

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

DOXA, INC.)	
1100 WAYNE AVENUE, SUITE 720)	
SILVER SPRING, MARYLAND 20910)	
)	
UNDER OFFICE OF THE PEOPLE'S)	CAB Nos. 1284 and 1285
COUNSEL OF THE DISTRICT OF)	
COLUMBIA CONTRACTS FOR.)	
DC PSC FORMAL CASE NOS. 766, 945,)	
982, 991, 1002, 1009, 1017, 1023 AND 1026)	

**MOTION FOR RECONSIDERATION OF OPINION
DISMISSING APPEALS OF DOXA, INC.**

1. Pursuant to 27 DCMR § 2-208.4 (1988) appellant, DOXA, Inc. ("DOXA"), moves for reconsideration of the opinion issued August 2, 2006 dismissing DOXA's appeal of the denial of its claim for penalty interest against the Office of the People's Counsel of the District of Columbia ("OPC" or "Office"), an independent agency of the municipal government of the District of Columbia.

STATEMENT

2. DOXA provided the Office with consulting and expert witness services before the Public Service Commission ("PSC") from 1999 through 2005 in PSC Formal Case Nos. 766, 945, 982, 991, 1002, 1009, 1017, 1023, and 1026. Although DOXA payment invoices submitted to OPC were ultimately paid, many payments were made more than 30 days after the invoice date. In September 2005, DOXA submitted claims to OPC for interest penalties on the late-paid invoices pursuant to the Quick Payment Act of 1984 ("QPA"). The Office made no decision respecting the QPA claims, and on December 23, 2005, DOXA filed notices of appeal with the Contract Appeals Board ("Board" or

“CAB”) based on the deemed denials of its claims. In CAB Case No. D-1284, DOXA claims QPA interest penalties of \$2,482.27 and interest upon unpaid interest penalties of \$49.48 as of January 26, 2006, and in CAB Case No. D-1285, DOXA claims QPA interest penalties of \$35,117.55 and interest upon unpaid interest penalties of \$2,584.64 as of January 26, 2006. OPC filed motions to dismiss in each of the cases and the Board heard the arguments of the parties during status conferences. On August 2, 2006, the Board issued an opinion granting OPC’s motion to dismiss on the Board’s finding that OPC is not subject to the QPA.

3. DOXA respectfully submits that the Board’s dismissal is unsupported by a fair reading of both the relevant statutes and their legislative histories as set forth in detail below and requests reconsideration. The relief sought by DOXA is a Board order (a) reversing the August 2, 2006 finding that OPC is not subject to the QPA and (b) setting CAB Case Nos. D-1284 and D-1285 for hearing on the merits.

ARGUMENT

4. In its August 2, 2006 opinion dismissing DOXA’s QPA claims, the Board reasoned as follows. The QPA does not apply to independent agencies that are exempt from the Procurement Practices Act of 1985 (“PPA”). The PSC is exempt from the PPA by virtue of Section 320 of the PPA. OPC, as an agency within the PSC, is also exempt from the PPA. Therefore, OPC is not subject to the QPA.

5. That reasoning and conclusion are inexplicably and wholly inconsistent with the reasoning and conclusion in CAB Case No. D-1116¹ (“Curtis”), where, the Board found that the District of Columbia Housing Authority (“DCHA”), an independent agency with a PPA Section 320 exemption, was subject to the QPA. The Board erred in not applying and following the reasoning and findings in

¹ Curtis Chevrolet CAB No. D-1116 (2001 DCBCA LEXIS 6) January 25, 2001

Curtis to the instant claims. Specifically, as demonstrated below, the Board erred in finding (1) that QPA Section 2-221.02(a)(1) limits application of the QPA, (2) that QPA Section 2-221.02(b)(1A) predicates QPA applicability on PPA applicability, and (3) that PPA Section 320 exempts the PSC from the PPA.

