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District of Columbia REGISTER

HIGHLIGHTS

- D.C. Council schedules a public hearing on Bill 21-877, Student Loan Ombudsman Establishment and Servicing Regulation Act of 2016
- D.C. Contract Appeals Board publishes opinions issued between May 22, 2013 and May 1, 2015
- Board of Elections publishes sample ballots for the November General Election
- Department of Health Care Finance notifies public of the proposed amendment to the District of Columbia State Plan for Medical Assistance
- Department of Health announces funding availability for the Teen Pregnancy Program
- Department of Housing and Community Development announces availability of property improvement loans for small multi-family property owners
- Department of Housing and Community Development solicits proposals for the development of Community Facility Projects
- District Department of Transportation establishes operation guidelines for on-street metered parking spaces for persons with disabilities

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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ENROLLED ORIGINAL

A RESOLUTION

21-555

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

July 12, 2016

To confirm the reappointment of Mr. Andrew Aurbach to the Historic Preservation Review Board.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Historic Preservation Review Board Andrew Aurbach Confirmation Resolution of 2016".

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

Mr. Andrew Aurbach
3711 Morrison Street, N.W.
Washington, D.C. 20015
(Ward 3)

as a historian member of the Historic Preservation Review Board, established by Mayor's Order 83-119, issued May 6, 1983 (30 DCR 3031), in accordance with section 4 of the Historic Landmark and Historic District Protection Act of 1978, effective March 3, 1979 (D.C. Law 2-144; D.C. Official Code § 6-1103), for a term to end July 21, 2018.

Sec. 3. The Council of the District of Columbia 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

21-556

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

July 12, 2016

To confirm the reappointment of Ms. Gretchen Pfaehler to the Historic Preservation Review Board.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Historic Preservation Review Board Gretchen Pfaehler Confirmation Resolution of 2016".

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

Ms. Gretchen Pfaehler
709 E Street, N.E.
Washington, D.C. 20002
(Ward 6)

as an architectural historian member of the Historic Preservation Review Board, established by Mayor's Order 83-119, issued May 6, 1983 (30 DCR 3031), in accordance with section 4 of the Historic Landmark and Historic District Protection Act of 1978, effective March 3, 1979 (D.C. Law 2-144; D.C. Official Code § 6-1103), for a term to end July 21, 2018.

Sec. 3. The Council of the District of Columbia 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

21-585

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

September 20, 2016

To confirm the appointment of Mr. Todd A. Lee as the Executive Director of the District of Columbia Housing Finance Agency.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Executive Director of the District of Columbia Housing Finance Agency Todd A. Lee Confirmation Resolution of 2016".

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

Mr. Todd A. Lee
15403 Symondsbury Way
Upper Marlboro, Maryland 20774

as the Executive Director of the District of Columbia Housing Finance Agency, pursuant to section 203 of the District of Columbia Housing Finance Agency Act, effective March 3, 1979 (D.C. Law 2-135; D.C. Official Code § 42-2702.03), to serve at the pleasure of the Board of Directors of the District of Columbia Housing Finance Agency.

Sec. 3. The Council of the District of Columbia shall transmit a copy of this resolution, upon its adoption, to the nominee and to the Board of Directors of the District of Columbia Housing Finance Agency.

Sec. 4. This resolution shall take effect immediately.

ENROLLED ORIGINAL

A RESOLUTION

21-586

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

September 20, 2016

To amend the Rules of Organization and Procedure for the Council of the District of Columbia, Council Period 21, Resolution of 2015 to eliminate the Committee on Business, Consumer, and Regulatory Affairs and transfer jurisdiction of its subject matter and agencies to the Committee of the Whole, to establish the Subcommittee on Local Business Development and Utilities, the Subcommittee on Workforce, the Subcommittee on Consumer Affairs, and the Subcommittee on Boards and Commissions under the Committee of the Whole, to add the Deputy Mayor for Greater Economic Opportunity to the list of agencies that come within the purview of the Committee of the Whole, to add the Department of For-Hire Vehicles and the Department of Energy and Environment to the list of agencies that come within the purview of the Committee on Transportation and the Environment, to eliminate all references to the District of Columbia Taxicab Commission and the District Department of the Environment, and to clarify the reporting requirements for subcommittees; and to amend the Council Period 21 Appointment of Chairperson Pro Tempore, Committee Chairpersons, and Committee Membership Resolution of 2015 to no longer appoint a chairperson and membership of the Committee on Business, Consumer, and Regulatory Affairs, to revise the membership of the Committee on Finance and Revenue and the Committee on Housing and Community Development, and to appoint the chairpersons and members of the Subcommittee on Local Business Development and Utilities, the Subcommittee on Workforce, the Subcommittee on Consumer Affairs, and the Subcommittee on Boards and Commissions.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Council Period 21 Rules of Organization and Procedure and Appointment of Committee Chairpersons and Membership Amendment Resolution of 2016".

Sec. 2. The Rules of Organization and Procedure for the Council of the District of Columbia, Council Period 21, attached and made part of the Rules of Organization and Procedure for the Council of the District of Columbia, Council Period 21, Resolution of 2015, effective January 2, 2015 (Res. 21-1; 62 DCR 493), is amended as follows:

(a) The Table of Contents is amended by striking the phrase "232. COMMITTEE ON BUSINESS, CONSUMER, AND REGULATORY AFFAIRS." and inserting the phrase "232.

COMMITTEE ON BUSINESS, CONSUMER, AND REGULATORY AFFAIRS. [REPEALED].” in its place.

(b) Section 231 (Committee of the Whole) is amended as follows:

(1) Subsection (a) is amended by striking the phrase “government of the District of Columbia;” and inserting the phrase “government of the District of Columbia; matters concerning small and local business development policy; financial literacy; consumer and regulatory affairs; matters related to workforce-development issues; employment and manpower development; apprenticeship; employment services; workforce investment; occupational safety and health; unemployment compensation; disability compensation; the regulation of alcoholic beverages; public utilities; cable television; motion picture and television development; the operation of business-improvement districts (“BIDs”) and oversight of BIDs, but not including the establishment of BIDs; the conduct of Emancipation Day celebrations within the District of Columbia; the regulation of banks and banking activities, securities, and insurance, including private health insurance, but not including the Health Benefit Exchange; captive insurance; risk management; construction codes coordination; condemnation of insanitary buildings;” in its place.

(2) Subsection (e) is amended by adding the following agencies to the list of agencies that come within the purview of the Committee of the Whole, to be inserted in alphabetical order within the existing list:

Alcoholic Beverage Regulation Administration
Apprenticeship Council
Board of Accountancy
Board of Architecture and Interior Designers
Board of Barber and Cosmetology
Board of Condemnation of Insanitary Buildings
Board of Consumer Claims Arbitration for the District of Columbia
Board of Funeral Directors
Board of Industrial Trades
Board of Professional Engineering
Board of Real Estate Appraisers
Captive Insurance Agency
Commission on Fashion Arts and Events
Construction Codes Coordinating Board
Department of Consumer and Regulatory Affairs
Department of Employment Services
Department of Insurance, Securities and Banking
Department of Small and Local Business Development
Deputy Mayor for Greater Economic Opportunity
Disability Compensation Fund
District of Columbia Boxing and Wrestling Commission
Emancipation Commemoration Commission

ENROLLED ORIGINAL

Financial Literacy Council
Occupational Safety and Health Board
Office of Cable Television, Film, Music, and Entertainment
Office of People's Counsel
Office of Risk Management
Office of the Tenant Advocate
Public Access Corporation
Public Service Commission
Real Estate Commission
Unemployment Compensation Fund
Workforce Investment Council.

(3) New subsections (f), (g), (h), and (i) are added to read as follows:

"(f)(1) The Subcommittee on Local Business Development and Utilities, as delegated by the Committee of the Whole, shall be responsible for the regulation of alcoholic beverages; small and local business development; financial literacy; cable television; and motion picture and television development.

"(2) The following agencies come within the purview of the Subcommittee on Local Business Development and Utilities:

"Alcoholic Beverage Regulation Administration
"Department of Small and Local Business Development
"Financial Literacy Council
"Office of Cable Television, Film, Music, and Entertainment
"Office of People's Counsel
"Public Access Corporation
"Public Service Commission

"(g)(1) The Subcommittee on Workforce, as delegated by the Committee of the Whole, shall be responsible for apprenticeship; employment services; workforce investment; occupational safety and health; unemployment compensation; disability compensation; and risk management.

"(2) The following agencies come within the purview of the Subcommittee on Workforce:

"Apprenticeship Council
"Department of Employment Services
"Deputy Mayor for Greater Economic Opportunity
"Disability Compensation Fund
"Occupational Safety and Health Board
"Office or Risk Management
"Unemployment Compensation Fund
"Workforce Investment Council

"(h)(1) The Subcommittee on Consumer Affairs, as delegated by the Committee of the Whole, shall be responsible for captive insurance; consumer and regulatory affairs; construction

codes coordination; condemnation of insanitary buildings; and insurance, securities, and banking.

"(2) The following agencies come within the purview of the Subcommittee on Consumer Affairs:

"Board of Condemnation of Insanitary Buildings
"Captive Insurance Agency
"Construction Codes Coordinating Board
"Department of Consumer and Regulatory Affairs
"Department of Insurance, Securities and Banking
"Office of the Tenant Advocate

"(i)(1) The Subcommittee on Boards and Commissions, as delegated by the Committee of the Whole, shall be responsible for the functions of the boards and commissions enumerated in paragraph (2) of this subsection.

"(2) The following agencies come within the purview of the Subcommittee on Boards and Commissions:

"Board of Accountancy
"Board of Architecture and Interior Designs
"Board of Barber and Cosmetology
"Board of Consumer Claims Arbitration for the District of Columbia
"Board of Funeral Directors
"Board of Industrial Trades
"Board of Professional Engineering
"Board of Real Estate Appraisers
"Commission on Fashion Arts and Events
"District of Columbia Boxing and Wrestling Commission
"Emancipation Commemoration Commission
"Real Estate Commission.".

(c) Section 232 (Committee on Business, Consumer, and Regulatory Affairs) is amended to read as follows:

"232. COMMITTEE ON BUSINESS, CONSUMER, AND REGULATORY AFFAIRS. [REPEALED].

"Repealed.".

(d) Section 238(b) (Committee on Transportation and the Environment) is amended as follows:

(1) Strike the phrase "District Department of the Environment" and insert the phrase "Department of Energy and Environment" in its place.

(2) Strike the phrase "District of Columbia Taxicab Commission" and insert the phrase "Department of For-Hire Vehicles" in its place.

(e) Section 245 (Subcommittees) is amended by striking the phrase "Each bill or resolution reported by a subcommittee shall be referred to its standing committee for a vote and scheduling for the Committee of the Whole" and inserting the phrase "With the exception of

measures primarily pertaining to matters substantially within the purview of the Department of Small and Local Business Development, each bill or resolution reported by a subcommittee shall be referred to its standing committee for a vote and scheduling for the Committee of the Whole. A measure primarily pertaining to matters substantially within the purview of the Department of Small and Local Business Development shall be reported and filed by the Subcommittee on Local Business Development and Utilities in accordance with section 803 and referred to the Committee of the Whole only for the purposes set forth in section 231(c).” in its place.

Sec. 3. The Council Period 21 Appointment of Chairperson Pro Tempore, Committee Chairpersons, and Committee Membership Resolution of 2015, effective January 2, 2015 (Res. 21-2; 62 DCR 1102), is amended as follows:

(a) The long title is amended by striking the word “committee” and inserting the phrase “committee and subcommittee” in its place.

(b) Section 3 is amended as follows:

(1) The lead-in language is amended by striking the word “committee” and inserting the phrase “committee and subcommittee” in its place.

(2) Paragraph (1) is repealed.

(3) Paragraph (3) is amended by striking the phrase “Vincent Orange, and Elissa Silverman” and inserting the phrase “Elissa Silverman, and Robert White” in its place.

(4) Paragraph 5 is amended by striking the phrase “Brianne Nadeau, Vincent Orange, Elissa Silverman, and LaRuby May” and inserting the phrase “LaRuby May, Brianne Nadeau, Elissa Silverman, and Robert White” in its place.

(5) New paragraphs (8), (9), (10), and (11) are added to read as follows:

“(8) The chairperson of the Subcommittee on Local Business Development and Utilities, established by section 231(f) of the Rules, pursuant to section 245 of the Rules, shall be Charles Allen and its members shall be Brianne Nadeau, Elissa Silverman, Brandon Todd, and Robert White.

“(9) The chairperson of the Subcommittee on Workforce, established by section 231(g) of the Rules, pursuant to section 245 of the Rules, shall be Elissa Silverman, and its members shall be Charles Allen, Brianne Nadeau, Brandon Todd, and Robert White.

“(10) The chairperson of the Subcommittee on Consumer Affairs, established by section 231(h) of the Rules, pursuant to section 245 of the Rules, shall be Brianne Nadeau and its members shall be Charles Allen, Elissa Silverman, Brandon Todd, and Robert White.

“(11) The chairperson of the Subcommittee on Boards and Commissions, established by section 231(i) of the Rules, pursuant to section 245 of the Rules, shall be Brandon Todd and its members shall be Charles Allen, Brianne Nadeau, Elissa Silverman, and Robert White.”.

Sec. 4. This resolution shall take effect immediately.

ENROLLED ORIGINAL

A RESOLUTION

21-587

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

September 20, 2016

To declare the existence of an emergency with respect to the need to amend the Child and Youth, Safety and Health Omnibus Amendment Act of 2004 to define "covered child or youth services provider" to include any private entity that is licensed by the District government to provide direct services to children or youth or for the benefit of children or youth.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Child and Youth, Safety and Health Omnibus Emergency Declaration Resolution of 2016".

Sec. 2. (a) Section 658H of the Head Start Act, approved November 19, 2014 (128 Stat. 1990; 42 U.S.C. § 9858f), requires the District of Columbia to provide a process by which an applicant for employment at a child development facility may appeal the results of a criminal background check.

(b) The District already has a process to appeal the denial of an application for employment based on the results of a criminal background check, as established in section 205a of the Child and Youth, Safety and Health Omnibus Amendment Act of 2004 ("CYSHA"), effective April 24, 2007 (D.C. Law 16-306; D.C. Official Code § 4-1501.05a), which provides that the applicant may appeal the denial to the Commission on Human Rights. An applicant is defined therein as "an individual who has filed a written application for employment with a covered child or youth services provider" (D.C. Official Code § 4-1501.02(1)).

(c) However, the current definition of a "covered child or youth services provider" does not capture all child development facilities operating in the District of Columbia. The definition of "covered child or youth services provider" in the CYSHA only includes private entities that contract with the District of Columbia to provide direct services to children and youth. There are hundreds of child care development centers that are private entities that are also licensed by the District government. Based on the federal law, applicants to private child development facilities licensed by the District should also have an appeals process with regard to background checks.

(d) Currently there are 472 licensed child development facilities in the District of Columbia. Of the 472 licensed child development facilities, only 232 are also under a contract with the District government to provide subsidized child care to eligible families.

(e) Therefore, an immediate need exists to amend the definition of "covered child or youth services provider" in the CYSHA to ensure a consistent process for appealing the denial of an application for employment based on the results of a criminal background check in all child development facilities throughout the District of Columbia.

ENROLLED ORIGINAL

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 Child and Youth, Safety and Health Omnibus Emergency Amendment Act of 2016 be adopted after a single reading.

Sec. 4. This resolution shall take effect immediately.

ENROLLED ORIGINAL

A RESOLUTION

21-588

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

September 20, 2016

To declare the existence of an emergency with respect to the need to amend the District of Columbia Election Code of 1955 to allow registered voters who moved within the District of Columbia, but did not notify the District of Columbia Board of Elections of their change of address before the deadline, to vote at the precinct serving their current address.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Election Day Change of Address Emergency Declaration Resolution of 2016".

Sec. 2. (a) Section 7 of the District of Columbia Election Code of 1955, approved August 12, 1955 (69 Stat. 699; D.C. Official Code § 1-1001.07) ("District of Columbia Election Code"), establishes the District of Columbia's voter requirements, including the requirements and deadlines for becoming a qualified elector and where qualified electors may vote.

(b) The Primary Date Alteration Amendment Act of 2014, effective May 2, 2015 (D.C. Law 20-273; 62 DCR 6644), amended section 7(i)(4) (D.C. Official Code § 1-1001.07(i)(4)) of the District of Columbia Election Code to require that voters who have moved within the District but did not notify the District of Columbia Board of Elections of their move before the change of address deadline, prior to being permitted to vote, file a notice of change of address with the District of Columbia Board of Elections at the precinct serving their former residence address during early voting or on election day. The amendment further provided that a voter who files an election day change of address must vote at the precinct serving their former address.

(c) The June 14, 2016, primary election was the first election in which these new requirements were in force. The effect of the change was that many voters were required to return to their old precinct in order to cast a ballot. Although the change in the law was intended to reduce the number of special ballots required to be processed by the District of Columbia Board of Elections, the change has led to voter confusion and does not effectuate the goal of removing barriers to voting.

(d) Early voting for the General Election will take place from October 22, 2016, through November 4, 2016, with Election Day on November 8, 2016. This emergency legislation will allow a voter who moved within the District but failed to provide the District of Columbia Board of Elections a notice of change of address before the deadline, to file a notice of change of address and vote at the precinct serving their new, current address.

ENROLLED ORIGINAL

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 Election Day Change of Address Emergency Amendment Act of 2016 be adopted after a single reading.

Sec. 4. This resolution shall take effect immediately.

ENROLLED ORIGINAL

A RESOLUTION

21-589

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

September 20, 2016

To declare the existence of an emergency with respect to the need to require the Department of Parks and Recreation to issue a grant to an organization providing programming to low-income children at the Fort Dupont Ice Arena.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Fort Dupont Ice Arena Programming Emergency Declaration Resolution of 2016".

Sec. 2. (a) The Fiscal Year 2017 Local Budget Act of 2016, effective July 29, 2016 (D.C. Law 21-142; 63 DCR 8786)("Local Budget Act"), allocated $235,000 in recurring funds to the Department of Parks and Recreation ("the Department") to support programming at the Fort Dupont Ice Arena for low-income children.

(b) The National Park Service transferred jurisdiction of Fort Dupont to the District in 2010. Currently, a nonprofit organization leases and operates the ice rink on the site, offering a variety of programs, one of which provides free figure skating, hockey, and speed skating lessons to low-income children.

(c) Since the passage of the Local Budget Act, it has come to light that the Department lacks grant-making authority, preventing it from distributing the funds allocated to it for programming at the Fort Dupont Ice Arena.

(d) This legislation is necessary to give the Department the authority to issue a grant using the funds allocated for programming at the Fort Dupont Ice Rink. Moving the legislation on an emergency basis will allow the Department to issue the grant at the beginning of Fiscal Year 2017.

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 Fort Dupont Ice Arena Programming Emergency Amendment Act of 2016 be adopted after a single reading.

Sec. 4. This resolution shall take effect immediately.

ENROLLED ORIGINAL

A RESOLUTION

21-590

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

September 20, 2016

To declare the existence of an emergency with respect to the need to amend the District of Columbia Government Quick Payment Act of 1984 to require a change order clause in contracts, and to establish a minimum interest penalty and faster review of claims by contracting officers; to amend the Procurement Practices Reform Act of 2010 to clarify the authority of the Chief Procurement Officer to review contracts of all agencies, allow procurement of facilities maintenance services for certain District-owned buildings, require additional transparency in Council contract summaries, amend requirements for the solicitation and award of privatization contracts, establish restrictions on the performance of inherently governmental functions by contractors, establish an Agency Ombudsman for Contracting and Procurement at District agencies, allow the District to reduce payments to vendors to recoup minor delinquent tax amounts, prohibit certain contacts during source selection, establish contractor past performance as an evaluation criteria during source selection, require a government cost estimate for construction projects, modify surety requirements for construction contracts and non-construction service contracts, clarify the scope of the Contract Appeals Board's review of procurements with regard to business judgment, modify requirements for posting contract information on the Internet, and clarify the rulemaking authority of the Chief Procurement Officer and the Department of General Services; and to amend the Department of General Services Establishment Act of 2011 to clarify the authority of the Department of General Services with regard to the representative program.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Procurement Integrity, Transparency, and Accountability Emergency Declaration Resolution of 2016".

Sec. 2. (a) There exists a need to approve emergency legislation to amend several acts to update the District procurement processes to increase transparency, integrity, and accountability in contracting.

(b) A permanent version of this legislation passed the Council on second reading on July 12, 2016 and was transmitted to Congress for its review on August 24, 2016.

ENROLLED ORIGINAL

(c) Because 2016 is a presidential election year, Congress is likely to have fewer days in session than usual – pushing completion of the congressional review period into late November, or later, depending on Congress's schedule in the lame-duck period after the election.

(d) By making the portions of the permanent bill – other than those that are subject to appropriations – effective immediately, the Council will enable OCP and other agencies to move forward with implementation of the new policies established by the permanent legislation.

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 Procurement Integrity, Transparency, and Accountability Emergency Amendment Act of 2016 be adopted after a single reading.

Sec. 4. This resolution shall take effect immediately.

ENROLLED ORIGINAL

A RESOLUTION

21-591

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

September 20, 2016

To declare the existence of an emergency with respect to the need to provide 80 days for the Real Property Tax Appeals Commission to decide a residential real property case involving a residential real property with 5 or more dwelling units.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Real Property Tax Appeals Commission Review Clarification Emergency Declaration Resolution of 2016".

Sec. 2. (a) There exists an immediate need to approve emergency legislation to provide 80 days for the Real Property Tax Appeals Commission ("RPTAC") to decide a residential real property case involving a residential real property with 5 or more dwelling units at the second level of appeal with RPTAC.

(b) Large multi-family apartment buildings are complex properties that often require the same amount of scrutiny, consideration, and expertise as large commercial buildings.

(c) There were 2,008 second-level appeals filed regarding properties with 5 or more residential units for proposed assessments for Real Property Tax Year 2016. And it is anticipated that RPTAC will receive the same number appeals, if not more, for Real Property Tax Year 2017.

(d) The statutory deadline to file a second-level appeal with RPTAC for Real Property Tax Year 2017 proposed assessments is September 30, 2016.

(e) The statutory deadline for second-level decisions by RPTAC for Real Property Tax Year 2017 proposed assessments is February 1, 2017.

(f) Enacting this legislation on an emergency basis will allow RPTAC sufficient time to review and render a decision that is appropriate and allow for RPTAC to meet its statutory deadlines for the 2017 appeals season, which is for 2017 proposed assessments.

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 Real Property Tax Appeals Commission Review Clarification Emergency Amendment Act of 2016 be adopted after a single reading.

Sec. 4. This resolution shall take effect immediately.

ENROLLED ORIGINAL

A RESOLUTION

21-592

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

September 20, 2016

To declare the existence of an emergency with respect to the need to amend An Act Authorizing the sale of certain real estate in the District of Columbia no longer required for public purposes to extend the time in which the Mayor may dispose of certain District-owned real property, commonly referred to as the Strand Theater, located at 5131 Nannie Helen Burroughs Avenue, N.E., and designated for tax and assessment purposes as Lot 801 in Square 5196.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Extension of Time to Dispose of the Strand Theater Emergency Declaration Resolution of 2016".

Sec. 2. (a) The District owns real property located at 5131 Nannie Helen Burroughs Avenue, N.E., ("Property"). The Property, commonly referred to as the Strand Theater, is currently improved by an abandoned building.

(b) The Council approved the Strand Theater Disposition Approval Resolution of 2009, effective October 6, 2009 (Res. 18-263; 56 DCR 8410) ("Resolution"), authorizing the disposition and development of the Property. The Washington Metropolitan Community Development Corporation ("Developer") was selected in 2008, through a competitive solicitation process, to redevelop the Property. The Disposition and Development Agreement ("DDA") was executed with the District on March 30, 2010 pursuant to the Resolution.

(c) The Developer has worked diligently to create a development program for the Property that will address neighborhood needs of both quality retail and community space, while also incorporating much-needed affordable housing, which was not originally planned for the Property. The Developer was able to achieve this expanded program by working with adjacent property owners to acquire sites to the west and south of the Property, thus significantly expanding the project footprint.

(d) The Property is planned to include approximately 9,000 square feet of commercial space, including 2 retail bays, a small business incubator, and additional community space, and approximately 53,000 square feet of residential space, allowing for approximately 86 for-rent apartments, each of which shall be reserved for a household with an income at or below 60% of Area Median Income ("AMI"), including 28 replacement units for families currently living at Lincoln Heights or Richardson Dwellings ("Project").

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(e) The community, through its advocates, the affected Advisory Neighborhood Commission, and the Ward 7 Councilmember, has expressed support for the revised Project, including the 86 residential units, all 100% of which will be affordable.

(f) The Project is of great importance to the surrounding Deanwood neighborhood and Ward 7 as a whole due to the dire need for additional retail and commercial offerings in the community. Additionally, the 28 replacement units that will be brought online through the Project will prevent the displacement of families currently living at Lincoln Heights or Richardson Dwellings, while allowing the District to clear the portion of the Lincoln Heights site slated for the first round of on-site demolition and redevelopment under the New Communities Initiative.

(g) Prior to transfer of the Property to the Developer, the DDA requires that the following pre-closing obligations must be met: Developer must apply and be approved for a Planned Unit Development, complete construction drawings, apply and secure a building permit from the Department of Consumer and Regulatory Affairs, and secure all financing for the project, including 4% Low Income Housing Tax Credits ("LIHTCs").

(h) The time required to satisfy the conditions precedent to the disposition of the Property in accordance with the DDA extends beyond the date upon which the Mayor's authority to dispose of the property expires under the Extension of Time to Dispose of the Strand Theater Temporary Amendment Act of 2015, effective January 30, 2016 (D.C. Law 21-53; 62 DCR 15593).

(i) The proposed legislation will permit additional time to satisfy the pre-closing obligations and allow for disposition of the Property.

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 Extension of Time to Dispose of the Strand Theater Emergency Amendment Act of 2016 be adopted on an emergency basis.

Sec. 4. This resolution shall take effect immediately.

ENROLLED ORIGINAL

A RESOLUTION

21-594

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

September 20, 2016

To declare the existence of an emergency with respect to the need to institute a moratorium on the construction or operation of any additional automobile paint spray booths in Ward 5; provided, that the moratorium shall not apply to automobile paint spray booths that meet certain operational conditions.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Ward 5 Paint Spray Booth Conditional Moratorium Emergency Declaration Resolution of 2016".

Sec. 2. (a) It is necessary to place a moratorium on the establishment of new and renewed paint spray booths within Ward 5 that do not meet certain standards.

(b) This emergency legislation addresses the immediate and longstanding concerns of residents who are adversely affected by the noxious fumes emanating from already existing paint spray booth operators. Not all operators are in compliance with current law and even those that are, due to the low threshold of certain regulations, persistently pollute the air with such fumes.

(c) There are several pending permit applications in Ward 5 under consideration before the Department of Energy and Environment ("DOEE"). The possible granting of these permits will exacerbate the problem by adding new operators within a ward with an already-high concentration and disproportionate number of such operators.

(d) The effects of the fumes have a negative impact on economic development and property value within the ward as well as the quality of life of its residents.

(e) The Council previously enacted the Air Quality Amendment Act of 2014, effective September 9, 2014 (D.C Law 21-135; 61 DCR 9968). One of the purposes of this law is to combat toxic odors. Even with this, however, the complaints from residents due to such odors caused by paint spray booths remain frequent and steady.

(f) Therefore, the Council passed the Ward 5 Paint Spray Booth Conditional Moratorium Emergency Act of 2015, effective October 27, 2015 (D.C. Act 21-189; 62 DCR 14227), on an emergency basis at the October 6, 2015 legislative meeting. That measure expired on January 25, 2016. The identical temporary version of the bill, the Ward 5 Paint Spray Booth Conditional Moratorium Temporary Act of 2015, effective January 30, 2016 (D.C. Law 21-58; 63 DCR 182), expired on September 11, 2016.

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(g) DOEE adopted emergency regulations on February 9, 2016, that expired on June 8, 2016. DOEE is currently drafting final rulemaking to address this subject matter, but regulations have not yet been adopted.

(h) In order to avoid any lapses in legal authority, the Council must now pass this emergency legislation.

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 Ward 5 Paint Spray Booth Conditional Moratorium Emergency Act of 2016 be adopted after a single reading.

Sec. 4. This resolution shall take effect immediately.

ENROLLED ORIGINAL

A RESOLUTION

21-595

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

September 20, 2016

To declare the existence of an emergency with respect to the need to extend the time allowed for the disposition of District-owned real property, commonly referred to as the R.L. Christian Community Library, located at 1300 H Street, N.E., known for tax and assessment purposes as Lots 97, 98, 99, 100, 101, 102, and 103 in Square 1026; and to amend the term sheet for the disposition of the property.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Extension of Time to Dispose of 1300 H Street, N.E., and Approval of Amended Term Sheet Emergency Declaration Resolution of 2016".

Sec. 2. (a) The District owns real property located at 1300 H Street, N.E. ("Property"), formerly used as one of D.C. Public Library's community library kiosks and known as the R.L. Christian Community Library. The Property, which has been vacant for several years, is located in a neighborhood experiencing rapid increases in home-sale prices and residential and commercial rents.

(b) The Council approved the 1300 H Street, N.E. Disposition Approval Resolution of 2014 (Res. 20-600; 61 DCR 10470) ("Resolution") on September 23, 2014, which was accompanied by a term sheet dated November 27, 2013, authorizing disposition and development of the Property to provide approximately 8,000 square feet of ground floor retail, and approximately 30 to 45 total residential units, of which approximately 20% were to be affordable ("Project").

(c) Since the execution of a Land Disposition Agreement ("LDA") between the District and 1300 H Street NE LLC ("Developer") on December 4, 2014, the Project, as approved by the Resolution, went through the Board of Zoning Adjustment's approval process. One hundred percent schematic plans and 100% construction plans and specifications were completed, and an application for a building permit was submitted to the Department of Consumer and Regulatory Affairs.

(d) In response to increased housing costs in the H Street, N.E. neighborhood and increased Project construction costs for the Developer, the Developer and District subsequently restructured the Project to adapt to the changing needs of the neighborhood. The restructured Project will require that 100% of the residential units be made affordable for very low-income

ENROLLED ORIGINAL

households, *i.e*., those earning incomes at or below 30% of Area Median Income ("AMI"), and low-income households, *i.e.*, those earning incomes at or below 50% of AMI.

(e) Pursuant to section 1(b-1)(6)(A) of 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(b-1)(6)(A)) ("Act"), the Mayor submitted an amended term sheet that includes changes in the manner in which the Property will be conveyed, the consideration to be paid, the development program, the schedule of performance, and the affordable housing requirements for the Project.

(f) The community, through its advocates, the affected Advisory Neighborhood Commission, and the Ward 6 Councilmember, has expressed support for revising the Project and increasing the affordable housing requirements for the Project.

(g) To finance the new all-affordable Project, the Developer has applied for 9% Low Income Housing Tax Credits ("LIHTC") via the Department of Housing and Community Development ("DHCD"). DHCD expects to announce its LIHTC awards in October 2016 or later.

(h) However, the Mayor's authority to dispose of the Property will expire on September 23, 2016, prior to DHCD's announcement of the LIHTC awards.

(i) The required timeline to satisfy the conditions precedent to the disposition of the Property in accordance with the LDA provides for pre-closing obligations that extend beyond the 2-year timeframe authorized by the Resolution pursuant to the Act.

(j) The Council's approval of the emergency legislation extending the disposition authority granted by the Resolution by 6 months and approving the amended term sheet is crucial to the cost-effective development of this Project and to producing additional, much-needed affordable housing. The restructured Project will provide multiple affordable housing benefits, including additional units with deeper levels of affordability than those planned in the original Project, additional units with greater bedroom sizes, including approximately 6 3-bedroom family units, additional units adjacent to multiple modes of public transit, including Priority Corridor Network Metrobus routes and the DC Streetcar, and additional units in the quickly developing H Street N.E. corridor, as well as the surrounding Capitol Hill neighborhood.

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 Extension of Time to Dispose of 1300 H Street, N.E. and Approval of Amended Term Sheet Emergency Amendment Act of 2016 be adopted after a single reading.

Sec. 4. This resolution shall take effect immediately.

ENROLLED ORIGINAL

A RESOLUTION

21-596

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

September 20, 2016

To declare the existence of an emergency with respect to the need to approve the proposed compensation system changes submitted by the Mayor for all Legal Service employees.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Legal Service Employee Compensation System Changes Approval Emergency Declaration Resolution of 2016".

Sec. 2. (a) It has become necessary to adjust the salary schedules for Fiscal Year 2017 for union and non-union employees on the Legal Service salary schedules that were approved pursuant to the Career, Educational, Excepted, Management Supervisory, Legal and Executive Services for Non-Collective Bargaining Unit Employees Compensation System Changes Emergency Approval Resolution of 2013, effective June 18, 2013 (Res. 20-166; 60 DCR 9600).

(b) Section 858 of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1-608.58), requires an annual review of the compensation for employees in the Legal Service to ensure that such employees' salaries are competitive with their federal counterparts. Based on the Mayor's review, the salary schedules approved for Fiscal Year 2017 will need to be adjusted to ensure pay parity and compliance with the statutory mandate.

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 Legal Service Employee Compensation System Changes Emergency Approval Resolution of 2016 be adopted on an emergency basis.

Sec. 4. This resolution shall take effect immediately.

ENROLLED ORIGINAL

A RESOLUTION

21-597

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

September 20, 2016

To approve, on an emergency basis, the proposed compensation system changes submitted by the Mayor for all Legal Service employees.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Legal Service Employee Compensation System Changes Emergency Approval Resolution of 2016".

Sec. 2. Pursuant to sections 858 and 1106 of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code §§ 1-608.58 and 1-611.06), the Council of the District of Columbia approves the proposed compensation system changes for union and non-union employees in the Legal Service as set forth in the following adjusted salary schedules:

ENROLLED ORIGINAL

District of Columbia Government Salary Schedule: Legal Services (Non-union)

Fiscal Year:	2017	*Service Code Definition:*	*Attorneys (includes both OAG and other agencies)*
Effective Date:	10/02/16		
Union/Nonunion:	Non-union	*Affected CBU/Service Code(s):*	XAA A35
Pay Plan/Schedule:	LS (Legal Service)		
Peoplesoft Schedule:	LA0001		
% Increase:	4.84%		
Resolution Number:			
Date of Resolution:			

	Steps										
Grade	*1*	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*	Between Steps
09	$ 55,036	$ 56,871	$ 58,706	$ 60,541	$ 62,376	$ 64,211	$ 66,046	$ 67,881	$ 69,716	$ 71,551	$ 1,835
10	$ 60,612	$ 62,632	$ 64,652	$ 66,672	$ 68,692	$ 70,712	$ 72,732	$ 74,724	$ 76,749	$ 78,764	$ 2,020
11	$ 66,588	$ 68,810	$ 71,032	$ 73,254	$ 75,476	$ 77,698	$ 79,920	$ 82,142	$ 84,364	$ 86,586	$ 2,222
12	$ 79,810	$ 82,472	$ 85,134	$ 87,796	$ 90,458	$ 93,120	$ 95,782	$ 98,444	$ 101,106	$ 103,728	$ 2,662
13	$ 94,915	$ 98,078	$ 101,241	$ 104,404	$ 107,567	$ 110,730	$ 113,893	$ 117,056	$ 120,219	$ 123,335	$ 3,163
14	$ 112,155	$ 115,895	$ 119,635	$ 123,375	$ 127,115	$ 130,855	$ 134,595	$ 138,335	$ 142,075	$ 145,755	$ 3,740
15	$ 131,935	$ 136,331	$ 140,727	$ 145,123	$ 149,519	$ 153,915	$ 158,311	$ 162,707	$ 165,071	$ 168,403	Varies

ENROLLED ORIGINAL

District of Columbia Government Salary Schedule: Legal Services (Union)

Fiscal Year:	2017	*Service Code Definition:*	*Attorneys (includes both OAG and other agencies)*
Effective Date:	10/02/16		
Union/Nonunion:	Non-union	*Affected CBU/Service Code(s):*	BQA A35
Pay Plan/Schedule:	LS (Legal Service)		
Peoplesoft Schedule:	LA0002		
% Increase:	4.84%		
Resolution Number:			
Date of Resolution:			

	Steps										
Grade	*1*	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*	Between Steps
09	$ 55,036	$ 56,871	$ 58,706	$ 60,541	$ 62,376	$ 64,211	$ 66,046	$ 67,881	$ 69,716	$ 71,551	$ 1,835
10	$ 60,612	$ 62,632	$ 64,652	$ 66,672	$ 68,692	$ 70,712	$ 72,732	$ 74,724	$ 76,749	$ 78,764	$ 2,020
11	$ 66,588	$ 68,810	$ 71,032	$ 73,254	$ 75,476	$ 77,698	$ 79,920	$ 82,142	$ 84,364	$ 86,586	$ 2,222
12	$ 79,810	$ 82,472	$ 85,134	$ 87,796	$ 90,458	$ 93,120	$ 95,782	$ 98,444	$ 101,106	$ 103,728	$ 2,662
13	$ 94,915	$ 98,078	$ 101,241	$ 104,404	$ 107,567	$ 110,730	$ 113,893	$ 117,056	$ 120,219	$ 123,335	$ 3,163
14	$ 112,155	$ 115,895	$ 119,635	$ 123,375	$ 127,115	$ 130,855	$ 134,595	$ 138,335	$ 142,075	$ 145,755	$ 3,740
15	$ 131,935	$ 136,331	$ 140,727	$ 145,123	$ 149,519	$ 153,915	$ 158,311	$ 162,707	$ 165,071	$ 168,403	Varies

ENROLLED ORIGINAL

District of Columbia Government Salary Schedule: Legal Supervisory Service (LX)

Fiscal Year:	2017	*Service Code Definition:*	*Legal Service Attorney Managers and Attorneys in the Senior Executive Service (includes both OAG and other agencies)*
Effective Date:	10/02/16		
Union/Nonunion:	Non-union	*Affected CBU/Service Code(s):*	XAA A34
		Occupational Series:	905
Pay Plan/Schedule:	LX (Legal Service)		
Peoplesoft Schedule:	LX0001		
% Increase:	7%		
Resolution Number:			
Date of Resolution:			

Grade	*MINIMUM*	*MIDPOINT*	*MAXIMUM*
LX1	$ 108,478	$ 137,181	$ 165,885
LX2	$ 120,560	$ 151,379	$ 182,196
LX3	$ 134,727	$ 168,214	$ 201,699

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Sec. 3. Applicability.

The proposed compensation system changes shall become effective the first pay period after October 1, 2016.

Sec. 4. Transmittal.

The Council of the District of Columbia shall transmit a copy of this resolution, upon its adoption, to the Mayor and the Director of the Department of Human Resources.

Sec. 5. Fiscal impact statement.

The Council adopts the fiscal impact statement of the Chief Financial Officer as the fiscal impact statement required by section 4a of the General Legislative Procedures Act of 1975, approved October 16, 2006 (120 Stat. 2038; D.C. Official Code § 1-301.47a).

Sec. 6. Effective date.

This resolution shall take effect immediately.

ENROLLED ORIGINAL

A RESOLUTION

21-598

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

September 20, 2016

To declare the existence of an emergency with respect to the need to amend the Police Officer and Firefighter Cadet Programs Funding Authorization and Human Rights Act of 1977 Amendment Act of 1982 to change the age eligibility requirements for the police officer cadet program.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Law Enforcement Career Opportunity Emergency Declaration Resolution of 2016".

Sec. 2. (a) The Metropolitan Police Department ("MPD") engages youth and young adults under 21 years of age in a program to allow them to fulfill the legislative requirements for admission to the Police Academy as a recruit in the MPD.

(b) The cadet program ensures that young adults develop the leadership and analytical thinking skills required to meet the challenges of police officers, given their complex roles as problem-solvers, service providers, and professionals in the criminal justice system. The cadet program pays for the costs of earning the college credit hours required to join MPD at the University of the District of Columbia.

(c) Raising the age of eligibility will ensure that a steady stream of District young adults have the education necessary to join the MPD.

(d) Raising the maximum age for police cadet program participants from 20 to 24 years would support more District residents on a pathway to the middle class through stronger career opportunities.

(e) There exists an immediate need to change the age eligibility requirements for the cadet program to expand employment and educational opportunities for qualified District residents.

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 Law Enforcement Career Opportunity Emergency Amendment Act of 2016 be adopted after a single reading.

Sec. 4. This resolution shall take effect immediately.

ENROLLED ORIGINAL

A RESOLUTION

21-599

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

September 20, 2016

To declare the existence of an emergency with respect to the need to amend the Retired Police Officer Redeployment Amendment Act of 1992 to authorize the Chief of the Metropolitan Police Department to pay Metropolitan Police Department police officers who retired at a rank other than Officer and who are rehired a salary of not more than the salary paid for specified service steps.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Senior Law Enforcement Officer Emergency Declaration Resolution of 2016".

Sec. 2. (a) In 1989 and 1990, the District hired more than 1,000 Metropolitan Police Department ("MPD") officers in an 18-month period. Those officers who are still on the force have become eligible to retire at the same time.

(b) By the end of Fiscal Year 2016, almost half of the MPD's command staff, one in 4 lieutenants, and one in 5 sergeants and detectives will be eligible to retire.

(c) There exists an immediate need to provide the Chief of the MPD with incentives to retain veteran, experienced MPD officers due to the challenges resulting from the retirement bubble.

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 Senior Law Enforcement Officer Emergency Amendment Act of 2016 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

B21-889 Campus Sexual Assault Victims Assistance Act of 2016

Intro. 9-20-16 by Councilmember Bonds and referred to the Committee on Judiciary

B21-890 Uniform Electronic Legal Material Act of 2016

Intro. 9-21-16 by Councilmember McDuffie and referred sequentially to the Committee on Judiciary and then to the Committee of the Whole

PROPOSED RESOLUTIONS

PR21-904 South Dakota Avenue Riggs Road Excess Property Surplus Declaration Approval Resolution of 2016

Intro. 9-16-16 by Chairman Mendelson at the request of the Mayor and referred to the Committee on Transportation and the Environment

PR21-905	South Dakota Avenue Riggs Road Excess Property Disposition Approval Resolution of 2016 Intro. 9-16-16 by Chairman Mendelson at the request of the Mayor and referred to the Committee of the Whole
PR21-906	Capitol Vista Surplus Declaration and Approval Resolution of 2016 Intro. 9-16-16 by Chairman Mendelson at the request of the Mayor and referred to the Committee on Transportation and the Environment
PR21-907	Capitol Vista Disposition Approval Resolution of 2016 Intro. 9-16-16 by Chairman Mendelson at the request of the Mayor and referred to the Committee of the Whole
PR21-908	Bruce Monroe Surplus Declaration and Approval Resolution of 2016 Intro. 9-16-16 by Chairman Mendelson at the request of the Mayor and referred to the Committee on Transportation and the Environment
PR21-909	Bruce Monroe Disposition Approval Resolution of 2016 Intro. 9-16-16 by Chairman Mendelson at the request of the Mayor and referred to the Committee of the Whole
PR21-910	Director of the Office of Returning Citizens Affairs Brian Ferguson Confirmation Resolution of 2016 Intro. 9-20-16 by Chairman Mendelson at the request of the Mayor and referred to the Committee on Judiciary
PR21-911	Director of the Office of Veterans Affairs Ely S. Ross Confirmation Resolution of 2016 Intro. 9-20-16 by Chairman Mendelson at the request of the Mayor and referred to the Committee on Housing and Community Development

PR21-912	Director to End Homelessness Kristy Greenwalt Confirmation Resolution of 2016 Intro. 9-23-16 by Chairman Mendelson at the request of the Mayor and referred to the Committee of the Whole

COUNCIL OF THE DISTRICT OF COLUMBIA
SUBCOMMITTEE ON WORKFORCE
NOTICE OF PUBLIC HEARING
1350 Pennsylvania Avenue, NW, Washington, DC 20004

CHAIRPERSON ELISSA SILVERMAN
COMMITTEE OF THE WHOLE
SUBCOMMITTEE ON WORKFORCE

ANNOUNCES A PUBLIC HEARING

on

Bill 21-120, Wage Theft Prevention Clarification and Overtime Fairness Amendment Act of 2015

Bill 21-711, Wage Theft Prevention Revision Amendment Act of 2016

on

Wednesday, October 26, 2016
10:00 a.m., Hearing Room 412, John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Councilmember Elissa Silverman, Chairperson of the Subcommittee on Workforce, announces a public hearing before the Subcommittee on Bill 21-120, the "Wage Theft Prevention Clarification and Overtime Fairness Amendment Act of 2015" and Bill 21-711, the "Wage Theft Prevention Revision Amendment Act of 2016." The hearing will be held at 10:00 a.m. on Wednesday, October 26, 2016, in Room 412 of the John A. Wilson Building.

The purpose of **Bill 21-120** is, among other things, to clarify that the Attorney General and certain membership organizations can bring civil enforcement actions in court, to revise criminal penalties for noncompliance, to remove the overtime exemption of parking lot and garage attendants from District overtime laws to maintain consistence with federal overtime law, to clarify language access requirements for notices provided by employers, to require overtime exempt employees to be paid at least once rather than at least twice a month, and to clarify the remedies and procedures available to those who claim employers are noncompliant with this legislation.

The purpose of **Bill 21-711** is, among other things, to clarify that the Office of Administrative Hearings has jurisdiction over all administrative hearings in wage theft cases, to require all bona fide administrative, executive, and professional employees be paid at least once rather than at least twice a month, to revise criminal penalties for noncompliance, to clarify and amend business recordkeeping protocols and access, to amend the minimum wage law notice requirements, and to put lower limits on the amount of attorney fees that a prevailing plaintiff may be awarded.

Those who wish to testify before the Subcommittee are asked to contact Ms. Charnisa Royster at croyster@dccouncil.us or (202) 724-7772 by close of business Monday, October 24,

2016, to provide your name, address, telephone number, organizational affiliation and title (if any), as well as the language of oral interpretation, if any, they require. Those wishing to testify are encouraged, but not required, to submit 15 copies of written testimony. Those representing organizations will have five minutes to present their testimony, and individuals will have three minutes to present their testimony; less time will be allowed if there are a large number of witnesses. A copy of the legislation can be obtained through the Legislative Services Division of the Secretary of the Council's office or on http://lims.dccouncil.us.

