

In August 2002, the Department of Health issued Solicitation No. POHC-2002-R-1752, seeking proposals to centralize the distribution and dispersal of anti-retroviral and other HIV-related medications to the approximately 4,600 HIV-infected residents of the District. (Protest (P-0674), at 4; Whitman-Walker July 3, 2003 Motion, at 4-5; District July 7, 2003 Response, Exs. 1-2). On May 30, 2003, the District and Care Pharmacies, Inc., entered into an indefinite delivery/indefinite quantity letter contract to provide the HIV medication dispensing services to the HIV population, consisting of approximately 3,000 District Medicaid patients and enrollees in a Medicaid HIV demonstration project pursuant to section 1115 of the Social Security Act (“1115 Waiver”), and to the approximately 1,600 qualified District residents participating in the District’s AIDS Drug Assistance Program (“ADAP”). (Whitman-Walker Motion, at 4-5; District Response, Exs. 1-2). Previously, Medicaid patients were able to receive their medications at any Medicaid-enrolled pharmacy in the District, and ADAP participants received their medications exclusively through Care Pharmacies. Under the newly awarded contract, ADAP participants will continue to receive their medications from the Care Pharmacies

network, but Medicaid recipients will now obtain their HIV medications only through the Care Pharmacies network.

Prior to the new contract, pricing for medications varied significantly depending on whether the medication was dispensed to Medicaid recipients or ADAP participants. Under the ADAP, the District arranged and paid for the purchase of drugs under pharmaceutical “Prime Vendor Agreements” awarded by the United States Department of Defense. The District distributed these drugs to Care Pharmacies and paid Care a dispensing fee. As a result, the prices for ADAP-eligible individuals was significantly lower than Medicaid retail pricing. (Whitman-Walker Motion, at 5; District Response, Ex. 2). Using the Federal 340-B Drug Pricing Program, Whitman-Walker states that its medication costs are only 2 percent higher than the contract prices the Department of Health pays DOD. The Department of Health says the price difference is on the order of 15 percent. (District Response, Ex. 2, at 3). Care Pharmacies has been under contract with the District for dispensing medications under the ADAP for approximately 10 years. Prior to the recent award to Care Pharmacies, the approximately 3,000 HIV-positive Medicaid beneficiaries could obtain their HIV and AIDS-related medications from any Medicaid-enrolled pharmacy throughout the District, including Whitman-Walker. Whitman-Walker states that it provided HIV medication to over 500 of the District’s Medicaid HIV recipients. (Whitman-Walker Motion, *Chiliade Aff.*, at 1).

In its initial protest of the award to Care Pharmacies, filed on June 11, 2003, and docketed as CAB No. P-0672, Whitman-Walker challenged the rejection of its best and final offer but did not specify any protest grounds because the debriefing process had not been completed. On June 24, 2003, the District filed its determination and findings, approved by the CPO, to proceed with contract performance while the protest was pending. Mr. Ronald Lewis, the chief executive officer of the Department of Health (“DOH”) provided the following facts justifying the continuation of performance:

The most immediate and critical impact of stopping work on this contract would be on the AIDS Drug Assistance Program (ADAP). The entire ADAP program has begun to transition to the new contract and all current clients are now being served under this new contract, which began June 1, 2003. Interruption will jeopardize the lives of approximately 1,800 persons who are receiving free HIV/AIDS drugs through the program. Without the support of the Pharmacy Network contract services, there is a strong possibility that the ADAP program would be become fee-for-service. Given the cost of the drugs, an interruption of the contract would be devastating to both the clients and to the Department of Health.

. . . . [T]he Department of Health is expanding its coverage of eligible residents of the District of Columbia who are HIV positive. In recent months, the Medical Assistance Administration [“MAA”], which provides medical assistance (Medicaid) to eligible District residents, conducted an intensive review of pharmacy services provided to HIV-infected beneficiaries. Given the high rate of sub-optimal antiretroviral therapy utilization, the District seeks to improve monitoring, facilitate appropriate patient education and outreach, and develop an HIV pharmacotherapy adherence program. To that end, DOH is able to expand HIV/AIDS pharmaceutical service through implementation of the 1115 Waiver.

The 1115 Waiver was approved by the Center for Medicaid and Medicare Services

(CMS), a Division of the [U.S.] Department of Health and Human Services, in August [2001]. Section 1115 of the Social Security Act . . . allows state agencies to request a waiver of the usual Medicaid requirements that would otherwise apply for persons who participate in experimental, pilot, or demonstration projects. The 1115 Waiver . . . expands Medicaid eligibility to persons with HIV/AIDS to an array of benefits not otherwise covered by Medicaid. MAA expects to be able to provide coverage to approximately 120-285 HIV infected adults However, this projection is contingent upon MAA's ability to administer the expansion without incurring additional cost to MAA's approved budget. The savings must offset the cost of implementation. Thus, execution of the 1115 Waiver is contingent upon the District's ability to procure the costly HIV related pharmaceuticals at a substantial discount. The Federal government currently provides matching funds to the District of Columbia at 70 to 30 percent ratios to offset the cost of providing health services to Medicaid eligible recipients. . . .

Additionally, the CMS has already been advised of the contract award, and CMS formally advised the District that CMS may rescind the Waiver if work stops. This would prevent DOH from providing services to an additional 250 HIV/AIDS clients this fiscal year and another 1,000-plus over the base year plus the four option years of the contract and could possibly create a lapse in the program affecting the 70 to 30 percent matches. This lapse in the program would also create an extreme hardship for the District residents that are HIV infected clients and their families. . . .

