

PL-11
Mr. Siegel 13521

DECISION



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

[Protest of IFB Cancellation and Resolicitation]

FILE: B-195044, B-195510 DATE: April 21, 1980

MATTER OF: Arlandria Construction Co., *DLG02037*
Inc.

DIGEST:

1. GAO will not consider propriety of IFB cancellation after bid opening and thus whether issuance of resolicitation was proper, since cancellation was not timely protested under Bid Protest Procedures.
2. Bad faith on part of contracting officials is not shown in absence of irrefutable proof of malicious and specific intent to injure protester.

Arlandria Construction Co., Inc. (Arlandria) requests that we reconsider our decision in Arlandria Construction Co., Inc., B-195044, July 5, 1979, 79-2 CPD 10, in which we dismissed the firm's protest against the Department of the Army's decision to set aside a procurement for waterproofing services at Fort Myer, Virginia under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), as amended by Pub. L. No. 95-507, October 24, 1978, 92 Stat. 1757. Arlandria also protests the Army's ultimate award of a contract for the services under invitation for bids (IFB) No. DAHC30-79-B-0050, issued after the negotiations between the Army and the Small Business Administration (SBA) for the section 8(a) contract proved unsuccessful. *AGC00000*

We affirm our July 5 decision, and we deny the protest.

Request for Reconsideration

The Army initially issued IFB No. DAHC30-78-B-0108 for the waterproofing requirement in late 1978.

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Arlandria's low bid of \$623,000 (the only other one submitted was from A.A. Beiro Construction Co. (Beiro) in the amount of \$688,000) was considered unreasonable in price relative to the Government estimate of \$306,495 which the record shows was prepared for the contracting activity by an architect-engineer firm. The solicitation therefore was canceled pursuant to Defense Acquisition Regulation (DAR) § 2-404.1(b)(vi)(1976 ed.). IFB No. DAHC30-79-B-0010 was then issued with an increased Government estimate of \$473,633, but was canceled under the same regulation when the only bid submitted, \$619,000 by Arlandria, was still deemed too high. Arlandria's bid of \$622,000 was the only one under the third solicitation for the effort, IFB No. DAHC30-79-B-0015, which also was canceled under DAR §2-404.1(b)(vi) (the Government estimate had not changed).

Following the third cancellation, the contracting officer attempted to let a contract for the requirement to the SBA under the section 8(a) program. At that point Arlandria protested. The basis for our dismissal of the matter was that the decision to set aside a procurement under section 8(a) is a matter for the contracting agency and the SBA, which we would not review unless the protester could show fraud on the part of Government officials or such willful disregard of the facts as to necessarily imply bad faith. In our view, no such showing was made.

In its request for reconsideration, Arlandria in effect argues that the basis for protest actually was the cancellation of the third invitation after Arlandria's bid had been exposed, rather than the initiation of the section 8(a) set-aside.

The protest nonetheless properly was dismissed. Arlandria was advised by letter from the Army dated February 27, 1979, that the IFB was canceled, but did not file the protest in our Office until May 31. Section 20.2(b)(2) of our Bid Protest Procedures, 4 C.F.R. part 20 (1979) (Procedures), requires that protests be filed not later than 10 working days after the basis for protest is known. Since it is apparent that the protest against

the cancellation was not filed within the prescribed period, it was untimely under our Procedures and thus not for consideration on the merits in any event. JRT&T Associates, B-197061, December 31, 1979, 80-1 CPD 4.

Arlandria also suggests that the protest raised an issue significant to procurement practices and procedures, in which case the merits could be considered under section 20.2(c) of our Procedures. However, to maintain the integrity of our timeliness rules, the significant issue exception is exercised sparingly, and thus it essentially contemplates only an issue which involves a procurement principle of widespread interest or which affects a broad class of procurements. Loud Engineering and Manufacturing, Inc., B-195189, December 27, 1979, 79-2 CPD 439. We do not view Arlandria's protest as having raised a significant issue under section 20.2(c).

The Protest

Arlandria filed the instant protest shortly before the four bids under IFB No. DAHC30-79-B-0050 were opened. The firm contended that the cancellations after Arlandria's bids were exposed created a situation in which bids were now being solicited in an "auction" atmosphere, to Arlandria's prejudice. Arlandria requested that the third IFB be reinstated and award made to Arlandria at its bid increased for "price escalation between the period of the canceled IFB and the date the contract is negotiated."

Subsequent to the filing, the bids were opened. The low bid was submitted by Beiro in the amount of \$800,000. Arlandria's bid of \$914,500 was the third lowest. In view of the bid prices and the procurement's history, the contracting activity reviewed its cost estimate, which by then was \$571,890, and for reasons discussed below was revised to \$808,041. A contract for the requirement therefore was awarded to the low bidder.

Arlandria subsequently supplemented its protest to suggest that the facts now demonstrated that the firm's bids under the earlier invitations in fact were reasonable, but the contracting activity simply kept re-competing the requirement to deny Arlandria the contract. The protester thus argues that the final revision of the estimate to almost precisely the amount of Beiro's bid was a bad faith exercise to justify an award to that bidder.

