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PL-11



DECISION

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

[Protest Alleging Duress by Contracting Agency]

FILE: B-193719

DATE: January 17, 1980

MATTER OF: Fordice Construction Company--Reconsideration

CNG 0045

DIGEST:

Prior decision is affirmed. Protester fails to show that it agreed to contract price as a result of duress by contracting agency. While protester may have accepted agency terms because of its fear of not obtaining the contract, claim of duress is not established thereby.

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Fordice Construction Company (Fordice) requests reconsideration of our decision of November 9, 1979, 79-2 CPD 346, in which we denied its protest against the rejection of its low bid for price unreasonableness.

against the ABC 00305

After rejection of its bid by the U.S. Army Corps of Engineers, Fordice protested to our Office and the Army issued a request for proposals for the same work. Fordice, the only offeror, proposed a price approximately \$131,000 below its rejected bid price. After negotiations, Fordice and the Army agreed upon a price approximately \$728,000 below the bid price and 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." Fordice contended this statement was signed under duress and, in any event, did no more than recognize someone determined the price to be reasonable. However, we concluded that while Fordice may have accepted the contract on the Army's terms because of its fear of not obtaining the contract, such fear was not sufficient to support a claim of duress. We also found the statement rendered moot the protest of the bid rejection because we could not recommend reinstatement of the invitation for bids and award thereunder to Fordice at a price far above that which both parties had agreed was fair and reasonable.

Subsequent to 4/2/80

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Fordice states no facts were cited in the decision to substantiate our conclusion that Fordice agreed to the statements in the "Resume of Negotiations" which its president signed. Fordice still contends the sentence regarding price reasonableness does not say Fordice accepted the price as fair and reasonable. It points out the resume's preceding two sentences state "The parties who affix their signatures hereto agreed * * *" and "Further, it is mutually agreed * * *" and that the sentence in controversy begins "It has been determined * * *". This, Fordice contends, shows that the Army alone determined the price to which Fordice agreed was fair and reasonable. Moreover, Fordice states that in the context of the negotiations and all that preceded them, the statement cannot reasonably be interpreted as reflecting any intention by Fordice to give up its right to have the protest resolved. These arguments were previously presented and thoroughly considered in connection with our decision. Nevertheless, we have reviewed the decision in the light of the request for reconsideration and we find no grounds for changing it.

We concede that up to the time of negotiations, the record clearly indicates no intention by Fordice to waive or in anyway prejudice its protest and that the Army was fully aware of, if not in agreement with, this position. However, successful negotiations almost always result in compromise by one or both parties of previously stated positions. Other than the conflicting statements of the parties, the resume of negotiations is the only evidence reflecting their intentions at the time. It specifies the major differences which were resolved. It clearly indicates that a price was mutually agreed upon but it makes no reference to the pending protest. A degree of uncertainty may be detected only when the price reasonableness statement is read in the light of Fordice's subsequent statements as to its intent. We find no ambiguity in the document itself and we know of no better evidence of Fordice's agreement to its contents than its president's signature. In view of this signature, we do not agree that the document can reasonably be interpreted as indicating only the Army or some unidentified person or group made the determination. Especially as Fordice's president was an experienced and knowledgeable businessman, we believe it was

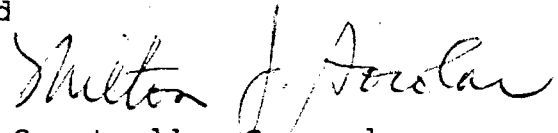
incumbent upon him to insure the document clearly reserved his right to have the deferred protest resolved and that the agreement was intended by neither party as a settlement of all outstanding disputes with regard to the project.

Moreover, we have reviewed the Army's estimate and find it was reasonable and properly served as the basis for determining all bids, including that of Fordice, to be unreasonably high. This is not to say the estimate was or needed to be accurate in all cost categories. We have recognized the inexact nature of estimates. See W.G. Construction Corporation, B-188837, August 9, 1977, 77-2 CPD 100; General Elevator Company, Inc., B-190605, June 12, 1978, 78-1 CPD 426. In any event, the errors in this estimate appear to have been offsetting and, in total, to have resulted in no prejudice to Fordice. For example, \$92,866 may have been erroneously included for taxes but \$93,450 for transportation costs of cement to be purchased from outside the immediate area may have been improperly excluded. While we question the lack of a waste allowance and suspect that the projection with regard to the sand and gravel required may have been too low, we believe any increase which might be warranted in these areas would be more than offset by a reduction in the excessive cost per ton for gravel used in the estimate.

Throughout the course of this protest, Fordice has placed great stress on the failure of the contracting officer before award to discuss the Army's estimate or to accept explanatory material regarding Fordice's bid. It presents this failure as evidence the contracting officer acted arbitrarily and unreasonably.

We do not agree. The record discloses the contracting officer after a thorough review of the estimate concluded that it was basically correct and usable for the conduct of the competitive negotiated procurement. Under these circumstances, we know of no legal requirement that discussions of the estimate and the bid be held.

The decision is affirmed



For the Comptroller General
of the United States