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District of Columbia REGISTER

HIGHLIGHTS

- D.C. Council enacts Act 22-338, Limited-Equity Cooperative Task Force Act of 2018
- D.C. Council schedules a public hearing on Bill 22-0522, District Waterways Management Act of 2017
- D.C. Council schedules a public hearing on Bill 22-0574, District of Columbia Paperwork Reduction and Data Collection Act of 2017
- D.C. Contract Appeals Board publishes opinions issued between May 2, 2015 and September 30, 2017
- Board of Elections schedules a public hearing to consider the proposed initiative "Delegate Voting Rights Act of 2018"
- Department of Human Services announces funding availability for the Fiscal Year 2018 District of Columbia Homeless Youth Extended Supportive Housing Program
- Public Service Commission schedules a public hearing on Potomac Electric Power Company's application to increase the Company's Rate Schedules for electric service in the District
- Office of the State Superintendent of Education announces funding availability for the Fiscal Year 2019 Special Education Enhancement Fund Competitive Grant

DISTRICT OF COLUMBIA REGISTER

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MAYOR

VICTOR L. REID, ESQ.
ADMINISTRATOR

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ENROLLED ORIGINAL

AN ACT

D.C. ACT 22-318

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 3, 2018

To amend the Rental Housing Act of 1985 to increase the rental unit fee from $25 to $30, and to deposit money obtained from the increase into the Department of Housing and Community Development Unified Fund.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Rental Unit Fee Adjustment Amendment Act of 2018".

Sec. 2. Section 401(a) of the Rental Housing Act of 1985, effective July 17, 1985 (D.C. Law 6-10; D.C. Official Code § 42-3504.01(a)), is amended as follows:

(a) Paragraph (1) is amended by striking the number "25" and inserting the number "30" in its place.

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

"(2)(A) $21.50 of each rental unit fee shall be deposited in the fund established pursuant to section 1(b) of An Act To provide for the abatement of nuisances in the District of Columbia by the Commissioners of said District, and for other purposes, approved April 14, 1906 (34 Stat. 114; D.C. Official Code § 42-3131.01(b));

"(B) $3.50 of each rental unit fee shall be deposited in the Rental Unit Fee Fund established pursuant to section 401a; and

"(C) The remainder shall be deposited in the Department of Housing and Community Development Unified Fund, established pursuant to section 2009 of the Department of Housing and Community Development Unified Fund Establishment Act of 2008, effective August 16, 2008 (D.C. Law 17-219; D.C. Official Code § 42-2857.01).".

Sec. 3. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report 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).

ENROLLED ORIGINAL

Sec. 4. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

Chairman
Council of the District of Columbia

Mayor
District of Columbia

APPROVED
May 3,2018

ENROLLED ORIGINAL

AN ACT

D.C. ACT 22-319

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 3, 2018

To amend Chapter 10 of Title 47 of the District of Columbia Official Code to exempt from taxation certain property leased by the University of the District of Columbia.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "University of the District of Columbia Leased Property Tax Abatement Amendment Act of 2018".

Sec. 2. Chapter 10 of Title 47 of the District of Columbia Official Code is amended as follows:

(a) The table of contents is amended by adding a new section designation to read as follows:

"47-1099.02. University of the District of Columbia, Lot 114, Square 676.".

(b) A new section 47-1099.02 is added to read as follows:

"§ 47-1099.02. University of the District of Columbia, Lot 114, Square 676.

"The real property located at 801 North Capitol Street, N.E., Washington, D.C., and described as Lot 114, Square 676, shall be exempt from real property taxation so long as the real property continues to be leased by the University of the District of Columbia.".

Sec. 3. Applicability.

(a) This act shall apply upon the date of inclusion of its fiscal effect in an approved budget and financial plan.

(b) The Chief Financial Officer shall certify the date of the inclusion of the fiscal effect in an approved budget and financial plan, and provide notice to the Budget Director of the Council of the certification.

(c)(1) The Budget Director shall cause the notice of the certification to be published in the District of Columbia Register.

(2) The date of publication of the notice of the certification shall not affect the applicability of this act.

ENROLLED ORIGINAL

Sec. 4. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report 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. 5. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

Chairman
Council of the District of Columbia

Mayor
District of Columbia

APPROVED
May 3, 2018

ENROLLED ORIGINAL

AN ACT

D.C. ACT 22-320

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 3, 2018

To amend, on a temporary basis, the District of Columbia Election Code of 1955 to exempt the current Executive Director of the District of Columbia Board of Elections from the domicile requirement.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Board of Elections Domicile Requirement Temporary Amendment Act of 2018".

Sec. 2. Section 5(e)(1) of the District of Columbia Election Code of 1955, approved August 12, 1955 (69 Stat. 700; D.C. Official Code § 1-1001.05(e)(1)), is amended by adding a new subparagraph (B-i) to read as follows:

"(B-i) The requirements of subparagraph (B) of this paragraph shall not apply to Executive Director Alice Miller, beginning on her hire date of July 6, 2016.".

Sec. 3. Fiscal impact statement.

The Council adopts the fiscal impact statement of the Budget Director 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. 4. Effective date.

(a) This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved

ENROLLED ORIGINAL

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

(b) This act shall expire after 225 days of its having taken effect.

Chairman
Council of the District of Columbia

Mayor
District of Columbia

APPROVED
May 3, 2018

ENROLLED ORIGINAL

AN ACT

D.C. ACT 22-321

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 3, 2018

To approve, on an emergency basis, Modification Nos. 01 and 02 to Contract No. DCAM-17-CS-0025A with Hard Light Consulting Group for on-call construction, maintenance, and repair services, and to authorize payment in the not-to-exceed amount of $2.5 million for the goods and services received and to be received under the modifications.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Modifications to Contract No. DCAM-17-CS-0025A Approval and Payment Authorization Emergency Act of 2018".

Sec. 2. Pursuant to section 451 of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 803; D.C. Official Code § 1-204.51), and notwithstanding the requirements of section 202 of the Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code § 2-352.02), the Council approves Modification Nos. 01 and 02 to Contract No. DCAM-17-CS-0025A with Hard Light Consulting Group for on-call construction, maintenance, and repair services, and authorizes payment in the not-to-exceed amount of $2.5 million for the goods and services received and to be received under the modifications.

Sec. 3. Fiscal impact statement.

The Council adopts the fiscal impact statement of the Office 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. 4. Effective date.

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

ENROLLED ORIGINAL

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

Chairman
Council of the District of Columbia

Mayor
District of Columbia
APPROVED
May 3, 2018

ENROLLED ORIGINAL

AN ACT

D.C. ACT 22-322

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 3, 2018

To approve, on an emergency basis, Modification Nos. 01 and 02 to Contract No. DCAM-17-CS-0025M with Columbia Enterprises Inc. for on-call construction, maintenance, and repair services, and to authorize payment in the not-to-exceed amount of $2.5 million for the goods and services received and to be received under the modifications.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Modifications to Contract No. DCAM-17-CS-0025M Approval and Payment Authorization Emergency Act of 2018".

Sec. 2. Pursuant to section 451 of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 803; D.C. Official Code § 1-204.51), and notwithstanding the requirements of section 202 of the Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code § 2-352.02), the Council approves Modification Nos. 01 and 02 to Contract No. DCAM-17-CS-0025M with Columbia Enterprises Inc. for on-call construction, maintenance, and repair services, and authorizes payment in the not-to-exceed amount of $2.5 million for the goods and services received and to be received under the modifications.

Sec. 3. Fiscal impact statement.

The Council adopts the fiscal impact statement of the Office 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. 4. Effective date.

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

ENROLLED ORIGINAL

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

Chairman
Council of the District of Columbia

Mayor
District of Columbia
APPROVED
May 3, 2018

ENROLLED ORIGINAL

AN ACT

D.C. ACT 22-323

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 3, 2018

To approve, on an emergency basis, Modification Nos. 01 and 02 to Contract No. DCAM-17-CS-0025H with General Services Inc. for on-call construction, maintenance, and repair services, and to authorize payment in the not-to-exceed amount of $2.5 million for the goods and services received and to be received under the modifications.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Modifications to Contract No. DCAM-17-CS-0025H Approval and Payment Authorization Emergency Act of 2018".

Sec. 2. Pursuant to section 451 of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 803; D.C. Official Code § 1-204.51), and notwithstanding the requirements of section 202 of the Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code § 2-352.02), the Council approves Modification Nos. 01 and 02 to Contract No. DCAM-17-CS-0025H with General Services Inc. for on-call construction, maintenance, and repair services, and authorizes payment in the not-to-exceed amount of $2.5 million for the goods and services received and to be received under the modifications.

Sec. 3. Fiscal impact statement.

The Council adopts the fiscal impact statement of the Office 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. 4. Effective date.

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

ENROLLED ORIGINAL

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

Chairman
Council of the District of Columbia

Mayor
District of Columbia
APPROVED
May 3, 2018

ENROLLED ORIGINAL

AN ACT

D.C. ACT 22-324

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 3, 2018

To approve, on an emergency basis, Modification Nos. 03 and 04 to Contract No. DCAM-17-CS-0025J with Blue Skye Construction LLC for on-call construction, maintenance, and repair services, and to authorize payment in the not-to-exceed amount of $2.5 million for the goods and services received and to be received under the modifications.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Modifications to Contract No. DCAM-17-CS-0025J Approval and Payment Authorization Emergency Act of 2018".

Sec. 2. Pursuant to section 451 of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 803; D.C. Official Code § 1-204.51), and notwithstanding the requirements of section 202 of the Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code § 2-352.02), the Council approves Modification Nos. 03 and 04 to Contract No. DCAM-17-CS-0025J with Blue Skye Construction LLC for on-call construction, maintenance, and repair services, and authorizes payment in the not-to-exceed amount of $2.5 million for the goods and services received and to be received under the modifications.

Sec. 3. Fiscal impact statement.

The Council adopts the fiscal impact statement of the Office 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. 4. Effective date.

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

ENROLLED ORIGINAL

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

Chairman
Council of the District of Columbia

Mayor
District of Columbia
APPROVED
May 3, 2018

ENROLLED ORIGINAL

AN ACT

D.C. ACT 22-325

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 3, 2018

To approve, on an emergency basis, Modification Nos. 01 and 02 to Contract No. DCAM-17-CS-0025B with Micon Constructions, Inc. for on-call construction, maintenance, and repair services, and to authorize payment in the not-to-exceed amount of $2.5 million for the goods and services received and to be received under the modifications.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Modifications to Contract No. DCAM-17-CS-0025B Approval and Payment Authorization Emergency Act of 2018".

Sec. 2. Pursuant to section 451 of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 803; D.C. Official Code § 1-204.51), and notwithstanding the requirements of section 202 of the Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code § 2-352.02), the Council approves Modification Nos. 01 and 02 to Contract No. DCAM-17-CS-0025B with Micon Constructions, Inc. for on-call construction, maintenance, and repair services, and authorizes payment in the not-to-exceed amount of $2.5 million for the goods and services received and to be received under the modifications.

Sec. 3. Fiscal impact statement.

The Council adopts the fiscal impact statement of the Office 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. 4. Effective date.

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

ENROLLED ORIGINAL

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

Chairman
Council of the District of Columbia

Mayor
District of Columbia
APPROVED
May 3, 2018

ENROLLED ORIGINAL

AN ACT

D.C. ACT 22-326

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 3, 2018

To approve, on an emergency basis, Modification Nos. 02 and 03 to Contract No. DCAM-17-CS-0025E with WKM Solutions LLC for on-call construction, maintenance, and repair services, and to authorize payment in the not-to-exceed amount of $2.5 million for the goods and services received and to be received under the modifications.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Modifications to Contract No. DCAM-17-CS-0025E Approval and Payment Authorization Emergency Act of 2018".

Sec. 2. Pursuant to section 451 of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 803; D.C. Official Code § 1-204.51), and notwithstanding the requirements of section 202 of the Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code § 2-352.02), the Council approves Modification Nos. 02 and 03 to Contract No. DCAM-17-CS-0025E with WKM Solutions LLC for on-call construction, maintenance, and repair services, and authorizes payment to in the not-to-exceed amount of $2.5 million for the goods and services received and to be received under the modifications.

Sec. 3. Fiscal impact statement.

The Council adopts the fiscal impact statement of the Office 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. 4. Effective date.

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

ENROLLED ORIGINAL

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

Chairman
Council of the District of Columbia

Mayor
District of Columbia

APPROVED
May 3,2018

ENROLLED ORIGINAL

AN ACT

D.C. ACT 22-327

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 3, 2018

To amend, on an emergency basis, section 25-314 of the District of Columbia Official Code to create an exemption to the 400-foot restriction for taverns, multipurpose facilities, and off-premises retailers located in the Southwest Waterfront area.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Southwest Waterfront Exemption Emergency Amendment Act of 2018".

Sec. 2. Section 25-314(b) of the District of Columbia Official Code is amended as follows:

(a) Paragraph (1) is amended by striking the phrase "paragraphs (2) through (5)" and inserting the phrase "paragraphs (2) through (8)" in its place.

(b) Paragraph (3) is amended as follows:

(1) Designate the existing text as subparagraph (A).

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

"(B) The exception in subparagraph (A) of this paragraph shall not apply if the currently functioning establishment holding a license of the same class is exempt from the 400-foot restriction under paragraph (8) of this subsection.".

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

"(8) The 400-foot restriction shall not apply to an application for an on-premises retailer's license, class CT, DT, CX, or DX, or an off-premises retailer's license, class A or B, located in the Mixed Use-12 Zone, Square 473, according to the official atlases of the Zoning Commission of the District of Columbia.".

Sec. 3. Fiscal impact statement.

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

ENROLLED ORIGINAL

Sec. 4. Effective date.

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

Chairman
Council of the District of Columbia

Mayor
District of Columbia
APPROVED
May 3, 2018

ENROLLED ORIGINAL

AN ACT

D.C. ACT 22-328

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 3, 2018

To order, on an emergency basis, the closing of a portion of the public alley system in Square 748, bounded by 3rd Street, N.E., L Street, N.E., 2nd Street, N.E., Delaware Avenue, N.E., and M Street, N.E., in Ward 6.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act be cited as the "Closing of a Public Alley in Square 748, S.O. 16-21105, Emergency Act of 2018".

Sec. 2. (a) Pursuant to section 404 of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-204.04), and consistent with the Street and Alley Closing and Acquisition Procedures Act of 1982, effective March 10, 1983 (D.C. Law 4-201; D.C. Official Code § 9-201.01 *et seq.*), the Council finds a portion of the public alley system in Square 748, as shown on the Surveyor's plat filed in S.O. 16-21105, is unnecessary for alley purposes and orders it closed, with title to the land to vest as shown on the Surveyor's plat.

(b) The approval of the Council of this alley closing is contingent upon the recordation of an easement for the benefit of the District of Columbia, as shown on the Surveyor's plat filed in S.O. 16-21105, that includes an agreement by the owner of the property encumbered by the easement to maintain the easement area for public use.

Sec. 3. Transmittal.

The Council shall transmit a copy of this act, upon its effective date, to the Office of the Surveyor.

Sec. 4. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report for the Closing of a Public Alley in Square 748, S.O. 16-21105, Act of 2018, passed on 1st reading on March 6, 2018 (Engrossed version of Bill 22-328), 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).

ENROLLED ORIGINAL

Sec. 5. Effective date.

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

Chairman
Council of the District of Columbia

Mayor
District of Columbia

APPROVED
May 3, 2018

ENROLLED ORIGINAL

AN ACT

D.C. ACT 22-329

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 3, 2018

To officially designate, on an emergency basis, the entire portion of the public alley system within Square 1043, bounded by 13th Street, S.E., Pennsylvania Avenue, S.E., G Street, S.E., 14th Street, S.E., and E Street, S.E., in Ward 6, as Watkins Alley.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Watkins Alley Designation Emergency Act of 2018".

Sec. 2. Pursuant to sections 401, 403, and 421 of the Street and Alley Closing and Acquisition Procedures Act of 1982, effective March 10, 1983 (D.C. Law 4-201; D.C. Official Code §§ 9-204.01, 9-204.03, and 9-204.21), the Council officially designates the entire portion of the public alley system within Square 1043, bounded by 13th Street, S.E., Pennsylvania Avenue, S.E., G Street, S.E., 14th Street, S.E., and E Street, S.E., in Ward 6, as "Watkins Alley".

Sec. 3. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report for the Watkins Alley Designation Act of 2018, passed on 1st reading on April 10, 2018 (Engrossed version of Bill 22-538), 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. 4. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), and shall remain in effect for no longer than

ENROLLED ORIGINAL

90 days, as provided for emergency acts of the Council of the District of Columbia in section 412(a) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 788; D.C. Official Code § 1-204.12(a)).

Chairman
Council of the District of Columbia

Mayor
District of Columbia
APPROVED
May 3,2018

ENROLLED ORIGINAL

AN ACT

D.C. ACT 22-330

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 3, 2018

To officially designate, on an emergency basis, the park in Lot 68 in Square 749, bounded by L Street, N.E., 2nd Street, N.E., K Street, N.E., and 3rd Street, N.E., in Ward 6, as Swampoodle Park.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Swampoodle Park Designation Emergency Act of 2018".

Sec. 2. Pursuant to sections 401 and 422 of the Street and Alley Closing and Acquisition Procedures Act of 1982, effective March 10, 1983 (D.C. Law 4-201; D.C. Official Code §§ 9-204.01 and 9-204.22), the Council officially designates the park in Lot 68 in Square 749, bounded by L Street, N.E., 2nd Street, N.E., K Street, N.E., and 3rd Street, N.E., in Ward 6, as "Swampoodle Park".

Sec. 3. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report for the Swampoodle Park Designation Act of 2018, passed on 1st reading on April 10, 2018 (Engrossed version of Bill 22-629), 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. 4. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), and shall remain in effect for no longer than

ENROLLED ORIGINAL

90 days, as provided for emergency acts of the Council of the District of Columbia in section 412(a) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 788; D.C. Official Code § 1-204.12(a)).

Chairman
Council of the District of Columbia

Mayor
District of Columbia
APPROVED
May 3, 2018

ENROLLED ORIGINAL

AN ACT
D.C. ACT 22-331

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA
MAY 3, 2018

To symbolically designate, on an emergency basis, due to congressional review, the 2600 block of Wisconsin Avenue, N.W., between Davis Street, N.W., and Edmunds Street, N.W., in Ward 3, as Boris Nemtsov Plaza.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Boris Nemtsov Plaza Designation Congressional Review Emergency Act of 2018".

Sec. 2. Pursuant to sections 401, 403a, and 423 of the Street and Alley Closing and Acquisition Procedures Act of 1982, effective March 10, 1983 (D.C. Law 4-201; D.C. Official Code §§ 9-204.01, 9-204.03a, and 9-204.23), the Council symbolically designates the 2600 block of Wisconsin Avenue, N.W., between Davis Street, N.W., and Edmunds Street, N.W., in Ward 3, as "Boris Nemtsov Plaza".

Sec. 3. Transmittal.
The Council shall transmit a copy of this act, upon its effective date, to the Mayor, the District Department of Transportation, and the Office of the Surveyor.

Sec. 4. Applicability.
This act shall apply as of April 25, 2018.

Sec. 5. Fiscal impact statement.
The Council adopts the fiscal impact statement in the committee report for the Boris Nemtsov Plaza Designation Act of 2018, enacted on March 8, 2018 (D.C. Act 22-276; 65 DCR 2642), 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 act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), and shall remain in effect for no longer than 90 days, as provided for emergency acts of the Council of the District of Columbia in section

ENROLLED ORIGINAL

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

Chairman
Council of the District of Columbia

Mayor
District of Columbia

APPROVED
May 3, 2018

ENROLLED ORIGINAL

AN ACT

D.C. ACT 22-332

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 3, 2018

To officially designate, on an emergency basis, the school in Lot 822 in Square 5561, bounded by Nicholson Street, S.E., Prout Street, S.E., 22nd Street, S.E., and Minnesota Avenue, S.E., in Ward 8, as Lawrence E. Boone Elementary School.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Lawrence E. Boone Elementary School Designation Emergency Act of 2018".

Sec. 2. Pursuant to sections 401 and 422 of the Street and Alley Closing and Acquisition Procedures Act of 1982, effective March 10, 1983 (D.C. Law 4-201; D.C. Official Code §§ 9-204.01 and 9-204.22), the Council officially designates the school in Lot 822 in Square 5561, bounded by Nicholson Street, S.E., Prout Street, S.E., 22nd Street S.E., and Minnesota Avenue, S.E., in Ward 8, as the "Lawrence E. Boone Elementary School".

Sec. 3. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report for the Lawrence E. Boone Elementary School Designation Act of 2018, passed on 1st reading on April 10, 2018 (Engrossed version of Bill 22-664), 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. 4. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), and shall remain in effect for no longer than

ENROLLED ORIGINAL

90 days, as provided for emergency acts of the Council of the District of Columbia in section 412(a) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 788; D.C. Official Code § 1-204.12(a)).

Chairman
Council of the District of Columbia

Mayor
District of Columbia

APPROVED
May 3, 2018

ENROLLED ORIGINAL

AN ACT

D.C. ACT 22-333

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 3, 2018

To amend on an emergency basis, due to congressional review, 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 located at 1336 8th Street, N.W., and known for tax and assessment purposes as Lot 68 in Square 399.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Extension of Time to Dispose of 8th & O Streets, N.W., Congressional Review Emergency Act of 2018".

Sec. 2. Section 1 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), is amended by adding a new subsection (d-7) to read as follows:

"(d-7) Notwithstanding subsection (d) of this section, the time period within which the Mayor may dispose of District-owned real property located at 1336 8th Street, N.W., and known for tax and assessment purposes as Lot 68 in Square 399, for a mixed-use development providing for affordable housing, residential and market-rate housing, and retail, and any ancillary uses allowed under applicable law, pursuant to the 8th & O Streets, N.W., Disposition Approval Resolution of 2016, effective February 2, 2016 (Res. 21-374; 63 DCR 1498), is extended to February 2, 2020.".

Sec. 3. Fiscal impact statement.

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

Sec. 4. Effective date.

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

ENROLLED ORIGINAL

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

Chairman
Council of the District of Columbia

Mayor
District of Columbia
APPROVED
May 3, 2018

ENROLLED ORIGINAL

AN ACT

D.C. ACT 22-334

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 3, 2018

To amend, on an emergency basis, the Legalization of Marijuana for Medical Treatment Initiative of 1999 to establish a preference for certified business enterprises that apply for the registration of a dispensary, cultivation center, or testing laboratory.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Medical Marijuana Certified Business Enterprise Preference Emergency Amendment Act of 2018".

Sec. 2. Section 7(d) of the Legalization of Marijuana for Medical Treatment Initiative of 1999, effective July 27, 2010 (D.C. Law 18-210; D.C. Official Code § 7-1671.06(d)), is amended by adding a new paragraph (5) to read as follows:

"(5)(A) Any application for registration of a dispensary, cultivation center, or testing laboratory submitted by a certified business enterprise pursuant to this subsection after the effective date of the Medical Marijuana Certified Business Enterprise Preference Emergency Amendment Act of 2017, effective June 28, 2017 (D.C. Act 22-83; 64 DCR 6229), shall be awarded a preference equal to 20 points or 7.5% of the available points, whichever is more.

"(B) For the purposes of this paragraph, the term "certified business enterprise" shall have the same meaning as provided in section 2302(1D) of the Small and Certified Business Enterprise Development and Assistance Act of 2005, effective October 20, 2005 (D.C. Law 16-33; D.C. Official Code § 2-218.02(1D)).".

Sec. 3. Applicability.

This act shall apply as of April 19, 2018.

Sec. 4. Fiscal impact statement.

The Council adopts the fiscal impact statement of the Budget Director 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).

ENROLLED ORIGINAL

Sec. 5. Effective date.

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

Chairman
Council of the District of Columbia

Mayor
District of Columbia
APPROVED
May 3, 2018

ENROLLED ORIGINAL

AN ACT

D.C. ACT 22-335

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 7, 2018

To amend, on a temporary basis, the Not-for-Profit Hospital Corporation Establishment Amendment Act of 2011 to require the retention of electronic recordings of meetings of the Board of Directors of the Not-For-Profit Hospital Corporation for a minimum of 5 years, to require the board to take all efforts reasonably necessary to recover and retain electronic recordings of its meetings dating from April 1, 2013, and to require the Chairperson of the board to inform the Council and the Director of the District of Columbia Open Government Office in writing of compliance efforts by April 1, 2018.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Preservation of Electronic Recordings of Meetings Temporary Amendment Act of 2018".

Sec. 2. Section 5116 of the Not-for-Profit Hospital Corporation Establishment Amendment Act of 2011, effective September 14, 2011 (D.C. Law 19-21; D.C. Official Code § 44-951.05), is amended by adding new subsections (d-1) and (d-2) to read as follows:

"(d-1) Electronic recordings of meetings of the Board shall be retained for a minimum of 5 years.

"(d-2)(1) The Board shall immediately undertake all efforts reasonably necessary to recover and retain electronic recordings of all meetings of the Board dating from April 1, 2013.

"(2) If the Board's current provider of electronic recording services is incapable of retaining electronic meeting recordings for a minimum of 5 years, then the Board shall immediately utilize an alternate means of electronically recording its meetings and retaining such electronic recordings for a minimum of 5 years.

"(3) By April 1, 2018, the Chairperson of the Board shall provide a written update to the Council of the District of Columbia and the Director of the District of Columbia Open Government Office regarding its progress in complying with paragraphs (1) and (2) of this subsection.".

Sec. 3. Fiscal impact statement.

The Council adopts the fiscal impact statement of the Budget Director 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).

ENROLLED ORIGINAL

Sec. 4. Effective date.

(a) This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of congressional review as provided in section 602 (c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

(b) This act shall expire after 225 days of its having taken effect.

Chairman
Council of the District of Columbia

Mayor
District of Columbia
APPROVED
May 7,2018

ENROLLED ORIGINAL

AN ACT

D.C. ACT 22-336

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 7, 2018

To amend, on a temporary basis, the District of Columbia Mental Health Information Act of 1978 to permit the disclosure of mental health information by a third-party payor to a health care provider in certain enumerated instances, to require a health care provider to notify clients whether a third-party payor's privacy practices permit the disclosure of mental health information, and to allow clients to prevent the disclosure of mental information by a third-party payor upon request.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, that this act may be cited as the "Mental Health Information Disclosure Temporary Amendment Act of 2018".

Sec. 2. Section 301 of the District of Columbia Mental Health Information Act of 1978, effective March 3, 1979 (D.C. Law 2-136; D.C. Official Code § 7–1203.01), is amended as follows:

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

(1) Strike the phrase "a health care provider" and insert the phrase "a health care provider or its third-party payor" in its place.

(2) Strike the phrase "case management, or rehabilitation of a health or mental disorder" and insert the phrase "case management, conduct of quality assessment and improvement activities, or rehabilitation of a health or mental disorder" in its place.

(b) Subsection (c) is amended as follows:

(1) Paragraph (1)(A) is amended by striking the phrase "Whether the health care provider's" and inserting the phrase "Whether the health care provider or its third-party payor's" in its place.

(2) Paragraph (2) is amended by striking the phrase "the health care provider" and inserting the phrase "the health care provider or its third-party payor" in its place.

ENROLLED ORIGINAL

Sec. 3. Fiscal impact statement.

The Council adopts the fiscal impact statement of the Budget Director 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. 4. Effective date.

(a) This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

(b) This act shall expire after 225 days of its having taken effect.

Chairman
Council of the District of Columbia

Mayor
District of Columbia

APPROVED
May 7, 2018

ENROLLED ORIGINAL

AN ACT

D.C. ACT 22-337

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 7, 2018

To establish an Address Confidentiality Program, administered by the Office of Victim Services and Justice Grants, to allow a victim of a covered offense or a covered employee to maintain the confidentiality of her or his actual address; to amend the Freedom of Information Act of 1976 to prohibit the disclosure of an actual address; to amend the Office of Administrative Hearings Establishment Act of 2001 to authorize the Office of Administrative Hearings to hear adjudicated cases relating to the Address Confidentiality Program; and to amend section 389 of the Revised Statutes of the District of Columbia to provide that the actual addresses of participants in the Address Confidentiality Program shall be withheld from public inspection.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Address Confidentiality Act of 2018".

TITLE I. ADDRESS CONFIDENTIALITY

Sec. 101. Definitions.

For the purposes of this title, the term:

(1) "Actual address" means a participant's residential, work, or school address, or a combination thereof, as specified on an applicant's application to participate in the Program.

(2) "Applicant" means a District resident who:

(A) Submits or intends to submit an application to OVSJG to participate in the Program; and

(B) Is a victim of a covered offense or a covered employee.

(3) "Application assistant" means a person trained and designated by OVSJG to assist an applicant or an applicant's representative in the preparation of an application to participate in the Program.

(4) "Covered employee" means an individual, including a volunteer, who provides services at an organization:

(A) That focuses on reproductive healthcare; or

(B) Whose primary purpose is serving victims of a covered offense.

(5) "Covered offense" means domestic violence, a sexual offense, stalking, or human trafficking.

(6) "Day" means calendar day, unless otherwise specified in this title.

(7) "District agency" means any office, department, division, board, commission, or other unit of the District government, including an independent agency, required by law or by the Mayor or the Council to administer any law or any rule adopted under the authority of a law.

(8) "Domestic violence" shall have the same meaning as provided in section 3032(1) of the Domestic Violence Hotline Establishment Act of 2013, effective December 24, 2013 (D.C. Law 20-61; D.C. Official Code § 4-551(1)).

(9) "Human trafficking" means an act prohibited by section 103 or section 104 of the Prohibition Against Human Trafficking Amendment Act of 2010, effective October 23, 2010 (D.C. Law 18-239; D.C. Official Code § 22-1833 or § 22-1834).

(10) "Law enforcement agency" means the Metropolitan Police Department, the Office of the Attorney General, or any other District agency, except the Office of the Chief Medical Examiner and the Department of Forensic Sciences, that has the authority to investigate, make arrests for, or prosecute or adjudicate District criminal or delinquency offenses. The term "law enforcement agency" includes a covered Federal law enforcement agency, as that term is defined in section 11712(d) of the National Capital Revitalization and Self-Government Improvement Act of 1997, approved August 5, 1997 (111 Stat. 782; D.C. Official Code § 5-133.17(d)) ("Cooperative Agreement Act"), that has entered into a cooperative agreement with the Metropolitan Police Department pursuant to section 11712 of the Cooperative Agreement Act, to the extent the covered Federal law enforcement agency is acting pursuant to the cooperative agreement.

(11) "OVSJG" means the Office of Victim Services and Justice Grants.

(12) "Participant" means an applicant who is certified under section 103.

(13) "Program" means the Address Confidentiality Program established by this title to protect the confidentiality of an actual address of a participant.

(14) "Representative" means a parent, guardian, or legal representative of:

(A) A minor, if the minor resides with the parent, guardian, or legal representative; or

(B) An incapacitated person.

(15) "Sexual offense" means any of the following offenses:

(A) Incest, as described in section 875 of An Act To establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1332; D.C. Official Code § 22-1901);

(B) First degree sexual abuse, as described in section 201 of the Anti-Sexual Abuse Act of 1994, effective May 23, 1995 (D.C. Law 10-257; D.C. Official Code § 22-3002) ("Act");

(C) Second degree sexual abuse, as described in section 202 of the Act;

(D) Third degree sexual abuse, as described in section 203 of the Act;

(E) Fourth degree sexual abuse, as described in section 204 of the Act;

(F) Misdemeanor sexual abuse, as described in section 205 of the Act;

(G) First degree sexual abuse of a secondary education student, as described in section 208c of the Act;

(H) Second degree sexual abuse of a secondary education student, as described in section 208d of the Act;

(I) First degree sexual abuse of a ward, patient, client, or prisoner, as described in section 212 of the Act;

(J) Second degree sexual abuse of a ward, patient, client, or prisoner, as described in section 213 of the Act;

(K) First degree sexual abuse of a patient or client, as described in section 214 of the Act;

(L) Second degree sexual abuse of a patient or client, as described in section 215 of the Act; or

(M) Attempts to commit sexual offenses, as described in section 217 of the Act.

(16) "Stalking" means an act prohibited by section 503 of the Omnibus Public Safety and Justice Amendment Act of 2009, effective December 10, 2009 (D.C. Law 18-88; D.C. Official Code § 22-3133).

(17) "Substitute address" means an address designated by OVSJG under the Program that can be used by a participant or a participant's representative pursuant to this title, instead of the participant's actual address.

(18) "Tribunal" means a court, administrative agency, or other body acting in an adjudicative capacity that, after presentation of evidence or legal argument, has jurisdiction to render a decision affecting a party's interests in a matter.

Sec. 102. Establishment of the Address Confidentiality Program.

(a) There is established the Address Confidentiality Program to be administered by OVSJG to protect the confidentiality of the actual address of a participant.

(b) Under the Program, OVSJG shall:

(1) Designate a substitute address for a participant that shall be used as provided in this title; and

(2) Receive first-class, certified, and registered mail sent to a participant's substitute address and forward the mail to the participant or the participant's representative within 3 business days after receipt.

(c) OVSJG shall maintain records of any certified or registered mail received on behalf of a participant.

(d) A participant's actual address shall not be disclosed under the Freedom of Information Act of 1976, effective March 29, 1977 (D.C. Law 1-96; D.C. Official Code § 2-531 *et seq.*).

Sec. 103. Program applications and certification of participants.

(a) OVSJG shall:

(1) Establish a training program for a person to complete before the person may be designated as an application assistant; and

(2) Designate application assistants to assist an applicant or an applicant's representative in submitting an application to the Program.

(b) A person may be designated as an application assistant if the person successfully completes the training program established pursuant to subsection (a)(1) of this section and provides:

(1) Counseling, referral, or other services to victims of a covered offense; or

(2) Services at an organization that focuses on reproductive healthcare.

(c) To apply to participate in the Program, an applicant or an applicant's representative shall meet with an application assistant to fill out an application together.

(d) The application shall be on a form prescribed by OVJSG and contain the following:

(1) The applicant's name;

(2) Evidence that the applicant is a victim of a covered offense or is a covered employee, including at least one of the following:

(A) A sworn affidavit by the applicant or the applicant's representative, stating that the applicant:

(i) Is a victim of a covered offense or is a covered employee; and

(ii) Fears for her or his safety;

(B) Law enforcement agency or other District agency records or files;

(C) An order of a tribunal;

(D) If the applicant is alleged to be a victim of domestic violence, documentation from a domestic violence program or facility, including a shelter or safe house;

(E) If the applicant is alleged to be a victim of a sexual offense, documentation from a sexual assault program or facility;

(F) If the applicant is alleged to be a victim of human trafficking, documentation from a human trafficking program or facility, including a shelter or safe house;

(G) If the applicant is alleged to be a victim of stalking, documentation from a program or facility providing services for victims of stalking; or

(H) Documentation from a medical professional from whom the applicant has sought assistance in dealing with the alleged covered offense;

(3) A statement by the applicant or the applicant's representative that disclosure of the applicant's actual address would endanger the applicant's safety;

(4) The actual address that the applicant is seeking to have protected by OVSJG;

(5) A statement as to whether there are any existing orders or pending actions of a tribunal involving the applicant, and if so, describing those orders or actions;

(6) A statement designating the Director of OVSJG as an agent for purposes of service of process and receiving mail;

(7) If applicable, the name and contact information of the applicant's representative; and

(8) A statement by the applicant or the applicant's representative, under penalty of perjury, that to the best of the applicant's or the applicant's representative's knowledge, the information contained in the application is true.

(e)(1) Before submitting an application to OVSJG, the application assistant may attach a statement to the application describing whether the application assistant believes the applicant to be a strong candidate for the Program, and the application assistant's reasoning.

(2) A completed application shall be signed and dated by the applicant or the applicant's representative and the application assistant.

(f) After reviewing a completed application, OVSJG shall certify an applicant to be a participant if the applicant:

(1) Meets the requirements of this title; and

(2) Would benefit from participation in the Program.

(g) Upon certifying a participant, OVSJG shall issue to the participant or the participant's representative a Program authorization card, which shall identify the participant's substitute address.

(h)(1) A certification shall remain valid for 3 years following the date of certification unless the certification is cancelled by OVSJG or the participant or the participant's representative before the end of the 3-year period.

(2) At least 60 days before a participant's certification expires, OVSJG shall send the participant or the participant's representative written notice of the upcoming expiration.

(3) A certification may be renewed for an additional 2 years by filing a renewal application with the Director. The renewal application shall be signed and dated by the participant or the participant's representative and an application assistant. The renewal application shall contain a statement by the participant or the participant's representative, under penalty of perjury, that, to the best of the participant's or the participant's representative's knowledge, the information contained in the renewal application is true.

(i) If any of the information provided in an application or renewal application changes, including the participant's name, address, or telephone number, the participant or the participant's representative shall notify OVSJG within 30 days of the change.

Sec. 104. Certification cancellation.

(a) OVSJG may cancel a participant's certification if:

(1) The participant or the participant's representative fails to comply with the requirements of this title; or

(2) Mail forwarded to the participant by OVSJG is returned as undeliverable.

(b) If the Director determines that there are grounds for cancelling the certification of a participant pursuant to subsection (a) of this section, the Director shall, at least 60 days before

cancelling the participant's certification, send written notice of the upcoming cancellation to the participant or the participant's representative that explains the reasons for cancellation.

(c)(1) A participant or the participant's representative may cancel her or his certification at any time.

(2) If a participant or the participant's representative cancels the participant's certification because the participant is moving to another jurisdiction, the person or the person's representative may provide OVSJG with the new address, to which OVSJG shall continue to forward the person's mail for 30 days after the Director receives the person's new address.

(d) When a certification is canceled, regardless of the reason for the cancellation, the person who was a participant or the person's representative shall be responsible for notifying others that the certification was canceled and the person will no longer receive mail at the substitute address.

Sec. 105. Address use by District agencies.

(a) Notwithstanding any other law, except as provided in this section, a participant or the participant's representative shall not be required to provide the participant's actual address for any purpose for which a District agency requires or requests a residential, work, or school address.

(b) Only a participant's actual address shall be used as part of a registration required by the Sex Offender Registration Act of 1999, effective July 11, 2000 (D.C. Law 13-137; D.C. Official Code § 22-4001 *et seq.*).

(c)(1) After a participant who is eligible to vote is certified to participate in the Program, unless the participant opts out, OVSJG shall send the participant's actual address and a copy of the participant's Program authorization card to the District of Columbia Board of Elections ("Board"), which the Board shall maintain.

(2) If a participant decides to vote, the participant shall vote by absentee ballot.

(3) If a participant decides to sign a petition to be filed with the Board, the participant may use her or his substitute address to sign the petition.

(d) Only a participant's actual address shall be used on any document filed with the Office of Tax and Revenue.

(e)(1) Upon written request by a supervisor at the rank of sergeant or above of the Metropolitan Police Department ("MPD"), OVSJG shall provide a participant's actual address to MPD for law enforcement purposes only.

(2) MPD shall not publish a participant's actual address pursuant to section 389 of the Revised Statutes of the District of Columbia (D.C. Official Code § 5-113.06).

(f)(1) If a participant or a participant's representative is or becomes aware that a District agency has made public the participant's actual address, the participant or the participant's representative may submit a written request, along with a copy of the participant's Program authorization card, to the District agency, asking the District agency to remove any publicly accessible references to the participant's actual address.

(2) Upon receipt of a request pursuant to paragraph (1) of this subsection, the District agency shall remove publicly accessible references to the participant's actual address, including any references on the District agency's website, within 10 business days of receiving the request.

Sec. 106. Requests by a District agency for disclosure of an actual address.

(a) A District agency may request disclosure of a participant's actual address from OVSJG pursuant to this section by sending a written request to OVSJG on the District agency's letterhead with the following information:

(1) The name of the participant for whom the District agency seeks disclosure of the actual address;

(2) An explanation of the reasons that the District agency is requesting the participant's actual address;

(3) A statement that the agency has adopted internal procedures that would ensure that the confidentiality of the participant's actual address will be protected; and

(4) Any other information that OVSJG may reasonably request to identify the participant in the records of OVSJG.

(b)(1) Upon the receipt of a request pursuant to this section, OVSJG shall provide the participant or the participant's representative with:

(A) Written notice of the request for disclosure received pursuant to this section; and

(B) An opportunity to express whether the request should be granted.

(2) Paragraph (1) of this subsection shall not apply if the request for disclosure is made by a law enforcement agency investigating alleged criminal or delinquent conduct by the participant or when complying with paragraph (1) of this subsection would jeopardize an ongoing investigation or the safety of law enforcement personnel.

(c)(1) Within 30 days after receiving a request under this section, OVSJG shall determine whether to grant the request.

(2)(A) Upon making a determination under paragraph (1) of this subsection, OVSJG shall provide the participant or the participant's representative with written notice describing whether the request is being granted or denied.

(B) Subparagraph (A) of this paragraph shall not apply if the request for disclosure is made by a law enforcement agency investigating alleged criminal or delinquent conduct by the participant or when complying with subparagraph (A) of this paragraph would jeopardize an ongoing investigation or the safety of law enforcement personnel.

(d)(1) If OVSJG grants a request pursuant to this section, OVSJG shall provide the District agency that submitted the request with the following information:

(A) The participant's actual address;

(B) A statement setting forth the permitted uses of the actual address and the persons permitted to have access to the actual address; and

(C) The date on which the permitted use expires, if expiration is appropriate, after which the agency may no longer use the actual address.

(2) If a District agency's request is granted pursuant to this section, the District agency may only use the participant's actual address as set forth in the statement required by paragraph (1)(B) of this subsection.

(e) If OVSJG denies a request under this section, OVSJG shall provide prompt written notice to the District agency that submitted the request, setting forth the specific reasons for the denial.

Sec. 107. Program participation and procedures.

(a) If, at any time, a participant is subject to an order or is involved in an action of a tribunal, OVSJG shall notify the relevant tribunal of the participant's certification.

(b)(1) No person shall be compelled to disclose a participant's actual address during any proceeding before a tribunal unless the tribunal finds, based upon clear and convincing evidence, that:

(A) A party will suffer material harm without disclosure of the participant's actual address;

(B) The harm to the participant is substantially outweighed by the material harm to the party requesting disclosure of the participant's actual address;

(C) There are no alternatives to disclosure of the participant's actual address that would address the material harm; and

(D) The disclosure is narrowly tailored in both scope and manner to disclose the minimum amount of participant information necessary to address the material harm.

(2) A tribunal may seal the portion of any record that contains a participant's actual address.

(c) Nothing in this title, including the fact that a person is a participant, shall affect an existing or future order relating to the allocation of custody, parental responsibilities, or parenting time.

(d) Participation in the Program shall not constitute evidence of a covered offense.

(e) Whenever the laws of the District provide a participant a legal duty to act within a prescribed period of 10 days or less after the service of a notice or other paper upon the participant, and the notice or paper is served upon the participant by mail pursuant to this title, 5 days shall be added to the prescribed period.

Sec. 108. Penalties.

(a) Notwithstanding any other law, except as provided by this title, no person shall intentionally obtain from a District agency or disclose a participant's actual address knowing that the participant is participating in the Program.

(b) A person violating subsection (a) of this section shall be subject to a civil fine of not more than $10,000.

Sec. 109. Immunity from liability.

Neither the District government nor its employees, nor an application assistant, shall be liable for the failure of a participant to receive any mail forwarded to her or him by OVSJG pursuant to this title.

Sec. 110. Appeals.

Any person aggrieved by an action of OVSJG taken pursuant to this title may appeal the action of OVSJG to the Office of Administrative Hearings pursuant to section 6 of the Office of Administrative Hearings Establishment Act of 2001, effective March 6, 2002 (D.C. Law 14-76; D.C. Official Code § 2-1831.03).

Sec. 111. Program review.

By January 1, 2020, and annually thereafter, OVSJG shall submit a review of the Program to the chairperson of the Council committee with jurisdiction over OVSJG.

Sec. 112. Rules.

OVSJG, pursuant to Title I of the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1204; D.C. Official Code § 2-501 *et seq.*), shall issue rules to implement the provisions of this title.

TITLE II. CONFORMING AMENDMENTS

Sec. 201. Section 204(d) of the Freedom of Information Act of 1976, effective March 29, 1977 (D.C. Law 1-96; D.C. Official Code § 2-534(d)), is amended as follows:

(a) The existing text is designated as paragraph (1).

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

"(2) An actual address, as that term is defined in section 101 of the Address Confidentiality Act of 2018, passed on 2nd reading on April 10, 2018 (Enrolled version of Bill 22-37), shall not be disclosed under this title.".

Sec. 202. Section 6 of the Office of Administrative Hearings Establishment Act of 2001, effective March 6, 2002 (D.C. Law 14-76; D.C. Official Code § 2-1831.03), is amended by adding a new subsection (b-24) to read as follows:

"(b-24) This act shall apply to all adjudicated cases relating to the Address Confidentiality Program established by section 102 of the Address Confidentiality Act of 2018, passed on 2nd reading on April 10, 2018 (Enrolled version of Bill 22-37).".

Sec. 203. Section 389 of the Revised Statutes of the District of Columbia (D.C. Official Code § 5-113.06) is amended by adding a new subsection (d) to read as follows:

"(d) Notwithstanding subsections (a) and (b) of this section, the actual addresses of participants in the Address Confidentiality Program established by section 102 of the Address

ENROLLED ORIGINAL

Confidentiality Act of 2018, passed on 2nd reading on April 10, 2018 (Enrolled version of Bill 22-37), shall be withheld from public inspection.".

TITLE III. APPLICABILITY; FISCAL IMPACT STATEMENT; EFFECTIVE DATE

Sec. 301. Applicability.

(a) This act shall apply upon the date of inclusion of its fiscal effect in an approved budget and financial plan.

(b) The Chief Financial Officer shall certify the date of the inclusion of the fiscal effect in an approved budget and financial plan and provide notice to the Budget Director of the Council of the certification.

(c)(1) The Budget Director shall cause the notice of the certification to be published in the District of Columbia Register.

(2) The date of publication of the notice of the certification shall not affect the applicability of this act.

Sec. 302. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report 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. 303. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

Chairman
Council of the District of Columbia

Mayor
District of Columbia

APPROVED
May 7, 2018

ENROLLED ORIGINAL

AN ACT

D.C. ACT 22-338

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 7, 2018

To establish a Limited-Equity Cooperative Task Force to provide comprehensive policy recommendations to assist District residents and the District government with improving existing limited-equity cooperatives, establishing new limited-equity cooperatives, and helping all limited-equity cooperatives succeed and prosper.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Limited-Equity Cooperative Task Force Act of 2018".

Sec. 2. Definitions.

For the purposes of this act, the term

(1) "Cooperative" means an association, whether incorporated or unincorporated, organized for the purpose of owning and operating residential real property in the District of Columbia, the shareholders or members of which, by reason of their ownership of a stock or membership certificate, a proprietary lease, or other evidence of membership, are entitled to occupy a dwelling unit pursuant to the terms of a proprietary lease or occupancy agreement.

(2) "Limited-equity cooperative" or "LEC" means a cooperative required by a government agency or nonprofit organization to limit the resale price of membership shares for the purpose of keeping the housing affordable to incoming members that are low- and moderate-income.

Sec. 3. Establishment of Limited-Equity Cooperative Task Force.

There is established a Limited-Equity Cooperative Task Force ("Task Force") to provide the Council with comprehensive policy recommendations on how the District can assist in the formation of new LECs and help existing LECs succeed.

Sec. 4. Membership.

(a) The composition of the Task Force shall be as follows:

(1) Three residents, each of whom is currently a board member of an LEC in the District; provided, that no 2 residents shall be from the board of the same LEC.

(2) One representative from a community-based organization that provides training, counseling, and client advocacy services to low- to moderate-income residents.

(3) One representative from a property management company that manages cooperatives in the District.

(4) One representative from a development company that develops cooperatives in the District.

(5) One representative from a financial entity that specializes in the financing of LECs.

(6) One attorney with experience working with LECs.

(7) One individual who has conducted significant research on LECs in the District and elsewhere in the United States.

(8) Other representatives appointed by the Chairperson of the Committee on Housing and Neighborhood Revitalization.

(9) One representative from the Department of Housing and Community Development.

(10) One representative from the District of Columbia Housing Finance Agency.

(b) The Chairperson of the Council Committee on Housing and Neighborhood Revitalization shall appoint the:

(1) Chair of the Task Force; and

(2) Task Force representatives designated in subsection (a)(1) through (8) of this section.

(c) The members of the Task Force shall serve without compensation and shall either reside or work in the District.

(d) Meetings of the Task Force shall be open to the public.

(e) The Department of Housing and Community Development shall provide administrative support to the Task Force.

Sec. 5. Duties of the Task Force.

Within 180 days after the appointment of all members, the Task Force shall submit to the Council a comprehensive report on:

(1) Policy and legislative recommendations related to how the District can help stabilize, strengthen, and preserve existing LECs, as well as how the District can best support the formation of new LECs;

(2) Funding options and sources to assist in the formation of new LECs and to provide technical support and assistance to LEC members and LEC boards in the District;

(3) How to establish appropriate government oversight to ensure that LEC boards have the necessary financial and structural management resources to help them succeed and prosper; and

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(4) Any other identified needs or requirements for the successful formation and preservation of LECs in the District.

Sec. 6. Sunset.

This act shall expire upon the Task Force submitting the report required pursuant to section 5 to the Council.

Sec. 7. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report 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. 8. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

Chairman
Council of the District of Columbia

Mayor
District of Columbia

APPROVED
May 7, 2018

ENROLLED ORIGINAL

AN ACT

D.C. ACT 22-339

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 7, 2018

To amend the Rental Housing Conversion and Sale Act of 1980 to exempt single-family accommodations from the Tenant Opportunity to Purchase Act of 1980 ("TOPA"), to provide an exception from the exemption when a current tenant is an elderly tenant or a tenant with a disability, and the tenant signed a rental agreement to occupy the housing accommodation by March 31, 2018, and took occupancy by April 15, 2018, to specify the rights and obligations of elderly tenants and tenants with a disability under TOPA, and to clarify that provisions of TOPA applicable to housing accommodations with 2 through 4 units do not apply to 2-unit single-family accommodations.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "TOPA Single-Family Home Exemption Amendment Act of 2018".

Sec. 2. The Rental Housing Conversion and Sale Act of 1980, effective September 10, 1980 (D.C. Law 3-86; D.C. Official Code § 42-3401.01 *et seq.*), is amended as follows:

(a) Section 103 (D.C. Official Code § 42-3401.03) is amended as follows:

(1) Paragraph (1) is redesignated as paragraph (1A).

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

"(1) "Accessory dwelling unit" means a rental unit that is secondary to the principal single-family dwelling in terms of gross floor area, intensity of use, and physical character, but which has kitchen and bath facilities separate from the principal dwelling, and may have a separate entrance.".

(3) New paragraphs (16A) and (16B) are added to read as follows:

"(16A) "Single-family accommodation" means:

"(A) A housing accommodation, whether freestanding or attached, and the appurtenant land that contains:

"(i) One single-family dwelling; or

"(ii) One single-family dwelling with one accessory dwelling unit; or

"(B) A single rental unit in a condominium, cooperative, or homeowners association, as that term is defined in D.C. Official Code § 47-871(2).

"(16B) "Single-family dwelling" means a structure, whether freestanding or attached, that contains a room or group of rooms forming a single living space, which includes a kitchen, that is used or intended to be used for living, eating, and sleeping, and the structure's

appurtenant land.".

(b) Section 405 (D.C. Official Code § 42-3404.05) is amended as follows:

(1) Subsection (a) is amended by striking the phrase "sections 409(4), 410(4), and 411(4), respectively," both times it appears and inserting the phrase "sections 410(4) and 411(4), respectively, or within 90 days of delivering an offer of sale to an elderly tenant or a tenant with a disability pursuant to section 409(c)," in its place.

(2) Subsection (a-1) is amended by striking the number "409" and inserting the phrase "409(c)" in its place.

(c) Section 408 (D.C. Official Code § 42-3404.08) is amended by striking the phrase "409(2)" and inserting the phrase "409(c)(4)" in its place.

(d) Section 409 (D.C. Official Code § 42-3404.09) is amended to read as follows:

"Sec. 409. Single-family accommodations.

"(a) The provisions of this title shall not apply to single-family accommodations except as provided in this section.

"(b) Notice to all tenants of the potential sale of a single-family accommodation. –

"(1) Within 3 calendar days of receiving or soliciting, in writing, an offer to purchase a single-family accommodation, an owner of a single-family accommodation who has an intent to sell the single-family accommodation shall deliver written notice to a tenant of the single-family accommodation or a unit in the single-family accommodation that the owner received or solicited an offer to purchase the single-family accommodation.

"(2) For one year after delivering notice to a tenant pursuant to paragraph (1) of this subsection, an owner is not required to provide the same tenant with subsequent notice that the owner has received or solicited offers to purchase the single-family accommodation.

"(3)(A) Liability for failure to provide the notice required by this subsection shall lie with the owner and may not attach to the real property that is the subject of the required notice.

"(B) A tenant who brings an action in any court of law against an owner for failing to provide the notice required by this subsection may not file a notice of pendency of action pursuant to section 556a of An Act To establish a code of law for the District of Columbia, effective June 24, 2000 (D.C. Law 13-129; D.C. Official Code § 42-1207), with the Recorder of Deeds.

"(4) Nothing in this subsection shall be construed as creating rights enforceable under Title V.

"(c) Elderly tenants and tenants with disabilities. – (1) If a tenant is an elderly tenant or is a tenant with a disability as of the date of the offer of sale, and the tenant signed a rental agreement to occupy a single-family accommodation or a unit in a single-family accommodation by March 31, 2018, and took occupancy by April 15, 2018, the provisions of this title shall apply, as modified by this section.

"(2) Written offer of sale. – (A) A written offer of sale shall comply with the requirements of section 403, and in addition, shall include a description of the tenant's rights and obligations under this section, and a list of organizations from which the tenant may seek help to

exercise the right to purchase.

"(B) The owner shall deliver a copy of a written offer of sale and of any notice of intent delivered pursuant to subsection (d)(1) of this section to the Office of the Tenant Advocate ("OTA"), and shall initiate delivery of the copy on the same date as initiating delivery of the original document.

"(C) Within 4 business days of receiving a copy of an offer of sale or notice of intent pursuant to this subparagraph, the OTA shall exercise its best efforts to contact all affected tenants and provide them with the contact information of organizations that provide tenants advice concerning their rights under this title.

"(3) Written statement of interest. – (A) Upon delivery of a written offer of sale from the owner, the tenant shall have 20 days to deliver a written statement of interest to the owner.

"(B) The tenant's statement of interest shall be a clear expression of interest on the part of the tenant to exercise the right to purchase the housing accommodation as specified in this title.

"(C) A tenant's failure to deliver a written statement of interest to the owner in a timely manner shall be deemed a waiver of the tenant's rights under this section.

"(4) Negotiation period. – If a tenant has delivered a written statement of interest in accordance with paragraph (3) of this subsection, the owner shall afford the tenant at least 25 days after delivery of the statement of interest to the owner to negotiate a contract of sale, not including the 20 days provided by paragraph (3) of this subsection. For every day of delay in providing information by the owner as required by this title, the negotiation period is extended by one day.

"(5) Time before settlement. – (A) The owner shall afford the tenant at least 45 days after the date of contracting to go to settlement to secure financing and financial assistance.

"(B) If, within 45 days after the date of contracting, the tenant presents the owner with the written decision of a lending institution or agency that states that the institution or agency estimates that a decision with respect to financing or financial assistance will be made within 75 days after the date of contracting, the owner shall afford an extension of time consistent with the written estimate.

"(6) Assignment of rights. – (A) The only consideration an elderly tenant or a tenant with a disability may receive for the sale or assignment of the tenant's rights under this title is the right to immediately use and occupy the tenant's unit for a period of 12 months following the sale of the single-family accommodation at the rate of rent charged to the tenant as of the date of the offer of sale.

"(B)(i) If a tenant assigns or sells the tenant's rights under this title, the recipient may only further reassign the rights to a private or nonprofit corporation or a partnership of which the assignee or buyer is an owner, managing member, or officer who can legally bind the entity.

"(ii) No consideration shall be allowed in exchange for a secondary assignment.

"(C) A bargain in which the tenant receives consideration to vacate the tenant's unit before the 12-month period ends so that the owner may use or occupy the unit shall constitute a willful violation of this paragraph.

"(d) Determining whether a tenant claims elderly or disability status. – (1)(A) An owner of a single-family accommodation may determine whether a tenant claims status as an elderly tenant or a tenant with a disability under this section by delivering to the tenant a written notice of intent to sell, demolish, or discontinue the housing use of the single-family accommodation before issuing an offer of sale.

"(B) The notice shall include a description of the rights and obligations of elderly tenants and tenants with disabilities under this section, and a list of organizations from which the tenant may seek help to exercise those rights.

"(2) The tenant shall have 20 days from the date of delivery of the notice to deliver to the owner, in writing, a response that states the tenant's status as an elderly tenant or a tenant with a disability.

"(3) An owner may not serve a tenant with notice of intent to sell, demolish, or discontinue the housing use of the single-family accommodation pursuant to this subsection more than 60 days before issuing the offer of sale.

"(4) Failure of the tenant to deliver to the owner a response to notice provided pursuant to paragraph (1) of this subsection in a timely manner shall be deemed a waiver of rights under this title.

"(e) Documentation of status as an elderly tenant or tenant with disability. – (1) A tenant who asserts rights under subsection (c) of this section shall deliver documentation of status as an elderly tenant or a tenant with a disability to the Mayor by the same date the tenant's written statement of interest is due to the owner.

"(2) The Mayor shall require the minimum documentation necessary to establish status as an elderly tenant or a tenant with a disability. Such documentation may include:

"(A) For elderly status, a passport, birth certificate, District-issued driver's license or identification card, or other such documentation the Rental Conversion and Sale Administrator deems sufficient to establish proof of age; or

"(B) For disability status, an award letter for disability benefits from the U.S. Social Security Administration, a letter from a physician stating that the tenant is a tenant with a disability, or other such documentation the Rental Conversion and Sale Administrator deems sufficient to establish proof of disability.

"(3) In determining whether a tenant qualifies as a tenant with a disability, the Mayor:

"(A) Shall limit the inquiry to the minimum information and documentation necessary to establish that the tenant meets the definition of a tenant with a disability under this act and shall not inquire further into the nature or severity of the disability; and

"(B) Shall not require the tenant to provide a description of the disability; provided, that the Mayor may require that a physician or other licensed healthcare professional

verify that the tenant meets the definition of a tenant with a disability under this act.

"(4)(A) The Mayor shall maintain records of the information compiled under this subsection and shall not disclose information about the disability of a tenant unless the disclosure is required by law.

"(B)(i) Within 30 days of receiving from a tenant documentation of status as an elderly tenant or tenant with a disability, the Mayor shall determine whether a tenant qualifies as an elderly tenant or a tenant with a disability.

"(ii) Upon the request of one of the following parties, the Mayor shall issue the determination as to whether the tenant qualifies as an elderly tenant or a tenant with a disability to the requesting party, who shall not share the determination with third parties except as necessary to facilitate the transfer of ownership of the single-family accommodation or to pursue rights under this act, unless otherwise authorized by the tenant:

"(I) Owner;

"(II) Tenant;

"(III) A title or settlement company that is conducting a closing on the transfer of ownership of the single-family accommodation; or

"(IV) A real estate agent representing the owner in the sale of the single-family accommodation.

"(5) The Mayor's timeframe for determining a tenant's status pursuant to this subsection shall run concurrently with other timeframes in this section.

"(f) Documentation. – (1) A document delivered pursuant to this section shall be delivered by:

"(A) First-class mail;

"(B) A delivery service providing delivery tracking confirmation;

"(C) Certified mail; or

"(D) Hand.

"(2) Within 10 days of the initiation of delivery, copies of all documents delivered to a tenant, owner, or OTA pursuant to subsections (c) or (d) of this section shall be delivered to the Mayor with written evidence of the date of delivery of the original document.

"(3)(A) The Mayor shall date stamp copies of all documents received pursuant to this subsection.

"(B) Upon the request of one of the following parties, the Mayor shall provide written confirmation of receipt or non-receipt of any document required to be delivered to the Mayor pursuant to this subsection to the requesting party:

"(i) Owner;

"(ii) Tenant;

"(iii) A title or settlement company that is conducting a closing on the transfer of ownership of the single-family accommodation; or

"(iv) A real estate agent representing the owner in the sale of the single-family accommodation.

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"(g) No tenant who occupies a rental unit pursuant to subsection (c)(6) of this section may be evicted pursuant to section 501(d), (e), (g), (h), (i), or (j) of the Rental Housing Act of 1985, effective July 17, 1985 (D.C. Law 6-10; D.C. Official Code § 42-3505.01(d), (e), (g), (h), (i), or (j)), during the 12-month period of occupancy following the sale of the single-family accommodation.".

(e) Section 410 (D.C. Official Code § 42-3404.10) is amended by striking the phrase "The following provisions apply to accommodations with 2 through 4 units:" and inserting the phrase "The following provisions apply to accommodations with 2 through 4 units, other than 2-unit single-family accommodations:" in its place.

(f) Section 412 (D.C. Official Code § 42-3404.12) is amended by striking the phrase "409(3)" and inserting the phrase "409(c)(5)" in its place.

Sec. 3. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report 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. 4. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

Chairman
Council of the District of Columbia

Mayor
District of Columbia

APPROVED
May 7, 2018

ENROLLED ORIGINAL

AN ACT

D.C. ACT 22-340

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 7, 2018

To amend the District of Columbia Government Quick Payment Act of 1984 to require that any contract awarded by a District agency include a standard contract clause obligating the contractor to include a dispute-resolution clause in any contract that it enters into with a subcontractor; and to amend the Procurement Practices Reform Act of 2010 to require that certain District government contracts be solicited through the electronic procurement system operated and maintained by the Chief Procurement Officer, to require that certain District government procurement solicitations be linked to via a single publicly accessible Internet webpage, and to require the Mayor to maintain a publicly available website that provides information regarding payments made to contractors by agencies that manage financial transactions through systems maintained by the Chief Financial Officer and allows for electronic invoicing by such agencies.

BE IT ENACTED BY THE COUNCI L OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Accessible and Transparent Procurement Amendment Act of 2018".

Sec. 2. Section 3(d) of the District of Columbia Government Quick Payment Act of 1984, effective March 15, 1985 (D.C. Law 5-164; D.C. Official Code § 2-221.02(d)), is amended as follows:

(a) Paragraph (2) is amended by striking the word "and" at the end.

(b) Paragraph (3) is amended by striking the period and inserting a semicolon in its place.

(c) Paragraph (4)(C) is amended by striking the period at the end and inserting the phrase "; and" in its place.

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

"(5) A dispute-resolution clause that obligates the contractor to include in any subcontract a provision that would require the contractor, at the election of the subcontractor, to participate in negotiation or mediation as an alternative to administrative or judicial resolution of a dispute.".

Sec. 3. The Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code § 2-351.01 *et seq.*), is amended as follows:

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(a) Section 401 (D.C. Official Code § 2-354.01) is amended by adding a new subsection (c) to read as follows:

"(c)(1) To the maximum extent practicable, each District government agency subject to the provisions of this act pursuant to section 105(a) shall solicit each contract in an amount in excess of $100,000, not including contracts for goods or services obtained pursuant to the District of Columbia Supply Schedule, through the electronic procurement system operated and maintained by the Chief Procurement Officer pursuant to section 204(b)(9).

"(2) Paragraph (1) of this subsection shall not apply to an agency that continues to employ the same electronic procurement system that it operated or maintained as of April 10, 2018; provided, that the agency shall comply with paragraph (1) of this subsection upon the expiration of the useful life of such system; provided further, that the agency may operate and maintain such system, but shall not expend any funds to upgrade or improve such system or acquire a new system.".

(b) Section 1104(b) (D.C. Official Code § 2-361.04(b)) is amended as follows:

(1) Paragraph (2) is amended to read as follows:

"(2)(A) A webpage with links to each District government website containing active solicitations for goods or services in an amount in excess of $100,000, including websites maintained by District agencies exempt from the authority of the CPO.

"(B) Each website linked to by the webpage provided for in subparagraph (A) of this paragraph shall provide clear instructions on how to respond electronically to each solicitation, unless a solicitation cannot be responded to electronically, in which case the website shall provide clear instructions on how to respond to the solicitation through non-electronic means.".

(2) Paragraph (6) is repealed.

(c) A new section 1104a is added to read as follows:

"Sec. 1104a. Vendor portal.

"(a) The Mayor shall establish and maintain on the Internet a publicly accessible website containing a portal which shall, at a minimum:

"(1) Show payments made by the District of Columbia government to contractors, searchable by purchase order number, invoice number, check number, voucher number, or any combination of the aforementioned necessary to identify a particular payment; and

"(2) Allow for electronic submission of invoices to the District by a contractor.

"(b) The website may require registration to view payments to contractors shown pursuant to subsection (a)(1) of this section, but such registration shall not require the viewer to supply any identifying information except for the viewer's name, email address, and password.

"(c) This section shall apply to payments made by, and invoices submitted to, any agency that manages financial transactions through systems maintained by the Chief Financial Officer.".

Sec. 4. Applicability.

(a) Section 1104a(a)(2) of the Procurement Practices Reform Act of 2010, effective April

8, 2011 (D.C. Law 18-371; D.C. Official Code § 2-351.01 *et seq.*), as added by section 3(c), shall apply upon the date of inclusion of its fiscal effect in an approved budget and financial plan.

(b) The Chief Financial Officer shall certify the date of the inclusion of the fiscal effect in an approved budget and financial plan, and provide notice to the Budget Director of the Council of the certification.

(c)(1) The Budget Director shall cause the notice of the certification to be published in the District of Columbia Register.

(2) The date of publication of the notice of the certification shall not affect the applicability of section 1104a(a)(2) of the Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code § 2-351.01 *et seq.*).

Sec. 5. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report 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 act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

Chairman
Council of the District of Columbia

Mayor
District of Columbia

APPROVED
May 7, 2018

ENROLLED ORIGINAL

AN ACT

D.C. ACT 22-341

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 7, 2018

To establish a subrogation fund for the District.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Subrogation Fund Establishment Act of 2018".

Sec. 2. Subrogation Fund.

(a) There is established as a special fund the Subrogation Fund ("Fund"), which shall be administered by the Chief Risk Officer in accordance with subsections (c) and (d) of this section.

(b) Revenue from the following sources shall be deposited in the Fund:

(1) Funds appropriated for the Fund; and

(2) Revenue arising from subrogation claims brought by or on behalf of the Chief Risk Officer, including revenue arising from subrogation claims referred by the Chief Risk Officer to the Office of the Attorney General for prosecution; provided, that before deposit of such revenue into the Fund in fiscal years 2018 through 2021, the following sums arising from subrogation claims in fiscal years 2018 through 2021 shall be deposited first into the General Fund of the District of Columbia:

(A)$310,000 in Fiscal Year 2018;

(B) $315,000 in Fiscal Year 2019;

(C) $322,000 in Fiscal Year 2020; and

(D) $328,000 in Fiscal Year 2021.

(c) Money in the Fund shall be used for the following purposes:

(1) To repair and replace District property damaged or destroyed by the actions or negligence of persons who caused such damage or destruction;

(2) To pay for the costs of administering the subrogation functions of the Office of Risk Management; and

(3) To pay for the costs incurred by the Office of the Attorney General in the prosecution of subrogation claims referred to it by the Chief Risk Officer and collection of judgments on such claims.

(d)(1) The money deposited into the Fund shall not revert to the unrestricted fund balance of the General Fund of the District of Columbia at the end of a fiscal year, or at any other time.

(2) Subject to authorization in an approved budget and financial plan, any funds appropriated in the Fund shall be continually available without regard to fiscal year limitation.

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(e) The Chief Risk Officer, pursuant to Title I of the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1204; D.C. Official Code § 2-501 *et seq.*), may issue rules to implement the provisions of this section.

(f) For the purposes of this section, the term:

(1) "Chief Risk Officer" means the director of the Office of Risk Management established by Reorganization Plan No. 1 of 2003, effective December 15, 2003 (50 DCR 7298; D.C. Official Code § 1-1518.01).

(2) "Subrogation" means the right of the District to pursue claims against persons who caused loss or damage to the District.

Sec. 4. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report 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. 5. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

Chairman
Council of the District of Columbia

Mayor
District of Columbia

APPROVED
May 7, 2018

ENROLLED ORIGINAL

AN ACT

D.C. ACT 22-342

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 7, 2018

To amend the District of Columbia Medical Liability Captive Insurance Agency Establishment Act of 2008 to authorize the Captive Insurance Agency to procure liability, personal property, and other insurance policies for the District to reduce the risk of loss.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Captive Insurance Agency Amendment Act of 2018".

Sec. 2. The District of Columbia Medical Liability Captive Insurance Agency Establishment Act of 2008, effective July 18, 2008 (D.C. Law 17-196; D.C. Official Code § 1-307.81 *et seq.*), is amended as follows:

(a) Section 2 (D.C. Official Code § 1-307.81) is amended as follows:

(1) Paragraph (4A) is redesignated as paragraph (4B).

(2) A new paragraph (4A) is added to read as follows:

"(4A) "District personal property asset" means property, other than a District real property asset, that is owned by the District.".

(3) Paragraph (8A) is redesignated as paragraph (8B).

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

"(8A) "Liability insurance" means an insurance policy that pays, or renders a service on behalf of, the insured for losses arising out of a legal liability to others.".

(5) Paragraph (9A) is redesignated as paragraph (9B) and amended to read as follows:

"(9B) "Real property insurance" means an insurance policy that protects against risks to real property such as earthquakes, floods, acts of terrorism, fire, boiler or machinery failures, business interruptions, pollution, debris removal, and weather damage.".

(6) A new paragraph (9A) is added to read as follows:

"(9A) "Personal property insurance" means an insurance policy that protects against risks to personal property.".

(b) Section 3(b)(2) (D.C. Official Code § 1-307.82(b)(2)) is amended to read as follows:

"(2) Procure real property insurance for District real property assets, personal property insurance for District personal property assets, liability insurance to protect the District

against loss arising out of a legal liability to others, and such other insurance policies as the Risk Officer determines necessary to minimize risk of loss to the District.".

(c) Section 4(a)(4A) (D.C. Official Code § 1-307.83(a)(4A)) is amended to read as follows:

"(4A) Procure policies of real property insurance, personal property insurance, and liability insurance to reduce the risk of loss to the District.".

(d) Section 6(i)(2A) (D.C. Official Code § 1-307.85(i)(2A)) is amended to read as follows:

"(2A) Assess the needs and interests of the District with respect to procuring insurance through the Agency.".

(e) Section 8(b)(4A) (D.C. Official Code § 1-307.87(b)(4A)) is repealed.

(f) Section 11(a) (D.C. Official Code § 1-307.90(a)) is amended to read as follows:

"(a) The Agency shall offer health centers medical malpractice insurance that is consistent with coverage offered in the market.".

(g) Section 12 (D.C. Official Code § 1-307.91) is amended by striking phrase "Sec. 12. Establishment of the Medical Liability Captive Trust Fund." and inserting the phrase "Sec. 12. Establishment of the Captive Trust Fund." in its place.

(h) A new section 13a is added to read as follows:

"Sec. 13a. Construction.

"Nothing in this act shall be construed to limit or constitute a waiver of the District's sovereign immunity or common-law defenses to claims that may be covered by insurance.".

(i) Section 16a is redesignated as section 15a.

Sec. 3. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report 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. 4. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of congressional review as

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provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

Chairman
Council of the District of Columbia

Mayor
District of Columbia
APPROVED
May 7, 2018

ENROLLED ORIGINAL

AN ACT

D.C. ACT 22-343

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 7, 2018

To amend the Fiscal Year 2018 Budget Support Act of 2017, the District of Columbia Government Comprehensive Merit Personnel Act of 1978, the Early Childhood and School-Based Behavioral Health Infrastructure Act of 2012, the Clean and Affordable Energy Act of 2008, the Homeland Security, Risk Reduction, and Preparedness Amendment Act of 2006, the Protecting Pregnant Workers Fairness Act of 2014, the Healthy Schools Act of 2010, the District of Columbia Real Estate Deed Recordation Tax Act, Title 47 of the District of Columbia Official Code, the Marion S. Barry Summer Youth Employment Expansion Amendment Act of 2016, the Fiscal Year 2018 Budget Support Clarification Temporary Amendment Act of 2017, the Uniform Per Student Funding Formula for Public Schools and Public Charter Schools Act of 1998, and Title 5-E of the District of Columbia Municipal Regulations to clarify provisions supporting the Fiscal Year 2018 budget; to provide funding for the collective bargaining agreement between the District of Columbia Public Schools and the Washington Teachers' Union and additional funding to District of Columbia public charter schools; and to authorize certain one-time payments to District of Columbia public charter schools.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Fiscal Year 2018 Budget Support Clarification Amendment Act of 2018".

TITLE I. BUDGET SUPPORT ACT CLARIFICATIONS

Sec. 101. The District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1-601.01 *et seq.*), is amended as follows:

(a) Section 2605 (D.C. Official Code § 1-626.05) is amended as follows:

(1) Paragraph (2) is amended by striking the phrase "; and" and inserting a semicolon in its place.

(2) Paragraph (3) is amended by striking the phrase "Internal Revenue Code." and inserting the phrase "Internal Revenue Code, for employer contributions on behalf of an employee pursuant to section 2609(c); and" in its place.

(3) A new paragraph (4) is added to read as follows:

"(4) A defined contribution plan pursuant to section 401(a) of the Internal Revenue Code, for employer contributions on behalf of an employee pursuant to section 2609(e).".

(b) Section 2609 (D.C. Official Code § 1-626.09) is amended as follows:

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

"(b) Each employee may voluntarily contribute to the deferred compensation plan under section 2605(2) in amounts not exceeding the limits set by section 457 of the Internal Revenue Code.".

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

"(e) On behalf of each employee of the Council, the Office of the District of Columbia Auditor, and the Office of Advisory Neighborhood Commissions participating in the deferred compensation plan established by section 2605(2), the District shall contribute to the defined contribution plan established by section 2605(4) each pay period an amount equal to that employee's contribution pursuant to subsection (b) of this section for that pay period; provided, that the District's contribution pursuant to this subsection on behalf of an employee in any pay period shall not exceed 3% of the employee's base salary during that pay period.".

(c) Section 2610 (D.C. Official Code § 1-626.10) is amended by adding a new subsection (e) to read as follows:

"(e) The District's contributions to the defined contribution plan under section 2605(4) and the earnings on the District's contributions for each employee shall vest immediately.".

Sec. 102. Section 203(b)(2) of the Early Childhood and School-Based Behavioral Health Infrastructure Act of 2012, effective June 7, 2012 (D.C. Law 19-141; D.C. Official Code § 2-1517.32(b)(2)), is amended as follows:

(a) Subparagraph (A) is amended by striking the phrase "designee;" and inserting the phrase "designee, to co-chair the task force;" in its place.

(b) Subparagraph (P) is amended by striking the phrase "members." and inserting the phrase "members, to co-chair the task force." in its place.

Sec. 103. Section 210(c) of the Clean and Affordable Energy Act of 2008, effective October 22, 2008 (D.C. Law 17-250; D.C. Official Code § 8-1774.10(c)), is amended as follows:

(a) Paragraph (9) is amended by striking the phrase "; and" and inserting a semicolon in its place.

(b) Paragraph (10) is amended by striking the period at the end and inserting the phrase "; and" in its place.

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

"(11) For the fiscal year beginning October 1, 2017 and ending September 30, 2018, supporting DOEE activities in the amount of $242,412.".

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Sec. 104. Section 501 of the Homeland Security, Risk Reduction, and Preparedness Amendment Act of 2006, effective March 14, 2007 (D.C. Law 16-262; D.C. Official Code § 22-4251), is amended as follows:

(a) Subsection (a) is amended by striking the phrase "report on the most effective elements of a comprehensive plan that would lead to the elimination of homicide in the District of Columbia." and inserting the phrase "report on successful violence prevention and intervention strategies that can be used to eliminate homicides in the District of Columbia." in its place.

(b) Subsection (b)(2) and (3) is amended to read as follows:

"(2) Of the 20 representatives, 10 shall be appointed by the Mayor and 10 shall be appointed by the Chairman of the Council no later than 60 days after October 1, 2017.

"(3) The Mayor and the Chairman of the Council shall each designate a co-chair of the Task Force, one each from the government and non-government sectors.".

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

"(c) No later than June 1, 2019, the Task Force shall hold at least 3 public meetings and shall submit the report required in subsection (a) of this section to the Mayor and the Council.".

(d) Subsection (d) is repealed.

Sec. 105. The Protecting Pregnant Workers Fairness Act of 2014, effective March 3, 2015 (D.C. Law 20-168; D.C. Official Code § 32-1231.01 *et seq.*), is amended as follows:

(a) Section 8(b)(3)(B) (D.C. Official Code § 32-1231.07(b)(3)(B)) is amended by striking the phrase "examiner at set forth" and inserting the phrase "examiner as set forth" in its place.

(b) Section 9(b) (D.C. Official Code § 32-1231.08(b)) is amended by striking the phrase "a determination of an independent hearing examiner" and inserting the phrase "a final decision of the Director" in its place.

Sec. 106. Section 102(c)(6) of the Healthy Schools Act of 2010, effective July 27, 2010 (D.C. Law 18-209; D.C. Official Code § 38-821.02(c)(6)), is amended to read as follows:

"(6) To increase physical activity in schools, the Office of the State Superintendent of Education shall make grants available, subject to the availability of funds in the Fund, through a competitive process or a formula grants process to public schools, public charter schools, or organizations that provide technical assistance to public schools and public charter schools to increase the amount of physical activity in schools; provided, that a school receiving a grant award shall seek to meet the requirements of section 402, and seek to increase the amount of physical activity in which its students engage.".

Sec. 107. The District of Columbia Real Estate Deed Recordation Tax Act, approved March 2, 1962 (76 Stat. 11; D.C. Official Code § 42-1101 *et seq.*), is amended as follows:

(a) Section 301 (D.C. Official Code § 42-1101) is amended as follows:

(1) Paragraph (16) is amended by striking the phrase "an individual who has never owned eligible property" and inserting the phrase "an individual purchaser who has never owned improved residential real property or an economic interest in a cooperative unit that qualified for the homestead deduction provided pursuant to D.C. Official Code § 47-850 or § 47-850.01" in its place.

(2) Paragraph (17) is amended to read as follows:

"(17) The phrase "eligible property" means improved residential real property, including an economic interest in a cooperative unit, purchased at an amount not to exceed the purchase ceiling of $625,000 (adjusted annually beginning with real property tax year 2019 by the addition to the prior purchase ceiling of an amount equal to the percentage increase in the Washington, D.C., Standard Metropolitan Statistical Area Consumer Price Index for All Urban Consumers for the preceding calendar year in which the real property tax year begins, rounded to the next lowest multiple of $500), that qualifies for the homestead deduction provided pursuant to D.C. Official Code § 47-850 or § 47-850.01; and the phrase also includes within the purchase ceiling all other real property conveyed on the same deed.".

(b) Section 303 (D.C. Official Code § 42-1103) is amended as follows:

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

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

"(1) Beginning October 1, 2017, for eligible property purchased by a first-time District homebuyer, the rate of tax provided in subsections (a) and (a-4) of this section shall be reduced as follows; provided, that the requirements of paragraph (2) of this subsection are met; provided further, that the entire benefit of the reduced recordation tax rate shall be allocated to the grantees of the eligible property, as shown on the settlement statement or closing disclosure form:

"(A) To 0.725% for a deed of title; or

"(B) For an economic interest in a cooperative unit:

"(i) To 1.825% when consideration allocable to the real property is less than $400,000; or

"(ii) To 2.175% when consideration allocable to the real property is $400,000 or greater.".

(B) Paragraph (2) is amended to read as follows:

"(2)(A) To be eligible for the reduced recordation tax rate provided by this subsection, the applicant for the reduced rate shall, at the time the deed is offered for recordation:

"(i) Certify that the applicant is a first-time District homebuyer and is a bona fide District of Columbia resident;

"(ii) Provide proof that the combined federal adjusted gross income, as shown on all the owners' and household members' federal income tax returns originally due or filed immediately before (if filed before the original due date) the deed is offered for recordation, is no higher than 180% of the Area Median Income as provided before the beginning of the real property tax year (and effective for such tax year) by the United States

Department of Housing and Urban Development as a direct calculation without taking into account any adjustment;

"(iii) Provide proof that the real property to be purchased is eligible property; and

"(iv) Submit a copy of the homestead deduction application for the eligible property, signed by the applicant.

"(B) For purposes of subparagraph (A)(ii) of this paragraph, the term "household" excludes any tenant occupying a separate dwelling unit under a written lease for fair market value.".

(C) Paragraph (3) is amended to read as follows:

"(3) The Mayor or the Chief Financial Officer of the District of Columbia may require the applicant to provide such documentation as may be necessary or appropriate to substantiate entitlement to the reduced rate of tax provided under this subsection.".

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

"(g) Notwithstanding subsection (c) of this section and D.C. Official Code § 47-4421, any subsequent deficiency of recordation tax determined to be owed on a deed taxed at the rate provided under subsection (e) of this section when the deed was accepted for recordation shall be the liability of the grantee or grantees solely and shall not create a lien on the real property that was transferred under such deed.".

Sec. 108. Chapter 22 of Title 47 of the District of Columbia Official Code is amended as follows:

(a) The table of contents is amended by adding a new section designation to read as follows:

"47-2202.03. Additional tax on gross receipts for transient lodgings or accommodations.".

(b) A new section 47-2202.03 is added to read as follows:

"§ 47-2202.03. Additional tax on gross receipts for transient lodgings or accommodations.

"(a) A tax, separate from, and in addition to, the taxes imposed pursuant to §§ 47-2202 and 47-2202.01 is imposed at the rate of 0.3% on the use, storage, or consumption of any room or rooms, lodgings, or accommodations furnished to a transient by any hotel, inn, tourist camp, tourist cabin, or any other place in which rooms, lodgings, or accommodations are regularly furnished to transients.

"(b) Vendors engaging in the business activities listed in this section and purchasers of the vendors' tangible personal property and services shall pay the tax at the rate of 0.3% of the gross receipts for the sale or charges for any room or rooms, lodgings, or accommodations furnished to a transient by any hotel, inn, tourist camp, tourist cabin, or any other place in which rooms, lodgings, or accommodations are regularly furnished to transients.

"(c) If the occupancy of a room or rooms, lodgings, or accommodations is reserved, booked, or otherwise arranged for by a room remarketer, the tax imposed by this section shall be determined based on the net charges and additional charges by the room remarketer.

"(d) The tax revenue receipted pursuant to this section shall be dedicated to the Washington Convention and Sports Authority, for transfer to Destination DC for the purposes of marketing and promoting the District of Columbia as a destination. Any tax revenue dedicated pursuant to this subsection shall be in addition to the funds dedicated to Destination DC pursuant to § 10-1202.08a.".

Sec. 109. Section 3 of the Marion S. Barry Summer Youth Employment Expansion Amendment Act of 2016, effective May 12, 2016 (D.C. Law 21-112; 63 DCR 4326), is repealed.

Sec. 110. (a) Chapter 35 of Title 5-E of the District of Columbia Municipal Regulations is amended as follows:

(1) Section 3503.5 is amended by striking the phrase "that school." and inserting the phrase "that school, unless a later time has been arranged." in its place.

(2) Section 3504 is amended as follows:

(A) Subsection 3504.5 is amended to read as follows:

"3504.5 Use of public school buildings and grounds pursuant to a use agreement shall be granted only when the use is without cost to the Board of Education or when the costs are reimbursed to the Board of Education by other agencies of the District government; provided, that:

"(a) The Superintendent of Schools for short-term use agreements and the Board of Education for long-term use agreements may accept in-kind services to the School System in lieu of all or part of the custodial, utility, and operational expenses attendant to providing the space; and

"(b)(1) A civic association may use a school for a regularly scheduled meeting at no charge; provided, that those attending the meeting vacate the building no later than fifteen (15) minutes before the end of the regular shift of the engineer/custodian charged with the responsibility of closing the school, unless a later time has been arranged.

"(2) For the purposes of this subsection, the term "civic association" means:

"(A) A nonprofit association, corporation, or other organization that is:

"(i) Comprised primarily of residents of the community within which the school to be used is located;

"(ii) Operated for the promotion of social welfare and general neighborhood improvement and enhancement; and

"(iii) Exempt from taxation under section 501(c)(3) or (4) of the Internal Revenue Code of 1986, approved August 16, 1954 (68A Stat. 163; 26 U.S.C. § 501(c)(3), (4)), or a member of the D.C. Federation of Civic Associations or the Federation of Citizens Associations of the District of Columbia; or

"(B) A nonprofit association, corporation, or other organization that is:

"(i) Comprised primarily of residents of a contiguous community that is defined by specific geographic boundaries, within which the school to be used is located; and

"(ii) Operated for the promotion of the welfare, improvement, and enhancement of that community.".

(B) Subsection 3504.16 is amended as follows:

(i) Paragraph (g) is amended by striking the phrase "A description of the costs" and inserting the phrase "Except where costs are waived pursuant to § 3504.5, a description of the costs" in its place.

(ii) Paragraph (h) is amended by striking the phrase "; and" and inserting the phrase "; provided, that the Mayor may waive liability insurance requirements for a civic association; and" in its place.

(b) Sections 1152 and 1153 of the Fiscal Year 2018 Budget Support Act of 2017, effective December 13, 2017 (D.C. Law 22-33; 64 DCR 7652), are repealed.

(c) Section 109 of the Fiscal Year 2018 Budget Support Clarification Temporary Amendment Act of 2017, effective January 25, 2018 (D.C. Law 22-44; 64 DCR 12387), is repealed.

TITLE II. WASHINGTON TEACHERS' UNION AGREEMENT AND PUBLIC CHARTER SCHOOLS FUNDING

Sec. 201. The Uniform Per Student Funding Formula for Public Schools and Public Charter Schools Act of 1998, effective March 26, 1999 (D.C. Law 12-207; D.C. Official Code § 38-2901 *et seq.*), is amended as follows:

(a) Section 104 (D.C. Official Code § 38-2903) is amended by striking the phrase "$9,972 per student for Fiscal Year 2018" and inserting the phrase "$10,257 per student for Fiscal Year 2018" in its place.

(b) Section 105 (D.C. Official Code § 38-2904) is amended by striking the tabular array and inserting the following tabular array in its place:

"

"Grade Level	Weighting	Per Pupil Allocation in FY 2018
"Pre-Kindergarten 3	1.34	$13,744
"Pre-Kindergarten 4	1.30	$13,334
"Kindergarten	1.30	$13,334
"Grades 1-5	1.00	$10,257
"Grades 6-8	1.08	$11,078

"Grades 9-12	1.22	$12,514
"Alternative program	1.44	$14,770
"Special education school	1.17	$12,001
"Adult	0.89	$9,129

.".

(c) Section 106(c) (D.C. Official Code § 38-2905(c)) is amended to read as follows:

"(c) The supplemental allocations shall be calculated by applying weightings to the foundation level as follows:

"Special Education Add-ons:

"Level/ Program	Definition	Weighting	Per Pupil Supplemental Allocation FY 2018
"Level 1: Special Education	Eight hours or less per week of specialized services	0.97	$9,949
"Level 2: Special Education	More than 8 hours and less than or equal to 16 hours per school week of specialized services	1.20	$12,308
"Level 3: Special Education	More than 16 hours and less than or equal to 24 hours per school week of specialized services	1.97	$20,206
"Level 4: Special Education	More than 24 hours per week of specialized services, which may include instruction in a self-contained (dedicated) special education school other than residential placement	3.49	$35,797

"Special Education Compliance	Weighting provided in addition to special education level add-on weightings on a per-student basis for Special Education compliance.	0.069	$708
"Attorney's Fees Supplement	Weighting provided in addition to special education level add-on weightings on a per-student basis for attorney's fees.	0.089	$913
"Residential	D.C. Public School or public charter school that provides students with room and board in a residential setting, in addition to their instructional program	1.67	$17,129

"General Education Add-ons:

"Level/ Program	Definition	Weighting	Per Pupil Supplemental Allocation FY 2018
"ELL	Additional funding for English Language Learners.	0.49	$5,026
"At-risk	Additional funding for students in foster care, who are homeless, on TANF or SNAP, or behind grade level.	0.219	$2,246

"Residential Add-ons:

"Level/ Program	Definition	Weighting	Per Pupil Supplemental Allocation FY 2018

"Level 1: Special Education - Residential	Additional funding to support the after-hours level 1 special education needs of students living in a D.C. Public School or public charter school that provides students with room and board in a residential setting	0.368	$3,775
"Level 2: Special Education - Residential	Additional funding to support the after-hours level 2 special education needs of students living in a D.C. Public School or public charter school that provides students with room and board in a residential setting	1.337	$13,714
"Level 3: Special Education - Residential	Additional funding to support the after-hours level 3 special education needs of students living in a D.C. Public School or public charter school that provides students with room and board in a residential setting	2.891	$29,653
"Level 4: Special Education - Residential	Additional funding to support the after-hours level 4 special education needs of limited and non-English proficient students living in a D.C. Public School or public charter school that provides students with room and board in a residential setting	2.891	$29,653

"LEP/NEP - Residential	Additional funding to support the after-hours limited and non-English proficiency needs of students living in a D.C. Public School or public charter school that provides students with room and board in a residential setting	0.668	$6,852

"Special Education Add-ons for Students with Extended School Year ("ESY") Indicated in Their Individualized Education Programs ("IEPs"):

"Level/ Program	Definition	Weighting	Per Pupil Supplemental Allocation FY 2018
"Special Education Level 1 ESY	Additional funding to support the summer school or program need for students who require extended school year (ESY) services in their IEPs	0.063	$646
"Special Education Level 2 ESY	Additional funding to support the summer school or program need for students who require extended school year (ESY) services in their IEPs	0.227	$2,328
"Special Education Level 3 ESY	Additional funding to support the summer school or program need for students who require extended school year (ESY) services in their IEPs	0.491	$5,036
"Special Education Level 4 ESY	Additional funding to support the summer school or program need for students who require	0.491	$5,036

	extended school year (ESY) services in their IEPs		

.".

Sec. 202. Chapter 3 of Title 47 of the District of Columbia Official Code is amended as follows:

(a) The table of contents is amended by adding a new section designation to read as follows:

"47-368.07. Workforce Investments account.".

(b) A new section 47-368.07 is added to read as follows:

"§ 47-368.07. Workforce Investments account.

"(a) The Workforce Investments account ("Account") shall be administered by the Mayor in accordance with subsections (b) and (c) of this section.

"(b) Money in the Account shall be used for the following purposes only:

"(1) Costs related to financial, developmental, and other investments in the District government workforce, including salary increases or other items required by the terms of collective bargaining agreements and cost-of-living adjustments to salaries and hourly wages;

"(2) Payments to public charter schools authorized by section 204 of the Fiscal Year 2018 Budget Support Clarification Amendment Act of 2018, passed on 2nd reading on April 10, 2018 (Enrolled version of Bill 22-466); and

"(3) For such other expressed purposes for which funds previously may have been deposited into the account.

"(c)(1) The money deposited into the Account shall not revert to the unrestricted fund balance of the General Fund of the District of Columbia at the end of a fiscal year, or at any other time.

"(2) Subject to authorization in an approved budget and financial plan, any funds appropriated in the Account shall be continually available without regard to fiscal year limitation.".

Sec. 203. The Fiscal Year 2018 Budget Support Act of 2017, effective December 13, 2017 (D.C. Law 22-33; 64 DCR 7652), is amended as follows:

(a) Section 4003(b) is amended to read as follows:

"(b) For District of Columbia Public Schools, no more than $30,200,000 of the Fiscal Year 2018 increase to the Uniform Per Student Funding Formula foundation level over the Fiscal Year 2017 foundation level, effectuated by section 4002, shall be used in Fiscal Year 2018 to satisfy compensation terms required by a collective bargaining agreement that becomes effective in Fiscal Year 2018.".

(b) Section 7102 is amended as follows:

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

(A) The lead-in language is amended as follows:

(i) Strike the phrase "if local revenues" and insert the phrase "the portion of local revenues" in its place.

(ii) Strike the phrase "estimate exceed the" and insert the phrase "estimate that exceeds the" in its place.

(iii) Strike the phrase "for Fiscal Year 2018, these additional revenues" and insert the phrase "for Fiscal Year 2018 ("additional revenues")" in its place.

(B) Paragraph (1) is amended as follows:

(i) Strike the phrase "50% to the Workforce Investments account," and insert the phrase "Pursuant to subsection (b)(1) under the heading "Revised Revenue Estimate Contingency Priority" in the Fiscal Year 2018 Local Budget Act of 2017, effective August 29, 2017 (D.C. Law 22-16; 64 DCR 6581), 50% of the additional revenues to the Workforce Investments account" in its place.

(ii) Strike the phrase "which shall be available to fund salary increases or other items required by the terms of collective bargaining agreements that will become effective in Fiscal Year 2018; and" and insert the phrase "; and" in its place.

(C) Paragraph (2) is amended to read as follows:

"(2) Pursuant to subsection (b)(2) under the heading "Revised Revenue Estimate Contingency Priority" in the Fiscal Year 2018 Local Budget Act of 2017, effective August 29, 2017 (D.C. Law 22-16; 64 DCR 6581), 50% of the additional revenues as follows:

"(A) $24.175 million in recurring additional revenues to the General Fund of the District of the Columbia ("offset"), which shall offset in an equal amount a dedication of general sales tax revenue to the capital improvements program ("CIP") that in turn will be dedicated to the Washington Metropolitan Area Transit Authority ("WMATA"), in accordance with subsections (b) and (c) of this section; and

"(B) All remaining additional revenues to the Workforce Investments account.".

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

"(b) Revenue from general sales tax imposed by section 47-2002(a) of the District of Columbia Official Code at the rate of 5.75% ("general sales tax") in an amount equal to the recurring revenue in the offset shall become a dedicated tax ("dedicated tax") for use in the CIP.".

(3) Subsection (c) is amended by striking the phrase "(b)(1)(A)" both times it appears and inserting the phrase "(b)" in its place.

Sec. 204. Payments to public charter schools.

In Fiscal Year 2018, each public charter school, as that term is defined in section 102(9) of the Uniform Per Student Funding Formula for Public Schools and Public Charter Schools Act of 1998, effective March 26, 1999 (D.C. Law 12-207; D.C. Official Code § 38-2901(9)) ("UPSFF Act"), that received Fiscal-Year-2017-based uniform per student funding formula

("UPSFF") payments shall receive a payment in Fiscal Year 2018 in an amount equal to the difference between the total sum of Fiscal-Year-2017-based UPSFF payments that the public charter school received and the total sum of Fiscal-Year-2017-based UPSFF payments that the public charter school would have received if:

(1) The foundation level set forth in section 104 of the UPSFF Act (D.C. Official Code § 38-2903) for Fiscal Year 2017 were $9,885;

(2) The per-pupil allocations for Fiscal Year 2017 set forth in section 105 of the UPSFF Act (D.C. Official Code § 38-2904) were adjusted to reflect a foundation level of $9,885;

(3) The per-pupil supplemental allocations set forth in section 106(c) of the UPSFF Act (D.C. Official Code § 38-2905(c)) were adjusted to reflect a foundation level of $9,885; and

(4) The at-risk allocations described in section 106a of the UPSFF Act (D.C. Official Code § 38-2905.01) were calculated based on a foundation level of $9,885.

TITLE III. APPLICABILITY; FISCAL IMPACT; EFFECTIVE DATE

Sec. 301. Applicability.

This act shall apply as of October 1, 2017.

Sec. 302. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report 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. 303. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of congressional review as

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provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

Chairman
Council of the District of Columbia

Mayor
District of Columbia
APPROVED
May 7,2018

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AN ACT

D.C. ACT 22-344

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 7, 2018

To amend the District of Columbia Long-Term Care Ombudsman Program Act of 1988 to establish an Office of the Long-Term Care Ombudsman within the Office on Aging, to prohibit certain individuals from serving as the ombudsman, and to clarify the responsibilities of the ombudsman.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Long-Term Care Ombudsman Program Amendment Act of 2018".

Sec. 2. The District of Columbia Long-Term Care Ombudsman Program Act of 1988, effective March 16, 1989 (D.C. Law 7-218; D.C. Official Code § 7-701.01 *et seq.*), is amended as follows:

(a) Section 101 (D.C. Official Code § 7-701.01) is amended as follows:

(1) Subsections (a), (b), (c), (d), (e), (f), (g), (j), (k), (l), (m), and (n) are redesignated as paragraphs (1), (2), (3), (4), (5), (6), (7), (10), (11), (12), (13), and (14), respectively.

(2) The newly designated paragraph (5) is amended as follows:

(A) Paragraph (1) is redesignated as subparagraph (A).

(B) Paragraph (2) is redesignated as subparagraph (B).

(3) The newly designated paragraph (7) is amended as follows:

(A) Paragraph (1) is redesignated as subparagraph (A).

(B) Paragraph (2) is redesignated as subparagraph (B).

(4) Paragraph (7A) is amended by striking the phrase "means services" and inserting the phrase "means services and supports" in its place.

(5) A new paragraph (7B) is added to read as follows:

"(7B) "Office" means the Office of the Long-Term Care Ombudsman established by section 202, including the ombudsman and any employees or volunteers designated by the ombudsman to fulfill the duties set forth in 45 C.F.R. § 1324.19(a).".

(6) Subsection (h) is redesignated as paragraph (9) and is amended to read as follows:

"(9) "Ombudsman" means the individual responsible for administering the Long-Term Care Ombudsman Program established by section 201.".

(7) Subsection (i) is redesignated as paragraph (8).

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(8) The newly designated paragraph (12) is amended as follows:

(A) Paragraph (1) is redesignated as subparagraph (A).

(B) Paragraph (2) is redesignated as subparagraph (B).

(9) The newly designated paragraph (14) is amended as follows:

(A) Paragraph (1) is redesignated as subparagraph (A).

(B) Paragraph (2) is redesignated as subparagraph (B).

(C) Paragraph (3) is redesignated as subparagraph (C).

(b) Section 201 (D.C. Official Code § 7-702.01) is amended by striking the phrase "District of Columbia within the Office on Aging. The program shall" and inserting the phrase "District of Columbia. The program shall" in its place.

(c) Section 202 (D.C. Official Code § 7-702.02) is amended as follows:

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

"(a)(1) There is established within the Office on Aging the Office of the Long-Term Care Ombudsman, which shall be headed by the ombudsman. Except as provided in subsection (b) of this section, the ombudsman shall be appointed by the Director. The ombudsman shall administer the Program in coordination with the Director or his or her designee.

"(2) The ombudsman shall be appointed for a term of 2 years and shall be a resident of the District.".

(2) Subsection (b) is amended by striking the phrase "and residents." and inserting the phrase "and residents. Before contracting with a nonprofit provider, the Director shall ensure that the provider does not have organizational conflicts in accordance with 45 C.F.R. § 1324.21(b)(3)." in its place.

(3) Subsection (d) is amended by striking the phrase "The primary responsibility" and inserting the phrase "In addition to the functions set forth in 45 C.F.R. § 1324.13, the primary responsibility" in its place.

(d) Section 203 (D.C. Official Code § 7-702.03) is amended as follows:

(1) Subsection (b) is amended by striking the phrase "shall be an ombudsman" and inserting the phrase "shall be appointed or employed as the ombudsman" in its place.

(2) New subsections (b-1) and (b-2) are added to read as follows:

"(b-1) No person who has been directly involved in the licensing or certification of any long-term care facility shall be appointed or employed as the ombudsman.

"(b-2) No person who has been employed by or participated in the management of a long-term care facility within the previous 12 months shall be appointed or employed as the ombudsman.".

(e) Section 204(a) (D.C. Official Code § 7-702.04(a)) is amended as follows:

(1) Paragraph (4) is amended to read as follows:

"(4) By January 1, 2019, and on an annual basis thereafter, submit the report described in 45 C.F.R. § 1324.13(g);".

(2) Paragraph (5) is amended by striking the phrase "on behalf of the Office on Aging and with the approval of the Director" and inserting the phrase "as necessary" in its place.

(3) Paragraph (12) is amended to read as follows:

"(12) Monitor, analyze, and make recommendations regarding the development and implementation of District and federal laws, rules, regulations, and other governmental policies and actions pertaining to the health, safety, welfare, and rights of residents;".

(4) Paragraph (13) is amended to read as follows:

"(13) Make specific recommendations to the operator or agent of the operator of any long-term care facility, whenever the ombudsman believes that conditions exist that adversely affect residents' health, safety, welfare, or rights, in accordance with the disclosure requirements set forth in section 712g(d) of the Older Americans Act of 1965, approved September 30, 1992 (106 Stat. 1195; 42 U.S.C. § 3058g(d)), and 45 C.F.R. § 1324.11(e)(3));".

(5) Paragraph (14) is amended by striking the phrase "District law, regulation, or rule;" and inserting the phrase ""District law, regulation, or rule, in accordance with the disclosure requirements set forth in section 712g(d) of the Older Americans Act of 1965, approved September 30, 1992 (106 Stat. 1195; 42 U.S.C. § 3058g(d)), and 45 C.F.R. § 1324.11(e)(3);" in its place.

(6) Paragraph (16) is amended to read as follows:

"(16) Provide ongoing support as requested by residents and family councils to protect the well-being and rights of residents;".

(7) Paragraph (18) is amended by striking the word "and".

(8) Paragraph (19) is amended by striking the period and inserting the phrase "; and" in its place.

(9) A new paragraph (20) is added to read as follows:

"(20) Perform any other acts required by 45 C.F.R. §§ 1324.13 and 1324.19.".

Sec. 3. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report 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. 4. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of congressional review as

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provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

Chairman
Council of the District of Columbia

Mayor
District of Columbia
APPROVED
May 7, 2018

ENROLLED ORIGINAL

AN ACT

D.C. ACT 22-345

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 7, 2018

To amend the Telehealth Reimbursement Act of 2013 to expand the scope of reimbursable telehealth services covered by Medicaid, to clarify that all categories of Medicaid recipients are eligible for telehealth services, to establish eligibility and prior authorization requirements for remote patient monitoring services, to require operational standards and establish conditions of payment for remote patient monitoring services, to establish fees for remote patient monitoring services, to establish facility fees for telehealth services, to require the Mayor to seek the approval of the Centers for Medicare and Medicaid Services for any amendments to the District's Medicaid State Plan necessary to implement the act, and to require the Department of Health Care Finance to issue rules.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Telehealth Medicaid Expansion Amendment Act of 2018".

Sec. 2. The Telehealth Reimbursement Act of 2013, effective October 17, 2013 (D.C. Law 20-26; D.C. Official Code § 31-3861 *et seq.*), is amended as follows:

(a) Section 2 (D.C. Official Code § 31–3861) is amended to read as follows:

"Sec. 2. Definitions.

"For the purposes of this act, the term:

"(1) "Asynchronous store and forward" means the transmission of a patient's medical information via a telecommunications system from an originating site to a provider at a distant site.

"(2) "Department" means the Department of Health Care Finance

"(3) "Department of Behavioral Health certified provider" shall have the same meaning as the term "core services agency" as provided in section 102(3) of the Department of Mental Health Establishment Amendment Act of 2001, effective December 18, 2001 (D.C. Law 14-56; D.C. Official Code § 7-1131.02(3)). .

"(4) "Distant site" means a site where a provider is located while delivering health care services to a patient through telehealth, and shall include a:

"(A) Hospital, nursing facility, federally qualified health center, or clinic;

"(B) Physician or nurse practitioner group;

"(C) Physician or nurse practitioner office;

"(D) District of Columbia public school or District of Columbia public charter school;

"(E) Department of Behavioral Health certified provider, home care agency, or hospice; or

"(F) Other locations as determined by the Director of the Department through rules issued pursuant to section 4e.

"(5) "Facility fee" means the reimbursement issued by the Department to an originating site for health care services delivered through telehealth.

"(6) "Federally qualified health center" shall have the same meaning as provided in section 1861(aa)(4) of the Social Security Act, approved August 14, 1935 (79 Stat. 313; 42 U.S.C. § 1395x(aa)(4)).

"(7) "Health benefits plan" shall have the same meaning as provided in section 2(4) of the Prompt Pay Act of 2002, effective July 23, 2002 (D.C. Law 14-176; D.C. Official Code § 31-3131(4)).

"(8) "Health insurer" shall have the same meaning as provided in section 2(5) of the Prompt Pay Act of 2002, effective July 23, 2002 (D.C. Law 14-176; D.C. Official Code § 31-3131(5)).

"(9) "Home care agency" shall have the same meaning as provided in section 2(a)(7) of the Health-Care and Community Residence Facility, Hospice and Home Care Licensure Act of 1983, effective February 24, 1984 (D.C. Law 5-48; D.C. Official Code § 44-501(a)(7)).

"(10) "Hospice" shall have the same meaning as provided in section 2(a)(6) of the Health-Care and Community Residence Facility, Hospice and Home Care Licensure Act of 1983, effective February 24, 1984 (D.C. Law 5-48; D.C. Official Code § 44-501(a)(6)).

"(11) "Hospital" shall have the same meaning as provided in section 2(a)(1) of the Health-Care and Community Residence Facility, Hospice and Home Care Licensure Act of 1983, effective February 24, 1984 (D.C. Law 5-48; D.C. Official Code § 44-501(a)(1)).

"(12) "Medication adherence management services" means the monitoring of a patient's conformance with a provider's medication plan with respect to timing, dosing, and frequency of medication-taking through telehealth.

"(13) "Nursing home" shall have the same meaning as provided in section 2(a)(3) of the Health-Care and Community Residence Facility, Hospice and Home Care Licensure Act of 1983, effective February 24, 1984 (D.C. Law 5-48; D.C. Official Code § 44-501(a)(3)).

"(14) "Originating site" means a site where a patient is located at the time health care services are delivered through telehealth, and shall include a:

"(A) Hospital, nursing home, federally qualified health center, or clinic;

"(B) Physician or nurse practitioner group;

"(C) Physician or nurse practitioner office;

"(D) District of Columbia public school or District of Columbia public charter school;

"(E) Department of Behavioral Health certified provider, home care agency, hospice, or university health center;

"(F) Patient's home; or

"(G) Other locations as determined by the Director of the Department through rules issued pursuant to section 4e.

"(15) "Provider" shall have the same meaning as provided in section 2(7) of the Prompt Pay Act of 2002, effective July 23, 2002 (D.C. Law 14-176; D.C. Official Code § 31-3131(7)).

"(16) "Remote patient monitoring services" means the collection and transmission of personal health information and medical data from a patient at an originating site to a provider at a distant site for use in the treatment and management of chronic medical conditions.

"(17) "Synchronous interaction" means a real-time interaction between a patient at an originating site and a provider at a distant site.

"(18) "Telehealth" means the delivery of health care services, including services provided via synchronous interaction and asynchronous store-and-forward, through the use of interactive audio, video, or other electronic media used for the purpose of diagnosis, consultation, remote patient monitoring, or treatment. The term "telehealth" shall not include services delivered through audio-only telephones, electronic mail messages, or facsimile transmissions.

(b) Section 4 (D.C. Official Code § 31–3863) is amended as follows:

(1) Designate the existing text as subsection (a).

(2) The newly designated subsection (a) is amended to read as follows:

"(a) Medicaid shall cover and reimburse for health care services delivered through telehealth if:

"(1) The health care services are covered when delivered in person; or

"(2) The health care services are covered under the District's Medicaid State Plan and any implementing regulations, including:

"(A) Evaluation, consultation, and management;

"(B) Behavioral health care services, including psychiatric evaluation and treatment, psychotherapies, substance abuse assessment, and counseling;

"(C) Diagnostic, therapeutic, interpretative, and rehabilitation services;

"(D) Medication adherence management services;

"(E) Remote patient monitoring, subject to prior authorization by the Department; and

"(F) Any other service as authorized by the Director of the Department through rules issued pursuant to section 4e.".

(3) New subsections (b), (c), and (d) are added to read as follows:

"(b) Reimbursements issued to a provider at a distant site for professional services shall not be shared with a referring provider at an originating site.

"(c) To be eligible for Medicaid reimbursement pursuant to this act, a telehealth provider shall utilize the reimbursement codes designated for telehealth by the Department.

"(d) All Medicaid recipients, including individuals who receive services on either a fee for service basis or through a health benefit plan provided by a health insurer under contract with the Department shall be eligible to receive health care services delivered through telehealth, pursuant to this act.".

(c) New sections 4a, 4b, 4c, 4d, and 4e are added to read as follows:

"Sec. 4a. Remote patient monitoring service providers; payment.

"(a) A provider engaged in the provision of remote patient monitoring services delivered through telehealth shall establish protocols governing the:

"(1) Authentication and authorization of patients;

"(2) Process for monitoring, tracking, and responding to changes in a patient's clinical condition;

"(3) Acceptable and unacceptable parameters for a patient's clinical condition;

"(4) Response of monitoring staff to abnormal parameters of a patient's vital signs, symptoms, or lab results;

"(5) Process for notifying the patient's provider of significant changes in the patient's clinical condition;

"(6) Prevention of unauthorized access to the provider's information-technology systems;

"(7) Provider's compliance with the security and privacy requirements of the Health Insurance Portability and Accountability Act of 1996, approved August 21, 1996 (110 Stat. 1936; 42 U.S.C. § 1320d *et seq.*);

"(8) Storage, maintenance, and transmission of patient information;

"(9) Synchronization and verification of patient data, as appropriate; and

"(10) Notification of the patient's discharge from remote patient monitoring services.

"(b) To receive payment for remote patient monitoring services delivered through telehealth, a provider shall:

"(1) Assess and monitor a patient's clinical data, including appropriate vital signs, pain levels, other biometric measures specified in the plan of care, and the patient's response to prior changes in the plan of care;

"(2) Assess changes, if any, in the condition of the patient observed during the course of remote patient monitoring that may indicate the need for a change in the plan of care; and

"(3) Develop and implement a patient plan addressing:

"(A) Management and evaluation of the plan of care, including changes in visit frequency or addition of other health care services;

"(B) Coordination of care regarding telehealth findings; and

"(C) Coordination and referral to other providers, as needed.

"(c) The equipment used by a provider to deliver remote patient monitoring services through telehealth shall:

"(1) Be maintained in good repair and kept free from safety hazards;

"(2) Be newly purchased or, if previously used, sanitized before installation in the patient's home;

"(3) Accommodate non-English language options; and

"(4) Provide technical and clinical support services to the patient user.

"Sec. 4b. Right to synchronous interaction.

"(a) A patient receiving asynchronous store and forward health care services delivered through telehealth shall have the right to interact with a provider via synchronous interaction.

"(b) Providers shall give notice of the right described in subsection (a) of this section to a patient at the time the asynchronous store and forward health care services are delivered through telehealth.

"(c) If, for any reason, the provider is unable to provide a patient with a synchronous interaction within 30 days of the patient's request for such, the provider shall not be reimbursed for any asynchronous store and forward health care services delivered through telehealth that were previously provided to the patient.

"Sec. 4c. Facility fees.

"(a) For health care services delivered through telehealth during the period between October 1, 2018, and October 1, 2019, an originating site shall receive a payment from the Department equivalent to the lesser of the reimbursement paid by the Department to a provider or the originating site facility fee of $25.

"(b) Beginning October 2, 2019, the facility fee for the originating site shall be determined in accordance with the Medicare Economic Index, as determined by the United States Centers for Medicaid and Medicaid Services.

"(c) A distant site provider shall not bill for or receive payment for facility fees associated with health care services delivered through telehealth.

"(d) A provider of remote patient monitoring services shall not be eligible to receive facility fees.

"Sec. 4d. Federal authorization.

"By January 1, 2019, the Mayor shall seek the approval of the United States Department of Health and Human Services, Centers for Medicare and Medicaid Services for any amendments to the Medicaid State Plan necessary to implement this act.

"Sec. 4e. Rules.

Within 180 days after the effective date of the Telehealth Medicaid Expansion Amendment Act of 2018, passed on 2nd reading on April 10, 2018 (Enrolled version of Bill 22-233), the Mayor, pursuant to Title I of the District of Columbia Administrative Procedure Act,

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approved October 21, 1968 (82 Stat. 1204; D.C. Official Code § 2-501 *et seq.*), shall issue rules to implement the provisions of this act.".

Sec. 3. Applicability.

(a) This act shall apply upon the date of inclusion of its fiscal effect in an approved budget and financial plan.

(b) The Chief Financial Officer shall certify the date of the inclusion of the fiscal effect in an approved budget and financial plan, and provide notice to the Budget Director of the Council of the certification.

(c)(1) The Budget Director shall cause the notice of the certification to be published in the District of Columbia Register.

(2) The date of publication of the notice of the certification shall not affect the applicability of this act.

Sec. 4. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report 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. 5. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

Chairman
Council of the District of Columbia

UNSIGNED

Mayor
District of Columbia

May 7, 2018

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ENROLLED ORIGINAL

A RESOLUTION

22-481

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

May 1, 2018

To declare that the District-owned real property located at 1125 Spring Road, N.W., and known for tax and assessment purposes as Lots 0804 and 0807 in Square 2902, is no longer required for public purposes.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "1125 Spring Road, N.W., Surplus Property Declaration Resolution of 2018".

Sec. 2. Findings.

(a) The District is the owner of the real property located at 1125 Spring Road, N.W., known for tax and assessment purposes as Lots 0804 and 0807 in Square 2902 ("Property"). The Property consists of approximately 144,400 square feet of land.

(b) The Property is no longer required for public purposes because the Property's condition cannot viably accommodate a District agency use or other public use without cost-prohibitive renovation. The most pragmatic solution for reactivating this space is to declare the Property surplus and dispose of the Property for redevelopment.

(c) The District has satisfied the public hearing requirements of section 1(b-5) 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-5)) ("Act"), by holding a public hearing on July 27, 2017, at the Raymond Recreation Center, located at 3725 10th Street, N.W.

Sec. 3. Pursuant to section 1(a-1) of the Act, the Council determines that the Property is no longer required for public purposes.

Sec. 4. Transmittal.

The Council shall transmit a copy of this resolution, upon its adoption, to the Mayor.

Sec. 5. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report 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

22-482

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

May 1, 2018

To approve the disposition of District-owned real property located at 1125 Spring Road, N.W., known for tax and assessment purposes as Lots 0804 and 0807 in Square 2902.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "1125 Spring Road, N.W., Disposition Approval Resolution of 2018".

Sec. 2. Definitions.

For the purposes of this resolution, the term:

(1) "Act" means An Act Authorizing the sale of certain real estate in the District of Columbia no longer required for public purposes, approved August 5, 1939 (53 Stat. 1211; D.C. Official Code § 10-801 *et seq.*).

(2) "CBE Act" means the Small and Certified Enterprise Development and Assistance Act of 2005, effective October 20, 2005 (D.C. Law 16-33; D.C. Official Code § 2-218.01 *et seq.*).

(3) "Certified Business Enterprise" means a business enterprise or joint venture certified pursuant to the CBE Act.

(4) "Developer" means Spring Flats MD, LLC, a District of Columbia limited liability company, with a business address of 11400 Rockville Pike, Suite 505, Rockville, Maryland 20852, or its successors, affiliates, or assignees, comprised of Victory Housing, Inc., a Maryland nonprofit corporation, with a business address of 11400 Rockville Pike, Suite 505, Rockville, Maryland 20852, or its successors, affiliates, or assignees, Brinshore Development, LLC, an Illinois limited liability company, with a business address of 666 Dundee Road, Suite 1102, Northbrook, Illinois, 60062, or its successors, affiliates, or assignees, and Banc of America Community Development Corporation, a North Carolina corporation, with a business address of One Bryant Park, New York, New York, 10036, or its successors, affiliates, or assignees, as approved by the Mayor.

(5) "First Source Agreement" means an agreement with the District governing certain obligations of the Developer pursuant to section 4 of the First Source Employment

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Agreement Act of 1984, effective June 29, 1984 (D.C. Law 5-93; D.C. Official Code § 2-219.03), and Mayor's Order 83-265, dated November 9, 1983, regarding job creation and employment generated as a result of the construction on the Property.

(6) "Project" means a residential development project, including adaptive preservation of the historic Hebrew Home for the Aged, affordable housing, market-rate housing, and any ancillary uses allowed under applicable law, and as further described in the term sheet submitted with this resolution, in accordance with section 1(b-1) of the Act.

(7) "Property" means the real property located at 1125 Spring Road, N.W., known for tax and assessment purposes as Lots 0804 and 0807 in Square 2902.

Sec. 3. Findings

(a) The property consists of a trapezoidal shaped lot, approximately 144,400 square feet in total land area, improved by the historic Hebrew Home for the Aged, a fire-proofed utility and chiller building, the former Paul Robeson School, a parking lot, and the adjacent portion of 10th Street, N.W.

(b) The intended use of the Property is residential development as further described in section 2(6).

(c) The Developer shall comply with the requirements of the Act.

(d) The Developer shall enter into an agreement that shall require Developer to, at a minimum, contract with Certified Business Enterprises for at least 35% of the contract dollar volume of the Project and shall require at least 20% equity and 20% development participation of Certified Business Enterprises in the Project, in accordance with section 2349 of the CBE Act and section 1(b)(6) of the Act.

(e) The Developer shall enter into a First Source Agreement.

(f) The proposed method of disposition is a lease of greater than 15 years pursuant to section 1(b)(8)(C) of the Act, as further described in the documents submitted to the Council with this resolution, in accordance with section 1(b-1) of the Act.

(g) The District has satisfied the public hearing requirements of section 1(b-5) of the Act.

(h) The Land Disposition Agreement for the disposition of the real property shall not be inconsistent with the substantive business terms of the transaction submitted by the Mayor with this resolution in accordance with section 1(b-1)(2) of the Act, unless revisions to those substantive business terms are approved by Council.

Sec. 4. Approval of disposition.

(a) Pursuant to the Act, the Mayor transmitted to the Council a request for approval of the disposition of the Property to the Developer.

(b) The Council approves the disposition of the Property.

Sec. 5. Transmittal.

The Council shall transmit a copy of this resolution, upon its adoption, to the Mayor.

Sec. 6. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report 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. 7. Effective date.

This resolution shall take effect immediately.

ENROLLED ORIGINAL

A RESOLUTION

22-483

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

May 1, 2018

To declare the sense of the Council that the Congress of the United States must pass the Equality Act without delay to ensure that federal civil rights laws are fully inclusive of protections against discrimination based on sex, gender identity, and sexual orientation in employment, housing, credit, public accommodations, federally funded programs, and federal jury service.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Sense of the Council Supporting Passage of the Equality Act Resolution of 2018".

Sec. 2. The Council finds that:

(1) Women and LGBTQ individuals commonly experience discrimination, harassment, and violence in many facets of their lives, and such mistreatment is often more egregious for certain demographics, such as women of color and transgender individuals.

(2) The District is committed to eradicating discrimination in all its forms.

(3) The District has one of the strongest and most comprehensive state human rights acts in the country.

(4) The Human Rights Act of 1977, effective December 13, 1977 (D.C. Law 2-38; D.C. Official Code § 2-1401.01 *et seq*.), covers 20 protected traits and explicitly prohibits discrimination based on sex, gender identity or expression, and sexual orientation.

(5) Twenty-two other states prohibit discrimination in employment and housing based on sexual orientation and 20 states prohibit discrimination in employment and housing based on gender identity. Twenty-one other states prohibit discrimination in public accommodations based on sexual orientation and 19 states prohibit discrimination in public accommodations based on gender identity.

(6) This patchwork of state laws breeds confusion, creates vulnerability, and inhibits participation in public life.

(7) On May 2, 2017, the Equality Act was introduced in the House of Representatives (H.R. 2282) by Representative David Cicilline (D-RI) and in the Senate (S. 1006) by Senators Jeff Merkley (D-OR), Tammy Baldwin (D-WI), and Cory Booker (D-NJ). The Equality Act was introduced with 241 original cosponsors — including Congressmember

Eleanor Holmes Norton — the most congressional support that any piece of pro-LGBTQ legislation has received upon introduction.

(8) The Equality Act would amend existing federal civil rights laws, including the Civil Rights Act of 1964, the Fair Housing Act, and the Equal Credit Opportunity Act, and jury selection standards to explicitly add gender identity and sexual orientation to the traits protected against discrimination in employment, housing, credit, public accommodations, federally funded programs (including education), and federal jury service. The bill also prohibits discrimination based on sex in public places like restaurants, stores, banks, health care providers, and transportation, and in all federally funded programs and activities.

(9) The Equality Act is currently pending in the House Judiciary Committee's Subcommittee on the Constitution and Civil Justice and in the Senate Judiciary Committee.

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

(1) Individuals have the right to live free from discrimination in all aspects of their lives, including in employment, education, housing, credit, public accommodations, federally funded programs, and federal jury service; and

(2) Congress must pass the Equality Act without further delay to ensure that federal civil rights laws are fully inclusive of protections from discrimination based on sex, gender identity, and sexual orientation in employment, housing, credit, public accommodations, federally funded programs, and federal jury service.

Sec. 4. The Council shall transmit a copy of this resolution, upon its adoption, to the President of the United States, the Chair of the Senate Judiciary Committee, and the Chair of the House Judiciary Committee's Subcommittee on the Constitution and Civil Justice.

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

ENROLLED ORIGINAL

A RESOLUTION

22-484

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

May 1, 2018

To declare the sense of the Council in opposition to congressional action that would make the District less safe by imposing concealed carry reciprocity, thereby allowing people who are licensed to carry a concealed firearm in any state to carry their firearms in the District.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Sense of the Council in Opposition to Concealed Carry Reciprocity Resolution of 2018".

Sec. 2. The Council finds that:

(1) Every day in America, 318 people are shot, and 96 people die from gun violence, including 7 children and teenagers.

(2) Every year in America, 35,141 people die from gun violence, including from 12,246 murders and 21,637 suicides.

(3) Countries around the world, such as Australia, the United Kingdom, and Japan, have dramatically reduced gun deaths by enacting strong gun control laws. For every 100,000 people, there are approximately 12 firearms deaths per year in the United States, compared to only one in Australia, 0.2 in the United Kingdom, and none in Japan.

(4) In the District, in 2016, there were 19.7 homicides per 100,000 people, compared to a national rate of 5.3 murders per 100,000 people. The Metropolitan Police Department reported that 77% of the homicides in the District were by firearm.

(5) While the U.S. Supreme Court and the U.S. Court of Appeals for the District of Columbia Circuit have imposed some limits on the District's ability to regulate firearms, the District's gun control laws remain some of the strongest in the country.

(6) H.R. 38 and S. 446 have been introduced in Congress with the support of the National Rifle Association and President Donald Trump. Both bills, if passed into law, would undermine local law by allowing anyone who has a license to carry a concealed firearm in any state to carry a concealed firearm in every state, including the District.

(7) The U.S. Conference of Mayors, the American Bar Association, and cities across the country have adopted resolutions opposing H.R. 38, S. 446, and similar legislation before Congress, citing the deleterious impact on public safety such laws would cause.

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(8) In addition, Representative Thomas Massie (R-WV) introduced H.R. 2909, the D.C. Personal Protection Reciprocity Act, in the House of Representatives on June 15, 2017, to specifically impose concealed carry reciprocity on the District.

(9) Furthermore, Senator Marco Rubio (R-FL) introduced S. 162, the Second Amendment Enforcement Act of 2017, which would repeal the ban on semiautomatic firearms in the District and the firearm registration requirement in the D.C. Official Code. Representative Thomas Garrett (R-VA) introduced identical legislation, H.R. 1537, in the House of Representatives.

(10) The District has long suffered from the illegal transportation of firearms across its borders from surrounding jurisdictions and remains particularly vulnerable to gun violence.

(11) Concealed carry reciprocity would dramatically increase the number of firearms in the District, place unreasonable burdens on the District's law enforcement, and harm public safety. Moreover, repealing firearm regulations enacted by the duly-elected legislature of the District would undermine the will of District voters.

Sec. 3. It is the sense of the Council that members of Congress should oppose H.R. 38, S. 446, H.R. 2909, S. 162, H.R. 1537, and any similar legislation, and allow the District and other states to establish and maintain gun control measures that reflect the needs of each jurisdiction.

Sec. 4. The Council shall transmit a copy of this resolution, upon its adoption, to the Mayor, the President and Vice President of the United States, the Speaker of the U.S. House of Representatives, the Majority Leader of the U.S. Senate, and the Delegate to the House of Representatives from the District of Columbia.

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

ENROLLED ORIGINAL

A RESOLUTION

22-485

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

May 1, 2018

To confirm the reappointment of Ms. Linda Greenan to the Washington Convention and Sports Authority Board of Directors.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Washington Convention and Sports Authority Board of Directors Linda Greenan Confirmation Resolution of 2018".

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

Ms. Linda Greenan
2700 Virginia Avenue, N.W., Unit #303
Washington, D.C. 20037
(Ward 2)

as a public member with expertise in municipal finance to the Washington Convention and Sports Authority Board of Directors, established by section 205 of the Washington Convention Center Authority Act of 1994, effective September 28, 1994 (D.C. Law 10-188; D.C. Official Code § 10-1202.05), for a term to end May 16, 2022.

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

22-486

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

May 1, 2018

To confirm the appointment of Mr. George T. Simpson to the Washington Convention and Sports Authority Board of Directors.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Washington Convention and Sports Authority Board of Directors George T. Simpson Confirmation Resolution of 2018".

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

Mr. George T. Simpson
31 Bryant Street, N.W.
Washington, D.C. 20001
(Ward 5)

as a public member with expertise in business finance to the Washington Convention and Sports Authority Board of Directors, established by section 205 of the Washington Convention Center Authority Act of 1994, effective September 28, 1994 (D.C. Law 10-188; D.C. Official Code § 10-1202.05), for a term to end May 16, 2020.

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

22-487

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

May 1, 2018

To confirm the reappointment of Mr. Julio Jay Haddock Ortiz to the Washington Convention and Sports Authority Board of Directors.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Washington Convention and Sports Authority Board of Directors Julio Jay Haddock Ortiz Confirmation Resolution of 2018".

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

Mr. Julio Jay Haddock Ortiz
509 H Street, S.W.
Washington, D.C. 20024
(Ward 6)

as a public member with expertise in tourism to the Washington Convention and Sports Authority Board of Directors, established by section 205 of the Washington Convention Center Authority Act of 1994, effective September 28, 1994 (D.C. Law 10-188; D.C. Official Code § 10-1202.05), for a term to end May 16, 2022.

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

22-488

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

May 1, 2018

To declare the existence of an emergency with respect to the need to approve Modification Nos. 2, 3, and 4 to Contract No. CW46185 with Ramsell Corporation to provide a pharmacy benefit management system, and to authorize payment in the not-to-exceed amount of $2.5 million for the goods and services received and to be received under the modifications.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Modifications to Contract No. CW46185 Approval and Payment Authorization Emergency Declaration Resolution of 2018".

Sec. 2. (a) There exists an immediate need to approve Modification Nos. 2, 3, and 4 to Contract No. CW46185 with Ramsell Corporation to provide a pharmacy benefit management system, and to authorize payment in the not-to-exceed amount of $2.5 million for the goods and services received and to be received under the modifications.

(b) By Modification No. 2, dated June 6, 2017, the Office of Contracting and Procurement ("OCP"), on behalf of the Department of Health, exercised option year one of Contract No. CW46185, for the period from August 1, 2017, through July 31, 2018, in the amount of $900,000.

(c) By Modification No. 3, dated March 23, 2018, the OCP exercised an administrative modification.

(d) Modification No. 4 is now necessary to increase the not-to-exceed amount for option year one of Contract No. CW46185 to $2.5 million.

(e) Council approval is necessary because the modifications increase the contract value by more than $1 million during a 12-month period.

(f) Approval is necessary to allow the continuation of these vital services. Without this approval, Ramsell Corporation cannot be paid for the goods and services provided in excess of $1 million for the contract period of August 1, 2017, through July 31, 2018.

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 Modifications to Contract No. CW46185 Approval and Payment Authorization Emergency Act of 2018 be adopted after a single reading.

Sec. 4. This resolution shall take effect immediately.

ENROLLED ORIGINAL

A RESOLUTION

22-489

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

May 1, 2018

To declare the existence of an emergency with respect to the need to approve multiyear Contract No. DHCF-2017-C-0026 with KPMG LLP to manage and deliver software enhancements to the District of Columbia Access System.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Contract No. DHCF-2017-C-0026 Emergency Declaration Resolution of 2018".

Sec. 2. (a) The Office of Contracting and Procurement, on behalf of the Department of Health Care Finance, proposes to enter into multiyear Contract No. DHCF-2017-C-0026 with KPMG LLP to manage and deliver software enhancements to the District of Columbia Access System.

(b) The contract price under this multiyear contract with KPMG LLP is in the amount of $109.9 million.

(c) Approval is necessary to allow the District to receive the benefit of these vital services in a timely manner from KPMG LLP.

(d) These critical services can only be obtained through an award of the multiyear contract to KPMG LLP.

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 Contract No. DHCF-2017-C-0026 Emergency Approval Resolution of 2018 be adopted on an emergency basis.

Sec. 4. This resolution shall take effect immediately.

ENROLLED ORIGINAL

A RESOLUTION

22-490

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

May 1, 2018

To approve, on an emergency basis, multiyear Contract No. DHCF-2017-C-0026 with KPMG LLP to manage and deliver software enhancements to the District of Columbia Access System.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Contract No. DHCF-2017-C-0026 Emergency Approval Resolution of 2018".

Sec. 2. Pursuant to section 451(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 803; D.C. Official Code § 1-204.51(c)(3)), the Council approves multiyear Contract No. DHCF-2017-C-0026 with KPMG LLP to manage and deliver software enhancements to the District of Columbia Access System in the amount of $109.9 million.

Sec. 3. Transmittal.

The Council shall transmit a copy of this resolution, upon its adoption, to the Mayor.

Sec. 4. Fiscal impact statement.

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

Sec. 5. Effective date.

This resolution shall take effect immediately.

ENROLLED ORIGINAL

A RESOLUTION

22-491

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

May 1, 2018

To declare the existence of an emergency with respect to the need to approve Modification Nos. 020 and 021 to Contract No. DCFA-2015-C-2292SS/CW37092 with PFC Associates, LLC to provide occupational and ancillary healthcare services at the Police and Fire Clinic, and to authorize payment for the goods and services received and to be received under the modifications.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Modifications to Contract No. DCFA-2015-C-2292SS/CW37092 Approval and Payment Authorization Emergency Declaration Resolution of 2018".

Sec. 2. (a) There exists a need to approve Modification Nos. 020 and 021 to Contract No. DCFA-2015-C-2292SS/CW37092 with PFC Associates, LLC to provide occupational and ancillary healthcare services at the Police and Fire Clinic, and to authorize payment for the goods and services received and to be received under the modifications.

(b) By Modification No. 020, dated April 19, 2018, the Office of Contracting and Procurement, on behalf of the Metropolitan Police Department, extended the contract for the period from May 1, 2018, through May 21, 2018, in the total estimated amount of $941,573.67.

(c) Modification No. 021 is now necessary to extend the contract from May 1, 2018, through July 31, 2018, in the total estimated amount of $3,113,853, thereby increasing the total estimated amount for the period of May 1, 2018, through July 31, 2018, to $4,055,426.67.

(d) Council approval is required by section 451(b) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 803; D.C. Official Code § 1-204.51(b)), because the modifications increase the contract value by more than $1 million during a 12-month period.

(e) Approval is necessary to allow the continuation of these vital services. Without this approval, PFC Associates, LLC cannot be paid for the goods and services received and to be received in excess of $1 million for the period of May 1, 2018, through July 31, 2018.

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

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Modifications to Contract No. DCFA-2015-C-2292SS/CW37092 Approval and Payment Authorization Emergency Act of 2018 be adopted after a single reading.

Sec. 4. This resolution shall take effect immediately.

ENROLLED ORIGINAL

A RESOLUTION

22-492

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

May 1, 2018

To approve an agreement to enter into a long-term subsidy contract for 15 years in support of the District's Local Rent Supplement Program to fund housing costs associated with affordable housing units for Contract No. 2014-LRSP-09A with Texas Gardens Partners LLC for program units at MinnTex Apartments, located at 3500-3510 Minnesota Avenue, S.E., and 1741 28th Street, S.E.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Local Rent Supplement Program Contract No. 2014-LRSP-09A Approval Resolution of 2018".

Sec. 2. (a) In 2007, the District passed Title II of the Fiscal Year 2007 Budget Support Act of 2006 ("BSA") to provide funding for affordable housing for extremely low-income households in the District. The passage of the BSA created the Local Rent Supplement Program ("LRSP"), a program designed to provide affordable housing and supportive services to extremely low-income District residents, including those who are homeless or in need of supportive services, such as elderly individuals or those with disabilities, through project-based, tenant-based, and sponsored-based LRSP affordable housing units. The BSA provided for the District of Columbia Housing Authority ("DCHA") to administer the LRSP on behalf of the District.

(b) In 2014, the DCHA participated in a request for proposals issued by the District of Columbia Department of Housing and Community Development. Of the total proposals received, 11 developers were chosen to work with DCHA and other District agencies to develop affordable housing and permanent supportive housing units for extremely low-income families making zero to 30% of the area's median income, as well as the chronically homeless and individuals with mental or physical disabilities. Upon approval of the contract by the Council, DCHA will enter into an agreement to enter into a long-term subsidy contract ("ALTSC") with the selected housing providers under the LRSP for housing services.

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(c) There exists an immediate need to approve the long-term subsidy contract with Texas Gardens Partners LLC under the LRSP in order to provide long-term affordable housing units for extremely low-income households for units located at 3500-3510 Minnesota Avenue, S.E., and 1741 28th Street, S.E.

(d) The legislation to approve the contract will authorize an ALTSC between DCHA and Texas Gardens Partners LLC with respect to the payment of rental subsidy and allow the owner to lease the rehabilitated units at MinnTex Apartments and house the District of Columbia extremely low-income households with incomes at 30% or less of the area median income.

Sec. 3. Pursuant to section 451 of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 803; D.C. Official Code § 1-204.51), and section 202 of the Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code § 2-352.02), the Council approves the ALTSC with Texas Gardens Partners LLC to provide operating subsidy in support of 17 affordable housing units in an initial amount not to exceed $208,896 annually.

Sec. 4. Transmittal.

The Council shall transmit a copy of this resolution, upon its adoption, to the District of Columbia Housing Authority and the Mayor.

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

22-493

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

May 1, 2018

To declare the existence of an emergency with respect to the need to approve Change Order No. 6 to Contract No. DCAM-16-CS-0032 with MCN Build, Inc. for design-build services in connection with the modernization of Watkins Elementary School, and to authorize payment in the amount of $1,753,916 for the goods and services received under the change order.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Change Order to Contract No. DCAM-16-CS-0032 Approval and Payment Authorization Emergency Declaration Resolution of 2018".

Sec. 2 (a) There exists an immediate need to approve Change Order No. 6 to Contract No. DCAM-16-CS-0032 with MCN Build, Inc. for design-build services in connection with the modernization of Watkins Elementary School and authorize payment in the amount of $1,753,916 for the goods and services received under the change order.

(b) On July 1, 2016, Contract No. DCAM-16-CS-0032 was deemed approved by the Council as CA21-0423 in an initial not-to-exceed amount of $32 million.

(c) The Department of General Services subsequently submitted Change Order Nos. 1 through 5, in an aggregate amount of $6,356,819.20, which were collectively approved by the Council as D.C. Act 22-62, increasing the total contract amount to $38,356,819.20.

(d) Change Order No. 6, in the amount of $1,753,916, causes the aggregate value of the contract to increase to $40,110,735.20 for the goods and services already received.

(e) Because Change Order No. 6 exceeds $1 million, Council approval of Change Order No. 6 is now required pursuant to section 451 of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 803; D.C. Official Code § 1-204.51).

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 Change Order to Contract No. DCAM-16-CS-0032 Approval and Payment Authorization Emergency Act of 2018 be adopted after a single reading.

Sec. 4. This resolution shall take effect immediately.

ENROLLED ORIGINAL

A RESOLUTION

22-494

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

May 1, 2018

To declare the existence of an emergency with respect to the need to approve Modification No. 1 to an Enrollment Agreement with the Washington Metropolitan Area Transit Authority to provide transit benefits to adult learners, and to authorize payment for the services received and to be received under the modification.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Modification to an Enrollment Agreement with the Washington Metropolitan Area Transit Authority Approval and Payment Authorization Emergency Declaration Resolution of 2018".

Sec. 2. (a) There exists an immediate need to approve Modification No. 1 to an Enrollment Agreement with the Washington Metropolitan Area Transit Authority ("WMATA") to provide adult learners enrolled in qualified programs transit benefits to get to and from their learning centers.

(b) On December 21, 2017, the District Department of Transportation entered into an Enrollment Agreement with WMATA for $999,999 to cover adult learners transit subsidies for January, February, March, and April of 2018.

(c) Modification No. 1 to an Enrollment Agreement will add $988,001 to the Enrollment Agreement to cover adult learners transit subsidies for the rest of Fiscal Year 2018.

(d) With Modification No. 1, the total amount of the Enrollment Agreement would be $1,988,000.

(e) Council approval is necessary because the Enrollment Agreement is in excess of $1 million during a 12-month period.

(f) The Council authorized the Mayor to spend up to $1,988,000 on a program for students of adult learning programs to receive subsidies for the Metrorail and Metrobus Transit Systems in section 7122 of the Fiscal Year 2018 Budget Support Act of 2017, effective December 13, 2017 (D.C. Law 22-33; 64 DCR 7652).

(g) Council approval is necessary to allow the District to continue to provide adult learners transit subsidies to ride Metrorail and Metrobus Transit Systems to and from their learning centers.

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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 Modification to an Enrollment Agreement with the Washington Metropolitan Area Transit Authority Approval and Payment Authorization Emergency Act of 2018 be adopted after a single reading.

Sec. 4. This resolution shall take effect immediately.

ENROLLED ORIGINAL

A RESOLUTION

22-495

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

May 1, 2018

To declare the existence of an emergency with respect to the need to approve Modification Nos. 8, 9, and 10 to Contract No. DCKA-2013-C-0029 with Fort Myer Construction Corporation to provide continued sidewalk restoration and repair services, and to authorize payment for the goods and services received and to be received under the modifications.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Modifications to Contract No. DCKA-2013-C-0029 Approval and Payment Authorization Emergency Declaration Resolution of 2018".

Sec. 2. (a) There exists a need to approve Modification Nos. 8, 9, and 10 to Contract No. DCKA-2013-C-0029 with Fort Myer Construction Corporation to provide continued sidewalk restoration and repair services, and to authorize payment for the goods and services received and to be received under the modifications.

(b) By Modification No. 8, dated January 22, 2018, the Office of Contracting and Procurement, on behalf of the District Department of Transportation, partially exercised Option Year 4 of Contract No. DCKA-2013-C-0029 for the period from January 25, 2018, through May 31, 2018, in the amount of $0.

(c) Modification No. 9 was an administrative modification.

(d) Modification No. 10 is now necessary to exercise the remainder of Option Year 4 for the period from June 1, 2018, through January 24, 2019, in the not-to-exceed amount of $27.3 million, which will make the total not-to-exceed amount for Option Year 4 $27.3 million.

(e) Council approval is required by section 451(b) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 803; D.C. Official Code § 1–204.51(b)), because the modifications increase the contract by more than $1 million during a 12-month period.

(f) Approval is necessary to allow the continuation of these vital services. Without this approval, Fort Myer Construction Corporation cannot be paid for the goods and services provided in excess of $1 million for the contract period of June 1, 2018, through January 24, 2019.

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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 Modifications to Contract No. DCKA-2013-C-0029 Approval and Payment Authorization Emergency Act of 2018 be adopted after a single reading.

Sec. 4. This resolution shall take effect immediately.

ENROLLED ORIGINAL

A RESOLUTION

22-496

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

May 1, 2018

To declare the existence of an emergency with respect to the need to approve Modification Nos. 2, 3, and 4 to Contract No. DCKA-2016-C-0016 with Capitol Paving of D.C., Inc. to operate, maintain, and expand the existing regional Green Infrastructure Construction, and to authorize payment for the goods and services received and to be received under the modifications.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Modifications to Contract No. DCKA-2016-C-0016 Approval and Payment Authorization Emergency Declaration Resolution of 2018".

Sec. 2. (a) There exists a need to approve Modification Nos. 2, 3, and 4 to Contract No. DCKA-2016-C-0016 with Capitol Paving of D.C., Inc. to operate, maintain, and expand the existing regional Green Infrastructure Construction, and to authorize payment for the goods and services received and to be received under the modifications.

(b) By Modification No. 2, dated March 16, 2018, the Office of Contracting and Procurement ("OCP"), on behalf of the District Department of Transportation, partially exercised Option Year One of Contract No. DCKA-2016-C-0016 for the period from March 16, 2018, through April 15, 2018, in the not-to-exceed amount of $975,000.

(c) By Modification No. 3, dated April 16, 2018, the OCP extended the term of the partial option from April 16, 2018, to May 15, 2018, in the amount of $0.

(d) By proposed Modification No. 4, OCP now intends to exercise the remainder of Option Year One from May 16, 2018, through March 15, 2019, in the not-to-exceed amount of $9,639,350, thereby increasing the total not-to-exceed amount for Option Year One to $10,614,350.

(e) Council approval is necessary since these modifications increase the contract by more than $1 million during a 12-month period.

(f) Approval is necessary to allow the continuation of these vital services. Without this approval, Capitol Paving of D.C., Inc. cannot be paid for the goods and services provided in excess of $1 million for the contract period of March 16, 2018, through March 15, 2019.

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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 Modifications to Contract No. DCKA-2016-C-0016 Approval and Payment Authorization Emergency Act of 2018 be adopted after a single reading.

Sec. 4. This resolution shall take effect immediately.

ENROLLED ORIGINAL

A RESOLUTION

22-497

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

May 1, 2018

To declare the existence of an emergency with respect to the need to amend the Commission on the Arts and Humanities Act to establish the duration of specified terms for members of the commission for the purpose of maintaining the staggered expiration of terms required by the act.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Commission on the Arts and Humanities Emergency Declaration Resolution of 2018".

Sec. 2. (a) In 2017, the Council amended on an emergency and temporary basis section 203(b) of the Commission on the Arts and Humanities Act, effective October 21, 1975 (D.C. Law 1-22; D.C. Official Code § 39-203(b)), to reestablish the staggered format for the expiration of members' terms.

(b) The Commission on the Arts and Humanities Temporary Amendment Act of 2017, effective September 20, 2017 (D.C. Law 22-19; 64 DCR 7422) ("temporary legislation"), expires on May 3, 2018.

(c) Permanent legislation will not be law before the expiration of the temporary legislation.

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

Sec. 3. The Council of the District of Columbia determines that the circumstances enumerated in section 2 constitute emergency circumstances making it necessary that the Commission on the Arts and Humanities Emergency Amendment Act of 2018 be adopted after a single reading.

Sec. 4. This resolution shall take effect immediately.

ENROLLED ORIGINAL

A RESOLUTION

22-498

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

May 1, 2018

To declare the existence of an emergency with respect to the need to extend the hours of operation, sale, service, and consumption of alcoholic beverages for on-premises retailer license holders during the 2018 World Cup Tournament and the hours of operation, sale, service, and consumption of alcoholic beverages for on-premises retailers, manufacturers, and temporary license holders during the 2018 All-Star Game.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "2018 All-Star Game and World Cup Emergency Declaration Resolution of 2018".

Sec. 2. (a) Barring an exception, D.C. Official Code § 25-723(b) sets forth the hours of operation, sale, service, and consumption of alcoholic beverages for on-premises retailers and temporary license holders. Specifically, the law provides that an on-premises retailer's license or temporary license may sell or serve alcoholic beverages on any day and at any time except between 2:00 a.m. to 8:00 a.m., Monday through Friday, and 3:00 a.m. to 8:00 a.m., Saturday and Sunday, excluding District and federal holidays.

(b) Section 25-721(c) of the D.C. Official Code provides that a manufacturer may sell alcoholic beverages between the hours of 7:00 a.m. and midnight, Monday through Sunday.

(c) In the summer of 2018, 2 major sporting events will take place that are likely to yield significant revenue for the District of Columbia. First, the Fédération Internationale de Football Association will host the 2018 World Cup tournament in Russia. This event takes place every 4 years and is a Super Bowl-type sporting event for soccer fans. Russia is several hours ahead in time of the District of Columbia. Notwithstanding the time difference, local soccer fans are expected to watch the 2018 World Cup tournament regardless of the hour. To meet the demand, licensed establishments will likely want to amend their hours for this sporting event. To allow on-premise retailers to remain open for operation, sale, service, and consumption of alcoholic beverages during the hours of the World Cup tournament, as has been done previously, emergency action is necessary so that licensees can avail themselves of the extended hours.

(d) The second major sporting event will take place in the District of Columbia. The 2018 All-Star Game will take place in the District for the first time. The District anticipates that thousands of people will travel to the District for this event. This will lead to substantial revenues for the District. As with the World Cup tournament, licensed establishments will likely want to be able to operate, sell, serve, and allow for the consumption of alcoholic

ENROLLED ORIGINAL

beverages for a longer period of time during the event. To allow on-premise retailers, manufacturers, and temporary license holders to avail themselves of extended hours during the 2018 All-Star Game Tournament, emergency action is necessary.

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 2018 All-Star Game and World Cup Emergency Amendment Act of 2018 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

B22-804	Housing Conversion and Eviction Clarification Amendment Act of 2018 Intro. 5-1-18 by Councilmembers Allen, McDuffie, Bonds, and T. White and referred to the Committee on Housing and Neighborhood Revitalization
B22-805	Veterans Cyber Academy Pilot Program Act of 2018 Intro. 5-1-18 by Councilmember Todd and referred to the Committee on Government Operations
B22-806	Veterans Emergency Food Program Act of 2018 Intro. 5-1-18 by Councilmember Todd and referred to the Committee on Government Operations
B22-807	Medical Necessity Review Criteria Amendment Act of 2018 Intro. 5-1-18 by Councilmembers Gray, T. White, Grosso, and Evans and referred to the Committee on Health

B22-808	Baby-Friendly Hospital Initiative Act of 2018 Intro. 5-1-18 by Councilmembers Gray, McDuffie, Nadeau, Evans, and T. White and referred to the Committee on Health
B22-809	Eviction with Dignity Act of 2018 Intro. 5-1-18 by Councilmembers T. White and Bonds and referred to the Committee on Housing and Neighborhood Revitalization
B22-810	Appraisal Management Company Regulation Amendment Act of 2018 Intro. 5-1-18 by Chairman Mendelson and referred to the Committee of the Whole
B22-811	Housing Assistance Program for Unsubsidized Seniors Act of 2018 Intro. 5-1-18 by Chairman Mendelson and Councilmembers Bonds, McDuffie, and T. White and referred to the Committee on Housing and Neighborhood Revitalization

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 22-434, the "Targeted Historic Assistance Amendment Act of 2017"

on

Thursday, June 21, 2018
9:30 a.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 22-434,** the "Targeted Historic Assistance Amendment Act of 2017." The hearing will be held at 9:30 a.m. on Thursday, June 21, 2018 in room 412 of the John A. Wilson Building.

The stated purpose of **Bill 22-434** is to amend the Historic Landmark and Historic District Protection Act of 1978 to include the Emerald Street Historic District as a historic district eligible for the Targeted Homeowner Grant Program. The Emerald Street Historic District includes Emerald Street N.E. bounded by F Street N.E, E Street N.E., 13th Street N.E., and 14th Street N.E., in Ward 6. The Targeted Homeowner Grant Program helps preserve the affordability of housing for low- and moderate-income homeowners who reside in the city's historic districts by making non-taxable grants available for home repairs that have sometimes been left unattended for years due to lack of funds.

Those who wish to testify are asked to email the Committee of the Whole at cow@dccouncil.us, or call Sydney Hawthorne at (202) 724-7130, and to provide your name, address, telephone number, organizational affiliation and title (if any) by close of business **Tuesday, June 19, 2018.** Persons wishing to testify are encouraged, but not required, to submit 15 copies of written testimony. If submitted by the close of business on March 23, 2018 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. Hearing materials, including a draft witness list, can be accessed 24 hours in advance of the hearing at http://www.chairmanmendelson.com/circulation.

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 July 5, 2018.

Council of the District of Columbia
Committee on Government Operations
Notice of a Public Hearing

John A. Wilson Building 1350 Pennsylvania Avenue, NW, Suite 117 Washington, DC 20004

Councilmember Brandon T. Todd, Chair (*REVISED & ABBREVIATED*)
Committee on Government Operations
Announces a Public Hearing

on

B22-0522 - District Waterways Management Act of 2017

Wednesday, May 16, 2018, 2:30 PM
John A. Wilson Building, Room 500
1350 Pennsylvania Avenue, N.W.
Washington, DC 20004

Councilmember Brandon T. Todd announces the scheduling of a public hearing by the Committee on Government Operations on B22-522, the "District Waterways Management Act of 2017". The public hearing is scheduled for Wednesday, May 16, 2018 at 2:30 PM in Room 500 of the John A. Wilson Building, 1350 Pennsylvania Ave., NW, Washington, DC 20004. ***This notice has been revised and abbreviated to announce that B22-522 will be held at 2:30 PM in Room 500. Previously, B22-522 was scheduled to be held at 11 AM in Room 412.***

B22-522 establishes the District Waterways Management Office within the Office of the City Administrator and also establishes the District Waterways Management Commission. The Office's purpose will be to plan, manage, coordinate, promote, and advocate for the diverse uses of and access to the waterways and adjacent property. The Commission is required to develop and publish a District Waterways Management Action Plan by July 1, 2019.

