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A DISCUSSION ON THE DISTRICT OF COLUMBIA'S PROCUREMENT LAW AND THE SPARK THAT LED TO RENEWED REFORM EFFORTS

Megan S. Vahey*

INTRODUCTION

October 2009 was a touchstone month for District of Columbia taxpayers. It was during that month that it was revealed that Mayor Adrian Fenty's administration authorized \$82 million in contracts to improve or rebuild a number of parks and recreation facilities throughout the city. With just under 600,000 residents, the District of Columbia's gross budget in fiscal year 2010 was \$10.1 billion.¹ Spending \$82 million to upgrade parks and recreation facilities after had they had fallen "into a severe state of disrepair" at the end of the last decade was something many residents felt was long overdue.²

It is common for cities like the District of Columbia to use tax dollars to rehabilitate its facilities for the enjoyment of residents and visitors. In fact, the District's "proposed capital budget for FY 2010 - FY 2015 call[ed] for financing \$595 million of general capital expenditures in FY 2010."³ The parks and recreation contracts represented less than 14% of the overall capital budget. What makes these particular contracts so unusual is the fact that they were pushed through without the approval of the taxpayers' elected representatives—the Council of the District of Columbia.⁴

By law the Mayor must send contracts that exceed \$1 million to the Council for its approval or disapproval. Instead, the \$82 million for the parks and recreation projects was channeled through various city agencies before ending up at the D.C. Housing Authority ("DCHA"), an independent agency exempt from the District's procurement law.⁵ No contracts were ever sent to Council for its approval. Contracting the projects out to the independent DCHA seemingly bypassed the lengthy Council review process and therefore the Council had no

* B.A., The Ohio State University, 2001; J.D., University of the District of Columbia, David A. Clarke School of Law, 2010.

1 GOVERNMENT OF THE DISTRICT OF COLUMBIA, FY 2010 PROPOSED BUDGET AND FINANCIAL PLAN VOL. 1 EXECUTIVE SUMMARY 1-1 (Sept. 2009) [*hereinafter* BUDGET AND FINANCIAL PLAN].

2 Tim Craig, *D.C. Boasts New Recreation Parks Facilities, But Can It Pay for Them?*, WASH. POST, Aug. 29, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/28/AR2009082803843.html?sid=ST2009120203198>.

3 BUDGET AND FINANCIAL PLAN, *supra* note 1, at 6-1.

4 Nikita Stewart, *D.C. Council Questions Parks Projects it Didn't Approve*, WASH. POST, Oct. 23, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/22/AR200910204602.html?sid=ST2009120203198>

5 *See id.*

opportunity to review who was contracted to perform the work on the parks and recreation facilities. Had the review happened, it would have been known that the developer selected as the manager of the multi-million dollar contracts was “Banneker Ventures, a firm run by Omar Karim, [Mayor] Fenty’s fraternity brother and a campaign contributor.”⁶

The District has very extensive, yet fractured, contracting and procurement laws and regulations. The “Mayor and all independent agencies and entities” must submit all multiyear contracts or those in excess of \$1 million during a 12-month period to the Council for review and approval.⁷ Only those agencies specifically exempted from the District’s procurement law may avoid this review process.⁸ Those agencies that funneled the parks and recreation rehabilitation money to DCHA were not excluded from the procurement law. Therefore, at the moment the District agencies formulated the parks and recreation contracts with DCHA, the duty to submit them to Council for review was triggered.

Why did the Fenty Administration choose to route the money for the parks and recreation projects in this manner? The administration has not directly addressed that question and the Council has been embroiled in hearings for months in an attempt to get an answer. What is known is that Mayor Fenty “campaigned in 2006 on a platform of investing more resources in city neighborhoods. Shortly after he took office, he started expediting the construction of recreational facilities.”⁹ It begs the following question: was the law ignored for expediency’s sake?

This note explores the premise that the Council contract review process applies to all non-exempt agency contracts which meet the \$1 million or multiyear thresholds. The first section explores the history of procurement law in the District of Columbia. The second section discusses procurement reform efforts. The third section provides an overview of the parks and recreation contracts controversy. Finally, the fourth section analyzes the procurement authority of exempt and non-exempt District agencies with respect to the legislative powers granted to the Council of the District of Columbia.

6 Nikita Stewart, *D.C. Housing Agency Contracts That Bypassed Council “Illegal”*, WASH. POST, Oct. 24, 2009 available at http://www.washingtonpost.com/wp-dyn/content/article/2009/10/23/AR2009102303974_pf.html.

