



Report of the Special Counsel

to the

Special Committee on Investigation of Capital Projects of the Department of Parks and Recreation

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INTRODUCTION AND EXECUTIVE SUMMARY

In October 2009, members of the Council of the District of Columbia became aware that the District of Columbia Housing Authority was overseeing multi-million dollar contracts for the construction and renovation of city recreation centers, ball fields, and parks. Groundbreakings had been announced for multiple projects on a schedule that did not seem to correspond with the DPR capital budget with which the Council members were familiar. They discovered that the funding and authority for the capital expenditures had been transferred from the Department of Parks and Recreation (DPR) to the Deputy Mayor for Planning and Economic Development (DMPED), and from there to the Housing Authority (DCHA), which then assigned responsibility for the projects to its wholly-owned subsidiary, District of Columbia Housing Enterprise (DCHE). Moreover, a \$4.2 million dollar contract to manage the construction of all of the projects had been awarded to a single firm, Banneker Ventures, whose principal, Omar Karim, was reportedly a close ally and friend of then-Mayor Adrian Fenty. This came as a surprise to the Council members since under the Home Rule Act, contracts that exceed one million dollars or are to be performed over multiple years are supposed to be submitted to the Council for approval, and no parks contracts had been presented to them. Adding to the Council's concerns, Banneker, as project manager, was entitled to receive a 9% mark-up on the amounts it paid consultants such as architects and engineers, and it had awarded the engineering work on all of the parks to Liberty Engineering and Design (LEAD), whose principal, Sinclair Skinner, was also known to be close to the Mayor.

All of these facts raised the question: why? Why had the funding taken such a circuitous route, so that parks and recreation projects were now being managed by the independent agency responsible for public housing? The Council learned that DCHA took the position – and that

DMPED also understood – that DCHA contracts were not subject to the requirement of Council approval. Were the funding transfers simply a sleight of hand, then, designed to avoid Council oversight? Was the lack of transparency the bi-product of a decision to transfer the projects for a legitimate reason, or was the circumvention of Council review rooted in a concern that the Council would scrutinize and possibly disapprove valuable contracts that had been awarded to firms with ties to the Mayor?

The Council members also wanted to know: had the program management procurement been steered to Banneker or manipulated in some other way to give Banneker an advantage? Was the engineering work appropriately awarded to LEAD? In other words, were the contracts the outcome of a fair and lawful procurement process, or grounded in cronyism or something worse? And finally, were the public and private entities and individuals tasked with providing the necessary oversight performing their functions? Were taxpayer dollars for DPR capital projects being appropriately managed and spent?

After the Council began looking into the matter in late October, more questions arose. If, as the Attorney General found on Friday, October 23, 2009, DCHA was actually bound by the Home Rule Act when it contracted to spend the city's money, did the Attorney General correctly advise DCHA the following Monday that the Banneker contract was valid and could proceed? The Council froze the flow of funds in November, so why did DMPED and DCHA agree to increase the number of parks and the amount of funds to be transferred at the beginning of December? Why did DCHA issue a check to Banneker for \$2.5 million on Christmas eve, even though by then, the Council had formally disapproved and cancelled the project management contract altogether? And why did the Mayor remove the Chair of the DCHA Board of Commissioners – a critic of the Banneker contract – from his position?

Faced with these questions, the Council appointed Special Counsel to undertake an investigation that would attempt to answer them and to aid the Council in determining whether any further legislative action or inquiry was warranted. This Report is the result of that investigation.

Background

We note at the outset that the public discussion of the DPR capital projects issues has often included references to “90 million dollars’ worth of contracts,” but the amount of money that was actually transferred or spent before the Council halted the projects was considerably lower than that. By the time the Council inquiry began, DPR had transferred *authority for* the expenditure of approximately \$87 million of capital funds to DMPED. The actual amount of money sent from DPR to DMPED, however, was \$18,413,500.¹ And the actual amount transferred from DMPED to DCHA was only \$6,200,000. Moreover, Banneker did not receive all of the contracts for construction of the projects; instead, it was awarded the project management contract, which represented only a small portion of the total construction budget. By December 24, 2009, a total of \$4,483,578.77 had been paid to Banneker – not only for management fees, but also for hard costs and amounts due to its consultants.²

As will be described in greater detail in the body of the Report, based on the scope of the investigation we were authorized to conduct, and the information that was provided to us, we came to the following findings and conclusions:

¹ Ex. 1, Letter from Barbara Roberson, DPR Fiscal Officer, and Conrad Bridges, DMPED Fiscal Officer, to then Chairman Vincent C. Gray (Nov. 23, 2009) with DPR project funding chart attached.

² Ex. 2, DCHE charts showing a breakdown of invoices paid.

The Transfer of Funds

Our investigation uncovered no wrongdoing on the part of the Mayor, and we found that the DPR capital funds were not transferred for the purpose of avoiding Council oversight.

- The transfer of funds for the DPR capital projects from DPR to DMPED, and from there to DCHA, was prompted by a sincere desire on the part of administration officials to expedite the completion of long-awaited public projects.
- The Fenty administration identified the renovation of parks and community centers as an important priority, and the Mayor's office and DPR officials were frustrated by the backlog of stalled projects. Speed was considered to be imperative, and it was generally understood that DPR was ill-prepared to deliver it.
- DPR is required to conduct its solicitations through the Office of Contracting and Procurement (OCP), which delegated authority for construction procurements to the Department of Real Estate Services (DRES). The OCP process can be slow and deliberate. DPR also believed that its in-house construction management capacity was insufficient to handle multiple large scale projects involving the building of new facilities as opposed to the ongoing repair and maintenance of existing parks.
- Before the funds were transferred to DCHA, city officials attempted to transfer responsibility for the DPR capital projects to the Office of Public Education Facilities Management (OPEFM), which had independent procurement authority and was not tied to OCP. In November 2008, though, the Council intervened and prohibited the transfer.
- OPEFM would have utilized its existing project management team, so there would have been no need to procure a construction management firm for that function. Moreover, since the agency is bound by the Home Rule Act, any contracts that exceeded the million dollar threshold would have been submitted to the Council for review had the projects remained under OPEFM's control. The fact that city officials initially sought to transfer the DPR projects to OPEFM is therefore a significant factor in our conclusion that the projects were not transferred for the purpose of avoiding Council review.
- The execution of a memorandum of understanding (MOU) to move funds to another agency – including to DCHA to obtain its assistance on construction projects – was lawful, and it was consistent with prior practice that predated the Fenty administration. In fact, DCHE had been specifically created to generate revenue for DCHA by providing construction services to other entities, and what it proposed to offer them was efficiency.
- The Fenty administration utilized the procedure, though, to an unprecedented degree. Prior to the DPR projects, DMPED implemented an MOU process culminating at DCHE for two major projects that far exceeded the cost of anything transferred to the housing agency before: the completion of a combined public school, library, and recreation center project at the Walker Jones educational campus in Northwest D.C., and the construction

of the Deanwood Community Center in N.E. Those projects were then viewed as possible templates for the DPR capital projects.

The Selection of Banneker

- Banneker Ventures was not selected alone, but rather, it was teamed with a seasoned construction management firm with significant experience in public projects, Regan Associates, Inc. And it was the Banneker-Regan team that had previously managed both Walker Jones and Deanwood.³ Thus, there were reasonable grounds for choosing the Banneker-Regan team on the merits to assume the project management role on the DPR capital projects.
- When the Regans were first seeking a local, minority-owned firm with which to partner, Banneker was brought to their attention through a referral from DMPED's David Jannarone. But there was no evidence in the bank records of any benefit flowing to Jannarone from Banneker or from Karim or Skinner's other businesses. And no participant in the DPR project manager selection process reported being subjected to any improper influence or even advocacy on the part of Jannarone, or anyone else in city government, in favor of Banneker.
- DCHE issued a Request for Qualifications ("RFQ") to which a number of firms responded. Their submissions were fairly reviewed by a selection panel made up of representatives from DPR, DMPED, and DCHE, and the Banneker-Regan team in fact received the highest score. We found no evidence of improper influence in the selection and scoring process. We have therefore concluded that the award of the contract to Banneker is not a matter that calls for further investigation.

The Failure to Obtain Council Approval

Many of the questions that were raised at the time the Council became aware of the Banneker contract concerned the issue of the failure to obtain Council approval.

- DCHA is an independent agency, and it did not view itself as bound by the D.C. law requiring Council approval of certain contracts. Thus, when DMPED decided to transfer funding for the DPR projects to DCHA, it was with the expectation that DCHA would not be submitting the resulting contracts to the Council. While administration officials responsible for the decision indicated that they were well aware that Council review typically takes additional time they did not want to spend, they stated that the MOU was not prompted by a desire to evade Council review. Officials on both sides of the DMPED/DCHA transfer testified that the move was inspired by DCHA's capacity to manage construction efficiently and that Council approval was not discussed.

³ The circumstances surrounding those procurements were outside the scope of this investigation.

- We conclude, though, that DCHA was wrong in its judgment that the contracts were not subject to Council review. DCHA did not receive a formal opinion from the Attorney General until October 23, 2009, after the Council expressed dismay that it had been bypassed in this instance. But DCHA's general counsel, Hans Froelicher, was aware as early as 2007 that the Attorney General's Office was of the view that DCHA was subject to the requirement, particularly when District funds were involved. In 2008, the Attorney General expressed himself unambiguously and in writing on the subject, and he cited the authority underlying his opinion. Although we believe that DCHA can be faulted for its refusal to acknowledge the Council's authority to approve contracts involving city funds, we note that there was no evidence that DCHA's legal position grew out of the intent to shield any particular contract or contracts from review.
- When the Attorney General declared on October 23 that DCHA was indeed bound by the Home Rule Act when contracts encumbering District funds were awarded, he premised his opinion in large part upon a formal opinion that had been issued in 1996 applying the same ruling to a different independent agency. We therefore question the basis for the memorandum the Attorney General sent to DCHA on October 26, which stated that since his October 23 opinion was not retroactive, the Banneker contract remained in force. Based on the law set forth in the October 23 opinion, we conclude that absent Council approval, the contract was not valid.

Questions Related to the Procurement

Records related to the procurement revealed other anomalies that prompted questions from the Council.

- Jacqueline Glover, who had been offered a job at Banneker before taking a position at DMPED, served as a DMPED representative on the selection panel that considered the responses to the RFQ for the project manager. We find that her limited interaction with Banneker did not disqualify her. Moreover, her participation in the procurement made no difference to the outcome, since Banneker-Regan would have been the top scorer even if Glover's scores were excluded entirely.
- Even before the Banneker-Regan team was formally selected as program manager for the DPR capital projects, there appears to have been an assumption within DMPED, at least on the part of David Jannarone, that Banneker would be involved in the program management for the projects. Jannarone was the DMPED official with primary responsibility for overseeing the projects, and he was a close friend of Sinclair Skinner's. Initially DMPED considered adding the DPR capital projects to the Walker Jones contract through the execution of a change order. Even after that concept was abandoned, Jannarone acted as if it was a foregone conclusion that Banneker would be awarded the contract. After DCHE issued the RFQ, but before the proposals were due, Jannarone directed Karim to prepare cash flow projections for DPR capital projects. It was inappropriate for an official involved in the procurement to communicate with a single bidder about the work while the procurement was pending, and the exchange bespeaks a bias on Jannarone's part in favor of Banneker. But we concluded that neither the subject

matter of the communication nor Jannarone's apparent mindset gave the Banneker-Regan team an actual advantage given the manner in which the procurement was carried out, the scores fairly awarded by disinterested panel participants, and the fact that budget information played no role in the procurement.

- Another question that arose was why, if the selection panel chose "Banneker-Regan" as the project manager, was the contract executed with Banneker alone? That circumstance arose out of the terms of the mentoring relationship Regan established with Banneker, over which city officials exerted no control. Pursuant to agreements between the two private parties, Regan was the signatory on the project management contract on Walker Jones, and it executed a subcontract bringing Banneker on as a consultant for 33% of its fee. The roles were reversed on Deanwood and the DPR projects, and Banneker's share was increased, as Regan was committed to Banneker's advancement to the leadership position.

Although we conclude that no further investigation is warranted into the decision to transfer funds from DPR through DMPED to DCHA or the selection of Banneker as project manager, certain of the explanations given for those decisions did not hold up under close scrutiny.

Review of Justifications Provided to the Council

- One reason for the transfer of the projects to DCHA that was advanced by city officials at the initial Council hearings was DMPED's need to utilize the superior construction management expertise available at the housing agency. But this explanation did not align with the plain terms of the MOU or the manner in which the arrangement was actually implemented. The MOU between DMPED and DCHA engaged DCHA only to perform contract administration services and serve as a "pay agent." DCHE staff reviewed Banneker invoices for accuracy, but they compared them to budgets that had been supplied to them by DMPED and Banneker, and they relied on DMPED – which they referred to as DCHA's "client" – to verify that the work had been performed and the expenditures were reasonable and necessary. DMPED remained in full control of the projects: it negotiated the terms of the project management contract with Banneker, approved Banneker's invoices, and directed and oversaw Banneker's work. Indeed, DMPED resisted DCHE's attempts to provide guidance on the terms of the contract. So while we did not uncover evidence establishing that the capital funds were transferred for the purpose of avoiding Council oversight, there was little evidence to support the publicly proffered justification that DMPED wanted to utilize the superior construction management expertise available at DCHA.
- Similarly, DMPED and Banneker took the position that the 9% mark-up on amounts due consultants was a reasonable fee – even on top of the \$4.2 million fixed fee – since it was Banneker that would be responsible for procuring and contracting with the design professionals and that would be at risk for their negligence or breach of contract. But in

fact, the Banneker contract specifically relieves the project manager of any liability for the consultants' performance or misconduct.

- DMPED and other city officials publicly defended the Banneker contract on the grounds that it had been “competitively bid.” But the decision to proceed by RFQ – while not unusual or inherently improper – did not provide for any price competition at all. It is our view that the District would have been better served by a process that solicited price proposals, either at the outset or after the most qualified firms had been identified via the RFQ. The total to be paid once the mark-up on consultants was added to the fixed fee sparked a great deal of public second-guessing and discussion; price competition would have opened the process to other bidders and established some basis for confidence that the work was actually being performed at the lowest cost.
- Finally, while the Banneker procurement and the terms of its contract were explained at the Council hearings as the replication of a formula that had previously worked well at Walker Jones and Deanwood, in March of 2009, it was premature to assess the success of Deanwood, and in fact, Deanwood was handled quite differently. The MOU from DPR to DMPED in that instance expressly recognized the need for Council approval; DMPED, and not DCHA, conducted the procurement for the project manager; the project management contract was awarded after a procurement process that solicited competitive price proposals; and the contract did not include the controversial 9% mark-up.

Events Occurring After the Council Inquiry Began

We also reached conclusions about questioned events that transpired after the Council inquiries were underway.

- On December 9, 2009, DMPED and DCHA amended their MOU to increase the number of parks and the total amount of capital funds transferred to the housing agency. On the same date, DCHE and Banneker executed a change order to the project management contract, expanding the scope of the work and revising the fee arrangement, while reducing and capping the controversial 9% mark-up. We found that these actions were simply part of an effort led by DMPED to present a complete package to the Council for approval at that time. The parties took steps to ensure that the paperwork finally reflected the full scope of the work, and they amended the contract to address Councilmembers' concerns in the hope of securing approval so that work could proceed. While the effort was ultimately unsuccessful, there is nothing about it that warrants further investigation.
- There were some within DCHA who agreed that moving forward to seek Council approval was the right course of action. There were others, in particular, William Slover, then Chair of the DCHA Board of Commissioners, who felt that in light of the Council's decision to cut off the flow of funds for the projects, the agency would be better advised to terminate its MOU with DMPED and conclude its involvement in the projects. Slover had also raised a number of questions about the terms of the Banneker contract. The Mayor made the decision to remove the Chair in November, but we did not find that the personnel action was motivated by a desire to silence a critic. The Mayor's action was

prompted by the Attorney General, who was frustrated at the time that the General Council of DCHA was proposing a course of action other than the one that the Attorney General had recommended. The Attorney General suggested that therefore, a change in leadership at DCHA was required. The Chair served at the will of the Mayor in any event.

- The \$2.5 million payment to Banneker on Christmas eve came as a shock to Council members who had formally disapproved the contract nine days before. We found that DCHA made the decision to pay the outstanding invoices, under some prodding by David Jannarone at DMPED, in a good faith effort to make contractors who had already performed work whole and to bring the agency's involvement in the projects to a close. While the CFO of DCHA expressed reservations at the time, and the report raises questions about the legal underpinnings for the settlement agreement and the decision to issue the payment without broader notification or consensus, the matter does not require further examination. We found no evidence that the Mayor or the Attorney General were involved.

Banneker's Management of the Projects

Our investigation went on to reach certain findings and conclusions concerning Banneker's management of the DPR projects: in particular, its selection of LEAD to perform engineering services and its procurement of certain general contractors to build the individual projects. It is with respect to these issues that we conclude that further investigation is warranted.

The Selection and Payment of Liberty Engineering & Design

- Banneker selected LEAD to perform all of the engineering work on all of the projects. LEAD was a year-old, two-man firm, and only one of its two principals was a licensed professional engineer. LEAD had not previously been hired to provide the full range of civil engineering services on a large scale public recreation project.
- Immediately after it was notified of DCHE's intent to award it the project management contract, Banneker hired LEAD on a sole source basis to provide consulting services and to survey the sites. There was no licensed surveyor at LEAD.
- Banneker subsequently issued an RFQ seeking a firm to perform all of the civil engineering services – civil engineering, geotechnical engineering, environmental assessments, structural engineering, testing and inspection, and also, the surveys – for all of the parks. The RFQ required participation by a firm identified by the Department of Small & Local Business Development as a "Certified Business Enterprise."
- While LEAD met few of the limited set of other criteria set out in the RFQ, Banneker selected it on the grounds that it was the only respondent that met the CBE requirement. Price played no role in the procurement.

- LEAD’s response to the RFQ was false in several material respects. In particular, LEAD misrepresented its capacity, and it provided resumes falsely identifying individuals who worked elsewhere as LEAD employees. Based on facts uncovered about the relationship between Skinner and Karim, and Banneker and LEAD, there is reason to believe that Karim knew or should have known that LEAD’s RFQ response was inaccurate and that it significantly exaggerated LEAD’s qualifications.
- Banneker did not involve Regan – which was supposed to have responsibility for half of the parks – with respect to either the original sole source arrangement or the subsequent consulting services contracts with LEAD. Banneker assumed sole responsibility for the pricing and procurement of the engineers.
- After LEAD was awarded the engineering work, it did little of the work itself. It engaged other, non-CBE firms to perform the surveying and civil engineering and to draft the environmental site assessments while it provided “management, direction, and supervision.”
- While LEAD’s “management” of the other engineers amounted to little more than scheduling and transmitting their work product, it submitted invoices to Banneker that marked up its payments to those engineers by more than 125%. Surveys were marked up by more than 400%. Thus, Banneker’s selection of LEAD, as opposed to a firm with the capacity to perform the work itself, added an extremely expensive layer of management to the projects, resulting in, at the very least, considerable waste to the taxpayers.
- While Banneker was on notice of LEAD’s reliance on other engineering firms, there is no evidence that Banneker required LEAD to produce records of its costs before applying its 9% markup and transmitting LEAD’s invoices to DMPED and DCHE for payment.
- There is no evidence that Banneker negotiated with LEAD before accepting its proposed pricing structure; indeed, Banneker submitted LEAD’s overpriced invoices for the first five surveys to DMPED – applying the 9% mark up – before it had even executed a contract with LEAD determining what the survey prices would be.

**The Relationship between Skinner and Karim
and the Witnesses’ Testimony on those Matters**

How did this happen? The investigation has uncovered multiple ties between Skinner and Karim that may bear on the questions presented to the Special Counsel. At one time, Skinner represented himself as being affiliated with Banneker Ventures: he was issued a Banneker Ventures business card with a phone extension and email address there, and he testified in an unrelated matter that Banneker was one of the clients for whom he sought to develop government business opportunities. Karim and Skinner also worked together through their sole

proprietorships – Liberty Law Group and Liberty Industries – which they started in 2007. According to one of their clients, their efforts were also related to assisting would-be city contractors. Bank records reflect that Karim’s Liberty Law Group paid Skinner’s Liberty Industries more than \$1,000,000 between 2008 and 2010 for services that neither witness could or would explain. The businesses had separate bank accounts, but they utilized the same office address – an address that was also used by Banneker Ventures and LEAD. Indeed, Karim’s Liberty Law Group was paying at least some portion of the rent for the office suite at the very time that LEAD was obtaining work from his construction firm.

These connections and transactions were not fully clarified in the course of the investigation, but the inability to plumb the depths of the issues cannot be attributed to any lack of effort on the part of the Council or the Special Counsel. The Council was forced to resort to court proceedings to secure Sinclair Skinner’s appearance at the hearings to which he had been subpoenaed. But when Skinner testified pursuant to the court order, his counsel objected to questions related to Liberty Industries and the payments from Liberty Law Group on relevance grounds, and he directed Skinner not to answer them. Karim appeared for his deposition, but he also refused to answer questions or produce documents related to Liberty Law Group or Liberty Industries. Ultimately, Skinner agreed to answer the questions, and the court granted the Council’s motion to compel Karim to do so. But despite the court order and the promise of cooperation, the witnesses did not answer the questions in any substantive way when they appeared a second time. Instead, they repeatedly responded: “I don’t recall.”

Karim, Skinner, and Skinner’s partner at LEAD, Abdullahi Barrow, professed to be unable to remember basic facts about their businesses, such as how many people they employed, how they came to work with each other, how they spent their time, or the nature of the work they

performed for their clients. The obfuscation was particularly comprehensive when the questions turned to the relationship between Skinner and Karim and the connections between Banneker Ventures, Liberty Law Group, and Liberty Industries. Karim failed to produce any records related to Liberty Law Group. He could not recall why anyone had ever hired his firm for anything other than “community consulting,” which he defined as “consulting in the community.” Skinner could not recall the specific reason behind a single payment he received at Liberty Industries from Liberty Law Group, but he swore that none had anything to do with the DPR capital projects. The only thing Karim and Skinner could say about the million dollars that changed hands was that Liberty Industries had performed unspecified “consulting” services for Liberty Law Group. The witnesses’ claimed failure of recollection was so extensive and so complete that it was unworthy of belief. Karim and Skinner essentially thwarted the investigation, and their performance left us with the clear impression that they believed they had something to hide.

The Selection of the General Contractors

The problems went beyond possible improprieties in Banneker’s selection of LEAD. Our investigation also discovered that Banneker led the procurement of the general contractors, even for the parks within Regan’s portfolio, and that it recommended that contracts be awarded to several firms with financial ties to either Karim or Skinner: Blue Skye Construction, AF Development, Capital Construction, and District Development Corp. Bank records revealed that all of these successful bidders made substantial payments to either Liberty Law Group or Liberty Industries close in time to procurement of the general contractors, but the payments were not disclosed during the selection process, and neither Karim nor Skinner would explain to us the reasons behind those payments.

The Need for Further Investigation

Thus, the testimony that was provided and the records we reviewed give rise to concerns about the arms length nature of Banneker's award of DPR work to LEAD and to others. We find that LEAD submitted a false proposal in connection with its effort to obtain city contracts, and that its invoices were grossly inflated, and that there is reason to believe that Karim knew or should have known about LEAD's lack of capacity and its unsupportable profits. In their refusal to offer any satisfactory explanation for their financial dealings, Karim and Skinner have left open the question of whether Karim's payments to Liberty Industries or the fees paid to Liberty Law Group by other contractors indicate the existence of undisclosed conflicts of interest, or worse, an unlawful scheme. A reading of the witnesses' unresponsive testimony in its entirety also raises the question whether the "I don't recall" incantation was knowingly false or designed to obstruct the investigation. For these reasons, while we express no view as to the likely outcome of a future inquiry, given the limits on the investigative tools available to us as Special Counsel, we recommend that the Council refer these matters to the United States Attorney for further examination.

Conclusions about Government Oversight

Finally, we conclude that Banneker was able to direct such a large proportion of the dollars expended on the DPR projects in 2009 to LEAD because of a failure of oversight on the part of DCHE and particularly, DMPED. DCHE personnel reviewed Banneker's invoices to ensure that project expenditures were in accordance with project budgets, and they checked for arithmetic errors and supporting documentation. But they deferred to their "client," DMPED, to assess whether the work claimed in the invoices was actually performed and properly priced. Even in its limited role, DCHE should have asked more questions about LEAD's invoices when

there was no indication that Banneker had sought approval to hire LEAD under the terms of the project management contract DCHE was being paid to administer.

DMPED, for its part, simply relied on Banneker to review the invoices submitted by its consultants, and it took no action to question LEAD's charges even though the DMPED project manager, Jacqui Glover, observed that they were high. She was well aware that LEAD was actually subcontracting the work to other firms, but she signed off on the invoices even in the absence of records reflecting LEAD's costs for those subcontractors.

Ultimately, while we are recommending further investigation with respect to Banneker, LEAD, and Skinner and Karim's other business entities only, our review uncovered areas for improvement across the board as many government officials share responsibility for what took place. District officials gave priority to the need for speed while ignoring the preference for price competition that is embodied in both District and DCHE procedures and would have better served the District's interests. DMPED was operating under an assumption that Banneker would end up with the project management contract, and when the time came to negotiate its terms, there was a lack of hard bargaining on the city's side. Terms from previous contracts that were favorable to Banneker were repeated without an exploration of their continued justification, and DMPED brushed aside DCHA's attempts to take time to improve the contract. This combination of expedition, inattention, and inertia left the city vulnerable to complaints that there had been at least an appearance of impropriety, and the use of the RFQ left city officials unable to point to proof that would dispel complaints that the deal was too rich for Banneker.

The Council was told that funds and authority were transferred from DPR to DMPED in an effort to supplement DPR's construction management capacity. But DMPED was just getting its construction team off the ground, so it transferred funds and authority to DCHA – and agreed

to pay DCHE \$700,000 – to tap into *its* superior construction management expertise. But DMPED turned a deaf ear when DCHE tried to offer that input. And in the end, DCHE was not expected to serve as the project manager either. At DMPED’s direction, DCHE paid to engage a private firm to hire and manage the consultants and contractors, and Banneker, once selected for that role, selected an engineering firm that did little more than hire and manage its own contractors. All of these multiple layers of management led to a significant waste of taxpayer funds.

In addition, the successive hand-offs resulted in such a diffusion and dilution of responsibility that in the end, no one in government took ownership of the projects, and Banneker was presented with an opportunity it may have exploited for the benefit of LEAD and possibly others. Banneker was considered and selected for the award in combination with Regan, but the firm took advantage of its lead position. DCHE held Banneker’s contract, but DMPED retained control of the projects and the project manager, and neither agency paid sufficient attention. Both agencies fell short in their roles and both promptly pointed fingers at the other when problems with the contracts first came to light.

In light of all of the facts and circumstances to be set forth in detail below, we recommend that the Council refer the matters related to Banneker, LEAD, and Banneker’s selection of the general contractors to the United States Attorney for further investigation and that the Council consider the additional legislative recommendations set forth at the conclusion of this report.

SCOPE OF THE INVESTIGATION

A. How It Began

On October 22, 2009, four members of the Council of the District of Columbia (“Council”) wrote a letter to Mayor Adrian M. Fenty, stating that it had come to their attention that week that “tens of millions of dollars in contracts are being awarded through the District of Columbia Housing Authority.”⁴ They noted that “Funding for these contracts appears to be directed from District government agencies for projects related to parks, recreation centers and fields.” The Council members voiced their concern that the “transfer of procurement authority may circumvent District procurement laws” and was not sufficiently transparent.⁵ They also pointed out that “work appears to have been started or completed on projects over \$1 million without Council approval.”⁶

One of the questions raised by the Council and in ensuing media reports was why funding for DPR projects was transferred from DPR to the Deputy Mayor for Planning and Economic Development (“DMPED”), and then again from DMPED to DCHA and its wholly-owned subsidiary, District of Columbia Housing Enterprises (“DCHE”).⁷ Questions were also raised about the award of the multi-million dollar project management contract to Banneker Ventures

⁴ Ex. 3, Letter from Kwame Brown, Chair, Committee on Economic Development, Marion Barry, Chair, Committee on Housing and Workforce Development, Mary Cheh, Chair, Committee on Government Operations & the Environment, and Harry Thomas, Jr., Chair, Committee on Libraries, Parks & Recreation, to Adrian M. Fenty, Mayor of the District of Columbia (Oct. 22, 2009).

⁵ *Id.*

⁶ *Id.*

⁷ Nikita Stewart, D.C. Council Questions Parks Projects It Didn’t Approve, Wash. Post, Oct. 23, 2009, at B1.

LLC (“Banneker Ventures” or “Banneker”), a company owned by Omar Karim, a fraternity brother of Mayor Fenty’s,⁸ and about Banneker’s award of the civil engineering contract for the projects to a company owned in part by Sinclair Skinner, also a friend and fraternity brother of the Mayor’s.⁹

In light of these questions, the four Council members, each the chair of a committee with relevant oversight responsibility, convened a joint public oversight roundtable on October 30, 2009 to examine the DPR capital projects.¹⁰ At the roundtable, City Administrator Neil Albert and several other District officials testified about the projects. In addition, community members spoke out about their concerns over the contracting and procurement process.¹¹

B. The Authorizing Resolution

Based in part on testimony presented at the October 30 roundtable, the Committee on Libraries, Parks and Recreation (“the Committee”) found that the circumstances surrounding the

⁸ *Id.*

⁹ Stewart, Wash. Post, Oct. 31, 2009.

¹⁰ Pursuant to Council Rule 501(c), “a committee may hold a roundtable on any matter related to the affairs of the District that is properly within the committee’s jurisdiction.” In essence, a roundtable meeting is similar to a hearing except for the notice requirements involved. Rules for the Council of the District of Columbia, Council Period 18 Resolution of 2009, effective January 2, 2009 (Res. 18-1, 55 DCR 784) (“Council Rules”). The roundtable was convened by Kwame Brown, Chair, Committee on Economic Development, Marion Barry, Chair, Committee on Housing and Workforce Development, Mary Cheh, Chair, Committee on Government Operations & the Environment, and Harry Thomas, Jr., Chair, Committee on Libraries, Parks & Recreation.

¹¹ Joint Public Oversight Roundtable on the Contracting Process Related to Parks and Recreation Before the Committee on Economic Development, the Committee on Housing and Workforce Development, the Committee on Government Operations & the Environment, and the Committee on Libraries, Parks & Recreation (hereinafter “Joint Roundtable”), 18th Council Period (D.C. Oct. 30, 2009); *see also* Nikita Stewart, *Contractor Chose Firms Linked to Fenty, D.C. Council Told*, Wash. Post, Oct. 31, 2009, at B1.

transfer of DPR funds demonstrated “inadequate controls and accountability over the budget process,” and that the “unanswered and potentially inappropriate involvement of [DPR] and other District agencies” warranted an investigation.¹² Accordingly, on November 2, 2009, the Committee passed the Committee on Libraries, Parks and Recreation Budget Transparency Investigation Authorization Resolution of 2009 (“Authorizing Resolution”).

The Authorizing Resolution directed the Committee to investigate the following:

- “A determination of policies, procedures, or other practices surrounding the transfer of funds or authority via memoranda of understanding, or any other instrumentality, for Department of Parks and Recreation capital projects;”
- “All funds concerning Department of Parks and Recreation capital projects;” and
- “All relevant facts and circumstances related to the matters listed above to determine what, if any, legislative action may be appropriate.”¹³

¹² Ex. 4, Committee on Libraries, Parks and Recreation Budget Transparency Investigation Authorization Resolution of 2009, effective November 2, 2009 (56 DCR 8724) (the “Authorizing Resolution”). The Authorizing Resolution was amended by the Committee on Libraries, Parks and Recreation Resolution Budget Transparency Investigation Amendment Resolution of 2010, effective March 9, 2010 (57 DCR 3210) (Ex. 5, the “Special Counsel Resolution”).

¹³ Ex. 4, Authorizing Resolution § 3(1)-(3).

The Authorizing Resolution granted the Committee authority to use subpoenas to compel the attendance of witnesses, to obtain testimony, and to require the production of documents or other information or tangible items.¹⁴

The Committee then held a series of joint roundtables on November 5, 2009, November 16, 2009, December 2, 2009, December 10, 2009, January 8, 2010, and January 27, 2010.¹⁵ Among the witnesses that appeared before the Committee were representatives of DPR, DMPED, DCHA, DCHE, the Office of Contracting and Procurement (“OCP”) and the Office of the Chief Financial Officer (“OCFO”). In addition, Omar Karim testified on behalf of Banneker Ventures, alongside two representatives of Regan Associates LLC, the firm that shared project management duties with Banneker. Several members of the public also testified.

The Committee also sought the testimony of Sinclair Skinner. Skinner was a founder and principal of Liberty Engineering & Design (“LEAD”). LEAD was hired by Karim’s company, Banneker Ventures, to perform civil engineering, geotechnical, environmental, and surveying services for the DPR capital projects. After Skinner failed to appear to testify,¹⁶ the Council

¹⁴ Ex. 4, Authorizing Resolution § 4. In addition, on November 5, 2009, Councilmember-at-Large Brown formally requested that the District of Columbia auditor conduct an audit of the contract and procurement practices related to the DPR capital projects. Ex. 6, Letter from Deborah K. Nichols, District of Columbia Auditor, to Adrienne Todman, Interim Executive Director, DCHA (Nov. 16, 2009).

¹⁵ Like the October 30, 2009 joint roundtable, these roundtable meetings were also conducted jointly with the Committee on Economic Development, the Committee on Housing and Workforce Development, and the Committee on Government Operations & the Environment.

¹⁶ Ex. 7, Letter from Harry Thomas, Jr., Chair, Committee on Libraries, Parks and Recreation, to Sinclair Skinner, Liberty Engineering and Design, PLLC, Dec. 8, 2009; Ex. 8, Subpoena to Sinclair Skinner issued by Council member Harry Thomas, Jr., Chair, Committee on Libraries, Parks and Recreation of the Council of the District of Columbia, Jan. 14, 2010.

moved to enforce its subpoena in the Superior Court of the District of Columbia.¹⁷ On February 26, 2010, the Superior Court granted the Council’s petition, and ordered Skinner to appear and provide testimony before the Committee, subject to a \$5,000 fine for the day of his non-appearance and a \$1,000 fine for every subsequent day that he failed to appear.¹⁸ Skinner appeared before the Committee on April 15, 2010.

C. The Special Counsel Resolution

In light of Skinner’s recalcitrance, the Committee sought the assistance of outside counsel in taking Skinner’s testimony. The Committee also requested assistance in reviewing the facts relating to the DPR capital projects and determining whether further action was warranted. Accordingly, on March 9, 2010, the Committee unanimously approved the Committee on Libraries, Parks and Recreation Resolution Budget Transparency Investigation Amendment Resolution of 2010 (“the Special Counsel Resolution”). The Special Counsel Resolution appointed Robert P. Trout of Trout Cacheris PLLC as Special Counsel,¹⁹ and directed him to do the following:

- “Review all material he deems appropriate concerning this investigation;”
- “Conduct a thorough review of District laws to determine if the circumstances surrounding the transfer of capital funds, the subsequent awarding of contracts, or the approval and expenditure of funds warrant further review of the United States Attorney for the District of Columbia or any other investigative or enforcement agency;”

¹⁷ Pursuant to D.C. Official Code section 1-204.13, which authorizes the Council to petition the Superior Court of the District of Columbia to enforce a Council subpoena on a witness, the Committee adopted the Enforcement of Subpoena of Sinclair Skinner Resolution of 2010, effective February 2, 2010 (Res. 18-379). *See Ex. 9.*

¹⁸ Ex. 10, *Council of the District of Columbia v. Sinclair Skinner*, No. 1122-2010 (D.C. Super. Ct. Feb. 26, 2010) (order granting consent motion).

¹⁹ Ex. 5, Special Counsel Resolution, § 3a.

- “Make any recommendations that he may have for any necessary changes to District laws;” and
- “Examine any other areas or matters that may be necessary to assist the Committee as determined by the Chairman.”²⁰

The Special Counsel Resolution also provided that the “Special Counsel is permitted, through the Committee, to utilize subpoenas to obtain testimony and documents” and provided that the Special Counsel may take testimony of witnesses by deposition.²¹ It noted that the Chairman of the Committee may “retain and delegate investigative duties to Mr. Trout,” and that Mr. Trout would provide his services on a *pro bono* basis.²² Finally, the Special Counsel Resolution directed Mr. Trout to issue a report within 60 days of the conclusion of the investigation.²³

Other attorneys from Trout Cacheris assisted Mr. Trout in this investigation.

D. Methodology

At the outset of the investigation, we were briefed by Council staff on District budgeting and contracting policies and procedures and on the status of the Committee’s investigation. We researched the applicable laws governing contracting, procurement, and budgeting in the District of Columbia. We reviewed the information already collected by the Committee, including numerous documents and the testimony taken at the seven hearings held by the Council between

²⁰ Ex. 5, Special Counsel Resolution, § 3a(c)(1)-(4).

²¹ Ex. 5, Special Counsel Resolution, § 3a(e)-(f).

²² Ex. 5, Special Counsel Resolution, § 3a. The Committee did not authorize or provide funding for forensic accountants or experts in construction management or government contracts.

²³ Ex. 5, Special Counsel Resolution, § 3a (c)(5).

October 30, 2009 and January 27, 2010. Approximately 45 witnesses appeared during these roundtables (some more than once), providing more than 45 hours of testimony.

Using that information as a baseline, we proceeded to gather facts and evidence by means of document subpoenas and requests, Committee hearings, depositions and interviews.

1. Document collection and review

After reviewing the documents gathered by the Committee, we issued 14 document subpoenas pursuant to our authority under the Special Counsel Resolution and Council Rule 611 and made additional document requests.²⁴ We collected and reviewed thousands of documents from a variety of sources, including District agencies and private contractors and subcontractors who worked on the DPR capital projects. We also subpoenaed bank records of Banneker Ventures and LEAD, as well as Liberty Law Group, a law and consulting firm owned by Omar Karim, and Liberty Industries, a consulting firm owned by Sinclair Skinner.

Our efforts to obtain documents were at times hindered by incomplete and delayed productions. For example, on April 7, 2010, we issued a subpoena to Sinclair Skinner for documents relating to LEAD's activities, to be produced at the time of his appearance before the Council on April 15, 2010.²⁵ Skinner made a partial production on April 15. He made a second production on April 26 and a third production on April 27, which he described as final and

²⁴ Council Rule 611 states: "The Council, any standing committee of the Council, and, if authorized by the Resolution establishing it, any special committee, may subpoena the attendance and testimony of witnesses and the production of documents and other tangible items at meetings, hearings, and depositions in connection with an investigation...."

²⁵ Ex. 11, Subpoena to Sinclair Skinner issued by Council member Harry Thomas, Jr., Chair, Committee on Libraries, Parks and Recreation of the Council of the District of Columbia, Apr. 5, 2010.

complete.²⁶ Skinner then appeared before the Council a second time on April 28, and during that appearance we requested several specific documents that had not been produced.²⁷ Skinner then made a fourth production of documents on May 7²⁸ and a fifth production on May 24,²⁹ representing again that this was a final and complete production.³⁰ Yet on May 28, 2010, Skinner produced a *sixth* set of responsive documents,³¹ and still failed to produce documents that should have been in LEAD's possession if its records had been adequately maintained.

We also experienced delays and a seriously inadequate response in our efforts to obtain documents from Omar Karim and Banneker Ventures. Banneker's initial production of documents to the Council was notably incomplete. To take one important example, e-mails were produced with critical attachments missing. We issued a follow-up subpoena to Karim, which was met with the assertion that no production could be accomplished without significant delay.³² In the end, no additional documents or records were provided by Karim or Banneker, and we did

²⁶ See Ex. 12, Letter from A. Scott Bolden, Counsel for Sinclair Skinner, to Robert Trout, Special Counsel to the Council of the District of Columbia, Apr. 27, 2010.

²⁷ Joint Roundtable (April 28, 2010) 6:2-11; 136:17-137:14.

²⁸ See Ex. 13, Letter from A. Scott Bolden, Counsel for Sinclair Skinner, to Robert Trout, Special Counsel to the Council of the District of Columbia, May 7, 2010.

²⁹ See Ex. 14, Letter from A. Scott Bolden, Counsel for Sinclair Skinner, to Robert Trout, Special Counsel to the Council of the District of Columbia, May 24, 2010.

³⁰ See Ex. 15, Letter from Robert Trout, Trout Cacheris PLLC, to A. Scott Bolden, Reed Smith, June 4, 2010.

³¹ See Ex. 16, Letter from A. Scott Bolden, Reed Smith, to Robert Trout, Trout Cacheris PLLC, May 28, 2010.

³² See Ex. 17, E-mail from Lawrence Sher, Reed Smith, to Robert Trout, Trout Cacheris PLLC (July 20, 2010, 11:55 EST).

not receive any indication that they made any effort to search for documents in response to our subpoena.

The process of obtaining documents from District agencies also moved slowly, for a number of reasons. First, facts learned during the investigation caused us to issue more than one document request to certain agencies. Second, some agencies took a significant amount of time to provide documents, requesting successive extensions to our deadlines. Third, some agencies produced e-mails without attachments, and other agencies produced documents in a manner that made it difficult to correlate e-mails with their attachments, adding additional time to our review.³³ We also do not believe that we received complete productions from any of the agencies involved since, among other things, we received many e-mails where a copy was produced by the sending or receiving party but not by the other.

2. Skinner's testimony before the Council

Shortly after the Special Counsel was appointed, we took the lead in questioning Sinclair Skinner, one of the principals of LEAD, during his court-ordered testimony before the Committee on April 15, 2010 and again on April 28, 2010. During both appearances, Skinner, through his counsel, refused to answer questions that he claimed were outside of the scope of the investigation.³⁴ Among other things, these questions related to the activities of Liberty Industries, LLC, a company solely owned by Skinner, and its relationship to Liberty Law Group, a firm solely owned by Omar Karim. Special Counsel pursued these inquiries because the evidence showed close ties between Skinner and Karim through their companies, including transfers of

³³ See, e.g., Ex. 18, E-mail from Amy Jackson, Trout Cacheris PLLC, to Kelly Kramer, Nixon Peabody LLC (Oct. 28, 2010, 1:35 PM EST).

³⁴ See, e.g., Joint Roundtable (Apr. 15, 2010) 143:11-145:3 (refusing to answer questions about Liberty Industries or Liberty Law Group).

more than one million dollars from Liberty Law Group to Liberty Industries between 2008 and April 2010. The relationship between Skinner and Karim raised serious questions about whether the contracts for engineering work were awarded in a fair and open manner. Although Skinner's objections to our inquiries about Liberty Industries and Liberty Law Group were overruled,³⁵ Skinner's counsel nevertheless directed him not to answer or provide related documents. The Committee held Skinner's appearance open at the conclusion of the April 28, 2010 hearing subject to resolving these objections.³⁶

After meetings with Skinner's counsel, we were advised that Skinner had changed his position and would testify about the subjects he had previously claimed were outside the scope of the investigation. By agreement, the follow-up testimony was taken by deposition. Because of Skinner's continuing objections and scheduling conflicts, that deposition was not held until October 6, 2010, nearly six months after Skinner's original appearance before the Committee. As will be discussed in more detail below, however, Skinner's professed willingness to testify proved illusory.

3. Depositions and interviews

In addition to Sinclair Skinner, we deposed 14 witnesses, either through their voluntary

³⁵ See, e.g., Joint Roundtable 145:4-145:15 (Apr. 15, 2010); see also Council Rule 621 (providing that a witness may claim statutory or common law privileges recognized by the Superior Court of the District of Columbia, but if the presiding member determines the claim of privilege is not warranted, he or she shall direct the witness to answer the question, and a continued claim of privilege constitutes contumacy by the witness).

³⁶ Joint Roundtable (Apr. 28, 2010) 137:15-19.

cooperation or testimonial subpoenas.³⁷ The deponents included District government employees, as well as contractors and subcontractors for the DPR capital projects. Several depositions were conducted in executive session,³⁸ but have since been released for use in this Report.

We filed a motion to compel with regard to one witness: Omar Karim. Karim appeared for a deposition, but refused to answer questions or to produce documents related to Liberty Law Group and his relationship with Sinclair Skinner and Liberty Industries. Karim, like Skinner, claimed that these questions were irrelevant to the investigation.³⁹ Karim similarly refused to answer questions about ties between Liberty Law Group and other companies that also were awarded contracts to work on the DPR capital projects. Accordingly, Special Counsel sought permission from the Council to file a motion to compel, which was granted in a resolution passed unanimously on August 12, 2010.⁴⁰ On September 17, 2010, the Superior Court entered an order finding that these issues were within the bounds of the investigation, and ordering Karim to

³⁷ Depositions were taken at the Council's chambers in the John A. Wilson Building and, as is the Council's practice, were preserved by audiotape recording, using the technology made available to us by the Council. After each deposition, electronic copies of the audiotapes were provided to the witness or their counsel. The audiotape of each deposition was subsequently transcribed. We learned after the fact that due to errors in the operation of the recording equipment during four of the depositions, some portions of the witnesses' testimony were not captured on the recordings. We advised counsel for each of these deponents of the recording issues, and provided them with the opportunity to propose solutions that would leave each deponent satisfied that the record accurately reflected his or her statements. We also provided counsel for these deponents with copies of our detailed notes of the depositions and with the opportunity to review this Report before final submission to the Council. We have not been advised of any inaccuracies in our descriptions of the witnesses' statements. Where we rely on any portions of the testimony that were not recorded, we treat that testimony as an un-sworn interview, and cite to them as "Dep. Notes."

³⁸ See Ex. 19, Council Rule 504.

³⁹ Deposition of Omar Karim (August 5, 2010) at 76:1-14. Karim, Skinner and their companies were represented by the same counsel in this investigation.

⁴⁰ Ex. 20, The Enforcement of Subpoena of Omar Karim Resolution of 2010, effective August 12, 2010 (Res.18-615).

answer questions and to produce the documents relating to Liberty Law Group that he had previously refused to provide.⁴¹ Karim, however, did not produce any additional documents. He was re-deposed on September 21, 2010. But as described more fully below, his testimony was more evasive than responsive, and he provided virtually no meaningful information about the activities of Liberty Law Group or Liberty Industries.

In addition to taking depositions, we interviewed 30 witnesses, including contractors, architects and engineers who worked on the DPR capital projects, employees and former employees of a number of District agencies, Councilmember Harry Thomas, Jr., and Attorney General Peter Nickles. Because the projects were originally slated in 2008 to be managed by the Office of Public Education Facilities Modernization (OPEFM), and were again transferred to OPEFM after the Council's action in December 2009, we interviewed Allen Lew, then Executive Director of OPEFM, and the two OPEFM project managers who were assigned responsibility for the projects: Will Mangrum of Brailsford and Dunlavey and Marcos Miranda of McKissack & McKissack, about those circumstances.⁴² Since, as noted above, the appointment of Special Counsel did not provide for the engagement of independent experts in construction management or any other field, we asked the project managers, engineers, architects, and others we did interview to shed light on industry practices in general and their practices in particular, and while

⁴¹ Ex. 21, *Council of the District of Columbia v. Omar Karim*, No. 1122-2010 (D.C. Super. Ct. Sept. 17, 2010) (order granting motion to compel testimony and compliance with Council subpoena duces tecum).

⁴² While the projects were originally assigned to OPEFM, Brailsford and McKissack worked on the RFP for design-build services that was issued by OPEFM on February 2, 2009. See Ex. 22, D.C. Office of Public Education Facilities Modernization, Request for Proposals, Design-Build Renovation Services, Recreation Centers, Solicitation #: GM-09-M-0204-FM (Feb. 2, 2009). Brailsford also submitted a response to the project management RFQ issued by DCHE on March 9, 2009, but was not chosen. McKissack did not respond to the DCHE RFQ.

we do not proffer these comments as expert opinion, we include them in the report where relevant.

We also requested the opportunity to depose or interview Mayor Adrian Fenty. Responding on behalf of the Mayor, the Attorney General asserted that the Council did not have the authority to compel the Mayor to testify, and declined our request for a deposition.⁴³ However, he indicated that the Mayor would answer a limited number of written questions:

... in the spirit of transparency and cooperation, I am informed that the Mayor is willing to answer certain specific questions that are neither privileged nor repetitive of questions already addressed by other witnesses in the investigation. In order to preserve precedent, however, I propose that the questions be submitted in writing and answered in writing. Given these parameters, I'm certain such questions would number no more than between 5-10 separate queries.⁴⁴

After consultation with the Committee and in light of the evidence already gathered, Special Counsel decided to accept the Mayor's offer to answer written questions in lieu of a deposition or interview. A copy of the written questions and the Mayor's answers is attached to this Report.⁴⁵

E. Limitations of the Investigation

Pursuant to the Special Counsel Resolution, our investigation focused on the transfer of funds and authority for the DPR capital projects to DMPED and then to DCHA, the awarding of contracts to carry out the work on those projects, and events relating to termination of the contracts and the December 2009 payment. We did not have the benefit of forensic accounting expertise in our investigation. While the Joint Roundtable hearings exposed possible funding

⁴³ See Ex. 23, Letter from Peter J. Nickles to Robert P. Trout (Dec. 3, 2010).

⁴⁴ *Id.*

⁴⁵ Ex. 24, Letter from Peter J. Nickles to Robert P. Trout (Dec. 30, 2010).

deficiencies, questions about DMPED's decisions to authorize spending in excess of amounts budgeted for particular parks or allocated for the particular fiscal year,⁴⁶ and inconsistencies between the list of projects DMPED directed Banneker to manage and the list of projects covered by the MOUs, the Committee agreed that since the D.C. Auditor was conducting a parallel investigation into those matters, questions related to reprogramming and anti-deficiency act concerns fell outside the scope of our investigation. For the same reason, we did not undertake an audit of Banneker's invoices.

One question we were asked to address was whether any of the circumstances warranted further review by the United States Attorney for the District of Columbia or any other enforcement agency.⁴⁷ As Special Counsel, we had the investigative tools provided under the Council's rules, but we did not have access to the government's full range of investigatory resources, and we could not exercise the powers available to a public prosecutor conducting a grand jury investigation, including the power to grant immunity to certain witnesses. Thus, we do not represent that we have uncovered every fact relating to the DPR capital projects. Where we have uncovered sufficient facts to give rise to a concern that potential violations of law may have occurred, or there are questions that cannot be answered without the tools available to a

⁴⁶ David Jannarone operated under the mistaken impression that DMPED had "pool authority" to move funds between projects and between fiscal years. Jannarone Dep. 93:5-94:2. DPR employees were troubled by DMPED's approach to funding and brought their concerns to Jannarone's attention on several occasions before he sought legal guidance on the issue. Ex. 25, E-mail from Bianca Fagin (DPR) to Jacquelyn Glover (EOM), Bridget Stesney (DPR), and David Janifer (DPR) (Aug. 3, 2009 2:40 PM EST); Janifer Dep. 105:5-106:10. DCHE personnel did not track this issue at all, and instead saw their task as managing the budgets provided to them by DMPED. Interview with Asmara Habte, Contractor, DCHA (Jul. 27, 2010).

⁴⁷ Ex. 5, Special Counsel Resolution.

prosecutor, we have recommended that the issues be referred for investigation by the appropriate authorities.

LEGAL BACKGROUND

This section briefly outlines several legal and regulatory issues that are relevant to the events under investigation: (1) the requirement of Council approval for District contracts of more than one million dollars; (2) the differing procurement rules applicable to different District agencies; (3) procurement requirements relating to small, local, and disadvantaged business enterprises; and (4) the use of memoranda of understanding (MOUs) as a means of transferring authority and budgetary funds between District agencies.

A. The Council Approval Requirement

Congress enacted the District of Columbia Self-Government and Governmental Reorganization Act (“Home Rule Act”) in part to delegate certain legislative powers to the District of Columbia.⁴⁸ The Home Rule Act, in a provision now codified as Section 1-204.51 of the D.C. Code, requires the Council to approve certain types of contracts to be entered by the District and its agencies before those contracts can be valid. The Mayor must submit to the Council for approval any contract for goods and services “involving expenditures in excess of \$1,000,000 during a 12-month period.”⁴⁹ The Mayor must also seek Council approval for

⁴⁸ See D.C. Code § 1-201.02(a).

⁴⁹ D.C. Code § 1-204.51(b)(1) (“No contract involving expenditures in excess of \$1,000,000 during a 12-month period may be made unless the Mayor submits the contract to the Council for its approval and the Council approves the contract (in accordance with criteria established by act of the Council).”).

multiyear contracts for goods and services.⁵⁰ In the D.C. Court of Appeals' 2007 decision in *Fairman v. District of Columbia*,⁵¹ dealing with the multiyear contract approval provision, the court held that any contract requiring Council approval that is not so approved is "invalid."⁵²

DCHA is an independent authority of the D.C. government, created in 2000 to construct and manage public housing in the District. The majority of DCHA's activities are funded by the U.S. Department of Housing and Urban Development. DCHA has also formed a wholly-owned subsidiary called D.C. Housing Enterprises ("DCHE"). DCHE carries out real estate development and construction activities on a fee basis, with its earnings going to support DCHA's mission.⁵³ Until the Committee began investigating the DPR capital projects, DCHA took the position that as a federally-funded independent authority, neither it nor its subsidiaries were subject to the Council approval requirement. As a result, Banneker's program management contract with DCHE was not submitted to the Council for approval – even though the contract amount was well in excess of \$1 million, and it involved District money, not federal funds.

⁵⁰ Congress authorized this requirement as part of the District of Columbia Appropriations Act of 1996, Pub. L. No. 104-134, § 134, Apr. 26, 1996, 110 Stat. 1321-92. It is now codified at D.C. Code section 1-204.51(c), which provides, in part: "No [multiyear contract] shall be valid unless the Mayor submits the contract to the Council for its approval and the Council approves the contract (in accordance with criteria established by act of the Council). The Council shall be required to take affirmative action to approve the contract within 45 days. If no action is taken to approve the contract within 45 calendar days, the contract shall be deemed disapproved."

⁵¹ 934 A. 2d 438 (D.C. 2007). While *Fairman* focused on the language of the multiyear contract provision, the same policies underlie the requirement for Council approval of contracts in excess of \$1 million.

⁵² *Id.* at 448.

⁵³ According to Michael Kelly, who was the Executive Director of DCHA when DCHE was created, DCHE's purpose was to use available engineers and project managers to earn non-federal dollars to supplement the funds received by DCHA from HUD. Interview with Michael Kelly, former Executive Director, DCHA (Nov. 4, 2010).

DCHA took this position despite a 1996 opinion of the District’s Corporation Counsel concluding that independent agencies were governed by the Council approval requirement,⁵⁴ and despite being advised by the Attorney General’s Office in 2007 and 2008 of its view that DCHA was subject to the requirement. DCHA only changed its position in October 2009, after the Attorney General issued a formal opinion concluding that “without any doubt,” DCHA must abide by the Home Rule Act and its Council approval provision with respect to contracts involving District funds.⁵⁵

Because of the importance of this issue to the events under investigation, it is discussed in detail in Section VI below.

B. Laws Governing District Procurements

The Procurement Practices Act (“PPA”) is the District’s primary procurement law. It is implemented through Title 27 of the District of Columbia Municipal Regulations.⁵⁶ The statute and regulations set the standards and procedures for purchases of goods and services by the District. The PPA was amended in 1997, primarily to centralize procurement authority and activities in the Office of Contracting and Procurement (“OCP”), headed by the District’s Chief

⁵⁴ Ex. 26, Opinion of Corporation Counsel, *Is Council review required for proposed contracts of independent agencies in excess of one million dollars during a 12-month period?*, May 10, 1996 (“1996 Opinion”).

⁵⁵ Ex. 27, Opinion of the Attorney General of the District of Columbia, *Whether the DCHA must seek approval of the City Council for contracts for goods and services involving expenditures in excess of \$1,000,000 during a 12-month period*, Oct. 23, 2009 (“October 23 Opinion”). The Attorney General’s opinion does not explicitly address the applicability of the Council review requirement to DCHA contracts involving federal funds, and this remains an open question.

⁵⁶ D.C. Code § 2-301.1 *et seq.*

Procurement Officer.⁵⁷ OCP personnel issue solicitations and enter contracts on behalf of District agencies. If Council approval is required, OCP submits the contract to the Council prior to execution.⁵⁸

Most, but not all, District agencies are obligated to follow the PPA and to conduct procurements through OCP.⁵⁹ However, some of the agencies that are subject to the PPA have their own procurement authority and may enter contracts without going through OCP. And certain agencies are exempt from both the PPA and OCP and may do their own contracting following their own procurement policies and procedures.

Each of the three agencies involved in the DPR capital projects falls into a different procurement regime. DPR is subject to the authority of both the PPA and OCP. DMPED is subject to the PPA but has its own procurement authority by delegation from the Mayor, and may enter contracts without going through OCP. DCHA is exempt from both the PPA and OCP.⁶⁰ It has the authority to “[a]dopt and administer its own procurement and contracting

⁵⁷ 44 D.C. Reg. 1423 (Jan. 3, 1997), codified at D.C. Code § 2-301.05.

⁵⁸ Interview with David Gagan, Chief Procurement Officer of the District of Columbia, Office of Contracting and Procurement (Jul. 28, 2010).