Individuals and representatives of organizations who wish to testify at the public hearing are asked to contact Faye Caldwell of the Committee on Government Operations at (202) 724-6663 or by email at fcaldwell@dccouncil.us and provide their name(s), address, telephone number, email address, and organizational affiliation, if any, by close of business Tuesday, May 15, 2018. Each witness is requested to bring 20 copies of his/her written testimony. Representatives of organizations and government agencies will be limited to 5 minutes in order to permit each witness an opportunity to be heard. Individual witnesses will be limited to 3 minutes.

If you are unable to testify at the public hearing, written statements are encouraged and will be made a part of the official record. The official record will remain open until close of business Wednesday, May 30, 2018. Copies of written statements should be submitted to the Committee on Government Operations, Council of the District of Columbia, Suite 117 of the John A. Wilson Building, 1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004.

Council of the District of Columbia
Committee on Government Operations
Notice of a Public Hearing

John A. Wilson Building 1350 Pennsylvania Avenue, NW, Suite 117 Washington, DC 20004

Councilmember Brandon T. Todd, Chair
Committee on Government Operations
Announces a Public Hearing

on

B22-0574 - District of Columbia Paperwork Reduction and Data Collection Act of 2017
B22-0741 - Comprehensive Boards and Commissions Review Amendment Act of 2018

Wednesday, June 6, 2018, 10:00 A.M.
John A. Wilson Building, Room 412
1350 Pennsylvania Avenue, N.W.
Washington, DC 20004

Councilmember Brandon T. Todd announces the scheduling of a public hearing by the Committee on Government Operations on *B22-574, the "District of Columbia Paperwork Reduction and Data Collection Act of 2017"* and *B22-741, the "Comprehensive Boards and Commissions Review Amendment Act of 2018"*. The public hearing is scheduled for Wednesday, June 6, 2018 at 10:00 a.m. in Room 412 of the John A. Wilson Building, 1350 Pennsylvania Ave., NW, Washington, DC 20004.

B22-574 establishes a Data Sharing and Paperwork Advisory Council to improve efficiencies in data collection, information sharing, and information resources management to serve as an advisory body to the Mayor, the Council, and District agencies.

B22-741 amends the Governmental Reorganization Procedures Act of 1981 to require a comprehensive review of certain boards and commissions every 2 years.

Individuals and representatives of organizations who wish to testify at the public hearing are asked to contact Faye Caldwell of the Committee on Government Operations at (202) 724-6663 or by email at fcaldwell@dccouncil.us and provide their name(s), address, telephone number, email address, and organizational affiliation, if any, by close of business Tuesday, June 5, 2018. Each witness is requested to bring 20 copies of his/her written testimony. Representatives of organizations and government agencies will be limited to 5 minutes in order to permit each witness an opportunity to be heard. Individual witnesses will be limited to 3 minutes.

If you are unable to testify at the public hearing, written statements are encouraged and will be made a part of the official record. The official record will remain open until close of business Wednesday, June 20, 2018. Copies of written statements should be submitted to the Committee on Government Operations, Council of the District of Columbia, Suite 117 of the John A. Wilson Building, 1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004.

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

COUNCILMEMBER CHARLES ALLEN, CHAIRPERSON COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY

ANNOUNCES A PUBLIC HEARING ON

BILL 22-0778, THE "YOUTH VOTE AMENDMENT ACT OF 2018"

Wednesday, June 27, 2018, 10:00 a.m.
Room 500, John A. Wilson Building
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

On Wednesday, June 27, 2018, Councilmember Charles Allen, Chairperson of the Committee on the Judiciary and Public Safety, will hold a public hearing on Bill 22-0778, the "Youth Vote Amendment Act of 2018". The hearing will take place in Room 500 of the John A. Wilson Building, 1350 Pennsylvania Avenue, N.W., at 10:00 a.m.

The stated purpose of Bill 22-0778, the "Youth Vote Amendment Act of 2018", is to amend the District of Columbia Election Code of 1955 to allow sixteen- and seventeen-year-olds to vote.

The Committee invites the public to testify or to submit written testimony. Anyone wishing to testify at the hearing should contact the Committee via email at judiciary@dccouncil.us or at (202) 724-7808, and provide their name, telephone number, organizational affiliation, and title (if any), by **close of business Friday, June 22**. 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 double-sided copies** of their written testimony and, if possible, also submit a copy of their testimony electronically in advance 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 to the Committee at judiciary@dccouncil.us. **The record will close at the end of the business day on July 12.**

COUNCIL OF THE DISTRICT OF COLUMBIA
Notice of Grant Budget Modifications

Pursuant to the Consolidated Appropriations Act of 2017, approved May 5, 2017 (P.L. 115-31), the Council of the District of Columbia gives notice that the Mayor has transmitted the following Grant Budget Modification (GBM).

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

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

GBM 22-86: FY 2018 Grant Budget Modifications of April 10, 2018

RECEIVED: 14 day review begins May 2, 2018

GBM 22-87: FY 2018 Grant Budget Modifications of April 5, 2018

RECEIVED: 14 day review begins May 3, 2018

GBM 22-88: FY 2018 Grant Budget Modifications of April 18, 2018

RECEIVED: 14 day review begins May 3, 2018

GBM 22-89: FY 2018 Grant Budget Modifications of April 19, 2018

RECEIVED: 14 day review begins May 3, 2018

COUNCIL OF THE DISTRICT OF COLUMBIA
Notice of Reprogramming Requests

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

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

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

Reprog. 22-123 Request to reprogram $610,000 of Fiscal Year 2018 Enterprise and Other Funds budget authority within the DC Health Benefit Exchange (HBX) was filed in the Office the of Secretary on May 1, 2018. This reprogramming ensures that HBX will be able to pay expenses that are associated with call center operations.

RECEIVED: 14 day review begins May 1, 2018

Reprog. 22-124 Request to reprogram $2,100,043 of capital funds budget authority and allotment within the District Department of Transportation (DDOT) was filed in the Office of the Secretary on May 1, 2018. This reprogramming is needed to support sidewalk construction to meet the planned level of Improvement by the end of FY 2018.

RECEIVED: 14 day review begins May 2, 2018

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

NOTICE OF PUBLIC HEARING

Placard Posting Date:	May 11, 2018
Protest Petition Deadline:	June 25, 2018
Roll Call Hearing Date:	July 9, 2018
Protest Hearing Date:	September 12, 2018

License No.:	ABRA-109855
Licensee:	Aslin Food Works, LLC
Trade Name:	Aslin Beer Garden
License Class:	Retailer's Class "C" Tavern
Address:	1299 1st Street, S.E.
Contact:	Andrew Kline, Esq.: 202-686-7600

WARD 6 ANC 6D SMD 6D02

Notice is hereby given that this licensee has applied for a new license under the D.C. Alcoholic Beverage Control Act and that the objectors are entitled to be heard before the granting of such on the **Roll Call Hearing date on July 9, 2018 at 10 a.m., 4th Floor, 2000 14th Street, N.W., Washington, DC 20009**. Petition and/or request to appear before the Board must be filed on or before the Petition Date. The **Protest Hearing date** is scheduled on **September 12, 2018 at 4:30 p.m.**

NATURE OF OPERATION

A new Retailer's Class C Tavern with an outdoor Beer Garden. Food will be provided by rotating DC area food trucks. Seating capacity of 300. Total Occupancy Load of 300. Summer Garden with 300 seats.

HOURS OF OPERATION AND ALCOHOLIC BEVERAGE SALES, SERVICE, AND CONSUMPTION FOR THE ENTIRE PREMISES INCLUDING THE OUTDOOR SUMMER GARDEN

Sunday through Saturday 11am – 12am

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

NOTICE OF PUBLIC HEARING

Placard Posting Date:	May 11, 2018
Protest Petition Deadline:	June 25, 2018
Roll Call Hearing Date:	July 9, 2018
License No.:	ABRA-095465
Licensee:	Catrachitos Restaurant, Inc.
Trade Name:	Catrachitos Restaurant
License Class:	Retailer's Class "C" Restaurant
Address:	4608 14th Street, N.W.
Contact:	Ana De Leon, Esq.: (202) 246-7601

WARD 4 ANC 4C SMD 4C03

Notice is hereby given that this licensee has requested a Substantial Change to their 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 **Roll Call Hearing date on July 9, 2018 at 10 a.m., 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
Request to add a Sidewalk Cafe with 24 seats.

CURRENT HOURS OF OPERATION (INSIDE PREMISES)
Sunday – Thursday 6am – 2am
Friday – Saturday 6am – 3am

CURRENT HOURS OF ALCOHOLIC BEVERAGE SALES, SERVICE, AND CONSUMPTION (INSIDE PREMISES)
Sunday – Thursday 10am – 2am
Friday – Saturday 10am – 3am

PROPOSED HOURS OF OPERATION (SIDEWALK CAFE)
Sunday – Thursday 6am – 2am
Friday – Saturday 6am – 3am

PROPOSED HOURS OF ALCOHOLIC BEVERAGE SALES, SERVICE, AND CONSUMPTION (SIDEWALK CAFE)
Sunday – Thursday 10am – 2am
Friday – Saturday 10am – 3am

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

NOTICE OF PUBLIC HEARING

Placard Posting Date:	May 11, 2018
Protest Petition Deadline:	June 25, 2018
Roll Call Hearing Date:	July 9, 2018
Protest Hearing Date:	September 12, 2018
License No.:	ABRA-109231
Licensee:	Ice N Slice Eatery, LLC
Trade Name:	Ice N Slice Eatery
License Class:	Retailer's Class "D" Restaurant
Address:	3937 Georgia Avenue N.W.
Contact:	Zi Rusell: (646) 533-1350

WARD 4 ANC 4C SMD 4C08

Notice is hereby given that this licensee has applied for a new license under the D.C. Alcoholic Beverage Control Act and that the objectors are entitled to be heard before the granting of such on the **Roll Call Hearing date on July 9, 2018 at 10 a.m., 4th Floor, 2000 14th Street, N.W., Washington, DC 20009**. Petition and/or request to appear before the Board must be filed on or before the Petition Date. **The Protest Hearing date** is scheduled on **September 12, 2018 at 4:30 p.m.**

NATURE OF OPERATION

New Class "D" American restaurant that will serve pizza, and hot and cold sandwiches. The restaurant will have 25 seats and a Total Occupancy Load of 35. The licensee is requesting a Sidewalk Café with 30 seats.

PROPOSED HOURS OF OPERATION AND ALCOHOLIC BEVERAGE SALES, SERVICE, AND CONSUMPTION (INSIDE PREMISES AND SIDEWALK CAFÉ)

Sunday – Thursday, 10am – 2am
Friday – Saturday, 10am – 3am

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

NOTICE OF PUBLIC HEARING

Placard Posting Date:	May 11, 2018
Protest Petition Deadline:	June 25, 2018
Roll Call Hearing Date:	July 9, 2018
Protest Hearing Date:	September 12, 2018

License No.:	ABRA-109739
Licensee:	Neptune Room, LLC
Trade Name:	Neptune Room
License Class:	Retailer's Class "C" Tavern
Address:	5405 Georgia Avenue, N.W.
Contact:	Andrew Kline, Esq.: 202-686-7600

WARD 4 ANC 4D SMD 4D01

Notice is hereby given that this licensee has applied for a new license under the D.C. Alcoholic Beverage Control Act and that the objectors are entitled to be heard before the granting of such on the **Roll Call Hearing date on July 9, 2018 at 10 a.m., 4th Floor, 2000 14th Street, N.W., Washington, DC 20009**. Petition and/or request to appear before the Board must be filed on or before the Petition Date. The **Protest Hearing date** is scheduled on **September 12, 2018 at 1:30 p.m.**

NATURE OF OPERATION

A new Retailer's Class C Tavern. Seating capacity of 30 inside. Total Occupancy Load of 96. The License will include an Entertainment Endorsement for the inside of the premises only.

HOURS OF OPERATION AND ALCOHOLIC BEVERAGE SALES, SERVICE, AND CONSUMPTION INSIDE OF THE PREMISES

Sunday 2pm – 2am, Monday through Thursday 5pm – 2am, Friday 5pm – 3am,
Saturday 2pm to 3am

HOURS OF LIVE ENTERTAINMENT INSIDE OF THE PREMISES

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

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

NOTICE OF PUBLIC HEARING

****CORRECTION**

Placard Posting Date:	April 27, 2018
Protest Petition Deadline:	June 11, 2018
Roll Call Hearing Date:	June 25, 2018
Protest Hearing Date:	August 15, 2018

License No.:	ABRA-109491
Licensee:	Sidamo Coffee and Tea, Inc.
Trade Name:	Sidamo Coffee and Tea, Inc.
License Class:	Retailer's Class "C" Restaurant
Address:	417 H Street, N.E.
Contact:	Costa Pappas: (202) 536-7961

WARD 6 ANC 6C SMD 6C04

Notice is hereby given that this licensee has applied for a new license under the D.C. Alcoholic Beverage Control Act and that the objectors are entitled to be heard before the granting of such on the **Roll Call Hearing date on June 25, 2018 at 10 a.m., 4th Floor, 2000 14th Street, N.W., Washington, DC 20009**. Petition and/or request to appear before the Board must be filed on or before the Petition Date. The **Protest Hearing date** is scheduled on **August 15, 2018 at 1:30 p.m.**

NATURE OF OPERATION
A new restaurant serving American styled cuisine. Seating capacity of 100, and a Total Occupancy Load of 100.

****HOURS OF OPERATION**
Sunday through Saturday 7am – 1am

****HOURS OF ALCOHOLIC BEVERAGE SALES, SERVICE AND CONSUMPTION**
Sunday through Saturday 11am – 1am

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

NOTICE OF PUBLIC HEARING

****RESCIND**

Placard Posting Date:	April 27, 2018
Protest Petition Deadline:	June 11, 2018
Roll Call Hearing Date:	June 25, 2018
Protest Hearing Date:	August 15, 2018

License No.:	ABRA-109491
Licensee:	Sidamo Coffee and Tea, Inc.
Trade Name:	Sidamo Coffee and Tea, Inc.
License Class:	Retailer's Class "C" Restaurant
Address:	417 H Street, N.E.
Contact:	Costa Pappas: (202) 536-7961

WARD 6 ANC 6C SMD 6C04

Notice is hereby given that this licensee has applied for a new license under the D.C. Alcoholic Beverage Control Act and that the objectors are entitled to be heard before the granting of such on the **Roll Call Hearing date on June 25, 2018 at 10 a.m., 4th Floor, 2000 14th Street, N.W., Washington, DC 20009**. Petition and/or request to appear before the Board must be filed on or before the Petition Date. The **Protest Hearing date** is scheduled on **August 15, 2018 at 1:30 p.m.**

NATURE OF OPERATION
A new restaurant serving American styled cuisine. Seating capacity of 100, and a Total Occupancy Load of 100.

****HOURS OF OPERATION**
Sunday CLOSED, Monday through Saturday 7am – 7pm

****HOURS OF ALCOHOLIC BEVERAGE SALES, SERVICE AND CONSUMPTION**
Sunday CLOSED, Monday through Saturday 12pm – 7pm

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

NOTICE OF PUBLIC HEARING

Placard Posting Date:	May 11, 2018
Protest Petition Deadline:	June 25, 2018
Roll Call Hearing Date:	July 9, 2018
Protest Hearing Date:	September 12, 2018
License No.:	ABRA-109779
Licensee:	Simply Banh Mi, Inc.
Trade Name:	Simply Banh Mi
License Class:	Retailer's Class "C" Restaurant
Address:	1624 Wisconsin Avenue, N.W.
Contact:	John Tran: (202) 333-5726

WARD 2 ANC 2E SMD 2E02

Notice is hereby given that this licensee has applied for a new license under the D.C. Alcoholic Beverage Control Act and that the objectors are entitled to be heard before the granting of such on the **Roll Call Hearing date on July 9, 2018 at 10 a.m., 4th Floor, 2000 14th Street, N.W., Washington, DC 20009**. Petition and/or request to appear before the Board must be filed on or before the Petition Date. The **Protest Hearing date** is scheduled on **September 12, 2018 at 1:30 pm.**

NATURE OF OPERATION

New Restaurant serving Vietnamese cuisine. Total Occupancy Load is 24 with seating for 24.

HOURS OF OPERATION AND ALCOHOLIC BEVERAGE SALES, SERVICE, AND CONSUMPTION

Monday Closed, Tuesday through Sunday 11am – 9pm

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION

NOTICE OF PUBLIC HEARING

Placard Posting Date:	May 11, 2018
Protest Petition Deadline:	June 25, 2018
Roll Call Hearing Date:	July 9, 2018
Protest Hearing Date:	September 12, 2018

License No.:	ABRA-109673
Licensee:	Jemal's Bulldog, LLC
Trade Name:	The Moxy Hotel Washington, D.C.
License Class:	Retailer's Class "C" Hotel
Address:	1011 K Street, N.W.
Contact:	Michael Fonseca: (202) 625-7700

WARD 2 ANC 2C SMD 2C01

Notice is hereby given that this licensee has applied for a new license under the D.C. Alcoholic Beverage Control Act and that the objectors are entitled to be heard before the granting of such on the **Roll Call Hearing date on July 9, 2018 at 10 a.m., 4th Floor, 2000 14th Street, N.W., Washington, DC 20009**. Petition and/or request to appear before the Board must be filed on or before the Petition Date. The **Protest Hearing date** is scheduled on **September 12, 2018 at 1:30 p.m.**

NATURE OF OPERATION
New Class "C" Hotel with a total of 200 rooms. Licensee is requesting to have an Entertainment Endorsement, including Dancing. Establishment will have a north terrace Summer Garden with 40 seats and a south terrace Summer Garden with 50 seats (for a total of 2 Summer Gardens). Total Occupancy Load of 550.

HOURS OF OPERATION INSIDE PREMISES
Sunday through Saturday 12am - 12am (24 hour operations)

HOURS OF ALCOHOLIC BEVERAGE SALES, SERVICE, AND CONSUMPTION INSIDE PREMISES
Sunday through Thursday 8am to 2am, Friday and Saturday 8am to 3am

HOURS OF LIVE ENTERTAINMENT INSIDE PREMISES
Sunday through Thursday 8am to 1am, Friday and Saturday 8am to 2am

HOURS OF OPERATION/ALCOHOLIC BEVERAGE SALES, SERVICE, AND CONSUMPTION FOR SUMMER GARDENS
Sunday through Saturday 8am to 11pm

HOURS OF LIVE ENTERTAINMENT FOR SUMMER GARDENS
Sunday through Saturday 8am to 10pm

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
5/4/2018

****CORRECTION**

Notice is hereby given that:

License Number: ABRA-102895 **License Class/Type: **Retail A Liquor Store**

Applicant: VC Imports, LLC

Trade Name: Vintage Cellars

ANC: 5D01

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

301 New York AVE NE

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:
6/18/2018

A HEARING WILL BE HELD ON:
7/2/2018

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 - 7 pm	7 am - 7 pm
Monday:	7 am - 7 pm	7 am - 7 pm
Tuesday:	7 am - 7 pm	7 am - 7 pm
Wednesday:	7 am - 7 pm	7 am - 7 pm
Thursday:	7 am - 7 pm	7 am - 7 pm
Friday:	7 am - 7 pm	7 am - 7 pm
Saturday:	7 am - 7 pm	7 am - 7 pm

FOR FURTHER INFORMATION CALL: (202) 442-4423

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ON
5/4/2018

****RESCIND**

Notice is hereby given that:

License Number: ABRA-102895 **License Class/Type: A / **Internet**

Applicant: VC Imports, LLC

Trade Name: Vintage Cellars

ANC: 5D01

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

301 New York AVE NE

PETITIONS/LETTERS OF OPPOSITION OR SUPPORT MUST BE FILED ON OR BEFORE:
6/18/2018

A HEARING WILL BE HELD ON:
7/2/2018

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 - 7 pm	7 am - 7 pm
Monday:	7 am - 7 pm	7 am - 7 pm
Tuesday:	7 am - 7 pm	7 am - 7 pm
Wednesday:	7 am - 7 pm	7 am - 7 pm
Thursday:	7 am - 7 pm	7 am - 7 pm
Friday:	7 am - 7 pm	7 am - 7 pm
Saturday:	7 am - 7 pm	7 am - 7 pm

FOR FURTHER INFORMATION CALL: (202) 442-4423

D.C. BOARD OF ELECTIONS

NOTICE OF PUBLIC HEARING
RECEIPT AND INTENT TO REVIEW INITIATIVE MEASURE

The Board of Elections shall consider in a public hearing whether the proposed measure "Delegate Voting Rights Act of 2018" is a proper subject matter for initiative at the Board's regular meeting on June 6, 2018 at 10:30 a.m., at 1015 Half Street S.E., Suite 750, Washington DC 20003.

The Board requests that written memoranda be submitted for the record no later than 4:00 p.m., Thursday, May 31, 2018 to the Board of Elections, General Counsel's Office, 1015 Half Street, S.E., Suite 750, Washington, D.C. 20003.

Each individual or representative of an organization who wishes to present testimony at the public hearing is requested to furnish his or her name, address, telephone number and name of the organization represented (if any) by calling the General Counsel's office at 727-2194 no later than Friday, June 1, 2018 at 4:00p.m.

The Short Title, Summary Statement and Legislative Text of the proposed initiative read as follows:

SHORT TITLE

"Delegate Voting Rights Act of 2018"

SUMMARY STATEMENT

This initiative, if passed, will amend the District of Columbia Delegate Act of 1970 to provide the D.C. Delegate to the House of Representatives the right to vote in the House of Representatives on matters exclusively related to the District. The Home Rule Act delegated authority to act as the local legislature the Council. Aside from enumerated exceptions, the Council has the authority to act on matters that apply "exclusively" to the District. The Council's authority in this regard may also be exercised by the voters though their initiative prerogative.

LEGISLATIVE TEXT

BE IT ENACTED BY THE ELECTORS OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Delegate Voting Rights Act of 2018."

Sec. 2. Section 202(a) of the District of Columbia Delegate Act, approved September 22, 1970 (84 Stat. 848; D.C. Official Code § 1-401(a)), is amended by striking the phrase "but not of voting" and inserting the phrase "the right of voting with regard to any matter restricted in its application exclusively in or to the District" in its place.

Sec. 3. Fiscal impact statement.

Sec. 4. This act shall take effect after a 30-day period of Congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 2973 (87 Stat. 813; D.C. Official Code §1-206.02(c)(1)) and publication in the District of Columbia Register.

DEPARTMENT OF ENERGY AND ENVIRONMENT

NOTICE OF PUBLIC HEARING AND SOLICITATION OF PUBLIC COMMENT

Fiscal Year 2019 Weatherization Assistance Program Draft State Plan

The Department of Energy and Environment (the Department) invites the public to present its comments at a public hearing on the fiscal year (FY) 2019 Weatherization Assistance Program (WAP) Draft State Plan.

Public Hearing: Monday, June 4, 2018

HEARING DATE:	**Monday, June 4, 2018**
TIME:	**6:00 pm**
PLACE:	**Department of Energy and Environment** **1200 First Street, NE, Washington, DC 20002** **5th Floor** **NOMA Gallaudet (Red Line) Metro Stop**

Beginning 05/03/18, the full text of the **FY 2019 WAP Draft State Plan** will be available online at the Department's website. A person may obtain a copy of the FY 2019 WAP Draft State Plan by any of the following means:

Download from the Department's website, http://doee.dc.gov/service/weatherization-assistance-program. Look for "FY19 WAP Draft State Plan" near the bottom of the page. Follow the link to the page, where the document can be downloaded in a PDF format.

Email a request to WAPStatePlan@dc.gov with "Request copy of **FY 2019 WAP**" in the subject line.

Pick up a copy in person from the Department's reception desk, located at 1200 First Street NE, 5th Floor, Washington, DC 20002. To make an appointment, call the Department's reception at (202) 535-2600 and mention this Notice by name.

Write the Department at 1200 First Street NE, 5th Floor, Washington, DC 20002, "Attn: Rasha Butler RE: FY19 **WAP Draft State Plan**" on the outside of the envelope.

The deadline for comments is 06/04/18 at the conclusion of the public hearing. All persons present at the hearing who wish to be heard may testify in person. All presentations shall be limited to five minutes. Persons are urged to submit duplicate copies of their written statements.

Persons may also submit written testimony by email, with a subject line of "FY19 WAP Draft State Plan", to WAPStatePlan@dc.gov. Comments clearly marked "FY19 WAP Draft State Plan" may also be hand delivered or mailed to the Department's offices at the address listed above. All comments should be received no later than the conclusion of the public hearing on Monday, June 4, 2018. The Department will consider all comments received in its final decision.

DISTRICT OF COLUMBIA PUBLIC CHARTER SCHOOL BOARD

NOTIFICATION OF CHARTER AMENDMENT

The District of Columbia Public Charter School Board (DC PCSB) hereby gives notice of DC Preparatory Public Charter School (DC Prep PCS)'s request to amend its goals and academic achievement expectations.

DC Prep PCS is currently in its fifteenth year of operation serving students in grades PK3 through eighth at five campuses located in Wards 5, 7 and 8: Anacostia Elementary, Benning Elementary, Benning Middle, Edgewood Elementary, and Edgewood Middle. Effective immediately, the school requests to amend its mission specific goals to replace the current PMF goal that it adopted in 2017. The school's proposed new goals may be found in the subsequent attachment.

A public hearing will be held on May 21, 2018 at 6:30 p.m.; a vote will be held on June 18, 2018. The public is encouraged to comment on this proposal. Comments must be submitted on or before 4 p.m. on May 21, 2018.

How to Submit Public Comment:

1. Submit written comment one of the following ways:
   a. E-mail: public.comment@dcpcsb.org
   b. Postal mail: Attn: Public Comment, *DC Public Charter School Board, 3333 14th ST. NW., Suite 210, Washington, DC 20010
   c. Hand Delivery/Courier*: Same as postal address above

2. Sign up to testify in-person at the public hearing on March 19, 2018 to public.comment@dcpcsb.org no later than 4 p.m. on Thursday, March 15, 2018. Each person testifying is given two minutes to present testimony.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA

NOTICE OF PUBLIC INTEREST HEARING

JUNE 4, 2018, at 1:00 P.M.

COMMISSION HEARING ROOM,
1325 G STREET, N.W., SUITE 800, WASHINGTON, DC 20005

FORMAL CASE NO. 1150, IN THE MATTER OF THE APPLICATION OF POTOMAC ELECTRIC POWER COMPANY FOR AUTHORITY TO INCREASE EXISTING RETAIL RATES AND CHARGES FOR ELECTRIC DISTRIBUTION SERVICE, and

FORMAL CASE NO. 1151, IN THE MATTER OF THE IMPACT OF THE TAX CUTS AND JOBS ACT OF 2017 ON THE EXISTING DISTRIBUTION SERVICE RATES AND CHARGES FOR POTOMAC ELECTRIC POWER COMPANY AND WASHINGTON GAS LIGHT COMPANY

The Public Service Commission of the District of Columbia ("Commission") hereby gives notice of a public interest hearing to be held pursuant to Section 130.11 of the Commission's Rules of Practice and Procedure[1] to consider the Non-Unanimous Full Settlement Agreement and Stipulation ("Settlement Agreement") filed by the Potomac Electric Power Company ("Pepco" or "Company"), the Office of the People's Counsel for the District of Columbia, the Apartment and Office Building Association of Metropolitan Washington, the District of Columbia Government, the Maryland DC Virginia Solar Energy Industry Association, D.C. Climate Action, Baltimore-Washington Construction and Public Employees Laborers' District Council, Tesla, Inc., Small Business Utility Advocates, and DC Consumer Utility Board and Solar United Neighbors (hereinafter collectively referred to as the "Settling Parties") on April 17, 2018, in *Formal Case Nos. 1150 and 1151*.[2] The public interest hearing will convene Monday, June 4, 2018, at 1:00 p.m. in the Commission Hearing Room, 1325 G Street, N.W., Suite 800, Washington, DC 20005. Only parties in the case will be permitted to participate in the hearing.

The hearing will be streamed live on the Commission's website, www.dcpsc.org, and the video archived at http://www.dcpsc.org/public_meeting/index.asp.

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1 15 DCMR § 130.11 (1992).

2 *Formal Case No. 1150, In the Matter of the Application of Potomac Electric Power Company for Authority to Increase Existing Retail Rates and Charges for Electric Distribution Service* ("*Formal Case No. 1150*"), and *Formal Case No. 1151, In the Matter of the Impact of the Tax Cuts and Jobs Act of 2017 on the Existing Distribution Service Rates and Charges for Potomac Electric Power Company and Washington Gas Light Company* ("*Formal Case No. 1151*").

BACKGROUND

On December 19, 2017, Pepco filed an Application for Authority to Increase Existing Retail Rates and Charges for Electric Distribution Service along with supporting testimony and exhibits ("Application"). By Order No. 19247, the Commission opened *Formal Case No. 1151*, a single-issue rate proceeding, to determine the impact on current revenue requirements of Pepco and Washington Gas Light Company ("WGL") to give effect to the federal Tax Cuts and Jobs Act of 2017 ("TCJA"), which became effective January 1, 2018, and to determine the proposed distribution of the revenue reductions to Pepco's and WGL's customer classes. The Commission directed Pepco to file its plan to reduce its existing revenue requirement to reflect the impact of the TCJA and to distribute the revenue reduction across-the-board to each customer class. Pepco filed its plan on February 6, 2018. On February 9, 2018, Pepco updated its rate case Application to reflect the TCJA.

On April 17, 2018, the Settling Parties filed a Joint Motion for Approval of the Non-Unanimous Full Settlement Agreement and Stipulation ("Settlement Agreement"). The proposed Settlement Agreement is a resolution of all the issues in *Formal Case Nos. 1150 and 1151* with respect to Pepco and will result in a retail base rate reduction from present rates of $24.1 million.

PUBLIC INTEREST HEARING

The purpose of the hearing is to determine if the proposed Settlement Agreement is in the public interest pursuant to Section 130.11 of the Commission's Rules of Practice and Procedure. During the course of the hearing, the Settling Parties will present witnesses to testify regarding the proposed Settlement Agreement and may be cross-examined by the Non-Settling Parties and questioned by the Commission on whether the Settlement Agreement is in the public interest. The Commission also notifies the Non-Settling Parties that they may be subject to cross-examination by the Settling Parties and may be questioned by the Commission.

ADDITIONAL INFORMATION

Copies of the proposed Settlement Agreement may be obtained by contacting the Office of the Commission Secretary, Public Service Commission of the District of Columbia, 1325 G Street, N.W., Suite 800, Washington, DC 20005 or by visiting the Commission's website at www.dcpsc.org. The proposed Settlement Agreement can also be accessed through the Commission's eDocket system in *Formal Case Nos. 1150 and 1151*.

BOARD OF ZONING ADJUSTMENT
PUBLIC HEARING NOTICE
WEDNESDAY, JUNE 20, 2018
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

19712 ANC 1A — **Application of Newton Park Apartments Condominium Unit Owners Association,** pursuant to 11 DCMR Subtitle X, Chapter 9, for a special exception under the residential conversion regulations of Subtitle U § 320.2, and pursuant to Subtitle X, Chapter 10, for a variance from the residential conversion requirements of U § 320.2(d), to allow a three-unit apartment house in the RF-1 Zone at premises 452 Newton Place, N.W. (Square 3036, Lot 89).

WARD TWO

19767 ANC 2E — **Application of Compass Coffee,** pursuant to 11 DCMR Subtitle X, Chapter 9, for a special exception under Subtitle U § 513.1(n) from the use requirements of Subtitle U § 512.1(d)(3), to permit a coffee/prepared foods shop with more than 18 seats in the MU-4 Zone at premises 1351 Wisconsin Avenue N.W. (Square 1243, Lot 75).

WARD ONE

19770 ANC 1A — **Application of 3554 10th Street LLC,** pursuant to 11 DCMR Subtitle X, Chapter 9, for a special exception under the residential conversion requirements of Subtitle U § 320.2, to construct a three-story rear addition to the existing principal dwelling unit and convert it to a three-unit apartment house in the RF-1 Zone at premises 3554 10th Street N.W. (Square 2832, Lot 52).

WARD TWO

19774 ANC 2B — **Application of Philip Qiu and Associates LLC,** pursuant to 11 DCMR Subtitle X, Chapter 10, for a use variance from the use provisions of Subtitle U § 502, to use a portion of the existing office building as a small public gallery in the MU-16 Zone at premises 1218 16th Street N.W. (Square 182, Lot 56).

WARD TWO

19778
ANC 2E

Application of Calvin Coolidge Presidential Foundation Inc., pursuant to 11 DCMR Subtitle X, Chapter 9, for a special exception under the use provisions of Subtitle U § 203.1(n), and pursuant to Subtitle X, Chapter 10, for variances from the gross floor area requirements of Subtitle U § 203.1(n)(2), to permit the use of an existing residential building by a nonprofit organization in the R-20 Zone at premises 3425 Prospect Street N.W. (Square 1221, Lot 96).

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?

Amharic
ለመሳተፍ ዕርዳታ ያስፈልግዎታል?
የተለየ እርዳታ ካስፈለገዎት ወይም የቋንቋ እርዳታ አገልግሎቶች (ትርጉም ወይም ማስተርጎም) ካስፈለገዎት እባክዎን ከስብሰባው አምስት ቀናት በፊት ዚ ሂልን በስልክ ቁጥር (202) 727-0312 ወይም በኤሜል Zelalem.Hill@dc.gov ይገናኙ። እነኝህ አገልግሎቶች የሚሰጡት በነጻ ነው።

Chinese

您需要有人帮助参加活动吗？
如果您需要特殊便利设施或语言协助服务（翻译或口译），请在见面之前提前五天与 Zee Hill 联系，电话号码 (202) 727-0312，电子邮件 Zelalem.Hill@dc.gov。这些是免费提供的服务。

French
Avez-vous besoin d'assistance pour pouvoir participer ? Si vous avez besoin d'aménagements spéciaux ou d'une aide linguistique (traduction ou interprétation), veuillez contacter Zee Hill au (202) 727-0312 ou à Zelalem.Hill@dc.gov cinq jours avant la réunion. Ces services vous seront fournis gratuitement.

Korean
참여하시는데 도움이 필요하세요?
특별한 편의를 제공해 드려야 하거나, 언어 지원 서비스(번역 또는 통역)가 필요하시면, 회의 5일 전에 Zee Hill 씨께 (202) 727-0312로 전화 하시거나 Zelalem.Hill@dc.gov 로 이메일을 주시기 바랍니다. 이와 같은 서비스는 무료로 제공됩니다.

Spanish
¿Necesita ayuda para participar?
Si tiene necesidades especiales o si necesita servicios de ayuda en su idioma (de traducción o interpretación), por favor comuníquese con Zee Hill llamando al (202) 727-0312 o escribiendo a Zelalem.Hill@dc.gov cinco días antes de la sesión. Estos servicios serán proporcionados sin costo alguno.

Vietnamese
Quí vị có cần trợ giúp gì để tham gia không?
Nếu quí vị cần thu xếp đặc biệt hoặc trợ giúp về ngôn ngữ (biên dịch hoặc thông dịch) xin vui lòng liên hệ với Zee Hill tại (202) 727-0312 hoặc Zelalem.Hill@dc.gov trước năm ngày. Các dịch vụ này hoàn toàn miễn phí.

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

FREDERICK L. HILL, CHAIRPERSON
LESYLLEÉ M. WHITE, MEMBER
LORNA L. JOHN, MEMBER
CARLTON HART, VICE-CHAIRPERSON,
NATIONAL CAPITAL PLANNING COMMISSION
A PARTICIPATING MEMBER OF THE ZONING COMMISSION
CLIFFORD W. MOY, SECRETARY TO THE BZA
SARA A. BARDIN, DIRECTOR, OFFICE OF ZONING

DEPARTMENT OF HEALTH

NOTICE OF FINAL RULEMAKING

The Director of the Department of Health, pursuant to Section 14 of the Legalization of Marijuana for Medical Treatment Amendment Act of 2010 (Act), effective July 27, 2010 (D.C. Law 18-210; D.C. Official Code § 7-1671.13 (2012 Repl.)), and Mayor's Order 2011-71, dated April 13, 2011, hereby gives notice of the adoption of the following amendments to Chapter 53 (General Registration Requirements) of Title 22 (Health), Subtitle C (Medical Marijuana), of the District of Columbia Municipal Regulations (DCMR).

This rulemaking is necessary to protect the public by ensuring that there are a sufficient number of dispensaries open for business to adequately supply the needs of the District's registered patients. A quarter of the qualifying patients in the District's Medical Marijuana Program live in Wards 7 and 8, but there are no dispensaries east of the Anacostia River, resulting in a geographical barrier to access to these healthcare services. To further ensure adequate access to medical marijuana for patients located in Wards 7 and 8, the Department exercised its authority under D.C. Official Code § 7-1671.06(d)(2)(A) to increase the number of dispensaries registered to operate in the District by emergency and proposed rulemaking to seven (7) so that a dispensary could be registered in Ward 7 and in Ward 8.

The Department is aware that in previous rounds, a significant number of the applicants that were selected to receive registrations took many months to complete the requirements for registration and then to open for business. This rulemaking will ensure that applicants who have been selected and deemed eligible for registration proceed expeditiously to open their facilities for business.

A Notice of Emergency and Proposed rulemaking was published in the *D.C. Register* on February 2, 2018 at 65 DCR 1090. The Department did not receive any comments in response to the notice. No changes have been made to the rulemaking.

Following the required period of Council review, the rules were deemed approved by the D.C. Council on March 9, 2018. These final rules will be effective upon publication of this notice in the *D.C. Register*.

Chapter 53, GENERAL REGISTRATION REQUIREMENTS, of Title 22-C DCMR, MEDICAL MARIJUANA, is amended as follows:

Section 5303, FAILURE TO OPEN OR OPERATE, is amended to read as follows:

5303 FAILURE TO OPEN OR OPERATE

5303.1 For purposes of this section, "deemed eligible" shall mean:

(a) The applicant has met all application prerequisites;

(b) The applicant has been selected by the Director for registration; and

(c) The applicant is only pending the remaining necessary approvals required under this title from MPD, DCRA, OTR, and the Department, including passing the pre-opening inspection.

5303.2 Being "deemed eligible" does not guarantee that an applicant will receive a registration, or create a contract between the applicant and the Department. The medical marijuana laws of the District of Columbia and the federal government are subject to change at any time and that the District of Columbia shall not be liable as a result of these changes.

5303.3 An applicant that has been deemed eligible for a dispensary registration shall complete the steps to obtain a registration and open for business within one hundred twenty (120) days from the date of receipt of the notice of selection.

5303.4 Except as provided in § 5303.6, if an applicant that has been deemed eligible for a dispensary registration, or a registrant that has received a dispensary registration, fails to open for business within one hundred twenty (120) days, the Director shall withdraw the applicant's selection, and consider the next highest ranking applicant. If a registration has been issued, the registrant shall surrender and return the registration to the Department.

5303.5 If there are no applicants pending, the Director may open the application process to select a replacement dispensary or cultivation center applicant.

5303.6 The Director may grant an applicant that has been deemed eligible for a dispensary registration an extension at his or her discretion for good cause shown.

5303.7 A registration for a dispensary or cultivation center shall be returned to the Director if the dispensary or cultivation center fails to operate for any reason for more than sixty (60) days after it has opened for business.

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA

NOTICE OF FINAL RULEMAKING
AND
Z.C. ORDER NO. 14-13D
Z.C. Case No. 14-13D
(Text Amendment – 11 DCMR)
Technical Corrections to Z.C. Order Nos. 14-13 and 08-06A
March 26, 2018

The Zoning Commission for the District of Columbia, (Commission) pursuant to its authority under § 1 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797), as amended; D.C. Official Code § 6-641.01 (2012 Repl.)), hereby gives notice of the adoption of amendments to Z.C. Order Nos. 14-13 and 08-06A to amend Subtitle C (General Rules) of Title 11 (Zoning Regulations of 2016) of the District of Columbia Municipal Regulations (DCMR) to reflect technical corrections. Z.C. Order No. 14-13 made amendments to Chapter 4 of Title 11 DCMR, which Z.C. Order No. 08-06A repealed and replaced with Chapter 15 of Subtitle C.

The corrections clarify that penthouse area is limited to one-third (1/3) of total roof area only in zones with a three (3)- story or less limitation and strike the references to specific zones. As part of Z.C. Case No. 14-13, the Commission significantly revised the regulations pertaining to roof structures, which it renamed "Penthouses." The record of that case makes plain the Commission's intent to eliminate the limitation on penthouse area to one-third (1/3) of the roof for all zones except zones with a story limitation of three (3) or less. The adopted rule did not expressly state that numeric limit, but required compliance for areas in "Zones where there is a limitation on the number of stories other than the C-3-B Zone District," which had a story limit of six (6). Because the rule failed to explicitly apply the roof area limit to just those zones with a story limit of three (3) and then exempted a zone with a story limit of six (6), the rule could be misinterpreted as applying to all zones with a story limit except C-3-B. Since Z.C. Order No. 08-06A repealed § 411.12, and replaced it with 11-Z DCMR § 1503.2, the only mechanism clarify the Commission's intent is to amend § 1503.2(a) to apply the penthouse area limit to: "Zones **or portions of zones** where there is a limitation on the number of stories **of three (3) or less."**

In addition, the corrections to Z.C. Order No. 08-06A further amend 11-Z DCMR § 1503.2 to strike its reference to the MU-8, MU-20, and NC-13 zones. These zones had been the C-3-B Zone District, but no longer have a story limit. Even if the zones still had a story limit of six (6), the proposed clarification eliminates the need to exempt them.

A Notice of Proposed Rulemaking was published in the *D.C. Register* on February 23, 2018, at 65 DCR 001900 proposing the amendments described above, and the Commission received no comments. Because the proposed amendments are technical in nature, no public hearing was held and no referral to the National Capital Planning Commission made. (*See* 11-Z DCMR § 703.1). The Commission took final action to adopt the amendments at a public meeting on March 26, 2018.

The amendments shall become effective upon publication of this notice in the *D.C. Register*.

Title 11 DCMR, ZONING REGULATIONS OF 2016, is amended as follows:

Chapter 15, PENTHOUSES, of Subtitle C, GENERAL RULES, is amended as follows:

Paragraph (a) of § 1503.2, § 1503, PENTHOUSE AREA, is amended to read as follows:

1503.2 Penthouses shall not exceed one-third (1/3) of the total roof area upon which the penthouse sits in the following areas:

(a) Zones or portions of zones where there is a limitation on the number of stories of three (3) or less; and

(b) Any property fronting directly onto Independence Avenue, S.W. between 12th Street, S.W. and 2nd Street, S.W.

On January 29, 2018, upon the motion of Commissioner Shapiro, as seconded by Chairman Hood, the Zoning Commission **APPROVED IMMEDIATE PUBLICATION** of the proposed rulemaking at its public meeting by a vote of **5-0-0** (Anthony J. Hood, Robert E. Miller, Peter A. Shapiro, Peter G. May, and Michael G. Turnbull to approve).

On March 26, 2018, upon the motion of Commissioner Shapiro, as seconded by Chairman Hood, the Zoning Commission took **FINAL ACTION** to **APPROVE** the petition at its public meeting by a vote of **5-0-0** (Anthony J. Hood, Robert E. Miller, Peter A. Shapiro, Peter G. May, and Michael G. Turnbull to approve).

In accordance with the provisions of 11-Z DCMR § 604.9, this Order shall become final and effective upon publication in the *D.C. Register*; that is, on May 11, 2018.

BY THE ORDER OF THE D.C. ZONING COMMISSION

A majority of the Commission members approved the issuance of this Order.

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA

NOTICE OF FINAL RULEMAKING
AND
Z.C. ORDER NO. 17-15
Z.C. Case No. 17-15
(Zoning Map Amendment @ Lot 85 in Square 3846 from PDR-2 to MU-6)
March 26, 2018

The Zoning Commission for the District of Columbia (Zoning Commission), pursuant to its authority under § 1 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797; D.C. Official Code § 6-641.01 (2012 Repl.)), hereby amends the Zoning Map to rezone Square 3846, Lot 85 from the PDR-2 zone to the MU-6 zone.

A Notice of Proposed Rulemaking was published in the *D.C. Register* on February 23, 2018, at 65 DCR 001902. In response the Commission received comments from DC for Responsible Development and Ward 5 Alliance for Equity.

The comments from DC for Responsible Development expressed general concern about the need for studies to identify and mitigate environmental and public service impacts prior to the Commission's approval of the proposed map amendment. The Ward 5 Alliance for Equity comments noted that the proposed rezoning would result in higher density development on the site and further exacerbate traffic congestion in an area where several construction projects are already underway.

In analyzing these comments, the Commission considered that the Future Land Use Map (FLUM) designates the property for a mix of high-density residential use and medium-density commercial use. As noted by OP, the current PDR zone is not consistent with the FLUM and rezoning to MU is needed to permit "a mix of housing and other development specifically recommended in the Comprehensive Plan's Upper Northwest Area Element and in the location's relevant Small Area Plan." The Commission is confident that the requisite planning in support of this amendment has occurred and notes both the Office of Planning and the District Department of Transportation supported it. Neither of the affected Advisory Neighborhood Commissions submitted reports.

The Commission therefore took final action at a public meeting on March 26, 2018 to adopt the map amendment as proposed.

The Zoning Map of the District of Columbia is amended as follows:

SQUARE	LOT	Map Amendment
3846	85	PDR-2 to MU-6

On February 1, 2018, upon the motion of Chairman Hood, as seconded by Vice Chairman Miller, the Zoning Commission took **PROPOSED ACTION** to **APPROVE** the petition at the

conclusion of its public hearing by a vote of **5-0-0** (Anthony J. Hood, Robert E. Miller, Peter A. Shapiro, Peter G. May, and Michael G. Turnbull to approve).

On March 26, 2018, upon the motion of Commissioner Turnbull, as seconded by Vice Chairman Miller, the Zoning Commission took **FINAL ACTION** to **APPROVE** the petition at its public meeting by a vote of **5-0-0** (Anthony J. Hood, Robert E. Miller, Peter A. Shapiro, Peter G. May, and Michael G. Turnbull to approve).

In accordance with the provisions of 11-Z DCMR § 604.9, this Order shall become final and effective upon publication in the *DC Register*; that is on May 11, 2018.

BY THE ORDER OF THE D.C. ZONING COMMISSION
A majority of the Commission members approved the issuance of this Order.

DEPARTMENT OF HEALTH

NOTICE OF PROPOSED RULEMAKING

The Director of the Department of Health, pursuant to the authority set forth in § 302(14) of the District of Columbia Health Occupations Revision Act of 1985 ("Act"), effective March 25, 1986 (D.C. Law 6-99; D.C. Official Code § 3-1203.02(14) (2016 Repl.)), and Mayor's Order 98-140, dated August 20, 1998, hereby gives notice of the intent to take a proposed rulemaking action to adopt the following new Chapter 104 of Title 17 (Business, Occupations, and Professionals) of the District of Columbia Municipal Regulations (DCMR), entitled "Athletic Trainers," in not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*.

The adoption of Chapter 104 is necessary to implement § 501(a) of the Act (D.C. Official Code § 3-1205.01(a) (2016 Repl.)), which requires the licensure of athletic trainers in the District of Columbia.

Chapter 104, ATHLETIC TRAINERS, of TITLE 17 DCMR, BUSINESS, OCCUPATIONS, AND PROFESSIONALS, is added to read as follows:

10400 GENERAL PROVISIONS

10400.1 This chapter shall apply to persons authorized to practice athletic training and persons applying for or holding a license to practice athletic training.

10400.2 Chapters 40 (Health Occupations: General Rules) and 41 (Health Occupations: Administrative Procedures) of this title shall supplement this chapter.

10401 TERM OF LICENSE

10401.1 Subject to § 10401.2, a license issued pursuant to this chapter shall expire at 12:00 midnight of January 31st of each odd-numbered year.

10401.2 If the Director changes the renewal system pursuant to § 4006.3 of Chapter 40 of this title, a license issued pursuant to this chapter shall expire at 12:00 midnight of the last day of the month of the birth date of the holder of the license, or other date established by the Director.

10402 QUALIFICATIONS

10402.1 Except as otherwise provided in this chapter, to qualify for a license to practice athletic training, an applicant shall meet the following requirements:

(a) Possess at least a baccalaureate degree from a four (4)-year college or university that is accredited by an agency recognized for that purpose by the United States Department of Education and with an athletic training curriculum meeting one of the following standards:

(1) Accredited by the Commission on Accreditation of Athletic Training Education (CAATE) or its successor organization;

(2) Approved by the National Athletic Trainers Association (NATA); or

(3) Substantially equivalent programs approved by the Board;

(b) Successfully passed the entry-level athletic trainers examination administered by the Board of Certification for the Athletic Trainer, or its successor, or an equivalent organization approved or recognized by the Board; and

(c) Possess a valid Emergency Cardiac Care (ECC) certification at the Basic Life Support/Professional Rescuer level or above.

10403 CERTIFICATION MAINTENANCE

10403.1 To maintain his or her qualification for an athletic training license, an athletic trainer shall maintain continuously and without interruption a valid BOC Certification and a valid Emergency Cardiac Care (ECC) certification, required pursuant to § 10402.1(c).

10404 SCOPE OF PRACTICE

10404.1 An athletic trainer may, under the general supervision of a physician, perform treatment and rehabilitation of an athletic injury, which may include but is not limited to:

(a) Coordinating or administering a treatment or rehabilitation plan, assessing progress, and discharging based on their functional status for the post-operative, acute, subacute, and chronic injury or medical condition of a patient;

(b) Providing treatment or rehabilitation by utilizing physical modalities of heat, cold, light, massage, traction, water, air, electricity, sounds, or mechanical, therapeutic and post rehabilitative exercise; or

(c) Using appropriate preventative or supportive devices to assist in the recovery or prevention of injury or illness.

10404.2 An athletic trainer may provide immediate and emergency care of athletic injuries, including common emergency medical situation, which may include, but is not limited to, cardiopulmonary resuscitation (CPR), an automated external

defibrillator (AED), spinal stabilization techniques, standardized testing for head-related injuries, or making referrals for follow-up care.

10404.3 An athletic trainer may provide education, guidance, or counseling regarding athletic training and the prevention, care, and treatment of athletic injuries. He or she may also assess and promote awareness and education concerning issues such as, but not limited to, risks of illness or injury (orthopedic, neurological, systemic), environmental stress, nutrition, equipment and facilities, and general health and well-being.

10404.4 An athletic trainer may organize and administer athletic training programs and related services.

10405 PRACTICE OF ATHLETIC TRAINING BY STUDENTS

10405.1 Students enrolled as candidates for at least a baccalaureate degree in an athletic training program accredited by the Commission on Accreditation of Athletic Training Education (CAATE) and engaging or seeking to engage in an internship or practicum required for the completion of the degree may practice athletic training without a license issued pursuant to this chapter and only in accordance with this section.

10405.2 A student practicing pursuant to this section shall do so only under the direct supervision of an athletic trainer licensed in the District.

10405.3 An athletic trainer supervising a student shall be fully responsible for all of the actions performed by the student during the time of the supervision and may be subject to disciplinary action for any violation of the Act or this chapter by the person supervised.

10405.4 The supervising athletic trainer shall review and co-sign any documentation written by a student practicing pursuant to this section.

10405.5 A student practicing pursuant to this section shall be subject to all of the applicable provisions of the Act and this chapter. The Board may deny an application for a license by, or take other disciplinary action in accordance with § 514 of the Act (D.C. Official Code § 3-1205.14 (2016 Repl.)) against, a student who is found to have violated the Act or this chapter.

10405.6 If the Board finds that a student has violated the Act or this chapter, the Board may, in addition to any other disciplinary actions permitted by the Act, revoke, suspend, or restrict the privilege of the student to practice.

10405.7 A student practicing pursuant to this section shall identify himself or herself as a student at all times when performing actions of an athletic trainer.

10405.8 A student may not be paid or receive compensation of any nature, directly or indirectly from a patient.

10406 PRACTICE OF ATHLETIC TRAINING BY APPLICANTS

10406.1 An applicant with a pending application pursuant to this chapter may practice athletic training only in accordance with this section.

10406.2 An applicant with a pending application pursuant to this chapter may practice athletic training under the supervision of an athletic trainer licensed in the District if the applicant has received authorization from the Board to practice under supervision. Such authorization shall not exceed ninety (90) days.

10406.3 An athletic trainer supervising an applicant shall be fully responsible for all of the actions performed by the applicant during the time of the supervision and may be subject to disciplinary action for any violation of the Act or this chapter by the person supervised.

10407 CONTINUING EDUCATION REQUIREMENTS

10407.1 This section shall apply to applicants for the renewal, reactivation, or reinstatement of a license but shall not apply to applicants for an initial license or applicants seeking renewal for the first time after the initial grant of a license.

10407.2 A continuing education credit shall be valid only if it is part of a program or activity approved by the Board in accordance with § 10408.

10407.3 To qualify for the renewal of a license, an applicant shall have completed, during the two (2)-year period preceding the date the license expires, fifty (50) hours of approved continuing education meeting the requirement of § 10408.1 and two (2) hours of LGBTQ continuing education.

10407.4 To qualify for the reactivation of a license, a person in inactive status within the meaning of § 511 of the Act (D.C. Official Code § 3-1205.11 (2016 Repl.)) shall possess a current and valid BOC Certification.

10407.5 To qualify for the reinstatement of a license, an applicant seeking reinstatement shall have completed, during the two (2) years before the submission of the application, twenty-five (25) hours of approved continuing education for each year after the last expiration of the license up to a maximum of one hundred (100) hours and shall possess a current BOC certification.

10407.6 An applicant under this section shall prove completion of required continuing education credits by submitting the following information with respect to each program:

(a) The name and address of the sponsor of the program;

(b) The name of the program, its location, a description of the subject matter covered, and the names of the instructors;

(c) The dates on which the applicant attended the program;

(d) The hours of credit claimed; and

(e) Verification by the sponsor of completion.

10407.7 The Board may periodically conduct an audit of some or all licensees to determine compliance with the continuing education requirements. A licensee who has been selected to participate in an audit shall, within thirty (30) days of receiving the notice of the audit, submit proof of completion of any continuing education completed. During the audit, the Board may also require proof of a current BOC Certification and a valid Emergency Cardiac Care (ECC) certification to determine the licensee's compliance with § 10403.1.

10408 APPROVED CONTINUING EDUCATION PROGRAMS AND ACTIVITIES

10408.1 The Board may approve continuing education programs and activities that contribute to the growth of professional competence in athletic training and meet the relevant requirements of this section.

10408.2 The Board shall approve continuing education programs or activities approved by the BOC or offered by BOC-approved providers.

10408.3 The Board may approve the following type of continuing education program, if the program meets the requirements of § 10408.1:

(a) A post-professional coursework, residency, fellowship, or doctoral dissertation obtained at an athletic training program accredited by the Commission on Accreditation of Athletic Training Education (CAATE);

(b) A post-professional coursework, residence, fellowship, or doctoral dissertation, obtained at an accredited program or institution, that the Board has deemed to be relevant to the practice of athletic training;

(c) A seminar or workshop;

(d) An education program given at a conference;

(e) In-service training;

(f) A home study course; or

(g) An online course.

10408.4 The Board may approve the following continuing education activities engaged in by a requestor:

(a) Serving as an instructor or speaker at a conference, seminar, or workshop;

(b) Participating as a panelist at a conference, seminar, or workshop;

(c) Authoring and publishing an article in a professional, refereed journal;

(d) Authoring and publishing an abstract in a refereed journal;

(e) Authoring and publishing a textbook;

(f) Contributing as an author of a published textbook;

(g) Authoring a peer-reviewed or refereed poster presentation;

(h) Authoring published multimedia material such as CD-ROM, audio or video material;

(i) Participating in clinical research study team;

(j) Serving as a primary author of a home study program;

(k) Authoring a review article in a refereed publication; or

(l) Participating as an examination item writer.

10409 CONTINUING EDUCATION CREDITS

10409.1 The Board may grant continuing education credit in a quarter of an hour increments.

10409.2 The Board may grant up to ten (10) hours of continuing education credit for each credit hour of a program approved in accordance with § 10408.3(a) or (b).

10409.3 The Board may grant up to ten (10) hours of continuing education credit per topic to a sole speaker or instructor of a conference, seminar, or workshop.

10409.4 The Board may grant up to five (5) hours of continuing education credit per topic to a panelist at a conference, seminar, or workshop.

10409.5 The board may grant up to fifteen (15) hours of continuing education credit per article to the primary author or ten (10) hours to the secondary author of an article approved in accordance with § 10408.4(c).

10409.6 The Board may grant up to ten (10) hours of continuing education credit per abstract to the primary author or five (5) hours to the secondary author of an abstract approved in accordance with § 10408.4(d).

10409.7 The Board may grant up to forty (40) hours of continuing education credit per book to the primary author or twenty (20) hours to the secondary author of a published textbook approved in accordance with § 10408.4(e).

10409.8 The Board may grant up to ten (10) hours of continuing education credit per book to a contributing author of a published textbook approved in accordance with § 10408.4(f).

10409.9 The Board may grant up to ten (10) hours of continuing education per presentation to the primary author or five (5) hours to the secondary author of a peer-reviewed or refereed poster presentation approved in accordance with § 10408.4(g).

10409.10 The Board may grant up to ten (10) hours of continuing education credit per publication to the primary author of published multimedia material approved in accordance with § 10408.4(h).

10409.11 The Board may grant up to ten (10) hours of continuing education credit per research project to a participating member of a clinical research study team approved in accordance with § 10408.4(i).

10409.12 The Board may grant up to ten (10) hours of continuing education credit per program to the primary author of a home study program approved in accordance with § 10408.4(j).

10409.13 The Board may grant up to five (5) hours of continuing education credit per review to the reviewer of a refereed publication approved in accordance with § 10408.4(k).

10409.14 The Board may grant up to five (5) hours of continuing education credit per year of active item writing approved in accordance with § 10408.4(l).

10409.15 The Board may grant continuing education credit in accordance with this section only for programs or activities that were completed or published during the licensure period for which credit is claimed.

10409.16 The Board may grant a maximum of ten (10) hours of continuing education credit for any programs or activities not approved by the BOC.

10410 STANDARDS OF CONDUCT

10410.1 An athletic trainer shall comply with the Code of Ethics established and adopted by the National Athletic Trainers' Association (NATA) and the Board of Certification Standards of Professional Practice adopted and implemented by the BOC, as they may be amended or adopted from time to time.

10410.2 An athletic trainer shall not sell, dispense, or administer anabolic steroids to any person.

10410.3 An athletic trainer shall comply with the requirements of Chapter 28B of Title 7 of the D.C. Code.

10499 DEFINITIONS

10499.1 As used in this Chapter the following terms shall have the meanings ascribed:

Act – District of Columbia Health Occupations Revision Act of 1985, effective March 25, 1986 (D.C. Law 6-99; D.C. Official Code § 3-1201.01 *et seq.* (2016 Repl.)) .

Athlete - is:

a) A person participating in, or preparing for a competitive team or individual sport or other athletic activity being conducted by an educational institution, professional athletic organization, or a board sanctioned amateur athletic organization; or

(b) A member of a professional athletic team.

Athletic injury - a musculoskeletal injury suffered by an athlete resulting from or limiting participation in or training for scholastic, recreational, professional, or amateur athletic activities.

Athletic trainer – a person licensed to practice athletic training pursuant to this chapter.

Board - the Board of Physical Therapy, established by § 209 of the Act (D.C. Official Code § 3-1202.06 (2016 Repl.)).

BOC – Board of Certification for the Athletic Trainer.

Direct supervision – supervision provided to a student authorized to practice athletic training by an athletic trainer licensed in the District in which the

supervising athletic trainer shall be physically present within the line of sight at the time that the student performs an athletic training function.

Director – the Director of the Department of Health or any successor or assignee.

General supervision of a physician – the overall direction and control of a physician over the services of an athletic trainer, which may be achieved through the planning of services with a physician; the development and approval by the physician of procedures and protocols to be followed in the event of an injury or illness; the mutual review of the protocols on a periodic basis; and the appropriate consultation with a physician. The physical presence of the supervising physician is not required during the provision of the services.

LGBTQ Continuing Education - continuing education focusing on patients or clients who identify as lesbian, gay, bisexual, transgender, gender nonconforming, queer, or question their sexual orientation or gender identity and expression ("LGBTQ") meeting the requirements of § 510(b)(5) of the Act (D.C. Official Code § 3-1205.10 (b)(5) (2016 Repl.)).

Requestor – a person who seeks continuing education credit.

Treatment - the prevention, evaluation, recognition, management, treatment, rehabilitation, or reconditioning of an athletic injury, including the usage of appropriate preventative and supportive devices, temporary splinting and bracing, physical modalities of heat, cold, light, massage, water, electric stimulation, sound, and exercise equipment for which an athletic trainer has received appropriate training or education.

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., 6th Floor, Washington, D.C. 20002. Copies of the proposed rules may be obtained between the hours of 8:15 a.m. and 4:45 p.m. at the address listed above, or by contacting Angli Black, Paralegal Specialist, at Angli.Black@dc.gov, (202) 442-5977.

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
CONSTRUCTION CODES COORDINATING BOARD

NOTICE OF SECOND EMERGENCY RULEMAKING

The Director of the Department of Consumer and Regulatory Affairs ("Department"), pursuant to paragraph 7 of the General Expenses title of An Act Making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and ten, and for other purposes, approved March 3, 1909 (35 Stat. 689; Pub. L. 60-303; D.C. Official Code § 6-661.01(a) (2012 Repl.)), and Mayor's Order 2013-23, dated January 29, 2013, hereby gives notice of the adoption, on an emergency basis, and intent to adopt permanently, the following amendment to Chapter 1 (DCRA Permits Division Schedule of Fees) of Title 12 (Construction Codes Supplement of 2013), Subtitle M (Fees), of the District of Columbia Municipal Regulations (DCMR).

This second emergency rulemaking establishes a fee for the Department's accelerated review pilot program.

This second emergency rulemaking is necessary to protect the health, safety, and well-being of the District of Columbia by establishing an appropriate fee for accelerated review projects. Without emergency rules, the District would be deprived of revenue associated with these reviews. The 120-day period for the rules will also provide the agency with time to pilot and evaluate the fees associated with the program so that the agency can determine whether they are, as proposed, appropriate to compensate for the time and skillset of the new government team, and to ensure that staffing is appropriate so that this program does not slow regular approvals but rather supplements them. The proposed fee structure is competitive with those charged by the private sector for reviews. Identical language was adopted on September 26, 2017 in a Notice of Emergency and Proposed Rulemaking published on October 20, 2017 at 64 DCR 10595.

This second emergency rulemaking was adopted on January 24, 2018, and became effective on that date. The emergency rulemaking shall remain in effect for up to one hundred and twenty (120) days or until May 23, 2018, unless earlier superseded by publication of a Notice of Final Rulemaking in the *D.C. Register*.

Chapter 1, DCRA PERMITS DIVISION SCHEDULE OF FEES, of Title 12-M DCMR, FEES, is amended as follows:

Section 101, BUILDING PERMIT FEES, is amended as follows:

Paragraph (b) of Subsection 101.1 is amended by adding the following phrase to the end of the paragraph:

Accelerated Permit Review	Projects 50,000 square feet or less.	$50,000 per day
	Projects 50,001-99,999 square feet	$50,000 + $0.50 per each square foot more than 50,000 per day
	Projects 100,000 square feet or more	$75,000 per day

DEPARTMENT OF HEALTH

NOTICE OF THIRD EMERGENCY RULEMAKING

The Director of the Department of Health, pursuant to Section 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 § 7-1671.13 (2012 Repl. & 2017 Supp.)); Section 4902(d) of the Health Clarifications Act of 2001, effective October 3, 2001 (D.C. Law 14–28; D.C. Official Code § 7–731(d) (2012 Repl. & 2017 Supp.)); Section 6(9) of the Medical Marijuana Omnibus Amendment Act of 2016, effective February 19, 2017 (D.C. Law 21-209; D.C. Official Code §§ 7-1671.05(9) (2012 Repl. & 2017 Supp.)); and Mayor's Order 2011-71, dated April 13, 2011; hereby gives notice of the adoption, on an emergency basis, of the following amendments to Chapter 51 (Registration and Permit Categories) of Title 22 (Health), Subtitle C (Medical Marijuana), of the District of Columbia Municipal Regulations (DCMR).

This emergency action is necessary to immediately preserve and promote the health, safety and welfare of the public by enabling the Department to sustain the availability of the Medical Marijuana Program for the District's qualifying patients. At present, all medical marijuana cultivation center and dispensary registrations expire on September 30th of each calendar year. These registrants are required to renew their registrations by September 30th of each year. The application and registration fees that accompany these renewals support the operation of the Medical Marijuana Program. However, since the fees are presently received on the last day of the fiscal year, the Department is unable to apply the fees toward the Medical Marijuana Program's operating costs before the fiscal period ends on the same day. This emergency action will enable the Department to utilize these funds to support the operating costs of the Medical Marijuana Program throughout the duration of the fiscal period, thus ensuring its continued availability for the District's qualifying patients.

This emergency rulemaking will change the registration period for a cultivation center or dispensary registration from the current period October 1st to September 30th, to the new period of January 1st to December 31st of each year. It will further establish the registration period for testing laboratories, consolidate the renewal fee and application fees for cultivation centers and dispensaries into one single regulation to avoid confusion, increase the initial and renewal application and registration fee for dispensaries and cultivation centers to offset the Department's operating costs for the electronic tracking system that is required for implementing reciprocity, establish the initial application and registration fee and renewal application and registration fee for testing laboratories, establish the application fees for change of ownership or transfer of location applications, and discontinue the refunding of application fees.

A Notice of Emergency and Proposed Rulemaking was published in the *D.C. Register* on October 20, 2017 at 64 DCR 10602, to immediately preserve and promote the health, safety and welfare of the public by enabling the Department to sustain the availability of the Medical Marijuana Program for the District's qualifying patients. Those emergency regulations were adopted on August 28, 2017 and were set to expire one hundred twenty (120) days from the date of adoption, on December 26, 2017. However, a Second Notice of Emergency Rulemaking action was taken since the proposed regulations were pending introduction to the Council of the

District of Columbia and would not become effective prior to the December 26, 2017 expiration date of the emergency regulations that were adopted on August 28, 2017. The Second Notice of Emergency Rulemaking was adopted on December 14, 2017, and became effective on that date. The Second Notice of Emergency Rulemaking was not published in the *D.C. Register*. The Second Notice of Emergency Rulemaking is set to expire one hundred twenty (120) days from the date of adoption, on April 13, 2018.

This Third Notice of Emergency Rulemaking is necessary as the Council Review of the proposed regulations completed on April 27, 2018, after the expiration date of the Second Notice of Emergency Rulemaking.

No comments were received after the Notice of Emergency and Proposed Rulemaking was published in the *D.C. Register* on October 20, 2017. Accordingly, no changes have been made and this emergency rulemaking is identical to the Notice of Emergency and Proposed Rulemaking published in the *D.C. Register* on October 20, 2017.

This emergency rulemaking action was adopted on April 17, 2018, and became effective on that date. This emergency rulemaking will expire one hundred twenty (120) days from the date of adoption, on August 14, 2018, or upon publication of a Notice of Final Rulemaking in the *D.C. Register*, whichever occurs first.

Chapter 51, REGISTRATION AND PERMIT CATEGORIES, of Title 22-C DCMR, MEDICAL MARIJUANA, is amended as follows:

Section 5101, RENEWAL PERIODS, is amended as follows:

Subsection 5101.1 is amended to read as follows:

5101.1 Effective upon adoption of this rulemaking, the registration period and renewal period for each registration type listed below shall occur annually between the following dates:

Registration Type	Registration Period	Renewal Period
Cultivation Center	January 1 to December 31	November 1 to December 31
Dispensary	January 1 to December 31	November 1 to December 31
Testing Laboratory	January 1 to December 31	November 1 to December 31

The current Subsections 5101.2 and 5101.3 are renumbered as 5101.3 and 5101.4 respectively.

A new Subsection 5101.2 is added to read as follows:

5101.2 A registration set forth in § 5101.1 that is active and in good standing as of the date of adoption of this rulemaking shall remain in full force and effect until December 31, 2017, unless suspended or revoked by the Department for cause.

Section 5103, REGISTRATION AND PERMIT FEES, is amended to read as follows:

5103 APPLICATION, REGISTRATION, AND PERMIT FEES

5103.1 All application, registration, and permit fees shall be paid by cashier's check, certified check, or money order payable to the DC Treasurer. Applicants shall pay the fees specified by the Department at the time an application is filed. All fees are nonrefundable.

5103.2 The Department may impose a late fee upon an applicant that fails to timely renew their registration or permit in the amount of fifty dollars ($50) for each day after the due date of payment. The total amount of the late fee to be paid shall not exceed the annual cost of the registration. The Department may suspend a previously approved registration until the renewal fee is paid. A cultivation center or dispensary that has not timely renewed its registration shall not be permitted to sell medical marijuana with an expired registration.

5103.3 The Department may suspend a registration or permit where payment was made by the applicant with a check returned unpaid. The applicant, in addition to any late fees imposed by the Department pursuant to § 5103.2, shall also be charged with a one hundred dollar ($100) returned check fee.

5103.4 The fee for the filing of an initial application for a medical marijuana dispensary shall be eight thousand dollars ($8,000).

5103.5 The annual renewal fee and renewal application fee for a medical marijuana dispensary registration shall be sixteen thousand dollars ($16,000). This fee shall also cover any audit and inspection costs incurred by the Department.

5103.6 The fee for the filing of an initial application for a medical marijuana cultivation center shall be eight thousand dollars ($8,000).

5103.7 The annual renewal fee and renewal application fee for a cultivation center registration shall be eleven thousand dollars ($11,000). This fee shall also cover any audit and inspection costs incurred by the Department.

5103.8 The fee for the filing of an initial application for a testing laboratory shall be three thousand five hundred dollars ($3,500).

5103.9 The annual renewal fee and renewal application fee for a testing laboratory shall be seven thousand five hundred dollars ($7,500). This fee shall also cover any audit and inspection costs incurred by the Department.

5103.10 The annual fee for each director, officer, member, incorporator, or agent registration shall be two hundred dollars ($200).

5103.11 The annual fee for an employee registration shall be seventy-five dollars ($75).

5103.12 The fee for the filing of an initial medical marijuana certification provider permit shall be one hundred dollars ($100).

5103.13 The annual renewal fee and renewal application fee for a medical marijuana certification provider permit shall be three hundred dollars ($300).

5103.14 The annual fee for a Manager's registration shall be one hundred fifty dollars ($150).

5103.15 The annual fee for a transport permit shall be twenty-five dollars ($25).

5103.16 The fee for a duplicate registration or replacement of a lost registration shall be twenty-five dollars ($25).

5103.17 The fee for a duplicate permit or replacement of a lost permit shall be twenty-five dollars ($25).

5103.18 The fee for a change of director, officer, member, incorporator, or agent shall be one hundred dollars ($100).

5103.19 The fee for a corporate or trade name change shall be one hundred dollars ($100).

5103.20 The fee for the transfer of a dispensary, cultivation center, or testing laboratory registration to a new owner shall be two thousand five hundred dollars ($2,500).

5103.21 The fee for the transfer of a dispensary, cultivation center, or testing laboratory registration to a new location shall be five thousand dollars ($5,000). This fee shall also cover any audit and inspection costs incurred by the Department.

Section 5104, APPLICATION FEES, is repealed in its entirety.

These rules were published as Emergency and Proposed Rulemaking in the *D.C. Register* on October 20, 2017 for the thirty (30) day public comment period. No comments were received after publication of the Notice. Copies of the Emergency and Proposed Rulemaking can be obtained at www.dcregs.dc.gov or by contacting Phillip Husband, General Counsel, Department of Health, Office of the General Counsel, 899 North Capitol Street, N.E., 6th Floor, Washington, D.C. 20002.

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ALCOHOLIC BEVERAGE CONTROL BOARD

NOTICE OF PUBLIC HEARINGS
CALENDAR

WEDNESDAY, MAY 16, 2018
2000 14TH STREET, N.W., SUITE 400S
WASHINGTON, D.C. 20009

Donovan W. Anderson, Chairperson
Members: Nick Alberti, Mike Silverstein,
James Short, Donald Isaac, Sr., Bobby Cato, Rema Wahabzadah,

Protest Hearing (Status), Case # 18-PRO-00015, Eleana, LLC t/a Secret Lounge, 1928 9th Street NW, License #107123, Retailer CT **9:30 AM**
Substantial Change (Entertainment Endorsement to Include Live Entertainment with Dancing and Cover Charge)
This hearing was cancelled due to the dismissal of the Protest. See Board Order No. 2018-288.

Protest Hearing (Status), Case # 18-PRO-00016, Yegna Restaurant and, Lounge, Inc., t/a Asefu's Palace, 1920 9th Street NW, License #105977, Retailer CR **9:30 AM**
Substantial Change (Increase Seating from 38 Seats to 106 Seats, and Increase Occupancy Load from 38 to 166 on the First and Second Floors of the Establishment)

Show Cause Hearing (Status), Case # 17-CMP-00684, Howard Theatre Entertainment, LLC, t/a Howard Theatre, 620 T Street NW, License #88646 Retailer CX **9:30 AM**
Failure to Follow Security Plan

Show Cause Hearing (Status), Case # 17-CMP-00681, Howard Theatre Entertainment, LLC, t/a Howard Theatre, 620 T Street NW, License #88646 Retailer CX **9:30 AM**
Failure to Follow Security Plan

Board's Calendar
May 16, 2018

BOARD RECESS AT 12:00 PM

ADMINISTRATIVE AGENDA
1:00 PM

Protest Hearing*, Case # 17-PRO-00064, Albo Corp, t/a Eleven Market, 1936 11th Street NW, License #60236, Retailer B, ANC 1B **1:30 PM**
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
CANCELLATION AGENDA

WEDNESDAY, MAY 16, 2018
2000 14TH STREET, N.W., SUITE 400S, WASHINGTON, D.C. 20009

The Board will be cancelling the following licenses for the reasons outlined below:

ABRA-100620 – **TBD (Zenebe Shewayene)** – Retail – B – No Location
[The Licensee did not pay Safekeeping fees within 30 days.]

ABRA-060723 – **Geranium Market** – Retail – B – 7350 Georgia Avenue NW
[The Licensee did not pay Safekeeping fees within 30 days.]

ABRA-090634 – **Red Apron Burger Bar –** Retail – C – Restaurant - 1323 Connecticut Avenue NW
[The Licensee did not pay Safekeeping fees within 30 days.]

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ALCOHOLIC BEVERAGE CONTROL BOARD

NOTICE OF MEETING
INVESTIGATIVE AGENDA

WEDNESDAY, MAY 16, 2018
2000 14TH STREET, N.W., SUITE 400S, WASHINGTON, D.C. 20009

On Wednesday, May 16, 2018 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# 18-CC-00033, Union Kitchen Grocery, 1251 9th Street N.W., Retailer B, License # ABRA-104694

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2. Case# 18-CC-00032, Wal-Mart, 99 H Street N.W., Retailer B, License # ABRA-092202

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3. Case# 18-CC-00034, Union Kitchen, 538 3rd Street N.E., Retailer B, License # ABRA-098204

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4. Case# 18-CC-00037, 13th Street Market, 3582 13th Street N.W., Retailer B, License # ABRA-078242

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5. Case# 18-251-00066, Anacostia Market, 1303 Good Hope Road S.E., Retailer B, License # ABRA-086470

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6. Case# 18-CMP-00068, Vita Restaurant and Lounge/Penthouse Nine, 1318 9th Street N.W., Retailer CT, License # ABRA-086037

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7. Case# 18-251-00070, Mad Hatter, 1321 Connecticut Avenue N.W., Retailer CT, License # ABRA-082646

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8. Case# 18-CC-00015, Good Food Markets, 2006 Rhode Island Avenue N.E., Retailer B, License # ABRA-098178

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9. Case# 18-MGR-00003, ABC Manager, Gilbert White, License # ABRA-107530

10. Case# 18-251-00089, Decades, 1219 Connecticut Avenue N.W., Retailer CN, License # ABRA-103505

11. Case# Unlicensed, Lift Lounge, 1318 9th Street N.W.

12. Case# 18-251-00098, Kiss Tavern, 637 T Street N.W., Retailer CT, License # ABRA-104710

13. Case# 18-CMP-00092, Kiss Tavern, 637 T Street N.W., Retailer CT, License # ABRA-104710

14. Case# 18-251-00099, Nellie's Restaurant and Sports Bar, 900 U Street N.W., Retailer CT, License # ABRA-075240

15. Case# 18- Case# 18-CC-00029, FoBoGro, 2140 F Street N.W., Retailer B, License # ABRA-082431

16. Case# 18-CMP-00090, Panda Gourmet, 2700 New York Avenue N.E., Retailer CR, License # ABRA-086961

17. Case# 18-CMP-00089, Red Apron at Union Market, 1390 5th Street N.E., Retailer CR, License # ABRA-091030

18. Case# 18-CC-00036, Prego Again, 1617 17th Street N.W., Retailer B, License # ABRA-090326

19. Case# 18-MGR-00007, ABC Manager, Montaz Sfar, License # ABRA-108369

20. Case# 18-AUD-00027, La Dulce Noche, 3566 14th Street N.W., Retailer CR, License # ABRA-092426

21. Case# 18-AUD-00028, Golden Paradise Restaurant, 3903 14th Street N.W., Retailer CR, License # ABRA-098205

22. Case# 18-CMP-00091, Bon Appetit Management Company, 600 New Jersey Avenue N.W., Retailer DR, License ABRA-071419

23. Case# 18-CMP-00093, Justin's Café, 1025 1st Street S.E., Retailer CR, License # ABRA-083690

24. Case# 18-CMP-00099, Osteria Morini/Nicoletta, 310 Water Street S.E., Retailer CR, License # ABRA-092083

ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ALCOHOLIC BEVERAGE CONTROL BOARD

NOTICE OF MEETING
LICENSING AGENDA

WEDNESDAY, MAY 16, 2018 AT 1:00 PM
2000 14TH STREET, N.W., SUITE 400S, WASHINGTON, D.C. 20009

1. Review Request to expand seating from 34 seats to 79 seats and to increase the Total Occupancy Load to 85. ANC 5C. SMD 5C05. No outstanding fines/citations. No outstanding violations. No pending enforcement matters. No Settlement Agreement. ***Zion Kitchen and Trading***, 1805 Montana Avenue NE, Retailer CR, License No. 096141.

***In accordance with D.C. Official Code §2-547(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.**

DC INTERNATIONAL PUBLIC CHARTER SCHOOL

REQUEST FOR PROPOSALS

RFP for Interior Painting: DCI requires interior painting services for the halls of our 140,000 square foot building. We have approximately 40,000 square feet of wall space to be painted. Please include awards, experience in the education area, and a portfolio of work. Bids must include evidence of experience in field, qualifications and estimated fees. Please send proposals to RFP@dcinternationalschool.org. Proposals must be received no later than the close of business Friday, May 25, 2018.

DC SCHOLARS PUBLIC CHARTER SCHOOL

NOTICE OF INTENT TO ENTER A SOLE SOURCE CONTRACT

Security Officers

DC Scholars Public Charter School intends to enter into a sole source contract with LGC Security for a contracted Security Officer for approximately $50,000 for the school year 2018-19. The decision to sole source is due to the fact that LGC Security provides high-quality security officers who review employee and visitor identification as well as perform other measures necessary for maximum security at the school campus. LGC Security previously provided security officers to DC Scholars Public Charter School in Spring 2018 for the conclusion of SY17-18. LGC Security has a proven history in providing security officers who protect against fire, theft, and vandalism at various local schools.

The Sole Source Contract will be awarded at the close of business on May 23, 2018. If you have questions or concerns regarding this notice, contact **Emily Stone** at **202-559-6138 or estone@dcscholars.org** no later than **4:00 pm on May 23, 2018.**

E.L. HAYNES PUBLIC CHARTER SCHOOL

REQUEST FOR PROPOSALS

Bathroom Renovation Services

E.L. Haynes Public Charter School ("ELH") is seeking proposals from qualified vendors to provide bathroom renovation services for our six in-classroom pre-kindergarten and kindergarten bathrooms.

The contract will be assigned to a successful bidder who can provide the parts and service to complete these tasks.

Proposals are due via email to Kristin Yochum no later than 5:00 PM on Friday, June 1, 2018. We will notify the final vendor of selection and schedule work to be completed. The RFP with bidding requirements can be obtained by contacting:

Kristin Yochum
E.L. Haynes Public Charter School
Email: kyochum@elhaynes.org

E.L. HAYNES PUBLIC CHARTER SCHOOL

REQUEST FOR PROPOSALS

IT Solutions

E.L. Haynes Public Charter School ("ELH") is seeking proposals from qualified vendors to provide annual servicing solutions (products and services) for laptops, desktops, tablets, and chromebook devices. E.L. Haynes will award multiple vendors for proposals that satisfy any solutions listed in section 3 of this RFP. Vendors must at minimum provide a proposal that satisfies Section 3.1.1, 3.3.1, and 3.3.2 (Laptops and Chromebooks). The selected vendor(s) will enter an agreement which provides for orders to be placed and invoiced throughout the one year contract period.

Proposals are due via email to Kristin Yochum no later than 5:00 PM on Friday, May 25, 2018. We will notify the final vendor of selection and schedule work to be completed. The RFP with bidding requirements can be obtained by contacting:

Kristin Yochum
E.L. Haynes Public Charter School
Phone: 202.667-4446 ext 3504
Email: kyochum@elhaynes.org

OFFICE OF THE DEPUTY MAYOR FOR EDUCATION

NOTICE OF PUBLIC MEETING

COMMISSION ON OUT OF SCHOOL TIME GRANTS AND YOUTH OUTCOMES

The Commission on Out of School Time Grants and Youth Outcomes will hold a public meeting on Thursday, May 17, 2018 from 6:00 pm to 7:30 pm at One Judiciary Square, 441 4th Street NW, Room 1107 South. The OST Commission will finalize the draft bylaws for the OST Commission and discuss the strategic plan. In addition, the Commission will hear updates from the Office of Out of School Time Grants and Youth Outcomes.

Individuals and representatives of organizations who wish to comment at a public meeting are asked to notify the OST Office in advance by phone at (202) 481-3932 or by email at learn24@dc.gov. Individuals should furnish their names, addresses, telephone numbers, and organizational affiliation, if any, and if available, submit one electronic copy of their testimony by the close of business on Monday, May 14 at 5:00 pm.

Below is the draft agenda for the meeting.

I. Call to Order
II. Public Comment
III. Announcement of a Quorum
IV. Approval of the Agenda
V. Updates: Office of Out of School Time Grants and Youth Outcomes
VI. Draft Bylaws
VII. Strategic Plan Discussion
VIII. Adjournment

The Office of Out of School Time Grants and Youth Outcomes (OST Office) and the OST Commission support the equitable distribution of high-quality, out-of-school-time programs to District of Columbia youth through coordination among government agencies, grant-making, data collection and evaluation, and the provision of technical assistance to service providers. The OST Commission's purpose is to develop a District-wide strategy for equitable access to out-of-school-time programs and to facilitate interagency planning and coordination for out-of-school time programs and funding.

Date: May 17, 2018
Time: 6:00 p.m. – 7:30 p.m.
Location: One Judiciary Square
Room 1107 South
441 4th Street, NW
Washington, DC 20001
Contact: Debra Eichenbaum
Grants Management Specialist
Office of Out of School Time Grants and Youth Outcomes
Office of the Deputy Mayor for Education
(202) 478-5913
Debra.eichenbaum@dc.gov

OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

OFFICE OF PUBLIC CHARTER SCHOOL FINANCING AND SUPPORT

ANNOUNCES MAY 17, 2018 PUBLIC MEETING
DISTRICT OF COLUMBIA PUBLIC CHARTER SCHOOL CREDIT ENHANCEMENT COMMITTEE

The Office of the State Superintendent of Education (OSSE) hereby announces that it will hold a public meeting for the District of Columbia Public Charter School Credit Enhancement Committee as follows:

12:30 p.m. – 1:30 p.m.
Thursday May 17, 2018
1050 First St. NE, Washington, DC 20002
Conference Room 536 (LeDroit Park)

For additional information, please contact:

Debra Roane, Financial Program Specialist
Office of Public Charter School Financing and Support
Office of the State Superintendent of Education
1050 First St. NE, Fifth Floor, Washington, DC 20002
(202) 478-5940
Debra.Roane@dc.gov

The draft agenda for the above-referenced meeting will be:

I. Call to Order
II. Approval of agenda for the May 17, 2018, committee meeting
III. Approval of minutes from March 15, 2018, committee meeting
IV. Approval of minutes from April 26, 2018, special committee meeting
V. Early Childhood Academy Public Charter School (PCS) - $ 2,000,000 direct loan
VI. Digital Pioneers Academy PCS - $600,000 direct loan
VII. Breakthrough Montessori PCS - $1,000,000 credit enhancement
VIII. Review of the Conflict of Interest Policy

Any changes made to the agenda that are unable to be submitted to the DC Register in time for publication prior to the meeting will be posted on the public meetings calendar no later than two (2) business days prior to the meeting.

OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

NOTICE OF FUNDING AVAILABILITY (NOFA)

FISCAL YEAR 2019

Special Education Enhancement Fund Competitive Grant

Request for Applications Release Date: Friday, May 25, 2018 by 5:00 p.m.

The Office of the State Superintendent of Education (OSSE) is soliciting grant applications for the Special Education Enhancement Fund Competitive Grant, pursuant to OSSE's authority to issue grants for programs that increase the capacity of a local education agency to provide special education services (D.C. Code § 38-2602(b)(18)) and the Special Education Quality Improvement Amendment Act of 2014, effective March 10, 2015 (D.C. Law 20-196; D.C. Code § 38-2613). The purpose of this funding is to improve transition from Individuals with Disabilities Education Act (IDEA), Part C (20 U.S. Code §1431 et. seq.) to IDEA Part B (20 U.S. Code §1411 et seq.), timely evaluation and service delivery for children ages 3 to 6, academic outcomes, graduation rates, and post-secondary success of students with disabilities in District of Columbia public schools and public charter schools through projects that:

- Address needs identified through a needs assessment using relevant data;
- Are linked to evidence-based research and have been shown to increase academic achievement; and
- Apply promising practices to increase academic achievement.

Eligibility: OSSE will make these grants available through a competitive process. Eligible applicants include District of Columbia local educational agencies (LEAs) and third-party non-profit organizations that partner with one or more LEAs. Third-party non-profit organizations must secure partnerships with the LEAs with which they intend to work and will be required to verify these partnerships through a signed Joint Agreement that details the parameters of the partnership and demonstrates each partner's role in the planning and implementation of programs and services. Entities with an existing SEEF FY 2018 competitive grant award (Cohort 1) are ineligible to apply for the SEEF FY 2019 competition (Cohort 2).

Grant applications that demonstrate the following will be prioritized:

- Ability to support the creation of a continuum of public placements and build capacity to serve students in the least restrictive environment, in accordance with the IDEA, 34 CFR Section 300.114;
- Ability to demonstrate partnerships developed between nonpublic schools, public schools, and/or public charter schools to provide special education services and training;
- Ability to ensure that children with disabilities served in early intervention (IDEA Part C) receive a smooth and effective transition to special education (IDEA Part B) and support timely evaluation and service delivery for children ages 3-6, with a focus on the beginning of the school year; and
- Ability to improve graduation, secondary transition, and post-secondary outcomes for students with disabilities.

Length of Award: The grant award period will start on August 1, 2018 and will end on September 30, 2019. Successful applicants may be eligible to receive funding for up to two additional grant award periods of 12 months each, subject to the availability of continued funding.

Available Funding for Award: The total funding available for the grant award period is $2,000,000. Awards are limited to one per applicant. Applicant LEAs (or partnerships) serving a total of up to 99 students with disabilities may apply for up to $300,000.[1] Applicant LEAs (or partnerships) serving 100 or more students with disabilities may apply for up to $500,000. Determinations regarding the number of competitive grant awards will be based on the quality and number of applications received and available funding. Successful applicants may be awarded amounts less than requested. OSSE will provide up to $500,000 per award, subject to LEA (or partnership) size as discussed above, availability of continued funding and satisfactory completion of grant obligations. Successful applicants shall be eligible to receive up to the same amount as their first grant award for each of two additional periods of 12 months each, subject to availability of continued funding and satisfactory completion of grant obligations.

A review panel or panels will be convened to review, score, and rank each application for a competitive grant. The review panel(s) will be composed of external neutral, qualified, professional individuals selected for their expertise, knowledge or related experiences. Each application will be scored against a rubric and applications will have multiple reviewers to ensure accurate scoring. Upon completion of its review, the panel(s) shall make recommendations for awards based on the scoring rubric(s). The State Superintendent or her designee will make all final award decisions.

To receive more information on this grant, please contact:

Before August 6, 2018: Brianna Becker, Brianna.Becker@dc.gov
August 6, 2018 and afterward: Jonathan Elkin, Jonathan.Elkin@dc.gov
Office of the State Superintendent of Education
1050 First Street, NE, Fifth Floor, Washington, D.C. 20002

The Requests for Applications (RFAs) for the competitive grant program as well as the instructions for completing the grant application will be available on OSSE's website at www.osse.dc.gov. All applications will be submitted through the Enterprise Grants Management System (EGMS) at grants.osse.dc.gov.

[1] For the purposes of this grant competition, the number of students with disabilities served by each applicant will be determined based on OSSE's school year 2017-18 enrollment audit, available at pp. 103-5 here: https://osse.dc.gov/sites/default/files/dc/sites/osse/page_content/attachments/2017-18%20School%20Year%20Audit%20and%20Verification%20of%20Student%20Enrollment%20Report%20-%20Feb%202018.pdf

DEPARTMENT OF ENERGY AND ENVIRONMENT

NOTICE OF FILING OF AN APPLICATION TO PERFORM VOLUNTARY CLEANUP

680 Rhode Island Avenue, NE
Case No. VCP2018-055

Pursuant to § 636.01(a) of the Brownfield Revitalization Amendment Act of 2000, effective June 13, 2001 (D.C. Law 13-312; D.C. Official Code §§ 8-631 et seq., as amended April 8, 2011, DC Law 18-369 (herein referred to as the "Act")), the Voluntary Cleanup Program in the Department of Energy and Environment (DOEE), Land Remediation and Development Branch, is informing the public that it has received an application to participate in the Voluntary Cleanup Program (VCP). The applicant for real property located at 680 Rhode Island Avenue, NE, Washington, DC 20002, is Bryant Street Partners, LLC, c/o MRP Realty, 3050 K Street, NW, Washington, DC 20007. The application identifies the presence of petroleum related organics (TPH-DRO) and polycyclic aromatic hydrocarbons (PAHs) in the soil and groundwater. The applicant intends to redevelop the subject property into three buildings: one six-story apartment building with ground floor retail, one seven-story apartment building with ground-floor retail, and a three-story cinema and retail building.

Pursuant to § 636.01(b) of the Act, this notice will also be mailed to the Advisory Neighborhood Commission (ANC-5E) for the area in which the property is located. The application is available for public review at the following location:

Voluntary Cleanup Program
Department of Energy and Environment (DOEE)
1200 First Street, NE, 5th Floor
Washington, DC 20002

Interested parties may also request a copy of the application by contacting the Voluntary Cleanup Program at the above address or by calling (202) 535-2289. An electronic copy of the application may be viewed at http://doee.dc.gov/service/vcp-cleanup-sites.

Written comments on the proposed approval of the application must be received by the VCP office at the address listed above within twenty-one (21) days from the date of this publication. DOEE is required to consider all relevant public comments it receives before acting on the application, the cleanup action plan, or a certificate of completion.

Please refer to Case No. VCP2018-055 in any correspondence related to this application.

THE DISTRICT OF COLUMBIA
DEPARTMENT OF HUMAN SERVICES
FAMILY SERVICES ADMINISTRATION

NOTICE OF FUNDING AVAILABILITY (NOFA)

FISCAL YEAR (FY) 2018

THE DISTRICT OF COLUMBIA HOMELESS YOUTH EXTENDED SUPPORTIVE HOUSING PROGRAM

Background

The District of Columbia (District), Department of Human Services (DHS) is soliciting detailed proposals to establish an Extended Supportive Housing Program (ESHP) for youth ages 18-24 in the District pursuant to the Homeless Services Reform Act of 2005, effective October 22, 2005 (D.C. Law 16-35, D.C. Official Code § 4-755.01(d)), as amended (HSRA).

In accordance with HSRA, DHS is authorized to provide funding to establish sixteen (16) youth ESHP units in the District. DHS seeks to expand the availability of youth-friendly housing options and homeless services where youth facing housing crises receive resources to enable them to grow and move toward stability and self-sufficiency. Applicants must demonstrate a culturally competent youth centric case management plan to support housing placement and facilitate an exit to permanent housing. DHS anticipates executing up to two (2) awards for the services discussed herein.

Target Population

The District of Columbia Extended Supportive Housing Program target population is:

- Highly vulnerable youth ages 18-24 old who are economically or emotionally detached from their families and lack an adequate or fixed residence, including youth who are homeless, unstably housed, living in doubled up circumstances, in transitional housing, in shelter, or on the street and have been assessed as needing extended supportive housing; and
- Youth assessed as needing long-term supportive housing due to significant barriers to self-sufficiency such as, behavioral health issues, alcohol and/or drug abuse, education or employment barriers, and /or risk of chronic homelessness.

Eligibility

Organizations that meet the following eligibility requirements at the time of application may apply:

- Community-based organization with a Federal 501(c)(3) tax-exempt status; or evidence of a fiscal agent relationship with a 501 (c)(3) organization;
- The organization's principal place of business is located in the District;
- The organization is currently registered in good standing with the District Department of Consumer & Regulatory Affairs, the District Office of Tax and Revenue, and the United Stated Department of Treasury's Internal Revenue Service (IRS); and
- Current grantees must be up-to-date on all reporting obligations for the FY18 grant cycle.

Program Scope:

Grantees will be required, at minimum, to meet the following requirements:

- Create sixteen (16) extended housing beds;
- Operate according to Housing First principles;
- Comply with all provisions of the Homeless Services Reform Act (HSRA) and corresponding regulations;
- Utilize a culturally-competent youth development approach to serve clients of various races, ethnicities, sexual orientations, and gender identities, as well as language accessibility;
- Report client data via the Homeless Management Information System (HMIS);
- Use the TAY-SPDAT as a case management tool, conducting a formal update at least twice in the first year, and at least annually thereafter;
- Coordinate, monitor, and evaluate supportive services provided to clients; this may require accompanying the client to scheduled appointments and/or coordinating/communicating with service Providers via another forum;
- Work to ensure that clients are receiving and engaged in needed health care and supportive services and stay enrolled and engaged to these services;
- Serve as mediator/liaison between clients and their service providers;and

Specific details on the program scope are listed in the RFA.

Release Date of RFA:	Friday, May 11th, 2018
Availability of RFA:	The RFA will be posted on the District's Grant Clearinghouse Website
Total Estimated Available Funding:	Up to four hundred thirty thousand dollars and zero cents ($432,000.00)
Total Estimated Number of Awards:	Up to two (2) awards
Total Estimated Amount per Award:	Eligible organizations can be awarded up to four hundred thirty thousand dollars and zero cents ($432,000.00) per award
Length of Award:	Twelve (12) months with up to five (5) additional option years
Pre-Bidder's Conference:	Friday, May 25th, 2018, 12:00PM - 2:00PM The Department of Human Services Headquarters 64 New York Ave, NE (room number TBD after RSVP deadline) Washington, DC 20002

Deadline for Submission:	4:00 PM, June 8th, 2018 The District of Columbia Department of Human Services 64 New York Avenue, NE, 5th Floor Washington, DC 20002
Contact Person:	Tamara Mooney, Program Analyst Phone: 202-299-2158 tamara.mooney@dc.gov

INGENUITY PREP PUBLIC CHARTER SCHOOL

REQUEST FOR PROPOSALS

Furniture Vendor

Ingenuity Prep PCS solicits proposals for the following:

- **Furniture vendor**

Full RFP(s) by request. Proposals shall be submitted no later than 5:00 PM on Tuesday, May 15, 2018. Contact: bids@ingenuityprep.org

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA

NOTICE OF PROPOSED TARIFF

PEPPOR 2018-01, PURCHASE OF RECEIVABLES

1. The Public Service Commission of the District of Columbia (Commission) hereby gives notice, pursuant to Sections 34-802 and 2-505 of the District of Columbia Official Code,[1] and pursuant to Order No. 17052 directing the Potomac Electric Power Company (Pepco or the Company) to implement a Purchase of Receivables (POR) program in the District of Columbia,[2] of our intent to act upon Pepco's tariff filing revising the POR tariff and Supplier Discount Rate.[3] The Commission will act upon Pepco's tariff in not less than 30 days from the date of publication of this Notice of Proposed Tariff (NOPT) in the *D.C. Register*.

2. Pepco implemented the POR Supplier Discount on October 7, 2013. The first true-up of the POR Supplier Discount Rate was derived based on the POR activity from October 2013 through December 2014. The second true-up was derived based on POR activity from January 2015 through August 2016. This filing is the third true-up based on POR activity from September 2016 through December 2017. Pepco's proposed tariff modifies the Company's Electric Supplier Coordination Tariff (Electric Supplier--P.S.C. of D.C. No. 1). Attachment A of the tariff filing includes the revisions to the Supplier Tariff Schedule 3, which describes the components and derivation of the POR Supplier Discount Rates.[4] Specifically, Pepco proposes to revise the current tariff pages:

Electricity Supplier Coordination Tariff, P.S.C. of D.C. No.1
Current Fifth Revised Page No. i to Sixth Revised Page No. i
Current Fifth Revised Page No. ii to Sixth Revised Page No. ii
Current Fifth Revised Page No. iii to Sixth Revised Page No. iii
Current Fifth Revised Page No. iv to Sixth Revised Page No. iv
Current Second Revised Page No. 41 to Third Revised Page No. 41
and Current Second Revised Page No. 42 to Third Revised Page No. 42

3. Pepco's proposed tariff applies a discount rate on the receivables associated with Residential customers of 0.0000% on Schedules R and MMA. The Company is proposing to apply a discount rate of 0.0000% on receivables associated with Small Commercial customers, Schedules GS-LV ND, T: SL, TS and TN, and 0.0000% on the receivables associated with Large Commercial customers, Schedules GS-LV, GS-3A, GT-LV, GT-3A, GT-3B, and RT, and finally, 0.0000% for Market

[1] D.C. Official Code §§ 34-802 (2001) and 2-505 (2001).

[2] *Formal Case No. 1085, In the Matter of the Investigation of a Purchase of Receivables Program in the District of Columbia* (*Formal Case. No. 1085*), Order No. 17052, issued January 18, 2013.

[3] *PEPPOR 2018-01*, Purchase of Receivables Tariff Filing, filed April 19, 2018 (Proposed Tariff).

[4] Proposed Tariff Attachment A at 7-8.

Priced Customers, Schedules GSLV-ND, GS-LV, GS-3A, GT-LV, GT-3A, T, SL, and TS. Pepco notes that Schedules AE and RTM have been eliminated as directed by the Commission in *Formal Case No. 1139*, Order No. 18846.[5] The Company states that customers who had received service under Schedules AE and RTM are now billed under Schedule R. Pepco adds that references to new Schedule MMA are now included.

4. In Attachment B through Attachment D of the tariff filing, Pepco provides information detailing how the Discount Rates are derived using the POR data for the period of September 2016 through December 2017. Pepco states that Attachment B to this filing is a summary showing the results of the Write-Offs, including Reinstatements, and Late Payment Revenues expressed as a percentage of Third Party Supplier Revenues for Residential Customers served under Schedules R and MMA; Small Commercial customers served under Schedules GS-LV-ND, T, SL, TS and TN; Large Commercial customers served under Schedules GS-LV, GS-3A, GT-LV, GT-3A, GT-3B and RT; And Market Priced Service customers served under Schedules GS-LV-ND, GS-LV, GS-3A, GT-LV, GT-3A, T, SL and TS.

5. In Order No. 16916,[6] the Commission approved a Risk Component to be included in the Discount Rate. In the same Order, the Commission allowed for a Cash Working Capital adjustment. Pursuant to the Commission's directive that both components be set to zero and that they may not be changed without the Commission's written authorization, Pepco set the Risk Component and the Cash Working Capital adjustment to zero. Pepco states that the Interest and Reconciliation Factors are added to arrive at the Discount Rates for each of the four rate classes described above.

6. In Attachment C, Pepco lists by month from September 2016 through December 2017, and by customer type, the Electric Revenues Billed, less POR Discounts, the Net Electric Revenues Billed, and the Write-Offs, net of Reinstatements. Pepco asserts that there is a timing difference of about six months between billing the customer and writing off the account as uncollectible. The Company represents that its policy for uncollectibles is to write off delinquent accounts after 120 days. The interest is calculated based on the cumulative Over/(Under) Collection at 7.65% per Order No. 17424[7] from September 1, 2016, through August 14, 2017, at 7.46% per Order No. 18846[8] from August 15, 2017, through the December 31, 2017.

7. In Attachment D, Pepco provides the detailed calculation by customer type for the Reconciliation and Interest Factor. The Company states that the

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[5] *Formal Case No. 1139, In the Matter of the Application of Potomac Electric Power Company for Authority to Increase Existing Retail Rates and Charges for Electric Distribution Service* (*Formal Case No. 1139*), Order No. 18846, rel. August 15, 2017.

[6] *Formal Case. No. 1085*, Order No. 16916, issued September 20, 2012.

[7] *Formal Case No. 1103, In the Matter of the Application of Potomac Electric Power Company for Authority to Increase Existing Retail Rates and Charges for Electric Distribution Service*, Order No. 17424, rel. March 26, 2014.

[8] *Formal Case No. 1139*, Order No. 18846, rel. August 15, 2017.

Reconciliation factor is derived by adding the Amortization of Program Cost to the POR Discounts less Write-Offs, plus Late Fee Revenues. Pepco states that the net Over/(Under) Collection is divided by the Electric Revenues billed for September 2016 through December 2017. Pepco states that the Interest Factor is derived by dividing the Interest from Attachment C by the Electric Revenues billed for September 1, 2016, through December 31, 2017.

8. Pepco states that because the Program Development and Operation Cost is fully amortized, Attachments E and F that were included in previous tariff filings are omitted in this filing.

9. The original and proposed tariff pages and attachments are on file with the Commission. They may be reviewed at the Office of the Commission Secretary, 1325 G Street, N.W., Suite 800, Washington, D.C. 20005, between the hours of 9:00 a.m. and 5:30 p.m., Monday through Friday, as well as on the Commission's Website at www.dcpsc.org. Once at the website, open the "eDocket System" tab, click on "Search Current Dockets," click on "Advanced Search," select "Pepco's Purchase of Receivables Reports and Filings" from the "Case Type" field's drop down menu and type "2018-01" in the "Case Number" field. Copies of the tariff pages and attachments are available, upon request, at a per page reproduction fee.

10. Comments on the Proposed Tariff must be made in writing to Brinda Westbrook-Sedgwick, Commission Secretary, at the above address, at psc-commissionsecretary@dc.gov or by clicking on the following link: http://edocket.dcpsc.org/comments/submitpubliccomments.asp. All comments must be received within 30 days from the date of publication of this NOPT in the *D.C. Register*. Once the comment period has expired, the Commission will take final rulemaking action on Pepco's Proposed Tariff. Persons with questions concerning this NOPT should call (202) 626-5150.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA

NOTICE OF PROPOSED TARIFF

PEPRADR 2018-01, THE POTOMAC ELECTRIC POWER COMPANY'S RESIDENTIAL AID DISCOUNT COMPLIANCE REPORTS AND FILINGS

1. The Public Service Commission of the District of Columbia (Commission) hereby gives notice, pursuant to Section 34-802 of the District of Columbia Official Code and in accordance with Section 2-505 of the District of Columbia Official Code,[1] of its intent to act upon the Potomac Electric Power Company's (Pepco) Rider "RADS" — Residential Aid Discount Surcharge (Rider Update)[2] in not less than 30 days from the date of publication of this Notice of Proposed Tariff (NOPT) in the *D.C. Register*.

2. In *Formal Case No. 1053*, the Commission established the Residential Aid Discount (RAD) Surcharge, the means by which Pepco recovers the costs of the subsidy for the RAD Program for low-income electricity customers in the District of Columbia.[3] Subsequently, pursuant to the Residential Aid Discount Subsidy Stabilization Amendment Act of 2010 (the Act of 2010),[4] the Commission, in Order No. 15986, directed Pepco to seek a true-up for the surcharge on an annual basis, commencing January 2011, in the event of an over or under collection of the RAD Surcharge and to address any changes in income eligibility criteria.[5]

3. In *Formal Case No. 1120*, Order No. 18059, the Commission adopted a new methodology for computing the RAD subsidy, and implemented a Residential Aid Credit (RAC), which is equal to the full Distribution Charge plus certain applicable surcharges.[6] The new methodology for calculating the RAD subsidy became effective June 1, 2016.[7]

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1 D.C. Code § 2-505 (2001) and D.C. Code § 34-802 (2001).

2 *PEPRAD 2018-01, In the Matter of Potomac Electric Power Company's Residential Aid Discount Compliance Reports and Filings* ("*PEPRAD Year*"), Update to Potomac Electric Power Company's Rider "RADS" — Residential Aid Discount Surcharge ("Rider Update"), filed April 4, 2018.

3 *Formal Case No. 1053, In the Matter of the Application of Potomac Electric Power Company for Authority to Increase Existing Retail Rates and Charges for Electric Distribution Service*, Order No. 14712, rel. January 30, 2008.

4 D.C. Law 18-195, Residential Aid Discount Subsidy Stabilization Amendment Act of 2010; D.C. Code § 8-1774.14 (2016).

5 *Formal Case No. 945, In the Matter of the Investigation into Electric Service Market Competition and Regulatory Practices*, and *Formal Case No. 813, In the Matter of Application of Potomac Electric Power Company for an Increase in its Retail Rates for the Sale of Electric Energy*, Order No. 15986, ¶¶ 6, 13, rel. September 20, 2010.

6 *Formal Case No. 1120, In the Matter of the Investigation into the Structure and Application of Low Income Assistance for Electricity Customers in the District of Columbia ("Formal Case No. 1120")*, Order No. 18059, ¶¶ 31, 34, rel. December 15, 2015 ("Order No. 18059").

7 *Formal Case No. 1120*, Order No. 18059, ¶ 35.

4. On April 4, 2018, in compliance with the Act of 2010 and Order Nos. 15986 and 18059, Pepco filed its annual update to the Rider "RADS." Based on our preliminary review of the Rider Update, Pepco's filing is consistent with the changes made to the methodology for computing the RAC. In the Rider Update, Pepco proposes to amend the following tariff pages:

Rate Schedules for Electric Service in the District of Columbia,

P.S.C. of D.C. No. 1
Ninety-Fourth Revised Page No. R-1
Superseding Ninety-Third Revised Page No. R-1

P.S.C. of D.C. No. 1
Ninety-Fourth Revised Page No. R-2
Superseding Ninety-Third Revised Page No. R-2

P.S.C. of D.C. No. 1
Eighty-Seventh Revised Page No. R-2.1
Superseding Eighty-Sixth Revised Page No. R-2.1

P.S.C. of D.C. No. 1
Sixty-Third Revised Page No. R-2.2
Superseding Sixty-Second Revised Page No. R-2.2

P.S.C. of D.C. No. 1
Eighth Revised Page No. R-46
Superseding Seventh Revised Page No. R-46

5. According to Pepco, the estimated funding level for the RAD program from June 2018 through May 2019 is $5,558,684, up from $4,897,772 in the previous true-up filing.[8] This is an increase of $660,912 over the previous true-up filing. Additionally, Pepco reports that the difference in the subsidy for the RAD Program and the RAD Surcharge revenues for the period June 2016 to February 2018 resulted in an under-recovery of $2,731,996, which is included in the true-up calculation.[9] Finally, Pepco forecasts a RAD Surcharge under-recovery of $93,843 for the period March 2018 to May 2018 that is also included in the true-up calculation.[10] To recover the estimated cost for the RAD program from June 2018 through May 2019, and the under-collection for the period from June 2016 to May 2018, Pepco proposes to increase the RAD Surcharge from $0.000442 to $0.000765.[11]

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[8] *See PEPRADR 2018-01*, Rider Update, Attachment B. *PEPRADR 2015-01*, Rider Update, Attachment B, filed September 30, 2016.

[9] Pepco reports that the difference in the RAD Program subsidy and the RAD Surcharge revenues for the period January 2016 through May 2016 "was de minim[i]s and is not included in the true-up calculation.

[10] *See PEPRADR 2018-01*, Rider Update, at 1 and Attachment B.

[11] *See PEPRADR 2018-01*, Rider Update, Attachment B.

6. Additionally, in the Rider Update, the Company requested that the revised Rider "RADS" become effective with service on and after June 1, 2018.[12] The revised Rider "RADS" tariff pages are provided in the Rider Update.

7. This Rider Update may be reviewed at the Office of the Commission Secretary, Public Service Commission of the District of Columbia, 1325 G Street N.W., Suite 800, Washington, D.C. 20005, between the hours of 9:00 a.m. and 5:30 p.m., Monday through Friday as well as on the Commission's website at www.dcpsc.org. Once at the website, open the "eDocket System" tab, click on "Search Current Dockets" and input "PEPRADR2018-01" in the "Select Case Number" field. Copies of the tariff pages and attachments are available, upon request, at a per page reproduction fee.

8. Comments on this Rider Update must be made in writing to Brinda Westbrook-Sedgwick, at the above address, or by email at psc-commissionsecretary@dc.gov, or by clicking the following link: http://edocket.dcpsc.org/comments/submitpubliccomments.asp. Comments must be received within 30 days of the date of publication of this NOPT in the *D.C. Register*. Once the comment period has expired, the Commission will take final action on Pepco's Rider Update. Persons with questions concerning this NOPT should call (202) 626-5150.

[12] *PEPRADR 2015-01* and *Formal Case No. 1120*, Rider Update at 1.

DISTRICT OF COLUMBIA RETIREMENT BOARD

NOTICE OF OPEN PUBLIC MEETING

May 17, 2018
1:00 p.m.

900 7th Street, N.W.
2nd Floor, DCRB Boardroom
Washington, D.C. 20001

The District of Columbia Retirement Board (DCRB) will hold an Open meeting on Thursday, May 17, 2018, at 1:00 p.m. The meeting will be held at 900 7th Street, N.W., 2nd floor, DCRB Boardroom, Washington, D.C. 20001. A general agenda for the Open Board meeting is outlined below.

Please call one (1) business day prior to the meeting to ensure the meeting has not been cancelled or rescheduled. For additional information, please contact Deborah Reaves, Executive Assistant/Office Manager at (202) 343-3200 or Deborah.Reaves@dc.gov.

AGENDA

I.	Call to Order and Roll Call	Chair Clark
II.	Approval of Board Meeting Minutes	Chair Clark
III.	Chair's Comments	Chair Clark
IV.	Executive Director's Report	Ms. Morgan-Johnson
V.	Investment Committee Report	Mr. Warren
VI.	Operations Committee Report	Mr. Smith
VII.	Benefits Committee Report	Ms. Collins
VIII.	Legislative Committee Report	Mr. Blanchard
IX.	Audit Committee Report	Mr. Hankins
X.	Other Business	Chair Clark
XI.	Adjournment	

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 June 15, 2018.

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 May 11, 2018. 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: June 15, 2018**
Recommendations for Appointments as DC Notaries Public **Page 2**

Abubakar	Rashida	Bank of America 55 M Street, SE, Suite 101	20003
Ayele	Frehiwot	Bank of America 3100 14th Street, NW, Suite 101	20010
Bell	Danielle T.	DC Public Charter School Board 3333 14th Street, NW, Suite 210	20010
Bentwila	Kalyl	Self 1660 Lanier Place, NW, #514	20009
Boone	Linda Lorraine	Self (Dual) 1018 Lamont Street, NW	20010
Brasa	Liana	Inter-American Development Bank 1300 New York Avenue, NW, Stop W0804	20577
Cavanaugh	David L.	Wilmer, Cutler, Pickering, Hale and Dorr, LLP 1875 Pennsylvania Avenue, NW	20006
Chapman	Cheryl L.	Jacobson Holman, PLLC 400 7th Street, NW, Suite 700	20004
Chinn	Lisa E.	Lockheed Martin 300 M Street, SE, Suite 700	20003
Cohen	Heidi	Department of Treasury 1500 Pennsylvania Avenue, NW, Room 1023	20220
Cokley	Michael	DC Office of Human Rights 441 4th Street, NW, Suite 570N	20001
Conley	Shawn Wesley	Conley Law Office 2351 S Street, SE	20020
Cuillane	Theresa	Carroll Manor Nursing Facility 1150 Varnum Street, NE	20017
Del Gandio	Gabriella Vincent	Arent Fox, LLP 1717 K Street, NW	20006

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Recommendations for Appointments as DC Notaries Public **Page 3**

Diaz	Jamin E.	E Keith Edwards Insurance Agency 7813 Georgia Avenue, NW	20012
Drayton	Tracy S.	Centene Corporation 1150 Connecticut Avenue, NW, Suite 100	20036
Eben ezer	Kidist	Ethio Diaspora Communication (Yanet Ethiopian, LLC) 2837 Alabama Avenue, SE	20020
Eisen-Markowitz	Jack	Self (Dual) 1832 Irving Street, NW	20010
Felder	Corlis B.	The Morris & Gwendolyn Cafritz Foundation 1825 K Street, NW, Suite 1400	20006
Felix	Paige	Edens Limited Partnership, LLP 1272 5th Street, NE	20002
Forman	Jason	Worldwide Settlements, Inc 1629 K Street, NW, Suite 300	20006
Forney	Matthew D.	Planet Depos 1100 Connecticut Avenue, NW, Suite 950	20036
Fox	Melvon	Self 600 Barnes Street, NE, #325	20019
Fuentes	AhXul	Bank of America 201 Pennsylvania Avenue, SE	20003
Geiger	Susan	Kaiser Dillon, PLLC 1401 K Street, NW, Suite 600	20005
Glass	David	Akridge 601 13th Street, NW, Suite 300 N	20005
Gonzaga	Natalie Figueroa	Worldwide Settlements, Inc 1629 K Street, NW, Suite 300	20002
Green	Druzilla H.	Urban City Management 1928 Benning Road, NE	20002

D.C. Office of the Secretary **Effective: June 15, 2018**
Recommendations for Appointments as DC Notaries Public **Page 4**

Hamilton	Tamika Nikia	Self 706 Jefferson Street, NE	20011
Hargrove	Percell	Wells Fargo 1700 Pennsylvania Avenue, NW	20006
Hart	Elaine M.	KPMG, LLP 1801 K Street, NW	20006
Heeralall	Diamond S.	The Veritas Law Firm 1225 19th Street, NW, Suite 320	20036
Helm	Cassondra	American College of Obstetricians and Gynecologists 409 12th Street, SW	20024
Henry	Steven A.	Self (Dual) 2548 Massachusetts Avenue, NW	20008
Holley	Leta L.	Federal Election Commission 1050 First Street, NW	20463
Holmes	Jillian J.	Chaikin Sherman Cammarata & Siegel PC 1232 17th Street, NW	20036
Hoston	Curtrina	Self (Dual) 2425 18th Street, NE	20018
Johnson	Kimberly D.	Self 4328 E Street, SE	20019
Johnson	Tenaya	Self (Dual) 655 Michigan Avenue, NE, Apartment 216	20017
Johnson	Tia N.	TIAA CREF Financial Services 601 13th Street, NW, Suite 700 N	20005
Jones	Jessica Charmaine	Louis Berger 1250 23rd Street, NW	20037
Kan	Jonathan D.	Aestar, LLC 1775 Eye Street, NW, Suite 1150	20006

D.C. Office of the Secretary **Effective: June 15, 2018**
Recommendations for Appointments as DC Notaries Public **Page 5**

Knell	Katie S.	Tandem Legal Group, LLP 2000 P Street, NW, Suite 408	20036
Laird-Hammond	John	Franciscan Monastery USA, Inc 1400 Quincy Street, NE	20017
Lamarre	Sean L.	UPS Store 1966 5614 Connecticut Avenue, NW	20015
Lea	L. Laurel	Lea Wills, LLC 1717 K Street, NW, Suite 900	20006
Locke	Brooke Lynn	Self (Dual) 1421 Euclid Street, NW, # 503	20009
Lund	John Joseph	Arent Fox, LLP 1717 K Street, NW	20006
Main	Laura	United States Department of Commerce 1401 Constitution Avenue, NW	20230
Manning	Jacqueline	Self (Dual) 2116 R Street, NE	20002
Mason	Shelonda E.	Savills Studley, Inc 1201 F Street, NW, Suite 500	20004
Matos Concepcion	Larissa Desiree	Bank of America 3100 14th Street, NW	20010
May	Jasmine Nicole	Self 1151 4th Street, SW, Apartment 1017	20024
McDowell	Tanisha J.	Housing and Urban Development Federal Credit Union 590 L'Enfant Plaza, SW, #3509	20024
Mejia	Mario D.	Housing and Urban Development Federal Credit Union 590 L'Enfant Plaza, SW, #3509	20024
Miller	Tracy Leane	YMCA of Metropolitan Washington 1112 16th Street, NW, Suite 720	20036

D.C. Office of the Secretary **Effective: June 15, 2018**
Recommendations for Appointments as DC Notaries Public **Page 6**

Mitchell	Jermaine C.	Children's National Medical Center 111 Michigan Avenue, NW	20010
Mohler	Shannon D.	The George Washington University 2121 I Street, NW, Suite 101	20052
Molina	Monique D.	John Marshall Bank 1401 H Street, NW, Suite 702	20005
Moses	Janet L.	MetLife 600 13th Street, NW, Suite 700	20005
Muhammad	Francine N.	Self 4334 Gorman Terrace, SE	20019
Munu	Jenaba	Agriculture Federal Credit Union 1400 Independence Avenue, SW	20250
Neville	Mable D.	The Washington Informer Newspaper 3117 Martin Luther King Jr Avenue, SE	20032
Oak	Anna M.	Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C. 1615 M Street, NW, Suite 400	20036
Rance	Lindsay M.	Simpson Thacher & Bartlett, LLP 900 G Street, NW	20001
Recht	Ronald E.	Ronald E. Recht, Chartered 5028 Wisconsin Avenue, NW, Suite 404	20016
Richards	Kendra M.	Self 285 V Street, NW	20001
Robinson	Stanley M.	Bank of America 55 M Street, SE, Suite 101	20003
Roche	Michael H.	William P. Gelberg, Inc 6511 Chillum Place, NW	20012
Rogers	Hattie	University of the District of Columbia 4200 Connecticut Avenue, NW	20008

D.C. Office of the Secretary **Effective: June 15, 2018**
Recommendations for Appointments as DC Notaries Public **Page 7**

Shark	Melanie	The John F. Kennedy Center for the Performing Arts 2700 F Street, NW	20566
Shell	Marilyn	Self 561 24th Street, NE	20002
Smith	Mary	Edens Limited Partnership, LLP 1272 5th Street, NE	20002
Spach	Jerilyn A.	Miles and Stockbridge, P.C 1500 K Street, NW, Suite 800	20005
Speight	Abraham A.	United States Small Business Administration 409 3rd Street, SW, Room 6133	20416
St. Germain	Ashley	Wells Fargo Bank 4302 Connecticut Avenue, NW	20008
Starks	Andria L.	U.S Department of Justice, Antitrust Division 450 5th Street, NW, Suite 3100	20530
Sumichrast	Sondra	Edens Limited Partnership, LLP 1272 5th Street, NE	20002
Taheri	Kevin	Worldwide Settlements, Inc 1629 K Street, NW, Suite 300	20006
Thomas	Yvette A.	Lydia's House 4101 Martin Luther King Jr. Avenue, SW	20032
Tillery	Janice B.	Kuder, Smollar, Friedman and Mihalik, PC 1350 Connecticut Avenue, NW, Suite 600	20036
Trotter	Camille	Cuneo Gilbert & LaDuca, LLP 4725 Wisconsin Avenue, NW, Suite 200	20016
Tucker	Monica	Hillwood Estate Museum & Gardens 4155 Linnean Avenue, NW	20008
Tyler Jr.	Marvin A.	U.S Department of Justice, Antitrust Division 450 5th Street, NW, Suite 3100	20530

D.C. Office of the Secretary **Effective: June 15, 2018**
Recommendations for Appointments as DC Notaries Public **Page 8**

Wallace	Haley N.	Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C. 1615 M Street, NW, Suite 400	20036
Warner	Keviar	Self 6244 Eastern Avenue, NE	20011
Washington	Monica R.	National Disability Rights Network 820 First Street, NE, Suite 740	20002
Watson	Jessica	Department of Commerce Federal Credit Union 1401 Constitution Avenue, NW	20230
Wesley	Deborah M.	Quinn Evans Architect 2121 Ward Place, NW	20037
Wilkerson	Shandra	Department of Behavioral Health 35 K Street, NE	20032
Wolde	Selam	Bank Fund Staff Federal Credit Union 1725 I Street, NW	20006
Worsley	Leatrice M.	Department of Behavioral Health 35 K Street, NE	20032
Younger	Esther N.	Perkins Coie 700 13th Street, NW, Suite 600	20005

SOMERSET PREP PUBLIC CHARTER SCHOOL

NOTICE OF INTENT TO ENTER A SOLE SOURCE CONTRACT

Student Assessment Services

Somerset Prep DC Public Charter School intends to enter into a sole source contract with The Achievement Network for student assessment services to help identify and close gaps in student learning for the upcoming school year.

- Somerset Prep DC Public Charter School constitutes the sole source for The Achievement Network for student assessment services that will lead to student achievement.

- For further information regarding this notice contact sspdc_bids@somersetprepdc.org no later than **4:00 pm Friday, May 18, 2018.**

THE NEXT STEP PUBLIC CHARTER SCHOOL

REQUEST FOR PROPOSALS

Financial and Accounting Services

The Next Step Public Charter School Solicits Proposals for Financial and Accounting Services for the 2018-2019 school year (July 1, 2018 – June 30, 2019).

The Request for Proposals (RFP) specifications such as scope and responsibilities can be obtained after Friday, May 11, 2018 from Taunya Melvin via email listed below.

Bids must be received by Friday, June 15, 2018 by 5 pm at the email address listed below. Any bids not addressing all areas as outlined in the IFB (RFP) will not be considered.

SUBMITT BIDS electronically to: rfp@nextsteppcs.org up to 5:00 p.m., June 15, 2018. Please put "Finance and Accouting Services" in subject line.

THE NEXT STEP PUBLIC CHARTER SCHOOL

REQUEST FOR PROPOSALS

Human Resources Services

The Next Step Public Charter School Solicits Proposals for Human Resources Services for the 2018-2019 school year (July 1, 2018 – June 30, 2019).

The Request for Proposals (RFP) specifications such as scope and responsibilities can be obtained after Friday, May 11, 2018 from Taunya Melvin via email listed below.

Bids must be received by Friday, June 15, 2018 by 5 pm at the email address listed below. Any bids not addressing all areas as outlined in the IFB (RFP) will not be considered.

SUBMITT BIDS electronically to: rfp@nextsteppcs.org up to 5:00 p.m., June 15, 2018. Please put "Human Resources Services" in subject line.

TWO RIVERS PUBLIC CHARTER SCHOOL

NOTICE OF INTENT TO ENTER A SOLE SOURCE CONTRACT

Apple Computers

Two Rivers Public Charter School intends to enter into a sole source contract with Apple Inc. for the purchase of computers and operating system products. Two Rivers purchases Apple products directly with Apple for two reasons: (1) the AppleCare product is only available for purchases made directly with Apple. AppleCare provides technical service and support from Apple experts beyond the standard one-year limited warranty and 90 days of telephone technical support that comes with Apple hardware purchased through other vendors; and (2) by purchasing products directly from Apple, Two Rivers receives education pricing and discounts not available from any other vendor. The estimated yearly cost is approximately $50,000. Questions should be addressed to Mary Gornick at procurement@tworiverspcs.org.

REQUEST FOR PROPOSALS

Dell Computers

Two Rivers PCS is soliciting proposals for the purchase of Dell 11-inch Chromebooks, licenses, and charging carts. To request a copy of the RFP, email Gail Williams at procurement@tworiverspcs.org.

WASHINGTON LEADERSHIP ACADEMY PUBLIC CHARTER SCHOOL

REQUEST FOR PROPOSALS

School Technology

Washington Leadership Academy Public Charter School, an approved 501(c)3 organization, requests proposals for the following Chromebook technology:

Quantity: 130

Required Specifications:
Screen: 11.6 inch screen w/ webcam (1366 x 768 resolution or better)
CPU: Intel N3060 Celeron or better
RAM: 4GB or more
SSD/HDD: 16 GB MMC or better
OS: Chrome OS

Additional Specifications:
Require 1 Chromebook Management License per device.

Please exclude convertible or tablet models.

Purchase Reference model: Lenovo N23 Chromebook
Current Models in-use: HP Chromebook 11 G5

Please email proposals to ngould@wlapcs.org. We request proposals by May 25, 2018.

DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY

BOARD OF DIRECTORS

NOTICE OF PUBLIC MEETING

DC Retail Water and Sewer Rates Committee

The Board of Directors of the District of Columbia Water and Sewer Authority (DC Water) DC Retail Water and Sewer Rates Committee will be holding a meeting on Tuesday, May 22, 2018 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 lmanley@dcwater.com.

DRAFT AGENDA

1.	Call to Order	Committee Chairperson
2.	Monthly Updates	Chief Financial Officer
3.	Committee Work plan	Chief Financial Officer
4.	Other Business	Chief Financial Officer
5.	Executive Session	Committee Chairperson
6.	Adjournment	Committee Chairperson

DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY

BOARD OF DIRECTORS

NOTICE OF PUBLIC MEETING

Finance and Budget Committee

The Board of Directors of the District of Columbia Water and Sewer Authority (DC Water) Finance and Budget Committee will be holding a meeting on Thursday, May 24, 2018 at 11:00 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	Committee Chairperson
2.	April, 2018 Financial Report	Committee Chairperson
3.	Agenda for June, 2018 Committee Meeting	Committee Chairperson
4.	Adjournment	Committee Chairperson

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 17703-B of Sidwell Friends School, pursuant to 11 DCMR Subtitle Y, § 705.1, for a two-year time extension of BZA Order No. 17703A approving a special exception from the private school requirements of § 206 to increase the size of an existing education campus and number of students and staff in the C-2-A/R-1-B (now MU-4 and R-1-B) District at premises 3825 Wisconsin Avenue N.W. (Square 1825, Lot 818).[1]

Hearing Dates (17703-A):	January 26, 2016, March 1, 2016, and March 29, 2016
Decision Date (17703-A):	March 29, 2016
Final Date of Order (17703-A):	April 1, 2016
Time Extension Decision:	April 25, 2018

SUMMARY ORDER ON MOTION TO EXTEND THE VALIDITY OF BZA ORDER NO. 17703A

The Underlying BZA Order

On March 29, 2016, the Board of Zoning Adjustment (the "Board") approved the Applicant's request for a special exception from the private school requirements of § 206 under the 1958 Regulations to increase the size of an existing education campus and number of students and staff in the C-2-A/R-1-B (now MU-4 and R-1-B) District[2] at premises 3825 Wisconsin Avenue N.W. (Square 1825, Lot 818) (the "Subject Property"). The Application was granted on March 29, 2016, and the Board issued its written order, No. 17703-A (the "Order") on April 1, 2016. Pursuant to 11 DCMR § 3125.9 in the 1958 Zoning Regulations (now Subtitle Y § 604.11 of the 2016 Regulations), the Order became final on April 1, 2016 and took effect ten days later. Under the Order and pursuant to § 3130.1 of the 1958 Regulations (now Subtitle Y § 702.1 of the 2016 Regulations), the Order was valid for two years from the time it was issued -- until April 1, 2018. Order No. 17703-A is subject to ten conditions.

Motion to Extend

[1] This and all other references to the relief granted in Order No. 17703-A are to provisions that were in effect the date the Application was heard and decided by the Board of Zoning Adjustment (the "1958 Regulations"), but which were repealed as of September 6, 2016 and replaced by new text (the "2016 Regulations"). The repeal of the 1958 Zoning Regulations and their replacement with the 2016 Regulations has no effect on the vesting and validity of the original application.

[2] The zone districts were renamed in the 2016 Zoning Regulations. Thus, the C-2-A/R-1-B District is now the MU-4/R-1-B District under the 2016 Regulations. This is reflected on the Zoning Map. This change in nomenclature has no effect on the vesting or validity of the original application.

On March 23, 2018, the Applicant submitted an application for a time extension requesting that the Board grant a two-year extension of Order No. 17703-A. This request for extension is pursuant to Subtitle Y § 705 of the 2016 Zoning Regulations, which permits the Board to extend the time periods in Subtitle Y § 702.1 for good cause shown upon the filing of a written request by the applicant before the expiration of the approval.

In its request for a two-year extension, the Applicant stated that the time extension is needed to accommodate a lease extension for the Washington Home, which is the site of the campus expansion previously approved, and because of associated costs. The parties in the original case, Advisory Neighborhood Commission ("ANC") 3F and the Van Ness/Veazey Street Residents Coalition and the Springland Farm Community LLC, both proponents of the original application, submitted reports and letters in support of the request for a time extension.

Pursuant to Subtitle Y § 705.1(a), the Applicant shall serve on all parties to the application and all parties shall be allowed 30 days to respond. Pursuant to Subtitle Y § 705.1(b), the Applicant shall demonstrate that there is no substantial change in any of the material facts upon which the Board based its original approval of the application. Finally, under Subtitle Y § 705.1(c), good cause for the extension must be demonstrated with substantial evidence of one or more of the following criteria: (1) An inability to obtain sufficient project financing due to economic and market conditions beyond the applicant's reasonable control; (2) an inability to secure all required governmental agency approvals by the expiration date of the Board's order because of delays that are beyond the applicant's reasonable control; or (3) the existence of pending litigation or such other condition, circumstance, or factor beyond the applicant's reasonable control.

The Board finds that the motion has met the criteria of Subtitle Y § 705.1 to extend the validity of the underlying order. Pursuant to Subtitle Y § 705.1(a), the record reflects that the Applicant served the parties to the original application, including ANC 3F, the Van Ness/Veazey Street Residents Coalition, and the Springland Farm Community, LLC, as well as the Office of Planning. (Exhibit 3.) The parties were allowed at least 30 days to respond. ANC 3F submitted a report and resolution in support of the time extension request. The ANC's report and resolution indicate that at a duly noticed and scheduled public meeting of the ANC on April 17, 2018, at which a quorum was present, the ANC voted 5-0-0 to support the Applicant's request for a time extension. (Exhibits 10 and 11.) The Van Ness/Veazey Street Residents Coalition, which was a party-proponent to the original case, submitted a letter of support for the time extension request. (Exhibit 7.) The Springland Farm Community LLC, which also was a party-proponent to the original case, submitted a letter of support for the time extension request. (Exhibit 8.) The Office of Planning ("OP") submitted a report, dated April 13, 2018, recommending approval of the request for the time extension. (Exhibit 9.)

As required by Subtitle Y § 705.1(b), the Applicant demonstrated that there has been no substantial change in any of the material facts upon which the Board based its original approval

in Order No. 17703-A. There have also been no substantive changes[3] to the Zone District classification applicable to the Site or to the Comprehensive Plan affecting the Site since the issuance of the Board's order that would affect the application.

To meet the burden of proof for good cause required under Subtitle Y § 705.1(c), the Applicant provided a statement and other evidence regarding factors causing a delay in obtaining a building permit. (Exhibits 3 and 5.) The good cause basis for the request was the Applicant's inability to move forward with the project due to economic and market conditions beyond its control, pursuant to Subtitle Y § 705(c)(1). The Applicant states that since the issuance of the Order, the Applicant has been diligently working to fundraise and move forward to finalize its plans for its campus expansion into the Subject Property, including determining what the most efficient use of the expansion space and the overall campus will be. According to the Applicant, its fundraising campaign is well underway. However, costs associated with the project have increased in the two years since the Order was issued due to economic and market conditions in the District. Consequently, the Applicant needs additional time to continue its fundraising efforts to effectuate the project and finalize its plans. A two-year extension will allow the Applicant that time necessary to meet the rise in costs. Also, since the Order was issued, Washington Home has continued to operate on the Subject Property. Washington Home has been having difficulty finding a new space to operate and continues to operate on the Subject Property, caring for continuing hospice patients. Recently, Washington Home requested a three-year[4] lease extension from the Applicant to give it time to find an appropriate facility at which to care for its patients. The Applicant has stated that it would like to accommodate Washington Home's request, but to do so, it needs to obtain this extension from the Board. The Applicant cites as good cause for a two-year time extension its efforts to finalize its plans and secure financing as well as the need to accommodate the Washington Home's request for additional time to find an appropriate facility to care for its hospice patients. (Exhibit 3.)

Given the totality of the conditions and circumstances described above and after reviewing the information that was provided, the Board finds that the Applicant satisfied the "good cause" requirement under Subtitle Y § 705.1(c), specifically meeting the criteria for Subtitle Y § 705.1(c)(1). The Board finds that the delay in the Applicant being able to finalize its plans and secure financing as well as to accommodate the Washington Home's request for additional time to find an appropriate facility to care for its hospice patients constitutes good cause and is beyond the Applicant's reasonable control and that the Applicant demonstrated that it has acted diligently, prudently, and in good faith to proceed towards the implementation of the Order.

[3] Although the zone districts were renamed in the 2016 Zoning Regulations, this change in nomenclature does not constitute a substantive change as contemplated by Subtitle Y § 705.1(b), and has no effect on the vesting or validity of the original application.

[4] The application requests a two-year time extension, although the supporting affidavit mentions a three-year extension. Pursuant to Subtitle Y § 705.2, a time extension that is granted pursuant to Subtitle Y § 705.1 shall not exceed two years. Although the record makes reference to a request for a three-year time extension, the Board determined that this was a discrepancy, as the regulations limit time extensions to no more than two-year periods.

Having given the written reports of the ANC and OP great weight, the Board concludes that extension of the approved relief is appropriate under the current circumstances and that the Applicant has met the burden of proof for a time extension under Subtitle Y § 705.1.

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.

Pursuant to 11 DCMR Subtitle Y § 702, the Board of Zoning Adjustment hereby **ORDERS APPROVAL** of a two-year time extension of Order No. 17703-B, which Order shall be valid until **April 1, 2020**, within which time the Applicant must file plans for the proposed project with the Department of Consumer and Regulatory Affairs for the purpose of securing a building permit.

VOTE: 3-0-2 (Carlton E. Hart, Michael G. Turnbull, and Lorna L. John to APPROVE; Frederick L. Hill and Lesylleé M. White, not present or voting.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of the Board members approved the issuance of this order.

FINAL DATE OF ORDER: April 27, 2018

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.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 19134-B of The Embassy of Zambia, pursuant to 11 DCMR Subtitle Y § 703, for a modification of consequence to the time limit condition of BZA Order No. 19134 to allow the temporary location of a chancery in the in the R-3 Zone at premises 2200 R Street N.W. (Square 2512, Lot 808).[1]

HEARING DATES (19134):	October 27 and November 10, 2015
DECISION DATE (19134):	November 10, 2015
ORDER ISSUANCE DATE (19134):	February 23, 2016
FIRST MODIFICATION DECISION:	February 15, 2017
SECOND MODIFICATION DECISION:	March 21 and April 18, 2018[2]

NOTICE OF FINAL RULEMAKING

and

DETERMINATION AND ORDER

The Board of Zoning Adjustment ("Board"), pursuant to the authority set forth in § 306 of the Foreign Missions Act, approved August 24, 1982 (96 Stat. 283; D.C. Official Code § 6-1306 (2012 Repl.)) and Subtitle X of the Zoning Regulations of the District of Columbia, Title 11 DCMR, hereby gives notice that it took final action not to disapprove the application of The Embassy of Zambia ("Applicant") for a modification of consequence to BZA Order No. 19134, as previously modified by BZA Order No. 19134-A, to continue to allow the temporary location of a chancery in the D/R-3 District at premises 2200 R Street, N.W. (Square 2512, Lot 808) (the "Subject Property"). A notice of proposed rulemaking was published in the March 16, 2018 edition of the *D.C. Register*. (65 DCR 2817.)

The Applicant's requested modification of a condition of the Order complies with 11 DCMR Subtitle Y § 703.4, which defines a modification of consequence as a "proposed change to a condition cited by the Board in the final order, or a redesign or relocation of architectural elements and open spaces from the final design approved by the Board."

Pursuant to Subtitle Y §§ 703.8-703.9, the request for modification of consequence shall be served on all other parties to the original application and those parties shall be allowed at least ten days to submit a response to the request. The Applicant provided proper and timely notice of

[1] This request for a modification of consequence was advertised as Application No. 19134-A; however, this Order has been labeled 19134-B, as the prior modification of consequence was issued as Order No. 19134-A.

[2] The Board's consideration of the modification of consequence was originally scheduled for March 21, 2018 and postponed to April 18, 2018.

the request for modification of consequence to Advisory Neighborhood Commission ("ANC") 2D, the only other party to the underlying case, on January 30, 2018. (Exhibit 6.) The ANC was provided at least ten days to file a response, but did not submit a written report to the record.

The Applicant also served its request on the Office of Planning ("OP"). (Exhibit 7.) OP submitted a report dated March 5, 2018 recommending that the Board not disapprove the requested modification of consequence. (Exhibit 9.)

Background

In Order No. 19134, the Board determined not to disapprove the Applicant's request to temporarily locate its chancery operations at the Subject Property for a period of one year while its permanent location at 2419 Massachusetts Avenue, N.W. underwent renovations. Order No. 19134 was issued on February 23, 2016, and contained one condition, as follows:

1. Approval of the temporary use is granted for a period to end on December 31, 2016.

On November 9, 2016, the Applicant filed a request to modify the condition in order to allow the temporary use of the Subject Property to continue for an additional year, as the renovations were not yet completed at 2419 Massachusetts Avenue, N.W. The Board determined to not disapprove that request for modification of consequence, and Order No. 19134-A was issued on May 8, 2017, with the following revised condition:

1. Approval of the temporary use is granted for a period to end on December 31, 2017.

On January 26, 2018, the Applicant filed a second request for modification of consequence to again modify the condition limiting the term of approval. The Applicant argues that the request to revise the time limit condition is based on issues with the Zambian economy that have affected the project budget and the Embassy's ability to complete renovations on its permanent chancery property. (Exhibit 3.) For this reason, the Applicant requests that the condition be modified to allow the temporary use of the Subject Property to continue until January 31, 2020. No other changes are proposed to the scope or intensity of the temporary use not disapproved in Order No. 19134, as modified by Order No. 19134-A.

When determining whether to not disapprove a modification of consequence, the Board applies the standards applicable to the original application. 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 January 9, 2017, the Department of State determined that favorable action on the prior request for modification of consequence would fulfill the international obligation of the United States to facilitate the Embassy of Zambia in acquiring adequate and secure premises to carry out their diplomatic mission. The Department of State indicated that the current chancery located at 2419 Massachusetts Avenue, N.W. is in dire need of repair, and that continuing to allow the temporary location of the chancery at the Subject Property would facilitate the renovation project. (Exhibit 56 for Application No. 19134.) The Board found that there has been no change to the proposal since the Department of State's letter recommending favorable action; therefore, 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.**

The Subject Property is located within the Sheridan-Kalorama Historic District. In Application No. 19134, staff of the Historic Preservation Office expressed no concerns about the proposed temporary location of the chancery, as no changes to the existing structure are proposed in this application. (See OP Report, Exhibit 26 for Application No. 19134.) The only change proposed in this application is extending the time limit for the temporary use of the Subject Property; therefore, 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 the Office of Planning ("OP") in Application No. 19134 that no alteration would be made to affect the adequacy of on-site parking in this case. The Board also credits OP's original finding that this site is adequately served by public transportation, including the Dupont Circle Metrorail station and various Metrobus routes. (Exhibit 26 for Application No. 19134.) These aspects of the project will not be affected by the modification of the condition; therefore, the Board concurs with OP's finding that this criterion is met.

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 56 in Application No. 19134.) These aspects of the project will not be affected by the modification of the condition; therefore, the Board finds that this criterion is 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 56 in Application No. 19134.) This aspect of the project will not be affected by the modification of the condition; therefore, the Board finds that this criterion is met.

5. The municipal interest, as determined by the Mayor.

OP, on behalf of the Mayor of the District of Columbia, determined that approving Application No. 19134 was in the municipal interest and is generally consistent with the Comprehensive Plan for the Nation's Capital and the Zoning Regulations. (Exhibit 26 for Application No. 19134.) The only change proposed in this application is in the time limit for the temporary use of the property; therefore, the Board finds that this criterion is met by the current application.

6. The federal interest, as determined by the Secretary of State.

The Department of State determined that there is federal interest in this project. Specifically, the Department of State acknowledged the Embassy of Zambia's generous assistance in accommodating security requirements for the U.S. Embassy in Lusaka. 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 56 in Application No. 19134.) This aspect of the project will not be affected by the modification of consequence requested; therefore, the Board finds that this criterion is met.

ANC 2D 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 2D. The ANC did not submit a written report to the record for this case; therefore, there are no issues or concern to which the Board must give "great weight."

Based upon its consideration of the six criteria discussed above, the Board has decided not to disapprove the request to modify the condition of Order No. 19134, as modified by Order No. 19134-A. As a result, the Applicant will be permitted to continue to allow the temporary location of a chancery in the D/R-3 District at premises 2200 R Street, N.W. Accordingly, it is hereby **ORDERED** that the application is **NOT DISAPPROVED, SUBJECT TO THE FOLLOWING CONDITION:**

1. Approval of the temporary use is granted for a period to end on January 31, 2020.

VOTE: 5-0-0 (Frederick L. Hill, Lesylleé M. White, Lorna L. John, Peter G. May, and Marcel C. Acosta to Not Disapprove.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of the Board members approved the issuance of this order.

FINAL DATE OF ORDER: May 2, 2018

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.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 19654 of 523 8th Street LLC, as amended[1], pursuant to 11 DCMR Subtitle X, Chapter 10, for a variance from the rear yard setback requirements of Subtitle G § 705.3, to construct a rear, first floor addition, and add a new third floor to an existing two-story restaurant in the MU-25 at premises 523 8th Street S.E. (Square 903, Lot 841).

HEARING DATE: January 17, 2018
DECISION DATE: January 17, 2018

SUMMARY ORDER

SELF-CERTIFIED

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR § 3113.2. (Exhibits 5 (original) and 36 (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") 6B[2] and to owners of property located within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 6B, which is automatically a party to this application. The ANC submitted a timely report recommending approval of the application. The ANC's report indicated that at a regularly scheduled, properly noticed public meeting on January 9, 2018, at which a quorum was present, the ANC voted 7-0-0 to support the application.[3] (Exhibit 34.)

[1] The original request also included variances for lot occupancy (Subtitle G § 704.1) and nonconforming structure (Subtitle C § 202.2). (See, Exhibit 5.) At the public hearing, the Applicant's agent agreed with the Office of Planning's assessment that only rear yard variance relief is required and the application was amended to that effect. The Board requested an amended self-certification to show the amended relief. (Exhibit 36.) The caption has been changed accordingly.

[2] Notice was incorrectly sent to ANC 6A; however, ANC 6B -- the ANC in which the property is located – did receive notice, having reviewed the application and submitted a report. (See, Exhibit 34.)

[3] The ANC report noted that it had previously voted to oppose the Applicant's Historic Preservation request, but as the Applicant worked with the ANC and residents to resolve a point of contention that is reflected in the approved revised plans which show an interior trash room with an access door directly from the interior of the building as well as a roll up door access from the exterior, the ANC submitted a report in support of the application, based on those revised plans. (Exhibit 34.)

The Office of Planning ("OP") submitted a timely report recommending approval of the application. In its report, OP noted that only rear yard relief was required and that lot occupancy relief was not needed because the restriction under Subtitle G § 705.3 only applies to residential, not commercial, uses. (Exhibit 25.) The District Department of Transportation ("DDOT") submitted a timely report indicating that it had no objection to the grant of the application. (Exhibit 26.)

Letters of support for the application from the owner of 525 8th Street, S.E. and from the Capitol Hill Restoration Society were submitted to the record. (Exhibits 28 and 32.)

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 an area variance from the rear yard setback requirements of Subtitle G § 705.3, to construct a rear, first floor addition, and add a new third floor to an existing two-story restaurant in the MU-25. 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 a variance from 11 DCMR Subtitle G § 705.3, 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.

It is therefore **ORDERED** that this application is hereby **GRANTED AND, PURSUANT TO SUBTITLE Y § 604.10, SUBJECT TO THE APPROVED REVISED PLANS AT EXHIBIT 30.**

VOTE: **4-0-1** (Carlton E. Hart, Frederick L. Hill, Lesylleé M. White, and Anthony J. Hood to APPROVE; one Board seat vacant.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of the Board members approved the issuance of this order.

FINAL DATE OF ORDER: May 1, 2018

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. 19727 of Mihai Psederski, pursuant to 11 DCMR Subtitle X, Chapter 9, for a special exception under Subtitle D § 5201 from the side yard requirements of Subtitle D § 307.2, to construct a side garage and rear deck addition to an existing principal dwelling unit in the R-3 Zone at premises 5035 B Street S.E. (Square 5325, Lot 10).

HEARING DATE: Applicant waived right to a public hearing
DECISION DATE: April 25, 2018

SUMMARY ORDER

SELF-CERTIFICATION

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR Subtitle Y § 300.6. (Exhibit 1.) 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.

Pursuant to 11 DCMR Subtitle Y § 401, this application was tentatively placed on the Board's expedited review calendar for decision without hearing as a result of the applicant's waiver of its right to a hearing.(Exhibit 9.)

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") 7E, and to owners of property within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 7E, which is automatically a party to this application. The ANC did not submit a report for the application.

The Office of Planning ("OP") submitted a timely report, dated April 13, 2018, in support of the application. (Exhibit 32.) The District Department of Transportation ("DDOT") submitted a timely report, dated April 6, 2018, expressing no objection to the approval of the application. (Exhibit 31.)

No objections to expedited calendar consideration were made by any person or entity entitled to do by Subtitle Y §§ 401.7 and 401.8. The matter was therefore called on the Board's expedited calendar for the date referenced above and the Board voted to grant the application.

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 from the side yard requirements of Subtitle D § 307.2, to construct a side garage and rear deck addition to an existing principal dwelling unit in the R-3 Zone. No parties appeared at the public meeting 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 report, 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 307.2, 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 6.**

VOTE: **3-0-2** (Carlton E. Hart, Lorna L. John, and Robert E. Miller to APPROVE; Frederick L. Hall and Lesylleé M. White, not participating or voting.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of the Board members approved the issuance of this order.

FINAL DATE OF ORDER: April 26, 2018

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. 19732 of FocusWorks, LLC, pursuant to 11 DCMR Subtitle X, Chapter 10, for a use variance under the nonconforming use requirements of Subtitle C § 204.1, to construct a rear addition to a six-unit apartment house in the R-3 Zone at premises 400 Newcomb Street, S.E. (Square 5996, Lot 805).

HEARING DATE: April 25, 2018
DECISION DATE: April 25, 2018

SUMMARY ORDER

SELF-CERTIFICATION

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR Subtitle Y § 300.6. (Exhibit 12 (original), Exhibit 13 (updated).[1]) 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") 8C and to owners of property located within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 8C, which is automatically a party to this application. The ANC did not submit a report related to the application; however, the ANC 8C Chair testified at the public hearing in support of the application.

The Office of Planning ("OP") submitted a timely report recommending approval of the application. (Exhibit 38.)

The District Department of Transportation ("DDOT") submitted a timely report indicating that it had no objection to the grant of the application. (Exhibit 36.)

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 a use variance from the nonconforming use requirements of Subtitle C § 204.1, to construct a rear addition to a six-unit apartment house in the R-3 Zone. The only parties to the case were the ANC and the Applicant. No parties appeared at the public hearing in opposition to

[1] The self-certification form was only updated to provide the owner's name and signature.

the 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 report filed in this case, the Board concludes that in seeking a variance from 11 DCMR Subtitle C § 204.1, 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 an undue hardship for the owner in complying with the Zoning Regulations, and that the relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map.

Pursuant to 11 DCMR 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 8 – ARCHITECTURAL PLANS AND ELEVATIONS.**

VOTE: **3-0-2** (Carlton E. Hart, Lorna L. John and Robert E. Miller to APPROVE; Frederick L. Hill and Lesylleé M. White not present, not voting).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of the Board members approved the issuance of this order.

