

PL 44

13067



DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-194789

DATE: March 10, 1980

MATTER OF: Bradford National Corporation

DLG 04054

DIGEST:

[Protest Against Contract TERMINATION]

1. GAO will not consider protest of decision to terminate contract for convenience of Government based on alleged improprieties unrelated to award process of terminated contract.
2. Protester alleging bad faith in agency decision to effect procurement under section 8(a) of the Small Business Act has not met its very heavy burden of meeting judicially established standard of "well-nigh irrefragable proof" where record contains sworn statements of agency official and other agency explanations supporting agency's position that it did not act in bad faith.

Bradford National Corporation (BNC) protests the termination for convenience of its contract No. EY-77-C-08-1515 by the Department of Energy (DOE) and the award of any contract to OAO Corporation (OAO) to complete the remaining work. BNC was awarded the contract on a sole-source basis effective July 1, 1977 for the performance of financial/technical analyses and loan accounting/tracking services related to DOE's electric and hybrid vehicle (EHV) loan guaranty program. The services were to be provided through September 30, 1978, with an option for three additional years. DOE terminated the contract on April 16, 1979 during the first option year.

ACCO 0912
DLG 04030

BNC argues that its contract was illegally terminated by DOE for the sole purpose of having the remaining work completed by former BNC employees who resigned as a group in January 1979 and went to work for OAO. As BNC concedes, our Office does not generally review terminations for convenience as this is a matter of contract administration

~~008886~~ 111744

and is within the responsibility of the procurement activity. E. Walters & Company, Inc., et al., B-180381, May 3, 1974, 74-1 CPD 226. BNC argues, however, that this case falls within an exception to this rule because it alleges that the termination for convenience resulted from bad faith or from a clear abuse of discretion.

Pursuant to the decision of the Court of Claims in National Factors, Inc., et al. v. United States, 492 F.2d 98 (Ct. Cl. 1974), that "termination of a contract for the convenience of the Government is valid only in the absence of bad faith or a clear abuse of discretion," we have stated that we would consider cases where allegations of bad faith are raised because a "bad faith" termination constitutes a breach of contract and entitles the contractor to breach of contract damages instead of the termination settlement remedy provided by the contract. See, e.g., Kaufman DeDell Printing, Inc.--Reconsideration, B-188054, October 26, 1977, 77-2 CPD 321; Velda Farms, Division of the Southland Corporation, B-192307, October 3, 1978, 78-2 CPD 254. BNC, while strenuously objecting to the termination action, has not requested breach of contract damages, but rather requests that the terminated contract be reinstated and that no award be made to OAO. Under these circumstances, we do not find the matter appropriate for our consideration. See Jets Services, Inc., B-190584, November 22, 1977, 77-2 CPD 394.

The protester argues in the alternative that our Office should consider this matter under the rationale in Safemasters Company, Inc., 58 Comp. Gen. 225 (1979), 79-1 CPD 38, where we indicated that we would review a termination if it was based on the agency's determination that the contract award was improper. Safemasters is not applicable in the present case, however, because the termination was not based on any impropriety in the initial award process of the terminated contract, but rather on an alleged "bad faith" decision by DOE to terminate BNC's contract and "follow" BNC's former employees for the completion of the work. Consequently, the Safemasters approach cannot be relied on by the protester here.

In regard to the proposed award of a contract to OAO, DOE states in its report that it intends to award

the contract pursuant to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1976). That section authorizes the Small Business Administration (SBA) to enter into a contract with any Government procuring agency, and the contracting officer of such agency is authorized "in his discretion" to let the contract to the SBA under such terms and conditions as may be agreed upon by the SBA and the procuring activity. Initially, we point out that we do not review decisions to effect procurements under the 8(a) program, and do not consider protests of 8(a) awards, absent a showing of fraud or such wilful disregard of the facts as to necessarily imply bad faith by Government officials. Maintenance, Incorporated, B-193237, November 30, 1978, 78-2 CPD 379.

BNC, in its original protest, prior to being informed of DOE's present intent to award the contract pursuant to section 8(a), alleged that DOE improperly intended to award a sole-source contract to OAO. BNC protested any sole-source award to OAO as primarily motivated by "mere preference" for the former BNC "team", unsupported by any urgency, and not based on any lack of other qualified contractors.

After receipt of the agency's report, BNC states that it was "shocked" to read about the proposed 8(a) award and regards it as a "blatant" attempt to circumvent GAO review of improper agency action. BNC states that the agency is attempting in bad faith to use section 8(a) as a cloak to shield its preference for the old BNC team from GAO review. BNC reiterates that DOE had decided to follow the old team anywhere and that it is a mere happenstance that the old team joined an 8(a) firm. Since DOE's alleged preference for OAO therefore had nothing to do with the policy of favoring businesses owned by socially and economically disadvantaged individuals, BNC requests that we disregard the 8(a) aspects of this matter and treat this solely as a sole-source decision subject to close scrutiny.