STATUTORY CONTEXT AND CASE LAW

6. The QPA originally excluded independent agencies in its definition of “District agency:”

“‘District agency’ means any office, department, division, board, commission, or other agency of the District government, **other than an independent agency** ... [f]or the purposes of this definition, **the term "independent agency" means any agency of government not subject to the administrative control of the Mayor**“(emphasis added) ²

and in Section 3, which set forth the procedures for calculation and payment of interest penalties:

“each agency of the District of Columbia government (“District”), **under the direct control of the Mayor**, which acquires property or services from a business concern but which does not make payment for each complete delivered item of property or service by the required payment date shall pay an interest penalty” (emphasis added). ³

² DC Law 5-164, District of Columbia Government Quick Payment Act of 1984: Sec. 2(3) "District agency" means any office, department, division, board, commission, or other agency of the District government, other than an independent agency, required by law or by the Mayor or the Council to administer any law or any rule adopted under the authority of a law. For the purposes of this definition, the term "independent agency" means any agency of government not subject to the administrative control of the Mayor and includes, but is not limited to, the Superior Court of the District of Columbia, District of Columbia Court of Appeals, Council of the District of Columbia, Board of Elections and Ethics, Armory Board, Zoning Commission, Convention Center Board of Directors, District of Columbia Board of Education, and Public Service Commission.

³ DC Law 5-164, District of Columbia Government Quick Payment Act of 1984: Sec. 3. (a)(1) In Accordance with rules and regulations issued by the Mayor of the District of Columbia (“Mayor”), each agency of the District of Columbia government (“District”), under the Direct control of the Mayor, which acquires property or services from a business concern but which does not make payment for each complete delivered item of property or service by the required payment date shall pay an interest penalty to the business concern in accordance with this section on the amount of the payment which is due. (2) Each rule or regulation issued pursuant to paragraph (1) shall: (A) Specify that the required payment date shall be: (i) The date on which payment is due under the terms of the contract for the provision of the property or service; or (ii) 30 calendar days, excluding legal holidays, after receipt of a proper invoice for the amount of the payment due, if a specific date on which payment is due is not established by contract; (B)(i) Specify, in the case of any acquisition of meat or of a meat food product, a required payment date which is not later than 7 calendar days, excluding legal holidays, after the date of delivery of the meat or meat food product; and (ii) Specify, in the case of any acquisition of a perishable agricultural commodity, a required payment date which is not later than 10 calendar days, excluding legal holidays, after the date of delivery of the perishable agricultural commodity pursuant to the act; (C) Specify separate required payment dates for contracts under which property or services are provided in a series of partial executions or deliveries, to the extent that the contract provides for separate payment for partial execution or delivery; and (D) Require that, within 15 days after the date on which any invoice is received, District agencies notify the business concern in writing of any defect in the invoice or delivered goods, property or services or impropriety of any kind which

The PPA also originally excluded independent agencies. Section 107(2) of the PPA stated

“[t]his act shall apply to all agencies and employees of the District government **which are subordinate to the Mayor**” (emphasis added).⁴

As with the QPA, the PPA’s definition of “agency” also excluded independent agencies:

“‘Agency’ means any officer, employee, office, department, board, commission, or other entity of the District **other than an independent agency**” (emphasis added).⁵

7. Eleven years later, the Procurement Reform Amendment Act of 1996 (“PRAA”) expanded the PPA’s application and its definition of “agency” to include independent agencies:

“this act shall apply to all departments, agencies, instrumentalities, and employees of the District government, **including** agencies which are subordinate to the Mayor, **independent agencies**, boards, and commissions ” (emphasis added)⁶

would prevent the running of the time period specified in subparagraph (A)(ii) . (b)(1) Interest penalties on amounts due to a business concern under this act shall automatically be paid to the business concern for the period beginning on the day after the required payment date and ending on the date on which payment of the amount due is made, except that no interest penalty shall be paid if payment for the complete delivered item of property or service concerned is made on or before (A) the 3rd day after the required payment date, in the case of meat or a meat food product, described in subsection (a)(2)(B)(i); (B) the 5th day after the required payment date, in the case of an agricultural commodity, described in subsection (a)(2)(B)(ii); or (C) the 15th day after the required payment date in the case of any other item. Interest, computed at a rate of not less than 1%, shall be determined by the Mayor by regulation. (2) Any amount of an interest penalty which remains unpaid at the end of any 30-day period shall be added to the principal amount of the debt and thereafter interest penalties shall accrue on the added amount. (c) This section does not authorize the appropriation of additional funds for the payment of interest penalties required by this section. A District agency shall pay any interest penalty required by this section out of funds made available for the administration or operation of the program for which the penalty was incurred.

