

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:)	
)	
FORT MYER CONSTRUCTION CORP.)	CAB No. P-641
)	
)	
Contract No.: 01-0133-AA-2-0-KA)	
Relocation of the Department of Public Works Brentwood Operations)	

ORDER GRANTING MOTION TO DISMISS

Fort Myer Construction Corp. (“Fort Myer” or “protester”) protests award of an emergency contract for paving and construction by the Department of Public Works (“DPW”). The Board finds that the protester has standing in this matter to protest. It is not necessary to substantively consider the protest, however, because the issues are moot. The protest is dismissed as moot.

FACTS

For a number of years, DPW has stored salt and parked, managed and dispatched trash collection vehicles on a site to the north of Brentwood Road, N.E. More than 131 employees reported to the site, which included more than 50 large truck parking spaces, nearly 90 automobile parking spaces, two office trailers and a salt dome. The District, through the Deputy Mayor for Economic Development, determined to sell the site for retail development. The amended agreement with the purchasers provided that the site would be vacant so as to allow construction by the purchasers to begin on May 21, 2001. (Affidavit of Kevin Green dated May 18, 2001).

On May 8, 2001, DPW solicited bids on an emergency basis from four engineering contractors to relocate the salt storage operation, perform asphalt work to provide temporary trailer and salt pads and install utility hookups, as well as permanent construction of a new salt dome, parking areas and finishing of the site. The closing time for bids was initially May 10, 2001, at 4 p.m. On May 9, 2001, the contracting officer orally notified the four solicited vendors that the closing time was moved earlier by 6 hours to 10 a.m. Bids from three of the solicited vendors and a “no bid” from the fourth were received by 10 a.m. Although Fort Myer was not one of the four vendors solicited, it learned of the original solicitation. Fort Myer was not notified and did not learn of the amended opening time. Fort Myer submitted a bid by the original 4 p.m. deadline. *Id.*

The bids received at 10 a.m. were as follows:

Dynamic Corporation	\$1,133,930
Louis Berger Group, Inc.	3,908,053
Delon, Hampton and Associates	1,102,300 (approximately)

The bid received from protester in the amount of \$1,588,990 was determined to be late and not considered. *Id.*

On May 10, 2001, the District accepted part of the Dynamic Corporation (“Dynamic”) offer and awarded a contract in the amount of \$272,190 for performance of only the temporary work offered in the bid. *Id.*

Notice to Proceed under the contract was given on the same day as the award was made. On May 14, 2001, Fort Myer filed a protest against award of the contract to Dynamic. Pursuant to D.C. Code §1-1189.8(c)(1), work under a contract awarded within 11 days prior to the filing of protest is required to be immediately suspended pending decision by the Board of the protest or a determination by the Chief Procurement Officer (CPO) that “urgent and compelling circumstances that significantly affect interests of the District will not permit waiting for a decision of the Board.” *Id.* §1-1189.8(c)(2). The contacting officer issued a Cease and Desist Order to Dynamic on May 15, 2001. Later on May 15, 2001, the CPO determined that “urgent and compelling circumstances” existed justifying proceeding with performance of the contract. (Determination and Findings dated May 15, 2001). By letter dated May 16, 2001, Dynamic was ordered to return to work. On May 18, 2001, Protester timely challenged the determination of urgent and compelling circumstances made by the CPO. On May 24, 2001, the Board denied the challenge and permitted the work to proceed. The initial contract for temporary work was 90% completed prior to June 28, 2000. (Supplement to Motion to Dismiss).

On June 4, 2001, the District moved to dismiss the protest alleging that Ft. Myer was not an interested party and thus lacked standing to protest, (Motion, 2-4), and further alleging that the matters protested were not timely raised. *Id.* at 4-7.

Dynamic’s bid price for the remainder of the work not included in the partial contract was \$861,740. On June 4, 2001, the Contracting Officer received a letter from Dynamic advising him that a site visit first conducted May 30, 2001, revealed that approximately 9,000 tons of fill was required and that there were many trees to be cleared which were not included in the original bid.¹ Dynamic advised that it was not willing to complete the rest of the work unless the bid price was increased by \$410,461. The Contracting Officer rejected Dynamic’s request for an increase in price and stated that “the price bid by Dynamic . . . should have included all tasks necessary to perform the work.” Findings, June 6, 2001. Nevertheless, based on Dynamic’s refusal to perform under the terms of its bid, the Contracting Officer determined to cancel the solicitation for the remaining work. Determination and Finding for Partial Cancellation of Emergency Solicitation. Upon cancellation of the unawarded portion of the solicitation, the District further moved to dismiss the protest as moot.

On June 25, 2001, protester responded to the District’s motions to dismiss and amended its protest. The protest, as amended, alleges that an emergency solicitation was not justified, that even if justified, sufficient competition was not solicited, that advance notice was given to favored

¹ The record does not explain how the Dynamic could not have visited the site until May 30, 2001, when it had begun performance on the site on May 11, 2001, some 19 days earlier.

bidders, that the oral modifications of the solicitation were improper, that Dynamic was not responsible and that Dynamic's bid was not responsive..

