

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of Contracting and Procurement



**Public Oversight Hearing on Bill B23-0545, the “Small Business Procurement Reform
Omnibus Amendment Act of 2019”
and
Contract CW75765 with Sagitec Solutions, LLC**

Testimony of
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Before the
Committee on Facilities and Procurement
The Honorable Robert C. White, Jr., Chairman
Council of the District of Columbia

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12:00 PM

Council of the District of Columbia
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Good afternoon Chairman White and members of the Committee on Facilities and Procurement. I am George Schutter, Chief Procurement Officer of the District of Columbia and Director of the Office of Contracting and Procurement. I am pleased to provide my testimony on two topics: B23-0545, the “Small Business Procurement Reform Omnibus Amendment Act of 2019”, as well as the District’s contract with Sagitec Solutions, LLC, Contract Number CW75765. As always, I appreciate the opportunity to testify before the Committee on Facilities and Procurement. Thank you for the invitation.

B23-0545, THE “SMALL BUSINESS PROCUREMENT REFORM OMNIBUS AMENDMENT ACT OF 2019”

I would like to begin my testimony by highlighting that I am a strong proponent of our District’s small business community and District subcontractors. I see as a strong central tenet of my duties as CPO to support, partner, and be an instrument of growth for the District’s small businesses. I think this legislative effort underscores the desire by the District to ensure continued support and investment in these communities that provide significant value to the District and its residents. The proposed legislation seeks to (i) amend the Quick Payment Act of 1984 with a goal of providing better recourse for District subcontractors in situations where they may not have been paid accurately or timely under the current requirements of the Quick Payment Act and District contracts, (ii) amend the Procurement Practices Reform Act of 2010 with a goal of ensuring small businesses received contract set-asides that are issued on the open market, and (iii) amend the Small, Local, and Disadvantaged Business Enterprise Development Assistance Act of 2005 with a goal strengthening the Certified Business Enterprise program and investing in greater opportunities for the intended beneficiaries of the program. While I strongly support the bill’s intent, I believe that several of its provisions conflict with current law, place a

heavy burden on District contracting officers, contract administrators, program agencies and potentially the Contract Appeals Board, may have unintended financial impacts on the District and its resources, and will insert the District in private contract disputes that present legal risks to the District.

Proposed Changes to the Quick Payment Act

B23-0545 currently seeks to amend several provisions to the Quick Payment Act. If enacted, these amendments would profoundly change the contracting officer's role and increase legal risk and administrative and cost burdens on the District. As proposed, the legislation would require the District to become involved in payment disputes between a contractor and its subcontractors, or even between subcontractors and their lower-tier subcontractors. The proposed legislation would require the District to act as an arbitrator in these payment disputes by requiring contracting officers to investigate claims of late or inaccurate payments, evaluate the merit of such claims, and make findings of fact involving private parties and a contract to which the District is not a party. The role of the prime contractor in resolving payment disputes is, therefore, essentially eroded and bypassed by the proposed legislation.

The District in this new role increases its legal risk and costs based on its involvement in such disputes, its decision-making in such disputes, and the need to ensure it is represented in any appeal of its decisions regarding such disputes. The proposed legislation broadens the role and responsibilities of the Contract Appeals Board as the authority to which decisions by the District may be appealed. Additionally, the dispute and appeal process raises concerns about the potential impact it may have on contract performance while the parties await a decision by the District contracting officer or a decision from the CAB. Finally, this new dispute process in the proposed

legislation has the operational effect of making the resolution of payment disputes more administratively burdensome for subcontractors as the contractor is provided greater opportunities to delay payment to subcontractors.

