**GOVERNMENT OF DISTRICT OF COLUMBIA**
**CONTRACT APPEALS BOARD**
**717 14th Street, N.W., Suite 430**
**Washington, D.C. 20005**

(202) 727-6597

DATE: February 13, 1998

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SUBJECT: CAB Nos. D-1017 & D-1025, Appeal of Adrian L. Merton, Inc.

Attached is a copy of the Board's opinion and order in the above-referenced matter.

Mia J. House
MIA J. HOUSE
Clerical Assistant

Attachment

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEALS OF:

| | | |
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| ADRIAN L. MERTON, INC. | ) | |
| | ) | CAB Nos. D-1017, D-1025 |
| | ) | |
| Under Contract No. 9112-62-A1-90, *et al.* | ) | |

For the Appellant: Judah Lifschitz, Esq., Randal W. Wax, Esq., Shapiro, Lifschitz & Schram, P.C. For the District of Columbia Government: Nancy S. Schultz, Esq., Assistant Corporation Counsel. For the District of Columbia Housing Authority: Ralph C. Conte, Esq., Assistant General Counsel.

Opinion by Administrative Judge Jonathan D. Zischkau, with Chief Administrative Judge Lorilyn E. Simkins and Administrative Judge Phyllis W. Jackson, concurring.

## OPINION AND ORDER

Pending before the Board are several motions: (1) a motion of Appellee the District of Columbia Housing Authority ("DCHA") to dismiss CAB No. D-1017 because Appellant Adrian L. Merton, Inc., failed to exhaust administrative remedies, or, alternatively, to dismiss DCHA as a party; (2) a motion of Appellee the District of Columbia ("District") to dismiss CAB No. D-1017 raising the same failure to exhaust remedies defense and a laches defense; (3) a consent motion of Merton to consolidate CAB Nos. D-1017 and D-1025; and (4) a motion by Merton to seal the record. For the reasons discussed below, the motions to dismiss are denied, the motion to consolidate is granted, and the motion to seal the record is denied.

The appeals involve contract claims by Merton relating to contracts with the District's former Department of Public and Assisted Housing ("DPAH"). DPAH was abolished by the District of Columbia Housing Authority Act of 1994. The same legislation created DCHA and transferred all DPAH functions, powers, assets, and personnel to DCHA.

### Appellees' Motions to Dismiss and Appellant's Motion to Consolidate

DCHA argues that the appeal as to DCHA must be dismissed because the Board lacks jurisdiction over DCHA pursuant to: (1) a provision in the Housing Authority Act, D.C. Code § 5-129(b), which expressly exempted DCHA from the Procurement Practices Act;[1] (2) Merton

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[1] In *First Impression Constr. Co.*, CAB No. P-513, Dec. 30, 1997, 9 P.D. 7448, we held that pursuant to the Procurement Reform Amendment Act of 1996, D.C. Law 11-259, the Board properly exercises jurisdiction over protests of DCHA procurements.

failed to exhaust its administrative remedies prior to filing an appeal with the Board; and (3) the District, not DCHA, is the real party in interest, as a result of the May 18, 1995 consent order in *Pearson, et al. v. Kelly, et al.*, CA-14030-92, which placed DCHA in receivership. In its own motion to dismiss, the District adopts DCHA's failure to exhaust argument and additionally argues that Merton's claims are barred by laches. In a separate submission, the District opposes DCHA's motion to dismiss on the basis of D.C. Code § 5-129(b) and the *Pearson* consent order. The District contends that DCHA, not the District, is liable for contract claims relating to DPAH contracts.

Merton responds that it has not been paid over $100,000 (CAB No. D-1017) for work it performed under various contracts (construction contracts and "emergency work orders") and that DCHA and the District government are essentially trying to "pass the buck" to each other as far as claim liability is concerned. Merton states that it has exhausted any prior administrative remedies, a futile act since each appellee declares that it is not responsible for claims arising from DPAH contracts, and has properly appealed to the Board from denials of claims or deemed denials. As for the District's laches argument, Merton argues that it diligently pursued its claims and points to a chronology identifying numerous actions by Merton to obtain payment from DCHA officials.

