

## DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

### PROTESTS OF:

W2I VENTURE	)	
	)	CAB Nos. P-0796, P-0802
Under Solicitation Nos. CFOPD-07-R-053	)	
and CFOPD-09-R-013	)	

For the Protester: Peter F. Garvin, III, Esq. and Grant H. Willis, Esq., Jones Day. For the District of Columbia Government: Talia S. Cohen, Esq., Assistant Attorney General. For the Intervenor: Joanne Duddy Fort, Esq., Baach, Robinson & Lewis PLLC

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

### OPINION

Filing ID 26625718

W2I Venture has protested the District's decision to cancel Solicitation No. CFOPD-07-R-053 for a new gaming system platform for the DC Lottery and Charitable Games Control Board ("DCLB"). The contracting officer canceled the solicitation because the City Council declined to approve the proposed award to W2I. W2I now argues that the Mayor was not required to submit the proposed contract to the Council for approval pursuant to D.C. Code § 1-204.51 because the contract did not involve the expenditure of appropriated funds. The District responds that the proposed contract does involve the expenditure of appropriated funds and moreover the new solicitation incorporates sufficient changes to the old solicitation to merit the cancellation and issuance of the revised solicitation. We conclude that the contracting officer had a cogent and compelling basis for cancelling the proposed contract when the Council refused to approve the proposed contract award to W2I because the lottery contract would involve the expenditure of appropriated funds. We also conclude that the new solicitation contained sufficient changes to independently support the decision to cancel the original solicitation. W2I's second protest, challenging the District's issuance and activities under the revised solicitation during the pendency of the protest of the cancellation, is without merit. Accordingly, we deny the captioned protests.

### BACKGROUND

On May 27, 2007, the Office of the Chief Financial Officer ("OCFO") issued a Request for Proposals, Solicitation No. CFOPD-07-R-053 ("RFP-1"). (Motion to Dismiss, Ex. 1). RFP-1 sought a contractor to provide to the DCLB a new gaming system platform. Section I.21 of RFP-1 provided as follows:

#### I.21 Appropriation of Funds

The District's liability under this contract is contingent upon the future availability of monies with which to make payment for the contract purposes. The legal liability on the part of the District for payment of any money shall not arise unless and until such monies shall have been provided. The District's obligation to pay under this contract is subject to the provisions of (i) the federal Anti-Deficiency Act, 31 U.S.C. §§ 1341, 1342, 1349, 1351; (ii) The District of Columbia Anti-Deficiency Act, D.C. Official Code §§ 47-355.01-355.08 (2001); (iii) D.C. Official Code § 47-105 (2001); and (iv) D.C. Official Code § 1-204.46 (2001), as the foregoing statutes may be amended from time to time.

(Motion to Dismiss, Ex. 1). On September 20, 2007, W2I and Lottery Technologies Enterprises ("LTE") submitted proposals. After an extensive evaluation process, the OCFO contracting officer determined that W2I's proposal offered the most advantageous method for the District to fulfill the RFP's requirements, and on March 14, 2008, the Mayor submitted the proposed lottery contract, Contract No. CFOPD-7-C-053, for the first time to Council for approval. (Motion to Dismiss, Ex. 4). On March 28, 2008, the District of Columbia Register, Vol. 55, No. 13, notified the public of a public hearing on the proposed lottery contract. (Motion to Dismiss, Ex. 3).

On April 4, 2008, LTE filed a protest (CAB No. P-0774) with the Board, challenging the proposed award to W2I. On May 14, 2008, the Mayor withdrew for the first time from Council the proposed lottery contract. On May 14, 2008, the Mayor resubmitted to Council for a second time the proposed lottery contract. LTE filed an amended protest (CAB No. P-0778) on May 30, 2008. On June 27, 2008, the Mayor withdrew from the Council for a second time the proposed lottery contract. On September 16, 2008, the Mayor submitted to the Council for a third time the proposed lottery contract. On October 30, 2008, the Mayor withdrew from the Council for a third time the proposed lottery contract. On November 3, 2008, we dismissed in part and denied in part the consolidated protests of LTE. On November 14, 2008, the Mayor submitted for a fourth and final time to Council the proposed lottery contract. On December 16, 2008, the Council disapproved the proposed lottery contract. (Motion to Dismiss, Exs. 5, 6).

