DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTESTS OF:

WARDMAN INVESTOR, L.L.C. and CIM/WARDMAN, L.L.C.	)	
Under Convention Center Headquarters Hotel RFP Dated April 26, 2001 and Revised Hotel RFP Dated June 7, 2001	)	CAB Nos. P-0817 and P-0818 (Consolidated)

For the Protesters: Peter Buscemi, Esq., Morgan, Lewis & Bockius LLP. For the District of Columbia Government: Nancy Hapeman, Esq., Chief, Procurement Section Office of the Attorney General. For the Intervener: Daniel R. Forman, Esq., Crowell & Moring LLP.

Opinion by Chief Administrative Judge Jonathan D. Zischkau, with Administrative Judge Warren J. Nash, concurring.

OPINION

Filing ID 27159349

Wardman Investor, L.L.C. and CIM/Wardman, L.L.C. (collectively "Wardman") protest the process that the District employed in seeking, evaluating, and pursuing proposals for a new Washington Convention Center Headquarters Hotel. Wardman identifies a 2001 Request for Proposals ("2001 RFP") related to the development of a Washington Convention Center Hotel and argues that the District repeatedly has made material changes in the terms of its procurement, including the real estate to be used for the Hotel, the terms on which the real estate will be made available for development, and the nature and extent of public financial support to be provided for the development of the Hotel. The District has moved to dismiss the protests on the grounds that the City Council through a series of legislative enactments exempted from the Procurement Practices Act the development agreement and related contracts for the Hotel project, the protest allegations are untimely, and the protesters lack standing because they never submitted proposals in response to the 2001 RFP. We agree with the District that the Council's legislative enactments exempted the Hotel project from the Procurement Practices Act and thus we have no jurisdiction to consider these protests. The District is also correct that the protesters lack standing and that the protests are untimely. Accordingly, we dismiss the consolidated protests.

BACKGROUND

The relevant facts, as set forth in the District's motion to dismiss, are not in dispute. On April 26, 2001, the District of Columbia issued the subject RFP for the development of a hotel to complement the new Washington, D.C. Convention Center. On June 7, 2001, a revised RFP was issued. The RFP stated that the new convention center "requires an adequate supply of accessible and high quality rooms as well as substantially more square footage devoted to ballrooms, meeting rooms and lobbies, than found in the basic hotel structure." (Protest Ex. 1, RFP at 1). The 2001 RFP also mandated that the new convention center hotel be located in

proximity to the new convention center. The RFP stated that the District considered the development of the hotel to be "an opportunity for public-private partnership." (*Id*., RFP at 1, 9 (stating that if an offeror requested the District's financial involvement, the offeror must discuss the value and terms of a District contribution to the project). The Questions and Answers to the RFP also specifically stated that several community development programs may be used to contribute to project funding, including tax increment funding ("TIF"). (*Id.*, RFP Questions & Answers 2, 48, 56, 57, 60, and 66). The RFP set August 8, 2001, as the deadline for the initial receipt of proposals. Wardman points to no language in the RFP indicating that the RFP was to be governed by the Procurement Practices Act.

Two development teams, the Marriott/Gould team and the Landmark/Hilton team submitted their initial proposals to the District. Marriott and Landmark were selected for the short list of proposals, and were invited to submit and did submit Best and Final Proposals. In October 2002, then Mayor Anthony Williams announced that Marriott/Gould had been selected for negotiations for the Hotel project. The District states that no contract was awarded under the 2001 RFP.

The Council of the District of Columbia enacted several pieces of legislation to authorize aspects of the construction, leasing, and financing of the Hotel project between the District, the Washington Convention Center Authority ("WCCA") and Marriott International, Inc. In 2006, the Council enacted the New Convention Center Hotel Omnibus Financing and Development Act of 2006, D.C. Law 16-163 ("2006 Act"). (District's Motion to Dismiss, Ex. 1). The legislation was first read on May 2, 2006, approved by the Council on June 6, 2006, and went into effect on September 19, 2006. (*Id*.). The 2006 Act states:

> The Council finds that in order for the development of the new convention center hotel to proceed, it is necessary for the District and the [Washington Convention Center] Authority to lease to Marriott International, Inc., the developer of the new convention center hotel, or its designee, 2 parcels of land that are part of the site of the new convention center hotel.

D.C. Law 16-163, § 701 (codified at D.C. Code § 10-1202.21). The Act provides authority to the Mayor to grant a lease to "Marriott International, Inc., or its designee" of certain lots of real property for a lease term of 99 years and with specified payment terms. *Id*. § 702 (codified at D.C. Code § 10-1202.22). Similarly, the Act provides authority to WCCA to lease to Marriott certain lots of real property for a lease term of 99 years with specified payment terms. *Id.* § 703 (codified D.C. Code § 10-1202.23).

