

DECISION

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

31727

FILE: B-218587 **DATE:** July 22, 1985
MATTER OF: Security Fence Company

DIGEST:

1. A contracting officer's determination concerning price reasonableness is a matter of administrative discretion which GAO will not question unless the determination is clearly unreasonable or there is a showing of possible bad faith or fraud.
2. To prove bad faith on the part of an agency, a protester must present virtually irrefutable proof that agency officials acted with a specific and malicious intent to injure the protester. Inference and suspicion alone will not support a finding of bad faith.
3. A firm's reliance on agency action that precludes it from competing for a contract does not constitute a reason to cancel a solicitation and recompute the requirement, as long as there is no showing that the contracting agency deliberately attempted to exclude the firm and the agency obtained adequate competition and reasonable prices.

Security Fence Company protests the failure of the General Services Administration (GSA) to award it a contract under request for proposals (RFP) No. WPFNS-85-004, a small business set-aside for the furnishing and installation of a fence at the Bureau of the Census building in Suitland, Maryland. Security contends that it was entitled to the award of the contract as the low offeror under the RFP, that the RFP was canceled improperly and without notice to it, and that it never received notice of the resolicitation so that it was prevented from competing under the second RFP.

We deny the protest.

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The closing date for the receipt of proposals was December 3, 1984. GSA received four proposals, including Security's. The low offeror was determined to be a large business and was rejected. The second low offeror failed to acknowledge an amendment and the contracting officer was unable to contact the firm. According to GSA, then it attempted to negotiate lower prices with Security, the third low offeror, and with the remaining offeror. GSA reports that Security declined to lower its price and that the fourth low offeror also could not be contacted. The contracting officer therefore canceled the solicitation because she determined that the prices received were unreasonable.

The agency states that a synopsis of the second RFP was published in the Commerce Business Daily (CBD) but that Security did not respond to it. A solicitation package was sent to all firms responding to the CBD notice. The agency received six proposals under the second RFP.

Security alleges that the initial solicitation was canceled improperly and that it should have received award of the contract under it as the low offeror. We find no merit to the protester's argument.

The solicitation was canceled because the contracting officer found that the prices offered were unreasonable. A determination that the prices received are unreasonable provides a basis for cancellation. That determination is within the discretion of the contracting officer, and this Office will not question such a determination unless it is clearly unreasonable or there is a showing of fraud or bad faith on the part of the contracting official. Flagg Integrated Systems Technology, B-214153, Aug. 24, 1984, 84-2 CPD ¶ 221. This discretion is extremely broad. Eclipse Systems, Inc., B-216002, Mar. 4, 1985, 85-1 CPD ¶ 267.

In making the determination of price reasonableness, a contracting officer may compare an offer with such factors as government estimates, current market conditions, and other factors which have been revealed by the proposals of competitors, including the price submitted by an otherwise ineligible large business. Flagg Integrated Systems Technology, supra. In this respect, a small business concern's price that is as little as 7.2 percent higher than that used by the government for comparison purposes

may properly be considered to be unreasonable. See Saratoga Industries--Reconsideration, B-202698.2, Jan. 22, 1982, 82-1 CPD ¶ 47.

Here, Security's offer exceeded the government's cost estimate by more than 10 percent. In addition, Security's price was approximately 65 percent higher than the initial low offeror's (which was disqualified because it was a large business) and approximately 17.4 percent more than the highest offer received under the second RFP. Based on the information in the record, we do not find that the contracting officer abused her discretion in determining Security's price unreasonable and in canceling the first RFP.

GSA states that Security was telephonically informed of the cancellation. The protester denies receiving any such notice. We simply point out that generally, a failure to notify an offeror of a cancellation is a procedural deviation that does not affect the validity of the cancellation itself. See Northpoint Investors, B-209816, May 17, 1983, 83-1 CPD ¶ 523.

Security, however, alleges that bad faith on the part of GSA's contracting officials prevented it from obtaining the award under the canceled solicitation and from participating in the competition for the second RFP.

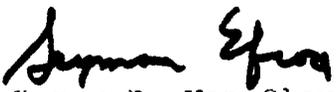
A protester bears a heavy burden of proof when alleging bad faith on the part of government officials. It must show by virtually irrefutable proof that the officials had a specific or malicious intent to injure the protester. Ebonex, Inc., B-213023, May 2, 1984, 84-1 CPD ¶ 495. Inference and suspicion alone will not support a finding of bad faith. Security has alleged bad faith of GSA's contracting officials at nearly every step of this procurement. Security maintains, and the government disagrees, that the contracting officers never discussed lowering Security's proposed price, that they encouraged Security's president to inspect the work site, that they "assured" Security that award of the contract to it would be "forthcoming," that they failed to notify Security of the cancellation of the initial solicitation and the grounds therefore or of the issuance of the second RFP. GSA, however, acknowledges that it failed to send Security a copy of the second RFP because of the inadvertance of a trainee, but it did extend the due date, as it had promised to do.

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Based on our review of the record, we cannot say that Security has met its heavy burden since the only evidence before this Office is the conflicting statements of the protester and the agency. Where there is an irreconcilable conflict between the protester and the agency on factual matters, the protester has not met the burden of establishing its version of the fact, and we will accept the agency's position. See National Council for Urban Economic Development, Inc., B-213434, Aug. 1, 1984, 84-2 CPD 140.

Further, even agency action which, by a firm's reliance on it, precludes a potential supplier from competing does not constitute a reason to cancel an RFP and resolicit, as long as adequate competition and reasonable prices were obtained and no deliberate or conscious attempt to exclude the protester from competing is shown. Doan Building Corp.; Window Supply Co., B-211942, B-211942.2, Oct. 24, 1983, 83-2 CPD ¶ 480. In this respect, it is clear that there was adequate competition under the second solicitation. We also do not believe that the record supports a finding of a deliberate attempt to exclude the protester from the second competition. GSA published a timely CBD notice of the resolicitation to which Security did not respond. Since there was a published public notice of the second solicitation to which Security could have responded, we fail to see how GSA's failure to forward the resolicitation package can be categorized as a deliberate or conscious attempt to exclude Security from the competition.

The protest is denied.

for 
Harry R. Van Cleve
General Counsel