On February 6, 2009, the OCFO contracting officer issued a notice that RFP-1 had been cancelled which stated in pertinent part: "Solicitation No. CFOPD-07-R-053 for On-Line Gaming System is cancelled. The Office of Contracts will issue a new solicitation in the near future." (Protest, Ex. 1). On February 23, 2009, W2I protested the cancellation of RFP-1 (CAB No. P- 0796), arguing that although the OCFO concluded that the proposed contract to W2I offered the best value to the District, OCFO incorrectly assumed that the proposed multiyear contract had to be submitted to the Council for approval, and that the Council's ultimate disapproval of the proposed contract was the sole basis for OCFO's cancellation of RFP-1. According to W2I, the procurement did not involve the expenditure of appropriated funds and thus Council approval was not required under D.C. Code § 1-204.51. The District filed a motion to dismiss the protest as untimely on March 16, 2009. On April 3, 2009, the OCFO issued Solicitation No. CFOPD-09-R-013 ("RFP-2") as a replacement for RFP-1. On April 9, W2I filed another protest (CAB No. P-0802) requesting that the Board stay all further activities relating to RFP-2 until the Board resolved the earlier protest challenging the cancellation of RFP-1. Thereafter, the Board directed the District to file an Agency Report for CAB No. P-0796, and the District filed the Agency Report on June 18, 2009. W2I filed its comments on the Agency

Report on June 25, 2009. The District filed a response on July 6, 2009. W2I filed a reply on July 13.

## **DISCUSSION**

We exercise jurisdiction over these protests pursuant to D.C. Code § 2-309.03(a)(1).

### Timeliness

The District argues that the protest of the cancellation is untimely because W2I should have protested within 10 business days of March 14, 2008, when the Mayor first submitted the proposed contract to the Council. We reject the District's contention as W2I is challenging the cancellation of RFP-1 and it did not receive notice of the cancellation until February 6, 2009. Although the propriety of submitting the proposed award to the Council is at the heart of the protest, the issue did not become ripe for protest until W2I received notice of the cancellation. Accordingly, W2I's protest in CAB No. P-0796 was timely filed.

### Standard of Review for the Cancellation of RFP-1

W2I argues that the District must support its cancellation action by the more demanding test that the cancellation is supported by a "cogent and compelling reason" rather than the "reasonable basis" test normally associated with a negotiated procurement like this one. According to W2I, the circumstances here are more akin to the post-opening cancellation in a sealed bid procurement because significant aspects of W2I's proposed pricing and technical proposal have been disclosed to the public and thus the same danger to the competitive process exists as in the case of sealed bids being opened. We agree with W2I and believe that the more demanding standard should apply here, namely that the cancellation be supported by a cogent and compelling reason. Even under this more demanding standard, we conclude for the reasons discussed below, that the contracting officer stated a cogent and compelling reason for cancelling RFP-1.

### Council Review under D.C. Code § 1-204.51

W2I argues that the Lottery gaming system procurement did not involve the expenditure of appropriated funds and thus Council approval was not required under D.C. Code § 1-204.51. The relevant portions of D.C. Code § 1-204.51 provide as follows:

(a) *Contracts extending beyond one year.* – No contract involving expenditures out of an appropriation which is available for more than 1 year shall be made for a period of more than 5 years unless, with respect to a particular contract, the Council, by a two-thirds vote of its members present and voting, authorizes the extension of such period for such contract. Such contracts shall be made pursuant to criteria established by act of the Council.

(b) *Contracts exceeding certain amount.*

(1) *In general.* – No contract involving expenditures in excess of \$1,000,000 during a 12-month period may be made unless the Mayor submits the contract to the Council for its approval and the Council approves the contract (in accordance with criteria established by act of the Council). . . .

(c) Multiyear contracts. – (1) The District may enter into multiyear contracts to obtain goods and services for which funds would otherwise be available for obligation only within the fiscal year for which appropriated.

(2) If the funds are not made available for the continuation of such a contract into a subsequent fiscal year, the contract shall be cancelled or terminated . . . .

(3) No contract entered into under this subsection shall be valid unless the Mayor submits the contract to the Council for its approval and the Council approves the contract (in accordance with the criteria established by act of the Council). The Council shall be required to take affirmative action to approve the contract within 45 days. If no action is taken to approve the contract within 45 calendar days, the contract shall be deemed disapproved.

