

DECISION



11979 Martin
Proc II
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-193719

DATE: November 9, 1979

MATTER OF: Fordice Construction Company DLG03310

[Protest of Bid Rejection For Price Unreasonableness]
DIGEST:

Protest of cancellation of IFB on basis of unreasonably high price is mooted by protester's subsequent acceptance of negotiated contract at price which it agreed was fair and reasonable and which was below its low bid on prior IFB.

The Corps of Engineers, U.S. Army (Army) rejected *ABC00305* for price unreasonableness the low bid submitted by Fordice Construction Company (Fordice) in response to invitation for bids (IFB) No. DACW38-79-B-0001. Fordice protests the rejection of its bid, the cancellation of the IFB and the decision of the Army to procure the supplies on a negotiated basis.

The IFB called for bids for casting 180,000 squares of articulated concrete mattresses, with an option for an additional 30,000 squares, for a river bank revetment program. The solicitation provided that award would be made for one of 4 alternative schedules.

The Army prepared its control estimate of \$5,565,628 on the assumption that Alternative IV would provide the least expensive approach to the casting operation because it permitted use of cement containing the greatest amount of fly ash. This estimate, which included no factor for profit, was used to compare the reasonableness of all bids regardless of the alternative schedule selected by the bidder.

~~007737~~ 110814

Fordice submitted a bid of \$7,060,155.60 under Alternative II for the base and option quantities. This price was \$1,494,527.68 higher than the Government's estimate and substantially higher than the contract price for the previous year's work. The Army reviewed its estimate and found an error which required an increase of \$58,520 in its estimate bringing the total to \$5,624,148. As Fordice's bid exceeded this figure by 26.5 percent, the Army determined all bid prices were unreasonable and canceled the solicitation.

After receiving authority from the Assistant Secretary of the Army to procure its requirement by negotiation, the Army issued a request for proposals (RFP), No. DACW38-79-R-0010. Fordice, the only offeror, submitted a price of \$6,929,055.50. After negotiations, a total contract price of \$6,331,499.71 was agreed upon and both parties signed a "Resume of Negotiations" in which it was stated "It has been determined that the price, as mutually agreed to on 7 March 1979, is fair and reasonable to both parties."

The Army contends the protest has been rendered moot by Fordice's acceptance of the negotiated contract at a price which it agreed was fair and reasonable. It states the negotiated price, which is only 13 percent over the Government estimate and \$726,655.89 less than Fordice's original bid, supports the soundness of the estimate and the rejection of the initial bids. Under these circumstances, the Army argues that Fordice should not now be heard to contend the cancellation was unreasonable, and that the protest should be dismissed for want of a clear issue for resolution.

Fordice contends that the Army's estimate was so grossly erroneous that the Army's reliance thereon in determining price reasonableness was arbitrary and capricious. It states that substantial errors were made in the Army estimate and that if such errors had not occurred, the estimate would have been 22.6 percent (\$1,259,454) higher. In that case, Fordice's bid would have been only 3.4 percent higher than the Government's estimate. As further support for its contention of arbitrary and capricious action, Fordice cites the Army's refusal prior to the rejection of all bids to accept Fordice's offer to explain and justify its bid price.

As this contract constitutes approximately 80 percent of its business, Fordice contends economic necessity coerced its signature because without the contract, it could not have continued operations. Fordice asserts that access to the Army's control estimate was essential to support its protest and that its agreement to postponement of the protest conference permitted by our Bid Protest Procedures, 4 C.F.R. § 20.7 (1979), was induced by the Army's refusal of such access until after contract award. It also believes all parties had agreed Fordice's participation in the negotiated procurement need not preclude consideration of its protest on the merits. It denies any intention to waive its rights and contends the Army obviously inserted the statement that the price was fair and reasonable to subvert Fordice's pending protest. Fordice asks that it be compensated for the work it is performing under the negotiated contract at the rate it submitted in response to the invitation for bids.

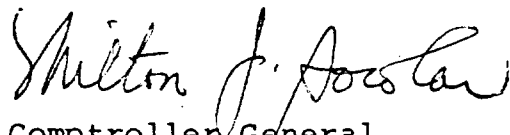
On a number of occasions when cancellation of a solicitation has been found to be improper, we have sanctioned or recommended reinstatement of canceled solicitations when to do so would cause no prejudice to the rights of others and such action would enhance the competitive bidding system. Spickard Enterprises, Inc.; Cottrell Engineering Corporation, et al., 54 Comp. Gen. 145 (1974), 74-2 CPD 121; Burley Machinery, Inc., 55 Comp. Gen. 592 (1975), 75-2 CPD 411; Joy Manufacturing Company, 54 Comp. Gen. 237 (1974), 74-2 CPD 183. These cases, however, do not involve factual situations such as is presented here. A reinstatement of the IFB here would result in no prejudice to others because Fordice was the low bidder on the IFB and the only offeror on the RFP. However, we cannot conclude that award to Fordice under the IFB at a price far above that which both parties agreed was fair and reasonable would enhance the competitive bidding system.

The protester cites Chris Berg, Inc. v. United States, 426 F. 2d 314 (Ct. Cl. 1970), to support its position that accepting the negotiated contract did not constitute a waiver of any existing rights it may have had under its protest. That decision, however, rested on the agency's

knowledge at the time of award that the contractor had made a mistake in its bid price, the correction of which should have been considered under the Armed Services Procurement Regulation. This was, in the court's opinion, a clear-cut violation of law. We find no such violation existing here. In Fortec Constructors, B-179204, May 24, 1974, 74-1 CPD 285, we held the Chris Berg decision to be inapplicable where an agency considered and denied a claim of mistake in accordance with applicable regulations. Moreover, the contract entered into in the Fortec case contained a stipulation providing for upward price adjustment if favorable consideration to the contractor's previous protest was given by this Office. Under those circumstances, we recognized the protest had not been rendered moot by the contract. Not only is there no such stipulation in Fordice's negotiated contract, there is a negotiation memorandum signed by the parties agreeing the price is fair and reasonable.

We do not accept Farmers & Ginners Cotton Oil Co. v. United States, 76 Ct. Cl. 294 (1932), as supporting Fordice's contention that the economic consequences of a refusal to sign the negotiated contract amount to such coercion and duress that its rights to the contract under the canceled solicitation were unaffected. In that case, the court found the contractor was unlawfully coerced into giving up a valid contract for a less valuable one by the agency's threat to pay nothing on the first contract. In the case at hand, no contract existed at the time of the negotiations and agreement and we do not consider the rights of a bidder or offeror comparable to those of a contractor. In varying degrees, the need for business motivates most who seek Government contracts. However, even though extreme, such need cannot support a claim of duress unless there has been a violation of contractual rights. See John J. Harte Co. v. United States, 91 F. Supp. 753 (Ct. Cl. 1950), where the court found no duress where the contractor, though motivated by economic consequences, voluntarily accepted a contract modification for new or additional work which was offered on a "take-it-or-leave-it" basis.

In view of our conclusions we find no necessity to discuss the reasonableness of the Army's estimate or the contracting officer's refusal to discuss with Fordice, before award, the Government estimate and material regarding Fordice's bid.

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

For The Comptroller General
of the United States