

APPEAL OF:

Prior to September 5, 2000, the Duke Ellington School for the Arts was operated by DCPS, as evidenced by a document entitled “Agreement Between the Duke Ellington School of the Arts Project, the District of Columbia Public Schools, and the District of Columbia Office of Contracting and Procurement” (“DESAP Organizational Agreement”), dated September 5, 2000. (Hearing Ex. 4, at 1). DESAP, a District of Columbia nonprofit corporation, was formed on April 26, 1999, is partially funded by DCPS and is a collaboration of the Ellington Fund, the John F. Kennedy Center

for the Performing Arts, and The George Washington University. (DESAP Organizational Agreement, at 1). Article III of the DESAP Organizational Agreement clearly transfers DESA operational authority from DCPS to DESAP, effective September 13, 2000:

DELEGATION OF AUTHORITY TO DESAP; LINES OF AUTHORITY

3.1 General Grant of Authority. Except as provided in Section 3.2 of this Article III [Superintendent veto under extraordinary circumstances of action by DESAP Board of Directors], the DCPS hereby grants to DESAP the authority and responsibility for the management and operation of all aspects of DESA commencing on the day immediately following the end of the Transition Period [September 5, 2000 through September 12, 2000, *see* Article II, Section 2.3]. Such grant of authority shall remain in full force and effect for the remainder of the Initial Term and any extensions thereof subject to the terms hereof. DESAP shall exercise such authority in conformity with all applicable laws, rules and regulations, unless a specific waiver or exemption has been obtained from the appropriate government authority.

(Hearing Transcript (“Tr.”) 191; Hearing Ex. 4). Breeze asserts that on August 15, 2000, its president, Wilfred Welsh, met with Peggy Cooper Cafritz, a DESAP representative, and William Weir, the school’s chief financial officer. Welsh claims that Cafritz requested that he submit a proposal to perform various computer services for Duke Ellington School, that he and Weir prepared a draft agreement for the computer equipment and services, that Welsh signed three copies of the draft, and that the draft agreement was left at Cafritz’s home office for signature. (Hearing Tr. 8-22). The draft agreement contained the following statement of work and pricing:

BREEZE ENTERPRISES and CLIENT enter into following agreement (the "Agreement") to adhere to the terms, conditions, and prices stated herein. BREEZE ENTERPRISES will provide the services at the price specified below. No other statements written or implied by any employee of BREEZE ENTERPRISES shall be part of the Agreement. The CLIENT agrees to pay for work done pursuant to this Agreement. Additional terms and conditions which are an integral part of this Agreement are attached as a sheet entitled “EQUIPMENT MAINTENANCE AGREEMENT.” The itemized list of equipment/services covered by this Agreement is "Attachment 1".

OFFICE/PROGRAM	HARDWARE SERVICES	SOFTWARE SERVICES	COST
LAN Cabling	Yes	N/A	\$15,800.00
Networking Equipment/Services	Yes	Yes	\$74,000.00
Computer Hardware	Yes	N/A	\$70,000.00

Software/Support	N/A	Yes	\$40,000.00
TOTAL			\$199,800.00

See Attachment I for itemized list.

The Agreement period is 30 days beginning August 15th, 2000 with support services covering a period of one (1) year.

(Breeze March 23, 2006 submission, Tab 9, at 1). The “Equipment Maintenance Agreement” referenced in and attached to the one-page draft agreement provided for a 25 percent initial deposit payment of \$49,950.00, but did not specify a payment date. (*Id.* at 3). The draft agreement was never signed by Cafritz nor anyone else other than Welsh. (*Id.*). No initial deposit was paid to Breeze. (Hearing Tr. 23). Welsh testified that on Aug. 16, 2000, Weir requested that Welsh begin work immediately to prepare the school for the start of the academic year, and Welsh agreed based on his having known Ms. Cafritz for years, notwithstanding that she had not yet signed the agreement. (Hearing Tr. 22). Welsh states that he began work on August 16 or 17, though he also states that it took some time, perhaps a few days, to get organized and gain access to various school rooms. (Hearing Tr. 23-24; Amended Affidavit of Wilfred Welsh, March 24, 2006 (“Welsh Aff.”) at 1).