I believe the current Quick Payment Act and the District's Standard Contract Provisions provide District subcontractors with mechanisms for receipt of timely payments and the District Court of Appeals provides District subcontractors with an appropriate venue to resolve payment disputes to the extent District prime contractors are unable to resolve those disputes privately. As the Quick Payment Act stands now, the District is required to include a clause in each contract that requires contractors to pay their subcontractors within seven days of receipt of any amount paid to them by the District. OCP includes this clause in its contracts, but we go further. The standard OCP clause contains the mandatory provision and includes language that requires the provision to flow down to lower-tier subcontractors. Currently, if there are issues with payment, a subcontractor can contact the contracting officer who will meet with the parties and ultimately determine the appropriate path forward regarding the District contract. In contrast, the proposed legislation significantly expands the contracting officer's role in payment disputes, and shifts the appeals process away from the D.C. Superior Court to the Contracts Appeals Board (CAB).

These changes would place additional demands on the contracting officer, contract administrator, and the program manager — demands which are uncharacteristic for these roles in public procurement. I believe that it is inappropriate to force a contracting officer into a role best filled by attorneys and judges, especially when the District is not a party to the contract wherefrom a dispute has arisen, as well as the complex nature of these disputes which often go beyond the performance and payment of the contract. Typically, these matters would be resolved in court, where attorneys representing the relevant parties and a judge can properly resolve the dispute.

Likewise, involving the District and the contracting officer in the dispute arbitration process will prove costly and create a burden on contracting officers, contract administrators and program agency staff time increasing the District's personnel needs.

It is important to note as well that the proposed legislation does not modify the existing Quick Payment Act stipulation that “[a] dispute between a contractor or 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.”¹ Additionally, the proposed amendments fail to consider how a subcontractor’s ability to have the District contracting officer investigate a payment dispute is triggered vis-à-vis the current requirements of the Quick Payment Act regarding a contractor’s notice to the District of its intent to withhold payment. The provision by a contractor of this notice will effectively stall any ability of the District contracting officer to make a determination regarding the dispute.

Proposed Changes to the Procurement Practices Reform Act and Certified Business Enterprise Law

The proposed legislation also includes amendments to the Procurement Practices Reform Act (PPRA) and the Certified Business Enterprise (CBE) law aimed at ensuring small businesses receive contract set-asides that based on the legal requirements have been issued on the open market. While I support the aim of the amendments, I believe the amendments as currently

¹ § 2-221.02(f)(1) of the Quick Payment Act.

drafted conflict with the current structural framework for how these procurements are managed and require greater consideration and clarity to operationalize. In the proposed amendments to the PPRA, if an agency does not award a contract or procurement through a small business enterprise set-aside because the bids received are believed to be 12% or more above the likely price on the open market and the agency proceeds to issue the procurement in the open market, then per the proposed amendment the agency must select the bid of the small business enterprise if it is the lowest bid or 12% or less above the lowest bid by a business that is not a small business enterprise. The proposed amendment ignores the current association with CBE preference points and bid price reduction currently applied to small business enterprises and administered by DSLBD. CBE preference points are awarded if the small business enterprise meets various criteria set forth in D.C. Code § 2–218.43 and small business enterprises receive a percentage bid price reduction based on the number of points awarded. For example, a small business enterprise that meets the criteria set forth in D.C. Code § 2–218.43 and has been awarded 5 CBE preference points will have a 5% bid price reduction for the purpose of evaluation. The proposed legislation does not consider this convention and does not clarify how this convention should now be treated. It is unclear whether the proposed amendment would treat all small business enterprises, regardless of CBE preference point rankings, equally. The proposed amendment also remains silent on circumstances where multiple small business enterprises may submit bids in the open market context.