If you are unable to testify at the hearing, written statements are encouraged and will be made a part of the official record. Written statements should be submitted by email to Ms. Royster at croyster@dccouncil.us or mailed to the Subcommittee on Workforce, Council of the District of Columbia, Suite 408 of the John A. Wilson Building, 1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004. The record will close at 5:00 p.m. on October 31, 2016.

COUNCIL OF THE DISTRICT OF COLUMBIA
SUBCOMMITTEE ON LOCAL BUSINESS DEVELOPMENT AND UTILITIES
NOTICE OF PUBLIC HEARING
1350 Pennsylvania Avenue, NW, Washington, DC 20004

COUNCILMEMBER CHARLES ALLEN, CHAIRPERSON
COMMITTEE OF THE WHOLE: SUBCOMMITTEE ON LOCAL BUSINESS DEVELOPMENT AND UTILITIES

ANNOUNCES A PUBLIC HEARING ON

Bill 21-0151, "Prohibition of the Sale of Powdered Alcohol Amendment Act of 2015"

Bill 21-0829, "Sale to Minors Penalty Clarification Amendment Act of 2016"

Bill 21-0849, "Omnibus Alcoholic Beverage Regulation Amendment Act of 2016"

and

Proposed Resolution 21-0879, "Technical Amendment Approval Resolution of 2016"

on

Monday, October 17, 2016, 11 a.m.
Council Chamber, John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Councilmember Charles Allen, Chairperson of the Subcommittee on Local Business Development and Utilities, announces a public hearing on **B21-0151**, the "Prohibition of the Sale of Powdered Alcohol Amendment Act of 2015"; **B21-0829**, the "Sale to Minors Penalty Clarification Amendment Act of 2016"; **B21-0849**, the "Omnibus Alcoholic Beverage Regulation Amendment Act of 2016"; and **PR21-0879**, the "Technical Amendment Approval Resolution of 2016". The hearing will be held at 11:00 a.m. on Monday, October 17, 2016 in room 500 of the John A. Wilson Building.

The stated purpose of **B21-0151** is to prohibit the sale of powdered alcoholic beverages for consumption or use with any combination with water or any other substance. The stated purpose of **B21-0829** is to clarify the penalties for sale of alcohol to minors violations and for the failure to ascertain the legal drinking age violations. The stated purpose of **B21-0849** is to make numerous technical and substantive amendments to many sections within Title 25 of the D.C. Official Code, including changes to permit full-service grocery stores to sell growlers of wine; create a new bed and breakfast liquor license; and permit manufacturers to apply for entertainment, sidewalk café, and summer garden endorsements, among other proposals. The stated purpose of **PR21-0879** is to approve proposed rules of the Alcoholic Beverage Control Board that make technical amendments to Title 23 of the D.C. Municipal Regulations.

The Subcommittee invites the public to testify. Those who wish to testify are asked to contact Ms. Jamie Gorosh, Legal Fellow with the Subcommittee on Local Business Development and Utilities, via email at jgorosh@dccouncil.us or at (202) 741-0929 to provide your name, address, telephone number, organizational affiliation and title (if any), by close of business Thursday, October 13, 2016. Persons wishing to testify are encouraged to bring 15 copies of written testimony to the hearing. If electronic testimony is submitted by the close of business on October 14, 2016 the testimony will be distributed to Councilmembers before the hearing. Witnesses should limit their testimony to four minutes; less time will be allowed if there are a large number of witnesses. A copy of the legislation can be obtained through the Legislative Services Division of the Secretary of the Council's office or at http://lims.dccouncil.us.

If you are unable to testify at the hearing, written statements are encouraged and will be made a part of the official record. Written statements should be submitted to jgorosh@dccouncil.us or to the Subcommittee on Local Business Development and Utilities, 1350 Pennsylvania Avenue, N.W., Suite 406, Washington, D.C. 20004. The record will close at 5:00 p.m. on October 24, 2016.

COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE OF THE WHOLE
NOTICE OF PUBLIC HEARING
1350 Pennsylvania Avenue, NW, Washington, DC 20004

CHAIRMAN PHIL MENDELSON
COMMITTEE OF THE WHOLE
ANNOUNCES A PUBLIC HEARING

on

Bill 21-469, William H. Jackson Way Designation Act of 2015

Bill 21-476, Walter Way Designation Act of 2015

Bill 21-765, McGill Alley Designation Act of 2016

And

Bill 21-788, Janice Wade McCree Way Designation Act of 2016

on

Tuesday, November 8, 2016
12:30 p.m., Hearing Room 412, John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Council Chairman Phil Mendelson announces a public hearing before the Committee of the Whole on Bill 21-469, the "William H. Jackson Way Designation Act of 2015"; Bill 21-476, the "Walter Way Designation Act of 2015"; Bill 21-765, the "McGill Alley Designation Act of 2016"; and Bill 21-788, the "Janice Wade McCree Way Designation Act of 2016." The hearing will be held at 12:30 p.m. on **Tuesday, November 8, 2016** in Hearing Room 412 of the John A. Wilson Building.

The stated purpose of **Bill 21-469** is to symbolically designate the 100 block of Rhode Island Avenue, N.W., as William H. Jackson Way. The stated purpose of **Bill 21-476** is to designate the alleyway that runs east and west in Square 756, between Massachusetts Avenue, N.E., and C Street, N.E. in Ward 6 as Walter Way in recognition of the family that owned the William Walter's Son Carriage Repository and Coach Shop in that alleyway at the turn of the century. The stated purpose of **Bill 21-765** is to designate the alley in Square 376, parallel to F Street, N.W. and G Street, N.W. between 9th Street, N.W. and 10th Street, N.W., in Ward 2, as McGill Alley. The stated purpose of **Bill 21-788** is to symbolically designate the 700 block of 24th Street, N.E., in Ward 5, as Janice Wade McCree Way.

Those who wish to testify are asked to email the Committee of the Whole at cow@dccouncil.us, or call Sydney Hawthorne, Legislative Counsel at (202) 724-7130, and to provide your name, address, telephone number, organizational affiliation, and title (if any) by close of business **Friday, November 4, 2016.** Persons wishing to testify are encouraged, but not required, to submit 15 copies of written testimony. If submitted by the close of business on November 4, 2016 the testimony will be distributed to Councilmembers before the hearing. Witnesses should limit their testimony to four minutes; less time will be allowed if there are a

large number of witnesses. Copies of the legislation can be obtained through the Legislative Services Division of the Secretary of the Council's office or on http://lims.dccouncil.us.

If you are unable to testify at the hearing, written statements are encouraged and will be made a part of the official record. Written statements should be submitted to the Committee of the Whole, Council of the District of Columbia, Suite 410 of the John A. Wilson Building, 1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004. The record will close at 5:00 p.m. on Monday, November 21, 2016.

COUNCIL OF THE DISTRICT OF COLUMBIA
SUBCOMMITTEE ON BOARDS & COMMISSIONS
NOTICE OF PUBLIC HEARING
1350 Pennsylvania Avenue, NW, Washington, DC 20004

COUNCILMEMBER BRANDON TODD, CHAIRPERSON
COMMITTEE OF THE WHOLE: SUBCOMMITTEE ON BOARDS & COMMISSIONS
ANNOUNCES A PUBLIC HEARING

on

Bill 21-0541, Accountancy Practice Act of 2015

and

B21-279, Professional Engineers Licensure and Regulation Clarification Act of 2015

on

Monday, October 17, 2016
10:00 a.m., Hearing Room 123, John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Councilmember Todd, Chairperson of the Subcommittee on Boards & Commissions, announces a public hearing before the Subcommittee on Bill 21-0541, the "Accountancy Practice Act of 2015" and Bill 21-279 the "Professional Engineers Licensure and Regulation Clarification Act of 2015." The hearing will be held at 10:00 a.m. on Monday, October 17, 2016 in room 123 of the John A. Wilson Building.

The stated purpose of Bill 21-0541,the "Accountancy Practice Act of 2015"is to update the laws on the practice of accountancy. Among other things it, revises eligibility requirements for licensure, eliminating residency and place of employment restrictions. It clarifies licensure requirements for certified public accountant (CPA) firms that provide attestation services. It also expands the range of disciplinary action that may be imposed on firms of certified public accountants that are permitted to operate in the District of Columbia.

The stated purpose of Bill 21-279, the "Professional Engineers Licensure and Regulation Clarification Act of 2015" is to repeal D.C. Official Code § 47-2886.01 through 47-2886.16 to prevent confusion in the licensing and regulation of Professional Engineers in the District of Columbia.

Those who wish to testify are asked to email Special Assistant Faye Caldwell at fcaldwell@dccouncil.us, or call at (202) 727-6683, and to provide your name, address, telephone number, organizational affiliation and title (if any) by close of business Wednesday, October 12, 2016. Persons wishing to testify are encouraged, but not required, to submit 15 copies of written testimony. If submitted by the close of business on Wednesday 12, 2016 the testimony will be distributed to Councilmembers before the hearing. Witnesses should limit their testimony to four minutes; less time will be allowed if there are a large number of witnesses. A copy of the

legislation can be obtained through the Legislative Services Division of the Secretary of the Council's office or on http://lims.dccouncil.us.

If you are unable to testify at the hearing, written statements are encouraged and will be made a part of the official record. Written statements should be submitted to the Committee of the Whole, Council of the District of Columbia, Suite 119 of the John A. Wilson Building, 1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004. The record will close at 5:00 p.m. on October 20, 2016.

COUNCIL OF THE DISTRICT OF COLUMBIA
SUBCOMMITTEE ON CONSUMER AFFAIRS
NOTICE OF PUBLIC HEARING
1350 Pennsylvania Avenue, NW, Washington, DC 20004

CHAIRPERSON BRIANNE K. NADEAU
COMMITTEE OF THE WHOLE
SUBCOMMITTEE ON CONSUMER AFFAIRS
ANNOUNCES A PUBLIC HEARING

on

B21-610, The Risk-Based Capital Amendment Act of 2016;

B21-656, Relocation Expenses Recoupment and Lien Authority Amendment Act of 2016;

B21-742, Charitable Solutions Relief Amendment Act of 2016;

B21-766, Secondhand Games and Puzzles Regulation Amendment Act of 2016

B21-862, Department of Consumer and Regulatory Affairs Community Partnership Amendment Act of 2016

and

B21-877, Student Loan Ombudsman Establishment and Servicing Regulation Act of 2016;

on

Thursday, October 20, 2016
9:00 a.m., Hearing Room 500, John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Councilmember Brianne K. Nadeau, Chairperson of the Subcommittee on Consumer Affairs, announces a public hearing before the Subcommittee on Consumer Affairs on B21-610, "The Risk-Based Capital Amendment Act of 2016"; B21-656, "Relocation Expenses Recoupment and Lien Authority Amendment Act of 2016"; B21-742, "Charitable Solutions Relief Amendment Act of 2016"; B21-766, "Secondhand Games and Puzzles Regulation Amendment Act of 2016;" B21-862, "Department of Consumer and Regulatory Affairs Community Partnership Amendment Act of 2016," and B21-877, "Student Loan Ombudsman Establishment and Servicing Regulation Act of 2016." The hearing will be held at 9:00 a.m. on Thursday, October 20, 2016 in room 500 of the John A. Wilson Building.

The stated purpose of Bill 21-610, The Risk-Based Capital Amendment Act of 2016," is to enable the District to retain its accreditation with the National Association of Insurance Commissioners ("NAIC") by conforming to key, nationally accepted risk-based capital standards. NAIC changed the trigger point for the Risk-Based Capital trend test for life insurers from 2.5 to 3.0. This legislation will also ensure that fraternal benefit societies (any insurance

company licensed under the Fraternal Benefit Societies Act of 1998) in the District are subject to the District's risk-based capital requirements.

The stated purpose of Bill 21-656, the "Relocation Expenses Recoupment and Lien Authority Amendment Act of 2016," is to give the District the collection authority to recoup the cost of emergency housing assistance provided for displaced tenants**,** where the housing provider has not satisfied their obligations regarding maintenance of the rental accommodation. The legislation establishes the Emergency Housing and Relocation Assistance Fund ("Fund"), which is a special fund, to be administered by the Office of the Tenant Advocate, to collect revenue from the fines, penalties, interest, charges, and costs collected pursuant to the Act. The Fund shall be used to offset the costs of providing emergency housing and relocation assistance. The bill also specifies the assessment of expenses for recoupment, the required notice of the expenses to the owner, how the owner may contest liability for the expenses, and how the District shall impose liens to collect unpaid amounts.

The stated purpose of Bill 21-742, the "Charitable Solutions Relief Amendment Act of 2016," is to authorize the Mayor, in place of the Council, through regulations, to prescribe the terms and conditions under which charitable solicitations may be exempted from the certificate of registration requirement. This legislation also increases the maximum exemption amount from $1,500 to $25,000. Exorbitant registration fees can be prohibitive for small community based or neighborhood non-profits. B21-742 will support the District's smaller non-profits to grow as they serve numerous charitable purposes in the District.

The stated purpose of Bill 21-766, the "Secondhand Games and Puzzles Regulation Amendment Act of 2016," is to exempt businesses that sell secondhand puzzles, non-electronic games, or game pieces from being required to obtain a secondhand dealer license.

The stated purpose of Bill 21-862, the "Department of Consumer and Regulatory Affairs Community Partnership Amendment Act of 2016," is to create an exemption from the requirement to obtain a basic business license for businesses with de minimus business activity. It also requires that landlords register a 24-hour contact number with the agency and post that number in a common area or in each unit for rent. Further, the bill protects District homeowners against higher vacant property tax rates by ensuring that only the owner of record, or an authorized agent, may register the property as vacant. A passerby's report of a suspected vacant property will be required to go through a standard complaint and inspection process before a homeowner receives an increased tax bill.

The stated purpose of Bill 21-877, the "Student Loan Ombudsman Establishment and Servicing Regulation Act of 2016," is to establish a Student Loan Ombudsman ("Ombudsman") within the Department of Insurance, Securities, and Banking ("DISB"). The Mayor shall appoint the Ombudsman. Alongside the DISB Commissioner, the Ombudsman's responsibilities shall include receiving, reviewing, and attempting to resolve any complaints from student loan borrowers, including attempts to resolve such complaints in collaboration with other participants in student loan lending. The Ombudsman shall also compile and analyze data on student loan borrower complaints and complete an annual report. The report will include the average student loan debt for graduates of degree and certificate programs; assist student loan borrowers in

understanding their rights and responsibilities under the terms of student education loans; and monitor the actions student loan servicers.

Those who wish to testify are asked to notify the Subcommittee on Consumer Affairs through Faye Caldwell: fcaldwell@dccouncil.us, or (202) 724-6683, and to provide your name, address, telephone number, organizational affiliation and title (if any) by close of business Tuesday, October 18, 2016. Persons wishing to testify are encouraged to submit 15 copies of written testimony. Public witnesses should limit their testimony to three minutes and representatives of organizations should limit their testimony to five minutes; less time will be allowed if there are a large number of witnesses. A copy of the legislation can be obtained through the Legislative Services Division of the Secretary of the Council's office or on http://lims.dccouncil.us.

If you are unable to testify at the hearing, written statements are encouraged and will be made a part of the official record. Written statements should be submitted to the Subcommittee on Consumer Affairs, Committee of the Whole, Council of the District of Columbia, Suite 119 of the John A. Wilson Building, 1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004. The record will close at 5:00 p.m. on Monday, October 24, 2016.

Council of the District of Columbia
COMMITTEE ON THE JUDICIARY
NOTICE OF PUBLIC HEARING
1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004

COUNCILMEMBER KENYAN R. MCDUFFIE, CHAIRPERSON
COMMITTEE ON THE JUDICIARY

ANNOUNCES A PUBLIC HEARING ON

B21-0724, THE "IMMIGRATION SERVICES PROTECTION ACT OF 2016"
B21-0827, THE "SENIOR LAW ENFORCEMENT OFFICER AMENDMENT ACT OF 2016"
B21-0846, THE "FIREARMS RE-REGISTRATION REQUIREMENT AMENDMENT ACT OF 2016"
B21-0847, THE "LAW ENFORCEMENT CAREER OPPORTUNITY AMENDMENT ACT OF 2016"
B21-0864, THE "TAMPERING WITH A DETECTION DEVICE AMENDMENT ACT OF 2016"
B21-0886, THE "STUN GUN REGULATION AMENDMENT ACT OF 2016"

Monday, October 17, 2016, 9:00 a.m.
Room 120, John A. Wilson Building
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

On Monday, October 17, 2016, Councilmember Kenyan R. McDuffie, Chairperson of the Committee on the Judiciary, will hold a public hearing on Bill 21-0724, the "Immigration Services Protection Act of 2016"; Bill 21-0827, the "Senior Law Enforcement Officer Amendment Act of 2016"; Bill 21-0846, the "Firearms Re-registration Requirement Amendment Act of 2016"; Bill 21-0847, the "Law Enforcement Career Opportunity Amendment Act of 2016"; Bill 21-0864, the "Tampering with a Detection Device Amendment Act of 2016"; and Bill 21-0886, the "Stun Gun Regulation Amendment Act of 2016". The hearing will be held in Room 120 of the John A. Wilson Building, 1350 Pennsylvania Avenue, N.W., at 9:00 a.m.

The stated purpose of Bill 21-0724 is to amend Title 28 of the District of Columbia Official Code to prohibit persons who provide immigration services from making certain misrepresentations, providing legal advice, collecting fees for services not performed, and refusing to return documents; to make certain disclosures in contracts; and to provide for enforcement of rights.

The stated purpose of Bill 21-0827 is to amend the Metropolitan Police Department Chief of Police's existing authority to rehire retired officers without jeopardy to the officers' retirement benefits by allowing the Chief to rehire retired detectives and sergeants at higher pay grades.

The stated purpose of Bill 21-0846 is to amend the Firearms Control Regulations Act to establish a procedure for the expiration and renewal of firearm registration certificates.

The stated purpose of Bill 21-0847 is to amend the Police Officer and Firefighter Cadet Funding Authorization and Human Rights Act of 1977 Amendment Act of 1982 to raise the upper age limit for the Metropolitan Police Department's Cadet Program from 21 to 25 in order to expand program eligibility.

The stated purpose of Bill 21-0864 is to amend the Omnibus Public Safety and Justice Amendment Act of 2009 to impose criminal sanctions for tampering with or removing an electronic monitoring device that a person is required to wear while incarcerated, committed, or released to the community.

The stated purpose of Bill 21-0886 is to amend the Firearms Control Regulations Act of 1975 to permit and regulate the possession and sale of stun guns, and to repeal the registration requirement for self-defense sprays.

The Committee invites the public to testify or to submit written testimony. Anyone wishing to testify at the hearing should contact the Committee at (202) 727-8275, or via e-mail at judiciary@dccouncil.us, and provide their name, telephone number, organizational affiliation, and title (if any) **by close of business, October 13, 2016**. Representatives of organizations will be allowed a maximum of five minutes for oral testimony, and individuals will be allowed a maximum of three minutes. Witnesses should bring **twenty, single-sided copies** of their written testimony and, if possible, also submit a copy of their testimony electronically to judiciary@dccouncil.us.

For witnesses who are unable to testify at the hearing, written statements will be made part of the official record. Copies of written statements should be submitted either to the Committee or to Nyasha Smith, Secretary to the Council, 1350 Pennsylvania Avenue, N.W., Suite 5, Washington, D.C. 20004. **The record will close at the end of the business day on October 24, 2016.**

COUNCIL OF THE DISTRICT OF COLUMBIA
SUBCOMMITTEE ON BOARDS & COMMISSIONS
NOTICE OF PUBLIC HEARING
1350 Pennsylvania Avenue, NW, Washington, DC 20004

COMMITTEE OF THE WHOLE
SUBCOMMITTEE ON BOARDS & COMMISSIONS
CHAIRPERSON TODD
ANNOUNCES A PUBLIC HEARING

on

Bill 21-0790, Regulation of Landscape Architecture and Professional Design Firms Amendment Act of 2016

on

Wednesday, October 19, 2016
10:00 a.m., Hearing Room 412, John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Councilmember Todd, Chairperson of the Subcommittee on Boards & Commissions, announces a public hearing before the Subcommittee on Bill 21-0790, the "Regulation of Landscape Architecture and Professional Design Firms Amendment Act of 2016." The hearing will be held at 10:00 a.m. on Wednesday, October 19, 2016 in room 412 of the John A. Wilson Building.

The stated purpose of Bill 21-0790 is to establish a Board of Architecture, Interior Design and Landscape Architecture to regulate the practice of architecture, interior design, and landscape architecture. It allows students and employees to engage in the practice of architecture when under the supervision of a licensed architect. It establishes the requirements for a professional design firm to be licensed in the District of Columbia and requires a license from the District prior to being able to offer or perform professional design services.

Those who wish to testify are asked to email the Subcommittee on Boards & Commissions at kyoshino@dccouncil.us, or call Keiko Yoshino, Committee Director at (202) 724-8052, and to provide your name, address, telephone number, organizational affiliation and title (if any) by close of business Tuesday, October 18, 2016. Persons wishing to testify are encouraged, but not required, to submit 15 copies of written testimony. If submitted by the close of business on October 18, 2016 the testimony will be distributed to Councilmembers before the hearing. Witnesses should limit their testimony to four minutes; less time will be allowed if there are a large number of witnesses. A copy of the legislation can be obtained through the Legislative Services Division of the Secretary of the Council's office or on http://lims.dccouncil.us.

If you are unable to testify at the hearing, written statements are encouraged and will be made a part of the official record. Written statements should be submitted to the Committee of the Whole, Council of the District of Columbia, Suite 105 of the John A. Wilson Building, 1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004. The record will close at 5:00 p.m. on October 24, 2016.

COUNCIL OF THE DISTRICT OF COLUMBIA
SUBCOMMITTEE ON LOCAL BUSINESS DEVELOPMENT AND UTILITIES
NOTICE OF PUBLIC HEARING
1350 Pennsylvania Avenue, NW, Washington, DC 20004

COUNCILMEMBER CHARLES ALLEN, CHAIRPERSON
COMMITTEE OF THE WHOLE: SUBCOMMITTEE ON LOCAL BUSINESS DEVELOPMENT AND UTILITIES

ANNOUNCES A PUBLIC HEARING ON

Bill 21-0863, Certified Business Enterprise Bonding Liability Clarification Amendment Act of 2016

on

Thursday, October 20, 2016, 11 a.m.
Room 412, John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Councilmember Charles Allen, Chairperson of the Subcommittee on Local Business Development and Utilities, announces a public roundtable on **B21-0863**, the Certified Business Enterprise Bonding Liability Clarification Amendment Act of 2016. The roundtable will be held at 11:00 a.m. on Thursday, October 20, 2016 in room 412 of the John A. Wilson Building.

The stated purpose of B21-0863 is to amend the Small and Certified Business Enterprise Development and Assistance Act of 2005 to repeal the section related to bonding and surety liability for certified joint ventures. A copy of the legislation can be obtained through the Legislative Services Division of the Secretary of the Council's office or at http://lims.dccouncil.us/Download/36382/B21-0863-Introduction.pdf.

The Subcommittee invites the public to testify. Those who wish to testify are asked to contact Ms. Jamie Gorosh, Legal Fellow with the Subcommittee on Local Business Development and Utilities, via email at jgorosh@dccouncil.us or at (202) 741-0929 to provide your name, address, telephone number, organizational affiliation and title (if any), by close of business Tuesday, October 18, 2016. Persons wishing to testify are encouraged to bring 15 copies of written testimony to the hearing. If electronic testimony is submitted by the close of business on October 19, 2016 the testimony will be distributed to Councilmembers before the hearing. Witnesses should limit their testimony to four minutes; less time will be allowed if there are a large number of witnesses.

If you are unable to testify at the hearing, written statements are encouraged and will be made a part of the official record. Written statements should be submitted to jgorosh@dccouncil.us or to the Subcommittee on Local Business Development and Utilities, 1350 Pennsylvania Avenue, N.W., Suite 406, Washington, D.C. 20004. The record will close at 5:00 p.m. on October 27, 2016.

COUNCIL OF THE DISTRICT OF COLUMBIA
SUBCOMMITTEE ON WORKFORCE
NOTICE OF PUBLIC HEARING
1350 Pennsylvania Avenue, NW, Washington, DC 20004

CHAIRPERSON ELISSA SILVERMAN
COMMITTEE OF THE WHOLE
SUBCOMMITTEE ON WORKFORCE

ANNOUNCES A PUBLIC HEARING

on

Bill 21-878, Fair Wage Amendment Act of 2016

on

Tuesday, November 29, 2016
10:00 a.m., Hearing Room 500, John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Councilmember Elissa Silverman, Chairperson of the Subcommittee on Workforce, announces a public hearing before the Subcommittee on Bill 21-878, the "Fair Wage Amendment Act of 2016." The hearing will be held at 10:00 a.m. on Tuesday, November 29, 2016, in room 500 of the John A. Wilson Building.

The stated purpose of **Bill 21-878** is to amend the Wage Transparency Act of 2014 to prohibit an employer from screening prospective employees based on their wage history or seeking the wage history of a prospective employee.

Those who wish to testify before the Subcommittee are asked to contact Ms. Charnisa Royster at croyster@dccouncil.us or (202) 724-7772 by close of business Monday, November 29, 2016, to provide your name, address, telephone number, organizational affiliation and title (if any), as well as the language of oral interpretation, if any, they require. Those wishing to testify are encouraged, but not required, to submit 15 copies of written testimony. Those representing organizations will have five minutes to present their testimony, and individuals will have three minutes to present their testimony; less time will be allowed if there are a large number of witnesses. A copy of the legislation can be obtained through the Legislative Services Division of the Secretary of the Council's office or on http://lims.dccouncil.us.

If you are unable to testify at the hearing, written statements are encouraged and will be made a part of the official record. Written statements should be submitted by email to Ms. Royster at croyster@dccouncil.us or mailed to the Subcommittee on Workforce, Council of the District of Columbia, Suite 408 of the John A. Wilson Building, 1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004; or. The record will close at 5:00 p.m. on December 7, 2016.

Council of the District of Columbia
COMMITTEE ON THE JUDICIARY
NOTICE OF PUBLIC HEARING
1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004

COUNCILMEMBER KENYAN R. MCDUFFIE, CHAIRPERSON COMMITTEE ON THE JUDICIARY

ANNOUNCES A PUBLIC HEARING ON

BILL 21-0879, THE "EXPANDING ACCESS TO JUSTICE ACT OF 2016"

Wednesday, October 19, 2016, 10:00 a.m.
Room 500, John A. Wilson Building
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

On Wednesday, October 19, 2016, Councilmember Kenyan R. McDuffie, Chairperson of the Committee on the Judiciary, will hold a public hearing on Bill 21-0879, the "Expanding Access to Justice Act". The hearing will be held in Room 500 of the John A. Wilson Building, 1350 Pennsylvania Avenue, N.W., at 10:00 a.m.

The stated purpose of B21-0879 is to authorize the DC Bar Foundation ("DCBF") to adopt policies and procedures, issue requests for proposals, and make grants to designated legal services providers as part of a new series of legal counsel projects. The providers would represent low-income tenants at or below 200% of the federal poverty level facing eviction, housing code violations, termination from a rental housing subsidy program, increases in rent controlled units, and homeless shelter proceedings.

The bill also requires the DCBF to collaborate with key government entities in developing an annual plan for the provision of legal services. Lastly, the bill requires annual reporting that analyzes implementation and performance metrics in order to assess the continued needs of low-income residents and recommend adjustments to the criteria, policies, and procedures for the provision of legal services.

The Committees invites the public to testify or to submit written testimony. Anyone wishing to testify at the hearing should contact the Committee at (202) 724-7808, or via e-mail at judiciary@dccouncil.us, and provide their name, telephone number, organizational affiliation, and title (if any) **by close of business, October 14, 2016**. Representatives of organizations will be allowed a maximum of five minutes for oral testimony, and individuals will be allowed a maximum of three minutes. Witnesses should bring **twenty, single-sided copies** of their written

testimony and, if possible, also submit a copy of their testimony electronically to judiciary@dccouncil.us.

For witnesses who are unable to testify at the hearing, written statements will be made part of the official record. Copies of written statements should be submitted either to the Committee or to Nyasha Smith, Secretary to the Council, 1350 Pennsylvania Avenue, N.W., Suite 5, Washington, D.C. 20004. **The record will close at the end of the business day on November 2, 2016.**

COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT
NOTICE OF PUBLIC HEARING
1350 Pennsylvania Avenue, NW, Washington, DC 20004

COUNCILMEMBER ANITA BONDS, CHAIRPERSON COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT

ANNOUNCES A PUBLIC HEARING OF THE COMMITTEE ON

B21-0884, the "Rental Housing Affordability Stabilization Amendment Act of 2016"

B21-0880, the "Rent Concession and Rent Ceiling Abolition Clarification Amendment Act of 2016"

and

B21-0885, the "Four-unit Rental Housing Tenant Grandfathering Amendment Act of 2016"

on

Wednesday, October 19, 2016, at 10:00 AM
John A. Wilson Building, Room 123
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Councilmember Anita Bonds, Chairperson of the Committee on Housing and Community Development, will hold a public hearing on B21-0884, the "Rental Housing Affordability Stabilization Amendment Act of 2016", B21-0880, the "Rent Concession and Rent Ceiling Abolition Clarification Amendment Act of 2016" and B21-0885, the "Four-unit Rental Housing Tenant Grandfathering Amendment Act of 2016". The public hearing will be held on Wednesday, October 19, 2016, at 10:00 AM in Room 123 of the John A. Wilson Building.

The purpose of B21-0884, the "Rental Housing Affordability Stabilization Amendment Act of 2016", is to stabilize rents and help preserve the affordability of the District's rental housing stock by limiting the standard annual rent increase for rent control units to the Consumer Price Index (CPI-W), and by eliminating additional rent increases when a rent control apartment is vacated.

The purpose of B21-0880, the "Rent Concession and Rent Ceiling Abolition Clarification Amendment Act of 2016", is to clarify that the abolition of rent ceilings applies to any attempt by the housing provider to preserve for future implementation all or any part of any rent adjustment, and to establish limited exceptions for rent concessions based on individual tenant circumstances.

The purpose of B21-0885, the "Four-unit Rental Housing Tenant Grandfathering Amendment Act of 2016", is to require a housing provider to give tenants a TOPA offer before a 4-unit exemption from rent control may be granted, if the housing accommodation becomes eligible for

the exemption due to a transfer that is exempt from TOPA; and to grandfather tenants under rent control who reside in a housing accommodation that due to a transfer that is exempt from TOPA, becomes eligible for a four-unit exemption to rent control.

Those who wish to testify are requested to telephone the Committee on Housing and Community Development, at (202) 724-8900, or email omontiel@dccouncil.us, and provide their name, address, telephone number, organizational affiliation and title (if any), by close of business on October 18, 2016. Persons wishing to testify are encouraged to submit 15 copies of written testimony. Oral testimony should be limited to three minutes for individuals and five minutes for organizations.

If you are unable to testify at the public hearing, written statements are encouraged and will be made a part of the official record. Written statements should be submitted to the Committee on Housing and Community Development, John A. Wilson Building, 1350 Pennsylvania Avenue, N.W., Suite 112, Washington, D.C. 20004. The record will close at 5:00 p.m. on Wednesday, November 2, 2016.

COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE OF THE WHOLE
NOTICE OF PUBLIC HEARING

1350 Pennsylvania Avenue, NW, Washington, DC 20004

CHAIRMAN PHIL MENDELSON
COMMITTEE OF THE WHOLE
ANNOUNCES A PUBLIC HEARING

on

PR 21-875, Historic Preservation Review Board Marnique Heath Confirmation Resolution of 2016

on

Thursday, November 10, 2016
12:30 p.m., Hearing Room 412, John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Council Chairman Phil Mendelson announces a public hearing before the Committee of Whole on PR 21-875, the "Historic Preservation Review Board Marnique Heath Confirmation Resolution of 2016." The hearing will be held Thursday, November 10, 2016 at 12:30 p.m. in Hearing Room 412 of the John A. Wilson Building, 1350 Pennsylvania Avenue, NW.

The stated purpose of PR 21-875 is to confirm the appointment of Ms. Marnique Heath to the Historic Preservation Review Board. Ms. Heath has previously served the public as a member of the Board of Zoning Adjustment. The Historic Preservation Review Board ("Board") is the official body of advisors appointed by the Mayor to guide the government and public on preservation matters in the District of Columbia. The Board also assists with the implementation of federal preservation programs and the review of federal projects in the District. The purpose of this hearing is to receive testimony from government and public witnesses as to the fitness of this nominee for the Board.

Those who wish to testify are asked to email the Committee of the Whole at cow@dccouncil.us, or call Sydney Hawthorne, Legislative Counsel at (202) 724-7130, and to provide your name, address, telephone number, organizational affiliation, and title (if any) by close of business Tuesday, November 8, 2016. Persons wishing to testify are encouraged, but not required, to submit 15 copies of written testimony. If submitted by the close of business on November 8, 2016 the testimony will be distributed to Councilmembers before the hearing. Witnesses should limit their testimony to four minutes; less time will be allowed if there are a large number of witnesses. Copies of the legislation can be obtained through the Legislative Services Division of the Secretary of the Council's office or on http://lims.dccouncil.us.

If you are unable to testify at the hearing, written statements are encouraged and will be made a part of the official record. Written statements should be submitted to the Committee of the Whole, Council of the District of Columbia, Suite 410 of the John A. Wilson Building, 1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004. The record will close at 5:00 p.m. on November 23, 2016.

COUNCIL OF THE DISTRICT OF COLUMBIA
SUBCOMMITTEE ON WORKFORCE
NOTICE OF PUBLIC ROUNDTABLE
1350 Pennsylvania Avenue, NW, Washington, DC 20004

CHAIRPERSON ELISSA SILVERMAN
COMMITTEE OF THE WHOLE
SUBCOMMITTEE ON WORKFORCE

ANNOUNCES A PUBLIC ROUNDTABLE

on

Fair Scheduling Issues in the District of Columbia

on

Thursday, November 3, 2016
11:00 a.m., Hearing Room 500, John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Councilmember Elissa Silverman, Chairperson of the Subcommittee on Workforce, announces a public roundtable before the Subcommittee on fair scheduling issues in the District of Columbia. The roundtable will be held at 11:00 a.m. on Thursday, November 3, 2016, in room 500 of the John A. Wilson Building.

The purpose of the roundtable is to discuss and hear testimony regarding fair scheduling issues in the District of Columbia. The Subcommittee will review current scheduling practices in the District, legislative actions in other jurisdictions, the economic impact of potential legislation, and hear research concerning the impact of unstable schedules on workers.

Those who wish to testify before the Subcommittee are asked to contact Ms. Charnisa Royster at croyster@dccouncil.us or (202) 724-7772 by close of business Wednesday, November 2, 2016, to provide your name, address, telephone number, organizational affiliation and title (if any), as well as the language of oral interpretation, if any, they require. Those wishing to testify are encouraged, but not required, to submit 15 copies of written testimony. Those representing organizations will have five minutes to present their testimony, and individuals will have three minutes to present their testimony; less time will be allowed if there are a large number of witnesses.

If you are unable to testify at the roundtable, written statements are encouraged and will be made a part of the official record. Written statements should be submitted by email to Ms. Royster at croyster@dccouncil.us or mailed to the Subcommittee on Workforce, Council of the District of Columbia, Suite 408 of the John A. Wilson Building, 1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004. The record will close at 5:00 p.m. on November 17, 2016.

COUNCIL OF THE DISTRICT OF COLUMBIA
SUBCOMMITTEE ON LOCAL BUSINESS DEVELOPMENT AND UTILITIES
NOTICE OF PUBLIC ROUNDTABLE
1350 Pennsylvania Avenue, NW, Washington, DC 20004

COUNCILMEMBER CHARLES ALLEN, CHAIRPERSON
COMMITTEE OF THE WHOLE: SUBCOMMITTEE ON LOCAL BUSINESS DEVELOPMENT AND UTILITIES

ANNOUNCES A PUBLIC ROUNDTABLE ON

Proposed Resolution 21-0805, Alcoholic Beverage Control Board James Short Confirmation Resolution of 2016

Proposed Resolution 21-0806, Alcoholic Beverage Control Board David Jacob Perry Confirmation Resolution of 2016
and
Proposed Resolution 21-0807, Alcoholic Beverage Control Board Mafara Hobson Confirmation Resolution of 2016

on

Wednesday, October 5, 2016, 10 a.m.
Room 120, John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Councilmember Charles Allen, Chairperson of the Subcommittee on Local Business Development and Utilities, announces a public roundtable on **PR 21-0805**, the Alcoholic Beverage Control Board James Short Confirmation Resolution of 2016, **PR 21-0806**, the Alcoholic Beverage Control Board David Jacob Perry Confirmation Resolution of 2016, and **PR 21-0807**, the Alcoholic Beverage Control Board Mafara Hobson Confirmation Resolution of 2016. The roundtable will be held at 10:00 a.m. on Wednesday, October 5, 2016 in room 120 of the John A. Wilson Building.

The stated purpose of each resolution is to confirm the nominee to the Alcoholic Beverage Control Board. The Alcoholic Beverage Control Board ("Board") is an independent body that meets weekly to adjudicate, administer, and enforce alcoholic beverage laws. Board members are appointed by the Mayor and confirmed by the Council for a four-year term.

The Subcommittee invites the public to testify. Those who wish to testify are asked to contact Ms. Jamie Gorosh, Legal Fellow with the Subcommittee on Local Business Development and Utilities, via email at jgorosh@dccouncil.us or at (202) 741-0929 to provide your name, address, telephone number, organizational affiliation and title (if any), by close of business Monday, October 3, 2016. Persons wishing to testify are encouraged to bring 15 copies of written testimony to the roundtable. If electronic testimony is submitted by the close of business on October 3, 2016, the testimony will be distributed to Councilmembers before the roundtable. Witnesses should limit their testimony to four minutes; less time will be allowed if there are a large number of witnesses. A

copy of the legislation can be obtained through the Legislative Services Division of the Secretary of the Council's office or at http://lims.dccouncil.us.

If you are unable to testify at the roundtable, written statements are encouraged and will be made a part of the official record. Written statements should be submitted to jgorosh@dccouncil.us or to the Subcommittee on Local Business Development and Utilities, 1350 Pennsylvania Avenue, N.W., Suite 406, Washington, D.C. 20004. The record will close at 5:00 p.m. on October 10, 2016.

COUNCIL OF THE DISTRICT OF COLUMBIA
SUBCOMMITTEE ON LOCAL BUSINESS DEVELOPMENT AND UTILITIES
NOTICE OF PUBLIC ROUNDTABLE
1350 Pennsylvania Avenue, NW, Washington, DC 20004

COUNCILMEMBER CHARLES ALLEN, CHAIRPERSON
COMMITTEE OF THE WHOLE: SUBCOMMITTEE ON LOCAL BUSINESS DEVELOPMENT AND UTILITIES

ANNOUNCES A PUBLIC ROUNDTABLE ON

The Department of Small and Local Business Development's Progress on Main Streets, and the Growing Role of Main Streets and Business Improvement Districts in Supporting Local Business Development

on

Friday, October 14, 2016, 10 a.m.
Room 412, John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Councilmember Charles Allen, Chairperson of the Subcommittee on Local Business Development and Utilities, announces a public roundtable to be held at 10:00 a.m. on Friday, October 14, 2016 in room 412 of the John A. Wilson Building.

The purpose of this roundtable is to discuss the Department of Small and Local Business Development's progress on new Main Streets funded in the current and upcoming fiscal year budgets, and the growing role of Main Streets and Business Improvement Districts in supporting local business development.

The Subcommittee invites the public to testify. Those who wish to testify are asked to contact Ms. Jamie Gorosh, Legal Fellow with the Subcommittee on Local Business Development and Utilities, via email at jgorosh@dccouncil.us or at (202) 741-0929 to provide your name, address, telephone number, organizational affiliation and title (if any), by close of business Wednesday, October 12, 2016. Persons wishing to testify are encouraged to bring 15 copies of written testimony to the roundtable. If electronic testimony is submitted by the close of business on October 13, 2016 the testimony will be distributed to Councilmembers before the roundtable. Witnesses should limit their testimony to four minutes; less time will be allowed if there are a large number of witnesses.

If you are unable to testify at the roundtable, written statements are encouraged and will be made a part of the official record. Written statements should be submitted to jgorosh@dccouncil.us or to the Subcommittee on Local Business Development and Utilities, 1350 Pennsylvania Avenue, N.W., Suite 406, Washington, D.C. 20004. The record will close at 5:00 p.m. on October 24, 2016.