7 D.C. CODE § 2-301.05d (2010).

8 D.C. CODE § 2-303.20 (2010).

9 Craig, *supra* note 2.

I. THE HISTORY OF PROCUREMENT LAW IN THE DISTRICT OF COLUMBIA

A. *The Home Rule Act*

“In 1973, Congress enacted the District of Columbia Self-Government and Governmental Reorganization Act or Home Rule Act.”¹⁰ The Act provides for “an elected Mayor and a council with certain delegated legislative powers.”¹¹ The Mayor is “responsible for the proper execution of all laws relating to the District and for the proper administration of the affairs” of the city.¹² The Mayor appoints the heads of District departments, agencies and offices.¹³ The city’s chief executive may also “reorganize the offices, agencies, and other entities within the executive office of the government.”¹⁴ In addition, the Mayor “may authorize the heads of executive departments, offices, and agencies to place orders with any other department, office, or agency of the District for materials, supplies . . . [or] work.”¹⁵

The Council is “vested [with] and . . . exercise[s]” legislative power in the District.¹⁶ It has the “authority to create, abolish, or organize any office, agency, department, or instrumentality of the government of the District and to define the powers, duties, and responsibilities” of such entities.¹⁷ This includes the independent DCHA.

The Home Rule Act carved out very specific provisions for the Council regarding certain contracts. “No contract involving expenditures in excess of \$1 million 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.¹⁸ It may also enter into “multiyear contracts to obtain goods and services” provided that the “Mayor submits the contract to the Council for its approval and the Council approves the contract.”¹⁹

The Council review process is detailed but its time parameters ensure that contracts move through the deliberation period expeditiously. The legislative body is “deemed to approve a [\$1 million threshold] contract” in two ways. First, the contract is approved if no member “introduces a resolution approving or disapproving” it during the ten day window from the point of introduction by the

10 UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, GAO-07-159, DISTRICT OF COLUMBIA: PROCUREMENT SYSTEM NEEDS MAJOR REFORM 7 (Jan. 2007) (*quoting* Pub. L. No. 93-198 (1973)) [*hereinafter* GAO Report].

11 *Id.*

12 D.C. CODE §1-204.22 (2010).

13 *Id.*

14 *Id.*

15 D.C. CODE § 1-301.01(k) (2010).

16 D.C. CODE § 1-204.04(a) (2010).

17 D.C. CODE § 1-204.04(b) (2010).

18 D.C. CODE § 1-204.51(b) (2010) (emphasis added).

19 D.C. CODE § 1-204.51(c) (2010).

Mayor.²⁰ A resolution is “an expression of a simple determination of the Council of a special or temporary character.”²¹ Second, the contract is approved if the Council does not “disapprove [it] during the 45-calendar day” from the point of its introduction.²² The Council must “take affirmative action to approve [a multi-year] contract within 45 days . . . [or else it will] “be deemed disapproved.”²³

B. *The District of Columbia’s Procurement Practices Act*

“The objective of a public procurement system is to deliver on a timely basis the best value product or service to the customer, while maintaining the public’s trust and fulfilling public policy goals.”²⁴ The objective is simple; the implementation and fulfillment of this goal is complicated. The District’s procurement law is wrought with challenges for elected officials and the public.

The District of Columbia Procurement Practices Act of 1985 (“PPA”) was first signed into law in December 1985. It was designed to “provide for a uniform procurement law and procedures for the District of Columbia government.”²⁵ The PPA applied to “all agencies and employees of District government which were subordinate to the Mayor” but “excluded from its application a separate branch of government or an independent agency that had authority to enter into contracts . . . pursuant to existing law.”²⁶ The law also created the Contracts Appeals Board which provided a forum for contractors to protest contract awards.²⁷

The Act was amended with the Procurement Reform Amendment Act of 1996 which became effective in April 1997.²⁸ The “amendment was enacted around the same time that various procurement studies were published, with one describing procurement in the District as ‘in crisis.’”²⁹ These studies found that the existing procurement law was “inconsistent” and ineffective.³⁰ In short, there was no uniformity in the law or in its application.

The PPA’s purpose is straightforward: it seeks to “simplify, clarify, and modernize the law governing the procurement [or acquisition] of property, supplies, services, and construction” by the District’s government.³¹ The law was designed

20 § 1-204.51(b).

21 D.C. Res. 18-1 (Jan. 2009).

22 *Id.*

23 § 1-204.51(c).

24 GAO REPORT, *supra* note 10, at 9.

25 GAO REPORT, *supra* note 10, at 54.

26 GAO REPORT, *supra* note 10, at 54.

27 D.C. CODE §§2-309.01, 309.04 (2010).

28 Legislative History of the District of Columbia Procurement Practices Act of 1985, D.C. CODE § 2-301.01 (2010); Legislative History of the Procurement Practices Amendment Act of 1997, D.C. CODE § 2-301.01 (2010).

29 GAO REPORT, *supra* note 10, at 8.

30 GAO REPORT, *supra* note 10, at 8.

31 D.C. CODE § 2-301.01 (2010).

to “centralize procurement and the authority” to direct procurement operations in one office led “by a chief procurement officer with a team of procurement professionals.”³² The PPA’s purpose also made clear the government’s intent to make the system equitable and transparent to all parties.

