

**COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE OF THE WHOLE
COMMITTEE REPORT**

1350 Pennsylvania Avenue, NW, Washington, DC 20004

DRAFT

TO: All Councilmembers

FROM: Chairman Phil Mendelson
Committee of the Whole

DATE: June 21, 2016

SUBJECT: Report on Bill 21-334, the “Procurement Integrity, Transparency, and Accountability Amendment Act of 2016”

The Committee of the Whole, to which Bill 21-334, the “Procurement Integrity, Transparency, and Accountability Amendment Act of 2016” was referred, reports favorably thereon with amendments, and recommends approval by the Council.

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I. BACKGROUND AND NEED

On September 16, 2015, Bill 21-334, the “Procurement Integrity, Transparency, and Accountability Amendment Act of 2016” was introduced by Chairman Phil Mendelson. Bill 21-334 would make a number of changes to the Procurement Practices Reform Act of 2010 (PPRA) and other District laws related to contracting and procurement to strengthen the integrity of the procurement process, increase transparency of procurements and contracts for the benefit of decision-makers and the public, and provide for increased accountability in soliciting and administering contracts.

On September 20, 2015, the “Procurement Practices Reform Amendment Act of 2015” was introduced by Chairman Phil Mendelson at the request of the Mayor. Bill 21-397 would also make several changes to the PPRA, some of which the Committee agrees would streamline the procurement process, but a number of which would erode the Council’s authority over contracting and procurement matters in the District. Bill 21-334 includes many of the provision

of the legislation as introduced, certain provisions contained in Bill 21-397, and a number of additional provisions created as a result of feedback and the hearing process.

In 2010, the Council passed the PPRA which repealed the procurement laws in effect at the time and replaced it with a new body of law. Before enactment of the PPRA, the District's procurement laws had not been comprehensively updated since 1985. The purpose of Bill 21-334 is to provide comprehensive updates based on the District's experience under the current law, and to add new provisions that will ensure integrity, transparency, and accountability in the procurement process.

Department of General Services and Construction Contracts

The Department of General Services (DGS) is the agency responsible for management of the District's real estate portfolio including management, maintenance, and security for District-owned properties. Importantly, DGS is the implementing agency for District of Columbia Public School facilities modernization with a budget of almost \$400 million in Fiscal Year 2017. Unfortunately, problems with contracting at DGS have been myriad. A 2015 report by the District of Columbia Auditor found, with regard to school modernization, that the program has failed to comply with law and lacks accountability, transparency and basic financial management. School modernization is run through a contract with DC Partners for the Revitalization of Education Projects, LLC which performs overall day-to-day management of each construction contract for renovation and stabilization of the District's schools.¹

As introduced, Bill 21-334 would have removed the independent procurement authority of DGS, reverting authority back to the Office of Contracting and Procurement (OCP) and the Chief Procurement Officer (CPO). The Committee Print instead recommends that independent authority remain for DGS, but clarifies that the CPO may review and monitor procurements – including construction contracts – by any agency. OCP and the CPO have a unique set of skills allowing it to monitor procurements already through its Office of Procurement Integrity and Compliance. The Committee Print also recommends addition of language in DGS's enabling legislation to clarify that certain DGS programs may not use contractors to make decisions which bind the District, oversee District employees, or make determinations on District spending. This will ensure that contractors provide a supportive role to the District and do not supplant the authority of District officials.

Bill 21-334 also contains a provision that would require detailed cost estimates of construction projects for all agencies, including DGS. The DC Municipal Regulations (DCMR) currently contain such a rule for construction projects,² but the rule does not apply to DGS. Instead, DGS has promulgated regulations requiring only “market research.”³ That rule details how market research can be used for cost estimation, with one method allowing DGS to “solicit information from prospective sources on matters such as their interest in the potential procurement, the characteristics and costs of their products or services, their customary practices,

¹ Auditor Report

² 27 DCMR Chapter 26.

³ 27 DCMR Chapter 47.

and their knowledge of the industry generally.” This essentially allows DGS to create a cost estimate by relying on potential design-builders – who may ultimately be involved in the construction – to create a cost estimate when they may be the ones later bidding.

Lack of reliable cost estimates for construction projects in the school modernization program has been cited as a problem by the District of Columbia Auditor (Auditor). A report by the Auditor on the modernization of the Duke Ellington School for the Arts recounted that the original cost estimate for Ellington in fiscal year 2012 was \$71 million. According to that report, that estimate was based on “internal cost estimates for all high schools” provided by a third-party contractor – the DC Partners for the Revitalization of Education Projects (DC PEP). The estimate assumed that Ellington would have a population of 500 students and a final size of 167,500 square feet. However, later, more accurate estimates taking into account the actual population and square footage increased the Ellington modernization cost to \$178.2 million. The Auditor uncovered documentation acknowledging that “the initial assumption was for a renovation project comparable to [Woodrow] Wilson [Senior High School].” Moreover, DC PEP had “no real comparable schools to model the budget from.”⁴

To address the issue of poor cost estimation for projects, Bill 21-334 codifies language similar to the current non-DGS construction cost estimation rules in the DCMR. The new provision would require that, for all construction contracts, an “estimate shall be prepared in detail, as though the District were competing for the contract, and shall not be based solely on the estimates or actual costs of similar construction projects.” As introduced, Bill 21-334 required such an estimate for any project anticipated to exceed \$10,000 – the current DCMR threshold dating to 1988. Based on testimony from the Executive, the Committee Print raises the threshold to \$100,000.

Finally, with regard to construction contracts, the Committee Print adds a new requirement that most construction projects with an anticipated value of \$50 million or more include a project labor agreement (PLA) between project contractors and subcontractors. PLAs have been used on certain past high-profile construction projects including the Convention Center hotel, the Nationals Ballpark, and the Soccer Stadium. The Committee believes that PLAs are an effective tool for protecting the interests of the District interests, working conditions for labor, and management protections for prime contractors to set forth procedures to resolve labor disputes arising under the contract. The new PLA requirement can be waived by the Mayor on a project-by-project basis, upon a determination that the construction project would be contrary to the interest of the District. Testimony at the hearing on Bill 21-334 suggested that offerors committing to a PLA be given additional points in the source selection process.⁵ While such a provision would encourage the use of PLAs, it could become an overly-burdensome complicating factor in the evaluation process. Instead, the Committee Print would set inclusion of a PLA as a baseline for most large-scale construction projects in the District.

⁴ Ellington Report p. 9.

⁵ See testimony of Stephen W. Courtien, Community Hub for Opportunities in Construction Employment.

Strengthening Council Review of Contracts

The Council's power to review all contracts represents one of the most important tools to oversee the expenditure of District funds by the Executive. The Home Rule Act requires that any contract worth over \$1 million in a single year or any multiyear contract be approved by the Council. The vast majority of contracts sent to the Council for review are those exceeding \$1 million, requiring only a 10-day passive review. Multiyear contracts require active review by the Council. The Council has very rarely moved to disapprove a contract. Nevertheless, the opportunity for review is one of the most meaningful oversight mechanisms available to the Council, allowing the Council to have questions answered by Executive on the details of any given contract. By law, Council approval of the base period of a contract is explicitly not considered to constitute approval of any option year contemplated under the contract. Thus, each modification to exercise an option period must undergo the same Council review.

Bill 21-397, as proposed by the Mayor, seeks to limit the Council's review of option periods by purporting to allow approval of the base year to constitute approval of the option periods. Even with the amendment proposed, the Council's General Counsel has taken the view that waiving Council review of option periods is not legally sufficient. Beyond the legal question, there are overarching policy concerns with waiving Council review. Council review of option periods was important enough to add clarifying language in the District's procurement law explicitly stating that base period approval does not constitute option period approval.⁶ For these reasons, the Committee Print does not include the exemption from Council review of option periods as requested by the Mayor. However, the Committee does recognize the significant work required of the Executive to prepare a Council contract package, including for option periods where most of the verifications and certifications are duplicative of the work done for the base period package. Therefore, the Committee Print adds an alternative Council contract summary package for option periods allowing the executive to submit only the modification document exercising the option period, and a streamlined Council summary. The intent is that the Executive would transmit only the modification document exercising option period, and a short – likely one page – summary.

Bill 21-397 also contained a provision that would allow a check of the Citywide Clean Hands Database to verify that a vendor is in compliance with its District taxes. Current law requires a manual records search and certification by the Office of Tax and Revenue. The Committee Print adopts this provision. The Committee notes its initial reluctance to substituting a clean hands check due to certain limitations of the database. However, the Office of the Chief Financial Officer plans to undertake the Clean Hands Administrative Initiative that will now include a check for missing withholding tax returns.⁷ The Committee Print also includes a provision from the Mayor's bill to allow execution a contract with a vendor that has a *de minimus* tax delinquency of up to \$25,000, provided that the amount of the delinquency is recouped by offsetting the delinquency with reduced any payment by the District.

The Committee Print also contains a number of provisions that will give the Council additional information on proposed contracts to assist in its review function. Currently, any

⁶ Section 1090 of D.C. Law 18-111

⁷ FY 2017 Proposed Budget and Financial Plan, Budget Books – Mayor Submission p. 3-21.

contract submitted to the Council for review is accompanied by a Council contract summary containing ten items including the name of the contractor and contract amount, a description of the goods or services to be provided, the selection process, and compliance certifications with several laws. The bill as introduced adds several new categories of information to the Council summary, and the Committee Print adds additional new items. The additional summary is focused mainly on information on option periods, letter contracts, bid protests, past reports on the contractor, additional subcontracting information, and past spending on the contract before Council review.

In addition the Committee Print requires a new, more detailed, contract summary for any contract submitted to the Council for approval after the effective date of the contract. These are generally referred to as retroactive contracts. There are two categories of retroactive contracts: those that come to the Council because of aggregate changes in the contract over \$1 million, and those that come to the Council because the contract was originally executed for under \$1 million, but subsequently had modifications or change orders that raise the value above \$1 million, requiring Council review. These are considered retroactive actions because approval of the contract is sought after the beginning of the period of performance. Unlike a letter contract or emergency contract, whereby a contract entered into and later definitized through Council action, merging the letter contract with the final contract, retroactive contracts represent changes to a definitized contract necessitating Council review. Finally, the Committee Print would require that retroactive contracts be referred to the Inspector General who may elect to investigate the contract for any waste, fraud, abuse, or mismanagement underlying the retroactive action.

Contracting Out of District Government Functions

The PPRA includes a framework for consideration of contracts that would contract out services currently performed by the District government with government employees. Such “Privatization contracts” are defined as contracts “by which the District government enters into an agreement with a person who is not part of the District government to provide a good or service to or on behalf of the District government that is being provided by a District government agency or instrumentality.”

Under existing law, to enter into a privatization contract, a contracting officer must issue a determination and findings that provides the estimated cost of the services, demonstrates 5% savings over performing the work in-house, describes the impact on quality of services, and includes a “written confirmation of review” by the Office of the Chief Financial Officer and the Office of the Attorney General. The law then provides that if a privatization contract moves forward, the contract awardee must offer displaced employees a right of first refusal to employment under the contract subject to certain criteria, and the District must assist displaced workers not working under the contract with finding alternative employment either in the government or private sector.

Implementation of the PPRA also removed provisions of the previous procurement law that required periodic reviews by the Auditor of actual cost savings under privatization contracts, and if the contract is not meeting the savings goal, issue recommendations to the Mayor and Council on whether the functions could be better performed by District government employees.

Studies of contracting out at the federal government level have concluded that, in fact, most contracts for services cost the same or more than if government employees provide the services in house – it is rarely cheaper to contract out or privatize. The Committee agrees with strong additional requirements for contracts that could cost District government employees their jobs as both a matter of fairness and a matter of economy. Therefore, the bill as introduced, and the Committee Print, recommend strengthening the privatization contract requirements. The section strengthens the current PPRA by incorporating certain aspects of California's privatization law, identified as a responsible approach for service contracting by the American Federation of State, County and Municipal Employees (AFSCME),⁸ and restoration of the Auditor's periodic review.

The Committee Print therefore sets as a baseline that a privatization contract (1) cannot displace District government employees except through an exception after a rigorous review process, (2) must provide a significant economic advantage over using District employees, (3) that the economic advantage must not outweighed by the public's interest in having the function performed by the government, (4) must be awarded only through a competitive process, and (5) must include specific provision pertaining to the qualifications of staff performing work under the contract including hiring practices that meet all District standards. Before soliciting a privatization contract, the District must issue a determination and findings demonstrating the at least a 5% cost savings taking into account personal and nonpersonal services costs and overhead. The savings must be reviewed and analyzed by the OCFO, and the analysis forwarded to the Council with any privatization contract. If a contract that displaces workers is solicited, the government workers, or a representative, can bid on the contract as either a private entity or as government employees. The Committee Print differs from the introduced bill on this point in clarifying when such a bid should be accepted by the District and how the District may assist the employees in formulating their bids. Finally, if a contract displacing workers is solicited, first rights of refusal for employment under the contract must be offered to affected employees, and the contract must incorporate specific performance standards for contract workers and periodic reporting on the contractors' meeting those standards. Finally, as stated above, the Committee Print, as with the introduced bill, restores the Auditor's review and reporting of cost savings compliance.

Inherently Governmental Functions

A longstanding tenet of federal contracting regulation and law is that taxpayers may receive more value for their dollars if certain commercial activities can be performed by the private sector because of the forces of private competition.⁹ However, to maintain management control and accountability, federal regulations and laws define certain services that are not appropriate to contract out, known as inherently governmental functions, and a class of functions that are closely associated with inherently governmental functions, that require increased

⁸<http://www.afscme.org/issues/privatization/resources/power-tools-for-fighting-privatization/legislative-approaches-to-responsible-contracting>

⁹ Presidential Memorandum for the Heads of Executive Departments and Agencies. Subject: Government Contracting. March 4, 2009. <https://www.whitehouse.gov/the-press-office/memorandum-heads-executive-departments-and-agencies-subject-government-contracting>.

oversight on the part of the government.¹⁰ The first law to codify this concept was the Federal Activities Inventory Reform (FAIR) Act of 1998¹¹ which defined inherently governmental function as “a function that is so intimately related to the public interest as to require performance by Federal Government employees.”

A 2007 Government Accountability Office (GAO) report on the Department of Homeland Security’s management of service contracts found that “The closer contractor services come to supporting inherently governmental functions, the greater the risk of their influencing the government’s control over and accountability for decisions that may be based, in part, on contractor work. This may result in decisions that are not in the best interest of the government, and may increase vulnerability to waste, fraud, or abuse.”¹² The report found that several programs under the Department of Homeland Security, including the Coast Guard’s use of a contractor to manage planning and development of its new fleet of vessels, were functions that were closely related to inherently governmental functions, but which did not receive greater oversight.¹³ A 2007 report by a Federal Acquisition Advisory Panel cautioned against the use of such contracts: “While in the short run such contracts may appear to be the best—or at least the simplest—way for an agency to implement a particular project or program, they can have serious adverse consequences in the long run. Such consequences include the loss of institutional memory, the inability to be certain whether the contractor is properly performing the specified work at a proper price, and the inability to be sure that decisions are being made in the public interest rather than in the interest of the contractors performing the work.”¹⁴

Council oversight has also shed light on some District contract that appear to task contractors with functions closely related to inherently governmental, if not inherently governmental. This report earlier touched on the DC PEP contract with DGS for school modernization. That contract was first put in place in fiscal year 2008 to bring in outside expertise to manage the Office of Public Education Facilities Management’s portfolio of school renovations. The original contract’s Council Summary described DC PEP’s role as “providing day-to-day program management services” for various projects including the schools Master Facilities Plan. That contract has continued through several option years and a new base contract, and is currently valued at over \$10 million, supporting approximately 25 employees. A 2015 report by the DC Auditor comprehensively reviewed with the school modernization program’s compliance with laws and basic financial management which examined payments. In examining the relationship between DGS and DC PEP, the report notes:

“Our review of the recommendations for payment that DGS received from DC PEP has demonstrated troubling concerns with regards to the District’s contract with DC PEP. Over the course of the audit, we noted that DC PEP plays a substantial role in the selection of the contractors that design and build the

¹⁰ Office of Federal Procurement Policy (OFPP) Policy Letter 11–01, Performance of Inherently Governmental and Critical Functions (Federal Register /Vol. 76, No. 176 /Monday, September 12, 2011)

¹¹ PUBLIC LAW 105–270—OCT. 19, 1998

¹² GAO-07-990 DHS Services Contracting p. 9.

¹³ *Id* at 3.

¹⁴ REPORT OF THE ACQUISITION ADVISORY PANEL to the Office of Federal Procurement Policy and the United States Congress, January 2007. p. 399

District's schools. Furthermore, we found that the DGS employee in charge of contracting for the school modernization program was unfamiliar with the basic terminology and accounting practices one would expect of an individual overseeing construction contracts of this magnitude.

When reviewed as a whole, it would appear that the District government has relinquished at least some of its responsibilities to its private contractors. In researching how DGS should assess whether to continue with the privatization of the District's school modernization program, we noted that both the GAO and District government have guidelines for determining when to contract out government functions."

While it is true that the District currently has statutory guidelines regarding contracting out, the guidelines are focused on privatization contracts. The DC PEP contract also predates the current law, and even if it did not, DC PEP performs enhanced work for the government rather than supplanting previous government workers, which is the focus of a privatization contract.

Another contract that has received Council attention is the Department of Human Service's management contract with The Community Partnership for the Prevention of Homelessness (TCP) Continuum of Care. Since 1993, TCP, a 501(c)(3) non-profit organization, has managed the District's homeless services on behalf of the Department and the District. TCP is a prime contractor of the District that in turn awards and manages various subcontracts, including one to itself. Again, the DC Auditor conducted a review of the management of this contract covering fiscal year 2014. In relation to several actions by TCP, the report found that they were "example[s] of TCP independently making a program spending decision, and one that did not reflect DHS' program expectations on how funds were to be spent. This was allowed to happen because DHS was not conducting proper oversight of TCP, knowing that TCP was managing itself." The report concluded thusly: "We found that the Department of Human Services (DHS) did not conduct adequate oversight of The Community Partnership for the Prevention of Homelessness (TCP) Continuum of Care management contract."

Both of these contracts seem to include functions that under the federal statute would be or approach inherently governmental work, including: (1) binding the government to take or not to take some action by contract, policy or regulation, and (2) exerting the ultimate control over the acquisition or use of property, real or personal, including the control or disbursement of appropriated government funds.¹⁵ Given these examples of contracts with identified serious deficiencies in oversight by the District, the Committee recommends adopting standards for performance of inherently governmental functions consistent with the framework implemented by the federal government. The body of research and oversight with regard to the issue, including the GAO, overwhelmingly points to the dangers of losing management control and the benefits of better oversight by limiting performance of inherently governmental functions.

The Committee Print includes a definitions for "inherently governmental functions" and "functions closely associated with inherently governmental functions" consistent with the federal

¹⁵ FAIR Act § 5(2)(b).

definitions. As introduced, the bill included a very specific, detailed list of functions that would be considered inherently government based on the functions identified in the Federal Acquisition Regulations. However, at the request of the Executive, the Committee Print instead provides broad guidance on defining functions, but still consistent with the definitions in FAIR Act. The guiding factors for in the federal definition of inherently governmental function are (1) binding the District, (2) directing District government employees, and (3) controlling acquisition and use of property, including disbursement of District funds. The Committee Print goes a step further by including certain procurement-related activities such as awarding and terminating contracts. The Committee Print also directs the Mayor to promulgate rules providing guidance on determining whether functions are inherently governmental or closely associated with inherently governmental.

In addition to providing guidance on defining these functions, the Committee Print goes on to prohibit the District from entering into a contract to provide a service that is inherently governmental. The Committee Print does allow contractors to perform work that is closely associated with inherently governmental functions, only if the agency head institutes additional management controls and oversight of the contract, including ensuring government employee supervision of contractors, and addressing any potential organizational conflicts of interest.

The Committee Print also includes a phased in approach for compliance with the new inherently governmental law. This is important because the Committee understands that there are many contracts, including those discussed in this report that could be affected by the new policy. The Committee Print would allow any contract in place as of the effective date of Bill 21-344 to continue. In addition, any option year that was contemplated in a contract currently in effect could be exercised without the need to comply with the new rules. The Committee expects that the new policy would be in place for any new contracts solicited by the District. However, that should not preclude the District from modifying or renegotiating existing contracts or option years to ensure compliance so that better management controls can be put in place sooner rather than later. The Committee Print does, however, time-limit the phase-in for five years, requiring full compliance thereafter for any contract, regardless of whether it is a continuation of an existing contract.

Accountability for Contractors

While there are better policies and controls that can be put in place as part of the contracting process to protect the effectiveness, efficiency, and economy of the District and taxpayer dollars spent on contracts, there is also more than can be done on the part of the District to make it an attractive customer for contractors. Time and again, the Committee has heard that there are frustrations on the part of contractors and subcontractors doing work with the District. Some of these could be addressed through better customer service and communication with vendors. The District could also do more to require protections for subcontractors that do not do business directly with the District, but with its prime contractors.

The Committee Print would establish an Ombudsman for Contracting and Procurement within the Office of Contracting and Procurement, and would require agencies exempt from the authority of the CPO to designate Agency Ombudsmen for Contracting and Procurement. The

introduced version of the bill required a fully-centralized Ombudsman for all agencies housed at OCP, and would have required the Ombudsman to be appointed independently by the Mayor after conferring with various stakeholders. The Committee Print establishes the Ombudsman as a direct-report to the CPO, and provides flexibility for exempt agencies to appoint their own Agency Ombudsmen to address agency-specific concerns.

The purpose of an Ombudsman is to provide a one-stop-shop for complaints, concerns, and possible resolution of the gambit of issues related to District contracting. For current prime contractors and subcontractors, this office could serve as a means of communicating broader concerns with its experience doing business with the District, not necessarily something that would be the concern of individual contracting officers administering a contract. This also serves as a check on a contracting officer or other staff when a contractor feels that it is not receiving resolution on an issue. This could include seeking to informally work out a dispute before it rises to the level of an appeal of a contracting officers' decision to the Contract Appeals Board or further litigation. The office can also serve as a resource for potential contractors that have questions about doing business with the District and eliciting feedback from the vendor community. The Committee Print includes less prescriptive functions for the office based on feedback from OCP which already has a customer care center that provides some of the resources envisioned for the Ombudsman. It is the Committee's intent that such an office be formalized as the Ombudsman. In addition, exempt agencies should also designate existing customer service oriented staff to be an Ombudsman to create uniformity across agencies and also create opportunities for sharing of resources and best practices across the procurement Ombudsman community.


The Committee has also focused on ways to improve the procurement environment for subcontractors. By law and practice, federal, state, and municipal governments have a so-called privity of contract only with a prime contractor, and not with any subcontractors. That is to say that a contract between the District and a prime contractor does not then confer rights or impose obligations between the District and any subcontractors working under the contract. While this is no legal relationship between the District and subcontractors, there are policies and laws put in place by the District designed to provide protections for subcontractors. For example, under current law, for a construction contract with the District, a prime-contractor must obtain a surety bond known as a payment bond that can provide payment to a subcontractor under certain circumstances when a prime contractor has not paid a subcontractor. District law also has certain common contract clauses that bind a contractor to perform certain duties as part of the contract, including prompt payment to subcontractors.

As introduced, Bill 21-334 would have extended the requirement for a payment bond for non-construction contracts to ensure that service-based subcontractors also have guaranteed payment. However, the Committee heard convincing testimony that such a payment bond is very uncommon outside of construction and would moreover reduce competition by limiting the pool of prime contractors that could finance such a bond. This could have an impact on the same small and local certified business enterprises that the provision was seeking to protect. Instead, the Committee Print requires the CPO to issue rules to allow various bond types for non-construction contracts in cases where such surety makes sense.

The Committee also received testimony related to bonds for construction projects where the current requirements in the PPRA make it difficult for a small, non-profit builder to obtain the necessary surety, in turn making it difficult for such a builder to do business with the District. The Committee Print therefore allows additional flexibility for certain small, non-profit licensed general contractors to put up alternative security in the form of a letter of credit. This is necessary because the payment and performance bonds required of most general contractors require the contractor to have access to significant capital to back the surety. The non-profit contractor, which is currently engage with building affordable housing units for the District, would not have access to the capital needed to obtain traditional surety.

The Committee Print also contains additional provisions not included in the bill as introduced designed to strengthen quick payment requirements and provide additional protections for contractors and subcontractors related to change orders by the District. Testimony at the hearing suggested that the legislation require more timely payment by prime contractors to subcontractors and clarify interest penalty charges. Some testimony also suggested better controls around change orders and additional work ordered by the District. Currently, a contracting officer may order additional work through a notice to a vendor. A copy of such a notice, obtained by the Committee, shows that a contracting officer may order additional work that is undisputedly “Disputed Work,” providing no guarantee that the additional work will ever be funded by the District until after the work is done. Requiring work based on a unilateral directive by a contracting officer with no funding certifications or agreement by the parties puts vendors in a precarious position of wanting to continue working with the District all the while not knowing if or when they will get paid.

Figure 1: Sample Additional Work Letter from DGS to Vendors

<p style="text-align: center;">GOVERNMENT OF THE DISTRICT OF COLUMBIA DEPARTMENT OF GENERAL SERVICES</p> <p style="text-align: center;"></p> <p>Contracts & Procurement Division</p> <p>[DATE]</p> <p>By Electronic Mail</p> <p>[NAME] [TITLE] [COMPANY] [ADDRESS] [ADDRESS] [EMAIL ADDRESS]</p> <p>Reference: Agreement for [PROJECT NAME] (Contract Number: XXXXXXXXXXXX)</p> <p>Subject: Directive XXX</p> <p>Dear [NAME]:</p> <p>We refer to the discussions between our representatives regarding [SCOPE AND PROJECT] as outlined on Exhibit A (the “Disputed Work”), including, but not limited to, [SPECIFIC SCOPE IN QUESTION]. The Department is currently evaluating whether the Disputed Work is outside the scope of [CONTRACTOR] (“Contractor”) current scope of work and accordingly, and whether such work is a change. However, we believe that this work must be released immediately in order to maintain the project schedule. Accordingly, Contractor is hereby directed to proceed with the Disputed Work on a price and entitlement to be determined later basis. The terms of this directive are as follows:</p> <ol style="list-style-type: none">Scope of Work. Contractor is hereby directed to proceed with the work outlined in Exhibit A (the “Disputed Work”).Schedule. The Substantial Completion remains unchanged. The Disputed Work must be completed by the applicable Substantial Completion Date. <p>2000 14th Street, NW 8th Floor • Washington, DC 20009 • Telephone (202) 727-2800 • Fax (202) 727-7283</p>	<p>[NAME] [DATE] Page 2</p> <ol style="list-style-type: none">Price Proposal. We are in receipt of the price proposal for the Disputed Work, a copy of which is attached hereto as Exhibit A. Once we complete our review, we will advise of our findings. In the event we are unable to reach agreement on entitlement and/or a final price for the Disputed Work, the dispute shall be addressed and the GMP shall be adjusted in accordance with the applicable contract provisions.Net-to-Exceed Amount. The limit of this authorization is [AMOUNT]. In no event shall Contractor be entitled to recover more than this amount for the performance of the work authorized hereby unless authorized in advance and in writing by the Department of General Service’s contracting officer. <p>Should you have any questions or wish to discuss this matter further, please feel free to contact [NAME AND PHONE NUMBER]</p> <p>Sincerely,</p> <p>[NAME] Contracting Officer</p> <p>2000 14th Street, NW 8th Floor • Washington, DC 20009 • Telephone (202) 727-2800 • Fax (202) 727-7283</p>
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To address these issues, first, the Committee Print would require payment by a contractor to a subcontractor within 30 days of the completion of the work instead of the current 60 days allowed. In addition, the Committee Print would set a base interest charge of 1.5% instead of leaving all discretion to the executive which is in current law.

The Committee Print also requires a new common contract clause in all contracts to prohibit the District or a prime contractor from requiring additional work from a prime contractor or subcontractor unless the parties have already agreed to a price for the additional work, the OCFO has issued a funding certification, the contracting officer has made a written, binding commitment to pay for the work within 30 days of invoice and notice of such certification and written commitment has been furnished to the prime contractor. The new clause would allow a prime contractor or subcontractor to stop work without penalty if the District fails to make a binding commitment. In addition, the clause would bind the prime contractor to have in its contract with a subcontractor a requirement that the prime contractor provide a subcontractor a copy of the approved amount resulting from the written commitment, pay the subcontractor within 10 days of receipt of payment by the prime contractor, and provide notice to the subcontractor in writing any reasons for withholding of payment. Finally, the clause would prohibit any party from making a claim or pursuing damages for any delays in construction due to the inability of parties to agree on a price for additional work. This provision is based closely on a recently enacted Maryland law.¹⁶

Integrity in Source Selection

As discussed earlier in this report with regard to Council review of contracts, Council disapproval of a contract is extremely rare. The most recent exception came when the Council disapproved a proposed jail healthcare contract with a for-profit provider known as Corizon. The Council contract summary for that contract described Corizon's years of experience and technical abilities to perform services under the contract. In particular, the summary stated "Jurisdictions with inmate populations equal to or greater than that of the District regarded their services as excellent, instilling confidence in DOC that this is the right choice for the future of their inmates [sic] medical care." This description was in stark contrast to the hundreds of calls and emails received by Councilmembers expressing concern over the past performance of Corizon in other jurisdictions. A letter from the American Civil Liberties Union to Chairman Mendelson laid out several cases where Corizon had questionable past performance in other jurisdictions including poor clinical staffing levels in Arizona, willful violation of a contract in New York for failure to provide a safe work environment, death of an inmate after not receiving medication in Vermont, and others. Corizon had also been involved in numerous lawsuits across the country due to concerns over their services.¹⁷

However, the contracting officer evaluated the RFPs submitted under the jail healthcare solicitation only on the basis of price and technical factors. Corizon was found to be 7% more expensive than the next offeror, Unity, and a technical evaluation panel convened to review the

¹⁶ HB 403 (State Procurement Change Order Fairness Act), effective June 1, 2016

¹⁷ CA21-25

offers and determined Corizon was superior. The award was made to Corizon, however Unity appealed this decision to the Contract Appeals Board. OCP then notified CAB that it was taking corrective action and providing another opportunity for both offerors to correct their deficiencies. At this point, OAG suspended its legal sufficiency after concluding that OCP had failed to evaluate past performance of the offerors as required under the RFP. According to the contract summary, the contracting officer obtained about a dozen past performance responses from each offeror's references. "Evaluations received from Unity references denoted across the board 'Good' and in one instance 'Excellent.' Conversely, with Corizon, a review of the references submitted revealed two very strong positive references attesting to excellence in all areas of service." This suggests a somewhat inconsistent *ad hoc* review of past performance, which was only performed after OAG realized that OCP had failed to consider it as a subfactor as required in the RFP during the first several rounds of negotiation and evaluation. Had past performance risen to the level of a primary evaluation factor, and the contracting officer performed any independent analysis of what was provided by hand-picked references, the negative record of Corizon that led to the Council's disapproval may have influenced the contracting officer's independent evaluation.

Under current law, the only criteria that must be evaluated in an RFP is price. However, in practice, most RFPs also have a technical or non-price component, as contemplated under procurement regulations describing rules for technical evaluation.¹⁸ The Committee believes that RFPs must take non-price factors into account in an RFP, especially because the underlying premise of an RFP contemplates non-price factors. In addition, the Committee feels strongly that past performance is an important factor that can look to the past to assess risk to the District. It is such an important factor that the Committee Print would require that each RFP include as an evaluation factor at least price, quality, and past performance of an offeror. In addition, the approach for evaluating past performance would be included in the solicitation, and past performance evaluation would have to be applied consistently to all offerors. The Committee Print is less prescriptive than the bill as introduced, but still retains the overarching requirement that past performance always be evaluated. This principal is also reflected in federal procurement regulations that generally require these same three factors as a baseline.

Both Bill 21-334 and Bill 21-397 contained a provision to better safeguard the integrity of the source selection process by limiting improper contacts between District employees and vendors while a procurement is still active to avoid procurement lobbying. Bill 21-334 would have prohibited a prospective contractor from attempting to improperly influence a District employee or official with respect to source selection. Bill 21-397 went farther by also prohibiting District employees or officials from disclosing confidential information regarding live procurement actions at any public forum. The wording of that provision, particularly the reference to a public forum, seem to be aimed at infringing on the Council's contract review responsibility by seeking to thwart any attempt at holding a public hearing or roundtable on a procurement that has not yet been approved by the Council.

After consultations with the Council's Office of General Counsel, the Committee determined that the proposed underlying language in both bills were problematic. As drafted,

¹⁸ *i.e.* 27 DCMR 1630

both bills would have attempted to generically regulate “attempt[s] to influence” which could include public statements, advertising campaigns, or even any form of speech on the part of a vendor. In addition, there is no bright line as to what may be considered improper influence. Instead, the Committee Print would focus on regulating particular contacts between District officials and vendors. This approach is modelled on a similar approach recently adopted by the State of New York. In general no District employee or official would be allowed to contact any contracting personnel in an effort to influence source selection. While a procurement is “live” – defined in the Committee Print as the restricted period – no bidder or offeror may contact any District employee or official with respect to source selection, except for certain permissible contacts that are incidental to the official source selection process.

The new structure addresses two categories of attempting to improperly influence source selection. First, District employees and officials, to include anyone from the Mayor to a Councilmember to agency staff, should not be contacting a contracting official seeking to substitute their opinion for the professional and unbiased judgement of a contracting official. Second, vendors should not be contacting District employees or officials other than designated contract officials attempting to influence the outcome of a procurement outside of the official process undertaken by contract officials as part of the source selection process. Exceptions, or permissible contacts, are allowed for contacts such as the submission of proposals, submission of questions, participation in demonstrations through official means, negotiations with contracting officials, and any contact with the Contract Appeals Board or any other tribunal of jurisdiction. If a prohibited contact is made, the bid or offer could be rejected. The new structure is easier to enforce and abide by due to clear cut rules and less ambiguity.

Finally, the Committee Print adds a new provision aimed at addressing the perception of a pay-to-play environment between District officials and contractors. There is constant worry a real or perceived conflict of interest when doing work for the District government intersects with source selection and contribution by District vendors to District officials and Councilmembers in a position to influence the award or non-award of a contract. Some have said that the solution to combat such a problem or perceived problem is to take the Council out of the business of reviewing contracts. However, the truth is that the Council has acted on very rare occasion to disagree with a contracting officer’s recommendation to approve a contract. In addition, eliminating Council review would not address the fact that various other actors including the Executive and the Attorney General, play a role in the contracting approval process, and are also in a position to receive campaign contributions. The Committee does not believe that to answer to addressing the appearance of pay-to-play is curtailing the Council’s role. Instead, the Committee believes that the best way to address pay-to-play is for the District to stay out of giving contracts to those who contribute to District campaigns – in other words, stop playing with those who pay.

The Committee Print contains language similar to legislation introduced by Chairman Mendelson in Council Periods 20 and 21 known as the Contractor Pay-to-Play Elimination Amendment Act of 2014 and 2015, respectively. The Committee Print would prohibit the award of a District contract to a person, business, or person closely associated with a business that has made political contributions to covered recipients in the District. Those covered recipients include elected District officials, candidates for elective District office, political committees

affiliated with District candidates or officials, political action committees registered with the Office of Campaign Finance, any District of Columbia political party, any constituent-service program or fund managed by District officials or subordinates, and any other entity which a candidate or public official, or a member of his or her family, controls or has an ownership interest of ten percent or more. The prohibition would expire after a “cooling off” period of one year for a contribution to a District official, candidate, or candidate’s political committee, and eighteen months for a contribution to any other covered recipient.

This structure will eliminate any perception that contributions to *any* elected official could influence the award of a contract because those who contribute will not be eligible to do business with the District. This gives vendors two choices: do business with the District, or exercise their right to support candidates and officials by forgoing the opportunity to do business with the District. The prohibition would not take effect until January 1, 2018, leaving time for any vendors that have made contributions around the time of the effective date of this act to bid on future work so long as they have not contributed.

Transparency in Contracting

Current law requires that the CPO establish and maintain a website that contains publicly-available information regarding District procurements. This must include information on the legal authority and rules governing procurement, the names of all individuals with delegated procurement authority, and a copy of all contracts in excess of \$100,000, including amendments thereto. Agencies exempt from the authority of the CPO are to transmit the information to the CPO so that it may be posted online. In practice, the OCP website has not met the requirements of the law with respect to posting contracts online. Moreover, the information available on <http://ocp.dc.gov> does not reflect contracts from any other agencies – notably DGS.