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-077812 **License Class/Type: C Restaurant**
Applicant: TGR, LLC.
Trade Name: Cities DC
ANC: 2B06

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

1909 K ST NW

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	11:30 am - 2 am	11:30 am - 2 am
Monday:	11:30 am - 2 am	11:30 am - 2 am
Tuesday:	11:30 am - 2 am	11:30 am - 2 am
Wednesday:	11:30 am - 2 am	11:30 am - 2 am
Thursday:	11:30 am - 2 am	11:30 am - 2 am
Friday:	11:30 am - 3 am	11:30 am - 3 am
Saturday:	11:30 am - 3 am	11:30 am - 3 am

ENDORSEMENT(S): Cover Charge Dancing Entertainment Sidewalk Cafe

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-019008 **License Class/Type: C Tavern**
Applicant: Bedrock Billiards, Inc.
Trade Name: Bedrock Billiards
ANC: 1C03

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

1841 COLUMBIA RD NW

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	12 pm - 2 am	12 pm - 1:30 am
Monday:	4 pm - 2 am	4 pm - 1:30 am
Tuesday:	4 pm - 2 am	4 pm - 1:30 am
Wednesday:	4 pm - 2 am	4 pm - 1:30 am
Thursday:	4 pm - 2 am	4 pm - 1:30 am
Friday:	4 pm - 3 am	4 pm - 2:30am
Saturday:	12 pm - 3 am	12 pm - 2:30 am

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-092773 **License Class/Type: C Tavern**
Applicant: Daci Enterprises, LLC
Trade Name: Dacha Beer Garden
ANC: 6E01

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

1600 - 1602 7th ST NW

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	7am - 10:30pm	8am - 10:30pm
Monday:	7am - 10:30pm	8am - 10:30pm
Tuesday:	7am - 10:30pm	8am - 10:30pm
Wednesday:	7am - 10:30pm	8am - 10:30pm
Thursday:	7am - 10:30pm	8am - 10:30pm
Friday:	7am - 11:59pm	8am - 11:59pm
Saturday:	7am - 11:59pm	8am - 11:59pm

ENDORSEMENT(S): Entertainment Sidewalk Cafe Summer Garden

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-024778 **License Class/Type: C Tavern**
Applicant: Mec Inc
Trade Name: Turntable Restaurant
ANC: 4C01

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

5802 GEORGIA AVE NW

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	11:30 am - 2 am	11:30 am - 2 am
Monday:	11:30 am - 2 am	11:30 am - 2 am
Tuesday:	11:30 am - 2 am	11:30 am - 2 am
Wednesday:	11:30 am - 2 am	11:30 am - 2 am
Thursday:	11:30 am - 2 am	11:30 am - 2 am
Friday:	11:30 am - 3 am	11:30 am - 3 am
Saturday:	11:30 am - 3 am	11:30 am - 3 am

ENDORSEMENT(S): Cover Charge Dancing Entertainment

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-094018 **License Class/Type: C Tavern**
Applicant: Carlson Restaurant Group, LLC
Trade Name: The Royal
ANC: 1B01

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

501 FLORIDA AVE NW

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	7am - 2am	11am - 2am
Monday:	7am - 2am	11am - 2am
Tuesday:	7am - 2am	11am - 2am
Wednesday:	7am - 2am	11am - 2am
Thursday:	7am - 2am	11am - 2am
Friday:	7am - 3am	11am - 3am
Saturday:	7am - 3am	11am - 3am

ENDORSEMENT(S): Sidewalk Cafe

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-091618 **License Class/Type: C Tavern**
Applicant: 8th Street, LLC
Trade Name: Tree House Lounge
ANC: 5D06

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

1006 FLORIDA AVE NE

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	12 pm - 2am	12 pm - 2am
Monday:	12 pm - 2am	12 pm - 2am
Tuesday:	12 pm - 2am	12 pm - 2am
Wednesday:	12 pm - 2am	12 pm - 2am
Thursday:	12 pm - 2am	12 pm - 2am
Friday:	11 am - 3am	11 am - 3am
Saturday:	11 am - 3am	11 am - 3am

ENDORSEMENT(S): Cover Charge Entertainment Summer Garden

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-025542 **License Class/Type: C Nightclub**
Applicant: Trade Center Management Associates, LLC
Trade Name: The International Trade Center/Air
ANC: 2C01

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

1300 PENNSYLVANIA AVE NW

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	7 am - 2 am	10 am - 2 am
Monday:	7 am - 2 am	8 am - 2 am
Tuesday:	7 am - 2 am	8 am - 2 am
Wednesday:	7 am - 2 am	8 am - 2 am
Thursday:	7 am - 2 am	8 am - 2 am
Friday:	7 am - 3 am	8 am - 3 am
Saturday:	7 am - 3 am	8 am - 3 am

ENDORSEMENT(S): Summer Garden

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-000931 **License Class/Type: C Nightclub**
Applicant: Harco Inc
Trade Name: Archibald's/Fast Eddies Billiards Cafe
ANC: 2B05

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

1520 K ST NW

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	11 am - 2 am	11 am - 2 am
Monday:	11 am - 2 am	11 am - 2 am
Tuesday:	11 am - 2 am	11 am - 2 am
Wednesday:	11 am - 2 am	11 am - 2 am
Thursday:	11 am - 2 am	11 am - 2 am
Friday:	11 am - 3 am`	11 am - 3 am`
Saturday:	11 am - 3 am	11 am - 3 am

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-091022 **License Class/Type: C Tavern**
Applicant: Sunflower Inc.
Trade Name: FLAVORS OF INDIA/MARSHALL'S BAR
ANC: 2A03

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

2524 L ST NW

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	11 am - 2 am	11 am - 2 am
Monday:	11 am - 2 am	11 am - 2 am
Tuesday:	11 am - 2 am	11 am - 2 am
Wednesday:	11 am - 2 am	11 am - 2 am
Thursday:	11 am - 2 am	11 am - 2 am
Friday:	11 am - 3 am	11 am - 3 am
Saturday:	11 am - 3 am	11 am - 3 am

ENDORSEMENT(S): Sidewalk Cafe

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-082216 **License Class/Type: C Tavern**
Applicant: Dickson THC, LLC
Trade Name: Dickson Wine
ANC: 1B02

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

903 - 905 U ST NW

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	12 pm - 2 am	12 pm - 2 am
Monday:	5 pm - 2 am	5 pm - 2 am
Tuesday:	5 pm - 2 am	5 pm - 2 am
Wednesday:	5 pm - 2 am	5 pm - 2 am
Thursday:	5 pm - 2 am	5 pm - 2 am
Friday:	5 pm - 3 am	5 pm - 3 am
Saturday:	12 pm - 3 am	12 pm - 3 am

ENDORSEMENT(S): Entertainment Summer Garden

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-060457 **License Class/Type: C Tavern**
Applicant: Lounge 201 Llc
Trade Name: The 201 Bar
ANC: 6C02

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

201 D ST NE

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	11:30 am - 2 am	11:30 am - 2 am
Monday:	11:30 am - 2 am	11:30 am - 2 am
Tuesday:	11:30 am - 2 am	11:30 am - 2 am
Wednesday:	11:30 am - 2 am	11:30 am - 2 am
Thursday:	11:30 am - 2 am	11:30 am - 2 am
Friday:	11:30 am - 2:30 am	11:30 am - 2:30 am
Saturday:	11:30 am - 2:30 am	11:30 am - 2:30 am

ENDORSEMENT(S): Cover Charge Dancing Entertainment

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:

License Number: ABRA-092701 **License Class/Type: C Tavern**

Applicant: Baba's Cooking School, LLC

Trade Name: EatsPlace

ANC: 1A08

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

3607 GEORGIA AVE NW

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	7 am - 2 am	10 am - 2 am
Monday:	7 am - 2 am	9 am - 2 am
Tuesday:	7 am - 2 am	9 am - 2 am
Wednesday:	7 am - 2 am	9 am - 2 am
Thursday:	7 am - 2 am	9 am - 2 am
Friday:	7 am - 3 am	9 am - 3 am
Saturday:	7 am - 3 am	9 am - 3 am

ENDORSEMENT(S): Summer Garden

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-097569 **License Class/Type: C Tavern**
Applicant: DEW DROP INN LLC
Trade Name: Dew Drop Inn
ANC: 5E01

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

2801 8TH ST NE

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	10AM - 2AM	10AM - 2AM
Monday:	10AM - 2AM	10AM - 2AM
Tuesday:	10AM - 2AM	10AM - 2AM
Wednesday:	10AM - 2AM	10AM - 2AM
Thursday:	10AM - 2AM	10AM - 2AM
Friday:	10AM - 3AM	10AM - 3AM
Saturday:	10AM - 3AM	10AM - 3AM

ENDORSEMENT(S): Entertainment Summer Garden

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-079523 **License Class/Type: C Tavern**
Applicant: Kelly's Michigan Park LLC
Trade Name: San Antonio Bar & Grill III
ANC: 5B05

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

3908 12TH ST NE

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	11 am - 2 am	11 am - 2 am
Monday:	11 am - 2 am	11 am - 2 am
Tuesday:	11 am - 2 am	11 am - 2 am
Wednesday:	11 am - 2 am	11 am - 2 am
Thursday:	11 am - 2 am	11 am - 2 am
Friday:	11 am - 3 am	11 am - 3 am
Saturday:	11 am - 3 am	11 am - 3 am

ENDORSEMENT(S): Entertainment Sidewalk Cafe Summer Garden

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-097647 **License Class/Type: C Tavern**
Applicant: WW 1875 Connecticut Ave, LLC
Trade Name: We Work
ANC: 1C01

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

1875 CONNECTICUT AVE NW

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

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

ENDORSEMENT(S): Entertainment

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-085095 **License Class/Type: D Tavern**
Applicant: RLJ III - HS Washington, DC Lessee, LLC
Trade Name: Homewood Suites
ANC: 2F03

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

1475 MASSACHUSETTS AVE NW

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	24 HR - 24 HR	5 pm - 8 pm
Monday:	24 HR - 24 HR	5 pm - 8 pm
Tuesday:	24 HR - 24 HR	5 pm - 8 pm
Wednesday:	24 HR - 24 HR	5 pm - 8 pm
Thursday:	24 HR - 24 HR	5 pm - 8 pm
Friday:	24 HR - 24 HR	5 pm - 8 pm
Saturday:	24 HR - 24 HR	5 pm - 8pm

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-071086 **License Class/Type: C Tavern**
Applicant: MCHAP Inc.
Trade Name: The Saloon
ANC: 1B12

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

1205 U ST NW

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	closed -	closed - closed
Monday:	closed -	closed - closed
Tuesday:	5 pm - 1 am	5 pm - 1 am
Wednesday:	5 pm - 1 am	5 pm - 1 am
Thursday:	5 pm - 1 am	5 pm - 1 am
Friday:	5 pm - 2 am	5 pm - 2 am
Saturday:	3 pm - 2 am	3 pm - 2 am

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-019007 **License Class/Type: C Tavern**
Applicant: Atomic Billards Corporation
Trade Name: Atomic Billiards
ANC: 3C04

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

3427 CONNECTICUT AVE NW

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	8am - 2am	8am - 2am
Monday:	8am - 2am	8am - 2am
Tuesday:	8am - 2am	8am - 2am
Wednesday:	8am - 2am	8am - 2am
Thursday:	8am - 2am	8am - 2am
Friday:	8am - 3am	8am - 3am
Saturday:	8am - 3am	8am - 3am

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-095398 **License Class/Type: C Tavern**
Applicant: Crave, LLC
Trade Name: Mess Hall
ANC: 5E02

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

703 EDGEWOOD ST NE

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	24 - HOURS	8 am - 2 am
Monday:	24 - HOURS	8 am - 2 am
Tuesday:	24 - HOURS	8 am - 2 am
Wednesday:	24 - HOURS	8 am - 2 am
Thursday:	24 - HOURS	8 am - 2 am
Friday:	24 - HOURS	8 am - 3 am
Saturday:	24 - HOURS	8 am - 3 am

ENDORSEMENT(S): Cover Charge Entertainment

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-078663 **License Class/Type: C Nightclub**
Applicant: C J Enterprises, Inc.
Trade Name: Ziegfeld's/Secrets
ANC: 6D05

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

1824 HALF ST SW

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	3:00 PM - 2:00 AM	3:00 PM - 2:00 AM
Monday:	9:00 PM - 2:00 AM	9:00 PM - 2:00 AM
Tuesday:	9:00 PM - 2:00 AM	9:00 PM - 2:00 AM
Wednesday:	9:00 PM - 2:00 AM	9:00 PM - 2:00 AM
Thursday:	9:00 PM - 2:00 AM	9:00 PM - 2:00 AM
Friday:	9:00 PM - 3:00 AM	9:00 PM - 3:00 AM
Saturday:	9:00 PM - 3:00 AM	9:00 PM - 3:00 AM

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-086604 **License Class/Type: C Tavern**
Applicant: 919 U Street LLC
Trade Name: El Rey
ANC: 1B02

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

919 U ST NW

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	11am - 3am	11am - 2am
Monday:	11am - 3am	11am - 2am
Tuesday:	11am - 3am	11am - 2am
Wednesday:	11am - 3am	11am - 2am
Thursday:	11am - 3am	11am - 2am
Friday:	11am - 4am	11am - 3am
Saturday:	11am - 4am	11am - 3am

ENDORSEMENT(S): Dancing Entertainment Summer Garden

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:

License Number: ABRA-094801 **License Class/Type: C Tavern**

Applicant: MRG 600 F LLC

Trade Name: Denson

ANC: 2C01

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

600 F ST NW

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	10 am - 2 am	10 am - 2 am
Monday:	10 am - 2 am	10 am - 2 am
Tuesday:	10 am - 2 am	10 am - 2 am
Wednesday:	10 am - 2 am	10 am - 2 am
Thursday:	10 am - 2 am	10 am - 2 am
Friday:	10 am - 3 am	10 am - 3 am
Saturday:	10 am - 3 am	10 am - 3 am

ENDORSEMENT(S): Cover Charge Entertainment

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-097412 **License Class/Type: C Tavern**
Applicant: WW641 S St LLC
Trade Name: We Work
ANC: 1B01

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

641 S ST NW

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

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

ENDORSEMENT(S): Entertainment

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-087668 **License Class/Type: C Tavern**
Applicant: Cafe AKA White House LLC
Trade Name: Cafe AKA
ANC: 2B06

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

1710 H ST NW

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

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

ENDORSEMENT(S): Entertainment

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-077883 **License Class/Type: C Tavern**
Applicant: 1215 CT, LLC
Trade Name: Rosebar
ANC: 2B05

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

1215 CONNECTICUT AVE NW

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	11 am - 3 am	11 am - 2 am
Monday:	11 am - 3 am	11 am - 2 am
Tuesday:	11 am - 3 am	11 am - 2 am
Wednesday:	11 am - 3 am	11 am - 2 am
Thursday:	11 am - 3 am	11 am - 2 am
Friday:	11 am - 4 am	11 am - 3 am
Saturday:	11 am - 4 am	11 am - 3 am

ENDORSEMENT(S): Cover Charge Dancing Entertainment Summer Garden

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-094321 **License Class/Type: C Tavern**
Applicant: Colony Club, LLC
Trade Name: Colony Club
ANC: 1A10

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

3118 GEORGIA AVE NW

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	7 am - 2 am	10 am - 2 am
Monday:	7 am - 2 am	10 am - 2 am
Tuesday:	7 am - 2 am	10 am - 2 am
Wednesday:	7 am - 2 am	10 am - 2 am
Thursday:	7 am - 2 am	10 am - 2 am
Friday:	7 am - 3 am	10 am - 3 am
Saturday:	7 am - 3 am	10 am - 3 am

ENDORSEMENT(S): Entertainment Summer Garden

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-081161 **License Class/Type: C Tavern**
Applicant: 1620 DC, LLC
Trade Name: Blackfinn
ANC: 2B05

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

1620 I ST NW

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	11 am - 2 am	11 am - 2 am
Monday:	11 am - 2 am	11 am - 2 am
Tuesday:	11 am - 2 am	11 am - 2 am
Wednesday:	11 am - 2 am	11 am - 2 am
Thursday:	11 am - 2 am	11 am - 2 am
Friday:	11 am - 3 am	11 am - 3 am
Saturday:	11 am - 3 am	11 am - 3 am

ENDORSEMENT(S): Entertainment Sidewalk Cafe

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-102006 **License Class/Type: C Tavern**
Applicant: 1875 K Street NW Tenant LLC
Trade Name: WeWork
ANC: 2B06

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

1875 K ST NW

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

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

ENDORSEMENT(S): Entertainment

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-060477 **License Class/Type: C Tavern**
Applicant: Aqua NYA LLC
Trade Name: Aqua Restaurant
ANC: 5C04

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

1818 NEW YORK AVE NE

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	10 am - 2 am	10 am - 2 am
Monday:	10 am - 2 am	10 am - 2 am
Tuesday:	10 am - 2 am	10 am - 2 am
Wednesday:	10 am - 2 am	10 am - 2 am
Thursday:	10 am - 2 am	10 am - 2 am
Friday:	10 am - 3 am	10 am - 3 am
Saturday:	10 am - 3 am	10 am - 3 am

ENDORSEMENT(S): Cover Charge Dancing Entertainment Summer Garden

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-087780 **License Class/Type: C Tavern**
Applicant: Da Luft DC, Inc.
Trade Name: Da Luft Restaurant & Lounge
ANC: 6A01

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

1242 H ST NE

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	12 pm - 2 am	12 pm - 2 am
Monday:	12 pm - 2 am	12 pm - 2 am
Tuesday:	12 pm - 2 am	12 pm - 2 am
Wednesday:	12 pm - 2 am	12 pm - 2 am
Thursday:	12 pm - 2 am	12 pm - 2 am
Friday:	12 pm - 3 am	12 pm - 3 am
Saturday:	12 pm - 3 am	12 pm - 3 am

ENDORSEMENT(S): Cover Charge Dancing Entertainment

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-099536 **License Class/Type: C Tavern**
Applicant: 1327 Connecticut, LLC
Trade Name: The Manor
ANC: 2B07

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

1327 Connecticut AVE NW

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	8 am - 2 am	10 am - 2 am
Monday:	8 am - 2 am	8 am - 2 am
Tuesday:	8 am - 2 am	8 am - 2 am
Wednesday:	8 am - 2 am	8 am - 2 am
Thursday:	8 am - 2 am	8 am - 2 am
Friday:	8 am - 3 am	8 am - 3 am
Saturday:	8 am - 3 am	8 am - 3 am

ENDORSEMENT(S): Cover Charge Dancing Entertainment

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-086063 **License Class/Type: C Tavern**
Applicant: Doughboy Enterprises, LLC
Trade Name: Mellow Mushroom
ANC: 1C03

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

2436 18TH ST NW

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	9 am - 2am	11:30am - 2am
Monday:	9am - 2am	11:30am - 2am
Tuesday:	9am - 2am	11:30am - 2am
Wednesday:	9am - 2am	11:30am - 2am
Thursday:	9am - 2am	11:30am - 2am
Friday:	9am - 3am	11:30am - 3am
Saturday:	9am - 3am	11:30am - 3am

ENDORSEMENT(S): Entertainment Sidewalk Cafe Summer Garden

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-088785 **License Class/Type: C Tavern**
Applicant: HGH 1610 LLC
Trade Name: Ghibellina/Sotto
ANC: 2F01

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

1610 14TH ST NW

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	11am - 1am	11am - 1am
Monday:	11am - 1am	11am - 1am
Tuesday:	11am - 1am	11am - 1am
Wednesday:	11am - 1am	11am - 1am
Thursday:	11am - 1am	11am - 1am
Friday:	11am - 2am	11am - 2am
Saturday:	11am - 2am	11am - 2am

ENDORSEMENT(S): Cover Charge Dancing Entertainment Sidewalk Cafe

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-086613 **License Class/Type: D Tavern**
Applicant: The Capital Wine School LLC
Trade Name: The Capital Wine School
ANC: 3E04

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

5207 WISCONSIN AVE NW

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

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

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-071202 **License Class/Type: C Nightclub**
Applicant: The Wonderland Ballroom, Llc.
Trade Name: The Wonderland Ballroom
ANC: 1A06

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

1101 KENYON ST NW

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	10 am - 2 am	10 am - 2 am
Monday:	10 am - 2 am	10 am - 2 am
Tuesday:	10 am - 2 am	10 am - 2 am
Wednesday:	10 am - 2 am	10 am - 2 am
Thursday:	10 am - 2 am	10 am - 2 am
Friday:	10 am - 3 am	10 am - 3 am
Saturday:	10 am - 3 am	10 am - 3 am

ENDORSEMENT(S): Sidewalk Cafe Summer Garden

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-025996 **License Class/Type: C Tavern**
Applicant: Johanas, Inc
Trade Name: Johana's Restaurant
ANC: 4C02

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

4728 14TH ST NW

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	10 am - 2 am	10 am - 2 am
Monday:	10 am - 2 am	10 am - 2 am
Tuesday:	10 am - 2 am	10 am - 2 am
Wednesday:	10 am - 2 am	10 am - 2 am
Thursday:	10 am - 2 am	10 am - 2 am
Friday:	10 am - 3 am	10 am - 3 am
Saturday:	10 am - 3 am	10 am - 3 am

ENDORSEMENT(S): Cover Charge Dancing Entertainment

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-086354 **License Class/Type: C Tavern**
Applicant: Second Home, LLC
Trade Name: Number Nine
ANC: 2F02

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

1435 P ST NW

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	12 pm - 1:45 am	12 pm - 1:45 am
Monday:	12 pm - 1:45 am	12 pm - 1:45 am
Tuesday:	12 pm - 1:45 am	12 pm - 1:45 am
Wednesday:	12 pm - 1:45 am	12 pm - 1:45 am
Thursday:	12 pm - 1:45 am	12 pm - 1:45 am
Friday:	12 pm - 2:45 am	12 pm - 2:45 am
Saturday:	12 pm - 2:45 am	12 pm - 2:45 am

ENDORSEMENT(S): Entertainment Sidewalk Cafe

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-099229 **License Class/Type: C Tavern**
Applicant: In Stereo LLC
Trade Name: Trade
ANC: 2F02

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

1410 14TH ST NW

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	11am - 1:45am	11am - 1:45am
Monday:	11am - 1:45am	11am - 1:45am
Tuesday:	11am - 1:45am	11am - 1:45am
Wednesday:	11am - 1:45am	11am - 1:45am
Thursday:	11am - 1:45am	11am - 1:45am
Friday:	11am - 2:45am	11am - 2:45am
Saturday:	11am - 2:45am	11am - 2:45am

ENDORSEMENT(S): Cover Charge Dancing Entertainment Summer Garden

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-001200 **License Class/Type: C Tavern**
Applicant: Allen J. Carroll
Trade Name: Phase I
ANC: 6B03

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

525 8TH ST SE

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	7 pm - 2 am	7 pm - 2 am
Monday:	7 pm - 2 am	7 pm - 2 am
Tuesday:	7 pm - 2 am	7 pm - 2 am
Wednesday:	7 pm - 2 am	7 pm - 2 am
Thursday:	7 pm - 2 am	7 pm - 2 am
Friday:	7 pm - 3 am	7 pm - 3 am
Saturday:	7 pm - 3 am	7 pm - 3 am

ENDORSEMENT(S): Cover Charge Dancing Entertainment

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-084577 **License Class/Type: C Tavern**
Applicant: H & H, LLC
Trade Name: American Ice Company
ANC: 1B02

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

917 V ST NW

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	11 am - 2 am	11 am - 2 am
Monday:	11 am - 2 am	11 am - 2am
Tuesday:	11 am - 2 am	11 am - 2 am
Wednesday:	11 am - 2 am	11 am - 2 am
Thursday:	11 am - 2 am	11 am - 2 am
Friday:	11 am - 3 am	11 am - 3 am
Saturday:	11 am - 3 am	11 am - 3 am

ENDORSEMENT(S): Dancing Entertainment Summer Garden

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-075284 **License Class/Type: C Tavern**
Applicant: Axis Bar & Grill, LLC
Trade Name: Sudhouse
ANC: 1B12

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

1340 U ST NW

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	11 am - 2 am	11 am - 2 am
Monday:	11 am - 2 am	11 am - 2 am
Tuesday:	11 am - 2 am	11 am - 2 am
Wednesday:	11 am - 2 am	11 am - 2 am
Thursday:	11 am - 2 am	11 am - 2 am
Friday:	11 am - 3 am	11 am - 3 am
Saturday:	11 am - 3 am	11 am - 3 am

ENDORSEMENT(S): Entertainment Summer Garden

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-076260 **License Class/Type: C Tavern**
Applicant: Langston Bar & Grille, LLC
Trade Name: Langston Bar & Grille
ANC: 6A07

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

1831 BENNING RD NE

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	11 am - 12 am	11 am - 12 am
Monday:	8 am - 2 am	11 am - 2 am
Tuesday:	8 am - 2 am	11 am - 2 am
Wednesday:	8 am - 2 am	11 am - 2 am
Thursday:	8 am - 2 am	11 am - 2 am
Friday:	8 am - 3 am	11 am - 3 am
Saturday:	11 am - 3 am	11 am - 3 am

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-020480 **License Class/Type: C Tavern**
Applicant: Buffalo Billiards Corporation
Trade Name: Buffalo Billiards Corporation
ANC: 2B06

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

1330 19TH ST NW

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	8 am - 2 am	8 am - 2 am
Monday:	8 am - 2 am	8 am - 2 am
Tuesday:	8 am - 2 am	8 am - 2 am
Wednesday:	8 am - 2 am	8 am - 2 am
Thursday:	8 am - 2 am	8 am - 2 am
Friday:	8 am - 3 am	8 am - 3 am
Saturday:	8 am - 3 am	8 am - 3 am

ENDORSEMENT(S): Summer Garden

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-023167 **License Class/Type: C Nightclub**
Applicant: 19th & K, Inc.
Trade Name: Ozio Martini & Cigar Lounge
ANC: 2B06

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

1813 M ST NW

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	10 am - 2 am	11 am - 2 am
Monday:	10 am - 2 am	11 am - 2 am
Tuesday:	10 am - 2 am	11 am - 2 am
Wednesday:	10 am - 2 am	11 am - 2 am
Thursday:	10 am - 2 am	11 am - 2 am
Friday:	10 am - 3 am	11 am - 3 am
Saturday:	10 am - 3 am	11 am - 3 am

ENDORSEMENT(S): Sidewalk Cafe Summer Garden

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-097654 **License Class/Type: C Tavern**
Applicant: WW 718 7th Street LLC
Trade Name: We Work
ANC: 2C01

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

718 7TH ST NW

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

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

ENDORSEMENT(S): Entertainment

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-099805 **License Class/Type: C Tavern**
Applicant: 1831 M, LLC
Trade Name: 1831
ANC: 2B06

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

1831 M ST NW

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	10 am - 5 am	10 am - 2 am
Monday:	11 am - 5 am	11 am - 2 am
Tuesday:	11 am - 5 am	11 am - 2 am
Wednesday:	11 am - 5 am	11 am - 2 am
Thursday:	11 am - 5 am	11 am - 2 am
Friday:	11 am - 5 am	11 am - 3 am
Saturday:	10 am - 5 am	10 am - 3 am

ENDORSEMENT(S): Cover Charge Entertainment Sidewalk Cafe

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

NOTICE OF PUBLIC HEARING

Posting Date: September 30, 2016
Petition Date: November 14, 2016
Hearing Date: November 28, 2016

License No.: ABRA-104027
Licensee: Sangdo, Inc.
Trade Name: Daily 14 Mart
License Class: Retailer's Class "A"
Address: 1135 14th Street, N.W.
Contact: Kevin Lee: (703) 941-3133

WARD 2 ANC 2F SMD 2F05

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 transfer with Settlement Agreement from 1319 Rhode Island Avenue, N.E. to a new location at 1135 14th Street, N.W.

HOURS OF OPERATION/ ALCOHOLIC BEVERAGE SALES
Sunday Closed, Monday through Saturday 9:00 am – 10:00 pm

ALCOHOLIC BEVERAGE REGULATION ADMINSITRATION
NOTICE OF PUBLIC HEARING

Posting Date: September 30, 2016
Petition Date: November 14, 2016
Hearing Date: November 28, 2016

License No. ABRA-074712
Licensee: Dalunas, LLC
Trade Name: Marx Café American Bar
License Class: Retailer's Class "C" Tavern
Address: 3203 Mt Pleasant St. NW

WARD: 1 ANC: 1D SMD: 1D04

The Alcoholic Beverage Regulation Administration (ABRA) provides notice that the Licensee has filed a Petition to Amend or Terminate the Settlement Agreement(s) attached to its license.

The current parties to the agreement(s) are: Bianca, Inc. t/a Marx Café (Applicant) and Advisory Neighborhood Commission 1E (Protestant), dated, December 6, 1999 and Bianca, Inc. t/a Marx Café (Applicant) and Mount Pleasant Neighborhood Alliance (Protestant), dated, January 5, 2000 and Dalunas, LLC t/a Marx Café American Bar (Applicant) and Mount Pleasant Neighborhood Alliance (Protestant), dated, August 13, 2008.

A copy of the Petition may be obtained by contacting ABRA's Public Information Office at 202-442-4423.

Objectors are entitled to be heard before the granting of such a request on the Hearing Date, at 2000 14th Street, N.W., 400 South, Washington, D.C., 20002.

Petitions or requests to appear before the Board must be filed on or before the Petition Date.

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
9/30/2016

Notice is hereby given that:
License Number: ABRA-074712 **License Class/Type: C Tavern**
Applicant: Dalunas, LLC
Trade Name: Marx Cafe American Bar
ANC: 1D04

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

3203 MT PLEASANT ST NW

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

11/14/2016

A HEARING WILL BE HELD ON:

11/28/2016

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

Days	Hours of Operation	Hours of Sales/Service
Sunday:	11 am - 2 am	11 am - 1:30 am
Monday:	11 am - 2 am	11 am - 1:30 am
Tuesday:	11 am - 2 am	11 am - 1:30 am
Wednesday:	11 am - 2 am	11 am - 1:30 am
Thursday:	11 am - 2 am	11 am - 1:30 am
Friday:	11 am - 3 am	11 am - 2:30 am
Saturday:	11 am - 3 am	11 am - 2:30 am

ENDORSEMENT(S): Entertainment

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

NOTICE OF PUBLIC HEARING

Posting Date:	September 30, 2016
Petition Date:	November 14, 2016
Hearing Date:	November 28, 2016
Protest Date:	January 25, 2017

License No.:	ABRA-104119
Licensee:	Rito Loco, LLC
Trade Name:	Rito Loco
License Class:	Retailer's Class "C" Restaurant
Address:	606 Florida Avenue, N.W.
Contact:	Andrew Kline: 202-686-7600

WARD 6 ANC 6E SMD 6E02

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. Petitions and/or requests to appear before the Board must be filed on or before the petition date. The Protest Hearing Date is scheduled for January 25, 2017 at 1:30 pm.

NATURE OF OPERATION

Restaurant serving Mexican food with seating for 49 and a Total Occupancy Load of 49. Applicant has also requested an Entertainment Endorsement and a Summer Garden with 47 seats.

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

Sunday through Thursday 9 am – 2 am, Friday 9 am – 3 am and Saturday 10 am – 3 am

HOURS OF ENTERTAINMENT FOR PREMISES

Sunday through Thursday 6 pm – 2 am, Friday – Saturday 6 pm - 3 am

HOURS OF ENTERTAINMENT FOR SUMMER GARDEN

Sunday through Thursday 6 pm – 12 am, Friday-Saturday 6 pm – 1 am

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

NOTICE OF PUBLIC HEARING

Posting Date: September 30, 2016
Petition Date: November 14, 2016
Hearing Date: November 28, 2016

License No.: ABRA-101007
Licensee: The Avenue DC, LLC
Trade Name: The Avenue
License Class: Retailer's Class "C" Restaurant
Address: 5540 Connecticut Avenue, N.W.
Contact: Andrew Kline: (202) 686-7600

WARD 3 ANC 3G SMD 3G06

Notice is hereby given that this licensee has applied for Substantial Changes 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 1:30pm, 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 has requested an expansion of the existing premises, to include an additional 28 seats on the basement level and 63 seats on the second floor, thus resulting in a new Total Occupancy Load of 214. Applicant has also requested a Change of Hours of operation and alcoholic beverage sales, service, and consumption.

CURRENT HOURS OF OPERATION AND ALCOHOLIC BEVERAGE SALES/SERVICE/CONSUMPTION ON PREMISE
Sunday through Saturday 11 am – 12 am

PROPOSED HOURS OF OPERATION
Sunday through Thursday 7 am – 2 am, Friday and Saturday 7 am – 3 am

PROPOSED HOURS OF ALCOHOLIC BEVERAGE SALES/SERVICE/CONSUMPTION ON PREMISE
Sunday through Thursday 8 am – 2 am, Friday and Saturday 8 am – 3 am

HISTORIC PRESERVATION REVIEW BOARD
NOTICE OF PUBLIC HEARING

The D.C. Historic Preservation Review Board will hold a public hearing to consider applications to designate the following properties as historic landmarks in the D.C. Inventory of Historic Sites. The Board will also consider the nomination of the properties to the National Register of Historic Places:

Case No. 09-06: C & P Telephone Cleveland Emerson Exchange
4268 Wisconsin Avenue NW
Square 1786, Lot 9
Applicant: Tenleytown Historical Society
Affected Advisory Neighborhood Commission: 3E

Case No. 16-21: Glade Apartments
1370-1372 Fort Stevens Drive NW
Square 2791, Lot 2
Applicant: Athena LLC/Manna, Inc. (property owner)
Affected Advisory Neighborhood Commission: 4A

The hearing will take place at **9:00 a.m. on Thursday, November 17, 2016**, at 441 Fourth Street, NW (One Judiciary Square), in Room 220 South. It will be conducted in accordance with the Review Board's Rules of Procedure (10C DCMR 2). A copy of the rules can be obtained from the Historic Preservation Office at 1100 4th Street SW, Suite E650, Washington, DC 20024, or by phone at (202) 442-8800, and they are included in the preservation regulations which can be found on the Historic Preservation Office website.

The Board's hearing is open to all interested parties or persons. Public and governmental agencies, Advisory Neighborhood Commissions, property owners, and interested organizations or individuals are invited to testify before the Board. Written testimony may also be submitted prior to the hearing. All submissions should be sent to the Historic Preservation Office.

For each property, a copy of the historic landmark application is currently on file and available for inspection. A copy of the staff report and recommendation will be available at the office five days prior to the hearing. The office also provides information on the D.C. Inventory of Historic Sites, the National Register of Historic Places, and Federal tax provisions affecting historic property.

If the Historic Preservation Review Board designates the property, it will be included in the D.C. Inventory of Historic Sites, and will be protected by the D.C. Historic Landmark and Historic District Protection Act of 1978. The Review Board will simultaneously consider the nomination of the property to the National Register of Historic Places. The National Register is the Federal government's official list of prehistoric and historic properties worthy of preservation. Listing in the National Register provides recognition and assists in preserving our nation's heritage. Listing provides recognition of the historic importance of properties and assures review of Federal undertakings that might affect the character of such properties. If a property is listed in the Register, certain Federal rehabilitation tax credits for rehabilitation and other provisions may

apply. Public visitation rights are not required of owners. The results of listing in the National Register are as follows:

Consideration in Planning for Federal, Federally Licensed, and Federally Assisted Projects: Section 106 of the National Historic Preservation Act of 1966 requires that Federal agencies allow the Advisory Council on Historic Preservation an opportunity to comment on all projects affecting historic properties listed in the National Register. For further information, please refer to 36 CFR 800.

Eligibility for Federal Tax Provisions: If a property is listed in the National Register, certain Federal tax provisions may apply. The Tax Reform Act of 1986 (which revised the historic preservation tax incentives authorized by Congress in the Tax Reform Act of 1976, the Revenue Act of 1978, the Tax Treatment Extension Act of 1980, the Economic Recovery Tax Act of 1981, and the Tax Reform Act of 1984) provides, as of January 1, 1987, for a 20% investment tax credit with a full adjustment to basis for rehabilitating historic commercial, industrial, and rental residential buildings. The former 15% and 20% Investment Tax Credits (ITCs) for rehabilitation of older commercial buildings are combined into a single 10% ITC for commercial and industrial buildings built before 1936. The Tax Treatment Extension Act of 1980 provides Federal tax deductions for charitable contributions for conservation purposes of partial interests in historically important land areas or structures. Whether these provisions are advantageous to a property owner is dependent upon the particular circumstances of the property and the owner. Because the tax aspects outlined above are complex, individuals should consult legal counsel or the appropriate local Internal Revenue Service office for assistance in determining the tax consequences of the above provisions. For further information on certification requirements, please refer to 36 CFR 67.

Qualification for Federal Grants for Historic Preservation When Funds Are Available: The National Historic Preservation Act of 1966, as amended, authorizes the Secretary of the Interior to grant matching funds to the States (and the District or Columbia) for, among other things, the preservation and protection of properties listed in the National Register.

Owners of private properties nominated to the National Register have an opportunity to concur with or object to listing in accord with the National Historic Preservation Act and 36 CFR 60. Any owner or partial owner of private property who chooses to object to listing must submit to the State Historic Preservation Officer a notarized statement certifying that the party is the sole or partial owner of the private property, and objects to the listing. Each owner or partial owner of private property has one vote regardless of the portion of the property that the party owns. If a majority of private property owners object, a property will not be listed. However, the State Historic Preservation Officer shall submit the nomination to the Keeper of the National Register of Historic Places for a determination of eligibility for listing in the National Register. If the property is then determined eligible for listing, although not formally listed, Federal agencies will be required to allow the Advisory Council on Historic Preservation an opportunity to comment before the agency may fund, license, or assist a project which will affect the property. If an owner chooses to object to the listing of the property, the notarized objection must be submitted to the above address by the date of the Review Board meeting.

For further information, contact Tim Dennee, Landmarks Coordinator, at 202-442-8847.

BOARD OF ZONING ADJUSTMENT
PUBLIC HEARING NOTICE
WEDNESDAY, NOVEMBER 16, 2016
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 ONE

19356 ANC-1C **Appeal of The Argonne, LLC**, pursuant to 11 DCMR §§ 3100 and 3101, from a June 8, 2016 decision by the Zoning Administrator, Department of Consumer and Regulatory Affairs, to issue Building Permit No. B1508236, requiring conformance with R-4 regulations at premises 1630-1634 Argonne Place, N.W. (Square 2589, Lot 480).

WARD THREE

17508A ANC-3D **Application of Palisades Montessori School**, pursuant to 11 DCMR Subtitle X, Chapter 9, for a special exception under the R-Use group requirements of Subtitle U § 203.1(g), to operate a daytime care use serving 25 children with four staff in the R-1-B Zone at premises 2828 Hurst Terrace, N.W. (Square 1498, Lot 12).

WARD THREE

19367 ANC-3E **Application of Frank and Andrea Mirkow**, pursuant to 11 DCMR Subtitle X, Chapter 9, for special exceptions under the rear yard requirements of Subtitle D § 306.1, and the side yard requirements of Subtitle D § 307.1, to construct a rear second story garage addition in the R-1-B Zone at premises 4831 Alton Place N.W. (Square 1498, Lot 821).

WARD SIX

19369 ANC-6B **Appeal of Capitol Hill Partners I, LLC**, pursuant to 11 DCMR §§ 3100 and 3101, from a July 15, 2016 decision by the Zoning Administrator, Department of Consumer and Regulatory Affairs, to not issue a stop-work order on Building Permit No's. B1512726 and B1605810 in the R-4 District at premises 521 11th Street S.E. (Square 973, Lot 69).

WARD FIVE

19363 ANC-5E **Application of Zachary and Robert Bernstein**, pursuant to 11 DCMR Subtitle X, Chapter 9, for a special exception under the penthouse requirements of Subtitle C § 1500.4, to add a roof deck addition to an existing one-family dwelling in the R-3 Zone at premises 35 Franklin Street N.E. (Square 3501, Lot 31).

WARD SEVEN

16011A ANC-7F **Application of American Tower Corporation**, pursuant to 11 DCMR Subtitle X, Chapter 9, for a special exception under the antenna requirements of Subtitle C § 1313.1, to allow the continued operation of a non-conforming monopole in the PDR-1 Zone at premises 3701 Benning Road N.E. (Square 5044, Lot 807).

WARD TWO

THIS CASE WAS HEARD ON JULY 12, 2016, CONTINUED BY THE BOARD TO OCTOBER 18, 2016, AND RESCHEDULED FROM OCTOBER 18, 2016 BY REQUEST OF THE APPLICANT - VESTED UNDER THE 1958 ZONING REGULATIONS:

19309 ANC-2B **Application of Valor P Street, LLC**, pursuant to 11 DCMR § 3103.2, for variances from the lot occupancy requirements under § 772.1, and the rear yard requirements under § 774.1, to renovate an existing structure to create a mixed-use building containing eight dwelling units with a ground-floor restaurant in the DC/C-2-C District at premises 2147-2149 P Street, N.W. (Square 67, Lot 835).

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 Subtitles X and Y of the District of Columbia Municipal Regulations, Title 11. Pursuant to Subtitle Y, Chapter 2 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.

**Note that party status is not permitted in Foreign Missions cases.*

Do you need assistance to participate?
If you need special accommodations or need language assistance services (translation or interpretation), please contact Zee Hill at (202) 727-0312 or Zelalem.Hill@dc.gov five days in advance of the meeting. These services will be provided free of charge.

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

MARNIQUE Y. HEATH, CHAIRMAN, ANITA BUTANI D'SOUZA, VICE CHAIRMAN, FREDERICK L. HILL, JEFFREY L. HINKLE, AND A MEMBER OF THE ZONING COMMISSION, CLIFFORD W. MOY, SECRETARY TO THE BZA, SARA A. BARDIN, DIRECTOR, OFFICE OF ZONING.

BOARD OF ZONING ADJUSTMENT
PUBLIC HEARING NOTICE
WEDNESDAY, NOVEMBER 30, 2016
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 ONE

19366
ANC-1C

Application of California Land Company LLC, pursuant to 11 DCMR Subtitle X, Chapter 10, for variances from the nonconforming structure requirements of Subtitle C § 202.2, and the lot occupancy requirements of Subtitle E § 304.1, to construct three balconies to the rear of an existing 16-unit apartment building in the RA-2 Zone at premises 1829 California Street N.W. (Square 2554, Lot 4).

WARD ONE

19370
ANC-1D

Appeal of Historic Mount Pleasant, Inc., pursuant to 11 DCMR §§ 3100 and 3101, from an August 3, 2016 decision by the Zoning Administrator, Department of Consumer and Regulatory Affairs, to issue Building Permit No. B1605094, for a four-unit apartment house in the R-4 District at premises 1833 Lamont Street N.W. (Square 2606, Lot 95).

WARD ONE

19371
ANC-1B

Application of 14th & R Street Enterprise LLC, pursuant to 11 DCMR Subtitle X, Chapter 9, for special exceptions under the loading requirements of Subtitle C § 901, the penthouse setback and height requirements of Subtitle C § 1502.1 and Subtitle K § 803.3, the rear yard requirements of Subtitle K § 805, and the side yard requirements of Subtitle K § 806, to construct a seven-story mixed-use building in the ARTS-3 Zone at premises 2213 14th Street N.W. (Square 234, Lot 163).

WARD SIX

19372
ANC-6E

Application of Glenn Counts, pursuant to 11 DCMR Subtitle X, Chapter 9, for a special exception under the lot occupancy requirements of Subtitle E § 304.1, to construct a single-car detached garage in the RF-1 Zone at premises 440 N Street N.W. (Square 513, Lot 932).

WARD ONE

19373 ANC-1B **Application of Stephen Babatunde**, pursuant to 11 DCMR Subtitle X, Chapter 9, for a special exception under the RF-use requirements of Subtitle U § 320.2(c), to expand an existing four-unit apartment house in the RF-1 Zone at premises 911 T Street N.W. (Square 361, Lot 803).

WARD SIX

18915A ANC-6B **Application of Aminta**, pursuant to 11 DCMR Subtitle Y § 704, for a modification of significance of BZA Order No. 18915, now requesting special exception relief under the parking requirements of Subtitle C § 703, and the loading requirements of Subtitle C § 909, and variance relief under the lot occupancy requirements of Subtitle G § 404.1, to construct a mixed-use building in the MU-4 Zone at premises 1330-1338 Pennsylvania Avenue N.W. (Square 1044, Lots 12, 29, and 802).

WARD SIX

THIS CASE WAS POSTPONED BY THE APPLICANT FROM THE PUBLIC HEARINGS OF JUNE 21, 2016, JULY 6, 2016, AND SEPTEMBER 20, 2016, AND HAS BEEN CONVERTED TO A ZR16 CASE:

19280 ANC-6E **Application of Martin Hardy**, pursuant to 11 DCMR Subtitle X, Chapter 10, for variances from the lot occupancy requirements of Subtitle G § 304.1, the open court requirements of Subtitle G § 202.1, and the nonconforming structure requirements of Subtitle C § 202, to allow the conversion of an existing two-story, one-family dwelling into a three-story, four-unit apartment house in the MU-4 District at premises 1316 8th Street N.W. (Square 399, Lot 830).

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 Subtitles X and Y of the District of Columbia Municipal Regulations, Title 11. Pursuant to Subtitle Y, Chapter 2 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.

**Note that party status is not permitted in Foreign Missions cases.*

Do you need assistance to participate?
If you need special accommodations or need language assistance services (translation or interpretation), please contact Zee Hill at (202) 727-0312 or Zelalem.Hill@dc.gov five days in advance of the meeting. These services will be provided free of charge.

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

MARNIQUE Y. HEATH, CHAIRMAN, ANITA BUTANI D'SOUZA, VICE CHAIRMAN, FREDERICK L. HILL, JEFFREY L. HINKLE, 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, November 17, 2016, @ 6:30 p.m.**
Jerrily R. Kress Memorial Hearing Room
441 4th Street, N.W., Suite 220-S
Washington, D.C. 20001

FOR THE PURPOSE OF CONSIDERING THE FOLLOWING:

Case No. 14-11B (Office of Planning – Text Amendment to the Zoning Regulations: Subtitle B, Definitions; Subtitle D, Zones R-3, R-13, R-17, and R-20; and Subtitle E, RF Zones)

THIS CASE IS OF INTEREST TO ALL ANCs

The Office of Planning (OP), in a report dated April 29, 2016, petitioned the Zoning Commission for the District of Columbia (Commission) for text amendments to Subtitles B, D, and E of Title 11 DCMR (Zoning). These subtitles are part of the subtitles that constitute the Zoning Regulations pursuant to 11-A DCMR § 200.2.

At its regular public meeting held May 9, 2016, the Commission set down this case for a public hearing. The Office of Planning Report served as the Supplemental Filing then required by 11 DCMR § 3013 (now 11-Z DCMR § 501). The OP Report's principally focused upon what it referred to as "Rear Additions" and proposed new sections with that title. In reviewing the format of Subtitles D and E, it was determined that the draft text should instead be added to the existing "Rear Yard" sections.

The proposed text amendments address concerns about excessively disproportionate rear extensions relative to adjoining row buildings. The language proposes to limit a matter-of-right rear extension, whether as an addition to an existing building or as new construction, to extending no more than 10 feet beyond the rear wall of an adjoining building and would allow a rear extension to extend further than 10 feet as a special exception.

The proposed language would be applicable in combination with the other existing development standards such as lot occupancy and rear yards, to regulate the overall development of a lot. The 10-foot rear wall limit could not be used to encroach into a required rear yard, to exceed lot occupancy or to reduce required pervious surface standards. The proposed language is limited to attached and semi-detached buildings because a detached building, including any rear addition, would be subject to side yard requirements.

Also considered as part of this case are amendments to the adopted text from case Z.C. Case No. 14-11 regarding conversions to apartment houses in the RF zones identified by the Zoning Administrator. These amendments are listed below as items 6 through 9 and propose to do the following:

- Clarify that a boarding house is a residential structure and therefore conversion to an apartment house would be subject to special exception under Subtitle U § 320.2;
- Change "residential building" to "apartment building" to clarify that the section applies when a non-residential building is converted to an apartment house and not when a change in use is to a matter-of-right single household dwelling or flat;
- Clarify that the building to be converted is an existing non-residential building;
- Provide clarity in the administration of the upper story additions and roof elements through proposed changes to Subtitle U § 320.2 and correct the numbering; and
- Delete the phrase "existing prior to May 12, 1958" to allow for non-residential buildings such as churches, schools, and fire stations, that were built as a matter of right after 1958 to be converted to an apartment house subject to the conditions of Subtitle U §§ 301.2 and 320.3.

The new language is shown in **bold** and underlined text; deleted language is shown with ~~strikethrough~~:

1. Add new Subtitle D §§ 306.3 and 306.4 to read as follows:

306.3 Notwithstanding §§ 306.1 and 306.2, a rear wall of an attached or semi-detached building shall not be constructed to extend more than ten feet (10 ft.) beyond the furthest rear wall of any adjoining principal residential building on an adjoining property.

306.4 A rear wall of an attached or semi-detached building may be constructed to extend more than ten feet (10 ft.) beyond the furthest rear wall of any adjoining principal residential building on an adjoining property if approved as a special exception pursuant to Subtitle Y, Chapter 9 and as evaluated against the criteria of Subtitle D §§ 5201.3(a) through (d) and §§ 5201.4 through 5201.6.

2. Add new Subtitle D §§ 706.3 and 706.4 to read as follows:

706.3 Notwithstanding §§ 706.1 and 706.2, a rear wall of an attached or semi-detached building shall not be constructed to extend more than ten feet (10 ft.) beyond the furthest rear wall of any adjoining principal residential building on an adjoining property.

706.4 A rear wall of an attached or semi-detached building may extend more than ten feet (10 ft.) beyond the furthest rear wall of any adjoining principal residential building on an adjoining property if approved as a special exception pursuant to Subtitle Y, Chapter 9 and as evaluated

against the criteria of Subtitle D §§ 5201.3 (a) through (d) and §§ 5201.4 through 5201.6.

3. Add new Subtitle D §§ 1006.2 and 1006.3 to read as follows:

1006.2 Notwithstanding § 1006.1, a rear wall of an attached or semi-detached building shall not be constructed to extend more than ten feet (10 ft.) beyond the furthest rear wall of any adjoining principal residential building on an adjoining property.

1006.3 A rear wall of an attached or semi-detached building may extend more than ten feet (10 ft.) beyond the furthest rear wall of any adjoining principal residential building on an adjoining property if approved as a special exception pursuant to Subtitle Y, Chapter 9 and as evaluated against the criteria of Subtitle D §§ 5201.3(a) through (d) and §§ 5201.4 through 5201.6.

4. Add new Subtitle D §§ 1206.3 and 1206.4 to read as follows:

1206.3 Notwithstanding § 1206.2 of this section, a rear wall of an attached or semi-detached building shall not be constructed to extend more than ten feet (10 ft.) beyond the furthest rear wall of any principal residential building on an adjoining property.

1206.4 In the R-20 zone a rear wall of an attached or semi-detached building may extend more than ten feet (10 ft.) beyond the furthest rear wall of any principal residential building on an adjoining property if approved as a special exception pursuant to Subtitle Y, Chapter 9 and as evaluated against the criteria of Subtitle D §§ 5201.3(a) through (d) and §§ 5201.4 through 5201.6.