The PPA applies to all governmental departments, offices, and agencies and applies to “any contract for procurement of goods and services, including construction and legal services.”³³ The Reform Amendment Act of 1996 “expanded the [PPA’s] application to include independent agencies, which were previously excluded from its application.”³⁴ However, many agencies were still exempted from the reach of the PPA including the D.C. Advisory Neighborhood Commissions, the District’s Water and Sewer Authority, and the “Metropolitan Police Department’s authority to make procurements not in excess of \$500,000.”³⁵

The Act mandates that any proposal to “contract out services” must be submitted to Council for approval.³⁶ Contracts exceeding \$1 million or for multiple years are also mandated to comply with the Council review and approval process.³⁷ The law demands that the Mayor provide a summary of the proposed contract, including the name of the proposed contractor, the goods to be provided, and the details of the selection process.³⁸ This is to assist the members of Council in the review process.

The PPA sets out disciplinary provisions its willful or knowing violation. District employees and agency heads are subject to suspension or dismissal.³⁹ A contractor “who knowingly or willfully performs on a contract with the District by providing a product or service worth in excess of \$1 million . . . without prior Council approval, can be paid no more than \$1 million for the product of services provided.”⁴⁰ Should the contractor “knowingly or willfully” perform on a multi-year contract without prior Council approval or review, the contractor cannot “be paid in more than one calendar year for the products or services provided.”⁴¹

32 *Id.*

33 D.C. CODE § 2-301.04 (2010).

34 GAO REPORT, *supra* note 10, at 55.

35 D.C. CODE § 2-303.20 (2010).

36 D.C. CODE § 2-301.05d (2010). D.C. CODE § 2-301.07(15A) (2010) defines “contracting out” as the “process in which the District . . . enters into a contract with a private-sector firm . . . or other external entity, to provide a good or service to or on behalf of the District government that has [previously] been provided by District government employees, departments, or agencies.”

37 D.C. CODE § 2-301.05a (2010).

38 *Id.*

39 *Id.*

40 *Id.*

41 *Id.*

II. PAST AND PRESENT EFFORTS AT PROCUREMENT REFORM

A. *A System in Need of Repair*

The District procures “approximately \$3.75 billion by contract” each year and, according to a 2006 study, “a substantial portion of this amount is known to be in violation of procurement procedures, indicating a lack of controls to insure compliance with the procurement laws and regulations.”⁴² The Office of Contracting and Procurement (“OCP”) reported that it “purchases approximately \$1.5 billion in goods and services on behalf of more than 60 different District agencies and programs.”⁴³

Given the enormous amount of tax dollars that are expended each year, and the state of the procurement law in the District, the Council unanimously passed emergency legislation that established a Contracting and Procurement Reform Task Force.⁴⁴ It was made up of seven voting members who were contract or procurement experts; its purpose was to “assess and improve the District’s contracting and procurement process; establish appropriate laws to decrease the over-utilization of sole-source contract awards; and enhance the District’s ethics and disciplinary provisions regarding contracting and procurement.”⁴⁵

The Task Force, after a full assessment of the District’s procurement law and processes, levied its finding succinctly:

[T]here [were] no significant deficiencies in the District’s procurement framework which would cause the procurement system, if its requirements were followed, to be dysfunctional. The critical problem in the District system is the failure to establish a climate of compliance and enforcement of controls that insure compliance with the existing procurement regulation system.⁴⁶

The Task Force’s report issued findings and a series of recommendations to cure the issues surrounding the procurement and contracting law. It found that “many of the inappropriate procurement actions . . . were the result of negligence, while others were the result of failure to hire or assign appropriate staff.”⁴⁷ The group also discovered that “procurement regulations and proce-

42 DISTRICT OF COLUMBIA CONTRACTING AND PROCUREMENT TASK FORCE FINAL REPORT 3 (Dec. 2006) available at <http://www.dccouncil.washington.dc.us/lims/searchbylegislation.aspx>.

43 GOVERNMENT OF THE DISTRICT OF COLUMBIA, OFFICE OF CONTRACTING AND PROCUREMENT, FY09 PERFORMANCE PLAN, 1 (2008).

44 B16-546, the “Contracting and Procurement Reform Task Force Establishment Emergency Act of 2005,” Council Period 16 (2005), available at <http://www.dccouncil.washington.dc.us/lims/searchbylegislation.aspx>.

45 *Id.*

46 TASK FORCE 3, *supra* note 42.

47 TASK FORCE 3, *supra* note 42, at 4.

dures are difficult to access by both government agencies and the contracting public.”⁴⁸

The group found a serious lack of “respect for compliance with basic tenants of government procurement” and the failure to empower a Chief Procurement Officer (“CPO”) with authority to regulate and enforce procurement law was a major cause of concern.⁴⁹ At the time of the report’s release, the interim CPO had “little procurement experience, let alone senior-level procurement experience” which helped lead to the decrease in the “office’s effectiveness and created the unfortunate appearance that compliance with procurement policy [was] not a high priority.”⁵⁰

The failure to observe the mandate which gives Council authority to approve contracts over \$1 million or those for multiple years was an issue in 2005 as well. In one fiscal year’s time, the “number of contracts for which ratification of improper actions was required increased threefold from 19 . . . to 59.”⁵¹

