

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

Fort Myer Construction Corporation)	
)	CAB No. P-0685
Under Solicitation No. POKA-2003-B-0048-JJ)	

For the Protester, Fort Myer Construction Corp.: Joe R. Caldwell, Jr., Esq., O. Kevin Vincent, Esq. and Robert J. Wagman, Esq., Baker Botts L.L.P. For the Intevenor, Capitol Paving of D.C.: Douglas Datt, Esq., Gavett and Datt, P.C. For the Government: Howard S. Schwartz, Esq. and Talia S. Cohen, Esq., Assistants Attorney General.

Opinion by Administrative Judge Matthew S. Watson with Chief Administrative Judge Jonathan D. Zischkau and Administrative Judge Warren J. Nash concurring.

OPINION ON RECONSIDERATION
(LexisNexis Filing ID 3704988)

Fort Myer Construction Corporation was the second low bidder on each of the two award groups of a procurement for road repair services. The Lane Construction Corporation was the low bidder on each award group. Fort Myer protested against award to Lane alleging that Lane's bid was nonresponsive due to a failure to include a notarized subcontracting plan as part of its bid. The Board found the requirement to submit a subcontracting plan was a matter of responsibility and not responsiveness and denied the protest. Fort Myer has moved for reconsideration, asserting that the District, by establishing a "set-aside -- as opposed to a subcontracting goal -- had the effect of creating an eligibility requirement," which is the equivalent of responsiveness. (Motion at 1). The District asserts that the requirement of a 50% "set-aside" of the contract value by the prime contractor for qualified subcontractors provided in the instant procurement is not the same type of "set-aside" as used in D.C. Code § 2-217 (2004) (Equal Opportunity For Local, Small, and Disadvantaged Business Enterprises) and implementing regulations, 27 DCMR § 801.4. (Opposition at 4-5). The Board agrees with the District and denies Fort Myer's motion for reconsideration.

DISCUSSION

This Board has consistently held that a bidder on a "set-aside" contract which is not qualified at the time of bid opening in the category required by the solicitation, is ineligible to bid on the solicitation. *See, e.g., Barcode Technologies, Inc.*, CAB No. P-0524, Feb. 11, 1998, 45 D.C. Reg. 8723 and *J&K Distributors, Inc. of Washington, D.C. and Urban Service Systems Corp.*, CAB No. P-0432 & P-0433, June 13, 1995, 42 D.C. Reg. 4986.

Fort Myer's allegation that the subject solicitation is for a set-aside contract is based on Section M.B. of the solicitation which provides:

Under the provisions of 27 DCMR § 801.2(b) . . . **fifty percent (50%)** of the total dollar value of this contract has been set-aside for performance through subcontracting with local business enterprises, disadvantaged business enterprises, or resident business

ownerships. Any prime contractor responding to this solicitation shall submit with its bid or proposal a notarized statement detailing its subcontracting plan (See Clause C-1), Subcontracting Plan and Clause 2C-2, Liquidated Damages). Once the plan is approved by the contracting officer, changes will only occur with the prior written approval of the contracting officer.

Although the term “set-aside” is used in the cited provision, it is used in a colloquial, not a technical, sense. “Set-aside” is used in a technical sense as a contract offered in a “sheltered market” as distinct from an “open market” solicitation. *Horton & Barber Prof. Serv., Inc.*, CAB No. P-0653, May 20, 2002, 50 D.C. Reg. 7421, 7422 n. 4. Any entity is eligible for award as a prime contractor of an open market contract. Only qualified entities are eligible to bid on properly set-aside contracts. In the instant matter, the so-called set-aside was made pursuant to 27 DCMR § 801.2(b). That provision provides:

The inclusion of clauses in open market solicitations that promote Local (LBE), Small (SBE) and Disadvantaged Business Enterprises' (DBE) participation in procurement, including clauses that:

- (1) Award a preference to offerors that include with their bids or proposals submitted in response to a solicitation a commitment to award particular subcontracts or a particular percentage of subcontracts to certified LBEs, SBEs or DBEs;
- (2) Establish particular goals for the award of subcontracts to certified LBEs, SBEs or DBEs; and
- (3) Designate particular subcontracts for award to certified LBEs or DBEs.

By its own terms, section 801.2(b) applies only to “open market solicitations.” Proof of sheltered market qualification, or in this matter, a sheltered market subcontracting plan, is not required as a qualification for bidding on an open market solicitation. *Horton & Barber*, 50 D.C. Reg. at 7422.

Protester’s Motion for Reconsideration is denied.

June 9, 2004

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

Concur:

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

/s/ Warren J. Nash
WARREN J. NASH
Administrative Judge