

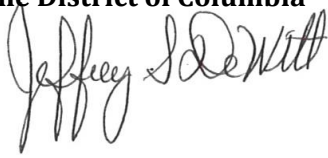
Government of the District of Columbia
Office of the Chief Financial Officer



Jeffrey S. DeWitt
Chief Financial Officer

MEMORANDUM

TO: The Honorable Phil Mendelson
Chairman, Council of the District of Columbia

FROM: Jeffrey S. DeWitt
Chief Financial Officer 

DATE: June 21, 2016

SUBJECT: Fiscal Impact Statement – Procurement Integrity, Transparency, and Accountability Amendment Act of 2016

REFERENCE: Bill 21-334, Draft Committee Print as shared with the Office of Revenue Analysis on June 18, 2016

Conclusion

Funds are not sufficient in the fiscal year 2016 budget and the proposed fiscal year 2017 through fiscal year 2020 budget and financial plan to implement the bill.

There are three provisions in the bill that have a cost. First, the requirement that the Office of Contracting and Procurement (OCP) establish and Ombudsman's Office will cost \$113,000 in fiscal year 2017 and \$477,000 over the proposed four-year financial plan period. Second, the requirement for contracts above \$50 million can increase construction contract costs by up to 4 percent.¹ Finally, the provision that requires the District to support workers who want to bid on a privatization contract has a cost, but the cost will depend greatly on the scale and the scope of the privatization contract, and cannot be estimated reliably at this time.

The bill makes the implementation of these three requirements subject to their inclusion in an approved budget and financial plan.

Background

In 18 sections, the bill makes comprehensive changes to procurement laws in the District. Here, we summarize them across different themes:

¹ This is based on estimates developed for a similar requirement in another bill. See the fiscal impact statement issued for the District Resident Employment and Trade Stimulus Amendment Act of 2010 (Bill 18-650) available at http://app.cfo.dc.gov/services/fiscal_impact/pdf/spring09/FIS18-650.pdf.

General Contracting Provisions

The bill expands the Department of General Services (DGS) independent procurement authority² to include operations and maintenance of facilities, real estate management, utilities, and security services.³

Under current law, when the District disposes a property no longer required for public use and has already in hand a land development agreement, the procurement of services for the design, development and construction of a facility on the disposed property is not subject to the District's procurement laws.⁴ The bill extends this exemption to the planned facilities on properties disposed of under any District law (and District-owned adjacent properties).

The bill defines a new term: "inherently government functions." These are functions that are so intimately related to the public interest as to require performance by District government employees.⁵ The broad set of examples of inherently government functions offered in the bill include binding the government to take any action by law, contract, rule, regulation, or policy; appointing, directing or controlling government employees; deciding to buy, use or dispose of property, or control spending, including through contracting; participating in contract procurement activities including selection, evaluation, awarding, administration or termination of a contract. DGS contracts with real estate professionals to analyze real estate transactions and negotiate on behalf of the District. The bill bans these contractors from making any binding commitments in a real estate transaction, offering commitments (for example, during negotiations) would now be considered inherently government actions. In addition, the Mayor cannot contract for inherently governmental functions, but can procure a contract for functions closely associated with inherently governmental functions⁶ if District employees cannot reasonably perform the function, but will supervise contractor performance. Contracts and option years of contracts that deal with inherently governmental functions are exempted for five years if they are in effect as of the effective date of this bill.

The bill authorizes the Chief Procurement Officer (CPO) to review and monitor any procurement activity, including procurements at agencies exempt from procurement laws or that have independent procurement authority. It prohibits government employees and officials from contacting contracting officers in an attempt to influence a procurement unless they are part of the technical advisory group.

Currently, OCP maintains a website with information on District's procurement activities such as executed contracts and solicitation documents. The bill requires OCP to expand the contents of this

² DGS is still subject to District procurement laws, but is not under the direct authority of the Chief Procurement Officer.

³ Security services are those authorized in the Department of General Services Establishment Act of 2011, effective September 14, 2011 (D.C. Law 19-21; D.C. Official Code § 10-551.01 et seq.).

⁴ Those disposed under An Act Authorizing the sale of certain real estate in the District of Columbia no longer required for public purposes, approved August 5, 1939 (53 Stat. 1211; D.C. Official Code § 10-801).

⁵ Section 6 of the proposed bill.

⁶ Functions that are not inherently governmental, but approach that distinction based on the nature of the function, the manner in which the contractor performs, or the manner in which the District administers contractor performance.

website including a weekly list of payments made to prime contractors through the Procurement Automated Support System (PASS).⁷

Finally, government employees must prepare a cost estimate for any contract, contract modification, or change order proposal for a construction contract exceeding \$100,000, as if the government were going to bid on the contract. The contracting officers should use this estimate to determine the reasonableness of the bidder's offer.

