

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

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DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

FORT MYER CONSTRUCTION CORPORATION
2237 33rd Street, N. E.
Washington, D. C. 20018

CAB No. P-641

Under Emergency Solicitation for Engineering Services and
Construction Work for Relocation of the Department of
Public Works Brentwood Road Facility

RESPONSE OF THE DISTRICT OF COLUMBIA TO MOTION OF FORT MYER
CONSTRUCTION CORPORATION CHALLENGING THE CHIEF PROCUREMENT
OFFICER'S DETERMINATION TO PROCEED WITH PERFORMANCE
NOTWITHSTANDING THIS PROTEST AND MOTION CHALLENGING THE
EMERGENCY SOLICITATION FOR ENGINEERING SERVICES AND
CONSTRUCTION WORK FOR RELOCATION OF THE DEPARTMENT
OF PUBLIC WORKS BRENTWOOD ROAD FACILITY

The District of Columbia pursuant to Rule 304.4 and D. C. Code § 1-1189(c)(2)
responds to the Motion of Fort Myer Construction Corporation (Fort Myer) challenging
the Director's determination to proceed with performance notwithstanding this protest
and responds to the Motion challenging the emergency solicitation for engineering
services and construction work for the relocation of the Department of Public Works
Brentwood Road Facility, states as follows.

STATEMENT OF THE CASE

Fort Myer contends that (1) the determination of the Chief Procurement Officer
(CPO) and the Director of the Office of Contracting and Procurement did not comply
with D. C. Code § 1-1189(c)(2), and (2) an emergency did not exist to justify the
issuance of the emergency solicitation for engineering services and construction work
for relocation of the Department of Public Works Brentwood Road facility.

The District responds that (1) the determination of the Chief Procurement Officer complied with D. C. Code § 1-1189(c)(2) and Rule 304.3, and was supported by substantial evidence, and (2) since Fort Myer has amended its protest regarding the emergency solicitation, the District will respond by a Motion to Dismiss and/ or Agency Report pursuant to Rules 305 and 306.

STATEMENT OF FACTS

The Department of Public Works (DPW) has an urgent requirement to relocate all of its operations at the Brentwood Road site to a five acre site across Brentwood Road on W Street, N.E. (W St. site) adjacent to the BET building. (Response Ex. 1, Green Affidavit). The operations that DPW must relocate are the Operations Center for all residential and bulk trash collection and disposal and the salt storage facility.

DPW's residential and bulk trash operations are managed from the Brentwood Road site. Moving of the operations involves more than parking of trucks and the setting up of office trailers. (Response Ex. 1, Green Affidavit). DPW currently has approximately fifty-three 16 and 20 cubic yard packers valued at approximately \$6,625,000.00. These trucks occupy approximately 3,500 square yards of space (.72 acres). There are also eighty-nine employee parking spaces and two office trailers that house a total of 131 employees.

Scattering of office trailers and the trucks throughout the District would result in DPW being unable to coordinate and dispatch its residential and bulk trash operations, resulting in DPW being unable to satisfactorily perform trash removal services. Failure to collect trash from the residences will seriously jeopardize the health and safety of the

District's residents, and the continuation of necessary government functions. (Response Ex. 1, Green Affidavit and Response Ex. 2, Hotaling Affidavit)

The District has agreed to sell the Brentwood Road site to purchasers that will construct and develop retail and commercial uses on the property. (Response Ex. 1, Green Affidavit). The District has transferred possession of the Brentwood Road site to the purchasers. On May 21, 2001, the purchasers will disconnect all utility services at the Brentwood Road site in order to start construction.

On April 19, 2001, Office of Property Management (OPM) obtained the W St. site for use by DPW. (Response Ex. 1, Green Affidavit).

On May 8, 2001, OPM, on behalf of the Agency Chief Contracting Officer for the Department Public Works (ACCO), issued an emergency solicitation requesting bids from four potential contractors to perform engineering services and construction work to prepare the W St. site for occupation and use by DPW. (Response Ex. 1, Green Affidavit, Response Ex. 3, Emergency Solicitation). The four potential contractors were: Louis Berger Group, Inc. (Berger), Delon Hampton & Associates (Delon), Dynamic Corporation (Dynamic), and 3D/International (3D). (Response Ex. 1, Green Affidavit). DPW intended that the work be completed by May 15, 2001 so that DPW could move from the Brentwood Road site to the W St. site. The emergency solicitation provided that bids were due by 4:00 p.m. on May 10, 2001.

