GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

RDP DEVELOPMENT CORPORATION	)	
	)	CAB No. D-928
Under [No Contract]	)	

For the Appellant: Richard B. Nettler, Esquire. For the Government: Howard S. Schwartz and Edward J. Rich, Assistants Corporation Counsel.

Opinion by Administrative Judge Zoe Bush, with Administrative Judges Terry Hart Lee and Benjamin B. Terner, concurring.

OPINION AND ORDER ON MOTION TO DISMISS

The Board has pending before it the motion of the District of Columbia to dismiss the above-captioned appeal on the ground that RDP Development Corporation (RDP, Appellant) has failed to exhaust its administrative remedies pursuant to the District of Columbia Procurement Practices Act of 1985 (PPA) D.C. Code § 1-1188.5, and that accordingly the Board does not have jurisdiction to decide this matter. For the reasons set forth below, the District's motion is **GRANTED**, and this case is **DISMISSED**, without prejudice.

RDP filed a complaint with the Board on October 21, 1992, "in lieu of a notice of appeal or protest." See Board Rule 201.2, 36 DCR 2701. In its complaint RDP asserts, inter alia, that:

> 1. For several years prior to July, 1990, the District of Columbia conducted negotiations with RDP with the intent of leasing the property at 642 H Street, N.E. On July 19, 1990, RDP submitted a formal lease proposal to the District of Columbia. That proposal was revised on August 21, 1990, by RDP to transform the proposal from a lease into a lease/purchase contract (Lease).
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> 2. While the lease/purchase contract was being refined in minor respects, on October 9, 1990, D.C. Act 8-264 was introduced into the Council of the District of Columbia (Council). That Act required, in section 2(c), affirmative approval of the Council prior to the appropriation, obligation or expending of any funds to construct, alter, purchase or acquire any building or interest in any building that involves a total expenditure in excess of

$1,000,000.00 or lease of any space at an annual gross rental in excess of $1,000,000.00. Furthermore, under section 2(h) the Mayor was precluded from awarding a contract that provides for the acquisition of a leasehold interest unless done pursuant to the competitive bidding requirements of the PPA. D.C. Act 8-264 was passed by the Council but on October 25, 1990, vetoed by former Mayor Marion F. Barry.

3. On November 13, 1990, the Council overrode the Mayor's veto of D.C. Act 8-264, which then went into effect for 90 days and, by its terms, applied to all "proposed contract or other agreement for real property, goods, or services for use by the District of Columbia that has not been completed prior to October 1, 1990."

4. On November 29, 1990, in accordance with D.C. Act 8-264 and prior to executing the Lease on behalf of the District, former Mayor Barry transmitted to the Council a resolution for approval of the Lease pursuant to the Acquisition of Space needs for District Government Officers and Employees Act of 1990, D.C. Code § 1336 (1991 Supp.) (the Acquisition of Space needs Act or the Permanent Act), which is retroactive to October 1, 1990, and its emergency counterpart, D.C. Law 8-264, which is also retroactive to October 1, 1990 (the Emergency Act).

5. On or about November 30, 1990, pursuant to former Mayor Barry's request, the proposed resolution was introduced in the Council as PR 8-545 by former Council Chairman Clark, and was referred to the Committee on Government Operations.

6. The Lease was signed by former Mayor Marion Barry on December 31, 1991.

7. On May 23, 1991, RDP sent a letter to the District enclosing an estoppel certificate and requesting that the District execute the estoppel certificate as required by Paragraph 25(b) of the Lease.

8. On or about September 18, 1991, the District sent a letter to RDP stating that the District considers the Lease to be invalid and unenforceable.

9. On September 27, 1991, RDP filed its Amended Complaint in the Superior Court for the District of Columbia seeking to enforce the Lease and seeking other equitable relief against the District and Mayor Sharon Pratt Kelly. RDP Development Corp. v. the District of Columbia, et al. (Civil Action No. 91-CA11402).

10. Upon the District's motion, the Superior Court in the above-referenced action dismissed, without prejudice, RDP's Complaint, finding that the court lacked jurisdiction to make a final determination as to the validity of the Lease. In support of its decision, the court stated that RDP was obligated to exhaust its administrative remedies before seeking judicial review of the Lease's validity.