FINAL DATE OF ORDER: April 27, 2018

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.

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.

Include this paragraph in all orders where NO CONSTRUCTION is authorized:

PURSUANT TO 11 DCMR SUBTITLE Y § 702.2, THIS ORDER SHALL NOT BE VALID FOR MORE THAN SIX MONTHS AFTER IT BECOMES EFFECTIVE UNLESS THE USE APPROVED IN THIS ORDER IS ESTABLISHED WITHIN SUCH SIX-MONTH PERIOD.

Include this paragraph in all orders authorizing CONSTRUCTION: (ANY TYPE OF CONSTRUCTION INCLUDING RENOVATIONS, UPGRADES TO EXISTING STRUCTURES, PROPERTIES)

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.

Include this paragraph in all orders authorizing CONSTRUCTION: (unless the Board specifies flexibility for construction under the plans submitted, in which case all such information should be in the body of the Order.)

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.

Include this paragraph in all orders containing CONDITIONS: (Conditions must be those crafted by the Board at the end of the order)

PURSUANT TO 11 DCMR SUBTITLE A § 303, THE PERSON WHO OWNS, CONTROLS, OCCUPIES, MAINTAINS, OR USES THE SUBJECT PROPERTY, OR ANY PART THERETO, SHALL COMPLY WITH THE CONDITIONS IN THIS ORDER, AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT. FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

Include this paragraph in ALL ORDERS:

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. 19734 of Angel Donchev, as amended[1], pursuant to 11 DCMR Subtitle X, Chapter 9, for special exceptions under Subtitle E § 5201 from the nonconforming structure requirements of Subtitle C § 202.2, the rear addition requirements of Subtitle E § 205.4, the lot occupancy requirements of Subtitle E § 304.1, and the rear yard requirements of Subtitle E § 306.1, and under Subtitle E § 5203 from the height requirements of Subtitle E § 303.1, to construct a partial third-story addition and roof deck to an existing flat in the RF-1 District at premises 1432 Newton Street N.W. (Square 2677, Lot 371).

HEARING DATES: April 18, 2018 and May 2, 2018[2]
DECISION DATE: May 2, 2018

SUMMARY ORDER

SELF-CERTIFIED

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR § 3113.2. (Exhibits 16 (original) and 59 (revised).)[3] 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") 1A and to owners of property located within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 1A, which is automatically a party to this application. The ANC submitted a report in support of the application. The ANC report indicated that at a duly noticed and scheduled public meeting on April 11, 2018, at which a quorum was present, the ANC voted 7-0-0 in support of the application based on the revised plans. (Exhibit 56.)

[1] The original application did not include relief for rear addition. (Self-cert, Ex. 16.) A Zoning Administrator ("ZA") memo was submitted to the record, which added rear addition relief, but did not include originally-requested relief for lot occupancy. (ZA memo, Ex. 46.) The Applicant submitted a final revised self-cert, which included the newly-added rear addition relief, as well as relief for lot occupancy. (Revised self-cert, Ex. 59.). The caption reflects the amended relief being requested.

[2] The case was originally scheduled for the public hearing of April 18, 2018 and postponed at the Applicant's request. (Exhibit 54.). The Board of Zoning Adjustment granted that request and the case was heard on May 2, 2018.

[3] The revised self-certification form incorrectly cites Subtitle C, instead of Subtitle E, for the rear addition relief, but the Applicant clarified that the relief sought is under Subtitle E § 205.5.

The Office of Planning ("OP") submitted two reports and recommended approval of the application, as amended, in its supplemental report. (Exhibit 61.) Previously, OP submitted a report in which it stated it could not make a recommendation. (Exhibit 45.)

The District Department of Transportation ("DDOT") submitted a timely report indicating that it had no objection to the grant of the application. (Exhibit 43.)

Three letters in support of the application from adjacent property owners were submitted to the record. (Exhibits 50, 51, and 60.)

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 special exceptions under Subtitle E § 5201 from the nonconforming structure requirements of Subtitle C § 202.2, the rear addition requirements of Subtitle E § 205.4, the lot occupancy requirements of Subtitle E § 304.1, and the rear yard requirements of Subtitle E § 306.1, and under Subtitle E § 5203 from the height requirements of Subtitle E § 303.1, to construct a partial third-story addition and roof deck to an existing flat in the RF-1 District. No parties appeared at the public hearing in opposition to this application. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board and having given great weight to the ANC and OP reports, the Board concludes that the Applicant has met the burden of proof, pursuant to 11 DCMR Subtitle X § 901.2; Subtitle E §§ 5201, 5203, 205.4, 303.1, 304.1, and 306.1; and Subtitle C § 202.2, 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 REVISED PLANS AT EXHIBIT 52.**

VOTE: **4-0-1** (Carlton E. Hart, Peter A. Shapiro, Lorna L. John, and Lesylleé M. White to APPROVE; Frederick L. Hill not participating or voting.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of the Board members approved the issuance of this order.

FINAL DATE OF ORDER: May 3, 2018

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.

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 13-05C
Z.C. Case No. 13-05C
Forest City Washington
(PUD Time Extension @ Square 744S, Lots 808 and 812)
February 26, 2018

Pursuant to notice, a public meeting of the Zoning Commission for the District of Columbia ("Commission") was held on February 26, 2018. At that meeting, the Commission approved the application ("Application") of Forest City Washington ("Applicant") for a time extension in which to file a building permit application for the consolidated planned unit development ("PUD"), approved by Z.C. Order No. 13-05 ("Initial Order"), until February 7, 2019. The property (Square 744S, Lots 808 and 812[1] [the "Property"]) that is the subject of this Application is bordered by N Place, S.E. on the north, 1st Street, S.E. on the west, the Anacostia River on the south, and property used by DC Water operations on the east. The time extension request was made pursuant to Chapter 7 of Title 11, Subtitle Z of the District of Columbia Code of Municipal Regulations.

FINDINGS OF FACT

BACKGROUND INFORMATION

1. The Initial Order included both a consolidated PUD approval and a first-stage PUD approval. The consolidated PUD approved in the Initial Order, which became final and effective on February 7, 2014, authorized the construction of a movie theater and parking garage structure on the Property, which is the northeast portion of the overall PUD site (such property known as the "F1 Parcel"). The consolidated PUD approval was originally effective for two years from the effective date of the Initial Order (that is, until February 7, 2016), and extended for a period of two years (that is, until February 7, 2018) pursuant to Z.C. Order No. 13-05A (the "First Extension"). The Commission approved modifications to the consolidated PUD pursuant to Z.C. Order No. 13-05B, which became effective as of November 25, 2016.

2. The first-stage PUD approval also in the Initial Order included three additional parcels located along 1st Street, S.E. and known as the G1, G2, and G3 Parcels, which will be developed with a mix of residential and retail uses. The first-stage PUD approval is effective for 12 years from the effective date of the Z.C. Order No. 13-05 (that is, until February 7, 2026).

3. The Initial Order also authorized the PUD-related rezoning of the Property from the CG/W-2 Zone District to the CG/CR and CG/W-1 Zone Districts. (The entirety of the F1 Parcel was rezoned to the CG/CR Zone District.)

[1] The Initial Order was approved for portions of Lot 805 in Square 744S and Lot 801 in Square 744S. Pursuant to an approved Division of Lots application, Lot 805 has been divided into separate assessment and taxation lots, and the Property is now known as Lots 808 and 812.

4. The Property is owned by the District of Columbia and has been used by DC Water for various operations related to its utility service.

5. On January 16, 2018, the Applicant filed a request asking that the Commission grant a one-year time extension in which the Applicant was required to file a building permit application for the consolidated PUD. (Exhibit ["Ex."] 1.)

6. The Applicant served the extension request on the two parties to the initial PUD proceeding, Advisory Neighborhood Commission ("ANC") 6D and DC Water. (Ex. 1 at 6.) The Commission provided both parties at least 30 days to respond. The Applicant presented the Application to the ANC at the ANC's January 8, 2018 public meeting, and the ANC unanimously supported the Application. (Ex. 1 at 4.) The ANC filed a letter in support of the extension dated January 28, 2018. (Ex. 5.) DC Water did not respond.

7. There has been no substantial change in any material facts upon which the Commission based its original approval of the Initial Order with respect to the consolidated PUD. (Ex. 1 at 4.) Since the Initial Order was approved, the Zoning Regulations have been amended and other development in the vicinity of the Property has proceeded (*see* Ex. 5 at 2), but both items were contemplated at the time of the Initial Order.

8. The Applicant's inability to file a building permit under the consolidated PUD within the requisite time period is a result of factors beyond the direct control of the Applicant. In a signed affidavit, the Applicant indicated that since the approval of the PUD, the Applicant proceeded diligently and in good faith to realize the Project. (Ex. 1D.) Actions taken included: negotiating and entering into a lease with the theater operator; modifying the design of the Project to accommodate the needs of the theater operator; negotiating and executing a Land Disposition Agreement with the District of Columbia, and securing approval from the DC Council for the same; working with the Deputy Mayor for Planning and Economic Development ("DMPED") and DC Water on the relocation of the existing DC Water operations on the Property to another location, which relocation is required in order to effectuate the PUD; negotiating and reaching agreement with DMPED and DC Water on DC Water operational matters that will remain on DC Water-owned property adjacent to the Property. (*Id.*)

9. The Applicant explained that it has worked diligently and closely with DMPED and DC Water to finalize and fund the relocation activities that are necessary to move DC Water operations off the Property. The District completed the acquisition of two relocation sites for DC Water and secured funding for DC Water's construction of and relocation onto such new locations. The D.C. Council approved the funding for such relocation activity on December 18, 2017 and a funding agreement between the District and DC Water was executed in January 2018. Such relocation activities were not within the Applicant's control but instead must be undertaken by DMPED and DC Water. The Applicant explained that it helped manage the process between the District and DC Water and took the lead in drafting many of the required agreements necessary for the DC Water relocation efforts. (Ex. 1, 1D.)

10. The Applicant indicated that since the date of the Initial Order, it had expended approximately $4,259,676 on the negotiation of the theater lease and LDA, refinement of the design of the F1 Parcel, assistance in DC Water relocation efforts, and negotiation and execution of site coordination, construction, and operational agreements with DMPED and DC Water. (Ex. 1D.)

11. The Applicant explained that the additional time would allow the Applicant to finish the design and permitting needed to move forward with the development of the F1 Parcel. (Ex. 1 at 4.)

12. DMPED filed a letter in support of the requested one-year extension. (Ex. 4.) The Office of Planning ("OP") noted in its report that the situation leading to the delay in the Applicant's pursuing a building permit was beyond the Applicant's reasonable control and supported the request for the extension. (Ex. 5 at 2.)

CONCLUSIONS OF LAW

The Commission may extend the time period of an approved PUD provided the requirements of 11-Z DCMR § 705.2 are satisfied. The Application was made in writing prior to the expiration of the First Extension. Subsection 705.2(a) requires that the applicant serve the extension request on all parties and that all parties are allowed 30 days to respond. The parties in Z.C. Case No. 13-05 were ANC 6D and DC Water (previously known as the DC Water and Sewer Authority). ANC 6D and DC Water were each properly served with this time extension request and ANC 6D submitted a letter evidencing its support for this Application.

Subsection 705.2(b) requires that the Commission find that there is no substantial change in any of the material facts upon which the Commission based its original approval of the PUD that would undermine the Commission's justification for approving the original PUD. Based on the information provided by the Applicant and the analysis from OP, the Commission concludes that extending the time period of approval for the consolidated PUD is appropriate, as there are no substantial changes in the material facts that the Commission relied on in approving the consolidated PUD application that were not contemplated at the time of the Initial Order.

Section 705.2 requires that the applicant demonstrate with substantial evidence that there is a good cause for the proposed extension, and identifies in § 705.2(c) three scenarios that satisfy such good cause requirement:

(1) An inability to obtain sufficient project financing for the PUD, following an applicant's diligent good faith efforts to obtain such financing because of changes in economic and market conditions beyond the applicant's reasonable control;

(2) An inability to secure all required governmental agency approvals for a PUD by the expiration date of the PUD order because of delays in the governmental agency approval process that are beyond the applicant's reasonable control; or

(3) The existence of pending litigation or such other condition, circumstance or factor beyond the applicant's reasonable control that renders the applicant unable to comply with the time limits of the PUD order.

The Commission finds that the Applicant demonstrated good cause to extend the period of time in which the Applicant is required to file a building permit application for the F1 Parcel/consolidated PUD component of the Initial Order. The time needed to relocate DC Water's operations is beyond the Applicant's reasonable control, has rendered the Applicant unable to comply with the time limits of the PUD order for the consolidated PUD, and has caused the Applicant's inability to secure all required governmental agency approvals. For these reasons, the Commission finds that the Applicant has satisfied the requirements of 11-Z DCMR § 705.2 regarding the application for a time extension of the consolidated PUD.

The Commission is required under § 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d)) to give "great weight" to the issues and concerns raised in the written report of the affected ANC. As noted above, ANC 6D was properly served with this time extension request but did not raise any issues or concerns other than to express its support for the Application.

The Commission is required under § 5 of the Office of Zoning Independence Act of 1990, effective September 20, 1990 (DC Law 8-163, D.C. Official Code § 6-623.04), to give great weight to OP recommendations. The Commission gives the requisite weight to OP's report in support of the Application.

DECISION

In consideration of the above Findings of Fact and Conclusions of Law contained in this Order, the Zoning Commission for the District of Columbia **ORDERS APPROVAL** of a time extension of the consolidated PUD approved in Z.C. Order No. 13-05, as previously extended by Z.C. Order No. 13-05A and modified by Z.C. Order No. 13-05B. The consolidated PUD approved by the Commission shall be valid until February 7, 2019, within which time the Applicant will be required to file a building permit application to construct the approved consolidated PUD, and construction of the consolidated PUD must start no later than February 7, 2020.

On February 26, 2018, upon motion by Chairman Hood, as seconded by Vice Chairman Miller, the Zoning Commission took **FINAL ACTION** to **APPROVE** the Application at its public meeting by a vote of **5-0-0** (Anthony J. Hood, Robert E. Miller, Peter A. Shapiro, Peter G. May, Michael G. Turnbull to approve).

In accordance with the provisions of 11-Z DCMR § 604.9, this Order shall become final and effective upon publication in the *D.C. Register* on May 11, 2018.

BY THE ORDER OF THE D.C. ZONING COMMISSION
A majority of the Commission members approved the issuance of this Order.

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF FINAL RULEMAKING
AND
Z.C. ORDER NO. 14-13D
Z.C. Case No. 14-13D
(Text Amendment – 11 DCMR)
Technical Corrections to Z.C. Order 14-13 and. Order 08-06A
March 26, 2018

The full text of this Zoning Commission Order is published in the "Final Rulemaking" section of this edition of the *D.C. Register*.

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
ZONING COMMISSION ORDER NO. 16-06A
Z.C. Case No. 16-06A
Jemal's Lazriv Water, LLC
(Design Review Modification of Significance @ Square 666, Lot 15)
January 29, 2018

Pursuant to notice, the Zoning Commission for the District of Columbia ("Commission") held a public hearing on December 18, 2017, to consider an application filed by Jemal's Lazriv Water, LLC ("Applicant") for a modification of significance to a project approved pursuant to the Capitol Gateway Overlay District design review provisions of the 1958 Zoning Regulations of the District of Columbia ("1958 Zoning Regulations"),[1] Title 11 of the District of Columbia Municipal Regulations ("DCMR"). The property that is the subject of this application is located at 1900 Half Street, S.W. (Square 666, Lot 15) ("Property"). The modification request was made pursuant to 11-Z DCMR § 704 of the 2016 Zoning Regulations. The hearing was conducted in accordance with the contested case provisions of 11-Z DCMR Chapter 4. For the reasons stated below, the Commission hereby approves the application.

FINDINGS OF FACT

Background Information

1. Pursuant to Z.C. Order No. 16-06, dated July 7, 2016 and effective on August 26, 2016, the Commission approved a design review application submitted under the then-applicable Capitol Gateway Overlay District design review provisions of the 1958 Zoning Regulations. The application proposed to renovate and adaptively reuse an existing office building on the Property into a mixed-use project comprised of residential and retail uses. The approval included a variance from the maximum building height requirements, a variance from the loading requirements, and special exception relief to provide multiple penthouses at multiple heights and penthouses that do not comply with the setback requirements from open court walls.

2. On August 28, 2017, the Applicant filed an application for a modification of significance to revise the penthouse plan approved in Z.C. Case No. 16-06 ("Original Application"). (Exhibit ["Ex."] 1-3.) The Original Application included architectural drawings of the building's approved and proposed penthouses. The Original Application was deemed a modification of significance because it requested additional zoning relief for penthouse heights and setbacks.

[1] The project that is the subject of this modification of significance was originally approved when the 1958 Zoning Regulations were in effect (Z.C. Order No. 16-06). On September 6, 2016, the 1958 Zoning Regulations were repealed and replaced by the 2016 Zoning Regulations. The repeal of the 1958 Zoning Regulations and the replacement with the 2016 Zoning Regulations has no effect on the validity of the Commission's prior decision and Order regarding the project.

3. On October 13, 2017, the Applicant submitted a letter and updated architectural drawings amending the Original Application ("Revised Application"). (Ex. 8.) The Revised Application requested additional modifications to the overall building design and program, including: (i) a reduction in the number of approved residential units; (ii) a reduction in the number of on-site vehicle parking spaces; (iii) a reallocation of interior amenity spaces, including a reduction in the floor area devoted to retail use and an increase in the floor area devoted to residential amenity space; and (iv) minor refinements to the approved building façade. The Revised Application included approved and proposed architectural drawings of the entire building, including the penthouse drawings previously submitted, all dated October 13, 2017 ("Modification Drawings"). (Ex. 8A.) Together the Original Application and the Revised Application, including the Modification Drawings, are hereinafter referred to as the "Modification Application."

4. On November 28, 2017, the Applicant filed a Prehearing Submission, which included an updated Zoning Tabulation chart, information on the project's consistency with the Buzzard Point Vision Framework + Design Review Guide ("Buzzard Point Guide"), an update on approvals for the Anacostia Riverwalk design; proposed language for the project's design flexibility; an update on community engagement; and the resumes of witnesses that the Applicant would proffer as experts at the public hearing. (Ex. 11.)

5. On December 12, 2017, the Office of Planning ("OP") submitted a report in support of the Modification Application subject to the following: (i) the Applicant provides additional information regarding the design flexibility requested to phase construction of the northern penthouse mechanical screen wall; (ii) the Applicant further justifies the requested penthouse height relief; and (iii) the Applicant submits final design plans, as approved through the public space permitting process, for the Anacostia Riverwalk trail. (Ex. 12.)

6. Advisory Neighborhood Commission ("ANC") 6D, the ANC in which the Property is located, submitted two reports on the application. (Ex. 7, 14.) The reports describe ANC 6D's three separate votes on the application, discuss the ANC's concerns over the reduction of ground-floor retail space and the need for street activation, indicate the ANC's specific conditions to approval, and state that ANC 6D is "impressed with much of this project."

7. The National Capitol Planning Commission ("NCPC") submitted a report dated November 3, 2017, stating that the proposed modifications are consistent with the intent and requirements of Capitol Gateway design review and are not inconsistent with the Comprehensive Plan for the National Capitol or other federal interests. (Ex. 10.)

8. The Commission held a public hearing on the Modification Application on December 18, 2017. Parties to the case were the Applicant and ANC 6D. Proper notice of the hearing was provided by the Office of Zoning pursuant to 11-Z DCMR § 402.

9. Witnesses appearing at the hearing on behalf of the Applicant were Mr. Paul Millstein and Mr. Drew Turner of Douglas Development, and Mr. Kevin Sperry of Antunovich Associates Architects. The Commission indicated that Mr. Sperry had already been qualified by the Commission as an expert in architecture.

10. ANC Commissioner Roger Moffatt testified on behalf of ANC 6D at the public hearing. No individuals or organizations testified in support of or in opposition to the Modification Application.

11. On December 26, 2017, and as requested by the Commission at the close of the public hearing, the Applicant submitted a post-hearing submission that provided additional information on the project's consistency with the Buzzard Point Guide and proposed Findings of Facts and Conclusions of Law. (Ex. 19, 19A, 19B.)

12. At its January 29, 2018 public meeting, the Commission took final action to approve the Modification Application.

The Property

13. The Property consists of Lot 15 in Square 666. Square 666 is located in the southwest quadrant of the District and is bounded by T Street to the north, the Anacostia River to the east, U Street to the south, and Water Street and Half Street to the west. The Property is the only lot in Square 666 and has an angled rectangular shape with a total land area of approximately 110,988 square feet.

14. The Property is presently improved with an existing and mostly vacant nine-story office building that was constructed circa 1976. The existing building has a height of 90 feet and approximately 665,928 square feet of gross floor area with a density of 6.0 floor area ratio ("FAR"). On-site parking for 691 vehicles is located within the building, and exterior on-site loading is located on the Property to the north of the building. The building was originally constructed for use by the General Services Administration for Federal occupancy and was used as an office building for several decades.

Approved Project

15. In Z.C. Order No. 16-06, the Commission approved the adaptive reuse of the existing building as a mixed-use apartment house with approximately 427 residential units and approximately 24,032 square feet of retail use ("Approved Project"). In order to provide a high quality residential building and take full advantage of its location along the Anacostia River, the Approved Project incorporated two large river-facing courts that were created by removing approximately 215,217 square feet of gross floor area (1.9 FAR) from the existing building. The Approved Project resulted in an overall density of 4.06 FAR and maintained the building's existing height of 90 feet except for a new two-foot three-inch roof slab located on the center portion of the roof to reinforce the new rooftop mechanical equipment and amenity space, and a new five-foot pool deck.

16. The Approved Project maintained two and a half levels of the building's existing parking garage with 312 parking spaces (300 zoning-compliant spaces and 12 tandem spaces), with ingress and egress from T Street, S.W. On-site loading was approved in its existing location along T Street, adjacent to the parking garage entrance, such that all vehicular access would be consolidated on the north side of the Property.

17. In Z.C. Order No. 16-06, the Commission approved variances and special exception relief from the 1958 Zoning Regulations. The approved zoning relief included: (i) a variance from the maximum building height requirements (11 DCMR § 1603.4); (ii) a variance from the loading requirements (11 DCMR § 2201.1); and (iii) special exception relief to provide multiple penthouses (11 DCMR § 411.6), penthouses with multiple heights (11 DCMR § 411.9), and penthouses not setback from the open court walls (11 DCMR § 411.18(c)(5)).

18. Pursuant to 11-A DCMR § 102.3(a), the Approved Project, including the approved zoning relief, is vested and subject to the provisions and requirements of the 1958 Zoning Regulations. Pursuant to 11-A DCMR § 102.4 of the 2016 Zoning Regulations, the proposed modifications to the vested project are required to conform with the 2016 Zoning Regulations as the 2016 Zoning Regulations apply to those modifications. The Modification Drawings approved by this Order conform to the 2016 Zoning Regulations in every aspect except for the relief previously granted in Z.C. Order No. 16-06 and where additional relief is being requested herein for penthouse heights and setbacks on certain areas of the roof, far removed from any street frontages.

Modifications to the Approved Project

19. As shown on the Modification Drawings, the Applicant requested the following modifications to the Approved Project: (i) modifications to the building's approved roof plan; (ii) a reduction in the total number of residential units; (iii) a reduction in the total number of on-site vehicle parking spaces; (iv) a reallocation of interior spaces and uses, resulting in additional floor area devoted to residential amenity space and less floor area devoted to retail space; and (v) modifications to the building's façade.

20. The Applicant requested additional special exception relief pursuant to 11-C DCMR § 1500.9 and 11-C DCMR § 1502.1(c)(5) to provide penthouses with multiple heights and penthouses that are not setback from the open court walls; and a variance from the penthouse height requirements of 11-K DCMR § 505.5. Pursuant to 11-K DCMR § 512.7 and 11-X DCMR § 603.3, the Commission may hear and decide requests for special exception and variance relief together with an application for design review.

21. As set forth below, based on the testimony provided at the public hearing and the materials submitted to the record, the Commission finds that the proposed modifications are reasonable, comply with the applicable standards in the 2016 Zoning Regulations, and are consistent with the Buzzard Point Guide. Moreover, the Commission finds that the Applicant meets the burden of proof for the special

exception relief and variances requested. Therefore, the Commission approves the Modification Application for the reasons described herein.

Modifications to the Penthouse

22. The modifications to the building's approved roof plan result from three major changes: First, the Applicant's desire to maintain the building's existing mechanical penthouse structure and elevator shafts, which were previously proposed to be demolished and rebuilt. Second, to provide elevator access to the roof via one of the existing elevators and existing elevator shafts. Third, to replace the building's HVAC system with new VRF heat pumps. As shown on the Modification Drawings, these proposed deviations from the Approved Project create three separate penthouse structures on the roof as follows:

    a. The largest penthouse is in the center wing of the building ("Center Penthouse"). The Center Penthouse will include the existing penthouse structure, converted to contain elevator mechanical equipment, storage and trash rooms, restrooms, the existing elevator shafts, and one existing stair tower. The existing structure is currently 16 feet, nine and one-half inches tall and will be increased to 17 feet, 10 inches tall to comply with current building code insulation standards. The existing structure will also include a 20-foot-tall portion to enclose a single elevator that will provide access to the roof via the existing elevator and elevator shaft. Connected to the existing structure, also within the Center Penthouse, is a newly constructed residential amenity lounge (12 feet tall above the reinforced roof slab), a screen wall enclosing the VRF heat pumps and other mechanical equipment (14 feet, three-inches tall above the existing roof), and a screen wall enclosing a code-required stair pressurization fan (six feet tall above the existing roof);

    b. On the building's north wing is a second penthouse that will contain one existing stair tower (12 feet, nine inches above the existing roof) and a screen wall enclosing additional VRF heat pumps and other mechanical equipment to bring the building into compliance with current building code requirements and provide exhaust for future ground-floor retailers (one foot, nine inches above the existing roof); and

    c. On the building's south wing is a third penthouse that will contain an existing stair tower (12 feet, nine inches above the existing roof) and a screen wall enclosing a stair pressurization fan (11 feet, nine inches above the existing roof).

23. The modified penthouse design requires the same special exception relief granted in Z.C. Order No. 16-06 to provide multiple penthouses, penthouses with multiple heights, and penthouses that are not setback from the open court walls. The Commission found that the Approved Project met the special exception burden of proof for these areas of relief in Z.C. Order No. 16-06, Findings of Fact Nos. 48-53.

24. The modified penthouse design requires additional zoning relief in three areas: (i) special exception relief to provide multiple penthouse heights because six separate penthouse heights are proposed instead of four separate penthouse heights approved; (ii) special exception relief from the penthouse setback requirements for the existing stair towers that were approved to be flush with the court walls but are now proposed to extend five feet to 10 inches into the building's open courts, as measured from the exterior wall (or three feet, seven inches measured from the overhang). Additional setback relief is also needed for the existing penthouse structure that is 17 feet, 10 inches tall for the majority of the structure and 20-feet tall for the elevator, but is only setback 16 feet, three inches from the court walls; and (iii) a variance from the penthouse height requirements, which permit a maximum penthouse height of 12 feet for habitable space and 15 feet for mechanical space, whereas heights of 17 feet, 10 inches and 20 feet are proposed.

25. Penthouse Special Exception Relief. The Commission hereby approves the Applicant's request for special exception relief to provide multiple penthouses,[2] multiple penthouse heights that exceed the maximum penthouse height requirements, and penthouses that do not meet the setback requirements from the open court walls. Pursuant to 11-C DCMR § 1504 and 11-X DCMR, Chapter 9, special exception relief may be granted from the requirements of 11-C DCMR §§ 1500.6 through 1500.10 and § 1502, subject to the following considerations: (a) the strict application of the penthouse requirements would result in construction that is unduly restrictive, prohibitively costly, or unreasonable, or is inconsistent with building codes; (b) the relief requested would result in a better design of the roof structure without appearing to be an extension of the building wall; (c) the relief requested would result in a roof structure that is visually less intrusive; (d) operating difficulties such as meeting D.C. Construction Code, Title 12 DCMR requirements for roof access and stairwell separation or elevator stack location to achieve reasonable efficiencies in lower floors; size of building lot; or other conditions relating to the building or surrounding area make full compliance unduly restrictive, prohibitively costly or unreasonable; (e) every effort has been made for the housing for mechanical equipment, stairway, and elevator penthouses to be in compliance with the required setbacks; and (f) the intent and purpose of this chapter and this title shall not be materially impaired by the structure, and the light and air of adjacent buildings shall not be affected adversely. (11-C DCMR § 1504.)

26. The Commission finds that the proposed penthouse configuration is consistent with the standards set forth in 11-C DCMR § 1504. Due to the nature of the existing building and the mechanical and elevator equipment therein, strict application of the penthouse regulations would result in a roof plan that would be unduly restrictive, prohibitively costly and unreasonable, and would result in inconsistencies with the current building code. The relief requested will allow for penthouses that are minimally intrusive and create a better rooftop design that will not affect the light and air of adjacent buildings. Thus, the Commission finds that the modified penthouse plan will not impair the intent

[2] Relief to provide multiple penthouses was granted in Z.C. Order No. 16-06. The modified roof plan includes fewer penthouses; such that additional relief is not required. However, the Commission's rationale and approval for providing multiple penthouses in Z.C. Order No. 16-06 is still applicable in this case.

and purpose of the penthouse regulations for reasons that are explained in further detail below.

27. Relief for Penthouses with Multiple Heights. The Commission approves the requested relief to provide multiple penthouse heights. The relief is needed due to the Applicant's desire to maintain the existing penthouse structure, elevators, and elevator shafts, which were previously thought to not be salvageable. However, after further examination, the Applicant determined that the elevators have a useful life of 20 to 30 years more and therefore should be maintained. The Commission finds that the Applicant could theoretically increase the heights of several of the penthouse elements to meet the highest proposed penthouse height and reduce the number of different penthouse heights (e.g., increase the mechanical screen wall heights or increase the existing stair tower heights). However, doing so would create additional and unnecessary massing on the roof and reduce the proposed penthouse setbacks. Doing either is contrary to the intent of the penthouse regulations and would result in the penthouses being more visible from the street and river. Moreover, three of the proposed penthouse heights are within two and one-half feet of each other (121.04 feet, 122.08 feet, and 123.54 feet in elevation) such that their height differences will be imperceptible.

28. Relief from the Penthouse Setback Requirements. The Commission approves the requested relief from the penthouse setback requirements. In Z.C. Order No. 16-06, the Commission granted relief for the three existing stair towers to not provide any setback from the court walls. The proposed new bump-outs into the courts for the north and south stair towers is a result of vertical ductwork that connects through all levels of the building and is needed for the stair pressurization system. This duct work cannot be located on the interior sides of the stair towers because it would conflict with the building layout in the residential units, residential corridors, and in the garage. Thus, to bring the building into compliance with the current building code standards and provide required stair pressurization for a residential building, the duct work must project into the new courts.

29. The Commission also grants relief to not provide a 1:1 setback from the court walls for the existing penthouse structure, including the new elevator pop-up. The 17-foot, 10-inch height for the existing structure is a result of the existing stacked elevator mechanical equipment and overruns, which are located on top of the existing elevator shafts. Although the existing elevators do not currently provide access to the roof, the equipment and overruns for the elevators below require 17 feet, 10 inches of vertical clearance to comply with current building code standards, even when sandwiched as close together as possible. The 20 feet height for the single elevator that will provide access to the roof is a result of the building's existing elevator equipment that will be reused, which collectively require a minimum height of 20 feet. Therefore, the Commission finds that the Applicant cannot reasonably reduce the height of the existing penthouse structure or proposed elevator pop-up while reusing the building's existing equipment, elevators, and elevator shafts.

30. The Commission notes that, theoretically, the Applicant could have demolished the existing structure and elevator equipment and constructed a new penthouse that meets the setback requirements (as was approved in Z.C. Order No. 16-06). However, the Commission concludes that requiring the Applicant to demolish the existing structures and equipment would add unreasonable cost to the renovations and would have unreasonably required the Applicant to destroy salvageable materials. The Commission also finds that the Applicant cannot reasonably extend the width of the three wings to reduce the non-compliant setbacks. This is because the building has columns spaced at 20-foot intervals, which can only sustain a minimal cantilever. Thus, extending the width of the wings by a few feet to the north and/or south to meet the setback requirement would require extending that width by almost 20 feet, which would eliminate a substantial number of dwelling units and destroy the architectural character and environment created by the large, open courts facing the waterfront.

31. Based on the foregoing, the Commission concludes that strict application of the setback requirements would result in a roof plan that would be unduly restrictive, prohibitively costly and unreasonable, and would result in inconsistencies with the building code. The Applicant made every effort to ensure that all mechanical equipment, stair towers, and elevator penthouses are in compliance with the required setbacks. The only penthouse elements that are not setback 1:1 are those that are already existing in the building, and which will become exposed when the Applicant cuts out the open courts. The non-compliant penthouses are setback at least 1:1 from all front, rear, and side building walls, including river-facing walls, and only require relief along the internal court walls. Thus, the Commission concludes that setback relief will not result in any negative impacts, will not materially impair the intent and purpose of the penthouse regulations, and will not affect adversely the light and air of adjacent buildings.

32. Variance for Penthouse Height. Pursuant to 11-X DCMR § 603.3 and 11-X DCMR Chapter 10, the Applicant requested a variance from 11-K DCMR § 505.5, which limits the maximum permitted penthouse height in the CG-5 Zone District to 12 feet and 15 feet for mechanical space. As measured from the roof on which they sit, the proposed penthouse heights range from six feet to 20 feet.

33. The test for variance relief is three-part: (1) demonstration that a particular piece of property is affected by some exceptional situation or condition; (2) such that, without the requested variance relief, the strict application of the Zoning Regulations would result in some practical difficulty upon the property owner; and (3) that the relief requested can be granted without substantial detriment to the public good or substantial impairment of the zone plan. As set forth below, the Commission finds that a variance from the penthouse height requirements meets the three-prong variance test and should be approved:

    a. Exceptional Situation or Condition. This Commission previously found in Z.C. Order No. 16-06, Findings of Fact Nos. 39-40, that the Property is exceptional due to the presence of the existing office building. (*See Clerics of St. Viator, Inc. v. D.C. Board of Zoning Adjustment,* 320 A.2nd 291, 294 (D.C. 1974) (stating

that the phrase "exceptional situation or condition" applies not only to the land, but also to the existence and configuration of a building on the land).) The existing building is exceptionally large, and much of its existing height, density, setbacks, core elements, elevators, shafts and equipment, stair towers, column spacing, and siting cannot be modified or redesigned without significantly altering or destroying the building's structural integrity. The Applicant proposes to remove a substantial amount of the building's gross floor area to provide appropriate massing, create enhanced public access points to the river, and maximize views for the residential uses. In doing so, the Applicant proposes to maintain where possible the existing structure, including existing stair towers, elevator systems, structural columns, and penthouse structures, which directly impact the ability to comply with the penthouse height requirements;

b. Resulting Practical Difficulty. The Commission finds that strict application of the penthouse height requirements would result in a practical difficulty by constraining the Applicant's ability to adaptively renovate and reuse the existing building, including the existing elevators, elevator shafts, elevator mechanical equipment, and overruns. The Center Penthouse includes two heights that are inconsistent with the maximum heights permitted by 11-K DCMR § 505.5. The existing penthouse is already non-conforming at 16 feet, nine and one-half inches in height. The Applicant will slightly increase that height to 17 feet, 10 inches to comply with current building code standards. The Applicant will also create a 20-foot pop-up to allow one of the existing elevators in its existing shaft to provide elevator access to the roof. All other penthouse elements will comply with the 12-foot and 15-foot requirements. Requiring the Applicant to demolish the existing shafts through the building, replace all of the elevators, and demolish and replace the existing penthouse mechanical structure would result in a practical difficulty to the Applicant;

c. Moreover, the existing penthouse height is consistent with the regulations in effect when the building was constructed, and is only now non-compliant as a result of the changes made to the penthouse regulations pursuant to Z.C. Order No. 14-13 (January 2016). After further investigation into the condition of the existing elevators and shafts, the Applicant determined that they could be refurbished and reused, rather than replaced as previously proposed, which allows the Applicant to retain and reuse the existing penthouse, elevator machine room, and overruns. The existing elevator machine room and overruns are sandwiched as close together as possible, such that the Applicant cannot reduce the structure's height to 15 feet without demolishing it altogether—which the Commission finds would defeat the purpose of preserving the building's existing elevator systems;

d. The Commission also finds that providing elevator access to the roof using the building's existing elevators, shafts, and equipment is not possible without providing a 20-foot structure. The proposed height is based on the existing elevator cab and its overrun, the required hoist way beams, and the roof

assembly, which together require a total penthouse height of 20 feet. Thus, the Commission finds that due to the existing structures and equipment within the building, it would be practically difficult for the Applicant to meet the penthouse height requirements of 11-K DCMR § 505.5; and

e. No Harm to the Public Good or Zone Plan. The Commission concludes that the requested variance can be granted without substantial detriment to the public good and without substantial impairment to the zone plan. The two portions of the main penthouse that do not comply with the penthouse height requirements are located in the center of the building and are significantly setback from all of the building's exterior walls (front, rear, and side), except the court walls. The court walls are being created by the Applicant to establish a residential use for the existing office building. The Commission finds that due to their extensive setbacks from all surrounding streets and the river, the non-compliant penthouses will be extremely difficult to see from any location, including from the river, and therefore will not have any impact on the public good. Therefore, the Commission finds that the proposed non-compliant penthouse heights will not adversely affect surrounding properties and will not be a detriment to the public good or zone plan.

34. Based on the foregoing, the Commission concludes that the Applicant has met the three-prong variance test and hereby grants the requested relief to allow a penthouse that exceeds the maximum penthouse height requirements permitted in the CG-5 Zone District.

Modifications to the Number of Dwelling Units

35. The Applicant proposes to increase the size of many of the residential units, which results in fewer total units being provided within the building (427 approved, compared to 415 proposed). Reducing the total number of units removes the project's smallest units and creates a greater number of larger unit types with more bedrooms. The total number of two- and three-bedrooms units increases from approximately 60 units (14% of the total units) in the approved project to approximately 106 units (25% of the total units) in the proposed project. The Applicant requested flexibility to increase or decrease the total number of residential units to plus or minus 10% from the 415 units proposed.

36. The requested modifications to the number of dwelling units does not require additional zoning relief. Nevertheless, the Commission approves the requested modification. Reducing the number of dwelling units and increasing the number of larger-sized units is fully consistent with the District's goal of providing housing for families. The Commission also finds that increasing or decreasing the approved number of units by plus or minus 10% is consistent with the District's goals of either providing more residential units, or providing fewer units but at larger sizes to accommodate families.

Modifications to the Number of On-site Parking Spaces

37. The Applicant proposes to reduce the total number of parking spaces within the building from 312 (approved) to 246 (proposed). The proposed number of parking spaces exceeds the minimum number of spaces required by the 2016 Zoning Regulations; however, the Applicant requests flexibility to reduce the total number of spaces so long as the number provided meets the minimum number of spaces required by 11-C DCMR Chapter 7.

38. The requested modifications to the number of parking spaces does not require additional zoning relief. Nevertheless, the Commission approves the Applicant's request to reduce the total number of parking spaces to 246 spaces, including the request to have the flexibility to further reduce the number of spaces so long as the total amount meets the minimum zoning requirement. Doing so is consistent with the Zoning Regulations and will allow the Applicant to utilize the existing building in the most efficient manner possible.

Modifications to the Interior Layout and Retail Space

39. The Applicant proposes to reallocate the proposed interior layout and uses within the building, primarily to increase and improve the floor area devoted to residential amenity space and decrease the gross floor area devoted to retail space. Under the Approved Drawings, approximately 24,032 square feet was devoted to retail space. Under the Modification Drawings, approximately 16,542 square feet is devoted to retail space, and the remaining space is devoted to necessary residential amenities. The Applicant requests flexibility to adjust the amount of space devoted to retail so long as the adjustments do not impact the design of the building façade.

40. The revised interior layout also includes the following modifications: (i) increased the size of the trash room to accommodate future more sustainable trash types and disposal options, and relocated the trash room from the P1 level to the ground level; (ii) revised the type of long-term bicycle racks (single rack instead of stacked), per DDOT's request, increased the number of long-term residential bicycle parking spaces, and relocated the residential bicycle parking location from the P1 level to the ground level for increased ease of use; (iii) added a small one-story element to the building in the south courtyard (second floor) to allow for a taller ceiling and better amenity space in this location; and (iv) filled in the previously-proposed second-floor two-story retail area by maintaining the building's existing slab in this location to create additional residential units.

41. The Applicant also further developed the landscape design of the courtyards and the Riverwalk in conjunction with OP, the District Department of Transportation ("DDOT"), and the District Department of Energy and the Environment ("DOEE"), as shown on Sheets 9-10 and 43 of the Modification Drawings. The scope of the public space plan has not changed from the plan approved in Z.C. Order No. 16-06, and the

Applicant has continued to work with the applicable District agencies to obtain necessary approvals. The updated Riverwalk plan, as approved by OP, was submitted to the record as part of the Applicant's PowerPoint presentation. (Ex. 15, p. 11.)

42. The requested modifications to the interior layout or landscape and Riverwalk plans do not require additional zoning relief. Nevertheless, the Commission approves the requested modifications. As testified to by the Applicant at the public hearing, the proposed residential building needs additional amenity space to remain competitive within the residential market. Given the existing building and the Property's location relating to retail use (two dead-end streets to the north and south, the Anacostia River to the east, and Half and Water streets to the west that separate the Property from Pepco facilities), it would be exceptionally difficult to locate more retail space in the building that would be successful. The Commission finds that the Applicant has maximized the amount of retail based on the anticipated market conditions, and has located the proposed retail space at the northwestern-most portion of the building where the majority of pedestrian activity is expected to take place. Moreover, the Commission finds that the residential amenity space proposed for the ground floor will include active and interesting uses, such as co-working rooms and gym facilities, which will help to create a vibrant and active ground floor retail presence along the entire building frontage, much in the same way that retail use is expected to do. Finally, the Commission finds that the amount of retail space proposed is consistent with the Buzzard Point Guide, which recommends "over 15,000 square feet of retail space" for the Property. At approximately 16,542 square feet of retail space proposed, the Commission concludes that the modification to reduce the amount of retail in the building is fully consistent with the District's goals for the Property and is an appropriate modification for the project.

Modifications to the Façade Design

43. As shown on the Modification Drawings, the Applicant proposes the following modifications to the building façade: (i) add glass canopies above the residential and retail entrances along Water Street; (ii) incorporate a brick masonry finish at the first two-stories; (iii) incorporate operable windows at the residential units; (iv) remove the trellises on the private terraces facing east on floors seven and nine; (v) replace the panelized rain screen for the stair enclosures facing the courtyards with metal panels; (vi) provide a matte grey finish for the penthouses' metal paneling and mechanical screens; and (vii) remove the inset balconies for the smallest residential units not facing the river, and replace them with interior living space to create larger and more functional units.

44. The requested modifications to the façade design do not require additional zoning relief. Nevertheless, the Commission approves the request because doing so will increase the building's aesthetic and more appropriately adaptively reuse the existing structure. The Commission finds that the balconies proposed to be removed were small, had marginal use capacity, and limited the amount of light that could reach the units' living areas.

The revised unit layouts with no balconies bring the windows closer to living areas, increase the size of the living areas, and create a more functional interior layout. Given the extensive indoor and outdoor residential amenities in the building, the addition of operable windows, and the ability to have a better unit layouts and increased light, as well as the Applicant's testimony regarding the benefits of removing the balconies at the public hearing, the Commission concludes that removing individual unit balconies in the locations shown on the Modification Drawings is an overall benefit to the project. (*See* Applicant's PowerPoint presentation at Ex. 15, pp. 7-8.)

Design Flexibility

45. In addition to the flexibility granted in Z.C. Order No. 16-06, the Applicant requested the following flexibility with respect to the design of the modified project:

a. To provide a range in the number of residential dwelling units of plus or minus 10% from the number depicted on the architectural drawings approved in Z.C. Order No. 16-06A;

b. To vary the garage layout and the number, location, and arrangement of vehicle parking spaces, provided the total number of parking spaces is not reduced below the number of spaces required under 11-C DCMR Chapter 7;

c. To vary the final design of retail frontages, including the location and design of entrances, show windows, and size of retail units, in accordance with the needs of retail tenants, and to vary the types of uses designated as "retail" use on the approved architectural drawings to include the following use categories: (i) Retail (11-B DCMR § 200.2(cc)); (ii) Services, General (11-B DCMR § 200.2(dd)); (iii) Services, Financial (11-B DCMR § 200.2(ee)); and (iv) Eating and Drinking Establishments (11-B DCMR § 200.2(j));

d. To vary the location and design of the ground-floor components to comply with any of the applicable District of Columbia laws and regulations and to accommodate any specific tenant requirements, and to vary the size of the retail area; and

e. To construct the northern portion of the proposed 11-foot, nine-inches-tall penthouse screen wall located on the northern portion of the building before constructing the southern portion of that same screen wall, in order to best accommodate the mechanical needs of future retail tenants.

Compliance with Design Review Requirements

46. Pursuant to 11-X DCMR § 604.1, the Commission evaluates and approves or disapproves a design review application according to the standards of 11-X DCMR § 604 and the applicable standards of Subtitle K. Pursuant to 11-K DCMR §§ 512.1(a) and 512.2, properties within the CG-5 zone, and all proposed uses, buildings, and

structures, or any proposed exterior renovation to any existing building or structure that would result in an alteration of the exterior design, is subject to review and approval by the Commission in accordance with 11-K DCMR §§ 512.3. Pursuant to 11-K DCMR §§ 512.3, an applicant requesting approval under 11-K DCMR § 512 must also prove that the proposed building or structure, including the siting, architectural design, site plan, landscaping, sidewalk treatment, and operation, will meet the requirements of 11-K DCMR § 500.1. Finally, 11-K DCMR § 512.4 sets forth specific requirements that apply to all new buildings, structures, or uses within the CG-5 zone. As described below, the Commission finds that the modified project is consistent with the applicable design review standards.

Compliance with General Design Review Standards (11-X DCMR § 604)

47. The Commission finds that the modified project meets the design review standards of 11-X DCMR § 604. The Commission finds that the modified project is not inconsistent with the Comprehensive Plan and with other adopted public policies, since the project is to adaptively reuse an existing, mostly vacant office building with significant new residential units, including large units for families. The project will adaptively reuse the existing building, thus bringing the Property into compliance with all current building code requirements and meeting all applicable storm water and GAR requirements. Moreover, the project will provide new ground-floor retail to serve residents and visitors of the Buzzard Point neighborhood. (11-X DCMR § 604.6).

48. The Commission also finds that the modified project is in harmony with the general purpose and intent of the Zoning Regulations and Zoning Map and will not tend to affect adversely the use of neighboring property. With the exception of the requested penthouse relief and the previously-approved building height and loading variances, the project complies with all other applicable zoning requirements. The Commission finds that the requested relief will have no adverse impacts on surrounding property and will not impair the purpose or intent of the Zoning Regulations. As set forth below, the Commission also finds that the project is consistent with the design requirements set forth for buildings in the CG-5 Zone District. (11-X DCMR § 604.6.)

49. The Commission finds that the building's street frontages have been designed to be safe, comfortable, and inviting to pedestrian activity, and that the modified project includes ground floor retail uses with distinct entryways and separate entrances for the residential use. The project also includes significant streetscape improvements, including new sidewalks and landscaping, and all public space improvements, including the width of the sidewalks, will comply with DDOT standards. Moreover, the Applicant minimized blank façades on the renovated building. (11-X DCMR § 604.7(a).)

50. The Project includes well-designed new gathering spaces and open spaces, including the construction and extension of the Riverwalk and a dog park to the north of the building.

The Commission finds that these spaces will be inviting to the public, easily accessible, and appropriate for the Property's unique location. (11-X DCMR § 604.7(b).)

51. The Property is not located along one of the District's major boulevards. However, the Commission finds that the public space improvements will enhance the existing urban form. The Project does not infringe on any key landscape vistas or axial views of landmarks and important places, and the building's massing along the river will be improved following the proposed renovations. Thus the Commission finds that the building's alteration will have no detrimental impact on views and vistas. (11-X DCMR § 604.7(c).)

52. The Commission finds that the pedestrian realm surrounding the Property will be reinforced through the provision of active ground floor retail and residential amenity spaces with clear inviting windows, outdoor seating, the extended Riverwalk, the dog park, and an overlook at the terminus of the Riverwalk and T Street. Moreover, the building will be re-clad in high quality materials that will significantly enhance the building's design and aesthetic from the surrounding streets and from the river (11-X DCMR § 604.7(d).)

53. The Commission finds that the Project includes significant sustainable landscaping features, such as native vegetation that promotes biodiversity, a green roof, strategic plant selections and site irrigation, and high quality storm water management and bio-retention systems. (11-X DCMR § 604.7(e).)

54. The Commission finds that the Project has been designed to promote connectivity both internally and within the surrounding neighborhood. Vehicle parking and loading will be accessed along the north side of the Property, with pedestrian entrances into the building located along Water Street. Pedestrians and bicyclists will access the Riverwalk from T Street to the north and from the extended Riverwalk to the south. The Project incorporates significant long- and short-term bicycle parking facilities for residents, employees, and retail customers, and electric vehicle charging spaces in the garage. Thus, the Commission finds that redevelopment of the Property will result in significantly better integration into the surrounding street system, through the upgrading of surrounding sidewalks, the planting of trees, and significant improvements to the public realm consistent with DDOT standards. (11-X DCMR § 604.7(f).)

Compliance with the Zoning Commission Review of Buildings, Structures, and Uses in the CG Zones (11-K DCMR §§ 512 and 500.1)

55. The Commission finds that the project will help achieve the objectives of the Capitol Gateway defined in 11-K DCMR § 500.1. The project will help assure development of the area with a mixture of residential and retail uses, and with a suitable height, bulk, and design, as generally indicated in the Comprehensive Plan and recommended in the Buzzard Point Guide. (11-K DCMR § 500.1(a).)

56. The Commission finds that the project encourages a variety of support and visitor-related uses through development of new retail uses that will increase visibility and walkability to the Property. Construction of the Riverwalk will draw visitors to the area to take advantage of recreational opportunities and views of the river that were not previously available. Safe pedestrian and bicycle connections to the surrounding streets will be provided through the implementation of new sidewalks, bicycle lanes, street furniture, pedestrian-oriented lighting, crosswalks, and landscape buffers. (11-K DCMR § 500.1(b).)

57. The project provides an appropriate massing along the Anacostia River and includes significant step-backs and height step-downs to maximize views and create an aesthetically pleasing design. The Commission finds that the project includes continuous public open space along the waterfront through the creation of the Riverwalk, with ample space for pedestrians, cyclists, and landscape elements. (11-K DCMR § 500.1(d).)

58. The modified project will help achieve the objectives of the Capitol Gateway district because the project is in harmony with the general purpose and intent of the Zoning Regulations and Zoning Map and will not tend to affect adversely the neighboring property in accordance with the Zoning Regulations and Zoning Map. Thus, the Commission finds that the project assures development of Buzzard Point with a mixture of uses and a suitable height, bulk, and design. (11-K DCMR § 512.3(a).)

59. The Commission finds that the project will help achieve the desired use mix with proposed residential, retail, and service uses at the Property. (11-K DCMR § 512.3(b).)

60. The Commission finds that the height, bulk, and architectural design of the building will be in harmony with the surrounding neighborhood and will improve the adjoining street patterns and circulation. The renovated building provides distinct façade articulation at each elevation and creates an innovative design that connects the building to the surrounding street frontages and the Anacostia River. The Applicant will provide new streetscape improvements on T Street, Half Street, and Water Street, which will support pedestrian and bicycle infrastructure where none currently exist and which will be consistent with the vision for the streetscape set forth in the Buzzard Point Guide. Moreover, the approved design and construction of the Riverwalk will help guide future development to this portion of the southwest waterfront. (11-K DCMR § 512.3(c).)

61. The Commission finds that the project will minimize potential conflicts between vehicles and pedestrians. Consolidated access for parking and loading will be located on the north side of the Property, which eliminates the existing parking access point at the south side of the Property and reduces the width of the existing curb cut on the north side of the Property. Trash operations will occur from the loading area. All loading and trash trucks will access the loading docks without negatively impacting public space between the docks and the nearest DDOT-designated truck routes. Trucks will be able to make front-in and front-out maneuvers. In addition, a two-way separated cycle track

will connect T Street to the Riverwalk on the north side of the building, which will minimize potential bicycle conflicts with parking and loading operations. (11-K DCMR § 512.3(d).)

62. In reviewing the Modification Drawings, the Commission finds that the redesigned building will minimize unarticulated blank walls adjacent to public spaces by offering extensive façade articulation across every elevation. Each façade is distinctly and extensively conveyed through irregular patterns and a mixture of materials, fenestration, and colors. (11-K DCMR § 512.3(e).)

63. The project will be designed with sustainability features and will achieve LEED-Gold v. 2009 for new construction. Thus, the Commission finds that the building will not have adverse impacts on the natural environment. (11-K DCMR § 512.3(f).)

64. The Commission finds that the project incorporates suitably designed public open spaces along the waterfront that are inviting to the public, easily accessible, and particularly appropriate for the Property's unique location. For example, the Applicant is redeveloping a portion of the Riverwalk that is accessed to the north and south of the Property, and is also providing a dog park so that building residents have a convenient and aesthetically pleasing location to let their dogs run. (11-K DCMR § 512.4(a)). The architectural drawings approved in Z.C. Case No. 16-06 include plans showing open space treatments, public space access, and use of the Riverwalk (11-K DCMR § 512.4(b)), and a view analysis that assesses the views and vistas set forth in 11-K DCMR § 512.4(c). The Commission concludes that because the building's height and mass already exist along the river and Half Street/Water Street, the proposed alterations will have no detrimental impact on the views and vistas of the identified monumental properties and focus areas.

OP Report

65. By report dated December 12, 2017, OP recommended approval of the application subject to the following conditions: (i) the Applicant provides additional information regarding the design flexibility requested to phase construction of the northern penthouse mechanical screen wall; (ii) the Applicant further justifies the requested penthouse height relief; and (iii) the Applicant submits final design plans, as approved through the public space permitting process, for the Anacostia Riverwalk trail. (Ex. 12.)

66. At the public hearing, the Applicant clarified the area of the mechanical penthouse for which it requested design flexibility to phase construction. The Applicant also provided testimony regarding the need for the penthouse height relief based on the existing penthouse structure, elevators, shafts, and equipment. Finally, the Applicant submitted a plan showing the final, approved Riverwalk design (*see* Ex. 15, p. 11). At the public hearing, OP stated that the Applicant had adequately addressed all of its outstanding questions and that it was in full support of the application.

ANC Reports

67. By report dated September 12, 2017, ANC 6D indicated that at its September 11, 2017 public meeting, ANC 6D voted to support the application subject to the Applicant upholding the commitments it made to ANC 6D in Z.C. Case No. 16-06, which were to provide 10 affordable housing units at 60% of the area medium income for 10 years; provide a 3,200-square-foot dog park on the Property; and work with the ANC to establish an appropriate construction management plan. At the time that the ANC took its vote on September 12, 2017, the Applicant had not yet submitted the Revised Application that included modifications to the project other than to the penthouse.

68. By report dated December 12, 2017, ANC 6D indicated that on November 13, 2017, ANC 6D voted to withhold support for the Revised Application due to the reduction in the amount of retail space and the Applicant's request to provide an increase or decrease of 10% in the number of residential units and parking spaces. The ANC's December 12, 2017 report also stated that at its December 11, 2017 public meeting, ANC 6D voted to rescind its November 13, 2017 vote and reaffirm its September 11, 2017 vote, provided that the Applicant would agree to uphold the commitments it made to the ANC in Z.C. Case No. 16-06 and increase the amount of retail space. The ANC left the matter of 10% flexibility on the number of units and parking spaces to the discretion of the Commission.

69. On December 26, 2017, at the request of the Commission at the public hearing, the Applicant submitted a post-hearing submission addressing the ANC's stated concern about the adequacy of retail space in the project. The Applicant's post-hearing submission relied on the Buzzard Point Guide, which recommended that the Property provide approximately 15,000 square feet of retail. With approximately 16,524 square feet of retail proposed, the Commission finds that the project is consistent with the District's vision for the Property as set forth in the Buzzard Point Guide.

70. On January 8, 2018, ANC 6D Single Member District (05) Commissioner Roger Moffatt submitted a response to the Applicant's post-hearing submission. The response stated that the ANC continued to be opposed to the reduction of the amount of retail space in the project. The letter did not indicate that the ANC had voted to authorize the letter at a properly noticed public meeting with a quorum present.

71. As stated above, given the existing building and the Property's location relating to retail use (two dead-end streets to the north and south, the Anacostia River to the east, and Half and Water streets to the west that separate the Property from Pepco facilities), it would be exceptionally difficult to locate more retail space in the building that would be successful. The Commission therefore believes that the Applicant has maximized the amount of retail based on the anticipated market conditions, and has located the proposed retail space at the northwestern-most portion of the building where the majority of pedestrian activity is expected to take place. Finally, the Commission finds that the amount of retail space proposed is consistent with the Buzzard Point Guide, which recommends "over 15,000 square feet of retail space" for the Property. At

approximately 16,542 square feet of retail space proposed, the Commission concludes that the modification to reduce the amount of retail in the building is fully consistent with the District's goals for the Property and is an appropriate modification for the project. The Commission therefore does not find ANC 6D's advice regarding the reduction in retail space persuasive.

CONCLUSIONS OF LAW

1. The application was submitted pursuant to 11-Z DCMR § 704 for a modification of significance, and pursuant to 11-X DCMR Chapter 6 and 11-K DCMR § 512 for design review of a project located in the CG-5 zone. The Commission required the Applicant to satisfy all of the applicable requirements set forth in 11-Z DCMR § 704, 11-X DCMR Chapter 6, and 11-K DCMR § 512, and concludes that the Applicant has met its burden of proof.

2. The Commission provided proper and timely notice of the public hearing on the application by publication in the *D.C. Register* and by mail to ANC 6D, OP, and owners of property within 200 feet of the Property.

3. The modified project is within the applicable height, bulk, and density standards for the CG-5 zone and will not tend to affect adversely the use of neighboring property. The modified project is also in harmony with the general intent and purpose of the Zoning Regulations and Zoning Map.

4. The Commission concludes that the modified project will further the objectives of the Capitol Gateway set forth in 11-K DCMR § 500.1 and will promote the desired mix of uses set forth therein. The design of the renovated building also meets the purposes of the Capitol Gateway and the specific design requirements of 11-K DCMR § 512.

5. No persons or parties appeared at the public hearing in opposition to the application.

6. The Commission is required under § 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (DC. Law 1-21; D.C. Official Code § 1-309 10(d)) to give great weight to the issues and concerns raised in the written report of the affected ANC. The affected ANC in this case is ANC 6D. The Commission carefully considered ANC 6D's recommendation for approval, as well as its conditions to approval, and concurs in its conclusion to support the granting of the application. As was the case in Z.C. Order No. 16-06, the Commission believes that it would be inappropriate to include as conditions to this Order the ANC's requests to incorporate affordable housing into the project, provide an on-site dog park, and establish a construction management plan. The Commission's authority in this case is limited to whether the Applicant has met the design review, special exception, and variance tests required by the Zoning Regulations, and any conditions to approval should be intended to mitigate identified adverse effects related to that review. Because the ANC's requests go beyond the scope of the Commission's review of this application, the Commission declines to include them as conditions of this Order.

7. The Commission does not agree with the ANC that additional retail space should be provided in the building. The Applicant has made a compelling case for why additional residential amenity space is needed on the ground floor of the building, and why additional retail space would not be supported by the market. The Commission also finds that the proposed residential amenity space will create an active streetscape along the building's frontage, thus establishing the type of vibrant public space that retail uses are intended to create. Finally, the Commission believes that the amount of retail proposed is fully consistent with the intent and purposes of the Capitol Gateway set forth in the Zoning Regulations, and with the District's vision for the Property and the Buzzard Point neighborhood in general as set forth in the Buzzard Point Guide.

8. The Commission is required under § 5 of the Office of Zoning Independence Act of 1990, effective September 20, 1990 (D.C. Law 8-163; D.C. Official Code § 6-623.04 (2001)), to give great weight to OP's recommendations. The Commission carefully considered the OP report in this case and finds its recommendation to grant the application persuasive. As stated by OP at the public hearing, the Applicant satisfactorily addressed OP's three outstanding questions noted in its report at the public hearing.

9. Based upon the record before the Commission, including witness testimony, the reports submitted by OP and ANC 6D, and the Applicant's written submissions to the record, the Commission concludes that the Applicant has met the burden of satisfying the applicable standards under 11-X DCMR, Chapter 6 and 11-K DCMR § 512.

DECISION

In consideration of the above Findings of Fact and Conclusions of Law, the Zoning Commission for the District of Columbia **ORDERS APPROVAL** of the application consistent with this Order. The term "Applicant" shall mean the person or entity then holding title to the Property. If there is more than one owner, the obligations under the Order shall be joint and several. If a person or entity no longer holds title to the Property, that party shall have no further obligations under the Order; however, that party remains liable for any violation of any condition that occurred while an owner. This approval is subject to the following guidelines, standards, and conditions:

1. Approval of the project shall apply to Lot 15 in Square 666.

2. The project shall be built in accordance with the architectural drawings submitted in the record of Z.C. Case No. 16-06, dated June 20, 2016 (Ex. 29A1-29A3), as modified by the architectural drawings submitted in the record of Z.C. Case No. 16-06A, dated October 13, 2017 (Ex. 8A1-8A2), as further modified by the Riverwalk Plan shown in the Applicant's PowerPoint presentation (Ex. 15, p. 11 [Sheet 43]), and as modified by the guidelines, conditions, and standards below.

3. The Applicant shall implement the transportation demand management and transportation mitigation measures set forth in Decision Nos. 3 and 4 of Z.C. Order No. 16-06.

4. The project shall be designed to include at least the minimum number of points necessary to achieve LEED-Gold v.2009 for New Construction.

5. The Applicant shall have flexibility with the design of the project in the following areas:

   a. To vary the location and design of all interior components, including but not limited to partitions, structural slabs, doors, hallways, columns, stairways, and mechanical rooms, provided that the variations do not materially change the exterior configuration of the buildings;

   b. To vary the final selection of exterior materials within the color ranges provided (maintaining or exceeding the same general level of quality) as proposed, based on availability at the time of construction, without making changes to the exterior materials;

   c. To make refinements to exterior materials, details, and dimensions, including belt courses, sills, bases, cornices, railings, and trim, or any other changes that do not substantially alter the exterior design to comply with the District of Columbia Building Code or that are otherwise necessary to obtain a final building permit or any other applicable approvals;

   d. To vary the sustainable features of the project, provided the total number of LEED points achievable for the project does not decrease below the LEED-Gold certification;

   e. To provide a range in the number of residential dwelling units of plus or minus 10% from the number depicted on the architectural drawings approved in Z.C. Order No. 16-06A;

   f. To vary the garage layout and the number, location, and arrangement of vehicle parking spaces, provided the total number of parking spaces is not reduced below the number of spaces required under 11-C DCMR Chapter 7;

   g. To vary the final design of retail frontages, including the location and design of entrances, show windows, and size of retail units, in accordance with the needs of retail tenants, and to vary the types of uses designated as "retail" use on the approved architectural drawings to include the following use categories: (i) Retail (11-B DCMR § 200.2(cc)); (ii) Services, General (11-B DCMR § 200.2(dd)); (iii) Services, Financial (11-B DCMR § 200.2(ee)); and (iv) Eating and Drinking Establishments (11-B DCMR § 200.2(j));

h. To vary the location and design of the ground-floor components to comply with any of the applicable District of Columbia laws and regulations and to accommodate any specific tenant requirements, and to vary the size of the retail area; and

i. To construct the northern portion of the proposed 11-foot, nine-inch-tall penthouse screen wall located on the northern portion of the building before constructing the southern portion of that same screen wall, in order to best accommodate the mechanical needs of future retail tenants.

6. The Applicant is required to comply fully with the provisions of the Human Rights Act of 1977, D.C. Law 2-38, as amended, and this Order is conditioned upon full compliance with those provisions. In accordance with the D.C. Human Rights Act of 1977, as amended, D.C. Official Code § 2-1401.1 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 that is also prohibited by the Act. In addition, harassment based on any of the above protected categories is also prohibited by the Act. Discrimination in violation of the Act will not be tolerated. Violations will be subject to disciplinary action.

On January 8, 2017, upon the motion of Commissioner Turnbull, as seconded by Vice Chairman Miller, the Zoning Commission took **FINAL ACTION** to **APPROVE** the application at its public meeting by a vote of **5-0-0** (Anthony J. Hood. Robert E. Miller, Peter A. Shapiro, Peter G. May, and Michael. G. Turnbull to approve).

In accordance with the provisions of 11-Z DCMR § 604.9, this Order shall become final and effective upon publication in the *D.C. Register*, that is on May 11, 2018.

BY THE ORDER OF THE D.C. ZONING COMMISSION
A majority of the Commission members approved the issuance of this Order.

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF FINAL RULEMAKING
AND
Z.C. ORDER NO. 17-15
Z.C. Case No. 17-15
(Zoning Map Amendment @ Lot 85 in Square 3846 from PDR-2 to MU-6)
March 26, 2018

The full text of this Zoning Commission Order is published in the "Final Rulemaking" section of this edition of the *D.C. Register*.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

Opinions Issued Between May 2, 2015 and September 30, 2017

COMPANY NAME	CAB No.	DATE ISSUED
Forney Enterprises, Inc.	D-1383	11-10-2015
Fort Myer Construction Corp.	D-1437	06-29-2016
Keystone Plus Construction Corp.	D-1410, D-1414	07-28-2016
Fort Myer Construction Corp.	P-1012	9-20-2016
Ward & Ward	P-1001	09-29-2016
Optimal Solutions	P-1013	10-11-2016
Jerome L. Taylor Trucking, Inc.	P-1016	10-04-2016
Pearson Vue	P-0997	10-13-2016
Treasury Service Group LLC	P-1015	10-14-2016
Fit Kids	D-1506	10-14-2016
Urban Service Systems Corp.	P-0735 P-0739	10-20-2016
A. Wash & Associate, Inc./ Truelite Electrical Services, LLC	P-1018 P-1019	10-25-2016
Touch Media Systems, LLC	P-1021	12-08-2016
AAA Termite & Pest Control	P-1024	01-06-2017
Neal Gross, LLC	P-1031	03-02-2017
ANA Towing	D-1378	03-15-2017
Metropolitan Protective Services, Inc.	P-1033	03-23-2017
Advanced Integrated Technologies Corp./ Innovative IT Solutions, Inc.	D-1428	04-04-2017
Timely Performance Care, Inc.	D-1492	05-05-2017
Flippo Costruction Co., Inc.	D-1422	06-09-2017
SimplyDigi.Com, Inc.	P-1039	06-21-2017
Quadri-Technology Ltd.	D-1494	08-04-2017
Prism International, LLC	P-1045	09-07-2017

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

APPEAL OF:

FORNEY ENTERPRISES, INC.	)	
	)	CAB No. D-1383
Under Contract No. DCAM-2007-B-0069	)	

For the appellant, Forney Enterprises, Inc.: Leo G. Rydzewski, Esq., Alexander B. Ginsberg, Esq., Holland & Knight LLP. For the District of Columbia: Darnell E. Ingram, Esq., Matthew G. Lane, 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 #58144727

This appeal arises from a contracting officer's final decision denying a claim by Forney Enterprises, Inc. ("Forney" or "appellant") in the amount of $231,225.00 for furnishing a temporary boiler at the University of the District of Columbia at the beginning of the 2008-2009 winter heating season. After appellant concluded its case to the Board at a hearing on June 11-12, 2013, the District stated its intention to move for dismissal due to insufficient evidence, arguing that a release of claims signed by appellant bars appellant's recovery. The Board stayed further proceedings pending receipt of the District's written motion. The District subsequently filed its Motion for Judgment as a Matter of Law on July 26, 2013, with appellant filing an opposition thereto on August 19, 2013, and the District filing its reply on November 22, 2013.

Before the Board is the District's Motion for Judgment as a Matter of Law, the responsive pleadings thereto, and the entire record herein. Upon review of the record, the Board finds that the final release of liens and claims signed by appellant on November 5, 2009, bars appellant's claim. Therefore, the District's motion for judgment is granted, and Forney's appeal is hereby dismissed with prejudice.

BACKGROUND

On June 15, 2007, the District of Columbia Office of Contracting and Procurement issued Solicitation No. DCAM-2007-B-0069 (the "Solicitation") for the replacement of boilers at Power Plant, Building No. 43, University of the District of Columbia ("UDC"). (Joint Pretrial Statement, Stipulations of Fact ("SF") at 14, ¶ A.) The Office of Property Management ("OPM") was identified as the agency seeking the boiler replacement services. (Appellant's Hr'g Ex. 1, at 3, § B.1.) OPM would later be renamed the Department of Real Estate Services ("DRES"). (*See* Hr'g Tr. vol. 1, 306:16-307:2, 392:16-20, June 11, 2013; Hr'g Tr. vol. 2, 543:13-17, June 12, 2013.) Under the Solicitation, the awardee would be required to replace three old boilers – Boilers No. 1, No. 2, and No. 3 – with two new boilers. (SF at 15, ¶ D.) However, Boiler No. 3 was to remain in place, as a backup, until the other two new boilers were installed. (*See* Appellant's Hr'g Ex. 2, at 3-4.)

On August 2, 2007, Amendment No. 4 to the Solicitation was issued, which, *inter alia*, incorporated the District's responses to questions from potential offerors. (*See id.* at 1-8.) In response to a question concerning who would be responsible for maintaining Boiler No. 3 after the removal of the

other two boilers, the District stated that "[t]he contractor shall provide all maintenance and repair services to keep existing boiler No. 3 functioning in a safe and acceptable working condition during removal of boilers No. 1 and 2." (*Id.* at 4.) In response to a follow-up question concerning what would happen "[i]f the only boiler that is left in service has a major problem during the heating season and is down for a long period of time," the District responded that "[t]he contractor shall only be responsible to maintain and repair boiler no. 3. If the boiler is down for a long period, it will be the responsibility of the District Government to provide a substitute boiler on-site to heat the buildings." (*Id.*)

Forney submitted its bid in response to the Solicitation and, on or about December 13, 2007, was awarded Contract No. DCAM-2007-B-0069 in the amount of $1,825,798.00 (the "Contract"). (*See* SF at 15, ¶ C; Appellant's Hr'g Ex. 13.) Forney commenced performance of the Contract in February 2008. (Hr'g Tr. vol. 1, 48:10-12.)

The contracting officer ("CO") for the project was Diane Wooden who, pursuant to the terms of the Contract and "[i]n accordance with Article 3 of the Standard Contract Provisions For Use With Specifications for District of Columbia Government Construction Projects, dated 1973, as amended, [was] the only person authorized to approve changes to any of the requirements of the contract." (Appellant's Hr'g Ex. 1, at 14, §§ G.7-G.8.) The contracting officer's technical representative ("COTR"), who did "not have any authority to make changes in the specifications/scope of work, price or terms and conditions of the contract," was Dale Barrett, who was also the Project Manager. (*Id.* at 14-15, § G.9.) Adenegan Olusegun also served as the COTR and Project Manager during the Contract's period of performance. (Hr'g Tr. vol. 2, 762:17-763:16.)

Before Boiler No. 3 could be declared operational for the 2008-2009 winter heating season, it was required to pass both an inspection by the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") and a hydrostatic test to ensure that the boiler would hold steam without leaking. (*See* Hr'g Tr. vol. 1, 72:12-74:14.) On October 20, 2008, Boiler No. 3 failed the required hydrostatic test due to a crack that prevented it from holding pressure. (*Id.*, 75:10-19.) As a result, the boiler inspector issued a "NOT APPROVED" inspection sticker for Boiler No. 3, and wrote the word "unsafe" on the sticker. (*See* Appellant's Hr'g Ex. 5; Hr'g Tr. vol. 1, 76:1-18.) At the hearing, appellant's boiler expert estimated that 30 to 45 days would have been required to effect repairs, at an approximate cost of between $70,000.00 and $130,000.00. (*See* Hr'g Tr. vol. 1, 359:14-21, 369:6-370:9.)

Approximately five days after Boiler No. 3 was deemed "NOT APPROVED," on or about October 25, 2008, Forney furnished and installed a temporary boiler to replace Boiler No. 3 in order to continue to provide heat at the UDC campus.[1] (SF at 15, ¶ F.) The temporary boiler remained in use at the UDC campus for approximately two months. (Hr'g Tr. vol. 1, 110:13-22.)

On January 22, 2009, Forney submitted to OPM a request for a change order, seeking an equitable adjustment of the Contract's price in the amount of $231,225.00 for "[f]urnishing and installing a 700 horse power, gas fired boiler to replace the existing boiler deemed unsafe by the District of Columbia Boiler Inspector." (Appellant's Hr'g Ex. 8, at 1; *see also* SF at 15, ¶ G.)[2] On February 2, 2009, COTR Olusegun denied Forney's request. (SF at 15, ¶ H; *see also* Appellant's Hr'g Ex. 9.) COTR Olusegun cited to the District's responses to the offerors' questions as set forth in Amendment No. 4

[1] Forney's president testified that he decided to provide the temporary boiler, in part, due to concerns that the contractor would be publicly blamed if the UDC campus was forced to close due to a lack of heat. (*See* Hr'g Tr. vol. 1, 82:16-22.)

[2] When referring to documents that lack consistent internal page numbering (e.g., Appellant's Hr'g Ex. 8), the Board has used the page numbers assigned by Adobe Reader.

during the pre-proposal phase of the Solicitation. (*See* Appellant's Hr'g Ex. 9; *see also* Appellant's Hr'g Ex. 2, at 3-5.) The District had stated that it was the contractor's responsibility to maintain and repair Boiler No. 3 and that the District would provide a substitute boiler if Boiler No. 3 was down for a long period of time. (Appellant's Hr'g Ex. 2, at 3-5; *see also* Appellant's Hr'g Ex. 9.) On September 10, 2009, Forney submitted a request for the CO's final decision for the cost of providing the temporary boiler. (SF at 16, ¶ I; *see also* Appellant's Hr'g Ex. 10.)

On October 27, 2009, Forney completed the Contract work. (*See* Appellant's Hr'g Ex. 12, at DC 338.) On November 4, 2009, COTR Olusegun e-mailed Forney's president to express concern that Forney's final invoice had under-billed the District by $1.00. (*Id.* at DC 333.) He wrote in a follow-up e-mail, "[w]e all want to close the book on this project." (*Id.* at DC 332-33.) Forney's president responded the same day by writing, "[w]hen we sign the final release of lien that is our statement of payment in full, what part of that is not clear?"[3] (Appellant's Hr'g Ex. 12, at DC 331-32.)

On November 5, 2009, Forney executed a "Final Release of Liens and Claims" ("final release"), (SF at 16, ¶ J; Appellant's Hr'g Ex. 13), which had been drafted by the District, (Hr'g Tr. vol. 2, 802:5-15). Under the heading "Government of the District of Columbia Department of Real Estate Services," the final release contained the following language:

FINAL RELEASE OF LIENS AND CLAIMS

Project Name: **BUILDING 43 BOILER REPLACEMENT**

Contract No.: **DCAM-2007-B-0069**

Task Order No.: **PO244825**

Work Performed: **BOILER REPLACEMENT**

Contract Date: **FEBRUARY 11, 2008**

Contract Amount: **$1,825,798.00**

Date: **NOVEMBER 5, 2009**

Final Release of Liens and Claims:

> The undersigned . . . , in consideration of payments received and upon receipt of the amount of this payment hereby waives and releases any and all liens and claims for the above referenced project for the final amount paid of **$92,108.87** in accordance for said work as outlined above. All claims, right to liens, terminations, stop notices upon said

[3] At the hearing, Forney's president testified that he made this statement "separate and apart from" the claim for the temporary boiler. (Hr'g Tr. vol. 1, 140:9-141:19.) However, nothing in the November 4, 2009, e-mail points to any intent by Forney to exclude the equitable adjustment claim from the final release. (*See* Appellant's Hr'g Ex. 12, at DC 331-33.) Forney's president also testified that he had signed other releases during the company's thirteen years of performing contracts with the District, (Hr'g Tr. vol. 1, 158:2-12), and had excluded specific claims from other releases before, (*see id.*, 130:17-131:4).

> premises or the improvements thereon under the statues [sic] of the jurisdiction in which the project is located [sic].
>
> The foregoing sum of **$92,108.87** represents final payment for the work performed. The undersigned further represents and warrants, as of this date, that he/she is duly authorized to sign and execute this Release of Final Liens and Claims . . . and that any materials supplied to or incorporated in this project have been paid.

(Appellant's Hr'g Ex. 13 (emphasis in original).)

Most pertinently, the final release did not expressly exclude Forney's claim for an equitable adjustment for the cost of providing the temporary boiler. (*Id.*) The final release was signed by Forney's president, (*id.*), and the District paid Forney in accordance with the release, (*see* Hr'g Tr. vol. 2, 846:13-18).

During the hearing at the Board, Forney's president testified that he signed the release but did not specifically exclude the company's claim for the cost of providing the temporary boiler because (1) he believed that an agreement to split the cost of providing the temporary boiler with the District had already been made;[4] and (2) the District had indicated that it would not pay Forney's final invoice until Forney executed the release. (*See* Hr'g Tr. vol. 1, 130:5-131:8, 141:1-19, 159:18-160:6.)

Indeed, Forney's president testified that UDC's manager for capital construction projects, Steven McKenzie, had agreed that the District and Forney would each split the cost of providing the temporary boiler. (*See id.*, 122:9-123:20, 143:8-147:18.) However, McKenzie, who was previously an OPM program manager, was not working for OPM or DRES at the time of the negotiations between the parties. (*See id.*, 312:4-17; Hr'g Tr. vol. 2, 543:8-17, 740:17-741:10; Appellant's Hr'g Ex. 7, at 4.) Forney's president also stated that the negotiations with McKenzie had occurred prior to Forney's execution of the final release. (*See* Hr'g Tr. vol. 1, 122:9-123:20, 131:9-17.) However, the contemporaneous record indicates that the negotiations between Forney's project manager and McKenzie took place on or around November 13, 2009, (*see* Appellant's Hr'g Ex. 14, at DC 433-36),[5] and that negotiations between Forney's president and McKenzie also took place after the final release was executed, on or around November 30, 2009, (*see* Appellant's Hr'g Ex. 15; Appellant's Hr'g Ex. 16, at 1).

On December 2, 2009, McKenzie e-mailed Forney a memorandum to memorialize the negotiations between the parties, writing that once Forney's president executed the memorandum, McKenzie would "send[] it over to procurement to get [Forney] paid." (Appellant's Hr'g Ex. 15.) The negotiations memorandum, which was drafted on UDC letterhead, concluded that UDC would recommend splitting the cost of the temporary boiler with Forney but further stated that Forney was advised that this was subject to "final approval pending review by the Contracting Officer." (Appellant's Hr'g Ex. 16, at 2.) Forney's president testified that he believed that McKenzie possessed the authority to negotiate on behalf of the District, even though he was aware that McKenzie did not possess the authority to contractually bind the District. (*See* Hr'g Tr. vol. 1, 304:14-306:2, 309:4-310:21.) He also said that he

[4] Forney's president characterized Forney's failure to exclude its claim for the cost of providing the temporary boiler from the final release as the result of "poor wording," "an oversight," and "a technicality." (Hr'g Tr. vol. 1, 144:8-145:18.)

[5] Forney's project manager wrote an e-mail to McKenzie on November 13, 2009, which stated, "[t]hank you for speaking with me this morning. . . . As discussed, I have revised the original proposal to reflect the agreed upon 50% reduction. I have attached the revised proposal hereto." (Appellant's Hr'g Ex. 14, at DC 433.)

knew that the CO "is the final arbiter of approving all changes, modifications to the contract, final decision authority. She at the end of the day has to sign-off on everything." (*See id.*, 180:22-181:6.)

COTR Olusegun testified that he only learned of McKenzie's negotiations with Forney after the negotiations were concluded. (*See* Hr'g Tr. vol. 2, 802:19-803:14, 827:8-20.) CO Wooden testified that she was aware that McKenzie had conducted negotiations with Forney, and although she could not recall the date on which she learned of the negotiations, her testimony and contemporaneous documents show that she was only made aware of the negotiations after the final release was signed.[6] (*See* Hr'g Tr. vol. 2, 735:13-736:2.) CO Wooden further testified that McKenzie had no authority to negotiate adjustments to the Contract on behalf of the District. (*See id.*, 740:13-741:16.)

On December 10, 2009, CO Wooden issued a contracting officer's final decision denying Forney's claim for the cost of the temporary boiler. (SF at 16, ¶ K; Appellant's Hr'g Ex. 11, at 1.) In her final decision, CO Wooden found that "the reasons stated in the February 2, 2009 [denial by COTR Olusegun] still stand." (Appellant's Hr'g Ex. 11, at 1.) She further wrote:

> [Forney] on November 5, 2009, signed a "Final Release of Liens and Claims" against the subject contract . . . . By signing the aforementioned release, [Forney] released DRES from "all claims["] . . . . Therefore, it is the Contracting Officer's final decision that the temporary boiler change order request in the amount of $231,225.00 is denied.

(*Id.*) Still, at the hearing, CO Wooden testified that she had been "surprised" that Forney had executed the final release given appellant's then-outstanding request for an equitable adjustment for over $200,000.00. (Hr'g Tr. vol. 2, 736:11-18.)

On March 3, 2010, Forney filed the instant appeal. (Notice of Appeal.) In its April 2, 2010, complaint, appellant stated that it was seeking $215,706.00 for the costs of furnishing and installing the temporary boiler. (Compl. at 7-8.) On May 3, 2010, the District moved to dismiss or, in the alternative, for summary judgment, arguing that the final release barred appellant's claim. (*See* District's Mot. to Dismiss or, in the Alternative, for Summ. J. ("District's MTD") at 4-5, 8.) On June 6, 2013, the Board denied the District's motion, finding that (1) the allegations raised in the appeal evidenced a plausible claim of the District's liability, which rendered dismissal inappropriate; and (2) there existed genuine issues of material facts regarding the circumstances surrounding the final release, which rendered summary judgment inappropriate. (*See* Order Den. District's MTD.)

A hearing was held on June 11-12, 2013. At the conclusion of appellant's case-in-chief, the District informed the Board that it would file a motion "for dismissal for insufficient evidence" in lieu of presenting its own case-in-chief. (*See* Hr'g Tr. vol. 2, 875:8-21, 877:2-15.) Subsequently, the District filed the aforementioned Motion for Judgment as a Matter of Law ("District's JMOL").

[6] CO Wooden stated that an e-mail she saw made her aware of the negotiations between McKenzie and Forney, (*see* Hr'g Tr. vol. 2, 735:13-736:2, 743:17-745:2); however, that e-mail was sent after the release was signed, (*see infra* note 13).

DISCUSSION

I. Jurisdiction and Standard of Review

The Board has jurisdiction over "[a]ny appeal by a contractor from a final decision by the contracting officer on a claim by a contractor, when the claim arises under or relates to a contract." D.C. CODE § 2-360.03(a)(2) (2013).[7] In this case, the Board properly exercises jurisdiction over this matter based on appellant's timely March 3, 2010, appeal from the CO's December 10, 2009, final decision denying appellant's request for an equitable adjustment in the amount of $231,225.00. The Board's jurisdiction thus includes review of the District's affirmative defense that the final release executed by appellant bars recovery herein.

As noted above, at a hearing conducted by the Board on June 11-12, 2013, appellant presented evidence purporting to establish its prima facie case for an equitable adjustment and, in doing so, also presented evidence regarding the final release. (*See, e.g.*, Appellant's Hr'g Exs. 1-22; Hr'g Tr. vol. 1, 8:21-10:8, 34:6-38:16, 65:9-75:22, 82:3-84:1, 115:1-10, 130:5-131:8, 141:1-19, 159:18-160:6.) Following the close of appellant's case-in-chief, the District stated that it would move for dismissal, arguing that appellant's evidence was insufficient, "specifically concerning the final release." (Hr'g Tr. vol. 2, 875:8-21; *see also* Hr'g Tr. vol. 2, 877:2-15, 881:9-882:7.) The Board stayed further proceedings pending the District's filing of its written motion. (*See id.*, 880:15-882:7.)

Now pending before the Board is the District's JMOL. Although the District cites D.C. Superior Court Rule of Civil Procedure 41(b) for its motion, (*see* District's JMOL at 6-7), we note that this rule has been amended since the decisions the District relies on were decided and the rule no longer allows for dismissal of a plaintiff's case for insufficient evidence. We find that D.C. Superior Court Rule of Civil Procedure 52(c) is the proper basis for the District's motion.[8] Rule 52(c) provides:

> **Judgment on Partial Findings.** If during a trial without a jury a party has been fully heard on an issue and the Court finds against the party on that issue, the Court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the Court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law . . . .

D.C. SUPER. CT. R. CIV. P. 52(c) (emphasis in original). Given the above, we will treat the District's motion as a request for judgment as a matter of law pursuant to D.C. Superior Court Rule of Civil Procedure 52(c).

[7] Prior to April 8, 2011, and at the time this appeal was filed, the Board exercised jurisdiction pursuant to D.C. CODE § 2-309.03(a)(2) (2001). The Procurement Practices Reform Act of 2010 ("PPRA") repealed the District of Columbia Procurement Practices Act of 1985, and amended and recodified the District's procurement statutes at D.C. CODE §§ 2-351.01 to 2-362.03. Procurement Practices Reform Act of 2010, D.C. Law No. 18-371, 58 D.C. Reg. 1185 (Feb. 11, 2011). The PPRA did not substantively change the Board's jurisdiction relevant to this appeal.

[8] *See* D.C. SUPER. CT. R. CIV. P. 41(b); *see also* FED. R. CIV. P. 41, note on 1991 amendment (analogous Federal Rule of Civil Procedure amended such that "[a] motion to dismiss under Rule 41 on the ground that a plaintiff's evidence is legally insufficient should now be treated as a motion for judgment on partial findings as provided in Rule 52(c)").

We also note that in discussing the standard for dismissal under the prior version of D.C. Superior Court Rule of Civil Procedure 41(b), the D.C. Court of Appeals stated:

> [If the court] finds that the evidence does not preponderate in plaintiff's favor, the court can enter judgment for the defendant. Thus, if there is insufficient credible evidence to sustain each element of plaintiff's claim, *or if, despite such credible evidence, a valid defense is evident from plaintiff's own case, judgment for the defendant is justifiable.*

Kearns v. McNeill Bros. Moving & Storage Co., 509 A.2d 1132, 1135 (D.C. 1986) (alteration in original) (emphasis added) (quoting *Marshall v. District of Columbia*, 391 A.2d 1374, 1379 (D.C. 1978)); *see Fireison v. Pearson*, 520 A.2d 1046, 1048-52 (D.C. 1987) (affirming trial court's grant of defendant's motion to dismiss under prior version of Rule 41(b) because the evidence in the record at the close of plaintiff's case-in-chief established defendant's affirmative defense).

The evidence regarding appellant's execution of the final release has been presented, and if the Board finds in favor of the District on this affirmative defense, appellant's claim will be barred. Therefore, we review the issue of the final release and its effect on appellant's right to an equitable adjustment in accordance with D.C. Superior Court Rule of Civil Procedure 52(c).

The recitation of facts stated in the Background, Discussion, and Conclusion sections constitutes the Board's findings of fact in accordance with Board Rule 214.2, 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.

II. The District's Motion for Judgment as a Matter of Law

In the instant appeal, the District argues, *inter alia*, that Forney is precluded from asserting the claim in the present appeal because Forney has executed a clear and unambiguous general release that discharged the District from any and all claims. (*See* District's JMOL at 7-14.) And although appellant has conceded that it signed the final release, (SF at 16, ¶ J), it argues that the release does not apply to the instant claim, or is at least ambiguous as to whether it applies. (*See* Appellant's Opp'n to District's JMOL at 2-3.) Appellant also argues that even if the Board were to find that the final release applies to the claim, the Board should still consider the claim because one or more exceptions to the general bar of a release apply here. (*See id.* at 3-5.) While the District acknowledges that there are certain special and limited exceptions to the general bar of a release, (District's JMOL at 11 (citing *Ft. Myer Constr. Corp.*, CAB No. D-0859, 40 D.C. Reg. 4655, 4674 (Nov. 3, 1992))), the District contends herein that appellant "has not presented any evidence to invoke an exception to the general rule," (*id.* at 14).

As an initial matter, we note that the District bears the burden of establishing its affirmative defense that a binding general release was executed. *See Shell Oil Co. v. United States*, 751 F.3d 1282, 1297 (Fed. Cir.) (citing *A.R.S. Inc. v. United States*, 157 Ct. Cl. 71, 76 (1962)), *reh'g en banc denied* (2014); *see also Prince Constr. Co./W.M. Schlosser Co., Joint Venture*, CAB Nos. D-1369, D-1419, D-1420, 62 D.C. Reg. 6339, 6385 (Dec. 9, 2013) (District bears the burden of proving its affirmative defense (citing *Sw. Marine, Inc.*, ASBCA No. 39472, 93-2 BCA ¶ 25,682)). However, the District's burden can be met without presenting a defense case where it is apparent to the Board that appellant cannot prevail. *See, e.g.*, *Fireison*, 520 A.2d at 1049. Once the District's burden is met, appellant then has the burden of proving that the release should not be given effect. *See Cmty. Heating & Plumbing Co.*, ASBCA Nos. 37981, 38166, 38167, 38168, 38467, 40151, 92-2 BCA ¶ 24,870 (citing *W. M. Schlosser, Inc.*, ASBCA No. 24645, 83-2 BCA ¶ 16,827), *aff'd*, 987 F.2d 1525 (Fed. Cir. 1993); *see also Newport Constr., Inc.*, DOTCAB No. 2262, 91-1 BCA ¶ 23,366; *Detroit Testing Lab.*, EBCA No. 153-1-81, 83-1

BCA ¶ 16,458; *IMS Eng'rs-Architects, P.C. v. United States*, 92 Fed. Cl. 52, 77-78 (2010), *aff'd per curiam*, 418 Fed. Appx. 920 (2011).

In this case, we conclude that the District has met its burden of proof regarding the final release that appellant signed on November 5, 2009. Proof has been established through appellant's own admission that it signed the final release, (SF at 16, ¶ J), as well as evidence regarding the general release presented in appellant's case-in-chief, (*see, e.g.*, Hr'g Tr. vol. 1, 8:21-10:8, 130:5-131:8, 141:1-19, 159:18-160:6; Appellant's Hr'g Exs. 12-17). Moreover, we find that the release signed by appellant included its then-pending claim for an equitable adjustment because (1) appellant failed to exclude or except its claim for an equitable adjustment from the release; and (2) appellant has failed to show that there exist any exceptional circumstances which would prevent the general release from taking effect.

Despite acknowledging that it signed the final release, appellant contends that the release is not controlling because (1) the description of work performed does not include the provision of the temporary boiler; (2) the release is ambiguous; (3) the release applies "only to statutory claims, not claims arising under the Contract;" (4) the release was executed under a mutual mistake, and neither party intended to include the instant claim in the release; (5) the District's conduct shows that it did not intend the final release to apply to appellant's claim for the temporary boiler; and (6) appellant's failure to exclude the temporary boiler from the release was an obvious mistake or oversight. (Appellant's Opp'n to District's JMOL at 2, 22-32.) Each of appellant's contentions is without merit, and we address them below.

A. The Final Release Waived and Released All of Appellant's Claims Against the Project, Including Appellant's Prior Existing Claim for an Equitable Adjustment, Because It Did Not Expressly Exclude Appellant's Equitable Adjustment Claim

First, appellant contends that the release did not include its claim for an equitable adjustment because the description of work performed does not include the provision of the temporary boiler. (*See id.* at 2, 22-24.) In other words, appellant contends that its work in providing the temporary boiler was outside the scope of work embodied in the phrase "boiler replacement."

However, the Final Release of Liens and Claims signed by appellant on November 5, 2009, identified the project as "Building 43 Boiler Replacement." (Appellant's Hr'g Ex. 13.) The work performed was described as "Boiler Replacement." (*Id.*) In executing the release, appellant agreed that in consideration for receipt of the final payment amount, appellant waived and released "any and all liens and claims for the above referenced project for the final amount paid of $92,108.87 in accordance for said work as outlined above." (*Id.* (emphasis removed).) In addition, the release expressly stated that "[t]he foregoing sum of $92,108.87 represents final payment for the work performed." (*Id.* (emphasis removed).) The final release makes no mention of appellant's claim for an equitable adjustment and does not include language so as to expressly limit the scope of the release as it relates to appellant's then-pending claim.

The general rule is that a release which is "general and absolute on its face [and] contains no exceptions . . . serves as a bar to the claim unless there is some legal basis for concluding that the release was not intended to apply to th[e] claim." *Mecon Co.*, ASBCA No. 13620, 69-2 BCA ¶ 7,786 (citing *J. G. Watts Constr. Co.*, 161 Ct. Cl. 801, 805-06 (1963)). Therefore, it is well-settled that a contractor who executes a general release is barred from maintaining a suit for additional compensation under the contract based upon events that occurred prior to execution of the release. *B. D. Click Co. v. United States*, 614 F.2d 748, 756 (Ct. Cl. 1980) (citations omitted); *see also Ft. Myer Constr. Corp.*, CAB No. D-0859, 40 D.C. Reg. at 4674 ("Ordinarily, a release general and absolute on its face and containing no exceptions will serve as a bar to any prior existing claims arising under a contract." (quoting *Arnold M. Diamond, Inc.*, ASBCA No. 19080, 75-2 BCA ¶ 11,605)); *IMS Eng'rs-Architects, P.C.*, 92 Fed. Cl. at 64.

In other words, "[n]o matter how meritorious may be the claims not excepted by a contractor from the operation of a full, valid release under a Government contract . . . , they may not be judicially entertained later unless the release be found invalid or waived by the subsequent conduct of the Government." *Adler Constr. Co. v. United States*, 423 F.2d 1362, 1364 (Ct. Cl. 1970) (citation omitted); *see also J.C. Equip. Corp. v. England*, 360 F.3d 1311, 1316 (Fed. Cir. 2004) (citation omitted) ("[The contractor's] failure explicitly to except the additional claims from the waiver and release bars it now from asserting them."); *Beardsley, Beardsley, Cowden & Glass*, VABCA Nos. 4545, 4546, 95-2 BCA ¶ 27,694 ("[W]here a 'contractor has, but fails to exercise, the right to reserve claims from the operation of such a release, it is neither improper nor unfair to invoke the principle that absent some vitiating circumstance' suit on such claims are barred." (quoting *Inland Empire Builders, Inc. v. United States*, 424 F.2d 1370, 1376 (Ct. Cl. 1970))).

The principle that execution of a general release bars any contractor claims that have not been excluded from the release applies to both known and unknown contractor claims, as well as to all pending claims that the contractor may have had at the time the release was executed. JOHN CIBINIC, JR., RALPH C. NASH, JR. & JAMES F. NAGLE, ADMINISTRATION OF GOVERNMENT CONTRACTS 1204 (4th Ed. 2006) (citing *B. D. Click Co.*, 614 F.2d at 756; *Envtl. Devices, Inc.*, ASBCA Nos. 37430, 39308, 39719, 93-3 BCA ¶ 26,138). This is particularly true of releases signed in conjunction with a contract close-out, such as the final release in the present appeal, since "[g]eneral releases signed at the time of final payment are given more weight by boards and courts than releases in individual modifications to a contract." *Id.* (citing *Middlesex Contractors & Riggers, Inc.*, IBCA No. 1964, 89-1 BCA ¶ 21,557).

Furthermore, releases are interpreted in the same manner as contracts, *IMS Eng'rs-Architects, P.C.*, 92 Fed. Cl. at 64, and the Board looks to the plain language of the contract to determine its interpretation, *Heller Elec. Co.*, CAB No. D-0939, 41 D.C. Reg. 3717, 3723 (Nov. 17, 1993). In this context, the plain meaning of the phrase "boiler replacement" for work performed would include both installation of the new boilers and the act of providing a temporary boiler to *replace* an old boiler that had failed (as Boiler No. 3 failed here). There is no evidence that the release did not include the provision of a temporary boiler. Thus, we conclude that the general release included the instant equitable adjustment claim for costs associated with the installation of a temporary boiler.

Second, appellant contends that the phrase "boiler replacement" was ambiguous. (*See* Appellant's Opp'n to District's JMOL at 2, 22-24.) Contract language is ambiguous if it is susceptible to more than one reasonable interpretation. *AnA Towing & Storage, Inc.*, CAB No. D-1176, 50 D.C. Reg. 7514, 7516 (June 25, 2003). In recognizing ambiguity, one is guided by the terms of the contract in its entirety, giving a reasonable effect to all its parts, and avoiding an interpretation that would render part of the contract meaningless or incompatible with the contract as a whole. *See District of Columbia v. Young*, 39 A.3d 36, 40 (D.C. 2012). Although appellant contends that the final release's language is "at best ambiguous," appellant does not identify what the two (or more) possible interpretations of the release language might be. (Appellant's Opp'n to District's JMOL at 23-24.) As far as the Board is able to determine, appellant appears to be arguing that the phrase "boiler replacement" is ambiguous in that it could allegedly be interpreted to mean either (1) all boiler replacement work performed during the project; or (2) only the boiler replacement work as set forth in the Contract, but not including work related to the provision of the temporary boiler. (*See id.*)

In light of the plain language of the final release, however, we do not find this second interpretation to be a reasonable reading of the release. As noted above, the final release states that appellant releases the District from all claims "for the above referenced project," which is described as "Building 43 Boiler Replacement." (Appellant's Hr'g Ex. 13.) In addition, the release specifically states that payment of $92,108.87 represents "final payment for the work performed." (*Id.*)

Appellant next argues that the "plain meaning of [the following] sentence expressly qualifies the scope of the claims released," (Appellant's Opp'n to District's JMOL at 23), and, as such, only statutory claims were released:

> All claims, right to liens, terminations, stop notices upon said premises or the improvements thereon under the statues [sic] of the jurisdiction in which the project is located [sic].

(Appellant's Hr'g Ex. 13.) However, it would take a strained reading of this incomplete sentence to conclude that its plain language "expressly qualifies" the scope of the release such that the release is limited to statutory claims and does not include all claims arising from the Contract. We find appellant's argument unavailing. Hence, we reject appellant's contention that the phrase "statues [sic] of the jurisdiction" means that the release applied only to statutory claims. (*See* Appellant's Opp'n to District's JMOL at 23.)

Moreover, the Board finds that the phrase "statues [sic] of the jurisdiction" does not render the release ambiguous. The release states (in three places) that it is a "Final Release of Liens and Claims."[9] (Appellant's Hr'g Ex. 13.) It also identifies the project and contract number, and states that appellant "hereby waives and releases any and all liens and claims for the above referenced project." (*Id.*) Taking the entire release as a whole, appellant's interpretation that the above-referenced phrase limits the release to only statutory claims is not reasonable. *See Fire Sec. Sys., Inc.*, GSBCA No. 13198, 98-1 BCA ¶ 29,331 (rejecting contractor's interpretation that "strips the release language of any real purpose or meaning"). To the contrary, the parties' intent that the release should embody appellant's receipt of final payment in consideration for the District's receipt of a final release of all claims (statutory and contractual) is quite clear.

In short, the Board finds that there is a preponderance of record evidence to prove the District's affirmative defense that the release applies to bar appellant's claim. In so finding, the Board rejects appellant's contention that the language of the final release is ambiguous[10] and concludes that the final release was a general release of all claims, thereby including appellant's claim for an equitable adjustment. Further, since the final release did not expressly exclude appellant's claim for an equitable adjustment, the effect of the final release is to bar appellant's claim unless any of the applicable exceptions apply.

B. Appellant Has Failed to Show that Exceptional Circumstances Exist so as to Prevent the Final Release from Taking Effect

As stated above, once the District meets its burden of proof regarding the existence of a binding general release, the burden then shifts to appellant to prove that the release should not be given effect. *See, e.g., Cmty. Heating & Plumbing Co.*, ASBCA Nos. 37981, 38166, 38167, 38168, 38467, 40151, 92-2 BCA ¶ 24,870 (citation omitted).

[9] Presumably due to a typographical error, in one instance the document instead uses the term "Release of Final Liens and Claims." (Appellant's Hr'g Ex. 13.)

[10] Since the Board finds the release unambiguous, the Board also rejects appellant's arguments regarding the interpretation of the release based on extrinsic evidence and the rule of *contra proferentem*. *See Advantage Healthplan, Inc.*, CAB Nos. D-1239, D-1247, 2013 WL 6042884 (Oct. 4, 2013) (citing *GranTurk Equip. Co.*, CAB No. P-0884, 62 D.C. Reg. 4320, 4326 (June 5, 2012); *Heller Elec. Co.*, CAB No. D-0939, 41 D.C. Reg. at 3723).

The Board has recognized that there are four special and limited exceptions which can serve as vitiating circumstances to the general rule that a release which does not contain exceptions ordinarily bars any prior existing claims. *Ft. Myer Constr. Corp.*, CAB No. D-0859, 40 D.C. Reg. at 4674 (citations omitted). These vitiating circumstances are as follows:

> (1) where it is shown that, by reason of mutual mistake, neither party intended the release to cover a certain claim;
> (2) where the conduct of the parties in continuing to pursue a claim after execution of a release makes clear that they never intended the release to be an abandonment of the claim;
> (3) where it is obvious that inclusion of a claim in a release was due to mistake or oversight; or
> (4) where fraud or duress is involved.

Id. (citing *Arnold M. Diamond, Inc.*, ASBCA No. 19080, 75-2 BCA ¶ 11,605; *Nippon Hodo Co. v. United States*, 142 Ct. Cl. 1, 3-4 (1958); *Winn-Senter Constr. Co. v. United States*, 110 Ct. Cl. 34, 65-66 (1948); *Michael Rose Prods., Inc. v. Loew's Inc.*, 143 F. Supp. 606, 607-08 (S.D.N.Y. 1956)); *see also Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1395 (Fed. Cir. 1987); *Jackson Constr. Co. v. United States*, 62 Fed. Cl. 84, 93 (2004).

In this case, appellant contends that the first three vitiating circumstances noted above prevent the final release from taking effect. (*See* Appellant's Opp'n to District's JMOL at 29-32.) As we discuss in greater detail below, appellant has not shown that there are vitiating circumstances applicable herein so as to save its claim from being barred because of the final release.

1. There Is No Evidence of a Mutual Mistake

A mutual mistake occurs when "both parties at the time a contract was made [were mistaken] as to a basic assumption on which the contract was made [and this mistake] has a material effect on the agreed exchange of performances." RESTATEMENT (SECOND) OF CONTRACTS § 152 (1981). The doctrine applies in the context of a release "where it is shown that, by reason of a mutual mistake, neither party intended that the release cover a certain claim." *J. G. Watts Constr. Co.*, 161 Ct. Cl. at 806 (citations omitted).

In the instant case, both the District and appellant were aware of appellant's claim for an equitable adjustment since appellant had first submitted its claim to the COTR on January 22, 2009, (Appellant's Hr'g Ex. 8), yet the release was not executed until November 5, 2009, (Appellant's Hr'g Ex. 13). Although appellant may have believed that the release did not include its pending equitable adjustment claim, (*see* Hr'g Tr. vol. 1, 144:8-145:18), in order to find that a mutual mistake occurred, we would have to find that the District also mistakenly believed that the release did not include appellant's equitable adjustment claim. *See* RESTATEMENT (SECOND) OF CONTRACTS § 152; *J. G. Watts Constr. Co.*, 161 Ct. Cl. at 806. Yet, the record before us does not support such a finding. There is no evidence that, when appellant executed the final release, the CO (or anyone authorized to bind the District) believed that the release excluded appellant's equitable adjustment claim.[11] Therefore, the Board finds that there was no mutual mistake in appellant's execution and the District's acceptance of the release.

[11] Appellant relies on its negotiations with Steven McKenzie, a construction manager for UDC, to assert its claim that the District also believed that the release excluded appellant's claim. (*See* Appellant's Opp'n to District's JMOL at 4, 30.) However, as stated above, the contemporaneous record indicates that appellant's negotiations with

2. The Conduct of the Parties Does Not Clearly Show that They Did Not Intend for the Final Release to Be an Abandonment of Appellant's Claim

The record shows that after the final release was executed, appellant met with Steven McKenzie, a construction manager for UDC, to negotiate payment for the cost of the temporary boiler. Indeed, appellant alleges that McKenzie's conduct establishes that the parties did not intend for the final release to be an abandonment of appellant's claim for an equitable adjustment. (Appellant's Opp'n to District's JMOL at 30.) In support of its argument, appellant relies on, among others, the case of *Ft. Myer Constr. Corp.*, CAB No. D-0859, 40 D.C. Reg. at 4671-75.

However, the facts in *Ft. Myer* are readily distinguishable from the facts in the present appeal. In *Ft. Myer*, the contractor executed a release of any and all claims "except the amount listed in Paragraph 2." *Id.* at 4672. Paragraph 2 required the contractor to identify "items which [the contractor] claims are just and due and owing" by the District; the contractor wrote "[n]one." *Id.* at 4671. However, prior to signing the release, the contractor had filed an appeal with the Board of the contracting officer's final decision denying it additional compensation for its subcontractor's claims, and this appeal before the Board was still pending at the time the release was signed. *Id.* at 4673-74. Despite filing its answer and appeal file without relying on the release, on the eve of trial, seven months after the release was signed, the District moved to dismiss, or for summary judgment, based on the release. *Id.* at 4655. After reviewing the evidence, the Board concluded that an exception to the general rule that a release bars later claims should be applied because both parties had continued to pursue the claim before the Board even after executing the release, thereby demonstrating that both parties never intended the release to be an abandonment of the subcontractor claims. *Id.* at 4674-75. In other words, through their conduct, the parties showed that the release did not include the subcontractor claims. Furthermore, the release covered those amounts "due and owing" to the contractor, Fort Myer Construction Corporation, at the time based on five approved change orders, but did not include the pending subcontractor claims. *Id.* The Board concluded that since the government did not have an obligation to pay the subcontractor claims, those claims could not have been covered by the release. *Id.*

Here, the CO's final decision clearly asserted the final release as a bar to appellant's request for an equitable adjustment, (*see* Appellant's Hr'g Ex. 11, at 1), and the District has argued the preclusive effect of the final release since the outset of this appeal before the Board, (*see* District's MTD at 4-5, 8). Moreover, after appellant signed the general release, the record is absent of any action taken by a District official, with authority to bind the District, to show that the District did not intend for the final release to apply to appellant's claim for the temporary boiler.[12] There is no evidence that McKenzie – an employee of UDC, rather than the contracting agency (OPM/DRES) – had the authority to act as a CO, or even that he was acting as a representative of the CO or that his actions were later ratified by the CO.[13] (*See*

McKenzie took place after execution of the final release. (*See* Appellant's Hr'g Exs. 14-16.) More importantly, however, there is no evidence that McKenzie had the authority to act as a CO for the Contract or to bind the District.

[12] Appellant argues that COTR Olusegun "admitted that the District did not consider the release to represent a settlement of the then-outstanding request for equitable adjustment." (Appellant's Opp'n to District's JMOL at 26 (emphasis removed).) However, appellant misconstrues the testimony. COTR Olusegun testified, and the contemporaneous record shows, that he understood the final release to close out the project. (*See* Hr'g Tr. vol. 1, 827:22-828:14, 845:4-846:16; Appellant's Hr'g Ex. 12, at DC 332.)

[13] The District has provided to the Board for *in camera* review e-mails between McKenzie, COTR Olusegun, and other District officials that were sent after the final release was executed but before McKenzie sent Forney the negotiations memorandum. The District withheld these e-mails under the deliberative process privilege. The Board finds that these e-mails are privileged as they are recommendations and opinions of UDC and DRES officials and, as such, they were part of the deliberative process regarding the UDC negotiations, but not adopted in the negotiations memorandum. *See Beretta U.S.A. Corp.*, CAB Nos. P-0144, P-0177, 38 D.C. Reg. 3098, 3112-13 n.30 (Aug. 23,

Appellant's Hr'g Exs. 14-16.) In fact, McKenzie's negotiations memorandum to appellant was written on UDC letterhead and expressly stated that it was subject to "final approval pending review by the Contracting Officer." (Appellant's Hr'g Ex. 16, at 2.) Appellant's president was aware that (1) McKenzie did not possess the authority to contractually bind the District; and (2) only the CO had authority to modify the Contract. (*See* Hr'g Tr. vol. 1, 180:22-181:6, 304:14-306:2, 309:4-310:21.) Lastly, the language of the signed release clearly stated that appellant was releasing "any and all claims for the above referenced project." (Appellant's Hr'g Ex. 13.) Therefore, unlike in *Ft. Myer*, where the release could be interpreted to show that the parties did not intend for it to include the subcontractor claim at issue, the release in the instant case does not contain any language to indicate that appellant and the District did not intend for the release to apply to appellant's claim for the temporary boiler.

Appellant also relies on the case of *Winn-Senter*, wherein the court looked at the conduct of the government in considering the claim at issue, and determined that the conduct showed that the government did not intend for the release to apply to the claim because the government continued to consider the claim even after the plaintiff's execution of the release. *See Winn-Senter Constr. Co.*, 110 Ct. Cl. at 65-66. Appellant asserts that, here, because appellant's request for an equitable adjustment was submitted for the CO's final decision before the release was signed, and because the District was "continu[ing] to consider and negotiate the claim after the Release was signed," the District's conduct shows it did not intend the final release to apply to appellant's claim for the temporary boiler. (Appellant's Opp'n to District's JMOL at 27-28 (emphasis removed).) But the relevant facts of the instant appeal are distinctly dissimilar from those in *Winn-Senter*. In this case, after the release was signed, the record is absent of any action taken by an authorized District official other than CO Wooden

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1990). Appellant has argued that testimony regarding the e-mails from COTR Olusegun and CO Wooden waived the deliberative process privilege, citing *Bundy v. United States*, 422 A.2d 765, 767 n.4 (D.C. 1980). However, *Bundy* involved waiver of the attorney-client privilege. In *In re Sealed Case*, 121 F.3d 729, 741-42 (D.C. Cir. 1997), the D.C. Circuit stated:

> It is true that voluntary disclosure of privileged material subject to the attorney-client privilege to unnecessary third parties in the attorney-client privilege context waives the privilege, not only as to the specific communication disclosed but often as to all other communications relating to the same subject matter. . . . But this all-or-nothing approach has not been adopted with regard to executive privileges generally, or to the deliberative process privilege in particular. Instead, courts have said that release of a document only waives these privileges for the document or information specifically released, and not for related materials.

Id. at 741 (citations omitted). Accordingly, any waiver of the deliberative process privilege by testimony regarding the e-mails applies only to the specific information disclosed in the testimony and not to the entire set of e-mails. The testimony regarding the e-mails generally concerned: (1) McKenzie negotiating with Forney; (2) COTR Olusegun telling McKenzie that McKenzie did not have the authority to negotiate with Forney since it was an OPM/DRES contract, and that UDC could pay for the temporary boiler if it wanted to but the project was closed out as far as OPM/DRES was concerned; and (3) McKenzie asserting that he represented the District of Columbia and, as such, was directing COTR Olusegun to pay. (*See* Hr'g Tr. vol. 2, 735:13-736:2, 743:17-745:2, 803:15-806:5.) The information about the e-mails that was disclosed in the hearing does not change the Board's decision on the District's motion for judgment as a matter of law as stated herein since (1) the e-mails were sent after the release was executed and, therefore, are not germane to the issue of the final release's applicability to appellant's claim; and (2) the COTR rejected McKenzie's assertion of authority and stated that the project was closed out, which is contrary to conduct showing that the District never intended the release to be final, (*see id.*, 744:19-745:2, 803:22-11, 805:21-806:2).

who issued her final decision citing the release as a bar to all of appellant's claims under the Contract. (*See* Appellant's Hr'g Ex. 11, at 1.)

The present appeal is also distinguishable from cases, such as *Mecon Co.*, ASBCA No. 13620, 69-2 BCA ¶ 7,786, where the contracting officer's final decision does not rely on the release but instead considers the claim on its merits. In *Mecon*, the contractor had signed a release that "was general and absolute on its face" and contained no exceptions. *Id.* Prior to signing the release, the contractor had submitted a claim to the Officer in Charge of Construction. *Id.* After the release was executed, a contracting officer's final decision was issued "which denied the claim on its merits and said nothing at all about the release." *Id.* The ASBCA held that the actions of the government were consistent with a finding that the government did not intend to treat the general release as a bar to the claim. *Id.* Notably, the ASBCA stated in *Mecon* that the case was factually distinct from a previous case relied upon by the government, specifically because in the previous case the "[g]overnment did not at any time consider the claim on its merits after appellant had signed the general release." *Id.* (citing *Brown's Engine Rebuilding Co.*, ASBCA No. 11694, 67-2 BCA ¶ 6,602); *see also MPR Assocs., Inc.*, EBCA No. C-9608198, 97-1 BCA ¶ 28,810 (general release was ineffective because the claim arose after execution of the release and the contracting officer did not assert the release as a defense in his final decision). Unlike the government's actions in *Mecon*, CO Wooden's final decision in the present appeal does specifically rely on the release as a bar to appellant's claim, (*see* Appellant's Hr'g Ex. 11, at 1).

The Board finds that, taken as a whole, the record does not support a finding that the parties' conduct makes clear that they intended to exclude appellant's claim for the temporary boiler from the release. To the contrary, the final release represented an abandonment of appellant's claim for an equitable adjustment, particularly since there is no evidence of appellant continuing to assert its claim for the cost of providing the temporary boiler concurrent with executing the release. (*See* Appellant's Hr'g Ex. 12, at DC 331-33.) As noted by the Federal Circuit, "[t]he time to have reserved such claims was upon execution of the release." *Mingus Constructors, Inc.*, 812 F.2d at 1395 (quoting *Adler Constr. Co.*, 423 F.2d at 1364). Finally, COTR Olusegun declared to appellant's president, "[w]e all want to close the book on this project," (Appellant's Hr'g Ex. 12, at DC 332), clearly signaling that appellant's final release and the District's related payment were the final transactions under the Contract.

3. <u>There Is No Obvious Mistake or Oversight on the Part of Appellant in Not Excluding Its Claim from the Final Release</u>

The District requested that appellant sign a general release in consideration for receipt of the final payment due under the Contract. (*See id.* at DC 333.) However, the record does not show that, in doing so, appellant mistakenly failed to exclude its claim for providing the temporary boiler. (*See* Appellant's Hr'g Exs. 12-13.) On the contrary, one day before signing the release, appellant's president wrote to COTR Olusegun, "[w]hen we sign the final release of lien that is our statement of payment in full, what part of that is not clear?" (Appellant's Hr'g Ex. 12, at DC 331-32.) By its own admission, appellant understood that by signing the release appellant would waive and release any and all claims arising from the Contract.

Therefore, although appellant's president testified that his failure to exclude the claim for the temporary boiler from the release was "an oversight," (*see* Hr'g Tr. vol. 1, 145:9-18), an alleged oversight does not, by itself, qualify as a vitiating circumstance to invalidate the release because appellant must show that "it is *obvious* that inclusion of a claim in a release was due to mistake or oversight," *Ft. Myer Constr. Corp.*, CAB No. D-0859, 40 D.C. Reg. at 4674 (emphasis added) (citations omitted). In other words, "the binding effect of a release cannot be avoided if it arises from a unilateral mistake where the other party neither knew of the mistake nor had reason to know it." *Canadian Commercial Corp.*, ASBCA No. 37528, 89-1 BCA ¶ 21,462 (citing *H.L.C. & Assocs. Constr. Co.*, 367 F.2d 586, 591-92 (Ct.

Cl. 1966); *Edward R. Marden Corp.*, ASBCA Nos. 22793, 22904, 22906, 79-1 BCA ¶ 13,821). As a result, we find that any alleged mistake on appellant's part in failing to exclude its claim was not obvious to the District such that appellant can avoid the finality of the release.[14]

4. There Has Been No Allegation of Fraud or Duress

Lastly, with regard to the fourth exception, there has been no allegation that fraud or duress was involved in appellant's execution of the release. (*See* Appellant's Opp'n to District's JMOL at 30.) Moreover, even if appellant had made such an allegation, bad faith on the part of the government must be proven by "well nigh irrefragable proof" – that is, by clear and convincing evidence. *See, e.g.*, *Unfoldment, Inc.*, CAB No. D-1062, 62 D.C. Reg. 4453, 4458 (Mar. 14, 2013) (citations omitted). The record does not contain any such evidence.

In sum, taking into account all the facts of this appeal, the Board finds that there is no evidence in the record, as established by the conduct of the parties, of circumstances to justify an exception to the effect of the final release, which thus bars appellant's claim.

CONCLUSION

For the reasons discussed herein, we grant the District's motion for judgment as a matter of law. In response to the record evidence of the final release which on its face released "any and all liens and claims" for the boiler replacement work, we find that (1) appellant executed a valid general release which applies to its claim; and (2) appellant has not established that there exist special circumstances to justify an exception to the general rule that the final release bars appellant's prior existing claim. As a result, the Board hereby dismisses the instant appeal with prejudice.

SO ORDERED.

Date: November 10, 2015

/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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[14] The Board notes that although CO Wooden testified that she was "surprised" that appellant signed the release, (*see* Hr'g Tr. vol. 2, 736:11-18), her surprise does not in any way impute knowledge that appellant had made a mistake, particularly in light of the emphatic statement of appellant's president that the final release would be Forney's statement of payment in full.

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

APPEAL OF:

FORT MYER CONSTRUCTION CORPORATION	)	
	)	CAB No. D-1437
Under Contract No. DCKA-2009-B-0092	)	

For the Appellant: Adam J. Kwiatkowski, Esq., Christopher M. Kerns, Esq., Fort Myer Construction Corporation. For the District of Columbia: Carlos M. Sandoval, Esq., Brett A. Baer, Esq. (entered an appearance after post-hearing briefs), Office of the Attorney General.

Opinion By: Chief Administrative Judge Marc D. Loud, Sr., with Administrative Judge Monica C. Parchment, concurring.

OPINION

Filing ID #59210643

In November 2009, the District of Columbia awarded Appellant, Fort Myer Construction Company (FMCC or Appellant), a one-year contract to reconstruct a section of 18th Street, N.W., in the District. The project was completed four months beyond the contract deadline, and Appellant claims entitlement to delay damages on three grounds. First, Appellant contends that the District delayed completion and constructively changed the contract by requiring Appellant to perform its road work at the same time that the gas utility was relocating gas lines on 18th Street. Second, Appellant claims the District suspended its work by taking an unreasonable amount of time to issue a change order for repair of a leaking 18-inch water main. And lastly, Appellant claims that the District's failure to activate traffic signal control cabinets in a timely manner delayed project completion.

For the reasons set forth more fully herein, we deny Appellant's claims for delay damages on all three grounds. We find that the contract indicated that the gas line relocations would occur during Appellant's work, and that the District was not responsible for any delay the Appellant suffered due to the gas company's interference with its work. Second, we find that Appellant agreed to bilateral Change Order 3, which authorized repair of the leaking water main *and* waived Appellant's right to claim related delay damages. And lastly, we conclude that Appellant's delay claim related to activation of the traffic control cabinets was not included in the claims it submitted to the contracting officer herein, and thus is beyond Board jurisdiction. This latter claim, therefore, is dismissed without prejudice.

FINDINGS OF FACT

1. CONTRACT AWARD

1. On November 2, 2009, the District of Columbia ("District") awarded Appellant Contract No. DCKA-2009-C-0092, for the reconstruction and resurfacing of 18th Street, N.W., from Massachusetts Avenue to Florida Avenue, N.W. (Appellant's Hr'g Ex. 1, pages DC11, DC352 -DC393.)[1]

2. The contract award followed the District's acceptance of Appellant's successful bid on Invitation No. DCKA-2009-B-0092 (the "solicitation"). (Appellant's Hr'g Ex. 1, DC1–DC351.) The solicitation included all plans and specifications and advised potential bidders of the bidding process. It identified the District Department of Transportation ("DDOT") as the office issuing the solicitation and advised that requests for clarification or interpretation of Bid Documents prior to the date of bid opening were to be addressed to the contracting officer, whose address was given. (Appellant's Hr'g Ex. 1, at DC5; Appellant's Hr'g Ex. 100.)

2. CONTRACT PROVISIONS

a. GENERAL

3. The contract work included implementation of sediment and erosion control measures; removal and disposal of existing roadway pavement, curbs, gutters, and sidewalk; construction of new asphalt pavement, sidewalks, and curbs; replacement of existing storm drain basins with new; conversion of existing fire hydrants to breakaway type; installation of a new 12-inch diameter water line along 18th Street;[2] modification of traffic signals; and installation of conduits and electrical work as shown on the plans. (Appellant's Hr'g Ex. 1, DC12-DC13, items 2, 4, 7-10, 12, 14, 17, 18.)

4. The STANDARD SPECIFICATIONS FOR HIGHWAYS AND STRUCTURES, 2005, REVISED 2007 ("Standard Specifications") were made a part of the contract. (Appellant's Hr'g Ex. 1, DC11.) The contract also included Special Provisions that supplemented and modified the Standard Specifications. (Appellant's Hr'g Ex. 1, DC11.)

5. Standard Specifications Article 2, ORDER OF PRECEDENCE, provided, in part,

[1] Appellant's Exhibit 1 also appears in the record as Appeal File A and District Exhibit 1. A number of other documents appear among Appellant's exhibits as well as in the Appeal File and among District exhibits. Generally, we will refer only to one location of the exhibits. In referring to exhibits, leading zeros are omitted for bates numbered pages.

[2] The contract plans showed installation of the 12-inch water main in the center of 18th Street, including the new hydrants and existing water mains to which it was to be connected. (Appellant's Hr'g Ex. 100, Sheets 37, 37A; Hr'g Tr. vol. 1, 176:6-179:20, May 13, 2014.)

> Anything mentioned in the specifications and not shown on the contract drawings, or shown on the Contract drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both.
>
> All contract requirements are equally binding. Each Contract requirement, whether or not omitted elsewhere in the Contract, is binding as though occurring in any or all parts of the Contract. In case of discrepancy:
>
> > 1. The Contracting Officer shall be promptly notified in writing of any error, discrepancy, or omission, apparent or otherwise.

(Appellant's Hr'g Ex. 1, DC337.)

6. Standard Specifications Article 3, CHANGES, authorized the contracting officer to make changes in the work within the general scope of the contract by written order designated as a change order. Other instructions, directions, or interpretations from the contracting officer that caused a change in the contractor's work, including a change in the method or manner of performance of the work, were also treated as change orders. The Changes clause also provided,

> If any change under this Article causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of this work under the Contract, whether or not changed by any order, an equitable adjustment shall be made and the Contract modified in writing accordingly.

(Appellant's Hr'g Ex. 1, DC338.)

7. Special Provision 38 reminded the contractor that only the contracting officer was authorized to approve changes to the contract and directed the contractor not to comply with directions of anyone else that changed the requirements unless issued in writing and signed by the contracting officer. (Appellant's Hr'g Ex. 1, DC34.)

8. Standard Specifications Article 4, EQUITABLE ADJUSTMENT OF CONTRACT TERMS, provided that the contractor would be entitled to an equitable adjustment if the contractor encountered *Differing Site Conditions*;[3] *Suspensions of Work Ordered by the Contracting Officer*;[4] or *Significant Changes in the Character of Work.*[5] (Appellant's Hr'g Ex. 1, DC339.)

[3] Subsurface or latent physical conditions that differ materially from those indicated in the contract or unknown physical conditions of an unusual nature.

[4] A suspension or delay of all or any portion of the work by the contracting officer for an unreasonable period of time was a basis for an equitable adjustment.

[5] Changes to the work caused by the contracting officer that materially alter the character of the work.

9. The Disputes clause set forth as Article 7, DISPUTES, in the Standard Specifications described the process for the contractor to submit a claim for equitable adjustment to the contracting officer. Subsection A. (a)(5) of the clause required that a claim by the contractor against the District include a "[c]ertification that, to the best of the Contractor's knowledge, the cost and pricing data included with the claim is accurate, complete and current as of the date of claim submission." (Appellant's Hr'g Ex. 1, DC340-DC341.)

10. The contract's Special Provisions, that, as discussed above, modified and supplemented the Standard Specifications, included a modification to the Disputes clause of the Standard Specifications. The Disputes clause as modified by Special Provision 3 did not contain a requirement that the contractor submit certified cost or pricing data with a claim. (Appellant's Hr'g Ex. 1, DC13-DC14.)

11. Standard Specifications Article 26, SUSPENSION OF WORK, provided, in part:

> If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed or interrupted by an act of the Contracting Officer in the administration of the Contract, or by his failure to act within the time specified in the Contract (or, if no time is specified, within a reasonable time), an adjustment will be made for an increase in the cost of performance of the Contract (excluding profit) necessarily caused by such unreasonable suspension, delay or interruption and the Contract modified in writing accordingly. However, no adjustment will be made under this article for any suspension, delay or interruption to the extent: [the Contractor's] performance would have been suspended or delayed by another cause including the fault or negligence of the Contractor [.]

(Appellant's Hr'g Ex. 1, DC344.)

12. The plans distributed with the solicitation included a phasing schedule and Maintenance of Traffic ("MOT"), that described the order of work on the project, and the location of barricades closing traffic lanes in the various segments of work. (Appellant's Hr'g Ex. 100, sheets 48-80; Hr'g Tr. vol. 1, 92:10-94:18.) The contract provided further direction regarding management of traffic during the project. (Appellant's Hr'g Ex. 1, DC345, Special Provision 104.02, Maintenance of Traffic; Appellant's Hr'g Ex. 1, DC115-DC123, Maintenance of Traffic – Typical Lane Closure.)

b. CONTRACT PRICING

13. The contract was a fixed price contract (Appellant's Hr'g Ex. 1, Special Provision 2, DC13), but the prices were established by application of a formula in the Schedule of Items in the solicitation. On the Schedule of Items, the District specified the tasks Appellant was to perform under the contract and the approximate quantities of each

task. (Appellant's Hr'g Ex. 100, Sheet 4, Summary of Quantities; Appellant's Hr'g Ex. 1, DC360; Hr'g Tr. vol. 1, 45:8-48:10.)

14. Each bidder on the solicitation was required to enter on the Schedule of Items its price for providing each unit and the extended price for the quantity of each item specified in the solicitation. For example, on line 0130 of the Schedule of Items was listed "212002 Test Pit." The quantity of test pits contemplated under the contract was approximately 160. Appellant's proposal priced each test pit at $250. The extended price for 160 test pits listed on the Schedule of Items was $40,000. This extended price was summed with the extended prices of all other listed work items to result in Appellant's successful bid price and the contract price of $5,940,481.17. (Appellant's Hr'g Ex. 1, DC360-DC377; Transcript of Hearing ("Hr'g Tr.") vol. 1, 54:16-55:14; Hr'g Tr. vol. 2, 506:9-507:2, May 14, 2014; Hr'g Tr. vol. 3, 747:12-750:11, May 15, 2014.)[6]

15. The unit price Appellant submitted and the District agreed to pay under the contract for each task on the Schedule of Items included all general and administrative costs, overhead and profit. (Appellant's Hr'g Ex. 1, DC157, Division 1 – General Requirements, Part 4, Payment, 4.1 Parts A and B.) These costs were not listed separately in the contract, and the prices submitted were not subject to any markups for general and administrative costs, profit and overhead. (*Id.*, Part C, DC157-158.)

c. CONTRACT PROVISIONS ADDRESSING UTILITIES

16. The plans noted, "The following known utilities have facilities in the area of contract limits" and listed Potomac Electric and Power Company ("Pepco"), Water and Sewer Authority of the District of Columbia ("WASA"), Verizon, and Washington Gas. (Appellant's Hr'g Ex. 100, Sheet 2.)

17. The contract included,

> The Contractor shall be fully responsible for protection against damage for the duration of the contract of all the utilities within the project limits. The utilities include but are not limited to public and/or private water, sewer, electricity, gas, oil, and communication lines. No separate measurement or payment will be made. Cost of this protection work shall be reflected and distributed among the contract pay items.

(Appellant's Hr'g Ex. 1, DC13, Special Provision 1.)

18. Subsection 108.06 of the contract's Standard Specifications addressed partial suspensions of the work and specifically addressed utilities:

> (C) UTILITY DELAYS. The Contractor shall consider the location of existing utilities in determining contract time. The Contractor is warned

[6] The contractor was entitled to be paid for the actual quantities performed if they varied from those stated in the solicitation. (Hr'g Tr. vol. 2, 545:2-22.)

> 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.

(Appellant's Hr'g Ex. 1, DC351.)

19. Note 4.H on Sheet 2 of the plans provided,

> The location of utilities shown on the plans are based on field survey data and/or record drawings of the original locations. The information shown is not necessarily complete and the location of utilities shown is approximate. It shall be the responsibility of the contractor to verify the existence of all utilities well in advance of conducting construction operations, which could damage these facilities. In the areas where proposed construction may conflict with existing utilities, the contractor shall take all necessary precautions to avoid damage to existing utilities. If an underground utility is damaged, the contractor shall immediately notify the engineer and the owner of the said utility. Any damage sustained to utilities above or below the ground shall be repaired by or under the direction of the utility, at the contractors expense. Under no circumstance shall the contractor backfill an excavation affecting said utility without first receiving permission from the utility owner.

(Appellant's Hr'g Ex. 100, Sheet 2, Note 4.H.; also Note 1 on Plan Sheet 33.)

20. Standard Specifications Article 17, CONDITIONS AFFECTING THE WORK, addressed the contractor's responsibility with respect to identifying conditions that might have an impact on the contract work:

> The Contractor shall be responsible for having taken steps reasonably necessary to ascertain the nature and location of the work, and the general and local conditions which can affect the work and the cost thereof. Any failure by the Contractor to do so will not relieve him from responsibility for successfully performing the work specified, without additional expense to the District.

(Appellant's Hr'g Ex. 1, Standard Specifications Article 17, Subsection A, DC342.)

21. Standard Specifications Article 17, also discussed the contractor's responsibility for protecting utilities and vaults:

> No compensation, other than authorized time extensions, will be allowed the Contractor for protective measures, work interruptions, changes in construction sequence, changes in methods of 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.

(Appellant's Hr'g Ex. 1, Standard Specifications Article 17, CONDITIONS AFFECTING THE WORK, Subsection E, DC342.)

22. The contract addressed coordination with utility companies regarding their lines that might affect the project in Special Provision 23, UTILITY STATUS:

> The District of Columbia Department of Transportation maintains coordination with the public utility companies during the preliminary engineering and the construction phases of the project. The Contractor shall be required to maintain and continue this coordination throughout the construction of the project. Construction delays as a result of inadequate coordination shall be the Contractor's responsibility.
>
> Except for PEPCO, no utility company work outside the scope of the project is anticipated. However, it will be necessary for utility companies to perform work during construction related to the contract work being performed. Such work consists of inspection of furnished materials and utility supports installed by the Contractor and being present during any demolition or concrete placement in the vicinity of their facilities.
>
> The Contractor's involvement and coordination with utility companies includes, but is not restricted to, the following:
>
> A. Adjustment and resetting of utility manholes and manhole frames respectively to new grades.
> B. Location and verification of existing utility lines (as shown [o]n the plans).
> C. Relocation of existing fire hydrants.

(Appellant's Hr'g Ex. 1, DC22.)

23. The contract provided that the District would notify utilities regarding their lines that conflict with the proposed contract work, and

> endeavor to have all accessory adjustments of the public or private utility fixtures, pipe lines, and other appurtenances within or adjacent to the limits of construction, made as soon as practicable.
>
> * * *
>
> Utility work will be performed by utility owners at no cost to the Contractor except for utility work included as part of the Contract. Vault adjustments will be made by vault owners. It is anticipated that utility or

> vault work to be performed by others will not interfere with work under the contract, however, should work by others become necessary during the life of the contract, the Contractor shall cooperate accordingly.

(Appellant's Hr'g Ex. 1, Standard Specifications 105.05, COOPERATION WITH UTILITY RELOCATION, DC348.)

3. COORDINATION WITH OTHERS

24. The solicitation described work that Appellant would be required to perform in conjunction with Pepco's planned upgrades, including placing electric lines, as part of Appellant's scope of work. (Appellant's Hr'g Ex. 1, Special Provision 23, DC22-DC23; Hr'g Tr. vol. 1, 202:1-3.)

25. The District generally coordinated early with utilities whose facilities might interfere with the proposed street reconstruction project. (Hr'g Tr. vol. 3, 627:2-630:16, 646:10-20.)

26. Appellant's scope of work included the removal of existing catch basins, and the installation of new basins and related connecting pipes. (Appellant's Hr'g Ex. 1, DC12-DC13; Hr'g Tr. vol. 1, 196:14-197:22.)[7]

27. The plans included with the solicitation and made part of the contract noted in at least 10 places the presence of Washington Gas lines that conflicted with Appellant's work replacing the catch basins. These locations were marked on the drawings with the description "GAS LINE TO BE RELOCATED." (*See, e.g.*, Appellant's Hr'g Ex. 100, Sheets 31-34; Hr'g Tr. vol. 2, 448:2-450:19.) The contract specifications did not mention relocation of Washington Gas lines. (Appellant's Hr'g Ex. 48, DC1697; Hr'g Tr. vol. 1, 74:15-22, 136:4-22.)

28. Washington Gas had to relocate its gas lines before Appellant could install the catch basins that were in conflict with the gas lines. (Hr'g Tr. vol. 2, 450:11-19; Hr'g Tr. vol. 3, 643:4-7, 648:17-649:1.) Relocation of the gas lines required special expertise and was to be performed by a Washington Gas subcontractor. (Hr'g Tr. vol. 1, 74:18-22, Hr'g Tr. vol. 3, 642:2-7.) Gas line relocation was not within the scope of Appellant's contract. (Appellant's Hr'g Ex.1, DC12-DC13; Appellant's Hr'g Ex. 100, Sheet 4, Summary of Quantities; Hr'g Tr. vol. 1, 74:15-19, 201:15-22; Hr'g Tr. vol. 4, 911:10-22.)

4. PREPARATION OF BID

29. Appellant's staff reviewed the solicitation plans and specifications when preparing its bid. (Hr'g Tr. vol. 2, 525:3-526:6, 557:7-14.) In reviewing the plans, they

[7] Catch basins are drains that collect and drain away water that comes onto the roadway. (Hr'g Tr. vol. 1, 74:8-14.)

noted the references to relocating the gas lines and understood that Washington Gas was responsible for that work. (Hr'g Tr. vol. 2, 558:15-559:9.)

30. The employees preparing Appellant's bid on the project were aware that Washington Gas would be relocating the gas lines while Appellant was performing its contract work on 18th Street. (Hr'g Tr. vol. 2, 561:15 - 562:2.)

31. Appellant's company typically bids on 10-12 District street reconstruction projects every year. (Hr'g Tr. vol. 2, 526:7-21). In some, relocation of conflicting utilities had been done before Appellant was awarded the contract. (Hr'g Tr. vol. 2, 562:6-11, 558:15-559:9.) Appellant did not include in its bid any cost associated with coordinating with utilities. (Hr'g Tr. vol. 2, 554:14-555:13.)

5. PRE-CONSTRUCTION MEETING

32. On December 1, 2009, DDOT held a pre-construction meeting for the 18th Street project. Attendees included Appellant's representative as well as representatives of Volkert,[8] DDOT, Pepco, and Washington Gas. Utilities conflicts were among the topics discussed. Appellant's representative noted the drawing notations that gas lines would need to be relocated in a number of areas to permit installation of the contract-required drainage basins. She asked whether plans had been made for doing so and was advised by the DDOT representative that plans had not been developed for gas line relocations. (Appellant's Hr'g Ex. 67, 6080-6085; Hr'g Tr. vol. 1, 75:15-77:20.)

33. At the pre-construction meeting, Pepco presented its plans that identified its lines in the street and its intended work. However, Appellant could not ascertain the timing or duration of Pepco's work from Pepco's plans or from the contract. (Appellant's Hr'g Ex. 1, DC22-DC23; Hr'g Tr. vol. 1, 170:7-171:20.)

34. Although attending the December 1, 2009, pre-construction meeting, Washington Gas was not previously aware that the project would require relocation of its lines and had not prepared any plans for doing so. (Hr'g Tr. vol. 1, 70:18-71:10, 76:3-13, 76:17-77:8, 78:9-20; Hr'g Tr. vol. 2, 455:3-12.)

6. NOTICE TO PROCEED

35. The District issued a Notice to Proceed on December 3, 2009, instructing Appellant to proceed with the contract work on December 7, 2009, under the terms and conditions of the contract and to complete the contract work on or before December 6, 2010 (365 consecutive calendar days from the Notice to Proceed). (Appellant's Hr'g Ex.

[8] Prior to award of the contract, the District had engaged a construction manager, David A. Volkert and Company ("Volkert"). Volkert was to provide overall project supervision, including having an on-site engineer and verifying quantities and evaluating pay applications. (Hr'g Tr. vol. 1, 36:14-37:9; Hr'g Tr. vol. 2, 325:19-326:12, 411:18-412:3 413:3-16, 414:9-13, 420:7-421:3, 440:4-14.)

2, DC393; *See* Appellant's Hr'g Ex. 1, Special Provision 13 (DC19) and Standard Specifications 108.02 (DC349)); Hr'g Tr. vol. 1, 111:6-112:1.)

36. Appellant first began work on the site on January 5, 2010, to install erosion and sedimentation controls, and then left after a day, returning on January 22 to place no-parking signs. (Appellant's Hr'g Ex. 97, 13-15.)

7. WASHINGTON GAS INTERFERENCE

a. Preparation of Relocation Plans

37. At a January 14, 2010, meeting, DDOT, Volkert, and Washington Gas discussed and documented the conflicts between Washington Gas lines and the project work to be done by Appellant. (Appellant's Hr'g Ex. 48, DC1697, DC1700.)

38. Appellant, Washington Gas, DDOT, and Volkert representatives attended a January 19, 2010, walk-through at the site. At a follow-up meeting on January 21, 2010, the locations where test pits would be needed to facilitate the gas line relocations were identified. (Appellant's Hr'g Ex. 8, DC586; Appellant's Hr'g Ex. 48, DC1698-DC1699; Appellant's Hr'g Ex. 51, DC2412; Hr'g Tr. vol. 1, 82:1-21.) Test pitting is hand digging around utility lines to locate the elevation, size of utility, and what is surrounding it. (Hr'g Tr. vol. 1, 83:1-6; Hr'g Tr. vol. 2, 455:13-456:9; Hr'g Tr. vol. 4, 799:8-21.)

39. Test pits were contemplated under the contract as necessary to locate underground utilities. (Appellant's Hr'g Ex. 1, Division 2 – Sitework Section 02225 – Test Pits 1.1.A, DC178.) The contract required Appellant to do test pits at all gas line crossings to determine the exact location and depth of the lines, well in advance of construction. (Appellant's Hr'g Ex. 100, Sheet 33, Note12.) Although test pitting was part of Appellant's contract (Finding of Fact number ("FF") 14, 39), Appellant believed it was only required to dig test pits as needed for *its* work on the project. (Hr'g Tr. vol. 2, 364:7-365:7, 366:7-12, 367:1-6.)

40. Washington Gas needed information from test pits to prepare its relocation plans, and after the January 19 walk through, Volkert asked Appellant to do the test pitting. (Hr'g Tr. vol. 1, 89:21-92:4.) On January 22, Washington Gas complained to Volkert that their designs for the gas line relocations were being delayed by the lack of test pit information. (Appellant's Hr'g Ex. 7, DC585; Appellant's Hr'g Ex. 20, DC651.)

41. In Volkert's January 21, 2010, memorandum of a Utility Coordination Meeting, attended by DDOT, Volkert, and Appellant, it identified conflicts where test pits would be required. The memo noted as follows:

> This meeting was held to identify locations on the 18th Street project where test pit information will be required to resolve[] utility conflicts. The test pits are listed by approximate station number and run north to south. Test pit numbers are assigned only for ease of reference. Fort

> Myer will start the test pit work Monday, 1/25/2010, and will work north to south.

(Appellant's Hr'g Ex. 68, 6092.)

42. In a January 29, 2010, email, with a copy to Appellant, Washington Gas again complained about the lack of test pit information. The Washington Gas representative advised that "Washington Gas is getting delayed in finalizing the design of gas relocations in this project" due to the failure of Appellant to provide test pits and test pit information. "Our designs are getting badly delayed for want of these (sic) critical information." (Appellant's Hr'g Ex. 8, DC586; Appellant's Hr'g Ex. 21, DC652-DC653.)

43. Appellant noted in a February 12, 2010, letter to DDOT, "There are nine references of gas line relocations in the contract and one gas regulator box that are in direct conflict with storm items." Appellant mentioned that the on-site meeting on conflicts identified the test pits Appellant needed to dig to verify existing gas lines near proposed catch basins, and agreed to provide test pit information to the District, but cautioned that the information should be verified by Washington Gas. (Appellant's Hr'g Ex. 3, REA[9] Ex. 26, DC523.)

44. After placing no parking signs from January 22 through January 26, and test pitting on a few days after, Appellant's forces left the job until February 23, due in part to a severe snowstorm that affected the Washington D.C. area from February 5 through 22, 2010. (Appellant's Hr'g Ex. 97, 13-15.)

45. In February 2010, Appellant started work installing the 12-inch water main running in 18th Street, even though it was not scheduled to begin so early and was inconsistent with the phasing established in the contract. It began this work out of sequence because conflicts regarding relocation of gas lines were impeding installation of catch basins. Also, working linearly along the street, installing the entire length of the water main and its connections in one process was more efficient than the segment-by-segment schedule in the contract. (Appellant's Hr'g Ex. 35, DC1082-DC1083; District's Hr'g Ex. 10, DC1714; Hr'g Tr. vol. 1, 181:8-182:12.)

b. Washington Gas's Work

46. Washington Gas began its work on March 9, 2010, taking about 6-8 days per gas line relocation. On April 15, Volkert advised Appellant of the need for it to coordinate its work with that of Washington Gas. (Appellant's Hr'g Ex. 3, REA Ex. 27, DC527.) On April 19, 2010, Appellant complained in a letter to the contracting officer that the gas line relocations were slowing it down and that Washington Gas was not keeping to its schedule. (Appellant's Hr'g Ex. 3, REA Ex. 27, DC526.)

[9] Appellant included a number of exhibits with its Request for Equitable Adjustment ("REA") submitted to the contracting officer. These are located in Appellant's Hr'g Ex. 3 and are identified as REA Exhibits ("REA Ex.").

47. As of April 2, 2010, Washington Gas was behind the schedule it had provided. (Appellant's Hr'g Ex. 11, DC590.)

48. In an April 6, 2010, letter to the DDOT Deputy Project Manager, Appellant's project manager reminded him that Appellant had "expressed our concern about the circumstances [Washington Gas relocations] and the impact on the project's one year contract duration". (Appellant's Hr'g Ex. 3, REA Ex. 25, DC520.)

49. Because Washington Gas was working on the gas line relocations in a few places conflicting with catch basins, Appellant was required to shift its crews around instead of working as it had planned. In its May 10, 2010, schedule update for April, Appellant noted the following:

> We still can not [sic] perform in the sequence specified in the preliminary CPM schedule due to the conflicts with gas relocations in the area of several catch basins. Earlier in the month of April, crews were completing what could be done on catch basins and briefly had to pull off the project. Crew work had shifted to constructing the proposed water main during the time WG continues with their relocations.

(Appellant's Hr'g Ex. 52, DC2414; Hr'g Tr. vol. 1, 153:11-154:20, 254:6-255:17.)

50. An important, high-level meeting of government officials, referred to as the nuclear summit, was held in Washington D.C. from April 12, 2010, through April 14, 2010. Due to security concerns, operations on the project were shutdown in their entirety for the duration of the summit. (Appellant's Hr'g Ex. 97, 17.)

51. On April 2, 2010, DDOT asked Volkert to write a letter to Washington Gas, asking it to address its schedule for the gas line relocations. (Appellant's Hr'g Ex. 31, DC1010.)

52. Washington Gas advised in an April 6, 2010, email to Volkert, that it had to pull some of its crews and transfer them to a gas outage emergency away from the project. Additionally, Washington Gas reported:

> We are doing the best we can. FMCC may have to go to alternate work or move around the gas work. Monday my crew at Willard St had to wait on FMCC. We all cannot work the same locations at the same time. I had to move my crew back to S St so FMCC could finish what they were doing. I am a team player, and FMCC will have to be a player too. The east side of 18th St has really been tough. We encountered two more unmarked utilities at Willard St today. This [sic] going to cause further delays.

(Appellant's Hr'g Ex. 40, DC1546.)

53. Appellant's project manager wrote to the DDOT Deputy Project Manager on April 6, 2010, complaining of Washington Gas's slow progress on the relocations. She noted, "We put forth our notice of a potential change order for equitable adjustment in time due to the interference these circumstances have and will cause on the completion of the project." (Appellant's Hr'g Ex. 3, REA Ex. 25, DC520-DC521; REA Ex. 27, DC526.)

54. Washington Gas completed relocation of the gas lines and demobilized as of July 7, 2010. (Appellant's Hr'g Ex. 3, REA Ex. 28, DC530.)

8. LEAKING WATER MAIN AND CHANGE ORDER 3

a. Discovery of leaking water main

55. When excavating between Q and Corcoran Streets, Appellant discovered saturated soils at New Hampshire Avenue. (Hr'g Tr. vol. 1, 203:6-204:20.)

56. The source of the leak was identified on or about October 28, 2010, to be a leaking 48-inch water main in the vicinity of 18th and New Hampshire Avenue. Appellant proposed a fix for the water main, but DDOT rejected it because of the expense. (Appellant's Hr'g Ex. 3, REA, DC412; Hr'g Tr. vol. 1, 204:21-205:15, 208:12-22, 211:5-21, 216:12-217:7.)

57. The water main leak prevented Appellant's project construction in the immediate area of the intersection of 18th and New Hampshire until it could be resolved. (Hr'g Tr. vol. 1, 217:13-18, 218:17-220:3.)

b. Preparing a change order

58. The District's water agency, WASA, approved the proposed method of repair of the water main and the price of the repair in November 2010, but it was up to the District to prepare and finalize a change order. (Appellant's Hr'g Ex. 3, REA Ex. 33, DC544; Appellant's Hr'g Ex. 32, DC1019; Appellant's Hr'g Ex. 43, DC1668; Appellant's Hr'g Ex. 45, DC1680.)

59. In the Schedule Update Narrative for the period of December 1 – December 31, 2010, Appellant noted that the 48-inch water main leak may be impacting project progress. (Appellant's Hr'g Ex. 3, REA Ex. 24, DC517-DC518.)

60. On January 12, 2011, Appellant's project manager emailed an inquiry regarding the status of the formal change order, noting, "As you know, this matter has been pending for the last two months . . . and we are very concerned about the impact the current cold weather may have if not executed expediently." (Appellant's Hr'g Ex. 43, DC1667.)

61. In January 2011, Appellant's project manager asked DDOT repeatedly about the status of the water main change order and asked the District to get the change order moving. (Appellant's Hr'g Ex. 38, DC1392; Appellant's Hr'g Ex. 41, DC1625-DC1626; Appellant's Hr'g Ex. 44, DC1675; Hr'g Tr. vol. 1, 233:6-236:6.) In a January 24 email, she noted that "[t]he review process has been circulated somewhere for several months. We have done what we can to assist in bringing this matter to fruition." (Appellant's Hr'g Ex. 41, DC1627.) In a January 28, 2011 email, she again asked when the change order would be executed:

> Since the latest revision to Pending Change Order #3 was returned immediately upon receipt today, please provide a date in which the executed change order will be forwarded so that scheduling of crew will be available for the work to be performed.

(Appellant's Hr'g Ex. 41, DC1626.)

c. Change Order 3

62. Change Order 3 provided for the necessary excavation and repair of the leaking 48-inch water main for an adjustment to the contract price of $8,900.[10] The Change Order, executed by Appellant's authorized representative on February 11, 2011, and by the contracting officer on March 3, 2011, included a release as follows:

> The individual signing this change order on behalf of the Contractor hereby certifies that payment under this change order constitutes full, complete and final compensation for all cost and time associated with this change order, and agrees that this change order represents an all inclusive and equitable adjustment to the Contract, and further agrees to waive all rights to make any further claim arising out of or as a result of this change order. There is no impact to the current contract schedule based on this process.

(Appellant's Hr'g Ex. 1, DC396-397.)

63. The water main repair using one 48-inch bell clamp supplied by the water district took about two days and was completed on March 9, 2011. (District's Hr'g Ex. 26, 5815; Hr'g Tr. vol. 1, 236:7-11.)

