted invoices, and therefore, are within the Board's jurisdiction.

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 & Assocs., Inc. v. United States*, 47 Fed. Cl. 280, 285 (2000) (citations omitted). To avoid being considered a new claim, the post-August 13, 2008, claims must be based on the "same set of operative facts" as those in the August 13 claim such that the contracting officer had "adequate notice of the basis and amount" of the later claims. *Id*.; *Keystone Plus Constr. Corp.*, CAB No. D-1358, 2012 WL 554443.

The introduction of additional facts, which do not alter the nature of the original claim or assert a new legal theory of recovery, when based upon the same operative facts as included in the original claim, do not constitute new claims. *Todd Pacific Shipyards Corp.*, ASBCA No. 55126, 06-2 BCA ¶ 33,421 (citations omitted); *accord, Rex Systems, Inc.*, ASBCA No. 54436, 07-2 BCA ¶ 33,718; *cf. Kora & Williams Corp.*, CAB No. D-839, 40 D.C. Reg. 3954 (Mar. 7, 1994).[388] That the amount of a claim might change as additional information is developed does not invalidate it as a claim. *See Tecom, Inc. v. United States*, 732 F.2d 935, 937-38 (Fed. Cir. 1984). In *Madison Lawrence, Inc.*, ASBCA No. 56551, 09-2 BCA ¶ 34,235, the appellant complained that it was being required to serve more meals at a military base than its contract called for. It filed a claim before the end of the contract for extra meals already served and noted that the claim would grow over the coming months as it continued serving meals beyond the contract requirements. The Board found that the appellant's future extra costs were included in the appellant's claim, even though not specified in an exact amount, because the additional amount was readily subject to calculation and known by the contracting officer. (*Id*.)

In this case, the contracting officer knew that the District continued to rent the uniforms because of the transition services it ordered (FF 50), that Appellant continued to invoice for the uniforms, that the District continued to make reduced payments, that Appellant objected to the reduction of its payments, and that Appellant had filed a claim regarding such invoice reductions. Although JH invoices dated between August 1, 2008, and March 30, 2009, were not presented to the contracting officer for a final decision, they were based on the same operative facts regarding uniform rentals that applied to JH's August 13, 2008, claim. These facts were well known to the

[388] In *Kora & Williams*, the Board considered the required certification of a termination for convenience claim. The District argued that a new certification was required before the Board could consider an increase to the amount of the certified claim. The Board determined that a new certified claim was not required: "A contractor's good faith certification does not preclude later proof of a higher amount." *Kora & Williams Corp.*, CAB No. D-839, 40 D.C. Reg. 3954 (citations omitted).

contracting officer, and hence do not constitute new claims.[389] Accordingly, Appellant is not precluded from seeking recovery of the entire amount claimed for unpaid invoices in this appeal.

CLAIM FOR BREACH OF REQUIREMENTS CONTRACT AS TO LAUNDRY SERVICES

Jurisdiction

In its August 13, 2008, letter, Appellant submitted a claim to the contracting officer for damages related to the failure of all but one of the five District agencies to send soiled uniforms to JH for cleaning (FF 47); however, the contracting officer did not issue a decision. (FF 28.) Appellant's claim was therefore "deemed" denied pursuant to D.C. CODE § 2-359.08(c); *see Keystone Plus Constr. Corp.*, CAB No. D-1358, 2012 WL 554443, and Board jurisdiction was properly invoked when the Appellant submitted a timely appeal. (FF 57-59.)

Requirements Contract

It is not disputed by the parties that the contract between the parties was a requirements contract under which the District was required to fill all its actual requirements for uniform laundry services for the five covered agencies from JH during the contract period.[390] (FF 1, 36). *See* D.C. Mun. Regs. tit. 27, § 2791.1; *Fort Myer Constr. Corp.*, CAB No. D-1195, 50 D.C. Reg. 7479 (Mar. 24, 2003); *Modern Sys. Tech. Corp. v. United States*, 979 F.2d 200, 205 (Fed. Cir. 1992); *Mason v. United States*, 615 F.2d 1343, 1346, n.5 (Ct. Cl. 1980).

With respect to laundry services, the Appellant's argument is twofold. The gravamen of Appellant's first contention is this: the parties' contract required 1,500 District employees to obtain its laundry services, but only 100 such employees actually utilized the service during the contract period.[391] (JH Post Hr'g Br. 25-26, n.23.) The Appellant points to this disparity as a basis for recovery on the grounds that the District's estimated employee usage was negligently or inadequately prepared, or undertaken in bad faith. (*See generally* JH Post Hr'g Br. 12, 20.)

[389] The District also argues that because the post-August 13, 2008, invoices were not in dispute when submitted, written notice to the contracting officer was necessary to convert them to claims. (Dist. Br. 8-9.) In support of its position, the District cites *Kalamazoo Contractors, Inc. v. United States*, 37 Fed. Cl. 362, 368 (1997) (finding that an invoice or other routine request for payment that is not in dispute when submitted is not a proper claim). Because we have determined that the post-August 13, 2008, underpayments are part of the claim before the Board, we need not decide this issue. However, we note that the Contract Disputes Act governed the contract in *Kalamazoo*, and the applicable Disputes clause provided, "A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Act." The Disputes clause in Appellant's contract with the District, which is not subject to the Contract Disputes Act, *see Civil Constr., LLC*, CAB No. D-1294, D-1413, D-1417, 2013 WL 3573982 (Mar. 14, 2013), does not include similar language relating to invoices. *See Friends of Carter Barron Found.*, CAB No. D-1421, 2011 WL 7428966 (Nov. 15, 2011).

[390] The contract did not, however, obligate the District to acquire any minimum amount of laundry services from Appellant (FF 36), or guarantee that any particular minimum quantity would be purchased. *See American Gen. Trading & Contracting, WLL*, ASBCA No. 56758, 14-1 BCA ¶ 35,587.

[391] Specifically, the contract provided: "The Contractor shall provide professional, efficient, and timely cleaning and deliver[y] service to approximately 1500 employees." (FF 37.)

Appellant's alternative theory of recovery is that the District diverted the laundry service from JH, and did not use it to satisfy requirements. (JH Post Hr'g Br. 11-12, 25-27.) *See also Rumsfeld v. Applied Companies, Inc.*, 325 F.3d 1328, 1339 (Fed. Cir. 2003). Under this theory, the Appellant argues that "if the government obtained services from someone other than the contractor, then the contractor may recover its losses for their services". (JH Post Hr'g Br. 25.) Insofar as the instant case is concerned, the Appellant argues that "[i]nstead of utilizing Appellant's services, [the District] had its employees clean their own uniforms." (*Id*.)

We have reviewed Appellant's contentions against the record and find them to be without merit. The record contains no evidence about the District's preparation of the information for the solicitation that would support a conclusion that the District estimate was negligently or inadequately prepared. Additionally, the Appellant has not shown how the laundering of uniforms by District employees came about, nor that the District intended thereby to injure JH, or that the District's allowance of this practice was not for a valid business reason. There is also no proof in the record that the District engaged in bad faith toward the Appellant. Under these circumstances, we dismiss Appellant's claim for breach of the laundry services requirement of the contract. We discuss these matters below.

Variance Between Estimate and Quantity Ordered

In a requirements contract, a contractor may recover where the government's quantity estimates, upon which the contractor properly based its bid, are erroneous and negligently prepared. *See Integrity Mgt. Int'l, Inc.*, ASBCA No. 18289, 75–1 BCA ¶ 11,235, *aff'd on reconsideration*, 75–2 BCA ¶ 11,602 (government negligently failed to exercise degree of care necessary where meal estimates were not based upon all available relevant information); *Rumsfeld v. Applied Companies, Inc.*, 325 F.3d 1328, 1334-1335 (Fed. Cir. 2003). Generally, when the quantity ordered is significantly more or less than the estimated quantities, "the courts will protect the aggrieved party from unfair usage by applying a test of good faith to the other party's actions." *Shader Contractors, Inc. v. United States*, 276 F.2d 1, 4 (Ct. Cl. 1960).

An incorrect estimate stemming from the government's unintentional negligence is as much a misrepresentation as a deliberate one, and is consequently as much a breach of contract. *Rumsfeld v. Applied Companies, Inc.*, 325 F.3d 1328, 1335 (Fed. Cir. 2003); *J.A. Jones Mgmt. Servs., Inc.*, ASBCA No. 46793, 99-1 BCA ¶ 30,303 at 149,832-33. It is well established that the government is required to exercise reasonable care in the preparation of its workload estimates. *Womack v. United States*, 389 F.2d 793, 801 (Ct. Cl. 1968) (When an estimate as to a material matter is provided by the government to bidders upon these contracts, it must be based upon "all relevant information that is reasonably available to it."). Even if the government's estimate is not drastically inaccurate, if it was prepared negligently or in bad faith the government is liable for breach. *See Engineered Demolition, Inc.* v. *United States*, 70 Fed. Cl. 580, 592 (2006); *American Gen. Trading & Contracting, WLL*, ASBCA No. 56758, 12-1 BCA ¶ 34,905.

However, in the absence of any evidence to demonstrate a lack of due care in preparing an estimate, simply showing disparities between estimates and actual purchases, however substantial, does not establish that the estimate was negligently prepared. *Medart, Inc. v. Austin*,

967 F.2d 579, 581 (Fed. Cir. 1992); *American Marine Decking Servs., Inc.*, ASBCA No. 47082, et al., 97-1 BCA ¶ 28,821; *Emerald Maint., Inc*, ASBCA No. 29948, 89-3 BCA ¶ 22,127. Only when a contractor demonstrates that the estimates, at the time they were prepared, were "inadequately or negligently prepared, not in good faith, or grossly or unreasonably inadequate" may the government be liable for an adjustment to the contract price. *Bannum, Inc. v. Fed. Bureau of Prisons*, DOTCAB No. 4450, 05-2 BCA ¶ 33,049 citing *Medart, Inc. v. Austin*, 967 F.2d 579, 581 (Fed. Cir. 1992).

In *Crown Laundry & Dry Cleaners, Inc. v. United States*, 29 Fed. Cl. 506 (1993), the court found that the government had not used due care in preparing its estimate for use in a requirements contract solicitation. The court considered extensive evidence in the record regarding the methods used and actions taken by the government procurement officials to prepare the estimate and concluded that the government had specific information available to it regarding the actual workload of the predecessor contractor and failed to consider it in preparing the estimate and instead relied on information the contracting officials knew was suspect. When the quantity of laundry sent to the contractor was only 60% of the estimate, the court found the appellant entitled to damages.

In the instant appeal, the record contains no evidence about the District's preparation of estimates for the solicitation that would support a conclusion that the District's estimate was negligent or inadequately prepared. The Appellant has done no more than point to the disparity between the amount of laundry it expected (based on the number of employees to be served) and the amount of laundry it actually received (as evidence that the information provided in the solicitation by the District was negligently prepared). The cases discussed above make clear that that is not sufficient proof of negligence.

This contract did not provide a specific estimate of the quantity of laundry services (e.g., number of pounds of laundry, number of garments), that the Appellant could expect to provide, but instead identified the number of employees at the affected agencies.[392] And although the estimate was framed in terms of the number of employees to be served, Appellant reasonably assumed that they would be using its laundry service.[393] The District specifically advised that Appellant *shall* be providing laundry services to approximately 1500 employees. (FF 37.) However, Appellant had no reason to know that only 100 of those would actually utilize the cleaning services and, moreover, it was reasonable for Appellant to prepare for the expected

[392] Similar solicitations have advised bidders not only of the number of persons available for laundry services on, for example, a military base, but also advised of specific expected workloads. *See, e.g., Robertson & Penn, Inc.*, ASBCA No. 55625, 08-2 BCA ¶ 33,951 (the contract and bid price schedule gave total pieces to be laundered and estimated individual items processed based on the previous years' workload experience); *Crown Laundry & Dry Cleaners, Inc.*, ASBCA No. 39982, 90-3 BCA ¶ 22,993 (The Contractor will pick up, launder and deliver an average of 2,110,862 pounds of linen per year); *American Gen. Trading & Contracting, WLL*, ASBCA No. 56758, 14-1 BCA ¶ 35,587 ("7,000 troops x 5 Camps x 4 weeks/mo x 21 pieces x 6 mo = 17,640,000 pieces").

[393] It was left to Appellant to calculate how much laundry service would be required for the stated number of employees. Appellant's accountant testified that in preparation of Appellant's claim, he calculated the amount of laundry he believed Appellant should have received, multiplied that quantity by the appropriate weekly unit prices, and multiplied that by four to arrive at the monthly charge for unutilized laundry services. (FF 46.) He did not explain whether the same sort of calculation was made in preparing Appellant's bid.

laundry work by acquiring facilities and employees to do so. (FF 40.) But as we have noted above, the Appellant has not demonstrated its entitlement to relief because there is no evidence that the District's estimate was negligent, or resulted from bad faith.

Diversion of Work

It might also be said that the District breached the requirements aspect of the laundry service under the contract if it had actual requirements for uniform cleaning but diverted the laundry service from Appellant and did not use it to satisfy the requirements. *See Rumsfeld v. Applied Companies, Inc*., 325 F.3d 1328, 1339 (Fed. Cir. 2003).

The government "will be presumed to have varied its requirements for valid business reasons, *i.e.*, to have acted in good faith, and will not be liable for the change in requirements" in the absence of a showing by the contractor that the government reduced its requirements solely to avoid its contract obligations. *Technical Assistance Int'l v. United States*, 150 F.3d 1369, 1373 (Fed. Cir. 1998). A change in operations by a contracting entity made independent of the contract that results in a reduction in requirements will not constitute a breach or a constructive change. *Id.* at 1374; *Empire Gas Corp. v. Am. Bakeries Co.*, 840 F.2d 1333, 1340-41 (7th Cir. 1988) (where a buyer reduces its requirements "the essential ingredient of good faith" is that it is not trying to get out of the contract based on second thoughts about the bargain's advantages and disadvantages); *East Bay Auto Supply, Inc.*, ASBCA No. 25542, 81-2 BCA ¶ 15,204 at 75,282 (government not liable for differences between estimates and orders absent bad faith).

In *D.J. Miller & Assocs., Inc.*, ASBCA No. 55357, 11-2 BCA ¶ 34,856, the appellant held a contract for providing CDC's staff requirements, but CDC directly hired four former employees of the contractor who later performed the same work for the government as they had before through the contractor. As a result, the CDC then required less work from the contractor. These facts alone were insufficient to establish that a compensable diversion had occurred. The appellant had not provided credible evidence that the government lacked a valid business reason for ordering less under the contract or that CDC specifically intended to injure the appellant by hiring more government employees.

Here, the District did not divert the laundry requirements to another provider; the employees simply laundered the uniforms themselves (FF 43), but nevertheless this diminished the District's laundry requirements to Appellant's disadvantage. JH, however, has not shown how it came about that the employees chose to launder their uniforms themselves, and certainly has not demonstrated that the District thereby intended to injure Appellant, *see D.J. Miller & Assocs., Inc.*, ASBCA No. 55357, 11-2 BCA ¶ 34,856, or that the District merely had second thoughts about the terms of the contract and wanted to get out of it, *see Empire Gas Corp. v. Am. Bakeries Co.*, 840 F.2d 1333, 1340-1341 (7th Cir. 1988). It is Appellant's burden to demonstrate that the District's variation of the quantity of laundry sent to Appellant was done in bad faith, *see Technical Assistance Int'l, Inc. v. United States*, 150 F.3d 1369, 1373-1374 (Fed. Cir. 1998), and, on this record, it has not been shown that allowing District employees to perform work that otherwise likely would have gone to Appellant was specifically intended to injure Appellant or was not done for a valid business reason.

Presumption of Good Faith

Moreover, we note that District officials are presumed to act in good faith in discharging their contracting duties, *Unfoldment, Inc.*, CAB No. D-1062, 2013 WL 3573981 (Mar. 14, 2013), and the burden of proving otherwise is on Appellant. Clear and convincing evidence of a specific intent to injure Appellant is required to rebut the presumption that District officials acted in good faith in allowing a reduction of the requirements below that which JH reasonably expected. *See Kora & Williams Corp.*, CAB No. D-839, 40 D.C. Reg. 3954); *Advantage Healthplan, Inc.*, CAB No. D-1239, 2013 WL 6042884 (Oct. 4, 2013); *see also Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1240 (Fed. Cir. 2002). Appellant has not proved by clear and convincing evidence that the District's reduction in laundry requirements occurred in bad faith. Nothing indicates that the District intended to injure Appellant or was trying to avoid its contract obligations when it ordered less laundry service than Appellant expected. To the contrary, the record suggests that some District parking employees paid to clean their own uniforms because they were "on the street" and did not want laundered uniforms. (Hr'g Tr. vol. 5, 1201:20-1202:21.) On the other hand, District mechanics used Appellant's laundry services because their agencies did not want them to "take the uniforms home and bring them back still greased or soiled from mechanic work." (*Id*.)

Damages

Appellant has failed to establish that the District's estimate was negligent or that the District reduced its requirements in bad faith. Were it able to overcome these hurdles, however, appellant would still be denied recovery because it has urged an impermissible measure of damages.

The appropriate measure of breach of contract damages is an award of damages sufficient to place the injured party in as good a position as he or she would have been in had the breaching party fully performed. *San Carlos Irrigation and Drainage Dist. v. United States,* 111 F.3d 1557, 1562-63 (Fed. Cir. 1997); *Northern Helex Co. v. United States,* 524 F.2d 707, 713 (Ct. Cl. 1975); *A-1 Garbage Disposal and Trash Serv., Inc.,* ASBCA No. 43006, 93-1 BCA ¶ 25,465; *T&M Distributors, Inc.,* ASBCA No. 51279, 01-2 BCA ¶ 31442; *Joe Phillips,* ASBCA No. 57280, 13 BCA ¶ 35,263. However, the injured party is not entitled to more than it would have received had the contract been fully performed, and the amount awarded must not result in a windfall to it. *Rumsfeld v. Applied Companies, Inc*., 325 F.3d 1328, 1336 (Fed. Cir. 2003); *Hi-Shear Tech. Corp. v. United States,* 356 F.3d 1372, 1381-82 (Fed. Cir. 2004); *Joe Phillips*, ASBCA No. 57280, 13 BCA ¶ 35,263.

Appellant has calculated the quantity of laundry services it contends should have been provided to it and applied the contract price per garment to that calculated quantity (FF 44-47); even though it is seeking damages for work it did not perform. Were Appellant to receive an award on this basis, it would be put in a better position than it would have been in had the District sent Appellant the expected quantity of laundry because Appellant has saved the labor, equipment, utility, and overhead expenses that it would have incurred had it actually performed. As such, granting damages on the basis Appellant seeks would create an impermissible windfall to Appellant.

CLAIM FOR QUICK PAYMENT ACT RELIEF

Appellant has not submitted a claim to the contracting officer for the claimed Quick Payment Act interest penalties addressed in its Complaint. (FF 35.) Accordingly, the Board does not have jurisdiction, and Appellant's Quick Payment Act claim is dismissed. *See Keystone Plus Constr. Corp.*, CAB No. D-1358, 2012 WL 554443. That dismissal, however, is without prejudice to Appellant returning to the Board should it file an appropriate claim with the contracting officer that is either denied or not decided within the time allowed.[394]

CLAIM FOR THE VALUE OF UNRETURNED UNIFORMS

At the conclusion of the contract, the District returned some, but allegedly not all, uniforms to Appellant. (FF 54.) Appellant seeks recovery of the value of unreturned uniforms. However, we find that Appellant did not file a claim for such damages with the contracting officer. The August 13, 2008, letter from Appellant's counsel regarding unreturned uniforms at the conclusion of the contract (FF 51, 52) was not a claim. It did not make a demand as a matter of right under the contract for a sum certain. (FF 55.) Rather, it proposed an amount as a basis for a negotiated buyout and was submitted in response to the contracting officer's solicitation of such an offer. (FF 50, 51.)

Absent a claim filed with the contracting officer, the Board does not have jurisdiction over that issue. *See Keystone Plus Constr. Corp.*, CAB No. D-1358, 2012 WL 554443. Accordingly, as the issue of the allegedly unreturned uniforms was not properly before the Board, we are without authority to decide it, and we dismiss that portion of Appellant's claim. That dismissal, however, is without prejudice to Appellant returning to the Board should its claim be filed with the contracting officer in accordance with any applicable filing requirements, and the Board's jurisdictional prerequisites are established.

MISCELLANEOUS PERFORMANCE ISSUES

Appellant presented evidence regarding a number of complaints about the District's administration of this contract. It complained that it had difficulties measuring the employees for the uniforms due to poor scheduling on the part of the inventory specialists (FF 4-6), difficulties delivering the uniforms due to uncooperative inventory specialists (FF 7-9), delays in the inventory specialists issuing the uniforms to the employees (FF 10), and unjustified requests for alterations because the employees did not like the fit of the uniforms (FF 12). However, none of these issues has been shown to have any bearing on the claims that are properly before the Board in this appeal, namely those claims for underpaid invoices, underutilized laundry service, Quick Payment Act interest, and/or (allegedly) unreturned uniforms. Accordingly, we have no need to address these complaints.

[394] Should the jurisdictional prerequisites be met for the Appellant to bring a Quick Payment Act dispute before us, the Board notes that FF 29, 30 and 33 herein tend to support entitlement for Appellant. (*See* FF 29, 30, 33.) The Board notes, however, that Appellant's computation of Quick Payment Act damages as noted in FF 34, has neither been established nor discredited in this proceeding. (*See* FF 34.)

CONCLUSION

Appellant's claim for the shortfall in its invoices is granted in the amount of $114,822.51. The District shall also pay Appellant interest thereon, in accordance with D.C. CODE § 2-359.09 (2011) (formerly D.C. CODE § 2-308.06).

Appellant's claim for damages related to the failure of four of the administrations to utilize (and pay for) laundry services from Appellant is denied. Appellant has failed to demonstrate that the District's preparation of its estimate of laundry services, or its reduction in the quantity of uniforms sent to Appellant were done negligently or in bad faith. Moreover, even if it had established liability on the part of the District, the damages it sought were based on an impermissible measure, and there is inadequate evidence in the record from which the Board could determine, even on a jury verdict basis, damages to which Appellant might be entitled.

Appellant's claim for Quick Payment Act interest penalties for late payment of invoices is dismissed without prejudice for lack of jurisdiction. Appellant's claim for the value of uniforms not returned by the District at the conclusion of the contract is dismissed without prejudice for lack of jurisdiction.

SO ORDERED.

DATED: November 14, 2014

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

Concurring:

/s/ Maxine E. McBean
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GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

ECO-COACH, INC.	)	
	)	CAB No. P-0976
Solicitation No: DCAM-14-NC-0160	)	

For the Protester, Eco-Coach, Incorporated: Randy Alan Weiss, Esq., Weiss LLP. For the District of Columbia Department of General Services: Charles J. Brown, Esq., and C. Vaughn Adams, Esq., Agency Counsel.

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

OPINION

Filing ID #56527023

This protest arises from a solicitation for conservation program support services issued by the District of Columbia Department of General Services ("DGS"). Eco-Coach, Inc. ("Eco-Coach" or "protester") argues that in the conduct of this procurement and resulting award decision, DGS allegedly failed to (1) provide offerors with sufficient time to revise their proposals following DGS' amendment of the solicitation; (2) evaluate and score proposals in accordance with the terms of the solicitation in making the award decision; (3) contact the protester's references; and (4) properly award preference points to certified business enterprises ("CBEs").

Upon consideration of the allegations raised by the protester and the underlying record, we deny and dismiss the specific protest allegations raised by Eco-Coach as either untimely or without merit, as further detailed herein. However, based upon the Board's review of the record in this case, we do find *sua sponte* that the District evaluated the past performance credentials of each offeror based upon an undisclosed requirement, not stated in the solicitation, that offerors show evidence of past work performed in District of Columbia Public Schools ("DCPS") and, accordingly, that the District improperly assessed proposal strengths and weaknesses against offerors on this undisclosed basis. The Board, therefore, sustains the protest for this reason.

BACKGROUND

On July 10, 2014, DGS issued Solicitation No. DCAM-14-NC-0160 (the "Solicitation" or "RFP"), which sought a "DC-based contractor to provide outreach and monitoring services to support . . . resource conservation programs in [DCPS] for 2014-2015." (*See* Agency Report

("AR") Ex. 1, at 2-3.)[395] In particular, the awardee would be responsible for providing services in support of a recently-expanded organics recycling program in DCPS cafeterias and kitchens, with the goal of achieving a 45% recycling rate by August 1, 2015—a target set by the Healthy Schools Act. (*Id*.) *See also* D.C. CODE § 38-825.01(a)(1)(B) (2012) (stating the August 1, 2015 deadline). These conservation support services included, but were not limited to (1) developing an online records system for program data; (2) establishing data collection protocols for site visits and waste audits; (3) hiring and training Conservation Fellows approved by the District; and (4) community outreach, including development of communications materials, school-specific program roll-out plans, and DCPS staff training. (*See* AR Ex. 1, at 3, 6-8.)

DGS issued the first two addenda to the Solicitation on July 17 and July 25, 2014, respectively. (AR ¶ 3, at 2-3.) These addenda (1) provided the sign-in sheet from the pre-proposal conference; and (2) extended the RFP's due date to August 5, 2015. (*See id*.) On July 31, 2014, DGS issued Solicitation Addendum No. 3, which (1) revised the RFP's terms concerning the type of contract to be awarded and contractor compensation; and (2) provided answers to 23 questions submitted by Eco-Coach. (AR ¶¶ 3-4, at 2-3; *see also* AR Ex. 1, at 31-38.) Addendum No. 3 did not extend the RFP's August 5, 2014, deadline for proposal submission. (*See generally* AR Ex. 1, at 31-38.)

DGS anticipated that it would award a fixed-price contract with a cost reimbursement ceiling. (AR Ex. 1, at 31.) The RFP also provided for an initial period of performance from September 1, 2014, through July 31, 2015, followed by two one-year option periods. (*Id*. at 3.)

The Solicitation stated that offerors' proposals would be evaluated on a 100-point scale that included the following evaluation criteria: (1) Experience and References (50 points); (2) Management Plan – Technical Approach (40 points); and (3) Price Proposal (10 points). (AR Ex. 1, at 21-22.) Eligible offerors could also receive up to 12 additional points for qualifying as a CBE pursuant to the Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005, D.C. CODE § 2-218.01, *et seq.*, for a total of 112 possible points. (*See* AR Ex. 1, at 9-10.)

As it relates to the instant protest, the RFP also provided a list of 10 subfactors, underlying the main technical evaluation criteria that would be used in evaluating offerors' technical proposals—five subfactors for "Experience and References" and five subfactors for "Management Plan – Technical Approach." (*See* AR Ex. 1, at 21.) Of these, the "Experience and References" criteria included the following subfactors: (1) "[e]stablishing organics recycling programs in public schools[;]" (2) conducting outreach activities; (3) conducting monitoring and data collection activities; (4) producing "high quality communications and/or educational materials[;]" and (5) "building and maintaining relevant teams and partnerships." (*Id*.) The RFP further directed offerors to address each "Experience and References" subfactor by submitting "documentation sufficient to demonstrate high quality[,] relevant past experience and performance" for these criteria. (*See id*.)

[395] When referring to documents that do not contain consistent internal page numbering (*see, e.g.,* AR Ex. 1), the Board has cited to the page numbers assigned by Adobe Reader.

The Solicitation's "Management Plan – Technical Approach" evaluation criteria included the following subfactors: (1) key personnel, not including Conservation Fellows; (2) procedures to train, manage, and retain Conservation Fellows; (3) a description of the resources that would be necessary to support contract activities; (4) a description of the online system to be provided; and (5) a list of anticipated project risks and mitigation plans. (*Id*.) For the "Management Plan – Technical Approach" criteria, the Solicitation similarly directed offerors to "[s]ubmit a plan that addresse[d] all relevant technical aspects." (*See id*.)

Two offerors submitted responsive proposals by the Solicitation's deadline of August 5, 2014—Eco-Coach, the protester, and Agricity, LLC ("Agricity"), the awardee. (*See* AR at 3, ¶ 5; AR Ex. 7, at 2 (the Notice of Award to Agricity).)