⁴ DC Law 6-85, District of Columbia Procurement Practices Act of 1985: Sec. 104 Application of the Act (a) Nothing in this act shall abrogate the authority of a separate branch of government or an independent agency, as defined in the District of Columbia Administrative Act, approved October 21, 1968 (82 Stat. 1204; D.C. Code sec. 1-150J et seq.), to enter into contracts or to issue rules and regulations for the awarding of contracts pursuant to existing law. (b) Any existing provisions of District law regarding the conformity to District procurement law of rules and regulations issued or promulgated by independent agencies shall remain in effect. (c) This act shall apply to all agencies and employees of the District government which are subordinate to the Mayor. (d) This act shall apply to every contract, interagency agreement, or intergovernmental agreement for procurement or disposal of goods and services by covered agencies and employees, except contracts or agreements for the receipt or the making of a grant-in-aid or for federal financial assistance. (e) Any branch or agency of government exempted from the provisions of this act by subsection (a) of this section may formally agree to be bound by any provisions of this act, or by the final rules and procedures adopted pursuant to this act. (f) The Council may enter into contracts to procure supplies and services.

⁵ DC Law 6-85, District of Columbia Procurement Practices Act of 1985: Sec. 107(2): “Agency” means any officer, employee, office, department, board, commission, or other entity of the District other than an independent agency, the Mayor, or the Council, that is required by law, the Mayor, or the Council to implement any law, rule, or regulation that is adopted pursuant to a law.

and

“‘agency’ means any officer, employee, office, department, board, commission, or entity of the District as described in section 104(a).”⁷

The PRAA also explicitly excluded three entities from application of the PPA:

“this act shall apply to all departments, agencies, instrumentalities, and employees of the District government, ..., but excluding the Council of the District of Columbia, District of Columbia courts, and the District of Columbia Financial Responsibility and Management Assistance Authority.”⁸

Subsequently, Advisory Neighborhood Commissions (“ANCs”) were added to the list of entities excluded from the PPA’s application.

8. In addition to excluding the Council, courts, and Financial Responsibility and Management Assistance Authority, the PRAA also added Section 320 to the PPA, consisting of nine “exemptions”:

“[e]xcept as provided in section 320 this act shall apply to ...”⁹

⁶ DC Law 11-259, Procurement Reform Amendment Act of 1996: To ... to establish the office of Contracting and Procurement, to centralize procurement authority for the District government in the Director of the Office of Contracting and procurement ... Sec. 104 (a) Except as provided in section 320, this act shall apply to all departments, agencies, instrumentalities, and employees of the District government, including agencies which are subordinate to the Mayor, independent agencies, boards, and commissions, but excluding the Council of the District of Columbia, District of Columbia courts, and District of Columbia Financial Responsibility and Management Assistance Authority. (b) This act shall apply to any contract for procurement of goods and services, including construction and legal services, but shall not apply to a contract or agreement receiving or making grants-in-aid or for federal financial assistance. (c) The Council of the District of Columbia, the Corporation Counsel, Inspector General, Auditor, and Chief Financial Officer may contract for the services of accountants, lawyers, and other experts when they determine and state in writing that good reason exists why such services should be procured independently of the CPO. During a control year, as defined by section 305(4) of the District of Columbia Financial Responsibility and management Assistance act of 1995, approved April 17, 1995 (109 Stat. 97; D.C. Code 47-393(4)), the Office of the Chief Financial Officer of the District of Columbia shall be exempt from the provisions of this chapter, and shall adopt, within 30 days of passage of the Procurement Reform Amendment Act of 1996, the procurement rules and regulations adopted by the District of Columbia Financial Responsibility and Management Assistance Authority. During years other than control years, the Office of the Chief Financial Officer shall be bound by the provisions contained in this act.

⁷ DC Law 11-259, Procurement Reform Amendment Act of 1996: Sec. 107 (2) “Agency” means any officer, employee, office, department, board, commission, or entity of the District as described in section 104(a).

⁸ DC Law 11-259, Procurement Reform Amendment Act of 1996: Sec. 104 (a). See footnote 6, above.

⁹ DC Law 11-259, Procurement Reform Amendment Act of 1996: Sec. 320 Exemptions. (a) Nothing in this act shall affect the operations, jurisdiction, functions, or authority of the Redevelopment Land Agency relating to real property or interests in real property. (b) Nothing in this act shall affect the operations, jurisdiction, functions, or authority of the Administrator of the Homestead Program Administration under the Homestead Housing Preservation Act of 1986, effective August 9, 1986 (D.C. Law 6-135; D.C. Code 45-2701 *et seq.*), as they relate to the disposal or transfer of real property under that act. (c) Nothing in this act shall affect the authority of the Mayor to sell real property in the District of

Each of the nine exemptions is, not an exclusion from the PPA's application, but rather an exemption with regard to a specific operation, jurisdiction, function or authority of the named agency. In subsequent years, there were added, *inter alia*, further exemptions for the PSC¹⁰ and DCHA¹¹. The PSC's exemption is quite limited in that it is simply an exemption from the PPA's assignment of