In our view, the assertion that an auction atmosphere existed in the competition is based on the cancellation of the third IFB on February 27, 1979, in concert with the prior cancellations, not the issuance of the IFB under protest. At that time Arlandria was aware of the amount of the then-current Government estimate and had the opportunity to protest that action, but chose not to do so. Instead, by letter dated March 6, 1979, it advised the Army that it was its intention to submit a value engineering change proposal (VECP) for the project under a companion contract, and requested the agency to "delay negotiations with other contractors." The VECP was submitted on March 20 and rejected on April 27. The protest over the 8(a) set-aside discussed above followed on May 30, 1979. Since Arlandria failed to file a timely protest against the cancellation, the firm should not now be allowed to circumvent our Procedures merely by characterizing its present protest as being against the issuance of the last invitation. In any event, we point out that an auction atmosphere is not created by cancellation and resolicitation after bid opening where the cancellation is in accordance with the governing regulations. See Stacor Corporation; Isles Industries, Inc., 57 Comp. Gen. 234, 239 (1978), 78-1 CPD 68. This portion of the protest is therefore dismissed as untimely.

Thus, our review is limited to whether the revision of the estimate to \$808,041 after bid opening was done in bad faith to justify an award to a preferred contractor. To that end, we have examined the estimate and its "history" as presented by the Army.

As stated above, the first estimate of \$306,495 actually was not prepared by the Government; the Army states that the contracting activity "lacked the in-house capacity to do all of its own design and estimating work." The record shows that after bid opening under the first invitation the contracting activity itself reviewed the estimate (neither the original estimator nor funds to secure a new one were available), and determined that although certain requirements had not been considered by the estimator, Arlandria's bid of \$623,000 still was too high.

The record further shows that the revision of the estimate to \$473,633 for IFB No. DAHC30-79-B-0010 was based on the above-noted review, the addition of certain work to the requirement, and cost experience regarding similar work at Fort Myer. Arlandria's bid of \$619,000 was deemed unreasonable, as was the firm's bid of \$622,000 under the third IFB.

The contracting officer states:

"As a result of the limited response to three solicitations, and the consistently high bid prices, this agency became convinced that something was wrong with the Government estimate and with the specifications and drawings. This position was confirmed as a result of preliminary discussions under 8(a) procedures which produced allegations about ambiguous and unclear specifications and drawings.* * * the Engineers were directed to review and revise the specifications, drawings, cost estimate, and job performance time."

The contracting officer states that, as a result:

"There were physical changes and alterations in the number of drawings, in the markings and notes on the drawings, and in the wording of the Scope of Work statement. These changes

were first used in formal advertising under DAHC30-79-B-0050. While the design of the project was not changed, the method of communicating that design was changed.* * *

Thus, the estimate was revised to \$571,890 for IFB No. DAHC30-79-B-0050.

However, bid opening under this final invitation indicated that even another review of the estimate was warranted -- Beiro's low bid was \$800,000, and Arlandria bid over \$900,000. That review disclosed additional costs occasioned by the now "clarified" specifications which still had not been factored into the Government's estimate. Moreover, the Army engineer states:

"* * * the following factors indicated that the estimate should be revised:

- "a. Experience gained during the prosecution of the waterproofing of * * * [other buildings at Fort Myer.] Work on this contract indicates an extensive number of manhours required in accomplishing the sitework, demolition and earth work (excavation and backfill). Due to the proximity of the earth work to the buildings and other structures, the work has progressed slower than expected.
- "b. Equipment cost escalation during the period since the basic estimate units were calculated.
- "c. General economic inflation and escalation peculiar to the construction trades.
- "d. Varied methods in accomplishing the specified work * * * i.e., method of excavation * * *; utilization * * * of subcontractors for similar work."

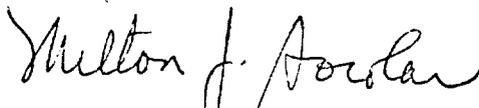
On those bases, the estimate ultimately was increased to an amount that justified the award of the contract to Beiro.

We first point out that given the inexact nature of Government estimates a post-bid opening estimate review to some degree is to be expected where the unreasonableness of the low bid as compared to the estimate is in doubt. See e.g., OKC Dredging, Inc., B-189507, January 18, 1978, 78-1 CPD 44; W.G. Construction Corporation, B-188837, August 9, 1977, 77-2 CPD 100. However, we agree with Arlandria to the extent that proper procurement planning and administration dictates that it not take the number of reviews and cancellations after bid exposure as were involved here to arrive at an "accurate" estimate.

Nevertheless, to support a finding of bad faith the record must show, in the words of the Court of Claims, "well-nigh irrefragable [irrefutable] 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); see Bradford National Corporation, B-194789, March 10, 1980, 80-1 CPD _____. We do not believe that the record as set out above supports that conclusion here. Rather, in our view it reflects at worst varying degrees of inexperience, inexperience, and perhaps inefficiency, and a lack of estimating resources and funds, with the revision of the estimate to \$808,041 being a final concerted attempt to finally fulfill a Fort Myer requirement.

Accordingly, and while it is unfortunate that Arlandria's earlier bids were exposed without award, we cannot conclude that the award to Beiro was made in bad faith. Nevertheless, we are bringing this procurement to the attention of the Secretary of the Army.

The protest is denied.



Acting Comptroller General
of the United States