GOVERNMENT OF THE DISTRICT OF COLUMBIA

CONTRACT APPEALS BOARD

APPEAL OF:	)	
	)	
PINNACLE TOWERS III, INC.	)	CAB No. D-1183
	)	
Under Antenna Site Management Agreement	)	

For the Appellant: Ross W. Dembling, Esq., Holland & Knight, LLP. For the Government: Mark, D. Back, Esq. and Jacob D. Ritting, Esq. Assistant Attorneys General.

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

OPINION

(*LexisNexis Filing ID 6621172*)

Pinnacle Towers III, Inc., successor to Shaffer & Associates, Inc. ("S&A") appealed the final decision of Chief Procurement Officer ("CPO") dated April 11, 2002, which found that the contract alleged by Pinnacle was void *ab initio*. The District moved to dismiss the Complaint, or alternatively, enter summary judgment in the District's favor on the basis that the formation of the contract violated the Procurement Practices Act ("PPA") and that the substance of the contract violated the District Charter limitations on multiyear contracts and the Federal Anti-Deficiency Act. Pinnacle asserts that the contract was not subject to the requirements of the PPA. We agree with the District that the contract was governed by the PPA and that its formation failed to comply with the PPA, making it as a matter of law void *ab initio*. Accordingly we grant the motion for summary judgment and dismiss the appeal

BACKGROUND

In August 1981 the District executed a five-year agreement with Channel 50, Inc., whereby Channel 50 leased certain space on a communications tower owned by the District for a base term of five years and four additional five-year option periods ending in August of 2011, if the options are fully exercised. Effective June 1, 1986, as part of the first five-year extension ("1986 Lease Extension"), the District and Channel 50 agreed that Channel 50 would build a new tower at the same site and dismantle the original tower. To pay for the cost of construction

of the new tower and dismantling of the original tower[1], Channel 50 was granted a leasehold in the new tower, known as the "Additional Tower Leasehold." Sublease by Channel 50 of space on the new tower was intended to provide the funds to repay Channel 50 its costs of construction. (Appeal File ("AF") Ex. 4, 7-8). The Additional Tower Leasehold was to terminate at the expiration of its stated term (including any renewals) or when Channel 50 recovered all its construction costs through sublease payments, whichever was earlier.

Under the terms of the 1986 Lease Extension, Channel 50 agreed to use its best efforts to sublet the Additional Tower Space "consistent with commercially reasonable terms and subject to approval by the District (which approval shall not unreasonably be withheld)." ("AF" Ex. 4, 8). Payment of rent by Channel 50 would be made monthly in the amount of $3,625.00 reduced "by an amount equal to actual expenditures made by Lessee for services for maintenance of, and improvements to the Tower at the request of the District." (*Id*. at 4).

In September 1988, S&A, Appellant's predecessor, executed a contract with Channel 50 (the "S&A Contract") to act as Channel 50's agent to sublease space on the new tower. As compensation, S&A was to receive 25 percent of the Monthly User Charges defined as total charges less direct costs. The contract granted S&A, the service provider, but not Channel 50, an option to extend the contract for three additional five year periods for a total of 20 years. (AF 3, § 3(A)). Either party, however, could terminate the agreement without cause upon 90 days' notice to the other, provided that if Channel 50 terminated the agreement, Channel 50 was required to pay S&A an amount equal to approximately 14-months compensation. The S&A Contract, recognized the District as owner of the tower[2] and further, in its introductory recitals, recognized that if cumulative net sublease revenues exceeded the construction costs, the Additional Tower Leasehold could expire prior to the termination of the S&A Contract. (AF Ex. 3, 2). Paragraph 3 of the separately numbered paragraphs which preceded the specific terms of the agreement, stated:

> The parties recognize and agree that as of the day on which Channel 50, Inc. shall have recovered all "Costs of Construction" as that term is defined in the Extension of Agreement of Lease . . . made and effective as of June 1, 1986, by and between [the District] and Channel 50, Inc. all rights and obligations of [Channel 50] under this Agreement shall revert to [the District] and this Agreement shall continue in effect with [District] substituted for Channel 50, Inc. for all purposes as Tower Manager.