The relevant facts of record are as follows. Merton's claims relate to work performed for the District under various construction contracts and emergency work orders authorized by contracting officials at DPAH, on behalf of the District government, and invoiced during the period of approximately March 1992 through August 1994. Merton and DCHA representatives appear to have met frequently between the period September 1996 through December 1996. (Complaint ¶ 6, Ex. C). Merton states that at one meeting in early December 1996, a DCHA representative requested that Merton submit a claim to DCHA's contracting officer. Merton submitted claim letters, dated December 16, 1996, to DCHA's contracting officer. (*E.g.*, Appeal File Supplement, at 1528-1534). DCHA's contracting officer denied Merton's claim by letter dated May 8, 1997. (*Id.*, at 1536). In denying Merton's claim, DCHA stated that the claims arise from actions prior to the establishment of the receiver (May 18, 1995), that the claims therefore were the responsibility of the District government, and that Merton should file its claims with the Director of the Department of Administrative Services ("DAS"). The contracting officer stated that her decision was a "final decision of the Contracting Officer made in accordance with the Disputes Clause as outlined in the standard Contract Provisions for the use with the District of Columbia Government." (*Id.*). On June 5, 1997, Merton appealed DCHA's decision to us. The appeal was docketed as CAB No. D-1017. On July 7, 1997, Merton filed a consolidated claim with the DAS Director. (*Id.*, at 1539). On October 6, 1997, Merton appealed to us from the DAS Director's deemed denial of Merton's July 7, 1997 claim. That appeal was docketed as CAB No. D-1025.

No party contests our consolidating Merton's protective appeal under D-1025 (appeal from the DAS Director deemed denial) with Merton's original appeal under D-1017 (appeal from DCHA's denial). Both appeals relate to the same items of work and invoices. For the reasons

discussed below, we believe that Merton's appeal from DCHA's final decision validly placed the dispute before us, notwithstanding Merton's subsequent claim submitted to the DAS Director and its appeal from a deemed denial. In any event, we consolidate the two appeals.

We have previously held that both DCHA and the District government are properly named as appellees in contract appeals relating to DPAH contract claims. *Padula Construction Co.*, CAB No. D-997, Sept. 17, 1996, 44 D.C. Reg. 6497, 6501-02. We concluded in *Padula* that the Housing Authority Act effected a comprehensive transfer of powers, functions, assets, and personnel from DPAH to DCHA, including the transfer of "[a]ll of the functions related to the powers, duties, operations, and administration" of DPAH. D.C. Code §§ 5-123(b)-(c), 5-128 (Supp. 1997). This transfer means, in particular, that DCHA assumed contracting authority and administration over existing DPAH contracts. We find this interpretation to be the only rational construction of the statute. And DCHA, in practice, has assumed those functions. The present record, and the record in other Board appeals, makes clear that DCHA continued to administer (including the making contract payments) and exercise contract authority over open DPAH contracts after DPAH was abolished and replaced by DCHA and the receiver. This record in this case shows that DCHA has also reviewed and considered contract claims related to DPAH contracts. With regard to such DPAH contracts, DCHA apparently has drawn the line only with respect to the disbursement of DCHA funds for contract claims arising from events during DPAH's existence and prior to the establishment of the current receivership.[2]

The *Pearson* consent order transferred the functions and powers of DPAH and its successor, DCHA, to the receiver. Therefore, the receiver assumed the statutory contract functions and powers of DCHA. We see nothing in the *Pearson* consent order suggesting that the parties to the consent order intended to negate the statutory contract functions and powers, including the contracting authority over, and administration of, DPAH contracts existing at the time the receivership was established.