Columbia for nonpayment of taxes or assessments of any kind pursuant to section 437 of the District of Columbia Real Property Tax Revision Act of 1974, approved September 3, 1974 (88 Stat. 1059; D.C. Code 47-847). (d) Nothing in this act shall affect the authority of the Mayor and the Council pursuant to the District of Columbia Public Space Rental Act, approved October 17, 1968 (82 Stat. 1156; D.C. Code 7-1001 *et seq.*). (e) Nothing in this act shall affect the authority of the Convention Center Board of Directors pursuant to the Washington Convention Center Management Act of 1979, effective November 3, 1979 (D.C. Code 9-602 *et seq.*). (f) Nothing in this act shall affect the authority of the Sports Commission pursuant to the Omnibus Sports Consolidation Act of 1994, effective August 23, 1994 (D.C. Law 10-152; D.C. Code 2-4001 *et seq.*). (g) Nothing in this act shall affect the authority, jurisdiction, functions, or operations of the District of Columbia Housing Finance Agency. (h) Nothing in this act shall affect the authority of the District of Columbia Retirement Board pursuant to the District of Columbia Retirement Reform Act, effective November 17, 1979 (93 Stat. 866; D.C. Code 1-701 *et seq.*). (i) Nothing in this act shall affect the Metropolitan Police Department's authority to make procurements not in excess of \$500,000 as provided in the District of Columbia Appropriations Act, approved April 26, 1996 (Pub. Law 104-134).

¹⁰ DC Law 12-263, Residential Real property Seller Disclosure, Funeral Services Date Change, and Public Service Commission Independent Procurement Authority Act of 1998: "To ... to allow the Public Service Commission ... to enter into contracts with the government and other public and private entities" Sec. 13. Nongermane amendments ... (b) Sec. 320 of the District of Columbia Procurement Practices Act of 1985, effective May 22, 1984 (D.C. Law 5-84; D.C. Code 2-2805), is amended by adding a new subsection (l) to read as follows: "(1) Nothing in this act shall affect the authority of the District of Columbia Public Service Commission pursuant to section 8 of An Act Making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and fourteen, and for other purposes, approved March 4, 1913 (37 Stat. (38; D.C. Code 43-401 *passim*).)" ... (c) Section 8 of an Act Making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and fourteen, and for other purposes, approved March 4, 1913 (37 Stat. (38; D.C. Code 43-401 *passim*), is amended as follows: ... (2) Paragraph 95 (D.C. Code 43-408) is amended as follows: (A) By designating the existing text as subsection (a); and (B) By adding a new subsection (b) to read as follows: "(b) The Commission is authorized to enter into contracts with the District government, the United States government, and other public and private entities for goods and services, as needed, to achieve its purposes in carrying out its statutory duties."

¹¹ DC Law 13-105, District of Columbia Housing Authority Act of 1999: "To ... authorize the District of Columbia Housing Authority to establish, with certain limitations, an independent personnel system, procurement policies and procedures, and financial systems ... to amend the District of Columbia Procurement Practices Act of 1985 to conform it to this act" Sec. 20. Procurement ... The Procurement Act shall not apply to contracts and contractors of the Authority, except that Title IX of the procurement Act shall apply to contract protests, appeals, and claims arising from procurements of the Housing Authority. Sec. 29. Conforming Amendments to District of Columbia Procurement Practices Act. The District of Columbia Procurement practices Act of 1985, effective February 21, 1986 (D.C. Law 6-85; D.C. Code 1-1181.1 *et seq.*) is amended as follows: ... (b) Section 320 (D.C. Code 1-1183.20) is amended by adding a new subsection (m) to read as follows: "(m) Nothing in this act shall affect the authority of the District of Columbia Housing Authority, except that Title IX shall apply to contract protests, appeals, and claims arising from procurements of the Housing Authority."

procurement authority to the Director of the Office of Contracting and Procurement. The DCHA exemption is much wider, leaving it subject only to Subchapter IX of the PPA.

