

Government of the District of Columbia

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IN REPLY REFER TO:

May 10, 1996

OLC:WCW:pmw

OPINION OF THE CORPORATION COUNSEL

SUBJECT: Is Council review required for proposed contracts of independent agencies in excess of one million dollars during a 12-month period?

Charlotte Brookins-Hudson
General Counsel
Council of the District of Columbia
John A. Wilson Building
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Dear Ms. Brookins-Hudson:

This responds to your April 23, 1996 memorandum to me requesting an opinion addressing the above-noted question.

Your April 23, 1996 memorandum states that section 451(b) of the District of Columbia Self-Government and Governmental Reorganization Act ("Self-Government Act"), approved December 24, 1973, Pub.L. 93-198, 87 Stat. 803, as added by section 304(a) of the District of Columbia Financial Responsibility and Management Assistance Act of 1995 ("FRMA Act"), approved April 17, 1995, Pub. L. 104-8, 109 Stat. 97, to be codified at D.C. Code § 1-1130(b), reasonably can be construed as requiring Council review for all contracts, including those for executive independent agencies, that exceed one million dollars over a 12-month

period.¹ You also have provided us with an April 16, 1996 letter to Councilmember Jarvis from John Hill, Executive Director of the Financial Responsibility and Management Assistance Authority ("Authority"). Turner Madden, General Counsel of the Washington Convention Center Authority ("WCCA") provided us with memoranda dated April 26 and April 30, 1996. These additional documents take the contrary position, *i.e.*, that such contracts by executive independent agencies are not subject to Council review.

After weighing the various arguments and considering the language of the Self-Government and FRMA Acts, their purpose, structure, and legislative history, I conclude that Congress intended that the Council review the proposed contracts of all District government entities, including executive independent agencies like WCCA, that exceed one million dollars during a 12-month period (hereafter "covered contracts").

ARGUMENTS

Your April 23, 1996 memorandum argues that the term "Mayor" in the new section 451(b) is ambiguous and, thus, that the rule of construction against implying an exception to a statutory requirement should be applied to bar an implied exception to the requirement for Council review of covered contracts of executive

¹ Section 451(b) provides:

"(b) Contracts Exceeding Certain Amount. -

"(1) In General. - No contract involving expenditures in excess of \$ 1,000,000 during a 12-month period may be made unless the Mayor submits the contract to the Council for its approval and the Council approves the contract (in accordance with criteria established by act of the Council).

"(2) Deemed Approval. - For purposes of paragraph (1), the Council shall be deemed to approve a contract if -

"(A) during the 10-day period beginning on the date the Mayor submits the contract to the Council, no member of the Council introduces a resolution approving or disapproving the contract; or

"(B) during the 45-calendar day period beginning on the date the Mayor submits the contract to the Council, the Council does not disapprove the contract."

independent agencies. Your April 23, 1996 memorandum also argues in favor of such review based on the placement by Congress of the requirement for Council review in part D of title IV of the Self-Government Act -- which governs all District government agencies -- and, more particularly, in section 451 of the Self-Government Act -- which "prior to [the FRMA Act] clearly pertained to all contracts, including those by independent agencies." See page 2 of your April 23, 1996 memorandum.

On the other hand, the April 16, 1996 letter to Councilmember Jarvis from Mr. Hill argues that section 451(b) excludes Council review of covered contracts of executive independent agencies because section 451(b) "by its terms is limited to contracts proposed to be awarded by authority of the Mayor" and the WCCA, which has express authority to enter into contracts pursuant to section 203 of the Washington Convention Center Authority Act of 1994, effective September 28, 1994, D.C. Law 10-188, D.C. Code § 9-804 (1995), "is not within that portion of the District government which operates by authority delegated by the Mayor." The same letter also argues, alternatively, that even if the Council has the authority under section 451(b) to review covered contracts of executive independent agencies, it cannot now do so because it has failed to adopt the criteria which section 451(b) requires for such review.

