GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

C&F Construction Company	)	CAB No. P-0676
Under Solicitation No. POKA-2002-B-0081-JBW	)	

For the Appellant: Robert Klimek, Esq., Klimek Kolodney & Casale PC. For the Government: Howard Schwartz, Esq., and Warren J. Nash, Esq., Assistants Corporation Counsel.

Opinion by Administrative Judge Matthew S. Watson with Chief Administrative Judge Jonathan D. Zischkau, concurring.

OPINION

(*Courtlink Filing ID 2347562*)

C&F Construction Company ("C&F") has protested against the refusal by the District to consider its bid on the above-mentioned solicitation based on a suspension and possible debarment determined by the Chief Procurement Officer ("CPO") dated June 27, 2003. (Agency Report ("AR") Ex. 3). C&F contends that the CPO's action is an unlawful extension of an expired voluntarily debarment that C&F agreed to with the United States Department of Transportation, or, in the alternative, is an unlawful extension of a *de facto* debarment by the District. The District contends that Federal and District debarment authority is totally independent, that the CPO's suspension and proposed debarment action taken June 27, 2003, was fully authorized and the contracting officer's refusal to consider C&F's bid was proper. The Board agrees with the District that the suspension was proper. Because the suspension was lawful, we see no error in the contracting officer's refusal to consider C&F's low bid. The Board therefore denies the protest. The Board notes, however, that although it does not agree with the protester that the CPO's action was an improper extension of a *de facto* debarment, the record does show a *de facto* suspension by the District from at least as early as November 28, 2000, that was confirmed by a letter dated December 18, 2002. (Reply to Agency Report, Ex. 5). In considering a debarment at this time, the CPO must consider the length of the *de facto* suspension, 27 DCMR §2213.4, as well as the length of the effective debarment by the U.S. Department of Transportation.

DISCUSSION

The Chief Procurement Officer is granted authority to suspend or debar a contractor from doing business with the District by the District's Procurement Practices Act, D.C. Code § 2-308.04, which is separate and independent of the authority of the Federal Highway Administration to debar a contractor from any federally funded contracts. 29 CFR, Subpart C. It is axiomatic that the CPO, when he is acting within the authority of District law, is not limited by determinations made by Federal officials, just as the CPO's action cannot limit the action of a Federal official.

Section 2-308.04 of the D. C. Code provides:

> (a)(3)(A) The CPO shall suspend a person or business from consideration for award of contracts or subcontracts for . . .
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> * * *
>
> (b)(1) Conviction for commission of a criminal offense incident to obtaining or attempting to obtain a public or private contract, or subcontract, or in the performance of the contract or subcontract;

It is undisputed that on December 7, 2001, the president of C&F and C&F entered pleas of guilty to one count of unlawful supplementation of the salary of a government employee in violation of 18 U.S.C. §§ 209(a), 216(a)(1) and payment of a gratuity in violation of 18 U.S.C. 201(c), respectively, arising out of performance of District of Columbia contracts. (Reply, 4). Based on the conviction, the CPO had discretion to suspend C&F as early as December 2001.

The CPO has not yet taken action to debar C&F and thus the propriety of a debarment is not before the Board. There appears to be support in the record that prior to the guilty plea there was a *de facto* suspension of the Protester by the District. A *de facto* suspension occurs where a firm is excluded from contracting because a contracting agency makes repeated determinations of nonresponsibility, or even a single determination of nonresponsibility as part of a long-term disqualification attempt, without following the procedures for suspension or debarment. *See Government Contract Advisory Services, Inc.*, 94-1 Comp. Gen. 181. Beginning in November 2000, the District refused to do business with C&F without a formal suspension proceeding. (Reply, Ex. 1). In December 2002, the Water and Sewer Authority formally notified C&F of the suspension. (Reply, Ex. 5). C&F has not received contracts from the District during the period of its federal suspension and voluntary debarment. Although debarments may be for a maximum of 3 years, it is clear that any action taken now by the CPO based on the 2001 conviction must recognize the suspension or debarment time previously imposed for the same conduct in determining the debarment period, if any. (27 DCMR § 2213.4). In determining C&F's current fitness as a contractor, the contracting officer must also consider C&F's agreement to continuing review of contract performance by an independent reviewer approved by the federal Department of Transportation. (Reply, Ex. 2, ¶ 2.3).

SO ORDERED.

August 28, 2003

/s/ *Matthew S. Watson*
MATTHEW S. WATSON
Administrative Judge

CONCURRING:

/s/ *Jonathan D. Zischkau*
JONATHAN D. ZISCHKAU
Chief Administrative Judge