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[1] It does not appear that the original tower was ever dismantled.

[2] The capacity of the District in the agreement is, at best, ambiguous. In the signature block, the District is titled as "Owner," which is consistent with the capacity of an owner which consents, but does not become a party, to subleases. "Under the terms of the 1986 Lease Extension, Channel 50 agreed to use its best efforts to sublet the Additional Tower Space 'consistent with commercially reasonable terms and subject to approval by the District (which approval shall not unreasonably be withheld)'" (Opposition, 2; AF Ex. 4, 7-8). The District is not recognized as a party in the body of the agreement which speaks to rights and obligations of only two parties, Channel 50 and S&A. For instance, the District is given no right to terminate, even for cause. The agreement states, "This Agreement may, be terminated by the Tower Manager or S&A upon giving of ninety (90) days prior written notice to the other party" (§ 3(B), and "This Agreement may be terminated by Tower Manager or S&A if the other party has failed to perform its obligations hereunder. . . ." (§ 3(D)).

Although the introductory recital appears, upon termination of the tower lease, to bind the District to Channel 50's remaining obligations under the S&A contract for the full term of the S&A contract, including renewals, this is not entirely consistent with the specific terms of the agreement. Paragraph 10 of the contract terms provides:

> [Channel 50] may assign or transfer its interest in the facilities or under this agreement to [the District] or any other entity it may choose, provided, however, if [Channel 50] does not cause such assignee or transferee to assume [Channel 50's] obligations hereunder, [Channel 50] shall pay S&A the Termination Price whereupon this Agreement shall be deemed terminated.

This action is brought by Appellant against the District to enforce against the District, as successor to Channel 50's possessory interest in the tower, the terms of S&A's contract with Channel 50.

Between September 1989 and July 1995, Channel 50 executed a number of sublease agreements, each of which acknowledged S&A as the "firm retained by [Lessee] to manage and administer certain provisions of th[e] Agreement." In September 1993, S&A exercised its option to renew its contract for an additional period of five years through September 1998.

In September, 1997, the District executed a five-year lease with National Cable Satellite Corporation d/b/a C-SPAN ("C-SPAN Agreement") for certain portions of the Tower. Channel 50 was not a party to this lease. The District was identified as the "Lessor" and S&A as the "firm currently retained by the lessor to manage and administer certain portions of this Agreement, or any successor thereto." (C-SPAN Agreement, ¶ 1(a)(iv) attached as Ex. 7 to Appellant's Complaint). The Agreement continued the practice of requiring lease payments "to be made payable and mailed to Shaffer & Associates." (*Id*. at 3).

By letter dated May 15, 1998, S&A advised Channel 50[3] of its intent to renew the S&A Contract[4] for an additional period of five years through August 31, 2003. On January 14, 2000, Pinnacle Towers purchased all of the stock of S&A. (Opposition, 5). At some time prior to May 2000, Channel 50 had recouped its full construction cost, at which time the Additional Tower Lease and Channel 50's possessory rights in the new tower terminated. Beginning in May 2000 and continuing, Pinnacle has regularly remitted rent payments collected from tenants to the District less its compensation. (*See*, AF Ex. 1, 2). The District has, however, advised tenants to remit rent directly to it.

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[3] Even though the C-Span Agreement which had been entered into the previous year identified the District as the Lessor and S&A as the firm retained by the District to manage the tower property, the renewal letter was sent to Channel 50 and does not indicate that a copy was sent to the District.