The District's technical evaluation panel ("TEP") consisted of the DGS Schools Conservation Coordinator, a DCPS Program Coordinator, and a Specialist Coordinator from the District's Office of the State Superintendent of Education. (*See* AR Ex. 5, at 2.) In evaluating proposals submitted in response to the Solicitation, the TEP used the following adjectival rating scale: Excellent Plus (E+); Excellent (E); Excellent Minus (E-); Good Plus (G+); Good (G); Good Minus (G-); Fair Plus (F+); Fair (F); Fair Minus (F-); Poor Plus (P+); Poor (P); and Poor Minus (P-). (*See generally* AR Ex. 6.) The TEP then converted each adjectival score assigned to offerors under the evaluation criteria into a numerical score,[396] allocating points to each offeror in the following manner:

	Eco-Coach			**Agricity**		
Evaluator	E1	E2	E3	E1	E2	E3
Experience and References (50)	21.10	33.70	34.40	47.20	45.70	36.90
Management Plan – Technical Approach (40)	14.64	26.32	22.96	38.32	35.28	28.80
Total Technical Score (90)	**35.74**	**60.02**	**57.36**	**85.52**	**80.98**	**65.70**

(*See generally* AR Ex. 6.) The TEP's individual scores were subsequently averaged to determine a consensus score for each offeror's technical proposal:

Offeror	**Experience and References (50)**	**Management Plan – Technical Approach (40)**	**Total Technical Points (90)**	**Rank**
Agricity	43.27	34.13	77.40	1
Eco-Coach	29.73	21.31	51.04	2

[396] Specifically, the TEP assigned a number to each adjectival rating—e.g., 0.15 for Poor, 0.50 for Fair Plus, and 1.00 for Excellent Plus—and then multiplied the number of points available for a subfactor by the offeror's adjectival rating for the subfactor to calculate the offeror's total points for the subfactor. (*See generally* AR Ex. 6.) For example, for the subfactor "Description of on-line system to be provided," (8 points available) one TEP panelist rated Eco-Coach's proposal as "Good Minus," or 0.60, resulting in a score of 4.80 for this subfactor. (*See* AR Ex. 6, at 11-12.) That is, **0.60** (Eco-Coach's adjectival rating) **x 8.0** (points available for the subfactor) **= 4.80** (Eco-Coach's total points for the subfactor).

(*See* AR Ex. 5, at 3.)

The contemporaneous record in this matter, including specific written commentary provided by the evaluators, provides further details on the perceived weaknesses that were identified by the TEP, which led to Eco-Coach's ultimate technical score. As it relates to the particular protest allegations raised by Eco-Coach, the TEP made negative comments in its evaluation concerning (1) Eco-Coach's perceived lack of outreach experience including its lack of use of social media as a current outreach mechanism; (2) a perceived lack of information concerning Eco-Coach's past performance, including a noted absence of letters of reference providing additional details concerning Eco-Coach's past programs; and (3) Eco-Coach's proposed online system and management approach, which was described as potentially lacking "flexibility." (*See generally* AR Ex. 6.) All of these negative comments were correlated with a lower score for Eco-Coach's proposal in the related evaluation subfactors. (*See generally id*.)

More notably, however, one of the "Experience and References" subfactors listed on the TEP's score sheets differed from the subfactors listed in the RFP's evaluation criteria. That is, while the Solicitation stated that offerors would be evaluated for their experience in "[e]stablishing organics recycling programs in public schools," the TEP appears to have evaluated offerors' experience in "[e]stablishing composting programs in public schools in D.C. [emphasis added]." (*Compare* AR Ex. 1, § E.3.1, at 21, *with* AR Ex. 6, at 3-6, 10-12.) The addition of the requirement that offerors' have experience in DCPS, rather than in public schools generally, was also reflected in the TEP's comments concerning Eco-Coach's proposal. One panelist wrote, "Eco-Coach has lots of experience, but they lack the focus on urban settings, which Agricity has. Working in suburban school district[s] is very different than working in the D.C. public school system." (AR Ex. 6, at 13.) Another panelist simply noted that Eco-Coach had "[n]o experience with public schools in D.C."[397] (*Id*. at 17.) On the other hand, a TEP member noted under the same "revised" DCPS subfactor that "Agricity's experience with DC schools gives them a major push for being more qualified for this project." (*Id*. at 14.)

Subsequently, in a memorandum dated September 2, 2014, the contracting officer (1) evaluated offerors' proposals; (2) adopted the TEP's exact consensus technical scores for both offerors; and (3) determined that a contract should be awarded to Agricity. (AR Ex. 5, at 1, 3-4.) The offerors received the following final scores:

Offeror	Total Technical Points (90)	Price Points (10)	Total Proposal Points (100)	CBE Points (12)	Final Points (112)	Rank
Agricity	77.40	8.40	85.80	0.00	85.80	1
Eco-Coach	51.04	10.00	61.04	12.00	73.04	2

(AR Ex. 5, at 4.)

[397] Although the District only submitted "[Sub]Factor Comment" score sheets for this particular evaluator that made this comment, and not the score sheets for this evaluator containing the breakdown of the precise numerical technical rating and score for each subfactor as they did with the other evaluators (*see generally* AR Ex. 6, at 16-19), the omitted score sheets presumably listed the same "revised" subfactor as the score sheets used by the other TEP panelists given the nature of this comment.

Further, in addition to adopting the TEP's consensus scores (and, by extension, the subfactor scores and comments underlying the TEP's consensus scores), the contracting officer's award memorandum explicitly adopted many of the TEP comments outlined above. (*See generally* AR Ex. 5, at 2-3.) DGS' Director and Chief Contracting Officer signed his approval of the contracting officer's award memorandum on September 3, 2014. (*Id*. at 4.) Although the District notified the offerors of its award decision in letters dated September 2, 2014, Eco-Coach did not receive notice of the District's award decision until September 4, 2014. (*See* AR Ex. 7, at 2-3; Protest at 2; Protest Ex. B.)

Eco-Coach filed the instant protest on September 17, 2014. (*See* Protest at 10.) In its protest, Eco-Coach argues that DGS allegedly (1) failed to provide offerors with sufficient time to revise their proposals following the issuance of Solicitation Addendum No. 3; (2) did not evaluate and score proposals in accordance with the terms of the Solicitation; (3) failed to contact protester's references; and (4) did not award the proper number of CBE points to each offeror.[398] (*See* Protest at 2-5.)

In its responsive Agency Report, DGS argues that (1) Eco-Coach's protest allegations concerning Addendum No. 3 are untimely; (2) Eco-Coach's proposal was properly evaluated and scored; and (3) the Solicitation did not require the TEP to contact Eco-Coach's references.[399] (*See* AR at 4-10.)

DISCUSSION

I. Jurisdiction and Standard of Review

The Board exercises jurisdiction over a protest of a solicitation or contract award by any actual or prospective offeror who is aggrieved in connection with the solicitation or award, pursuant to D.C. CODE 2-360.03(a)(1) (2011).

Notwithstanding, when an offeror's protest is based on improprieties in a solicitation that are apparent prior to the solicitation's deadline for proposals, the offeror must file its protest prior to this solicitation deadline. D.C. CODE § 2-360.08(b)(1). Applying this requirement to the instant protest, we find that protester's allegation that it had insufficient time to revise its proposal following the issuance of Addendum No. 3 should have been filed with the Board prior to the Solicitation's deadline for proposals: August 5, 2014. In its protest, the protester states that it did not file its protest until September 17, 2014—approximately six weeks after the Solicitation's deadline for proposals—because it did not have the ability to simultaneously submit a timely protest and a timely proposal, thereby effectively conceding that its protest on

[398] On September 30, 2014, the DGS Director and Chief Procurement Officer issued a Determination & Findings to proceed with contract performance by Agricity while Eco-Coach's protest is pending. (*See generally* D&F.) Eco-Coach filed a challenge to the D&F on October 7, 2014. Thereafter, on October 23, 2014, the Board overruled the D&F, finding that the District had failed to show that urgent and compelling circumstances justified proceeding with contract performance during the pendency of the protest.

[399] Protester filed its reply to the Agency Report on October 16, 2014, which repeated and expanded upon the arguments presented in the Protest. (*See generally* Protestant's [sic] Reply to the DGS Agency Report ("Reply").)

this ground was untimely under law.[400] (*See* Protest at 5-6.) As the Board is without legal basis to exempt the protester from the timeliness requirements of D.C. CODE § 2-360.08(b)(1), the Board hereby dismisses protester's allegations concerning Addendum No. 3 as untimely.

II. Protester's Specific Allegations are Without Merit.

The protester largely argues in this matter that the District's award decision was not reasonable and in accordance with the criteria set forth in the Solicitation. In this regard, D.C. Mun. Regs., tit. 27, § 1630.1 (2013) states that contracting officers must evaluate offerors' proposals using only the evaluation criteria and relative weightings stated in the solicitation. *Id.* This provision echoes "the fundamental principle that the government may not solicit proposals on one basis and make award on another basis." *Bean Stuyvesant, L.L.C. v. United States*, 48 Fed. Cl. 303, 321 (2000) (citing *Dubinsky v. United States*, 43 Fed. Cl. 243, 266 (1999)) (citations and internal quotation marks omitted); *see also Arltec Hotel Grp.*, B-213788, 84-1 CPD ¶ 381 (Comp. Gen. Apr. 4, 1981) ("While procuring agencies have broad discretion in determining the evaluation plan they will use, they do not have the discretion to announce in the solicitation that one plan will be used and then follow another in the actual evaluation.") (citing *Umpqua Research Co.*, B-199014, 81-1 CPD ¶ 254 (Comp. Gen. Apr. 3, 1981)).

It is thus improper for an agency "to add or substitute evaluation criteria after [final] proposals have been submitted." John Cibinic, Jr., Ralph C. Nash, Jr., & Christopher R. Yukins, Formation of Government Contracts 818 (4th Ed. 2011) (citing *Grey Advertising, Inc.*, B-184825, 55 Comp. Gen. 1111 (May 14, 1976)). Similarly, "[o]nce an evaluation factor has been included in the RFP, the agency may not ignore that factor." Formation of Government Contracts 823 (citing *Cardkey Sys., Inc.*, B-239433, 90-2 CPD ¶ 159 (Comp. Gen. Aug. 27, 1990)). This rule applies to both price and technical considerations, as well as an agency's evaluation of offerors' past performance. *See id*. at 823-824 (citations omitted).

Eco-Coach raises several allegations in its protest concerning its belief that the District failed to adhere to the stated evaluation criteria in making the award decision. Specifically, the protester argues that DGS improperly penalized its proposal for failing to address social media outreach under the "Experience and References" subfactors -- presumably based upon the District's favorable comments regarding the awardee's proposal, which featured the use of social media to conduct the contract's required outreach activities. (*See* Reply at 4-5.) However, by contrast, the evaluators found Eco-Coach's proposal to be generally weak in the area of its proposed public outreach approach given its lack of proposal focus on this area of performance *including* its lack of use of social media as a commonly used outreach mechanism in public schools. (*See, e.g.,* AR Ex. 6, at 6.)[401] In this regard, the Board finds nothing improper in the District's recognition of the awardee's extensive prior use of social media for outreach activities as a favorable display of its capabilities in meeting this Solicitation requirement to show relevant

[400] Specifically, protester writes that it "simply could not file a Protest in the two business days between the release of the final Addendum and the deadline for submitting a final proposal." (Protest 5-6.)

[401] As we noted *supra*, the Solicitation made no explicit mention of social media outreach, either under the "Experience and References" criteria or elsewhere, but merely stated that offerors should demonstrate past experience and performance "conducting relevant outreach activities." (*See generally* AR Ex. 1, at 21.)

outreach activities.[402] Conversely, to the extent that the District found that the protester's proposal did not display comparable strength in the manner in which it had previously conducted relevant outreach activities – using social media or any other relevant means – based upon the District's specific agency needs, the Board finds nothing improper in this determination either. Therefore, the Board rejects protester's social media arguments, and hereby denies this protest ground.

In addition, the protester contends that DGS impermissibly penalized the protester for failing to submit letters of reference, and also by not contacting its prior contract references that were identified in its proposal. As previously detailed, the Solicitation directed offerors to submit documentation sufficient to demonstrate high-quality, relevant past experience and performance for each of the "Experience and References" subfactors. (*See* AR Ex. 1, at 21.) Here, although the protester submitted extensive information regarding its proposed key personnel, in addition to a paragraph describing each of its prior contracts, the protester only submitted contact information for its prior contract references, with no letters of reference that might also describe the ongoing success of its programs. (*See generally* AR Ex. 4, at 11-18.) The awardee, on the other hand, chose to bolster its response to the same requirement with letters of reference/recommendation, which were viewed favorably by the members of the TEP. (*See generally* AR Ex. 3, at 21-30.) Again, the fact that the District found that the awardee's response to the past performance requirement was more meaningful than the protester's, in part, because it was bolstered by actual letters of recommendation, was not an improper consideration by the TEP. Indeed, the TEP was under no legal obligation to contact the protester's references to assist it in further substantiating Eco-Coach's proposal representations.[403] We, therefore, also deny this protest ground as without merit.

The protester also contends that the TEP's evaluation of its prior data collection experience was unreasonable because one of the panelists commented that it was "unclear" how the protester's experience in waste management data collection might translate into on-going management of a school recycling program requiring flexibility. (*See* Reply at 6-7 (citing AR Ex. 6, at 6).) The protester, in sum, merely disagrees with the evaluators' findings in this regard and offers its opinion on how this information is adequately addressed in its proposal. However, as this Board has repeatedly held, a protester's mere disagreement with the evaluations findings does not provide a sufficient basis on which to sustain this protest ground. *See Recycling Solutions*, CAB No. P-0377, *supra*. Rather, absent (1) clear evidence of unequal treatment, (2) an evaluation that is clearly inconsistent with the terms of the Solicitation, or (3) other violations of procurement law, it is inappropriate for the Board to reevaluate offerors' technical proposals in the manner suggested by the protester. *Id*. Therefore, the Board rejects protester's arguments concerning its data collection experience, and hereby denies this protest ground.

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[402] The Board reviews *de novo* the propriety of an agency's award decision to ensure that it is reasonable, and that it was made "in accordance with the applicable law, rules, and terms and conditions of the solicitation." D.C. Code 2-360.08(d); *Trifax Corp.*, CAB No. P-0539, 45 D.C. Reg. 8842, 8847 (Sept. 25, 1998) (citing *Health Right, Inc.*, CAB Nos. P-0507, *et al.*, 45 D.C. Reg. 8612, 8635 (Oct. 15, 1997). In reviewing the propriety and consistency of DGS' evaluation, however, we will not reevaluate offerors' technical proposals and their relative merits. *Recycling Solutions, Inc.*, CAB No. P-0377, 42 D.C. Reg. 4550, 4578 (Apr. 15, 1994) (citations omitted).

[403] "[P]rocurement officials have no duty to check any or all of the references" submitted by an offeror. *Employment Perspectives*, B-218338, 85-1 CPD ¶ 715 (Comp. Gen. June 24, 1985) (citing *Basic Tech., Inc.*, B-214489, 84-2 CPD ¶ 45 (Comp. Gen. July 13, 1984)).

Finally, the Board denies and dismisses protester's remaining allegation that DGS failed to properly award CBE points to offerors as the record shows that the protester received the maximum number of available CBE points (i.e., 12 points), while Agricity, the awardee, received none. (*See* AR Ex. 5, at 4.) Therefore, the Board hereby denies this protest ground.

III. The District Improperly Added a New Past Performance Requirement for Experience in District of Columbia Public Schools which was not Included in the Solicitation.

While the Board has found that the protester's specific allegations are without merit, our review of the contemporaneous record in this case does reveal an impropriety in the District's evaluation of offerors' past performance which we address *sua sponte*. As previously detailed herein, the Solicitation's evaluation criteria for "Experience and References" included an underlying subfactor which required offerors to demonstrate experience "[e]stablishing organics recycling programs in *public schools* [emphasis added]." (AR Ex. 1, at 21.) Indeed, there was no language under this, or any other evaluation criteria, that required offerors to demonstrate that their past experience was obtained within the DCPS system, in particular. (*See generally* AR Ex. 1, at 21-22.) Notwithstanding the plain language of the Solicitation in this regard, however, the record in this procurement clearly demonstrates that individual evaluators utilized a scoring worksheet which essentially directed the evaluators to assess whether an offeror had, in fact, demonstrated through its proposal that it had organics recycling/composting experience within DCPS. (*See generally* AR Ex. 6.) Accordingly, the TEP scoring worksheets in the record before us expressly included language under the "Experience and References" criteria prompting evaluators to assess whether an offeror had experience in "[e]stablishing composting programs *in public schools in D.C.* [emphasis added]." (*See* AR Ex. 6, at 3-5, 10-12.) The actual language in the Solicitation for this subfactor only required that offerors display experience in public schools.

Thus, because the evaluation incorporated a new requirement for past performance experience within the DCPS system, the protester was seemingly downgraded by at least two of the evaluators for not having past performance experience either in DCPS or in an urban setting, both of which are newly added requirements. (*Id.* at 13, 17.) On the other hand, the awardee's proposal was obviously bolstered during the evaluation by the fact that it had shown experience within DCPS, as referenced by the evaluators' repeated commendations regarding the awardee's display in its proposal that it had prior experience in the DCPS system, with one evaluator specifically noting that this DCPS experience made Agricity more qualified to receive the contract award. (*Id.* at 7, 14, 18.) Moreover, the contracting officer, in making the final award decision to Agricity, adopted the TEP's findings that the protester failed to display any experience in DCPS or other urban public schools as a basis for awarding the contract to Agricity. (*See* AR Ex. 5, at 1-4.)

In short, the record reveals that, by evaluating proposals based upon whether each offeror had specific past experience within the DCPS system, and assigning relative strengths or weaknesses to each proposal based upon this requirement, the District unreasonably added a new evaluation criterion that was not stated in the Solicitation. Although the numerical impact on the protester and awardee's score resulting from the imposition of this undisclosed evaluation

criterion cannot be precisely determined from the TEP's scoring worksheets, which were effectively adopted by the contracting officer, it is clear that the protester was downgraded and prejudiced by the TEP members for not showing past performance experience in the DCPS system, which offerors were not advised was a proposal requirement.[404] For this reason we sustain this protest as a result of this impropriety.

CONCLUSION

For the reasons stated herein, the Board sustains the protest, in part. DGS is hereby ordered to (1) withdraw its contract award to Agricity; (2) reevaluate and re-score proposals consistent with the Solicitation's express requirements under the "Experience and References" criteria along with the other Solicitation criteria; and (3) re-award the contract consistent with this proper evaluation. Finally, we deny and dismiss protester's remaining protest grounds.

SO ORDERED.

Date: December 29, 2014

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

CONCURRING:

/s/ Marc D. Loud, Sr.
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[404] In protests where the government has clearly violated procurement requirements, "the reasonable possibility of prejudice is a sufficient basis for sustaining [the] protest." *Lithos Restoration, Ltd.*, B-247003, *et al.*, 71 Comp. Gen. 367, 371 (Apr. 22, 1992) (citing *Labat-Anderson, Inc.*, B-246071, *et al.*, 71 Comp. Gen. 252, 257 (Feb. 24, 1993)).

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

GOEL SERVICES, INC.	)	
	)	CAB No. D-1359
	)	
UNDER CONTRACT NO.: CFOPD-05-C-053	)	

For the Appellant: Paul V. Waters, Esq., Erin A. Behbehani, Esq., The Waters Law Firm, PLLC.
For the District: Robert Dillard, Esq., Office of the Attorney General

Opinion By: Chief Administrative Judge Marc D. Loud, Sr., with Administrative Judge Monica C. Parchment, concurring.

OPINION

Filing ID 56916902

Goel Services, Inc. ("Appellant" or "Goel") seeks conversion of the District's ("Appellee or "District") termination for default into a termination for convenience, payment of outstanding invoice amounts, and the remaining alleged contract balance in connection with the parties' contract for office suite renovation. The District contends that Appellant failed to meet the contract's performance deadline of November 15, 2005, performed unsatisfactory work, and failed to establish its damages.

For the reasons stated herein, the Board rules in favor of the Appellant. We find that the District failed to establish that the termination for default was proper. Therefore, the termination for default herein is converted into a termination for convenience of the government. We direct the parties to work in good faith to decide upon termination for convenience costs due, and provide the Board with an update within 45 days. We also conclude that Appellant is owed $261,008.80 for unpaid invoice amounts, plus the amount determined by the parties to constitute loads herein based on the Board's decision, plus the release of retainage, and statutory interest under D.C. Code §2-359.09.[405]

BACKGROUND

In the instant case, it is not disputed that the District awarded Contract No. CFOPD-05-C-053, in the amount of $430,113.00, to Appellant on June 3, 2005. (Appellant's Hr'g Ex. 2, Bates DC 2.) The contract required the Appellant to "perform [. . .] renovation/construction for approximately 20,159 square feet of office space" located at 441 4th Street, NW. in the District of Columbia. (Appellant's Hr'g Ex. 2, Bates DC 8.)[406] Pursuant to Modification 2 issued on October 15, 2005, the parties significantly altered the scope of the base contract (discussed

[405] We define loads at p. 25 herein.
[406] We have omitted leading zeroes from citations to Bates-numbered documents.

below), adding $266,014.38 to the contract price and extending the contract deadline to November 15, 2005.[407] (Hr'g Tr. vol. 1, 136:2-4; Appellant's Hr'g Ex. 12, Bates DC 64.)

The contract identifies the Contracting Officer (CO) as the "Director or his designee[,] Office of Contracts and Procurement[,] Office of the Chief Financial Officer." (Appellant's Hr'g Ex. 2, Bates DC 15.) The record indicates that Eric Payne, who wrote his title as, "Acting Director[,] Office of Contracts", served as the CO. (*See* Appellant's Hr'g Ex. 35, DC 72; *see also* Hr'g Tr. vol. 2, 480:13-22, Oct. 25, 2011, Hr'g Tr. vol. 4, 561:8-21, November 15, 2011.) At all times material hereto, Brenda Proctor served as the contracting officer's technical representative (COTR). (Appellant's Hr'g Ex. 2, ¶ G.5, Bates DC 15.). At the time, Proctor served as the Office of the Chief Financial Officer (OCFO) Acting Director for Logistics and Support. (*Id.*) At all times material to the outcome herein, the actions of the COTR were authorized by the CO. (Hr'g Tr. vol. 2, 479:17-480:22)(the COTR testified that she and other employees served under the CO's authority), Appellant's Hr'g Ex. 12, Bates DC 420-424 (Modification 2 signed by Angela Long as CO, and approving various change orders requested by Brenda Proctor (the COTR).)

Under the contract, the following five suites were to be renovated: Suite "230N" (1,700 square feet), Suites "400/410S" (5,610 square feet), Suite "360N" (5,337 square feet), and Suite "480N" (7,512 square feet).[408] (Appellant's Hr'g Ex. 2, Bates DC 8-9, ¶¶ C.3.1.1-C.3.1.4.) The contract included a "Description/Specifications/Work Statement" listing the tasks that Appellant was to complete in each suite, (*Id.*, Bates DC 8-11), along with attached drawings depicting the final floor plan for each suite. (*Id.* Bates DC 59-62).

Upon completion of the contract, the renovated suites were to be occupied by various divisions within OCFO, including the Payroll Information Technology Division (Suite 230), the Executive Offices of Pay and Retirement (Suites 400/410), the Retirement Division (Suite 360), and the Payroll Division (Suite 480). (Appellant's Hr'g Ex. 2, Bates DC 8-9, ¶¶ C.3.1.1-C.3.1.4.)

The contract provided that the 1973 version (with amendments) of the "Standard Contract Provisions for Use with Specifications for District of Columbia Government Construction Projects" (SCP) was incorporated into the parties' agreement. (Appellant's Hr'g Ex. 2, Bates DC 31.) At Article 5, and in pertinent part, the 1973 SCP provided the following:

> If the Contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in the Contract, or any extension thereof, or fails to complete said work within specified time (sic), the District may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work involving the delay. (…)

[407] Modification 2 is discussed herein in great detail.
[408] As the contract documents do not consistently apply designations of north and south to the suite numbers (*cf.* Appellant's Hr'g Ex. 2, Bates DC 6-7, *with Id.*, Bates DC 8-10), we have omitted such designations from the remainder of our opinion, except when quoting from the record.

> The Contractor's right to proceed shall not be so terminated nor the Contractor charged with resulting damage if:
>
> 1. The delay in the completion the work (sic) arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including but not restricted to acts of God, acts of the public enemy, acts of the District in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the District, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, climatic conditions beyond the normal which could be anticipated, or delays of subcontractors or suppliers arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and such subcontractors or suppliers (the term subcontractors or suppliers shall mean subcontractors at any tier) (…)

For the reasons, and under the circumstances discussed in greater detail below, the District default terminated Appellant's contract under Article 5 above on March 16, 2006. (Appellant's Hr'g Ex. 35; Appellee's Hr'g Ex. 57.) In pertinent part, the CO's termination letter stated that "through no fault of the District, the Project remains far from complete[;]" and that Goel had "refus[ed] and fail[ed] to prosecute the work with the diligence required to complete the work by the agreed upon completion date." (Appellant's Hr'g Ex. 35.)

On March 15, 2007, the Appellant filed a claim with the CO requesting that the District convert the default termination into one for convenience, and make payment in the amount of $417,178.85, a figure which combined Appellant's alleged actual costs as represented in an unpaid December 14, 2005, "third requisition for payment," with what Appellant contended was "the value left in the contract." (Appellant's Hr'g Ex. 37, Bates DC 65, 68, *see also* Appellant's Hr'g Ex. 31 (the December 14, 2005, invoice.) At the time of Appellant's March 15 claim to the CO, Appellant contended that it was owed $212,978.92 on the unpaid invoice. (Appellant's Hr'g Ex. 37, Bates DC 68, Appellant's Hr'g Ex. 31, Bates DC 515-517, 952-955.)

Following a deemed denial of its claim, Appellant filed a timely appeal with the Board on March 12, 2009. (*See* Notice of Appeal.) At the merits hearing, the Board heard testimony from the COTR, and Appellant's president, but not from the CO. At issue presently is whether Appellant's default termination is lawful on the record before the Board, and whether Appellant is entitled to $417,178, or any other lawful sum, in allegedly unpaid invoice amounts, and the contract balance.

Because the facts in this dispute are numerous and potentially unwieldy, we begin our discussion by separately analyzing the contract requirements and performance issues applicable to each suite before drawing our conclusions as to the ultimate resolution of the dispute as a whole. Thus, we begin with a discussion of the four suites at issue in descending order of complexity, beginning with Suite 230 and ending with Suite 360. For purposes of analysis, we treat Suites 400/410 as a single suite.

Overview of Suite 230, Pertinent Base Contract Provisions, Modification 2, and Subsequent Performance.

As pertains to the instant dispute, the following are the facts most germane to Suite 230. The parties' base contract provided that the 1,700 square feet of space within Suite 230 would be renovated into a suite with two offices, a storage area, repair room, a 450 square foot LAN (Local Area Network) "environment" with a one-foot raised floor, and (very importantly) an area for Appellee's "Xerox Docutech 180 printing system" (Docutech). (Appellant's Hr'g Ex. 2, Bates DC 8-9.) The suite housed the District's payroll information technology division. (Appellant's Hr'g Ex. 2, Bates DC 8; Hr'g Tr. vol. 1, 69:1-11.) The total base contract price for the renovation of Suite 230 was $85,236. (Appellant's Hr'g Ex. 2, Bates DC 6.)

Insofar as the instant dispute is concerned, the two major Suite 230 performance requirements at issue concern construction of the LAN environment and the Docutech printing system areas. With respect to the LAN environment, the base contract expressly required the Appellant to "design" [the] LAN environment". (Appellant's Hr'g Ex. 2, DC Bates 8.) In this regard, Suite 230 was the only suite wherein the parties' contract expressly required design services. (Appellant's Hr'g Ex. 3, Contract Amendment #1, Bates DC 761; Hr'g Tr. vol. 1, 66:3-13.) The Appellant testified that its design scope for the LAN environment was to "provide cooling so [the LAN] room wouldn't overheat" and to provide an uninterruptible power supply for the nine servers located therein. (Hr'g Tr. vol. 1, 95:4-14.) The LAN environment was also the only part of Suite 230N that required a one-foot raised floor under the base contract.[409] (Appellant's Hr'g Ex. 2, Bates DC 8-9.)

The second Suite 230 performance requirement most relevant to the instant dispute is the Docutech printing area. The base contract required the Appellant to create an area for the District's Docutech printing system. (Appellant's Hr'g Ex. 2, Bates DC 9.) According to the Appellant's president, this printing system was used by the District to produce employee paychecks. (Hr'g Tr. vol. 1, 86:2-6) The printing system was described by Appellant's president as "huge". (Hr'g Tr. vol. 1, 86:4.) The Appellant's president testified that the Docutech printing system was originally to be placed directly onto a concrete floor in Suite 230. (Hr'g Tr. vol. 1, 102:16-103:13.) Thus, the base contract did not require raised flooring beneath the Docutech system. (Appellant's Hr'g Ex. 2, Bates DC 8-9.)

Very significantly, the base contract required the Appellant to keep both the LAN environment and DocuTech areas adequately cooled. Thus, in pertinent part, §C.3.1.1 required the Appellant to "determine required HVAC requirements for the LAN room" and to "provide back up system (HVAC) for the LAN room." (Appellant's Hr'g Ex. 2, Bates DC 8.) Similarly, §C.3.1.1 also required Appellant to "provide balanced AC/ heating in … the area for the Xerox Docutech 180 printing system". (*Id*., at Bates DC 8-9, Hr'g Tr. vol. 1, 70:19-21.)