In its motion challenging the determination to proceed with performance, Whitman-Walker states that the status quo would be better maintained by requiring the District to enter into a short emergency contract with Care Pharmacies similar to the District's contract with Care that expired on June 30, 2003, for covering ADAP participants, and allowing Medicaid eligible patients to continue obtaining their medications from Medicaid-enrolled pharmacies, such as the one at Whitman-Walker Clinic. Whitman-Walker's medical director states that the change to an all-Care Pharmacies network for ADAP and Medicaid will disrupt treatment regimens for HIV infected individuals:

The critical component of successful treatment for HIV disease is adherence to prescribed anti-retroviral regimens. In order for treatment to be successful, patients need to take more than 95% of their medication doses. If that level of adherence is not maintained, the HIV virus is able to replicate and to develop resistance not only to the prescribed medications, but also to many other anti-retroviral agents. This resistance has been proven to result in poor clinical outcomes with rapid disease progression and death. . . . In my experience, when HIV-positive patients change pharmacists, adherence is often jeopardized, resistance develops and progression to AIDS and ultimately death hastened. . . .

(Whitman-Walker Motion, Chiliade Aff., at 1). Whitman-Walker states that if it does not continue to provide pharmacy services, its ability to offer comprehensive HIV-related care will be compromised.

DISCUSSION

The standard for determining whether the District's Chief Procurement Officer properly may override the automatic stay of D.C. Code § 2-309.08(c)(1) is provided in D.C. Code § 2-309.08(c)(2):

Performance under a protested procurement may proceed, or award may be made, while a protest is pending only if the CPO makes a written determination, supported by substantial evidence, that urgent and compelling circumstances that significantly affect interests of the District will not permit waiting for the decision of the Board concerning the protest. . . .

Because the stay provision is meant to provide effective and meaningful review of procurement challenges before the protested procurements become *faits accomplis*, we consider whether there will be irreparable harm to the protester and whether a corrective award may later be made if the protester is successful on the merits of its protest. In *B&B Security Consultants*, CAB Nos. P-0583 and P-0585, 46 D.C. Reg. 8626, involving multiple awards for security services at government buildings, we sustained a CPO determination to override the automatic stay provided in D.C. Code § 2-309.08(c). Although the protester, who had been one of the incumbent contractors, urged us to require the District to extend various emergency contracts during pendency of the protests, we did not find maintaining the status quo through additional emergency contracts to be a compelling factor under the circumstances.

Whitman-Walker relies on *Dairy Maid Dairy, Inc. v. United States*, 837 F. Supp. 1370 (E.D. Va. 1993), and cases cited therein, interpreting an analogous federal statutory stay provision found in the Competition in Contracting Act ("CICA"), for the proposition that the CPO must not only show that urgent and compelling circumstances significantly affecting interests of the government justify continuing performance of the newly awarded contract, but also that performance by the specific proposed contractor is urgent and compelling. The rationale seems to be that simply showing that performance of the contract is urgent and compelling would "eviscerate the purpose and effect of the stay provision . . . because performance of almost any government contract could conceivably be deemed 'urgent and compelling circumstances.'" 837 F. Supp. at 1378-79. The District argues that the approach taken by *Dairy Maid* is inconsistent with the approach we have taken in interpreting the District's stay provision in D.C. Code § 2-309.08(c). We read *Dairy Maid* and the cases it cited as standing for the principle that a court may examine whether award to a specific contractor is urgent and compelling, as part of the overall consideration of urgent and compelling circumstances. But such an examination may carry less weight under different facts. In *Dairy Maid*, the Army had agreed to revise and later reissue a protested solicitation and to negotiate a 6-month extension to Dairy Maid's existing contract while the new procurement was being prepared. When a competitor offered to provide the Army the 6-month dairy requirement, the Army decided to compete the requirement. After the Army awarded the 6-month requirement to the competitor, Dairy Maid protested the award. The new contract was substantially identical to the one being replaced (except for duration) and the history of the administration of the contract "was replete with instances of contract extensions and reflected that the Army in fact had previously stayed award of a virtually identical contract under substantially similar circumstances." 837 F. Supp. at 1378. The court also emphasized that for the award protest, the Army had failed to issue a determination identifying urgent and compelling circumstances justifying the override and that the terms of Dairy Maid's existing contract were more favorable than the terms of the competitor's contract. Our case is quite different.

Here, the new award for HIV medication services differs significantly from the prior scheme.

The contract that expired was Care's contract for providing dispensing services only for ADAP participants. Medicaid pharmacy services were not provided by contract. Whitman-Walker provided pharmacy services for a portion of the Medicaid population infected with HIV. The purpose of the new contract is to centralize the distribution of HIV medication to ADAP participants as well as Medicaid recipients, reducing the costs the District pays for HIV medication services, and thereby permitting the District to expand the number of clients who receive services through the 1115 Waiver program. The District's decision to proceed with performance of the new comprehensive contract with Care, rather than extend a less beneficial contract through an emergency contract action and potentially jeopardize its 1115 Waiver, was reasonable. Moreover, Whitman-Walker will not suffer irreparable harm should it prevail on its protests, and corrective action may be taken if the protests are sustained.

Accordingly, we deny Whitman-Walker's motion challenging the CPO's determination to proceed with contract performance.

SO ORDERED.

DATED: July 25, 2003

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

CONCURRING:

/s/ Matthew S. Watson
MATTHEW S. WATSON
Administrative Judge