The bill as introduced and the Committee Print would update the website requirements in the PPRA to make clearer the intent with regard to transparency and what information should be available online. The Committee print would require a single, comprehensive database containing all executed contracts in excess of \$100,000. Agencies not under the authority of the CPO would have to submit the information to OCP for inclusion on the website. Specifically, the database would need to establish a unique identifier for each contract package, a contain (1) a copy of the executed contract; (2) any determinations and findings issue related to the contract; (3) any modifications, change orders, or amendments related to the contract; (4) copies of or links to the underlying solicitation documents; and (5) copies of summary documents sent to the Council. The Committee envisions the database to provide functionality similar to the Council’s own legislative information system that contains records for all legislation, searchable by the legislation’s unique identifier. A similar contract database should contain a unique identifier for all contracts, and each contract record should contain copies or links to all of the information required in the database, and any other information the CPO feels would be helpful to the public.

The Committee Print also adds a requirement that the website include up-to-date information on payments made by the District to prime contractors. The purpose of this addition is to allow the public – specifically subcontractors – to see when a prime contractor is paid by the District which would trigger a timeline for receipt of payment by subcontractors.

Current law also requires that the CPO develop and implement an acquisition planning process. The PPRA required that each agency submit an acquisition plan for the following fiscal year to the Council no later than March 20th of each year. Since implementation of the PPRA, the Executive has not met this requirement. However, in 2015, OCP for the first time released a comprehensive acquisition plan that identified thousands of upcoming procurements, including 300 large and mission-critical procurements that OCP is managing. This largely reflects the new requirement in the bill as introduced and the Committee Print for a comprehensive acquisition plan. However, more information is needed by the Council during budget formulation that cannot wait for completion of the comprehensive plan. Therefore, the Committee Print would require that each agency submit a summary of planned contracts for an upcoming fiscal year during the budget cycle. Most agency fiscal officers do make available to Council committees during budget formulation a list of anticipated contracts, upon request. This modified requirement would align the PPRA to what is currently available in a standardized process.

Miscellaneous Provisions

The Committee Print includes several minor provisions to address issues in the PPRA. First, the Committee Print would clarify that certain contracts for payments related to facilities costs in certain developments are not subject to the PPRA. This is in response to an issue identified by the Deputy Mayor for Planning and Economic Development, whereby the District disposed of a parcel of public land to a private developer. Part of the development agreement was that the developer would build a new fire station for the District as part of the site. It has now come to the Executive's attention that it does not have clear authority to pay for facilities costs, including shared HVAC and utility costs, directly to the building owners on a non-competitive basis.

The Committee Print includes a provision clarifying the discretion of the Contract Appeals Board with respect to questioning the judgement of an agency. This recommendation comes from the Office of the Attorney General after consultation with the Contract Appeals Board based on a recent DC Superior Court opinion.

Finally, the Committee Print contains a clarification with regard to rulemaking authority. Under current law,¹⁹ the CPO has authority to promulgate rules under the PPRA, except that the head of the Department of Real Estate Services makes rules for construction contracts under Title VI of the act. This is problematic, first because the functions of the Department of Real Estate Services has since been subsumed by the Department of General Services. Second, there are many construction contracts at OCP-covered agencies, notably the District Department of Transportation. Therefore, the Committee Print includes a clarification the CPO has authority to promulgate rules, with an exception for DGS to promulgate rules for construction projects only under its purview.

¹⁹ PPRA § 1106

Conclusion

Bill 21-334 and the Committee Print contain important updates to the PPRA and other District laws to improve the integrity of the procurement process, increase transparency in the spending of taxpayer dollars on goods and services, and ensure accountability for the District and vendors. The Committee therefore recommends approval of Bill 21-334 as reflected in the Committee Print.

II. LEGISLATIVE CHRONOLOGY

- | | |
|--------------------|---|
| September 16, 2015 | Bill 21-334, the “Procurement Integrity, Transparency, and Accountability Amendment Act of 2015” is introduced by Chairman Mendelson. |
| September 22, 2015 | Bill 21-397, the “Procurement Practices Reform Amendment Act of 2015” is introduced by Chairman Mendelson, at the request of the Mayor. |
| September 22, 2015 | Notice of Intent to Act on Bill 21-334 is published in the <i>District of Columbia Register</i> . |
| October 9, 2015 | Notice of a Public Hearing on Bill 21-334 and Bill 21-397 is published in the <i>District of Columbia Register</i> . |
| November 10, 2015 | The Committee of the Whole holds a public hearing on Bill 21-334 and Bill 21-397. |
| February 16, 2015 | The Committee of the Whole marks-up Bill 21-334. |

III. POSITION OF THE EXECUTIVE

George Schutter, Chief Procurement Officer of the District of Columbia, and Christopher Weaver, Director of the Department of General Services, testified on behalf of the Executive at the Committee’s public hearing on November 10, 2015. Mr. Schutter recognized a shared goal between the Council and the Executive to enact change that will result in good governance and an efficient and transparent procurement process that balances oversight with the ability to execute contracts. He looked forward to working with the Committee to refine Bill 21-334 and Bill 21-397. Mr. Weaver testified to the importance of maintaining contracting and procurement processes that are clear and transparent, but expressed concerns as to provisions of Bill 21-334 that applied to DGS’s contracting and procurement activities. He concluded that there were a number of positive elements or concepts in the bill, but he believed that there were also many elements that, without clarification or modification, may result in unintended negative consequences.

IV. COMMENTS OF ADVISORY NEIGHBORHOOD COMMISSIONS

The Committee received no comments from Advisory Neighborhood Commissions.

V. SUMMARY OF TESTIMONY

The Committee of the Whole held a public hearing on Bill 21-334 on Tuesday, November 10, 2015. The testimony summarized below is from that hearing. Copies of written testimony are attached to this report.

Jos Williams, President, Metropolitan Washington Council, AFL-CIO, stated that Labor supports Bill 21-334 which would provide more protection for works in the DC Government's exercise of potential privatization of government jobs, and by providing an independent mechanism to address complaints and concerns against contractors through the Ombudsman.

Timothy Traylor, President, American Federal of Government Employees, Local 383, testified to the importance of rigorous review and analysis of privatization contracts. His testimony also contained various examples supporting the prohibition of performance of inherently governmental functions by contractors, including the oversight of government employees and of other government contractors.

Tim Butera, Director, Politics and Government Relations, LiUNA! Mid-Atlantic Region, testified in support of Bill 21-334 and recommended additional provisions to emphasize the importance of project labor agreements and compliance with labor and first source laws being included as a weight in the source selection process. During questioning, Mr. Butera also emphasized the importance of Council review of change orders and contract modifications.

Stephen Courtien, Field Representative, Community Hub for Opportunities in Construction Employment (C.H.O.I.C.E.), testified in support of Bill 21-334, and recommended inclusion of a weight for project labor agreements, a focus on labor compliance in examining past performance, and increasing review of subcontractors' safety, wage, and labor compliance.

Andrew Porter, Alliance for Construction Excellence, testified that getting paid for construction work can be difficult in the District, and supported the concept of the Ombudsman. In addition, Mr. Porter suggested that the CPO post online a list of payments made by the District to prime contractors to let subcontractors know when they may be paid.

Sarah Scruggs, Alliance for Construction Excellence, testified in regard to surety and bonding requirements. She testified that her organization, MANNA's, non-profit housing general contractor cannot comply with current bonding requirements put in place in 2010 and the need for an exception to provide a letter of credit for her organization so it could continue developing low income and affordable housing.

Rob Duke, Corporate Counsel, Surety & Fidelity Association of America, testified in support of the service contractor bonding requirements in the bill as introduced but recommended increasing the coverage amount from 35 percent to 100 percent.

Bill Byrd, CEO, Business Promotion Consultants, Inc., made suggestions with regard to privatization contracts, testified to the burden and prospect of reduced competition for compulsory payment bonds for service contracts, and expressed concern over strategic sourcing's impact of small and local businesses.

Fred Coddling, Iron Workers Employers Association, suggested modifying the legislation to require posting of payments to construction prime contractors on the Internet.

Margaret Singleton, Vice President of Contracts and Programs, D.C. Chamber of Commerce, testified in support of an independent Ombudsman, against a compulsory payment bond for service contracts, expressed concern over more stringent requirements for privatization contracts, in support of elimination of Council approval of option years, and in support of *de minimus* delinquent tax allowance.

Roscoe Grant, CEO, Roscoe Grant Enterprises, testified in support of an Ombudsman, in support of faster payments under the Quick Payment Act, and in support of requiring all parties to agree to change order directives.

Ramon Jacobson, Senior Program Officer, Local Initiatives Support Coalition, testified in support of alternative forms of surety and bonding for non-profit general contractors working on affordable housing.

Tim Hampton, Washington Area Community Investment Fund, provided additional background on underwriting loans to non-profits and in support of alternative forms of surety and bonding.

George Schutter, Chief Procurement Officer and Director, Office of Contracting and Procurement, testified on behalf of the Executive. His testimony is summarized in section III above.

Christopher Weaver, Acting Director, Department of General Services, testified on behalf of the Executive. His testimony is summarized in section III above.

The Committee also received the following written testimony:

Bernard Brill, Executive Director, Sheet Metal and Air Conditioning Contractors' Mid-Atlantic Chapter, testified in support of provisions in Bill 21-334 regarding timely payment, more information on the website, including payment information online, and creation of an Ombudsman.

VI. IMPACT ON EXISTING LAW

Bill 21-334 amends several sections of, and adds several new sections to the Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code § 2-351.01 *et seq.*). The bill also makes a change to Section 1027 of the Department of General Services Establishment Act of 2011, effective September 14, 2011 (D.C. Law 19-21; D.C. Official Code § 10-551.07.) to clarify that certain contemplated contract positions working on real estate must comply with new prohibitions on performing inherently governmental functions. The District of Columbia Government Quick Payment Act of 1984, effective March 15, 1985 (D.C. Law 5-164, D.C. Official Code § 2-221.01 *et seq.*) is amended to reduce the time in which a vendor must be paid, and to include a new common contract clause affecting change order directives.

VII. FISCAL IMPACT

The attached June __, 2016 fiscal impact statement from the District's Chief Financial Officer (CFO) states that funds are sufficient in the FY 2016 through FY 2021 budget and financial plan to implement Bill 21-334.

VIII. SECTION-BY-SECTION ANALYSIS

<u>Section 1</u>	States the short title of Bill 21-334.
<u>Section 2</u>	Clarifies that facilities fees for certain District facilities may be paid on a non-competitive basis.
<u>Section 3</u>	Clarifies the role of various agencies with regard to construction contracting, allows the CPO to monitor non-OCP contracts, and clarifies the allowable functions of DGS's Real Estate Representative.
<u>Section 4</u>	Makes several changes to the Council contract summary materials prepared by the Executive and transmitted to the Council for its review.
<u>Section 5</u>	Updates the process for entering into a privatization contract.
<u>Section 6</u>	Creates new policies regarding the performance of inherently governmental functions and those functions closely related by contractors.

<u>Section 7</u>	Establishes an Ombudsman for Contracting and Procurement at OCP and designates individual agency Ombudsmen at OCP-exempt agencies.
<u>Section 8</u>	Allows the District to enter into a contract with a vendor that has <i>de minimus</i> delinquent debt to the District, provided payment is offset by the amount of the debt.
<u>Section 9</u>	Prohibits the District from entering into a contract with individuals and businesses who have made political contributions to District officials, candidates, or political committees.
<u>Section 10</u>	Establishes certain prohibited contacts between contractors and District employees during portions of the procurement lifecycle.
<u>Section 11</u>	Requires evaluation of an offeror's past performance during source selection as a criteria for making an award under a request for proposals.
<u>Section 12</u>	Requires an estimate of construction costs for any construction contract over \$100,000.
<u>Section 13</u>	Allows the CPO to reduce the amount of surety required for certain non-profit general contractors and to require additional surety for service contracts.
<u>Section 14</u>	Directs the Mayor to require a project labor agreement as a part of a solicitation for certain construction projects over a certain threshold.
<u>Section 15</u>	Clarifies the discretion of the Contract Appeals Board to question a determination of an agency's minimum need.
<u>Section 16</u>	Requires additional information be made available on a central procurement website.
<u>Section 17</u>	Requires additional acquisition planning and a summary of planned future agency contracts be submitted to the Council with the budget.
<u>Section 18</u>	Clarifies that the CPO may promulgate rules for the PPRA, except for construction contracts under the purview of DGS.
<u>Section 19</u>	Establishes a new common contract clause prohibiting contractor or subcontract from starting new work unless a change order without written authorization and notification of funding availability.
<u>Section 20</u>	States the applicability of certain sections of the bill.
<u>Section 21</u>	Fiscal Impact Statement.
<u>Section 22</u>	Establishes the effective date by stating the standard 30-day Congressional review language.

IX. COMMITTEE ACTION

On February 16, 2016, the Committee met to consider Bill 21-334, the Closing of Public Streets adjacent to Squares S-603, N-661, 605, 661, 607 and 665, and in U.S. Reservations 243 and 244, S.O. 13-14605, Act of 2015.” The meeting was called to order at 11:24 a.m., and Bill 21-334 was item IV-D on the agenda. After ascertaining a quorum (Chairman Mendelson and Councilmembers Alexander, Allen, Bonds, Cheh, Evans, Grosso, Orange, May, McDuffie, Nadeau, Silverman, and Todd present), Chairman Mendelson moved the print with leave for staff to make technical and conforming changes. After an opportunity for discussion, the vote on the print was unanimous (Chairman Mendelson and Councilmembers Alexander, Allen, Bonds, Cheh, Evans, Grosso, Orange, May, McDuffie, Nadeau, Silverman, and Todd voting aye). The Chairman then moved the report with leave for staff to make technical, conforming, and editorial changes. After an opportunity for discussion, the vote on the report was unanimous (Chairman Mendelson and Councilmembers Alexander, Allen, Bonds, Cheh, Evans, Orange, Grosso May, McDuffie, Nadeau, Silverman, and Todd voting aye). The meeting adjourned at 11:55 a.m.

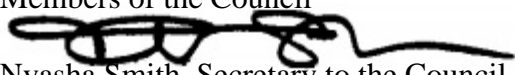
X. ATTACHMENTS

1. Bill 21-334 as introduced.
2. Bill 21-397 as introduced.
3. Written Testimony.
4. Fiscal Impact Statement for Bill 21-334.
5. Legal Sufficiency Determination for Bill 21-334.
6. Comparative Print for Bill 21-334.
7. Committee Print for Bill 21-334.

COUNCIL OF THE DISTRICT OF COLUMBIA
1350 Pennsylvania Avenue, N.W.
Washington D.C. 20004

Memorandum

To : Members of the Council

From :  Nyasha Smith, Secretary to the Council

Date : September 17, 2015

Subject : Referral of Proposed Legislation

Notice is given that the attached proposed legislation was introduced in the Office of the Secretary on Wednesday, September 16, 2015. Copies are available in Room 10, the Legislative Services Division.

TITLE: "Procurement Integrity, Transparency, and Accountability Amendment Act of 2015", B21-0334

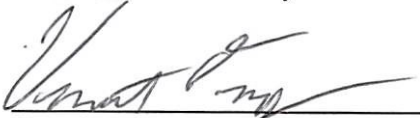
INTRODUCED BY: Chairman Mendelson and Councilmembers Orange, Grosso, Cheh, Bonds, Silverman, and Allen

The Chairman is referring this legislation to the Committee of the Whole with comments from the Committee on Transportation and the Environment.

Attachment

cc: General Counsel
Budget Director
Legislative Services


1 
2 Councilmember Mary Cheh


3 
4
5 Councilmember Vincent Orange

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8 
9 Councilmember David Grosso


Chairman Phil Mendelson


Councilmember Anita Bonds


Councilmember Elissa Silverman


Councilmember Charles Allen

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18 A BILL
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24 IN THE COUNCIL OF THE DISTRICT OF COLUMBIA
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29 Chairman Mendelson introduced the following bill which was _____.

30
31 To amend the Procurement Practices Reform Act of 2010 to modify the procurement authority
32 exemption for the Department of General Services, establish additional transparency in
33 Council contract summaries, amend requirements for the solicitation and award of
34 privatization contracts, establish restrictions on the performance of inherently
35 governmental functions by contractors, establish an Ombudsman for contracting and
36 procurement, prohibit procurement lobbying, establish evaluation criteria related to
37 contractor past performance, require a government cost estimate for construction projects,
38 require payment bonds for service contracts, modify requirements for posting contract
39 information on the Internet, require additional information on acquisition plans, and
40 establish goals for strategic sourcing.

41
42 BE IT ENACTED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this
43 resolution may be cited as the "Procurement Integrity, Transparency, and Accountability
44 Amendment Act of 2015."

Sec. 2. Department of General Services authority clarification

(a) Section 201 of the Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code § 2-351.01 *et seq.*) is amended as follows:

(1) subsection (b)(9) is amended by replacing the phrase “Counsel;” with the phrase “Counsel; and”.

(2) subsection (b)(10) is amended by replacing the phrase “Council; and” with the phrase “Council.”.

(3) subsection (b)(11) is repealed.

(4) subsection (d) is amended to read as follows:

“(e) Except regarding agencies exempted in section 105(c) and 201(b) and roads, bridges, other transportation systems, and facilities and structures appurtenant to roads, bridges, and other transportation systems, the Department of General Services shall have procurement authority for construction and related services under subchapter VI of this chapter, and operations and maintenance of facilities, real estate management, utilities, and security pursuant to section 1023(5) of the Department of General Services Establishment Act of 2011, effective September 14, 2011 (D.C. Law 19-21; D.C. Official Code § 10-551.01 *et seq.*)”.

(5) subsection (e) is amended to read as follows:

“(e) Except as otherwise provided section 105(b), the CPO may review and monitor procurements, including for construction and related services under Title VI, by any agency, instrumentality, employee, or official exempt under this chapter or authorized to procure independently of OCP.”.

(b) Section 1023 of the Department of General Services Establishment Act of 2011, effective September 14, 2011 (D.C. Law 19-21; D.C. Official Code § 10-551.01 *et seq.*) is amended as follows:

(1) Paragraph 5(D) is amended by replacing the phrase “utility contracts;” with the phrase “utility contract; and”.

(2) Paragraph 5(E) is amended by replacing the phrase “security services; and” with the phrase “security services.”.

(3) Paragraph 5(F) is repealed.

Sec. 3. Council review of contracts.

(a) Section 202(c) of the Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code § 2-351.01 *et seq.*), is amended as follows:

(1) Paragraph (1) is amended by replacing the phrase “and type of contract;” with the phrase “type of contract, and the source selection method;”

(2) A new paragraph (1A) is inserted to read as follows:

“(1A) For a contract containing option years, the contract amount for the base year and for each option year, and an explanation of the reasons for differing contract amounts in the options, if the amounts are different;”.

(3) A new paragraph (1B) is inserted to read as follows:

“(1B) If the contract is to definitize a letter contract or a contract on an emergency basis, provide:

“(A) the date on which the letter contract or emergency contract was executed;

88 “(B) how many times the letter contract or emergency contract has been
89 extended; and

90 “(C) the value of the goods and services provided to date under any
91 extension.”.

92 (4) Paragraph (3) is amended to read as follows:

93 “(3)(A) The selection process, including the number of offerors, the evaluation
94 criteria, and the evaluation results, including price, and technical or quality, and past
95 performance components.

96 “(B) If the contract was awarded on a sole source basis, the date on which
97 a competitive procurement for the goods or services to be provided under the contract was last
98 conducted and date of the resulting award, and a detailed explanation of why a competitive
99 procurement is not feasible;

100 (5) A new paragraph (3A) is inserted to read as follows:

101 “(3A) A description of any bid protest and resolution of a protest through either
102 litigation, withdrawal, or corrective action. Such description shall include the identity of any
103 protestor and the grounds alleged in the protest, deficiencies identified in the protest;”.

104 (6) A new paragraph (3B) is inserted to read as follows:

105 “(3B) A summary of any review or reports on the proposed contract, or any
106 previous contract for substantially the same goods or services procured from the same vendor”.

107 (7) Paragraph (4) is amended by replacing the phrase “prior performance on
108 contracts with the District government” with the phrase “performance on past or current
109 government or private sector contracts for efforts similar to the District’s requirement under the
110 proposed contract;”.

111 (8) A new paragraph (4A) is inserted to read as follows:

112 “(4A) A summary of the subcontracting plan required under Section 2346 of the
113 Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005,
114 effective October 20, 2005 (D.C. Law 16-33, § 2301, D.C. Code § 2-218.46).”, including the
115 name of each subcontractor, whether it is a certified local, small, or disadvantaged business
116 enterprise, the percentage of the expected value of the contract to be awarded each subcontractor,
117 and what goods or services each subcontractor will be expected to provide;”.

118 (9) A new paragraph (5A) is inserted to read as follows:

119 “(5A) The amount and date of any funds expended by the District on the contract
120 or option year before submission of the contract to the Council for its review pursuant to section
121 202;”.

122 (10) Paragraph (11) is amended by replacing the phrase “debarment; and” with
123 the phrase “debarment;”.

124 (11) Paragraph (12) is amended to read as follows:

125 “(12) Where the contract, and any amendments or modifications, if executed, will
126 be made available online; and.

127 (12) A new paragraph (13) is inserted to read as follows:

128 “(13) Where the original solicitation, and any amendments or modifications, can
129 be found online.”.

130 (b) A new Section 202(c-1) is added to the Procurement Practices Reform Act of 2010,
131 effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code § 2-351.01 *et seq.*), to read as
132 follows:

133 “(c-1) Proposed changes to the contract scope or amount, including options years,
134 modifications, change orders, or other changes affecting the price of the contract, submitted
135 pursuant to this section after the date of the beginning of the period of performance resulting
136 from the changes, shall include the summary required under subsection (c) and shall also
137 include:

138 “(1) The period of performance for the change, including date on which the
139 change was effective;

140 “(2) The value of any work or services performed during a period of performance
141 for which the Council has not provided approval, disaggregated by each such modification or
142 change if more than one modification or change are being aggregated for Council review;

143 “(3) The aggregate changed contract amount since the original award;

144 “(4) The date on which the contracting officer was notified of the change;

145 “(5) The reason why the change was sent to the Council for approval after the
146 change had been made;

147 “(6) The reason for the change; and

148 “(7) The legal, regulatory, or contractual authority for the change.”

149 (c) A new Section 202(c-2) is added to the Procurement Practices Reform Act of 2010,
150 effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code § 2-351.01 *et seq.*), to read as
151 follows:

152 “(c-2) Any contract submitted to the Council for its review in accordance with
153 subsection (c-1) shall be referred to the Inspector General to examine the contract for possible
154 corruption, mismanagement, waste, fraud, or abuse pursuant to Section 208(a-1)(2) of the

District of Columbia Procurement Practices Act of 1985, effective February 21, 1986 (D.C. Law 6-85; D.C. Official Code § 1-301.115a(a-1)(2)).”.

Sec 4. Privatization contracts.

The Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code § 2-351.01 *et seq.*), is amended as follows:

(1) Section 202(c) is amended as follows:

(A) In paragraph 11, by replacing the phrase “reasons for debarment; and” and replacing it with “reasons for debarment;”.

(B) In paragraph 12, by replacing the phrase “available online.” With “available online; and”

(C) by adding a new paragraph (11A) to read as follows:

“(11A) Any determination and findings issued in relation to the contract’s formation, including under section 205.”.

(2) Section 205 is amended to read as follows:

“Sec. 205. Privatization contracts.

“(a) A privatization contract shall meet the following requirements:

“(1) Except as provided for under subsection (d), a contract shall not cause the displacement of District government employees including by layoff, demotion, involuntary transfer to a new class, involuntary transfer to a new location requiring a change of residence, and time base reductions. Displacement does not include changes in shifts or days off, nor does it include reassignment to other positions within the same class and general location.

176 “(2) The economic advantage of the contract, as indicated a determination and
177 findings issued pursuant to subsection (b), shall be significant enough to justify using a personal
178 services contract instead of District government employees.

179 “(3) The economic advantage of the contract is not outweighed by the public’s
180 interest in having a particular function performed directly by District employees.

181 “(4) The contract shall be awarded through a publicized, competitive bidding
182 process pursuant to Title IV of this act.

183 “(5) Any contract shall include specific provisions pertaining to the qualifications
184 of the staff that will perform the work under the contract and affirmation that the contractor’s
185 hiring practices meet applicable District standards.

186 “(b) Before a solicitation for any privatization contract, the Mayor, instrumentality, or
187 independent agency shall:

188 “(1) Issue a draft determination and findings demonstrating the cost of providing
189 the service by a contractor will be at least 5% less than if the service were provided by District
190 government employees. Such determination and finding shall include, at a minimum, the
191 following:

192 “(A) The overall cost of a contractor providing a service versus any
193 continuing costs that would be directly associated with the contracted function

194 “(B) Personal services costs including, salary and fringe benefits of the
195 contractor or District employee providing the service;

196 “(C) Non personal services costs including rent, equipment, utilities, and
197 other materials attributable to a contractor or District employee providing the service;

198 “(D) Any additional costs built into a service contract;

199 “(E) Costs related the administration, oversight, and supervision by
200 District government personnel of a privatization contract and contractors;
201 “(F) A description of the expected impact of a privatization contract on
202 the quality of goods or services provided to or on behalf of the District government;
203 “(G) The number of District government employees necessary to perform
204 the service proposed to be contracted; and
205 “(H) The number of District government employees that would be
206 displaced by the contract.
207 “(2) Request an analysis by the Chief Financial Officer of whether the costs in the
208 determination and findings can be substantiated.
209 “(3) Share the determination and findings with employees who could be displaced
210 as a result of the contract and any labor unions or groups representing those employees to solicit
211 their comments.
212 “(4) Issue a final determination and findings which incorporates the full analysis
213 by the Chief Financial Officer, and a summary of comments provided pursuant to paragraph (3),
214 unless the Mayor, instrumentality, or independent agency rescinds the determination and
215 findings. Each final determination and findings shall be made publicly available online before
216 any solicitation based on the determination and findings is issued.
217 “(c) If the Mayor, instrumentality, or independent agency solicit a privatization contract
218 which would displace District government employees, such employees or a person or entity
219 representing such employees may submit a bid to perform the services as either District
220 government employees, or as a private-entity. Any bid submitted pursuant this subsection shall
221 be deemed responsive under Title IV of this act. The Chief Procurement Officer shall make

available reasonable resources to assist District government employees, or an entity representing such employees in formulating a bid.

“(d) If a privatization contract that displaces District government employees is awarded:

“(1) The contractor shall offer to the displaced employee a right of first refusal to employment by the contractor, in a comparable available position for which the employee is qualified, for at least a 6-month period during which the employee shall not be discharged without cause;

“(2) Any District employee who is displaced as a result and is hired by the contractor who was awarded the contract, shall be entitled to the benefits provided by the Service Contract Act of 1965, approved October 22, 1965 (79 Stat. 1034; 41 U.S.C. § 351 *et seq.*);

“(3) If the employee's performance during the 6-month transitional employment period described in paragraph (1) of this subsection is satisfactory, the contractor shall offer the employee continued employment under terms and conditions established by the contractor;

“(4) The Mayor, instrumentality, or the independent agency head shall make efforts to assist affected District government employees and to promote employment opportunities for District residents with the contractor. These efforts shall include:

“(A) Consulting with union representatives and District government employees who would be affected by the privatization contract;

“(B) Providing prior notification of at least 30 days of any adverse impact of a privatization contract to District government employees who would be affected by the contract, including notification to a labor organization certified as the exclusive representative of employees affected by the contract;

244 “(C) Providing alternative employment in the District government to
245 displaced District government employees if there are unfilled positions for which those
246 employees are qualified; and

247 “(D) Encouraging the contractor to offer employment to qualified District
248 residents before offering employment to qualified nonresidents.

249 “(e)(1) Any privatization contract shall incorporate specific performance standards and
250 targets.

251 “(2) The contractor shall submit reports, as required by the contract, to the District
252 government contracting officer and the Chief Financial Officer on the contractor's compliance
253 with the specific performance criteria; and

254 “(3) The contract may be canceled if the contractor fails to comply with the
255 performance criteria set out in the contract.

256 “(f) An agency shall not attempt to circumvent the requirements of this section by
257 eliminating the provision of goods or services by the agency before procuring substantially the
258 same goods or services from a person who is not part of the District government.

259 “(g) A privatization contract shall not be solicited or awarded for any services or
260 functions that are inherently governmental.

261 “(h)(1) The Mayor, instrumentality, or the independent agency with authority over a
262 contract shall apply the provisions of paragraphs (b)(1), (2), and (3) of this section to any
263 privatization contract in place as of the effective date of the Procurement Integrity,
264 Transparency, and Accountability Amendment Act of 2015.

265 “(2) Determinations and findings resulting from paragraph (1) shall be made
266 publicly available and sent to the Council.

267 “(i)(1) The Auditor shall review selected privatization contracts, which shall be chosen
268 based on the dollar value and scope of the contract, its potential impact on the health and safety
269 of District residents, its potential impact on economic development and employment
270 opportunities in the District, and other factors deemed appropriate by the Auditor.

271 “(2) The Auditor shall issue an annual report to the Mayor and the Council on the
272 contracts reviewed pursuant to paragraph (1) analyzing for each contract whether it is achieving:

273 “(A) The 5% savings target set forth in subsection (b)(1) of this section;
274 and

275 “(B) The performance standards and targets incorporated into the contracts
276 as required under subsection (e) of this section.

277 “(3) The Auditor may report that the cost and performance data for the selected
278 contracts are inconclusive, but if the District has failed to collect, maintain, or provide cost and
279 performance data, the Auditor may reasonably conclude that the cost or performance targets are
280 not being met.

281 “(4) If the Auditor finds in the report issued pursuant to paragraph (2) of this
282 section that a privatization contract has not met the cost savings or performance standards, the
283 Mayor, or independent agency head shall review the merits of cancelling the privatization
284 contract and performing the work with District employees and report to the Council on the
285 conclusion of their review.

286 “(j) The requirements of this section shall not apply to:

287 “(1) A contract for a new function for which the Council has specifically
288 mandated or authorized the performance of the work by independent contractors.

289 “(2) Services that cannot be performed satisfactorily by District government
290 employees, or are of such a highly specialized or technical nature that the necessary expert
291 knowledge, experience, and ability, are not available through District employees.

292 “(3) Contracts for staff augmentation services to be provided under the contract
293 will be for less than one year and contain no options.

294 “(4) Contracts for services that are incidental to a contract for the purchase or
295 lease of real or personal property such as contracts to maintain office equipment or computers
296 that are leased or rented.

297 “(5) Contracts that are necessary to protect against a conflict of interest or to
298 insure independent and unbiased findings in cases where there is a clear need for a
299 different, outside perspective.

300 “(6) Contracts entered in to pursuant to section 201(c) of this act.

301 “(7) Contracts that will provide equipment, materials, facilities, or support
302 services that could not feasibly be provided by the District in the location where the services are
303 to be performed.

304 “(8) Contracts that provide for training courses for which appropriately qualified
305 District employees are not available.

306 “(9) Contracts for services that are of such an urgent, temporary, or occasional
307 nature that the delay incumbent in their implementation under this section would frustrate their
308 very purpose.

309 **Sec. 5. Inherently governmental functions.**

310 The Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-
311 371; D.C. Official Code § 2-351.01 *et seq.*), is amended as follows:

312 (1) A new paragraph 34B is added to section 104 to read as follows:

313 “(34B) “Functions closely associated with inherently governmental functions”
314 means functions not considered to be inherently governmental functions but functions that may
315 approach being in that category because of the nature of the function, the manner in which the
316 contractor performs the contract, or the manner in which the Government administers contractor
317 performance, including, but not limited to the criteria set forth under section 205b.”.

318 (2) A new paragraph 37B is added to section 104 to read as follows:

319 “(37B) “Inherently governmental function” means a function that is so intimately
320 related to the public interest as to require performance by District government employees,
321 including, but not limited to the criteria under section 205b.”.

322 (3) A new section 205b is added to read as follows:

323 “Sec. 205b. Inherently governmental functions.

324 “(a) No District government contract may be awarded to perform any work or service that
325 is an inherently governmental function.

326 “(b) The District government may enter into a contract for the performance of functions
327 closely associated with inherently governmental functions only if the contracting officer for the
328 contract ensures that:

329 “(1) Appropriate District government employees cannot reasonably perform the
330 functions;

331 “(2) Appropriate District government employees supervise contractor
332 performance of the contract and perform all inherently governmental functions associated with
333 the functions to be performed under the contract; and

334 “(3) The agency for which the contract is being performed addresses any
335 potential organizational conflicts of interest of the contractor in the performance of the functions
336 under the contract.

337 “(b)(1) In general, the term inherently governmental function includes activities that
338 require either the exercise of discretion in applying District government authority or the making
339 of value judgments in making decisions for the District government, including judgments
340 relating to monetary transactions or benefits.

341 “(2) An inherently governmental function involves, among other things, the
342 interpretation and execution of the laws of the District to:

343 “(A) bind the District to take or not to take some action by contract,
344 policy, regulation, authorization, order, or otherwise;

345 “(B) appoint, direct, or control officials or employees of the District; or

346 “(C) exert ultimate control over the acquisition, use, or disposition of the
347 property, real or personal, tangible or intangible, of the District, including the control, or
348 disbursement of appropriated and other District funds.

349 “(d) Inherently governmental function includes the following, in addition to any other
350 function the Mayor determines through a rulemaking:

351 “(1) The direct conduct of criminal investigations.

352 “(2) The performance of adjudicatory functions other than those relating to
353 arbitration or other methods of alternative dispute resolution.

354 “(3) The command of public safety, fire, emergency response, and homeland
355 security employees;

356 “(4) The determination of agency policy, such as determining the content and
357 application of regulations, among other things.

358 “(5) The direction and control of District employees.

359 “(6) The selection or non-selection of individuals for District government
360 employment, including the interviewing of individuals for employment.

361 “(7) The approval of position descriptions and performance standards for District
362 government employees.

363 “(8) The determination of what District government property is to be disposed of
364 and on what terms, except that the Mayor or the Mayor’s designee, may give contractors
365 authority to dispose of property at prices within specified ranges and subject to other reasonable
366 conditions deemed appropriate;

367 “(9) In procurement activities with respect to prime contracts:

368 “(A) Determining what supplies or services are to be acquired by the
369 Government, except that the Mayor or the Mayor’s designee, may give contractors authority to
370 acquire supplies at prices within specified ranges and subject to other reasonable conditions
371 deemed appropriate;

372 “(B) Participating as a voting member on any source selection boards;

373 “(C) Approving any contractual documents, to include documents defining
374 requirements, incentive plans, and evaluation criteria;

375 “(D) Awarding contracts;

376 “(E) Administering contracts, including ordering changes in contract
377 performance or contract quantities, taking action based on evaluations of contractor performance,
378 and accepting or rejecting contractor products or services;

379 “(F) Terminating contracts;

380 “(G) Determining whether contract costs are reasonable, allocable, and

381 allowable; and

382 “(H) Evaluating a contractor’s performance when it is to be used to

383 determine any payment to the contractor.

384 “(10) The determination of budget policy, guidance, and strategy.

385 “(11) The collection, control, and disbursement of fees, royalties, fines, taxes, and

386 other public funds, unless authorized by the Council;

387 “(12) The drafting of Council testimony, responses to Council correspondence, or

388 agency responses to audit reports from the Inspector General or the Auditor.

389 “(e) The term inherently governmental function does not normally include:

390 “(1) gathering information for or providing advice, opinions, recommendations,

391 or ideas to District government employees or officials; or

392 “(2) any function that is primarily ministerial and internal in nature, such as

393 building security, mail or courier services, operations and maintenance services, facilities

394 operations, vehicle fleet management.

395 “(f) Functions closely associated with inherently governmental functions includes the

396 following, in addition to any other function the Mayor determines through rulemaking:

397 “(1) Services that involve or relate to budget preparation.

398 “(2) Services that involve or relate to government reorganization and planning

399 activities.

400 “(3) Services that involve or relate to the development of regulations.

401 “(4) Services that involve or relate to the evaluation of another contractor’s
402 performance.

403 “(5) Services in support of acquisition planning.

404 “(6) Contractors providing assistance in contract management (such as where the
405 contractor might influence official evaluations of other contractors).

406 “(7) Contractors providing assistance in technical evaluation of contract
407 proposals.

408 “(8) Contractors providing assistance in the development of statements of work.

409 “(9) Contractors providing support in preparing responses to Freedom of
410 Information Act requests.

411 “(10) Contractors working in any situation that permits or might permit them to
412 gain access to confidential business information and/or any other sensitive information.

