

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
CONTRACT APPEALS BOARD

PROTEST OF:

ALL-BUSINESS SYSTEMS AND DESIGN	)	
	)	CAB No. P-609
Under Child and Family Services Agency RFQ	)	
(LaShawn Receivership)		

For the Protester: Brad Cribb, Vice President, All Business System and Design. For the Receiver: Suzan Aramaki, Esq., General Counsel; Jeffrey M. Ford, Esq., Assistant General Counsel

Opinion by Administrative Judge Matthew S. Watson, with Chief Administrative Judge Lorilyn E. Simkins and Administrative Judge Jonathan D. Zischkau, concurring.

**OPINION ON MOTION TO DISMISS AND ORDER**

On January 28, 2000, All-Business Systems and Design (“ABSD”) protested against award of a contract by the Child Welfare Receiver (“Receiver”) based on a solicitation requesting quotations for reconfiguration of file storage at the Agency’s new facility located at 400 6<sup>th</sup> Street, S.W.

On February 22, 2000, the Receiver filed a Motion to Dismiss for Lack of Jurisdiction (“Motion”) asserting that “the Child Welfare Receivership and the General Receiver are neither departments, agencies, instrumentalities, boards nor commissions of the District government” and are accordingly not subject to the jurisdiction of the Board. (Motion at 5). We deny the motion because we conclude that the court order establishing the Receivership incorporated the protest jurisdiction of this Board under the Procurement Practices Act.

**Background**

The Child Welfare Receivership was established and the Receiver appointed pursuant to a Remedial Order of the United States District Court for the District of Columbia dated, May 22, 1995. *LaShawn v. Kelly*, 887 F. Supp. 297 (1995). The District Court granted all necessary powers to the Receiver in a General Receivership Order dated August 23, 1995. (Motion, Ex. 2). The Court added additional procedural controls in a supplemental order dated December 8, 1995. (Motion, Ex. 3).

For the purposes of this motion, the Board accepts the assertion of the Receiver that the Receiver is not one of the “departments, agencies, instrumentalities, boards [or] commissions of the District government” referred to in the Procurement Practices Act (“PPA”). D.C. Code §1-1181.4. Nevertheless, the Board finds that the District Court, in empowering the Receiver, has subjected the

Receiver’s authority to reasonable requirements of District law and therefore that this Board has jurisdiction to consider a protest against award of a contract executed by the Receiver.

### **Authority of a Receiver**

"A receiver derives his authority from the act of the court appointing him . . . ." *Consumers United Ins. Co. v. Smith*, 644 A.2d 1328, 1351 (D.C. 1994) (quoting *Union National Bank of Chicago v. Bank of Kansas City*, 136 U.S. 223, 236 (1890)). It follows that the receiver’s authority is defined and limited by the orders of the appointing court and it has long been held that a receiver “has only such power and authority as are given him by the court, and must not exceed the prescribed limits.” *Davis v. Gray*, 83 U.S. 203, 218 (1862) *quoted in Capitol Terrace, Inc. v. Shannon & Luchs, Inc.*, 564 A.2d 49, 52 (D.C. 1989).

### **Powers Granted to the Receiver by the District Court**

In the introductory paragraph of the General Receivership Order, the Court grants the Receiver :

all necessary authority to carry out its responsibilities . . . . The Receiver will make all reasonable efforts to exercise its authority in cooperation with District of Columbia officials and in a manner consistent with local law whenever possible. However, to the degree that local law governing . . . procurement . . . unreasonably interfere[s] with the Receiver’s discharge of its responsibilities, local law is superseded by the Receiver’s authority.

(Motion, Ex 2, at 1).

In Section I, “Structure of the Receivership” provides that the Receiver shall have “direct control and line supervisory authority over. . . creation and operation of an independent contracting and procurement function.” (§B.13, at 3).

Section II, “Receiver’s Authority,” grants the Receiver “[t]he authority to enter into contracts and procure all goods and services necessary to carry out the Child Welfare Receivership.” (§E, at 4)

Clearly, the Court did not intend to give the Receiver a blanket exemption from District laws, or the orders would have so stated. The Court directed that in the exercise of her authority, the Receiver is relieved only from compliance with such laws which will *unreasonably* interfere with her work. It appears that the principal intent of the Court in establishing the “Structure of the Receivership” was that the Receiver not be required to implement her programs through employees over whom she does not have complete and unambiguous control. The Court granted sweeping and unlimited management authority to insure “direct control and line supervisory authority over all activities and tasks. . . .” (*Id.*) in contrast to the limited exemption it permitted the Receiver from the application of District law.

The December 8, 1995, supplemental order, which the Court issued in response to the District's "detailing several procedural controls they deem necessary," to which the Receiver agreed, reiterated that "the Receiver shall contract and procure goods and services consistent with the District's existing procurement law and procedures . . . ." (Motion, Ex 3, at 1). By singling out this limitation on the Receiver's authority, the Court emphasized its intent that the Receiver follow the District's existing procurement law and procedures, namely the Procurement Practices Act

### **Application of District law to the Receiver's Authority**

The Motion asserts that the Receiver may establish procurement procedures "independent of the District and the PPA." (at 6). The Receiver focuses on the language of the December 1995 supplemental order that the Receiver exercise his authority "consistent with local law." By adopting a definition of "consistent" to mean only, "'in harmony with,' 'compatible with,' 'holding the same principles' or 'in general agreement with,'" the Receiver concludes that he is not subject to the PPA. (Motion at 6).