On the proposed amendments to the CBE law, I want to recommend some changes and highlight certain concerns for consideration. First, based on the advice of OCP's Office of the General Counsel, I am concerned the proposed amendments to D.C. Code § 2–218.41(a-2)(2) as currently written may be an infringement on the legal authority vested in the Mayor. Section 412 of the

District Charter vests the Council with the power through the use of resolutions to approve or disapprove proposed actions “of a kind historically or traditionally transmitted by the Mayor ... to the Council pursuant to an act.” OCP attorneys have informed me that the D.C. Court of Appeals has interpreted the Council's resolution cautiously. Thus, the proposed amendment, which would permit the Mayor to waive a spending requirement subject to approval or disapproval via Council resolution, may run afoul of the District Charter. Second, an important concern is the proposed amendment at D.C. Code § 2–218.46(a) that authorizes a District contracting officer to provide additional payment up to 10% of the dollar volume by which the contractor exceeds the subcontracting requirement of the CBE Act. This proposed amendment is unclear in its meaning, fails to provide standards for determining when such payments could be made, fails to address the source of the additional funds that would be used for such payment and fails to address the point in time that such payment could be made. Third, the proposed amendment to the CBE law at D.C. Code § 2–218.45(d) requires OCP to notify DOES of contract awards made to a small business enterprise included in the D.C. Supply Schedule for purposes of securing a First Source Agreement, however it is important to note that a First Source Agreement is one of the requirements for vendors to be on the DCSS so this proposed amendment is superfluous. Fourth, I want to highlight that the proposed change to the civil penalty provision of the CBE law is significant in its potential impact, as it fails to differentiate a contractor that fails to meet the subcontracting requirement by 1% versus one that fails by 99%, and the severity of the penalty may not be commensurate with the failure by the contractor. For example, based on the proposed penalty structure, a contractor with a \$10 million District contract who only meets 34% of the 35% subcontracting requirement, would be subject to a penalty of \$1 million (10% of the dollar volume of the contract). Let me be clear — I support

holding vendors accountable for meeting the subcontracting requirement. My concern is that such a disproportionate penalty to the infraction may unintentionally stifle industry participation in the District's procurements, thus having a negative impact on both the District and our CBE community. Fifth, in the new complaint reporting structure proposed in the amendments, I recommend considering building in mechanisms to ensure complaints are legitimate and are not being made for purposes of abuse or harassment. Finally, I recommend that the terminology found in § 2-218.44 referencing "contract or procurement" be changed to "procurement or solicitation."

Should the Council wish to proceed with enacting this legislation, I would like to share several technical edits prior to final passage.

Before proceeding to my testimony on the Sagitec contract, I would like to comment on the District's robust and resilient small business community. Let me state unequivocally, Mr. Chairman: small and certified businesses are the lifeblood of our business community and serve as the foundation upon which the District's economy is built. We have some of the strongest laws that support small businesses in the nation. During my tenure as Chief Procurement Officer of the District and Director of OCP, we have substantially increased our small business contract awards from approximately \$317 million in FY15 to about \$790 million in FY19. This is not a fluke and did not occur by accident. This growth in small business awards was intentional and a result of adhering to the current procurement laws and regulations and ensuring that our contracting staff are well-informed and well-trained on the application of those laws.

CONTRACT CW75765 WITH SAGITEC SOLUTIONS, LLC

I will now proceed to discuss Contract CW75765 with Sagitec Solutions, LLC. On October 23, 2018, OCP, on behalf of the Department of Employment Services, issued a solicitation to support a modernized Unemployment Insurance Tax System to replace the existing legacy system. On October 9, 2019, a letter contract not to exceed \$1 million was awarded to Sagitec Solutions, LLC. After receiving notice of its non-selection, CODICE requested a debriefing to explain the basis of the contract award, which was held on November 22, 2019. In the interim, CODICE filed a protest on October 24, 2019, with the Contracts Appeals Board (CAB). Filing the protest triggered the automatic stay of contract performance pursuant to D.C. Official Code § 2-360.08. OCP determined to hold submission of the contract package to Council until the CAB reached a decision on the protest.

Protest by CODICE-OnPoint Joint Venture and CAB Decision

In the protest submitted to the CAB, CODICE cited seven concerns with the District's procurement practices. The concerns cited were based on previous procurement opportunities in which CODICE had participated. In the protest, CODICE alleged that bidder scores were manipulated, and alleged bias against the protester by the contracting officer.