5. Add new Subtitle E §§ 205.4 and 205.5 to read as follows:

205.4 Notwithstanding §§ 205.1 through 205.3, a rear wall of an attached or semi-detached building shall not be constructed to extend more than ten feet (10 ft.) beyond the furthest rear wall of any adjoining principal residential building on an adjoining property.

205.5 A rear addition may extend more than ten feet (10 ft.) beyond the furthest rear wall of any principal residential building on an adjoining property if approved as a special exception pursuant to Subtitle Y, Chapter 9 and as evaluated against the criteria of Subtitle E §§ 5201.3 through 5201.6.

6. Amend Subtitle B, § 100.2, the definition of Boarding House as follows:

Boarding House: A building or part thereof where, for compensation, lodging and meals are provided to three (3) or more guests on a monthly or longer basis; **a boarding house shall be considered a residential structure**.

7. Amend Subtitle U § 301.2 (Matter of Right Uses in RF zones) as follows:

301.2 Conversion of an existing non-residential building or structure, ~~existing prior to May 12, 1958~~, to ~~a residential building~~ **an apartment house** shall be permitted as a matter of right in the R-4 Zone District subject to the following conditions:

(a) **The building or structure to be converted is in existence** ~~There is an existing non-residential building~~ on the property at the time of filing an application for a building permit;

(b) …

(e) A roof top architectural element original to the structure such as **cornices, porch roofs,** a turret, tower, or dormers shall not be removed or significantly altered, including **shifting its location**, changing its shape or increasing its height, elevation, or size;

(f) Any addition, including a roof structure or penthouse, shall not block or impede the functioning of a chimney or other external vent **compliant with any municipal code** on an adjacent property ~~required by any municipal code~~. **A chimney or other external vent must be existing and operative at the date of the building permit application for the addition.**

(g) Any addition, including a roof structure or penthouse, shall not **significantly** interfere with the operation of an existing ~~or permitted~~ solar energy system on an adjacent property. **For the purposes of this provision, "significantly interfere" shall mean an impact caused solely by the addition that decreases the energy produced by the system by more than five percent (5%) on any one day,** as evidenced through a shadow, shade, or other reputable study acceptable to the Zoning Administrator. **For the purposes of this provision "an existing solar energy system" shall mean a system that is installed and operative or a system for which a permit has been issued as of the date of filing an application for a building permit for the addition. If the permitted solar energy system is not operative within one (1) year of the issuance of the solar energy system permit, a system shall not be considered existing.**

8. Amend Subtitle U § 320.2, paragraphs (f) through (h) as follows:

(f) Any addition, including a roof structure or penthouse, shall not block or impede the functioning of a chimney or other external vent **compliant with any municipal code** on an adjacent property ~~required by any municipal code.~~ **A chimney or other external vent must be existing and operative at the date of the building permit application for the addition.**

(g) Any addition, including a roof structure or penthouse, shall not **significantly** interfere with the operation of an existing ~~or permitted~~ solar energy system on an adjacent property. **For the purposes of this provision, "significantly interfere" shall mean an impact caused solely by the addition that decreases the energy produced by the system by more than five percent (5%) on any one day,** as evidenced through a shadow, shade, or other reputable study acceptable to the Board. **For the purposes of this provision "an existing solar energy system" shall mean a system that is installed and operative or a system for which a permit has been issued. If the permitted solar energy system is not operative within one (1) year of the issuance of the solar energy system permit, a system shall not be considered existing.**

(h) A roof top architectural element original to the structure such as **cornices, porch roofs,** a turret, tower, or dormers shall not be removed or significantly altered, including **shifting its location**, changing its shape or increasing its height, elevation, or size.

9. Amend Subtitle U § 320.3 (Special Exception Uses in the RF zones) to delete the phrase "existing prior to May 12, 1958" as follows:

320.3 Conversion of a non-residential building or other structure ~~existing prior to May 12, 1958,~~ to an apartment house and not meeting one (1) or more of the requirements of Subtitle U § 301.2, shall be permitted as a special exception in an RF-1, RF-2, or RF-3 zone if approved by the Board of Zoning Adjustment under Subtitle X, Chapter 9 subject to the following provisions…

Proposed amendments to the Zoning Regulations of the District of Columbia are authorized pursuant to the Zoning Act of June 20, 1938, (52 Stat. 797), as amended, D.C. Official Code § 6-641.01, *et seq.*

The public hearing on this case will be conducted as a rulemaking in accordance with the provisions of Subtitle Z, Chapter 5.

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.

Time limits.

All individuals, organizations, or associations wishing to testify in this case are encouraged to inform the Office of Zoning of 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.	Organizations	5 minutes each
2.	Individuals	3 minutes each

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 https://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, 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 SCHELLIN, SECRETARY TO THE ZONING COMMISSION.

Do you need assistance to participate? If you need special accommodations or need language assistance services (translation or interpretation), please contact Zee Hill at (202) 727-0312 or Zelalem.Hill@dc.gov five days in advance of the meeting. These services will be provided free of charge.

ZONINGCOMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF FURTHER PUBLIC HEARING

TIME AND PLACE: **Thursday, December 15, 2016, @ 6:30 p.m.**
Jerrily R. Kress Memorial Hearing Room
441 4th Street, N.W., Suite 220-South
Washington, D.C. 20001

FOR THE PURPOSE OF CONSIDERING THE FOLLOWING:

CASE NO. 15-02 (MHI-Brookland and The Redemptorists – Consolidated Review and Approval of a Planned Unit Development)

THIS CASE IS OF INTEREST TO ANC 5E

On February 3, 2015, the Office of Zoning received an application from MHI-Brookland and The Redemptorists (collectively, the "Applicant") requesting approval of a consolidated planned unit development and a PUD-related map amendment to facilitate the development of Square 3645, Lots 802 and 804, Square 3648, Lot 804, and Parcel 132/89 for residential use. The Office of Planning submitted its report in support of setting the application down for a public hearing on June 18, 2015. On June 29, 2015, the Commission voted to set down the application for a public hearing. The Applicant provided its prehearing statement on August 21, 2015, and a public hearing was conducted on October 29, 2015. At the close of the public hearing, the Zoning Commission requested modifications to the plans and noted that another public hearing would be held to evaluate the revised plans. The Applicant filed the updated plans on August 25, 2016.

The property that is the subject of this application consists of approximately 119,215 square feet of land area. The property is located in the southwest corner of the intersection of 7th Street, N.E. and Jackson Street, N.E. The property is located in the D/R-5-A Zone District. The initial application sought a map amendment to the R-5-B Zone District; however, the revised plans no longer require a map amendment and the existing zoning designation of R-5-A will remain in place. The property is located in the Institutional land use category on the Future Land Use Map of the District of Columbia Comprehensive Plan.

The Applicant proposes to develop the property with 22 residential townhomes located to the south of the existing Holy Redeemer College building. The existing Holy Redeemer building will remain. The project, including the Redemptorists' building, will have a floor area ratio of .78 and a lot occupancy of 24%. The maximum height of the proposed townhomes will be 47 feet and thirty parking spaces will be provided on-site for the townhomes. This application includes flexibility to convert the existing Redemptorists' building to multi-family use.

This public hearing will be conducted in accordance with the contested case provisions of the Zoning Regulations, 11 DCMR Subtitle Z, Chapter 4.

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 Subtitle Z § 404.1.

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 an 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, or 14 days prior to a scheduled public meeting if seeking advanced party status consideration, a Form 140 – Party Status Application, a copy of which may be downloaded from the Office of Zoning's website at: https://app.dcoz.dc.gov/Help/Forms.html.** This form may also be obtained from the Office of Zoning at the address stated below.

Subtitle Z § 406.2 provides that the written report of an affected ANC shall be given great weight if received at any time prior to the date of a Commission meeting to consider final action, including any continuation thereof on the application, and sets forth the information that the report must contain. Pursuant to Subtitle Z § 406.3, if an ANC wishes to participate in the hearing, it must file a written report at least seven days in advance of the public hearing and provide the name of the person who is authorized by the ANC to represent it at the hearing.

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

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

1.	Applicant and parties in support	60 minutes collectively
2.	Parties in opposition	60 minutes collectively

3.	Organizations	5 minutes each
4.	Individuals	3 minutes each

Pursuant to Subtitle Z § 408.4, 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, 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.

Do you need assistance to participate? If you need special accommodations or need language assistance services (translation or interpretation), please contact Zee Hill at (202) 727-0312 or Zelalem.Hill@dc.gov five days in advance of the meeting. These services will be provided free of charge.

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF PUBLIC HEARING

TIME AND PLACE: **Monday, December 5, 2016, @ 6:30 p.m.**
Jerrily R. Kress Memorial Hearing Room
441 4th Street, N.W., Suite 220-South
Washington, D.C. 20001

FOR THE PURPOSE OF CONSIDERING THE FOLLOWING:

CASE NO. 16-11 (Park View Community Partners & the District of Columbia – Consolidated PUD & Related Map Amendment @ Square 2890, Part of Lot 849)

THIS CASE IS OF INTEREST TO ANCs 1A and 1B

On May 13, 2016, the Office of Zoning received an application from Park View Community Partners and the District of Columbia (together, the "Applicant") for approval of a consolidated Planned Unit Development ("PUD") and a PUD-related Zoning Map amendment from the R-4 and C-2-A zones to the R-5-B and C-2-B zones for the above-referenced property. The property was rezoned to the RF-1 and MU-4 zones effective September 6, 2016, as a result of Z.C. Order No. 08-06A. That order also repealed the existing text of Title 11 DCMR (the "1958 Regulations") and replaced it with new substantive and procedural provisions (the "2016 Regulations"). Nevertheless, because this application was set down for hearing prior to September 6th, the PUD-related Zoning Map amendment will be based upon the zones that existed as of September 5, 2016. The merits of the PUD application will be evaluated based upon the provisions of Chapter 24 of the 1958 Regulations and the extent of the zoning flexibility requested will be determined based upon the requirements of the 1958 Regulations. In all other respects, the provisions of the 2016 Regulations shall apply to this proceeding.

The property that is the subject of this application consists of part of Lot 849 in Square 2890 in northwest Washington, D.C., on property bounded by Irving Street, N.W. to the north, Georgia Avenue, N.W. to the east, Columbia Road, N.W. to the south, and private property to the west (the "Subject Property"). The Subject Property consists of approximately 77,531 square feet of land area.

The Office of Planning provided its report on July 15, 2016, and the case was set down for a public hearing on July 25, 2016. The Applicant provided its prehearing statement on August 5, 2016.

The Applicant proposes to redevelop the Subject Property with a mixed-income community with a total of approximately 273 residential units, comprised of 189 apartment units, 76 senior apartment units, and 8 townhomes. The project will also include approximately 4,545 square feet of community service space. The majority of the new residential units will be subsidized housing for low or moderate income households. Overall, the Subject Property will be developed with approximately 274,333 total square feet of gross floor area (approximately 3.5 floor area ratio

("FAR")) and will have an overall lot occupancy of approximately 53%. The apartment house will have a maximum height of 90 feet; the senior building will have a maximum height of 60 feet; and the townhomes will have a maximum height of 40 feet. The Subject Property and proposed development will serve as the Build-First site for the Park Morton Public Housing Community, a targeted site that is part of the District's New Community's Initiative.

This public hearing will be conducted in accordance with the contested case provisions of the Zoning Regulations, 11 DCMR Subtitle Z, Chapter 4.

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 Subtitle Z § 404.1.

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 an 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, or 14 days prior to a scheduled public meeting if seeking advanced party status consideration, a Form 140 – Party Status Application, a copy of which may be downloaded from the Office of Zoning's website at: https://app.dcoz.dc.gov/Help/Forms.html.** This form may also be obtained from the Office of Zoning at the address stated below.

Subtitle Z § 406.2 provides that the written report of an affected ANC shall be given great weight if received at any time prior to the date of a Commission meeting to consider final action, including any continuation thereof on the application, and sets forth the information that the report must contain. Pursuant to Subtitle Z § 406.3, if an ANC wishes to participate in the hearing, it must file a written report at least seven days in advance of the public hearing and provide the name of the person who is authorized by the ANC to represent it at the hearing.

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

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

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

Pursuant to Subtitle Z § 408.4, 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 https://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, 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.

Do you need assistance to participate? If you need special accommodations or need language assistance services (translation or interpretation), please contact Zee Hill at (202) 727-0312 or Zelalem.Hill@dc.gov five days in advance of the meeting. These services will be provided free of charge.

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF PUBLIC HEARING

TIME AND PLACE: **Thursday, December 8, 2016, @ 6:30 p.m.**
Jerrily R. Kress Memorial Hearing Room
441 4th Street, N.W., Suite 220-South
Washington, D.C. 20001

FOR THE PURPOSE OF CONSIDERING THE FOLLOWING:

CASE NO. 16-12 (Park View Community Partners and the District of Columbia Housing Authority – Consolidated PUD and Related Map Amendment @ Squares 3039, 3040, and 3043)

THIS CASE IS OF INTEREST TO ANC 1A

On May 16, 2016, the Office of Zoning received an application from Park View Community Partners and the District of Columbia Housing Authority (together, the "Applicant") for approval of a consolidated planned unit development ("PUD") and a PUD-related Zoning Map amendment from the R-4 zone to the R-5-B zone for the above-referenced property. The property was rezoned to the RF-1 zone effective September 6, 2016, as a result of Z.C. Order No. 08-06A. That order also repealed the existing text of Title 11 DCMR (the "1958 Regulations") and replaced it with new substantive and procedural provisions (the "2016 Regulations"). Nevertheless, because this application was set down for hearing prior to September 6th, the PUD-related Zoning Map amendment will be based upon the zones that existed as of September 5, 2016. The merits of the PUD application will be evaluated based upon the provisions of Chapter 24 of the 1958 Regulations and the extent of the zoning flexibility requested will be determined based upon the requirements of the 1958 Regulations. In all other respects, the provisions of the 2016 Regulations shall apply to this proceeding.

The property that is the subject of this application consists of Lots 128-134 and 846 in Square 3039, Lots 124-126 and 844 in Square 3040, and Lots 18-20 in Square 3043, in northwest Washington, D.C. (the "Subject Property"). The Subject Property spans across a dead-end portion of Morton Street, N.W., and also has frontage on Park Road, N.W. to the north and a small portion of Warder Street to the east. The Subject Property consists of approximately 174,145 square feet (3.99 acres) of land area.

The Office of Planning provided its report on July 15, 2016, and the case was set down for a public hearing on July 25, 2016. The Applicant provided its prehearing statement on August 5, 2016.

The Applicant proposes to redevelop the Subject Property with a mixed-income residential community that replaces the existing public housing units with approximately 183 new residential units, comprised of new apartment units, row dwellings, semi-detached dwellings, and "stacked flats." Of the total 183 new units, over half (51%) will be income-restricted housing

for low or moderate income households. Overall, the Subject Property will be developed with approximately 206,764 square feet of gross floor area (approximately 0.9 floor area ratio ("FAR")) and will have an overall lot occupancy of approximately 45%. The apartment house will have a maximum height of 60 feet and the row dwellings, semi-detached dwellings, and stacked flats will range in height from 30 feet to 45 feet. The Subject Property is one of the communities that is part of the District's New Communities Initiative.

This public hearing will be conducted in accordance with the contested case provisions of the Zoning Regulations, 11 DCMR Subtitle Z, Chapter 4.

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 Subtitle Z § 404.1.

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 an 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, or 14 days prior to a scheduled public meeting if seeking advanced party status consideration, a Form 140 – Party Status Application, a copy of which may be downloaded from the Office of Zoning's website at:** https://app.dcoz.dc.gov/Help/Forms.html**.** This form may also be obtained from the Office of Zoning at the address stated below.

Subtitle Z § 406.2 provides that the written report of an affected ANC shall be given great weight if received at any time prior to the date of a Commission meeting to consider final action, including any continuation thereof on the application, and sets forth the information that the report must contain. Pursuant to Subtitle Z § 406.3, if an ANC wishes to participate in the hearing, it must file a written report at least seven days in advance of the public hearing and provide the name of the person who is authorized by the ANC to represent it at the hearing.

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

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

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

Pursuant to Subtitle Z § 408.4, 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 https://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, 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.

Do you need assistance to participate? If you need special accommodations or need language assistance services (translation or interpretation), please contact Zee Hill at (202) 727-0312 or Zelalem.Hill@dc.gov five days in advance of the meeting. These services will be provided free of charge.

DISTRICT OF COLUMBIA BOARD OF ELECTIONS

NOTICE OF FINAL RULEMAKING

The District of Columbia Board of Elections, pursuant to the authority set forth in the District of Columbia Election Code of 1955, approved August 12, 1955, as amended (69 Stat. 699; D.C. Official Code § 1-1001.05(a)(14) (2014 Repl.)), hereby gives notice of the adoption of amendments to Chapters 1 (Organization of the Board of Elections) and 4 (Hearings) of Title 3 (Elections and Ethics) of the District of Columbia Municipal Regulations (DCMR).

The amendments to Chapter 1 and 4 affirm the Board's ability to conduct meetings by telephone, video conference, or any device that allows all board members to be able to hear each other.

A Notice of Proposed Rulemaking was published in the *D.C. Register* on August 12, 2016 at 63 DCR 010476. 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.

The rules were adopted as final at a Special Board meeting on Wednesday, September 14, 2016, and they will become effective upon publication of this notice in the *D.C. Register*.

Chapter 1, ORGANIZATION OF THE BOARD OF ELECTIONS, of Title 3 DCMR, ELECTIONS AND ETHICS, is amended as follows:

Section 102, ORGANIZATION OF THE BOARD OF ELECTIONS, is amended in its entirety to read as follows:

102 ORGANIZATION OF THE BOARD OF ELECTIONS

102.01 Board members are charged with providing ultimate oversight over the activities and affairs of the agency. Members should make every effort to ensure their participation in all Board activities.

102.02 Board attendance is directly correlated to Board participation and thereby to the success of the agency and its mission. Such participation is necessary for Board Members to fulfill their fiduciary obligation to the electors of the District of Columbia. All Board Members are expected to be physically present, at all scheduled meetings unless some other form of attendance has been approved by the Chair.

102.03 Except as provided otherwise by statute, a quorum of the Board shall consist of no fewer than two (2) members of the Board and shall be necessary to conduct official Board business. Board members may be present by any means, be it in person, telephonic, video or other wherein all Board members may hear and be heard by each other.

102.04 At the beginning of each calendar year, a preliminary schedule of regular meetings for the year, which the Board has discretion to change, will be published in the *D.C. Register*.

102.05 The Board may hold a pre-meeting immediately prior to commencing a regular meeting for the sole purpose of administrative action, which does not include the deliberation or taking of official action.

102.06 Regularly scheduled Board meetings shall be held on the first Wednesday of each month, or at least once each month, at a time to be determined by the Board. Additional meetings may be called as needed by the Board.

102.07 Notice of all regular and additional meetings of the Board will be published on the Board's web site at least forty-eight (48) hours in advance, except in the case of emergency.

102.08 The Board may exercise its discretion and reschedule a regular meeting or call special meetings when necessary with reasonable notice to the public.

102.09 The Board encourages comments on any issue under the jurisdiction of the Board at its regular meetings and will provide the public with a reasonable opportunity to appear before the Board and offer such comments.

102.10 To ensure the orderly conduct of public Board meetings, public comments may be limited with respect to the number of speakers permitted and the amount of time allotted to each speaker; however, the Board will not discriminate against any speaker on the basis of his or her position on a particular matter.

102.11 Any member of the public who intends to comment regarding any agenda item or any issue under the jurisdiction of the Board is encouraged to notify the Board in advance of his or her intent to do so, providing his or her name and the topic on which he or she wishes to speak. Such notification may be provided by e-mail to ogc@dcboee.org, by fax to (202) 741-8774, by telephone at (202) 727-2194, by mail to 441 4th Street, N.W., Suite 270 North, Washington, D.C. 20001, or in person at the Board's office. No person shall be prevented from speaking at a Board meeting simply because he or she has not provided advance notice of his or her intent to do so.

102.12 Members of the public who wish to submit items for consideration by the Board shall do so in writing one (1) week in advance. Failure to submit an item in advance as required may, within the Board's discretion, result in the matter being continued until the next regularly scheduled meeting.

Section 406, MEETINGS AND HEARINGS, of Chapter 4, HEARINGS, is amended in its entirety to read as follows:

406 MEETINGS AND HEARINGS

406.1 The meetings and hearings of the Board shall be open to the public, with the exception of executive sessions, as that term is defined and explained in Section 103 in Chapter 1 of this title.

406.2 The proposed agenda for each Board meeting and the minutes from the previous regular Board meeting shall be posted in the office of the Board and on its website at least twenty-four (24) hours prior to a regular Board meeting.

406.3 Copies of the agenda and the minutes from the previous regular Board meeting shall be available to the public at the meeting or hearing.

406.4 Nothing in this section shall preclude the Board from amending the agenda at the meeting or hearing.

406.5 A meeting of the Board shall be held once each month in accordance with a schedule to be established by the Board, and additional meetings may be called as needed by the Board.

406.6 Hearings shall be scheduled as needed for the purpose of receiving evidence and testimony on specific complaints or petitions.

406.7 Meetings and hearings shall be held at the time and place the Board or the Chairperson designates.

406.8 Meetings and hearings may be adjourned from time-to-time.

406.9 If the time and place of resumption is publicly announced when the adjournment is ordered, no further notice shall be required.

406.10 A majority of the Board shall constitute a quorum. However, the Board is authorized to utilize the use of one-member panels pursuant to D.C. Official Code § 1-1001.05(g) (2006 Repl.).

406.11 A member absent at the decision meeting may cast an absentee vote only if the member attended all of the hearings on the complaint or petition.

406.12 A member attending the decision meeting and having read the transcript and reviewed the complete record may vote even though that member may not have attended any or all of the prior meetings or hearings on the complaint or petition.

406.13 At the discretion of the Chairperson, any member may participate in a meeting of the Board by means of a video conference, telephone conference or by any means of communication by which all persons participating in the meeting are able to hear one another, and such participation shall constitute presence in person at the meeting.

406.14 At least one member shall be physically present at any hearing.

All persons desiring to comment on the subject matter of this proposed rulemaking should file written comments by no later than thirty (30) days after the date of publication of this notice in the *D.C. Register*. Comments should be filed with the Office of the General Counsel, Board of Elections, 441 4th Street, N.W., Suite 270N, Washington, D.C. 20001. Please direct any questions or concerns to the Office of the General Counsel at 202-727-2194 or ogc@dcboee.org. Copies of the proposed rules may be obtained at cost from the above address, Monday through Friday, between the hours of 9:00 a.m. and 4:00 p.m.

DEPARTMENT OF HEALTH CARE FINANCE

NOTICE OF FINAL RULEMAKING

The Director of the Department of Health Care Finance (DHCF), pursuant to the authority set forth in An Act to enable the District of Columbia to receive federal financial assistance under Title XIX of the Social Security Act for a medical assistance program, and for other purposes, approved December 27, 1967 (81 Stat. 744; D.C. Official Code § 1-307.02 (2014 Repl. & 2016 Supp.)) and Section 6(6) of the Department of Health Care Finance Establishment Act of 2007, effective February 27, 2008 (D.C. Law 17-109; D.C. Official Code § 7-771.05(6) (2012 Repl.)), hereby gives notice of the adoption of an amendment to repeal Section 930, entitled "Nutrition Evaluation and Consultation Services," of Chapter 9 (Medicaid Program) of Title 29 (Public Welfare) of the District of Columbia Municipal Regulations (DCMR).

The repealed section established standards governing reimbursement of nutrition evaluation and consultation services 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 for the period from November 2007 to November 2012. The renewal of the ID/DD Waiver, which was approved by the Council of the District of Columbia (Council) and by the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), for a five-year period beginning November 20, 2012, no longer includes nutrition evaluation and consultation services as a separate service, but includes these services along with bereavement counseling, fitness training, massage therapy, and sexuality education in what are known as Wellness Services, 29 DCMR § 1936. The recent amendments to the ID/DD Waiver, which were approved by the Council through the Medicaid Assistance Program Amendment Act of 2014, effective February 26, 2015 (D.C. Law 20-155; D.C. Official Code § 1-307.02(a)(8)(E) (2014 Repl. & 2016 Supp.)), and by CMS effective September 24, 2015, continue to include the former nutrition evaluation and consultation services as part of Wellness Services.

A Notice of Proposed Rulemaking was published in the *D.C. Register* on April 22, 2016, at 63 DCR 006259, by which DHCF proposed to repeal 29 DCMR § 930. DHCF received no comments to the proposed rulemaking.

The Director of DHCF adopted the repeal of these rules on September 21, 2016, and the repeal shall become final on the date of publication of this notice in the *D.C. Register*.

Chapter 9, MEDICAID PROGRAM, of Title 29 DCMR, PUBLIC WELFARE, is amended as follows:

Section 930, NUTRITION EVALUATION AND CONSULTATION SERVICES, is deleted in its entirety and amended to read as follows:

930 [REPEALED]

DEPARTMENT OF HEALTH CARE FINANCE

NOTICE OF FINAL RULEMAKING

The Director of the Department of Health Care Finance (DHCF), pursuant to the authority set forth in An Act to enable the District of Columbia to receive federal financial assistance under Title XIX of the Social Security Act for a medical assistance program, and for other purposes, approved December 27, 1967 (81 Stat. 774; D.C. Official Code § 1-307.02 (2014 Repl. & 2016 Supp.)) and Section 6(6) of the Department of Health Care Finance Establishment Act of 2007, effective February 27, 2008 (D.C. Law 17-109; D.C. Official Code § 7-771.05(6) (2012 Repl.)), hereby gives notice of the adoption of an amendment to Section 1920, entitled "Day Habilitation Services," 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 final rules establish standards governing reimbursement of day habilitation one-to-one services and day habilitation small group services 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. Day habilitation services are aimed at developing activities and skills acquisition to support or further integrate community opportunities outside of a person's home and assist the person in developing a full life within the community. Day habilitation one-to-one services are provided to persons with intense medical behavioral supports who require a behavioral support plan or require intensive staffing and supports.

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 (CMS), for a five-year period beginning November 20, 2012. An amendment to the ID/DD Waiver was approved by the Council through the Medicaid Assistance Program Amendment Act of 2014, effective February 26, 2015 (D.C. Law 20-155; D.C. Official Code § 1-307.02(a)(8)(E) (2014 Repl. & 2016 Supp.)). CMS approved the amendment to the ID/DD Waiver effective September 24, 2015.

The rules for Day Habilitation Services (29 DCMR § 1920) have undergone three sets of emergency and proposed rulemakings since October 2015. The Notice of Emergency and Proposed Rulemaking, published in the *D.C. Register* on October 23, 2015, at 62 DCR 013880, amended the rules by: (1) clarifying the purpose of day habilitation services; (2) adding a nursing component to the service definition for the purpose of medication administration, and staff training and monitoring of waiver participants' Health Care Management Plans; (3) modifying the rate to reflect the approved methodology in accordance with the ID/DD Waiver; (4) adding small group day habilitation for people with higher intensity needs and describing the conditions in which services may be delivered; (5) specifying that the required staff to person ratio for small group day habilitation is 1:3; (6) introducing a small group day habilitation rate for the staffing ratio of 1:3; (7) adding the provision of one nutritionally adequate meal per day for persons who live independently or with their families and who select to receive a meal; (8) adding to the list of activities that day habilitation shall consist of, including requiring activities to support

community integration and inclusion; (9) requiring the development of a Positive Personal Profile, Job Search and Community Participation Plan; (10) requiring an individualized daily schedule; (11) requiring that, if day habilitation is provided in a facility, it must provide opportunities for community engagement, inclusion and integration; (12) requiring that all day habilitation providers comply with Section 1938 of Chapter 19 of Title 29 DCMR; (13) requiring that quarterly reports include a description of the person's activities in the community that support community integration and inclusion; and (14) barring the payment of stipends by the day habilitation provider to a waiver beneficiary.

DHCF received public comments on the first emergency and proposed rulemaking requesting clarification for the staffing ratios and billing rates. The Notice of Second Emergency and Proposed Rulemaking, published in the *D.C. Register* on February 12, 2016, at 63 DCR 001707, continued the program changes reflected in the first emergency and proposed rules as described above and further amended the rules by: (1) clarifying the staffing ratios for day habilitation and small group day habilitation; (2) clarifying the billing rates for day habilitation and small group day habilitation; (3) providing further details about provider responsibility for offering activities that support community integration and inclusion; and (4) including rates that align with Waiver Year 4.

DHCF did not receive public comments on the second emergency and proposed rulemaking. However, DHCF promulgated the Notice of Third Emergency and Proposed Rulemaking, published in the *D.C. Register* on May 27, 2016, at 63 DCR 007988, which continued the cumulative changes as reflected in the second emergency and proposed rules as described above and further amended the rules by: (1) clarifying that all persons in day habilitation services must receive individualized services; (2) specifying requirements for activities to support community integration and inclusion; (3) requiring compliance with the DDS guidance on individualized schedules; (4) describing provider staffing requirements; and (5) requiring that all small group day habilitation settings fully comply with the federal Home and Community-Based Settings Rule. The third emergency and proposed rulemaking was adopted on May 11, 2016, became effective immediately, and remained in effect until September 8, 2016. DHCF received no comments to the third emergency and proposed rulemaking and no changes have been made.

The Director of DHCF adopted these rules as final on September 21, 2016, and they shall become effective on the date of publication of this notice in the *D.C. Register*.

Chapter 19, HOME AND COMMUNITY-BASED SERVICES WAIVER FOR INDIVIDUALS WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, of Title 29 DCMR, PUBLIC WELFARE, is amended as follows:

Section 1920, DAY HABILITATION SERVICES, is amended to read as follows:

1920 DAY HABILITATION SERVICES

1920.1 The purpose of this section is to establish standards governing Medicaid eligibility for day habilitation for persons enrolled in the Home and Community-Based Services (HCBS) Waiver for Individuals with Intellectual and

Developmental Disabilities (Waiver), and to establish conditions of participation for providers of day habilitation services.

1920.2 Day habilitation services are aimed at developing meaningful adult activities and skills acquisition to: support or further community integration, inclusion, and exploration, improve communication skills; improve or maintain physical, occupational and/or speech and language functional skills; foster independence, self-determination and self-advocacy and autonomy; support persons to build and maintain relationships; facilitate the exploration of employment and/or integrated retirement opportunities; help a person achieve valued social roles; and to foster and encourage persons on their pathway to community integration, employment and the development of a full life in the person's community.

1920.3 Day habilitation services are intended to be different and separate from residential services. These services are delivered in group settings or can be provided as day habilitation one-to-one services.

1920.4 Day habilitation services may also be delivered in small group settings at a ratio of one-to-three for persons with higher intensity support needs. Small group day habilitation settings must include integrated skills building in the community and support access to the greater community. It cannot be:

(a) Provided in the same building as a large day habilitation facility setting; or

(b) Delivered in groups larger than fifteen (15) persons.

1920.5 To be eligible for day habilitation services:

(a) The service shall be requested by the person and recommended by the person's Support Team and included in the Individualized Support Plan (ISP) and Plan of Care; and

(b) A person shall have a demonstrated personal and/or social adjustment need that can be addressed through participation in a habilitation program that is individualized to meet their goals, preferences, and needs.

1920.6 Day habilitation one-to-one services shall consist of:

(a) Intense behavioral supports that require a behavioral support plan; or

(b) Services for a person who has medical needs that require intensive staffing and supports.

1920.7 To be eligible for day habilitation one-to-one services, a person shall meet at least one of the following requirements:

(a) Exhibit elopement which places the health, safety, or well-being of the person at risk;

(b) Exhibit behavior that poses serious bodily harm to self or others;

(c) Exhibit destructive behavior that poses serious property damage, including fire-setting;

(d) Have any other intense behavioral problem that has been deemed to require one-to-one supervision;

(e) Exhibit sexually predatory behavior; or

(f) Have a medical history of, or high risk for, falls with injury, be physically fragile or have physical needs that do not require professional nursing but require intensive staffing, and have a physician's order for one-to-one staffing support.

1920.8 Day habilitation one-to-one services shall be authorized and approved in accordance with DDS/DDA policies and procedures available at http://dds.dc.gov/page/policies-and-procedures-dda.

1920.9 Day habilitation services shall be provided pursuant to the following service delivery criteria:

(a) The service may be provided in a group setting. However, persons within the group must also receive individualized services to meet their goals, preferences and needs;

(b) The services provided in a community-based venue shall offer skill-building activities to enhance the person's habilitation needs; and

(c) The service shall be provided in the most integrated setting appropriate to the needs of the person.

1920.10 Day habilitation services shall consist of the following activities that are based on what is important to and for the person as documented in his or her Individualized Support Plan and reflected in his or her Person-Centered Thinking and Discovery tools:

(a) Training and skills development that increase participation in community activities, enhance community inclusion, and foster greater independence, self-determination and self-advocacy;

(b) A diversity of activities that allow the person the opportunity to choose and identify his or her own areas of interest and preferences;

(c) Activities that provide opportunities for socialization and leisure activities in the community, community explorations, and activities that support the person to build and maintain relationships;

(d) Training in the safe and effective use of one or more modes of accessible public transportation;

(e) Coordination of transportation to enable the person to participate in community activities;

(f) Activities to support community integration and inclusion:

(1) These must occur in the community in groups not to exceed four (4) participants for regular day habilitation or three (3) participants for persons in small group day habilitation;

(2) The activities, frequency and duration of these activities must be based on a person's interests and preferences as reflected in his or her Individualized Support Plan and Person-Centered Thinking and Discovery tools;

(3) There should be documentation that efforts were made to match persons together in community outings based on common interests, goals, and/ or friendships, including that a person is given a choice as to whom he or she would like to spend time with during these activities;

(4) Except when a person's ISP indicates a lower frequency, each person must be offered the opportunity to engage in community integration and inclusion activities at least once per week, and more if indicated by the ISP;

(5) The Department on Disability Services (DDS) encourages the use of learning logs for documentation of community integration and inclusion activities;

(6) At least quarterly there must be a community integration activity in which a Program Coordinator, Assistant Director, and/or a Qualified Intellectual and Developmental Disabilities Profession participates to ensure: proper matching of participants; that the community outings reflect each person's interests, goals, or friendships; that each person receiving supports has opportunities to engage with people while in the community and to coach Direct Support Professionals (DSPs) on the skills needed to successfully

connect persons receiving supports with the broader community; and

(7) Each day habilitation provider must have, and must train their DSP staff on, written protocols regarding how DSPs are expected to support persons in the community and requirements for documenting progress notes regarding community engagement activities; and

(g) Individualized or group services that enable the person to attain his/her maximum functional level based on the ISP and Plan of Care.

1920.11 Day habilitation services shall include a nursing component for the purposes of:

(a) Medication administration;

(b) Staff training in components of the Health Care Management Plan (regardless of the author of the plan); and

(c) Oversight of Health Care Management Plans (regardless of the author of the plan).

1920.12 Day habilitation services shall include a nutritionally adequate meal for participants who live independently or in the family home and who select to receive a meal. The meal shall be provided during lunch hours, meet one-third of a person's daily Recommended Dietary Allowance, be based on the person's preferences, and not be medically contraindicated.

1920.13 Each day habilitation provider shall develop a day habilitation plan for each person that corresponds with the person's ISP and Plan of Care that supports the interests, choices, goals and prioritized needs of the person. In order to develop this plan, the provider must first develop a Positive Personal Profile (PPP) and Job Search and Community Participation Plan; the initial PPP and Job Search and Community Participation Plan shall be developed within thirty (30) days of the initiation of services and shall be updated at least annually. Activities set forth in the day habilitation plan shall be functional, chosen by the person, correspond with habilitation needs and provide a pattern of life experiences common to other persons of similar age and the community-at-large. To develop the plan, the provider shall:

(a) Use observation, conversation, and other interactions, including assessments such as a vocational assessment, as necessary, to develop a functional analysis of the person's capabilities within the first month of participation and annually thereafter;

(b) Use the functional analysis, the ISP and Plan of Care, Person-Centered Thinking and Discovery tools, and other information available to identify what is important to and for the person and to develop a plan with measurable outcomes that develops to the extent possible the skills necessary to allow the person to reside and work in the community while maintaining the person's health and safety; and

(c) Focus on enabling each person to attain his or her maximum functional level by coordinating Waiver services with other services provided by any licensed professionals listed in the person's ISP and Plan of Care.

1920.14 Each provider of Medicaid reimbursable day habilitation services shall develop, with the person, an individualized schedule of daily activities that meets all requirements in the DDS guidance on daily schedules, including that it is based upon the person's goals and activities as identified in his or her ISP, and consistent with what is in his or her Person-Centered Thinking and Discovery tools, of meaningful adult activities that support the person on his or her pathway to employment and community integration and inclusion.

1920.15 Day habilitation providers may not pay a stipend to a person for attendance or participation in activities at the day habilitation program.

1920.16 Each day habilitation provider shall meet the following provider qualification and enrollment requirements:

(a) Comply with the requirements described under Section 1904 (Provider Qualifications) and Section 1905 (Provider Enrollment Process) of Chapter 19 of Title 29 DCMR;

(b) Maintain the required staff-to-person ratio, indicated on the person's ISP and Plan of Care, to a maximum staffing ratio of 1:4 for regular day habilitation or 1:3 for persons in small group day habilitation;

(c) Shall have at least one individual on staff as a full-time employee or consultant basis that has experience developing adult education programs for a person with intellectual disabilities, to ensure outcome-based learning is taking place; and

(d) Shall have one individual on staff as a full-time employee or consultant basis that has experience developing adult senior curriculums for persons with intellectual disabilities, to ensure outcome-based learning is taking place.

1920.17 In addition to the requirements at Subsection 1920.16, each small group day habilitation provider shall meet the following provider qualifications and enrollment requirements:

(a) Fully comply with all requirements of the HCBS Settings Rule as that phrase is defined in Section 1999 (Definitions); and

(b) Provide documentation that the program manager of the HCBS Waiver provider agency has at least three (3) years of experience working with persons with intellectual and developmental disabilities who have complex medical and/or behavioral needs.

1920.18 Each DSP providing day habilitation services for a provider shall comply with Section 1906 (Requirements of Direct Support Professionals) of Chapter 19 of Title 29 DCMR.

1920.19 To receive Medicaid reimbursement, day habilitation services shall be provided in the community or in a facility-based setting that provides opportunities for community engagement, inclusion and integration.

1920.20 Each provider of Medicaid reimbursable day habilitation services shall comply with the requirements under Section 1938 (Home and Community-Based Settings Requirements) of Chapter 19 of Title 29 DCMR.

1920.21 All day habilitation services shall be authorized in accordance with the following requirements:

(a) DDS shall provide a written service authorization before the commencement of services;

(b) The day habilitation DSP providing one-to-one services shall be trained in physical management techniques, positive behavioral support practices and other training required to implement the person's health care management plan and behavioral support plan, as applicable;

(c) The service name and provider entity delivering services shall be identified in the ISP and Plan of Care;

(d) The ISP, Plan of Care and Summary of Supports and Services shall document the amount and frequency of services to be received;

(e) Completion of the person's day habilitation plan;

(f) Approval of the behavioral support plan or the physician's order for one-to-one staffing support for persons receiving day habilitation one-to-one services; and

(g) When required by a person's BSP, accurate completion by the DSP of the behavioral data sheets for persons receiving day habilitation one-to-one services.

1920.22 Each provider shall comply with the requirements described under Section 1908 (Reporting Requirements) of Chapter 19 of Title 29 DCMR and Section 1911 (Individual Rights) of Chapter 19 of Title 29 DCMR. Additionally, quarterly reports shall include a description of the person's activities in the community that support community integration and inclusion.

1920.23 Each provider shall comply with the requirements described under Section 1909 (Records and Confidentiality of Information) of Chapter 19 of Title 29 DCMR.

1920.24 The reimbursement rate for regular day habilitation services shall be twenty-one dollars and eighty cents ($21.80) per hour. Services shall be provided for a maximum of eight (8) hours per day. The billable unit of service for regular day habilitation services shall be fifteen (15) minutes. A provider shall provide at least eight (8) minutes of service in a span of fifteen (15) continuous minutes to be able to bill a unit of service. The reimbursement rate for regular day habilitation services shall be five dollars and forty-five cents ($5.45) per billable unit.

1920.25 The reimbursement rate for day habilitation one-to-one services shall be forty-one dollars and twenty-four cents ($41.24). The billable unit of service for day habilitation one-to-one services shall be fifteen (15) minutes. A provider shall provide at least eight (8) minutes of service in a span of fifteen (15) continuous minutes to be able to bill a unit of service. The reimbursement rate for day habilitation one-to-one services shall be ten dollars and thirty-one cents ($10.31) per billable unit.

1920.26 The reimbursement rate for small group day habilitation services shall be thirty-two dollars and eighty-eight cents ($32.88). The billable unit of service for small group day habilitation shall be fifteen (15) minutes. A provider shall provide at least eight (8) minutes of service in a span of fifteen (15) continuous minutes to be able to bill a unit of service. The reimbursement rate for small group day habilitation services shall be eight dollars and twenty-two cents ($8.22) per billable unit.

1920.27 For persons who live independently or with family and select to receive a meal, the rate is increased by seven dollars and thirty-two cents ($7.32) per day that the person receives a meal, and an additional five dollars and two cents ($5.02) per day that the person receives a meal, if that meal is delivered by a third-party vendor.

1920.28 Day habilitation services, small group day habilitation, and day habilitation one-to-one services shall be provided for a maximum of eight (8) hours a day, not to exceed forty (40) hours per week and two thousand eighty hours (2080) hours annually.

1920.29 Day habilitation services shall not be provided concurrently with Individualized Day Supports, Companion, Supported Employment or Employment Readiness services.

1920.30 No payment shall be made for care and supervision normally provided by the family or natural caregivers, residential provider, or employer.

1920.31 Provisions shall be made by the day habilitation provider for persons who arrive early and depart late.

1920.32 Time spent in transportation to and from the program shall not be included in the total amount of services provided per day.

Section 1999, DEFINITIONS, § 1999.1, is amended by adding the following:

Behavioral Support Plan (BSP) - A plan that is a component of the ISP that outlines positive supports and strategies to help a person ameliorate and/or eliminate the negative impact of one or more challenging behaviors that have a negative impact on a person's ability to achieve his or her goals.

Day Habilitation Plan - A person-centered plan developed by the day habilitation provider, based on a person-centered planning process that takes into account the results of a functional analysis, ISP, Plan of Care and other available information which lists services and outlines preferences, interests, and measurable outcomes to enable the person to reside, work and participate in the community, and maintain the person's health.

Direct Support Professional (DSP) - A person who works directly with persons with developmental disabilities with the aim of assisting the individual to become integrated into his or her community or the least restrictive environment.

Family - Any person who is related to the person by blood, marriage, or adoption.

Functional Analysis - The process of identifying a person's specific strengths, preferences, developmental needs, and need for services by identifying the person's present developmental level, health status, expressed needs and desires of the person and his or her family, and environmental or other conditions that would facilitate or impede the person's growth and development.

Small Group Day Habilitation – Day habilitation services delivered in small group settings at a ratio of one-to-three for persons with higher intensity support needs in a setting not to exceed fifteen (15) people.

Staffing Plan - A written document that includes the numbers and titles of staff assigned to the particular person, for a specified time period and scheduled for a given site and/or shift to successfully provide oversight and to ensure the maintenance of the health, safety and well-being of the person receiving services.

Stipend – Nominal fee paid to a person for attendance and/ or participation in activities designed to achieve his or her goals, as identified in the person's ISP.

Summary of Supports and Services - A written document that lists the various supports and services to be received by a person and a component of the person's ISP.

Support Team - A group of people providing support to a person with an intellectual/developmental disability, who have the responsibility of performing a comprehensive person-centered evaluation to support the development, implementation and monitoring of the person's person-centered ISP and Plan of Care.

DISTRICT DEPARTMENT OF TRANSPORTATION

NOTICE OF FINAL RULEMAKING

The Director of the District Department of Transportation (DDOT), pursuant to the authority set forth in Sections 5(3)(D) (allocating and regulating on-street parking) and 6(b) (transferring to the Department the parking management function previously delegated to the Department of Public Works under Section III (H) of Reorganization Plan No. 4 of 1983) of the Department of Transportation Establishment Act of 2002, effective May 21, 2002 (D.C. Law 14-137; D.C. Official Code §§ 50-921.04(3)(D) (2014 Repl. & 2016 Supp.)) and 50-921.05(b) (2014 Repl.), and Section 3 of the People First Respectful Language Modernization Amendment Act of 2006, effective September. 29, 2006 (D.C. Law 16-169; D.C. Official Code § 2-632 (2012 Repl. & 2016 Supp.)), hereby gives notice of the adoption of the following amendment to Chapters 24 (Stopping, Standing, Parking, and Other Non-Moving Violations), 26 (Civil Fines For Moving and Non-Moving Infractions), and 27 (Special Parking Privileges For Persons With Disabilities) of Title 18 (Vehicles and Traffic) of the District of Columbia Municipal Regulations (DCMR).

The final rulemaking establishes installation and operation guidelines for on-street metered parking spaces available within the Central Business District for the exclusive use of persons with disabilities. In the context of this rulemaking any reference to the United States Access Board would refer to both Americans with Disabilities Act Accessibility Guidelines and the Public Right of Way Accessibility Guidelines. The final rulemaking also makes conforming changes consistent with the People First Respectful Language Modernization Act of 2006, effective September 29, 2006 (D.C. Law 16-169; D.C. Official Code §§ 2-631 *et seq.* (2012 Repl.)).

A Notice of Proposed Rulemaking was published in the *D.C. Register* on June 24, 2016, at 63 DCR 8883.