Very early into the project, however, much of the original scope for Suite 230 was abandoned. Thus, in pertinent part, Modification 2 to the contract deleted the offices, storage room, and repair room originally envisioned for Suite 230, but expanded the footprint for the

[409] The raised flooring was necessary to allow for "extensive cabling that would run under the floor" in the LAN room. (Hr'g Tr. vol. 4, 573:4-17.)

LAN and Docutech printing areas to the full 1,700 square feet. (Appellant's Hr'g Ex. 12, Bates DC 420.) In lieu of the original scope, Modification 2 resulted in the parties' agreement to utilize the entire 1,700 square foot area exclusively for the dual purpose of housing the Appellee's LAN operation and its Docutech printing system.[410] (Appellant's Hr'g Ex. 12; Hr'g Tr. vol. 1, 85:13-86:2.)

Very significantly, Modification 2 also removed the original requirement for a *one-foot* raised floor in the LAN area "due to height constraints in the room", *but* replaced the requirement with a new one calling for a *two-inch* raised floor throughout the entire suite. (Appellant's Hr'g Ex. 12, Bates DC 420; *see also* Hr'g Tr. vol. 1, 107:18-108:9; Appellant's Hr'g Ex. 12, Bates DC 427, Item 10.) As to the height constraints which made the original one-foot raised flooring impractical, the COTR testified that air conditioning units were delivered for the LAN room but "were too large to fit into the space when the floor was one foot height (sic)". (Hr'g Tr. vol. 4, 676:18-677:4.) She also testified that the height of the server racks in the LAN room necessitated a lower floor. (Hr'g Tr. vol. 4, 679:16-680:3; *see also* Appellant's Hr'g Ex. 27, Bates DC 479 (" The height of the floor was dictated by the LAN vendors (racks)…").)[411] The record is silent as to why it was agreed that a two-inch raised floor was also needed for Docutech printing area.

The record is also unclear regarding whether the District or the Appellant determined that two inches would be an appropriate new height for the raised floor. The Appellant testified that he made the recommendation for a two-inch height to Angela Long (identified by the Appellant as one of several contracting officers during contract performance). (Hr'g Tr. vol. 1, 107:18-108:2.) On the other hand, the COTR testified that the District determined the two-inch raised floor height in a request made to the Appellant, (Hr'g Tr. vol. 4, 679:16-680:3.) Regardless of its genesis, it is clear that the District was aware that a two-inch raised floor height would be installed throughout Suite 230 because the District executed Modification 2, which specifically provided for "2 inch raised flooring" as part of the Appellant's labor and materials cost. (Appellant's Hr'g Ex. 12, Bates DC 427; *see also* Hr'g Tr. vol. 1, 107:18-108:9.)

Very significantly, the continuing importance of adequately cooling both the LAN and Docutech printing areas in Suite 230 was not overlooked in Modification 2. Whereas the base contract required the Appellant to "determine the required HVAC system for the [450 square foot] LAN room", Modification 2 expanded that requirement by providing that "appellant provide a new system for the increased LAN room which is now 1700 sq./ft." (Appellant's Hr'g Ex. 12, Bates DC 420.) The modified requirement for cooling the Docutech printing system included the exact same language, except that it erroneously stated the square footage as "2000 sq/ft.". (*Id.*) The Appellant also testified that Modification 2 required "us to design the mechanical—mechanical (sic) the heating and ventilation requirements to properly cool the Docutech printing room." (Hr'g Tr. vol. 1, 91:1-6.)

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[410] The record is not definitive as to why Suite 230 became the exclusive suite for Appellee's technology (i.e., the nine servers and the DocuTech equipment). The Appellant's testimony suggests that Suite 230 may have been repurposed in this manner because the original scope may have placed too heavy of a weight burden on the building lobby, which sat directly underneath Suite 230. (Hr'g Tr. vol. 1, 91:7-93:2.)

[411] Similarly, the Appellant testified that the District chose to lower the floor height once it learned that the one-foot raised flooring would create a "space that's 7 foot." (Hr'g Tr. vol. 1, 99:1-8.)

According to the Appellant's president, the modified system for cooling the now expanded LAN/Docutech areas under Modification 2 was the "[addition of] four up flow computer room air conditioning systems".[412] (Hr'g Tr. vol. 1, 92:5-8; 142:18-22; 791:2-13; *see also* Appellant's Hr'g Ex. 12, Bates DC 427, Line 9.) The purpose of these units was to "to cool the DocuTech printers that were supposed to be cooled from the top side." (Hr'g Tr. vol. 5, 792:5-8.) Modification 2 increased the contract price for the additional HVAC units by $100,400. (Appellant's Hr'g Ex. 12, Bates DC 427; *see also* Hr'g Tr. vol. 1, 92:5-9.)

The Appellant's president testified that the District agreed to the "up flow" cooling units and approved the corresponding design submittals which it contended showed "up flow" units for the Docutech and LAN areas. (Hr'g Tr. vol. 1, 249:6-250:4.) The Appellant testified further that the "up flow" cooling units were compatible with the two-inch raised floor which the parties had agreed would be installed throughout Suite 230 under Modification 2. (Hr'g Tr. vol. 1, 249:4-16.)

The Appellant's president contrasted the up flow cooling units from ones used for underside cooled printers. Per the Appellant's president, HVAC units for underside cooled printers "push air under the raised flooring system in the DocuTech printer room, and then with an outlet so that the cooling would come back up into the printers." (Hr'g Tr. vol. 1, 103:4-104:8.) The Appellant testified further that the two-inch raised flooring installed under the instant contract was inadequate for underside cooled printers because "[y]ou need at least four inches of clear space [from the bottom] for the air to flow underneath with enough cubic feet of air per minute to cool those printers properly." (Hr'g Tr. vol. 5, 797:12-798:4.) The cooling systems for these underside cooled printers were referred to by Appellant's president as "down flow" units. (Hr'g Tr. vol. 1, 249:5-12.)

In the instant case, the principal performance issue which developed with respect to the renovation of Suite 230 is that the "up flow" cooling units and two-inch raised flooring provided by the Appellant were incompatible with the "underside cooled" Docutech printers ordered by the District. (Hr'g Tr. vol. 1, 103:1-5; 103:8-12; 249:20-250:22.) The Appellant testified that it did not know that the Appellee ordered bottom cooled printers "until the day that they cancelled the contract." (Hr'g Tr. vol. 1, 103:17-104:8.) Neither the parties' base contract, Modification 2, any attachments submitted with Modification 2, or other contemporaneous written evidence submitted by the parties address whether Appellant was to order "up flow" or "down flow" cooling units for the purpose of adequately cooling the Docutech printing system, and/or whether the District was to order an underside cooled printer.

As a result of the incompatibility between the cooling and flooring systems provided by the Appellant, and the printing system ordered by the Appellee, the progress in Suite 230 became stalemated in early November 2005. An early indication in the record of the problem is a November 14, 2005, email from a District official documenting a request to Appellant's project manager "not to work on cove base and doors [in 230], which will have direct [sic] impact on the final decision on the raised floor." (Appellant's Hr'g Ex. 23.) The Appellant's president

[412] By way of explanation, the Appellant testified that "up flow" meant the cooling units "shoot air up to a ceiling system and then they disburse." (Hr'g Tr. vol. 1, 249:6-9; 794:9-12.)

testified that on the same date, the user agency's IT specialist said it "needed a larger height on the raised floor … for ventilation of the printers and wiring that goes to the printers."[413] (Hr'g Tr. vol. 1, 245:7-16.)

The November 14 email was followed by two e-mails from the CO sent on December 5, 2005. In the first e-mail, the CO requested the Appellant to "submit its final invoice [to the District] as soon as possible" and to "reflect work performed PRIOR to 11/15/05 only." (Appellant's Hr'g Ex. 28, Bates DC 487.) In the second email, sent hours later, the CO directed Appellant to "cease and desist with all work related to" the contract (i.e., all five suites) and noted that "[n]o additional work whatsoever should occur on this project absent a written directive from the Contracting Officer or his authorized representative." (*Id.*, Bates DC 485.) After December 5, the Appellant was locked out of Suite 230 and performed no additional work therein. (Hr'g Tr. vol. 1, 180:11:181:3; Hr'g Tr. vol. 5, 786:7-787:2.) But as requested by the CO, the Appellant did submit what would be its final invoice in this matter on December 14, 2005, which has been identified as "Invoice #3." (Appellant's Hr'g Ex. 31.)

The record indicates that subsequent efforts by the parties to reconcile differences pertaining to Suite 230 were not successful. Per the record, the parties conducted at least two meetings between February-March 2006, but those meetings did not resolve their differences regarding Suite 230 performance issues. (Appellant's Hr'g Ex. 35, Bates DC 71.) Both the COTR and Appellant's president agreed that the meetings went poorly.

As we have noted, the CO issued a default termination letter on March 16, 2006. (Appellant's Hr'g Ex. 35; Appellee's Hr'g Ex. 56.) In the letter, the CO noted that Goel's work in all five suites was "far from complete" by the "agreed upon Project completion date" of November 15, 2005. (Appellant's Hr'g Ex. 35, Bates DC 70.) The CO's default termination letter is silent regarding any specific deficiencies in Suite 230, stating only that "Goel's work in Suite 230 will have to be removed and replaced it (sic) its entirety because the room as designed and constructed by Goel is simply not functional and does not meet the stated Contract requirements and the prescribed needs of the District." (Appellant's Hr'g Ex. 35, Bates DC 71.)

The default termination letter did not specify how Suite 230 was "not functional", or which "stated Contract requirements" Appellant failed to perform. However, the letter noted that "in two separate meetings" (February 15 and March 13, 2006, respectively), the District "explained in detail its position to Goel" and provided Goel with "specific and itemized documents identifying the required remaining work to be completed." (Appellant's Hr'g Ex. 35, Bates DC 71.) The default letter then notes that Goel "continued to refuse" to complete the remaining work after each meeting. (*Id.*)

As noted, the Appellant filed a claim for wrongful default termination and conversion of the default termination into a convenience termination on March 15, 2007. (Appellant's Hr'g Ex. 37.). And as noted, the CO never issued a final decision on Appellant's wrongful termination and conversion claims, nor did the CO testify at the hearing on the merits.

[413] The user agency's IT specialist was identified as Clark Scott, who was described as the supervisor of the check processing unit and the person responsible for acquiring equipment, servers, and printers for the project. (Hr'g Tr. vol. 1, 104:14-19.) Scott did not testify at the hearing.

The District's evidence that the Appellant's performance was in default in Suite 230 (and the other suites) consists largely of the COTR's November 11, 2005, punch list, the COTR's testimony at the hearing, and a purported "independent" punch list developed by an outside consultant hired by the District. The contracting officer did not testify at the hearing, nor did the outside consultants that prepared the independent report. The COTR's November 11 punch list is inconclusive because it contains only a single conclusory entry regarding Suite 230: "No punch list has been compiled for suite 230 due to the significant amount of work required to complete the suite." (Appellee's Hr'g Ex. 42, Bates DC 508, *see also* Hr'g Tr . vol. 2, 505:16-506:11; 583:5-17.)[414] The COTR prepared the punch list based on her visual inspection of the suite. (Hr'g Tr. vol. 4, 608:8-609:1.)

At the hearing, the COTR testified that she was at all of the construction progress meetings, although she "may have missed one". (Hr'g Tr. vol. 4, 718:4-7.) Similarly, the Appellant's president testified that the COTR was at the project site daily. (Hr'g Tr. vol. 1, 148:14-18.) That notwithstanding, the COTR testified that she was *not* involved in the District's default termination of Appellant. (Hr'g Tr. vol. 2, 513:20-514:14; 515:2-17; *Id*., vol. 4, 706:8-709:7.) As a result, she did not know whether Appellant's work performance in Suite 230 (or any of the other suites) was the basis of the District's default termination because, "what happened in the Office of Contracts with Mr. Goel I was not privy to", (Hr'g Tr. vol. 2, 541:3-14), and "[w]hatever communication about how Goel's contract would ultimately end was between Mr. Goel and the Office of Contracts." (Hr'g Tr. vol. 2, 515:15-17.)

With respect to deficiencies in Suite 230, however, the COTR testified that Suite 230 was not accepted by the District as of November 18, 2005. (Hr'g Tr. vol. 4, 615:13-16.) The COTR testified principally to a number of deficiencies in Suite 230 involving the air conditioning and raised floor issues.[415] The Board notes that none of the complaints that the COTR testified to at the hearing regarding Suite 230 are noted in her November 11 punch list.

Generally speaking, however, the COTR testified that as of the date of her punch list Suite 230 was "probably only 50% completed", and "HVAC units had not been installed". (Hr'g Tr. vol. 4, 599:9-20.) Specifically, the COTR testified that there were "four 10 ton air conditioning units sitting in the hallway" as of November 18, 2005, that were not installed. (Hr'g Tr. vol. 4, 627:9-13.) She also testified that "the DocuPrint machines" had not been

[414] The COTR's punch list is identified in the record as Appellant's hearing exhibit 26 and Appellee's hearing exhibit 42. (*See also* Hr'g Tr. vol. 2, 505:6-19, Hr'g Tr. vol. 4, 583:5-586:12.) The punch list is not dated, but the COTR testified that it was prepared "probably a week or two" before November 18, 2005. (Hr'g Tr. vol. 4, 506:3-11.) The Appellant testified that the COTR's punch list was "created prior to the [November] 15th". (Hr'g Tr. vol. 1, 197:4-7.) The only version of the punch list available in the record is one which has Appellant's comments added thereto, and which bears the November 18, 2005, date that Appellant's comments were sent. (Appellant's Hr'g Ex. 26; Appellee's Hr'g Ex. 42, Hr'g Tr. vol. 4, 583:5-586:12.) For ease of reference only, we refer to the COTR's punch list as the "November 11" punch list, which approximates the COTR's testimony that it was prepared "probably a week or two before the Appellant's comments were provided."

[415] But the COTR also noted several other purported deficiencies, including that Suite 230 "hadn't been painted", that "most of the equipment had not been installed", (Hr'g Tr. vol. 4, 599:9-20), "that [t]here was still construction debris", "that [t]here was (sic) still exposed ceilings", and that "[d]oors weren't hung". (Hr'g Tr. vol. 4, 599:9-20; 627:8-629:9.)

delivered from Suite 410 to Suite 230 "because there was no connectivity." (Hr'g Tr. vol. 4, 627:9-628:13.)

Additionally, the COTR testified that the two-inch raised floor installed by Appellant in Suite 230 was "unusable". (Hr'g Tr. vol. 4, 677:18-678:3.) She testified that the District needed two inches "below the floor" for cabling, (Hr'g Tr. vol. 4, 679:11-15; 678:6-7), but instead was provided with a two-inch raised floor "from the concrete to the top of the deck." (Hr'g Tr. vol. 4, 678:6-11.) Although the COTR testified that the District determined the two-inch height of the raised flooring in a request made to the Appellant, (Hr'g Tr. vol. 4, 679:16-680:3), she asserted that "the contractor has the responsibility to inform the end user if what we're asking for is unacceptable, if it's going to yield a product that would not be acceptable." (Hr'g Tr., vol. 4, 680:5-9.) The COTR also noted that as of December 16, 2005, she found the raised floor work performed by Appellant to be zero percent complete. (Hr'g Tr. vol. 4, 668:5-21, 676:18-677:13, *see also* Appellant's Hr'g Ex. 31, Bates DC 955.)[416]

The COTR also testified that a District consultant produced an independent punch list (the McKissack report) which the District adopted as its own.[417] (Hr'g Tr. vol. 2, 505:16-508:14; 512:9-21; 604:15-605:10; 613:1-8.) There is nothing in the record, however, which allows the Board to conclude that the COTR was personally familiar with the McKissack report's extensive list of deficiencies and/or its conclusions.[418] (*See generally*, Hr'g Tr. vol. 2, 512:9-513:19.) The COTR's testimony at the hearing did not establish her personal familiarity with the McKissack report's findings, or even that she reviewed them.[419] (*Id*.) Further, the COTR was also unfamiliar with how the McKissack report was developed. (Hr'g Tr. vol. 4, 609:2-20.) The COTR did not know whether the McKissack report was based on its visual inspection of the suites, and/or its review of underlying contract documents, including but not limited to, the statement of work and solicitation. (*Id*.) The COTR was also unsure of whether the McKissack report was ever given to Appellant.[420] (Hr'g Tr. vol. 4, 705:18-706:4.) Further, the COTR was unsure of whether the District's default termination of the Appellant was based on the McKissack report. (Hr'g Tr. vol. 4, 706:5-7.) In addition to all of the above, the most searing

[416] The Appellant introduced a contemporaneous proposal into evidence at the hearing which it submitted to the District on November 15, 2005, offering to install "4 inch raised flooring" for $16,449, but testified that the District never "responded to this change order proposal." (Hr'g Tr. vol. 1, 176:10-177:1, *see also* Appellant's Hr'g Ex. 25.)

[417] The McKissack report is identified in the record as Appellee's hearing exhibit 53, and is dated February 7, 2006, in the bottom right-hand corner. (Hr'g Tr. vol. 2, 512:9-513:7, *see also* Appellee's Hr'g Ex. 53.) The author is identified as "McKissack McKissack/Diversified Engineering, Inc." in the bottom left-hand corner. (*Id*.) No one associated with "McKissack McKissack/Diversified Engineering, Inc." testified at the hearing.

[418] There were more than 300 items on the February 7, 2006, McKissack report, and the majority of them were for purported deficiencies located in Suites 400/410. (*See generally*, Appellee's Hr'g Ex. 53.)

[419] The COTR's testimony regarding the McKissack report was vague and conclusory only. (*See generally* Hr'g Tr. vol. 2, 506:16-509:4, vol. 4, 604:18-605:10 (the COTR's first mention of the McKissack report during the hearing, noting that the District retained McKissack to prepare an independent punch list), Hr'g Tr. vol. 2, 512:9-513:7 (the COTR testified that the McKissack February 7 report was "much more extensive" than hers, and was adopted by the District as its own), Hr'g Tr. vol. 2, 512:9-514:16 (the COTR remembers attending one meeting with the McKissack representatives and Appellant regarding the February 7 report that "did not end well"), Hr'g Tr. vol. 2, 514:11-515:14 (following that one meeting, the COTR's attention was redirected to identifying an alternative contractor to finish the Suites).)

[420] The Appellant's president testified, however, that the District presented the McKissack report to Appellant at a February 15, 2006, meeting. (Hr'g Tr. vol. 4, 617:5-12; *see also,* Appellee's Hr'g Ex. 55, Bates DC 85 (stating that the meeting took place on February 15, 2006).)

defect in the McKissack report is that it is completely silent as to Suite 230. (Appellee's Hr'g Ex. 53, Bates DC 1245-1267.)

Since the presumed author(s) of the McKissack report did not testify at the hearing (i.e., principals or employees of the firm "McKissack and McKissack"), and the COTR's testimony regarding the McKissack report was vague and conclusory, the report was not signed or sworn, and its authors were presumably paid by the District and arguably biased, we find the McKissack report to be unreliable, unpersuasive and uncorroborated hearsay.[421] *See, e.g., Wisconsin Ave. Nursing Home v. D.C. Comm'n on Human Rights*, 527 A.2d 282, 288-289 (D.C. 1987) (citation omitted). Moreover, since the McKissack report does not list a single deficiency regarding Suite 230, we also find the report to be irrelevant as to Suite 230.[422]

The Appellant's version of its performance in Suite 230 as of November 18, 2005, the District's default termination, and the status of allegedly unpaid invoice amounts runs counter to the COTR's testimony and the CO's default letter. With respect to work performance in Suite 230, the Appellant's overall testimony is that it was complete by November 15, 2005, as to some contract requirements and by December 16, 2005, as to others. The Appellant testified that, overall, the remaining work in suite 230 could have been completed by two people in a single day. (Hr'g Tr. vol. 1, 174:18-175:5; vol. 1, 224:4-9.) But the Appellant contended that the District suspended work on November 15, 2005, and instructed it "not to perform any work above the raised floor" in Suite 230 due to the mistake regarding floor height. (Hr'g Tr. vol. 1, 223:1-16.)

As regards specific requirements, the Appellant contends that it was "around 60%" complete with HVAC by November 15, 2005, but had completed 95% of the HVAC either by December 5, 2005, or December 16, 2005. (Hr'g Tr. vol. 1, 248:6-11; 251:6-252:8.) He testified that the four HVAC "up flow" units were on site "after Thanksgiving" and ready for the District to connect to the UPS (uninterrupted power supply) room. (Hr'g Tr. vol. 1, 159:3-11; 169:18-170:21; 249:4-5.) The Appellant further testified that the District would not permit final installation of the cooling units "until the [floor] height issue was resolved". (Hr'g Tr. vol. 1, 256:16-258:6; *see also* Appellant's Hr'g Ex. 27 (e-mail from a contract specialist instructing the Appellant not to install HVACs pending the correction of floor issues).) On cross-examination, the COTR conceded that as of December 15, 2005, the only remaining HVAC system work was to move the air cooling units into Suite 230 and connect them. (Hr'g Tr. vol. 4, 685:4-17.)

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[421] We reference the McKissack report repeatedly herein as acknowledgment that the District relies on the report as evidence. The Board's repeated references to the McKissack report should not, however, be construed as our giving the report any weight. For the reasons stated above, we do not give the report any weight.

[422] The Board is not persuaded by the District's post-hearing attempt to identify a February 24, 2006, McKissack document as the District's officially adopted punch list. In its post-hearing brief, the District argues for the first time that McKissack submitted a written punch list to the Appellant on February 24, 2006, listing 65 alleged Suite 230 deficiencies. (Appellee's Post Hr'g Br. 10-11, *see also* Appellee's Hr'g Ex. 55.) This assertion was not made at the trial. At the trial, the District did not introduce any evidence that its CO adopted the February 24 document as its official punch list. The COTR did not provide *any* testimony at the hearing regarding the February 24 document. The District did not call as a witness the consultant whose name appears at the bottom of the February 24 document ("McKissack McKissack/Diversified Engineering, Inc."). The only evidence presented at the hearing regarding the February 24 document was provided by the Appellant, who testified that the document was "not a punch list" but a District "want list" that included items both within and outside of the contract scope. (Hr'g Tr. vol. 2, 434:1-436:14.)

At the hearing, the Appellant contended that it was owed $95,380 for completed HVAC work. (Appellant's Hr'g Ex. 1-R, Line 27, Hr'g Tr. vol. 1, 248:6-258:6.) Although this amount represented a $74,877.13 increase over Appellant's December 14, 2005, invoice for the HVAC line item, (*Cf.* Appellant's Hr'g Ex. 31, Bates DC 517, with Appellant's Hr'g Ex. 1-R, Line 27), Appellant justified the higher amount on the grounds that between October 15 and December 3, 2005, (1) Appellant completed core drilling of the concrete slabs needed to run piping to connect the air cooling units inside Suite 230 to an HVAC unit "that sits on" the building roof, and (2) Appellant's subcontractor delivered the four air cooling units onsite for installation. (Hr'g Tr. vol. 1, 251:4-258:6.) According to Appellant, completion of the two referenced tasks (i.e., performance of core drilling and delivery of the four air cooling units onsite) increased its HVAC percentage completion to 95% and the dollar value to $95,380. (*Id.*) The COTR approved Appellant's HVAC line item for $20,502.87 (or 20%) on December 16, 2005, but the District never paid even that amount. (Appellant's Hr'g Ex. 31, Bates DC 516-517.) Following the COTR's initial approval, it sent an internal email to District staff stating that "[a]fter a conversation with [the CO], he suggested that we withhold payment." (Appellant's Hr'g Ex. 32.) The COTR then instructed District staff to "suspend payment of invoice #3 [i.e., the December 14 invoice] for Goel Services until further notice." (*Id.*) The payment issue regarding HVAC remains unresolved.

As to the specific issue of the raised floor, the Appellant contends that it was 99% complete with the two-inch raised floor in Suite 230. (Hr'g Tr. vol. 1, 246:12-19; 246:21-247:2.) The Appellant testified that the incomplete work consisted of four uninstalled panels. (Hr'g Tr. vol. 1, 168:3-14; 174:1-175:5; *see also* Appellant's Hr'g Ex. 24.) This appears to be corroborated by photographs taken by the Appellant on that day, and not disputed by the District, albeit the District contends the raised flooring should have been four inches in height. (*See* Appellant's Hr'g Ex. 24; *see also* Hr'g Tr. vol. 1, 166:20-168:2 (describing the contents of the photographs).)

At the hearing, the Appellant contended that it is still owed $23,200.65 for completed raised flooring work. (Appellant's Hr'g Ex. 1-R, Line 25, Hr'g Tr. vol. 1, 245:3-248:2.) Appellant's December 14, 2005, invoice sought payment for raised flooring in the amount of $23,435. (Appellant's Hr'g Ex. 31, Bates DC 954.) The COTR did not allow any payment for Appellant's raised flooring line item, finding that the work was zero percent complete as of December 16, 2005. (Hr'g Tr. vol. 4, 668:5-21,676:18-677:13, *see also* Appellant's Hr'g Ex. 31, Bates DC 955.) The payment issue regarding the raised floor remains unresolved.

As to other Suite 230 issues not involving the HVAC or raised flooring, the record contains the following. The Appellant testified that it was 99% complete with painting in Suite 230. (Hr'g Tr. vol. 1, 159:3-7; Hr'g Tr. vol. 1, 230:18-232:8.) Appellant contended that it was owed $12,719.52 for completed painting. (Appellant's Hr'g Ex. 1-R, Line 3, *see also* Hr'g Tr. vol. 1, 230:12-232:8.) The COTR's testimony was silent regarding whether painting was complete in Suite 230. (Hr'g Tr. vol. 4, 599:9-20; 627:8-629:9.) The COTR approved payment for $12,205.60 for the painting line item on December 16, 2005, but due to the CO's instruction (as noted above), Appellant never received payment. (Appellant's Hr'g Ex. 31, Bates DC 516.) The payment issue regarding painting remains unresolved.

Appellant further testified that it was 99% complete with construction in Suite 230, but that one door in the suite was uninstalled because the District barred access to the suite. (Hr'g Tr. vol. 1, 232:8-12.) The Appellant contended that it was owed $54,626.22 for construction in Suite 230. (Appellant's Hr'g Ex. 1-R, Line 4.). At the hearing, the Appellant did not provide testimony on why it believed that $54,626.22 was owed for construction. In two previous construction payments made to Appellant, the District paid a total of $37,245.15 and withheld $4,138 as retainage (Invoices No. 1 and 2). (Appellant's Hr'g Exs. 8, 9, 31, Bates DC 516, Hr'g Tr. vol. 1, 232:8-12.) The COTR approved $11,035.60 for the construction payment on December 16, 2005, but this amount was never paid due to the CO's instruction (as noted above). (Appellant's Hr'g Ex. 31, Bates 516.) The payment issue regarding construction remains unresolved.

The Appellant testified that it was 100% complete with design under Modification 2 in Suite 230. (*See* Hr'g Tr. vol. 1, 225:14-226:19; 229:17-230:11.) The Appellant contends that it was owed $40,000 for Modification 2 design work. (Appellant's Hr'g Ex. 1-R, Line 26.) The COTR approved payment of $40,000 for Modification 2 design work on December 16, 2005, but this amount was never paid due to the CO's instruction (as noted above). (Appellant's Hr'g Ex. 31, Bates DC 517.) The payment issue regarding design work under Modification 2 remains unresolved.

Finally, the Appellant testified that it was 100% complete with Modification 2 demolition and wall changes in Suite 230. (*See* Hr'g Tr. vol. 1, 225:14-226:19; 229:17-230:11; 266:6-267:9.) The Appellant testified that the walls were "done." (Hr'g Tr. vol. 1, 159:3-7.) The Appellant also testified that demolition was 100% complete. (Hr'g Tr. vol. 1, 266:6-267:6.) The Appellant contends it is owed $2,056 and $6,600, respectively, for the demolition and wall changes contract scope. (Appellant's Hr'g Ex. 1-R, Lines 21-22.) The COTR approved payment of $2,056 and $6,600, respectively, for the demolition and wall changes contract scope on December 16, 2005, but these amounts were never paid due to the CO's instruction (as noted above). (Appellant's Hr'g Ex. 31, Bates DC 517.) The payment issues regarding demolition and wall changes remain unresolved.

The Appellant contended that references in the COTR's November 11 punch list that there was a "significant amount of work required to complete" Suite 230 were based on "the District view that there was some alternate scope other than what they had paid us to build." (Hr'g Tr. vol. 1, 200:20-201:10.) The Appellant also testified generally that the District's punch list included items for correction that were not part of the parties' "contract … specifications, change orders, [or] contract or bidding documents." (*See generally*, Hr'g Tr. vol. 2, 439:4-440:6; Appellant's Hr'g Ex. 29, Bates DC 489.) Further, the Appellant testified that as to all suites, including 230, "the District wanted us to do approximately $175,000 in change orders for free." (Hr'g Tr. vol. 5, 772:15-773:3.) Finally, the Appellant characterized the District's purported punch list as a "bad faith" attempt to get Appellant to do "all of the [proposed] change orders that the District had not … consummated with Goel." (Hr'g Tr. vol. 5, 773:9-13.)