⁵⁹ D.C. Code § 2-301.04(a) (“Except as provided in § 2-303.20, this chapter shall apply to all departments, agencies, instrumentalities, and employees of the District government, including agencies which are subordinate to the Mayor, independent agencies, boards, and commissions . . .”).

⁶⁰ There is one exception to this exemption, regarding the Contract Appeals Board, but it is not applicable here. D.C. Law 13-105 (2000); D.C. Code § 6-219; D.C. Code § 2-303.20(m) (“Nothing in this chapter shall affect the authority of the District of Columbia Housing Authority, except that subchapter IX of Unit A of this chapter shall apply to contract protests, appeals, and claims arising from procurements of the Housing Authority.”).

policies and procedures in accordance with” D.C. Code section 6-219.⁶¹ Its subsidiary, DCHE, also has its own procurement policies.

Like the Home Rule Act, the PPA requires Council approval for multiyear contracts and for contracts in excess of one million dollars. Unlike the Home Rule Act, however, these provisions only apply to contracts governed by the PPA, and therefore do not apply to DCHA.⁶²

C. Local, Small and Disadvantaged Businesses

The Department of Small & Local Business Development (“DSLBD”) was established with the goal of fostering greater opportunities for local, small and disadvantaged businesses to participate in District contracting and procurement.⁶³ One of the ways it does this is through the Certified Business Enterprise (“CBE”) program. Local business enterprises that are also small or disadvantaged, or meet certain other criteria, may be certified as CBEs.⁶⁴ Each District agency is required to meet the goal of procuring and contracting 50% of the dollar volume of its goods and services to small business enterprises.⁶⁵ Of particular importance here, CBEs are entitled to

⁶¹ D.C. Code § 6-203(16).

⁶² D.C. Code § 2-301.05d (“Pursuant to § 1-205.51(b) the Mayor and all independent agencies and entities of the District government shall submit to the Council for approval any proposal to contract out services *covered by this act* that involves expenditures in excess of \$1,000,000 during a 12-month period.” (emphasis added)). The Home Rule Act requirement applies to contracts of any District agency whether covered by the PPA or not.

⁶³ D.C. Code § 2-218.13(a).

⁶⁴ D.C. Code § 2-218.31 through 218.37. To qualify as “local,” a business must have “its principal office located physically in the District of Columbia,” and must require “that its chief executive officer and the highest level managerial employees of the business enterprise maintain their offices and perform their managerial functions in the District,” as well as meeting other standards. D.C. Code § 2-218.31.

⁶⁵ D.C. Code § 2-218.41.

receive certain preferences from agencies when they are evaluating bids or proposals.⁶⁶ In the case of proposals, points are added to a business's score, with the number added depending on which LSDBE categories the business falls into; in the case of a bid, the statute provides for a deemed reduction in the bidder's price.⁶⁷ The statute also provides for mandatory set-asides of small contracts for small business enterprises.⁶⁸ In addition, the statute imposes requirements on the dollar volume of subcontracts to be awarded to small business enterprises or CBEs under construction contracts greater than \$250,000.⁶⁹

D. Memoranda of Understanding

District law permits District departments, offices and agencies to place orders with other District agencies for goods or services.⁷⁰ Such orders are documented in Memoranda of Understanding ("MOUs") between the agencies.

⁶⁶ D.C. Code § 2-218.43.

⁶⁷ *Id.*

⁶⁸ D.C. Code § 2-218.44. David Gragan also noted that set-asides are permissible even where not mandatory. Interview with David Gragan.

⁶⁹ D.C. Code § 2-218.46.

⁷⁰ D.C. Code § 1-301.01(k)(1) ("The Mayor may authorize the heads of District departments, offices, and agencies to place orders with any other department, office, or agency of the District for materials, supplies, equipment, work, or services of any kind that the requisitioned department, office, or agency may be in a position to supply or equipped to render; provided, that the Mayor shall submit annually to the Council a report of all Memoranda of Understanding between District agencies involving an exchange of materials, supplies, equipment, work, or services of any kind. ..."). Effective October 22, 2009, D.C. Law 18-63 amended the first sentence of subsection (k)(1), which had required the District's Chief Procurement Officer to authorize MOUs. 56 D.C. Reg. 3053 (Jul. 28, 2009). This change was proposed by CPO David Gragan. He felt that if two agency heads had already agreed that an MOU was appropriate, his review used resources and added delay, but little value. Interview with David Gragan.

Until the statute was changed effective October 2009, all MOUs had to be approved by the Chief Procurement Officer. David Gragan, the CPO through the relevant period, estimated that he signed 3 or 4 per week.⁷¹ MOUs are used for many different purposes, and often involve relatively small sums. Gragan indicated that a typical MOU might involve an agency that needs to provide a certain type of training to its employees and procures that service from another agency that has trainers on its staff.⁷² According to Gragan, MOUs are not treated as open market procurement contracts.⁷³ They are not required to be submitted to the Council for approval.

Not only did the MOUs in this case – from DPR to DMPED and then from DMPED to DCHA – transfer millions of dollars in parks funding, they also had the effect of moving procurement for the parks projects to DCHA and DCHE, which were subject to different procurement regulations than DPR and DMPED, and which took the position that they were exempt from the Council review requirement. These actions spawned the concerns that underlie this investigation.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

CHRONOLOGY OF KEY EVENTS

Date	Event
<i>February 27, 2009</i>	MOU between DPR and DMPED for up to \$40,350,000 for DPR Capital Projects.
<i>March 9, 2009</i>	Request for Qualifications (“RFQ”) for Project Management issued by DCHE.
<i>March 11, 2009</i>	DCHA Board authorizes entry into an MOU with DMPED (but the MOU is not signed until July).
<i>March 12, 2009</i>	DCHA assigns its tasks under the MOU to DCHE.
<i>March 18, 2009</i>	David Jannarone (DMPED) asks Omar Karim (Banneker) to prepare budget spreadsheets and cashflows for DPR projects.
<i>March 27, 2009</i>	13 bidders, including a team made up of Banneker Ventures and Regan Associates, submit responses to the Project Management RFQ.
<i>April 29, 2009</i>	Contractor selection panel recommends that Banneker Ventures-Regan Associates be awarded the project management contract.
<i>April 30, 2009</i>	DCHE sends notice of its intent to award the project management contract to Banneker-Regan.
<i>May 4, 2009</i>	Banneker hires LEAD under a letter agreement for consulting and surveying work on parks.
<i>May 15, 2009</i>	LEAD retains Currie and Associates, LLC to complete 5 surveys.
<i>June 2, 2009</i>	Banneker issues an RFQ for architects/engineers for the DPR projects.
<i>June 3, 2009</i>	Banneker issues an RFQ for civil engineering and surveying for the DPR projects.
<i>June 10, 2009</i>	Banneker submits invoice #1 to DMPED.
<i>June 11, 2009</i>	LEAD responds to Banneker’s RFQ for engineering services.

Date	Event
<i>June 26, 2009</i>	Banneker submits invoice #2 to DMPED.
<i>July 14, 2009</i>	DCHE Board authorizes entry into project management contract with Banneker-Regan “joint venture;” resolution references flat fee but not 9% mark-up.
<i>July 14, 2009</i>	DCHE signs Project Management Services contract with Banneker (effective date May 1, 2009). Project management fee is fixed fee of \$4,212,600, plus bonuses, and a 9% mark-up on consultants’ fees.
<i>July 20, 2009</i>	Banneker issues RFQ for general contractors
<i>July 20, 2009</i>	Banneker and Regan Associates execute consulting agreement; Regan will receive 48% of Banneker’s fee, not including the 9% mark up.
<i>July 22 & 25, 2009</i>	Consulting Services Agreements between Banneker and LEAD for LEAD to provide surveying, civil engineering and geotechnical services.
<i>July 31, 2009</i>	First amendment to MOU between DPR and DMPED, adding parks and increasing amount to \$68,394,795.64.
<i>July 31, 2009</i>	MOU between DMPED and DCHA for \$40,350,000 for DPR capital projects. DCHA to receive \$700,000 fee.
<i>July 31, 2009</i>	Banneker submits invoice #3 to DMPED.
<i>August 11, 2009</i>	Banneker issues Requests for Proposals (RFP) to qualified general contractors for large, medium, and small projects.
<i>Sept. 2, 2009</i>	Banneker submits invoice #4 to DCHE and DMPED
<i>Sept. 14, 2009</i>	Second amendment to MOU between DPR and DMPED, adding parks and increasing amount to \$86,854,000.
<i>Sept. 21, 2009</i>	Consulting Services Agreement between Banneker and LEAD for LEAD to provide environmental site assessments.
<i>October 6, 2009</i>	Banneker submits invoice #5 to DCHE and DMPED.
<i>October 22, 2009</i>	Councilmembers send letter to Mayor Fenty raising questions about DCHA’s award of contracts for DPR projects.

Date	Event
<i>October 23, 2009</i>	Attorney General issues formal opinion, in response to request from DCHA general counsel made the same day, concluding that DCHA must obtain Council approval for contracts over \$1 million.
<i>October 26, 2009</i>	Attorney General issues memorandum stating that his October 23 opinion is not retroactive, so any previously executed DCHA contracts are valid and binding.
<i>October 30, 2009</i>	First Joint Roundtable Hearing on the DPR contracts
<i>November 3, 2009</i>	Banneker submits invoice #6 to DCHE and DMPED.
<i>November 3, 2009</i>	DC Council passes Budget Transparency Emergency Act to cut off flow of funds from DPR to DCHA.
<i>November 12, 2009</i>	DCHA Board Chair William Slover proposes a resolution terminating the MOU with DMPED due to insufficient funds.
<i>November 20, 2009</i>	DCHE issues stop work notice to Banneker, effective on November 30.
<i>November 20, 2009</i>	Mayor Fenty removes Slover as Chair of DCHA Board.
<i>November 30, 2009</i>	Work stops.
<i>December 8, 2009</i>	Banneker submits invoice #7 to DCHE and DMPED
<i>December 9, 2009</i>	DCHE and Banneker execute Change Order No. 1 to the Banneker contract, expanding the scope of the projects and adjusting compensation. New fixed fee of \$3,778,488 with a 5% mark up on consultants, capped at \$350,000.
<i>December 9, 2009</i>	The MOU between DMPED and DCHA is amended, to transfer up to \$99,354,000.
<i>December 9/10, 2009</i>	The revised project management contract is submitted to the Council for approval.
<i>December 15, 2009</i>	DC Council disapproves the Banneker contract for project management services on DPR projects; authorizes OPEFM to handle the DPR projects.

Date	Event
<i>December 24, 2009</i>	DCHE enters into a Settlement Agreement with Banneker/Regan and pays Banneker \$2,554,071 for invoices 5 - 8 (portions of invoice #7 left open for further negotiation).
<i>January 5, 2010</i>	Banneker sends a settlement proposal for contract close-out amounts.
<i>January 14, 2010</i>	Banneker submits “final” invoice #9 to DMPED and DCHE.
<i>February 25, 2010</i>	Banneker issues cease and desist letters to project architects, claiming ownership of drawings.
<i>July 8, 2010</i>	Attorney General and Banneker sign settlement agreement providing for \$550,000 payment to Banneker; no payment made as of March 1, 2011.

FACTS AND ANALYSIS

This portion of the report outlines the facts that we found through our investigation, and provides answers, where possible, to the key questions raised by the DPR capital projects transactions.

I. BACKGROUND: DPR, WALKER JONES, DEANWOOD, AND THE BANNEKER-REGAN TEAM

In order to understand why the DPR capital projects were handled as they were, it is important to examine DPR's prior experience with the construction and procurement process, and particularly with Walker Jones and Deanwood, two major projects that also involved DMPED and DCHE.⁷⁴

A. DPR's Inability to Move Capital Projects Forward

There is a consensus that during the 2007-2008 time period, DPR was unable to construct capital projects in a timely manner. Clark Ray, the director of DPR from August 2007 through April 2009, acknowledged that there were a number of funded projects, particularly recreation centers – which are bigger, more complex and more expensive than parks – that were in the “queue” for construction but had not moved forward.⁷⁵ Witnesses offered a number of reasons for this problem, including the lack of qualified staff and insufficient “drive” on the part of DPR management. Although DPR had about 10 full time positions in its capital projects division at

⁷⁴ For background purposes, this report discusses other DPR projects, and particularly Walker Jones and Deanwood, but those projects were not within the scope of our investigation. We did not undertake to examine the propriety of any transactions relating to those projects.

⁷⁵ Interview with Clark Ray, former Director of D.C. Department of Parks and Recreation, (Oct. 26, 2010).

that time, half of those were planners and architects, not construction managers.⁷⁶ Of the remaining positions, in mid-2008 only one was filled with an experienced construction engineer, and he was overextended.⁷⁷

Another significant reason for delay was the procurement process.⁷⁸ Because DPR does not have independent procurement authority, it could not handle on its own any of the many contracts that are required for a construction project. Instead, DPR, like other agencies without procurement authority, was supposed to turn to the Office of Contracts and Procurement (OCP) for its contracting.⁷⁹ OCP's function is to buy goods and services for all covered agencies, including DPR. For various reasons, however, the OCP process was slow, and particularly ill-suited for handling complex construction projects.

⁷⁶ Interview with Jason Turner, former Chief of Capital Projects and Planning, D.C. Department of Parks and Recreation (Oct. 19, 2010).

⁷⁷ *Id.*; see also Deposition of David Janifer, Capital Projects Division, DPR (Jul. 20, 2010) at 18:12-14: "... DPR has ... project management capability, but it doesn't have the capacity for the number of jobs that we have to manage."

⁷⁸ Interview with Clark Ray; Interview with Jason Turner.

⁷⁹ David Janifer of DPR's capital projects division described the process as follows:

... DPR requests money for a construction budget. All of the actions or the contracts are negotiated by a procurements office, which was formerly named Office of Contracts and Procurements and now it's the Department of Real Estate Services.

DPR identifies projects that it would like to engage in. It provides all that information to the procurement office and the procurement office actively solicits all the vendors or contractors who actually perform services, perform the construction services.

Janifer Dep. 12:18-13:5.

David Gragan became the District’s Chief Procurement Officer, and head of OCP, in June 2007.⁸⁰ When he started, OCP had approximately 150 employees; as of mid-2010, it had approximately 100. OCP is responsible for procurement for construction as well as other types of goods and services. According to Gragan, this structure is unusual. Due to the complexity of construction contracting, in other jurisdictions it is usually assigned to a separate, specialized agency. In an effort to concentrate expertise, Gragan decided to delegate authority for construction procurement to the Department of Transportation (“DOT”) for “horizontal” construction (roads and bridges) and to the Office of Property Management (“OPM”) – renamed the Department of Real Estate Services (“DRES”) in August 2009 – for “vertical” construction (buildings). According to Gragan, OPM initially did not embrace the procurement function because it did not feel it had appropriate capability. Gragan revisited the issue and in 2008 assigned all OCP employees focused on construction to OPM.⁸¹ DRES now has both a construction procurement group and a construction management group. Like procurements done through OCP, DRES procurements are subject to the PPA.⁸²

Gragan described OCP’s procurement process as “built for deliberation, not for speed.” The process is purposefully slow to some degree, in order to provide for control over the expenditure of public funds. The DRES employees we interviewed agreed that working under the PPA slowed the construction process down because of the many upfront approvals and

⁸⁰ Interview with David Gragan.

⁸¹ Interview with David Gragan; Interview with Diane Wooden, Procurement, D.C., DRES, and Gerick Smith, Deputy Director Construction Division, DRES (Dec.7, 2010).

⁸² While the DPR capital projects are now being handled by OPEFM, DRES does construction procurement for other DPR projects, with project management handled by DPR. Interview with Diane Wooden and Gerick Smith.

compliance documents required to issue a solicitation and then to award a contract.⁸³ Issues with internal OCP processes, capacity and staff capabilities also affect the pace of OCP procurements.⁸⁴

OCP's problems were well known to the administration. Albert noted that as early as the transition to the Fenty regime, "there were serious conversations about how do we make OCP a better functioning agency to support the District government?"⁸⁵

Clark Ray and others also pointed to the types of contracts that OCP entered as a source of delay. One key distinction they saw was between "design-build" and "design-bid-build" contracts. Under a design-build contract, one firm or team (referred to as the design-builder) is hired to both design and construct a project. In a design-bid-build procurement, the architect is hired first, and the procurement of the general contractor cannot begin until the drawings are complete. Although each method has advantages and disadvantages, many witnesses expressed the view that using a design-build contract can reduce the time it takes to complete a project because, among other things, the contractor can start to mobilize before the drawings are complete. Ray noted, however, that OCP was reluctant to enter design-build contracts, and some District employees believed that OCP was precluded from doing so. In fact, D.C. law does not prohibit the use of design-build contracts.⁸⁶ However, Ray's perception that OCP was reluctant to use such contracts was correct. The DRES employees we interviewed stated that the District

⁸³ *Id.*

⁸⁴ Interview with David Gragan; Deposition of Neil Albert, City Administrator and former Deputy Mayor for Planning and Economic Development (Oct. 19, 2010) 89:5-91:3.

⁸⁵ *Id.* at 89:1-3.

⁸⁶ *See* D.C. Code § 2-303.11.

typically does not use the design-build method on larger projects because it leaves the city with less control over the design process, and OCP does not presently have a standard form design-build contract. As will be discussed further below, OCP also does not use “guaranteed maximum price” contracts, which also can facilitate early mobilization.

B. DPR Looked to Other Agencies for Help with Construction.

Faced with these issues with OCP, Clark Ray looked for ways to make parks construction move more quickly. He determined that he could bypass OCP by partnering with other district agencies that had independent contracting authority.⁸⁷ Ray identified DCHA, OPEFM and DMPED as agencies with procurement authority that he could work with to get projects built. And while OPEFM and DMPED were subject to the PPA, DCHA was not. Instead, DCHA was governed by its own procurement policies. Its subsidiary, DCHE, also had its own set of policies.

The partnering arrangements were created via MOUs between the agencies. According to Ray, he obtained David Gagan’s approval to handle parks projects in this manner.⁸⁸ For example, DPR entered into the following MOUs for parks-related construction:

- MOU between DPR and DCHA, effective date July 6, 2007, signed by DPR and DCHA in August, 2007, for demolition of the existing facility at the Wilson Pool.⁸⁹
- MOU between DPR and DCHA for field lighting, signed in August 2008.⁹⁰

⁸⁷ Interview with Clark Ray.

⁸⁸ *Id.*

⁸⁹ Ex. 28, Memorandum of Understanding Between the District of Columbia Department of Parks and Recreation and the District of Columbia Housing Authority (Jul. 6, 2007).

⁹⁰ Ex. 29, Memorandum of Understanding Between the District of Columbia Department of Parks and Recreation and the District of Columbia Housing Authority (Aug. 21, 2008).

- MOU between DPR and OPEFM in August 2008 for the development and construction of a new Stoddert Recreation Center at 39th and Calvert Streets, N.W.⁹¹
- MOU between DPR and DCHA in November 2008 for redevelopment of the park at 14th and Girard Streets, N.W.⁹²

From DPR’s point of view, use of an MOU was not seen in itself as a means for evading the Council approval requirement. The current and former DPR employees that we spoke to were well aware that contracts in excess of \$1 million had to be submitted to the Council. Further, it was their understanding that involving DMPED or DCHA in a project would not change that requirement. The MOUs listed above contained language referencing the necessity of compliance with the Council approval requirement. DPR’s then general counsel told us that she was aware that DCHA was not subject to the PPA, and inserted this language to be sure that the Council approval requirement was met.⁹³

For example, the MOU for the park at 14th and Girard addressed the Council approval issue in its termination provision, stating that “This MOU shall automatically terminate if the Council fails to approve the construction contract for the 14th & Girard Playground Project or at any time lawfully appropriated funds are not available.”⁹⁴ The MOU between DPR and DCHA for field lighting specifically assigns to DCHA the responsibility to

Insure compliance with all District of Columbia laws and regulations and secure advance approvals, if any, relative to the award of any contract hereunder

⁹¹ Ex. 30.

⁹² Ex. 31, Memorandum of Understanding Between the District of Columbia Department of Parks and Recreation and the District of Columbia Housing Authority (Dec. 11, 2008).

⁹³ Interview with Marie Claire Brown, former General Counsel, DPR (Sep. 9, 2010).

⁹⁴ Ex. 31, at 7. DCHA, however, did not believe that it had any obligation to take contracts to the Council for approval.

including, but not limited to, Council approval pursuant to D.C. Official Code §1-204.51 of any contract involving expenditures in excess of \$1,000,000.⁹⁵

We have not reviewed the contracts awarded for the field lighting project, but because the total budget under the MOU was \$1,023,000, it is unlikely that any of the contracts met the \$1 million threshold for Council review. However, we note that inclusion of this provision obligated DCHA by contract to take on the responsibility for obtaining Council approval – an approach that was not used in the DPR capital projects MOUs.

C. Walker Jones

In addition to MOUs for smaller projects, DPR was involved in two significantly larger projects with other agencies prior to the capital projects MOU: Walker Jones and Deanwood. Both of these projects, and particularly Walker Jones, are frequently cited as models for many aspects of the DPR capital projects procurements. Although an examination of these projects was outside of the scope of our investigation, key background facts are discussed below.

The Walker Jones project involved the redevelopment of two school sites in the Northwest One neighborhood of Ward 6 into a new school, library and recreation center. Walker Jones was part of the “New Communities” initiative, for which DMPED was the implementing agency.⁹⁶ Because Walker Jones had school, library and parks components, its funding came from three agencies (D.C. Public Schools, D.C. Public Libraries and DPR), with coordination provided by DMPED.⁹⁷

⁹⁵ Ex. 29 at 5.

⁹⁶ Albert Dep. 41:4-11.

⁹⁷ DMPED’s general mission is promoting economic development in the District. *See* Deposition of Valerie Santos, Deputy Mayor for Planning and Economic Development (Sept. 27, 2010) at 15:1-3. It does that by trying to get property owned by the District into productive uses, and by negotiating tax increment financing and other public finance tools. *Id.* at 15:14-22.

DMPED sought DCHA's assistance in constructing the Walker Jones project. According to Neil Albert, who was Deputy Mayor at that time, DMPED involved DCHA in Walker Jones because DCHA "had the capacity to – and the history and the track record of getting things done quickly."⁹⁸ Albert also believed that involving DCHA was a way of "getting program management oversight to augment the puny program management ... expertise that I had within DMPED."⁹⁹ At the time, David Jannarone was the only DMPED employee with construction management experience.¹⁰⁰

DMPED and DCHA had also worked together on other New Communities issues. As explained in a memorandum from Michael Kelly, then-Executive Director of DCHA,

DMPED and DCHA have been partners in the New Communities initiative. The New Communities Initiative focuses on the District's most distressed neighborhoods and contemplates methods to transform them into vibrant and productive areas, by focusing on the physical and human capital needs of residents. This wide reaching initiative aims to leverage DMPED spending to direct \$1 billion in public and private funds to some of the most troubled neighborhoods in Washington, D.C.

One of the communities to be revitalized through this program is the Northwest One Neighborhood in Ward 6. ... To date, DCHA has worked closely with the District on the New Communities Initiatives including providing under various memoranda of understanding with DMPED services that include master planning, facilitation of community planning and resident participation, assistance with resident tracking and program evaluation, various predevelopment work, and

⁹⁸ Albert Dep. 41:14-16.

⁹⁹ *Id.* at 41:19-21. Although real estate development is part of DMPED's portfolio, most of its real estate related activities involved private developers who were constructing projects on land owned or sold to them by the District. *Id.* at 35:14-36:8; Santos Dep. 36:9-22. According to Albert, DMPED was just "standing up" its own construction management function in 2007 when the Walker Jones project was getting underway. Albert Dep. 32:20-33:3.

¹⁰⁰ From Special Counsel's notes from the unrecorded portion of the Deposition of David Jannarone, former Development Director for DMPED taken on September 29, 2010 (hereafter, "Jannarone Dep. Notes").

the management and joint ownership of Temple Courts, a troubled Project-based Section 8 HCVP property.

* * *

Because of DMPED's favorable experience working with DCHA and DCHE in similar endeavors and DCHA's active participation in the Northwest One redevelopment effort, DMPED has asked DCHA to redevelop the Walker Jones Elementary School and R.H. Terrell Junior High School sites. DCHA intends to assign the MOU to its wholly-owned subsidiary, DCHE, for DCHE to perform in an expeditious and cost-effective manner.¹⁰¹

DMPED and DCHA signed the MOU for Walker Jones in September 2007.¹⁰² DMPED was to provide DCHA with funds from the three agencies involved, and DCHA was responsible for using the funds "to perform or cause to be performed the demolition, development and construction services necessary for the Project, at the request and direction of the DMPED."¹⁰³ DMPED retained "programmatic and policy jurisdiction" over the activities under the MOU.¹⁰⁴ Other than the general statement that "[t]he Parties agree to comply with all applicable laws, rules and regulations whether now in force or hereafter enacted or promulgated,"¹⁰⁵ there is no reference in this MOU to the requirement for Council approval of any contracts exceeding \$1 million. The budget for the project was \$47,200,000, and DCHA was to receive a \$200,000 fee for its services, to be paid by DMPED.¹⁰⁶

¹⁰¹ Ex. 32, Memorandum from Michael Kelly to DCHA Board of Commissioners (Sept. 12, 2007), at 1-2.

¹⁰² Ex. 33, Memorandum of Understanding between the Office of the Deputy Mayor for Planning and Economic Development and the District of Columbia Housing Authority (Sept. 13, 2007).

¹⁰³ *Id.* at § 2(B)(1).

¹⁰⁴ *Id.* at § 2(A)(2).

¹⁰⁵ *Id.* at § 8.

¹⁰⁶ *Id.* at § 5(A).

Prior to Walker Jones, DCHA had entered into other MOUs with District agencies. A chart provided by DCHA lists 12 other MOUs involving DCHA between 2003 and 2007.¹⁰⁷ But the \$47 million Walker Jones MOU was by far the largest. Of the prior 12, two were for \$2.5 million, three were for \$1 million, and the rest were under \$1 million.¹⁰⁸

DPR and DMPED entered into an MOU for the Walker Jones project in February 2009; although \$2 million was provided by DPR to DMPED in 2008, there does not appear to have been an MOU executed in 2008.¹⁰⁹ The February 2009 MOU provides that DPR will transfer up to an additional \$8 million for the recreation center portion of the project, which DMPED was to construct “per DPR specifications.”¹¹⁰ There is no mention in this MOU of the Council approval requirement, or of DCHA. According to Clark Ray, he was never made aware of DCHA’s involvement in the project.

1. The Banneker/Regan Associates team

The team of Banneker Ventures and Regan Associates, which was awarded the project management contract for the DPR capital projects, first came together on the Walker Jones project.

Regan Associates was originally formed in 1995 as the Highland Company. It does project management work, consulting for school systems and universities, and property

¹⁰⁷ Ex. 34, Chart: “MOU With District Agencies.”

¹⁰⁸ David Gagan, who at the time was required to approve all MOUs, told us that he noted the unusual magnitude of the \$40 million DPR capital project MOU, but did not make any further inquiry about it. Interview with David Gagan.

¹⁰⁹ Ex. 35, Memorandum of Understanding Between the Department of Parks and Recreation and the Office of the Deputy Mayor for Planning and Economic Development (Feb. 25, 2009).

¹¹⁰ *Id.* at § II (B)(1).

development. According to the Regans, the company has been involved with approximately 50 projects on the east coast, primarily in the Washington, D.C. area.¹¹¹ Sometime prior to 2007, Regan Associates was involved with the Capitol Hill Community Development Foundation on a project to renovate elementary and middle school libraries on Capitol Hill. This experience led the Regans to become concerned about the condition of the city's schools; they became supporters of Mayor Fenty's campaign because of that issue. At the same time, they decided to explore the possibility of doing business with the District. In order to comply with District CBE requirements, they sought out minority partners. According to the Regans, they were looking for a CBE firm they could "mentor,"¹¹² and considered a number of different firms, including firms on the D.C. Public Schools facilities division approved contractor list. Banneker was not on the list. Instead, the Regans recall that in the course of talking to many people about potential CBE partners they were given the name of David Jannarone at DMPED, and he referred them to Banneker.¹¹³

After meeting with Banneker representatives, the Regans thought Banneker was appropriate for the mentoring relationship they had in mind: big enough to take on work but small enough to need training. They envisioned giving Banneker a small stake in their first project together, and a bigger role in subsequent projects, so that Banneker could eventually stand on its own.¹¹⁴ The Regans learned that Omar Karim, the Banneker principal, had

¹¹¹ Interview with Sean M. Regan and Thomas J. Regan, Regan Associates LLC (Apr. 20, 2010).

¹¹² *Id.*

¹¹³ Interviews with Sean Regan and Thomas Regan, Regan Associates LLC (Apr. 20, 2010; Nov. 12, 2010).

¹¹⁴ *Id.*

previously worked for a construction company with which they were familiar.¹¹⁵ They were also aware of Karim's work on Mayor Fenty's campaign. During their interview, they reported that Karim made it known to them that he was in the same fraternity as the mayor. They acknowledged that as businesspeople, they viewed this relationship with the Mayor as something that "can't hurt."¹¹⁶

No other witness could provide any helpful information as to how Banneker and Regan Associates got together. Karim testified that he could not recall how Banneker came to work with Regan Associates, and that he did not think Jannarone had recommended Regan to him.¹¹⁷

¹¹⁵ Karim's education and experience as an engineer and an attorney, including his previous experience at Bundy Development Corporation and work on The Jazz @ Florida Avenue and The Residences @ Thayer Avenue, among other projects, are detailed in the resume attached to Banneker-Regan's response to DCHE's RFQ. *See* Ex. 36, Response to Request for Qualifications for Capital Projects – District of Columbia Parks and Recreation Project Management, submitted by Banneker Ventures LLC and Regan Associates LLC (Mar. 27, 2009).

¹¹⁶ *Id.*

¹¹⁷ Q: How did Banneker Ventures come to work with Regan and Associates?
A: I think the Walker Jones project was our first project together.
Q: And how did it come about that you all ended up working together on that?
A: ... I don't recall, it was a couple years ago.
Q: Did you call them? Did they call you?
A: I don't recall.
Q: Had you heard of Regan and Associates before working together on Walker Jones?
A: I don't recall. I might have.
Q: Do you remember how it was that the name Regan and Associates first came to your attention?
A: No.
Q: Did David Jannarone recommend Regan to you?
A: I don't recall.
Q: Is it possible that David Jannarone recommended Regan to you?
A: I don't – I don't think so.
Q: What is your best recollection as to how it was that Regan and Associates came to your attention?
A: Well, you gotta ask him. We were a subcontractor to them on Walker Jones.
(footnote continued on next page)

Karim denied that he told the Regans that he was a fraternity brother of Mayor Fenty's or that he had a relationship with the mayor that could be helpful.¹¹⁸

Q: Well, I understand. What I'm trying to find out is how did you come to first have dealings with each other. I understand that once you connected up you ended up in a subcontractor relationship with them. But they didn't pick you out of the blue.

A: I don't – you gotta – I mean, you talk to them. You gotta ask them. What do they say? You know. I don't recall.

Q: Well, I'm trying to get your understanding of how it was that you all came to work together.

A. I don't recall. ...

Deposition of Omar Karim (Aug. 5, 2010) 81:1–82:16.

¹¹⁸ *Id.* at 85:8-86:8.

Jacquelyn Glover, who interviewed for a job with Banneker Ventures in the summer of 2008, testified that during her interview Karim told her that “he was friends with the Mayor and he had gotten quite a few projects in the D.C. government.” Deposition of Jacquelyn Glover, Construction Manager, DMPED (Sept. 13, 2010) at 79:6-7. Karim denies that this conversation occurred.

In our written questions to Mayor Fenty, he was asked, “Were you aware that Omar Karim told prospective business partners and employees, among others, that his relationship with you would help him get business with the District? Do you believe that it would be appropriate for you to help Karim get District business or contracts?” The Mayor responded “No to both questions.” Ex. 24 at 2, No. 5.

Another answer provided by the Mayor does suggest, however, that he may have had some general conversations with Karim about doing business with the city:

Did you ever talk to Omar Karim ... about opportunities for Banneker Ventures, LLC, or any other business he had an interest in, to do work for the District of Columbia or on District of Columbia projects? If so, describe each such conversation in detail.

(footnote continued on next page)

When Jannarone was asked whether he had recommended Banneker to Regan Associates, he responded, “Not that I remember,” and added that he did not remember specific conversations.¹¹⁹ We find the Regans’ clear recollection of their introduction to Banneker to be credible.¹²⁰

DCHE issued a Request for Qualifications (RFQ) for a project manager to oversee the Walker Jones project on June 29, 2007. The team of Regan Associates and Banneker Ventures was selected for the award. Although they were proceeding as a team, Regan Associates and Banneker did not form a joint venture for the project management work. Instead, only Regan Associates was a party to the project management contract with DCHE. It was to receive a flat fee of \$1,410,000, plus a 9 percent mark-up on certain consultants’ costs.

Banneker was identified in the contract as a consultant who would work with Regan on all aspects of project management. The Regans explained that entering into a joint venture was more of a commitment than they wanted to make, and that they could satisfy CBE requirements

ANSWER: Over the course of the last four years, I have had frequent occasion to talk to businessmen/developers who have inquired about opportunities to work with the District on various projects. Generally speaking, I would suggest that these businessmen/developers talk to the relevant agencies and pursue their requests in accordance with the standard procedures. I don’t recall any conversations with Omar Karim that would have gone beyond this type of conversation.

Id. at 1, No. 1.

¹¹⁹ Jannerone Dep. Notes.

¹²⁰ A full examination of the Walker Jones project was outside of the scope of this investigation. Accordingly, we do not offer any conclusions about the propriety of the introduction by Jannarone or about any other matters relating to the selection of the Regan Associates/Banneker team as the project manager for Walker Jones.

through a contractual relationship with Banneker.¹²¹ Their consulting relationship was memorialized in a letter agreement between Regan Associates and Banneker, which provided that Banneker would receive 33% of Regan Associates' fees, exclusive of mark-ups.¹²²

Because the Walker Jones contract was used as the model for the project management contract for the DPR capital projects, its terms will be discussed in more detail below.

The Walker Jones program management contract was not submitted to the Council for approval in 2007, nor was the construction contract between DCHE and Forrester Construction Company. Both contracts were submitted in December 2009, after the Council's investigation began, and were approved as of January 4, 2010.¹²³ Although we have not independently verified it, numerous witnesses have stated that the Walker Jones project was completed on time and on (or under) budget.

D. Deanwood

Deanwood Community Center is a recreation center and library located at 49th and Quarles Streets, N.E. This was a large project that had been in DPR's "queue" for a number of years.

In 2008, DMPED took on the task of managing the construction of the Deanwood project. The evidence as to how this came about is somewhat inconsistent. Clark Ray and Jason Turner recalled that the impetus for DMPED's involvement came from DMPED.¹²⁴ According to Neil Albert, who was then the Deputy Mayor for Planning and Economic Development and had

¹²¹ Interview with Sean Regan and Thomas Regan (Apr. 20, 2010).

¹²² Ex. 37, Letter Agreement between Regan and Banneker (Sep. 4, 2007) at 3.

¹²³ D.C. Act 18-258.

¹²⁴ Interview with Clark Ray; Interview with Jason Turner.

formerly been the director of DPR, he made the decision in conjunction with Ray and then-City Administrator Dan Tangherlini, because DPR did not have the capacity to do a project of this magnitude.¹²⁵

The MOU between DPR and DMPED for Deanwood was signed by Ray and Albert on April 2, 2008.¹²⁶ It states that DPR will provide approximately \$31 million to DMPED, with \$8.8 million to be transferred immediately and the remaining amounts in subsequent fiscal years. DMPED was to use the funds to construct the project. The MOU provides that DMPED will obtain a delegation of construction authority from the Mayor and a delegation of procurement authority from the Chief Procurement Officer prior to the transfer of funds. A written delegation of contracting authority to DMPED signed by David Gragan accompanies the MOU.¹²⁷ However, Gragan believed that DMPED already possessed procurement authority delegated to it by the Mayor, and could not explain why this additional delegation was necessary.¹²⁸

Unlike the Walker Jones MOUs, the Deanwood MOU expressly recognizes the Council approval requirement, providing that:

This MOU shall automatically terminate if the City Council fails to approve the construction contract for the New Deanwood Community Center or at any time lawfully appropriated funds are not available.¹²⁹

¹²⁵ Albert Dep. 59:22-60:19.

¹²⁶ Ex. 38, Memorandum of Understanding Between the Department of Parks and Recreation and the Office of the Deputy Mayor for Planning and Economic Development (Apr. 2, 2008).

¹²⁷ *Id.*, Delegation of Contracting Authority (Apr. 3, 2008).

¹²⁸ Interview with David Gragan.

¹²⁹ Ex. 38 at § IX(B).

1. The Deanwood program management RFO

Deanwood also differed from Walker Jones in other respects. First, DCHA was not involved in the project at the outset, and it was DMPED, not DCHA, that procured the program manager. On April 28, 2008 DMPED issued a Request for Proposals (“RFP”) for project management, not an RFQ. DMPED’s RFP was a 71-page, detailed document that specifies the contractual provisions that would govern the program manager’s performance.¹³⁰ It also required responding companies to provide pricing information as well as qualifications.¹³¹ According to Albert, either OCP or a contracting officer within DMPED was involved in preparing the RFP.¹³² Jannarone recalled that it was the OCP employee assigned to DMPED.¹³³

Banneker and Regan submitted a joint response on June 6, 2008. They followed up with a Best and Final Offer submitted on June 24, 2008, offering a total not-to-exceed contract amount of \$579,456 for the first year and \$509,184 for the second option year.¹³⁴

2. Banneker as program manager

The program management contract for Deanwood was signed by Omar Karim on behalf of Banneker and by Jonathan Butler, DMPED’s Director of Contracts, on July 23, 2008. Unlike

¹³⁰ Ex. 39, Request for Proposals, Solicitation No.: DCEB-DMPED-080R-Deanwood (Apr. 28, 2008).

¹³¹ *Id.* According to the RFP, the drawings and specifications for Deanwood were already 100% complete, which could account for the decision to seek price submissions from bidders for this project. *See id.* at 8.

¹³² Albert Dep. 66:10-67:4.

¹³³ Jannerone Dep. Notes. Although DMPED had independent procurement authority, it was still subject to the PPA and all of its procedures, and used assigned OCP personnel to assist with its procurements.

¹³⁴ A full examination of the Deanwood project was outside of the scope of this investigation. Accordingly, we do not offer any conclusions about the selection of the Banneker-Regan team or the terms of the project management contract.

the Walker Jones contract, this contract is on a standard government contract form. It states that the contract is a Firm Fixed Price Contract in the amount of \$579,456 for the first year, and incorporates by reference the RFP, standard contract clauses, and Banneker-Regan's proposal. One year later, Karim and Butler signed a contract modification adding another year to the contract, for a firm fixed price of \$509,184.00. Neither contract was submitted to the Council for approval, presumably because neither exceeded the \$1 million mark. Unlike Walker Jones, there was no mark-up for consultants in the Deanwood contract. Karim testified that he was not sure why, but thought that it was because DMPED used a different form contract than DCHE.¹³⁵

The Regan-Banneker proposal for Deanwood asserted that "If selected, Regan and Banneker will complete this project on a 50-50 basis where we will split staff and responsibilities."¹³⁶ The project management contract, however, was executed solely by Banneker.¹³⁷ As they did on Walker Jones, Banneker and Regan Associates entered into a consulting agreement. This time, however, Banneker was the contractor and received 51% of the fees, and Regan Associates was the consultant, receiving 49% of the fees. According to the Regans, giving Banneker the lead on this project was in furtherance of the Regans' mentoring role; they also believed the city would look more favorably on their team with Banneker, the CBE, at 51%.¹³⁸

¹³⁵ Karim Dep. (Aug. 5, 2010) 99:14-100:3.

¹³⁶ Ex. 40, Letter from Regan Associates and Banneker Ventures, LLC to Office of the Deputy Mayor for Planning & Economic Development regarding Program Management Services for Deanwood Project Solicitation # DCEB-DMPED-08-R-Deanwood (June 6, 2008).

¹³⁷ Ex. 41, Letter from Jonathan R. Butler, Director of Contracts, DMPED, to Omar A. Karim (July 11, 2008).

¹³⁸ Interview with Sean Regan and Thomas Regan.

3. DCHA's role on Deanwood

After the construction drawings for Deanwood were completed, the project stalled because of funding issues, but was restarted in 2008.¹³⁹ Jannarone stated that the initial plan was for DMPED to procure the general contractor itself, but that discussions with OCP as to how DMPED could handle this were frustrating.¹⁴⁰ For Walker Jones, DCHE used a guaranteed maximum price (“GMP”) contract, which Jannarone described as the most advantageous type of contract from an owner’s point of view.¹⁴¹ Although DMPED has independent procurement authority, Jannarone believed that under District procurement policies, DMPED could not enter into a GMP contract, while DCHE operated under different procurement policies that permitted it to do so.¹⁴² In fact, as with the design-build versus design-bid-build issue, D.C. law does not preclude the use of GMP contracts, but OCP and DRES had never used one, and did not have a form GMP contract that was compliant with the PPA.¹⁴³ So Jannarone was correct as a practical matter that even though a GMP contract might help control costs and decrease the total time needed to complete the project, it would have been very difficult for DMPED to attempt to utilize one. Involving DCHE, however, meant that they could use the same form of GMP contract that had been used for Walker Jones. Jannarone commented that a point came when

¹³⁹ Janifer Dep. 65:10-66:6; Jannarone Dep. Notes.

¹⁴⁰ Jannarone Dep. Notes.

¹⁴¹ *Id.* Under a GMP contract, before the design drawings are complete, the contractor offers to do the job for no more than a fixed maximum price. Cost savings are split with the owner, while the contractor is at risk for costs that exceed the GMP. The contractor will begin work before all of the drawings are complete, resulting in a faster job. Interview with Diane Wooden, and Gerick Smith.

¹⁴² Jannarone Dep. Notes.

¹⁴³ Interview with Diane Wooden and Gerick Smith.

DMPED decided they should go back to something they knew had worked.¹⁴⁴ With DCHE and the Walker Jones GMP contract, they could move forward to get bids for the Deanwood construction work “without re-inventing the wheel.”¹⁴⁵

The DCHA/DMPED MOU for construction of the Deanwood Community Center was signed by Michael Kelly for DCHA on November 21, 2008, and by Deputy Mayor Neil Albert on March 5, 2009.¹⁴⁶ It provides for a project budget of up to \$27.3 million, and a contract management fee for DCHA of \$100,000.¹⁴⁷ There is no reference to a Council approval requirement.

A joint venture between Forney Enterprises and Manhattan Construction Company was selected as the general contractor for the Deanwood Community Center. The construction contract with DCHE was not submitted to the Council for approval when entered; instead, it was submitted in December 2009 and approved by the Council as of January 4, 2010.¹⁴⁸ The facility opened on June 25, 2010.¹⁴⁹

¹⁴⁴ Jannarone Dep. Notes.

¹⁴⁵ *Id.* Although he recalled conversations about getting the project moving, Neil Albert testified that he did not know why DCHA got involved with Deanwood at this point. Albert Dep. 71:17-71:18.

¹⁴⁶ Ex. 42, Memorandum of Understanding Between the Office of the Deputy Mayor for Planning and Economic Development and the District of Columbia Housing Authority (Mar. 5, 2009).

¹⁴⁷ *Id.* at § 6(A).

¹⁴⁸ D.C. Act 18-528.

¹⁴⁹ See “Fenty Officially Opens Deanwood Recreation Center and Library,” DPR Press Release (Jun. 25, 2010), <http://dpr.dc.gov>.

II. THE DPR CAPITAL PROJECTS AND THE MOU TO DMPED

A. The Attempted Transfer to OPEFM

As discussed above, during 2008, DPR was attempting to work with other agencies to increase the pace of parks construction in line with the “significant emphasis” placed by the Mayor “on moving parks construction quickly.”¹⁵⁰ But the Mayor and then-City Administrator Tangherlini continued to be dissatisfied with DPR’s efforts: “the Mayor was constantly frustrated [be]cause he would be in the community and get broadsided. The Parks Department would give the community dates for a project and will miss the dates until ... within the executive offices of the Mayor, there were conversations about how to help Parks and Rec deliver its projects on a timely basis.”¹⁵¹ They considered the possibility of using other agencies and of requesting independent procurement authority for DPR.¹⁵²

At a meeting to discuss the status of capital projects in October of 2008, the Mayor and Tangherlini decided that the DPR projects should be moved to OPEFM.¹⁵³ In mid-November 2008, DPR and OPEFM executed an MOU under which OPEFM agreed “to oversee and manage DPR’s capital projects that directly or indirectly relate to the District of Columbia Public

¹⁵⁰ Ex. 24 at 3.

¹⁵¹ Albert Dep. 87:11-87:18.

¹⁵² *Id.* at 87:21-88:1.

¹⁵³ Interview with Jason Turner.

Schools.”¹⁵⁴ The MOU contemplated that up to \$35 million in FY 2009 funds would be transferred by DPR to OPEFM.¹⁵⁵

Although OPEFM has independent procurement authority, it is subject to the Council approval statute (except with respect to Convention Center contracts) and routinely submits contracts to the Council for review.¹⁵⁶ There is no suggestion that any of the parties involved in the decision to transfer the projects to OPEFM expected it to bypass this requirement.

On February 2, 2009, OPEFM issued a Request for Proposals for contractors to provide design-build services for the renovation and modernization of four recreation centers: Rosedale, Kenilworth, Guy Mason and Bald Eagle.¹⁵⁷ On February 5, 2009, OPEFM held a pre-proposal conference to discuss the solicitation.¹⁵⁸

But OPEFM was not permitted to proceed. On November 17, 2008, Councilmember Harry Thomas, Jr. introduced legislation to limit construction by OPEFM to D.C. public school facilities only.¹⁵⁹ According to Councilmember Thomas, he was concerned that moving projects

¹⁵⁴ Ex. 43, Memorandum of Understanding Between the District of Columbia Department of Parks and Recreation and the Office of Public Education Facilities Modernization (Nov. 21, 2008), § II.

¹⁵⁵ *Id.* at § II (A)(1).

¹⁵⁶ Interview with Allen Lew, Executive Director, OPEFM (Jul. 16, 2010).

¹⁵⁷ Ex. 22 at 2.

¹⁵⁸ Ex. 44, Government of the District of Columbia Office of Public Education Facilities Modernization, Design-Build Renovation Services, Recreation Centers, Solicitation #: GM-09-M-0204-FM, Preproposal Conference Sign-in Sheet (Feb. 5, 2009). Neither Regan Associates nor Banneker appears on the sign-in sheets for the conference.

¹⁵⁹ Office of Public Education Facilities Modernization Clarification Emergency Amendment Act of 2008; Office of Public Education Facilities Modernization Clarification Temporary Amendment Act of 2008; Office of Public Education Facilities Modernization Clarification Congressional Review Energy Amendment Act of 2008.

to OPEFM would cause the Council to lose oversight of how budgeted funds were spent, and would waste the 11 fully-funded employees in DPR's capital projects division. He was also concerned about what he saw as a disparity in OPEFM's level of spending in different areas of the city. Finally, he believed that OPEFM should not become the capital development center for all of DC unless there was legislation to that effect.¹⁶⁰ Thus, on February 18, 2009, OPEFM cancelled the recreation center procurement.¹⁶¹

In our view, the administration's decision to assign the DPR projects to OPEFM – although rescinded as the result of Council action – is significant evidence that the Fenty administration was not attempting to structure the projects to avoid Council review or to permit project contracts to be steered to particular companies. OPEFM operates with its own procurement authority and utilizes its own project managers. OPEFM is subject to the Council approval requirement and routinely submits contracts to the Council for approval.¹⁶² The initial effort to assign the projects to OPEFM is simply inconsistent with an intent to manipulate the projects to benefit associates of the Mayor or to otherwise bypass the Council. These facts support the conclusion that transferring the projects out of DPR was done in an effort to move construction forward and not for an improper purpose.

¹⁶⁰ Interview with Harry Thomas, Jr., D.C. Councilmember (Ward 5), Chair, Committee on Libraries, Parks & Recreation, (Sep. 28, 2010).

¹⁶¹ Ex. 45, Office of Public Education Facilities Modernization, Design-Build Services, Recreation Centers Solicitation #: GM-09-M-0204-FM, Addendum No. 5, Issued: February 18, 2009.

¹⁶² Interview with Allen Lew.

B. DMPED's Involvement

After the projects were removed from OPEFM, DPR needed another “partner” agency to get the projects moving. Deputy Mayor Neal Albert offered DMPED’s assistance in constructing the projects.¹⁶³ Ray was willing to work with DMPED because he knew it had independent procurement authority, and because DMPED was already handling the Deanwood recreation center project.¹⁶⁴

In his written responses to our questions, the Mayor explained the move to DMPED as follows:

My original idea to ensure that projects important to the citizens of the District moved quickly was to have Allen Lew take over such projects. When the Council rejected my request, I discussed with senior officials of the Administration how we could move the DPR capital projects forward as quickly as possible. It would have been in the context of those discussions that I received the recommendation that we follow the lead of former Mayor Williams and transfer the DPR capital projects to DMPED. I generally approved the transfer, but had nothing to do with the implementation of any such transfer.¹⁶⁵

C. DMPED Looked to Banneker from the Start

Banneker and Regan Associates were already working with DMPED on Walker Jones and Deanwood, and the evidence suggests that DMPED personnel assumed that they would work on the DPR capital projects as well. On February 17, 2009, Ayris Scales of DMPED sent an e-mail to confirm a meeting for the next day, described in the “re” line as “Rosedale and

¹⁶³ Interview with Clark Ray.

¹⁶⁴ *Id.*

¹⁶⁵ Ex. 24 at 2.

Kenilworth-Parkside Rec Centers Kick Off Mtg.” to be held at the Walker Jones trailer.¹⁶⁶ The e-mail was sent to Omar Karim, Larry Dwyer of DCHA, Duane Oates of Banneker, David Jannarone and Jacquelyn Glover of DMPED, and David Janifer and Jason Turner of DPR. The e-mail identifies the agenda for the meeting as “SOW; Solicitation process and requirements for.”¹⁶⁷ None of the witnesses we spoke to had a specific recollection of what happened at this meeting,¹⁶⁸ but Banneker’s inclusion suggests that they were expected to have a role in the Rosedale and Kenilworth projects, two of the parks that “came back” from OPEFM. David Jannarone’s suggestion that the Banneker employees were included on the e-mail simply to advise them that their construction trailer would be used for the meeting¹⁶⁹ does not ring true.

Neil Albert testified that consideration was given to doing the DPR capital projects as an add-on to the Walker Jones contract.¹⁷⁰ Although both Jannarone and Karim testified that they were unaware of such a plan,¹⁷¹ the documents support Albert’s testimony. On February 19, 2009, Jannarone sent an e-mail to Omar Karim, requesting that Karim prepare a change order to

¹⁶⁶ Ex. 46, E-mail from Ayris Scales (EOM) to Omar Karim; Lawrence Dwyer; Duane W. Oates; David Jannarone (EOM); Jacquelyn Glover (EOM), David Janifer (DPR); Jason Turner (DPR) (Feb. 17, 2009 5:01 PM).

¹⁶⁷ *Id.*

¹⁶⁸ Deposition of Larry Dwyer, Director of Planning and Development, DCHA; President, DCHE (Aug. 6, 2010) 90:1-90:6; Glover Dep. 45:12-46:3; Janifer Dep. 38:8-39:4; Jannarone Dep. 5:9-6:5.

¹⁶⁹ Jannarone Dep. 5:9-6:5.

¹⁷⁰ Albert Dep. 92:13-93:20.

¹⁷¹ Jannarone Dep. 8:9-8:14; Karim Dep. (Aug. 5, 2010) 101:10-108:8.

the Walker Jones program management contract based on an enclosed project list.¹⁷² The version of the e-mail originally produced to the Council by Banneker Ventures did not include a project list, but the subject line indicates “DPR Capitol project list enclosed.”¹⁷³ At his deposition, Omar Karim testified that he could not recall the e-mail, but would not agree that it referred to the DPR capital projects; instead, he stated that it looked like it related to other DPR projects being handled by Regan Associates.¹⁷⁴ David Jannarone testified that he was not sure what this e-mail was about, but thought it referred to the Emery Football Field (which was done as an add-on to the Walker Jones contract), and several other smaller projects.¹⁷⁵

After Jannarone’s deposition, DMPED, through the Attorney General’s Office, provided the attachment, which confirms that the e-mail does relate to the particular projects at issue here. The attachment is a chart entitled “MOU for DPR Capital Projects – EXHIBIT A,” which includes the four projects covered by OPEFM’s RFP – Rosedale, Kenilworth, Guy Mason and Bald Eagle – as well as two additional projects – Chevy Chase Ballfield and Justice Park.¹⁷⁶ It indicates that the program management contract for each project except Kenilworth will be handled by a change order to Walker Jones;¹⁷⁷ for Kenilworth, the chart provides for an “RFP

¹⁷² Ex. 47, E-mail from David Jannarone (EOM) to Omar A. Karim; Duane Oates; Thomas Maslin (Feb. 19, 2009 3:38 PM).

¹⁷³ *Id.*

¹⁷⁴ Karim Dep. (Aug. 5, 2010) 103:22-105:22.

¹⁷⁵ Jannarone Dep. 6:17-7:20.

¹⁷⁶ Ex. 48, E-mail from David Jannarone (EOM) to Omar A. Karim; Duane Oates; Thomas Maslin (Feb. 19, 2009 3:38 PM) with attachment “MOU for DPR Capital Projects – Exhibit A.”

¹⁷⁷ Regan Associates was the signatory on the Walker Jones program management contract. On that contract, the fees were split 67% to Regan Associates and 33% to Banneker, with the 9% soft cost mark-up going to Regan Associates.

through DCHE.”¹⁷⁸ However, the change order idea was not pursued. Albert could not recall the reason why.¹⁷⁹

Instead, on February 27, 2009, Clark Ray and Neil Albert signed the MOU for the DPR Capital Projects.¹⁸⁰ The MOU obligates DPR to provide DMPED with up to \$40,350,000 for the projects, and obligates DMPED to “use the funds from DPR to facilitate the repair, construction, and/or modernization of DPR recreation facilities per DPR specifications.”¹⁸¹ There is no specific reference to the requirement for Council approval of contracts in excess of \$1 million, and the MOU does not provide that it will terminate if Council approval of construction contracts is not obtained. A chart attached to the MOU lists seven projects to be constructed by DMPED: Chevy Chase, Rosedale, Kenilworth, Guy Mason, Bald Eagle, Justice Park and Barry Farms.¹⁸²

¹⁷⁸ Ex. 48, Exhibit A.

¹⁷⁹ Albert Dep. 95:7-95:9.

¹⁸⁰ Ex. 49, Memorandum of Understanding Between the District of Columbia Department of Parks and Recreation and the Office of the Deputy Mayor for Planning and Economic Development (Feb. 27, 2009).

¹⁸¹ *Id.* at § II (A)(1); (B)(1).

¹⁸² *Id.* at attachment: “DMPED Projects.”

Even after the February 2009 MOU was signed, DPR continued to ask DMPED to add additional parks to its list. In May of 2009, for example, Ximena Hartsock, who had recently succeeded Clark Ray as director of DPR, was advised about an issue at the Watts Branch Recreation Center: “... the Mayor is adamant that he wants the resurfacing of the basketball courts completed before he returns to the community on June 18th, 2008 at 4pm.” Ms. Hartsock’s response was to forward the e-mail to Deputy Mayor Albert with the following message:

(footnote continued on next page)

The evidence we have reviewed does not support the claim that this MOU had an improper purpose. The Mayor first attempted to move the capital projects to OPEFM, which had independent contracting authority, utilized its own project managers, and routinely brought contracts to the Council for review. DMPED only became involved after the Council disapproved OPEFM's participation in the projects, and it too was subject to the Council approval requirement. The evidence supports the consistent testimony that DPR teamed with DMPED in order to move the projects forward.

III. THE MOU FROM DMPED TO DCHA

Although it does not appear to have been discussed with DPR, it is clear that DMPED expected from the beginning that DCHA would be involved in the DPR capital projects. Jacquelyn Glover, DMPED's project manager for the DPR projects, testified that she understood that DCHA would be involved at the time the DPR/DMPED MOU was being put together.¹⁸³ Larry Dwyer, the president of DCHA's subsidiary DCHE, recalled learning around March 2009 that DMPED would request DCHE's assistance on projects that DPR could not get done on a timely basis.¹⁸⁴ Dwyer understood that DMPED wanted DCHE's help to expedite the work: "I was told the work was – the schedule was lagging behind severely and that expectations weren't

I keep coming back to you because DPR cannot do fast enough. I would love to discuss how we can find a way to get work done faster. In the meanwhile, can you help us to get this one done? We do have the funds.

Thanks so much. Sorry for being a pest.

Ex. 50, E-mail exchange dated May 12, 2009, 5:27 PM.

¹⁸³ Glover Dep. 51:20-52:1.