11. It would be futile for RDP to appeal the District's decision to the Director of the Department of Administrative Services (DAS). During the pendency of the Civil Action No. 91-CA11402 before the Superior Court, the Director unequivocally took the position that the Lease was invalid and unenforceable. It is unreasonable to expect the Director to reverse his position with respect to the validity and enforceability of the Lease during any administrative proceeding.

Therefore, RDP requests that the Board hear its appeal de novo, pursuant to D.C. Code §1-1189.3.[1/]

The District has moved to dismiss this matter because RDP has failed to submit its claim against the District to the Director of DAS, prior to filing an appeal with this Board, D.C. Code § 1-1188.5. In the alternative, the District moves for summary judgment on the ground that RDP is estopped from receiving a de novo hearing before the Board because of the Superior Court's decision in CA11402, supra. The District cites as support Affiliated Textiles, Inc., B-242970.2, August 5, 1991, 91-2 CPD ¶ 127. Finally, the District argues that the only issue that should be before the Board is the issue of whether this purported lease agreement, which was judicially determined to have been entered into in violation of the Acquisition of Space Needs For District Government Officers and Employees Emergency Act, D.C. Act 8-264, 37 DCR 7336 (1990) (Emergency Act), and the District of Columbia Procurement Practices Act, D.C. Code §§ 1-1183.3 and 1-1183.4 (1985) (PPA) can be validated by a showing of good faith by all parties and substantial compliance with the relevant provisions of the PPA and its implementing regulations, as provided for in D.C. Code § 1-1182.5(d)(2). The District notes that the specific issue of good faith and substantial compliance pursuant to D.C. Code § 1-1182.5(d)(2) was not raised in the claim filed by RDP.

RDP has opposed the District's motion to dismiss and in the alternative motion for summary judgment. RDP argues that because the Director of DAS has already decided the lease is invalid, further pursuit of administrative remedies with DAS would be futile and therefore are not required. As support RDP cites Cafferello v. United States Civil Service

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[1/]In its prayer for relief RDP states that it has filed an appeal and protest. However, in that no solicitation is referenced or involved here, the Board cannot see how D.C. Code § 1-1189(1) applies to the matters before it.

Commission, 625 F.2d 285 (9th Cir. 1980); Porter County Chapter of the Izaak Walton League v. Costle, 571 F.2d 359, 634 (7th Cir.) cert. denied, 439 U.S. 834 (1970). RDP also argues that the District's motion for summary judgment must be denied because there exist genuine issues of material fact which are before the Board. According to RDP, it has not asked the Board to re-examine whether the Emergency and Permanent Acts are valid. Instead RDP says that the issue before the Board is whether the Lease is valid and whether the District, by virtue of its conduct and representations, is estopped from denying the validity of the Lease - issues not addressed by the Superior Court. Further, RDP argues that whether or not it has acted in good faith and whether or not there has been substantial compliance with the relevant acts are questions which inherently give rise to fundamental issues of fact which are genuinely disputed by the parties; and therefore summary judgment is inappropriate here.

The District has replied in opposition to RDP's response in opposition to the District's motion to dismiss. The District argues that while Appellant is correct that courts have on occasion held that they have discretion as to whether to require strict adherence to exhaustion of administrative remedies, it is important to note that the courts have, in the very case cited by Appellant, distinguished between administratively imposed processes and statutorily created claims processes, such as that created by the PPA. Cafferello v. United States Civil Service Commission, 625 F.2d 285 (9th Cir. 1980). According to the District, the courts have clearly stated that failure to adhere to exhaustion requirements that are statutorily specified jurisdictional prerequisites defeats that court's jurisdiction. Montgomery v. Rumsfeld, 572 F.2d 250, 253 (9th Cir. 1976). Further, the United States Supreme Court has very clearly stated that statutorily required exhaustion requirements have a "non-waivable jurisdictional element" which must be respected. Mathews v. Eldridges, 424 U.S. 319 (1976). See also, Weinberger v. Salfi, 424 U.S. 749, 766 (1975).