413 “(11) Contractors providing information regarding agency policies or regulations,
414 such as attending conferences on behalf of an agency, conducting community relations
415 campaigns, or conducting agency training courses.

416 “(12) Contractors participating in any situation where it might be assumed that
417 they are agency employees or representatives.

418 “(13) Contractors participating as technical advisors to a source selection board or
419 participating as voting or nonvoting members of a source evaluation board.

420 “(14) Contractors providing inspection services.

421 “(15) Contractors providing legal advice and interpretations of regulations and
422 statutes to Government officials.

“(g) The Mayor may waive compliance with any of the requirements of this section for any contract in effect upon the effective date of the Procurement Integrity, Transparency, and Accountability Amendment Act of 2015, and for any option year exercised under such contract, so long as the option year was contained in the contract as of the effective date of the Procurement Integrity, Transparency, and Accountability Amendment Act of 2015.

“(h) Notwithstanding subsection (g), the requirements of this section shall apply to any contract or option year in effect on the date five years after the effective date of the Procurement Integrity, Transparency, and Accountability Amendment Act of 2015”.

Sec. 6. Ombudsman for contracting and procurement

The Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code § 2-351.01 *et seq.*), is amended by adding a new section 207 to read as follows:

“Sec. 207. Ombudsman for contracting and procurement.

“(a) There is established within the Office of Contracting and Procurement an Office of Ombudsman for Contracting and Procurement which shall be headed by an ombudsman appointed by the Mayor after consultation with the CPO, agency heads of agencies independent of the CPO’s authority, the Director of the Department of Small and Local Business Development, and contracting and procurement stakeholders in the private-sector representing prime contractors and subcontractors doing work and providing services for the District.

“(b) The Ombudsman shall:

“(1) Serve as a vehicle for contractors and subcontractors performing work or providing services under a District contract to communicate their complaints and concerns regarding contracting and procurement through a single office;

446 “(2) Respond to complaints and concerns in a timely fashion with accurate and
447 helpful information;

448 “(3) Determine the validity of any complaint quickly and professionally;

449 “(4) Generate options for a response and offer a recommendation among the
450 options;

451 “(5) Except when the parties are involved in legal or administrative proceedings,
452 attempt to informally facilitate a resolution of the complaint between the contracting officer, the
453 prime contractor, and the subcontractor as appropriate;

454 “(6) Refer complainants to the Contract Appeals Board, the Department of Small
455 and Local Business Development, the contracting officer administering the contract, the
456 Inspector General, or the Attorney General, when appropriate;

457 “(7) Recommend to the CPO the suspension or debarment of a contractor or
458 subcontractor upon a finding of a pattern of non-compliance with District laws or regulations, or
459 other repeated bad behaviors by a contractor or subcontractor;

460 “(8) Recommend to the Director of the Department of Small and Local Business
461 Development decertification of a certified business enterprise upon a finding of a pattern of non-
462 compliance with District laws or regulations, or other repeated bad behaviors by a contractor or
463 subcontractor; and

464 “(9) Identify systemic concerns and recommend to the Mayor and the Council
465 policy changes, and strategies to improve the contracting and procurement process.”.

466 **Sec. 7. Procurement lobbying.**

467 Section 401 of the Procurement Practices Reform Act of 2010, effective April 8, 2011
468 (D.C. Law 18-371; D.C. Official Code § 2-351.01 *et seq.*) is amended by adding s new
469 subsection (c) to read as follows:

470 “(c)(1) A prospective contractor, or any person associated therewith, shall not attempt to
471 influence a District employee or official with respect to source selection.

472 “(2) A bid or offer associated with a violation of subsection (c)(1) of this section
473 may be rejected, unless the Director determines that it is in the best interest of the District not to
474 reject the bid or offer.

475 “(3) This subsection shall not apply to a prospective contractor, or any person
476 associated therewith, in relation to communications with Councilmembers or their staff with
477 regarding a contract recommend for award by the Mayor that is before the Council for review in
478 accordance with Section 202.”.

479 **Sec. 8. Evaluating contractor past performance**

480 Section 403 of the Procurement Practices Reform Act of 2010, effective April 8, 2011
481 (D.C. Law 18-371; D.C. Official Code § 2-351.01 *et seq.*), is amended as follows:

482 (1) Subsection (d) is amended to read as follows:

483 “(d) Each RFP shall include a statement of work or other description of the District’s
484 specific needs, which shall be used as a basis for the evaluation of proposals.”.

485 (2) A new subsection (d-1) is added to read as follows:

486 “(d-2)(1) Each RFP shall set forth each evaluation factor and indicate the relative
487 importance of each evaluation factor. At a minimum, the following shall be included as
488 evaluation factors:

489 “(A) Price or cost to the District government;

490 “(B) The quality of the product or service as addressed by consideration of

491 one or more non-cost evaluation factors such as compliance with solicitation requirements,

492 technical capability, management capability, prior experience, and past performance of the

493 offeror; and

494 “(C) Past performance of the offeror, including a description of the

495 approach for evaluating past performance pursuant to paragraph (2).

496 “(2) In evaluating past performance, the contracting officer shall consider, at a

497 minimum:

498 “(A) The offeror’s past or current government or private sector contracts

499 for efforts similar to the District’s requirement.

500 “(B) Information obtained from the offeror, or any other source, on

501 problems encountered on the offeror’s past or current contracts including protests, legal actions,

502 and resulting corrective actions.

503 “(C) Information regarding predecessor companies, parent companies,

504 subsidiary companies, key personnel who have relevant experience, or subcontractors that will

505 perform major or critical aspects of the requirement when such information is relevant to the

506 acquisition.

507 “(D) Compliance with past or current subcontracting plan goals and other

508 provisions of the Small, Local, and Disadvantaged Business Enterprise Development and

509 Assistance Act of 2005, effective October 20, 2005 (D.C. Law 16-33, § 2301, D.C. Code § 2-

510 218.01 *et seq.*)”.

511 “(3) In the case of an offeror without a record of relevant past performance or for
512 whom information on past performance is not available, the offeror may not be evaluated
513 favorably or unfavorably on past performance.”.

514 **Sec. 9. Estimate of construction costs**

515 (a) The Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law
516 18-371; D.C. Official Code § 2-351.01 *et seq.*), is amended by adding a new section 605 to read
517 as follows:

518 “Sec. 605. Estimate of construction costs.

519 “(a) An estimate of costs shall be prepared for each proposed contract, contract
520 modification, or a change order for a construction project anticipated to exceed \$10,000 dollars.

521 “(b) The estimate shall be prepared in detail, as though the District were competing for
522 the contract, and shall not rely solely on the comparable costs of similar construction projects.

523 “(c) The estimate shall be made available to the contracting officer for use in preparation
524 of the contract solicitation and in the determination of price reasonableness in awarding a
525 contract.

526 “(d) Access to information concerning the estimate, and the overall amount of the
527 estimate, shall be limited to District personnel or agents of the District whose official duties
528 require knowledge of the estimate and shall not be disclosed, except as otherwise permitted by
529 law.

530 (b) Within 90 days of the effective date of this act, the Mayor shall promulgate
531 regulations to conform Chapter 27-47 of the District of Columbia Municipal Regulations to the
532 requirements of the amendment under subsection (a) of this section.

533 **Sec. 10. Non-construction payment bonds**

Section 702 of the Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code § 2-351.01 *et seq.*), is amended as follows:

(1) the section title is amended by replacing the phrase “construction contracts” with the phrase “construction contracts and non-construction service contracts”.

(2) a new subsection (a-1) is added to read as follows:

“(a-1)(1) When a non-construction contract for services is awarded in excess of \$250,000, a payment bond satisfactory to the District, executed by a surety company authorized to do business in the District or otherwise secured in a manner satisfactory to the District, for the protection of all persons supplying services and labor to the contractor or its subcontractors for the performance of the work provided for in the contract shall be delivered to the District and shall become binding on the parties upon the execution of the contract.

“(2) The payment bond required by paragraph (1)(B) of this subsection shall be in an amount equal to 35%, or the amount set aside in the contract to be spent on subcontractors, whichever is greater.”.

(3) subsection (b) is amended to read as follows:

“(b) Pursuant to rules promulgated under this chapter, the CPO may reduce the amount of performance and payment bonds for construction contracts to 50% of the amounts established in subsection (a) of this section, and may reduce the amount of payment bonds for non-construction service contracts to an amount equal to the dollar value to be performed by subcontractors according to a certified business enterprise subcontracting plan filed pursuant to Section 2346 of the Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005, effective October 20, 2005 (D.C. Law 16-33, § 2301, D.C. Code § 2-218.46).”.

(4) subsection (c) is amended by replacing the phrase “subsection (a) of this section.” with the phrase “subsection (a) or subsection (a-1) of this section.” anywhere it appears.

(5) subsection (d)(1) is amended by replacing the phrase “construction contract” with the phrase “construction contract or non-construction contract for services”.

Sec. 11. Transparency in contracting.

Section 1104 of the Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code § 2-351.01 *et seq.*), is amended to read follows:

“(a) The CPO shall establish and maintain on the Internet a website containing publicly-available information regarding District procurement. Any documents on the website added after the effective date of the Procurement Integrity, Transparency, and Accountability Amendment Act of 2015 shall be made available in machine-readable and searchable format and shall include the following.

“(b) The website established under subsection (a) shall contain, at a minimum, the following sections:

“(1) Information of the legal authority and rules that govern procurement for all District agencies and instrumentalities, including those exempt from the authority of the CPO;

“(2) Links to contract solicitation websites of OCP and all district agencies exempt from the authority of the CPO.

“(3) A database containing contracts in excess of \$100,000, including those made by District agencies exempt from the authority of the CPO, which shall include, at a minimum the following:

“(A) A copy of the executed contract;

“(B) Determinations and findings related to the contract;

580 “(C) Contract modifications, change orders, and amendments associated
581 with the contract;

582 “(D) Solicitation documents, including requests for proposals and
583 invitations for bids, and any amendments of such documents; and

584 “(E) Contract summary documents submitted to the Council for its
585 review.

586 “(4) A list of all contracts under \$100,000 which shall include the vendor name, a
587 description of the goods or services purchased, the amount of the contract, and the term of the
588 contract.

589 “(c) Agencies not subject to the authority of the CPO shall transmit the information
590 required by this section to the CPO for posting on the Internet.”.

591 **Sec. 12. Acquisition planning.**

592 Section 1105 of the Procurement Practices Reform Act of 2010, effective April 8, 2011
593 (D.C. Law 18-371; D.C. Official Code § 2-351.01 *et seq.*), is amended as follows:

594 (1) A new subsection (a-1) is added to read as follows:

595 “(a-1) At a minimum, each agency acquisition plan shall contain anticipated
596 procurement needs of the coming fiscal year, and four subsequent fiscal years, with specific
597 information on the following:

598 “(1) program-level needs;

599 “(2) anticipated multi-year procurements;

600 “(3) option years for contracts; and

601 “(4) expected major changes in ongoing or planned procurements.”.

602 (3) Subsection (b) is amended to read as follows:

603 “(b) Each agency shall submit a draft acquisition plan for the following fiscal year to the
604 Council no later than the date of submission of the Mayor’s proposed budget to the Council.
605 Such plan shall be finalized based on the funding levels provided for in a fiscal year budget
606 passed by the Council and an updated acquisition plan shall be submitted to the Council no later
607 than the first day of the fiscal year.”.

608 (2) A new subsection (c) is added to read as follows:

609 “(c) Not later than the date of submission of an annual proposed budget by the Mayor to
610 the Council, the Mayor shall transmit to the Council and make available to the public a
611 government-wide strategic acquisition plan that includes:

612 “(1) the guiding principles, overarching goals, and objectives of the District’s
613 acquisitions for work, goods, and services; and

614 “(2) goals and plans for utilization of strategic sourcing the agency-wide or
615 government-wide contracts pursuant to section 1107.”.

616 **Sec. 13. Strategic sourcing**

617 The Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-
618 371; D.C. Official Code § 2-351.01 *et seq.*), is amended as follows:

619 (1) A new paragraph 63A is added to section 104 to read as follows:

620 “(63A) “Strategic sourcing” means a structured and collaborative process of
621 critically analyzing an organization’s spending patterns to better leverage its purchasing power,
622 reduce costs, and improve overall value and performance.”.

623 (2) A new section 1107 is added to read as follows:

624 “Sec. 1107. Strategic Sourcing

625 “(a) The Mayor shall establish an annual Government-wide goal to procure goods and
626 services using strategic sourcing, in accordance with this section.

627 “(b) The Mayor shall issue regulations applicable to all agencies, except those specified
628 in Section 105, for implementing the goal established under subsection (a). The Mayor may set
629 specific goals for procurement and savings that are customized to individual agencies.

630 “(c) The regulations issued under subsection (b) shall include, at a minimum:

631 “(1) Criteria for the goods and services to be procured using strategic sourcing,
632 consistent with the considerations described in subsection (d).

633 “(2) Standards to measure progress towards meeting strategic sourcing goals.

634 “(3) Procedures to hold agencies accountable and ensure that agencies are
635 achieving their strategic sourcing goals.

636 “(4) Procedures to ensure that an agency is not making purchases that
637 significantly exceed the requirements of the agency.

638 “(d) In developing the regulations issued under this section, the Mayor shall take into
639 consideration the application of strategic sourcing in a manner that

640 “(1) is consistent with applicable laws;

641 “(2) accounts for the benefits as well as the costs of procuring goods and services;

642 “(3) emphasizes the procurement of goods and services that are procured
643 repetitively, procured Government-wide and in large amounts, and are non-technical and
644 commercial in nature; and

645 “(4) reflects the requirements of the Small, Local, and Disadvantaged Business
646 Enterprise Development and Assistance Act of 2005, effective October 20, 2005 (D.C. Law 16-
647 33, § 2301, D.C. Code § 2-218.01 *et seq.*).”

Sec. 14. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973, (87 Stat. 813; D.C. Official Code § 1-206.02(c)(3)).

Sec. 15. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the mayor, action by the Council to override the veto), a 30-day period of Congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973, (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

COUNCIL OF THE DISTRICT OF COLUMBIA
1350 Pennsylvania Avenue, N.W.
Washington D.C. 20004

Memorandum

To : Members of the Council

From : 
Nyasha Smith, Secretary to the Council

Date : September 28, 2015

Subject : Referral of Proposed Legislation

Notice is given that the attached proposed legislation was introduced in the Office of the Secretary on Tuesday, September 22, 2015. Copies are available in Room 10, the Legislative Services Division.

TITLE: "Procurement Practices Reform Amendment Act of 2015", B21-0397

INTRODUCED BY: Chairman Mendelson at the request of the Mayor

The Chairman is referring this legislation to the Committee of the Whole.

Attachment

cc: General Counsel
Budget Director
Legislative Services



OFFICE OF THE
SECRETARY
2015 SEP 22 AM 10:03

MURIEL BOWSER
MAYOR

SEP 22 2015

The Honorable Phil Mendelson
Chairman
Council of the District of Columbia
John A. Wilson Building
1350 Pennsylvania Avenue, N.W., Suite 504
Washington, D.C. 20004

Dear Chairman Mendelson:

Enclosed for consideration and approval by the Council of the District of Columbia is proposed permanent legislation entitled "Procurement Practices Reform Amendment Act of 2015."

The Legislation would improve and streamline various aspects of the procurement process. Among these areas this legislation addresses Council review of options, Clean Hands Certification for contractors, acquisition planning, and establishes rules for protection of the integrity of the procurement process.

I urge you and the Council to take prompt and favorable action on the enclosed legislation. If you have any questions, please contact George Schutter, Director of the Office of Contracting and Procurement at 202-724-4982.

Sincerely,

A handwritten signature in black ink, appearing to read "Muriel Bowser". The signature is written in a cursive, flowing style. Below the signature, the name "Muriel E. Bowser" is printed in a standard font. The word "Enclosures" is printed below the name.

Muriel E. Bowser

Enclosures



Chairman Phil Mendelson

At the request of the Mayor

A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To revise the criteria for review by the Council of multiyear contracts and contracts in excess of \$1 million; to revise the criteria for review by the Council of options which increase the value of a contract to over \$1 million; to amend the “clean hands” certification criteria; to establish rules for District employees to protect the integrity of the procurement process; and to clarify acquisition planning by District agencies.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the “Procurement Practices Reform Amendment Act of 2015.”

Sec. 2. The District of Columbia Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code § 2-351.01 *et seq.*) (Act), is amended as follows:

(a) Section 202 (D.C. Official Code § 2-352.02) is amended as follows:

(1) Subsection (b)(3) is amended to read as follows:

“(b)(3) Contract modifications which did not previously require Council approval and which increase the contract to an amount in excess of \$1 million during a 12-month period shall be deemed approved by the Council if one of the following occurs:

(A) During the 10-day period beginning on the 1st day (excluding Saturdays, Sundays, and holidays) following its receipt by the Office of the Secretary to the

1 Council, no member of the Council introduces a resolution to approve or disapprove the contract;
2 or

3 (B) If a resolution has been introduced in accordance with subparagraph
4 (A) of this paragraph, and the Council does not disapprove the contract during the 45-day review
5 period beginning on the 1st day (excluding Saturdays, Sundays, and holidays) following its
6 receipt by the Office of the Secretary to the Council.”.

7 (2) A new subsection (b)(4) is added to read as follows:

8 “(b)(4) Review and approval by the Council of a proposed multiyear contract or
9 contract in excess of \$1,000,000 during a 12-month period that contains one or more option
10 periods each of a duration of 12 months or less shall constitute the Council review and approval
11 required by section 451(b) of the District of Columbia Home Rule Act, approved December 24,
12 1973 (87 Stat. 803; D.C. Official Code § 1-204.51(b)) of the base period and the option periods
13 if the option is exercised pursuant to the terms in the original contract approved by the Council.”.

14 (3) Subsection (c)(1) is amended to read as follows:

15 “(c)(1) The proposed contractor, contract number, contract amount, unit and
16 method of compensation, contract term, and type of contract;”.

17 (4) Subsection (c)(8) is amended to read as follows:

18 “(c)(8) A verification from the Citywide Clean Hands database that the proposed
19 contractor is current with its District taxes or has worked out and is current with a payment
20 schedule approved by the District, except as provided under section 301(9) ;

21 (5) A new subsection (c)(8A) is added to read as follows:

1 “(c)(8A) A certification from the proposed contractor that it is current with its
2 federal taxes or has worked out and is current with a payment schedule approved by the federal
3 government.”.

4 (b) Section 301 (D.C. Official Code § 2-353.01) is amended by replacing section 301(9)
5 with the following:

6 “(9) Does not have an outstanding debt with the District or federal governments in
7 a delinquent status of more than the greater of \$1,000 or 1 percent of the contract value up to
8 \$25,000; and”.

9 (c) Section 401 (D.C. Official Code § 2-354.01) is amended by adding a new subsection
10 (c) to read as follows:

11 “(c)(1) A prospective contractor, or any person associated therewith, shall not
12 attempt to influence improperly a District employee or official with respect to source selection.

13 (c)(2) No District employee or official may disclose confidential information
14 regarding live procurement actions (i.e., solicitation phase through contract award) at any public
15 forum.

16 (c)(3) A bid or offer associated with a violation of subsection (c)(1) or (c)(2) of
17 this section may be rejected, unless the Director determines that it is not in the best interest of the
18 District to reject the bid or offer.”.

19 (d) Subsection (b) of section 1105 (D.C. Official Code § 2-361.05(b)) is amended to read
20 as follows:

21 “(b) Each agency shall submit to the Council, its acquisition plan for the
22 following fiscal year no later than 60 days after the agency’s budget has been approved by the
23 Council.”.

1 Sec. 3. Fiscal impact statement.

2 The Council adopts the fiscal impact statement of the Chief Financial Officer as the fiscal
3 impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act,
4 approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-602(c)(3)).

5 Sec. 4. Effective date.

6 This act shall take effective following approval by the Mayor (or in the event of veto by
7 the Mayor, action by the Council to override the veto), and shall remain in effect for no longer
8 than 90 days, as provided for emergency acts of the Council of the District of Columbia in
9 section 412(a) of the District of Columbia Home Rule Act, approved December 24, 1973 (87
10 Stat. 788; D.C. Official Code § 1-204.12(a)).



Metropolitan Washington Council, AFL-CIO

888 16th Street, NW, Suite 520 • Washington, DC 20006 • (202) 974-8150 • Fax (202) 974-8152

An AFL-CIO "Union City"

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Testimony of Joslyn N. Williams,
President
on B21-334, the "Procurement
Integrity,
Transparency and Accountability
Amendment Act
of 2015"
Before the Committee of the Whole
Honorable Phil Mendelson,
Chairman
10 November 2015

BRINGING LABOR TOGETHER SINCE 1896

www.dclabor.org

Mr. Chairman and members of the Committee, my name is Joslyn Williams and I am the president of the Metropolitan Washington Council, AFL-CIO which is the regional labor federation made up of 175 local union representing 150,000 members, 60,000 of whom live in the District of Columbia.

I am here today to testify in support of Bill 21-334, the Procurement Integrity, Transparency and Accountability Amendment Act of 2015. Labor supports this legislation which is intended to provide more oversight, transparency and accountability to the District of Columbia procurement process. This bill will help provide more protection for workers in the DC Government's exercise of potential privatization of government jobs- jobs which are currently overwhelmingly union and living wage, family-sustaining jobs which no jurisdiction can afford to lose.

This legislation will provide an independent mechanism to more effectively address complaints and concerns against contractors who have a history of poor and irresponsible labor standards. It will provide more disclosure of information for Council, and therefore public, review, especially subcontracting information, which provides a clearer picture of which companies will provide services under the contracts awarded. Second, it discourages retroactive contracts which occur when an agency extends a contract over \$1 million without Council authorization, which can affect workers, especially under construction contracts, and a chance to receive timely payment.

In addition, the bill provides a requirement for a more stringent past performance review as part of the evaluation process for contractors who are bidding to do work in the District of Columbia. This is long overdue.

Nicole Hank, New York State deputy press secretary of the Comptroller's Office, when that state was considering similar legislation stated, "Before government hires outside contractors it's important to examine the cost-effectiveness. More times than not, it's less expensive to use state workers instead of outside contractors".

The state of Maryland requires a cost savings of 20% of the contract or \$200,000 whichever is less. It also requires, a cost comparison that includes all relevant costs of contracting, any continuing or transitional costs such as unemployment compensation for dislocated workers and the cost of transitional services to those workers. This requirement allows the state to make a sound judgment whether or not the state is saving taxpayers' money.

The Center for American Progress Access Fund reported that state and local governments seeking to protect taxpayers and workers and promote quality services should begin by requiring careful review of decisions to contract out government work to the private sector. Review processes should ensure that the government contracts only those services that public employees cannot capably and cost effectively perform and that do not involve functions that should be performed by government for accountability or other public interest reasons.

As you know, the residents of our great city have been demanding more transparency from our government and this bill takes a positive step forward in providing that.

The Metropolitan Washington Council, AFL-CIO urges the Committee and the Council to vote in favor of Bill 21-334. Thank you.

BEFORE THE COUNCIL OF THE DISTRICT OF COLUMBIA
Committee of the Whole
Suite 412
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

TESTIMONY OF TIMOTHY TRAYLOR

PRESIDENT OF THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 383

November 10, 2015

My name is Timothy Traylor and I am President of the American Federation of Government Employees, Local 383. AFGE, Local 383 is the exclusive representative of bargaining units of District government employees at the Department on Disability Services, the Department of Health, the Department of Mental Health, Department on Youth Rehabilitation Services, and the District of Columbia Public Libraries. I am here today to testify in favor of Bill 21-334. AFGE, Local 383 supports the Council's efforts to increase transparency, accountability, and integrity in the District's contract procurement practices. If contracting practices are appropriate and fair to the District, its residents, and employees, then no one should fear exposing those practices to the light of day. The District has an obligation to its residents to spend their tax dollars in such a way as to avoid even the appearance of undue influence or inappropriate gain.

In a step toward fulfilling the government's obligation to the City, the proposed legislation includes important language that, if adopted and enforced, would go a long way towards ensuring that privatization contracts, if necessary, are a good deal for the

citizens of the District. The language proposed in Bill 21-334 at §205 is important and meaningful. It is similar to the language of the now repealed D. C. Code § 2-301.05b which at least theoretically provided more robust employee protections than the current law. (See Ex. A, copy of now repealed D.C. Code §2-301.05b.) Relying on the old statute, my local challenged efforts by the Department of Health to quietly and expensively privatize functions formerly performed by employees of the Addition Prevention and Recovery Administration. DOH's conduct ended up costing the District nearly \$200,000 payable to displaced employees for a privatization contract that was never properly scrutinized in terms of its value to the District. The particular terms of that settlement are confidential, but it was in resolution of FMCS Case No. 090915-14166-A. (A copy of the underlying grievance is attached as Ex. B.)

Another example of a privatization contract not being a good deal for the District involves DDS' contracts with Liberty Healthcare. As reported to the Council, DDS has at least two current contracts with Liberty Healthcare each valued annually at \$2 million that are in place for a base year followed by additional option years. (See Ex. C, DDS response to Council listing 2016 contracts.) Liberty Healthcare is a Pennsylvania company that does not qualify as a small, female, or minority owned business. None of the profits of this company will be reinvested in the local economy nor will the contracts benefit any local District business. Awarding this contract to a contractor based in Pennsylvania ignored a then legal requirement of the Agency head to "assess the impact

of the privatization contract on the District's economic and tax base, including the affects on employment opportunities for District residents, business creation, business development, and business retention (See Ex. A, a copy of now repealed D.C. Code §2-301.05b)."

One of those \$2 million contracts is for Quality Improvement Reviews. This is a function that was formerly performed by DDS employees and still could be. When this work was first contracted out to Liberty Healthcare in 2010 for one base year plus four additional one-year option year terms, the Office of the Attorney General noted that the cost of hiring Liberty Healthcare significantly exceeded the cost of DDS employees continuing to do the same work. (Ex. D at ¶ 9 of OAG's Comments.) The estimated cost for DDS to continue performing the work over the next five years was just short of \$3.5 million. The cost of Liberty Healthcare doing the work over next five years was estimated to be more than \$8.1 million. (Ex. E, DDS Determination and Findings for a Privatization Contract at pages 2 and 3 of 8.) At the time, it was a requirement that, prior to privatizing work performed by District employees, the contractor must demonstrate a meaningful cost savings over the cost of keeping the work "in house". DDS did not submit the proposed contract for review by the Office of Contracting and Procurement, but instead conducted its own internal privatization review and justification that was never subjected to meaningful scrutiny.

DDS responded to the OAG that the apparent increase in costs could be explained by the fact that its current costs (projected to be about \$3.5 million) were for only 105 provider reviews per year and Liberty Healthcare would be performing 300 provider reviews under the contract. (Ex. D at ¶ 9.) Supposedly, the increased number of reviews would justify the additional \$4.6 million tab the District would be asked to pay.

Although this sounds reasonable, it was and is deeply misleading. The Compliance Specialists employed by DDS reviewed providers as a whole looking at all of the services provided by each provider as component parts of a single review. Follow-up reviews were not counted as separate reviews, but as a continuation of the provider's original review. Liberty was not counting that way. Instead, it counted a review of each individual service offered by a provider as a single review and proposed to bill DDS a la cart. (Ex. F, Liberty Contract Award.) With each provider offering three to four waiver services and each service counting as a single review, and each follow-up review counting as an additional review, Liberty Healthcare could quickly multiply the number of projected reviews to 300 or more easily dwarfing the number of all-inclusive reviews performed by DDS employees. Indeed, Liberty Healthcare has submitted invoices claiming to have conducted even more reviews than projected at nearly \$4,800 each, thereby driving up overall costs and necessitating contract modifications to absorb all those expensive extra reviews. (See, e.g. Ex. G, 12/19/2013 memo to Council with Council Contract Summary at (B).) For example, the contract originally contemplated that option

year four would cost \$1,692,673. (See Ex. F at 5.) By the time option year four came along, however, DDS was asking the Council to modify that figure up to \$1,945,275.96. (Ex. G.) DDS had projected that during the same time period—option year four--DDS employees would have performed the work for just over \$500,000. (Ex. E at 3.)

Although DDS batted away criticism of the exponentially higher costs associated with privatization by claiming it was getting more services, there was no further investigation or evidence to support its contention that the Liberty contract was not more expensive. Apparently, there was no fact checking done to be sure that DDS was using the correct metrics to claim that privatization by Liberty Healthcare was a good deal for the District. Under the proposed legislation, it appears the Inspector General could have investigated to test DDS' claims that it was worthwhile to spend millions of extra dollars on the Liberty contract.

Meanwhile, back in 2010, members of AFGE, Local 383 were laid off, losing their jobs to make way for the contractors. (See Ex. H, sampling of notices to employees displaced by Liberty Healthcare contract.) Displaced employees were forced to compete for a job that they have been performing for years, yet only 2 individuals were offered an employment opportunity with Liberty Healthcare and at great personal loss. Liberty Healthcare maintained the displaced employee's salaries for six months, then cut their salaries significantly and offered benefit packages as high as \$819.00 per month, which were far more costly than what they would have had to pay as District employees. (See

Ex. I, Liberty letter cutting pay; and see Ex. J, 4/20/2015 letter to Liberty employees setting forth healthcare costs for comparison to current costs to District employees.) As a result, Liberty Healthcare Corporation repudiated D.C. law, which entitled displaced District employees the provision of benefits provided by the Service Contract Act of 1965, specifically the provision of fringe benefits covered by a collective bargaining agreement.

It was never clear that there was any added value to the District in terms of actual increases or improvements in services, but what has always been clear is the much higher overall cost of using Liberty instead of DDS employees. Nevertheless, this very contract has been renewed as a sole source contract and increased on a supposedly emergency basis after the expiration of the initial four option years. (See, e.g., Ex. K, 6/17/2015 emergency legislation to modify Liberty contract.)

Even setting aside the lack of cost savings realized by the award of the Liberty Healthcare contract, the Council should be troubled by the deep conflicts of interest that have swirled around the relationship between DDS and Liberty executives. In responding to the initial RFP for the privatization of quality improvement reviews, Liberty provided a list of names and resumes of its "key corporate managers" associated with the contract. Among those names was that of Catherine Yadamec from the Council for Quality and Leadership (CQL) who Liberty promised would be the Quality Improvement Manager if Liberty won the contract with DDS. (See Ex. L, Appendix A to

Liberty bid.) Shortly after DDS awarded Liberty this contract and privatized the work in 2010, DDS hired Catherine Yadamec into a grade 15 management position as the Quality Improvement Manager over the Quality Improvement Division—the division responsible for overseeing the work of the Liberty Healthcare contract for performing Quality Improvement Reviews. (See Ex. M, DDS responses to Council at p. 3 describing Yadamec’s responsibilities.) This position was at the top ranks of management of the Agency on par with the Chief Procurement Officer. (See Ex. N, DDS Org. Chart from 2011.) By at least as early as 2011, Ms. Yadamec became the point person, or Contracting Officer’s Technical Representative (COTR) for contracts with Liberty Healthcare. (See Ex. O, contract amendment naming Yadamec as the COTR.) She was also the “Contract Monitor” for Liberty Healthcare in 2011 and 2012. (See Exs. P and Q, DDS lists of contracts and grants for FY2011 and FY2012 respectively.)

While in this position, Yadamec continued to be involved in a domestic partnership relationship with a person named Janet Delehanty. The same month that Liberty began work on the contract for DDS, it hired Delehanty as the Senior Review Manager at Liberty Healthcare with oversight over the DDS contract. To this day, Ms. Delehanty works out of DDS’s offices on the second floor in the Provider Certification Unit. (See Ex. R, Current DDS Phone Directory.) Before moving to this area together, Ms. Delehanty and Ms. Yadamec lived together in St. Charles, Missouri where they continue to co-own a home. (See Ex. S, Missouri property assessor’s records.) In an environment

with such close ties between the contractor and the District employee charged with monitoring the contract, it is not at all surprising that liberty Health care has continued to have its contract renewed, even though it is not the best deal for the District.

AFGE Local 383 supports the passage of the proposed legislation because, if these protections were in place and enforced, the District and its employees would stand a better chance to resist expensive cozy relationships and the job loss associated with privatization such as I have just described.

I also want to speak to the proposed legislation's attempts to clarify which types of work should be considered inherently governmental functions that should be performed by District employees. This is an important feature of the proposed reform. AFGE Local 383 represents many employees in positions performing inherently governmental functions; yet the encroachment of contractors who management would put in place to take on their work is a serious and constant threat, if not a reality. This exists in all agencies and seemingly no position is entirely safe.

But even apart from the problem of contractors doing bargaining unit work is the problem of contractors being used to manage District employees and the District itself. The proposed legislation addresses problematic situations such as using contractors to provide information regarding agency policies. AFGE, Local 383 has so far successfully challenged an employee conduct policy put in place at DYRS in 2012. (The PERB's hearing examiner ruled in the Union's favor, but a final determination by PERB is

pending.) According to management officials we met with, the Union was told that the policy was created based on the advice and recommendations of an outside contractor. Why should outside contractors be making policies about how DYRS employees can interact with youth out in the community? Apart from the fact that DYRS management ought to be capable of making this type of policy without the added expense of contractors; these are the types of policies that District government employees should be making and held accountable for based on their institutional knowledge and positions of public trust.

The proposed legislation addresses the impropriety of contractors being used to direct or manage District employees. What I have not yet discussed about the Liberty Healthcare contract with DDS is that, in addition to the performance of the provider certification reviews, Liberty has been given responsibility to perform Service Coordinator audits and customer satisfaction surveys about the Service Coordinators. These audits are essentially a performance measure of DDS employees to evaluate the quality of how they are implementing the Individualized Service Plans or "ISPs" in place for DDS clients. Contractors should not be evaluating the performance of government employees. DDS supervisors are already capturing this data and evaluating the performance of the Service Coordinators. There is no reason an outside contractor should do this work much less be paid for duplicating work that is already being performed by District employees.

Finally, the proposed legislation also discusses the inappropriateness of contractors having a say in evaluating another contractor's performance. The entire contract I have discussed that Liberty Healthcare has to perform "Quality Improvement Reviews" is designed for a contractor to evaluate other provider/contractors' performance. Privatizing the accountability reviews of outside contractors is privatizing what is an inherently governmental function and it should be stopped. The proposed legislation recognizes this approach to accountability as one that is not in the public interest and AFGE, Local 383 agrees.

In summary, AFGE, Local 383 supports legislative efforts to make large-scale contracting and procurement oversight more robust. AFGE, Local 383 supports legislation that will limit privatization of public services to only those instances where it is in the best interest of the District's residents and the integrity of the government. AFGE, Local 383 supports legislation defining those functions that are inherently governmental and reserving that authority and responsibility for government employees. We note, however, that legislation is only as good as it is enforceable. In the past, there were news reports of how the OIG found that the Office of Contracting and Procurement fell short of performing the requisite review of proposed privatization efforts, thereby costing the District hundreds of thousands of dollars. (Ex. T, Article from "The Examiner"; Ex. U, OIG Investigative Report.) The Council needs to remain committed to making sure that any contracting reforms it enacts are armed with sufficient

mechanisms for enforcement and penalties for those who would ignore new or existing requirements to make the process fair. This needs to include a mechanism for not just would-be contractors to raise challenges, but for employees to raise complaints and achieve meaningful relief when violations occur.

With that, I thank you for your time and encourage you to adopt legislation leading to more accountability, not less.

Attached Exhibits

- Ex. A Copy of now repealed D.C. Code §2-301.05b
- Ex. B AFGE Local 383 grievance challenging APRA privatization by DOH
- Ex. C DDS response to Council listing contracts in place for FY2016
- Ex. D OAG comments with DDS response to proposed Liberty Healthcare contract
- Ex. E DDS Determination and Findings for a Privatization Contract
- Ex. F Liberty Healthcare contract award
- Ex. G 12/19/2013 memo to Council with Council Contract Summary
- Ex. H Sampling of notices to employees displaced by Liberty Healthcare contract
- Ex. I Liberty Healthcare letter to employee cutting her pay after six months
- Ex. J Liberty Healthcare letter to employee announcing increased healthcare insurance premiums for 2015
- Ex. K 6/17/2015 emergency legislation to modify Liberty contract
- Ex. L Appendix A to Liberty response to RFP listing key corporate officers
- Ex. M DDS' 2012 responses to Council describing Catherine Yadamec's responsibilities
- Ex. N DDS organizational chart from 2011/2012
- Ex. O Liberty Healthcare contract amendment naming Catherine Yadamec as the COTR
- Ex. P DDS listing of contracts and grants for FY2011

- Ex. Q DDS listing of contracts and grants for FY2012
- Ex. R Screenshot of current DDS telephone directory showing Janet Delehanty
- Ex. S Missouri tax assessor's records showing joint ownership of property by Janet Delehanty and Catherine Yadamec
- Ex. T Article from The Examiner: "District skipped fair-price checks on \$353m in contracts" (Mar. 28, 2012)
- Ex. U March 22, 2012, Office of the Inspector General: "Report on Noncompliance with the Requirement to Perform Cost Analyses"

Stephen W. Courtien
Community Hub for Opportunities in Construction Employment
C.H.O.I.C.E.
815 16th Street NW
Washington, DC 20006
(202) 756-4660

Good Afternoon. I represent the Community Hub for Opportunities in Construction Employees (CHOICE) we are an organization made up of 28 construction unions in the greater Capitol Region representing over 40,000 workers and their families. Our affiliates represent over 22,000 members in the Washington DC region.

