

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
CONTRACT APPEALS BOARD

PROTEST OF

PRISON HEALTH SERVICES, INC.	)	
	)	CAB No. P-610
Under RFP No. 01-CDF99	)	

For the Protester: Lisa L. Hawkins, Esq., Patton Boggs, L.L.P. For the Receiver: David W. Burgett, Esq., Hogan & Hartson, L.L.P.

Opinion by Administrative Judge Matthew S. Watson, with Chief Administrative Judge Lorilyn E. Simkins and Administrative Judge Jonathan D. Zischkau, concurring.

**OPINION ON MOTION TO DISMISS AND ORDER**

On January 28, 2000, Prison Health Services, Inc. (“PHS”) protested against award of a contract by the Receiver for Medical and Mental Health Services for the United States District Court District of Columbia Central Detention Facility [D.C. Jail] (“Receiver”).

On February 16, 2000, the Receiver, by special appearance, filed a Motion to Dismiss for Lack of Subject Matter and Personal Jurisdiction (“Motion”) asserting that “the Receiver is not an agency of the District of Columbia government, and none of the actions complained of by the Protester . . . is a procurement action of a D.C. agency. Accordingly, neither the Receiver nor the subject matter of this . . . protest is subject to the Board’s jurisdiction under the D.C. Procurement Practices Act.” (Motion at 1-2). We deny the motion because we conclude that the court order establishing the Receiver incorporated the protest jurisdiction of this Board under the Procurement Practices Act.

**Background**

The D.C. Jail Health Services receivership was established and the Receiver appointed pursuant to an order of the United States District Court for the District of Columbia dated July 11, 1995 (“Order Appointing Receiver”). *Campbell v. McGruder*, C.A. No. 1462-71 (consolidated with *Inmates of D.C. Jail v. Jackson*, C.A.75-1668). (Motion, Ex. 1). As directed in the Order Appointing Receiver, the Receiver proposed procedures to be followed in implementing the receivership which were approved by the District Court on September 26, 1995 (“Order Regarding Procedures”). *Id.* (Motion, Ex. 2).

For the purposes of this motion, the Board accepts the assertions of the Receiver that the Receiver is not “an agency of the District of Columbia” and that the procurement is not “a procurement action of a D.C. agency.” Nevertheless, the Board finds that the District Court, in

empowering the Receiver, has authorized the Receiver to exercise the authority of the Mayor and Director of the Department of Corrections, subject, except where exempted by the Court, to the same statutory restrictions as apply to exercise of such authority by the Mayor and Director and therefore that this Board has jurisdiction to consider a protest against award of a contract executed by the Receiver.

### **Authority of a Receiver**

"A receiver derives his authority from the act of the court appointing him . . . ." *Consumers United Ins. Co. v. Smith*, 644 A.2d 1328, 1351 (D.C. 1994) (quoting *Union National Bank of Chicago v. Bank of Kansas City*, 136 U.S. 223, 236 (1890)). It follows that the receiver's authority is defined and limited by the orders of the appointing court and it has long been held that a receiver "has only such power and authority as are given him by the court, and must not exceed the prescribed limits." *Davis v. Gray*, 83 U.S. 203, 218 (1862) quoted in *Capitol Terrace, Inc. v. Shannon & Luchs, Inc.*, 564 A.2d 49, 52 (D.C. 1989).

### **Powers Granted to the Receiver by the District Court**

The Order Appointing Receiver ordered "that the Receiver shall have the following powers:

1. All powers currently held by the Mayor . . . .

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3. The power to procure such supplies, equipment or services as are necessary to obtain compliance with this Court's orders, the cost of such contracts to be borne by the defendants.
4. The power to contract for such services as are necessary to obtain compliance with this Court's orders, the cost of such contracts to be borne by the defendants.

(at 8-9).

Recognizing that the initial order required more detail as to the specific authority granted to the Receiver, the Order Appointing Receiver further provided that the Receiver:

shall submit a plan to the Court that contains the procedures for the receiver to exercise these powers. The procedures shall ensure that the receiver shall not be unreasonably impeded in her or his work by District procedures, regulations or laws.

(at 9).

Clearly, the Court did not intend to give the Receiver a blanket exemption from District laws, or the Order would have so stated. The Court directed that the procedures relieve the Receiver only from compliance with such laws which would *unreasonably* impede the Receiver's work.

The plan submitted by the Receiver and approved by the Order Regarding Procedures contains “General Procedures” in Part II and specific procedures governing “Procurement . . .” in Part IV. The specific procurement procedures provide, in part, that:

The Receiver may, consistent with the General Provisions in Part II, and the budget for Jail Health Services referred to in Part V., exercise the contracting authority of the Mayor and the Director of the Department of Corrections. Procurements, for both goods and services, may be paid with regular Department of Corrections funds maintained for the purpose or the funds deposited in the Operating Fund referred to in Part VI., whichever is determined by the Receiver to best facilitate timely procurement.

