

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Executive Office of Mayor Muriel Bowser



Office of the City Administrator

M E M O R A N D U M

TO: Mayor Muriel Bowser

THROUGH: Rashad M. Young, City Administrator

FROM: George A. Schutter III, Chief Procurement Officer

DATE: October 2, 2017

RE: Procurement Accountability Review Board After-Action Report #7

The purpose of this memorandum is to provide an After-Action Report following the seventh meeting of the Procurement Accountability Review Board (PARB) on June 20, 2017. Under Section VII of Mayor's Order 2015-165, the following matters are required to be referred to the PARB for its consideration: (1) contracts requiring retroactive approval by the Council of the District of Columbia, (2) noteworthy decisions by the Contract Appeals Board, (3) audit findings, and (4) other procurement matters specifically referred to the Board.

No audit findings or issues affecting the delivery of procurement services in the District were identified as requiring consideration by the Board. Accordingly, the PARB's June 20th agenda consisted of the following three items: (1) a Child and Family Services Agency (CFSA) contract modification requiring retroactive Council approval; (2) an adverse Contract Appeals Board Decision regarding a Department of Motor Vehicles' (DMV) contract solicitation; and (3) proposed revisions to Mayor's Order 2015-165. Each issue is discussed in more detail below.

I. CFSA RETROACTIVE CONTRACT ACTION – TOTAL HEALTHCARE SOLUTIONS, LLC

The first item the PARB reviewed concerned the need for retroactive Council approval of a modification to CFSA's contract with Total Healthcare Solutions, LLC ("Total Healthcare"), DCRL-2016-R-0113. Total Healthcare currently provides staffing for CFSA's Healthy Horizons Assessment Center ("Healthy Horizons"), which conducts initial medical screenings and comprehensive health assessments of children who are entering, re-entering, exiting, or changing placements while in foster care. The contract specifies that Total Healthcare shall provide 10



licensed registered nurse practitioners, 8 certified medical assistants, and 2 medical records technicians to “work on a rotation schedule of 12 hour shifts over a 24 hour period, including weekends and holidays.” The contract was awarded to Total Healthcare on March 31, 2016 for a base term of one year in the not to exceed amount of \$998,602.56, and contained four one-year option periods.

On September 13, 2016, CFSA ascertained that the contract’s burn rate was higher than expected, and, as a result, a modification was needed to add an additional \$318,918.48 to fund the contract through the remainder of the base year. This increase was due to a disparity between the number of hours listed in the contract price schedule and the number of hours the vendor was required to provide to meet its obligations under the contract. As the addition of these funds would raise the base year’s not to exceed amount to over \$1 million—specifically \$1,317,521.04—approval by Council was required. However, CFSA was compelled to identify additional funding sources prior to executing the modification. This process was not completed before the total base year spend exceeded the \$1 million threshold. As a result, the modification required retroactive Council approval (rather than approval as a tipping action where neither the contracting officer nor the Executive would have been acting outside their authority). The Council approved the modification on May 2, 2017.

The PARB identified three root causes that led to retroactive Council approval, specifically the disparity between the hours contained in the price schedule and those required to meet the statement of work, intermittent monitoring of the contract burn rate, and the need to identify additional funding sources. To address these challenges, CFSA has undertaken the following corrective actions:

- (1) Each Deputy Director is required to monitor the burn rate on CFSA contracts monthly;
- (2) The Director receives a quarterly status report on all CFSA contracts, which is then reviewed by the agency’s leadership team; and
- (3) CFSA’s program manager and Deputy Director will attend OCP’s enhanced two-day contract administration course.

II. CONTRACTING APPEALS BOARD DECISION AND SUBSEQUENT APPEALS— MORPHOTRUST USA, INC.

A. *Initial Protest*

The second agenda item considered by the Board was a protest by MorphoTrust USA, Inc. (“MorphoTrust”) against the DMV’s solicitation for a secure credentialing system for driver’s licenses and identification cards. MorphoTrust filed this protest in 2012 alleging the minimum need was overly-restrictive thereby inhibiting competition and making the procurement a de facto sole source. MorphoTrust asserted that the DMV’s requirements that driver’s licenses be



composed of a polycarbonate base, contain four laser-engraved identifiers, that manufacturing facilities have specific security measures were unduly restrictive and would preclude firms that utilized alternative technologies, such as theirs, from participating in the procurement. The Contract Appeals Board (CAB), however, rejected these assertions and found in favor of the District. *MorphoTrust USA, Inc.*, CAB No. P-0924, 2012 WL 6929398 (Nov. 28, 2012). MorphoTrust appealed the CAB's opinion to Superior Court, which upheld the CAB's decision. *MorphoTrust USA, Inc. v. C.A.B.*, 2012 CA 9430 (Aug. 2, 2013).

