



OFFICE OF THE DISTRICT OF COLUMBIA AUDITOR

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Deborah K. Nichols
District of Columbia Auditor

007:00:LJB

**Agency Retaliation Against Contractors Appearing
Before or Providing Information to the Council**

April 12, 2000



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The Honorable Kathleen Patterson, Chairperson
Committee on Government Operations
Council of the District of Columbia
441 4th Street, N.W., Room 709
Washington, D.C. 20001

Letter Report: Agency Retaliation Against
Contractors Appearing Before or Providing
Information to the Council

Dear Councilmember Patterson:

Pursuant to your request of October 15, 1999, the District of Columbia Auditor has completed the research concerning actions that can be taken to address apparent retaliation by District government agency officials against a contractor.

RESEARCH OBJECTIVE, SCOPE AND METHODOLOGY

In conducting this examination, the Auditor reviewed D.C. Code, § 1-224, "Obstruction of Council proceedings and investigations; penalty," and contacted several state and local legislative bodies to ascertain whether their jurisdictions have statutes or ordinances which address the problem of retaliation against witnesses appearing before or providing information to legislative bodies.¹ Additionally, the Auditor contacted the District's Board of Contract Appeals, the United States General Services Administration's Board of Contract Appeals (GSBCA), the United States General Accounting Office (GAO), the Congressional Research Service, and the Maryland Board of Public Works. The Auditor also researched GSBCA and GAO decisions for relevant cases and their disposition.

¹ The Auditor reviewed relevant legislation obtained from legislative bodies of the states of Alabama, California, Georgia, Idaho, Kansas, Kentucky, Maine, Maryland, Minnesota, South Dakota, Texas, Utah, Virginia, and Wisconsin.

RESULTS OF RESEARCH

Most State and Local Jurisdictions Do Not Have Legislation that Specifically Addresses Agency Retaliation Against Witnesses Appearing Before or Providing Information to Legislative Bodies

The majority of the jurisdictions consulted have not enacted statutes or ordinances that specifically address government officials' retaliation against witnesses appearing before or providing information to legislative bodies. With respect to the obstruction of legislative proceedings and investigations, many of the statutes reviewed focus on the prohibition and consequences of disrupting official proceedings. Where witnesses are concerned, the emphasis is placed on penalties for intimidating or tampering with witnesses prior to their testimony. The prohibited offenses were primarily threats of physical injury or damage to personal property.

Whistleblower Protection Does Not Appear to Be Applicable to the Committee's Concern

The Auditor's research failed to reveal language in other jurisdictions' statutes that: (1) penalized retaliatory actions of a government official against a contractor, and (2) penalized a government official's intentional interference in a contract as a result of the contractor, or an employee of the contractor, providing information or testimony to a legislative body. In an attempt to find cases that addressed retaliation, the Auditor researched GSA Board of Contract Appeals cases and GAO decisions concerning contract disputes, but did not find any that were useful to this research. Nevertheless, a representative from GAO stated that: "Although in effect the alleged retaliation is being made against the contractor, it was the contractor's employee who testified and who under the statutory provisions cited [D.C. Law 12-160, the Whistleblower Reinforcement Act] is entitled to whistleblower protection. Therefore, it is questionable whether the statutory language protects only the individual right of an employee, or is broad enough to provide any protection to a contractor." This view appears to coincide with the opinion rendered by the Council's General Counsel. Thus, D.C. Law 12-160 does not presently extend to retaliatory actions of a government agency against a contractor as a result of testimony presented to the Council by the contractor or one of the contractor's employees.

Possible Remedies to Address Agency Officials' Retaliation Against Contractors

In order to address the specific issues in which you have requested our assistance, the most certain remedy is to amend District of Columbia law to account for situations where a District agency retaliates against a contractor due to protected disclosures made by officers or employees of the contractor. As you know, Title II of D.C. Law 12-160, the "Employees of District Contractors and Instrumentality Whistleblower Protection Act of 1998," established protections for employees of contractors who give protected disclosures. Because the law does not expressly prohibit retaliation against contractors, this law could be amended to expand the protections so as to clearly prohibit retaliatory actions against contractors.

If amending existing law is to be the mechanism to address this issue, the current definitions

contained in Section 202 of D.C. Law 12-160 should be amended to include the following or a similar definition:

"Prohibited procurement action includes, but is not limited to, any recommended, threatened or actual proceedings to terminate a contract by default or convenience without adequate and documented justification, unreasonably delaying or withholding payment on legitimate vouchers or claims of a contractor, imposing conditions or requirements on the contractor not required by the contract, taking any action designed to or having the effect of impeding a contractor's performance, or taking any other action designed to or having the effect of injuring the business or reputation of a contractor solely on the basis of protected disclosures made by officers or employees of the contractor."

Section 203 of D.C. Law 12-160 would also have to be amended to include language similar to the following:

"A District government official or employee having the responsibility to evaluate, award, authorize payments, terminate, or otherwise administer a contract for goods or services between the District government and a contractor shall not threaten to take or take a **prohibited procurement action** against a contractor, or a contractor competing for a contract, because of protected disclosures made by an officer or employee of the contractor to a public body."

I note that D.C. Law 12-160 includes only civil enforcement mechanisms. However, D.C. Code § 1-224, "Obstruction of Council proceedings and investigations; penalty," contains criminal sanctions of \$2,000, two years imprisonment, or both. If you wish to have criminal penalties apply when a contractor is retaliated against, D.C. Law 12-160 should also be amended to account for that scenario.

The above are only suggestions, and you and your staff may wish to consider modifying the language above to fully address your concerns. In any event, current law offers no clear protections to a contractor whose employee has provided protected disclosures to one of the enumerated public bodies. And as the General Counsel of the Council has pointed out, the courts have not consistently held for contractors when this issue has been presented.

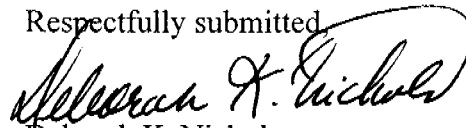
CONCLUSION

The Auditor concurs with the opinion of the Council's General Counsel. With respect to amending the existing code, the definitions could be expanded to include a definition of "prohibited procurement action," and the provision addressing prohibited actions could be amended to include a prohibition of specified actions that might be taken against a contractor. D.C. Code § 1-224 could also be amended to include prohibitions against threatening, coercing, or taking other injurious

action against a contractor due to protected disclosures made by officers or employees of a contractor that testify before the Council

Should you have any questions or require additional assistance concerning the matters discussed herein, please do not hesitate to contact me at 202-727-3600.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Deborah K. Nichols", written over the typed name.

Deborah K. Nichols

District of Columbia Auditor

cc: Charlotte Brookins-Hudson
General Counsel
Council of the District of Columbia