On May 9, 2001, the ACCO changed the submission time on May 10, 2001 from 4:00 p.m. to 10:00 a.m. (Response Ex. 1, Green Affidavit). On May 9, 2001, OPM notified Berger, Delon, Dynamic and 3D by telephone of the change in submission time

to 10:00 a.m. since the emergency solicitation had been sent to these four potential contractors.

On or before 10:00 a.m. on May 10, 2001, Dynamic, Berger, Delon and 3D submitted bids to the ACCO. The bids were:

<u>Contractor</u>	<u>Bid</u>
Dynamic	\$1,133,930
Berger	\$3,908,053
Delon	\$1,102,300 (approximately)
3D	unable to submit bid

In its bid, Delon stated that the cost of engineering services for the site was \$102,300. (Response Ex. 1, Green Affidavit) In addition, Delon stated that

The cost of construction quoted by Ft. Myer Construction Company is approximately \$1,000,000.00. A detailed cost proposal will be provided by Ft. Myer Construction by 4:00 p.m. today.

On May 10, 2001 after 10:00 a.m., the ACCO evaluated the bids. (Response Ex. 1, Green Affidavit). The ACCO determined that Dynamic and Berger had submitted responsive and responsible bids. The ACCO rejected Delon's bid since the bid did not contain detailed construction costs. The ACCO determined that an award should be made to Dynamic since Dynamic was the lowest price responsive and responsible contractor.

On May 10, 2001 on or about noon, the ACCO notified Dynamic and the other bidders present at his office that an award would be made to Dynamic. (Response Ex. 1, Green Affidavit).

On May 10, 2001, at approximately 3:40 p.m., Fort Myer submitted a supplement to Delon's bid. (Response Ex. 1, Green Affidavit). Fort Myer submitted a price of \$1,588,940 for the construction work.

On May 11, 2001, the ACCO awarded Contract No. 01-0133-AA-2-0-KA to Dynamic in the amount of \$272,190 for the work required to be completed by May 15, 2001. (Response Ex. 1, Green Affidavit). The District intends to award a contract to Dynamic for the balance of the work set forth in the solicitation. The ACCO issued Dynamic a notice to proceed.

OPM only sent the emergency solicitation to Dynamic, Berger, Delon and 3D. (Response Ex. 1, Green Affidavit). The ACCO and OPM were not aware that Ft. Myer had a copy of the emergency solicitation until they saw Delon's bid.

The ACCO and OPM have no knowledge or record of any communication from Fort Myer on the morning of May 10, 2001 with respect to the 10:00 a.m. submission time for bids. (Response Ex. 1, Green Affidavit).

On May 15, 2001, the CPO executed a determination lifting the automatic stay. (Response Exhibit. 4, D&F Lifting Stay). The CPO determined that there were urgent and compelling circumstances that significantly affect the interest of the District that will not permit waiting for the decision of the Board. (Response Exhibit 4, D&F Lifting Stay). In addition, the CPO determined that it was in the best interest of the District to proceed with performance of the contract pursuant to D. C. Code § 1-1189(c)(2). (Response Exhibit 4, D&F Lifting Stay).

ARGUMENT

1. THE DETERMINATION BY THE CHIEF PROCUREMENT OFFICER TO PROCEED

WITH PERFORMANCE UNDER THE CONTRACT AFTER FILING OF THIS
PROTEST WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND LAWFUL.

Ft. Myer contends that the determination of the Chief Procurement Officer did not comply with D. C. Code § 1-1189(c)(2). (Motion p. 3-6). The District responds that the determination of the Chief Procurement Officer complied with D. C. Code § 1-1189(c)(2) and was supported by substantial evidence.