9. TRAFFIC SIGNAL CONTROL CABINETS

a. Pepco Work

[10] The change order provided an adjustment of $8,900, but no payment was made to Appellant. Instead the change order reflected that less 12-inch ductile iron pipe than listed in the quantities in the Schedule of Items was actually used, so the District reduced that item by 65.927 linear feet at a unit price of $135.00 for an adjustment downward of $8,900.14, offsetting the cost of the change. (Appellant's Hr'g Ex. 1, DC396-DC397; Hr'g Tr. vol. 1, 229:17-230:6.)

64. Appellant's work included modification of traffic signals at six intersections on 18th Street and the installation of conduits and street lights and electrical work. (Appellant's Hr'g Ex. 1, DC 13, *id*. at Appendix E, Traffic and Street Lighting, DC137-DC139.)

65. The contract described the work Pepco would be performing during the project, including the following:

> PEPCO will be relocating and replacing old clay tile conduits at isolated locations within 18th Street NW and approach roadways. The work is estimated to last 6 months based on the schedule below.

The sections that followed identified nine locations where Pepco would be performing work but did not include a specific schedule. After listing the locations for Pepco's work, the clause continued, "To avoid any overlapping of schedules, Contractor will coordinate with PEPCO to ensure that work at each location mentioned above have [sic] been totally completed before starting reconstruction at that location." (Appellant's Hr'g Ex. 1, DC22-DC23; Hr'g Tr. vol. 3, 618:12-620:12, 623:4-14.)

66. Pepco did not provide Appellant a schedule showing the timing or duration of Pepco's work, which it performed through its own subcontractor. (Appellant's Hr'g Ex. 1, DC22-DC23; Hr'g Tr. vol. 1, 167:16-168:9, 170:7-171-2.) Pepco took nine months to finish its work. (Hr'g Tr. vol. 1, 172:8-15.)

67. On August 27, 2010, Appellant's project manager wrote to the project engineer, "We feel it necessary to give notice of the continued burden Pepco continues to place on Fort Myer without any obvious intention of completing their work prior to us commencing in the next phase of work." (Appellant's Hr'g Ex. 3, REA Ex. 30, DC 536.)

b. Activation of Traffic Control Cabinets

68. The District was responsible for activation of the traffic signal control cabinets. (Appellant's Hr'g Ex. 100, Cable Note 1 on sheet TS-23 and on other sheets including TS-40; Hr'g Tr. vol. 8, 2440:3-19, 2442:14-19.)

69. Appellant noted on its Schedule Update number 6 of January 8, 2011:

> Fort Myer Construction's electrical department has been trying to accelerate the delivery and programming of the remaining Traffic Control Cabinets on the project. Although originally told to deliver on 18 November, the delivery has been pushed back due to backlog of work at the TST Shop. We have been told that the work order will be given precedence on the schedule. Additionally, Pepco has been contacted to connect remaining feeds on the project. Recent retirement of main contact has left a void as to who is to assume the responsibility of the project. We

> are hopeful the items will be addressed within the next period and activation to commence.

(Appellant's Hr'g Ex. 3, REA Ex. 24, DC518.)

70. On January 10, 2011, Appellant installed one traffic control cabinet, and on January 11, 2011, Appellant installed two traffic control cabinets, but one had to be brought back to the warehouse for repair. (District's Hr'g Ex. 24, DC5381-DC005385.)

71. Pepco was responsible for hooking up power to the new cabinets but was proceeding slowly in January. On the January 20, 2011, Daily Report, Appellant noted, "We need Pepco to hook up the new cabinets. There are 3 to be hooked up. FMCC has put about 4 requests in already to Pepco." (District's Hr'g Ex. 24, DC5489.)

72. Appellant's Daily Reports show work on the traffic control cabinets on January 21, 2011 (District's Hr'g Ex. 24, DC5509), DDOT wiring of cabinets at 18th and Q on February 11, 2011 (District's Hr'g Ex. 25, DC5578), and completion of a traffic control cabinet at 18th and New Hampshire on February 14, 2011. (District's Hr'g Ex. 25, DC5617.)

73. Appellant's Daily Report for March 2, 2011, stated, "turned 3 new intersections on." (District's Hr'g Ex. 26, DC5782.)

74. A March 21, 2011, memo from Appellant's electrical division noted the electrical work remaining but did not include on the list any mention of activation of traffic control cabinets. It did list as remaining work to turn on a traffic control cabinet on S Street. It noted that the old traffic controller cabinets had not been removed because Pepco needed to disconnect the power. (District's Hr'g Ex. 26, DC5900.)

75. On March 28, 2011, Appellant's report read, "DDOT sent a tech to 18th & S St. to hook up the cabinet. Cooper wouldn't let him wire it up. Said it was [illegible] job." (District's Hr'g Ex. 26, DC5891.)

76. Volkert's March 24, 2011, memo reflecting a Project Closeout Meeting, which Appellant's representative attended along with Volkert and DDOT, makes no mention of traffic control cabinet activation remaining. The report notes, however, "Before the electrical equipment can be energized, the existing equipment must be terminated by PEPCO. At the time FMCC did not know when PEPCO would schedule the work. FMCC will then be able to remove old equipment completely." (Appellant's Hr'g Ex. 93, DC6425-DC6426.)

77. Appellant completed work on the contract on or about April 26, 2011. (Compl., ¶30, p. 4; District's Hr'g Ex. 7, DC2456.)

10. REQUEST FOR EQUITABLE ADJUSTMENT

78. On July 28, 2011, Appellant submitted a Request for Equitable Adjustment (REA) in which it claimed extra costs for delays it experienced on the contract resulting from interference with its progress by Washington Gas and Pepco and from the District's delay in processing Change Order 3 regarding the 48-inch water main leak. (Appellant's Hr'g Ex. 3.) Appellant described the delaying events as follows:

> The disruptions to Fort Myer's work fell into three general areas: delays associated with relocation of gas lines in direct conflict with several proposed drainage structures, the upgrade to PEPCO infrastructure in the center of the roadway that should have been completed before Fort Myer commenced work on the proposed contract,[11] and delays in the approval to proceed with the repair of an existing water main leak at a prominent intersection of the project after its discovery. While waiting for Washington Gas to relocate lines, PEPCO to finish its infrastructure upgrades, and the processes to provide authorization to correct the leak on the shallow water main, Fort Myer could not work efficiently in the affected areas according to plan. Instead, Fort Myer's crews had to "jump around" from one section of the job to another, relocating equipment, barriers, and other items necessary for the work. Had Fort Myer been able to perform its work linearly instead of searching for ways to complete productive work during these disruptions, Fort Myer would have completed the contract on time without expending resources in maneuvering around these other projects.

(Appellant's Hr'g Ex. 3, DC401.)

79. In its REA, Appellant sought a contract extension of 140 days due to the delay, its additional costs resulting from the disruptions to its performance of $915,520, and Eichleay damages of $241,625.70 for unabsorbed home office expenses for the 140 days of delay, for a total recovery claimed of $1,156,145.67. (Appellant's Hr'g Ex. 3, DC415-DC418.)

80. The REA did not include Appellant's certification that the accompanying cost or pricing data was accurate, complete and current as of the date it was submitted. (Appellant's Hr'g Ex. 3.)

11. DENIAL OF CLAIM

81. On December 1, 2011, the contracting officer denied Appellant's claim. (Appellant's Hr'g Ex. 4, DC575-DC576.) He concluded that all three of the alleged delaying events – relocation of conflicting gas lines, the upgrade of Pepco facilities in the roadway, and the shallow water main requiring repair – were all shown on the plans. He

[11] Appellant has dropped this portion of the claim, choosing not to pursue any recovery based on Pepco's work on the project. (Hr'g Tr. vol. 8, 2451:8-2452:10.)

relied on Article 17 E of the Standard Specifications, Utilities and Vaults, that limits a contractor's compensation to a time extension for work interruptions, changes in sequence, changes in methods "made necessary by existing utilities, imprecise utility or vault information, or by others performing work within or adjacent to the project." (FF 21) (Appellant's Hr'g Ex. 4, DC576.)

82. Appellant filed its Notice of Appeal of the contracting officer's decision on December 19, 2011.

DISCUSSION

I. JURISDICTION

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."[12] Except for Appellant's claim that the District caused delay in activating traffic signal control cabinets (discussed herein), the Board concludes that we have jurisdiction over Appellant's instant claims. Specifically, we reject the District's contention that Appellant's failure to certify its cost or pricing data precludes our jurisdiction over the instant claims.

A. Certified Cost or Pricing Data

The District contends that the Board lacks jurisdiction over Appellant's claims because Appellant failed to submit a certification of cost and pricing data with its claim as set forth in the REA. (Appellee District of Columbia's Post Hearing Brief 10)(hereafter District's Post Hr'g Br.) It cites, *inter alia*, the Disputes clause included as Article 7 of the Standard Specifications incorporated by reference in the contract. (*Id.*) Subparagraph A. (a)(5) of that Disputes clause, provided, in pertinent part, that the contractor's claim shall provide a certification that, to the best of the contractor's knowledge, the cost and pricing data included with the claim is accurate, complete and current. (FF 9.) The REA did not include such certification. (FF 80.)

The District's argument is without merit. Our jurisdiction over Appellant's claims is not defeated by Appellant's failure to submit a certification of current cost and pricing data. The provision in Article 7 of the Standard Specifications has been modified by the contract's Special Provisions (FF 4), and the Disputes clause, *as modified* by the Special Provisions, does not include subparagraph A. (a)(5). (FF 10.) Nothing in the contract, including the Disputes clause as modified by the Special Provisions, or in applicable law to which the District has directed us, requires that a contractor's claim be certified. *See Civil Constr., LLC*, CAB Nos. D-1294, D-1413, D-1417, 2013 WL

[12] Prior to April 8, 2011, the Board exercised jurisdiction pursuant to D.C. Code §2-309.03(a)(2). The Procurement Practices Reform Act of 2010 repealed and replaced the District's procurement statute, including the Board's previous jurisdictional provision. D.C. Law No. 18-371, 58 D.C. Reg. 1185 (Feb. 11, 2011).

3573982 (Mar. 14, 2013); *Prince Constr. Co./W.M. Schlosser Co., Joint Venture*, CAB Nos. D-1369, D-1419, D-1420, 2013 WL 7710334 (Dec. 9, 2013).

The Federal cases the District cites as "instructive" have no bearing on this issue before the Board. While cases such as *Skelly and Loy v. United States*, 685 F.2d 414 (Ct. Cl. 1982), hold that Federal courts or contract appeals boards have no jurisdiction over a contractor's claim exceeding $50,000 [13] submitted without a certification as to its accuracy and to the contractor's belief that it is entitled to the amount claimed, the basis for such holdings lie in provisions of the Contract Disputes Act, which Act does not apply to the District of Columbia. *See Civil Constr., LLC*, CAB Nos. D-1294 *et al*., 2013 WL 3573982; *JH Linen, LLC*, CAB No. D-1366, 2014 WL 6468189 (Nov. 14, 2014).

II. WASHINGTON GAS INTERFERENCE

A. Constructive Change

Appellant argues that it is entitled to an equitable adjustment for the delay to its work because of interference by Washington Gas. The basis for the claimed equitable adjustment is that, according to Appellant, the contract provided that Pepco would be the only utility performing utility work while Appellant worked on the 18th Street project. (Post Hearing Brief of Appellant Fort Myer Construction Corp. 5, 31)(hereafter Appellant's Post Hr'g Br.) Appellant argues that Washington Gas's lines should have been relocated before Appellant was awarded the contract, and had that been done, Washington Gas would not have been on the site relocating gas lines and interfering with Appellant's work during Appellant's contract performance window. (*Id*.)

Thus, Appellant argues that the District "constructively changed Fort Myer's contract when it neglected" to coordinate the relocation of Washington Gas lines before awarding the contract. (Appellant's Post Hr'g Br. 29.) This interference, according to Appellant, "significantly changed the nature of the project that Fort Myer was to perform, caused Fort Myer to perform additional work that it never anticipated, and fundamentally changed the way in which Fort Myer performed its work in the early part of the project." (*Id*.)

As Appellant notes, "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." (Appellant's Post Hr'g Br. 27) (citing *Weigel Hochdrucktechnik GmbH & Co. KG*, ASBCA No. 57207, 12-1 BCA ¶ 34,975).) In *District of Columbia v. Org. for Envtl. Growth, Inc.*, 700 A.2d 185 (D.C. 1997), a case cited by Appellant, the District required the contractor to attend more meetings than the contract called for, and the contractor claimed the extra costs for performing work beyond the scope of its contract. The Court of Appeals upheld the

[13] Under current federal law, the threshold for certification has been raised to $100,000. *See* 41 U.S.C. § 7103(b) (2011).

Board's determination that that was a constructive change entitling the contractor to additional compensation.[14] The Court concluded,

> 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." A "change" is established when the actual performance goes beyond the minimum standards required by the contract. 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. *OFEGRO,* HUDBCA Nos. 88–3410–C7, 89–4469–C7, 91–3 BCA ¶ 24,206, 1991 WL 144232.

District of Columbia v. Org. for Envtl. Growth, Inc., 700 A.2d 185, 203.

B. Interpretation of Contract

To establish that the work Appellant was required to perform on the project was different from the work called for under the contract, Appellant must establish "the minimum standards required by the contract" with respect to whether Washington Gas would be relocating its gas lines during Appellant's project. "[T]he determination as to whether a constructive change has occurred is driven by the contract's language." *Weigel Hochdrucktechnik GmbH & Co. KG*, ASBCA No. 57207, 12-1 BCA ¶ 34,975 (citing *Aydin Corp. v. Widnall*, 61 F.3d 1571, 1577 (Fed. Cir. 1995)).

In support of its interpretation that the parties' contract required gas line relocations before Appellant commenced contract performance, Fort Myer asserts three arguments. First, Appellant argues that the language of Special Provision 23, UTILITY STATUS (FF 22), which advises that the District DDOT "maintains coordination with the public utility companies during the preliminary engineering and the construction phases of the project" meant that the District would have arranged for relocation of the gas lines before award so Appellant would have had no need to delay or reschedule its work because of Washington Gas's relocation work on the site. (Appellant's Post Hr'g Br. 31-32.)

Second, from the absence of detailed specifications for Washington Gas's work in the contract comparable to the provisions addressing Pepco's work, Appellant argues that the gas lines were to be relocated before contract award. (Appellant's Post Hr'g Br. 30-32.) As stated by Appellant, "the absence of references to gas line relocations in the Special Provisions [make it] reasonable for Fort Myer to expect that the gas line relocations would be completed in advance of the contract work. (*Id*. at 32.)

Finally, the UTILITY STATUS provision (FF 22) specifically advised that "[e]xcept for PEPCO, no utility company work outside the scope of the project is

[14] The D.C. Court of Appeals remanded the issue to the Board because it disagreed with the Board's calculation of extra costs. *Id.*, at 205.

anticipated" (aside from incidental work like verifying utility lines shown on the plans). Appellant considers this a representation on which it could rely, and a contract requirement. (Appellant's Post Hr'g Br. 29-32.) In this regard, Special Provision 105.05 is consistent with Appellant's view, representing that the District will notify affected utilities and that the utility owner, here Washington Gas, will perform the utility work at no cost to the contractor. That section notes, "It is anticipated that utility or vault work to be performed by others will not interfere with work under the contract." (FF 23.)

Based on all of the above, the Appellant argues that since the gas lines had to be relocated before Appellant could install the catch basins (FF 28), the only conclusion to be drawn from the contract is that the relocations would occur before Appellant was awarded the contract (or directed to proceed), and that Washington Gas would not be working on the site during Appellant's performance. (Appellant's Post Hr'g Br. 32.)

It is not disputed that the gas lines had to be relocated before Appellant could install the catch basins, and we have so found. (FF 28.) The issue is whether having Washington Gas working on the site and allegedly interfering with Appellant's work was a change to the contract entitling Appellant to an equitable adjustment. Appellant argues that the natural reading of the UTILITY STATUS provision is that no utility but Pepco would be performing work on the site along with Appellant. (Appellant's Post Hr'g Br. 32.)

We conclude that Appellant is not entitled to an equitable adjustment based on constructive change. The fatal flaw in Appellant's proposed interpretation of the contract as providing Appellant exclusive access to the site except for Pepco's work, lies in the inclusion in the drawings of the gas lines in their pre-relocation positions and the notations "GAS LINE TO BE RELOCATED" in at least 10 places in the plans. (FF 27.) In interpreting the contract, all parts of a contract must be read together, and in resolving an interpretation dispute, we will not render any contract provision meaningless. *See A&M Concrete Corp.,* CAB Nos. D-1314, D-1330, D-1401, 2013 WL 7710333 (Dec. 9, 2013) (citing *Grunley Constr., Inc.*, CAB No. D-910, 1993 WL 763511 (Sept. 14, 1993)) (other citations omitted). Appellant's interpretation depends upon doing just that, i.e. it reads out of the contract or renders meaningless the inclusion on the plans of the gas lines in their conflicting positions with the designation GAS LINE TO BE RELOCATED.[15] If the relocation had already occurred, it would have been error to include the lines' original, unrelocated locations on the plans, and there would have been no need to highlight the 10 locations of conflict where "GAS LINE TO BE RELOCATED" appeared on the plans. (FF 27.)

[15] Additionally, if a contract "contains general and specific provisions which are in any respect inconsistent, the provision directed to a particular matter controls over the provision which is general in its terms." *Urban Serv. Sys. Corp.,* CAB No. D-901, 48 D.C. Reg. 1518, 1521 (Apr. 18, 2000) (citations omitted); *see also Advantage Healthplan, Inc.,* CAB Nos. D-1239, D-1247, 2013 WL 6042884 (Oct. 4, 2013). The specific references to the gas lines to be relocated would prevail over the general UTILITY STATUS provisions.

The District failed to follow its usual practice of notifying and coordinating with utilities, here Washington Gas, that would be affected by the road reconstruction project. (FF 25, 32, 34.) However, Appellant has not shown that a pre-contract failure by the District to follow its usual practice regarding Washington Gas is a breach that overcomes the plain indications in the solicitation and contract that the gas lines had not been relocated before Appellant's project was to begin.[16] (Appellant's Post Hr'g Br. 29, 39-40.)

There are other weaknesses in Appellant's analysis of the contract language. For example, Appellant has failed to direct us to any part of the contract to indicate that the language of the UTILITY STATUS clause to "maintain[] coordination" with public utility companies during the design phase (FF 22) means the gas lines would have been relocated before award of the contract. Additionally, the statement that no interference from utilities is anticipated as set forth in Standard Specifications 105.05, is ameliorated by the concluding language, "[H]owever, should work by others become necessary during the life of the contract, the Contractor shall cooperate accordingly." (FF 23.) Plainly, 105.05 did not eliminate the risk that utility owners would be working on the site while Appellant was performing the contract.

Thus, we find that Appellant's interpretation that the contract affords Appellant exclusive access to the work site but for Pepco's work is unreasonable. The contract specifically identified the Washington Gas lines and provided unmistakably that they were to be relocated. "If the plain language of the contract is unambiguous on its face, the inquiry ends, and the contract's plain language controls." *Hunt Constr. Group, Inc. v. United States*, 281 F.3d 1369, 1373 (Fed. Cir. 2002).

C. Was the contract language ambiguous?

Even were we to find Appellant's interpretation reasonable, which we do not, the outcome would be the same. If Appellant's interpretation were found reasonable, this would result in two reasonable interpretations – one that the gas lines were to be relocated within the time frame of Appellant's contract (the District's) and one that Pepco would be the only utility working on the site based on the assumption that the lines would be relocated before contract award (Appellant's). If contract language is susceptible to more than one reasonable interpretation, it is ambiguous. *See E.L. Hamm & Assocs. v. England*, 379 F.3d 1334, 1341 (Fed. Cir. 2004) ("ambiguity exists when a contract is susceptible to more than one reasonable interpretation") (citations omitted).

D. Request for Clarification

[16] The District's pre-contract failure to notify Washington Gas is not a contract breach as the contract had not come into being at the time Appellant alleges the District neglected its "duty" to coordinate. *See CAE USA, Inc.*, ASBCA No. 58006, 13 BCA ¶ 35,323 ("Implied duty to cooperate and of good faith and fair dealing does not arise until after contract award."); *Scott Timber Co. v. United States*, 692 F.3d 1365, 1372 (Fed. Cir. 2012).

Generally, "[w]hen a dispute arises as to the interpretation of a contract and the contractor's interpretation of the contract is reasonable, we apply the rule of *contra proferentem*, which requires that ambiguous or unclear terms that are subject to more than one reasonable interpretation be construed against the party who drafted the document." *Turner Constr. Co. v. United States*, 367 F.3d 1319, 1321 (Fed. Cir. 2004); *see also A n A, Inc.*, CAB No. D-1022, 48 D.C. Reg. 1560, 1562 (July 19, 2000). However, if "the ambiguity or lack of clarity was sufficiently apparent" on the face of the solicitation before the contract was awarded, the contractor is required "to inquire as to that provision before entering into the contract," and it is barred from later pressing its own interpretation if it failed to do so. *Turner Constr. Co.*, 367 F.3d at 1321.

Appellant's construction of the contract language to mean that the gas lines would have been relocated before it was awarded the contract, or at least before it was directed to commence replacement of the catch basins, creates an obvious inconsistency with the express inclusion of the gas lines in their original positions in the solicitation and contract plans and the language that they were to be relocated. Moreover, other prominent provisions of the contract required Appellant to "verify the existence of all utilities" that could be damaged by its work (FF 19), "consider the location of existing utilities in determining contract time" (FF 18), be responsible for ascertaining the "conditions which can affect the work and the cost thereof "(FF 20), and receive only a time extension as compensation for changes in the work "made necessary by existing utilities or others performing work within or adjacent to the project" (FF 21). These provisions were broad enough to at least raise questions about Appellant's conclusion that it would not be working around any utility work except Pepco's. Consequently, Appellant was bound to inquire of the contracting officer before bidding on the contract. *A n A, Inc.*, CAB No. D-1022, 48 D.C. Reg. 1560, 1563.

Appellant's failure to inquire into the obvious inconsistencies between the indications in the contract plans that the gas lines had not been relocated and its interpretation that they would be relocated before it received award of the contract defeats its claim that the contract provided that only Pepco would be working on the site. This is the type of discrepancy, omission or conflict that should have alerted Appellant as a reasonable bidder of a difference in interpretation. *See Jamsar, Inc. v. United States*, 442 F.2d 930, 934-35 (Ct. Cl. 1971); *Ana Towing & Storage, Inc.*, CAB No. D-1176, 50 D.C. Reg. 7514, 7516 (June 25, 2003). "Rather than seek clarification when it was in a position to do so, appellant, by its inaction, effectively precluded the District from taking steps to avoid the dispute which is before us today." *Technical Constr. Inc.*, CAB No. 730, 36 D.C. Reg. 4067, 4084 (Mar. 14, 1989). The solicitation invited such inquiries regarding any questions on the solicitation. (FF 2, 5.)

E. Appellant's Actual Knowledge

Appellant argues that it reasonably understood when bidding that the gas lines would have been relocated before award or at least before it was given direction to begin work on the project. It was DDOT's practice to work with affected utilities during the design phase of a project (FF 25), and, in fact, Appellant's staff in its past experience

bidding on District of Columbia street reconstruction projects had encountered similar road projects where relocation of conflicting utilities had occurred before contract award (FF 31.)

Appellant is an experienced road construction contractor bidding on 10-12 District street reconstruction projects per year (FF 31), and in this case, Appellant's personnel reviewing the solicitation and preparing Appellant's bid noticed the indications that the gas lines had not been relocated. (FF 29.)

The evidence supports a conclusion that Appellant reasonably understood that the Washington Gas lines would not have been relocated before Appellant was required to perform its contract work. Where a contractor seeks recovery based on its interpretation of an ambiguous contract, it must show that it relied on this interpretation in submitting its bid. *Edward R. Marden Corp. v. United States*, 803 F.2d 701, 705 (Fed. Cir. 1986) (citing *Dale Ingram, Inc. v. United States*, 475 F.2d 1177, 1185; *Astro-Space Labs., Inc. v. United States*, 470 F.2d 1003, 1010 (Ct. Cl. 1972); *WPC Enters., Inc. v. United States*, 323 F.2d 874, 876 (Ct. Cl. 1963)) (citations omitted).

> This rule is aimed at preventing contractors from recovering additional compensation under a contract based on a mere afterthought, *i.e.*, based on an interpretation of the contract not contemplated by the contractor at the bidding stage. Put another way, the actual-reliance rule forces the contractor to prove that it has *actually been injured* as the result of the government's inclusion of a latently ambiguous provision in the contract. If the contractor did not *actually rely* on its interpretation when formulating its bid, it cannot later claim that it will lose money if its post-bid interpretation is not adopted.

Fry Communications, Inc. v. United States, 22 Cl. Ct. 497, 510 (1991).

Although Appellant included no amount in its price submission for coordinating with Washington Gas on relocating its lines (FF 31), it understood before bidding the significance of the inclusion in the plans of the gas lines and the GAS LINE TO BE RELOCATED labels and understood that the Washington Gas lines had not been relocated as of the time of bidding. (FF 29.)[17] With this knowledge that Washington Gas

[17] Appellant's estimator testified regarding the preparation of Appellant's bid:

Q Okay. Now, isn't it true that you reviewed this drawing [Sheet 31] and you saw the indication of gas line relocation, isn't that correct?

A Yes.

Q And that is telling you that Washington Gas will be relocating gas lines, isn't that correct?

A Yes, it tells us that there [they're] going to be relocating the gas line, but it doesn't tell us when exactly they are –

had not relocated the lines, Appellant did not rely on its present interpretation,[18] and the rule that ambiguities are resolved against the drafter does not apply. *See Dale Ingram, Inc. v. United States*, 475 F.2d 1177, 1185-86.

We find that Appellant did not rely on the interpretation that it urges now: that the contract guarantees it exclusive access to the worksite but for Pepco. As a contract interpretation matter, we find that any assumption by Fort Myer that the relocation of gas lines would occur before the District expected Appellant to begin performance was unreasonable, given the language in the contract. Even were we to find the contract ambiguous, given the inconsistencies between the contract language and Appellant's interpretation, we find that a request for clarification was in order.

III. IS THE DISTRICT RESPONSIBLE FOR DELAYS TO APPELLANT'S PROGRESS CAUSED BY WASHINGTON GAS?

Once we reject Appellant's argument that the contract provided that Pepco would be the only utility working on the site during Appellant's performance period, the issue becomes whether the District is liable for any delays caused by Washington Gas's alleged interference with Appellant's work.

The claim that the District is responsible for interference by Washington Gas is analogous to claims of interference by another contractor of the Government. In those cases, if the Government acted diligently in administering the second contractor's work, it will not be found liable for interference with the claimant's work on the project. *See Star Communications, Inc.*, ASBCA No. 8049, 1962 BCA ¶ 3538; John Cibinic, Jr., Ralph C. Nash, Jr., & James F. Nagle, *Administration of Government Contracts* 586 (4th

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Q I understand that. I understand –

A – doing that.

Q – but it's telling us it's going to be relocated, correct?

A Yes.

(Hr'g Tr. vol. 2, 558:15 – 559:9.)

[18] Appellant's estimator testified

Q And you know that's [relocation of the gas lines] not Fort Myers scope of work because Fort Myer don't [sic] relocate gas lines, is that correct?

A Yes.

Q And so therefore Washington Gas would be on the site doing [during] Fort Myers Construction to relocate the gas lines, isn't that correct?

A Yes

(Hr'g Tr. vol. 2, 561:15 - 562:2.)

ed. 2006). Here, the District did not undertake to be responsible for Washington Gas delays, *see Paccon, Inc. v. United States*, 399 F.2d 162 (Ct. Cl. 1968), so unless Appellant demonstrates a lack of diligence by the District in addressing Washington Gas's performance, the District will not be liable for any delays to Appellant's work caused by Washington Gas.

There is no showing that the District wielded any special control over Washington Gas, such that it had a heightened responsibility to ensure that Washington Gas did not disrupt Appellant's work. Appellant argued that the District continued coordination with utilities on the site after the Notice to Proceed notwithstanding the provision in the UTILLITY STATUS provision that Appellant would have responsibility for coordination during the construction phase. (Appellant's Post Hr'g. Br. 8-9.) However, the clause contemplated that both Appellant and the District would coordinate with utilities after the contract was awarded, i.e. during the construction phase. (FF 23.) Neither had exclusive control over coordinating with Washington Gas.

When a party outside the control of either party interferes with the contractor's progress, the District will generally not be held liable unless some warranty is found. *See* John Cibinic, Jr., Ralph C. Nash, Jr., & James F. Nagle, *Administration of Government Contracts* 586 (4th ed. 2006). It remained the District's *and* Appellant's responsibility specifically under the UTILITY STATUS provision to coordinate with Washington Gas (FF 22), but delays resulting from Washington Gas's lack of diligence are beyond the control of and not the fault of either Appellant or the District. *Star Communications, Inc*., ASBCA No. 8049, 1962 BCA ¶ 3538.

Appellant and Washington Gas accused each other of delaying work on the project (FF 40, 42, 46, 48, 49, 53), and on this record we cannot determine which was responsible. In any event, Appellant has not shown that during the contract period the District guaranteed Washington Gas would not interfere or that the District was not diligent in working with Washington Gas.[19] Accordingly, there is no basis for finding the District responsible for any delay to Appellant's work stemming from Washington Gas' utility work on the site.

IV. WATER MAIN DELAY

A. Suspension of Work

In the REA, Appellant claimed that the District's delay in processing a change order for the repair of the leaking 48-inch water main was a cause of delay on the project. According to Appellant's expert, although the repair of the water main was not on the project's critical path when it was discovered in late 2010, by the time the District

[19] The District made at least one attempt to address Washington Gas's progress. DDOT asked Volkert to draft a letter to Washington Gas regarding their schedule (FF 51, 52), which was apparently communicated to Washington Gas, and prompted a reply from the gas company representative explaining the reasons for delay and expressing a willingness to cooperate with Appellant. (FF 52.)

processed Change Order 3, it was a delaying factor. The expert attributed 104 days of delay to the leaking water main and its repair. (Appellant's Hr'g Ex. 97, p. 9.)

The Suspension of Work clause allows recovery for increased costs if the contractor shows that the District unreasonably delayed part of the contract work. (FF 11.) *See Chaney and James Constr. Co. v. United States*, 421 F.2d 728 (Ct. Cl. 1970); *Ebone, Inc.*, CAB Nos. D-971, D-972, 45 D.C. Reg. 8753, 8769 (May 20, 1998).

B. Effect of Release included in Change Order 3

The District argues that Appellant's claim related to the leaking 48-inch water main is barred because the release included in Change Order 3 and the District's payment of the agreed upon consideration (FF 62) constituted an accord and satisfaction. (Appellee District of Columbia's Post Hr'g Br. 30-31, 72-73)(hereafter Appellee's Post Hr'g Br.) As the party asserting the affirmative defense, the District bears the burden of proving an accord and satisfaction. *See Jimenez, Inc*., ASBCA No. 52825, 01-1 BCA ¶ 31,294. 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." *Prince Constr. Co./W.M. Schlosser Co., Joint Venture*, CAB Nos. D-1369, D-1419, D-1420, 2013 WL 7710334 (Dec. 9, 2013) (citations omitted).

The only one of the elements at issue in this proceeding is the third: whether there was a meeting of the minds. The change to the contract work regarding the water main repair was a proper subject for a release; the parties executing the agreement were authorized to do so; and there was consideration, although no funds flowed to Appellant because the amount of the change order for the repair was set off against a credit due the District. (FF 62.)

Appellant concedes that Change Order 3 addressed the water main repair and that Appellant executed a waiver of all claims "for all costs and time associated with this change order," and waived "all rights to make any further claims arising out of or resulting from this change order." (Appellant's Reply Br. 11) However, Appellant argues that the release does not extend to the administrative delay it alleges occurred in processing the change order:

> Administrative processing delays are not delays "arising out of or as a result of this change order" or "associated with" it. Instead, they are the consequence of the absence of a change order. Fort Myer was delayed along the critical path by having to wait for the District to issue Change Order #3, not by the work it directed.

(Appellant's Reply Br. 11-12.) Appellant argues that the compensation in the change order covered only the cost of repairing the water main and did not cover delay damages to Appellant resulting from the alleged unreasonable delay in processing the Change Order No. 3: the leak was discovered in October 2010, a solution reached in November

2010, yet the change order was not finalized until March 2011. (FF 62.)

Where the language of a contract modification unambiguously releases the Government from further liability for the changed work, no further compensation is due the contractor. *Prince Constr. Co./W.M. Schlosser Co., Joint Venture*, CAB Nos. D-1369, D-1419, D-1420, 2013 WL 7710334 (citations omitted).

The release included in Change Order 3 was broad and all encompassing, and we conclude that Appellant thereby waived any claim relating to the leaking water main repair, including the time taken by the District to resolve the issue. The delay in processing was known to Appellant, and, in fact, Appellant had repeatedly objected to the delay. (FF 58-61.) Appellant had already expressed concern that the time taken to issue the change order might cause project delay. (FF 60, 61.) If Appellant wished to except any potential delay costs from the release that is broad and all encompassing on its face, it should have stated its intention to reserve delay claims before executing Change Order 3 including the release. *See also*, *Forney Enters., Inc.*, CAB No. D-1383, 2015 WL 7008722 (Nov. 10, 2015)(general release enforced against contractor where there was no mutual mistake, oversight, fraud or duress).

Accordingly, we find that any delay associated with the discovery of the leaking water main and its repair and the alleged unreasonable delay between the two were included within the scope of the release. Appellant acknowledged that there was "no impact to the current contract schedule based on this process," and waived further damages. (FF 62.) Accordingly, insofar as Appellant seeks recovery due to the leaking water main, including any delay in processing Change Order 3 for its repair, it is denied.

V. TRAFFIC SIGNAL CONTROL CABINETS

In supporting its claim for an equitable adjustment to recognize delay damages, Appellant no longer contends, as it did in the REA, that Pepco interference was a cause of the project delay Appellant experienced. (FF 78, n. 12.) Instead, Appellant argues, based on its expert's report, that the delay beyond that resulting from Washington Gas interference, was caused by the District's delay in activating the traffic signal control cabinets, which Appellant contends was concurrent with the delay resulting from processing the change order for repair of the leaking water main. (Appellant's Post Hr'g Br. 20; Appellant's Reply Br. 7-10.)

A. Is the claim of delay caused by the District's failure to activate the traffic signal control cabinets a *new* claim?

Appellant did not mention in its REA any delay to the project stemming from the District's failure to activate the traffic control cabinets. (FF 78, 79.) The claim related to the traffic control cabinets is asserted at this stage because it was identified by Appellant's expert witness as the driving factor in project delay of 126 days. (Appellant's Hr'g Ex. 97, p. 9.)

The District argues that assertion of this claim for delay caused by the District's failure to activate the traffic signal control cabinets is a new claim, not included in Appellant's REA or considered by the contracting officer in his decision. The District urges that as a new claim it is beyond the jurisdiction of the Board. We agree with the District.

B. Jurisdiction of the Board

Section 360.03(a)(2) of the District of Columbia Code, authorizes our jurisdiction over "any appeal by a contractor from a final decision by the contracting officer on a claim by a contractor, when such claim arises under or relates to a contract." We have noted 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 (Jan. 27, 2012); *Friends of Carter Barron Found. of the Performing Arts*, CAB No. D-1421, 2011 WL 7428966 (Nov. 15, 2011); *Advantage Healthplan, Inc.*, CAB Nos. D-1239, D-1247, 2013 WL 6042884 (Oct. 4, 2013). If such a claim is brought initially before the Board, it is considered a "new claim," i.e. one that does not arise from the "same set of operative facts" as the claim the contractor submitted to the contracting officer. *Keystone Plus Constr. Corp.*, CAB No. D-1358, 2012 WL 554443; *Advantage Healthplan, Inc.*, CAB Nos. D-1239, *et al*., 2013 WL 6042884 (Oct. 4, 2013).

The claim that Appellant urges in this proceeding regarding the District's failure to promptly activate the traffic control cabinets originates in its expert's analysis of the delays affecting the 18th Street project. (Appellant's Hr'g Ex. 97, p. 9.) Appellant's view is that this does not constitute a new claim because "the electrification of cabinets involves facts that are 'springing from the same factual claim' that was presented in the Claim, i.e., the upgrade of PEPCO's work." (Appellant's Reply Br. 9.) It claims these issues were addressed in the REA because Appellant addressed in the REA interference with its progress caused by Pepco. Appellant argues:

> Although the Claim [the REA] did not refer with specificity to the issues with the cabinets, activation of cabinets involved electrification of those cabinets and the related traffic signals, which involve electrical utility work performed by PEPCO. Tr. at 1314:8-15:8; 1740:5-1741:4; 1821:8-10.

(Appellant's Reply Br. 8.)

However, as discussed above, to determine whether a claim not specifically mentioned in the REA submitted to the contracting officer is a new claim not subject to the Board's jurisdiction, we look to whether the claim at issue arises from the same operative facts as the original REA claim such that the contracting officer would have had adequate notice of the nature of the claim when issuing his decision. We find the claim that the project was delayed by the District's failure to activate the traffic control cabinets to be a *new* claim.

What has changed here is the *nature* of the claim itself. Instead of seeking delay damages because Appellant was delayed by Pepco and by the leaking water main, now Appellant claims that it suffered a delay caused by the District's failure to activate the traffic control cabinets. The requirement that a claim be submitted to the contracting officer first is a requirement of our jurisdiction, but a practical effect of the requirement is that it allows the contracting officer to consider the claim before the parties resort to litigation. And the only way the claim can be addressed effectively is if the contracting officer knows its basis. The claim submitted to the contracting officer must provide "adequate notice of the basis and amount" of the claim later submitted to a board or court. *Keystone Plus Constr. Corp.*, CAB No. D-1358, 2012 WL 554443 (no jurisdiction over delay claim not asserted in claim to contracting officer).

Appellant made a clear statement of a claim to the contracting officer in its REA, but that claim was not the claim urged now that the cause of the delay was the District's failure to activate the traffic control cabinets. Since Appellant did not include the traffic control cabinet activation claim in its REA it cannot assert it for the first time now before the Board. As stated in *Croman Corp. v. United States*, 44 Fed. Cl. 796, 801-02 (1999),

> It would subvert the statutory purpose of requiring contractors first to submit their claims to the contracting officer if plaintiffs were allowed first to submit a claim based on an unexamined factual premise and then permitted later to investigate for the first time and set forth an altered factual basis for a claim before this court.

Id. (citations omitted; footnote omitted).

Here, the REA specifically mentioned three events as causing interference with Appellant's work and sought damages for the resulting delay. (FF 78.) The contracting officer specifically considered those three events and denied the claim because he concluded that each of the three causes was actually not additional work for Appellant but that the three were required by the contract: the contract plans indicated that Washington Gas would be relocating its gas lines, that Pepco would be upgrading its facilities during the project, and identified the shallow water main location. (FF 81.) The REA did not mention that the District's failure to activate the traffic control cabinets in a timely manner caused a project delay, and the contracting officer did not consider it.[20] By changing the cause of alleged contract delay, Appellant failed to provide the contracting officer adequate notice of the basis of the claim as now fashioned.

Moreover, in its Reply Brief Appellant did not blame the delay on the District for

[20] Additionally, there was little information in the record of the project that would have alerted the contracting officer to a possible claim related to activation of the traffic control cabinets. During the project Appellant regularly complained that it was being delayed by the activities of Washington Gas (FF 46-49, 53), Pepco (FF 67), and of the delay in processing Change Order 3 (FF 61). There are no similar contemporaneous notifications that the District's failure to activate the traffic signal control cabinets was a cause of delay to Appellant. In fact, there is little mention of the cabinets in the record of the project. (FF 69-76.)

failure to activate timely the traffic control cabinets but rather directly laid the blame for delays on Pepco's alleged failure to timely perform its work. "DDOT's coordination efforts with PEPCO were a primary focus of the Claim, and electrical utility work, performed by PEPCO, was discussed extensively in the Claim." Appellant characterized the delay as caused by *Pepco's* failure to perform its work involving bringing power to the cabinets in a timely fashion.[21] (Appellant's Reply Br. 8.)

As discussed above in Section III, the District is not responsible for delays caused by a third party such as Pepco. We find insufficient connection between Appellant's complaints in the REA of delays caused by Pepco and its current claim that delay was caused by the District's failure to activate the traffic control cabinets timely to find the latter within the same set of operative facts. We find it was a new claim not within the jurisdiction of the Board.

VI. OTHER CAUSES OF DELAY

A. Differing Site Condition

In its brief, Appellant argues that unmarked utilities, leaking pipes, and other disruptive subsurface obstructions to the progress of Fort Myer's work constitute Differing Site Conditions under Article 4 of the contract (FF 8). (Appellant's Post Hr'g Br. 43-44.) The elements for a differing site condition are particular and different from those needed to prove a constructive change, as claimed in Appellant's REA.

The Differing Site Conditions clause of Standard Specifications Article 4 (FF 8) authorizes an equitable adjustment for two types of differing site conditions. *James A. Federline, Inc*., CAB No. D-834, 41 D.C. Reg. 3853, 3860-61 (Dec. 15, 1993); *Ft. Myer Constr. Corp*., CAB No. D-859, 40 D.C. Reg. 4655, 4675-76 (Nov. 3, 1992); *Technical Constr. Inc*., CAB No. D-730, 36 D.C. Reg. 4067, 4077-78 (Mar. 14, 1989), *Prince Constr. Co./W.M. Schlosser Co., Joint Venture*, CAB Nos. D-1369, D-1419, D-1420, 2013 WL 7710334.. In order to establish the existence of a Type I differing site condition, a contractor must prove that it encountered a subsurface or latent physical condition at the site that differed materially from those indicated in the contract. *Dennis T. Hardy Electric, Inc.*, ASBCA No. 47770, 97-1 BCA ¶ 28,840. Proof of a Type II differing site condition requires that the evidence establish the existence of an unknown physical condition at the site, of an unusual nature, which differs materially from that ordinarily encountered and generally recognized in inhering in work of the character provided for in the contract. *Id.*; *CDM Constructors, Inc.*, ASBCA No. 59524, 15-1 BCA ¶ 36,097.

[21] Appellant characterized the delay as caused by *Pepco's* failure to perform its work in a timely fashion (Appellant's. Reply Br. 8), notwithstanding its counsel's representation at the hearing that it no longer sought damages for delay attributable to Pepco. (Hr'g Tr. vol. 8, 2452:6-10) ("We do not intend to claim that the PEPCO work that's described in Section 22 or whatever it is of the special provisions caused critical path delays to Fort Myer's work."). Appellant's opening brief did not mention any claim based on Pepco's delay.

This differs from the elements of a constructive change, which require the claimant to demonstrate the occurrence of a bona fide "change" requiring the contractor to perform beyond the contract minimum requirements and the issuance of an "order" by a government representative. *See OFEGRO,* HUDBCA Nos. 88–3410–C7, 89–4469–C7, 91–3 BCA ¶ 24,206 (citations omitted); *see supra* Section II.A. While the REA mentioned unmarked utilities as contributing to its delay, it did not assert a claim based on a differing site condition. (Appellant's Hr'g Ex. 3, DC416.)

Consequently, under our previous analysis, this is a new claim not within the Board's jurisdiction. *See CDM Constructors, Inc.*, ASBCA No. 59524, 15-1 BCA ¶ 36097 (claim was a new claim where the contractor sought to add a differing site condition claim where the claim to the contracting officer did not articulate a differing site condition claim, nor did it identify the operative facts of such a claim.).

B. Snow Event and Nuclear Summit

Appellant's expert addressed two additional delaying events, a snow event in January 2010 (FF 44) and a three-day project shutdown resulting from the nuclear summit meeting in April 2010 (FF 50). Neither of these alleged delaying events was mentioned in Appellant's REA submitted to the contracting officer. The District argues that they constitute new claims and are beyond the Board's jurisdiction. However, Appellant concedes that it was able to mitigate any delays resulting from those events and that it makes no claim for delay relating them. (Appellant's Reply Br. 10)("These days therefore do not contribute to Fort Myer's delay claim.").) We need not consider them further.

VII. CONCLUSION[22]

We have rejected Appellant's interpretation of the contract as including a requirement that the gas lines that conflicted with Appellant's work either had been relocated before Appellant scheduled its work on the catch basins, or would be so relocated before Appellant commenced performance. We found that the contract language indicated that Washington Gas would be relocating gas lines during Appellant's work. Moreover, there was ample evidence in the record that Appellant's staff was aware or should have been aware that the lines had not been relocated and that Appellant would be sharing the work site with Washington Gas. Accordingly, insofar as Appellant claims that its contract was constructively changed by the presence of gas lines to be relocated during performance of Appellant's contract work, it is denied.

We find that Appellant's claim for damages related to the alleged delay of the District in issuing Change Order 3 was waived by its agreement to the general release

[22] Both parties submitted testimony and reports of experts addressing calculation of the days of delay and monetary delay damages. As we have not found Appellant entitled to delay damages, we have no reason to discuss the two opposing arguments regarding the extent of delay and additional costs to which Appellant might be entitled. In other words, because Appellant has not prevailed on entitlement, we need not consider the evidence regarding quantum.

included in the change order. Insofar as Appellant claims delay damages related to the leaking 48-inch water main, including alleged delay stemming from the time taken for the District to formalize the change order, it is denied.

Appellant's claim for delay damages based on the alleged failure of the District to activate the traffic control cabinets timely is a new claim not presented to the contracting officer before its assertion before the Board, and we have no jurisdiction to consider it. It is dismissed without prejudice.

Appellant's claim for differing site condition damages related to striking unmarked utility lines is also a new claim, not presented to the contracting officer and therefore not within our jurisdiction. It is dismissed without prejudice.

Appellant has withdrawn its claim that its progress was delayed by the actions of Pepco performing on the site during Appellant's work. That claim is moot.

SO ORDERED.

Date: June 29, 2016

/s/ Marc D. Loud, Sr.
MARC D. LOUD, SR.
Chief Administrative Judge

CONCURRING:

/s/ Monica C. Parchment
MONICA C. PARCHMENT
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GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:	)	
	)	
KEYSTONE PLUS CONSTRUCTION CORP.	)	CAB Nos. D-1410 & D-1414
	)	(Consolidated)
Under Contract No. POAM-2005-C-0027-DW	)	

For the Appellant, Keystone Plus Construction Corporation: John Hardin Young, Esq., Sandler, Reiff, Young & Lamb, P.C., Brian Cohen, Esq., Greenberg & Spence LLC. For the District of Columbia: Brett A. Baer, Esq., Office of the Attorney General.

Opinion by Administrative Judge Monica C. Parchment, with Chief Administrative Judge Marc D. Loud, Sr., concurring.

OPINION
Filing ID #59341644

These two consolidated appeals arise under a contract between Keystone Plus Construction Corporation and the District of Columbia for renovation of the District's J.B. Johnson Nursing Center. Specifically, CAB No. D-1410 arises from the Appellant's appeal of the contracting officer's final decision denying its claim for a contract adjustment in the amount of $1,769,254.86, and assessing liquidated damages against Appellant in the amount of $1,725,000.00, for 1,150 days of delay as part of the same decision. The Appellant also challenges its subsequent termination for default by the District as improper under CAB No. D-1414.

For the reasons stated herein, we find Appellant entitled to delay damages for a total of 221 days of delay and deny the District's claim for liquidated damages. The District shall compensate the Appellant in accordance with the delay damage amounts awarded by the Board herein. We also find the District's termination for default to be improper and consequently convert it to a termination for convenience. Finally, we find that the Board lacks jurisdiction over the District's reprocurement claim because the record does not show that it was ever appealed to the Board.

FINDINGS OF FACT

Contract Award

1. Appellant, Keystone Plus Construction Corporation ("KPC" or "Appellant"), and the District of Columbia Office of Contracting and Procurement ("OCP"), on behalf of the Office of Property Management ("OPM") and the Capital Construction Services Administration

("CCSA") (collectively the "District"), entered into Contract No. POAM-2005-C-0027-DW (the "contract") on February 23, 2006,[1] in the amount of $4,300,000.00. (Revised Joint Pretrial Statement, Stipulations of Fact ("SF"), ¶¶ 1, 3; Appeal File ("AF") Ex. 15-2, at DC 1172-73; *see also* Appellant's Hr'g Ex. 1, at 1-2.)[2] The contract was a firm fixed-price contract (AF Ex. 15-2, at DC 1172), that called for the partial renovation of the J.B. Johnson Nursing Center ("J.B. Johnson" or the "Center"), a District-owned nursing facility located at 901 1st Street, Northwest in the District of Columbia. (*Id*.)

Contract Provisions

2. Under the contract, Appellant was required to provide all labor, materials and equipment for renovation of the Center. (*Id*. at DC 1185.) In particular, the contract work consisted of: (1) demolition and removal of existing partitions, ceilings, finishes, doors and frames, roofing, storefront/windows, mechanical, electrical, plumbing equipment and fixtures; (2) construction of partitions, equipment, finishes, doors and frames, storefronts, stair windows and roofing; (3) installation of all mechanical units, controls and devices, plumbing and electrical renovations; (4) exterior façade renovation with exterior insulation and finish system, water repellant treatment for existing concrete and masonry; (5) storefront modifications and exterior awning at Smokers Lounge; and (6) HVAC unit installation with new electrical service, conduit, and supports. (*Id.*)

3. The District's solicitation outlined contract deliverables in the "Scope of Work," "Specifications," "Drawings," and other documents, which were incorporated by reference into the contract. (*See generally* AF Exs. 15-1- 15-8; Appellant's Hr'g Ex. 110.)

4. The contract Specifications provided that the contractor was to perform the work in accordance with the OPM Specifications included as Attachment J.1 and Drawings included as Attachment J.2. (AF Ex. 15-2, at DC 1185.) The general character and scope of work were illustrated by the Drawings listed in Section J.1 which provided architectural, mechanical and plumbing specifications including the placement and schedule of the equipment required. (*Id.* at DC 1186, 1209; Appellant's Hr'g Ex. 110; *see, e.g.*, Hr'g Tr. vol. 4, 770:3-15, Sept. 19, 2013.)

5. The contract noted that certain sections of J.B. Johnson would be occupied during construction and, therefore, the contractor's renovation work in the building had to follow a precise sequence. (AF Ex. 15-2, at DC 1185.) Specifically, Section C.1.3 of the contract outlined this sequence of construction activities as follows:

[1] Although the parties have stipulated that the contract was awarded on February 23, 2006 (*see* SF ¶ 1), the signed copy of the contract was actually executed on February 1, 2006. (*See* Appellant's Hr'g Ex. 1, at 1; *see also* District's Hr'g Ex. 4, at DC 1598.)
[2] The Board has omitted leading zeroes from its citations to the pages of bates-numbered documents.

> Various wings of the J.B. Johnson Nursing Center will be occupied during construction. The Contractor shall first renovate the unoccupied north wing of the third floor. When construction is completed in this area, the District shall move the occupants in the south wing into the north wing and the Contractor shall renovate the south wing.

(*Id.*)

6. The contract's initial period of performance was 270 calendar days (Appellant's Hr'g Ex. 1, at 1; District's Hr'g Ex. 4, at DC 1598). Performance was to begin on March 20, 2006, the start date specified in the Notice to Proceed, and all work was to be completed on or before December 1, 2006.[3] (Appellant's Hr'g Ex. 2, at 3; District's Hr'g Ex. 4, at DC 1600.)

7. The contract incorporated the following documents by reference, and in the event of a discrepancy, the following Order of Precedence would apply: (1) Schedule for Construction, Alteration, Repairs Prices (Section-B); (2) Scope (Section C), Specifications (Attachment J.1.), Drawings (Attachment J.2); (3) Special Contract Requirements (Section H); (4) Contract Clauses (Section I); (5) US-DOL Wage Determination Rates (Attachment J.3); and (6) the 1973 STANDARD CONTRACT PROVISIONS ("SCP") for use with Specifications for District of Columbia Construction Projects. (AF Ex. 15-3, at DC 1231, sec. I.12.)

8. SCP Article 3, CHANGES, states "[i]f any change under this Article causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this Contract, whether or not changed by any order, an equitable adjustment shall be made and the Contract modified in writing accordingly." (SCP at 6.)

9. SCP Article 4, DIFFERING SITE CONDITIONS, provided the circumstances under which a contractor would be entitled to an equitable adjustment based upon encountering a differing site condition on the project. (SCP at 7.) Specifically, Article 4 provides that:

> The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of:
>
> 1. Subsurface or latent physical conditions at the site differing materially from those indicated in the Contract, and
>
> 2. Unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered or indicated in the Contract and

[3] It should be noted that 270 calendars days after March 20, 2006, is actually December 15, 2006, and not December 1, 2006.

> generally recognized as inhering in work of the character provided for in the Contract.
>
> The Contracting Officer will promptly investigate the conditions, and if he finds that such conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performance of any part of the work under the Contract, whether or not changed as a result of such conditions, an equitable adjustment shall be made and the Contract modified in writing accordingly.

(*Id.*)

10. Section H.1. of the contract stated that if the contractor failed to complete work within the specified time limits, it would be assessed liquidated damages in the amount of $1,500.00 per day, subject to the provisions of SCP Article 5, DELAYS. (AF Ex. 15-2, at DC 1195, sec. H.1.) SCP Article 5, TERMINATION-DELAYS, further provides the circumstances where liquidated damages may be assessed. (SCP at 7.) Accordingly, Article 5 provides that:

> If the Contractor refuses or fails to prosecute the work, or… fails to complete said work within specified time, the District may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work involving the delay.
>
> If fixed and agreed liquidated damages are provided in the Contract and if the District so terminates the Contractor's right to proceed, the resulting liability will consist of such liquidated damages until such reasonable time as may be required for final completion of the work together with any increased costs occasioned the District in completing the work.
>
> The Contractor's right to proceed shall not be so terminated nor the Contractor charged with resulting damage if:
>
> 1. The delay in the completion [of] the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including but not restricted to … acts of the District in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the District ... or delays of subcontractors or suppliers arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and such subcontractors or suppliers…; and
>
> 2. The Contractor, within 10 days from the beginning of any such delay, (unless the Contracting Officer grants a further period of time before the date of final payment under the Contract) notifies the Contracting Officer in writing of the causes of delay.

> The Contracting Officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when, in his judgment, the findings of fact justify such an extension.
>
> If, after notice of termination of the Contractor's right to proceed under the provisions of this Article, it is determined for any reason that the Contractor was not in default under the provisions of this Article, or that the delay was excusable under the provisions of this Article, the rights and obligations of the parties shall be in accordance with Article 6 [TERMINATION FOR CONVENIENCE OF THE DISTRICT].

(*Id.* at 7-8.)

11. SCP Article 8, PAYMENTS TO CONTRACTOR, states that the District would make progress payments monthly as the work proceeds, or at more frequent intervals as determined by the Contracting Officer, on estimates approved by the Contracting Officer. (SCP at 11.) The provision further provides that the District could retain 10 percent of the estimated amount of the progress payment until final completion and acceptance of the contract work. (*Id.*)

12. SCP Article 26, SUSPENSION OF WORK, states that the Contracting Officer may order the contractor to suspend, delay or interrupt all or any part of the work for such a period of time determined to be appropriate for the convenience of the District. (SCP at 16.) The provision further states that if the work is suspended or delayed by the Contracting Officer for an unreasonable period of time, an adjustment will be made for the increase in the cost of performance (excluding profit) necessarily caused by the unreasonable suspension, delay or interruption. (*Id.*) However, there would be no entitlement to these costs if the contractor's work would have otherwise been suspended, delayed, or interrupted by its own fault or negligence. (*Id.*)

13. The contract's DISPUTES clause provides that all claims against the District, relating to the underlying contract, be made in writing and submitted to the Contracting Officer for decision. (AF Ex. 15-3, at DC 1229, sec. I.8.) Upon either the Contracting Officer's written decision, or deemed denial (failure to issue a decision within the required time), the contractor has the right to seek further redress by appealing to the Contract Appeals Board.[4] (*Id.* at DC 1229-30.)

[4] SCP Article 7, DISPUTES, provides for the same. (SCP at 10.)

Parties Involved in the Project

14. The contract identified two contracting officers ("CO") for the project, Karen Hester and Diane Wooden. (*See, e.g.,* AF Ex. 15-2, at DC 1170, 1182, 1193; Appellant's Hr'g Ex. 99, at 1205.) Additional "acting" COs, Ramesh Sharma and Geoffrey Mack, also participated in providing direction for the contract. (*See, e.g.,* Appellant's Hr'g Ex. 3, at 4; Appellant's Hr'g Ex. 10, at 89.)

15. The Contracting Officer's Technical Representative ("COTR") for the contract was Amar Singh. (AF Ex. 15-2, at DC 1193-94.) Subsequently, in the fall of 2008, Adenegan Olusegun joined the J.B. Johnson project as the COTR. (Hr'g Tr. vol. 6, 1587:4-1588:7, 1589:5-9, Sept. 23, 2013.)

16. The contract drawings and specifications were prepared under a separate contract by Setty & Associates, Ltd. ("Setty"), a company that served as the District's architect-engineer for the J.B. Johnson project. (*See, e.g.,* AF Ex. 15-2, at DC 1185-86; Appellant's Hr'g Ex. 110; Hr'g Tr. vol. 7, 1842:9-12, Sept. 24, 2013.) Setty attended regular progress meetings with Appellant and other District officials and reviewed and approved Appellant's submissions concerning construction related activities throughout the contract's period of performance. (*See, e.g.,* Appellant's Hr'g Ex. 43, at 563; Appellant's Hr'g Ex. 67, at 687-88; Hr'g Tr. vol. 7, 1843:5-14.) Setty was also responsible for inspecting the contractor's work, and upon the contractor's request for inspection for Substantial Completion, Setty was required to prepare the Certificate of Substantial Completion or notify the contractor of any items that needed to be completed or corrected before the certificate could be issued. (District's Hr'g Ex. 10, at DC 2239-40; *see also* Hr'g Tr. vol. 6, 1459:2-1460:4.)

17. Keystone had no design responsibilities under the contract. (Hr'g Tr. vol. 4, 839:15-22.) The contract required them to install what was shown on the contract plans and specifications in accordance with these documents. (*Id.* at 840:1-4.)

Project Commencement and Discovery of Asbestos

18. It was later agreed that the date for the Appellant's commencement of the contract work would be March 6, 2006, and not the March 20, 2006, date originally stated in the Notice to Proceed. (AF Ex. 9-1, at 72.) However, the December 1, 2006, anticipated completion date for the contract remained unchanged. (*Id.*)

19. Neither the contract terms, nor the originally-incorporated specifications and drawings included any requirement for asbestos abatement or otherwise indicated that asbestos was

present on the worksite. (*See generally* Appellant's Hr'g Ex. 1; AF Exs. 15-1-15-8; Appellant's Hr'g Ex. 110.)

20. On March 6, 2006, Appellant mobilized at J.B. Johnson, and began demolition of ceiling tiles in the third floor north ("3N") wing, after which, one of Appellant's employees began to experience unexplained nasal bleeding. (Hr'g Tr. vol. 2, 86:1-15, Sept. 17, 2013.) In response, Appellant stopped work and notified the District of the issue after which Appellant engaged Volkert & Associates, Inc. ("Volkert"), a hazardous materials consultant, to test various materials for asbestos. (*Id.* at 86:16-87:9; Appellant's Hr'g Ex. 23, at 210.)

21. On March 9, 2006, Volkert reported that it had found asbestos throughout J.B. Johnson's 3N wing and basement mechanical room southwest corner. (Appellant's Hr'g Ex. 23, at 210.) Volkert's report recommended that all renovation and demolition be halted and the asbestos be remediated. (*Id*.) Thereafter, on March 21, 2006, based upon Volkert's findings and recommendations, the District ordered Appellant to contain and isolate the 3N wing and restricted the 3N wing to only licensed and trained asbestos professionals until all asbestos was removed from the area. (Appellant's Hr'g Ex. 3, at 26.)

22. OPM contracted with Volkert to develop specifications and drawings for asbestos abatement and provide asbestos assessment reports. (*See generally* Appellant's Hr'g Exs. 24-26.) Volkert issued its Asbestos Specification and Drawings for the 3N wing and basement mechanical room on May 12, 2006. (*See generally* Appellant's Hr'g Ex. 24.) In its follow-up June 10, 2006, report, Volkert issued its asbestos assessment based upon its inspection of the 3N wing, third floor south ("3S") wing, 4th floor south classroom, basement mechanical room, roof, first floor south wing smoking lounge, basement dishing [sic] washing room, basement laundry room, basement kitchen and outside façade. (*See* Appellant's Hr'g Ex. 25, at 255-58.) The June 10, 2006, inspection report concluded that asbestos was present in both the 3N and 3S wings, as well as the basement mechanical room, first floor south wing smoke lounge, basement dishing [sic] washing room, basement laundry room, basement hallway, basement dining area, fourth floor south classroom, the roof, the building's exterior and the kitchen. (*Id.* at 258-61.)[5]

23. Volkert's June 10, 2006, report repeated the recommendation that all renovation and demolition work be stopped, and further recommended that all of the asbestos containing material be removed before any construction work began that would disturb the asbestos materials. (*Id.* at 284.) On June 20, 2006, Volkert provided OPM with updated asbestos

[5] In a separate report, also dated June 10, 2006, Volkert stated that it had found lead paint throughout the interior of the Center, and on its roof. (*See generally* Appellant's Hr'g Ex. 27.) Following this, on June 20, 2006, Volkert provided the District with specifications and drawings for lead paint abatement. (*See generally* Appellant's Hr'g Ex. 28.) However, the District did not transmit a copy of Volkert's lead paint abatement specifications and drawings to Appellant until September 12, 2006. *(See generally* Appellant's Hr'g Ex. 29.)

remediation specifications and drawings, which now included the 3S wing and the other asbestos-containing areas identified in its June 10, 2006, inspection report. (Appellant's Hr'g Ex. 26, at 310.)[6]

24. The District directed that the asbestos abatement at the Center was to be limited to those areas of that wing which would be disturbed by the project renovations. (Appellant's Hr'g Ex. 30, at 474; Hr'g Tr. vol. 3, 520:3-20, Sept. 18, 2013.) Further, only a licensed and qualified asbestos abatement contractor could do the asbestos remediation work. (Appellant's Hr'g Ex. 30, at 474.)

25. Since Appellant was not licensed to perform asbestos abatement work, it hired a subcontractor, Apro Enterprises, Inc., to remove the asbestos-containing materials identified by Volkert. (Hr'g Tr. vol. 2, 85:20-22, 88:22-89:4; Appellant's Hr'g Ex. 32, at 505; Appellant's Hr'g Ex. 34, at 513.)

26. The asbestos abatement in the 3N wing commenced on August 7, 2006, but was not fully completed until on or around late August or early September 2006—roughly 180 days after the discovery of the asbestos. (Hr'g Tr. vol. 2, 97:10-98:13, Hr'g Tr. vol. 4, 901:15-20.)[7]

27. The District's expert testified that he considered the 3N wing asbestos abatement to be a situation that was very close to a "standby" situation meaning that the Appellant's work was effectively suspended while the asbestos abatement was taking place in the 3N wing. (Hr'g Tr. vol. 6, 1506:11-16.)

Mutually Executed Change Orders

28. Although they are not in dispute in this matter, in addition to the change orders discussed below, the District and the Appellant mutually signed and executed multiple change orders including: Change Order No. 1 (May 30, 2006); Change Order No. 3 (November 30, 2006); Change Order No. 4 (January 4, 2007); Change Order No. 9 (May 27, 2007); Change Order No. 10 (March 28, 2007); Change Order No. 11 (July 26, 2007); Change Order No. 12 (October 23, 2007); Change Order No. 13 (February 27, 2008); Change Order No. 14 (February 27, 2008); Change Order No. 15 (February 27, 2008); Change Order No. 16

[6] Volkert continued to provide hazardous material inspection services and remediation recommendations to the District throughout the contract's period of performance. (*See, e.g.*, Appellant's Hr'g Ex. 31, at 483-86 (a list of asbestos and lead-containing materials in the 3S wing that would be disturbed by construction, as identified by Volkert during an on-site inspection on June 18, 2007).)

[7] Asbestos abatement on the roof of the Center, however, was not completed until around December 5, 2006. (Appellant's Hr'g Ex. 42, at 556.)

(February 11, 2008); Change Order No. 17 (May 21, 2008); Change Order No. 18 (July 18, 2008); and Change Order No. 19 (July 18, 2008). [8]

Change Order 7 (Asbestos 3N Wing)

29. The District drafted a change order dated July 5, 2006, in an attempt to provide a contract adjustment to Appellant of $121,985.56 and a time extension of 161 days for asbestos remediation in the 3N wing and the basement mechanical room that was performed by the Appellant's subcontractor pursuant to Volkert's May 12, 2006, Asbestos Specification and Drawings.[9] (*See* Appellant's Hr'g Ex. 4, at 28-29.) Appellant originally sought a time extension of 181 days for this work, which the parties subsequently agreed to reduce to 161 calendar days during negotiations. (*See id.* at 28; Hr'g Tr. vol. 2, 97:10-98:13.)

30. On August 7, 2006, Appellant submitted a schedule impact analysis of the asbestos abatement work to the District. (*See* District's Hr'g Ex. 10, at 2582, 2777.) Following this, on September 20, 2006, representatives from OPM and Appellant met to discuss contract changes. (*See* District's Hr'g Ex. 11, at DC 2620; Hr'g Tr. vol. 2, 97:10-98:13.)

31. Handwritten notes from the September 20, 2006, meeting initialed by Appellant's president, Carlos Perdomo, and OPM project manager, Lanilta Farrior-Taylor, state that the parties had finally agreed to a contract extension of 161 days for the "asbestos related change" in the 3N wing. (*See* District's Hr'g Ex. 11, at DC 2620; Hr'g Tr. vol. 4, 796:8-18.)

32. On November 10, 2006, the District's on-site representative issued Field Work Authorization ("FWA") No. 6, which instructed Appellant to remove asbestos wrapping from pipes located inside the walls of the 3N wing. (*See* Appellant's Hr'g Ex. 8, at 67.) Draft Change Order No. 6, related to the asbestos removal, sought to compensate Appellant in the amount of $20,800.00, for work it performed to relocate plumbing risers and to repair walls, including walls damaged during removal of asbestos. (*See* AF Ex. 5; Hr'g Tr. vol. 3, 501:22-502:7.) However, while the District issued a purchase order for the changed work on February 9, 2007 (Appellant's Hr'g Ex. 8, at 68-71), Change Order No. 6 was never executed by the District (*See generally* AF Ex. 5).

33. On or about November 16, 2006, Appellant submitted a request for equitable adjustment ("REA") to CO Hester, in the amount of $573,699.00, for asbestos abatement in the 3N wing.

[8] At the hearing, the parties stipulated to the validity of the majority of the change orders that had been mutually executed between the parties including Change Orders 1, 3, 4, 5, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19. (Stipulations as to Admissibility of Trial Exhibits ("Stip. Tr. Ex.") 1). While the District did not stipulate to the admissibility and validity of Change Order 7, as discussed *infra*, this change order was clearly signed, and fully executed, by both the District and the Appellant. (Appellant's Hr'g Ex. 9, at 72.)

[9] This draft change order was initially referred to as "Change Order 2."

(District's Hr'g Ex. 11, at DC 2612.) Appellant stated that the REA related to the 161-calendar day delay, consistent with the parties' previous negotiations, and sought compensation for costs in addition to the $121,925.56 [sic] outlined in Change Order No. 2, which Appellant stated were only the "actual costs" (i.e. direct costs) for asbestos abatement. (*See id*.)

34. On February 7, 2007, Appellant's project manager Vicky Guzman contacted the District to inquire as to whether Change Order No. 7 would be issued related to asbestos removal for the 3N wing stating that "[t]he situation is starting to get out of hand." (Appellant's Hr'g Ex. 9, at 80.) In response, OPM employee Steven McKenzie stated that the change order would remit payment to Appellant for the direct costs associated with asbestos removal for the 3N wing, but that the District was still "researching the time issue in terms of a contract extension and delay claims as presented by Appellant." (*Id*.)

35. On February 9, 2007, Change Order No. 7 was issued, which provided Appellant with a contract adjustment in the amount of $121,986.00 to remove the asbestos-containing material identified in Volkert's May 12, 2006, report from the 3N wing and the basement mechanical room, which was the same work contemplated in the never-executed Change Order No. 2. (*See id.* at 72-73; Appellant Hr'g Ex. 4, at 28-29; *see also* Hr'g Tr. vol. 2, 107:14-108:3, 110:12-112:21.) Further, it stated that the contract period of performance would "be determined later," and contained a note that a "related Time Extension change" order would be issued separately. (Appellant Hr'g Ex. 9, at 72-73.)

36. In addition, Change Order No.7, which was signed and fully executed by both parties, also included the following release language (the "Release language"):

> It is mutually agreed that in exchange for this modification 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, [or] additional work which the contractor . . . may . . . have against the District . . . based on . . . or in any manner connected with the subject modification or the prosecution of work hereunder.

(*Id.* at 72.)

37. According to the May 8, 2007, progress meeting minutes, Appellant was still completing punch list items, and final inspection had not yet occurred.[10] (*See* Appellant's Hr'g Ex. 50, at

[10] The specific punch list items listed in the May 8, 2007, meeting notes include: (1) additional bathroom light switches; (2) installation of new curtains; (3) air and water balancing; and (4) therapy equipment, including a therapy tub that was added in Change Order No. 10. (*See* Appellant's. Hr'g Ex. 50, at 598-99; Appellant's Hr'g Ex. 12, at 109-18.)

598-99.) However, as of the May 22, 2007, progress meeting, Appellant had turned over the keys for the 3N wing to J.B. Johnson's staff, and the District was preparing to provide Appellant with a letter confirming its beneficial occupancy of the 3N wing. (*See* Appellant's Hr'g Ex. 51, at 632.)[11]

38. Thereafter, by the June 5, 2007, progress meeting, the Center had the beneficial occupancy letter for the 3N wing with an effective date of April 30, 2007. (*See* Appellant's Hr'g Ex. 53, at 636; Hr'g Tr. vol. 6, 1517:1-13.)

39. After the District took control of the 3N wing, the parties anticipated that the District would require three days to transfer J.B. Johnson's residents from the 3S wing to the 3N wing so that construction work could begin in the 3S wing. (Appellant's Hr'g Ex. 46, at 580-81; Hr'g Tr. vol. 3, 517:18-518:4.) However, the actual time it took the District to relocate all of the residents was five weeks -- covering the period of approximately April 30, 2007, through early June 2007. (Hr'g Tr. vol. 3, 517:18-518:4; Hr'g Tr. vol. 6, 1517:20-1519:2; Appellant's Hr'g Ex. 53, at 637.)

Change Order No. 5

40. On February 9, 2007, Change Order No. 5 was issued, which provided Appellant with a contract adjustment in the amount of $93,980.00 for constructing and installing casework (i.e., closets, bureau units, television stand) to accommodate the personal effects of the residents in the 3N and 3S wings of the Center. (*See* Appellant's Hr'g Ex. 7, at 48-49.) It was noted that the fabrication of the required casework under this change order would take 6 to 8 weeks to complete. (*Id.*)

41. Change Order No. 5 expressly noted that Appellant had not requested additional time for this additional work based upon the District's underlying agreement to accept the 3N wing for beneficial occupancy without this casework being complete. (*Id.* at 49, 58.) The District planned to make other provisions for the resident's furniture while the casework was being fabricated. (*Id.*) In particular, the District intended to utilize temporary furniture until the permanent casework could be fabricated and installed by the Appellant to prevent any delay in the District's acceptance of the completed 3N wing. (*Id.*)

[11] All meeting minutes discussed herein, were prepared by Appellant's Project Manager, Victoria Guzman, who was present at the regularly held progress meetings for the renovation of the Center. (Hr'g Tr. vol. 3, 442:2-19.) Guzman would record the minutes for the meetings and after they were reviewed by the meeting's attendees, Guzman would incorporate the minutes as a record of everything that was discussed during the progress meeting. (*Id.* at 479:17-481:4.)

42. Change Order No. 5 also included the same Release Language as earlier change orders. (*Compare id*. at 48, *with* Appellant's Hr'g Ex. 9, at 72.)

43. Subsequently, however, the District determined that it would not be able to use temporary furniture in the 3N wing as originally contemplated when it was negotiating the terms of Change Order No. 5 with the Appellant. (*See* Hr'g Tr. vol. 2, 103:6-14.) Thus, the residents in the Center could not immediately be transferred to the renovated 3N wing (from the 3S wing), after all of the 3N wing renovation work was complete, until the new casework was delivered to the 3N wing between April 6, 2007, and April 13, 2007. (Appellant's Hr'g Ex. 7, at 59-60.) By the May 8, 2007, progress meeting, Appellant was still waiting on the J.B. Johnson staff to turn over the 3S wing. (Appellant's Hr'g Ex. 50, at 598-99.) This delayed the start of renovation work in the 3S wing. (*Id.*)

Asbestos Abatement and Renovation of the 3S Wing

44. On June 1, 2007, the parties conducted an abatement preconstruction meeting to discuss the asbestos abatement schedule for the 3S wing. (Appellant's Hr'g Ex. 52, at 635.) The tentative schedule for the completion of the asbestos abatement in the 3S wing was originally established to be from June 4, 2007, through June 25, 2007. (*Id.*) Specifically, the parties planned for the 3S wing abatement to be performed in two phases. (*Id.*) Phase 1 was scheduled to occur between June 4, 2007, and June 12, 2007, and was to include containment, abatement, and air clearance activities. (*Id.*) Thereafter, phase 2 of the 3S wing abatement was scheduled to occur between the dates of June 13, 2007, and June 25, 2007, and was to include preabatement, recontainment, abatement, air clearance, and release activities. (*Id.*).

45. On June 18, 2007, Volkert conducted an on-site inspection, and subsequently produced a report dated June 20, 2007, to identify the asbestos and lead-containing materials that would be disturbed by renovations in the 3S wing under the contract. (*See* Appellant's Hr'g Ex. 31, at 483-86; Hr'g Tr. vol. 3, 521:1-22.) Significant quantities of asbestos and lead-based paint components were identified during this inspection of the 3S wing. (Appellant's Hr'g Ex. 31, at 483-86.)

46. Ultimately, the asbestos abatement of the 3S wing was not completed until July 25, 2007, after which Appellant was able to begin its contract renovation work in the 3S wing on July 30, 2007. (*See* Appellant's Hr'g Ex. 56, at 648.) Thus, in summary, the 3S wing asbestos abatement process was performed between the dates of June 4, 2007, to July 25, 2007. (*See* Appellant's Hr'g Ex. 53, at 636-37; Appellant's Hr'g Ex. 56, at 648.) Thereafter, as reflected in the July 31, 2007, meeting minutes, Appellant began the contract work in the 3S wing on July 30, 2007. (Appellant's Hr'g Ex. 56, at 648.)

47. According to the February 13, 2008, meeting minutes, the 3S wing was substantially complete and Appellant was planning to send a notice of substantial completion and request for inspection to the owner. (Appellant's Hr'g Ex. 64, at 679.) Accordingly, a tentative beneficial occupancy and punch list walk through inspection was scheduled for February 22, 2008. (*Id.*)

48. Setty conducted final inspections of the 3S wing on February 27, 2008, and March 6, 2008. (*See* Appellant's Hr'g Ex. 81, at 744.) In its resulting March 6, 2008, punch list, Setty identified around two dozen items requiring correction by the Appellant which largely appeared to be cosmetic in nature (e.g., poorly-finished doors and ceiling tiles). (*Id*. at 744-45.) Despite the punch list items, the District's expert testified that as of February 2008, the District was utilizing the Center for its intended purposes. (Hr'g Tr. vol. 6, 1494:14-1495:4; 1496:11-20.)

The Romex Cable Delays

49. On December 11, 2007, Appellant failed an inspection of its electrical work in the ceiling of the 3S wing, due to the presence of a non-compliant Romex wire that the Center, and not Appellant, had previously installed in order to power a magnetic door holder. (Hr'g Tr. vol. 6, 1533:21-1534:9; Appellant's Hr'g Ex. 79, at 739.)

50. According to the January 3, 2008, meeting minutes, the non-compliant Romex cable needed to be removed from the nursing home ceiling so that a new electrical close-in inspection could be scheduled. (Appellant's Hr'g Ex. 61, at 666.) Although the ceiling tile border had been installed, the remaining acoustical ceiling tiles could not be installed until after close-in inspection was passed. (*Id.*) The Center informed Appellant that it would replace the non-compliant cable, yet it delayed doing so by approximately three weeks. (Hr'g Tr. vol. 3, 534:1-535:8)

51. The January 29, 2008, meeting minutes indicate that Appellant passed the electrical close-in inspection on January 15, 2008. (Appellant's Hr'g Ex. 63, at 672.) Thereafter, Appellant was able to complete the acoustical ceiling tile work around or about February 13, 2008. (Appellant's Hr'g Ex. 64, at 679.)

Water Heaters

52. The contract specifications and drawings required Appellant to remove three existing water heaters from J.B. Johnson, and replace them with new A.O. Smith, model LW-750 water

heaters.[12] (*See, e.g.* Appellant's Hr'g Ex. 110, at 1368(A1-5), 1374(P5-1); Hr'g Tr. vol. 4, 836:4-13.) The manufacturer's specifications for this model of water heater required each heater to have a direct vent to the exterior of the building. (*See id.*; Hr'g Tr. vol. 4, 833:1-15, 836:4-837:6.) The contract drawings, however, depicted the exhaust flues from the new water heaters being connected to a single, common venting system used by multiple pieces of equipment -- a design that would later be determined to be contrary to the manufacturer's specifications for the required water heaters to be installed. (Appellant's Hr'g Ex. 110, at 1371(M1-3); *see also* Hr'g Tr. vol. 4, 833:16-834:15, 836:4-837:13.)

53. On January 29, 2007, OPM inspected and accepted the Appellant's newly-installed water heaters under the contract. (*See* Appellant's Hr'g Ex. 73, at 717-18.)

54. The manufacturer's inspection of the new hot water heaters on November 21, 2007, found multiple problems with their installation. (*See* Appellant's Hr'g Ex. 60, at 664.) The problems listed in the manufacturer's report included, but were not limited to (1) improperly installed wiring; (2) flue piping not installed pursuant to the manufacturer's specifications; (3) flue pipes for two of the water heaters sloped downwards, resulting in condensation; and (4) improperly installed valves and sensors. (Appellant's Hr'g Ex. 60, at 664; *see also* Appellant's Hr'g Ex. 78, at 736-38.)

55. In response to the problems identified by the manufacturer, Appellant identified what issues were their responsibilities and what issues were the responsibilities of OPM. (*See* Appellant's Hr'g Ex. 60, at 661, 665.) Specifically, Appellant indicated that it would correct the valve and sensor problems, provide training for the installed equipment and have DCRA inspect its installation of the hot water heaters. (*Id.* at 665.) Appellant further indicated that it believed that it was OPM's responsibility to exhaust the vents for each water heater, repair the existing exhaust between two water heaters, and perform maintenance on the air filters. (*Id.*)

56. Subsequently, on January 4, 2008, OPM program manager, Caroline Baldwin, wrote in an email that the water heaters were "functioning reliably," following Appellant's corrective work, and that the flue problems were not Appellant's responsibility and did not appear to have contributed to the water heaters' previous malfunctions. (*See* Appellant's Hr'g Ex. 79, at 739; Hr'g Tr. vol. 3, 532:19-533:12.)

[12] Although Appellant proposed to provide a different manufacturer's model on October 30, 2006, Setty rejected the submission, instructing Appellant to re-submit its proposal with the water heaters specified in the contract drawings. (*See* Appellant's Hr'g Ex. 67, at 687-88.) Appellant provided Setty with a revised submittal using the A.O. Smith water heaters shown in the contract drawings on November 27, 2006, which Setty approved the following day. (*See* Appellant's Hr'g Ex. 68, at 689-96.)

57. Thereafter, the January 15, 2008, meeting minutes indicate that Appellant was planning to follow-up with its subcontractor to determine whether the hot water heaters' flues could be fixed. (*See* Appellant's Hr'g Ex. 62, at 669-70; *see also* Appellant's Hr'g Ex. 63, at 672, 674.) At the parties' progress meeting on February 13, 2008, Appellant reported that its subcontractor's personnel had "fixed [the flues] [as] best they could." (Appellant's Hr'g Ex. 64, at 679-80.)

58. On December 1, 2009, in response to the District's November 24, 2009, email regarding the District's concerns about the hot water heaters, Appellant stated that the water heaters were in a safe condition and that the contract drawings indicated that the water heaters were to be installed to the Center's existing piping/venting system. (Appellant's Hr'g Ex. 89, at 855.)

59. Appellant delivered manufacturer's warranties for the required water heaters to the District. (*See* Appellant's Hr'g Ex. 74; Hr'g Tr. vol. 2, 238:16-239:1.) These warranties, however, were later voided by the manufacturer once it discovered that this equipment had been installed into the Center's common venting system. (Hr'g Tr. vol. 2, 238:22-240:7.)

Laundry Equipment Issues

60. The contract drawings required Appellant to provide five new 50-pound UniMac washer-extractors for the Center's laundry room. (*See* Appellant's Hr'g Ex. 110, at 1373(P1-1); Hr'g Tr. vol. 4, 848:21-849:6.) The contract drawings also required Appellant to replace three existing dryers with Alliance 120 pound tumbling capacity and one Alliance model with a 75 pound tumbling capacity. (*See* Appellant's Hr'g Ex. 110, at 1373(P1-1); Hr'g Tr. vol. 4, 849:7-18.)

61. On June 8, 2006, Appellant addressed a proposal to CO Hester to provide new 60-pound UniMac washer-extractors, noting that the 60-pound model had replaced the 50-pound model. (Appellant's Hr'g Ex. 69, at 697-701; *see also* Hr'g Tr. vol. 3, 523:10-525:5.) Thereafter, on July 31, 2006, Appellant addressed a revised submission to CO Hester -- this time for 100-pound UniMac washer-extractors. (Appellant's Hr'g Ex. 70, at 702-07.) Appellant's July 31, 2006, submission noted that the new, 100-pound model was being proposed at the District's request.[13] (*Id*. at 702; *see also* Hr'g Tr. vol. 3, 525:6-21.) Information from the manufacturer included with Appellant's July 31, 2006, submission stated that the washer-extractors should be placed on a concrete floor "of sufficient strength and thickness to handle the floor loads generated by the high extract speeds of the machine." (*See generally* Appellant's Hr'g Ex. 70, at 707.)

[13] Although addressed to CO Hester, the June 8, 2006, and July 31, 2006, equipment proposals were actually sent to the project manager, Lanilta Taylor for approval. (Hr'g Tr. vol. 3, 524:1-7, 525:18-21.)

62. Contract drawings showed that the new laundry equipment, including both the washers-extractors and dryers, were required to be placed in the same location as the older equipment being replaced. (*See* Appellant's Hr'g Ex. 110, at 1373(P1-1), 1375(E1-3).) In this regard, the contract drawings did not include any requirement for Appellant to alter the nature of the existing concrete base on which either the new dryers or washer-extractors would be installed. (*See generally id.*; *see also* Hr'g Tr. vol. 4, 770:3-771:7, 848:21-850:21.) Thus, these new laundry machines were not required to be mounted on a slab of any greater thickness than the existing concrete slab at that time. (*See* Appellant's Hr'g Ex. 110, at 1373(P1-1); Appellant's Hr'g Ex. 108, at 1254; Hr'g Tr. vol. 4, 850:1-21, 857:12-18.)

63. According to the December 19, 2006, progress meeting minutes, the laundry equipment had been replaced by the Appellant and the Center was using the washer-extractors and dryers with the exception of one washer that filled with water but would not spin. (Appellant's Hr'g Ex. 43, at 563, 565; Hr'g Tr. vol. 3, 489:18-490:7.) By the January 16, 2007, progress meeting all of the laundry equipment was stated to be working properly. (Appellant's Hr'g Ex. 44, at 571-72.)

64. Appellant, delivered warranties for the laundry equipment to the District by facsimile dated February 2, 2007. (*See* Appellant's Hr'g Ex. 72, at 709-16.)

65. Sometime after installation of the new laundry equipment, J.B. Johnson employees began to complain that when they operated the equipment at full speed, the laundry machines were causing the entire building to shake and vibrate from the laundry room to the top floor. (*See* Hr'g Tr. vol. 6, 1593:20-1594:9, 1595:11-21.)

66. By letter dated January 11, 2010, CO Wooden advised the Appellant that it had improperly installed the new drying machines on the laundry room's existing 7-inch concrete pad. (*See* Appellant's Hr'g Ex. 90, at 891.) According to the District, the new machines were supposed to be installed on a 12-inch concrete pad. (*Id.*) Thus, the District determined that the building was shaking because the drying machines had been improperly installed due to the fact that they were not installed on a 12-inch reinforced concrete pad. (Appellant's Hr'g Ex. 91, at 897.) The District maintained that the dryer's manufacturer specifications required installation on a 12-inch pad. (*Id.*)[14]

[14] Correspondence between the parties demonstrates that on several occasions, the parties identified the laundry equipment issue as an issue with the washing machines. (*See e.g.*, Appellant's Hr'g Ex. 92, at 900; Appellant's Hr'g Ex. 93, at 913-16.) Nonetheless, as discussed *infra*, the ultimate termination for default and subsequent reprocurement specified that the dryers were the source of the laundry equipment issues. (*See* App. Hr'g Ex. 99, at 1203; Appellant's Hr'g Ex. 100, at 1212.)

Roof Leaks

67. The contract drawings called for partial replacement of the Center's flat roof. (Hr'g Tr. vol. 2, 83:22-84:3; Appellant's Hr'g Ex. 110, at 1369(A1-16).) Specifically, the contract roofing worked required the Appellant to strip off the old and deteriorating existing roof membrane, and then install a new rubber membrane. (Appellant's Hr'g Ex. 110, at 1369-70(A1-16-A1-15); Hr'g Tr. vol. 4, 869:18-22.)

68. As part of the required contract roofing work, the Appellant was also required to install a series of counter flashings in the area where the rubber roof met a vertical wall and then turned up onto that wall. (Appellant's Hr'g Ex. 110, at 1370(A1-15); Hr'g Tr. vol. 4, 870:1-22.) Specifically, the District designed the flashing to be installed by the Appellant so that it covered this area where the roof turned up on the vertical wall (the flashing), while a second piece of material (the counter-flashing) would cover the top of the flashing and be held in place by a metal strip. (*See* Appellant's Hr'g Ex. 110, at 1369-70(A1-16-A1-15); Hr'g Tr. vol. 4, 860:20-862:5.)

69. Although the Center's roof included a penthouse unit with stucco walls that adjoined the area of the roof to be renovated, the contract drawings did not require Appellant to perform any renovations on the penthouse itself, or on the other stucco and split-faced block walls adjoining the Center's roof. (*See generally* Appellant's Hr'g Ex. 110, at 1369-70(A1-15-A1-16); Hr'g Tr. vol. 2, 211:9-15, 212:18-21, 215:12-15.)

70. Preconstruction photos depict the stucco and split-faced block walls adjoining the relevant portions of the Center's roof as being porous and in a state of deterioration prior to contract work. (*See* Appellant's Hr'g Ex. 90, at 882-87; Hr'g Tr. vol. 2, 212:9-215:11.)

71. The April 22, 2008, meeting minutes indicate that the roof work had been completed and J.B. Johnson confirmed that there were no leaks. (*See* Appellant's Hr'g Ex. 66, at 684.)

72. After Appellant completed the roof work, the District engaged Schofield LLC ("Schofield"), a third-party contractor, to perform an inspection and recommend repairs following complaints from J.B. Johnson employees that the Center's new roof was leaking. (*See* Appellant's Hr'g Ex. 107, at 1243; Hr'g Tr. vol. 2, 260:7-11.) In its report dated April 9, 2009, Schofield found that the "vast majority" of the leaks in the Center's roof appeared to correspond to areas where the roof membrane joined exterior walls. (Appellant's Hr'g Ex. 107, at 1245.)

73. The Schofield report noted that the Center's stucco and split-faced block walls were "not inherently water tight," and that water that penetrated the walls (e.g., during wind-driven rain)

could travel behind the roofing membrane due to the inadequate design of the installed flashing. (*See id*.) Schofield further stated that the roof leaks could be resolved by installing a more comprehensive through-wall flashing or reglet flashing in place of the existing flashings -- flashing designs which were not included in the contract drawings requirements. (*Id*. at 1245-46; Hr'g Tr. vol. 4, 865:17-22; Appellant's Hr'g Ex. 110, at 1369-70(A1-15-A1-16).)

Revised Requests for Equitable Adjustment

74. On or about August 28, 2008, Appellant submitted a revised REA, in the amount of $787,698.26, to CO Wooden. (*See* District's Hr'g Ex. 11, at 2615.) In its cover letter, Appellant noted that its revised REA included supplemental documents that OPM and OCP officials had requested during a meeting on December 26, 2007, and that the revised amount included an additional adjustment sought by Appellant's subcontractor, Revis Engineering, Inc. ("Revis"). (*Id*.)

75. On or about September 22, 2009, Appellant submitted a newly-revised REA to CO Wooden.[15] (*See* District's Hr'g Ex. 11, at 2608.) Appellant's September 22, 2009, REA sought a contract adjustment of $1,769,254.86[16] and additional compensable delay for (1) asbestos abatement in both the 3N and 3S wings; (2) furniture delays; (3) removal of the Romex wire that had delayed final acceptance of the 3S wing; and (4) Appellant's extended field and home office overhead costs for the previously-negotiated 161-day asbestos delay. (*See generally* District's Hr'g Ex. 11, at DC 2607-61; AF Ex. 10, at DC 115-22.)

Cure Notices and the Contracting Officer's Final Decision

76. On or about January 11, 2010, Wooden sent a cure notice to Appellant, entitled "Outstanding Issues." (Appellant's Hr'g Ex. 90, at 890; Hr'g Tr. vol. 2, 208:1-12.) Wooden's cure notice stated that the following items were considered incomplete: (1) the Center's roof, which continued to leak; (2) the installation of the dryers, which were not placed on a new, 12-inch concrete pad; and (3) the installation of the Center's hot water heaters, which tied the new heaters' flues into the existing venting system rather than venting them directly to the exterior of the building. (Appellant's Hr'g Ex. 90, at 890-91.) Wooden's letter instructed Appellant to submit a response outlining its solution to the above problems within 10 calendar days in order to avoid termination of its contract. (*Id*. at 891.)

[15] The September 22, 2009, REA's cover letter indicates that the District had "misplaced" Appellant's November 11, 2006, and August 28, 2008, REAs, and that, consequently, OPM had never rendered a decision on them.
[16] The $1,769,254.86 total sought consisted of $633,965.75 for work performed by Appellant, and $1,135,289.11 for work performed by Appellant's subcontractor, Revis. (*See* AF Ex. 10, at DC 116.)

77. Appellant responded to the District's cure notice on or about January 20, 2010, writing that it disputed the facts presented in the cure notice. (*See id.* at 879.) With regards to the roof repairs, Appellant stated that: (1) it had already repaired all potential leaks that could be attributable to its roof installation; (2) it requested that the District allow an inspection and water test (i.e., flooding of the roof)[17] which it believed would provide that the roof was water-tight; and (3) cracks in the deteriorated stucco of the roof's penthouse were responsible for any other leaks.[18] (*Id*. at 879-80.) With regard to the dryers, Appellant wrote that: (1) it had complied with the contract's requirement for in-kind replacement equipment at the same locations; (2) the requirement for a 12-inch reinforced concrete pad was a structural change that would need to be addressed in the Center's permit drawings before any work could be performed; and (3) proposed to perform x-ray and core drilling tests to determine if the pads were of adequate thickness, and would correct any pads that were of inadequate thickness, provided that the CO provided a written directive for it to do so. (*Id*. at 880.) Finally, with regard to the water heaters' installation, Appellant wrote that although it believed that the venting problem had arisen due to flawed contract specifications, it would be willing to replace the installed water heaters with new heaters that allowed common venting, provided that the CO provided a written directive for it to do so. (*Id.* at 881.)

78. Wooden responded to Appellant's letter on February 22, 2010, writing that Appellant's response had failed to provide a proposal and schedule to resolve the District's issues. (Appellant's Hr'g Ex. 91, at 895-96.) Wooden's February 22, 2010, letter also requested that Appellant provide manufacturer's inspection reports and warranties for the roof, washer-extractors, and water heaters. (*See id*. at 895-98.)

79. On May 6, 2010, Wooden wrote Appellant indicating that the District still found numerous deficiencies with Appellant's performance regarding the water heaters and the roof. (Appellant's Hr'g Ex. 93, at 915-16.) Moreover, contrary to its previous cure notice, the District's May 6th letter stated that it was the washing machines that were improperly installed on a 7-inch slab which was causing the building to vibrate when the washing machines were in use. (*Id.* at 916-17.) Wooden demanded that the problems be fixed on or before May 15, 2010, and indicated that the District "may move to terminate the contract for default and apply the retainage to correcting the items…" (*Id*.)

80. In an email to Wooden, dated May 17, 2010, Appellant amended its previous response and unequivocally offered to correct all of the work that the District was complaining about in the Center. (*See id.* at 913.) Appellant offered to provide new water heaters that allowed for common venting, agreed to immediately install a 12-inch concrete pad under the washers

[17] The District ultimately did not allow Appellant to flood the roof, as it offered to do in an attempt to establish the integrity of its installed roof work. (*See* Hr'g Tr. vol. 4, 776:5-9; 871:15-873:1.)
[18] Appellant also added that it would be willing to provide a quote for stucco repair at the District's request. (Appellant's Hr'g Ex. 90, at 880.)

(with work scheduled for completion on June 23, 2010) asking only that the District clarify whether an amendment to the original building permit would be required, and asked for an additional 15 days to gather additional documentation to access the roof warranty. (*Id*. at 913-14.)

81. Appellant subsequently learned that its roofing subcontractor went bankrupt and was no longer able to provide warranties from the roofing materials manufacturer. (*See generally* Appellant's Hr'g Ex. 75; Hr'g Tr. vol. 2, 254:10-255:13.)

Contracting Officer's Denial of REA

82. On July 21, 2010, Wooden issued a final decision denying Appellant's September 22, 2009, REA, and finding that Appellant was liable for liquidated damages in the amount of $1,725,000.00. (AF Ex. 10, at DC 115-22.) This amount represented 1,150 days of delay (after subtracting Appellant's 161-day extension), at $1,500.00 per day. (*Id*.) Wooden wrote that the 161-day extension only granted Appellant a non-compensable extension to the contract's period of performance, and that the release language included in Change Order No. 7 effectively barred Appellant from seeking additional costs for the 161-day delay. (*Id*. at DC 118-19.) With regard to the other change-related delays for which Appellant sought compensation,[19] Wooden wrote that the release on each change order barred Appellant from seeking additional time or costs.[20] (*Compare id.* at 118-20, *with* AF Exs. 3, 5, 7-8.) Wooden's final decision also stated that Appellant had failed to deliver warranties for the Center's roof "and other items," in violation of the contract terms, and that Wooden intended to refer the matter to the District's Office of the Attorney General. (AF Ex. 10, at DC 121.)

83. On October 12, 2010, Appellant appealed the Contracting Officer's July 21, 2010, Final Decision to the Board, which was docketed as CAB No. D-1410. (*See* D-1410 Notice of Appeal.) In its subsequent November 12, 2010, complaint, Appellant sought: (1) monetary damages, in an amount to be adduced at trial; (2) compensable and/or noncompensable time extensions for delay; (3) denial of the District's claim for liquidated damages; and (4) statutory interest on its claims.[21] (*See* D-1410 Compl. 5.)

[19] The other change orders for which Appellant sought additional delay related costs were Change Order Nos. 5, 6, 8, 9, and 19. (*See* AF Ex. 10, at DC 119-20.)

[20] Wooden also found that the delay associated with the failed electrical inspection in the 3S wing was non-compensable, stating that (1) the failure was attributed to Appellant; and (2) final inspection was not on the project's critical path. (AF Ex. 10, at DC 120.)

[21] Although Appellant's complaint also included a sponsored claim made on behalf of Appellant's subcontractor, Revis, at Appellant's request, the Board dismissed the sponsored claim with prejudice on July 17, 2013. (*See* Appellant's Dismissal of the Claim of Revis Engineering, Inc. on the Condition Dismissal Does Not Affect or Limit the Claims of Appellant 1-2; Order of Dismissal 1.)

Termination for Default

84. In a letter dated October 25, 2010, CO Wooden terminated the contract for default. (*See* Appellant's Hr'g Ex. 99, at 1203-05.) In her termination letter to Appellant, Wooden stated that the parties had negotiated a time extension of 161 days for latent conditions and concluded that the contract should have been completed on or about May 15, 2007, which was 165 days after the original December 1, 2006, completion date. (*See id*. at 1203.)

85. The termination letter further noted that the contract had reached "99% completion," however, not until February 15, 2009, and that Appellant's performance had been "ripe [sic] with improperly installed items, equipment, and willful violations of contract terms." (*Id*.)

86. Among the problems identified in Wooden's termination letter were: (1) roof leaks; (2) the alleged failure by Appellant to install the Center's new water heaters in accordance with contract documents and the manufacturer's specifications; and (3) its alleged failure to install the new dryers on a 12-inch concrete pad. (*See id*. at 1203-05.) Wooden also cited Appellant's alleged failure to deliver warranties related to the roof, new water heaters, and new dryers as an additional basis for the termination decision. (*Id*.)

87. On November 12, 2010, Appellant filed a new appeal, docketed as CAB No. D-1414, challenging the termination for default. (*See* D-1414 Notice of Appeal.) Thereafter, on December 10, 2010, Appellant filed a Complaint seeking: (1) conversion of its termination for default into a termination for convenience; (2) payment for both the retention withheld by the District and all pending change orders; and (3) statutory interest. (*See* D-1414 Compl. 3-4.)

Reprocurement Decision

88. On January 20, 2011, Wooden issued a new task order, in the amount of $272,500.00, to Horton and Barber Construction ("Horton"), a third-party contractor. (Appellant's Hr'g Ex. 100, at 1207.) The statement of work for the Horton task order included correction of the work items at the Center which were the basis of the termination of the Appellant, as well as additional projects including: (1) a total replacement of the roof installed by Appellant; (2) new water heaters of a different make and model than originally required under the contract (Model EVAW500); (3) a new 12-inch concrete pad for the dryers;[22] (4) new water softeners; (5) partial replacement of an outdoor sidewalk; and (6) finishing work. (*Compare id*. at 1210-14, *with* Appellant's Hr'g Ex. 90, at 890-91; *see also* District's Hr'g Ex. 13, at DC

[22] Specifically, the District stated that the existing drying machines were incorrectly installed on the existing concrete pad and instructed Horton to disconnect the existing drying machines and demolish the existing concrete pad in order to reconstruct the concrete pad per manufacturer's instructions. (Appellant's Hr'g Ex. 100, at 1212.)

3313.) The District ultimately paid approximately $412,500.00 to Horton to complete this work at the Center. (Hr'g Tr. vol. 7, 1798:18-21.) Thereafter, on April 26, 2013, the District issued a written determination purporting to assess Appellant $288,850.00 in reprocurement costs. (*See* District's Hr'g Ex. 16.)

Dispositive Motions

89. The District moved for partial summary judgment in CAB No. D-1410 on December 13, 2010, arguing that the release language included in certain change orders precluded Appellant from recovery, and that the claims in Appellant's complaint had not been properly submitted to the CO for a final decision prior to appeal. (*See* District's Mot. For Partial Summ J.) On July 10, 2013, the Board denied the District's motion, finding, that Appellant's complaint in CAB No. D-1410 did not raise any claims that had not been previously presented to the CO, and that there was a genuine dispute of material fact that precluded granting summary judgment.[23] (Order Den. District's Mot. for Partial Summ. J. 1-2.)

90. In addition, on December 16, 2010, the District moved to dismiss CAB No. D-1414 for lack of jurisdiction. (*See* District's Mot. to Dismiss.) On July 1, 2011, the Board found that Appellant had failed to seek a contracting officer's final decision prior to filing its appeal with the Board. (*See* Order on Mot. to Dismiss 1-2.) However, rather than dismiss CAB No. D-1414 for lack of jurisdiction, in the interests of judicial economy, the Board temporarily stayed its judgment, and allowed Appellant to seek a contracting officer's final decision on its claim for improper termination. (*See* Order on Mot. to Dismiss 1-3.) Pursuant to the Board's order, on July 15, 2011, Appellant submitted a letter (dated July 11, 2011) requesting conversion of the termination for default into one for convenience to CO Wooden. (*See* Exs. to Resp. Filed Nov. 28, 2011, Ex. 7, at 203-07.)[24]

91. On June 6, 2013, the Board issued an order that: (1) found that Appellant's July 11, 2011, letter to CO Wooden was a valid request for a contracting officer's final decision; (2) denied the District's requests for dismissal of CAB No. D-1414; and (3) consolidated CAB Nos. D-1410 and D-1414 into a single case. (*See generally* Order on Req. for Dismissal and for Consolidation of Appeals.)

[23] Appellant also filed a motion for summary judgment on the District's liquidated damages claim in CAB No. D-1410 on April 30, 2012, in which it argued that the District had failed to submit a written claim for liquidated damages to the contracting officer for a final decision. (*See generally* Appellant's Mot. for Summ. J. and Mem. in Supp.) The Board, however, denied Appellant's motion on July 12, 2013. (*See generally* Order Den. Appellant's Mot. for Summ. J.)

[24] For documents that do not contain consistent internal page numbering (*see, e.g.*, Exs. to Resp. Filed Nov. 28, 2011), the Board has cited the page number assigned by Adobe Reader.

92. The Board conducted a seven-day hearing on the merits in this matter on September 16-20 and 23-24, 2013.

JURISDICTION

At all times material hereto, the Board exercised jurisdiction over contract disputes pursuant to D.C. Code §§2-309.03(a)(2) and 2-309.03(a)(3) (repealed 2011). Under §309.03(a)(2), the Board exercised jurisdiction over "[a]ny appeal by a contractor from a final decision by the contracting officer on a claim … when the claim arises under or relates to a contract." Under §309.03(a)(3), the Board exercised jurisdiction over "[a]ny claim by the District against a contractor, when such claim arises under or relates to a contract." With respect to contractor claims, the Board's jurisdiction may arise from the appeal of a contracting officer's written final decision, or from the appeal of a contracting officer's "deemed denial" of the claim. *See* D.C. CODE §2-308.05(c)-(d).[25]

As a threshold issue, the District has raised several arguments challenging the Board's jurisdiction in D-1414 and D-1410. For the reasons set forth more fully below, we conclude that the Board has jurisdiction over the claims asserted in D-1414 and D-1410. Further, we conclude that the Board lacks jurisdiction over the District's April 26, 2013, reprocurement claim because Appellant never appealed the contracting officer's final decision to our Board. We briefly address the District's jurisdictional arguments before proceeding to the merits herein. For ease of review, we separately discuss the District's jurisdictional contentions as to each case.

1. CAB No. D-1414

The threshold question presented is whether the Board's jurisdiction is proper under the above cited provision governing contractor claims, i.e., D.C. Code §2-309.03(a)(2). In particular, the District has challenged the Board's jurisdiction over KPC's appeal of the District's denial of its claim to convert a default termination into a convenience termination. In support of its jurisdictional challenge, the District offers the following five grounds: (i) Appellant "never submitted a certified claim contesting the default termination as required by the Board's July 1, 2011, Order" (District's Post Hr'g Br. 15-16); (ii) Appellant did not submit a settlement proposal to the contracting officer as part of its purported claim, in violation of 27 D.C. MUN. REGS. tit. 27, § 3708.1 (*Id*. at 16); (iii) assuming arguendo that such a claim was submitted by Appellant's July 11, 2011, correspondence to the contracting officer, it was denied by written final decisions on May 1, 2012, and April 22, 2013, and never appealed to the Board by KPC (*Id*. at 15, 20, 22); (iv) it was improper for the Board to accept Appellant's uncertified September 2009 Request for

[25] The Procurement Practices Reform Act of 2010 ("PPRA") repealed the District of Columbia Procurement Practices Act of 1985 ("PPA"), as amended by the Procurement Reform Amendment Act of 1996 and codified at D.C. CODE § 301.01, *et seq.*, and amended and recodified the District's procurement statutes at D.C. CODE § 2-351.01, *et seq.*, effective April 8, 2011. Procurement Practices Reform Act of 2010, D.C. Law. No. 18-371, 58 D.C. Reg. 1185 (Feb. 11, 2011). However, because the instant appeal was filed prior to the enactment of the PPRA, the PPA, as amended, establishes the Board's jurisdiction.

Equitable Adjustment as the monetary component of its re-filed claim for conversion of the default termination into a convenience termination (*Id*. at 18-19, 21-22); and (v) the Board's July 1, 2011, stay of proceedings after finding that Appellant had failed to file a conversion claim with the contracting officer was improper because there was no underlying appeal properly before the Board upon which jurisdiction could be grounded (*Id*. at 23).

We have reviewed each of these contentions and find them to be without merit. First, by previous Board Order dated June 13, 2013, we have already ruled that Appellant's July 11, 2011, letter was a valid claim seeking conversion of the District's October 25, 2010, default termination, and that there is no certification required under District law to perfect jurisdiction. (*See* Order on Req. for Dismissal and for Consolidation of Appeals 3-4.)[26]; *see also Civil Construction, LLC*, CAB Nos. D-1294, *et al.*, 62 D.C. Reg. 4422 (March 14, 2013) (lack of claim certification does not deprive the Board of jurisdiction over appeals.)

Similarly, our June 6, 2013, Order also ruled that the validity of Appellant's claim in D-1414 does not require the submission of a settlement proposal to the contracting officer. (Order on Req. for Dismissal and for Consolidation of Appeals 3-4.) There is no jurisdictional requirement that an Appellant submit a settlement proposal to a contracting officer in a proceeding to convert a *termination for default* into a convenience termination. The regulatory and contract provisions cited by the District apply when a contracting officer has terminated a contract for convenience. D.C. MUN. REGS. tit. 27, §§3702.1(k), 3708.1 (2002)(emphasis added); s*ee also, Jody Builder's Corp*., PSBCA Nos. 5047, *et al.*, 08-2 BCA ¶ 33,959 (Sept. 17, 2008) (the Board exercised jurisdiction over contractor's default termination conversion claim, but delayed consideration of its settlement proposal until after the claim had been converted to a convenience termination). The Board's continued consideration of these issues runs counter to the doctrine of the law of the case, and we refuse to consider them further. *See United States v. Thomas*, 572 F.3d 945, 949 (D.C. Cir. 2009) ("[T]he same issue presented a second time in the same case in the same court should lead to the same result.")

Furthermore, although we have not previously addressed the District's argument that its May 1, 2012, and April 22, 2013, letters were "final decisions" as to which the Appellant failed to take proper appeals, (*See* District's Post Hr'g Br. 15, 20, 22), we do not find the argument persuasive. Both the May 1 and April 22 letters vehemently denied that Appellant had ever filed claims. (*See* Mot. Recons. Exs. 1-2.) We thus find disingenuous the District's contention that the letters were somehow final decisions "denying" claims, when the District has all along contended claims were never filed by Appellant in the first place. (*Id*.)

The District also contends that it was improper for the Board to accept Appellant's uncertified September 2009 Request for Equitable Adjustment as the monetary component of its

[26] The July 11, 2011, letter *plainly* demands that Appellant's termination for default "be converted to a termination for convenience" and indicates that Appellant was owed $634,037.74. (*See* Appellant's Opp. to Dist. Request for an Order of Dismissal with Prejudice Ex. 1, at 2.)

July 1, 2011, claim for conversion of the default termination into a termination for the District's convenience. (District's Post Hr'g Br. 18-19, 21-22.) First, as discussed *supra*, Appellant's claims are not required to be certified. Further, as the Board explained in its June 6, 2013, Order, both the September 22, 2009, and July 11, 2011, claims involve the same contract, underlying performance issues and contracting parties. Accordingly, and as a result, Appellant's July 11, 2011, claim properly and specifically incorporated by reference the monetary component of its September 2009 claim because its claim for conversion of its default termination was largely dependent on, and related to its claim for an equitable adjustment.

Finally, we find no basis for the District's contention that the Board erred by staying Appellant's D-1414 appeal instead of dismissing it for lack of jurisdiction. (District's Post Hr'g Br. 23.) Previously, in its December 16, 2010, Motion to Dismiss, the District argued that the Board lacked jurisdiction over Appellant's D-1414 appeal because Appellant failed to submit a claim challenging the propriety of the termination decision to the contracting officer prior to seeking relief from the Board. (Mot. Dismiss 2.) Finding that Appellant had in fact failed to submit a claim to the contracting officer, this Board, on July 1, 2011, temporarily stayed the proceedings, without accepting or rejecting jurisdiction, to permit the Appellant a short period of time to file a claim with the contracting officer challenging the termination decision. (Order on Mot. Dismiss 2.) In deciding to stay the appeal, this Board recognized the impracticability and inefficiency of dismissing an appeal in response to a dispositive motion when Appellant would immediately re-file the action after obtaining the contracting officer's final decision necessary to invoke the Board's jurisdiction. (*Id.*)

In nearly identical circumstances, this Board has taken similar action. In *Vista Contracting*, the contractor appealed its termination for default directly to the Board without first submitting a claim to the contracting officer seeking conversion of its termination for default to one for convenience. *See Vista Contracting, Inc.*, CAB Nos. D-1388, *et al.* (June 15, 2011) (Order Den. Mot. Dismiss).[27] Instead of granting the District's Motion to Dismiss for lack of jurisdiction, the Board granted a temporary stay of the proceedings to permit the contractor time to submit a claim to the contracting officer. In doing so, the Board reiterated the impracticability of dismissing the appeal on dispositive motion where the Appellant would simply re-file the action after obtaining the contracting officer's final decision. Therefore, given the procedural posture of the D-1414 appeal at the time of the Board's decision, and in the interests of judicial economies, the Board's July 1, 2011, decision to stay the proceedings was proper.

Thereafter, Appellant submitted its July 11, 2011, claim letter to CO Wooden. CO Wooden failed to render a final decision on Appellant's valid claim within the statutorily required timeframe. As a result, the Board, by our June 6, 2013, Order, ruled that Appellant's July 11, 2011, claim letter was "deemed denied" by the District. (*See* Order on Req. for

[27] Although currently unpublished, this decision may be found via a docket number search on the Board's website, at http://app.cab.dc.gov/WorkSite/Docket_Case_Number.asp.

Dismissal and for Consolidation of Appeals 4.) The District's deemed denial thereby permitted the Board to obtain jurisdiction over Appellant's pending D-1414 appeal challenging the propriety of the District's default termination decision.

2. CAB No. D-1410

In addition to its arguments challenging our jurisdiction in D-1414, the District offers separate grounds for challenging the Board's jurisdiction in D-1410. In particular, the District has challenged: (i) the Board's jurisdiction over certain purported "defenses" which it contends the Appellant has asserted to the District's claim for liquidated damages, and (ii) the Board's jurisdiction over KPC's appeal of the District's denial of its delay claims. (*See generally*, District's Post Hr'g Br. 33-34, 37-38.) With respect to the Appellant's purported "defenses" to the District's claim for liquidated damages, the District challenges our jurisdiction on the following grounds: (i) substantial completion or design deficiencies as an excusable delay defense to liquidated damages is a claim that must first be submitted to a contracting officer, citing *M. Maropakis Carpentry, Inc. v. U.S.*, 609 F.3d 1323 (Fed. Cir. 2010) (District's Post Hr'g Br. 33-34); (ii) arguing that substantial completion terminates the accrual of liquidated damages requires a contract adjustment to section H.1 of the contract and therefore, must first be submitted to the contracting officer as a claim (*Id*. at 37-38); (iii) contesting the reasonableness of the daily rate imposed by the assessment of liquidated damages as set forth by paragraph A of section H.1 is a claim that must first be submitted to the contracting officer (*Id*. at 37); and (iv) the determination or lack thereof regarding substantial completion of the contract is a claim that must first be submitted to the contracting officer since the contract called for the Architect to make such determinations (*Id*. at 38).

With respect to Appellant's delay claims, the District challenges our jurisdiction on the following grounds: (i) Appellant's delay claim is based on the 2013 Hummer expert report which relies on the "as-planned" dates (versus the "as-built" dates contained in the initial claim submitted to the CO) (District's Post Hr'g Br. 15); (ii) Appellant's pending appeal presents a new claim for $816,343.02 and 439 delay days whereas its claim before the CO was for $633,965.75 and 398 delay days (*Id.* at 25-26); and (iii) Appellant's claim to the CO was "solely for extended home office overhead and jobsite overhead" whereas the pending claim includes "$330,574 for retentions, base payments and change orders" (*Id.* at 25-26).[28] For the reasons stated below, we conclude that the Board has jurisdiction over the liquidated damages and delay claims appealed in CAB No. D-1410.

Liquidated Damages Claim. The Board has jurisdiction over KPC's appeal of the District's liquidated damages claim under § 2-309.03(a)(3), which gives the Board jurisdiction over "[a]ny claim by the District against a contractor, when such claim arises under or relates to

[28] The Appellee also argues that KPC's removal of the claim's original subcontractor sponsorship claim component changes facts and defenses pertinent to this action. (District's Post Hr'g Br. 26.)

a contract". In this case, the claim for liquidated damages is the government's claim as set forth in the July 21, 2010, final decision. (Findings of Fact ("FF") 82; *see also Evergreen Int'l Aviation, Inc.* PSBCA No. 2468, 89-2 BCA ¶ 21,712 (Mar. 24, 1989)). Thus, we exercise jurisdiction over the government's claim pursuant to § 2-309.03(a)(3).

We consider as moot, the various arguments asserted by the District that we lack jurisdiction over "defenses" it contends the Appellant has asserted to the liquidated damages claim. As we discuss herein, the District did not establish a *prima facie* case establishing default by Appellant. The liquidated damages provision arises under the default clause of the contract. (*See* AF Ex. 15-2, at DC 1195, sec. H.1.) The government may only exercise this remedy if the contractor is in default. *See, e.g*., *Gaffny Corp*., ASBCA Nos. 46026, *et al.*, 94-1 BCA ¶ 26,522 (Nov. 22, 1993). In other words, the District's failure to recover liquidated damages instantly is due to its failure to prove a default, and we do not need to consider any of Appellant's purported "defenses to the liquidated damages claim" to conclude that the District has not proven a default.

Delay Claim. The Appellant submitted a revised claim primarily for delay damages, and change order work, to the contracting officer on September 22, 2009, in connection with work it claimed it properly performed under the contract. (FF 75.) The District denied this claim for lack of proof, and as a part of that final decision and in direct response to the Appellant's factual claims, asserted that the Appellant in fact never completed the contract requirements. (*See generally* AF Ex. 10, at DC 115-22.) A timely appeal was taken therefrom. (*See* Oct. 12, 2012 Notice of Appeal; *see also* Nov. 12, 2012 Compl.) At issue presently, is whether the Board has jurisdiction over the Appellant's delay damages claim.

For purposes of our jurisdiction, a "new" claim before the Board, that arguably was not before the contracting officer at the claim level, is one that does not arise from the same set of operative facts as the claim submitted to the contracting officer such that the government has no prior notice of the nature and amount of the new claim prior to its appeal by a contractor to the Board. *Keystone Plus Constr. Corp*., CAB No. D-1358, 62 D.C. Reg. 4262 (Jan. 27, 2012.)

We find no merit to the District's argument that Appellant's delay claims based on the 2013 Hummer report are new claims. The claims based on the 2013 Hummer report are the same claimed delays that were included in Appellant's September 22, 2009, request for equitable adjustment, namely Appellant's asbestos and change order work delay damages. Further, the District's argument that Appellant's claim for $816,343.02 for 439 days of delay is a new claim similarly fails. The mere fact that Appellant adjusted the monetary amount of its claim does not render it an entirely new claim. As stated *supra*, a new claim is one that does not arise from the same set of operative facts. Here, Appellant's increased claim amount is still based on the same operative facts relating to costs it alleged it incurred due to specific delays experienced during the project. Finally, Appellant's inclusion of $330,574.00 for retensions, base payment and change orders also do not constitute new claims.

Indeed, although the Board lacks jurisdiction over new claims not presented to the contracting officer, it is generally recognized by boards and courts that a contractor's claim is not unalterable and set in stone as presented to the contracting officer. *See Diversified Marine Tech, Inc.*, DOTCAB Nos. 2455, *et al.*, 93-2 BCA ¶ 25,719 (Jan. 25, 1993). In this regard, increases by the contractor in the dollar amount of the claim, the inclusion of a different legal theory for recovery, or the assertion of additional factual allegations in support of its claim that were not presented to the contracting officer do not create a new claim that must be submitted again to the CO for final decision. *Keystone Plus Constr. Corp.*, 62 D.C. Reg. at 4262.

Thus, as our analysis above demonstrates, the pending delay damages claims are not *new*, but rather are part of the same operative set of facts as contained in Appellant's original September 22, 2009, claim to the contracting officer.[29] As a result, the Board exercises jurisdiction over Appellant's appeal of the contracting officer's July 21, 2010, final decision pursuant to D.C. Code § 2-309-03(a)(3).

Reprocurement Claim. Finally, the Appellant argues that the Board has jurisdiction over an April 26, 2013, purported contracting officer final decision, which, *inter alia*, assessed reprocurement costs against it totaling $288.850.00. (Appellant's Repl. Brief 6-13; FF 88.) The District, citing D.C. Code § 2-360.04(a)(2011), contends that the Board lacks jurisdiction over the reprocurement claim because Appellant failed to file an appeal therefrom within the 90 day statutory limitation period. (District's Post Hr'g Br. 14.) We agree with the District. We have searched the record extensively and do not find that Appellant filed an appeal from the District's April 26, 2013, issuance. Accordingly, the Board lacks jurisdiction to review the matters asserted in the contracting officer's April 26 correspondence.

CONCLUSIONS OF LAW
CAB No. D-1414

I. THE DISTRICT'S TERMINATION FOR DEFAULT WAS IMPROPER

A. Standard of Review

Appellant contends that the District's termination decision was arbitrary and capricious and, thereby, seeks conversion of its termination to one for the convenience of the District. (Appellant's Post Hr'g Br. 7.)[30] Termination for default is a drastic sanction that should be imposed only for good grounds and on solid evidence. *Lisbon Contractors, Inc. v. United States,*

[29] Moreover, the fact that an appellant may refine the damage amounts or offer different legal theories in support of its claim that were not presented to a contracting officer in a subsequent Board action does not automatically act to change the operative facts upon which the claim and Board action rely. *See Keystone Plus Constr. Corp*., 62 D.C. Reg. at 4262.

[30] Although Appellant filed more than one Post Hearing Brief, all references to Appellant's Post Hearing Brief are to the November 9, 2013, submission.

828 F.2d 759, 765 (Fed. Cir. 1987) (citations omitted). The Government bears the burden of establishing default and circumstances that justify its termination of a contractor for default. *See, e.g., Lisbon Contractors,* 828 F.2d at 763-64; *Cantrill Development Corporation,* ASBCA Nos. 30160, *et al.*, 89-2 BCA ¶ 21,635 (Feb. 3, 1989); *G.A. Karnavas Painting Co.*, ASBCA No. 19569, 76-1 BCA ¶ 11,837 (Mar. 16, 1976). In the event that the District puts forth sufficient evidence to make its prima facie case, the burden then shifts to the contractor to show that the default was excusable and "due to causes beyond its control and without its fault or negligence." *See MCI Constructors, Inc.*, CAB No. D-835, 39 D.C. Reg. 4305, 4321-22 (Sept. 27, 1991).

In applying the above standards to the instant case, as set forth below, we conclude that the District has failed to meet its prima facie burden, and that its decision to terminate Appellant for default was unreasonable and an abuse of discretion. Furthermore, its assessment of liquidated damages under these circumstances was inappropriate.

B. The District's Stated Grounds for Default Were Unreasonable

The CO's final decision stated that its grounds for terminating the Appellant for default included the Appellant's failure to remedy the following issues: (a) improperly installed water heaters; (b) improperly installed dryers[31]; (c) a leaking roof; and (d) failing to provide warranties for these items. (FF 86.) In this regard, the District's decision to subsequently hire a third party contractor to perform this work, and seek reimbursement of these contract costs from the Appellant, was also based upon these same performance issues. (*See generally* Appellant's Hr'g Ex. 100.)

Nonetheless, the facts in the record for this case establish that the Center's residents were fully occupying the 3N wing by April 30, 2007 (FF 38), and that the 3S wing was in use by the Center's residents and substantially complete by February 13, 2008 (FF 47). Further, the District did not contact Appellant until almost two years after the Center's 3S and 3N wings were in use by its residents, to address what it deemed to be defective work that was performed by Appellant in three areas of the project (i.e., hot water heaters, improperly installed dryers, and roof leaks). (FF 76.) The termination for default decision by the District followed promptly thereafter on October 25, 2010, after several exchanges between the parties. (FF 84.)

However, to the extent that the District had been using the Center's 3N and 3S wings for almost two years without notifying the Appellant of any problems with its performance (FF 56, 63, 71), the Board finds it highly improbable that prior to that point either party viewed the Appellant to be in default under the contract. The District was receiving the benefit and use of the Center and Appellant's renovations to the building prior to that point, as there was no earlier

[31] In its Post Hearing Brief, the District references the improperly installed laundry equipment as "laundry extractors," while, again, the termination for default indicated that the dryers were the issue. (*Compare* District's Post Hr'g Br. 57, *with* FF 86.)

allegation that the residents were not able to comfortably reside in the building. Nonetheless, even after being contacted by the District almost two years after performing its contract work with claims that its work was insufficient, the Appellant ultimately represented to the District that it would correct all of the alleged defective work (FF 77, 80.) Appellant was still swiftly terminated by the District which the Board believes to be unreasonable in light of these factors. *See MCI Constr., Inc.*, 39 D.C. Reg. at 4327 (finding termination for default improper where the contractor was ready, willing and able to complete the job).

Moreover, the record reveals, as highlighted by the Appellant's expert witness, that the problems that the District complained of with the contract work, and attributed as the fault of the Appellant, were, in fact, the result of the District developing specifications that were inadequate to meet its needs. (FF 52, 62, 67, 69.) Therefore, the District's decision to terminate the Appellant for default on these bases was unreasonable and an abuse of discretion.

1. The Roof

The contract specifications required Appellant to do a partial replacement of J.B. Johnson's flat roof which included replacing the roof membrane. (FF 67.) In addition, the contract drawings specify that the Appellant was also required to install a series of flashings and counter-flashings where a specific section of the rubber roof met a vertical wall. (FF 68.) Appellant completed this roof work by April 22, 2008. (FF 71.)

However, after residents at the Center began to complain about the roof leaking, the District engaged Schofield, a third-party contractor, to perform an inspection of the roof to determine the source of the leaks and to recommend the necessary repair. (FF 72.) Schofield's April 9, 2009, subsequent inspection report determined that the vast majority of the leaks appeared to correspond to areas where the roof membrane joined exterior walls. (*Id.*) In particular, the report noted that the Center's stucco and split-faced block walls adjacent to the roof were "not inherently water tight," and that water that penetrated the walls (e.g., during wind-driven rain) could travel behind the roofing membrane. (FF 73.) The report further stated that the roof leaks could be resolved by essentially installing a more comprehensive through-wall flashing or reglet flashing in place of the existing flashing design. (*Id.*) In short, there was no determination by the District's inspector that the Appellant did not properly install the then-current roof flashing work. Rather, it found that a more comprehensive and invasive flagship design was necessary to prevent continuing leaks in the roof attributed to the porous stucco and split-faced block walls adjoining certain portions of the Center's roof.

Based on these facts, there is no evidence that the Appellant failed to properly perform the roof work that was required under the contract. Instead, the evidence supports the fact that the District developed a flashing design for the roof work that, even if performed correctly by the

Appellant, was inadequate to completely prevent leaking from the roof. As a result, the District improperly terminated Appellant for the roofing work that it performed because there was no evidence that it had been performed improperly. The termination on this basis was therefore unreasonable and an abuse of discretion.

2. Water Heaters

The District also asserts that Appellant failed to properly install water heaters that functioned properly in the Center. (District's Post Hr'g Br. 57.) The contract required Appellant to remove several existing water heaters from J.B. Johnson, and replace them with new A.O. Smith, model LW-750 water heaters. (FF 52.) Although Appellant provided and installed the water heaters that were required by the District under the contract, the District later claimed that they were nonfunctional. (FF 53, 76.)

Appellant's expert provided undisputed testimony that these particular water heaters ultimately did not properly function because they were designed to be installed in a building that had a direct venting system whereas the Center maintained a common venting system for this type of equipment. (Hr'g Tr. vol. 4, 833:7-864:15.) Indeed, further evidence of the District's error in selecting the direct venting type of water heaters for the Appellant to install is evidenced by the fact that, after terminating the Appellant, the District reprocured common venting water heaters for another contractor to install. In other words, the District reprocured water heaters (Model EVAW 500) that are compatible with the common venting system in the Center instead of the original direct venting water heaters that it had required the Appellant to provide. (FF 88.)

Consequently, the evidence establishes that the District specified an inappropriate type of water heater for installation by Appellant under the contract as it was the District's, and not the Appellant's, responsibility to develop and design the requirements under the contract. (FF 52.) Therefore, this flaw in the District's contract specifications was an unreasonable basis upon which to terminate Appellant for default. By the same token, only the District can be held responsible for the fact that the manufacturer voided the warranty on the original water heaters selected by the District, and installed by Appellant, because they were incompatible with the common venting system in the Center. (FF 59.) The Appellant's termination for default on this basis was, therefore, also improper.

3. Laundry Equipment

The District also contends that the Appellant failed to properly install the laundry equipment required by the contract. (District's Post Hr'g Br. 57.) The District argued at the hearing that it was the laundry washing machine extractors that failed to be properly installed on a 12 inch concrete pad that led to the termination decision. (Hr'g Tr. vol. 7, 1750:6-17, 1755:7-

9.) However, the contemporaneous record reflects another basis for the termination. In particular, both the termination for default letter itself and the reprocurement documents to correct the alleged deficient work state that it was the lack of a 12-inch concrete pad under the installed dryers at the Center that was the basis upon which the Appellant was terminated. (FF 86, 88.)

There is simply no specification in the contract which required the installed dryers, much less any of the required laundry equipment, to be installed on a 12-inch pad. (FF 62.) Notably, however, the contract drawings directed Appellant to place all of the new laundry equipment (dryers and washers) on the exact same 7-inch reinforced pad as the units that were being replaced. (*Id*.) Thus, although the District may have ultimately determined that the existing 7-inch slab was not adequate to reduce vibrations from the dryers, this does not render Appellant in default for complying with the contract requirement that the dryers be installed on the existing slab in the Center.

For these reasons, we find that Appellant was not in default for installing the dryers at the Center on the existing 7-inch concrete pad as there was no other specification that required otherwise. Additionally, as previously discussed, the evidence shows that Appellant did in fact deliver warranties for the laundry equipment to the District by a facsimile dated February 2, 2007, contrary to the District's contention that it did not. (FF 64.) Thus, the District's termination for default of the contract on these bases was also unreasonable and an abuse of discretion.

C. The District Waived Its Right to Terminate Appellant for Untimely Performance

As stated earlier, the District waited over two years after the original completion date for the contract passed to advise Appellant that it believed that its work was nonconforming to the contract specifications. (FF 76.) Specifically, as stated in the Notice to Proceed, Appellant was instructed to commence work on March 20, 2006, and to complete all contract work on or before December 1, 2006. (FF 6.) However, after the discovery of asbestos throughout the 3N wing upon Appellant's initiation of contract performance, the time for the completion of the contract necessarily changed. Shortly thereafter, the parties executed Change Order No. 7, which stated that the contract's period of performance was extended for a period "to be determined later," (FF 35), which clearly recognized that the original contract performance period would be extended. The parties also agreed that the delay associated with the asbestos abatement in the 3N wing was 161 days. (FF 29, 31, 84.)

Similarly, the District's expert also testified that the asbestos abatement work on the 3S wing, also delayed contract performance by 60 days, along with changes that the District

required for the built in furniture in the resident rooms which delayed the project by an additional 10 days. (Hr'g Tr. vol. 5, 1262:15-1263:3, Sept. 20, 2013.) Furthermore, the District continued to issue additional change orders to Appellant until July 18, 2008, without ever formally establishing a new contract completion date.[32] (*See* FF 28.)

Under the doctrine of waiver, the government waives its right to default terminate a contractor "where the government elects to permit a delinquent contractor to continue performance past a due date … assuming the contractor has not abandoned performance and a reasonable time has expired for a termination notice to be given." *MCI Constructors*, 39 D.C. Reg. at 4323 (quoting *DeVito v. U.S.*, 188 Ct. Cl. 979 (1969)).[33] "The necessary elements of an election by the non-defaulting party to waive a default in delivery under a contract are (1) failure to terminate within a reasonable time after the default under circumstances indicating forbearance, and (2) reliance by the contractor on the failure to terminate and continued performance by him under the contract, with the Government's knowledge and implied or express consent." *MCI Constructors*, 39 D.C. Reg. at 4324.

There is no evidence in the record that the District ever established a new contract completion date after the original completion date of December 1, 2006 (FF 6), passed. Clearly recognizing that delaying factors and continuing change order work could potentially affect the contract completion date, the District executed multiple change orders with language indicating that it intended to later negotiate a specific period of delay days with the contractor that would extend the contract completion period. (*See* Appellant's Hr'g Ex. 11, at 92; Appellant's Hr'g Ex. 21, at 190.) As such, the Appellant continued to work diligently to meet the contract requirements well beyond the original contract completion date, and was never threatened with termination at any point before turning over use of the Center to the District. Thus, Appellant was obviously led to believe that its performance was adequate to meet the contract requirements and that it should continue to work to complete the project.

Based upon these facts, the Board finds that the District's failure to establish a new contract completion date or advise Appellant that it was in default under the contract (and subject to liquidated damages for over three years after the original contract completion date) constitutes a waiver of that right as a matter of law. Moreover, as discussed *supra*, the non-compliance bases that the District provided as grounds for the termination were unreasonable.

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[32] Change Order No. 9 (May 2007) and Change Order No. 19 (July 2008) also contain language indicating that the contract would be extended for an undetermined period of time. (*See* Appellant's Hr'g Ex. 11, at 92; Appellant's Hr'g Ex. 21, at 190.)

[33] While the Court's ruling in *DeVito* was in the context of a supply contract, Boards have often applied the waiver doctrine to construction cases. *See B.V. Constr., Inc*., ASBCA Nos. 47766, *et al*., 04-1 BCA ¶ 32,604 at 161,351 (Apr. 22, 2004); *La Grow Corp.*, ASBCA No. 42386, 91-2 BCA ¶ 23,945 at 119,914 (Apr. 22, 1991); *In re Technocratica*, ASBCA No. 47992, 06-2 BCA ¶ 33,316 (June 13, 2006).

CONCLUSIONS OF LAW
CAB No. D-1410

Having addressed the propriety of the District's termination for default, the Board now considers the District's liquidated damages claim and the Appellant's request for damages for delay allegedly caused by the District. We will address the liquidated damages claim first, and then proceed to a discussion of the delay damages claim.

As noted above, the District assessed liquidated damages in the amount of $1,725,000.00 for an alleged 1,150 days of delay. (FF 82.) To obtain liquidated damages, the party assessing liquidated damages, bears the burden of proving that liquidated damages are due and owing. This involves showing that the contract performance requirements were not substantially completed by the contract completion date, and that the delay period was assessed properly. *Perdomo & Associates, Inc.*, CAB No. D-799, 41 D.C. Reg. 3641 (Sept. 17, 1993). However, liquidated damages are not properly assessed on a construction contract after the date the project is substantially completed or, in other words, capable of being used for its intended purpose. *In Re Kemron Envtl. Servs. Corp.*, ASBCA No. 51536, 00-1 BCA ¶ 30,664 (Nov. 18, 1999).[34]

In its denial of Appellant's REA, the District attempts to impose liquidated damages on the Appellant for the period of approximately May 2007 to July 21, 2010. (*See* AF Ex. 10, at DC 115-22.) The CO's termination for default letter stated that the contract should have been completed on or about May 15, 2007. (FF 84.) However, as discussed above, this new completion deadline was never formally established by the District as it waived the contract completion deadline and never formally re-established a new completion date for the Appellant prior to its substantial completion of the project. Thus, it is unreasonable for the District to define a new contract completion deadline that was never made known to the Appellant and thus is an arbitrary deadline from which to calculate liquidated damages.

Further, the evidentiary record establishes that by February 13, 2008, the Appellant had reached substantial completion of both the 3N and 3S wings, and had not been advised by the District that its performance was improper in any respect. (FF 38, 47.) Again, the District's expert also testified that as of February 2008, the District was utilizing the Center for its intended purposes. (Hr'g Tr. vol. 6, 1494:14-1495:4; 1496:11-20.) For almost two years, the District

[34] "[I]n cases involving assessment of liquidated damages, substantial completion is evaluated by 'whether the owner was able to use the facility in the manner intended' because 'when use of a facility commences, it is not reasonable to expect those costs [for which liquidated damages compensate] the owner will continue unabated.'" *See Tromel Constr. Corp.*, PSBCA No. 6303, 13 BCA ¶ 35,346 (June 27, 2013) (quoting *Two State Constr. Co.*, DOTCAB No. 1070, 81-1 BCA ¶ 15,149 (May 29, 1981)).

utilized the Center for its full benefit but now seeks to assess liquidated damages against the Appellant for this very same time period. Such an assessment of liquidated damages in the face of a waived completion deadline by the District, and its beneficial use of the Center, is unreasonable. *See Technocratica*, ASBCA No. 47992, 06-2 BCA ¶ 33,316 (holding that the Government waived its right to assess liquidated damages upon the contract completion date where the completion date had been waived and a new date had not been established.) Thus, the District's assessment of liquidated damages is dismissed with prejudice.

With respect to its delay damages claim, Appellant seeks an equitable adjustment to cover the increased costs that resulted from delays it claims to have encountered during the course of the project related to the discovery of asbestos on the project site, discovery of the Romex cable, and other delays associated with change order work requirements. (Appellant's Post Hr'g Br. 1.) In sum, Appellant contends that it is entitled to delay damages for 440 days of District caused delay. (*Id.* at 5.)

To receive an equitable adjustment, a contractor must show three elements—liability, causation, and resultant injury. *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). The Appellant has the burden of proving its entitlement to an equitable adjustment by a preponderance of the evidence. *A.S. McGaughan Co.*, CAB No. D-884, 41 D.C. Reg. 4130, 4135 (Mar. 16, 1994). The Board's review is de novo and the factual findings of the contracting officer are not attributed any presumed validity. *See Ebone, Inc.*, CAB Nos. D-971, *et al.*, 45 D.C. Reg. 8753, 8773 (May 20, 1998).

Accordingly, as it relates to Appellant's claim of entitlement to delay damages in the present case, it is the Appellant's burden to demonstrate the extent of any delay and the causal link between the District's actions and the extended delay period claimed by the contractor. *Essex Electro Eng'rs, Inc. v. Danzig*, 224 F.3d 1283, 1295 (Fed. Cir. 2000). 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 establish that completion of the entire project was delayed by reason of those delays to the segments of work at issue. *Prince Constr. Co./W.M. Schlosser Co., Joint Venture*, CAB Nos. D-1369, *et al.*, 62 D.C. Reg. 6339, 6378 (Dec. 9, 2013) (citing *Donohoe Constr. Co.*, ASBCA Nos. 47310, *et al.*, 99-1 BCA ¶ 30,387 (Mar. 13, 1999)).

In order for a court or board of contract appeals to award damages for such delay, the forum must have before it evidence that establishes the critical path of the project. *Clark Constr. Grp., Inc.*, GAOCAB No. 2003-1, 2004 WL 5462234 (Nov. 23, 2004). In this regard, the critical path method (CPM) is the Board's preferred method for the contractor to demonstrate that it experienced delays on the project through no fault of its own that delayed the completion date. *See Advanced Eng'g & Planning Corp., Inc.*, ASBCA No. 53366, 05-1 BCA ¶ 32,806 (Nov. 19, 2004) (citing *Haney v. United States*, 676 F.2d 584, 595 (Ct. Cl. 1982) ("Courts and boards of

contract appeals have acknowledged that CPM analysis is the preferred method for determining the causes of delay.") This is an efficient means of organizing and scheduling a complex project consisting of numerous but interrelated smaller projects. *Haney*, 676 F.2d at 595. The subprojects are classified as to duration and order of precedence. *Id.* Items determined to be on the critical path are those that if not performed on schedule will delay the entire project. *Id.* Accordingly, determining the critical path is crucial because only work along the critical path has an impact on project completion. *Fortec Constructors v. United States*, 8 Cl. Ct. 490, 505 (1985) (quoting *G.M. Shupe, Inc.*, 5 Cl. Ct. 662, 728 (1984)). This analysis is required to show a clear apportionment of delay and expense to each respective party in order for the contractor to recover monetary compensation for delay damages. *Tromel Constr. Corp.*, PSBCA No. 6303, 13 BCA ¶ 35,346.

Here, Appellant argues that it is entitled to 440 days of compensable delay. (Appellant's Post Hr'g Br. 5; Hr'g Tr. vol. 4, 990:1-6.) In support of its claim for delay damages, Appellant primarily relies on the testimony of its time impact analysis expert who evaluated the project's delays and concluded that all of the delays that Appellant encountered, and at issue in this action, impacted the critical path and were not the fault of the Appellant. (Hr'g. Tr. vol. 4, 896:2-15.) In making his determination, Appellant's expert testified that he conducted an "as-planned" versus "as-built" analysis in order to determine how the delays impacted overall project completion. (*Id.* at 884:1-885:3.) Along with his expert report, Appellant's expert also provided a CPM schedule illustration to the Board which depicted his as-planned versus as-built analysis and attributed liability for significant critical path delays to the District.

While accepting the testimony of this expert in support of establishing the unreasonableness of the District's stated grounds for termination, the Board finds discrepancies in his CPM analysis that diminished its usefulness to the Board. [35] Specifically, conflicting evidence presented by the District established that while the Appellant's expert utilized industry-recognized software to generate his CPM report, he manually entered data points for inclusion in the CPM report of his choosing in lieu of allowing the CPM software to independently create those data points utilizing its own software algorithm. (Hr'g Tr. vol. 5, 1287:7-1288:19.)

In addition, the CPM schedule created by Appellant's expert clearly contained errors with regard to the dates on which Appellant allegedly started and finished certain work activities on the project. In this regard, the District's expert presented evidence of discrepancies between dates in the Appellant's CPM analysis and the contemporaneous project record. (*Id.* at 1299:1-

[35] "A trial judge has a 'gatekeeping role' to screen proposed expert evidence for reliability and relevance." *Yates-Desbuild Joint Venture*, CBCA Nos. 3350, *et al.*, 15-1 BCA ¶ 35,996 (June 4, 2015) *(*quoting *Peter Kiewit Sons' Co.*, IBCA Nos. 3535-95, *et al.*, 00-2 BCA ¶ 31,044 at 153,303 (July 26, 2000)). A trial judge's inquiry is a flexible one, and the judge is accorded broad latitude in determining the reliability of, and whether to admit or exclude, expert evidence." *Id.*; *see also Yamaha Int'l Corp. v. Hoshino Gakki Co*., 840 F.2d 1572, 1582 (Fed. Cir. 1988) (tribunal has "broad discretion to admit the testimony of ... experts").

10.) In other instances, the Appellant's proffered CPM analysis also contained redundant fragnet entries of the exact same discrete project activities, all of which had different start and finish dates. [36] These discrepancies were never reconciled or explained by the Appellant at the hearing.

As a result of these factors, we are unable to accept the CPM analysis and testimony proffered by the Appellant's expert as reliable evidence to support its delay claim. Thus, we are left to determine the merits of Appellant's delay claims based upon the remaining evidence in the record and the positions of the parties. In so doing, we note that there is no dispute from the District that the Appellant is entitled to at least 161 days of compensable delay herein related to asbestos abatement in the 3N wing, and 60 additional compensable delay days related to asbestos abatement in the 3S wing (*see* discussion below).

1. The Asbestos Delay

It is undisputed that the contract did not include a requirement for asbestos abatement. (FF 19; *see also* Hr'g Tr. vol. 2, 85:13-18.) However, shortly after Appellant began its contract performance, inspections confirmed the existence of asbestos throughout the Center's 3N and 3S wings, various rooms in the basement, various rooms on the first and fourth floors, and in the center's façade and roof, requiring the District to halt work. (*See* FF 21-23; *see also* Hr'g Tr. vol. 2, 86:16-22.)

The record corroborates that the discovery of asbestos in the 3N and 3S wings of the Center was unforeseeable by Appellant and significantly delayed and hampered the completion of the J.B. Johnson project. In both cases, Appellant could not even begin its construction activities in either wing of the building until the abatement process was completed by the third-party contractor. (FF 21, 23, 24.) Appellant mobilized at J.B. Johnson around March 6, 2006 (FF 20), and the parties agree that the asbestos abatement process substantially impaired Appellant's ability to prosecute the contract work in that wing of the building according to the original schedule. (Hr'g Tr. vol. 2, 97:10-98:13; Hr'g Tr. vol. 5, 1224:8-17; Hr'g Tr. vol. 6, 1506:11-16.) More significantly, the contract did not permit Appellant to begin work in the 3S wing of the Center until its construction work was completed in the 3N wing. (FF 5.) Similarly, the asbestos abatement in the 3S wing, which started around June 4, 2007, was not fully completed until July 25, 2007, which was also well beyond the original completion schedule planned by the parties. (FF 44, 46.)

At the hearing in this matter, the District's expert testified, and corroborated, that the Appellant's claim for delay damages associated with the discovery of asbestos were valid and

[36] For example, the District's expert pointed the Board to at least five different instances, on five different dates, where this CPM report stated that Appellant "turned over" the 3N wing to the District presumably after completion. (*See* Hr. Tr. vol. 5, 1306:13-1307:15.) Obviously, it makes no sense that the Appellant would turn over the 3N wing to the District on more than one occasion.

compensable as a differing site condition. (Hr'g Tr. vol. 5, 1224:8-17; Hr'g Tr. vol. 6, 1513:21-1514:4.) Specifically, the District's expert testified that Appellant was entitled to 161 days of delay related to the asbestos abatement in the 3N wing which delayed its performance and that the District bore responsibility for these delays. (Hr'g Tr. vol. 5, 1210:12-16.) The record also reflects that the parties had agreed during the course of the project that because of the suspension of Appellant's work on the 3N wing at the beginning of the contract related to the discovery of asbestos, the Appellant was entitled to compensation for a 161 day delay period. (*See* Appellant's Hr'g Ex. 99, at 1203; District's Hr'g Ex. 11, at DC 2620.)

Appellant's work in the 3S wing was similarly suspended by the District while the asbestos in the 3S wing was remediated. (*See* Appellant's Hr'g Ex. 56, at 648.) Accordingly, the District's expert testified that Appellant's claim of 60 days of delay days related to the follow-on asbestos abatement activities had a similar delay impact on Appellant's performance in the 3S wing of the Center and was compensable. (Hr'g Tr. vol. 5, 1262:15-19; Hr'g Tr. vol. 6, 1514:12-21.) Thus, by virtue of the fact that both parties are essentially in agreement as to the number of compensable delay days arising from the 3N and 3S wings asbestos abatement and related suspension of Appellant's work performance, the Board finds Appellant entitled to appropriate compensation for these delay days. *See, e.g., Molony & Rubien Constr. Co.*, DOTCAB No. 2486, 1993 WL 160312 (March 7, 1993) (finding 20 days of delay to be excusable after FAA conceded that it caused 20 days of delay).

Moreover, in addition to the District's concession regarding the delay impact to the Appellant from the asbestos abatement, the record also reflects that the parties did not intend for the Change Order No. 7 to limit the Appellant's ability to pursue a delay damage claim in the future against the District. The change order, as agreed to by the parties, specifically reserves the Appellant's right to pursue such a delay claim (FF 35) and, thus, the Release Language should not be construed in a way the counters the intent of the parties in executing this agreement. Indeed, release agreements are to be scrutinized carefully to determine the true intent of the parties. *See Ralcon, Inc.*, ASBCA No. 43176, 94-2 BCA ¶ 26,935; *Leslie & Elliott*, ASBCA No. 36271, 89-1 BCA ¶ 21,263.

2. Furniture Delay

Appellant also seeks delay damages for the District's ordered change, under Change Order No. 5 that Appellant provide and install casework, or built-in furniture, in resident rooms. (FF 40.) This change order specifically notes on its face that the Appellant did not request extra time to perform this work based upon the District's underlying agreement to accept the 3N wing for beneficial occupancy prior to completion of the casework. (FF 41.) However, the District changed course and informed Appellant that the casework, which is the subject of Change Order No. 5, had to be completed before J.B. Johnson residents could be transferred to the renovated

3N wing. (FF 43.) While the District acknowledges an overall project delay impact of 10 days arising from this change (Hr'g Tr. vol. 5, 1262:20-1263:3), there is no CPM analysis from which the Board can analyze the impact to the critical path and rule out any concurrent delays potentially attributable to the Appellant. Thus, there is no reasonable basis upon which the Board can deem this delay compensable.

3. Romex Cable Delay and Additional Change Order work

The Appellant also claims that it is entitled to delay damages because of a non-compliant Romex cable that was found in the Center which caused Appellant to fail inspection, and also because of additional delays arising from the District's multiple change order requests. (Appellant's Post Hr'g Br. 4-5; FF 50.) However, Appellant fails to provide credible evidence that shows a definitive impact of these activities on the critical path that was not the fault of the Appellant and, thus, a resulting compensable delay for the Appellant. *Tromel Constr. Corp.*, 13 BCA ¶ 35346 (denying Appellant's delay claim, in part, where Appellant failed to present critical path or other credible evidence of delay to overall project completion). Additionally, with respect to Appellant's delay claim based on the District's change order requests, the fact that the government issues a change order is not unequivocal evidence that a change impacted the critical path of a project and is compensable to the Appellant. *See Interstate Constr., Inc.*, ASBCA No. 38745, 90-1 BCA ¶ 22,482 (Nov. 7, 1989) (although government-directed change in sequence of performing work may give rise to a compensable change, the contractor bears the burden of establishing the extent to which the project as a whole was delayed as a result of such change). Further, as noted previously, the Appellant has the burden of proving that the claimed compensable days were caused by the government, were not concurrent with contractor-responsible delay, as well as that it delayed overall completion of the contract. *See Clark Constr. Grp., Inc.*, 2004 WL 5462234.

Consequently, with the exception of 221 days of delay, which was also affirmed by the District (Hr'g Tr. vol. 6, 1513:21-1514:21) and discussed herein, Appellant has provided no other credible evidence to support its contention that the remaining claims for delay damages resulting from the Romex cable and other change order work are compensable particularly in the absence of a valid CPM analysis.

II. QUANTUM

A. Field Overhead Costs

Field overhead costs, also referred to as general conditions costs, are direct costs that can be attributed to the performance of a specific contract. *Civil Constr. Corp.*, 62 D.C. Reg. at 4422 (*citing AMEC Constr. Mgmt., Inc. v. Gen. Servs. Admin.*, GSBCA No. 16233, 06-1 BCA ¶ 33,177 (Jan. 24, 2006); *Young Enters, of Ga., Inc. v. Gen. Servs. Admin.*, GSBCA No. 14437, 00-2 BCA ¶ 31,148 (Oct. 19, 2000)). Field costs are recoverable where there is compensable delay

to the project. *See e.g. Gottfried Corp.*, ASBCA No. 51041, 98-2 BCA ¶ 30,063 (Sept. 25, 1998). We have previously recognized that one way to measure such costs is to divide the total general conditions costs incurred on a project by the total number of days on the project in order to derive a daily rate, and then multiply the number of compensable days by the daily rate. *MCI Constructors*, 44 D.C. Reg. at 6464*; Civil Constr.*, 62 D.C. Reg. at 4422.

Based upon financial data from its accounting department, Appellant claims general condition costs for the period of March 6, 2006, through February 13, 2008, in the amount of $454,944.41. (Appellant's Hr'g Ex. Binder IVA; Hr'g Tr. vol. 3, 351:21-352:15.) Appellant also calculates a performance period for the contract of 709 days based upon the date that it started work on the contract on March 6, 2006, and the date that it reached substantial completion of the project on February 13, 2008. (*See* Appellant's Hr'g Ex. 108, at 1251-52.) After dividing its performance days on the project (709) by its general condition costs, Appellant calculates that its daily rate for field overhead is $641.67. According to the Appellant, this daily rate should be multiplied by the number of its compensable delay days, and further increased by at 10% profit margin. (*See* Appellant's Hr'g Ex. 108, at 1251-52; Hr'g Tr. vol. 4, 815:2-14.)