¹⁸⁴ Dwyer Dep. (Aug. 6, 2010) 13:5-14:7.

being met and that they were trying to accelerate the development process of the Parks and Recreation project process.”¹⁸⁵

Although DCHE initially anticipated that it would handle project management on the DPR projects, in fact DMPED asked it to play a much more limited role.¹⁸⁶ DMPED tasked DCHE only with procuring the project manager and providing financial and accounting support for the projects.¹⁸⁷ Dwyer described DCHE’s function as merely “contract administration.” Project management services were assigned to an outside project manager, and program coordination and decision making were to be handled by DMPED in conjunction with DPR.¹⁸⁸ Asmara Habte, DCHE’s primary representative on the project, described DCHE’s role similarly.¹⁸⁹ Under this division of responsibilities, DCHE personnel thought of DMPED as their “client.”¹⁹⁰

On March 11, 2009, the DCHA board passed a resolution authorizing entry into an MOU with DMPED. The memorandum recommending approval of the resolution described DCHA’s limited role:

Under the MOU, DCHA would conduct the primary project management’s solicitation for the repairs, provide oversight of the project management process, and process payments between DMPED and the project contractors.¹⁹¹

¹⁸⁵ *Id.* at 14:16-14:20.

¹⁸⁶ *Id.* at 20:16-21:17.

¹⁸⁷ *Id.* at 17:9-17:18.

¹⁸⁸ *Id.* at 17:9-17:18; 33:12-33:19.

¹⁸⁹ Interview with Asmara Habte.

¹⁹⁰ Dwyer Dep. (Aug. 6, 2010) 30:7-30:8, 33:1-33:4.

¹⁹¹ Ex. 51, Memorandum from Michael Kelly to the Board of Commissioners District of Columbia Housing Authority (March 11, 2009) at 1.

The MOU between DMPED and DCHA, which was not actually signed until July 31, 2009, further defined DCHA's role:

As an agent for DMPED, DCHA will coordinate procurement of a Project Manager, provide administrative oversight to the Project Manager and act as financial manager and "pay agent" with District of Columbia Government funds provided by DMPED, all in coordination with DMPED.¹⁹²

For these functions, DCHA was to be paid an administrative fee of \$700,000.¹⁹³ DCHA assigned its functions under the MOU to its for-profit subsidiary, DCHE.

It appears that DPR was never formally advised that DMPED was bringing DCHA into the project. Clark Ray, who was the director of DPR until April 19, 2009, told us that he had no knowledge that DCHA would be involved.¹⁹⁴ Other DPR employees became aware that DCHE had a role only when they saw DCHE representatives at project meetings.¹⁹⁵

A. Why DCHA?

One of the key questions raised by these events is why DCHA and DCHE were involved in the DPR capital projects. It has been suggested that DMPED moved the projects to the independent agency as a means to avoid Council review of the contracts for the project, possibly to shield the contract with Banneker Ventures from scrutiny, or to avoid any delay Council review might entail. But we did not find either to be the case.

It is true that DMPED personnel were aware of DCHA's position that it was not required to bring contracts to the Council for approval. Neil Albert stated that DCHA "constantly

¹⁹² Ex. 52, Memorandum of Understanding Between the Office of the Deputy Mayor for Planning and Economic Development and the District of Columbia Housing Authority, § 2.

¹⁹³ *Id.* at § 6(A).

¹⁹⁴ Interview with Clark Ray.

¹⁹⁵ Janifer Dep. 47:3-7; Stesney Dep. 44:2-16.

articulated” that they did not need to take contracts over \$1 million to the Council.¹⁹⁶ David Jannarone said that he was told by DCHE that they had a legal opinion stating that Council approval was not required.¹⁹⁷ Glover testified that Jannarone told her that DCHA was not subject to the Council approval requirement.¹⁹⁸

However, we did not find evidence that DMPED personnel involved DCHA in the DPR capital projects in order to evade review of the Banneker contract or otherwise provide improper advantages to Banneker, Karim or Skinner. We reviewed bank records from Karim’s and Skinner’s businesses, and saw nothing to suggest that payments were being made to Jannarone or anyone else at DMPED. Nor was there other evidence suggesting that DMPED’s decision was improperly influenced.

The Council approval process can increase the amount of time it takes to carry out a procurement. According to several witnesses, obtaining Council approval takes up to approximately one month, and sometimes longer.¹⁹⁹ Avoiding this step would have been consistent with the Mayor’s goal of expediting construction of parks and recreation centers. It is plausible that avoiding Council review as a time saver was at least a consideration in the use of DCHA, even if it was not the primary motivation. However, none of the witnesses pointed to the

¹⁹⁶ Albert Dep. 44:9-44:13.

¹⁹⁷ Jannarone Dep. Notes.

¹⁹⁸ Glover Dep. 40:17-40:20.

¹⁹⁹ David Gragan noted that when OCP sent a contract package to the Wilson Building, it would be reviewed and then sent to the Secretary of the Council; if the Council did nothing, the contract would be deemed approved in 10 days. Interview with David Gragan. Jason Turner said the Council approval process took approximately one month, although he described means he used to shave the time down. Interview with Jason Turner. Neil Albert recalled one contract taking nine months to get approvals while he was at DPR. Albert Dep. 45:18-46:9.

Council approval issue as a reason for involving DCHA in the capital projects, even in the interests of speed. When asked, Albert and Jannarone specifically denied that it was a consideration.²⁰⁰

Instead, the witnesses who offered testimony on this issue asserted that the reasons for involving DCHA were that it had the ability to move projects along more quickly and efficiently than DMPED or DPR, as exemplified by its work on Walker Jones and Deanwood. Further, they stated that DCHA had capabilities, particularly in financial administration, that those agencies did not have.

At the October 30, 2009 Council Roundtable, Neil Albert testified that DCHA had been a partner with DMPED on a variety of capital projects in both the Williams and Fenty administrations. He stated that DCHA had experience in design, construction and construction management, and had a “nimble and efficient” system that allowed projects to be designed, permitted and built quickly. He pointed to Walker Jones and Deanwood as successful projects that were constructed in partnership with DCHA.²⁰¹ At the Roundtable on December 2, 2009, David Jannarone testified that partnering with DCHA was the fastest, cheapest and most efficient way to get projects done, and offered Walker Jones as the prime example. He also testified that DCHA had accounting resources that DMPED did not have, and that DCHA applied these resources to accounting for the projects, reviewing invoices, and tracking line items in the budget.²⁰² Larry Dwyer, the president of DCHE, understood that DMPED wanted DCHA’s

²⁰⁰ Albert Dep. 98:13-98:18; Jannarone Dep. Notes. The Mayor was asked whether he instructed anyone in his administration to structure the DPR capital projects procurements in a way that would avoid Council review of the contracts, and answered “No.” Ex. 24 at 3.

²⁰¹ Skinner Dep. 37:3-37:7, 38:1-39:10 (Oct. 30, 2009).

²⁰² Joint Roundtable 56:5-58:18 (Dec. 2, 2009).

assistance on the DPR capital projects “to do the job faster, just to move the projects.”²⁰³ The March 11, 2009 memorandum from the executive director of DCHA recommending approval of the MOU with DMPED noted that “DMPED has indicated that the MOU is of some urgency and requests the Board of Commissioner’s prompt consideration.”²⁰⁴

There is no doubt, as the Mayor acknowledges in his written responses to our questions, that the administration wanted to accelerate the pace of park and recreation center construction. This was the reason for the effort to move the parks to OPEFM, and the sense of urgency imposed by the Mayor is also supported by the record throughout the period when the projects were underway. For example,

- In a May 12, 2009 e-mail regarding the Watts Branch Recreation Center, DMPED advised DPR that “we completed a Walk-Thru with the Mayor and the NE Boundary Civic Association yesterday. We discussed all of the upcoming projects to be completed at the center, and the Mayor is adamant that he wants the resurfacing of the basketball courts completed before he returns to the community on June 18, 200[9] at 4pm.”²⁰⁵
- In a May 14, 2009 follow-up e-mail to David Jannarone and David Janifer, Deputy Mayor Albert said, “let’s piggyback on an existing contract to meet the Mayor’s deadline.”²⁰⁶
- In a July 7, 2009 e-mail about the 7th and N Street Park, Jacquelyn Glover said, “Per David Jannarone’s meeting with the Mayor this morning, we

²⁰³ Dwyer Dep. (Aug. 6, 2010) 16:16-17:4 (“motion was basically most of the conversation”).

²⁰⁴ Ex. 51 at 2.

²⁰⁵ Ex. 53, E-mail from Demetria Harris (EOM) to Bridget Stesney (DPR) (May 12, 2009 5:16 PM).

²⁰⁶ Ex. 54, E-mail from Neil Albert (EOM) to David Jannarone (EOM); David Janifer (DPR) (May 14, 2009 9:28 AM).

have to move quickly to get 7th and N done .. The Mayor wants a ground breaking in September, which we can do.”²⁰⁷

- In a September 4, 2009 e-mail, Jannarone told Glover, Karim and others: “The Mayor told me to have the groundbreaking on the following dates:

Justice park Oct. 13
Kennilworth Nov. 1

He’s pissed we missed the dates we told him per the original draw schedules. I took the bullet, but you guys must figure out how to make the dates listed. Next week I want a plan on how you will accomplish this.
”²⁰⁸
...

Increasing the pace of construction activity had public relations value for the administration, but it also would bring needed facilities to District residents more quickly. However, the witnesses did not agree on precisely why adding DCHA to the projects when DMPED was already involved would result in greater speed or efficiency, and the evidence does not support some of the explanations they offered for seeking DCHA’s assistance.

For example, in the public hearings in October 2009, DCHA’s capacity and capability in construction management was highly touted, and witnesses such as Neil Albert and David Jannarone explained the move to DCHA on those grounds.²⁰⁹ But this expertise was not actually used. The MOU limited DCHA’s role to contract administration. Negotiations for the program management contract were carried out by DMPED, not DCHE, and DCHE’s attempts to comment on the terms of the contract were cut off by David Jannarone of DMPED. DCHE does not appear to have overseen the work of the program manager. While DCHE reviewed and paid

²⁰⁷ Ex. 55, E-mail from Jacquelyn Glover (EOM) to Bridget Stesney (DPR); David Janifer (DPR) (Jul. 7, 2009 11:36 AM).

²⁰⁸ Ex. 56, E-mail from David Jannerone (EOM) to Jacquelyn Glover (EOM); Cc to: Omar Karim; Sean Regan; Tom Maslin; Erin Jackson (EOM) (Sep. 4, 2009 6:12 PM).

²⁰⁹ *See, e.g.* Albert Dep. 41:13-42:4, 43:5-16, 82:18-19.

the invoices submitted by Banneker, its personnel relied on Jacquelyn Glover of DMPED to determine whether the work had been satisfactorily done.²¹⁰ DCHE personnel did not participate in weekly project meetings or project specific meetings,²¹¹ did not participate in the selection of architects, and did not participate in the selection of general contractors for the DPR projects.²¹²

Indeed, Neil Albert testified that he tasked David Jannarone with managing the project for DMPED, and that Jannarone “had the experience and the skill-sets to manage all aspects of the project.”²¹³ When asked in his deposition, then, what DCHE’s role was supposed to be, Albert testified, “it is fuzzy right now. You know, but, again, you know, sort of just broad, sort of program management responsibilities. ... Just making sure the projects got delivered on time, good quality and within the budget.”²¹⁴ When asked how DCHE would do that, Albert responded, “we hired them because ... they had a track record of doing it ... And we had someone from DMPED who was sort of the liaison to them ... David [Jannarone] was the one keeping their feet to the fire.”²¹⁵

Some witnesses pointed more persuasively to the different procurement rules that apply to District agencies and DCHA to explain why they would turn to DCHA when speed was required. DMPED and DPR employees believed that DCHA and DCHE could enter into types of

²¹⁰ Interview with Asmara Habte.

²¹¹ Glover Dep. 99:2-17; Deposition of Bridget Stesney, Planning and Design Officer, DPR (Nov. 10, 2010) at 74:11-75:5.

²¹² See Glover Dep. 169:11-169:21; Stesney Dep. 110:10-111:9.

²¹³ Albert Dep. 129:11-12.

²¹⁴ *Id.* at 129:19-130:6.

²¹⁵ *Id.* at 130:8-13.

contracts that reduced the time needed to complete a project, and that DCHA's procedures allowed for greater efficiency and ease in the procurement process. As discussed above, it is true that design-build contracts are rarely used in procurements conducted by OCP/DRES, and GMP contracts have never been used. Although DMPED had independent contracting authority, it was still subject to the PPA and, as the Deanwood example shows, worked with OCP contracting officers in conducting its procurements. DCHE, by contrast, does not conduct procurements through OCP and is not subject to the PPA. It is plausible, therefore, that involving DCHE could speed up procurements and decrease project completion times.

In sum, even though the explanations offered do not all hold up under scrutiny, we credit the consistent testimony that DMPED brought DCHA into the DPR capital projects in order to increase the speed with which the projects could be constructed and to supplement DMPED's team. DMPED personnel believed that what had worked before would work again: they wanted to follow the pattern established on Walker Jones and Deanwood, successful projects where DCHA, through its subsidiary DCHE, was involved. While the actual value of DCHE's involvement in the DPR projects can be questioned, and while the combination of a lack of Council review and diffused responsibility between DMPED and DCHE may have provided Banneker and LEAD with an opportunity to abuse the contracting and payment process, the evidence does not support the conclusion that the MOU with DCHA was entered for an improper purpose.

IV. THE SELECTION OF BANNEKER VENTURES AS PROJECT MANAGER

A. The Project Management RFQ

On March 5, 2009, about a week after the DPR/DMPED MOU was signed, Glover e-mailed a project list to DCHA. Shortly thereafter, on March 9, DCHE issued a Request for

Qualifications (RFQ) for a program manager for the DPR Capital Projects.²¹⁶ The RFQ was prepared by an outside consultant to DCHE.²¹⁷ Glover was the only witness from DMPED or DPR who acknowledged playing any role in the RFQ. She said that she provided scopes and budgets to DCHE and reviewed a draft of the RFQ, but offered no changes.²¹⁸

The RFQ required prospective contractors to provide their qualifications and experience, but, unlike a request for proposals (RFP), it did not require them to provide cost or fee information. Instead, the RFQ provided that “DCHE and/or DMPED will negotiate fee proposals with finalists and may request a Best and Final fee proposal from qualified respondents or solicitation finalists.”²¹⁹ It further stated:

DCHE and DMPED will conduct price negotiations with the highest qualified offeror(s) and anticipate that the successful bidder’s compensation will be based on a fee structure that is reasonable and within normal industry standards for similar work. If DCHE/DMPED cannot negotiation [sic] an acceptable price, negotiations will be conducted with the next highest ranked offeror(s) who has been determined to have sufficient qualifications.²²⁰

Glover stated that the suggestion to use an RFQ rather than an RFP came from DCHE,²²¹ while Dwyer and Habte recalled that the idea was discussed in a conference call between

²¹⁶ While the RFQ was issued on March 9, the DCHA board did not approve entry into the MOU with DMPED until March 11 (and the MOU was not actually finalized until months later). Dwyer testified that it was not unusual for DCHA to issue a solicitation based on anticipated board approval. Dwyer Dep. (Aug. 6, 2010) 44:1-12.

²¹⁷ Ex. 57, E-mail from Jack Geary to Anthony Gilardi (Mar. 8, 2009 16:23:48).

²¹⁸ Glover Dep. 57:3-12.

²¹⁹ Ex. 58, Request for Qualifications for Capital Projects, District of Columbia Parks and Recreation Project Management, Solicitation No.: 2009-5 (Mar. 9, 2009) at 4.

²²⁰ *Id.* at 9.

²²¹ Glover Dep. at 58:13-15.

DMPED and DCHE staff and the decision was made to proceed by RFQ to facilitate DMPED's goal of expedition.²²² When she was asked who made the decision, Habte pointed out that DMPED was DCHA's "client." Dwyer did not remember the specifics of the discussion, but he did not believe it was a "huge source of debate."²²³ He indicated that DCHA occasionally utilizes RFQs to accelerate the selection process because they provide a means to weed out unqualified bidders. He did not have a particular objection to proceeding by RFQ for the project manager function as long as there would ultimately be a competitive RFP process for the high cost construction contractors.²²⁴

It is not clear, however, whether DMPED and DCHE had authority to proceed solely by means of an RFQ. The PPA, which governs DMPED's contracting, does not list RFQs as a permissible method of procurement.²²⁵ And DCHE's procurement policy contemplates that major procurements will be handled by solicitations for bids or proposals, which would include a price component.²²⁶ While price need not be determinative, "[p]rice comparability is expected to be a major factor in the selection of vendors and contractors."²²⁷ Moreover, paragraph 3(C)(1) of the MOU between DMPED and DCHA provides that DCHA will procure a project manager "through a competitive bidding process." This language would exclude the use of an RFQ, which

²²² Dwyer Dep. (Aug. 6, 2010) 47:5-14; Interview with Asmara Habte.

²²³ Dwyer Dep. (Aug. 6, 2010) 47:2-49:12; Interview with Asmara Habte.

²²⁴ Dwyer Dep. (Aug. 6, 2010), 47-49.

²²⁵ *See* D.C. Code § 2-303.02; *see also* Interview with David Gagan.

²²⁶ Ex. 59, DC Housing Enterprises Procurement Policy (April 2009 Revision) at 5.

²²⁷ *Id.* at § 2002.1.

does not call for bids. However, the MOU was not executed until July 31, 2009, long after Banneker had been selected as project manager via the RFQ process.

Various industry witnesses offered different views about the use of RFQs. Architect Dale Stewart of CORE indicated that it is *not* unusual for government solicitations to omit a price component, particularly in the case of federal solicitations; and that “the city does it both ways.”²²⁸ He noted that when price was not requested in an RFQ, the selection could be made based on qualifications, with a fee negotiation to follow. Will Mangrum of Brailsford said that while competitions for project managers typically include a price component, it was not usual not to ask for price, particularly very early in a project when budgets have not been established.²²⁹ Allen Lew stated that at OPEFM, he might start a procurement with an RFQ but would always follow up with an RFP.²³⁰

Even if an RFQ was used at the outset here to narrow the field quickly to the most qualified, DCHE could have proceeded to solicit prices from the top qualifiers. We believe that the District was ill-served by the decision not to obtain price information from a range of potential project managers.

B. Communications between Jannarone and Karim while the RFQ was pending

Responses to the RFQ were due on March 27, 2009. The evidence shows that between March 9 and March 27, while the RFQ was “on the street,” DMPED and Omar Karim were communicating about the budgets and cash flows for the capital projects. Their e-mails fueled

²²⁸ Interview with Dale Stewart, Principal, CORE Architects (Oct. 29, 2010).

²²⁹ Interview with Will Mangrum, Vice President of Brailsford and Dunlavey, and Marcos Miranda, program director from McKissack & McKissack (Oct. 1, 2010).

²³⁰ Interview with Allen Lew.

concerns expressed at the Joint Roundtables that the project management contract had been steered to Banneker. Without condoning private communications between procuring officials and one prospective contractor, based on our review of the selection panel’s activities, we do not believe that these communications ultimately affected the procurement, and we do not find that further investigation of the award to Banneker is warranted.

On March 18, 2009, Karim sent an e-mail to Jacquelyn Glover and David Jannarone, with the subject line “Cash flows – DPR Projects” and the following text: “As requested, attached please find in Excel a combined as well as individual cashflows for the DPR projects. Please let me know if you have any questions.”²³¹ This e-mail was produced to the Council by Banneker without any attachments. When questioned about it at his deposition, Karim asserted that he did not know whether this e-mail related to the capital projects included in the DPR MOU, or to other DPR projects.²³² David Jannarone similarly stated that he did not think these cash flows related to the DPR capital projects.²³³ Glover, however, testified that this e-mail did relate to the DPR Capital Projects, and that Jannarone asked Karim to provide cash flows so that DMPED would know how money would be spent throughout the duration of the projects.²³⁴

Subsequently, DMPED produced the attachments to the March 18 e-mail. They consist of spreadsheets showing draft draw schedules for Bald Eagle, Guy Mason, Kenilworth, Chevy

²³¹ Ex. 60, E-mail from Omar A. Karim to Jacquelyn Glover (EOM) and David Jannarone (EOM) (March 18, 2009 10:31 AM) with attachments.

²³² Karim Dep. 108:12-110:16.

²³³ Jannarone Dep. 10:11-14.

²³⁴ Glover Dep. 62:1-10.

Chase, Justice Park, and Rosedale.²³⁵ Each schedule is labeled “Regan-Banneker Team” in the upper left-hand corner. Each spreadsheet identifies an amount labeled “Cash in Agency Estimated” for the particular project, and shows estimated expenditures on soft costs and hard costs over a series of months (the number of months varies per project).²³⁶ Jannarone responded to Karim’s e-mail, saying “Great work.”²³⁷

This e-mail exchange appears to have been followed by a conversation between Jannarone and Karim. The next day, Jannarone sent Karim an e-mail with no text, and the following subject line: “Where are the revised spreadsheets front loading the bell curve like we discussed? You were supposed to get them to me yesterday.”²³⁸ Karim responded that they had been sent and would be re-sent, to which Jannarone replied, “You modified them per our conversation? You had edits to make, the ones you sent at 4pm didn’t work. Come on dude, we talked about this.”²³⁹ At his deposition, Karim suggested that these e-mails might refer to

²³⁵ See Ex. 60, E-mail from David Jannarone (EOM) to Omar A. Karim (Mar. 18, 2009 12:11 PM) at attachments.

²³⁶ *Id.*

²³⁷ Ex. 60.

²³⁸ Ex. 61, E-mail from David Jannarone (EOM) to Omar A. Karim (Mar. 19, 2009 4:01 PM).

²³⁹ Ex. 62, E-mail exchange between David Jannarone (EOM) and Omar A. Karim (Mar. 19, 2009 4:48 PM; 4:56 PM).

“generic” bell curves.²⁴⁰ But in a March 20, 2009 e-mail, which was provided to us by DMPED after Karim’s deposition, Karim sent Jannarone updated draw schedules for Kenilworth, Justice Park, Guy Mason, Chevy Chase, Bald Eagle and Rosedale.²⁴¹

Thus, it is evident that Banneker was working with DMPED on budgeting issues for the DPR projects at the same time as it was participating in the solicitation for the project management contract. While it does not appear that Banneker obtained any direct advantage in preparing its response to the RFQ as a result of this work, it can be inappropriate for a prospective responder to have private communications with the procuring officials while a solicitation is in progress or to receive information that would give it an unfair advantage.²⁴² It appeared to us that both Jannarone and Karim were determined to avoid acknowledging that DMPED was talking to Banneker about the DPR projects before the procurement was complete. The fact that they consistently denied it even in the face of the subject line on the e-mails suggested to us that they were uncomfortable about the communications.

²⁴⁰ Karim Dep. (Aug. 5, 2010) 111:2-13; 112:12-13; 118:15-120:4. Asked what he recalled about the conversation with Jannarone referenced in the e-mail, Karim responded: “I don’t remember. I mean we were working on a lot of stuff with them. Walker Jones was going full blast at the time. Deanwood was going full blast and these were these, you know, to put together some generic bell curve cash flows.” *Id.* at 112:9-13. Karim also evasively described these e-mails as referring to “generic” bell curves in his testimony before the Council without agreeing that they related to the DPR projects in particular. (Dec. 10, 2009 hearing transcript at 190-193, 295-296).

²⁴¹ Ex. 63, E-mail from Omar A. Karim to David Jannarone (EOM) (Mar. 20, 2009 12:58 PM) with attachments.

²⁴² *See generally*, 27 DC ADC § 1602.3 (in the context of competitive sealed proposals, “The contracting officer shall furnish identical information concerning a proposed procurement to all prospective contractors receiving the RFP.”). Neil Albert commented that although he did not know the full context of this e-mail exchange, he would not do it that way. Albert Dep. 120:14-121:10.

C. The Banneker-Regan Response to the RFQ

On March 27, 2009, thirteen firms submitted responses to the project management RFQ. Banneker and Regan Associates submitted as a team. According to the Regans, their response was put together by Banneker;²⁴³ Karim stated that they worked on it together with Regan Associates.²⁴⁴ The response stressed their experience on Walker Jones and Deanwood. In his cover letter, Karim wrote, “We believe that no other responder has more experience or familiarity with large-scale, complex, District of Columbia recreation center and parks projects than the Banneker-Regan Team.”²⁴⁵ He also stated,

As you may know, we are currently working on two large-scale, recreation center projects (Walker Jones and Deanwood) and to date, have been successful in meeting both our schedules and budgets. If selected to provide Project Management Services for the Capital Projects listed in this RFQ, we expect to deliver these projects on schedule and within budget as well.²⁴⁶

The cover letter indicates that Banneker will lead the Banneker-Regan team.²⁴⁷

The response includes a chart of relevant project experience for Banneker and Regan. Walker Jones, Deanwood and Emery Recreation Center are identified as joint projects of the team.²⁴⁸ The other projects listed for Banneker are The Residences @ Thayer Avenue; Pattern

²⁴³ Interview with Sean Regan and Thomas Regan.

²⁴⁴ At his deposition, Karim testified that after they saw the RFQ advertised in the Washington Post, his firm “spent thousands of dollars putting it [a response] together and hundreds of hours putting it together as well.” Karim Dep. (Aug. 5, 2010), 113:20-22. *See also* 124:18-125:3.

²⁴⁵ Ex. 64, Response to Request for Qualifications for Capital Projects – District of Columbia Parks and Recreation Project Management, submitted by Banneker Ventures LLC and Regan Associates LLC (Mar. 27, 2009) at 2.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 10, “Matrix of Relevant Project Experience.”

Shop Lofts; The Jazz @ Florida Avenue; a project in connection with the Park Morton Master Plan; and a role as “co-master developer,” as well as the developer of residential/retail space and commercial space, for the Northwest One Redevelopment.²⁴⁹ The remaining projects on Banneker’s chart are described as “staff involvement,” apparently meaning that they were projects undertaken by Bundy Development Corporation while Karim was employed there. Regan’s experience is also detailed in the RFQ response.

D. The Selection Process

Questions have been raised about whether the program management contract was deliberately steered to Banneker. As noted above, some DMPED personnel seemed to assume from the beginning that Banneker would be involved in the DPR Capital Projects. However, we did not find that the selection process was manipulated to reach this result.

The responses to the RFQ were reviewed by a committee of 5 members. Initially, DMPED proposed a committee consisting of 3 DMPED employees (Clint Jackson, Jacquelyn Glover and David Jannarone) and two DPR employees (David Janifer, Bridget Stesney).²⁵⁰ No DCHE representatives were included in DMPED’s proposed committee even though DCHE had been specifically tasked with doing the program management solicitation. Within several days, two DCHE employees – Asmara Habte and Christopher Regan²⁵¹ – were put on the committee in place of Clint Jackson and David Jannarone.²⁵²

²⁴⁹ *Id.* at 11. The chart shows a Fall 2001 completion date for the Thayer Avenue and Florida Avenue projects, but that is obviously incorrect.

²⁵⁰ Ex. 65, E-mail from Jacquelyn Glover (EOM) to Jack Geary (Apr. 1, 2009 3:42 PM).

²⁵¹ Christopher Regan of DCHE is no relation to the Regans of Regan Associates.

²⁵² *See* Ex. 66, E-mail from Anthony Gilardi to Christopher Regan and Asmara Habte (Apr. 3, 2009 1:17 PM).

1. Did Glover have a disqualifying relationship with Banneker?

Questions have been raised about Glover's participation on the selection committee because Banneker's Best and Final Offer for the Deanwood contract, submitted on June 24, 2008, identifies Jacqueline Glover as a Banneker project engineer who is expected to spend 100% of her time on Deanwood. Banneker also listed Glover as an employee on the Employment Plan submitted as part of its First Source Employment Agreement, also dated June 24, 2008.²⁵³

However, Glover was never employed by Banneker. At her deposition, Glover testified that while working for another contractor, she met Karim at a networking event.²⁵⁴ In mid-2008, she interviewed with Banneker, which offered her a position as a project manager.²⁵⁵ Glover turned the job down in July 2008, deciding that she was not interested in working for a small company.²⁵⁶ Glover also testified that no one from Banneker had asked whether they could list her in a submission to the government.²⁵⁷ At the Joint Roundtable on December 2, 2009, however, Glover testified that while she was considering Banneker's offer, she gave them permission to list her name on its proposal, but that they later included her name on a DOES form without her permission.²⁵⁸ At the Joint Roundtable on December 10, 2009, Karim testified that they thought they had an agreement with Glover to join Banneker, and that her name was

²⁵³ The First Source Employment Agreement relates to the contractor's obligations to use the Department of Employment Services as its first source of employee recruitment and to hire District residents.

²⁵⁴ Glover Dep. 11:18-12:10.

²⁵⁵ *Id.* at 12:16-13:5.

²⁵⁶ *Id.* at 13:4-11.

²⁵⁷ *Id.* at 15:9-14.

²⁵⁸ Joint Roundtable (Dec. 2, 2009) 67:14-67:19.

included on their Best and Final Offer with her authorization.²⁵⁹ He stated that including her name on Banneker's later DOES form was a mistake.²⁶⁰

Glover was called for an interview at DMPED in late July or early August of 2008, after giving her resume to a headhunter.²⁶¹ She started working at DMPED in late October 2008.²⁶²

Based on these facts, we do not believe that Glover had a relationship with Banneker Ventures that disqualified her from participating on the selection committee for the DPR projects program manager.

2. Was the selection committee or its scoring manipulated to favor Banneker?

The Special Counsel deposed or interviewed each member of the selection committee, and reviewed the score sheets and other documents related to the selection process. As described in detail below, the selection committee evaluated the RFQ responses on four criteria, and while there were three respondents with relatively close high scores – Banneker/Regan, KCI Technologies, Inc. and Brailsford & Dunlavey, Inc. – the Banneker-Regan team led the scoring at that time. CBE scores, which were obtained from the Department of Small & Local Business Development and were not subject to the panelists' judgment, were then added. They solidified Banneker/Regan's lead, resulting in the decision to award the project management contract. We do not find that the selection process was manipulated to favor Banneker.

²⁵⁹ Joint Roundtable (Dec. 10, 2009)165:19-166:1.

²⁶⁰ Joint Roundtable (Dec. 10, 2009) 166:2-166:9, 234:7-234:8. As noted above, however, Banneker's Best and Final Offer and its DOES form have the same date.

²⁶¹ Glover Dep. 16:12-16:15.

²⁶² *Id.* at 21:10-21:14. There was a report that Glover introduced herself as a Banneker employee at a community meeting about the projects. Glover testified that she never introduced herself this way (Glover Dep. 192:4-193:5), and we view this testimony as credible.

The committee members' recollections of the selection process were not consistent in all their details. Some members recall the responses being sent to them at their offices,²⁶³ while one remembers picking them up at the initial meeting of the committee.²⁶⁴ Most of the members recalled that the committee met twice. It appears that the first meeting took place on April 6, 2009.²⁶⁵ Glover thought that the proposals were discussed at that meeting, and that the Banneker/Regan response was identified as a "good proposal."²⁶⁶ Other members of the committee did not think that any substantive discussions took place at the first meeting.²⁶⁷

The selection committee members used a score sheet created by DCHE based on the criteria in the RFQ.²⁶⁸ Each respondent was to be rated on 5 evaluation factors:

- Demonstrated Experience & Qualifications
- Demonstrated ability to coordinate complex projects
- Familiarity with applicable DC and Federal Laws

²⁶³ Glover Dep. 76:16-19; Interview with Asmara Habte.

²⁶⁴ Stesney Dep. 47:17-48:17. The documents show that on April 3, 2009, Anthony Gilardi of DCHE e-mailed copies of the responses to the two DCHE members of the selection committee, Chris Regan and Asmara Habte. *See* Ex. 67, E-mail from Anthony Gilardi to Christopher Regan and Asmara Habte (Apr. 3, 2009 5:21 PM). Chris Regan then asked for all of the responses to be printed and made available at the meeting. *See* Ex. 68, E-mail from Christopher Regan to Anthony Gilardi (Apr. 3, 2009 7:04 PM). We have no documents showing transmittals to the other members.

²⁶⁵ Ex. 66.

²⁶⁶ Glover Dep. 77:10-78:1.

²⁶⁷ Interview with Christopher Regan, Project Manager, DCHE (Jul. 22, 2010); Interview with Asmara Habte; Stesney Dep. 48:18-49:1. David Janifer testified that the selection committee received over 20 proposals, narrowed them down to 5 on which they focused, and heard oral presentations from the candidates. Janifer Dep. 53:6-53:17. We believe that Janifer's testimony was a mistaken reference to a different selection process.

²⁶⁸ Interview with Asmara Habte.

- Experience with publicly funded projects
- Business Enterprise Designation (MBE, WBE, etc.)²⁶⁹

It is not clear when the score sheets were provided to the committee members.

The committee held its second meeting on April 22, 2009.²⁷⁰ The witnesses did not agree on whether the committee members filled out their score sheets before the meeting²⁷¹ or at the meeting.²⁷² There was agreement, which is supported by the documents, that at the April 22 meeting, each member read their total scores for each proposal out loud, and that Larry Dwyer of DCHE took notes of each score and calculated totals for each respondent.²⁷³ Those totals did not include CBE points (the fifth evaluation factor) for any of the respondents.²⁷⁴ According to Glover, the fact that Banneker was the top scorer at that point was discussed at the meeting.²⁷⁵

²⁶⁹ Ex. 69, Proposal Evaluation and Scoring Sheet, DCHE Solicitation No. 2009-05, DMPED Capital Projects – DC Parks and Recreation Project Management Services (Apr. 22, 2009).

²⁷⁰ Interview with Asmara Habte; *see* Ex. 70, Handwritten tally of scores (2 pages), initialed “LD” and dated Apr. 22, 2009.

²⁷¹ Glover Dep. 89:3-6; Stesney Dep. 68:5-7; Interview with Christopher Regan.

²⁷² Interview with Asmara Habte.

²⁷³ *See* Ex. 70.

²⁷⁴ A comparison of Dwyer’s handwritten scores, *see* Ex. 70, and the scores on the final score sheets, *see* Ex. 71, minus the CBE points, which were not known at the time of Dwyer’s tally, reveals that they are generally consistent. Dwyer’s notes list 5 scores for each of the 13 contractors. Although the notes do not indicate which member gave which score, it seems clear that Dwyer listed the scores from the committee members in this order: Glover, Janifer, Stesney, Regan, Habte. There are 3 instances where the score sheets and Dwyer’s notes do not match: Glover’s score for Eller Group DC, and Janifer’s scores for Banneker and KCI. However, the scores on the score sheets match the totals on the combined score sheet attached to Dwyer’s selection memo, Ex. 72, so the 3 discrepancies do not appear to have made any difference.

²⁷⁵ Glover Dep. 94:12-14.

Other witnesses did not recall this, and beyond the reading of the scores, we have not been able to get a full picture of any discussions that took place at the April 22 meeting.

Both Banneker and Regan Associates' qualifications were presented in their proposal, and according to the committee members we interviewed, they assessed them together. Glover testified that the fact that it was a joint proposal was particularly important to her:

Banneker is not a large company. Regan has definitely got a significant history and good work performance in construction management. So the team made them stronger.²⁷⁶

She also indicated that she would have evaluated a proposal from Banneker alone quite differently: "Alone they could not handle the large volume of projects that we had."²⁷⁷

After the April 22 meeting, Habte went to the District's LSDBE website and determined the business enterprise points for each responder.²⁷⁸ She e-mailed the LSDBE points to the other committee members that evening.²⁷⁹ It appears that the members entered the points on their score sheets and then determined the final totals for each proposer.²⁸⁰

DCHE collected signed score sheets from each member of the selection committee. They are dated as follows:

²⁷⁶ Glover Dep. at 85:5-8.

²⁷⁷ *Id.*

²⁷⁸ Interview with Asmara Habte.

²⁷⁹ Ex. 73, E-mail from Asmara Habte to Jacquelyn Glover (EOM); David Janifer (DPR); Bridget Stesney (DPR); Lawrence Dwyer; Christopher Regan (Apr. 22, 2009 7:33 PM).

²⁸⁰ Ex. 71.

Habte	April 14, 2009
Janifer	April 22, 2009
Stesney	April 22, 2009
Regan	April 23, 2009
Glover	June 1, 2009 ²⁸¹

The June 1 date on Jacquelyn Glover’s score sheet has raised questions about whether her scores may have been changed after the fact to enable Banneker to win.

The witnesses’ accounts of what happened to Glover’s score sheet are not consistent. Glover testified that she turned in her score sheet on April 22, the day of the second meeting, but that either Dwyer or Habte told her that DCHE had lost it.²⁸² Habte stated that it was Glover who lost her score sheet. Habte said that she asked her for it several times and that she ultimately went and picked up another score sheet from Glover.²⁸³ Chris Regan thought that Habte found an arithmetic error in Glover’s score sheet and asked Glover to re-do it. At the time, Chris Regan and Glover were working together on another project, and Regan recalled that Glover brought him the score sheet and he gave it to Habte.²⁸⁴ Neither Bridget Stesney nor David Janifer, the other members of the selection committee, had any knowledge about Glover’s score sheet.²⁸⁵

It is clear that Glover’s June 1 score sheet was created after the fact. Glover testified that Habte provided her with the scores she had originally awarded each contractor as they were recorded at the April 22 meeting, and that she used these scores to fill out a new score sheet.²⁸⁶

²⁸¹ *Id.*

²⁸² Glover Dep. 89:14-17, 91:2-11.

²⁸³ Interview with Asmara Habte.

²⁸⁴ Interview with Christopher Regan.

²⁸⁵ Stesney Dep. 70:15-71:6; Janifer Dep. 58:19-60:2.

²⁸⁶ Glover Dep. 91:17-92:9.

Habte did not give her the scores for each evaluation factor; instead, Glover filled those in based on her memory.²⁸⁷

While Glover's score sheet was mishandled, we did not find any evidence that Glover's scores were manipulated after the fact to allow Banneker to win. The comparison between Glover's June 1 score sheet and Dwyer's handwritten notes from the April 22 meeting is particularly important in this regard. Although there was one score on Glover's June 1 score sheet that differed from her score in Dwyer's notes, it was a score for a contractor that had no chance in any event. After accounting for CBE points, which were not within Glover's control, all the other scores on Glover's sheet, including the score for Banneker, matched Dwyer's April 22 notes. Moreover, Banneker had the highest combined score from the other four committee members and would have won even without Glover's score.

None of the members of the selection committee reported experiencing anything inappropriate about the process, or reported knowledge of any facts suggesting that the contract might have been steered to Banneker.²⁸⁸ None of the panelists recalled that Glover, Jannarone or anyone else advocated for Banneker in particular or pressed them to vote in a particular way. We found no evidence of financial or other ties between any of the selection committee members and Banneker that would suggest improper bias or favoritism. As discussed above, we do not believe that Glover's job offer from Banneker was meaningful in this regard. Several of the committee members viewed the experience of the Banneker/Regan team on Walker Jones and Deanwood as

²⁸⁷ *Id.* at 92:10-15.

²⁸⁸ Glover Dep. 219:2-9; Stesney Dep. 71:10-72:2; Janifer Dep. 60:14-61:11; Interview with Asmara Habte; Interview with Christopher Regan.

particularly significant in their consideration of the proposals,²⁸⁹ but this was not an improper advantage.²⁹⁰ In short, the facts we have found do not support a conclusion that the selection process was manipulated.

In a memorandum dated April 29, 2009, Dwyer recommended the selection of Banneker to the DCHE board. It is not clear how this memorandum, which purports to attach all of the evaluation forms,²⁹¹ could have been written and sent on April 29 when Glover's score sheet was dated June 1. While it thus appears that the recommendation was made before the supporting paperwork was fully in place, it was consistent with what Dwyer knew to be the results of the selection process.

V. THE BANNEKER PROJECT MANAGEMENT CONTRACT

Questions have been raised about whether the program management contract provided excessive compensation to Banneker or terms that were otherwise unfair to the District. Based on the evidence we have reviewed, we do not believe this issue warrants referral for further investigation. But the manner in which the contract negotiations were handled does raise concerns about the appropriateness of the compensation to Banneker and whether the District's interests were adequately protected. Banneker was entitled to negotiate the most favorable terms

²⁸⁹ Glover Dep. 255:8-20; Stesney Dep. 56:4-10. Glover testified that after the RFQ responses were received, she talked with DMPED project managers about some of the responding companies. Knowing that Banneker was working on Walker Jones and Deanwood, she spoke with the project managers for those projects, who had nothing negative to say and were pleased with Banneker's work. Glover Dep. 255:19-20.

²⁹⁰ The decision to proceed by RFQ alone, rather than to solicit price proposals from the most qualified bidders, compounded the advantage, though, as no other contractor had an opportunity to compete with the Banneker/Regan team on the basis of price.

²⁹¹ Ex. 72.

it could, so if the contract was overly favorable to Banneker, it is the government officials, not Banneker, who should be faulted.

A. The Intent to Award Letter; Work Begins

By letter dated April 30, 2009, DCHE notified Banneker that the program management contract would be awarded to the Banneker/Regan team.²⁹² According to the letter, DCHE – consistent with the responsibilities assigned to it under the MOU – expected to be handling the contract negotiations:

DCHE Project Manager, Asmara Habte, will be contacting your office over the next few days to finalize the contractual agreement and to schedule the work for this project. In the meantime, please provide us with a proposed budget for your services based on the scope of work detailed in the DCHE solicitation No. 2009-05.²⁹³

Although the project management contract had not yet been signed, DMPED directed Banneker to begin work. A kick-off meeting for the DPR projects was held on May 1, 2009.²⁹⁴ As will be discussed in more detail below, on May 4, 2009, without any competitive solicitation, Banneker issued a letter to Liberty Engineering & Design, informing LEAD that it would be receiving a contract for consulting and surveying services for the DPR capital projects, and authorizing LEAD to begin performing consulting and surveying work immediately.²⁹⁵ On May 14, 2009, representatives of Banneker, Regan, DMPED and DPR held a planning meeting, at which, among other things, they scheduled site visits to Kenilworth, Bald Eagle, Guy Mason and

²⁹² Ex. 74, Letter from Larry Dwyer to Omar A. Karim (Apr. 30, 2009).

²⁹³ *Id.*

²⁹⁴ Ex. 75, E-mail confirmation regarding DPR Projects Kickoff Meeting scheduling (May 1, 2009).

²⁹⁵ Ex. 76, Letter from Duane W. Oates, Banneker Ventures, L.L.C., to Abdullahi Barrow, P.E., Liberty Engineering and Design, PLLC (May 4, 2009).

Chevy Chase for the following week.²⁹⁶ Banneker continued to move forward, and to invoice the District, during the two and a half months it took for the parties to finalize the program management contract.

While it may have been advantageous to the District to allow Banneker to begin before contract execution, it also could have made it more difficult for the District to reject contract demands from Banneker and begin negotiations with another contractor. At the same time, Banneker was technically at risk of not being compensated for work done, or of being compensated at less than its anticipated rate, if its negotiations with the District did not result in an executed contract.

B. DMPED controlled the contract negotiations

Both the MOU and the award letter to Banneker contemplated that DCHE would have responsibility for negotiating Banneker's program management contract. It is clear, however, that the negotiations, such as they were, were controlled by DMPED, and that DMPED largely regarded attempts by DCHE to have input into the terms of the contract as an unwanted annoyance.

1. The fixed fee

Jacquelyn Glover of DMPED was the District employee primarily responsible for negotiating fees with Banneker. She described her role as "a representative for DPR, just making sure that we get, in a sense, our best bang for our buck."²⁹⁷

²⁹⁶ Ex. 77, E-mail from Jacquelyn Glover to Bridget Stesney (DPR); David Janifer (DPR); Omar A. Karim; Duane Oates; Tom Maslin; Bernard Guzman (EOM); David Jannarone (EOM); McClinton Jackson (EOM) (May 14, 2009 4:04 PM).

²⁹⁷ Glover Dep. 100:13-15.

It appears that the first document presented to the District as part of the contract negotiations was a fee proposal, which Glover described as a “funding sheet that basically outlined how much their monthly billing would be.”²⁹⁸ Despite requests, we have not received a copy of the initial fee proposal. According to Karim, the fee proposal was prepared by Regan Associates, and was based on the staffing plan included in the Banneker-Regan response to the RFQ. Although Glover thought that the proposal was also provided by Banneker to DCHE, and possibly to DCHE first,²⁹⁹ Karim testified that the initial fee proposal went to DMPED,³⁰⁰ which seems more likely.

On May 18, 2009, Glover sent Karim a response to the fee proposal, copying representatives of Banneker, Regan, DPR and DMPED, but not DCHE.³⁰¹ Glover’s e-mail indicates that the proposal was based on a monthly fee of \$44,000 per “project.” “Project” in this context did not mean an individual park; instead, the parks were grouped for purposes of calculating workloads.³⁰² Banneker calculated that it would be working on 4 “projects” during months 1-15 of contract performance, and 3.1 “projects” during months 16-28, for a total fee

²⁹⁸ Glover dep. at 100:22-101:3.

²⁹⁹ *Id.* at 101:4-7.

³⁰⁰ Karim Dep. (Aug. 5, 2010) 138:14-15.

³⁰¹ Ex. 78, E-mail from Jacquelyn Glover (EOM) to Duane Oates; Sean Regan; Tom Maslin; David Janifer (DPR); David Jannarone (EOM); Jacquelyn Glover (EOM) (May 18, 2009 5:59 PM).

³⁰² Glover dep. at 109:19-110:9. The contract included 10 different parks and recreation centers (3 more than were in the initial DPR/DMPED MOU).

over 28 months of \$4,413,200.³⁰³ Glover testified that she discussed the calculation of the monthly fee with Karim, and that it was based on “units of work per project.”³⁰⁴

According to the Regans, Banneker’s fee was based on expected staffing levels, and was calculated in the same manner as their fee on Walker Jones.³⁰⁵ On the earlier project, the Regans priced 3 full time employees at \$45,000 per month, and then priced the work by determining how many full time employees would be needed in total.³⁰⁶ They said that the same analysis was applied here.³⁰⁷

In her response, Glover offered a lower monthly fee of \$40,000 per project group, but added a bonus of \$250,000 for successful completion of certain parks in the first 15 months and a second bonus of \$300,000 that could be earned at the end of 28 months.³⁰⁸ Although both Glover and Karim describe Banneker’s fee as having been negotiated down,³⁰⁹ in fact Glover’s proposal provided for a total potential fee of \$4,562,000, which was \$148,800 *more* than Karim requested. Glover testified that the reason for the increase in the total fee was to create an incentive for Banneker to move quickly and meet the “very aggressive” schedules imposed by DPR.³¹⁰

³⁰³ *Id.* at 110:2-9.

³⁰⁴ *Id.* at 103:15-22.

³⁰⁵ Interview with Sean Regan and Thomas Regan (Apr. 20, 2010).

³⁰⁶ *Id.*

³⁰⁷ The Regans indicated that contract negotiations with the city were handled by Banneker, which consulted with them; “we had to be comfortable with what the fee would be.” Interview with Sean Regan and Tom Regan. According to Karim, representatives of Regan Associates met with Glover to explain the fee proposal.

³⁰⁸ *See Ex. 78.*

³⁰⁹ Glover Dep. 104:20-105:9, 108:17-109:12; Karim Dep. (Aug. 5, 2010) 139:4-5.

³¹⁰ Glover Dep. 105:19-106:1.

Glover and Karim compromised on a monthly fee of \$42,000 per “project” (with the workload calculated at 4 projects in the first 15 months and 3.1 projects in the subsequent thirteen months),³¹¹ resulting in a contract amount of \$168,000 per month from May 2009 to July 2010, and \$130,200 from August 2010 to August 2011. Glover reduced the bonus amounts to \$150,000 and \$200,000, which resulted again in a total potential fee of \$4,562,600 – again, more than Karim had originally proposed.³¹²

It appears that no one in DMPED other than Jannarone reviewed this decision. Neil Albert testified that he was not aware of the fees being negotiated, and that it was David Jannarone’s responsibility to manage the project.³¹³ Jannarone did not conduct an in-depth review. He testified that he discussed the fees with Glover after Banneker’s proposal came in. Glover was “going to go back and try to negotiate the lower fees, which she did successfully.”³¹⁴ They also discussed whether the fees were consistent with other projects and fair and reasonable.³¹⁵ However, Jannarone rejected the suggestion that he was responsible for the final

³¹¹ Glover Dep. 109:17-110:1; Ex. 79, E-mail from Jacquelyn Glover to Omar A. Karim (May 19, 2009 7:34 PM) (“Omar, Per our conversation, we will meet in the middle and adjust your monthly fee ... from \$44,000 to \$42,000/month/project. Then adjust the Bonuses accordingly to ensure the Grand Total Fee is 4,562,600, as shown in my original Proposed Fee Calculation ...”). These numbers were carried through into the contract. *See* Ex. 80, Contract for Services between DCHE and Banneker Ventures, Contract No. 2009-05 (Jul. 14, 2009) at 4. The bonus targets were based on two groups of parks: Part A, the smaller parks that were expected to be completed first (Barry Farms, Justice Park, Parkview Community Park, 7th and N Street), and Part B (Bald Eagle, Chevy Chase, Fort Stanton, Guy Mason, Kennilworth-Parkside, Rosedale Community Center). Ex. 80 at 35; Glover Dep. 104:20-105:18, 109:19-110:9. Note that the contract covered 3 parks that were not included in the DPR/DMPED MOU.

³¹² *See* Ex. 79.

³¹³ Albert Dep. 129:9-18.

³¹⁴ Jannarone Dep. 36:7-8.

³¹⁵ *Id.* at 36:9-11.

numbers: “[Glover] did what she had to do, and when she ended up in a place that she felt comfortable with[,] her and I talked about it.”³¹⁶

Once the fee issue was concluded, Glover requested that Karim send her his contract, in terms that suggested DCHE’s role was only a formality: “Please send over your contract, with these amounts included, for review, and we will then send it to DCHE for formal execution.”³¹⁷

2. The 9% mark-up

The contract proposed by Banneker was largely based on the program management contract for Walker Jones: “Banneker had an existing contract on Walker Jones with DCHE so pretty much they used the same template, just changed the scope and the funding portions of it.”³¹⁸ In addition to the monthly fee and bonuses, Banneker was entitled to be paid “Amounts due to Consultants under the Contractor’s contracts with the Consultants (other than Regan Associates), plus a mark-up of nine percent (9%) thereof for the Contractor’s overhead and management (Consultant Payments).”³¹⁹

The contract includes construction contractors in the definition of Consultant³²⁰ During some of the hearings, this 9% mark-up was described as mark-up on the entire construction

³¹⁶ *Id.* at 36:19-22.

³¹⁷ Ex. 79.

³¹⁸ Glover Dep. 101:19-22.

³¹⁹ Ex. 80, at § 9(A)(11). The PPA prohibits the use of the “cost-plus-a-percentage-of-cost contract system of contracting.” D.C. Code, § 2-303.09. While DCHA and DCHE are not governed by the PPA, we understand that the D.C. Auditor is looking into whether including the 9% mark-up made the Banneker contract a cost-plus-percentage-of-cost contract, and if so, why DCHE would issue such a contract. *See* Ex. 81, E-mail from Francis Bonsiero, Senior Analyst, Office of the District of Columbia Auditor to Hans Froelicher (Feb. 3, 2010 4:45 PM).

³²⁰ *Id.* at § 5.

budget. However, the parties understood the mark-up to apply only to “soft cost” consultants, primarily engineers and architects, and not to the construction contractors.³²¹

The 9% mark-up is a term that was included in the program management contract for Walker Jones and stayed in the version used by Banneker for the DPR Capital Projects.³²² Although Glover testified that she discussed the mark-up with Karim, it does not appear to have been the subject of serious negotiation, nor was it reviewed by anyone other than Glover. She thought it was standard for a mark-up to be added when a contractor, as opposed to the owner, would be holding contracts with consultants or sub-contractors.³²³ She stated that the mark-up was justified because the contractor was taking on additional liability, both for paying the consultant and for the work done by the consultant.³²⁴ Jannarone did not recall any specific discussions about the 9% mark-up, and pointed to the Walker Jones contract as justification.³²⁵ Asked about the mark-up in the Walker Jones contract, Karim stated that it was normal to charge a fee for holding a contract and that the 9% amount was “industry standard.”³²⁶

³²¹ See e.g. Jannarone Dep. 43:6-46:16; Dwyer Dep. (Aug. 6, 2010) 109:5-9, 138:15-141:22; Interviews with Sean Regan and Thomas Regan (Apr. 20, 2010, Nov. 12, 2010).

³²² There was no similar provision in the Deanwood project management contract.

³²³ Glover Dep. 106:20-22.

³²⁴ *Id.* at 107:1-108:16.

³²⁵ Jannarone Dep. 37:1-12.

³²⁶ Karim Dep. (Aug. 5, 2010) 97:6-7. Karim’s explanation was as follows:

[Regan and Associates] had to manage those contracts. They have to manage those staff. They had to negotiate the contracts. They had to negotiate invoices every month and submit them and oversee them and when – if the District didn’t pay, they’re the ones who get those emails and phone calls and reputations are on the line when all of those consultants begin to ask where’s our money.

(footnote continued on next page)

During the investigation, we spoke to numerous people in various positions in the construction industry. Based on those discussions, it appears that it is not unusual for a contractor to add a percentage fee when it holds a contract, and we heard various estimates of a standard mark-up amount, ranging from 2 to 10%.³²⁷ But in this case, the mark-up was being added on top of a significant fixed fee.

More importantly, the purpose of such a mark-up is to cover costs to the contractor of managing the sub and assuming additional liability.³²⁸ But Banneker did not take on that liability in this case. The language of the contract does not support Karim's claim that Banneker retained

And then you have reputations on the line and all of those things. Similarly, the same situation that we're in under the – our contract with DCHE and all the subcontractors who aren't paid. It's a major, major burden on us because we don't have the funds to directly pay those consultants. They have to come from the government.

So I think a nine percent fee is certainly industry standard. It's regular. General contractors charge the same thing. Architects charge the same – they charge more for this.

Karim Dep. (Aug. 5, 2010) 96:12-97:9.

³²⁷ Interview with Dale Stewart; Interview with Mangrum and Miranda. Larry Dwyer testified that in DCHE's view, a mark-up of 4 to 6% would be more in line. Dwyer Dep. (Aug. 6, 2010) 55:10-13. During the negotiations, Habte recommended a 4% mark-up on Banneker's subs.

At the Council hearing on Nov. 16, 2009, Valerie Santos, who became Deputy Mayor for Planning and Economic Development in June 2009, testified that 9 percent was in line with industry standards for taking on liability and risk associated with the work. Council Hearing (Nov. 16, 2009) 161:10-16. At her deposition, Santos testified that she got this explanation from Dwyer and Jannarone, who advised her that the program manager was bearing all the risk if anything went wrong with the work of the consultants. Deposition of Valerie Santos, Deputy Mayor for Planning and Economic Development (Sep. 27, 2010) at 45:18-46:9.

³²⁸ Interview with Mangrum and Miranda; Interview with Dale Stewart.

liability for the work of its consultants.³²⁹ The contract states that Banneker “is responsible for its own negligence and willful misconduct.”³³⁰ But it also provides that “Notwithstanding anything else in the Contract Documents, however, the Contractor is not responsible for the performance of Enterprises [DCHE], of the Consultants, or of construction contractors, as such performance is solely the responsibility of those firms.”³³¹ Banneker is not relieved of responsibility “for coordinating efforts of or managing Consultants as set forth in the Contract Documents or for administration of Consultant contracts” – which are its obligations under the contract. But it is expressly relieved of liability for the consultants’ acts:

To the extent a claim by Enterprises involves or relates to the performance, breach of contract, negligence, or intentional misconduct or any other act or omission by a Consultant, Enterprises (at its own expense, including attorneys’ and experts’ fees) will pursue its claim either through the Contractor (i.e., in the name of the Contractor) or directly against the Consultant, and Enterprises will be limited in its recovery to the amount that Enterprises recovers from the Consultant.³³²

Asked about the meaning of this provision in the project management contract for Walker Jones,³³³ which was the model for the Banneker contract, Karim stated that it did not disclaim

³²⁹ The 9% mark-up also cannot be justified as compensation for Banneker’s taking on the risk of having to pay the consultants. Its contracts with LEAD and the architects expressly state that the consultants are not entitled to any payment from Banneker unless and until Banneker has received payment from DCHE. *See, e.g.,* Ex. 82, Consulting Services Agreement between Banneker and LEAD (Jul. 22, 2009) at 8, Schedule 2 “Contract Sum.”

³³⁰ Ex. 80, at § 5.

³³¹ *Id.*

³³² *Id.* at § 5.B.

³³³ *See* Ex. 83, Contract for Services between DCHE and Regan Associates, LLC (Aug. 3, 2007) (“Walker Jones Contract”) at § 5B.

liability for the work of the consultants.³³⁴ But the Regans, who negotiated the Walker Jones contract with DCHE, acknowledged that in return for reducing their original demand for a 15% mark-up, they were able to obtain contract language relieving them of claims.³³⁵

Because the Banneker contract was disapproved long before completion, the total amount that would have been paid to Banneker due to the 9% mark-up is unknown. For analysis purposes, we looked at a set of project budgets produced by DCHA dated June 8, 2009.³³⁶ Applying a 9% mark-up to the soft cost category entitled “Program Manager Contracts” in each budget (some of which appear to be missing architects’ fees) yields \$388,823. Using this amount, the total fee payable to Banneker under the contract would have been \$4,601,423 without bonuses, and \$4,951,423 with bonuses. With a total estimated project budget of \$53,150,000, as indicated in the scopes of work for each of the 10 parks covered by the contract, Banneker’s fee without bonuses could have totaled 8.7% of the budget; with bonuses, 9.3%.³³⁷

It is outside of the scope of the Special Counsel’s responsibilities to set compensation standards for project management. But the absence of price competition in the original award, the manner in which the negotiations for the contract were conducted, the lack of hard bargaining on the price components, and the inclusion of the 9% mark-up on consultants’ costs, when

³³⁴ Karim Dep. (Aug. 5, 2010), 92:9-93:5.