To move forward, the Task Force recommended strengthening the CPO to a level “equivalent to that of the Attorney General and the Chief Financial Officer” so it could monitor and enforce the District’s procurement law.⁵² It also suggested that the procurement law be made readily available to the public and District employees.⁵³ Among its other final recommendations, the Task Force requested that the Mayor “[e]stablish, and appropriately fund, a training and certification program for all employees assigned acquisition responsibilities.”⁵⁴

Just over one month after the District of Columbia Contracting and Procurement Task Force released its report, the United States Government Accountability Office (“GAO”) released its report entitled “District of Columbia Procurement System Needs Major Reform.” Its findings were damning:

The District’s procurement law as currently in effect generally does not incorporate accepted key principles of sound procurement as established by [the National Association of State Procurement Officials], the [American Bar Association’ model procurement code, and the [Federal Acquisition Regulation. As a result, the law fails to adequately promote transparency, accountability, and competition to reduce the risk of fraud, waste and abuse.⁵⁵

48 TASK FORCE 3, *supra* note 42, at 4.

49 TASK FORCE 3, *supra* note 42, at 5.

50 TASK FORCE 3, *supra* note 42, at 5.

51 DISTRICT OF COLUMBIA CONTRACTING AND PROCUREMENT TASK FORCE FINAL REPORT 6 (Dec. 2006) available at <http://www.dcwwatch.com/govern/ocp061204.htm>. .

52 *Id.* at 8.

53 *Id.*

54 *Id.* at 9.

55 GAO REPORT, *supra* note 10, at 2.

The GAO report had similar findings to that of the Contracting and Procurement Task Force. It found that the District lacked “a uniform procurement law that appli[ed] to all District entities and provid[ed] the CPO with adequate authority and responsibility for the entire acquisition function.”⁵⁶ The GAO also cited the numerous agencies that were exempted from the procurement law as a serious flaw. The exemptions led to an “undermin[ed] . . . authority to capture an overall view of [the District’s] procurements as well as . . . an added burden on vendors to understand how to do business with the District.”⁵⁷

The culture that existed in 2007, and what could be said of current times, was that “entities seek exemptions believing that working through the CPO or the competitive process required by the law takes too much time.”⁵⁸ The report further cited the CPO’s relatively low-level status assigned within the government as a problem. This status weakened the ability to “enforce agency compliance with policies and procedures.”⁵⁹ Despite efforts to reform the process, the GAO found that the District’s procurement officials were concerned “about the merits and benefits of these efforts as well as the absence of high-level and sustained attention from District leaders to address systemic problems that hamper management and oversight of the procurement system.”⁶⁰

The GAO provided several recommendations to address the serious concerns surrounding the District’s procurement practices. Included among the recommendations: the suggestion that the CPO should be given “sole authority and responsibility to head the District’s Office of Contracting and Procurement,” that the administration ensure that the “ratification procure are not . . . used in a manner that encourage unauthorized commitments by government personnel,” and that the CPO’s position be elevated “in line with other critical cross-governmental functions . . . or higher” to allow for participation in “management, budgeting, planning, and review processes.”⁶¹

B. *Current Legislative Procurement Reform Efforts*

The last major overhaul of the District’s procurement law occurred in 1996. There have also been numerous amendments to permit exemptions from the PPA.⁶² Now, fourteen years later, there are two bills making their way through the legislative process. Both were introduced in January 2010—one by the Mayor

56 GAO REPORT, *supra* note 10, at 11.

57 GAO REPORT, *supra* note 10, at 12.

58 GAO REPORT, *supra* note 10, at 15.

59 GAO REPORT, *supra* note 10, at 30.

60 UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, GAO-07-159, DISTRICT OF COLUMBIA: PROCUREMENT SYSTEM NEEDS MAJOR REFORM 41 (Jan. 2007) (*citing* Pub. L. No. 93-198 (1973)).

61 *Id.* at 44.

62 *Id.* at 57.

and the other by Council. Each seeks to reform the District's current procurement practices.

B18-610, the "Omnibus Procurement Reform Amendment Act of 2010" was unanimously sponsored by the members of Council. It was introduced on January 5, 2010, and referred to the Committee on Government Operations and the Environment.⁶³

B18-610 adds several new sections to the PPA. First, the bill creates an independent Office of the Procurement Ombudsman.⁶⁴ The office would "provide oversight and review of the procurement process" including "audits and reviews for compliance" and "detecting fraud, waste and abuse in procurement operations."⁶⁵ The office's director would be appointed by the Mayor, approved by the Council, and "serve for no more than two terms."⁶⁶

Second, B18-610 mandates the creation of a "single procurement transparency website to ensure that all publically available information regarding District procurement is easily accessible in one online location."⁶⁷ The website would feature the names of all "personnel with delegated contracting authority," copies of contracts and supporting documents "in excess of \$100,000," and "notice of all emergency procurements."⁶⁸

B18-610 provides for specific and required "training, continuing education, and certification for District contracting personnel."⁶⁹ The bill adds another new section regarding acquisition planning. Here, all contracts exceeding \$100,000 must be on a chronological list detailing the expiration of each contract, including the contracting officer responsible for the contract.⁷⁰ In what appears to be a direct response to the parks and recreation controversy, among the other new sections in the bill, is the provision that each member of the Contract Appeals Board must be licensed District of Columbia attorneys with no less than "five years experience in public contract law."⁷¹

B18-635, the "Procurement Reform Act of 2010," was transmitted to City Council on January 29, 2010.⁷² Mayor Fenty, in a letter to Council Chairman Vincent C. Gray, stated that the "legislation provides for a comprehensive,

63 B18-610, "Omnibus Procurement Reform Amendment Act of 2010," Council Period 18 (D.C. 2010) available at <http://www.dccouncil.washington.dc.us/lims/searchbylegislation.aspx>.