After assessing the veracity of Appellant's field overhead calculations described above, the District's expert made a downward adjustment of $60,948.00 to Appellant's claimed general condition costs which resulted in a field overhead rate of $555.71/day by his calculations, which Appellant accepts as reasonable and does not contest the downward adjustment. (*See* District's Hr'g Ex. 11, at DC 3175; Hr'g Tr. vol. 7, 1996:3-13; Appellant's Post Hr'g Br. 5.) The Board, after examination of Appellant's accounting records, (Appellant's Hr'g Ex. Binder IVA), also finds the District's adjustments to be reasonable and acceptable. (*See id*. at 1807-1871; Hr'g Tr. vol. 3, 351:8-353:10; Hr'g Tr. vol. 7, 1996:3-13.) Based upon the field overhead rate of $555.71, and the Board's finding that Appellant is entitled to 221 days of compensable delay, we find that Appellant is entitled to field overhead costs in the amount of $122,811.91 (555.71 daily rate x 221 days of compensable delay) plus 10% profit in the amount of $12,281.19 for total award of $135,093.10.

A. Unabsorbed Home Office Overhead Costs

The Appellant also seeks to recover its unabsorbed home office overhead costs for the 3N and 3S wings asbestos remediation period pursuant to the Eichleay formula.

> The Eichleay formula was first introduced by the Armed Services Board of Contract Appeals in *Eichleay Corp.*, ASBCA No. 5,183, 60-2 BCA ¶ 2,688 (July 29, 1960). The Eichleay formula allocates overhead costs "pro-rata because they cannot ordinarily be charged to a particular contract." *Wickham Contracting Co. v. Fischer*, 12 F.3d 1574, 1579 (Fed. Cir. 1994) (citing *Eichleay Corp.*, ASBCA

> No. 5,183, 60-2 BCA ¶ 2,688) (quotation marks omitted). Use of the Eichleay formula is appropriate where a government caused-delay has "reduced the stream of direct costs in a contract." *C.B.C. Enters., Inc. v. United States*, 978 F.2d 669, 674 (Fed. Cir. 1992).

Civil Constr., 62 D.C. Reg. at 4422.

However, the Eichleay formula does not automatically apply to all claims for unabsorbed or extended home office overhead costs. *Id.* Instead, the contractor must meet certain prerequisites. Specifically, before the formula can be used, Appellant must show there was a government-caused delay of uncertain duration, the delay extended the time of performance, and that the contractor was required to remain on standby, and thus unable to take on additional work to mitigate damages. *Id.* However, properly understood, the standby prong focuses on whether the contractor was suspended from performing work on the contract. *Id*. Where the contractor makes a *prima facie* showing that it meets these prerequisites the burden of production shifts to the government to show that "it was not impractical for the contractor to take on replacement work." *Id.* (citing *P.J. Dick v. Principi*, 324 F.3d 1364, 1370 (Fed. Cir. 2003); *Melka Marine v. United States*, 187 F.3d 1370, 1375 (Fed. Cir. 1999)).

Here, the Board finds that the record only supports a finding of a complete standby situation during Appellant's asbestos delay in the 3N wing for purposes of determining whether Eichleay damages are appropriate. The 3N wing asbestos delaying event occurred at the initial outset of the contract performance period (FF 20), and prevented Appellant from even starting the very first sequence of work in the 3N wing after the District suspended its performance. Work in other parts of the building also could not be initiated until the 3N wing was completed pursuant to the contract terms. (FF 5.) The District's expert also testified that the 3N wing asbestos remediation essentially resulted in a standby situation for purposes of the Appellant's inability to prosecute any further contract work until the remediation was completed. (FF 27.) Consequently, the Board finds that the 3N wing asbestos delaying impact (161 days) was in fact a standby situation where the Appellant was effectively suspended from performing any further work on the contract until that first stage of contract work in the 3N wing could be started.

On the other hand, the Board is unable to find that any of the other delay impacts found by the Board to be compensable meet the requirements for the application of Eichleay damages, as there is insufficient evidence in the record that any of these delays caused a complete stand-still in Appellant's ability to perform any other work. Indeed, particularly given that there was approximately $700,000.00 worth of change order work ultimately ordered under this contract (*see* FF 28), the Board finds it unlikely that the Appellant was ever again at a complete stand-still in its performance after the 3N wing asbestos remediation was complete. We therefore only find that Appellant was entitled to Eichleay damages for the 161 delay days associated with the 3N wing asbestos remediation.

Eichleay Calculation

In principle, the applicable rate for a contractor's unabsorbed overhead costs on a project are determined by first dividing the contractor's total billing for a project by the contractor's overall company billing during the same period of contract performance. *Eichleay Corp.*, 60-2 BCA ¶ 2,688. This resulting number is then multiplied by the contractor's total General & Administrative ("G&A") costs during the same time period, and then is divided by the total number of contract work days, which is then multiplied by the total number of compensable delay days. *Id.*

As applied in the present case, the Appellant's asserts that its daily unabsorbed overhead rate is $556.90 per day. Appellant reaches this figure by dividing its stated contract billings for the J.B. Johnson project in the amount of $4,545,607.00, by its company's total contract billings during the relevant period in the amount of $28,629,101.88, and then multiplies this figure by its G&A costs in the amount of $2,486,805.12. Appellant then divides the resulting amount of $394,844.34 by its total 709 contract performance days to reach its claimed unabsorbed daily overhead rate of $556.90 per day. (*See* Appellant's Hr'g Ex. 108, at 1251.)

The District's expert, however, took exception to multiple costs components of Appellant's calculation including several categories of costs which, amongst other things, were cost which were believed to be unallowable, and cost items which had insufficient detail that prevented validation. (Hr'g Tr. vol. 7, 1966:14-1967:14.) The District's expert, however, admitted on cross examination that prior to trial he had been provided with additional documentation by the Appellant which resolved many of the questions and concerns raised after his assessment of the underlying cost data which formed the basis of the Appellant's Eichleay daily rate calculation. (*Id.* at 2030:13-2031:14; 2039:1-2043:5.) The Board, therefore, believes that given that the District's expert has largely substantiated the majority of the Appellant's underlying cost calculation for its unabsorbed overhead rate, that it is possible for the parties to reasonably negotiate a fair daily rate to be applied to the 161 days of compensable delay awarded to the Appellant by this Opinion in connection with the 3N wing asbestos delay.

CONCLUSION

D-1414 – For the reasons stated herein, we find that with respect to D-1414, that the District improperly terminated the Appellant for default. Therefore, the Board hereby converts the Appellant's termination for default into a termination for the convenience of the District. Accordingly, the rights and obligations of the parties shall be determined according to Article 6 of the contract's termination for convenience clause and the parties are ordered to proceed with the formal close-out of the contract according to these procedures. In addition, the Board lacks jurisdiction over the District's purported reprocurement claim because an appeal therefrom was

not taken in this matter. As a practical matter, however, we note that a finding in favor of reprocurement costs against Appellant herein would be inconsistent with our instant decision.

D-1410– We find that the Appellant is entitled to field overhead costs in the amount of $135,093.10 based upon the Appellant's entitlement to 221 days of compensable delay for the reasons discussed herein. The Board also finds that the Appellant is entitled to unabsorbed overhead costs for 161 delay days. Further, the District, having had its expert witness testify under oath as to his opinion regarding the propriety of the underlying costs components included in Appellant's Eichleay calculation presented to the Board at the hearing, shall negotiate in good faith with the Appellant, and Appellant shall do the same, to determine a reasonable daily unabsorbed overhead rate. This negotiated rate shall then be multiplied by 161 days of delay damages to which the Appellant is entitled and shall be paid by the District. Further, the District failed to establish that it is entitled to liquidated damages, and its claim therefore is dismissed with prejudice.

The District shall also release any remaining retainage to the Appellant, and shall pay statutory interest to the Appellant in accordance with D.C. Code § 2-359.09 (2011) in connection with this award of damages by the Board.

The parties shall file a status report with the Board within 30 days after the issuance of this Opinion to provide the Board with the status of the termination for convenience close-out procedures for the contract, as well as to inform the Board regarding the status of the parties' unabsorbed overhead negotiations.

SO ORDERED.

DATED: July 28, 2016

/s/ Monica C. Parchment
MONICA C. PARCHMENT
Administrative Judge

CONCURRING:

/s/ Marc D. Loud, Sr.
MARC. D. LOUD, SR.
Chief Administrative Judge

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:	)	
	)	
FORT MYER CONSTRUCTION CORPORTATION	)	
	)	CAB No. P-1012
Solicitation No: DCAM-16-CS-0084	)	

For the Protestor, Fort Myer Construction Corporation: Christopher A. Coppula, Esq. For the District of Columbia: C. Vaughn Adams, Esq., Department of General Services, Office of General Counsel.

Opinion by Administrative Judge Monica C. Parchment with Chief Administrative Judge Marc D. Loud, Sr. concurring.

OPINION
Filing ID #59588020

This protest arises from a solicitation issued by the District of Columbia Department of General Services seeking a design/build contractor to implement transportation and infrastructure improvements at the District of Columbia's St. Elizabeths East Campus. Fort Myer Construction Corporation ("Fort Myer" or "protestor") argues that: (1) the source selection official improperly disregarded Fort Myer's evaluation score when making the contract award decision primarily based upon price; (2) the solicitation was unclear regarding the proper means by which the contract awardee would recoup its profit and overhead; and (3) the District's technical evaluation was flawed because it unreasonably deducted points from Fort Myer's score in relation to several evaluation criteria.

Upon consideration of the allegations raised by the protestor and the underlying record, we deny and dismiss Fort Myer's protest allegations as either without merit or untimely as further detailed herein.

FACTUAL BACKGROUND

On February 12, 2016, the Department of General Services ("DGS") issued Request for Proposals No. DCAM-16-CS-0084 (the "Solicitation") seeking a design/build contractor to complete the 100% plans and construction documents and construct the Stage 1 Phase 1 Transportation and Infrastructure Improvements project at St. Elizabeths East Campus ("East Campus") located at 1100 Alabama Ave, SE, Washington, DC. (Agency Report "AR" Exhibit "Ex." 1, at 2-3.)[1] The East Campus at St. Elizabeths is owned by the District and has an

[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.

approved master plan and zoning for over 5 million square feet for the development of new buildings and reuse of historic buildings. (*Id.* at 3.) In redeveloping the East Campus, the Deputy Mayor for Planning & Economic Development ("DMPED") created a master development plan, concept infrastructure plan and also procured engineering services from an outside firm, CH2M, to develop preliminary 30% and 65% plans for Stage 1 Phase 1 of the infrastructure improvements. (*Id.*)

The Solicitation outlined the design/build work involved to develop the infrastructure plans from the 65% level of completion through the construction and final completion of the project's initial improvements stage. (*Id*.) The District intended to implement the design/build project in two phases: (1) the Preconstruction Phase, and (2) the Construction Phase. (*Id.* at 4.) During the Preconstruction Phase, the design/builder would assume the design contract with the engineer and complete the design. Thereafter, the Construction Phase to implement the design would begin. (*Id.*)

DGS sought a contractor to provide a turnkey price to deliver the project requirements. (*Id.* at 5.) Specifically, offerors were required to submit with their proposal a lump sum price which included all costs necessary to complete the project such as profit, home and field office overhead, supervision, labor, materials, equipment, bonds, and insurance. (*Id.*) Additionally, offerors were required to submit as part of their lump sum fee proposal a schedule of values that included an estimation of cost required to design, permit, manage and construct the Stage 1 Phase 1 Infrastructure Improvements in accordance with the Solicitation's Form of Offer Letter. (*Id.* at 295-98.)

DGS issued a total of ten addenda to the Solicitation between February 18 - April 13, 2016. (*See generally* AR Exs. 1b-1c.) Collectively, these addenda: (1) issued project data and reports; (2) deleted the tax affidavit from the proposal attachments; (3) issued the sign-in sheet from the pre-proposal conference, pre-proposal conference meeting minutes, and pre-proposal PowerPoint presentation; (4) issued Request for Information responses, scope of work clarifications and revised the contract structure; (5) extended the Solicitation's due date; (6) issued the agreement for professional design services for the project; and (7) revised the bidder/offeror certification form. (*Id.*) Notably, DGS issued Addendum No. 8, which, in part, revised the price components that offerors would be required to submit in their proposals to include: (1) Preconstruction Fee; (2) Design Fee; (3) Design-Build Fee; (4) Lump Sum General Conditions Price; (5) Above Grade Demolition Price; (6) Contingency Percentage; and (7) Unit/Hourly Rates for Self-Performed Work. (AR Ex. 1b, at 106-07,113-115.)

Evaluation Criteria

The Solicitation stated that DGS would evaluate the offerors' submissions and any best and final offers in accordance with the Solicitation and DGS' Procurement Regulations. (AR Ex. 1, at 20.) Further, proposals would be scored on a scale of one (1) to one hundred and eighty-eight (188) points. (*Id.* at 21.) Offerors would also be eligible to receive up to twelve (12) additional preference points in accordance with the parameters detailed in Section C of the Solicitation. (*Id*.) In particular, pursuant to the Small and Certified Business Enterprise Development and Assistance Act of 2014 (the "Act"), Section C.1.1 of the Solicitation provided

for preferences in evaluating bids from businesses that were certified as small, local, or disadvantaged by the District's Department of Small and Local Business Development. (*Id.* at 15.)

The Solicitation also listed the following evaluation criteria: Relevant Experience and References (35 points), Key Personnel (35 points), Project Management Plan (30 points), Preliminary Project Schedule (25 points), Ward 7 & 8 Economic Inclusion Plan (15 points), and Price (60 Points) which included a possible forty-eight (48) price evaluation points and an additional twelve (12) preference points. (*Id.* at 21-23.) Therefore, the maximum number of points available under the Solicitation was two hundred (200). (*Id.* at 23.)

Further, the price evaluation score for all offerors would be determined by applying the following formula:

$$\frac{\text{High Price} - \text{Offeror's Price}}{\text{Highest Price} - \text{Lowest Price}} \times \text{Available Points} = \text{Evaluated Price Score}$$

(*Id.*)

The Solicitation required proposal submissions to be evaluated by an evaluation committee that would prepare a written report summarizing its findings prior to submitting its findings to the source selection official. (*Id.* at 20.) Section D.2 mandated that the source selection official would select the offeror whose submission was determined to be the most advantageous to the Department based upon the information submitted by the offerors in response to the Solicitation as well as the report prepared by the evaluation committee. (*Id.*)

Offerors' Proposals

On the Solicitation's April 26, 2016, due date for proposals, the District received proposals from two offerors including Fort Myer, the protestor, and Gilbane Building Company ("Gilbane"). (AR Exs. 2-3.)

Fort Myer's total bid price of $19,404,680.00 included the following price components:

Preconstruction Fee:	$218,000.00
Design Fee:	$2,390,000.00
Design-Build Fee:	$6,750,000.00
Lump Sum General Conditions:	$8,706,680.00
Above Grade Demolition:	$1,340,000.00

(AR Ex. 2, at 2.)

Gilbane's total bid price of $ 8,053,523.00 included the following price components:

Preconstruction Fee:	$97,380.00
Design Fee:	$1,423,520.00
Design-Build:	$2,250,000.00
Lump Sum General Conditions:	$3,771,762.00
Above Grade Demolition:	$510,861.00

(AR Ex. 3, at 6.)

Technical Evaluation

The Technical Evaluation Panel ("TEP") for this procurement consisted of three individuals from DGS and one individual from the District's Department of Transportation ("DDOT"). (AR Ex. 8, at 4.) The TEP evaluated the technical proposals of Fort Myer and Gilbane based upon a scale of a possible one hundred and forty (140) points which included the following evaluation factors: Relevant Experience & References (35 points), Key Personnel (35 points), Project Management Plan (30 points), Preliminary Project Schedule (25 points), and Ward 7 & 8 Economic Inclusion (15 points). (*Id.)*

Each TEP member individually completed an evaluation of the proposals for Gilbane and Fort Myer. The individual TEP members divided the points available for each factor among the sub-factors in that category and rated each offeror with respect to the specific sub-factors thereby assigning each offeror one of twelve (12) possible technical ratings. (*Id*.) In this regard, the TEP used the following adjectival rating scale in assessing the merit of the technical proposals submitted by the offerors:

Excellent + (E+)	Good + (G+)	Fair+ (F+)	Poor+ (P+)
Excellent (E)	Good (G)	Fair (F)	Poor (P)
Excellent - (E-)	Good- (G-)	Fair- (F-)	Poor- (P-)

(*Id.*)

The TEP then converted each adjectival score assigned to the offerors under the evaluation criteria into a numerical score[2], and totaled the points for each offeror in the following manner:

[2] Specifically, it appears that 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 sub-factor by the offeror's adjectival rating for the sub-factor to calculate the offeror's total points for the sub-factor. After performing this rating process for each sub-factor under the technical factors, the evaluator totaled the points Fort Myer had received for each sub-factor to determine Fort Myer's total points for the respective technical factor.

	Fort Myer				**Gilbane**			
Evaluator	E1	E2	E3	E4	E1	E2	E3	E4
Experience & Reference (35)	15.82	25.75	18.44	17.94	17.27	15.85	15.22	24.25
Key Personnel (35)	19.8	23.15	22.22	18.97	12.29	19.65	16.13	22.45
Project Management Plan (30)	12.79	19.84	17.23	15.97	19	18.57	17.25	21.46
Prelim. Project Schedule (25)	12.83	15.87	11.95	12.35	16.91	14.59	10.35	16.75
Ward 7&8 Economic Inclusion (15)	7.05	8.45	8.49	5.4	6.55	8.45	10.3	10.05
Total Technical Score (140)	**68.29**	**93.06**	**78.33**	**70.63**	**72.02**	**77.11**	**69.25**	**94.96**

(*See generally*, AR Ex. 7, at 45-48.)

After the TEP completed their individual evaluations of the proposals, the panel collectively met on May 16, 2016, to develop a consensus technical score for each offeror. (*See* AR Ex. 8, at 11.) In developing the consensus score, the TEP discussed the merits of each proposal in light of the stated evaluation factors and sub-factors in the Solicitation and then, collectively completed a technical evaluation consensus score for each offeror, assigning for each sub-factor one of the twelve (12) adjectival ratings as each member had done individually. (*Id.*) Subsequently, the TEP summarized its assessment of each offerors' proposal with respect to each evaluation factor. (*Id.*)

Accordingly, under the Relevant Experience & References criteria, the TEP's consensus was that Fort Myer's proposal fell on the lower end of the "Good" range primarily based upon Fort Myer's experience working with projects similar to the work contemplated in the Solicitation, while Gilbane's proposal fell on the higher end of the "Fair" range largely because Gilbane lacked significant experience working on projects similar to the one at hand. (*Id.*) Additionally, under the Key Personnel criteria, the TEP's consensus was that Fort Myer's proposal fell on the high end of the "Fair" range given that the TEP was concerned that several of the individuals that Fort Myer proposed for the project were already committed to other projects, while Gilbane's proposals fell in the "Fair" range since a number of individuals that Gilbane proposed for the project lacked significant experience in performing their roles. (*Id.* at 12.)

Furthermore, under the Project Management Plan criteria, the TEP's consensus was that Fort Myer's proposal fell between the high "Fair" and the low "Good" range for this category because Fort Myer's plan was disordered and lacked sufficient description of the challenges Fort Myer expected for the project. (*Id.* at 12, 14.) However, the panel did note that Fort Myer's plan adequately addressed how Fort Myer would staff the project sufficiently and described how its personnel would manage the project. (*Id.* at 14.) Gilbane's proposal fell in the "Good" range for this category, according to the TEP, largely due to the fact that it thoroughly described how it would complete the project. (*Id.*)

Under the Preliminary Project Schedule criteria, the TEP's consensus was that both offerors' proposals fell in the lower end of the "Good" range for this category since the panel found both offerors' proposed project schedules to be sufficiently detailed in all of the key project issues. (*Id.* at 14-15.) Under the Ward 7 & 8 Economic Inclusion Plan, the TEP's consensus was that both offerors fell on the verge of the "Good" range for this category because although both offerors described how they planned to involve Ward 7 & 8 residents, neither offeror included an estimate of the hours, broken out by trade, that would be worked by the residents on the project. (*Id.* at 15.)

Based on these determinations, the panel assigned final technical consensus scores to Fort Myer and Gilbane as follows:

Offeror	**Experience & Reference (35)**	**Key Personnel (35)**	**Project Management Plan (30**	**Prelim. Project Schedule (25)**	**Ward 7&8 Economic Inclusion (15)**	**Total Technical Consensus Score**
Fort Myer	21.23	17.45	16.40	15.79	8.45	79.32
Gilbane	17.80	16.61	19.46	15.07	8.45	77.39

(AR Ex. 7, at 40-41.)

Ultimately, however, although the TEP determined that Fort Myer had a very slight technical advantage in scoring based upon the initial proposals that were submitted by both offerors, the TEP specifically noted its belief that either Gilbane or Fort Myer could successfully perform the project. (AR Ex. 8, at 15.) The TEP submitted these initial findings to the Contracting Officer ("CO") on May 17, 2016. (*Id.* at 9.)

Thereafter, on May 24, 2016, the District issued a request to Gilbane and Fort Myer to submit a Best and Final Offer ("BAFO") for the contract award. (AR Ex. 4, at 2.) With this request for BAFOs, the District specifically requested that the offerors reconsider the content of their original pricing and technical submissions in light of clarifications that the District issued regarding the design fee, demolition scope, and project budget and schedule. (*Id.*) With regard to the design fee, the agency noted that the fee that should be included for the contract would

essentially be the remaining amount of CH2M's engineering contract fee of $1,423,520.82 and, therefore, the design fee price component would not be evaluated by the District. (*Id.*) The offerors were also directed to reconsider and update as necessary any aspects of their pricing and technical submission, and detail these adjustments on the Solicitation's Form of Offer Letter document. (*Id*.)

On May 31, 2016, both offerors submitted their respective BAFO to the District. Fort Myer clarified its bid and adjusted its design fee to the $1,423,520.82 remaining on the CH2M contract. (AR Ex. 5, at 2.) Fort Myer also reduced its Preconstruction Fee to $86,000.00, increased its Design-Build Fee to $12,342,000.00, reduced its Lump Sum General Conditions to $3,076,280.00, and reduced its Above Grade Demolition Price to $1,070,000.00. (*Id.* at 5.) Although Gilbane did not make any adjustments to its pricing, it broke down its demolition fee to detail the price associated with each building's demolition requirement. (AR Ex. 6, at 3.)

Chief Contracting Officer's Evaluation

Subsequent to his review of the BAFOs, DGS' Chief Contracting Officer ("CCO") drafted a Proposed Contract Award Memorandum detailing the technical findings of the TEP.[3] (*See* AR Ex. 8.) Therein, the CCO expressly concluded that he found the TEP's evaluation to be reasonable and appropriate after independently reviewing the evaluation process followed by the TEP, as well as the underlying notes, score sheets and final consensus technical scores developed by the TEP members. (*Id.* at 4-5.) In making his determination that the TEP scores were reasonable and justified, the CCO also factored in the agency's historical experience with both of the offerors. (*Id.* at 5.) Accordingly, and as a result of this independent assessment, the CCO ultimately, and expressly, adopted the TEP's technical evaluation scores for Fort Myer (79.32) and Gilbane (77.39). (*Id.*)

Further, in this same memorandum, the CCO also detailed the manner in which he conducted an independent analysis of both Gilbane and Fort Myer's proposed prices based upon the Solicitation's evaluation scheme of a possible forty-eight (48) points for the price component and twelve (12) points for CBE preference. (*Id.*) The CCO noted that a portion of the forty-eight (48) points were allocated to the Preconstruction Fee, Design Fee, Design-Build Fee, and Lump Sum Conditions Price components. (*Id.*) The CCO then assigned price points on a sliding scale, with the lowest proposed price for each component receiving all the available points and the highest price receiving none. (*Id.*) Ultimately, based upon the offerors' BAFO price submissions, the CCO scored the price proposals as follows:

[3] The Board notes that although the Proposed Award Memorandum states that it was from the CO, the memorandum was actually prepared and signed by the CCO. (*Id.* at 1, 5-6.)

	Fort Myer	**Points Awarded**	**Gilbane**	**Points Awarded**
Preconstruction Fee (2 points)	$86,000.00	2	$97,380.00	0
Design Fee (10 points)	$1,423,520.00	10	$1,423,520.00	10
Design-Build Fee (12 points)	$12,342,000.00	0	$2,250,000.00	12
Lump Sum General Conditions (14 points)	$3,076,280.00	14	$3,771,762.00	0
Above Grade Demo (10 points)	$1,070,000.00	0	$510.861.00	10
Total Price	**$16,574,280.00**		**$6,630,003.00**	
Total Points		**26**		**32**

(*Id.* at 19.)

After scoring the offerors' price components, the CCO determined the CBE preference points that either offeror was entitled to receive. In the case of Fort Myer, it was entitled to receive 11 CBE preference points while Gilbane was not entitled to any preference points. (*Id.* at 5.) Based upon the technical scoring adopted by the CCO, the determination of each offeror's price score and CBE preference points, the CCO calculated the offerors final evaluation scores as follows:

Offerors	**Technical (140)**	**Price (48)**	**CBE (12)**	**Total (200)**
Fort Myer	79.32	26.00	11.00	116.32
Gilbane	77.39	32.00	0	109.39

(*Id.*)

Contract Award Decision

In documenting the basis for his ultimate award decision, the CCO underscored the fact that the final technical evaluation scores of Gilbane and Fort Myer were within points of each other –1.93 points to be exact. (*Id.* at 5-6.) The CCO also noted that based on the competitiveness of its price, pre-BAFO, Gilbane was the highest scoring offeror since it submitted the lowest fee for all of the price components and netted all of the price points. (*See* AR Ex. 9.)[4] However, the CCO explained that after Fort Myer adjusted its price structure at the

[4] The District represents that Exhibit 9 contains the CO's pre-award pricing analysis and notes written during the evaluation of the proposals. Although the protestor challenges the validity of this document included in Exhibit 9

BAFO stage, Fort Myer was able to obtain 26 price points (from 0 points initially) compared to Gilbane's 32 points and was able to "edge out" Gilbane's price score by 5 points only after Fort Myer received its 11 preference points even though Fort Myer's total contract performance price was approximately $9.9 million higher than Gilbane's. (*Id.*) Ultimately, after considering the project schedule and potential project costs, the CCO determined that an award to Gilbane would provide the District with an almost $10 million savings which could be used to offset additional expenses that would possibly be incurred by the District during the project. (*Id.*)

As a result of these factors, and despite Fort Myer's higher overall evaluation score, the CCO recommended that the contract be awarded to Gilbane given the fact that its technical proposal was only scored slightly lower than Fort Myer's and also because it would cost the District almost $10 million less to have Gilbane perform the contract. (AR Ex. 8, at 6.) Therefore, the CCO determined that an award to Gilbane would be most advantageous to the District. (*Id.*) Additionally, the CCO found Gilbane to be a responsible contractor and that its proposed pricing was fair and reasonable. (*Id.*)

Fort Myer's Protest

On June 7, 2016, Fort Myer received an email from DGS informing it that the project had been awarded to Gilbane. (Protest 1.) Thereafter, Fort Myer requested a debriefing from DGS upon receiving this notice which took place on June 23, 2016.[5] (Protest 2.) Fort Myer later filed a protest with this Board alleging that: (1) the source selection official's contract award decision thwarts the Certified Business Law by disregarding the advantage it received from its preference points and failing to adjust the preference points to be proportional to the Solicitation's 200 point scale; (2) the source selection official improperly disregarded Fort Myer's evaluation score when making the contract award decision primarily based upon price; (3) the Solicitation was unclear regarding the proper means by which the contract awardee would recoup its profit and overhead; and (4) the District's technical evaluation was flawed because it unreasonably deducted points from Fort Myer's score in relation to the technical components of Ward 7 and 8 Economic Inclusion Plan and Key Personnel. (*Id.* at 2-7.)

In response to Fort Myer's protest, the District filed an Agency Report on July 14, 2016, supporting its decision to award the contract to Gilbane as its offer was allegedly the most advantageous to DGS.[6] (*See generally* AR.) Specifically, the District contends that Gilbane and Fort Myer's proposals were essentially technically equivalent but that Gilbane's proposed cost was $9.9 million less than Fort Myer's which justified the selection of Gilbane's proposal for award despite the fact that Fort Myer's proposal was scored overall seven (7) points higher than Gilbane's. (AR 10, 18.) Further, the District also contends that the CO questioned several changes in the pricing structure between Fort Myer's original submission and its BAFO that led him to believe that Fort Myer's offer was not most advantageous and lacked an understanding of

(*see* AR Resp. 17-18), the Board finds no basis to question the District's representation regarding the authenticity of Exhibit 9.

[5] During the debriefing, Fort Myer learned of the bases underlying its subsequent protest. (Protest 2.)

[6] Fort Myer's counsel was not simultaneously served with a copy of the District's Agency Report filing for unknown reasons. On August 4, 2016, counsel for the District informed counsel for Fort Myer of its failure to serve the Agency Report and, thus, sent Fort Myer only portions of the Agency Report by e-mail service. Fort Myer only received the final remaining portions of the Agency Report on August 10, 2016.

the design-build process. (AR 10.) Additionally, the District maintains that Fort Myer's challenge to the 200 point scale used in the Solicitation is untimely since it was raised by Fort Myer during pre-bid questions, but was not protested prior to the deadline for receipt of proposals. (AR 19; AR Ex. 1b, at 35.) The District also maintains that any challenge to the scoring methods outlined in the Solicitation is also untimely. (AR 23.)

In its August 23, 2016, response to the Agency Report, Fort Myer reiterates its original protest grounds primarily including its contention that the CO improperly disregarded Fort Myer's higher overall score, and over-emphasized the offerors' total proposal price, in favor of Gilbane's lower priced proposal in making its most advantageous determination. (AR Resp. 10-14.) [7] Fort Myer also disputes, contrary to the District's assertions, that there were any risk issues inherent in its proposal that diminished its ability to competently perform the contract requirements. (*Id.* at 7-10.)

Upon review of the Solicitation, and the contemporaneous record of this protest, and as discussed below, the Board finds that the award decision was made in accordance with the terms of the Solicitation and was based upon a reasonable evaluation of the offerors' proposals.

DISCUSSION

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).

I. Propriety of the Contracting Officer's Award Decision

The crux of Fort Myer's protest allegations in this matter, rest on its belief that the CCO's award decision was an abuse of discretion. Specifically, the protestor contends that despite its higher price evaluation score of thirty-seven (37), as compared to Gilbane's score of thirty-two (32), it failed to receive the contract award because Gilbane's price was lower. (AR Resp. 11-12.) Fort Myer argues that the CCO acted improperly in deciding to disregard its price score, including its CBE preference points advantage, in favor of accepting Gilbane's proposal because it was significantly lower in price. (*Id.*) In short, the protestor contends that the District made an award decision that was inconsistent with the Solicitation by placing undue emphasis on the total price of the offerors' proposals instead of their price evaluation score.

In reviewing the propriety of an agency's award decision, the Board examines whether the decision is reasonable and consistent with the evaluation criteria listed in the RFP, and whether there exists any violations of procurement laws or regulations. *F&L Constr., Inc.*, CAB No. P-0985, 2016 WL 3194271 (Apr. 14, 2016) (citing *Trifax Corp.*, CAB No. P-0539, 45 D.C. Reg. 8842, 8847 (Sept. 25, 1998)) (citations omitted). Implicit in this is that an agency's judgments must be documented in sufficient detail to show that its decisions were not arbitrary. *Id.* (citing *Health Right Inc.*, CAB Nos. P-0507, *et al.*, 45 D.C. Reg. 8612, 8635 (Oct. 15, 1997)). While we review the entire written record in each protest, we accord greater weight to

[7] Pursuant to Board Rule 307, Fort Myer's response to the Agency Report was due on August 19, 2016. However, upon Fort Myer's motion for an extension of time to respond to the Agency Report, the Board granted Fort Myer an extension of its deadline until August 23, 2016. (Order Granting Extension 1.)

contemporaneous documents rather than those prepared in the heat of litigation. *Id.* Further, the relative merit of competing proposals is primarily a matter of agency discretion and we will not substitute our judgment for that of the agency. *Ridecharge, Inc.*, CAB Nos. P-0920, *et al.*, 62 D.C. Reg. 4370, 4378 (Nov. 9, 2012) (citing *Group Ins. Admin., Inc.*, CAB No. P-0309, 40 D.C. Reg. 4485, 4508 (Sept. 2, 1992)).

As applied to the instant facts, the District has provided the Board with a substantial contemporaneous source selection record which established that the CCO's award decision was reasonable and consistent with the evaluation criteria and procurement law.

A. Proposals Were Evaluated According to the Stated Solicitation Criteria.

Governing procurement law requires that a contracting officer must evaluate offerors' proposals using only the evaluation criteria and relative weightings stated in the solicitation. *Eco-Coach, Inc.*, CAB No. P-0976, 62 D.C. Reg. 6560, 6565 (Dec. 29, 2014). This provision echoes "the fundamental principle that the government may not solicit proposals on one basis and make award on another basis." *Id.* (citing *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)).

As previously, stated, the Solicitation set forth the technical and cost evaluation scheme for proposals based upon a scoring scale of up to 200 possible points (140 maximum technical points and up to 60 price (including CBE preference) points). The Solicitation also prescribed the formula by which the CCO was to evaluate and determine price scoring for the offerors.

Here, the record demonstrates the offerors' proposals were fully evaluated by the TEP members individually and then collectively to determine their consensus findings for both Fort Myer and Gilbane. (AR Ex. 8, at 10-11.) After individually scoring each offerors' technical proposals according to the technical criteria in the Solicitation, the TEP met as a group to determine a consensus score for each offeror. (*Id.* at 11.) In developing the consensus score, the TEP was, again, guided by the factors enumerated in the Solicitation and graded each factor according to the previously described adjectival ratings to reach a final numerical technical evaluation score for both offerors just as the panel members had done individually. (*Id.*) Thus, the TEP determined that Fort Myer had an overall technical score of 79.32, while Gilbane scored 77.39, and submitted their findings to the CO. (*Id.* at 15.) Although Fort Myer had a very slight higher technical advantage, the TEP reasonably concluded that both companies were technically competent to perform the contract requirements given the very minimal difference in their final technical ratings. (*Id.*)

After receiving the technical panel's consensus findings, the District requested that the offerors submit BAFOs. (AR Ex. 4, at 2.) While Gilbane did not make any adjustments to its proposed pricing, Fort Myer made several significant changes to its price proposal primarily

leading to a reduction in its Preconstruction Fee, Lump Sum General Conditions price, and Above Grade Demolition price while also increasing its Design-Build Fee. (*See* AR Exs. 5-6.)

As detailed in the CCO's contemporaneous pricing notes, the CCO scored the BAFO prices of the offerors based upon the pricing formula prescribed in the Solicitation. (AR Ex. 9.) As such, Fort Myer received the maximum available points for its preconstruction fee and lump sum general conditions price based on its lower price for those price components. (*Id.*) Gilbane received the maximum available points for its design-build fee and above grade demolition fee based on offering the lowest price for those price components. (*Id.*) Both offerors received the 10 points available for the design-fee based on the fact that fee was predetermined by the District. (*Id.*) In sum, the record reflects that Fort Myer properly received a total of 26 points and Gilbane 32 points prior to the inclusion of Fort Myer's CBE preference points. This was the very price scoring methodology required by the Solicitation's terms.

Although Fort Myer argues that the technical and price evaluations in this case were conducted in a manner inconsistent with the Solicitation requirements, as detailed above, the record, in fact, reflects the opposite. The TEP evaluated the proposals based upon the prescribed technical criteria, and the CCO adopted those findings and scored the BAFOs prices based upon the Solicitation's price evaluation scheme. The Board finds no impropriety in this scoring process based upon the evaluation record.

The issue remains for the Board, however, as to whether the District's determination that the awardee's proposal was most advantageous to the District was proper based upon its consideration of these technical and price evaluation scores. On the record before the Board, we conclude that the District did not err when it awarded the instant contract to Gilbane based on its proposed cost being $9.9 million less than Fort Myer's. The CCO had determined that there was no significant difference in the parties' technical scores, and the $9.9 million cost-savings to the District made Gilbane's proposal more advantageous to the government.

B. The CCO Performed a Proper Independent Analysis Underlying the Award Decision.

As it relates to the protester's allegation that the District improperly based its award decision on the awardee's lower price, we emphasize again in this decision that source selection officials in negotiated procurements, as in the instant matter, have broad discretion in determining the manner and extent to which they will make use of technical and cost evaluation results. *EER Sys., Inc.*, B-290971.3 *et al.*, 2002 CPD ¶ 186 (Comp. Gen. Oct. 23, 2002). Moreover, the Board has previously held that the contracting officer has "a critical and unique role" in the evaluation and selection process, and as such, is ultimately responsible for the evaluation and for determining the relative merits of competing proposals. *Ridecharge, Inc.*, CAB Nos. P-0920, *et al.*, 62 D.C. Reg. at 4382-83 (citing *Health Right*, CAB Nos. P-0507, *et al.*, 45 D.C. Reg. at 8636). Although a technical evaluation panel can assist the contracting officer in his decision, the contracting officer ultimately remains responsible for the evaluation of the proposals and, accordingly, must actually conduct his own independent review. *Id.* at 4383; *see also* D.C. MUN. REGS. tit. 27, §1630.1 (2014). The contracting officer must prepare documentation supporting his selection decision and demonstrating the relative differences among the merits of the proposals. D.C. MUN. REGS. tit. 27, §1630.9.

Moreover, an agency may award to a lower priced, lower technically rated offeror if it determines that the price premium involved in awarding to a higher technically rated, higher priced offeror is not justified given the acceptable level of technical competence at the lower price. *W.M. Schlosser Co., Inc.*, B-247579 *et al.*, 92-2 CPD ¶ 8 (Comp. Gen. July 8, 1992); *see also Harrison Sys. Ltd.*, B-212675, 84-1 CPD ¶ 572 (Comp. Gen. May 25, 1984). In deciding between competing proposals, cost/technical tradeoffs may be made, the propriety of which turns not on the difference in technical scores or rating *per se*, but on whether the source selection official's judgment concerning the significance of the difference was reasonable and adequately justified in light of the Solicitation's evaluation scheme. *W.M. Schlosser Co., Inc.*, B-247579 *et al.*, 92-2 CPD ¶ 8.

The instant case is somewhat analogous to *Harrison Sys. Ltd., supra.* In *Harrison*, the United States Information Agency issued a Request for Proposals, for design and installation services, whose evaluation criteria stated that award would be made to the offeror achieving the highest combined score (i.e., based on technical and price proposals). *Harrison Sys. Ltd.*, B-212675, 84-1 CPD ¶ 572 at *1. The RFP also provided a weighted allocation formula for determining the award most advantageous to the government. *Id.*

Notwithstanding the protester's higher combined score in *Harrison*, and the solicitation's language that award would be made to the offeror with the highest combined score, the CO made the award to the offeror with the lowest cost proposal because the lower pricing was deemed the most advantageous to the government (the winning proposal was $241,511.00 less than the protester's). *Id.* at *1-2. In sustaining the contract officer's award decision, the Comptroller General ruled, in pertinent part, that the CO retained the discretion to award to the lowest priced offeror provided there was no "actual, significant difference in technical merit". *Id.* at *2. The Comptroller General reasoned that to hold otherwise would limit "the contracting agency's flexibility and discretion" while providing "no significant benefit to the agency or offerors." [8] *Id.* at *3.

In the instant case, the CCO detailed the basis for his award decision in a 6-page memorandum outlining in depth the scope of the project, the evaluation process including the basis and methodology for the technical and price evaluation scores ascribed to both Gilbane and Fort Myer as part of his independent assessment of the proposals. (*See* AR Ex. 8, at 2-7; *see also* AR Ex. 9.) Based upon this record, it is obvious that the CCO fully reviewed and considered the significance of the technical evaluation scores that each offeror had received, as he was legally required to do, and that this independent analysis of the proposals was proper.

As part of the same analysis, the CCO expressly recognized that the technical proposals of Gilbane and Fort Myer were less than two points apart in final scoring, but that Fort Myer's total proposed performance cost was approximately $9.9 million higher than Gilbane's proposed cost. (*See* AR Ex. 9.) We find that the CCO's consideration of Gilbane's substantially lower price and its benefit of cost-savings to the District, coupled with the technical equivalency of

[8] The Board notes that, while it has not been raised by either party as a matter of dispute, the Solicitation's terms did provide language regarding the District making award of the contract based upon the highest points received. (*See* Solicitation Section D.4.) However, we, nonetheless, find that this provision did not ultimately remove the agency's discretion to make an award decision based upon a determination as to which proposal was most advantageous to the District.

both offerors' proposals, was very appropriate as part of his independent analysis of both proposals. *See Harrison supra*; *see also W.M. Schlosser Co., Inc.*, B-247579 *et al.*, 92-2 CPD ¶ 8 (finding the agency's decision to award a contract to a lower technically rated lower priced proposal as most advantageous was reasonable where the record showed that both offerors were capable of performing the project and the difference in the technical rating did not warrant paying a higher price).

Nonetheless, the protester contends that the District unreasonably disregarded the fact that because of the CBE preference points (11) added to its raw price evaluation score (26), Fort Myer was able obtain a total pricing score (37) that was five points higher than Gilbane's total price score (32), and a total evaluation score that was approximately seven (7) points higher than Gilbane's. In this regard, protestor argues that the preference points served their intended purpose by giving a competitive advantage to a CBE and should have been the basis for it receiving the contract award because of its higher evaluated score without undue consideration of its significantly higher total proposed price.[9]

The Board acknowledges the significance of the ultimate goal of the CBE program to promote the inclusion of small, local and disadvantaged businesses in the District's procurements and finds that the bid preference point mechanism is a conducive way to achieve this goal. Nothing in our decision today should be construed as the Board granting latitude to contracting officers to ignore the inclusion of CBE preference points required by solicitations or under law. Our holding controls as to the facts of this case only, and in that regard, the Board does not view the program as limiting the CO's discretion to make an award to the lowest priced offeror, where there is no significant difference in technical merit, and the difference in price is almost $10 million. It is the District's ultimate responsibility to evaluate and select proposals that are technically, as well as financially, most advantageous for the District to accept. Thus, the fact that the District did not award the contract to Fort Myer based upon its higher evaluation score does not establish that the District's cost/technical tradeoff was an improper basis for determining which proposal was most advantageous to the District.

Indeed, in the present case, Fort Myer seemingly argues that the District was effectively obligated to accept a proposal that was almost $10 million more expensive and essentially technically equivalent to the lower priced offeror simply because once CBE preference points were added to its score, its price score surpassed the lower priced offeror by five points. As we note above, that is an improper reading of the CO's discretion under the solicitation and applicable law. In summary, we find that the evaluation of proposals in this case was proper, and that the CCO properly considered and explained its assessment of the technical and price evaluation results that were the basis of its award decision.

[9] Under the provisions of the Small, Local, and Disadvantaged Business Enterprise Development Assistance Act of 2005, D.C. Code § 2-218.01 et seq., preferences shall be given to bidders that are certified by the Department of Small and Local Business Development (the "Department"). The goal and responsibility of the Department is to stimulate and foster the economic growth and development of businesses based in the District of Columbia, particularly through maximizing opportunities for CBEs to participate in the District's contracting and procurement process. D.C. CODE § 2-218.13 (2014). In achieving these goals, the Department established a bid preference mechanism for CBEs. *Id.* at § 2-218.42.

The record shows that the CCO carefully reviewed the offerors' proposals, evaluated the technical advantages and disadvantages of both proposals, and outlined the cost differences, and benefits, between the proposals. Therefore, we find that the CCO fully considered all the underlying documentation and reasonably concluded that the protestor's only minimally higher technical score (i.e., less than 2 points) did not warrant accepting its higher cost. Consequently, the award decision is reasonable and consistent with the Solicitation's evaluation criteria and award scheme. *See EER Sys., Inc.*, B-290971.3 *et al.*, 2002 CPD ¶ 186.

II. Remaining Protest Allegations

A. Fort Myer's Technical Evaluation was Proper

Given the Board's finding that the price and technical evaluations were properly conducted and based upon the evaluation criteria, we also find Fort Myer's additional challenges to its technical evaluation to similarly be without merit. Fort Myer alleges that the District's deduction of points for failure to delineate, by labor hours, the exact trades in which the residents of Ward 7 and 8 would be employed, during the technical evaluation relating to the Ward 7 and 8 Economic Inclusion Plan factor, was improper because doing so was not required by the Solicitation. (Protest 6-7.) Additionally, the protestor also argues that it was unreasonable for the TEP to deduct points under the Key Personnel evaluation factor because some of the proposed individuals were committed to other projects at the time Fort Myer submitted its proposal. (Protest 7.)

As explained above, 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. A protester's mere disagreement with the agency's judgment does not, by itself, render an agency's evaluation unreasonable. *Capitol Entm't Servs., Inc.*, CAB No. P-0932, 62 D.C. Reg. 6237, 6242 (May 22, 2013) (citations omitted). 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. *Eco-Coach, Inc.*, CAB No. P-0976, 62 D.C. Reg. at 6566.

Here, we find that the District reasonably evaluated Fort Myer's technical proposal consistent with the evaluation criteria for the Ward 7 & 8 Economic Inclusion Plan and Key Personnel technical factors. In evaluating these factors, the TEP discussed the strengths and weaknesses of each offerors' proposal in light of the Solicitation's criteria and the proposals submitted by each offeror. Both Fort Myer and Gilbane received the same number of evaluation points (8.45 points) for their Ward 7 & 8 Economic Inclusion Plans based upon the fact that neither offeror estimated the hours, broken out by trade, that would be worked by the residents of Ward 7 & 8.

Although Fort Myer contends that it was not required to break out its labor hours by trade, a review of the Solicitation's terms indicates otherwise. Notably, Section D.4.5, states that the offerors' Ward 7 & 8 Economic Inclusion Plan should include "an estimate of the anticipated hours to be worked by Ward 7 & 8 residents on the Project, ***broken out by trade***." (*See*

Solicitation Section D.4.5.) (emphasis added). Fort Myer failed to comply with this requirement and, therefore, the Board finds that it was reasonable for the District to downgrade its proposal on this basis.

The Board also finds protestor's challenge to its Key Personnel technical score to be without merit. Pursuant to the terms of the Solicitation, the District advised offerors that the availability of proposed Key Personnel assigned to the project would be evaluated as part of this evaluation factor. (*See* Solicitation Section D.4.2.) A number of the individuals Fort Myer proposed for the project were simultaneously working on other projects at the time the TEP evaluated Fort Myer's proposal. (*See* AR Ex. 8, at 12.) Therefore, the Board finds that the TEP's decision to downgrade Fort Myer's proposal on this basis was reasonable despite Fort Myer's contention that it intended to fully commit these individuals to the project once it started. In short, Fort Myer's mere disagreement with the District' scoring under the Ward 7 & 8 Economic Inclusion Plan and Key Personnel technical factors is not a basis to render the District's evaluation improper. *See Capitol Entm't Servs., Inc.*, CAB No. CAB No. P-0932, 62 D.C. Reg. at 6243-44 (finding that protestor's unsubstantiated disagreement with its evaluation score is insufficient to render the evaluation unreasonable).

B. Fort Myer's Untimely Protest Allegations

We also find a number of Fort Myer's remaining allegations to be untimely. Protest allegations based on improprieties in a solicitation that are apparent prior to the solicitation's deadline for proposals, must be filed prior to the deadline for receipt of proposals. D.C. CODE § 2-360.08(b)(1) (2011).

Fort Myer argues that by using a 200 point scale without adjusting the allocable CBE preference points, DGS violated the purpose of the CBE law and diluted the effect of the preference points. As noted by the District, prior to submitting its bid, Fort Myer questioned whether the CBE points would be adjusted to a 100 point scale and DGS responded that District law did not require a 100 point scale. Therefore, Fort Myer was informed of the basis for this protest ground prior to the deadline for submission of proposals and a protest should have been filed on this matter at that time. As a result, Fort Myer's post-award challenge on this basis is untimely. *See Analogue Imaging, LLC*, CAB No. P-0978, 2015 WL 837046 (Feb. 6, 2015) (dismissing protest as untimely where protestor challenged the Solicitation's requirements after the deadline for proposals).

By the same token, protestor's argument that the Solicitation was unclear regarding the proper means by which the contract awardee would recoup its profit and overhead is also untimely. This alleged lack of information was apparent to Fort Myer before the deadline for submission of its proposal, however Fort Myer, again, did not file its protest on this basis until after contract award. Consequently, this allegation is also untimely.

CONCLUSION

As discussed herein, the CCO did not abuse his discretion in making his award determination which was reasonable and consistent with the Solicitation's requirements. In

addition, we find that Fort Myer's remaining protest allegations are dismissed as without merit or untimely. Therefore, the Board denies and dismisses the present protest.[10]

SO ORDERED.

Date: September 20, 2016

/s/ Monica C. Parchment
MONICA C. PARCHMENT
Administrative Judge

CONCURRING:

/s/ Marc D. Loud, Sr.
MARC D. LOUD, SR.
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[10] Further, as reflected in the Board's Opinion, the District's Agency Report provided all documentation necessary to resolve the present protest. Therefore, Fort Myer's Motion for Leave to Conduct Discovery is denied. Additionally, based upon the Board's findings herein, Gilbane's Motion to Intervene is also denied as moot.

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

WARD & WARD	)	
	)	CAB No. P-1001
Under Solicitation No. DCHT-2013-R-0144	)	

For the protester, Ward & Ward: Uduak Ubom, Esq., Howard Haley, Esq. For the District of Columbia: Talia Sassoon Cohen, 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 #59630106

This protest arises from a solicitation for transportation services for Medicaid-eligible recipients, issued by the District of Columbia Office of Contracting and Procurement ("OCP") on behalf of the Department of Health Care Finance. Ward & Ward ("Ward" or the "protester") challenges the District's decision to award a contract to Medical Transportation Management, Inc. ("MTM"), arguing that (1) OCP's use of emergency procurement procedures was improper; (2) OCP's award of a sole source contract was improper; (3) MTM should have been disqualified from the procurement; and (4) OCP did not give Ward notice that the award had been made pursuant to the solicitation. The District contests these allegations, arguing that (1) OCP did not award a sole source or emergency contract; and (2) OCP's award of a contract to MTM pursuant to a competitive procurement process was proper.

For the reasons set forth below, the Board denies the instant protest. Specifically, we find that (1) OCP did not use emergency or sole source procurement procedures since the contract award to MTM was made by way of a competitive solicitation; and (2) the protester lacks standing to challenge the evaluation process and resulting contract award to MTM under the solicitation.

BACKGROUND

I. The Solicitation

On March 10, 2014, OCP issued Solicitation No. DCHT-2013-R-0144 (the "RFP") for non-emergency transportation ("NET") services for the District's Medicaid-eligible fee-for-service recipients. (*See* District's Mot. to Dismiss and Agency Report ("AR") Ex. 7, at 2-3; AR Ex. 1, at 2.)[1] According to the RFP, the District contemplated award of a fixed-price contract with a base term of three years and up to two one-year option periods. (AR Ex. 7, at 3-5.)

As set forth in the RFP, the District was required to grade the offerors' proposals on a 100-point scale, consisting of the following categories: (1) Technical Approach, Methodology, and Narratives (15

[1] When referring to documents that lack consistent internal page numbering (e.g., AR Ex. 7), the Board has used the page numbers assigned by Adobe Reader.

points); (2) Technical Expertise, Capacity, and Organizational Narrative (35 points); (3) Past Performance and Previous Experience (40 points); and (4) Price (10 points).[2] (*See* AR Ex. 8, at 8-9; AR Ex. 1, at 2-4.)

The District amended the RFP seven times during the course of the procurement. (AR Ex. 7, at 6-18.) Collectively, these amendments (1) provided the sign-in sheet for the pre-proposal conference; (2) revised the RFP's internal references and attached documents; (3) increased the insurance requirements; (4) extended the deadline for proposals; (5) revised the historical transportation data; (6) provided answers to the prospective offerors' questions regarding the RFP; and (7) updated the name of the District's contracting officer ("CO"). (*See id.*)

Four offerors submitted proposals prior to the RFP's May 30, 2014, deadline: (1) Ward; (2) MTM; (3) Access2Care; and (4) Southeastrans, Inc. (*See* AR at 5; AR Ex. 9, at 1.) After the District's technical evaluation panel ("TEP") evaluated the offerors' proposals, the District requested that each offeror submit a best and final offer ("BAFO"). (AR Ex. 9, at 1-2; *see also* AR Ex. 1, at 2-4.) The TEP evaluated the offerors' BAFOs on January 29 and February 2, 2015. (AR Ex. 1, at 3; *see also* AR Ex. 9, at 2.) The CO performed an independent evaluation of the offerors' BAFOs and, on September 4, 2015, issued a memorandum in which he concurred with the TEP's evaluations and determined that award should be made to MTM. (*See* AR Ex. 9, at 2-8.) The final evaluation scores for the offerors were as follows:

	Technical	Price	CBE	**Final Score**
Access2Care	48	10.0	0	**58.0**
Southeastrans	54	9.8	0	**63.8**
MTM	70	8.9	0	**78.9**
Ward	11	8.8	0	**19.8**

(*See* AR Ex. 8, at 9.)

On November 18, 2015, OCP's Chief Procurement Officer ("CPO") issued a business clearance memorandum approving the award to MTM as the highest-rated offeror who was determined to be responsible. (*See id.* at 3-4.) OCP requested that the Council of the District of Columbia (the "Council") approve a multi-year contract award to MTM for the period of December 15, 2015, to December 14, 2018, in the amount of $85,225,477.68. (*Id.* at 3.) On December 15, 2015, the Council passed a resolution, effective immediately, "declar[ing] the existence of an emergency with respect to the need to approve" the contract award to MTM. Council Res. 21-343, Period 21, 18th Legis. Meeting, 62 D.C. Reg. 16281 (Dec. 25, 2015); (*see also* AR Ex. 13, at 2). Also on December 15, 2015, the Council passed a resolution, effective immediately, which "approve[d], on an emergency basis," the award of the contract to MTM in the amount of $85,225,477.68 for the three-year base period beginning December 15, 2015. Council Res. 21-344, Period 21, 18th Legis. Meeting, 62 D.C. Reg. 16282 (Dec. 25, 2015); (*see also* AR Ex. 13, at 3). The Council's approval of the contract was made pursuant to D.C. CODE §§ 1-204.51(c)(3), 2-352.02 (2016). Council Res. 21-344, 62 D.C. Reg. at 16282. On December 26, 2015, OCP awarded the contract to MTM. (AR Ex. 10, at 1.)

[2] Offerors were also able to receive up to twelve additional points based on any Certified Business Enterprise ("CBE") designation that they had obtained, pursuant to D.C. CODE § 2-218.43 (2013) (amended June 10, 2014). (*See* AR Ex. 1, at 4; AR Ex. 8, at 9.)

II. Post-Award Procedural History

On December 30, 2015, Ward filed the instant protest, arguing that (1) OCP's award of a contract to MTM using emergency procedures was in violation of procurement regulations; (2) OCP's award of a sole source contract to MTM was in violation of procurement regulations; and (3) MTM should have been disqualified from the procurement due to MTM's alleged contract violations when performing the incumbent NET services contract. (*See* Protest at 6-13.)

On January 7, 2016, the District issued a Determination and Findings to Proceed with Contract Performance After Receipt of a Protest ("D&F"). The D&F stated that proceeding with the awarded contract was justified in order to provide uninterrupted NET services for the 61,000 eligible District residents. (D&F at 1-3.) According to the D&F, if NET services were not provided "to take [eligible residents] to physical, occupational, and speech therapy, dialysis, and other crucial medical appointments, it would be detrimental to the District's most vulnerable residents and could result in additional health problems, or possibly death." (*Id.* at 3.)

The protester filed a motion challenging the District's D&F. (*See* Protester's Mot. to Challenge the D&F.) On January 28, 2016, the Board held a telephone conference with the parties during which it denied the protester's challenge.[3] The Board found that the need to provide uninterrupted transportation services for District residents to attend medical appointments constituted urgent and compelling circumstances requiring the District to proceed with contract performance during the pendency of the protest.

On January 19, 2016, the District filed the AR, arguing that OCP did not award a sole source contract or use emergency contract procedures since it had awarded the contract to MTM on a competitive basis pursuant to the RFP. (AR at 8-9.) The District further stated that the Council, in approving the contract, adopted an "emergency" resolution because the Council used emergency resolution procedures, as opposed to normal resolution procedures which require publication in the District of Columbia Register for fifteen days.[4] (*See* AR at 9, n.7.)

On January 27, 2016, the protester filed its comments to the AR. (*See* Protester's Opp'n to District's Mot. to Dismiss and AR ("Protester's Comments").) Along with a restatement of its initial protest grounds, Ward raised a supplemental protest ground alleging that OCP failed to provide notice to Ward as required by D.C. MUN. REGS. tit. 27, §§ 1544.3, 1613.5 (2012 & 2013).[5] (*See* Protester's Comments at 6-8.) On February 4, 2016, the District responded to the protester's comments and moved to dismiss the protest, arguing that the protester lacked standing to challenge the award to MTM. (*See* District's Resp. to Protester's Comments ("District's Resp.") at 2-5.) The District further argued that the supplemental protest ground should be denied because D.C. MUN. REGS. tit. 27, § 1544.3 is inapplicable

[3] The D&F was initially signed by a designee of OCP's CPO. (D&F at 4.) The Board ordered the District to obtain and re-submit a validly-executed D&F bearing the signature of the CPO, pursuant to D.C. CODE § 2-360.08(c)(2) (2016); *see also Arrow Constr. Co., LLC/W.M. Schlosser Co., Inc., Joint Venture*, CAB No. P-0692, 52 D.C. Reg. 4233, 4235 (Oct. 6, 2004). The District re-submitted a valid D&F, signed by the CPO, on January 28, 2016.

[4] The District referenced Rule 421 of the Rules of Organization and Procedure for the Council of the District of Columbia, Council Res. 21-1, Period 21, Organizational Meeting, 62 D.C. Reg. 493, 553-54 (Jan. 16, 2015).

[5] In the AR, the District had also moved to dismiss what it thought to be protest grounds challenging the District's awards of prior emergency and sole source contracts to MTM, arguing that these protest grounds were untimely. (*See* AR at 6-8.) However, Ward responded that it was not protesting such prior contracts since "[i]t is clear that the time to protest [the prior contracts to MTM] has passed," but was referencing them as being relevant to show a "pattern of continuous violations of the law and the regulations." (Protester's Comments at 2, 5.)

and § 1613.5 does not have a notice requirement. (*See* District's Resp. at 5, n.3.) The protester did not reply to the District's response.[6]

DISCUSSION

I. Jurisdiction

The Board exercises exclusive jurisdiction over "[a]ny protest of a solicitation or award of a contract . . . by any actual or prospective bidder, offeror, or the contractor who is aggrieved in connection with the solicitation or award of a contract." D.C. CODE § 2-360.03(a)(1) (2016). This protest is timely, having been filed within ten business days of contract award. *See id.* § 2-360.08(b)(2).

II. OCP Did Not Use Emergency or Sole Source Procurement Procedures

The protester alleges that OCP improperly awarded an emergency or sole source contract to MTM. (*See* Protest at 6-12.) However, as the District has argued, the record shows that OCP awarded the contract to MTM pursuant to the competitive process of the RFP and did *not* award an emergency or sole source contract. (*See* AR Ex. 8, at 2-9; AR Ex. 9, at 1-8; AR Ex. 10, at 1; *see also* AR at 9, n.7.) Thus, the procurement regulations applicable to emergency and sole source procurements, D.C. MUN. REGS. tit. 27, §§ 1700-1799 (2012), which the protester alleges were violated by OCP, are inapplicable. The record further shows that the Council approved the contract award to MTM, as required by D.C. CODE §§ 1-204.51(b)-(c), 2-352.02 (2016), using the Council's internal "emergency" resolution procedures. *See* Council Res. 21-343, 62 D.C. Reg. at 16281; Council Res. 21-344, 62 D.C. Reg. at 16282; (*see also* AR at 9, n.7). However, the Council's approval resolution process did not convert OCP's contract award to MTM, pursuant to the RFP, into an emergency or sole source contract under D.C. MUN. REGS. tit. 27, §§ 1700-1799. Accordingly, we find that OCP did not award MTM an emergency or sole source contract. Thus, we deny the protest ground that OCP violated the emergency and sole source procurement regulations.

III. The Protester Lacks Standing to Challenge the Award to MTM Under the RFP

The District argues that the protester lacks standing to challenge the contract award to MTM because the protester was "not next in line for award" since it was the fourth-ranked offeror and had not challenged the ranking of the second-ranked and third-ranked offerors. (District's Resp. at 4-5 (citations omitted).) We agree.

Our Board 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." Board Rule 100.2(a), D.C. MUN. REGS. tit. 27, § 100.2(a) (2002). Accordingly, the Board has stated that "in order to have standing, a protester must have a direct economic interest in the protested procurement." *MWJ Solutions, LLC*, CAB No. P-0940, 62 D.C. Reg. 6300, 6303 (Sept. 26, 2013) (citations omitted). In determining whether a protester has a direct economic interest, the Board has consistently held that "[a] protester lacks standing where it would not be in line for award even if its protest were upheld." *C.P.F. Corp.*, CAB No. P-0521, 45 D.C. Reg. 8697, 8699 (Jan. 12, 1998) (citations omitted); *see also U.S. Sec. Assocs., Inc.*, CAB No. P-0910, 2012 WL 4753874 (July 25, 2012). Thus, where a fourth-ranked protester did not

[6] On March 15, 2016, the protester moved for leave to conduct discovery, and on May 25, 2016, the protester moved to dismiss the instant protest without prejudice. The Board's decision herein to deny and dismiss the protest with prejudice renders the protester's motions moot.

challenge the District's evaluation of its own proposal or the evaluations of the higher-ranked offerors, the Board dismissed the protest for lack of standing. *U.S. Sec. Assocs., Inc.*, CAB No. P-0910, 2012 WL 4753874; *see also, e.g., St. John's Cmty. Servs.*, CAB No. P-0555, 46 D.C Reg. 8594, 8596 (Mar. 23, 1999) (finding that a protester who was ranked third lacked standing when its only protest ground was that the awardee was improperly evaluated).

In the instant case, Ward has alleged that MTM should have been disqualified from the procurement, (Protest at 12-13), or "at the least should have been examined with greater scrutiny," (Protester's Mot. to Challenge the D&F at 5). Ward has also argued that OCP violated the competitive procurement regulations when OCP did not give Ward notice of the award to MTM.[7] (*See* Protester's Comments at 6-8.) However, Ward has not challenged OCP's evaluations of its BAFO or the BAFOs submitted by the other two offerors who responded to the RFP. (*See* Protest; Protester's Comments.) Accordingly, as the fourth-ranked offeror, Ward would not be in line to receive the award, even if these protest grounds were sustained, since two other offerors (Southeastrans and Access2Care) received higher BAFO evaluation scores than Ward. (*See* AR Ex. 8, at 9.) Thus, we find that Ward lacks standing to challenge the evaluation process and resulting contract award to MTM under the RFP and, therefore, dismiss these protest grounds. *See U.S. Sec. Assocs., Inc.*, CAB No. P-0910, 2012 WL 4753874; *St. John's Cmty. Servs.*, CAB No. P-0555, 46 D.C Reg. at 8596.

CONCLUSION

For the reasons set forth herein, the Board finds that (1) OCP did not award an emergency or sole source contract to MTM; and (2) the protester lacks standing to challenge the evaluation process and resulting contract award to MTM under the RFP. Accordingly, we deny the instant protest and dismiss it with prejudice.

SO ORDERED.

Date: September 29, 2016

/s/ Maxine E. McBean
MAXINE E. McBEAN
Administrative Judge

CONCURRING:

/s/ Marc D. Loud, Sr.
MARC D. LOUD, SR.
Chief Administrative Judge

[7] The protester incorrectly cites D.C. MUN. REGS. tit. 27, § 1544.3 for its argument that "[t]here was no notice provided to the Protester that the contract had been awarded," (Protester's Comments at 6). But the regulation cited by the protester applies to procurements conducted under the competitive sealed bidding procedures. *See* D.C. MUN. REGS. tit. 27, ch. 15 (2012) ("Procurement by Competitive Sealed Bidding"). D.C. MUN. REGS. tit. 27, § 1646.3 (2013), the provision that is relevant to solicitations involving sealed proposals, such as in this case, contains a substantively similar notice provision and the Board will construe the protester's argument as relying on § 1646.3. *See VMT Long Term Care Mgmt., Inc.*, CAB Nos. D-1356, D-1439, 2015 WL 6608323 (Sept. 18, 2015). However, although the protester also argues that "[t]here was no notice to the Protester with regard to how the TEP implemented [D.C. MUN. REGS. tit. 27,] § 1613.5," (Protester's Comments at 6), this regulation only states that the District may select the most advantageous proposal even when price is a factor, and does not contain any notice requirement. We therefore reject this argument.

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REDACTED VERSION

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

OPTIMAL SOLUTIONS AND TECHNOLOGIES)
) CAB No. P-1013
Under Solicitation No. Doc255442)

For the protester, Optimal Solutions and Technologies: Craig A. Holman, Esq., Kara Daniels, Esq., Arnold & Porter LLP. For the District of Columbia: Howard S. Schwartz, Esq., Tamar Glazer, 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 #59681569

This protest arises from a solicitation for information technology ("IT") resources, issued by the District of Columbia Office of Contracting and Procurement ("OCP") on behalf of the Office of the Chief Technology Officer. Optimal Solutions and Technologies ("OST" or the "protester") challenges the District's decision to reject its proposal as untimely submitted, arguing that (1) the proposal was timely submitted; (2) if the District did not receive OST's proposal, then it was due to a failure of the District's electronic proposal system; and (3) the District should have accepted its proposal for consideration. The District contests these allegations, arguing that (1) the District did not receive the protester's proposal through the District's electronic system; and (2) the District's rejection of the protester's proposal was proper.

For the reasons set forth below, the Board denies the instant protest. Specifically, we find that the protester did not timely submit its proposal in accordance with the requirements of the solicitation and, therefore, the District properly rejected the protester's late proposal.

BACKGROUND

I. The Solicitation

On May 9, 2016, the District issued Solicitation No. Doc255442 (the "RFP") seeking a contractor to provide IT resources to supplement the District's IT staff. (District's Agency Report ("AR") Ex. 1, at 1; AR Ex. 2, at 3.)[1] The RFP contemplated the award of an indefinite delivery indefinite quantity contract[2] consisting of a base period extending from the date of award until September 30, 2017, and up to two one-year option periods. (AR Ex. 1, at 58 (§ F.2.1); AR Ex. 2, at 3, 24.)

[1] When referring to documents that lack consistent internal page numbering (e.g., AR Ex. 2), the Board has used the page numbers assigned by Adobe Reader.

[2] The RFP referred to the proposed contract as "Pipeline." (*See* AR Ex. 2, at 3.)

Section M of the RFP described the District's evaluation and award criteria.[3] (AR Ex. 1, at 91-95; AR Ex. 2, at 28-29.) The offerors' proposals were to be graded on a 100-point scale, consisting of 70 points for technical criteria and 30 points for price.[4] (*See* AR Ex. 2, at 28-29 (§ M.3).) The contracting officer ("CO") for the procurement was Derrick White. (AR Ex. 1, at 63 (§ G.8).) However, the RFP identified Sally Ibrahim as the District's point of contact for information regarding the solicitation. (*Id.* at 1.)

Section L.2.1 of the RFP stated:

> This solicitation will be conducted electronically using the District's Ariba E-Sourcing system. To be considered, an Offeror must submit the required attachments via the Ariba E-Sourcing system before the closing date and time. Paper, telephonic, telegraphic, and facsimile proposals may not be accepted.

(*Id.* at 83.)

Section L.4 of the RFP further specified, in relevant part:

> **L.4.1. Proposal Submission**
>
> **L.4.1.1** Proposals must be fully uploaded into the District's E-Sourcing system no later than the closing date and time. The system will not allow late proposals, modifications to proposals, or requests for withdrawals after the exact closing date and time.
>
> **L.4.1.2** Paper, telephonic, telegraphic, and facsimile proposals may not be accepted or considered for award.
>
> **L.4.1.3** It is solely the Offeror's responsibility to ensure that it begins the upload process in sufficient time to get the attachments uploaded into the District's E-Sourcing system before the closing time. (PLEASE NOTE: DO NOT USE MICROSOFT INTERNET EXPLORER VERSION 9 TO UPLOAD THE ATTACHMENTS).
>
> . . .
>
> **L.4.3. Late Proposals**
>
> The District's E-Sourcing system will not accept late proposals or modifications to proposals after the closing date and time for receipt of proposals.

[3] Section L.1.1 of the RFP stated that the District intended to award the contract to the offeror whose proposal was the "most advantageous to the District, cost or price, technical and other factors . . . considered," and that the contracting officer "may reject all proposals or waive any minor informality or irregularity in proposals received whenever it is determined that such action is in the best interest of the District." (AR Ex. 2, at 25.)

[4] The offerors could also receive up to twelve additional points based on any Certified Business Enterprise designation that they had obtained, pursuant to D.C. CODE §§ 2-218.01 to .82 (2016). (*See* AR Ex. 1, at 93-94 (§ M.4).)

(*Id.* at 86.)

The RFP also stated:

> CAUTION: Late submission, Modifications and Withdrawals: See 27 DCMR chapters 15 & 16 as applicable.

(*Id.* at 1.)

The District amended the RFP three times during the course of this procurement. (AR Ex. 2, at 2-40.) Collectively, these amendments (1) revised certain specifications and contract performance provisions not at issue in this protest; (2) revised the distribution of points between the technical evaluation factors; (3) provided the sign-in sheet for the pre-proposal conference; (4) provided answers to the prospective offerors' questions regarding the RFP; and (5) extended the deadline for the submission of proposals to 2:00 p.m. on June 16, 2016.[5] (*See id.* at 2-40.)

II. Events Concerning the Submission of Proposals

On June 16, 2016, at 10:48 a.m., [redacted] of OST e-mailed Ms. Ibrahim to pose a question on how to upload multiple documents into the Ariba E-Sourcing system in response to a particular proposal requirement. (AR Ex. 5, at 4.) Ms. Ibrahim responded at 10:58 a.m., stating that "if there is a multiple documents [sic] requirement for one category you have to combine them into one document and upload them as one document." (*Id.* at 3.)

The Ariba E-Sourcing system log shows that at 2:00 p.m. on June 16, 2016, the deadline for receipt of proposals, six offerors had successfully submitted proposals into the system. (AR Ex. 11, at 2-3; *see also* AR Ex. 8, at 2-7.) OST was not one of the six offerors. (AR Ex. 11, at 2-3; *see also* AR Ex. 8, at 2-7.)

At 2:02 p.m. on June 16, 2016, OST e-mailed Ms. Ibrahim, asking "[c]an you please advise if our proposal was submitted on time[?]" (AR Ex. 5, at 3.) At 2:12 p.m., OST again e-mailed Ms. Ibrahim, stating:

> Just following up on my previous email. OST submitted/uploaded all documents by the 2pm deadline. However, we cannot determine if the our [sic] proposal was received. I've attached a screenshot to show that all documents were submitted/uploaded. Can you please confirm that our response was received?

(*Id.* at 1.)

OST attached computer screenshots to the e-mail which showed that OST had entered its price, and a price proposal and technical proposal into the Ariba E-Sourcing system. (*Id.* at 2.) In the lower right-hand corner of each of the computer screenshots, the respective times were shown as 2:05, 2:08, and

[5] All times in this opinion refer to Eastern Daylight Time.

2:09 p.m. (*Id.*) At 2:42 p.m. on June 16, 2016, OST e-mailed Ms. Ibrahim the technical and price volumes of its proposal.[6] (*See* AR Ex. 6.)

Later that day, Ms. Ibrahim responded to OST, stating that "[t]he [D]istrict didn't receive OST['s] proposal on time in the District eSourcing system (ARIBA)." (AR Ex. 5, at 1.) OST replied:

> We began uploading PIPELINE proposal[] documents into the Ariba system two days ago. After some minor changes this morning, we pushed the "submit" button before 2 pm today. The system did not appear to be functioning as we have experienced it in the past, which is why [redacted] emailed you. We have emailed you multiple times over the course of the procurement about peculiarities with the system, such as multiple forms required but only one place to upload a single file.
>
> Since Ariba was not responsive as expected, [redacted] remitted the technical and price proposal as reflected in the screen shot below to you electronically via email.
>
> As we followed the instructions and were diligent throughout the bid process to ensure that we submitted through Ariba by 2 PM, we hope that you will view our submission as timely. The system limitations experienced were beyond our control.

(Protest Ex. H, at 126.)

On June 23, 2016, OST e-mailed the CO and stated that OST had experienced "continuing technology issues" in responding to the RFP and that "the Ariba e-Sourcing system has not operated in this procurement as expected." (Protest Ex. E, at 116.) OST alleged that there were "government-related technology issues . . . that OST experienced" between May 12 and June 16, 2016. (*Id.* at 117.) It also claimed that "OST completed its upload and submission of all responsive proposal documents into the District's e-Sourcing system, but we could not verify receipt." (*Id.*) OST requested that the District confirm that OST's proposal was accepted as timely. (*Id.* at 119.)

On June 27, 2016, the CO e-mailed OST, stating, "OST's submittal [the CD and email] was not received at the location, by the method, and by the time and date designated in the RFP. It is therefore considered late and will not be evaluated." (AR Ex. 7.)

III. Procedural History

On June 30, 2016, OST filed the instant protest, arguing that the District's rejection of OST's proposal was improper because (1) "OST timely submitted its proposal in accordance with the RFP's instructions;" (2) if the District did not receive OST's proposal using the Ariba E-Sourcing system, then the system malfunctioned and the District should have either extended the deadline for proposal submission or accepted OST's e-mailed and hand-delivered proposal, pursuant to D.C. MUN. REGS. tit. 27, §§ 1400.4, 1402.1 (2011); (3) the District should have considered OST's proposal under the lateness

[6] OST also hand-delivered to the District a compact disc containing OST's proposal. (*See* Protest Ex. G, at 124, ¶ 9; Protest at 6, ¶ 24; *see also* AR Ex. 7.) The hand-delivery occurred after the 2:00 p.m. deadline. (*See* Protest at 6, ¶ 24.)

exceptions in D.C. MUN. REGS. tit. 27, § 1627 (2013); (4) even assuming that the Ariba E-Sourcing system did not malfunction, the District should have waived the lateness of OST's proposal as a "technical problem" with OST's proposal; and (5) the District should have investigated OST's allegations of "difficulties with the E-Sourcing system" before rejecting OST's proposal. (*See* Protest at 7-18.)

On July 20, 2016, the District filed the AR, arguing that (1) OST did not submit its proposal using the Ariba E-Sourcing system by time specified in the RFP; (2) the Ariba E-Sourcing system was operating properly at the time proposals were due; (3) OST was responsible for its own failure to timely submit a proposal using the Ariba E-Sourcing system; (4) the RFP did not allow for OST to submit a proposal by e-mail or hand delivery; (5) the lateness exceptions in D.C. MUN. REGS. tit. 27, § 1627 are inapplicable since OST did not submit a proposal using the Ariba E-Sourcing system; and (6) OST's failure to timely submit a proposal via the method specified in the RFP is not a minor irregularity that can be waived. (*See* AR at 5-13.)

On July 29, 2016, OST filed its comments to the AR and requested an evidentiary hearing. (OST's Resp. to AR and Request for an Evidentiary Hr'g ("OST's Comments").) OST argued that the AR was inadequate because it did not include, *inter alia*, records from the Ariba E-Sourcing system.[7] (*See* OST's Comments at 3.) On August 8, 2016, the District filed a reply to the protester's comments, (District's Reply to OST's Comments), and included as an additional AR exhibit a "solicitation log history" for the RFP on the Ariba E-Sourcing system, (AR Ex. 11).

DISCUSSION

I. Jurisdiction and Standard of Review

The Board exercises exclusive jurisdiction over "[a]ny protest of a solicitation or award of a contract . . . by any actual or prospective bidder, offeror, or the contractor who is aggrieved in connection with the solicitation or award of a contract." D.C. CODE § 2-360.03(a)(1) (2016). This protest is timely, having been filed within ten business days of the District's notice to OST that its proposal had not been timely received via the Ariba E-Sourcing system. *See id.* § 2-360.08(b)(2).

In reviewing the propriety of an agency's actions in conducting a solicitation, the Board examines whether the agency's actions were "in accordance with the applicable law, rules, and terms and conditions of the solicitation." *Id.* § 2-360.08(d); *see also Traffic Lines, Inc.*, CAB No. P-0715, 54 D.C. Reg. 1991, 1993 (Dec. 21, 2005). The protester bears the burden of establishing its case by a preponderance of the evidence. *See Stockbridge Consulting LLC*, CAB No. P-0963, 62 D.C. Reg. 6480, 6484 (Aug. 28, 2014) (citation omitted); *Nobel Sys., Inc.*, CAB No. P-0937, 62 D.C. Reg. 6309, 6311 (Oct. 4, 2013); *see also* Board Rule 120.1, D.C. MUN. REGS. tit. 27, § 120.1 (2002).

II. The District's Rejection of OST's Proposal Was Proper

The central issue in this protest is whether the District properly rejected the protester's e-mailed and hand-delivered proposal. For the reasons set forth below, we find that the District did not violate

[7] As the Board has previously stated, "[t]he purpose of discovery is to aid the Board in a just resolution of the protest, not to enable a protest[e]r to conduct a fishing expedition so as to develop the grounds of its protest." *Carter Fuel Oil. Co.*, CAB No. P-0208, 39 D.C. Reg. 4263, 4267 (July 12, 1991). Accordingly, since the Board finds that we can resolve the instant protest on the record now before us, we hereby deny the protester's requests for discovery.

procurement law or regulation when – in accordance with the terms of the RFP – it rejected the protester's untimely proposal.

Section 1627 of the District's procurement regulations, which is applicable to procurements conducted using sealed proposal procedures (such as an RFP), states, in relevant part:

> **1627 LATE PROPOSALS, LATE MODIFICATIONS, AND LATE WITHDRAWALS**
>
> 1627.1 Any proposal or modification to proposal received at the location designated in the RFP after the time and date set for receipt of proposals shall be considered "late" unless it was received prior to the contract award and any of the following applies:
>
> (a) It was sent by registered or certified mail not later than five (5) calendar days before the date and time specified for receipt of offers;
>
> (b) It was sent by mail and the contracting officer determines that the late receipt was due solely to mishandling by the District after receipt at the location specified in the RFP; [or]
>
> (c) It was sent electronically by the offeror prior to the time and date specified and there is objective evidence in electronic form confirming that the offer was received prior to the date and time specified for receipt; or
>
> (d) It was the only proposal received.
>
> . . .
>
> 1627.3 A late proposal, late request for modification, or late request for withdrawal shall not be considered, except as provided in this section.
>
> . . .
>
> 1627.6 If any information received electronically is unreadable, the contracting officer immediately shall notify the offeror and permit the offeror to resubmit the unreadable portion of the information. The method and time for resubmission shall be prescribed by the contracting officer after consultation with the offeror, and documented in the contract file. The resubmission shall be considered as if it were received at the date and time of the original unreadable submission for the purpose of determining timeliness, provided the offeror complies with the time and format requirements for resubmission prescribed by the contracting officer.

D.C. MUN. REGS. tit. 27, § 1627.

The Board has strictly applied the regulations regarding late proposals, stating that "neither the Board nor the contracting officer can authorize the untimely submission of [a] protester's proposal unless the requirements of the above regulation are met."[8] *Harris Res., PC*, CAB No. P-0894, 62 D.C. Reg. 4358, 4360 (Oct. 10, 2012) (citing *Wallace C. Wilson*, CAB No. P-0484, 44 D.C. Reg. 6879, 6881 (Aug. 4, 1997); *Planning & Dev. Int'l, Inc.*, CAB No. P-0336, 41 D.C. Reg. 3491, 3492 (June 22, 1993)). The Board "has long held that a prospective contractor bears the responsibility for ensuring timely delivery of its bid or proposal." *Phoenix Capital Partners, LLC*, CAB No. P-0938, 62 D.C. Reg. 6294, 6297 (Sept. 4, 2013) (citing *Tri Gas & Oil Co.*, CAB No. P-0867, 62 D.C. Reg. 4191, 4193 (Dec. 10, 2010); *Ctr. on Juvenile & Criminal Justice*, CAB No. P-0488, 44 D.C. Reg. 6834, 6836 (June 16, 1997)). As a result, the Board has denied protests where "the government was not the sole or paramount reason for the late delivery." *DenVille Line Painting, Inc.*, CAB No. P-0292, 40 D.C. Reg. 4640, 4643-44 (Oct. 22, 1992); *see also Tri Gas & Oil Co.*, CAB No. P-0867, 62 D.C. Reg. at 4193; *Quest Diagnostics, Inc.*, CAB No. P-0480, 44 D.C. Reg. 6849, 6851 (July 9, 1997).

Thus, the strict enforcement of compliance with proposal deadlines is well settled. For example, in *Harris Resources*, the protester alleged a "failure of the Ariba system to function properly." CAB No. P-0894, 62 D.C. Reg. at 4360. The Board denied the protest, finding that the record indicated that the problems alleged by the protester were due to "user error" and that the contracting officer's rejection of the protester's late proposal was not improper. *Id.* at 4360-61.

In *DenVille Line Painting*, although the protester had properly addressed its bid, Federal Express delivered the bid to a different agency located on the same floor of the building. CAB No. P-0292, 40 D.C. Reg. at 4640-41. The correct agency received the bid after the deadline for submission. *Id.* at 4641-42. The Board denied the protest, finding that there was no government mishandling of the bid and thus the bid was received late and properly rejected. *Id.* at 4643-44. To explain the reasoning behind the lateness rule, the Board quoted a decision of the Government Accountability Office ("GAO"):[9]

> "The reason for the late proposal rules, however, is that the manner in which the government conducts its procurements must be subject to clearly defined standards that apply equally to all so that fair and impartial treatment is ensured. There must be a time after which proposals generally may not be received. To permit one offeror's proposal to be accepted after the closing date would inevitably lead to confusion and unequal treatment of offerors and thus would tend to subvert the competitive system. While we realize that by application of its late proposal rules the government at times may lose the benefit of proposals that offer more advantageous terms than those received on time, maintaining confidence in the competitive system is of greater importance than the possible advantage to be gained by considering a late proposal in a single procurement."

[8] Although at the time of *Harris*, the procurement regulation regarding late proposals was found at D.C. MUN. REGS. tit. 27, § 1609.3 (1988) (amended 2013), the current D.C. MUN. REGS. tit. 27, § 1627.1 is substantively similar and adds § 1627.1(c) for electronic proposals.

[9] The Board often looks to decisions of the GAO, our federal bid protest counterpart, for guidance. *See, e.g.*, *Phoenix Capital Partners, LLC*, CAB No. P-0938, 62 D.C. Reg. at 6297.

DenVille Line Painting, Inc., CAB No. P-0292, 40 D.C. Reg. at 4643 (quoting *John Short & Assocs., Inc.*, B-231614, 88-1 CPD ¶ 565 at *2 (Comp. Gen. June 13, 1988)); *see also Phoenix Capital Partners, LLC*, CAB No. P-0938, 62 D.C. Reg. at 6297-98 (citation omitted).

Other GAO decisions hold similarly. In *PMTech, Inc.*, B-291082, 2002 CPD ¶ 172 at *2 (Comp. Gen. Oct. 11, 2002), the protester did not submit an offer through the agency's electronic system and the agency rejected the protester's proposal as late. The protester argued that some unidentified error in the agency's system had occurred. *Id.* at *3. The GAO denied the protest, finding that the system's logs showed that the system had received proposals from other offerors and the protester had not otherwise shown that its proposal was received by the government before the deadline for submission. *Id.* The GAO stated that while the lateness rule "may seem harsh, it alleviates confusion, ensures equal treatment of all offerors, and prevents one offeror from obtaining a competitive advantage that may accrue where an offeror is permitted to submit a proposal later than the deadline set for all competitors." *Id.* at *2 (citation omitted).

In *Turner Consulting Grp., Inc.*, B-400421, 2008 CPD ¶ 198 at *1 (Comp. Gen. Oct. 29, 2008), the protester alleged that it had sent its proposal to the agency by e-mail, as required by the solicitation, more than twelve hours before the submission deadline. The agency did not receive this e-mail from the protester. *Id.* at *2. After the deadline passed, the agency informed the protester that the agency did not receive the protester's proposal. *Id.* The protester then sent a new e-mail of its proposal to the agency, which the agency received but rejected as being submitted late. *Id.* The agency determined that there were no problems with the agency's e-mail server and that the agency had timely received e-mailed proposals from other offerors. *Id.* at *2-3. The GAO denied the protest, saying:

> Although [the protester] contends that something in [the agency]'s internet system prevented the timely receipt of [the protester]'s quotation, there is no evidence in the record to support this contention. Rather, [the agency] states that its investigation found no problems with the agency's servers that would prevent the timely receipt of quotations, and that the agency timely received other emailed quotations . . . . In short, given that there is no evidence in the record to show actual timely receipt of the [protester]'s quotation, we have no basis to find unreasonable the agency's rejection of the quotation as late.

Id. at *3 (citations omitted).

In *Lakeshore Eng'g Servs.*, B-401434, 2009 CPD ¶ 155 at *1 (Comp. Gen. July 24, 2009), the protester e-mailed its proposal to the agency, as required by the solicitation. The protester's e-mail server had a record that the e-mail had been sent to the agency's e-mail server and the protester's IT administrator stated that the e-mail had been delivered to the agency. *Id.* at *2. However, the agency never received the protester's proposal even though the agency had received other e-mails, and the agency argued that the protester's e-mail records only showed that the protester had *sent* the proposal and did not show that the agency had *received* the proposal. *Id.* The GAO held that the agency properly excluded the protester from the competition and denied the protest, finding that "[b]ecause there is no evidence that . . . the protester's . . . proposal was successfully delivered to the agency[] . . . prior to the due date for receipt of proposals, the protester has failed to satisfy its burden of showing that it timely delivered its proposal to the agency." *Id.* at *3; *see also Int'l Garment Processors*, B-299674 *et al.*, 2007 CPD ¶ 130 at *5 (Comp. Gen. July 17, 2007) ("Since there is no evidence in the record to show actual timely receipt of the firm's revised quotation, we find reasonable the agency's determination that the quotation was late.").

A. OST Did Not Submit a Proposal Through the Ariba E-Sourcing System

In the instant case, the RFP required offerors to submit proposals "via the Ariba E-Sourcing system before the closing date and time" and stated that "[p]aper, telephonic, telegraphic, and facsimile proposals may not be accepted." (AR Ex. 1, at 83 (§ L.2.1).) The RFP also stated that the Ariba E-Sourcing system "will not accept late proposals or modifications to proposals after the closing date and time for receipt of proposals." (*Id.* at 86 (§ L.4.3).) As amended, the RFP set a deadline for the receipt of proposals of 2:00 p.m. on June 16, 2016. (AR Ex. 2, at 35.)

The Ariba E-Sourcing system log shows that six offerors, none of whom were OST, submitted proposals into the system by the deadline.[10] (AR Ex. 11, at 2-3.) And the record evidence provided by the protester in support of its claim does not show that OST timely *submitted* its proposal into the Ariba E-Sourcing system. The computer screenshots that OST e-mailed to Ms. Ibrahim at 2:12 p.m. on June 16, 2016 – each of which shows a time past 2:00 p.m. – only show that OST had *uploaded* proposal documents into the Ariba E-Sourcing system. (*See* AR Ex. 5, at 2.) However, these computer screenshots do not establish that the proposal was in fact timely *submitted*.[11] (*See* AR Ex. 5, at 2.)

The protester also argues that a tutorial guide for the Ariba E-Sourcing system supports the protester's claim that it submitted a timely proposal. (*See* OST's Comments at 10-11; OST's Comments Ex. A.) However, not only does the record evidence fail to support the protester's claim, the evidence supports a finding to the contrary. The tutorial guide explains that, when an offeror submits a proposal, (1) there is a green check mark and message stating "[y]our response has been submitted;" (2) the "Checklist" in the left-hand menu shows a check mark next to "4. Submit Response;" and (3) there is a "Compose Message" button available for the offeror to click. (OST's Comments Ex. A, at 24; *see also* AR Ex. 3.) Yet, the OST computer screenshots do not contain any of these three indicators that a proposal was submitted: (1) there is no green check mark or message stating that a response was submitted; (2) there is no check mark for item "4. Submit Response"; and (3) the "Compose Message" button is "grayed-out" (i.e., it was not available for OST to click on). (AR Ex. 5, at 2.) Therefore, the screenshots show that, as of 2:05 p.m., OST had *not* submitted a proposal in the Ariba E-Sourcing system. (*See id.*)

Lastly, the computer screenshots of [redacted] internet browsing history, which the protester calls "network connections to the District's Ariba E-Sourcing system," (Protest at 5, ¶ 19), only show that OST accessed certain unspecified internet pages on the Ariba E-Sourcing system website between June 14-16, 2016, including at 1:58 p.m. on June 16th. (*See* Protest Ex. F, at 121.) These screenshots do not establish that OST submitted a proposal in the Ariba E-Sourcing system. (*See id.*)

In the absence of any objective evidence to show that OST submitted its proposal in the Ariba E-Sourcing system by the 2:00 p.m. deadline on June 16, 2016, the protester relies on a declaration by [redacted] which was prepared on the date the protest was filed. The declaration states, in relevant part, "I completed the upload, quality checked the proposal, and submitted the proposal through

[10] Although the log shows that "[redacted] OST" had "accepted the bidder agreement" on May 31, 2016, (AR Ex. 11, at 4), and had "indicated his/her intent to bid" on June 14, 2016, (*id.* at 3), the log does not show that any proposal was submitted by OST, (*id.* at 2-7).

[11] The protester asserts that because "the Ariba E-Sourcing system will not allow uploading at all after the closing time for proposal receipt," the post-2:00 p.m. computer screenshots "could not exist absent timely uploading of the proposal." (Protest at 1, ¶ 1.) But we note that while the process of uploading documents may have occurred before 2:00 p.m., the computer screenshots do not establish that the protester completed its proposal submission to the District by the RFP deadline of 2:00 p.m. (*See* AR Ex. 5, at 2.)

the E-Sourcing system all before to [sic] the DC Pipeline RFP's 2:00PM deadline." (Protest Ex. G, at 123, ¶ 5.) Notwithstanding, based on the record as described above, we find that OST did not submit a proposal to the District via the Ariba E-Sourcing system by the deadline of 2:00 p.m. on June 16, 2016.[12] *See Lakeshore Eng'g Servs.*, B-401434, 2009 CPD ¶ 155 at *1 (finding no evidence that the protester had successfully submitted its proposal, despite the protester's e-mail records showing that the proposal was sent and the protester's network administrator stating that the proposal was delivered); *see also Info., Prot., & Advocacy Ctr. for People with Disabilities*, CAB No. P-0427, 42 D.C. Reg. 4953, 4953-54 (Mar. 21, 1995) (disregarding the statements of the protester's director and employee, which lacked contemporaneous corroboration, and finding that the contemporaneous evidence in the record showed that the awardee had timely submitted its proposal).

B. The Ariba E-Sourcing System Did Not Malfunction

We also reject the protester's argument that the District's Ariba E-Sourcing system must have malfunctioned if OST's proposal was not received. (*See* Protest at 10, ¶ 38.) The Ariba E-Sourcing system successfully received proposals from six other offerors before the deadline, (AR Ex. 11, at 2-3; AR Ex. 8, at 2-7), and a District Program Manager who investigated the Ariba E-Sourcing system found the system to be "fully functioning" during the relevant time period, (AR Ex. 9, at 2-3, ¶¶ 16-18). Although the protester claims that it experienced difficulties with the Ariba E-Sourcing system, (*see* OST's Comments at 15-16), these "difficulties" were relayed to the District on June 23, 2016, (*see* Protest Ex. E, at 116-119), long after the District informed the protester on June 16, 2016, that the Ariba E-Sourcing system did not receive its proposal, (*see* AR Ex. 5, at 1). The only contemporaneous evidence of such "difficulties" is OST's e-mail to the District for guidance on how to submit multiple documents in response to a specific proposal requirement.[13] (*See* AR Ex. 5, at 4.) As argued by the District, this exchange shows that any difficulties that OST may have encountered with the Ariba E-Sourcing system were due to OST personnel's unfamiliarity with the Ariba E-Sourcing system but does not show that the system malfunctioned. *See Harris Res., PC*, CAB No. P-0894, 62 D.C. Reg. at 4361. Accordingly, we reject the protester's claim that the Ariba E-Sourcing system failed.[14] *See PMTech, Inc.*, B-291082, 2002 CPD ¶ 172 at *3; *Turner Consulting Grp., Inc.*, B-400421, 2008 CPD ¶ 198 at *2-3. Thus, we deny the protest ground that the District was required to extend the deadline for proposal submission, since the procurement regulations require an extension only if there is "a failure of the District's electronic system," D.C. MUN. REGS. tit. 27, § 1402.1.[15]

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[12] The protester's reliance on cases from the United States Court of Federal Claims, (*see* Protest at 9-12), is inapposite. In each of those cases, the record showed that the agency's e-mail servers received the protester's e-mailed proposal before the submission deadline, but the agency's e-mail servers then either delayed transmission to the contracting officer's e-mail inbox or erroneously rejected the proposal when transmitting it to additional agency e-mail servers. *See Fed. Acquisition Servs. Team, LLC v. United States*, 124 Fed. Cl. 690, 701-05 (2016); *Insight Sys. Corp. v. United States*, 110 Fed. Cl. 564, 570-72 (2013); *Watterson Constr. Co. v. United States*, 98 Fed. Cl. 84, 87-93 (2011).

[13] At the time, OST referred to the issue of uploading multiple documents for one proposal requirement as a "peculiarity," not a difficulty or a problem. (Protest Ex. H, at 126.)

[14] Based on our rejection of the protester's claim that the Ariba E-Sourcing system malfunctioned, we also deny the protest ground that the District arbitrarily and capriciously rejected OST's proposal before investigating OST's allegations of "difficulties" with the system, since the protester was not prejudiced by the alleged lack of investigation. *See B&B Sec. Consultants, Inc.*, CAB No. P-0708, 54 D.C. Reg. 1948, 1952 (July 18, 2005) (citations omitted); *C & E Servs., Inc.*, CAB No. P-0874, 62 D.C. Reg. 4216, 4222 (May 19, 2011); *Mell, Brownell & Baker*, CAB No. P-0615, 49 D.C. Reg. 3321, 3328 (Jan. 18, 2001), *appeal dismissed*, 2001-CA-000002-P(MPA) (D.C. Super. Ct. May 23, 2003) (Westlaw, D.C. Super. Ct. Dockets).

[15] Since we have found that the District's electronic system did not fail, the protester's reliance on *S.D.M. Supply, Inc.*, B-271492, 96-1 CPD ¶ 288 (Comp. Gen. June 26, 1996), *recons. denied*, 96-2 CPD ¶ 203 (Nov. 27, 1996), is

In sum, the protester did not submit a proposal via the Ariba E-Sourcing system by 2:00 p.m. on June 16, 2016, as required by the RFP. Accordingly, the protester's e-mailed and hand-delivered proposal must be considered late and must be rejected by the District unless one of the exceptions in D.C. MUN. REGS. tit. 27, § 1627.1(a)-(d) applies. *See id.* §§ 1627.1, .3.

C. OST's Proposal Does Not Meet Any of the Exceptions for Late Proposal Submissions

The protester contends that the exceptions in § 1627.1(b) and (c) are applicable and, as such, the District should have accepted the protester's proposal.[16] (*See* Protest at 13, ¶¶ 48-49.) However, § 1627.1(b) requires that "late receipt was due solely to mishandling by the District *after receipt at the location specified in the RFP*." D.C. MUN. REGS. tit. 27, § 1627.1(b) (emphasis added). The record shows that the District never received a proposal from OST in the Ariba E-Sourcing system, the location specified in the RFP.[17] Further, there is no record evidence that the Ariba E-Sourcing system malfunctioned so as to support a conclusion that OST's proposal was "mishandled" by the District. Accordingly, the exception to lateness in § 1627.1(b) is inapplicable.

The protester's reliance on § 1627.1(c) also fails since we have found that the protester did not submit its proposal via the Ariba E-Sourcing system by the deadline; the protester e-mailed its proposal to the District after the deadline. Thus, the protester's proposal was not "sent electronically by the offeror prior to the time and date specified," as required in D.C. MUN. REGS. tit. 27, § 1627.1(c). In addition, there is no "objective evidence in electronic form confirming that the offer was received prior to the date and time specified for receipt," *id.*, as we have noted above. In sum, consistent with D.C. MUN. REGS. tit. 27, § 1627.1, the District determined that the protester's proposal was "late," and properly rejected the protester's late proposal pursuant to D.C. MUN. REGS. tit. 27, § 1627.3.[18]

The protester finally argues that, even assuming that the Ariba E-Sourcing system did not malfunction, the District had the discretion to waive the lateness of OST's proposal as a "technical problem" with OST's proposal and that the District abused its discretion by not doing so. (*See* Protest at 14-15, ¶ 55.) We disagree.

The RFP allowed the contracting officer to waive any "minor informality or irregularity" in proposals if such waiver is in the best interest of the District. (AR Ex. 2, at 25 (§ L.1.1).) However, the RFP warned offerors that late proposals would not be accepted and that it was an offeror's responsibility

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inapt. In that case, the agency admitted that the electronic system malfunctioned and accidentally rejected *all* electronically-submitted proposals. *See id.* at *2-3.

[16] Since the District received proposals from offerors other than the protester and the protester did not send its proposal to the District via mail, the exceptions in D.C. MUN. REGS. tit. 27, § 1627.1(a), (d) are inapplicable.

[17] The protester also argues that "the District should have tolled the applicable deadline and worked with OST to devise a functional method of submission," pursuant to D.C. MUN. REGS. tit. 27, § 1627.6. (Protest at 13-14, ¶¶ 51-52.) However, that regulation only applies if the District receives unreadable electronic information from an offeror. D.C. MUN. REGS. tit. 27, § 1627.6. Since the District did not receive a proposal from OST in the Ariba E-Sourcing system, § 1627.6 is inapplicable.

[18] We also reject the protester's argument that the District was required to accept OST's e-mailed and hand-delivered proposal pursuant to D.C. MUN. REGS. tit. 27, § 1400.4. (*See* Protest at 10, ¶ 38.) That regulation only permits, but does not require, a contracting officer to allow non-electronic submission of proposal documents "to supplement electronic submissions to meet the requirements of the electronic transaction." D.C. MUN. REGS. tit. 27, § 1400.4. Moreover, the RFP specifically disallowed "[p]aper, telephonic, telegraphic, and facsimile proposals," and required that the "electronic transaction" be done via the Ariba E-Sourcing system. (AR Ex. 1, at 83 (§ L.2.1), 86 (§ L.4.1).) Accordingly, we find that the District's rejection of OST's e-mailed and hand-delivered proposal did not violate D.C. MUN. REGS. tit. 27, § 1400.4.

to ensure that it uploaded and submitted its proposal via the Ariba E-Sourcing system. (AR Ex. 1, at 86 (§§ L.4.1.1, L.4.1.3, L.4.3).) As the Board has previously stated, the District cannot allow a late proposal which does not meet one of the lateness exceptions in the procurement regulations.[19] *See Harris Res., PC*, CAB No. P-0894, 62 D.C. Reg. at 4360 (citations omitted); *see also Tri Gas & Oil Co.*, CAB No. P-0867, 62 D.C. Reg. at 4192-93 (rejecting the protester's argument that the lateness of its bid was a minor error). Accordingly, we reject the protester's claim that the District has the discretion to accept a late proposal which, in effect, would constitute a waiver of the deadline requirement.

In addition, we roundly reject the protester's claim that accepting the protester's late proposal "serves the District's best interest" because it would serve to maximize competition, (Protest at 15, ¶ 56). We find that maintaining the integrity of the procurement process by having clear standards that apply equally to all offerors outweighs any marginal benefit of increased competition through the addition of a seventh (OST's) proposal. *See DenVille Line Painting, Inc.*, CAB No. P-0292, 40 D.C. Reg. at 4643 (citation omitted); *Phoenix Capital Partners, LLC*, CAB No. P-0938, 62 D.C. Reg. at 6297-98 (citation omitted).

CONCLUSION

For the reasons set forth herein, we find that the District properly rejected the protester's late proposal in accordance with the terms of the RFP and pursuant to D.C. MUN. REGS. tit. 27, § 1627. Accordingly, we deny the instant protest and dismiss it with prejudice.[20]

SO ORDERED.

Date: October 11, 2016

/s/ Maxine E. McBean
MAXINE E. McBEAN
Administrative Judge

CONCURRING:

/s/ Marc D. Loud, Sr.
MARC D. LOUD, SR.
Chief Administrative Judge

Electronic Service to:

Craig A. Holman, Esq.
Kara Daniels, Esq.

Howard S. Schwartz, Esq.
Tamar Glazer, Esq.

[19] The protester relies on the Court of Federal Claim's statement in *Elec. On-Ramp, Inc. v. United States*, 104 Fed. Cl. 151, 163 (2012), that "in some circumstances it is more faithful to the preservation of competition to consider a late proposal than it is to reject it." (*See* Protest at 15, ¶ 57.) However, in that case the solicitation required multiple methods of proposal submission (e-mail, paper, and compact disc) and the protester had timely submitted its proposal via one of the required methods (e-mail). *Elec. On-Ramp, Inc.*, 104 Fed. Cl. at 156. The court found that the proposal was "under government control" for the purposes of the federal regulation regarding late proposals since the protester "already had submitted a complete copy of its proposal electronically." *Id.* at 164. In the instant protest, by contrast, OST did *not* timely submit its proposal by *any* method, let alone the one method allowed by the RFP.

[20] The parties shall confer to determine agreed-upon redactions of protected information, if any, and file a joint proposed redacted version of this opinion with the Board no later than October 18, 2016.

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

JEROME L. TAYLOR TRUCKING, INC.	)	
	)	CAB No. P-1016
	)	
Solicitation No: DCAM-16-NC-0105	)	

For the Protestor, Jerome L. Taylor Trucking, Incorporated: Jonathan T. Cain, Esq. For the District of Columbia: C. Vaughn Adams, Esq., Department of General Services, Office of General Counsel.

Opinion by Administrative Judge Monica C. Parchment with Chief Administrative Judge Marc D. Loud, Sr. concurring.

OPINION

Filing ID #59648004

This protest arises from a solicitation issued by the District of Columbia Department of General Services seeking contractors to provide trash collection services at a number of locations throughout the District of Columbia. The protestor, Jerome L. Taylor Trucking, Incorporated ("JLT" or "protestor") argues that: (1) the contracting officer failed to properly evaluate whether the awardee had in its possession the number of vehicles required to perform the trash collection services on the date of contract award; (2) the contracting officer failed to properly evaluate whether the awardee could timely provide the required trash containers after contract award; and (3) the contracting officer's determination that the awardee is a responsible contractor was arbitrary and capricious.

Upon consideration of the allegations raised by the protestor and the underlying record, we deny and dismiss JLT's protest allegations as without merit as further detailed herein.

FACTUAL BACKGROUND

On May 20, 2016, the District of Columbia Department of General Services ("DGS") issued Invitation for Bids No. DCAM-16-NC-0105 (the "Solicitation") seeking a contractor(s) to provide trash collection services including all labor, materials, equipment, containers, dedicated vehicles, management, recordkeeping, reporting and other services necessary to successfully perform trash collection services for various properties within the District of Columbia. (Agency Report ("AR") Ex. 1, at 2-3.)[1] The properties to be serviced were divided into five (5) award groups ("Aggregate Award Groups") including the following sevice areas: Group 1: DC

[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.

[redacted]

Housing Authority; Group 2: DC Public Libraries & DC Water; Group 3: front-end loader service for Wards 1-8; Group 4: rear-end loader service for Wards 1-8; and Group 5: trailer DC & MD.[2] (*See* Solicitation Attachment A.) Offerors were invited to bid on up to five of the Aggregate Award Groups, and the District intended to award up to five contracts, one contractor per Aggregate Award Group, for these services. (AR Ex. 1, at 3; AR 3.)

The Solicitation outlined the scope of work involved to facilitate the trash collection services and required the awardee to plan, schedule routes and coordinate trash collections from each of the service locations in the respective award groups. (AR Ex.1, at 6.) The awardee was also required to have dedicated trash collection vehicles including front-end packers, roll-off trailers, and lift gate collection vehicles that would only be used to perform the trash collection work required under the contract for each award group. (*Id.* at 6, 14.) Specifically, each Aggregate Award Group required dedicated vehicle types as follows: Group 1 front-end and rear-end loading trucks; Group 2 front-end or rear-end loading trucks and roll-off trailers; Group 3 front-end loading trucks; Group 4 rear-end loading trucks; and Group 5 roll-off trailer service or similar. (*See* Solicitation Attachment A.) The Solicitation did not specify a number of vehicles (of each type) that would be required to service each award group.

Similarly, the awardee was also required to provide a certain number of dedicated trash containers that would also be used to service the award groups. (*Id.* at 9.) In this regard, the awardee was required to provide: (1) front end/rear end loading containers with the capacity of 2, 4, 6, and 8 cubic yards ("CY"); (2) 96 gallon carts (supercans); (3) non-compacting roll-off containers with the capacity of 20, 30, and 40 CY; and (4) compacting roll-off containers with the capacity of 2, 4, 6, 8, 15, 20, 30, 34, and 40 CY. (*Id.* at 11-13.) Additionally, the Solicitation required the awardee to place the aforementioned trash containers at the appropriate locations throughout the award groups within 10 days after the contract was awarded. (*Id.* at 9.)[3]

The Solicitation contemplated award of one or more fixed unit price contracts by DGS with a base term of two years and up to three one-year option periods. (*Id.* at 122-23.) The Solicitation restricted participation in the procurement to certified Small Business Enterprise ("SBE") bidders that had been certified by the District's Department of Small and Local Business Development as a SBE. (*Id.* at 3.) Certified bidders would be eligible to receive up to a twelve (12) percent reduction in the price of their bid in accordance with the bid preference parameters detailed in the Solicitation. (*Id*. at 19.)

Bidders were required to submit fixed unit prices for each of the Aggregate Award Groups in accordance with the Solicitation's Statement of Work, and were required to include all costs necessary to cover all labor, supervision, management, materials, equipment, containers, supplies, vehicles, overhead, profit and other services. (*Id.* at 4.) The contract(s) would be

[2] Aggregate Award Group 5 includes the District of Columbia's New Beginnings Youth Development Center located in Laurel, MD. All properties that were to be serviced were listed by Aggregate Award Group in Attachment A of the Solicitation. Although a copy of Attachment A was not included in the District's Agency Report filing, this information is otherwise publicly available through DGS' procurement website at http://dgs.dc.gov/node/1162752.

[3] The Solicitation's Statement of Work also provided for a number of other services including on-call trash pick-ups and hauling services for the District's Department of Public Works that are not the subject of this protest. (*See* AR Ex. 1, at 7-8.)

awarded to the responsive and responsible bidder(s) with the total lowest firm fixed unit prices per Aggregate Award Group. (*Id.* at 25.) In addition to their proposed price submissions, bidders were also required to submit a Bidder/Offeror Certification Form ("Certification Form"), which required bidders to provide the District with information regarding, amongst other things, the past business activities of each offeror including licenses, activities of corporate officials, suspensions, debarments, terminations or prior non-responsibility determinations. (*Id.* at 56-58.) Furthermore, bidders were also required to provide information regarding their financial status including any history of bankruptcy proceedings or outstanding debts owed to any government entities. (*Id.* at 58-59.)

From May 25, 2016, through June 13, 2016, the District issued a total of seven addenda to the Solicitation. (*Id*. at 120-38.) Notably, Addendum No. 3, issued on June 6, 2016, clarified that the Solicitation's base term was for two years from the date of contract award and also changed the option year period from four years to three years. (*Id.* at 122-23.) Moreover, Addendum No. 3, also provided pre-bid questions and answers regarding the Solicitation's performance requirements, which were incorporated into the Solicitation. (*Id.* at 128-133.) In this regard, in Question No. 3, the District was asked to clarify whether the District would provide a 90 day lead up time for the contractors to deliver the required trash containers. (*Id.* at 128.) In response to this question, the District stated that the successful awardee was expected to have the available resources in place at the time of award to obtain the required inventory by either ownership, purchasing or leasing. (*Id.*)

Similarly, in Question No. 4, bidders asked whether the District would permit a 90 day period from award to acquire the necessary trash collection vehicles required to perform the contract. (*Id.)* In response, the District stated that the successful awardee was expected to have adequate vehicle inventory on hand at the time of award to fulfill the Solicitation's requirements. (*Id.*) However, in Question No. 41, when asked whether the awardee was required to own the required trash collection vehicles at the time of award, the District clarified its earlier response and stated that it expected the awardee to have the available resources in place at the time of award to obtain the required inventory by either ownership, purchasing and/or leasing. (*Id.* at 132.)

Bids were submitted and opened by the District on June 16, 2016. (AR 3-4.) The District received bids from JLT, F&L Construction, Inc. ("F&L"), and Tenleytown, LLC. (AR 4.) Both F&L and JLT submitted proposed pricing for all of the five Aggregate Award Groups and were both determined to be entitled to receive 9 SBE preference points. [4] (*See* AR Ex. 4, at 4.) Accordingly, after application of these preference points, the District determined both F&L and JLT's final evaluated bid prices to be as follows:

[4] Although Tenleytown provided bids for Aggregate Award Groups 2, 4, and 5 (*see* AR 5), Tenleytown's bid and pricing analysis was redacted from the District's Agency Report because it was not the lowest bidder for any award group. (*See* AR 14 n.1.)

F &L	Bid -Price	CBE Points	CBE Point Value	Evaluated Bid Total[5]
Group 1	$ 4,396,054.00	9	$ 395,644.86	$ 4,000,409.14
Group 2	$ 543,434.00	9	$ 48,909.06	$ 494,524.94
Group 3	$ 3,500,681.60	9	$ 315,061.34	$ 3,185,620.26
Group 4	$ 1,127,464.00	9	$ 101,471.76	$ 1,025,992.24
Group 5	$ 1,614,970.00	9	$ 145,347.30	$ 1,469,622.70

JLT	Bid Price	CBE Points	CBE Point Value	Evaluated Bid Total
Group 1	$ 4,574,076.00	9	$ 411,666.84	$ 4,162,409.16
Group 2	$ 617,872.50	9	$ 55,608.53	$ 562,263.98
Group 3	$ 4,184,037.90	9	$ 376,563.41	$ 3,807,474.49
Group 4	$ 1,106,430.00	9	$ 99,578.70	$ 1,006,851.30
Group 5	$ 1,283,800.00	9	$ 115,542.00	$ 1,168,258.00

(*See* AR Ex. 4, at 3-4.)

Based on these final evaluated prices, F&L was determined by the District to have the lowest evaluated price for Aggregate Award Group 1 ($4,000,409.14), Group 2 ($494,452.94), and Group 3 ($3,185,620.26). (*Id.* at 4.) JLT, on the other hand was determined to be the lowest evaluated price for Aggregate Award Group 4 ($1,006,851.30) and Group 5 ($1,168,258.00). (*Id.* at 4.)

Subsequently, on June 23, 2016, the District issued a Determination of Bidder Responsibility Letter ("Responsibility Letter") to F&L and JLT, which required both companies to provide the following supplemental information to the District by a June 27, 2016, submission deadline: (1) a description of the offerors' existing workload providing trash collection services; (2) a list of similar projects that the offerors completed in the last five years; (3) a description of the trash containers that would be utilized by the offerors to fulfill the contract requirements including inventory type and additional containers needed; (4) a detailed description of the dedicated trash collection vehicles and equipment that would be used to perform the contract requirements and additional vehicles and equipment needed for the contract; and (5) an organizational chart showing the Project Manager and key staff that would work on the project. (*See* Resp. to AR Ex. C.) Both F&L and JLT submitted the requested information by the letter's due date. (*See* AR Exs. 2-3.)

In its response to the Responsibility Letter, F&L detailed its current trash collection services consisting of roll-off, front-load, rear-load and bulk pickup operations, provided a list of similar projects that it has completed or is currently engaged in, and also provided a chart detailing the Project Manager and key personnel that would support its contract performance on the project. (AR Ex. 2, at 2-8.) Additionally, F&L stated that it maintained seven dedicated trash collection vehicles that were required under the contract including three front-end trucks,

[5] Specifically, the District determined the preferences' dollar value by multiplying the preference percentage (9%) by each offerors' proposed price per award group. Thereafter, the preference point dollar value was subtracted from the bid price to determine the evaluated bid total as required by the Solicitation.

two rear-load trucks, and two roll-off trailers and listed the vehicles' make, model, service-type, tag number and VIN number. (*Id.* at 7.)

Additionally, with respect to the trash containers that it intended to use during the project, F&L provided the following chart:

Container Type	**Size**	**Quantity Currently Owned**	**Quantity to be Purchased**
Front end Compactor	2 CY	15	0
VIP Front End Compactor	6 CY	1	0
VIP Front End Compactor	8 CY	2	0
Rear End Compactor	2 CY	6	0
VIP Rear End Compactor	4 CY	1	0
Self-Contained Compactor	15 CY	6	5
Self-Contained Compactor	34 CY	6	0
Open Top Container	30 CY	25	0
Front End Container	8 CY	0	359
Front End Container	6 CY	0	108
Front End Container	4 CY	0	54
Front End Container	2 CY	0	22
Rear End Container	4 CY	0	26
Rear End Container	3 CY	0	6
Rear End Container	2 CY	0	5
Toters (supercans)	96 gallons	0	560

(*Id.* at 3-4.)

Similarly, JLT provided a detailed response to the Responsibility Letter describing its trash collection experience with several agencies including its current trash collection contract with DGS. (AR Ex. 3, at 1.) JLT also provided a list of similar projects that it has completed and also provided a chart reflecting the key personnel that would work on the project. (*See id.* at 3-6, 12.) Furthermore, JLT also explained that it had all of the necessary vehicles and containers in place on its current contract with DGS. (*Id.* at 7.) With respect to its trash collection vehicles, JLT provided a breakdown by make, model and tag number of five (5) trucks consisting of four front-end packers and one additional truck whose vehicle type is unclear. (*Id.* at 10.) JLT also stated that it would provide its primary and spare roll-off and rear-loading trucks upon contract award. (*Id.)* Furthermore, JLT indicated that it would possibly subcontract out a portion of the service locations that required the use of a rear-end loading truck. (*Id.* at 11.) Additionally, in detailing the trash containers that it would utilize, JLT stated it would provide supercans with the capacity of no less than 96 gallons, CY dumpsters with side pockets to enable lifting, and roll-off

containers capable of being hauled by the standard roll-off truck as required by the Solicitation. (*Id.* at 8.)

On June 29, 2016, DGS' Supervisory Contract Specialist drafted a Proposed Contract Award Memorandum which was signed and approved by DGS' Director/Chief Contracting Officer explaining the underlying basis for the District's ultimate award decision in this procurement. (AR Ex. 4, at 1.) In evaluating F&L and JLT's proposed pricing, the District conducted a price breakdown of each bid submitted by these companies for each award group. (*Id.* at 3.) In reviewing these proposed prices, the District confirmed that both offerors received the appropriate number of SBE preference points that were applied in determining each offerors' final evaluated bid price. (*Id.* at 4.) The District also determined that the bids submitted by JLT and F&L were fair and reasonable given that both bids were within a reasonable price range of each other. (*Id.* at 3.) The District concluded that both F&L and JLT had satisfactory past performance in providing the same trash collection services at other locations. (*Id.* at 4.) Additionally, JLT and F&L were determined to be in full compliance with the District's Department of Employment Services and Office of Tax and Revenue, and were not included on the Federal Excluded Parties List. (*Id.*)

Accordingly, based on its analysis of the offerors' evaluated bid price and the offerors' performance and compliance records, the District proposed issuing awards to both F&L and JLT upon finding that both offerors were responsible and responsive. (*Id.*) Specifically, F&L was recommended for award based on its lowest price for Aggregate Group 1 ($4,000,409.14), Group 2 ($494,524.94), and Group 3 ($3,185,620.26). (*Id.*) JLT was recommended for award based on its lowest price for Aggregate Group 4 ($1,006,851.30) and Group 5 ($1,168,258.00). (*Id.*) Thereafter, on June 30, 2016, DGS issued letter contracts to F&L for Aggregate Groups 1, 2, and 3, and JLT for Aggregate Groups 4 and 5. (*See* AR Ex. 5.)

On July 12, 2016, JLT filed the present protest with this Board. In its protest, JLT challenges the District's award of Aggregate Groups 1, 2, and 3 to F&L arguing that the District's award decision and evaluation was unreasonable because: (1) the contracting officer ("CO") allegedly failed to properly evaluate whether F&L had in its possession the number of vehicles required to perform the trash collection services on the date of contract award and that F&L offered vehicles that were non-operational or dedicated to other projects; (2) the CO allegedly failed to properly evaluate whether F&L could (and did) provide the required trash containers within 10 days of contract award because, as of the date of the protest, F&L had allegedly failed to deliver these containers to the District; and (3) that the CO's determination that F&L is a responsible contractor was arbitrary and capricious based upon its lack of equipment and financial resources to pay subcontractors on prior projects. (*See* Protest 2-7.)

In response to JLT's protest, the District filed an Agency Report on August 1, 2016, contending that each contractor's bid was properly evaluated for responsibility and scored consistent with the Solicitation criteria. (AR 10.) The District maintains that, accordingly, the offerors with the lowest evaluated price per Aggregate Award Group were properly selected for award. (*Id.*) Moreover, the District asserts that under the Solicitation the awardee was only required to have the resources in place at the time of award to obtain the required trash containers and trash collection vehicles and, thus, F&L was properly determined during the District's evaluation to have the equipment and financial resources to perform the contract. (*Id.*

at 10-14.) Consequently, the District contends that F&L was properly deemed to be a responsible contractor. (*Id.*)

Upon review of the record in this matter, and as discussed below, the Board finds that the District's award decision was made in accordance with the terms of the Solicitation and procurement law.

DISCUSSION

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).

JLT's protest in this matter rests upon its belief that the CO improperly evaluated F&L's ability to provide the required trash collection vehicles and trash containers at the time of contract award. By the same token, JLT also argues that, based upon its failure to pay past subcontractors on its project, the awardee also allegedly lacked the financial resources to perform the contract requirements. JLT's protest on these bases is essentially a challenge to the CO's determination that F&L is a responsible contractor with regard to F&L's ability to have the required equipment and financial resources to meet the contract requirements. *See Commc'n Serv. Co. Inc.*, B-233188, 88-2 CPD ¶ 461 (Comp. Gen. Nov. 8, 1988) (protest allegation that awardee lacks equipment and financial resources necessary to satisfactorily perform a contract is a challenge to the CO's affirmative responsibility determination).

A proper determination that a bidder is a responsible contractor is a prerequisite to contract award. D.C. MUN. REGS. tit. 27, § 4706 (2012). Specifically, prior to awarding a contract over $100,000.00, the CO is required to request from the prospective contractors information about their responsibility in order to make a determination regarding whether a prospective contractor is, in fact, responsible. *Id.* at § 4706.2. The responsibility of a contractor is to be determined by a number of factors including the contractor's ability to obtain the necessary finances and equipment required to perform the contract and the contractor's satisfactory performance record. *Id.* at § 4706.1.

When a solicitation contains definitive responsibility criteria, which are specific and objective standards established by an agency to measure a bidder's ability to perform a particular contract, the agency must obtain evidence that the bidder meets those criteria. *Fei Constr. Co.*, CAB No. P-0902, 62 D.C. Reg. 4401, 4407 (Dec. 14, 2012) (quoting *Cent. Armature/Fort Myer Joint Venture*, CAB No. P-0478, 44 D.C. Reg. 6828-29 (June 6, 1997)). A contracting agency has broad discretion in determining whether bidders meet definitive responsibility criteria since the agency must bear the burden of any difficulties experienced in obtaining the required performance. *Id.* In evaluating the CO's responsibility determination, it is well settled that the Board will not overturn an affirmative responsibility determination unless a protester can show fraud or bad faith on the part of the contracting officials, a bidder's failure to adhere to definitive responsibility criteria, or that such a determination lacked any reasonable basis. *Id.*; *see also Lorenz Lawn & Landscape, Inc.*, CAB No. P-0869, 62 D.C. Reg. 4239, 4244-45 (Sept. 29, 2011).

In the present protest, we find ample support in the record showing that the District's responsibility determination for F&L was proper and reasonable under the terms of the Solicitation.

I. The CO's Award and Responsibility Determination was Proper

The Solicitation stated that the contract(s) would be awarded to the responsive and responsible offeror(s) with the total lowest fixed prices per Aggregate Award Group. Here, the record shows, and protestor does not allege otherwise, that the CO properly evaluated the offerors' final bid prices after applying the required SBE preference point deductions. The record evidences that, based upon these final evaluated prices, the District reasonably and accurately determined that F&L proposed the lowest price for Group 1 ($4,000,409.14), Group 2 ($494,452.94), and Group 3 ($3,185,620.26). JLT, however, proposed the lowest bid prices for Group 4 ($1,006,851.30) and Group 5 ($1,168,258.00). Nonetheless, JLT still argues that the award of Groups 1, 2, and 3 to F&L was improper because F&L lacked the required number of trash collection vehicles and trash containers required at the time of contract award, and also lacked the financial resources to perform the contract and was, therefore, not a responsible bidder.

Evaluation of Trash Vehicles

In reviewing these allegations, we look to the terms of the Solicitation which detail the trash collection equipment requirements for the Aggregate Award Groups awarded to F&L. These Aggregate Award Groups required the use of the following trash collection vehicles: Group 1 front-end and rear-end loading trucks; Group 2 front-end or rear-end loading trucks and trailer (roll-off) trucks; and Group 3 front-end loading trucks. Further, although the protestor argues that the Solicitation required the awardee to have all of the required equipment on hand at contract award for these award groups, the Board finds that this was not the case. The Solicitation terms (incorporating the pre-bid questions and responses provided in Addendum No. 3) make it clear that the bidders could have the required vehicle equipment on hand at contract award *or* have the resources in place to obtain the equipment at contract award. (*See* AR Ex. 1, at 128, 132.)

In determining each bidder's responsibility, the District requested information from F&L and JLT during evaluation regarding the number and type of dedicated trash collection vehicles and trash containers that each bidder would use to fulfill the Solicitation's requirements. (*See* Resp. to AR Ex. C.) In response, F&L listed the seven dedicated vehicles that it intended to use during the project in accordance with the Solicitation's requirements. (AR Ex. 2, at 7.) Furthermore, F&L also provided a detailed chart reflecting all of the trash containers that it intended to use by type, size and quantity and indicated whether the container was owned or needed to be purchased. (*Id.* at 3-4.)

In particular, F&L represented that it had seven dedicated trash collection vehicles to perform the contract and provided the vehicles' make, model, tag number and VIN number. (*Id.* at 7.) F&L offered to provide three front-end loading trucks, two rear-end loading trucks, and two roll-off trailers, which met the requirements of the Solicitation that these dedicated vehicles be provided by the awardee for Aggregate Award Group 1 (front-end and rear-end loading),

Group 2 (front-end or rear-end loading and roll-off trailer), and Group 3 (front-end loading). (*Id; see also* Solicitation Attachment A.)

Based on the stated factors which the District considered in making the award decision, we find nothing in the record which convinces us that the CO made an unreasonable determination that F&L would be able to provide the vehicles which it proposed in its bid, particularly given the District's personal knowledge of F&L's past performance. Again, the Solicitation's requirement was that the awardee have the resources on hand to obtain the required vehicles at the time of contract award and bidders were entitled to rely upon this provision. *See Eco-Coach, Inc.*, CAB No. P-0976, 62 D.C. Reg. 6560, 6565 (Dec. 29, 2014) ("Government may not solicit proposals on one basis and make award on another basis." (quoting *Bean Stuyvesant, LLC*, 48 Fed. Cl. 303, 321 (2000))).

In short, the protester's assertion that the foregoing F&L proposed trucks were not immediately available at the time of contract award was not the requirement of the Solicitation based upon a plain reading of its terms. Moreover, the protester's allegation that the vehicles which the awardee proposed were ultimately unavailable or non-functional is unsubstantiated and speculative and, thus, cannot be the basis for finding the evaluation and responsibility determination unreasonable or otherwise based upon bad faith or fraud. *See Fei Constr. Co.*, CAB No. P-0902, 62 D.C. Reg. at 4408 (upholding the CO's responsibility determination where the determination was supported by the record). As a result, we deny this protest ground.

Evaluation of Trash Containers

JLT also argues that the District improperly evaluated the awardee's ability to provide the required trash containers as evidenced by the fact that those containers were not put at their designated location within 10 days of contract award as required by the Solicitation. During the evaluation of its bid, F&L provided the District with a detailed description of the type, size, and quantity of the trash containers that it would use to fulfill the Solicitation's trash container requirements as previously set forth herein. There is no evidence in the record provided by the protester, or otherwise, showing that the CO failed to consider available information during the evaluation which would contradict the awardee's representation that it could provide this equipment.

Furthermore, we also find without merit the protestor's contention that the awardee failed to place the required containers at their designated location within 10 days of contract award. Allegations regarding an awardee's failure to comply with post-award contract performance specifications are matters of contract administration for resolution by the contracting parties and are not proper protest grounds for the Board's consideration. *See Zafer Constr. Co., et al.*, B-295903 *et al.*, 2005 CPD ¶ 87 (Comp. Gen. May 9, 2005) (declining to consider protest allegation based on awardee's alleged failure to comply with contract terms after award). This protest ground is also denied on this basis.

Evaluation of Financial Resources

Finally, JLT contends that the CO's responsibility determination of F&L was also improper because it failed to consider F&L's alleged failure to pay prior subcontractors as evidence of its financial instability.

However, the record reflects that the District reasonably considered the financial position of both bidders in determining F&L's responsibility. The District not only considered F&L's past performance under prior DGS contracts, but it also confirmed that F&L was in compliance with its tax payment obligations and had not been placed on the Excluded Parties List based upon prior contract performance issues. Indeed, the District required all offerors to complete the Solicitation's Certification Form for the very purpose of collecting information to assess each offeror's financial solvency. Therefore, we find that there was a reasonable basis for the District to have found F&L to be financially responsible based upon the responsibility determination process applicable to this procurement and followed by the District. The protestor's otherwise unsupported allegation that F&L failed to pay its subcontractors and, therefore, lacks adequate financial resources provides no grounds for the Board to find that the CO's responsibility determination was unreasonable.

Consequently, JLT's protest on this basis is denied. *See R4 Integration, Inc.*, B-409717 *et al.*, 2014 CPD ¶ 171 (Comp. Gen. June 6, 2014) (denying protestor's challenge to the CO's responsibility determination where there was no information in the record to cause the CO to doubt the awardee's capability to perform the contract requirements.)

CONCLUSION

As discussed herein, we find that the District reasonably found the awardee to be capable of meeting the discussed equipment requirements of the Solicitation and was properly found to be a responsible contractor by the District. Therefore, the Board denies and dismisses the instant protest.

SO ORDERED.

Date: October 4, 2016

/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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REDACTED VERSION

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

PEARSON VUE	)
	) CAB No. P-0997
Under Solicitation No. Doc197170	)

For the protester, Pearson VUE: G. Christian Roux, Esq., Jeffrey A. Belkin, Esq., Alston & Bird, LLP. For the District of Columbia: Jason Soltis, 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 #59696882

This protest arises from a solicitation issued by the District of Columbia Office of Contracting and Procurement ("OCP"), on behalf of the Department of Consumer and Regulatory Affairs ("DCRA"), for the provision and operation of a professional licensing program. Pearson VUE ("Pearson" or the "protester") challenges the District‟s decision to remove the protester‟s proposal from consideration for award, arguing that (1) OCP violated procurement law by failing to provide the Department of Small and Local Business Development ("DSLBD") with certain statutorily-required information when, on behalf of Pearson, it submitted a waiver request of the solicitation‟s mandatory subcontracting requirements; and (2) following DSLBD‟s denial of the waiver request, OCP‟s exclusion of Pearson‟s proposal from further negotiations was improper since Pearson was the highest-ranked offeror. The District contests these allegations, arguing that (1) the Board lacks jurisdiction over Pearson‟s challenge to DSLBD‟s denial of the waiver request; and (2) the District was not required to continue negotiations with Pearson and, therefore, its rejection of Pearson‟s proposal was proper.

For the reasons set forth below, the Board denies the instant protest. Specifically, the Board finds that (1) it has jurisdiction over this protest; (2) OCP‟s alleged failure to provide DSLBD certain information when it submitted the waiver request did not prejudice the protester; and (3) OCP‟s removal of the protester‟s non-compliant proposal from further consideration was proper.

BACKGROUND

I. The Solicitation

On July 2, 2015, the District issued Solicitation No. Doc197170 (the "RFP") seeking a contractor to provide and operate a professional licensing program for the District. (*See* District‟s Mot. to Dismiss or, in the Alternative, Agency Report ("AR") at 3; AR Ex. 3, at 1-2; AR Ex. 1, at 1.) The RFP contemplated the award of a requirements contract for a base period of one year and up to four one-year option periods. (AR Ex. 3, at 2-7 (§§ B.2-B.3).)

Section M of the RFP described the District‟s evaluation and award criteria. (*Id.* at 76-80.) The offerors‟ proposals were to be graded on a 100-point scale, consisting of the following categories: (1) Technical Approach and Methodology (35 points); (2) Technical Expertise (30 points); (3) Past Performance (25 points); and (4) Price (10 points). (*Id.* at 77 (§ M.3.1).) Finally, the offerors would

[redacted]

receive up to twelve additional preference points for their proposals based on the cajtegory of certification, if any, that they had obtained from DSLBD pursuant to the Small and Certified Business Enterprise Development and Assistance Act of 2005, D.C. CODE §§ 2-218.01 to .82 (2013, Supp. June 2015 & Supp. Oct. 2015) (amended Oct. 22, 2015) ("SCBED Act"), for a total of 112 possible points. (AR Ex. 3, at 79- 80 (§ M.5).)

The RFP included "Mandatory Subcontracting Requirements,"[1] which, *inter alia*, stated:

> **H.9.1.1** Unless the Director of [DSLBD] has approved a waiver in writing, for all contracts in excess of $250,000, at least 35% of the dollar volume of the contract shall be subcontracted to qualified small business enterprises (SBEs).
>
> **H.9.1.2** If there are insufficient qualified small business enterprises (SBEs) to completely fulfill the requirement of paragraph H.9.1.1, then the subcontracting may be satisfied by subcontracting 35% of the dollar volume to any certified business enterprises (CBE); provided, however, that all reasonable efforts shall be made to ensure that qualified SBEs are significant participants in the overall subcontracting work.
>
> **H.9.1.3** A prime Contractor which is certified by DSLBD as a small, local or disadvantaged business enterprise shall not be required to comply with the provisions of sections H.9.1.1 and H.9.1.2.

(AR Ex. 3, at 53).

Section H.9.2 of the RFP required non-CBE prime contractors, who were required by law to subcontract at least 35% of the dollar volume of the contract, *see supra* note 1, to include a subcontracting plan as part of their proposal. (*See* AR Ex. 3, at 54.) The RFP also included a requirement that "51% of

[1] The RFP"s subcontracting requirements were based on D.C. CODE § 2-218.46(a), which states, in relevant part:

> (2) All non-construction contracts for government-assisted projects in excess of $ 250,000 shall include the following requirements unless a waiver has been approved in accordance with § 2-218.51:
>
> (A) At least 35% of the dollar volume of the contract shall be subcontracted to small business enterprises; or
>
> (B) If there are insufficient qualified small business enterprises to completely fulfill the requirement of subparagraph (A) of this paragraph, then the subcontracting requirement may be satisfied by subcontracting 35% of the dollar volume to any qualified certified business enterprises; provided, that all reasonable efforts shall be made to ensure that qualified small business enterprises are significant participants in the overall subcontracting work.
>
> (3) For the purposes of this section, a business enterprise certified as a small business enterprise, local business enterprise, or disadvantaged business enterprise shall not have to comply with the requirements set forth in paragraphs (1) or (2) of this subsection.

D.C. CODE § 2-218.46(a).

the new employees hired for the contract shall be District residents" if the contract amount is at least $300,000.00.[2] (AR Ex. 3, at 50 (§ H.5.4).)

The District amended the RFP three times during the course of this procurement. (AR at 3.) Collectively, these amendments (1) provided the sign-in sheet and agenda for the pre-proposal conference; (2) corrected a typographical error; (3) revised certain contract performance terms not at issue in this protest; and (4) provided answers to the prospective offerors" questions regarding the RFP. (AR Ex. 4, at 2-14.)[3]

On July 17, 2015, prior to the deadline for receipt of proposals, the District reminded the RFP participants, through the District"s online procurement system, of the following:

> PLEASE NOTE THE MANDATORY REQUIREMENT: Proposals responding to this RFP may be rejected if the offeror fails to submit a subcontracting plan that is required by law. For contracts in excess of $250,000, at least 35% of the dollar volume of the contract shall be subcontracted in accordance with section H.9.1 of the [RFP].
>
> Attached Excel spreadsheet provides a listing of potential subcontractors that are Certified Business Enterprises (CBEs).
>
> Please make every effort to reach out to the companies listed so that the 35% subcontracting requirement can be met.
>
> When reaching out, be ready to provide proof of your earnest efforts.

(AR Ex. 2, at 20.) Along with the reminder, the District provided a spreadsheet that identified thirty-three CBEs who were "Invited Participants" to the procurement. (*Id.* at 13-19.)

Two offerors submitted proposals by the RFP"s July 24, 2015, deadline: (1) PSI Services LLC ("PSI"); and (2) Pearson. (*See* AR at 4; AR Ex. 1, at 1.) In its proposal, Pearson submitted a subcontracting plan which stated that Pearson would subcontrac[redacted]% of the base year contract price to one SBE, [redacted]% of the option year contract price for the first and third option years, an[redacted]% of the option year contract price for the second and fourth option years. (AR Ex. 6, at 2-10.) PSI offered a subcontracting plan that met the 35% subcontracting requirement.[4] (AR Ex. 5, at 2-7.)

On August 31, 2015, the District requested that both offerors submit a best and final offer ("BAFO"). (AR Ex. 7, at 2-5.) The District identified areas in each offeror"s proposal that needed to be addressed in their BAFO. (*See id.* at 2, 4.) In the BAFO request that the District sent to Pearson, the District stated, *inter alia*: "[t]he offered subcontracting plan does not comply with the required 35% SBE/CBE participation for each contract year. Please submit revised subcontracting plan showing your best efforts to reach the 35% subcontracting requirement." (*Id.* at 2.)

[2] This requirement is set forth in D.C. CODE § 2-219.03(e)(1)(A) (2016), which provision the RFP incorporated by reference and referred to as the "First Source Act," (AR Ex. 3, at 50 (§ H.5.1)).
[3] When referring to documents that lack consistent internal page numbering (e.g., AR Ex. 4), the Board has used the page numbers assigned by Adobe Reader.
[4] During negotiations with the District, PSI submitted a revised subcontracting plan which decreased the SBE subcontracting percentage in the base year to 23.4%. (*See* AR at 4, n.1; AR Ex. 5, at 8-12.)

[redacted]

On September 1, 2015, Pearson submitted its BAFO to the District. (Protest App. 4, at 15-30; *see also* AR Ex. 8.) Regarding the subcontracting plan requirement, Pearson explained in its BAFO that it was unable to meet the 35% subcontracting requirement and requested that the District waive "the remaining SBE/CBE goal." (Protest App. 4, at 18-19.) Pearson"s BAFO did not include a revised subcontracting plan. (*See id.* at 15-30.)

On September 2, 2015, after reviewing the offerors" BAFOs, the District requested that both offerors submit a second BAFO. (*See* AR at 4; Protest App. 6, at 38-39.) The District"s second BAFO request to Pearson did not refer to the subcontracting plan requirement. (*See* Protest App. 6, at 38-39.)

The District evaluated the offerors" second BAFOs based upon the factors identified in the RFP. (*See* AR Ex. 12, at 9-13; *see also* AR Ex. 3, at 77 (§ M.3.1).) Upon completion of its evaluation of the offerors" second BAFOs, the District ranked Pearson"s proposal first, with 69 total points, while PSI"s proposal was ranked second, with 65.98 total points. (AR Ex. 12, at 13.)

On September 11, 2015, the contracting officer ("CO") submitted a request to DSLBD to waive the 35% SBE subcontracting requirement in light of the District"s interest in awarding the contract to the first-ranked offeror, Pearson. (*See* AR Ex. 9, at 2-3.) In that vein, the CO sought approval of Pearson"s subcontracting plan which contemplated that [redacted] of the contract"s dollar volume would be subcontracted during the base year of the contract. (*Id.* at 2.) The CO"s justification for the waiver request was similar to the explanation that Pearson had provided to the District in its first BAFO.[5] (*Compare* AR Ex. 9, at 2-3, *with* Protest App. 4, at 18-19.)

On September 17, 2015, DSLBD requested that the CO "send [DSLBD] all information regarding the bidders on this contract and all subcontracting plans relating to th[e] Waiver request." (AR Ex. 13, at 3.) In response, the CO submitted Pearson"s subcontracting plan to DSLBD but did not provide the subcontracting plan of the other offeror, stating that "this is an active procurement." (*Id.* at 2.) On September 18, 2015, DSLBD requested that the CO submit "all plans received, otherwise [DSLBD] cannot take any position with regards to" the waiver request. (*Id.*) On September 22, 2015, DSLBD e-mailed the CO, stating that "in order for DSLBD to conduct a thorough evaluation and make a proper decision regarding OCP"s waiver request, DSLBD needs to know how many bids were received and see a copy of all plans submitted." (*Id.* at 1.) DSLBD further indicated that it needed to know (1) if "any of the bidders submit[ted] a 35% subcontracting plan" and why any such plan was rejected; (2) if none of the offerors submitted a 35% subcontracting plan, the reasons given for not doing so and "the SBE commitments for each of the bidders." (*Id.*) DSLBD stated that "[w]ithout this information, DSLBD cannot make a decision regarding this waiver request." (*Id.*)

[5] In explaining its inability to meet the RFP"s subcontracting plan requirement, Pearson (the incumbent contractor) claimed it was "at a distinct disadvantage for subcontracting 35%." (Protest App. 4, at 18.) According to Pearson, its personnel costs were the only portion of the contract that could reach 35% of the contract volume, and "to meet the 35% subcontracting requirement, [Pearson] would have to forcibly transition" its existing Maryland-based staff into becoming employees of an SBE staffing agency. (*Id.*) Pearson further explained that this would require Pearson to terminate its staff and then have them re-hired by an SBE staffing agency, which may not be possible due to the District"s First Source requirements or if the staff decided not to work for a staffing agency. (*See id.* at 18-19.)

On September 29, 2015, DSLBD denied the CO‟s request for a waiver of the 35% subcontracting requirement. (AR Ex. 9, at 4-5.) DSLBD stated that it had posted DCRA‟s waiver request online and had received comments from at least one SBE.[6] (*Id.* at 4.) DSLBD further stated:

> DCRA/OCP submitted a subcontracting plan from [Pearson] stating that only 2% of the contract amount is available for subcontracting. . . . DSLBD requested further clarification, including how many firms submitted proposals, and how many proposals included subcontracting plans. DCRA has not provided the requested information. As such, DSLBD has been unable to properly evaluate this request and make a proper determination regarding potential subcontracting opportunities. Based on this information, including ongoing interests of SBEs, the request for the waiver is hereby **Denied.**

(*Id.* at 5.)

On November 4, 2015, the CO notified Pearson that its offer was "now found unacceptable."[7] (AR Ex. 11, at 3.) The CO stated that DSLBD had denied the request for a waiver of the 35% subcontracting requirement and, therefore, Pearson‟s proposal did not meet the RFP‟s subcontracting requirements. (*Id.*)

II. Procedural History

On November 19, 2015, Pearson filed the instant protest. (*See* Protest.) In its protest, Pearson argued that (1) the District violated D.C. CODE § 2-218.51 when OCP failed to provide DSLBD certain information as part of OCP‟s request for a waiver of the subcontracting requirement "on behalf of Pearson;" and (2) OCP "improperly excluded" Pearson from "continued negotiations" after DSLBD denied the waiver request. (Protest at 11.)

On December 9, 2015, the District filed the AR, arguing that (1) the Board lacks jurisdiction over the protester‟s challenge to DSLBD‟s denial of the waiver request; and (2) even if the Board has jurisdiction, the District was not required to continue negotiations with Pearson and, therefore, the District‟s rejection of Pearson‟s proposal was proper. (*See* AR at 6-9.)

On December 18, 2015, Pearson filed its comments to the AR and opposition to the motion to dismiss. (Pearson‟s Resp. to the AR or, in the Alternative, Resp. in Opp‟n to the District‟s Mot. to Dismiss ("Pearson‟s Comments").) In so doing, Pearson argued that the Board has jurisdiction over the instant protest because Pearson was not challenging DSLBD‟s denial of the waiver request but, rather, was challenging OCP‟s "failure to comply with applicable law regarding the information that must be provided to DSLBD with a subcontracting plan waiver request." (*Id.* at 3.)

[6] DSLBD also noted that "[w]hen [Pearson] was initially awarded the [incumbent] contract in 2004, the contract contained no subcontracting requirements." (AR Ex. 9, at 4.)

[7] After receiving DSLBD‟s denial of the waiver request, the District conducted further negotiations with PSI only. (*See* AR at 6.)

DISCUSSION

I. Jurisdiction and Standard of Review

A. Jurisdiction

The Board has exclusive jurisdiction over "[a]ny protest of a solicitation or award of a contract . . . by any actual or prospective bidder, offeror, or the contractor who is aggrieved in connection with the solicitation or award of a contract." D.C. CODE § 2-360.03(a)(1) (2016). This protest is timely, having been filed by the protester within ten business days of receiving the District"s notice that its offer was deemed to be unacceptable. *See id.* § 2-360.08(b)(2) (2016).

In its motion to dismiss, the District argues that the Board lacks jurisdiction over this protest because the protester is challenging "DSLBD"s refusal to grant a waiver of Pearson["s] subcontracting plan." (AR at 1.) According to the District, "the Board lacks jurisdiction to consider deliberative or discretionary functions of DSLBD and the decision by DSLBD not to grant the waiver is such a function." (*Id.* at 7.)

Contrary to the District"s characterization of this protest, however, the protester is not challenging DSLBD"s decision to deny OCP"s request for a waiver of the 35% subcontracting requirement. Rather, the protester is challenging OCP"s conduct in requesting the waiver, alleging that OCP violated D.C. CODE § 2-218.51 by not submitting to DSLBD certain information as part of the waiver request. (*See* Protest at 12-14; Pearson"s Comments at 3-7.) In addition, the protester has alleged that OCP was required to "continue[] negotiations with [the protester] following the waiver denial." (Protest at 3; *see also* Protest at 14-15.) Given the nature of Pearson"s protest allegations, we find that the Board has jurisdiction over the instant protest pursuant to D.C. CODE § 2-360.03(a)(1).

B. Standard of Review

In reviewing the propriety of an agency"s evaluation of proposals and related award decision, the Board examines whether the agency"s actions were reasonable and consistent with the evaluation criteria listed in the RFP, and whether there exists any violations of procurement laws or regulations. *Martha's Table, Inc.*, CAB No. P-0896, 62 D.C. Reg. 4306, 4316 (May 10, 2012) (citations omitted). Even so, "we „will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency"s actions."" *B&B Sec. Consultants, Inc.*, CAB No. P-0708, 54 D.C. Reg. 1948, 1952 (July 18, 2005) (quoting *McDonald-Bradley*, B-270126, 96-1 CPD ¶ 54 at *2 (Comp. Gen. Feb. 8, 1996)); *see also C & E Servs., Inc.*, CAB No. P-0874, 62 D.C. Reg. 4216, 4222 (May 19, 2011) (District"s violation of procurement regulations did not prejudice the protester).

II. The Protester Was Not Prejudiced by the District's Alleged Violation of D.C. CODE § 2-218.51

The protester argues that OCP "fail[ed] to comply with applicable law regarding the information that must be provided to DSLBD with a subcontracting plan waiver request." (Pearson"s Comments at 3.) Specifically, the protester argues that the waiver request OCP submitted to DSLBD did not comply with D.C. CODE § 2-218.51. (Pearson"s Comments at 4-5; Protest at 12.) The District responds that a waiver of the subcontracting requirements is discretionary, (*see* AR at 7), and that the protester was not prejudiced by OCP"s alleged failure to comply with § 2-218.51, (*see* District"s Mot. to Respond to Pearson"s Comments at 3-4). For the reasons stated below, we deny this protest ground.

D.C. CODE § 2-218.51 states, in pertinent part:

> (a) The subcontracting requirements § 2-218.46 may be waived only if there is insufficient market capacity for the goods or services that comprise the project and such lack of capacity leaves the contractor commercially incapable of achieving the subcontracting requirements at a project level. The subcontracting requirements of § 2-218.46 may only be waived in writing by the Director [of DSLBD]. An agency seeking waiver of the subcontracting requirements of § 2-218.46 shall submit to the Director a request for waiver, which shall include the following:
>
> (1) The number of certified business enterprises, if any, qualified to perform the elements of work that comprise the project;
>
> (2) A summary of the market research or outreach conducted to analyze the relevant market; and
>
> (3) The consideration given to alternate methods for acquiring the work to be subcontracted in order to make the work more amenable to being performed by certified business enterprises.

D.C. CODE § 2-218.51.

The protester argues that "OCP provided nothing under elements (1) and (2)" of § 2-218.51(a) and "[o]n required element (3), OCP merely reconstituted Pearson"s first BAFO response and adopted as its own" Pearson"s explanation of its inability to meet the RFP"s subcontracting requirement. (Pearson"s Comments at 4-5.) However, § 2-218.51 does not *require* an agency to seek a waiver of the subcontracting requirement, and the protester freely admits that "the District is correct that contracting officers have discretion to decide whether to seek a waiver of the subcontracting requirement." (Pearson"s Comments at 4.) In the absence of any express statutory language to the contrary, we reject the protester"s argument that "once the contracting officer decides to pursue a waiver, . . . certain information ***must*** be provided in such a request." (*Id.*) We find that this statutory interpretation serves to unduly limit the agency"s discretionary function. We also find that § 2-218.51(a)(3) does not contain language that prohibits the contracting agency from reiterating the proposed contractor"s own justification in support of a request for a waiver of the subcontracting plan requirement.

Furthermore, it is important to note that the stated goal of the Council of the District of Columbia in enacting the subcontracting requirements of D.C. CODE § 2-218.46 is to "to improve contracting and procurement opportunities for local, small, and disadvantaged businesses based in the District." Fiscal Year 2006 Budget Support Act of 2005, D.C. Law No. 16-33, preamble, 52 D.C. Reg. 7503, 7509 (Oct. 20, 2005). Hence, an interpretation of the statute that allows non-CBEs, such as the protester, to force a contracting agency to pursue a waiver of the subcontracting requirements – to the detriment of CBEs – would be contrary to the purpose and intent of the SCBED Act. *See Mell, Brownell & Baker*, CAB No. P-0615, 49 D.C. Reg. 3321, 3327 (Jan. 18, 2001) (stating that "a statute must be read so as to give meaning to all of its parts"), *appeal dismissed*, 2001-CA-000002-P(MPA) (D.C. Super. Ct. May 23, 2003) (Westlaw, D.C. Super. Ct. Dockets).

The protester also argues that DSLBD denied the waiver request "because OCP failed to provide DSLBD any of the statutorily-required information." (Pearson"s Comments at 7.) Yet the record shows that DSLBD"s denial of the waiver request was not based on the lack of any "statutorily-required information," but, rather, was based on the absence of any information concerning the other offeror, PSI. Indeed, on September 22, 2015, DSLBD stated that it needed to know (1) how many offers were received,

I. the subcontracting plans submitted with those offers; (3) if any subcontracting plan submitted met the

35% subcontracting plan requirement and why such plan was rejected; and (4) the reasons given by the offerors for not meeting the subcontracting plan requirement and the SBE commitments of each of the offerors. (AR Ex. 13, at 1.) DSLBD"s later denial of the waiver request stated:

> DSLBD requested further clarification, including how many firms submitted proposals, and how many proposals included subcontracting plans. DCRA has not provided the requested information. As such, DSLBD has been unable to properly evaluate this request and make a proper determination regarding potential subcontracting opportunities. Based on this information, including ongoing interests of SBEs, the request for the waiver is hereby **Denied.**

(AR Ex. 9, at 5.)

Thus, even assuming *arguendo* that OCP violated § 2-218.51 by submitting a non-compliant waiver request on behalf of Pearson, the record shows that, regardless, DSLBD would have denied OCP"s waiver request due to the lack of information regarding the other offeror"s subcontracting plan. Accordingly, since the protester was not prejudiced by this alleged violation of § 2-218.51, we deny this protest ground. *See Mell, Brownell & Baker,* CAB No. P-0615, 49 D.C. Reg. at 3328 (denying protest ground that the agency violated a procurement statute because the protester was not prejudiced by the alleged violation).