[4] On November 30, 2000, Pinnacle executed an amended sublease with an existing sublessee of Channel 50, APC Realty and Equipment Company, LLC. In the amended sublease, Pinnacle erroneously represented itself as being the successor to Jasas Corporation, the parent of Channel 50 and Pinnacle further erroneously represented itself as the "sublessor" in the transaction, (APC; attached as Exhibit 10 to Appellant's Complaint), implying that Pinnacle was the lessee of the tower from the District. Although the D.C. Office of Property Management ("OPM") and a D.C. Assistant Corporation Counsel approved the amended sublease for legal sufficiency Appellant was not the successor to Channel 50 or the lessee of the tower from the District. Appellant does not claim any rights under the Channel 50 lease in this matter.

DISCUSSION

Jurisdiction

The Board must initially determine its jurisdiction in this matter. Pinnacle filed this appeal invoking the jurisdiction of the Board pursuant to D.C. Code § 2-309.03. (Complaint ¶ 3).

Subsection (b) of that section provides:

> (b) Jurisdiction of the Board shall be consistent with the coverage of [the Procurement Practices Act] . . . .

As an administrative agency created by statute, this Board has only those powers which are conferred either expressly or by necessary implication. *Ramos v. Department of Consumer & Regulatory Affairs*, 601 A.2d 1069, 1073 (D.C. 1992). The Board has consistently held that, as the statute explicitly provides, its jurisdiction does not exceed that of the PPA. *See, e.g. District of Columbia Local Development Corporation*, CAB No. P-0421, Nov. 14, 1994, 42 D.C. Reg. 4885, holding affirmed, but vacated on other grounds, Jan. 31, 1995, 42 D.C. Reg. 4914*; C. Peyton Barton, Jr.*, CAB No. P-0638, May 4, 2001, 49 D.C. Reg. 3359; *Safe, Inc.*, CAB No. P-0702, Jan. 26, 2005.

In its motion to dismiss, the District asserted that formation of the contract violated various sections of the PPA (Motion, 5-10) to which Pinnacle responded that "the agreement is a concession contract, not an acquisition contract subject to the Procurement Practices Act." (Post Oral Argument Brief, 2)). If Pinnacle's assertion is correct, its defense negates the jurisdiction of the Board and the appeal must be dismissed for lack of jurisdiction.

In *Eastern Ave. Development Corp*. CAB No. P-437, Sept 26, 1995, 44 D.C. Reg. 6384, the Board set forth four factors to be considered in determining whether the PPA covers particular contract actions, thus making them subject to our jurisdiction:

1. the type of contract or agreement contemplated;
2. the nature of the agency conducting the solicitation;
3. the basis for the procurement or contracting authority;
4. the statutory and regulatory scheme which controls the procurement or disposal being solicited.

(44 D.C. Reg. at 6387). Pinnacle's assertion that the PPA does not apply to this contract fails on each of the considerations.

The contract is best categorized as a procurement contract. Pinnacle asserts that the contract is not a procurement contract, but rather a "concession" contract in which "the contractor (or concessionaire) pays a franchise fee for the privilege of operating on or in a government facility." (Appellant's Posthearing Brief, 2-3) Contrary to Appellant's own definition of a concession contract, Appellant does not claim to pay the District a concession fee, but rather "deducts its agreed-to remuneration," (Opposition 8), from funds it collects on behalf of the District. (*Id*.). Nor do the terms of the Agreement meet the common understanding of a

concession contract with a government agency. First, franchise fees are "typically less than five percent of gross revenues, for the privilege of operating on federal land. If they used government-owned facilities they paid an additional fee." *Amfac Resorts, L. L. C. v. United States Dept. of Interior*, 350 U.S. App. D.C. 191, 282 F.3d 818, 834-835 (2002) The payment to the District under the Agreement, if the alleged contract is interpreted to be a concession contract would be 75% of net rental income. Second, the subject contract did not denominate the payment as a concession, but rather describes the amount retained by Pinnacle as a "Monthly Percentage Fee" to Appellant[5], with the remainder remitted to Channel 50, as lessee, or the District as owner after termination of the lease. Further, Pinnacle does not allege that it provides services to the sublessees, but rather that it acts as leasing agent and manager for Channel 50 and subsequently the District. Concessionaires are understood to provide accommodations, facilities, and services not for the benefit of the government, but for private parties. (See, *e.g.*, Bus Shelter Act of 1979, D.C. Law 3-67; National Park Service Concessions Management Improvement Act of 1998, 105 P.L. 391, 16 U.S.C. § 5951).