DDOT received 28 comments. Four of the 28 written comments were officially submitted by Advisory Neighborhood Commissions (ANC)s. Of these four, two were opposed to establishing a reserved metered parking program for people with disabilities indicating fairness and equity concerns. The commenters indicated that it would be unfair to charge people with disabilities for parking as their income may be lower than able-bodied individuals. DDOT considered fairness and equity concerns raised by commenters but disagrees with this position. Currently, there is no discounted parking program for low income individuals (disabled or not) citywide. In addition, the Red Top Meter Program is not an income- or age-based program as it intends to balance parking turnover and reserved accessible metered spaces for the exclusive used of people with disabilities citywide. Other ANC comments refer to the lack of a comprehensive study of existing conditions, public hearing, and community outreach. DDOT does not agree that there was inadequate outreach as the agency has been engaging with the national and local disability advocates since the start of the program in 2012. In addition, DDOT convened the Reserved Parking for People

with Disabilities Working Group (Working Group) in 2015 and has been working with the group to identify concerns and refine the program to meet the needs of the individuals within the disabilities community. The Working Group included representatives from the Office of Disabilities Rights, the Office of Human Rights, the Department of Public Works, and the Department of Motor Vehicles. In addition, the public hearing for the Accessible Parking Act of 2015 (Bill 21-175) was an opportunity for the public to voice their concerns regarding the program. Furthermore, the agency is planning on conducting a comprehensive public education and outreach campaign once the rulemaking is finalized. The campaign will include outreach to all disability placard holders in the District. DDOT disagrees with the comment regarding lack of a comprehensive study, as the agency has been conducting surveys and researching best practices in other jurisdictions since 2012.

Two ANCs requested an extension of the public comment period. DDOT considered this comment but believes that a 30-day comment period was adequate to allow for informed comments.

DDOT received two comments from disability organizations offering modifications to the rulemaking which DDOT will address administratively through Standard Operating Procedure (SOP) documents.

DDOT received 22 comments from residents. Commenters were generally opposed to the rulemaking indicating fairness and equity concerns for the same reasons noted above. Similar to the comments received from the ANCs, some residents were critical of the lack of public and community outreach. Residents were also concerned that one reserved parking space per block is not enough to accommodate the demand for parking in the Central Business District. DDOT considered this comment but believes that one parking space per block is likely to adequately meet expected demand. In addition, the number of red top meters per block was determined based on standards set forth by Americans with Disabilities Act Accessibility Guidelines and the Public Right of Way Accessibility Guidelines. A few commenters indicated that the program is not age-friendly since many elderly residents are also among the disabled population. DDOT considered this comment but does not agree with the rational as the Red Top Meter program is not an income- or age-based program.

DDOT thoroughly reviewed and considered each of the comments received and determined that no substantive changes to the rulemaking are needed. Therefore no substantive changes were made to the text of the proposed rulemaking.

The Director adopted this rulemaking as final on September 2, 2016, and it shall become effective upon publication of this notice in the *D.C. Register*.

Chapter 24, STOPPING, STANDING, PARKING, AND OTHER NON-MOVING VIOLATIONS, of Title 18 DCMR, VEHICLES AND TRAFFIC, is amended as follows:

Section 2406, PARKING PROHIBITED BY POSTED SIGN, is amended as follows:

Subsections 2406.9 through 2406.11 are amended to read as follows:

2406.9

(a) The Director is authorized to establish on-street metered parking spaces, within the Central Business District, as defined in Title 18, for the exclusive use of persons with disabilities using vehicles displaying valid disability license tags or valid disability permits issued by the District pursuant to Chapter 27 or issued by another jurisdiction meeting the requirements of § 2717.1.

(b) Parking meters associated with parking spaces established pursuant to this subsection shall:

(1) Meet the standards set forth in the Americans with Disabilities Act Accessibility Guidelines of the United States Architectural and Transportation Barriers Compliance Board (commonly referred to as the "United States Access Board"), and comply with any applicable regulations of the Department of Justice, regarding the:

(i) Demarcation of the parking space;

(ii) Accessible meter hardware and payment technology;

(iii) Infrastructure placement; and

(iv) Pedestrian access route; and

(2) Unless a more stringent standard is established by the United States Access Board or applicable regulations of the Department of Justice:

(i) Be located adjacent to or within one hundred (100) feet of a curb cut, access ramp, or driveway; and

(ii) Indicate by signage affixed to a sign post or a decal on the meter that the space is reserved for the exclusive use of persons with disabilities.

(3) Be reserved for the exclusive use of persons with disabilities at all times; provided, metered spaces shall only require payment during the hours posted on the meter.

(c) When and where feasible, one (1) parking space on each metered block, or at least four percent (4%) of the District's total metered parking spaces, shall be reserved for the exclusive use of persons with disabilities.

(d) The Director shall create and maintain a publicly accessible database showing the location and time restriction of each parking space set aside under this subsection.

(e) The Director may establish reasonable payment and time limits for parking in the spaces established pursuant to this subsection; provided, that any time restrictions established shall allow parking for twice the period of time, not to exceed four (4) hours, permitted at the nearest non-reserved, time-limited parking space.

(f) Before setting aside the parking spaces authorized by this subsection, the Director shall mail or email, or cause to be mailed or emailed, a notice to each person who holds a disability license tag or disability permit issued by the District pursuant to Chapter 27. The notice shall inform the person that new parking spaces will be set aside pursuant to this subsection and shall describe the rules that apply to parking in such spaces.

2406.10

(a) The Director is authorized to establish on-street metered parking spaces, outside the Central Business District, for the exclusive use of persons with disabilities.

(b) On-street metered parking spaces established pursuant to this subsection shall be identified based on a process established by the Director in consultation with the Mayor's Office of Disability Rights after the launch of the program defined in Subsection 2406.9.

(c) The process by which on-street metered spaces are established for the exclusive use of people with disabilities outside the Central Business District shall include at a minimum:

(1) Entities that can request establishment of on-street metered parking spaces for the exclusive use of people with disabilities outside of the Central Business District;

(2) A process by which the Director will evaluate requests to establish on-street metered parking spaces, outside of the Central Business District, for the exclusive use of persons with

disabilities;

(3) Criteria for evaluation of additional zones including but not limited to existing meter occupancy, existing disability placard use; and

(4) Process by which the Director will notify the public of the intent to establish on-street metered parking spaces, outside of the Central Business District, for the exclusive use of persons with disabilities.

2406.11

(a) A vehicle parked in a space set aside pursuant to § 2406.9 shall be subject to the fine set forth in § 2601 if the vehicle:

(1) Does not display a valid disability license tag or valid disability permit described in § 2406.9;

(2) Was not either driven by a person to whom such a tag or permit was issued or a person to whom such a tag or permit was issued was not a passenger in the vehicle;

(3) Is engaged in vending;

(4) Is parked beyond the posted time limits on the meter;.

(5) Fails to make payment at the meter or through pay-by-phone; or

(6) The amount of time paid for at the meter or through pay-by-phone has lapsed;

(b) A vehicle parked, stopped, or standing in a space set aside pursuant to § 2406.9 during a time when parking, stopping, or standing in the space is prohibited shall be subject to the applicable no parking, no stopping, or no standing fine set forth in § 2601, even if the vehicle displays a disability license tag or disability permit described in § 2406.9.

Chapter 26, CIVIL FINES FOR MOVING AND NON-MOVING INFRACTIONS, is amended as follows:

Section 2601, PARKING AND OTHER NON-MOVING INFRACTIONS, is amended as follows:

Subsection 2601.1 is amended as follows:

The row labeled "Individual with disabilities only; unauthorized use of space reserved for (§ 2406.9)" is amended to read as follows:

Individual with disabilities only; unauthorized use of space reserved for (§ 2406.11(a)(1))"	$250.00

Three new rows are added, after the row labeled "Individual with disabilities, reserved residential space of; unauthorized use of (§ 2715.3)", to read as follows:

Individual with disabilities, parked beyond time limit in parking space for (§ 2406.11(a)(4))	$30.00
Individual with disabilities, no proof of payment (§2406.11(a)(5))	$30.00
Individual with disabilities, amount of payment has lapsed (§ 2406.11(a)(6))	$30.00

Subsection 2601.2 is amended as follows:

The row labeled "Handicapped (disabled) parking privileges, unauthorized use of; (§ 2406.9)" is repealed.

Two new rows are added, after the row labeled "Glass or debris, failure to remove from street (§§ 2418.4; 2418.5; 2418.6)", to read as follows:

Individual with disabilities parking privileges; unauthorized use of (§ 2406.11(a)(2))	$100.00
Individual with disabilities parking privileges; Vending using [§§ 2406.11(a)(3) and 2704.3]	$500.00

Chapter 27, SPECIAL PARKING PRIVILEGES FOR PERSONS WITH DISABILITIES, is amended as follows:

Section 2700, GENERAL PROVISIONS, is amended as follows:

Subsection 2700.2 is amended to read as follows:

2700.2 This chapter shall apply upon application for a reserved on-street residential parking space, or upon an initial or renewal application for disability license tags or a disability parking permit.

Section 2701, ELIGIBILITY, is amended as follows:

Subsection 2701.1(b) is amended by striking the phrase "Is so severely disabled" and inserting the phrase "Has such a severe disability so" in its place.

Section 2704, ISSUANCE OF SPECIAL LICENSE TAGS OR PARKING PERMIT, is amended as follows:

Subsection 2704.3 and 2704.4 are amended to read as follows:

2704.3 Except as provided in §§ 2406.9 and 2406.11, a vehicle displaying a disability license tag or disability parking permit for an individual with a disability, whether issued by the District or any other jurisdiction shall be subject to any time limitation or meter payment requirement established for any space in which the vehicle is parked, as indicated on the sign or meter denoting the space and shall not be engaged in vending.

2704.4 Notwithstanding § 2704.3, a vehicle displaying a disability license tag or disability parking permit for an individual with a disability, whether issued by the District or any other jurisdiction, shall be permitted to park for twice the period of time as posted on a residential permit parking designated block.

A new Subsection 2704.10 is added to read as follows:

2704.10 Until such time as the Director has established a program for reserved on-street metered parking spaces outside the Central Business District in accordance with § 2406.10, a vehicle displaying a disability license tag or disability parking permit for a person with a disability, whether issued by the Director or any other jurisdiction, shall be permitted to park at a metered space outside of the Central Business District, without depositing payment established for the on-street metered parking space, for twice the period of time, but not to exceed four (4) hours.

Section 2707, ORGANIZATIONS TRANSPORTING DISABLED PERSONS, is amended as follows:

The section heading is amended to read as follows:

2707 ORGANIZATIONS TRANSPORTING PERSONS WITH DISABILITIES

Subsection 2707.5 is amended by striking the phrase "2704.4, 2707.5, ".

Subsection 2707.6 is amended by striking the phrase "transport of disabled persons"

and inserting the phrase "transport of persons with disabilities" in its place.

Section 2710, RESERVED PARKING SPACE, is amended as follows:

Subsection 2710.1(e) is amended by striking the phrase "where the physically disabled person resides" and inserting the phrase "where the individual with a disability resides".

Section 2714, DESIGNATION OF RESERVED SPACE, is amended as follows:

Subsection 2714.1 is amended by striking the phrase "universal symbol for the disabled" and inserting the phrase "universal symbol of accessibility" in its place.

Section 2717, RECIPROCITY, is amended as follows:

Subsection 2717.1 is amended by striking the phrase "sections § 2406.9 or 2704.4" and inserting the phrase "§ 2406.9" in its place.

Section 2718, PENALTY, is amended as follows:

Subsection 2718.3(d) is amended by striking the phrase "Allows a non-disabled person" and inserting the phrase "Allows a person without a disability" in its place.

DISTRICT OF COLUMBIA BOARD OF ELECTIONS

NOTICE OF PROPOSED RULEMAKING

The District of Columbia Board of Elections, pursuant to the authority set forth in the District of Columbia Election Code of 1955, approved August 12, 1955, as amended (69 Stat. 699; D.C. Official Code § 1-1001.05(a)(14) (2014 Repl.)), hereby gives notice of a proposed rulemaking to adopt amendments to Chapter 8 (Tabulation and Certification of Election Results) of Title 3 (Elections and Ethics) of the District of Columbia Municipal Regulations (DCMR).

The proposed amendments establish that write-in votes will only be tabulated in contests where an individual has timely filed an Affirmation of Write-in Candidacy, and there is either no candidate printed on the ballot in order to determine a winner, or the total number of write-in votes reported is sufficient to elect a write-in candidate. The amendment to recount procedures determines the procedures and rules for conducting a recount.

The Board gives notice of its intent to take final rulemaking action to adopt these amendments in not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*.

Chapter 8, TABULATION AND CERTIFICATION OF ELECTION RESULTS, of Title 3 DCMR, ELECTIONS AND ETHICS, is amended as follows:

Section 806, TABULATION PROCEDURES, is amended in its entirety, to read as follows:

806 TABULATION PROCEDURES

806.1 The tabulation of votes shall be started immediately on Election Day after the close of polls, and shall be conducted under the direct supervision of the Executive Director or his or her designee.

806.2 Whenever votes are counted by machines, the Executive Director shall utilize personnel qualified to operate the system. Additional personnel may be employed to perform such tasks as may be deemed necessary by the Executive Director.

806.3 Only those persons authorized by the Board, including credentialed poll watchers and election observers, shall be admitted to the Counting Center while tabulation is in progress.

806.4 All valid ballots shall be counted by mechanical tabulation unless otherwise determined by the Executive Director.

806.5 Special Ballots, together with any damaged ballots received from the polling places, shall be tabulated separately at a time designated by the Executive Director.

806.6 The valid votes recorded on damaged ballots shall be reproduced on duplicate ballots, in the presence of watchers, with the original and the reproduced ballots marked for identification with corresponding serial numbers.

806.7 The reproduced duplicate ballots, which have converted the votes on the damaged ballots to a machine readable form, shall be tabulated by machine.

806.8 Federal write-in absentee ballots shall be reproduced and tabulated in the same manner as damaged ballots, in accordance with §§ 806.6 - 806.7.

806.9 A Special Ballot cast by a voter who votes in a precinct that does not serve the address listed on the Board's registration records shall not be counted.

806.10 A count of the number of ballots tallied for a precinct, ballots tallied by groups of precincts and city-wide, shall be accumulated.

806.11 The total of votes cast for each candidate whose name appears pre-printed on the ballot shall be calculated by precinct and city-wide.

806.12 The total number of write-in votes marked by voters shall be reported for each contest.

806.13 The total number of votes cast for each write-in nominee shall be calculated only in contests where at least one individual has timely filed an Affirmation of Write-in Candidacy in accordance with Section 602 of this title, and:

(a) There is no candidate printed on the ballot in order to determine a winner, or;

(b) The total number of write-in votes reported, under § 806.12, is sufficient to elect a write-in candidate.

806.14 Following tabulation of all ballots, a consolidated report shall be produced showing the total votes cast and counted for all offices and ballot questions. Unless otherwise mandated by the Board, the consolidated ballot report shall be made by precinct.

Section 815, PETITIONS FOR RECOUNT, RECOUNT DEPOSITS, AND REFUNDS OF RECOUNT DEPOSITS, is amended in its entirety, to read as follows:

815 PETITIONS FOR RECOUNT, RECOUNT DEPOSITS, AND REFUNDS OF RECOUNT DEPOSITS

815.1 Any qualified candidate in any election may, within seven (7) days after the Board certifies the election results, petition the Board for a recount of the ballots

cast in that election. Such petition shall be in writing and shall specify the precincts in which the recount shall be conducted.

815.2 Upon receipt of a recount petition, the Board shall prepare an estimate of:

(a) The costs to perform the recount; and

(b) The number of hours to complete the recount.

815.3 If the petitioner chooses to proceed, the petitioner shall deposit fifty dollars ($50.00) for each precinct included in the recount within seven (7) days of receipt of the estimate of the cost of the recount and the hours required to complete the recount.

815.4 Deposits shall be paid by certified check or money order made payable to the order of the "D.C. Treasurer." No cash will be accepted.

815.5 The petitioner shall not be required to make a deposit for or pay the cost of any recount in any election where the difference between the number of votes received by the petitioner and the number of votes received by the person certified as having been elected to that office is:

(a) In the case of a ward-wide contest, less than one percent (1%) of the total valid ballots cast in the contest or less than fifty (50) votes, whichever is less; or

(b) In the case of an at-large contest, less than one percent (1%) of the total valid ballots cast in the contest or less than three hundred fifty (350) votes, whichever is less; and

(c) In the case of an Advisory Neighborhood Commission Single-Member District contest, less than ten (10) votes.

815.6 If the recount changes the result of the election, the entire amount deposited by the petitioner shall be refunded.

815.7 If the result of the election is not changed, the petitioner is liable for the actual cost of the recount, minus the deposit already made.

815.8 If the results of the election are not changed as a result of the recount, but the cost of the recount was less than fifty dollars ($50.00) per precinct, the difference shall be refunded to the petitioner.

815.9 A candidate may, at any time, request in writing that the recount be terminated and the Board shall refund the deposit remaining for any uncounted precincts.

Section 816, RECOUNT PROCEDURES, is amended in its entirety to read as follows:

816 RECOUNT PROCEDURES

816.1 The Executive Director shall conduct recount proceedings in accordance with provisions of this section.

816.2 The validity of ballots and votes recounted shall be determined pursuant to the provisions of this chapter.

816.3 Manual tabulation of votes in a recount proceeding shall be conducted in accordance with the provisions of this chapter.

816.4 Within two (2) days following the Board's determination to grant a recount petition or a court order directing the Board to conduct a recount, notice of recount proceedings shall be delivered via email to all qualified candidates for the contest being recounted. Public notice of recount proceedings shall be posted on the Board's website at least twenty-four (24) hours in advance of the commencement of the recount.

816.5 Each candidate, or organizational group in support of or opposition to a ballot question, in a contest involved in a recount shall be permitted to have no more than two (2) poll watchers at all phases of the recount, regardless of whether the candidate properly applied for poll watcher credentials pursuant to § 706. Candidates may also observe all phases of the recount in addition to their assigned poll watchers.

816.6 Apart from the election officials necessary to conduct the recount, priority of access to the place where the recount will occur will first be given to the candidate, or organizational groups in support of or opposition to a ballot question, in the contest being recounted. Space permitting, poll watchers and election observers credentialed pursuant to § 706, then members of the public and media shall also be given access.

816.7 Recount officials shall re-run all official ballots through a tabulator and count only the votes for the office or ballot question at issue in the recount. All ballots which are not machine-readable shall be tabulated manually, pursuant to the rules provided in this chapter.

816.8 [REPEALED].

816.9 At the conclusion of the recount proceedings, a recount results report shall be presented to the Board and posted on the Board's website. The Board shall determine the number of votes received by each candidate as a result of the recount, but shall not make a new certification of the results of the election unless the outcome of the contest has changed as a result of the recount.

816.10 There shall be only one (1) recount per contest.

816.11 Results of the recount are final and not appealable.

All persons desiring to comment on the subject matter of this proposed rulemaking should file written comments by no later than thirty (30) days after the date of publication of this notice in the *D.C. Register*. Comments should be filed with the Office of the General Counsel, Board of Elections, 441 4th Street, N.W., Suite 270N, Washington, D.C. 20001. Please direct any questions or concerns to the Office of the General Counsel at 202-727-2194 or ogc@dcboee.org. Copies of the proposed rules may be obtained at cost from the above address, Monday through Friday, between the hours of 9:00 a.m. and 4:00 p.m.

DEPARTMENT OF FOR-HIRE VEHICLES

NOTICE OF PROPOSED RULEMAKING

The Department of For-Hire Vehicles (DFHV), formerly the District of Columbia Taxicab Commission, pursuant to the authority set forth in Sections 8(c)(7) and (19), 14, and, 20j of the District of Columbia Taxicab Commission Establishment Act of 1985 ("Establishment Act"), effective March 25, 1986 (D.C. Law 6-97; D.C. Official Code §§ 50-307(c) (7) and (19), 50-313, and 50-329 (2014 Repl. & 2016 Supp.)), hereby gives notice of its proposed adoption of amendments to Chapter 9 (Insurance Requirements for Public Vehicles for Hire) of Title 31 (Taxicabs and Public Vehicles for Hire) of the District of Columbia Municipal Regulations (DCMR).

This proposed rulemaking would amend Chapter 9 to conform DFHV's insurance requirements for public vehicles-for-hire to those of the Department of Insurance, Securities, and Banking ("DISB"). This rulemaking is necessary to clarify that DFHV's insurance requirements must track the requirements set by DISB because that agency, not DFHV, is charged by statute with setting applicable insurance requirements for public vehicle-for-hire, and to obviate the need for further amendments for this purpose.

DFHV also hereby gives notice of its intent to take final rulemaking action to adopt these proposed rules in not less than thirty (30) days after the publication of this notice in the *D.C. Register*. Directions for submitting comments may be found at the end of this notice.

Chapter 9, INSURANCE REQUIREMENTS FOR PUBLIC VEHICLES FOR HIRE, of Title 31 DCMR, TAXICABS AND PUBLIC VEHICLES FOR HIRE, is amended as follows:

Section 900, APPLICATION AND SCOPE, is amended as follows:

Subsection 900.2 is amended to read as follows:

900.2 Each insurance policy for a public vehicle-for-hire shall provide the coverage required by DISB at 26 DCMR § 801.4, as may be amended from time to time.

Copies of this proposed rulemaking can be obtained at www.dcregs.dc.gov or by contacting the Department of For-Hire Vehicles, Office of Regulatory Policy and Planning, 2235 Shannon Place, S.E., Suite 3001, Washington, D.C. 20020. All persons desiring to file comments on the proposed rulemaking action should submit written comments via e-mail to dfhv@dc.gov, or by mail to the Department of For-Hire Vehicles, Office of Regulatory Policy and Planning, 2235 Shannon Place, S.E., Suite 3001, Washington, D.C. 20020, no later than thirty (30) days after the publication of this notice in the *D.C. Register*.

DEPARTMENT OF HEALTH CARE FINANCE

NOTICE OF PROPOSED RULEMAKING

The Director of the Department of Health Care Finance (Director), pursuant to the authority set forth in An Act to enable the District of Columbia to receive federal financial assistance under Title XIX of the Social Security Act for a medical assistance program, and for other purposes, approved December 27, 1967 (81 Stat. 744; D.C. Official Code § 1-307.02 (2014 Repl. & 2016 Supp.)) and Section 6(6) of the Department of Health Care Finance Establishment Act of 2007, effective February 27, 2008 (D.C. Law 17-109; D.C. Official Code § 7-771.05(6) (2012 Repl.)), hereby gives notice of the intent to adopt an amendment to Section 5213 (Reimbursement) of Chapter 52 (Medicaid Reimbursement for Mental Health Rehabilitative Services) of Title 29 (Public Welfare) of the District of Columbia Municipal Regulations (DCMR).

This proposed rulemaking establishes a new reimbursement rate for Rehabilitation/Day Services (Rehab Day). Rehab Day is a structured clinical program offered under the Mental Health Rehabilitative Services (MHRS) program that is intended to develop skills and foster social role integration through a range of social, psycho-educational, behavioral and cognitive mental health interventions.

The Director gives notice of the intent to take final rulemaking action to adopt the proposed rules in not less than thirty (30) days after the date of publication of this notice in the *D.C. Register*.

Chapter 52, MEDICAID REIMBURSEMENT FOR MENTAL HEALTH REHABILITATIVE SERVICES, of Title 29 DCMR, PUBLIC WELFARE, is amended as follows:

Section 5213, REIMBURSEMENT, is amended to read as follows:

5213 REIMBURSEMENT

5213.1 Medicaid reimbursement for Mental Health Rehabilitative Services (MHRS) provided to consumers, other than consumers who are deaf or hearing-impaired, shall be determined as follows:

SERVICE	CODE	BILLABLE UNIT OF SERVICE	RATE
Diagnostic/ Assessment	T1023HE	An assessment, at least 3 hours in duration	$256.02
	H0002	An assessment, 40 – 50 minutes in duration to determine eligibility for admission to a mental	$85.34

SERVICE	CODE	BILLABLE UNIT OF SERVICE	RATE
		health treatment program	
Medication Training& Support	H0034	15 minutes	$44.65 – Individual
	H0034HQ	15 minutes	$13.52 – Group
Counseling	H0004	15 minutes	$26.42 – Individual
	H0004HQ	15 minutes	$8.00 – Group
	H0004HR	15 minutes	$26.42 – Family with Consumer On-Site
	H0004HS	15 minutes	$26.42 – Family without Consumer On-Site
	H0004HETN	15 minutes	$27.45 – Individual Off-Site
Community Support	H0036	15 minutes	$21.97 – Individual
	H0036HQ	15 minutes	$6.65 – Group
	H0036UK	15 minutes	$21.97 – Collateral
	H0036AM	15 minutes	$21.97 – Physician Team Member
	H0038	15 minutes	$21.97 – Self-Help Peer Support
	H0038HQ	15 minutes	

SERVICE	CODE	BILLABLE UNIT OF SERVICE	RATE
	H0038HS	15 minutes	$6.65 –Self-Help Peer Support Group
	H0038HQHS	15 minutes	$21.97 – Family/Couple Peer Support without Consumer
	H0036HR	15 minutes	
	H0036HS	15 minutes	
	H0036U1	15 minutes	$6.65 – Family/Couple Peer Support Group Without Consumer
			$21.97 – Family with Consumer
			$21.97 – Family without Consumer
			$21.97– Community Residence Facility
	H2023	15 minutes	$18.61– Supported Employment (Therapeutic)
Crisis/ Emergency	H2011	15 minutes	$36.93
Day Services	H0025	One day, at least 3 hours in duration	$116.90
Intensive Day Treatment	H2012	One day, at least 5 hours in duration	$164.61

SERVICE	CODE	BILLABLE UNIT OF SERVICE	RATE
Community-Based Intervention (Level I – Multi-Systemic Therapy)	H2033	15 minutes	$57.42
Community-Based Intervention (Level II and Level III)	H2022	15 minutes	$35.74
Community-Based Intervention (Level IV – Functional Family Therapy)	H2033HU	15 minutes	$57.42
Assertive Community Treatment	H0039	15 minutes	$38.04 – Individual
	H0039HQ	15 minutes	$11.51 – Group
Trauma Focused Cognitive Behavioral Therapy	H004ST	15 minutes	$35.74
Child-Parent Psychotherapy for Family Violence	H004HT	15 minutes	$35.74

5213.2 Medicaid reimbursement for MHRS provided to consumers who are deaf or hearing-impaired shall be determined as follows:

SERVICE	CODE	BILLABLE UNIT OF SERVICE	RATE
Diagnostic/ Assessment	T1023HEHK	An assessment, at least 3 hours in duration	$345.63
	H0002HK	An assessment, 40 – 50 minutes in duration to determine eligibility for admission to a mental health treatment program	$115.21
Medication Training& Support	H0034HK	15 minutes	$60.28 – Individual
	H0034HQHK	15 minutes	$18.25 – Group
Counseling	H0004HK	15 minutes	$35.67 – Individual
	H0004HQHK	15 minutes	$10.80 – Group
	H0004HRHK	15 minutes	$35.67 – Family with Consumer On-Site
	H0004HSHK	15 minutes	$35.67 – Family without Consumer On-Site
Community Support	H0036HK	15 minutes	$29.66 – Individual
	H0036HQHK	15 minutes	$8.98 – Group
	H0036UKHK	15 minutes	$29.66 – Collateral
	H0036AMHK	15 minutes	$29.66 – Physician Team Member

SERVICE	CODE	BILLABLE UNIT OF SERVICE	RATE
	H0038HK	15 minutes	$29.66 – Self-Help Peer Support
	H0038HQHK	15 minutes	
	H0038HSHK	15 minutes	$8.98 –Self-Help Peer Support Group
	H0038HQHK	15 minutes	$29.66 – Family/Couple Peer Support without Consumer
	H0036HRHK	15 minutes	
	H0036HSHK	15 minutes	$8.98 – Family/Couple Peer Support Group Without Consumer
	H0036U1HK	15 minutes	
			$29.66 – Family with Consumer
			$29.66 – Family without Consumer
			$29.66– Community Residence Facility
	H2023HK	15 minutes	$25.12 Supported Employment (Therapeutic)
Crisis/ Emergency	H2011HK	15 minutes	$49.85
Day Services	H0025HK	One day, at least 3 hours in duration	$166.12
Intensive Day	H2012HK	One day, at least 5	$222.22

SERVICE	CODE	BILLABLE UNIT OF SERVICE	RATE
Treatment		hours in duration	
Community-Based Intervention (Level I – Multi-Systemic Therapy)	H2033HK	15 minutes	$77.52
Community-Based Intervention (Level II and Level III)	H2022HK	15 minutes	$48.25
Community-Based Intervention (Level IV – Functional Family Therapy)	H2033HUHK	15 minutes	$77.52
Assertive Community Treatment	H0039HK	15 minutes	$51.35 – Individual
	H0039HQHK	15 minutes	$15.54 – Group
Trauma Focused Cognitive Behavioral Therapy	H004STHK	15 minutes	$48.25
Child-Parent Psychotherapy for Family Violence	H004HTHK	15 minutes	$48.25

5213.3 The Department of Behavioral Health (DBH) shall be responsible for payment of the District's share or the local match for all MHRS in accordance with the terms and conditions set forth in the Memorandum of Understanding between Department of Health Care Finance (DHCF) and DBH. DHCF shall claim the federal share of financial participation for all MHRS services.

5213.4 Providers shall not bill the client or any member of the client's family for MHRS services. DBH shall bill all known third-party payors prior to billing the Medicaid Program.

5213.5 Medicaid reimbursement for MHRS is not available for:

(a) Room and board costs;

(b) Inpatient services (including hospital, nursing facility services, intermediate care facility for persons with mental retardation services, and Institutions for Mental Diseases services);

(c) Transportation services;

(d) Vocational services;

(e) School and educational services;

(f) Services rendered by parents or other family members;

(g) Socialization services;

(h) Screening and prevention services (other than those provided under Early and Periodic, Screening Diagnostic Treatment requirements);

(i) Services which are not medically necessary, or included in an approved Individualized Recovery Plan for adults or an Individualized Plan of Care for children and youth;

(j) Services which are not provided and documented in accordance with DBH-established MHRS service-specific standards; and

(k) Services furnished to a person other than the Medicaid client, when those services are not used exclusively for the well-being and benefit of the Medicaid client.

Comments on this proposed rulemaking shall be submitted in writing to Claudia Schlosberg, Senior Deputy Director/Medicaid Director, Department of Health Care Finance, 441 4th Street, N.W., 9th Floor, Washington, D.C. 20001, via email to DHCFPubliccomments@dc.gov, online

at www.dcregs.dc.gov, or by telephone to (202) 442-9115, within thirty (30) days after the date of publication of this notice in the *D.C. Register*. Additional copies of this proposed rule may be obtained from the above address.

DEPARTMENT OF HEALTH CARE FINANCE

NOTICE OF PROPOSED RULEMAKING

The Director of the Department of Health Care Finance (DHCF or the Department), pursuant to the authority set forth in An Act to enable the District of Columbia (District) to receive federal financial assistance under Title XIX of the Social Security Act for a medical assistance program, and for other purposes, approved December 27, 1967 (81 Stat.744; D.C. Official Code § 1-307.02 (2014 Repl. & 2016 Supp.)), and Section 6(6) of the Department of Health Care Finance Establishment Act of 2007, effective February 27, 2008 (D.C. Law 17-109; D.C. Official Code § 7-771.05(6) (2012 Repl.)), hereby gives notice of the intent to amend Chapter 95 (Medicaid Eligibility) of Title 29 (Public Welfare) of the District of Columbia Municipal Regulations (DCMR), by adding a new Section 9513 (Non-MAGI Eligibility Group: Optional Aged and Disabled).

This proposed rule sets forth the non-Modified Adjusted Gross Income (non-MAGI) financial and non-financial eligibility factors, pursuant to Sections 1902(a)(10)(A)(ii)(X) and 1902(m)(1) of the Social Security Act, for the optional Aged and Disabled (AD) eligibility group. In order to be eligible for Medicaid under the AD eligibility group, an individual must meet the following requirements: (1) Be aged sixty-five (65) or older or be determined disabled pursuant to 42 USC § 1382c(a)(3); (2) Have income at or below one hundred percent (100%) of the federal poverty level; (3) Have resources at or below the Supplemental Security Income (SSI) resource levels of four thousand dollars ($4,000) for an individual, and six thousand dollars ($6,000) for a couple; and (4) Meet other non-financial requirements, including but not limited to District residency, social security number, and citizenship and/or immigration requirements.

The Director gives notice of the intent to take final rulemaking action to adopt these rules not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*.

Chapter 95, MEDICAID ELIGIBILITY, of Title 29 DCMR, PUBLIC WELFARE, is amended as follows:

A new Section 9513 is added to read as follows:

9513 NON-MAGI ELIGIBILITY GROUP: OPTIONAL AGED AND DISABLED

9513.1 This section shall govern eligibility determinations pursuant to sections 1902(a)(10)(A)(ii)(X) and 1902(m)(1) of the Social Security Act, for the optional Aged and Disabled (AD) eligibility group.

9513.2 The Department of Health Care Finance ("Department") may provide Medicaid reimbursement under the optional Aged and Disabled (AD) eligibility group to individuals who:

(a) Are aged sixty-five (65) years or older or who are determined disabled in accordance with 42 U.S.C. § 1382c(a)(3), by either the U.S. Social

Security Administration (SSA) or by the Department of Human Services, ESA Medicaid Review Team::

(b) Have a household income at or below one hundred percent (100%) of Federal Poverty Level;

(c) Meet the following non-financial eligibility factors in accordance with Subsection 9506.9:

(1) Are a District resident pursuant to 42 C.F.R. Section 435.403;

(2) Can provide a Social Security Number (SSN) or are exempt pursuant to 42 C.F.R. Section 435.910 and Subsection 9504.7; and

(3) Are a U.S. citizen or national, or be in a satisfactory immigration status; and

(d) Have resources at or below the Supplemental Security Income (SSI) resource levels of four thousand dollars ($4,000) for an individual and six thousand dollars ($6,000) for a couple.

9513.3 The Department shall determine whether an applicant meets the eligibility factors for Medicaid reimbursement under the optional AD eligibility group based upon the submission of: :

(a) A complete application for Medicaid in accordance with Subsection 9501.5 of this chapter. The date of application shall be the date that a complete application is received by the Department; and

(b) A document containing verification from the Social Security Administration (SSA) in accordance with Subsection 9513.5, or the submission of a completed medical review form in accordance with Subsection 9513.7, if applying for the optional AD eligibility group based on disability.

9513.4 If an applicant is applying for Medicaid based on age, the Department shall accept self-attestation of aged sixty-five (65) or older unless the attestation is not reasonably compatible with other available information.

9513.5 If an applicant is applying for Medicaid based on disability, the applicant shall provide verification of disability from SSA, unless Subsection 9513.6 applies, and no further medical documentation shall be required to verify.

9513.6 If an applicant is applying for Medicaid based on a disability and SSA has not issued a disability determination, the Department shall immediately provide the applicant (by mail, in person, or other commonly available electronic means) a

medical review form that must be completed by a physician to document disability.

9513.7 The medical review form shall be submitted to the Department through the following means:

(a) Mail;

(b) In person; or

(c) Other commonly available electronic means.

9513.8 The applicant shall submit the medical review form with supporting medical documentation to the Department for review within sixty (60) calendar days from the date of the application.

9513.9 Where the Department determines that an applicant is not at least aged sixty-five (65) or is not disabled based on a review of the submitted medical review form and supporting medical documentation, the applicant shall be ineligible for Medicaid under the optional AD eligibility group and the Department shall submit a notice to the applicant in accordance with Section 9508 of this Chapter.

9513.10 Application timeliness standards set forth under Subsection 9501.9 of this chapter shall apply.

9513.11 A beneficiary shall immediately notify the Department of any change in circumstances that directly affects the beneficiary's eligibility to receive Medicaid under the optional AD eligibility group.

9513.12 For continued Medicaid coverage under the optional AD eligibility group, each beneficiary shall complete and submit (by mail, in person, or through commonly available electronic means) the following renewal documents every twelve (12) months:

(a) A completed and signed renewal form;

(b) A new medical review form that is completed by the beneficiary's physician or verification of disability if the beneficiary is receiving Medicaid based on a disabled determination by the Economic Security Administration Medical Review Team; and

(c) Documents that may be required in order to verify financial and non-financial eligibility factors set forth under Subsection 9513.2.

9513.13 When renewal is required in accordance with Subsection 9513.12, the Department shall send a renewal form for the beneficiary's completion prior to the end of the eligibility period subject to the District's policies.

9513.14 The beneficiary shall provide the required renewal information to the Department before the end of the beneficiary's renewal period.

9513.15 The Department shall not use a pre-populated renewal form, as described in Subsections 9501.22 through 9501.27, for beneficiaries under the AD eligibility group.

Comments on the proposed rule shall be submitted, in writing, to Claudia Schlosberg, JD, Senior Deputy Director/State Medicaid Director, Department of Health Care Finance, 441 4th Street, N.W., Suite 900S, Washington, D.C. 20001, via telephone on (202) 442-8742, via email at DHCFPubliccomments@dc.gov, or online at www.dcregs.dc.gov, within thirty (30) days after the date of publication of this notice in the *D.C. Register*. Copies of the proposed rule may be obtained from the above address.

DEPARTMENT OF HEALTH

NOTICE OF PROPOSED RULEMAKING

The Director of the Department of Health, pursuant to Sections 4(a), 7(e)(1) and 14 of the Legalization of Marijuana for Medical Treatment Amendment Act of 2010, effective July 27, 2010 (D.C. Law 18-210; D.C. Official Code §§ 7-1671.03(a) and 7-1671.13 (2012 Repl.)) respectively, and Mayor's Order 2011-71, dated April 13, 2011, hereby gives notice of the intent to adopt the following amendments to Chapter 3 (Use of Medical Marijuana) of Title 22 (Health), Subtitle C (Medical Marijuana), of the District of Columbia Municipal Regulations (DCMR), in final, in not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*, and upon completion of the thirty (30) day Council period of review if the Council does not act earlier to adopt a resolution approving the rules.

This action is being taken in order to implement the provisions of Sections 4(a) and 7(e)(1) of the Legalization of Marijuana for Medical Treatment Amendment Act of 2010, effective July 27, 2010 (D.C. Law 18-210; D.C. Official Code §§ 7-1671.03(a) and 7-1671.13 (2012 Repl.)), which allow the Mayor to increase, through rulemaking the quantity of medical marijuana that a patient may possess and that a dispensary may dispense within a thirty (30) day time period to four (4) ounces, to address the needs of patients suffering from medical conditions which need to receive medical marijuana in excess of the current limit of two (2) ounces, and in consideration of the recommendations made by the Medical Marijuana Program Advisory Committee's Scientific Subcommittee and the Intergovernmental Subcommittee.

Chapter 3, USE OF MEDICAL MARIJUANA, of Title 22-C, MEDICAL MARIJUANA, is amended as follows:

Section 300, USE BY QUALIFYING PATIENT, TRANSPORTATION BY CAREGIVER, AND LIMITATIONS ON MEDICAL MARIJUANA, is amended as follows:

Subsection 300.9 is amended to read as follows:

300.9 The maximum amount of medical marijuana any qualifying patient or caregiver may possess at any time is:

(a) Four (4) ounces of dried medical marijuana; or

(b) The equivalent of four (4) ounces of dried medical marijuana when sold in any other form.

Subsection 300.10 is repealed.

Chapter 57, PROHIBITED AND RESTRICTED ACTIVITIES, is amended as follows:

Section 5709, MEDICAL MARIJUANA AND PARAPHERNALIA RESTRICTIONS, is amended as follows:

Subsection 5709.1 is amended to read as follows:

5709.1 A dispensary shall not provide a qualified patient or caregiver more than four (4) ounces of dried medical marijuana, or the equivalent of four (4) ounces of dried medical marijuana in a form other than dried, either at one (1) time or within a thirty (30) day period.

All persons desiring to comment on the subject matter of this proposed rulemaking action shall submit written comments, not later than thirty (30) days after the date of publication of this notice in the *D.C. Register*, to Phillip Husband, General Counsel, Department of Health, Office of the General Counsel, 899 North Capitol Street, N.E., 5th Floor, Washington, D.C. 20002. Copies of the proposed rules may be obtained between the hours of 8:00 a.m. and 4:00 p.m. at the address listed above, or by contacting Angli Black, Administrative Assistant, at Angli.Black@dc.gov, (202) 442-5977.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA

NOTICE OF EXTENSION OF PUBLIC COMMENT PERIOD

RM28-2016-01, IN THE MATTER OF THE COMMISSION'S RULES GOVERNING UNIVERSAL SERVICE

1. By this Public Notice, the Public Service Commission of the District of Columbia ("Commission") informs interested persons of an extension of time to file comments and reply comments in response to a Notice of Proposed Rulemaking ("NOPR") published in this proceeding on September 2, 2016 in the *D.C. Register*.[1] The NOPR seeks comment on rule changes required by the Federal Communications Commission's ("FCC") Third Report and Order, Further Report and Order and Order on Reconsideration Regarding Lifeline ("*Lifeline Modernization Order*").[2]

2. Through this Public Notice, the Commission extends the comment period from October 3, 2016 to October 17, 2016 and the reply comment period from October 17, 2016, to October 31, 2016. Due to the requirement that the rule changes required by the *Lifeline Modernization Order* be in effect by December 1, 2016, there can be no further extensions of time for this NOPR.

3. All persons interested in filing comments and reply comments on the subject matter of the NOPR shall file these comments and reply comments with Brinda Westbrook-Sedgwick, Commission Secretary, Public Service Commission of the District of Columbia, 1325 G Street, Suite 800, Washington D.C. 20005. Copies of the NOPR may be obtained by visiting the Commission's website at www.dcpsc.org or at cost, by contacting the Commission Secretary at the above address.

[1] 63 DCR 11181 (September 2, 2016).

[2] *In the Matter of Lifeline and Link Up Reform and Modernization, Telecommunications Carriers Eligible for Universal Service Support, Connect America Fund*, WC Docket Nos. 11-42, 09-197, 10-90, Third Report and Order, Further Report and Order and Order on Reconsideration ("*Lifeline Modernization Order*"), rel. April 27, 2016.

DEPARTMENT OF HEALTH CARE FINANCE

NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The Director of the Department of Health Care Finance (DHCF), pursuant to the authority set forth in An Act to enable the District of Columbia to receive federal financial assistance under Title XIX of the Social Security Act for a medical assistance program, and for other purposes, approved December 27, 1967 (81 Stat. 744; D.C. Official Code § 1-307.02 (2014 Repl. & 2016 Supp.)), and 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 903 of Chapter 9 (Medicaid Program) of Title 29 (Public Welfare) of the District of Columbia Municipal Regulations (DCMR), entitled "Outpatient and Emergency Room Services."

The effect of these rules is to extend the provision of supplemental payments to eligible hospitals located within the District of Columbia that participate in the Medicaid program for outpatient hospital services rendered through September 30, 2017.

Emergency action is necessary for the immediate preservation of the health, safety, and welfare of Medicaid beneficiaries who are in need of outpatient hospital services. By taking emergency action, this proposed rule will ensure that appropriate and needed payments to District hospitals are sustained and allow Medicaid beneficiaries access to needed outpatient medical services.

The corresponding amendment to the District of Columbia State Plan for Medical Assistance ("State Plan") requires approval by the Council of the District of Columbia (Council) and the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS). The Council has approved the State Plan through the Fiscal Year 2017 Budget Support Act of 2016, effective July 20, 2016 (D.C. Act 21-463; 63 DCR 009843 (July 29, 2016)). These rules shall become effective for outpatient hospital services provided by Medicaid participating hospitals located within the District of Columbia occurring on or after: (1) October 1, 2016, if the corresponding State Plan amendment has been approved by CMS with an effective date of October 1, 2016; or (2) the effective date established by CMS in its approval of the corresponding State Plan amendment, whichever is later. DHCF projects an aggregate increase in expenditures of approximately $15,304,400 for Fiscal Year 2017.

The emergency rulemaking was adopted on September 21, 2016 and shall become effective for outpatient hospital services occurring on or after October 1, 2016. The emergency rules will remain in effect for one hundred and twenty (120) days or until January 19, 2017 unless superseded by publication of a Notice of Final Rulemaking in the *D.C. Register*. The Director also gives notice of the intent to take final rulemaking action to adopt these rules not less than thirty (30) days after the date of publication of this notice in the *D.C. Register*.

Chapter 9, MEDICAID PROGRAM, of Title 29 DCMR, PUBLIC WELFARE, is amended as follows:

Subsection 903.31 of Section 903, OUTPATIENT AND EMERGENCY ROOM SERVICES, is amended as follows:

903.31 Beginning FY 2017, each eligible hospital shall receive a supplemental hospital access payment calculated as set forth below:

(a) For visits and services beginning October 1, 2016 and ending on September 30, 2017, quarterly access payments shall be made to each eligible private hospital. Each payment shall be an amount equal to each hospital's District Fiscal Year (DFY) 2014 outpatient Medicaid payments divided by the total in District private hospital DFY 2014 outpatient Medicaid payments multiplied by one quarter (1/4) of the total outpatient private hospital access payment pool. The total outpatient private hospital access payment pool shall be equal to the total available spending room under the private hospital outpatient Medicaid upper payment limit for DFY 2017;

(b) United Medical Center: For visits and services beginning October 1, 2016 and ending on September 30, 2017, quarterly access payments shall be made as follows: (1) Each payment shall be equal to one quarter (1/4) of the total outpatient public hospital access payment pool; and(2) The total outpatient public hospital access payment pool shall be equal to the total available spending room under the District-operated hospital outpatient Medicaid upper payment limit for DFY 2017;

(c) Payments shall be made fifteen (15) business days after the end of the quarter for the Medicaid visits and services rendered during that quarter; and

(d) For purposes of this section, the term District Fiscal Year shall mean dates beginning on October 1st and ending on September 30th.

Comments on these rules should be submitted in writing to Claudia Schlosberg, J.D., Senior Deputy/Medicaid Director, Department of Health Care Finance, Government of the District of Columbia, 441 4th Street, N.W., Suite 900S, Washington D.C. 20001, via telephone on (202) 442-8742, via email at DHCFPubliccomments@dc.gov, or online at www.dcregs.dc.gov, within thirty (30) days of the date of publication of this notice in the *D.C. Register*. Additional copies of these rules are available from the above address.