³³⁵ Interview with Sean Regan and Thomas Regan (Aug. 2, 2010).

³³⁶ Ex. 84, Projected Budget tables for Rosedale, Kenilworth, Bald Eagle, Guy Mason, Chevy Chase Field, Barry Farms, Justice Park, Park View, 7th and N (Cash Flow as of 5/4/2009), Fort Stanton (Jun. 8, 2009).

³³⁷ The total project budget is higher than the \$40 million MOU amount because parks were added to the projects after the MOU was executed. As happened throughout these projects, documents authorizing additional funding or work were prepared after the fact.

Banneker was relieved of liability for the consultants' performance, give rise to the view that the District's interests could have been better served.

C. Finalizing the Contract

On May 26, 2009, Karim sent Jacquelyn Glover and David Jannarone an e-mail attaching a draft of the contract between DCHE and Banneker Ventures.³³⁸ Karim noted that “[i]t is essentially the same contract that was signed for Walker Jones.” He also indicated that he would provide the contract attachments once the scopes of work were finalized; they appear to have been sent to Glover on June 9, 2009.³³⁹ Later that same day, Glover forwarded the draft and attachments to Asmara Habte³⁴⁰ with no comments.³⁴¹

DCHE took steps to review the language of the contract. Its insurance analyst provided comments on June 16, 2009.³⁴² The analysts noted the sentence in paragraph 5 of the contract providing that Banneker was not responsible for the performance of the Consultants or the construction contractors, and commented “We believe the Contractor SHALL be responsible for the performance of the Consultants and of construction contractors.”³⁴³ They noted the language of the insurance provision, section 10, which as drafted provided that the insurance maintained by Banneker would cover “the Contractor’s own operations (and not the operations of

³³⁸ Ex. 85, E-mail from Omar A. Karim to Jacquelyn Glover (EOM) (May 26, 2009 7:04 PM).

³³⁹ *Id.*; Ex. 86, E-mail from Jacquelyn Glover (EOM) to Asmara Habte (June 9, 2009 3:50 PM). We have not been provided with a copy of the draft attached to this e-mail or the contract attachments that were subsequently forwarded.

³⁴⁰ *Id.*

³⁴¹ Glover Dep. 115:4-6.

³⁴² Ex. 87, E-mail from Julie Ellis to Jack Geary; Nancy Ahrens (June 16, 2009 1:36 PM).

³⁴³ *Id.*

Consultants or anyone else),” and commented that Banneker *should* be responsible for the consultants and contractors, and that the insurance requirements should be extended by Banneker to the Consultants and contractors.³⁴⁴ They also recommended other specific language changes to the insurance provisions of the contract.³⁴⁵ However, none of these recommendations or changes were incorporated into the contract.³⁴⁶

On June 24, 2009, Asmara Habte advised Karim that “there are many issues in the contract that we need to discuss and change.”³⁴⁷ David Cortiella of DCHE was asked to review the contract by Larry Dwyer.³⁴⁸ On June 25, Cortiella sent Karim a red-lined copy of the contract with DCHE’s comments.³⁴⁹ Among the proposed changes were edits to paragraph 5 that appear to have been intended to make Banneker responsible for the work of its consultants.³⁵⁰

Cortiella’s efforts provoked a flurry of dismissive responses from DMPED. At 12:38 pm, David Jannarone sent him an e-mail stating “Jacqui will get you the contract we approve.”³⁵¹

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ *See* Ex. 80, at 6-7.

³⁴⁷ Ex. 88, E-mail from Asmara Habte to Omar A. Karim (Jun. 24, 2009 4:15 PM); Habte was concerned that Banneker would have minimal responsibility for the work, and also thought that 4% would have been a more appropriate management mark-up fee. Interview with Asmara Habte.

³⁴⁸ Ex. 89, E-mail from David Cortiella to David Jannarone (EOM) (Jun. 25, 2009 10:18:51).

³⁴⁹ Ex. 90, E-mail from David Cortiella to Jacquelyn Glover (EOM); David Jannarone (EOM); Omar A. Karim (Jun. 25, 2009 2:10 PM) with attachment (“Contract for Services”).

³⁵⁰ *See id.*, attachment at 2-3. In other words, DCHE tried several times to require Banneker to carry the liability that might have justified its 9% mark-up.

³⁵¹ Ex. 91, E-mail from David Jannarone to David Cortiella; Omar A. Karim; Jacquelyn Glover (EOM) (Jun. 25, 2009 12:38 PM).

Glover followed up at 12:44 pm, indicating that they had reached agreement with Dwyer on certain changes and would make no more:

Banneker is revising their contract to reflect the revisions suggested to the Insurance Section only which we discussed and agreed upon with Larry this morning. They will send the updated agreement this afternoon for Larry to promptly review and approve.³⁵²

Jannarone continued to e-mail Cortiella:

- June 25, 2:07 pm: “To be clear, we will send you the contract we would like you to sign as I said earlier. If Larry has issue with what we send, he will call me.”³⁵³
- June 25, 2:08 pm: “You are wasting your time, we have a path forward. We will be in touch.”³⁵⁴
- June 25, 3:05 pm: “Larry has our copy that we want him to sign. Thanks for your hard work.”³⁵⁵

When asked about these exchanges, Jannarone said that the negotiation of the terms of Banneker’s contract should have been straightforward, because the parties had already agreed on a form of project management contract for Walker Jones.³⁵⁶ Jannarone described Cortiella’s proposed edits as “minor stuff that didn’t make one difference one way or the other. That was a

³⁵² Ex. 92, E-mail from Jacquelyn Glover (EOM) to David Cortiella (Jun. 25, 2009 12:44 PM).

³⁵³ Ex. 93, E-mail from David Jannarone (EOM) to David Cortiella; Jacquelyn Glover (EOM) (Jun. 25, 2009 2:07 PM).

³⁵⁴ Ex. 94, E-mail from David Jannarone (EOM) to David Cortiella; Jacquelyn Glover (EOM) (Jun. 25, 2009 2:08 PM).

³⁵⁵ Ex. 95, E-mail from David Jannarone (EOM) to David Cortiella; Larry Dwyer; Jacquelyn Glover (Jun. 25, 2009 3:05 PM).

³⁵⁶ Jannarone Dep. 61:14-62:20, 65:3-9.

lot of time.”³⁵⁷ As long as Dwyer was comfortable with the language, that was the end of it as far as Jannarone was concerned.³⁵⁸

Dwyer, however, testified that he was primarily interested in including language making it clear that DCHE was responsible only for the \$700,000 worth of work it would perform, and not on other substantive issues in the contract.³⁵⁹ Dwyer was aware at the time that DMPED was not being particularly responsive to DCHE’s other comments, but chose not to press the issue, for fear that the discussions were becoming unproductive.³⁶⁰ The contract was not reviewed by DCHA’s Office of General Counsel, contrary to agency standard practice.³⁶¹

Thus, the only change that was made in the final version of the contract was the one requested by Dwyer – the addition of an introductory sentence in the insurance section in which DCHE disclaimed responsibility for negligent or wrongful acts of the contractor or its subcontractors, agents or employees.³⁶² But this change did not alter the language relieving Banneker of liability for its consultants’ work. The project management contract was signed by Omar Karim on June 25, 2009³⁶³ and e-mailed by him to Larry Dwyer on the same day.³⁶⁴

³⁵⁷ *Id.* at 73:12-14.

³⁵⁸ *Id.* at 73:5-74:7.

³⁵⁹ Dwyer Dep. (Aug. 6, 2010) 57:3-20.

³⁶⁰ *Id.* at 64:20-65:6.

³⁶¹ Interview with Hans Froelicher, General Counsel DCHA (Sep. 14, 2010).

³⁶² Ex. 90, attachment at 7; Ex. 80, at 6.

³⁶³ *Id.* at 15.

³⁶⁴ Ex.96, E-mail from Omar A. Karim to Asmara Habte (Jun. 26, 2009 11:17 AM).

Banneker and Regan Associates subsequently signed a letter agreement under which Regan Associates was retained as a consultant to Banneker on the DPR projects.³⁶⁵ The agreement provides that Regan Associates will receive 48% of Banneker's contract amount (excluding consultant mark-ups) and will play the lead management role for half of the projects.

D. DCHE Approval of the Contract

On June 18, 2009, while contract negotiations were still ongoing, Larry Dwyer circulated a DCHE board resolution proposing approval of the contract.³⁶⁶ But DCHE did not act on the resolution at its June 18 meeting because it lacked a quorum.³⁶⁷ The MOU between DCHA and DMPED had not been finalized at this point.

By the end of June, although the contract had not been signed by DCHE and the MOU was not in place, Karim had already submitted Banneker's first invoice for work done in May to DMPED, and would soon submit a June invoice. Asmara Habte advised him that DCHE could not make any payments without a signed contract.³⁶⁸ Karim pressed DCHE to approve the contract and the MOU so payments could begin.³⁶⁹ On June 29, Glover told Karim that the issue

³⁶⁵ Ex. 97, Letter from Sean M. Regan, Regan Associates to Omar A. Karim, Banneker Ventures (Jul. 20, 2009) (consulting agreement).

³⁶⁶ Ex. 98, Memo from Larry Dwyer to DCHE Board of Directors (Jun. 18, 2009).

³⁶⁷ See Ex. 99, E-mail from Larry Dwyer to Omar A. Karim (Jun. 28, 2009 22:29:57); Dwyer Dep. (Aug. 6, 2010) 71-72; Ex. 100, E-mail from Asmara Habte to Omar A. Karim (Jun. 25 2009 10:36 AM).

³⁶⁸ Ex. 101, E-mail from Asmara Habte to Omar A. Karim (Jun. 25, 2009 10:36 PM).

³⁶⁹ See Ex. 102, E-mail from Omar Karim to Asmara Habte (June. 29, 2009 9:51 AM); Ex. 103, E-mail from Omar Karim to Lawrence Dwyer (Jul. 1, 2009 5:22 PM); Ex. 104, E-mail from Omar A. Karim to Lawrence A. Dwyer (Jul. 6, 2009 6:48 PM).

of DCHE's fee still needed to be resolved before the MOU could be finalized.³⁷⁰ Glover offered to look for other ways to pay Banneker in the interim:

Once the fees have been approved the MOU can be executed and the money can be transferred. Since DCHE is delayed with providing their fee information, I'll talk with David Jannarone today to see if there are other mechanisms to issue payment in order to prevent delay on work that is already in play.³⁷¹

It appears that one of the options considered was adding the DPR invoices to Deanwood.

But after receiving Banneker's second invoice, Glover told Karim that would not work:

Your invoices are very very high and as a result we can't add to Deanwood because that would put your contract over \$1 Million forcing it to go to council, per the conversation I had with Jonathan Butler. Plus you want to modify your contract to add more money today and I'm sure you'll be doing so again before next summer.³⁷²

At her deposition, Glover testified that she described the Council approval requirement as a problem because Banneker was looking to get paid quickly: "there is no way to put in the whole – put in a change order over a million dollars, put it through Council and then have it be paid quickly."³⁷³

As noted, the fees to be charged by DCHE to DMPED were an issue between the agencies, which was finally resolved on July 10, 2009.³⁷⁴ According to Jannarone, the \$700,000 fee for DCHE was the result of negotiations he had with Larry Dwyer.³⁷⁵ Dwyer said that the amount was a combination of actual costs that DCHE would incur for its role in the project and a

³⁷⁰ See Ex. 102, E-mail from Jacquelyn Glover to Omar Karim (Jun. 29, 2009 9:57 AM).

³⁷¹ *Id.*

³⁷² Ex. 105, E-mail from Jacquelyn Glover to Omar A. Karim (Jul. 7, 2009 4:11 PM).

³⁷³ Glover Dep.127:1-5.

³⁷⁴ See Ex. 106, E-mail from Jacquelyn Glover to Omar A. Karim (Jul. 10, 2009 6:07 PM).

³⁷⁵ Jannarone Dep. Notes.

percentage fee.³⁷⁶ By comparison, DCHE's fee on the Walker Jones project was \$200,000. Jannarone explained the disparity by noting that Walker Jones was one project, while the DPR Capital Projects involved multiple parks, commenting that the \$700,000 fee sounded like a "good deal."³⁷⁷

A resolution approving the project management contract was presented to the DCHE board for its July 14 meeting.³⁷⁸ The resolution stated that the contract would be awarded to "Banneker Ventures, LLC and Regan Associates, LLC (a joint venture)," and that it would be a "firm fixed price contract ... in the amount of \$4,562,600."³⁷⁹ No mention was made of the 9% mark-up, and the contract itself was not attached to the resolution.

By this point, William Slover, who was appointed chairman of the DCHA board in May 2009, was seeking information about DCHE's role in the DPR capital projects and the procurement of the program management contract.³⁸⁰ According to Slover, none of the board members ever saw the actual contract.³⁸¹ At the July 14 meeting, Slover voiced concerns about

³⁷⁶ Dwyer Dep. (Aug. 6, 2010) 27:21-28:2.

³⁷⁷ Jannarone Dep. Notes. Glover testified that she thought the \$700,000 fee was high. She believed she discussed it with Asmara Habte of DCHE and with David Jannarone, and was told that the fact that multiple parks were involved explained the size of the fee. Glover Dep. 120:19-122:13.

³⁷⁸ Ex. 107, DC Housing Enterprises Resolution 09-09, effective July 14, 2009.

³⁷⁹ *Id.*

³⁸⁰ Interview with William Slover, former Chair of the DCHA Board (Apr. 19, 2010).

³⁸¹ *Id.*

the contract, including the process by which it had been awarded and the size of the fees.³⁸² One of the four DCHE directors recused himself from the vote because of a potential conflict of interest. Slover stated that he would not vote for the contract, and ultimately abstained.³⁸³ The resolution passed on the votes of just two directors, Michael Kelly and William Knox. Without a copy of the contract or full disclosure of its terms, however, the board's review cannot be described as meaningful, and the terms of the contract it ostensibly approved were not the terms of the contract that DCHE signed. Larry Dwyer signed the program management contract on behalf of DCHE on July 14, 2009.³⁸⁴

The DCHA board had approved entry into an MOU with DMPED by resolution dated March 11, 2009.³⁸⁵ The MOU was finally signed by Valerie Santos on July 31, 2009; Michael Kelly's signature for DCHA is undated.³⁸⁶ Although the amount of the DMPED/DCHA MOU was \$40,350,000, the number of projects to be handled for DPR had already increased. At the end of July, DPR and DMPED entered a first amendment to their MOU, adding projects and

³⁸² *Id.* Michael Kelly, who was then the Executive Director of DCHA, recalled that Slover asked a series of questions, but did not remember the specific concerns he raised. Interview with Michael Kelly.

³⁸³ According to Slover, he voted no, but Dwyer asked if he wasn't sure if he wanted to abstain, so Slover said he would abstain because it was the same thing as voting no. Interview with William Slover. According to Dwyer, Slover said he wasn't going to go forward. Dwyer asked him to clarify his vote, and Slover then abstained. Dwyer stated that he did not encourage Slover to abstain. Dwyer Dep. (Aug. 6, 2010) 74:19-75:6.

³⁸⁴ Ex. 80, at 15. Dwyer also sent Karim a notice to proceed dated July 14, 2009. Ex. 108, Letter from Larry Dwyer to Omar A. Karim (Jul. 14, 2009). Karim testified that he was unaware that the notice had been sent. Karim Dep. (Aug. 5, 2010) 140:5-142:9.

³⁸⁵ Ex. 50.

³⁸⁶ Ex. 52.

increasing the total funding to \$68,394,795.64.³⁸⁷ In September 2009, DPR and DMPED executed a second amendment, further increasing the funding to a total of \$86 million.³⁸⁸

VI. THE BANNEKER CONTRACT WAS NOT SUBMITTED TO THE COUNCIL.

In large part, this investigation concerns the fact that the transfer of funds to DCHA resulted in the execution of a multi-million dollar contract that was not submitted to the Council for review. DCHA took the position that neither it nor its subsidiaries were subject to the Council approval requirement in D.C. Code Section 1-204.51. DMPED appears to have believed it was relieved of any responsibility to take the contract to the Council itself because the contract was executed by DCHE. Had the Council been apprised of the contract at the outset as it should have been under Section 1-204.51, its questions and concerns about the award and terms of the contract and the involvement of DMPED and DCHE could have been addressed before the projects were underway.

It is our view that the required review would have taken place if the legal issues relating to the Council review statute had been addressed in a careful and timely way by DCHA's general counsel and the Office of the Attorney General. Questions about the applicability of the statute to

³⁸⁷ Ex. 109, Amendment No. 1 to Memorandum of Understanding Between the District of Columbia Department of Parks and Recreation and the Office of the Deputy Mayor for Planning and Economic Development (Jul. 31, 2009), § II.A.1. This amendment was signed by Valerie Santos for DMPED on July 30, 2009 and by Ximena Hartsock for DPR on July 31, 2009. *Id.* at 2. It added Parkview, 7th and N Street, 10th Street Park, Fort Stanton, Woodland Tigers, Walker Jones, Emery Ball Field and Watts Branch to the list of projects. *Id.* at 3. Emery Ball Field and Watts Branch were shown as having no funds available.

³⁸⁸ Ex. 110, Modification No. 2 to Memorandum of Understanding between the District of Columbia Department of Recreation and Parks and the Office of the Deputy Mayor for Planning and Economic Development (Sep. 14, 2009).

independent agencies had been discussed since at least 1996, and were the subject of specific discussions between DCHA and the Attorney General’s Office in 2007 and 2008:

- In 1996, the Council submitted a memorandum to the District’s Corporation Counsel, Charles F.C. Ruff, specifically asking whether the Council approval statute applied to independent agencies. In a formal opinion that addressed independent agencies in general and the Washington Convention Center Authority (“WCCA”) in particular (the “1996 Opinion”), the Corporation Counsel concluded that “Congress intended that the Council review the proposed contracts of all District government entities, including executive independent agencies like WCCA, that exceed one million dollars during a 12-month period.”³⁸⁹
- DCHA, whose activities are largely HUD-funded, was formed in 2000. In 2007, the Attorney General’s Office looked into the question of why DCHA had never submitted a contract to the Council for approval.³⁹⁰ In a meeting with OAG, Hans Froelicher, DCHA’s general counsel, stated DCHA’s view that as an independent agency it was exempt from the requirement.³⁹¹
- In a subsequent memo to the Attorney General dated October 23, 2007, OAG’s Legal Counsel Division, relying on the 1996 Opinion and a 2006 opinion

³⁸⁹ Ex. 26.

³⁹⁰ Ex. 111, Memorandum from Legal Counsel Division, OAG, to Linda Singer, Attorney General (Oct. 23, 2007) at 2.

³⁹¹ *Id.*

concerning the legal status of the National Capital Revitalization Corporation, concluded the DCHA *was* subject to the Council review provision.³⁹²

- DCHA asked an outside law firm to review the OAG's October 23, 2007 memo and conclusions. In a memo dated February 11, 2008, the firm concluded that:

While we note there is no definitive authority as to whether DCHA must submit all contracts involving expenditures in excess of \$1 million dollars during a 12-month period to the Council for approval, there is precedent for exempting contracts governed by federal contracting procedure from aspects of the District's procurement laws. ... To the extent that DCHA contracts are required to follow federal contracting procedures, there is a significant rationale for exempting contracts involving expenditures in excess of \$1 million dollars from Council approval. However, to definitively establish that DCHA contracts are exempt from Council approval, appropriate legislation granting the exemption should be considered.³⁹³

Thus, while the law firm opined that the issue was unresolved as to all contracts, its arguments that DCHA contracts could be exempt related only to contracts involving federal funds.

- For reasons that are not clear, the firm's memo to DCHA did not analyze or even mention the 1996 Opinion. Hans Froelicher stated that he did not see the 1996 Opinion until October 2009, after the Council's first inquiries were made, although he acknowledged that it might have been mentioned in one of the early OAG memos.³⁹⁴

³⁹² *Id.*

³⁹³ Ex. 112, Office Memorandum from ElChino Martin, Nixon Peabody LLP to Hans Froelicher (Feb. 11, 2008) at 3.

³⁹⁴ Interview with Hans Froelicher.

- The Attorney General's Office continued a dialogue with DCHA about the Council approval issue through mid-2008, insisting that DCHA's contracts were subject to the Council approval requirement. But for reasons that are again not clear, the 1996 Opinion was not expressly raised by OAG in these exchanges.
- In an April 22, 2008 letter to Attorney General Peter Nickles, Froelicher reacted to a suggestion made by OAG that the agencies had agreed that the issue would be resolved by legislation. He drew a distinction between federally-funded and District-funded contracts:

DCHA does not agree that the contract approval issue is resolved. We do believe DCHA would bring any contracts that exceed the one million dollar threshold or the multi-year requirement and are funded by District funds to the City Council. The LCD has relied on the suggestion that legislation could resolve this issue in Nixon Peabody's memorandum to me dated February, 2008 [a]s a concession that legislation is necessary. We do not agree. That is not the only resolution and our suggestion regarding contracts funded with District money is what will provide the council with the opportunity to review how its money is spent. Most of DCHA's funding comes from federal funds appropriated to HUD to operate the federal programs DCHA administers. DCHA's use of those funds is regulated and audited by HUD. Clearly the legislation separating the DCHA as a line agency of the District was to, in part, put it in charge of its federal funds and their use. ...³⁹⁵

- Froelicher's language could be read as an agreement that DCHA would bring all District-funded contracts to the Council. But according to Froelicher, his statement was only meant as an offer of compromise, not an acknowledgement of

³⁹⁵ See Ex. 113 at 1-2 (emphasis original).

the correctness of OAG's view or a commitment to obtain Council review in the future.³⁹⁶

- In a June 16, 2008 memo to Froelicher, Nickles noted Froelicher's statement about District-funded contracts without clarifying whether he took it as an agreement.³⁹⁷ Nickles continued to disagree about the legal analysis applicable to federally-funded contracts.³⁹⁸ He concluded:

OAG is not opposed to DCHA's being exempt from the contract approval requirements. We have even suggested that the Authority seek that relief from Congress. Nixon Peabody, in its February 11, 2008 memorandum, has also suggested that "appropriate legislation granting the exemption should be considered." Is the time right, then, to work from this standpoint of apparent agreement and discuss a proper legislative plan of action?³⁹⁹

- In the last piece of correspondence on this issue before the investigation, Froelicher reiterated his position that DCHA was not subject to the Council approval requirement, but agreed that the prudent approach was to modify the law.⁴⁰⁰ But neither agency moved forward on legislation, nor did they clarify the ambiguity left by the correspondence with regard to DCHA's position on District-funded contracts.

The Council approval issue was not raised again until October 23, 2009, the day the Council notified DCHA of its concerns about the award of the DPR project management contract

³⁹⁶ Interview with Hans Froelicher.

³⁹⁷ Ex. 114, Memorandum from Peter J. Nickles to Hans Froelicher (Jun. 16, 2008) at 2.

³⁹⁸ *Id.*

³⁹⁹ *Id.*

⁴⁰⁰ Ex. 115, Letter from Hans Froelicher to Peter Nickles (Jul. 24, 2008) at 1.

to Banneker Ventures. At 5:30 p.m. on that day, a Friday, DCHA asked Nickles for an “Opinion of the Attorney General of the District of Columbia” on the applicability of the review requirement to DCHA contracts involving District funds.⁴⁰¹ It is not clear why Froelicher thought this step was necessary, since he was already well aware of the Attorney General’s position. The Attorney General responded immediately, issuing an opinion that same day (the “October 23 Opinion”). Relying heavily on the 1996 Opinion, he concluded that “without any doubt,” DCHA must abide by the Home Rule Act and its Council approval provision.⁴⁰² The Attorney General stated that DCHA occupied a legal position within the District government that was similar to that of WCCA, discussed in the 1996 Opinion, and therefore was bound by the conclusions in the 1996 Opinion.⁴⁰³ The Attorney General concluded that “DCHA, as part of the District government, must submit its covered contracts for Council review.”⁴⁰⁴ Under this Opinion and

⁴⁰¹ Ex. 116, E-mail from Hans Froelicher, General Counsel, District of Columbia Housing Authority, to Peter Nickles, Attorney General, District of Columbia (Oct. 23, 2009, 17:27 EST).

⁴⁰² Ex. 117, Opinion of the Attorney General of the District of Columbia, Whether the DCHA must seek approval of the City Council for contracts for goods and services involving expenditures in excess of \$1,000,000 during a 12-month period, Oct. 23, 2009 (“October 23 Opinion”). Nickles had no specific recollection of why or how there was such a quick turnaround (i.e., the same day) for the issuance of the opinion following Froelicher’s request. Interview with Peter Nickles, former Attorney General of the District of Columbia (Dec. 1, 2010).

⁴⁰³ *Id.* at 2. The Attorney General also noted the binding nature of AG opinions, citing Reorganization Order No. 50 of 1953, as amended, Part II.A(a) (written opinions of the Attorney General, “in the absence of specific action by the Commissioner or Council to the contrary, or until overruled by controlling court decision, shall be the guiding statement of law, to be followed by all District officers and employees in the performance of their official duties.”) *Id.*

⁴⁰⁴ *Id.*, at 2. The October 23 Opinion does not address whether the Council review requirement applies to contracts in excess of one million dollars, or multiyear contracts, when those contracts are funded by *non-District* funds. Answering that question is outside the scope of our investigation, but it is an important distinction because many DCHA contracts involve non-District funds, such as federal funds.

applying the 2007 Court of Appeals decision in *Fairman v. District of Columbia*,⁴⁰⁵ therefore, any DCHA contract involving over one million dollars of District funds that is not approved by the Council would be invalid.

But the following Monday, October 26, Attorney General Nickles issued a memorandum to “clarify” the October 23 opinion.⁴⁰⁶ Stating that retroactivity was not favored in the law, the October 26 memorandum asserted that the prior opinion “was not intended as a pronouncement that any such past or current DCHA contracts that were awarded without Council approval are unlawful. Indeed, such contracts should be regarded as legal and binding.”⁴⁰⁷ The Attorney General concluded by confirming that his October 23 Opinion “is to operate prospectively only.”⁴⁰⁸

In our interview, Nickles asserted that the October 26 Memorandum was written after several people expressed “consternation” about the impact of the October 23 Opinion on existing contracts.⁴⁰⁹ He stated that the October 26 memorandum was a response to his general concern about interfering with DCHA’s 10-year procurement history and the impact that his October 23 opinion might have on existing DCHA contracts. Nickles disclaimed any link between the October 26 memorandum and the Banneker contract, and denied having any communication on this issue over the weekend of October 24-25 with the Mayor or with anyone representing

⁴⁰⁵ Note 48.

⁴⁰⁶ Ex. 118, Opinion of the Attorney General of the District of Columbia, *Council Approval of DCHA Contracts*, Oct. 26, 2009 (“October 26 Memorandum”).

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ Interview with Peter Nickles.

Banneker. Indeed, he claimed he had no knowledge of the existence of the Banneker contract until January of 2010,⁴¹⁰ although that statement is difficult to square with comments Nickles made to the press on October 23 that reflect his knowledge that it was the Banneker contract in particular that was being discussed,⁴¹¹ or with his subsequent letter of November 13, 2009, in which he referenced the DCHE/Banneker contract.⁴¹² While we accept that Nickles was genuinely concerned about DCHA's many existing contracts when he wrote the October 26 memo, it seems unlikely that the Banneker contract was not part of his thinking.

The retroactivity analysis in the October 26 memorandum is questionable at best. Although the law does disfavor retroactivity, a retroactive statute or rule is one that "attaches new legal consequences to events completed before its enactment."⁴¹³ The October 23 Opinion

⁴¹⁰ *Id.*

⁴¹¹ On Saturday, October 24, 2009, Nikita Stewart of the Washington Post reported on the opinion the Attorney General had issued the previous afternoon, quoting him as saying on Friday: "I have made my position clear," and "The mayor agrees with me." The article goes on to recount the Attorney General's reaction to specific questions about the Banneker contract as well as general contracts awarded to Keith Lomax's RBK Landscaping and Construction:

Nickles dismissed some council members' concerns that the contracts went to Fenty's friends. "I have no reason to believe there was a problem with them. They were all competitively bid," he said. "The fact that the mayor has friends, has fraternity brothers and goes to a ball game [with them], that doesn't exclude someone from competing for a contract."

<http://www.washingtonpost.com/wp-dyn/content/article/2009/10/23/AR2009102303974.html?nav=emailpage>

⁴¹² Ex. 119, Letter from Peter J. Nickles to Adrienne Todman (Nov. 13, 2009). As discussed further below, in the November 13 letter, Nickles advised DCHA "to inform the Council of the potentially devastating impact of its emergency and temporary legislation on the DCHE/Banneker contract, specifically, and recreation projects in general, and submit the contracts on an emergency basis for approval at the Council's December 1, 2009 legislative session."

⁴¹³ *Landgraf v. USI Film Products*, 511 U.S. 244, 270 (1994).

was not a new enactment but an analysis of existing precedent dating from 1996 applying a statute dating from 1995. For ten years, DCHA had simply been wrong – “without any doubt,” as the Attorney General put it – and for at least two years, it had been aware that the Attorney General thought so. Moreover, the October 26 memorandum did not grapple with the 2007 D.C. Court of Appeals decision in *Fairman v. District of Columbia*, which addressed the consequences of failure to obtain Council approval of a multiyear contract and held that any such contract lacking required approval is “invalid.”⁴¹⁴

The Council did not accept the Attorney General’s retroactivity analysis. It passed the Unauthorized Contract Stop Payment Temporary Act of 2009, which provides, among other things, that “The memorandum of opinion of the Attorney General, dated October 26, 2009, which states that contracts entered into unlawfully are nonetheless legally binding, is contrary to the clear letter of the law and of no effect.”⁴¹⁵ The Council also expressly disapproved the Banneker program management contract when it was finally submitted for approval in December 2009 as a result of the investigation. The Attorney General has since acknowledged that this disapproval action rendered the Banneker contract void.⁴¹⁶

We do not believe that DCHA’s refusal before October 2009 to submit District-funded contracts to the Council was well-founded, given the 1996 Opinion, of which DCHA was on notice, the fact that DCHA’s own lawyers had found no authority for that position, and the clear statements by the Attorney General’s Office in 2007-2008 (which Froelicher acknowledges

⁴¹⁴ Note 48, 934 A.2d at 448.

⁴¹⁵ Unauthorized Contract Stop Payment Temporary Act of 2009, effective March 23, 2010 (D.C. Law 18-0139).

⁴¹⁶ Ex. 120, Letter from Peter J. Nickles to Councilmember Phil Mendelson (Oct. 28, 2010), at 8.

would have been binding on DCHA if expressed in a formal opinion). Moreover, while those discussions were ongoing, and well before the Banneker contract was signed, DCHE executed a \$1,410,000 project management contract for Walker Jones and an MOU with DMPED for construction of the \$47 million Walker Jones project, as well as a \$31 million MOU for Deanwood which specifically referenced the need for Council approval of the Deanwood construction contract. DCHA should have focused on its obligations with regard to District-funded contracts when confronted with these projects, and should have done so again when it became involved with the DPR capital projects.

DMPED too is accountable here. It was bound by the Home Rule Act, and under its MOU with DPR it retained primary responsibility for the DPR projects. Yet DMPED took no action either to seek Council approval or to require DCHE to do so, as DPR had done in prior MOUs it negotiated directly with DCHA. The Attorney General also could have taken steps to clarify the situation, but he stated that he turned to other matters and chose to work on the issue gradually rather than “put his foot down.”⁴¹⁷ Had the Council review issue been handled more responsibly by DCHA and DMPED or with more attention by OAG, the Council could have approved or rejected the contract before it was underway, and the consequences associated with the Council’s discovery of the issue in October, after months of performance, could have been avoided.

VII. BANNEKER’S SELECTION AND MANAGEMENT OF LIBERTY ENGINEERING & DESIGN

It was the project manager’s function to engage the engineering and design professionals who would be responsible for the design of the buildings and exterior spaces in compliance with

⁴¹⁷ Interview with Peter Nickles.

all building code and legal requirements. While Banneker submitted its qualifications to perform this function as “the Banneker-Regan team,”⁴¹⁸ it went about choosing and paying the engineers on its own.

One of Banneker’s very first acts after it received notice of its selection was to retain an engineer on a sole source basis. On May 4, 2009, it hired Liberty Engineering and Design (LEAD) to survey the sites and provide “consulting services” for ten of the projects. Banneker subsequently contracted with LEAD to perform all of the civil, survey, geotechnical, and environmental engineering services on all of the projects. LEAD’s selection followed an RFQ process that called for no pricing information. And although the project management contract required Banneker to obtain DCHE’s prior approval of the consultants it retained, both DCHE and Banneker treated the prior approval requirement as inapplicable to the engineering contracts.

A. Liberty Engineering & Design

LEAD was formed in March of 2008 by Sinclair Skinner and Abdullahi Barrow, and it was designated that year as a “Certified Business Enterprise (“CBE”) by the Department of Small and Local Business Development. While Skinner obtained his undergraduate degree in engineering, he is not licensed as a professional engineer in the District of Columbia or any other jurisdiction.⁴¹⁹ Abdullahi Barrow has an M.S. degree in engineering. He had served as a

⁴¹⁸ See Ex. 64, Banneker-Regan Response to the RFQ.

⁴¹⁹ According to the resume submitted to DSLBD with LEAD’s CBE application, Skinner worked in the engineering field before he obtained his college degree, he served as an operations engineer for the Architect of the Capitol for two summers, and he worked as a mechanical engineer in HVAC for two years after college. He then operated a dry cleaning business from 1999 to 2005, and worked in city politics as an ANC commissioner and part of Mayor Fenty’s campaign. LEAD’s response to the Banneker RFQ did not list Skinner as one of its key personnel and did not attach his resume or describe his experience. See Ex. 121, Letter from Abdullahi Barrow, LEAD, to Banneker Ventures, LLC, submitting proposal in response to the RFQ (Jun. 11, 2009).

structural engineer at the D.C. Department of Consumer and Regulatory Affairs and had also been employed by private engineering firms, but at the time LEAD was formed, he was not a licensed professional engineer either. He failed the licensing examination on multiple occasions,⁴²⁰ and first received a P.E. license on April 25, 2008 on the basis of eminence in the field.⁴²¹

Neither Skinner nor Barrow is a licensed surveyor, and LEAD did not employ a licensed surveyor when it was engaged by Banneker to survey the park sites. At the time it was selected to serve as the engineering contractor on the DPR projects, LEAD had not previously served as the chief engineer on the construction or renovation of any public recreation centers or parks,⁴²² and it had little or no prior experience providing the full range of engineering services on any other types of projects.⁴²³

LEAD itself lacked the capacity to carry out the work assigned to it. Indeed, LEAD promptly contracted out virtually all of its work on the projects to other engineering firms.

⁴²⁰ Ex. 122, Department of Consumer and Regulatory Affairs, Business and Professional Licensing Administration Examination Candidate Abstract Printout, Abdullahi Barrow (Oct. 25, 2007).

⁴²¹ Ex. 123, Government of the District of Columbia Board of Professional Engineering Minutes (Apr. 24, 2008). Licensure based upon established and recognized standing in the engineering profession was available at that time to an engineer with more than 12 years of experience pursuant to D.C. Code §47-2886.08(2)(A)(v). Barrow had worked at DCRA since 2004, and he was supported in his application by officials there. Ex. 124, Government of the District of Columbia Occupational and Professional Licensing Administration Application, Abdullahi Barrow (Aug. 13, 2007). While DCRA was unable to produce any witnesses with any personal knowledge about, or recollection of, Barrow's application or the decision to grant him a license, the investigation and review of DCRA records unearthed no reason to conclude that any improper influence was brought to bear in his case. Barrow's engineering experience is detailed in the resume he included in LEAD's response to Banneker's RFQ. *See* Ex. 121.

⁴²² Deposition of Abdullahi Barrow (Sep. 30, 2010) 71:2-72:1.

⁴²³ *Id.* at 72:2-77:19.

LEAD applied significant mark-ups to the amounts due those subcontractors, and our review of LEAD's invoices reveals gross overcharging, which was passed through to the District by Banneker – subject to Banneker's own 9% mark-up – without challenge. Furthermore, the investigation has revealed that LEAD's proposal in response to Banneker's RFQ was false and misleading in multiple respects that could very well have been known to Karim.

The evidence thus gives rise to significant concerns about LEAD's selection and performance and Banneker's expenditure of city funds. These concerns are magnified by contemporaneous, unexplained financial dealings between Karim, Skinner, and their wholly owned "consulting" companies, Liberty Law Group and Liberty Industries. Since the connections between Skinner and Karim form the backdrop for Banneker's interactions with LEAD, they will be described in more detail below, and it is our conclusion that the combination of all of these circumstances warrants further investigation. The facts also, at the very least, raise questions about the adequacy of Banneker's management of the DPR capital projects as well as the quality of the oversight that was provided by DMPED and DCHA.

B. The Relationship between Karim and Skinner

Banneker's decision to retain LEAD for the DPR capital projects must be viewed in the context of the larger set of relationships between Sinclair Skinner and Omar Karim.⁴²⁴

⁴²⁴ According to Karim, the two had a long term relationship that went back 20 years, prior to their days in engineering school.

1. Banneker Ventures

Karim founded Banneker Ventures in 2005.⁴²⁵ Although he and Skinner have both testified that Skinner was never employed at Banneker, Skinner has distributed Banneker business cards with his name printed on them.⁴²⁶ The card identifies a phone extension and an e-mail address for Skinner at Banneker Ventures. Skinner testified that he was a “volunteer,” who offered to perform undefined “community outreach” for Banneker.⁴²⁷

I mean one of the things with small businesses, there are so many hats you wear. I mean you have to be everywhere at one time. There are so many different things you’ve got to do. At the end of the day I thought that he needed help in that area, in getting, you know, just having folks, a person that could, you know, volunteer and talk to folks in the community.⁴²⁸

Banneker is a for-profit company, but Karim also explained the business card by saying that Skinner was a “volunteer” for a short period of time in 2007.⁴²⁹

2. Liberty Law Group

Banneker Ventures is not Omar Karim’s only business interest. He has a law degree, and during the time period involved in the investigation, he operated a business he called Liberty

⁴²⁵ Karim testified during his deposition on August 5 that the company had no other investors or owners, Karim Dep. (Aug. 5, 2010) 37:22-38:2, but during the deposition on September 21, he indicated that it had “numerous owners at different times.” Karim Dep. (Sep. 21, 2010) 49:15-16.

⁴²⁶ Ex. 125, Sinclair Skinner printed business card for Banneker Ventures, LLC.

⁴²⁷ Joint Roundtable (Apr. 15, 2010) 117:8-15.

⁴²⁸ *Id.*

⁴²⁹ Joint Roundtable (Dec. 10, 2009) 162:17-163:13, 182:15-17, 183:8-9, 184:2-5.

Law Group, which Karim states was formed in 2007 and dissolved in 2010.⁴³⁰ It maintained bank accounts in the name of Law Offices of Omar A. Karim, PLLC, d/b/a Liberty Law Group, with an address at 700 12th Street in Washington, DC. When the Special Counsel investigation began in March of 2010, Liberty Law Group had no website or presence on the internet. While Omar Karim was listed as member in good standing on the D.C. Bar's website in 2010, his entry there identified Banneker Ventures in Silver Spring, Maryland, and not Liberty Law Group in D.C., as his professional address.

Karim was asked about Liberty Law Group during his December 10, 2009 testimony before the Committee. He stated that he ran the firm as its sole partner, but his description of the nature of his work was quite vague. "If our clients ask for legal advice we render it, but it's mostly consulting.... Maybe community consulting and that type of thing, business consulting."⁴³¹ At his deposition on August 5, Karim refused to answer questions about Liberty Law Group, often interposing the objections himself.⁴³² After the court granted the Council's motion to compel him to answer, Karim appeared for a second deposition session. But despite the Court's order, Karim provided no additional detail, and his answers were as uninformative as his previous refusals to respond.

Q: Describe the business of Liberty Law Group.

A: What about it.

Q: What business does it do?

⁴³⁰ According to the opposition to the motion to compel that Karim filed on his own behalf, he founded Liberty Law Group in 2007 and dissolved it in May 2010. When Judge Winfield granted the motion to compel on September 17, 2010, she ordered Karim to produce formation and organizational documents of Liberty Law Group. None were provided.

⁴³¹ Joint Roundtable (Dec. 10, 2009) 176:16-177:1.

⁴³² Karim Dep. (Aug. 5, 2010) 43:8-19.

A: It's no longer in existence.... The firm provided consulting services and legal services.

Q: What sort of consulting services?

A: Community consulting services.

Q: So Liberty Law Group was in the business of providing community consulting services?

A: You said that, I didn't.

Q: You said they provide community consulting.

A: And legal services.

Q: What clients asked for community consulting?

A: I don't recall.⁴³³

Q: What do you mean by "community consulting"?

A: That's exactly what I mean, consulting, you know, in the community.⁴³⁴

3. Liberty Industries

Sinclair Skinner also purports to be providing consulting services, and also began using a "Liberty" moniker to do so in 2007. Skinner is the sole owner of a business called Liberty Industries LLC, which he formed in February 2007, one month after Mayor Fenty was sworn into office. Skinner has been vague in describing the nature of its work. He told the Committee on April 15, 2010 that it was business consulting, "filling a need" in the community: "...[A]s the small business person on Georgia Avenue, I ended up having a unique set of skills that I had so many people coming to me and saying I need some help, I need some help with this, and I thought it was just, again, about filling a need."⁴³⁵

⁴³³ Karim Dep. (Sep. 21, 2010) 28:14-29:22.

⁴³⁴ Karim Dep. (Sep. 21, 2010) 23:6-8. The investigation revealed that the boundaries between these various business entities are rather indistinct. Not only did the record include a Banneker business card for Skinner, but one of Karim's Liberty Law Group clients, Brian "Scott" Irving of Blue Skye Construction, testified that Skinner and Karim provided services to him after he hired Liberty Law Group, and that Skinner gave him a Liberty Law Group business card. Irving Dep.27-28. Documents that Irving produced include Liberty Law Group invoices transmitted to him from sinclair.skinner@att.net in December of 2009 and January of 2010. Ex. 126, E-mails from Sinclair Skinner to scott@blueskyeconstruction.com (Dec. 21, 2009, Jan. 25, 2010) with The Liberty Law Group invoices attached.

⁴³⁵ Joint Roundtable (Apr. 15, 2010) 126:18-22.

Skinner was deposed in an unrelated Council inquiry in September 2009, at a time when LEAD was actively engaged in the DPR work. But he testified that he was self-employed, and he identified his company as Liberty Industries. Skinner seemed flummoxed when asked to describe what Liberty Industries did, responding that Liberty Industries was involved in unspecified “business endeavors” and “entrepreneurial activities” such as “business development,” “consulting,” and “helping,” including work for clients seeking to do business with the District of Columbia.⁴³⁶ When asked to provide a “concrete example” of the work that Liberty Industries performed, he could offer only this:

⁴³⁶ There is no official transcript of the September 2009 deposition, which was tape recorded at the Council’s offices. The transcript of the following excerpts was prepared by Special Counsel:

Q: “When you say you’re self-employed, could you describe what the nature of your business is?”

A: “Well, I’m an entrepreneur.”

Q: “Could you be more specific?”

A: “Um, um.”

Counsel for Skinner: “What’s the name of your business?”

A: “Um, Liberty Industries.”

Q: “And what does Liberty Industries do?”

A: “Just different business endeavors, and, just entrepreneurial activities as far as different, really, a variety of [inaudible]”

Q: “I would you ask for some more specifics. Could you give me some of the nature of the business that you do?”

A: “Just like business development, and helping, like, consulting.”...

Q: “Okay. Now, I want to get back to this matter about the income earned by this business. You say that the projects that you take on, some of the groups that you take on to facilitate their work in some fashion or other are seeking work with the District of Columbia?”

A: “Can you be more – can you rephrase it?”

Q: “You said that, you know, groups come to you, developers who develop projects, right, and the nature of what they ask you to do, if I’m understanding this correctly, is to provide them with experts in various fields, typically engineering. Is that what you said?”

A: “No, I didn’t say development, it could be anybody that, you know, who has a project or something they’re trying to get done, and they need somebody to
(footnote continued on next page)

Concrete example. Um. Ah. What's a good, good, good example? Um. Organizing, um, an opportunity to, ah, work with, um, I've got a project right now working with engineering and helping to do some geotechnical studies and, ah, what else, ah surveys, and kind of coordinating, you know, where to find good survey folks and, where to, you know, stuff like that. Most of it is engineering related.⁴³⁷

Skinner's September 2009 description of Liberty Industries seems to embody what it was that Liberty Engineering was doing at the time on the DPR projects. When asked whether his company actually did the engineering work, though, Skinner replied, "no, no, no."⁴³⁸

As discussed further below, this investigation uncovered business dealings and significant transfers of funds between Karim's firm, Liberty Law Group, and Skinner's firm, Liberty Industries. But at his deposition in this matter, Skinner was virtually incapable of describing the business of Liberty Industries or its work for Liberty Law Group:

Q: [W]hen did you form Liberty Industries?

A: I don't recall.

Q: What was the purpose for ... forming Liberty Industries?

A: Consulting.

Q: What sort of consulting did you intend to do?

A: General consulting.

Q: Well, did you provide, through Liberty Industries, consulting services to Liberty Law Group?

A: Yes.

Q: And how did that come about?

A: I don't recall.

Q: Who did you have conversations with at Liberty Law Group to discuss the consulting services or the possibility of providing consulting services?

A: I don't remember those conversations.

Q: Well you were a friend of Mr. Karim's?

A: Yes.

come and help them kind of figure out what are some good folks to work with as far as, or what's a good way to do a particular project...."

⁴³⁷ From untranscribed Deposition of Sinclair Skinner before the D.C. Council (Sep. 3, 2009).

⁴³⁸ *Id.*

Q: Are you saying that you didn't have any conversation with Mr. Karim about providing consulting services to Liberty Law Group?

A: I just don't remember.

Q: Well was there any written agreement between yourself or Liberty Industries on the one hand and Liberty Law Group on the other about providing consulting services?

A: I don't recall.

Q: Were there any invoices that Liberty Industries provided to Liberty Law Group for the consulting services that were rendered?

A: I don't recall.

Q: Was there any work – written work product or documents that were created reflecting the consulting services that were provided to Liberty Law Group by Liberty Industries?

A: I don't recall.

Q: In connection with your services to Liberty Law Group, who did you meet with?

A: I don't recall any meetings.⁴³⁹

Deputy Mayor Valerie Santos was able to shed more light on Skinner's activities than Skinner himself. She testified that Skinner had been to the Deputy Mayor's office "a number of times," requesting that she meet with CBE companies interesting in bidding on opportunities with the city.⁴⁴⁰ She was unaware of whether Skinner was being compensated for making the introductions, and she did not recall whether he indicated that he was acting as a consultant, but she estimated there had been half a dozen meetings. She particularly recalled one meeting with "two guys from Ward 8 who had a construction business."⁴⁴¹ Santos also specifically recalled a meeting when Skinner introduced Abdullahi Barrow and his engineering firm to her. According to her, the upshot of the meeting was: "here's this up and coming person who's trying to get a firm off the ground."⁴⁴²

⁴³⁹ Skinner Dep. (Oct. 6, 2010) at 8:3-10:1.

⁴⁴⁰ Santos Dep. Notes.

⁴⁴¹ *Id.*

⁴⁴² Santos Dep. 54:12-56:12.

City Administrator Neil Albert also testified that Skinner would seek to introduce him to people interested in doing business with the city.⁴⁴³ He likened Skinner’s role to that of a “lobbyist,” and he could particularly recall that Skinner spoke to him about an insurance company.⁴⁴⁴

David Jannarone testified, though, that Skinner’s promotional activities did not extend to him. He testified that he considered Skinner to be a personal friend and had traveled with him to the Dominican Republic and Brazil, but he stated that Skinner never talked to him about Liberty Industries.⁴⁴⁵ “I knew he was a consultant, but we never talked about business. I don’t talk about business with any of my friends.”⁴⁴⁶ According to Jannarone, Skinner did not speak with him in his position at DMPED on behalf of any client.⁴⁴⁷ When asked if Skinner brought any clients to meet with him about city business, Jannarone replied, “not that I recall.”⁴⁴⁸ Jannarone said he did not know whether Skinner brought business people in to meet with Santos, and he did not think that Skinner would have set up such meetings through him.⁴⁴⁹

During the unrelated September 2009 deposition, before public attention had been focused on Banneker Ventures and its relationship with him, Skinner testified that Banneker

⁴⁴³ Albert Dep. 133:22-34:3.

⁴⁴⁴ Albert Dep. 134:5-35:4.

⁴⁴⁵ Jannarone Dep. Notes

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.*

Ventures was a Liberty Industries client that was attempting to do work with the District.⁴⁵⁰ However, during his deposition in connection with the Special Counsel investigation a year later, Skinner could no longer recall whether he did any consulting for Banneker Ventures or not.⁴⁵¹

For his part, Karim denied discussing city business opportunities with Skinner.⁴⁵² And he was emphatic that Liberty Industries did no work for Banneker Ventures and did not help it secure its contracts:

Liberty Industries provided service to Liberty Law Group. It never provided any services to Banneker eve[r]. ... Be very, very, very clear about that.⁴⁵³

So if what you're trying to get to is that Liberty provided or we paid Liberty because they got us a contract on Walker Jones, it's 1,000 percent false. It's inaccurate. It's not true. It's somewhat irresponsible for you to say that.⁴⁵⁴

4. The 12th Street address

Liberty Law Group, Liberty Industries, and Liberty Engineering are tied together by more than just their similar names. Liberty Law Group's bank records identified 700 12th Street,

⁴⁵⁰ From Untranscribed Skinner Dep. (D.C. Council Sep. 2009):

Q: You were asked how many clients are attempting to work with the District government. You answered, I don't know. Do you have any clients that are attempting to or happen to work with the District?

A: I can't recall right now.

Q: I just want to make sure I understand. You cannot recall whether you have any clients that have attempted to do work with the District government?

A: Banneker Ventures.

Q: So Banneker Ventures is a client of Liberty Industries?

A? Yes.

⁴⁵¹ Skinner Dep. (Oct. 6, 2010) 47:15-17.

⁴⁵² Karim Dep. (Aug. 5, 2010) 80:19-22.

⁴⁵³ Karim Dep. (Sep. 21, 2010) 28:10-13.

⁴⁵⁴ *Id.* at 46:21-47:3.

N.W., Suite 700, as the firm's address. The bank records for Liberty Industries identify 700 12th Street, N.W., Suite 700, as that firm's address. When Banneker Ventures submitted its response to the request for qualifications for the DPR capital projects contract in March of 2009, it provided 700 12th Street, N.W., Suite 700 as its address. And Liberty Engineering and Design utilized the same address on its bank account as of April 2008, listed the address on its CBE application in May 2008, and provided it, along with another address on Martin Luther King Avenue, S.E., on its 2009 proposal for the DPR engineering subcontracts and subsequent invoices.

The 700 12th Street location houses executive office suites, and according to records provided to the Committee by the landlord, three of these companies – Banneker Ventures, Liberty Law, and LEAD – have alternated as the tenant of a single office ("office 61") within suite 700 from January 2007 until at least November 2009.⁴⁵⁵ And although Liberty Industries is not formally listed as a tenant in any Office Service Agreement executed with the landlord, the landlord's records do contain references to the "Liberty Industries account."⁴⁵⁶ Thus, all four entities have ties to the same single office within the suite over the course of at least two and a half years.

There is nothing inherently improper, of course, about small companies using the same office space or using a corporate suite as a mail drop. But the documents that track the usage of

⁴⁵⁵ LEAD is identified as the tenant from February to July 2008 on the Office Service Agreement dated January 31, 2008. Ex. 127, Metro Offices Office Service Renewal Agreement (Jul. 31, 2008).

⁴⁵⁶ See e.g. Ex. 128, E-mail from Korie Bedsole, Metro Offices, to Sinclair Skinner (Aug. 12, 2009 12:43 PM EST) (referencing "your Liberty Industries account"); Ex. 129, One Metro Center Exercise Facility Agreements ("Sinclair Skinner/Liberty Industries" listed as the employer).

the 12th Street address raise questions about the relationship among these companies. According to the landlord's records, it was Liberty Law Group that first entered into an agreement with Metro Offices to lease Office Number 61 in January of 2007, but the contact information provided on the lease was not for Karim, but for Skinner: sinclair@fenty06.com.⁴⁵⁷ When the lease was renewed in the name of Banneker Ventures,⁴⁵⁸ the contact person again was shown as Sinclair@fenty06.com. And at the time LEAD was first engaged by Banneker to perform engineering work on the DPR projects, the landlord was billing Banneker for the office space, and Karim's Liberty Law Group was paying the bills.⁴⁵⁹

5. The financial relationships between Karim and Skinner

The most significant ties between Skinner, Karim, and their Liberty entities were financial. Bank records obtained during the investigation establish that over \$1,130,000 was transferred from Liberty Law Group's bank account to Liberty Industries from 2008 to April 2010. Yet neither Skinner nor Karim could provide a single reason why. Through a combination of blanket assertions of failure of recollection and flippant, non-responsive remarks, the two effectively stonewalled the investigation.

Liberty Law Group made transfers to Liberty Industries of more than \$610,000 in 2008; more than \$440,000 in 2009 (including tens of thousands of dollars during the months that Banneker and LEAD were working on the DPR capital projects); and more than \$65,000 in

⁴⁵⁷ Ex. 130, Metro Offices, Office Service Agreement (Jan. 12, 2007).

⁴⁵⁸ Ex. 131, Metro Offices, Office Service Renewal Agreement (May 25, 2007).

⁴⁵⁹ Ex. 132, LLG check # 1077, dated Apr. 29, 2009, to Metro Office ("May rent"); Ex. 133, LLG check # 1084, dated Jun. 2, 2009, to Metro Office ("June rent").]

2010.⁴⁶⁰ The transfers were accomplished through approximately 70 different transactions. The purpose of these payments was described on the face of checks as being for “services rendered.” In addition, at least \$16,000 was transferred from Liberty Law Group directly to Sinclair Skinner in 2008.⁴⁶¹ And in 2008 Liberty Industries made two payments to Karim or Liberty Law Group, denominated as “loans,” totaling \$55,000.⁴⁶²

Karim testified that Liberty Industries did “community consulting” for Liberty Law Group, whose business he also described as providing “community consulting services.”⁴⁶³ But he elected to shed no light on the matter beyond that.

Q: ...[W]hat did he [Skinner] say that Liberty Industries could do for you?

A: ... I’m not sure what you’re referring to. This is – this thing that was two and a half years ago, almost three years ago, that’s a long time.... I’m sure you don’t remember a conversation that you had in January 2008 with one of your law partners or an employee or consultant or – your – the lady that cleans your home even.

Q: Well... you made another \$13,000 payment to him. What was that for?

A: To Liberty Industries. Again, as I indicated, they did community consulting for my law firm.

Q: Can you describe what you mean by “community consulting”?

A: Just what it says.

Q: Well, I’m not sure I understand it. I mean, I’m not sure I understand why it would be worth over a million dollars over a couple year period.... [I]f you

⁴⁶⁰ See Ex. 134, Liberty Law Group bank statements and cancelled checks showing payments and wire transfers from the Liberty Law Group account (Law Office of Omar Karim) to Liberty Industries in 2008, 2009 and 2010. In some instances – August 2008, for example – transfers were made directly from the Liberty Law Group account to the Liberty Industries account. The account numbers on the bank statements and checks have been redacted. See also Karim Dep. (Sep. 21, 2010) 24:12-25:7.

⁴⁶¹ Ex. 135, “Official Check” in the amount of \$16,000 drawn on the account of Liberty Law Group to Sinclair Skinner dated Mar. 27, 2008. The check memo states “Gift for purchase of 1737 Webster St. NW.”

⁴⁶² Ex. 136, Check #1033 from Liberty Industries, LLC, to Liberty Law Group in the amount of \$50,000 dated Sep. 9, 2008 (“loan”).

⁴⁶³ Karim Dep. (Sep. 21, 2010) 23:2-5, 29:3-19.

look at the – all of the checks and payments, wire transfers over the course of a couple of years to March 2010, you will see that a total of over \$1.1 million was transferred to ... Liberty Industries. Do you see that? ... Can you tell us what these payments were for?

A: I just told you.

Q: So all of the payments related to what? Community?

A: As I indicated, you know, they did community consulting for us. Whether you think that's worth a million dollars or not, it's not up to you to determine that. Your clients might not think you're worth what ... they pay you.

* * *

Q: Well, try to describe if somebody had a question as to what "community consulting" meant. Describe that.

A: I already did.