OPINION

Motion to Dismiss for Lack of Standing

The District asserts that the protester lacks standing to protest, and thus the Board lacks jurisdiction to decide the protest, because the protester's bid was late and could not be considered for award, citing *Planning and Development International, Inc.*, CAB No. P-336, June 22, 1993, 41 D.C. Reg. 3491, 3492. Although the general rule of law is accurately stated, it begs the question in this matter. Protester does not assert that a late bidder has standing to protest an award. Rather, protester asserts that its bid was not late because the alleged *oral* amendment of the solicitation was not effective to change the time of bid opening, *see* 27 D.C.M.R. §1615, and protester's bid arrived before the latest time set in writing. Protester is challenging the validity of the change in bid opening time. If protester were to prevail, its bid was not late and it had proper standing to raise both that issue and, if timely made, other issues. "Such merits rulings on issues inherent in a jurisdictional analysis are justified because courts, at the very least, 'always have jurisdiction to determine their jurisdiction.'" *Timus v. District of Columbia Dept. of Human Rights*, 633 A.2d 751, 757 (1993). Notwithstanding the District's determination that the Fort Myer bid was late, Fort Myer has standing, and the Board thus has jurisdiction, to determine whether its bid was, in fact, late. The District's Motion to Dismiss for lack of standing is denied.

Motion to Dismiss on Ground of Mootness

We need not determine whether the protest was timely or consider the substantive issues raised in the protest since the matter is now moot. A case is moot when the issues are academic and there is no possible remedy which the Board could order were it to grant the protest. *C & E Services, Inc.*, CAB No. P-360, March 12, 1993, 40 D.C. Reg. 5020, 5022. The initial portion of the solicitation has been performed, eliminating any further need for the services solicited. The remainder of the solicitation has been cancelled.² All issues regarding the protest are thus moot. *R & R Lighting Co., Inc.*, CAB No. P-332, March 15, 1993, 40 D.C. Reg. 5038, 5039.

² The needs have been resolicited in a separate solicitation to which protester submitted a timely, but unsuccessful, bid. A letter contract was awarded to Louis Berger Group, Inc., the highest bidder in the initial solicitation. Additional District Submission, July 24, 2001.

The protester has suggested that the Board recognize an exception to the doctrine of mootness as has been recognized by courts. In *In re W.L.*, 603 A.2d 839 (D.C. 1991), the Court of Appeals stated that, notwithstanding the general mootness rules, a case may be heard when issues are "capable of repetition, yet evading review" if "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again," 603 A.2d. At 841, (citing *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)), or, even if similar future action would not affect the complaining party, if the matter "involved overarching issues important to the resolution of an entire class of future [actions]." *McClain v. U.S.*, 601 A.2d 80, 82 (D.C. 1992). Such "decisions require the exercise of careful discretion in deciding whether to reach the merits of a seemingly moot controversy." *Atchison v. District of Columbia*, 585 A.2d 150, 153 (D.C. 1991). The District argues that the Board's jurisdiction is statutorily limited to "present, live controversies." We need not reach this issue because, even if we recognize the exception, it does not apply in this matter.

We find the facts of this matter are unique and thus not likely to be repeated with the protester. The issues raised by the protest, while serious, are also not of overarching importance to an entire class of future actions.³ We therefore decline to find that the merits of this matter should be considered notwithstanding their mootness. The District's Motion to Dismiss for Mootness is granted and the protest is DISMISSED.

SO ORDERED

Dated: August 16, 2001

/s/

MATTHEW S. WATSON
Administrative Judge

CONCURRING:

/s/

³ This is not to say that the issues raised by the protester should not be of concern. The major portion of this solicitation was paving. The problems encountered with this procurement may well have been the result of the agency's initial determination to limit competition by soliciting only engineering firms, excluding from the solicitation list experienced paving contractors, such as the protester. In addition, the fact that completion of the work could be delayed to allow cancellation and resolicitation of the majority of the work may indicate that the original emergency procurement was, as alleged by Fort Myer, overbroad. And lastly, the finding by the contracting officer after the partial award that Dynamic did not intend to perform all of the remaining work within its bid price, confirms protester's allegations that Dynamic was nonresponsive. Although the definitized contract resulting from the resolicitation is not in this record, the not to exceed amount of the letter contract awarded to The Louis Berger Group, Inc., indicates that Louis Berger, in order to win the second contract, apparently reduced its bid price substantially after knowing the bid prices of other bidders on the cancelled solicitation. The availability of such competitive information raises issues of procurement integrity. A more orderly procurement process with greater competition might have provided better quality work, more quickly, and at a lower cost.

JONATHAN D. ZISCHKAU
Administrative Judge

/s/
PHYLLIS W. JACKSON
Administrative Judge