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.*

68 B18-610, "Omnibus Procurement Reform Amendment Act of 2010," Council Period 18 (D.C. 2010), available at <http://www.dccouncil.washington.dc.us/lims/searchbylegislation.aspx>.

69 *Id.*

70 *Id.*

71 *Id.*

72 B18-635, "Procurement Reform Act of 2010," Council Period 18 (D.C. 2010), available at <http://www.dccouncil.washington.dc.us/lims/searchbylegislation.aspx>.

streamlined overhaul of the District's Procurement System."⁷³ B18-635 seeks to modernize the PPA. At the time of the bill's public introduction, Mayor Fenty proclaimed that "[f]or decades the District neglected to make substantial changes in the way we do business in this government. This legislation will bring our procurement into the 21st Century."⁷⁴

Though not all sections of the original PPA are changed, nine new provisions are found in within the seventy-eight pages of the bill. Training, education, and expediency are major themes of this legislation. Its stated purpose is to "safeguard the integrity of the procurement process" and to "increase public confidence in the procedures followed in public procurement."⁷⁵ The bill applies to "any contract for procurement of goods and services, including construction, but [does not] apply to a contract or agreement receiving or making grants or loans or for federal assistance."⁷⁶

Similar to B18-610, Mayor Fenty's bill creates an option for the Chief Procurement Officer to establish a Procurement Training Institute which is designed to "[c]onduct, develop, or collaborate with established training or certification programs for the express purpose of providing certifications of proficiency to all participants."⁷⁷ The legislation does not state that the CPO "shall" create this training program; instead, it uses the word "may" and does not mandate training.

B18-610 maintains the original provision that Council shall review contracts in excess of \$1 million or those for multiple years. It also keeps the disciplinary provisions for District employees who "knowingly or willfully enter into a proposed multiyear contract or a proposed contract in excess of \$1 million without prior Council review and approval."⁷⁸ Contractors with the District of Columbia are also under the same knowing and willful provision. Like the original PPA, if a contractor performs on a contract without prior Council approval, that contractor will be limited to payment of not more than \$1 million or to payment only within the first year of a multiyear contract.⁷⁹

Mayor Fenty's legislation attempts to "consolidate the CPO's procurement authority."⁸⁰ As in the initial PPA, the "CPO shall be the exclusive contracting au-

73 Letter from Adrian M. Fenty, Mayor, to Vincent C. Gray, Chairman, Council of the D.C. (Jan. 29, 2010) (on file with the Office of the Secretary to the Council).

74 Press Release, Office of Contracting and Procurement, Mayor Fenty Announces Comprehensive Procurement Reform Legislation (Feb. 4, 2010), available at <http://newsroom.dc.gov/show.aspx/agency/ocp/section/2/release/19162>.

75 B18-635, "Procurement Reform Act of 2010," Council Period 18 (D.C. 2010), available at <http://www.dccouncil.washington.dc.us/lims/searchbylegislation.aspx>.

76 *Id.*

77 *Id.*

78 *Id.*

79 *Id.*

80 Press Release, Office of Contracting and Procurement, *supra* note 74.

thority for all procurements covered by [the] Act.”⁸¹ The CPO is “authorized to delegate contracting authority” to District employees in order to carry out the “objectives of [the] Act.”⁸² However, the bill then proceeds to exempt twelve District agencies from the CPO’s purview. Included among the exempt agencies are the Washington Convention and Sports Authority, the District of Columbia Housing Finance Agency, and the District of Columbia Courts. Notably, the very agency at the center of the parks and recreation contracts controversy—DCHA—is explicitly left under the control of the PPA.

Another new provision in the Mayor’s proposed legislation is the addition of stipends “to cover a portion of bid or proposal developments costs to an unsuccessful responsible offeror that submits a responsive proposal . . . to generate meaningful competition and to ensure that small businesses are not competitively disadvantaged.”⁸³ Here, the District could take advantage of “any ideas or information contained in the proposals in connection with any contract awarded for the project” if the offeror chose to accept the stipend.⁸⁴

Both pieces of legislation, the Council’s and the Mayor’s, make an attempt to change the way procurement is handled in the District of Columbia. As was discussed in the GAO and Task Force Reports, the need for reform has been outstanding for many years. The Administration and the Council have begun to take the steps to reform the system with the introduction of these bills. At the time of the writing of this note, neither bill been passed by Council or signed into law by the Mayor.