Breeze submitted six invoices to DESAP during the period of performance. Invoice No. 2327, dated August 31, 2000, requested payment of \$15,800 for the following work: “Cabling/Engineering Service Charge. Extension of existing Data/Voice Network to accommodate a minimum of 125 additional work area outlets. Correctional modifications of sections of existing cable infrastructure.” (Breeze March 23, 2006 submission, Tab 5).

Breeze submitted Invoice No. 2371, dated October 20, 2000, in the total amount of \$8,019.15 for the following hardware, software, and supplies: “3COM 3C905B-TX-N 10/100 Network card (1) @ \$79.00; Mid Tower PC with Intel Pentium III processor running at 550 MHZ with the following: Pentium II/III mother board; Intel Pentium III 550 CPU; 64 MEG SDRAM; Western Digital 7.5 G hard drive; Toshiba 48X CD-ROM; Creative Lab Sound Blaster 128 sound card; Misumi Win 95 keyboard; Microsoft Intelli PS2 Mouse; Windows 98 second edition; 3COM 10/100 3C905 fast Ethernet network interface card; Viewsonic E771 flat screen multimedia Monitor 17” (3) @ \$899.00 [totaling] \$2697.00; CAT 5 Patch cord modular plugs (55) @ \$3.19 [totaling \$175.45]; Category 5 plenum cable (1) \$ 185.00; Lucent module cat 5 jack inserts (10) @ \$5.07 [totaling] \$50.70; Toshiba Tecra 8100 Notebook P3-700 \$3500.00; Black toner cartridge for Phaser 780 (2) @ \$105.00 [totaling] \$ 210.00; Jet Direct print server (2) @ \$159.00 [totaling] \$ 318.00.” (Breeze March 23, 2006 submission, Tab 5).

Breeze received a payment check of \$15,800.00 dated December 22, 2000. (Breeze March 23, 2006 submission, Tab 8). The payor of the check was the Government of the District of Columbia. (Breeze March 23, 2006 submission, Tab 8). The \$15,800 payment was funded from DCPS capital budget funds on behalf of DESAP, and appears to have been paid as part of DCPS’s

funding of DESAP as contemplated in the DESAP Organizational Agreement. (Hearing Tr. 174-180). To provide the capital funding to DESAP, a requisition and direct purchase order were created based on the authority of the DESAP Organizational Agreement. (Hearing Ex. 3; Tr. 174-180). As referenced in Hearing Ex. 3, Ms. Glorious Bazemore, the DCPS Deputy Chief Procurement Officer at the time, testified that the payment was by direct voucher, also referred to as “direct purchase order”, and was not made pursuant to any contract obligation between DCPS and Breeze as there was no contract between them. (*Id.*).

Breeze submitted Invoice No. 2399, dated January 4, 2001, in the total amount of \$458.00 for the following computer supplies: “Color Imaging kit for Phaser 780 (1) \$ 279.00; Targus Tecra deluxe notebook bag with security system (1) \$ 179.00. (Breeze March 23, 2006 submission, Tab 5).

Breeze submitted Invoice No. 2428, dated March 30, 2001, in the total amount of \$31,181.25, for the following computer consulting services:

Hourly consultancy fee, Sept., 2000	
105.2 @ \$75.00	\$7890.00
Hourly consultancy fee, Oct., 2000	
45.05 @ \$75.00	\$3378.75
Hourly consultancy fee, Nov., 2000	
37.55 @ \$75.00	\$2816.25
Hourly consultancy fee, Dec., 2000	
39.5 @ \$75.00	\$2962.50
Hourly consultancy fee, Jan., 2001	
130.25 @ \$75.00	\$9768.75
Hourly consultancy fee, Feb., 2001	
58.2 @ \$75.00	\$4365.00