The memoranda from Mr. Madden offer different arguments against Council review. The first memorandum argues that the predecessor statutes seeking to make certain proposed contracts in excess of one million dollars subject to Council review expressly applied only to contracts proposed by the Mayor and officials subordinate to the Mayor.² The same memorandum argues that the legislative history of the FRMA Act reflects a

² These laws are the Acquisition of Space Needs for District Government Officers and Employees Act of 1990, effective March 8, 1991, D.C. Law 8-257, and the D.C. Procurement Practices Act of 1985 Council Contract Approval Procedures Amendment Act of 1992, effective July 28, 1992, D.C. Law 9-136. Section 3 of D.C. Law 8-257 added a new section 105(a) to the D.C. Procurement Practices Act of 1985 ("PPA"), effective February 21, 1986, D.C. Law 6-85, D.C. Code § 1-1181.5a, to require Council review, and to authorize Council disapproval by resolution, of contracts over one million dollars made by the Mayor or his subordinates. In Wilson v. Kelly, 615 A.2d 229 (D.C. 1992), the D.C. Court of Appeals struck down the emergency version of this law as beyond the Council's resolution powers under section 412(a) of the Self-Government Act. Section 2 of D.C. Law 9-136 substituted a new section 105(a) of the PPA requiring the same Council review, but authorizing Council disapproval by act as well as resolution. This provision was not addressed by the decision in Wilson v. Kelly.

Congressional intent to limit Council review under section 451(b) to contracts proposed by the Mayor and Mayoral subordinates.³

The second memorandum argues that Congress drew an important distinction between the use of "Mayor" alone in section 451(b), and the use of "Mayor (or the appropriate officer or agent of the District government)" in section 203(b)(1) of the FRMA Act, to be codified at D.C. Code § 47-392.03(b)(1), which establishes the general requirement for the Authority's review of all collective bargaining agreements and any other kind of contract, including a lease, as specified by the Authority.⁴ In other words, since

³ The only comment in any committee report cited by Mr. Madden to support this proposition simply states, "Certain enhancements to the power of the Council in relation to the Mayor are also included in the [FRMA] Act." See page 4 of the March 30, 1995 House Report 104-96 on H.R. 1345, the bill that became the FRMA Act. However, the same committee report, on page 49, cites section 304 of the FRMA Act as providing that "no contract involving expenditures in excess of \$1,000,000 during a 12 month period may be made unless the Mayor submits the contract to the Council for its approval and the Council approves the contract," without any suggestion that this requirement is limited to Mayoral contracts. The only other legislative history cited in Mr. Madden's April 26, 1996 memorandum is Delegate Norton's statement, in the context of the Board of Education's budget process, railing against "political influence in the operation of the schools or in matters such as the awarding of contracts." See 141 Cong. Rec. H 4422 (April 7, 1995). However, the value of this statement is undermined by the final version of the FRMA Act, section 202(g) of which amends section 452 of the Self-Government Act to allow the Council and Mayor to specify the purposes for which Board of Education funds may be spent during a control year.

⁴ Section 203(b)(1) provides:

"(b) Effect of Approved Financial Plan and Budget on Contracts and Leases. -

"(1) Mandatory Prior Approval for Certain Contracts and Leases. -

"(A) In General - In the case of a contract or lease described in subparagraph (B) which is proposed to be entered into by the District government during a control year, the Mayor (or the appropriate officer or agency of the District government) shall submit the proposed contract or lease to the

"District government" is defined in section 305(5) of the FRMA Act to include an executive independent agency, while "Mayor" is not, and since Congress easily could also have included the parenthetical phrase "or the appropriate officer or agent of the District government" in the new section 451(b) of the Self-Government Act, its failure to do so raises the necessary inference that it intended section 451(b) to be less expansive than section 203(b)(1) of the FRMA Act and to exempt contracts proposed by executive independent agencies from Council review. Finally, the second memorandum argues that the distinction intended by Congress in this respect is buttressed by section 203(b)(4) of the FRMA Act, to be codified at D.C. Code § 47-392.03(b)(4), which supplies the statutory mechanism for submission of a Council-approved covered contract to the Authority and references "Mayor" without using the above-quoted parenthetical phrase.⁵

Authority for review under paragraph (1) (and the Authority shall review the contract or lease pursuant to paragraph (2)), and may not enter into the contract or lease unless the Authority determines that the proposed contract or lease is consistent with the financial plan and budget for the fiscal year.

"(B) Contracts and Leases Described. - A contract or lease described in this subparagraph is -

"(i) a labor contract entered into through collective bargaining; or

"(ii) such other type of contract or lease as the Authority may specify for purposes of this subparagraph."

