DECISION

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

FILE: B-220640 DATE: December 18, 1985

MATTER OF: Reliance Machine Works, Inc.

DIGEST:

1. A protester's inference that certain agency actions were motivated by the agency's desire to discriminate against the protester is not sufficient to establish agency bad faith; to prove bad faith, the protester must establish that agency officials acted with the specific and malicious intent to injure the protester.

2. Agency's use of limited competitive procedures (provided for under the Competition in Contracting Act) on a procurement for the completion of a terminated contract at a medical center is unobjectionable where the agency reasonably determined that conditions at the worksite were dangerous and threatened the well-being of the patients, so that there was no time to conduct a full competition.

Reliance Machine Works, Inc. (Reliance), protests the award of a contract under request for proposals No. 580-211-85, issued by the Veterans Administration (VA) for the completion of a contract to replace two water-cooled air conditioning chillers at the VA Medical Center in Houston, Texas. Reliance, a minority, small business contractor, complains that the VA acted in a discriminatory manner in its handling of this procurement. We deny the protest.

A contract for this effort, No. V580C-674-84, originally was awarded to Industrial Refrigeration Service Corporation (Industrial) on June 25, 1984. On February 27, 1985, the VA terminated Industrial's contract for default and, on March 19, an appeal of this termination was filed with the VA Board of Contract Appeals. In the meantime, the VA executed a Surety Takeover Agreement with the surety, which became effective on May 13. Under this agreement, the Astre Company (Astre) continued performance of the contract.

The VA and Industrial engaged in settlement negotiations, which resulted in the VA's agreement to

convert the termination for default into a termination for the convenience of the government. Although this termination took place on or about August 5, Astre continued performing until approximately August 15. On August 29, the surety notified the VA that its obligations under the surety agreement were terminated as a result of the conversion, and the VA rescinded the surety agreement on September 4.

The VA determined that "potentially emergent circumstances" regarding the chillers required the use of a limited competition for completion of the contract and, on or about September 6, the VA contacted two firms--South Texas Mechanical Services, Inc. (STMS), and Neva Corporation (Neva)--for proposals. Proposals were received from the two firms and award was made to STMS on September 16. On October 9, the VA's procurement director issued a determination and finding of urgent and compelling circumstances to justify the continuation of performance during the pendency of this protest.

Reliance claims that certain agency actions were motivated by discrimination and prevented Reliance from competing for the chiller contract. Reliance finds persuasive, in this regard, the fact that the VA immediately accepted Astre, a company which Reliance claims is owned by nonminority individuals, as the surety's contractor instead of Reliance. Reliance also claims the VA intentionally misidentified Reliance (prior to the award to STMS) as Industrial's subsidiary in an effort to make Reliance appear nonresponsible, and that the VA failed to take into account certain of Reliance's past experience. Finally, Reliance maintains that the VA exercised a dual standard of supervision by supervising Reliance on a past job while allegedly failing to supervise Astre while performing the work for the surety.

Reliance's allegations of discrimination amount to a claim of bad faith on the part of VA personnel. We have held that a protester bears a heavy burden of proof when alleging bad faith on the part of government officials; it must establish clearly that these officials had a specific and malicious intent to injure the protester. Ebonex, Inc., B-213023, May 2, 1984, 84-1 C.P.D. ¶ 495. Inference and suspicion will not support a finding of bad faith. Id.

While Reliance may believe that the VA's actions evidence discrimination, the record contains nothing to

support such a conclusion. Reliance essentially would have us infer discrimination on the part of the VA from selected activities. The fact that certain agency actions may have had a negative impact on a firm, however, does not constitute evidence that the agency was acting in bad faith, and the record contains no other facts or documentary evidence which even suggests that the cited actions in fact were motivated by discrimination or bad faith. The record does show, on the other hand, that Reliance failed to list chiller work in its standard form (SF) 129 (application to be placed on solicitation mailing list, which the agency had on file), and that Reliance in fact expressly identifies Industrial as its affiliate in the SF 129. We thus find no basis for concluding that the VA was motivated by bad faith in not soliciting an offer from Reliance. See Ebonex, Inc., B-213023, supra.

It appears that the reason Reliance was not afforded an opportunity to compete was that the VA determined that there was insufficient time to conduct a full competition. Although the Competition in Contracting Act of 1984 (CICA) generally requires full and open competition through the use of competitive procedures, 41 U.S.C.A. § 303(a)(1)(A) (West Supp. 1985), it also provides that noncompetitive procedures may be used when the "agency's need . . . is of such an unusual and compelling urgency that the government would be seriously injured" unless the agency were allowed to limit the number of sources from which it solicited offers. 41 U.S.C.A. § 303(c)(2).

The VA used abbreviated competitive procedures here due to the lack of progress on and the abandonment of the project by Astre (the surety's contractor). Two surgery units were closed due to a lack of cooling; the largest of two temporary chillers went out of service on September 13; and debris left behind and piping left uncovered created dangerous conditions (such as the electrical distribution system being exposed to dripping water). Further, the VA considered it virtually impossible to draft adequate specifications to permit a full and open competition for completion of the project, since it was unclear how much progress Astre had made before abandoning the project.

The VA concluded that because the well-being of the patients was being jeopardized, an exigent situation existed, and a limited competition was called for. The VA competition advocate concurred, and the agency proceeded to

select two firms known to have satisfactory work experience and ultimately awarded a contract to the low offeror. We think the VA reasonably determined that full and open competition was not feasible under these circumstances, and that it properly excluded Reliance from the competition.

Reliance has raised several allegations concerning the VA's supervision of contract work. We will not consider these allegations as they involve elements of contract administration. 4 C.F.R. § 21.3(f)(1) (1985).

The protest is denied.

for Seymour Efros
Harry R. Van Cleve
General Counsel