III. THE PARKS AND RECREATION CONTRACTS CONTROVERSY

A. *An Overview of the Parks and Recreation Contracts Controversy*

In October 2009, the Council of the District of Columbia became aware that \$82 million in contracts had been routed through the government without its approval. Complicating the matter was the fact that every project was managed by “Banneker Ventures, a firm owned by [Mayor Fenty’s] fraternity brother, Omar Karim.”⁸⁵ The contracts came to light when, after the Mayor held numerous press events to announce new parks and recreation facilities, it was noticed that the projects “did not correspond with the recreation capital budget.”⁸⁶ After Council members talked with “housing authority and parks officials” it was dis-

81 B18-635, *supra* note 75.

82 B18-635, *supra* note 75.

83 B18-635, *supra* note 75.

84 B18-635, *supra* note 75.

85 Nikita Stewart, *D.C. Council Questions Parks Projects It Didn't Approve*, WASH. POST, Oct. 23, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/22/AR2009102204602.html>.

86 *Id.*

covered that the “money was taken from the Department of Parks and Recreations, given to the Deputy Mayor of Planning and Economic Development (“DMPED”) and then passed through the quasi-government agency that operates the city’s public housing system [DCHA].”⁸⁷

The DCHA is independent of the District’s procurement policy.⁸⁸ It has a “legal existence separate from the District government” and is authorized to “adopt and administer its own procurement and contracting policies and procedures.”⁸⁹ When asked “why [the administration] went through the housing authority to build the facilities,” a spokesperson cited the DCHA’s “autonomous procurement authority.”⁹⁰

After news of the contracts broke, a series of opinions came from the District’s Attorney General, Peter Nickles. First, Mr. Nickles opined that the “D.C. Housing Authority broke the law when it failed to seek the approval of D.C. Council before awarded [the parks and recreation contracts].”⁹¹ Just three days later, Mr. Nickles said that “past or current DCHA contracts that were awarded without Council approval . . . should be regarded as legal and binding.”⁹² He went on to state that:

DCHA has a long-standing practice of awarding contracts over \$1 million during a 12-month period . . . without Council approval. To regard such past or current DCHA contracts as unlawful would be to run an unacceptable risk of depriving the Authority’s contracting partners of legitimate expectations and of upsetting settled transactions.⁹³

General confusion ensued. DCHA went on record that it “did not think that [the Council contract approval] law applied to its procurement process.”⁹⁴ Mr. Nickles, in a memorandum to the DCHA, held that the independent agency would have to submit contracts to Council in the future only.⁹⁵ This opinion, according to the Council Chairman, was “inappropriate” and “not in compliance with [his] reading of the law.”⁹⁶ The Council did not make a “distinction between

87 *Id.*

88 D.C. CODE § 6-219 (2010).

89 D.C. CODE §§ 6-202, 6-203 (2010).

90 Stewart, *supra* note 85.

91 Stewart, *supra* note 6.

92 Memorandum from Attorney General Peter Nickles to Adrienne Todman, Interim Executive Director, D.C. Housing Authority (Oct. 26, 2009).

93 *Id.*, see e.g., *E. Enters v. Apfel*, 524 U.S. 498, 533 (1998).

94 Nikita Stewart, *D.C. Parks Contracts Are Legal After All*, *City Official Says*, WASH. POST, Oct. 27, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/26/AR2009102603280.html?sid=ST2009120203198>.

95 Memorandum from Attorney General Peter Nickles, *supra* note 92.

96 Stewart, *supra* note 94.

the past and the future” and “expect[ed] to receive the [parks and recreation] contracts.”⁹⁷

B. *The Council Takes Action*

The revelation that the money for the parks and recreation contracts went from the District’s Department of Parks and Recreation to the Deputy Mayor for Planning and Economic Development and ultimately came to rest with the D.C. Housing Authority—all without Council’s approval—jumpstarted a series of legislative hearings. Four Council committees—Economic Development; Government Operations and the Environment; Parks, Recreation, and Libraries; and Housing and Workforce Development—came together to launch “a joint special investigation in October [2010] after learning that the Fenty administration had transferred millions of dollars to the [DCHA] to build recreation centers, ballfields, and parks.”⁹⁸

Omar Karim, of Banneker Ventures, was called to testify before the joint committee in December 2010, the fifth since the discovery of the contracts.⁹⁹ Mr. Karim was asked about his relationship with the Mayor and about the “amount of contact he had with city officials before Banneker won the contract.”¹⁰⁰ He stated that “he did not participate in ‘any inappropriate, unethical or unlawful actions to obtain the contract.’”¹⁰¹

The Council voted to “remove Banneker as the manager of the construction projects [and] effectively [terminate] Banneker’s base \$4.2 million [project manager] contract and the agreements with several subcontractors.”¹⁰² During the height of the council hearings, and on Christmas Eve, the District government cut a \$2.5 million check to Banneker Ventures in recognition of the work performed on the parks and recreation contracts.¹⁰³ The Council was not informed of the payment until another joint committee hearing in January and “questioned whether the Fenty administration had once again circumvented the legislative body.”¹⁰⁴ In response, the administration stated that the payment was for services rendered through November 2010, prior to the Council vote to terminate the

97 Stewart, *supra* note 94.

98 Nikita Stewart, *D.C. Council Hires Lawyer Robert P. Trout to Probe Recreation Contracts*, WASH. POST, March 6, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/05/AR2010030503858.html>.

