

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD**

PROTEST OF:

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| ANNE ROBERTSON SELLIN |) | |
| |) | CAB No. P-238 |
| Under Formal Agreement No. J89-009 |) | |

For the Protestor: Katherine A. Meyer, Esquire, and Anne Spielberg, Esquire. For the Government: James B. McDaniel, Deputy Corporation Counsel, and Jocelyn N. Sands, Esquire, Consultant to Office of the Corporation Counsel.

Opinion by Administrative Judge Zoe Bush, with Administrative Judges David H. Marlin and William L. Davis concurring.

OPINION

Protestor Anne Robertson Sellin (Protestor, Ms. Sellin) has challenged the process used by the District of Columbia Department of Public Works (District) to enter into a contract for a historic survey of the McMillan Reservoir. Ms. Sellin asserts that because the contract entered into by the District and Engineering Science for the survey was not advertised and subjected to the competitive bidding process, the District is in violation of D.C. Code §§ 1-1183.3, 1-1183.4, and applicable regulations at 27 DCMR §§ 1300.1 - 1300.4. Protestor requests the Board to void the contract award and order the District to comply with the competitive bidding process as set forth in the referenced provisions of the D.C. Code. The instant protest was filed on May 16, 1990.

On August 14, 1990, the District filed a Motion to Dismiss the protest.^{1/} In its Motion to Dismiss the District explains that D.C. Formal Agreement No. J89-009 was procured as an architectural-engineering services contract and was exempted from

^{1/}On July 15, 1990, the District filed a Motion for Enlargement of Time, which motion was opposed by Protestor on June 21, 1990. By Order dated June 25, 1990, the Board extended the time within which the agency report could be filed to July 26, 1990. On August 14, 1990, the District filed a Motion to Accept Agency Motion to Dismiss Out of Time. On August 24, 1990, the Protestor filed its Opposition to Motion to Accept Agency Motion Out of Time. On September 28, 1990, Protestor filed its opposition to the District's Motion to Dismiss.

WHEREFORE, upon consideration of the District's Motion to Accept Agency Motion to Dismiss Out of Time, and it appearing good cause has been shown, said motion is GRANTED.

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pre-solicitation advertising pursuant to Title 27 DCMR § 1300.7.^{2/} According to the District, only individuals, firms, partnerships or corporations licensed by the District to practice architecture or engineering are eligible for award of such contracts by the District. The District utilizes the selection procedures set forth in 27 DCMR § 2620 et seq. for architect-engineering services.

With regard to Formal Agreement No. J89-009, the District explains that on November 14, 1988, it advertised for expressions of interest for open-end architect-engineer contracts for archaeological consultant services. Ten firms submitted qualification statements and Engineering Science, Inc., was selected by the District as most qualified. On April 18, 1989, the District and Engineering Science executed Formal Agreement No. J89-009. More than one year later, on April 24, 1990, Ms. Sellin inquired about advertisement of the project. On May 11, 1990, Ms. Sellin filed a protest of the award of the contract.

The District argues that the procurement procedures for architect-engineers provide for solicitations of "qualified persons," who subsequently are selected to negotiate particular contracts. Therefore, according to the District, in order to be an aggrieved person sufficient to protest the award of an architect-engineering contract, a person must (1) have actually submitted an expression of interest pursuant to the agency's advertisement, or (2) be eligible and likely to have submitted an expression of interest pursuant to the advertisement. The District further argues that Ms. Sellin (1) failed to actually submit an expression of interest pursuant to advertisement; and (2) does not allege that she is an architect or engineer and thus qualified as eligible to submit qualifications in response to the advertisement, or one who prospectively would have

^{2/}27 DCMR § 1300.7 provides:

The requirements for pre-solicitation advertising set forth in this section shall not apply to any of the following:

- (a) Sole source procurements under chapter 17 of this title;
- (b) Emergency procurements under chapter 17 of this title;
- (c) Small purchases under chapter 18 of this title; or
- (d) Procurement of architect-engineering services, medical and human care services, or real property appraisal services.

The Board notes that the advertising requirements for architect-engineering contracts set forth in DCMR are not without ambiguity. While 27 DCMR § 1300.7, quoted above, would exempt these contracts from Chapter 13 pre-solicitation advertising, 27 DCMR § 2620.1, requires that, "The contracting officer shall publicize all requirements for architect engineering services in accordance with chapter 13 of this title...." However, as further discussed, infra, the District has satisfied the advertising requirements of Chapter 13 with regard to Formal Agreement No. J89-009, in any event.