DEPARTMENT OF HEALTH CARE FINANCE

NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The Director of the Department of Health Care Finance (DHCF), pursuant to the authority set forth in An Act to enable the District of Columbia (District) to receive federal financial assistance under Title XIX of the Social Security Act for a medical assistance program, and for other purposes approved December 27, 1967 (81 Stat.744; D.C. Official Code § 1-307.02 (2012 Repl. & 2016 Supp.)) 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 Chapter 65 of Title 29 (Public Welfare) of the District of Columbia Municipal Regulations (DCMR), entitled "Medicaid Reimbursement to Nursing Facilities."

These rules reflect changes to the reimbursement methodology used for nursing facilities providing care to District Medicaid beneficiaries.

These rules remove the annual inflation adjustment component of the nursing facility reimbursement methodology for Fiscal Year 2017 and all years thereafter in line with the District's long term budget priorities. Because the DHCF budget is included in the District's overall budget, emergency action is necessary in order to preserve the District's ability to provide uninterrupted services to the public consistent with the District's overall budget. The aggregate impact of the elimination of the inflation adjustment is a reduction of approximately $4,569,346 in each year from FY17 through FY21.

The corresponding State Plan Amendment (SPA) to the District of Columbia State Plan for Medical Assistance (State Plan) must be approved by the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS) and the Council of the District of Columbia (Council). The Council approved the corresponding SPA through the Fiscal Year 2017 Budget Support Emergency Act of 2016, effective July 20, 2016 (D.C. Act 21-463; 63 DCR 009843 (July 29, 2016)). This rule is contingent upon approval of the corresponding SPA by CMS. If the corresponding SPA is approved, DHCF will publish a notice setting forth the effective date.

The emergency rules were adopted on September 21, 2016 and shall remain in effect for not longer than one hundred and twenty (120) days from the adoption date or until January 19, 2017, unless superseded by publication of a Notice of Final Rulemaking in the *D.C. Register*.

The Director also gives notice of the intent to take final rulemaking action to adopt these rules not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*.

Chapter 65, MEDICAID REIMBURSEMENT TO NURSING FACILITIES, of Title 29 DCMR, PUBLIC WELFARE, is amended as follows:

Section 6508, FINAL PER DIEM RATE CALCULATION, is amended to read as follows:

6508 FINAL PER DIEM RATE CALCULATION

6508.1 Each nursing facility's per diem rate effective January 1, 2006 shall be the sum of Subparagraphs (a), (b), and (c) as set forth below:

(a) The nursing and resident care base year cost per diem, which shall be calculated as follows:

(1) Effective January 1, 2006, through September 30, 2007, the nursing and resident care base year cost per diem established pursuant to Section 6505, adjusted for inflation to March 30, 2003, using the CMS Prospective Payment System Skilled Nursing Facility Input Price Index (CMS Index).

(2) Effective October 1, 2007, through September 30, 2008, the nursing and resident care base year cost per diem calculated pursuant to Subsection 6508.1(a)(1), adjusted for inflation using the CMS Index for District Fiscal Years 2006, 2007, and 2008.

(3) Effective October 1, 2008, through September 30, 2009, the nursing and resident care base year cost per diem calculated pursuant to Subsection 6508.1(a)(2), adjusted for inflation using the CMS Index.

(4) Effective October 1, 2009 through December 31, 2010, the nursing and resident care base year cost per diem calculated pursuant to Subsection 6508.1(a)(3), adjusted for inflation using the CMS Index.

(5) Effective January 1, 2011 through September 30, 2013, the annual inflation adjustment shall be eliminated.

(6) Effective October 1, 2013, the nursing and resident care base year cost per diem calculated pursuant to Subsection 6508.1(a)(4), shall be annually adjusted for inflation using the CMS Index. This inflation adjustment shall not apply or be calculated for the period in which the inflation adjustment was eliminated in Subsection 6508.1(a)(5).

(7) Effective October 1, 2016, the annual inflation adjustment shall be eliminated.

(b) The routine and support base year cost per diem, which shall be calculated as follows:

(1) Effective January 1, 2006, through September 30, 2007, the routine and support base year cost per diem established pursuant to Section 6506, adjusted for inflation to March 30, 2003, using the CMS Prospective Payment System Skilled Nursing Facility Input Price Index (CMS Index).

(2) Effective October 1, 2007, through September 30, 2008, the routine and support base year cost per diem calculated pursuant to Subsection 6508.1(b)(1), indexed for inflation using the CMS Index.

(3) Effective October 1, 2008, through September 30, 2009, the routine and support base year cost per diem calculated pursuant to Subsection 6508.1(b)(2), adjusted for inflation using the CMS Index.

(4) Effective October 1, 2009 through December 31, 2010, the routine and support base year cost per diem calculated according to Subsection 6508.1(b)(3), adjusted for inflation using the CMS Index.

(5) Effective January 2011 through September 30, 2013, the annual inflation adjustment is eliminated.

(6) Effective October 1, 2013, the routine and support base year cost per diem calculated pursuant to Subsection 6508.1(b)(4), shall be annually adjusted for inflation using the CMS Index. This inflation adjustment shall not apply or be calculated for the period in which the inflation adjustment was eliminated in Subsection 6508.1(b)(5).

(7) Effective October 1, 2016, the annual inflation adjustment shall be eliminated.

(c) The capital-related base year cost per diem, which shall be calculated as follows:

(1) Effective January 1, 2006, through September 30, 2007, the capital-related base year cost per diem established pursuant to Section 6507 adjusted for inflation to March 30, 2003, using the CMS Prospective Payment System Skilled Nursing Facility Input Price Index (CMS Index). The inflation adjustment in this subparagraph shall not be applied to depreciation, amortization, and interest on capital related expenditures.

(2) Effective October 1, 2007, through September 30, 2008, the capital-related base year cost per diem calculated pursuant to Subsection 6508.1(c)(1) adjusted for inflation using the CMS Index for District Fiscal Years 2006, 2007, and 2008. The inflation adjustment in this subparagraph shall not be applied to depreciation, amortization and interest on capital-related expenditures.

(3) Effective October 1, 2008, through September 30, 2009, the capital-related base year cost per diem calculated pursuant to Subsection 6508.1(c)(2) adjusted for inflation using the CMS Index. The inflation adjustment in this subsection shall not be applied to depreciation, amortization and interest on capital-related expenditures.

(4) Effective October 1, 2009 through December 31, 2010, the capital-related base year cost per diem calculated pursuant to Subsection 6508.1(c)(3) adjusted for inflation using the CMS Index. The inflation adjustment in this subsection shall not be applied to depreciation, amortization and interest on capital-related expenditures.

(5) Effective January 1, 2011 through September 30, 2013, the annual inflation adjustment is eliminated.

(6) Effective October 1, 2013, the capital-related base year cost per diem calculated pursuant to Subsection 6508.1(c)(4), shall be annually adjusted for inflation using the CMS Index. This inflation adjustment shall not apply or be calculated for the period in which the inflation adjustment was eliminated in Subsection 6508.1(c)(5). The inflation adjustment in this subsection shall not be applied to depreciation, amortization and interest on capital-related expenditures.

(7) Effective October 1, 2016, the annual inflation adjustment shall be eliminated.

6508.2 Effective April 1, 2006 and every six (6) months thereafter, the nursing and resident care costs per diem shall be re-calculated in accordance with Section 6505. The per diem rates established for routine and support costs and capital-related costs established pursuant to Subsection 6508.1 shall be carried forward until costs are rebased.

6508.3 When necessary, each facility's per diem rate shall be reduced by the same percentage to maintain compliance with the Medicare upper payment limit requirement.

6508.4 DHCF may approve an adjustment to the facility's per diem rate if the facility demonstrates that it incurred higher costs due to extraordinary circumstances beyond its control including but not limited to strikes, fire flood, earthquake, or similar unusual occurrences with substantial cost effects.

6508.5 Each adjustment pursuant to Subsection 6508.4 shall be made only to the extent the costs are reasonable, attributable to the circumstances specified, separately identified by the facility, and verified by DHCF.

Comments on the proposed rule shall be submitted, in writing, to Claudia Schlosberg, J.D. Senior Deputy/Medicaid Director, Department of Health Care Finance, 441 4th Street, N.W., Suite 900S, Washington, D.C. 20001, via telephone on (202) 442-8742, via email at DHCFPubliccomments@dc.gov, or online at www.dcregs.dc.gov, within thirty (30) days after the date of publication of this notice in the *D.C. Register*. Copies of the proposed rule may be obtained from the above address.

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ALCOHOLIC BEVERAGE CONTROL BOARD

NOTICE OF PUBLIC HEARINGS
CALENDAR

WEDNESDAY, OCTOBER 5, 2016
2000 14TH STREET, N.W., SUITE 400S
WASHINGTON, D.C. 20009

Donovan W. Anderson, Chairperson
Members: Nick Alberti, Mike Silverstein,
Ruthanne Miller, James Short

Protest Hearing (Status) **9:30 AM**
Case # 16-PRO-00089; Gobind, LLC, t/a Toscana Café, 601 2nd Street, NE
License #97558, Retailer DR, ANC 6C
Substantial Change (Class Change from "D" to "C")

Protest Hearing (Status) **9:30 AM**
Case # 16-PRO-00039; A&A Restaurant Group, Inc., t/a Russia House, 1800
Connecticut Ave, NW, License #80952, Retailer CR, ANC 2D
Application to Renew the License

Show Cause Hearing (Status) **9:30 AM**
Case # 15-CMP-00764; The Bards of Washington, LLC, t/a James Hoban's
1 Dupont Circle, NW, License #77039, Retailer CR, ANC 2B
Allowed a Patron to leave the Establishment with an Alcoholic Beverage in an Open Container, Substantial Change without Board Approval

Show Cause Hearing (Status) **9:30 AM**
Case # 16-CC-00059; E & K, LLC, t/a 13th Street Market, 3582 13th Street,
NW, License #78242, Retailer B, ANC 1A
Sale to Minor Violation, No ABC Manager on Duty

Show Cause Hearing (Status) **9:30 AM**
Case # 16-CMP-00237; Mimi & D, t/a Vita Restaurant and Lounge/Penthouse
Nine, 1318 9th Street, NW, License #86037, Retailer CT, ANC 2F
Violation of Settlement Agreement

Board's Calendar
October 5, 2016

Show Cause Hearing (Status) **9:30 AM**
Case # 15-CMP-00826; 2718 Corporation, t/a Chuck & Bill Bison Lounge 2718 Georgia Ave, NW, License #14759, Retailer CT, ANC 1B
Trade Name Change Without Board Approval

Show Cause Hearing (Status) **9:30 AM**
Case # 16-CMP-00299; TGR, Inc., t/a Cities DC, 1909 K Street, NW, License #77812, Retailer CR, ANC 2B
No ABC Manager on Duty

Show Cause Hearing (Status) **9:30 AM**
Case # 16-CMP-00333; Ima Pizza H Street, LLC, t/a H & Pizza, 1118 H Street, NE, License #89158, Retailer CR, ANC 6A
Violation of Settlement Agreement

Show Cause Hearing (Status) **9:30 AM**
Case # 16-CMP-00277; RR4, LLC, t/a Red Rock, 1348 H Street, NE, License #90997, Retailer CR, ANC 6A
Operating After Board Approved Hours (Summer Garden), No ABC Manager on Duty

Show Cause Hearing (Status) **9:30 AM**
Case # 16-AUD-00021; Laliguras DC, LLC, t/a Laliguras Indian & Napali Bistro, 4221 Connecticut Ave, NW, License #95042, Retailer CR, ANC 3F
Failed to File Quarterly Statements

Show Cause Hearing (Status) **9:30 AM**
Case # 16-CMP-00274; Juanita's Inc., t/a Okapi, 4811 Georgia Ave, NW License #96523, Retailer CT, ANC 4D
No ABC Manager on Duty

Show Cause Hearing (Status) **9:30 AM**
Case # 16-251-00065; U Street Music Hall, LLC, t/a U Street Music Hall, 1115 U Street, NW, License #83219, Retailer CX, ANC 1B
Failed to Follow Security Plan

Fact Finding Hearing* **9:30 AM**
Hopeful, Inc., t/a To Be Determined (formerly Bobby Lew's Saloon), 1815 Connecticut Ave, NW, License #91955, Retailer CR, ANC 1C
Request to Extend Safekeeping

Board's Calendar
October 5, 2016

Show Cause Hearing* **10:00 AM**
Case # 15-CMP-00788; HSR, Inc., t/a New Dodge Market, 3620 14th Street, NW, License #99565, Retailer B, ANC 1A
No ABC Manager on Duty, Failed to Post License Conspicuously in the Establishment

Show Cause Hearing* **11:00 AM**
Case # 16-CMP-00006; Lee Casa Lebrato, Inc., t/a Casa Lebrato, 1733 Columbia Road, NW, License #98074, Retailer B, ANC 1C
Sold Go-Cups

BOARD RECESS AT 12:00 PM
ADMINISTRATIVE AGENDA
1:00 PM

Protest Hearing* **1:30 PM**
Case # 16-PRO-00023; Mendelsohn Hospitality Group, t/a Bearnaise, 313 Pennsylvania Ave, SE, License #89622, Retailer CR, ANC 6B
Application to Renew the License

Protest Hearing* **1:30 PM**
Case # 16-PRO-00024; Kookoovaya, Inc., t/a We, The Pizza, 305 Pennsylvania Ave, SE, License #82062, Retailer CR, ANC 6B
Application to Renew the License

Protest Hearing* **1:30 PM**
Case # 16-PRO-00029; Sunnyside Group, LLC, t/a Good Stuff Eatery, 303 Pennsylvania Ave, SE, License #78027, Retailer DR, ANC 6B
Application to Renew the License

***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, OCTOBER 5, 2016
2000 14TH STREET, N.W., SUITE 400S, WASHINGTON, D.C. 20009

On Wednesday, October 5th, 2016 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#16-CC-00092, Glen's Garden Market, 2001 S Street N.W., Retailer B, License # ABRA-090082

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2. Case#16-CC-00132, Kovacs Liquors, 1237 Mount Olivet Road N.E., Retailer A, License # ABRA-076573

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3. Case#16-CC-00123, Embassy Suites, 5335 Wisconsin Avenue N.W., Retailer CH, License # ABRA-074223

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4. Case#16-CC-00088, Sportsman Wine & Liquor, 3249 Mt. Pleasant Street. N.W., Retailer A, License # ABRA-070310

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5. Case#16-251-00205, Salty Dog Tavern, 1723 Connecticut Avenue N.W., Retailer CT, License# ABRA-098331

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6. Case#16-CC-00047, Continental Wine & Liquor, 1100 Vermont Avenue N.W., Retailer A, License# ABRA-078964

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7. Case#16-251-00069, Madam's Organ, 2461 18th Street N.W., Retailer CT, License# ABRA-025273

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8. Case#16-CC-00074, Good Ole Reliable, 1513 Rhode Island Avenue N.E., Retailer A, License #ABRA-060116

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9. Case#16-CMP-00620, Nile Market & Kitchen, 7815 Georgia Avenue N.W., Retailer CR, License # ABRA-060432.

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10. Case#16-CC-00140, The Haymaker, 1015 H Street N.E., Retailer CT, License # ABRA-084689

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11. Case#16-CC-00115, Afghan Grill, 2309 Calvert Street N.W., Retailer CR, License # ABRA-060278

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12. Case#16-CC-00109, Georgetown Wine & Spirits, 1500 27th Street N.W., Retailer A, License# ABRA-085209

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13. Case#16-CC-00078, New Seven Market, 1406 Good Hope Road N.E., Retailer B, License # ABRA-095880

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14. Case#16-251-00207, Club 2020 Bar & Lounge, 2434 18th Street N.W., Retailer CR, License# ABRA-101093

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ALCOHOLIC BEVERAGE CONTROL BOARD

NOTICE OF MEETING
LICENSING AGENDA

WEDNESDAY, OCTOBER 5, 2016 AT 1:00 PM
2000 14TH STREET, N.W., SUITE 400S, WASHINGTON, D.C. 20009

1. Review Request to remove Tasting Permit from License effective in next licensing year (beginning October 1, 2017). Licensee has paid tasting permit fee for the current licensing year. ANC 2B. SMD 2B04. A fine is outstanding for citation #3671. No pending enforcement matters. No Settlement Agreement. ***Prego Again***, 1617 17th Street NW, Retailer B, License No. 090326.

***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.**

BRIDGES PUBLIC CHARTER SCHOOL

NOTICE OF EXTENSION OF REQUEST FOR PROPOSALS

Nursing Services

The Bridges Public Charter School, in compliance with Section 2204 (c) of the District of Columbia School Reform Act of 1995 ("Act"), hereby extends solicits and expressions of interest from Vendors or Consultants for the following service(s) that was originally posted on September 9, 2016:

- Nursing Services

Proposal Submission
A Portable Document Format (pdf) version of your proposal must be received by the school no later than **2:00 p.m. EST on October 14, 2016** unless otherwise stated in associated RFP's. Proposals should be emailed to bids@bridgespcs.org

No phone call submission or late responses please. Interviews, samples, demonstrations will be scheduled at our request after the review of the proposals only.

BRIDGES PUBLIC CHARTER SCHOOL

REQUEST FOR PROPOSALS

Security Services and Crossing Guard Services

Bridges Public Charter School in accordance with section 2204(c) of the District of Columbia School Reform Act of 1995 solicits proposals for vendors to provide the following services:

- Security Services
- Crossing Guard Service

Please email bids@bridgespcs.org to receive a full RFP offering, with more detail on scope of work and bidder requirements.

Proposals shall be received no later than **5:00 P.M., Friday, October 7, 2016**.

Prospective Firms shall submit one electronic submission via e-mail to the following address:

Bid Administrator
bids@bridgespcs.org

Please include the bid category for which you are submitting as the subject line in your e-mail (e.g. Security Guard). Respondents should specify in their proposal whether the services they are proposing are only for a single year or will include a renewal option.

CHILD AND FAMILY SERVICES AGENCY

NOTICE OF PUBLIC MEETING

Mayor's Advisory Committee on Child Abuse and Neglect (MACCAN)

Tuesday – September 27, 2016
10:00 a.m. – 12:00 p.m.
Child and Family Services Agency
200 I Street SE, Conference Room 1001-A
Washington, DC 20003

Agenda

1. Call to Order
2. Ascertainment of Quorum
3. Acknowledgement of Adoption of the Minutes of the July 26, 2016 meeting
4. Report by the Chair and Co-Chair of MACCAN
5. Membership Update
    a. CFSA- recommendation- Ariana Quinones, OPPPS administrator
    b. 2017 Calendar/new meeting time
6. Discussion
    a. Research on alternative methods of discipline- themes
    b. Draft Strategic Plan
7. Opportunity for Public Comment
8. Adjournment
9. Next Meeting December 6, 2016, 10:00-12:00 pm @ CFSA, **room 1001-A**

If any questions/comments, please contact Roni Seabrook at (202) 724-7076 or roni.seabrook@dc.gov.

CITY ARTS & PREP PUBLIC CHARTER SCHOOL
FOR THE PERFORMING ARTS

REQUEST FOR PROPOSALS

Grant Management

The City Arts & Prep Public Charter School for the Performing Arts, in compliance with Section 2204 (c) of the District of Columbia School Reform Act of 1995 ("Act"), hereby solicits expressions of interest from Vendors or Consultants for the following tasks and service(s):

- Grant Management

Please send an email to bids@cityartspcs.org to receive a full RFP offering more detail on scope of work and bidder requirements.

Proposals shall be received no later than 5:00 pm, on **October 7, 2016**.

Prospective Firms shall submit one electronic submission via e-mail to the following address:

Bid Administrator
bids@cityartspcs.org

FEDERAL BALLOT
PRECINCT 001

OFFICIAL BALLOT
GENERAL ELECTION
DISTRICT OF COLUMBIA
TUESDAY, NOVEMBER 8, 2016

INSTRUCTIONS TO VOTER

1. TO VOTE YOU MUST DARKEN THE OVAL (⬭) TO THE LEFT OF YOUR CHOICE COMPLETELY.
   An oval (⬬) darkened to the left of the name of any candidate indicates a vote for the candidate.
2. Use only a blue or black ink pen.
3. If you make a mistake, ask for a new ballot.
4. For a Write-in candidate, darken the oval and write the name of the person on the line.

FEDERAL BALLOT
DISTRITO ELECTORAL 001

BOLETA OFICIAL
ELECCIÓN GENERAL
DISTRITO DE COLUMBIA
MARTES, 8 DE NOVIEMBRE 2016

INSTRUCCIONES PARA EL VOTANTE

1. PARA VOTAR DEBE RELLENAR EL OVALÓ (⬭) A LA IZQUIERDA DE SU PREFERENCIA COMPLETAMENTE.
   Un ovaló (⬬) totalmente relleno a la izquierda del nombre de un candidato indica un voto por ese candidato.
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3. Si comete un error, pedir una nueva boleta.
4. Para votar por un candidato por escrito, rellene el ovaló y escriba el nombre de la persona en la linea.

FEDERAL
FEDERAL

ELECTORS OF PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES

ELECTORES DE PRESIDENTE Y VICE PRESIDENTE DE LOS ESTADOS UNIDOS

VOTE FOR NO MORE THAN One (1) VOTE POR NO MÁS DE UNO (1)

- ⬭ **Gary Johnson - Bill Weld**
  LIBERTARIAN / LIBERTARIO
- ⬭ **Jill Stein - Ajamu Baraka**
  STATEHOOD GREEN /ESTADIDAD-VERDE DE DC
- ⬭ **Donald J. Trump - Michael R.Pence**
  REPUBLICAN/REPUBLICANO
- ⬭ **Hillary Clinton - Tim Kaine**
  DEMOCRATIC/ DEMÓCRATA

Write-in / Candidato "Por Escrito"

DELEGATE TO THE U.S. HOUSE OF REPRESENTATIVES

DELEGADO A LA CÁMARA DE REPRESENTANTES DE LOS ESTADOS UNIDOS

VOTE FOR NO MORE THAN One (1) VOTE POR NO MÁS DE UNO (1)

- ⬭ **Natale (Lino) Stracuzzi**
  STATEHOOD GREEN/ ESTADIDAD-VERDE DE DC
- ⬭ **Eleanor Holmes Norton**
  DEMOCRATIC/ DEMÓCRATA
- ⬭ **Martin Moulton**
  LIBERTARIAN / LIBERTARIO
- ⬭ _____
  Write-in/Candidato "Por Escrito"

WARDS 1,3,5 & 6

ANC XXXX **ANC XXXX** **ANC XXXX**

PRECINCT XXX

OFFICIAL BALLOT
GENERAL ELECTION
DISTRICT OF COLUMBIA
TUESDAY, NOVEMBER 8, 2016

INSTRUCTIONS TO VOTER

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DISTRITO ELECTORAL XXX

BOLETA OFICIAL ELECCIÓN
GENERAL
DISTRITO DE COLUMBIA
MARTES, 8 DE NOVIEMBRE 2016

INSTRUCCIONES PARA EL VOTANTE

1. PARA VOTAR DEBE RELLENAR EL OVALÓ (⬭) A LA IZQUIERDA DE SU PREFERENCIA COMPLETAMENTE. Un ovaló (⬬) totalmente relleno a la izquierda del nombre de un candidato indica un voto por ese candidato.
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FEDERAL
FEDERAL

ELECTORS OF PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES
ELECTORES DE PRESIDENTE Y VICE PRESIDENTE DE LOS ESTADOS UNIDOS
VOTE FOR NO MORE THAN One (1)
VOTE POR NO MÁS DE UNO (1)

- ⬭ **Gary Johnson - Bill Weld** LIBERTARIAN / LIBERTARIO
- ⬭ **Jill Stein - Ajamu Baraka** STATEHOOD GREEN /ESTADIDAD-VERDE DE DC
- ⬭ **Donald J. Trump - Michael R. Pence** REPUBLICAN/ REPUBLICANO
- ⬭ **Hillary Clinton - Tim Kaine** DEMOCRATIC/ DEMÓCRATA
- ⬭ _____ Write-in / Candidato "Por Escrito"

DELEGATE TO THE U.S. HOUSE OF REPRESENTATIVES
DELEGADO A LA CÁMARA DE REPRESENTANTES DE LOS ESTADOS UNIDOS
VOTE FOR NO MORE THAN One (1)
VOTE POR NO MÁS DE UNO (1)

- ⬭ **Natale (Lino) Stracuzzi** STATEHOOD GREEN/ ESTADIDAD-VERDE DE DC
- ⬭ **Eleanor Holmes Norton** DEMOCRATIC/ DEMÓCRATA
- ⬭ **Martin Moulton** LIBERTARIAN / LIBERTARIO
- ⬭ _____ Write-in / Candidato "Por Escrito"

DISTRICT OF COLUMBIA
DISTRITO DE COLUMBIA

AT - LARGE MEMBER OF THE COUNCIL
MIEMBRO POR ACUMULACIÓN DEL CONSEJO
VOTE FOR NO MORE THAN Two(2)
VOTE POR NO MÁS DE DOS (2)

- ⬭ **Matthew Klokel** LIBERTARIAN / LIBERTARIO
- ⬭ **John C. Cheeks** INDEPENDENT/ INDEPENDIENTE
- ⬭ **G. Lee Aikin** STATEHOOD GREEN/ ESTADIDAD-VERDE DE DC
- ⬭ **Carolina Celnik** REPUBLICAN/ REPUBLICANO
- ⬭ **David Grosso** INDEPENDENT/ INDEPENDIENTE
- ⬭ **Robert White** DEMOCRATIC/ DEMÓCRATA
- ⬭ _____ Write-in / Candidato "Por Escrito"
- ⬭ _____ Write-in / Candidato "Por Escrito"

UNITED STATES REPRESENTATIVE
REPRESENTANTE DE LOS ESTADOS UNIDOS
VOTE FOR NO MORE THAN One (1)
VOTE POR NO MÁS DE UNO (1)

- ⬭ **Franklin Garcia** DEMOCRATIC/ DEMÓCRATA
- ⬭ _____ Write-in / Candidato "Por Escrito"

DISTRICT OF COLUMBIA
DISTRITO DE COLUMBIA

AT - LARGE MEMBER STATE BOARD OF EDUCATION
MIEMBRO POR ACUMULACIÓN DE LA JUNTA ESTATAL DE EDUCACIÓN
VOTE FOR NO MORE THAN One (1)
VOTE POR NO MÁS DE UNO (1)

- ⬭ **Mary Lord**
- ⬭ **Tony Donaldson, Jr.**
- ⬭ **Ashley Carter**
- ⬭ _____ Write-in / Candidato "Por Escrito"

ADVISORY NEIGHBORHOOD COMMISSIONER
COMISIONADO DEL VECINDARIO CONSULTIVO

ANC - XXXX
VOTE FOR NO MORE THAN One (1)
VOTE POR NO MÁS DE UNO (1)

- ⬭ **Candidate 1**
- ⬭ _____ Write-in / Candidato "Por Escrito"

VOTE BOTH SIDES **TURN OVER / VOLTEAR LA BOLETA** **VOTE AMBOS LADOS**

DISTRICT OF COLUMBIA
DISTRITO DE COLUMBIA

ADVISORY REFERENDUM B
REFERÉNDUM CONSULTIVO B

Advisory Referendum on the State of New Columbia Admission Act Resolution of 2016

To ask the voters on November 8, 2016, through an advisory referendum, whether the Council should petition Congress to enact a statehood admission act to admit the State of New Columbia to the Union. Advising the Council to approve this proposal would establish that the citizens of the District of Columbia ("District") (1) agree that the District should be admitted to the Union as the State of New Columbia; (2) approve of a Constitution of the State of New Columbia to be adopted by the Council; (3) approve the State of New Columbia's boundaries, as adopted by the New Columbia Statehood Commission on June 28, 2016; and (4) agree that the State of New Columbia shall guarantee an elected representative form of government.

Shall the voters of the District of Columbia advise the Council to approve or reject this proposal?

Referéndum Consultivo sobre la Resolución para la Ley de Admisión del Estado de Nueva Columbia de 2016

Solicitar a los votantes el 8 de noviembre de 2016, a través de un referéndum consultivo, si el Consejo debería pedir al Congreso a promulgar una ley de admisión a la estadidad para admitir al Estado de Nueva Columbia como estado de la Unión. Asesorar al Consejo para aprobar esta propuesta establecería que los ciudadanos del Distrito de Columbia ("Distrito") (1) están de acuerdo en que el Distrito debe ser admitida en la Unión como el Estado de Nueva Columbia; (2) aprueban una Constitución del Estado de Nueva Columbia que se adopte por el Consejo; (3) aprueban los límites del Estado de Nueva Columbia, como aprobado por la Comisión para la Estadidad de Nueva Columbia el 28 de junio de 2016; y (4) están de acuerdo en que el Estado de Nueva Columbia garantizará una forma de gobierno representativo electo.

¿Asesorarán los votantes del Distrito de Columbia al Consejo para aprobar o rechazar esta propuesta?

○ **YES, to approve / SÌ, para aprobar**

○ **NO, to reject / NO, para rechazar**

VOTE BOTH SIDES	TURN OVER / VOLTEAR LA BOLETA	VOTE AMBOS LADOS

WARD2

ANC XXXX **ANC XXXX** **ANC XXXX**

PRECINCT XXX

OFFICIAL BALLOT GENERAL ELECTION
DISTRICT OF COLUMBIA
TUESDAY, NOVEMBER 8, 2016

INSTRUCTIONS TO VOTER

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3. If you make a mistake, ask for a new ballot.
4. For a Write-in candidate, darken the oval and write the name of the person on the line.

DISTRITO ELECTORAL XXX

BOLETA OFICIAL ELECCIÓN GENERAL
DISTRITO DE COLUMBIA
MARTES, 8 DE NOVIEMBRE 2016

INSTRUCCIONES PARA EL VOTANTE

1. PARA VOTAR DEBE RELLENAR EL OVALÓ (⬭) A LA IZQUIERDA DE SU PREFERENCIA COMPLETAMENTE. Un ovaló (⬬) totalmente relleno a la izquierda del nombre de un candidato indica un voto por ese candidato.
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FEDERAL / FEDERAL

ELECTORS OF PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES
ELECTORES DE PRESIDENTE Y VICE PRESIDENTE DE LOS ESTADOS UNIDOS
VOTE FOR NO MORE THAN One (1)
VOTE POR NO MÁS DE UNO (1)

- ⬭ **Gary Johnson - Bill Weld** LIBERTARIAN / LIBERTARIO
- ⬭ **Jill Stein - Ajamu Baraka** STATEHOOD GREEN /ESTADIDAD-VERDE DE DC
- ⬭ **Donald J. Trump - Michael R. Pence** REPUBLICAN/ REPUBLICANO
- ⬭ **Hillary Clinton - Tim Kaine** DEMOCRATIC/ DEMÓCRATA
- ⬭ _____ Write-in / Candidato "Por Escrito"

DELEGATE TO THE U.S. HOUSE OF REPRESENTATIVES
DELEGADO A LA CÁMARA DE REPRESENTANTES DE LOS ESTADOS UNIDOS
VOTE FOR NO MORE THAN One (1)
VOTE POR NO MÁS DE UNO (1)

- ⬭ **Natale (Lino) Stracuzzi** STATEHOOD GREEN/ ESTADIDAD-VERDE DE DC
- ⬭ **Eleanor Holmes Norton** DEMOCRATIC/ DEMÓCRATA
- ⬭ **Martin Moulton** LIBERTARIAN / LIBERTARIO
- ⬭ _____ Write-in / Candidato "Por Escrito"

DISTRICT OF COLUMBIA / DISTRITO DE COLUMBIA

AT - LARGE MEMBER OF THE COUNCIL
MIEMBRO POR ACUMULACIÓN DEL CONSEJO
VOTE FOR NO MORE THAN Two(2)
VOTE POR NO MÁS DE DOS (2)

- ⬭ **Matthew Klokel** LIBERTARIAN / LIBERTARIO
- ⬭ **John C. Cheeks** INDEPENDENT/ INDEPENDIENTE
- ⬭ **G. Lee Aikin** STATEHOOD GREEN/ ESTADIDAD-VERDE DE DC
- ⬭ **Carolina Celnik** REPUBLICAN/ REPUBLICANO
- ⬭ **David Grosso** INDEPENDENT/ INDEPENDIENTE
- ⬭ **Robert White** DEMOCRATIC/ DEMÓCRATA
- ⬭ _____ Write-in / Candidato "Por Escrito"
- ⬭ _____ Write-in / Candidato "Por Escrito"

WARD TWO MEMBER OF THE COUNCIL
DISTRITO DOS MIEMBRO DEL CONSEJO
VOTE FOR NO MORE THAN One (1)
VOTE POR NO MÁS DE UNO (1)

- ⬭ **Jack Evans** DEMOCRATIC/ DEMÓCRATA
- ⬭ _____ Write-in / Candidato "Por Escrito"

UNITED STATES REPRESENTATIVE
REPRESENTANTE DE LOS ESTADOS UNIDOS
VOTE FOR NO MORE THAN One (1)
VOTE POR NO MÁS DE UNO (1)

- ⬭ **Franklin Garcia** DEMOCRATIC/ DEMÓCRATA
- ⬭ _____ Write-in / Candidato "Por Escrito"

DISTRICT OF COLUMBIA / DISTRITO DE COLUMBIA

AT - LARGE MEMBER STATE BOARD OF EDUCATION
MIEMBRO POR ACUMULACIÓN DE LA JUNTA ESTATAL DE EDUCACIÓN
VOTE FOR NO MORE THAN One (1)
VOTE POR NO MÁS DE UNO (1)

- ⬭ **Mary Lord**
- ⬭ **Tony Donaldson, Jr.**
- ⬭ **Ashley Carter**
- ⬭ _____ Write-in / Candidato "Por Escrito"

WARD TWO MEMBER STATE BOARD OF EDUCATION
DISTRITO DOS MIEMBRO DE LA JUNTA ESTATAL DE EDUCACIÓN
VOTE FOR NO MORE THAN One (1)
VOTE POR NO MÁS DE UNO (1)

- ⬭ **Jack Jacobson**
- ⬭ _____ Write-in / Candidato "Por Escrito"

ADVISORY NEIGHBORHOOD COMMISSIONER
COMISIONADO DEL VECINDARIO CONSULTIVO

ANC - XXXX
VOTE FOR NO MORE THAN One (1)
VOTE POR NO MÁS DE UNO (1)

- ⬭ **Candidate 1**
- ⬭ _____ Write-in / Candidato "Por Escrito"

VOTE BOTH SIDES **TURN OVER / VOLTEAR LA BOLETA** **VOTE AMBOS LADOS**

DISTRICT OF COLUMBIA
DISTRITO DE COLUMBIA

ADVISORY REFERENDUM B
REFERÉNDUM CONSULTIVO B

Advisory Referendum on the State of New Columbia Admission Act Resolution of 2016

To ask the voters on November 8, 2016, through an advisory referendum, whether the Council should petition Congress to enact a statehood admission act to admit the State of New Columbia to the Union. Advising the Council to approve this proposal would establish that the citizens of the District of Columbia ("District") (1) agree that the District should be admitted to the Union as the State of New Columbia; (2) approve of a Constitution of the State of New Columbia to be adopted by the Council; (3) approve the State of New Columbia's boundaries, as adopted by the New Columbia Statehood Commission on June 28, 2016; and (4) agree that the State of New Columbia shall guarantee an elected representative form of government.

Shall the voters of the District of Columbia advise the Council to approve or reject this proposal?

Referéndum Consultivo sobre la Resolución para la Ley de Admisión del Estado de Nueva Columbia de 2016

Solicitar a los votantes el 8 de noviembre de 2016, a través de un referéndum consultivo, si el Consejo debería pedir al Congreso a promulgar una ley de admisión a la estadidad para admitir al Estado de Nueva Columbia como estado de la Unión. Asesorar al Consejo para aprobar esta propuesta establecería que los ciudadanos del Distrito de Columbia ("Distrito") (1) están de acuerdo en que el Distrito debe ser admitida en la Unión como el Estado de Nueva Columbia; (2) aprueban una Constitución del Estado de Nueva Columbia que se adopte por el Consejo; (3) aprueban los límites del Estado de Nueva Columbia, como aprobado por la Comisión para la Estadidad de Nueva Columbia el 28 de junio de 2016; y (4) están de acuerdo en que el Estado de Nueva Columbia garantizará una forma de gobierno representativo electo.

¿Asesorarán los votantes del Distrito de Columbia al Consejo para aprobar o rechazar esta propuesta?

○ **YES, to approve / SÌ, para aprobar**

○ **NO, to reject / NO, para rechazar**

VOTE BOTH SIDES	TURN OVER / VOLTEAR LA BOLETA	VOTE AMBOS LADOS

WARD7

ANC XXXX **ANC XXXX** **ANC XXXX**

PRECINCT XXX

OFFICIAL BALLOT
GENERAL ELECTION
DISTRICT OF COLUMBIA
TUESDAY, NOVEMBER 8, 2016

INSTRUCTIONS TO VOTER

1. TO VOTE YOU MUST DARKEN THE OVAL (⬭) TO THE LEFT OF YOUR CHOICE COMPLETELY. An oval (⬬) darkened to the left of the name of any candidate indicates a vote for the candidate.
2. Use only a blue or black ink pen.
3. If you make a mistake, ask for a new ballot.
4. For a Write-in candidate, darken the oval and write the name of the person on the line.

DISTRITO ELECTORAL XXX

BOLETA OFICIAL ELECCIÓN
GENERAL
DISTRITO DE COLUMBIA
MARTES, 8 DE NOVIEMBRE 2016

INSTRUCCIONES PARA EL VOTANTE

1. PARA VOTAR DEBE RELLENAR EL OVALÓ (⬭) A LA IZQUIERDA DE SU PREFERENCIA COMPLETAMENTE. Un ovaló (⬬) totalmente relleno a la izquierda del nombre de un candidato indica un voto por ese candidato.
2. Use solamente un boligrafo azul o negro.
3. Si comete un error, pedir una nueva boleta.
4. Para votar por un candidato por escrito, rellene el ovaló y escriba el nombre de la persona en la linea.

FEDERAL
FEDERAL

ELECTORS OF PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES
ELECTORES DE PRESIDENTE Y VICE PRESIDENTE DE LOS ESTADOS UNIDOS
VOTE FOR NO MORE THAN One (1)
VOTE POR NO MÁS DE UNO (1)

- ⬭ **Gary Johnson - Bill Weld** LIBERTARIAN / LIBERTARIO
- ⬭ **Jill Stein - Ajamu Baraka** STATEHOOD GREEN /ESTADIDAD-VERDE DE DC
- ⬭ **Donald J. Trump - Michael R. Pence** REPUBLICAN/ REPUBLICANO
- ⬭ **Hillary Clinton - Tim Kaine** DEMOCRATIC/ DEMÓCRATA
- ⬭ _____ Write-in / Candidato "Por Escrito"

DELEGATE TO THE U.S. HOUSE OF REPRESENTATIVES
DELEGADO A LA CÁMARA DE REPRESENTANTES DE LOS ESTADOS UNIDOS
VOTE FOR NO MORE THAN One (1)
VOTE POR NO MÁS DE UNO (1)

- ⬭ **Natale (Lino) Stracuzzi** STATEHOOD GREEN/ ESTADIDAD-VERDE DE DC
- ⬭ **Eleanor Holmes Norton** DEMOCRATIC/ DEMÓCRATA
- ⬭ **Martin Moulton** LIBERTARIAN / LIBERTARIO
- ⬭ _____ Write-in / Candidato "Por Escrito"

DISTRICT OF COLUMBIA
DISTRITO DE COLUMBIA

AT - LARGE MEMBER OF THE COUNCIL
MIEMBRO POR ACUMULACIÓN DEL CONSEJO
VOTE FOR NO MORE THAN Two(2)
VOTE POR NO MÁS DE DOS (2)

- ⬭ **Matthew Klokel** LIBERTARIAN / LIBERTARIO
- ⬭ **John C. Cheeks** INDEPENDENT/ INDEPENDIENTE
- ⬭ **G. Lee Aikin** STATEHOOD GREEN/ ESTADIDAD-VERDE DE DC
- ⬭ **Carolina Celnik** REPUBLICAN/ REPUBLICANO
- ⬭ **David Grosso** INDEPENDENT/ INDEPENDIENTE
- ⬭ **Robert White** DEMOCRATIC/ DEMÓCRATA
- ⬭ _____ Write-in / Candidato "Por Escrito"
- ⬭ _____ Write-in / Candidato "Por Escrito"

WARD SEVEN MEMBER OF THE COUNCIL
DISTRITO SIETE MIEMBRO DEL CONSEJO
VOTE FOR NO MORE THAN One (1)
VOTE POR NO MÁS DE UNO (1)

- ⬭ **Gary Butler** INDEPENDENT/ INDEPENDIENTE
- ⬭ **Christian Carter** INDEPENDENT/ INDEPENDIENTE
- ⬭ **Vincent C. Gray** DEMOCRATIC/ DEMÓCRATA
- ⬭ _____ Write-in / Candidato "Por Escrito"

UNITED STATES REPRESENTATIVE
REPRESENTANTE DE LOS ESTADOS UNIDOS
VOTE FOR NO MORE THAN One (1)
VOTE POR NO MÁS DE UNO (1)

- **Franklin Garcia** DEMOCRATIC/ DEMÓCRATA
- ⬭ _____ Write-in / Candidato "Por Escrito"

DISTRICT OF COLUMBIA
DISTRITO DE COLUMBIA

AT - LARGE MEMBER STATE BOARD OF EDUCATION
MIEMBRO POR ACUMULACIÓN DE LA JUNTA ESTATAL DE EDUCACIÓN
VOTE FOR NO MORE THAN One (1)
VOTE POR NO MÁS DE UNO (1)

- ⬭ **Mary Lord**
- ⬭ **Tony Donaldson, Jr.**
- ⬭ **Ashley Carter**
- ⬭ _____ Write-in / Candidato "Por Escrito"

WARD SEVEN MEMBER STATE BOARD OF EDUCATION
DISTRITO SIETE MIEMBRO DE LA JUNTA ESTATAL DE EDUCACIÓN
VOTE FOR NO MORE THAN One (1)
VOTE POR NO MÁS DE UNO (1)

- ⬭ **Dorothy Douglas**
- ⬭ **Marla M. Dean**
- ⬭ **Karen Williams**
- ⬭ _____ Write-in / Candidato "Por Escrito"

ADVISORY NEIGHBORHOOD COMMISSIONER
COMISIONADO DEL VECINDARIO CONSULTIVO

ANC - XXXX
VOTE FOR NO MORE THAN One (1)
VOTE POR NO MÁS DE UNO (1)

- **Candidate 1**
- ⬭ **Candidate 2**
- ⬭ _____ Write-in / Candidato "Por Escrito"
- ⬭

VOTE BOTH SIDES **TURN OVER / VOLTEAR LA BOLETA** **VOTE AMBOS LADOS**

DISTRICT OF COLUMBIA
DISTRITO DE COLUMBIA

ADVISORY REFERENDUM B
REFERÉNDUM CONSULTIVO B

Advisory Referendum on the State of New Columbia Admission Act Resolution of 2016

To ask the voters on November 8, 2016, through an advisory referendum, whether the Council should petition Congress to enact a statehood admission act to admit the State of New Columbia to the Union. Advising the Council to approve this proposal would establish that the citizens of the District of Columbia ("District") (1) agree that the District should be admitted to the Union as the State of New Columbia; (2) approve of a Constitution of the State of New Columbia to be adopted by the Council; (3) approve the State of New Columbia's boundaries, as adopted by the New Columbia Statehood Commission on June 28, 2016; and (4) agree that the State of New Columbia shall guarantee an elected representative form of government.

Shall the voters of the District of Columbia advise the Council to approve or reject this proposal?

Referéndum Consultivo sobre la Resolución para la Ley de Admisión del Estado de Nueva Columbia de 2016

Solicitar a los votantes el 8 de noviembre de 2016, a través de un referéndum consultivo, si el Consejo debería pedir al Congreso a promulgar una ley de admisión a la estadidad para admitir al Estado de Nueva Columbia como estado de la Unión. Asesorar al Consejo para aprobar esta propuesta establecería que los ciudadanos del Distrito de Columbia ("Distrito") (1) están de acuerdo en que el Distrito debe ser admitida en la Unión como el Estado de Nueva Columbia; (2) aprueban una Constitución del Estado de Nueva Columbia que se adopte por el Consejo; (3) aprueban los límites del Estado de Nueva Columbia, como aprobado por la Comisión para la Estadidad de Nueva Columbia el 28 de junio de 2016; y (4) están de acuerdo en que el Estado de Nueva Columbia garantizará una forma de gobierno representativo electo.

¿Asesorarán los votantes del Distrito de Columbia al Consejo para aprobar o rechazar esta propuesta?