In 2008, the Council enacted the New Convention Center Hotel Omnibus Financing and Development Amendment Act of 2008, D.C. Law 17-144 (effective April 15, 2008) (the "2008 Amendment Act") (Motion to Dismiss, Ex. 2) and the New Convention Center Hotel Technical Amendments Act of 2008, D.C. Law 17-399 (effective March 21, 2009) (the "2008 Technical Amendments Act") (Motion to Dismiss, Ex. 3). Section 2(e) of the 2008 Amendment Act provides in relevant part:

> Unit A of Chapter 3 of Title 2 [the District of Columbia Procurement Practices Act of 1985, effective February 21, 1986 (D.C. Law 6-85); D.C. Code § 2-301.01 *et seq*.] and subchapter III-A of Chapter 3 of Title 47 shall not apply to the Financing Documents, Closing Documents, and any other contract the Mayor may from time to time enter into in connection with the Project.

D.C. Code § 10-1221.09(d). The statute says that the term "Project" means "the financing, refinancing, or reimbursing of costs incurred for the acquisition, construction, installing, and equipping of a hotel having approximately 1,100 rooms and suites, meeting and ballroom space, and other ancillary facilities customarily found in convention center hotels." D.C. Code § 10-1221.01(18). The 2008 Technical Amendments Act approved the Hotel Development and Funding Agreement (the "DFA") by which District, WCCA, and Marriott's designee agreed to the terms by which the District would issue a TIF note; WCCA would issue the bonds to finance a portion of the Hotel project; the District and WCCA would lease land in square 370 adjacent to the Convention Center to Marriott's designee; and Marriott's designee would construct the Hotel. (Motion to Dismiss, Ex. 3, D.C. Law 17-399, § 4). This provision exempted contract approval from the Council review criteria for multiyear contracts and contracts exceeding $1 million found in the D.C. Code § 2-301.05a.

Due to adverse conditions in the financial markets, certain changes to the DFA were subsequently negotiated and on July 31, 2009, the Council approved the revised DFA by enacting the New Convention Center Hotel Emergency Amendment Act of 2009, D.C. Bill No. 18-391 (Motion to Dismiss, Ex. 4) and the New Convention Center Hotel Amendment Act of 2009, D.C. Bill No. 18-310 (the "2009 Act") (Motion to Dismiss, Ex. 5).

DISCUSSION

The various Hotel Acts enacted by the Council for the Hotel project – namely, the 2006 Act, the 2008 Amendment Act, the 2008 Technical Amendments Act, and the 2009 Act – uniformly show that the Council authorized the Mayor and WCCA to enter into contracts with Marriott for the development of the Hotel project, and that the authority to enter into such contracts was independent of the Procurement Practices Act. Indeed, the Hotel Acts can only reasonably be interpreted as exempting the Hotel project contracts from the requirements of the Procurement Practices Act. Because our jurisdiction is founded upon the Procurement Practices Act, we have no jurisdiction to consider Wardman's protests. Consistent with the legislative enactments from 2006 through 2009, there is no indication in the 2001 RFP that it was meant to be covered by the Procurement Practices Act. As the District correctly observes, Wardman has no standing with respect to the 2001 RFP because it was not a prospective offeror since it was not in existence at the time of the RFP. The entire selection process by which the Hotel developer was chosen, including the legislative enactments by which the Hotel project was approved, does not reflect a procurement carried out under the authority of the Procurement Practices Act. The Hotel Acts authorize the Mayor and WCCA to enter into contracts with Marriott or its selected designee "notwithstanding any other provision of law."

Wardman argues that the Procurement Practices Act exemptions found in the Hotel Acts apply only to the "Project" which is defined in the 2008 Act with regard to the financing of the

Hotel. Wardman's argument misses the mark. The express exemptions of the Hotel Acts cover in substance the essential undertaking of the Mayor and WCCA in the Hotel project. Moreover, beyond the express exemptions from the Procurement Practices Act, we construe the Hotel Acts to be special project specific legislation by the Council authorizing and approving the selection of Marriott and the execution of contracts for the Hotel project notwithstanding the provisions of the Procurement Practices Act.

Although we conclude that we have no jurisdiction to consider the selection of Marriott and contracts related to the Hotel project, it is clear that the protesters lack standing to challenge the legislative authorization of the selection and contracts and any "protest" would be untimely in that the Council effectively authorized the Mayor and WCCA to enter into contracts with Marriott in the 2006 Act. Wardman argues that its protests were triggered by the 2009 Act in July 2009, but that Act itself provides no grounds for protest.

CONCLUSION

We lack jurisdiction to consider the protests because the process for the selection of Marriott and the contracts related to the Hotel project are not subject to the Procurement Practices Act as evidenced by the Hotel Acts. Further, even if we had been granted jurisdiction over the contracts related to the Hotel project, the protesters lack standing to challenge the contracts and the challenges are clearly untimely. Accordingly, we dismiss the consolidated protests.

SO ORDERED.

DATED: September 18, 2009

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

CONCURRING:

/s/ Warren J. Nash
WARREN J. NASH
Administrative Judge