On January 24, 2020, the Contract Appeals Board published its opinion concerning CODICE's protest. The CAB conducted a review of the entire procurement, including the evaluation of proposals and the District's award decision. The CAB determined that there was no evidence of bias by the District contracting officer and that the evaluation of the proposals was consistent with the evaluation criteria contained in the solicitation. Accordingly, the CAB dismissed the protest by concluding, and I quote, "we find nothing improper in the District's election to enter into negotiations with Sagitec . . . the District's evaluation and award decision were reasonable

and consistent with the Solicitation and procurement law.” During the proceedings, all parties (CODICE, the District, and Sagitec) were represented by their respective legal teams before the CAB and fully participated in the protest proceedings. Following the issuance of the CAB’s decision, the contract package was refreshed with updated compliance documents, certifications, and clearances, and the package was then submitted for legal sufficiency and Executive review. The contract was submitted for Council approval on April 1, 2020.

On February 25, 2020, OCP — represented by Nancy Hapeman, the Deputy Chief Procurement Officer, and me — met with CODICE at their request. CODICE requested that I investigate the procurement further. I advised CODICE that I had already performed an extensive review of the procurement process and ensured that OCP’s Procurement Review Committee had adequately reviewed the contracting officer’s approach. I also disclosed that if the contract were not conducted properly, from both a legal and ethical perspective, I would not have sent the contract to the Council. I noted further that the CAB had reviewed the matter in detail, and the board’s decision sided with the District.

Performance

The COVID-19 public health pandemic has resulted in an overwhelming demand on the unemployment tax system due to the large numbers of persons seeking unemployment benefits. Given the exigent circumstances, I made the decision to allow Sagitec to continue to perform, rather than having them stop work while the contract package was pending at the Council. As the CPO, I evaluated the District’s emergency needs and allowed the contractor to proceed under the public emergency based on the Mayor’s authority set forth in D.C. Official Code § 7-2304(b)(2). My consideration in extending the Unemployment Insurance tax system’s development under the

public emergency includes the fact that a separate, independent body, the CAB, concurred with the District contracting officer, the District Procurement Review Committee, and the D.C. Attorney General in the appropriateness of the contract award after reviewing the law, regulations, contracting process, and documentation supporting the contract award.

The modernization of the system is much needed. This contract aims to completely modernize the District's unemployment insurance tax system that will result in a system that increases the District's ability to provide efficient and effective services to District employers and employees. The current system uses outdated and archaic platforms. Specifically, these platforms include a combination of Common Business-Oriented Language (COBOL) [IBM Mainframe], Microsoft .NET, and Sun Solaris systems, which have presented many programmatic and administrative issues for the District's unemployment insurance tax program.

The functionality and reliability of the Unemployment Insurance tax system impacts another District benefits program: Paid Family Leave. The Unemployment Insurance tax system supplies vital wage data to the DOES Paid Family Leave (PFL) tax system, a requirement for the PFL program to collect taxes and administer benefits.

I want to be clear on my belief that the protest process is one that I strongly support. Protests are an important part of the competitive procurement process in the public sector. Governments are very protective of competition as a way to seek the best value for the public when buying goods and services to support government operations. Competition is a fundamental tenet of government procurement. When an offeror honestly believes that we made a mistake in awarding a contract, I want to hear about it. None of us are infallible, and the protest process can make us aware of a mistake in our interpretation or application of the law. Once, however, a protest has

been fairly and thoroughly adjudicated, and the District's decision is upheld, we move forward with the contract performance and working to meet the other needs of District residents. Our work on behalf of the citizens of this city is too important, and in many cases too urgent, for us to dwell on an award decision that has had several layers of District reviews and has been adjudicated pursuant to the District's protest procedures before the CAB.

CONCLUSION

As I conclude this testimony, I would like to thank you, Chairman White, for the opportunity to testify on B23-0545, the "Small Business Procurement Reform Omnibus Amendment Act of 2019" and discuss the procurement of the Unemployment Insurance tax system. I would be happy to answer any questions you may have.