D.C. Code Section 1-1189.8(c)(2) provides that:

Performance under a protested procurement may proceed, or award may be made, while a protest is pending only if the CPO [Chief Procurement Officer] makes a written determination, supported by substantial evidence, that urgent and compelling circumstances that significantly affect the interests of the District will not permit waiting for the decision of the Board on the protest. (Emphasis added)

D.C. Code Section 1-1189.8(c)(2) applies the same standard to the determination of the CPO as is applied to the decision of an administrative official or agency, which is whether the decision was supported by substantial evidence. Gardner v. Dept. of Employment Services, 736 A. 2d 1012, 1015 (D. C. 1999), James v. Dist. of Co. Dept. of Emp. Servs. 632 A.2d 395, 397 (D.C. 1993). Substantial evidence means more than a mere scintilla and such evidence that a reasonable mind might accept as adequate to support a conclusion. Olson v. DC Dept. of Employment Services, 736 A.2d 1031, 1037 (D. C. 1999); Ferreira v. Dist. of Co. Dept. of Emp. Servs. 667 A.2d 310, 312 (D.C. 1995). The court will affirm the decision of an administrative official or agency as long as the decision was supported by substantial evidence, even if there is evidence in the record to support contrary findings. Hutchinson v. Dist. of Co. Office of Employee Appeals 710 A.2d 227, 230 (D.C. 1998); Ferreira v. Dist. of Co. Dept. of

Emp. Servs. 667 A.2d 310, 312 (D.C. 1995). Factual findings supported by substantial evidence are binding on the reviewing court, although the court may have reached a different result based on an independent review of the record. Robinson v. Smith, 683 A.2d 481, 487 (D.C. 1996). The court will only set aside an agency decision if the court finds that the decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Fair Care Foundation v. Dept. of Ins., 716 A. 2d 987, 994 (D. C. 1998).

The Board in applying D.C. Code Section 1-1189.8(c)(2) has sustained determinations by the CPO when the determinations were supported by substantial evidence, and neither unreasonable nor arbitrary. B & B Security Consultants, Inc., CAB No. P-630 pp. 6-7 (Dec. 22, 2000); Rodgers Brothers Custodial Services, Inc., CAB No. P-565 p. 2 (November 18, 1998); B&B Security Consultants, Inc., CAB Nos. P-583 and P-585, 46 DCR 8626, 8628 (May 24, 1999). In B&B Security Consultants, Inc., CAB P-630, the Board held:

We sustain the Interim Director's determination because it is neither unreasonable nor arbitrary. We find that substantial evidence supports the Interim Director's determination that there are urgent and compelling circumstances that significantly affect the interest of the District, which will not permit waiting for the decision of the Board.

The CPO's determination was supported by substantial evidence that failure to relocate the residential and bulk refuse collection and disposal operations of DPW from the Brentwood Road site to the W. St. site endangered the health and safety of the residents of the District who depend upon these services to maintain a clean and hazardous free environment. The determination was supported by substantial evidence

that the failure to remove refuse collection operations from the Brentwood Road site by the deadline date imposed by the purchasers of the Brentwood Road site will impede the economic development of that site and cause the District to breach its agreement.

2. **SINCE FORT MYER HAS AMENDED ITS PROTEST, THE DISTRICT WILL RESPOND BY A MOTION TO DISMISS AND/OR AGENCY REPORT PURSUANT TO RULES 305 AND 306.**

Fort Myer contends that the emergency solicitation requesting bids for engineering and construction work for relocation of the Department of Public Works from the Brentwood Road site to the W St. site violated the 27 DCMR Chapter 17. (Motion pp. 2, 5-9). The District responds that this contention constitutes an amendment to the protest, which the District will respond to by a Motion to Dismiss and/or Agency Report pursuant to Rules 305 and 306.

Fort Myer has amended its protest of the emergency solicitation by inserting its motion challenging the determination of the CPO to lift the automatic stay under Rule 304.4, contentions challenging the existence of an emergency. Fort Myer has exceeded the scope of Rule 304.4 by amending its protest through the motion. Since, Fort Myer has amended its protest, the District must respond to the amended protest under Rules 305 and 306. Rules 305 and 306 provide that the District has twenty days to respond to a protest after receiving notice of the protest from the Board. The District received notice of the original protest on May 15, 2001. The District will file a Motion to Dismiss and/or Agency Report in response to the amended protest on or before June 4, 2001.