III. The District's Exclusion of the Protester's Proposal from Further Consideration Was Proper

Lastly, the protester argues that the District improperly rejected its proposal after DSLBD denied the waiver request. (*See* Protest at 14-15; Pearson"s Comments at 8-9.) According to the protester, since it was the highest-rated offeror, it "was entitled to further negotiations or meaningful discussions under the terms of the RFP." (Pearson"s Comments at 8.) The protester contends that Section L.14 of the RFP limited OCP to either "(1) award[] the contract to [the protester], who was the highest ranked offeror; or (2) continu[e] to negotiate with [the protester] as the highest ranked offeror." (Protest at 14.) The protester alternatively argues that it was "[a]t the very least . . . entitled to have meaningful discussions with the [CO] following the waiver denial." (*Id.* at 15 (citations omitted).) For the reasons stated below, we deny this protest ground.

Section L.1.2 of the RFP stated that, "[i]n accordance with [D.C. MUN. REGS. tit. 27, § 1632 (2013)], after evaluation of the proposals . . . , the contracting officer may elect to proceed with *any method* of negotiations, discussions or award of the contract without negotiations, which is set forth in subsections (a), (b), (c), or (d) of section 1632.1."[8] (AR Ex. 3, at 66 (emphasis added).) Thus, although

[8] The referenced subsections state:

> (a) Award of the contract without negotiations or discussions in accordance with § 1633;
> (b) Negotiations with the highest ranked offeror in accordance with § 1634;
> (c) Discussions with all offerors in the competitive range in accordance with §§ 1636, 1637, 1638 and 1639; or
> (d) Negotiations with the highest ranked offeror after discussions with offerors in the competitive range or after receipt of best and final offers in accordance with § 1634.

Section L.14 of the RFP additionally states, "[a]fter evaluation of best and final offers, the CO *may* award the contract to the highest-ranked offeror, or negotiate with the highest ranked offeror in accordance with [D.C. MUN. REGS. tit. 27, § 1634 (2013)]," (AR Ex. 3, at 73 (emphasis added)), we reject the protester"s contention that the RFP *required* OCP to either award the contract to the protester or negotiate with the protester after the BAFOs were evaluated. Instead, we find that OCP was permitted to conduct multiple rounds of discussions and requests for BAFOs pursuant to the RFP and relevant procurement laws and regulations.

As noted above, after the offerors submitted their initial proposals, OCP conducted written discussions with both offerors and requested BAFOs, (AR Ex. 7, at 2-5), pursuant to D.C. MUN. REGS. tit. 27, §§ 1632.1(c), 1636, 1639 (2013). Subsequently, after receipt of the offerors" first BAFOs, the District conducted further written discussions with both offerors and requested second BAFOs. (*See* AR at 4; Protest App. 6, at 38-39.) We note that neither the RFP nor the procurement statutes and regulations contain prohibitions against the District"s method of successive rounds of discussions with the offerors.[9]

In sum, we find that although the protester submitted the highest-ranked BAFO, (AR Ex. 12, at 13), the District rightfully determined the protester to be ineligible for contract award due to its failure to meet the subcontracting requirements as set forth in Section H.9.1.1 of the RFP, (AR Ex. 3, at 53), and D.C. CODE § 2-218.46(a)(2). As a result, OCP"s exclusion of the protester"s proposal from further consideration was proper pursuant to D.C. MUN. REGS. tit. 27, § 1638.6 (2013), which states:

> If, after discussions have begun, an offeror originally in the competitive range is no longer considered to be among the most highly rated offerors being considered for award, that offeror may be eliminated from the competitive range *whether or not all material aspects of the proposal have been discussed, or whether or not the offeror has been afforded an opportunity to submit a proposal revision*.

D.C. MUN. REGS. tit. 27, § 1638.6 (emphasis added); *see also Benefits Consulting Assocs., LLC v. United States*, 93 Fed. Cl. 254, 274-76 (2010) (the agency"s rejection of the protester"s proposal without conducting multiple rounds of discussions with the protester was not improper since the agency was allowed to eliminate the protester"s non-compliant proposal pursuant to 48 C.F.R. § 15.306(d)(5) (2016) (which is identical to D.C. MUN. REGS. tit. 27, § 1638.6)); *CEdge Software Consultants, LLC v. United States*, 117 Fed. Cl. 419, 433, n.11 (2014) (the agency"s removal of the offeror"s proposal from the competitive range was proper under 48 C.F.R. § 15.306(d)(5) once the agency determined that the proposal did not meet the solicitation"s requirements).

The District was not required to further discuss with the protester its subcontracting plan deficiency or give the protester another opportunity to meet the subcontracting plan requirement.[10] Thus,

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D.C. MUN. REGS. tit. 27, § 1632.1.

[9] We further note that a prohibition against the District reopening discussions, "unless it is clearly in the best interests of the District to do so," D.C. MUN. REGS. tit. 27, § 1622.3 (1988) (repealed 2013), was removed from the current regulations governing BAFOs, *see id.* § 1639 (2013).

[10] During the first round of discussions the District notified the protester of its deficient subcontracting plan and requested that the protester submit, as part of its BAFO, a "revised subcontracting plan showing [the protester"s] best efforts to reach the 35% subcontracting requirement." (AR Ex. 7, at 2.) We thus reject the protester"s claim that the District "failed to give [the protester] a meaningful opportunity to address any deficiencies in its proposal regarding the subcontracting requirement," (Protest at 15). *See Psychiatric Inst. of Washington, Inc.*, CAB No. P-0905, 62 D.C. Reg. 4329, 4343 (Aug. 1, 2012) (rejecting a protester"s argument that it should have been given

we find that the District properly excluded the protester‟s offer from further consideration and we therefore deny this protest ground.

CONCLUSION

For the reasons set forth herein, we find that the Board has jurisdiction over this protest, and we further find that (1) the protester was not prejudiced by the alleged failure of OCP to submit information to DSLBD consistent with D.C. CODE § 2-218.51; and (2) the District‟s exclusion of the protester‟s offer from further consideration was proper. Accordingly, we deny the instant protest and dismiss it with prejudice.[11]

SO ORDERED.

Date: October 13, 2016

/s/ Maxine E. McBean
MAXINE E. McBEAN
Administrative Judge

CONCURRING:

/s/ Marc D. Loud, Sr.
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additional opportunities to correct deficiencies when, previously, the District had explicitly raised the deficiencies with the protester).

[11] The parties shall confer to determine agreed-upon redactions of protected information, if any, and file a joint proposed redacted version of this opinion with the Board no later than October 20, 2016.

REDACTED VERSION

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

TREASURY SERVICES GROUP, LLC)
) CAB No. P-1015
Under Solicitation No. CFOPD-15-R-028)

For the protester, Treasury Services Group, LLC: Shane Osborn, *pro se*. For the District of Columbia: Jason Soltis, 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 #59702105

This protest arises from a solicitation for unclaimed property examination and auditing services, issued by the District of Columbia Office of the Chief Financial Officer ("OCFO"). Treasury Services Group, LLC ("TSG" or the "protester") protests the District's scoring of proposals and subsequent decision not to award a contract to TSG. In response, the District (1) moves the Board to dismiss the protest due to TSG's alleged failure to state a clear and concise statement of legal and factual protest grounds; or (2) in the alternative, argues that the District properly evaluated the proposals.

For the reasons set forth below, we deny the District's motion to dismiss, finding that the protester has stated its protest ground. However, the protester failed to comment on and/or rebut the evidence presented by the District in support of its evaluation of the proposals. Finding no impropriety on the part of the District in the conduct of this procurement, the Board denies and dismisses the instant protest with prejudice.

BACKGROUND

I. The Solicitation

On February 25, 2015, OCFO issued Solicitation No. CFOPD-15-R-028 (the "RFP") for unclaimed property examination and auditing services. (District's Mot. to Dismiss or, in the Alternative, Agency Report ("AR") at 2; *see* AR Ex. 1, at 2 (§ B.1.1).) According to the RFP, the District contemplated the award of multiple requirements-type contracts, (AR Ex. 1, at 2 (§ B.2)), with base terms of one year and up to four one-year option periods, (AR Ex. 2, at 4, ¶¶ 5-6).

Section M of the RFP described the District's evaluation and award criteria. (AR Ex. 1, at 60-64.) The offerors' proposals were to be graded on a 100-point scale, consisting of 70 points for technical criteria and 30 points for price.[1] (*See* AR Ex. 1, at 61 (§ M.3); *see also* AR Ex. 8, at 3.)[2]

[1] The offerors could also receive up to twelve additional points based on any Certified Business Enterprise designation that they had obtained, pursuant to D.C. CODE §§ 2-218.01 to .82 (2016). (*See* AR Ex. 1, at 63-64 (§§ M.4, M.4.2.1).)

[redacted]

The District amended the RFP five times during the course of the procurement. (AR Exs. 2-5; AR Ex. 8.) Collectively, these amendments (1) revised certain specifications and contract performance provisions not at issue in this protest; (2) provided answers to the prospective offerors' questions regarding the RFP; (3) extended the deadline for the submission of proposals; and (4) corrected a mathematical error regarding the distribution of points between the technical evaluation factors. (*See* AR Exs. 2-5; AR Ex. 8.)

Five offerors submitted proposals prior to the RFP's March 18, 2016, deadline: (1) Audit Service US LLC ("ASUS"); (2) [redacted] (3) TSG; (4) Verus Financial ("Verus"); and (5) Xerox State and Local Solutions Inc. ("Xerox"). (*See* AR Ex. 10, at 2; *see also* AR at 3.) The District convened a source selection evaluation board ("SSEB") to evaluate the offerors' technical proposals. (*See* AR Ex. 9, at 2-3; *see also* AR Ex. 10, at 2-3; AR at 3.) The individual evaluations of the offerors' proposals by the SSEB members resulted in the following total scores for technical criteria:

	Evaluator [redacted]	Evaluator [redacted]	Evaluator [redacted]	Evaluator [redacted]
[redacted]	59	58	54	56
	52	39	45	51
	66	68	59	70
	63	62	59	50
	66	65	57	70

(AR Ex. 9, at 3; *see also* AR at 3-4.)

Having performed individual evaluations, the SSEB reached a consensus technical rating for each offeror. (AR Ex. 9, at 3-4.) The SSEB consensus evaluation also discussed strengths and weaknesses of each offeror's proposal. (*See id.* at 4-28; *see also* AR at 4.) The following table shows the SSEB's consensus technical score for each offeror:

	Consensus Score
[redacted]	56.5
	44
	65
	56
	65

(*See* AR Ex. 9, at 4; *see also* AR at 4.)

The contracting officer then reviewed the offerors' proposals, the SSEB individual evaluations, and the SSEB consensus report. (AR Ex. 10, at 4; *see also* AR at 4.) The contracting officer concurred with the SSEB's consensus technical scores for each offeror and scored the offeror's price proposals. (AR Ex. 10, at 4-5; *see also* AR at 4.) The final total evaluation scores for the offerors were as follows:

[2] When referring to documents that lack consistent internal page numbering (e.g., AR Ex. 8), the Board has used the page numbers assigned by Adobe Reader.

	Price	Technical	Total	Ranking
[redacted]	30	65	95	1
[redacted]	27.95	65	92.95	2
[redacted]	25.62	56.5	82.12	3
[redacted]	25.62	56	81.62	4
[redacted]	25.62	44	69.62	5

(AR Ex. 10, at 5-6; *see also* AR at 4-5.)

On June 22, 2016, the contracting officer recommended contract awards to Verus, Xerox, and ASUS. (AR Ex. 10, at 6.) On that same day, the contracting officer notified TSG that it was not selected for award. (*See* AR Ex. 12.) In doing so, the District also informed TSG that award would be made to Verus, Xerox, and ASUS. (*Id.*)

II. Post-Award Procedural History

On July 6, 2016, TSG filed the instant protest, stating that it was "protest[ing] the score and subsequent determination against awarding TSG a contract." (Protest at 1.) TSG further stated that, because it did not know "the scores for the three firms awarded contracts," TSG "cannot specifically name sections that were underscored." (*Id.*)

On July 26, 2016, the District filed the AR, arguing that the protest should be dismissed because "the Protester does not set forth a clear and concise statement of the legal and factual grounds of the protest, nor does it include copies of relevant documents and citations to statutory regulations or solicitation provisions claimed to be violated." (AR at 1 (citation omitted).) In the alternative, the District argued that OCFO's evaluation of proposals was reasonable and in accordance with the RFP. (*See id.* at 7-8.) The protester did not file comments to the AR and has not made any additional filings with the Board since its initial protest.

DISCUSSION

I. Jurisdiction and Standard of Review

The Board exercises exclusive jurisdiction over "[a]ny protest of a solicitation or award of a contract . . . by any actual or prospective bidder, offeror, or the contractor who is aggrieved in connection with the solicitation or award of a contract." D.C. CODE § 2-360.03(a)(1) (2016). This protest is timely, having been filed within ten business days of the protester's receipt of the notice of contract award. *See id.* § 2-360.08(b)(2).

In reviewing the propriety of an agency's award decision, the Board examines whether the decision is reasonable and consistent with the evaluation criteria listed in the RFP, and whether there exists any violations of procurement laws or regulations. *Martha's Table, Inc.*, CAB No. P-0896, 62 D.C. Reg. 4306, 4316 (May 10, 2012) (citations omitted). The protester bears the burden of establishing its case by a preponderance of the evidence. *See Stockbridge Consulting LLC*, CAB No. P-0963, 62 D.C. Reg. 6480, 6484 (Aug. 28, 2014) (citation omitted); *see also* Board Rule 120.1, D.C. MUN. REGS. tit. 27, § 120.1 (2002).

II. The District's Motion to Dismiss

The District has moved to dismiss the protest due to the protester's alleged failure to meet the requirements of Board Rule 301.1(c), D.C. MUN. REGS. tit. 27, § 301.1(c) (2002). (*See* AR at 1, 6-7.) For the reasons stated below, we deny the District's motion to dismiss.

Our rules require that a protest include "[a] clear and concise statement of the legal and factual grounds of the protest, including copies of relevant documents, and citations to statutes, regulations, or solicitation provisions claimed to be violated." Board Rule 301.1(c), D.C. MUN. REGS. tit. 27, § 301.1(c). In interpreting this rule, we have stated that "[o]ur expectation of specificity in the initial protest submission must take into account that the protester may often have little more than the benefit of the solicitation documentation, its observations as a participant in the procurement, and a debriefing." *Unfoldment, Inc.*, CAB No. P-0435, 44 D.C. Reg. 6378, 6381 (Sept. 12, 1995). Accordingly, where the District believes that a protest fails to meet the requirements of Board Rule 301.1(c), the District should nonetheless address the merits of the protest in the agency report and the absence of detailed facts concerning an alleged procurement violation in the initial protest does not necessarily require dismissal. *Psychiatric Inst. of Washington, Inc.*, CAB No. P-0905, 62 D.C. Reg. 4329, 4336 (Aug. 1, 2012) (citing *CUP Temps., Inc.*, CAB No. P-0474, 44 D.C. Reg. 6841, 6844 (July 3, 1997); *Unfoldment, Inc.*, CAB No. P-0435, 44 D.C. Reg. at 6381). Thus, "even where a protester's allegations are mainly conclusory or barely supported by fact, where the applicable law and regulations at issue are made reasonably clear, this Board must address the allegations on the merits." *Urban Alliance Found.*, CAB Nos. P-0886, P-0887, P-0890, P-0891, P-0892, 62 D.C. Reg. 4281, 4292 (Feb. 15, 2012) (citation omitted).

In *CUP Temporaries*, the protester alleged that the District's review and evaluation of the proposals was improper, but the protest "d[id] not identify specific statutory or regulatory provisions of which the District [was] allegedly in violation." CAB No. P-0474, 44 D.C. Reg. at 6842-43. The District filed an agency report and moved to dismiss for failure to include a clear and concise statement of the legal and factual grounds of the protest. *Id.* The protester did not file comments or a response to the District's agency report and motion to dismiss. *Id.* at 6842. The Board denied the District's motion, finding that the protest "ma[d]e reasonably clear the alleged improprieties in the award decision and the applicable law and regulations." *Id.* at 6844. It further stated that the agency report provided the Board with sufficient evidence to rule on the merits of the protest. *Id.* The Board then denied the merits of the protest, stating:

> [The protester] has not pointed to a single evaluation or scoring error. It did not do so in its protest and, more importantly, by failing to respond to the evaluation and award record established by the Agency in the Agency Report, the record remains devoid of any evidence to support finding any material evaluation error.

Id. at 6845.

In the instant case, TSG protests OCFO's evaluation of the proposals. (*See* Protest at 1.) The laws and regulations at issue, i.e., whether the evaluation of proposals was reasonable and in accordance with the stated RFP criteria, are clear. *See CUP Temps., Inc.*, CAB No. P-0474, 44 D.C. Reg. at 6844; *Urban Alliance Found.*, CAB Nos. P-0886, P-0887, P-0890, P-0891, P-0892, 62 D.C. Reg. at 4292. Accordingly, the District's motion to dismiss based on the protester's alleged failure to state a clear and concise statement of legal and factual protest grounds is hereby denied.

III. The Merits of the Protest

The protester has challenged the District's evaluation of the offerors' proposals. However, the protester has not identified any specific error or impropriety in the District's evaluation process. (*See* Protest at 1.) In the AR, the District provided the factual background for this procurement and contends that the record shows that OCFO's evaluation of the offerors' proposals was reasonable and in accordance with the RFP. (*See* AR at 2-5, 7-8.) The protester failed to file comments in response to the AR.[3]

Our rules state that "[w]hen 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." Board Rule 307.4, D.C. MUN. REGS. tit. 27, § 307.4 (2002). Accordingly, we treat as conceded the District's statement of facts as set forth in the AR regarding OCFO's evaluation of the offerors' proposals. In the absence of any evidence to rebut OCFO's record of its evaluation of the proposals, and finding no basis in the record for disputing such evaluation, the Board finds reasonable the District's evaluation of proposals and denies the instant protest. *See MWJ Solutions, LLC*, CAB No. P-0940, 62 D.C. Reg. 6300, 6303, 6305 (Sept. 26, 2013) (citations omitted); *CUP Temps., Inc.*, CAB No. P-0474, 44 D.C. Reg. at 6845; *Roberson Int'l*, CAB No. P-0734, 54 D.C. Reg. 2030, 2031-32 (Aug. 23, 2006); *Jones Transp. Servs., Inc.*, CAB No. P-0584, 46 D.C. Reg. 8650, 8650-51 (July 8, 1999); *see also Seagrave Fire Apparatus, LLC*, CAB No. P-0928, 62 D.C. Reg. 4416, 4418 (Dec. 20, 2012).

CONCLUSION

For the reasons set forth herein, the Board denies the District's motion to dismiss, finding that the protester has adequately stated its protest ground. However, we conclude that neither the protester nor the record evidence establishes that the District's evaluation of the offerors' proposals was unreasonable or otherwise contrary to procurement law. Accordingly, we deny the instant protest and dismiss it with prejudice.[4]

SO ORDERED.

Date: October 14, 2016

/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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Shane Osborn

Jason Soltis, Esq.

[3] The deadline for the protester to file its response to the AR was seven business days after the protester's receipt of the AR, i.e., August 4, 2016. *See* Board Rule 307.1, D.C. MUN. REGS. tit. 27, § 307.1 (2002).
[4] The parties shall confer to determine agreed-upon redactions of protected information, if any, and file a joint proposed redacted version of this opinion with the Board no later than October 21, 2016.

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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

APPEAL OF:

FIT KIDS	)	
	)	
	)	CAB No. D-1506
Under Contract No. Unpaid Fees Owed	)	

ORDER DISMISSING APPEAL

Filing ID #59700118

This appeal concerns a claim by Fit Kids ("Appellant") for monies allegedly owed under a contract with the District of Columbia Office of the State Superintendent of Education ("OSSE") for physical education services. Presently before the Board is an unopposed motion by Appellee, the District of Columbia, to dismiss the instant appeal as untimely. For the reasons noted herein, the Board grants the District's unopposed motion to dismiss, finds that we lack jurisdiction because Appellant's appeal is untimely, and dismisses the instant appeal with prejudice.

BACKGROUND

The pertinent background to this case is as follows. On July 22, 2013, OSSE issued Purchase Order No. PO466629 to Appellant, in the amount of $4,500, to provide physical activity "fun zones" for children during an upcoming Parent and Community Conference. (*See* Appeal File ("AF") Ex. 2, at 17.)[1] Approximately one month later, on August 29, 2013, the District rescinded its earlier purchase order, and awarded Purchase Order No. PO470103 to Appellant, in the amount of $8,000, for "increased services"—services which Appellant subsequently performed. (*See* Notice of Appeal Ex. 5, at 43; *see also* Appellee District of Columbia's Mot. to Dismiss & Mot. to Stay These Proceedings ("Mot. to Dismiss") at 2 (stating that Appellant performed its contractual services); Notice of Appeal at 3, ¶ 12.)

Appellant's instant allegations are that the District repeatedly used the wrong business address on its purchase orders to Appellant—a problem which Appellant first discovered on or around July 12, 2013. (*See, e.g.*, Notice of Appeal at 2, ¶¶ 3, 5, 8-9; Notice of Appeal Ex. 4, at 31.) Appellant made numerous unsuccessful attempts to change the address which the District had on file (*see, e.g.*, Notice of Appeal Ex. 4, at 31; Notice of Appeal Ex. 5, at 42-43; Notice of Appeal Ex. 9, at 51). That notwithstanding, the District still mailed two checks totaling $8,000 to an address which allegedly did not belong to Appellant on September 30, 2013. (*See* Notice of Appeal Ex. 14, at 63-64.)

On January 2 and 6, 2014, Appellant contacted the District via email and telephone, claiming that it had not received payment for its contractual services. (*See* AF Ex. 1, at 2.)

[1] For ease of reference, the Board has used the page numbers assigned by Adobe Reader when citing documents that do not contain consistent internal pagination. (*See, e.g.*, AF Exs. 1-8.)

Subsequently, on January 28, 2014, OSSE's Agency Contracting Officer issued a final decision denying Appellant's request on the grounds that it was a claim for duplicate payment. (*See id*. at 2-3.) The contracting officer's final decision also stated that Appellant had the right to appeal the decision to the Board, and provided the Board's contact information. (*See id*. at 3.)

Following its receipt of the contracting officer's January 28, 2014, final decision, Appellant filed the instant appeal with the Board on July 28, 2015.[2] (*See* Notice of Appeal at 1, 6.) Appellant has not made any other filings since submitting its Notice of Appeal. Finally, on January 20, 2016, the District moved to dismiss the instant appeal as untimely. (*See* Mot. to Dismiss.)

DISCUSSION

As a general matter, 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, when the claim arises under or relates to a contract." D.C. CODE § 2-360.03(a)(2) (2011). However, pursuant to D.C. Code § 2-360.04(a), a contractor must file its appeal of a contracting officer's final decision with the Board within 90 days of receiving that decision. D.C. CODE § 2-360.04(a).

Upon review of the District's motion to dismiss, the lack of opposition thereto, and the entire record herein, the Board finds that it lacks jurisdiction over CAB No. D-1506 because Appellant's claim is untimely. The relevant facts here are clear. The record indicates that Appellant received the contracting officer's final decision on its claim for payment by email on or around January 28, 2014. (*See* AF Ex. 1, at 1.) The Appellant has not disputed its email receipt of the final decision. Inexplicably, however, Appellant did not file its appeal in this matter with the Board until July 28, 2015—well beyond the 90 day period permitted by law. Therefore, the Board finds that it lacks jurisdiction over Appellant's appeal and hereby dismisses this matter with prejudice.

CONCLUSION

For the reasons stated herein, the Board dismisses the Appellant's untimely appeal with prejudice for lack of jurisdiction.

SO ORDERED.

DATED: October 14, 2016

/s/ Marc D. Loud, Sr.
MARC D. LOUD, SR.
Chief Administrating Judge

CONCURRING:

[2] Although the District has alleged that Appellant's July 28, 2015, letter to the Board (which was titled, "RE: Confidential Settlement Communications Re: Unpaid Fees Owed to [Appellant]") was erroneously docketed as a Notice of Appeal (*see* Mot. to Dismiss at 2), the Board need not reach this argument because, as discussed *infra*, it has determined that it does not have jurisdiction over Appellant's untimely appeal.

/s/ Monica C. Parchment
MONICA C. PARCHMENT
Administrative Judge

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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTESTS OF:

URBAN SERVICE SYSTEMS CORPORATION)
) CAB Nos. P-0735, P-0739
Under Solicitation No. DCAM-2005-B-0027)

For the Protester: Shelley D. Hayes, Esq. For the Intervenor, TAC Transport LLC: Kristen E. Ittig, Esq., Holland & Knight LLP. For the District of Columbia: Howard Schwartz, Esq., and Talia S. Cohen, Esq., Office of the Attorney General.

Opinion by Chief Administrative Judge Marc D. Loud, Sr., with Administrative Judge Monica C. Parchment, concurring.

OPINION ON REMAND
Filing ID #59728159

Before the Board presently on remand from the D.C. Superior Court, are the above-styled protest matters concerning Urban Service Systems' (Urban or protester) protest of the award of a trash and recycling collection contract to TAC Transport LLC (TAC). In particular, the Board has been asked to address the following two questions on remand: (1) did the Department of Small and Local Business Development (DSLBD) reasonably believe that TAC would ultimately be re-certified as a Local/Disadvantaged Business Enterprise (LBE/DBE) when its provisional certificate was issued for the trash and recycling contract, and (2) if DSLBD did not consider whether TAC would ultimately be recertified as a LBE/DBE, did Urban make a prima facie case that TAC was not entitled to certification. Upon review of the entire record herein, and for the reasons set forth more fully below, we conclude that (1) the record supports a finding that DSLBD, in issuing TAC's provisional certificate, considered whether it would ultimately be recertified. Because we have so found, we do not reach the court's second remand question (i.e., whether Urban made a prima facie showing that TAC was not entitled to certification). Accordingly, on remand we dismiss the protest with prejudice.

BACKGROUND

The full background facts pertaining to these consolidated cases have been litigated previously, and are fully incorporated herein by reference.[1] We only repeat such background facts as are required to address the two remand questions noted above. It appears from our record that both Urban and TAC timely submitted bids for the District's trash collection and recycling services contract, which, in pertinent part, included a provision for the award of evaluation preference points for certified local business enterprises (LBE) and disadvantaged

[1] *See Urban Service Systems Corp.*, CAB No. P-0714, 54 D.C. Reg. 1973 (November 15, 2005); *Urban Service Systems Corp.*, CAB Nos. P-0735, P-0739, 54 D.C. Reg. 2042 (October 16, 2006); *remanded by Urban Service Systems, Corp. v. District of Columbia Contract Appeals Board*, CA No. 2006-8307 (D.C. Super. Ct. Apr. 1, 2008).

business enterprises (DBE).[2] The record indicates that both firms apparently submitted applications for LBE/DBE certification, and both were awarded nine preference points during the evaluation as a result. *Urban Service Systems*, CAB No. P-0739 at 2043. After bid tabulation, TAC was awarded four of the contract's six award groups, and Urban was awarded the other two.[3] *Id.* The only award group contested instantly is Award Group I, which Urban contends TAC should not have won but for DSLBD's erroneous award of preference points. *Id.* at 2043-44.

The gravamen of the instant protest centers on whether the District used the statutorily required process to certify TAC for preference points in the instant procurement. At the time of certification herein, this process was governed by D.C. Code § 2-218.62 (2005), which allowed businesses without a LBE/DBE certification to obtain "provisional certification" for the purposes of bid submission. The provisional certification procedure was enacted in July 2005, prohibited "self-certification" and replaced the previous District procedure which specifically allowed businesses to "self-certify" as LBEs/DBEs for the purposes of bid submission. D.C. CODE § 2-218.62(d) (2005) (repealed 2014). *See also*, D.C. CODE § 2-217.04 (1999) (repealed 2005) (The Equal Opportunity for Local, Small, and Disadvantaged Business Enterprises Act of 1998); *Urban Service Systems Corp. v. District of Columbia Contract Appeals Board*, CA No. 2006-8307 (D.C. Super. Ct. Apr. 1, 2008) ("Remand") at 5.

In the instant case, TAC was certified by DSLBD after the 2005 "provisional certification" law went into effect and was required to meet the certification test of the 2005 law. (Remand 1, 5.) In pertinent part, the 2005 law provided that a provisional certificate would be granted when "[t]he Department reasonably believes that the Commission will certify the business enterprise after the business enterprise has submitted all of the information required under this subtitle or regulations promulgated pursuant to this subtitle." D.C. CODE § 2-218.62(a)(3) (2005) (repealed 2014). As noted, the self-certification provisions of the former governing statute were no longer in effect at the time that TAC was certified.

The record before us reveals that DSLBD provisionally certified TAC for nine preference points for the instant procurement by allowing it to submit a self-certification affidavit and a DSLBD acknowledgment letter. *See Urban Services, supra*, CAB No. P-0714, 54 D.C. Reg. at 1974-76. As noted, the nine preference points were determinative in TAC's selection as the winning bidder for Award Group I herein. *Urban Services, supra*, CAB No. P-0735, 54 D.C. Reg. at 2043.

Believing that DSLBD failed to follow the applicable statutory certification requirements in awarding nine preference points to TAC, Urban filed three substantially similar protests with the Board. The instant remand stems from the Board's decision in the latter two such cases,

[2] *Urban Service Systems, supra*, CAB No. P-0735, 54 D.C. Reg. at 2043.
[3] Of the seven original award groups, TAC won award groups I-III and VI, and Urban won award groups IV-V. CAB No. P-0735, 54 D.C. Reg. 2042, 2043. The District cancelled award group VII. *Id.* The only contested award herein is Award Group I. *Id.*

CAB Nos. P-0735 and P-0739, and the D.C. Superior Court's rejection thereof as not supported by substantial evidence.[4]

In particular, in the underlying cases, the Board concluded that the record showed that the provisional certification requirements were followed because DSLBD "made a determination for provisional certification of TAC" as evidenced by a DSLBD issued "temporary certification acknowledgment letter" and the DSLBD Interim Director's affidavit. *Urban Services*, *supra*, CAB No. P-0714, 54 D.C. Reg. at 1974-75, 1978; Remand 2, 4-5. The Board also concluded, based on the aforementioned acknowledgment and a separate affidavit submitted into the record by the agency Interim Director, that the agency "reasonably believed" that TAC would be re-certified. Remand 4.

The D.C. Superior Court disagreed with the Board, concluding that we "erroneously found that [DSLBD] had indicated that it reasonably believed that TAC would be re-certified." Remand 4. In particular, the court concluded that the above referenced acknowledgment letter and agency interim Director's affidavit did not show the agency's "affirmative belief" that TAC would ultimately be certified after it received the provisional certification. Remand 4-5. The court noted that both documents "merely state that TAC had submitted all necessary documentation to be considered eligible for certification." Remand 6.

The court, therefore, remanded the matter to CAB "for consideration of" whether the DSLBD had a reasonable belief that TAC would be certified when it issued the provisional certification referenced above. The court also directed CAB to consider Urban's prima facie case against TAC's LBE/DBE certification *if CAB determines that the DSLBD did not consider whether TAC would ultimately be recertified* (emphasis added). Remand 6-7.

In response to the court's remand questions, the Board referred the following questions to DSLBD for supplementation of the Board's record:

> 1. Did the DSLBD construe the acknowledgement letter of August 30, 2005, of the re-certification package submitted earlier by TAC Transport, and referenced in the October 7, 2005, affidavit of the Interim Director of the DSLBD, as constituting a "provisional certification" of TAC Transport pursuant to D.C. Code §§ 2-218.61 and 2-218.62, entitling TAC Transport to be entitled to 9 preference points as of bid opening on August 31, 2005?
>
> 2. If the DSLBD determines that it did not provide a provisional certification of TAC Transport as of August 30, 2005, then we request that the SLBOC determine whether TAC Transport was entitled to receive preference points as an LBE and DBE, and, if TAC Transport was entitled to receive preference points, how many

[4] In the first protest, *Urban Services*, CAB No. P-0714, the matter was denied in part, and dismissed in part as premature, because the trash collection and recyclables contract had not been awarded yet. *See* 54 D.C. Reg. at 1979.

total preference points was TAC Transport entitled to receive as of August 30, 2005?[5]

The DSLBD thereafter supplemented the Board's record with a statement from its General Counsel indicating that he spoke with the then-Interim DSLBD Director, who stated that she was "aware of the change in the law from self-certification to provisional certification" when the Department issued the TAC temporary certification letter in 2005, and that the DSLBD "unequivocally intended" the temporary letter to be a "provisional certification."[6]

DISCUSSION

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) (formerly D.C. Code § 2-309.03(a)(1) (repealed 2011)).

The issue presented on remand is whether the DSLBD's supplementation of our record as noted above (and the underlying record as a whole), establishes that it held a reasonable belief TAC would be recertified as an LBE/DBE when the temporary certification was issued on August 30, 2005. The protester argues that the record does not support a finding that DSLBD held a reasonable belief regarding re-certification because (1) "the DSLBD response does not add further light …whether the DSLBD had a reasonable belief that TAC would be certified as a [LBE/DBE] under the new 2005 Act …" , and (2) "there is no current record evidence to demonstrate that DSLBD had a basis for an affirmative belief that TAC's application was consistent with the provisions of the new 2005 Act …" (Protester's Comments on DLSBD's Resp. to Board Referral Questions 4, 5.) The District, however, argues that the DLSBD supplemental letter provides the Board with "clear evidence that TAC's temporary certification was unequivocally a provisional certification, and therefore that TAC would ultimately be recertified." (D.C. Resp. to Protestor's Comments on DLSBD Resp. to Board Referral Questions.)

Upon consideration and review of the entire record before the Board on remand, we agree with the District. The DSLBD Interim Director, aware of the "change" in the law from self-certification to provisional certification, stated that it "unequivocally intended" the temporary certification letter to be a provisional certificate. The Board construes the Interim Director's awareness of the "change" in the law to include awareness of the new requirement that a provisional certificate would only be issued when "[t]he Department reasonably believe[d]" that the Commission would recertify the business enterprise after the business enterprise has submitted all of the required information. D.C. CODE § 2-218.62(a)(3) (2005) (repealed 2014). Indeed, the "reasonable belief" in ultimate certification was one of the most significant "changes" from the former self-certification law to the new "provisional certification" regime.

[5] (Order With Referral Questions, Feb. 12, 2009.)
[6] (Kokesch Letter to Board, April 4, 2009.)

Under the 1998 law, a business could obtain certification for bid purposes simply by submitting an acknowledgment letter from the DSLBD along with a self-certification affidavit. Remand 5. In 2005, however, the new law added the requirement that upon issuance of the provisional certification, the DSLBD must have a reasonable belief that the business would be recertified before the provisional certificate expired in 120 days. D.C. CODE § 2-218.62 (2005) (repealed 2014). It is "awareness" of this change in the law, i.e. from "self-certification" to a "reasonable belief" in ultimate recertification, that the Board construes the Interim Director's communication to be referring. That would give the Interim Director's words their plain meaning.[7] Otherwise, it would be meaningless for the Interim Director to profess "awareness of the change in the law from self-certification to provisional certification," and *not* be aware of the single most important change, i.e., the new reasonable belief standard. We do not think that the DSLBD supplemented the record with a meaningless communication.

CONCLUSION

For the reasons stated herein, the Board concludes that the DSLBD made a determination under the 2005 Act that TAC was provisionally certified as a LBE/DBE, and in so doing held a reasonable belief that TAC would be recertified within the statutory time-frame. Because we have so found, we do not reach the court's second remand question (i.e., whether Urban made a prima facie showing that TAC was not entitled to certification).

SO ORDERED.

Date: October 20, 2016

/s/ Marc D. Loud, Sr.
MARC D. LOUD, SR.
Chief Administrative Judge

CONCURRING:

/s/ Monica C. Parchment
MONICA C. PARCHMENT
Administrative Judge

[7] In the context of contract interpretation, we have often said that where the Board finds that only one *reasonable* interpretation of a contract term or provision is possible, that single *reasonable* interpretation will be applied. *See, e.g.*, *ANA Towing & Storage, Inc.*, CAB No. D-1176, 50 D.C. Reg. 7514 (June 25, 2003). Although we are not dealing with contractual language instantly, we believe the principle retains its merit.

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

A. WASH & ASSOCIATES, INC.	)	
TRULITE ELECTRICAL SERVICES, LLC	)	
	)	CAB Nos. P-1018 and P-1019
	)	(Consolidated)
Solicitation No: DCAM-16-NC-0100	)	

ORDER OF DISMISSAL
Filing ID #59745698

These protests arise from a solicitation issued by the District of Columbia Department of General Services seeking contractors to provide on-call electrical repair services for the District. The protestors, A. Wash & Associates, Incorporated ("A.Wash") and Trulite Electrical Services, LLC ("Trulite"), contend that the District's award decision was improper because the protestors offered the lowest bid prices and also because several of the awardees were not properly licensed.[1] In lieu of filing an Agency Report, the District separately filed motions to dismiss both of these protests pursuant to Board Rule 306.1 whereby it contends that the protestors lack standing to challenge the District's award decision because A. Wash's bid was non-responsive and also because Trulite was not a responsible contractor. The protestors failed to file any opposition, or response, to the District's motions to dismiss.

Upon consideration of the merits of the District's requests for dismissal, in connection with the underlying record, the Board grants the requests for dismissal of these protests.

FACTUAL BACKGROUND

On April 1, 2016, the District of Columbia Department of General Services ("DGS") issued Invitation for Bids Solicitation No. DCAM-16-NC-0100 (the "Solicitation"), seeking one or more contractors to provide on-call electrical repair services for various District facilities on an as-needed basis. (P-1018 Mot. to Dismiss Ex. 1, at 1-2.)[2] The awardee was required to provide all labor, supervision, permits, tools, supplies, equipment and materials necessary to perform the electrical repair services. (*Id.* at 2.) Participation in this procurement was restricted to certified Small Business Enterprise ("SBE") bidders that had been certified by the District's Department of Small and Local Business Development as a SBE. (*Id.* at 1.) Certified bidders would be eligible to receive up to a twelve (12) percent reduction in the price of their bid in accordance with the bid preference parameters detailed in the Solicitation. (*Id*. at 12.)

[1] The Board hereby consolidates these protests because they arise from the same solicitation, they concern the same set of operative facts, and a single decision covering all matters in dispute would be most judicially efficient.
[2] When referring to documents that do not contain consistent internal page numbering, the Board has cited to the page numbers assigned by Adobe Reader.

The Solicitation's scope of work included installing and repairing mechanical connections of electrical hardware and wiring, and also assembling, installing, testing and maintaining electrical systems to ensure that the systems operated properly. (*Id.* at 5.) The awardee was further required to be available to perform these services 24 hours a day, seven days a week including weekends and holidays. (*Id.* at 7.) The Solicitation required the awardee to provide a skilled electrical certified/licensed Journeyman Electrician and Electrician's Apprentice to complete all service work. (*Id.* at 11.) Furthermore, offerors were required to propose fixed hourly rates for these two labor categories to include labor rates for Regular/Standard Service Hour, After Hour/Non-Standard Service Hour and Weekend and Holiday Service Hour for all costs necessary for labor, travel, trade, subcontractor costs, home office overhead and profit in connection with performance of the contract. (*Id.* at 3.)

Offerors were also expected to submit with their bids a copy of their Master's Professionals License, proof of Apprentice, and a copy of a valid Electrician's License. (*Id.* at 11.) The District reserved the right, in its sole discretion, to reject: (1) any bid submission that failed to prove that the bidder was responsible; and (2) any bid that contained any conditions and/or contingencies that made the bid indefinite, incomplete, non-responsive or unacceptable for award. (*Id.* at 22-23.) Furthermore, in order to be considered for award, each offeror was required to complete a tax affidavit and be in full compliance with their tax obligations to the District of Columbia government. (*Id.* at 20.) Bidders were also required to submit a Bidder/Offeror Certification Form ("Certification Form"), (*id.* at 4), which required bidders to provide the District with information regarding, amongst other things, the past business activities of each offeror including licenses, activities of corporate officials, suspensions, debarments, terminations or prior non-responsibility determinations. (P-1019 Mot. to Dismiss Ex. 3, at 69-73.) Furthermore, bidders were also required to provide information regarding their financial status including any history of outstanding debts owed to any government entities or any failure to file a tax return or pay taxes required by federal, local or District of Columbia law. (*Id.* at 71.)

The Solicitation contemplated the award of multiple Indefinite Delivery Indefinite Quantity ("IDIQ") contracts by DGS with a base term of one year and up to two one-year option periods. (*Id.* at 2.) The IDIQ contract(s) would be awarded to the responsive and responsible bidders with the lowest evaluated bid price as determined by the sum of the fixed hourly labor rates for the base term and two option years after the application of any appropriate bid preference price reduction. (*Id.* at 18.) After contract award, the Solicitation advised the bidders that services would be ordered on an as-needed basis by the issuance of task orders to the awardee holding an IDIQ contract whose offer was most advantageous to the District. (*Id.* at 3.) The District would award the task order primarily based on price but reserved the right to also consider non-price factors. (*Id.*)

Bids were submitted and opened by the District on April 21, 2016. (P-1018 Mot. to Dismiss Ex. 5, at 2.) The District received bids from the following 16 offerors: (1) A. Wash & Associates, Inc.; (2) Alternative Renewal Solutions, LLC; (3) Ava Electric Company, Inc.; (4) Capitol Services Management, Inc.; (5) Emergency 911 Security; (6) General Services, Inc.; (7) Interface Fire Alarms & Electrical Services, LLC; (8) Jones & Wood, Inc.; (9) Keystone Plus Construction Corp.; (10) Paige Industrial Services, Inc.; (11) RJ Electric Works, Inc.; (12) RSC

Electrical & Mechanical Contractors; (13) RWD Consulting, LLC; (14) Savage Technical Services; (15) Trulite Electrical Services; and (16) Wilson Dependable Services. (*Id.* at 2-3.)

In evaluating the 16 submitted offers, the District determined that A. Wash did not provide proposed weekend and holiday rates for the Journeymen Electrician and Electrician's Apprentice labor categories as required by the Solicitation. (*Id.* at 3.) Instead, it only proposed standard hour and non-standard/after hour service rates for these labor categories. (*See* P-1018 Mot. to Dismiss Ex. 3, at 2.) Therefore, the District determined that A. Wash's bid was non-responsive to the Solicitation for failing to include proposed weekend and holiday rates for the Journeymen Electrician and Electrician's Apprentice labor categories. (P-1018 Mot. to Dismiss Ex. 5, at 3.)

After eliminating A. Wash's bid, the District totaled the remaining 15 bidders' proposed hourly rates for the Journeyman Electrician and Electrician's Apprentice labor categories for the base year and both option year periods. (*Id.*) Thereafter, the District calculated the grand total of each offeror's bid by adding up the total proposed hourly rates. (*Id.*) The District then ranked the offerors from lowest to highest based upon each offeror's proposed prices. (*Id.*) Subsequently, the District confirmed that all of the remaining 15 offerors were certified as SBE vendors and, accordingly, determined the number of evaluation preference points that each bidder was entitled to receive in order to calculate each offeror's final evaluated bid price.[3] (*Id.* at 4.)

In addition, the District also conducted responsibility determinations for the bidders. (P-1019 Mot. to Dismiss Ex. 8, at 4.) During this process, DGS learned that Trulite was deemed non-compliant by the District's Office of Tax and Revenue ("OTR") and the Department of Employment Services ("DOES"). (*Id.*) Specifically, on May 2, 2016, DGS received a notification from OTR which stated that Trulite was not in compliance with the tax filing and payment requirements of the District of Columbia's tax laws. (*See* P-1019 Mot. to Dismiss Ex. 4.) Similarly, on May 5, 2016, DOES' Tax Division also informed DGS that Trulite had failed to comply with its tax obligations under the District of Columbia's unemployment tax laws. (*See* P-1019 Mot. to Dismiss Ex. 5.) As a result of these notices from OTR and DOES, the District notified Trulite, on May 3 and May 6, 2016, that DOES and OTR had deemed Trulite non-compliant with the District's tax requirements. (*See* P-1019 Mot. to Dismiss Ex. 6, at 17-20.) The District granted Trulite three weeks to correct the issues underlying the DOES and OTR tax non-compliance determinations. (P-1019 Mot. to Dismiss Ex. 8, at 4 n.1.) Ultimately, however, based upon its continued failure to achieve tax compliance status with OTR and DOES, as required by the Solicitation, the District determined that Trulite was not a responsible contractor and that its bid was not eligible for award. (P-1019 Mot. to Dismiss Ex. 8, at 4.)

On July 11, 2016, the DGS Associate Director for Contracts and Procurement drafted a Proposed Contract Award Memorandum which was signed and approved by the DGS Director/Chief Contracting Officer explaining the underlying basis for the District's ultimate award decision in this procurement. (P-1018 Mot. to Dismiss Ex 5, at 1.) The District explained that during its evaluation of the offerors' bids, it discovered that A. Wash did not include

[3] The District converted each offeror's preference points to a percentage and then to a dollar value. Afterwards, the dollar value was subtracted from each offeror's bid grand total to determine the evaluated bid total price.

weekend and holiday rates for the Journeyman Electrician and Electrician's Apprentice labor categories in its bid submission. (*Id.* at 3.) As a result, the District determined that A.Wash's bid was non-responsive and was, therefore, no longer eligible for award. (*Id.*) Thereafter, the District stated that DGS' Contract Specialist confirmed that all of the remaining 15 bidders were certified SBE vendors and determined the remaining bidders' evaluated bid price before conducting contractor responsibility determinations. (*Id.* at 4.) The District also noted that during the responsibility determination, DGS learned that Trulite was deemed non-compliant by DOES and OTR. (*Id.*) The District further detailed that it gave Trulite three weeks to resolve its tax compliance issues which it failed to do and which led to the District's ultimate determination that it was not responsible. (*Id.* at 4.)

Subsequently, the District explained that it analyzed the 14 remaining offerors' proposed pricing by comparing the prices that the District paid for the same services during the 2015 Fiscal Year, and verified that each of the remaining offerors' proposed rates were compliant with the rates listed in the Davis-Bacon Wage Determination Act. (*Id.* at 4-5.) Accordingly, based on its analysis of the remaining offerors' bids and evaluated pricing and the value of the prior year's services, the District proposed issuing awards to Alternative Renewal Solutions, LLC, Jones & Wood, Inc., Emergency 911 Security, and Savage Technical Services. (*Id.* at 5.) Thereafter, on July 15, 2016, the District issued a Notice of Award informing all bidders of the District's award decision. (P-1018 Protest 8.)

On July 29, 2016, A. Wash and Trulite filed protests with this Board. (*See* P-1018, P-1019 Protests.) In its protest, A. Wash argues that the District's award decision was improper because it submitted the lowest bid price and also because Alternative Renewal Solutions, LLC and Jones & Wood, Inc. were not licensed to perform the electrical work called for in the Solicitation. (P-1018 Protest 2-3.) Similarly, Trulite argues that the District improperly awarded contracts to offerors that did not possess the required electrician's license, were not registered to do business with the District, and were not a certified SBE at bid opening. (P-1019 Protest 2-3.) Furthermore, Trulite also argues that it was one of the top four lowest bidders and that the District improperly deemed its bid non-compliant. (*Id.*)[4]

On August 18, 2016, the District filed separate motions to dismiss with the Board arguing that both protestors are not aggrieved contractors as required to invoke the Board's protest jurisdiction and, therefore, lack standing to pursue the present protests. (*See* P-1018 Mot. to Dismiss 9; *see also* P-1019 Mot. to Dismiss 9.) According to the District, A. Wash lacks standing to challenge the District's award decision because A. Wash's bid was non-responsive due to the fact that it failed to propose weekend and holiday rates for the Journeymen Electrician and Electrician's Apprentice labor categories as required by the Solicitation. (P-1018 Mot. to Dismiss 9.) Similarly, the District also argues that Trulite lacks standing because, as a result of the unresolved tax non-compliance determinations of OTR and DOES, Trulite was not a responsible contractor and was, thus, ineligible for award. (P-1019 Mot. to Dismiss 5-6, 9.)

[4] Along with its protest, Trulite attached a Certificate of Clean Hands to show that it had no outstanding liabilities with the District as of July 20, 2016. (*See* P-1019 Protest Ex. 2.)

The protestors failed to file an opposition, or any other response, to the District's motions to dismiss challenging to any extent the grounds for dismissal asserted by the District. For the reasons discussed below, we grant the present motions to dismiss these protests.

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 consider the District's contention that the protestors lack standing in this matter before it may consider the merits of the underlying protests 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 for a contract. D.C. MUN. REGS. tit. 27, § 100.2(a) (2002); *Tree Servs., Inc*., CAB No. P-0982, 62 D.C. Reg. 6619, 6621 (May 1, 2015).

A. Wash Lacks Standing

The District contends that A.Wash lacks standing because its bid was non-responsive and, thus, ineligible for consideration. *See C&E Servs. Inc.*, CAB No. P-356, 40 D.C. Reg. 4942, 4945 (Feb. 10, 1993). Indeed, we have repeatedly held that a non-responsive bidder has no direct economic interest in a procurement because it would not be in line for award even if its protest were sustained and, as a result, cannot be considered an aggrieved bidder. *Wayne Mid-Atl.*, CAB No. P-227, 41 D.C. Reg. 3594, 3595 (Aug. 12, 1993); *see also CNA Inc.*, CAB No. P-0875, 2011 WL 7402966 (Mar. 14, 2011) ("A nonresponsive bidder is not in line for award and therefore lacks standing to raise other challenges regarding an award.")

A responsive bidder is defined as an offeror that submitted a bid which conforms in all material respects to the solicitation. D.C. CODE § 2-351.04(56). The bid must also be an unequivocal offer to perform, without exception, the exact thing called for in the solicitation. *Wayne Mid-Atl.*, CAB No. P-227, 41 D.C. Reg. at 3595. In this regard, the Board has held that the "materiality" of a solicitation factor, as it relates to determining whether a bid is responsive, is to be determined by its resultant effect on price, quality, quantity or delivery of the items offered. (*Id.*)

Accordingly, based upon the foregoing standard, the Board finds that the Solicitation requirement that all bidders submit proposed fixed hourly rates for Regular/Standard Service Hour, After Hour/Non-Standard Service Hour and Weekend and Holiday Service Hour is a material requirement under the Solicitation. (*See* P-1018 Mot. to Dismiss Ex. 1, at 3.) Specifically, the District is unable to determine an offeror's overall bid price if all required hourly rates are not included in the bid submission as part of the offeror's price proposal. However, A. Wash failed to submit a bid that included hourly rates for weekend and holiday service, and solely included rates for standard hour and non-standard hour service. (*See* P-1018 Mot. to Dismiss Ex. 3, at 2.) Thus, A. Wash's failure to propose all the required categories of

hourly rates in its bid submission was a failure to meet a material requirement. Therefore, its bid was properly deemed non-responsive by the District.

Consequently, because A. Wash's bid was non-responsive, it would not be in line for award, and, therefore, lacks standing to challenge the District's award decision. *See Configuration Inc.*, CAB No. P-0819, 57 D.C. Reg. 867, 871 (Nov. 9, 2009) (dismissing protest for lack of standing where protestor's bid was non-responsive). We dismiss this protest on this basis and, accordingly, find it unnecessary to address the merits of this protest.

Trulite Lacks Standing

The District also contends that Trulite lacks standing to challenge the District's award decision because it was not a responsible contractor. We have previously held that when the District properly determines that a bidder is not responsible, the bidder lacks standing to challenge the District's award decision. *See AMI Risk Consultants, Inc*., CAB No. P-0900, 2012 WL 4753867 (May 25, 2012) (A non-responsible bidder would not be next in line for award and lacks standing).

The Solicitation required offerors to be in full compliance with their tax obligations to the District of Columbia government in order to be eligible for award. (*See* P-1019 Mot. to Dismiss Ex. 1, at 20.) Furthermore, the District required all offerors to complete the Solicitation's Certification Form for the very purpose of determining each offeror's responsibility including any history of failing to file tax returns or pay taxes required under District of Columbia law. (*See* P-1019 Mot. to Dismiss Ex. 3, at 71.) After bid submission, the District was advised by DOES and OTR that Trulite was not in compliance with its tax filing and payment obligations. After being advised of this non-compliance issue by the District multiple times, and being given three weeks to correct it, Trulite failed to provide evidence that these issues had been resolved prior to contract award as repeatedly requested by the District. Therefore, the Board finds that the District properly determined that Trulite was not a responsible contractor at the time of award because of this tax non-compliance problem. *See J&L Contract Servs.,Inc.*, CAB No. P-313, 40 D.C. Reg. 4565, 4567 (Oct. 2, 1992) (finding protestor non-responsible where the Department of Employment Services and the Department of Finance and Revenue reported that the protestor was not in good standing).

Consequently, because Trulite was determined to be a non-responsible bidder, it also was not in line for award and, therefore, lacks standing to challenge the District's award decision. *See Heller Electric Co*., CAB No. P-444, 44 D.C. Reg. 6784, 6787 (Jan. 22, 1997) (dismissing protest allegations for lack of standing where protestor was determined to be a non-responsible bidder). As a result, we dismiss this protest on this basis and, similarly, find it unnecessary to address the merits of this protest.[5]

[5] In addition, pursuant to Board Rule 110.5, the Board also treats the District's motions to dismiss as conceded by the protesters based upon their failure to file a statement of opposing points and authorities within the prescribed time.

CONCLUSION

For the reasons discussed herein, we dismiss the present protests with prejudice.

SO ORDERED.

DATED: October 25, 2016

/s/ Monica C. Parchment
MONICA C. PARCHMENT
Administrative Judge

CONCURRING:

/s/ Marc D. Loud, Sr.
MARC. D. LOUD, SR.
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GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

TOUCH MEDIA SYSTEMS, LLC	)	
	)	CAB No. P-1021
	)	
Solicitation No: DCAM-16-NC-0112	)	

ORDER OF DISMISSAL
Filing ID #59933871

This protest arises from a solicitation issued by the District of Columbia Department of General Services seeking contractors to provide Public Access and Clock System on-call repair services for the District. The protestor, Touch Media Systems, LLC ("Touch Media"), contends that the solicitation's requirement that offerors be licensed as Electrical Contractors and employ a licensed Master Electrician was unduly restrictive and serves as an improper basis to reject otherwise qualified bids. In lieu of filing an Agency Report, the District filed a motion to dismiss this protest pursuant to Board Rule 306.1 whereby it contends that Touch Media's challenge is untimely because its protest pertains to the terms of the solicitation and, therefore, its protest should have been filed prior to bid opening. The District also argues that because the protestor's bid was non-responsive it also lacks standing to challenge the District's award decision.

Upon consideration of the merits of the District's request for dismissal, in connection with the underlying record, the Board grants the request for dismissal of this protest.

FACTUAL BACKGROUND

On July 11, 2016, the District of Columbia Department of General Services ("DGS") issued Invitation for Bids Solicitation No. DCAM-16-NC-0112 (the "Solicitation"), seeking one or more contractors to provide Public Access and Clock ("PA/Clock") System on-call repair services for various DGS facilities on an as-needed basis. (Mot. to Dismiss Ex. 1, at 1-2.)[1] Participation in this procurement was restricted to certified Small Business Enterprise ("SBE") bidders that had been certified by the District's Department of Small and Local Business Development as a SBE. (*Id*.) Certified bidders would be eligible to receive up to a twelve (12) percent reduction in the price of their bid in accordance with the bid preference parameters detailed in the Solicitation. (*Id*. at 14.)

The Solicitation's scope of work consisted of repairing and replacing all replacement parts of the PA/Clock System as necessary and also included testing all devices and equipment such as microphones, speakers, telephones, radios and call switches. (*Id.* at 5.) The awardee was further required to provide all labor, materials and equipment needed to clean, adjust, repair

[1] When referring to documents that do not contain consistent internal page numbering, the Board has cited to the page numbers assigned by Adobe Reader.

or replace any defective or improperly operating PA/Clock System device or equipment. (*Id.*) Offerors were required to submit with their bids unit prices consisting of all costs that were necessary to provide the on-call repair services on a time and material basis. (*Id.* at 3.) These unit prices were to include fixed standard hour and non-standard hour rates for the Technician and Technician Assistant labor categories. (Mot. to Dismiss Ex. 4, at 3.)

Furthermore, the Solicitation's Scope of Work Project Summary required that each offeror submit with their bid proof of being licensed by the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") as an Electrical Contractor in addition to submitting proof that it employed a District of Columbia licensed Master Electrician. (Mot. to Dismiss Ex. 1, at 5.) In addition, bidders were also required to submit a Bidder/Offeror Certification Form ("Certification Form"), (*id.* at 4), in order for the bidders to provide the District with information relating to, amongst other things, the past business activities of each offeror including licenses, financial status, suspensions, terminations or prior non-responsibility determinations. (Mot. to Dismiss Ex. 3, at 10-14.) The District reserved the right, in its sole discretion, to reject any bid that failed to prove the bidder's responsibility or contained any conditions and/or contingencies that made the bid indefinite, incomplete, non-responsive or unacceptable for award. (Mot. to Dismiss Ex. 1, at 24.)

The Solicitation contemplated the award of an Indefinite Delivery Indefinite Quantity ("IDIQ") contract by DGS with a base term of one year and a one-year option period. (*Id.* at 2-3.) The IDIQ contract would be awarded to the responsive and responsible bidder with the lowest total price as determined by the sum of the total hourly labor rates for the base term and option year period. (*Id.* at 19.)

Pursuant to the Solicitation, bids were submitted and opened by the District on August 5, 2016. (*Id.* at 1; Mot. to Dismiss Ex. 4, at 3.) The District received bids from two companies, Emergency 911 Security Services, LLC ("Emergency 911") and Touch Media. (Mot. to Dismiss Ex. 4, at 3.) In evaluating the offerors' proposed pricing, the District totaled each offeror's proposed hourly rates for the Repair Technician and Repair Technician Assistant labor categories for the base year and option year period. (*Id.*) Thereafter, the District determined each offeror's SBE price reduction based on the number of preference points that each bidder was entitled to receive.[2] (*Id.*) Upon subtracting the applicable bid preference point reduction from each offeror's initial total pricing, the District calculated the sum of the offerors' proposed hourly rates to be as follows: 1) Touch Media ($352.00); and (2) Emergency 911 ($391.58). (*Id.*)

After evaluating each offeror's total proposed pricing, the District determined that although Touch Media's rates were within the average price range for the repair services, it had failed to provide the licenses that were required by the Solicitation. (*Id.* at 4.) In addition, upon requesting information from DCRA regarding Touch Media's Electrician and Master Electrician licensing status, DGS was informed by DCRA's Occupational and Professional Licensing Administration that Touch Media did not have any licenses on file. (*Id.* at 15.) Therefore, the District concluded that Touch Media's bid was non-responsive to the Solicitation's requirements. (*Id.* at 4.)

[2] The District converted each offeror's preference points to a percentage and then to a dollar value.

On the other hand, the District determined that Emergency 911's proposed pricing for the on-call repair services was also within the average price range for these same repair services by comparing its proposed Repair Technician hourly rate to the Repair Technician hourly rates of three GSA schedule contract holders for similar repair services. (*Id.*) Furthermore, the District concluded that Emergency 911 had submitted the required Electrical Contractor and Master Electrician licenses with its bid as required by the Solicitation and also verified the validity of these licenses with the DCRA. (*Id.* at 4-7.)

Subsequently, on August 22, 2016, the DGS Supervisor of Goods & Services drafted a Proposed Contract Award Memorandum which was signed and approved by the DGS Associate Director explaining the underlying basis for the District's ultimate award decision in this procurement. (*Id.* at 2.) As previously detailed herein, this memorandum noted that Touch Media's proposed pricing was within a reasonable price range for the required on-call repair services but that it did not provide the licenses that were required by the Solicitation. Thus, the District deemed its bid to be non-responsive to the Solicitation's requirements. (*Id.* at 4.)

The District also detailed its evaluation findings that Emergency 911's proposed pricing was within a reasonable range for the required services, and that it also held the required licenses for an Electrical Contractor and Master Electrician. (*Id.*) Accordingly, the District determined that Emergency 911's bid was most advantageous to the District based on the fact that it provided competitive pricing and also because its unit price for the Repair Technician labor category was determined to be fair and reasonable as reflected in the GSA Schedule price comparison. (*Id.*) The District also concluded that Emergency 911 was not listed on the District or Federal Excluded Parties List and was also compliant with its tax obligations with the District of Columbia Department of Employment Services and Office of Tax and Revenue. (*Id.*) Ultimately, on August 23, 2016, the DGS Associate Director approved proposing award of the contract to Emergency 911 to provide the PA/Clock System on-call repair services. (*Id.*)

On September 9, 2016, Touch Media filed a protest with this Board arguing that the District's award decision should be rescinded because the Solicitation's requirement that offerors be licensed with DCRA as an Electrical Contractor and have an employee licensed as a Master Electrician was unduly restrictive. (Protest 1-2.) In this regard, the protester contends that this licensing requirement has no relevancy to the duties and responsibilities needed to perform the Solicitation's scope of work which included work that was traditionally performed by Audio Visual ("AV") companies and not Electrical Contractors. (*Id.* at 2.) Therefore, the protestor also argues that these licensing requirements unreasonably allowed DGS to reject otherwise qualified companies because they do not employ a Master Electrician and are not registered as Electrical Contractors. (*Id.*) Of note, in no instance in its protest letter did Touch Media allege that it did, in fact, hold any of the electrician licenses that were required by the Solicitation.

On October 3, 2016, the District filed a motion to dismiss with the Board arguing that Touch Media's protest is untimely and that Touch Media lacks standing to pursue the present protest. (Mot. to Dismiss 1.) According to the District, Touch Media's protest is untimely because it had notice of the Solicitation's licensing requirements prior to the bid opening date but did not timely protest this requirement as being unduly restrictive. (*Id.* at 5-6.) Furthermore, the

District also argues that Touch Media lacks standing to challenge the District's award decision because Touch Media's bid was non-responsive due to its failure to submit the required Electrical Contractor and Master Electrician licenses with its bid. (*Id.* at 6-7.)

In response to the District's motion to dismiss, the protestor contends that its protest is timely because it did not learn that its bid was rejected based upon the licensing requirement until its August 30, 2016, debriefing meeting and timely filed a protest within 10 days of that meeting. (Opp'n 1.) Additionally, the protestor again argued that the Solicitation's electrical licensing requirement was unreasonable and immaterial to the Solicitation's scope of work and that its bid was responsive and conformed to all material aspects of the Solicitation as required to receive the contract award. (*Id.* at 3.)

DISCUSSION

The Board exercises jurisdiction over a protest and its underlying allegations pursuant to D.C. Code § 2-360.03(a)(1) (2011). However, the Board first considers the District's jurisdictional challenge that the present protest is untimely.

For the purposes of determining timeliness, protests based upon alleged improprieties that are apparent prior to bid opening or the time set for receipt of initial proposals must be filed with the Board "prior to bid opening or the time set for receipt of initial proposals." *See* D.C. CODE § 2-360.08(b)(1) (2011). Further, in applying this legal standard, we have previously held that when a limitation on competition is evident on the face of a solicitation, and is apparent prior to deadline for receipt of proposals, a protestor must file any protest regarding this limitation before the deadline for the receipt of proposals. *See Analogue Imaging, LLC*, CAB No. P-0978, 2015 WL 837046 (Feb. 6, 2015) (protest against solicitation's brand name limitation untimely when filed after due date for receipt of proposals).

A review of Touch Media's protest letter, on its face, unequivocally establishes that its challenges primarily concern the terms of the Solicitation as it relates to the electrician licensing requirement. Specifically, the protester contends at the outset that the Solicitation was unduly restrictive and unreasonable because it requires AV companies to register as an electrical company and employ a Master Electrician to be considered for the contract. (Protest 2.) This is based upon the protester's belief that the Solicitation's statement of work requires core competency in traditional AV work, and not the electrical trade, thereby making the electrical licensure requirement unduly restrictive. (*Id.*) In this regard, the protester cites to the relevant terms of the Solicitation which it believes cumulatively make the electrician licensure requirement unreasonable. (*Id.* at 3-4.) Further, the protest letter closes with the protester's assertion that "[t]he newly added requirement that AV companies be licensed as electrical contractor [sic] and have a licensed master electrician on staff to successfully bid on PA or similar contracts is restrictive and unreasonable." (*Id.* at 4.) On this basis, the protester requests that the contract be rescinded and the Solicitation be re-valuated or re-issued. (*Id.*)

Consequently, based upon a plain reading of the protest letter, the Board finds that Touch Media's protest is clearly a challenge to the Solicitation's stated electrician licensing requirement

that was evident on the face of the Solicitation and obviously apparent prior to bid opening. Therefore, we agree with the District that Touch Media's protest regarding its belief that these provisions were unduly restrictive or unnecessary should have been filed prior to bid opening and, thus, renders its protest to be untimely because it was not filed prior to the August 5, 2016, bid opening date. The fact that the protester contends that it was not aware that it had been rejected for not holding the required licenses until after the contract award does not change the fact that its present challenge to the terms of the solicitation was legally required to be filed before the bid opening date, and it was not. For this reason, the present protest is untimely and it is denied.

Additionally, having found that we lack jurisdiction over the present protest because it is untimely, the Board finds it unnecessary to address the District's argument that the protestor also lacks standing to challenge the District's award decision.

CONCLUSION

For the reasons discussed herein, we deny and dismiss this protest with prejudice.

SO ORDERED.

DATED: December 8, 2016

/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

PROTEST OF:

AAA TERMITE & PEST CONTROL	)	
	)	CAB No. P-1024
Under Solicitation No. PO-550998	)	

For the protester, AAA Termite & Pest Control: Michael Wanamaker, *pro se*. For the District of Columbia: Katherine C. Clark, 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 #60034905

This protest arises from a solicitation for integrated pest management ("IPM") services. AAA Termite & Pest Control ("AAA Termite" or the "protester") protests the District's issuance of the solicitation, arguing that the solicitation was issued prematurely and that the District was biased against the protester. In response, the District (1) moves the Board to dismiss the protest, alleging that the protester does not have standing; or (2) in the alternative, argues that the District properly conducted the procurement.

For the reasons set forth below, the Board denies the District's motion to dismiss, finding that the protester has standing. However, we deny the protest, finding that (1) the District properly conducted the procurement; and (2) the protester has not shown that the District was biased or otherwise acted in bad faith.

BACKGROUND

On September 13, 2016, the District of Columbia Public Library ("DCPL") issued Solicitation No. PO-550998 consisting of a Request for Quotations (the "RFQ") for one or more contractors to provide IPM services to twenty-six District libraries. (*See* District's Mot. to Dismiss and Agency Report ("AR") at 2; AR Ex. 1, at 1 (§ A).) The RFQ was issued under DCPL's simplified procurement procedures, D.C. MUN. REGS. tit. 19 § 4305 (2008). (AR at 2; AR Ex. 6, at 1, para. 4.) Pursuant to D.C. CODE § 2-218.44 (2016), the RFQ was set aside for contractors who had obtained certification as a small business enterprise ("SBE") or certified business enterprise ("CBE") from the District of Columbia Department of Small and Local Business Development ("DSLBD"). (AR at 2-3.) DCPL issued the RFQ to the only two contractors who, as of September 13, 2016, were listed on DSLBD's website as CBEs who performed pest control services under NIGP code 910-59-60 "Pest Control Services."[1] (*See* AR at 3; AR Ex. 6, at 1-2, paras. 6-7; *see also* AR Ex. 3, at 3; AR Ex. 7.)[2] The offerors were to submit quotes by September 20, 2016. (AR Ex. 6, at 2, para. 7.)

[1] The NIGP Commodity/Services Code system is a standardized method for classifying goods and services promulgated by the National Institute of Governmental Purchasing, Inc. *See About NIGP.com*, NAT'L INST. OF GOVERNMENTAL PURCHASING, http://www.nigp.com/aboutus.php (2014).

[2] When referring to documents that lack consistent internal page numbering (e.g., AR Ex. 3), the Board has used the page numbers assigned by Adobe Reader.

AAA Termite was not listed as an SBE or CBE on DSLBD's website on September 13, 2016, and, therefore, DCPL did not send it the RFQ. (*See* AR at 3; AR Ex. 6, at 2, paras. 7, 10; *see also* AR Ex. 3, at 3; AR Ex. 5.) The District received a quote from just one offeror, IJS Limited LLC d/b/a EJ's Pest Control ("IJS"), by the RFQ's deadline on September 20, 2016.[3] (*See* AR Ex. 6, at 2, para. 8; AR Ex. 7.)

On September 27, 2016, AAA Termite e-mailed DCPL, stating, *inter alia*:

> We hereby are given [sic] DC Public Library an advance that we are going to bid on the new pest control contract for the fiscal year October 1, 2016. The upcoming bid, RFP or quote for pest control on twenty-six (26) libraries and MLK JR Library. This is a letter hereby in writing of proof of a request to be included in the upcoming quotes for pest control October 1, 2016 fiscal new year. . . . We are requesting a quote to be sent to us . . . . We request an opportunity to bid on the upcoming quote/RFP[.]

(AR Ex. 2, at 3.)

The next day, September 28, 2016, DCPL replied to AAA Termite, stating that DCPL had already issued a request for quotations. (AR Ex. 3, at 3.) DCPL further stated that it had searched the DSLBD website for SBE and CBE pest control contractors on September 13, 2016, and AAA Termite "was not on the list." (*Id.*)

On October 13, 2016, AAA Termite filed the instant protest, alleging that the RFQ was "an illegal and a bias[ed] approach."[4] (Protest at 1.) On November 1, 2016, the District filed the AR, arguing that the protest should be dismissed because the protester lacks standing since it was not an SBE or CBE at the time of the RFQ and thus was not an actual or prospective bidder. (AR at 4-6.) In the alternative, the District argued that DCPL properly conducted the procurement and the protester has failed to prove that DCPL was biased. (*See id.* at 6-8.) On November 2, 2016, the protester filed a response to the AR.[5] (Protester's Statement of Facts.)

DISCUSSION

I. Jurisdiction and Standard of Review

The Board exercises exclusive jurisdiction over "[a]ny protest of a solicitation or award of a contract . . . by any actual or prospective bidder, offeror, or the contractor who is aggrieved in connection with the solicitation or award of a contract." D.C. CODE § 2-360.03(a)(1) (2016). This protest is timely, having been filed within ten business days of DCPL's notice to AAA Termite that a request for quotations had been issued. *See id.* § 2-360.08(b)(2).

[3] On October 5, 2016, DCPL awarded IJS a blanket purchase order pursuant to the RFQ in an amount not to exceed $100,000.00. (AR at 3; AR Ex. 4, at 1, 5.)

[4] On October 20, 2016, the District issued a Determination to Proceed with Contract Award While a Protest is Pending ("Determination to Proceed"), which the protester challenged on October 25, 2016. On November 2, 2016, the Board issued an order denying the protester's challenge for the reasons stated therein. (*See* Order Den. Protester's Challenge to District's Determination to Proceed.)

[5] Also on November 2, 2016, the protester filed a "Motion to File Injunction." Since the Board has already denied the protester's challenge to the District's Determination to Proceed, *see supra* note 4, the Board hereby denies this motion.

A. *Standing*

The District argues that the protester lacks standing because the protester was not an SBE or CBE during the RFQ period and thus the protester was not an actual or prospective bidder. (AR at 4-6.) It is undisputed that the protester was not an SBE or CBE during the RFQ period of September 13-20, 2016, and, in fact, did not receive its certification from DSLBD until September 30, 2016. (*See* Protest at 1-4; AR Ex. 5.) However, AAA Termite's protest is grounded in the argument that it was improper for DCPL to issue the RFQ on September 13, 2016, and that the RFQ should have been issued on October 1, 2016, at the start of the District's new fiscal year. (*See* Protest at 3-4.)

This Board has previously held that a protester has standing as an aggrieved party if its protest were to be sustained and, as a result, the protester is able to compete in a new resulting solicitation. In *MWJ Solutions, LLC*, CAB No. P-0940, 63 D.C. Reg. 12047, 12051-52 (Sept. 26, 2013), the protester challenged an award made under a General Services Administration ("GSA") Schedule, arguing that the District's use of the GSA Schedule was improper. The Board held that the protester had standing even though it was not a GSA Schedule contractor and thus was ineligible to compete for the contract. *See id.* at 12051-52. The Board reasoned that if the protest were sustained, the District would be required to resolicit the contract through open competition and the protester would then have the opportunity to bid for, and receive, the contract award. *See id.* at 12051 (citation omitted); *see also B & B Sec. Consultants, Inc.*, CAB No. P-0630, 49 D.C. Reg. 3340, 3344 (Mar. 7, 2001) (finding a protester had standing to challenge an award made under the Federal Supply Schedule ("FSS"), even though the protester was not an FSS vendor). In the instant protest, if the protest were to be sustained, the protester would be able to compete in the new set-aside solicitation, having received its DSLBD certification on September 30, 2016. Accordingly, we find that the protester has standing and deny the District's motion to dismiss.

B. *Standard of Review*

In reviewing the propriety of an agency's actions in conducting a solicitation, the Board examines whether the agency's actions were "in accordance with the applicable law, rules, and terms and conditions of the solicitation." D.C. CODE § 2-360.08(d) (West, Westlaw through Dec. 20, 2016). The protester bears the burden of establishing its case by a preponderance of the evidence. *See Stockbridge Consulting LLC*, CAB No. P-0963, 63 D.C. Reg. 12188, 12192 (Aug. 28, 2014) (citation omitted); Board Rule 120.1, D.C. MUN. REGS. tit. 27, § 120.1 (2002). However, where protest grounds also include an allegation of bad faith on the part of the government, such bad faith must be established by clear and convincing evidence. *See RSC Elec. & Mech. Contractors, Inc.*, CAB No. P-0621, 48 D.C. Reg. 1589, 1592-1593 (Aug. 23, 2000) (citations omitted); *Urban Dev. Solutions, LLC v. District of Columbia*, 992 A.2d 1255, 1267 (D.C. 2010) (citations omitted).

II. <u>The District Properly Conducted the Procurement</u>

The protester argues that DCPL took "an illegal and a bias[ed] approach" in issuing the RFQ. (Protest at 1.) According to the protester, the RFQ was issued before the new fiscal year started on October 1, 2016, which violated District law. (*See id.* at 3-4.) The protester has not identified any particular law which was allegedly violated when DCPL issued the RFQ on September 13, 2016. (*See id.* at 1-4; Protester's Statement of Facts.) Rather, the protester claims that, "in the past," DCPL had never issued requests for quotations before October 1. (Protest at 4.)

The District argues that the procurement was conducted in accordance with District procurement law. (AR at 6-8.) Specifically, the District states that DCPL properly issued the RFQ pursuant to DCPL's simplified procurement procedures, D.C. MUN. REGS. tit. 19 § 4305. (*See* AR at 1-2, 6.) The District further states that D.C. CODE § 2-218.44 required that the RFQ be set aside for SBEs and CBEs.

(*See* AR at 7-8.) Following our review, we find that the record does not support the protester's claim that the procurement was conducted illegally. Under its procurement regulations, DCPL is allowed to solicit written price quotations for procurements between $25,000.00 and $100,000.00. D.C. MUN. REGS. tit. 19 §§ 4305.1, .7.[6] Pursuant to D.C. CODE § 2-218.44(a)-(a-1), DCPL was required to set aside the RFQ for SBEs and CBEs because the procurement was not to exceed $100,000.00. And although the protester argues that it was illegal for DCPL to issue an RFQ at the end of one fiscal year for services to be performed in the next fiscal year, the Board finds nothing improper with DCPL's timing in issuing the RFQ. In its response to the AR, the protester also argues that it was improper for the RFQ to include option periods. (*See* Protester's Statement of Facts.) However, DCPL's procurement regulations allow DCPL to "include options in solicitations and contracts when it is in the Library's interests," D.C. MUN. REGS. tit. 19 § 4362.1 (2008), and does not prohibit the use of option periods in requests for quotations or procurements using simplified procedures, *see id.* § 4305. In sum, we find that DCPL's conduct regarding the RFQ was in accordance with District procurement laws and regulations. Thus, we deny the protest ground that the RFQ was "illegal."

III. There Is No Evidence that the District Was Biased or Acted in Bad Faith

We also deny the protest ground that DCPL was biased or otherwise acted in bad faith. In reviewing allegations of bias, the Board presumes that government officials, acting in their official capacity, do so in good faith. *Emergency Assocs. of Physician's Assistants & Nurse Practitioners, Inc.*, CAB No. P-0500, 46 D.C. Reg. 8527, 8531 (Dec. 15, 1998); *RSC Elec. & Mech. Contractors, Inc.*, CAB No. P-0621, 48 D.C. Reg. at 1592 (citation omitted). In order to show that a government official has acted in bad faith, a protester must produce well-nigh irrefragable proof – that is, clear and convincing evidence – that the government official acted with a specific, malicious intent to harm the protester. *See RSC Elec. & Mech. Contractors, Inc.*, CAB No. P-0621, 48 D.C. Reg. at 1592-93 (citations omitted); *Urban Dev. Solutions, LLC*, 992 A.2d at 1267 (citations omitted).

The protester alleges DCPL bias and "retaliation because [the protester] reported [DCPL] to the Officer of the Inspector General." (Protest at 2.) However, based on the record, we have found nothing improper in DCPL's practice of using the RFQ. In the absence of any facts to the contrary, the Board therefore concludes that there is no record evidence in support of the protester's allegations that DCPL conducted the procurement with the specific intent to injure the protester. *See AMI Risk Consultants, Inc.*, CAB No. P-0900, 2012 WL 4753867 (May, 25, 2012).

CONCLUSION

For the reasons set forth herein, the Board denies the District's motion to dismiss, finding that the protester has standing. However, we conclude that the District's conduct of the procurement did not violate procurement laws and regulations and, furthermore, the protester has not shown that DCPL was biased or acted in bad faith. Accordingly, we deny the instant protest and dismiss it with prejudice.

SO ORDERED.

Date: January 6, 2017

/s/ Maxine E. McBean
MAXINE E. McBEAN
Administrative Judge

[6] In using simplified procurement procedures, DCPL is only required to publicize solicitations for acquisitions exceeding $100,000.00. *See* D.C. MUN. REGS. tit. 19 § 4302.2 (2012). Accordingly, the Board finds nothing improper with DCPL's method of utilizing the DSLBD website to find SBE and CBE contractors from whom to solicit written price quotations.

CONCURRING:

/s/ Marc D. Loud, Sr.
MARC D. LOUD, SR.
Chief Administrative Judge

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

NEAL R. GROSS & CO., INC.)
) CAB No. P-1031
)
Solicitation No: DOC288695)

For the Protester, Neal R. Gross, Incorporated: Neal R. Gross, *pro se*. For the District of Columbia: Lauren A. Brown, 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 #60282770

This protest arises from a solicitation issued by the District of Columbia Office of Contracting and Procurement seeking a contractor to provide transcription services of public meetings for the District of Columbia State Board of Education. The protester, Neal R. Gross & Company, Incorporated ("Neal Gross"), challenges the District's award decision and argues that the contracting officer's determination that it was not a responsible contractor was improper and unreasonable. Upon consideration of the allegations raised by the protester and the underlying record, we deny and dismiss the protester's challenge to the District's award decision in this matter.

FACTUAL BACKGROUND

On November 14, 2016, the District of Columbia Office of Contracting and Procurement ("OCP") on behalf of the District of Columbia State Board of Education ("SBOE") issued Request for Quotations No. DOC288695 (the "Solicitation") seeking a contractor to provide transcription services for SBOE's public meetings for the 2017 fiscal year. (Agency Report ("AR") Ex. 2, at 1, 4.)[1] Notably, SBOE needed performance to begin on November 16, 2016, for a mandatory meeting that required transcription services. (AR Ex. 1, at 2.) Offerors were required to submit proposed pricing for these transcription services consisting of a unit price per page for regular delivery and expedited delivery in addition to proposed cancellation and appearance fees. (AR Ex. 2, at 4.) The Solicitation was later amended to advise offerors that the award would be based on the total quoted price for these services. (*Id.*; AR Ex. 1, at 2.)

Three companies were invited to participate in this procurement: (1) Capital Reporting Company; (2) Olender Reporting ("Olender"), Incorporated, and (3) Neal Gross. (AR Ex. 1, at

[1] When referring to documents that do not contain consistent internal page numbering (*see, e.g.*, AR Ex. 2), the Board has cited to the page numbers assigned by Adobe Reader.

2.) By the Solicitation's November 15, 2016, 2 p.m. bid submission deadline, the District received quotes from Olender and Neal Gross. (*Id.*) After reviewing Neal Gross' quote, the contracting officer ("CO") contacted the protester seeking clarification about its proposed pricing for the expedited delivery service category and asked that the protester provide a detailed cost breakdown for each item included in its pricing. (*Id.*) Upon receiving Neal Gross' revised submission, the contracting specialist evaluated both Neal Gross' and Olender's proposed pricing and Certified Business Enterprise ("CBE") preference point eligibility to determine each offeror's total evaluated cost. (*Id.*) Accordingly, the District determined both Neal Gross' and Olender's final evaluated prices to be as follows:

Company	CBE Points	Total Quoted Price	CBE Point Value	Evaluated Total Price[2]
Neal Gross	12%	$14,755.00	$1,770.60	$12,984.40
Olender	10%	$20,248.90	$2,024.89	$18,224.01

(AR Ex. 6, at 2.)

Based on these final evaluated prices, Neal Gross was determined to be the lowest priced offeror. (AR Ex. 1, at 2.) After bid opening, the contract specialist also conducted a search of the District's Citywide Clean Hands web application in order to determine Neal Gross' compliance with the District's Clean Hands Mandate. (*Id.*)[3] The initial report generated by the Clean Hands web application on November 15, 2016, at 3:08 p.m., indicated that Neal Gross was out of compliance with the District's Clean Hands Mandate although the report did not identify specific agencies that were related to this non-compliance report. (*See* AR Ex. 8.)[4] An hour later, the District conducted a second search of the District's Citywide Clean Hands web application in another attempt to verify the protester's Clean Hands status. The 4:09 p.m. results of this second search, again, stated that Neal Gross was not compliant with the District's Clean Hands Mandate without identifying specific agencies for which the protester was considered to be non-compliant. (*See* AR Ex. 9.)

The District also contacted the protester on this same day to advise the protester that its company was being reported as non-compliant in the Clean Hands web application, which the protester verbally disputed. (AR Ex. 1, at 2-3.) The protester, however, failed to submit follow-up documentation or information to the District on this day to dispute these non-compliant reports. (*Id.*) As a result, the District determined that Neal Gross was not in compliance with the

[2] Each offeror's evaluated bid total was determined by subtracting the CBE preference point value from each offeror's original total quoted price.

[3] Pursuant to a May 6, 2015, email issued by OCP's Deputy Director, in order to ensure that all vendors are properly licensed to do business with the District and have no outstanding compliance issues, procurement officials are required to obtain a Certificate of Clean Hands and a copy of the vendor's business license for all simplified purchases and contracts under $ 1,000,000.00. (AR Ex. 7.)

[4] As provided by D.C. Code § 47-2866, the Office of the Chief Financial Officer – Office of Tax and Revenue manages the Citywide Clean Hands web application located at https://ocfocleanhands.dc.gov/CCH/. (*See* AR Ex. 13.) This web application supports the District's Clean Hands Mandate which prohibits the District from issuing a license or permit to an individual or business that owes the District more than $100.00 in outstanding fines, penalties, fees or taxes. *See* D.C. CODE §47-2861 (2007); *see also* D.C. CODE §47-2862 (2016).

Clean Hands requirement and, thus, its company was determined to be ineligible for award by the District. (*Id.* at 3.)

Thereafter, as Olender was the next lowest priced offeror, the District conducted a search of the Clean Hands web application to determine Olender's compliance status. (*Id.*) The web application issued a Certificate of Clean Hands at 5:03 p.m. on November 15, 2016, which stated that Olender had no outstanding liabilities with the District. (*See* AR Ex. 11.) Accordingly, on November 15, 2016, Olender was awarded the disputed contract for the transcription services. (*See* AR Ex. 12.) Ultimately, on November 16, 2016, Neal Gross was able to obtain a Certificate of Clean Hands from the Office of the Chief Financial Officer ("OCFO") stating that it had no outstanding liabilities with the District. (*See* Protest Ex. D.) However, by this time, an award had already been made by the District to Olender.

On December 1, 2016, Neal Gross filed the present protest with this Board challenging the District's responsibility determination which found it non-compliant with the Clean Hands requirement as part of the District's ultimate award decision. In particular, Neal Gross argues that it was unreasonable for the District to determine that it was out of compliance based upon the reports generated by the Clean Hands web application. (Protest 1-3) First, the protester contends that these reports were ambiguous and inaccurate primarily because they failed to list any agencies, in particular, that considered the protester non-compliant. (*Id.*) In that regard, the protester contends that the District had a duty, and failed, to further inquire about the validity of these non-compliance reports in light of the alleged ambiguities. (*Id.* at 2-3.) The protester also contends that the District failed to consider prior evidence of the protester's compliance as demonstrated by the Certificate of Good Standing that it included with its bid submission. (*Id.* at 2.)

In response to Neal Gross' protest, the District filed an Agency Report on December 20, 2016, contending that it properly awarded the contract to the next lowest priced offeror after it determined that the protester was not a responsible contractor based upon repeated searches of the Citywide Clean Hands web application which reported that the protester was not in compliance with the District's Clean Hands requirement at the time of the impending award decision. (AR 6-9.) The District asserts that despite being the lowest priced offeror, the District was still required to ascertain the protester's compliance with the Clean Hands Mandate, through the Clean Hands web application which certifies a company's compliance with this law, in order to make a proper responsibility determination. (*Id.* at 4-6.) Moreover, upon being contacted by the District about these non-compliance reports, the protester did not provide any additional documentation to the District in support of its contention that the search results were inaccurate and that it was in compliance with the Clean Hands requirement. (*Id.* at 7-8.) Consequently, the District contends that Neal Gross was properly deemed to be not responsible and, thus, ineligible for award absent any information clearly indicating that it was in compliance with the Clean Hands requirement prior to the District's award decision. (*Id.* at 6.)[5]

[5] In its December 21, 2016, Response to the Agency Report, the protester further challenges the District's responsibility determination and reasserts its protest grounds. (*See* Resp. to AR.) The District subsequently filed a reply to the protester's response rearguing the propriety of the District's award decision. (*See* Jan. 11, 2017, Resp.)

Upon consideration of the record in this matter, and as discussed below, the Board finds that the District's responsibility determination and award decision was reasonable and made in accordance with procurement law.

DISCUSSION

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). The crux of this protest is essentially a challenge to the District's determination that the protester was not a responsible contractor based upon the reports generated by the Clean Hands web application on November 15, 2016, showing that it was not in compliance with the Clean Hands requirement.

A proper determination that a bidder is responsible is a prerequisite for contract award to ensure that a prospective contractor has the necessary capacity to perform in accordance with the terms of a contract. D.C. CODE § 2-353.02(a) (2011). Specifically, contracting officers are required to make a written determination as to whether a bidder is responsible prior to contract award and may only award a contract to a bidder that is determined to, in fact, be responsible. D.C. MUN. REGS. tit. 27, § 2200.1- 2200.2 (1988). The responsibility of a contractor is determined by a number of factors considered by the contracting officer including an offeror's compliance with the District's licensing and tax laws and regulations, which is evidenced by a Certificate of Clean Hands. *See id.* at § 2200.4(f); *see also* D.C. CODE § 47-2862 (2016).[6]

Before making a determination of responsibility, the contracting officer is required to possess or obtain information sufficient to satisfy the contracting officer that a prospective contractor currently meets the applicable standards and requirements for responsibility. *See* D.C. MUN. REGS. tit. 27, § 2204.1. Furthermore, the regulations place the burden of demonstrating responsibility on the prospective contractor and, in this regard, prospective contractors are required to promptly supply responsibility information requested by the contracting officer. *See* D.C. MUN. REGS. tit. 27, § 2204.2-2204.4; *see also AMI Risk Consultants*, CAB No. P-0900, 2012 WL 4753867 (May 25, 2012) (citing *Grp. Ins. Admin., Inc.*, CAB No. P-309-B, 40 D.C. Reg. 4485, 4517 (Sept. 2, 1992). Ultimately, in the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility. *Id.* at § 2200.3.

This Board has consistently held that a contracting officer is vested with wide discretion and business judgment in making its responsibility determination. *AMI Risk Consultants*, CAB No. P-0900, 2012 WL 4753867. Thus, it is well settled that the Board will not overturn an affirmative responsibility determination unless a protester can show fraud or bad faith on the part of the contracting officials, or that the contracting officer's determination lacked any reasonable basis. *Id.* (citing *Lorenz Lawn & Landscape, Inc.*, CAB No. P-0869, 62 D.C. Reg. 4239, 4244-45 (Sept. 29, 2011).

[6] Additional factors considered by the contracting officer in determining whether a contractor has the capacity to perform include, amongst other things, adequate financial resources, satisfactory record of business integrity, organization, experience, accounting and operational controls, and equipment and facilities. *See* D.C. MUN. REGS. tit. 27, § 2200.4.

Here, as demonstrated by the record, the District searched the Clean Hands web application at least twice before making its award decision and repeatedly received reports which stated that the protester was not in compliance with the Clean Hands requirement. Specifically, both searches of the web application conducted by the District on November 15, 2016, generated reports at 3:08 p.m. and 4:09 p.m. on that date which stated that the protester failed to comply with the Clean Hands Mandate under D.C. Code § 47-2862. (*See* AR Exs. 8, 9.) There is no evidence in the record, or that has been offered by the protester, which shows that the District did not use appropriate business judgment in searching this particular web application as part of its responsibility determination process to determine bidder compliance with this law. Thus, we find that it was reasonable for the District to rely on these search results particularly after conducting this search twice and receiving the same non-compliant results for the protester. The fact that specific agencies were not identified in these non-compliance reports does not negate the final conclusion of these reports stating that the protester was non-compliant with the Clean Hands Requirement.

In addition, the District contacted the protester to advise it of the non-compliance reports, and the protester failed to immediately submit any further information or documentation to the District that day which refuted the conclusions of the non-compliance reports before the District needed to make an award decision. *See AMI Risk Consultants*, CAB No. P-0900, 2012 WL 4753867 (upholding nonresponsibility determination where the protester failed to provide the District with business license prior to contract award). The District's multiple efforts were undertaken against the backdrop of the SBOE's need for performance to begin promptly on November 16, 2016, for a mandatory meeting which required that transcription services be in place expeditiously. (AR Ex. 1, at 2.) Moreover, although the protester argues that the District was required to further investigate the veracity of the Clean Hands non-compliance reports by directly contacting OCFO's Office of Tax and Revenue, the protester offers no authority for this proposition, nor has the Board found any such authority.[7]

Thus, in the absence of information clearly indicating that the protester was a responsible offeror, we find that the CO made a proper determination that the protester was not a responsible company as part of its evaluation process and decision to award the contract to the second lowest priced responsible bidder. *See* D.C. MUN. REGS. tit. 27, § 2200.3. As a result, we find that the District's award decision was proper and the present protest is denied and dismissed.

CONCLUSION

For the reasons discussed above, the Board denies the instant protest and dismisses it with prejudice.

SO ORDERED.

[7] Although the contracting officer in *Lorenz Lawn & Landscape* directly contacted the Office of Tax and Revenue to determine whether a failed Clean Hands report was accurate, the Board's holding in *Lorenz* does not require such direct agency contact in all cases. *See Lorenz Lawn & Landscape, Inc.*, CAB No. P-0869, 62 D.C. Reg. at 4246. Here, the CO acted reasonably and in good faith given the time constraints within which it operated.

Date: March 2, 2017

/s/ Monica C. Parchment
MONICA C. PARCHMENT
Administrative Judge

CONCURRING:

/s/ Marc D. Loud, Sr.
MARC D. LOUD, SR.
Chief Administrative Judge

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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

APPEAL OF:

ANA TOWING, INC.	)	
	)	CAB No. D-1378
Under Contract No. POKT-2005-C-0001-BB	)	

For the appellant, ANA Towing, Inc.: Lloyd J. Jordan, Esq. For the District of Columbia: Carlos M. Sandoval, 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 #60344656

ANA Towing, Inc. ("ANA" or "appellant") appeals a contracting officer's final decision denying its claim for termination damages in the amount of $1,174,740.00 arising from a vehicle towing contract with the District. Specifically, ANA alleges that the District improperly terminated Contract No. POKT-2005-C-0001-BB (the "Contract"), despite exercising Option Year 4 of the Contract. The District contends that it did not terminate the Contract but, rather, that the Contract expired at the conclusion of Option Year 3, after the District's decision not to extend the Contract.

Following a hearing in this matter and a thorough review of the record, the Board finds that the Contract expired at the conclusion of Option Year 3. In doing so, we reject appellant's contention that the District exercised Option Year 4 by way of a contract modification, and we also reject appellant's argument in the alternative that the contract modification contained unilateral errors that should be construed against the District. Accordingly, ANA's appeal is hereby denied.

BACKGROUND

I. The Contract

On September 30, 2005, ANA and the District of Columbia Office of Contracting and Procurement ("OCP"), on behalf of the Department of Public Works ("DPW"), entered into the Contract for ANA to provide towing services for the District. (Appellant's Hr'g Ex. 1, at 1-2; *see* District's Hr'g Ex. 11 ("Stipulations"), at 1, para. 1.) The term of the Contract consisted of a one-year base period from September 30, 2005, to September 29, 2006, and up to four one-year option periods. (Stipulations at 1, para. 2; *see also* Appellant's Hr'g Ex. 1, at 21 (§§ F.1-F.1.1).) Section F.2 of the Contract, which described the procedure that the District would use to extend the term of the Contract, stated:

> **F.2 Option to Extend the Term of the Contract**
>
> **F.2.1** The District may extend the term of this contract for a period of four (4), one-year option periods, or successive fractions thereof, by written notice to the Contractor before the expiration of the contract; provided that the District shall give the Contractor a preliminary written notice of its intent to extend at least thirty

> (30) days before the contract expires. *The preliminary notice does not commit the District to an extension*. The exercise of this option is subject to the availability of funds at the time of the exercise of this option. The Contractor may waive the thirty (30) day preliminary notice requirement by providing a written waiver to the Contracting Officer prior to expiration of the contract.
>
> **F.2.2** If the District exercises this option, the extended contract shall be considered to include this option provision.
>
> **F.2.3** The price for the option period shall be as specified in the contract.

(Appellant's Hr'g Ex. 1, at 21 (bold in original, italics added).)

The indefinite quantity Contract consisted of seven fixed-price contract line items representing different types of towing services, with separate minimum and maximum order quantities for each line item. (*See id.* at 2-7.)

The Contract identified James Roberts as the contracting officer. (*Id.* at 26 (§ G.6).) In addition, Tara Sigamoni and Gena Johnson served as contracting officers during the performance of the Contract. (*See, e.g., id.* at 1; District's Hr'g Ex. 3, at 2.)[1] The Contract stated that the contracting officer was "the only person authorized to approve changes in any of the requirements of this contract" and that "[t]he 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 Contracting Officer." (Appellant's Hr'g Ex. 1, at 26 (§§ G.7.1-G.7.2).)

II. Option Years 1, 2, and 3

A. Option Year 1: September 30, 2006, to September 29, 2007

On September 29, 2006, the District exercised Option Year 1 through a unilateral modification to the Contract. (District's Hr'g Ex. 4, at 2; *see also* Stipulations at 1, para. 3.) The modification stated:

> Pursuant to contract no. POKT-2005-C-0001-BB, page 21, Section F.2.1, Option to Extend the Term of the Contract, the District hereby exercises the option to extend the term of the contract from September 30, 2006 through September 29, 2007. The Estimated amount of the option period is $293,000.00.

(District's Hr'g Ex. 4, at 2.) The unilateral modification did not include a place or requirement for ANA's signature. (*See id.*)

On September 26, 2007, the District issued Modification No. 4 to the Contract, which increased the dollar value for Option Year 1 to $835,000.00. (*See* Hr'g Tr. vol. 1, 131:18-132:18, Dec. 15, 2011.) Contracting officer Johnson testified that the District increased the Contract's ceiling amount after DPW

[1] When referring to documents that lack consistent internal page numbering (e.g., District's Hr'g Ex. 3), the Board has used the page numbers assigned by Adobe Reader.

staff gave notice that the previously established ceiling amount was at risk of being exceeded.[2] (*See* Hr'g Tr. vol. 2, 402:19-404:1, 418:14-419:3, Jan. 24, 2012.) In addition to modifying the Contract's ceiling amount, the District also revised and increased the funding amount for the corresponding purchase order. (*See id.* at 402:3-11; *see also, e.g.*, District's Hr'g Ex. 9, at 4.) The contracting officer testified that the purchase orders served as the "mechanism" through which ANA received payment for work under the Contract. (*See* Hr'g Tr. vol. 2, 398:8-399:13.)

B. Option Year 2: September 30, 2007, to September 29, 2008

On September 26, 2007, the District exercised Option Year 2 through a contract modification that stated:

> Pursuant to contract no. POKT-2005-C-0001-BB, page 21, Section F.2.1, "Option to Extend the Term of the Contract" the District hereby exercises the option to extend the term of the contract from September 30, 2007 through September 29, 2008. The estimated amount of the option period is $293,000.00[.]

(District's Hr'g Ex. 5, at 2; *see also* Stipulations at 1, para. 3.) Contracting officer Sigamoni executed the modification on behalf of the District. (District's Hr'g Ex. 5, at 2.) Section 13.E of the modification stated that ANA's signature was not required. (*Id.*)

C. Option Year 3: September 30, 2008, to September 29, 2009

On September 18, 2008, the District exercised Option Year 3 through a contract modification that stated:

> Pursuant to contract no. POKT-2005-C-0001-BB, page 21, Section F.2.1, "Option to Extend the Term of the Contract" the District hereby exercises the option to extend the term of the contract from September 30, 2008 through September 29, 2009. The estimated amount of the option period is $303,000.00[.]

(District's Hr'g Ex. 6, at 2; *see also* Stipulations at 1, para. 3.) Contracting officer Roberts executed the modification on behalf of the District. (District's Hr'g Ex. 6, at 2.) Section 13.E of the modification stated that ANA's signature was not required. (*Id.*)

III. Dispute over Option Year 4

A. Contract Modification No. M0009

On March 9, 2009, the District issued Contract Modification No. M0009 ("Modification No. 9"). (District's Hr'g Ex. 1, at 2.) The modification stated, in pertinent part:

> Under option year four (4), for the period of September 30, 2008 through September 29, 2009, the contract maximum ceiling amount is increased from $648,500.00 (by $188,250.00) to $836,750.00.

[2] Contracting officer Johnson testified that the District increased the ceiling amount of the Contract whenever it became necessary in order to avoid an Anti-Deficiency Act violation. (*See* Hr'g Tr. vol. 2, 418:14-419:3.)

(*Id.*) Contracting officer Johnson testified that Modification No. 9's reference to "option year four" was the result of a typographical error, and that the modification should have stated "option year three." (*See* Hr'g Tr. vol. 2, 408:6-409:19.) The period September 30, 2008, to September 29, 2009, specifically relates to Option Year 3. (*See* District's Hr'g Ex. 6, at 2; *see also* Stipulations at 1, para. 3.)

B. Preliminary Notice to Extend the Contract

On August 12, 2009, contracting officer Johnson sent a letter to ANA providing thirty days' preliminary notice of the District's intent to exercise Option Year 4. (Appellant's Hr'g Ex. 3, at 2; *see also* Stipulations at 1, para. 4.) The letter stated: "This notification is in accordance with page 21 section F.2 of the contract. This preliminary notice does not obligate the District to actually exercise the option." (Appellant's Hr'g Ex. 3, at 2.)

ANA's president testified that the District had sent ANA preliminary notices of its intent to exercise the option for each of the three previous option years. (*See* Hr'g Tr. vol. 1, 64:3-14; Hr'g Tr. vol. 2, 216:5-217:8.) In response, ANA prepared the tax certification affidavit that had been attached to the District's letter and returned the completed form to the District. (*See* Hr'g Tr. vol. 1, 54:6-57:19; *see also* Appellant's Hr'g Ex. 4, at 1-4.)

C. Contract Suspension

Keith Cross, administrator for DPW's Parking Enforcement Management Administration, testified that, due to an approximately $1.5 million decrease in DPW's budget, DPW "suspended" ANA's services on or around September 9, 2009. (Hr'g Tr. vol. 2, 358:7-360:20.) The suspension was subsequently lifted, however, after DPW reallocated funds to pay for the remainder of Option Year 3. (*See id.* at 361:4-362:4.) Although she could not recall the date, ANA's president confirmed the District's suspension of services, testifying that:

> [T]here was a pause one time, and they had to do something with their [purchase orders], and I don't know whether that was a few weeks . . . and I don't know what it was about, funding for the -- I don't know what it was. But anyway, we started back up, again.

(*Id.* at 248:17-249:4.)

Administrator Cross also stated that, in light of the budget cut, DPW decided that it would not contract for towing services in the following fiscal year, which began on October 1, 2009, and would instead perform towing services using the District's fleet of thirty tow trucks. (*See id.* at 359:2-360:2, 388:12-389:9 (referring to tow trucks as "cranes").)

D. Contract Modification No. M0011

On September 23, 2009, the District issued Contract Modification No. M0011 ("Modification No. 11"). (Appellant's Hr'g Ex. 5; *see also* Stipulations at 2, para. 5.) Modification No. 11 read, in pertinent part:

> PO#282159, which funds the contract, is modified to add additional funds for towing services. As a result of this modification, the total contract amount for Option Year Four is increased to $950,000.00.

(Appellant's Hr'g Ex. 5.) Section 13.E of the modification contained a requirement for ANA's signature, and Modification No. 11 was signed by both ANA's president and contracting officer Roberts. (*Id.*; *see also* Stipulations at 2, paras. 5-6.)

Contracting officer Johnson testified that, despite its reference to "Option Year Four," the purpose of Modification No. 11 was to increase the ceiling amount for Option Year 3, as the District thought that it might exceed the amount previously set for that period. (*See* Hr'g Tr. vol. 2, 402:3-407:1; *see also* Hr'g Tr. vol. 2, 408:6-19, 428:3-429:22.) The contracting officer attributed this discrepancy to an error on the part of the contract specialist who prepared Modification No. 11, stating:

> [W]hat typically happens, when the specialist is preparing the next mod, they would have looked at the previous mod, first, to figure out what the next number is going to be for the modification, and then if the previous one had, in this case, incorrectly stated the option year, they just repeated it, unfortunately.

(*Id.* at 428:3-22.)

Contracting officer Johnson also testified that Modification No. 11's reference to "PO#282159" was a reference to Purchase Order No. 282159, which funded Option Year 3. (*See id.* at 399:14-400:7, 406:16-407:1.) In its description of services, Purchase Order No. 282159 included the following sentence: "ALL DELIVERIES/SERVICES MUST BE RECEIVED/RENDERED BY SEPTEMBER 30, 2009." (District's Hr'g Ex. 9, at 1.) Purchase Order No. 282159 also contained a reference to "FY09," the period from October 1, 2008, through September 30, 2009.[3] (District's Hr'g Ex. 9, at 1.) The contracting officer testified that, since allocated funds expire at the end of each fiscal year, a separate and distinct purchase order number would have been required to fund Option Year 4 expenses. (*See* Hr'g Tr. vol. 2, 400:8-401:10.)

E. Towing Services Provided September 30 and October 1, 2009

ANA provided towing services to the District on September 30 and October 1, 2009, towing seven cars each day. (*Id.* at 218:1-18; *see also* Appellant's Hr'g Ex. 9, at 3-4, paras. 9-11.) ANA's president testified that on those days, ANA sent its tow trucks "automatically" to rush hour towing locations. (Hr'g Tr. vol. 1, 69:6-70:12.) According to ANA's president, each time ANA towed a car, a District parking enforcement "ticket writer[] or aide[]" at the location would be responsible for calling DPW's dispatch office and reporting that towing services had been performed. (*Id.* at 69:17-72:3.) But administrator Cross provided a different account of the towing procedure, stating that (1) District parking enforcement personnel were not present when ANA towed a vehicle; and (2) ANA's tow truck drivers were responsible for calling DPW's dispatch office and reporting that towing services had been performed. (*See* Hr'g Tr. vol. 2, 355:16-357:15.) Notwithstanding, on the afternoon of October 1, 2009, DPW contacted ANA and instructed it to cease providing towing services for the District, stating that there was no contract was in place. (*See* Hr'g Tr. vol. 1, 70:13-72:12.) Administrator Cross further testified that he was not aware of the District having made any request for ANA to perform towing services on September 30 or October 1, 2009. (Hr'g Tr. vol. 2, 357:16-358:6.)

[3] The District's 2009 fiscal year ran from October 1, 2008, through September 30, 2009. *See* 2009 D.C. OFF. OF THE CHIEF FINANCIAL OFFICER CITIZEN'S FIN. REP. 5, *available at* http://cfo.dc.gov/sites/default/files/dc/sites/ocfo/publication/attachments/ocfo_pafr_2009_citizens_financial_report.pdf.

F. Contract Modification No. M0012

On October 1, 2009, the District issued Contract Modification No. M0012 ("Modification No. 12"). (District's Hr'g Ex. 3, at 2; *see also* Stipulations at 2, para. 7.) Modification No. 12, signed by contracting officer Johnson, stated the following:

> A. Make corrections to Modification #9 and Modification #11 which incorrectly referenced option year four (4). In both modifications, delete all reference to option year four (4) and replace to read option year three (3). The contract term expired on September 29, 2009.
>
> B. The purpose of modification #11 was to increase the ceiling amount of the contract term from 9/30/08 thru 9/29/09.

(District's Hr'g Ex. 3, at 2.)

IV. ANA's Claim for Wrongful Termination

On December 21, 2009, ANA submitted a claim to contracting officer Roberts alleging that DPW had terminated the Contract without cause and had acted in bad faith. (*See* Appellant's Hr'g Ex. 7, at 2-4.) ANA's claim sought $1,174,740.00, allegedly representing "the full amount due for the minimum amount of the purchase orders." (*Id.* at 4.)

On December 31, 2009, contracting officer Roberts issued a final decision denying ANA's claim. (Appellant's Hr'g Ex. 8, at 1-2.) In his final decision, the contracting officer stated that the District had not terminated the Contract but, rather, that "the District, in its sole discretion, did not exercise the fourth option year." (*Id.* at 1.) He further stated:

> Modification No.11 dated September 23, 2009, which simply increased the ceiling amount of the contract for the period ending September 29, 2009, incorrectly included the phrase "Option Year Four". The option period from September 30, 2008 through September 29, 2009 had previously been mislabeled as Option Year Four in Modification No. 9. The error in the labeling of the Option Year was corrected in Modification No.12 which clearly stated that the term of the contract ended on September 29, 2009.

(*Id.*)

V. ANA's Appeal to the Board

ANA filed an appeal of the contracting officer's final decision with the Board, alleging that the District had exercised Option Year 4, then terminated the Contract without cause and in bad faith. (*See* Compl. at 2-3, paras. 5, 15-18.) ANA sought damages for breach of contract in the amount of $1,174,740.00. (*See id.* at 4, para. 25.)

In response, the District moved to dismiss ANA's appeal or, in the alternative, for summary judgment, arguing, *inter alia*, that the Board did not have jurisdiction over ANA's appeal because the Contract expired on September 29, 2009, and therefore ANA's claim was "not a contract claim." (District's Mot. to Dismiss or, in the Alternative, for Summ. J. ("District's MTD") at 6.) The Board denied the District's motion, finding that (1) the Board had jurisdiction because ANA's appeal involved a

contracting officer's final decision on a claim arising under or relating to a contract; and (2) there was a factual dispute as to whether Option Year 4 had been exercised. (*See* Order on District's MTD at 2.)

A. Hearing and Post-Hearing Briefs

Pursuant to Board Rule 119.1, D.C. MUN. REGS. tit. 27, § 119.1 (2002), the Board conducted a hearing during which it heard testimony from four witnesses: (1) appellant's president; (2) appellant's accounts receivable manager; (3) administrator Cross; and (4) contracting officer Johnson. (*See generally* Hr'g Tr. vols. 1-2.) Following the hearing, the parties submitted post-hearing briefs.

1. Appellant's Brief

Appellant argues that "[t]he plain language of Modification 11 is clear and not ambiguous." (Appellant's Post-Hr'g Br. at 3-4.) As such, appellant contends that "the Board must apply the plain meaning of the words in reading Mod 11," (*id.* at 8 (citations omitted)), and may not consider any extrinsic evidence presented by the District, (*id.* at 11). Appellant asserts that the plain meaning of Modification No. 11 is to extend the Contract for Option Year 4, and to increase the funding to $950,000.00. (*Id.* at 9.)

Next, appellant argues that "a reasonable person" viewing both Modification No. 11 and "[t]he practice and course of conduct between the Appellant and the District in exercising the three previous option years" would conclude that Modification No. 11 extended the Contract for Option Year 4. (*Id.* at 11-15.) Appellant contends that, although Modification No. 11 differs from the previous modifications used to extend the Contract in that the words, "the District hereby exercises the option," were not included in Modification No. 11, neither the Contract nor any procurement authority requires specific language to be used by the District when exercising an option to extend. (*See id.* at 13.) Appellant also points to the towing services it provided for the District on September 30 and October 1, 2009, as evidence that the District exercised the option. (*See id.* at 13-14.)

Finally, appellant argues that any error contained in Modification No. 11 was the result of a unilateral mistake by the District and a unilateral mistake "does not void a properly executed contract." (*Id.* at 15-16.) As such, appellant argues, Modification No. 12 did not correct the District's mistake because it "was never executed or accepted by ANA" and because it was issued "after the start of performance in option year 4." (*Id.* at 17.)

2. The District's Brief

The District argues that appellant failed to present any documentation to establish that the District exercised its option to extend the Contract for Option Year 4. (*See* District's Post-Hr'g Br. at 3-4.) First, the District contends that Modification No. 11 only increased the ceiling amount of the Contract for Option Year 3. (*Id.* at 11-12.) The District points out that Modification No. 11 did not contain the language that the District had used to extend the Contract for Option Years 1, 2, and 3. (*See id.* at 8, 14.) Rather, Modification No. 11 contained the language typically used by the District to increase the ceiling amount of the Contract. (*See id.* at 14.) Modification No. 11 also required ANA's signature, unlike the modifications that had extended the Contract for Option Years 1, 2, and 3. (*Id.* at 8-9, 12.) Thus, the District argues that any reference to Option Year 4 in Modification No. 11 was a "clerical error." (*Id.* at 12-13.)

Second, the District argues that its August 12, 2009, preliminary notice letter to ANA did not exercise the District's option to extend the Contract for Option Year 4. (*Id.* at 15-16.) The District points out that the letter included the statement that "[t]his preliminary notice does not obligate the District to

actually exercise the option." (*Id.* at 16 (alteration in original).) Furthermore, the District notes that Section F.2.1 of the Contract stated that "[t]he preliminary notice does not commit the District to an extension." (*Id.* (alteration in original).)

Finally, the District contends that ANA's performance in providing towing services on September 30 and October 1, 2009, did not extend the Contract for Option Year 4. (*Id.* at 16-17.) The District argues that no District official with contracting authority ordered those services, and that ANA's performance occurred after the Contract had expired on September 29, 2009. (*See id.*)

DISCUSSION

I. Jurisdiction

The Board has jurisdiction over ANA's appeal pursuant to D.C. CODE § 2-360.03(a)(2) (2016), as it is an "appeal by a contractor from a final decision by the contracting officer on a claim by the contractor . . . aris[ing] under or relat[ing] to a contract."[4] The recitation of facts stated in the Background, Discussion, and Conclusion sections constitutes the Board's findings of fact in accordance with Board Rule 214.2, 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.

At issue in this appeal is whether the District (1) exercised its option to extend the Contract for Option Year 4; and (2) wrongfully terminated the Contract. In support of its claim, appellant relies on Modification No. 11, the District's preliminary notice letter, and ANA's performance on September 30 and October 1, 2009, after the conclusion of Option Year 3. We consider these issues below.

II. The District Did Not Exercise Option Year 4 of the Contract

Appellant contends that the District extended the Contract for Option Year 4 through Modification No. 11. (Appellant's Post-Hr'g Br. at 3-4.) Appellant cites "the plain language and unambiguous wording" of Modification No. 11 and the "customary practice" between the parties. (*Id.* at 4.) An option is "a unilateral right in a contract under which, for a specified time, the District . . . may elect to extend the term of the contract." D.C. MUN. REGS. tit. 27 § 2099.1 (1994) (amended July 17, 2015). It is well-settled that the government has the discretion to decide whether to exercise an option. *Am. Flag Constr., Inc.*, CAB No. D-1135, 50 D.C. Reg. 7441, 7443 (July 25, 2002) (citations omitted); *see also Good Food Servs., Inc.*, CAB No. P-0494, 44 D.C. Reg. 6846, 6847-48 (July 8, 1997) (citation omitted); *Tri-Cont'l Indus., Inc.*, CAB No. P-0297, 39 D.C. Reg. 4456, 4459-60 (Mar. 6, 1992).

A contract is ambiguous "when, and only when, it is . . . reasonably or fairly susceptible of different constructions or interpretations, or of two or more different meanings." *Transwestern Carey Winston, L.L.C.*, CAB No. D-1193, 52 D.C. Reg. 4166, 4168 (Apr. 9, 2004) (quoting *Gryce v. Lavine*, 675 A.2d 67, 69 (D.C. 1996)); *see also AnA Towing & Storage, Inc.*, CAB No. D-1176, 50 D.C. Reg. 7514, 7516 (June 25, 2003). If the contract is not ambiguous, this Board will only consider "the wording of the contract," rather than "extraneous circumstances or subjective interpretations," to determine its meaning. *GranTurk Equip. Co.*, CAB No. P-0884, 62 D.C. Reg. 4320, 4324 (June 5, 2012) (citing *Heller*

[4] Prior to April 8, 2011, and at the time this appeal was filed, the Board exercised jurisdiction pursuant to D.C. CODE § 2-309.03(a)(2) (2001). The Procurement Practices Reform Act of 2010, D.C. Law No. 18-371, preamble, 58 D.C. Reg. 1185, 1186 (Apr. 8, 2011), repealed the District of Columbia Procurement Practices Act of 1985, and amended and recodified the District's procurement statutes, but did not substantively change the Board's jurisdiction relevant to this appeal.

Elec. Co., CAB No. D-939, 41 D.C. Reg. 3717, 3723 (Nov. 17, 1993)). On the other hand, if the contract is ambiguous, "[t]he choice among reasonable interpretations . . . is for the factfinder to make, based on the evidence presented by the parties to support their respective interpretations." *Transwestern Carey Winston, L.L.C.*, CAB No. D-1193, 52 D.C. Reg. at 4168-69 (quoting *Gryce*, 675 A.2d at 69). As such, the Board will consider "what a reasonable person in the position of the parties would have thought the disputed language meant." *Id.* at 4169 (citing *Intercounty Constr. Corp. v. District of Columbia*, 443 A.2d 29, 32 (D.C. 1982)). The "reasonable person is bound by all usages -- habitual and customary practices -- which either party knows or has reason to know." *Id.* (quoting *1901 Wyoming Ave. Coop. Ass'n v. Lee*, 345 A.2d 456, 462 (D.C. 1975)). Lastly, the fact-finder should avoid, if possible, any interpretation that renders the contract provisions meaningless. *See A&M Concrete Corp.*, CAB Nos. D-1314, D-1330, D-1401, D-1402, 63 D.C. Reg. 12068, 12077 (Dec. 9, 2013) (citations omitted).

On its face, Modification No. 11 is ambiguous because it can be interpreted to have two different meanings. The modification states that "*PO#282159*, which funds the contract, is modified to add additional funds for towing services. As a result of this modification, the total contract amount for *Option Year Four* is increased to $950,000.00." (Appellant's Hr'g Ex. 5 (emphasis added).) Option Year 4 would have run from September 30, 2009, through September 29, 2010. However, Modification No. 11 also references Purchase Order No. 282159, the purchase order which included (1) a reference to "FY09;" and (2) the statement, "ALL DELIVERIES/SERVICES MUST BE RECEIVED/DELIVERED BY SEPTEMBER 30, 2009." (District's Hr'g Ex. 9, at 1.) Fiscal Year 2009 ended on September 30, 2009, one day following the conclusion of Option Year 3. *See supra* note 3.

Given this ambiguity, we have considered the competing interpretations of Modification No. 11 using the reasonable person standard. Having reviewed Modification No. 11 and the entirety of the record evidence in accordance with the above-stated considerations, the Board concludes that the District's interpretation of Modification No. 11 is the most reasonable interpretation.

A. Appellant's Interpretation of Modification No. 11

Modification No. 11 stated:

> PO#282159, which funds the contract, is modified to add additional funds for towing services. As a result of this modification, the total contract amount for Option Year Four is increased to $950,000.00.

(Appellant's Hr'g Ex. 5.)

Despite appellant's argument, the plain meaning of Modification No. 11 does not "clearly establish[] that [the] Contract has been extended to option year 4." (Appellant's Post-Hr'g Br. at 11-12.) Modification No. 11 refers to an increase in funding for Purchase Order No. 282159, and refers to "Option Year Four." (Appellant's Hr'g Ex. 5.) However, it does not contain language stating that the District was exercising Option Year 4, or that the Contract was being extended to Option Year 4. (*Id.*) A person not in the position of the parties might interpret the reference to "Option Year Four" to mean that such option had already been exercised (e.g., through a previous contract modification), and that the funding for the option was now being increased – an interpretation at odds with the facts of the instant case. However, the Board's consideration must be based on that of a reasonable person in the position of the parties, *see A&M Concrete Corp.*, CAB Nos. D-1314, D-1330, D-1401, D-1402, 63 D.C. Reg. at 12076, and presumes that a reasonable person in the position of the parties is acquainted with the contemporaneous circumstances regarding the issuance of Modification No. 11, *see AnA Towing & Storage, Inc.*, CAB No. D-1176, 50 D.C. Reg. at 7515 (citing *Hol-Gar Mfg. Corp. v. United States*, 351 F.2d 972, 975 (Ct. Cl. 1965)); *Gryce*, 675 A.2d at 69.

First, appellant asserts that its interpretation is reasonable in light of the contemporaneous circumstances because, in issuing Modification No. 11, the District followed the "same practice and conduct" as in each of the three previous years when it exercised its option under the Contract by sending appellant (1) preliminary notice of the District's intent to exercise its option, along with tax certification documents; and (2) "a contract modification in the form of that which was sent like [Modification No.] 11." (Appellant's Post-Hr'g Br. at 12-13.) However, as further discussed below, we find that the contemporaneous circumstances, including the prior modifications of the Contract which are part of our consideration of the Contract as a whole, do not support appellant's interpretation.

The District's preliminary notice to extend the Contract which was sent on August 12, 2009, did not, by itself, serve to exercise the District's Option Year 4 extension of the Contract. Indeed, Section F.2.1 of the Contract required the District to provide appellant with at least thirty days' notice of its intent to exercise the option, but it also stated that the preliminary notice would "not commit the District to an extension." (Appellant's Hr'g Ex. 1, at 21.) Furthermore, the preliminary notice expressly stated, "[t]his preliminary notice does not obligate the District to actually exercise the option." (Appellant's Hr'g Ex. 3, at 2.) Accordingly, a reasonable person in the position of the parties would understand that the District's preliminary notice of intent to exercise the option was not, by itself, an exercise of Option Year 4. As we stated in *American Flag Construction*, "the government has discretion in deciding whether to exercise [an] option, even when the government has provided the contractor preliminary notice of its intent to exercise the option." CAB No. D-1135, 50 D.C. Reg. at 7443 (citations omitted).

In addition, contrary to appellant's claim, the form of Modification No. 11 was, in fact, substantially different from the form used by the District in exercising its option to extend the Contract in Option Years 1, 2, and 3. Specifically, each of the three previous times that the District exercised its option, it affirmatively stated:

> Pursuant to contract no. POKT-2005-C-0001-BB, page 21, Section F.2.1, ["]Option to Extend the Term of the Contract,["] the District hereby exercises the option to extend the term of the contract from [start date] through [end date]. The Estimated amount of the option period is [sum of minimum extended prices for the option year based on the Contract's Price Schedule].

(District's Hr'g Exs. 4-6; *see also* Appellant's Hr'g Ex. 1, at 4-6.) In contrast, the language used in Modification No. 11, which did not expressly state that the District was exercising its option, (Appellant's Hr'g Ex. 5), is inconsistent with the District's customary practice of using the same language each time it exercised its option under the Contract.[5]

Second, the circumstances were such that the District had erroneously written "option year four" in an earlier modification. Modification No. 9 stated that "[u]nder option year four (4), for the period of September 30, 2008 through September 29, 2009, the contract maximum ceiling amount is increased from $648,500.00 (by $188,250.00) to $836,750.00." (District's Hr'g Ex. 1, at 2.) Although Modification No.

[5] While appellant is correct that no "magical language" was required to extend the term of the Contract, (*see* Appellant's Post-Hr'g Br. at 13), District procurement regulations in force at the time required that "[t]he contract modification or other written document which notifies the contractor of the exercise of the option *shall cite the option provision as authority for the action*." D.C. MUN. REGS. tit. 27, § 2008.7 (1988) (emphasis added) (repealed July 17, 2015). As applied here, the District would have been required to cite to section F.2.1 – the Contract's option provision – in any instrument that it used to extend the term of the Contract, which is precisely what the District did when exercising the first three option years, (*see* District's Hr'g Exs. 4-6).

9 cited to "option year four (4)," Option Year 3 encompassed the period of performance from September 30, 2008, through September 29, 2009, (Stipulations at 1, para. 3; *see also* District's Hr'g Ex. 6, at 2). We find that a reasonable person would understand that there was a clear typographical or clerical error in Modification No. 9, and that such typographical or clerical error was then repeated in Modification No. 11.

Third, a reasonable person familiar with the contemporaneous circumstances would have been aware that the District had routinely issued modifications to raise the ceiling amount of the Contract, as distinguished from modifications issued to exercise option years under the Contract. (*Compare* District's Hr'g Ex. 1, at 2, *and* Hr'g Tr. vol. 1, 131:18-133:13, *with* District's Hr'g Ex. 6, at 2.) In addition, such person would have been aware that, on or around September 9, 2009, the District had temporarily suspended appellant's performance due to budget cuts. (*See* Hr'g Tr. vol. 2, 358:7-360:20; *see also* Hr'g Tr. vol. 2, 248:17-249:4.)

Fourth, appellant cites to Modification No. 11 in which the District states that it "add[ed] additional funds" to Purchase Order No. 282159 and increased funding "to $950,000.00," (Appellant's Hr'g Ex. 5), to argue that it was reasonable "to believe that this large amount of money pertained to a whole new contract year, especially since at the time of the issuance of [Modification No.] 11, the District only needed enough money to pay for one month." (Appellant's Post-Hr'g Br. at 14.) However, the record shows that Modification No. 11 was issued at a time when Purchase Order No. 282159 was already funded to $836,750.00.[6] (*See* District's Hr'g Ex. 9, at 4; *see also* District's Hr'g Ex. 1, at 2.) Thus, Modification No. 11 increased the ceiling amount for Purchase Order No. 282159 from $836,750.00 to $950,000.00. Based on the contemporaneous circumstances, a reasonable person in the position of the parties would not interpret Modification No. 11 as the District's mechanism to both exercise its option for Option Year 4, as well as fund that option year in the amount of $950,000.00.

Fifth, we note that a contractor's signature is not required when the District exercises its option to extend a contract. "The contracting officer shall use a unilateral contract modification to . . . [m]ake changes authorized by a provision of the contract . . . , such as an option." D.C. MUN. REGS. tit. 27 § 3601.2(c) (1988) (current version at § 3601.3(c) (2012)). A unilateral modification is defined as "a contract modification that is signed only by the contracting officer." *Id.* § 3699.1 (1988). But unlike the modifications that the District used to exercise the first three option years, Modification No. 11 required appellant's signature.[7] (*Compare* District's Hr'g Exs. 4-6, *with* Appellant's Hr'g Ex. 5.)

Lastly, we reject appellant's argument that "[t]he District was aware that the Appellant was working at the beginning of Option [Year] 4 because the Appellant received towing authorizations from DPW to tow cars on September 30 and October [1], 2009." (Appellant's Post-Hr'g Br. at 14.) The record contains no evidence that appellant received any directive to perform towing services on September 30 and October 1, 2009, (1) from a contracting officer; or (2) from another District official acting either on behalf of, or with the knowledge of, a contracting officer. (*See* Appellant's Hr'g Ex. 1, at 26 (§§ G.7.1-G.7.2)); *see also* D.C. MUN. REGS. tit. 27, § 3602.2 (1988) ("A contractor shall not rely upon any written

[6] Contracting officer Johnson testified that Modification No. 11 was written because they "thought that they might exceed" the ceiling amount for Option Year 3 and "[t]he program would have looked at where they were at the time that they requested for the ceiling to be increased, and what they anticipated to spend." (Hr'g Tr. vol. 2, 404:2-406:2.)

[7] Although appellant's president stated that she was required to sign each modification in which the District exercised its option to extend, (*see* Hr'g Tr. vol. 1, 96:18-97:15), this testimony is inconsistent with the contemporaneous record before the Board, as the modifications exercising the options for the first three option years did not require appellant's signature, (District's Hr'g Exs. 4-6).

or oral statements or directions of employees or agents of the District, other than the contracting officer, for authority to perform work, alter schedules or specifications, or any other action that would normally require written contract modification.").

Appellant's president testified that appellant's tow trucks "automatically" went to rush hour towing locations and that "ticket writers or aides" notified DPW's dispatch office that appellant was providing towing services. (Hr'g Tr. vol. 1, 69:6-72:3; *see also* Hr'g Tr. vol. 2, 285:22-286:12.) But the record shows that on October 1, 2009, contracting officer Johnson issued Modification No. 12 which corrected the error in Modification No. 11 and stated that "[t]he contract term expired on September 29, 2009." (District's Hr'g Ex. 3, at 2.) Also on October 1, 2009, DPW contacted appellant and instructed it to cease providing towing services to the District, stating that there was no contract in place. (*See* Hr'g Tr. vol. 1, 70:13-72:12.) Accordingly, the record does not support a finding that the District's conduct shows that the Contract was extended into Option Year 4.

Pursuant to District procurement regulations, only the contracting officer can exercise the District's option to extend a contract. *See, e.g.*, D.C. MUN. REGS. tit. 27, § 2008.4 (1988) (repealed July 17, 2015); *see also* D.C. MUN. REGS. tit. 27, § 3602.2. And the contracting officer's contract extension must be in writing. D.C. MUN. REGS. tit. 27, § 2008.1 (1988) (repealed July 17, 2015). In fact, even the continued performance of services by a contractor cannot extend a contract. *See Info., Prot. & Advocacy Ctr. for Handicapped Individuals, Inc.* ("*IPACHI*"), CAB No. D-0945, 42 D.C. Reg. 4972, 4977-78 (Apr. 14, 1995). In *IPACHI*, the contractor performed services for the District for six months under a mistaken belief that the District had exercised its option to extend the contract for a second option year. *See id.* at 4975-76. The Board held that the contractor's performance of services did not extend the contract for the second option year. *See id.* at 4977-78. Rather, we found that, "[i]n essence, [the contractor] acted as a volunteer in providing services." *Id.* at 4978. As such, the contractor was not entitled to payment for its performance. *Id.* Similarly, in this case appellant's provision of services after the end of Option Year 3 did not extend the Contract into Option Year 4.

In sum, the Board concludes that Modification No. 11 did not extend the Contract to Option Year 4 based on (1) the absence of any language in Modification No. 11 to affirmatively exercise Option Year 4; (2) what a reasonable person in the position of the parties would have thought the language meant; and (3) a consideration of all parts of the Contract, including the previous modifications.

B. The District's Interpretation of Modification No. 11

Based on our review of the record, we find that the District's interpretation of Modification No. 11 is the most reasonable interpretation, considering that (1) Modification No. 11 does not plainly state that the District is exercising Option Year 4, (*see* Appellant's Hr'g Ex. 5); (2) Modification No. 11 does not contain the specific language used by the District when exercising its option in each of the three previous years, (*compare id., with* District's Hr'g Exs. 4-6); and (3) the contemporaneous circumstances were such that a clear typographical or clerical error in Modification No. 9 appears to have been repeated in Modification No. 11, (*see* District's Hr'g Ex. 1, at 2; Hr'g Tr. vol. 2, 428:3-22).

We are mindful that the Board should avoid any interpretation that renders contract provisions meaningless. *See A&M Concrete Corp.*, CAB Nos. D-1314, D-1330, D-1401, D-1402, 63 D.C. Reg. at 12077 (citations omitted). However, the District's interpretation gives more meaning to Modification No. 11 than appellant's interpretation. *See Hale Bldg. Co.*, ASBCA No. 36553, 91-1 BCA ¶ 23,514 (finding that the only reasonable interpretation of the contract as a whole was that there was a typographical error); *Walter Petersen & Co.*, GSBCA No. 3358, 71-2 BCA ¶ 9,177 (rejecting the contractor's interpretation as unreasonable, as "the reasonable, plain, simple, and natural reading" of the provision was to read typographical error out of the provision). Under the District's interpretation, Modification No. 11 simply

increased the ceiling amount of the Contract under Option Year 3. Thus, the Board finds that Modification No. 11's reference to "Option Year Four" was due to a clerical error and neither exercised Option Year 4 of the Contract, nor extended the Contract past Option Year 3.[8]

III. The Contract Expired at the End of Option Year 3

Having concluded that the District did not exercise Option Year 4, we find that the Contract expired on its own terms on September 29, 2009, the last day of Option Year 3, (*see* District's Hr'g Ex. 6, at 2; Stipulations at 1, para. 3). Accordingly, we find that the District did not, wrongfully or otherwise, terminate the Contract. *See Green Mgmt. Corp. v. United States*, 42 Fed. Cl. 411, 443 (1998) (contract had expired by its terms and thus was not subject to being terminated), *appeal dismissed*, 194 F.3d 1337 (Fed. Cir. 1999); *see also C3, Inc.*, ASBCA Nos. 23750, 38391, 91-2 BCA ¶ 23,750 ("[T]here can be no effective termination for default if a contract is no longer in existence." (citing *Star Contracting Co.*, ASBCA Nos. 27848, 27890, 30501, 89-2 BCA ¶ 21,587)).

CONCLUSION

For the reasons discussed herein, the Board finds that (1) the District did not exercise its option to extend the Contract for Option Year 4; (2) as such, the Contract expired at the end of Option Year 3; and, therefore, (3) the District did not wrongfully terminate or breach the Contract. Accordingly, the Board hereby denies the instant appeal.

SO ORDERED.

Date: March 15, 2017

/s/ Maxine E. McBean
MAXINE E. McBEAN
Administrative Judge

CONCURRING:

/s/ Marc D. Loud, Sr.
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[8] Having found the District's explanation of Modification No. 11 to be the most reasonable interpretation, we reject appellant's argument that, even if the District had made errors in Modification No. 11, "the errors were unilateral mistakes that must be construed against the District," (Appellant's Post-Hr'g Br. at 15-17). *See Ambush Grp., Inc.*, CAB No. D-1014, 52 D.C. Reg. 4200, 4209 (July 8, 2004) (citing *Affordable Elegance Travel, Inc. v. Worldspan, L.P.*, 774 A.2d 320, 328 (D.C. 2001)), *rev'd on other grounds sub nom. Tillery v. D.C. Contract Appeals. Bd.*, 912 A.2d 1169 (D.C. 2006).

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

METROPOLITAN PROTECTIVE SERVICES, INC.	)	
	)	CAB No. P-1033
	)	
Solicitation No: RFP DCAM-17-NC-0007	)	

For the Protester, Metropolitan Protective Services, Incorporated: Derrick Parks, *pro se*. For the District of Columbia: C. Vaughn Adams, Esq., Department of General Services, Office of General Counsel.

Opinion by Administrative Judge Monica C. Parchment, with Chief Administrative Judge Marc D. Loud, Sr., concurring.

OPINION

Filing ID #60380012

This protest arises from a solicitation issued by the District of Columbia Department of General Services seeking a contractor to provide security services at a number of locations throughout the District of Columbia. The protester, Metropolitan Protective Services, Incorporated ("MPS"), argues that the District failed to provide sufficient responses during the District's pre-award Question & Answer exchanges with offerors in order to allow the protester to adequately prepare its proposal. Upon consideration of the allegations raised by the protester and the underlying record, we deny and dismiss MPS' protest allegations as without merit as further detailed herein.

FACTUAL BACKGROUND

On November 9, 2016, the Department of General Services ("DGS") on behalf of the Protective Services Division ("PSD") issued Citywide Security Guard Services Sectors 1 and 3 Request for Proposal No. DCAM-17-NC-0007 (the "Solicitation") seeking a security contractor to provide security services and qualified personnel to protect persons and property at approximately 65 District owned or leased facilities. (Agency Report "AR" Ex. 1, at 1-2, 16.) Specifically, the awardee was responsible for providing security personnel consisting of Licensed Security Officers ("SO") Unarmed, Commissioned Special Police Officers ("SPO") Armed, and Commissioned SPOs Unarmed.[1] (*Id.* at 11-13.)

In addition, the Solicitation required the awardee to provide all training, uniforms, equipment (unless provided by the District), supplies, licenses, permits, certificates, insurance,

[1] Special Police Officers are individuals appointed by the Mayor for the purpose of protecting property or persons within the District pursuant to D.C. Mun. Reg. tit. 6, § 1101. (AR Ex. 1, at 11.) D.C. Mun. Reg. tit. 6, § 1100 *et seq.*, was incorporated into the Solicitation by reference. (*Id.* at 9.)

pre-employment screenings, reports and files necessary to provide the required security services. (*Id.* at 9.)[2] The awardee would also be responsible for training the security personnel that would perform the services that were contemplated by the Solicitation. In that regard, the Solicitation enumerated specific training requirements for the SO, SPO Armed, and SPO Unarmed job categories including specified hours of training covering customer service, District of Columbia laws, ethics, conflict resolution, arrest powers, search and seizure, use of force, terrorism awareness, emergency procedures, on-the-job training, and firearms use. (*Id.* at 32-42.)

The District contemplated awarding a requirements contract with fixed hourly rates with a base term of one-year and four one-year option periods, and the fixed hourly rates would constitute the entire payment under the contract for the services that the awardee was required to perform. (*Id.* at 2-7.) In that regard, offerors were required to submit proposed pricing for the base term and each option period based on an estimated quantity of hours for the following personnel: (1) SO (350,860 hours); (2) SPO Unarmed (82,927 hours); and (3) SPO Armed (391,843 hours). (*Id.* at 3-7.) Offerors were also required to propose pricing for SO, SPO Unarmed, and SPO Armed training inclusive of any costs for a certified training instructor. (*Id.*)

Furthermore, offerors were also required to submit the following: (1) a Management Plan detailing the qualifications and training of the personnel that would perform the required security services in addition to detailing the offerors ability to meet the Solicitation's requirements; (2) a detailed description of the Key Personnel (Senior Level Managers, Administrators and Supervisors) who would perform the work required by the Solicitation; (3) Three Business References; and (4) a Price Proposal for the base term and option periods. (*Id.* at 105-107.) The contract would be awarded to the offeror whose proposal was determined to be most advantageous to the District based upon the information submitted by the offerors in response to the Solicitation. (*Id.* at 2.) In particular, each offeror's proposal would be eligible to receive up to one hundred and twelve (112) points based upon the District's evaluation of each proposal according to the following evaluation criteria: Price (20 points); Past Performance/Business References (20 points); Management Plan (40 points); Key Personnel (20 points); and CBE Preference (12 points).[3] (AR Ex. 3.)

The Solicitation also incorporated multiple documents by reference including the District of Columbia Municipal Regulations Title 6A, Chapter 11; Schedule of Security Services & Locations, Sectors 1 and 3; and the 2016 Washington D.C. Security Contractors Agreement Between AlliedBarton Security Services, LLC and Service Employees International Union ("SEIU"), Local 32BJ (the "Collective Bargaining Agreement" or "CBA") and accompanying Rider Agreement for D.C. Public Sites Sector 1 and 3 (Citywide Sector 1 and 3). (AR Ex. 1, at 9, 101; AR Exs. 5, 9.) The Rider Agreement, which covers security officers that are employed at District facilities within Citywide Sector 1 and 3, modified the terms of the CBA governing

[2] The District, on the other hand, was only required to provide electrical and mechanical equipment such as alarm and surveillance systems, wand metal detectors, x-ray machines, portable radios, in addition to Post Orders, telephones, locker space, and locker and office equipment. (*Id.* at 81-82.)

[3] In particular, Section M.5 of the Solicitation permitted the District to apply a maximum of 12 preference points in evaluating bids from businesses that were certified as small, local, or disadvantaged by the District's Department of Small and Local Business Development. (*Id.* at 116-117.)

wages and benefits that must be provided by employers of security personnel. (AR. Ex. 9, at 34-43.)[4]

In particular, the Rider Agreement provided that the minimum hourly pay rate with a minimum raise of $0.75 per year for SOs and SPOs Armed should be as follows: (1) Security Guard 1 - April 18, 2016 ($16.70); April 18, 2017 ($17.45); and April 18, 2018 ($18.20), and (2) Armed SPO Guard 2: April 18, 2016 ($24.80); April 18, 2017 ($25.55); and April 18, 2018 ($26.30). (*Id.* at 35.) Further, employers were required to provide health insurance for full time employees including dependent health care coverage. (*Id.* at 35-37.) As it pertains to dependent health care coverage, the Rider Agreement set forth monthly contributions that employers were required to make to the SEIU 32BJ Health Fund on behalf of employees who elected dependent coverage as follows: Effective January 1, 2016 ($812 per month); Effective January 1, 2017 ($873 per month); and Effective January 1, 2018 ($939 per month). (*Id*. at 36-37.)

DGS issued a total of seven addenda to the Solicitation between November 17 and December 16, 2016. (*See generally* AR Exs. 2-8.) Collectively, these addenda: (1) issued the sign-in sheet from the pre-proposal conference; (2) modified the Solicitation's evaluation criteria and points; (3) extended the Solicitation's due date; (4) incorporated the Rider Agreement into the Solicitation; (5) provided a Performance Bond/Letter of Credit sample attachment; (6) issued Question & Answer ("Q&A") responses to questions presented to DGS by interested offerors; and (7) revised the Award/Contract Signature Page. (*See id.*) Of note, Addendum No. 4, issued on December 8, 2016, modified the Solicitation's terms and provided answers to 50 questions that had been submitted by prospective offerors to DGS concerning the Solicitation's requirements. (*See* AR Ex. 5.) By the Solicitation's December 22, 2016, due date, four offerors, including MPS, submitted proposals in response to the Solicitation. (AR 6.)

On the same day that it submitted its proposal to the District, MPS also filed a protest with this Board challenging the adequacy of DGS' Q&A responses to several questions that were included in Addendum No. 4. (Protest 1.) The protester argues that DGS' failure to provide meaningful responses to the offerors' questions deprives the protester of all information that it requires to submit an accurate cost proposal and effective management plan. (*Id.*) Further, the protester also contends that DGS failed to obtain relevant information from the incumbent contractor that is necessary for the protester to prepare its proposal and which creates a bias and unfair advantage for the incumbent contractor. (*Id.*) In particular, and as further set forth below, the protester challenges the sufficiency of the District's pre-award Q&A responses to Questions No. 31, 33, 34, 36, 37, 38, 41, 42, 43, 44, and 45 in connection with the Solicitation's requirements. (*Id.* at 1-5.) In response to MPS' protest, the District filed an Agency Report on January 11, 2017, contending that the Solicitation, addenda and Q&A responses to the offerors provided sufficient and unambiguous information which allowed all offerors to compete intelligently and on equal terms. (AR 1-2.) Accordingly, the District argues that MPS' protest is without merit and should be dismissed. (*Id.*)

[4] When referring to documents that do not contain consistent internal page numbering (*see, e.g.*, AR Ex. 9), the Board has cited to the page numbers assigned by Adobe Reader.

Protested Allegations Related to the Solicitation's Q&A Responses

As it relates to the present protest allegations, MPS specifically challenges the District's response to several areas of questioning as set forth below:

1. The protester challenges the sufficiency of the District's response to Question No. 31 based upon the District's alleged failure to provide offerors with Appendix B of the CBA, which the protester contends is a necessary document to prepare its price proposal.[5] (Protest 2.) In response to this allegation, the District contends that it informed offerors that it had confirmed with SEIU that there was no Appendix B for the CBA to additionally provide to offerors as part of this Q&A response. (AR 10; AR Ex. 8.)

2. The protester contends that the District's response to Question No. 33 was insufficient based upon the District's alleged failure to provide offerors with the percentage of union members of the incumbent contractor who have elected dependent child coverage in order for offerors to prepare their price proposals. (Protest 2.) The District contends that its response was appropriate as it does not have this additional requested information from the incumbent contractor. (AR 11.)

3. The protester argues that the District's response to Question No. 34 was insufficient because the District allegedly failed to provide offerors with the monthly dependent health care contribution rates for option years 2-4 in order for offerors to prepare their price proposals. (Protest 2.) The District argues in response that it is the contractor's responsibility to exercise its business judgment regarding pricing over the contract term as it relates to this matter and that the District is not obligated to provide this information. (AR 13.)

4. The protester contests the District's response to Question No. 36 where offerors sought to have the District verify information that may be provided by the incumbent contractor. (Protest 2.) The District asserts that its response was appropriate because the District provided prospective offerors with sufficient information to prepare their proposals and the District is not obligated to verify any additional information that may be provided by the incumbent. (AR 14.)

5. The protester also challenges the sufficiency of the District's response to Question No. 37 based upon the District's alleged failure to provide requested information to the offerors regarding the minimum wage rates for option years 2-4 of the Solicitation in order for offerors to prepare their price proposals. (Protest 3.) The District argues that its response to this question was appropriate in advising offerors that this information was not available because the minimum wage rates for option years 2-4 have not been negotiated by the incumbent and SEIU. (AR 14.)

6. The protester also argues that the District's response to Question No. 38 was non-responsive because the District failed to provide offerors, as was requested, with

[5] According to the CBA, Appendix B is a list of all employees covered by the CBA and their applicable seniority dates. (AR Ex. 9, at 13.)

information concerning the training hours and certification status of the security personnel listed in Appendix B of the CBA that would be inherited by the awardee in order for offerors to adequately prepare their price proposals as it relates to anticipated training costs. (Protest 3.) The District contends that its response to this question was appropriate in advising offerors that it was their responsibility, and not the District's, to verify that all security personnel that would be working under the contract were trained in accordance with the District's training requirements, as set forth in the Solicitation, and that these requirements provided offerors with sufficient information to factor the required training costs into their proposals. (AR 15-16.)

7. The protester challenges the sufficiency of the District's response to Question No. 41 based upon the District's alleged failure to provide information, as requested from offerors, concerning firearm clearing areas and barrels that would be provided by the District in contract locations requiring security services from Armed SPOs. (Protest 4.) The protester contends that additional information on this issue is necessary because if SPOs are not permitted to transfer and store their weapons in District provided clearing areas and barrels, the protester will have to factor in the costs of purchasing weapons for each Armed SPO into its proposal. (*Id.*) In response to this allegation, the District argues that its response to this question was proper because it reasonably advised offerors that SPOs should arrive at their assigned location prepared to perform their duties and that firearm clearing areas and barrels would not be provided by the District. (AR 16.)

8. The protester argues that the District's response to Question No. 42 was insufficient because the District failed to inform offerors about the District's policies regarding on-site firearm transfer from officer to officer. (Protest 4.) The District maintains that its response was appropriate because it informed offerors that more detailed information regarding weapons transfer policies would be provided to the awarded contractor in the Post Orders for each contract location and that the District properly withheld these Post Order documents from offerors because these documents contain sensitive security information. (AR 16-17.)

9. The protester also contests the sufficiency of the District's response to Question No. 43 for allegedly failing to inform offerors, as requested, about the District's specific requirements pertaining to firearm safes for contract locations that would require Armed SPOs, and for failing to supply offerors with the number of contract locations that would require firearm safes. (Protest 4.) The District contends that its response to this question was proper because it informed offerors that the District did not permit security personnel to store or transfer any weapons on District property. (AR 17.)

10. The protester further challenges the sufficiency of the District's response to Question No. 44 based upon the District's alleged failure to explain whether SPOs Armed were permitted to carry their weapons off-site while the SPOs were off-duty. (Protest 4.) The District contends that its response to this question was proper in reasonably advising offerors that the awardee would have to work with the Security Officers Management

Branch[6] ("SOMB") of the Metropolitan Police Department for information concerning the District's weapon transportation policies. (AR 18.)

11. The protester also argues that the District's response to Question No. 45 was insufficient because the District allegedly failed to inform offerors about the equipment that would be required for weapons storage during the contract performance period. (Protest 5.) The District maintains that it appropriately advised offerors that the awardee would be required to provide all necessary equipment at its own expense. (AR 18-19.) Upon consideration of the record in this matter, and as discussed below, the Board finds that the District adequately responded to the protested questions in light of the Solicitation's stated requirements.

DISCUSSION

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).

As previously discussed herein, MPS primarily argues that the District failed to provide sufficient information in its Q&A responses to offerors regarding the Solicitation's requirements. The sufficiency of the District's responses at issue can generally be categorized according to the following Solicitation requirements: (1) the CBA requirements related to dependent health care coverage, minimum wage and minimum raise rates, and seniority status for security personnel (Questions No. 31, 33, 34, 37); (2) the training requirements for security personnel (Question No. 38); and (3) the requirements for carrying, transferring and storing firearms (Questions No. 41-45). Furthermore, MPS also alleges that the incumbent had an unfair advantage in this procurement because the incumbent had information regarding the Solicitation's requirements, that was not available to all prospective offerors, and that the District failed to request this information from the incumbent contractor (Question No. 36).

Supplemental information, such as the District's pre-award Q&A responses, which are in writing, signed by the contracting officer, and provided to all prospective offerors during the course of the procurement act as an amendment to the Solicitation and effectively become part of the Solicitation's requirements. *See Energy Eng'g & Consulting Servs., LLC*, B-407352, 2012 CPD ¶ 353 (Comp. Gen. Dec. 21, 2012); *see also Linguistic Sys., Inc.*, B-296221, 2005 CPD ¶ 104 (Comp. Gen. June 1, 2005). Thus, MPS' challenge to the sufficiency of the District's responses to the protested questions is essentially a challenge to the sufficiency of the Solicitation's terms.

When evaluating the propriety of a solicitation's terms, the general rule is that a solicitation must contain sufficient information to allow offerors to compete intelligently and on an equal basis. *PLA*, CAB No. P-352, 40 D.C. Reg. 4946, 4948 (Feb. 12, 1993); *see also Richen Mgmt., LLC*, B-406750 *et al.*, 2012 CPD ¶ 215 (Comp. Gen. July 31, 2012). Therefore, a

[6] SOMB is responsible for the oversight and administration of SO licenses and SPO Commissions. (AR Ex. 1, at 15.)

procuring agency must provide specifications that are free from ambiguity and accurately describe the agency's minimum needs. *Id.* However, a solicitation is not required to be drafted in such detail as to completely eliminate all performance uncertainties and risks from the mind of every prospective offeror. *Id.* Here, we find that the District's responses to the protested Q&A responses, in conjunction with the Solicitation, as a whole, provided sufficiently detailed information to allow prospective offerors to compete intelligently and on a relatively equal basis under the terms of the Solicitation.

As it relates to the protester's challenge to the District's response to Question No. 31, the Board finds no merit to the protester's argument that the District unreasonably failed to provide offerors with the requested copy of Appendix B of the CBA leading to the protester's competitive disadvantage. The CBA, which was included as part of the Solicitation terms, referenced Appendix B as the document which included a list of all employees covered by the CBA and their agreed upon seniority dates. (AR Ex. 9, at 13; AR Ex. 1, at 101.) The District, however, subsequently issued Addendum No. 7, which informed all prospective offerors that the District had confirmed with SEIU that there is no Appendix B for the CBA, and the District has represented to the Board that this continues to be the case. (AR 10; AR Ex. 8.) Thus, there is no evidence that this information is available and is arbitrarily being withheld from the protester by the District.

Similarly, we find the District's response to Question No. 33 to be reasonable. The District was asked to provide supplemental information regarding the number of union members that elected dependent child coverage under the incumbent contract, and the District subsequently advised offerors that it did not maintain this information. Again, there is no evidence that has been provided by the protester showing that the District was either required to provide this information or that the District is unreasonably withholding this information from the protester.

By the same token, the fact that the District also could not provide offerors with the future minimum wage and raise rates for option years 2-4, as requested in Question No. 37, because these rates have not been negotiated as part of the CBA, does not make this response insufficient.[7] No evidence has been provided to this Board to show that this response was not accurate. Moreover, the Solicitation provided that Security Guards were required to be paid a minimum rate of $16.70 beginning April 18, 2016, $17.45 beginning April 18, 2017, and $18.20 beginning April 18, 2018. (AR Ex. 9, at 35.) Further, Armed SPO Guards were required to be paid a minimum rate of $24.80 beginning April 18, 2016, $25.55 beginning April 18, 2017, and $26.30 beginning April 18, 2018. (*Id.*) Accordingly, we find that the Solicitation provided sufficient information to allow prospective offerors to reasonably project the minimum wage and raise rates for all years contemplated under the Solicitation in order to prepare their price proposals.