We believe that the Receiver misconstrues the Court's orders. The language of the supplemental order must be read together with the Court's General Receivership Order issued the previous August. In the previous order, the Court used a similar formulation that the Receiver "make all reasonable efforts to exercise its authority . . . in a manner consistent with local law whenever possible." But the Court stated immediately following that language that only "to the degree that local law governing . . . procurement . . . unreasonably interfere[s] with the Receiver's discharge of its responsibilities, [that] local law is superceded by the Receiver's authority." Thus the Court indicated its corollary intent that if District law does not unreasonably interfere with exercise of the Receiver's authority, the Receiver is to be subject to District procurement law, including the Board's authority to hear and decide protests under the PPA.

The Receiver asserts that, by her definition, she "has adopted contracting Procedures that are consistent with the District's procurement laws and procedures," (Motion at 6) and has attached those procedures to her Motion<sup>1</sup>. (Ex. 5). After carefully reviewing the Receiver's Procedures, we note that a number of provisions are inconsistent with District procurement law. The Receiver's Procedures establish an agency-level protest forum, a mechanism eliminated by the Procurement Reform Amendment Act. D.C. Law 11-259. Although a nonexclusive protest review within the agency is not prohibited by the PPA, the Receiver's position that her procurement actions as Receiver are not subject to independent review is inconsistent with District law, as well as federal procurement law. The PPA, as amended, states that "[t]he proceeding [before the Board] shall be de novo . . . . Any prior determinations by administrative officials shall not be final or conclusive." D.C. Code §1-1189.8(d). The position of the Receiver that her decisions are final and unreviewable (Motion at 3) is directly contrary to District law.

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<sup>1</sup> For the purposes of determining this motion, the Board accepts the validity of the Procedures. The "Policy and Procedures Governing Contracting Protests" attached to the Motion give no indication as to the manner of adoption, date of adoption, publication of the procedures or notice to bidders.

The Receiver does not argue that the protest jurisdiction of the Board established by the Procurement Practices Act is an unreasonable impediment to her functioning. Such a position would be difficult to maintain. Virtually all District of Columbia and federal agencies are subject to independent protest review. Indeed, procurement actions of the United States District Court itself are subject to the protest jurisdiction of the General Accounting Office.<sup>2</sup> The protest authority and procedures of this Board were patterned on those of the GAO. Further, the Board’s rules provide that a procurement action may continue pending determination by the Board of a protest if the circumstances necessitate proceeding.

The Court’s orders establish the authority of the Receiver to function independently of District agencies, but, with regard to statutory obligations, subjects the Receiver to District law. Absent clear language to the contrary, the Board cannot assume that the Court intended to deprive prospective contractors of any remedy in the nature of a bid protest outside of the Agency. The absence of a traditional protest forum contradicts long-standing and well-settled federal and District law and policy.

Although the Receiver asserts in her motion that the Board lacks jurisdiction over protests against her contract awards, it does not appear that the Receiver’s Procedures attached to the Motion (Ex. 5) preclude the Board’s jurisdiction over protests. Rather, the Procedures appear to recognize the jurisdiction of the Board.<sup>3</sup>

Section 10701.00, “General,” provides:

(a) Contracting officers shall consider all protests . . . whether filed directly with the Agency or in some other forum.

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<sup>2</sup> 4 C.F.R. 21.0(c) (1997). The Receiver asserts that she is an officer of a District Court. (Motion at 5) While this may be true, it does not follow that the Board lacks jurisdiction. We read the Court’s orders as providing for review under existing District law and procedures. There is no indication that the Court intended to preclude such expert independent review which has been well established in District and similar federal law for many years. If the Receiver is an officer of the court, she may also be subject to concurrent protest jurisdiction in the GAO whose jurisdiction encompasses “any establishment in . . . the judicial branch.” (*Id.*).

<sup>3</sup> Somewhat confusingly, the introductory section entitled “Policy” provides: “[t]he Agency may also elect to proceed under the authority and requirements of the federal A[dministrative] D[ispute] R[esolution] A[ct], Public Law 100-522 [*sic*].” The Administrative Dispute Resolution Act of 1996 (Public Law 104-320) amended Public Law 101-552 and 102-354. By its terms, that act is inapplicable for two reasons. First that act does not apply to the District of Columbia. (§4 incorporating U.S. Code §5-551(1)). Second, the ADRA is not intended to cover bid protests, but rather grants concurrent bid protest jurisdiction to the United States Court of Federal Claims and the District Courts of the United States. Pub. L. No. 104-320, §12.

(e) An interested party wishing to protest is encouraged to seek resolution within the Agency before filing suit in any other forum allowed by law or these regulations.

And §10710.00, “Protests to the Agency,” states:

(a) The following procedures are established to resolve Agency protests effectively, to build confidence in the CFSA’s acquisition system, and to reduce protests outside of the Agency.

The Board would appear to be the only outside administrative forum with jurisdiction to hear protests to which the regulations could refer. It is unlikely that the District Court itself intended to undertake detailed reviews of specific procurements requested by an unlimited number of disappointed prospective contractors.

### **Conclusion**

The Board finds that the authority of the Receiver granted by the District Court with regard to procurement actions is subject to District of Columbia law, including the PPA. Pursuant to the PPA, and in conformity with the District Court orders, the Board has jurisdiction over the subject matter of this protest and over the Receiver, in her official capacity. The Receiver’s Motion to Dismiss for Lack of Subject Matter and Personal Jurisdiction is DENIED.

It is further ORDERED, that the receiver shall file an “Agency Report” within 15 days of the date of this order.

### **SO ORDERED**

DATED: March 23, 2000

/S/ MATTHEW S. WATSON  
MATTHEW S. WATSON  
Administrative Judge

CONCURRING:

LORILYN E. SIMKINS  
Chief Administrative Judge

JONATHAN D. ZISCHKAU  
Administrative Judge