Suites 400/410

The parties' base contract provided that Suites 400/410 would be renovated into adjoining suites for use by employees within the Executive Office of Pay and Retirement. (Appellant's Hr'g Ex. 2, Bates DC 7, DC 9, DC 62.) In very broad terms, the base contract generally required the Appellant to create "traditional office spaces" and at least two pantries in accordance with a space layout provided as "Attachment C" to the contract. (Appellant's Hr'g Ex. 2, Bates DC 9, § 3.3.1.3, Bates DC 62.) The Appellant testified that the "original space layout" indicated where "the new wall partitions […] were supposed to go" in the finished spaces. (Hr'g Tr. vol. 1, 119:2-10, Appellant's Hr'g Ex. 2, Bates DC 62.)

The scope for Suites 400/410 was largely the same, but with a few significant differences for purposes of the instant dispute. In terms of similarities, Suites 400/410 both had requirements to re-use existing sprinkler and alarm systems, (Hr'g Tr. vol. 1, 115:10-22, Appellant's Hr'g Ex. 26, DC 508), and existing doors and frames throughout the renovated suites. (Appellant's Hr'g Ex. 3, Bates DC 762 ("Amendment #1, June 3, 2005). In addition, Modification 2 to the base contract required that plumbing be completed in the suites to connect water drainage and supply lines to sinks in the two pantries.[423] (Hr'g Tr. vol. 1, 242:11-243:12, 243:19-244:2.)

In terms of differences, Suites 400/410 had different scopes as regards ceiling and lighting systems. (Hr'g Tr. vol. 1, 77:9-12; vol. 5, 774:8-21.) Put succinctly, Suite 400 was to get a new ceiling system including grids, panels and lighting, (Hr'g Tr. vol. 1, 77:13-20; *see also* Appellant's Hr'g Ex. 12, Bates DC 423), but Suite 410 "was to reuse the existing ceiling system" and "reuse the 1 by 4 lights." (Hr'g Tr. vol. 1, 77:21-78:1; *see also* Appellant's Hr'g Ex. 2, Bates DC 7.)

Insofar as Suites 400/410 are concerned, the dispute between the parties centers largely on the following salient factors which are noted below and discussed in greater detail thereafter:

- Despite the base contract's inclusion of a space layout depicting where wall partitions were originally to be constructed, the District is alleged to have completely disregarded the original space layout immediately after contract award. In lieu of the original layout, the District allegedly directed Appellant to create walls in locations not depicted on the original space plan. The changed wall locations, in turn, had a rippling effect on the adjoining ceiling (Suite 400/410), lighting (Suite 410 only), sprinkler and alarm systems (both suites) which, because they were pre-existing, remained in the precise locations depicted on the original space layout.

- The reuse of the doors and frames led to allegedly unsafe conditions involving loose side light glass, which the District contends prevented it from accepting occupancy of Suites 400/410.

[423] This additional plumbing work is captured in Appellant's Hr'g Ex. 2, Bates DC 427, Items 17-18, 35-36, which refer to "sinks" and "garbage disposals" in Suites 400/410, and reference "400/410 Plumbers (Welsh & Rushe)."

- The Appellant is alleged to have painted the renovated offices in Suites 400/410 in an unsatisfactory manner.

- The Appellant alleges that it was underpaid for its plumbing work connecting water drainage and supply lines to the two pantries. Further, the Appellant contends that the District wrongfully withheld payment for completed plumbing work as leverage to obtain higher quality pantry finishes than those required by contract.

We discuss these issues in the context of the instant dispute below.

The Change in Wall Locations from the Original Space Plan

The record reveals that the initial challenge encountered by the parties with respect to Suites 400/410 was the District's changes to wall locations depicted in the original space plan provided with the contract. Shortly after the Appellant's June 3, 2005, contract execution, the District COTR requested that Appellant change the placement of walls from what had been depicted on the original space layout.[424] (Hr'g Tr. vol. 1, 86:7-18, 121:22-123:1.)

In this regard, Goel's president testified that at progress meetings, the COTR and other authorized District officials instructed Appellant to change the size of the individual offices in Suites 400/410 by reconfiguring the walls. (*See* Hr'g Tr. vol. 5, 761:17-764:1.) This statement appears to be corroborated by progress meeting notes from August 8, 2005, which state that on that date, new design plans for Suites 400/410 were delivered. (*See* AFS Ex. 5.) According to Goel's president, the relocation of walls within Suites 400/410 was made to satisfy certain OCFO end-users' desires for offices larger than their co-workers. (Hr'g Tr. vol. 1, 117:9-11, 121:22-123:1.)

Appellant contends that the wall changes increased the construction of drywall from 900 linear feet in the base contract to 1800 linear feet, and that the District never paid for the increase. (Hr'g Tr. vol. 1, 86:7-18, 119:6-13, 121:22-123:1.) According to Appellant, the added construction translated into reconfiguration of the wall dimensions in approximately 21 of the 50 offices that Appellant was contracted to renovate. (Hr'g Tr. vol. 5, 778:8-780:5).

The Appellant contends that it completed 100% of the wall changes requested by the District, and that it is owed $12,194. (Hr'g Tr. vol. 2, 267:13-14, Appellant's Hr'g Ex. 1-R, Line 24.) The District has not contested Appellant's assertions that wall changes were requested by it, and completed by the Appellant. (*See* Appellant's Hr'g Ex. 12, Bates DC 423, Items 32-25, 39, 40.) The COTR approved payment in the amount of $12,194 on Appellant's December 14, 2005, invoice for Suites 400/410 wall changes on December 16, 2005. (Appellant's Hr'g Ex. 31, Bates DC 517, DC 955.) At the request of the CO, however, no payment was ever made to the Appellant (as noted above). The payment issue regarding wall changes remains unresolved.

[424] (*See* Hr'g Tr. vol. 1, 86:7-18, 121:22-123:1 (stating that the COTR and two other District employees requested the changes).

The Impact of Changed Wall Locations on the Lighting System in Suite 410

All of the newly reconfigured walls were in place by September 30, 2005. (Hr'g Tr. vol. 1, 117:5-11.) However, there were immediate rippling effects caused by the reconfigured walls in Suite 410. As to lighting, the record reveals that on September 30, 2005, Goel's president wrote an email to the COTR and the CO, in which he stated that many of the lights in suite 410 would need to be relocated because "wall[s] run in the middle of them." (*See* Appellant's Hr'g Ex. 10, Hr'g Ex. vol. 1, 115:8-19.) To remedy this problem, the Appellant recommended that the District "remove and replace the ceiling system in Suite 410 and relocate the existing lights." (*Id., see also*, Hr'g Tr. vol. 1, 115:8-118:17.) On October 3, 2005, Appellant sent a second email stating that the cost of removal and relocation of the lights to match the new layout of Suite 410 would be $23,000.00. (*See* Appellant's Hr'g Ex. 11.) Goel's president testified that the District did not accept this proposal. (Hr'g Tr. vol. 1, 127:18-128:4.)

The District's evidence justifying its default termination as regards lighting deficiencies in Suites 400/410 was inconclusive. At the hearing, the COTR did not testify to any specific lighting deficiencies in Suites 400/410. In fact when testifying to the deficiencies which prevented the District from accepting Suites 400/410 on November 18, 2005, lighting was conspicuously *not* mentioned. (Hr'g Tr. vol. 4, 632:17-635:9.) To the extent that the District provided evidence of lighting deficiencies in Suites 400/410, such evidence consisted largely of the COTR's November 11 punch list, and the aforementioned McKissack report. The COTR's November 11 punch list notes but a single lighting deficiency in Suites 400/410: the lighting is described as "insufficient" in Suite 410, Room 111. (Appellant's Hr'g Ex. 26, Bates DC 507.) The Appellant's November 18 written response to the COTR's punch list for lighting deficiencies in Suites 400/410 noted that pre-existing ductwork was responsible for the lighting problem. (Appellant's Hr'g Ex. 26, Bates DC 507.)

The McKissack report contains dozens of references to lighting deficiencies in Suites 400/410. (Appellee's Hr'g Ex. 53.) Typical were entries noting that "1 by 4" or "2 by 2" lighting was installed in Suites 400 and 410 instead of the "2 by 4" lighting shown in "drawings". (Appellee's Hr'g Ex. 53, Bates DC 1246-1253.) There was no testimony elicited at the hearing, however, to establish that the authors of the McKissack report visually inspected suites 400/410, nor to identify which "drawings" were being referred to, and whether those drawings were within the scope of the parties' contract. Moreover, there is direct testimony from the COTR that the Appellant (at least as to Suite 400), completed "100%" of the "2 by 4" light replacements by December 16, 2005. (Hr'g Tr. vol. 4, 671:1-3, *see also* Appellee's Hr'g Ex. 49, Bates DC 955.) As we have noted above, the McKissack report's findings are unpersuasive and unreliable hearsay which the Board gives no weight. *See, e.g., Wisconsin Ave. Nursing Home*, 527 A.2d at 288-289.

The preponderance of the evidence supports a finding that Suites 400/410 were finished by November 15, 2005, as to all lighting requirements. First, the Appellant testified that Suites 400/410 were finished by November 15, 2005, and that "the District had already taken occupancy by putting in the flooring and installing the furniture." (Hr'g Tr. vol. 1, 162:3-163:14, *see also*, Appellant's Hr'g Ex. 24 (first six unnumbered pages showing photographs of the status of work completion in Suites 400/410 as of November 15, 2005).) Second, the COTR

acknowledged that the District's furniture vendor had moved furniture into Suites 400/410 and begun its assembly, (Hr'g Tr. vol. 4, 713:12-714:6), and also acknowledged that she found that Appellant completed 100% of the light replacement task in Suites 400/410. (Hr'g Tr. vol. 4, 667:11-19, Appellee's Hr'g Ex. 49, Bates DC 955.) Additionally, the COTR found that the Appellant completed "100%" of the *"construction"* tasks in Suites 400/410 as of December 16, 2005; which is a line item that included "lights." (Appellee's Hr'g Ex. 49, Bates DC 516, 955, Hr'g Tr. vol. 4, 670:12-15, 668:16-21.)

The Appellant contends that it is owed $5,050 for its lighting work in Suite 400. (Appellant's Hr'g Ex. 1-R, Line 18, Hr'g Tr. vol. 1, 239:10-20.) The COTR approved Appellant's December 14, 2005, invoice line item for light replacement, finding the work 100% complete and authorizing payment of $5,050. Payment was never made due to the CO's instruction (as noted above). (Appellee's Hr'g Ex. 49, Bates DC 955, *see also* vol. 4, 667:11-19.) The payment issue regarding lighting remains unresolved.

The Impact of Changed Wall Locations on the Ceiling System in Suites 400/410

The base contract scope required Appellant to reuse the existing ceiling grid in both Suite 400 and Suite 410, but to replace the existing ceiling panels with new ones. (Appellant's Hr'g Ex. 2, Bates DC 7, Appellant's Hr'g Ex. 6, Bates DC 346, Item #42, Appellee's Hr'g Ex. 9, Bates DC 334, Hr'g Tr. vol. 1, 67:14-20.) Modification 2, however, authorized a new suspended ceiling in Suite 400, but not in Suite 410. (Appellant Hr'g Ex. 12, DC 420, 423.) The Appellant testified that the District used a "very old antiquated ceiling system in 410 to save money." (Hr'g Tr. vol. 1, 118:15-17.) Goel recommended by email dated September 30, 2005, to the COTR that the District remove the existing Suite 410 ceiling grid and install a new one. (Appellant's Hr'g Ex. 10, Bates DC 408, *see also*, Hr'g Tr. vol. 4, 699:17-700:7) There is no record that the District ever responded to the Appellant's recommendation. (*See* Hr'g Tr. vol. 4, 699:17-700:7.)

The COTR's November 11 punch list includes numerous entries denoting various ceiling deficiencies, including entries for misaligned ceiling grids, entries for incorrectly cut ceiling tiles, and references to sagging ceilings. (Hr'g Ex. 26, Bates DC 505-508.) The Appellant's November 18 written response to the COTR's punch list for ceiling deficiencies in Suites 400/410 noted either that (1) corrections had been completed (e.g., missing ceiling tiles), (2) that pre-existing ductwork was responsible for the problem (e.g., sagging hallways or misaligned grids), or (3) that the problem (e.g., incorrectly cut ceiling tiles) could be remedied through the installation of wood trim at the top of the walls (which Appellant proposed). (Appellant's Hr'g Ex. 26, Bates DC 505-508.)

The McKissack report section on "General Notes" lists unlevel ceiling grids and ceiling tiles with rough edges in the "corridors". (Appellee's Hr'g Ex. 53, Bates DC 1254.) The report also lists numerous additional alleged ceiling deficiencies in various suite offices, including the absence of a ceiling grid to support ceiling tiles, (Appellee's Hr'g Ex. 53, Bates DC 1254), gaps between the top of a wall and its adjoining ceiling (*Id.*), and tiles that require replacement in various suite offices, including but not limited to, offices numbered 109, 110, 111, 115, 118, etc. (Appellee's Hr'g Ex. 53, Bates DC 1256, 1257, 1258, 1259 *et seq.*) As we have noted, we find

the McKissack report to be unpersuasive and unreliable hearsay which the Board gives no weight. *See, e.g., Wisconsin Ave. Nursing Home,* 527 A.2d at 288-289.

At the hearing, the COTR testified that the ceiling in Suites 400/410 was only "75%" complete as of December 16, 2005. (Hr'g Tr. vol. 674:9-675:14.) When asked to explain the basis for its "75%" calculation, the COTR (echoing its November 11 punch list), testified that "the ceiling grid was misaligned" in Suite 410, (Hr'g Tr. vol. 4, 594:14-595:1, 675:11-14), and that the ceiling in Suite 400 had incorrectly cut ceiling tiles and was "sagging" in the hallway. (Hr'g Tr. vol. 4, 607:20-608:4, 674:9-675:10, *see also* Hr'g Tr. vol. 4, 594:14-595:4.)

The Appellant's president testified that the ceiling was 100% complete in Suites 400 and 410. (Hr'g Tr. vol. 1, 235:10-22, 239:5-7, Hr'g Tr. vol. 2, 311:6-19 (ceiling replacement in Suite 400 complete by October 31, 2005), *see also* Appellant's Hr'g Ex. 1-R).) In addition, an email dated December 5, 2005, from Appellant to the CO also claims that Appellant achieved substantial completion in Suites 400/410 before November 17, 2005, and that the government had already taken occupancy by that date. (Appellant's Hr'g Ex. 29, Bates DC 489, *see also* Hr'g Tr. vol. 1, 162:3-163:14, Appellant's Hr'g Ex. 24.) And as noted, the COTR acknowledged that the District's furniture vendor had moved furniture into Suites 400/410 and begun its assembly. (Hr'g Tr. vol. 4, 713:12-714:6.)

The Appellant contends that it is owed $23,220 for the ceiling work in Suite 400. (Appellant's Hr'g Ex. 1-R, Line 17, Hr'g Tr. vol. 1, 235:11-239:7.) The COTR approved payment of $5,805 for the ceiling line item on December 16, 2005, and noted 100% completion, but due to the CO's instruction (as noted above), Appellant never received payment. (Appellant's Hr'g Ex. 31, Bates DC 516.) The payment issue regarding ceiling work remains unresolved.

The Appellant's testimony and previous payment records which it submitted into evidence support a finding that Appellant was previously paid $6,966 for ceiling work from its Invoice No. 1 dated September 19, 2005, (Appellant's Hr'g Ex. 8, Bates DC 946, Appellant's Hr'g Ex. 9, Bates DC 522), and $10,449 for ceiling work from its Invoice No. 2 dated September 30, 2005 (Appellant's Hr'g Ex. 9, Bates DC 522, Appellant's Hr'g Ex. 31, Bates DC 516) (retainage of $1741.50 withheld). To the extent that any amount is due Appellant for ceiling work, the Board notes that payments totaling $17,415 have already been made under Appellant's invoices Nos. 1 and 2.

The Impact of Changed Wall Locations on the Sprinkler and Fire Alarm Systems

As noted, the Appellant testified that its construction drawings, which were approved by the District, required the re-use of existing sprinkler and alarm systems. (Hr'g Tr. vol. 1, 115:10-22, Appellant's Hr'g Ex. 26, DC 508). Testimony from the COTR corroborated that the District approved construction drawings which provided that existing sprinkler and fire alarm systems were to remain. (Hr'g Tr. vol. 4, 695:17-698:5.) The COTR also testified that she was not qualified to "speak" on whether re-use of existing sprinklers and alarm systems was "appropriate or not." (Hr'g Tr. vol. 4, 606:6-607:8)

The above notwithstanding, the COTR testified that the District did not accept Suites 400/410, at least in part, because they were missing sprinkler heads. (Hr'g Tr. vol. 2, 502:14-503:9, Hr'g Tr. vol. 4, 601:19-602:2.) She explained that the District did not want to put "that whole office at risk" in the event that "a heater fell over and something ignited." (Hr'g Tr. vol. 2, 504:12-505:1.) The evidence supporting the COTR's assertion rested largely on her November 11 punch list, and the McKissack report.

The COTR's November 11 punch list identifies only two sprinkler deficiencies: a misaligned sprinkler head in Suite 410, room 132, and a missing sprinkler head in Suite 400, room 106. (Appellant's Hr'g Ex. 26, Bates DC 505, 507; *see also* Hr'g Tr. vol. 4, 693:13-694:9.) The COTR's trial testimony generally corroborated her November 11 punch list findings. Thus, the COTR testified that "there were at least two offices where there were no sprinkler heads present at all…" (Hr'g Tr. vol. 2, 504:12-19.) But she also testified that there were "a few offices where the sprinkler head was in the corner of the office rather than in the center of the room." (Hr'g Tr. vol. 4, 595:19-21.) The McKissack report noted approximately six offices in Suites 400/410 that were missing sprinkler heads. (Appellee's Hr'g Ex. 53.)

The Appellant testified that Suites 400/410 were finished by November 15, 2005, and that the District had already taken occupancy by that date, (Hr'g Tr. vol. 1, 162:3-163:14, Appellant's Hr'g Ex. 24), and noted that the District's furniture vendor had moved furniture into the suites and begun assembly. (Hr'g Tr. vol. 4, 713:12-714:6.) The Appellant acknowledged that the movement of walls resulted in a need to relocate the sprinkler system, but added that the District needed to approve a change order to accomplish the relocation.[425] (Hr'g Tr. vol. 1, 203:15-204:22.) The Appellant also emphasized that the originally approved construction drawings noted that existing sprinkler and fire alarm systems were to remain in place. (Appellant's Hr'g Ex. 26, Bates DC 508; Hr'g Tr. vol. 1, 203:18-205:5; vol. 5, 755:15-757:5; 784:18-785:15.)

Reuse of the Existing Doors and Frames

As noted, the parties' contract directed the Appellant to reuse existing doors and frames throughout Suites 400/410 during the renovation. (Appellant's Hr'g Ex. 3, Bates DC 762 ("Amendment #1, June 3, 2005; *see also* Hr'g Tr. vol. 4, 651:2-10 (COTR concedes that doors/frames were to be reused in Suites 400/410.)) According to the COTR, there were approximately 19 offices in Suites 400/410 that were affected by loose sidelight glass. (Hr'g Tr. vol. 4, 632:17-633:16.)

The COTR testified at the hearing that the glass in the re-used door side lights "was not sealed properly" and "rattled," creating a potentially unsafe condition which could lead to the glass shattering upon impact. (Hr'g Tr. vol. 2, 502:14-503:19; vol. 4, 602:3-603:7.) The COTR testified further that the District did not want to allow its employees to occupy Suites 400/410 out of concern that "if somebody bumped the glass and it's not secure the glass could shatter and somebody could be injured." (Hr'g Tr. vol. 2, 503:3-6; vol. 4, 602:3-22.)

[425] The Appellant estimated that fewer than 10 sprinklers "needed to be moved or added." (Hr'g Tr. vol. 5, 755:2-757:5.)

The evidence proffered by the District to support the COTR's assertion consists of her November 11 punch list, and the McKissack report. The COTR's November 11 punch list, however, does not contain a single entry denoting loose, rattling or otherwise potentially dangerous sidelight glass. (Appellant's Hr'g Ex. 26, Bates DC 505-508.) In fact, the punch list mentions sidelight glass on 12 occasions, but only to denote paint blemishes. (*Id*., 505-507.) The McKissack report notes approximately seven instances of a "[g]lass vision panel" not being "properly secured within the pocket, reset & secure." (Appellee's Hr'g Ex. 53, Bates DC 1257, 1258, 1260, 1261, 1263.) As we have noted, however, the McKissack report is unpersuasive and unreliable hearsay which the Board gives no weight. *See, e.g., Wisconsin Ave. Nursing Home*, 527 A.2d at 288-289.

Appellant's president testified that it re-used the existing doorframes in the suites, as instructed, and that any loose glass was a pre-existing condition which could not have been caused by relocating the door frames. (*See* Hr'g Tr. vol. 5, 764:6-767:14.) Appellant also noted that loose sidelight glass was not mentioned on the COTR's punch list. (Hr'g Tr. vol. 5, 764:6-765:13.) And as noted, the Appellant testified that the District took occupancy of Suites 400/410 at least as early as November 15, 2005. (Hr'g Tr. vol. 1, 162:3-163:14.) In addition, and as we have noted, the COTR acknowledged that the District's furniture vendor moved furniture into Suites 400/410 and begun assembly. (Hr'g Tr. vol. 4, 713:12-714:6.)

Unsatisfactory Paint Finishes

With respect to paint finishes, the COTR's November 11 punch list for Suites 400/410 included approximately 46 references to poor paint workmanship, including missing accent paint, discoloration, paint drips, dark spots and numerous references to blemished finishes. (Appellee's Hr'g Ex. 42, Bates DC 505-508.) The McKissack report, prepared several months later, also noted numerous alleged issues with painting, listing approximately 37 offices in Suites 400/410 which required repainting. (Appellee's Hr'g 53, Bates DC 1254-1266.)

At the hearing, the COTR testified that "it appeared that [the Appellant] had only painted the walls one time because you could see marks where they had marked on the wall." (Hr'g Tr. vol. 4, 594:19-21; Appellee's Hr'g Ex. 42, Bates DC 505.) The COTR acknowledged, however, that she found the painting in Suite 400 to be "100%" complete as of December 16, 2005 (upon her review of Appellant's December 14 invoice). (Hr'g Tr. vol. 4, 670:12-15.)

The Appellant testified that it responded to the COTR's punch list by sending its "people" on site, and where the District "didn't agree that there was enough paint on the wall, they were literally painting it right there on the spot." (Hr'g Tr. vol. 1, 198:17-199:6, *see also* Hr'g Tr. vol. 2, 366:9-18.) And as noted above, an email dated December 5, 2005, from Appellant to the CO claims that Appellant achieved substantial completion in Suites 400/410 before November 17, 2005, and that the government had already taken occupancy by that date. (Appellant's Hr'g Ex. 29, Bates DC 489, *see also* Hr'g Tr. vol. 1, 162:3-163:14, Appellant's Hr'g Ex. 24.) Further, the COTR acknowledged that the District's furniture vendor had moved furniture into Suites 400/410 and begun its assembly at an unspecified date. (Hr'g Tr. vol. 4, 713:12-714:6.)

The Appellant contends that it is owed $34,568 for completed painting in Suites 400/410. (Appellant's Hr'g Ex. 1-R, Line 11, Appellant's Hr'g Ex. 31, Bates DC 516.) Despite criticisms of Appellant's performance as noted above, the COTR approved payment of $34,568 under Appellant's December 14, 2005, invoice, and noted 100% completion. (Appellant's Hr'g Ex. 31, Bates DC 516, Hr'g Tr. vol. 4, 670:12-15.) Because the CO directed that all payments to the Appellant be suspended (as noted above), the Appellant never received the $34,568 payment. The payment issue regarding painting remains unresolved.

Alleged Incomplete Plumbing Work and Inferior Pantry Finishes

In addition to the rippling effects of the wall changes as noted above, (i.e., ceiling grids, lighting, life safety devices), and the allegedly loose sidelights and unsatisfactory paint finishes, there were two final alleged deficiencies. First, the District contends that the Appellant failed to properly connect water drainage and supply lines to sinks in the pantry. (Hr'g Tr. vol. 4, 676:7-12.) The District also contends that Appellant installed incorrect cabinetry and countertops in Suite 410. (Appellee's Hr'g Ex. 42, Bates DC 505-508, Hr'g Tr. vol. 4, 588:1-8; 595:14-19.)

As regards the plumbing issue, Modification 2 required the Appellant to provide hot and cold water lines, and drainage systems for the two pantries in Suites 400/410. (Hr'g Tr. vol. 1, 242:11-244:9, *see also* Appellant's Hr'g Ex. 2, Bates DC 62 (layout plan for Suite 400/410 depicting two pantries with sinks), Appellant's Hr'g Ex. 12, Bates DC 427.) The COTR's November 11 punch list does not list any deficiencies related to plumbing work by the Appellant. (Appellant's Hr'g Ex. 26.) At the hearing, the COTR acknowledged that she computed the Appellant's completion of plumbing work at "43.48%" as of December 16, 2005, but testified variously that, "I can't tell you how I came up with that percentage", (Hr'g Tr. vol. 4, 675:15-676:2), and that "I do recall an inspector's report saying that the sink was supposed to empty into a specific pipe, and it didn't". (Hr'g Tr. vol. 4, 676:7-12.) The District did not introduce such an "inspector's report" into evidence at the hearing, nor does the record as a whole include any such report.[426]

The Appellant testified specifically that the plumbing work in Suites 400/410 was complete by October 31, 2005. (Hr'g Tr. vol. 1, 244:20-22, vol. 2, 311:6-22.) And as noted above, an email dated December 5, 2005, from Appellant to the CO also claims that Appellant achieved substantial completion in Suites 400/410 before November 17, 2005, and that the government had already taken occupancy by that date. (Appellant's Hr'g Ex. 29, Bates DC 489, *see also* Hr'g Tr. vol. 1, 162:3-163:14, Appellant's Hr'g Ex. 24.)

As regards the cabinetry issue, the COTR informed the Appellant in a November 7, 2005, email that it had not installed the correct cabinets in Suite 400, writing, "Goel selected a color finish without confirming with the customer. Please remove the white cabinets and install the … Monticello Maple cabinets and Slate Gray countertops …" (Appellant's Hr'g Ex. 20.) The COTR's punch list cites deficiencies for incorrect cabinetry and countertops in Suite 400/Room 132 and Suite 410/Room 111. (Appellant's Hr'g Ex. 26, Bates DC 505, 508.) The

[426] The COTR may have been referring to the McKissack report, which includes a deficiency for "under counter sump with pump" that is inconsistent with "drawings" depicting a "sink drain hard piped to sanitary." (Appellee's Hr'g Ex. 53, Bates DC 1249.) The Board has already indicated that the McKissack report carries no weight.

McKissack report cites a deficiency in Suite 410/Room 132 for "white cabinets" instead of maple, but does not mention countertops.[427] (Appellee's Hr'g Ex. 53, Bates DC 1264.) The McKissack report cites a deficiency in Suite 400/Room 111 for a "countertop" with no supporting detail, and directs the Appellant to "replace" it. (*Id.*, at Bates DC 1266.)

At the hearing, the COTR characterized Appellant's installation of "off-the-shelf-white cabinetry" as "incorrect." (Hr'g Tr. vol. 4, 589:3-590:3; Appellee's Hr'g Ex. 42, Bates DC 505, *see also* Hr'g Tr. vol. 1, 116:1-22.) The COTR testified that the Appellant should have installed "maple cabinets" and "a certain counter-top" because they were identified for him in a finish schedule provided after contract award, but sufficiently in advance to have been included in Modification 2. (*See generally* Hr'g Tr. vol. 4, 588:1-590:3.) Significantly, however, the COTR conceded that there was no subsequent contract modification agreed to by the parties that included maple cabinets and the desired slate gray countertops. (*See generally* Hr'g Tr. vol. 4, 590:4-594:9; 660:12-661:22, 692:9-693:12.) The preponderance of the evidence does not support a finding that the District contracted for "maple cabinets" nor "slate gray" countertops in the base contract nor in any subsequent modifications. (*Id.*)

The Appellant contends that $23,000 is due for plumbing changes in Suite 400/410. (Appellant's Hr'g 1-R, Line 23, Appellant's Hr'g Tr. vol. 1, 242:11-245:2.) The COTR approved a $10,000 payment to Appellant under its December 14, 2005, invoice for plumbing work. (Appellant's Hr'g Ex. 31, Bates DC 517.) The Appellant's testimony and payment records which it submitted into evidence support a finding that no payments were made to Appellant for the authorized contract value of $23,000. (*See* Appellant's Hr'g Ex. 12, Bates DC 427, Appellant's Hr'g Ex. 31 Bates DC 954.) The payment issue regarding plumbing remains unresolved.

