

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

RIDECHARGE, INC.)
CREATIVE MOBILE TECHNOLOGIES, LLC.) CAB Nos. P-0920 and P-0921 CONS
))
Solicitation No: DCPO-2012-R-0342)

ORDER

Filing ID #46219563

The protesters in this consolidated matter, RideCharge, Inc. and Creative Mobile Technologies, LLC, challenge the August 1, 2012, Determination and Findings (“D&F”) of the District of Columbia Chief Procurement Officer (“CPO”) to proceed with performance under a contract award for the installation of smart meter technology in the District’s taxicab fleet. The District contends that *immediate* installation is required to protect public safety, ensure that the taxicab upgrade is completed prior to the January 2013 Presidential inaugural, gather GPS generated data on neighborhoods underserved by taxicabs so as to directly propose remedial measures thereafter, and to generate surcharge revenues that, inter alia, will fund the hiring of hack inspectors and the creation of a jitney service. Having reviewed the entire record in this matter, we overrule the CPO’s determination to proceed because it does not meet the required evidentiary burden of providing substantial evidence of urgent and compelling circumstances which justify proceeding with the contract before this protest is decided on its merits. We also overrule the CPO’s decision because allowing the contract to proceed at this time would potentially preclude a corrective remedy or award for the protesters in this procurement in the event that the present protest is sustained.

FACTUAL BACKGROUND

This protest is set against the backdrop of a comprehensive effort by the District of Columbia to overhaul and modernize its taxicab industry. These efforts include strengthening the District of Columbia Taxicab Commission, upgrading licensure requirements, and addressing what city leaders have described as an “absence of modern vehicles, quality services and innovative technology.” “Taxicab Service Improvement Amendment Act of 2012,” D.C. Code §50-301(3) (2012 Supp.). The present protest arises from the District’s June 29, 2012, award of a \$34.9 million contract to VeriFone, Inc. to implement a Taxicab Smart Meter System (TSMS) in the city’s approximately 6,500 licensed taxicabs. (Agency Report (“AR”), Exhibit 2.)

Protests by RideCharge, Inc. (“RideCharge”) and Creative Mobile Technologies, LLC (“CMT”) of the award to VeriFone, Inc. (“VeriFone”) form the basis of the instant protest. More specifically, the District’s attempts to proceed with immediate contract performance pursuant to D.C. Code 2-360.08(c)(2) (2011), have resulted in the protesters’ combined efforts to reinstate the stay that automatically accompanies the filing of a protest with our Board. The protesters seek a

continuing stay of VeriFone's contract performance until a resolution of this protest by the Board on its merits. (CMT Protest 5; RideCharge Protest 3.) All pertinent background information is provided below.

The Solicitation and Award Decision

The District solicited contractors to perform this requirement under Solicitation Number DCPO-2012-R-0342 (the "Solicitation") that was issued by the District of Columbia Office of Contracting and Procurement, on behalf of the District of Columbia Taxicab Commission ("DCTC"). *Id.* The successful offeror would ultimately be awarded a contract to develop, install and operate a fully integrated TSMS in approximately 6,500 taxicabs under a multi-year fixed price contract that includes a five year base period with three possible one year option periods. *Id.* The District values this disputed award in the amount of \$34,931,000. (D&F 2.)

The Solicitation advised offerors that the District's target was to have a fully installed and operational TSMS solution in up to 6,500 District taxicabs within 90 days of contract award. *Id.*¹ Further, the Solicitation mandated that the TSMS solution offered by bidders have distinct and extensive technical capabilities, and enhancements, in several service areas. *Id.* These required functional capabilities include: (1) strong authentication; (2) electronic trip-sheet data collection reporting; (3) Driver Information Module (DIM) with text messaging; (4) credit/debit card and PIN Acceptance; (5) Passenger Information Monitors (PIM) with Programming; (6) Web-Based Back Office Management Information System (BOMIS); (7) Safety Activation Devices; and (8) Advertisement Management. *Id.* The successful offeror would also be required to support, maintain and operate these functional capabilities after they were implemented for the entire multi-year contract period. *Id.*

The District received eight proposals in response to the Solicitation, and on May 24, 2012, determined that only three bidders were within the competitive range for the contract including CMT, RideCharge, and the ultimate awardee, VeriFone. (AR Ex.8.) OCP thereafter requested best and final offers ("BAFOs") from these three remaining bidders – the protesters and the awardee – and the Contracting Officer ("CO") determined on June 11, 2012, that only VeriFone remained in the competitive range.² (AR Ex. 9.)