B. *MorphoTrust's Appeal and Remand to the CAB*

MorphoTrust filed a second appeal to the D.C. Court of Appeals, which overturned the holdings of the CAB and Superior Court. *MorphoTrust USA, Inc. v. C.A.B.*, 115 A.3d 571 (D.C. 2015). The Court of Appeals held that the CAB misapplied the "de novo" standard of review to the agency's minimum need. Citing numerous previous decisions, the CAB noted that "Board will defer to the agency's determination so long as the restrictive specifications are reasonably related to achieving the government's actual minimum needs." *MorphoTrust*, 2012 WL 6929398 at *4 (citations omitted). The deference given to an agency's determination was, according to the appeals court, inconsistent with the de novo standard. Consequently the Court of Appeals reversed the CAB's opinion and ordered the board to re-review the challenged specifications with no deference to the DMV's determination of minimum need. On May 1, 2017, the CAB sustained the protest in light of the Court of Appeals' decision. By order of the CAB, the current contract, which is in its Option Year 4, will remain in effect pending a new solicitation and award. The District must award a new contract by July 31, 2018.

C. *Statutory Change*

As a result of the Court of Appeals' decision, the District passed legislation to amend the standard by which an agency's minimum need is reviewed. Specifically, the de novo standard was repealed and replaced with the following language:

An agency's determination of its minimum needs and its determination of the 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.

The Procurement Integrity, Transparency, and Accountability Amendment Act of 2015, § 3(p) (to be codified at D.C. Official Code § 2-360.08(d-1)). This provision supersedes the Court of Appeals decision.

D. *Current Status and Key Issues*

The Board identified the following key issues as a result of this case:



- (1) The government must not specify a minimum need in such a narrow manner so as to decrease competition;
- (2) If the government's minimum need does require precise specifications, the government must be prepared to evince that the justification was reasonable; and
- (3) Market research conducted in preparation of a procurement must survey the market for the good or service rather than only focus on the capabilities of one or two vendors.

Bearing these issues in mind, the DMV is updating market research and requirements to comport with any new technologies and security features of driver's licenses and identification cards. The new solicitation is on track to meet the CAB's award deadline of July 31, 2018.

III. PROPOSED REVISIONS TO MAYOR'S ORDER 2015-165

The last item the PARB considered was updating Mayor's Order 2015-165. The PARB has been successful at driving accountability in District contracting and has improved the transparency, efficiency, and quality of District procurements by focusing on specific issues such as retroactive contract actions. As the District continues to improve the contracting process in key areas, the Board is now in a position to broaden its focus to include procurement policies, business processes, and best practices. Toward that end, the following changes have been proposed to Mayor's Order 2015-165:

- 1) The Board shall meet quarterly unless the Chief Procurement Officer (CPO) determines, in writing, that there are no matters requiring referral. If any member of the Board requests a meeting to be held within three days of receiving the memorandum the PARB shall convene at the call of the Chairperson;
- 2) Agency directors are expressly required to provide the CPO all information or documents pertinent to a matter under consideration by the Board;
- 3) Directors of agencies with procurement authority independent of the CPO are now required to notify the CPO of any contract requiring retroactive Council approval;
- 4) The CPO is now responsible for informing the Board of all retroactive contract actions; and
- 5) Neither agencies subject to or independent of the CPO's procurement authority may submit a retroactive contract action to Council for approval



until after the Board is notified of the matter and decides whether to hold a meeting prior to its consideration by Council.

The Mayor approved the changes and a new order will be promulgated and distributed to agency directors and procurement staff in the upcoming weeks.

If you have any additional questions, or would like further briefing from staff on this matter, please do not hesitate to contact me.

cc: Kevin Donahue, Deputy City Administrator / Deputy Mayor for Public Safety and Justice