SUITE 480

In pertinent part, the contracted for scope of work in Suite 480 included, but was not limited to, the creation of offices, a pantry, an area for rotary files, a training room, a conference room, and the preparation of construction drawings. (Appellant's Hr'g Ex. 2, Bates DC 10, 61, *see also* Hr'g Tr. vol. 1, 79:19-80:10.) The District's payroll division was to be housed in Suite 480. (*Id.*, Bates DC 10.) The contract amount for Suite 480 totaled $73,744, which included $24,464 for demolition, $15,312 for painting, $29,216 for construction, and $4,752 for survey work. (Appellant's Hr'g Ex. 2, Bates DC 7.) No design services were contracted for in Suite 480. (*Id.*, Hr'g Tr. vol. 1, 66:12-13.) Pursuant to Modification 2, the deadline date for completion of Suite 480 was November 15, 2005. (Appellant's Hr'g Ex. 12.) Suite 480 was not completed on November 15, 2005, because the Appellant never gained access to it. (Hr'g Tr. vol. 1, 144:5-11.)

[427] The Board notes that the COTR punch list and the McKissack report do not list the same locations for the pantries. The COTR punch list identifies pantries as being located in Suites 400/Room 132 and 410/Room 111, respectively. (Appellant's Hr'g Ex. 26, Bates 505, 508.) The McKissack report lists pantries in Suite 410/Room 111, Suite 400/Room 111, and Suite 400/Room 132, respectively. (Appellee's Hr'g Ex. 53, Bates DC 1247, 1266, 1253.) To add to the confusion, the McKissack report also lists an office in Suite 400/Room 111, although that same location is listed elsewhere in the report as a pantry. (*Cf.* Appellee's Hr'g Ex. 53, Bates DC 1251, 1266.)

Under Contract Amendment 1 (dated June 3, 2005), the parties agreed that the desired order of work for completion of all four suites was as follows: (1) suite 230 (below this, the District wrote, "NOTE: Suite 230N must be completed first"); (2) suites 400/410; (3) suite 360N; and (4) suite 480N. (Appellant's Hr'g Ex. 3.) There was no express provision in the contract which required the Appellant to complete any particular suite before gaining access to Suite 480. In a July 1, 2005, email, the COTR notified Appellant that the desired order did "**NOT PRECLUDE WORK FROM OCCURRING SIMULTANEOUSLY IN MULTIPLE SUITES**." (Appellee's Hr'g Ex. 3, Bates DC 291.)

Despite the above, there was testimony at the hearing that the District contemplated Appellant finishing Suites 400/410 before Suite 480, relocating Suite 480's tenants to Suites 400/410, and then completing renovations in an emptied Suite 480.[428] (Appellant's Hr'g Ex. 17, Bates DC 448, *see also*, Hr'g Tr. vol. 1, 143:16-22, 144:12-21; vol. 2, 404:12-405:1, 499:11-501:8.) Because the District perceived that Appellant failed to finish Suites 400/410 in a safe manner as regards life safety systems and loose sidelight glass, Appellant was never granted access to Suite 480 for completion. (*See e.g.*, Hr'g Tr. vol. 1, 144:9-11, 222:8-18, vol. 2, 502:14-503:14, 503:3-6, vol. 4, 601:19-602:17.) The COTR testified that the Appellant requested access to Suite 480 to commence work, but that such request was denied. (Hr'g Tr. vol. 4, 638:11-20.) The COTR acknowledged, however, that there was no express contractual requirement mandating that Appellant complete renovations to Suites 400/410 before gaining access to Suite 480. (Hr'g Tr. vol. 4, 655:11-18.)

Although denied access to Suite 480, Goel Services contended at the hearing that the District owed it $25,000 for work performed regarding Suite 480. The Appellant's testimony was inconsistent, however, as to the basis for the $25,000 alleged cost. For example, at one point the Appellant testified that the $25,000 item was for a "simple design drawing" for Suite 480, depicting the "removal of the carpet, deletion of X (sic) feet of partitions, the new pantry, and-and construction of one single wall in that suite."[429] (Hr'g Tr. vol. 1, 232:17-233:4.) Pressed further, the Appellant testified that the $25,000 cost represented "the general vis-a-vis the project manager and superintendent, they're contained within these job costs items along with some of the costs of [Appellant's architect subcontractor] to create simple drawings for Office of Property Management (sic)." (Hr'g Tr. vol. 2, 348:16-349:20.)

Elsewhere, the Appellant testified that the $25,000 captured costs for "general conditions", which included "a period of time in order to have a superintendent on site", a survey and a postcard permit. (Hr'g Tr. vol. 2, 358:14-19, 368:6-369:4, vol. 4, 673:14-674:6.) Further,

[428] Unlike the other suites to be renovated under the contract, Suite 480 was occupied by the District at all times during the course of contract performance. (Hr'g Tr. vol. 1, 79:15-19.)

[429] On October 28, 2005, the Appellant sent an email to the District advising it, *inter alia*, that construction documents had been completed for Suite 480. (Appellant's Hr'g Ex. 16, Bates DC 443, *see also*, Hr'g Tr. vol. 1, 143:16-144:4.) Appellant also submitted a claim to the CO seeking a 15 calendar day compensable time extension to November 30, 2005. (Appellant's Hr'g Ex. 17, Bates DC 448, *see also*, Hr'g Tr. vol. 1, 144:12-21.) The extension request was premised upon the impact to Appellant's schedule (i.e., a projected November 15, 2005, completion deadline) of the time estimated by the District to relocate Suite 480 tenants into the finished Suites 400/410. (*Id.*, *see also* Hr'g Tr. vol. 1, 145:2-14.) The government never responded to Appellant's delay claim. (Hr'g Tr. vol. 1, 145:2-5.) Because there is no record that the Appellant ever appealed the government's deemed denial of the 2005 delay claim to the Board, we do not consider the matter herein.

the Appellant testified that "survey" meant verification of the quantities identified on the original space layouts (e.g., "if the District says there are 900 linear feet of wall the survey allows us to verify there is (sic) 900 linear feet of wall to be removed"). (Hr'g Tr. vol. 2, 290:9-291:1.) The Appellant contends that 100% of the above items were completed prior to October 31, 2005. (*Id*., *see also* Appellant's Post Hr'g Br. 23.)

The Board does not reach the merits of Appellant's claim for $25,000 in billings regarding Suite 480, however, because the record does not support a finding that the Appellant submitted an invoice or claim to the CO regarding the above $25,000 *prior* to raising it on appeal with the Board. The Appellant submitted three invoices to the District regarding payment matters herein. (Appellant's Hr'g Exs. 8, 9, 31.) None of the invoices request payment for Suite 480, and thus render somewhat hollow Appellant's trial demand for $25,000 for various claimed services provided in Suite 480. (*Id*.)

While it is true that the Appellant submitted one invoice dated December 5, 2005, seeking $25,000 for work performed in Suite 480, that invoice was promptly withdrawn on December 14, 2005. The December 5 invoice requests payment in the amount of $25,000 regarding Suite 480 services for what it describes as "survey existing based upon OCP provided layout, perform full design in compliance with OCP and DCRA requirements." (Appellant's Hr'g Ex. 30, Bates DC 484.) This invoice was withdrawn, however, on December 14, 2005, and replaced with a revised one removing the requested $25,000 Suite 480 payment in its entirety. (Appellant's Hr'g Ex. 31, Bates DC 516.) Goel's president testified that it submitted the revised invoice after a series of emails and telephone conversations with the District "renegotiating" the invoice. (Hr'g Tr. vol. 1, 208:8-209:4.)

Appellant's March 15, 2007, claim letter also fails to include a claim for payment of any amounts pertaining to Suite 480. (*See generally* Appellant's Hr'g Ex. 37, Bates DC 65 *et seq*.) The March 15 claim letter incorporates by reference Appellant's "third requisition for payment." (Appellant's Hr'g Ex. 37, Bates DC 68.) We construe Appellant's reference to a "third requisition" to mean its December 14, 2005, invoice since the December 5 invoice had already been withdrawn due to the aforementioned "renegotiation". As we note above, the December 14 invoice does not include a request for payment regarding Suite 480.We cannot but conclude that the Appellant's $25,000 claim was thusly withdrawn, was never resubmitted to the CO, and did not reappear until presented to the Board in the instant matter.

SUITE 360

The scope of work for Suite 360 included, but was not limited to, the creation of offices, a pantry, an area for rotary files, a supply room, and the preparation of construction drawings. (Appellant's Hr'g Ex. 2, Bates DC 9.) The District's retirement division was to be housed in Suite 360. (*Id*.) There is no dispute between the parties regarding the timely completion of Suite 360. The record as a whole supports a finding that Suite 360 was accepted for occupancy by the District on November 18, 2005, and that performance in Suite 360 met contract requirements. The COTR testified throughout the proceeding that the District accepted Suite 360 on November 18, 2005. (Hr'g Tr. vol. 4, 615:21-616:1; 616:11-14; 622:1-12; 629:10-15.) The Appellant also testified that Suite 360 was 100% complete. (Hr'g Tr. vol. 1, 232:14-16.)

The sole question remaining for the Board is whether the Appellant is owed $2,728 for Suite 360 (plus $4,614.76 retainage). The Appellant submitted two invoices for payment of the Suite 360 construction line item and received payments totaling $41,532.48. On September 19, 2005, Appellant submitted Invoice No. 1, which included a request for payment of $38,860.80 for the construction line item. (Appellant's Hr'g Ex. 8, Bates DC 946.) The Appellant testified that the District paid Invoice No. 1 in full ($139,647.51) and withheld a 10% retainage ($15,516.39). (Hr'g Tr. vol. 1, 111:2-13.) On September 30, 2005, Appellant submitted Invoice No. 2 to the District, which included a request for payment of $7,286.40 for the construction line item. (Appellant's Hr'g Ex. 9, Bates DC 522.) The Appellant testified that the District paid Invoice No. 2 in full ($109,299.02) and withheld a 10% retainage ($12,144.34). (Hr'g Tr. vol. 1, 114:19-115:5-7.)

There is no record that the Appellant ever submitted an invoice to the District for the $2,728 claimed in the instant action for the Suite 360 construction line item. Appellant's final invoice to the District, i.e., its December 14, 2005, invoice, did not bill for the Suite 360 construction line item. (Appellant's Hr'g Ex. 31, Bates DC 516.) Appellant's March 15, 2007, claim letter also fails to include a claim for an unpaid invoice amount that would include the $2,728 pertaining to Suite 360. The Board lacks jurisdiction over Appellant's claim for an unpaid invoice amount of $2,728. The Board notes that although Appellant has completed 100% of Suite 360, the District continues to withhold retainage of $4614.76 to date from previous payments. (Appellant's Hr'g Ex. 31, Bates DC 516.)

Additional Alleged Unpaid Invoice Amounts

In addition to the unpaid invoice amounts discussed above, the Appellant contends that there are several additional unpaid amounts due in this matter. These amounts can be divided into two categories: three unpaid amounts that were previously billed by Appellant to the District CO, and (2) one unpaid amount for which the District CO was never billed ("miscellaneous items"). We discuss each item below, along with the record evidence relating to each.

There are several allegedly unpaid invoice amounts that were billed to the District by the Appellant on December 14, 2005. The first such line item is for "construction" in Suites 400/410. (Appellant's Hr'g Ex. 31, Bates DC 516.) The Appellant billed the District $5,269 under this line item on December 14, 2005. (*Id.*, *see also* Appellant's Hr'g Ex. 1-R, Line 12.) The COTR disapproved payment by drawing a line through Appellant's payment figure, and handwriting "zero" in its place. (Appellee's Hr'g Ex. 49, Bates DC 953, *see also* Hr'g Tr. vol. 4, 666:11-667:19.)

The record denotes that Appellant's Suite 400/410 construction line item includes both construction services proper (i.e., layout, framing, drywall, sand, doors, ceilings, lighting, mechanical, electrical, and installation of owner provided fixtures), but also the so-called "survey" line item. (Hr'g Tr. vol. 2, 287:11-288:1)("…when we go to what Brenda Proctor allowed us to include in our schedule of values she had us role up the survey in line E of each Suite and add it into the construction item in line D".).) The Appellant testified that "survey" entailed its verifying "that the room quantities, based on the Attachments A through D [i.e., the

floorplans attached to the original solicitation] equal the same scope as what the District has plotted out." (Hr'g Tr. vol. 2, 290:9-20.) Once "surveys" were completed in each suite, they were to be used to secure a construction permit from the Department of Consumer and Regulatory Affairs. (Hr'g Tr. vol. 2, 291:7-22.) The Appellant testified that it completed the surveys, and obtained permits for each suite. (Hr'g Tr. vol. 2, 296:2-21, 297:16-22.)

The basis for Appellant's December 14, 2005, invoice for $5,269 in the construction line item is not clear to the Board. There is no testimony from Appellant or exhibits clarifying whether the $5,269 is for uncompensated construction work *proper*, or for uncompensated survey work. The only testimony pertinent to this issue was provided by the COTR who testified that her review of Appellant's December 14, 2005, invoice found the construction line item in Suite 400/410 to be 100% complete. (Hr'g Tr. vol. 2, 670:12-15.) However, this testimony is in direct conflict with her handwritten rejection of the $5,269 figure on Appellant's December 14, 2005, invoice. The payment issue regarding $5,269 in "construction" costs remains unresolved.

The second contract item for which Appellant seeks payment is three refrigerators. (Appellant's Hr'g Ex. 31, Bates DC 516, Appellant's Hr'g Ex. 1-R, Line 20.) The three refrigerators were for Suites 360, 400 and 480. (Hr'g Tr. vol. 4, 671:14-19.) This line item was included in Appellant's December 14, 2005, invoice to the District. (Appellant's Hr'g Ex. 31, Bates DC 516.) Upon her review of Appellant's invoice, the COTR listed the three refrigerators as "100%" complete, and approved payment in the amount of $2,400. (*Id*.) The COTR also testified that she found the refrigerators to be "100%" complete. (Hr'g Tr. vol. 4, 671:11-19.) The Appellant was never paid for the three refrigerators due to the CO's suspension of payment (as noted above). The payment issue regarding the three refrigerators remains unresolved.

The third contract item for which Appellant seeks payment is termed "loads". The Appellant testified that the term "loads" was provided by the COTR, who used it to refer to the overhead, profit, bond premium, and general liability insurance line items in Modification 2 (Hr'g Tr. vol. 1, 264:5-19.) According to Appellant and as written in Modification 2, the overhead, profit, bond premium, and general liability insurance line items represented the difference between the Appellant's total change order costs ($266,014.68) and Appellant's total "self-performed" change order costs ($219,180). (Hr'g Tr. vol. 1, 263:14-264:11, *see also* Appellant's Hr'g Ex. 12, Bates DC 427.)

In this action, the Appellant seeks $45,476.58 in loads. (Appellant's Hr'g Ex. 1-R, Line 29.) The total amount of "loads" as calculated from Modification 2, is $46,834.38. (Appellant's Hr'g Ex. 1-R, Line 29, Hr'g Tr. vol. 1, 263:14-264:4.) The difference between the "load" amount sought by Appellant in this action and the total Modification 2 value for loads is because the loads calculated instantly are premised upon 97.10% Modification 2 completion, whereas the contract loads amount is calculated based upon a premise of 100% completion. (*See, e.g*., Hr'g Tr. vol. 4, 686:5-687:4 (COTR's testimony regarding load calculation).)

In order for the Appellant to receive the full value for loads, it would have needed to complete 100% of Modification 2 contract items. In this case, however, the Appellant contends that it completed 97.10% of Modification 2 requirements. (Appellant's Hr'g Ex. 1-R, Line 29, Hr'g Tr. vol. 1, 265:5-7.) Thus, Appellant's claim for $45,476.58 in loads is therefore dependent

upon the accuracy of its calculation that 97.10% of Modification 2 requirements were completed. Appellant's contention that it completed 97.10% of Modification 2 requirements rests on its assertion that it completed the percentages as noted below for each Modification 2 task:

Modification No. 2 Description	Appellant's Testimony on Percentage Completion
Suite 480/Electronic Buzzer	-0-
Suite 360/400/480 Refrigerators	100%
Suite 230 Demolition	100%
Suite 230 Wall Changes	100%
Suites 400/410 Plumbing Changes	98%
Suites 400/410 Wall Changes	100%
Suite 230 Raised Flooring	99%
Suites 230/400/410 Design	100%
Suite 230 HVAC Systems	95%
Miscellaneous	100%

(*See* Hr'g Tr. vol. 1, 265:5-268:8.)

Upon review of Appellant's December 14, 2005, invoice, the COTR approved payment of $29,505 in loads to Appellant, finding that Appellant completed only 63% of Modification 2 requirements. (Appellant's Hr'g Ex. 31, Bates DC 955, Hr'g Tr. vol. 1, 264:22-265:2, Hr'g Tr. vol. 4, 686:5-687:10.) The Appellant never received the $29,505 payment because the CO suspended payment (as noted above). The payment issue regarding loads remains unresolved.

In addition to the above amounts which were provided for in Appellant's December 14, 2005, invoice to the District, the Appellant presented a claim at the hearing for $7,995 in "miscellaneous" costs. (Appellant's Hr'g Ex. 1-R, Line 28.) These costs were never presented to a contracting officer. Moreover, the District's COTR testified that she was not even sure what was meant by the category "miscellaneous". (Hr'g Tr. vol. 4, 685:18-686:4))(the COTR testified at the hearing that she did not know what the miscellaneous category meant so she zeroed it out on Appellant's invoice).

The Appellant's testimony was inconsistent as regards the services it performed which constituted the "miscellaneous" costs. Initially, Appellant testified that this claim was premised upon its completion of a number of "miscellaneous" items that were included in Suite 230 under Modification 2, including dumpsters, drywall, paint, metal framing materials, doors, frames and miscellaneous accessories. (*See* Appellant's Hr'g Ex. 12, Bates DC 427, Hr'g Tr. vol. 1, 258:8-262:6.) The Appellant testified that it completed the miscellaneous Modification 2 tasks by October 31, 2005. (Hr'g Tr. vol. 2, 311:6-312:3.) But the Appellant also testified that the "miscellaneous" tasks were undertaken only in Suites 400/410 between November 15, 2005, and December 5, 2005; a period during which Appellant contends it was locked out of Suite 230. (Hr'g Tr. vol. 1, 184:6-194:5, 198:6-200:15.) Under these circumstances, we do not find credible Appellant's contention that it performed miscellaneous services during the contract period.

DISCUSSION

The Board exercises jurisdiction over contract disputes pursuant to D.C. Code § 360.03(a)(2) (2011), 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's jurisdiction includes appeals from a contracting officer's final decision, as well as appeals from a contracting officer's "deemed denial" of a claim. D.C. Code § 2-359.08(c).

The threshold question herein is whether Board jurisdiction is proper under the above cited provisions. The District has challenged our jurisdiction on the following grounds: (i) Appellant did not submit its termination conversion claim *to the contract officer of record* (emphasis added)(Appellee's Post Hr'g Br.,14-15), (ii) Appellant failed to submit a certified claim to the contracting officer requesting conversion of the default termination to one for convenience, and seeking monetary damages therefore, (Appellee's Post-Hr'g Br. 14, 18), (iii) Appellant failed to submit a termination settlement proposal to the contracting officer prior to seeking relief from the Board (Appellee's Post Hr'g Br. 8, 19-21), (iv) Appellant failed to submit a monetary claim to the contracting officer, (*Id*. 18, 20), (v) Appellant's claims for $10,000 in meeting preparation costs, and $25,000 in subcontractor settlement costs were not submitted to the contracting officer (Appellee's Post Hr'g Br. 14, 18, 20), (vi) Appellant failed to submit claims for penalty interest (i.e., Quick Payment Act) to the contracting officer, and (vii) Appellant's claims for breach of D.C. Mun. Regs. tit. 27, §§ 3711.6; 3711.5; 3711.8 were not in its original claim letter to the contracting officer (Appellee's Reply to Appellant's Post Hr'g Br., 7-8).

We have reviewed the record herein and conclude that we have jurisdiction over appellant's claims for conversion of its default termination into a convenience termination and unpaid invoice amounts, *except* that we lack jurisdiction over appellant's claims for $10,000 in meeting preparation costs, $25,000 in subcontractor settlement costs, $25,000 in design costs for Suite 480, $7,995 in miscellaneous contract costs, and $2,728 in Suite 360 construction costs. These latter claims were never presented to a contracting officer for resolution. We briefly address Appellee's jurisdictional arguments before proceeding to the merits herein.

Appellant's Claim Was Submitted to the Contracting Officer

The District contends that Appellant's March 15, 2007, claim to Eric Payne was submitted to the wrong official (Appellee Post-Hr'g Br., 8, 14-15). Per the District, this Board's jurisdiction has not been "invoke[d" because the Appellant testified at trial that "the individual to whom [he] mailed [the] [claim]…was not the contracting officer…". (*Id*. at 14.) At the hearing, the Appellant testified that a "Ms. Long" was the contracting officer, and that Mr. Payne was neither the original contracting officer nor was he ever designated as such. (Hr'g Tr. vol. 1, 41:4-10, 46:3-6, 147:20-22, 148:1-3; vol. 2, 382:9-22, 383:1-10.) We conclude that the preponderance of the evidence establishes that Appellant submitted its claim to the correct contracting officer. Accordingly, the District's argument is without merit.

The record shows that the Appellant submitted its claim to Eric Payne on March 15, 2007. (Appellant's Hr'g Ex. 37, Bates DC 65.) The parties' contract identified the contracting officer herein as the "Director (or his designee), Office of Contracts and Procurement, Office of the Chief Financial Officer." (Appellant's Hr'g Ex. 2, §G.5, Bates DC 15.) At all times material to the instant dispute, Eric Payne served as the *Acting* Director, Office of Contracts, Office of the Chief Financial Officer. (*See, e.g.*, Appellant's Hr'g Ex. 35, Bates DC 72, Appellant's Hr'g Ex. 28, Hr'g Tr. vol. 4, 561:18-21). Thus, Payne served in the position actually designated in the contract as the "contracting officer."

Moreover, the District's own evidence in this proceeding has shown that Payne's status as contracting officer has never genuinely been at issue. First, the District's only trial witness testified that Payne was the contracting officer herein. (Hr'g Tr. vol. 2, 479:17-480:22.) Second, the District's Answer admits that Payne was the contracting officer.[430] Third, Payne issued a Stop Work order to Appellant on December 5, 2005, wherein he listed his title as Acting Director of Contracts. (Appellant's Hr'g Ex. 28.) Finally, Payne issued the Termination For Default letter to the Appellant on March 16, 2006. (Appellant's Hr'g Ex. 35, Bates DC 70-72.) The preponderance of the evidence leads to the conclusion that Eric Payne served as contracting officer at all times material to the instant dispute, and we conclude that Appellant's claim was submitted to the correct contracting officer. Although other District officials may have been involved in contracting actions taken in this matter (e.g., the COTR, Irene Scott, Angela Long), they did so as authorized persons working under Payne. (Hr'g Tr. vol. 2, 479:17-480:22.) Long, in particular, signed Modification 2 as contracting officer. (Appellant's Hr'g Ex. 12, Bates DC 64.) We construe the solicitation, the contract, and the record herein to conclude that Payne served as CO herein, and that the COTR, Scott, and Long were among Payne's authorized designees to take the actions each took herein. (*Id*., Hr'g Tr. vol. 2, 479:17-480:22.)

The Appellant Submitted A Monetary Claim To The Contracting Officer Seeking Conversion of the Default Termination Into One For Convenience.

The District also contends that the Appellant failed to submit a certified claim to the contracting officer seeking monetary damages, and requesting conversion of the default termination to one for convenience. (Appellee's Post-Hr'g Br. 18.) We have reviewed the record and find the District's argument to be wholly without merit. First, claims before our Board do not require certification to invoke our jurisdiction. The Board made our position with respect to certification of claims very clear in *Civil Construction, LLC*, CAB Nos. D-1294, D-1413, D1417 (CONS.) 2013 WL 3573982 (Mar. 14, 2013)(lack of claim certification does not deprive the Board of jurisdiction over appeals). Additionally, appellant's claim letter *plainly* requests conversion of its default termination into a convenience termination, and *plainly* demands $417,178.85 in damages.[431] We therefore conclude that Appellant's March 15, 2007, claim letter

[430] The Appellee's Answer "admit[s]" appellant's allegation that its "Claim for Wrongful Default Termination [was submitted] to the *Contracting Officer* in the amount of $417,178.55" (emphasis added). *See* App. Answer ¶27, May 9, 2009; Appellant's Compl., ¶27 April 10, 2009.

[431] Appellant's claim letter states in capitalized letters on the first page: WE REQUEST A CONTRACTING OFFICERS'[sic] FINAL DECISION IN RESPONSE TO THIS CLAIM FOR WRONGFUL TERMINATION AND REQUEST TO CONVERT THE TERMINATION FOR DEFAULT INTO A TERMINATION FOR

did not require certification and included a monetized request for conversion of a default termination into a convenience termination.

Submission Of A Settlement Proposal Is Not A Prerequisite To Board Jurisdiction Over A Termination For Default Claim

The Appellee also contends that we lack jurisdiction because the Appellant failed to submit a termination settlement proposal to the contracting officer prior to seeking Board jurisdiction. (Appellee's Post Hr'g Br. 8, 19-21.) Specifically, the Appellee cites Standard Contract Provisions, Art. 6 ¶G and D.C. Mun. Regs. tit. 27, §§ 3705.6, 3708 as imposing a duty on Appellant to submit a settlement proposal to the contracting officer *prior* to invoking the Board's jurisdiction. (Appellee's Post Hr'g Br. 19.)

The Appellee is wrong as a matter of law. There is no jurisdictional requirement that an Appellant submit a settlement proposal to a contracting officer in a proceeding to convert a *termination for default* into a convenience termination. The regulatory and contract provisions cited by Appellee apply when a contracting officer has terminated a contract for *convenience*. D.C. Mun. Regs. tit. 27, §§3702.1(k), 3708.1 (2002)(emphasis added). *See also, Jody Builder's Corp*., PSBCA Nos. 5047, 5178, 08-2 BCA ¶ 33959 (the Board exercised jurisdiction over contractor's default termination conversion claim, but delayed consideration of its settlement proposal until after the claim had been converted to a convenience termination). The Appellee's cited authority does not apply when a contractor *challenges* a termination for default and seeks its *conversion* to a termination for convenience. In the latter scenario, a party may appeal the contracting officer's final decision directly to our Board, without first having submitted a settlement proposal to the contracting officer.

Appellant's Claims for $10,000 in Meeting Preparation Costs, and $25,000 in Subcontractor Settlement Costs Were Never Submitted To The Contracting Officer

At the hearing, the Appellant advanced claims for $10,000 in legal fees and staff costs to prepare for three meetings held with the CO, and $25,000 in subcontractor settlement costs. (Appellant's Hr'g Ex. 1-R, Lines 34-35, Hr'g Tr. vol. 2, 447:5-452:3.) The District contends that these costs were never submitted to the contracting officer as claims. The Board agrees with the District that we lack jurisdiction over Appellant's claim for $35,000 in meeting preparation and subcontractor settlement costs. By testimony of the Appellant it is admitted that these claims were never presented to a contracting officer. (Hr'g Tr. vol. 2, 449:15-452:3, 458:4-459:7.) Neither are these claims part of the same set of operative facts as Appellant's claims for unpaid invoices or for conversion of its default termination.

The test for determining the same set of operative facts is whether the claim actually submitted to the contracting officer also gave it notice of the nature and amount of the claim(s) later submitted to the Board for the first time on appeal. *Keystone Plus Construction Corp.*, CAB No. D-1358 2012 WL 55443 (Jan. 27, 2012). A close review of the record herein reveals

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CONVENIENCE AND REQUEST PAYMENT IN THE AMOUNT OF $417,178.85. (Appellee's Hr'g Ex. 57; Appellant's Hr'g Ex. 37.)

that Appellant's settlement cost claims were not in existence at the time of Appellant's March 15, 2007, claim to the CO. (Hr'g Tr. vol. 2, 450:15-452:3.) We noted in *Severn Construction Servs., LLC,* CAB No. D-1409, 2013 WL 3291402 (June 24, 2013), that in order to qualify as a claim, the amount sought by a contractor must have been determined before the claim is submitted to a CO. In this case, the settlement costs were purely speculative at the time of Appellant's March 15 claim to the CO, precluding the CO from knowing the amount of such claims at that time. Moreover, Appellant's March 15, 2007, claims did not give the CO notice that $10,000 in meeting preparation costs were being made. The focus and wording of Appellant's March 15 claims were clearly directed to conversion of the default termination, payment of already pending invoice amounts, and payment of the contract balance. There were no pending unpaid invoices for meeting preparation costs on March 15, 2007, nor were such costs part of the contract balance. As a result, the Board lacks jurisdiction to decide the proffered claims pertaining to the subcontractor settlements and meeting preparation costs.