99 Nikita Stewart, *Contractor Defends Dealings with D.C.*, WASH. POST, Dec. 11, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/10/AR2009121004141.html>.

100 *Id.*

101 *Id.*

102 Nikita Stewart, *Fenty’s Friend’s Firm Got Millions After D.C. Ended Contract*, WASH. POST, Jan. 9, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/08/AR2010010803663.html>.

103 *Id.*

104 *Id.*

Banneker contract.¹⁰⁵ Further, the administration maintained that the multi-million dollar payment was a “fair way to end the contract and ‘the right thing to do.’”¹⁰⁶

All of the contracts for the rehabilitation of the parks and recreation facilities were halted by the Council in December 2009 on the basis that they should have been submitted to the body for approval. After the contracts were submitted for review, the Council, through emergency legislation in February 2010, unanimously authorized the District’s Chief Financial Officer to “transfer all funds associated with the Department of Parks and Recreation (“DPR”) capital projects in the disapproved contract . . . from the Office of the Deputy Mayor for Planning and Economic Development to DPR.”¹⁰⁷ The legislation then authorized the Office of Public Education Facilities Modernization to manage the parks and recreation projects instead of Banneker Ventures.¹⁰⁸

With the management of the DPR projects back in the hands of the District government, the Council continued its probe into the background of the contracts. It appointed a special investigator in March 2010. Defense lawyer Robert P. Trout took that role pro bono to conduct “an independent examination of how the Fenty administration awarded the contracts without Council approval.”¹⁰⁹ The appointment of Mr. Trout has been assailed as politically motivated.¹¹⁰ Attorney General Nickles has assisted the investigation by providing documents related to the parks and recreation contracts and remains on record as stating that the “contracts should have been submitted to the council for approval, but . . . [he] deemed them legal and binding.”¹¹¹

IV. ANALYSIS OF INDEPENDENT AGENCY PROCUREMENT AUTHORITY AND THE LEGISLATIVE POWERS OF COUNCIL

A. *The Dispute Between the Council of the District of Columbia and the Administration*

The dispute between the Council of the District of Columbia and the Fenty Administration arose soon after the discovery that the parks and recreation contracts escaped legislative review. The lingering question was whether an independent agency was required to observe the Council approval law for contracts that

105 *Id.*

106 *Id.*

107 B18-664, “Contracts for Project Management and General Contractor Services for the Revitalization of District Recreation Centers, Schools, and Public Parks Approval and Payment Authorization Emergency Act of 2009,” Council Period 18 (2010), available at <http://www.dccouncil.washington.dc.us/lims/searchbylegislation.aspx>.

108 *Id.*

109 Stewart, *supra* note 98.

110 Stewart, *supra* note 98.

111 Stewart, *supra* note 98.

exceed \$1 million or those that were for multiple years. A fortiori, was a governmental agency that transferred funds to an independent agency bound by the same requirement?

As outlined earlier, the District's Attorney General issued conflicting statements regarding the necessity of Council review for the projects. The transfer of parks and recreation capital dollars to an independent agency outside the scope of the District's PPA laws only led to extra murkiness about the details of, and reasoning behind, the transaction.

The Department of Parks and Recreation and the Office of the Deputy Mayor for Planning and Economic Development entered into a Memorandum of Understanding to transfer the \$82 million in capital funds between each other.¹¹² D.C. Code section 1-301.01(k) was cited in the MOU as the authority for DPR and DMPED to transfer these funds. Departments and agencies may enter into agreements with each other for "materials, supplies, equipment, work, or services of any kind that the requisitioned department . . . may be in a position to supply."¹¹³ Following the law to that extent, it was only after the MOU was signed with DPR that DMPED then transferred the capital funds to DCHA for the parks and recreation projects. Once the funds left the government's coffers for DCHA, the requirement to inform Council of the contract was triggered.

B. *Analysis of Independent Agency Procurement Authority and the Council Approval Requirement*

The District of Columbia Housing Authority is an independent agency of the District government.¹¹⁴ It enjoys a "legal existence separate" from the District.¹¹⁵ The Council of the District of Columbia empowered DCHA to "enter into contracts, joint ventures, or other cooperative arrangements with the District."¹¹⁶ DCHA was created to "govern public housing and implement the Housing Act of 1937 in the District [and is] responsible for providing decent, safe, and sanitary dwellings, and related facilities, for persons and families of low-and moderate-income in the District."¹¹⁷ Thus, by virtue of its enabling statute, DCHA is a distinct body with a clear purpose, separate and independent from the executive, legislative, and judicial branches of the District government. It also enjoys independent procurement authority and may enter into contracts.¹¹⁸

112 Memorandum of Understanding Between the Department of Parks and Recreation and the Deputy Mayor for Planning and Economic Development (Feb. 27, 2009) [*hereinafter* MOU].