⁵ Section 203(b)(4) provides:

"(b) Effect of Approved Financial Plan and Budget on Contracts and Leases. -

"(4) Special Rule for Contracts Subject to Council Approval. - In the case of a contract which is required to be submitted to the Authority under this subsection and which is subject to approval by the Council under the laws of the District of Columbia, the Mayor shall submit such contract to the Authority only after the Council has approved the contract."

ANALYSIS

Although for reasons other than those set out in your letter of April 23, 1996, I agree that covered contracts by independent agencies must be submitted to the Council for its review. I disagree with your argument that the word "Mayor" as used in section 451(b) is ambiguous; this term is expressly defined in section 103(6) of the Self-Government Act, D.C. Code § 1-202(6), to mean Mayor as provided in Title IV of that act. Nor is the term "contract" in that section unclear, given the courts' use of it to cover any binding exchange of promises, including a lease, in the context of the Mayor's contracting powers under the Self-Government Act. See e.g., RDP Development Corporation v. District of Columbia, 645 A.2d 1078, 1082 (D.C. 1994).

However, contrary to the arguments of Mr. Hill and Mr. Madden, the scope of section 451(b) is not limited in any way and plainly applies to every covered contract by an entity of the "District government," which includes the District's executive independent agencies.⁶ This express coverage must be construed as admitting of no exceptions unless the FRMA Act elsewhere clearly so provides. See, e.g., 2A Sutherland Statutory Construction § 47.11 (5th ed. 1992). A governmental entity enjoys no inherent freedom from executive or legislative control in particular areas, such as budgeting or contracting, solely because of its status as an independent agency. See, e.g., Hazel v. Barry, 580 A.2d 110, 113-114 (D.C. 1990) (upholding the Mayor's fiscal control over, and unilateral authority to reduce the budget for, a statutory independent agency).⁷ See also H.R. Subcommittee on

⁶ Mr. Hill and Mr. Madden concede that WCCA and similar agencies, while "independent", remain part of the District government. Any independent agency, like WCCA, that administers a law in a tripartite governmental system is an executive independent agency. See, e.g., Buckley v. Valeo, 424 U.S. 1, 135-141 (1976) (per curiam). Even if WCCA is viewed as having less connection with the District government than the typical independent agency, the fact that its statutory charter authorizes it to accept money from the District, D.C. Code § 9-804(7), and that section 305(5) of the FRMA Act defines "District government" to include any entity authorized by statute to receive money from the District, leave no doubt that WCCA is part of the District government for purposes of section 451(b).

⁷ Section 2 of the D.C. Emergency Deficit Reduction Act of 1991, approved August 17, 1991, Pub. L. 102-106, 105 Stat. 539, added section 453 to the Self-Government Act, D.C. Code § 47-304.1 (1995 Supp.), to require joint Council and Mayoral approval of any reduction in the appropriated budget of a District independent agency. This amendment, however, does not affect the proposition that an independent agency of the District government

District of Columbia Government Operations, Markup Session for Subcommittee Discussion Draft No. 2, 93rd Cong., 1st Sess. 612 and 618 (June 13, 1973), set forth in Home Rule for the District of Columbia (December 31, 1974) (remarks of Chairman Brock Adams recognizing that even the independent agencies under title IV-F of the Self-Government Act are not completely free of control by the Council and the Mayor). Hence, the observation by Mr. Hill that WCCA's contracting authority arises from Council legislation rather than from Mayoral delegation is irrelevant to the present issue.⁸

The view that section 451(b) encompasses independent agencies is supported by its inclusion in title IV-D of the Self-Government Act, which grants the Executive Branch government-wide fiscal and planning authority, in accordance with the strong executive form of government envisioned by the drafters of the Self-Government Act. See, e.g., H.R. Subcommittee on District of Columbia Government Operations, Full Committee Markup Session, 93rd Cong., 1st Sess. 1049 (July 17, 1973), set forth in Home Rule for the District of Columbia (December 31, 1974) (remarks of Chairman Adams). The amendment of section 451 to include the Council review authority must be considered as especially significant, because, before the FRMA Act, section 451 contained a provision, now designated as subsection (a), which clearly

may remain subject to control by the Council or the Mayor in particular areas.