Q: Well, I think you said community consulting is community consulting.

A: Yep.

Q: Can you be more specific as to what community consulting is?

A: Nope.⁴⁶⁴

Skinner similarly declined to offer a single fact that would explain why it was that he received more than a million dollars from Liberty Law Group. Instead, he came to the deposition that was scheduled for the specific purpose of obtaining testimony on that issue armed with a copy of the Council resolution authorizing the investigation into the DPR capital projects. When asked questions about his work for Karim, he claimed that he could not recall anything beyond the fact that it was not related to the subject matter of the investigation. For example, when he was shown an exhibit, he answered, reading from the resolution:

Q: Mr. Skinner, there are a series of checks. The first one is for \$30,000. A week later there's another check for \$20,000. Within the next month there are two checks, one for \$20,000 and one for \$90,000. These are checks, all checks going from Liberty Law Group to Liberty Industries, and my question is: why were these payments made from Liberty Law Group to Liberty Industries?

A: I don't recall, but I know that it had nothing to do with the determining of policies and procedures or any other practices surrounding the transfer of funds or authority via memorandum of understanding or any other instrumentality for the Department of Parks and Recreation capital projects or funds concerning

⁴⁶⁴ Karim Dep. (Sep. 21, 2010) 23:6-25:7; 26:6-15.

Department of Parks and Recreation Capital Projects. I know that for certain.⁴⁶⁵

Skinner gave some variation of that answer 19 times.⁴⁶⁶ He declared, “I’m glad to be here to help,”⁴⁶⁷ but responded to 90 other questions with a flat “I don’t recall.”

Skinner was accorded every opportunity to enhance the state of the record, and he was specifically warned that his failure to provide responsive answers would affect the investigators’ assessment of his credibility.⁴⁶⁸

⁴⁶⁵ Skinner Dep. (Oct. 6, 2010) 35:2-18.

⁴⁶⁶ Skinner Dep. (Oct. 6, 2010) 10, 11, 12, 13, 16, 17, 21, 23, 35, 37, 40, 44, 45, 46, 51, and 54.

⁴⁶⁷ Skinner Dep. (Oct. 6, 2010) 24:7-8.

⁴⁶⁸ Karim was provided with a similar admonition, but he persisted in his evasions:

Karim: ...I just want to make a statement. Liberty Industries did provide no services to me or my firm in connection with the DPR capital project. A hundred percent clear about that, nor did my law firm do any work in connection [with] the DPR capital project.

Q: And Mr. Karim, just so you know, as I made clear to Judge Winfield on Friday, we want to test the credibility of that denial by trying to find out, well, what is it that Liberty Industries did do for your company, and my understanding is that you have said they did community consulting. And I’ve asked you what does that mean, and you’ve said community consulting.... And I asked you can you recall any specific conversation and you said could not.

A: Yeah.

Q: ...[D]o you recall the conversation that you had with him when he first basically was talking to you about providing these community consulting services?

A: I don’t. Three years ago, conversation, nope.

Q: ...[D]o you recall any conversation with Mr. Skinner regarding these what you’ve identified as community consulting services?

(footnote continued on next page)

Q: Mr. Skinner, as I mentioned to you, the Court has previously made clear, when this matter was put to the court, that it was appropriate for us to make inquiry regarding the very substantial payments that were made from Liberty Law Group, Mr. Karim's company, to Liberty Industries, your company, over a million dollars over the course of a two, maybe a little bit more than a two year period. And we're trying to get answers to these questions, because it is a fair inquiry to make an assessment as to whether these payments were related. I understand there's been testimony from you that they were not related, but we're trying to make credibility determinations on how we see it. And my question to you is: is it your testimony, under oath ... that you have no recollection about any of these events? Is that true that you have no recollection or is it simply you think that's a way that you can avoid answering the question?

A: No, I don't recall. What I do recall though, and I do recall something, and nothing that I participated in involved a determination of policies, procedures or other practices surrounding the transfer of funds or authority via memorandum of understanding or any other instrumentality of the Department of Parks and Recreation Capital Projects. I think that's a fair assessment.

Q: Well, and just so you know, we are going to have to make some credibility assessments and so I want to be absolutely fair to you and make sure that I am clear about your testimony. And is it your sworn testimony here today, as you sit here, that you have no memory of any of the services that you provided to earn over a million dollars from Liberty Law Group?

A: I don't recall the services that were rendered. At this time, I don't recall. And I'm not going to do anything that doesn't give you the facts that I can substantiate clearly. I want to be as open and forthcoming with facts, not speculation, guesses. I want to give a complete answer when I have those answers. And I think I've given complete answers and I've done my best to – with the documents that I've submitted were – almost probably three thousand-some-odd documents. I've given hours and hours of sworn testimony in all types of environments. I've – my bank statements and everything that I've done of the last years that even went beyond the scope of the time frame of these Parks projects has been reviewed. If my credibility is somehow in question, after doing all these things, I think it's not an issue of anything that I

A: Not that I can recall six months ago.

Q: So why did you stop making these payments?

A: We no longer needed their services.

Q: And describe the conversation that you had with Mr. Skinner about that.

A: I don't recall.

Karim Dep. (Sep. 21, 2010) 42:7-43:10; 45:5-9; 57:7-15.

have said or done, it's an issue of something else that I don't – I'm not aware of.

But I've done everything, as a business person, that is I think beyond reasonable. And I've had no reluctance in coming in. I've done what I've been asked to do....⁴⁶⁹

The Special Counsel gave Skinner one final chance to provide truthful, helpful information, but he declined the invitation.

Q: Well Mr. Skinner, as I say, we have questions about these payments from Liberty Law Group to Liberty Industries. This is really your opportunity to give us your side of the story, that's why we asked the questions. You've just said what you said. And my question is: is there anything else you'd like to tell us to help us understand better why these payments were made from Liberty Law Group to Liberty Industries that you haven't already said? Now's your opportunity.

A: All of the things that I've done, none of these things have anything to do with the policies, procedures or any other practices surrounding the transfer of funds or authority via memorandum of understanding or any other instrumentality for the Department of Parks and Recreation capital projects. At all.⁴⁷⁰

C. "I Don't Recall"

This testimony (or lack of testimony) about Liberty Industries and Liberty Law Group was part of a pattern that characterized all of Skinner and Karim's responses to questions from the Special Counsel. In addition to providing evasive and minimally substantive responses, Karim and Skinner answered a significant portion of the questions posed during their depositions with the assertion: "I don't recall." Barrow, who was questioned on two occasions, did the same. The witnesses' professed failure to recall was so extensive and so complete that it appeared to be part of an orchestrated strategy to withhold information, and raised serious questions about their credibility.

⁴⁶⁹ Skinner Dep. (Oct. 6, 2010) 50:13-53:2.

⁴⁷⁰ Skinner Dep. (Oct. 6, 2010) 54:10-55:4.

Karim deflected numerous questions with responses such as:

- “I don’t recall. You’re talking about three years ago;”
- “Two years. Over two years ago? ... I certainly don’t recall;”
- “It’s been a year and a half ago. I don’t recall;”
- “This is over a year ago;” and even,
- “Not that I can recall six months ago.”⁴⁷¹

Karim was unable to remember what percentage of his time was devoted to construction management or how much of his time he devoted to the practice of law.⁴⁷² He even claimed he could not recall whether Liberty Law Group had any employees.⁴⁷³

Barrow and Skinner could not recall such fundamental things as how it was that the two got together, how they planned to function as an engineering firm when neither had a P.E. license, or whether they launched their business with bank loans or funds from other investors.⁴⁷⁴ When Barrow was asked if he had failed the P.E. exam more than once, he would only say: “Possibly.”⁴⁷⁵ Barrow claimed in September 2010 that he could not remember the names of employees supposedly working at LEAD the previous July, or when it was that LEAD last employed anyone at all.⁴⁷⁶

⁴⁷¹ Karim Dep. (Aug. 5, 2010) 41:2-3; 50:10-13; 114:8-9; and 183:1; Karim Dep. (Sep. 21, 2010) 57:10.

⁴⁷² Karim Dep. (Aug. 5, 2010) 40:19–42:5.

⁴⁷³ *Id.* at 42:11-13.

⁴⁷⁴ Barrow Dep. (May 20, 2010) 13:2-19, 18:9-14; Joint Roundtable (Apr. 15, 2010) 62:2-68:3.

⁴⁷⁵ *Id.* at 11:22.

⁴⁷⁶ *Id.* at 53:12-53:8.

While Barrow was unresponsive and vague, Skinner exhibited a fundamental lack of seriousness. Although Liberty Law Group is a one man operation owned by his friend Karim, Skinner claimed he could not recall who he spoke with at Liberty Law Group about providing consulting services.⁴⁷⁷ He swore that he was unable to recall whether or not he was familiar with Karim's signature.⁴⁷⁸ Skinner even refused to identify his own signature whenever it appeared on a document he claimed not to remember.⁴⁷⁹ This persisted throughout a deposition that had been scheduled for the very purpose of discussing Liberty Industries' bank records:

Q: Now if you'd look at the next page ... this is dated October 2, 2009 and it's from Liberty Industries to Liberty Engineering and Design Do you recognize the signature?

A: I don't recall this check.

Q: Well I understand your testimony is that you don't recall the check, my question is, do you recognize the signature?

A: I don't want to speculate because I don't recall the check.

Q: So is it your testimony you can't, as you sit here, recognize that that is your signature?

A: I'm saying I don't recall.⁴⁸⁰

The unexplained financial ties between Omar Karim and Sinclair Skinner and the failure of either witness to provide substantive answers about those matters, coupled with the manner in which Banneker selected and managed LEAD on the DPR capital projects, which is discussed in detail below, raise serious questions about the fairness of the procurement of the engineer and Banneker's use of District funds. Accordingly, we recommend that the Council submit this

⁴⁷⁷ Skinner Dep. (Oct. 6, 2010) 8:19-22.

⁴⁷⁸ *Id.* at 28:13-18.

⁴⁷⁹ *Id.* at 31:13-33:14, 36:5-20.

⁴⁸⁰ *Id.* at 38:4-19. If Karim, Skinner and Barrow truly had a failure of recollection as profound as what they described under oath, then there are serious questions as to whether the three possess the fundamental competence to perform multi-year government contracts.

aspect of the investigation to the United States Attorney. We do not express a view as to the outcome of a further investigation, but without access to the tools available to a prosecutor, the Special Counsel cannot comfortably advise the Committee that no further investigation is warranted.

D. Banneker's Selection of LEAD

1. The initial sole source contract

On April 30, 2009, DCHE notified Banneker of its intent to award the project management contract to the Banneker/Regan team.⁴⁸¹ By a letter agreement dated May 4, 2009, Banneker authorized LEAD to begin performing consulting and surveying services, with the understanding that the parties would negotiate and execute an agreement covering those services later.⁴⁸² While Banneker was not yet under contract with DCHE, it committed to pay LEAD consulting fees up to \$25,000 (\$2,500 per project) and an amount to be determined per site for the surveys – despite the fact that LEAD employed no licensed surveyors. Although prior approval of the hiring of consultants was provided for in the project management contract, Banneker did not obtain DCHE's consent to its retention of LEAD. Karim was of the view that

⁴⁸¹ Ex. 137, Letter from Larry Dwyer, President, DCHE, to Omar A. Karim, Banneker Ventures, LLC (Apr. 30, 2009).

⁴⁸² Ex. 138, Letter from Duane W. Oates, Banneker Ventures, to Abdullahi Barrow, P.E., Liberty Engineering and Design, PLLC (May 4, 2009).

the contract, which he said had been based upon the Walker Jones contract, required prior approval only for the hiring of general contractors, and not the architects or engineers.⁴⁸³

During his deposition, Karim was asked to explain LEAD's role in the DPR projects:

There are two aspects of Liberty's involvement. The first aspect came, we engaged them to do some limited consulting services and some survey services, because we needed someone to come on board once we found out ...how much was involved and the timetables behind it, you can't just go get an architect, find him, and have him build a rec center on a 20 acre site without knowing where the site [is] going to be, who[']s got soil issues and that type of thing. So we brought them on in the early, limited engagement for that, I think, no more than \$2500 per site for the consulting services, and then to do limited survey services on an as needed basis for some of the projects that were ... done early on.

And then there was a second aspect of it once we realized how much, how many projects were involved and the scopes of those. We thought it was appropriate not to just sole source Liberty the other survey work and the other work associated with it. So we thought it was appropriate to issue a competitive request for qualifications, which we did. And then once we got some response of some people who asked us to send the RFQ to them, not many of them were LSDB, so we extended the period so as to get LSDB's involved. And then, ultimately we selected Liberty.⁴⁸⁴

Karim testified that LEAD was initially selected to do the surveys because the firm had successfully done survey work for Banneker on at least one previous project.⁴⁸⁵ Karim could not

⁴⁸³ Karim Dep. (Aug. 5, 2010)153:4-19. Despite the plain language of the contract, Larry Dwyer also testified that he expected Banneker to manage the design process and soft costs itself, and that he only intended to pre-approve the construction contractor selections. Dwyer Dep. (Aug. 6, 2010) 107:7-108:21. He understood that Banneker would handle the procurement of the architects and engineers and he was not interested in taking on the administrative burden of approving Banneker's selections in advance. He did expect, though, that DCHA would receive the appropriate documentation, which did not happen in this case until after the Council inquiry began. *Id.* at 79:6-81:8.

⁴⁸⁴ Karim Dep. (Aug. 5, 2010) 148:21-150:4.

⁴⁸⁵ *Id.* at 153:4-154:13. Karim identified a private project called The Jazz as the site for which LEAD had previously completed a survey. *Id.* at 153:18-154:3. As was the case for the DPR projects, LEAD subcontracted the survey work on the Jazz to Anthony Currie, a licensed surveyor located in Maryland.

recall who made the decision in May to hire LEAD to prepare surveys, but he stated that he would have signed off on it.⁴⁸⁶ Duane Oates, a top Banneker project manager for the DPR projects, could not recall who selected LEAD to perform the initial surveys either. He indicated that it is not unusual for engineering firms to rely upon subcontractors for particular subspecialties, but he stated that he would have assumed that a firm that professed to be able to provide surveys had the ability to stamp them.⁴⁸⁷

While Oates fully appreciated the need to have a credentialed surveyor involved in a construction project, his boss did not appear to be aware of that fundamental requirement.

Q: Were you aware that Mr. Barrow was not licensed to perform surveys?

A: Licensed to perform surveys. Are individuals licensed to perform surveys? Is that what you're – I mean are you making that statement that individuals have licenses to perform surveys?⁴⁸⁸

Nonetheless, Karim was comfortable that LEAD was fully qualified.⁴⁸⁹ For his part, Skinner declared LEAD to be “overqualified” since Barrow was a civil engineer.⁴⁹⁰

⁴⁸⁶ Karim Dep. (Aug. 5, 2010) 150:18-151:12.

⁴⁸⁷ Interview with Duane Oates, Project Manager, Banneker Ventures, LLC (Nov. 9, 2010).

⁴⁸⁸ Karim Dep. (Aug. 5, 2010) 55:8-13.

⁴⁸⁹ *Id.* at 153:3-6; 159:3-10.

⁴⁹⁰ Joint Roundtable (Apr. 28, 2010) 22:14-17, 47:1-5. “We’re an engineering company. Survey work falls underneath that. Now I’m not saying underneath says it’s beneath it, but much like a doctor might have someone who does lab tech work or x-ray technician work ... that might be a licensed person to take x-rays, but a doctor can – will take that information and decide what ails you and what the problems are. So even though our principal engineer is not a licensed surveyor, as a P.E., as a professional engineer, he oversees the surveys. He takes that information and uses it just like a doctor uses an x-ray to determine what’s the best course of action... So even though we didn’t have a licensed surveyor, as a professional engineer, we’re overqualified, really, to do that work.” *Id.* at 21:17-22:17.

Banneker's contract with Regan Associates provided that the more experienced contractor would participate in "identifying professional service firms (architects, engineers, and other consultants) to serve on the project team," and "working with Banneker to evaluate bids and proposals [and] negotiate major contracts."⁴⁹¹ But it does not appear that Banneker solicited Regan's input. Members of the Regan team indicated during their interview that they were not consulted when Banneker initially brought LEAD on board, and they did not know who made the decision. They were well aware that it is necessary to have a licensed surveyor's stamp on construction plans, and they did not know what the \$2,500 per park consulting fee was supposed to be for.⁴⁹²

DMPED's Jacqui Glover testified that Banneker advised her of the need to get some early survey work done, and that she had no objection to its retention of LEAD for that purpose.⁴⁹³ But she was unaware of the firm's capabilities or limitations and did not educate herself before giving her consent.⁴⁹⁴

Larry Dwyer was not asked to approve Banneker's choice of LEAD or its plan to retain LEAD on a sole source basis. He was shown the May 4 agreement between Banneker and LEAD during his deposition and asked, "how does that fit with standard practice in a construction project?" He answered:

⁴⁹¹ See Ex. 97, Banneker/Regan consulting agreement.

⁴⁹² Interview with Sean Regan and Thomas Regan, Regan Associates, LLC (Nov. 12, 2010). Two other Regan Associates employees, Ray Nix and Bonnie Vancheri, were also present and participated in the interview.

⁴⁹³ Glover Dep. 128:15-129:17.

⁴⁹⁴ *Id.* at 131:20-133:4.

It doesn't – it doesn't fit other than in an emergency situation. It doesn't fit with what our expectation would have been in terms of how the project manager would've handled the solicitation of third parties.⁴⁹⁵

But Dwyer's main concern at that time was protecting DCHE's interest:

[W]hat I was told was that there was a lot of pressure to get some ... some preliminary work really needed to be done so the project could hit the ground running, and I just simply said – I didn't get into the weeds. I just simply said, "I want you to understand that we're not liable for any of that activity that takes place. I understand that you might want to do it. I do it with my own stuff, but we have no liability financially or otherwise."⁴⁹⁶

2. The engineering RFQ

In early June – still before its own contract had been executed – Banneker initiated the procurement of the design professionals for the parks. On June 2, it published a request for qualifications ("RFQ") for architects, seeking design firms for each of the parks.⁴⁹⁷ On June 3, it issued a one page RFQ for an engineering firm to provide the civil, survey, geotechnical, and testing and inspection services for all of the projects.⁴⁹⁸

The engineering RFQ set out the following requirements:

The Contractors must be able to demonstrate proficiency in working on projects that require an understanding of local (District of Columbia) and federal government regulatory processes and knowledge of District of Columbia land surveying and District of Columbia public facilities.

* * *

⁴⁹⁵ Dwyer Dep. (Aug. 6, 2010) 99:22-100:4.

⁴⁹⁶ *Id.* at 100:13-21.

⁴⁹⁷ Ex.139, Request for Qualifications for Architect/Engineering Services, Multiple Capital Projects at District of Columbia Parks and Recreational Facilities by Banneker Ventures, LLC (Jun. 2, 2009).

⁴⁹⁸ Ex. 140, Request for Qualifications for Civil, Geotechnical and Testing and Inspection Services, Multiple Capital Projects at District of Columbia Parks and Recreational Facilities by Banneker Ventures, LLC (Jun. 3, 2009).

This RFQ *requires* the participation of District of Columbia Certified Business Enterprises (“CBE”) ... with a minimum of 51% CBE participation in the Contractor team. In the selection process, preference points will be considered based on the Contractor’s certification by the DSLBD.

At minimum, the Qualification package shall include: Contractor’s experience working with new construction or renovation of public recreation centers, parks or fields; and resumes of key personnel.⁴⁹⁹

The CBE requirement in this RFQ is noticeably different from the treatment of CBE status in the June 2, 2009 RFQ for architects, also prepared by Banneker. The architects RFQ stated: “This RFQ **strongly encourages** the participation of [DC CBE]s ... with a minimum of 33% CBE participation in the Design Team...”⁵⁰⁰

Karim could not say who drafted the RFQ or whether he played any role in its creation. Other than the CBE requirement, he could not identify any other particular credentials he was looking for:

Q: Did you discuss with anyone certain things you wanted in the RFQ?

A: I think we had – we made sure that all of our RFQ’s required CBE participation ... I’m not sure what other stuff I might have looked at.⁵⁰¹

Other witnesses questioned the manner in which the RFQ handled the issue of CBE participation. Glover testified that the RFQ appropriately reflected DMPED’s clear policy to promote the hiring of CBE’s, but she acknowledged that CBE status usually operates as a preference, through which a contractor would be awarded points in a competitive procurement,

⁴⁹⁹ *Id.* (emphasis added).

⁵⁰⁰ *See* Ex. 139, RFQ, (emphasis in original). In addition, while the RFQ for architects, issued on June 2, gave applicants until June 19 to respond, the engineering RFQ called for responses within 5 days. Banneker extended the time once in an effort to hear from more CBEs, but even the extended period was 8 days shorter than the response time for the architects.

⁵⁰¹ Karim Dep. (Aug. 5, 2010) 162:22-163:5.

not as a prerequisite that would eliminate non-CBE's from consideration.⁵⁰² Dwyer was also unfamiliar with the concept of a 51% CBE "requirement." "generally ... there's encouragement, bonus points, and other things.... And certainly that's a percent that [is] higher than generally what I'm accustomed to seeing because I think the targets are usually 35."⁵⁰³

Will Mangrum and Marcos Miranda, project managers for OPEFM, indicated that they typically require at least some CBE participation, but in their view, merely making an award to a CBE is not enough. They indicated that 51% participation in a solicitation is supposed to mean that the CBE will actually be doing 51% of the work and earning 51% of the dollars. They would expect a project manager issuing such a solicitation to monitor compliance with any requirement it set out in its RFQ through the imposition of reporting requirements and review of the subcontractors' invoices.⁵⁰⁴

David Jannarone explained that it is "not unreasonable for a company that has real capacity to leverage outside companies to increase the capacity that they have," and he indicated that joint ventures and teaming agreements are quite prevalent.⁵⁰⁵ But he observed that the CBE program could be abused.

I think one of the historic flaws with the CBE program where a lot of times you have people who don't have real capacity – I'm not suggesting that this is that situation, but – for example, like on a construction project ... where you get like a middle man to supply steel to a project, but he's not really a steel guy. He's like a broker who is a CBE ... That's not the intent of the CBE program, but, you know, there's – I'm sure there's a lot of problems like that.

⁵⁰² Glover Dep. 135:21-37:3.

⁵⁰³ Dwyer Dep. (Aug. 6, 2010) 101:11-102:10.

⁵⁰⁴ Interview with Mangrum and Miranda.

⁵⁰⁵ Jannarone Dep. 86:19-87:3.

We conscientiously in everything that we've done have – have tried to prevent that from happening. You know ... our staff and the program managers are supposed to be watching to make sure that companies we hire have real capacity.⁵⁰⁶

According to witnesses, the engineering RFQ was quite thin. Larry Dwyer testified that he would have expected a project manager soliciting proposals to evaluate the respondents on multiple factors, including capacity and price.⁵⁰⁷ Allen Lew observed that the RFQ should have had much more in it.⁵⁰⁸ Mangrum and Miranda were also struck by the lack of substantive information on the nature and scope of the work, even taking the evolving nature of the projects into account. They characterized the RFQ as “rather generic” and “not sufficient” to solicit reasonable proposals in response.⁵⁰⁹

The original deadline for response to the engineering RFQ was June 8, 2009. On June 8, Banneker extended the deadline to June 12, 2009.⁵¹⁰ According to a memorandum prepared by Banneker after the investigation began, they extended the deadline “in order to give firms more time to submit as well as to allow for more CBE participation,” after discovering that of the 10 firms that requested a copy of the RFQ, only two were CBEs.⁵¹¹

The combination of the singular emphasis on CBE participation, coupled with the paucity of specific requirements other than familiarity with local regulatory practices, gives rise to the

⁵⁰⁶ *Id.* at 86:3-19.

⁵⁰⁷ Dwyer Dep. (Aug. 6, 2010) 103:9-12.

⁵⁰⁸ Interview with Allen Lew.

⁵⁰⁹ Interview with Mangrum and Miranda.

⁵¹⁰ Ex. 141, E-mail from Cheo Hurley, Banneker Ventures, to Duane Oates, S. Godley, Banneker (Jun. 8, 2009 4:57 PM EST).

⁵¹¹ Ex. 142, Memorandum from Duane W. Oates to Larry Dwyer (Nov. 20, 2009).

impression that Banneker prepared an RFQ that was tailor-made for LEAD. In his testimony, Karim denied that LEAD had any edge in the procurement.⁵¹² But even if one takes the RFQ at face value, it is difficult to understand how it was that LEAD was selected. Beyond its CBE credentials, LEAD's proffered qualifications fell far short of even the paltry list of requirements set out in the RFQ. The RFQ stated: "At minimum, the Qualification package shall include: Contractor's experience working with new construction or renovation of public recreation centers, parks or fields."⁵¹³ (emphasis added). While LEAD had been retained to perform testing and inspection services at Deanwood, it did not list Deanwood or any other public recreation projects in its response.⁵¹⁴ And the response had significant other problems that the investigation suggests should have been known to, or discovered by, Karim.

3. LEAD's proposal

LEAD submitted its response to the Banneker RFQ for engineering services on June 11, 2009. The investigation has revealed that the proposal was false and misleading in multiple

⁵¹² Karim Dep. (Aug. 5, 2010) 166:4-6.

⁵¹³ See Ex. 139.

⁵¹⁴ See Ex. 121, LEAD response to the RFQ. LEAD's response identified the following as "past performance and references for LEAD:" The Jazz at Florida Ave, Washington, D.C., described as an "ongoing" project with the nature of the engineering work unspecified; Strand Theater, Washington, D.C., described as an "ongoing" project, "presently in the design stage," for which LEAD would be performing the civil, structural and construction management work; Congress Heights School Redevelopment, Washington, D.C., for which LEAD "will perform the civil, structural, and construction management," and 6425 14th Street, Washington, D.C., an ongoing project for which "LEAD performed the structural assessment and civil engineering We are currently retained to provide construction code consultations and construction management." Banneker would also have been aware that it had previously engaged LEAD to perform testing and inspection services on Deanwood, but LEAD brought in GC&T for that assignment. Interview with Sean Regan and Thomas Regan (Apr. 20, 2010); Barrow Dep. (May 20, 2010) 103:9-104:4.

respects, and the referral to the United States Attorney should include a request for a determination of whether criminal charges should be brought on those grounds.⁵¹⁵

The problems with LEAD's response begin with the cover letter. In his transmittal of LEAD's qualifications to Banneker Ventures, Barrow states:

Our company has been in business since 2007. Although we are a newly formed company, the founders and the professional staff bring 60 to 80 years combined experience in all areas of civil engineering and design/analysis...⁵¹⁶

But LEAD had no "professional staff" and only one of its founders, Barrow, had any significant professional engineering experience: 15 years, according to his resume.⁵¹⁷ Since Barrow left his government position in March of 2008, the company had not been providing engineering services since 2007.

The overstatement continues in Section 1 – Professional Qualifications. The proposal sets out the qualifications of a team to be comprised of LEAD and GC&T, a geotechnical engineering firm in Woodbridge, Virginia. But the statements that purport to describe LEAD alone bear no resemblance to the two-man firm:

LEAD is a Washington, DC based company with over twenty full and part-time technical and non-technical employees. The company is organized as a Professional Limited Liability Company (PLLC), and has been operating since 2007.... LEAD staff has over 60+ years of combined experience in analysis in civil engineering and condition assessment of various types of facilities.⁵¹⁸

⁵¹⁵ D.C. Code §22-2405, the criminal false statements statute, covers statements made directly *or indirectly* to any instrumentality of the D.C. government.

⁵¹⁶ Ex. 121, LEAD response to RFQ.

⁵¹⁷ *Id.* at 5.

⁵¹⁸ *Id.* at 5.

According to LEAD's response to the RFQ, the services it could provide included geotechnical engineering, environmental services, civil site development and surveying, construction material testing and inspection, structural engineering, project management, and third party inspections.

LEAD's RFQ response includes an expansive organizational chart which depicts a "business development director" and a "technical operation director" at the top, but also depicts a host of other personnel including an Administrative Assistant; a Legal Department/Contract Manager; an Accountant/Chief Marketing Research; an Engineering Services Director; three project managers; and seven divisions for multiple engineering disciplines.⁵¹⁹ The organizational chart is a work of fiction.

As was called for by the RFQ, the response identifies the key personnel being proposed by Liberty and GC&T, and it states that the Liberty team will include Barrow; Mounir A. Abouzakhm, M.S., P.E.; Dawit Zena, P.E.; and Mesfin Madhin, P.E.⁵²⁰ However, besides Barrow, none of these individuals was actually employed by LEAD at the time. LEAD reinforced the misimpression by providing resumes that described those individuals as current LEAD employees with falsified dates of employment.

- Abouzakhm's resume lists his most recent employment as: "Senior Project Engineer, Liberty Engineering and Design (LEAD) ... May 2008 to Present",⁵²¹
- The most recent entry on Zena's resume is: "Senior Structural Engineer, Liberty Engineering and Design (LEAD) ... May 2008 to Present",⁵²² and,

⁵¹⁹ *Id.*, at 8.

⁵²⁰ *Id.* at 10-11.

⁵²¹ *Id.* at 16.

⁵²² *Id.* at 19.

- Medhin’s resume identifies him as a LEAD “Senior Mechanical Engineer/Project Manager ... August 2008 to Present.”⁵²³

But as of June 11, 2009, when the resumes were transmitted in support of LEAD’s effort to obtain city dollars, none of these engineers had left their places of employment to work for LEAD.

According to both Skinner and Barrow, it was Barrow who was responsible for preparing the response to the Banneker RFQ.⁵²⁴ Skinner testified that he “reviewed it.”⁵²⁵ But neither LEAD principal could justify the blatant exaggeration and outright falsehoods in their RFQ response.⁵²⁶

⁵²³ *Id.* at 21.

⁵²⁴ Barrow Dep. (May 20, 2010) 101:14-18.

⁵²⁵ Joint Roundtable (Apr. 15, 2010) 180:20-181:1; Joint Roundtable (Apr. 28, 2010) 50:7-9, 62:5-7.

⁵²⁶ LEAD persisted in misrepresenting itself even after it was retained. Barrow and Skinner attended a kick off meeting with the Banneker and Regan project managers in the Walker Jones trailer, and they presented them with a bound notebook of materials that outlined how they planned to staff the DPR projects. *See Ex. 143*, copy of LEAD notebook materials. It stated, “our professional team includes fifteen technical and non-technical staff,” and repeated the claim of more than 60 years of combined experience. *Id.* at 3. The presentation included a different organizational chart, and this one clearly depicted the role that subcontractors such as LSA and GC&T would play. But for both the civil engineering and the surveying, it identified someone named Abdurashid Yahia Sheikh-Ali as the LEAD engineer in charge. *Id.* at 5. No such person worked at LEAD. The chart also identified Dawit Zena and an Emmanuel Foseh as LEAD team members in charge of other disciplines when neither was at LEAD then or at any time that LEAD worked on the projects. *Id.*

(footnote continued on next page)

Barrow took the position that the reference to LEAD's 20 "employees" included subcontractors and consultants,⁵²⁷ and he expressed his view that it was appropriate to identify as an employee anyone who would ultimately be working on the project under his direction.⁵²⁸ Skinner would not agree that the statement was false, but he could not explain it either. "The reason why the defense of it, I'm not sure what he was referencing in that. I didn't write that particular line, but I'm thinking that he's referring to the folks that were included in the submission."⁵²⁹

Q: And who – what members of your staff had over 60 years of combined experience?

A: Again, I would have to say, I think we were referencing the engineers that we included in the submission. But I can get back to you with that information.⁵³⁰

Skinner further indulged in LEAD's penchant for overstatement during his testimony before the Committee on April 15, 2010. Among other representations, Skinner swore that his firm had expended more than 29,000 man hours on the DPR projects in the six months between May and November of 2009. Joint Roundtable (Apr. 15, 2010) 45:13-15; Ex. 144, LEAD information and material, at 27. That would mean that for each of the 30 weeks that LEAD was engaged, its employees and subcontractors put in 966 hours per week, which would amount to 24 people working 40 hours a week each for the entire period. LEAD itself never had more than Barrow and one or two project managers, Michael Florence or Timothy White, on board. See Joint Roundtable (Apr. 15, 2010) 220:5-14. And the company has no time records for Barrow or any subcontractors.

⁵²⁷ Barrow Dep. (May 20, 2010) 113:5-22.

⁵²⁸ Barrow Dep. (May 20, 2010) 121:7-10.

⁵²⁹ Joint Roundtable (Apr. 28, 2010) 50:3-6.

⁵³⁰ *Id.* at 51:4-9. Skinner did not identify his own experience as part of the calculus, and this explanation falls short. While adding in the careers of the GC&T principals would have significantly enhanced the experience of the entire team being proposed, the RFQ did not represent that LEAD and GC&T together had a certain number of employees or a certain number of years of experience. It attributed all of that capacity to LEAD alone, and GC&T touted its own credentials in a different section of the response.

Neither witness could provide much insight into the organizational chart either. Barrow was asked:

Q: Well can you just explain to me what this organizational chart is and what it was designed to convey to the person who received your RFQ response?

A: Any response to an RFQ, there's some relevant and there's some irrelevant, and you can put as much information as possible to respond to the request.⁵³¹

Skinner was also unfamiliar with what the chart meant to convey, and he testified that he was not sure who would be filling the various positions depicted in the boxes, such as “legal department.”⁵³² “I’d say in [the] organizational chart that I’m looking at, the people who were going to perform those tasks for this project I’m sure were identified, I just don’t know who they – the particular persons would have been for this particular case.”⁵³³ Skinner supposed that in creating the chart, “when we were referencing these different departments and different staff members, we were speaking to contractors and subcontractors that would have that capacity.”⁵³⁴ He added, “I think also since they’re functions, that these functions could have been performed by the same person. ... So there might have been some duplication. It might have been more than one person or it might have been one person doing more than one task.”⁵³⁵

Barrow repeated the duplication theory:

One thing you have to remember, it’s a small company, sometimes I wear different hats, so I might be in that box one day and I might be in another box one

⁵³¹ Barrow Dep. (May 20, 2010) 117:22-18:5.

⁵³² See Joint Roundtable (Apr. 28, 2010) 62:10-63:22.

⁵³³ *Id.* at 66:16-21.

⁵³⁴ *Id.* at 63:14-18.

⁵³⁵ *Id.* at 66:7-10.

day.... [W]hen I made the drawing I know that at any time any service that's needed for the company being small I can play that role.⁵³⁶

Skinner was unable to provide any information about the key personnel LEAD proposed – Abouzakhm, Zena, and Mesfin – beyond the fact that they were “probably” contractors hired to work on the job.⁵³⁷ Barrow explained that he listed the three because they “might” be members of the team who would eventually do the work.⁵³⁸ He was untroubled by the fact that the resumes he submitted specifically identified them as current LEAD employees:

Q: Can you turn to page 16 of Exhibit 14 where Mr. Abouzakhm's resume begins; under professional experience where it says senior project engineer, Liberty Engineering and Design, May 2008 to the present. Was Mr. Abouzakhm a professional, a senior project engineer at Liberty Engineering from May 2008 to June 2009?

A: I'll say it again, as I said it before, Mr. Abouzakhm was working as a consultant and his role was senior engineer who [was] going to have the second eye on some of the product we produce.

Q: Well directly below that it says, president, Geotechnical Environmental and Testing, GE&T, August 1988, '98, to 2007.

A: Right.

Q: Isn't it true that he was still at [GE&T] in 2008 and 2009 when this document was prepared?

A: You got to remember, Mr. Abouzakhm, this company GE&T is his own company, personal company. While I have my own company, you can call me and say hey, I need your expertise, I need you to come on board to help me out certain hours, certain days. So it doesn't mean that he was going to quit his GE&T, but he's just come in here on his own time, weekends, after work to provide anything that's asked.

Q: Well why didn't you simply list him as a consultant as opposed to indicating that he was a senior project engineer at your company from May 2008 to the present?

⁵³⁶ Barrow Dep. (May 20, 2010) 115:10-12.

⁵³⁷ Joint Roundtable (Apr. 28, 2010) 74:6-78:4.

⁵³⁸ Barrow Dep. (May 20, 2010) 118:12-19:9.

A: Well, as far as I was concerned and as far as Mr. Mounir was concerned, anybody, whether he's a consultant or subcontractor working under direction is working for the company.⁵³⁹

According to Karim, the RFQ response had the desired effect. "I looked at the RFQ and these people here have decades and decades and decades of experience."⁵⁴⁰ When confronted during the deposition with the fact that the individuals listed were not actually LEAD employees, Karim did not express any concern about the way they had been described in their resumes.

A: As I indicated, I believe nothing that they submitted was inaccurate. And sometimes people even submit people who they're going to have on projects if they get awarded it or that type of thing. It's a common practice in the construction industry, design industry, architect industry, particularly if it's a very very large project where you have to pull resources from different places.

Q: ...[W]hen you make representations as to who is going to be on your staff, do you expect those representations to be accurate?

A: All I can speak to is my firm and the representations we make. If you want to ask Barrow or whoever completed this RFQ, you gotta ask them about that.⁵⁴¹

But no other witness with any connection to government contracting and construction found it to be an acceptable practice. Duane Oates, a Banneker project manager working for Karim and the owner of his own construction company, indicated that he would have understood the Abouzakhm, Zena, and Medhin resumes to be representing that those engineers were currently employed at LEAD. He was not surprised that an engineering firm might subcontract out particular specialties and identify those outside contractors as part of the proposal package,

⁵³⁹ Barrow Dep. (May 21, 2010) 119:18-21:10. Barrow testified that Abouzakhm had provided him with a resume and that he was free to use it in proposals whenever he chose to do so. Barrow Dep. (May 20, 2010) 121:21-122:1. Abouzakhm confirmed that account. While he confirmed that he had never been employed at LEAD and that the representation in the resume included in the RFQ response was false, as far as he was concerned, Barrow was free to present him in that fashion. Interview with Mounir Abouzakhm, President, GE&T (May 21, 2010).

⁵⁴⁰ Karim Dep. (Aug. 5, 2010) 173:14-16.

⁵⁴¹ *Id.* at 177:10-178:2.

as LEAD did with GC&T, but he opined that the LEAD key personnel resumes should have been handled differently.⁵⁴²

When Will Mangrum and Marcos Miranda, the OPEFM program managers, were shown LEAD's RFQ response, they stated that they would have understood the key personnel resumes to be representing that the three engineers were in fact LEAD employees. They deemed that representation to be "important." They indicated that as program managers in receipt of an RFQ response, they would "absolutely" want to know if the engineering firm under consideration was planning to perform the work itself or to outsource it.⁵⁴³

William C. Gridley, the principal of Bowie Gridley Architects, explained that when his firm puts together a proposal including engineers, it clearly identifies the employment status of any outside consultants.⁵⁴⁴ Carlos Ostria and Stephan Goley, engineers with Loiederman Soltesz Associates ("LSA"), also indicated during their interview that if they were preparing an engineering proposal, they would attach any subcontractors' resumes and not represent those individuals to be employees of LSA.⁵⁴⁵

⁵⁴² Interview with Duane Oates.

⁵⁴³ Interview with Mangrum and Miranda. DCHE's Larry Dwyer did not find it unusual that the lead firm in a proposal might not have sufficient capacity. He indicated that "usually, people will create an LLC, and then you'll get the qualifications of all of the team members who are party to the LLC." Dwyer Dep. (Aug. 6, 2010) 112:9-11. He did not express an opinion as to whether it would be appropriate to identify subcontractors as actual employees in a proposal. "[T]o me, that's more of a technical question. You know, I, -- I wouldn't necessarily care whether they were employees or not if an LLC was formed and it had the relevant partners, and they had the qualifications, you know ... I don't know what was represented or not represented quite frankly in the proposal because I didn't see it." *Id.* at 112:16-13:2.

⁵⁴⁴ Interview with Bill Gridley, Bowie Gridley Architects (Oct. 13, 2010).

⁵⁴⁵ Interview with Carlos Ostria and Steven Goley, Engineers, Loiederman Soltesz Associates ("LSA") (Jul. 15, 2010).

Karim testified that he did not know the representations were false and that he was unaware of the size of LEAD's staff.⁵⁴⁶ But David Jannarone testified that it was Banneker's responsibility as program manager to determine whether the engineering firm it selected had the necessary capacity.⁵⁴⁷ In light of the relationships between Skinner and Karim, it is reasonable to believe that if anyone besides Skinner and Barrow was aware of the false and misleading nature of the LEAD proposal, it was Karim. Certainly he should have known. If Karim knew LEAD's proposal did not accurately describe the firm and its capacity but thought that it didn't matter, then he had a fundamental misunderstanding of the role and duties of a program manager. And if he knew that LEAD's proposal gave a grossly exaggerated picture of the firm, that raises the question of whether LEAD's proposal was intended simply as a cover in the event the selection of LEAD was later challenged.

In any event, Jannarone also acknowledged that DMPED staff was "supposed to be watching" to ensure that contractors had "real capacity."⁵⁴⁸ The record reflects that DMPED fell down on that job in this instance, and DCHE neglected its oversight responsibilities as well.⁵⁴⁹

⁵⁴⁶ Karim Dep. (Aug. 5, 2010) at 175:3-17; 176:1-6; 177:10-11.

⁵⁴⁷ Jannarone Dep. 90:7-15.

⁵⁴⁸ *Id.* at 86:16-19.

⁵⁴⁹ While the record revealed a close relationship between Skinner and Jannarone and a previous connection between Glover and Banneker, the review of the documents and bank records produced to date showed no benefit flowing to Glover or Jannarone that would prompt a criminal referral as to them. While they did not oppose the selection of LEAD, there is no evidence that they encouraged Banneker to take LEAD on, and there is no evidence that the Mayor weighed in on the matter in any way.

4. LEAD's selection based on CBE status

In addition to LEAD, responses to the RFQ were submitted by three more established firms: Hillis-Carnes Engineering Associates, Inc., Charles P. Johnson and Associates, and Froeling & Robertson, Inc.⁵⁵⁰ Banneker selected LEAD to receive the engineering contracts for the DPR projects. Banneker did not interview the respondents, and there was no evidence produced to indicate that it scored the proposals. Instead, Banneker pointed to LEAD's CBE status to justify its selection. Karim testified, "I reviewed the [LEAD] response and thought it was thorough and addressed the CBE participation that we required."⁵⁵¹ Since none of the other firms that responded to the RFQ included any CBE participation, according to Karim, LEAD was the only contractor that was responsive.⁵⁵²

Duane Oates provided some feedback on the responses at the time, and he thought that the Regan team did as well.⁵⁵³ But the Regan project managers stated that they did not have a voice in the decision. According to Sean Regan, Banneker and Regan had divided up responsibility for individual parks and also for certain tasks, and Banneker took responsibility for all of the civil engineering. It prepared the RFQ. Sean Regan recalled being shown the responses at a meeting with Karim and Hurley, but the decision to utilize LEAD was made by Banneker alone. Regan did not recall seeing any formal scoring sheets or tallies,⁵⁵⁴ and no such documents

⁵⁵⁰ See Ex. 142, Memorandum from Duane W. Oates to Larry Dwyer; see also Ex. 145, Response to RFQ from Charles P. Johnson & Associates, Inc., and Information from Hillis-Carnes Engineering Associates, Inc.

⁵⁵¹ Karim Dep. (Aug. 5, 2010) 182:11-17.

⁵⁵² *Id.* at 166-67; 166:19-167:2.

⁵⁵³ Interview with Duane Oates.

⁵⁵⁴ Interview with Sean Regan and Thomas Regan (Nov. 12, 2010).

have been produced by Banneker. The Regans also had no input into negotiating the amounts to be paid to LEAD under its contracts.⁵⁵⁵

Neither DMPED nor DCHE weighed in on the question of which engineering firm should be selected. Glover testified that she directed Banneker to issue the RFQ quickly, and that she reviewed the document before it went out “and told them it was fine.”⁵⁵⁶ Jannarone testified that he had not seen either the RFQ or LEAD’s response prior to his deposition.⁵⁵⁷ No one at DMPED participated in the review of the responses; Glover was not provided with a copy of LEAD’s submission until after the firm had been selected.⁵⁵⁸ Indeed, it was not until October 28,

⁵⁵⁵ *Id.*

⁵⁵⁶ Glover Dep. 131:3-12; 134:18-19.

⁵⁵⁷ Jannarone Dep. 77:5-7, 80:9-10.

⁵⁵⁸ Glover Dep. 138:5-7, 140:2-8. Glover thought she had been given a copy of LEAD’s proposal, but in all likelihood, what she saw was the notebook LEAD put together for its kick-off meeting with the project management team. *See* Ex. 143. She testified:

Glover: I saw their proposal and it had legitimate companies that I was familiar with working with them so their team was appropriate for what we required.

Q: When you say legitimate companies that you were familiar with, working with them, who were you referring to?

A: They partnered with LSA and I worked with them on a previous project before so they had companies that I was familiar with.

Q: And so you didn’t know any – you didn’t really know anything about the individuals who owned or were employed by Liberty but you were comfortable because of the other companies they were working with, is that a fair statement?

A: Yes.

Glover Dep. 140:19-141:12. However, the proposal LEAD submitted to Banneker to obtain the subcontract did not mention LSA; the firm was introduced at a kick-off meeting after LEAD was on board.

2009, after the newspaper articles appeared, that Glover asked Karim to send her the scores and back up for his architect and engineer selections.⁵⁵⁹

DCHE did not participate in the selection of the engineers, and there were no documents transmitted at any time from May through October notifying the agency of the decision or seeking its approval. Documents received by the Committee do include three memoranda dated November 20, 2009 that purport to be from Duane Oates to Larry Dwyer “recommending” that LEAD and the architects be engaged. The documents seek belated approval of the selection of LEAD in May to perform the initial survey and consulting services,⁵⁶⁰ the procurement of the architects,⁵⁶¹ and the choice of LEAD for all of the engineering work.⁵⁶² Neither Oates nor Karim could say why or how the documents came to be created or whether or not they had ever been transmitted to DCHE.⁵⁶³ Oates did not remember the memos, and he surmised that it was

⁵⁵⁹ Ex. 146, E-mail from Jacquelyn Glover (EOM) to Omar Karim and Duane Oates (Oct. 28, 2009 11:14 AM); Glover Dep. 201:11-22. Glover testified that she believed that Banneker ultimately sent her not only LEAD’s proposal but a score sheet evaluating all of the bidders and tabulating the results, but neither DMPED nor Banneker has produced such a document. Glover Dep. 202:15-203:18. By the time of her deposition, she could not recall whether or not she had concluded, based on what she received, that Banneker had a sufficient basis to select LEAD as the engineer for the projects. Glover Dep. 206:18-207:3.

While Jannarone and Glover had little or no personal involvement in the selection of LEAD, they took steps to assure the media in January of 2010 that the LEAD engineering contract had been “competitively bid.” *See, e.g.*, Ex. 147, E-mail from Jacquelyn Glover (EOM) to Sean Madigan (EOM) (Jan. 11, 2010) and related e-mails. In fact, that was not true of LEAD’s initial survey and consulting contract, and the description hardly applies to the abbreviated process that led to the four engineering contracts with LEAD.

⁵⁶⁰ Ex. 148, Memorandum from Duane W. Oates to Larry Dwyer (Nov. 20, 2009).

⁵⁶¹ Ex. 149, Memorandum from Duane W. Oates to Larry Dwyer (Nov. 19, 2009).

⁵⁶² *See* Ex. 142, Nov. 20, 2009 Memorandum.

⁵⁶³ Karim Dep. (Sep. 21, 2010) 126:8-127:18; Interview with Duane Oates.

possible that someone else had drafted them to go out under his name.⁵⁶⁴ Dwyer expressed genuine surprise when they were shown to him during his deposition, and he was confident that he had never seen them before.⁵⁶⁵

After selecting LEAD for the engineering work on the projects, Banneker and LEAD executed four consulting services agreements: a July 22, 2009 agreement to perform surveys on 10 parks;⁵⁶⁶ a July 22, 2009 agreement for civil engineering services;⁵⁶⁷ a July 25, 2009

⁵⁶⁴ *Id.*

⁵⁶⁵ Dwyer Dep. (Aug. 10, 2010) 13:18–14:10. It is likely that the memos were created as part of the effort organized by DMPED in November and December of 2009 to get all of the contract paperwork in order so that the DPR contracts could be submitted to the Council for retroactive approval. *See* Section IX, *infra*. Jannarone’s to-do list assigned Banneker the action item of sending “all civil proposals and selection back up” to DMPED and DCHA. Ex. 150. Oates could only speculate, and he thought that the memos might have been written because it was brought to Banneker’s attention at that time that DCHE approval had been required. He recalled that they assembled a huge binder of materials to transmit to DCHA but could not remember if that was in connection with the Council hearings or in response to earlier requests from DCHA for supplementary material. Interview with Duane Oates.

⁵⁶⁶ Ex. 151, Consulting Services Agreement between Banneker Ventures and LEAD, (Jul. 22, 2009) (surveys).

⁵⁶⁷ *See* Ex. 82, Consulting Services Agreement (civil engineering).

agreement for geotechnical evaluations;⁵⁶⁸ and a September 21, 2009 agreement for environmental site assessments.⁵⁶⁹

E. LEAD's Performance and Invoices

Once LEAD was in place, it performed primarily by transmitting the work of others, but it charged excessive prices that were sanctioned by Banneker. While the referral to the United States Attorney is necessary to determine whether those circumstances arose out of any malfeasance or complicity on Karim's part, our review of the role LEAD played on the projects and the invoices it submitted has uncovered, at the very least, a pattern of nonfeasance on the part of both the private and government project managers that resulted in a significant waste of the taxpayers' money.⁵⁷⁰

⁵⁶⁸ Ex. 152, Consulting Services Agreement between Banneker Ventures and Lead (Jul. 25, 2009) (geotechnical).

⁵⁶⁹ Ex. 153, Consulting Services Agreement between Banneker Ventures and Lead (Sep. 21, 2009) (environmental). Each Consulting Services Agreement states in Article 1 that the Consultant shall provide the services specified in an attached Schedule 1 – Scope of work, and provides in Article 4 that “Banneker Ventures shall pay Consultant on a time-and-materials basis as per the attached Schedule 2.” But the schedule 1 for each of these agreements is LEAD's proposal to Banneker, and the schedule 2 for each also refers to the proposals, none of which price the work on a time and materials basis. Rather, each proposal includes a Table A, which is a spreadsheet breaking out a flat projected fee per park. LEAD submitted no back-up reflecting how the prices were derived, and the record did not reveal any negotiation with Banneker over the prices. The Regans were not asked to review the proposals or to weigh in on the fees before the agreements were consummated.

⁵⁷⁰ LEAD proposed flat fee prices for the engineering work, and Banneker accepted those prices and contracted to pay them, so, based on the evidence gathered to date, we cannot conclude that LEAD's invoices under those contracts provide grounds for an action against LEAD for “false” claims under the District's civil or criminal false claims statutes, D.C. Code §2-308.14 and §2-308.21, even though the law covers subcontractors' invoices.

1. LEAD's role on the projects

LEAD performed little substantive work on the DPR capital projects. Instead, it subcontracted the vast majority of the work for its four contracts – surveying, civil engineering, geotechnical engineering, and environmental site assessments – to third parties.

Banneker was on notice from the start that LEAD would not be performing the bulk of the work. There was a kick-off meeting convened shortly after the engineers had been selected, at which LEAD presented a chart depicting its staffing. It showed that the civil engineering and the surveying were going to be performed primarily by LSA and the geotechnical work by GC&T.⁵⁷¹ LEAD introduced an engineer from LSA named Steven Goley to the project managers at the meeting, and Ernest Njaba of GC&T attended as well.⁵⁷² It became clear to Sean Regan that LEAD “was sort of a quarterback,” and that they were subcontracting the actual work out to LSA and other firms.⁵⁷³

While LEAD secured the contracts by virtue of its status as a CBE, the bulk of the work and the accompanying fees flowed out of the District to non-CBE firms. None of LEAD's third party subcontractors were located in the District of Columbia, let alone were qualified as

⁵⁷¹ See Ex. 143, LEAD notebook materials.

⁵⁷² Njaba Dep. 49:8-11.

⁵⁷³ Regan recalls thinking at the time that he knew who Goley was, and that he was very relieved to know that there was going to be a decent civil engineer involved. Interview with Sean Regan and Thomas Regan (Nov. 12, 2010). Duane Oates reported having the same reaction, stating in the interview that he became comfortable when he learned that LSA was going to be utilized. Interview with Duane Oates (Nov. 9, 2010). It was LSA that made Jacqui Glover comfortable as well. Glover Dep. 141:4-12.

CBE's.⁵⁷⁴ According to Barrow, the 51% CBE requirement Banneker included in the RFQ would be met as long as the non-CBE subcontractors doing the job were working under his direction.⁵⁷⁵ As noted above, other construction managers disputed this assertion.⁵⁷⁶ LEAD's use

⁵⁷⁴ LEAD subcontracted with the following entities: Loiederman Soltesz Associates, Inc. (Maryland); Currie and Associates, LLC (Maryland); Accurate Infrastructure Data, Inc. (Maryland); Anabell Environmental, Inc. (Maryland); Chesapeake Geosciences, Inc. (Maryland); Environmental Data Resources (Connecticut); GE&T Consultants, Inc. (Maryland); Geomatrix Drilling, Inc. (Maryland); Hillis-Carnes Engineering Associates, Inc. (Maryland); and Insight, LLC (Virginia). LEAD also hired Ernest Njaba, an employee of GC&T, a company located in Virginia.

⁵⁷⁵ Barrow Dep. (May 21, 2010) 134:15-21. Jacqueline Glover also stated that it was not a problem if all of LEAD's subcontractors were non-CBE, as long as the company submitting the invoice was a CBE. But she did not explain why she found that practice to be acceptable. *See* Glover Dep. 171:1-19.

⁵⁷⁶ Interview with Mangrum and Miranda. The Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005, effective October 20, 2005 (D.C. Law 16-33; D.C. Official Code § 2-218.01 *et seq.*) (the "Act"), governs CBE. Section 2346 of the Act provides that certain types of contracts for which a CBE is selected as a prime contractor through Sections 2343 or 2344 must include requirements for the amount of work to be performed by the CBE itself. Because LEAD was not a prime contractor and therefore Banneker did not procure LEAD pursuant to Sections 2343 or 2344 of the Act, we cannot conclude that those sections were violated when LEAD subcontracted out the lion's share of its work to non-CBE firms.

However, the arrangement undermined the purpose of the CBE preferences that Karim was purporting to implement. The goals of the Department of Small and Local Business Development, which administers the CBE program, are to (1) stimulate and expand the local District of Columbia tax base; (2) increase the number of viable opportunities for District residents; and (3) extend economic prosperity to local business owners, their employees, and the communities they serve. D.C. Official Code § 2-18.13(a)(1). When LEAD was selected based on its CBE status but then directed city funds to firms outside of the District, and when Banneker took no steps to enforce the stated condition of its own procurement, Banneker and LEAD frustrated these objectives.

of out of state subcontractors was also inconsistent with the First Source Employment Agreement it submitted to the D.C. Department of Employment Services on October 29, 2009.⁵⁷⁷

a. LEAD contracted out the surveying work

Banneker selected LEAD on a sole source basis to launch the projects by surveying the sites, but LEAD had no licensed surveyor and did not actually perform the survey work. LEAD was brought on board for this purpose on May 4, and Barrow immediately contacted a licensed surveyor from Maryland, Anthony Currie.⁵⁷⁸ Skinner followed up and faxed Currie a list of the five surveys he was to complete – Kenilworth, Rosedale, Guy Mason, Ft. Stanton, and Parkview – and he directed Currie to complete the work in 8 days.⁵⁷⁹ Currie found the proposed schedule to be unreasonable. He stated in his interview that when he spoke with Skinner and Barrow, he was surprised to discover how little LEAD understood about the fundamentals of what was

⁵⁷⁷ Ex. 154, First Source Employment Agreement, Contract No. S/C722-2009, LEAD (Oct. 28, 2009). In the agreement it signed pursuant to D.C. law, LEAD agreed to use DCDOES as its first source for the recruitment of employees and to require any of its own subcontractors receiving over \$100,000 to sign similar agreements. LEAD imposed no such requirement. When asked to list its “current employees,” LEAD falsely identified Mounir Abouzakhm, Dawit Zena, and Mesfin Medhin, and it also listed Timothy White, whom LEAD has identified elsewhere as an independent contractor, and not an employee. *Id.*

⁵⁷⁸ Interview with Anthony Currie, President and CEO, Currie and Associates, LLC (Apr. 22, 2010). Currie explained that he met Barrow in July of 2008, when Barrow informed him that he was starting a company called Liberty and he was looking for someone who could do survey work in Maryland and the District of Columbia. After the meeting, Barrow retained Currie to survey a Banneker project on Thayer Avenue in Silver Spring, MD and 600 Alabama Avenue, in Southeast, D.C. Later, LEAD hired Currie to survey the Strand Theater site in Northeast D.C. But LEAD identifies the Alabama Avenue and Strand Theater jobs, as examples of its own “prior performance” in its response to the Banneker RFQ. *See* Ex. 121 at 43-44.