Council Review

The bill makes changes to two areas of Council review as it relates to contracting. First, one of the Council's main responsibilities related to contracts is to review any multi-year contracts or contracts in excess of \$1 million. The Mayor must now include more documents⁸ in the package sent to Council, including a clean hands certification.⁹ Any approval request for a retroactive contract change or payment must include detailed information on the work done without approval, the value of this work, when contract officials were notified of the changes to the work and why the changes were not sent to Council in a timely manner. Any retroactive contract or payment approval must also be sent to the Inspector General for review at his or her discretion. If exercising the option year does not result in a material change to the contract, the Mayor can submit the modification to exercise and a summary of the option year terms, a clean hands certification, and a confirmation that the funds are included in the budget.

Current law requires the Mayor to annually submit an acquisition plan to Council for the upcoming fiscal year by March 20th. The bill changes the required submission date to coincide with the Mayor's proposed budget submission, provides guidance on what should be included in the plan,¹⁰ and requires the Mayor to submit a summary of the plan.

Privatization Contracts

District law requires the Mayor to show that a privatization contract will cost at least 5 percent less than the government's cost of performing the same functions, and the contract will not unduly harm District government workers, or burden the District economy.¹¹ The bill expands the scope of this analysis to include impact on quality, and a broader analysis of displaced government workers.¹² The District's Chief Financial Officer must substantiate these calculations, and the final package must include comments from potentially displaced workers as well as any unions or

⁷ The CPO can mark as confidential any portions of the required documents as it deems necessary.

⁸ A summary of the subcontracting plan, any bid protests and their resolutions, information on past performance (Past performance should include the vendor's performance in other government or private sector contracts. This evaluation of past performance should also be an evaluation factor in any procurement), an accounting of funds spent prior to submission to Council, details about a letter or emergency contract if applicable, and the determination and findings associated with a privatization contract.

⁹ Clean Hands Before Receiving a License or Permit Act of 1996, effective 26, 1996 (D.C. Law 11-118; D.C. Official Code § 47-2861 et seq.).

¹⁰ Details include program-level needs, anticipated multi-year procurements, anticipated exercises of option year contracts, expected major changes to contracts, and the guiding principles related to agency acquisitions.

¹¹ § 2-352.05. Privatization contracts and procedures requirements.

¹² Generally, the bill prohibits the privatization of any function that displaces government employees unless the contractor meets hiring requirements outlined established in current law and maintained in the bill.

representatives of these workers.¹³ If current District employees decide to bid on the contract, the Mayor must make reasonable resources available to help them formulate a bid.

The Auditor must also look at select privatization contracts and annually report on whether or not the contractor is achieving the required savings and meeting the required performance standards. If the contract is not meeting the cost savings based on the Auditor's reporting, the Mayor must consider the merits of cancelling the privatization and performing the function with government employees.

Changes for Contractors

The bill changes how existing and prospective contractors can access contracting opportunities and interact with the District in the following ways:

- OCP will establish an Office of Ombudsman for Contracting and Procurement; agencies outside the CPO's authority will designate an ombudsman. Contractors and subcontractors can express their concerns to and expect a timely answer from the ombudsman's office or agency ombudsman, who can offer an informally negotiated resolution to any complaints.
- Prospective contractors, who are delinquent taxpayers, can bid on contracts and the District would deduct due taxes from payments owed to the contractor. This applies to prospective contractors who are delinquent on taxes in an amount of less than the greater of \$1,000 or 1 percent of the contract value up to \$25,000. At present, delinquent taxpayers would be considered ineligible bidders on contracts.
- Beginning January 1, 2018, individuals or business entities that have made political contributions to an elected official,¹⁴ candidate, or political committee cannot enter into a contract valued at \$100,000 or more from the date of the contribution through one year following the primary¹⁵ or general election.¹⁶ Contributors to other types of political entities¹⁷ cannot enter into contracts for eighteen months following the date of the contribution.
- Bidders cannot interact with any District officials related to the selection process from the time when the first notice or advertisement of the contract is made through the contract's final execution or submission to Council except when submitting a written proposal, asking questions, participating in a demonstration, or negotiating.
- In lieu of a performance bond, certain construction contractors can present the District with a letter of credit of at least 10 percent of the contract value. These contractors include non-profits, contractors with a net worth of at least \$1 million, a licensed general contractor, or a construction contractor who has been in business for at least five years. All construction contractors must enter into a project labor agreement¹⁸ if the agreement furthers other

¹³ The bill exempts a number of situations from privatization requirements such as new functions, trainings, or functions to protect against a conflict of interest.