DCHA's duty to defend contract claims such as Merton's is plain from the Housing Authority Act and the consent order. Under the Act, DCHA, and therefore the receiver, exercises all contract powers, duties, operations, and administration related to DPAH contracts. DCHA received DPAH's contract records and personnel. Similarly, under the *Pearson* consent order, the receiver is responsible for overseeing, supervising, and directing "all financial, contractual, legal, administrative, and personnel functions of DPAH."

Because DCHA has a duty to defend, or support the defense of, a contractor claim relating to a DPAH contract, there is no prejudice to DCHA in making it a party to these consolidated appeals. The Board will require DCHA to do no more than it is required to do by virtue of the Housing Authority Act and the *Pearson* consent order. We recognize that both the District

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[2] It is not clear whether DCHA has ever settled or paid a contractor claim or potential claim under DPAH contracts.

government and DCHA have an independent interest in defending such contract claims as long as the question of financial responsibility is pending before the Court of Appeals. For this additional reason, it would be imprudent for us to dismiss DCHA from the appeals.

*Exhaustion of Administrative Remedies*

DCHA and the District argue that Merton's appeal in D-1017 should be dismissed because Merton appealed from the decision of DCHA's contracting officer denying its claim, rather than appealing from a decision of the DAS Director, or, as the Procurement Practices Act now provides, *see* D.C. Code § 1-1189.4(a) (Supp. 1997), from a decision of a District contracting officer. The issue is moot in light of Merton's subsequent appeal, in D-1025, of the DAS Director's deemed denial of Merton's July 7, 1997 claim. In view of the long-standing dispute between the District government and DCHA over responsibility for claims relating to DPAH contracts, we also agree with Merton that its appeal from the final decision of DCHA's contracting officer validly placed the dispute before us. Through legal delegations, DCHA's contracting officer was authorized to take contract actions on these former DPAH contracts. A subsequent appeal to the DAS Director was a futile act. Accordingly, Merton exhausted its administrative remedies prior to filing its appeal in D-1017.

*Laches*

The District argues that Merton did not diligently pursue its claims and that during the reorganization of the District's public housing agency, from DPAH to DCHA, files have been misplaced, potential witnesses are no longer District employees, and it is impossible to ascertain the accuracy of Merton's claims. From the record presented, we conclude that the District has not established a defense of laches. Merton's claims involve invoices submitted from March 1992 through August 1994. Merton and DCHA representatives apparently discussed the invoices and payment issues on a regular basis between September 1996 through December 1996. After DCHA's representatives requested that Merton file a claim, Merton did so promptly. On this record, we see no basis for a laches defense.

**Appellant's Motion to Seal the Record**

When it filed its supplement to the Appeal File, Merton requested that the record be sealed pursuant to Board Rule 104.2 because the documentation contains confidential business data and techniques. DCHA has opposed the request because Merton did not file a proper motion and Merton's request is overbroad, vague, and unsupported by any justification for sealing the entire record.

We agree with DCHA that Merton's request is overbroad and unsupported. Having reviewed the 1,500 pages, we believe that much of the material cannot be characterized as being proprietary or confidential information the release of which could result in a competitive advantage to other firms. Merton should identify to DCHA and District counsel the specific

documents it seeks to protect. The parties may then propose a protective order for our approval.

## CONCLUSION

The motions to dismiss filed by DCHA and the District are denied. Merton's motion to seal the record is denied and its motion to consolidate is granted.

**SO ORDERED.**

DATED: February 13, 1998

JONATHAN D. ZISCHKAU
Administrative Judge

CONCURRING:

LORILYN E. SIMKINS
Chief Administrative Judge

PHYLLIS W. JACKSON
Administrative Judge

# Facsimile
## TRANSMITTAL

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**Re:** CAB Nos. D-1017 & D-1025, Appeal of Adrian L. Merton, Inc.
**Opinion and Order**

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**Date:** February 13, 1998



From the desk of...

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