

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

Quality Plan Administrators, Inc.)	
)	
Greater Washington Dental Services, Inc.)	CAB Nos. P-0675, P-0677
)	
Under Solicitation No. DCBE-2002-R-0047)	
(Contract No. DCBE-2003-D-0072))	

Opinion by Administrative Judge Matthew S. Watson, with Chief Administrative Judge Jonathan D. Zischkau concurring.

**ORDER SUSTAINING THE CPO'S DETERMINATION
TO PROCEED WITH CONTRACT PERFORMANCE**
(CourtLink Filing ID)

Quality Plan Administrators, Inc. (CAB No. P-0675) and Greater Washington Dental Service, Inc. (CAB No. P-0677) filed timely motions on August 1, 2003, and July 31, 2003, respectively, challenging the July 24, 2003, determination of the District's Chief Procurement Officer ("CPO"), pursuant to D.C. Code § 2-309.08(c)(2), to proceed during the pendency of the captioned protests with performance under a contract for the District of Columbia Government employee dental benefits program. Having reviewed the CPO's determination and findings to proceed with contract performance, the parties' pleadings and oral argument, we conclude that the CPO's determination should be sustained. The determination is supported by substantial evidence that urgent and compelling circumstances that significantly affect interests of the District will not permit waiting for a decision of the Board on the protests.

BACKGROUND

In August 2002, the Office of Contracting and Procurement, on behalf of the Office of Personnel, solicited 18 firms for offers to provide an employee dental service plan for approximately 14,000 union and nonunion District employees. Five offers were timely received. Following discussions and the receipt of best and final offers, an evaluation panel recommended award to CIGNA Healthcare MidAtlantic. After making an independent evaluation, the Contracting Officer determined to award to CIGNA. A contract summary was circulated to the Council of the District of Columbia on June 27, 2003, and deemed approved effective July 7, 2003, after the Council's five-day review period. The District executed the contract on July 8, 2003. Since the extended contract with the then incumbent contractor was to expire July 26, 2003, the date for CIGNA to begin service under the new contract was set for July 27, 2003 ("service date"). (Contract §F.1)

The contract requires establishment of a Dental Health Maintenance Organization for District employees (“plan”) through independent providers. In such a plan, independent dentists (“panel dentists”), not employees of the contractor, agree to provide service to District government employees and their families (“participants”) for a fixed compensation per service to be paid by the contractor and a set copayment to be paid by the participant. Each participant is assigned to a specific primary care panel dentist who provides routine care and approves referrals to specialized panel dentists for more complex services. Participants are entitled to primary care only from their assigned primary care panel dentist. Participants may not receive primary care under the plan from any dentist other than the assigned dentist, even if the other dentist is a panel dentist, unless the plan approves a change in assigned primary care dentist. Thus, without the assignment of a participant to a primary care dentist by the plan, the participant is not able to obtain dental services under the plan.

Dental services are such that it would be untenable, and potentially in violation of collective bargaining agreements, to have a gap in the availability of plan services for covered participants. As noted above, for plan service to be available, each individual District employee and covered family member must be assigned by the plan to a panel dentist and that assignment communicated to the participant. If there is to be no gap between the plan being replaced and the plan under the new contract, the new plan services must be available to participants immediately on the service date. To accomplish this, assignment of each of the 14,000 participants to a primary care panel dentist and communication of the assignment to each participant must occur *prior* to the expiration of the existing contract and the beginning of services under the new contract. Further, since dental services are generally not utilized on a walk-in basis, but require advance appointments, in order to insure that there is no gap in the availability of prepaid dental services, the follow-on contractor must notify participants of their assigned panel dentist sufficiently prior to the service date to allow appointments to be made for treatment immediately after the service date.

The protested contract was awarded to CIGNA on Tuesday, July 8, 2003, only 19 days prior to the service date of July 27. If participants were to be advised of their newly assigned primary care providers sufficiently in advance of the service date to allow for prompt appointments after commencement of service, notice of assignments would have to be in the mail to participants no later than the week prior to the start of plan service. The automatic stay commenced upon filing of the protest (P-675) by Quality Plan Administrators on July 21, 2003, one week before the date patient services were to begin. On July 24, 2003, the Chief Procurement Officer (“CPO”) executed a determination and findings permitting performance to proceed on the contract. By that date, CIGNA was already in the process of distributing information to participants.