We support Bill B21-334 the "Procurement Integrity, Transparency, and Accountability Amendment Act of 2015. We have three suggested additions to the legislation that we feel would help protect workers in the construction industry by including factors in the RFP practice that take into account contractors past labor, safety record and past compliance with current DC laws.

First we would like to see if a contractor has a signed Project Labor or a Collective Bargaining Agreement that additional weight is given to their bid. We have discussed PLAs often with you and the rest of the Council. The city currently accounts for factor we would like if the city factors if the Contractor has a PLA as this shows that the construction workers on the project will have protections. Other areas have similar factors such as Maryland.

Secondly we would like to see increased evaluation of contractors past performance to include factors such as Labor Violations, Safety Record, and wage violations. This would be similar to the Executive Order that President Obama recently signed for all Federal Agencies called "The Fair Pay and Safe Workplace".

Lastly we would also suggest adding language requiring a contractor awarded a project that they review their subcontractors records in regards to the subcontractors safety, wage and labor violations. Failure to do so would affect future contracting opportunities with the city. This is similar to DC WASA requirements and also the "Fair Pay and Safe Workplace" Executive order.

I've included the suggestion with my written testimony.

Thank you.



LiUNA!
MID-ATLANTIC REGION
Laborers' International Union of North America

**Suggestions for B21-334: "Procurement Integrity, Transparency,
and Accountability Amendment Act of 2015"**
as of October 21, 2015

1. Add in a signed project labor agreement or collective bargaining agreement as an RFP evaluation factor.

Between lines 493 and 494 insert the following:

(C) A project labor agreement signed by the offeror or collective bargaining agreements signed by the offeror and any subcontractors to the offeror that facilitate labor-management co-operation and workplace efficiencies.

2. For construction-related competitive sealed proposals and RFPs with construction cost estimates of \$30M or more, require a project labor agreement signed by the offeror to be assigned a specific percentage price reduction or evaluation value.

Add a new section to Title VI: Procurement of Construction Projects and Related Services of the PPRA of 2010. New section could fit between existing Sections 602 and 603:

Sec. 60X Evaluation Criteria for Project Delivery Methods.

(a) This section specifies the evaluation factor points in RFPs and price reductions for competitive sealed proposals that shall be allocated to a project labor agreement signed by the offeror.

(b) RFPs issued for the project delivery method listed in Section 601(b-3) and in (b-5) through (b-8) having an estimated construction cost of \$30 million or more shall assign a project labor agreement signed by the offeror an evaluation factor of 5%.

(c) Competitive sealed proposals issued for project delivery methods listed in Section 601(b-2) and (b-4) having an estimated construction cost of \$30 million or more shall assign a project labor agreement signed by the offeror a percentage price reduction of 5%.

Note to discuss: What about placing this in Chapter 2: Contracts as a new subchapter?

3. Include more explicitly evaluation of past performance regarding labor and safety violations, and compliance with associated laws.

Revise (B) on lines 500 through 502 as follows:

(B) Information from the offeror, or any other source, on problems encountered on the offeror's past or current contracts including protests, legal actions, **labor violations, safety violations**, and resulting corrective actions.

Between lines 506 and 507 insert the following:

(D) Compliance with the District of Columbia's laws regarding workers' compensation, unemployment insurance, minimum wage, wage theft, worker misclassification, and the United States code regarding the Fair Labor Standards Act or the Davis-Bacon Act.

(E) Compliance with the local hiring requirements of the District of Columbia Workforce Intermediary Establishment and Reform of First Source Amendment Act of 2011, effective ...

4. Strengthen *Section 301: Contractor Standards* of the Procurement Practices Reform Act of 2010

Revise the contractor standards as follows:

To be determined responsible, a prospective contractor shall meet all of the following requirements:

- (a) Financial resources adequate to perform the contract or the ability to obtain them;
- (b) Ability to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;
- (c) A satisfactory performance record;
- (d) A satisfactory record of integrity and business ethics;
- (e) Disclosure of all labor violations by the contractor or any affiliated person or entity, including contractor's owners, parent entity, predecessors and subsidiaries that have resulted in any adverse administrative determination, arbitral award or decision, or civil judgment on the merits, or in a settlement or consent decree resolving violations in the three-year period preceding the proposed effective date of the contract, or any pending formal charges of labor violations against the contractor, any affiliated entity, or subcontractor that may not yet been settled or otherwise adjudicated, and address to the satisfaction of the Contracting Officer, with such documentation and records as he/she may request, the details of any such violations and any corrective measures, if any, taken;**

- (f) Not be the subject of debarment or suspension proceedings commenced by the Office of Contracting and Procurement.
- (g) The necessary organization, experience, accounting and operational controls, and technical skills or the ability to obtain them;
- (h) Compliance with the applicable District licensing and tax laws and regulations;
- (i) The necessary production, construction, and technical equipment and facilities or the ability to obtain them; and
- (j) Other qualifications and eligibility criteria necessary to receive an award under applicable laws and regulations.

5. Add in a new section called *Subcontractor Responsibility* to the Procurement Practices Reform Act of 2010. It could be placed after *Sec. 302 Determination of contractor responsibility*.

Suggested language:

Sec. 303. Subcontractor responsibility.

- (a) Prospective contractors are responsible for determining the responsibility of their prospective subcontractors regarding debarred, ineligible, or suspended firms. Determination of prospective subcontractor responsibility may affect the District of Columbia's determination of the prospective contractor's responsibility.
- (b) Contractors shall include as a provision in any subcontract entered into during the course of and in connection with the contract stating that the subcontractor shall not engage in any labor violations, and shall require that all subcontractors disclose to the contractor all labor violations that have not been settled or otherwise adjudicated and addressed to the satisfaction of the contractor, with such documentation and records as it may request, the details of any such violations and corrective measures, if any, taken;

6. Add a definition for labor violations to Section 104 of the Procurement Practices Reform Act of 2010.

Suggested definition:

"Labor violations" means any violation of applicable labor law, including but not limited to any violation of the National Labor Relations Act, prevailing wage laws, wage and hour laws, anti-discrimination laws, and occupational safety and health laws. Such "labor violations" shall also include retaliation against an employee for exercising or attempting to exercise any right or interest under law arising from, in connection with, or related to a contract covered herein or intimidation of an employee to prevent the exercise of such right or interest.

**Testimony of Sarah Scruggs, Director of Advocacy & Outreach
MANNA, Inc.
Committee of the Whole
Public Hearing on B21-334 & B21-397
November 10, 2015**

Good afternoon Chairman Mendelson and other committee members; thank you for the opportunity to testify this afternoon. My name is Sarah Scruggs and I work for MANNA, Inc., a nonprofit affordable housing developer that has been building in the District since 1982. Our general contractor, directly owned by MANNA, is called Providence Construction. We have built almost 1,200 homes, mostly affordable for-sale units. As you will see in the attached project list, since 2003, we have completed almost \$40 million and 400 units of construction activity, both for MANNA and other nonprofits/third parties. Much of this activity has been DHCD or otherwise publicly funded. We are proud to have been a partner with the District in creating affordable housing and look forward to continue doing so.

As relayed to your staff over the past month or so, I am here today to testify about changes that were made to the District's Procurement and Contract law in 2010, the same part of the law that today's hearing is focused on. Per the Procurement Practices Reform Act of 2010, all entities receiving financing from the city are now required to secure a 100% performance and payment bond for the entire construction amount, with an exception down to 50% and the possibility of using a letter of credit. MANNA was not informed of these change to the law until earlier this year when new leadership at DHCD was looking into the Department's adherence to current law. Until now, MANNA has been providing risk mitigation to the District through 5-10% letters of credit. When we looked into securing a bond, we were told by a bond broker and several other providers that MANNA would not be eligible due to the following reasons, which are also outlined in the attached letter that we submitted to DHCD:

1. Net Worth - As a nonprofit corporation, MANNA has a limited net worth. As with most nonprofits, much of our equity is "restricted or temporarily restricted" due to funding sources. Surety companies are not comfortable with this restriction.
2. Indemnity - Sureties often require the personal indemnity of the company's owners and their spouse. As a nonprofit, MANNA does not have owners.
3. Personal Financial Pledge by Owners - The personal pledge of an owner's credit is not feasible because MANNA does not have owners; it has a board of directors, who cannot take on that kind of risk.

DHCD has worked with MANNA to give us a period of time to come into compliance with the current exemption of a 50% Letter of Credit, which you can see in the included email. However, a 50% LOC would be incredibly expensive for MANNA and drastically bring down our affordable housing pipeline capacity, of which we currently have \$25 million and over 100 affordable units in the works. The 50% exemption would require MANNA to have a \$12.5 million LOC for these projects, and for our recently completed Buxton Condominiums alone, a \$1.65 million LOC.

Current DC law makes it almost impossible for us to compete and continue to operate as a general contractor at a time when affordable housing development is a great need and priority in DC. We ask that the Council set different surety standards for nonprofit general contractors that still provide the District risk mitigation while maximizing affordable housing development. The reason that nonprofits should be given this benefit is because we provide benefit to the city by building affordable housing - current surety requirements will increase the cost of construction and since our mission commits us to serving low-to-moderate income residents we cannot just pass off the cost to market-rate units or projects the way that a for-profit developer could. Consider the following:

- MANNA has been doing construction work for 30 years and we have never defaulted on a project, have never failed to complete construction on a project. So, our track record shows that the risk to the District is minimal.
- The District has their own inspector that makes regular inspections to control quality of work and the payment of funds to ensure that contractors are not allowed to front load construction draws to the detriment of the project.

We think a 10% Letter of Credit and a regular inspections schedule for nonprofits with a strong track record is reasonable.

Thank you for the opportunity to testify; there are some lenders here who will testify later about how they think about risk mitigation when lending to nonprofits such as MANNA, and there are other organizations that will be submitting written testimony into the record. I am happy to answer any questions you have.

**Providence Construction, Inc./Manna Inc.
2004-2014**

Project Name	Location	Value	Rehab/New	Type	Total SQ FT	# Units	Complete
Buxton Condos	1700 - 1720 W St SE	\$3,300,000	Gut Rehab	Walk Up	26,000	24	2014
Whitelaw Hotel Apartments	1839 - 13th St NW	\$1,662,059	Mod Rehab	Apartment	45,500	35	2013
Bexhill Condos/Ivy City	1840-42 Kendall St NE	\$594,304	New Construction	Townhomes	3,680	4	2013
Bexhill Condos/Ivy City	1925-27 Capitol Ave NE	\$564,261	New Construction	Townhomes	5,427	4	2013
Jubilee Housing	2720 Ontario Rd NW	\$418,937	Mod Rehab	Townhome	3,565	1	2013
Bexhill Condos/Ivy City	1908-10-12 Capitol Ave. NE	\$834,642	New Construction	Townhome	8,100	6	2012
27 55th ST SE	27 55th ST SE	\$702,069	Mod Rehab	Single Family	1,275	1	2012
805 7th St NW	805 7th St NW	\$321,229	New Construction	Townhome	2,280	1	2012
723 Somerset Pl NW	723 Somerset Pl NW	\$113,119	Mod Rehab	Townhome	1,440	1	2012
509 S St NW	509 S St NW	\$107,317	Mod Rehab	Townhome	1,136	1	2012
Cardozo Court Condos	1343 Clifton Terr NW	\$1,703,407	Gut Rehab	Walk Up	14,895	15	2011
Bexhill Condos/Ivy City	1845-47-49 Kendall St. NE	\$930,966	New Construction	Townhome	8,100	6	2011
Willowbrook Condos	1029 Perry St NE	\$743,381	Mod Rehab	Walk Up	12,085	16	2010
640 Keefer Pl NW	640 Keefer Pl NW	\$181,034	Mod Rehab	Townhome	2,340	1	2010
Belgrove Condos	2760 Naylor Rd SE	\$723,246	Mod Rehab	Walk Up	13,175	13	2009
Belgrove Condos	2845 Denver St SE	\$626,506	Mod Rehab	Walk Up	12,575	12	2009
YouthBuild PCS	Columbia Rd NW	\$603,166	Mod Rehab	Commercial	5,300	1	2009
Atonatl Condos	3125 Mt. Pleasant St NW	\$969,693	Gut Rehab	Walk Up	10,050	12	2008
Latin American Youth Center	3045 15th St NW	\$487,796	Gut Rehab	Townhome	4,200	5	2008
Valencian Condos	3229 11th St NW	\$365,051	Gut Rehab	Townhome	3,400	3	2008
Fernwood Condos	1441 Spring Rd NW	\$697,676	Mod Rehab	Walk Up	12,681	13	2007
Unity Gardens Condos	1390 Bryant St NE	\$409,678	Mod Rehab	Walk Up	9,804	12	2007
Valtisee Condos	320 V St NE	\$345,962	Gut Rehab	Townhome	2,400	2	2007
S2616 Myrtle St NE	2616 Myrtle St NE	\$295,577	New Construction	Single Family	1,620	1	2007
Potters House Addition	1658 Columbia Road NW	\$315,115	Mod Rehab	Commercial	2,100	1	2007
Fairmont Condos	1340 Fairmont St NW	\$1,225,553	Gut Rehab	Walk Up	16,690	16	2006
Madeline Gardens Condos	1210 Holbrook Terr NE	\$1,133,306	Gut Rehab	Walk Up	12,780	10	2006
Madeline Gardens Condos	1240 Holbrook Terr NE	\$954,310	Gut Rehab	Walk Up	12,780	10	2006
Madeline Gardens Condos	1230 Holbrook Terr NE	\$952,471	Gut Rehab	Walk Up	12,780	10	2006
Oakshire Condos	345 Oakdale Pl NW	\$546,463	Gut Rehab	Walk Up	7,575	9	2006
Latin American Youth Center	3043 15th St NW	\$440,969	Gut Rehab	Townhome	3,715	N/A	2006
Capitol Corner Condo	320 K St NE	\$202,225	Gut Rehab	Townhome	2,050	2	2006
Overlook at Washington View	2601-2619 Douglass Road SE	\$8,205,988	Gut Rehab	Walk Up	105,084	77	2004
Syphax Village Condos	1322 Half St SW	\$1,668,256	New Construction	Walk Up	26,580	12	2004
Syphax Village Condos	17-33 O St SW	\$883,193	New Construction	Townhome	10,692	9	2004
Syphax Village Condos	14-28 N St SW	\$745,188	New Construction	Townhome	9,504	8	2004
Syphax Village Condos	1326-38 Half St SW	\$620,249	New Construction	Townhomes	8,316	7	2004
Syphax Village Condos	1342-50 Half St SW	\$536,044	New Construction	Townhome	5,940	5	2004
New Community For Children	1722 6th Street NW	\$156,391	Mod Rehab	Commercial	2,620	N/A	2004
Seekers Church	276 Carroll St NW	\$370,137	Mod Rehab	Commercial	3,472	1	2004
Ella Jo Baker Cooperative	2552-54 University Pl NW	\$421,412	Gut Rehab	Townhome	6,140	5	2003
Ella Jo Baker Cooperative	2519-21 University Pl NW	\$396,087	Gut Rehab	Townhome	5,410	5	2003
Ella Jo Baker Cooperative	2548 University Place NW	\$318,148	Gut Rehab	Townhome	4,605	4	2003
Ella Jo Baker Cooperative	1443 Clifton Pl NW	\$204,331	Gut Rehab	Townhome	3,082	2	2003
4506 Georgia Ave NW	4506 Georgia Ave NW	\$1,036,681	Gut Rehab	Apartment	12,000	13	2003
TOTAL		\$39,033,593			484,943	396	



Rebuilding Neighborhoods and Preserving
Diversity Through Affordable Housing

MANNA®

A 501 (c)(3) nonprofit organization.

September 2, 2015

Ms. Polly Donaldson
Director
Department of Housing and Community
Development
1800 Martin Luther King Jr Ave SE
Washington, DC 20020

Ms. Allison Ladd
Chief of Staff
Department of Housing and Community
Development
1800 Martin Luther King Jr Ave SE
Washington, DC 20020

Dear Ms. Donaldson and Ms. Ladd:

I am writing to request a policy clarification regarding performance and payment bonds on DHCD projects. Recent conversations with your staff have led us to believe that the agency will require 100% performance and payment bonds on all DHCD funded projects. Manna has had extensive conversations with a number of sureties about bonding and there are a number of factors that immediately disqualify Manna and other nonprofits from consideration for a performance and payment bond:

1. Net Worth. Unlike for profit developers, as a nonprofit corporation, Manna has a limited net worth. As with most nonprofits, much of our equity is "restricted or temporarily restricted" due to funding sources. This is a restriction with which sureties are not comfortable.
2. Indemnity. Sureties often require the personal indemnity of the company's owners and their spouse. As a nonprofit, Manna does not have owners.
3. Personal financial worth and personal credit of owners. Once again, Manna does not have owners; it has a board of directors, who cannot take on that kind of risk.

We understand that DHCD may be concerned about Manna's overall financial position. In light of this concern it is important to highlight two recent events. First, Manna has secured \$4.2 million in loans, letters and lines of credit from United Bank to bolster its financial capacity, which is not reflected in our most recent audited financial statements. Of the \$4.2 million, \$1.2 million will be used to provide construction guarantees to mitigate DHCD risk; \$1 million will be used for working capital; and \$2.2 million will be used to provide a portion of the construction financing at 8th and T, NW.

Secondly, Manna and Jubilee were recently awarded \$15 million in NMTCs. A portion of those NMTCs will be invested in the ownership units being developed at 8th and T, NW and Hunter Place, SE, bringing new Manna equity to these deals. In addition, it should be noted that our Buxton project is sold out and we are nearing the point where we will realize funds from those sales.

In each instance, Manna has brought new money and investors to the table to ensure that we are financially positioned to deliver each of our construction projects.

According to the Procurement Practices Reform Act of 2010 (PPRA), there seems to be sufficient language in the relevant sections relating to surety bonding that gives the city latitude to lessen the amount, or allow for a negotiated alternate form of surety, in order to offset the city's risk and ensure the completion of affordable projects. The law appears to allow DHCD to negotiate with Manna, or similarly situated nonprofits, toward the posting of some surety that closely matches the 5-10% we have been granted in other construction projects for many years and through all administrations.

Manna acknowledges that DHCD does face some risk of Manna non-performance, unpaid subcontractor costs, interest carry until a new contractor can be hired and possible costs increases due to a new contractor. All of these risks can be mitigated by the contingency, the retainage and the letter of credit, as well as more frequent DHCD inspections, if needed. Additionally, DHCD generally advances funds on a percentage complete basis so as a lender you are never too far ahead of the contractor. Borrowing funds to provide 100% construction guarantees is not an effective business practice for nonprofit developers with proven track records.

Manna has a proven track record and has never failed to deliver on any of its DHCD sponsored projects in over 30 years and over 1,200 homes. If DHCD insists on the policy of requiring more in the way of monetary surety it will undermine our recapitalization efforts, place an unsustainable strain on our finances, and unnecessarily put our current affordable projects at risk. Each of these facts should be considered when evaluating Manna's commitment to transforming low-income neighborhoods, promoting economic diversity and building sustainably affordable communities in DC.

Financial remedies are not the only form of good risk management. In most projects, tremendous damage has occurred by the time a bond is called. We ask that you consider Manna's non-financial strengths that contribute the success of a project. They include:

-
1. Over the last 10 years, Manna has completed over \$40 million and 400 units of construction activity. Much of this activity has been DHCD or otherwise publicly funded;
 2. Our construction management team has over 100 years of combined project experience;

Polly Donaldson, Director and Allison Ladd, Chief of Staff
Department of Housing and Community Development
Re: Manna - Surety Bonding
September 2, 2015
Page Three

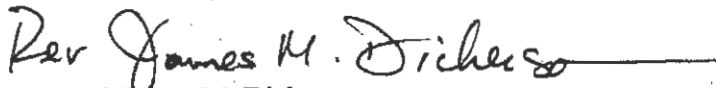
3. We have maintained insurance levels consistent with industry standard, including General Liability, Workmen's Comp, and Errors and Omissions;
4. We are able to provide stellar bank and supplier references; and
5. In lieu of P&P bonds, Manna has provided 5-10% Letters of Credit naming DHCD as its designee on several recent jobs, including Ontario Road for Jubilees Housing, the Buxton Condominium and most recently Miriam's House/N Street Village, which we are in the middle of constructing.

Manna is committed to delivering high quality affordable housing for DHCD and the city's residents. Our construction costs are lower than many bondable general contractors. This reduces the amount of subsidy being requested from DHCD and allows for a more efficient use of the subsidy pool. On a recent bid in which Manna's in-house approach was compared against an outside general contractor, our pricing came in close to \$1.5 million lower. If bonding is required on this job, Manna will be forced to use the outside contractor which will increase our subsidy ask, reduce affordability, or both.

A requirement for bonding would eliminate our ability to self-perform construction and increase our cost of delivering housing. We ask that you consider a formal policy exception that allows Manna to continue to provide risk protection to DHCD in other ways.

Accordingly, we respectfully request that Manna, and similarly situated nonprofits with proven track records, return to providing 5-10% construction guarantees so we can continue our commitment toward helping DHCD make housing more affordable in our nation's capital.

Sincerely,



Reverend James M. Dickerson
President and CEO

Sarah Scruggs

From: Sarah Scruggs
Sent: Monday, October 05, 2015 5:27 PM
To: Alana Intrieri (Council); Evan W. Cash (Council); LeFevre, Cynthia (Council)
Cc: Victoria Palacio; Kang, Irene (Council)
Subject: DHCD: Draft to go to MANNA

Below is the email we received from DHCD outlining the amount of time they will allow Manna to come into compliance with the exception allowed in the current law.

Sarah Scruggs
Short Film - What is Affordable Housing?
Director of Advocacy and Outreach
Manna, Inc.
828 Evarts St NE
Washington, DC 20018
202-832-1845, ext 238

[Experience Manna: A Virtual Tour](#)

<http://www.mannadc.org>

<http://www.hatdc.org>

Follow Manna and HAT on Twitter <<http://twitter.com/MannaINC>> and <<http://twitter.com/HATDC>>

Begin forwarded message:

From: Lestitian, John (DHCD) [<mailto:john.lestitian@dc.gov>]
Sent: Wednesday, September 23, 2015 1:43 PM
To: Jim Dickerson
Cc: Ladd, Allison (DHCD)
Subject: FW: Draft to go to MANNA

Good Afternoon,

As discussed a few minutes ago and in our meeting, the primary outstanding concern is the length of time over which a Mission-Driven Nonprofit Contractor and For-profit Contractors wholly owned by Mission-Driven Non-profits must increase capacity to meet the reduced surety standard of a 50% Letter of Credit. In our efforts to find balance, staff have developed the following:

1. Such entities that cannot provide the 50% Letter of Credit may be granted time to develop capacity as they work towards compliance. The time period to build capacity is established as a three (3) year period with the opportunity for two (2) one-year extensions.
 - a. The goal of developing a workout plan is to encourage and assist such entities to increase capacity in a timely manner.
 - i. An entity that has met the 24th month benchmark (25% Letter of Credit) but needs additional time to meet the subsequent

benchmarks may at this benchmark request a one-year extension to the original three-year period. An extension request will be evaluated based on the entity's plan to build additional capacity. If the one-year extension is granted, the remaining benchmarks will be spread over a new twenty-four month period instead of the original last twelve months.

ii. An entity that received an initial one-year extension may after achieving the 40% Letter of Credit benchmark at the 42nd Month request a second one-year extension if the entity has demonstrated that the additional time is needed and that they have a plan to achieve the goal of 50% letter of credit at the 60th Month.

2. Workout Plan will provide surety according to the following schedule:

- a. 10% Letter of Credit – for all current and awarded projects
- b. 15% Letter of Credit – Months 1 to 12 of the Workout Plan
- c. 20% Letter of Credit – Months 13 to 18 of the Workout Plan
- d. 25% Letter of Credit – Months 19 – 24 of the Workout Plan
- e. 30% Letter of Credit – Months 25 – 30 of the Workout Plan
- f. 45% Letter of Credit – Months 31 – 36 of the Workout Plan
- g. 50% Letter of Credit – Months 37+

One-year Extension Scenario:

- a. If at the 24th month benchmark, the entity has grown capacity to achieve 25% Letter of Credit, has demonstrated that additional time is needed to achieve the next benchmarks in the series and has a plan to achieve the subsequent benchmarks then:
 1. 25% Letter of Credit – Months 25 – 30
 2. 30% Letter of Credit – Months 31 – 36
 3. 40% Letter of Credit – Months 42 – 48
 4. 50% Letter of Credit – Months 49+

Second One-year Extension Scenario

- a. If at the end of 48th month benchmark period, the entity has demonstrated that additional time is needed to increase from 40% to the final goal of the 50% Letter of Credit standard, and has a plan to achieve the goal within twelve (12) months, then a second one-year extension may be granted.

Please let me know of your thoughts on the above. We will then work to coordinate the implementation of such standards and related administrative process. It is our hope that this effort finds the needed balance and provides clarity in these types of circumstance.

Regards,
John

John Nathan Lestitian, Manager
Development Finance Division
Department of Housing and Community Development
1800 Martin Luther King Jr. Avenue SE
Washington, DC 20020
O 202.442.7141 | C 202.809.2477
John.Lestitian@dc.gov



Statement of The Surety & Fidelity Association of America

on

***Bill 21-334—Procurement Integrity, Transparency and Accountability
Amendment Act of 2015***

Council of the District of Columbia Committee as a Whole

November 10, 2015

The Surety & Fidelity Association of America (SFAA) is a non-profit corporation whose member companies collectively write the majority of surety and fidelity bonds in the United States. SFAA is a licensed rating or advisory organization in all states and is designated by state insurance departments as a statistical agent for the reporting of fidelity and surety experience.

Our comments are limited to Section 10 of Bill 21-334, which would create a new payment bond requirement for all non-construction procurements in excess of \$250,000. The Bill states that the amount of the payment bond shall be the greater of 35% of the contract price or the amount specified in the contract to be set aside for subcontractors.

SFAA supports the Council's intent to assure that those who provide labor and supplies on public contracts as subcontractors get paid for their efforts. The Little Miller Act has long required both payment bonds and performance bonds on District construction projects. We support the bond requirement created by Bill 21-334, but we recommend that the Council consider a required amount equal to 100% of the contract price. We understand that the Council established the amount of 35% of the contract price with the intention of facilitating bond availability. However, the end result may be reduced availability with reduced coverage.

The purpose of the payment bond on contracts for goods and services is to prequalify the contractors that will perform the contract fully and provide payment security for subcontractors and suppliers of materials. A surety's evaluation of a contractor is designed to prevent defaults. The surety's underwriting takes into account the size and scope of the underlying obligation in the goods and services contract. The risk to the surety is that the contractor will not be able to complete the contract and pay everyone. If the contractor defaults, the surety's obligations under the bond are triggered. Therefore, the surety's financial and other underwriting analysis are based on the size of the contract, not the size of the bond. The bond secures payment of subcontractor and suppliers for the entire contract not just some percentage of the work. To a surety underwriter, a bond in the amount of 100% of the contract price presents essentially the same risk as a bond in an amount of 35% of the contract. Requiring a 35% bond or a bond proportionate to the amount of set asides for subcontractors simply provides less coverage with no greater bond availability. Further, a bond in such a small amount creates the increased probabilities of a full bond loss. Such exposure may cause a surety to enhance its scrutiny and tighten its underwriting requirements.

Depending on when the contractor defaults and how large of an amount is left unpaid, some subcontractors and workers still may not get paid with a 35% bond amount. Every time the surety pays a claim, the penal sum of the bond is reduced by that amount, leaving less protection for other workers and subcontractors.

Payment bonds will not be more available just because they are for 35% of the contract price, as the surety has to qualify the contractor based on its ability to complete the entire contract. A surety likely would not issue a bond to a contractor that cannot complete the contract, and reducing the bond amount does not change the surety's underwriting.

For the reasons stated above, we recommend that the bond amount established in Section 10 should be 100% of the contract price.



Date: Tuesday, 10 November 2015

To: Committee of the Whole, Council of the District of Columbia

Subject: BPC testimony on the following –

- ❖ B21-334, Procurement Integrity, Transparency, and Accountability Amendment Act of 2015

Presented by: Bill Byrd, President, Business Promotion Consultants, Inc.

My name is Bill Byrd. I am President of Business Promotion Consultants, Inc. (BPC), a 34-year-old Certified Business Enterprise (CBE), here in Washington DC.

I have the following comments on the legislation:

B21-334, Procurement Integrity, Transparency, and Accountability Amendment Act of 2015

1.0 Privatization contracts

1.1 Type of contract

The legislation limits the type of contract usable for privatization contracts to the personal services type of contract. A nonpersonal services type of contract may either be more applicable, or at least, also applicable in a process outsourcing situation, depending on the procurement objective.

The District used to follow the Federal Acquisition Regulation (the FAR) when the District was an agency of the Federal Government. With home rule, the District has made and continues to maintain its own procurement regulations. Still, the FAR informs as the model of public procurement (i.e., government procurement) policy in the US. Note that the FAR discourages personal services contracts, as it circumvents the federal civil service process.

Business Promotion Consultants, Inc.

5028 Wisconsin Avenue NW, Suite 302 • Washington DC 20016
T) 202-463-1900 • F) 202-293-7018 • www.bpci.com

Subject: BPC testimony on the following –
❖ B21-334, Procurement Integrity, Transparency, and Accountability
Amendment Act of 2015

Presented by: Bill Byrd, President, Business Promotion Consultants, Inc.

Page 2 of 7

1.2 Contract price escalation

One of the justifications in the legislation for proceeding with establishing a privatization contract is the anticipated economic advantage of the privatization contract. The criterion is a savings of 5%, to be documented in a “determination and findings” (i.e., a D&F) document, which will be published online prior to the issuance of any solicitation for the privatization contract. The legislation requires the District’s Auditor to review privatization contracts, and if a privatization contract fails to achieve the 5% savings, the District may cancel the privatization contract.

This seems to be a reasonable measure of success for a privatization contract after the first year performance period. But the 5% savings target is based on the government’s costs at a point in time, as documented in the above mentioned D&F. An unanticipated consequence of the 5% savings target, as it is currently structured, is that it may provide cause to cancel most, if not all, privatization contracts after the first year.

This is because the legislation does not account for normal and reasonable increases in the contractor’s direct and indirect contract performance period operating costs beyond the first year.

The legislation needs to provide for privatization contract price escalation, either through negotiation and/or through appropriate utilization of an objective index such as the US Bureau of Labor Statistics’ (BLS’) Consumer Price Index (CPI).

1.3 Evaluation Criteria

The legislation says, “Any contract...” (and therefore, presumably, any solicitation preceding the contract) “...shall include specific provisions pertaining to the qualifications of the staff that will perform the work under the contract...”

If the District is legislating procurement behavior at this level of detail, then it should also legislate that personnel qualifications requirements stipulated in a solicitation should also be accurately weighted in solicitation evaluation criteria, to ensure the most responsive, best value offer is selected.

1.4 Government Interference in Fair and Reasonable Competition

The legislation says, “The Chief Procurement Officer shall make available reasonable resources to assist District government employees, or an entity representing such employees in formulating a bid.”

This appears to be government interference in what should be the fair and reasonable competition of private sector firms to win the contract. It creates the appearance of a

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❖ B21-334, Procurement Integrity, Transparency, and Accountability Amendment Act of 2015

Presented by: Bill Byrd, President, Business Promotion Consultants, Inc.

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conflict of interest. Instead, the legislation should require the Chief Procurement Officer to:

- ❖ Have a bidders' conference 10 days after the solicitation is issued.
- ❖ At the bidders' conference, provide a forum where interested bidders can meet with interested government employees who may be displaced by the privatization contract.
- ❖ Make available complete and detailed resumes of interested government employees, who may be displaced by the privatization contract, either before the bidders conference or at the bidders conference.
- ❖ Establish the proposal due date no sooner than 30 days after the bidders' conference.

Meanwhile, nothing should prevent the government employees who may be displaced by the privatization contract from submitting their own proposal, of their own accord, without any governmental interference.

1.5 Government Interference with Contractor Project Management

The legislation says, "If a privatization contract that displaces District government employees is awarded... The contractor shall offer to the displaced employee a right of first refusal to employment by the contractor, in a comparable available position for which the employee is qualified, for at least a 6-month period during which the employee shall not be discharged without cause."

I must ask the rhetorical question: If the District could not make the program work with the District employees who may be displaced by the privatization contract, what makes the District think a contractor could make it work with the same employees for a cost that is 5% less than the District's cost?

This mandatory personnel retention requirement interferes with the contractor's potential for success on the project. It interferes with a contractor's prerogative to pick and choose, to reconfigure, to downsize, to innovate in pursuit of the 5% savings target. The mandatory personnel retention requirement should be optional.

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2.0 Non-Construction Payment Bonds

2.1 Will Reduce Competition

The legislation requires payment bonds for 35% of the award value of non-construction contracts for services in excess of \$250,000.

This is not a good idea. It will reduce competition. Bonding discriminates against all but the financially strongest private companies. It will discriminate against CBEs. This idea of payment bonds for non-construction contracts for services should be eliminated.

Bonding is not part of the standard financial model for non-construction contracts for services. Services companies have not typically configured their financial operations to conform to the expectations and requirements of bonding companies. Consequently, when small businesses such as CBEs need to obtain bonding within a limited time period in order to satisfy a bid requirement, they can't get bonding.

Large firms interested in doing or continuing to do business in the District may decide to do business elsewhere. Certified Business Enterprises (CBEs), in the business of providing non-construction services, who are otherwise technically and financially capable of bidding on, winning, and performing non-construction contracts for services in excess of \$250,000, may not be able to qualify for payment bonds.

2.2 Limits Financial Flexibility

Bonding limits a private company's financial flexibility. A bond is a bonding company's promise, in this case to the District, that if the company that it is providing the bond for fails to perform financially, the bonding company will step in and perform financially. Since the bonding company is contingently promising its money, before it will make that promise, it obtains assurance from the company that it is providing the bond for that the company can make good and pay back the bonding company. The bonding company obtains that assurance in the form of collateral. Acceptable collateral is the assets of the company, satisfactory to the bonding company. The bonding company is interested in the most liquid assets of the company. The most liquid assets are cash and items close to cash. If the company does not have sufficient liquid assets to satisfy the bonding company, the bonding company may consider the personal assets of the owners of the company. Alternatively, and most typically, the bonding company will decline further consideration of providing a bond for that company. Large companies may find that they can make profits equal to or greater than the profits they can make in the District in other markets without tying up their assets in a bonding situation. CBEs may not have sufficient cash reserves to satisfy the bonding company's requirements.

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2.3 Increases Operating Costs

In addition to minimizing the risk to their own cash by collateralizing the assets of the company to be bonded, bonding companies charge fees for their services. These fees are paid by the companies seeking to be bonded. Therefore, bonding increases a private company's operating costs.

2.4 Better Alternative

If the intent of the District is to provide a better payment mechanism for CBE subcontractors, then it should develop and implement a prime contractor and subcontractor payment tracking system. Ideas associated with this concept are beyond the scope of this testimony. However, I will be happy to discuss them offline, at the convenience of Committee representatives.

3.0 Strategic Sourcing

3.1 DC is not the Ford Motor Company

In the non-governmental procurement arena, implementation of strategic sourcing has resulted in the elimination of small businesses from first-tier contracting relationships with large business customers.

The best example of strategic sourcing was when Ford Motor Company bought all of its tires from Firestone Tire and Rubber Company. Ford achieved what it believed was the best quality at the best price, and it was clear who to call when there was a problem. No other company could sell a single tire to Ford for decades, until Ford Explorers started rolling, and the rolling was blamed on Firestone tires.

The first DC Chief Procurement Officer came to the District from the Ford Motor Company. He told me he wanted to implement a prime vendor program. (A prime vendor program is what strategic sourcing was called before it was called Strategic Sourcing.) Here is what he had in mind:

- ❖ The District was doing business with too many vendors (code for too many small contracts with too many local, small and minority businesses).
- ❖ Procurement would improve if the volume of transactions was reduced, if the quantity of vendors/contractors was reduced.