The District Department of Administrative Services ("DAS"), with whom this contract is alleged to have been made, was a line agency of the District of Columbia reporting to the Mayor whose procurements are generally subject to the PPA. (See, *e.g. Impex Industries, Inc.* CAB No. D-956 July 26, 2000,) The PPA was applicable to "all agencies and employees of the District government which are subordinate to the Mayor" at the time of execution of the S&A Agreement. (D.C. Code § 1-1181.4 (1981 ed. 1987 Supp.)). Appellant does not cite any general or specific exemption to the PPA for DAS.

Absent the PPA, DAS did not have procurement authority. The Board has found the PPA not to apply only where the procurements "were carried out under statutory and regulatory schemes entirely independent of the PPA." *C&D Tree Service, Inc*., CAB No. P-0440, Mar. 11, 1996; see, also, *Potomac Capital Investment Corp.*, CAB No. P-0383, Jan. 4, 1994, 41 D.C. Reg. 3885 and *Metropolitan Service & Maintenance Corp*., CAB No. P-0388, Feb. 7, 1995, 42 D.C. Reg. 4918. There was no independent statutory or regulatory scheme governing procurements by DAS.

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[5] Section (k) of Exhibit B to the S&A agreement entitled Management Services provides:

> Invoice and collect all Gross Charges (as defined above) from Users under the User Agreements. All User Agreements shall incorporate language directing that all fees due under such agreements are to be paid to S&A. Monthly, prior to the 10th day of each month, S&A shall determine the total of monthly User Charges by adding the total Gross Charges collected and subtracting the Deductible Costs (as defined above). S&A will then deduct its Monthly Percentage Fee from the remainder resulting after Deductible Costs are subtracted from Gross Charges. It will retain the amount necessary to pay the Deductible Costs and will timely pay such costs. The balance will then be remitted to Tower Manager monthly by the 15th of the month. S&A's obligation hereunder is limited to employing ordinary collection procedures, without any responsibility on the part of S&A for amounts reasonably deemed uncollectible by S&A.

Although Appellant categorizes this procurement as a concession, it cites no District statutory or regulatory scheme which controls such procurements. No valid action can be taken without statutory or regulatory authority. In instances when concession agreements are authorized, detailed requirements are imposed. See *Metropolitan Service & Maintenance Corp.*, CAB No. P-0388, Feb. 7, 1995, 27 D.C. Reg. 1266 (discussing the District of Columbia Bus Shelter Act of 1979, D.C. Law 3-67; and the National Parks Omnibus Management Act of 1998, 16 U.S.C. §§ 5951 -5966)).

The Board finds no authority for the alleged contract other than the PPA and thus has jurisdiction to consider this appeal.

Formation of the alleged contract violated the Procurement Practices Act

The formation of the alleged contract violated the most basic principle of government procurement law, namely, that selection of the contractor and award of a contract be made by an authorized District contracting officer. There is no authority to delegate contracting officer responsibility outside the District Government. "The contracting officer shall be responsible for source selection." 27 DCMR §1614.3; see also D.C. Code § 2-301.07; 27 DCMR §§ 1905.4, 1622.6, 2623.1 and 48 CFR § 15.504. There is no dispute that no District official selected S&A or made any award. Appellant admits in its opposition to the motion:

> . . . [T]he District did not award the 1988 contract. Instead, Channel 50, the Lessee under the 1981 Agreement of Lease awarded the contract. Channel 50 sought and received the District's approval of the S&A contract award, as contemplated by the 1986 Lease Extension. See AF Tab, 4 at Article 35 (as amended) section 6, p. 9. But neither this approval, nor the acknowledgment that the District was the owner of the tower, established or intended to create a contractual relationship with the District necessitating adherence to the PPA.[6]

