

COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON GOVERNMENT OPERATIONS
AND THE ENVIRONMENT
PUBLIC OVERSIGHT HEARING ON AGENCY PERFORMANCE
FOR FY 2009 AND FY 2010 (TO DATE)

TESTIMONY OF JONATHAN D. ZISCHKAU
CHIEF ADMINISTRATIVE JUDGE
DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

March 1, 2010

Good morning Chairperson Cheh, Members of the Committee on Government Operations and the Environment, and staff. I am pleased to appear before you to discuss the performance of the Contract Appeals Board in FY2009 and the first five months of FY2010. Administrative Judge Warren Nash, Richard Rothschild, Esq., the Board's General Counsel, and William Selinger, the Board's Attorney-Advisor, accompany me. I have provided the Committee copies of this testimony.

The mission of the Contract Appeals Board is to provide an impartial, expeditious, inexpensive, and knowledgeable forum for hearing and resolving contractual disputes and protests involving the District and its contracting communities. The Procurement Practices Act ("PPA"), the principal procurement statute for the District government, vests the Board with exclusive jurisdiction to decide: (1) protests of District contract solicitations, awards, and related procurement actions; (2) appeals by

contractors of District contracting officer final decisions; (3) claims by the District against contractors; (4) appeals by contractors of suspensions and debarments; and (5) contractor appeals of interest payment claims under the Quick Payment Act. The PPA applies to all departments, agencies, instrumentalities, and employees of the District government, except as to entities exempted from such coverage by provisions in the PPA itself, or in other District and Federal statutes. The Board has published rules of practice and procedure which govern the adjudication of all cases before the Board. The Board's rules contain chapters on general procedures applicable to all cases, procedures for appeals, procedures for protests, and procedures for electronic filing. The rules are published in the District of Columbia Register and at the Board's website (<http://cab.dc.gov>) and the website of its electronic filing service provider.

The Board is composed of Administrative Judges who hear and decide the cases filed by the parties. Judge Nash and I, the Board judges, are supported by Mr. Rothschild and Mr. Selinger who, with their government contracts expertise, provide outstanding legal work for the Board judges and handle communications with parties and the public. The Board has an administrative officer, Mr. Albert Wilcox, and a staff

assistant, Ms. Mia House-Thomas, who function as the Board's clerks for case management of the protest docket and appeals docket, as well as other administrative roles including importing cases into the Board's website-enabled database, and supporting the Board's information technology, telecommunications, human resources, procurement, and reporting and statistics.

In FY 2009, contractors filed 40 protests with the Board (up from 24 filed in FY2008), and the Board resolved 37 protests (up from 18 in FY2008). During the first 5 months of FY2010, that is, since October 1, 2009, 17 new protests have been filed, and a total of 24 protests have been resolved (13 of which were protests filed during FY 2009). Our measure of performance for protest cases is whether the Board resolved at least 90 percent of the protest cases within 60 business days of filing as provided in D.C. Code § 2-309.08(d). Consolidated protests are measured from the latest filing date and the Board considers decisions on protests to be timely where decisions are issued reasonably promptly after the record is complete, taking into account cases where the parties require additional time to prepare the record, the contracting agency reconsiders its actions, or the parties attempt to settle the protest. For FY2009, the performance result

was 78 percent (29/37); for FY 2010 (to date) the performance result is 88 percent (21/24). Although the Board saw a 166 percent increase in the number of protest filings in FY2009, the Board's resolution total increased by over 200 percent for that fiscal year. In FY2010 to date, the Board is resolving protests at an even higher rate than in FY2009. Currently, the Board has five pending protests.

In FY 2009, contractors filed 23 appeals (down from 30 appeals in FY 2008), and the Board resolved 21 appeals. Of the 21 appeals resolved, 8 cases involved claims exceeding \$100,000. Since October 1, 2009, 11 new appeals have been filed and 14 appeals have been resolved. The Board currently has 78 appeals pending. The performance measures relating to appeals is the percentage of appeals cases decided within 4 months of their being ready for decision. In FY2009, all 21 closed appeals were voluntary dismissals based on settlement. In FY2010 to date, 12 decisions were voluntary dismissals, and 2 decisions were published opinions, one of which was decided more than 4 months after the appeal was ready for decision but that came after a protracted period in which the parties were attempting to settle the case after the hearing.

Another performance measure is the percentage of Board decisions sustained on appeal. For FY2009 and FY2010 to date, 100 percent of the Board's decisions for which judicial review was sought have been sustained on appeal. The proper forum for judicial review of a Board dispute decision is the D.C. Court of Appeals, while for protests, it is the D.C. Superior Court in the first instance. No party sought judicial review of any disputes decision in FY2009, and in FY2010 to date; one order was appealed to the D.C. Court of Appeals but the Court dismissed that appeal because it was from a non-final order. In FY2009, one protester misfiled a petition for judicial review of the Board's decision in CAB No. P-0809, in the D.C. Court of Appeals, and that petition was dismissed by the Court on October 28, 2009. In FY2010, petitions for review were filed in D.C. Superior Court regarding the Board's September 18, 2009 decision in the consolidated protests of *Wardman Investor and CIM/Wardman LLC*, CAB Nos. P-0817 and P-0818, and on February 12, 2010, the Superior Court summarily affirmed the decision of the Board in those cases. On December 9, 2009, a petition for review of the Board's decision in *Configuration, Inc.*, CAB No. P-0819, was filed in the Superior Court and that petition is pending. In an April 1, 2008 order, the Superior Court remanded to the Board for further proceedings a protest decided by the Board in November

2005 in *Urban Service Systems, Inc.*, CAB Nos. P-0735, P-0739. On remand, the Board referred an issue to the DSLBD, and the parties are completing briefing of the matter before the Board.

Another performance measure assesses the percentage of new cases which use the Board's electronic filing services. For the 63 new cases filed in FY 2009 and for the 28 new cases filed during the first five months of FY 2010, the Board has achieved electronic filing in 100 percent of its cases. In October 2001, the Board became the first administrative tribunal in the District (and, in the nation, as far as we can tell) to have a fully operational and comprehensive web-based electronic filing system for its entire docket of pending cases.

The final performance measure assesses the percentage of Board's cases resolved during the fiscal year which are converted to electronic format and imported to its website database. The Board set a target of 90 percent for FY2009 and achieved a 95 percent performance result. For FY2010 to date, 100 percent of the resolved cases are in electronic format and imported into the database. The Board's website went live on August 15, 2006, with its integrated document management system. This

functionality enables website users to display electronic docket sheets with hyperlinks to individual pleadings, as well as permitting users to conduct full-text searching of the Board's case database, such as published opinions, pending appeals and protests, closed appeals and protests, and the entire Board database. We are not aware of any other judicial or quasi-judicial tribunal in the country that has this type of transparency and functionality available to public users.

We wish to thank you, Chairperson Cheh, your staff, and the entire Council, for your support of the Board and its initiatives and we look forward to working closely with you to continue improving the fair, timely, and cost-effective resolution of District of Columbia government contract disputes and protests. We appreciate this opportunity to appear before the Committee. I am available to answer your questions.