¹⁴ Excluding an Advisory Neighborhood Commissioner.

¹⁵ If the candidate does not appear on the general election ballot.

¹⁶ Or the date of the contribution if it was not tied to any particular election.

¹⁷ These include political parties (excluding national parties), political action committees (pursuant to D.C. Law 19-124), constituent services funds, and 3rd party entities controlled by the candidate or official.

¹⁸ At least one labor union must be one party to the agreement and the agreement shall be binding with guarantees against strikes, lockouts, and other job disruptions. The Mayor can waive this requirement if she or he issues a determination and findings that the agreement is not in the District's interests.

District goals, multiple contractors are required, and the value of the contract is \$50 million or greater.

- A contractor cannot perform any work beyond the scope of the original contract without a written agreement with the District on how much the contractor will be paid, and a certification that funds are sufficient. The District must agree that the contractor will be paid within thirty days, and that the prime contractor will pay any subcontractors within ten days of receiving payment from the District. If the District fails to pay on time, it will be responsible for an interest penalty of at least 1.5 percent.

Financial Plan Impact

Funds are not sufficient in the fiscal year 2016 budget and the proposed fiscal year 2017 through fiscal year 2020 budget and financial plan to implement the bill.

The general changes to contracting processes can be absorbed within existing agencies' budgets. These include prohibiting contracts for inherently government functions, expanding the CPO's review authority, posting a weekly list of payments made through the PASS procurement system,¹⁹ and preparing organic cost estimates. There is also no impact to expand the exemption for properties and adjacent properties subject to Land Development Agreements.

The Council review provisions may require OCP to spend more time putting together Council packages, but any additional information requested, with the exception of the more detailed past performance requirements, should be readily available. There are also provisions which should reduce the package preparation burden on OCP such as the use of the Clean Hands database to validate the tax payment status of a potential contractor and the simplified packages for the exercising of an option year of a contract. The acquisition planning efforts are consistent with how OCP currently gathers this information and no additional resources are required. The Inspector General reviews of retroactive contracts are not mandatory and the Inspector General can absorb any costs associated with the reviews it undertakes.

The bill requires the District to provide resources to bid on a potential privatization contract. Bid costs could range from one to three percent of the contract cost and the District does not have funding identified to cover this cost for any future privatization contracts. There are currently no privatization contracts in the contracting process so any potential costs are unknown at this time. The Chief Financial Officer can absorb any costs associated with the evaluation of the cost savings proposed in the privatization contract. The Auditor can also absorb costs associated with its review of privatization contracts, but it is important to note this could require it to delay or supplant other Council directives or reviews.

The Project Labor Agreements for construction projects over \$50 million could increase contract costs between two to four percent.²⁰

OCP also performs many of the duties required of the Office of the Ombudsman, but it does not have an individual who can serve as the ombudsman. OCP will hire an ombudsman and it will cost \$113,000 in fiscal year 2017 and \$477,000 over the four-year financial plan period. Independent

¹⁹ Some payments, known as direct vouchers, are outside of the PASS system and are exempted in the proposed legislation.

²⁰ The District Resident Employment and Trade Stimulus Amendment Act of 2010 (Bill 18-650).

The Honorable Phil Mendelson

FIS: Bill 21-334, "Procurement Integrity, Transparency, and Accountability Amendment Act of 2016," Draft Committee Print as shared with the Office of Revenue Analysis on June 18, 2016

agencies would be required to designate an existing employee as the ombudsman and one of the District's main independent contracting agencies, the Department of General Services, already has the structure in place to accommodate this mandate.

OCP currently uses 1.5 percent for its rate of interest on delayed payments, so statutorily establishing 1.5 percent as the floor rate of interest will have no impact on the District's budget or financial plan. The District would need to budget additional resources if it were to raise the interest rate above the floor. Other quick payment provisions now require a bilateral agreement between the District and a contractor for any contract changes and allows a contractor to stop working if it is not paid for that work within 30 days. The District aims to pay contractors in a timely manner, so any stop work occurrences are expected to be infrequent. However, if a stoppage of work occurred, the District could incur additional costs due to project or service delays.

The reduction in performance bond requirements and the delinquent tax recovery provision will make it easier for some prospective contractors to bid on government contracts, but they do not have a fiscal impact. The restrictions on communications with government officials and the pay-to-play provisions require will have no impact on the District's budget or financial plan.