We cannot agree that we can now ignore the 8(a) aspects of the proposed award in order to rule on whatever justification there is for a sole-source award. Even if we assume that DOE's interest in OAO is based on "mere preference" for the former BNC "team" and is not motivated by the policies underlying the 8(a) program, the fact is that DOE

now proposes to award a contract pursuant to the laws and regulations governing the 8(a) program to a certified 8(a) firm. While BNC vigorously maintains that the proposed 8(a) award is motivated by DOE's desire to make award to OAO and to prevent our Office from reviewing that award, the protester does not argue that OAO is not otherwise a bona fide firm eligible for an 8(a) award under applicable SBA regulations.

Award to an eligible socially and economically disadvantaged firm under SBA's 8(a) program is independent of the competitive procurement statutes; generally competition is not required since the program's purpose is to assist small business concerns owned and controlled by socially and economically disadvantaged persons to achieve a competitive position in the market place. See 13 C.F.R. Part 124 (1979). We do not believe that our review of the proposed 8(a) award to OAO should be subject to a different standard because of the current composition of its staff, i.e., partially including former BNC employees. Thus, our initial review must be limited to consideration of whether the decision to effect an 8(a) award involves fraud or bad faith, and not whether a sole-source award is otherwise justified. (The protester's allegations concerning DOE's alleged improper motives, of course, are relevant to the issue of whether DOE's decision to effect the procurement under the 8(a) program was tainted by fraud or such wilful disregard of the facts as to necessarily imply bad faith.)

BNC has not alleged fraud on the part of agency procuring officials. Concerning BNC's allegation of bad faith, the Court of Claims has held that in order to support a finding of bad faith, the record must show "well-nigh irrefragable proof" that the agency had a malicious and specific intent to injure the party alleging bad faith. Kalvar Corporation, Inc. v. United States, 543 F.2d 1298, 1301 (Ct. Cl. 1976). As stated by the court, "any analysis of a question of Government bad faith must begin with the presumption that public officials act 'conscientiously in the discharge of their duties,'" and the presumption of good faith dealing must be refuted by that "irrefragable proof." "Irrefragable" is defined as follows:

"Impossible to deny or refute." Webster's New Collegiate Dictionary of the English Language (1977).

The protester has advanced numerous factual allegations concerning DOE's actions over a period of many months as "evidence" of DOE's "bad faith" in terminating its contract and proposing to award the 8(a) contract to OAO, the current employer of the "old team". On the other hand, the agency has provided some explanations for its actions which, on their face, appear to be reasonable. The following examples are illustrative:

1. A recommendation for termination of BNC's contract for the convenience of the Government was prepared by the Director, Property Management Division, acting as a representative (COR) of the contracting officer, and which was subsequently approved and adopted by the contracting officer. BNC argues that "DOE terminated [its] contract for the single and improper purpose of giving the work under the contract to OAO." The COR, however, has submitted an affidavit flatly stating that he "would not have considered termination of the contract if BNC had brought in qualified personnel to manage the program" after the departure of the previous personnel.

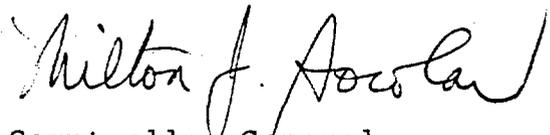
2. A meeting was held between representatives of BNC and DOE after the departure of the employees and before termination of BNC's contract. BNC alleges that DOE attempted to intentionally "discredit" its proposed replacement personnel during this meeting as a "justification for a predetermined decision to reject" them. The COR, however, who arranged the meeting, states that he "had no ulterior motive to discredit the interviewees, nor had [he] made any decision with respect to continued performance by BNC at the time of the interview." He further states that after the meeting he informed BNC representatives of his "concern and disappointment" that the proposed replacement personnel were "totally lacking in qualifications."

3. A BNC employee, by personal letter, informed DOE of a possible departure of current BNC employees. This possible "exodus" of employees was not known to

BNC at the time. BNC characterizes DOE's failure to inform BNC of this departure as the first link in a "chain of bad faith." DOE, on the other hand, in its report to our Office, states that "internal difficulties between a contractor and its employees are for resolution by the contractor and not by the agency, unless or until contract performance is endangered or suffers [and] it would have been improper for DOE to act in any way as an intermediary between disgruntled [BNC] employees and their management."

While there are other allegations of "bad faith" by DOE personnel, including some which are not specifically rebutted by DOE, we are unable to conclude on this record that the evidence irrefragably establishes that the allegations of bad faith are valid. Certainly, in light of the sworn statements of the COR, who recommended termination of BNC's contract to the contracting officer for the convenience of the Government, we cannot say that BNC has met its very heavy burden. Nor can we say that the record contains no support for the agency's position. Consequently, we find no bad faith in the decision to award a contract here pursuant to the 8(a) program.

Accordingly, the protest is dismissed in part and denied in part.



For The Comptroller General
of the United States