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submitted her qualifications. Finally, the District argues that the protest was not timely filed because the November 14, 1988 advertisement was constructive notice and Ms. Sellin should have known the basis for her protest at the time of publication.

In opposition to the District's Motion to Dismiss, Ms. Sellin argues that although the District may call the contract one for "architectural-engineering services," the services required under the contract are actually for historic research. Therefore, because the contract requires a historic survey of McMillan Park rather than architectural or engineering services, 27 DCMR § 1300.7 does not apply, according to the Protestor. Furthermore, because the contract does not require an architect-engineer, the fact that Ms. Sellin is not a professional architect or engineer is irrelevant, according to Protestor.

The Board does not agree. Both the Invitation for Expression of Interest for Open End A-E Contracts for Archaeological Consulting Services (Attachment A to Motion to Dismiss) and Formal Agreement No. J89-009 (Attachment C to Motion to Dismiss) reflect the fact that the District had determined that it required the services of an architect-engineer to perform the work for the project at issue. Furthermore, in light of the fact that the District properly complied with 27 DCMR §§ 2620 *et seq.*, the Board's review of this matter need go no further. It is not the function of the Board to second-guess the District's determination that the services of an architect-engineer were necessary or appropriate.

With regard to the District's claim that Protestor is not an aggrieved party, the District cites Protest of Purac Engineering, Inc., CAB No. P-157, 38 DCR 2974 (1989); Protest of Schwing America, Inc., CAB No. P-156, 38 DCR 2963 (1989); and Protest of Remco Business Systems, Inc., CAB No. P-131, 36 DCR 4016 (1988) for the proposition that a protestor who is not found to be an actual or prospective bidder lacks standing to file a protest with the Board. The Board agrees. Because Ms. Sellin is not a licensed architect or engineer, she would have been ineligible for award and so was not an interested or aggrieved party who could invoke the jurisdiction of the Board pursuant to the D.C. Procurement Practices Act of 1985 (PPA), D.C. Code §1-1189.3(1).

Protestor further argues that the advertisement did not constitute adequate public notice as required by the PPA, D.C. Code § 1-1183.3(c) because it did not appear in any trade publications. The Board notes that the PPA, D.C. Code § 1-1183(c), and 27 DCMR § 1300.4 require,

"The advertisement shall appear at least once in a newspaper of general circulation and any trade publications considered appropriate by the Director. . . ." (Emphasis added.)

The District submits that the advertisement was published in the Washington Post, Washington Times, Afro American, and El Pregonero. (District's letter of September 13,

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1990, filed pursuant to Board Order dated September 10, 1990.) In that the D.C. Code and DCMR leave within the discretion of the District which, if any, trade publications should be used to satisfy the notice requirements, the Board finds that the District's notice in this instance was adequate.

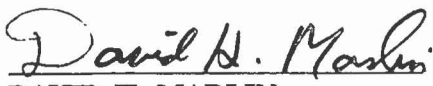
Finally, Ms. Sellin claims that her protest was timely filed because she first learned on May 2, 1990 that a contract for the survey had already been awarded, and her protest was filed on May 11, 1990. The Board's rules require that the protest shall be filed not later than ten days after the basis of the protest is known or should have been known, whichever is earlier. See, Rule 301.1, 36 DCR 2710 (1989). Because the advertisement was published in newspapers of general circulation on November 14, 1988, Ms. Sellin should have known the basis for her protest at that time because it was then clear that the invitation was for an architect-engineer contract for archaeological consultant services. Thus, given this constructive notice, the protest was not timely filed.

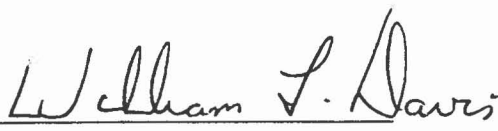
WHEREFORE, finding that (1) the solicitation was properly in accordance with 27 DCMR §§ 2620 et seq., (2) the Protestor lacks standing as an actual or a prospective bidder, and (3) the protest was not timely filed, the protest is hereby DISMISSED, with prejudice.

DATE: July 2, 1991


ZOE BUSH
Administrative Judge

CONCUR:


DAVID H. MARLIN
Administrative Judge


WILLIAM L. DAVIS
Chief Administrative Judge