9. Finally, the PRAA also expanded the application of the QPA to include independent agencies. Section 307 of the PRAA struck from the QPA's definition of "District agency" the phrase "other than an independent agency" and inserted the phrase "including, unless otherwise provided, an independent agency,"¹² producing the following definition:

"District agency" means any office, department, division, board, commission, or other agency of the District government, including, unless otherwise provided, an independent agency, required by law or by the Mayor or the Council to administer any law or any rule adopted under the authority of a law. For the purposes of this definition, the term "independent agency" means any agency of government not subject to the administrative control of the Mayor and includes, but is not limited to, the Superior Court of the District of Columbia, District of Columbia Court of Appeals, Council of the District of Columbia, Board of Elections and Ethics, Armory Board, Zoning Commission, Convention Center Board of Directors, District of Columbia Board of Education, and Public Service Commission. (emphasis added)¹³

This expansion of the definition was clearly intended to broaden the QPA's applicability to include independent agencies and the Board so held in Curtis, holding that the QPA's application had thereby become even broader than that of the PPA.

By virtue of the Procurement Reform Amendment Act of 1996, D.C. Law 11-259, 44 D.C. Reg. 1423 (Mar. 14, 1997), the Quick Payment Act's definition of "District agency" was expanded to include independent agencies and any agency of government not subject to the administrative control of the Mayor. D.C. Law 11-259, § 307(a), codified at D.C. Code § 1-1171(3) (1999). Hood's Int'l Foods, Inc., CAB No. D-996, Feb. 20, 1998, 45 D.C. Reg. 8742, 8743 & n.2. As section 1-1171(3) demonstrates, the Council intended that the Quick Payment Act have broader application than even the Procurement Practices Act. The Procurement Reform Amendment Act made DCHA subject to both the Quick Payment Act and the Procurement Practices Act.¹⁴

¹² DC Law 11-259, Procurement Reform Amendment Act of 1996: Sec. 307 The District of Columbia Government Quick Payment Act of 1984, effective March 15, 1985 (D.C. Law 5-164; D.C. Code 1-1171 *et seq.*) is amended as follows: (a) Section 2 (D.C. Code 1-1171) is amended as follows: (1) Paragraph (3) is amended by striking in the first sentence the phrase "other than an independent agency" and inserting the phrase "including, unless otherwise provided, an independent agency" in its place.

¹³ DC Code 2-221.01 (3)

¹⁴ Curtis Chevrolet CAB No. D-1116 (2001 DCBCA LEXIS 6) January 25, 2001, at 2.

ERRORS OF LAW

1. The Board Erred As A Matter of Law In Finding That QPA Section 2-221.02(a)(1) Limits Application of the QPA.

10. In its August 2 opinion, the Board correctly notes that QPA Section 2-221.04(a) references “claims for interest penalties which a District agency has failed to pay” and that QPA Section 2-221.01 defines “District agency” as “any office, department, division, board, commission, or other agency of the District government, including, unless otherwise provided, an independent agency.”¹⁵ The Board then notes that QPA Section 2-221.02(a)(1) states that “each agency of the District of Columbia government (“District”), **under the direct control of the Mayor**, which ... does not make payment ... by the required payment date shall pay an interest penalty.”¹⁶ From the phrase “under the direct control of the Mayor,” the Board erroneously concludes that only some independent agencies are subject to QPA interest penalties, observing that “there is no clear manifestation here that the Council intended to make all independent agencies subject to the QPA interest penalties.”¹⁷

11. In the first instance, because an independent agency is by definition an agency that is not under the direct supervision of the Mayor, this reading would exclude, not **some**, but **all** independent agencies from the QPA. It was, however, the unambiguous intent of the PRAA to bring **all independent agencies** under the purview of both the QPA and the PPA. The section-by-section

¹⁵ August 2, 2006 Opinion in CAB Nos. D-1284 and D-1285 at 2.

¹⁶ August 2, 2006 Opinion in CAB Nos. D-1284 and D-1285 at 3. In the same place the Board cites to DCMR 1700.2, “Pursuant to section 3 of the [QPA], these rules shall apply to any office, department, division, board, commission or other agency of the District other than an independent agency required either by law, the Mayor or the Council of the District of Columbia (Council), to administer any law or any rule adopted under the authority of a law.” A rule promulgated pursuant to a statute can not, however, stand as evidence supporting an interpretation of the statute. As explained below, this rule simply reflects an anachronism in the statute.