Appellant's Claim For $25,000 in Design Costs for Suite 480 Was Never Submitted to the Contracting Officer

As we have noted, the record does not support a finding that the Appellant submitted an invoice or claim to the CO regarding $25,000 in Suite 480 design costs *prior* to raising it on appeal with the Board. The Appellant submitted three invoices to the District regarding payment matters herein. (Appellant's Hr'g Exs. 8, 9, 31.) None of the invoices request payment for Suite 480. (*Id*.) We have also noted that Appellant's March 15, 2007, claim letter does not include a claim for payment of any amounts pertaining to Suite 480. (*See generally* Appellant's Hr'g Ex. 37, Bates DC 65 *et seq*.) The March 15 claim letter incorporates by reference Appellant's "third requisition for payment." (Appellant's Hr'g Ex. 37, Bates DC 68.) The Appellant's third requisition for payment, i.e., the December 14, 2005, invoice, does not include a request for design costs pertaining to Suite 480. (*See* Appellant's Hr'g Ex. 31.) Accordingly, we conclude that the Board lacks jurisdiction over Appellant's claim for $25,000 in Suite 480 design costs.

Appellant's Claim for $7,995 in Miscellaneous Costs Was Never Submitted to the Contracting Officer

The Appellant presented a claim at the hearing for $7,995 in "miscellaneous" costs. (Appellant's Hr'g Ex. 1-R, Line 28.) There is no consistent explanation for the services performed which constituted the "miscellaneous" costs. Initially Appellant testified that this claim was premised upon its completion of a number of "miscellaneous" items that were included in Suite 230 under Modification 2, including dumpsters, drywall, paint, metal framing materials, doors, frames and miscellaneous accessories. (*See* Appellant's Hr'g Ex. 12, Bates DC 427, Hr'g Tr. vol. 1, 258:8-262:6.) The Appellant testified that it completed the miscellaneous Modification 2 tasks in Suite 230 by October 31, 2005. (Hr'g Tr. vol. 2, 311:6-312:3.) But the Appellant also testified that the "miscellaneous" tasks were undertaken in Suites 400/410 only between November 15, 2005, and December 5, 2005; a period during which Appellant contends it was locked out of Suite 230. (Hr'g Tr. vol. 1, 184:6-194:5, 198:6-200:15.)

The Board does not reach the merits of Appellant's claim for $7,995 in miscellaneous costs. These costs were never presented to the CO. The Board does not find a record of

Appellant seeking $7,995 from the CO for "miscellaneous" costs in any of the invoices submitted to the COTR in this matter (i.e., the first invoice (Appellant's Hr'g Ex. 8), the second invoice (Appellant's Hr'g Ex. 9), or the third invoice (Appellant's Hr'g Ex. 31). The Board also finds no record of a claim for $7,995 in "miscellaneous" costs in Appellant's March 15, 2007, claim for unpaid invoice amounts and conversion of the default termination herein to a convenience termination. (*See* Appellant's Hr'g Ex. 37.) Accordingly, we conclude that the Board lacks jurisdiction over Appellant's claim for $7,995 in miscellaneous costs.

Appellant's Claim for $2,728 in Suite 360 Construction Costs Was Never Submitted to the Contracting Officer

As noted, there is no record that the Appellant ever submitted an invoice to the District for the $2,728 claimed in the instant action for Suite 360 construction costs. As a result, and for the reasons we have noted above, the Board lacks jurisdiction over Appellant's claim for an unpaid invoice amount of $2,728.

The Merits Of Appellant's Claims Against The District

We now consider the merits of the two issues before us: (1) whether the District's termination of the Appellant for default was proper, and (2) whether Appellant is owed unpaid invoice amounts under the contract. 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. We address termination for default first.

I. The Termination For Default

A. Standard of Review

Termination for default is a drastic sanction that should be imposed only for good grounds and on solid evidence. *See Lisbon Contractors v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987)(citations omitted). The prima facie burden is on the government to establish the correctness of its actions in terminating a contractor for default. *Lisbon Contractors,* 828 F.2d at 765. In a case where the District has terminated a contractor for failure to complete performance within the specified delivery date, the Board considers three factors, namely "the identity of the job completion date, secondly, whether the appellant was in default at the time the contract was terminated; and thirdly, whether there was an abuse of discretion in making such a decision based upon [the] circumstances of this case." *MCI Constructors, Inc.*, CAB No. D-835, 39 D.C. Reg. 4305, 4322 (Sept. 27, 1991).

If the District establishes its prima facie case, then the burden shifts to the contractor to show that the default was excusable, i.e., that the default "was due to causes beyond its control and without its fault or negligence." *See MCI Constructors,* 39 D.C. Reg. 4321-4322, SCP, Article 5.

In applying the above standards to the instant case, we conclude that the District's default termination of Appellant in this case was not justified and proper. As a result, the District's default termination is converted into a convenience termination. Specifically we conclude that the District met the initial burden of establishing that Appellant's default termination was justified and proper in Suites 230, 400/410 and 480, but that the Appellant has shown that the default was excusable. Further, we conclude that the District has not met its initial burden to establish that the Appellant defaulted in its completion of Suite 360. We address these matters below.

B. The Appellant Did Not Meet the Contract's Completion Deadline In Suites 230, 400/410 and 480.

Under *MCI Constructors, supra*, the Board's analysis begins with review of the elements as to which the District carries the initial burden of proof. Therefore, we will look first to the parties' contract completion date. In this case, it is not disputed by the parties that Modification 2 required that all of the suites be completed by November 15, 2005. (Appellant's Hr'g Ex. 12, Bates DC 64.) Secondly, we review whether the Appellant was in default at the time of contract completion. Third, we analyze whether under the circumstances of the case the District abused its discretion in making a default termination. As applied to the instant facts, we conclude that the District met its initial burden of proof with respect to Suites 230, 400/410 and 480, but not as to Suite 360. The record as regards the District's establishment of its prima facie case is noted below.

Suite 230. One of Appellant's primary tasks under Modification 2 was to provide a new HVAC system for the expanded 1,700 square foot LAN room and Docutech printing areas. (Appellant's Hr'g Ex. 12, Bates DC 420.) By the Appellant's own testimony, the HVAC was to provide cooling so that the computer equipment in the LAN room would not overheat (e.g., the nine servers), (Hr'g Tr. vol. 1, 95:4-14), and to provide balanced HVAC for the Xerox Docutech 180 printing area. (Appellant's Hr'g Ex. 2, Bates DC 8-9; Hr'g Tr. vol. 1, 70:19-21.)

In this regard, the record is clear that Appellant defaulted in Suite 230 by failing to have HVAC equipment completed by the contract's November 15, 2005, deadline. By the Appellant's own testimony, it is clear that Appellant was only "around 60%" complete with HVAC by November 15, 2005. (Hr'g Tr. vol. 1, 248:6-11; 251:6-252:8.) Specifically, the Appellant's testimony admits that the four HVAC "up flow" units were not even onsite until "after Thanksgiving." (Hr'g Tr. vol. 1, 159:3-11; 169:18-170:21; 249:4-5.) Additionally, the COTR testified that "HVAC units had not been installed" by the contract deadline. (Hr'g Tr. vol. 4, 599:9-20.) The COTR specifically testifying that there were "four 10 ton air conditioning units sitting in the hallway" as of November 18, 2005. (Hr'g Tr. vol. 4, 627:9-13.) The Appellant admits that it was not 95% complete with HVAC until December 5, 2005. (Hr'g Tr. vol. 1, 248:6-16.) Under these circumstances, and with respect to the HVAC system, we conclude that the District has met its initial burden of establishing that Appellant defaulted in Suite 230.

We do not believe, however, that Appellant defaulted any other requirements in Suite 230. In particular, we conclude that the District has not shown by a preponderance of the

evidence that Appellant defaulted its obligations as to the raised flooring, painting, construction, design, demolition and wall changes required in Suite 230. We find Appellant's testimonial and other evidence credible that it was 99% complete with the two-inch raised floor before the November 15, 2005, contract deadline. (Hr'g Tr. vol. 1, 246:12-19; 246:21-247:2.) We note that Appellant's testimony is corroborated by photographs taken by the Appellant before the contract deadline, and that such completion is not disputed by the District, albeit the District contends the raised flooring should have been four inches in height. (*See* Appellant's Hr'g Ex. 24; *see also* Hr'g Tr. vol. 1 at 166:20-168:2 (describing the contents of the photographs).)

Further, we find no evidence in our record that Appellant's construction of two-inch raised flooring in this case was in error. First, the District executed Modification 2, which specifically provided for "2 inch raised flooring" as part of the Appellant's labor and materials cost. (Appellant's Hr'g Ex. 12, Bates DC 427; *see also* Hr'g Tr. vol. 1, 107:18-108:9.) Second, the COTR testified that it was the District that requested that the raised floor be two-inches in height. (Hr'g Tr. vol. 4, 679:16-680:3.) Third, we note that the District's post-hearing brief does not challenge Appellant's performance in Suite 230, including, but not limited to, Appellant's installation of two-inch raised flooring. (*See* Appellee's Post Hr'g Br. 23-26.) *See, e.g., Wagner v. Georgetown Univ. Med. Ctr.,* 768 A.2d 546, 554 n. 9 (D.C. 2001) (brief mention of an argument in a brief does not preserve it for the court's consideration)(citing *Bardoff v. U.S.*, 628 A.2d 86, 90 n.8 (D.C. 1993) (the court need not address questions raised, but not argued, in a briefing)(citation omitted). Under these circumstances, the Board does not conclude that the District has shown by a preponderance of the evidence that Appellant defaulted its obligation to install raised flooring per the contract terms.

We also conclude that the District has not shown by a preponderance of the evidence that Appellant defaulted with respect to painting in Suite 230. We find Appellant's testimonial evidence credible that it was 99% complete with painting in Suite 230 by the contract deadline. (Hr'g Tr. vol. 1, 159:3-7; Hr'g Tr. vol. 1, 230:18-232:8.) We note that Appellant's testimony is corroborated by photographs taken by the Appellant before the contract deadline. (Appellant's Hr'g Ex. 24.) The COTR did not dispute the Appellant's testimony regarding 99% completion as to the painting requirement. (Hr'g Tr. vol. 4, 599:9-20; 627:8-629:9.) Further, the District's post-hearing brief does not challenge Appellant's performance in Suite 230, including, but not limited to, the painting requirement. (*See* Appellee's Post Hr'g Br. 23-26.)

We also conclude that the District has not shown by a preponderance of the evidence that Appellant defaulted with respect to construction in Suite 230. We find Appellant's testimonial and other evidence credible that it was 99% complete with construction in Suite 230, except for one uninstalled door. (Hr'g Tr. vol. 1, 232:8-12.) We note that Appellant's testimony is corroborated by photographs taken by the Appellant before the contract deadline. (Appellant's Hr'g Ex. 24.) Further, the District's post-hearing brief does not challenge Appellant's performance in Suite 230, including, but not limited to, the construction scope. (*See* Appellee's Post Hr'g Br. 23-26.)

We also conclude that the District has not shown by a preponderance of the evidence that Appellant defaulted with respect to Modification Two design work in Suite 230. The Appellant testified that it was 100% complete. (*See* Hr'g Tr. vol. 1, 225:14-226:19; 229:17-230:11.) The

COTR noted that Appellant completed 100% of the design work in combined Suites 230 and 400/410. (Appellant's Hr'g Ex. 31, Bates DC 517.) Further, the District's post-hearing brief does not challenge Appellant's performance in Suite 230, including, but not limited to, design work. (*See* Appellee's Post Hr'g Br. 23-26.)

Finally, we conclude that the District did not establish its prima facie case that Appellant defaulted with respect to Modification 2 demolition and wall changes in Suite 230. The Appellant testified that it was 100% complete with demolition and wall changes in Suite 230. (*See* Hr'g Tr. vol. 1, 225:14-226:19; 229:17-230:11; 266:6-267:9.) The Appellant testified that the walls were "done", (Hr'g Tr. vol. 1, 159:3-7), and that demolition was 100% complete. (Hr'g Tr. vol. 1, 266:6-267:6.) The COTR noted that Appellant completed 100% of the demolition and wall changes work under Modification 2. (Appellant's Hr'g Ex. 31, Bates DC 517.) Further, the District's post-hearing brief does not challenge Appellant's performance in Suite 230, including, but not limited to, demolition and wall changes. (*See* Appellee's Post Hr'g Br. 23-26.)

Suites 400/410. As noted herein, the parties' base contract provided that Suites 400/410 would be renovated into adjoining suites composed largely of "traditional office spaces" and at least two pantries. (Appellant's Hr'g Ex. 2, Bates DC 7, DC 9, § 3.3.1.3, DC 62.) Project drawings included with the solicitation depict approximately 50 rooms/offices within the two suites which the base contract and Modification 2 required to be painted. (Appellant's Hr'g Ex. 2, Bates DC 7, DC 62, Appellant's Hr'g Ex. 12, Bates DC 423.) Although the scope for Suites 400/410 were largely similar, the differences were that Suite 400 was to get a new ceiling system including grids, panels and lighting (Hr'g Tr. vol. 1, 77:13-20; *see also* Appellant's Hr'g Ex. 12, Bates DC 423), but that Suite 410 "was to reuse the existing ceiling system" and "reuse the 1 by 4 lights". (Hr'g Tr. vol. 1, 77:21-78:1; *see also* Appellant's Hr'g Ex. 2, Bates DC 7.)

Based upon the record before us, it is clear that Appellant defaulted in Suite 400/410 by failing to complete painting in Suites 400/410 and to properly finish installation of ceiling tiles in Suite 400 by the contract's November 15, 2005, deadline. With respect to painting, the COTR's November 11 punch list for Suites 400/410 included approximately 46 references to poor paint workmanship, including missing accent paint, discoloration, paint drips, dark spots and numerous references to blemished finishes. (Appellee's Hr'g Ex. 42, Bates DC 505-508.) At the hearing, the COTR testified that "it appeared that [the Appellant] had only painted the walls one time because you could see marks where they had marked on the wall." (Hr'g Tr. vol. 4, 594:19-21; Appellee's Hr'g Ex. 42, DC Bates 505.)

Although the Appellant testified that it responded to the COTR's punch list by sending its "people" on site to make corrections "on the spot", (Hr'g Tr. vol. 1, 198:17-199:6, *see also* Hr'g Tr. vol. 2, 366:9-18.), the Appellant admits that it did not complete the painting punch list until December 5, 2005. (*See* Hr'g Tr. vol. 1, 183:6-193:4)(Appellant working to finish paint "smudges" and "miscellaneous" painting required by Modification 2 on December 5, 2005.) Under these circumstances, we conclude that the District met its initial burden to demonstrate that Appellant defaulted in Suites 400/410 by not completing its painting requirement by the November 15, 2005, contract deadline.

With respect to completion of the new ceiling system intended for Suites 400, the record is clear that there were a number of incorrectly cut ceiling tiles as of the contract completion date. In this regard, the COTR testified that the ceiling in Suites 400/410 was only "75%" complete as of December 16, 2005. (Hr'g Tr. vol. 674:9-675:14.) When asked to explain the basis for its "75%" calculation, the COTR (echoing its November 11 punch list), testified, in pertinent part, that the ceiling in Suite 400 had incorrectly cut ceiling tiles and was "sagging" in the hallway. (Hr'g Tr. vol. 4, 607:20-608:4, 674:9-675:10, *see also* Hr'g Tr. vol. 4, 594:14-595:4.) In addition, the COTR's November 11 punch list included numerous entries denoting various ceiling deficiencies, including, but not limited to, multiple entries for incorrectly cut ceiling tiles, and two references to sagging ceilings. (Hr'g Ex. 26, Bates DC 505-508.)

We conclude that these references to incorrectly cut ceiling tiles were not persuasively disputed by the Appellant, whose contemporaneous punch list report acknowledged the deficiency but proposed to correct it by "installing wood trim at the tops of walls". (Appellant's Hr'g Ex. 26, Bates DC 508.) Thus, we conclude that the District met its prima facie burden that Appellant's painting requirement in Suites 400/410 and its requirement to install correctly cut ceiling tiles in Suite 400 were not met by the contract deadline date of November 15, 2005.

We do not believe, however, that Appellant defaulted any other requirements in Suite 400/410. In particular, as we note below, the District has not shown by a preponderance of the evidence that Appellant defaulted its obligations as to wall changes, "sagging" ceilings in Suites 400/410, nor as to misaligned ceiling grids and improper lighting in Suite 410, nor improper sprinkler/fire alarm systems, loose sidelight glass, incomplete plumbing, and/or incorrect pantry finishes in Suites 400/410.

As to wall changes, the record establishes that the COTR and other District officials instructed Appellant to change the size of the individual offices in Suites 400/410 by reconfiguring the walls. (*See* Hr'g Tr. vol. 5, 761:17-764:1.) These wall changes increased the construction of drywall from 900 linear feet in the base contract to 1800 linear feet, and the District never paid for the increase. (Hr'g Tr. vol. 1, 86:7-18, 119:6-13, 121:22-123:1.) The Appellant completed 100% of the wall changes requested by the District. (Hr'g Tr. vol. 2, 267:13-14, Appellant's Hr'g Ex. 1-R, Line 24.) The District has not contested Appellant's assertions that wall changes were requested by it, and completed by the Appellant. (*See* Appellant's Hr'g Ex. 12, Bates DC 423, Items 32-25, 39, 40.) The COTR approved payment in the amount of $12,194 on Appellant's December 14, 2005, invoice for Suites 400/410 wall changes on December 16, 2005. (Appellant's Hr'g Ex. 31, Bates DC 517, DC 955.)

Although the District's evidence (i.e., the COTR's testimony and the COTR's punch list) indicated that there was a single instance of a "sagging hallway" ceiling in Suite 400, (Hr'g Tr. vol. 4, 607:20-608:4, 674:9-675:10, *see also* Hr'g Tr. vol. 4, 594:14-595:4; Appellant's Hr'g Ex. 26, Bates DC 507), and a single instance of a sagging ceiling in room 410B, (Appellant's Hr'g Ex. 26, Bates DC 506), the Appellant noted that it corrected the sagging in room 410B, and explained that the sagging hallway in Suite 400 was the result of "pre-existing ductwork". (Appellant's Hr'g Ex. 26, Bates DC 506, 507.) We find the Appellant's testimony in this regard credible.

The District's evidence (i.e., the COTR's testimony and the COTR's punch list) also indicated that there were multiple alleged instances of ceiling grid misalignment in Suite 410. (Hr'g Tr. vol. 4, 594:14-595:1, 675:11-14); Appellant's Hr'g Ex. 26, Bates DC 505-508.) We conclude that correction of the misaligned ceiling grids was not part of Appellant's scope, but were one of the rippling effects caused by the many District directed wall changes which impacted the alignment of walls to ceilings. Although the Appellant recommended by email dated September 30, 2005, to the COTR that the District remove the existing Suite 410 ceiling grid and install a new one, (Appellant's Hr'g Ex. 10, Bates DC 408, *see also*, Hr'g Tr. vol. 4, 699:17-700:7), there is no record that the District ever responded to the Appellant's recommendation. (*Id*.) We do not find correction of the misaligned ceiling grid problem in Suite 410 to be within Appellant's base or modified contract scope.

With respect to lighting, the District has not shown by a preponderance of the evidence that Appellant defaulted on the lighting scope within Suites 400/410. First, the COTR did not testify to any specific lighting deficiencies in either Suites 400 or 410 at the hearing. Lighting was conspicuously *not* mentioned when the COTR testified to deficiencies which prevented the District from accepting Suites 400/410 on November 18, 2005. (Hr'g Tr. vol. 4, 632:17-635:9.) Although the COTR's November 11 punch list notes a single lighting deficiency ("insufficient" lighting in Suite 410, Room 111), (Appellant's Hr'g Ex. 26, Bates DC 507), the COTR acknowledged that she found the Appellant to have completed 100% of the light replacement task in Suites 400/410. (Hr'g Tr. vol. 4, 667:11-19, Appellee's Hr'g Ex. 49, Bates DC 955), and that the District's furniture vendor had moved furniture into Suites 400/410 and begun its assembly. (Hr'g Tr. vol. 4, 713:12-714:6.) Additionally, the COTR found that the Appellant completed "100%" of the *"construction"* tasks in Suites 400/410; which is a line item that included "lights". (Appellee's Hr'g Ex. 49, Bates DC 516, 955, Hr'g Tr. vol. 4, 670:12-15, 668:16-21.)

With respect to sprinkler and fire alarm systems, the District has not shown by a preponderance of the evidence that Appellant defaulted on any sprinkler and/or fire alarm system contractual requirements. The Appellant has noted that the original District approved construction drawings depicted the sprinkler and fire alarm systems remaining in the existing locations. (Appellant's Hr'g Ex. 26 at Bates DC 508; Hr'g Tr. vol. 1, 203:18-205:5; vol. 5, 755:15-757:5; 784:18-785:15.) The District's sole witness corroborated that the District approved construction drawings providing that existing sprinkler and fire alarm systems were to remain in the same locations. (Hr'g Tr. vol. 4, 695:17-698:5.)

However, once wall construction was reconfigured within Suites 400/410 by the District, it appears that several sprinkler/fire alarm ceiling systems were no longer aligned with office walls.[432] The COTR testified that "there were at least two offices where there were no sprinkler heads present at all…" (Hr'g Tr. vol. 2, 504:12-19.) She also testified that there were "a few offices where the sprinkler head was in the corner of the office rather than in the center of the room". (Hr'g Tr. vol. 4, 595:19-21.) The District's changes to wall configurations in the suites did not, however, create an obligation on Appellant's part to remedy the resulting misaligned

[432] We have noted *infra* that the District COTR requested Appellant to change the placement of walls from what had been depicted on the original space layout. (Hr'g Tr. vol. 1, 86:7-18, 121:22-123:1.)

sprinkler/fire alarm systems at its expense. The District should have approved a change order, and the record does not indicate that such a change order was executed by the parties.

With respect to allegedly loose sidelight doors, the District has not shown by a preponderance of the evidence that Appellant defaulted on its obligation to reuse existing doors and frames in a safe and workmanlike manner. Although the COTR testified that there were approximately four offices in Suites 400/410 that were affected by loose sidelight glass, (Hr'g Tr. vol. 4, 632:17-633:16), her November 11 punch list does not contain a single entry denoting loose, rattling or otherwise potentially dangerous sidelight glass. (Appellant's Hr'g Ex. 26, Bates DC 505-508.) In fact, the COTR's punch list mentions sidelight glass on 12 occasions, but only to denote paint blemishes. (*Id*., 505-507.)

We find less than credible the COTR's testimony that approximately four offices were known by her to be unsafe to District employees, yet she took no decisive action to remedy the apparent danger by placing the alleged sidelight door defects on her punch list. In addition, we note that the COTR was aware that a District vendor moved furniture into Suites 400/410 for the purpose of assembly. (Hr'g Tr. vol. 1, 162:3-163:14.) If the COTR's testimony regarding the allegedly unsafe offices was credible, we believe our record would have shown the COTR, who was described as being on the construction site daily, (Hr'g Tr. vol. 1, 148:14-18), taking steps to prevent the furniture assemblers' exposure to danger as well. We see no such evidence in our record, leading further to our conclusion that the COTR's characterization of loose sidelight glass in Suites 400/410 lacks credibility.

Finally, with respect to plumbing and pantry finishes the District has not shown by a preponderance of the evidence that Appellant defaulted on its contractual obligations as to these two items in Suites 400/410. As regards the plumbing issue, there is no evidence that Appellant did not complete installation of hot and cold water lines, and drainage systems for two pantries as required by Modification 2. The Appellant testified specifically that the plumbing work in Suites 400/410 was complete by October 31, 2005. (Hr'g Tr. vol. 1, 244:20-22, vol. 2, 311:6-22.) The COTR's November 11 punch list does not list any deficiencies related to plumbing work by the Appellant. (Appellant's Hr'g Ex. 26.) In addition, the COTR could not recall at the hearing why she concluded that Appellant's plumbing work was incomplete. (Hr'g Tr. vol. 4, 675:15-676:2.) And although the COTR testified that she recalled "an inspector's report saying that the sink was supposed to empty into a specific pipe, and it didn't", (Hr'g Tr. vol. 4, 676:7-12), the record before the Board does not include such a report, nor did the District introduce such a record into evidence at the hearing.

With respect to pantry finishes (cabinetry), the District also has not shown by a preponderance of the evidence that Appellant defaulted on its contractual obligations. Although the COTR testified that the Appellant should have installed "maple cabinets" and "a certain [slate gray] counter-top", (Hr'g Tr. vol. 4, 588:1-590:3), she conceded that there was no contractual obligation to provide such in either the base contract or Modification 2. (Hr'g Tr. vol. 4, 590:4-594:9; 660:12-661:22, 692:9-693:12.) Thus, Appellant's failure to provide maple cabinets and/or slate gray counter-tops was not grounds for the District to default it as to Suites 400/410.

Suite 480. There is no dispute between the parties that Appellant never commenced performance of any of the construction work in Suite 480, and no dispute that the suite was not completed by the contract deadline (i.e., November 15, 2005). (Hr'g Tr. vol. 1, 144:5-11.) Therefore, unless there is a valid excuse for non-performance, the default termination must be sustained. We address excusability as to Suite 480 below.

Suite 360. We conclude that the District failed to establish its prima facie case that Appellant defaulted in Suite 360. (Hr'g Tr. vol. 4, 615:21-616:1; 616:11-14; 622:1-12; 629:10-15.) Both the Appellant and the COTR agreed that Suite 360 was completed by the contract deadline. (*See, e.g.*, Hr'g Tr. vol. 1, 232:14-16; vol. 4, 615:21-616; 616:11-14; 622:1-12; 629:10-15.)

C. The Appellant's Failure to Complete Suites 230, 400/410 and 480 Was Excusable.

Having established that the Appellant failed to meet the November 15, 2005, contract deadline in Suites 230 (HVAC only), 400/410 (painting and ceiling installation only), and 480 (none of the work commenced prior to termination), we now review whether Appellant's failure was excusable. In pertinent part, the parties' contract provided the following:

> The Contractor's right to proceed shall not be so terminated nor the Contractor charged with resulting damage if:
>
> 1. The delay in the completion the work (sic) arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including but not restricted to acts of God, acts of the public enemy, acts of the District in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the District, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, climatic conditions beyond the normal which could be anticipated, or delays of subcontractors or suppliers arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and such subcontractors or suppliers (the term subcontractors or suppliers shall mean subcontractors at any tier) (…)

(Appellant's Hr'g Ex. 2, Bates DC 31.) In addition to the above, we have noted that once the government establishes its prima facie case, the evidentiary burden shifts to the Appellant to show that its default was excusable in order to avoid termination. *MCI Constructors, Inc.*, CAB No. D-835, 39 D.C. Reg. 4305, 4321-22 (Sept. 27, 1991). In the instant case, we conclude that the Appellant's failure to meet the contract deadline in Suites 230, 400/410 and 480 was excusable.

Suite 230. As we have noted, the record is clear that Appellant failed to have HVAC equipment installed in Suite 230 by the contract's November 15, 2005, deadline. Both the COTR and the Appellant testified that HVAC units had not been installed by the contract deadline. (*See, e.g.*, Hr'g Tr. vol. 4, 599:9-20 (the COTR testified that HVAC units had not been installed by the contract deadline, Hr'g Tr. vol. 1, 248:6-11; 251:6-252:8 (the Appellant acknowledged that it was only "around 60%" complete with HVAC by November 15, 2005).)

The Appellant eventually delivered the HVAC units to Suite 230 and testified that it was 95% complete by December 5, 2005. (Hr'g Tr. vol. 1, 248:6-16.) The Appellant estimated that $5,000 of work remained on this task which it never completed. (Hr'g Tr. vol. 1, 248:6-249:3.) The Appellant never completed HVAC installation because the District would not permit final installation "until the [floor] height issue was resolved". (Hr'g Tr. vol. 1, 256:16-258:6; *see also* Appellant's Hr'g Ex. 27 (e-mail from a contract specialist instructing the Appellant not to install HVACs pending the correction of floor issues)).

We have reviewed the record and conclude that the Appellant's failure to install the Suite 230 HVAC equipment is excused. The record indicates that the District waived its default termination right as to installation of the HVAC by the contract deadline by acquiescing to Appellant's installation of the same after the Thanksgiving holidays. Under the doctrine of waiver, the government waives its right to default terminate a contractor "where the government elects to permit a delinquent contractor to continue performance past a due date … assuming the contractor has not abandoned performance and a reasonable time has expired for a termination notice to be given." *MCI Constructors, Inc.*, 39 D.C. Reg. at 4323 (quoting *DeVito v. U.S.*, 188 Ct. Cl. 979 (1969). "The necessary elements of an election by the non-defaulting party to waive default in delivery under a contract are (1) failure to terminate within a reasonable time after the default under circumstances indicating forbearance, and (2) reliance by the contractor on the failure to terminate and continued performance by him under the contract, with the Government's knowledge and implied or express consent." *MCI Constructors, Inc.*, *supra* at 4324.