⁵⁷⁹ Ex. 155, Facsimile to Anthony Currie (May 15, 2009 15:07 EST). It is notable that at that time, neither Fort Stanton or Parkview had been included in the MOU from DPR to DMPED, DMPED had not yet executed its MOU with DCHA, and DCHE had not yet executed a contract with Banneker.

involved.⁵⁸⁰ Currie had to explain that the surveys would require several weeks of work. He also found that he had to question both men about whether certain features of the surveys that LEAD requested were even necessary for the DPR projects.⁵⁸¹

Barrow communicated with Currie to prioritize the work and to convey requests from project managers or architects to add information to the drawings, but Currie stated that he completed the surveys – which bear his seal – himself. The documentary record supports his testimony. Currie’s files contain his original drawings and work product, and there is no indication in the records provided by LEAD that LEAD added anything to them. Barrow simply directed Currie to the sites to be surveyed. He also provided Currie with a LEAD title block to be utilized on the drawings. Currie’s invoices list the steps he performed in connection with each survey,⁵⁸² and when the OPEFM project managers were shown the invoices, they indicated that

⁵⁸⁰ Interview with Anthony Currie.

⁵⁸¹ For each site, LEAD asked Currie to provide an “ALTA” (American Land Title Association) survey, a complex, relatively costly exercise that is generally required when commercial property is transferred. An ALTA survey provides the lender or the title company with the detailed legal and title information necessary for the issuance of title insurance. <http://www.landsurveyors.com/resources/definition-of-an-alta-survey>; <http://www.alta.org>. The LSA engineers retained to survey other parks also expressed surprise that LEAD requested ALTA surveys on all of the parks. Interview with Carlos Ostria and Steven Goley (Jul. 15, 2010). While some of the witnesses indicated that for some individual parks, there may have been issues of ownership necessitating this type of inquiry, Barrow was unable to explain clearly why he included that service in his proposals to Banneker in every instance. Barrow Dep. (May 21, 2010) 147:15-149:22.

⁵⁸² Ex. 156, Letter from Currie and Associates, LLC, to Abdullahi Barrow (May 15, 2009) (Kenilworth); Ex. 157, Letter from Currie and Associates, LLC, to Abdullahi Barrow (May 15, 2009) (Guy Mason); Ex. 158, Letter from Currie and Associates, LLC, to Abdullahi Barrow (May 15, 2009) (Rosedale); Ex. 159, Letter from Currie and Associates, LLC, to Abdullahi Barrow (May 15, 2009) (Parkview), Ex. 160, Letter from Currie and Associates, LLC, to Abdullahi Barrow (May 15, 2009) (Fort Stanton).

the lists were complete.⁵⁸³ Currie was later hired to survey five more parks: Chevy Chase, Justice Park, 7th and N, Raymond Recreation Center, and the 10th Street park. LEAD also engaged LSA to survey Bald Eagle and Barry Farms. Like Currie, the LSA surveyor, stated that Barrow played no role in completing the work.⁵⁸⁴

b. LEAD contracted out the civil engineering work

After the RFQ process, Banneker hired LEAD to perform the civil engineering on all of the projects, but LEAD immediately engaged LSA to do that work as well.⁵⁸⁵ During his deposition, Barrow repeatedly stated that he provided “management,” “direction,” and “coordination” for this engineering work, and he insisted that LEAD thereby added value to what LSA and Currie provided.⁵⁸⁶ He also claimed that he had to verify his subcontractors’ work product, including the surveys.⁵⁸⁷ He testified that he would go to the project sites and to

⁵⁸³ Interview with Mangrum and Miranda.

⁵⁸⁴ Interview with Carl Ostria and Steven Goley. The documents gathered during the investigation confirm the witnesses’ description of LEAD as a mere pass-through. *See e.g.*, Ex. 161, E-mail from Shamika M. Godley to Abdullahi Barrow (Jul. 2, 2009 2:09 PM) scheduling meeting with environmental regulators on Rosedale (“At a minimum, both myself and your civil engineer (Carlos Ostria, I believe) need to attend.”); Ex. 162, Email from Abdullahi Barrow to Anthony Currie (Jul. 14, 2009 6:43:53 PM EDT) (asking Currie to send him responses to architects’ comments on a survey; Ex. 163, E-mail from Abdullahi Barrow to Steve Goley, P.E. (LSA) (Jul 30, 2009 12:09 PM EST) (“Please perform the survey operation ...”); Ex. 164, E-mail from Abdullahi Barrow to Steve Goley, P.E. (Aug. 31, 2009 2:22 PM), forwarding architects’ requests for civil engineering specs for Barry Farms and Fort Stanton (“Steve, as requested below, would you start working on the Civil Spec. Thank you Abdullahi.”); Ex. 165, E-mail from LEAD project manager Michael Florence to Banneker project manager, Cleo Hurley (Jul 30, 2009) (“The surveyors have finished 7th and N.”); Ex. 166, E-mail from Abdullahi Barrow to Bonnie Vancheri at Regan Associates (Sep. 3, 2009).

⁵⁸⁵ *See* Ex. 82; Interview with Carlos Ostria and Steven Goley.

⁵⁸⁶ Barrow Dep. (May 20, 2010) 175:9-12; 176:6-8; 189:15-19; 205:21-206:2.

⁵⁸⁷ *Id.* at 91:14–94:4.

government agencies to take measurements and verify information, which would take “days, sometimes weeks.”⁵⁸⁸ Yet LEAD produced no documents reflecting this work or any input Barrow offered, and despite Barrow’s testimony that he regularly recorded the hours he worked on slips of paper, LEAD informed the Special Counsel through its attorneys that the company had no such time records.⁵⁸⁹ Moreover, CORE architects who used a Currie survey observed that the drawing had errors that should have been corrected if Barrow had actually verified the work.⁵⁹⁰

The LSA engineers stated that Barrow would obtain information about the scope of work to be performed and then pass it along to them, giving them free reign to then complete the engineering tasks. They did not see him on the sites performing any measurements and could not say that he verified any of their work.⁵⁹¹ With respect to the surveys in particular, they indicated that Barrow played no role beyond asking them to get them done in a timely manner.⁵⁹² Ultimately, the investigation produced no documentary evidence or witness testimony that verified Barrow’s account that he participated in or enhanced the quality of the civil engineering

⁵⁸⁸ *Id.* at 93:13–94:15.

⁵⁸⁹ Barrow Dep. (May 20, 2010) 29:18-30:13; Ex. 16 at 3.

⁵⁹⁰ Interview with Dale Stewart.

⁵⁹¹ Interview with Carlos Ostria and Steven Goley.

⁵⁹² *Id.*

or the surveys. Instead, the record revealed, as CORE's Dale Stewart put it, that LEAD acted as "just a conduit" passing along other engineers' work.⁵⁹³

c. LEAD contracted out much of the geotechnical and environmental engineering work

Banneker also hired LEAD to complete the geotechnical and environmental engineering.⁵⁹⁴ Barrow's previous experience had been in geotechnical and structural engineering,⁵⁹⁵ and there is evidence that LEAD played a larger role in connection with those aspects of the engineering for the parks. But LEAD did not do this work alone.

For the parks that required geotechnical analyses, Barrow hired a subcontractor to take soil borings and submitted the samples to another subcontractor for laboratory testing.⁵⁹⁶ Barrow stated that he used the results to write the geotechnical reports himself, and that he paid Ernest Njaba, an employee of GC&T working on an individual basis in his personal time, to look over

⁵⁹³ Notwithstanding these circumstances, Skinner presented the surveys and civil engineering drawings during his testimony on April 15, 2010 as examples of LEAD's "accomplishments," and of the work it "completed and coordinated" on the DPR projects. *See* Ex. 144.

⁵⁹⁴ *See* Ex. 152, Consulting Services Agreement between Banneker Ventures and LEAD (geotechnical); Ex. 153, Consulting Services Agreement between Banneker Ventures and LEAD (environmental).

⁵⁹⁵ Barrow specialized in geotechnical engineering in graduate school and performed work related to structural and environmental engineering for the District of Columbia. Barrow Dep. (May 20, 2010) 5:15-20; 9:12-10:2. Although Barrow claims he does not have a specialty within the field of civil engineering, several witnesses describe him as specializing in geotechnical or structural engineering. Njaba Dep. 18:16-20 (stating that Barrow specialized in geotechnical engineering); Interview with Bonnie Vancheri, Regan Associates, LLC (Nov. 12, 2010) (describing Barrow as having some competence in geotechnical and structural engineering); Interview with Carlos Ostria and Steven Goley (describing LEAD as specializing in geotechnical and structural engineering).

⁵⁹⁶ Barrow Dep. (May 20, 2010) 76:1-15; Ex. 167, Geomatrix Drilling, Inc. invoice # 141-09 (Jul. 3, 2009); Ex. 168, Hillis-Carnes Engineering Associates, Inc. invoice # 83407 (Aug. 12, 2009).

the drafts and provide a second set of eyes.⁵⁹⁷ Njaba, who described himself as a longtime personal friend of Barrow's, confirmed Barrow's account.⁵⁹⁸

GC&T, a Virginia company with particular geotechnical expertise, had been identified as part of LEAD's team in LEAD's response to the RFQ.⁵⁹⁹ But Njaba testified that GC&T was not asked to perform any geotechnical engineering on the DPR projects, and that he provided input individually as part of his "consulting business on the side."⁶⁰⁰ He indicated that after the soil boring and lab tests had been completed, his friend Barrow contacted him:

⁵⁹⁷ Barrow Dep. (May 20, 2010) 76:18-21.

⁵⁹⁸ Njaba Dep. 57:5-7; 69:19-22; 99:22-100:2.

⁵⁹⁹ Ex. 121.

⁶⁰⁰ Njaba Dep. 58:2-4. LEAD obtained the DPR engineering contracts based on a proposal that represented that GC&T would be its partner on the projects, and it was GC&T's credentials and experience that added the necessary heft to the response to the RFQ. Njaba attended the kick off meeting with Banneker, but LEAD did not actually utilize the company to perform any of the geotechnical work. Njaba testified that he anticipated that GC&T would have been engaged to handle a more significant portion of the engineering work – the construction materials testing – had the projects continued. *Id.* at 58:11-21.

Njaba's deposition was revealing since the engineer also testified that it was GC&T that had been solely responsible for the construction materials testing work that LEAD had been hired to provide for Deanwood:

Njaba: I had a technician present at the site that did all the work. He would write a field report. He's going to submit it to our secretaries. They will type it. It's going to our field manager. He's going to review it. Then he's going to come to me for my final review and I put my seal and stamp...

Q: And so would Mr. Barrow have a role in actually writing the reports?

A: Writing the field reports?

Q: Yeah, or any of the reports you were writing?

A: No. I mean we are doing the service work and we submit it to Mr. Barrow. Mr. Barrow is with Liberty Engineering and they are my client.

Njaba Dep. 24:19-25:18; *see also* 29:8-30:7. So the Deanwood work, which Karim pointed to as an example of LEAD's prior experience, *see e.g.*, Karim Dep. (Aug. 5, 2010) 53:2-4, was not actually work performed by LEAD at all.

He put together the package and he was looking for my second – he was looking for a second eye on the project. He was looking for somebody to give him a – to review their work and in my private time and mostly on weekends, I went to his office on 18th Avenue. I reviewed the work, suggested any recommendations that I felt – I felt that was much more appropriate.⁶⁰¹

Banneker also entered into a contract with LEAD to perform Environmental Site Assessments.⁶⁰² With respect to the environmental engineering, Barrow initially testified that he had obtained the necessary data and prepared the reports himself, calling upon another experienced engineer and friend named Mounir Abouzakhm only to review them.⁶⁰³ But the investigation established that it was Abouzakhm, the owner of Geotechnical Engineering & Testing Consultants, Inc. (“GE&T”) in Virginia, who was primarily responsible for drafting the ESA’s. Abouzakhm said that he worked with Barrow to complete the Phase I ESA reports for Barry Farms, Justice Park, Ft. Stanton, and 10th Street Park. They researched the project sites together: walking the property and making observations for up to a few hours.⁶⁰⁴ Based on their research, Abouzakhm said he wrote reports, which Barrow then reviewed and approved.⁶⁰⁵ Barrow ultimately conceded at the end of his deposition that it was Abouzakhm who drafted the Phase I reports in the first instance.⁶⁰⁶

⁶⁰¹ Njaba Dep. 56:15-22.

⁶⁰² See Ex. 153, Consulting Services Agreement (environmental).

⁶⁰³ See, e.g., Barrow Dep. (May 20, 2010) 209:22–210:3 (“Mr. Mounir played a limited role as far as just doing a site reconnaissance and also reviewing the report prior to submitting to the client.”); *Id.* at 217:6-224:14.

⁶⁰⁴ Interview with Mounir Abouzakhm; Barrow Dep. (May 20, 2010) 206:8-21.

⁶⁰⁵ Interview with Mounir Abouzakhm; Ex. 169, GE&T Invoice # 465 (Jan 2, 2010) (“Performed site reconnaissance and submitted the required report.”).

⁶⁰⁶ Barrow Dep. (May 20, 2010) 226:19-228:21. Earlier, he claimed that nobody really “wrote” the reports. *Id.* at 208:2-6.

Justice Park required a more extensive report, known as a Phase II ESA. For that work, Abouzakhm performed field work and took soil samples to a laboratory for further testing.⁶⁰⁷ After receiving the laboratory results, Abouzakhm sent the results to Barrow and the two discussed them.⁶⁰⁸ Abouzakhm drafted the Phase II ESA report, and worked with Barrow in revising it.⁶⁰⁹

d. LEAD used consultants for the “management” function too.

While Barrow was thus involved in coordinating the surveying and civil engineering work performed by others, and he collaborated on the geotechnical and environmental engineering, Skinner, by his own admission, played no role in the engineering aspects of his business at all. When asked what he did at LEAD, he testified: “I mean, all the non-technical management functions and trying to coordinate activities, following up with people, look for deadlines, if necessary, taking out the trash – I mean, with a small business you do everything, but I am saying as it relates to the engineering work, that's Abdullahi Barrow.”⁶¹⁰ Barrow agreed. “Well most of the meetings would be held in our office and [Skinner] might be in the office just stop by and sit down in the office. But mainly he was, if I recall correctly, he was not participating that much, he would just sit in there if he had the time; most of the time he was involved in something else.”⁶¹¹ Steven Goley, the LSA engineer who worked extensively on the

⁶⁰⁷ Interview with Mounir Abouzakhm; Barrow Dep. (May 20, 2010) 207:1-5.

⁶⁰⁸ Interview with Mounir Abouzakhm.

⁶⁰⁹ *Id.*

⁶¹⁰ Joint Roundtable (Apr. 15, 2010) 163:11-16.

⁶¹¹ Barrow Dep. (Sep. 30, 2010) 84:14-19.

projects, stated that he had no contact whatsoever with Skinner, and other subcontractors and project managers provided similar information.⁶¹²

Despite the fact that Barrow identified “management” as LEAD’s primary function, LEAD subcontracted out much of that work to independent contractors as well. The role of LEAD project manager was filled by Michael Florence and then Tim White, whom LEAD identified as “1099 independent contractors.”⁶¹³ White was not a licensed professional engineer, and Barrow was not certain whether Florence obtained his license during his time with LEAD or not.⁶¹⁴ The two informed subcontractors of meeting dates, scheduled access to the project sites, and generally transmitted information to coordinate the projects, but neither performed any technical work.

Reviews of LEAD’s performance – even in its limited role – were mixed.⁶¹⁵ The e-mail traffic reveals that the Regan project managers experienced a number of problems with the

⁶¹² Interview with Steven Goley and Carlos Ostria; Interview with Anthony Currie (describing Skinner as having minimal involvement in the DPR capital projects); Interview with Mounir Abouzakhm (reporting that he never worked with Skinner); Glover Dep. 153:1-2 (“I never had any contact with Mr. Skinner during the projects.”). The documentary evidence revealed that Skinner served as little more than an administrative assistant who answered phones and relayed messages. *See e.g.*, Ex. 170, E-mail from Sinclair Skinner to Abdullahi Barrow and Timothy White (Oct. 14, 2009 12:58 PM); Ex. 171, E-mail exchange between Sinclair Skinner and Timothy White (Nov. 18, 2009, 18:13:08 and 6:21 PM).

⁶¹³ *See* Ex. 172, “1099 Employees & Subcontractors”; *see also* Joint Roundtable (Apr. 28, 2010) 16:17-21 (Apr. 28, 2010) (describing White as a 1099 contractor).

⁶¹⁴ Barrow Dep. (May 20, 2010) 59:1-4 (“Based on the information he provided, he was EIT [Engineer in Training] and prior to his leaving the company I think he become licensed . . . based on his information that he told us.”).

⁶¹⁵ For example, one project manager from Regan Associates described LEAD as being competent in some areas but struggling in others, and that they “bit off more than they could chew” in trying to handle their workload. Interview with Bonnie Vancheri, Regan and Associates, LLC (Nov. 12, 2010).

materials Barrow was passing along, and that they complained about LEAD's timeliness and responsiveness.⁶¹⁶ Indeed, LEAD's efforts to facilitate the projects often had the opposite effect.⁶¹⁷ Barrow insisted that all communications flow through LEAD, even though the engineers needed to be able to communicate with the architects directly.⁶¹⁸ That request only slowed communications.⁶¹⁹ Ultimately the process of working through LEAD proved "so painful

⁶¹⁶ See, e.g., Interview with Bonnie Vancheri (describing several problems with the work LEAD provided); Interview with Ray Nix, Regan and Associates, LLC (Nov. 12, 2010) (describing missing information and delays from LEAD after having asked repeatedly for additional information); Ex. 173, E-mail from Kris Benson, Core Architects, to Shamika Godley, Banneker Ventures (Jun. 8, 2009, 18:39 EST) (describing various information missing from the Rosedale survey); Ex. 174, E-mail from Kris Benson, Core Architects, to RPeterson@amtengineering.com and bjob@amtengineering.com (Jun. 26, 2009, 11:28 AM EST) (noting that the revised survey "added very little to quell" their initial concerns); Ex. 175, E-mail from Bonnie Vancheri, Regan Associates, to Michael Florence and Abdullahi Barrow, Liberty Engineering & Design (Aug. 21, 12:29 PM EST) (requesting long-overdue information and complaining that the "schedules are being compromised because we are unable to complete schematic design without this information."); Ex. 176, E-mail from Bonnie Vancheri, Regan Associates, to Abdullahi Barrow, Liberty Engineering & Design (Nov. 11, 2009, 16:00 EST) ("It is now 4pm on Wed of the final day you were to have the long awaited for soils report to us. We are now way behind schedule. What is the holdup? I have asked repeatedly for a verbal and have not received any usable information [sic]."). The Regan project management team indicated that these emails accurately reflected their experience with LEAD. Interview with Sean Regan and Thomas Regan (Nov. 12, 2010).

⁶¹⁷ Interview with Dale Stewart.

⁶¹⁸ See, e.g., Ex. 177, E-mail from Abdullahi Barrow, Liberty Engineering & Design, to Steven Goley, Loiederman Soltesz Associates (Oct. 22, 2009, 11:49 AM EST).

⁶¹⁹ Interview with Dale Stewart.

and the response time was so slow” that at least one set of architects brought their complaints to Banneker.⁶²⁰

These are the facts and circumstances that form the backdrop for the analysis of LEAD’s invoices and of Banneker’s management of its consultants. The record shows that Banneker did not hire an engineering firm with the experience and capacity to do the work and that it failed to implement its own stated objective of directing work to local firms. Instead, the private contractor that was paid a substantial fee to retain and manage qualified engineers and consultants simply hired another middle man that charged its own fee to retain and manage qualified engineers and consultants. And Banneker applied its 9% fee to that middle man’s invoices. The review of LEAD’s invoices and profit margins reveals that the unnecessary layer of bureaucracy turned out to be particularly wasteful for the D.C. taxpayers in this case.

2. **LEAD’s invoices**

LEAD reaped significant profits from organizing and transmitting the work of others. While witnesses with construction expertise acknowledged that it is generally appropriate for contractors to apply some mark-up to amounts due from subcontractors working under their auspices – even in a pure pass-through situation – they indicated that an industry-standard fee for

⁶²⁰ *Id.* Karim deflected all criticism of LEAD by claiming that it was the critics – who were Regan project managers – and not Barrow, who lacked the experience to understand the issues with the projects. *See* Karim Dep. (Sep. 21, 2010) 95:15-115:3. For instance, he argued that one Regan Associates project manager, Bonnie Vancheri, questioned LEAD because she was inexperienced and “didn’t have a clear understanding of what some of the things were.” Karim Dep. (Sept. 21, 2010) 107:1-2. He also posited that Vancheri was not an engineer. In fact, Vancheri is a licensed civil engineer. Interview with Bonnie Vancheri.

managing subcontractors would be in the range of 10, or 10 to 15 percent.⁶²¹ In this case, though, LEAD charged a markup in excess of 125 percent. The records made available to the Special Counsel show that LEAD paid approximately \$422,600 to its subcontractors,⁶²² but it billed Banneker approximately \$969,000.00.⁶²³ Even if one assumes that the firm was entitled to some fee for its management and direction of others, and that Barrow performed some substantive engineering work in certain of the areas, LEAD's fees – which Banneker never questioned – were not justified.⁶²⁴

⁶²¹ Sean Regan, from Regan Associates, described ten percent as a typical markup for management of subcontractors, and doubted that anyone would opine that the industry standard could exceed 20 percent. Interview with Sean Regan and Thomas Regan (Nov. 12, 2010). Jacqui Glover and the LSA engineers said that the mark-up would typically range from 10 to 15 percent. Glover Dep. 163:15; Interview with Carlos Ostria and Steven Goley.

⁶²² LEAD claims to have paid its subcontractors and “1099” independent contractors a total of \$422,603.11 for work on the DPR capital projects. *See* Ex.172. Since the records provided to the Special Counsel were incomplete, it was not possible to definitively account for the exact amount LEAD was charged by subcontractors, or what it ultimately paid its subcontractors for their work on the DPR capital projects. For example, LEAD claims to have paid \$11,799.16 to Tim White, an independent contractor who served as a project manager. But LEAD did not produce documentary evidence to support that claim, such as invoices or payroll receipts. LEAD's bank records verify that LEAD in fact paid White, but those checks do not match the amount LEAD claims it paid him for the DPR capital projects in particular. For purposes of calculating LEAD's markup and profits, however, we found that LEAD's claimed payouts to be an adequate approximation of what it paid subcontractors for the DPR capital projects.

⁶²³ *See* Ex. 2, showing invoices Nos. #1-9 submitted by Banneker to DCHE.

⁶²⁴ Barrow claimed that LEAD's profit margin percentage was only “between 6 to 15, some of them 20, a few of them 20.” Barrow Dep. (May 20, 2010) 97:21-98:2. This claim is simply not credible in light of the documentary record, which reflects that LEAD had limited overhead and expenses. Since LEAD's project managers were independent contractors, their salaries are already accounted for in the \$422,000 total for payouts to subcontractors. Few supplies were needed since others were doing the testing and engineering drawings. There are no grounds to believe that LEAD's expenses were high enough to decrease its profit margin from 129 to 20 percent. It is notable that as soon as OPEFM got involved in the projects, it immediately sought to reduce the high fees going to the civil engineers. *See* Ex.178, E-mail from Sean Lewis to Timothy White (Feb. 18, 2010 11:11 AM).

a. Consulting and surveying services

After LEAD was engaged to conduct the surveys, it promptly solicited a proposal from Currie. Skinner pressed him to lower his prices, and LEAD hired him on May 15 to complete five surveys at \$8,000 each.⁶²⁵ Within weeks, LEAD began invoicing Banneker for the surveys Currie produced, but at vastly higher prices than Currie charged. For example, Currie charged LEAD \$8,000 for the boundary and topographical survey for the Rosedale site on June 9, 2009.⁶²⁶ LEAD also hired a contractor, Insight LLC, to locate underground utilities at the site, and it paid \$3,800 for that component of the survey.⁶²⁷ Although LEAD thus paid a total of \$11,800 to its subcontractors, and it added little or nothing to the process itself, it charged Banneker \$48,500 for the Rosedale site survey: a 411% markup.⁶²⁸

LEAD's invoice to Banneker included no back-up substantiating its costs. But Banneker transmitted the LEAD invoice to DMPED as part of its May invoice on June 10, applying its 9% markup to LEAD's fee. Banneker accepted the price for the Rosedale survey even though it had access to information that could have provided another measure of how the work should be priced: the architects for the project – CORE – had proposed to use a different engineering firm

⁶²⁵ Interview with Anthony Currie; *See* Ex.160, (Fort Stanton); Ex. 157, (Guy Mason); Ex. 179, Letter from Anthony Currie, Currie and Associates, to Abdullahi Barrow (May 15, 2009) (Kenilworth); Ex. 159, (Parkview); Ex. 158 (Rosedale). *See also* Ex. 155.

⁶²⁶ Ex. 180, Letter from Anthony Currie, Currie and Associates, to Abdullahi Barrow (Jun. 9, 2009) (charging \$8,000 for Rosedale survey).

⁶²⁷ Ex. 181, Insight LLC invoice # 2009250 (Jul. 5, 2009).

⁶²⁸ Ex. 182, LEAD invoice # S529-2009 (May 29, 2009). Interestingly, LEAD's invoice to Banneker is dated weeks before the dates of the invoices from its subcontractors. Thus, it appears as if LEAD may have charged Banneker the full cost of the surveying services before they were completed, or at least, before LEAD was out of pocket for them.

that proposed to complete the boundary and topographic survey for only \$19,000.⁶²⁹ Banneker's May invoice also included LEAD's bills for the Guy Mason and Parkview surveys. Currie had completed them for \$8,000 each, and LEAD charged \$49,200 and \$46,800.⁶³⁰

Similarly, on the Kenilworth project, Currie charged \$8,000 for survey drawings on June 24, 2009,⁶³¹ and LEAD paid Insight LLC \$2,800 to designate utilities on the site.⁶³² These two charges, worth \$10,800, were LEAD's only third-party costs for surveying the Kenilworth project. Yet on June 26, 2009, LEAD charged Banneker \$47,000 for the Kenilworth site survey – a \$36,200, or 335%, surcharge over what LEAD had paid its subcontractors.⁶³³ Banneker included LEAD's invoices in its June bill to DMPED.⁶³⁴

⁶²⁹ Ex. 183, Letter from Michael Wiercinski, A. Morton Thomas and Associates, Inc., to Dale Stewart, Core Architects (May 13, 2009).

⁶³⁰ The invoices thus establish that as of early June, DMPED was on notice that LEAD had been hired to provide the surveys before Banneker's contract was executed, and that it was charging fees that should have caught the project manager's attention. The record also reflects that DCHE was provided with copies of the invoices by June 24, 2009 at the latest. *See* Ex. 184, E-mail from Omar A. Karim to Asmara Habte (Jun. 24, 2009 3:21 PM).

⁶³¹ Ex. 185, Letter from Anthony Currie, Currie and Associates, to Abdullahi Barrow (Jun. 24, 2009) (charging \$8,000 for Kenilworth survey).

⁶³² Ex. 186, Insight LLC invoice # 2009251 (Jul. 5, 2009).

⁶³³ Ex. 187, LEAD invoice # S62-2009 (Jun. 26, 2009). The Fort Stanton project is yet another example of LEAD's billing practices. LEAD paid Currie \$8,000 for the survey and A/I/Data \$8,466 for utility designation. LEAD then charged Banneker \$49,600 for the survey. Ex. 188, Letter from Anthony Currie, Currie and Associates, to Abdullahi Barrow, Liberty Engineering & Design (Jun. 24, 2009); Ex. 189, Accurate Infrastructure Data, Inc. invoice #1085 (Sep. 2, 2009); Ex. 190, LEAD invoice #S63-2009. Once again, it appears as though LEAD charged Banneker its lump sum fee for the survey in advance of receiving its subcontractors' invoices.

⁶³⁴ Ex. 191, Letter from Omar A. Karim to Jacquelyn Glover (Jun. 26, 2009).

Banneker's acceptance of the May and June LEAD invoices is even more troubling because at the time LEAD submitted them, and Banneker passed them on to DMPED, Banneker and LEAD had not yet executed a contract establishing a price for the surveys. The original May 4 arrangement with LEAD capped the fees for consulting services at \$2,500 per park, but it did not specify prices for the surveys.⁶³⁵ And there is no evidence that Banneker negotiated with LEAD over the prices for the surveys at any time before LEAD submitted its invoices. The parties did not agree to prices for the surveys in writing until July 22, 2009, and by that point, LEAD had already billed for five surveys, and Banneker had already applied its 9% markup and passed the invoices along.⁶³⁶

The formal consulting contract for surveying between Banneker and LEAD covered surveys on ten projects,⁶³⁷ several of which LEAD had already hired Currie to produce. But LEAD decided to enlist more help in completing the surveys because it did not think Currie's small operation could handle all of its needs.⁶³⁸

⁶³⁵ See 76, May 4, 2009 letter of intent to contract with LEAD.

⁶³⁶ Karim claimed to have had a large team of lawyers and staff negotiating the contracts, but could not specifically say whether Banneker negotiated with LEAD over the prices for the surveys or not. Karim Dep. (Sep. 21, 2010) 67:18-68:3 ("I didn't negotiate all of these projects. We had a ton of different lawyers involved negotiating a lot of the terms of different contracts. So we probably had, you know, over a dozen different people working on to make sure that the District got the fairest services and fees for the work that it did that are – that vendors who performed for the contract."). But neither LEAD nor Banneker produced a single document reflecting communication concerning the prices for surveys prior to the execution of the July 22, 2010 contract. And we have seen no documentation of negotiations over the terms of that contract.

⁶³⁷ See Ex. 151, Consulting Agreement (surveys).

⁶³⁸ Barrow Dep. (May 20, 2010) 90:2-8.

LEAD contacted LSA and solicited a proposal for its surveying services.⁶³⁹ On July 21, 2009, LSA submitted a proposal to LEAD for six of the ten DPR projects. LSA did not submit proposals for the remaining projects because it was told that other surveying firms had already been selected on those projects.⁶⁴⁰ LSA's proposal included a chart, titled "Table A," in which LSA set out how it calculated the pricing for each site.⁶⁴¹ The next day, LEAD submitted its own proposal to Banneker for the surveys. LEAD's proposal also included a "Table A" of prices, which appeared to copy the Table A template from LSA's proposal. Both tables included the exact same seven categories of services that LSA proposed to provide within the field of "Boundary and Topographical Surveying Services."⁶⁴² But the two tables differed in one critical respect: LEAD significantly increased the prices on every line item.⁶⁴³

For example, LSA proposed to perform surveying services for LEAD at Chevy Chase for a total of \$17,780. This included:

⁶³⁹ Interview with Carlos Ostria and Steven Goley.

⁶⁴⁰ Interview with Carlos Ostria and Steven Goley.

⁶⁴¹ Ex. 192, Letter from Loiederman Soltesz Associates, Inc. (LSA) to Abdullahi Barrow, LEAD (Jul. 21, 2009) submitting LSA proposal, including Table A.

⁶⁴² Those categories were: "Boundary Survey, Including computations"; "ALTA Survey, Including Description"; "Legal Description"; "Field Run Topography of Site"; "Record Plat"; "Monument Property Corners (Survey to Mark by Subconsultant)"; and "Subdivision Plan."

⁶⁴³ Aside from the price, virtually everything about the table, including its formatting and punctuation, demonstrates that it was a wholesale copy of LSA's proposal. When confronted with the fact that LEAD's proposal to Banneker used the identical table as the one produced by LSA, albeit with higher prices, Barrow claimed that it was a standard table used in the industry. Barrow Dep. (May 20, 2010) 167:9-168:1; 180:19-181:3. Like other aspects of Barrow's testimony, this simply was not credible. The LSA engineers explained that the table was not standard in the industry, and that it took between a few days and one week to create it. Interview with Carlos Ostria and Steven Goley. Barrow's inability to clearly explain the components of the chart also supported our conclusion that he did not develop it.

\$5,940 for “Boundary Survey, Including computations,”
\$1,500 for “Legal Description,” and
\$10,340 for “Field Run Topography of Site.”⁶⁴⁴

LSA did not include prices for any of the remaining four categories. LEAD’s proposal to Banneker the following day offered to perform the same services at Chevy Chase, but for a total \$43,000. LEAD’s Table A included:

\$16,600 for “Boundary Survey, Including computations,”
\$6,300 for “Legal Description,” and
\$15,400 for the “Field Run Topography of Site.”

LEAD also proposed to charge \$4,500 for a “Subdivision Plan.”⁶⁴⁵ In short, LEAD simply copied LSA’s proposal for surveying services but marked up the prices drastically.⁶⁴⁶

Despite LEAD’s inflated prices and the availability of other firms to produce the surveys at much lower rates, Banneker agreed to LEAD’s July 22 proposal and signed a contract incorporating it on the very same day. The total price for surveying services on the ten parks was to be \$451,900.⁶⁴⁷

Even if one accepts LEAD’s contention that since Currie was a surveyor, but not a civil engineer, Barrow needed to add something before Currie’s work could be transmitted to Banneker (a contention that could not be substantiated), we find that LSA’s proposals provide

⁶⁴⁴ Ex. 192.

⁶⁴⁵ Ex. 151, Table A.

⁶⁴⁶ And in the end, LEAD retained Currie, not LSA, to do the survey at Chevy Chase for a mere \$5500. *See* Ex. 193, Invoice from Currie and Associates, L.L.C., to LEAD (Aug. 10, 2009) (Chevy Chase Park).

⁶⁴⁷ Ex. 151, Table A. A project manager from Regan Associates recalls thinking that the proposed survey prices were high when she finally saw Table A, but Banneker had assumed responsibility for procuring those services so Regan did not have an opportunity to raise objections to the contract before it was signed. Interview with Bonnie Vancheri.

one potential gauge of what Banneker should have been paying for the civil engineering and the surveying on the projects. LSA is a full service, fully credentialed engineering firm, it provided both surveying and civil engineering expertise, and its prices incorporated its costs, its overhead, and an appropriate profit. Yet for the six parks that LSA proposed to survey for \$150,210,⁶⁴⁸ LEAD told Banneker that it would charge \$235,400⁶⁴⁹ – a difference of over \$14,000 per survey – for work that LSA was going to perform, and Banneker accepted the proposal with no negotiation.

LEAD hired LSA to perform surveying services for two of the projects, Bald Eagle and Barry Farms. For Bald Eagle, LSA charged LEAD \$8,250 for the “field run topography” of the site on September 4, 2009.⁶⁵⁰ No other subcontractors performed surveying services for the project, nor is there any evidence that anyone from LEAD contributed to the survey. But on September 27, 2009, LEAD charged Banneker \$43,250 – more than 5 times its cost – for surveying services on Bald Eagle.⁶⁵¹

Similarly, LSA charged LEAD \$12,540 for the “field run topography” of the Barry Farms site on September 4, 2009.⁶⁵² LEAD also hired A/I/Data for utility designating, surveying, and mapping, and A/I/Data charged \$11,000 for those services.⁶⁵³ Those two charges, worth

⁶⁴⁸ See Ex. 192.

⁶⁴⁹ See Ex. 151, Table A.

⁶⁵⁰ Ex. 194, LSA invoice # 0077276.

⁶⁵¹ Ex. 195, LEAD invoice # S922-2009.

⁶⁵² Ex. 196, LSA invoice # 0077277.

⁶⁵³ Ex. 197, A/I/Data invoice #1114.

\$23,540, were the only third-party invoices for surveying services on the Barry Farms project. Yet LEAD billed Banneker \$47,000 – double its costs – for the same services.⁶⁵⁴

For the remaining projects, LEAD relied on Currie. In addition to the five original surveys, LEAD used Currie to produce surveys on five other sites at prices ranging from \$3,000 to \$8,000.⁶⁵⁵ LEAD also hired third-parties to locate utilities on the properties.⁶⁵⁶ As with the other projects, LEAD then drastically marked up its prices in its invoices to Banneker.⁶⁵⁷ Neither

⁶⁵⁴ Ex. 198, LEAD invoice # S923-2009.

⁶⁵⁵ Those projects were Chevy Chase, Justice Park, 7th & N Park, 10th Street Park, and Raymond. *See* Ex. 193, Letter from Anthony Currie, Currie and Associates, to Abdullahi Barrow, Aug. 10, 2009 (Chevy Chase surveying for \$5,500); Ex. 199, Invoice from Anthony Currie, Currie and Associates, to Abdullahi Barrow (Aug. 10, 2009) (Justice Park surveying for \$4,500); Ex. 200, Letter from Anthony Currie, Currie and Associates, to Abdullahi Barrow (July 24, 2009) (7th and N Park surveying for \$4,500); Ex. 201, Letter from Anthony Currie, Currie and Associates, to Abdullahi Barrow (May 15, 2009) (10th Street Park surveying for \$3,500); Ex. 202, Letter from Anthony Currie, Currie and Associates, to Abdullahi Barrow (Sep. 29, 2009) (Raymond surveying for \$6,000). As previously described, LEAD provided Currie with incorrect information for the Justice Park project, so that Currie had to produce a new survey. Currie charged \$4,500 for the initial survey, but only charged \$3,000 for that second survey. Ex. 203, Letter from Anthony Currie, Currie and Associates, to Abdullahi Barrow (Aug. 27, 2009) (Justice Park surveying for \$3,000).

⁶⁵⁶ *See, e.g.*, Ex. 204, A/I/Data invoice # 1084 (Sep. 2, 2009) (\$3,864 for 10th Street Park); Ex. 205, A/I/Data invoice # 1074 (\$3,720 for 7th and N Park).

⁶⁵⁷ *See, e.g.*, Ex. 206, LEAD invoice # S/C722L-2009-1 (Oct. 15, 2009) (\$39,000 for Raymond survey); Ex. 207, LEAD invoice # S732-2009 (Jul. 31, 2009) (\$29,100 for Justice Park survey); Ex. 208, LEAD invoice # C927D-20009-1 (Sep. 27, 2009) (\$16,600 for “additional” Justice Park survey).

Barrow, Skinner, nor Karim could provide a credible justification for LEAD's profit margin on the surveys.⁶⁵⁸

LEAD even charged Banneker and the government for its own mistakes. On one occasion, Barrow gave Currie incorrect information about the location of a project, so Currie surveyed the wrong property.⁶⁵⁹ LEAD nevertheless invoiced Banneker \$29,100 for that survey, for which it paid \$4500. Currie was directed to complete a second survey for the proper site for a \$3000 fee, but LEAD charged Banneker another \$16,600. While Karim was informed of LEAD's mistake and the need to order a second survey on August 20,⁶⁶⁰ Banneker included second Justice Park bill in its September invoice and applied the 9% mark-up as it had in July,

⁶⁵⁸ Karim adamantly denied that LEAD profited as much on the projects as the record suggests, arguing that there are "all types of services" that are included in LEAD's costs. Karim Dep. (Sept. 21, 2010) 89:6-17. But when asked for specifics, Karim could only speculate: "I know that my staff met with them on a regular basis throughout the project and spent significant hours with... a significant number of their staff to handle the surveys. So if they had three people over there who spent just five hours a week meeting at, let's say, at \$200 rate, 200 times three is ... \$600 time five hours. That's 3,000. If they did that for ten weeks, that's \$30,000 right then, and I know they were doing something." Karim Dep. (Sept. 21, 2010) 90:11-22.

Nothing in the record supports Karim's arithmetic. LEAD never had more than Barrow and one or two project managers working on the projects at any given time, and it was billing for the surveys on a flat fee, and not an hourly basis. Even if it had charged by the hour, the hourly rates set out in LEAD's own proposal were well less than \$200 per hour – a LEAD project manager attending meetings would have been billing at \$130 an hour. *See* Ex. 82. Karim's argument also fails to take account of the fact that it didn't take three people five hours a week for 10 weeks to meet concerning any one particular survey – LEAD billed well over \$30,000 for three surveys in May alone and for two in June.

⁶⁵⁹ Interview with Anthony Currie. Barrow had shown Banneker an aerial photograph of the site, based on its understanding of its location. After Banneker did not comment, LEAD had Currie produce the survey, but it ultimately proved to be the wrong location. Ex. 206A, E-mail from Abdullahi Barrow, Liberty Engineering & Design to Shamika Godley, Banneker Ventures (Aug. 20, 2009, 15:49 EST).

⁶⁶⁰ *Id.* Karim has described this as a reasonable mistake, since the property across the street from the site to be surveyed was also called Justice Park, which required no credit to the District.

without explaining the duplication or offering the city any sort of credit for LEAD's error. We received no documents reflecting that DMPED asked any questions.⁶⁶¹

LEAD's fees included components that were never adequately explained. For several projects, LEAD offered to provide a "record plat" or "subdivision plan" for thousands of dollars each. Barrow defined a record plat as a "plat of a survey that might exist in the surveyor's office that will show the land area. . . ."⁶⁶² A subdivision plan is a similar document and is related to a record plat.⁶⁶³ Record plats and subdivision plans are kept on file with the Office of the Surveyor and can be purchased for a modest fee.⁶⁶⁴ Even though it is not clear whether any of these

⁶⁶¹ Interview with Anthony Currie; Ex. 207, LEAD invoice # S732-2009 (charging Banneker \$29,100 for a site survey); Ex. 208, LEAD invoice # C927D-20009-1 (charging Banneker \$16,600 for an "additional survey"). By contrast, Currie only charged \$4,500 for the initial survey, and \$3,000 for the second survey. Ex. 199, (Aug. 10, 2009) (Justice Park survey); Ex. 203, (second Justice Park survey).

⁶⁶² Barrow Dep. (May 20, 2010) 152:15-17. Skinner described a record plat as "just the thing you go down the surveyor's office. They give you a plat. It just lays out your land, you're lots, each square." Joint Roundtable (Apr. 28, 2010) 104:9-11.

⁶⁶³ Interview with Carlos Ostria and Steven Goley.

⁶⁶⁴ Interview with Anthony Currie; Interview with Carlos Ostria and Steven Goley; Karim Dep. (Sept. 21, 2010) 100:4-5 ("Sometimes you can go down to the D.C. Surveyor's Office and request it.")

Karim did not know whether or not a record plat can be obtained from anywhere else besides the surveyor's office. Karim Dep. (Sept. 21, 2010) 100:6-9. We were told that in certain instances a record plat can be created from scratch. Interview with Sean Regan and Thomas Regan; Interview with Bonnie Vancheri; Interview with Ray Nix. If that is true, we recognize that a record plat would cost significantly more than the administrative fee paid to the Office of the Surveyor. Here, however, the record indicates that the documents were simply purchased from the Office of the Surveyor and nothing suggests they were created anew. In its own proposal to LEAD, LSA offered to provide a record plat for Bald Eagle for \$2,500 and for Fort Stanton for \$3,500. In its proposal to Banneker, LEAD offered to provide the same services for \$3,500 each. The record is not clear as to whether LSA's proposal contemplated a new record plat or simply purchasing the document from the Office of the Surveyor.

documents were necessary for the DPR capital projects,⁶⁶⁵ and although they can typically be purchased for a small fee,⁶⁶⁶ LEAD proposed to provide those records for several thousand dollars each.

For example, on the Justice Park project, LEAD proposed in its Table A to provide a “subdivision plan” for \$3,000 and a “record plat” for \$2,500.⁶⁶⁷ But according to the Office of the Surveyor, on July 28, 2009 a “subdivision plat” was purchased for just \$196.⁶⁶⁸ Similarly, LEAD offered to provide a “record plat” of Guy Mason for \$5,900,⁶⁶⁹ but on August 6, 2009, LEAD’s project manager purchased a record plat for only \$30, and a subdivision plat for Guy Mason was purchased from the Office of the Surveyor for \$196 on July 28, 2009.⁶⁷⁰ LEAD also included “record plat” in its price for Parkview at a cost of \$6,100.⁶⁷¹ But on August 6, 2009, LEAD’s project manager paid \$30 for a “building plat” from the Office of the Surveyor.⁶⁷²

⁶⁶⁵ Regan Associates questioned why those fees were necessary but never received a satisfactory response. Interview with Bonnie Vancheri.

⁶⁶⁶ The District of Columbia Office of the Surveyor lists its prices at the following website: <http://dcra.dc.gov/DC/DCRA/Permits/Surveyor+Services/Surveyor+Fees>.

⁶⁶⁷ See Ex. 151, Table A.

⁶⁶⁸ Interview with Mr. Reed, District of Columbia Office of the Surveyor, by telephone (Apr. 27, 2010).

⁶⁶⁹ See Ex. 151, Table A.

⁶⁷⁰ Interview with D.C. Office of the Surveyor.

⁶⁷¹ Ex. 151, Table A.

⁶⁷² Interview with D.C. Office of the Surveyor.

For Fort Stanton, LEAD offered to provide a “record plat” for \$3,500 and a “subdivision plan” for \$3,500. But the Office of the Surveyor could not find any transactions related to that property. For Bald Eagle, LEAD offered to provide a “record plat” for \$3,500 and a “subdivision plan” for \$4,500. The Office of the Surveyor was unable to locate information related to that project without further information about the site.

Barrow claimed that LEAD had to “take that information and also go to the site and verify that record plat reflects what’s on site at the present time that we’re doing the survey.”⁶⁷³ Barrow’s claim of performing any additional work related to the record plat was not convincing, but even if he devoted some time to verification, the record does not demonstrate that he added sufficient value to justify the thousands of dollars charged.

LEAD’s May 4 agreement with Banneker also provided that LEAD would perform “consulting services” for ten parks. LEAD was to be paid a maximum of \$2,500 per park for those services, which the contract did not define.⁶⁷⁴ LEAD ultimately billed Banneker for that work, describing it in its invoices only as “study and consulting phase.”⁶⁷⁵ When asked what services LEAD provided, Barrow said that they were “going to do a site visit, do an analysis and develop and inform [Banneker] what kind of specific services is needed for each park because each park was different.”⁶⁷⁶ He also said that the contract was to “develop specific scope of engineering service that needed for each project.”⁶⁷⁷ Yet LEAD provided no evidence of any work product that it created as part of its \$25,000 fees for consulting. Barrow claims there was no written product, but that he communicated verbally “almost daily” with Banneker to tell them

⁶⁷³ Barrow Dep. (May 20, 2010) 152:19-22. When confronted with the fact that LEAD charged far more for the record plat than it paid, Skinner did not know what justified the significant disparity in prices. Joint Roundtable (Apr. 28, 2010) 110:5-11.

⁶⁷⁴ See Ex. 76.

⁶⁷⁵ See, e.g., Ex. 187, LEAD invoice # S62-2009 (Kenilworth); LEAD invoice # S63-2009 (Fort Stanton).

⁶⁷⁶ Barrow Dep. (May 20, 2010) 79:20-80:1.

⁶⁷⁷ *Id.* at 80:12-14.

what work was needed on each project.⁶⁷⁸ While we cannot conclude that LEAD performed no consulting work, there was little evidence that substantiated or explained the consulting fees.

b. Civil engineering services

To fulfill its civil engineering contract, LEAD followed the same pattern of subcontracting the work to LSA and charging an inflated fee. As it had done for surveying services, in July 2009, LEAD solicited a proposal from LSA.⁶⁷⁹ In its July 21 proposal, LSA provided a table of prices for each category of civil engineering services, which it labeled “Table A.”⁶⁸⁰ And just as it had done with the surveying proposal, LEAD turned around and used LSA’s template for the “Table A” in its proposal, listing all 27 categories just as LSA had proposed. But once again, LEAD proposed prices for the work that far exceeded the standard mark-up for managing a subcontractor. Banneker accepted LEAD’s inflated proposal on July 22.⁶⁸¹

⁶⁷⁸ Barrow Dep. (May 20, 2010) 85:3-14. With respect to the initial consulting and surveying services contract, Karim describes hiring LEAD to “do some limited consulting services and some survey services, because we needed somebody to come on board once we found out the depth of – well, it took awhile to find out really all of the scopes but once we found out how much was involved and the time tables behind it, you can’t just go get an architect, find him and have him build a rec center on a 20 acre site without knowing where the site [was] going to be, who got soil issues and that type of things. So we brought them on in the early limited engagement for that, I think, no more than \$2,500 a site for the consulting services and then to do limited survey services on an as need[ed] basis for some of the projects that were . . . done early on.” Karim Dep. (Aug. 5, 2010) 148:22-149:14.

⁶⁷⁹ Interview with Carlos Ostria and Steven Goley.

⁶⁸⁰ Ex. 192, LSA proposal. LSA’s proposed “Table A” included both surveying services and civil engineering services. LEAD simply copied the formatting and categories of that table but split it into two separate tables, one for surveying and one for civil engineering.

⁶⁸¹ Ex. 209, Consulting Services Agreement between Banneker and LEAD (Jul. 22, 2009) (civil engineering).

For instance, on the Fort Stanton project, LSA submitted an invoice to LEAD for civil engineering services on November 25, 2009 for a total of \$11,364.91.⁶⁸² Five days later, LEAD submitted an invoice for the exact same services, but charged Banneker \$17,905.00.⁶⁸³ LSA's charges included \$4,020 for construction drawings services and \$6,130 for design drawings. For those same services, LEAD billed Banneker \$6,450 and \$9,195, respectively. LEAD also marked up reimbursable costs, such as mileage and parking, by far more than 10 to 15 percent.⁶⁸⁴

LEAD's handling of one of LSA's civil engineering functions, the "due diligence investigations," was a stark example of how it marked up its subcontractors' invoices without adding any value. LSA engineers described "due diligence investigations" as written reports designed to answer the questions of whether what the owner was requesting could be built on the site.⁶⁸⁵ As LSA's work progressed, it would charge LEAD a percentage of the total fee for that service, representing the latest portion of the investigation it had performed to date. But the LSA engineers explained that they would not provide a written report to LEAD until it was complete. According to LSA, until the written report had been transmitted, there was nothing for LEAD to

⁶⁸² Ex. 210, LSA invoice # 0078249 (Nov. 25, 2009).

⁶⁸³ Ex. 211, LEAD invoice # C1130G-2009 (Nov. 30, 2009). While it is possible that LEAD added charges for its own attendance at the listed meetings, nothing in the record suggests that these were anything more than markups on others' costs. For further examples of LEAD's invoicing practices, *compare* Ex. 212, LSA invoice # 0077980 (Oct. 30, 2009) (charging \$5,810 for Chevy Chase Park), *with* Ex. 213, LEAD invoice # C1125B-2009 (Nov. 25, 2009) (charging \$12,750 for Chevy Chase Park).

⁶⁸⁴ *Compare* Ex. 214, LSA invoice # 0077658 (Oct. 1, 2009) (charging \$23.65 for "mileage/parking"), *with* Ex. 215, LEAD invoice # C1033B-2009-2 (Oct. 23, 2009) (charging \$60 for "delivery/Mileage," a markup of 253%). Although it is possible that LEAD was including its own reimbursable costs in this line item, the record as a whole suggests that this was nothing more than a markup of its subcontractor's costs.

⁶⁸⁵ Interview with Carlos Ostria and Steven Goley.

revise, or to which it could add value.⁶⁸⁶ Nevertheless, LEAD repeatedly marked up LSA's fees for partially completed due diligence investigations.

For example, in its September 4, 2009 invoice to LEAD, LSA charged \$1,000 for its work to that point on the Bald Eagle due diligence investigation. The invoice noted that the total fee would be \$4,000, but the investigation was only 25 percent complete – thus the charge of \$1,000.⁶⁸⁷ According to the LSA engineers, they had not produced any work product to LEAD at this point because they had not completed their report.⁶⁸⁸ But on September 27, 2009, LEAD invoiced Banneker \$2,050 for “due diligence investigation.”⁶⁸⁹

For the Raymond Recreation Center, LSA invoiced LEAD \$2,437.50 on November 25, 2009 for a due diligence investigation that was 75 percent complete.⁶⁹⁰ Five days later, LEAD submitted an invoice to Banneker that charged \$4,875 for due diligence on that project.⁶⁹¹ LEAD simply doubled LSA's fees – from \$2,437.50 to \$4,875 – without having received a completed

⁶⁸⁶ Interview with Carlos Ostria and Steven Goley.

⁶⁸⁷ Ex. 194.

⁶⁸⁸ Interview with Carlos Ostria and Steven Goley.

⁶⁸⁹ Ex. 216, LEAD invoice # C927A-20-009-01.

⁶⁹⁰ Ex. 217, LSA invoice # 0078252 (Nov. 25, 2009).

⁶⁹¹ Ex. 218, LEAD invoice # C1130L-2009 (Nov. 30, 2009).

report and without having added any value. The witnesses could provide no explanation for this practice.⁶⁹²

c. Geotechnical engineering

As noted above, LEAD's response to the RFQ for the DPR capital projects identified Geotechnical Consulting & Testing ("GC&T") as its partner on the projects. Yet when it was time to perform the work, LEAD did not use GC&T's services. Instead, Barrow hired one of GC&T's employees, Ernest Njaba, who was also his friend, on an individual basis.⁶⁹³ Barrow paid Njaba \$500 to \$1,000 to review each of Barrow's geotechnical engineering reports on his "private time," and did not involve GC&T in the work.⁶⁹⁴

Njaba's testimony provided evidence that Barrow played a role in the geotechnical engineering, but LEAD's profits were notable nonetheless. On the Kenilworth project, for example, LEAD hired Geomatrix Drilling, Inc. for \$1,600 and paid Hillis-Carnes Engineering

⁶⁹² When asked explicitly about this discrepancy, Barrow gave vague answers that did not persuade us that LEAD performed additional work. "Due diligence investigation is just looking into the – what needs – what's happening on – on the site, especially what kind of utility information, how we're going to bring in to the waterline, how we're going to bring it to the sewer line. All this stuff I'm responsible." Barrow Dep. (May 20, 2010) 205:5-10. It is unclear how this work was any different from the "consulting" for which LEAD charged \$2500 per park.

When asked why LEAD billed \$3,000 to Banneker for due diligence when LSA was only 20 percent complete, Barrow replied that LSA "is not the only company who was working on this project, we were doing a part of the due diligence and we also provided some information, sent them information so they might, their part, they're 20 percent of this thing, but we probably went farther than that, so that's what that reflects."). Barrow Dep. (Sep. 30, 2010) 65:20-66:3.

⁶⁹³ Njaba Dep. 69:13-22.

⁶⁹⁴ Njaba Dep. 72:2-10; *see* Ex. 219, check from Liberty Engineering & Design to Ernest Njaba, Sept. 18, 2009 (\$2,000 payment for Rosedale and Kenilworth), check from Liberty Engineering & Design to Ernest Njaba, Sept. 18, 2009 (\$500 payment for Parkview). With respect to a payment for \$2,500 from LEAD to Njaba, Njaba could not recall which projects were related to the payment, but believed it was payment for two projects. Njaba Dep. 73:16-74:9.

Associates, Inc. \$556 for laboratory tests.⁶⁹⁵ Barrow also paid Njaba \$1,000 to review his report.⁶⁹⁶ Although LEAD's third-party costs thus totaled \$3,156, it charged Banneker \$22,500 for geotechnical engineering on Kenilworth alone.⁶⁹⁷ Even Barrow's friend Njaba, who specializes in geotechnical work, observed during his deposition that if those were LEAD's costs, its price for the Kenilworth geotechnical engineering was "really inflated."⁶⁹⁸ Even if Barrow wrote the report himself, there is little in the record to justify this 713 percent increase.⁶⁹⁹

The Rosedale project is another example. LEAD paid Geomatrix Drilling, Inc. \$2,806 to drill soil samples, which Njaba described as "the most expensive items in geotechnical investigation."⁷⁰⁰ It paid Hillis-Carnes Engineering Associates, Inc., \$568 for laboratory testing of those samples.⁷⁰¹ And it paid Njaba \$1,000 to review the report.⁷⁰² Those costs totaled \$4,374, but LEAD charged Banneker \$14,640 for the geotechnical work on Rosedale.⁷⁰³ Even if Barrow

⁶⁹⁵ See Ex. 168, Hillis-Carnes invoice # 83407.

⁶⁹⁶ See Ex. 219, check from Liberty Engineering & Design to Ernest Njaba (Sep. 18, 2009) (\$2,000 payment for Rosedale and Kenilworth).

⁶⁹⁷ Ex. 220, LEAD invoice # S735-2009 (Jul.31, 2009); Ex. 221, LEAD invoice # G920-2009 (Sep. 27, 2009).

⁶⁹⁸ Njaba Dep. 89:21.

⁶⁹⁹ Njaba estimated that it would have taken Barrow approximately 12 hours to complete the geotechnical reports that he reviewed. Njaba Dep. 86:6-12. So even if Barrow drafted it himself and charged by the hour at the \$180 rate specified in LEAD's July 25, 2009 geotechnical engineering proposal, the fee for drafting the report would have been in the range of \$2160.00.

⁷⁰⁰ Ex. 222, Geomatrix Drilling, Inc. invoice # 148-09 (Aug. 19, 2009); Njaba Dep. 78:14-15.

⁷⁰¹ Ex. 223, Hillis-Carnes Engineering Associates, Inc. invoice #83874 (Aug. 31, 2009).

⁷⁰² See Ex. 219, check from Liberty Engineering & Design to Ernest Njaba (Sep. 18, 2009) (\$2,000 payment for Rosedale and Kenilworth).