¹⁷ August 2, 2006 Opinion in CAB Nos. D-1284 and D-1285 at 3.

analysis of the Council Report on the PRAA states that the purpose of the amendment to PPA Section 104 is “to expand the applicability of the PPA to **independent agencies**, boards and commissions, and the Council” (emphasis added).¹⁸ Similarly, the Council Report states of the PRAA’s amendments to the QPA that the purpose is “to make the quick payment provisions applicable to **all** District agencies” (emphasis added).¹⁹ Contrary to the Boards assertion, there is in fact a clear and unambiguous manifestation that the Council intended precisely “to make **all** independent agencies subject to the QPA interest penalties” (emphasis added). It would be strange indeed for the Council to include specifically and explicitly all independent agencies in the QPA, only then to turn around and exclude all independent agencies from application via retention of a qualifying phrase in the introductory subsection to QPA Section 2-221.02, the manifest purpose of which is, not to define applicability, but to set forth the procedures for calculation and payment of interest penalties.²⁰ To interpret the phrase “under the direct control of the Mayor” here as limiting application of the QPA would be contrary to clear legislative intent, common sense, and logic.

12. When viewed within the full legislative history, it is clear that the phrase, “under the direct control of the Mayor,” remains in the statute due to an oversight in the task of conforming the QPA as amended by the PRAA. Originally both the QPA and the PPA construed applicability along the line of subordination to and control by the Mayor and the acts’ definitions of “agency” mirrored this. That is, the acts applied to agencies subordinate to the Mayor and did not apply to agencies not subordinate to the Mayor and “agency” was defined accordingly, i.e., independent agencies were not agencies for the purposes of the acts and the acts did not apply to independent agencies. The PRAA

¹⁸ Report on Bill 11-705, The Procurement Reform Amendment Act of 1996, Section-by-Section Analysis, I.2.

¹⁹ Report on Bill 11-705, The Procurement Reform Amendment Act of 1996, Section-by-Section Analysis, Title III (j).

²⁰ DC Law 5-164, District of Columbia Government Quick Payment Act of 1984: Sec. 3. See footnote 3, above.

amended both the applicability provision and the definition of “agency” in the PPA to include independent agencies. It also amended the QPA definition of “agency” to include independent agencies. That the PRAA did not amend Section 2-221.02(a)1 to remove the phrase “under the direct control of the Mayor” can only be construed as an oversight in the process of conformance.²¹

13. Finally, while the Board does not reference it, QPA Section 2-221.01(3) does contain a limiting qualification regarding the definition of “agency:”

““District agency” means any office, department, division, board, commission, or other agency of the District government, including, **unless otherwise provided**, an independent agency ...”²² (emphasis added)

There is, however, no provision in the QPA that exempts any agency from the definition of “District agency” in QPA Section 2-221.01(3).

14. A plain and fair reading of the statute and its legislative history clearly shows that the QPA was expanded by the PRAA to include all independent agencies and exempts no independent agencies from its application. This reading is wholly consistent with the Board’s finding in Curtis that “[b]y virtue of the [PRAA], the [QPA’s] definition of “District agency” was expanded to include independent agencies”²³ and the Board erred in not so finding in the instant cases.

²¹ The QPA’s legislative file indicates that this was in fact the second time the phrase had wrongly survived conformance. During the legislative session on the original QPA, Councilwoman Winter introduced Amendment No. 7 to strike the phrase “under the direct control of the Mayor,” stating as the rationale that the amendment would “help[] make clear the intent of the Council that this act apply to **all** agencies, boards, etc., of the District government” (emphasis added). The Chair ruled this to be a conforming amendment. In spite of the amendment and the Chair’s ruling, the phrase remained in the enrolled act – presumably an oversight – and was duly carried over into the codified statute.

²² DC Code 2-221.01 (3)

²³ Curtis Chevrolet CAB No. D-1116 (2001 DCBCA LEXIS 6) January 25, 2001, at 2.

2. The Board Erred As A Matter of Law In Finding That QPA Section 2-221.02(b)(1A) Predicates QPA Applicability on PPA Applicability.

15. After erroneously concluding that that the QPA does not apply to all independent agencies, the Board predicates QPA applicability on PPA applicability, on the theory that the independent agencies to which the Board erroneously concluded the QPA does not apply are the independent agencies that are exempt from the PPA.²⁴ In support of this theory the Board references QPA Section 2-221.02(b)(1A) which states:

Each contract executed pursuant to Chapter 3 of Title 2 shall include in the solicitation a description of the contractor's rights and responsibilities under the chapter.²⁵

The Board correctly notes that the reference to Chapter 3 of Title 2 must be a reference to the PPA. It is certainly true that this provision's occurring in the QPA is strong evidence that it was the Council's intent that the QPA should apply to all contracts pursuant to the PPA. The Board, however, commits the common elementary logical error of denying the antecedent when it concludes therefrom that the QPA applies only to contracts pursuant to the PPA. The inference from "If A, then B" to "If not-A, then not-B" (from "if a contract is pursuant to the PPA, then the QPA applies" to "if a contract is not pursuant to the PPA, then the QPA does not apply") is a form of inference that has been recognized to be invalid since the time of Aristotle.