On June 29, 2012, VeriFone signed the proposed contract in the amount of \$34,931,000. (AR Ex. 12.) Subsequently, on July 5, 2012, the CO issued notifications to RideCharge and CMT, informing them that their proposals were no longer within the competitive range of the contract. (AR

¹ In this regard, Contract Line Items (CLINs) 0001-0013 for the base contract year are largely devoted to Upfront Implementation Costs associated with hardware and equipment, software, installation and mounting, set up for wireless communication, and start up and training.

² On July 5, 2012, the CO signed a Determination and Findings of Competitive Range, which described the proposals of all 8 bidders and their scores and supplemented the CO's June 11, 2012, determination that VeriFone was the only bidder in the competitive range. (AR Ex. 10.)

Ex. 15.) RideCharge and CMT (the “protesters”) filed protests with the Board on July 18, 2012, and July 19, 2012, respectively. (RideCharge Protest 1; CMT Protest 1.)³

The Extent of the Protest Allegations

The protest allegations in this matter are extensive, and have been further supplemented since the original protests were filed with the Board. (CMT First Supplemental Protest 1.) Although there are many protest allegations made herein, the protest largely challenges the propriety of the manner in which the District ultimately excluded all but the awardee from the competitive range in this \$34.9 million procurement after allowing both protesters to participate in BAFOs and Oral Presentations during the competition. (CMT Comment on Agency Report 9-13.) In this regard, the protest contends that the District effectively converted the subject procurement into a *de facto* sole source procurement in violation of the District of Columbia requirement for full and open competition in a procurement of this large dollar value. *Id.*

Additionally, there are numerous other challenges by the protesters. The protesters allege improprieties in the manner in which the District conducted and insufficiently documented discussions and the technical and cost evaluation of proposals. The protesters also challenge the improper manner in which the District allegedly eliminated the initial Solicitation’s mandatory requirement that offerors agree to subcontract a certain portion of the contract work to small Certified Business Enterprises (“CBE’s”) approved by the District of Columbia Department of Small and Local Business Development (“DSLBD”). (CMT Comments on AR 1-3; RideCharge’s Comments on AR 1-2.) Both protesters also allege that the District ultimately negotiated, and executed, contract terms with VeriFone that inappropriately altered the original parameters of the contract that were defined by the terms of the Solicitation (CMT Comments on AR 36-41; RideCharge Comments on AR 7-8.)

The District’s Decision to Override the Stay

On or about August 1, 2012, the DCTC issued the D&F to override the statutory stay of the disputed contract in order to immediately proceed with its performance. (D&F 1.)⁴ The D&F primarily articulates four bases for its assertion that the District cannot delay proceeding with the contract until the resolution of the present protests and must, therefore, override the statutory contract

³ The Board consolidated these two protests on August 3, 2012, pursuant to Board Rule 118.1.

⁴ D.C. CODE § 2-360.08(c)(2) provides in relevant part that “[p]erformance under a protested procurement may proceed ... while a protest is pending only if the CPO makes a written determination, supported by substantial evidence, that urgent and compelling circumstances that significantly affect interests of the District will not permit waiting for the decision of the Board concerning the protest.” Similarly, Board Rule 304.3 allows a protested procurement to proceed only if “the Director makes a written determination, supported by substantial evidence, that urgent and compelling circumstances that significantly affect interests of the District will not permit waiting for the decision of the Board concerning the protest.”

stay related to this case. (D&F 2-3.) These four reasons offered by the D&F include the District's contention that:

- (1) immediate performance of this contract is needed to protect the public safety and welfare of District residents and visitors to the District of Columbia because the implementation of the TSMS will allow, for the first time, upon installation, the real-time tracking of all taxicab vehicles and provide immediate electronic notification to law enforcement personnel by both drivers and passengers of any imminent threat to their health, welfare, and safety;
- (2) a delay in the TSMS equipment installation will not afford the District the time needed to fully implement the TSMS in time for the Presidential Inauguration in January 2013, which is vital to the District government so that it is capable of presenting a high quality, safe taxi experience to the riding public;
- (3) The GPS component of the TSMS will allow DCTC to collect data on the deployment of taxicab service to all District of Columbia neighborhoods in order for DCTC to determine whether there is adequate service in underserved neighborhoods, which will allow the District to determine whether to provide grants, loans, incentives, or other financial assistance to taxicab owners who will agree to provide service in these neighborhoods; and
- (4) the installation of the TSMS will allow the District to collect a surcharge for each taxicab transaction, which will allow DCTC to immediately hire an additional 14 hack inspectors that will supplement the efforts of DCTC, and allow it to have hack inspectors on the street during late evening and early morning hours to address taxicab service issues, including the problem of unlicensed or out of jurisdiction taxicab and limousine operators. These surcharge funds will also be used to immediately audit the number of licensed vehicles on the street that are available to service the general population, and also to implement a new jitney service that will provide a low cost alternative to taxi and bus service primarily in underutilized areas.⁵

(D&F 2-3.)

The protesters challenge all four bases offered by the District to support the D&F decision on the grounds that they do not meet the legal standard that requires the District to show substantial evidence of urgent and compelling circumstances which justify overriding the stay of contract performance. (CMT Opp'n D&F 1; RideCharge Opp'n D&F 1.) The protesters contend that none of the four justifications offered by the D&F show that the District will suffer harm or an extremely negative consequence in the short term were it to wait until this protest is resolved to move forward

⁵ The D&F also notes that the City Council for the District of Columbia has recognized the importance of immediately performing this contract and noted that, without the contract in place, the District would not be able to move forward toward leasing the necessary equipment, thereby eliminating the benefit of the TSMS to the District.

with contract performance. (CMT Opp'n D&F 8-14; RideCharge Opp'n D&F 2-5.) Moreover, the protesters point out that the District's ability to make TSMS taxicab improvements described in the D&F would only be temporarily delayed, and not wholly eliminated, while suspending performance of the contract during the protest. *Id.* Additionally, the protesters note that the District already has an existing taxicab service in place to provide public transportation in the District and, therefore, is not without ongoing taxicab service pending resolution of the instant protest. *Id.*

Finally, the protesters request that the D&F be overruled by the Board because continued contract performance by VeriFone will impede the Board's ability to grant corrective action or relief if the protest is later sustained on the merits. (CMT Opp'n D&F 14-16; RideCharge Opp'n D&F 5.) The protester notes that it and the awardee's TSMS solution are not completely compatible with each other and, thus, the ongoing contract could not be seamlessly "turned over" to any other company if the award is invalidated. (CMT Opp'n D&F 14.)⁶ The protester argues that the District would have to undertake a logistically burdensome and expensive contract "unwinding" process involving the removal of extensive hardware components in thousand of taxicabs in order to reinstall the TSMS hardware/software solution of either protester if a corrective award was ultimately required. (CMT Reply Supporting Opp'n D&F 5-7.)

DISCUSSION

The parties have invoked this Board's jurisdiction over this protest and its underlying allegations pursuant to the D.C. CODE §2-360.03(a)(1) (2011).

The Board's Role in Ensuring the Integrity of the Procurement Process

As discussed herein, the present protest extensively challenges the propriety of the manner in which the District evaluated proposals and made its determination to award the nearly \$35 million disputed contract to VeriFone. The Procurement Practices Reform Amendment Act ("PPRAA") of 2010, D.C. CODE § 2-351.01 (2011), as enacted by the Council of the District of Columbia, establishes the policies and laws governing the procurement of goods, services, and construction items by the District government. Amongst its many enumerated purposes, the PPRAA was enacted not only "to ensure the fair and equitable treatment of all persons who deal with the procurement system of the District government," but also "to increase public confidence in the procedures followed in public procurement." D.C. CODE § 2-351.01(b)(4)-(5) (2011).