(Opposition, at 9). The approval referenced by Appellant is pursuant to a standard lease requirement giving lessor the right to approve sublease or subcontract agreements, provided that such approval "shall not be unreasonably withheld." *Id.* Such approval, however, pursuant to regulation, does "not constitute a determination of the acceptability of the subcontract terms or price or of the allowability of costs." 27 DCMR § 2801.3. More importantly, the contracting officer is forbidden by the procurement regulations from consenting to a subcontract which requires, as Appellant asserts, that the District deal directly with the subcontractor. "The contracting officer shall not consent to subcontract . . . (c) [w]hen the contracting officer is obligated to deal directly with the subcontractor." (27 DCMR § 2801.4). Just as the District's approval of the Channel 50 contract with S&A does not create a contract between S&A and the District, the District's approval of subleases referencing the S&A Agreement does not award a contract and obviously does not reflect any "selection" of S&A by the District.

[6] Appellant also stated on page 8, "S&A was a contractor to Channel 50 and Channel 50 was solely responsible for compensating S&A, and on page 10 "The party to whom Pinnacle (and its predecessor S&A) was bound was Channel 50, not the District, S&A did not look to the District for its compensation."

Notwithstanding Appellant's admission that the District did not select S&A or award a contract to it, and that "the contract was not the District's" (Opposition, at 9), Pinnacle, as successor to S&A, now requests the Board to "reinstate the Contract and require the District to specifically perform its obligations under the Contract." (Complaint, at 19). Appellant does not point to any subsequent selection of Pinnacle or its predecessor by the District, nor does Appellant point to any award by a District contracting officer of a contract to S&A or Pinnacle. The Board finds that no contract was entered into by the District.

It is further unclear that the actual parties to the S&A Agreement, Channel 50 and S&A, intended the District to be bound without further action by the District. Although the introductory recitals to the contract seem to imply that the District would stand in the shoes of Channel 50, the actual terms of the contract conflict with this intent.

Paragraph 3 of the separately numbered recitals state:

> The parties recognize and agree that as of the day on which Channel 50, Inc. shall have recovered all "Costs of Construction" as that term is defined in the Extension of Agreement of Lease . . . made and effective as of June 1, 1986, by and between [the District] and Channel 50, Inc., all rights and obligations of [Channel 50] under this Agreement shall revert to [the District] and this Agreement shall continue in effect with [District] substituted for Channel 50, Inc. for all purposes as Tower Manager.

Section 10 of the specific contract terms states:

> [Channel 50] may assign or transfer its interest in the facilities or under this agreement to the [District] or any other entity it may choose, provided, however, if [Channel 50] does not cause such assignee or transferee to assume [Channel 50's] obligations hereunder, [Channel 50] shall pay [Pinnacle] the Termination Price whereupon this Agreement shall be deemed terminated.

Although introductory recitals may indicate the understandings of the parties in entering into a contract, *Trilon Plaza v. Comptroller of N.Y.*, 788 A.2d 146, 151 (D.C. Cir. 2001), if the recitals and specific terms are in conflict, the specific terms will govern. *Kogod v. Stanley Co.*, 186 F.2d 763, 765 (D.C. Cir. 1950). The specific contract term contemplates potential transfer to the District but requires that, for the District to be bound to the obligations under the agreement, the District must at that time specifically assume those obligations. If there was not a specific assumption by the District of the obligations, as there was not, the contract is terminated and Channel 50, not the District as transferee, remains liable for the termination costs. Appellant has not shown any assumption by an authorized District official.[7]

[7] The Board also questions the authority to include the option which is included in the agreement. In general, options permit the *District* to extend a contract. The option provision in this agreement permits the contactor to unilaterally extend the contract. (¶ 3(A)). Appellant cites no authority which authorizes the District's obligation to pay the contractor to be unilaterally extended by the contractor.