16. A plain and fair reading of the statute clearly shows that the QPA contains no provisions predicating QPA applicability upon PPA applicability. This reading is wholly consistent with the Board's finding in Curtis that "the Council intended that the [QPA] have broader application than even the [PPA]."²⁶ The Board erred in not so finding in the instant cases.

²⁴ August 2, 2006 Opinion in CAB Nos. D-1284 and D-1285 at 3.

²⁵ DC Code 2-221.02(b)(1A)

²⁶ Curtis Chevrolet CAB No. D-1116 (2001 DCBCA LEXIS 6) January 25, 2001, at 2.

3. The Board Erred As Matter of Law In Finding That PPA Section 320 Excludes The PSC From Application of The PPA.

17. In its August 2 opinion, the Board correctly notes that PPA Section 2-301.04(a) qualifies applicability by reference to PPA Section 2-303.20: “[e]xcept as provided in 2-303.20, this chapter shall apply to all departments, agencies, instrumentalities, and employees of the District government” and that PPA Section 2-303.20(l) provides that “[n]othing in this chapter shall affect the authority of the [PSC] pursuant to Chapter 8 of Title 34.”²⁷ From this, the Board erroneously concludes that the PSC is not subject to the PPA.

18. As an initial matter, it is a clear misreading of the PPA to conclude that the exemption granted the PSC in PPA Section 2-303.20(l) is a blanket exclusion. In addition to referencing PPA Section 2-303.20, PPA Section 2-301.04(a) also states that

“this Chapter shall apply to all departments ..., but excluding the Council of the District of Columbia, District of Columbia courts, the District of Columbia Financial Responsibility and Management Assistance Authority, and [ANCs].”

The Council knew how to grant in plain language a blanket exclusion from the PPA. It was the PRAA that first introduced this language to the statute and it did so only with regard to the Council, the courts and the Financial Responsibility Authority. The ANCs were added to the list of excluded agencies four years later by the Advisory Neighborhood Commission Procurement Exclusion Amendment Act of 2000. Clearly, the Council knows how to grant a blanket exclusion from the PPA and it does not use PPA Section 2-303.20 to do so.

19. The exemptions granted in Section 2-303.20 are limited. The original nine exemptions are, as the Council Report states,

“**exemptions** from the act **for real property disposition** by the Redevelopment Land Agency, the Administrator of the Homestead Program Administration, the Mayor for nonpayment of taxes or assessments, the Council and the Mayor under the Public

²⁷ August 2, 2006 Opinion in CAB Nos. D-1284 and D-1285 at 3.

Space Rental Act, the Washington Convention Center, and the Sports Commission” (emphasis added)²⁸

Similarly, the PPA Section 2-303.20(1) exemption granted the PSC is not an exclusion from application of the Act, but rather a limited exemption with regard to Chapter 8 of Title 34:

(1) Nothing in this chapter shall affect the authority of the District of Columbia Public Service Commission pursuant to Chapter 8 of Title 34.

While Chapter 8 of Title 34 grants a number of authorities to the PSC, Section 13 of the Residential Real Property Seller Disclosure, Funeral Services Date Change, and Public Service Commission Independent Procurement Authority Act of 1998 (“PSCIPAA”),²⁹ which created this exemption, indicates that the authority in question is that of procurement.

20. The purpose of the PPA was to “provide for a uniform system of procurement management for the District of Columbia government.”³⁰ The PPA established uniform procurement procedures to be used by the agencies covered by the act and delegated authority to procure under those procedures to the covered agencies.³¹ The primary purpose of the PRAA was to “centralize procurement authority for the District of Columbia government in the Director of the Office of Contracting and Procurement.” To that end, the PRAA Sec. 101³² established the Office of

²⁸ Report on Bill 11-705, The Procurement Reform Amendment Act of 1996, Section-by-Section Analysis, I.18.(e).

²⁹ DC Law 12-263, Residential Real Property Seller Disclosure, Funeral Services Date Change, and Public Service Commission Independent Procurement Authority Act of 1998. Sec. 13. Nongermane amendments. See footnote 10, above.

³⁰ DC Law 6-85, District of Columbia Procurement Practices Act of 1985.