This Board is, and has historically been⁷, the exclusive hearing tribunal to determine *de novo* any protest of a solicitation or contract award challenge involving covered District of Columbia agencies arising from alleged violations of governing procurement law. D.C. CODE § 2-360.03(a)(1)

⁶ The protester also argues that another company would be unable to assume the VeriFone contract at a later time in the event that the District modifies regulations to require any company performing the TSMS contract to have a technical solution identical to VeriFone's solution. (CMT Opp'n D&F 14-15.)

⁷ The Contract Appeals Board was originally established in 1953 by Reorganization Order No. 29, pt. VII.

(2011). Given this long-term grant of exclusive protest jurisdiction, we have previously recognized, even under earlier District of Columbia procurement statutes granting this same jurisdiction to the Board, that with this broad grant of protest jurisdiction to the Board:

the Council of the District of Columbia meant to ensure that the District's procurement law would be applied uniformly and that the integrity of the procurement process would be maintained. (citation omitted).

C&D Tree Services, Inc., CAB No. P-440, 44 D.C. Reg. 6426 (March 11, 1996) (Board reviewed the basis and intent behind its broad grant of protest jurisdiction in response to protest jurisdictional challenge).

Accordingly, and consistent with the current PPRAA statute, we, again, reaffirm this Board's statutory jurisdiction and resulting obligation to ensure the integrity of the District of Columbia procurement process. That necessarily includes reviewing bid protests to ensure that contract awards made by District agencies are in accordance with governing procurement law. Indeed, the PPRAA expressly recognizes that ensuring public confidence in the manner in which the District conducts its procurements is a critical goal underlying the framework of the District's procurement regulations. *See* D.C. CODE § 2-351.01(b)(5) (2011). This is a bedrock principle of procurement law regardless of contract value, and is especially pertinent herein given the significant value of the contested award.

The contract stay provision, currently at issue in this matter, is one of the means conferred by the PPRAA to ensure public confidence in the process for resolving bid protest actions. Pursuant to District of Columbia law, D.C. CODE § 2-360.08(c)(1) (2011), a contracting officer must direct a contract awardee to cease contract performance or any activities related to a contract when it is protested with this Board.⁸ Contract and performance related activities may not be resumed by the awardee while the protest is pending. This provision protects the interests of all parties by maintaining the *status quo* in protest actions pending issuance of the Board's decision on the merits. "The [contract] stay provision is meant to provide effective and meaningful review of procurement challenges before the protested procurements become *faits accomplis*..."⁹ *Whitman-Walker Clinic, Inc.*, CAB Nos. P-0672 & P-0674, 50 D.C. Reg. 7521 (July 25, 2003).

The Board must, as a result, ensure that any action by the District to override this provision is based upon compliance with the statutory requirements to effect an override. Performance under a protested contract may only proceed while a protest is pending if the CPO makes a written determination, supported by substantial evidence, that urgent and compelling circumstances that

⁸ This order from the CO to the awardee to cease performance of a contract, pursuant to D.C. CODE § 2-360.08(c)(1) (2011), is frequently referred to in our case law precedent as an order which institutes a "stay" on contract performance.

⁹ The Board issued this decision pursuant to an interpretation of the stay provision under the former D.C. CODE § 2-309.08 which is the equivalent of the stay provision in the current statute, D.C. CODE § 2-360(c)(1)-(2).

significantly affect the interest of the District will not permit waiting for the decision of the Board concerning the protest. D.C. CODE § 2-360.08(c)(2) (2011).

In applying the foregoing standard of “urgent and compelling circumstances,” the Board has sustained the District’s decision to override the statutory contract stay where the evidence showed that the District’s ability to repair city streets before winter would be impaired by *waiting for the Board’s decision on the merits (emphasis added)*. *Nation Capital Builders, LLC*, CAB No. P-0761, 57 D.C. Reg. 741 (Nov. 20, 2007). Similarly, in *Goel Svcs., Inc.*, CAB No. P-0862, 2010 WL 5776589 (Sept. 24, 2010), we sustained the District’s D&F to lift the stay override where the evidence showed that the safety concerns of employees, visitors, and homeless persons at D.C. General Hospital required that an awardee demolish a vacant building *before the Board issued its merits decision (emphasis added)* (several acts of vandalism at a vacant District building resulted in cut telephone and water lines; thereby jeopardizing the ability of D.C. General personnel to contact public safety officials in an emergency.)