(at 6).

Section 2 of the referenced Part II of the General Procedures provides:

The Receiver, with the assistance of the liaison and consistent with his obligations under the Court’s orders, shall cooperate in efforts to accomplish all such actions that are necessary to deliver medical and mental health services at the Jail pursuant to and in compliance with applicable District of Columbia law. In the event that the liaison notifies the Receiver that the action cannot be accomplished within the specified time frame, or the Receiver determines after appropriate inquiry that an action cannot be accomplished within the specified time frame, the Receiver may, upon notice specified below, execute the personnel action, procurement or other action and such action shall be binding upon defendants.

(at 3-4).

### **Application of District law to the Receiver’s Authority**

The Motion asserts that, when executing procurement actions, the Receiver is completely exempt from all District procurement law. The Receiver states:

[a]lthough the Order specifies procedural requirements, *e.g.*, notification of the liaison prior to certain actions, there is no requirement that Procurement Practices Act procurement or protest procedures be followed. To the contrary, the Order provides that procurement actions taken under §II.2 are reviewable by the *Court*. Ex.2 §II.3,”

The Receiver thus acts under authority of the Court, not the Department of Corrections. The Receiver’s activities are monitored by the Special Officer on behalf of the Court, and are subject only to the Court’s review and authority. . . . He is not an agent, officer, or employee of the Department or of the District, and is not subject

to their direction, supervision, or control in any fashion or respect. Although the receiver carries out functions which were formerly Department functions . . . , the Receivership is an entity distinct from the Department. The Receiver has no authority to speak or act in the name of the District.

(Motion at 3).

We believe that the Receiver misreads the Court orders. With regard to procurement, the Court did not implement the receivership by transferring the “functions which were formerly Department functions” to the Receiver, but rather permitted the Receiver to “exercise the contracting authority of the Mayor and the Director of the Department of Corrections.” A transfer of functions assumes that the transferee has, or is given, the independent authority to perform the functions. Such authority might have been granted by the Court. The Court, however, did not transfer the procurement functions of the District. The Court merely permitted the Receiver to take action in place of District action, that is, to stand in the shoes of the Mayor and the Director. The authority of the Mayor and Director to take procurement actions is limited by, among other acts, the Procurement Practices Act (“PPA”). D.C. Code §1-1181.1 *et seq.* (1999). In exercising the authority of the Mayor and Director, the Receiver acts on behalf of the District. Contrary to the assertion of the Receiver that “[t]he Receiver has no authority to speak or act in the name of the District” (Motion at 4), the Court provides that a contract executed by the Receiver “shall be binding upon defendants” (Order Regarding Procedures, §II.2, at 4) and that obligations under such contracts “may be paid with regular Department of Corrections funds maintained for the purpose.”<sup>1</sup> (Order Regarding Procedure, §IV.2, at 6; *see also*, Order Appointing Receiver, §2, at 9).

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<sup>1</sup> The District is indeed responsible for every action of the Receiver and his staff, including contract staff. “The District of Columbia shall indemnify the Receiver and all staff hired by the Receiver on personal services contracts to fill positions specified by court orders to the same extent that it indemnifies employees of the District of Columbia government.” (Order Regarding Procedures, §III.2, at 5).

The framework described by the Order Regarding Procedures for procuring necessary supplies and services provides for the Department of Corrections and the Receiver to share responsibility for procurement. The procedures intend that the District government, not the Receiver, be looked to in the first instance to undertake procurement actions. Only in the event that the District cannot accomplish the procurement needs within the Receiver’s required time frame, subject to certain notice requirements, may the Receiver “execute” a procurement action. (Order Regarding Procedure, §II.2, at 3). There is no indication in the Order Regarding Procedure that such authority to “execute” a procurement action is intended to do anything more than insure that the processing of such actions is not delayed<sup>2</sup>

The Court received proposed procedures from the Receiver and incorporated them into the Order Regarding Procedures. (at 1). The authority of the Mayor and the Director of the Department of Corrections referenced in the Order is limited by the Procurement Practices Act which establishes the jurisdiction of this Board to rule on protests of awards. D.C. Code §1-1189.3(1) (1999). By asserting a blanket exemption from all procurement law, the Receiver makes meaningless the criterion for exemption stated in the Order Appointing Receiver, whether particular laws “unreasonably impede” the functioning of the Receiver. The Receiver does not even attempt to argue that the protest jurisdiction of the Board established by the Procurement Practices Act is an unreasonable impediment to his functioning. Such a position would be difficult to maintain. Virtually all District of Columbia and federal agencies are subject to independent protest review. Indeed, procurement actions of the United States District Court itself are subject to the protest jurisdiction of the General Accounting Office.<sup>3</sup> The protest authority and procedures of this Board were patterned on those of the GAO. Further, the Board’s rules provide that a procurement action may continue pending determination by the Board of a protest if the circumstances necessitate proceeding.