⁸ Local courts considering the scope of the power of the former Commissioners (now the Mayor) under the comparable provisions in section 2 of An Act To grant additional powers to the Commissioners of the District of Columbia, and for other purposes, approved December 20, 1944, 58 Stat. 821, D.C. Code § 1-339 (1992), have recognized a distinction between a government contracting officer's making a contract that is enforceable against a private party without the requisite Mayoral approval, on the one hand, and the need for Mayoral approval to create an enforceable obligation under the contract against the government, on the other. See, e.g., Singleton v. District of Columbia, 198 F.2d 945, 947-948 (D.C. Cir. 1952), cited approvingly in District of Columbia v. McGregor Properties, 479 A.2d 1270, 1273 (D.C. 1984). Thus, there is no necessary conflict between the Council's grant of contracting authority to the WCCA and Congress's requirement that certain of the WCCA's one-million-plus contracts be approved by the Council before the Mayor submits them to the Authority. In any event, Congress's law would "trump" the Council's law if they were in conflict on this point. See, e.g., District of Columbia v. A.F.G.E., 619 A.2d 77,85 (D.C. 1993).

authorized Council review of multi-year contracts for all District government entities, including independent agencies.⁹

The view that section 451(b) encompasses Council review of covered contracts of independent agencies is further supported by the following: (1) the FRMA Act preserves the Mayor's express authority under section 449(b) of the Self-Government Act, D.C. Code § 47-312(b) (1990), to "examine and approve all contracts, orders and other documents by which the District government incurs financial obligations"¹⁰; and (2) section 451(b) requires a Mayoral decision to submit such a contract to the Council before it can become effective by virtue of approval by the Council and, in turn, approval by the Authority. Removing the Council from this contract-approval process also would have the effect of removing the Mayor from it, contrary to the Mayor's expressly preserved role under section 449(b) of the Self-Government Act and the rule of statutory construction that two statutes relating to the same thing should be construed in harmony so as to give effect to every provision in them. See, e.g., Morton v. Mancari, 417 U.S. 535, 549-551 (1974); District of Columbia Police Department v. Perry, 638 A.2d 1138, 1144 (D.C. 1994); 2B Sutherland Statutory Construction, § 51.02, p. 122 (5th ed. 1992).

⁹ Section 451(a) provides:

"No contract involving expenditures out of an appropriation which is available for more than one year shall be made for a period of more than five years unless, with respect to a particular contract, the Council, by a two-thirds vote of its members present and voting, authorizes the extension of such period for such contract. Such contracts shall be made pursuant to criteria established by act of the Council."

The legislative history of the this provision shows that it is intended to cover "all contracts entered into by the city." See H.R. Report No. 93-482, 93rd Cong., 1st Sess. 30 (September 11, 1973).

¹⁰ In section 302(a) of the FRMA Act, Congress amended the Self-Government Act to transfer to the new Chief Financial Officer, during a control year, certain of the Mayor's fiscal powers under section 449 of the Self-Government Act, including the certification of invoices for payment and the performance of internal accounting audits. But Congress deliberately left intact the Mayor's power to examine and approve all District government contracts under subsection (b) of section 449.

An interpretation of section 451(b) that includes a role for the Council, as well as the Mayor, in the review process for covered contracts of independent agencies also would be in harmony with other relevant provisions of the FRMA Act, including section 203(b)(1), to be codified as D.C. Code § 47-392.03(b)(1) (establishing the general right of the Authority to review contracts) and section 203(b)(4), to be codified as D.C. Code § 47-392.03(b)(4) (establishing the rule for Mayoral submission of Council-approved contracts to the Authority). It would accord, as well, with the statement in the legislative history that "[c]ertain enhancements to the power of the Council in relation to the Mayor are also included in the [FRMA] Act." See H.R. Report No. 104-96, 104th Cong; 1st Sess. 4 (March 31, 1995). Such an interpretation also is essential to one of the FRMA Act's stated purposes, namely, to provide for full review of the financial impact of activities of the District government before such activities are implemented, section 2(b)(8), to be codified as D.C. Code § 7-134a.01(b)(8). Otherwise, large contract expenditures by the District's approximately 20 independent agencies -- a significant part of the District's annual budget -- would entirely escape such review by the District's elected leadership. As described above, the plain language, purpose, structure and legislative history of the FRMA Act, taken together with the Self-Government Act, proscribe such an inexplicable result.