⁷⁰³ Ex. 224, LEAD invoice # G921-2009 (Sep. 27, 2009).

prepared the first draft of the geotechnical reports, the evidence suggests that the prices LEAD charged and Banneker accepted were excessive.⁷⁰⁴

d. Environmental Site Assessments

Barrow hired his friend Mounir Abouzakhm, owner of Geotechnical Engineering & Testing Consultants, Inc. (“GE&T”), to work with him to produce the ESA reports.⁷⁰⁵ LEAD paid GE&T between \$500 and \$1,000 per project for its Phase I ESA work on Barry Farms, Justice Park, Fort Stanton, and 10th Street Park.⁷⁰⁶ LEAD paid GE&T another \$1,000 for the Justice Park Phase II ESA.⁷⁰⁷

Even if one gives Barrow credit for his collaboration with Abouzakhm in walking the sites and forming conclusions, his mark-ups of the GE&T invoices were remarkable. On Justice Park, for instance, LEAD paid out a total of \$2,825 to its subcontractors to perform

⁷⁰⁴ Karim approved LEAD’s substantial fees for geotechnical engineering without consulting his teaming partner, even though the parks fell within the scope of Regan’s responsibilities. On October 27, 2009, after she had received an executive summary of the Fort Stanton geotechnical report, Bonnie Vancheri emailed Skinner, Barrow, Karim and others at LEAD and Banneker to express frustration about the failure to keep her apprised. “[A]s project manager, one of my roles is to keep control of the budget. As requested several times, please send me the proposal to do the geotechnical for Ft. Stanton, Barry Farms, and Parkview. With the tight budgets, it is imperative that we keep track of all costs. And that we get all due diligence work completely in a timely manner so that the pricing is as accurate as can be.” Ex. 225, E-mail from Bonnie Vancheri to Timothy White, Cc to Sean Regan, Tom Maslin, Duane W. Oates, Omar A. Karim, Sinclair Skinner, Abdullahi Barrow (Oct. 27, 2009 7:33 PM).

⁷⁰⁵ Interview with Mounir Abouzakhm.

⁷⁰⁶ Ex. 226, GE&T Consultants Inc. invoice Nos. 463-467. Abouzakhm noted that his prices can be cheaper than other companies because he has no overhead costs. Interview with Mounir Abouzakhm.

⁷⁰⁷ Ex. 227, GE&T invoice # 462 (\$1,000).

environmental work.⁷⁰⁸ Yet LEAD invoiced Banneker \$15,300 for the same work – a 542 percent markup.⁷⁰⁹

F. Management and Oversight of LEAD

The Special Counsel’s review of LEAD’s invoices to Banneker and Banneker’s invoices to DMPED uncovered, at the very least, poor management on the part of Banneker as well as the several District agencies responsible for the projects.

As the project manager that hired LEAD, Banneker was primarily responsible for ensuring that the District obtained the best price and value for LEAD’s services.⁷¹⁰ Indeed, it was Banneker’s job to provide “the most efficient allocation of available funds to achieve the desired improvements” of all the projects.⁷¹¹ But Banneker apparently accepted LEAD’s inflated prices without questioning how much it would actually cost LEAD to provide those services. Karim claimed that Banneker did not ask LEAD for supporting documents from its subcontractors because such a request is not within the industry standard.⁷¹² That explanation is unconvincing in

⁷⁰⁸ Ex. 228, Environmental Data Resources, Inc. invoice # 2582880 (\$425); Ex. 229, Anabell Environmental Inc. invoice # 6356 (\$3,600); *see* Ex. 226, invoice #463 (\$500); Ex. 227.

⁷⁰⁹ Ex. 230, LEAD invoice # C1022D-2009-3 (Oct. 23, 2009).

⁷¹⁰ Although Regan Associates handled the program management duties for half of the projects, Banneker handled all of the invoicing. Interview with Bonnie Vancheri; Glover Dep. 153:2-3 (“I think the only difference was Banneker handled the issuing of invoices and any contractual documents.”).

⁷¹¹ *See* Ex. 80, July 14, 2009 Contract: Scopes of Work, General Notes.

⁷¹² Karim Dep. 84:12-15 (Sep. 21, 2010) (“That’s not an industry standard. It doesn’t happen like that. We worked – we worked on a lot of projects in my time doing this type of work, and that just doesn’t happen.”). Interview with Asmara Habte (confirming that LEAD’s invoices did not have supporting documents for subcontractors).

light of other witnesses' testimony, including other project managers involved in the DPR capital projects.⁷¹³

Banneker's contractual right to mark up LEAD's costs gave it an incentive to turn a blind eye to LEAD's billing practices. Whether Banneker accepted LEAD's invoices because it wanted to maximize its own markup or simply failed to notice that the invoices were inflated, the evidence reflects a failure of management.

Although Banneker was responsible as the project manager for overseeing LEAD, several District government agencies were also accountable for overseeing the projects, and they share responsibility for the deficiencies in the management of the engineers. DMPED took over management control of the projects from DPR, and retained that control when it contracted with DCHE.⁷¹⁴ DMPED's own project manager for the DPR capital project, Jacqueline Glover, was the primary point of contact between Banneker and the District. She did not participate in the

⁷¹³ Glover Dep. 159:6-13; Interview with Asmara Habte. Thomas Regan, a principal of Regan Associates with several decades of experience in program management, said that he would expect the subcontractor to be identified to the client. Interview with Sean Regan and Thomas Regan (Nov. 12, 2010). Dale Stewart said he generally expects to show his client his subcontractors' bills, although there are some clients that do not want to see them. Interview with Dale Stewart.

⁷¹⁴ Ex. 231, Memorandum of Understanding Between the District of Columbia Department of Parks and Recreation and the Office of the Deputy Mayor for Planning and Economic Development (Feb. 27, 2009); Ex. 232, Memorandum of Understanding Between the Office of the Deputy Mayor for Planning and Economic Development and the District of Columbia Housing Authority (Jul. 31, 2009).

initial negotiation of LEAD's prices,⁷¹⁵ and had "limited" direct contact with LEAD.⁷¹⁶ She instead communicated any instructions for the engineers through the project managers.⁷¹⁷

One key aspect of Glover's job was to approve the monthly invoices submitted by Banneker. Glover stated that she would check to be sure the project manager had provided the "appropriate backup," which she described as the invoices from Banneker's contractors.⁷¹⁸ She would then talk with the Banneker project manager to verify that the contractors' work was actually performed.⁷¹⁹ Once satisfied by Banneker, Glover would relay her approval to DCHE, which served as the pay agent for the projects and would pay Banneker for its invoices.⁷²⁰ She approved and passed along all of Banneker's invoices even though she concluded after the first two that the invoices were "very very high."⁷²¹

Glover testified that when a contractor uses a subcontractor to perform some of the work, the contractor typically includes the subcontractors' bills when it submits its own invoices.⁷²² For the DPR capital projects specifically, Glover said she was aware that LEAD had subcontracted out some of its work, but she could not recall which engineering services in particular were

⁷¹⁵ Glover Dep. 208:2.

⁷¹⁶ *Id.* at 153:17-19.

⁷¹⁷ *Id.* at 153:17-19.

⁷¹⁸ *Id.* at 157:13-19.

⁷¹⁹ *Id.* at 158:12-14.

⁷²⁰ Interview with Asmara Habte.

⁷²¹ *See* Ex. 105; Glover Dep. 161:9-20.

⁷²² Glover Dep. 159:6-13.

involved.⁷²³ She noted that it would have been helpful in her review of LEAD's invoices if she had received the subcontractors' invoices as well.⁷²⁴ Yet she did not ask for backup substantiating LEAD's costs at the time, and she approved the invoices for payment by DCHE.⁷²⁵

Because Glover did not request that information – even though she was on notice from the first kick-off meeting that LEAD would be relying heavily on subcontractors – she was unaware of the prices LEAD had paid its subcontractors.⁷²⁶ Glover acknowledged in her deposition that had she been aware of LEAD's actual costs, she would have been concerned

⁷²³ Glover Dep. 159:19-160:1.

⁷²⁴ Glover Dep. 163:16-164:1.

⁷²⁵ Glover Dep. 159:21-160:1. Glover's own description of her level of oversight was unspecific and underwhelming.

Q: ...Did you ever have a conversation with anyone from Banneker Ventures about the amount of Liberty Engineering's fee that it was charging for its surveying services?

A: I believe I questioned them about it and asked them to provide more information about what they were doing.

* * *

Q: And when you asked for more information, what did they give you?

A: They provided something, I'm not sure exactly and we also met with them, met with LEAD.

Glover Dep. 144:22-145:6, 145:11-14. Glover met with Skinner and Barrow to become comfortable but she had no recollection of what they said to ease her concerns. *See* Glover Dep. 147:18-148:16. She testified that she found the \$48,500 price for a survey of Rosedale Park to be high, but she couldn't quite recall what led her to accept it. "I talked with Banneker about the price and what it was for. ... I can't recall exactly what was discussed, but obviously they provided enough justification for me to go ahead and approve the invoice." Glover Dep. 161:19-162:3. When asked whether she was concerned that the architects' invoices included a percentage of completion but LEAD's did not, she responded, "I'm sure I probably asked Banneker about that and whatever answer they provided I'm assuming was satisfactory." Glover Dep. 240:11-13.

⁷²⁶ Glover Dep. 162:15-163:4.

about LEAD's prices.⁷²⁷ She explained, though, that she viewed it as Banneker's responsibility to ensure that LEAD's invoices were sufficient because it was Banneker that had hired LEAD.⁷²⁸

DCHE also had a role in administering the contracts and serving as the pay agent and budget administrators for the DPR capital projects.⁷²⁹ DCHE's project manager for the DPR capital projects, Asmara Habte, was responsible for reviewing the invoices submitted by Banneker.⁷³⁰ Habte and other DCHE staff reviewed the invoices to make sure they were complete, mathematically correct, and accompanied by any required documentation.⁷³¹ They were charged with comparing the invoices to the budgets that DMPED and Banneker had provided. But DCHE did not question whether the District was paying too much for particular services, or whether any contractors had actually subcontracted any work to others. Instead,

⁷²⁷ Glover Dep. 162:15-163:4.

⁷²⁸ *Id.* at 239:8-19.

⁷²⁹ See Ex. 232, MOU between DMPED and DCHA (Jul. 31, 2009).

⁷³⁰ Habte explained that DCHE was not responsible for deciding whether reprogrammings were necessary, which would involve reviewing whether appropriated funds were spent in the proper year and for the proper project. Instead, as budget administrators, DCHE would monitor the budget prepared by DMPED and Banneker and, if funding was nearly depleted for a project, DCHE would inform DMPED and ask DMPED what they wanted to do about it. Interview with Asmara Habte.

⁷³¹ Interview with Asmara Habte. During the investigation, some Council members asked about notations – “SS” – that were handwritten across several invoices submitted to DCHE from Banneker. They asked if Sinclair Skinner – “SS” – had a role in approving Banneker's invoices, even though he did not work for Banneker or DCHE. When Skinner testified on April 15, he was firm that the initials were not in his handwriting and that he had not signed off on the invoices. Joint Roundtable (Apr. 15, 2010) 223:18-225:20. Asmara Habte later cleared up the mystery when she identified “SS” as a notation used by DCHE staff to signify that an invoice was “superseded” by a subsequent, updated invoice. Interview with Asmara Habte.

DCHE viewed that as DMPED's responsibility, and relied on DMPED's approval of the invoices to indicate that it was satisfied that the work was completed and billed at an appropriate price.⁷³²

Like Glover, Habte said that she would have expected to see LEAD's subcontractors' invoices as part of Banneker's submission if LEAD did not perform the work itself. She expected such information because DCHE's other contractors provide such supporting documentation when they hire subcontractors. Habte explained that those records would enable her to judge whether LEAD's mark-up was reasonable.⁷³³ But DCHE never received – and it did not ask for – that backup, and it did not object to LEAD's inflated prices.

In sum, the many layers of project management – provided by DMPED, DCHE, and Banneker – confused and obscured responsibilities for the DPR capital projects. DCHE relied on DMPED to ensure that the contractors were actually providing the services for which they submitted invoices to DCHE. When DCHE raised questions about Banneker's invoices, Banneker would say that they had been approved by DMPED and that Banneker's bills were appropriate.⁷³⁴ DMPED, in turn, relied on Banneker to verify that its contractors were providing value for their services. What no one did, unfortunately, was call upon Banneker to justify LEAD's role in the DPR capital projects or to substantiate its costs. Had anyone done so, they

⁷³² Interview with Asmara Habte; Dwyer Dep.123:12-126:12.

⁷³³ Interview with Asmara Habte.

⁷³⁴ See e.g. Ex. 233, E-mail from Asmara Habte to Omar Karim and Carol Rajaram (Jul. 15, 2009 12:13:27 PM EST) and reply E-mail from Omar Karim to Asmara Habte and Carol Rajaram (Jul. 15, 2009 12:28 PM EST) Habte requests supporting documentation for the \$100,000 requested for “advance payments and related costs” in invoice #1. *Id.* Karim replies that the advance is for permits and related fees to agencies and states, “DMPED agreed with this approach and amount.” *Id.* DCHE paid the invoice.

would have quickly found that LEAD added virtually no value to the projects and wasted tens of thousands of dollars of taxpayer funds.

VIII. AWARD OF THE CONSTRUCTION CONTRACTS

After the architects and engineers had been hired, another of the program manager's key functions was to procure the general contractors who would be responsible for the actual construction. Banneker took the lead role in this process, notwithstanding the fact that the Regans were supposed to share the project management function, and they were assigned responsibility for half of the parks. The selection process overseen by Banneker resulted in the recommendation of several firms with financial ties to Omar Karim and/or Sinclair Skinner: Blue Skye Construction, AF Development, Capital Construction, and District Development Group. Since those ties have not yet been adequately explained, this is another aspect of the inquiry that should be referred to the United States Attorney for further investigation.⁷³⁵

The July 20, 2009 Regan Associates consulting contract with Banneker provided that Regan would "play the lead role for half of the projects," and it was contemplated that those parks would include Parkview, Guy Mason, Chevy Chase, Fort Stanton, and Barry Farms.⁷³⁶ The contract also indicates that Regan's services shall include: "working with Banneker to prepare

⁷³⁵ There were questions raised in the fall of 2009 about the selection of RBK Construction, a company owned by Keith Lomax, to perform the work at two playgrounds, one as a joint venture partner with Forrester Construction and one alone. The investigation has not uncovered ties between RBK and any member of the selection panel that lead us to recommend a referral of that decision, but the award of the smaller solo job – Chevy Chase – raises questions about the decision to award the contract to RBK when another small contractor received a higher overall score. *See* Ex. 234, Request for Proposals, Construction Services, DPR Capital Projects – DMPED Project Management Services, Interview/RFP Proposal Comparison Sheet.

⁷³⁶ Ex. 97, Regan/Banneker Letter Agreement.

and issued an RFQ for construction services” and “working with Banneker to evaluate bids and proposals.”⁷³⁷

Banneker issued its request for qualifications for general contractors for the parks on July 20, 2009.⁷³⁸ The Regan team had provided some comments on a draft, some of which were incorporated into what went out and some of which were not. The solicitation indicated that based upon the responses, the project manager would develop a short list of contractors to be interviewed. Responses were originally due on July 31, but the date was extended until August 5.⁷³⁹ In the meantime, Sean Regan informed Duane Oates that the Regan team would be doing its own solicitations for the parks under its management at a later date.⁷⁴⁰

So according to Sean Regan, he was surprised when he was informed that the responses were arriving and were available to be reviewed. He reminded Karim that he had requested that the Regan project managers conduct their own solicitations for the parks under their management. On August 4, Regan sent Jannarone and Karim an e-mail reiterating that his team planned to manage the procurement of the general contractors for Parkview, Guy Mason, Chevy

⁷³⁷ *Id.*

⁷³⁸ Ex. 235, Request for Qualifications – Construction Services, Multiple Capital Projects at District of Columbia Parks and Recreational Facilities (Jul. 20, 2009).

⁷³⁹ Ex. 236, RFQ/RFP for Construction Services, DPR Capital Projects, Qualifications/Proposals Received Log.

⁷⁴⁰ Interview with Sean Regan and Thomas Regan (Nov. 12, 2010).

Chase, and Fort Stanton separately.⁷⁴¹ Regan proposed to select a contractor through the Banneker process for Barry Farms only.⁷⁴²

Banneker went on to evaluate and score the 58 RFQ responses on its own anyway,⁷⁴³ and it made the determination of which contractors would be invited to submit proposals for all of the parks without reviewing its decisions with the Regan project managers.⁷⁴⁴

On August 12, the contractors deemed most qualified by Banneker were invited to submit proposals for large projects (construction of approximately 20,000 GSF new recreation center),⁷⁴⁵ for medium projects (renovation of 10,000 GSF recreation center),⁷⁴⁶ or for small

⁷⁴¹ Ex. 237, E-mail from Sean Regan to David Jannarone, Cc to Duane Oates, Omar Karim, Thomas M. Maslin (Aug. 4, 2009 12:45 PM).

⁷⁴² One of the Regan Project Managers, Bonnie Vancheri, did look over the responses, and she created a spreadsheet organizing data about the respondents' level of experience, etc., which she transmitted to Banneker. Vancheri did not use any sort of numerical rating system. The Regans do not know whether or how the observations she submitted were incorporated into Banneker's scoring, if at all.

⁷⁴³ Ex. 238, Request for Qualifications for Construction Services, DPR Capital Projects, Initial Response Evaluation and Scoring Sheet (Aug. 5, 2009).

⁷⁴⁴ The companies with ties to Karim – Blue Skye Construction and AF Development – came out on top. Within the large projects, the Coakley/Blue Skye joint venture topped the list, receiving 94 out of a maximum 100 points, tied with Sigal/AF Development/F&L. Forrester Construction came in 4th with 87 points. In the medium category, Blue Skye was again tied for first, this time with Hamel Builders/District Development Group, both with a score of 88. RBK ranked third in the medium category with a score of 84. *Id.*

⁷⁴⁵ Ex. 239, Request for Proposals – Construction Services, Multiple Capital Projects at District of Columbia Parks and Recreational Facilities (Aug. 12, 2009) (“approx. 20,000 GSF”).

⁷⁴⁶ Ex. 240, Request for Proposals – Construction Services, Multiple Capital Projects at District of Columbia Parks and Recreational Facilities (Aug. 12, 2009) (“10,000 GSF recreational center”).

projects (hardscape and field renovation).⁷⁴⁷ Some contractors were considered for more than one category. The requests for proposals indicated that interviews with the selection committee would follow the review of the fee proposals, and the interviews were conducted on August 24, 2009. Seven companies or joint venture teams were rated for large projects, three for medium projects, and two for small projects.⁷⁴⁸

While DMPED was paying DCHE for its assistance with the DPR capital projects, and while DCHE would ultimately be the party that entered into the contracts with the general contractors, the interview sheets indicate that no one from DCHA or DCHE participated in the selection process. The panel included Jacquie Glover, Latrena Owens, and Bernard Guzman from DMPED; David Janifer from DPR; Omar Karim, Duane Oates, and Shayla Taylor from Banneker; and Bonnie Vancheri and occasionally Sean Regan from Regan Associates. Based on the written score sheets, it appears that not everyone in the group was present for every interview.⁷⁴⁹ Banneker collected the score sheets, but there was no discussion among the group as to which contractor should be awarded which park. Banneker made that decision on its own or in consultation with DMPED after the interviews, and the Regans were not provided with an opportunity to weigh in on that.⁷⁵⁰

⁷⁴⁷ Ex. 241, Request for Proposals – Construction Services, Multiple Capital Projects at District of Columbia Parks and Recreational Facilities (Aug. 12, 2009) (“Hardscape and Field Renovation”).

⁷⁴⁸ See Ex. 234.

⁷⁴⁹ Ex. 242, General Contractor Interview Evaluations, Multiple Capital Projects at District of Columbia Parks and Recreational Facilities (Aug. 24, 2009).

⁷⁵⁰ Interview with Sean Regan and Thomas Regan (Nov. 12, 2010).

On August 31, Banneker informed the bidders of its intent to award the following contracts:⁷⁵¹

- Rosedale Recreation Center -- \$12,091,000: Blue Skye/Coakley Williams joint venture⁷⁵²
- Barry Farms -- \$10,360,000: Forrester Construction Company/RBK Construction joint venture
- Fort Stanton Community Center -- \$7,775,000: Winmar Construction/Dustin Construction joint venture
- Justice Park -- \$7,775,000: Winmar Construction/Capitol Construction
- Kenilworth Recreation Center – \$7,651,250: Forney Enterprises, Inc.
- Raymond Recreation Center -- \$7,598,750: AF Development/Sigal Construction Corp. joint venture
- Bald Eagle Recreation Center -- \$3,341,250: Blue Skye Construction
- Chevy Chase Playground -- \$1,879,250: RBK Construction
- Parkview Recreational Field -- \$660,000: Forney Enterprises Inc.
- Guy Mason Recreational Center – (amount unknown) District Development Group, LLC/Hamel Builders, Inc. joint venture.⁷⁵³

⁷⁵¹ Banneker notified Regan Associates of its choices by email, and Sean Regan recalls being relieved that the large projects under his management had been awarded to teams including well-established construction firms. Banneker mailed out letters notifying the contractors of its intent to award them contracts on August 31, and it submitted a memorandum to DCHE informing it of those “recommendations” on September 7, 2009. Ex. 243, Memorandum from Duane W. Oates, Banneker Ventures, to Lawrence Dwyer, DC Housing Enterprises (Sep. 7, 2009). The investigation did not reach the question of whether or not these companies ultimately received contracts once the projects were moved to OPEFM.

⁷⁵² On October 20, 2009, Banneker also issued a notice to proceed to Blue Skye Construction LLC for the construction of Rosedale.

⁷⁵³ Ex. 244, Letters from Duane W. Oates to contractors regarding “Notification of Award”/Construction Services (Aug. 31, 2009); *see* Ex. 245, “Pending DPR General Contracting Services Contracts,” for contract amounts. RBK was evaluated as part of a team with Forrester for large projects and alone for small projects. All of the ratings for the Forrester/RBP team were generally high, although Vancheri rated RBK and Forrester separately, and it was Forrester that
(footnote continued on next page)

Separate from this process, Banneker also awarded a \$146,000 contract to Capital Construction to renovate Gibbs elementary school, which was going to house the Rosedale Recreation Center activities while the Center was being demolished and rebuilt.⁷⁵⁴

The investigation has revealed certain financial ties between Omar Karim, whose company was managing the competitive procurement, and some of the successful bidders, and it has also revealed ties between some bidders and Sinclair Skinner:

- In 2008 and 2009, Blue Skye paid Karim's sole proprietorship, Liberty Law Group, over \$50,000. Blue Skye made a payment of over \$10,000 just eight days before it submitted its August 19, 2009 response to Banneker's RFP.⁷⁵⁵
- AF Development, which was selected as part of the team to build the \$7.6 million Raymond Recreation Center, was also one of Karim's clients, and it paid \$53,500 to Liberty Law Group between October of 2008 and November of 2009, including \$10,500 on March 12, 2009 (memo says "Jan Feb Mar"); \$3500 on April 3, 2009;

got the high score. RBK alone was evaluated by Guzman, Owens, Oates, Taylor, Karim, Glover, Vancheri, and Sean Regan. The Regan and Vancheri ratings were considerably lower than the others. In the end, four of the seven contractors scored higher than Forrester/RBK – which received a score of 78.1 out of 100 points. *See* Ex. 234. The large contractors who scored higher – Blue Skye/Coakley (92 points), Dustin/Winmar (87.7 points), FEI Construction (85.2 points), and Signal/AF/F&L (78.3 points) all received notices of intended awards as well, but it is unclear why Forrester/RBK was selected for the second largest project instead of other contracting teams that scored higher.

For the medium projects, RBK received a score of 75.8, with its proposal and interview receiving only 8 out of 20 possible points. All of the other medium and small contractors scored higher -- Blue Skye, Hamel/DDG, FEI, and HRGM. All but HRGM, which also scored higher than Hamel/DDG, received notices. There is nothing in the record that would explain Banneker's selection of RBK over HRGM; while some of the interviewers raised questions about HRGM's community involvement, those assessments were reflected in the scoring and HRGM received a higher overall score than RBK.

⁷⁵⁴ Ex. 246, Proposal from Capital Construction, Inc., to Banneker Ventures, LLC (Jul. 29, 2009).

⁷⁵⁵ Ex. 247, Check # 1196 from Blue Skye Development LLC account to Liberty Law Group (Aug. 11, 2009) (\$10,500).

and \$7500 on July 1, 2009 ("May, June, Aug"). Monthly payments of \$2500 payments were made from August through November of 2009.⁷⁵⁶

- Capital Construction, which was awarded Justice Park in a team with Winmar Construction, and was also selected to handle the renovation of Gibbs Elementary School, paid Skinner's Liberty Industries \$54,500 between August of 2008 and March of 2010, including \$10,000 on September 10 of 2009. The memo lines on the checks describe them as loan reimbursements.⁷⁵⁷
- District Development Group, a successful bidder teamed with Hamel Brothers on Guy Mason, made payments totaling \$9000 to Liberty Industries between July and December of 2008.⁷⁵⁸ While several of the interview sheets from their August 24, 2009 presentation commented on the fact that the companies had worked together only once before,⁷⁵⁹ Karim wrote on his evaluation: "Experienced working together for 20 years!"⁷⁶⁰

Karim did not disclose his financial ties to the general contractors to either his joint venture partner or to city officials. Thomas Regan observed during his interview, "it would give me heartburn," if one of the bidders had been paying Karim a consulting fee to improve its responses to solicitations.⁷⁶¹ Even Duane Oates, one of the Banneker project managers, observed

⁷⁵⁶ Ex. 248, Check #'s 3079, 3099, 3217, 3259, 3274, 3302, 3323, from AF Development, LLC, payable to the Liberty Law Group.

⁷⁵⁷ Ex. 249, Check #'s 1210, 1239, 1286, 160, 5107 from Capital Construction Enterprises Inc. payable to the Liberty Industries, LLC ("reimbursement of loan").

⁷⁵⁸ Ex. 250. District Development lists 3215 Martin Luther King Avenue, S.E. as its address on its proposal; this is one of the addresses also used by Skinner in LEAD's October 2008 and September 2009 applications with the D.C. Small Business Administration for upgraded certification as a CBE.

⁷⁵⁹ See, e.g., Ex. 251, General Contractor Interview Evaluation of Hamel/DDG by Jacqui Glover ("Old Congress Heights school only project worked on together") and Ex. 252 General Contractor Interview Evaluation of Hamel/DDG by B. Guzman ("as a JV [illegible], not very experienced...").

⁷⁶⁰ Ex. 253, General Contractor Interview Evaluation of Hamel/DDG by Omar Karim.

⁷⁶¹ Interview with Sean Regan and Thomas Regan (Nov. 12, 2010).

that in his eyes, such financial relationships would have constituted a conflict of interest, and that the information would have made a difference to him in making his recommendations.⁷⁶²

As noted previously, during his deposition in August of 2010, Karim took the position that payments made to Liberty Law Group fell outside the scope of the Special Counsel's investigation and he declined to answer any questions about the firm.⁷⁶³ The Superior Court rejected his contention and on September 17, 2010, ordered Karim to answer questions about these matters. But his testimony was unhelpful, to say the least.

Q: Well, but Liberty Law Group was providing community consulting services.

What did it do in the nature of community consulting services?

A: Whatever was asked of us.

Q: Well, did you meet with anybody as part of community consulting services.

A: You have to be more specific about that.

Q: Did you ever meet with any – ... Do you recall ever meeting with anyone as part of providing community consulting services?

A: Like whom are you referring to?

Q: Anybody.

A: I'm sure I met with people over the last three years.⁷⁶⁴

Karim professed to be unable to recall who he met with or whether he prepared invoices, and he did not recall that he generated any written work product.⁷⁶⁵ While he firmly maintained that that the payments he received from his consulting clients had nothing to do with their obtaining government contracts or contracts related to the DPR projects, he could provide no information about what the money *was* for and offered nothing that would explain why Liberty

⁷⁶² Interview with Duane Oates (Nov. 9, 2010).

⁷⁶³ Karim Dep. (Aug. 5, 2010) 47:20-48:18.

⁷⁶⁴ Karim Dep. (Sep. 21, 2010) 38:1-38:15.

⁷⁶⁵ Karim Dep. (Sep. 21, 2010) 174:20-177:16.

Law Group was receiving payments from Blue Skye at the very time that Banneker Ventures was considering Blue Skye's proposal and recommending that it receive two contracts.

Q: What did the Liberty Law Group do for Blue Skye Construction?

MR. BOLDEN [Counsel for Karim]: I'll allow him to answer subject to the attorney client privilege. ...

A: I believe they're consulting work.

Q: What sort of consulting work?

A: Whatever consulting they asked us to do, but I do know it had nothing to do with DPR capital projects nor any city contracts or public contracts or any of those types of things. And we have been doing consulting for them for two years, you know, prior to, you know, us even getting involved with any DPR Capital projects, and it wasn't for anything related to the DPR capital projects at or any other government project. That's not – we don't do government consulting.

Q: Who did you speak with at Blue Skye Construction about performing consulting services for Blue Skye?

A: I don't recall.

Q: Well, how many individuals do you know at Blue Skye Construction?

A: They've got a lot of people over there.

Q: I understand they may have a lot of people over there. My question is who do you know.

A: I know a number of the people over there.

Q: Well, do you – you indicated that you know Scottie Irving.

A: Yeah, I know –

Q: He's the president, correct?

A: Yeah, to my knowledge.

Q: Did you speak with Mr. Irving about consulting services that you were – that Liberty Law Group was performing for Blue Skye Construction?

A: Yep.

Q: Did you speak with anyone else besides Mr. Irving?

A: I don't recall.

* * *

Q: ... [T]ell me about your conversation with Mr. Irving and the specifics of how it is that Liberty Law Group came to provide consulting services for Blue Skye Construction?

A: Oh, we provide consulting services for, you know, a number of different clients and on a, you know – there are a range of different type of companies and I don't recall our, you know, first conversation or you're talking about over, you know, numerous years of having that firm.

* * *

Q: ... [M]y question is describe the conversation that you had with Mr. Irving about what Liberty Law Group could do for Blue Skye Construction, the sort of work they could do for them.

A: I don't recall the initial conversations ...

Q: Well, what would be – what would be the typical way you would have – you would solicit business or go about getting business? And describe how you would market Liberty Law Group's consulting services.

A: I don't market Liberty Law Group services. The firm is no longer in existence.

* * *

Q: Can you provide ... any specifics of any conversation with anyone at Blue Skye about what it is that Liberty Law Group or you individually were going to do in the nature of consulting services for Blue Skye Construction?

A: There wasn't me individually. So my law firm, and I do know that none of it had to do with Blue Skye Construction paying us to get any work. They absolutely – and when they paid us in 2009, it was way prior to us selecting them. It was months that they – they – they paid us the last payment. It was for work that they – that we had done for the firm several months before even the RFQ or RFP was even put on the street. So we didn't—so just to be clear, they weren't paying to get any contracts with us. They do a lot of other stuff in the District, both public and private, and they select who – I mean they – they were selected with a dozen other general contractors who we do no business with, my law firm, and who didn't pay us a nickel over any type of time period, and the work that we did for Blue Skye Construction had nothing to do with their being selected for the DPR contract or any other contract to do with the District.

Q: ... What did Liberty Law Group do for Blue Skye Construction?

A: Oh, consulting, consulting, community consulting. They do a lot of work in the community, right? They hire brothers and sisters who just got out of the pen, you know. They, you know, give people jobs and that type of thing.

Q: So did you do any – did you do any of the work, the consulting work for Blue Skye Construction?

A: My firm did.

Q: My question is did you.

A: I'm the only person – the only person that's part of the firm. So?

Q: So the answer is, yes, you, as part of Liberty Law Group actually did the consulting.

A: Well, you have to be specific. I mean this was, you know – we haven't done any work with the firm in over a year. So I have a dozen different clients, and I quite frankly don't recall it being a year ago.⁷⁶⁶

Brian Scott Irving, of Blue Skye Construction, did remember how it was that he came to work with Omar Karim, and his testimony contradicted Karim's assertion that it had nothing to do with obtaining government business. At his deposition on November 12, 2010, Irving

⁷⁶⁶ Karim Dep. (Sep. 21, 2010) 173:21-175:19, 176:5-177:9, 177:17-179:20.

explained that his firm hired Liberty Law Group for the specific purpose of enhancing its ability to compete for government contracts: “it provides us with labor and an understanding of government contracts.”⁷⁶⁷ He explained that Karim approached him shortly after Blue Skye submitted a proposal with Coakley Williams to serve as the general contractor for the Walker Jones project, for which Banneker was serving as the project manager along with Regan. Karim advised Irving that Blue Skye was not well represented in its proposal. According to Irving, Karim then offered, for a fee, to help Blue Skye understand the technical aspects of construction, build capacity, and make a stronger appearance in response to future solicitations. Irving began meeting with him regularly for that purpose, and Karim provided him with proposals that other contractors had submitted which they would review and discuss.⁷⁶⁸

So he would have like manuals or other bid sheets that people had turned in, and we would review them, and some of them dealt with technical questions that I had no understanding of. So we would review them and every time I would go after a job, I would apply these technical questions or these QC questions dealing with – or safe developer, safety manual. So that’s what he would help me with.⁷⁶⁹

As part of Liberty Law Group’s consulting services, Irving also met with Skinner, who as Irving recalls, handed him a Liberty Law Group business card bearing his name at a party. Skinner’s assistance related to how to operate within the community – how to understand the Advisory Neighborhood Commissions, and how to hire from the community, including ex-offenders returning home.⁷⁷⁰

⁷⁶⁷ Deposition of Brian Scottie Irving, Blue Skye Construction (Nov. 12, 2010) 11:15-16.

⁷⁶⁸ The investigation did not reveal whether Karim showed Irving proposals he had received in his capacity as the city’s program manager or whether these were samples he obtained from other sources such as his previous work experience.

⁷⁶⁹ Irving Dep. 23:19-24:4.

⁷⁷⁰ *Id.* at 28:15-30:2.

My conversation with Skinner was – was kind of like he used the term which I was comfortable with, “black.” “I need to talk to you about how you incorporate our people into what you’re doing and how you uplift our community.”⁷⁷¹

Skinner and Karim referred Blue Skye to African-American architects, attorneys, and other consultants:

Q: Is it correct that basically what ... Liberty Law Group did for you was just give you the names of these individuals to contact?

A: A little bit more than that, but yeah.

Q: All right. What more did they do for you?

A: Make sure that African Americans share our money together, and that’s why these African Americans was used, that we developed these shops in DC.

* * *

Q: Did you expect to pay a monthly fee just to get the name of someone who might be able to help you?

A: Yes.

Q: Did you expect that in, you know, trying to develop business for the African American community some of your – some of your friends, whoever they were, or acquaintances would help you do that without a fee, in other words, would give you names? “You ought to talk to this person” –

A: I have never met that person.

Q: – or they referred you to that person?

A: I have never met that person.

Q: What? You’ve never met the –

A: I have never met a person that never gave a name without a fee... In construction.⁷⁷²

When it came to answering questions about the solicitation for the DPR projects in particular, Irving could not recall whether he had any conversations with Karim or Skinner related to either Blue Skye’s proposal or his interview.⁷⁷³ He testified that he stopped utilizing

⁷⁷¹ *Id.* at 29:16-21.

⁷⁷² *Id.* at 73:20-74:6; 76:12-77:6.

⁷⁷³ *Id.* at 56:20-57:8

Karim and Skinner's services when "all hell broke loose" concerning the Banneker and Liberty recreation center contracts.⁷⁷⁴

Despite his personal involvement in the Blue Skye relationship, Sinclair Skinner did not advance the inquiry.

Q: Did you provide any consulting services, either yourself individually or through your company, Liberty Industries, to Blue Skye Construction, LLC or to Blue Skye Development?

A: At this moment I don't – I can't recall specifically. I know I didn't do anything related to transfer of funds...⁷⁷⁵

After initially refusing to answer questions about Liberty Industries, he later agreed to do so. But his "answers" were not really answers at all.

Q: ... What is general consulting?

A: It's consulting.

Q: Can you be more – any more specific than that?

A: No.

Q: Based on the work you did for any client, and without necessarily at this point getting into the identity of any client, what sort – can you give me some examples of the sort of work that you have done for clients beyond describing it as consulting? Can you be more specific?

A: Yes. I don't recall any details but I'm clear that it had nothing to do with determination of policies, consulting in procedures or practices surrounding the transfer of funds or authority via the memorandum of understanding or any other instrumentality for the Department of Parks and Recreation capital projects. I'm positive the consulting had nothing to do with that.

Q: ... [M]y question is really aimed at what it did relate to, what it – what was involved in consulting. So that's the question that I have for you now.

A: Yeah, I can't recall. But I know for certain it didn't involve the transfer of funds.

* * *

Q: Have you done any community consulting?

A: Oh, I'm sure I have.

⁷⁷⁴ *Id.* at 35:7-10. While Karim could not recall whether Liberty Law Group generated any invoices or documents, Blue Skye was able to provide some records memorializing the relationship. Blue Skye's files included not only invoices from Karim, but also an email from Skinner attempting to collect on Liberty Law Group's invoice.

⁷⁷⁵ Skinner Dep. (Oct. 6, 2010) 16:5-11.

Q: Do you recall ever having done any community consulting?

A: Nothing specific but I have background in community organizing and I'm definitely capable of doing so.

* * *

Q: Can you be more specific other than simply saying that community consulting is consulting in the community?

A: No.⁷⁷⁶

In light of this record, more investigation is needed concerning the payments made to Liberty Law Group by Blue Skye and other contractors.⁷⁷⁷ And while the bank records reveal that District Development and Capital Development made payments to Skinner's Liberty Industries, and not to Karim's Liberty Law Group, given the unexplained and overlapping relationships between Liberty Law Group and Liberty Industries, the payments to Liberty Industries warrant further inquiry as well.

There is insufficient evidence to enable us to conclude whether the payments made to Liberty Law Group and Liberty Industries by contractors bidding for city work were made for independent, legitimate reasons or whether they were part of an improper effort to affect the process. While the expansion of opportunity for minority owned contractors is an important goal – and indeed, preferences for local and disadvantaged businesses are codified in D.C.'s procurement laws – and while it is laudable for businessmen who achieve success to assist up-and-coming companies seeking to enter the market behind them, the evidence raises questions as to whether Karim was taking advantage of his status as the city's project manager to market that

⁷⁷⁶ *Id.* at 46:10-47:14, 48:2-14.

⁷⁷⁷ Anthony Floyd, the owner of AF Development was scheduled to be deposed on December 14, 2010, but on December 13, he cancelled the deposition, citing the need to obtain counsel and holiday-related conflicts that would require deferring the deposition until 2011. In light of the recommendation that the matter be referred for further investigation, the decision was made not to prolong the investigation further in order to obtain the testimony of other witnesses, on these issues.

mentorship as a paid service, and whether he was selling the service to would-be city contractors at the same time that he was entrusted with making unbiased decisions about the disposition of city funds. At the very least, the facts that have come to light so far indicate the existence of a significant undisclosed conflict of interest; at worst, they raise the question of whether the payments were part of an improper scheme. Without expressing a view as to the likely outcome, we recommend that the Council refer this matter to the United States Attorney for further investigation.

IX. EVENTS AFTER THE INVESTIGATION BEGAN

A. The Funds Cutoff and the Stop Work Order

After the press began reporting on the Banneker contract and the Committee held its initial Roundtable hearing on October 30, 2009, there was considerable discussion both within the government and between the government and its contractors about how to proceed. On November 2, Sean Regan wrote to Glover and asked: “We’ve had a couple contractors and consultants ask us if the projects are on hold or if they should keep working on the design and estimating going on right now.” Glover sought Jannarone’s guidance on how to respond, and he directed her to “keep moving, get the contracts signed and ready to send to council.”⁷⁷⁸

On November 3, the Council voted to suspend the flow of funds from DMPED to DCHA for the parks projects.⁷⁷⁹ Since DCHA viewed DMPED as its “client” on the parks projects, on

⁷⁷⁸ Ex. 254, E-mail from David Jannarone (EOM) to Jacquelyn Glover (EOM) and Sri Sekar (EOM) (Nov. 2, 2009 1:20 PM). *See also* Ex. 255, E-mail from Erika Lehman, Regan Associates, to Craig Atkins, Jeff Lee, Abdullahi Barrow, *et. al.* (Nov. 12 2009 10:34 AM) (“our project managers at DMPED are asking us to keep moving forward with all projects in spite of the uncertainty”).

⁷⁷⁹ Ex. 256, Department of Parks and Recreation Budget Transparency Emergency Act of 2009.

November 4, the DCHA Executive Director, Adrienne Todman, wrote a letter to the Deputy Mayor seeking direction.⁷⁸⁰ The letter to Santos asks: “In light of the Public Roundtable on Friday, October 30, 2009, the MOU and the contract with Banneker Ventures, LLC, please advise how DMPED would like DCHA to proceed with the MOU and the contract with Banneker Ventures, LLC for program management.”⁷⁸¹

At the same time, William Slover, the Chair of the DCHA Board and therefore a member of the DCHE Board, was concerned that DCHE could find itself responsible for charges for work performed on the projects that it could not pay. He came to the view that the agency could best protect itself by transferring responsibility for the park projects back to DMPED. Slover consulted with the DCHA General Counsel, who drafted a proposed resolution to accomplish that end.⁷⁸²

Slover discussed his proposal with fellow Board members during the informal brown bag session that preceded the November 11 monthly Board meeting. According to Adrienne Todman, the reaction was “mixed:”

[T]here were some board members who fully supported what he proposed. Folks were very nervous about the scrutiny. It’s the first time the Housing Authority had been under such severe scrutiny. But there were some board members who thought that, you know, we began a partnership with DMPED and we should see it through.⁷⁸³

⁷⁸⁰ Ex. 257, Letter from Adrienne Todman to Valerie Santos (Nov. 4, 2009).

⁷⁸¹ When asked during her deposition, Valerie Santos could not recall whether she responded to Todman’s November 4 letter or not. Santos Dep. 89:1-2 Nor did she know whether she had referred it to the OAG for a response, although she recalled consulting with that office. *Id.* at 89:7-10.

⁷⁸² Ex. 258, Resolution 09-42, DCHA, Notice of Termination of Memorandum of Understanding.

⁷⁸³ Deposition of Adrienne Todman, DCHA (Sep. 24, 2010) 35:8-14.

For her part, Todman “was trying to find a solution that would protect DCHA. I had some concern about an outright termination, if it would look like we were somehow doing something that was inappropriate.”⁷⁸⁴

Valerie Santos, the Deputy Mayor, sat on the DCHA Board, and she was strongly opposed to Slover’s approach. LaRuby May, another DCHA Board member, remembered little about the Board meeting when she was deposed,⁷⁸⁵ but she indicated that she “just really tried to give a good look at how it would affect the residents that we are privileged to serve.”⁷⁸⁶ Looking at it from the standpoint of the communities’ needs, she concluded that it was important to continue work on the recreation centers.⁷⁸⁷ The resolution was not put forward for a formal vote at the November meeting.

On November 13, the Attorney General sent a letter to Adrienne Todman and the DCHA Board containing his recommendation on how the agency should proceed. Nickles wrote:

I believe the solution is for DCHA on its own behalf and on behalf of DCHE to inform the Council of the potentially devastating impact of its emergency and temporary legislation on the DCHE/Banneker contract, specifically, and recreation projects in general and submit the contracts on an emergency basis for approval at the Council’s December 1, 2009 legislative session. Such legislation should exempt the contracts from the emergency and temporary legislation prohibiting the transfer of any funds to DCHA relating to DPR projects.⁷⁸⁸

⁷⁸⁴ Todman Dep. notes.

⁷⁸⁵ May Dep. 39:14-40:13.

⁷⁸⁶ May Dep. 51:1-3.

⁷⁸⁷ *Id.* at 51:7-8.

⁷⁸⁸ Ex. 262, Letter from Peter J. Nickles to Adrienne Todman (Nov. 13, 2009).

Nickles sent a copy of his letter to every member of the DCHA Board and to Froelicher, the DCHA General Counsel.

On November 16, Froelicher responded. He outlined the nature of the agency relationship established between DMPED and DCHA under the terms of the MOU and pointed out that DCHA/DCHE now lacked the funds it needed to perform its responsibilities. Froelicher took the position that under the terms of the MOU, it was DMPED's responsibility to seek Council approval for the program management contract.⁷⁸⁹ Todman agreed with this position.

We actually responded to him and suggested that it was actually a project that was owned and sponsored by the city government and that we would not take the lead in terms of providing these matters to the council. In having had reviewed the MOU, it was clear that it was the responsibility of DMPED to engage in certain local government matters.⁷⁹⁰

Meanwhile, according to Larry Dwyer, the Executive Director of DCHE, the agency was becoming increasingly concerned that it could incur additional liability to pay contractors at a time when it was unclear whether the funds to pay those contractors would ever be forthcoming. Therefore, the decision was made to suspend all work on the projects. On November 20, 2009, Dwyer transmitted a letter to Banneker indicating that all work must stop as of November 30.⁷⁹¹ DCHA Board members agreed with this approach.⁷⁹²

⁷⁸⁹ Ex. 259, Letter from Hans Froelicher to Peter J. Nickles (Nov. 16, 2009).

⁷⁹⁰ Todman Dep. 32:21-33:5.

⁷⁹¹ Ex. 260, Letter from Larry Dwyer to Omar Karim (Nov. 20, 2009) with delivery receipt attached.

⁷⁹² May Dep. 41:10-21 (“[W]e had an obligation to make sure that we didn’t have vendors or contractors working beyond a point that we could pay them.... I think we issued a stop work notice, I don’t know, effective in November or at some point. So I know that that was something I was definitely in support of, to make sure that we didn’t allow people to work beyond what we could pay them.”).

B. The December 2009 Change Order and MOU

After the work stopped, DMPED took steps to resolve the conflict with the Council in the hope of getting the projects moving again. David Jannarone took charge of the effort,⁷⁹³ and he circulated a checklist of tasks to be completed by DMPED, Banneker, and DCHA.⁷⁹⁴ Jannarone testified that “when the Attorney General issued an opinion that the contracts should go to Council, we started this process to send them to Council.”⁷⁹⁵ He stated that the City Administrator directed him to make sure it happened.⁷⁹⁶

Neil Albert confirmed that as City Administrator, he supported the effort to revise the contracts and obtain Council approval. He testified that at the time, the executive branch was engaged in informal conversations with some members of the Council and that they were optimistic that the effort to package the contracts to be submitted to the Council after the fact would solve the problem.

... I had a voice in that and my voice was to make sure that the contracts went to the Council. I had conversations with Council members about it, particularly Council member Harry Thomas about sort of what is the best way to move the projects forward, getting City Council approval. I think we both, Harry and I both were of the opinion that we shouldn't penalize the residents of the District of Columbia for some, my words, “mistakes” on behalf of the municipal government.⁷⁹⁷

⁷⁹³ Glover Dep. 209:8-11.

⁷⁹⁴ Ex. 261, E-mail from David Jannarone (EOM) to Omar Karim (Dec. 4, 2009 7:41 PM) with DPR Capital Projects checklist.

⁷⁹⁵ Jannarone Dep. 131:6-9.

⁷⁹⁶ *Id.* at 131:12-15.

⁷⁹⁷ Albert Dep. 161:5-14.

Jannarone also testified that he had reason to believe that the Council would be receptive to the effort.

I was involved in conversations about, “What do we do now to get these projects done?” And I was involved in conversation with every single person including every single Councilmember about that issue.

* * *

[I] spoke with many, many Councilmembers about this. Worked with many Councilmembers to figure out how to resolve this issue and move the projects forward.⁷⁹⁸

Jannarone identified Councilmembers Harry Thomas, Marion Barry, Kwame Brown, Tommy Wells, and possibly Yvette Alexander as those with whom he spoke.⁷⁹⁹ Glover also believed that the Council was aware of what Jannarone was attempting to accomplish. “I don’t really know the specifics, at least I can’t remember, but per some conversation that Mr. Jannarone had with some of the Council members, I guess, they came to some type of understanding that if Banneker were to change their contract around then it could be presented to Council for approval and it might be approved.”⁸⁰⁰

The change order submitted to DCHA for execution reflected the expanded scope of work, and it also reduced the fees that had been the subject of criticism at the earlier hearings.

Jannarone explained:

It was actually Kwame Brown who was working with all the Councilmembers again individually to try and come up with a package that they felt comfortable with and approve. As part of that, we went back and beat them down on the markup per my conversation with Kwame Brown.⁸⁰¹

⁷⁹⁸ Jannarone Dep. 128:2-6, 132:7-10.

⁷⁹⁹ *Id.* at 132:13-14.

⁸⁰⁰ Glover Dep. 214:10-16.

⁸⁰¹ Jannarone Dep. 138:17-22.

While the original contract provided for a fixed fee of \$4.2 million and a 9% mark-up on payments to consultants,⁸⁰² the change order increased the fixed fee commensurate with the expanded scope of work but reduced the percentage of the mark-up on consultants to 5% and capped the amount that could be paid under that provision at \$350,000.⁸⁰³ As was the case with the original contract, it was DMPED and not DCHA that negotiated the terms of the agreement.⁸⁰⁴

While DCHA resisted taking the lead, it worked with DMPED to revise the MOU and the contract so that the work could resume. According to LaRuby May, “I do recall there trying to be something, you know, an amicable like something that we can work this out in order to move forward or between DCHA and DMPED and the Council and all of the parties involved...”⁸⁰⁵ She testified that once it was determined that the contract needed to be submitted to the Council, the object of the exercise was to make sure that the Council had a complete package that fully reflected the scope of the work.⁸⁰⁶ Todman, the DCHA Executive Director, handled the issue on the DCHA side.⁸⁰⁷

⁸⁰² Ex. 80, Contract for Services between DCHE and Banneker Ventures, Contract No. 2009-05 (Jul. 14, 2009), § 9.A. I and II.

⁸⁰³ Ex. 263, DC Housing Enterprises Resolution 09-15, Change Order to Contract for Project Management Services regarding DMPED/DPR Capital Construction Projects (Dec. 9, 2009).

⁸⁰⁴ See Todman Dep. 20:1-7, 44:12-21; Dwyer Dep. (Aug. 6, 2010) 29:2-32:8.

⁸⁰⁵ May Dep. 44:19-45:1.

⁸⁰⁶ *Id.* at 42:18-43:9.

⁸⁰⁷ *Id.* at 45:15-21.

On December 9, the DCHA Board was asked to vote on a resolution to amend and increase the MOU,⁸⁰⁸ and the DCHE Board (consisting of 3 DCHA Board members and Todman) was presented with a resolution to execute the change order to its contract with Banneker.⁸⁰⁹ Todman explained that there had been discussions between DCHA and DMPED, “its client,” about taking the DPR contract to the Council, and that DMPED decided it wanted the contract to reflect the full scope of the work to be performed.⁸¹⁰ When she was asked why it was being done in December, after the Council had cut off the money, Todman’s response was:

DMPED wanted to take the contracts to the Council. We had done the stop work order and no work was happening. DMPED decided it wanted the parks built, so it wanted to get past the issue of Council approval by getting Council approval, hoping the work would be approved and continued.⁸¹¹

While city officials may have believed that the effort to have the Council ratify the contract retroactively would succeed, the DCHA Board was placed on notice that at least some members of the Council would take a dim view of any effort to expand the MOU or the Banneker contract at that point in time. Councilmember Barry personally attended the DCHA Board meeting on December 9, 2009 at which the resolution to increase the MOU to \$99 million and to execute the change order with Banneker was discussed. Barry informed the Board that he was “shocked” and “outraged” that DMPED and DCHE were even considering taking such action in the middle of a controversy that had tarnished both the city and the Housing Authority, particularly when the Council was poised to take action and the projects were likely to be sent to

⁸⁰⁸ Ex. 264, DCHA Resolution 09-49 (Dec. 9, 2009) (approving amendment to MOU with DMPED regarding Capital Construction Projects).

⁸⁰⁹ Ex. 265, DC Housing Enterprises Resolution 09-15 (Dec. 9, 2009) (change order).

⁸¹⁰ Todman Dep. Notes.

⁸¹¹ Todman Dep. Notes.

OPEFM.⁸¹² He warned, “the climate down there on the City Council is very toxic right now.”⁸¹³ The Board’s reaction to the resolutions was “mixed but ultimately successful.”⁸¹⁴ It approved the resolution by a vote of 5 to 3.⁸¹⁵

Thus, although the activity in December was not universally approved, it seems to have been nothing more than an effort to reconcile the governing documents with the evolution of the project, and it did not represent the first attempt to get that done. The record reveals that Banneker prepared change orders along the way when it was asked to manage the renovation of additional parks, although there is no indication that they were ever signed by DCHE.⁸¹⁶ The documents produced by city agencies also include many emails between DPR and DMPED exchanging drafts of MOUs that would have transferred additional funds and more accurately reflected the reality of the work being overseen by DCHA.⁸¹⁷

⁸¹² Ex. 266, DCHA Board Minutes (Dec. 9, 2009) at 30-56.

⁸¹³ *Id.* at 55.

⁸¹⁴ Todman Dep. Notes.

⁸¹⁵ During his interview, Slover characterized the non-unanimous vote as an extraordinary event. When Todman was asked whether it was unusual for the Board to pass a resolution without consensus, she said, “At that point, no, but it was unusual given the history of the board.” Todman Dep. Notes.

⁸¹⁶ See Ex. 267, “Change Order No. 1 to Contract for Services,” signed by Karim on Aug. 1, 2009; Ex. 268, “Change Order No. 2 to Contract for Services,” signed by Karim on Sep. 1, 2009; and, Ex. 269, E-mail from Carol Rajaram, Banneker Ventures to Asmara Habte, DCHA (Oct. 28, 2009), transmitting change orders 1-3.

⁸¹⁷ See *e.g.*, Ex. 270, E-mail from Jacquelyn Glover (EOM) to Bianca Fagin (DPR) and David Janifer (DPR) (Mar. 16, 2009), transmitting MOU for Raymond Recreation Center (“We are adding this project to our list.”); Ex. 271, E-mail from Bianca Fagin (DPR) to Bridget Stesney (DPR) (Jun. 15, 2009) attaching draft MOU for Bald Eagle; and Ex. 272, E-mail from Jacquelyn Glover (EOM) to Bianca Fagin (DPR) (Jul. 17, 2009) regarding amending the MOU.

Experienced construction managers who were interviewed, such as Larry Dwyer from DCHE and Will Mangrum of Brailsford and Dunlavey, indicated that it is not unusual for the scope of ongoing projects to expand before the paperwork catches up. While the most prudent practice would involve executing a change order before new work begins, they were not particularly troubled by the fact that Banneker began work on additional parks based upon DMPED's oral directions. They noted that in the absence of a revised contract, the contractor was proceeding at its own risk.⁸¹⁸

The driving consideration in this effort was speed, and it was symptomatic of that approach that DMPED expanded the contractor's scope of work without negotiating appropriate change orders, and that DCHA approved invoices for work on parks not included in the MOU. In this push to complete things quickly, what suffered was the quality of DMPED's project management and the administrative services performed by DCHA. But the evidence did not reveal anything underhanded. As Larry Dwyer pointed out, it was never anticipated that the work would stop abruptly in November, and it is likely that the paperwork would have caught up if the projects had run their course.⁸¹⁹

The expansion of the MOU and the Banneker contract in December were intended to align the contract and the funding documents with the actual scope of the project, so that the contract being presented for approval – which had also been revised to be more palatable to the Council – would be complete. While we conclude that William Slover's proposed resolution to

⁸¹⁸ Dwyer Dep. (Aug. 6, 2010) 77:8-15, 82:7-22, 133:19-134:11; Interview with Mangrum and Miranda.

⁸¹⁹ Dwyer Dep. (Aug. 10, 2010) 24:17-25:2.

terminate the MOU was an equally acceptable approach,⁸²⁰ the fact that DCHA and DMPED revised both the contract and the MOU on the eve of the December Council hearings is not itself something that gives rise to concerns about wrongdoing.

C. Removal of the DCHA Board Chairman

On November 20, the Chairman of the DCHA Board of Commissioners, William Slover, was removed from his position as Chair. Slover remained on the DCHA Board as a member, but the loss of his Chair's position had the effect of removing him from the Board of DCHE as well. Slover had been vocal in raising concerns about the Banneker contract. And in November, after the Council cut off further transmittals of funds to DCHA, he advocated terminating DCHA's involvement and transferring the DPR projects back to DMPED, rather than increasing the MOU and modifying the Banneker contract. Slover expressed his opinion to DCHA Board members, including Deputy Mayor Santos. He spoke directly to City Administrator Neil Albert on the afternoon of November 20, and that evening, he learned from Tracy Sandler, the Director of the Office of Boards and Commissions, that he was being removed. Slover's removal as DCHA Board Chair appeared to some at the time to have been related to his opposition to the Banneker contract and the course of action being recommended by the Deputy Mayor. The interview with Peter Nickles revealed, though, that the change in DCHA leadership was prompted by the Attorney General's own dissatisfaction with the DCHA General Counsel's response to his advice. In any event, Slover served as Chair at the pleasure of the Mayor, so the Mayor's action was not illegal, and it does not raise issues for further investigation.

⁸²⁰ As Neil Albert testified, "he certainly had the – I think he had the authority as the chair of the Housing Authority Board to make that decision." Albert Dep. 151:10-12.