As it relates to the District's contested response to Question No. 34, we find that the District adequately advised prospective offerors that they were required to make their own internal decision about pricing in response to a question seeking to have the District further confirm projected dependent health care monthly contribution amounts for option years 2-4 that

[7] In particular, the District maintains that these future minimum wage and raise rates are unavailable because these rates have not been negotiated between the incumbent contractor and SEIU. (AR 14.)

were not included in the Solicitation.[8] The underlying Solicitation provided sufficient information to allow offerors to reasonably project what these monthly contribution amounts would be for the contract term by mandating that employers of security personnel that were covered by the CBA make monthly contributions to the SEIU health fund in the amount of $812 per month beginning January 2016, $873 a month beginning January 2017, and $939 per month beginning January 2018. (*Id.* at 36-37.) This provided sufficient information to allow prospective offerors to reasonably further project what these monthly contribution amounts would be for all option years contemplated under the Solicitation in preparing their price proposals. While the protester may have desired more extensive information on the contribution amounts for option years 2-4 to prepare its price proposal, the Solicitation was not required to be drafted in such detail as to eliminate all risks and uncertainties in the mind of a prospective offeror. *See PLA*, CAB No. P-352, 40 D.C. Reg. at 4948.

The Board also finds the District's response to Question No. 38 to be responsive. The question sought to have the District confirm whether the security personnel of the incumbent contractor, who would be inherited by the awardee and listed in Appendix B as covered by the CBA, had received all training hours and certifications as required to provide security services within the District. There is no basis for the Board to find that the District improperly advised offerors that it was the awardee's responsibility to ensure that all contract security personnel were appropriately trained and certified in accordance with the terms of the Solicitation. Although offerors were required to include proposed training costs in their price proposals, the Solicitation provided sufficient information regarding the training requirements in order for offerors to prepare their proposals. In particular, the Solicitation advised prospective offerors of the very legal provisions governing the specific training requirements for the SO, SPO Armed, and SPO Unarmed job categories consisting of mandatory training courses and the number of training hours that were required for this security personnel. (AR Ex. 1, at 32-42.) This provided sufficient information for offerors to project what the costs of complying with these training requirements would be for all security personnel working under the contract regardless of whether offerors were provided with the specific training credentials of the personnel that would be inherited from the previous contractor.

Furthermore, we also find that the District sufficiently responded to Questions No. 41, 43, 44 and 45, which all concern the District's policies related to storing, transporting and transferring firearms within the District and the locations contemplated under the Solicitation. In response to these questions, offerors were repeatedly informed that the District would not permit security personnel to transfer or store weapons on District property, that the awardee would be responsible for providing all equipment necessary to store and transport weapons at the awardee's expense, and that information regarding the transportation of weapons within the District was governed by SOMB and it would be the awardee's responsibility to work with SOMB to ensure compliance with all weapons laws. (AR 16-18.) Likewise, the Solicitation also advised prospective offerors that it was the awardee's responsibility to provide all equipment that was necessary to provide the required security services and that SOMB would be responsible for the oversight and administration of SPO Commissions. (AR Ex. 1, at 9, 15.) Further, the

[8] As explained above, pursuant to the CBA Rider Agreement, the awardee would be required to make monthly contributions to the SEIU Health Fund for employees who elected dependent health care coverage. (AR Ex. 9, at 36-37.)

Solicitation stated that each SPO commission would specify any requirements for storage or special provisions for the transportation of firearms or other weapons within the District according to governing legal provisions. (*See* D.C. Mun. Reg. tit. 6, § 1100.3; *see also* AR Ex. 1, at 9.) Although the protester argues that the District was required to provide additional information concerning the methods by which the incumbent contractor stored and transported weapons within the District in order for the protester to prepare its proposal, again, the Board finds that this additional information was not required for offerors to reasonably prepare their proposals.

In addition, the mere fact that the District did not provide the protester with additional information concerning the Post Orders that would potentially provide greater detail regarding the particular firearm transfer policies at specified locations in response to Question No. 42 does not prove that the District's response was inadequate, particularly given the fact that the District represents that these Post Orders include sensitive security information of a non-public nature. (AR 16-17.) Notably, the Solicitation provided that the requested Post Order documents include security information and protocols concerning the protection of District facilities and personnel. (AR Ex. 1, at 14.) Thus, we find that it was reasonable for the District to withhold this information from prospective offerors.

Finally, as stated earlier, the protester repeatedly argues that the incumbent contractor maintains an advantage over other offerors in this procurement by virtue of information and insight that it may maintain regarding the Solicitation's requirements that is not available to all prospective offerors. The protester seemingly argues that the District is obligated to obtain personnel information related to wages, benefits, training and SPO Commissions from the incumbent contractor to assist prospective offerors in preparing their proposals for this procurement in order to prevent the incumbent from having an unfair competitive advantage in its proposal. However, we have previously held that even if the incumbent contractor possesses unique advantages and capabilities as a result of its experience under the previous contract, this does not render the information provided in the Solicitation inadequate because the District is not required to discount an incumbent's competitive advantage, unless the advantage was obtained unfairly. *See Trillian Techs., LLC*, CAB No. P-0954, 62 D.C. Reg. 6466, 6472 (Apr. 4, 2014); *see also Silver Spring Ambulance Serv., Inc.*, CAB No. P-218, 40 D.C. Reg. 4913, 4921 (Jan. 15, 1993) (the government is not required to attempt to equalize competition to compensate for contractor advantages unless there is evidence of preferential treatment or other improper action). Here, again, the protester has not shown that it was provided with inadequate information to prepare its proposal and it has certainly not shown that the incumbent contractor unlawfully obtained information that was not made available to the other offerors.

As a result, for the aforementioned reasons, we find that the District's protested responses to the subject questions, as part of the Solicitation's terms, included sufficient information to allow all offerors to compete intelligently and on an equal basis.

CONCLUSION

As discussed herein, we find that the District's responses to Questions No. 31, 33, 34, 36, 37, 38, 41, 42, 43, 44, and 45 were proper and deny and dismiss with prejudice the protest allegations against these Solicitation terms.

SO ORDERED.

DATED: March 23, 2017

/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

APPEAL OF:

ADVANCED INTEGRATED TECHNOLOGIES CORP.	)	
INNOVATIVE IT SOLUTIONS, INC.	)	CAB No. D-1428
	)	
Under Contract Nos. PO250324, PO270950	)	
PO271665, PO285280, etc.	)	

For the Appellants, Advanced Integrated Technologies, Corp. and Innovative IT Solutions, Inc.: Sushil Bansal, *pro se*. For the District of Columbia: Brett A. Baer, Esq., Office of the Attorney General.

Opinion by Administrative Judge Monica C. Parchment, with Chief Administrative Judge Marc D. Loud, Sr., concurring.

OPINION
Filing ID #60420913

The present appeal arises under contracts that were awarded to the Appellants, Advanced Integrated Technologies Corporation and Innovative IT Solutions, Incorporated to provide information technology support services for the District of Columbia Office of the Chief Technology Officer ("OCTO") and Department of Motor Vehicles ("DMV"). The contracts at issue were terminated after the Appellants' Chief Executive Officer was indicted for bribery and money laundering in connection with several of the Appellants' contracts with the District. The Appellants' initial complaint before the Board appealed the District's deemed denial of their claim seeking payment of outstanding invoices that were submitted to the District for the services that were performed by the Appellants prior to the termination of these contracts. At the hearing on the merits, however, the Appellants effectively withdrew their original claim for payment of outstanding invoices and pursued a new claim against the District for reimbursement of their actual out of pocket expenses which they allegedly incurred in rendering services to the District under the terminated contracts.

The District contends that this Board lacks jurisdiction over the Appellants' new claim for reimbursement of actual out of pocket expenses because this claim and the documents proffered as proof by the Appellants in pursuing this new claim, were never submitted to the contracting officer for a final decision before pursuing this action with our Board. The District also asserts that the Appellants failed to show entitlement to their actual out of pocket expenses by a preponderance of the evidence. Based upon the record, the Board dismisses this appeal for lack of jurisdiction due to the Appellants' failure to submit their new claim for reimbursement of their actual out of pocket expenses to the contracting officer for a final decision prior to filing the present action.

FINDINGS OF FACT

The Appellants' IT Support Services Contracts in Dispute

1. The present appeal arises under 25 purchase order contracts that were awarded to the Appellants, between April 2008 and February 2009, to provide information technology ("IT") support services to OCTO and DMV prior to the discovery of the Appellants' criminal conduct detailed herein.[1] (*See* Appellants Hr'g Ex. 96.)[2] Of these 25 purchase order contracts, 15 were awarded by the District where the Appellants acted as prime contractors and 10 were awarded by Optimal Solutions Technologies where the Appellants acted as subcontractors. (*See id.*) The parties have segregated these 25 disputed purchase order contracts according to the following groups: (1) OCTO Security Group, which involved OCTO's IT security division; (2) OCTO Non-Security Group; and (3) DMV. (*See* Joint Pretrial Statement ("JPS") 2-3; *see also* Hr'g Ex. 97B, at 64.)

2. In particular, the OCTO Security Group consists of the following purchase order contracts which are at issue in this appeal: (1) PO276952; (2) PO285280; (3) PO263947; (4) PO285499; and (5) PO285787. (JPS 2.) The OCTO Non-Security Group purchase order contracts also at issue in this matter include: (1) PO269660; (2) PO263001; (3) PO275705; (4) PO257593; (5) PO276724; (6) PO250324; (7) PO272224; (8) PO271665; (9) PO281083; (10) PO281648; (11) PO281997; (12) PO287700; (13) PO288171; (14) PO286673; (15) PO288685; (16) PO280932; and (17) PO270950. (JPS 3; *see also* Hr'g Ex. 96, at 27-64.) Finally, the DMV purchase order contracts at issue in this matter include: (1) PO248116; (2) PO275231; and (3) PO284926. (JPS 3; *see also* Hr'g Ex. 96, at 10-21.) For purposes of this Opinion, the Board shall collectively refer to these disputed purchase order contracts as the OCTO (Security and Non-Security Group) and DMV purchase orders at issue in this appeal.

The Appellants' Criminal Conduct in Connection with the District's Technology Contracts

3. By way of background, Advanced Integrated Technologies Corp. ("AITC") was a Certified Business Enterprise ("CBE") owned by Sushil Bansal ("Bansal"), who acted as its President and Chief Executive Officer ("CEO").[3] (Appeal File ("AF") Ex. 1, at DC56-57.) The majority of AITC's business, between March 2004 and February 2009, consisted of IT support services contracts with OCTO. (*Id.* at DC10, DC57.)

4. Appellant, Innovative IT Solutions, Inc. ("IITS") is a separate entity founded by Bansal and Sarosh Mir ("Mir"), a former AITC employee, in or about June 2007 for the purpose of increasing business opportunities without losing AITC's status as a CBE. (*Id*. at DC57) Mir

[1] The Board notes that although the record does not include specific award dates for all of the disputed purchase orders, these purchase orders were awarded with performance periods beginning between April 2008 and February 2009. (*See* Hr'g Ex. 96.)

[2] The Appellants were the only party to supply the Hearing Exhibits referenced herein.

[3] A CBE is a business that has been certified by the District's Department of Small and Local Business Development ("DSLBD") as being a small business, resident owned or operated, local or disadvantaged business enterprise. The District applies preferences in evaluating bids or proposals from businesses that have been certified by DSLBD. *See* Small and Certified Business Enterprise Development and Assistance Act of 2005, D.C. Law 16-33 (codified as amended at D.C. CODE § 2-218.01 *et seq.* (2014)).

incorporated IITS and acted as its president, while Bansal acted as its CEO. (*Id.*; Hr'g Tr. vol.1, 37:22-38:7, Oct. 23, 2012.)

5. Both Bansal and AITC became involved in a bribery and fraud scheme in connection with several OCTO IT support services contracts. During Bansal's and AITC's ultimate criminal proceedings related to this scheme, and as part of a plea agreement with the District's United States Attorney's Office, Bansal provided a detailed description regarding the inception of this criminal conduct in connection with AITC's OCTO contracts. (*See* AF Ex. 1, at DC56-78 "Statement of Offense".)

6. Specifically, by way of background, on August 29 and September 2, 2005, the District awarded two purchase orders to AITC: PO161602 and PO162000. (*Id.* at DC58.)[4] However, because the purchase orders were awarded six months after the initial requisitions, the security engineers that AITC had originally proposed to perform this work were engaged in other projects. (*Id.* at DC58-59.) As a result, AITC proposed substitute personnel to perform the work. (*Id*. at DC59.) Bansal represented that two OCTO employees, Yusef Acar ("Acar"), a former IT Security Specialist and the former Acting Chief Security Officer of OCTO, and Farrukh Awan, rejected these otherwise qualified personnel offered by AITC and instructed Bansal that they would not accept any of AITC's substitute personnel (and would cancel the order) unless Bansal paid them money. (*Id*. at DC57-59.) Bansal agreed to this request.

7. This bribery scheme continued through early 2009 and included various AITC and IITS contracts, including some of the contracts that are at issue in this appeal. (*Id.* at DC60-62.) The bribes were paid from the profit generated by AITC under the subject contracts. (*Id.* at DC62.)

8. Bansal further admitted that he and Acar fraudulently billed the District through ghost employee schemes. Between June 2007 and May 2008, three AITC employees provided services under purchase orders which had already expired. (*Id.* at DC64.) When the District refused to pay AITC for services rendered under the expired purchase orders, Acar advised Bansal to recover the money allegedly owed by submitting false invoices under the purchase orders that AITC was currently performing. (*Id.* at DC65.) As part of the ghost employee scheme, Bansal would submit timesheets for fake employees to Acar, which Acar would approve. (*Id.* at DC66, DC69-70.) Bansal would then submit the falsified timesheets to the District for payment. (*Id.*)

9. Additionally, Bansal, Acar and Mir submitted inflated invoices to OCTO for hours worked by the Appellants' subcontractors. (*Id.* at DC70-71.) Bansal and Mir would change the weekly timesheets submitted by the subcontractors from the 40 hours actually worked to 50 hours and then would cut the signatures from the original timesheets and affix them on the new falsified timesheets. (*Id.* at DC71.)

[4] The specific background details related to these contracts were provided by Bansal as part of his plea agreement and as reflected in the Statement of Offense that was prepared by the United States Attorney's Office.

10. Bansal and Mir would then submit invoices to the District based on the falsified time sheets. (*Id.*) Bansal and Mir falsified time sheets under various contracts, including PO263947 and PO276952, both of which are at issue in this appeal. (*Id.* at DC71-72.)

11. The subcontractors whose timesheets were falsified had no knowledge of Bansal's and Mir's inflation of their hours. (*Id.* at DC71.) The subcontractors were only paid for the number of hours that they actually worked. (*Id.*; Hr'g Tr. vol. 2, 580:16-22, Oct. 25, 2012.)

12. In sum, the Appellants' fraudulent actions caused a loss to the District in the amount of $886,312.50. (AF Ex. 1, at DC3.)

13. The Appellants also obtained illegal access to the District's Procurement Automated Support System ("PASS") for tracking contracts, issuing purchase orders, and approving invoices. (*Id.* at DC74.) While Acar had access to PASS as an OCTO employee, Bansal was also able to access PASS after illegally obtaining login information from Tawanna Sellmon, a Program Financial Manager at OCTO, sometime in 2008. (*Id.* at DC57-58, DC74.) Accessing PASS allowed Bansal and AITC to view confidential procurement information. (*Id.* at DC74.) On several occasions, Bansal illegally accessed PASS using Sellmon's user ID from a computer at Acar's house. (*Id.*) In or around December 2008, Bansal approached Sellmon at OCTO's offices and gave her $2,000.00 remarking that he wanted to thank her for his company's good year. (*Id.* at DC75.) Bansal also gave Sellmon gift cards valued between $25.00 and $100.00 on various occasions. (*Id.*)

14. Ultimately, Bansal was arrested in March 2009 on charges of bribery and money laundering arising from the Appellants' contracts with the District. (*See* Hr'g Ex. 97, at 1.) On or about March 25, 2010, Bansal, on behalf of AITC, entered into a plea agreement with the District's United States Attorney's Office. (AF Ex. 2, at DC117.) As part of the plea agreement, AITC and Bansal pled guilty to (1) bribery of a public official and (2) engaging in monetary transactions in property derived from specified unlawful activity. (*Id.* at 110.)

15. Bansal and AITC were subsequently convicted on August 18, 2010, for the aforementioned crimes. (AF Ex. 3, at DC118.) The Court ordered restitution to the District in the amount of $844,765.50. (*Id.* at DC120.) Bansal was adjudged to be jointly and severally liable for $168,647.00, and Mir was adjudged to be jointly and severally liable for $124,340.00. (*Id.* at DC121-22.) For his involvement, Acar was adjudged to be jointly and severally liable for $551,778.50 in restitution to the District. (*Id.* at DC122.)

16. AITC was subsequently debarred, following a finding by the District's Chief Procurement Officer ("CPO") that AITC was not presently responsible. (AF Ex. 1, at DC91-92.) IITS was not indicted for or convicted of any criminal act, however, like AITC, IITS was debarred by the District following a finding by the District's CPO that IITS was not presently responsible. (*Id.* at DC93-94.)

Contract Termination & Appellants' Attempts to Collect Payment from the District

17. Following Bansal's arrest for bribery and money laundering, the District terminated all of the OCTO and DMV purchase order contracts in dispute in this matter with the Appellants for the government's convenience. (*See* Hr'g Ex. 97, at 1.) The parties agree that all purchase orders currently at issue, and as discussed *supra*, *see* ¶ 2, were terminated by the District in March 2009. (JPS 6, Stipulation of Fact ("SoF") ¶ 1.)[5]

18. Following the District's termination of these purchase orders, Bansal attempted to recover payment for services AITC and IITS rendered to OCTO and DMV before their contracts were terminated for convenience. (*See* Hr'g Ex. 97B, at 63-88.) By letter dated May 28, 2009, the Appellants contacted the District's General Counsel for the Office of Contracting and Procurement to request that the District review and audit numerous outstanding invoices that had been issued by the Appellants for services provided to OCTO and DMV in the total amount of approximately $900,000.00. (*Id.* at 77-79.) More specifically, the Appellants sought payment for outstanding invoices for contracts where they acted as prime contractors to the District, in the amount of $533,000.00, as well as invoices where they performed services in support of the District but as subcontractors to Optimal Solutions Technologies in the amount of $367,000.00. (*Id.* at 77.)

The Appellants' Claim

19. Subsequently, on January 5, 2011, the Appellants submitted a claim to contracting officers ("COs") Karen Hubbard, Kenneth Marrow, and John P. Varghese seeking the payment of their outstanding invoices for services that the Appellants alleged they legitimately performed under the terminated OCTO and DMV purchase order contracts. (*See* Hr'g Exs. 97B-D.)[6] Specifically, the Appellants claimed entitlement to payment of unpaid invoices in the amounts of: (1) $72,230.00 for services provided to the DMV; (2) $619,649.72 for services provided to the OCTO Non-Security Group; and (3) $212,512.80 for services provided to the OCTO Security Group. (*See* Hr'g Ex. 97B, at 12-15; Hr'g Ex. 97C, at 91-96; Hr'g Ex. 97D, at 287-91.) Thus, the Appellants demanded payment from the District for outstanding invoices totaling $904,392.52.

20. In support of their January 5, 2011, claim to the District, the Appellants submitted copies of the outstanding invoices incorporating the negotiated hourly rates with the District for which they were seeking payment, as well as copies of timesheets which they claimed supported the hours billed to the District within these invoices. (Hr'g Ex. 97B, at 20-61; Hr'g Ex. 97C, at 107-250; Hr'g Ex. 97D, at 303-56.) This claim also included copies of the correspondence between the Appellants and District regarding payment of these outstanding invoices before the claim was filed on January 5, 2011. (Hr'g Ex. 97B, at 63-79; Hr'g Ex. 97C, at 256-75; Hr'g Ex. 97D, at 362-81.)

[5] Although the record does not include termination notices for all of the purchase order contracts that are in dispute in this appeal, the parties, nonetheless, agree that all of the disputed purchase orders were terminated for the convenience of the District in March 2009, following Bansal's arrest. (JPS 6, SoF ¶ 1.)

[6] The Board notes that although the DMV and OCTO Non-Security Group claim letters are dated January 5, 2010, the parties agree that the Appellants submitted their claim on January 5, 2011. (JPS 6, SoF ¶ 3.)

21. The COs failed to issue a written final decision within 90 days after the Appellants submitted their January 5, 2011, claim.[7] Accordingly, the Appellants appealed this deemed denial of their claim to the Board on May 13, 2011. (*See* Notice of Appeal.)

22. Consistent with their January 5, 2011, claim submission to the COs, the Appellants' Complaint to this Board in this matter alleged entitlement to the immediate payment of unpaid and outstanding invoices for services rendered to the District in the amounts of: (1) $72,230.00 (DMV Invoices); (2) $619,649.72 (OCTO Non-Security Group Invoices); and (3) $212,512.80 (OCTO Security Group Invoices). (*See* Compl. 4-6.) In total, the Complaint, again, alleged that the Appellants were entitled to $904,392.52 in payment from the District for these unpaid invoices. (*Id.* at 7.)

The New Claim

23. At the two-day hearing conducted by the Board in this matter, on October 23 and October 25, 2012, the Appellants effectively abandoned their original claim for payment of outstanding invoices in the amount of $904,392.52. Instead, the Appellants pursued a claim against the District at the hearing seeking reimbursement of their actual out of pocket costs (i.e., their claimed expenses) incurred under the same terminated OCTO (Security Group & Non-Security Group) and DMV purchase order contracts prior to their termination by the District.[8] (Hr'g Tr. vol. 1, 10:12-11:5.) In particular, the Appellants claimed entitlement to reimbursement of salaries and wages actually paid to their employees and contractors, as well as reimbursement of tax payments made to agencies on behalf of these same individuals under the terminated contracts.[9]

24. The Appellants specifically acknowledged to the Board at the hearing that their new claim for actual out of pocket expenses was different than the original claim that was submitted to the COs whereby they sought payment of all outstanding invoices which they had submitted to the District for work that was performed prior to the termination of the contracts. (Hr'g Tr. vol. 1, 32:3-33:6.)

25. In this regard, the Appellants also changed the damages that they were seeking from the District from $904,392.50 in unpaid invoices, to the substantially lower amount of $352,397.37 for reimbursement of the actual out of pocket expenses that were allegedly incurred while providing IT services to the District under the terminated purchase order contracts. (Appellants' Post Hr'g Br. 3.)

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[7] At the time the Appellants filed their claim, the statutory period for a deemed denial was 90 days. Former D.C. CODE § 2-308.05(c)-(d) (2001). This prior statutory period of 90 days for our 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) (2011).

[8] The Appellants first advised the Board of their intention to revise their claim to seek actual out of pocket expenses incurred by virtue of the parties' October 5, 2012, Joint Pretrial Statement. The parties seemingly agreed that the Appellants could only seek recovery for reimbursement of the actual out of pocket expenses incurred under the terminated OCTO and DMV contracts in accordance with D.C. Code § 2-359.03(b). (Appellants' Post Hr'g Br. 2.)

[9] The new claim presented by the Appellants at the hearing for actual out of pocket expenses related to their performance under the same OCTO (Non-Security Group and Security Group) and DMV contracts that were the basis of the original January 5, 2011, claim for payment of outstanding invoices, including the underlying purchase orders, timesheets, and invoices.

26. In further support of the Appellants' new claim for the out of pocket expenses, which were allegedly incurred in performing work on behalf of the District, the Appellants proffered additional documentation to the Board at the hearing including company bank statements and cancelled checks for payments which were allegedly made to the Appellants' contractors, employees and taxing agencies that were not previously included as part of the original claim that was submitted to the COs. (*See* Hr'g Exs. 5-6; *see also* Hr'g Tr. vol. 1, 41:16-42:2, 43:20-44:19.) The Appellants also produced internally generated business reports and payroll records in an effort to show the actual out of pocket payments and expenses that they incurred in performing the terminated contracts to justify the Appellants' claimed damages. (*See* Hr'g Exs. 3-4; *see also* Hr'g Tr. vol. 1, 43:20-44:19, 62:11-17; Hr'g Tr. vol. 2, 475:1-476:22.)

District's Request for Dismissal

27. Based upon the Appellants' submission of this new claim and the evidence presented in support thereof, the District seeks dismissal of this matter arguing that the Board lacks jurisdiction over the Appellants' new claim because it is materially different than the claim that was submitted to the COs for a final decision. (District's Post Hr'g Br. 9-10.)[10] In response, the Appellants maintain that the present new claim for reimbursement of their actual out of pocket expenses is encompassed in the claim that was presented to the COs. (*See* Appellants' Opp'n to District's Mot. to Dismiss 1-2.)

JURISDICTION

The Board exercises jurisdiction over the present matter based upon the COs deemed denial of the Appellants' claim pursuant to D.C. Code § 2-308.05 (c)-(d) (repealed Apr. 8, 2011). *See Keystone Plus Constr. Corp.*, CAB No. D-1358, 62 D.C. Reg. 4262, 4266 (Jan. 27, 2012); *Verifone, Inc.*, CAB No. D-1473, 2013 WL 3490940 n.1 (May 6, 2013). In this regard, our governing statute has always required a contractor to first submit its claim to a contracting officer for a final decision before appealing the matter to this Board. Former D.C. CODE § 2-308.05(a).[11]

As previously stated, the District challenges the Board's jurisdiction over the Appellants' new claim for reimbursement of the actual out of pocket expenses which they allegedly incurred in performance of the subject contracts. The District argues that this new claim is materially different from the original claim that the Appellants submitted to the COs on January 5, 2011, for a final decision.

[10] The District initially filed a Motion to Dismiss on October 18, 2012, similarly arguing that the new claim that the Appellants included in the Joint Pretrial Statement was materially different than the claim that was presented to the COs. (Mot. to Dismiss 1-5.)

[11] The Procurement Practices Reform Act of 2010 ("PPRA") repealed the District of Columbia Procurement Practices Act of 1985 ("PPA"), as amended by the Procurement Reform Amendment Act of 1996 and codified at D.C. CODE § 301.01, *et seq.*, and amended and recodified the District's procurement statutes at D.C. CODE § 2-351.01, *et seq.*, effective April 8, 2011. Procurement Practices Reform Act of 2010, D.C. Law. No. 18-371, 58 D.C. Reg. 1185 (Feb. 11, 2011). However, because the instant appeal was filed prior to the enactment of the PPRA, the PPA, as amended, establishes the Board's jurisdiction.

The general rule is that the proper scope of an appeal to this Board is based upon the nature of the original claim that is presented to the contracting officer, the contracting officer's decision in response to the claim, and the contractor's subsequent appeal. *Keystone Plus Constr. Corp.*, CAB No. D-1358, 62 D.C. Reg. at 4268. Although the Board's jurisdiction arises from a contractor's claim, a contractor's claim is not unalterable and set in stone as presented to the contracting officer. *See Diversified Marine Tech., Inc.*, DOTCAB Nos. 2455, *et al.*, 93-2 BCA ¶ 25,719 (Jan. 25, 1993). Thus, we have recognized that courts and boards will retain jurisdiction over a claim even though the contractor increases the dollar amount of the claim, offers a different legal theory, and/or asserts additional factual allegations in support of the claim that were not presented to the contracting officer as long as the claim is based on the same set of operative facts. *Keystone Plus Constr. Corp.*, CAB No. D-1358, 62 D.C. Reg. at 4268.

However, where the claim before the Board does not arise from the same set of operative facts as the claim submitted to the contracting officer such that the government has no prior notice of the nature and amount of the claim it will be considered a "new claim" and beyond the Board's jurisdiction. *Id.* at 4268-69. The requirement that the claim submission provide adequate notice of the basis and amount of the claim allows the contracting officer to receive and pass judgment on the contractor's entire claim. *Ketchikan Indian Cmty.*, CBCA No. 1053-ISDA, 13 BCA ¶ 35,436 (Sept. 4, 2013). Therefore, courts also evaluate whether the facts on which the revised claim is based differ from the factual basis of the claim that was submitted to the contracting officer. *Id.* Notably, where differing elements of proof exists to recover on the claim presented to the Board than the claim presented to the contracting officer, courts find that the revised claim is based on different facts than those presented to the contracting officer. *See Consol. Def. Corp.*, ASBCA No. 52315, 03-1 BCA ¶ 32,099 (Nov. 21, 2002). Furthermore, courts have declined to exercise jurisdiction over a revised claim where the revised claim is based on facts and data that existed at the time the initial claim was filed but not submitted to the contracting officer. *Wheeler Logging, Inc. v. U.S. Dep't of Agric.*, CBCA No. 97, 08-2 BCA ¶ 33,984 (Oct. 10, 2008).

Based upon the foregoing legal standard, we find that the new claim that was submitted by the Appellants at the hearing in this matter is not based on the same set of operative facts as the claim that was submitted to the COs for a final decision. In particular, the original claim did not provide the COs with adequate notice of the basis and amount of the claim that was presented to the Board at the hearing. Specifically, the original claim alleged that the Appellants were entitled to receive $904,392.50 in payment from the District for outstanding invoices for services that were claimed to be legitimately rendered and billed to the District under the OCTO (Security Group and Non-Security Group) and DMV contracts. (Findings of Fact ("FF") 19.) In support of this claim, the Appellants provided the District with copies of employee/contractor timesheets for hours worked during the course of these contracts, along with invoices which charged the District for this time at the hourly rates that the Appellants had negotiated with the District. (FF 20.) These outstanding invoice amounts also included profits sought by the Appellants in connection with these services. (*See* Appellants' Opp'n to Mot. to Dismiss 1-2.)

On the other hand, the new claim which the Appellants pursued at the hearing on the merits was no longer a request for payment of outstanding invoiced amounts. This new request for relief was based upon an entirely different legal theory, namely, that the Appellants were only entitled to reimbursement of their actual out of pocket expenses that were incurred prior to

the termination of the subject OCTO and DMV contracts, in accordance with D.C. Code § 2-359.03 (2011).[12] (FF 23-24.) In pursuing this new claim at the hearing on the merits in this case for out of pocket expenses allegedly incurred, the Appellants proffered documentary evidence of incurred expenses that the Appellants testified was created and maintained by the Appellants' CEO during the normal course of business. (Hr'g Tr. vol. 1, 41:16-19, 43:20-44:19.) However, this evidence was never submitted to the COs as part of the underlying claim.

This new evidence included copies of employee and contractor pay stubs, cleared checks paid from the Appellants' bank account, bank statements evidencing expenses paid by the Appellants to employees and contractors, as well as evidence of payments made by the Appellants to taxing agencies as part of the Appellants' payroll process. (FF 26.) In addition, the Appellants also proffered copies of internally generated accounts receivable and expense reports for consideration by the Board as further evidence to establish their out of pocket expenses. (*Id.*) Furthermore, the changes in the Appellants' claim for recovery also resulted in a significant reduction in the amount of damages that the Appellants were seeking to recover. Specifically, although the claim that was originally presented to the COs requested $904,392.50 for unpaid invoices, the new claim sought payment in the significantly lower amount of $352,397.37, for reimbursement of the Appellants' out of pocket expenses that were incurred before the subject contracts were terminated. (FF 25.)

As a result of the foregoing factors, the Board finds that the operative facts that pertain to the Appellants' new claim are significantly different than those underlying the original claim that was presented to the COs. The original claim to the COs sought recovery based upon invoiced amounts to the District that had not been paid where there was alleged proof that the Appellants' contractors/employees had worked hours at the rates negotiated with the District. (FF 19-20.) The original claim offered alleged proof of these damages in the form of copies of invoices issued by the Appellants that had not been paid by the District, and copies of the timesheets showing that particular individuals had worked the hours stated in these invoices. (FF 20.) No evidence of out of pocket expenses was presented with the original claim.

However, the Appellants' new claim under D.C. Code § 2-359.03 is reliant upon different proof, and operative facts, showing the Appellants' out of pocket expenses distinct from the issue of how much had been invoiced to the District by the Appellants. Indeed, while the Appellants' original claim relied upon only invoices and timesheets to establish entitlement to payment of outstanding invoices, the Appellants' new claim before the Board for out of pocket expenses relies upon different evidence not presented to the COs including bank statements, pay stubs, payments made to taxing agencies, and internal accounting and expense reports to demonstrate that the Appellants had incurred out of pocket expenses in the substantially lower amount of $352,397.37. (FF 25-26.) Although the Appellants contend that the new claim was encompassed in the original claim, there was nothing in the original claim to put the COs on notice that the Appellants were seeking repayment of their actual out of pocket contract expenses as their basis for legal recovery in the claim. No evidence of banking, payroll or other expense

[12] Pursuant to D.C. Code § 2-359.03, if the District terminates a contract as a result of the contractor's conviction for a crime in connection with any work done or payment made under the contract, the contractor is eligible to receive only the actual costs of the work performed prior to the date of termination. This law superseded D.C. Code § 2-303.18 shortly before this action was filed with the Board. D.C. CODE § 2-303.18 (2001) (repealed Apr. 8, 2011).

records was presented to the COs in the original claim for consideration or verification in rendering a final decision. (*See* FF 20.)

Consequently, the Appellants' new claim significantly reduced the initial claim amount, was based on distinct supporting data from the original claim (that according to the Appellants existed at the time the initial claim was filed), and ultimately was not the same claim as the one they submitted to the COs. Thus, the operative facts that would be required by the COs to evaluate the Appellants' new claim for actual out of pocket expenses incurred are different than the operative facts that were presented to the COs to evaluate the Appellants' original claim for payment of outstanding invoices.

Accordingly, the Board finds that the new claim currently before the Board for actual out of pocket expenses arising under the subject terminated contracts was never submitted to the COs for a final decision prior to filing the present action, which precludes our jurisdiction over this matter.

CONCLUSION

Based upon the matters discussed herein, the Board finds that it lacks jurisdiction over the Appellants' new claim for reimbursement of their actual out of pocket expenses incurred under the subject terminated OCTO and DMV contracts. The new claim was never submitted to the contracting officers for a final decision prior to filing this action. Thus, this appeal is dismissed without prejudice for lack of jurisdiction.[13]

SO ORDERED.

DATED: April 4, 2017

/s/ Monica C. Parchment
MONICA C. PARCHMENT
Administrative Judge

CONCURRING:

/s/ Marc D. Loud, Sr.
MARC D. LOUD, SR.
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[13] Further, on September 11, 2014, counsel of record for the Appellants filed a Motion to Withdraw as counsel in this matter, which the Appellants did not oppose. (*See* Mot. to Withdraw.) Accordingly, pursuant to Board Rule 106.6, the Board hereby grants the motion to withdraw as counsel of record in this matter.

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

APPEAL OF:

TIMELY PERFORMANCE CARE, INC.	)	
	)	CAB No. D-1492
Under Contract Nos. DCJM-2012-H-0004-01	)	
DCJM-2009-H-0020	)	

ORDER GRANTING APPELLEE'S MOTION TO DISMISS

Filing ID 60560781

Before the Board presently is the District's motion to dismiss Timely Performance Care, Inc.'s (TPC or Appellant) appeal of the D.C. Department of Disability Services' (District or DDS) denial of its claim for approximately $20 million in damages for alleged contract breach regarding the residential placement of individuals with disabilities.[1] In its various theories for relief, the Appellant has advanced actions sounding in tort, equity, discrimination, and contract. In its motion to dismiss, the District argues that (1) Appellant fails to state a claim upon which relief can be granted; (2) the Board lacks jurisdiction; (3) Appellant's allegations are untimely; (4) Appellant's claims are allegedly precluded by the doctrines of *res judicata* and collateral estoppel; and (5) Appellant lacks standing because it allegedly cannot show an injury-in-fact that is fairly traceable to the District. (*See* Appellee District of Columbia's Mot. to Dismiss or in the Alt. for Summ. J. in Lieu of an Answer ("District's Mot. to Dismiss" at 12-21.)

Upon review of the District' motion to dismiss, the Appellant's opposition thereto, both parties' supplemental briefs, and the entire record herein, the Board hereby dismisses the instant matter. The Board finds that the agreement entered into by the parties is unenforceable because there is no contract minimum, and therefore no consideration. Moreover, the District never placed a purchase or task order under the agreement, thereby precluding its liability. Under these circumstances, the District is entitled to dismissal. We discuss these matters further herein.

BACKGROUND

The pertinent background to this case is as follows. On May 16, 2012, Appellant executed a Human Care Agreement with the DDS pursuant to a solicitation which had been issued on February 24, 2012 (Contract No. DCJM-2012-H-0004-01; the "2012 agreement"). (*See generally* AF Ex. 4, at Bates 83-130.) At the time, the Appellant had been preliminarily qualified to provide residential habilitation, supported living, host home, and other residential services for District of Columbia persons with intellectual and developmental disabilities. (AF Ex. 6, at Bates 141.) The preliminary qualification occurred under a 2009 Solicitation which was not a contract, did not result in a contract with the Appellant, and as to which the District did not

[1] The District's motion is officially titled "Appellee District of Columbia's Motion To Dismiss Or In The Alternative For Summary Judgment In Lieu of an Answer," and was filed on July 30, 2014 ("District's motion to dismiss"), and was supplemented on May 10, 2016, ("District's Supplemental Brief").

place a purchase or task order with Appellant (per the record before the Board). (AF Ex. 2, at Bates 8.)

The 2012 agreement had a term of approximately 4.5 months, ending September 30, 2012, and stated that its estimated total value was $56,053.30. (*See* AF Ex. 4, at Bates 83.) Notably, the 2012 agreement provided that the District was not obligated to purchase any quantity of goods or services from Appellant unless and until the District issued a purchase or task order:

> **D.2 Agreement Not a Commitment of Funds or Commitment to Purchase**
> This Human Care Agreement is not a commitment by the District to purchase any quantity of a particular good or service covered under this Human Care Agreement from the Provider [i.e., Appellant]. The District shall be obligated only to the extent that authorized purchases are actually made by funded purchase orders or task orders pursuant to this Human Care Agreement.
> . . .
> **E.3.1**
> The Provider [i.e., Appellant] **shall not** provide services or treatment under this Agreement unless the Provider is in actual receipt of a purchase order or task order for the period of the service or treatment that is signed by a Contracting Officer.

(*Id.*, at Bates 104, 107 (emphasis original).)[2]

The record is undisputed that DDS never issued any purchase or task orders to Appellant pursuant to the 2012 agreement (and Appellant has conceded as much). (*See* Appellant's Supplemental Br. at (unnumbered) 3 (stating that no task order was issued).) Nonetheless, the Appellant filed a claim with the contracting officer on October 3, 2013, seeking $20,246,000 for "claims [that] . . . may include, but are not limited to breach of contract, negligence, interference with contracts, injurious falsehood, interference with economic relationship, civil conspiracy, discrimination, deceit, defamation, unfair competition[,] and violation of ethical standards." (AF Ex. 7, at Bates 144.)

The Appellant's October 3 claim letter outlines allegations which this Board has divided into three categories for purposes of clarity. First, the Appellant alleges in its first three (unnumbered) paragraphs that DDS wrote two letters to a District elected official dated October 5 and October 26, 2012, respectively, that (1) "falsely represented that TPC had never been selected by any DDS consumer for supported living services," (2) stated "TPC was not an approved residential resource," (3) stated "TPC entered into an apartment rental agreement for a DDS consumer before she [i.e., TPC] was in fact selected knowing all these statements to be untrue," (4) defamed "TPC by asserting that TPC had given a bribe to one of DDS' consumer clients and that TPC's business practices, acumen and personnel were inferior" and (5) stated

[2] The language included in section D.2 must be included in all District human care agreements. *See* D.C. Code § 2-354.06(h)(1), (2) (2011).

"TPC had mistreated a consumer client [and] that no DDS client had ever chosen TPC for supported living services." (AF Ex. 7, at Bates 144-145.)

As to the above set of allegations, the Appellant contends that the DDS statements were "false," "defamatory," "published … without privilege to third parties," and "negligent." The Appellant also states that DDS "made such allegations … to deny TPS the opportunity to meaningful [sic] participate in the program … and to unfairly benefit other providers to the detriment of claimants . . . " (*See* AF Ex. 7, at Bates 145.)

The Appellant's second category of allegations in the October 3 claim letter is found in (unnumbered) paragraph four, and contends that DDS and the Appellant executed a Human Care Services Agreement on May 16, 2012, on which an "individualized task order for service to TPC" had been issued by DDS on February 24, 2012. (*See* AF Ex. 7, at Bates 145.) As to such allegation, the Appellant contends it executed a lease agreement on "September 8, 2012" to perform services under the May 16 agreement. (*Id.*) The Appellant then alleges that DDS "induced TPC to enter into this agreement then knowing that it had no intention of implementing said agreement while willfully failing to disclose material information pertaining to the matter," and that DDS diverted to another provider "services for which TPC had been selected by a DDS residential client." (*Id*.)

The Appellant's final category of allegations in the October 3 claim letter is found in (unnumbered) paragraphs 5-7, and alleges "negligence," "interference with prospective advantage," "injurious falsehood," "breach of the standard of care," violations of "due process," "arbitrary, capricious, unfair and harmful procurement process," "loss of contract awards and business opportunities," "financial loss," "emotional distress," "mental anguish," and "humiliation and embarrassment." (*See* AF Ex. 7, at Bates 145-146.) The specific allegations listed in support of Appellant's third category of contentions are that DDS failed "to comply with procedural requirements set forth in their regulations by":

(a) failing to provide [Appellant] with a resource specialist in violation of [DDS'] policy and procedure until June 2012;
(b) failing to appoint [Appellant] a contracting officer until September 2012;
(c) failing to assign a training officer until September 2012;
(d) failing to include [Appellant] on the DDS provider mailing or referral lists until June 2012;
(e) diverting beneficiaries to other providers not qualified and/or in violation of DDS policy[,] even though [Appellant] had been chosen as their provide [sic];. [sic]
(f) disregarding and/or refusing [Appellant's] request to provide needed and critical beneficiary service;
(g) failing to compensate and reimburse [Appellant] for expenses and services provided to beneficiaries;
(h) embarrassing [Appellant] at a provider meeting by publicly stating that it was not a qualified provider when in fact it was so qualified;
(i) refusing to allow [Appellant] to make presentation [sic] at DDS provider events;

(j) failing to inspect [Appellant] host, residential, and respite homes;
(k) refusing to perform the HCA contracts in good faith.

(*Id*.)

The Appellant's claim was denied by the DDS chief procurement officer on January 31, 2014, and timely appealed to the Board on April 25, 2014. (*See* AF Ex. 1, at Bates 2-6.) (*See* Notice of Appeal at 1.)[3]

DISCUSSION

The Board exercises jurisdiction over contract appeals pursuant to D.C. Code § 2-360.03(a)(2), which confers our jurisdiction over "[a]ny appeal by a contractor from a final decision by the contracting officer on a claim by a contractor, when the claim arises under or relates to a contract." D.C. CODE § 2-360.03(a)(2) (2011). The matter is before the Board on the District's motion to dismiss, the Appellant's opposition thereto, and the entire underlying record.

The primary issue presented herein is the enforceability of the agreement entered into by the District and Appellant, where the agreement lacks a guaranteed minimum quantity. We have reviewed the record, and the applicable case law and regulatory provisions, and conclude that the contract entered into instantly by the parties is not an enforceable indefinite quantity/indefinite delivery contract (ID/IQ), and thus is only enforceable to the extent that a purchase or task order was issued by the District against the contract, and performed by the Appellant. Since the record is undisputed that the District never issued a purchase or task order instantly, we grant the District's motion to dismiss.

The general rule is that a guaranteed minimum is necessary consideration to create an ID/IQ contract. *See ASW Assocs., Inc. v. Envt'l Prot. Agency*, CBCA 2326, 2017 WL 1165790 (Mar. 27, 2017); *see also Coyle's Pest Control, Inc. v. Cuomo*, 154 F.3d 1302, 1306 (Fed. Cir. 1998) (for an indefinite quantity contract to be enforceable, it must include language requiring a minimum quantity order); *see also* D.C. MUN. REGS. tit. 27, § 2416.10 ("An indefinite-quantity contract shall require the District to order and the contractor to furnish at least the stated minimum quantity of goods or services."); D.C. MUN. REGS. tit. 27, § 2499 (defining an indefinite quantity contract as one that "requires the District to order and the contractor to furnish at least the stated minimum quantity of goods or services"). Absent a minimum quantity order, the courts have held that the contractor is entitled to payment only for services ordered by the agency and provided by the contractor. *ASW*, 2017 WL 1165790, (citing *Coyle's*, *supra*.)

The case of *Coyle's* is instructive as to the instant matter. In *Coyle's*, the contractor submitted a $1,525,170.74 claim to a HUD contracting officer asserting that the agency breached a contract for termite inspection and subterranean treatment of HUD-owned properties in Texas. *Coyle's*, 154 F.3d, 1303, 1304. The contract at issue in *Coyle's* referred to itself as a "fixed unit rate indefinite quantity contract" although there was express minimum quantities clause in the contract. *Coyle's* at 1303. The contractor, however, alleged that the parties had a firm-fixed

[3] When citing documents that do not include page numbers (*see, e.g.*, Notice of Appeal; Compl.), or that contain inconsistent page numbers, the Board has referenced the page numbers assigned by Adobe Reader.

price agreement which entitled it to the difference between the initial contract value ($1,930,000) and the amount HUD actually paid during the base contract year ($404,829.26). *Coyle's*, 154 F.3d at 1304. The contracting officer rejected the contractor's claim, and on appeal the HUDBCA found that the contract was unenforceable as an ID/IQ or requirements contract and granted the agency's motion for summary judgment. *Id.*

On appeal, the Federal Circuit affirmed the Board. The pertinent part of the court's analysis concluded that "this court cannot read this agreement as an indefinite quantity contract because it lacks a minimum quantity term." *Coyle's*, 154 F.3d at 1306. The court reasoned that the contract was therefore unenforceable because the absence of a specific quantity precluded the existence of contract consideration and mutuality. *Id*.

The Civilian Board of Contract Appeals' recent decision in *ASW Associates, Inc.* is also instructive in this regard. In *ASW*, a contractor asserting various theories for relief, including that its agreement with the EPA was an ID/IQ contract, claimed that it was entitled to damages because the government had allegedly "misrepresented the scope and quantity of work to be performed" under a lead soil remediation agreement. *ASW*, 2017 WL 1165790. On appeal, the Board found, in part, that the agreement was not enforceable because it lacked a guaranteed minimum dollar amount or quantity—i.e., "[c]onsideration [was] lacking." *See id*. (citing *Coyle's*, 154 F.3d 1302, 1304) (citations omitted). In light of this finding, the Board concluded that the contractor was only entitled to payment for the services actually purchased by the government. *See id*.

In the instant case, neither party contends that the instant contract is a firm-fixed price contract. (*See, e.g.*, District's Mot. to Dismiss at 1-8; Appellant's Compl. at 1-9.) Moreover, the Appellant has conceded that no purchase order was ever issued.[4] The undisputed record before the Board provides that the 2012 agreement explicitly stated, "[t]his Human Care Agreement is not a commitment by the District to purchase any quantity of a particular good or service covered under this Human Care Agreement from the Provider." (AF Ex. 4, at Bates 103.) Thus, the parties' 2012 agreement cannot be characterized as an indefinite quantity contract because consideration (in the form of a minimum order requirement) is lacking. *See ASW*, 2017 WL 1165790; *see also* D.C. MUN. REGS. tit. 27, §§ 2416.10, 2499 (stating that an indefinite quantity contract shall include a minimum order value). Under these circumstances, the 2012 agreement between the parties (as to which no purchase or task orders were ever issued is unenforceable as an ID/IQ contract, and the District is entitled to summary judgment.[5] Apart from the unenforceable 2012 agreement, there is no record of any other human care agreement between the parties.

CONCLUSION

[4] (*See* Appellant's Supplemental Br. at (unnumbered) 3.)

[5] Because we have concluded that the parties' instant agreement is not enforceable absent a District purchase or task order, we do not reach the question of the Board's jurisdiction over Appellant's non-contract claims. We note, however, that most of Appellant's allegations sounded in tort or other non-contract actions, and our Board only has jurisdiction over contract claims. *See Claim of Chief Procurement Officer*, CAB No. D-1182, 50 D.C. Reg. 7465 (Nov. 29, 2002).

For the reasons stated above, the Board grants the District's motion to dismiss with prejudice.

SO ORDERED.

Date: May 5, 2017

/s/ Marc D. Loud, Sr.
MARC D. LOUD, SR.
Chief Administrative Judge

CONCURRING:

/s/ Monica C. Parchment
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GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

FLIPPO CONSTRUCTION COMPANY, INC.)
) CAB No. D-1422
)
Under Contract No. POKA-2003-B-0066-FH)

For the Appellant, Flippo Construction Company, Incorporated: Gina L. Schaecher, Esq., Joseph H. Kasimer, Esq., Rees Broome, P.C. For the District of Columbia: Brett A. Baer, Esq., Office of the Attorney General.

Opinion by Administrative Judge Monica C. Parchment with Chief Administrative Judge Marc D. Loud, Sr. concurring.

OPINION
Filing ID # 60714995

This appeal arises under a contract between Flippo Construction Company, Inc. ("Flippo" or "Appellant"), and the District of Columbia ("District") for the rehabilitation of the New Hampshire Avenue Bridge in the District. The bridge spanned CSX Transportation, Inc. ("CSX") railroad tracks and tracks owned by Washington Metropolitan Area Transit Authority ("WMATA" or "Metro"). The project took almost two years longer than the contract's stated performance period. Appellant attributed the entire period of delay to various actions of the District and excusable grounds for delay. It filed a claim seeking a time extension to cover the entire period of late performance and $1,875,758.00 for Appellant's and its subcontractors' delay damages. In his final decision, the Contracting Officer denied Appellant's claim in its entirety and asserted the District's claim for liquidated damages in the amount of $915,300.00, both of which are the subject of the present appeal.

For the reasons stated herein, we find Appellant entitled to a time extension for performance of 294 days, 98 of which are compensable, and delay damages in the amount of $193,677.15. Furthermore, we also find that the District is entitled to liquidated damages in the amount of $420,200.00.

FINDINGS OF FACT

1. CONTRACT AWARD

1. On December 9, 2004, the District of Columbia ("District"), acting through the District's Department of Transportation ("DDOT"), awarded Appellant Contract POKA-2003-B-0066-FH, for rehabilitation of the New Hampshire Avenue bridge over CSX railroad and Metro

tracks. (*See* Appeal File ("AF") Ex. 1.)[1] The contract amount was $7,960,606.00, and the work was to be completed within 540 days after Appellant's receipt of the Notice to Proceed. (*Id.*; *see also* Appellant's Hr'g Ex. 2, at 000105; Joint Pretrial Statement ("JPS"), Stipulation of Fact "SoF" 1.) [2]

2. The scope of work required reconstruction of the bridge and roadway. (AF Ex. 2, at DC000075-76, Special Provisions 1.) The bridge was to remain open during the project, so it was necessary to reroute traffic to one side of the bridge while reconstructing the other, which was Phase 1, then moving all traffic to the completed side for reconstruction of the closed side. (*Id.*; Appellant's Hr'g Ex. 3, at 000686, Notes 10, 11; Appellant's Hr'g Ex. 16, at 000928-000931; Appellant's Hr'g Ex. 174, at 001935; Hr'g Tr. vol. 1, 158:5-19, 161:17-18, Sept. 11, 2012.)

3. The contract was a fixed price contract. (AF Ex. 2, at DC000181, Special Provision 88.) On the contract's "Schedule of Items," the District specified the tasks Appellant was to perform under the contract and the approximate quantities of each task. (AF Ex. 1, at DC000006-DC000023.)

4. Each bidder was required to enter on the Schedule of Items its price for providing each unit and the extended price for the quantity of each item specified in the solicitation. (AF Ex. 1, at DC000006-DC000023.) For example, on line 0170 of the Schedule of Items was listed "205002 Structure Excavation."[3] (*Id.* at DC000007.) The quantity of excavation anticipated was 2339 cubic yards, and Appellant's proposal was priced at $73.00 per cubic yard. (*Id.*) The extended price (unit price x quantity) for Structure Excavation listed on the Schedule of Items was $170,747.00. (*Id.*) This extended price was totaled with the extended prices of all other listed work items to result in Appellant's successful bid price and the contract price of $7,960,606.00. (*Id.* at DC000023.) The prices submitted were not subject to any markups for general and administrative costs, profit and overhead. (*See id.* at DC000006-DC000023.)

2. CONTRACT PROVISIONS

5. The STANDARD SPECIFICATIONS FOR HIGHWAYS AND STRUCTURES, 1996 ("Standard Specifications") were made a part of the contract. (AF Ex. 2, at DC000075.) The contract also included Special Provisions that supplemented and modified the Standard Specifications and, in case of conflict, the Special Provisions governed. (*Id.* at DC000075, DC000080.)

6. Standard Specifications Article 3, CHANGES, authorized the contracting officer to make changes in the work within the general scope of the contract (A) by written order

[1] Appeal File 1 also appears in the record as Appellant's Exhibit 1. A number of other documents appear among Appellant's Exhibits as well as in the Appeal File and among District Exhibits.

[2] The Bates page numbers in Appellant's Exhibits are preceded by "APPELLANT." We have omitted the term in citing to the pages of those exhibits in this Opinion. For exhibits and Appeal File documents whose pages are not so numbered, we use the page number within the document or the District's Bates numbering, which includes "DC" immediately before the page number.

[3] The first three numbers of each pay item number (here 205) refer to the section of the Standard Specifications in which the item is described. (AF Ex. 2, at DC000075.)

designated as a change order or (B) by other instructions, directions, or interpretations from the contracting officer that caused a change in the contractor's work, including a change in the method or manner of performance of the work. The clause also required that if the contractor received instruction or direction from the contracting officer that it considered to be a change, that it notify the contracting officer.

Further,

> If any change under this Article causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of this work under the Contract, whether or not changed by any order, an equitable adjustment shall be made and the Contract modified in writing accordingly. Provided, however, that except for claims based on defective specifications, no claim for any change under (B) above shall be allowed for any cost incurred more than 20 days before the Contractor gives written notice as therein required unless this 20 days is extended by the contracting officer. And provided further, that in case of defective drawings and specifications, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with such defective drawings and specifications.
>
> If the Contractor intends to assert a claim for an equitable adjustment under this Article, he must within 30 days after receipt of a written Change Order under (A) above or the furnishing of a written notice under (B) above, submit to the contracting officer a written statement setting forth the general nature and monetary extent of such claim, unless this period is extended by the contracting officer.

(Appellant's Hr'g Ex. 4, at 30-32.)

7. Standard Specifications Article 4, EQUITABLE ADJUSTMENT OF CONTRACT TERMS, provided that the contractor would be entitled to an equitable adjustment in the following situations:

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 Contactor, 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.

* * *

Suspensions of Work Ordered by the Contracting Officer:

(1) If the performance of all or any portion of the work is suspended or delayed by the contracting officer in writing for an unreasonable period of time (not originally anticipated, customary, or inherent to the construction industry) and the contractor believes that additional compensation and/or contract time is due as a result of such suspension or delay, the contractor shall submit to the contracting officer in writing a request for adjustment within seven (7) calendar days of receipt of the notice to resume work. The request shall set forth the reasons and support for such adjustment.

(2) Upon receipt, the contracting officer will evaluate the contractor's request. If the contracting officer agrees that the cost and/or time required for the performance of the contract has increased as a result of such suspension and the suspension was caused by conditions beyond the control and not the fault of the contractor, its suppliers, or subcontractors at any approved tier, and not caused by weather, the contracting officer will make an adjustment (excluding profit) and modify the contract in writing accordingly.

* * *

Significant changes in the Character of Work

(1) The contracting officer reserves the right to make . . . changes in quantities and such alterations in the work as are necessary to satisfactorily complete the project.

* * *

(2) If the alterations or changes in quantities significantly change the character of the work under the contract, whether or not changed by any such different quantities or alterations, an adjustment, excluding loss of anticipated profits, will be made to the contract.

* * *

(4) The term "significant change" shall be construed to apply only to the following circumstances:

(a) When the character of the work as altered differs materially in kind or nature from that involved or included in the original proposed construction or

(b) When a major item of work, as defined elsewhere in the contract, is increased in excess of 125 percent or decreased below 75 percent of the original contract quantity. Any allowance for an increase in quantity shall apply only to the portion in excess of 125 percent of original contract item quantity, or in case of a decrease below 75 percent, to the actual amount of work performed.

A major item is defined as any item having an original contract value in excess of 10 percent of the original contract amount.

(*Id.* at 33-36.)

8. Standard Specifications Article 5, TERMINATION/DELAY, provided:

If the Contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in the contract, or any extension thereof, or fails to complete said work within specified time, the District may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work involving the delay. In such event the District may take over the work and prosecute the same to completion, by contract or otherwise, and may take possession of and utilize in completing the work such materials, appliances, and plant as may have been paid for by the District or may be on the site of the work and necessary thereof. Whether or not the Contractor's right to proceed with the work is terminated, he and his sureties shall be liable for any liability to the District resulting from his refusal or failure to complete the work within the specified time.

If fixed and agreed liquidated damages are provided in the Contract and if the District does not so terminate the Contractor's right to proceed, the resulting damage will consist of such liquidated damages until the work is completed or accepted.

The Contractor's right to proceed shall not be so terminated nor the Contractor charged with resulting damage if:

1. The delay in the completion of the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including but not restricted to acts of God, acts of the public enemy, acts of the District in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the District, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, climatic conditions beyond the normal which could be anticipated, or delays of subcontractors or suppliers arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and such subcontractors or suppliers (the term subcontractors or suppliers shall mean subcontractor or suppliers at any tier); and

2. The Contractor, within 10 days from the beginning of any such delay, (unless the contracting officer grants a further period of time before the date of final payment under the Contract) notifies the contracting officer in writing of the causes of delay.

> The contracting officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when, in his judgement, the findings of fact justify such an extension, and his findings of fact shall be final and conclusive on the parties, subject only to appeal as provided in Article 7 herein.

(*Id.* at 36-37.)

9. The contract's DISPUTES clause did not contain a requirement that the contractor submit certified cost or pricing data with a claim. (*Id.* at 45-46; AF Ex. 2, at DC000096-DC000098; *see also id.* at DC000182-DC000183, Special Provision 90.)

10. Standard Specifications Article 27, SUSPENSION OF WORK, provided:

> The contracting officer may order the Contractor in writing to suspend, delay or interrupt all or any part of the work for such period of time as he may determine to be appropriate for the convenience of the District.
>
> If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed or interrupted by an act of the contracting officer in the administration of the Contract, or by his failure to act within the time specified in the Contract (or if no time is specified, within a reasonable time), an adjustment will be made for an increase in the cost of performance of the Contract (excluding profit) necessarily caused by such unreasonable suspension, delay or interruption and the Contract modified in writing accordingly. However, no adjustment will be made under this Article for any suspension, delay or interruption to the extent:
>
> > 1. That performance would have been so suspended, delayed or interrupted by any other cause, including the fault or negligence of the Contractor, or
> >
> > 2. For which an equitable adjustment is provided or excluded under any other provision of the Contract.
>
> No claim under this Article shall be allowed:
>
> > 1. For any cost incurred more than 20 days before the Contractor shall have notified the contracting officer in writing of the act or failure to act involved (but this requirement shall not apply as to a claim resulting from a suspension order), and
> >
> > 2. Unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of such suspension, delay, or interruption, but not later than the date of final payment under the contract.

(Appellant's Hr'g Ex. 4, at 60.)

11. Standard Specifications 108.06, DETERMINATION OF CONTRACT TIME AND PARTIAL SUSPENSION, provides:

> (A) CONTRACT TIME. The number of days allowed for completion of the work included in the contract will be stated in the contract documents and will be known as contract time.
>
> When the contract time is on a calendar day basis, it shall be counted from the effective date on the Notice to Proceed and shall include all working days and non-working days, including Sundays and Holidays.
>
> All calendar days elapsing between the effective dates of any orders of the contracting officer to suspend work and to resume work for suspensions not the fault of the Contractor shall be excluded.
>
> Adjustments will also be made for periods of partial suspensions as defined below.
>
> (B) PARTIAL SUSPENSION. The performance of work under the contract may, by written order of the contracting officer, be partially suspended during the period from December 1st to April 1st inclusive, or during such other periods as the contracting officer may determine necessary due to weather, soil or other conditions considered unsuitable for prosecution of the work. Suspension of work on some but not all items of work shall be considered partial suspension.
>
> During periods of partial suspension, the number of calendar days to be charged as contract time shall be computed by multiplying the number of calendar days of original contract time by the ratio of the amount earned during the period of partial suspension to the original contract amount. In no case shall the number of calendar days charged as contract time for a period of partial suspension exceed the total elapsed time of the partial suspension.

(*Id.* at 140-141.)

12. Standard Specifications Article 17, CONDITIONS AFFECTING THE WORK, addressed the contractor's responsibility with respect to identifying conditions that might have an impact on the contract work:

> The Contractor shall be responsible for having taken steps reasonably necessary to ascertain the nature and location of the work, and the general and local conditions which can affect the work and the cost thereof. Any failure by the Contractor to do so will not relieve him from responsibility for successfully performing the work specified, without additional expense to the District.

(*Id.* at 53.)

13. Special Provision 17, UTILITY STATUS, provided:

> The District of Columbia Department of Public Works maintains coordination with the public utility companies during the preliminary engineering and the construction phases of the project. The Contractor shall be required to maintain and continue this coordination throughout the construction of the project. Construction delays as a result of inadequate coordination shall be the Contractor's responsibility.

(Appellant's Hr'g Ex. 2, at 000098.)

14. Special Provision 31, FAILURE TO COMPLETE ON TIME, provided, in part:

> For each calendar day that contract work remains incomplete after expiration of the specified construction completion time or main part thereof, the sum of $1,100.00 has been set by the contracting officer as liquidated damages from any money due the Contractor.

(*Id.* at 000105.)

15. Standard Specification 108.07 authorizes collection of liquidated damages from the contractor for each calendar day that contract work remains uncompleted after expiration of the contract time. (Appellant's Hr'g Ex. 4, at 141.)

3. NOTICE TO PROCEED.

16. The District issued the Notice to Proceed on January 11, 2005, instructing Appellant to commence contract work on February 15, 2005, under the terms and conditions of the contract. (Appellant's Hr'g Ex. 12, at 000916.)

17. The contract provided that the contractor was to begin work as indicated in the Notice to Proceed issued by the Contracting Officer "and complete the work within Five Hundred and Forty (540) consecutive calendar days," which would require completion by August 8, 2006. (Appellant's Hr'g Ex. 2, at 000105; Appellant's Hr'g Ex. 223, at 002543.)

18. The District's on-site construction manager, an employee of a District contractor, was the District's chief on-site representative. (Hr'g Tr. vol. 1, 123:13-16, 126:1-5; Hr'g Tr. vol. 5, 1027:15-1028:19, Sept. 17, 2012.) He conducted regular Construction Progress meetings with Appellant's representatives and others as necessary and provided minutes of the meetings. (Hr'g Tr. vol. 1, 127:2-6, 129:3-13.) He was on the site every day, and he participated in recommending change orders and writing justifications for changes. (Hr'g Tr. vol. 5, 1028:20-1029:19.)

4. THE CLAIM

19. After the project was completed, Appellant submitted a Request for Equitable Adjustment ("REA"), seeking a time extension of 677 days (490 days from Phase I and 187 days

from Phase II), plus $1,875,758.00 in delay damages. (Appellant's Hr'g Ex. 9, at 000782.) The REA includes a number of different elements, which we will address below.

I-1[4] PEPCO DELAY IN UNCOVERING 69kV CONDUCTORS

20. The contract plans showed three 69kV lines of the local power company, Pepco, on the bridge. (Appellant's Hr'g Ex. 3, at 000711.) These lines were required to remain on the bridge, during and after reconstruction, and Appellant was required to adjust, support, and protect the lines during the project. (Hr'g Tr. vol. 4, 942:20-943:1, Sept. 14, 2012; Appellant's Hr'g Ex. 3, at 000664, 000711.)

21. The project work that Pepco was required to perform included:

> Prior to the start of Phase I construction, [Pepco] is to uncover approximately fifty (50) feet length of pipe on each approach to be able to make adjustments in the profile. The pipes in the trench should not be covered until the work of the pipe on the bridge is completed.

(AF Ex. 2, at DC000093, Special Provision 11.B.)

22. Appellant's baseline schedule showed uncovering of the 69kV lines to be completed prior to February 15, 2005, the date that the Notice to Proceed identified as the beginning of the project. (Appellant's Hr'g Ex. 223, at 002533, 002536.) As Appellant expected that the lines would be uncovered before it began its work, uncovering the lines was not assigned any time on Appellant's baseline schedule. (*See id.* at 002536.)

23. At the pre-construction meeting on January 4, 2005, attended by representatives of the District, Volkert,[5] CSX, Appellant, and Pepco, Appellant's representative raised a concern about the responsibility of Pepco to uncover the 69kV pipes, asking that it be completed before February 15, 2005. (Appellant's Hr'g Ex. 9, at 000806-000807.) The Pepco representative agreed to uncover about 50 feet of the existing 69kV pipes before Appellant started work on the bridge. (*Id.* at 000807.)

24. At the progress meeting of February 1, 2005, it was noted that Pepco had not started work on the 69kV lines nor had Pepco asked Appellant to do the work on their behalf. (*Id.* at 000810.) The same lack of work was reported at the February 15, 2005, progress meeting. (Appellant's Hr'g Ex. 9, at 000812; Appellant's Hr'g Ex. 111, at 001764.)

[4] For ease of reference, we have identified the Appellant's claims with the first number representing the phase of the project, and the second number representing the item as listed by the Appellant in its claim.
[5] David Volkert Associates ("Volkert") designed the bridge reconstruction. (Appellant's Hr'g Ex. 204, at 002175.)

25. On February 16, 2005, Appellant wrote to the COTR[6], noting that Appellant's work was currently being impacted due to Pepco's untimely commencement of its work to uncover and adjust approximately fifty (50) feet of existing pipe on each bridge approach. (Appellant's Hr'g Ex. 14, at 000925.) Appellant asked the District to mitigate this Pepco delay. (*Id.*)

26. As of March 1, 2005, Pepco had not exposed the 69kV lines. (Appellant's Hr'g Ex. 9, at 000815.) Although Pepco had its equipment at the site for the work, inclement weather for a few days had prevented completion. (*Id*.)

27. Pepco uncovered the 69kV lines on March 22, 2005. (Appellant's Hr'g Ex. 113, at 001770.) This was noted at the March 29 progress meeting, which also noted that the delivery of temporary signal hardware might delay the erection of the overhead signals by about 30 days. (*Id.* at 001769-001770.)

28. Appellant's REA claimed the project was delayed 17 days because of Pepco's failure to timely uncover the 69kV lines. (Appellant's Hr'g Ex. 83, at 001415.)

29. The narrative that accompanied Appellant's March 11, 2005, submission of its baseline CPM schedule discussed early work on Phase I and made no mention of late uncovering of the 69kV lines and instead focused on the importance of installing the traffic control items, including the temporary traffic signals. (Appellant's Hr'g Ex. 16, at 000928.)

30. Appellant's as-built schedule reflected that Appellant had mobilized on the site and performed significant Phase I work before the 69kV lines were uncovered. (Appellant's Hr'g Ex. 223, at 002549; Appellant's Hr'g Ex. 225, at 002615.)

31. The District's expert opined that there was no project delay resulting from Pepco's delay in uncovering the 69kV lines, as at that stage of the project, it was the installation of the temporary traffic signals that was the driving factor on the project. (Hr'g Tr. vol. 10, 2779:18-2780:22, June 13, 2013.) Completion of the traffic signals to permit switching the traffic on the bridge was what was on the critical path. (Hr'g Tr. vol. 13, 4447:17-4448:5, Dec. 18, 2013; Appellant's Hr'g Ex.16, at 000934.)

I-2 PEPCO DELAY IN TEMPORARY POWER TO OVERHEAD SIGNALS

32. In order to safely transfer all traffic to one half of the bridge, temporary signals were required to manage the traffic. (Hr'g Tr. vol. 1, 157:18-158:4.) Until the signals were installed and operational, Appellant could not switch traffic over so it could begin construction on the closed half of the bridge. (*Id.* at 158:20-159:6.) "The reversible lanes signal system shall be complete and operational prior to the beginning of Phase One (1) construction activities." (Appellant's Hr'g Ex. 3, at 000686, Note 6.)

[6] The Contracting Officer's Technical Representative ("COTR"), a District employee, represented the Contracting Officer on technical matters on the project. (Special Provision 93.C, AF Ex. 2, at DC000184-DC000185.) He had the responsibility of ensuring that the work conformed to the requirements of the contract but had no authority to grant deviations or effect changes to the work. (*Id*.) Among his responsibilities were to keep the Contracting Officer fully informed of problems on the project. (*Id*.)

33. It was Appellant's responsibility to request a new temporary power source from Pepco for the temporary signals and to pay all associated fees. (AF Ex. 2, at DC000138.)

34. Appellant scheduled the signalization work on its baseline schedule from March 17 to April 11, 2005, (Appellant's Hr'g Ex. 225, at 002615), but did not ask Pepco to energize the cabinet[7] until May 2, 2005, and did not ask DDOT to program the controller until May 6, 2005. (Appellant's Hr'g Ex. 226, at 002664-002665.) Pepco responded that it could not bring power to the traffic signal cabinet on such short notice. (*Id.* at 002662-002663.)

35. In April 2005, a District representative called Appellant's electrician seeking job details so he could issue an order to Pepco authorizing payment for the work, after which Pepco could schedule the temporary traffic signal work. (Appellant's Hr'g Ex. 9, at 000817-000818; Hr'g Tr. vol. 1, 234:16-235:2, 240:1-241:5.)

36. The contract plans included the method for supplying power to the temporary traffic signals by way of a temporary pole, but on May 6, 2005, Pepco rejected the planned method of connection and directed a redesign that supplied the power underground. (Appellant's Hr'g Ex. 204, at 002175; Appellant's Hr'g Ex. 3, at 000700, Installation Note B; Appellant's Hr'g Ex. 197, at 002100; Appellant's Hr'g Ex. 18, at 000960-00961; Hr'g Tr. vol. 1, 235:12-236:11; Hr'g Tr. vol. 12, 4023:14-4024:22, Nov. 25, 2013.)

37. On May 9, 2005, Appellant notified the District's construction manager that Pepco rejected the design of the electrical conduit connection that was specified in the contract. (Appellant's Hr'g Ex. 18, at 000948.) Appellant requested that DDOT redesign the connection and noted that critical path construction was being impacted. (*Id.*)

38. The District provided the revised design on about May 19, 2005. (Appellant's Hr'g Ex. 197, at 002100.) Appellant's electrician, Fort Myer Construction Company ("Fort Myer"), submitted the redesign of the connection to Pepco on about May 24, 2005, and Pepco accepted it. (Appellant's Hr'g Ex. 9, at 000819; Appellant's Hr'g Ex. 114, at 001771-001772; Appellant's Hr'g Ex. 204, at 002175.)

39. On May 25, 2005, Appellant provided its proposal to the construction manager seeking a change in the amount of $4,107.00 plus a 2 day time extension for the actual work performed in changing the connection for power to the temporary signals but reserved any claim for delay damages. (Appellant's Hr'g Ex. 18, at 000951.)

40. The connection of the signals per the changed design was completed on June 18, 2005. (Appellant's Hr'g Ex. 197, at 002100.)

41. Thereafter, on August 10, 2005, Appellant sought $2,932.00 plus a 2 day extension for the electrical design revision, which was based on its electrician's June 2, 2005, proposal of

[7] The "cabinet" contains the switches that control the inbound and outbound signalization. (Hr'g Tr. vol. 1, 233:16-19.)

additional costs of $2,923.45 for the change. (Appellant's Hr'g Ex. 18, at 000955-000956, 000962.) The request excluded extended overhead and other delay damages. (*Id*. at 000962.)

42. Subsequently, on September 24, 2007, the Contracting Officer issued unilateral Change Order No. 3 granting Appellant $2,932.00 and a time extension of 2 days, the time to do the work, on account of the Pepco required change to the connection. (Appellant's Hr'g Ex. 204, at 002166-02170; Appellant's Hr'g Ex. 226, at 002667; Hr'g Tr. vol. 1, 243:17-244:5.)

43. Appellant alleged in its REA that it was delayed from March 4 to May 23, 2005, a period of 81 days, as it could not set up traffic controls or begin demolition of the bridge deck until the signals were operational. (Hr'g Tr. vol. 1, 237:7-22; Appellant's Hr'g Ex.9, at 000787, 000797). Appellant's first expert report calculated the delay from March 4 to June 9, 2005, or 97 days. (Appellant's Hr'g Ex. 223, at 002497.) Appellant's second expert report calculated the delay from March 28 to June 18, 2005, or 82 calendar days. (Appellant's Hr'g Ex. 224, at 002564.)

44. The District's expert concluded that Appellant had demonstrated that it experienced a delay of 68 calendar delays to project completion due to the Pepco delay in installing power to the temporary signals, which delayed commencement of demolition work on the bridge. (District's Hr'g Ex. 7, at 7.) The delay was caused by the need to change the design for the traffic signal's power source. (*Id.*)

45. Appellant's as-built schedule showed that the planned duration for installing the signals was 18 days, and the actual duration was 69 days. (Appellant's Hr'g Ex. 223, at 002549.)

46. The Contracting Officer denied the claim, concluding that there had been no proof that the District caused the Pepco delay and because utility coordination and associated risk were between Pepco and the contractor per the contract's special provisions. (AF Ex. 4, at DC000715.)

I-4, I-5 FIBER-OPTIC CABLE[8]

47. The plans provided:

> Existing utilities are indicated on the drawings in accordance with the best available records. Drawings do not depict all utilities that will be encountered or the exact location of the shown utilities. It is the responsibility of the contractor to check and verify the exact location prior to excavation by calling "Miss Utility" for correct utility markings at 1-800-257-7777.

(Appellant's Hr'g Ex. 3, at 000705, General Note 14.)

[8] Appellant's Phase I, Loss of Productivity claim 3 (I-3), will be discussed below in Section II-7, Total Flagger Delays, as these claims involve common issues of fact.

48. At the progress meeting of February 1, 2005, a representative of Abovenet communications stated that a buried Abovenet fiber-optic cable not shown on the drawings ran parallel to the tracks under the bridge. (Appellant's Hr'g Ex. 9, at 000810-000811.) Abovenet was not among the companies listed on the plans as having utilities within the contract limits. (Appellant's Hr'g Ex. 3, at 000664.)

49. The fiber-optic cable was identified by Miss Utility and found on the south side of the bridge between the south abutment and the existing railroad track. (Appellant's Hr'g Ex. 9, at 000789; Hr'g Tr. vol. 1, 265:10-22.) The cable location impacted both the installation of the temporary support system for the 69kV electric line and the support of excavation ("SOE") for the south abutment work. (*Id.*)

50. In April 2005 through June 2005, Appellant raised the issue of dealing with the fiber-optic cable repeatedly with District representatives. (Appellant's Hr'g Ex. 97, at 001663; Appellant's Hr'g Ex. 15; Appellant's Hr'g Ex. 20, at 000974.)

51. On July 26, 2005, Appellant submitted Request for Information ("RFI") No. 038, noting the discovery through Miss Utility of the fiber-optic cable line not shown on the plans. (Appellant's Hr'g Ex. 101, at 001694.) Appellant had identified its location through test pitting in the area and noted that it was in direct conflict with the south abutment support of excavation where Appellant intended to install sheet piling between the south abutment footer and the railroad tracks. (*Id.*) Appellant sought guidance from the District. (*Id.*)

52. Through August 2005, Appellant again raised the issue of the fiber-optic cable, and noted that it constituted a differing site condition that increased Appellant's and its subcontractor's costs of performance. (Appellant's Hr'g Ex. 22, at 001022; Appellant's Hr'g Ex. 20, at 000990.) Appellant noted that without advice it could not drive SOE sheet piling without risk of severing the cable. (Appellant's Hr'g Ex. 22, at 001022, 001025.)

53. On September 19, 2005, Appellant again advised of its need for resolution regarding the discovered cable and noted that DDOT's delay in approving a change was impacting Appellant's schedule. (Appellant's Hr'g Ex. 29, at 001069.) On September 28, 2005, Appellant proposed to the COTR a change in the amount of $52,000.00 and an extension of 8 days. (Appellant's Hr'g Ex. 22, at 001038.) Its subcontractor, Midlantic Piling Incorporated ("Midlantic"), figured its costs to be $10,602.90. (*Id.* at 001030.)

54. On September 30, 2005, the District issued an Article 3 letter informing Appellant that it would be compensated for the work associated with the fiber-optic cable. (Appellant's Hr'g Ex. 178, at 001954; Hr'g Tr. vol. 1, 272:17-22.)

55. Appellant put in steel plates and sheet piles to protect the cable. (Hr'g Tr. vol. 1, 267:17-22.) Eventually, Appellant installed a steel plate shield between the cable and sheet pile for the south abutment SOE so it could safely drive the sheet pile without damaging the fiber-optic lines along the railroad. (*Id.*; Hr'g Tr. vol. 5, 1161:1-1162:19.) Appellant had to modify the sheeting and get it approved before it could install the SOE and the 69kV line supports. (Hr'g Tr. vol. 12, 4043:19-4044:14.)

56. The work was completed by October 20, 2005, as DDOT had to obtain approvals from affected agencies, and the process lengthened the time to install the south abutment SOE, the support piles for the 69kV electric line, and the horizontal support beam. (Appellant's Hr'g Ex. 9, at 000789; Appellant's Hr'g Ex. 223, at 002502.) Appellant's first expert report calculated the delay at 52 days, from August 29 until October 20, 2005. (Appellant's Hr'g Ex. 223, at 002502.)

57. On September 24, 2007, the District issued Change Order No. 2 unilaterally awarding Appellant $52,000.00 plus an extension of 8 days, August 11 – 18, 2006, for an additional 160 linear feet of steel protection for the Abovenet cable. (Appellant's Hr'g Ex. 203, at 002152-002153; District's Hr'g Ex. 10.)

58. The District's expert agreed that the project was delayed and concluded the delay was from August 13, 2005, until October 19, 2005, a total of 68 calendar days. (District's Hr'g Ex. 7, at 8.) Appellant's second expert report agreed with the 68-day delay, and Appellant seeks an extension of 68 days. (Appellant's Hr'g Ex. 224, at 002565.)

I-6, II-2, II-3, II-5 DEWATERING

59. The contract work included installation of a water main replacement. (Appellant's Hr'g Ex. 2, at 000090, Special Provision 10.A.) The Special Provisions incorporated DC Water and Sewer Authority ("WASA") specifications and directed that "the water main work shall be in compliance with any applicable DC WASA specifications contained in the Appendices." (*Id.* at 000091, Special Provision 10.C.)

60. Special Provision 18 provided, that "[t]he Water and Sewer Authority Specifications are to be used only for the items that are included in the Appendix of these Special Provisions. These Specifications supersede the District of Columbia Standard Specifications for Highways and Structures 1996 and amendments thereto." (*Id.* at 000099, Special Provision 18.)

61. Appendix C to the Special Provisions included the DC Water and Sewer Authority Specifications. (*Id.* at 000284.)

62. Specification 02220.06, of the DC WASA specifications, TRENCH EXCAVATION, F. Dewatering, provided that "[t]rench dewatering and drainage, including pumping and well points, when needed, shall be included as part of trench excavation." Additionally:

> Upon entering the premises, the Contractor shall assume responsibility for site surface and subsurface drainage and shall maintain such drainage in an acceptable manner during the life of the Contract. The Contractor shall provide, maintain and operate pumps and related equipment, including stand by[sic] equipment, of sufficient capacity to keep all excavation and trenches free of all water at all times and under any and all contingencies that may arise until all foundations, structures, and pipe installations have been completed and backfilled, and are safe from damage, flotation, settlement, or displacement.

> The Contractor shall supply all supervision, labor, material and equipment necessary to build and maintain all drains, ditching, sluiceways, pumping, bailing, wicking, sumps, wells, well points, cut off trenches, curtains, sheeting, and other appurtenances and structures required to obtain and maintain a dry excavation and as may be necessary to construct the project.
>
> The Contractor shall perform all work necessary to keep excavations and areas to be filled free of all groundwaters, surface waters, all supply water, and all wastewater.

(District's Hr'g Ex. 5, at DC000343; Appellant's Hr'g Ex. 2, at 000296.)

63. Standard Specification 205.01 (A) provided, in part:

> Excavation shall include removal of all materials and objects, of whatever nature encountered in excavation; disposal of excavated materials as specified herein; the construction and maintenance and subsequent removal of cribbing, sheeting, shoring and bracing; all necessary bailing, draining and pumping; and all precautions and work necessary to prevent damage to adjacent properties resulting from this excavation.

(Appellant's Hr'g Ex.4, at 164.)

64. Water seepage into the area of the south abutment was discovered when the core borings were done in the preliminary design phase of the project. (Appellant's Hr'g Ex. 108, at 001751.) However, groundwater is not uncommon in excavating for foundations, (Hr'g Tr. vol. 10, 2641:6-20), and the soil boring reports provided to bidders in the solicitation showed the presence of groundwater at the south abutment. (Hr'g Tr. vol. 11, 3025:3-14, June 14, 2013; Hr'g Tr. vol. 12, 4063:3-7; Appellant's Hr'g Ex. 3, at 000748-000749.)

65. From early in the project and throughout its performance, Appellant encountered water flows on the site that required use of water control measures during excavation. (Appellant's Hr'g Ex. 19, at 000971; *see also* Appellant's Hr'g Ex. 117, at 001779.) As early as June 8, 2005, Appellant, while test pitting for an underground communication line in the area of the south abutment footer, discovered an underground stream that would require water control measures to facilitate construction. (Appellant's Hr'g Ex. 19, at 000971.)

66. Appellant understood that there would be water on the site but believed that the water it encountered on the site was more than normal. (Hr'g Tr. vol. 5, 1164:20-1165:2; Appellant's Hr'g Ex. 83, at 001418.) One of Appellant's experts opined, based on what was told to him by Appellant's job superintendent and by reviewing daily job logs, that the water Appellant encountered was more than what would be expected based on the soils reports, and the dewatering efforts required were more extensive than would have been expected and included at the time of bidding. (Hr'g Tr. vol. 12, 4055:11-4056:4.)

67. In addition to the effort involved in pumping the water, it was inefficient for Appellant's crew to work in the wet conditions. (Hr'g Tr. vol. 5, 1167:1-9, 1170:19-1171:1.)

68. Water drainage to the south abutment excavation trench was discussed during the April 5 and April 21, 2006, progress meetings, and the meeting notes reflect that WASA intended to sample the water to determine if the source was from any leaking water main in the area. (Appellant's Hr'g Ex. 129, at 001817; Appellant's Hr'g Ex. 130, at 001820.)

69. In May 2006, the source of the water was identified to be from a DC WASA water main leak. (Appellant's Hr'g Ex. 149, at 001873; Appellant's Hr'g Ex. 131, at 001823.) However, the August 17, 2006, progress meeting minutes reflected doubt about the source of the water: "WASA later tried to locate the leak by closing different valves, but the leak couldn't be detected…WASA still trying to locate leak." (Appellant's Hr'g Ex. 135, at 001834.) Eventually, the water flow was found not to be DC WASA water. (Hr'g Tr. vol. 9, 2410:13-20, 2413:2-20, June 12, 2013; Appellant's Hr'g Ex. 149, at 001873.)

70. Appellant used submersible pumps to control the migrating water during construction of the south abutment and continued using a submersible pump to collect any water buildup behind the south abutment. (Appellant's Hr'g Ex. 135, at 001834.)

71. On August 17, 2006, Appellant submitted RFI No. 052 notifying the District that water behind the new Phase I south abutment was undermining the existing southeast wing wall. (*Id.* at 001834.)

72. On August 18, 2006, Volkert noted standing water above the toe of footing to the south abutment. (Appellant's Hr'g Ex. 105, at 001732.) Water accumulated in front of the south abutment because an existing stream was blocked by construction activity. (Appellant's Hr'g Ex. 149, at 001873.)

73. On March 20, 2007, Appellant advised that it would not fill voids in the south abutment or wing wall resulting from the water flow. (Appellant's Hr'g Ex. 48, at 001197.) Appellant continued to pump water from the face of the abutment and placed stone around the footer to mitigate the water flow. (*Id.*)

74. By letter dated May 15, 2007, Appellant submitted its proposed costs to address the maintenance of pumps and hoses to manage existing levels of water flow at the face of the south abutment and maintenance of trench lines to carry water flow downstream and repair of the void located beneath the southeast wing wall. (Appellant's Hr'g Ex. 69, at 001364.) The proposal covered the period from April 24, 2006, through April 26, 2007, and excluded any delay damages. (*Id.*)

75. On August 13, 2007, Appellant submitted RFI No. 082, again seeking advice regarding dealing with water on the site. (Appellant's Hr'g Ex. 108, at 001752.)

76. Appellant claimed it was delayed for 14 days by excess water on the site from August 17 through August 30, 2007, by 7 days from September 12 through September 18, 2007, for dewatering and stone placement, by 18 days, from October 2 through 19, 2007, and by 46 days from November 30, 2007, through January 14, 2008, for excessive dewatering. (*See*

Appellant's Hr'g Ex. 92, at 001562-001563; *see also* District's Hr'g Ex. 7, at 13.) Appellant's claim totals 85 days of alleged delay related to dewatering.

77. On March 28, 2008, in an Article 3 letter, the Contracting Officer directed Appellant to construct weep holes in the south abutment to alleviate water issues. (Appellant's Hr'g Ex. 9, at 000859; Appellant's Hr'g Ex. 92, at 001589.)

78. Change Order No. 18, issued unilaterally on June 6, 2008, compensated Appellant for the costs of pumping accumulated water at the south abutment, grouting of the void in the wing wall, installation of weep holes in south abutment wall, and installation of a dressing stone bed in front of the abutment wall. (Appellant's Hr'g Ex. 214, at 002370, 002384-002385.) Change Order No. 18 included no time extension or delay damages. (*Id.* at 002370, 002384.)

79. By letter dated August 29, 2008, Appellant submitted a proposal for $9,949.00 and a time extension of 12 calendar days based on excavation protection and use of pumps and hoses to deal with the excessive water and maintenance of trench lines. (Appellant's Hr'g Ex. 91, at 001505, 001511.) The proposal did not include extended overhead, delays, and inefficiencies for Phase II, July 12, 2007, through December 24, 2007. (*Id.* at 001505.)

80. In its REA, Appellant claimed a delay of 70 days due to excessive water on the site. (Appellant's Hr'g Ex. 83, at 001418; Appellant's Hr'g Ex. 9, at 000787.) Appellant's expert first found entitlement to a delay of 8 days, (Appellant's Hr'g Ex. 223, at 002504), and its later report found entitlement to 17 days of delay due to excessive water. (Appellant's Hr'g Ex. 224, at 002567.) Appellant now seeks an extension of 17 days for delay caused by excessive water on the site. (Appellant's Br. 22; Appellant's Reply Br. 32.)

I-7 PILING INSTALLATION – SOUTH ABUTMENT/I-8 ADDITIONAL TIE-BACK WORK[9]

Piling Installation

81. The plans included the layout of the pilings that were to be driven for support of the bridge. (Hr'g Tr. vol. 5, 1242:8-9; Hr'g Tr. vol. 10, 2635:10-16.) It identified the length of pile to be utilized based on the expected depth to which the piles were to be driven. (Appellant's Hr'g Ex. 26, at 001056-001057.) The plans also showed the location and elevation of Pepco's 69kV line that was to remain in place and be supported by the contractor as part of its work. (*Id.*)

82. Appellant and its subcontractor understood when submitting the bid for the project that some adjustment would have to be done regarding the pile locations under the 69kV lines. (Hr'g Tr. vol. 3, 482:3-5 ("I think everybody who saw the job recognized that a design was shown that was going to have to be changed."); *Id.* at 511:18-20 ("When we went on the job, we knew we were going to have to do something about the, the 69kV"); *Id.* at. 410:11-17 (The 69kV line affected "the piling operations because the original design showed where the pilings would

[9] Claims 7 and 8 are being discussed collectively as they involve common issues arising out of Phase I of the contract.

be driven continuously underneath the wire, which couldn't be done from a practical standpoint or a safety standpoint.")

83. On June 22, 2005, in RFI No. 33, Appellant advised the District that the location of the existing Pepco transmission lines and their temporary supports conflicted with installation of the steel H piles under and near them in both abutments. (Appellant's Hr'g Ex. 26, at 001048.) At the suggestion of Midlantic, Appellant's piling subcontractor, Appellant recommended redesigning piles in these areas to relocate conflicting piles and recommended that they be installed plumb instead of battered (angled). (*Id.* at 001048-001050.)

84. On June 24, 2005, Volkert forwarded Appellant's RFI No. 33 to the District's project engineer and stated that it would review the Appellant's request to see if the piles could be adjusted. (Appellant's Hr'g Ex. 99, at 001672.)

85. On June 29, 2005, in RFI No. 35, Appellant again complained of a conflict in the pile layout: "[t]he piles in conflict with the overhead obstruction, in this case the Pepco 69kV lines, are indicated on the attached copies of drawing 0690, South Abutment Footing Plan, and drawing 0740, North Abutment Plan and Elevation. A two-foot clearance per pile is required for the 12 piles denoted. Please advise as to how these piles may be adjusted." (Appellant's Hr'g Ex. 26, at 001054.)

86. Similarly, on August 22, 2005, Appellant again raised the problem of a conflict with the pile installation pattern. (Appellant's Hr'g Ex. 26, at 001045.) Appellant looked into moving the cables to avoid the conflict but determined that could not be done. (*Id.*)

87. On September 13, 2005, Appellant reported that its subcontractor's pile driving equipment didn't have enough clearance under the 69kV line support system. (*Id.* at 001057.) Appellant recommended driving larger permanent piles on each side to remove the requirement that piles be driven directly under the 69kV support system. (*Id.*) Appellant offered to redesign the piling layout. (*Id.*)

88. On September 19, 2005, Appellant met with the COTR and again asked DDOT to supply a redesign of pilings due to the 69kV conflict. (Appellant's Hr'g Ex. 30, at 001070.) Appellant complained about the impact of the District's failure to redesign the piling layout, (Appellant's Hr'g Ex. 29, at 001069), and at the September 21, 2005, progress meeting, Appellant urged that redesign was the best choice, although other methods were considered, including a low-clearance hammer that could drive beneath the 69kV support, (Appellant's Hr'g Ex. 122, at 001795).

89. Appellant's subcontractor, Midlantic, acknowledged the availability of low-overhead pile driving equipment, but its president testified that conditions would not permit the use of low overhead pile driving equipment on this job. (Hr'g Tr. vol. 3, 470:1-20.) The subcontractor had never discussed low overhead equipment with Appellant. (*Id.* at 473:12-474:5.)

90. The Contracting Officer, the District's construction manager, and the District's expert believed the piles could have been driven with low overhead pile drivers, but Appellant

and its subcontractor refused to consider use of such equipment. (Hr'g Tr. vol. 8, 2109:6-22; Hr'g Tr. vol. 10, 2635:17-2636:12; Hr'g Tr. vol. 11, 3028:9-22, June 14, 2013.)

91. On October 10, 2005, Appellant notified the District of impacts from the District's failure to redesign the south abutment piles due to the conflict between the 69kV support system and permanent piling layout. (Appellant's Hr'g Ex. 32, at 001072.)

92. On October 27, 2005, Appellant proposed costs regarding revised Drawings 69 and 70, the contractor's redesign of the piling layout, including subcontractor costs of $6,031.00 plus a time extension of two days. (*Id.* at 001073.) The proposal did not include extended overhead and other delay costs. (*Id.*)

93. On December 8, 2005, in response to RFI No. 041, Volkert provided a revised pile layout to alleviate the conflict with the 69kV line. (Appellant's Hr'g Ex. 102, at 001697, 001699.)

94. On April 19, 2006, the District provided another revised plan to avoid a piling conflict. (Appellant's Hr'g Ex. 103, at 001706.) On June 7, 2006, Volkert transmitted south abutment footing revision 3 (sheets 69 & 70). (Appellant's Hr'g Ex. 231, at 002763-2767.) In all, there were three redesigns of the piling system.

95. Appellant's Vice President testified that Appellant began receiving direction and revisions regarding the 69kV line and didn't start driving the piles until the middle to latter part of May. (Hr'g Tr. vol. 3, 415:6-10.) Also, the piles, at that point, had to be spliced and driven considerably deeper as the subcontractor did not achieve bearing capacity at the planned tip elevation. (*Id.* at 415:11-16; Hr'g Tr. vol. 5, 1176:5-13; Appellant's Hr'g Ex. 125, at 001804; Appellant's Hr'g Ex. 65, at 001342, 001346, 001350.)

96. Due to the revision, Appellant had to acquire a different pile. (Hr'g Tr. vol. 3, 416:1-3.) The redesign eliminated some of the piles underneath the wires and carried that load by putting some of the weight on other piles and, therefore, required a heavier pile to carry that capacity. (*Id.* at 416:3-13.) It took time to get the different piles and to complete installation. (*Id.* at 416:14-16.)

97. On June 6, 2007, Appellant submitted its executed Change Order No. 5. (Appellant's Hr'g Ex. 70, at 001368.) It noted that any time and cost impacts for extended overhead or delays would be addressed separately at a later date. (*Id.*) Appellant expressly reserved its right to an equitable adjustment for the impacts. (*Id.*)[10]

98. The September 24, 2007, Change Order No. 5 provided for payment to Appellant of $140,662.00 for additional pile length and installation below planned tip elevation. (Appellant's

[10] The file related to Change Order No. 5, (Appellant's Hr'g Ex. 205), includes a number of copies of the change order, its justification and specifications. One version includes the contractor waiver of further claims related to the change. (*Id.* at 002185.) However, the file includes a number of versions of the change order and justification that do not include a waiver and two versions of the documents that reflect intentional deletion of the release language. (*See e.g., id.* at 002192.)

Hr'g Ex. 205, at 002195, 002199; Hr'g Tr. vol. 5, 1178:12-1179:7.) It did not include payment for new pile, splicing, and some additional testing required of Appellant or for delay. (Hr'g Tr. vol. 5, 1179:8-1180:1.)

99. Change Order No. 5, as it appears in one iteration in the record of this appeal, was signed by a representative of Appellant and included a release of claims in the justification page:

> It is mutually agreed that in exchange for this modification 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 growing out of or in any manner connected with the subject modification or the prosecution of the work hereunder.

(Appellant's Hr'g Ex. 205, at 002201, 002199-002201; District's Hr'g Ex. 11.)

100. One version of the justification for the Change Order No. 5 reflects edits that deleted the release language, (Appellant's Hr'g Ex. 205, at 002192), and in a January 12, 2007, email regarding Change Order No. 5, Appellant advised, "[u]nfortunately, we are unable to sign it in its present condition." (*Id.* at 002189.) Appellant contended that the release language in the justification would have to be changed. (*Id.; see also* Hr'g Tr. vol. 5, 1178:4-8.)

101. It was Appellant's experience on District projects that any delay claims for time and compensation be held until the end of the project for negotiation all at once. (Hr'g Tr. vol. 1, 245:21-248:2; Hr'g Tr. vol. 4, 880:8-13.)

102. Unilateral Change Order No. 14 of February 20, 2008, granted Appellant $94,947.00 to account for the changes in numbers and types of piles required due to the redesign of the permanent piling layout. (Appellant's Hr'g Ex. 210, at 002272; District's Hr'g Ex. 15; Hr'g Tr. vol. 5, 1180:15-1181:18.) No time extension was included. (*Id.*)

103. In his final decision, the Contracting Officer denied this portion of the claim because, "[c]ontractor reneged on not driving piles on low overhead clearance as shown in the contract. DDOT in order to facilitate the contractor changed the location of several piles." (District's Hr'g Ex. 1, at DC000715.)

Tie-Back Work

104. On June 22, 2005, in RFI No. 033, Appellant notified the District that the redesign of the pile locations would necessitate additional tie-back work. (Appellant's Hr'g Ex. 26, at 001048.) Volkert proposed additional tie-backs in the south abutment to accommodate the pile driving conflict. (Appellant's Hr'g Ex. 133, at 001828.)

105. The pile redesign interfered with phasing, so on December 28, 2005, Midlantic received a revised tie-back layout to simplify construction and coordinate with the sheet piling layout. (Appellant's Hr'g Ex. 44, at 001115.)

106. On May 24, 2006, Volkert sent a sketch for a proposed tie-back to replace two battered (angled) piles. (Appellant's Hr'g Ex. 104, at 001728.)

107. Thereafter, on May 26, 2006, DDOT directed Appellant to proceed with the Volkert's tie-back remedy per the detail revision issued to Appellant on May 24, 2006. (Appellant's Hr'g Ex. 9, at 000821.)

108. Change Order No. 18, dated June 6, 2008, included payment of $9,068.00 for, among other items, tie-back work in the south abutment. (Appellant's Hr'g Ex. 214, at 002369, 002384-002385.)

I-9 INSURANCE CLEARANCE

109. Special Provision 9.D.6 required that Appellant have and maintain a Railroad Protective Liability Insurance Policy issued in the name of WMATA with specified limits, as well as General Liability Insurance, and Automobile Liability Insurance. (AF Ex. 2, at DC000089.) Appellant was required to maintain an insurance policy of specified limits and coverages "issued in the name of WMATA." (*Id.*)

110. WMATA required insurance coverages that protected it and its employees in the event of injury or death or damage "caused by the operations of the Contractor or any of its subcontractors with respect to the work to be performed on, adjacent to, above or underneath WMATA's operating railroad property." (*Id.*)

111. All insurance policies were to be sent to DDOT. (*Id.* at DC000104.) On January 11, 2005, Appellant sent DDOT a Railroad Protective Liability Insurance Policy naming CSX and WMATA as named insureds, for the period from December 1, 2004, through June 1, 2006. (Appellant's Hr'g Ex. 12.1, at 000916.002.)

112. Special Provision 9.D.3 provided:

> The Contractor shall obtain a right of entry permit, from WMATA to access or to work around the [Metro] facilities. The right of entry (real estate) permits for entering WMATA property requires a minimum thirty (30) day advance notice to WMATA.

(AF Ex. 2, at DC000088.)

113. The minutes from the August 23, 2006, progress meeting reported:

> WMATA didn't receive original copies of certificate of insurance from Flippo Construction. Besides some real estate issues need to be resolved. The WMATA requirements are as detailed in the special provisions. WMATA states that without the above two issues resolved, WMATA can't provide escort services and track outage for girder erection work as requested from tonight.

(Appellant's Hr'g Ex. 136, at 001836.)

114. Appellant's project manager testified that the problem with the insurance policy was that the original policies named both CSX and WMATA on the same policy. WMATA "wanted a separate policy giving them exclusive liability on their own, separated from CSX." (Hr'g Tr. vol. 5, 1237:20-1238:1.)

115. On August 28, 2006, WMATA emailed Appellant advising that WMATA required copies of all insurance policies, not just certifications of insurance, from Appellant and all its subcontractors and explained that:

> WMATA is missing Commercial General Liability, Automobile Liability and Workers Compensation from Flippo as well as all of the contractors on the list he submitted. Anyone working at that site has to name WMATA as an additional insured on CGL and Auto and provide evidence of Workers Compensation Insurance as well and provide copies of the complete policy.

Appellant circulated the email internally and advised the project manager, "Please forward this to all subcontractors for their review and compliance." (Appellant's Hr'g Ex. 50, at 001266.)

116. On August 29, 2006, Appellant circulated copies of insurance policies internally with this email notation: "[t]his should be everything they need." The transmittal noted: "[p]lease print this email and the attachments and place in the WMATA file. 1) Email goes into the correspondence file. 2) the Insurance docs go into the Insurance file." (Appellant's Hr'g Ex. 52.) There is no evidence that this communication went to the District or to WMATA.

117. No major construction activity was occurring on the site as of August 30, 2006. (Appellant's Hr'g Ex. 137, at 001838.) Appellant could not work over the tracks to place bridge girders because of issues regarding the WMATA insurance and the right of way entry permit. (*Id.*) From that point on, Appellant could not proceed to place bridge beams as WMATA would not provide flaggers until the issues were resolved, although Appellant's subcontractor's remained on the site. (Hr'g Tr. vol.1, 105:5-9; Hr'g Tr. vol. 5, 1208:3-1209:2.)

118. As of September 13, 2006, the WMATA issues regarding the right of entry permit and insurance remained open, and the progress meeting minutes of that date reflected that "[p]er FCCI, four lawyers are reviewing the documents." (Appellant's Hr'g Ex. 138, at 001841.)

119. The minutes of the October 11, 2006, progress meeting noted that "[t]he issue with WMATA on right of entry permit and insurance was resolved on 25 September 2006." (Appellant's Hr'g Ex. 140, at 001847.) Also, the minutes noted that although there was currently no construction activity at the site, Appellant was coordinating with its subcontractor to mobilize cranes to install the girders on October 16, 2006. (*Id*.) Further, the minutes estimated that about 7 weeks time was lost due to delays resulting from the WMATA right of entry permit issue. (*Id.*)

120. Appellant's expert calculated the delay from the insurance and right of entry permit issues to be 88 days, from August 4, 2006, to October 30, 2006, when the girders were installed, (Appellant's Hr'g Ex. 223, at 002509; Hr'g Tr. vol. 7, 1689:3-18, Sept. 19, 2012), and this is the delay sought in Appellant's REA. (Appellant's Hr'g Ex. 9, at 000787; Hr'g Tr. vol. 1, 105:5-16.)

121. WMATA's refusal to supply flaggers while resolving the insurance and right of entry issues prevented installation of the Phase I girders to be set immediately following the completion of the abutments. (Appellant's Hr'g Ex. 223, at 002509.) Installation of the girders was delayed from August 4, 2006, to October 30, 2006. (*Id.*)

122. The minutes of the February 7, 2007, progress meeting noted that "[i]n 2006 the project was delayed by about two months due to the right of entry permit issue of the WMATA." (Appellant's Hr'g Ex. 146, at 001863.) The District's expert agreed with an 88-day delay, from August 4 to October 30, 2006. (District's Hr'g Ex. 7, at 10.)

I-10 INSTALLATION OF 16-INCH WATER MAIN

123. Special Provision 10, WATER MAIN WORK, identified the requirement that Appellant replace a 16-inch water main across the bridge and provide a 30-inch steel casing for the exposed portion of the water main on the bridge. (Appellant's Hr'g Ex. 2, at 000090-000091, 000431-000432.) The specifications provided that "[t]he water main on the bridge shall be pressure tested and accepted prior to pouring of the deck." (*Id.* at 000091.)

124. Due to the camber of the unloaded bridge girders before the bridge was poured, Appellant could not insert the 16-inch pipe through the casing. (Appellant's Hr'g Ex. 61, at 001318.)

125. Appellant attempted to install the pipe on December 11, 2006, and found that it could not do it. (*Id.)* Appellant's crew worked on installing the water line in the casing daily from December 11 to December 18, 2006, (*id.* at 001326-001331), but the camber of the bridge girders prevented insertion of the water line on the cambered casing as the line itself had rigid joints that would not flex to go into the cambered casing. (Appellant's Hr'g Ex. 83, at 001420; Appellant's Hr'g Ex. 174, at 001925; Appellant's Hr'g Ex. 223, at 002511; Hr'g Tr. vol. 1, 181:7-183:11; Hr'g Tr. vol. 5, 1213:1-21; Hr'g Tr. vol. 12, 4085:8-4086:20.)

126. On December 20, 2006, Appellant sent RFI No. 059 to the District's project manager advising of the problem with installing the water line and seeking advice. (Appellant's

Hr'g Ex. 107, at 001749.) The District's response of December 20, 2006, said that WASA had no objection to placing the bridge deck prior to installation of the water main. (*Id.* at 001745.)

127. Once the bridge was loaded and the camber of the girders flattened, Appellant could and did install the water main, and the water main was completed on December 21, 2006. (Appellant's Hr'g Ex. 223, at 002512.)

128. On January 16, 2007, Appellant submitted a claim to cover the costs of its attempts to install the waterline as planned. (Appellant's Hr'g Ex. 61, at 001320.) On February 27, 2007, Appellant submitted a similar claim accompanied by an itemized cost breakdown seeking $28,825.00 and a time extension of 5 calendar days. (*Id.* at 001322-001325.)

129. In its claim, Appellant sought a time extension of 10 calendar days due to the impact of its inability to install the 16-inch water main as planned. (Appellant's Hr'g Ex. 9, at 000797.) Resolution of the issue with the water main delayed by 10 calendar days, forming and pouring of the bridge deck, which was on the project's critical path. (Hr'g Tr. vol. 5, 1217:7-16.)

I-11 WEATHER IMPACT ON SUBGRADE COMPACTION

130. The meeting minutes of November 19, 2005, noted: "[e]xcept for weather delay, construction work would continue throughout the winter without any work shutdown." (Appellant's Hr'g Ex. 124, at 001801-001802.)

131. In its REA, Appellant claims 65 calendar days from January 24, 2007, through March 29, 2007, for delays to completion of the sub-grade for the bridge approach slabs. (Appellant's Hr'g Ex. 9, at 000793.) Compaction tests failed on three occasions due to the wet soil and weather conditions, and, according to Appellant, this delayed critical work until the return of good drying conditions. (*Id.*)

132. The impact of weather was also a partial reason (along with excessive dewatering and holiday interruption) for Appellant requesting an extension of 46 days from November 30, 2007, through January 14, 2008, for backfilling the south abutment. (Appellant's Hr'g Ex. 92, at 001563.)

133. Appellant never requested a weather delay of the Contracting Officer during the project. (Hr'g Tr. vol. 5, 1243:7-11.)

134. However, a claim for partial suspension appears in Appellant's expert report alleging a time extension of 199 days under the partial suspension provision, Standard Specification 108.06(B) (Finding of Fact ("FF") 11), for the total calculated time under the four winter periods during which Appellant performed. (Appellant's Hr'g Ex. 224, at 002571-002572; Appellant's Hr'g Ex. 235.)

135. The Contracting Officer did not declare a winter shutdown or a weather suspension on this project. (Hr'g Tr. vol. 8, 2112:11-13, 2113:18-19.)

II-1 DELAY FOR SOUTH ABUTMENT FOOTER (REBAR COUPLER)

136. Appellant contends that the District directed it not to install rebar couplers between abutment phases, and then, after all the rebar was installed and access was limited, the District rescinded the earlier direction and directed Appellant to install rebar couplers between the abutment phases. (Appellant's Hr'g Ex. 92, at 001562-001563.)

137. Appellant describes this claim as occurring between August 17, 2007, and August 30, 2007, a period of 14 days, and includes dewatering as an additional cause for the delay. (*Id.* at 001562.)

II-6 RESEQUENCING BACKFILL AT SOUTH ABUTMENT

138. After the bridge was poured, Appellant claims that the District resequenced backfilling of the abutments to occur after the concrete bridge deck was poured, which caused additional work and costs to Appellant. (AF Ex. 6, at DC000852; Appellant's Hr'g Ex. 92, at 001563.)

139. On April 15, 2008, Appellant submitted its cost proposal due to resequencing of the backfill and claimed damages of $14,143.00 and alleged a delay of 7 calendar days, January 15, 2008, through January 21, 2008. (AF Ex. 6, at DC000852-DC000853; Appellant's Hr'g Ex. 92, at 001563.)

I-3 DECK DEMOLITION LOSS OF PRODUCTIVITY-LACK OF FLAGMEN/
II-7 TOTAL FLAGGER DELAYS

140. The bridge spanned tracks of CSX, a freight carrier, and WMATA, the operator of the District's metro subway system. (AF Ex. 2, at DC000076, Special Provision 1.) The contract specifically noted that traffic on the tracks would continue during construction and required that Appellant coordinate with CSX and with WMATA during construction. (*Id.* at DC000077.)

141. The contract required Appellant to:

> [O]btain all necessary permits and approvals to access railroad and WMATA property and coordinate the work around railroad. The Contractor will be responsible for any delay caused by CSX railroad, WMATA Metro or other utility agencies towards obtaining their permits, approvals and inspections. The Contractor will also protect railroad property against damage due to construction activity. It will be the Contractor's responsibility to obtain permits to remove and install new utilities over the railroad.

(*Id.*)

142. That coordination included arranging with CSX and WMATA for them to provide safety flaggers whenever Appellant was working above the tracks or within WMATA's property. (*Id.* at DC000083-DC000084.) The flaggers were in radio contact with CSX and WMATA

dispatchers to assure there was no traffic on the tracks during Appellant's work along or above the tracks. (Hr'g Tr. vol. 1, 251:14-252:4.)

143. Special Provision 8.J addressed flagging by the CSX railroad company and provided that CSX: "has sole authority to determine the need for flagging required to protect its operations. In general, the requirements of such services will be, whenever the Contractor's men or equipment are, or are liable to be, working within specified track clearance, or over tracks." (AF Ex. 2, at DC000083-DC000084.) The District agreed to reimburse CSX for all costs of flagging. (*Id.* at DC000084.)

144. Further, the same provision provided that:

> No charge or claims of the Contractor against either the DC Department of Public Works or the Railroad Company [CSX] will be allowed for hindrance or delay on account of railroad traffic, any work done by the railroad Company or other delay incident to or necessary for safe maintenance of railroad traffic or for any delays due to compliance with these Special Provisions.

(*Id.* at DC000082.)

145. The District and CSX entered into a Construction Agreement regarding the bridge replacement project at issue. (AF Ex. 1, at DC000046-DC000065.) Under the agreement, CSX agreed to provide flagging to support the bridge replacement work. (*Id.* at DC000053.) "In general, flagging protection will be required whenever Agency or Contractor or their equipment are, or are likely to be, working within fifty (50) feet of live track or other track clearances specified by [CSX], or over tracks." (*Id.* at DC000058.)

146. The Agreement[11] between the District and CSX required Appellant, as the District's contractor, to abide by the terms and conditions set forth in the agreement. The contractor was required to conduct its work so as not to interfere with CSX operations. (*Id.* at DC000055.) If flagging service was required, Appellant was required to give CSX notice at least thirty (30) business days in advance of the date scheduled for commencement of the work. (*Id.* at DC000056.) The agreement elsewhere required a minimum of 10 days advance notice to CSX for anticipated need for flagging service. (*Id.* at DC000058.)

147. The contract specifications Special Provision 8, CONTRACTOR WORK NEAR [CSX] FACILITIES, provided that Appellant was to provide notice to CSX at least 10 days in advance of performing any work on railroad rights-of-way. (AF Ex. 2, at DC000080-DC000081.) "If flagging service is required, it may take up to 30 days to obtain from the Railroad." (*Id.*) Special Provision 8 required that Appellant provide a minimum of thirty (30) days advance notice to CSX for flagging service. (*Id.* at DC000084.) "No work shall be undertaken until the flag person(s) is/are at the job site." (*Id.*)

[11] Appellant's representative signed off on the agreement between the District and CSX in which Appellant acknowledged the agreement and agreed "to abide by and perform all applicable terms of the Agreement." (AF Ex. 1, at DC000065.)

148. The contract also specified that CSX was the final authority over matters affecting the maintenance of railroad traffic and required approval from CSX for all construction that may interfere with railroad traffic. (*Id.* at DC000080.)

149. There were similar limitations regarding work near or over WMATA tracks. Appellant was required to obtain a right of entry permit from WMATA to access or to work around Metro facilities. (*Id.* at DC000088.) "The right of entry (real estate) permits for entering WMATA property requires a minimum thirty (30) day advance notice to WMATA." (*Id.*) Special Provision 9, CONTRACTOR WORK NEAR WMATA FACILITIES, provided:

> No work can take place within the fenced Metrorail right-of-way during revenue hours. The revenue hours are as follows:
>
> Monday thru Thursday – from 5:30 a.m. to 12:30 a.m.
> Friday – from 5:30 am to 2:30 am
> Saturday – from 8:00 a.m. to 2:30 am
> Sunday – from 8:00 am to 12:30 am

(*Id.* at DC000088.) "Crane operations that affect WMATA's track safety will be restricted to WMATA non-revenue hour operations." (*Id.* at DC000089.)

150. In practice, during the project, Appellant's representative communicated with CSX and WMATA representatives on Thursday of each week advising them of the dates and times for the next week that Appellant wanted track access and flagger support, and WMATA and CSX would reply to Appellant on Friday advising them of the times flagger support would be available for them to work. (Hr'g Tr. vol. 1, 254:10-255:8; Hr'g Tr. vol. 6, 1315:4-8, 1373:1-18, Sept. 18, 2012.)

151. When a flagger was requested of CSX, it had to put the requirement out for bid, and if no CSX employee signed up to do the work, CSX could not provide a flagman. (Hr'g Tr. vol. 6, 1373:10-18.)

152. At the January 4, 2005, pre-construction meeting, CSX cited the 30-day lead time for requesting flaggers but agreed to start the process for flagger requests with that meeting. (Appellant's Hr'g Ex. 9, at 000806-000807.)

153. The August 9, 2005, meeting minutes also reflect coordination between Appellant and CSX that did not require 30-day advance notice. (Appellant's Hr'g Ex. 118, at 001783.) Appellant continuously worked to obtain track access and flagger service. (*See* Appellant's Hr'g Ex. 110, at 001762-001763; Appellant's Hr'g Ex. 119, at 001786-001787; Appellant's Hr'g Ex. 120, at 001789; Appellant's Hr'g Ex. 123, at 001798; Appellant's Hr'g Ex. 33, at 001087.)

154. However, a project involving working over railroads can present unique challenges. Specifically, a former District project manager noted that "basically every time that we worked with the railroads, we ran into that problem, regardless of who is the contractor or regardless what's the project." (Hr'g Tr. vol. 4, 847:19-22, 848:19-20.) Difficulty with clearances on

projects over railroads was so common that "this is what contractors are expecting. They know that happens. But to a certain degree, beyond that expectation, of course they will file a claim." (*Id.* at 851:10-13.)

155. During the project there were repeated instances of Appellant and its subcontractors being unable to work because of the absence of a flagman. Some instances resulted from CSX's or WMATA's refusal to provide a flagman when requested and some resulted after Appellant properly requested and scheduled a flagger from CSX or WMATA and the flagger failed to appear. (Appellant's Hr'g Ex. 223, at 002516-002517.)

156. Appellant repeatedly notified the District that WMATA did not provide it adequate work time even when it allowed some work. Appellant asserted that it should be able to work during all non-revenue hours, i.e. 12:30 am to 5:30 am Monday through Thursday (*see* FF 149), but WMATA was not providing the amount of track time Appellant required to keep on schedule. (Appellant's Hr'g Ex. 21, at 001002-001005, 001021; Appellant's Hr'g Ex. 40, at 001104.) The absence of flaggers during the period July 2005 through August 12, 2005, delayed the project by at least 28 days, including loss of productivity. (Appellant's Hr'g Ex. 223, at 002500.)

157. As the project continued, the failure of flaggers to show up when promised and failure to allow track time for Appellant's work continued to interfere with Appellant's progress. (Appellant's Hr'g Ex. 71, at 001370; Appellant's Hr'g Ex. 73; Appellant's Hr'g Ex. 74.)

158. Appellant repeatedly notified the District that CSX's inability to provide flagmen impacted Appellant's work on the critical path from August 15-19, 2005, and again from August 22-26, 2005. (Appellant's Hr'g Ex. 23, at 001040; Appellant's Hr'g Ex. 25.)

159. There were extended periods when flagmen were not available in September, October, and November 2005. (*See* Appellant's Hr'g Exs. 28, 31, 34, 38.) On many occasions, Appellant brought crews and equipment to the site during WMATA's non-revenue hours (i.e., at night) and had no work for them because WMATA or CSX or both failed to supply the flaggers that had been arranged in advance by Appellant or the flagger was late permitting Appellant to work only for a part of the permitted window. (Hr'g Tr. vol. 1, 254:16-257:3.) On those occasions, Appellant's employees had no productive work to do. (*Id.* at 256:16-257:7.)

160. Appellant incurred crew and equipment costs when CSX granted track rights and then failed to send a flagger. (Appellant's Hr'g Ex. 39, at 001093.) Appellant's subcontractor, Williams Steel Erection Co. ("Williams Steel") incurred costs of mobilizing and bringing a crane on site for removal of the girders but could not work because there was no flagger on site. (*Id.* at 001098.)

161. Ultimately, on November 2, 2005, CSX advised "[a]t this time there are work orders in place for your location, but due to the limited manpower there is no way to [guarantee] that flagman will be available." (*Id.* at 001102.)

162. The meeting minutes of October 31, 2006, describe the difficulties Appellant was having getting reliable flagger services:

> Recently, [CSX] Flagger service and WMATA Escort service were scheduled for girder installation work in the bridge as night time work. Since 10.16.2006 to date nine (9) attempts were made to install the bridge girders of which only 4 nights were available to do the actual work. Four (4) nights of work were cancelled due to unavailability of flagger/escort services. The scheduled works for these nights were cancelled at the eleventh hour without any prior notice. As such the construction crews, MOT set up, crane setup were to be demobilized and remobilized multiple times to complete the girder installation work.

(Appellant's Hr'g Ex. 141, at 001850.)

163. The District paid the cost of WMATA and CSX flagmen through a force account, which it increased from time to time. (AF Ex. 1, at DC000058; AF Ex. 2, at DC000084; Appellant's Hr'g Ex. 11, at 000914.) Payments were passed through Appellant by change orders. (Appellant's Hr'g Ex. 203, at 002146; *see, e.g.*, District's Hr'g Exs. 12, 14, 16, 19.)

164. Appellant claims that the lack of flaggers delayed its deck demolition work by 44 days due to flagmen not being on the site in addition to being unable to obtain track closures to work adjacent to the railroad tracks. (Appellant's Hr'g Ex. 9, at 789.) Furthermore, through evaluation of time sheets, inspection reports, and Appellant's cost records, Appellant's expert calculated the lost crew time from July 5, 2005, through April 23, 2008, for all times where track time was granted but where one of the flagmen was late or did not show up or for other unexplained reasons track time was not allowed where crews were on site in the amount of $98,751.45. (Appellant's Hr'g Ex. 223, at 002516-002517, 002530-002531.) Additionally, Appellant's expert report and the District's construction manager, after evaluating job records and correspondence confirmed six to eight weeks of project delay resulting from lack of flaggers. (Appellant's Hr'g Ex. 178, 001963; Appellant's Hr'g Ex. 197, at 002101; Appellant's Hr'g Ex. 223, at 002516.)

II-8 PROJECT COST OVERRUNS

165. In its claim, Appellant claims entitlement to an 89-day adjustment as calculated under Standard Specifications 108.06 (b):

> As a result of quantity overruns and changes to the contract the total project cost is $9,267,442 vs. the original contract value of $7,960,606 or a 16.4% increase in value. Based on the original contract duration of 540 calendar days, 16.4% is equal to 89 calendar days. We are therefore requesting an additional 89 calendar days. See 108.06 (b) of the specifications for approval of this methodology.

(Appellant's Hr'g Ex. 92, at 001567.)

APPELLANT'S SCHEDULE

166. Special Provision 29, CONSTRUCTION SCHEDULING, supplemented section 108.03 of the Standard Specifications and required the use of the Critical Path Method of scheduling: "[t]he Contractor shall produce and submit a progress schedule, based on the Critical Path Method (CPM) of scheduling, to the Engineer for approval before commencing any work." (Appellant's Hr'g Ex. 2, at 000105.)

167. The District accepted Appellant's March 11, 2005, baseline CPM schedule, which was the basis of Appellant's delay claims. (Appellant's Hr'g Ex. 16, at 000928; Hr'g Tr. vol. 7, 1618: 1-13.)

168. The District critiqued Appellant's baseline schedule on April 6, 2005, (Appellant's Hr'g Ex. 17, at 000946), and Appellant provided a response to the critique on May 2, 2005, (*id.* at 000944).

169. On September 7, 2005, Appellant submitted an update to the CPM schedule and noted that its progress had been impeded by delays of flagmen. (Appellant's Hr'g Ex. 27, at 001059-001067; Appellant's Hr'g Ex. 54, at 001273.)

170. On Feb 1, 2006, Appellant submitted an update to the schedule noting that the project had slipped approximately 218 calendar days with a revised projected completion date of March 23, 2007. (Appellant's Hr'g Ex. 45, at 001129; Appellant's Hr'g Ex. 134, 001831.)

171. Appellant submitted a progress schedule update in August 2006, (Appellant's Hr'g Ex. 54), and on September 7, 2006, Appellant submitted a revised CPM schedule showing delays in job progress of approximately 402 days and showing a completion date of September 14, 2007. (Appellant's Hr'g Ex. 55.)

172. On April 17, 2008, Appellant submitted an updated schedule for the remainder of the job showing that it anticipated reaching substantial completion on June 23, 2008. (Appellant's Hr'g Ex. 87.) Subsequently, on April 22, 2008, Appellant submitted another revised schedule updating the substantial completion date to June 20, 2008. (Appellant's Hr'g Ex. 88.) District officials did not formally accept Appellant's updates because they believed that the updates were based on inaccurate and insufficient information. (Appellant's Hr'g Ex. 149, at 001872.)

PROJECT COSTS

173. Appellant incurred daily costs for overhead field support of $1,485.22, (Appellant's Hr'g Ex. 9, at 000901), for traffic control costs and variable material costs of $158.62, (*id.* at 000902), and a daily overhead rate of $751.42 based upon an Eichleay calculation, (*id.* at 000906). Appellant included a markup of 10%, and bond premium of 1% . (*Id.* at 000907).

174. Appellant has been paid by the District for work done but was not awarded a time extension or money for its claimed delay or impact damages. (Hr'g Tr. vol. 3, 399:6-15.)

175. The contract was substantially complete on June 14, 2008, 676 days beyond the contract's stated 540-day performance period. (Appellant's Hr'g Ex. 89, at 001501; Appellant's Hr'g Ex. 90, at 001504.)

THE CLAIM

176. On January 28, 2008, Appellant submitted a comprehensive claim for a time extension of 490 calendar days[12] based on the difference between the original scheduled completion date for Phase I of December 20, 2005, and the switch of traffic on the bridge signifying the beginning of Phase II on April 23, 2007. (Appellant's Hr'g Ex. 83, at 001413.) Appellant also sought impact costs of $1,006,825 for extended jobsite overhead, home office overhead and maintenance of traffic activities incurred during Phase I of the project. (*Id.*)

177. Appellant categorized its Phase I delays as shown below with the number of days sought for each of the alleged delaying events:

I-1. Pepco delay in uncovering 69 kV line	17
I-2. Pepco delay in energizing temporary signals	81
I-3. Loss of productivity due to lack of flaggers	44
I-4. Fiber-optic cable differing site condition – negotiations	33
I-5. Fiber-optic cable differing site condition – actual work	61
I-6. Excessive groundwater	70
I-7. Piling installation change	101
I-8. Additional tie-back work	28
I-9. Insurance clearance	88
I-10. Installation of 16 inch water line	10
I-11. Weather impact on subgrade compaction	65
	598

(*Id.* at 001415.)

178. On December 22, 2008, Appellant submitted an additional claim relating to alleged delays incurred during Phase II of the project. (Appellant's Hr'g Ex. 92, at 001560.) Appellant requested a time extension of 187 days based on the difference between the scheduled completion date for Phase II of August 8, 2006, and the actual completion date of June 14, 2008, minus the 490 days sought for Phase I delays. (*Id.*) Appellant also sought an equitable adjustment of $868,933.49, which included subcontractor delay costs of $235,452.27 plus Appellant's field overhead, traffic control, flagger delay costs, and home office overhead. (*Id.* at 001560, 001637.)

179. Appellant categorized its Phase II delays as shown below with the number of days sought for each of the alleged delaying events.

[12] Appellant asserted that it had demonstrated 598 days of incurred delay on the Phase I of the project but sought recovery for only 490 days. (Appellant's Hr'g Ex. 83, at 001413.)

II-1. Changed instructions regarding rebar couplers	14
II-2. Added drains and dewatering	7
II-3. Dewatering	18
II-4. Installation of concrete at Stemwall	-26[13]
II-5. Dewatering and winter weather	46
II-6. Resequencing of backfill at S. Abutment	7
II-7. Total flagger delays	49
II-8. Project Cost overruns	89
	204

(*Id.* at 001562.)

180. On February 16, 2009, Appellant combined and resubmitted the January 28, 2008, and December 22, 2008, claims discussed above into a REA, seeking a time extension of 677 days (490 days from Phase I and 187 days from Phase II), plus $1,875,758.00 for the impacts from jobsite and corporate overhead, traffic control, impacts to its subcontractors, and costs associated with flagmen delays. (Appellant's Hr'g Ex. 9, at 000782.)

181. Appellant included subcontractor delay and impact claims totaling $235,452.27. (Appellant's Hr'g Ex. 92, at 001633.)

182. Appellant's piling subcontractor, Midlantic, submitted a claim in the amount of $13,859.68 for its additional costs allegedly due to delays on the project caused by the District. (Appellant's Hr'g Ex. 242, at 003093, 003095.)

183. Specifically, on November 16, 2005, May 4, 2006, and May 5, 2006, Midlantic intended to perform piling operations, mobilized its equipment and crew to the site, but could not work because no flagman reported. (*Id.* at 003099-003101.) Midlantic incurred crew and equipment costs totaling $8,922.68 on those days, and submitted a claim in that amount to Appellant. (*Id.* at 003095-003098.)

184. Midlantic's labor costs increased for Phase II because its work was delayed beyond the anticipated schedule at bid time. It submitted a claim to Appellant in the amount of $4,937.00 for its additional cost of performing the contract work in a later period. (*Id.* at 003093-003094.)

185. Williams Steel, Appellant's steel subcontractor for removal of existing girders and installing the new girders, submitted a claim for its additional costs allegedly because of delays on the project, primarily for unanticipated mobilizations and demobilizations and idle labor and equipment costs incurred for occasions when Williams Steel was prevented from working. (*See* Appellant's Hr'g Exs. 58, 243; Hr'g Tr. vol. 3, 542: 1-15, 547:6-9, 596:3-13, 597:14-20.)

186. Williams Steel mobilized to the site but was prevented from working on October 31, 2005. (Appellant's Hr'g Ex. 243, at 003103.) On November 8, 2005, Williams Steel was on site but prevented from working until November 10, 2005. (*Id.*) On August 21, 2006, Williams

[13] Appellant recognized that a supplier caused this delay and not the District. (Appellant's Hr'g Ex. 92, at 001563.)

Steel was prevented from working, and it was able to only work four days between October 16 through October 30, 2006, because of track closures. (*Id*.; Hr'g Tr. vol. 3, 561:14-19.)

187. The witness from Williams Steel knew of occasions when the company came to the site but could not work but did not know the reason the company was prevented from working. (Hr'g Tr. vol. 3, 552:4-10.) He learned later that at least some of the stoppages were because the railroad was not permitting access. (*Id.* at 560:19-22, 587:8-11.)

188. Williams Steel provided dates when crews and equipment mobilized but could not work. Comparing these dates to the records of flagger no-shows, (Appellant's Hr'g Ex. 223, at 002530-002531), reveals the lack of a flagger caused mobilization and incurred expenses of $7,054.40 on October 31, 2005.[14] (Appellant's Hr'g Ex. 243, at 003104.)

189. Appellant's steel fabricator, Williams Bridge Company ("Williams Bridge"), submitted a claim for $50,957.69 in delay damages for lengthy storage costs and transportation relating to delays between the scheduled delivery date and the date steel was actually delivered to the site. (Appellant's Hr'g Ex. 244, at 003107; Hr'g Tr. vol. 3, 645:3-11.)

190. Prince Construction Company ("Prince") was subcontracted to place reinforcing steel on the job. Prince submitted a claim in the amount of $2,130.00, reflecting the increased costs of wages due to the extended performance period requiring it to perform some of its work in a later period than anticipated. (Appellant's Hr'g Ex. 245, at 003111; Hr'g Tr. vol. 3, 688:3-21, 696:11-13.)

191. Fort Myer was subcontracted to install sidewalks, roadways, and some electrical installations on the site. (Hr'g Tr. vol. 3, 721:13-722:2.) Fort Myer submitted a claim for delay damages in the amount of $43,369.00,[15] which reflected its increased costs for staying on the job almost two years longer than anticipated because of project delays. (Appellant's Hr'g Ex. 247, at 003115-003118; Hr'g Tr. vol. 3, 716:5-7, 716:18-717:10, 724:3-13.) Its claim included increased labor costs, increased equipment costs, increased material costs and home office overhead at a rate of 8%. (Appellant's Hr'g Ex. 247, at 003118.)

192. Espina Stone Company ("Espina") was subcontracted to remove and salvage the existing stone masonry veneer on the bridge wing walls, and reinstall the original stone supplemented with new stone as needed. (Hr'g Tr. vol. 4, 971:1-5.) Espina submitted a claim in the amount of $16,850.00 related to its rising labor, material, and operating costs associated with

[14] Williams Steel indicated it was able to work on November 10, 2005, (Appellant's Hr'g Ex. 243, at 003103), but Appellant's expert's records indicate no flagger was available that day. (Appellant's Hr'g Ex. 223, at 002530.) Any lack of work occurring August 4, 2006, through October 30, 2006, was during the project shutdown resulting from the WMATA insurance clearance issue. (FF 120.)

[15] In his testimony, the witness from Fort Myer made some adjustments to the claim and concluded the accurate amount to which Fort Myer is entitled would be $39,413.15. (Hr'g Tr. vol. 4, 803:21-804:6.) The presiding judge eliminated from Fort Myer's claim any calculation related to claim mobilization costs, as that claim had not been submitted to the Contracting Officer. (Hr'g Tr. vol. 4, 808:3-22.)

its work on the bridge taking longer than anticipated. (Appellant's Hr'g Ex. 246, at 003112; Hr'g Tr. vol. 4, 972:6-22.)[16]

193. Appellant has attributed costs, (FF 173), to each of the 502 compensable delay days it claims to arrive at the following total claim breakdown:

Overhead Field Support Costs	$715,355.02
Traffic Control Costs/Variable Material Costs	$115,234.10
Home Office Support Costs	$338,127.12
Subcontractor Delay Costs	$246,062.34
Flagman Delay Costs	$ 98,751.45
Subtotal	$1,513,530.03
Markup @ 10%	$151,353.00
Subtotal	$1,664,883.03
Bond Premium @ 1.0%	$16,648.83
Total Request	$1,681,531.86

(Appellant's Reply Br. 72-73.)

194. Upon receipt of Appellant's REA, the Contracting Officer referred it to his engineering section for an analysis and later spoke with members of the engineering section, who agreed with the Contracting Officer's assessment of the claim that there was inadequate supporting documentation to justify granting any part of it. (Hr'g Tr. vol. 8, 2058:20-2059:1, 2064:3-10.) The Contracting Officer relied heavily on his engineering staff for recommendations on the claims. (*Id.* at 2094:15-18, 2130:7-11.)

195. On January 14, 2011, the Contracting Officer responded to Appellant's REA, denying the claim in its entirety, identifying specific grounds for denying each element of the claim. (AF Ex. 4, at DC000713-000716; JPS SoF 2.) Additionally, the Contracting Officer in the final decision assessed liquidated damages against Appellant for what he considered to be 678 days of late performance at $1,350/day for a total of $915,300.00. (AF Ex. 4, at DC000713; JPS SoF 3.)

196. Appellant filed its Notice of Appeal in this matter on January 18, 2011. (*See* Notice of Appeal.)

[16] Correspondence from Espina in the record reflects an additional claim to Appellant of $20,765.00 based on what it considered a differing site condition regarding removal of stone veneer that had been concreted to the southeast wing wall, making it more difficult and labor intensive to remove. (Appellant's Hr'g Ex. 246, at 003113; Hr'g Tr. vol. 4, 976:20-978:19.) Appellant did not include that amount in its claim to the District, (Appellant's Hr'g Ex. 9, at 000903, and has not pursued it as part of its appeal. (Hr'g Tr. vol. 4, 984:2-6, 986:3-6, 985:15-18, 987:3-7.)

JURISDICTION

CERTIFIED COST OR PRICING DATA

The District argues that the Board lacks jurisdiction over this appeal because Appellant failed to submit certified cost or pricing data with its claim. It cites former D.C. Code § 2-303.08, which the District contends was applicable at the time the claim was submitted, which states, in pertinent part, "a contractor … shall submit cost or pricing data for procurements in excess of $100,000.00, and shall certify that, to the best of the contractor's … knowledge and belief the cost or pricing data submitted was accurate, complete, and current as of a mutually determined specified date, before entering into … any change order or contract modification." (District's Br. 13.)

The District also relies on D.C. MUN. REGS. tit. 27, §1624.1 (2002), which it quotes as providing that "[t]he contracting officer shall require a prime contractor to submit and certify cost or pricing data for … any change order or contract modification." It argues that the scheme described in these laws contemplates that cost or pricing data and a certification as to its accuracy, completeness, and currency must be submitted with a contract claim such as that submitted by Appellant. (District's Br. 13.)

We rejected this argument in our March 29, 2012, ruling on the District's Motion to Dismiss that raised the same grounds as a basis for dismissal:

> The Board, however, disagrees with the District's interpretation of the applicability of the foregoing statutory and regulatory provisions to the Appellant's claims based upon the Board's plain reading of the scope of these legal provisions. The foregoing legal provisions explicitly require a contractor to submit certified cost or pricing data to directly support a contract, a change order, or a contract modification. These provisions do not, on the other hand, expressly include, or even address, dispute "claims" within the categories of contract related submissions requiring a supporting cost or pricing certification.

(Order on Mot. to Dismiss 2.)

Nothing in the contract, including the Disputes clause, (*see* FF 9), or in applicable law to which the District has directed us requires that a District contractor's claim be certified. *See Civil Constr., LLC*, CAB Nos. D-1294, *et al.*, 62 D.C. Reg. 4422, 4437-4438 (Mar. 14, 2013).

The Federal cases the District cites as "instructive" have no bearing on this issue before the Board. Cases such as *Skelly and Loy v. United States*, 685 F.2d 414 (Ct. Cl. 1982), address the Contract Disputes Act ("CDA") requirement that a claim exceeding $50,000.00[17] be certified and hold that a Federal court or contract appeals board has no jurisdiction over a contractor's claim submitted without a certification as to its accuracy and to the contractor's belief that it is entitled to the amount claimed. The CDA does not apply to the District of Columbia contracts

[17] The Federal Acquisition Streamlining Act of 1994, P.L. 103-355, raised the Contract Disputes Act threshold for certification of a claim to $100,000.00.

nor does its certification requirement govern our jurisdiction. *See Civil Constr., LLC*, CAB Nos. D-1294, *et al.*, 62 D.C. Reg. at 4438.

For the foregoing reasons, the Board finds that Appellant's failure to submit a certification as to cost or pricing data with its February 16, 2009, claim (FF 180) does not deprive the Board of jurisdiction. The Board has jurisdiction over the present appeal pursuant to D.C. Code § 2-360.03(a)(2) (2011).[18] (The Board has jurisdiction to hear any appeal by a contractor from a final decision by the contracting officer on a claim by a contractor, when the claim arises under or relates to a contract.)

DISCUSSION

NOTICE OF CLAIMS

The District argues that this appeal should be dismissed for failure to state a claim upon which relief can be granted, because the claims submitted to the Contracting Officer for a final decision violate the terms of the contract by asserting claims for costs incurred more than 20 days before notice of the potential change was provided to the District. (District's Sur-Reply. Br. 14-17.) According to the contract's CHANGES clause, no claim for a constructive change, except for a defective specification claim, shall be allowed for any cost incurred more than 20 days before the contractor gives written notice of the direction that it considers to be a change. (FF 6.)

The District argues that the only letters that could be considered as providing the required written notice that Appellant considered a direction of the Contracting Officer to be a change and a statement of the general nature and monetary nature of the claim are the two claims submitted in 2008, long after the delaying events came to light. (District Sur-Reply Br. 15.) Therefore, the District contends that we must deny these claims as they fail to comply with the contract notice requirements. (*Id*. at 17.) The District relies on the decision of *District of Columbia v. Org. for Envtl. Growth, Inc.*, 700 A.2d 185 (D.C. 1997), which involved a claim for contract acceleration.

The District does not designate which of Appellant's claims it challenges on this ground, but in general, the record reflects that Appellant promptly and repeatedly notified the District of conditions at the site affecting its progress and increasing its costs. (*See, e.g*. FF 24, 25, 50, 51, 126.) Boards and courts have generally not strictly enforced such notice requirements absent a finding that the government was prejudiced by the contractor's failure to provide timely notice. *Civil Constr., LLC*, CAB Nos. D-1294, *et al*., 62 D.C. Reg. at 4447; *Grumman Aerospace Corp*., ASBCA Nos. 48006, *et al.*, 03-1 BCA ¶ 32,203. This liberal interpretation is especially appropriate where the government was aware of the operative facts underlying the eventual

[18] 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 January 18, 2011, (FF 196), under our previous jurisdictional statute.

claim. *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). Here, the on-site project construction manager had actual knowledge of the conditions of the site and progress of the work and regularly apprised the parties of the project conditions through progress meeting minutes. (FF 18.)

The District bears the burden of showing that it was prejudiced by the alleged lack of notice. *Civil Constr., LLC*, CAB Nos. D-1294, *et al*., 62 D.C. Reg. at 4447; *Ft. Myer Constr. Corp*., CAB No. D-859, 40 D.C. Reg. at 4677-4678. In view of the District's contemporaneous knowledge of each of the delaying events and the absence of prejudice shown by any failure to give written notice of constructive changes and defective specifications within the specific time frames of the contract, Appellant's claims are not barred for lack of notice.

DISTRICT DEFENSES TO CLAIMS

Appellant has raised an issue regarding the scope of the Board's review in this matter, arguing that in considering the District's defenses to Appellant's claim, we are confined to those grounds specifically relied upon by the Contracting Officer in his final decision denying the claim. (Appellant's Br. 16-21.) In that regard, Appelant argues that because it has refuted each of the stated grounds for the Contracting Officer's denial of the individual claims included in its REA, the Board must find in its favor. (*Id.*)

Appellant's argument relies on authority considering circumstances far different from those before the Board. Appellant cites *Horne v. Merit Sys. Protection Bd.*, 684 F.2d 155, 157 (U.S. App. D.C. 1982), which cites *SEC v. Chenery*, 332 U.S. 194, 196 (1947), for the proposition that "a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." (Appellant's Br. 16.)

The case law cited by Appellant is inapplicable to contract appeals before the Board. Under D.C. Code § 2-309.03 (a)(2) (repealed 2011), the Board has jurisdiction to hear any "appeal by the contractor from a final decision by the contracting officer on a claim by the contractor, when such claim arises under or relates to a contract."[19] The decision on the contractor's claim is not, as argued by Appellant, assigned to the Contracting Officer alone. Upon appeal of a final decision to the Board, the "Board considers the contracting officer's final decision in reviewing a contractor's claim, but the Board's review is *de novo*." *Civil Constr., LLC*, CAB Nos. D-1294, *et al*., 62 D.C. Reg. at 4439; *see also Ebone, Inc.*, CAB Nos. D-971, *et al.*, 45 D.C. Reg. 8753, 8773 (May 20, 1998); *C.P.F. Corp.*, CAB No. P-413, 42 D.C. Reg. 4902, 4908 (Nov. 18, 1994); *Prince Constr. Co., Inc.*, CAB Nos. D-1120, *et al.*, 63 D.C. Reg. 12132, 12152 (Feb. 28, 2014).

Further, this Board has consistently stated that " [t]o 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

[19] The current law contains the same grant of jurisdiction. D.C. CODE § 2-360.03 (a)(2) (April 8, 2011).

law. *See Ebone, Inc.*, CAB Nos. D-971, D-972, 45 D.C. Reg. at 8773.[20] Thus, the contracting officer's decisions will be affirmed or reversed based upon the evidence introduced in the proceedings before the agency board or the Court of Federal Claims and the law as interpreted by the forum involved. JOHN CIBINIC, JR., RALPH C. NASH, JR., & JAMES F. NAGLE, ADMINISTRATION OF GOVERNMENT CONTRACTS 1312 (4th ed. 2006); *see Renegotiation Bd. v. Bannercraft Clothing Co.,* 415 U.S. 1, 23 (1974) (*de novo* proceeding is "unfettered by any prejudice from the agency proceeding and free from any claim that the [prior] determination is supported by substantial evidence").

Presented with the exact argument Appellant makes here, the board in *Bromley Contracting Co.*, found:

> The first question before us is whether respondent's affirmative defenses should be stricken or dismissed because these defenses were not raised in the final decision. We cannot find that the Contracting Officer's failure to assert an affirmative defense results in a forfeiture of that defense in an appeal to the Board. As we stated in *Lenoir Contractors, Inc.*, DOTCAB 78–7, 80–2 BCA ¶14,459 at p. 71,281:
>
> > Government counsel 'is not restricted to merely a defense of the appealed ruling [of the contracting officer] nor . . . debarred from insisting upon what they perceive to be a right of the Government simply because it may be at variance with the findings and judgment of the contracting officer.' [citation omitted]. This view has been affirmed by the Court of Claims in *Monroe Garment Co. v. United States*, 203 Ct. Cl. 324, 345 (1973).

Bromley Contracting Co., DOTCAB No. 78-1, 81-2 BCA ¶ 15,191.

For the above reasons, we reject Appellant's argument that the District may only defend against Appellant's claims upon the same bases relied upon by the Contracting Officer in his final decision.

EFFECT OF GRANTING COMPENSATION FOR CHANGED WORK

Appellant also appears to argue that its claims of entitlement to time extensions and related delay damages are bolstered by the District's issuance of unilateral change orders compensating it for the actual work required. (Appellant's Br. 4.) Notably, Appellant argues

[20] Contrast this situation to the debarment of a District contractor as addressed in *In Re Principals of Fort Myer Constr. Corp.*, CAB No. D-1235, 52 D.C. Reg. 4237 (Nov. 23, 2004). At the time of the decision, proposed debarments were considered by the District's Debarment and Suspension Panel ("Panel") created by the Debarment Procedures Emergency Act of 2003. (D.C. Act 15-153, 50 D.C. Reg. 8730). The Panel was authorized to decide whether to debar a contractor, subject to review by the Board. D.C. CODE § 2-308.04(d). In an appeal of a debarment decision the District sought to submit evidence to the Board that had not been before the Panel. Ultimately, it turned out that the District did not have evidence relevant to the basis for the Panel's decision, and the issue was not determined by the Board, but we noted that it was "not clear that the Board, even in a *de novo* review, has authority to receive new evidence from the District which was not presented to the debarring authority to support a debarment." *Id.*

that "DDOT acknowledged its design defect in Change Order 3… District's responsibility for these changed or unforeseen conditions is acknowledged in Change Orders 2 and 17… District's responsibility for these impacts is documented in Change Order 14… District's acknowledgment of the design defect and differing site condition is documented in Change Order 18…Clearly, the District determined the dewatering effort to be compensable because it issued change orders for Flippo's additional costs for the extensive, and unforeseen dewatering required." (*Id.* at 5-7, 35.) However, Appellant is required to prove by a preponderance of the evidence that the District is liable for damages related to the alleged delaying events notwithstanding the fact that the District granted change orders awarding compensation to Appellant for the actual work performed. By doing so, the District does not concede that the delaying events were the District's fault nor will the Board so find without adequate evidence of the delay and fault.

In *Prince Constr. Co./W.M. Schlosser Co.,* we discussed the case of *Robert McMullan & Son, Inc*., ASBCA No. 19023, 76-1 BCA ¶ 11,728, in which 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. *See Prince Constr. Co./W.M. Schlosser Co., Joint Venture,* CAB Nos. D-1369, *et al*., 63 D.C. Reg. 12086, 12121-12122 (Dec. 9, 2013), *aff'd in part, rev'd in part on other grounds*, 145 A.3d 523 (D.C. 2016).

The *McMullan* 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 be decided *de novo* under the Federal Contract Disputes Act. *Prince Constr. Co./W.M. Schlosser Co.,* CAB Nos. D-1369, *et al*., 63 D.C. Reg. at 12122 (citing *England v. Sherman R. Smoot Corp.*, 388 F.3d 844, 856-57 (Fed. Cir. 2004) (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)). As previously discussed, deciding an appeal *de novo* requires that we make findings of fact, based on a factual record created through Board proceedings, and make legal conclusions, based on these findings of fact and the applicable law. *Ebone, Inc*., CAB Nos. D-971, *et al.*, 45 D.C. Reg. at 8773. Giving determinative effect regarding delay to the contracting officer's issuance of change orders addressing some aspects of the changed work but not the delay is inconsistent with the requirement that the Board decide appeals *de novo*. *Prince Constr. Co./W.M. Schlosser Co.*, CAB Nos. D-1369, *et al*., 63 D.C. Reg. at 12122; *see also England*, 388 F.3d at 856-57 (no basis for distinguishing unilateral contract modifications from contracting officer final decisions for purposes of applying presumptions).

We noted in *Prince Constr. Co./W.M. Schlosser Co.,* that we would not follow the *McMullan* reasoning, and we, therefore, apply no presumption or evidentiary value as to the responsibility for delay to the District's granting of change orders addressing compensation for

the changed work. We have considered the evidence bearing on each of the alleged delaying events *de novo*. To the extent Appellant has proven delay and resulting costs, it may recover without a need to apply any evidentiary value to the previous change orders.

Accordingly, we decline to accept the granting of change orders for work performed as evidence that any delay was the District's fault.

PROOF OF DELAY

Appellant's expert in the area of baseline CPM scheduling, (Hr'g Tr. vol. 6, 1536:18-1537:10-8), presented her report and testified regarding calculation of the delays Appellant experienced on the project and her time impact analysis of the work. As the contract did not designate any particular methodology for evaluating delay, she chose to compare the as-planned schedule to the as-built schedule as the best method. (Hr'g Tr. vol. 7, 1632:18-22.) She compared Appellant's as-planned schedule, which was the baseline CPM schedule submitted March 11, 2005, (FF 167), with the as-built plan she created in order to analyze the impacts of delaying events. (Hr'g Tr. vol. 7 1615:9-14.) The District had accepted the as-planned baseline schedule, which became the starting point for Appellant's expert's time and impact analysis. (*Id.* at 1618:1-13.) To establish the validity of the as-built schedule, she referred to daily time sheets and other contract documents, interviews with persons knowledgeable about the progress, and the daily inspection reports by the construction manager. (*Id.* at 1623:3-1624:20; 1636:1-13.) She also evaluated Appellant's cost account coding system to determine from time sheets the coded billing information to indicate the tasks that were performed on a given day. (*Id.* at 1626:10-1627:1.)

Based on her testimony and reports, we find that her determination of delays on the project was reasonable and reliable, especially in those situations where we have the concurrence of the District's expert or construction manager. However, Appellant's expert did not determine responsibility for the delays, (*id*. at 1748:1-14), which we address below.

I-1 PEPCO DELAY IN UNCOVERING 69kV CONDUCTORS (Availability of Site)

The contract plans showed a Pepco 69kV line that was required to remain on the bridge during reconstruction and which Appellant was required to support and protect during the project. (FF 20.) The contract provided that Pepco "is to uncover approximately fifty (50) feet" of the 69kV pipe at each approach prior to the start of Phase I construction, (FF 21), and Appellant argues that this constituted a warranty that the District would assure that the work was done before issuing a Notice to Proceed to Appellant. (Appellant's Br. 3.) The 69kV line was not uncovered by the, February 15, 2005, date on which Appellant was to commence work, (FF 16, 25, 27), and Appellant argues that the District thereby failed to deliver access to the site when warranted, conduct that Appellant contends entitles it to an extension of time of performance. (Appellant's Br. 2-3.)

There is an implied duty upon the government to have work sites available for contractors. *Federal Elec. Corp*., ASBCA No. 20490, 76–2 BCA ¶ 12,035. Further, where the government warrants that a job site will be available to the contractor by a particular date, and

then denies access, it may be liable for costs of delay under the suspension of work clause. *Strand Hunt Corp*., GSBCA No. 12859, 95-2 BCA ¶ 27,690 (citing *Singleton Contracting Corp*., GSBCA Nos. 9614, *et al.*, 90-3 BCA ¶ 23,125, at 116,106).

However, the contract language does not support Appellant's interpretation that Pepco's work in uncovering the 69kV lines was to be accomplished before the Notice to Proceed was issued. The contract required that uncovering of the 69kV lines and the installation of the temporary traffic signals, which was required in order for the bridge demolition to begin, both be completed before starting construction. Specifically, Pepco was to uncover the 69kV lines "[p]rior to the start of Phase 1 construction" (FF 21), and the temporary traffic signals were to be operational "prior to the beginning of Phase One (1) construction activities", (FF 32). Reading these provisions together and applying a consistent interpretation to almost identical language in the two clauses, we cannot accept Appellant's argument that there was a warranty that the lines would be uncovered before issuance of the Notice to Proceed. *See Hol-Gar Mfg. Corp. v. United States*, 351 F.2d 972, 979 (Ct. Cl. 1965) (contract must be read as a whole so as to harmonize all its parts); *see also American Contract Servs., Inc.*, ASBCA No. 46788, 94-2 BCA ¶ 26,855 (no apparent rationale for interpreting identical language in two contract clauses differently). The contract provided no warranty that the electric lines would be uncovered before the Notice to Proceed was issued.