Based upon the legal standard applied by the Board in the foregoing cases, the protesters argue that the District fails to meet this burden of proof required to show the existence of truly urgent and compelling circumstances that justified overriding the contract stay related to this matter based upon the reasons articulated, and discussed below, in the D&F. (CMT Opp’n D&F 1; RideCharge Opp’n D&F 1.)

The Evidence Provided by the District In Support of the D&F

D&F Public Safety Justification

The District’s first basis in support of the D&F primarily asserts that public safety and welfare reasons require that the District immediately move forward with the performance of the contract. (D&F 2.) The District states that the TSMS contract implementation will result in the real time tracking of District of Columbia taxicabs and allow both taxicab drivers and passengers to notify law enforcement of an immediate threat to their health, welfare and safety. (D&F 2.)

As discussed herein, in reviewing a challenge to a D&F decision, the Board has sustained the District’s D&F decisions where the District has provided some form of empirical data which supports its assertion that it would be adversely impacted by a delay in contract performance during the pendency of a protest. *Quality Plan Adm’rs, Inc. and Greater Wash. Dental Svcs., Inc.*, CAB Nos. P-0675 and P-0677, 2003 WL 23181955 (Aug. 8, 2003) (Board sustained CPO’s determination to proceed with contract in order to avoid confusion and disruption of dental coverage to 14,000 District employees and thereby found the existence of an urgent and compelling circumstance).

In the instant case, the District states that immediate implementation of the TSMS system is needed because it will allow taxicabs to be tracked and drivers and passengers to contact authorities in case of an emergency. (D&F 2.) However, the District provides no evidence to support its

assertion that the implementation of taxicab safety features cannot be delayed during the pendency of this protest. In particular, the D&F generally mentions an increase in consumer complaints about taxicab quality and safety, but the District in no way provides further evidence that passengers and drivers are experiencing consistent or daily threats to their person, or that the District could immediately implement the TSMS system in a sufficient number or percentage of its fleet to abate the alleged safety threat *before our Board renders a merits decision*.

The Board does not dispute that the modernization of the current taxicab system's safety features is a tremendous accomplishment for the District's leadership, residents and visitors. However, the District has not presented the Board with substantial evidence that its interests will be impaired by waiting for our merits decision before commencing installation. The District provides no data or other information to corroborate or quantify its assertion of an imminent threat to public safety by delayed TSMS installation.

In fact, the "Taxicab Service Improvement Amendment Act of 2012" actually belies the District's public safety argument. (CMT Reply Supporting D&F Opp'n Exhibit A; D.C. Council Res. 19-538, 2012 Leg., 19th Sess. (July 10, 2012)). The resolution declares "the existence of an emergency ... to authorize the existence of a passenger surcharge" relative to the instant contract award to Verifone; suggesting that the purported emergency is "revenue" and not safety driven. *Id.* at §2(a)-(b). Additionally, even the "revenue" emergency is not "urgent" for our purposes. The resolution notes that the surcharge is delayed until FY13 (i.e., October 1, 2012). *Id.* at §2(c).

Consequently, without any further substantiation of a definitive and actual impact to the District's public safety interests *pending resolution of this protest*, the D&F justification fails to meet the statutory standard for lift of the stay. By reaching this conclusion, the Board holds that the District must justify its D&F decision with substantial evidence and has not done so.

D&F Presidential Inauguration Justification

The D&F also states that the District must immediately proceed with the contract in order to complete the implementation by the Presidential Inauguration in January 2013. (D&F 2.) In this regard, the District only briefly asserts that it is vital to the District government that the taxicab industry be overhauled and capable of presenting a high quality, safe taxi experience to the riding public.