Fortunately, he failed to implement a prime vendor program in the District.

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But it seems what almost went around before is trying to come around again.

The legislation says, “ “Strategic sourcing” means a structured and collaborative process of critically analyzing an organization’s spending patterns to better leverage its purchasing power, reduce costs, and improve overall value and performance.”

This legislative instruction could easily be interpreted to mean the District should develop relationships with select suppliers of goods and services comparable to the above mentioned relationship between Ford and Firestone.

That would be inappropriate for the public procurement operations of the District, financed by District taxpayers, and disastrous for the District’s local, small and disadvantaged businesses.

Local government procurement is where many local, small and disadvantaged businesses start, and where many live.

Strategic sourcing will put many of these local, small and disadvantaged businesses out of business.

Strategic sourcing is mutually exclusive with maximizing opportunities for local, small and disadvantaged businesses.

3.2 DC Should Be the Best that it Can Be

Instead of embracing “strategic sourcing”, to the detriment of the District’s small business community (and the tax base that we represent), here is what the District should do to improve its public procurement operations:

- ❖ Right-size the authority and personnel allocation of the Office of Contracting and Procurement (OCP).
 - Reverse the personnel downsizing that a prior Chief Procurement Officer (CPO) implemented.
 - Reverse the delegation of procurement authority that a prior CPO implemented.
 - Finance the new procurement training plans of the current CPO wants to implement.
- ❖ Implement rigorous acquisition planning and forecasting, as hinted at elsewhere in this legislation.

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- Change the OCP mindset that the way to speed up procurement in the District is to give bidders less time to bid. Instead, significantly extend the bidding time on solicitations.
 - The way to speed up procurement in the District is for OCP to get what it needs from its customer agency program offices in time to implement OCP's best procurement processes, and then for bidders to have sufficient time to prepare and submit their best proposals, for each requirement.
 - ❖ Change the OCP mindset that they don't own their procurements. Contracting Officers and Contract Specialists need to invest intellectual energy in understanding the Statements of Work (SOW) that they solicit.
 - OCP needs to develop SOW writing skills, and ensure that, in partnership with the program office, the SOW is written to achieve the program office's procurement objective in a way that facilitates competition for the project; not in a way that assures continuation of the incumbent's incumbency.
 - ❖ Change the OCP mindset that price is a valid single evaluation criteria for the procurement of services among DCSS vendors (for projects less than \$100,000).
 - The cheapest price does not often reflect the best offer.
 - The cheapest price is not always in the District's best interests.
 - OCP needs to really utilize evaluation criteria, not just go through the motions, and assign a percentage weighting to each criteria, to define the lowest acceptable quality offer that is acceptable. Price can then be one but not the only criteria to be used.

Some of these suggestions require legislation, some require leadership at OCP.

I leave it to you to spearhead the legislative initiatives, and I look forward to the results of Chief Procurement Officer Schutter's new leadership toward an overall improvement in procurement in the District, for the betterment of the government, the businesses, and the citizens of the District.

Thank you for the opportunity to testify. I welcome any questions you may have.

Bill Byrd
President
Business Promotion Consultants, Inc.

Testimony of Margaret Singleton
Vice- President of Contracts & Programs, DC Chamber of Commerce
Before the Committee of the Whole on Tuesday, November 10, 2015
on
Bill 21-334, Procurement Integrity, Transparency, Accountability Amendment
Act of 2015, and Bill 21-397, Procurement Practices Reform Amendment Act of
2015

Good Afternoon Chairman Mendelson and members of the Committee, I am Margaret Singleton, Vice-President of Contracts and Programs at the DC Chamber of Commerce. In my current capacity, I lead initiatives on small business assistance, innovative partnering, and knowledge management for economic and small business operations to advance the Chamber's goals. Thank you for the opportunity to present testimony on Bill 21-334 and Bill 21-397. My comments today address provisions in Bill 21-334, and Bill 21-397 that we support, as well as, those that can be improved to make the District a better place to work and do business. However, as you will note in my submitted testimony, the DC Chamber of Commerce and its members do not support the Community Impact Fund Act of 2015, as the potential impact of that measure is too far, and too much.

Bill 21-334, Procurement Integrity, Transparency Accountability Amendment Act of 2015; and Bill 21-397, Procurement Practices Reform Amendment Act of 2015

Bill 21-334, is an extensive legislative measure that makes some significant changes to the procurement policies in the District. One provision (found in section 6 of the bill), the establishment of an ombudsman for contracting and procurement, who will respond to complaints and concerns raised by vendors and identify systematic issues and improvements to the contracting process is a conceptual idea the DC Chamber can appreciate. Specifically, if the office acts as an independent voice that points vendors towards a resolution or solution while underscoring areas or processes in need of transformation .

We would not encourage you to establish another policy developing entity, and understand that careful balance must be taken so that this new office does not override the authority of current administrative bodies (ex. appeals boards) Often we hear about the deficiencies of OCP from our members who participate in the public sector procurement process, and we understand the Committee of the Whole, the Committee on Business, Consumer and Regulatory Affairs, as well as, the Committee on Finance and Revenue also receive comments, complaints, and concerns from vendors regarding the efficiency, quality, and service-delivery of the District's procurement process and office. However, beyond the proposal of an ombudsman --- to our membership, both Bill 21-397 and Bill 21-334 do very little to fix the core concerns that contractors want the District to change if it is considering "procurement accountability" or "contracting practices reform". Those central concerns are about the proficiency of the procurement office and DC's independent procurement agencies. Secondly, many vendors raise concerns about receiving timely payment even though there exists a Quick Payment Act. I believe that as a chamber of commerce that supports advocating for business friendly policies, it is essential that we highlight to you today the abovementioned concerns of the business community, and urge you to address those concerns while you have oversight of contracting and procurement.

As you may know, the DC Chamber of Commerce, much like the Committee, and the Mayor, supports a procurement process that is clear, transparent, and fair to all businesses that qualify and wish to participate in these opportunities. For us, when the District has a fair and competitive procurement process, it can also encourage new and additional vendors to compete for local contracts. In many cases, these additional vendors are looking to relocate their business to the district or may be a certified business enterprise exploring access to contracting opportunities as a way to enhance their operations and produce additional jobs. With that said, we caution the District about including in a legislative proposal any measure that would deter businesses from bidding on contracts. As drafted, Section 10 of Bill 21-334, would require vendors who receive non-construction contracts in excess of \$250,000 to "obtain a payment bond equal to 35%, or the amount set aside in the contract to be spent on subcontractors" . This is a major concern for our small business members and local non-profits who have difficulty getting access to capital. Many vendors already have to obtain a line of credit to sustain themselves, and pay their subcontractors when necessary, when

payment from the District is not quickly received even though statute says it must be. We ask that you take a step back to be clear about what specific issue/problem we are trying to solve. Is it that subcontractors did not receive their payment because the District government has not paid its general contractor? We agree that we need to adopt policies that work for everyone in DC, and want to work with you on alternate language, that would be less burdensome than payment bonds to potential and existing contractors.

Section 4 of Bill 21-334, should be reconsidered, and we would like to work with the Committee on this section of the bill as we have some grave concerns. Specifically, we would ask that the mandates placed on the vendor or contractor in paragraph (d), page 10 are removed. To require a vendor to offer a specific employee employment or right of first refusal, plus continued employment after a six-month transitional employment period when most probationary periods by employer policies have different timelines is excessive and overstretches itself into the vendor's control of its operations, and should be removed from the bill. Also, to penalize a contractor, would only promote that the process is not business friendly and further discourage participation in a process that is dependent on the support of private sector businesses. Finally, to further tie the hands of the contractor so that they are mandated to supply specific compensation/benefits to that employee would also impact and misalign what the vendor has established in compensation for its current and future hires. Some in human resources would call this *salary compression* and if mandated by Bill 21-334, would cause inequity and increased turnover in the workplace. DC employers, vendors, contractors want to hire the most qualified, and skilled individuals to work on private or public projects, but legislation that impacts the day-to-day and core HR policies of a business should not be the focus of the Committee's policy discussion.

Lastly, we are in support of OCP providing forecasts and projections of future contracting needs at least estimating one- year into the future. This provision is business friendly and anything less than a year would not permit a vendor or potential contractor to plan or project which solicitations it should consider in the future. We also support that Bill 21-397, which amends the current statute providing option years in a multi-year contract to be approved by Council at the same time as the base period of the contract. We would propose that the threshold in Bill 21-397, for delinquent tax status is higher than \$1,000. Increasing the

threshold would not create impediments to doing business with the government and could possibly expand the pool of vendors. Additionally, we support the provision in Bill 21-397 that permits tipping contracts to be deemed approved following a review period by Council. These proposals promote a timesaving, simplified process that is beneficial to both the private and public sectors.

Thank you for the opportunity to testify, I have specific comments about Bill 21-64 that is before the Committee and have submitted testimony for the record. I am available to answer questions at this time.

R. Grant Enterprises LLC

Testimony
OF
Roscoe Grant, Jr.
On

Bill 21-334 Procurement Integrity, Transparency, and Accountability
Amendment Act of 2015, and Bill 21-397, Procurement Practices Reform
Amendment Act of 2015.

Before the Council of the District of Columbia
Chairman, Committee of the Whole
The Honorable, Phil Mendelson

Tuesday, November 10, 2015, 1:30p.m.
Room 412, John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Good Afternoon Chairman Mendelson and Members of the Committee Of The Whole.

My name is Roscoe Grant, Jr., CEO/President of R. Grant Enterprises, LLC in Washington, D. C.

Mr. Chairman, I am here today to express concerns regarding Bill 21-334, Procurement Integrity, Transparency, and Accountability Amendment Act of 2015 and Bill 21-397, Procurement Practices Reform Amendment Act of 2015.

Mr. Chairman, I would like to make the following suggestions or recommendations for your consideration. First, any reference in the definitions to prime and subcontractors should also include developers and nonprofit organizations. Second, with respect to the submission of complaints, the language is vague and ambiguous, and should state clearly a specific time frame within which to submit a complaint, for example, “thirty (30) days”, as opposed to “a timely fashion”. Third, all references to “change orders” should require that all “change orders” must be signed by all parties, including the prime, the subcontractor, the developer, the nonprofit organization, and the authorized government agency representative in order to be a valid change order for payment, in a “Change Order Directive”.

Chairman Mendelson, we must insist on a cultural change in how prime contractors, subcontractors, developers, nonprofit organizations, and the District of Columbia Government do business, and specifically as it relates to payment for services rendered or products delivered. D.C. tax dollars are being spent on these government projects and, therefore, the District Government must always maintain control over this entire process. For example, I have a client that performed work, on time and in a satisfactory manner and, to date, has not been paid by the prime contractor. When my client sought assistance from the Agency's contracting official, he was advised that the Agency could not get involved in any payment disputes between the prime and subcontractor.

I strongly disagree with this practice and policy. The prime contractor, developer, or nonprofit organization is awarded the contract by the District of Columbia Government, and all subcontractors must be approved through a subcontracting plan. In effect, when the Agency takes this hands-off position, it creates a financial burden on these small businesses, some of whom have gone out of business because of lack of capital and earnings.

In other neighboring jurisdictions, government agencies issue a "joint check" to the prime and subcontractor, and have instituted other financial systems to allow the subcontractors to track their

payment when invoices are submitted and approved. This system of checks and balances works for the small business subcontractor.

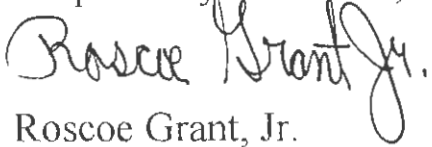
It is hard enough for D.C. certified businesses to win contracts, and then not to get paid for work performed causes loss of jobs, taxes, missed payrolls, and lack of training opportunities for DC residents. Small businesses are also being blackballed for speaking out against this harsh and untenable practice. I do not know any small, DC certified business that can take an \$800,000 dollar hit, and not feel the financial fallout from such a hit. This is a clear example of noncompliance and bad behaviors on the part of prime contractors, developers, nonprofit organizations, and even D.C. Government contracting and procurement officers.

In addition, I would recommend that you include language in the proposed legislation which clearly identifies the entity or organization that represents the interests CBEs, SBEs and subcontractors.

Finally, proposed Section 207(b)(1) does not go far enough in identifying or laying out a clear cut administrative process to redress any grievances brought by or on behalf of small businesses.

Thank you Chairman Mendelson for allowing me to appear before your Committee and I hope you give my recommendations due consideration in the final outcome of these bills.

Respectfully submitted,

A handwritten signature in black ink that reads "Roscoe Grant Jr." in a cursive, flowing script.

Roscoe Grant, Jr.

CEO/President

R. Grant Enterprises, LLC

COW Public Hearing on B21-334 & B21-397

Ramon Jacobson
Local Initiatives Support Corporation
1825 K Street NW, Suite 1100
Washington, DC 20006

Hello, my name is Ramon Jacobson and I am a Senior Program Officer for the Washington, D.C. office of The Local Initiatives Support Corporation – better known as LISC. LISC is a national organization, with Washington, D.C. as one of the flagship offices. Established in 1982, we have invested in more than 8,300 units of affordable housing, in health clinics, theaters, community centers, and retail and shopping centers throughout the city.

Throughout our 30-plus years in the District, Manna has been a key partner along the way. LISC has provided over \$16 million in loans, grant support, and in tax credit equity investment to Manna for its community development work. These include more than 90 separate transactions, each approved by our internal credit and legal teams, and each reviewed by our local advisory committee of bankers, foundation executives, and philanthropic leaders. LISC has never had a write off, a default, or a failure to repay an investment by Manna.

That's the track record. In our current work, Manna remains an important partner in a context that we all recognize, when affordable housing is becoming increasingly scarce. LISC's financing pipeline includes an additional \$4 million for affordable homeownership in Anacostia and Shaw, and an equity investment in 70 affordable rental units in the Brightwood neighborhood. We are also financing other groups, such as limited equity cooperatives and Jubilee Housing, who use Manna and Providence as their General Contractor. For our credit team and local advisory committee, Manna is a brand name that is associated with quality, reliability, and affordability.

The issue today is about ways of hedging and managing risk, and where bonding fits in the array of risk management techniques. The key point is that bonding is at the end of a long list of remedies and steps we utilize. Bonding is not a remedy that we have used in my 17 years working in community development in the District of Columbia. My sense is that the District has other, more useful means of controlling risk and making sure that these projects are completed appropriately.

The key step in managing risk is upfront underwriting. We look at the 4 C's – Collateral, Capacity to complete the project, capital creditworthiness, and most important, character. For an affordable housing developer, they also face all the hoops and hurdles of compliance with state and local requirements. And, there are many.

During construction, we utilize a range of measures, which are mirrored by the public agencies as well:

- References and credit check for contractors.
- Upfront permit approvals, and stamped architectural drawings.
- Independent reports from Construction Inspectors of each monthly draw request.
- Release of lien's to make sure sub-contractors are receiving payment.
- Title updates to ensure that no lien has been placed on the property.

- Contingency is budgeted to ensure that unexpected costs can be absorbed during construction, and deal with change orders.
- Retainage, to ensure that the Contractor remains committed through completion, until the final lightbulb is screwed in.

Each of those measures limits exposure and risk. If there is a problem, it is small enough to fix. And, if there is a loss, it is small enough to absorb.

With a nonprofit general contractor, there is additional security. Nonprofits 501c3 charitable organizations cannot distribute equity or profits to board members. Any excess revenue or fee income remains within the envelope of the nonprofit corporation to support its charitable purpose. One successful project begets the next.

That's kind of obvious, but it is the opposite of nearly every other entity in our for-profit economy. The incentive to cut corners, or cut and run and pocket profits is lessened for nonprofit organizations. That matters.

It matters to groups like the limited equity cooperative in Petworth that hired Manna to help them turnaround their cooperative. This Co-op was founded in 1989, and has an outmoded heating system that left some units broiling and the others freezing. Half the building had boilers and radiators, and the other electric baseboards. The windows had surrendered. Vacancies were undermining their financial stability, but they were anxious about being swindled by a developer or contractor, and reluctant to move forward. The Cooperative selected Manna's Providence Construction to modernize and repair the building, and Manna's nonprofit status was key to the residents' confidence that they could make this million dollar investment in their homes. This project which LISC is financing and is under construction today, will restore 7 vacant affordable units, and ensure that the 31 unit property is sustainable for decades to come.

We believe that Manna's track record and function as a nonprofit contractor are invaluable in the District's affordable housing efforts. Resolving the bonding issue is key to making sure that there that nonprofit affordable housing developers can take on the challenge of addressing the affordable housing crisis in the District.

Nov. 9, 2015

Good Afternoon Chairman Mendelson and Committee Members. My name is Tim Hampton and I am testifying on behalf of WACIF, a local nonprofit Community Development Financial Institution (CDFI) that provides flexible financing to local businesses and nonprofits.

I am here because the Procurement Practices Reform Act of 2010 is in danger of causing some unintentional collateral damage that would impede the development of affordable housing in DC.

This act placed bonding requirements on general contractors. However, it is virtually impossible for not-for-profit organizations to become bonded, because of the ownership structure and how their so-called profit margins barely exist. The only alternative, according to the act, is for the nonprofit developer to place a huge sum of cash in a bank, equal to half the value of the entire project. Needless to say, this is a very expensive proposition -- one that nonprofits building affordable housing simply cannot afford.

Of course, the bonding requirement was added because the District wants surety that contractors will fulfill their obligations. I understand this. The problem is that the same financial standards are being applied to for-profit and non-profit entities, which just doesn't make sense.

At WACIF I have underwritten loans to nonprofits, including Manna, and I know firsthand that you have to evaluate the creditworthiness of a nonprofit differently than for a for-profit company. WACIF's credit policy, on which all our loans are based, states:

"The credit analysis of a nonprofit organization differs from that of a conventional business. Most fundamentally, the primary goal of non-profits is service delivery, not the generation of profits for owners and investors. Generally, the financial statements are on a fund accounting basis and there are no owners or guarantors... Traditional financial ratio analysis is not appropriate to the evaluation of non-profit entities. As noted above, since non-profits are more concerned with service delivery than profitability, traditional ratios measuring liquidity, leverage, profitability, and activity are not entirely relevant"

Unfortunately, the process of getting bonded relies heavily on those financial measures and ratios, plus getting a personal guarantee from the business owners, which isn't even possible in the case of a nonprofit.

I understand that this "collateral damage" against nonprofit developers was unintentional. Luckily, there is still time to act before the damage is done.

There are other ways to measure a nonprofit's creditworthiness and capacity to perform. I recommend that the council give DHCD flexibility in determining the requirements for nonprofit affordable housing developers, instead of requiring the same bonding and letters of credit as a for-profit.

If nothing is done to amend this provision, somewhat less affordable housing will be built, and it will cost more -- millions of dollars more.

That waste can still be prevented, with your action.

Thank you.

-Tim Hampton, WACIF

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of Contracting and Procurement



Public Hearing on

B21-397, “Procurement Practices Reform Amendment Act of 2015”
B21-334, “Procurement Integrity, Transparency, and Accountability Amendment
Act of 2015”

Testimony of
George Schutter
Chief Procurement Officer, District of Columbia

Before the

Committee of the Whole
Chairman Phil Mendelson

November 10, 2015
Room 412
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, D.C. 20004

Good afternoon, Chairman Mendelson and members of the Committee of the Whole. I am George Schutter, Chief Procurement Officer of the District of Columbia and Director of the Office of Contracting and Procurement. Today, I will offer testimony on the Procurement Practices Reform Amendment Act of 2015 bill number 21-0397 and the Procurement Integrity, Transparency, and Accountability Amendment Act of 2015, bill number 21-0334. I will outline the reforms proposed in the Mayor's bill, which I will refer to as PPRA Amendments, as well as highlight some concerns in the Council bill, which I will refer to as PITAA.

In reviewing these proposed amendments to the Procurement Practices Reform Act of 2010, I recognized a shared goal between Council and the Executive branch to enact change that will result in good governance and an efficient, transparent procurement process. Our challenge is to ensure good governance and balance oversight and the ability to execute contracts. It is also my priority to ensure that we have a transparent contracting process and maintain the integrity of procurement sensitive information submitted by industry partners.

PPRA amendments

As I shared with you in July at my confirmation hearing, the Mayor and I have a vision to improve the efficiency, quality and integrity of the procurement service delivery in the District. I take my position as the Chief Procurement Officer (CPO) and being a public procurement official seriously. I recognize the importance of obtaining the best value for goods, services, and construction, ensuring transparency and competition, and complying with the laws and regulations governing procurement. The proposed PPRA amendments are opportunities to improve the procurement process and remove or lessen some of the administrative bottlenecks that impede our work daily.

Option Years

One of the key elements of the PPRA amendments is to change the process for review of option periods contained in contracts previously reviewed by the Council. The PPRA amendments propose to change the duplicative approval process required to exercise option periods that were included in the proposed contract award submitted by the Executive and approved by Council.

Presently, we are required to submit each exercise of a contract option period over \$1 million, even though the options were included as part of the approval of the initial contract package submitted to Council. The PPRA amendments propose that Council reviews and approves option periods as part of the initial contract package. Option years would be resubmitted for Council review and approval if there are any changes to the option after it was originally submitted to Council. It is critical to remember that option year exercises are not separate contracts, so the initial contract package clearly outlines the plan for fulfilling the requirement during the period of performance.

Our intent is not to remove oversight of the Council in contracting. Our intent is to reduce the duplicative administrative processes that preclude contracting officers from working in the most efficient manner possible. We anticipate that this process change will conserve government resources, reduce the risk of a lapse in essential government services, and align the District with best practices in governmental purchasing. According to a 2015 survey by the National Association of State Procurement Officials, the District of Columbia is the only jurisdiction that requires approval of contracts by the legislative branch. In other jurisdictions, contract approval is handled solely by the Executive. Again, the proposed bill does not seek to remove Council's oversight of contracts, but only to remove the second approval of option periods by the legislative branch.

Tipping Actions

Currently, contract modifications that did not previously require Council approval and increase the contract to an amount in excess of one million dollars during a 12-month period are required to be added to the consent agenda at a legislative meeting. Practically, this approval can only happen during a

legislative meeting, which only occurs once a month, and requires legislation to be drafted, legally certified by the Office of the Attorney General and filed with the Council's Office of the Secretary five days before the legislative meeting. Our proposed change will allow these contract modifications, generally referred to as tipping actions, to be considered for 10-day passive Council approval. Often times tipping actions are time-sensitive and if not processed quickly, can interrupt critical services to residents of the District. Allowing passive approval of these contract actions at any time, rather than only during a legislative session will help streamline both essential and routine contract modifications without reducing the Council's oversight in the procurement process.

Integrity

The PPRA amendment also proposes measures that will prevent attempts to influence District decision-makers and protect procurement sensitive and proprietary information obtained in the procurement process from public disclosure. The District procurement process and global best practices consider procurement "live" from the point of industry solicitation through contract award. Since our laws and regulations require legislative branch approval prior to being officially executed or signed by the contracting officer, contracts are technically "live" until approved by Council and countersigned by the Executive. In those instances when contracts are not approved by Council, it is still a "live" procurement should we reopen negotiations with other offerors. Industry best practices require us to protect the integrity of procurement-sensitive information acquired through the procurement process, similar to the Good Government Rules upheld by many other jurisdictions. We are also seeking to extend the prohibitions against interfering with live procurements by District employees, or attempts to influence a District employee or official with respect to source selection, to contractors competing in the live procurement or anyone associated therewith. This proposal does not prevent non-public briefings between Council and members of the Executive on live procurements.

Clean Hands

Currently, a potential contractor is deemed not responsible, if it has any delinquent outstanding tax debt to the District or federal government. Responsibility is a technical term meaning that a prospective

contractor has been determined by the contracting officer to have the necessary capacity to perform in the accordance with the terms and conditions of the contract. OCP proposes to change the focus of the Council's "clean hands" review requirement to a procedure allowing the award if the contractor owes the District no more than the higher of \$1,000 or 1% of the contract value up to \$25,000. This provision also allows the District to withhold payment under the contract to offset the tax liability and place a penalty on the contractor if the contractor does not comply. This change to the Clean Hands requirement will allow some flexibility in the process.

The second part of this provision of the PPRA amendments includes a proposal that Council packages can rely on information from the Clean Hands Database, rather than requiring written certification from the Department of Employment Services and the Office of Tax and Revenue. In some cases, receiving the written tax certifications can add up to an additional 10 days to the procurement process.

Acquisition Planning

This year, the team at OCP led our customer agencies through an extensive acquisition planning process to produce the 2016 acquisition plan. This critical and ongoing acquisition planning process will improve planning and coordination for contract actions in fiscal year 2016 and moving forward. Our proposal simply changes the timeframe for submitting acquisition plans to 60 days after Council approval of each agency's budget. The change in timeframe allows us to submit a plan to Council that will clearly identify priority procurements and align them properly with approved budgets and agency priorities for the coming fiscal year.

Procurement, Integrity, Transparency, and Accountability Amendment Act of 2015

Director Weaver and I, with considerable support from our teams, reviewed the Procurement Integrity, Transparency, and Accountability Amendment Act of 2015 to analyze the key components of the bill. In our review, we understood the general intent; however, we do have concerns with some of the provisions of the Council's bill.

DGS AUTHORITY

Our analysis of section 2 of the bill, the proposal is to limit the procurement authority of the Department of General Services (DGS) to “construction and related services,” and the “operations and maintenance of facilities, real estate management, utilities, and security.” Procurement authority to purchase other goods and services would revert to the CPO.

The partial removal of DGS independent procurement authority will create ambiguity in execution and confuses the lines of authority, which are currently very clearly defined. While proper planning and coordination between DGS and OCP may alleviate this concern to an extent, interagency confusion over procurement authority may result in the delay of delivering critical goods and services to the District.

COUNCIL REVIEW PROCESS

Section 3 of the bill proposes two areas of change to the District’s Council review process: one concerns the information required to be sent to the Council for review; and the other adds a requirement for referral of contract modifications to the Office of the Inspector General (OIG).

The PITAA lists 10 specific items to be included in the Council Summary. OCP agrees with the bill’s intent to provide quality and relevant information to Council for consideration in review and approval of contracts. We agree that source selection method, option values and amounts, values and dates of letter contracts, anticipated date of competitive procurement if the contract was a sole source, and a general description of the selection process are valuable information for the Council’s review and approval of contracts. However, there are a few requirements in the bill that we believe merit further discussion. The three that cause the most concern are:

- Subcontracting plan. In certain construction procurements, the design may not yet be completed such that all types of work required for the project are known at the time work commences. As a result, it is impossible to identify all subcontractors without having first fully established the scope of the project’s design, and, therefore, impossible to submit a subcontracting plan. This is recognized by the Small and Certified Business Enterprise Development and Assistance Act of

2005, which provides that a design-build project shall not be required to identify specific subcontractors as a condition precedent to performing preconstruction services.

- Secondly, the proposed requirement for evaluation of past performance. The proposed requirement regarding evaluation of past performance is unclear and leaves room for interpretation as to what information would satisfy this requirement. Information on a contractor's performance relating to private contracts may not be available to the District, and may require additional administrative resources to obtain.
- And thirdly, the requirement that any reviews or reports be summarized and included in a Council package will add to the time needed to prepare the Council package. Reports may also contain deliberative information that would be inappropriate to disclose in a Council Contract Summary that is made available to the public.

Section 3 also requires that any option exercise, modification, or change order be submitted to the Inspector General for review for corruption, mismanagement, waste, fraud, or abuse.

Options exercised in accordance with the contract terms are legitimate procurement actions that should not be automatically submitted for the Inspector General's review. Other modifications, change orders, or basic change directives should only be referred when circumstances suggest further investigation is needed. Changes and modifications are normal parts of contracting, and there should not be an implication that any change or modification is an indication of corruption, mismanagement, waste, fraud, or abuse.

OMBUDSMAN

Section 6 of the bill creates an Office of Ombudsman for contracting and procurement. The Ombudsman is appointed by the Mayor, in consultation with independent agencies, the Department of Small and Local Business Development (DSLBD) and industry, and the office lies within the OCP. The Ombudsman is responsible for receiving complaints from District contractors and subcontractors, responding to those

complaints, trying to resolve any disputes, recommending suspensions and debarments, identifying “systematic concerns” and recommending to the Mayor and Council policy changes, and referring complaints to the Contract Appeals Board, DSLBD, the Office of the Inspector General, or the Office of the Attorney General.

This Ombudsman adds an administrative layer to the District’s procurement process, blurs the lines of responsibility for procurements, and creates confusion for contractors when the Ombudsman and the contracting officer have conflicting views. OCP is already subject to oversight and review through its own Office of Procurement Integrity and Compliance, OIG, the DC Auditor, and the OAG. Additionally, we established the Procurement Accountability Review Board to review widespread challenges in the contracting process with the Mayor, the City Administrator, and myself. This is an added layer of oversight where we can review pervasive contracting issues and identify solutions that will have widespread, far-reaching impact on the contracting process.

We are committed to ongoing engagement with industry through our Customer Contact Center, our Vendor Relations team, and creating opportunities for two-way communication with the business community. That being said, contracting officers are still the primary points-of-contact for procurement-specific issues.

EVALUATING CONTRACTOR PAST PERFORMANCE

Section eight of the bill lays out several evaluation criteria that are required to be included in all Requests for Proposals. Among these factors is the past performance of the offeror and elaborates further to list the following criteria:

- Current or past government and private sector contracts;
- Information obtained from the offeror or any source on the offeror’s past or current contracts;
- Information regarding predecessor companies, subsidiaries, key personnel, or subcontractors; and
- Compliance with past or current subcontracting plans or goals.

I am specifically concerned with the broad nature of this section. Evaluation factors are developed in conjunction with the program, designed for a specific procurement to get the best value, and should not be applied across all procurements. Further, contracting officers and program managers should be responsible for establishing evaluation criteria for a given procurement.

Non-Construction Payment Bonds

The bill significantly changes the PPRA's bond requirements by mandating that non-construction contracts valued at more than \$250,000 require a payment bond in the amount of 35 percent of the contract amount or the amount set aside for subcontractors, whichever is greater.

This new provision is not in line with standard and best procurement practices. For example, under the Federal Acquisition Regulations (FAR), "agencies shall not require performance and payment bonds for other than construction contracts," except in limited circumstances. Further, payment bonds are only required if a performance bond is required, and only if the use of payment bond is in the Government's interest; which is a determination of the contracting officer for the specific procurement. This new bond requirement will increase the time required to finalize a sizable number of procurements. Moreover, this requirement will also increase the cost of procurements as contractors will likely pass the cost of obtaining payment bonds on to District taxpayers. At a minimum we recommend that "whichever is greater" be changed to "whichever is lower" because if the subcontracting amounts do not exceed 35 percent, the payment bond should not be for an amount greater than 35 percent of the award.

Finally, the requirement for payment bonds on non-construction service contracts will most significantly affect small businesses, adding another requirement to engage with the District, and, therefore, possibly decreasing competition for District contracts. Businesses, particularly small businesses, for non-construction service contracts are not currently and have not traditionally been required to obtain bid, performance, or payment bonds. Small business may be prevented from doing business with the District because of their inability to obtain payment bonds.

INHERENTLY GOVERNMENTAL FUNCTIONS

Section five of the PITAAA adds a new section the PPRA that prohibits contracting for inherently government functions. The proposed addition creates three types of inherently governmental functions which is generally concerning because the delineation of specific government functions unduly ties the executive's hands, limits flexibility, and stifles creative solutions to meeting the District's needs. The PITAAA definition of inherently governmental functions does not include the critical premise of the federal definition that "This is a policy determination, not a legal determination."

Another concern is the definition of "closely associated with inherently governmental functions." The PITAA list of functions closely associated with inherently governmental includes functions that the FAR specifically lists in section 7.5 are "generally not considered to be inherently governmental functions." OCP and DGS share the opinion that the provision be revised to include only a definition of inherently governmental function and the authority for the Mayor to provide more detail through rules.

CONSTRUCTION COSTS

Section nine of the PITAAA requires an estimate for any proposed contract, modification, or change order in excess of \$10,000. It further requires that the estimate be prepared in detail, as though the District were bidding on the project, and shall not rely solely on comparable costs of similar construction projects.

Our concern is that \$10,000 is too low, especially when considering new awards. While a detailed, formal estimate for a larger project is appropriate, that level of detail is not necessary for a small purchase of \$100,000 or less. Furthermore, the proposed provision precludes reliance solely on comparable costs for a similar construction project. Such reliance, however, is a legitimate tool for assessing estimated costs and may be used appropriately when a detailed estimate on standard purchases would only be burdensome. Lastly, even though this provision implies that it pertains only to DGS, the wording would make it applicable to all construction handled by the District, including at the District Department of Transportation.

PRIVATIZATION CONTRACTS

Section four of the PITAAA clarifies and supplements the existing law on privatization contracts. Most of the changes involve preventing District employees from being displaced. The section also adds a requirement that the DC Auditor review District privatization contracts and assess their savings and impact on the District. OCP and DGS have identified the following concerns with this provision:

- Section four states that any bid submitted by District employees or an entity representing them, shall be deemed responsive. A bid can only be found responsive if it addresses the District's minimum needs. If the bid will not provide the required services, it should not, as a matter of law, be deemed responsive.
- The section also requires the CPO to provide available reasonable resources to assist District employees, or the entity representing them, in preparing the bid. This requirement creates a conflict for the CPO, who is conducting the procurement to provide resources to one of the parties bidding on the procurement. If resources are to be provided, it should be done by an agency that is not conducting the procurement.

CONCLUSION

I appreciate the opportunity to testify on the PPRA Amendment and the PITAA. The intent of these bills is to ensure that we instill principles of good governance in the District's procurement process, to which I am deeply committed. I would like to thank Mayor Bowser for her leadership and vision in support of improving contracting in the District. I also want to thank my staff for their hard work and dedication to improving the efficiency, quality, and integrity of the District's procurement process. I'm very happy that Director Weaver has joined the team and I look forward to working closely with him to make strategic improvements, particularly in how the District engages in construction contracts. Mr. Chairman, I would like to thank you personally and on behalf of OCP for your long standing commitment to ensuring that the District's contracting process is fair and open, and is one that maximizes value for District residents.

We look forward to working with you and the Committee of the Whole to refine both bills. This concludes my testimony and I am happy to answer any questions you may have.



Government of the District of Columbia



Department of General Services

Christopher Weaver
Acting Director
Department of General Services

Hearing on B21-334, the “Procurement Integrity, Transparency, and Accountability Amendment Act of 2015” and B21-397, the “Procurement Practices Reform Amendment Act of 2015”

Council of the District of Columbia
The Honorable Phil Mendelson, Council Chairman
Committee of the Whole

November 10, 2015

1:30 pm

Room 412

John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Introduction

Good afternoon Chairperson Mendelson, and members and staff of the Committee of the Whole. I am Christopher Weaver, Acting Director for the Department of General Services (or DGS). Today I am pleased to testify on Bill 21-334, the “Procurement Integrity, Transparency, and Accountability Amendment Act of 2015.”

Proposed Legislation

The “Procurement Integrity, Transparency, and Accountability Amendment Act of 2015” focuses on contracting and procurement practices in the District government and at DGS in particular. These changes include how DGS and other agencies may contract and procure for construction and non-construction related goods and services. The bill also proposes additional mechanisms for the purposes of transparency of agency contracting and procurement activities.

DGS is committed to providing high-quality construction projects, innovative energy procurements, professional real estate management, and ensuring our District facilities’ operability. Maintaining contracting and procurement processes that are clear and transparent is important to the agency. As this bill applies to DGS’ contracting and procurement activities, there are some areas of concerns, but also areas of agreement. The Office on Contracting and Procurement discussed the bill at length, but I will discuss DGS-specific areas in more detail below.

Amendments to the DGS Establishment Act of 2011

When DGS was created, and due to the specialized nature of the procurement and construction activity the agency would be performing, the Council approved DGS’ exemption from the oversight of the Office of Contracting and Procurement (OCP).¹ However, the bill proposes to repeal and modify this exemption.

The language of the bill is not clear on how involved OCP would be in monitoring and reviewing DGS’ procurements and contracts. The bill states that DGS will retain its authority for procurements for “construction and related services”, as well as “operations and maintenance of facilities, real estate management, utilities, and security.” This suggests that the functions performed by our Facilities Management, Portfolio, Energy and Sustainability, Capital Construction, and Protective Services Divisions would remain within the agency and handled by our own Contracting and Procurement Division. As such, the procurements recommended to be handled by OCP would mostly be uniforms, furniture, and administrative items, such as office supplies, which are currently procured by DGS from the DC Supply Schedule.