DISCUSSION

The Board has very recently discussed the standards to be applied in reviewing a determination to permit performance of a contract during the pendency of a bid protest. *Whitman-Walker Clinic, Inc.*, CAB Nos. P-0672 and P-0674, July 25, 2003, CourtLink Filing ID 2202351. We stated that “[b]ecause the stay provision is meant to provide effective and meaningful review of procurement challenges before the protested procurements become *faits*

accomplis, [in deciding whether to overturn the Chief Procurement Officer's determination to lift an automatic stay of performance] 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 oral argument, Greater Washington Dental Services asserted that, since the District contract represents substantially all of its business, losing the contract for even 60 days while the protest is pending, may put it out of business, making it impossible for it to accept the contract if the award to CIGNA is overturned. Based on this irreparable injury as a result of what it alleges is an improper award to CIGNA, Greater Washington argued that the stay should be reinstated.

We believe that Greater Washington misinterprets the Board's holding. The concept which we expressed in *Whitman Walker* is that the automatic stay is meant to prevent a *faits accomplis* in the protested procurement. We are not convinced from the record that Greater Washington Dental Services will be unable to provide the dental program if the protest is ultimately sustained and it were to receive award. Moreover, other offerors such as Quality Plan will not be prevented from receiving award should the protest be sustained. If an offeror were unable to provide the service after the protest is resolved, one would wonder if such an offeror could meet the requirements for responsibility in the first place.¹

The protesters do not dispute that the dental services involved in this contract are critical and must continue without interruption. The protesters argue, however, that the services can be provided by either extending the previous contract held by Greater Washington, or issuing an emergency contract to Greater Washington or Quality Plans for the period until the protest can be decided. As we stated in *Whitman-Walker*, in addition to deciding the question of whether the provision of the service itself is critical to the District, the Board "may examine whether award to a specific contractor is urgent and compelling, as part of the overall consideration of urgent and compelling circumstances." (*Id.*, citing *Dairy Maid Dairy, Inc. v. United States*, 837 F. Supp. 1370 (E.D. Va. 1993)). In this matter, since the contract has already been awarded and performance begun, we must therefore consider whether the CPO has stated urgent and compelling circumstances to continue performance by the awardee pending determination of the protest.

We believe that the CPO has met this burden. This contract is atypical. Although the protest was filed prior to the service date, preparation to begin coverage on the service date involved not only the contractor and the District, as in the normal contract situation, but required notice to 14,000 individual District employees, many of whom may have found it necessary, as a result of the change in contractor, to change their personnel dentists. It can also be expected that some participants receiving this notice changed specific dental treatment plans even before the service date.² Since the notice procedure was already underway prior to the filing of the protest,

¹ Quality Plan also argued that proceeding with performance somehow gives CIGNA a leg-up in winning the contract if the Board should require negotiations to be reopened. We fail to see any merit in this argument, since Greater Washington Dental Service also has experience offering a dental plan to District employees and Quality Plan has experience offering a vision plan to District employees.

² The District asserts that after Greater Washington Dental Services was advised on July 8, 2003, that its services would not continue past July 26, 2003, that it itself, prior to filing its protest, directed panel dentists to cancel participant appointments.

the interest of the District in avoiding the confusion and disruption that would be created by reverting to the incumbent provider or a third emergency provider, with the consequent requirement that some employees again change their changed dental appoints, justifies upholding the CPO's decision to allow the new contractor to proceed pending our decision on the protest. The Board believes that the findings adopted by the CPO that reverting to Greater Washington would cause confusion and adversely affect employee dental care and would disrupt District operations is also justified. On the other hand, the Board further believes that, in the event that the protests are sustained, the interim continuation of the awardee's contract performance will not interfere with the remedies available to the Board, including either termination of the contract or reopening negotiations.

Accordingly, we deny the protesters' motions challenging the CPO's determination to proceed with contract performance.

SO ORDERED.

DATED: August 8, 2003

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

CONCURRING:

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