It is axiomatic that the Presidential Inauguration activities that will take place in the District of Columbia in January 2013 will bring tens of thousands of visitors to Washington, D.C., many of whom will ride in District taxicabs. Nevertheless, the District must still provide substantial evidence to support its D&F decision to override the contract stay, that it cannot wait for our merits decision to commence installation because of urgent and compelling circumstances. The District, however, has not provided substantial evidence to the Board of what those "urgent and compelling" circumstances

are, and/or that a short delay in the official contract start date will jeopardize TSMS completion before the 2013 Presidential Inauguration.

Moreover, the District has not shown that it would be significantly impacted with less than the complete contract being performed by January 2013. In other words, the DCTC arguably still stands to gain a significant benefit for the city during the Inauguration if a significant percentage, if not all, of the TSMS systems can be installed in taxicabs by January 2013 even with a brief delay in the contract start date due to this protest.

Further, in light of the fact that DCTC currently has a taxicab system in place that has not yet been modernized, the D&F in no specific way attempts to quantify the exact negative impact to the District in the event that it temporarily maintained its current taxicab transportation system during the upcoming Presidential Inauguration. The District solely asserts, with nothing more, that it is vital that the District implement the TSMS system by January 2013, for purposes of providing a “high quality, safe” taxicab experience to the public. This conclusory statement alone is not substantial evidence¹⁰ of an urgent and compelling circumstance that supports the District’s D&F justification in this regard.

D&F Data Collection Justification

Similarly, the District provides no definitive evidence that it will be substantially impacted in a negative way by being temporarily delayed in utilizing the GPS tracking component of the TSMS system to determine the existence of areas in the city underserved by taxicabs. (D&F 3.) No information is provided by the District to even substantiate its suggestion that there is, in fact, evidence that many areas in the city are underserved. The District also provides no evidence explaining why it is of immediate detriment to the District when areas in the city are underserved. The District’s ability to facilitate better service in the future to underserved areas through the TSMS implementation may be beneficial in some respects, but the District in no way establishes that it is critical that this TSMS capacity be implemented before this protest can be resolved. The Board, thus, finds that the D&F does not establish that the District’s inability to utilize this GPS feature for a short period of time during the expeditious resolution of this protest justifies its decision to override the contract stay.

D&F Transaction Surcharge Justification

Lastly, as an additional justification for its D&F decision, the District points to the surcharge that will be charged to each TSMS taxicab transaction as alleged evidence of urgent and compelling circumstance that justifies it overriding the contract stay. (D&F 3.) Specifically, the D&F maintains

¹⁰ Substantial evidence is more than a mere scintilla and such evidence that a reasonable mind might accept as adequate. Olson v. D.C. Dep’t of Employment Services, 736 A.2d 1032, 1037 (D.C. 1999).

that a surcharge will be added to each taxicab transaction which will, in turn, be used by the DCTC to hire hack inspectors to work on the streets during early and late night hours to address service issues, and also to address the problem of unlicensed or out-of-jurisdiction taxicabs and limousine staffing issues. *Id.* According to the District, the surcharge funds will also be used to audit the sufficiency of the number of taxicabs providing service in the city, and to implement a low cost jitney service. *Id.*

Again, while the Board does not dispute that the District intends to charge and utilize these surcharge funds for an important service which supports the DCTC, the District provides no further evidence substantiating its assertion that it cannot temporarily delay the collection of this surcharge during the pendency of this protest. The District, thus, in no way articulates how interests significant to the city will be compromised during the pendency of this protest if the TSMS contract is not allowed to immediately proceed. Similarly, the District provides no detailed data to better establish or quantify the specific number of citizens or visitors at present risk of harm from the D&F's stated gypsy taxicab problem without the benefit of the surcharge funds to create a jitney service. The District falls short of establishing whether it could even hire additional hack inspectors or launch a jitney service during the short interval between now and the Board's merits decision. As a result, the District's fourth justification for the D&F decision also fails to provide substantial evidence of urgent and compelling circumstances that justify overriding the contract stay in connection with this matter.