W2I argues that “appropriation” only refers to the legal authority of Congress to incur obligations and make disbursements from the United States Treasury. Further, W2I urges that payments to the lottery contractor come from “other funds” – namely, the Lottery and Charitable Games Enterprise Fund, which W2I says are not appropriated funds. Citing section 446 of the Home Rule Act, D.C. Code § 1-204.46 (“no amount may be obligated or expended by any officer or employee of the District of Columbia government unless such amount has been approved by Act of Congress, and then only according to such Act”), W2I distinguishes between Congressional “approval” and “appropriation” and argues that neither the Home Rule Act nor any other provision “mandates that the District operate only with federally provided ‘appropriated’ funds.” (W2I Comments, at 5-6).

We agree with the District that W2I’s arguments miss the mark. Congress appropriates both federal funds and local funds for the District. Pursuant to the most recent Congressional appropriations act for the District, namely the District of Columbia Appropriations Act, 2009, Division D, Title IV, of Pub. L. 111-8, approved March 11, 2009, Congress appropriated – subject to available revenues – \$9,888,095,000, consisting of \$6,082,474,000 from local funds (mainly tax revenues of various kinds), \$2,177,382,000 from federal grant funds (grants in aid such as AFDC, Medicaid, etc.), \$1,621,929,000 from other funds (“Other-Type Funds” which are defined in D.C. Code § 47-368.01(a) as “District revenue . . . generated from fees, fines, assessments, or reimbursements by [the] District of Columbia or its agencies or instrumentalities . . . earmarked for special purposes and accounted for or placed in a fund for such purposes”), \$6,310,000 from private funds (such as donations), and \$202,326,130 from “federal payments” (including money for special projects such as the college tuition assistance program). Under the “District of Columbia Funds” portion of Title IV, the Act states that “the amounts provided

under this heading are to be available, allocated and expended as proposed under ‘Title III--District of Columbia Funds Division of Expenses’ of the Fiscal Year 2009 Proposed Budget and Financial Plan submitted to the Congress by the District of Columbia on June 9, 2008 and such title is hereby incorporated by reference as though set forth fully herein . . . .’ Thus, Congress appropriated both local and federal funds in this appropriations act and the local funds portion of the District’s budget must be appropriated by Congress.

District appropriations, and consequently District obligations and expenditures, occur as follows: (1). the District submits to Congress the proposed budget; (2) Congress approves the budget in the form of an appropriations act; and (3) the District can obligate or expend funds if the amount has been appropriated by Congress. The District states that money may not be expended from the Lottery Fund without a congressional appropriation. We agree with the District’s reasoning. Section 450 of the Home Rule Act, as amended, states:

The General Fund of the District shall be composed of those District revenues which on January 2, 1975 are paid into the Treasury of the United States and credited either to the General Fund of the District or its miscellaneous receipts, but shall not include any revenues which are applied by law to any special fund existing on January 2, 1975. The Council may from time to time establish such additional funds as may be necessary for the efficient operation of the government of the District. All money received by any agency, officer, or employee of the District in its or his official capacity shall belong to the District government and shall be paid promptly to the Mayor for deposit in the appropriate fund. . . .

*See* D.C. Code § 1-204.50; Pub. L. No. 93-198, section 450, 87 Stat. 803 (1973). The Lottery and Charitable Games Fund was established by the Council as a special fund under authority of section 450 of the Home Rule Act. This fund is owned by the District government, and cannot be spent without a congressional appropriation. As the District correctly argues, the lottery contractor must be paid from appropriated funds from the Lottery Fund. As adopted by sections 106 and 134 of the Continuing Appropriations Resolution, 2009, approved September 30, 2008 (Pub. L. 110-329), and further extended by Congress through March 11, 2009, the Fiscal Year 2009 Budget Request Act of 2008, D.C. Act 17-409, effective June 18, 2008, requested an appropriation of \$265,000,000 for the Lottery Fund, of which \$11,225,000 was allocated for the lottery contract. *See, e.g.*, Volume 3, at H-13, of the “FY 2009 Proposed Budget and Financial Plan” that the District submitted to Congress on June 9, 2008. Expenses for the lottery contract have been routinely included in the Lottery Board’s annual budgets in prior years as well. For fiscal year 2008, the Consolidated Appropriations Act, 2008 (Public Law 110-161, 121 Stat. 1844) shows that Congress appropriated \$266,700,000 for the Lottery Fund, of which \$11,312,500.00 was allocated for the lottery contract. *See, e.g.*, Volume 2B, H-15, of the District’s “FY 2008 Proposed Budget and Financial Plan” submitted to Congress on June 7, 2007.