As applied instantly, the Appellant testified that the District knew early on that the HVAC units "would not arrive until after Thanksgiving weekend" and agreed to the late arrival. (*See generally* Hr'g Tr. vol. 1, 254:7-20.) The Appellant's testimony appears to be corroborated by a District letter dated November 3, 2005, wherein it consents to Appellant missing the November 15 contract deadline for HVAC:

> The discussion then turned to the heating and cooling systems. Mr. Goel stated that the permanent HVAC system would not be installed until the weekend following Thanksgiving holiday. […] All parties present clearly understood that all suites would be completed per specifications and delivered to the District of Columbia government on or before November 15, 2005, *with the single exception of the HVAC system which was to be instilled over the weekend following the Thanksgiving holiday* (emphasis added).

(Appellee's Hr'g Ex. 33.) Thus, under these circumstances it was appropriate for the Appellant to rely upon the District's representation that it was acceptable to install the HVAC equipment after the contract deadline.

Suites 400/410. We have noted that the COTR's November 11 punch list for Suites 400/410 listed approximately 46 references to poor paint workmanship, including missing accent paint, discoloration, paint drips, dark spots and numerous references to blemished finishes. (Appellee's Hr'g Ex. 42, Bates DC 505-508.) The Appellant admits that it did not complete the painting punch list until December 5, 2005. (*See* Hr'g Tr. vol. 1, 183:6-193:4)(Appellant working to finish paint "smudges" and "miscellaneous" painting required by Modification 2 on

December 5, 2005).) In this regard, the Appellant's testimony went uncontradicted that between November 15, 2005, (the contract deadline) and December 5, 2005, "there was a bunch of on the site walking with Patrick Rivers and [the COTR] going through the punch list and finishing up painting "right there on the spot." (Hr'g Tr. vol. 1, 184:6-194:5, 198:6-200:15.) The COTR's testimony did not dispute that the Appellant completed painting finishes, but differs on the date by which those finishes occurred. The COTR testified that she found the painting in Suite 400 to be "100%" complete as of December 16, 2005 (upon her review of Appellant's December 14 invoice). (Hr'g Tr. vol. 4, 670:12-15.)

Under these circumstances, we find that the District waived its right to default terminate appellant for failure to complete painting within the specified delivery date because (1) the District requested Appellant to continue painting Suites 400/410 after the contract deadline, and (2) the Appellant relied on the District's request for continued completion of the painting punch list after the contract deadline by having its workmen finish up painting "right on the spot". *MCI Constructors, Inc.*, 39 D.C. Reg. at 4324.

As the waiver doctrine is applied to the painting requirement in Suites 400/410, the evidence establishes that the COTR requested the Appellant to complete the painting punch list after the contract deadline and that in reliance thereon, the Appellant sent its employees onsite to finish painting. We believe that the District had a reasonable amount of time to stop Appellant's performance in Suites 400/410 after the missed deadline because the District had already stopped the Appellant's performance in Suite 230 on November 14, 2005. (*See* Appellant's Hr'g Ex. 38 (November 14, 2005, email from District official requests that appellant stop installation cove base and doors in Suite 230 as a result of the raised floor issue).) Had the District so desired, it would only have taken a few minutes to add a sentence to the November 14, 2005, email also directing the Appellant to stop performance in Suites 400/410 as well.

With respect to its ceiling scope in Suite 400, we also conclude that Appellant's failure to install correctly cut ceiling tiles in Suite 400 by the contract deadline was excused. With respect to these ceiling tiles, we conclude that Appellant substantially completed correct installation by November 17, 2005 (two days after the contract deadline). (Appellant's Hr'g Ex. 29, Bates DC 489, *see also* Hr'g Tr. vol. 1, 162:3-163:14, Appellant's Hr'g Ex. 24.) That Appellant completed the correct installation of the ceiling tiles is corroborated by the COTR's approved payment of $5,805 for the ceiling line item on December 16, 2005, and notation that "100%" of the line item was complete. (Appellant's Hr'g Ex. 31, Bates DC 516.)

Suite 480. We have already noted that the District never granted Appellant access to Suite 480. The COTR testified that access to Suite 480 was denied because the District believed it was unsafe to relocate Suite 480 tenants into Suites 400/410 (due to alleged dangerous conditions pertaining to life safety systems and loose sidelight glass in Suites 400/410). (*See e.g.*, Hr'g Tr. vol. 1, 144:9-11, 222:8-18, vol. 2, 502:14-503:14, 503:3-6, vol. 4, 601:19-602:17.) We have reviewed the record and conclude that the Appellant's failure to finish Suite 480 by the contract deadline was excusable because the District never granted access to the suite.

In the cases that we have reviewed where the government denies a contractor access to a construction site during the performance period, the delays or non-performance occasioned

thereby have not been chargeable to the contractor. *See, e.g., Appeal of Dondlinger & Sons Construction Co., Inc.*, ASBCA Nos. 4551, 4503, 58-1 BCA ¶ 1631 (where the government prevents a contractor from gaining access to a construction site until 26 days after issuance of the notice to proceed, the contractor is entitled to 26 delay days instead of the 10 day extension granted by the contracting officer); *Appeal of John R. Glenn*, ASBCA No. 24028, 80-1 BCA ¶ 14428 (where the government's failure to grant contractor access to a construction site results in the contractor's failure to deliver within the specified time and the government waives the deadline, the government cannot thereafter threaten to default terminate the contractor for failure to proceed unless it provides a new and reasonable contract deadline); *Wheatley Associates dba Eagle Constructors*, ASBCA No. 24629, 80-2 BCA ¶ 14,639 (where the government's failure to provide access to a construction site due to the occupancy of a building is a breach of contract terms, a contractor is entitled to an equitable adjustment of time and costs).

The government concedes that it denied Goel access to Suite 480. (Hr'g Tr. vol. 1, 144:9-11, 222:8-18, vol. 2, 502:14-503:14, 503:3-6, vol. 4, 601:19-602:17.) The government's conduct was not authorized by any specific contractual provision to which we have been directed. (Appellant's Hr'g Ex. 2.) In fact, the COTR *acknowledged* that there was no express contract provision which required appellant to complete Suites 400/410 before gaining access to Suite 480. (Hr'g Tr. vol. 4, 638:11-20; 655:11-18.) The COTR even sent an email to appellant during the performance period stating that the desired order of priority did "NOT PRECLUDE WORK FROM OCCURING SIMULTANEOUSLY IN MULTIPLE SUITES". (Appellee's Hr'g Ex. 4, DC 291.) Moreover, Contract Amendment 1 does not mandate a rigid schedule for granting *access* to each of the five suites, but rather a desired order for *completion* of the suites. (*See* Appellant's Hr'g Ex. 3, Bates DC 761.)

In *Dondlinger, supra,* it was noted that:

> "There is something anomalous—to put it mildly—in the proposition that the Government may withhold from a contractor access to the site of its work for a considerable period and then attempt to assert the right to use some of that time for the purpose of termination for default or the collection of damages if the project is not completed on schedule." (*Id*.)

We agree with the reasoning in *Dondlinger, supra*. The government plainly denied Goel access to Suite 480. The parties' contract did not authorize such conduct by the government. Nothing in the contract documents conditioned Goel's access to Suite 480 upon its completion of Suites 400/410. Thus, we conclude that the Appellant's failure to complete Suite 480 instantly was excused by the government's failure to provide access to the suite.[433]

[433] We reject the District's factual representations that Suite 480 tenants were not relocated to Suites 400/410 due to unsafe sidelight glass and fire and safety alarm issues. Our record does not support a finding that sidelight glass in Suites 400/410 was dangerous, or that the District was authorized to compel Appellant to install fire and safety alarm systems absent a change order. (Appellant's Hr'g Ex. 26, Bates DC 505-508) (the COTR's November 11 punch list does not contain a single entry denoting loose, rattling or otherwise potentially dangerous sidelight glass), Hr'g Tr. vol. 4, 695:17-698:5 (the COTR testified that District approved construction drawings which provided that existing sprinkler and fire alarm systems were to remain in the same locations during the renovation).)

Default Termination Was Also An Abuse of Discretion and Arbitrary

A default termination can also be flawed if the government, based upon the circumstances of the case, fails to consider required factors which relate directly to the causes for delay and the consequences of termination before it default terminates a contractor. *MCI Constructors*, 39 D.C. Reg. at 4326. In the instant case, there are two pertinent factors, without limitation, which the contracting officer should have, but failed to consider prior to default termination of the Appellant as found at D.C. Mun. Regs. tit. 27, § 3711.6 (b), 3711.6 (d) (2002):

> (b) The specific failure of the contractor and the excuses for the failure, if any;
>
> (d) The urgency of the need for the goods or services and the period of the time required to obtain them from other sources, as compared with the time for delivery that could be obtained from the delinquent contractor.

(*Id*.) In this case, and for the reasons stated below, we also conclude that the District's default termination of Appellant was an abuse of discretion.

In *MCI Constructors*, *supra*, the District default terminated the Appellant approximately nine months after it failed to complete construction of a wastewater treatment facility by the contract deadline date (January 21, 1988). At the hearing, the evidence showed, in pertinent part, that although the District had itself caused six months of delay, the District failed to perform an analysis regarding delays to the project and the allocability of fault for the delays prior to terminating the contractor as required by § 3711.6 (b).[434] *Id*. at 4327. The evidence in *MCI Constructors*, *supra*, also showed that although the contractor was 96.96% complete with performance at the time of termination, the District failed to "consider and compare the time it would have taken appellant to complete the contract against the time it would have taken another contractor to complete the job" as required by § 3711.6 (d).[435] *Id*. at 4327. The court noted that the appellant was "ready, willing and able" to complete the contract, and that it was arbitrary for the District to default terminate appellant without performing the required analyses to determine the causes of delay and the effect of termination on the time of contract completion. *Id*.

In this case, the District has similarly failed to introduce evidence that the contracting officer analyzed the causes and allocability of fault for delay and the effect of termination on the time of contract completion. The CO's March 16, 2006, termination letter itself provides no analysis of allocability of fault for delays nor consider the effect of termination on the time of contract completion. The District's sole witness, i.e., the COTR, did not offer any testimony as to whether the CO conducted any such analyses prior to termination.[436] The District did not produce the contracting officer as a trial witness. The District also failed to issue a contracting officer's final decision, which arguably may have shed light on whether such analyses took place

[434] The *MCI Constructors* case addressed the precursor to the current §§3711.6 (b) (i.e., the former § 3711.6 (1)). The two provisions are identical.
[435] The *MCI Constructors* case addressed the precursor to the current §§3711.6 (d) (i.e., the former § 3711.6 (2)). The two provisions are identical.
[436] As noted herein, the COTR had testified that she had been "out of the information loop with regard to Goel" as regards termination. (*See* Hr'g Tr. vol. 4, 616:17-617:18.)

prior to termination. Further, the District does not argue in its two post-hearing briefs that such analyses occurred. (Appellee's Post Hr'g Br. 26-29, Appellee's Reply Post Hr'g Br. 7-9.)

In the absence of any supporting evidence by the District to the contrary, the only appropriate conclusion that the Board can reach is that the District failed to establish by a preponderance of the evidence that the contracting officer analyzed the causes and allocability of fault for delays and consideration of the effect of termination on contract completion prior to taking termination action. Absent such evidence, the Board finds that the decision to terminate Appellant's contract for default was an abuse of discretion, and therefore arbitrary.

The District's contention that Appellant has filed "new" claims by arguing that its default termination violated D.C. Mun. Regs. tit. 27, § 3711 is wholly without merit. (Appellee's Reply Post Hr'g Br. 7-8.) While Appellant did not reference § 3711 in its claim to the CO, its reliance on this section is not a "new" claim. As we noted in *Keystone Plus Construction, Corp*. CAB No. D-1358, 2012 WL 554443, the Appellant's proffer of a new legal theory for recovery than the one presented to the CO is not a new claim. *Id*. As applied instantly, the Appellant's reliance on § 3711 does not present a new claim, nor entitle the Appellant to additional damages; it simply provides an additional theory upon which the Appellant may recover on the claim which it has already presented to the CO (i.e., the claim requesting conversion of the default termination into a convenience termination).

II. Appellant's Claims for Unpaid Invoice Amounts

As the District correctly observes in its post-hearing brief, "[t]he burden of proof for costs in a contract action rests with the contractor." (Appellee's Post Hr'g Br. 21 (citing *Abadie v. Org. for Environmental Growth, Inc.*, 806 A.2d 1225, 1227 (D.C. 2002)).) Insofar as is material to the alleged unpaid invoice amounts herein, Appellant submitted three invoices herein. (Appellant's Hr'g Exs. 8, 9, 31.) Appellant prepared the invoices and submitted each to the COTR. (*Id*., Hr'g Tr. vol. 1, 111:2-13, 114:19-115:5-7, 208:8-209:4, 225:14-22.) The invoices were supported by extensive testimony provided by the Appellant (which we cite below), and by invoicing records which it maintained. (Appellant's Hr'g Ex. 38, Hr'g Tr. vol. 2, 319:12-334:4.)

We find the Appellant's testimony and invoicing records credible insofar as they are consistent with the conclusions reached below. We also find that in many instances, as outlined below, the Appellant's testimony and exhibit evidence regarding unpaid invoice amounts was corroborated by the COTR. Thus we reach the following conclusions regarding unpaid invoice amounts due Appellant in this matter.

A. *Suite 230*

1. HVAC Costs

The record supports a finding that the Appellant completed 95% of the HVAC work. The Appellant is entitled to payment of $95,380 for completed HVAC work under its invoice dated December 14, 2005. As regards specific requirements, the Appellant contends that it was

"around 60%" complete with HVAC by November 15, 2005, but had completed 95% of the HVAC either by December 5, 2005, or December 16, 2005. (Hr'g Tr. vol. 1, 248:6-11; 251:6-252:8.) He testified that the four HVAC "up flow" units were on site "after Thanksgiving" and ready for the District to connect to the UPS (uninterrupted power supply) room. (Hr'g Tr. vol. 1, 159:3-11; 169:18-170:21; 249:4-5.) The Appellant further testified that the District would not permit final installation of the cooling units "until the [floor] height issue was resolved". (Hr'g Tr. vol. 1, 17-21; 256:16-258:6; *see also* Appellant's Hr'g Ex. 27 (e-mail from a contract specialist instructing the Appellant not to install HVACs pending the correction of floor issues).) On cross-examination, the COTR conceded that as of December 15, 2005, the only remaining HVAC system work was to move the air cooling units into Suite 230 and connect them. (Hr'g Tr. vol. 4, 685:4-17.) Although the $95,380 sought by Appellant is not specifically requested in the December 14, 2005, invoice, it is within the same set of operative facts as Appellant's March 15, 2007, claim to the CO. The March 15, 2007, claim noted that "[a]t the time of the stop work order, Suite 230 was nearly complete, with approximately only one day worth of work left to be completed in the suite for the final hook up of the mechanical units." (Appellant's Hr'g Ex. 37, Bates DC 67.) The Appellant's near completion of the HVAC task, as conceded by the COTR's testimony on cross-examination and as noted in the March 15 claim letter, was sufficient to place the CO on notice that the $95,380 sought by Appellant herein was within the same operative facts as the lesser HVAC amount billed on December 14, 2005. *See, e.g. Keystone Plus Construction Corp.,* CAB No. D-1358, 2012 WL 55443 (Jan. 27, 2012).

2. Raised Floor

The record supports a finding that Appellant completed 99% of the raised flooring work as required by the contract. The Appellant is entitled to payment of $23,200.65 on its unpaid December 14, 2005, invoice. The Appellant testified that it was 99% complete with the two-inch raised floor. (Hr'g Tr. vol. 1, 246:12-19; 246:21-247:2.) The Appellant testified that the incomplete work consisted of four uninstalled panels. (Hr'g Tr. vol. 1, 168:3-14; 174:1-175:5; *see also* Appellant's Hr'g Ex. 24). This appears to be corroborated by photographs taken by the Appellant on that day, and not disputed by the District, albeit the District contends the raised flooring should have been four inches in height. (*See* Appellant's Hr'g Ex. 24; *see also* Hr'g Tr. vol. 1, 166:20-168:2 (describing the contents of the photographs).) At the hearing, the Appellant contended that it is still owed $23,200.65 for completed raised flooring work. (Appellant's Hr'g Ex. 1-R, Line 25, Hr'g Tr. vol. 1, 245:3-248:2.) Appellant's December 14, 2005, invoice sought payment for raised flooring in the amount of $23,435. (Appellant's Hr'g Ex. 31, Bates DC 954.)

3. Painting

The record supports a finding that Appellant completed 99% of the painting contract work. The Appellant is entitled to $12,719.52 on its December 14, 2005, invoice for this line item. The Appellant testified that it was 99% complete with painting in Suite 230. (Hr'g Tr. vol. 1, 230:18-232:8.) The COTR's testimony was silent regarding whether painting was complete in Suite 230, (Hr'g Tr. vol. 4, 599:9-20; 627:8-629:9), but she did not dispute the matter. The COTR approved payment for $12,205.60 for the painting line item on December 16, 2005, but no payments were ever made to the Appellant.

4. Construction

The record supports a finding that the Appellant completed 99% of the construction work in Suite 230. The Appellant testified that it was 99% complete with construction in Suite 230, but that one door in the suite was uninstalled because the District barred access to the suite. (Hr'g Tr. vol. 1, 232:8-12.) The Appellant contended that it was owed $54,626.22 for construction in Suite 230. (Appellant's Hr'g Ex. 1-R, Line 4.) The COTR's testimony was silent regarding whether construction was complete in Suite 230, but she did testify that "doors … were not hung", and "that [t]here was still construction debris". (Hr'g Tr. vol. 4, 599:9-20; 627:8-629:9.) The COTR approved $11,035.60 for payment on December 16, 2005.

The record denotes that the District paid Appellant a total of $37,245.15 for this line item from previous billings, and retained a total of $4,138. (Appellant's Hr'g Exs. 8, 9, 31, Bates DC 516.) The Board finds that Appellant is entitled to $11,035.60. With the Board's approved payment of $11,035.60 and previous payments already made to Appellant from Invoices Nos. 1 and 2, total payments made under this line item will equal $52,598.95 (including retainage).

5. Architectural Design

The record supports a finding that the Appellant completed 100% of the design work under Modification 2. The Appellant is entitled to $40,000 for the completed design work. The COTR acknowledged that as of December 16, 2005, she found the design work in Suite 230 to be "100%" complete. (Hr'g Tr. vol. 4, 668:5-670:2, 672:5-8.) The COTR approved payment of $40,000 for Appellant's design work on December 16, 2005. (Appellant's Hr'g Ex. 31.)

6. Demolition and Wall Changes

The record supports a finding that the Appellant was 100% complete with demolition and wall changes under Modification 2. The Appellant testified that its work was 100% complete with respect to these tasks, and the COTR did not dispute such testimony. The COTR approved payment in the amount of $2,056 and $6,600, respectively, for demolition and wall changes but these amounts were never paid to Appellant. (Appellant's Hr'g Ex. 31, Bates DC 517.) The Board finds that Appellant completed 100% of the demolition and wall changes work, and is entitled to payment of $2,056 and $6,600 respectively on its December 14, 2005, invoice.

B. *Suites 400/410*

1. Wall Changes

The record supports a finding that the Appellant was 100% complete with the wall changes requested by the District in Suites 400/410, and that it is owed $12,194. (Hr'g Tr. vol. 2, 267:13-14, Appellant's Hr'g Ex. 1-R, Line 24.) The District has not contested Appellant's assertions that wall changes were requested by it, and completed by the Appellant. (*See* Appellant's Hr'g Ex. 12, Bates DC 423, Items 32-25, 39, 40.) The COTR approved payment in

the amount of $12,194 on Appellant's December 14, 2005, invoice for Suites 400/410 wall changes on December 16, 2005. (Appellant's Hr'g Ex. 31, Bates DC 517, DC 955.)

2. Lighting Requirements

The record supports a finding that Appellant completed 100% of its lighting task and is owed $5,050 for its lighting work in Suite 400/410. (Appellant's Hr'g Ex. 1-R, Line 18, Hr'g Tr. vol. 1, 239:10-20.) The COTR acknowledged that she found that Appellant completed 100% of the light replacement task in Suites 400/410. (Hr'g Tr. vol. 4, 667:11-19, Appellee's Hr'g Ex. 49, Bates DC 955.) Additionally, the COTR found that the Appellant completed "100%" of the *"construction"* tasks in Suites 400/410 as of December 16, 2005; which is a line item that included "lights". (Appellee's Hr'g Ex. 49, Bates DC 516, 955, Hr'g Tr. vol. 4, 668:16-21, 670:12-15.) The COTR did not testify to any specific lighting deficiencies in either Suites 400 or 410 at the hearing. Lighting was conspicuously *not* mentioned when the COTR testified to deficiencies which prevented the District from accepting Suites 400/410 on November 18, 2005. (Hr'g Tr. vol. 4, 632:17-635:9.) Finally, the COTR approved Appellant's December 14, 2005, invoice line item for light replacement, finding the work 100% complete and authorizing payment of $5,050. (Appellant's Hr'g Ex. 31.)

3. Ceiling Installation

The record supports a finding that the Appellant is owed $5,805 for the ceiling work in Suite 400. (Appellant's Hr'g Ex. 1-R, Line 17, Hr'g Tr. vol. 1, 235:11-239:7.) The COTR approved payment of $5,805 for the ceiling line item on December 16, 2005, and noted 100% completion. (Appellant's Hr'g Ex. 31, Bates DC 516.) The Board finds that Appellant is owed $5,805 for completion of its ceiling requirements in Suites 400/410.

The Appellant's testimony and previous payment records which it submitted into evidence support a finding that Appellant was previously paid $6,966 for ceiling work from its Invoice No. 1 dated September 19, 2005, (Appellant's Hr'g Ex. 8, Bates DC 946, Appellant's Hr'g Ex. 9, Bates DC 522), and $10,449 for ceiling work from its Invoice No. 2 dated September 30, 2005 (Appellant's Hr'g Ex. 9, Bates DC 522, Appellant's Hr'g Ex. 31, Bates DC 516) (retainage of $1,741.50 withheld). Thus, the remaining amount due Appellant for the ceiling requirement is $5,805.

4. Painting

The record supports a finding that the Appellant is owed $34,568 for completed painting in Suites 400/410. (Appellant's Hr'g Ex. 1-R, Line 11, Appellant's Hr'g Ex. 31, Bates DC 516). The COTR approved payment of $34,568 under Appellant's December 14, 2005, invoice, and noted 100% completion. (Appellant's Hr'g Ex. 31, Bates DC 516, Hr'g Tr. vol. 4, 670:12-15.)

5. Plumbing

The Appellant contends that $23,000 is due for plumbing changes in Suite 400/410. (Appellant's Hr'g 1-R, Line 23, Appellant's Hr'g Tr. vol. 1, 242:11-245:2.) The COTR

approved a $10,000 payment to Appellant under its December 14, 2005, invoice for plumbing work. (Appellant's Hr'g Ex. 31, Bates DC 517.) The Appellant's testimony and payment records which it submitted into evidence support a finding that no payments were made to Appellant for the authorized contract value of $23,000. (*See* Appellant's Hr'g Ex. 12, Bates DC 427, Appellant's Hr'g Ex. 31 Bates DC 954.)

As regards the plumbing issue, there is no evidence that Appellant did not complete installation of hot and cold water lines, and drainage systems for two pantries as required by Modification 2. The Appellant testified specifically that the plumbing work in Suites 400/410 was complete by October 31, 2005. (Hr'g Tr. vol. 1, 244:20-22, vol. 2, 311:6-22.) The COTR's November 11 punch list does not list any deficiencies related to plumbing work by the Appellant. (Appellant's Hr'g Ex. 26.) In addition, the COTR could not recall at the hearing why she concluded that Appellant's plumbing work was incomplete. (Hr'g Tr. vol. 4, 675:15-676:2.) The Board concludes that Appellant completed 100% of the plumbing scope, and is owed $10,000 (the amount of Appellant's December 14, 2005, billing).

6. Construction

Appellant contends that it is also owed $5,269 for construction in Suites 400/410. (Appellant's Hr'g Ex. 31, Bates DC 516, Appellant's Hr'g Ex. 1-R, Line 12.) The COTR disapproved payment for this line item on Appellant's December 14, 2005, invoice by drawing a line through Appellant's payment figure, and handwriting "zero" in its place. (Appellee's Hr'g Ex. 49, Bates DC 953, *see also* Hr'g Tr. vol. 4, 666:11-667:19.) The record denotes that Appellant's construction line item includes both construction services proper (i.e., layout, framing, drywall, sand, doors, ceilings, lighting, mechanical, electrical, and installation of owner provided fixtures), but also the so-called "survey" line item. (Hr'g Tr. vol. 2, 287:11-288:1)

The basis for Appellant's December 14, 2005, invoice for $5,269 in the construction line item is not clear to the Board. The Appellant has neither testified nor introduced hearing exhibits which clarify the basis for the claimed amount. Moreover, the Appellant has not persuaded the Board that the COTR's insertion of "zero" next to this line item on Appellant's December 14, 2005, invoice is incorrect. Although the COTR testified that her review of Appellant's December 14, 2005, invoice found the construction line item in Suite 400/410 to be 100% complete, (Hr'g Tr. vol. 2, 670:12-15), we note that her testimony is in direct conflict with her handwritten rejection of the $5,269 figure on Appellant's December 14, 2005, invoice and note the dearth of testimony from Appellant explaining the basis for this item.

C. *Suite 480*

For the reasons previously stated herein, the Board lacks jurisdiction over Appellant's claim for $25,000 in Suite 480 design costs.

D. *Suite 360*

For the reasons previously stated herein, the Board concludes that we lack jurisdiction over Appellant's claim for $2,728 in unpaid invoices pertaining to Suite 360 construction. The

Board notes that there is no dispute between the parties regarding the timely completion of Suite 360. The COTR testified throughout the proceeding that the District accepted Suite 360 on November 18, 2005. (Hr'g Tr. vol. 4, 615:21-616:1; 616:11-14; 622:1-12; 629:10-15.) The Appellant also testified that Suite 360 was 100% complete. (Hr'g Tr. vol. 1, 232:14-16.) The record supports a finding, however, that Appellant is owed retainage of $4,614.76 herein.

E. *Refrigerators*

The record also supports a finding that the Appellant is entitled to payment of $2,400 for three refrigerators. (Appellant's Hr'g Ex. 31, Bates DC 516, Appellant's Hr'g Ex. 1-R, Line 20.) This line item was included in Appellant's December 14, 2005, invoice to the District. (Appellant's Hr'g Ex. 31, Bates DC 516.) Upon her review of Appellant's invoice, the COTR listed the three refrigerators as "100%" complete, and approved payment in the amount of $2,400. (*Id*.) The COTR also testified that she found the refrigerators to be "100%" complete. (Hr'g Tr. vol. 4, 671:11-19.) We conclude that Appellant completed 100% of this requirement and is entitled to $2,400.

F. *Loads*

Appellant also seeks payment herein for "loads" in the amount of $45,476.58. (Appellant's Hr'g Ex. 1-R, Line 29.) Loads are a contract item authorized by, and pertaining to, Modification 2 only, and consist of overhead, profit, bond premium, and general liability insurance line items. Appellant's load calculation herein is premised upon its contention that it completed 97.10% of Modification 2 requirements, (Appellant's Hr'g Ex. 1-R, Line 29, Hr'g Tr. vol. 1, 265:5-7), as noted below:

Modification 2 Description	Appellant's Testimony on Percentage Completion
Suite 480/Electronic Buzzer	-0-
Suite 360/400/480 Refrigerators	100%
Suite 230 Demolition	100%
Suite 230 Wall Changes	100%
Suites 400/410 Plumbing Changes	98%
Suites 400/410 Wall Changes	100%
Suite 230 Raised Flooring	99%
Suites 230/400/410 Design	100%
Suite 230 HVAC Systems	95%
Miscellaneous	100%

(*See* Hr'g Tr. vol. 1, 265:5-268:8.)

Based upon our review, we conclude that Appellant has completed the following percentages of Modification 2 requirements:

Modification 2 Description	Board's Conclusions on Percentage Completion
Suite 480/Electronic Buzzer	-0-
Suite 360/400/480 Refrigerators	100%
Suite 230 Demolition	100%
Suite 230 Wall Changes	100%
Suites 400/410 Plumbing Changes	100%
Suites 400/410 Wall Changes	100%
Suite 230 Raised Flooring	99%
Suites 230/400/410 Design	100%
Suite 230 HVAC Systems	95%
Miscellaneous	-0-

We therefore conclude that Appellant is entitled to loads based on percentage completions of Modification 2 requirements as determined by the Board. The parties are instructed to recalculate loads in light of the above.

G. *Miscellaneous*

For the reasons previously stated herein, the Board lacks jurisdiction over Appellant's claims for $7,995 in miscellaneous costs under the contract.

H. *Summary*

Based on our review, we conclude that the Appellant is entitled to $261,008.80 as unpaid invoice amounts.