DGS handles other goods and services procurements including grounds keeping, snow removal, equipment and equipment parts, and other items related to the maintenance, operations, and

¹ DC Code §2.352-01(b)(11)

security of the buildings within our portfolio. These types of procurements would presumably remain with DGS.

We appreciate the Council's recognition of the work we do in:

- Procuring award-winning energy contracts,
- Procuring leased space for optimal agency function,
- Procuring goods and services to support our buildings' operability, appearance and security, and
- Procuring high-quality contractors for our capital construction projects.

The bill's language supports these areas remaining with DGS. We recognize that the Council, through Bill 21-334, is seeking to ultimately have OCP be the District's repository of *all* District procurements. We also recognize that the specialized work DGS was formed to do, and performs daily, is a matter that, at least for now, should absolutely remain with the agency.

As I am new to this position, I would like to have the time to fully review how the agency functions to find those areas where duplicative processes can be eliminated. As my tenure advances, I would like to work with the Council to ensure that the agency's processes and products are meeting both the Mayor's and the Council's expectations.

Amendments to the Procurement Practices Reform Act of 2010

The proposed bill amends the Procurement Practices Reform Act of 2010 in many ways. Of particular note to DGS are amendments related to Council review of contracts, privatization contracts, inherently governmental functions, amendments to payment and performance bonds, and construction cost estimates.

1. Council Contract Review

DGS has specific concerns with the following proposed Council contract review amendments:

A. Subcontracting plan

DGS uses two construction methods – Design-Build and Construction Manager At-Risk. These methods are faster than the more traditional Design-Bid-Build method; for our projects, the design may not yet be complete prior to the development of the final Gross Maximum Price (GMP). Since a portion of the design may yet be incomplete, the full scope of work required for the project is not firm, and thus, the specific types of subcontractors required may be unknown. It would be impossible to submit a subcontracting plan without first having fully identified the scope of the project's design and allowing time for the Construction Manager (i.e. the General Contractor), to bid those jobs.

B. OIG Review

The bill proposes that the Office of the Inspector General (OIG) review any contract modification, change order, or option year submitted to the Council for possible corruption, mismanagement, waste, fraud, or abuse. Changes and modifications are normal parts of contracting, and there should not be an implication that the need for a contract change or modification is an indication of corruption, mismanagement, waste, fraud, or abuse. Further, as DGS submits hundreds of contracts that meet the Council review requirement, this would require OIG to be equipped with the staff and resources to handle reviewing potentially hundreds of DGS contracts each Council Period. It would also be necessary to ensure that OIG staff have a detailed understanding of and experience with construction and related-services contracting to ensure that such contracts were being properly reviewed. Unnecessary involvement of OIG in each contract modifying action sent to Council will cause delay and will expose contractors to the risk of non-payment for services legitimately authorized by the contracting officer.

2. Privatization Contracts

The proposed bill seeks to address and differentiate between District employees and District contractors, and to ensure that District employees are not displaced by the use of contractors. DGS currently supplements its D.C. employees through the use of contractors in many ways. We support our Protective Services Division officers with contracted security guards. We supplement our grounds maintenance and building maintenance efforts with specialized Consolidated Maintenance Contracts, and hire additional contractors to handle landscaping, snow removal, and other maintenance tasks. For DGS' larger schools, and parks and recreation projects, we use specialized and highly-trained teams of project managers to assist the agency in producing high-quality buildings for our client agencies. To be clear, agency FTEs are not displaced as a result of our use of contract support or specialized project managers.

As the goal of this section of the bill is to protect existing District employees, we will note that DGS agrees that District employees should not lose their jobs as the result of bringing in contract support. However, DGS wants to be clear with Council that it would be impossible for the agency to complete all our obligations, whether in the maintenance, security, construction, real estate, or sustainable energy arenas, without the expert and professional assistance we get from our contracted partners. Having these valued and skilled subject matter experts on our team also allows us the flexibility of "ramping up" and "drawing down" during periods where more or less support is necessary. In this way, we are not placed in a position where we must let an employee go because seasonal work has ended. So let me again state clearly, we use contractors to supplement, not displace, our employees.

3. Inherently Governmental Functions

Once again, consistent with OCP's testimony, DGS seeks clarity on this section. The proposed legislation seeks to categorize certain functions as inherently governmental or closely associated with being inherently governmental. It further places restrictions on who may do that work. It also states that "providing advice, opinions, recommendations, or ideas to District government officials" is *not* an inherently governmental function.

For some of the very skilled and technical work we do, prohibiting our contracted subject matter experts from involvement in specific tasks would greatly hamper our senior management employees from making informed decisions. Allow me to offer a few examples:

- At times, a contracted project manager will be one of many members on a source selection board or will participate as a technical advisor to the board. This actually makes sense. They are very close to the project, understand fully the work required, and have a keen awareness of local contractors' capacity and work product. To forbid this expertise from participating and therefore advising the District employees involved in making contract award decisions would put the District at a disadvantage. The language of the bill seems to both allow and prevent this type of activity.
- Similarly, preventing these contractors from assisting the District with evaluating contractor performance or inspecting the work product completed on our projects would make it significantly more difficult to determine whether a General Contractor met its contractual requirements and should be paid. Again, the language of the bill seems to both allow and prevent this type of activity.

In each of these scenarios, District employees make these decisions and determinations – no District contractor is making employment or payment decisions for the District – but their proximity to the work product and their expertise provides valuable insight to the District and helps us make the best decisions.

4. Non-Construction Payment Bonds

The bill proposes to allow the Chief Procurement Officer to halve the performance and payment bond for construction companies from 100 percent of the contract price (not including cost of operation, maintenance, and finance) to only 50 percent for construction contracts over \$100,000. DGS notes that this is already in the DC Official Code (section 2-357.02). Notwithstanding, we would like to reiterate that as a rule, reducing the bond required by the contractors would put the District at risk. We believe that encouraging companies with less capacity to take on projects which may be larger or more complex than they have previously handled is bad policy. While DGS understands the Council seeks to address concerns about non-payment or late payments made to subcontractors, DGS strongly advises against opening up the District's liability in this way.

DGS does support mentoring of businesses to gain capacity and reliability to take on increasingly complex contracted tasks. However, DGS does not support a blanket reduction of bonding thresholds that may leave the District at substantial risk.

5. Construction Costs

Lastly, we support OCP and their testimony with respect to the proposed construction cost estimate requirement. The \$10,000 threshold is too low, and we associate ourselves with their concerns.

Conclusion

Respectfully, I hope that the concerns I've mentioned today can be a starting point for a larger discussion about contracting and procurement both at DGS and in the District government. The changes proposed by the bill are many, and if adopted, will require much effort, clarification and coordination to implement. There are a number of positive elements or concepts in the bill, but I believe that are also many elements that, without clarification or modification, may result in unintended negative consequences. I ask the Council to consider allowing me and my counterpart at OCP, both new to District government but not new to improving our respective ships, the time to work collectively with the Mayor and Council on creating a strong and transparent contracting and procurement system. We all seek to bring the utmost integrity, efficiency and value to our contracting and procurement actions, and DGS is already engaging with OCP on ways we can improve. Thank you for the opportunity to testify, and I am happy to answer any of your questions.

PROCUREMENT PRACTICES REFORM ACT OF 2010

DC CODE, TITLE 2, CHAPTER 3A TITLE I. GENERAL PROVISIONS

§ 2-351.04. Definitions.

* * *

(34B) "Function closely associated with an inherently governmental function" means a function that is not an inherently governmental function, but functions that may approach an inherently governmental function because of the nature of the function, the manner in which the contractor performs the function, or the manner in which the government administers the contractor's performance of the function, as determined in part by the criteria set forth under section 205a.

* * *

(37B) "Inherently governmental function" means a function that is so intimately related to the public interest as to require performance by District government employees, as determined in part by application of the criteria under section 205a.

* * *

(38A) "Labor Organization" shall have the same meaning as set forth in section 102(15) of the Human Rights Act of 1977, effective December 13, 1977 (D.C. Law 2-48, D.C. Official Code § 2-1401.02(15).

* * *

(53A) "Restricted Period" means the period of time commencing with the earliest written notice, advertisement, or solicitation of a request for proposal, invitation for bids, or any other method of soliciting a response from offerors or bidders intending to result in a contract with a District, and ending with either the execution of the final contract and its approval by the District or submission of the contract to the Council for its review when such submission is required pursuant to section 451 of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 803; D.C. Official Code § 1-204.51).

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§ 2-351.05. Application; exemptions.

* * *

(c) This chapter, except for § 2-352.02, shall not apply to:

* * *

(13) The procurement of services for the design, development, ~~and~~ construction, and maintenance of a facility on real property that has been disposed of pursuant to ~~the authority in § 10-801; District law or on District-owned real property adjacent to a dispose property,~~ provided, that the construction of the facility is required by the Land Disposition Agreement, or similar agreement, governing the disposition of the real property;

TITLE II. PROCUREMENT ORGANIZATION

§ 2-352.01. Office of Contracting and Procurement; authority.

* * *

(d) Except regarding agencies exempted in §§ 2-351.05(c) and 2-352.01(b) and roads, bridges, other transportation systems, and facilities and structures appurtenant to roads, bridges, and other transportation systems, the Department of ~~Real Estate~~ General Services shall have procurement authority for:

(1) Construction and related services under subchapter VI of this chapter; and

(2) Facilities maintenance and operation services, real estate asset management services, utility contracts, and security services, pursuant to section 1023(5) of the Department of General Services Establishment Act of 2011, effective September 14, 2011 (D.C. Law 19-21; D.C. Official Code § 10-551.02(5)).”.

(e) Except as otherwise provided in § 2-351.05(b), the CPO may review and monitor procurements, including for construction and related services under Title VI, by any agency, instrumentality, employee, or official exempt under this chapter or authorized to procure independently of OCP.

* * *

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§ 2-352.02. Criteria for Council review of multiyear contracts and contracts in excess of \$1 million.

(a) **(1)** Pursuant to § 1-204.51, prior to the award of a multiyear contract or a contract in excess of \$1 million during a 12-month period, the Mayor or executive independent agency or instrumentality shall submit the proposed contract to the Council for review and approval in accordance with the criteria established in this section.

(2) For a contract modification to exercise an option period when the exercise of the option period does not result in a material change in the terms of the underlying contract, submission of the modification to exercise the option period shall constitute submission of the contract pursuant to this section.

* * *

(c) Proposed contracts submitted pursuant to this section may be submitted electronically and shall contain a summary, including the following:

(1) The proposed contractor, contract amount, unit and method of compensation, contract term, and type of contract;

(1A) For a contract containing option periods, the contract amount for the base period and for each option period, and if the contract amount for one or more of the option periods differs from the contract amount for the base period, an explanation of the reason or reasons for that difference;

(1B) If the contract definitizes a letter contract or replaces a contract awarded through an emergency procurement pursuant to section 405:

(A) The date on which the letter contract or emergency awarded through an emergency procurement was executed;

(B) The number of times the letter contract or contract awarded through an emergency procurement has been extended; and

(C) The value of the goods and services provided to date under the letter contract or contract awarded through an emergency procurement, including under each extension of the letter contract or contract awarded through an emergency procurement.

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(2) The goods or services to be provided, the methods of delivering goods or services, and any significant program changes reflected in the proposed contract;

(3)(A) The selection process, including the number of offerors, the evaluation criteria, and the evaluation results, including price, ~~and~~ technical or quality, and past performance components;

(B) If the contract was awarded on a sole source basis, the date on which a competitive procurement for the goods or services to be provided under the contract was last conducted, the date of the resulting award, and a detailed explanation of why a competitive procurement is not feasible;

(3A) A description of any bid protest related to the award of the contract, including whether the protest was resolved through litigation, withdrawal of the protest by the protestor, or voluntary corrective action by the District. Each such description shall include the identity of the protestor, the grounds alleged in the protest, and any deficiencies identified by the District as a result of the protest;

(4) The background and qualifications of the proposed contractor, including its organization, financial stability, personnel, and ~~prior performance on contracts with the District government~~ performance on past or current government or private-sector contracts with requirements similar to those of the proposed contract;

(4A) A summary of the subcontracting plan required under Section 2346 of the Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005, effective October 20, 2005, effective October 20, 2005 (D.C. Law 16-33; D.C. Official Code § 2-218.01 et seq.), and the dollar volume of the portion of the contract to be subcontracted, expressed both in total dollars and as a percentage of the total contract amount;

(5) Performance standards and expected outcomes of the proposed contract;

(5A) The amount and date of any expenditure of funds by the District pursuant to the contract prior to its submission to the Council for approval;

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(6) A certification that the proposed contract is within the appropriated budget authority for the agency for the fiscal year and is consistent with the financial plan and budget adopted in accordance with §§ 47-392.01 and 47-392.02;

(7) A certification that the proposed contract is legally sufficient, including whether the proposed contractor has any currently pending legal claims against the District;

(8)(A) A certification that Citywide Clean Hands database indicates that the proposed contractor is current with its District ~~and federal~~ taxes.

(B) If the Citywide Clean Hands Database indicates that the proposed contractor is not current with its District taxes:

(i) A certification that the contractor has worked out and is current with a payment schedule approved by the District or federal government; **or**

(ii) A certification that the contract will be current with its District taxes after the District recover any outstanding debt as provided under section 301(9);

(8A) A certification from the proposed contractor that it is current with its federal taxes, or has worked out and is current with a payment schedule approved by the federal government.

(9) The status of the proposed contractor as a certified local, small, or disadvantaged business enterprise, as defined in subchapter IX-A of Chapter 2 of this title [§ 2-218.01 et seq.];

(10) Other aspects of the proposed contract that the CPO considers significant;

(11) A statement indicating whether the proposed contractor is currently debarred from providing services or goods to the District or federal government, the dates of the debarment, and the reasons for debarment; ~~and~~

(12) Where the contract, if executed, will be made available online.;

(13) Where the original solicitation, and any amendments or modifications, will be made available online; and

(c-1) A proposed change to the contract or amount of a contract, including the exercise of an option period, a modifications, a change orders, or any similar change that is submitted to the Council pursuant to this section and that seeks from the Council

retroactive approval of an action or authorization for payment, shall include the summary required under subsection (c) and also shall include:

(1) The period of performance associated with the proposed change, including date as of which the proposed change is to be made effective;

(2) The value of any work or services performed pursuant to a proposed change for which the Council has not provided approval, disaggregated by each proposed change if more than one proposed change has been aggregated for Council review;

(3) The aggregate dollar value of the proposed change as compared with the amount of the contract as awarded;

(4) The date on which the contracting officer was notified of the proposed change;

(5) The reason why the proposed change was sent to the Council for approval after it is intended to take effect;

(6) The reason for the proposed change; and

(7) The legal, regulatory, or contractual authority for the proposed change."

(d) A new subsection (c-2) is added to read as follows:"

Any proposed change submitted to the Council for its review in accordance with subsection (c-1) shall be referred to the Inspector General who may examine the contract for possible corruption, mismanagement, waste, fraud, or abuse pursuant to Section 208(a-1)(2) of the District of Columbia Procurement Practices Act of 1985, effective February 21, 1986 (D.C. Law 6-85; D.C. Official Code § 1-301.115a(a-1)(2))."

(e) A new subsection (c-3) is added to read as follows:

(c-3) The proposed exercise of an option period pursuant to subsection (a)(2) may be submitted electronically and shall contain a summary, including the following:

(1) The proposed contractor, contract amount, contract term and contract type;

(2) The identifying number of the underlying contract, including the identifiers assigned to the underlying contract by the Council for the base period of the contract and any subsequent option periods;

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(3) A statement indicating that the contracting officer determined through the Citywide Clean Hands Database that the contractor is current with its District taxes or has worked out and is current with a payment schedule approved by the District, or that the contracting officer will offset any outstanding amount pursuant to section 301(9); and

(d) No proposed multiyear contract and no proposed contract in excess of \$1 million for a 12-month period shall be awarded until after the Council has reviewed and approved the proposed contract as provided in this section.

(e) Notwithstanding subsection (a) of this section, review and approval by the Council of a definitive contract in excess of \$1 million during a 12-month period shall constitute the Council review and approval, required by § 1-204.51(b), of the definitive contract and the merged letter contract contained therein, **provided that a copy of the underlying letter contract be transmitted to the Council with the definitive contract.**

(f) Any employee or agency head who shall knowingly or willfully enter into a proposed multiyear contract or a proposed contract in excess of \$1 million without prior Council review and approval in accordance with this section shall be subject to suspension, dismissal, or other disciplinary action under the procedures set forth in subchapter XVI-A of Chapter 6 of Title 1 [§ 1-616.51 et seq.].

(g)(1) No contractor who knowingly or willfully performs on a contract with the District in excess of \$1 million for a 12-month period without prior Council approval shall be paid more than \$1 million for the products or services provided.

(2) No contractor who knowingly or willfully performs on a multiyear contract with the District without prior Council approval of the multiyear contract shall be paid in more than one calendar year for the products or services provided.

(h) Review and approval by the Council of the annual capital program of federal highway aid projects shall constitute the Council review and approval required by § 1-204.51(d)(3) of individual federal-aid highway contracts that make up the annual program.

§ 2-352.03. Office of Contracting and Procurement.

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§ 2-352.04. Duties of the Chief Procurement Officer.

* * *

§ 2-352.05. Privatization contracts and procedures requirements.

~~(a) Before issuing a solicitation for a privatization contract pursuant to this section, the District government agency on whose behalf the solicitation will be issued shall prepare an estimate of the fully allocated cost associated with providing the relevant goods or services using District government employees. The agency shall transmit this estimate to the contract specialist responsible for the solicitation, who shall retain the estimate as part of the official contract file.~~

~~(b) A solicitation for a proposed privatization contract issued pursuant to this section shall include information describing how current District government employees may exercise the right to bid on the contracts.~~

~~(c) Before awarding a privatization contract, and prior to modifying a contract, the Mayor, instrumentality, or independent agency head shall transmit to the Council a determination and findings that:~~

~~(1) Compares the current fully allocated cost of providing the services using District government employees, departments, or agencies, using the estimate described in subsection (a) of this section, to the fully allocated costs associated with contracting for the service;~~

~~(2) Demonstrates that the privatization contract will provide savings of at least 5% over the duration of the contract in terms of total cost or the unit cost of providing the goods or services;~~

~~(3) Describes the expected impact of the privatization contract on the quality of goods or services provided to or on behalf of the District government, including performance targets and requirements for the contractor; and~~

~~(4) Includes a written confirmation of review by officials, including the Chief Financial Officer, the Attorney General for the District of Columbia, and the CPO.~~

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~~(d) A privatization contract, or any contracting policies and procedures relating to these contracts, to provide goods and services to or on behalf of the District government, including a contract resulting from a process of managed competition, shall provide that:~~

~~(1) The Mayor, instrumentality, or independent agency head shall complete the determination and findings described in subsection (c) of this section and transmit the determination and findings to the Council prior to the award of the contract;~~

~~(2) A contractor who is awarded a contract that displaces District government employees shall offer to the displaced employee a right of first refusal to employment by the contractor, in a comparable available position for which the employee is qualified, for at least a 6-month period during which the employee shall not be discharged without cause;~~

~~(3) Any District employee who is displaced as a result of a privatization contract, and is hired by the contractor who was awarded the privatization contract, shall be entitled to the benefits provided by the Service Contract Act of 1965, approved October 22, 1965 (79 Stat. 1034; 41 U.S.C. [§ 351 et seq.]);~~

~~(4) If the employee's performance during the 6-month transitional employment period described in paragraph (2) of this subsection is satisfactory, the contractor shall offer the employee continued employment under terms and conditions established by the contractor;~~

~~(5) The privatization contract shall incorporate specific performance criteria and the contractor shall submit reports, as required by the contract, to the District government contracting officer and the Chief Financial Officer on the contractor's compliance with the specific performance criteria; and~~

~~(6) The privatization contract may be canceled if the contractor fails to comply with the performance criteria set out in the contract.~~

~~(e) If a privatization contract is awarded, the Mayor, instrumentality, or the independent agency head shall make efforts to assist affected District government employees and to promote employment opportunities for District residents with the contractor. These efforts shall include:~~

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~~(1) Consulting with union representatives and District government employees who would be affected by the privatization contract;~~

~~(2) Providing prior notification of at least 30 days of any adverse impact of a privatization contract to District government employees who would be affected by the contract, including notification to a labor organization certified as the exclusive representative of employees affected by the contract;~~

~~(3) Providing alternative employment in the District government to displaced District government employees if there are unfilled positions for which those employees are qualified; and~~

~~(4) Encouraging the contractor to offer employment to qualified District residents before offering employment to qualified nonresidents.~~

~~(f) An agency shall not attempt to circumvent the requirements of this section by eliminating the provision of goods or services by the agency before procuring substantially the same goods or services from a person who is not part of the District government.~~

(a) A privatization contract shall meet the following requirements:

(1) Except as provided under subsection (d), a privatization contract shall not cause the displacement of District government employees including by layoff, demotion, involuntary transfer to a new class, involuntary transfer to a new location requiring a change of residence, or time base reductions. For purposes of this paragraph, displacement does not include changes in shifts or days off, nor does it include reassignment to other positions within the same class and general location.

(2) The privatization contract shall provide the District with an economic advantage, as demonstrated by the determination and findings issued pursuant to subsection (b).

(3) The economic advantage of the privatization contract shall not be outweighed by the public's interest in having a particular function performed directly by District employees, as demonstrated in the determination and findings issued pursuant to subsection (b).

(4) The privatization contract shall be awarded through a publicized, competitive procurement process pursuant to Title IV of this act.

(5) The privatization contract shall include specific provisions establishing the minimum qualifications for the employees of the contractor that will perform the work under the contract and an affirmation by the contractor that the contractor's hiring practices meet applicable District standards.

(b) Before issuing a solicitation for a privatization contract, the Mayor, instrumentality, or independent agency shall:

(1) Issue a draft determination and findings demonstrating that the cost of having the contracted-for service provided by a contractor will be at least 5% less than if the service were to be provided by employees of the District or its instrumentality or independent agency. The draft determination and findings shall include, at a minimum, the following:

(A) The estimated cost of having a contractor provide the service contrasted with the costs that would be directly associated with having employees of the District or its instrumentality continue performance;

(B) Personal services costs attributable to having a contractor provide the service contrasted with the personal services costs that would result from having employees of the District or its instrumentality or independent agency continue performance, including salary and fringe benefits;

(C) Non-personal services costs attributable to having a contractor provide the service contrasted with the non-personal services costs that would result from having employees of the District or its instrumentality or independent agency continue performance, including rent, equipment, and utilities;

(D) Any additional costs that would be built into a privatization contract, including expected costs related the administration, oversight, and supervision by District government personnel of a privatization contract;

(E) A description of the expected impact of a privatization contract on the quality of goods or services provided to or on behalf of the District government;

(F) The number of employees of the District or its instrumentality or independent agency that are necessary to perform the service proposed to be the subject of a privatization contract; and

(G) The number of employees of the District or its instrumentality or independent agency that would be displaced by the contract within the meaning of subsection (a)(1).

(2) Request an analysis by the Chief Financial Officer of whether the costs in the draft determination and findings can be substantiated.

(3) Share the draft determination and findings with employees who could be displaced within the meaning of subsection (a)(1) as a result of the privatization contract and any labor unions or groups representing those employees to solicit their comments.

(4) Issue a final determination and findings that incorporate the full analysis by the Chief Financial Officer, and a summary of comments provided pursuant to paragraph (3) . Each final determination and findings shall be made publicly available online before any solicitation for a privatization contract based on the final determination and findings is issued.

(c)(1) If the Mayor, instrumentality, or independent agency issues a solicitation for a privatization contract that would displace employees of the District or its instrumentality or independent agency, those employees or a person or entity representing those employees may submit a bid or proposal to perform the services as a private entity; provided, that the employees agree to resign their employment with the District or its instrumentality or independent agency upon selection as the awardee of the contract .

(2) The Mayor, instrumentality, or independent agency shall consider any employee bid or proposal submitted pursuant to paragraph (1) on the same basis as any other bid or proposal.

(3) The Mayor shall make available reasonable resources to assist employees of the District or its instrumentality or independent agency, or an entity representing such employees in formulating a bid or proposal pursuant to paragraph (1); provided, that standards for determining the resources to be made available and whether they are reasonable shall be determined by rulemaking.

(4) A solicitation for a privatization contract shall include information describing how displaced employees of the District or its instrumentality or independent agency may exercise their right to compete for the contract pursuant to this subsection.

(d) If a privatization contract is awarded that causes employees of the District or its instrumentality or independent agency to be displaced:

(1) The contractor shall offer to each displaced employee a right of first refusal to employment by the contractor, in a comparable available position for which the employee is qualified, for at least a 6-month period during which the employee shall not be discharged by the contractor without cause;

(2) Any District employee who is displaced as a result of a privatization contract and is hired by the contractor who was awarded the contract, shall be entitled to the benefits provided by the Service Contract Act of 1965, approved October 22, 1965 (79 Stat. 1034; 41 U.S.C. § 6702 et seq.);

(3) If the employee's performance during the 6-month transitional employment period described in paragraph (1) of this subsection is satisfactory, the contractor shall offer the employee continued employment under terms and conditions established by the contractor;

(4) The Mayor, instrumentality, or the independent agency head shall make efforts to assist employees of the District or its instrumentality or independent agency who would be affected by the privatization contract and to promote employment opportunities for District residents with the contractor. These efforts shall include:

(A) Consulting with union representatives and employees of the District or its instrumentality or independent agency who would be affected by the privatization contract;

(B) Providing prior notification of at least 30 days of any adverse impact of a privatization contract to employees of the District or its instrumentality or independent agency who would be affected by the contract, including notification to a labor organization certified as the exclusive representative of employees affected by the contract;

(C) Providing alternative employment in the District government to displaced employees if there are unfilled positions for which those employees are qualified; and

(D) Encouraging the contractor to offer employment to qualified District residents before offering employment to qualified nonresidents.

(e)(1) Any privatization contract shall incorporate specific performance standards and targets including for productivity and cost savings to be achieved under the contract.

(2) The contractor shall submit reports, as required by the contract, to the District government contracting officer and the Chief Financial Officer on the contractor's compliance with the specific performance criteria; and

(3) The contract may be canceled without prejudice to the District if the contractor fails to comply with the performance criteria set out in the contract.

(f) An agency or instrumentality shall not attempt to circumvent the requirements of this section by eliminating the provision of services by its own employees before procuring substantially the same services from a person who is not employed by that agency or instrumentality.

(g)(1) Each year the District of Columbia Auditor shall review a selection of privatization contracts, which shall be chosen by the Auditor based on the dollar value and scope of the contracts, their potential impact on the health and safety of District residents, their potential impact on economic development and employment opportunities in the District, and other factors deemed appropriate by the Auditor.

(2) The Auditor shall issue an annual report to the Mayor and the Council on the contracts reviewed pursuant to paragraph (1) analyzing for each contract whether it is achieving:

(A) The 5% cost savings set forth in subsection (b)(1) of this section; and

(B) The performance standards and targets incorporated into the contracts as required under subsection (e) of this section.

(3) The Auditor may report that the cost and performance data for the selected contracts are inconclusive, but if the District has failed to collect, maintain, or

provide cost or performance data, the Auditor may reasonably conclude that the cost savings or performance standards and targets are not being met.

(4) If the Auditor finds in the report issued pursuant to paragraph (2) of this subsection that a privatization contract has not met the cost savings or performance standards and targets, the Mayor, or independent agency head shall review the merits of cancelling the privatization contract and performing the work with District employees and shall report to the Council on the results of their review.

(h) The requirements of this section shall not apply to:

(1) A contract for a new function for which the Council has specifically mandated or authorized the performance of the work by independent contractors.

(2) Services that cannot be performed satisfactorily by District government employees, or are of such a highly specialized or technical nature that the necessary expert knowledge, experience, and ability, are not available through District employees, as determined by the Mayor.

(3) Contracts for staff augmentation services to be provided pursuant to a contract with a term of less than one year that does not contain options to extend the performance period.

(4) Contracts for services that are incidental to a contract for the purchase or lease of real or personal property such as contracts to maintain office equipment or computers that are leased or rented.

(5) Contracts that are necessary to protect against a conflict of interest or to insure independent and unbiased findings in cases in which there is a clear need for an unbiased and objective outside perspective, as determined by the Mayor.

(6) Contracts entered in to pursuant to section 201(c).

(7) Contracts that will provide equipment, materials, facilities, or support services that could not feasibly be provided by the District in the location where the services are to be performed, as determined by the Mayor.

(8) Contracts to provide training for which appropriately qualified District employees are not available, as determined by the Mayor.

(9) Contracts for services that are of such an urgent, temporary, or occasional nature that the delay incumbent in their formation under this section would frustrate their very purpose, as determined by the Mayor.

(i) The CPO shall promulgate rules with detailed procedures to implement this section.

Sec. 205a. Inherently governmental functions.

“(a) The District shall not award a contract to provide any service that is an inherently governmental function.

(b) The District may enter into a contract for the performance of a function closely associated with an inherently governmental function only if the head of an agency benefited by the performance of the contract:

(1) Finds that appropriate District government employees cannot reasonably perform the function at issue;

(2) Ensures that appropriate District government employees supervise contractor performance of the contract and perform all inherently governmental functions associated with the contract; and

(3) Addresses any potential organizational conflicts of interest of the contractor in the performance of the functions closely associated with an inherently governmental function under the contract.

(c) An inherently governmental function involves, among other things, the interpretation and execution of the laws of the District to:

(1) Bind the District to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;

(2) Appoint, direct, or control officials or employees of the District;

(3) Exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the District, including the control, or disbursement of appropriated and other District funds.

(4) With respect to contracts to procure goods or services for the District:

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(A) Determine what supplies or services are to be acquired by the District, and at what prices; provided, that the Mayor or the Mayor's designee, may give a contractor authority to acquire supplies for the District at prices within specified ranges and subject to other reasonable conditions deemed appropriate;

(B) Participate as a voting member on any source selection boards, unless the contractor has:

(i) Been hired by the District for its specific technical expertise;
and

(ii) No conflict of interest exists with regard to the contract or vendors under consideration by the source selection board.

(C) Approve any contractual documents, to include documents defining requirements, incentive plans, and evaluation criteria;

(D) Award contracts;

(E) Administer contracts, including ordering changes in contract performance or contract quantities, taking action based on evaluations of contractor performance, and accepting or rejecting contractor products or services;

(F) Terminate contracts;

(G) Determine whether contract costs are reasonable, allocable, or allowable; and

(H) Evaluate a contractor's performance when the evaluation is to be used to determine whether payment should be made to the contractor and in what amount.

(d) The CPO shall issue rules pursuant to Section 1106, consistent with this section and containing guidance on defining an inherently governmental functions and a function closely related to an inherently governmental function, and including categories of functions and specific functions meeting these definitions.

(e) The Mayor may waive compliance with any of the requirements of this section for any contract in effect upon the effective date of the Procurement Integrity, Transparency, and Accountability Amendment Act of 2016, and for any option period exercised under such contract, so long as the option period was provided for in the contract

as of the effective date of the Procurement Integrity, Transparency, and Accountability
Amendment Act of 2016.

(f) Notwithstanding subsection (e), the requirements of this section shall apply to
any contract or option period in effect five years after the effective date of the Procurement
Integrity, Transparency, and Accountability Amendment Act of 2016".

§ 2-352.06. Procurement training institute.

* * *

Sec. 207. Ombudsman for contracting and procurement.

(a) There is established within the Office of Contracting and Procurement an Office
of Ombudsman for Contracting and Procurement which shall be headed by an
ombudsman with purview over contracts under the authority of the CPO.

(b) Each District agency or instrumentality with independent procurement
authority pursuant to section 201 shall designate an Agency Ombudsman for Contracting
and Procurement.

(c) Each Ombudsman designated pursuant to this section shall:

(1) Serve as a vehicle for contractors and subcontractors performing work or
providing services under a District contract to communicate their complaints and concerns
regarding contracting, procurement, or a specific contract, through a single entity;

(2) Respond to complaints and concerns in a timely fashion with accurate
and helpful information;

(3) Determine the validity of any complaint quickly and professionally;

(4) Generate options for a response by the agency or instrumentality and
offer a recommendation from among the options;

(5) Except when the parties are involved in legal or administrative
proceedings, attempt informally to facilitate a resolution of a dispute between the
contracting officer, the prime contractor, and the subcontractor as appropriate; and

(6) Identify systemic concerns and recommend to the Mayor and the Council
policy changes, and strategies to improve the contracting and procurement process.".

TITLE III. CONTRACTOR STANDARDS

§ 2-353.01. Contractor standards.

(a) The CPO shall establish a process to certify, on a solicitation-by-solicitation basis, the responsibility of prospective contractors. The process shall ensure that the prospective contractor:

* * *

(9) Does not have an outstanding debt with the District or the federal government in a delinquent status of more than the greater of \$1,000 or 1 percent of the contract value, up to \$25,000; and

* * *

(b) If the District awards a contract to a prospective contractor that has an outstanding debt with the District in a delinquent status that is in an amount less than the amount required to disqualify the prospective contractor pursuant to subsection (a)(9), the District shall recoup the outstanding debt by offsetting it against any payment due to the contractor under the contract.

§ 2-353.02. Determination of contractor responsibility.

* * *

Sec. 303. Prohibition on contracting with political contributors.

Prior to awarding any contract to procure goods or services, an agency shall obtain a sworn statement from the contractor, made under penalty of perjury, that, to the best of the contractor's knowledge, and after due diligence, the contractor is in compliance with section 952, and is therefore eligible to enter into a contract with the District.

TITLE IV. SOURCE SELECTION AND CONTRACT FORMATION

§ 2-354.01. Source selection methods.

(a)(1) Except as otherwise authorized by law, all District government contracts shall be awarded by:

(A) Competitive sealed bidding pursuant to § 2-354.02;

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(B) Competitive sealed proposals pursuant to § 2-354.03;
(C) Sole source procurements pursuant to § 2-354.04;
(D) Emergency procurements pursuant to § 2-354.05;
(E) Human care procurements pursuant to § 2-354.06;
(F) Small purchase procurements pursuant to § 2-354.07;
(G) Special pilot procurements pursuant to § 2-354.08;
(H) Reverse auctions pursuant to § 2-354.09;
(I) Procurements through a General Services Administration schedule pursuant to § 2-354.10;
(J) Cooperative agreements pursuant to § 2-354.11;
(K) Procurements through the DCSS pursuant to § 2-354.12; or
(L) Infrastructure facilities and services pursuant to subchapter VI of this chapter.

(2) The CPO shall publish annually on the Internet a report on the number of and dollar value of contracts executed under each source selection method.

~~(b)(1) Except for members of a technical advisory group, a District employee or official shall not attempt to influence a procurement professional with respect to source selection; provided, that an employee or official may attempt to prevent a procurement professional from violating law or rules.~~

~~(2) Any employee or official who violates this section shall be subject to suspension, dismissal, or other disciplinary action under the procedures pursuant to subchapter XVI-A of Chapter 6 of Title 1 [§ 1-616.51 et seq.].~~

Sec. 401a. Prohibited contacts during source selection.

(a) Except for members of a technical advisory group, no District employee or official shall contact any contracting officer or contracting staff in an attempt to influence source selection outside of the processes established in Title IV of this act.

(b) Prior to the commencement of a restricted period, the CPO, or the lead contracting official of an agency with procurement authority independent of the CPO, shall

designate a person or persons to be the designated contact for offerors or bidders on a given contract during the restricted period.

(c)(1) During the restricted period, no bidder or offeror shall contact any District employee or official with respect to source selection during a restricted period, except as provided for under subsection (d).

(2) For the purposes of this section, contact means any oral, written or electronic communication.

(d)(1) During the restricted period, an offeror or bidder may make permissible contact with respect to source selection.

(2) For the purposes of this section, permissible contact means that the offeror or bidder shall contact only the individual designated under subsection (b) for a given contract, provided, that the following contacts are exempted from this subsection and do not need to be directed to the individual designated under subsection (a):

(A) The submission of written proposals in response to any method for soliciting a response from offerors or bidders intending to result in a contract;

(B) The submission of written questions through a process set forth in a solicitation, request for proposals, invitation for bids, or any other method of soliciting a response from offerors or bidders intending to result in a contract, so long as the written questions and responses are to be disseminated to all offerors or bidders who have expressed an interest in the proposed contract;

(C) Participation in any demonstration, conference, or other means of exchanging information in a setting open to all potential bidders or offerors through a process set forth in a solicitation, request for proposals, invitation for bids, or any other method of soliciting a response from offerors or bidders intending to result in a contract;

(D) Negotiation with the highest-ranking offeror or bidder regarding the terms of the proposed contract; and

(E) Contacts by offerors or bidders with the Contract Appeals Board or any other tribunal or court of competent jurisdiction in connection with a protest, appeal, or dispute before that tribunal or court.

