

(Cite as: 1995 WL 517644 (E.D.Pa.))

Motions, Pleadings and Filings

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United States District Court, E.D. Pennsylvania.
**PHILADELPHIA RECYCLING & TRANSFER
STATION, INC.**

v.

CITY OF PHILADELPHIA, et al.
Civ. A. No. 95-4597.

Aug. 29, 1995.

[John H. Widman](#), McAleese, Mc Goldrick & Susanin, P.C.,
King of Prussia, PA, for Philadelphia Recycling & Transfer
Station, Inc.

[Christopher I. Mc Cabe](#), City of Philadelphia Law Dept.
Philadelphia, PA, [Michael F. Eichert](#), Deputy City Sol.,
Philadelphia, PA, for City of Philadelphia, Louis
Applebaum, James Roundtree.

[Jan Z. Krasnowiecki](#), Pepper, Hamilton & Scheetz,
Philadelphia, PA, for Browning Ferris Inc.

MEMORANDUM[BARTLE](#), District Judge.

*1 This is an action by a bidder, Philadelphia Recycling &
Transfer Station, Inc. ("PRTS"), challenging the
constitutionality of the minority set aside program of the
City of Philadelphia (the "City") in connection with its
award of four contracts to purchase and process the city's
residential recyclable trash. [\[FN1\]](#)

Plaintiff contends it was the high bidder but lost the contract
because it did not meet the minority set aside participation
goals required by Chapter 17-500 of the Philadelphia Code.
The court entered a temporary restraining order prohibiting
the City from implementing on August 1, 1995 the award of
the contracts based on such a program. [See generally
Contractors Ass'n v. City of Philadelphia](#), 6 F.3d 990 (3d
Cir.1993); [Contractors Ass'n v. City of Philadelphia](#), No.
89-2737, 1995 WL 11900, 1995 U.S. Dist. LEXIS 228
(E.D.Pa. January 11, 1995). The parties agreed to the
continuation of the temporary restraining order until

September 25, 1995. The court has scheduled a trial on the
merits for September 21, 1995.

Browning Ferris Inc. ("BFI"), which alleges it won the
recycling contracts to begin on August 1, 1995, now seeks
to intervene, pursuant to [Rule 24 of the Federal Rules of
Civil Procedure](#).

BFI seeks first to intervene as of right under [Rule 24\(a\)](#).
[Rule 24\(a\)](#) states, in relevant part,

upon timely application, anyone shall be permitted to
intervene in an action ... (2) when the applicant claims an
interest relating to the property or transaction which is the
subject of the action and the applicant is so situated that
the disposition of the action may as a practical matter
impair or impede the applicant's ability to protect that
interest, unless the applicant's interest is adequately
represented by existing parties.

To satisfy [Rule 24\(a\)\(2\)](#), an applicant for intervention must
show: "(1) the application for intervention is timely; (2) the
applicant has a sufficient interest in the litigation; (3) the
interest may be affected or impaired, as a practical matter,
by the disposition of the litigation; and (4) the interest is not
adequately represented by an existing party in the
litigation." [Harris v. Reeves](#), 946 F.2d 214, 219 (3d
Cir.1991), cert. denied sub nom. [Abraham v. Harris](#), 503
U.S. 952 (1992). An applicant for intervention must meet
each requirement before being entitled to intervene. *Id.*

BFI filed its motion to intervene within two weeks of the
initiation of this action, and eleven days after BFI stated it
learned of the litigation. The motion also comes before the
defendant has filed an answer or motion in the case. Based
on these factors, the court finds BFI's motion to intervene is
timely made.

To be entitled to intervene as of right, a party must have a
"direct and legally protectable interest in the proceedings."
[Liberty Mut. Ins. Co. v. Pacific Indem. Co.](#), 76 F.R.D. 656,
658-59 (W.D.Pa.1977) (citing [Hobson v. Hansen](#), 44 F.R.D.
18, 24 (D.D.C.1968)); see also 3B Moore's Federal Practice
§ 24.07, at 24-55 (1995). The alleged interest must be direct
and not remote or contingent. [Harris v. Pernsley](#), 820 F.2d
592, 596-97 (3d Cir.), cert. denied, 484 U.S. 947 (1987).

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*2 The City awarded BFI four contracts, for which the total dollar amount exceeds \$2 million. In addition, according to an affidavit submitted with its motion to dissolve the temporary restraining order, BFI spent a total of \$38,034.12 in the intervening time between being awarded the contracts and the time of PRTS' current challenge. BFI therefore has a direct and substantial property interest in this litigation, which rises to a legally protectable interest.

[Rule 24](#) requires the court to determine "as a practical matter" whether BFI's interests will be impaired by the outcome of the litigation between PRTS and the City. If the court holds that Chapter 17-500 of the Philadelphia Code is unconstitutional, this decision will directly impair BFI's contract rights. BFI cannot be assured of winning the contracts again in a subsequent bidding process and should be permitted to defend its interest in the present litigation. As a practical matter, it has a direct interest in what happens here.