CONCLUSION

For the reasons stated herein, we find that the District failed to establish that the termination for default herein was proper. Therefore, the termination for default is converted into a termination for the convenience of the government. We direct the parties to work in good faith to decide upon termination for convenience costs due under applicable law, and provide the Board with an update within 45 days. We also conclude that Appellant is owed $261,008.80 for unpaid invoice amounts as noted herein, plus the amount determined by the parties to constitute loads herein based on the Board's decision (also to be resolved by the parties and identified for the Board within 45 days), plus the release of retainage, and statutory interest under D.C. Code §2-359.09.

SO ORDERED.

DATED: March 13, 2015

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

CONCURRING:

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

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

TREE SERVICES, INC.	)	
	)	CAB No. P-0982
Solicitation No. DCKA-2014-B-0053	)	

For the Protester: Timothy F. Maloney, Esq., Joseph, Greenwald & Laake, PA. For the District of Columbia Office of Contracting and Procurement: Jon N. Kulish, Esq., Tamar N. Glazer, Esq., Office of the Attorney General. For the Intervenor: Richard L. Moorhouse, Esq., Ryan C. Bradel, Esq., Greenberg Traurig, LLP.

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

ORDER DISMISSING PROTEST

Filing ID #57170404

This protest arises in connection with the District's solicitation for tree pruning services within the District of Columbia and the resulting contract awards for these services. The protester, Tree Services, Inc. t/a Adirondack Tree Experts ("Adirondack" or "protester"), challenges the award decision on the grounds that: (1) there was collusion between the awardees and the District during the evaluation and award decisions evidenced by their identical bids; and (2) the District exercised bias and bad faith against Adirondack in making the two subject contract awards.

The District moves to dismiss this protest, contending that the protester lacks standing to challenge the contract awards because it was the fourth-ranked bidder as a result of the evaluation and, thus, was not "next in line" to receive the contract award. Upon consideration of the merits of the motion for dismissal, the opposition thereto, and the underlying record, the Board finds that the protester lacks standing in this matter. Thus, the Board dismisses the protest for the reasons set forth herein.

FACTUAL BACKGROUND

On July 25, 2014, the District of Columbia Office of Contracting and Procurement, on behalf of the District of Columbia Department of Transportation, Urban Forestry Administration ("UFA"), issued Invitation for Bids No. DCKA-2014-B-0053 (the "IFB"), seeking a contractor to provide tree pruning services within the District (*see* AR Ex. 1, at 2, § B.1), for one base year with an option to extend the term of the contract for up to four, one-year option periods. (AR Ex. 1, at 13, §§ F.1-F.2.1.) The IFB contemplated the award of an indefinite delivery, indefinite quantity contract with firm-fixed unit prices set forth in the contract's Price Schedule.[437] (AR Ex. 1, at 2, § B.1.1.) The District could, but was not obligated to, award multiple contracts to the responsive and responsible bidders with the lowest bids. (AR Ex. 1, at 34, § L.1.2.)

[437] The Price Schedule lists individual Contract Line Items Nos. ("CLINs") for the price of pruning based on the diameter of the tree. (AR Ex. 1, at 42-46, §§ B.4.1-B.4.5.)

Vendors were required to submit bids in response to the IFB by August 15, 2014.[438] (*See* AR Ex. 2, at 1.)[439] Four bidders responded to the IFB in a timely manner: Excel Tree Experts ("Excel"), C&D Tree Services ("C&D"), Kennedy Development ("Kennedy"), and Adirondack. (*See* AR Ex. 7 at 1; AR Ex. 8.) The District found all four bid submissions to be responsive. (AR Ex. 15, at 2, ¶ D.a.)

The IFB stated that the District would evaluate the bids for award purposes by evaluating the total price for the base contract year as well as for all of the option year periods. (AR Ex. 1, at 41, § M.2.) Pursuant to the instructions of the Contracting Officer ("CO"), the Contract Specialist prepared a series of tables (the "Bid Tabulation") to enable the CO to analyze the bid prices of the four bidders. (*See* AR Ex. 7.) According to the Bid Tabulation, the evaluated prices of the four bidders were as follows:

Bidder	Base Year Bid Price	Total Bid Price (with option years)
Excel	$2,219,375.00	$11,246,125.00
C&D	$2,275,000.00	$11,375,000.00
Kennedy	$2,791,875.00	$14,208,750.00
Adirondack	$2,918,125.00	$14,928,750.00

(*See* AR Ex. 7, at 1.)

Thereafter, the Contract Specialist relayed the bid prices to the UFA Associate Director (AR Ex. 8, at 1), who prepared a pricing analysis assessing the price reasonableness of the bids by comparing the bid prices with a government price estimate (the "UFA Estimate").[440] (*See* AR Ex. 9, at 1.) The pricing analysis acknowledged that Excel and C&D's base year bids were only 0.4% and 3.5% higher than the UFA Estimate, respectively, while Kennedy and Adirondack's bids were 25% and 34% higher than the UFA Estimate, respectively. (AR Ex. 9, at 1.) Based upon this evaluation, the UFA Associate Director recommended awarding contracts to Excel and C&D only. (*See* AR Ex. 9, at 1; AR Ex. 16, at 3, ¶ C.2.)

Subsequently, the CO determined that, although all four bids were responsible, Excel and C&D offered the lowest, most reasonable, prices out of all of the four bidders. (*See* AR Ex. 10, at 1, ¶ 4; AR Ex. 11, at 1, ¶ 4.) On the foregoing basis, the CO awarded contracts to Excel and C&D, each in the amount of $2,219,375.00. (*See* AR Ex. 14, at 1.)

[438] The original bid submission closing date was August 5, 2014, but the closing date was extended by Amendment No. 1 due to technical difficulties with the bid submission system. (*See* AR Ex. 2, at 1-2.)
[439] When referring to documents that do not contain consistent internal page numbering (*see, e.g.*, AR Ex. 2), the Board has cited to the actual page count of each document, excluding document cover pages.
[440] The UFA Estimate represented the District's estimate of CLIN prices to be paid pursuant to this IFB. (*See* AR Ex. 9, at 2-6; AR 16, at 2, ¶¶ B.3-B.5.) When developing the UFA Estimate, the UFA Associate Director took into account factors such as budget, previous contract pricing, UFA needs, and overall tree inventory. (AR Ex. 16, at 2, ¶ B.4.) The UFA Estimate was confidential information (*See* AR Ex. 16, at 2, ¶ B.9), and the UFA Associate Director represented that prior to contract award he communicated the UFA Estimate only to the CO and Contract Specialist in this matter. (AR Ex. 16, at 2, ¶ B.6.)

Protest Allegations

The protester filed the instant protest on February 2, 2015, alleging that the two separate contract awards to Excel and C&D were identical in price and, therefore, evidenced that there were improprieties in the procurement process as the protester contends it would be nearly impossible for both bidders to independently arrive at identical bids. (Protest 1-2.) Additionally, the protester contends that the awards were made in bad faith based on bias against Adirondack and in favor of one of the awardees, C&D, given the occurrence of recent events regarding the contracting agency's dealings with the protester.[441] (*See* Protest 2-3.) The initial protest, however, in no way mentioned the propriety of the evaluation or award decision as it related to the third-ranked bidder in the competition, Kennedy.

The District filed a combined Motion to Dismiss and AR, arguing that Adirondack lacks standing to challenge the disputed contracts because it was not "next in line" for the award as the fourth-ranked bidder. (*See* Mot. Dismiss and AR 1.) The District also contends that the underlying protest allegations regarding collusion and bad faith by the District against the protester are without merit. (*See* Mot. Dismiss and AR 1-2.)

In response, the protester contends for the first time that the third-ranked bidder, Kennedy, is not a responsible bidder under the terms of the solicitation and, therefore, is not eligible to receive the contract award. (*See* Comments and Resp. Mot. Dismiss and AR 1-2.) Additionally, the protester's response further expounds upon its initial claims of collusion and bad faith regarding the two awardees. (*See* Comments and Resp. Mot. Dismiss and AR 2-15.)

DISCUSSION

The Board exercises jurisdiction over a protest and its underlying allegations pursuant to D.C. CODE § 2-360.03(a)(1) (2011). Additionally, as a threshold matter, the Board must also consider the District's contention that the Appellant lacks standing in this matter before it may consider the merits of the underlying protest allegations.

For purposes of standing, a protester must be an actual or prospective bidder, offeror, or contractor aggrieved in connection with the solicitation or award of a contract. D.C. CODE § 2-360.08(a). Our rules define an aggrieved person as an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or failure to award a contract, or who is aggrieved in connection with the solicitation of a contract. D.C. Mun. Regs. tit. 27, § 100.2(a) (2002). Indeed, the Board has repeatedly held that a protester must have a direct economic interest in the procurement in order to have standing. *See Wayne Mid-Atlantic*, CAB No. P-0227, 41 D.C. Reg. 3594, 3595 (Aug. 12, 1993); *MTI-RECYC*, CAB No. P-0287, 40 D.C. Reg. 4554, 4561 (Oct. 1, 1992). In this regard, the Board has consistently held that a protester must demonstrate that it was "next in line" to receive the contract in question in order to have a direct economic interest and standing in a protest. *See Certified Learning Ctrs.*, CAB

[441] C&D moved to intervene as an interested party in this matter on February 12, 2015. (Mot. Intervene.) The Board, hereby, grants this request.

No. P-0861, 62 D.C. Reg. 4207, 4208 (Feb. 17, 2011) (dismissing protest because protester was not "next in line" to be one of the multiple awardees whose bids were lower than the protester's bid); *Thomas*, CAB No. P-0579, 46 D.C. Reg. 8618, 8619-20 (May 11, 1999); *Unfoldment*, CAB No. P-0358, 41 D.C. Reg. 3656, 3658-59 (Sept. 17, 1993).

However, a protester that is not "next in line" for a contract award must challenge the evaluation score or bids of any higher ranked, intermediate bidders, to attempt to establish its standing in a protest in order to overcome what would otherwise be a remote interest in the contract award because of a lower-ranking evaluation score. *St. John's Cmty. Servs.*, CAB No. P-0555, 46 D.C. Reg. 8594, 8596 (Mar. 23, 1999) (dismissing protest in part for lack of standing because the third-ranked protester failed to challenge the evaluation and scoring of the second-ranked offeror); *Crawford/Edgewood Managers, Inc.*, CAB No. P-0424, 42 D.C. Reg. 4957, 4961 (Mar. 22, 1995) (finding the fourth-ranked protester failed to challenge the second- and third-ranked offerors and, thus, did not have standing to bring the protest).

As stated herein, in the present competition, the protester was the fourth-ranked bidder as a result of the price evaluation. Thus, undeniably, the evaluator results in this case show that protester was not "next in line" to receive the contract award based strictly upon the evaluation results.

Subsequently, however, in response to the District's motion for dismissal for lack of standing, the protester, for the first time, contends that the third-ranked bidder, Kennedy, in addition to C&D and Excel, was ineligible for the contract award because it was not a responsible bidder according to the terms of the IFB. (Comments and Resp. Mot. Dismiss and AR 1-2.) The protester presumably makes this new assertion for the Board's consideration to attempt to show that it effectively became "next in line" for the contract award given the alleged ineligibility of the first, second and (now) third-ranked bidders. Nevertheless, because the protester in no way challenged Kennedy's eligibility in its initial protest filing, the Board must consider this contention a new supplemental protest ground, which must have also been filed not later than 10 business days after the basis of the protest was known or should have been known by the protester. *See Abadie v. D.C. Contract Appeals Bd.*, 916 A.2d 913, 919-20 (D.C. 2007) (new and independent protest grounds, filed after initial protest, must still satisfy the Board's timeliness requirements).

Here, while the protester makes no statement to establish the timeliness of its new protest ground concerning Kennedy's eligibility as required by our rules, at best, the Board can only assume that this new challenge against Kennedy is made in response to information in the District's February 23, 2015, motion for dismissal showing that Kennedy was the third-ranked bidder ahead of protester for purposes of receiving the contract award. As a result, the protester was required to file this new protest allegation challenging Kennedy's eligibility with the Board no later than March 9, 2015 – 10 business days after the District filed the Motion to Dismiss and AR. However, the protester did not file this supplemental protest ground until March 16, 2015, as part of its Comments and Response to the Motion to Dismiss and AR. This protest ground is, therefore, untimely and, further, cannot be a valid basis to refute the District's standing challenge against the protester. Accordingly, the protester remains without standing to challenge the present award decision as the fourth-ranked bidder in this competition, and the matter is

dismissed.[442] Although mindful that the protester has alleged bias and bad faith conduct herein (Protest 1-3), we deem those allegations insufficient because the protester has not challenged "the integrity of the manner in which the agency officials scored all the offerors" herein. *See CUP Temps, Inc.*, CAB No. P-0474, 44 D.C. Reg. 6841, 6844 (July 3, 1997).

CONCLUSION

For the reasons discussed herein, the Board grants C&D's Motion to Intervene, and finds that the protester lacks standing in this matter. We, therefore, dismiss the protest with prejudice.

SO ORDERED:

DATED: May 1, 2015

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

CONCURRING:

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

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[442] The Board notes, as an aside, that protester previously filed a motion to enlarge the deadline for its response to the Motion to Dismiss and AR from March 4, 2015 until March 16, 2015, which remains pending before the Board. However, even assuming *arguendo* that the Board implicitly granted this motion, this would not alter the statutory deadlines applicable to the protester for filing a new supplemental protest allegation, as the Board is without authority to waive its statutory jurisdictional timeliness requirements. *See Abadie v. D.C. Contract Appeals Bd.*, 916 A.2d 913, 919 (D.C. 2007); *Omega Supply Servs., Inc.*, CAB P-0944 2013 WL 6042889 (Aug. 20, 2013). Thus, the Board's decision on the foregoing motion for an extension of time is of no consequence to the outcome of this decision as it relates to the untimeliness of the protester's new supplemental protest allegation.

OFFICE OF THE SECRETARY OF THE DISTRICT OF COLUMBIA

REQUEST FOR APPLICATIONS

Grant to Promote District of Columbia Self-Determination, Voting Rights, or Statehood

Release Date: Friday, May 15, 2015
Application Due Date: Friday, May 29, 2015 at noon

SECTION 1: FUNDING OPPORTUNITY

The Office of the Secretary of the District of Columbia (OS) hereby invites the submission of applications to provide support for Mayor Muriel E. Bowser's initiatives to achieve self-determination, budget and legislative autonomy, full voting rights in the United States Congress, and, ultimately, statehood for the District of Columbia.

Background

The residents of the District of Columbia serve in the military and pay federal taxes but continue to lack full democracy and the rights that residents of other states and municipalities enjoy, including autonomy from congressional oversight, voting representation in Congress, and statehood.

The District of Columbia Home Rule Act of 1973 provided limited "Home Rule" for the District by allowing election of a Mayor and Council of the District of Columbia. Since then, the District's elected officials and various groups have pursued strategies to raise awareness and work towards achieving voting representation in the U.S. House of Representatives and U.S. Senate and autonomy from congressional oversight. Yet democracy for DC has been derailed by the Charter itself, the courts, non-germane proposals restricting the District on must-pass Congressional legislation, riders on appropriations bills, and insufficient support for enactment of various budget autonomy and statehood proposals in the United States Congress.

For over a decade, the District has allocated funds to nonprofit organizations for educating citizens around the nation and pursuing strategies that highlight the continued lack of full democracy in the nation's capital. In addition, since 1990, District residents have elected a "shadow" delegation to Congress in order to promote statehood, and District residents have voted for, and the Mayor has supported, amending the Charter to allow for budget autonomy.

The Office of the Secretary is charged with responsibility for managing the funds allocated for statehood initiatives for DC residents. The Fiscal Year 2015 Budget authorized $200,000 for the Office of the Secretary to issue competitive grants to promote voting rights and statehood.

Purpose of Program
The objective of this grant is to strengthen support for District representation in Congress and autonomy for the District of Columbia. This will require outreach, canvassing, and measurement of support of elected officials and residents across the country and visitors to the nation's capital. The ultimate goal of this program is that the grantee(s) increase congressional and nationwide support for self-determination for the District of Columbia including, but not limited to, voting rights in Congress, legislative and budget autonomy, and DC statehood.

This program is funded with FY2015 funds, which must be expended by September 30, 2015, with a full accounting provided to the Office of the Secretary no later than December 31, 2015.

SECTION II: AWARD INFORMATION

$200,000 in District funds will be available on a competitive basis.

A. This year, 50% or $100,000.00 of the funds will be awarded on a competitive basis to an organization or organizations dedicated specifically to engaging youth (high school, college students and/or graduate students or other young adults) in civics, government, and/or voting rights in innovative ways by raising awareness through campaigns that include a branding and messaging strategy that include new media, social media and other fresh ideas. Such dedication can be evidenced by the organization's purpose, or through dedicated programming within the organization aimed at youth engagement.

B. The other 50% of the funds will be awarded to a non-profit organization or organizations that engage in general or targeted public education, organizing, or legal strategy to advance DC voting rights and autonomy. The release date of this Request for Applications (RFA) is 14 days after the date the Notice of Funding Availability was published in the DC Register on Friday, May 15, 2015. This grant process conforms to the guidelines established in the District's City-Wide and Sourcebook (which is available at http:1/opgs.dc.gov).

All funds will be disbursed upon award of the grant, with a report and budget accounting required July 30, September 30, and, if not already submitted in September, a final report due no later than December 31, 2015. All proposals must include a detailed description of how the funds will be spent, as well as a project plan. Creative proposals are encouraged.

SECTION III: ELIGIBILITY INFORMATION

Eligibility for this grant is restricted to:

A. Non-profit organizations with a 501(c) (3) certification, a current District of Columbia license, a "Clean Hands" certification that the organization does not owe any money to the District or Federal government, and no outstanding or

overdue final reports for grants received from the District government for similar purposes; and

B. Organizations with a history of advocating for democracy and self-determination for DC including, but not limited to, DC voting rights, legislative and budget autonomy, and/or statehood.

C. Organizations must have a financial track record and cannot be reliant on another organization under a fiscal agent arrangement. Audited financial statements, or other documents listed in Section VI, item 4, must be submitted with the application.

SECTION IV: APPLICATION & SUBMISSION INFORMATION

This Request for Applications is posted at http://os.dc.gov and http://opgs.dc.gov. Requests for copies of this RFA and inquiries may be submitted to: Office of the Secretary of the District of Columbia, 1350 Pennsylvania Avenue, NW, Suite 419, Washington, DC 20004 or secretary@dc.gov, or 202-727-6306.

Application Forms and Content
All applications will be judged against the following requirements:

1. All proposals must be written in clear, concise, and grammatically correct language. Narratives shall not exceed 2,500 words and must include answers to all the requirements specified in this Request for Applications.

2. There is no set form on which applications must be written but brevity and clarity are appreciated.

3. The grant applicant shall focus efforts on education and outreach to residents of the states, not just members of Congress, and funds shall not be used to lobby, directly or through grassroots advocacy, for or against particular pieces of legislation.

4. Grant applicants' efforts shall not consist in large part of paid media advertisements.

5. Proposal must be specific as to how funds will be expended including:
    a. Names of all staff or consultants proposed to work on this program;
    b. Justification of the need for grant funds.
    c. Specific activities for which funds will be used.
    d. Proposed line item budget.
    e. Agreement to submit all deliverables listed in section VI.
    f. Specific performance measures and evaluation plans.

6. All certifications listed in the Application Process section must be included.

Application Process & Requirements

Responses to this Request for Applications shall be submitted via email to secretary@dc.gov or hard copy and disk delivered to the Office of the Secretary, 1350 Pennsylvania Avenue, NW, Suite 419, Washington, DC 20004. Applications delivered to the Office of the Secretary must be date stamped no later than noon on Friday, May 29, 2015.

The following criteria for an application must be met. Applications that do not meet the requirements specified below will be disqualified from consideration:

1. All proposals shall include only written narrative with no additional input (such as DVDs, videos, etc.).

2. All files submitted shall be in any of the following formats: MS Word 2003 or 2007, PDF, MS Excel, HTML, MS Publisher or any format compatible with those formats.

3. Not included in the 2,500 word narrative, but also required are:
   a. the EIN also called Federal Tax ID number of the organization;
   b. the website and main contact information for the organization;
   c. a list of the Board of Directors of the organization (if not listed on the website);
   d. one-paragraph bios of all proposed project staff; and
   e. Web address or copy of the organization's most recent Form 990 submission to the Internal Revenue Service.

4. Copies (or web links thereto) of its most recent and complete set of audited financial statements available for the organization. If audited financial statements have never been prepared due to the size or newness of an organization, the applicant must provide an organizational budget, an income statement (or profit and loss statement), and a balance sheet certified by an authorized representative of the organization, and any letters, filings, etc. submitted to the IRS within the three (3) years before the date of the grant application.

5. Evidence of 501(c) (3) status, a current business license, and copies of any correspondence received from the IRS within the three (3) years preceding the grant application that relates to the organization's tax status (e.g. suspension, revocation, recertification, etc.).

6. Application narrative shall be accompanied by a "Statement of Certification," the Truth of which is attested to by the Executive Director or the Chair of the Board of Directors of the applicant organization, which states:

   a. The individuals, by name, title, address, email, and phone number who are authorized to negotiate with the Office of the Secretary on behalf of the organization;

   b. That the applicant is able to maintain adequate files, records, and can meet all reporting requirements;

c. That all fiscal records are kept in accordance with Generally Accepted Accounting Principles (GAAP) and account for all funds, tangible assets, revenue, and expenditures; that all fiscal records are accurate, complete and current at all times; and that these records will be made available for audit and inspection as required;

d. That the applicant is current on payment of all federal and District taxes, including Unemployment Insurance taxes and Workers' Compensation premiums. This statement of certification shall be accompanied by a certificate from the District of Columbia Office of Tax and Revenue (OTR) stating that the entity has complied with the filing requirements of District of Columbia tax laws and has paid taxes due to the District of Columbia, or is in compliance with any payment agreement with OTR;

e. That the applicant has the demonstrated administrative and financial capability to provide and manage the proposed services and ensure an adequate administrative, performance and audit trail;

f. That the applicant is not proposed for debarment or presently debarred, suspended, or declared ineligible, as required by Executive Order 12549, "Debarment and Suspension," and implemented by 2 CFR 180, for prospective participants in primary covered transactions and is not proposed debarment or presently debarred as a result of any actions by the District of Columbia Contract Appeals Board, the Office of Contracting and Procurement, or any other District contract regulating Agency;

g. That the applicant has the necessary organization, experience, accounting and operational controls, and technical skills to implement the program, or the ability to obtain them;

h. That the applicant has the ability to comply with the required performance schedule, taking into consideration all existing and reasonably expected commercial and governmental business commitments;

i. That the applicant has a satisfactory record performing similar activities as detailed in the award;

j. That the applicant has a satisfactory record of integrity and business ethics (Clean Hands Certificate);

k. That the applicant is in compliance with the applicable District licensing and tax laws and regulations (Clean Hands);

l. That, if the applicant has previously won a similar award from the District of Columbia government, it has submitted all reports due and owing.

m. That the applicant complies with provisions of the Drug-Free Workplace Act;

n. That the applicant meets all other qualifications and eligibility criteria necessary to receive an award under applicable laws and regulations;

o. The applicant agrees to indemnify, defend, and hold harmless the Government of the District of Columbia and its authorized officers, employees, agents, and volunteers from any and all claims, actions, losses, damages, and/ or liability arising out of this grant from any cause whatsoever, including the acts, errors, or omissions of any person and for any costs or expenses incurred by the District on account of any claim therefore, except where such indemnification is prohibited by law; and

p. If any of the organization's officers, partners, principals, members, associates or key employees, within the last three (3) years prior to the date of the application, has:

i. been indicted or had charges brought against them (if still pending) and/or been convicted of (a) any crime or offense arising directly or indirectly from the conduct of the applicant's organization or (b) any crime or offense involving financial misconduct or fraud, or

ii. been the subject of legal proceedings arising directly from the provision of services by the organization. If the response is in the affirmative, the applicant shall fully describe any such indictments, charges, convictions, or legal proceedings (and the status and disposition thereof) and surrounding circumstances in writing and provide documentation of the circumstances.

Timeline

All applications shall be submitted by email to secretary@dc.gov or delivered to the Office of the Secretary, 1350 Pennsylvania Avenue, NW, Suite 419, Washington, DC 20004 no later than Noon on Friday, May 29, 2015. The Office of the Secretary is not responsible for misdirected email or late deliveries.

Terms and Conditions

1. Funding for this award is contingent on the continued funding from the grantor, including possible funding restrictions pursuant to the federal Anti-Deficiency Act, 31 U.S.C. §§ 1341,1342,1349-51, and 1511-1519 (2004); the District Anti-Deficiency Act, D.C. Official Code§§ 1-206.03(e), 47-105, and 47-355.01-355.08 (2001); and Section 446 of the District of Columbia Home Rule Act, D.C. Official Code § 1-204.46 (2001). Nothing in this Request for Applications shall create an obligation of the District in anticipation of an appropriation by Congress and/or the Council of the District of Columbia (the "Council") for such purpose as described herein. The District's legal liability for any payment pursuant to this RFA shall not arise or obtain in advance of the lawful availability of appropriated funds for the applicable fiscal year as approved by Congress and/or the Council, and shall become null and void upon the lawful unavailability of such funds under these or other applicable statutes and regulations.

2. The Office of the Secretary reserves the right to accept or deny any or all applications if the Secretary determines it is in the best interest of the government to do so. The Secretary shall notify the applicant if it rejects that applicant's proposal. The Secretary may suspend or terminate an outstanding RFA pursuant to the policies set forth in the City-Wide Grants Manual and Sourcebook.

3. The Office of the Secretary reserves the right to issue addenda and/or amendments subsequent to the issuance of the RFA, or to rescind the RFA.

4. The Office of the Secretary shall not be liable for any costs incurred in the preparation of applications in response to the RFA. Applicant agrees that all costs incurred in developing the application are the applicant's sole responsibility.

5. The Office of the Secretary may conduct pre-award on-site visits to verify information submitted in the application and to determine if the applicant's facilities are appropriate for the services intended.

6. The Office of the Secretary may enter into negotiations with an applicant and adopt a firm funding amount or other revision of the applicant's proposal that may result from negotiations.

7. To receive an award, the selected grantee shall provide in writing the name of all of its insurance carriers and the type of insurance provided (e.g., its general liability insurance carrier and automobile insurance carrier, workers' compensation insurance carrier, fidelity bond holder (if applicable)), and, before execution of the award, a copy of the binder or cover sheet of their current policy for any policy that covers activities that might be undertaken in connection with performance of the grant, showing the limits of coverage and endorsements. All policies (except the workers' compensation, errors and omissions, and professional liability policies) that cover activities that might be undertaken in connection with the performance of the grant, shall contain additional endorsements naming the Government of the District of Columbia, and its officers, employees, agents and volunteers as additional named insured with respect to liability abilities arising out of the performance of services under the award. The grantee shall require their insurance carrier of the required coverage to waive all rights of subrogation against the District, its officers, employees, agents, volunteers, contractors, and subcontractors.

8. If there are any conflicts between the terms and conditions of the RFA and any applicable federal or local law or regulation, or any ambiguity related thereto, then the provisions of the applicable law or regulation shall control and it shall be the responsibility of the applicant to ensure compliance.

SECTION V: APPLICATION REVIEW INFORMATION

All proposals will be reviewed by a panel selected by the Executive Office of the Mayor (EOM) and may include reviewers from EOM as well as outside reviewers. The ratings awarded each applicant shall be public information and shall be made based on the following criteria:

1. Demonstrated ability to make progress toward increasing nationwide support for DC voting rights, budget autonomy, or full democracy for the District during the grant period: 50%;
2. Specificity and feasibility of proposed activities: 25%;
3. History of effectively supporting democracy and statehood efforts:10%;
4. Specificity of performance measures:15%;

SECTION VI: AWARD ADMINISTRATION INFORMATION

Grant award(s) will be announced on the Office of the Secretary website no later than 5:00 p.m. on Monday, June 8, 2015. Unsuccessful applicants will be notified by email at the address from which the application was sent (unless otherwise specified) prior to the announcement of the winners. Disbursement of grant funds will occur as soon as practicable following the announcement of the selection of the awardee(s).

Deliverables

Project requirements that must be submitted on or before due dates are:

1. A project plan with detailed expense projections for the amount requested. (Due within 15 calendar days of grant award.)

2. Progress reports detailing expenditures to date and summary of work completed shall be due every 90 days from award date, with the final report due December 31, 2015.

3. Expenditure of grant funds before October 1, 2015.

4. A final report provided by the grant recipient(s) no later than December 31, 2015. The close out or final report shall include detailed accounting of all expenditures for each project and summary of work completed under the grant.

SECTION VII: AGENCY CONTACT

All inquiries regarding this Request for Applications should be directed to:

Lauren C. Vaughan
Secretary of the District of Columbia
Office of the Secretary of the District of Columbia
1350 Pennsylvania Avenue, NW, Suite 419
Washington, DC 20004
secretary@dc.gov
202-727-6306