113 D.C. CODE §1-301.01(k) (2010).

114 D.C. CODE § 6-202(a) (2010).

115 *Id.*

116 D.C. CODE § 6-203(17) (2010).

117 D.C. CODE § 6-202(b) (2010).

118 §6-203(17).

Conversely, the Office of the Deputy Mayor for Planning and Economic Development is an executive department of the District. It is under “direct administrative control of the Mayor.”¹¹⁹ DMPED does not have a separate existence from the District government and derives its authority from an act of Council.¹²⁰ It is specifically not exempted from the PPA.¹²¹ Anytime it seeks to enter into a multi-year contract of one in excess of \$1 million or for multiple years, it must seek Council approval.

Based on these factors, there is no question that agreement for the rehabilitation of the parks and recreation facilities involved two separate entities—DMPED and DCHA. It is plain that DMPED, prior to entering into a contract with DCHA, was required by law to seek Council approval for projects in question once it determined that it would utilize DCHA for the project.¹²² For purposes of the procurement law, a “contract” is defined as a “mutually binding agreement” [that includes but is not limited to] awards, letter contracts, and orders.”¹²³ It matters not that DCHA was exempted from the Council review process in this instance because DMPED had the primary duty.

Thus, any contract for expenditures in excess of \$1 million during a twelve month period that is not submitted to Council for approval is invalid. It must be submitted to Council for review and approval. The Council may choose to ratify the contract at its discretion.

CONCLUSION

While it has not been thoroughly revealed what the true rationale was for pushing the parks and recreation contracts through an independent—and procurement law exempt—agency, the multi-million dollar episode opened wide the discussion for procurement reform in the District of Columbia. The issues surrounding the District’s procurement law and the difficulties observing it are plentiful and well documented.

The District of Columbia’s Contracting and Procurement Task Force and the Government Accountability Office reports, though years old, found that there was a lack of empowerment of the CPO as well as a lack of respect for generally acceptable procurement law. The multiple agency exemptions contribute to that

119 D.C. CODE § 6-603.01(17)(VV) (2010).

120 D.C. CODE § 1-204.04(b) (2010). (“The Council shall have the authority to create, abolish, or organize any office, agency, department or instrumentality of the government of the District”)

121 D.C. CODE § 2-303.20 (2010).

122 D.C. CODE § 2-204.51(b)(1) (2010). (“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”; D.C. CODE § 2-301.05d (2009). “[T]he Mayor and all independent agencies and entities of the District government shall submit to the council for approval any proposal to contract services . . . that involves expenditures in excess of \$1,000,000 during a 12-month period.”)

123 D.C. CODE § 2-301.07 (2010).

effect. Continued use of the disjointed PPA will likely enhance and compound the District's issues with procurement. Without a commitment from the District's elected and appointed leaders to changing the status quo, episodes such as the parks and recreation contracts may continue to happen.

It can be argued that these contracts provided the spark which led to the Council and the Administration taking serious steps towards reforming the way government procurement issues are handled. However, how the District's procurement law will be reformed remains to be seen.

Henry M. Robert once said, "where there is no law, but everyman does what is right in his own eyes, there is the least of real liberty."¹²⁴ His words ring true when considering how the parks and recreation contracts were handled. Take into consideration the words of Valerie Santos, the Deputy Mayor of Economic Development. She stated in November that the contracts were routed through the DCHA because it was "the cheapest, fastest and most efficient path to deliver first-rate community and recreation facilities."¹²⁵ What one deputy mayor thinks is cheap, fast, and efficient may very well be the opposite of the next deputy mayor.

Was the law avoided for expediency's sake? This note does not make a pronouncement on this question. However, it is not far-fetched to draw the conclusion that had the law been followed in the first place, the parks and recreation contracts may have been reviewed and approved without controversy. The Council of the District of Columbia has a mandate to review all governmental contracts that exceed the \$1 million or multi-year threshold. Any notion to the contrary is clearly contrary to the spirit and letter of the law.

District residents view the parks and recreation projects as worthy of their tax dollars. They have waited a long time to see these new parks and recreation centers built.¹²⁶ However, these same residents have entrusted its government with their tax dollars. Their elected officials have a duty to ensure that tax dollars are expended in a manner that is free from fraud, waste, and abuse. While these projects should get done quickly, District leaders must guarantee that they are done according to the law. The fate of real reform may very well hang in the balance if they act otherwise.

124 HENRY M. ROBERT, *ROBERT'S RULES OF ORDER REVISED* (1915) available at <http://www.bartleby.com/176/92.html>.

125 Elizabeth Wiener, *Rosedale Lies In Wait As Council Worries Over Park Contracts*, VOICE OF THE HILL, Nov. 18, 2009, available at <http://www.voiceofthehill.com/Front-page/Rosedale-lies-in-wait-as-council-br-argues-over-park-contracts>.

126 Craig, *supra* note 2.