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(e) A bid or offer associated with a violation of this section shall be rejected, unless the CPO determines that it is in the best interest of the District not to reject the bid or offer.

(f) For the purposes of this section the term "bidder" or "offeror" shall include any employee, agent, consultant, or person acting on behalf of a bidder or offeror.

(g) Nothing in this section shall be construed to prevent any contact or communications by any offeror, bidder, or District employee or official with respect to allegations of improper conduct to the Office of the Attorney General, the Office of the Inspector General, the Office of the District of Columbia Auditor, the CPO, the Council of the District of Columbia, the Contract Appeals Board, or any other tribunal or court of competent jurisdiction.

§ 2-354.02. Competitive sealed bids.

(a) Contracts exceeding \$100,000 shall be awarded by competitive sealed bidding unless the CPO issues a determination and findings that use of competitive sealed bidding is not practicable or not in the best interests of the District.

(b) Bids shall be solicited through an Invitation for Bids.

(c) The Invitation for Bids may include special standards of responsibility to ensure that bidders are properly qualified to perform the work.

(d) The Invitation for Bids shall state whether an award shall be made on the basis of the lowest bid price or the lowest evaluated bid price. If the lowest evaluated bid price basis is used, the objective measurable criteria to be utilized shall be set forth in the Invitation for Bids.

(e)(1) The CPO shall provide public notice of the Invitation for Bids of not less than 14 days for contracts, unless the CPO issues a determination and findings that it is appropriate to shorten the notice period to a period of not less than 3 days. In making the determination and findings, the CPO shall consider factors including the complexity of the procurement, the type of goods or services being purchased, and the impact of a shortened notice period on competition.

(2)(A) The CPO shall maintain an Internet site that provides prospective contractors with public notice of opportunities to bid, notice of contract awards, and other relevant information about District procurements.

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(B) Public notice of an Invitation for Bids may include publication in newspapers or trade publications considered to be appropriate by the CPO to give adequate public notice.

(f) Bids shall be opened publicly at the time and place designated in the Invitation for Bids; provided, that the opening may be conducted in a publicly accessible electronic forum. Each bid, with the name of the bidder and price offering contained therein, shall be recorded and be open to public inspection.

(g) The contract shall be awarded after completion of evaluation procedures for competitive sealed bids.

(h) Correction or withdrawal of bids shall be allowed only to the extent permitted by rules issued pursuant to this chapter.

§ 2-354.03. Competitive sealed proposals.

* * *

~~(d)(1) An RFP shall set forth each evaluation factor and indicate the relative importance of each evaluation factor. Price shall be included as an evaluation factor.~~

~~(2) Each RFP shall include a statement of work or other description of the District's specific needs, which shall be used as a basis for the evaluation of proposals.~~

(d) Each RFP shall include a statement of work or other description of the District's specific needs, which shall be used as a basis for the evaluation of proposals.

(d-1) An RFP for the construction of a road, bridge, other transportation system, or a facility or structure appurtenant to a road, bridge, or other transportation system, may allow prospective offerors or contractors to submit alternative technical concepts as a part of their proposals. The agency's determination on the alternative technical concepts may be considered by the contracting officer as part of the evaluation and ranking of proposals.

(d-2)(1) Each RFP shall set forth each evaluation factor and indicate the relative importance of each evaluation factor. At a minimum, the following shall be included as evaluation factors:

(A) Price or cost to the District government;

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(B) The quality of the product or service as addressed by one or more non-cost evaluation factors; and

(C) Past performance of the offeror.

(2) The general approach for evaluating past performance information shall be described in the RFP, but at a minimum shall include an evaluation of the offeror's performance under past or current government or private-sector contracts with requirements similar to those of the proposed contract.

(3) In the case of an offeror without a record of relevant past performance or for whom information on past performance is not available, the offeror may not be evaluated favorably or unfavorably on past performance.

(4) Notwithstanding any provision of this subsection, any review of past performance shall be evaluated consistent with the criteria specified in the solicitation and such criteria shall be applied consistently across all offerors.

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§ 2-354.04. Sole source procurements.

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§ 2-354.05. Emergency procurements.

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§ 2-354.06. Human care procurements.

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§ 2-354.07. Small purchase procurements.

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§ 2-354.08. Special pilot procurements.

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§ 2-354.09. Auctions.

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§ 2-354.10. General Services Administration schedules.

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§ 2-354.11. Cooperative purchasing.

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§ 2-354.12. District of Columbia Supply Schedule.

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§ 2-354.13. Competition exemptions.

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§ 2-354.14. Cancellation of solicitations.

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§ 2-354.15. Collusion.

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§ 2-354.16. Contingent fees.

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§ 2-354.17. Confidentiality.

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§ 2-354.18. Right to audit records; right to inspect.

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§ 2-354.19. Reasonable prices.

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§ 2-354.20. Prequalification.

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TITLE V. TYPES OF CONTRACTS

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**TITLE VI. PROCUREMENT OF CONSTRUCTION PROJECTS AND RELATED
SERVICES**

§ 2-356.01. Project delivery methods authorized.

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§ 2-356.02. Source selection methods assigned to project delivery methods.

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§ 2-356.03. Prequalification process for construction.

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§ 2-356.04. Architectural and engineering services.

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Sec. 605. Estimate of construction costs.

(a) An estimate of costs shall be prepared by the contracting officer for each proposed contract, contract modification, or change order to be issued in connection with a construction project and anticipated to exceed \$100,000 dollars.

(b) The estimate shall be prepared in detail, as though the District were competing for the contract, and shall not be based solely on the estimates or actual costs of similar construction projects.

(c) The estimate shall be made available to the contracting officer for use in preparation of the contract solicitation and in the determination of price reasonableness in awarding a contract.

(d) Access to materials gathered or created for the estimate, and the overall amount of the estimate, shall be limited to District personnel or agents of the District whose official duties require knowledge regarding the estimate. These materials and the overall amount of the estimate shall not be disclosed, except as otherwise permitted by law.

Sec. 606. Use of project labor agreements for construction projects

(a) The Mayor shall require, as part of a solicitation for a construction contract pursuant to this title, that every contractor and subcontractor that will engage in the construction project agree to negotiate or become a party to a project labor agreement, for that project, with one or more labor organizations if:

(1) Use of a project labor agreement will advance the District's interest producing labor-management stability, and ensuring compliance with laws and regulations governing safety and health, equal employment opportunity, labor and employment standards, and other matters;

(2) The project will require multiple construction contractors and/or subcontractors employing workers in multiple crafts or trades; and

(3) The total cost, not including ongoing operations and maintenance, of contract to the District is anticipated to be \$50 million or more.

(b) A project labor agreement agreed to pursuant to subsection (a) shall:

(1) Bind all contractors and subcontractors engaged in construction on the construction project to comply with the project labor agreement;

(2) Contain guarantees against strikes, lockouts, and similar job disruptions;

(3) Set forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the term of the project labor agreement;

(4) Provide other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health;
and

(5) Include any additional requirements that the CPO deems necessary to promote the District's interest.

(c) The Mayor may waive the requirements of this section by issuing a determination and findings, posted on the internet for at least 10 calendar days before advertising the solicitation, that:

(1) A project does not meet the criteria set forth in subsection (a); or

(2) A project labor agreement would be contrary to the interests of the District.

TITLE VII. BONDS AND OTHER FORMS OF SECURITY

§ 2-357.01. Bid security in construction contracts.

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§ 2-357.02. Contract performance and payment bonds in construction contracts.

(a)(1) When a construction contract is awarded in excess of \$100,000, the following bonds or security shall be delivered to the District and shall become binding on the parties upon the execution of the contract:

(A) A performance bond satisfactory to the District, executed by a surety company authorized to do business in the District or otherwise secured in a manner satisfactory

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to the District, in an amount equal to 100% of the portion of the contract price that does not include the cost of operation, maintenance, and finance; and

(B) A payment bond satisfactory to the District, executed by a surety company authorized to do business in the District or otherwise secured in a manner satisfactory to the District, for the protection of all persons supplying labor and material to the contractor or its subcontractors for the performance of the construction work provided for in the contract.

(2) The payment bond required by paragraph (1)(B) of this subsection shall be in an amount equal to 100% of the portion of the contract price that does not include the cost of operation, maintenance, and finance.

~~(b) Pursuant to rules promulgated under this chapter, the CPO may reduce the amount of performance and payment bonds to 50% of the amounts established in subsection (a) of this section.~~

(b) The CPO may:

(1) Reduce the amount of performance and payment bonds for construction contracts to 50% of the amounts established in subsection (a) of this section;

(2) Substitute for a bond required by paragraph (a) of this section, a letter of credit in an amount equal to at least 10% of the portion of the contract price that does not include the cost of operation, maintenance, and finance, in cases in which the contractor:

(A) Is a nonprofit corporation, as defined in section 2(6) of the Nonprofit Corporation Act of 2010, effective July 2, 2011 (D.C. Law 18-378, D.C. Official Code 29-401.02(6));

(B) Had a net worth of at least \$1 million in the preceding fiscal year;

(C) Is a licensed general contractor; and

(D) Has done business as a construction contractor for at least 5 years.

* * *

Sec. 702a. Security in non-construction service contracts.

The CPO shall issue rules pursuant to section 1106 to require performance bonds, payment bonds, letters of credit, or other forms of security for non-construction service contract prime contractors in cases in which such security may be effective in furthering

the District's interests or such security may assist subcontractors doing business under a prime contract to receive payment for goods or services.

§ 2-357.03. Bond forms and copies.

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§ 2-357.04. Other forms of security.

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§ 2-357.05. Authority to require bonds.

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§ 2-357.06. Fiscal responsibility.

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TITLE VIII. SUPPLY MANAGEMENT

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TITLE IX. PROHIBITED ACTIONS; REMEDIES.

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TITLE IX-A. ELIGIBILITY TO CONTRACT WITH THE DISTRICT.

Sec. 951. Definitions.

For purposes of this title, the term:

(1) "Business contributor" has the same meaning as set forth in term is defined in **section 101(4A) of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011, effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1161.01(4A)).**

(2) "Candidate" has the same meaning as set forth in term is defined in **section 101(6) of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011, effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1161.01(6)).**

(3) "Contracting authority" means:

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(A) The Chief Procurement Officer as defined in section 104(11) of the Procurement Practices Reform Act of 2010 (D.C. Law 18-371; D.C. Official Code § 2-351.04(11));

(B) Any subordinate agency, instrumentality, employee of the District government, independent agency, board, or commission, other than the District of Columbia courts and the District of Columbia Public Defender Service, that is exempted from Chapter 3A of this act pursuant to section 105(c);

(C) Any subordinate agency, instrumentality, employee of the District government, independent agency, board, or commission authorized to conduct procurements under section 201.

(4) "Contribution" has the same meaning as set forth in term is defined in section 101(10) of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011, effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1161.01(10)).

(5) "Covered recipient" means:

(A) Any elected District official except for an Advisory Neighborhood Commissioner.

(B) Any candidate for elective District office, except for an Advisory Neighborhood Commissioner.

(C) Any political committee affiliated with a District candidate or official described in subparagraphs (A) and (B).

(D) Any political action committee organized pursuant to Part B of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011, effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1163.07 et seq.);

(E) Any District of Columbia political party, not including any national political parties organized in the District of Columbia.

(F) Any constituent-service program or fund, or substantially similar entity, controlled, operated, or managed by:

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(i) Any elected District official who is or could be involved in influencing the award of a contract; or

(ii) Any person under the supervision, direction, or control of an elected District official who is or could be involved in influencing the award of a contract.

(G) Any entity or organization:

(i) Which a candidate or public official described in subparagraphs (A) and (B), or a member of his or her immediate family, controls; or

(ii) In which a candidate or public official described in subparagraphs (A) and (B) has an ownership interest of 10 percent or more.

"(6) "Election" has the same meaning as set forth in term is defined in section 101(15) of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011, effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1161.01(15)).

(7) "Immediate family" has the same meaning as set forth in term is defined in section 101(26) of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011, effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1161.01(26)).

(8) "Person" has the same meaning as set forth in term is defined in section 101(42) of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011, effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1161.01(42)).

(9) "Political action committee" has the same meaning as set forth in term is defined in section 101(43A) of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011, effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1161.01(43A)).

(10) "Political committee" has the same meaning as set forth in term is defined in section 101(44) of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011, effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1161.01(44)).

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(11) "Political party" has the same meaning as set forth in term is defined in section 101(45) of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011, effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1161.01(45)).

Sec. 952. Eligibility of contractor to enter into contract or agreement with the District.

(a) Beginning on January 1, 2018, a person or business contributor, that makes or solicits a contribution to a covered recipient shall be ineligible to enter into a contract for the provision of goods or services to the District valued at \$100,000 or more during the time period provided in subsection (b) of this section. The District shall not enter into an agreement or otherwise contract with a person that is ineligible pursuant to this subsection during the time period provided in subsection (b) of this section.

(b)(1) For contributions to covered recipients described under section 951(5)(A), (B), or (C), the restriction on a person or business contributor, entering into a contract with the District under this section shall apply beginning on the date the contribution was made or solicited and continuing until one year following:

(A) The date of the primary election if the District candidate or official does not appear on the general election ballot;

(B) The date of the general election if the District candidate or official appears on the general election ballot, regardless of whether the contribution or solicitation was for the primary election or general election; or

(C) If the contribution or solicitation was not for a particular election, the date the contribution was made or solicited.

(2) For contributions to covered recipients described under section 951(5)(D), (E), (F) or (G), the restriction on a person or business contributor entering into a contract with the District under this section shall apply beginning on the date the contribution was made or solicited and continuing for 18 months following that date."

TITLE X. CONTRACT APPEALS BOARD.

§ 2-360.01. Creation of Contract Appeals Board.

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§ 2-360.02. Terms and qualifications of members.

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§ 2-360.03. Jurisdiction of Board.

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§ 2-360.05. Appeal of Board decisions.

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§ 2-360.06. Oaths, discovery, and subpoena power.

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§ 2-360.08. Protest procedures.

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(d) On any direct protest pursuant to subsection (a) of this section, the Board shall decide whether the solicitation or award was in accordance with the applicable law, rules, and terms and conditions of the solicitation. The ~~proceeding shall be de novo and the~~ decision of the Board shall be issued within 60 business days from the date on which the protest is filed. Any prior determinations by administrative officials shall not be final or conclusive. If the Board determines that a contract is void pursuant to § 2-359.02, the Board shall direct that the contract be cancelled and cause a determination to be made pursuant to § 2-359.02.

(d-1) An agency's determination of its minimum needs and its determination of best method of accommodating those minimum needs are business judgments primarily within the agency's discretion. The Board may not sustain a protest on the basis of either determination unless a protester demonstrates by clear and convincing evidence that the determination lacked a reasonable basis.

* * *

TITLE XI. MISCELLANEOUS PROVISIONS.

§ 2-361.01. Green procurement.

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§ 2-361.02. Payment of stipends authorized.

* * *

§ 2-361.03. Supply schedule, purchase card, and training funds.

* * *

§ 2-361.04. Transparency in contracting.

(a) The CPO shall establish and maintain on the Internet a website containing publicly-available information regarding District procurement. ~~The information shall be made available in machine-readable and searchable format and shall include the following:~~

- ~~(1) The legal authority and rules that govern procurement for all District agencies and instrumentalities, including those exempt from the authority of the CPO;~~
- ~~(2) The names of all personnel with delegated contracting authority; and~~
- ~~(3) For contracts in excess of \$100,000, a copy of the contract and any determinations and findings, contract modifications, change orders, solicitations, or amendments associated with the contract, including those made by District agencies exempt from the authority of the CPO; provided, that the information required by this paragraph shall be made available on the Internet for at least the duration of the underlying contract or 5 years, whichever is longer.~~

~~(b) Agencies not subject to the authority of the CPO shall transmit the information required by this section to the CPO for posting on the Internet.~~

(b) The website established pursuant to subsection (a) shall contain, at a minimum, the following:

- (1) Information regarding the statutes and rules that govern procurement for all District agencies and instrumentalities, including those exempt from the authority of the CPO;
- (2) Links to the contract solicitation websites of OCP and all district agencies exempt from the authority of the CPO.
- (3) A database containing information regarding each contract executed by the District for an amount equal to or greater than of \$100,000, including each such contract made by a District agency exempt from the authority of the CPO pursuant to

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section 105. For each contract contained in the database, the database shall include a unique identifier and at a minimum, the following:

- (A) A copy of the executed contract;
- (B) All determinations and findings related to the contract;
- (C) All contract modifications, change orders, or amendments associated with the contract;
- (D) All solicitation documents for the contract, including all requests for proposals and invitations for bids, and any amendments of such documents; and
- (E) The contract summary documents for the contract submitted to the Council for its review.

(4) Placeholders identifying any portions of the items set forth in paragraph (3) withheld as confidential by the CPO pursuant to section 417.

(5) A list of each contract executed by the District for an amount less than \$100,000 which shall include, for each contract, the vendor name, a description of the goods or services purchased, and the dollar amount of the contract.

(6)(A) A list of each payment made by the District to a prime contractor, including the date and the dollar amount of the payment. The list shall be updated not less than once each week.

(B) Payments not administered through the Procurement Automated Support System shall be exempt from the requirement of subparagraph (A).

(c) Agencies not subject to the authority of the CPO shall transmit the information required by this section to the CPO for posting on the Internet.”.

§ 2-361.05. Acquisition planning.

(a) The CPO shall develop and implement a process by which each agency subject to the CPO's procurement authority shall prepare and submit to the CPO an acquisition plan identifying the size and nature of the anticipated procurement workload for the following fiscal year.

(a-1) At a minimum, each agency acquisition plan shall contain anticipated procurement needs of the coming fiscal year with specific information on the following:

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(1) Program-level needs;

(2) Anticipated multi-year procurements;

(3) Anticipated exercises of option period of existing contracts;

(4) Expected major changes in ongoing or planned procurements; and

(5) The guiding principles, overarching goals, and objectives of the agency's acquisitions of work, goods, and services; and

(6) Goals and plans for utilization of strategic sourcing.

(b) Each agency shall submit ~~its acquisition plan for the following fiscal year~~ to the Council no later than ~~March 20 of each year~~ the date of submission of the Mayor's proposed budget to the Council. Each summary, at a minimum, shall list each planned contract and the source of funding for each contract by program code in the budget.

§ 2-361.06. Rules.

(a)(1) The CPO, pursuant to subchapter I of Chapter 5 of this title [§ 2-501 et seq.], shall issue rules to implement the provisions of this chapter, ~~except subchapter VI of this chapter.~~

(2) ~~The Department of Real Estate Services~~ Notwithstanding paragraph (1), the Department of General Services, pursuant to subchapter I of Chapter 5 of this title [§ 2-501 et seq.], shall issue rules to implement the provisions of subchapter VI of this chapter for contracts within the authority of the Department of General Services.

(b) The existing procurement rules, to the degree that they are consistent with this chapter, shall remain in effect until they are superseded by rules issued in accordance with subsection (a) of this section.

(c) A District government procurement rule or regulation promulgated pursuant to this chapter shall not change in any way a contractual commitment by the District government or of a contractor to the District government which was in existence on the effective date of the rule or regulation.

TITLE XII. REPEALED PROVISIONS; TRANSFERS AND CONTINUATION.

* * *

District of Columbia Quick Payment Act of 1984
DC CODE, TITLE 2, CHAPTER II
CHAPTERSUBCHAPTER XI. QUICK PAYMENT PROVISIONS.

**§ 2-221.02. Rules and regulations governing interest penalty payments by District agencies;
computation and payment of penalties.**

* * *

(d) Any contract awarded by a District agency shall include:

(1) A payment clause that obligates the contractor to take one of the 2 following actions within 7 days of receipt of any amount paid to the contractor by the District agency for work performed by any subcontractor under a contract:

(A) Pay the subcontractor for the proportionate share of the total payment received from the District agency that is attributable to the subcontractor for work performed under the contract; or

(B) Notify the District agency and the subcontractor, in writing, of the contractor's intention to withhold all or part of the subcontractor's payment with the reason for the nonpayment;

(2) An interest clause that obligates the contractor to pay interest to the subcontractor or supplier as provided in subsection (b)(1) and (2) of this section; and

(3) A clause that obligates the contractor to include in any subcontract a provision that requires each subcontractor to include the payment and interest clauses required under paragraphs (1) and (2) of this subsection in a contract with any lower-tier subcontractor or supplier.

(4) A change order clause that:

(A) Prohibits the District or a prime contractor from requiring a prime contractor or a subcontractor to undertake any that is determined to be beyond the original scope of the prime contractor or a subcontractors contract or subcontract, including work under a District-issued change order, unless the contracting officer:

(i) Agrees with the prime contractor and, if applicable, the subcontractor on a price for the change order or additional work;

(ii) Obtains a certification from the Chief Financial Officer that there are sufficient funds to compensate the prime contractor and, if applicable, the subcontractor for the additional work;

(iii) Has made a written, binding commitment with the prime contractor to pay for the additional work within 30 days after the prime contractor submits an invoice for the additional work to the contracting officer; and

(iv) Gives written notice of the funding certification to the prime contractor.

(B) If the District fails to pay for the additional work within 30 days after the prime contractor submits an invoice for the additional work to the contracting officer, allows the prime contractor or subcontractor to stop work without incurring any penalty otherwise allowed for under the contract;

(C) Requires a prime contractor to include in its subcontracts a clause that requires the prime contractor to:

(i) Within 5 business days of receipt of the notice required under subparagraph (A)(iv), provide the subcontractor with notice of the approved amount to be paid to the subcontractor based on the portion of the additional work to be completed by the subcontractor;

(ii) Pay the subcontractor any undisputed amount to which the subcontractor is entitled for any additional work within 10 days of receipt of payment for the additional work from the District; and

(iii) If the prime contractor withholds payment from a subcontractor, notify the subcontractor in writing and state the reason why payment is being withheld and provide a copy of the notice to the contracting officer; and

(D) Prohibits the District, a prime contractor, or a subcontractor from declaring another party to the contract in default or assessing, claiming, or pursuing damages for delays in the completion of the construction due to the inability of the parties to agree on a price for the change order or additional work.

(e)(1) A contractor's obligation to pay an interest charge to a subcontractor pursuant to subsection (d)(2) of this section shall not constitute an obligation of the District agency.

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(2) A contract modification shall not be made for the purpose of providing reimbursement for any interest charge pursuant to subsection (d)(2) of this section.

(3) A cost reimbursement claim shall not include any amount for reimbursement for any interest charge pursuant to subsection (d)(2) of this section.

(f)(1) A dispute between a contractor and subcontractor relating to the amount or entitlement of a subcontractor to a payment or a late payment interest penalty under the provisions of this subchapter does not constitute a dispute to which the District of Columbia is a party. The District of Columbia may not be interpleaded in any judicial or administrative proceeding involving such a dispute.

(2) This subsection shall not limit or impair any contractual, administrative, or judicial remedies otherwise available to a contractor or subcontractor in the event of a dispute involving late payment or nonpayment by a prime contractor or deficient subcontract performance or nonperformance by a subcontractor.

§ 2-221.03. Interest penalty for failure to pay discounted price within specified period.

* * *

(b) Each District agency which violates subsection (a) of this section shall pay an interest penalty **of at least 1.5%** on any amount which remains unpaid in violation of subsection (a) of this section. The interest penalty shall accrue on the unpaid amount in accordance with the regulations issued pursuant to § 2-221.02, except that the required payment date with respect to the unpaid amount shall be the last day of the specified period of time described in subsection (a) of this section.

§ 2-221.04. Filing of claims; disputed payments.

(a)(1) Claims for interest penalties which a District agency has failed to pay in accordance with the requirements of §§ 2-221.02 and 2-221.03 shall be filed with the contracting officer for a decision. Interest penalties under this subchapter shall not continue to accrue: (A) after the filing of an appeal for the penalties with the Contract Appeals Board; or (B) for more than one year.

(2) The contracting officer shall issue a decision within ~~60~~ **30** days from the receipt of any claim submitted under this subchapter.

**DEPARTMENT OF GENERAL SERVICES ESTABLISHMENT
ACT OF 2011
DC CODE, TITLE 10, CHAPTER 5A**

* * *

§ 10–551.07. Representative program.

* * *

(c) The representative shall perform an analysis of all aspects of the proposed contract or real estate transaction, including the costs and benefits, and shall negotiate on behalf of the District; provided, that the representative shall not bind the District **or direct District government employees**, and the terms of the contract shall be approved by the Director and, if applicable, by the Council.

* * *

1 **DRAFT COMMITTEE PRINT**

2 **Committee of the Whole**

3 **June 21, 2016**

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7 **A BILL**

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12
13 **IN THE COUNCIL OF THE DISTRICT OF COLUMBIA**

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17
18 To amend the Procurement Practices Reform Act of 2010 to allow procurement of facilities
19 maintenance services for certain District-owned buildings, clarify the procurement
20 authority of the Department of General Services, require additional transparency in Council
21 contract summaries, amend requirements for the solicitation and award of privatization
22 contracts, establish restrictions on the performance of inherently governmental functions
23 by contractors, establish an Ombudsman for Contracting and Procurement at District
24 agencies, allow the District to offset minor tax delinquency with reduced payments to
25 vendors, prevent businesses and individuals making campaign contributions from
26 obtaining a contract with the District, prohibit certain contacts during source selection,
27 establish contractor past performance as an evaluation criteria during source selection,
28 require a government cost estimate for construction projects, modify surety requirements
29 for construction contracts and non-construction service contracts, require submission of
30 project labor agreements on construction contracts, clarify the scope of the Contract
31 Appeals Board's review of procurements with regard to business judgment, modify
32 requirements for posting contract information on the Internet, to clarify the rulemaking
33 authority of the CPO and DGS, to amend the Quick Payment Act of 1984 to require a
34 change order clause in contracts, and to establish a minimum interest penalty and faster
35 review of claims by contracting officer.

36
37 **BE IT ENACTED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this**
38 **act may be cited as the "Procurement Integrity, Transparency, and Accountability Amendment Act**
39 **of 2016."**

40
41 **Sec. 2. Contracts for ongoing facility costs.**

42 Section 105(c)(13) of the Procurement Practices Reform Act of 2010, effective April 8,
43 2011 (D.C. Law 18-371; D.C. Official Code§ 2-351.05(c)(13)), is to read as follows:

“(13) The procurement of services for the design, development, construction, and maintenance of a facility on real property that has been disposed of pursuant to District law or on District-owned real property adjacent to a disposed property, provided, that the construction of the facility is required by the Land Disposition Agreement, or similar agreement, governing the disposition of the real property;”.

Sec. 3. Department of General Services authority clarification

(a) Section 201 of the Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code § 2-351.01 *et seq.*) is amended as follows:

(1) Subsection (d) is amended to read as follows:

“(d) Except regarding agencies exempted in section 105(c) and 201(b) and roads, bridges, other transportation systems, and facilities and structures appurtenant to roads, bridges, and other transportation systems, the Department of General Services shall have procurement authority for:

“(1) Construction and related services under Title VI of this chapter; and

“(2) Facilities maintenance and operation services, real estate asset management services, utility contracts, and security services, pursuant to section 1023(5) of the Department of General Services Establishment Act of 2011, effective September 14, 2011 (D.C. Law 19-21; D.C. Official Code § 10-551.02(5)).”.

(2) Subsection (e) is amended to read as follows:

“(e) Except as otherwise provided in section 105(b), the CPO may review and monitor procurements, including for construction and related services under Title VI, by any agency, instrumentality, employee, or official exempt under this chapter or authorized to procure independently of OCP.”.

(b) Section 1028(c) of the Department of General Services Establishment Act of 2011, effective September 14, 2011 (D.C. Law 19-21; D.C. Official Code § 10-551.07.) is amended to read as follows:

“(c) The representative shall perform an analysis of all aspects of the proposed contract or real estate transaction, including the costs and benefits, and shall negotiate on behalf of the District provided, that the representative shall not bind the District or direct District government employees, and the terms of the contract shall be approved by the Director and, if applicable, the Council.”.

Sec. 4. Council review of contracts.

Section 202 of the Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code § 2-352.02), is amended as follows:

(a) Subsection (a) is amended to read as follows:

“(a)(1) Pursuant to § 1-204.51, prior to the award of a multiyear contract or a contract in excess of \$1 million during a 12-month period, the Mayor or executive independent agency or instrumentality shall submit the proposed contract to the Council for review and approval in accordance with the criteria established in this section.

“(2) For a contract modification to exercise an option period when the exercise of the option period does not result in a material change in the terms of the underlying contract, submission of the modification to exercise the option period shall constitute submission of the contract pursuant to this section.”

(b) Subsection (c) is amended as follows:

(1) Paragraph (1) is amended by replacing the phrase “and type of contract;” with the phrase “type of contract, and the source selection method;”

(2) A new paragraph (1A) is added to read as follows:

90 “(1A) For a contract containing option periods, the contract amount for the base
91 period and for each option period, and if the contract amount for one or more of the option
92 periods differs from the contract amount for the base period, an explanation of the reason or
93 reasons for that difference;”.

94 (3) A new paragraph (1B) is added to read as follows:

95 “(1B) If the contract definitizes a letter contract or replaces a contract awarded
96 through an emergency procurement pursuant to section 405:

97 “(A) The date on which the letter contract or emergency awarded through
98 an emergency procurement was executed;

99 “(B) The number of times the letter contract or contract awarded through
100 an emergency procurement has been extended; and

101 “(C) The value of the goods and services provided to date under the letter
102 contract or contract awarded through an emergency procurement, including under each extension
103 of the letter contract or contract awarded through an emergency procurement.”.

104 (4) Paragraph (3) is amended to read as follows:

105 “(3)(A) The selection process, including the number of offerors, the evaluation
106 criteria, and the evaluation results, including price, technical or quality, and past performance
107 components.

108 “(B) If the contract was awarded on a sole source basis, the date on which
109 a competitive procurement for the goods or services to be provided under the contract was last
110 conducted, the date of the resulting award, and a detailed explanation of why a competitive
111 procurement is not feasible;”

112 (5) A new paragraph (3A) is added to read as follows:

“(3A) A description of any bid protest related to the award of the contract, including whether the protest was resolved through litigation, withdrawal of the protest by the protestor, or voluntary corrective action by the District. Each such description shall include the identity of the protestor, the grounds alleged in the protest, and any deficiencies identified by the District as a result of the protest;”.

(6) Paragraph (4) is amended by striking the phrase “prior performance on contracts with the District government” and inserting the phrase “performance on past or current government or private sector contracts with requirements similar to those of the proposed contract;”.

(7) A new paragraph (4A) is added to read as follows:

“(4A) A summary of the subcontracting plan required under Section 2346 of the Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005, effective October 20, 2005 (D.C. Law 16-33, D.C. Official Code § 2-218.46) to include a certification by the District that the subcontracting plan meets the minimum requirements of the Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005, effective October 20, 2005 (D.C. Law 16-33; D.C. Official Code § 2-218.01 *et seq.*), and the dollar volume of the portion of the contract to be subcontracted, expressed both in total dollars and as a percentage of the total contract amount;”.

(8) A new paragraph (5A) is added to read as follows:

“(5A) The amount and date of any expenditure of funds by the District pursuant to the contract prior to its submission to the Council for approval;”.

(9) Paragraph (8) is amended to read as follows:

“(8)(A) A certification that the Citywide Clean Hands database indicates that the proposed contractor is current with its District taxes.

(B) If the Citywide Clean Hands Database indicates that the proposed contractor is not current with its District taxes:

(i) A certification that the contractor has worked out and is current with a payment schedule approved by the District; or

(ii) A certification that the contract will be current with its District taxes after the District recovers any outstanding debt as provided under section 301(9);”.

(10) A new paragraph (8A) is added to read as follows:

“(8A) A certification from the proposed contractor that it is current with its federal taxes, or has worked out and is current with a payment schedule approved by the federal government.

(11) Paragraph (11) is amended by striking the phrase “debarment; and” and inserting the phrase “debarment;” in its place.

(12) Paragraph (12) is amended to read as follows:

“(12) Where the contract, and any amendments or modifications, if executed, will be made available online;”

(13) A new paragraphs (13) is added to read as follows:

“(13) Where the original solicitation, and any amendments or modifications, will be made available online; and

(c) A new subsection (c-1) is added to read as follows:

“(c-1) A proposed change to the scope or amount of a contract, including the exercise of an option period, a modification, a change order, or any similar chanethat is submitted to the Council pursuant to this section and seeks from the Council retroactive approval of an action or authorization for payment, shall include the summary required under subsection (c) and also shall include:

“ (1) The period of performance associated with the proposed change, including date as of which the proposed change is to be made effective;

“ (2) The value of any work or services performed pursuant to a proposed change for which the Council has not provided approval, disaggregated by each proposed change if more than one proposed change has been aggregated for Council review;

“ (3) The aggregate dollar value of the proposed change as compared with the amount of the contract as awarded;

“ (4) The date on which the contracting officer was notified of the proposed change;

“ (5) The reason why the proposed change was sent to the Council for approval after it is intended to take effect;

“ (6) The reason for the proposed change; and

“ (7) The legal, regulatory, or contractual authority for the proposed change.”

(d) A new subsection (c-2) is added to read as follows:

“(c-2) Any proposed change submitted to the Council for its review in accordance with subsection (c-1) shall be referred to the Inspector General who may examine the contract for possible corruption, mismanagement, waste, fraud, or abuse pursuant to Section 208(a-1)(2) of the District of Columbia Procurement Practices Act of 1985, effective February 21, 1986 (D.C. Law 6-85; D.C. Official Code § 1-301.115a(a-1)(2)).”.

(e) A new subsection (c-3) is added to read as follows:

“(c-3) The proposed exercise of an option period pursuant to subsection (a)(2) may be submitted electronically and shall contain a summary, including the following:

“(1) The proposed contractor, contract amount, contract term and contract type;

184 “(2) The identifying number of the underlying contract, including the identifiers
185 assigned to the underlying contract by the Council for the base period of the contract and any
186 subsequent option periods;

187 “(3) A statement indicating that the contracting officer determined through the
188 Citywide Clean Hands Database that the contractor is current with its District taxes or has
189 worked out and is current with a payment schedule approved by the District, or that the
190 contracting officer will offset any outstanding amount pursuant to section 301(9); and

191 “(4) A statement indicating that the proposed contract is within the appropriated
192 budget authority for the fiscal year and is consistent with the financial plan and budget adopted
193 in accordance with § 47-392.01 and 47-392.02.”

194 (f) Subsection (e) is amended by striking the phrase “contained therein.” and inserting the
195 phrase “contained therein, provided that a copy of the underlying letter contract be transmitted to
196 the Council with the definitive contract.” in its place.

197 “(3) A statement indicating that the contracting officer determined through the
198 Citywide Clean Hands Database that the contractor is current with its District taxes or has
199 worked out and is current with a payment schedule approved by the District, except as provided
200 under section 301(9); and

201 “(4) A statement indicating that the proposed contract is within the appropriated
202 budget authority for the fiscal year and is consistent with the financial plan and budget adopted
203 in accordance with § 47-392.01 and 47-392.02.”

204 (f) Subsection (e) is amended by striking the phrase “contained therein.” and inserting the
205 phrase “contained therein, provided that a copy of the underlying letter contract be transmitted to
206 the Council with the definitive contract.” In its place.

Sec 5. Privatization contracts.

The Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code § 2-351.01 *et seq.*), is amended as follows:

(1) Section 202(c) is amended by adding a new paragraph (11A) to read as follows:

“(11A) Any determination and findings issued in relation to the contract’s formation, including any determination and findings made under section 205; and”.

(2) Section 205 is amended to read as follows:

“Sec. 205. Privatization contracts.

“(a) A privatization contract shall meet the following requirements:

“(1) Except as provided under subsection (d), a privatization contract shall not cause the displacement of District government employees including by layoff, demotion, involuntary transfer to a new class, involuntary transfer to a new location requiring a change of residence, or time base reductions. For purposes of this paragraph, displacement does not include changes in shifts or days off, nor does it include reassignment to other positions within the same class and general location.

“(2) The privatization contract shall provide the District with an economic advantage, as demonstrated by the determination and findings issued pursuant to subsection (b).

“(3) The economic advantage of the privatization contract shall not be outweighed by the public’s interest in having a particular function performed directly by District employees, as demonstrated in the determination and findings issued pursuant to subsection (b).

“(4) The privatization contract shall be awarded through a publicized, competitive procurement process pursuant to Title IV of this act.

