

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**CONTRACT APPEALS BOARD**  
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August 20, 1999

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SUBJECT: CAB No. **P-588** (Protest Of: **Health Right, Inc.**)

Attached is a copy of the Board's Opinion dismissing protest; denying its motion to void the determination to proceed with the novation; and the motion to disqualify counsel is moot.

A handwritten signature in cursive script, appearing to read 'Barbara Thompson', written over a horizontal line.

**BARBARA THOMPSON**  
Secretary to the Board

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
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On February 11, 1999, Prudential and Amerigroup entered into an asset purchase agreement under which Prudential agreed to sell to Amerigroup all of its right, title, and interest in the District Medicaid business and all assets used in the District Medicaid business. (*Id.*, Ex. 3). In letters of May 12, 1999, and May 27, 1999, to the District's Chief Procurement Officer ("CPO"), Health Right requested the District's position with regard to Amerigroup's asset purchase of Prudential Health Care Plan and whether the assignment or transfer of Prudential's Medicaid managed care contract was legally valid. (Protest, Attachment 1). By letter of June 17, 1999, a District contracting officer responded to Health Right, stating that District regulations would not permit Prudential to unilaterally assign its Medicaid managed care contract to Amerigroup but that other District regulations at 27 DCMR § 1220 "permit a novation where a District contractor has been transferred or purchased by another entity." (Protest, Attachment 2). The contracting officer advised Health Right that the District would contact Prudential "to ascertain whether it is necessary or appropriate for the District to enter into a novation with Prudential and AmeriGroup . . . ." (*Id.*).

On July 1, 1999, Health Right filed the captioned protest. On July 16 and July 22, 1999, Prudential and the District filed motions to dismiss the protest. Prudential also moved to disqualify the law firm representing Health Right on the ground that a partner who recently joined the firm had previously represented Prudential in the asset purchase transaction with Amerigroup, which, according to Prudential, creates an irremediable conflict of interest.

On July 22, 1999, the District filed a July 21, 1999 determination and findings to proceed with entering into a novation agreement with Prudential and Amerigroup during the pendency of the protest. On July 30, 1999, Health Right moved to void the July 21 determination. On July 28, 1999, the District filed the novation agreement executed by the Prudential, Amerigroup, and the District, to be effective August 1, 1999.

## DISCUSSION

The Board's protest jurisdiction is defined by D.C. Code § 1-1189.3 (1999) as follows:

- (a) The Board shall be the exclusive hearing tribunal for, and shall have jurisdiction to review and determine de novo:
  - (1) Any protest of a solicitation or award of a contract addressed to the Board by any actual or prospective bidder or offeror, or a contractor who is aggrieved in connection with the solicitation or award of a contract . . . .

District procurement regulations define a novation agreement as:

a legal instrument executed by a contractor (transferor), the successor in interest (transferee), and the District by which, among other things, the District recognizes the transfer of the contract and related assets.

27 DCMR § 1299.1. The regulations governing novation and change-of-name agreements, found

at 27 DCMR §§ 1220.1 to 1220.9, address novation in terms of the transfer of a contract from one entity to another with the concurrence of the contracting officer. Section 1220.6 states:

If recognizing a successor in interest[] to a District contract is consistent with the best interest of the District, the responsible contracting officer shall execute a novation agreement with the transferor and the transferee.

As the regulations make clear, a novation agreement is the transfer of preexisting contract rights and responsibilities. Although the novation agreement is itself a type of contract, it is not a contract "awarded" in the sense covered by D.C. Code § 1-1189.3(a)(1). Under the circumstances here, the transfer of the managed care contract from Prudential to Amerigroup effected by the novation also does not constitute an "award" of a contract under section 1-1189.3(a)(1). Two years have passed between the District's managed care contract award to Prudential and the novation of the contract to Amerigroup. There is no evidence that the District made the 1997 award to Prudential with the intention of entering into a novation agreement transferring the contract to Amerigroup. Thus, the novation here is a matter of contract administration and does not relate to a contract award. *See, e.g., Bosma Machine & Tool Corp.*, B-257443.2, Oct. 17, 1994, 94-2 CPD ¶ 143.<sup>1</sup>

Health Right responds that a novation agreement for a Medicaid managed care contract is prohibited by 29 DCMR § 5317.1, 42 D.C. Reg. 1586 (Mar. 31, 1995), which provides:

No prepaid, capitated provider shall assign or transfer any right gained by qualifying as a contractor with the Department.

We agree with the intervenor that the June 17, 1999 letter from the Department of Health's chief contracting officer reflects an interpretation by the agency authorized to interpret the Medicaid regulations that section 5317.1 prohibits the transfer of a District Medicaid managed care contract from one contractor to another without District approval, but does not prohibit a transfer which is approved by the District through a novation agreement. We believe such an interpretation is reasonable.

We need not address whether the novation agreement violates the anti-kickback provisions of 42 U.S.C. § 1320a-7b(b). That matter can be addressed in the first instance by the federal officials who are vested with authority to apply and enforce those provisions. The record indicates that the District's Department of Health has taken or will take appropriate measures to ensure that the novated Medicaid managed care contract meets applicable federal requirements and any required approvals from the Health Care Finance Administration of the U.S. Department of Health and Human Services.

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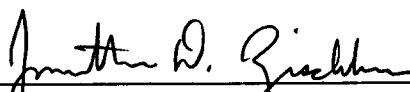
<sup>1</sup> No Board order in the consolidated protests of CAB Nos. P-507, P-510, and P-511, prohibited the District from subsequently entering into a novation agreement relating to a managed care contract.

**CONCLUSION**

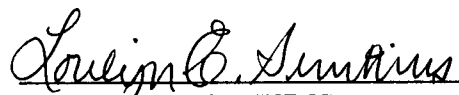
For the reasons discussed above, we dismiss Health Right's protest and deny its motion to void the determination to proceed with the novation. The motion to disqualify counsel is moot.

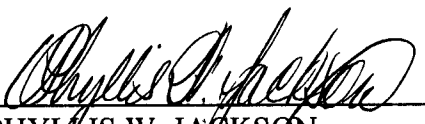
**SO ORDERED.**

DATED: August 19, 1999

  
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JONATHAN D. ZISCHKAU  
Administrative Judge

CONCURRING:

  
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LORILYN E. SIMKINS  
Chief Administrative Judge

  
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PHYLLIS W. JACKSON  
Administrative Judge