The court finds BFI is not adequately represented by the existing parties in this litigation. An applicant for intervention may establish that existing parties will not adequately represent its interests in the outcome of the litigation in two ways:

The applicant may demonstrate that its interests, though similar to those of an existing party, are nevertheless sufficiently different that the representative cannot give the applicant's interest proper attention.... Alternatively, the applicant may establish ... that the representative has not been diligent in prosecuting the litigation.

[Hoots v. Pennsylvania](#), 672 F.2d 1133, 1135 (3d Cir.1982) (citations omitted). There is a presumption of adequate representation when, as in this case, a challenge to official policies and practices is being defended by a governmental agency. [United States v. Philadelphia](#), 798 F.2d 81, 90 (3d Cir.1986).

BFI makes no allegation that the City will not pursue the defense of the bidding ordinance vigorously and effectively. Rather, BFI argues that its interests and that of the City are adverse and divergent. While BFI may choose to align itself with the City and defend its contracts by defending the constitutionality of the ordinance, this is not BFI's only option. The City may also reach some accommodation with

plaintiff or take some other position that may adversely affect BFI. Nor are BFI's interests aligned with the plaintiff, who pursues the same contract initially awarded to BFI. Since neither existing party will adequately protect BFI's contracts in the pursuit of this litigation, BFI will be permitted to intervene under [Rule 24\(a\)](#).

In the alternative, BFI seeks permissive intervention under [Rule 24\(b\)](#), which states in relevant part, "upon timely application anyone may be permitted to intervene in an action ... (2) when an applicant's claim or defense and the main action have a question of law or fact in common." [Fed.R.Civ.P. 24\(b\)](#). As determined above, BFI's motion is timely. BFI's claim, relating to the validity of its contracts with the City, clearly involves a common question of both law and fact.

*3 The additional touchstone for granting intervention is "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." [Brody v. Spang](#), 957 F.2d 1108, 1115; see generally, [7C Wright and Miller, Federal Practice and Procedure, § 1913, at 379 \(1986\)](#). The court finds BFI's intervention would not delay the proceedings nor prejudice either existing party.

As discussed above, BFI meets the requirements for intervention as of right under [Rule 24\(a\)\(2\)](#). However, even if [Rule 24\(a\)\(2\)](#) is inapplicable, BFI meets the requirement for permissive intervention under [Rule 24\(b\)](#).

[Rule 24](#) also places certain procedural requirements on the movant which must be met before the motion for intervention is properly granted. The rule states that the motion to intervene "shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." [Fed.R.Civ.P. 24\(c\)](#).

In opposition to BFI's motion to intervene, PRTS argues that BFI did not comply with the requirements of [Rule 24\(c\)](#) because BFI's motion to intervene was not accompanied by a pleading. Judicial interpretation of this rule has been liberal. Courts have held that the proper approach to the rule is to disregard non-prejudicial defects. [Spring Constr. Co. v. Harris](#), 614 F.2d 374, 377 (4th Cir.1980); see [7C Wright](#)

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[and Miller, supra, § 1914.](#)

Liberal construction of the rule is especially appropriate when the policy behind [Rule 24\(c\)](#) of providing notice to the existing parties of the basis and nature of the intervenor's claim has been satisfied. In this case, BFI filed a motion to intervene, served on both parties, which sets forth the facts, their position, and the desired relief. Concurrently, BFI filed and served a motion to dissolve the temporary restraining order in this case. These motions, even without an attached pleading, provided adequate notice to the parties and sufficiently set forth the nature of BFI's position and its interest in the litigation. Moreover, failure to file an accompanying pleading can be rectified when, as here, the court requires a supplemental pleading to be filed within a short period of time. [WJA Realty, Ltd. Partnership v. Nelson, 708 F.Supp. 1268, 1272 \(S.D.Fla.1989\).](#)

The court finds BFI's failure to file a pleading accompanying its motion to intervene was a non-prejudicial and non-fatal defect. However, the court will grant the motion on the condition that BFI promptly files a pleading which states either a claim or a defense, thereby aligning itself as a plaintiff or defendant for purposes of trial.

ORDER

AND NOW, this 29th day of August, 1995, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that motion of Browning-Ferris, Inc. ("BFI") to intervene is GRANTED, subject to the condition that on or before September 6, 1995, BFI file and serve a pleading, as required by [Rule 24\(c\) of the Federal Rules of Civil Procedure](#), setting forth the claim or defense for which intervention is sought.

[FN1.](#) The contracts are identified as bid numbers # S6-WE8510, # S6- WE8520, # S6-WE8530, and # S6-WE8540.

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- [2:95CV04597](#) (Docket) (Jul. 25, 1995)

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