Mr. Madden nonetheless contends that, in the FRMA Act: (1) Congress intended only to give its approval to the previous Council laws requiring Council review of covered contracts proposed by the Mayor or Mayoral subordinates; and (2) Congress necessarily intended an important distinction when it used the parenthetical phrase "or the appropriate officer or agent of the District government" in section 203(b)(1) (involving the Authority's general right to review District government contracts) but not in section 203(b)(4) (involving Mayoral submission of Council-approved contracts to the Authority) or section 451(b) of the Self-Government Act. Neither of these contentions has merit.

There is no evidence, in the language of the FRMA Act or in its legislative history, that Congress intended the effect of section 451(b) to be as narrow as the previous Council laws, which merely amended the PPA -- a statute applicable only to the Mayor and subordinate agencies. Had such a narrow result actually been intended, Congress could have achieved it simply by enacting the Council's amendments to the PPA that the D.C. Court of Appeals struck down in Wilson v. Kelly, 615 A.2d 229 (D.C. 1992). Instead, Congress chose to add to the District's Charter which already gives the Council government-wide contract-approval authority. Nor does Mr. Madden mention that section 451(b) covers Council approval of District government leases, which previously had been subject to Council approval where the lease

involved any building for the District government, or any building to house a program funded by the District government, and exceeded one million dollars. See section 2(b) of the Acquisition of Space Needs For District Government Officers and Employees Act of 1990, effective March 8, 1991, D.C. Law 8-257, D.C. Code § 1-336(c)(1992). These considerations support, rather than undermine, the broader Congressional aim under section 451(b) as identified here.

The additional contention by Mr. Madden that Congress necessarily intended an important distinction when it used "or the appropriate officer or agent of the District government" in section 203(b)(1) of the FRMA Act, but not in section 203(b)(4) or section 451(b) of the Self-Government Act as added by the FRMA Act, is similarly flawed. Given the other indicia of Congressional intent already discussed, the only reasonable interpretation of the quoted phrase is that contracts in an amount less than one million dollars during a 12-month period that are proposed by an independent or subordinate agency may be submitted directly to the Authority, without Council review, by the Mayor or the appropriate staff of the agency (e.g., where the Mayor has delegated his contract-approval authority to appropriate staff of the agency). Mr. Madden's interpretation of the quoted phrase -- which is only a parenthetical expression -- would unnecessarily convert it into a major exception, contrary to the rules of statutory construction described earlier.¹¹

The remaining arguments made by Mr. Hill and Mr. Madden -- i.e., that the Council has failed to enact the contract review criteria required by section 451(b) and, consequently, that it currently lacks authority to review any proposed 12-month

¹¹ The incongruity of Mr. Madden's interpretation of section 203(b)(1) is highlighted by the fact that, if the Mayor were to delegate all his contract-approval authority to executive subordinate agencies, the latter -- like the executive independent agencies under Mr. Madden's theory -- then would be "appropriate" entities to submit proposed 12-month contracts exceeding one million dollars directly to the Authority under section 203(b)(1), which is not limited to independent agencies, thereby bypassing the Council review which the WCCA General Counsel concedes is required for such contracts pursuant to section 451(b). The only distinction Congress drew concerning contracts subject to Council review is in section 451(b), which differentiates on the basis of size, not source. Indeed, to the extent the parenthetical phrase "or the appropriate officer or agent of the District government" in section 203(b)(1) connotes a person with contracting authority delegated from the Mayor, Congress did not need to use the same phrase in section 451(b), given the Mayor's existing right to delegate such authority under section 422(6) of the Self-Government Act.

contract in excess of one million dollars -- may be disposed of easily. The Council, in fact, has adopted such criteria. See, e.g., the Council Contract Approval Modification Temporary Amendment Act of 1995, effective February 13, 1996, D.C. Law 11-88. While these criteria are expressed as an amendment to the PPA, the reference in D.C. Law 11-88 to a "lease worth over \$1,000,000 for a 12-month period" shows the Council's intent to cover contracts beyond those within the scope of the PPA. In any event, section 451(b) does not bar the Council from enacting contract review criteria as part of the PPA and then using such criteria to review contracts proposed by independent agencies. The interpretation of D.C. Law 11-88 advocated by Mr. Hill and Mr. Madden would unnecessarily halt further review of any proposed 12-month one-million-dollar-plus contracts by the Authority, whose right to review such contracts, under section 203(b)(4) of the FRMA Act, is conditioned on their prior approval by the Council.

Sincerely,



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cc: John W. Hill, Jr.
Executive Director
District of Columbia Financial Responsibility
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