3. **THE BOARD DOES NOT HAVE JURISDICTION BECAUSE FORT MYER IS NOT AGGRIEVED PERSON AND IS NOT AN INTERESTED PARTY.**

In order for the Board to have jurisdiction over a protest, a protestor must be an actual or prospective bidder or a contractor who is aggrieved in connection with the solicitation or award. D.C. Code Sections 1-1189.3 and 1-1189.8(a). Pursuant to 27 DCMR Section 100.2 (a), an aggrieved person is an actual or prospective bidder or offeror whose direct economic interest would be affected by the award or who is aggrieved in connection with the solicitation. An interested party is an aggrieved person. 27 DCMR Section 100.2(k).

A protestor must be aggrieved person or an interested party. Wayne Mid-Atlantic, CAB No. P-227, 41 DCR 3594, 3595, (August 12, 1993); Planning & Development International, Inc. CAB No. P-336, 41 DCR 3491, 3492 (June 22, 1993). Only an aggrieved person or an interested party has standing. Group Insurance Administration, Inc., CAB No. P-354, 40 DCR 4933, 4936-4937 (February 2, 1993). A protestor, in order to be an aggrieved person or an interested party, must show that the protestor "has, or will, suffer an economic injury in fact by virtue of award of a contract". Tyrone F. General, CAB No. P-357, 40 DCR 4996, 4999 (February 19, 1993); MTI-Recyc, A Joint Venture, CAB No. P-287, 40 DCR 4554, 4560-4561 (October 1, 1992). The "protestor must have a direct economic interest in the procurement". Wayne Mid-Atlantic, *supra* at 3595; MTI-Recyc, *supra* at 4561.

A protestor who is not an actual or prospective bidder is not an aggrieved person or an interested party because the protestor will not suffer any direct economic injury. Tyrone F. General, *supra* at 4999 (protestor not participating in procurement or showing capacity to participate is not an interested party or aggrieved person); Wayne Mid-

Atlantic, supra at 3595 (nonresponsive bidder is not aggrieved person or interested party); Planning and Development, supra at 3492-3493 (protestor submitting a late proposal is not an interested party).

The Board has consistently held that subcontractors, manufacturers and suppliers are not interested parties or aggrieved persons and do not have standing to protest. Virginia E. Durbin, CAB No. P-591, 46 DCR 8693, 8695 (September 13, 1999), Schwing America, Inc., CAB No. P-156, 38 DCR 2963, 2967 (September 11, 1989); Purac Engineering, Inc., CAB No. P-157, 38 DCR 2974, 2978 (September 25, 1989); Remco Business Systems, Inc., CAB No. P-131, 36 DCR 4016, 4017 (Dec. 30, 1988).

Fort Myer is subcontractor to a bidder, Delon. As a subcontractor, Fort Myer is not an aggrieved person nor an interested party.

Even if the Board were to consider Fort Myer a bidder, Fort Myer's protest must be dismissed since its bid was late and incomplete. A nonresponsive bidder is not an aggrieved person or an interested party. Wayne Mid-Atlantic, supra at 3595. A protestor submitting a late proposal is not an interested party. Planning and Development, supra at 3492-3493. Since Fort Myer submitted its bid late, Fort Myer is not an aggrieved person nor an interested party.

CONCLUSION

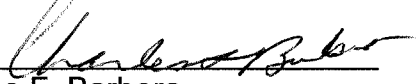
The District requests that the Board deny Fort Myer's motion contending that the determination of the Director of the Office of Contracting and Procurement (Chief Procurement Officer) did not comply with D. C. Code § 1-1189(c)(2) since the determination was supported by substantial evidence.

The District requests that the Board dismiss the amended protest based on lack of jurisdiction or defer decision on the amended protest until after the District responds pursuant to Rules 305 and 306.

The District reserves the right to file a response to a response to any reply filed by Fort Myer within fifteen days after receipt.

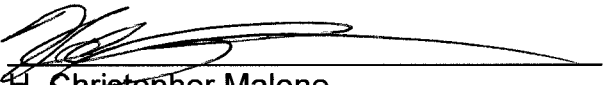
Respectfully submitted,

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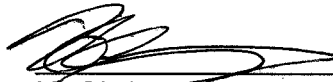

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the response and exhibits were sent on this 18th day of May 2001, to the following:



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BY FACSIMILE AND
MAILED, POSTAGE PREPAID

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