Potential for Corrective Action

In addition to our finding that the District has failed to provide substantial evidence of an urgent and compelling need to proceed with the contract prior to resolution of the protest, we also consider the protesters' assertions that allowing the contract to proceed will potentially eliminate the protesters' ability to obtain adequate relief from the Board in the event that the present protest is sustained. In prior decisions involving a challenge to a D&F, the Board has held that because the contract stay provision is meant to provide effective and meaningful review of procurement challenges before protested procurements become *faits accomplis*, we will consider whether there will be irreparable harm to the protester and whether a corrective award may later be made if the protester is successful on the merits of its protest. *Whitman Walker*, CAB P-0672.

The instant case involves a modernization and upgrade of the District of Columbia taxicab public transportation system that has never before been attempted in the District of Columbia. The evidence currently in the record strongly suggests that the awardee and protesters each offered to develop a customized, and different, TSMS solution that is proprietary to each individual offeror, and not interchangeable, in response to the Solicitation requirements. (AR Ex. 2; CMT Opp'n D&F 14.) The contract requires that the successful offeror implement its TSMS solution, including all associated hardware and software, in approximately 6,500 taxicabs, within 90 days after the contract award. (AR Ex. 2.)

Given the complexity of the TSMS contract requirements and its extensive upfront implementation schedule over a short period of time, the Board must consider whether realistic corrective relief could be ordered by the Board, and undertaken by the District were the protest to be sustained. This requires the Board to determine, as a practical matter, whether a mid-contract transition could realistically, and smoothly, be made from the awardee to either protester after the VeriFone contract implementation effort was well underway.

In light of these considerations, the Board finds that the complexity of the TSMS technical contract requirements, including extensive hardware installations in several thousand taxicabs over a 90 day period, will diminish another contractor's ability to easily assume ongoing performance of the contract after it has been allowed to proceed if a corrective award is later required. Because each company offered an individualized TSMS technical solution to perform the contract, another company could potentially only assume the performance of the disputed contract by implementing its own individualized TSMS solution in each taxicab. Before such a "corrective award" implementation could even occur, however, the hardware installed by VeriFone would have to be physically removed from thousands of taxicabs before another contractor could proceed with its installation. Moreover, the District would need to have the financial ability to pay for such a vast hardware removal and re-installation effort. In short, under this corrective award scenario, the District would theoretically have to pay twice for the same installation services, in addition to paying the costs associated with removing VeriFone's TSMS system before the second installation of TSMS equipment could even begin.

Other than generally alleging that this five year contract could be easily transitioned to a new company because it is a multi-year contract, the District has not established that it would, or could, even assume the cost of removing any of the awardee's equipment and reinstalling the equipment of another company if corrective relief and a new award decision was required by this Board. Thus, allowing the contract to proceed at this time would likely preclude the District from "unwinding" the VeriFone contract at a later time if a corrective award was required because of financial and logistical impracticalities. The disputed contract would then become *faits accomplis*. As we have noted herein, such a result would lessen public confidence in the procurement process and diminish the Board's ability to grant meaningful relief to the protesters herein if their allegations are ultimately found to be meritorious. The Board, therefore, finds that the D&F must also be overruled on this basis.

CONCLUSION

For the reasons set forth herein, the Board finds that the subject D&F fails to provide substantial evidence that urgent and compelling circumstances prevent the District from staying performance of the disputed contract pending the resolution of this protest. Consequently, the CPO's determination to override the contract stay is hereby overruled for failure to meet this evidentiary burden. The Board would also be limited in its ability to grant appropriate relief to the protesters by

allowing the contract to proceed at this time and finds this to be an additional basis for overruling the D&F decision.

Therefore, the District is hereby ordered to reinstitute the stay of the performance of the awarded contract, under Solicitation No. DCPO-2012-R-0342, and suspend any further contract work related activities by the putative contract awardee, VeriFone, Inc. on this contract, pursuant to D.C. CODE § 2-360.08(c)(1) (2011). The District shall maintain this stay on contract performance until this protest is resolved by the Board on its merits. The Board intends to issue a decision on the merits consistent with legal requirements.

SO ORDERED.

DATED: August 31, 2012

/s/ Monica C. Parchment
MONICA C. PARCHMENT
Administrative Judge

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