The District further asserts that, in any event, the contract is void in violation of law for lack of competitive selection and for violation of restrictions on multiyear contracting.[8] We agree with the District. Appellant asserts that "the PPA requires award by competitive bidding only for those contacts that contemplate expenditures in excess of $25,000," (Opposition 10-11), and that no expenditures are involved.[9] Appellant further asserts that the definition of competitive bidding requires "payment of a price." Appellant has inserted the words "expenditures" and "payment" which do not appear in the code. DC Code § 2-303.03 provides that "Contracts exceeding [$25,000] shall be awarded by competitive sealed bidding . . . ." D.C. Code § 2-303.21 reads, "Special small purchase procedures may be used . . . for procurements not exceeding $25,000." D.C. Code § 2-301.07(10) provides "Competitive bidding means the "offering of prices . . . for a contract, privilege or right to supply specified services or materials."

Appellant admits that the agreement intended to compensate S&A stating "not surprisingly, [S&A] had to be compensated for its contractual duties. . . . [T]he agreement provided that S&A would receive its remuneration by deducting the agreed-to compensation from the rental revenue that S&A was collecting from subtenants on behalf of Channel 50." (Opposition, 8). Once Channel 50 had recovered its construction costs, the lease terminated and possession of the tower reverted to the District. If the agreement continues, S&A would collect rent from subtenants, now tenants, on behalf of the District. Based on the leases in the record, (Exs. 3-8 and 11), the District funds withheld as compensation by S&A will exceed $25,000. The contract, as it would apply to the District, clearly exceeds $25,000 triggering the requirement for compensation. Appellant's argument that the contract was "awarded" by Channel 50 and therefore not subject to the competition requirements of the PPA is without merit. The effect of the contract, if upheld by the Board, would be to compensate Pinnacle directly from funds belonging to the District. The requirements of the PPA cannot be avoided by an agreement which allegedly requires the District to assume a contract in being.

Based on the undisputed facts, we conclude that the contract alleged by Appellant is a nullity because award was never made by an authorized official of the District of Columbia and that even if an award could be construed to have been ratified by an authorized District official, the underlying award was not made pursuant to the competition requirements of the PPA. We also reject the alternative argument of the Appellant that the agreement is not void, but merely voidable. (Opposition, 12-14). To avoid the binding stamp of nullity, "a contract which is entered into in violation of this chapter or the rules and regulations issued pursuant to this chapter is void, unless it is determined in a proceeding pursuant to this chapter or subsequent

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[8] Since we find that the District never entered into a contract, it is unnecessary for the Board to determine whether, had the District entered in to a contract, it was a multiyear contract requiring approval by the Council. The Board notes, however, that it would be difficult to apply the multiyear review requirements, because, at the outset of the agreement, it was uncertain when, if ever, it would bind the District. Initially, as Appellant admits, Channel 50 was solely responsible for compensation of S&A. At some undetermined time when rent from sublessees had repaid Channel 50's construction costs, the District's alleged obligation would spring up. The Board does not decide whether Council approval of a contract which did not begin within the Council's then current period could bind a future Council from taking action to disapprove the contract during the Council period when the obligation of the District actually arises.

[9] "To the contrary, S&A was to collect the rents from subtenants, with checks payable to Channel 50 [and subsequently the District] of the proceeds, less S&A's agreed-to expenses." Opposition, 10

judicial review that good faith has been shown by all parties, and there has been substantial compliance with the provisions of the chapter and the rules and regulations." D.C. Code § 2-302.5(1)(d); *Recycling Solutions, Inc.*, CAB No. P-0377, April 15, 1994, 42 D.C. Reg. 4550. In the instant matter, there was no attempt whatsoever to comply with the Procurement Practices Act.

The Board concludes that the alleged contract is void *ab initio*. The appeal is dismissed.

September 2, 2005

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

Concur:

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