³¹ While the PPA originally excluded independent agencies from its purview, it was not the intent of the Council that the PPA’s provisions be precluded from application to independent agencies. The October 10, 1985 report of the Committee on Government Operations on Bill 6-191 states on page 1 that “[t]he purpose of Bill 6-191 is to establish statutory provisions of a uniform system of procurement, applicable to agencies subordinate to the Mayor ... **[i]ndependent agencies ... can be covered by some or all of the act’s provisions by adopting rules and regulations that conform to regulations promulgated by the Mayor**” (emphasis added). On page 6 the report states of Sec. 104 (“Application of the act.”) that it “[p]rovides that the bill will apply to those agencies subordinate to the Mayor ... **[a]ny agency exempted, can be bound by rule to the bill’s provisions**” (emphasis added).

³² DC Law 11-259, Procurement Reform Amendment Act of 1996: Sec. 101 ... (c) Section 105 (D.C. Code 1-1181.5) is amended to read as follows: “Sec. 105. (a) There is established an independent service agency to be called the Office of

Contracting and Procurement and delegated procurement authority for all agencies covered by the PPA to the Director OCP:

There is established an independent service agency to be called the Office of Contracting and Procurement (“OCP”), which shall be administered by a Director. By delegation from the Mayor, the Director of the OCP (“Director”) shall be the exclusive contracting authority for all procurements covered by this act.

In other words, the PRAA retrieved the delegated procurement authority from covered agencies and conferred it upon the Director of OCP. The PSCIPAA Section 13(b) exemption for the PSC simply transferred procurement authority back to the PSC, as is made clear by both the name of the act and the PSCIPAA Sec. 13(c)(2) conforming amendment to Chapter 8 of Title 34, viz.,

“[t]he Commission is authorized to enter into contracts with the District government, the United States government, and other public and private entities for goods and services ...”

Thus, the PPA Section 320 exemption does not exclude the PSC from application of the PPA. It merely grants to the PSC procurement authority.

21. Finally, the case of DCHA demonstrates clearly that the Council knows how to exempt an independent agency from application of the contract provisions of the PPA. Section 20 of the District of Columbia Housing Authority Act of 1999 (“DCHAA”), which created DCHA’s PPA Section 320 exemption, states that “[t]he Procurement Act shall not apply to contracts and contractors of the Authority.”³³ The PSCIPAA grants to the PSC no such exemption from the contract provisions of the PPA.

Contracting and Procurement (“OCP”), which shall be administered by a Director. By delegation from the Mayor, the Director of the OCP (“Director”) shall be the exclusive contracting authority for all procurements covered by this act. Except as otherwise provided in this act, no other department, agency, instrumentality, or employee subject to the provisions of this act shall exercise procurement or contracting authority, except authority otherwise provided for receiving and making grants-in-aid or for federal financial assistance. Departments, agencies, and entities subject to this act shall be responsible for determining their requirements for goods and services and for technical direction of awarded contracts. The Director may, by regulation, delegate contracting authority to employees of a department, agency, or other entity commensurate with the Director’s judgment of each employee’s ability to meet the objective of this act.”

³³ DC Law 13-105, District of Columbia Housing Authority Act of 1999: Sec. 20. Procurement. See footnote 11, above.

22. A plain and fair reading of the statute and its legislative history clearly shows that the PSC's PPA Section 320 exemption is neither a blanket exclusion from application of the PPA nor an exemption from the contract provisions of the PPA. The Board erred in not so finding in the instant cases.

CONCLUSION

23. As demonstrated above, a plain and fair reading of the QPA and the PPA and their legislative histories shows that the PSC is subject to both statutes and OPC as an agency within the PSC is, therefore, subject to those statutes as well. This reading of the statutes is wholly consistent with the Board's findings in Curtis, where the Board found that DCHA, an independent agency with a PPA Section 320 exemption, is subject to the QPA. For the reasons set forth above and consistent with its finding in Curtis, the Board should reverse its August 2, 2006 finding that OPC is not subject to the QPA and the PPA and set the instant cases for hearing on their merits.

Respectfully submitted,

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August 21, 2006

CERTIFICATE OF SERVICE

**CAB Nos. 1284/1285, DOXA, Inc. Under Office of the People's Counsel Contracts
for DC PSC Formal Cases Nos. 945 et al**

I hereby certify that on this 21st day of August, 2006, a copy of the "Motion for Reconsideration of Opinion Dismissing Appeals of DOXA, Inc." was served on the following parties of record by hand delivery or first class mail, postage prepaid:

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