Although an entity within the jurisdiction of the Board cannot exempt itself from review of its actions through its own regulations, the Receiver’s failure to adopt his own procurement

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<sup>2</sup> In his Reply Memorandum, the Receiver asserts that “even if Judge Bryant had wished or intended to do so, he could not have created Board jurisdiction where it does not otherwise exist under the PPA.” (at 7). The Court orders do not create the jurisdiction of the Board. The Court has empowered the Receiver to exercise the authority of District officials to execute contracts. Exercise of that authority, pursuant to the PPA, is properly subject to review by the Board. The Special Officer’s Report dated March 15, 2000, and attached to the Reply Memorandum, indicates that the subject contract was executed by the Receiver on January 28, 2000, the same date that the protest was filed with the Board, and took effect without notice to the Board on March 12, 2000. Notwithstanding the requirements of the PPA, D.C. Code §1-1189(c)(2), and Board Rule 304 dealing specifically with award and performance of a contract while a protest is proceeding, none of the four pleadings filed by the Receiver in this matter have referenced these facts.

<sup>3</sup> The Receiver asserts that he is an agent of a federal Court. (Motion at 8) While it is not necessary to determine this question, the Board notes that if such is the case, the Receiver’s procurement actions may also be subject to protest to the GAO whose jurisdiction encompasses “any establishment in . . . the judicial branch.” 4 C.F.R. 21.0(c) (1997).

regulations is inconsistent with his claim that existing procurement law and regulations do not apply to his actions. As a public official, the Receiver may not act in an arbitrary manner, but must consistently apply policies and procedures. Procurement regulations have been recognized as having great weight in governing the relations between public entities and contractors. See, *G. L. Christian and Associates v. U.S.*, 312 F.2d 418, 46-427 (Ct. Cl. 1963). The Receiver has not adopted formal procurement procedures. (Praeipie transmitting Record Supplement filed Feb. 17, 2000, 1).

The Receiver further asserts that, in the Order Regarding Procedure, “procedure is specified for review of procurement actions by the Court” citing §II.3 of the Order Regarding Procedure. (Motion at 8). If the Receiver is asserting that the Protester now before the Board could bring this protest to the Court, the Receiver unreasonably interprets the terms of the Order. Section II.3 of the Order states:

If the Receiver determines to execute the action, as specified in paragraph 2 above, he shall deliver written notice to the parties and the liaison five (5) business days in advance of the proposed action. In emergency situations, as reasonably determined by the Receiver, the notice period may be shortened, but, except in an extraordinary emergency, shall be at least two full business days. Notice shall be provided to defendants by physical delivery directly, or facsimile transmittal with verbal notice by telephone, to the liaison, or, if the liaison is unavailable, to defendants’ designated counsel. The parties may challenge any such action by filing written objections with the Court. The pendency of any objection shall not, in itself, prevent the Receiver from completing the action. Contracts for the procurement of goods or services executed under this paragraph shall contain a clause that provides that the term of the contract will expire if the court so orders. In that event payment will be made only for services performed and goods received prior to the expiration of the contract.

(at 4).

The cited section of the Order clearly deals with rights of parties to the consolidated District Court cases first filed nearly 30 years ago and to the liaison with the Department of Corrections. The only right to review provided is to “parties [who] may challenge any such action by filing written objections with the Court.”<sup>4</sup> Clearly, an entity proposing to provide contract medical services

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<sup>4</sup> It should also be noted that, although the Motion asserts that “[t]he Receiver . . . implemented . . . [the procurement] with the approval of the Special Officer,” (at 5), the Motion contains no allegation that notice was given to the parties or the liaison, the only persons who have standing to object to the Court, nor does it appear that the mandatory contract provision as to termination upon order of the Court was included in the solicitation. Both of these requirements are conditions precedent to the Receiver executing the procurement action and cast into question the validity of any contract which may result from the solicitation.

Absent clear language to the contrary, the Board cannot assume that the Court intended to deprive prospective contractors of any remedy in the nature of a bid protest. The suggestion that “the receiver, and only the Receiver, [makes] the ultimate decision to award the contract,” (Motion at 6), and that the Receiver makes the final decision on a protest against award (Motion at 7), without the possibility of independent review is not consistent with the Order Regarding Procedure and contradicts well-settled Federal and District law and policy in favor of independent review.

The Board finds that the authority of the Receiver granted by the District Court with regard to procurement actions is subject to District of Columbia law, including the PPA. Pursuant to the PPA, and in conformity with the District Court orders, the Board has jurisdiction over the subject matter of this protest and over the Receiver, in his official capacity. The Receiver's Motion to Dismiss for Lack of Subject Matter and Personal Jurisdiction is **DENIED**.

**SO ORDERED**

/s/  
MATTHEW S. WATSON  
Administrative Judge

/s/  
LORILYN E. SIMKINS  
Chief Administrative Judge

JONATHAN D. ZISCHKAU  
Administrative Judge