○ **YES, to approve / SÌ, para aprobar**

○ **NO, to reject / NO, para rechazar**

VOTE BOTH SIDES	TURN OVER / VOLTEAR LA BOLETA	VOTE AMBOS LADOS

WARD 4

ANC XXXX **ANC XXXX** **ANC XXXX**

PRECINCT XXX

OFFICIAL BALLOT
GENERAL ELECTION
DISTRICT OF COLUMBIA
TUESDAY, NOVEMBER 8, 2016

INSTRUCTIONS TO VOTER

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DISTRITO ELECTORAL XXX

BOLETA OFICIAL ELECCIÓN
GENERAL
DISTRITO DE COLUMBIA
MARTES, 8 DE NOVIEMBRE 2016

INSTRUCCIONES PARA EL VOTANTE

1. PARA VOTAR DEBE RELLENAR EL OVALÓ ( ) A LA IZQUIERDA DE SU PREFERENCIA COMPLETAMENTE. Un ovaló ( ) totalmente relleno a la izquierda del nombre de un candidato indica un voto por ese candidato.
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FEDERAL
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ELECTORS OF PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES
ELECTORES DE PRESIDENTE Y VICE PRESIDENTE DE LOS ESTADOS UNIDOS
VOTE FOR NO MORE THAN One (1)
VOTE POR NO MÁS DE UNO (1)

- **Gary Johnson - Bill Weld** LIBERTARIAN / LIBERTARIO
- **Jill Stein - Ajamu Baraka** STATEHOOD GREEN /ESTADIDAD-VERDE DE DC
- **Donald J. Trump - Michael R. Pence** REPUBLICAN/ REPUBLICANO
- **Hillary Clinton - Tim Kaine** DEMOCRATIC/ DEMÓCRATA
- Write-in / Candidato "Por Escrito"

DELEGATE TO THE U.S. HOUSE OF REPRESENTATIVES
DELEGADO A LA CÁMARA DE REPRESENTANTES DE LOS ESTADOS UNIDOS
VOTE FOR NO MORE THAN One (1)
VOTE POR NO MÁS DE UNO (1)

- **Natale (Lino) Stracuzzi** STATEHOOD GREEN/ ESTADIDAD-VERDE DE DC
- **Eleanor Holmes Norton** DEMOCRATIC/ DEMÓCRATA
- **Martin Moulton** LIBERTARIAN / LIBERTARIO
- Write-in / Candidato "Por Escrito"

DISTRICT OF COLUMBIA
DISTRITO DE COLUMBIA

AT - LARGE MEMBER OF THE COUNCIL
MIEMBRO POR ACUMULACIÓN DEL CONSEJO
VOTE FOR NO MORE THAN Two(2)
VOTE POR NO MÁS DE DOS (2)

- **Matthew Klokel** LIBERTARIAN / LIBERTARIO
- **John C. Cheeks** INDEPENDENT/ INDEPENDIENTE
- **G. Lee Aikin** STATEHOOD GREEN/ ESTADIDAD-VERDE DE DC
- **Carolina Celnik** REPUBLICAN/ REPUBLICANO
- **David Grosso** INDEPENDENT/ INDEPENDIENTE
- **Robert White** DEMOCRATIC/ DEMÓCRATA
- Write-in / Candidato "Por Escrito"
- Write-in / Candidato "Por Escrito"

WARD FOUR MEMBER OF THE COUNCIL
DISTRITO CUATRO MIEMBRO DEL CONSEJO
VOTE FOR NO MORE THAN One (1)
VOTE POR NO MÁS DE UNO (1)

- **Brandon Todd** DEMOCRATIC/ DEMÓCRATA
- Write-in / Candidato "Por Escrito"

UNITED STATES REPRESENTATIVE
REPRESENTANTE DE LOS ESTADOS UNIDOS
VOTE FOR NO MORE THAN One (1)
VOTE POR NO MÁS DE UNO (1)

- **Franklin Garcia** DEMOCRATIC/ DEMÓCRATA
- Write-in / Candidato "Por Escrito"

DISTRICT OF COLUMBIA
DISTRITO DE COLUMBIA

AT - LARGE MEMBER STATE BOARD OF EDUCATION
MIEMBRO POR ACUMULACIÓN DE LA JUNTA ESTATAL DE EDUCACIÓN
VOTE FOR NO MORE THAN One (1)
VOTE POR NO MÁS DE UNO (1)

- **Mary Lord**
- **Tony Donaldson, Jr.**
- **Ashley Carter**
- Write-in / Candidato "Por Escrito"

WARD FOUR MEMBER STATE BOARD OF EDUCATION
DISTRITO CUATRO MIEMBRO DE LA JUNTA ESTATAL DE EDUCACIÓN
VOTE FOR NO MORE THAN One (1)
VOTE POR NO MÁS DE UNO (1)

- **Lannette Woodruff**
- Write-in / Candidato "Por Escrito"

ADVISORY NEIGHBORHOOD COMMISSIONER
COMISIONADO DEL VECINDARIO CONSULTIVO

ANC - XXXX
VOTE FOR NO MORE THAN One (1)
VOTE POR NO MÁS DE UNO (1)

- **Candidate 1**
- Write-in / Candidato "Por Escrito"

VOTE BOTH SIDES **TURN OVER / VOLTEAR LA BOLETA** **VOTE AMBOS LADOS**

DISTRICT OF COLUMBIA
DISTRITO DE COLUMBIA

ADVISORY REFERENDUM B
REFERÉNDUM CONSULTIVO B

Advisory Referendum on the State of New Columbia Admission Act Resolution of 2016

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Referéndum Consultivo sobre la Resolución para la Ley de Admisión del Estado de Nueva Columbia de 2016

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¿Asesorarán los votantes del Distrito de Columbia al Consejo para aprobar o rechazar esta propuesta?

○ **YES, to approve / SÌ, para aprobar**

○ **NO, to reject / NO, para rechazar**

VOTE BOTH SIDES | **TURN OVER / VOLTEAR LA BOLETA** | **VOTE AMBOS LADOS**

WARD 8

ANC XXXX **ANC XXXX** **ANC XXXX**

PRECINCT XXX

OFFICIAL BALLOT
GENERAL ELECTION
DISTRICT OF COLUMBIA
TUESDAY, NOVEMBER 8, 2016

INSTRUCTIONS TO VOTER

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DISTRITO ELECTORAL XXX

BOLETA OFICIAL ELECCIÓN
GENERAL
DISTRITO DE COLUMBIA
MARTES, 8 DE NOVIEMBRE 2016

INSTRUCCIONES PARA EL VOTANTE

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FEDERAL
FEDERAL

ELECTORS OF PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES
ELECTORES DE PRESIDENTE Y VICE PRESIDENTE DE LOS ESTADOS UNIDOS
VOTE FOR NO MORE THAN One (1)
VOTE POR NO MÁS DE UNO (1)

- ○ **Gary Johnson - Bill Weld** LIBERTARIAN / LIBERTARIO
- ○ **Jill Stein - Ajamu Baraka** STATEHOOD GREEN /ESTADIDAD-VERDE DE DC
- ○ **Donald J. Trump - Michael R. Pence** REPUBLICAN/ REPUBLICANO
- ○ **Hillary Clinton - Tim Kaine** DEMOCRATIC/ DEMÓCRATA
- ○ Write-in / Candidato "Por Escrito"

DELEGATE TO THE U.S. HOUSE OF REPRESENTATIVES
DELEGADO A LA CÁMARA DE REPRESENTANTES DE LOS ESTADOS UNIDOS
VOTE FOR NO MORE THAN One (1)
VOTE POR NO MÁS DE UNO (1)

- ○ **Natale (Lino) Stracuzzi** STATEHOOD GREEN/ ESTADIDAD-VERDE DE DC
- ○ **Eleanor Holmes Norton** DEMOCRATIC/ DEMÓCRATA
- ○ **Martin Moulton** LIBERTARIAN / LIBERTARIO
- ○ Write-in / Candidato "Por Escrito"

DISTRICT OF COLUMBIA
DISTRITO DE COLUMBIA

AT - LARGE MEMBER OF THE COUNCIL
MIEMBRO POR ACUMULACIÓN DEL CONSEJO
VOTE FOR NO MORE THAN Two(2)
VOTE POR NO MÁS DE DOS (2)

- ○ **Matthew Klokel** LIBERTARIAN / LIBERTARIO
- ○ **John C. Cheeks** INDEPENDENT/ INDEPENDIENTE
- ○ **G. Lee Aikin** STATEHOOD GREEN/ ESTADIDAD-VERDE DE DC
- ○ **Carolina Celnik** REPUBLICAN/ REPUBLICANO
- ○ **David Grosso** INDEPENDENT/ INDEPENDIENTE
- ○ **Robert White** DEMOCRATIC/ DEMÓCRATA
- ○ Write-in / Candidato "Por Escrito"
- ○ Write-in / Candidato "Por Escrito"

WARD EIGHT MEMBER OF THE COUNCIL
DISTRITO OCHO MIEMBRO DEL CONSEJO
VOTE FOR NO MORE THAN One (1)
VOTE POR NO MÁS DE UNO (1)

- ○ **Trayon "Ward Eight" White** DEMOCRATIC/ DEMÓCRATA
- ○ Write-in / Candidato "Por Escrito"

UNITED STATES REPRESENTATIVE
REPRESENTANTE DE LOS ESTADOS UNIDOS
VOTE FOR NO MORE THAN One (1)
VOTE POR NO MÁS DE UNO (1)

- ○ **Franklin Garcia** DEMOCRATIC/ DEMÓCRATA
- ○ Write-in / Candidato "Por Escrito"

DISTRICT OF COLUMBIA
DISTRITO DE COLUMBIA

AT - LARGE MEMBER STATE BOARD OF EDUCATION
MIEMBRO POR ACUMULACIÓN DE LA JUNTA ESTATAL DE EDUCACIÓN
VOTE FOR NO MORE THAN One (1)
VOTE POR NO MÁS DE UNO (1)

- ○ **Mary Lord**
- ○ **Tony Donaldson, Jr.**
- ○ **Ashley Carter**
- ○ Write-in / Candidato "Por Escrito"

WARD EIGHT MEMBER STATE BOARD OF EDUCATION
DISTRITO OCHO MIEMBRO DE LA JUNTA ESTATAL DE EDUCACIÓN
VOTE FOR NO MORE THAN One (1)
VOTE POR NO MÁS DE UNO (1)

- ○ **Tierra Jolly**
- ○ **Markus Batchelor**
- ○ **Shakira T. Hemphill**
- ○ Write-in / Candidato "Por Escrito"

ADVISORY NEIGHBORHOOD COMMISSIONER
COMISIONADO DEL VECINDARIO CONSULTIVO

ANC - XXXX
VOTE FOR NO MORE THAN One (1)
VOTE POR NO MÁS DE UNO (1)

- ○ **Candidate 1**
- ○ **Candidate 2**
- ○ Write-in / Candidato "Por Escrito"

VOTE BOTH SIDES **TURN OVER / VOLTEAR LA BOLETA** **VOTE AMBOS LADOS**

DISTRICT OF COLUMBIA
DISTRITO DE COLUMBIA

ADVISORY REFERENDUM B
REFERÉNDUM CONSULTIVO B

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¿Asesorarán los votantes del Distrito de Columbia al Consejo para aprobar o rechazar esta propuesta?

○ **YES, to approve / SÌ, para aprobar**

○ **NO, to reject / NO, para rechazar**

VOTE BOTH SIDES	TURN OVER / VOLTEAR LA BOLETA	VOTE AMBOS LADOS

FRIENDSHIP PUBLIC CHARTER SCHOOL

REQUEST FOR PROPOSALS

Friendship Public Charter School is seeking bids from prospective vendors to provide;

- School Uniforms
- Executive Search Firm to Select a Senior Academic Administrator
- Athletic Equipment Supplies
- Event Support Services
- Positive Action Coordinator, who will coordinate with students, teachers, administrators, and community members to implement a School Improvement Plan using Positive Action as its research based approach. Qualifications include BA and experience in working with urban schools. Classroom management experience is also a plus.

The competitive Request for Proposal can be found on FPCS website at http://www.friendshipschools.org/procurement. Proposals are due no later than 4:00 P.M., EST, October 20th 2016. No proposal will be accepted after the deadline. Questions can be addressed to: ProcurementInquiry@friendshipschools.org

DEPARTMENT OF HEALTH CARE FINANCE

NOTICE OF PROPOSED AMENDMENT TO THE DISTRICT OF COLUMBIA STATE PLAN FOR MEDICAL ASSISTANCE

The Director of the Department of Health Care Finance (DHCF), pursuant to the authority set forth in an Act to enable the District of Columbia to receive federal financial assistance under Title XIX of the Social Security Act for a medical assistance program, and for other purposes, approved December 27, 1967 (81 Stat.744; D.C. Official Code §1-307.02 (2012 Repl. & 2016 Supp.)) and 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. & 2016 Supp.)) hereby gives notice of the intent to submit an amendment to the District of Columbia State Plan for Medical Assistance (State Plan) for review and approval by the Centers for Medicare and Medicaid Services (CMS), U.S. Department of Health and Human Services.

The proposed State Plan Amendment (SPA) is authorized by Section 1945 of the Social Security Act, and upon approval, the SPA would establish a new Health Home program for District Medicaid beneficiaries who have multiple chronic conditions.

The goals of the Health Home program are: (1) to improve the integration of medical and behavioral health, community supports, and social services; (2) to lower rates of avoidable emergency department use; (3) to reduce preventable hospital admissions and re-admissions; (4) to reduce healthcare costs; (5) to improve the experience of care, quality of life, and beneficiary satisfaction; and (6) to improve health outcomes.

The following services will be offered in primary care settings to beneficiaries enrolled in the Health Home program: (1) comprehensive care management; (2) care coordination; (3) health promotion; (4) comprehensive transitional care; (5) individual and family support; and (6) referral to community and social support services.

Copies of the SPA may be obtained upon request to Joe Weissfeld, Project Manager, Health Care Reform and Innovation Administration, D.C. Department of Health Care Finance, 441 Fourth Street NW, Suite 900S, Washington, DC 20001.

Written comments on the SPA may be submitted to Claudia Schlosberg, J.D., Senior Deputy Director and Medicaid Director, D.C. Department of Health Care Finance, 441 Fourth Street NW, Suite 900S, Washington, DC 20001, or via e-mail at dhcfpubliccomments@dc.gov, during the thirty (30) day public comment period, beginning on the date this notice is published.

For further information, please contact Joe Weissfeld, Project Manager, Health Care Reform and Innovation Administration, D.C. Department of Health Care Finance, at (202) 442-5839 or joe.weissfeld@dc.gov.

DEPARTMENT OF HEALTH (DOH)

NOTICE OF FUNDING AVAILABILITY (NOFA)

Teen Pregnancy Program
RFA# CHA_TPP_10.14.16

The District of Columbia, Department of Health (DOH) is soliciting applications from qualified applicants to services in the program and service areas described in this Notice of Funding Availability (NOFA). This announcement is to provide public notice of the Department of Health's intent to make funds available for the purpose described herein. The applicable Request for Applications (RFA) will be released under a separate announcement with guidelines for submitting the application, review criteria and DOH terms and conditions for applying for and receiving funding.

General Information:

Funding Opportunity Title:	Teen Pregnancy Program
Funding Opportunity Number:	
Program RFA ID#:	RFA# CHA_TPP_10.14.16
Opportunity Category:	Competitive
DOH Administrative Unit:	Community Health Administration
DOH Program Bureau	Child, Adolescent and School Health
Program Contact:	Charlissa Quick at (202) 442- 9123 Charlissa.Quick@dc.gov

Program Description:

The District of Columbia, Department of Health Community Health Administration (CHA) is the lead agency charged with implementation and coordination of community-wide Teen Pregnancy Prevention initiatives in the District of Columbia. To prevent teen pregnancy and improve adolescent health outcomes, as well as to achieve the purposes of the Temporary Assistance for Needy Families program, CHA is soliciting applications from qualified applicants to implement evidence-based or evidence-informed teen pregnancy prevention initiatives. Qualified applicants will develop and implement programs to strengthen clinical systems to improve adolescent health, to build social-emotional skills and self-efficacy of adolescents, or to mobilize community partners and key stakeholders around community-wide teen pregnancy prevention. Initiatives to strengthen clinical systems must include one or more of the following systems-level changes: increase the availability of adolescent-friendly health services, create sustainable community-clinical linkages for adolescent health services, and increase access to long acting reversible contraceptives among adolescents.

Eligible Applicants	Not- for profit, public and private organizations located and licensed to conduct business within the District of Columbia and experienced in providing adolescent reproductive, primary care, and preventive services for populations at high risk for teen pregnancy
Anticipated # of Awards:	6
Anticipated Amount Available:	$1,300,000
Floor Award Amount:	$100,000
Ceiling Award Amount:	$400,000

Funding Authorization

Legislative Authorization	FY 17 Budget Support Act of 2016
Associated CFDA#	Not Applicable
Associated Federal Award ID#	Not Applicable
Cost Sharing / Match Required?	No
RFA Release Date:	**Friday, October 14, 2016**
Pre-Application Meeting (Date)	**Tuesday, October 25, 2016**
Pre-Application Meeting (Time)	11:00 am – 12:30 PM
Pre-Application Meeting (Location/Conference Call Access)	899 North Capitol Street, NE, 3rd Floor conference room 306
Letter of Intent Due date:	Not applicable
Application Deadline Date:	**Monday, November 14, 2016**
Application Deadline Time:	4:00 PM
Links to Additional Information about this Funding Opportunity	DC Grants Clearinghouse http://opgs.dc.gov/page/opgs-district-grants-clearinghouse. DOH EGMS https://dcdoh.force.com/GO__ApplicantLogin2

Notes:

1. DOH reserves the right to issue addenda and/or amendments subsequent to the issuance of the NOFA or RFA, or to rescind the NOFA or RFA.
2. Awards are contingent upon the availability of funds.
3. Individuals are not eligible for DOH grant funding.
4. Applicants must have a DUNS #, TaxID#, be registered in the federal Systems for Award Management (SAM) and the DOH Enterprise Grants Management System (EGMS)
5. Contact the program manager assigned to this funding opportunity for additional information.
6. DOH is located in a secured building. Government issued identification must be presented for entrance.

DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT

NEW PROGRAM ANNOUNCEMENT

SMALL MULTI-FAMILY LOAN PROGRAM

Polly Donaldson, Director, Department of Housing and Community Development (DHCD), announces a new program under the Great Spaces, Healthy Places Initiative for multi-family property owners with fewer than 50 units with an active Inspection Report from the Department of Consumer and Regulatory Affairs. The small, multi-family loan program provides up to $250,000 ($10,000 per unit) for limited systems replacement and other key repairs to improve sub-standard housing conditions, including safety and environmental hazards in the District.

HOUSING PRODUCTION TRUST FUND (HPTF)

The program will be financed with the local HPTF program. Units rehabbed must be affordable to low- to moderate-income households who earn at or below 80% of the area median income (AMI). Units financed through HPTF are subject to a 40-year affordability covenant that restricts the maximum allowable rents based upon unit size and income level served.

NEXT STEPS

Application materials and more detailed eligibility details will be available online at dhcd.dc.gov no later than **Monday September 26, 2016**. The entire application and submission process is online, and no hard copy submissions will be required or accepted.

Muriel Bowser, Mayor of the District of Columbia
Brian Kenner, Deputy Mayor for Planning and Economic Development
Polly Donaldson, Director, Department of Housing and Community Development

DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT

REQUEST FOR PROPOSALS

COMMUNITY FACILIITY PROJECTS

Polly Donaldson, Director, Department of Housing and Community Development (DHCD), announces a Request for Proposals (RFP) for Community Facility Projects. DHCD has made $3.6 million available from the U.S. Department of Housing and Urban Development's (HUD) Community Development Block Grant (CDBG) Program.

DHCD seeks proposals from nonprofit organizations to produce, expand, or enhance community facilities, which may include service-oriented facilities (i.e., housing counseling centers, small business technical assistance centers), urban agriculture, facilities targeted to special needs populations (i.e., day care centers, senior centers), and maker spaces designed to promote the creative economy.

The competitive Request for Proposals (RFP) will be released on **Wednesday, September 28, 2016** and applications will be due by **11:59PM Wednesday, November 30, 2016**.

Application materials, further instructions, and information about capacity building workshops will be available online at dhcd.dc.gov. The entire application and submission process is online, and no hard copy submissions will be required or accepted.

Muriel Bowser, Mayor of the District of Columbia
Brian Kenner, Deputy Mayor for Planning and Economic Development
Polly Donaldson, Director, Department of Housing and Community Development

IDEAL ACADEMY PUBLIC CHARTER SCHOOL

REQUEST FOR PROPOSALS

Experienced Fundraiser/Developer

Ideal Academy Public Charter School is seeking an experienced fundraiser/developer with at least 3 years' related experience or equivalent combination. Must include experience with development, fundraising, special event planning, cultivation and stewardship of individual and corporation donors. The candidate must have proven communication skills with an ability to write and speak persuasively with demonstrated results. The fundraiser/developer will be a member of the Staff Senior Management Team and works closely with Board of Trustees and the Development/Fundraising Committee of the Board. The fundraiser/developer will be developing an effective case for support, and will be relied upon and valued for providing feedback, direction, and strategy. All job functions are performed with a high degree of professionalism, including responsibility, initiative, creativity, dependability, human relations, cooperation, and courtesy, as well as, the ability to think on your feet, and make good judgments under pressure.

…….:

Please email **zuella.evans@iapcs.com** for more details about requirements.

Bids are DUE BY October 12, 2016

MONUMENT ACADEMY PUBLIC CHARTER SCHOOL

NOTICE OF INTENT TO ENTER INTO A SOLE SOURCE CONTRACT
Dated: September 19, 2016

Pursuant to the School Reform Act, D.C. 38-1802 (SRA) and the D.C. Public Charter Schools procurement policy, Monument Academy Public Charter School (MAPCS) hereby submits this public notice of intent to award the following sole source contract:

Contract: Apple Inc.

MAPCS intends to enter into a sole source contract with Apple Inc. in order to utilize iPads for individualized instruction. The school will provide an iPad to every student and utilize a service that selects particular apps that suit each child's needs and learning goals. The contract will amount to $31,815 over the course of 2016-2017 school year.

For further information regarding this sole source notice, please contact Jeff McHugh via email by close of business September 26, 2016.

Jeff McHugh, Director of Operations
Monument Academy Public Charter School
500 19th Street NE
Washington, D.C. 20002
tel: 914-721-0613
email: jeff.mchugh@monumentacademydc.org

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA

NOTICE OF COMMUNITY HEARINGS

PUBLIC INPUT SOUGHT ON WASHINGTON GAS LIGHT COMPANY'S RATE APPLICATION, FORMAL CASE NO. 1137, IN THE MATTER OF THE APPLICATION OF WASHINGTON GAS LIGHT COMPANY FOR AUTHORITY TO INCREASE EXISTING RATES AND CHARGES FOR GAS SERVICE.

This Notice informs the public that the Public Service Commission of the District of Columbia ("Commission") seeks input on the application submitted by the Washington Gas Light Company (WGL) requesting authority to increase existing rates and charges for gas service in the District of Columbia to collect approximately $17.4 million in additional weather-normalized annual revenues. The Commission published a Public Notice on March 11, 2016, regarding this application in the *D.C. Register* to allow interested persons to intervene in *Formal Case No. 1137*, the formal case established to consider WGL's application. The Public Notice can be accessed online at www.dcpsc.org. A hard copy of the Public Notice can be obtained by calling (202) 626-5150.

The Commission revises the scheduled time for convening the final two (2) community hearings[1] by deleting the end time of the hearings as follows:

Wednesday, October 5, 2016
Southwest Public Library
900 Wesley Place SW
Washington DC 20024
6:00 p.m.

Saturday, October 15, 2016
Thurgood Marshall Academy
2427 Martin Luther King, Jr., Avenue SE
Washington, DC 20020
10:00 a.m.

Those who wish to testify at the community hearings should contact the Commission Secretary by 5 p.m. three (3) business days prior to the date of the hearing by calling (202) 626-5150. Representatives of organizations shall be permitted a maximum of five (5) minutes for oral presentations; individuals shall be permitted a maximum of three (3) minutes. If an organization or an individual is unable to offer comments at the community hearings, written statements may be submitted to the Public Service Commission of the District of Columbia, 1325 G Street, NW, Suite 800, Washington, D.C. 20005 until November 18, 2016.

[1] *See D.C. Register* Vol. 63-No. 35 at 010676 (August 19, 2016) (Notice of Community Hearings).

Any person who is deaf or hearing-impaired, and cannot readily understand or communicate in spoken English, and persons with disabilities who need special accommodations in order to participate in the hearing, must contact the Commission Secretary by 5 p.m. seven (7) business days prior to the date of the hearing. Persons who wish to testify in Spanish, Chinese, Amharic, or Korean must also contact the Commission Secretary by 5 pm three (3) business days before the day of the hearing so arrangements can be made for translation services. **The number to call to request special accommodations and interpretation and translation services is (202) 626-5150**

REAL PROPERTY TAX APPEALS COMMISSION

NOTICE OF MEETING CANCELLATION

SEPTEMBER 28, 2016

The Administrative Meeting Scheduled for September 28, 2016 at the District of Columbia Real Property Tax Appeals Commission has been cancelled. The remaining meetings for 2016 will be held on the following dates:

- Monday, October 24, 2016; and
- Wednesday, November 30, 2016

All meetings will start at 2:30 p.m. and will be held in the Commission offices located at 441 4th Street, NW, Suite 360N, Washington, DC 20001. Below is the draft agenda for all meetings. A final agenda will be posted to RPTAC's website at http://rptac.dc.gov prior to each meeting.

For additional information, please contact: Carlynn Fuller, Executive Director, at (202) 727-3596.

DRAFT AGENDA

I. CALL TO ORDER
II. ASCERTAINTMENT OF A QUORUM
III. REPORT BY THE CHAIRPERSON
IV. REPORT BY THE EXECUTIVE DIRECTOR
V. COMMENTS FROM THE PUBLIC – LIMITED TO 2 MINUTES
VI. ADJOURNMENT

Individual who wish to submit comments as part of the official record should send copies of the written statements no later than 5:00 p.m. on the following dates:

For the October 24th meeting, the deadline is Thursday, October 20th , 2016
For the November 30th meeting, the deadline is Monday, November 28, 2016

Written statements should be submitted to:

Carlynn Fuller, Executive Director
Real Property Tax Appeals Commission
441 4th Street NW, Suite 360N
Washington, D.C. 20001
202-727-6860
Email: Carlynn.fuller@dc.gov

OFFICE OF THE SECRETARY OF THE DISTRICT OF COLUMBIA

RECOMMENDATIONS FOR APPOINTMENTS AS NOTARIES PUBLIC

Notice is hereby given that the following named persons have been recommended for appointment as Notaries Public in and for the District of Columbia, effective on or after November 1, 2016.

Comments on these potential appointments should be submitted, in writing, to the Office of Notary Commissions and Authentications, 441 4th Street, NW, Suite 810 South, Washington, D.C. 20001 within seven (7) days of the publication of this notice in the *D.C. Register* on September 30, 2016. Additional copies of this list are available at the above address or the website of the Office of the Secretary at www.os.dc.gov.

D.C. Office of the Secretary **Effective: November 1, 2016**
Recommendations for appointment as DC Notaries Public **Page 2**

Abu Ghannam	Nasser Ahmad	A Washington Travel and Passport Visa Services 1629 K Street, NW, Suite 300	20006
Alvarez	Silvia R.	The Ferraro Law Firm 3050 K Street, NW, Suite 215	20007
Anaya	Raul E.	Slocumb Law Firm, LLC 777 6th Street, NW, Suite 520	20001
Anderson	Casey	International Republican Institute 1225 Eye Street, NW, Suite 800	20005
Archvadze	Nino	Meridian Institute 1800 M Street, NW, Suite 450N	20036
Barros	Norma I.	Sullivan & Barros, LLP 1990 M Street, NW	20036
Bedell	Jamal	Madison Marquette 670 Water Street, SW	20024
Berry	Charnae Alaina	Capital One Bank, NA 701 Pennsylvania Avenue, NW	20004
Biber	Nicolas R.	Madison Marquette 670 Water Street, SW	20024
Blackstone	Karen	Sidley Austin LLP 1501 K Street, NW	20005
Bonilla	Catherine	Sonosky, Chambers, Sachse, Enreson & Perry, LLP 1425 K Street, NW, Suite 600	20005
Bous	Isis M.	LawRex 1301 Delaware Avenue, SW, 822N	20024
Boyd	Sabrina	Olender Reporting Inc 1100 Connecticut Avenue, NW	20036
Brooks	Renne Ann	Caplin & Drysdale, Chartered One Thomas Circle, NW, Suite 1100	20005

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Recommendations for appointment as DC Notaries Public **Page 3**

Brown-Hawkins	Devorah	Self 2010 Channing Street, NW #4	20018
Burke	Sharon A.	Kozusko Harris Duncan 1666 K Street, NW, Suite 400	20006
Burrell	Deonna E.	Transportation Federal Credit Union 1200 New Jersey, SE	20003
Burum	Courtney M.	Veritex Legal Solutions 1250 Eye Street, NW, Suite 350	20005
Caceres	Jose	Self 1300 N Street, NW, Apartment 709	20005
Carcone	Matthew	Stein Mitchell Cipolione Beato Missner, LLP 1100 Connecticut Avenue, NW, Suite 1100	20036
Carson	Tia M.	TD Bank 905 Rhode Island Avenue, NE	20018
Casey	Michael J.	Comcast 900 Michigan Avenue, NE	20017
Celcis	Jacqueline	Washington Circle Hotel 525 New Jersey Avenue, NW	20001
Chaves	Diana	Adduci, Mastrani & Shaumberg, LLP 1133 Connecticut Avenue, NW, 12th Floor	20036
Constantine	Gregory	Stewart Title Group, LLC 11 Dupont Circle, NW, Suite 750	20036
Cooley	Briata Janine	The Westbridge Condominiums 2555 Pennsylvania Avenue, NW	20037
Cosby	Chelsi	Neal R. Gross and Co, Inc. 1323 Rhode Island Avenue, NW	20007
Cubbage	Nichole McTurk	Kilpatrick Townsend & Stockton, LLP 607 14th Street, NW, Suite 900	20005

D.C. Office of the Secretary **Effective: November 1, 2016**
Recommendations for appointment as DC Notaries Public **Page 4**

Cundioglu, Esq.	Busra	DHA Group, Inc. 1101 Pennsylvania Avenue, NW, #510	20004
Daniels	Carolyn W.	Morgan, Lewis & Bockius, LLP 2020 K Street, NW	20006
Debuc	Francoise F.	The Law Offices of Irena I. Karpinski 1330 New Hampshire Avenue, NW, Suite 111	20036
Ducatman	David	Self 1225 17th Street, NE	20002
Ellis	Charles Massimo Sciacca	Grosvenor Americas 1701 Pennsylvania Avenue, NW, Suite 450	20006
Errico	Luca	Self 4601 Yuma Street, NW	20016
Exon	Maria Regina C.	Metalogix Software US Inc 5335 Wisconsin Avenue, NW, Suite 510	20015
Farmer	Daniella	STE, LLC dbe The UPS Store 6047 455 Massachusetts Avenue, NW	20001
Ferer, II	David	Self 1119 8th Street, NE	20002
Ferrette	Angeli J.	Honda North America, Inc. 1001 G Street, NW, Suite 950W	20001
Fry V	Lous E.	Wells Fargo 1300 Connecticut Avenue, NW	20036
Gayle	Cathy	LP Title, LLC 4725 Wisconsin Avenue, NW, Suite # 250	20016
Gebeyehu	Tigist	TD Bank 4849 Wisconsin Avenue, NW	20016

D.C. Office of the Secretary **Effective: November 1, 2016**
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Gibson	Vivian T.	Sibley Memorial Hospital 5255 Loughboro Road, NW	20016
Gowen	Kimberly	Gowen Rhoades Winograd & Silva PLLC 513 Capitol Court, NE, Suite 11	20002
Greene	Sierra Rebecca	Citibank, N.A. 5001 Wisconsin Avenue, NW	20006
Harris	Tammie L.	CBRE, Inc. 750 9th Street, NW, Suite 900	20001
Harrison	Jovon	The George Washington University Hospital 900 23rd Street, NW	20037
Hillyer	Damien	M&T Bank 1899 L Street, NW	20036
Hytovitz	Brie	Kimsey Foundation 1700 Pennsylvania Avenue, NW, Suite 900	20006
Inparaj	Majorie S.	O'Melveny & Myers, LLP 1625 Eye Street, NW	20006
Jarrin	Cynthia	Rhapsody Condominium 2120 Vermont Avenue, NW	20001
Jean	Natalie R.	Somerset Development Company, LLC 5101 Wisconsin Avenue, NW, Suite 410	20016
Jennings	Kenny	CitiBank NA 5001 Wisconsin Avenue, NW	20016
Jensen	Peter Henning	Stein Mitchell Cipolione Beato Missner, LLP 1100 Connecticut Avenue, NW, Suite 1100	20036
Johnson	Catherine M.	Intellectual Property Owners Association 1501 M Street, NW, Suite 1150	20005

Johnson	Phyllis	Self 1401 Half Street, SW	20024
Jones	Drucilla	Self 728 Roxboro Place, NW	20011
Kelly	Diane M.	Kellog, Huber, Hansen, Todd, Evans, & Figel, PLLC 1615 M Street, NW, Suite 400	20036
Klug	Christoper M.	Nelson Mullins Riley & Scarborough, LLP 101 Constitution Avenue, NW, Suite 900	20001
Konteh	Ibrahim A.	Veritex Legal Solutions 1250 Eye Street, NW, Suite 350	20005
Lara	Johana J.	JPN Masonry, LLC 2607 24th Street, NW, Suite 2	20008
Lassiter	LaShon M.	Cohen Mohr, LLP 1055 Thomas Jefferson Street, NW, Suite 504	20007
Lawrence	Jennifer Stacey	Self 2701 11th Street, NW	20001
Lloyd	Kirston	Public Defender Service for the District of Columbia 633 Indiana Avenue, NW	20004
Mak	Viktor	Veritex Legal Solutions 1250 Eye Street, NW, Suite 350	20005
Makis	Karla A.	Washington Metropolitan Area Transit Authority 600 5th Street, NW	20001
Martinez	Travis Alexander	Veritex Legal Solutions 1250 Eye Street, NW, Suite 350	20005
McAlpine	Tiffany	US Department of Transportation/Federal Railroad Administration 1200 New Jersey Avenue, SE	20590

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Recommendations for appointment as DC Notaries Public **Page 7**

McAvoy	Moira	FedChoice Federal Credit Union 900 Brentwood Road, NE	20066
McCall	Kenneth Douglas	Self (Dual) 44 T Street, NW	20001
McCormick	Jessica	United States Attorney's Office 555 4th Street, NW	20530
Moore	Cheryl A.	National Association of Letter Carriers 100 Indiana Avenue, NW	20001
Moore	Kenya C.	Goodwill of Greater Washington 2200 South Dakota Avenue, NE	20018
Moorman	Patricia	Events DC d/b/a Washington Convention and Sports Authority 801 Mount Vernon Place, NW	20001
Mosby	Hazel	Self 899 Bellevue Street, SE	20032
Muhammad	Sarita	Self 1625 Gainesville Street, SE, Unit 102	20020
Murangi	Kaveiriririua	Capital Bank N.A. 701 Pennsylvania Avenue, NW	20004
Nance	Terra	Hessler Bianco 1313 F Street, NW, Third Floor	20004
Nguyen	Thu Hong T.	Georgetown University 37th & O Street, NW, Gervase 2nd Floor	20057
Norman	Nicole M.	PNC Bank 800 17th Street, NW	20006
Pauly	Stephen	Wright & Talisman, P.C. 1200 G Street, NW, Suite 600	20005
Posey	Thomas J.	MBA Services, LLC 1426 G Street, SE, Rear	20003

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Recommendations for appointment as DC Notaries Public **Page 8**

Prue	Pamela	McKissack & McKissack of Washington, Inc. 901 K Street, NW, 6th Floor	20001
Rios	Christopher	Self 470 Taylor Street, NE, H42	20017
Ruckh	Allison Foster	Association of Schools and Programs of Public Health 1900 M Street, NW, #710	20036
Savage	Caroline	Farr, Miller & Washington, LLC 1020 19th Street, NW, #200	20036
Scott	Cheryl D.	Republic National Distributing Company 4235 Sheriff Road, NE	20019
Shaikh	Panaash	Ackerman Brown, PLLC 2101 L Street, NW, Suite 440	20037
Small	Majahn D.	Consumer Financial Protection Bureau 1700 G Street, NW	20552
Smith	Tai L.	Chadbourne & Parke, LLP 1200 New Hampshire Avenue, NW	20036
Smith-Price	Tanya M.	Washington Metropolitan Area Transit Authority 600 5th Street, NW	20001
Soderberg	Lorna G.	CapitalRE, LLC 1201 15th Street, NW, Suite 440	20005
Steele	Cynthia A.	National Capital Bank 316 Pennsylvania Avenue, SE	20003
Stewart	Lori	Self (Dual) 767 Morton Street, NW	20010
Tabones	Jennifer H.	Self 4303 3rd Street, SE #201	20032
Taylor	Dynita F.	Signal Financial FCU 1391 Pennsylvania Avenue, SE	20003

Terry	Brooke Allyn	DLA Piper, LLP, US 500 8th Street, NW	20004
Tintle	Jacquelynn A.	The Catholic of America School of Nursing 620 Michigan Avenue, NE	20064
Vick	Gwendolyn	Julia M. Toro Law Firm 1666 Connecticut Avenue, NW, Suite 240	20009
Vorndran	Anthony	American Institutes for Research 1000 Thomas Jefferson Street, NW	20007
Watson	Cullen P.	Lawyers Realty Group 840 First Street, NE, Third Floor	20002
Watson	Monique	Self (Dual) 247 Tuckerman Street, NW	20011
Willett	Arlin C.	The Tower Corporation 1909 K Street, NW, C180	20036
Williams	Nicky L.	Levi & Korinsky, LLP 1101 30th Street, NW, Suite 115	20007
Yoon	Sanghi	White & Case LLP 701 13th Street, NW	20005

D.C. SENTENCING AND CRIMINAL CODE REVISION COMMISSION

PUBLIC NOTICE

APPOINTMENT OF DATA MANAGEMENT SPECIALIST

MIATTA SESAY

The D.C. Sentencing and Criminal Code Revision Commission hereby gives notice pursuant to D.C. Code § 1-609.03(c) (2015) that Miatta Sesay was appointed as Data Management Specialist for the D.C. Sentencing and Criminal Code Revision on September 6, 2016. This is an excepted service position.

D.C. SENTENCING AND CRIMINAL CODE REVISION COMMISSION

NOTICE OF PUBLIC MEETING

The Commission meeting will be held on Tuesday, September 20, 2016 at 5:00 p.m. The meeting will be held at 441 4th Street, N.W. Suite 430S Washington, DC 20001. Below is the planned agenda for the meeting. The final agenda will be posted on the agency's website at http://sentencing.dc.gov

For additional information, please contact: Mia Hebb, Staff Assistant, at (202) 727-8822 or mia.hebb@dc.gov

Meeting Agenda

1. Review and Approval of the Meeting Minutes from June 20, 2016 Meeting - Action Item, Judge Weisberg.

2. Welcome Commission's New Staff Member – Miatta Sesay, Data Manager, Informational Item, Barbara Tombs-Souvey.

3. Criminal Code Revision Project Deliverables – Action Item, Richard Schmechel, Project Director.
    a. Overview of Report to the Council
    b. Overview of Appendices
    c. Commission Action

4. Guideline Evaluation Study Timeline - Informational Item, Barbara Tombs- Souvey.

5. Next Meeting Scheduled for October 18, 2016.

6. Adjourn.

DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY

BOARD OF DIRECTORS

NOTICE OF PUBLIC MEETING

The Board of Directors of the District of Columbia Water and Sewer Authority (DC Water) will be holding a meeting on Thursday, October 6, 2016 at 9:30 a.m. The meeting will be held in the Board Room (4th floor) at 5000 Overlook Avenue, S.W., Washington, D.C. 20032. Below is the draft agenda for this meeting. A final agenda will be posted to DC Water's website at www.dcwater.com.

For additional information, please contact Linda R. Manley, Board Secretary at (202) 787-2332 or linda.manley@dcwater.com.

DRAFT AGENDA

1.	**Call to Order**	Board Chairman
2.	**Roll Call**	Board Secretary
3.	**Approval of September 1, 2016 Meeting Minutes**	Board Chairman
4.	**Committee Reports**	Committee Chairperson
5.	**General Manager's Report**	General Manager
6.	**Action Items** Joint-Use Non Joint-Use	Board Chairman
7.	**Other Business**	Board Chairman
8.	**Adjournment**	Board Chairman

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 19301 of The Republic of The Gambia, pursuant to 11 DCMR § 1002 and § 206 of the Foreign Missions Act, to allow the location of a chancery in the SSH-1/R-1-B District at premises 5630 16th Street, N.W. (Square 2721W, Lot 27).

HEARING DATE: July 12, 2016
DECISION DATE: July 12, 2016

NOTICE OF FINAL RULEMAKING

and

DETERMINATION AND ORDER

The Board of Zoning Adjustment ("Board"), pursuant to the authority set forth in § 206 of the Foreign Missions Act, approved August 24, 1982 (96 Stat. 283; D.C. Official Code, § 6-1306 (2012 Repl.)) and Chapter 10 of the Zoning Regulations of the District of Columbia, Title 11 DCMR, and after a public hearing on July 12, 2016, hereby gives notice that it took final action not to disapprove the application of The Republic of The Gambia ("Applicant") to allow the location of a chancery in the SSH-1/R-1-B District at premises 5630 16th Street, N.W. (Square 2721W, Lot 27) (the "Subject Property").

A notice of proposed rulemaking was published in the May 27, 2016 edition of the *D.C. Register*. (63 DCR 8093.) In accordance with 11 DCMR §§ 3113.13 and 3134.9(c), the Board provided written notice to the public more than 40 days in advance of the public hearing. On May 4, 2016, the Office of Zoning ("OZ") provided notice of the filing of the application to the United States Department of State (Exhibit 15), the District of Columbia Office of Planning ("OP") (Exhibit 13), Advisory Neighborhood Commission ("ANC") 4A, whose boundaries encompass the Subject Property (Exhibit 11), the Single Member District Commissioner for ANC 4A07 (Exhibit 12), the District Department of Transportation ("DDOT") (Exhibit 14), and the Councilmember for Ward Four (Exhibit 16).

OZ scheduled a public hearing on the application for July 12, 2016 and provided notice of the hearing by mail to the Applicant (Exhibit 23), ANC 4A (Exhibit 22), and the owners of all property within 200 feet of the subject property (Exhibit 24), as well as to the Department of State (Exhibit 19), the National Capital Planning Commission (Exhibit 18), and the Commission

of Fine Arts (Exhibit 17). Notice of the hearing was published in the *D.C. Register* on May 27, 2016. (63 DCR 7970.)

The Proposed Chancery Use

The Applicant proposes to locate its chancery at the Subject Property located at 5630 16th Street, N.W. The Government of The Republic of The Gambia purchased the property to relocate its chancery operation from leased office space at 2233 Wisconsin Avenue, N.W. to provide an improved presence for its diplomatic mission in the United States. The Subject Property is improved with a two-story, one-family dwelling with a two-car garage and driveway at the rear. The Applicant does not propose any exterior addition or modification to the structure itself, aside from the installation of a flag pole and a small plaque, as well as minor interior alternations. On the perimeter of the property, the Applicant proposes to install a 42-inch tall fence, for security purposes.

For the proposed chancery operations, no more than six employees, including the ambassador, would be employed by the chancery. One staff person would reside on the property. The Subject Property provides onsite parking for up to six vehicles, with two parking spaces in the garage and four spaces on the adjacent parking pad. The chancery owns four cars, which would be the only vehicles commuting to the site on a daily basis. The Applicant indicates that the proposed chancery use would not generate a large number of visitors, as limited consular services would be offered and most services would be conducted by mail. The Applicant estimates that it would receive about three visitors on a weekly basis and that these visitors would likely be diplomats or businesspersons who would travel by taxi or be driven to the property. The Applicant states that up to two special events would be held annually with up to 60 persons.

Suitability of the Surrounding Area for Chancery Use

Subsection 1002.1 of the Zoning Regulations states, in part, "To locate, replace, or expand a chancery in an R-5-D, R-5-E, or SP District or in the D Overlay District … application shall be made to the Board of Zoning Adjustment." The Subject Property is located within the R-1-B District and the Sixteenth Street Heights Overlay, which is not referenced in § 1002.1. The Board may still consider the application for this property; however, it must first determine whether the area is generally suitable for chancery uses.[1] (See, Application No. 18242 of The Embassy of The Republic of Serbia, *supra* (R-3 property); Application No. 17481 of the Republic of Hungary, *supra* (R-1-A property).)

[1] In the Zoning Regulations of 2016, the Zoning Commission revisited the issue of "suitability" and amended the regulations regarding chancery applications accordingly. In applying the Zoning Regulations of 2016, the Board instead will consider whether the introduction of a chancery use would cause an existing residential neighborhood to become a mixed use neighborhood, based on the percentage of uses in that area. The Zoning Regulations of 2016 will become effective on September 6, 2016, and therefore, do not apply to this application.

The Board therefore first considers whether the area surrounding the Subject Property is suitable for chancery uses. Suitability is determined on a case-by-case basis, depending upon the nature and extent to which the surrounding area is already occupied by office and institutional uses. (See Application No. 17481 of the Republic of Hungary, *supra*.) The Board credits OP's finding that the neighborhood surrounding the Subject Property contains other institutional and diplomatic missions, particularly along 16th Street, N.W. Similar uses near the Subject Property include property owned by the Government of the Republic of Egypt at 5500 16th Street, N.W. and the Royal Thai Government at 5600 16th Street, N.W. Based on the presence of other institutional and international organizational uses in close proximity, the Board finds that the area surrounding the Subject Property is suitable for chancery use. Therefore, the Board may consider the application by evaluating the criteria provided in the Foreign Missions Act.

Foreign Missions Act Criteria

Pursuant to § 406(d) of the Foreign Missions Act, D.C. Official Code § 6-1306(d), the Board must consider six enumerated criteria when reviewing a chancery application. The provision further dictates who is to make the relevant finding for certain factors. The factors and relevant findings are as follows:

1. **The international obligation of the United States to facilitate the provision of adequate and secure facilities for foreign missions in the Nation's Capital.**

In a letter dated June 21, 2016, the Department of State determined that favorable action on this application would fulfill the international obligation of the United States to facilitate the Republic of The Gambia in acquiring adequate and secure premises to carry out their diplomatic mission. (Exhibit 34.) The Board finds that this criterion has been met.

2. **Historic preservation, as determined by the Board of Zoning Adjustment in carrying out this section; and in order to ensure compatibility with historic landmarks and districts, substantial compliance with District of Columbia and federal regulations governing historic preservation shall be required with respect to new construction and to demolition of or alteration to historic landmarks.**

As Office of Planning ("OP") notes in its report, the Subject Property is not a historic landmark, nor is it located within a historic district. (Exhibit 35.) Accordingly, the Board finds that no historic preservation basis exists for it to disapprove this application.

3. **The adequacy of off-street or other parking and the extent to which the area will be served by public transportation to reduce parking requirements, subject to such**

special security requirements as may be determined by the Secretary of State, after consultation with federal agencies authorized to perform protective services.