(Breeze March 23, 2006 submission, Tab 5). Invoice No. 2428 does not contain any time sheets or other contemporaneous records indicating what services Breeze provided for the hours claimed. In response to the Board’s request for additional documentation to support its claims, Mr. Welsh states in a prehearing filing containing “time sheets” for September 2000 through March 2001:

The times were recorded on the dates that the services were rendered. At the end of the first month, a summary time sheet was submitted to Mr. Weir. Weir then wanted to combine service and equipment into one billing entity in order to reduce the complexity of paperwork submitted to DCPS. No further time sheets were submitted until instructed to do so by Mr. Weir. The time sheets were initially submitted to Mr. Weir, but later resubmitted to the principal Mitzi Yates upon the request of Mr. Weir

at the end of his term as CFO of the school. Included in the submission to Ms. Yates, were all invoices referencing the time sheets, along with invoices for equipment purchased for the school.

(Breeze March 24, 2006 submission, Tab 6). The time sheet for each month consists of five columns labeled with the date, start time, end time, lunch, and hours worked. The entries do not differentiate between work by Welsh and his assistant, do not indicate the work performed, and were not contemporaneously certified by Breeze or DESAP. Welsh testified that he sent each time sheet by fax to Mr. Weir shortly after the end of the month but did not invoice for any of the time for September 2000 through February 2001 until the March 30, 2001 invoice. (Hearing Tr. 102-107, 128-129, 131). There is no documentation in the record corroborating Welsh's testimony about submitting the time sheets to Mr. Weir and no one from DESAP appeared to testify at the hearing. Breeze has submitted service requests forms prepared by DESAP staff outlining requested computer services to further support Breeze's hourly billings. (Breeze March 23, 2006 submission, Tab 4; Hearing Tr. 137-138). The service requests do not indicate the date work was rendered or the number of hours worked, and most do not indicate that work was completed. During the hearing, Mr. Welsh testified that there were no time sheets for the approximately 200 plus hours worked in August 2000, but the August 31, 2000 invoice submitted by Breeze for cabling/engineering services clearly constituted for the most part billing for labor expended during August 2000. (Hearing Tr. 34-60).

Breeze submitted Invoice No. 2430, dated April 6, 2001, in the total amount of \$649.80 for the following computer supplies:

Cyan toner cartridge for Phaser 780 (1)	\$ 179.95
Magenta toner cartridge for Phaser 780 (1)	\$ 179.95
Yellow toner cartridge for Phaser 780 (1)	\$ 179.95
Black toner cartridge for Phaser 789 (1)	\$ 99.95
Shipping and handling	\$ 10.00

(Breeze March 23, 2006 submission, Tab 5). Breeze received payment for this invoice in the amount of \$649.80 by check from the DESAP "Disbursement Account" dated April 26, 2001. (Breeze March 23, 2006 submission, Tab 8). The record contains a DESAP purchase order number 100136, bearing a fax date of March 31, 2001, for these supplies. (Breeze March 24, 2006 submission, Tab 7).

Breeze submitted Invoice No. 2431, also dated April 6, 2001, in the total amount of \$6,615.00, for the following computer consulting services:

Hourly consultancy fee, Aug., 2000	
8.0 @ \$75.00	\$600.00
Hourly consultancy fee, Mar., 2001	
80.2 @ 75.00	\$6015.00

(Breeze March 12, 2004 submission, Ex. F). As with the earlier invoice for hourly fees, there is no evidence in the record identifying the actual work performed, the number of hours billed for such work, certifications of hours, or corroborating documents from DESAP.

