

DECISION



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

FILE: B-195044; B-195510 DATE: July 9, 1980

MATTER OF: Arlandria Construction Co., Inc.--
Reconsideration

DIGEST:

[Protest Alleging Army's Actions Constituted Bad Faith]

Although protester alleges that agency's numerous revisions of its estimates for waterproofing buildings were so arbitrary and grossly erroneous as to constitute bad faith, protester has not met judicially established standard requiring "well-nigh irrefragable proof" of malicious and specific intent to injure protester. Consequently, prior decision holding that bad faith has not been shown is affirmed.

Arlandria Construction Co., Inc., requests that we reconsider our decision Arlandria Construction Co., Inc., B-195044, B-195510, April 21, 1980, 80-1 CPD 276. In that decision, we affirmed our earlier decision Arlandria Construction Co., Inc., B-195044, July 5, 1979, 79-2 CPD 10, dismissing Arlandria's protest of the Army's decision to procure under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), as amended, and denying its protest of an award of a contract to a competitor under invitation for bids (IFB) No. DAHC 30-79-B-0050, issued after negotiations for the section 8(a) contract proved unsuccessful. Arlandria disagrees with our conclusion that the Army's actions were not shown to have been the result of bad faith.

The procurement involved in this case is for waterproofing services at Fort Myer, Virginia. The Army issued an IFB for these services three times. Arlandria was the low bidder each time. However, the Army canceled each IFB on the basis that the bids submitted were unreasonably high compared to the Government estimate. The Army then attempted to negotiate a section 8(a) contract.

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When that attempt was unsuccessful, the Army issued a fourth IFB, under which Arlandria's competitor submitted the low bid. After bid opening, the Army revised its estimate upward, found the low bid to be reasonable, and awarded the contract.

Arlandria contends that the Army's various revisions of its original estimate of \$306,495 to an ultimate figure of \$808,041 have never been justified and that this indicates "grossly erroneous" earlier estimates which constitute bad faith.

The only issue considered on the merits in our decision was whether the revision of the Government estimate, after the fourth bid opening, was made in bad faith to justify an award to a preferred contractor. We concluded that the Army's process of arriving at a cost estimate which was revised upward after each IFB was canceled reflected, at worst, varying degrees of inexpertness, inexperience, and perhaps inefficiency, and a lack of estimating resources, but that record did not show "well-nigh irrefutable proof" that the Army had the malicious and specific intent to injure Arlandria, which is required to support a finding of bad faith. See Kalvar Corporation, Inc. v. United States, 543 F. 2d 1298 (Ct. Cl. 1976).

Arlandria disagrees with our conclusion, citing Levering & Garrigues Co. v. United States, 71 Ct. Cl. 739 (1931), for the proposition that the Army's actions were "so arbitrary and grossly erroneous as to constitute bad faith." This case, however, is clearly inapposite. Levering cannot be fairly read to equate bad faith with a high degree of negligence on the part of contracting officials. Levering merely involved the scope of review to be applied by the Court of Claims in reviewing contract appeals board decisions. It did not deal with the actions of the contracting officer.

The Kalvar case, on the other hand, is directly on point. The question there, as here, was whether the actions of the contracting officials were made in bad faith. The Court of Claims stated that actions of contracting officials are presumed to be discharged

in good faith and that bad faith must be equated with a specific intent to injure.

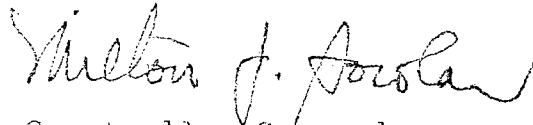
The conclusion that the agency's actions here reflect possible poor procurement practice clearly does not suffice to meet the high standard of proof required to show bad faith.

Arlandria further cites several decisions of our Office which suggest that the Army should have carefully reviewed its estimate when the first set of bids was rejected as unreasonably high. See, e.g., General Elevator Company, Inc., B-190605, June 12, 1978, 78-1 CPD 426. While this is certainly true, faulty estimating itself does not constitute bad faith.

Arlandria also complains that issuance of the fourth IFB was inconsistent with the advice it received from the Army that the requirements would not be readvertised, but instead would be negotiated. At the time the Army informed Arlandria that the requirement would not be readvertised, however, it was attempting to have the procurement set aside as a negotiated procurement under section 8(a) of the Small Business Act. If it had been successful in this effort, there, of course, would have been no need to readvertise the requirement. Only after the 8(a) negotiation failed to culminate in a contract was the fourth IFB issued. Obviously, the Army's statement of intent can not preclude the agency from subsequently issuing an IFB for the required work when its good faith negotiations failed to result in a contract, since that would leave the Army in the untenable position of never being able to procure the work other than by negotiation. In any event, this is an allegation that should have been raised prior to bid opening. See 4 C.F.R. § 20.2(b)(1) (1980).

Lastly, while the protester has now taken the position that the final revised estimate was unjustifiably increased, we also note that Arlandria's final bid exceeded that estimate by more than \$100,000. In view of this and the absence of any errors cited by Arlandria in the estimate, we cannot conclude the estimate was improper.

Since Arlandria has not demonstrated any errors of fact or law in our earlier decision, that decision is affirmed.

A handwritten signature in cursive script, reading "Milton J. Fowler".

For the Comptroller General
of the United States