Finally, the Board has before it RDP's supplemental memorandum in opposition to the District's motion for summary judgment. In its supplemental memorandum, RDP argues that the Board may exercise discretion in deciding whether it will require RDP to exhaust futile administrative remedies imposed by the PPA. RDP cites as support Barnett v. District of Columbia Department of Employment Services, 491 A.2d 1156 (D.C. App. 1985)

The statutory requirements for appeal to this Board are set forth in the PPA and do indeed indicate that a contractor's right of appeal is predicated upon a "decision" on the contractor's claim by the Director of DAS. In this regard the PPA provides at D.C. Code § 1-1188.3(a):

> All claims by a contractor against the District government arising under or relating to a contract shall be in writing and shall be submitted to the director for an informal hearing and decision.

The PPA further provides at § 1-189.3(b):

> The Board shall be the exclusive hearing tribunal for, and shall have jurisdiction to review and determine de novo: (2) Any appeal by an aggrieved party from a final decision by the Director which is authorized by this chapter.

Appellant here concedes that it has not submitted a written claim to the Director pursuant to D.C. Code § 1-188.3(a) and is not appealing a final decision of the Director pursuant to D.C. Code § 1-1189.3(b).

This Board has consistently held, as it must, that in order to invoke the jurisdiction of the Board, a contractor must first exhaust its administrative remedies with the Director of the Department of Administrative Services pursuant to D.C. Code § 1-1187.3(a). Mid-Atlantic Service industries, Inc., CAB No. D-826, 39 DCR 4418 (1992); Tensas Enterprises, CAB No. D-868, 39 DCR 4362 (1991); Edwin O. Abia-Okon, M.D., CAB No. D-856, 39 DCR 4360 (1991); Roubin & Janeiro of Washington, DC, Inc., CAB No. D-818, 39 DCR 4228 (1991); Impex International Industries, Inc., CAB Nos. D-855, D-858 (Consolidated), 39 DCR 4224 (1991).

Appellant asks that the Board exercise its "discretion" and find that exhaustion of administrative remedies not be required here because it would be futile. However, we find that the Board has no such "discretion." This Board is a creature of statute and must operate within the statutory confines of the PPA. In contrast, the cases cited by Appellant (and the District) address the equitable jurisdiction of courts to waive the requirements of exhaustion of administrative remedies at the level of judicial review of administrative decisions. Those cases are clearly not applicable to this Board. With regard to government contracts, the federal boards of contract appeals as well as the United States Court of Federal Claims have held that exhaustion of administrative remedies is a condition precedent to filing an appeal over which jurisdiction will be exercised. Paragon Energy, 645 F.2d 966 (Ct.Cl. 1981); Lucille Holden, AGBCA No. 81-208-1, A, B, January 11, 1984, 84-1 BCA ¶ 17,066; A.B. Tech Constructors, Inc., VACAB No. 1531, June 30, 1982, 82-2 BCA ¶ 15,897. Where administrative remedies have not been exhausted, jurisdiction will not be exercised notwithstanding the representations of counsel during hearings that the claim will be denied by the contracting officer and so need not be presented to the contracting officer. A.C. Tech Construction, Inc., 82-2 BCA at 78,823-7. Clearly, Appellant's claim is not properly before the Board.

Having determined that we have no jurisdiction over Appellant's claim because it has failed to comply with the provisions of the PPA concerning the filing of claims with the Director of DAS, D.C. Code § 1-1188.3(a), we do not need to address the District's motion for summary judgment. But the District has presented a novel argument to the Board in its motion for summary judgment in that it "takes issue with a number of the facts stated by Appellant to the Board" (District's Reply at page 2, footnote 1). We refer the District to

Rule 56 of Federal Rules of Civil Procedure and the Board's decisions in W.M. Schlosser Company, Inc., CAB No. 894, 5 P.D. 5117 (1993); W.M. Schlosser Company, Inc., CAB Nos, D-823 and D-824, 5 P.D. 3061 (1992), for the requirements for a motion for summary judgment.

WHEREFORE, based on the foregoing, the District's motion to dismiss is **GRANTED**. Appellant is directed to file a claim with the Director of DAS pursuant to D.C. Code § 1-1188.3(a) if Appellant wishes to further pursue an appeal with the Board. This appeal is therefore **DISMISSED**, without prejudice. Board Rule 121.4, 36 DCR 2698.

So **ORDERED.**

DATE: May 13, 1993

ZOE BUSH
Chief Administrative Judge

CONCUR

TERRY HART LEE
Administrative Judge

BENJAMIN B. TERNER
Administrative Judge