The Board concurs with the findings reached by OP that the parking spaces provided on site are adequate to satisfy the Zoning Regulations. The Board also credits OP's finding that Subject Property is well served by public transportation and on-demand car services. (Exhibit 35.)

The Department of State, after consulting with the Federal agencies authorized to perform protective services, determined that there exist no special security requirements relating to parking in this case. (Exhibit 34.) The Board finds that this criterion has been met.

4. **The extent to which the area is capable of being adequately protected, as determined by the Secretary of State, after consultation with federal agencies authorized to perform protective services.**

After consulting with Federal agencies authorized to perform protective services, the Department of State determined that the subject site and area are capable of being adequately protected. (Exhibit 34.) Based on this determination, the Board finds that this criterion has been addressed.

5. **The municipal interest, as determined by the Mayor.**

OP, on behalf of the Mayor of the District of Columbia, determined that approving this application is in the municipal interest and is generally consistent with the Comprehensive Plan for the Nation's Capital and the Zoning Regulations. (Exhibit 35.) OP notes that this property is located within the Sixteenth Street Heights Overlay and the R-1-B District. Pursuant to § 1553.2, a new nonresidential use is permitted within the Sixteenth Street Heights Overlay as a special exception, subject to the requirements of § 1553.2(a)&(b). The Board credits OP's analysis as to those requirements and finds that they have been met. Accordingly, the Board determined that this criterion has been addressed.

6. **The federal interest, as determined by the Secretary of State.**

The Department of State determined that there is a federal interest in this project. Specifically, the Department of State acknowledged the Government of the Republic of The Gambia's assistance in addressing the United States' land use needs in Banjul, The Gambia. Such cooperation was essential for successfully achieving the Federal Government's mission for providing safe, secure, and functional facilities for the conduct of U.S. diplomacy and the promotion of U.S. interests worldwide. (Exhibit 34.) Based on this determination, the Board finds that this criterion has been addressed.

ANC 4A Recommendation

The Board is required under § 13(d) of the Advisory Neighborhood Commission Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d) (2001) to give great weight to the issues and concerns raised in the written report of the affected ANC which is ANC 4A. The ANC submitted a resolution dated June 9, 2016, indicating that at its regularly scheduled, duly noticed public hearing on June 7, 2016, with a quorum present, the ANC voted 2-0 to support the application, with 12 proposed conditions. (Exhibit 28.) At its public hearing on July 12, 2016, the Board modified the language of several conditions, for clarity, based on testimony of the Applicant, ANC 4A Commissioner David Wilson, and the representative of the Department of State. In addition, the Board determined that three of the ANC's proposed conditions were outside the Board's jurisdiction, and therefore unenforceable as conditions of its order. The Board noted that, although those conditions would not be adopted as part of its order, these provisions remain a part of the agreement negotiated between the Applicant and ANC 4A. With the revisions made to the ANC's proffered conditions discussed during the public hearing, the Board was persuaded to follow ANC 4A's recommendation to not disapprove the application, with conditions.

Based upon its consideration of the six criteria discussed above, and having given great weight to the ANC, the Board has decided not to disapprove this application. As a result, the Applicant will be permitted to allow the location of a chancery in the SSH-1/R-1-B District at premises 5630 16th Street, N.W.

Accordingly, it is hereby **ORDERED** that the application is **NOT DISAPPROVED, SUBJECT TO EXHIBIT 32 – REVISED DC SURVEYOR'S PLAT – AND SUBJECT TO THE FOLLOWING CONDITIONS:**

1. The chancery shall be used only for the activities of The Republic of The Gambia.

2. The chancery will occupy 4,123 square feet comprising the first and second floors of the property with the basement level being devoted to an apartment where a Gambian staff member will reside full time.

3. The number of chancery officials and employees, including the Ambassador, on-site at any one time may not exceed six persons.

4. The public hours of operation of the chancery shall be between 9:30 AM to 4:00 PM.

5. The chancery will limit the use of the Property for large receptions, to no more than 60 persons, twice a year.

6. The exterior of the building will be maintained in its current excellent condition and no addition or exterior alteration of the Property will occur, such as an antenna, unless deemed necessary by the U.S. Department of State. The chancery may have a small plaque and a flag on a flag pole located in the front of the building indicating the presence of the chancery.

7. Pedestrian access to the chancery shall be from 16th Street, N.W.

8. Up to five vehicles will be parked at the chancery's parking spaces and The Republic of The Gambia shall forgo its right to designate on-street parking spaces for diplomatic use.

9. The Sixteenth Street Heights Civic Association ("SSHCA") and the Ambassador of The Republic of The Gambia shall hold quarterly meetings to discuss neighborhood issues.

Vote of the Board of Zoning Adjustment taken at its public hearing on July 12, 2016, to Not Disapprove the application:

VOTE: 4-0-1 (Marnique Y. Heath, Anita Butani D'Souza, Peter G. May, and Marcel C. Acosta to Not Disapprove; Frederick L. Hill not participating.)

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: September 20, 2016

PURSUANT TO 11 DCMR SUBTITLE Y § 604.11, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBTITLE Y § 604.7.

APPROVAL OF THIS 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. THE 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. 19321 of Margaret A. Roberts, pursuant to 11 DCMR Subtitle X, Chapter 9, for a special exception under Subtitle D § 5201, from the rear yard requirements of Subtitle D § 306.1, to add a one-story rear addition to an existing one-family dwelling in the R-1-B Zone at premises 3109 Park Drive S.E. (Square 5656, Lot 831).

HEARING DATE: September 13, 2016
DECISION DATE: September 13, 2016

SUMMARY ORDER

REVIEW BY THE ZONING ADMINISTRATOR

The application was accompanied by a memorandum, dated April 20, 2016, from the Zoning Administrator, certifying the required relief. (Exhibit 5.)

The Board provided proper and timely notice of the public hearing on this application by publication in the *D.C. Register* and by mail to Advisory Neighborhood Commission ("ANC") 7B and to owners of property located within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 7B, which is automatically a party to this application. The ANC submitted a report recommending approval of the application. The ANC's report indicated that at a regularly scheduled, properly noticed public meeting on August 18, 2016, at which a quorum was present, the ANC voted 6-0-0 to support the application. (Exhibit 30.)

The Office of Planning ("OP") submitted a timely report (Exhibit 29) and testified at the hearing in support of the application. The District Department of Transportation ("DDOT") submitted a report of no objection to the approval of the application. (Exhibit 31.)

Letters in support of the application were submitted by four neighbors. (Exhibit 10.)

As directed by 11 DCMR Subtitle X § 901.3, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case pursuant to Subtitle X § 901.2, for a special exception under Subtitle D §§ 5201 and 306.1. 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 Applicant has met the burden of proof, pursuant to 11 DCMR Subtitle X § 901.2 and Subtitle D §§ 5201 and 306.1, 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 Subtitle Y § 101.9, the Board has determined to waive the requirement of 11 DCMR Subtitle Y § 604.3, 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 AND, PURSUANT TO SUBTITLE Y § 604.10, SUBJECT TO THE APPROVED PLANS AT EXHIBIT 21.**

VOTE: **5-0-0** (Marnique Y. Heath, Anita Butani D'Souza, Frederick L. Hill, Jeffrey L. Hinkle, and Peter G. May to APPROVE.)

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: September 16, 2016

PURSUANT TO 11 DCMR SUBTITLE Y § 604.11, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBTITLE Y § 604.7.

PURSUANT TO 11 DCMR SUBTITLE Y § 702.1, 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 SUBTITLE Y § 705 PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THE REQUEST IS GRANTED. PURSUANT TO SUBTITLE Y § 703.14, NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO SUBTITLE Y §§ 703 OR 704, SHALL TOLL OR EXTEND THE TIME PERIOD.

PURSUANT TO 11 DCMR SUBTITLE Y § 604, 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. 19327 of Landmark Holdings, Inc., as amended[1], pursuant to 11 DCMR Subtitle X, Chapters 9 and 10, for a special exception under the penthouse requirements of Subtitle C § 1504.1, and variances from the expansion of nonconforming structure requirements of Subtitle C § 202.2(b), the expansion of gross floor area of nonconforming use requirements of Subtitle C § 204.1, the lot occupancy requirements of Subtitle F § 304.1, and the rear yard requirements of Subtitle F § 305.1, to allow the construction of an exterior egress stairwell to an existing hotel in the RA-5 Zone at premises 1201 13th Street, N.W. (Square 281, Lot 46).

HEARING DATE: September 13, 2016
DECISION DATE: September 13, 2016

SUMMARY ORDER

SELF-CERTIFICATION

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR Subtitle Y § 300.6. (Exhibits 5 (original) and 38 (revised).) In granting the certified relief, the Board of Zoning Adjustment ("Board" or "BZA") made no finding that the relief is either necessary or sufficient. Instead, the Board expects the Zoning Administrator to undertake a thorough and independent review of the building permit and certificate of occupancy applications filed for this project and to deny any application for which additional or different zoning relief is needed.

The Board provided proper and timely notice of the public hearing on this application by publication in the *D.C. Register* and by mail to Advisory Neighborhood Commission ("ANC") 2F and to owners of property located within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 2F, which is automatically a party to this application. The ANC submitted a report dated September 12, 2016 recommending approval of the application. The ANC's report indicated that at a regularly scheduled, properly noticed public meeting on September 7, 2016, at which a quorum was present, the ANC voted 7-0-0 to support the request for variance relief. The ANC noted that it took no action on the request for special exception relief which was added after the variances had already been reviewed by ANC 2F. Ultimately, ANC 2F urged the Board to approve the application. (Exhibit 42.)

The Office of Planning ("OP") submitted a timely report recommending approval of the application. (Exhibit 37.) The District Department of Transportation ("DDOT") submitted a timely report indicating that it had no objection to the grant of the application. (Exhibit 36.)

[1] The Applicant amended the application (Exhibit 38) by adding to the original request a special exception under the penthouse setback requirements of Subtitle C § 1504.1.

Variance Relief

As directed by 11 DCMR Subtitle X § 1002.2, the Board required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case pursuant to Subtitle X § 1002.1 for area variances from the expansion of nonconforming structure requirements of Subtitle C § 202.2(b), the expansion of gross floor area of nonconforming use requirements of Subtitle C § 204.1, the lot occupancy requirements of Subtitle F § 304.1, and the rear yard requirements of Subtitle F § 305.1, to allow the construction of an exterior egress stairwell to an existing hotel in the RA-5 Zone. The only parties to the case were the ANC and the Applicant. No parties appeared at the public hearing in opposition to the application. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board, and having given great weight to the ANC and OP reports filed in this case, the Board concludes that in seeking variances from 11 DCMR Subtitle C §§ 202.2(b) and 204.1 and Subtitle F § 304.1 and 305.1, the Applicant has met the burden of proof under 11 DCMR Subtitle X § 1002.1, that there exists an exceptional or extraordinary situation or condition related to the property that creates a practical difficulty for the owner in complying with the Zoning Regulations, and that the relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map.

Special Exception Relief

As directed by 11 DCMR Subtitle X § 901.3, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case pursuant to Subtitle X § 901.2, for a special exception under the penthouse requirements of Subtitle C § 1504.1. 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 averse 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 Applicant has met the burden of proof, pursuant to 11 DCMR Subtitle X § 901.2, and Subtitle C § 1504.1, 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 Subtitle Y § 101.9, the Board has determined to waive the requirement of 11 DCMR Subtitle Y § 604.3, 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 AND, PURSUANT TO SUBTITLE Y § 604.10, SUBJECT TO THE APPROVED PLANS AT EXHIBIT 7 – ARCHITECTURAL PLANS AND ELEVATIONS, AND EXHIBIT 40 – APPLICANT'S SUPPLEMENTAL DRAWINGS.**

VOTE: **5-0-0** (Anita Butani D'Souza, Marnique Y. Heath, Frederick L. Hill, Jeffrey L. Hinkle, and Peter G. May to APPROVE.)

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: September 19, 2016

PURSUANT TO 11 DCMR SUBTITLE Y § 604.11, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBTITLE Y § 604.7.

PURSUANT TO 11 DCMR SUBTITLE Y § 702.1, 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 SUBTITLE Y § 705 PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THE REQUEST IS GRANTED. PURSUANT TO SUBTITLE Y § 703.14, NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO SUBTITLE Y §§ 703 OR 704, SHALL TOLL OR EXTEND THE TIME PERIOD.

PURSUANT TO 11 DCMR SUBTITLE Y § 604, 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.

DC CONTRACT APPEALS BOARD

CORRECTED NOTICE

Decisions Issued Between May 22, 2013 and May 1, 2015

The DC Contract Appeals Board decisions issued between May 2013 and May 2015 were published in the *District of Columbia Register*, Volume 62, No. 20, on May 15, 2015 with technical issues including mislabeled footnotes.

The corrected decisions are re-published in this edition of the *District of Columbia Register*.

This notice cancels and supersedes the notice published on May 15, 2015.

DC CONTRACT APPEALS BOARD
Opinions Issued Between May 22, 2013 and May 1, 2015

COMPANY NAME	CAB No.	DATE ISSUED
Capitol Entertainment Services, Inc.	P-0932	05-22-2013
Qualis Health	P-0934	06-26-2013
C&D Tree Service, Inc.	D-1347	08-08-2013
Adsystech, Inc.	D-1210	08-15-2013
Phoenix Capital Partners, LLC	P-0938	09-04-2013
MWJ Solutions, LLC	P-0940	09-26-2013
Adsystech, Inc.	D-1210	09-26-2013
Nobel Systems, Inc.	P-0937	10-04-2013
Brentworks, Inc.	P-0943	10-09-2013
The Pittman Group, Inc.	P-0939	10-21-2013
A&M Concrete Corporation, Inc.	D-1314, D-1330, D-1401, D-1402	12-09-2013
Prince Construction Co., Inc./ W.M. Schlosser Co., Inc., Joint Venture,	D-1369, D-1419, D-1420	12-09-2013
Prince Construction Company, Inc.	D-1120, D-1126, D-1168, D-1173, D-1203	02-28-2014
Milestone Therapeutic Services, PLLC	P-0945	03-31-2014
Civil Construction, LLC	D-1294, D-1413, D-1417	04-03-2014
Trillian Technologies, LLC	P-0954	04-04-2014
A&A General Contractors, LLC	P-0964	06-25-2014
Stockbridge Consulting LLC	P-0963	08-28-2014
Dynamic Corporation	D-1365	10-06-2014
Rustler Construction Inc.	D-1385	11-10-2014
JH Linen, LLC	D-1366	11-14-2014
Eco-Coach, Inc.	P-0976	12-29-2014
Tree Services, Inc.	P-0982	05-01-2015

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

The below Opinion cancels and supersedes the Opinion published on May 15, 2015, due to mislabeled footnotes.

PROTEST OF:

CAPITOL ENTERTAINMENT SERVICES, INC.)
)
)
Solicitation No. DCKA-2012-R-0115)

CAB No. P-0932

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
MAXINE E. MCBEAN
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GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

The below Opinion cancels and supersedes the Opinion published on May 15, 2015, due to mislabeled footnotes.

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

Organization" to provide the services that the District had heretofore received under an April 2005 contract with the intervenor, Delmarva.[1] (*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"),[2] among 7 categories of services,[3] 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.[4] (*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.[5]) 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

[1] 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).)

[2] Sample CLINs included "0004AD Non-DRG Acute Care Hospitals" and "0006AA Level of Care Determinations." AR Ex. 1 ¶ B.3.1)

[3] 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)

[4] 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.).

[5] 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.)

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,[6] 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.[7] (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.)

[6] 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.)

[7] 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.)

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.[8] 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[9] 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[10] 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[11] 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 attachments. (*See generally* Protest Exs. I, J.) After receiving the D&F, Qualis timely protested the cancellation of the RFP on March 1, 2013.

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[8] 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.*)

[9] Presumably, CO Fuller made this determination given the date the determination was made. *See*, *supra*, note 6.

[10] While the email was sent on February 15, 2013, the letter itself was dated February 12, 2013. (Protest Ex. D at 2.)

[11] 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).

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.[12] (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,[13] 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 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.)

[12] 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.
[13] This is also the same date that the District canceled the RFP for the follow-on contract.

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.[14] (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[15] 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 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

[14] 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.)
[15] It is not clear from Qualis' protest whether this figure takes into account the District's changed requirements.

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.[16] (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.[17] 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).

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

[16] 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.)

[17] 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.

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.[18]

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 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).

[18] 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 11. However, the cited provision is substantially similar to its predecessor. *See* D.C. MUN. REGS. tit. 27, § 1615.3 (1988).

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).[19]

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) ("[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

[19] 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.

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.[20] 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

[20] 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

The below Opinion cancels and supersedes the Opinion published on May 15, 2015, due to mislabeled footnotes.

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[1] ("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 services to

[1] See section D of the Joint Pretrial Statement, pages 5-7.

the District, "when and if ordered," and the District would order a minimum of $10,000.00 worth of services.[2] (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."[3] (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.)

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.[4] (Hr'g Tr. vol. 1, 53:20-54:8, 67:13-

[2] 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.)

[3] 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."

[4] 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.)

69:3.) To support this contention, the Appellant introduced its 1997[5] tree trimming contract with the District (Contract No. OMS-5160-AA-DB, dated March 4, 1997).[6] (*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).[7] 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

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.[8] (UMF ¶ 7.) Instead of directing the Appellant to trim all (or most) trees on a city block,

[5] 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.)

[6] 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)

[7] *See supra* Finding 6.

[8] 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

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,[9] 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 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.)

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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.)

[9] 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.)

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,[10] 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.[11] (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

[10] 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.)

[11] 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.)

modification in the future reflecting negotiated pricing for this extension period.[12] (*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.[13] (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.[14] (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 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,[15] the Appellant determined that there was a "net underage of payment" in the amount of $444,538.33 for the extension period.[16] (*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,

[12] 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.)

[13] 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.)

[14] 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.)

[15] 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.)

[16] 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.)

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.)

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.[17] (*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.[18] (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.)

[17] 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.)

[18] Agresto also used a 10 month extension period in his calculations. (Appellant's Hr'g Ex. 3 at 9.)

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.[19] (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).[20]

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

[19] 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.)

[20] 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.)

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."[21] *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*

[21] 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)).

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 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.[22] *See Travel Ctr.*, 236 F.3d at 1319.

[22] 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

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

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

The below Opinion cancels and supersedes the Opinion published on May 15, 2015, due to mislabeled footnotes.

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.[1]

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

[1] The trial was conducted by a previous Board panel; none of whom are presently members of the Board. The present Board panel has reviewed the trial transcript, appeal file, appeal file supplement, hearing exhibits, post hearing briefs, and the entire record herein in rendering this decision.

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.[2] 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.[3] 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).[4] 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.[5] 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

[2] 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.

[3] 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.

[4] 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.

[5] 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.[6] 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,[7] data conversion, etc. *Id.*

Following the parties execution of both contracts, Adsystech was able to begin performance on DCRA's system overhaul.[8] 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.[9] 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

[6] *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.

[7] 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).

[8] 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.

[9] 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[10] 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).[11] 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 project manager also testified that DCRA stakeholders either did not show up for meetings, or

[10] 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.

[11] 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.

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[12]. 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.[13] Further, DCRA's Interim Director conceded that she too "never told them to stop working" although she knew

[12] 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.*

[13] 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.

Adsystech employees were working on site at DCRA. Hr'g Tr. vol. 2, 612:1-614:3.[14]

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.[15] *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 obligation to apply separately for multiple licenses, with a simplified process whereby a single

[14] 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.

[15] The stop work order issued herein is discussed *infra* at pp. 7-8.

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.[16]

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 came about because a newly-hired OCTO consultant[17] wanted Adsystech's contract stopped

[16] 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.

[17] The newly-hired official was "Kim Henderson." Witty testified that "if [he] had to guess", Kim Henderson joined

because of a funding shortage, and Adsystech's purported use of "triggers" instead of the Hansen system.[18] 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[.]"[19] 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,[20] 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.[21]

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.[22]

The Adsystech project manager's testimony regarding its completion of each contract task can be summarized as follows:

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.

[18] 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.

[19] 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.

[20] 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.

[21] 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.

[22] 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 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. [23] *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 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

[23] 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.

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.[24] 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).[25]

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.[26]

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 the document, providing the mapping, actually writing the code that had to do the actual conversion process[,]" but never received

[24] 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.

[25] 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.

[26] 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.

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.[27] 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.[28] 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 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

[27] 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.

[28] 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.

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).[29] 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 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.

[29] Prior to April 8, 2011, the Board exercised jurisdiction pursuant to D.C. Code § 2-309.03(a)(2)(2001).

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.[30] 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.

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

[30] 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.

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*.[31] In pertinent part, §2-301.05(d)(5) provided:

> (1) The Chief Procurement Officer, or a designee, may authorize payment for supplies or services received without a valid written contract if:
>
> (A) Supplies or services have been provided to and accepted by the District

[31] These provisions were in effect at all times material to the instant dispute.

> 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[32], 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.[33] 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.[34] 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.

The Provisions of Former D.C. Code §2-301.05(d)(3) Do Not Apply

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[32] *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.

[33] The Board takes judicial notice that DCRA is within the Economic Development Regulation cluster of agencies.

[34] 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.

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 meruit 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
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GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

The below Opinion cancels and supersedes the Opinion published on May 15, 2015, due to mislabeled footnotes.

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.[1] (*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.)

[1] 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.)[2] 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.)[3]

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

[2] 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.

[3] 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.[4] 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 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).

[4] *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.

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)[5]; *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 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.*,

[5] 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*.

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.[6] (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.[7]

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

[6] 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).

[7] 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

The below Opinion cancels and supersedes the Opinion published on May 15, 2015, due to mislabeled footnotes.

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,[1] 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,[2] 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

[1] The GSA Schedule program is also known as the Federal Supply Schedule program or the Multiple Award Schedule program. FAR 8.402(a).
[2] 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.)[3] 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.[4] (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.[5] (AR Ex. 7, at 1-2.)

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

[3] 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.

[4] 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.)

[5] It appears that Networking for Future, Inc. also did not respond to the RFTOB.

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,[6] 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.[7] 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[8]; (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 competitive bidding process which was required because it exceeded $100,000 in value. (*Id*. ¶

[6] 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.)

[7] 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.)

[8] 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).

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.[9] (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

[9] 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.[10] 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 protester's eligibility to receive the contract award or the propriety of the procedural formalities

[10] The regulations refer to the federal supply schedules instead of GSA Schedules, but as noted above, the terms are interchangeable. *See supra* n.1.

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.
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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

The below Opinion cancels and supersedes the Opinion published on May 15, 2015, due to mislabeled footnotes.

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.[1]

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.[2]

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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[1] *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.")

[2] 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

The below Opinion cancels and supersedes the Opinion published on May 15, 2015, due to mislabeled footnotes.

PROTEST OF:

NOBEL SYSTEMS, INC.	)	
	)	CAB No. P-0937
Solicitation No. Doc 93362	)	

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.)[1] 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.)

[1] 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.)

The District advertised the Solicitation in the Washington Examiner newspaper on January 18,[2] and on the District's eSourcing website on January 22.[3] (*See* AR 3-4; AR, Exs. 4-5.) The advertisement 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).)[4] 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.[5] (*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.*)

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[2] 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").)

[3] Due to "an internal information technology problem," the Solicitation was not available on the eSourcing website until January 22, 2013. (AR 2.)

[4] The second amendment to the Solicitation does not appear in the record contrary to the District's citation to the AR, Exhibit 3.

[5] The CO does not state which NIGP commodity code she used, nor does it appear on the Solicitation. (*See generally* AR, Exs. 6, 2.)

The Agency Report

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)[6] and D.C. Mun. Regs. tit. 27, § 1303.1 (2011).[7] (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.[8] 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;[9] *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.[10]

CONCLUSION

[6] "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).

[7] "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.

[8] "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

[9] "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.

[10] The protester also failed to challenge the D&F which the present Order hereby renders moot.

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.

SO ORDERED.

DATED: October 4, 2013

/s/ Maxine E. McBean
MAXINE E. MCBEAN
Administrative Judge

CONCURRING:

/s/ Marc D. Loud, Sr.
MARC D. LOUD, SR.
Chief Administrative Judge

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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

The below Opinion cancels and supersedes the Opinion published on May 15, 2015, due to mislabeled footnotes.

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").[1] (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.*)

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

[1] 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).

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
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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

The below Opinion cancels and supersedes the Opinion published on May 15, 2015, due to mislabeled footnotes.

PROTEST OF:

The Pittman Group, Inc.	)	
	)	CAB No. P-0939
Solicitation No.: DLMS DOC 93362	)	

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.[1]

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).[2] 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 be deemed nonresponsive and shall be rejected if the offeror is required

[1] The protester failed to challenge the D&F which the present Order hereby renders moot.

[2] 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.

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

The below Opinion cancels and supersedes the Opinion published on May 15, 2015, due to mislabeled footnotes.

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.[1] 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.[2] (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).[3] (*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.[4]

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

[1] 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.)

[2] 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.)

[3] Throughout our decision we refer to the repair method herein interchangeably as the steel plate/flange method or the Type 1/Type 2 repair.

[4] 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.[5] 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.[6] (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

[5] 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*.)
[6] 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.[7] 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

[7] 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.)

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.)

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.[8] 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.)

[8] 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*.

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 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).[9] (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)

[9] 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.)

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, 2008, to February 20, 2009.[10] 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.)

[10] 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.

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 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.)[11]

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).[12] 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.[13]

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).

[11] This claim is the subject of CAB No. D-1399, which is not presently before us.

[12] 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.

[13] 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.)

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 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.[14] (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

[14] 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."

payable under SP113, and not under SP112.[15] 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 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*.[16] 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

[15] "(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).

[16] 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.)

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 intended this interpretation of the contract is disputed.[17] 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.

[17] 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.

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 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).[18]

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

[18] 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.

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 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

The below Opinion cancels and supersedes the Opinion published on May 15, 2015, due to mislabeled footnotes.

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[1] ("SF") ¶¶ 1-2.) Under the Contract, Prince/Schlosser was

[1] *See* Section E of the parties' Joint Pretrial Statement.

required to complete the project within 275 calendar days. (SF ¶ 4; *see also* Post Hearing Appeal File[2] ("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.)[3]; 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

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.*)

[2] 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.

[3] All specific references to hearing exhibits throughout this opinion refer only to the Appellant's hearing exhibits presented at trial.

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[4]:

	Overhead[5]	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. (PH AF 58.) Article 5 defined excusable delays[6] 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

[4] While the format of the table has been slightly altered, the text is identical to the original. (*See* PH AF 57.)
[5] 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.)
[6] 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.)

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.)

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,"[7] (ii) "Submittal/Procurement Activities," (iii) "Demolition," (iv) "Site Work,"[8] 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

[7] Sample tasks included "Preconstruction Site Survey/Photograph," "Deliver & Setup Temp Office Trailer," and "Final Site Inspection." (*See* Hr'g Ex. 12.)
[8] 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.)

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.[9] (*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.[10] (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.)

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.[11] (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*.)

[9] 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.)

[10] 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.)

[11] Although this was discussed at length at trial, this condition was not stated in the MBP itself. (*See generally* Hr'g Ex. 15.)

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).)

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,[12] and that it would submit a request for an equitable adjustment "as soon as pertinent data can be accumulated." (*Id.*)

[12] 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.)

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 suppression pumps.[13] (*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,[14] 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.[15] (*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[;][16] 3. Connection point at electrical service[; and] 4. Feeder[17] 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.

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[13] 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.)

[14] 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.)

[15] The RFI indicated that Radius Services Fire Protection, a subcontractor, had requested the Flow Test from DC WASA. (Hr'g Ex. 55.)

[16] 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.)

[17] 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.)

(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.*)

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.) [18]

47. On January 16, 2008,[19] 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.[20] (*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,[21] 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

[18] The record indicates the Prince/Schlosser did not receive BCD No. 8 until January 3, 2008. (*See* Hr'g Ex. 60, at 1.)
[19] 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.)
[20] 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.)
[21] *See infra* section IV.E, Fire Alarm System Design Revisions.

data from a utility locator company and drawings from the original construction of the Transfer 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.[22] (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 manufacturers and instructions for installation of system components. (*See generally* PH AF 814-43.)

[22] At some point, Prince/Schlosser appears to have designated this issue as PCO 20. (*See* Hr'g Ex. 25, at 1.)

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;[23] Hr'g Ex. 136; *see also* Hr'g Tr. vol. 1, 199:18-202:3.)

[23] Hearing Exhibit 72 depicts only a cropped version of the revised Project Drawing. (Hr'g Ex. 72, at 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.[24] (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 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).)

[24] 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.)

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,[25] 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.)

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. <u>Roof Deck Modification</u>

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

[25] 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.)

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[26] 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,[27] 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 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.)

[26] The letter stated that the low point of the pipe was 24 feet above the tipping floor. (Hr'g Ex. 34.)
[27] The approved shop drawings themselves do not appear in the record.

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.[28] (*See* Hr'g Ex. 138.)

[28] 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.)

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),[29] 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 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

[29] 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.)

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[30] 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

[30] 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.

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[31]

(*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.[32] (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

[31] Krogh considered PCOs 15 and 25 together as they occurred concurrently. (*See* Hr'g Ex. 119, Attach. H.)
[32] 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).

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 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.[33] (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
Kelly Electric Extended Performance Costs	57,363[34]
Total Extended Performance Costs	$540,615
Prince/Schlosser Overhead (10%)	54,062

[33] 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.
[34] See FF 111.

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[35] 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 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.)

[35] Under the Contract, the term "provide" means "to furnish and install, complete[,] and ready for intended use." (PH AF 222.)

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.[36] (*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.*)

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

[36] 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.)

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,[37] 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,[38] 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 pozzolan"[39] cement, with a maximum water-to-cementitious materials ratio of 0.45, and a compressive strength of at least 4,500 psi.[40] (*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.[41] (*See* Hr'g Ex. 118, at 1-2.) Prince/Schlosser further stated

[37] The precise date of the first soil test is not clear from the documents in the record.

[38] 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.)

[39] 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.*)

[40] Compared to a minimum of 3250-4000 psi in the Project Drawings. (FF 137.)

[41] 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.

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.[42] Finally, Appellant requested a change order for the change in concrete, listing the following costs incurred by Prince/Schlosser, and its concrete subcontractor, APC.[43]

Subcontractor (Aggregate Placement Corporation) Costs

Materials	$5,967.00		
Labor	0.00		
Equipment	0.00		
Subcontractor Direct Costs:		$5,967.00	
	Overhead 20%	$1,253.07[44]	
	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[45]	$ 252.00
Subcontracted Cost Total	$8052.37
G.C. Commission 10%	$ 805.24
PSJV Cost Total	$8,857.61

[42] 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.").)

[43] While the formatting has been slightly altered, this data is identical to what was presented in Appellant's letter.

[44] Although identified as overhead, it appears to be calculated as the "10 and 10" allowed for APC's overhead and profit.

[45] 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.)

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

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.)[46]

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-

[46] 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.

{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.[47]

B. Timeliness of Claims

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.[48] *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.

[47] 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.
[48] 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)).

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. 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.[49]

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.

[49] 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.)

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. 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.[50] (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")[51] 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

[50] That is, the arching or curvature of the joists.
[51] *See Essex Electro Eng'rs, Inc. v. Danzig*, 224 F. 3d 1283, 1289 (Fed. Cir. 2000).

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 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).[52] (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 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.

[52] 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.

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).[53] The District made no showing of concurrent delays caused by Appellant

[53] 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.*,

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 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*

ASBCA No. 43099, 94-1 BCA ¶ 26,536.

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.[54] 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:[55]

Prince/Schlosser Extended Field Performance Costs	$457,842.00[56]
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

[54] Utilizing a daily rate would yield the same result.
[55] As discussed in the previous section, Appellant may not apply its standard overhead charge of 10% to claim elements that themselves are overhead.
[56] 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.

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.

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[57]
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

[57] The claim incorporated multiplication errors regarding the subcontractor's and Appellant's bond costs, which have been corrected in the calculation above.

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.

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.
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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

The below Opinion cancels and supersedes the Opinion published on May 15, 2015, due to mislabeled footnotes.

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,[1] 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).

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[1] 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[2] 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.)

[2] 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."[3] (AF 13; Hr'g Tr., vol. 2, 115:17-21.) Prince's subcontractor performed the cooling tower replacement.[4] (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.)[5] 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.)

[3] 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.)

[4] 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.)

[5] 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.[6] 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[7]

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

[6] Mr. Lee is identified in the record as the "Acting Chief, Construction Management Division" within the D.C. Office of Property Management. (AF2 10.)

[7] 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.[8]

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.[9]

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.[10]

11. Provide operation and maintenance manuals, $4,000.00.[11]

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[8] 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.)

[9] 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.)

[10] 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.)

[11] 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).[12] 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.

[12] 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).[13]

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

[13] 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.[14]

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

[14] 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."[15] (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

[15] 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.[16]

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

[16] 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*.)[17]

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

[17] 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.[18]

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

[18] 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,[19] 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).

[19] 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.[20]

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

[20] 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.[21] Accordingly, the appeal is subject to dismissal as beyond the jurisdiction of the Board.[22]

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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[21] 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.*

[22] *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

The below Opinion cancels and supersedes the Opinion published on May 15, 2015, due to mislabeled footnotes.

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")[1] 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

[1] *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.[2] (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.)[3]

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.)

[2] 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.)

[3] 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").[4]

On August 16, 2013, DCPS awarded Progressus a contract for services for the 2013-2014 school year.[5] (*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 the District. (*See* Mot. to Dismiss Ex. 1 at 1.) However, the RFI did not mention any federal mandates

[4] 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.
[5] 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.

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);[6] 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.*,[7] 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[8] 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 doing so; and (4) the

[6] The *Jones* Consent Decree is also available at 2006 WL 2456413.

[7] 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*.

[8] 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).

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.[9] *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."[10] *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.)

[9] 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.
[10] 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.

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

The below Opinion cancels and supersedes the Opinion published on May 15, 2015, due to mislabeled footnotes.

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.[1] (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 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

[1] The Appellant characterizes its request for profit as a request for "clarification" of the Board's decision regarding the award of profit damages.

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

The below Opinion cancels and supersedes the Opinion published on May 15, 2015, due to mislabeled footnotes.

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.[1] (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

[1] 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.[2] (*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.[3] (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.[4] (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[5] (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)

[2] 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.)
[3] Contract No. DCTO-2008-C-0135 was set to expire on August 19, 2013, after the exercise of all option years. (AR 2.)
[4] 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.*)
[5] 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.)

failure to utilize past performance measures or service level agreements under prior contracts as 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).[6] 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

[6] 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.)

personnel.[7] (*See* AR 5-6 (citing *Jackson Jordan, Inc.*, B-198072, 80-2 CPD ¶ 104 (Comp. Gen. 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.[8] (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.[9]

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,

[7] 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 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.)

[8] 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.)

[9] 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).

rather than the qualifications of the individuals responsible for contract performance, such as the terms involved in the present action.[10] *See* 80-2 CPD ¶ 104; 82-2 CPD ¶ 296. Thus, the 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

[10] 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.

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.[11] (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. 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.[12] 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.)

[11] 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.)

[12] 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).

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.

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
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GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

The below Opinion cancels and supersedes the Opinion published on May 15, 2015, due to mislabeled footnotes

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.[1] (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

[1] 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.) [2]

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.[3] (AR

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[2] 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 …

[3] 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.

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 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.[4] (*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.[5] 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.

[4] 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.

[5] 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.)

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 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

The below Opinion cancels and supersedes the Opinion published on May 15, 2015, due to mislabeled footnotes.

PROTEST OF:

STOCKBRIDGE CONSULTING LLC	)	
	)	CAB No. P-0963
Solicitation No. Doc 142966	)	

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[1] 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").[2] (*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").[3] (*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 &*

[1] Six offerors submitted proposals in response to the original Solicitation. (D&F 2; List of Interested Parties.)
[2] 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.)
[3] 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.[4] 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

[4] 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

The below Opinion cancels and supersedes the Opinion published on May 15, 2015, due to mislabeled footnotes.

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.) [1] 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.[2] (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.)

[1] Leading zeroes have been omitted from citations to the pages of bates-numbered documents.
[2] 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);[3] 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*.)

[3] 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"[4] 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.)

[4] 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")[5] 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,[6] 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.[7] (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.)

[5] The parties have also referred to these documents as Change Order Proposals or "COPs." (*See, e.g.*, SOF ¶ 7.)
[6] The parties have also referred to this proposed change order as a component of "PCO 5-C." (*See, e.g.*, SOF ¶ 7.a.)
[7] 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.)[8] 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,[9] in the amount of $6,995.12, for installation and painting of a wooden stair railing in the fire station's tower.[10] (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.[11] (*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 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

[8] 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.)

[9] 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.)

[10] 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.)

[11] 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.)

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,[12] Dynamic submitted PCO 36.[13] (*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.)[14] 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)[15] The amount was broken down between Mechanical Work $36,000.00, Electrical Work $78,591.00,[16] 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, Dynamic wrote that the fire suppression system had been completed "as per Specification

[12] This was the same day that Dynamic had submitted PCOs 23 and 32. (*See* Finding of Fact ("FF") ¶¶ 18, 24, supra.)

[13] Dynamic has also referred to this proposed changed order as "PCO 5-B." (*See, e.g.,* 2d. Am. Pretrial Statement at 5.)

[14] 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.

[15] 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.)

[16] 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.)

Section 13915,[17] 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.[18] (*Id.*, 481:15-16.) Dynamic's president testified that the District

[17] 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.

[18] 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 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.)

ultimately hired one of Dynamic's subcontractors to move the wall, after which Dynamic returned to complete the jockey pump's installation.[19] (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."[20] (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."[21] (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.)

[19] 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).)

[20] 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.)

[21] 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.[22] (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.)

[22] 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);[23] (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;[24] (4) repair of the apparatus bay trash basket;[25] 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;[26] (2) removal and replacement of quarry tile in the sitting room and kitchen;[27] and (3) repair of the laundry room door.[28] (Dynamic Hr'g Ex. 41, Dynamic 632-634.) Dynamic confirmed it would patch around the sprinkler in the closet, install

[23] 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.)

[24] 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.)

[25] 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.)

[26] 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.)

[27] 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.*)

[28] 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.)

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,[29] 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),[30] and a Vulcan-brand stove ($3,459.51) to COTR Cyrus.[31] (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.)[32]

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),[33] and at least $353.34 for the kitchen equipment[34] (*see* Dynamic Hr'g Ex. 12 at Dynamic 384-392). Dynamic's president testified that Dynamic had included the sales tax because the District had "refused or failed" to

[29] 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.)

[30] Plus an unspecified amount of sales tax—discussed further *infra*.

[31] 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.

[32] This is also true of Specifications section 15870 ("Commercial Kitchen Hoods"). (*See* AFS Part 5.)

[33] 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.)

[34] 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).

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)[35] consisted of the "Fire Suppression System, electrical and mechanical upgrade per latent condition," while PCO 5-C ($32,634.10)[36] 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,[37] including the as-built drawings, and the installation of the fire suppression system.[38] (*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. 43 at Dynamic 643.) With regard to the building's front door and the fire suppression system,

[35] 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.)
[36] 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.)
[37] 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.)
[38] 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.)

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);[39] (2) $25,377.64 for PCO 5-C (formerly, PCOs 23, 26, and 32);[40] and (3) $27,285.18 for PCO 4, which consisted of PCO 41 and extension of a gas line to the patio area.[41] (*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.[42] (*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 Dynamic from $265,174.88 claimed to $132,326.00, and retained a contract balance of

[39] 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.)

[40] 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.)

[41] 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.)

[42] 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.

$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."[43] (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 manuals[,] and warranty binder forwarded [by Dynamic] on April 29, 2009," (FF ¶ 64) FEMS

[43] 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.)

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,[44] five omitted O&M manuals,[45] and five missing warranties.[46] (*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,[[47]] 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.[48] (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.[49] (*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.[50] (Hr'g Tr. vol. 5, 1870:3-1874:6.)

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.)

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[44] 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*.)

[45] 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.)

[46] 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.)

[47] 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.)

[48] 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.)

[49] 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).)

[50] 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.)

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.[51] (*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;[52] (4) removal and reinstallation of quarry tile in the kitchen and 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

[51] 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.)

[52] 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 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.)

work in the study, $776.85.[53] (*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) replacement of "all sprinkler heads throughout the entire building[;]"[54] (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

[53] 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.)

[54] 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.)

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"[55] 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.)[56]

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."[57] (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.

[55] 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.)
[56] 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.
[57] 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.[58] (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).[59] Although the instant case concerns final decisions from two contracting officers (FF ¶¶ 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,

[58] 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.)

[59] 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, under our previous jurisdictional statute. (*See* Notice of Appeal.)

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 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);[60] *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 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.

[60] "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).

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."[61] *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 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

[61] 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)).

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[62] (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.) 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

[62] 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.

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.[63] (FF ¶ 66.)

The District's Non-Acceptance of the Project

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

[63] The retainage was subsequently reduced to $131,277.40. (*See* FF ¶ 78.)

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.[64]

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 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

[64] 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.)

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.[65] *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.[66]

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

[65] 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.)

[66] 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.[67] *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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[67] 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

The below Opinion cancels and supersedes the Opinion published on May 15, 2015, due to mislabeled footnotes.

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;[1] 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.[2] (*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.)

[1] The Board has omitted leading zeroes when referencing the pages of bates-numbered documents.

[2] 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. [3] (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:

> 103.1 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.

[3] 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[4]:

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[5] 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.[6] (*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).)[7] 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.)

[4] See the section entitled "Procedural History and Attempts at Settlement," *infra*, for a complete discussion of appellant's claims.
[5] The contract documents also refer to this plan as a "Maintenance of Traffic" plan. (*See, e.g.*, AFS Ex. 2, at Rustler 49.)
[6] 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.).
[7] 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.[8] (*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.[9] (*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]."[10] (*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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[8] 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.)

[9] 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).)

[10] 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.[11] (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.[12] (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.[13] [14] (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.)

[11] 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.)

[12] 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.)

[13] 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.)

[14] 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.[15] (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").[16] (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.[17] (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

[15] 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.)

[16] 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.)

[17] 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.[18] (*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."[19] (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.[20] (*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*.)

[18] 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.)

[19] 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*.)

[20] 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[21] 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.[22] (*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[23]—a total of $644,400.91 in costs, plus 153 days of delay.[24] (*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

[21] Notwithstanding this testimony, the Board notes that appellant claimed costs for nineteen unused catch basin tops. (*See generally* AF Ex. 2, at 7-8.)

[22] 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.)

[23] 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.*)

[24] 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*;[25] (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.)[26] 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"),[27] 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

[25] 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.)

[26] 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.

[27] 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).[28] 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:

[28] 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).[29] 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

[29] 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.[30]

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.[31]

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 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).

[30] 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.)
[31] (*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.)

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.[32] (*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.[33]

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[32] 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.

[33] 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 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

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.[34] (*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.

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construction schedule—if, that is, the ASBCA found that the Navy's actions constituted a constructive change. *Id.* (citations omitted).

[34] 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:[35]

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.*)
7) Thirty-one concrete pours during Phase IV, each requiring one day of work. (*Id.* at 18.)

[35] 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.

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

The below Opinion cancels and supersedes the Opinion published on May 15, 2015, due to mislabeled footnotes.

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.[1] (Appellant's Hr'g Ex. 4, Bates JH 477 ("JH Hr'g Ex.").)[2] 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.)

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[1] 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.)

[2] 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.

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 package as soon as possible.[3] (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

[3] A description of a complete uniform package is found at FF 16.

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.)

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.[4] (*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.)[5] The format and column headings were the same for each of the agencies. The first few entries for Fleet Management Administration were typical:

[4] 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.)
[5] 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.)

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
(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.[6]

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:[7]

Type	Date	Num	Name	Due Date	Aging [8]	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.[9] (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:

[6] The referenced pages do not contain discernible Bates numbers.
[7] Column headings "P.O. #" and "Terms" are not included because they are blank on the aging report.
[8] 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.)
[9] 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.

Fleet Management-FMA	$0.00[10]
Field Operation-DDOT	$31,923.88
Parking Services-PSA	$19,922.08
Street & Bridges-SBM	$14,142.48
Solid Waste-SWMA	$57,715.83
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.)[11] 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.)[12]

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-

[10] 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.)

[11] 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.)

[12] 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.)

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 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.[13] However, the only employees using laundry services were 100 Fleet Management

[13] 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.)

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. 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.[14] (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

[14] 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.)

> 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.)

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[15] 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.

[15] 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.

(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.

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."[16] 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.

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.[17]

[16] 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.)

[17] Prior to enactment of the Procurement Practices Reform Act of 2010, D.C. Law No. 18-371, 58 D.C.

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." [18]

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.)[19] 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 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

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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.

[18] (Hr'g Tr. vol. 3, 557-1:13.)

[19] 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*.)

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).[20] 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 contracting officer, and hence do not constitute new claims.[21] Accordingly, Appellant is not precluded from

[20] 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).

[21] 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.)

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.[22] (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.[23] (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.)

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).

[22] 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.

[23] 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.[24] 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

[24] 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").

service.[25] 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 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.

[25] 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.

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.[26]

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

[26] 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.)

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.

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

The below Opinion cancels and supersedes the Opinion published on May 15, 2015, due to mislabeled footnotes.

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.)[1] In particular, the awardee would be responsible for providing services in

[1] 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.

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*.)

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,[2] 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

(*See* AR Ex. 5, at 3.)

[2] 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).

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."[3] (*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.)

[3] 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.[4] (*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.[5] (*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

[4] 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.

[5] 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.[6] (*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.)[7] 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

[6] 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.)

[7] 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.[8] 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.[9] 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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[8] 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).

[9] "[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.[10] 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.
MARC D. LOUD, SR.
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[10] 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

The below Opinion cancels and supersedes the Opinion published on May 15, 2015, due to mislabeled footnotes.

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.[1] (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.)

[1] 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.[2] (*See* AR Ex. 2, at 1.)[3] 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").[4] (*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.)

[2] 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.)

[3] 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.

[4] 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.[5] (*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

[5] 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.[6] 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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[6] 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.