Appellant originally filed a suit for payment in the D.C. Superior Court on March 24, 2003, docketed as Civil Action CA03-2142. On May 29, 2003, Breeze consented to the District's motion to dismiss on the grounds that the Contract Appeals Board has exclusive jurisdiction pursuant to the Procurement Practices Act. On July 14, 2003, Breeze filed the instant appeal with the Board, requesting judgment against the DCPS in the amount of \$31,181.25, which was limited to its request for labor hours. On October 6, 2003, DCPS moved to dismiss the appeal on the ground that Breeze failed to allege that a contract existed between DCPS and Breeze and further that no final decision had been rendered by any DCPS contracting officer. On February 15, 2006, DCPS filed a copy of the September 5, 2000 DESAP Organizational Agreement, which DCPS had recently discovered. On April 27, 2006, DCPS filed a renewed motion to dismiss, alleging that there is no contract from which the Appellant may appeal because DESAP under the DESAP Organizational Agreement possessed contracting authority for Duke Ellington School procurements effective September 2000. Breeze filed its opposition motion on May 19, 2006. The Board held a hearing on the merits of the appeal and on jurisdiction on June 19, 2006. Subsequent to the hearing, the parties engaged in a prolonged but unsuccessful effort to settle the case.

DISCUSSION

The District has moved to dismiss the appeal contending that the Board lacks jurisdiction as (1) there was no contract between Breeze and DCPS, and there was no contracting officer's final decision to appeal from; and (2) even if the Board determines that there was some form of contract between Breeze and DESAP, DESAP is not subject to the Board's jurisdiction under the Procurement Practices Act because it is a private entity as shown by the DESAP agreement.

Pursuant to D.C. Code § 2-301.04(a), the Procurement Practices Act is limited to "departments, agencies, instrumentalities and employees of the District government" and the Board's jurisdiction generally is coextensive with the coverage of the PPA. D.C. Code § 2-309.03(b). Thus, DESAP, a private nonprofit corporation, is not subject to the Board's jurisdiction. Breeze relies upon the unsigned contract with DESAP dated August 15, 2000, which, on its face, is not a contract with DCPS or any other instrumentality of the District, and is executed only by Mr. Welsh of Breeze. Further, the actual performance and the invoices for time and materials are not consistent with the draft agreement's statement of work and pricing scheme. Although Breeze claims that the \$15,800 payment via a District government check dated December 22, 2000, "is an acknowledgment of Agents/Employee's authority to enter into this contract on its behalf," (Appellant's Opposition to Appellee's Renewed Motion to Dismiss, May 19, 2006, ¶ 13), this single DCPS payment to Breeze was funded from DCPS capital budget funds and reflected a payment made by DCPS on behalf of DESAP, pursuant to the DESAP Organizational Agreement, rather than pursuant to any contract obligation on the part of DCPS to Breeze. (DCPS Renewed Motion to Dismiss, April 27, 2006, ¶ 5). There is no evidence a DCPS contracting officer entered into a contract with Breeze or directed

Breeze to perform the work at issue.

Clearly, Mr. Welsh provided computer equipment, supplies, and related services to DESAP, believing that he would be fairly compensated based primarily upon the representations of Mr. Weir and Ms. Cafritz. (Hearing Tr. 26, 95, 99; Welsh March 24, 2006 Amended Affidavit, Section A). If the Board had jurisdiction over this dispute, based on the record presented, the Board would conclude that Breeze had shown it was entitled to compensation for Invoice Nos. 2371 (\$8,019.15) and 2399 (\$458.00) because there is reasonable evidence that Breeze provided the computers, printer, and related equipment and supplies, and DESAP has never paid for those items. Although we lack jurisdiction to order any payment, we recommend that DESAP promptly make a payment to Breeze for these items as there is no question as to entitlement and quantum. It is equally clear that the support for Breeze's claim for hours of labor for the months September 2000 through March 2001 is deficient. If we had jurisdiction, we would have no choice but to employ a jury verdict approach to estimate the hours for which Breeze should be compensated.

For the reasons stated above, we dismiss the appeal for lack of jurisdiction.

SO ORDERED.

DATED: December 18, 2009

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

CONCURRING:

/s/ Warren J. Nash
WARREN J. NASH
Administrative Judge