As noted above, on November 13, 2009, the Attorney General conveyed his recommendation to DCHA that it seek retroactive approval of the Banneker contract from the D.C. Council. And on November 16, the DCHA General Counsel, Hans Froelicher, responded with his opinion that under the terms of the MOU, it was DMPED's responsibility, and not DCHA's, to obtain any such review. During his interview, Nickles explained that he found Froelicher's November 16 letter "very disappointing" and "very frustrating." He was "offended" that DCHA would ask for his advice about these contracts and then reject it, particularly since the OAG had previously taken the position that Council approval for all contracts was necessary. He made it known within the Executive Office of the Mayor that he believed that a change in leadership at DCHA was required.⁸²¹

Slover made it clear during his interview that he had no personal knowledge of why the action was taken – he was not provided with any reasons at the time. What he did know was that he had publicly disagreed with Deputy Mayor Santos about the course of action DCHA should take, and that he had repeated his concerns about the Banneker contract and his recommendation that the parks projects should be transferred back to DMPED to the City Administrator, Neil Albert, on the very day that he was removed.⁸²² But it appears that neither Albert nor Santos was behind his removal.

⁸²¹ Nickles stated during his interview that he had never had any dealings with Slover individually nor any with the DCHA Board as a whole. But he felt that the General Counsel was simply an employee, and that the ultimate responsibility for the agency's actions lay with the Board. He also stated during the interview that he sought a change in leadership across the board and that he did not single Slover out, but the OAG produced a November 20, 2009 memorandum from Nickles to Tracy Sandler calling for the change which was entitled, "DCHA Board-- Chairmanship." Ex. 273, Memorandum from Peter Nickles to Tracy Sandler (Nov. 20, 2009).

⁸²² Interview with William Slover.

Albert confirmed Slover's account that the two of them had spoken at some length earlier in the day on which Slover was removed.⁸²³ He recalled that the two had been trying to schedule a meeting for some time and they were finally able to get together on that date. Slover expressed his view that the MOU between DMPED and DCHA should be terminated, and Albert took the opposing side, pointing out that the projects were moving forward and that the MOU had received legal approval within DCHA.⁸²⁴ The conversation was cordial; as Albert recalled, "I remember having a conversation with him ... I had lost my dad at that time and he was particularly sympathetic in that conversation and so the majority of what we talked about was that along with the DC Housing Authority issues."⁸²⁵ According to Albert, he was unaware that Slover was going to be removed at the time of the conversation,⁸²⁶ he did not have personal knowledge of how Slover came to be removed;⁸²⁷ and he did not recommend that anyone remove him.⁸²⁸

During her testimony, Valerie Santos, the Deputy Mayor for Planning and Economic Development, who also served on the DCHA Board, was able to detail her clash of perspectives with Slover:

Well, his view was that he was uncomfortable about the structure. He was uncomfortable. He was one of the people that thought that – he alleged that the fees were excessive, and he made several statements that DCHE should just get

⁸²³ Albert Dep. 152:14-153:12.

⁸²⁴ *Id.* at 153:16-154:6.

⁸²⁵ *Id.* at 157:1-7.

⁸²⁶ *Id.* at 153:9-12.

⁸²⁷ *Id.* at 151:19-152:8.

⁸²⁸ *Id.* at 157:8-12.

out of the business of doing this work. So he raised a number of questions, not all of which I remember. And he was in favor of basically stopping the work, from our perspective and putting it back on the City to figure out how else to get the work done.... I mean, he said all kind of things and this was a long time ago, but I do remember him saying, these fees are high based on his knowledge.

* * *

And so I said, Bill, we – it's important to us [that] the projects move. It's important not just to us, but we get complaints all the time from community members and also Council members, why aren't you guys faster, why isn't this done, why isn't this done. So that's where I'm coming from. What concerns do you have? Can we deal with them in a different way as opposed to just stopping work.

* * *

His response was, these are his concerns, he's worried about the fees, he wants reassurances that nothing inappropriate has happened. And I said, as far as I know, of course nothing inappropriate's happening. I have no desire to be involved in anything like that. It doesn't benefit anybody. I don't know Omar. I can give you my personal assurance. Because those are the things he was worrying about.

And then, I remember he needed to think about it.... He was just very nervous, is probably the better way of putting it. Nervous as in, he wanted to really be as conservative as possible.

* * *

...Bill didn't shift his position, and so he basically wanted to stop all work. I don't remember the sequence of who talked to whom and when, but culminating in ... I don't know which came first, but I do know that the decision was made to replace him as Chair of the Board. And after that it was just pretty acrimonious.⁸²⁹

But Santos could not remember any specific conversation concerning the actual decision to remove Slover, and she did not recall being provided with the reasons that he was removed.⁸³⁰

Tracy Sandler, who communicated the decision to Slover on November 20, testified as well. In November of 2009, Sandler was serving as Director of the Office of Boards and Commissions. She was a Mayoral appointee with responsibility for the recruitment and

⁸²⁹ Santos Dep. 91:3-19; 95:11-97:8.

⁸³⁰ *Id.* at 99:14-101:22.

recommendation of the more than 2700 other Mayoral appointees serving on over 180 boards.⁸³¹ She testified that there was only one occasion during her tenure that she removed an appointee, and that was in the case of William Slover.⁸³² On November 20, Sandler was called to the “bullpen,” an open space within the executive office of the Mayor, to meet with the Mayor. During a brief conversation, he asked if they were able to remove Slover as Chairperson, and she informed him that they were. He then directed her to do so.⁸³³ Sandler returned to her office to handle other matters and telephoned Slover that evening.⁸³⁴ The Mayor did not provide Sandler with any reasons for his request nor did Sandler request any.⁸³⁵ She was told to elevate LaRuby May to the position of Board Chair during the same conversation,⁸³⁶ and she informed May of the decision that evening as well. May was not told why she was replacing Slover.⁸³⁷ Other than speaking with a staff assistant, Sandler testified that she did not believe that she discussed the matter with anyone else in city government that day.⁸³⁸

⁸³¹ Sandler Dep. 13:14–18:20.

⁸³² *Id.* at 17:2-7.

⁸³³ *Id.* at 46:1-12, 50:17-51:9.

⁸³⁴ *Id.* at 25:2-15, 48:3-6.

⁸³⁵ *Id.* at 26:2-6, 46:13-18, 53:17-21.

⁸³⁶ *Id.* at 47:3-9.

⁸³⁷ May Dep. 12:8-12.

⁸³⁸ Sandler Dep. 27:10-22, 29:11-30:13, 54:19-21. Sandler testified on July 20, 2010 that she did not memorialize her conversation with the Mayor in writing, she did not create any paperwork regarding his removal, and there was no other record or document from the Mayor regarding Slover or his removal. *Id.* at 27:2-9. She had a clear recollection that it was the Mayor who directed her to take the personnel action in a face to face conversation, and she did not recall discussing the matter with any other city official. She also stated multiple times that she was never provided with any reasons for Slover’s removal. *See, e.g. id.* at 26:2-6, 46:13-18, 53:17-21.

(footnote continued on next page)

In the written questions submitted to the Mayor, Mayor Fenty was asked why he directed Tracy Sandler to remove Slover as Chair of the DCHA Board. He responded:

There were a number of reasons why I directed Tracy Sandler to remove William Slover as Chair of the DCHA Board. As I recall, a primary concern that I had was his unwillingness and the unwillingness of the leadership at DCHA to follow the opinion of my Attorney General that these DCHA contracts had to be submitted to the Council for approval.⁸³⁹

Given the Executive's prerogative in this area, there is nothing in the events surrounding Slover's November 20, 2009 removal as DCHA Board Chair that warrants further investigation.

After the deposition had been completed, we became aware of a memo dated November 20, 2009 from Peter Nickles to Tracy Sandler with the subject line: "DCHA Board – Chairmanship," which had not previously been produced to us, and was not mentioned by Sandler during her testimony. The memo states, "I have become increasingly concerned about the leadership of DCHA, particularly its failure to abide by the request I made recently that DCHA submit certain contracts to the Council for its retroactive approval. ... Please inform me as to whether the requested change in leadership of the DCHA Board can be effected promptly." Ex. 273. OAG provided the memo to the Special Counsel on September 13, 2010. Given the timing of the memo's production, we had no opportunity to question Sandler about it.

⁸³⁹ Ex. 24. On September 3, 2010, during a campaign debate, Fenty was asked about Slover. He responded: "the answer is that the person who you named would not, even though the Attorney General asked him, agree to send contracts to the Council. Because he did not, that was one of the reasons the Attorney General made the recommendation to the Director of Boards and Commissions that he step down and someone else would be put in there." <http://www.myfoxdc.com/dpp/news/politics/dc-mayoral-debate-adrian-fenty-vincent-gray-candidate-questions-090310>. While it is true that Slover did not think that DCHA should pursue the course being proposed by the Deputy Mayor and the Attorney General, the written answer and this statement could be read to imply that what he objected to was the idea of submitting the Banneker contract, or DCHA contracts in general, to the Council for approval at all, and that would be inaccurate. According to Slover, he was unaware of the Council approval issue until the investigation began. Once he learned about it in October, he did not object to seeking Council review, but thought from his review of the documents that it was DMPED's responsibility to do so. But from the start, Slover raised numerous questions about DCHE's participation in the projects and the award of the project management contract, and in November, after funding was cut off by the Council, his objective was extricating DCHA from the projects altogether.

D. The December 24 Payment

On December 15, 2009, the Council formally disapproved Banneker's project management contract in a unanimous vote.⁸⁴⁰ At that time, Banneker invoices 1 – 4 had already been paid in full, and invoices 5 through 7, for work performed in September, October, and November, were still outstanding. On December 21, Banneker representatives and their counsel met to discuss payment with Adrienne Todman – the Interim Executive Director of DCHA, who also served as a Board member of DCHE; LaRuby May – the DCHA Board Chair and a DCHE Board member; and, Hans Froelicher – the DCHA General Counsel. DMPED's David Jannarone participated in the meeting by phone as well.⁸⁴¹ Those present agreed that DCHE would work to review and pay the invoices promptly if Banneker provided all of the necessary documentation. On December 22, Banneker submitted a supplemental invoice #8, transmitting additional subcontractor bills for work performed before November 30.⁸⁴² Three days after the meeting, on Thursday, December 24, Banneker and DCHE executed a settlement agreement,⁸⁴³ and DCHA issued checks to Banneker totaling \$2,554,071.⁸⁴⁴ On that day, DCHA's Chief Financial Officer, Debra Toothman, raised concerns, but Todman directed that the payment be made.

⁸⁴⁰ D.C. Act 18-258. The Council passed the resolution on December 15, 2009, and it was signed by the Mayor on January 4, 2010.

⁸⁴¹ Ex. 274, Letter from A. Scott Bolden to Peter J. Nickles (Jan. 5, 2010); Todman Dep. Notes; May Dep. 59:18-62:19; Interview with Hans Froelicher.

⁸⁴² Ex. 275, Letter from Omar A. Karim to Asmara Habte (Dec. 22, 2009) with invoices attached.

⁸⁴³ Ex. 276, Settlement Agreement and Release (Dec. 24, 2009).

⁸⁴⁴ Ex. 277, Memo from Asmara Habte to Quincy Randolph (Dec. 24, 2009) (requesting payment of Invoice #'s 5, 6, 7, 8 in the amount of \$2,554,071 to Banneker Ventures); Ex. 278, E-mail from Debra Kay Toothman to Adrienne Todman (Dec. 24, 2009) (indicating that payment had been made).

The decision to pay the outstanding invoices was made primarily by Todman, under prodding by Jannarone and with May's concurrence, and without the participation or knowledge of the Council,⁸⁴⁵ the DCHA Board, or Deputy Mayor Santos.⁸⁴⁶ The DCHE Board resolution approving the Settlement Agreement was signed by Board members Todman and May and just one other director, William Knox.⁸⁴⁷ (The fourth DCHE director, Fernando Lemos, was out of the country, was not spoken to, and did not vote.) Larry Dwyer, the President of DCHE, was generally aware of the desire to wrap up the contract and terminate DCHE's involvement, but since he was out of the office for most of December tending to a relative who was ill, he was not actively involved in the discussions. He testified that DCHE's Chief Operating Officer, Hugh Triggs, was authorized to sign an agreement in his absence if the Board approved one. The agreement was signed by Triggs and the DCHA Deputy General Counsel.⁸⁴⁸ There is no evidence that the Mayor or the Office of the Attorney General played any role in the settlement with Banneker at this juncture.

⁸⁴⁵ We were not provided with any documentary evidence or testimony indicating that the Council had been notified.

⁸⁴⁶ Santos testified that she first learned of the payment when Councilmember Thomas asked her about it at a meeting in January 2010, and that she was caught "like a deer in the headlights." Santos Dep. 134:17-18. As of January 7, 2010, her executive assistant, Liza Collado, was summoning Glover, Jannarone, and others to a morning meeting to discuss how to clear up the Councilmember's "misimpression" that a settlement had been approved in late December. Ex. 279, E-mail from Liza Collado (EOM) to Chip Richardson (EOM), David Jannarone (EOM), Sri Sekar (EOM), Lindsey Parker (EOM), Jacquelyn Glover (EOM) (Jan. 7, 2010 9:28:45 EST). Todman's email to Santos confirming the settlement and outlining the amounts involved was not sent until later that day. Ex. 280, E-mail from Adrienne Todman to Valerie Santos (EOM) (Jan. 7, 2010 12:24 PM EST).

⁸⁴⁷ Ex. 281, DC Housing Enterprises Resolution "09-" To Authorize Payment of Subcontractor Invoices Pursuant to DCHE Contract with Banneker (Dec. 24, 2009).

⁸⁴⁸ See Ex. 276.

The DCHA witnesses who were deposed explained that they had been receiving repeated inquiries from contractors who had not been paid, as well as from David Jannarone, and that it was their desire at that point to make the contractors whole and bring DCHA's participation in the DPR projects to a conclusion. According to Larry Dwyer, "there was a desire to sort of clean it up on ... Housing Authority's part and at this point clearly the majority of it, if not all of both the DCHE board members, the commissioners and staff all wanted to just simply put a tourniquet on the Housing Authority's damage on this thing and part of that was pay off, get out of obligations, get this thing done."⁸⁴⁹ Todman, who had just been appointed in October 2009 to serve as DCHA's Interim Executive Director, testified that she had been receiving calls from vendors directly and from the DMPED representatives, who reported on the vendor calls being made to them. She stated:

There had been a number of concerns raised about vendors not getting paid and the subs who had done work and not paid for months. There were two outstanding invoices received in August or September, and there had been work done up until the stop work order. The vendors were calling me, among others, and I was getting calls from DMPED about vendors calling them. At the point the Council terminated the contract, it was clear the projects were not going to move forward but work had been done. There was a general interest in trying to make the vendors whole who had done that work. So the DCHE board decided to move forward and authorize the payments.

Q: When [did the Board authorize the payment]?

A: The Board authorized the payment on the same day the payment was made.⁸⁵⁰

Todman agreed, though, that the process was well underway before it was presented to the other members of the DCHE Board for approval. She explained that she received a call from

⁸⁴⁹ Dwyer Dep. (Aug. 10, 2010) 34:22-35:6.

⁸⁵⁰ Todman Dep. Notes (from Special Counsel's notes from the unrecorded portion of the Todman deposition).

May advising her that Banneker and its attorney wanted to meet. Todman attended the meeting along with May and Froelicher, and David Jannarone participated by phone.⁸⁵¹ She confirmed that counsel for Banneker accurately described what took place when he stated in a January 5, 2010 letter:

During the discussion, the parties agreed to bifurcate and separately resolve issues related to payment of the outstanding Banneker invoices for work performed through November 30, 2009 (the effective date of the Suspension of Work Order) and the negotiation of a final settlement to address contract close-out.⁸⁵²

She stated that she committed to cut the check within 48 hours if everything was in order, and testified that such speed was consistent with the practice of her agency. When asked whether she considered consulting the Council, or whether notifying the Council was discussed within DCHA, Todman indicated that it was not part of DCHA standard operating procedure or practice to inform the Council when making payments.⁸⁵³ While Todman could not identify any other instance in which a check of this magnitude was processed in three days, she testified that she was not troubled by the timeline:

It's not impossible to suggest it occurred in other settlement or emergency situations.

* * *

[C]utting a check is cutting a check. And I think that the fact that it was around Christmas is irrelevant for me because it was a work day, on the 24th. As it relates to the frequency or the casual observer how it usually is, settlement negotiations are never usual, it always presumes that something has occurred that's out of the ordinary. So I think that in situations like this it is not unusual that a large organization would take aggressive action to have closure and that's what we did.⁸⁵⁴

⁸⁵¹ Jannarone recalled discussing the settlement with May and Todman but did not recall being part of the meeting with Banneker and its counsel. Jannarone Dep. 149:13-19.

⁸⁵² See Ex. 274.

⁸⁵³ Todman Dep. Notes.

⁸⁵⁴ Todman Dep. 38:9-18.

Todman stressed this concept of “closure” as her principal motivating factor:

The closure for me ... was we, at HE/HA were the holders of the contract and we were the contract administrator, as evidenced by what we were doing, and we ultimately were going to be the ones responsible for getting the vendors paid. And the closure, for me and for all those who took this action is we wanted the vendors to be paid so that we at HA/HE were not dealing with legal matters and time staff matters and programmatic matters dealing with 15 or 16 or 17 vendors who were asking us on a daily basis to pay them. ... I am not funded by my primary funder to do this work. And so every time spent engaging in this is time spent away from our core mission. ... And for me closure meant taking something off the table so we could focus on the matters that matter.⁸⁵⁵

LaRuby May also played a key role in approving the Christmas Eve payment. While her recollection was somewhat limited, she testified that she had been receiving calls and emails from both Jannarone and Karim concerning the outstanding invoices and that she also heard from a Ms. Webster, the director of constituent services for Councilmember Thomas, who was advocating on behalf of Ward 5 contractors who had not been paid.⁸⁵⁶ May said that it was important to her to make sure that the small contractors got paid. According to May, the decision was DCHE’s to make, and she testified that since she and Todman sat on the DCHE Board, they were representing DCHE at the meeting. May recalled that at the meeting, they made a

⁸⁵⁵ Todman Dep. at 39:8-40:5. Todman’s complaint that handling vendor invoices diverted attention from DCHA’s “core mission” raises the question of why DCHA would agree to an MOU in which its role was to act not as the construction manager, but as the “pay agent” for another agency’s project.

⁸⁵⁶ Todman and May both specifically brought up advocacy on behalf of contractors by Councilmember Thomas’s staff as part of the motivation for their decision to pay the Banneker invoices. While there may have been telephone contacts, the only documents that have been produced that reflect communications from Thomas’s office to DCHA are emails from January of 2010, after the Christmas eve payment, and they relate to work performed on DPR and DCHA projects that were not among the set of DPR projects managed by Banneker – the 14th and Girard Street Park, and the 10th and French Street Park. Indeed, Todman pointed that out herself in her January 15, 2010 response to Thomas’s staff member. Ex. 282, E-mail from Adrienne Todman to James Pittman (Council) (Jan. 15, 2010 5:37 PM EST).

commitment to make the payment once all of the documentation issues were resolved, but she did not believe that they promised to pay by any particular date. She stated that she was out of town when Banneker was actually paid, but she also testified that she personally signed the DCHE Board resolution authorizing the payment, which is dated December 24.⁸⁵⁷

Hans Froelicher, the DCHA General Counsel, also recalled that they reached an oral agreement on December 21 to pay the invoices if Banneker submitted all of the necessary back-up documentation. He recalls that the goal was to get it done as soon as possible so that the contractors who had done the work could get paid. Todman and May indicated that they played no role in the negotiation of the settlement and that they left the terms of the agreement up to Froelicher. He was on leave on December 24, and he testified that he gave his Deputy General Counsel, Lori Parris, authority to consummate the settlement. She contacted Froelicher that day to confirm that it would be acceptable to carve portions of invoice # 7 out of the agreement, and he approved that arrangement.

Asmara Habte, the DCHE contractor whose job it was to review the Banneker invoices, recalled being asked by Todman to review the outstanding bills at some point in December, but she was not told that the work had to be completed by any particular date. She did not feel under pressure to finish by December 24 but indicated that for her own personal reasons, she tried to complete the review that day so that she would not have to think about it over the holiday. While she had never personally been involved in a situation in which a claim was resolved at this speed, she did not have an opinion as to whether the turnaround time in this instance was out of the ordinary. Habte explained that in those instances where she found the back-up for a claimed

⁸⁵⁷ The Board meeting was a telephone meeting and Todman, May and Knox were present on the call. Todman Dep. 51:20-52:2.

expense or subcontractor charge to be inadequate, she backed that expense out of the invoice and left it to be resolved in January.⁸⁵⁸

Habte explained that DCHE served as the “administrator” on the projects, managing the finance and budget aspects, but not the construction. DCHE had no responsibility for tracking the expenditures against amounts budgeted or appropriated in any particular fiscal year for the individual parks; it was monitoring the construction budget that had been provided by DMPED and Banneker for each park. Habte’s role consisted of reviewing the invoices to ensure the sufficiency of the documentation and comparing the amounts charged for each project against its individual budget. Banneker was supposed to review its subcontractors’ invoices in the first instance, and Habte made it clear that it was DMPED that had the responsibility for approving

⁸⁵⁸ The documents provided by DCHA include lengthy emails from Habte to Banneker in which she asked detailed questions about the invoices and requested additional documentation and verification. *See e.g.*, Ex. 283, E-mail from Asmara Habte to Carol Rajaram and Duane Oates, Banneker Ventures (Dec. 23, 2009 3:00 PM EST), in which for each park, she asked, “please provide supporting documents for Liberty’s reimbursement request.” While some of the support was provided, *see* Ex. 284, e-mail exchanges between Asmara Habte and Antwoine McCoy regarding “DPR...Questions” (Jul. 20, Jul. 21, Sep. 1, 2009), the documents also include e-mails from Karim pressing for payment and claiming that he had been “promised” a check on December 24, as well as an e-mail refusing to provide Habte with anything more. *See, e.g.* Ex. 285, e-mail exchanges between Banneker and Asmara Habte (Dec. 23, 2009); Ex. 286, e-mail exchanges between Banneker and Adrienne Todman (Dec. 23, 2009). (Karim stated, with respect to reimbursables: “we will not be sending you additional information. Since the work has ended we consider all past invoices old and expect no further delays;” with respect to subcontractor invoices: “By our submission of the sub-invoices to DCHE, we have signed off and approved all of them ... we are not going to go thru all of the invoices and physically sign them;” with respect to LEAD’s invoices: “We would not have invoiced you if we didn’t have LEAD’s deliverables. We will not provide you any additional information” *See* Ex. 285.) When Banneker grew frustrated with Habte, it went over her head and emailed Todman and May directly. “Ms. Todman, Asmara has everything she needs...” *See* Ex. 286. Habte explained that, ultimately, Banneker provided some of the missing supporting documentation in invoice #9. She also indicated that the unused portions of any amounts that had been advanced in the early invoices for permits were deducted from the payment Banneker received in December.

the invoices and confirming that the work billed for was satisfactorily performed.⁸⁵⁹ Dwyer confirmed this: “Generally, our review is administrative in nature. In terms of certification of acceptance of the work product ... Jacqui [Glover] is the project manager for this project.”⁸⁶⁰ DCHE did not make any sort of independent analysis of the reasonableness of fees being charged by Banneker’s subcontractors, nor did it ascertain whether services or work product referenced in the invoices had actually been provided.⁸⁶¹

Habte was aware that by invoice #4, when Banneker began breaking its invoices out by park, the total project management fees claimed in the invoices exceeded the \$168,000 monthly amount specified in the contract. She questioned Karim about this, and he attributed the higher

⁸⁵⁹ Interview with Asmara Habte.

⁸⁶⁰ Joint Roundtable (Jan. 8, 2010) 38:6-9.

⁸⁶¹ Interview with Asmara Habte. The timeline surrounding the December payment raises questions about how thoroughly Glover considered the November invoice. DCHE could not process invoices #5 – #8 in December without DMPED’s express approval, and the e-mail traffic indicates that the 278-page invoice #7 for November was transmitted to Jacqueline Glover at 5:48 p.m. on December 22. *See* Ex. 287, E-mail from Asmara Habte to Jacquelyn Glover (EOM) (Dec. 22, 2009 5:48 PM EST) When Glover hadn’t responded by midday on the 24th, Habte emailed her and indicated that DCHE was prepared to pay \$932,181. Glover was traveling, and she emailed back her approval from her car ten minutes later. Ex. 288, E-mail from Jacquelyn Glover to Asmara Habte (Dec. 24, 2009 12:38 PM EST). She testified that she was sure that she reviewed the material “at some point” in her office previously, but she could not recall when she did so or how long it took. Glover Dep. 239:10-13. Even when Glover was reviewing the earlier invoices on a more leisurely schedule, she relied heavily upon Banneker when looking at charges from the sub-contractors. “I’d look at the invoice, see what they were billing for and confirm with the project manager that this work was in place.” Glover Dep. 158:12-14.) When she noticed that LEAD’s invoices for the surveying were high, “I talked with Banneker about the price and what it was for. I can’t recall exactly what was discussed, but they obviously produced enough justification for me to approve of the invoice.” *Id.* at 161:11-162:3. In other words, the investigation revealed that DCHE deferred to DMPED to approve the expenditure of funds, and DMPED deferred to Banneker, so despite the multiple layers of review, in the end, there was little oversight of the project manager.

fees to the fact that the scope of the work had increased.⁸⁶² Even though no change orders had been executed, because DMPED approved the invoices, DCHA paid them. The December 24 settlement thus included project management fees of \$242,212 for September (invoice #5), \$242,712 for October (invoice #6), and \$242,212 for November (invoice #7).⁸⁶³

Debra Toothman had been recruited by former DCHA Executive Director Michael Kelly to serve as the agency's Chief Financial Officer. After the invoices were reviewed and approved by DCHE, they ultimately landed in her office for payment. She was out of the office on December 24, and was not involved in the efforts being made to process the invoices until she received a telephone call from Quincy Randolph, her payroll manager, who informed her that he was being asked to cut a check for a settlement agreement but that he had not even seen the

⁸⁶² As early as July, Banneker was billing for work performed on parks that were not part of the DMPED/DCHA MOU or the Banneker contract, and it was submitting those invoices to DCHE. Karim explained to Habte that change orders would be forthcoming, DMPED approved the invoices, and the invoices were paid. Ex. 289 E-mail from Omar A. Karim to Aaron Buchman (Sep. 1, 2009 11:03 AM EST).

⁸⁶³ See Ex. 2, DCHE charts showing a breakdown of Banneker paid invoices.

invoices yet.⁸⁶⁴ Toothman told him not to do anything until he heard from her further, and she telephoned Todman. Toothman informed Todman that she was out of the office and that there was no one present with the clearance to approve the check. She asked Todman whether anyone on the DCHA Board had been made aware of the payment, and she believes that Todman indicated that the Chairman (May) was informed. When she was asked who had authorized the payment, Todman informed Toothman that the DCHE Board would be meeting later that morning to approve the settlement.⁸⁶⁵ Toothman asked Todman if anyone had notified the Council, and according to Toothman, Todman told her that it was not necessary to do so.⁸⁶⁶

⁸⁶⁴ Todman stated that she stepped out of the meeting on December 21 to call Toothman when she was asked how quickly DCHA could pay. According to Todman, she said, “We’re talking about settlement,” and Toothman agreed that she would just need a call from Todman when it was time to pay. Todman Dep. Notes. Todman also testified that she specifically notified Toothman about the upcoming payment prior to December 24, but the email she sent to Toothman on December 23 was transmitted at 10:52 p.m. Ex. 290, E-mail from Adrienne Todman to Debra Kay Toothman (Dec. 23, 2009 10:52:35 PM EST) (“Tomorrow we will need to process the first of two settlement checks to Banneker.... Hans has drafted a work in place settlement document. Once I approve it in the am, I need the check to be cut by COB... I need to know who to work with in your shop once you have given them direction so this person(s) sticks around until this is done.” At 10:15 a.m. on the 24th, Toothman asked via email: “Adrienne on who’s authority [*sic*] are you paying these invoices did the board authorize a settlement payment?” Ex. 291, E-mail from Debra Kay Toothman to Adrienne Todman (Dec. 24, 2009 10:15 AM EST). Todman replied: “DCHE Board is meeting later this am to approve this portion of the settlement.” *Id.* Thus Todman’s instruction to Toothman that an employee needed to be available to process the check preceded any meeting of the DCHE Board.

⁸⁶⁵ Interview with Debra Kay Toothman, former Chief Financial Officer, DCHA (July 22, 2010).

⁸⁶⁶ Todman acknowledged that Toothman did ask her if they were planning to advise the Council, and that she responded that advising the Council was not part of what they usually did at DCHA. She did not recall whether she specifically stated that it was “not necessary.” She also said that when Councilmember Thomas asked her about the payment in January, she “apologized to him that he felt slighted,” but it was not done “given our normal course of duty.” Todman Dep. 56:17-21.

Toothman informed Todman that it had been her plan to release her employees at noon for the holiday. She also pointed out that the banks were going to close early on Thursday for Christmas Eve and remain closed on Christmas Day, so there was no need to cut the check before Monday.⁸⁶⁷ In her interview, Toothman said that she asked Todman to wait and Todman refused. Todman did not offer any reasons why the settlement needed to be completed that day, but she stated that the check had to be issued, and that Toothman's staff could not leave the building until it was done.⁸⁶⁸ Since Todman was her immediate supervisor, Toothman

⁸⁶⁷ Ex. 292, E-mail from Debra Kay Toothman to Adrienne Todman (Dec. 24, 2009 12:23 PM EST).

⁸⁶⁸ Todman did not recall that Toothman asked her to wait. She disagreed with any suggestion that she directed Toothman to cut the check over her objection, saying [in the unrecorded portion of the interview], "there was no time that Toothman said 'I'm not going to cut the check,' and I said, 'yes, you are going to cut the check.' That dialogue did not occur." While Toothman did not recount an express refusal on her part either, she stated in her interview that she asked Todman to wait, and reported in her testimony to the Council that Todman rejected her suggestion that they notify the Council.

Q: [C]ould you have said no, you wanted to wait and look at them further?

A: (Toothman): I express[ed] my concern about the invoices ... to Miss Todman. And I ask[ed] if she thought that we should bring – that we should at least notify the Council that we were about to make this payment. [S]he told me we did not need to notify the Council because of the previous Council action, we were going to have to settle the payments so we could return the money.

Joint Roundtable (Jan. 8, 2010) 333:16-334:8.

Toothman testified before the Council that Todman ordered that her employees remain in the building, and that she did not have authority to disobey the Executive Director's instruction. Todman agreed that she was the one who gave the order that the employees could not leave the building until the matter was concluded.

Q: Why did you cut the payment? ... Why did you agree to give the sign off?
(*footnote continued on next page*)

authorized her employee to sign the checks at around 3:00 that afternoon with the understanding that a complete package of supporting information and a Board resolution would be on her desk on Monday morning, December 28.⁸⁶⁹ Toothman was sufficiently concerned by these events that she made an unsuccessful attempt to reach Councilmember Michael Brown's staff that afternoon.⁸⁷⁰ She described the speed of the settlement in this case to be "unusual" and the order she received to be "unique" in her entire professional career.

To the Council, which was then engaged in its own investigation of how the DPR projects had been handled, and which had just voted to disapprove the Banneker contract, the Christmas eve checks to Banneker were extremely troubling. The effect was to exacerbate the Council's suspicions that the process was being manipulated to benefit Banneker. From our review of the all of the facts and circumstances, the settlement appears to have been a good faith

A (Toothman): Because it was Christmas Eve and my staff couldn't leave the building until [it was done]. [W]e needed to make sure that this was rectified and this check was cut before my staff left the building.

Q: Who said people can't leave until that's done?

A (Toothman): I did. ...

Joint Roundtable (Jan. 8, 2010) 362:17-363:14.

⁸⁶⁹ Interview with Toothman; Ex. 278. Toothman was still waiting for the information Monday afternoon. "These invoices were processed in good faith that I would have the documentation on my desk first thing this morning. I have not yet received them. If they were not yet complete, how were you able to establish the proper payment amount?" Ex. 293, E-mail from Debra Kay Toothman to Asmara Habte (Dec. 28, 2009 3:52 PM EST). The e-mail traffic reveals that much was still unsettled when people returned to work after the New Year. Ex. 294, E-mail exchange between Asmara Habte and Duane W. Oates (Jan. 5, 2010). Vendors were still asking DCHE why they had not been paid, *see* Ex. 295, E-mail exchange between Asmara Habte and Lawrence Dwyer (Jan. 4, 2010); Habte was still seeking documentation from Karim, *see* Ex. 296, E-mail from Asmara Habte to Omar Karim (Jan. 6, 2010 4:28 PM EST); and Karim was still seeking clarification about how the payments had been calculated, *see* Ex. 297, e-mail from Omar A. Karim to Asmara Habte (Jan. 7, 2010 11:33 AM EST).

⁸⁷⁰ Interview with Amy Bellanca, staff member for Councilmember Michael Brown (Sep. 28, 2010).

effort on the part of DCHA to pay for work that had been performed and to bring the agency's participation in the matter to a conclusion. However ill-advised it may have been from a political perspective to expedite payment without broader consultation, we did not find any wrongdoing that warrants further investigation.

But that conclusion does not express unqualified approval of the way the December settlement was handled. In the absence of any exigent circumstances compelling the three-day turnaround, DCHA should have taken the time to think through the implications of the payment and the settlement agreement, and it should have solicited input from – or at the very least, notified – the many interested parties. Taking more time could have improved both the quality of the process and the result.

The Settlement Agreement between Banneker, Regan, and DCHE provides that Banneker and DCHE are parties to the July 14, 2009 contract and to the change order dated December 9, 2009,⁸⁷¹ and that DCHE entered into the contract “as the agent” for DMPED. It describes the Council's emergency legislation cutting off the flow of funds to DCHA and the stop work order, but it fails to mention the Council's December 15, 2009 action invalidating the contract. The Agreement states that Banneker entered into contracts with vendors and consultants “in performance of the Contract,” and it expresses a desire to resolve disputes concerning payment of the invoices without resort to litigation. It specifies that invoices #1 - #4 have been paid in full, and that DCHE will pay \$2.5 million for invoices #5 - #8 on December 24, 2009. The agreement contains language in which the parties release each other from all claims arising out

⁸⁷¹ The Agreement states that it is entered into by and between Banneker Ventures, LLC, and Regan Associates, LLC, “a joint venture,” which is referred to thereafter in the document as “Banneker” or “Contractor.” It then asserts that “Banneker” entered into the contract with DCHE, but neither Regan nor a joint venture including Regan is a signatory to the contract.

of invoices #1 - #8, but it also specifies that invoice #7 has only been paid in part, and that further negotiations over the balance owed under invoice #7 are not precluded.⁸⁷² Thus, the rush to complete the deal before the questions concerning invoice #7 had been conclusively resolved resulted in a one-sided contract that purports to be a settlement agreement and complete mutual release, but has a significant gap in it favoring Banneker. If the justification for the settlement was to bring the matter to a conclusion, executing an agreement and issuing a payment before all of the issues were resolved did not accomplish that goal.⁸⁷³

The settlement raises other concerns, including the fact that the reasons that were publicly advanced for the settlement payment do not fully square with what took place. The witnesses cited the need to pay the subcontractors who had performed in good faith as their primary motivation: “I was only interested in funding for payment for work that had been done. I was focused on the vendors who hadn’t been paid.”⁸⁷⁴ Similarly, Jannarone asserted:

... my position, the way I felt about it is if the work was completed and we had the work and they performed, then they should be paid. ... And ... when I mean “they” I mean all of the consultants. ... I understand the position that they wanted to stop Banneker. I understand that. I understand what all this is about. I do, and that’s fine. But for a consultant who is a subcontract to Banneker who did their work not to get paid, that’s not fine.⁸⁷⁵

But the settlement went well beyond paying the subcontractors. The project management fees billed by Banneker in invoices #5, #6, and #7 – which far exceeded the monthly fee set out in the

⁸⁷² Ex. 276.

⁸⁷³ Indeed, by January of 2010, DCHA attorneys were already referring to the December 24 agreement as a “partial” settlement and release. Ex. 298, E-mail from Andrea Powell to Ben Miller, Sharon W. Geno (Jan. 14, 2010 12:57 PM).

⁸⁷⁴ Todman Dep. Notes.

⁸⁷⁵ Jannarone Dep. 149:21-150:10.

contract – were paid in full, and DCHE also paid the mark-up on the consultants’ invoices, including invoices that themselves had been tabled to await further documentation.⁸⁷⁶

Moreover, no one seems to have seriously thought through whether a settlement was appropriate at all at that juncture and under what terms. Todman justified the payment to the Council by explaining that the payments were made pursuant to the terms of the Banneker contract: “Under the contract between DCHE and Banneker, DCHE was responsible to pay for the costs incurred by Banneker ... and the fee for acting as program manager.”⁸⁷⁷ But by the time the invoices were being processed, the contract had already been rendered void by the Council. At that point, under the analysis applied by the Attorney General, any fee for Banneker should have been calculated on *quantum meruit* principles only.⁸⁷⁸ DCHE made no effort to determine the reasonable value of the services actually rendered by Banneker from September through November, and instead, it paid the management fees claimed in the invoices in full, including the mark-up on consultants that was the subject of much consternation at the Council hearings. While the DCHA Interim Executive Director cannot be faulted personally for failing to anticipate this legal analysis, a more broad-based, thorough, unhurried consideration of the unique legal circumstances surrounding the contract was warranted.

The Settlement Agreement recites that Banneker and DCHE were parties not only to the original contract, but also the December 9, 2009 change order. Yet, the payment that went out the door under the auspices of the Settlement Agreement did not incorporate the modifications

⁸⁷⁶ Ex. 299, E-mail from Asmara Habte to Omar Karim, Carol Rajaram and Duane Oates (Dec. 24, 2009 10:04 PM EST).

⁸⁷⁷ Ex. 300, Letter from Adrienne Todman to Councilmember Harry Thomas Jr. (Jan. 7, 2010).

⁸⁷⁸ Ex. 120, Letter from Peter J. Nickles (Oct. 28, 2010) at 2, n.5 and 8.

contained in the change order. DCHE accepted Banneker's application of the 9% markup to its consultants' invoices even though the mark-up had been reduced to 5% in the change order executed by both parties.⁸⁷⁹ And the fixed fee paid on invoices #5 - #7 exceeded not only the original \$168,000 per month, but also the increased amount for the larger scope agreed to in the change order: \$179,000 per month.⁸⁸⁰ So even if there was an appropriate legal basis to pay outstanding invoices according to the terms of the contract, or the terms of the contract as modified by the change order, the amount that was approved on December 24 was neither.

E. The July Settlement

On July 1, 2010, the District entered into a second settlement agreement with Banneker, providing for additional payments totaling \$550,000. Questions have been raised about whether this settlement was the result of improper favoritism toward Banneker, and whether it prematurely released potential claims against Banneker while the investigation was still ongoing. After the Council learned about the July 1 agreement, it took a number of actions intended to stop or postpone payment of the settlement amount. As a result, the payment has not been made, and Banneker has filed suit against the District seeking to compel payment.⁸⁸¹ This suit is pending, and we do not express an opinion on the issues before the Superior Court or any other legal issues, such as the extent of the releases included in the July settlement agreement. However, to answer the questions posed to us by the Committee, we have reviewed materials relating to the settlement negotiations, including settlement communications between the parties,

⁸⁷⁹ Ex. 301, Change Order No. 1 to Contract for Services (Dec. 9, 2009), §9.A.II.

⁸⁸⁰ See Ex. 2.

⁸⁸¹ *Banneker Ventures, LLC v. District of Columbia*, Case No. 2010 CA 006067 B, filed Aug. 11, 2010 in the Superior Court of the District of Columbia.

which were provided by Attorney General Peter Nickles with the consent of Banneker, and interviewed key participants.

As noted above, the December 24 settlement agreement addressed Banneker's invoices #5 through #8. Based on discussions at a meeting between the parties on December 21, Banneker understood that claims relating to the close-out of the contract were to be separately negotiated.⁸⁸² On December 15, 2009 (the same date as the December settlement agreement), the Council passed an act expressly disapproving the Banneker project management contract.⁸⁸³ The act went into effect when it was signed by the Mayor on January 4, 2010. Banneker nevertheless continued to pursue a further settlement for contract close-out amounts, and on January 5, 2010, submitted a settlement proposal to Attorney General Nickles.⁸⁸⁴ Banneker asserted that its contract, as amended on December 9, 2009, was still in force, and suggested that the correct course was for the District to terminate the contract for convenience and to pay Banneker an additional \$2,250,000 in fees under the contract, plus unspecified sums for consultant payments, reimbursable costs, and "Reasonable Fees Related to Shut Down." Banneker indicated that some of the "reasonable fees" would be in return for Banneker's assignment to OPEFM of Banneker's rights under the architects' contracts.

The District, however, took the position that the Council disapproval action rendered the project management contract void *ab initio*, which would make contract-based remedies

⁸⁸² Ex. 302, Letter from A. Scott Bolden to Peter J. Nickles (Jan. 5, 2010).

⁸⁸³ D.C. Act 18-258.

⁸⁸⁴ Ex. 302, at 2.

unavailable.⁸⁸⁵ Accordingly, on January 26, 2010, Banneker submitted a revised settlement proposal that purported to seek recovery in *quantum meruit*. Banneker's request totaled \$2,230,309.00. It included a demand for \$975,000 "to facilitate the assignment of the A/E Contracts," on the theory that Banneker – and not the District – owned the rights to the architects' designs for 9 of the parks, plus all designs created by Liberty Engineering & Design.⁸⁸⁶ Banneker demanded \$809,247 for shut down costs allegedly incurred by Banneker and Regan Associates for office costs, staff payroll, staff severance costs, legal fees and other expenses. And Banneker added a 25% lost profit amount of \$446,062. The next day, Banneker submitted invoice # 9, covering additional costs for services performed before work stopped as of November 30, 2010.⁸⁸⁷

The Attorney General responded on February 18, 2010, with a counter-offer of \$325,000. Mr. Nickles noted that the District rejected Banneker's claims under invoice #9, as well as Banneker's claims for lost profits and legal fees.⁸⁸⁸ While he maintained that the District already owned the intellectual property rights to the architects and engineers' designs, he indicated that "to the extent that your clients may fairly dispute that position, an amount has been factored into the counteroffer to reflect a value of assigning the contracts."⁸⁸⁹ The counteroffer also reflected

⁸⁸⁵ See Ex. 303, Letter from A. Scott Bolden to Peter Nickles (Jan. 26, 2010), at 1; Ex. 120, at 8.

⁸⁸⁶ Ex. 303, at Attachment A.

⁸⁸⁷ See Ex. 304, Letter from Peter Nickles to A. Scott Bolden (Feb. 18, 2010).

⁸⁸⁸ *Id.*

⁸⁸⁹ *Id.* at 2.

reductions to the direct costs claimed by Banneker and Regan “to account for expenses not reasonably recoverable in *quantum meruit*.”⁸⁹⁰

One week later, Banneker, through its counsel, sent cease and desist letters to seven of the firms that had provided architectural services on the DPR capital projects. Banneker asserted that under the language of the architects’ contracts, Banneker owned the project drawings and other “instruments of service” prepared by the architects.⁸⁹¹ Banneker stated that if the architects did not stop providing the District with access to project drawings, Banneker would file suit against them. In response to Banneker’s action, by letter dated February 26, the Attorney General demanded that Banneker withdraw the cease and desist letters, stating that failure to do so would end the settlement discussions.⁸⁹² The District also sought to address the concerns of the architects by agreeing to indemnify them against potential claims from Banneker. It entered indemnification agreements covering the work on 6 of the projects. This required the District to book the potential indemnification amounts (approximately \$4.15 million) against the project budgets.⁸⁹³

Banneker’s claim to ownership of the drawings was based on the terms of the contracts it executed with the architects, which provided that the “Owner” of the project would own all of the drawings and other documents prepared by the architect, but defined the term “Owner” to be

⁸⁹⁰ *Id.*

⁸⁹¹ *See, e.g.*, Ex. 305, Letter from A. Scott Bolden to Ronnie McGhee, R. McGhee and Associates (Feb. 25, 2010).

⁸⁹² Ex. 306, Letter from Peter Nickles to A. Scott Bolden (Feb. 26, 2010).

⁸⁹³ Interview with Peter J. Nickles; Ex. 120.

Banneker Ventures, and not the city.⁸⁹⁴ While it was in the District's interest to provide that the architects did not own the drawings, we do not believe that the District ever intended to make Banneker the owner of its consultants' work product.⁸⁹⁵ Without expressing an opinion as to the correct interpretation of the architects' contracts, we believe that if the design procurement process had been better managed by the District, Banneker would not have been permitted to include the language it subsequently relied on as establishing ownership.

Rather than responding to the Attorney General's February 26 letter, Banneker opened another front in its demand for payment. On March 11, 2010, Banneker submitted a "Request for Final Payment and Contracting Officer's Final Decision" to Larry Dwyer of DCHE. Banneker

⁸⁹⁴ See, e.g., Ex. 307, Banneker Contract with Bowie Gridley Architects, PLLC, § 1.5 (identifying Banneker as the "Owner") and § 1.3.2.1 ("Drawings, specifications and other documents, including those in electronic form, prepared by the Architect and the Architect's consultants are Instruments of Service for use solely with respect to this Project. The Owner shall be deemed the owner of the Instruments of Service and shall retain in perpetuity all common law, statutory and other reserved rights, including the copyright."). However, the contract also expressly acknowledged that Banneker was a contractor to DCHE, that Banneker was not the owner of the property or the project to be constructed, and that "DCHE and the District of Columbia are intended third party beneficiaries of this Agreement." § 1.1.4. The contract further expressly acknowledged that the money to be used to pay the architect would be coming from the D.C. government, and that Banneker had no obligation to pay the architect unless and until Banneker received payment from the District. § 1.3.9.5. Banneker's other contracts with architects have similar provisions.

⁸⁹⁵ There appears to be no valid reason for Banneker to have deemed itself to be the owner of the drawings, and Banneker's assumption of that role is inconsistent with the terms of its project management contract with DCHE. Banneker's contract states, "In the event that this Contract is terminated for any reason, then within ten (10) days after such termination, the Contractor shall make available to Enterprises [DCHE] all Work Product, including as-builts, original tracings, plans, maps, computerized programs, reports data and material which have been prepared as the result of this Contract directly by the Contractor's personnel or as to which the Contractor has the legal right to copy. The Contractor may keep copies for its records." Ex. 80, ¶ 19, at 12.

sought \$2,277,748.12,⁸⁹⁶ “representing the reasonable costs incurred by Banneker to facilitate contract close-out following the de facto termination for convenience of the Amended Contract by DCHE.”⁸⁹⁷ Banneker noted that the parties had been engaged in discussions seeking to resolve all issues remaining after the December 24 settlement, but “these discussions did not result in a resolution of this matter. For this reason, Banneker now files this Claim seeking a formal Contracting Officer’s Final Decision regarding Banneker’s Claim for compensation in accordance with applicable procurement rules, regulations and the Amended Contract.”⁸⁹⁸ Banneker itemized the amounts allegedly due as follows: (1) \$112,765.50 for unpaid portions of its fixed fee; (2) \$112,485.62 for additional amounts due for work done before November 30, 2009; (3) \$827,497 for reimbursable costs including staff severance, document copying and legal fees, plus \$250,000 for “reimbursable opportunity costs;” and (4) \$975,000 to compensate Banneker for its ownership rights in project drawings.

We are not aware of any action taken on Banneker’s claim by Dwyer or DCHE. Instead, according to the chronology provided by the Attorney General, a settlement meeting was held on the day after the claim was submitted (that is, March 12, 2010). After further negotiations, Banneker accepted the District’s offer of \$550,000 on March 31. But Banneker then claimed it was owed additional amounts over and above the \$550,000 sum, and made other demands as

⁸⁹⁶ The amount of the claim is stated differently on different pages of Banneker’s submission, but the total of the items included is \$2,277,748.12.

⁸⁹⁷ Ex. 308, Letter from Omar Karim, Banneker Ventures, to Larry Dwyer, DCHE (Mar. 11, 2010) at 1.

⁸⁹⁸ *Id.* at 4.

well.⁸⁹⁹ By letter dated April 26, 2010, the Attorney General rescinded the District’s settlement offer and advised Banneker to “take whatever steps you deem appropriate to pursue your claims.”⁹⁰⁰ Banneker responded by requesting that the parties continue to settle for \$550,000.⁹⁰¹ After several months of negotiations and exchanges of drafts, the settlement agreement was executed by Banneker and Regan Associates on June 28, by DCHE on June 30, and by DCHA and the Attorney General on July 1, 2010.⁹⁰²

The settlement agreement provides for the \$550,000 settlement amount to be paid in two payments: the first check, for \$264,863.21, was to be issued within 10 business days of execution of the agreement, and the second, for \$285,136.79, was to be issued after Banneker had paid and obtained lien releases from certain architects, engineers, consultants and subcontractors identified in Attachment A to the agreement.⁹⁰³ As part of the agreement, Banneker acknowledged that the District owned the drawings and other documents prepared by the architects and engineers for the projects, and covenanted not to sue the architects and engineers over intellectual property rights.⁹⁰⁴

The release given to Banneker and Regan provides as follows:

⁸⁹⁹ Ex. 309, Letter from Peter J. Nickles to Robert P. Trout (Jul. 12, 2010) with a chronology of the “Banneker Settlement” attached. The chronology shows that Banneker claimed additional amounts were owed Banneker on April 14 and April 23.

⁹⁰⁰ Ex. 310, Letter from Peter J. Nickles to Lawrence S. Sher (Apr. 26, 2010).

⁹⁰¹ Ex. 309, showing in the chronology that Banneker’s response was on April 28.

⁹⁰² Ex. 311, Settlement Agreement and Release (Jul. 1, 2010).

⁹⁰³ *Id.* at ¶ 1. Liberty Engineering & Design is listed on Attachment A as being owed \$11,862.93.

⁹⁰⁴ *Id.* at ¶ 3.

... the District hereby remises, releases and forever discharges Banneker and Regan, each of their successors and assigns, administrators, executors, and any other person claiming by, through, or under Banneker or Regan, of and from all agreements, actions, cases, causes of action, claims, compromises, controversies, costs, damages, debts, demands, disputes, expenses, judgments, liabilities, payments, promises, and suits of any nature whatsoever, including attorneys' fees, whether or not known, relating to, arising under, or in connection with Banneker's or Regan's provision, under the Contract, WITHOUT EXCEPTION, for project management services for capital projects to the District or from the District's administration of the Contract through the Effective Date; the intention hereof being to release Banneker and Regan completely, finally and absolutely from all liabilities, arising wholly or partially from Banneker's or Regan's provision, under the Contract, of project management services for capital projects and other services to the District or from the District's administration of the Contract.⁹⁰⁵

Peter Nickles described this settlement as one that was fair to the District, and that accomplished his objectives of relieving the city of the amounts it had to accrue for the indemnifications of the architects, and encouraging the architects to work with OPEFM to complete the projects.⁹⁰⁶ Various councilmembers, however, raised questions about the settlement as soon as it came to their attention, and the Council quickly passed emergency and temporary legislation intended to prevent payment of the settlement amount.

One of the Council's key concerns was whether it was appropriate to release claims against Banneker before this investigation was completed. The Attorney General disagrees that this is the result of the settlement agreement:

I have emphasized that in the past both in correspondence with the Council and Mr. Trout that the settlement agreement does not release Banneker or its individual officers from potential civil or criminal fraud if the appropriate authorities believe that such action is warranted. Indeed, counsel for Banneker agrees. *See* the attached October 21 letter from Lawrence S. Sher, Esq., in which he states his view "that paragraph 7 of the settlement agreement does not in itself

⁹⁰⁵ *Id.* at ¶ 7.

⁹⁰⁶ Interview with Peter J. Nickles.

preclude the authorities from seeking to prosecute the settling parties in the future for criminal or civil fraud.”⁹⁰⁷

As a result of the Council’s actions, however, the District has not yet issued checks for the settlement amounts. In October of 2010, Banneker filed suit to enforce the settlement agreement. As of March 1, 2011, the litigation had yet to be resolved. As noted above, we do not express a view on any of the matters at issue in the litigation or on the scope of the releases in the agreement. We do conclude, however, that the evidence of the conduct of the settlement negotiations does not support a claim that the settlement was improperly engineered in order to benefit Banneker, and that the circumstances surrounding the negotiation of its terms do not warrant further investigation.

⁹⁰⁷ Ex. 120, at 5 (footnote omitted).

RECOMMENDATIONS

The resolution appointing the Special Counsel directed him to conduct an investigation in order to 1) “determine if the circumstances surrounding the transfer of capital funds, the subsequent awarding of contracts, or the approval and expenditure of funds warrant further review of the United States Attorney for the District of Columbia or any other investigative or enforcement agency,” and 2) “make any recommendations that he may have for any necessary changes to District laws.”⁹⁰⁸ With respect to making those recommendations, the Special Counsel did not take on the task of drafting specific proposed legislation and regulations, or recommending particular policy choices, but rather, we reviewed what took place with an eye towards identifying systemic issues exposed during the investigation that the Council may wish to address.

A. Legislative Recommendations

1. It became clear during our investigation that the transfer of funds from DPR to other agencies was largely motivated by a broadly shared perception that the District’s procurement procedures were not well suited for large public construction projects, particularly when there was a public interest in getting stalled projects moving and completed on an expedited basis. As the administration cast about for the appropriate procurement agency, it looked at one point or another to OPEFM, DMPED, and DCHA/DCHE. What resulted was a multi-agency project involving the successive transfer of funds and the layering of different entities with management authority, blurring the lines of responsibility. In this instance, the

⁹⁰⁸ Ex. 5, Special Council Resolution.

dollars moved everywhere but the buck stopped nowhere. The result was substantial waste and the opportunity for improper practices to go unchecked.

DRES has been tasked since 2008 with handling construction procurement and project management for the District and for agencies without their own procurement authority or project management capacity, but DPR and the administration did not choose to use DRES for the DPR capital projects. We therefore recommend that the Council undertake a thorough analysis of construction contracting in the District, to examine issues including the following: (1) whether DRES's policies, procedures, budgets and staffing are appropriate for its role; (2) whether additional agencies should be given independent procurement authority; (3) whether agencies without procurement authority should be permitted to obtain construction services from agencies other than DRES, including independent agencies such as DCHA; (4) if so, whether the PPA should apply to procurements conducted by independent agencies on behalf of executive agencies; and (5) whether there are other changes to the District's construction procurement and project management policies that could increase the speed with which major projects are accomplished while maintaining appropriate budgetary controls and project oversight.

2. The investigation also revealed that while MOUs between agencies were not unusual or unlawful, and there had been prior MOUs transferring responsibility for construction projects to DCHA, the Walker-Jones, Deanwood, and DPR projects were of an entirely different order of magnitude. Much of the consternation that arose in the fall of 2009 was attributable to Council members' surprise and frustration that such large amounts of funds had been transferred from or to agencies under their supervision without their knowledge. To the extent that it is appropriate for one agency to reach out to another agency to obtain services, we recommend that

the Council should consider whether additional reporting or review should be required for MOUs involving more than a certain threshold amount, such as \$5 million dollars.

3. The revelations about the DPR capital projects prompted the issuance of a formal Opinion of the Attorney General on October 23, 2009, addressing the question of whether DCHA, an independent agency, was bound by the provision in the Home Rule Act calling for Council approval of contracts over \$1 million. DCHA has acknowledged that it is bound by that opinion, which by its terms addresses a situation when the contract involves the use of District funds. DCHA has not acknowledged that it is obliged to satisfy the Council approval requirement when non-District funds are being used. In the future DCHA might therefore enter into a contract involving non-District funds over \$1,000,000, yet fail to seek Council approval. Apart from whatever concern this might cause the Council once it learned of DCHA's actions, the contract itself would be at risk of being declared invalid if it were determined that DCHA was obliged to comply with the Council approval requirement even when non-District funds were being used. To avoid this possibility, the Council should clarify the obligation of all independent agencies, including DCHA, to satisfy the Council approval requirement regardless of whether District funds are being used. If the Council determines that a particular independent agency, or all of them, should be exempt from the Council approval requirement when the contract involves expenditure of non-District funds, it should take the necessary steps to establish the appropriate legislative exemption for such contracts or otherwise clarify the scope of the requirement.

4. The investigation also uncovered conduct that frustrated the intent behind the Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act. While the act by its terms governs prime contractors engaged directly by the District, and not

subcontractors retained by project managers or general contractors, the Council should consider whether to require city contractors to monitor and verify that subcontractors selected on the basis of their CBE status are in fact directing the appropriate percentage of the work and the dollars to CBE firms.

B. Referral to the United States Attorney

In response to the question posed in the resolution appointing the Special Counsel, it is our conclusion that certain of the circumstances surrounding the DPR capital projects warrant referral for further review by the United States Attorney for the District of Columbia. In particular, we believe that LEAD's response to the engineering RFQ, Banneker's award of the engineering contracts to LEAD, Banneker's selection of general contractors, and the financial relationships between Omar Karim, Sinclair Skinner, and their various business entities should be the subject of further inquiry. We also recommend that the Council refer for further inquiry the question of whether Karim and Skinner provided false testimony in the course of this investigation. The documents and testimony that we were able to obtain raised questions that could not be satisfactorily answered with the tools we had available. We express no opinion as to the likely outcome of any investigation.