Moreover, the District did not deny access to the site. There was no order of the Contracting Officer directing Appellant not to begin work, and, in fact, Appellant mobilized on the site and was performing work before the 69kV lines were uncovered. (FF 30.) Additionally, generally when a party outside the control of either party interferes with the contractor's progress, the District will not be held liable unless some warranty is found. *See* JOHN CIBINIC, JR., RALPH C. NASH, JR., & JAMES F. NAGLE, ADMINISTRATION OF GOVERNMENT CONTRACTS 586 (4th ed. 2006); *McNamara Constr., Ltd. v. United States,* 509 F.2d 1166, 1169–70 (Ct. Cl. 1975). In the present matter, there has been no showing that the District wielded any special control over Pepco, such that it had a heightened responsibility to assure Pepco completed its work by February 15, 2005.[21] *See Star Communications, Inc*., ASBCA No. 8049, 1962 BCA ¶ 3,538; *Perini, Horn, Morrison-Knudsen*, ENGBCA No. 4821, 87-1 BCA ¶ 19,545.

In addition, Appellant has not shown a logical connection between uncovering the lines and work that it had to perform thereafter other than that the lines had to be uncovered before bridge construction could begin. Appellant did not demonstrate that there was work delaying the entire project that could not be done until the 69kV lines were uncovered. The baseline schedule did not indicate such a relationship nor were delays to other items of work shown on the as-built schedule. (FF 29, 30.) The District's expert testified that the item on the critical path at the time in question was the activation of the temporary traffic signals that had to be completed before traffic on the bridge could be rerouted and demolition could begin, and the language of the contract, as discussed above, supports that interpretation. (FF 31.) Appellant has not

[21] Appellant alleges that Pepco is the District's contractor and that the District exercised significant control over Pepco's actions and could have caused Pepco to accelerate its work. (Appellant's. Br. 2; Appellant's. Reply Br. 2.) However, the record does not reflect a contractual relationship between the District and Pepco, and Appellant has not shown the contrary.

demonstrated that the project was delayed because of site unavailability or for any other reason due to Pepco's failure to uncover the 69kV lines in advance of the Notice to Proceed.

For the above reasons, we deny recovery to Appellant based on this claim.

I-2 PEPCO DELAY IN TEMPORARY POWER TO SIGNALS (Defective Specifications)

Appellant alleges DDOT failed to coordinate design of the connection of power to the temporary signals with Pepco, resulting in a delay to its work when Pepco required a change to the design for power access. (*See* Appellant's Hr'g Ex. 223, at 002496-002498.) Appellant sets forth two bases for the claimed delay. First, it alleges that the District delayed in providing authorization so Pepco could schedule the work. Second, it alleges that the contract specifications regarding connection of power to the traffic signal controller were defective in that they specified an overhead connection to the temporary signals that was ultimately rejected by Pepco, causing a redesign that changed the work. (Appellant's Br. 3-4.)

Appellant claims that the District delayed the project by failing to authorize Pepco to do the power connection timely. (Appellant's Br. 3.) Appellant planned to do the work from March 17 to April 11, 2005, (FF 34), but it was not until April that the District began the process of authorizing Pepco to make its connection. (FF 35.) However, Appellant has not explained how the District's failure to authorize Pepco to do the work until April 2005 delayed its progress. Providing authorization and payment to Pepco was not shown to be an issue when it was not until May 2, 2005, that Appellant asked that the cabinet be energized on May 6, 2005, (FF 34), supporting the conclusion that the authorization issue had been resolved in advance of Appellant actually needing it. Although, the timing of the District's authorization to Pepco was within the delay between the scheduled start date of March 17, 2005, and the date Appellant first requested that the traffic control cabinet be energized, May 6, 2005, it was not the cause of it. The delay between March 17, 2005, and May 6, 2005, is otherwise unexplained. Therefore, there is no basis for granting an extension related to the timing of the District's authorization to Pepco.

The second ground raised by Appellant to justify an extension of contract time for this issue is based on alleged defective specifications. In particular, Pepco rejected the method that was detailed in the contract plans for supplying power to the temporary signals. (FF 36.) Appellant argues that the contract plans were defective and that this caused its work to be delayed. Pursuant to the contract, it was the District's duty to coordinate with Pepco during design of the project, (FF 13), and its failure to do so resulted in defective plans. The contract specifications were defective in that the plan for connection of power to the signal controller supplied by the District was not acceptable to Pepco. When the government provides a contractor with design specifications, it impliedly warrants that, if complied with, the specifications are free from design defects. *District of Columbia v. Savoy Constr. Co.*, 515 A.2d 698, 702 (D.C. 1986); *United States v. Spearin*, 248 U.S. 132, 137 (1918); *White v. Edsall Constr. Co.*, 296 F.3d 1081, 1084 (Fed. Cir. 2002); *Am. Renovation & Constr. Co.*, ASBCA No. 53723, 10-2 BCA ¶ 34,487. The government is liable in an equitable adjustment for damage resulting if the plans prove to be defective. *Owens–Corning Fiberglass Corp. v. United States*, 419 F.2d 439 (Ct. Cl. 1969);

Hol–Gar Mfg. Corp. v. United States, 360 F.2d 634 (Ct. Cl. 1966); *Corner Constr. Co.*, ASBCA No. 20156, 75–1 BCA ¶ 11,326; *Huber, Hunt & Nichols, Inc.*, GSBCA No. 4311, 75-2 BCA ¶ 11,457.

Here, where the contract specifications showed connection of electric service to the temporary traffic signals in a manner that Pepco rejected, and Appellant relied on those original specifications in submitting its bid on the project, it would be unfair to hold Appellant responsible for increased costs or time resulting from the change. *W.M. Schlosser Co.*, CAB No. D-894, 40 D.C. Reg. 5083, 5095-5096 (Apr. 14, 1993). 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. v. United States*, 347 F.2d 235, 241 (Ct. Cl. 1965). However, the amount of the delay attributable to the District is from May 6, 2005, when the plans were found to be inadequate for Pepco's purposes, and May 24, 2005, when Pepco accepted the redesigned plan, (FF 38), a period of 18 days. That delay is compensable. As of May 24, 2005, the effect of the defective specification had been resolved, and Appellant was in the position it would have been in on May 6, 2005, had the plans not been defective.

Appellant also claims 81 days of delay, from March 4, 2005, through May 23, 2005. (FF 43.) However, the baseline schedule demonstrates that Appellant did not intend to begin this work until March 17, 2005, and intended to finish April 11, 2005. (FF 34.) The connection of power to the controller actually occurred on June 18, 2005, (FF 40), and we agree with the District's expert's assessment that the extent of the delay amounts to 68 days, from April 12 to June 18, 2005. (FF 44.) Eliminating the 18 days attributable to the defective specifications results in finding 50 days of non-compensable delay caused by Pepco, not the District.

Accordingly, we find Appellant entitled to a compensable time extension of 18 days, May 6 through May 23, 2005, plus a non-compensable time extension of 50 days.[22]

I-4, I-5 FIBER-OPTIC CABLE (Differing Site Condition) [23]

At the first progress meeting on February 1, 2005, a representative of Abovenet Communications advised that an Abovenet fiber-optic cable ran parallel to the tracks under the bridge and that it was not shown on the contract plans. (FF 48.) By April 12, 2005, Appellant had located the line by test pitting, notified the District, and requested advice regarding dealing with the cable. (FF 50.) It sought the District's guidance repeatedly, noting that the cable location conflicted with the support of excavation for the south abutment and the sheet piling that was intended to protect the tracks. (FF 51, 52.)

Ultimately, the parties developed a plan to protect and support the fiber-optic cable while at the same time permitting installation of the SOE for the south abutment work, although it took

[22] In a number of instances, Appellant relies on the justification document that was written for proposed Change Order No. 4, which would have extended the contract time by 220 calendar days. (Appellant's Hr'g Ex. 178, at 001969-001970.) A number of the alleged delaying events were discussed in the justification, including the design change that was required for Pepco to provide power to the temporary reversible signals, which the justification document concluded warranted a 2-week time extension. We note that proposed Change Order No. 4 was never issued, and we give no weight to the unsigned document or the conclusions asserted therein.

[23] We address Appellant's Phase I, Flagger Delay claim 3 (I-3), in Section II-7 below, as these claims both involve flagger delay issues.

months to get approvals of CSX and other affected parties. (FF 55, 56.) On September 30, 2005, the District issued an Article 3 letter informing Appellant that it would be compensated for the additional work related to the fiber-optic cable. (FF 54.) Thereafter, Appellant installed steel plates to protect the cable and drove the sheet piling to support the SOE for the south abutment and to protect the railroad tracks. It could then complete the support work for the 69kV lines. (FF 55.) This work was completed by October 20, 2005. (FF 56.)

Appellant claims a compensable extension of 68 days based on encountering the Abovenet fiber-optic cable, which it considered a differing site condition. Delay and costs caused by a differing site condition entitle Appellant to an equitable adjustment under the contract's EQUITABLE ADJUSTMENT clause, (FF 7), and thus are compensable. The Differing Site Conditions language of the contract, (*id.*), allows the bidder to rely on the government's solicitation and, therefore, not include a contingency element in its bid. *James A. Federline*, CAB No. D-834, 41 D.C. Reg. 3853, 3860 (Dec. 15, 1993) (citing *Foster Constr. C.A. & Williams Bros. Co. v. United States*, 435 F.2d 873 (Ct. Cl. 1973). The clause takes at least some of the gamble on subsurface conditions out of the bidding process. As a result, both sides are more likely to have no windfalls and no disasters. *Id.*

To establish a Type I differing site condition, Appellant must prove that: (1) the contract contained positive indications regarding the location of underground utilities; (2) Appellant reasonably interpreted and relied upon the indications in the solicitation in preparing its bid; (3) the site condition encountered was materially different from that indicated; (4) the condition encountered was reasonably unforeseeable based upon all the information available at the time of bidding; and (5) Appellant was delayed by the differing site condition. *Nova Group, Inc.*, ASBCA No. 55408, 10-2 BCA ¶ 34,533; *see Int'l Tech. Corp. v. Winter*, 523 F.3d 1341, 1348-49 (Fed. Cir. 2008); *P.J. Maffei Building Wrecking Corp. v. United States*, 732 F.2d 913, 916 (Fed. Cir. 1984); *PBS&J Constructors, Inc.*, ASBCA No. 57814, 14-1 BCA ¶ 35,680.

The existence of the underground Abovenet cable not disclosed in the plans is a classic Type 1 differing site condition. More specifically, in this case: (1) the plans depicted the locations of known underground utilities, (FF 47), but not the Abovenet cable at issue; (2) Appellant reasonably did not include the cost of dealing with the cable in its bid; (3) the buried Abovenet cable was significantly different from what was indicated regarding buried utilities; (4) the buried cable was unforeseeable; and (5) Appellant was delayed. *See Nova Group, Inc.*, ASBCA No. 55408, 10-2 BCA ¶ 34,533.

Appellant need not show fault on the part of the District in order to recover for a Type 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*, CAB No. D-834, 41 D.C. Reg. at 3863. Appellant has demonstrated that the condition indicated in the contract documents –the failure to note the location of the fiber-optic cable– was materially different from that encountered during performance entitling it to an equitable adjustment for the additional time required for performance as well as the extra costs incurred.

On September 24, 2007, Change Order No. 2 was issued, compensating Appellant for the changed work in the amount of $52,000.00 plus an extension of 8 days, from August 11 – 18, 2006, for the additional work that Appellant had to perform due to the discovery of the fiber-optic cable. (FF 57.) Pinpointing its location and designing a solution that allowed protection of the cable while allowing installation of the SOE for the south abutment and the 69kV lines' support and obtaining the approval of all interested parties, including the railroad, delayed the project by 68 days. (FF 55-58.) Therefore, we find Appellant entitled to a compensable extension of 68 days, which includes the 8 days granted in Change Order No. 2. (FF 57.)

I-6, II-2, II-3, II-5 DEWATERING (Differing Site Condition)

In a number of its claim elements, **I-6, II-2, II-3, II-5,** Appellant alleges that its progress was delayed at different points in the project by encountering excessive water on the site that interfered with its construction progress. Appellant argued that its work was made more difficult than reasonably planned and required implementation of dewatering controls. (Appellant's Br. 6; Appellant's Reply Br. 31-32, 64-65.) As early as June 2005, Appellant discovered an underground stream in the area of the south abutment footer that would require control measures. (FF 65.) The presence of water continued to affect Appellant's work. (FF 66, 67).[24] Appellant continued to implement water control measures through 2006 and 2007 by using various techniques, including pumps and hoses. (FF 70,74.)

Appellant claimed to have been delayed for additional periods by the need for dewatering, and in some instances, for placement of stone to alleviate water issues. (FF 75-79.) Unilateral Change Order No. 18 compensated Appellant for some of the costs to pump water at the south abutment and to repair some damage caused by the water, but no extension of time was granted. (FF 78.) All told, Appellant claimed about 141 days of delay related to dewatering. (FF 76.)

In its REA, Appellant characterized this claim as a changed or differing site condition. It did not denote which type of differing site condition it asserted, but we presume it is a Type I differing site condition claim that is before us. (*See* Appellant's Br. 6 "The water encountered was well beyond what the soil borings in the area identified.")

For a Type I differing site condition, Appellant must demonstrate that the water it encountered exceeded what was indicated in the contract plans, namely in the soil boring reports. As stated *supra*, the Differing Site Condition Clause of the contract, (FF 7), allows the bidder to

[24] Appellant alleges that in May 2006 the source of the water was identified to be from a WASA leaking water main. However, the source could not be pinned down for certain. (FF 69.) Later in the project, the source was determined not to be from a leaking WASA water main. (*Id*.) Appellant suggests that if the source of the water was WASA that the District's responsibility for its dewatering efforts would be heightened. However, first, there is no evidence how much if any of the water came from a WASA main and, second, if the water was from WASA, when the leak began. If the leak began after award, the Differing Site Condition clause would not apply. *See John McShain, Inc. v. United States*, 375 F.2d 829, 833 (Ct. Cl. 1967) (where water main broke, damaging construction site, it was not a differing site condition because the breach did not predate award of the contract); *Olympus Corp. v. United States*, 98 F.3d 1314, 1317 (Fed. Cir. 1996) (differing site condition clause only applies to conditions existing when contract was executed); *James A. Federline, Inc.*, CAB No. D-0834, 41 D.C. Reg. 3853.

rely on the representations in the solicitation regarding site conditions and therefore need not include a contingency element in its bid. JOHN CIBINIC, JR., RALPH C. NASH, JR., & JAMES F. NAGLE, ADMINISTRATION OF GOVERNMENT CONTRACTS 484 (4th ed. 2006); *James A. Federline*, CAB No. D-834, 41 D.C. Reg. at 3860. However, although the Differing Site Conditions Clause is a risk-shifting device, it does not shift all of the unanticipated adverse site conditions to the government. *Olympus Corp. v. United States*, 98 F.3rd 1314, 1317 (Fed. Cir. 1996); *Triad Mech., Inc.*, IBCA No. 3393, 97-1 BCA ¶ 28,771.

As discussed above in section I-4, to establish a Type I differing site condition in this part of the claim, Appellant must prove that: (1) the contract contained positive indications regarding water on the site; (2) Appellant reasonably interpreted and relied upon the indications in the solicitation in preparing its bid; (3) the site condition encountered was materially different from indicated; (4) the condition encountered was reasonably unforeseeable based upon all the information available at the time of bidding; and; (5) the contractor was delayed solely by the differing site condition. *Nova Group, Inc.*, ASBCA No. 55408, 10-2 BCA ¶ 34,533; *PBS&J Constructors, Inc.*, ASBCA No. 57814, 14-1 BCA ¶ 35,680.

Both sides agree that the plans indicated the presence of subsurface water through the soil boring reports. (FF 64, 66.) The dispute is whether the information in the reports is "reasonably plain or positive" or is such as to have "induced reasonable reliance by [Appellant] that the conditions would be more favorable than those encountered." *Pacific Alaska Contractors v. United States*, 436 F.2d 461, 469 (Ct. Cl. 1971); *see also Foster Constr. C.A. & Williams Bros. Co. v. United States*, 435 F.2d 873, 884 (Ct. Cl. 1970); *Kinetic Builders, Inc.*, ASBCA No. 32627, 88-2 BCA ¶ 20,657; *Nova Group, Inc.*, ASBCA No. 55408, 10-2 BCA ¶ 34,533. Borings are the most significant indication of subsurface conditions, such as water, *Nova Group Inc.*, 10-2 BCA ¶ 34,533 at 170,322, and Appellant acknowledged that the soil boring reports indicated the presence of water on the site and specifically at the south abutment. (FF 64, 66.) Moreover, the contract required that Appellant provide pumps and related equipment to keep all excavation and trenches free of all water. (FF 62, 63.)[25]

Appellant argues that it encountered more water than would be reasonably expected based on the boring reports. (Appellant's Br. 6.) Groundwater is not uncommon in excavating for foundations, and Appellant acknowledged that it expected to encounter water that it would be obliged to deal with. Appellant does not contend that it had no duty to dewater. (FF 64.) Appellant argues, however, that it encountered more water than it anticipated, but Appellant has

[25] Appellant correctly points out that the requirement to employ water control measures to "maintain a dry excavation", (FF 62,) is from the DC WASA specifications, (FF 59, 60, 61), and suggests that this provision applies only to installation of water mains or other work on DC WASA facilities and not other excavation. (Appellant's. Br. 34-35.) However, the provision's broad establishment of requirements for dewatering was indicative of Appellant's responsibility on the site, and the definition of structural excavation incorporated into the Schedule of Items and unit payment system, (FF 63), confirmed Appellant's duty to dewater all excavation on the site. We note that line item 0170 on the Schedule of Items is identified to 205002 Structure Excavation, and the first three digits of the reference number refer to the applicable section of the Standard Specifications, in this instance, Section 205. (FF 4.) That identifies to 205.01 (A), which defines structural excavation and includes "all necessary bailing, draining and pumping" as part of the unit price for the structural excavation. (FF 63.) Interpreting the two provisions together, we interpret the contract to require Appellant to provide water control measures to alleviate water entering site excavations of any kind.

failed to demonstrate that the amount of water it encountered differed materially from the amount that would reasonably be expected on the project based on the soil boring reports. Appellant has presented no proof of what amount of water and necessary dewatering it expected, of what it encountered and of what impact the water had on its progress. Appellant has presented no substantive proof to support either its factual position or its reliance on there being limited water on the site when it bid. *See Circle, Inc.,* ENGBCA No. 6048, 95-1 BCA ¶ 27,568.

The result would be the same were we to consider this as a Type II differing site condition. A Type II differing site condition requires the contractor to prove the recognized and usual conditions at the site, prove the actual physical conditions encountered and that they differed from the known and usual, and that the different conditions caused an increase in the cost of contract performance. *Charles T. Parker Constr. Co. v. United States*, 433 F.2d 771, 778 (Ct. Cl. 1970); *Costello Indus., Inc.*, ASBCA No. 49125, 00-2 BCA ¶ 31,098. It is a "relatively heavy burden of proof." *Charles T. Parker Constr. Co.,* 433 F.2d at 778; *Nova Group, Inc.,* ASBCA No. 55408, 10-2 BCA ¶ 34,533; *Circle, Inc.,* ENGBCA No. 6048, 95-1 BCA ¶ 27,568.

Fatal to a differing site condition claim of either type in this case is Appellant's failure to produce evidence as to the amount of water encountered as compared to what it expected other than the testimony of Appellant's witness generally stating that the water encountered was more than Appellant expected. (FF 66.) Absent some scientific or factual basis for concluding that the water encountered materially exceeded what should have been reasonably expected either based on indications in the soil boring reports or the recognized and usual conditions at the site, we cannot conclude a differing site condition occurred. *See Dennis T. Hardy Elec., Inc.*, ASBCA No. 47770, 97-1 BCA ¶ 28,840.

Appellant has not offered evidence about the level of dewatering effort it expected based on the soil boring reports and the other indications in the contract that all dewatering on the project was Appellant's responsibility, regardless of amount or source. (FF 62, 63.) Moreover, Appellant does not parse the delays it claims between the dewatering it expected and what it encountered. In other words, Appellant seeks to recover for all delay resulting from water on the site and gives no credit for what it admits it expected to encounter. Given the soil boring reports and the language in the contract, Appellant could not reasonably have expected that it would have no dewatering costs.

Appellant has not demonstrated that the dewatering efforts it was required to implement were other than what it was required to do by the contract. The WASA Specifications placed responsibility upon Appellant for water drainage during the life of the contract. (FF 62.) This obligation included use of pumps and related equipment sufficient to keep all excavation and trenches free of all water at all times and under any and all contingencies until all construction has been completed and backfilled. (FF 62.) The obligation was broad and all encompassing. Furthermore, in the Standard Specifications, the pay item for structural excavation made it clear that such excavation included dewatering efforts, specifically draining and pumping, to provide a dry site for construction. (FF 63.)

Because Appellant has failed to demonstrate that the amount of water encountered was unexpected given the soil reports and contract indications (Type I differing site condition) or that

the amount of water exceeded what would be expected from recognized and usual conditions at the site (Type II differing site condition), we deny recovery based on Appellant encountering water on the site.

I-7 PILING INSTALLATION – SOUTH ABUTMENT (Defective Specifications)/
I-8 ADDITIONAL TIE-BACK WORK

Change Order No. 5

The District argues that the Board must deny Appellant's claim for a time extension relating to the additional length of the piles required because Appellant waived any claim to time or impact damages in executing Change Order No. 5 for payment for the extra lengths of pile and which included a release of claims. (District's Br. 65, 81.)

First, the record is not clear that Appellant signed Change Order No. 5 with a release included. The record contains a number of versions of the change order, including a few where the release language was deleted by hand and at least one bearing computer edits deleting the release language. (FF 100.) The three pages that include the signed change order and the justification for the change that included the release language are among many different versions of the change order, (FF 99), and there was no testimony at the hearing that the three pages at issue were together when the change order was signed and constituted the final change order.

In the process leading up to the execution of Change Order No. 5, Appellant's representative refused to sign the change order with the release language included. (FF 100.) Appellant expressly noted that it reserved its rights to seek an equitable adjustment for delay impacts related to Change Order No. 5. (FF 97.) Many other change orders were issued unilaterally instead of obtaining Appellant's signature. (FF 42, 57, 78, 102.) Moreover, Appellant's project manager testified that on similar projects Appellant and the District customarily reserved delay claims for time and compensation until the end of the project. (FF 101.) Thus, we are not persuaded that Appellant intended to waive delay and impact claims nor are we persuaded that the District reasonably thought that Appellant intended such a release.

If it did purposely sign the change order with the release in it, generally Appellant would be bound:

> Ordinarily, a release general and absolute on its face and containing no exceptions will serve as a bar to any prior existing claims arising under a contract, unless some legal basis exists for concluding that it was not intended to apply to the claim in question. *Mecom* [sic]*Co.*, ASBCA No. 13620, 69–2 BCA ¶ 7786; *J.G. Watts Constr. Co. v. United States*, 161 Ct. Cl. 801 (1963).

Ft. Myer Constr. Corp., CAB No. D-859, 40 D.C. Reg. at 4674 (citing *Arnold M. Diamond, Inc.*, ASBCA No. 19080, 75–2 BCA ¶ 11,605; *Leonard Blinderman Constr. Co.,* ASBCA No. 18946, 74–2 BCA ¶ 10,811).

However, there are "special and limited" exceptions to the general rule: (1) where it is shown that, by reason of a mutual mistake, neither party intended the release to cover a certain claim; (2) where the conduct of the parties in continuing to pursue a claim after execution of a release makes clear that they never intended the release to be an abandonment of the claim; (3) where it is obvious that inclusion of a claim in a release was due to mistake or oversight; or (4) where fraud or duress is involved. *Ft. Myer Constr. Corp.*, CAB No. D-859, 40 D.C. Reg. at 4674 (citing *Nippon Hodo Co. v. United States*, 142 Ct. Cl. 1 (1958); *Winn–Senter Constr. Co. v. United States*, 110 Ct. Cl. 34, 65–66 (1948)); *Forney Enters., Inc.*, CAB No. D-1383, 2015 WL 7008722 (Nov. 10, 2015).

Under the circumstances of this appeal, we conclude that an exception to the general rule exists, in that the parties continued to address the claim after issuance of Change Order No. 5 without reference to the release or a waiver. *See England v. Smoot Corp.*, 388 F.3d at 849. The extended performance claim due to the piling redesign and longer piles was included in Appellant's REA, (FF 177, Claim I-7), and was submitted well after the September 24, 2007, issuance of Change Order No. 5, (FF 98). The Contracting Officer denied this claim in his final decision based on his contention that the pile redesign was an accommodation to Appellant not entitling Appellant to relief. The Contracting Officer made no mention of a waiver alleged to be included in Change Order No. 5. (FF 103.)

For the above reasons, the Board finds that Appellant did not release the District from its extended performance cost claims relating to the piling redesign.[26] The facts of the present matter support the conclusion that an exception to the general rule is applicable (i.e., the parties continued to address the claim after the release was purportedly executed,) which demonstrates that they never considered Change Order No. 5 to be a relinquishment of the claim. *Ft. Myer Constr. Corp.*, CAB No. D-859, 40 D.C. Reg. at 4674.

Defective Specification

Appellant seeks an extension of 64 days due to the redesign of the pile plan to avoid conflict with the 69kV line support, requiring redesign to provide for longer pile, additional pile, additional splicing work, and changed pile locations. (Appellant's Br. 6-7.) In this regard, Appellant argues that the conflict between the 69kV line support and the pile locations rendered the contract plans and specifications defective and entitles it to an equitable adjustment. Where faulty specifications delay completion of the project, the contractor is entitled to recover damages resulting from the delay. *J.D. Hedin Constr. Co.*, 347 F.2d at 241. Further, 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 (March 07, 1994); *Ft. Myer Constr. Co.*, CAB No. D-859, 40 D.C. Reg. at 4679.

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

[26] These same circumstances preclude finding a sufficient meeting of the minds necessary to establish an accord and satisfaction. *See Prince Constr. Co./W.M. Schlosser Co., Joint Venture,*. CAB Nos. D-1369, *et al.*, 63 D.C. Reg. at 12114-12115; *Ft. Myer Constr. Corp.*, CAB No. D-859, 40 D.C. Reg. at 4674-4675.

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 & Assocs., Inc. v. England*, 379 F.3d at 1339 (explaining that a patent defect is a defect that is an "obvious omission, inconsistency or discrepancy of significance"). A contractor cannot raise a patent ambiguity as a ground for an equitable adjustment unless the contractor previously sought clarification of the alleged ambiguity before bidding the contract. *Dalton v. Cessna Aircraft Co.*, 98 F.3d 1298, 1306 (Fed. Cir. 1996); *Blinderman Constr. Co. v. United States*, 39 Fed. Cl. 529, 538 (1997), *aff'd*, 178 F.3d 1307 (Fed. Cir. 1998); *Rustler Constr., Inc.*, CAB No. D-1385, 63 D.C. Reg. 12228, 12240 (Nov. 10, 2014).

A contractor has a "duty to investigate or inquire about a patent ambiguity, inconsistency, or mistake when the contractor recognizes or should have recognized an error in the specifications or drawings." *Prince Constr. Co./W.M. Schlosser Co., Joint Venture*, CAB Nos. D-1369, *et al*., 63 D.C. Reg. at 12120 (quoting *White v. Edsall Constr. Co*, 296 F.3d 1081, 1085 (Fed. Cir. 2002)). In this case, the plans showed the position of the 69kV lines, specifically required that they be supported, and showed the position of the piles beneath the lines. (FF 81.) The conflict as alleged by Appellant was patent. In fact, not only was the planned pile layout and specifications in conflict with the method of driving pile that Appellant's subcontractor intended patent and glaring, but Appellant and its subcontractor recognized the conflict before bidding. (FF 82.) Given this knowledge, or the knowledge it should have had, and the failure of Appellant or its subcontractor to bring it to the attention of the District before bidding, Appellant is not entitled to delay damages based on what it considered defective specifications.

Additionally, according to the District's witnesses, there were ways that the piling work could have been done consistent with the original plans using a low clearance driver or other equipment suited for working under restricted elevations. (FF 90.) Appellant's subcontractor, Midlantic, disagreed, (FF 89), and Appellant refused to perform the work unless it was granted a redesign of the piling layout that would not interfere with the planned 69kV line supports. (FF 83, 85, 87, 88, 91, 92.)

Thus, the District's several redesigns were accommodations to Appellant, recognizing the equipment its subcontractor had available and its desire to install the piles only if the pile layout were redesigned. Any delays occurring because of these redesigns, different pile locations and driving piles plumb with a coupler instead of battered as designed, (FF 93, 94, 96, 105), were because of an accommodation to Appellant and its subcontractor and do not entitle Appellant to additional time or delay damages on a defective specifications theory.

Constructive Change

Although there was no formal change order issued changing the piling and tie-back work, Appellant argues that the District constructively changed the work required, which entitles it to time and compensation for the piling redesign and tie-back work performed after the District made changes to the work required in the contract. (Appellant's Reply Br. 32-35.)

If the change caused an increase in Appellant's cost of or the time required for performance of the work, an equitable adjustment would be in order. *See 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; *Advanced Eng'g & Planning Corp.*, ASBCA Nos. 53366, *et al.*, 05-1 BCA ¶ 32,806; *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. Appellant has not identified any order of the Contracting Officer that affected its performance.

To meet the "change" component, the contractor must have performed work in addition to, or different from, that required under the contract. *LB&B Assocs., Inc. v. United States*, 91 Fed. Cl. 142, 154 (2010); *C&D Tree Serv., Inc.*, CAB No. D-1347, 63 D.C. Reg. 12004, 12011 (Aug. 8, 2013). 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; *Blood*, AGBCA Nos. 2000-102-1, *et al.*, 02-1 BCA ¶ 31,726 (Dec. 21, 2001); *C&D Tree Serv., Inc.*, CAB No. D-1347, 63 D.C. Reg. at 12012.

Here, the work required of Appellant and its subcontractor regarding adjustment of the piling layout was presumably just what Appellant expected to perform. As noted above, the condition of the conflict between the piling layout and the support system for the 69kV line was patent from the plans and known to Appellant at the time it bid. Appellant chose not to use low clearance driving equipment, which, according to the District's on-site representative could have accomplished the job without adjusting the piling layout and the tie-back couplers, but rather Appellant bid on the basis of realigning the piling layout and tie-back as was done. (FF 82, 88, 90.) Appellant has not shown that the work it intended to do was changed by the District's redesign of the layout, which was done as an accommodation to Appellant. Thus, Appellant has not shown that the work it did was more time consuming or costly than it intended in the first place. Regarding the time necessary to arrive at the three redesigns of the piling layout, (FF 94), any resulting delays stemmed from Appellant's refusal to perform according to the plans, even though such performance without redesign was possible. Accordingly, it has not shown entitlement to an extension of time.

Longer Piles

Part of Appellant's claim relates to the time necessary to obtain and install longer piles due to the failure of the piles originally driven to reach refusal at the planned depth. (FF 96, 98.) Change Order No. 5 paid Appellant for the change in piles, but Appellant claims a time extension because it allegedly took additional time to obtain the longer piles and more time to drive them to a greater depth.

The CHANGES clause, (FF 6), contemplates payment to the contractor when a change, such as Change Order No. 5 requiring longer and different piles, increases the contractor's cost

or time of performance. Thus, these basic facts alone are generally sufficient for Appellant to be entitled to an equitable adjustment under the CHANGES clause. *See H.E. Johnson Co.*, ASBCA No. 48248, 97-1 BCA ¶ 28,921 (Oct. 9, 1996) (disruption to contractor's sequence of work sufficient for entitlement to an equitable adjustment); *Civil Constr., LLC*, CAB Nos. D-1294, *et al*., 62 D.C. Reg. at 4439.

Appellant seeks a total of 64 days for the pile layout change and the longer piles change. (Appellant's Br. 6-7.) However, Appellant has not submitted evidence to separate any delay resulting from the need to drive longer piles from the alleged delay resulting from the pile redesign. Even though it has not attributed any particular delay to the installation of longer piles, it is reasonable to accept that driving substantially longer piles would take additional time, but Change Order No. 5 included payment for the longer piles and for their installation. (FF 98.) Therefore, we find that Appellant has been paid for obtaining and driving the longer lengths of pile through Change Order No. 5 and has not identified any other delay caused by the District regarding the longer length of piles.[27]

We deny Appellant recovery related to the redesign of the pile layout, the requirement for a tie-back system, and for the use of longer piles in the project.

I-9 INSURANCE CLEARANCE (Suspension of Work)

The contract required that Appellant "obtain all necessary permits and approvals to access Railroad and WMATA property" and that Appellant maintain a Railroad Protective Liability Insurance Policy issued in the name of WMATA. (FF 109, 112, 141.) On January 11, 2005, Appellant provided the District with an insurance policy that named WMATA and CSX as insureds. (FF 111.)

On August 23, 2006, WMATA advised that it had not received original copies of certifications of insurance and that certain real estate issues needed to be resolved before WMATA could again provide flagmen. (FF 113.) This was a particularly inauspicious time for WMATA to deny flagmen as Appellant was about to install girders on the bridge and could not proceed without WMATA's cooperation. (FF 117.) Appellant's project manager testified that the issue was that the insurance certificate Appellant provided named both WMATA and CSX on the same policy, (FF 114), but it is apparent from the contemporaneous documentation that the issue was broader and included insurance policies from Appellant's subcontractors and also involved Appellant's permit to work on WMATA property. (FF 112, 115-117.) Appellant was still working on the issues on September 13, 2006, when it advised at a progress meeting that its lawyers were reviewing the documents. (FF 118.) The stalemate with WMATA was reported as resolved on September 25, 2006, and installation of girders on the bridge resumed on October 16, 2006, but was not completed until October 30, 2006. (FF 119-120.)

Appellant argues that the District suspended its performance by ordering it not to work on the site until the insurance issue was resolved and that it is, therefore, entitled to an equitable adjustment under the Suspension of Work clause. (Appellant's Br. 7.) However, the record does

[27] Change Orders Nos. 5 (FF 98), 14 (FF 102), and 18 (FF 108) all included payment for additional costs incurred in performing the redesigned pile work. We conclude that Appellant has not shown entitlement to further payment.

not show that the work cessation was an action taken by the District to suspend Appellant's performance. Instead, it was a decision of WMATA based on what WMATA considered inadequate documentation of its insurance protection and by an unspecified failing of Appellant's permit to access WMATA property. (FF 113.) It was WMATA that advised that it would no longer provide flagger/escort service necessary to allow Appellant to use cranes above the tracks to place the girders on the bridge. (FF 113, 117.) Appellant has not shown a suspension caused by order of the Contracting Officer as required to invoke an equitable adjustment based on the District's suspension of Appellant's work. (FF 7.)[28]

Merritt-Chapman & Scott Corp. v. United States, 429 F.2d 431 (Ct. Cl. 1970), discusses the possibility of finding a suspension even when the government did not order a suspension and was not at fault for suspending the work. In this circumstance, even if a suspension order is not made, relief, in the form of an equitable adjustment to compensate for delay, "should be granted as if an actual suspension order had been issued." *Fruehauf Corp. v. United States*, 587 F.2d 486, 494 (Ct. Cl. 1978); *Henderson, Inc.*, DOTCAB No. 2423, 94-2 BCA ¶ 26,728.

However, the court in *Fruehauf* found in the appeal before it, that neither the government nor the contractor was at fault regarding the delay. *Fruehauf Corp.*, 587 F.2d at 496-97. We cannot make an equivalent finding here as Appellant has not proved that it is without fault in any delay that resulted from WMATA's insistence on receipt of the actual policies of insurance by Appellant and its subcontractors and on Appellant obtaining a proper right of entry permit to access WMATA property. *Commercial Contractors Equip., Inc.*, ASBCA No. 52930, 03-2 BCA ¶ 32,381. The Suspension of Work clause requires that the suspension of work be "caused by conditions beyond the control of and not the fault of the contractor." (FF 7.)[29] Appellant was responsible if the insurance policy was inadequate and the access permit deficient. (FF 109, 110, 112.)

Appellant argues that WMATA's action was arbitrary and unjustified because the insurance coverage and access permit had been accepted by WMATA when submitted, and WMATA had permitted Appellant to work at the site, including over the tracks, for fifteen months without complaint. (Appellant's Br. 7; Appellant's Reply Br. 36.) We agree. The problem surfaced on August 23, 2006, (FF 113), and it appears that as of August 29, 2006, Appellant had compliant insurance policies. (FF 116.) The matter was finally resolved on September 25, 2006, with work to commence October 16, 2006. (FF 119.)

If the deficiencies had been brought to Appellant's attention at the beginning of the project, they could have been corrected without significant effect on the project. If the insurance policies or the access permit were deficient, WMATA was remiss in not bringing the deficiencies to Appellant's and the District's attention until August 2006. We find Appellant entitled to a time extension for the delay from August 4, 2006, when Appellant intended to begin placing the girders, through October 30, 2006, the date the girders were installed. (FF 120-122.)

[28] That the Contracting Officer did not formally issue a suspension of work order is not necessarily fatal to Appellant's case. If the facts establish a duty to issue such an order, relief could be granted as if such an order had been issued. *John A. Johnson & Sons, Inc. v. United States*, 180 Ct. Cl. 969, 985 (1967) (citations omitted).

[29] Relief under the TERMINATION/DELAY clause also requires that the delay in the completion of the work arise from unforeseeable causes beyond the control and without the fault or negligence of the contractor. (FF 8.)

The District's expert concurred that Appellant was entitled to a time extension due to the suspension of work during the insurance clearance. (FF 120, 122.)

Appellant was responsible for the inadequacy of the insurance and right of access documents, and we denied recovery as Appellant was not without fault. However, Appellant was without fault regarding WMATA's dilatory assertion of its rights. Appellant is granted a non-compensable 88-day time extension for excusable delay (August 4 through October 30, 2006), due to WMATA's dilatory assertion of its right to insurance and proper right of access permit. *See Olympus Corp. v. United States*, 98 F.3d at 1318 (the government is not responsible for third-party actions such as labor strikes that delay a contractor's performance, absent a specific contractual provision).

I-10 INSTALLATION OF 16 INCH WATER MAIN (Defective Specifications)

The plans called for a 16-inch water main below the bridge deck to be enclosed in a 30-inch casing and installed and tested before the bridge deck was poured. (FF 123.) From December 11 through December 18, 2006, Appellant tried to install the line according to the contract plans, but the rigid joints specified for the water line made it impossible to get the pipe into the casing because of the camber in the bridge girders, which were to support the water main. To allow for the camber, the water main needed flexible joints, not the rigid joints specified. Once the bridge deck was poured and the girders loaded, the camber flattened and the water line could be installed. (FF 125-127.)

Appellant argues that the specifications calling for installing the 16-inch water line with its rigid joints in the casing before the bridge was loaded were defective because the camber in the casing that prevented inserting the water line persisted until the bridge was poured. (Appellant's Br. 8.) According to Appellant, the defective specifications caused Appellant a 10-day delay in performing critical path work in forming and pouring the bridge deck. *Id*.

Appellant relied on the specifications in attempting to comply with the plans but could not. (FF 125.) *See E.L. Hamm & Assocs., Inc. v. England*, 379 F.3d at 1339. The District, by providing Appellant with design specifications, impliedly warranted that, if complied with, the specifications are free from design defects. *United States v. Spearin*, 248 U.S. 132, 137 (1918); *Rick's Mushroom Serv., Inc.*, 521 F.3d 1338, 1344 (Fed. Cir. 2008); *White v. Edsall Constr. Co.*, 296 F.3d 1081, 1084 (Fed. Cir. 2002); *Am. Renovation & Constr. Co.*, ASBCA No. 53723, 10-2 BCA ¶ 34,487. Appellant is entitled to recover its costs flowing from the breach of the implied warranty. *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.*)

Because Appellant could not install the 16-inch water main according to the plans despite its attempts to do so, (FF 125), the District's plans regarding the water main were erroneous, as the planned method would not produce a satisfactory result. Due to the fact that the specifications were defective, Appellant is entitled to recover for those defects. *Rustler Constr., Inc.*, CAB No. D-1385, 63 D.C. Reg. at 12240. Any delay shown to have resulted from the defective plans is compensable. *Prince Constr. Co./W.M. Schlosser Co., Joint Venture*, CAB

Nos. D-1369, *et al*., 63 D.C. Reg. at 12120. Accordingly, we find 10 days of compensable delay is reasonable based upon the record. (FF 129.)

I-11 WEATHER IMPACT ON SUBGRADE COMPACTION

In its REA, Appellant sought a time extension of 65 days due to weather impact in pouring concrete approach slabs at the bridge access after completion of the concrete bridge deck, claiming wet conditions of the soil prevented preparation of the subgrade. (FF 131.) According to Appellant, these adverse weather conditions persisted for 65 calendar days, from January 24, 2007, to March 29, 2007. (FF 131.)

The TERMINATION/DELAY clause of the contract addresses and allows time extensions for delays occurring through no fault of the contractor, including delays resulting from "climatic conditions beyond the normal which could be anticipated." (FF 8.) However, Appellant has offered no evidence that would support a finding of entitlement under that contract provision. Appellant has not shown that the weather conditions complained of were beyond the normal expected winter conditions in the Washington, DC area. *See All-State Constr., Inc.*, ASBCA Nos. 50513, *et al*., 04-2 BCA ¶ 32,778 at 162,082-84 (number of days of excusable weather delay determined by comparing experienced rain and snowfall to "historic normal" rain and snowfalls); *Daydanyon Corp.,* ASBCA No. 57681, 15-1 BCA ¶ 36,073.

Furthermore, this 65-day weather claim was not addressed in Appellant's post-hearing brief, and there has been inadequate evidentiary support or argument in favor of this element of the request for equitable adjustment. We find that it has been abandoned, and it is denied.

In its place, Appellant now argues that it is entitled to 199 days of delay due to a partial suspension of the project for each of the four winters occurring within the project duration. This argument is based on Standard Specification 108.06(B). (FF 11.) That provision authorizes the Contracting Officer, by written order, to partially suspend performance during the period from December 1 to April 1, inclusive. Under such circumstances, an adjustment will be made to the period of performance in the ratio of the amount earned during the period of partial suspension to the original contract amount for that period. (Standard Specification 108.06(B), FF 11.) Appellant's expert calculated the ratio using information from Appellant's cost records and concluded that Appellant is entitled to an extension of 199 days to contract performance using the ratio in the clause. (FF 134.) (Appellant's Br. 9-10; Appellant's Reply Br. 69.)

There are two difficulties with this theory of recovery. First, the Contracting Officer did not issue a written order partially suspending the project, and there is nothing in the record to suggest Appellant, during the course of the project, ever requested that the Contracting Officer do so. (FF 133, 135.) Nonetheless, Appellant argues that the lack of a suspension order is irrelevant if the Contracting Officer was required to issue one. Yet, Appellant does not suggest under what circumstances the Contracting Officer would be compelled to issue such an order.

Second, and more important, this current claim was not made to the Contracting Officer in Appellant's REA. The claim Appellant maintains now, relying upon Standard Specification 108.06, is quite different from the individual and narrow request for 65 days of time extension

due to a specific period of weather allegedly not favorable to drying the subgrade for construction of the concrete slabs at the bridge approaches. (FF 131.) As the District argues, assertion of a right to recover under Standard Specification 108.06 based on the earnings under the contract during the claimed "winter shutdown" periods and what Appellant could reasonably have been expected to earn, is a new claim. (District's Br. 14-16.)

D.C. Code § 360.03(a)(2), authorizes our jurisdiction over "any appeal by a contractor from a final decision by the contracting officer on a claim by a contractor, when such claim arises under or relates to a contract." Generally, the proper scope of an appeal is based on the nature of the claim presented to the contracting officer, the contracting officer's decision thereon, and the contractor's appeal. *See, e.g., Stencel Aero Eng'g Corp.*, ASBCA No. 28654, 84-1 BCA ¶ 16,951; *Transco Contracting Co.*, ASBCA No. 28620, 85-2 BCA ¶ 17,977; *Centurion Elec. Serv.*, ASBCA No. 51956, 03-1 BCA ¶ 32,097.

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, 62 D.C. Reg. 4262, 4268 (Jan. 27, 2012); *Friends of Carter Barron Found. of the Performing Arts*, CAB No. D-1421, 2011 WL 7428966 (Nov. 15, 2011); *Advantage Healthplan, Inc.*, CAB Nos. D-1239, *et al.*, 2013 WL 6042884 (Oct. 4, 2013). Introduction of additional facts that do not alter the nature of a claim first filed with the contracting officer do not constitute new claims. *See Todd Pac. Shipyards Corp.*, ASBCA No. 55126, 06-2 BCA ¶ 33,421 (citations omitted); *Rex Systems, Inc.*, ASBCA No. 54436, 07-2 BCA ¶ 33,718. 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); *JH Linen, LLC*, CAB No. D-1366, 63 D.C. Reg. 12246, 12260.

However, if a claim is brought initially before the Board and does not arise from the same operative facts of a claim properly submitted to the contracting officer, that claim is considered a "new claim" that is not within the jurisdiction of the Board. *See J. Cooper & Assocs., Inc. v. United States*, 47 Fed. Cl. 280, 285 (2000) (citations omitted); *Keystone Plus Constr. Corp.*, CAB No. D-1358, 62 D.C. Reg. at 4268; *Advantage Healthplan, Inc.*, CAB Nos. D-1239, *et al.*, 2013 WL 6042884 ; *Transco Contracting Co.*, ASBCA No. 28620, 85-2 BCA ¶ 17,977 (citing *Modular Devices, Inc.*, ASBCA No. 24198, 82-1 BCA ¶ 15,536).

To determine whether a claim not specifically mentioned in the REA submitted to the Contracting Officer is a new claim, we look to whether the claim at issue arises from the same operative facts as the original REA claim such that the Contracting Officer would have had adequate notice of the nature of the claim when issuing his decision. *JH Linen, LLC*, CAB No. D-1366, 63 D.C. Reg. at 12261. Appellant's view is that its partial winter shutdown claim is not a new claim because the claim in the REA submitted to the Contracting Officer sought relief for winter weather delays. (Appellant's Reply Br. 5-6.) However, the elements of proving a weather delay – expected weather vs. actual weather – have not been met here and are entirely different proofs from what Appellant claims it must show to recover under Standard Specification 108.06 – namely, that the Contracting Officer ordered a partial shutdown and that Appellant's earnings during the period were less than average. (Appellant's Reply Br. 7, Appellant's Br. 9-10.)

The only way the Contracting Officer can address the claim effectively is if he knows its basis. Appellant's inclusion in the REA of a weather delay claim does not provide "adequate notice of the basis and amount" of the partial suspension claim later submitted to the Board. *See Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003); *Hawkins and Powers Aviation, Inc. v. United States*, 46 Fed. Cl. 238, 243 (2000); *Keystone Plus Constr. Corp.*, CAB No. D-1358, 62 D.C. Reg. at 4270-4271 (no jurisdiction over delay claim not asserted in claim to contracting officer). A weather delay claim would be addressed under the contract's TERMINATION/DELAY clause (FF 8), while a claim for a partial winter shutdown seeks relief under a different clause, Standard Specification 108.06, (FF 11). Notice of a weather delay claim under the first contract provision is not adequate notice to the Contracting Officer of a claim pursued under Standard Specification 108.06.

Appellant made a clear statement of a weather delay claim to the Contracting Officer in its REA, which it has not proved in this proceeding, and that is a different claim than the claim that is being pursued now based on an alleged partial shutdown under Standard Specification 108.06.[30] The claim based on Standard Specification 108.06 may not be asserted for the first time now before the Board, and that portion of the appeal is dismissed without prejudice.

II-1 DELAY FOR REBAR

In its claim, Appellant claimed entitlement to a delay of 14 days from August 17, 2007, to August 30, 2007, because of excessive water in the area and because it alleges it was first directed not to install rebar couplers between the phases of the south abutment installation then when access was limited, the District allegedly rescinded that earlier direction and directed Appellant to install rebar couplers between the abutment phases. (FF 136, 137.)

This issue is not addressed in Appellant's post-hearing briefs or in its expert's report. Appellant notes in its reply brief that the claim is "accounted for in project quantity overrun," which we consider below. (Appellant's Reply Br. 25-26.) As a result, the rebar coupler claim is denied for lack of proof. Further, the dewatering claim was considered above in Section I-6.

II-6 RESEQUENCING BACKFILL AT SOUTH ABUTMENT[31]

In its claim, Appellant asserted that it was delayed for 7 days, January 15, 2008, through January 21, 2008, by the District requiring that the backfill of the abutments occur after the concrete bridge deck was poured which caused additional work and delayed activities on the critical path of the project. (FF 138, 139.)

Appellant has not submitted evidence at the hearing or argument in its post-hearing briefs regarding this element of its REA. Appellant notes in its reply brief that the claim is "accounted for in project quantity overrun," (Appellant's Reply Br. 26), which we consider below. Therefore, the resequencing claim is denied for lack of proof.

[30] To the extent the weather claim is asserted under the partial shutdown theory, it would be dealt with under the Work in Winter Months section below.
[31] We note that Claims II-2, II-3, II-5 were discussed previously herein under Claim I-6.

I-3 DECK DEMOLITION LOSS OF PRODUCTIVITY- LACK OF FLAGGERS/ II-7 TOTAL FLAGGER DELAYS (Duty to Cooperate)

Appellant could not work above the CSX or WMATA tracks or within 50 feet of the tracks unless it had arranged with those companies for the presence of a flagger. (FF 142, 145.) The flagmen were in radio contact with their respective dispatchers and could stop any work that would endanger railroad operations. (FF 142.) The contract provided that CSX had "sole authority" to determine the need for flagging required to protect its operations. (FF 143.)

The time Appellant could work was constricted by WMATA's limitation of work over its tracks to non-revenue hours, specifically from 12:30 am to 5:30 am each weekday morning, Monday through Thursday, with slightly more hours available for work on weekends. (FF 149.) Appellant reasonably assumed, given the time necessary to mobilize its heavy equipment to the site for working on the bridge, that it would have reasonable access to the site during WMATA's non-revenue hours if it arranged in advance with WMATA and CSX for the presence of flaggers. Appellant's access to the tracks was also limited by CSX and WMATA's need to use the tracks for their own purposes, but when CSX and WMATA gave Appellant access and committed to providing the required flaggers, Appellant had reason to assume that it would have access for the specified periods. However, that proved not to be the case. On many occasions where Appellant had arranged with CSX and WMATA for access to the work site and for the presence of flaggers, the flaggers failed to show, or the work period permitted was far shorter than Appellant expected and what was needed for Appellant to work efficiently.

Failure to coordinate

The District asserts that Appellant is not entitled to damages resulting from CSX and WMATA failures to supply flaggers because Appellant was responsible for making arrangements with WMATA and CSX for access to the tracks and failed to provide the requisite advance notice of 30 days before flagger support was required. (District's Br. 33.)

However, the contract language did not require such coordination each time Appellant required flagger service. (FF 146.) It simply advised that it may take 30 days for a flagger to be provided. (FF 147, 148.) Moreover, the relevant parties, Appellant and WMATA and CSX acted contrary to there being such a requirement. Generally, Appellant's representative met with the companies on Thursday, stated the times it needed track access for the next week, and heard back from WMATA and CSX the next day. (FF 150.) How the parties interpret their obligations through their conduct is a better indicator of their understanding of the agreement than a cold reading of the contract language. *Macke Co. v. United States*, 467 F.2d 1323 (Ct. Cl. 1972); *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."); *A&M Concrete Corp.*, CAB Nos. D-1314, *et al*., 63 D.C. Reg. 12068, 12080-12081 (Dec. 9, 2013). Here, the conduct of Appellant, WMATA and CSX, with the District's knowledge, reflected their agreement regarding the coordination for flaggers that was required for the project. Neither CSX nor WMATA insisted on a full 30-day notice before providing a flagger, and Appellant adequately coordinated access.

Duty to Cooperate

Appellant characterized the basis for the District's liability for unreliable flagger service as the District's "[f]ailure to Manage Project & Administer Contract." (Appellant's Br. 4, 25.) We consider the substance of Appellant's claim to be a failure of the District to meet its duty to cooperate with Appellant in performing the contract. (Appellant's Reply Br. 17-19.)

The District alleges that WMATA and CSX were third parties with unlimited discretion to approve, modify or withdraw track access specified in the contract and that the District had no control and should not bear responsibility for their exercise of discretion regardless of any track access commitments. (District's Br. 34.) Appellant alleged that the companies were under contract with the District, but that has not been shown. Nor did Appellant show that the District had any particular control over the activities of either WMATA or CSX. For this reason, there is no basis for concluding that the District had leverage to force either entity to provide flaggers at a particular time, and the contract conveyed this. Accordingly, we reject finding a failure to cooperate as a basis for District liability.

When a party outside the control of either party interferes with the contractor's progress, the District will generally not be held liable unless some warranty or a specific contractual provision authorizes recovery. JOHN CIBINIC, JR., RALPH C. NASH, JR., & JAMES F. NAGLE, ADMINISTRATION OF GOVERNMENT CONTRACTS 586 (4th ed. 2006); s*ee McNamara Constr., Ltd.*, at 1169–70 (Ct. Cl. 1975).

Duty to Make Site Available

The District had a duty to make the site available for Appellant to work. *Singleton Contracting Corp*., GSBCA Nos. 9614, *et al.*, 90-3 BCA ¶ 23,125, at 116,106; *Strand Hunt Corp*., GSBCA No. 12859, 95-2 BCA ¶ 27,690. To pursue this claim, Appellant must demonstrate that the District warranted that the site would be available.

Interpreting the contract according to its plain meaning under ordinary circumstances and contract usage, *see Hol–Gar Mfg. Corp.*, 351 F.2d 972; *Blake Constr. Co., Inc*., GSBCA No. 2477, 71–1 BCA ¶ 8,870, and reading all provisions of the contract together, *see Perini, Horn, Morrison–Knudsen (JV),* ENGBCA No. 4821, 87–1 BCA ¶ 19,545; *Hol–Gar Mfg. Corp.*, 351 F.2d 972; *J.R. Cheshier Janitorial*, ENGBCA No. 5487, 91-3 BCA ¶ 24,351, we find that, in the context of the heavy highway/bridge construction, the plain understanding of the contract is that Appellant would have reasonable construction time, time to bring its cranes and other equipment to the site and set them up. This means that CSX and WMATA would provide a reasonable amount of time for Appellant to work, but in reality that access and the ability to work on the bridge was repeatedly barred by the unreasonable lack of flaggers.

While the contract pointed out that CSX or WMATA had the sole authority to provide flagger support, and barred claims by Appellant against the District or CSX for delays on account of railroad traffic or railroad work, (FF 142-144), Appellant alleges that these are not the circumstances under which it seeks delay damages. Appellant argues that it seeks damages only due to the failure to supply flagmen when CSX or WMATA had committed to do so or when

failure to provide a flagman was without any particular reason, such as the railroad's lack of resources or lack of a willing employee. (FF 151, 161.) *See Perini, Horn, Morrison-Knudsen*, ENGBCA No. 4821, 87-1 BCA ¶ 19,545. The contract made Appellant responsible for delays caused by CSX or WMATA "towards obtaining their permits, approvals and inspections", (FF 141), but the issue here is not the obtaining of permits or approvals. Nor is the issue with CSX's sole authority to determine the need for flagging. (FF 143, 145.) Appellant contends that the occasions at issue in the claim are those where a flagger was necessary under CSX and WMATA policies, a flagger was arranged by Appellant with CSX and WMATA giving necessary approvals and committing to provide flaggers, but then one of the companies failed to provide flaggers when promised, barring any work by Appellant.

Appellant had no reason to assume that after it had duly arranged with WMATA and CSX for the presence of flaggers, one would simply not appear, thus preventing Appellant from conducting work, even if it had mobilized its workers and equipment to the site in anticipation of working through the small window it was afforded under the contract. Nor could it have anticipated that CSX on occasion simply would not have resources available to hire flaggers or had no employees bidding on the work, even though there was no other reason why access to the tracks could not be granted. (FF 151, 161.) Nor could Appellant anticipated that flaggers would be available for only a small portion of the non-revenue hours it anticipated would be available for its work. (FF 164, 159.) A reasonable reading of the contract indicated that access to the site and the availability of flaggers would be sufficient to permit Appellant to reasonably work efficiently on the site.

The contract included cautionary language pointing out the authority of CSX and WMATA, (FF 141, 143, 144, 146), however, Appellant was entitled to rely on the implications of the language in the contract affording it reasonable access to the site notwithstanding the warnings in the contract. *See Hollerbach v. United States*, 233 U.S. 165, (1914); *Carl W. Linder Co.*, ENGBCA No. 3526, 78-1 BCA ¶ 13,114.

In *Merritt-Chapman & Scott Corp. v. United States*, 429 F.2d 431 (Ct. Cl. 1970), the court discussed possible entitlement to an equitable adjustment under the Suspension of Work clause when the government was not at fault for the suspension:

> There are occasions for the Suspension of Work clause to operate when the Government is at fault, as we recently noted (*See Chaney & James Constr. Co. v. United States*, 421 F.2d 728, 731-33, 190 Ct. Cl. 699, 705-08 (1970), but the clause can likewise be effective, as we have also held, when there is a suspension not due to the Government's fault, dereliction, or responsibility. *See T. C. Bateson Constr. Co. v. United States*, 319 F.2d 135, 162 Ct. Cl. 145 (1963); *John A. Johnson & Sons v. United States*, 180 Ct. Cl. 969 (1967). An instance of the latter category is a suspension and delay which lasts so long (regardless of the absence of government fault) that the contractor cannot reasonably be expected to bear the risk and costs of the disruption and delay. That is one type of suspension and delay 'for an unreasonable length of time causing additional expense', within the meaning of the clause. Depending on the circumstances, a delay due to a non-fault suspension by the Government can obviously be so protracted that it would be unreasonable to expect the contractor to shoulder the added expense himself. We think

> that in its terms and its purpose the Suspension of Work clause covers that situation, among others.

429 F.2d at 432.

In this circumstance, even if a suspension order is not made, relief, in the form of an equitable adjustment to compensate for delay, "should be granted as if an actual suspension order had been issued." *Fruehauf Corp. v. United States*, 587 F.2d at 493–97; *Henderson, Inc.*, DOTCAB No. 2423, 94-2 BCA ¶ 26,728.

In *Dravo Corp.*, ENGBCA No. 3800, 79-1 BCA ¶ 13,575, the board addressed contentions that the interference with the appellant's work was caused by a third party, similar to the District's arguments herein. (District's Br. 10, 34.) The appellant in *Dravo* had planned its excavation and hauling operations around the availability of a work storage area designated in the contract drawings. When the cognizant City Department of Highways and Traffic refused to issue a permit under the "Permits and Responsibilities" clause, effectively depriving the contractor of use of the area, WMATA, the contracting agency, refused to consider an adjustment under the "Changes" clause. On appeal, the board held the Permits and Responsibilities clause was not dispositive of the case and quoted the following language of the General Services Board of Contract Appeals decision in *ABC Demolition Corp.*, GSBCA No. 2288, 68–2 BCA ¶ 7096:

> If Government's contention was accepted, it would mean that the Superintendent of the National Park Service, who was not a party to the contract, could have refused to issue a special trucking permit which would have made performance of the contract impossible, or he could have imposed such onerous restrictions on the successful bidder that performance would have been extremely difficult and expensive.

Dravo Corp., ENGBCA No. 3800, 79-1 BCA ¶ 13,575. The board in *Dravo* further stated:

> Whatever the outer limitations of the warranty of availability in this case, this use falls clearly within its ambit. Since the warranty applies it is not significant that the warranted use was prevented by a third party rather than by WMATA. *Carl W. Linder Co.*, ENG BCA No. 3526, 78-1 BCA ¶ 13,114; *Dale Constr. Company v. United States*, 168 Ct. Cl. 692 (1964); *D & L Constr. Co. v. United States*, 185 Ct. Cl. 736, 752 (1968).

Id.; *see also Perini, Horn, Morrison-Knudsen,* ENGBCA No. 4821, 87-1 BCA ¶ 19,545 (quoting *Dravo Corp.*).

The above cases, which found the government responsible for a constructive suspension of work, address situations where the delay and inability to work was continuous and of long duration. Here, the delay was intermittent, and while damaging to Appellant's ability to perform important work on the bridge, the warranty of site availability was not breached as the site was available. Under the circumstances of this appeal, granting a suspension of work would have been impractical and unworkable regarding the intermittent and unpredictable lack of flaggers. Thus, we decline to follow *Dravo Corp.*, under the circumstances of this appeal, and we do not

find the District responsible for the resulting delay. However, the facts do establish Appellant's entitlement to a non-compensable delay.

Unforseeable Delay by Third Party

The TERMINATION/DELAY clause of the contract provides relief in the form of an extension of performance for a contractor when a "delay in the completion of the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor." (FF 8.) As we have found above, the delays caused by CSX and WMATA were unforeseeable and entitle Appellant to an extension of performance time.

With a basis for excusable delay established, relief (time, not money) under the clause requires that in each instance, the failure to perform must be beyond the control and without the fault or negligence of the contractor, and the failure to perform furthermore: (1) must be one that the contractor could not have reasonably anticipated and taken adequate measures to protect against; (2) cannot be overcome by reasonable efforts to reschedule the work; and (3) directly and materially affects the date of final completion of the project. *Fraser Constr. Co. v. United States*, 384 F.3d 1354, 1361 (Fed. Cir. 2004); *Fluor Intercontinental, Inc., d/b/a J.A. Jones Int'l v. Dep't of State*, CBCA No. 1559, 13 BCA ¶ 35,334. When a contractor requests an extension of contract performance time for delays caused by third-party interference and the delay was unreasonable, beyond the contractor's control, and not due to the contractor's own fault or negligence, an extension of performance time is generally allowed. *XPLO Corp.*, DOTCAB No. 1242, 86–2 BCA ¶13,460.

The delays caused by the lack of reliable flagger service were documented in Appellant's records, including its daily time sheets reflecting work on the project. Appellant's daily time reports, (Appellant's Hr'g Ex. 241), recount the interruptions of work due to the lack of flaggers on 59 days, noting comments such as "no CSX flagman on site", (*id*., at 003080), "[n]o Metro man. CSX flagman but no work orders", (*id.* at 003077), "[m]etro on site … CSX on site with no radio to communicate", (*id.* at 003074), "CSX worked, WMATA didn't work", (*id.* at 003071).

It is clear that Appellant was not at fault regarding the flagger delays and it could not have anticipated the difficulties or protected itself against them and it also could not reschedule the work. Thus, the sporadic flagger presence on the site delayed the date of final project completion. The delays resulting from flagger delays were intermittent, and they were not easily calculated or integrated into Appellant's as-built schedule and time impact analysis. (Appellant's Hr'g Ex. 9, at 000793.) Appellant's expert calculated a delay of 28 days initially for Phase I. (Appellant's Hr'g Ex. 223, at 002500.) The District's construction manager determined the delay resulting from flagger issues to be 6-8 weeks through Phase I. (Appellant's Hr'g Ex. 178, at 001963; Appellant's Hr'g Ex. 197, at 002101.) This is in line with the figure Appellant demonstrated by showing 67 non-work days on its schedule in its REA due to lack of flaggers, (Appellant's Hr'g Ex. 9, at 00794-00796), and is consistent with the record prepared by Appellant's expert showing the impact days from the flagger issue to be 58 days for the entire project. (Appellant's Hr'g Ex. 223, at 002530-002531.) Appellant has adequately demonstrated

the delay caused by CSX and WMATA, and we find Appellant entitled to a non-compensable delay of 60 days.

However, when the contractor seeks to recover from the District its costs attributable to the third party delay, absent an affirmative showing that the District unreasonably delayed the work, caused additional expense, or breached a duty owed to the contractor, the costs attributable to the delay cannot be recovered. *See Nielsons, Inc*., IBCA No. 1536–11–81, 82–2 BCA ¶ 16,034; *Peter Kiewit Sons Co./J.F. Shea Co. (Joint Venture)*, ENGBCA Nos. 5086, *et al*., 86–2 BCA ¶ 18,992; *Bromley Contracting Co.*, HUDBCA No. 85-969-C15, 87-1 BCA ¶ 19,411. Here, Appellant has not shown fault on the part of the District. Accordingly, Appellant's claim for delay damages of $98,751.45 due to lost crew time because of flagger delays is denied. Appellant has not shown the cause of the damages to be the District but rather third parties not under the District's control.

II-8 PROJECT COST OVERRUNS

Appellant claims entitlement to a time extension of 89 days calculated upon the amount by which the actual quantities from the Pay Items exceeded the amount of the contract. Appellant alleges that the actual cost, with all changes and increases, exceeded the original contract amount of $7,960,606 by 16.4%. According to Appellant, this entitles it to a 16.4% increase in contract performance time (89 days) over the original contract duration of 549 days. (FF 165.) Appellant bases its claim on Standard Specification 108.06 (b), which provides a method of calculating contract time during a partial suspension issued by the contracting officer. (FF 11.)

Appellant does not detail how the cited provision of the contract, Standard Specification 108.06 (b), dictates the result Appellant advocates. (Appellant's Br. 9.) Appellant's expert report also does not detail how this provision authorizes the extension sought but merely compares the actual project costs with the expected costs and concludes, "[t]herefore it is reasonable that an additional 89 calendar days be granted to address the project quantity overruns." (Appellant's Hr'g Ex. 223, at 002512.)

Appellant has been paid at the unit prices for all work performed in excess of the estimated quantities, (FF 174), and it has not shown or alleged that the unit prices were inadequate in light of any increases in the quantities. *See A.S. Horner, Inc.*, AGBCA No. 80-195-4, 85-3 BCA ¶ 18,347; *Kiska Constr. Corp.-USA and Kajima Eng'g and Constr., Inc., A Joint Venture*, ASBCA No. 54613, 09-1 BCA ¶ 34,089.

As the District points out, to the extent the increase in billings is due to Change Order Nos. 7 ($180,000.00), 12 ($84,888.00), 15 ($142,361.00), and 19 ($133,581.00), which increased the pass-through payments meant for CSX flagger services, (FF 163), this has no bearing on whether the character of the work was significantly changed. Thus, the overrun would be about $770,000.00 instead of the $1,306,836, (Appellant's Hr'g Ex. 234, at 002823), used by Appellant in its calculations. This puts the alleged overrun at less than 10% of the original contract price of $7,960,606.00, (FF 1). Thus this amount is below the threshold for finding a "major item" as used in the Equitable Adjustment Clause, (FF 7), which removes any basis for invoking the Equitable Adjustment Clause as grounds for the 89-day time extension sought, even if the entire

overrun alleged was due to one item, which it is not.

Appellant has failed to demonstrate any effect on the critical path of the project due to alleged quantity overruns experienced on the project and, consequently, is not entitled to a time extension based on project cost overruns.

Work in Winter Months

Appellant argues it is entitled to delay damages for loss of productivity for work pushed into winter months. Wrongful government delays that are not reasonably anticipated and push a contractor's performance into periods of adverse weather can be a cause of additional delay for which a contractor may be compensated. *Charles G. Williams Construction*, ASBCA No. 42592, 92-1 BCA ¶ 24,635; *DTC Eng'rs & Constructors, LLC*, ASBCA No. 57614, 12-1 BCA ¶ 34,967. However, Appellant has not shown that delays caused by the District pushed specific work into winter months. If we had found that the District was responsible for all project delay, the theory might have been viable. We have determined that much of the delay was not caused by the District, so it is not possible to determine whether any particular work was pushed into winter months by the District's actions.

Additionally, the relief Appellant claims is calculated under its project overrun theory and under Standard Specification 108.06, which has not been shown to apply. Appellant claims that under Standard Specification 108.06 no evidence of winter weather or actual loss of productivity need be shown. (Appellant's Reply Br. 38-39.) Appellant applies the formula in 108.06(B) and concludes Appellant is entitled to 199 days added to contract time for work during the winter periods. (Appellant's Reply Br. 69.) This was considered and rejected in Section I-11, above, and we reject it here.

Delay claim

We have decided Appellant's claims as follows:

I-1. Pepco delay in uncovering 69 kV line	Denied
I-2. Pepco delay in energizing temporary signals	18 compensable, 50 non-compensable
I-3, II-7. Project delays due to lack of flaggers	60 non-compensable
I-4. Fiber-optic cable differing site condition – negotiations	68 compensable
I-5. Fiber-optic cable differing site condition – actual work	Included with I-4
I-6, II-2, II-3, II-5. Excessive groundwater	Denied
I-7. Piling installation change	Denied
I-8. Additional tie-back work	Denied
I-9. Insurance clearance	88 non-compensable
I-10. Installation of 16 inch water line	10 compensable
I-11. Weather impact on subgrade compaction	Denied
II-1. Delay for Rebar Coupler	Denied
II-6. Resequencing of Backfill at South Abutment	Denied
II-8. Project Cost Overruns	Denied

DAMAGES

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 amount of incurred costs for and shown the accuracy of the daily rate it calculated. (FF 173.) From its cost and payroll records, Appellant compiled its claimed traffic control costs and field supervision costs and calculated a daily rate for each. (FF 173.) Appellant presented evidence from its records and from its subcontractor's records that persuades the Board that they are actual, incurred costs, and we find them to be accurate and reliable. Furthermore, the District has not challenged the validity of any of the costs claimed nor presented evidence to refute their amount. *See Teledyne McCormick-Selph v. United States*, 588 F.2d 808, 810 (Ct. Cl. 1978); *Reliable Contracting Grp., LLC v. Dep't of Veterans Affairs*, CBCA No. 1539, 11-2 BCA ¶ 34,882; *George A. Fuller Co. and Sherman R. Smoot Corp.*, CAB No. D-828, 40 D.C. Reg. 5111 (Apr. 23, 1993); *see also Gilbane-Smoot, Joint Venture*, CAB No. D-885, 40 D.C. Reg. 4954 (Feb. 18, 1993); *Org. for Envtl. Growth, Inc*. CAB No. D-850, 41 D.C. Reg. 3539 (Aug. 11, 1993).

Field supervision and traffic control costs are direct costs of the project and are recoverable in order to make the contractor whole. *See Williams Enters. v. Strait Mfg. & Welding*, 728 F. Supp. 12, 19-20 (D.D.C. 1990), *aff'd in part, remanded in part sub nom. Williams Enters., Inc. v. Sherman R. Smoot Co.*, 938 F.2d 230 (D.C. Cir. 1991); *MCI Constructors, Inc.*, CAB No. D-924, 44 D.C. Reg. 6444 (June 4, 1996).

To recover home office overhead under the Eichleay formula, a contractor must first show that there was a government-caused delay to its planned contract performance "that was not concurrent with a delay caused by the contractor or some other reason." *P.J. Dick, Inc. v. Principi*, 324 F.3d 1364, 1370 (Fed. Cir. 2003); *Sauer, Inc. v. Danzig*, 224 F.3d 1340, 1347-48 (Fed. Cir. 2000). The contractor must also show its original contract performance time was thus extended. *P.J. Dick, Inc.*, 324 F.3d at 1370. Finally, after proving the above elements, the contractor must show it was required to remain on "standby" during the delay. *Id.* Where a contractor proves these elements, "it has made a prima facie case of entitlement" and the burden of production shifts to the government "to show that it was not impractical for the contractor to take on replacement work and thereby mitigate its damages." *Id.*; *Melka Marine, Inc. v. United States*, 187 F.3d 1370, 1376 (Fed. Cir. 1999); *All State Boiler v. West*, 146 F.3d 1368, 1373-82 (Fed. Cir. 1998); *Precision Dynamics, Inc.*, ASBCA No. 50519, 05-2 BCA ¶ 33071.

In this case, Appellant failed to demonstrate that it was on standby during any of the time periods that we found District-caused delay (i.e., the delay in installing power to the temporary signal controller, the discovery of the underground Abovenet cable, or the 16-inch water main). In none of those delays was Appellant required to remain on standby. *Melka Marine, Inc. v. United States*, 187 F.3d 1370, 1375 (Fed. Cir. 1999); *Interstate Gen. Gov't Contractors, Inc. v. West*, 12 F.3d 1053, 1056 (Fed. Cir. 1993). The Federal Circuit has stated that the standby prong, properly understood, focuses on "suspension of work on the contract." *Interstate Gen.*, 12 F.3d at 1057.

Here, in none of the delaying events for which the District was found responsible did Appellant cease performance. Thus, it was not on standby, but, rather, continued working on the project. In such circumstance, the contractor's work generates sufficient contribution to the company home office overhead that it is not entitled to additional overhead. In addition, Appellant has not alleged that it was required to standby for any indefinite extended period of time as a result of the District's delays. Rather, there is no evidence Appellant ever stopped work on the contract except during the WMATA insurance suspension, which we have found was not the fault of the District. (FF 117.) When a contractor continues to perform a substantial amount of work on a contract, the contractor is not on standby and use of the Eichleay formula is improper. *P.J. Dick, Inc.*, 324 F.3d at 1373-1374. Accordingly, use of the Eichleay formula here is inappropriate. *Civil Constr., LLC,* CAB Nos. D-1294, *et al*., 62 D.C. Reg. at 4449.

Subcontractor Claims

Of the subcontractor claims, (FF 181-192), we deny in part those claims based upon the increased costs resulting from the extended contract period of their performance anticipated when bidding. Such damages are recoverable, *see Excavation-Constr. Inc*., ENGBCA No. 3858, 82-1 BCA ¶ 15,770, *recons. denied*, 83-1 BCA ¶ 16,338; JOHN CIBINIC, JR., JAMES F. NAGLE, & RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 733 (4th ed. 2006), but only in proportion to the delay caused by the District. *Berkeley Constr. Co*., VABCA No. 1962, 88-1 BCA ¶ 20,259. As discussed below, the District is responsible for 96 out of the 676 delay days on the project, so the subcontractors may recover 96/676 of their increased costs: Midlantic (FF 184), $4,937.00 x 96/676 = $701.11, Williams Bridge Company, (FF 189), $50,957.69 x 96/676 = $7,236.59, Prince Construction, (FF 190), $2,130.00 x 96/676= $302.49, Ft. Myer Construction, (FF 191), $39,413.15 x 96/676= $5,597.13, and Espina Stone, (FF 192), $16,850.00 x 96/676= $2392.90. We deny the claims based on Midlantic being barred from working due to lack of flagger for $8,922.68, (FF 183), and Williams Steel for being barred from working due to the lack of a flagger on October 31, 2005, for $7,054.40, (FF 188), as we have determined the flagger delay is non-compensable.

AWARD

We have found a total of 96 compensable days of delay resulting in the following damages:

Overhead field Support 96 x 1,488.22	$142,869.12
Traffic control and variable material costs 96 x $158.62	$15,227.52
Eichlaey damages	denied
Subcontractor claims	$16,230.22
Total Flagger Delay	denied
Subtotal	$174,326.86
Markup @10%	17,432.69
Subtotal	$191,759.55
Bond Premium @ 1%	1,917.60
	$193,677.15

LIQUIDATED DAMAGES

We exercise jurisdiction over the liquidated damages claim under D.C. Code § 2-360.03(a)(3) which authorizes Board jurisdiction over "[a]ny claim by the District against a contractor, when such claim arises under or relates to a contract." Appellant contends that the District is not entitled to liquidated damages because, as it sees it, all of the delays on the project were excusable or District-caused. However, even if the Board were to disagree with Appellant in this regard, Appellant argues that liquidated damages are inappropriate because the District failed to satisfy the conditions precedent to asserting a claim for liquidated damages. The Contracting Officer did not make any findings of fact, nor did the Contracting Officer provide any analysis to determine the extent of the delay as required under the TERMINATION/DELAY clause of the contract. (FF 8.) (Appellant's Br. 38.)

We have considered the evidence and found that the Contracting Officer adequately evaluated the claim. He referred the matter to his engineering staff for their recommendation and relied on their analysis in addressing Appellant's claim. (FF 194.) Such reliance is appropriate, *New England Tank Indus. of New Hampshire, Inc.*, ASBCA No. 9692, 66-1 BCA ¶ 5484 (contracting officer may rely on the advice of technical personnel, inspectors, and others in arriving at a decision to be made by him under the contract), and we find that the Contracting Officer fairly and reasonably considered Appellant's claim before issuing his final decision. *See K & M Constr.*, ENGBCA No. 2998, 72-1 BCA ¶ 9366.

In the Contracting Officer's final decision, the District sought liquidated damages in the amount of $915,300.00. (FF 195.) In its brief, the District has adjusted the amount, seeking a total of $743,600.00, figuring the project to have been completed 676 days late (the difference between the August 8, 2006, contract completion date, (FF 17), and June 14, 2008, substantial completion, (FF 175), times $1,100.00 per day contract liquidated damages, (FF 14).

The District argues that the Board lacks jurisdiction over any defense to assessment of liquidated damages based on excusable delay because Appellant failed to assert such a defense in a separate claim after the Contracting Officer's assertion of liquidated damages in his final decision. Appellant cites *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323 (Fed. Cir. 2010), for the proposition that a contractor seeking to raise excusable delay as a defense to the government's claim of liquidated damages must meet the jurisdictional requirements and procedural prerequisites of the Contract Disputes Act of 1978 (i.e, submit a claim to the contracting officer for a final decision). (District's Br. 16-17.)

In *Maropakis*, the Federal Circuit held that when facing a government counterclaim for liquidated damages, a contractor cannot assert an affirmative defense that would result in the modification of contract terms (e.g., an increase in the contract price or an extension of the time for contract performance) unless that contractor had filed a claim with the contracting officer pursuant to the CDA. *Maropakis Carpentry, Inc. v. United States*, 609 F.3d at 1331.

The *Maropakis* decision is inapplicable to the circumstances before the Board. In *Maropakis*, the contractor had discussed with the agency project delays and had proposed submitting a claim but had not done so. As the contractor had not submitted a claim for the

contracting officer's consideration, the court was without jurisdiction to consider the alleged delays as a defense to the agency's assessment of liquidated damages:

> Here, the Court of Federal Claims correctly required Maropakis to comply with the CDA requirements notwithstanding Maropakis's styling of its claim as a defense to a government counterclaim for liquidated damages. Because the Court of Federal Claims correctly held that it did not have jurisdiction over Maropakis's claim for time extensions, and because Maropakis's extension claim was the only defense asserted against the government's counterclaim for liquidated damages, we affirm the grant of summary judgment to the government on its counterclaim for liquidated damages.

Id. at 1331-32.

However, here Appellant submitted a delay claim accounting for all of the days alleged as delayed performance that are a part of the District's assessment of liquidated damages. (FF 176-179.) The District's denial of all of the claims and the subsequent appeal gives us jurisdiction over the delay claims Appellant asserts would account for all the contract delay days. *See K-Con Bldg. Sys., Inc. v. United States*, 114 Fed. Cl. 722, 731 (2014); *Tromel Constr. Corp.*, PSBCA No. 6303, 13 BCA ¶ 35,346; *Structural Concepts, Inc. v. United States*, 103 Fed. Cl. 84, 89 (2012).

Appellant argues that because Appellant's winter shutdown claim is a "new" claim beyond the jurisdiction of the Board, as we have found above, deleting the 199 days asserted based on that theory leaves Appellant short of claiming time extensions sufficient to account for all the days of delay on which the Contacting Officer based his liquidated damages claim. That determination has no effect on our jurisdiction regarding the other delay claims Appellant has submitted.

In sum, the Board possesses jurisdiction to entertain Appellant's claim for time extensions and costs due to alleged delays experienced on the project to the extent that the claim is premised on the excusable delays alleged in Appellant's claim. The Board also possesses jurisdiction to entertain the District's counterclaim for liquidated damages. *See K-Con Bldg. Sys., Inc.*, 114 Fed. Cl. at 733.

The District has met its burden of proving the liquidated damages are appropriate. Appellant has established entitlement to 294 days of delay, 96 of which have been determined to be compensable. The claim for damages for late completion is a liquidated claim that can readily be computed by multiplying the number of days that the project was late by the daily liquidated damage amount stated in the contract. *Prince Constr. Co.*, CAB No. D-1173, 50 D.C. Reg. 7494, 7495 (May 6, 2003).

Accordingly, the District's liquidated damages will be based on 676 – 294 or 382 days of delay times $1,100 per day, (FF 14), is $420,200.00.

CONCLUSION

We have found that Appellant is entitled to a compensable time extension of 96 days, resulting in damages in the amount of $193,677.15, and a non-compensable time extension of an additional 198 days. The District is entitled to Liquidated Damages in the amount of $420,200.00. In all other respects the appeal is denied, except Appellant's claim based on a partial winter shutdown is dismissed for lack of jurisdiction.

SO ORDERED.

Date: June 9, 2017

/s/ Monica C. Parchment
MONICA C. PARCHMENT
Administrative Judge

CONCURRING:

/s/ Marc D. Loud, Sr.
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GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

SIMPLYDIGI.COM, INC.	)	
	)	CAB No. P-1039
	)	
Solicitation No.: DOC292621	)	

For the Protester, SimplyDigi.Com, Incorporated: David Ludwig, Esq., Dunlap Bennett & Ludwig, PLLC. For the Intervenor, Netsource Interactive, Incorporated: Christopher Shiplett, Esq., General Counsel, P.C. For the District of Columbia: Jason Soltis, Esq., Talia Cohen, Esq., Office of the Attorney General.

OPINION
Filing ID # 60762190

This protest arises from a Solicitation issued by the District of Columbia Office of Contracting and Procurement seeking a contractor to provide, configure and maintain a web-based Professional Development Information System. The protester, SimplyDigi.Com, Incorporated ("SimplyDigi" or "protester") challenges the propriety of the District's award decision and argues that the District failed to award the contract in accordance with the terms of the underlying Solicitation. In response to SimplyDigi's protest, the District filed a combined Motion to Dismiss and Agency Report arguing that the protester lacks standing because its bid was nonresponsive and also that the protest allegations lack merit.

Upon consideration of the allegations raised by the protester and the underlying record, we deny and dismiss SimplyDigi's protest allegations as without merit as further detailed herein.

FACTUAL BACKGROUND

On February 14, 2017, the District of Columbia Office of Contracting and Procurement on behalf of the Office of the State Superintendent of Education ("OSSE") issued an Invitation for Bids No. DOC292621 (the "Solicitation") seeking a contractor to provide, configure, and maintain an existing web-based Professional Development Information System that would serve as the primary professional development tool and resource for the District's early childhood and school-age professionals. (Mot. to Dismiss/Agency Report ("AR") Ex. 2, at 1-2).[1] On February 22, 2017, the District issued Amendment No. 1 to revise the Solicitation's original Price Schedule. (*See* Mot. to Dismiss/AR Ex. 4.) Pursuant to the revised Price Schedule, bidders were required to provide a unit price/rate and a total price based upon a stated quantity of one for each

[1] Although the cover page of the Solicitation indicates that the Solicitation was issued on February 13, 2017, the Solicitation was actually posted on February 14, 2017. (*See* Mot. to Dismiss/AR Ex. 5.)

Contract Line Item Number ("CLIN") listed in the Price Schedule for the base year and option year periods. (*Id.* at 3-5.)[2]

The Solicitation also provided for preferences in evaluating bids from businesses that were certified by the District's Department of Small and Local Business Development as Certified Business Enterprises ("CBE"). (Mot. to Dismiss/AR Ex. 2, at 48.) Certified bidders would be eligible to receive up to a twelve (12) percent reduction in the price of their bid in accordance with the bid preference parameters detailed in the Solicitation. (*Id.*) Furthermore, the Solicitation also included General Standards of Responsibility and, accordingly, each bidder was required to demonstrate that it had adequate financial resources, a satisfactory performance record, was in compliance with the District's licensing and tax laws, and that it was not delinquent on any outstanding debt with the District or the federal government. (*Id.* at 46-47.)

The District contemplated awarding a firm-fixed price contract with a base term of one-year and up to four one-year option periods. (Mot. to Dismiss/AR Ex. 4, at 3-5.)[3] The Solicitation advised bidders that the contract would be awarded to the responsive and responsible bidder with the lowest bid price, and the District reserved the right to reject as nonresponsive any bid that failed to conform in any material respect to the Solicitation. (Mot. to Dismiss/AR Ex. 2, at 43.) By the Solicitation's February 28, 2017, bid submission deadline, the District received bids from the following offerors: (1) Netsource Interactive, Inc. ("Netsource"); (2) SimplyDigi; (3) Sylver Rain Consulting, LLC ("Sylver"); and (4) Health IT 2 Business Solutions, LLC ("HIT2"). (Mot. to Dismiss/AR Ex. 3, at 3.) After receiving each offeror's bid submission, on March 1, 2017, the District tabulated each bid as follows:

	Netsource	**SimplyDigi**	**Sylver**	**HIT2**
Bid Rank	1	2	3	4
Base Year	$130,000	$235,174	$382,034	$798,000
Option Year One	$25,000	$65,735	$72,750	$500,000
Option Year Two	$27,000	$65,735	$72,750	$500,000
Option Year Three	$30,000	$69,635	$72,750	$500,000
Option Year Four	$34,000	$69,635	$72,750	$500,000
Total	$246,000	$505,914	$673,034	2,798,000

(*See* Mot. to Dismiss/AR Exs. 3, 7.)

[2] Previously, under the Solicitation's original Price Schedule, bidders were required to propose a specific number of units for each CLIN. (*See* Mot. to Dismiss/AR Ex. 2, at 2-4.) However, Amendment No. 1 subsequently removed the proposed "unit" column from the Price Schedule. (*See* Mot. to Dismiss/AR Ex. 4.)

[3] When referring to documents that do not contain consistent internal page numbering (*see, e.g.*, Mot. to Dismiss/AR Ex. 4), the Board has cited to the page numbers assigned by Adobe Reader.

Based upon its proposed lower base year price of $130,000, Netsource was determined by the District to have the lowest price for the base year term. (*Id.*) Netsource also had the lowest overall proposed price of $246,000 including all four option years of the contract. (*Id.*)

Thereafter, the District evaluated Netsource's responsibility in accordance with the Solicitation's General Standards of Responsibility, which included: (1) an evaluation of the adequacy of Netsource's financial resources, organization, experience, technical skills, equipment and facilities; (2) a verification of Netsource's compliance with the District's Equal Employment Opportunity and Liability Insurance requirements; (3) a review of Netsource's Certificate of Clean Hands confirming no outstanding debt with the District or the federal government in a delinquent status; and (4) a search of the District's Excluded Parties List to verify that Netsource was eligible to receive the award. (*See* Mot. to Dismiss/AR Ex. 9.) Subsequently, on March 21, 2017, the District documented its determination that Netsource was a responsible contractor based upon its review of the aforementioned factors. (*Id.* at 2-4.) The District also made a written finding that Netsource's base year price of $130,000 was fair and reasonable and in the best interest of the District. (*See* Mot. to Dismiss/AR Ex. 8.) Ultimately, on March 22, 2017, the District awarded the contract to Netsource. (*See* Mot. to Dismiss/AR Ex. 10.) Thereafter, on March 24, 2017, the District informed the protester that it was no longer being considered for award and conducted a debriefing meeting during which it disclosed that Netsource was the awardee. (*See* Mot. to Dismiss/AR Ex. 11, at 4-5; Protest 2.)

On March 30, 2017, SimplyDigi filed a protest with this Board against the award to Netsource arguing that the District's evaluation and award decisions were improper. In this regard, the protester contends that the contracting officer allegedly awarded the contract solely based upon price and failed to evaluate other bidder qualifications set forth in the Solicitation including the requirement that the contract be awarded to the responsive and responsible bidder with the lowest price. (Protest 3-5.) The protester also alleges that the District failed to provide a timely notice of award, a date, time, or location for bid opening, and a bid abstract sheet. (*Id.* at 5.)

In response to SimplyDigi's protest, on April 19, 2017, the District filed a combined Motion to Dismiss and Agency Report arguing that the protest should be dismissed for lack of standing and merit. The District argues that SimplyDigi lacks standing because its bid was nonresponsive due to the fact that the protester did not submit a bid that conformed to the requirements of the Solicitation's Price Schedule. (Mot. to Dismiss/AR 5-7.) Specifically, the District contends that for 15 of the 30 CLINs the protester failed to provide pricing because the protester placed a "$0.0" in the total price column and indicated that pricing for those CLINs were included in other CLINs. (*Id.* at 6-7; *see also* Mot. to Dismiss/AR Ex. 1.) Further, the District maintains that SimplyDigi's offer did not comply with the material aspects of the Solicitation because, under three of the CLINs, the protester included the phrase "OSSE Responsibility" in the proposed unit price column and also did not include any dollar figure in

the corresponding price column. (*Id.*)[4] In addition, the District also contends that there is no merit to the protester's allegations concerning the propriety of the notice of the contract award, bid opening date, time and location, and the bid abstract sheet. (*Id.* at 8-13.)

Upon review of the record in this matter, and as discussed below, the Board finds that the District's award decision was proper.

DISCUSSION

The Board exercises jurisdiction over a protest and its underlying allegations pursuant to D.C. Code § 2-360.03(a)(1) (2011). The District, however, argues that the Board lacks jurisdiction over the protester's allegations because the protester lacks standing.

Standing

In order to establish 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). Additionally, 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 for a contract. D.C. MUN. REGS. tit. 27, § 100.2(a) (2002).

As discussed above, the District contends that SimplyDigi lacks standing because its bid was nonresponsive due to its alleged failure to submit pricing for each CLIN in the Solicitation's Price Schedule. However, the District's allegation regarding the protester's alleged nonresponsiveness is not supported by the contemporaneous source selection record. Specifically, there is no evidence in the record showing that the District ever reviewed the protester's proposed pricing and then found it to be nonresponsive to the Solicitation's proposed pricing requirements in any way. Notably, in tabulating the offerors' bid submissions, the contracting officer did not reject the protester's proposed pricing as nonresponsive and, instead, simply determined that SimplyDigi was the second lowest priced bidder with a proposed price of $235,174 for the base year term. (*See* Mot. to Dismiss/AR Ex. 7.) Thus, the Board does not accept the District's new argument in this proceeding that the protester's price proposal was nonresponsive as there is no record of any such finding being made by the District during the evaluation. *See M.C. Dean, Inc.*, CAB No. P-0955, 62 D.C. Reg. 6199, 6213-6214 (June 2, 2014) (rejecting lack of standing argument where the contracting officer did not treat protester's proposal as nonresponsive); *see also ACS State and Local Solutions, Inc.*, CAB No. P-0691, 52 D.C. Reg. 4227 (Aug. 31, 2004) (finding standing where protester's proposal was not clearly nonresponsive and was treated as responsive by the contracting officer).

[4] On April 28, 2017, the Intervenor, Netsource, filed comments on the District's Motion to Dismiss and Agency Report arguing that SimplyDigi's bid was also nonresponsive because its pricing was submitted on the Solicitation's original Price Schedule instead of the Price Schedule that was incorporated into the Solicitation in Amendment No.1. (*See* Intervenor Br. in Resp. to Mot. to Dismiss/AR.)

The District's Contract Award Decision was Proper

The crux of SimplyDigi's protest allegations is that the contracting officer improperly awarded the contract solely on the basis of price contrary to the evaluation requirements of the Solicitation. In reviewing the propriety of an agency's award decision, the Board examines whether the decision is reasonable and consistent with the evaluation criteria listed in the Solicitation, and whether there exists any violations of procurement laws or regulations. *F&L Constr., Inc.*, CAB No. P-0985, 2016 WL 3194271 (Apr. 14, 2016) (citing *Trifax Corp.*, CAB No. P-0539, 45 D.C. Reg. 8842, 8847 (Sept. 25, 1998)) (citations omitted). Implicit in this review is that an agency's judgment during an evaluation must be documented in sufficient detail to show that its decisions were not arbitrary. *Id.* (citing *Health Right Inc.*, CAB Nos. P-0507, *et al.*, 45 D.C. Reg. 8612, 8635 (Oct. 15, 1997)).

As previously discussed, the Solicitation in this case stated that the contract would be awarded to the responsive and responsible bidder with the lowest bid price. Here, the record shows that Netsource submitted the lowest bid price for the base year term, $130,000, as compared to the other bidders whose proposed base year prices ranged from $235,174 to $798,000. (*See* Mot. to Dismiss/AR Ex. 7.) By the District's own admission, however, its calculation of each bidder's proposed price mistakenly failed to include consideration of any CBE bid preference percentage reduction that each bidder was entitled to receive in accordance with the terms of the Solicitation. (Mot. to Dismiss/AR 5 n.3.) In particular, Netsource, Sylver and HIT2 were all entitled to a 12% CBE reduction in the price of their bids for evaluation purposes while the protester was not entitled to any bid preference percentage reduction. (*See* Mot. to Dismiss/AR Ex. 12.) Nonetheless, as detailed below, even after applying the proper percentage reduction to the bids of Netsource, Sylver and HIT2, Netsource still has the lowest priced bid.

	Total Bid Price (Without 12% Bid Preference Reduction)	**Applicable CBE Percentage Reductions**	**Total Bid Price (With Bid Preference Reduction)**
Netsource	$246,000[5]	12%	$216,480
SimplyDigi	$505,914	0%	$505,914
Sylver	$673,034	12%	$592,269.92
HIT2	2,798,000	12%	$2,462,240

(*See id.*)

Thus, the mistake that the District made in not initially applying the required CBE reduction had no bearing on the protester's price ranking during the evaluation. Absent a showing of prejudice by the protester arising from this mistake in not applying CBE bid

[5] For purposes of this reference table, each bid price includes the total proposed pricing for the base year and option periods.

preference percentage reductions, there is no basis for the Board to find that the District's determination of the lowest priced bidder in this procurement was improper. Indeed, the Board will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions and demonstrates that but for the agency's actions, it would have had a substantial chance of receiving the award, which is not the case with the protester. *See B&B Sec. Consultants, Inc.*, CAB No. P-0708, 54 D.C. Reg. 1948, 1952 (July 18, 2005) (denying protest where there was no reasonable possibility that the protester would receive award despite contracting officer's error in evaluation); *see also C & E Servs., Inc.*, CAB No. P-0874, 62 D.C. Reg. 4216, 4222 (May 19, 2011) (District's violation of procurement regulations did not prejudice the protester).

Furthermore, the Board finds that the District properly evaluated Netsource's responsibility in accordance with the Solicitation's General Standards of Responsibility. Bidder responsibility is a prerequisite to contract award. D.C. CODE § 2-353.02(a) (2011). Procurement regulations require that the contracting officer only make an award to responsible contractors, and that the contracting officer make a written determination of whether a prospective contractor is responsible prior to any award. D.C. MUN. REGS. tit. 27, § 2200.1-.2 (2002). Before making a responsibility determination, the contracting officer is required to obtain sufficient information demonstrating that a prospective contractor meets the applicable standards and requirements for responsibility. *Id.* at § 2204.1. Moreover, in evaluating the contracting officer's responsibility determination, it is well settled that the Board will not overturn an affirmative responsibility determination unless the protester shows bad faith on the part of the contracting agency or that the contracting officer's determination lacks any reasonable basis. *AMI Risk Consultants, Inc.*, CAB No. P-0900, 2012 WL 4753867 (May 25, 2012).

Here, the record demonstrates that after the District determined that Netsource was the lowest priced bidder, it conducted an evaluation of the adequacy of Netsource's financial resources, organization, experience, technical skills, equipment and facilities. The District also confirmed that Netsource was in compliance with the District's insurance requirements, and employment and tax laws, and that Netsource did not owe any outstanding debt to the District or the federal government. Further, the District verified that Netsource was eligible for award and had not been placed on the District's Excluded Party List prior to making a determination that Netsource was a responsible contractor. Moreover, the protester has not offered any evidence to refute the sufficiency of this responsibility finding made by the District. Therefore, we find that the District reasonably determined that Netsource was a responsible contractor based upon the responsibility criteria articulated in the Solicitation, in addition to reasonably finding that it was the lowest priced bidder. We, therefore, deny the protester's allegation that the award decision was improper and not reasonably based upon the Solicitation criteria.

The Protester's Remaining Allegations are Untimely or Lack Merit

The Board also finds SimplyDigi's protest grounds concerning the notice of the contract award, bid opening date, time and location, and the bid abstract sheet to be untimely or without merit. As the protester stated in its initial protest filing, it was informed by the District during the debriefing meeting on March 24, 2017, that the award had been made to Netsource. (Protest 2.) This meeting reasonably occurred within two days after the District awarded the contract to Netsource and the protester has not presented any evidence demonstrating that this two day notification period was unreasonable.

Moreover, we find the protester's allegation that the District failed to provide a bid opening date, time and location to be untimely, as this protest ground would have been known to the protester at the time it submitted its bid and was, therefore, required to be filed prior to the bid submission deadline. D.C. CODE § 2-360.08 (b)(1) (2011) (protests based upon alleged improprieties in a solicitation that are apparent prior to bid opening or the time set for receipt of initial proposals must be filed with the Board prior to bid opening or the time set for receipt of initial proposals). Furthermore, this allegation is also without merit because the protester has failed to demonstrate how it was prejudiced by the District's alleged failure to provide the bid opening details as it obviously submitted a bid that was considered by the District during the evaluation.

Finally, although the District concedes that it did not publish or provide the protester with the bid abstract sheet, (Mot. to Dismiss/AR 11-12), the Board finds that the District's failure in this regard is an insufficient basis to sustain SimplyDigi's protest because the protester has not shown that it was prejudiced by the District's actions. *See Cont'l Serv. Co.*, B-258807, 1995 WL 64174 (Comp. Gen. Feb. 15, 1995) (delay by the procuring activity in furnishing the bid abstract is a procedural deficiency that has no bearing upon the validity of the bids received and therefore would not affect the legality of an award).

In summary, the Board finds that the protester has failed to demonstrate any basis for sustaining the present protest grounds based upon the reasons articulated herein.[6]

CONCLUSION

As discussed herein, we find that the District's award decision was proper. Therefore, the Board denies and dismisses the instant protest with prejudice.

SO ORDERED.

[6] In addition, the Board denies the protester's document request, (Protest 5-6; Resp. to Mot. to Dismiss/AR 7-8), as the District's Agency Report provided all documents relevant to this matter as required by Board Rule 305.1.

SimplyDigi.Com, Inc.
CAB No. P-1039

Date: June 21, 2017

/s/ Monica C. Parchment
MONICA C. PARCHMENT
Administrative Judge

CONCURRING:

/s/ Marc D. Loud, Sr.
MARC D. LOUD, SR.
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DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

APPEAL OF:

QUADRI-TECHNOLOGY, LTD.	)	
	)	CAB No. D-1494
Under Contract No. CFSA-11-H-0095	)	

For the appellant, Quadri-Technology, Ltd.: Donald B. Terrell, Esq. For the District of Columbia: Brett A. Baer, Esq., Office of the Attorney General.

Opinion By: Administrative Judge Maxine E. McBean, with Chief Administrative Judge Marc D. Loud, Sr., concurring.

ORDER DISMISSING APPEAL
Filing ID #60941231

Quadri-Technology, Ltd. ("QTL" or "appellant") has filed an appeal arising from a congregate care diagnostic services contract with the District. Specifically, QTL has raised allegations of (1) breach of contract; (2) a violation of the duty of good faith and fair dealing; (3) promissory estoppel; and (4) unjust enrichment. The District has moved to dismiss the appeal, arguing that the Board does not have jurisdiction or, in the alternative, that appellant has failed to state a claim upon which relief can be granted.

For the reasons set forth below, the Board grants the District's motion to dismiss. Specifically, we find that (1) the Board is without jurisdiction over appellant's claims of a violation of the duty of good faith and fair dealing, promissory estoppel, and unjust enrichment; and (2) appellant's breach of contract claim fails to state a claim upon which relief can be granted.

BACKGROUND

III. The Contract

On May 24, 2011, QTL and the District of Columbia Child and Family Services Agency ("CFSA") entered into Human Care Agreement No. CFSA-11-H-0095 (the "Contract" or "HCA") for QTL to provide congregate care diagnostic services for CFSA. (Appeal File ("AF") at 5-6.) QTL's services consisted of providing temporary group residential care to children while CFSA arranged for the children's placement in permanent group residential care. (*See id.* at 11 (§ C.1.2), 13 (§ C.3.13).) The term of the Contract entailed a base period of one year, beginning on May 31, 2011, and up to four one-year option periods. (*Id.* at 5 (§ 12), 39 (§ F.1.1).) Section B of the Contract stated, *inter alia*:

> **B.1.1** The District is not committed to purchase under this HCA any quantities of a particular service covered under this Agreement. The District is obligated only to the extent that authorized purchases are made pursuant to this HCA.
>
> **B.1.2** Delivery or performance shall be made only as authorized by Task Orders issued in accordance with the Ordering Clause.

(*Id.* at 6.)

Section F.1.3 of the Contract stated that "[t]he District reserves the right to cancel a task order issued pursuant to this Human Care Agreement upon thirty (30) days written notice to the Provider." (*Id.* at 39.)

The Contract also stated:

> **F.2 AGREEMENT NOT A COMMITMENT OF FUNDS OR COMMITMENT TO PURCHASE**
>
> This Agreement is not a commitment by the District to purchase any quantity of a particular good or service covered under this Human Care Agreement from the Contractor. The District shall be obligated only to the extent that authorized purchases are actually made by purchase order or task order pursuant to this Human Care Agreement.

(*Id.*)

Section G of the Contract included the following clauses:

> **G.1.1** The District will make payments to the Provider, upon the submission of proper invoices, at the prices stipulated in this HCA, for supplies delivered and accepted or services performed and accepted, less any discounts, allowances or adjustments provided for in this HCA.
>
> . . .
>
> **G.2.1** CFSA shall use information generated from the Placement Provider Web (PPW) application for payment of placement services. The PPW is an application within the FACES database system whereby placement Providers certify the requisite placement information, through the Monthly Placement Utilization Report (MPUR), necessary to generate payment invoices to CFSA Fiscal Operations.
> Example: The District will utilize the following formula each month to determine how much it will pay the Provider for the Per Diem Services: f = (c X d X e) where "f" represents the total payment for Per Diem Services; "c" represents the number of children actually placed with the Provider over the course of the month; "d" represents the Per Diem rate set forth in the HCA; and "e" represents the number of days in the month. Assuming the actual number of children served is 35 and the Provider's Per Diem rate is $100 and the month is 30 days long, under the above formula, the District will pay the Provider $105,000 for Per Diem Services (calculated by multiplying 35 children X $100 Per Diem X 30 days).

(*Id.* at 43.)

The Contract's price schedule for the base period[1] stated as follows:

Contract Line Item Number (CLIN)	Services	Qty. Max No of Clients	Per Diem Rate	Max Days	Max total Amt.
0001 §C	Congregate Care-Diagnostic Assessment	16	$258.41	366	$1,513,248.96
0002 §B.3 and B.4	Cost Reimbursement (Annual)				$ 199,820.00
Total not-to-exceed					$1,713,068.96

(AF at 6 (§ B.2).)

The Contract identified Tara Sigamoni as the contracting officer. (*Id.* at 46 (§ G.7).) The Contract further stated:

> **G.8 AUTHORIZED CHANGES BY THE CONTRACTING OFFICER**
>
> **G.8.1** The Contracting Officer is the only person authorized to approve changes in any of the requirements of this HCA.
>
> **G.8.2** The Provider 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 Contracting Officer.
>
> **G.8.3** In the event the Contractor effects any change at the instruction or request of any person other than the Contracting Officer, the change will be considered to have been made without authority and no adjustment will be made in the contract price to cover any cost increase incurred as a result thereof.

(*Id.* at 47.)

On May 24, 2011, the District issued a task order to QTL pursuant to the Contract ("Task Order 1"). (*Id.* at 299 (§§ 1, 3, 14).) Task Order 1 detailed a period of performance beginning May 31, 2011, to May 30, 2012, (*id.* (§ 12)), and included the following:

ITEM/ LINE NO.	*NIGP CODE*	*BRIEF DESCRIPTION OF HUMAN CARE SERVICE*	*QUANTITY OF SERVICE REQUIRED*	*TOTAL SERVICE UNITS*	*SERVICE RATE*	*TOTAL AMOUNT*
0001	948-47	Diagnostic Assessment	Min 1	366	$258.41	$94,578.06
			Max 16	366	$258.41	$1,513,248.96

(*Id.* (§ 10).)

[1] The Contract's price schedules for the option years included the same per diem rate, $258.41, and only differed in that they indicated a maximum number of 365 days for non-leap years. (*Compare* AF at 7-8, *with* AF at 6 (§ B.2).)

On August 26, 2011, the District issued Contract Modification No. M0001, which amended the Contract's price schedule by increasing both the maximum quantity of clients from sixteen to twenty-four, and the corresponding maximum total amount of the Contract's base year to $2,569,603.44. (*Id.* at 295-98.)

On May 30, 2012, the District issued Contract Modification No. M0002, which exercised a partial period of the first option year, for the period May 31 to June 14, 2012. (*Id.* at 300 (§§ 14, 16).) Also on May 30, 2012, the District issued another task order to QTL pursuant to the Contract ("Task Order 2"). (*Id.* at 308 (§§ 1, 3, 14).) Task Order 2 indicated a period of performance from May 31 to June 14, 2012. (*Id.* (§ 12).) In its description, Task Order 2 included the following:

ITEM/ LINE NO.	*NIGP CODE*	*BRIEF DESCRIPTION OF HUMAN CARE SERVICE*	*QUANTITY OF SERVICE REQUIRED*	*TOTAL SERVICE UNITS*	*SERVICE RATE*	*TOTAL AMOUNT*
0001	948-47	Diagnostic and Emergency	Min 1	14	$258.41	$ 3,617.74
			Max 24	14	$258.41	$86,825.762

(*Id.* (§ 10).)

On June 14, 2012, the District issued Contract Modification No. M0003, which exercised another partial period of the first option year, for the period June 15 to September 30, 2012. (*Id.* at 301 (§§ 14, 16.) Also on June 14, 2012, the District issued another task order to QTL pursuant to the Contract ("Task Order 3"). (*Id.* at 310 (§§ 1, 3, 14).) Task Order 3's period of performance ran from June 15 to September 30, 2012. (*Id.* (§ 12).) In its description, Task Order 3 included the following:

ITEM/ LINE NO.	*NIGP CODE*	*BRIEF DESCRIPTION OF HUMAN CARE SERVICE*	*QUANTITY OF SERVICE REQUIRED*	*TOTAL SERVICE UNITS*	*SERVICE RATE*	*TOTAL AMOUNT*
0001	948-47	Diagnostic and Emergency	Min 1	108	$258.41	$ 27,908.28
			Max 24	108	$258.41	$669,798.72

(*Id.* (§ 10).)

IV. Contract Expiration and Subsequent Events

On August 2, 2012, contracting officer Sigamoni sent a letter to QTL which stated that the District would not exercise any additional option periods and that the Contract would end on September 30, 2012. (*Id.* at 346.) The letter further stated that "[n]o future referrals will be made for placement." (*Id.*)

On September 26, 2012, QTL e-mailed contracting officer Sigamoni an invoice "to cover August and September costs." (District's Mot. to Dismiss and Mot. to Stay Proceedings Pending Disposition ("District's Mot. to Dismiss") at MTD Exhibits 260-62.) QTL stated that "[a]s of 2 August 2012 the last resident was removed from QTL." (*Id.* at MTD Exhibits 260.) QTL's invoice in the amount of $55,319.63 detailed a period of performance from August 1 to September 30, 2012, and it included charges for two months' rent, utilities, and management and staff payments. (*Id.* at MTD Exhibits 262.)

On January 7, 2013, contracting officer Sigamoni sent QTL a written response to QTL's September 26, 2012, invoice. (AF at 3-4.) The contracting officer's letter stated that it was in reference to "Email dated September 26, 2012 Requesting $55,319.63 for the months of August and September 2012." (*Id*. at 3.) In a section titled "Description of Claim," the letter reproduced the table in QTL's invoice which itemized the payment amounts sought for August and September 2012, (*id.*), and the letter also stated the following:

> The second partial Option Year 1 was exercised for the period of June 15, 2012 through September 30, 2012 via Modification Number M0003. The remainder of the option year 1 was not exercised and the contract expired on September 30, 2012.
>
> On September 26, 2012, you requested payment in the amount of $55,319.63 to recover costs incurred by your organization for the facilities for the months of August and September.
>
> Contracting Officer's Final Decision
>
> This request is being denied for the following reasons:
>
> 1. A human care agreement is not a commitment by the District to purchase any quantities of a particular service. The District is obligated only to the extent that authorized purchases are made. See sections B.1.1 and F.2
> 2. Authorized purchases were made by task orders as indicated above. The task orders had a minimum quantity of one (1) and a maximum quantity of twenty-four (24) clients for the duration of the task orders which expired on September 30, 2012.
> 3. The HCA and the resultant task orders were based on a fixed per diem rate per client.
> 4. The HCA and the resultant task orders contained a cost reimbursement component. The cost reimbursement component was limited to client specific costs that cannot be accurately predicted such as food, clothing, allowance/stipend, transportation, incidental expenses, etc., See section B.3.1
> 5. On July 25, 2012, you were notified of the District's intent to not continue with the remainder of the option period effective September 30, 2012 and were notified that no additional placements would be made.
> 6. Per Quadri-Tech, the last youth was moved out of the facility on August 2, 2012. Therefore, after the last youth was moved, your organization was not required to keep the facilities open, since the District had communicated to you its intent to discontinue the contractual relationship after September 30, 2012 and that it would not be making any additional placements. It is also our understanding that the facilities are currently still open as of January 4, 2013.
> 7. [Task Order 3] dated June 14, 2012, ordered a minimum quantity of one, for the period of June 15, 2012 through September 30, 2012 (108 days) at the rate of $258.41 for a total of $27,908.28. Therefore, you are entitled to a minimum payment of $27,908.28 for the period of June 15, 2012 through September 30, 2012.

> 8. It is my understanding that the District has paid your organization a total of $170,505.46 for the period of June 15, 2012 through September 30, 2012. Therefore, you are not entitled to any additional payments from the District.

(*Id.* at 3-4.) The letter concluded with a restatement that it was the contracting officer's final decision and QTL was notified of its right to appeal the decision to the Board. (*Id.* at 4.)

On February 21, 2014, appellant, via its counsel, sent a letter to "Janice P. Stokes, Claims Specialist" at the District's Office of Risk Management. (Notice of Appeal and Compl. Ex. H, at 2.)[2] In this letter, which contained the subject line "RE: Notice of Representation of Quadri Technology Ltd. In Claim Number 1002013-000," appellant's counsel referred to QTL's receipt of a January 28, 2014, letter from Ms. Stokes and stated that he was representing QTL "in the above-identified matter." (*Id.*) The letter also contained a paragraph with the heading "Litigation Hold," wherein it requested that the District "preserve all evidence related to Quadri-Technology's claims against the District." (*Id.*) The letter stated that the obligation to preserve evidence "arose as soon as Agency Chief Contracting Officer Tara Sigamoni was notified on September 26, 2013, of Quadri Technology's legal challenge." (*Id.*)

V. Procedural History

On June 2, 2014, QTL filed a combined Notice of Appeal and Complaint with the Board, pleading four counts: (1) breach of contract; (2) violation of the duty of good faith and fair dealing in contractual relations; (3) promissory estoppel; and (4) unjust enrichment. (Notice of Appeal and Compl. at 1.) QTL asserted that it was entitled to $923,083.00. (*Id.*) QTL alleged that its "partial demand for payment" on September 26, 2012,[3] "did not include amounts that were owed to QTL for underpayments, miscalculations, and extra-contractual promises that were made by CFSA," and "[a]s a result, . . . were not denied by . . . CFSA Contracting Officer's Decision of January 7, 2013." (Notice of Appeal and Compl. at 3-4.)

The Notice of Appeal and Complaint further stated:

> QTL's counsel received noticed from CFSA that no payment, or additional contracting opportunities, were forthcoming at that time. Exhibit H (QTL's Attorney's Feb. 21, 2014, formal Notice of Representation to District "Claims Specialist" Janice P. Stokes and record of her voice mail of March 4, 2014, leading to her notifying QTL Counsel later that day of CFSA's Refusal to Pay with recourse to the Board. The date of this decision of the Contracting Officer certifies this Appeal as timely per the Appeal Rules of the District of Columbia Contract Appeals Board).

(*Id.* at 4.)

[2] When referring to documents that lack consistent internal page numbering (e.g., Notice of Appeal and Compl. Ex. H), the Board has used the page numbers assigned by Adobe Reader.

[3] QTL referred to a "written Demand for Payment of November 27, 2012," (Notice of Appeal and Compl. at 3), which was actually an e-mail from QTL to contracting officer Sigamoni sent on that date and inquiring about the September 26, 2012, QTL invoice, (Notice of Appeal and Compl. Ex. F).

The District moved to dismiss QTL's appeal, arguing that the Board did not have jurisdiction over the appeal and, alternatively, that QTL failed to state a claim upon which relief could be granted. (District's Mot. to Dismiss at 10-19.) On December 8, 2015, the Board held a hearing on the District's motion to dismiss. After the hearing, appellant filed a post-hearing brief in which appellant, for the first time, alleged that it had submitted a claim to contracting officer Sigamoni on September 26, 2013. (Appellant's Post-Hr'g Br. at 5-6, 10-12.) According to appellant, the contracting officer did not issue a final decision on this claim and, thus, the claim was deemed denied. (*See id.* at 6.) Appellant asserted that "QTL filed its appeal after a reasonable time, on June 4, 2014." (*Id.*)

In its post-hearing brief, the District argued, *inter alia*, that the Board was without jurisdiction to hear an appeal of the alleged September 26, 2013, claim and, alternatively, the September 26, 2013, claim failed to state a claim upon which relief can be granted. (District's Supplemental Br. in Supp. of Mot. to Dismiss ("District's Post-Hr'g Br.") at 1, 3-10.)

DISCUSSION

I. Jurisdiction

The Board exercises jurisdiction over contractor appeals pursuant to D.C. CODE § 2-360.03(a)(2) (2017), which confers jurisdiction over "[a]ny appeal by a contractor from a final decision by the contracting officer on a claim by a contractor, when the claim arises under or relates to a contract."[4] A contractor must file its appeal of a contracting officer's final decision with the Board within ninety days of receiving that decision. D.C. CODE § 2-360.04(a) (2017). In the absence of a contracting officer's final decision, 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 contractor's claim. *See id.* § 2-359.08(b)-(c). Accordingly, "[t]he Board cannot exercise jurisdiction over a claim unless it is first presented to a contracting officer, and then made the subject of an actual or deemed denial." *Advantage Healthplan, Inc.*, CAB Nos. D-1239, D-1247, 2013 WL 6042884 (Oct. 4, 2013), *recons. denied*, http://app.cab.dc.gov/cabasp/GetDoc.aspx?Database=CAB_DOCS&docnum=33812&version=1 (Dec. 22, 2015), *petition for review dismissed per stipulation*, 16-AA-0367 (D.C. Dec. 16, 2016), http://efile.dcappeals.gov/public/caseView.do?csIID=58946.

A. The Notice of Appeal and Complaint

In its Notice of Appeal and Complaint, QTL alleges that the Board has jurisdiction based on a telephone voicemail from Claims Specialist Janice P. Stokes which notified QTL of "CFSA's Refusal to Pay with recourse to the Board." (Notice of Appeal and Compl. at 4.) However, this alleged basis of jurisdiction fails for several reasons. To begin, Tara Sigamoni was the contracting officer, not Ms. Stokes. (AF at 46 (§ G.7).) Also, District procurement regulations, as well as the Contract, require that a contracting officer's final decision be made in writing. D.C. MUN. REGS. tit. 27, § 3803.6 (2004) (current version at § 3803.4 (2012)); (AF at 92 (§ 14.B(e))). Thus, Ms. Stokes' voicemail did not constitute a contracting officer's final decision. More importantly, QTL's February 21, 2014, letter, which according to QTL was the letter that Ms. Stokes was responding to, is not a claim. The letter was not sent to the contracting officer[5] and does not describe a claim or the amount sought, as required by the Contract and District procurement regulations, (AF at 92 (§ 14.B(a))); D.C. MUN. REGS. tit. 27, § 3803.3 (2004)

[4] Although not at issue in this case, the Board also has jurisdiction over District claims against contractors. D.C. CODE § 2-360.03(a)(3) (2017).

[5] The letter was sent to Ms. Stokes at the District's Office of Risk Management, not CFSA, the contracting agency. (Notice of Appeal and Compl. Ex. H, at 2.)

(current version at § 3803.2 (2012)). (*See* Notice of Appeal and Compl. Ex. H, at 2.) Further, the letter indicates that it is a "Notice of Representation," and requests only a "litigation hold."[6] (Notice of Appeal and Compl. Ex. H, at 2.) Since the letter is not a claim, there is no "deemed denial" under which the Board's jurisdiction could have arisen. In sum, we find that neither QTL's February 21, 2014, letter nor Ms. Stoke's March 4, 2014, voicemail give the Board jurisdiction over this appeal.

B. Appellant's Post-Hearing Brief

After the parties finished briefing on the District's motion to dismiss, and after the Board's hearing on the motion, QTL alleged for the first time that its appeal was based on a September 26, 2013, claim that QTL had submitted to the contracting officer.[7] (Appellant's Post-Hr'g Br. at 5-6, 10-12.) Although the Board disfavors presenting an entirely new claim as the basis for jurisdiction at such a late stage, particularly since there is no explanation as to why this occurred,[8] the Board will consider QTL's new jurisdictional basis.[9] *See Safe Haven Enters., LLC v. Dep't of State*, CBCA Nos. 3871, 3912, 15-1 BCA ¶ 35,928 (considering as jurisdictional bases claims and final decisions which, although not identified in the notices of appeal and complaint, were part of the record); *see also Dynamic Corp.*, CAB No. D-1365, 63 D.C. Reg. 12194, 12215 (Oct. 6, 2014), *petition for review dismissed per petitioner's motion*, 15-AA-0125 (D.C. Aug. 19, 2016), http://efile.dcappeals.gov/public/caseView.do?csIID=57199; *Foxy Constr., LLC v. Dep't of Agric.*, CBCA No. 5632, 2017 WL 1030202.

1. QTL's September 26, 2013, Letter

QTL's September 26, 2013, letter to contracting officer Sigamoni claimed that the District owed QTL "$577,424.15 in miscalculated payments that are still owed under the contract" and "approximately $568,000 (in reasonable, but detrimental, reliance on the District's extra-contractual promises)." (Appellant's Post-Hr'g Br. at 10.) Regarding the miscalculated payments, QTL attached what it called a "HCA Paragraph G2.1 Calculations Summary," (*id.*), which calculated the difference between what the District had paid QTL via the FACES system[10] compared to what QTL argued it should have been paid "per contract instructions in Paragraph G2.1," (Appellant's Post-Hr'g Br. at 16-17).

In regards to the $568,000 claim for detrimental reliance, which QTL called a "promissory estoppel claim," the letter stated:

> [W]e have adduced that there is legally sufficient evidence that the District made extra-contractual promises to pay expenses not covered by the initial agreement, Quadri-Technology Limited reasonably relied on those promises, Quadri-Technology Limited suffered damages due to the District's failure to perform, and justice requires the enforcement of

[6] The letter also refers to a "FedExed letter to Mayor Vincent Gray on November 8, 2013," (Notice of Appeal and Compl. Ex. H, at 2), which does not appear anywhere in the record.
[7] The Board notes that QTL's February 21, 2014, letter to Ms. Stokes, which was attached as an exhibit to the Notice of Appeal and Complaint, just briefly mentions a September 26, 2013, written notification from QTL to contracting officer Sigamoni. (Notice of Appeal and Compl. Ex. H, at 2.) However, QTL failed to identify the September 26, 2013, letter during the motion hearing before the Board.
[8] Although QTL substituted its counsel after filing its Notice of Appeal and Complaint, QTL's current counsel had entered his appearance by the time the District filed its motion to dismiss.
[9] The District's post-hearing brief did not allege any prejudice to the District by QTL's conduct. (*See* District's Post-Hr'g Br. at 2-7.) Presumably, the District was already aware of the September 26, 2013, letter since it had been sent to contracting officer Sigamoni and she had responded to it.
[10] The Contract identified the FACES system as the system used for invoicing. (*See* AF at 43 (§ G.2.1).)

> these extra-contractual promises in order to avoid injustice. A promissory estoppel claim does not conflict with B.4.5 or B.4.6 of our client's contract with the District (stating that Tara Sigamoni is the only individual that has the legal authority to modify the District's contract) because assurances that were made by other officials are new and separate agreements not governed by [the Contract].

(*Id.* at 11.)

QTL's letter acknowledged that its earlier September 26, 2012, "demand for payment was denied in a formal contracting officer's decision" and conceded "the fact that Quadri-Technology did not appeal that initial decision," but stated that "the failure to appeal does not impair Quadri-Technology Limited's right to seek payment for amounts that were not demanded." (*Id.*) QTL's letter (1) indicated that its claim of $577,424.15 was due to underpayments from the District that were not in line with Contract section G.2.1 (and included a table listing each month's underpayment); (2) briefly described its previous attempts to have the District rectify the underpayments; and (3) demanded "prompt issuance of the owed remuneration." (*Id.* at 10-12, 16-17.) Given that QTL's letter sought a sum certain as a matter of right, gave a description of its claim along with supporting information, described its previous efforts to resolve the dispute, and requested relief from the contracting officer, we find that QTL's September 26, 2013, letter constitutes a claim for payment still owed to QTL due to alleged miscalculations.[11] (*See* AF at 91-92 (§ 14.B)); D.C. MUN. REGS. tit. 27, § 3803.3 (2004); D.C. MUN. REGS. tit. 27, § 3899.1 (2004) (amended 2012).

2. The Contracting Officer's Response to QTL's September 26, 2013, Claim Letter

On January 13, 2014, contracting officer Sigamoni sent QTL a written response to QTL's September 26, 2013, claim letter.[12] (Appellant's Post-Hr'g Br. at 13-15.) Contracting officer Sigamoni stated that QTL's demand for miscalculated payments was unfounded. (*Id.* at 14.) In relevant part, the letter explained:

> 1. Payments are made for the number of clients at the facility. The facility is reimbursed at the contracted per diem for the number of days each client remains at the facility. Therefore, QTL claiming the entire month's payment for each client at their facility at any given time is unwarranted as no services were provided for the client when the client was not actually placed at QTL.
>
> . . .
>
> 4. Payments were made for each client placed at QTL for the actual number of days that the client actually resided at QTL including payments for the 3 day bed hold for youth in abscondence.

(*Id.*)

The letter further stated:

[11] The District does not argue that the letter did not set forth a contractor claim. (*See* District's Post-Hr'g Br. at 2-7.)
[12] Similar to the September 26, 2013, claim letter, this written response was also submitted to the Board for the first time as part of appellant's post-hearing brief.

> Your request for payment in the amount of $568,000.00, based upon detrimental reliance is also unfounded. Section G.8 of the HCA states that the Contracting Officer is the only person authorized to approve changes in any of the requirements of this HCA. The HCA and any associated task orders issued by the Contracting Officer did not provide for any extra-contractual payments or guarantees of referrals.

(*Id.*) Contracting officer Sigamoni did not state that the letter was her final decision nor did she advise QTL of its appeal rights. (*Id.* at 13-15.)

In its post-hearing brief, the District argues that contracting officer Sigamoni's January 13, 2014, letter was a final decision which denied QTL's claim and that, because the instant appeal was not filed within ninety days of receipt of the letter,[13] the appeal is untimely and the Board is without jurisdiction to hear the claim. (District's Post-Hr'g Br. at 3-7.) However, QTL argues that the letter was not a contracting officer's final decision because it neither stated that it was a final decision nor informed QTL of its appeal rights. (Appellant's Post-Hr'g Br. at 6.)

The Board finds that contracting officer Sigamoni's January 13, 2014, letter was not a contracting officer's final decision. Pursuant to District procurement regulations and the Contract, a contracting officer's written decision on a claim must both indicate that it is a final decision and notify the contractor of its appeal rights to the Board. D.C. MUN. REGS. tit. 27, § 3803.7 (2004) (current version at § 3803.5 (2012)); (AF at 92 (§ 14.B(e)(6)-(7))). The January 13, 2014, letter does neither, (Appellant's Post-Hr'g Br. at 13-15), and thus does not constitute a contracting officer's final decision.[14] *See J.E. Tibbs Constr. Co.*, CAB No. D-1169, 54 D.C. Reg. 1967, 1969-70 (Sept. 2, 2005) (finding that an appeal was not untimely filed because the purported final decision of the contracting officer did not notify the contractor of its appeal rights); *see also A.S. McGaughan Co.*, CAB No. D-0926, 40 D.C. Reg. 4855, 4864-66 (Dec. 10, 1992) (finding that a letter did not constitute a final decision because it did not comply with the regulations' requirements for a "final decision"), *appeal denied*, 48 D.C. Reg. 1452 (Nov. 18, 1999). Accordingly, we reject the District's argument that QTL's appeal is untimely because it was not filed within ninety days of the January 13, 2014, letter.

The record contains no other decision from a contracting officer regarding QTL's September 26, 2013, claim. And since there was no contracting officer's final decision, the claim was deemed denied on January 25, 2014, pursuant to D.C. CODE § 2-359.08(b)-(c). The Board's rules require that an appeal of a

[13] The ninety-day period to appeal a final decision received on January 13, 2014, would have ended on April 14, 2014.

[14] The District's reliance on *Placeway Constr. Corp. v. United States*, 920 F.2d 903, 906-07 (Fed. Cir. 1990), and *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1267-68 (Fed. Cir. 1999), is inapposite. (District's Post-Hr'g Br. at 5-6.) Those cases stand only for the proposition that, when a contractor files an appeal based on what it considers to be a "final decision," the government cannot use the lack of boilerplate language giving notice of appeal rights or labeling the decision as a "final decision" as a basis to dismiss the contractor's appeal. *See Placeway Constr. Corp.*, 920 F.2d at 906-07; *Alliant Techsystems, Inc.*, 178 F.3d at 1267-68. In the instant case, QTL did not file its appeal based on the January 13, 2014, letter being a contracting officer's final decision. Moreover, QTL would have been prejudiced by contracting officer Sigamoni's failure to adhere to the Contract and procurement regulations since QTL's appeal would have been untimely if the January 13, 2014, letter were to constitute a contracting officer's final decision. *See Uniglobe Gen. Trading & Contracting Co. v. United States*, 115 Fed. Cl. 494, 515-16 (2014) ("[W]here defects in a contracting officer's decision 'actually prejudiced [the contractor's ability] to prosecute its timely appeal,' such defects render the decision invalid and therefore insufficient to trigger the running of the applicable limitations period." (second alteration in original) (quoting *Decker & Co. v. West*, 76 F.3d 1573, 1580 (Fed. Cir. 1996))).

claim that has been deemed denied must be filed "within a reasonable time." Board Rule 200.2(a), D.C. MUN. REGS. tit. 27, § 200.2(a) (2002). QTL filed its appeal on June 2, 2014, less than five months after the deemed denial of its claim. As such, we find that QTL filed its appeal within a reasonable time of the deemed denial.

In sum, the Board finds that it has jurisdiction over QTL's appeal based on the deemed denial of QTL's September 26, 2013, claim letter. Consequently, QTL's appeal is limited to the claims which were asserted in its September 26, 2013, claim letter.[15]

C. Claims Set Forth in QTL's September 26, 2013, Claim Letter

As stated above, QTL's September 26, 2013, claim letter asserted a claim for "$577,424.15 in miscalculated payments that are still owed under the contract" and asserted a promissory estoppel claim for approximately $568,000. (Appellant's Post-Hr'g Br. at 10.) However, Count Two of QTL's Notice of Appeal and Complaint covers alleged "violations of the duties of good faith and fair dealing in contractual relations." (Notice of Appeal and Compl. at 1.) QTL's basis for this count is purportedly due to "an identical contract [being] given to two other providers" after QTL's contract was "cancelled." (*Id.* at 3 (emphasis removed).) But QTL's September 26, 2013, claim letter makes no mention of any claim for a violation of the duty of good faith and fair dealing. (*See* Appellant's Post-Hr'g Br. at 10-12.) Although the claim letter alleges in its introduction that the Contract was "unceremoniously canceled by the city" and that QTL was "improperly replac[ed] . . . with other providers," (*id.* at 10), the letter neither sets forth any other facts regarding these allegations nor alleges that the District violated the duty of good faith and fair dealing when it decided not to exercise any additional option periods under the Contract, (*id.* at 10-12). Accordingly, we find that the September 26, 2013, claim letter did not describe a claim for, or set forth the operative facts or basis of recovery for, a violation of the duty of good faith and fair dealing as set forth in Count Two of the Notice of Appeal and Complaint. In the absence of the claim being presented to the contracting officer for a decision, the Board is without jurisdiction to decide the claim set forth in Count Two. *See Advantage Healthplan, Inc.*, CAB Nos. D-1239, D-1247, 2013 WL 6042884; *Keystone Plus Constr. Corp.*, CAB No. D-1358, 62 D.C. Reg. 4262, 4268-69 (Jan. 27, 2012) (citations omitted).

In addition, we note that the Board "is not a tribunal of general jurisdiction, but possesses only the jurisdiction granted to it by the Procurement Practices Act."[16] *Advantage Healthplan, Inc.*, CAB Nos. D-1239, D-1247, 2013 WL 6042884 (quoting *Claim of Chief Procurement Officer*, CAB No. D-1182, 50 D.C. Reg. 7465, 7466 (Nov. 29, 2002)). As such, the Board does not possess the authority to hear claims in equity, such as claims for promissory estoppel and unjust enrichment.[17] *See Advantage Healthplan, Inc.*, CAB Nos. D-1239, D-1247, 2013 WL 6042884 (citation omitted); *Sch. for Contemporary Educ.*, CAB Nos. D-913, D-916, 41 D.C. Reg. 3672, 3679 (Oct. 6, 1993) (citations omitted). Accordingly, we lack jurisdiction over QTL's claims of promissory estoppel (Count Three) and unjust enrichment (Count Four).

[15] The Board has found no other document in the record which could consist of a QTL claim under the Contract.
[16] The Board currently exercises jurisdiction pursuant to the Procurement Practices Reform Act of 2010, D.C. Law No. 18-371, preamble, § 1003, 58 D.C. Reg. 1185, 1186-87, 1228-29 (Apr. 8, 2011) (codified at D.C. CODE § 2-360.03 (2017)), which repealed the Procurement Practices Act, and amended and recodified the District's procurement statutes, but did not substantively change the Board's jurisdiction regarding appeals. *Compare* D.C. CODE § 2-360.03(a)(2)-(3) (2017), *with* D.C. CODE § 2-309.03(a)(2)-(3) (2001).
[17] During the motion hearing, appellant's counsel acknowledged that the Board was without jurisdiction over appellant's equitable claims.

Finally, in its post-hearing brief, appellant alleges that the District also breached the Contract by "fail[ing] to compensate QTL as anticipated by the contract" based on "assurances" from District personnel that CFSA would order more than the minimum quantity of services as stated in the task orders. (Appellant's Post-Hr'g Br. at 7-8.) However, this allegation of breach of contract was not presented to the contracting officer in QTL's September 26, 2013, claim letter. (*See id.* at 10-12.) Rather, the claim letter asserted a "promissory estoppel claim, as [QTL] ha[s] adduced that there is legally sufficient evidence that the District made extra-contractual promises." (*Id.* at 11.) To the extent that appellant is attempting to recast its promissory estoppel claim as a breach of the Contract, *see supra* note 17, the claim letter did not give the contracting officer adequate notice of the basis and amount of such a claim. *See Advantage Healthplan, Inc.*, CAB Nos. D-1239, D-1247, 2013 WL 6042884; *Keystone Plus Constr. Corp.*, CAB No. D-1358, 62 D.C. Reg. at 4268-69 (citations omitted). In fact, the claim letter never identified any facts regarding the alleged "extra-contractual promises," such as who made the promises, approximate dates when such promises were made, or what provisions of the Contract were allegedly breached.[18] (*See* Appellant's Post-Hr'g Br. at 10-12.) And the claim letter only states that the amount of the promissory estoppel claim was "approximately $568,000." (*Id.* at 10.) Accordingly, because we find that the September 26, 2013, claim letter did not give the contracting officer adequate notice of the basis and amount of a claim for breach of the Contract based on the District's failure to order more than the minimum quantity of services, such claim was not presented to the contracting officer for a final decision. Thus, the Board lacks jurisdiction over such claim. *See Advantage Healthplan, Inc.*, CAB Nos. D-1239, D-1247, 2013 WL 6042884; *Keystone Plus Constr. Corp.*, CAB No. D-1358, 62 D.C. Reg. at 4268-69.

In sum, the Board's jurisdiction is limited to QTL's claim for miscalculated underpayments of amounts due under the Contract. This claim corresponds to Count One of QTL's Notice of Appeal and Complaint alleging breach of contract. (*See* Notice of Appeal and Compl. at 1, 3-4.) Accordingly, the Board dismisses Counts Two, Three, and Four for lack of jurisdiction.

II. Appellant's Remaining Claim Does Not State a Claim upon Which Relief May Be Granted

The District has also moved to dismiss QTL's breach of contract claim for failure to state a claim upon which relief may be granted. (District's Post-Hr'g Br. at 1, 7-10.) According to the District, QTL "was compensated according to the terms of the [Contract]," and QTL's claim for underpayments is based on an "unfounded" interpretation of the Contract. (*Id.* at 1, 9-10.)

In considering a motion to dismiss for failure to state a claim upon which relief may be granted, the Board is guided by precedent of the District of Columbia courts, particularly D.C. Superior Court Rule of Civil Procedure 12(b)(6). *See Fort Myer Constr. Corp.*, CAB No. D-1195, 50 D.C. Reg. 7479, 7479, 7483 n.6 (Mar. 24, 2003) (citations omitted), *remanded without opinion*, 03-AA-0738 (D.C. Mar. 4, 2005), http://efile.dcappeals.gov/public/caseView.do?csIID=38926. In order to withstand such a motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 544 (D.C. 2011) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)); *see also Fort Myer Constr. Corp.*, CAB No. D-1195, 50 D.C. Reg. at 7483 n.6 (citations omitted). The Board is "not bound to accept as true a legal conclusion couched as a factual allegation." *Grayson v. AT & T Corp.*, 140 A.3d 1155, 1162 (D.C. 2009) (citation omitted). In the context of appeals of claims pursuant to government contracts, "the primary document setting forth the claim is not the complaint, *per se*, but is either the contractor's claim or the government's claim." *Lockheed Martin Integrated Sys., Inc.*, ASBCA No. 59508, 17-1 BCA ¶ 36,597.

[18] The Board notes that these issues of adequate notice and basis also plague the claim for promissory estoppel, although we do not address the merits of QTL's argument due to the Board's lack of jurisdiction over promissory estoppel claims.

And "[i]n examining the sufficiency of the complaint, the court may consider the complaint itself and any documents it incorporates by reference." *Abdelrhman v. Ackerman*, 76 A.3d 883, 887 (D.C. 2013) (citation omitted). When assessing a breach of contract claim, the Board "must interpret the contract's provisions to ascertain whether the facts [appellant] alleges would, if true, establish [a] breach of contract." *Commissioning Solutions Global, LLC*, ASBCA No. 59254, 14-1 BCA ¶ 35,695 (first alteration in original) (quoting *Bell/Heery, A Joint Venture v. United States*, 739 F.3d 1324, 1330 (Fed. Cir. 2014)).

In its September 26, 2013, claim letter, QTL claims that CFSA owes QTL for "miscalculated payments that are still owed under the contract." (Appellant's Post-Hr'g Br. at 10.) According to the claim letter, CFSA did not fully pay QTL according to section G.2.1 of the Contract. (*See id.* at 10, 16-17; *see also* Notice of Appeal and Compl. at 3-4.) For instance, during the month of January 2012, CFSA placed eleven children with QTL and QTL provided 224.5 days of service to CFSA for the eleven children.[19] (Appellant's Post-Hr'g Br. at 17.) CFSA paid QTL the Contract's per diem rate, $258.41, for the 224.5 days of service, for a total of $58,013.05. (*Id.*) However, QTL asserts that it should have been paid $88,117.81 for the month of January 2012 pursuant to section G.2.1 of the Contract.[20] (Appellant's Post-Hr'g Br. at 16-17.)

QTL's claim for miscalculated underpayments is in contradiction with the unambiguous terms of the Contract. Section G.1.1 of the Contract states that the District would pay QTL for "services performed and accepted," and section G.2.1 states that the monthly payments would be made based on the daily per diem rate for "children actually placed with [QTL] over the course of the month." (AF at 43.) Therefore, we reject QTL's claim that it was not paid in accordance with the Contract. Accordingly, even assuming the truth of the facts regarding the alleged breach of contract in QTL's September 26, 2013, claim letter,[21] QTL has not stated a claim upon which relief may be granted, i.e., QTL has not plead facts which show that the District did not pay QTL the amount owed to QTL under the Contract. *See Commissioning Solutions Global, LLC*, ASBCA No. 59254, 14-1 BCA ¶ 35,695; *Fort Myer Constr. Corp.*, CAB No. D-1195, 50 D.C. Reg. at 7482-85. Accordingly, we dismiss this claim.

Finally, the Board notes that, even though we dismiss QTL's claim for breach of contract arising from alleged oral promises that modified the Contract, *see supra* Part I.C, QTL also fails to state a claim upon which relief may be granted. The Contract states that the Contract itself does not commit the District to purchase any quantity of services and that "[t]he District shall be obligated only to the extent that authorized purchases are actually made by purchase order or task order." (AF at 39 (§ F.2); *see also* AF at 6 (§ B.1.1).) All three task orders that were issued to QTL pursuant to the Contract had a minimum order quantity of one.[22] (AF at 299, 308, 310.) Although QTL alleges that District personnel other than the contracting officer made assurances that the District would order more than the stated minimums, (Appellant's Post-Hr'g Br. at 11), these assurances did not modify the Contract, as any modifications to the Contract needed to be in writing by the contracting officer, (AF at 47 (§ G.8).) As such, QTL has not plead a breach of the Contract, as its claim does not allege that the District failed to order the Contract's

[19] This means that, on average, QTL provided between twenty and twenty-one days of services per child during the month.

[20] QTL's claim of what it should have been paid is based on multiplying the daily per diem rate ($258.41) by the maximum 341 days of services that QTL *could* have provided for 11 children during the 31 days of January, even though QTL actually provided 11 children with only 224.5 days of services. (*See* Appellant's Post-Hr'g Br. at 17.)

[21] The Board points out that QTL's allegation of the amount it is owed "per contract instructions in Paragraph G2.1," (Appellant's Post-Hr'g Br. at 16), is not a factual allegation, but rather is a legal conclusion (couched as a factual allegation) regarding the interpretation of the Contract, which the Board need not, and does not, accept as true.

[22] The minimum dollar amounts that the District was required to order under Task Orders 1-3 were, respectively: $94,578.06, $3,617.74, and $27,908.28. (AF at 299, 308, 310.)

stated minimum quantities of services from QTL. *See Commissioning Solutions Global, LLC,* ASBCA No. 59254, 14-1 BCA ¶ 35,695; *Fort Myer Constr. Corp.*, CAB No. D-1195, 50 D.C. Reg. at 7482-85; *see also C&D Tree Serv., Inc.*, CAB No. D-1347, 63 D.C. Reg. 12004, 12015 (Aug. 8, 2013) (citations omitted).

CONCLUSION

For the reasons set forth herein, the Board grants the District's motion to dismiss. Accordingly, it is hereby ordered that:

(1) Count One of the Notice of Appeal and Complaint is dismissed with prejudice for failure to state a claim upon which relief may be granted;
(2) Count Two of the Notice of Appeal and Complaint is dismissed without prejudice for lack of jurisdiction due to appellant's failure to present the claim to the contracting officer for decision;
(3) Count Three and Count Four of the Notice of Appeal and Complaint are dismissed with prejudice for lack of jurisdiction since the Board is without jurisdiction to grant equitable relief.

SO ORDERED.

Date: August 4, 2017

/s/ Maxine E. McBean
MAXINE E. McBEAN
Administrative Judge

CONCURRING:

/s/ Marc D. Loud, Sr.
MARC D. LOUD, SR.
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GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

PRISM INTERNATIONAL, LLC.	)	
	)	CAB No. P-1045
	)	
Under Solicitation No. D0C315997	)	

For the protester, Prism International, LLC: Deon H. Ford, *pro se*. For the District of Columbia: Sharon G. Hutchins, 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 #61085096

This protest arises from a solicitation issued by the District of Columbia Office of Contracting and Procurement, seeking a contractor to provide, install, maintain, and repair new Ricoh Laser Multifunction Printers at the District of Columbia Office of the State Superintendent of Education's new agency location. The protester, Prism International, LLC ("Prism"), solely argues that the District's award decision was improper because the awardee was not a Ricoh certified technician and could not provide Ricoh certified technicians as required by the solicitation. Upon consideration of the allegations raised by the protester and the underlying record, we deny and dismiss Prism's protest allegations as without merit as further detailed herein.

FACTUAL BACKGROUND

On May 23, 2017, the District of Columbia Office of Contracting and Procurement ("OCP"), on behalf of the District of Columbia Office of the State Superintendent of Education ("OSSE"), issued Invitation for Bids No. DOC315997 (the "Solicitation") seeking a contractor to provide and install new Ricoh Laser Multifunction Printers at OSSE's new agency location. (Agency Report "AR" Ex. 1, at 2-3.)[1] The awardee would also be responsible for providing maintenance, repair, and consumable and monthly meter readings for the newly installed printers. (*Id.* at 3.) Further, the Solicitation required that all maintenance and repair work be performed in accordance with the manufacturer's specifications and only by a Ricoh certified technician on OSSE premises. (*Id.* at 10.) Participation in this procurement was limited to Certified Business Enterprise ("CBE") bidders that were certified by the District's Department of Small and Local Business Development as a CBE. (*Id.* at 2.)

[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.

The District contemplated awarding an Indefinite-Quantity contract with fixed-unit prices for a base term of one-year and four one-year option periods. (*Id.* at 3, 13.) Bidders were required to submit proposed pricing that consisted of a price per unit, a minimum total price, and a maximum total price for the base term and each option period based upon estimated quantities of units for the Contract Line Item Numbers listed in the Solicitation's Price Schedule. (*Id.* at 3-8.) Further, all bidders were required to meet the Solicitation's General Standards of Responsibility including that each bidder have adequate financial resources, satisfactory performance record and ability to obtain the necessary experience or technical skills to perform the contract requirements. (*Id.* at 44.) The District reserved the right to reject any bid that failed to comply with the Solicitation's requirements. (*Id.* at 41.) Ultimately, the District intended to award the contract to the responsive and responsible bidder with the lowest bid price. (*Id.*)

By the Solicitation's June 6, 2017, bid submission deadline, the District received bids from three companies: (1) MVS, Incorporated; (2) Stockbridge Consulting, LLC; and (3) Prism, the protester. (AR Ex. 7, at 3.) All three companies were certified as CBEs as required by the Solicitation. (*Id.*) Both Prism and MVS indicated in their bids that they intended to partner with authorized Ricoh servicers to provide the required hardware and maintenance services. (*Id.*) Prism intended to partner with Omni Business Solutions ("Omni") and provided a November 3, 2016, letter from Ricoh with its bid to confirm Omni's status as an authorized servicer of Ricoh brand products. (AR Exs. 5-6.) MVS represented that it would partner with Capitol Document Solutions ("CDS") and provided a November 19, 2012, letter from CDS with its bid to demonstrate that CDS was an authorized servicer for Lanier (Ricoh OEM) brand products. (AR Ex. 3, at 2.) MVS also provided a July 31, 2014, letter from Ricoh further evidencing that CDS was an authorized servicer for Lanier products, which allowed CDS to purchase genuine Ricoh parts and supplies. (AR Ex. 4, at 2.)

Based upon the information that MVS provided, the CO determined that MVS would provide the required Ricoh certified technicians through its partnership with CDS. (AR Ex. 7, at 4.)[2] Ultimately, after evaluating each bidder's submission, the CO determined that the award should be made to MVS. (*See* AR Ex. 2.) Thereafter, on June 23, 2017, the District awarded MVS the disputed contract for the Ricoh printer services. (*Id.*)

On June 27, 2017, Prism filed a protest with this Board solely arguing that the District's award decision was improper because MVS was not Ricoh certified and could not provide Ricoh certified technicians as required by the Solicitation's terms. (*See* Protest.) In response to Prism's protest, the District filed an Agency Report on July 18, 2017, contending that the Solicitation did not mandate that the actual bidders be Ricoh certified, and that the District reasonably determined that MVS was a responsible contractor that could provide the required Ricoh certified technicians through its partnership with CDS. (AR 6-7.)

The protester failed to file comments, or any other response, to the District's Agency Report challenging to any extent the District's assertions in the Agency Report. Accordingly, upon review of the record in this matter, the Board finds that the District reasonably concluded

[2] The CO also requested that MVS provide updated documentation regarding its relationship with CDS and CDS' status as a Ricoh authorized dealer. (AR Ex. 7, at 3.) MVS provided this updated information to the CO on June 30, 2017. (*See* AR. Ex. 3, at 3; AR Ex. 4, at 3.)

that MVS could provide the required Ricoh certified technicians as part of its responsibility determination.

DISCUSSION

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). The crux of this protest is essentially a challenge to the CO's determination that MVS is a responsible contractor with regard to MVS' ability to provide Ricoh certified technicians to meet the Solicitation's requirements.

A proper determination that a bidder is responsible is a prerequisite for contract award to ensure that a prospective contractor has the necessary capacity to perform in accordance with the terms of a contract. D.C. CODE § 2-353.02(a) (2011). Specifically, contracting officers are required to make a written determination as to whether a bidder is responsible prior to contract award and may only award a contract to a bidder that is determined to, in fact, be responsible. D.C. MUN. REGS. tit. 27, § 2200.1- 2200.2 (1988). Contracting officers determine a contractor's responsibility by a number of factors including the contractor's ability to obtain the necessary technical skills required to perform the contract. *See id.* at § 2200.4(e).[3] Further, before making a determination of responsibility, the contracting officer is required to possess or obtain information sufficient to satisfy the contracting officer that a prospective contractor currently meets the applicable standards and requirements for responsibility. *See* D.C. MUN. REGS. tit. 27, § 2204.1.

This Board has consistently held that a contracting officer is vested with wide discretion and business judgment in making its responsibility determination. *AMI Risk Consultants*, CAB No. P-0900, 2012 WL 4753867 (May 25, 2012). Thus, it is well settled that the Board will not overturn an affirmative responsibility determination unless a protester can show fraud or bad faith on the part of the contracting officials, or that the contracting officer's determination lacked any reasonable basis. *Id.* (citing *Lorenz Lawn & Landscape, Inc.*, CAB No. P-0869, 62 D.C. Reg. 4239, 4244-45 (Sept. 29, 2011)).

In the present protest, the Solicitation required that ultimately only a Ricoh certified technician could provide the Ricoh printer maintenance and repair services offered by a bidder. (AR Ex. 1, at 10.) The record demonstrates that MVS offered to comply with this Solicitation requirement through its partnership with CDS. In that regard, MVS supplied the District with detailed documentation to demonstrate that CDS was a certified servicer of Ricoh equipment. (AR Ex. 3, at 2; AR Ex. 4, at 2.) The CO reviewed this documentation and reasonably determined that MVS would provide Ricoh certified technicians through its partnership with CDS. (AR Ex. 7, at 2.) The protester has not offered any evidence to show that the CO's reliance on these documents, as evidence of MVS' ability to provide Ricoh certified technicians, lacked any reasonable basis.

[3] Additional factors considered by the contracting officer in determining whether a contractor has the capacity to perform include, amongst other things, adequate financial resources, satisfactory record of business integrity, organization, experience, accounting and operational controls, and equipment and facilities. *See* D.C. MUN. REGS. tit. 27, § 2200.4.

Thus, we find that the District reasonably relied on this information in concluding that MVS could perform the required maintenance and repair services as part of its responsibility determination. As a result, we deny and dismiss the present protest for lack of merit. *See R4 Integration, Inc.*, B-409717 *et al.*, 2014 CPD ¶ 171 (Comp. Gen. June 6, 2014) (denying protestor's challenge to the CO's responsibility determination where there was no information in the record to cause the CO to doubt the awardee's capability to perform the contract requirements).[4]

CONCLUSION

For the reasons discussed above, the Board denies the instant protest and dismisses it with prejudice.

SO ORDERED.

Date: September 7, 2017

/s/ Monica C. Parchment
MONICA C. PARCHMENT
Administrative Judge

CONCURRING:

/s/ Marc D. Loud, Sr.
MARC D. LOUD, SR.
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[4] In addition, pursuant to Board Rule 110.5, the Board also treats the District's Agency Report as conceded by the protester based upon its failure to file comments, or any other response, within the prescribed time.