230 “(5) The privatization contract shall include specific provisions establishing the
231 minimum qualifications for the employees of the contractor that will perform the work under the
232 contract and an affirmation by the contractor that the contractor’s hiring practices meet
233 applicable District standards.

234 “(b) Before issuing a solicitation for a privatization contract, the Mayor, instrumentality,
235 or independent agency shall:

236 “(1) Issue a draft determination and findings demonstrating that the cost of having
237 the contracted-for service provided by a contractor will be at least 5% less than if the service
238 were to be provided by employees of the District or its instrumentality or independent agency.
239 The draft determination and findings shall include, at a minimum, the following:

240 “(A) The estimated cost of having a contractor provide the service
241 contrasted with the costs that would be directly associated with having employees of the District
242 or its instrumentality continue performance;

243 “(B) Personal services costs attributable to having a contractor provide the
244 service contrasted with the personal services costs that would result from having employees of
245 the District or its instrumentality or independent agency continue performance, including salary
246 and fringe benefits;

247 “(C) Non-personal services costs attributable to having a contractor
248 provide the service contrasted with the non-personal services costs that would result from having
249 employees of the District or its instrumentality or independent agency continue performance,
250 including rent, equipment, and utilities;

251 “(D) Any additional costs that would be built into a privatization contract,
252 including expected costs related the administration, oversight, and supervision by District
253 government personnel of a privatization contract;

254 “(E) A description of the expected impact of a privatization contract on the
255 quality of goods or services provided to or on behalf of the District government;

256 “(F) The number of employees of the District or its instrumentality or
257 independent agency that are necessary to perform the service proposed to be the subject of a
258 privatization contract; and

259 “(G) The number of employees of the District or its instrumentality or
260 independent agency that would be displaced by the contract within the meaning of subsection
261 (a)(1).

262 “(2) Request an analysis by the Chief Financial Officer of whether the costs in the
263 draft determination and findings can be substantiated.

264 “(3) Share the draft determination and findings with employees who could be
265 displaced within the meaning of subsection (a)(1) as a result of the privatization contract and any
266 labor unions or groups representing those employees to solicit their comments.

267 “(4) Issue a final determination and findings that incorporate the full analysis by
268 the Chief Financial Officer, and a summary of comments provided pursuant to paragraph (3) .
269 Each final determination and findings shall be made publicly available online before any
270 solicitation for a privatization contract based on the final determination and findings is issued.

271 “(c)(1) If the Mayor, instrumentality, or independent agency issues a solicitation for a
272 privatization contract that would displace employees of the District or its instrumentality or
273 independent agency, those employees or a person or entity representing those employees may
274 submit a bid or proposal to perform the services as a private entity; provided, that the employees
275 agree to resign their employment with the District or its instrumentality or independent agency
276 upon selection as the awardee of the contract.

277 “(2) The Mayor, instrumentality, or independent agency shall consider any
278 employee bid or proposal submitted pursuant to paragraph (1) on the same basis as any other bid
279 or proposal.

280 “(3) The Mayor shall make available reasonable resources to assist employees of
281 the District or its instrumentality or independent agency, or an entity representing such
282 employees in formulating a bid or proposal pursuant to paragraph (1); provided, that standards
283 for determining the resources to be made available and whether they are reasonable shall be
284 determined by rulemaking.

285 “(4) A solicitation for a privatization contract shall include information describing
286 how displaced employees of the District or its instrumentality or independent agency may
287 exercise their right to compete for the contract pursuant to this subsection.

288 “(d) If a privatization contract is awarded that causes employees of the District or its
289 instrumentality or independent agency to be displaced:

290 “(1) The contractor shall offer to each displaced employee a right of first refusal
291 to employment by the contractor, in a comparable available position for which the employee is
292 qualified, for at least a 6-month period during which the employee shall not be discharged by the
293 contractor without cause;

294 “(2) Any District employee who is displaced as a result of a privatization contract
295 and is hired by the contractor who was awarded the contract, shall be entitled to the benefits
296 provided by the Service Contract Act of 1965, approved October 22, 1965 (79 Stat. 1034; 41
297 U.S.C. § 6702 *et seq.*);

298 “(3) If the employee's performance during the 6-month transitional employment
299 period described in paragraph (1) of this subsection is satisfactory, the contractor shall offer the
300 employee continued employment under terms and conditions established by the contractor;

301 “(4) The Mayor, instrumentality, or the independent agency head shall make
302 efforts to assist employees of the District or its instrumentality or independent agency who would
303 be affected by the privatization contract and to promote employment opportunities for District
304 residents with the contractor. These efforts shall include:

305 “(A) Consulting with union representatives and employees of the District
306 or its instrumentality or independent agency who would be affected by the privatization contract;

307 “(B) Providing prior notification of at least 30 days of any adverse impact
308 of a privatization contract to employees of the District or its instrumentality or independent
309 agency who would be affected by the contract, including notification to a labor organization
310 certified as the exclusive representative of employees affected by the contract;

311 “(C) Providing alternative employment in the District government to
312 displaced employees if there are unfilled positions for which those employees are qualified; and

313 “(D) Encouraging the contractor to offer employment to qualified District
314 residents before offering employment to qualified nonresidents.

315 “(e)(1) Any privatization contract shall incorporate specific performance standards and
316 targets including for productivity and cost savings to be achieved under the contract.

317 “(2) The contractor shall submit reports, as required by the contract, to the District
318 government contracting officer and the Chief Financial Officer on the contractor's compliance
319 with the specific performance criteria; and

320 “(3) The contract may be canceled without prejudice to the District if the
321 contractor fails to comply with the performance criteria set out in the contract.

322 “(f) An agency or instrumentality shall not attempt to circumvent the requirements of this
323 section by eliminating the provision of services by its own employees before procuring

substantially the same services from a person who is not employed by that agency or instrumentality.

“(g)(1) Each year the District of Columbia Auditor shall review a selection of privatization contracts, which shall be chosen by the Auditor based on the dollar value and scope of the contracts, their potential impact on the health and safety of District residents, their potential impact on economic development and employment opportunities in the District, and other factors deemed appropriate by the Auditor.

“(2) The Auditor shall issue an annual report to the Mayor and the Council on the contracts reviewed pursuant to paragraph (1) analyzing for each contract whether it is achieving:

“(A) The 5% cost savings set forth in subsection (b)(1) of this section; and

“(B) The performance standards and targets incorporated into the contracts as required under subsection (e) of this section.

“(3) The Auditor may report that the cost and performance data for the selected contracts are inconclusive, but if the District has failed to collect, maintain, or provide cost or performance data, the Auditor may reasonably conclude that the cost savings or performance standards and targets are not being met.

“(4) If the Auditor finds in the report issued pursuant to paragraph (2) of this subsection that a privatization contract has not met the cost savings or performance standards and targets, the Mayor, or independent agency head shall review the merits of cancelling the privatization contract and performing the work with District employees and shall report to the Council on the results of their review.

“(h) The requirements of this section shall not apply to:

“(1) A contract for a new function for which the Council has specifically mandated or authorized the performance of the work by independent contractors.

348 “(2) Services that cannot be performed satisfactorily by District government
349 employees, or are of such a highly specialized or technical nature that the necessary expert
350 knowledge, experience, and ability, are not available through District employees, as determined
351 by the Mayor.

352 “(3) Contracts for staff augmentation services to be provided pursuant to a
353 contract with a term of less than one year that does not contain options to extend the performance
354 period.

355 “(4) Contracts for services that are incidental to a contract for the purchase or
356 lease of real or personal property such as contracts to maintain office equipment or computers
357 that are leased or rented.

358 “(5) Contracts that are necessary to protect against a conflict of interest or to
359 insure independent and unbiased findings in cases in which there is a clear need for an unbiased
360 and objective outside perspective, as determined by the Mayor.

361 “(6) Contracts entered in to pursuant to section 201(c).

362 “(7) Contracts that will provide equipment, materials, facilities, or support
363 services that could not feasibly be provided by the District in the location where the services are
364 to be performed, as determined by the Mayor.

365 “(8) Contracts to provide training for which appropriately qualified District
366 employees are not available, as determined by the Mayor.

367 “(9) Contracts for services that are of such an urgent, temporary, or occasional
368 nature that the delay incumbent in their formation under this section would frustrate their very
369 purpose, as determined by the Mayor.

370 “(i) The CPO shall promulgate rules, pursuant to section 1106, with detailed procedures
371 to implement this section.

372 **Sec. 6. Inherently governmental functions.**

373 The Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-
374 371; D.C. Official Code § 2-351.01 *et seq.*), is amended as follows:

375 (a) Section 104 is amended as follows:

376 (1) A new paragraph (34B) is added to read as follows:

377 “(34B) “Function closely associated with an inherently governmental function”
378 means a function that is not an inherently governmental function, but is similar to an inherently
379 governmental function because of the nature of the function, the manner in which the contractor
380 performs the function, or the manner in which the government administers the contractor’s
381 performance of the function, as determined by application of the criteria set forth under section
382 205a.”.

383 (2) A new paragraph (37B) is added to section 104 to read as follows:

384 “(37B) “Inherently governmental function” means a function that is so intimately
385 related to the public interest as to require performance by District government employees, as
386 determined by application of the criteria under section 205a.”.

387 (b) A new section 205a is added to read as follows:

388 “Sec. 205a. Inherently governmental functions.

389 “(a) The District shall not award a contract to provide any service that is an inherently
390 governmental function.

391 “(b) The District may enter into a contract for the performance of a function closely
392 associated with an inherently governmental function only if the head of an agency benefited by
393 the performance of the contract:

394 “(1) Finds that appropriate District government employees cannot reasonably
395 perform the function at issue;

396 “(2) Ensures that appropriate District government employees supervise contractor
397 performance of the contract and perform all inherently governmental functions associated with
398 the contract; and

399 “(3) Addresses any potential organizational conflicts of interest of the contractor
400 in the performance of the functions closely associated with an inherently governmental function
401 under the contract.

402 “(c) An inherently governmental function involves, among other things, the interpretation
403 and execution of the laws of the District to:

404 “(1) Bind the District to take or not to take some action by contract, policy,
405 regulation, authorization, order, or otherwise;

406 “(2) Appoint, direct, or control officials or employees of the District;

407 “(3) Exert ultimate control over the acquisition, use, or disposition of the
408 property, real or personal, tangible or intangible, of the District, including the control, or
409 disbursement of appropriated and other District funds.

410 “(4) With respect to contracts to procure goods or services for the District:

411 “(A) Determine what supplies or services are to be acquired by the
412 District, and at what prices; provided, that the Mayor or the Mayor’s designee, may give a
413 contractor authority to acquire supplies for the District at prices within specified ranges and
414 subject to other reasonable conditions deemed appropriate;

415 “(B) Participate as a voting member on any source selection boards, unless
416 the contractor has:

417 “(i) Been hired by the District for its specific technical expertise;
418 and

419 “(ii) No conflict of interest exists with regard to the contract or
420 vendors under consideration by the source selection board.

421 “(C) Approve any contractual documents, to include documents defining
422 requirements, incentive plans, and evaluation criteria;

423 “(D) Award contracts;

424 “(E) Administer contracts, including ordering changes in contract
425 performance or contract quantities, taking action based on evaluations of contractor performance,
426 and accepting or rejecting contractor products or services;

427 “(F) Terminate contracts;

428 “(G) Determine whether contract costs are reasonable, allocable, or
429 allowable; and

430 “(H) Evaluate a contractor’s performance when the evaluation is to be
431 used to determine whether payment should be made to the contractor and in what amount.

432 “(d) The CPO shall issue rules pursuant to Section 1106, consistent with this section and
433 containing guidance on defining an inherently governmental functions and a function closely
434 related to an inherently governmental function, and including categories of functions and specific
435 functions meeting these definitions.

436 “(e) The Mayor may waive compliance with any of the requirements of this section for
437 any contract in effect upon the effective date of the Procurement Integrity, Transparency, and
438 Accountability Amendment Act of 2016, and for any option period exercised under such
439 contract, so long as the option period was provided for in the contract as of the effective date of
440 the Procurement Integrity, Transparency, and Accountability Amendment Act of 2016.

“(f) Notwithstanding subsection (e), the requirements of this section shall apply to any contract or option period in effect five years after the effective date of the Procurement Integrity, Transparency, and Accountability Amendment Act of 2016”.

Sec. 7. Ombudsman for contracting and procurement

The Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code § 2-351.01 *et seq.*), is amended by adding a new section 207 to read as follows:

“Sec. 207. Ombudsman for contracting and procurement.

“(a) There is established within the Office of Contracting and Procurement an Office of Ombudsman for Contracting and Procurement which shall be headed by an ombudsman with purview over contracts under the authority of the CPO.

“(b) Each District agency or instrumentality with independent procurement authority pursuant to section 201 shall designate an Agency Ombudsman for Contracting and Procurement.

“(c) Each Ombudsman designated pursuant to this section shall:

“(1) Serve as a vehicle for contractors and subcontractors performing work or providing services under a District contract to communicate their complaints and concerns regarding contracting, procurement, or a specific contract, through a single entity;

“(2) Respond to complaints and concerns in a timely fashion with accurate and helpful information;

“(3) Determine the validity of any complaint quickly and professionally;

“(4) Generate options for a response by the agency or instrumentality and offer a recommendation from among the options;

“ (5) Except when the parties are involved in legal or administrative proceedings, attempt informally to facilitate a resolution of a dispute between the contracting officer, the prime contractor, and the subcontractor as appropriate; and

“ (6) Identify systemic concerns and recommend to the CPO and the Council policy changes, and strategies to improve the contracting and procurement process.”.

Sec. 8. Tax delinquency offset allowance.

Section 301 of the Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code § 2-353.01), is amended as follows:

(a) The lead in language is redesignated as subsection (a).

(b) Paragraph (9) is amended by striking the phrase “delinquent status” and inserting the phrase “delinquent status of more than the greater of \$1,000 or 1 percent of the contract value, up to \$25,000” in its place

(c) A new paragraph (b) is added to read as follows:

“(b) If the District awards a contract to a prospective contractor that has an outstanding debt with the District in a delinquent status that is in an amount less than the amount required to disqualify the prospective contractor pursuant to subsection (a)(9), the District shall recoup the outstanding debt by offsetting it against any payment due to the contractor under the contract.”

Sec. 9. Preventing pay-to-play in contracting with the District.

The Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code § 2-351.01 *et seq.*), is amended as follows:

(a) A new section 303 is added to read as follows:

“Sec. 303. Prohibition on contracting with political contributors.

“Prior to awarding any contract to procure goods or services, an contracting officer shall obtain a sworn statement from the contractor, made under penalty of perjury, that, to the best of

the contractor’s knowledge, and after due diligence, the contractor is in compliance with section 952, and is therefore eligible to enter into a contract with the District.

(b) A new Title IX-A is added to read as follows:

“TITLE IX-A. ELIGIBILITY TO CONTRACT WITH THE DISTRICT.

“Sec. 951. Definitions.

“For purposes of this title, the term:

“(1) “Business contributor” has the same meaning as set forth in section 101(4A) of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011, effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1161.01(4A)).

“(2) “Candidate” has the same meaning as set forth in section 101(6) of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011, effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1161.01(6)).

“(3) “Contracting authority” means:

“(A) The Chief Procurement Officer as defined in section 104(11) of the Procurement Practices Reform Act of 2010 (D.C. Law 18-371; D.C. Official Code § 2-351.04(11));

“(B) Any subordinate agency, instrumentality, employee of the District government, independent agency, board, or commission, other than the District of Columbia courts and the District of Columbia Public Defender Service, that is exempted from Chapter 3A of this act pursuant to section 105(c);

510 “(C) Any subordinate agency, instrumentality, employee of the District
511 government, independent agency, board, or commission authorized to conduct procurements
512 under section 201.

513 “(4) “Contribution” has the same meaning as set forth in section 101(10) of the Board of
514 Ethics and Government Accountability Establishment and Comprehensive Ethics Reform
515 Amendment Act of 2011, effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-
516 1161.01(10)).

517 “(5) “Covered recipient” means:

518 “(A) Any elected District official except for an Advisory Neighborhood
519 Commissioner.

520 “(B) Any candidate for elective District office, except for an Advisory
521 Neighborhood Commissioner.

522 “(C) Any political committee affiliated with a District candidate or official
523 described in subparagraphs (A) and (B).

524 “(D) Any political action committee organized pursuant to Part B of the Board of
525 Ethics and Government Accountability Establishment and Comprehensive Ethics Reform
526 Amendment Act of 2011, effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-
527 1163.07 *et seq.*);

528 “(E) Any District of Columbia political party, not including any national political
529 parties organized in the District of Columbia.

530 “(F) Any constituent-service program or fund, or substantially similar entity,
531 controlled, operated, or managed by:

532 “(i) Any elected District official who is or could be involved in
533 influencing the award of a contract; or

534 “(ii) Any person under the supervision, direction, or control of an elected
535 District official who is or could be involved in influencing the award of a contract.

536 “(G) Any entity or organization:

537 “(i) Which a candidate or public official described in subparagraphs (A)
538 and (B), or a member of his or her immediate family, controls; or

539 “(ii) In which a candidate or public official described in subparagraphs (A)
540 and (B) has an ownership interest of 10 percent or more.

541 “(6) “Election” has the same meaning as set forth in section 101(15) of the Board of
542 Ethics and Government Accountability Establishment and Comprehensive Ethics Reform
543 Amendment Act of 2011, effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-
544 1161.01(15)).

545 “(7) “Immediate family” has the same meaning as set forth in section 101(26) of the
546 Board of Ethics and Government Accountability Establishment and Comprehensive Ethics
547 Reform Amendment Act of 2011, effective April 27, 2012 (D.C. Law 19-124; D.C. Official
548 Code § 1-1161.01(26)).

549 “(8) “Person” has the same meaning as set forth in section 101(42) of the Board of Ethics
550 and Government Accountability Establishment and Comprehensive Ethics Reform Amendment
551 Act of 2011, effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1161.01(42)).

552 “(9) “Political action committee” has the same meaning as set forth in section 101(43A)
553 of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics
554 Reform Amendment Act of 2011, effective April 27, 2012 (D.C. Law 19-124; D.C. Official
555 Code § 1-1161.01(43A)).

556 “(10) “Political committee” has the same meaning as set forth in section 101(44) of the
557 Board of Ethics and Government Accountability Establishment and Comprehensive Ethics

558 Reform Amendment Act of 2011, effective April 27, 2012 (D.C. Law 19-124; D.C. Official
559 Code § 1-1161.01(44)).

560 “(11) “Political party” has the same meaning as set forth in section 101(45) of the Board
561 of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform
562 Amendment Act of 2011, effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-
563 1161.01(45)).

564 “Sec. 952. Eligibility of contractor to enter into contract or agreement with the District.

565 “(a) Beginning on January 1, 2018, a person or business contributor, that makes or
566 solicits a contribution to a covered recipient shall be ineligible to enter into a contract for the
567 provision of goods or services to the District valued at \$100,000 or more during the time period
568 provided in subsection (b) of this section. The District shall not enter into an agreement or
569 otherwise contract with a person that is ineligible pursuant to this subsection during the time
570 period provided in subsection (b) of this section.

571 “(b)(1) For contributions to covered recipients described under section 951(5)(A), (B), or
572 (C), the restriction on a person or business contributor, entering into a contract with the District
573 under this section shall apply beginning on the date the contribution was made or solicited and
574 continuing until one year following:

575 “(A) The date of the primary election if the District candidate or official
576 does not appear on the general election ballot;

577 “(B) The date of the general election if the District candidate or official
578 appears on the general election ballot, regardless of whether the contribution or solicitation was
579 for the primary election or general election; or

580 “(C) If the contribution or solicitation was not for a particular election, the
581 date the contribution was made or solicited.”

“(2) For contributions to covered recipients described under section 951(5)(D), (E), (F) or (G), the restriction on a person or business contributor entering into a contract with the District under this section shall apply beginning on the date the contribution was made or solicited and continuing for 18 months following that date.”.

Sec. 10. Prohibited contacts during source selection

The Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code § 2-351.01 *et seq.*), is amended as follows:

(1) Section 104 is amended as by adding new paragraph (51A) to read as follows:

“(53A) “Restricted Period” means the period of time commencing with the earliest written notice, advertisement, or solicitation of a request for proposal, invitation for bids, or any other method of soliciting a response from offerors or bidders intending to result in a contract with a District, and ending with either the execution of the final contract and its approval by the District or submission of the contract to the Council for its review when such submission is required pursuant to section 451 of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 803; D.C. Official Code § 1-204.51).

(2) Section 401(b) is repealed.

(3) A new section 401a is added to read as follows:

“Sec. 401a. Prohibited contacts during source selection.

“(a) Except for members of a technical advisory group, no District employee or official shall contact any contracting officer or contracting staff in an attempt to influence source selection outside of the processes established in Title IV of this act.

“(b) Prior to the commencement of a restricted period, the CPO, or the lead contracting official of an agency with procurement authority independent of the CPO, shall designate a

person or persons to be the designated contact for offerors or bidders on a given contract during the restricted period.

“(c)(1) During the restricted period, no bidder or offeror shall contact any District employee or official with respect to source selection during a restricted period, except as provided for under subsection (d).

(2) For the purposes of this section, contact means any oral, written or electronic communication.

“(d)(1) During the restricted period, an offeror or bidder may make permissible contact with respect to source selection.

“(2) For the purposes of this section, permissible contact means that the offeror or bidder shall contact only the individual designated under subsection (b) for a given contract, provided, that the following contacts are exempted from this subsection and do not need to be directed to the individual designated under subsection (a):

“(A) The submission of written proposals in response to any method for soliciting a response from offerors or bidders intending to result in a contract;

“(B) The submission of written questions through a process set forth in a solicitation, request for proposals, invitation for bids, or any other method of soliciting a response from offerors or bidders intending to result in a contract, so long as the written questions and responses are to be disseminated to all offerors or bidders who have expressed an interest in the proposed contract;

“(C) Participation in any demonstration, conference, or other means of exchanging information in a setting open to all potential bidders or offerors through a process set forth in a solicitation, request for proposals, invitation for bids, or any other method of soliciting a response from offerors or bidders intending to result in a contract;

629 “(D) Negotiation with the highest-ranking offeror or bidder regarding the
630 terms of the proposed contract; and

631 “(E) Contacts by offerors or bidders with the Contract Appeals Board or
632 any other tribunal or court of competent jurisdiction in connection with a protest, appeal, or
633 dispute before that tribunal or court.

634 “(e) A bid or offer associated with a violation of this section shall be rejected, unless the
635 CPO determines that it is in the best interest of the District not to reject the bid or offer.

636 “(f) For the purposes of this section the term “bidder” or “offeror” shall include any
637 employee, agent, consultant, or person acting on behalf of a bidder or offeror.

638 “(g) Nothing in this section shall be construed to prevent any contact or communications
639 by any offeror, bidder, or District employee or official with respect to allegations of improper
640 conduct to the Office of the Attorney General, the Office of the Inspector General, the Office of
641 the District of Columbia Auditor, the CPO, the Council of the District of Columbia, the Contract
642 Appeals Board, or any other tribunal or court of competent jurisdiction.”

643 **Sec. 11. Evaluating contractor past performance**

644 Section 403 of the Procurement Practices Reform Act of 2010, effective April 8, 2011
645 (D.C. Law 18-371; D.C. Official Code § 2-354.03), is amended as follows:

646 (1) Subsection (d) is amended to read as follows:

647 “(d) Each RFP shall include a statement of work or other description of the District’s
648 specific needs, which shall be used as a basis for the evaluation of proposals.”.

649 (2) A new subsection (d-2) is added to read as follows:

650 “(d-2)(1) Each RFP shall set forth each evaluation factor and indicate the relative
651 importance of each evaluation factor. At a minimum, the following shall be included as
652 evaluation factors:

653 “(A) Price or cost to the District government;
654 “(B) The quality of the product or service as addressed by one or more
655 non-cost evaluation factors; and
656 “(C) Past performance of the offeror.
657 “(2) The general approach for evaluating past performance information shall be
658 described in the RFP, but at a minimum shall include an evaluation of the offeror’s performance
659 under past or current government or private-sector contracts with requirements similar to those
660 of the proposed contract.
661 “(3) In the case of an offeror without a record of relevant past performance or for
662 whom information on past performance is not available, the offeror may not be evaluated
663 favorably or unfavorably on past performance.
664 “(4) Notwithstanding any provision of this subsection, any review of past
665 performance shall be evaluated consistent with the criteria specified in the solicitation and such
666 criteria shall be applied consistently across all offerors.”.

667 **Sec. 12. Estimate of construction costs**

668 (a) The Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law
669 18-371; D.C. Official Code § 2-351.01 *et seq.*), is amended by adding a new section 605 to read
670 as follows:

671 “Sec. 605. Estimate of construction costs.

672 “(a) An estimate of costs shall be prepared by the contracting officer for each proposed
673 contract, contract modification, or change order to be issued in connection with a construction
674 project and anticipated to exceed \$100,000 dollars.

“ (b) The estimate shall be prepared in detail, as though the District were competing for the contract, and shall not be based solely on the estimates or actual costs of similar construction projects.

“ (c) The estimate shall be made available to the contracting officer for use in preparation of the contract solicitation and in the determination of price reasonableness in awarding a contract.

“ (d) Access to materials gathered or created for the estimate, and the overall amount of the estimate, shall be limited to District personnel or agents of the District whose official duties require knowledge regarding the estimate. These materials and the overall amount of the estimate shall not be disclosed, except as otherwise permitted by law.”

(b) Within 90 days of the effective date of this act, the Mayor shall promulgate regulations to conform Chapter 27 of the District of Columbia Municipal Regulations to the requirements of subsection (a) of this section.

Sec. 13. Payment bonds

Title VII of the Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code § 2-357.01 *et seq.*), is amended as follows:

(1) Section 702(b) is amended to read as follows:

“ (b) The CPO may:

“ (1) Reduce the amount of performance and payment bonds for construction contracts to 50% of the amounts established in subsection (a) of this section;

“ (2) Substitute for a bond required by paragraph (a) of this section, a letter of credit in an amount equal to at least 10% of the portion of the contract price that does not include the cost of operation, maintenance, and finance, in cases in which the contractor:

“(A) Is a nonprofit corporation, as defined in section 2(6) of the Nonprofit Corporation Act of 2010, effective July 2, 2011 (D.C. Law 18-378, D.C. Official Code 29-401.02(6));

“(B) Had a net worth of at least \$1 million in the preceding fiscal year;

“(C) Is a licensed general contractor; and

“(D) Has done business as a construction contractor for at least 5 years.”

(2) A new section 702a is added to read as follows:

“Sec. 702a. Security in non-construction service contracts.

“The CPO shall issue rules pursuant to section 1106 to require performance bonds, payment bonds, letters of credit, or other forms of security for non-construction service contract prime contractors in cases in which such security may be effective in furthering the District’s interests or such security may assist subcontractors doing business under a prime contract to receive payment for goods or services.”

Sec. 14. Project Labor Agreements

The Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code § 2-351.01 *et seq.*), is amended as follows:

(1) Section 104 is amended by adding a new paragraph (38A) to read as follows:

“(38A) “Labor Organization” shall have the same meaning as set forth in section 102(15) of the Human Rights Act of 1977, effective December 13, 1977 (D.C. Law 2-48, D.C. Official Code § 2-1401.02(15))”.

(2) A new section 606 is added to read as follows:

“Sec. 606. Use of project labor agreements for construction projects

“(a) The Mayor shall require, as part of a solicitation for a construction contract pursuant to this title, that every contractor and subcontractor that will engage in the construction project

722 agree to negotiate or become a party to a project labor agreement, for that project, with one or
723 more labor organizations if:

724 “(1) Use of a project labor agreement will advance the District’s interest
725 producing labor-management stability, and ensuring compliance with laws and regulations
726 governing safety and health, equal employment opportunity, labor and employment standards,
727 and other matters;

728 “(2) The project will require multiple construction contractors and/or
729 subcontractors employing workers in multiple crafts or trades; and

730 “(3) The total cost, not including ongoing operations and maintenance, of contract
731 to the District is anticipated to be \$50 million or more.

732 “(b) A project labor agreement agreed to pursuant to subsection (a) shall:

733 “(1) Bind all contractors and subcontractors engaged in construction on the
734 construction project to comply with the project labor agreement;

735 “(2) Contain guarantees against strikes, lockouts, and similar job disruptions;

736 “(3) Set forth effective, prompt, and mutually binding procedures for resolving
737 labor disputes arising during the term of the project labor agreement;

738 “(4) Provide other mechanisms for labor-management cooperation on matters of
739 mutual interest and concern, including productivity, quality of work, safety, and health; and

740 “(5) Include any additional requirements that the CPO deems necessary to
741 promote the District’s interest.

742 “(c) The Mayor may waive the requirements of this section by issuing a determination
743 and findings, posted on the internet for at least 10 calendar days before advertising the
744 solicitation, that:

745 “(1) A project does not meet the criteria set forth in subsection (a); or

746 “(2) A project labor agreement would be contrary to the interests of the District.”.

747 **Sec. 15. Review of bid protests.**

748 Section 1008 of the Procurement Practices Reform Act of 2010, effective April 8, 2011
749 (D.C. Law 18-371; D.C. Official Code § 2-360.08(d)) is amended as follows:

750 (a) Subsection (d) is amended by striking the phrase “proceeding shall be de novo and
751 the”.

752 (b) A new subsection (d-1) is added to read as follows:

753 “(d-1) An agency’s determination of its minimum needs and its determination of best
754 method of accommodating those minimum needs are business judgments primarily within the
755 agency’s discretion. The Board may not sustain a protest on the basis of either determination
756 unless a protester demonstrates by clear and convincing evidence that the determination lacked a
757 reasonable basis.”

758 **Sec. 16. Transparency in contracting.**

759 Section 1104 of the Procurement Practices Reform Act of 2010, effective April 8, 2011
760 (D.C. Law 18-371; D.C. Official Code § 2-361.04 *et seq.*), is amended to read follows:

761 “Sec. 1104. Transparency in contracting.

762 “(a) The CPO shall establish and maintain on the Internet a website containing publicly-
763 available information regarding District procurement.

764 “(b) The website established pursuant to subsection (a) shall contain, at a minimum, the
765 following:

766 “(1) Information regarding the statutes and rules that govern procurement for all
767 District agencies and instrumentalities, including those exempt from the authority of the CPO;

768 “(2) Links to the contract solicitation websites of OCP and all district agencies
769 exempt from the authority of the CPO.

770 “(3) A database containing information regarding each contract executed by the
771 District for an amount equal to or greater than of \$100,000, including each such contract made
772 by a District agency exempt from the authority of the CPO pursuant to section 105. For each
773 contract contained in the database, the database shall include a unique identifier and at a
774 minimum, the following:

775 “(A) A copy of the executed contract;

776 “(B) All determinations and findings related to the contract;

777 “(C) All contract modifications, change orders, or amendments associated
778 with the contract;

779 “(D) All solicitation documents for the contract, including all requests for
780 proposals and invitations for bids, and any amendments of such documents; and

781 “(E) The contract summary documents for the contract submitted to the
782 Council for its review.

783 “(4) Placeholders identifying any portions of the items set forth in paragraph (3)
784 withheld as confidential by the CPO pursuant to section 417.

785 “(5) A list of each contract executed by the District for an amount less than
786 \$100,000 which shall include, for each contract, the vendor name, a description of the goods or
787 services purchased, and the dollar amount of the contract.

788 “(6)(A) A list of each payment made by the District to a prime contractor,
789 including the date and the dollar amount of the payment. The list shall be updated not less than
790 once each week.

791 “(B) Payments not administered through the Procurement Automated
792 Support System shall be exempt from the requirement of subparagraph (A).

793 “(c) Agencies not subject to the authority of the CPO shall transmit the information
794 required by this section to the CPO for posting on the Internet.”.

795 **Sec. 17. Acquisition planning.**

796 Section 1105 of the Procurement Practices Reform Act of 2010, effective April 8, 2011
797 (D.C. Law 18-371; D.C. Official Code § 2-361.05), is amended as follows:

798 (1) A new subsection (a-1) is added to read as follows:

799 “(a-1) At a minimum, each agency acquisition plan shall contain anticipated procurement
800 needs of the coming fiscal year with specific information on the following:

801 “(1) Program-level needs;

802 “(2) Anticipated multi-year procurements;

803 “(3) Anticipated exercises of option period of existing contracts;

804 “(4) Expected major changes in ongoing or planned procurements; and

805 “(5) The guiding principles, overarching goals, and objectives of the agency’s
806 acquisitions of work, goods, and services; and

807 “(6) Goals and plans for utilization of strategic sourcing.”.

808 (2) Subsection (b) is amended to read as follows:

809 “(b) Each agency shall submit to the Council summary of planned contracts for the
810 upcoming fiscal year no later than the date of submission of the Mayor’s proposed budget to the
811 Council. Each summary, at a minimum, shall list each planned contract and the source of
812 funding for each contract by program code in the budget.”.

813 **Sec. 18. Rulemaking clarification.**

814 Section 1106(a) of the Procurement Practices Reform Act of 2010, effective April 8,
815 2011 (D.C. Law 18-371; D.C. Official Code § 2-361.06), is amended as follows:

(a) Paragraph (1) is amended by striking the phrase “chapter, except subchapter VI of this chapter.” and inserting the phrase “chapter.” in its place.

(b) Paragraph (2) is amended to read as follows:

“(2) Notwithstanding paragraph (1), the Department of General Services, pursuant to subchapter I of Chapter 5 of this title, shall issue rules to implement the provisions of subchapter VI of this chapter for contracts within the authority of the Department of General Services.”

Sec. 19. Quick payment provisions.

The District of Columbia Government Quick Payment Act of 1984, effective March 15, 1985 (D.C. Law 5-164, D.C. Official Code § 2-221.01 *et seq.*) is amended as follows:

(1) Section 3(d) is amended by adding a new paragraph (4) to read as follows:

“(4) A change order clause that:

“(A) Prohibits the District or a prime contractor from requiring a prime contractor or a subcontractor to undertake any that is determined to be beyond the original scope of the prime contractor or a subcontractors contract or subcontract, including work under a District-issued change order, unless the contracting officer:

“(i) Agrees with the prime contractor and, if applicable, the subcontractor on a price for the change order or additional work;

“(ii) Obtains a certification from the Chief Financial Officer that there are sufficient funds to compensate the prime contractor and, if applicable, the subcontractor for the additional work;

“(iii) Has made a written, binding commitment with the prime contractor to pay for the additional work within 30 days after the prime contractor submits an invoice for the additional work to the contracting officer; and

840 “(iv) Gives written notice of the funding certification to the prime
841 contractor.

842 “(B) If the District fails to pay for the additional work within 30 days after
843 the prime contractor submits an invoice for the additional work to the contracting officer, allows
844 the prime contractor or subcontractor to stop work without incurring any penalty otherwise
845 allowed for under the contract;

846 “(C) Requires a prime contractor to include in its subcontracts a clause
847 that requires the prime contractor to:

848 “(i) Within 5 business days of receipt of the notice required under
849 subparagraph (A)(iv), provide the subcontractor with notice of the approved amount to be paid to
850 the subcontractor based on the portion of the additional work to be completed by the
851 subcontractor;

852 “(ii) Pay the subcontractor any undisputed amount to which the
853 subcontractor is entitled for any additional work within 10 days of receipt of payment for the
854 additional work from the District; and

855 “(iii) If the prime contractor withholds payment from a
856 subcontractor, notify the subcontractor in writing and state the reason why payment is being
857 withheld and provide a copy of the notice to the contracting officer; and

858 “(D) Prohibits the District, a prime contractor, or a subcontractor from
859 declaring another party to the contract in default or assessing, claiming, or pursuing damages for
860 delays in the completion of the construction due to the inability of the parties to agree on a price
861 for the change order or additional work.”.

862 (2) Section 4(b)(1) is amended by striking the phrase “shall pay an interest
863 penalty” and inserting the phrase “shall pay an interest penalty of at least 1.5%” in its place.

(3) Section 5(a)(2) is amended by striking the phrase “60 days” and inserting the phrase “30 days” in its place.

Sec. 20. Applicability

Sections _____ of this act shall apply upon the inclusion of their fiscal effect in an approved budget and financial plan, as certified by the Chief Financial Officer to the Budget Director of the Council in a certification published by the Council in the District of Columbia Register.

Sec. 21. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 4a of the General Legislative Procedures Act of 1975, approved October 16, 2006 (120 Stat. 2038; D.C. Official Code § 1-301.47a).

Sec. 22. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the mayor, action by the Council to override the veto), a 30-day period of Congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973, (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.