The District cites in further support an opinion by the United States General Accounting Office, dated September 29, 2000, where the GAO held that the District violated the Anti-Deficiency Act by (1) obligating more than Congress appropriated and (2) by using the District of Columbia Fund to pay the District of Columbia Health and Hospitals Public Benefit

Corporation liabilities in excess of the resources ultimately realized. The GAO stated: “The Anti-Deficiency Act . . . prohibits District government officers and employees from making obligations or expenditures in excess of amounts available in an appropriation or fund unless they are otherwise authorized to do so by law. 31 U.S.C. sec. 1341 (1941). Only an appropriation may authorize an obligation and expenditure from the [District’s] General Fund or any other fund.” B-285725, at 6. The reference to “the General Fund or any other fund” shows that every dollar of District government money that is obligated or spent must first be appropriated by Congress, unless Congress has otherwise authorized the obligation or expenditure. The District cites the following examples of the latter kind of authorizations, which do not entail specific numerical appropriations: (1) the acceptance and use of private gifts and donations, made permanent by Section 115 of the District of Columbia Appropriations Act, 2003, approved February 20, 2003, Pub. L. 108-7, 117 Stat. 11, D.C. Code § 1-329.01 and (2) Section 446b of the Home Rule Act, made permanent by Section 808 of the District of Columbia Appropriations Act, 2009, which authorizes the District government to accept and use federal, private, and other grants received by the District government that are not reflected in the budget approved by Congress.

W2I argues that D.C. Code § 3-1311 (enacted in 1981) required an appropriation only for the first year of the Lottery’s operation. Section 3-1311 required the Lottery Board to submit to the Mayor a consolidated budget covering all anticipated income, expenses (including all start-up costs), and capital outlays of the Lottery “which budget shall show the net amount for which it requests an appropriation during its 1st year of operation.” The District responds that this provision is specific to the first budget of the Lottery Board and authorizes an appropriation not only for the Lottery Board’s expenses but also for the net proceeds of the lottery as start-up money to be credited to the Lottery Board Fund and that this does not mean that the Lottery Board needs no later appropriations. The District reasons that together with Congress’ first appropriation, Congress recognized the need for an appropriation to cover the obligation and expenditure of all lottery revenues and D.C. Code § 3-1311 illustrates that for the first year of Lottery Board operations. We agree with the District that this language means there might be appropriations to the Lottery Board beyond the revenues it generates, not that the revenues it generates are exempt from an appropriation.

In sum, under the proposed lottery contract with W2I, the District would expend funds to pay W2I for running the lottery system. This expenditure by the District would be an expenditure of appropriated funds. Accordingly, since the proposed lottery contract with W2I involved an expenditure of appropriated funds, the Mayor was required to submit the proposed lottery contract to the Council for approval pursuant to D.C. Code § 1-204.51. Once the Council voted to disapprove the contract, the contracting officer acted reasonably in cancelling RFP-1 and in determining that the cancellation of RFP-1 was in the District’s best interests.

As an independent basis supporting the cancellation, Exhibit C to the District’s Agency Report, which compares the differences between RFP-1 and RFP-2, identifies a significant number of material differences between RFP-1 and RFP-2 that affect the pricing and delivery of the services. The contracting officer had a compelling basis for cancelling RFP-1 on the basis of the changes reflected in RFP-2.

## CONCLUSION

We have carefully considered the arguments raised by W2I with respect to the cancellation of RFP-1 but conclude that the contracting officer had cogent and compelling bases for cancelling the solicitation because of the Council's disapproval of the proposed contract to W2I and the substantial changes made to the solicitation in the formulation of RFP-2. It was also proper for the contracting officer to begin the procurement process under RFP-2 even though W2I had protested the cancellation of RFP-1. Accordingly, we deny the captioned protests.

## SO ORDERED.

DATED: August 17, 2009

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

CONCURRING:

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