ARMED SERVICES BOARD OF CONTRACT APPEALS

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| Appeal of -- | ) | |
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| IMS Engineers - Architects, P.C. | ) | ASBCA No. 53471 |
| | ) | |
| Under Contract No. DACW45-94-D-0049 | ) | |
| | ) | |

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OPINION BY ADMINISTRATIVE JUDGE TUNKS

Appellant seeks $6,663,171 for breach of contract, alleging that the government terminated delivery order (DO) No. 0003 and failed to exercise the last two option years of the subject indefinite delivery (IDIQ) contract in bad faith. The appeal was docketed under the name of IMS P.C. Environmental & Engineering. Appellant has since changed its name to IMS Engineers - Architects, P.C. The caption has been amended to reflect the change. Only entitlement is at issue.

FINDINGS OF FACT

1. The Small Business Administration (SBA) certified appellant as a socially and economically disadvantaged 8(a) business on 23 December 1985. The firm provides architect-engineering services for hazardous, toxic and radioactive waste (HTRW) sites (R4, tab 18 at 2; app. supp. R4, tab 128 at SBA letter dated 13 February 1986). Mr. Iqbal Singh, appellant's founder and president, is from India and is a Sikh (tr. 2/159-60).

2. After founding IMS P.C. Environmental & Engineering in 1981, Mr. Singh aggressively marketed his firm to the United States Army Corps of Engineers (Corps). He submitted "innumerable" proposals to the various districts within the Corps, talked to Corps personnel and attended numerous small business and HTRW seminars. Mr. Singh was particularly interested in obtaining a contract from the Omaha District (district). (Tr. 1/164, 188-89)

3. After an HTRW seminar in November 1992, Mr. Singh complained to Colonel John E. Schaufelberger, Division Engineer for the Missouri River Division (which included the Omaha District), that he had been unable to obtain a contract (app. supp. R4, tab 91; tr. 191-93).

4. On 27 January 1993, the district issued Request for Proposals (RFP) No. DACW45-93-R-0055 requesting appellant through the SBA to submit a proposal for an indefinite delivery (IDIQ) contract for consulting services at Miscellaneous Military and Civil HTRW Sites (app. supp. R4, tab 128, SF Form 255).

5. The RFP included the following clauses that are pertinent to this appeal:

> FAR 52.217-9 OPTION TO EXTEND THE TERM OF THE CONTRACT (MAR 1989)
>
> (a) The Government may extend the term of this contract by written notice to the Contractor within sixty (60) days . . . .
>
> . . . .
>
> FAR 52.219-14 LIMITATIONS ON SUBCONTRACTING (JAN 1991)
>
> . . . .
>
> (b) By submission of an offer and execution of a contract, the Offeror/Contractor agrees that in performance of the contract in the case of a contract for - -
>
> (1) Services (except construction). At least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern.
>
> . . . .
>
> FAR 52.249-7 TERMINATION (FIXED-PRICE ARCHITECT-ENGINEER) (APR 1984)
>
> (a) The Government may terminate this contract . . . for the Government's convenience or because of the failure of the Contractor to fulfill the contract obligations. . . .

> (b) If the termination is for the convenience of the Government, the Contracting Officer shall make an equitable adjustment in the contract price but shall allow no anticipated profit on unperformed services.

(RFP at I-31, I-39, I-120)

6. Appellant's Statement of Qualifications identified Woodward-Clyde Federal Systems (Woodward-Clyde) as its subcontractor and represented that appellant would perform 60 to 75 percent of the work with its own forces (tr. 1/208-13; app. supp. R4, tab 128 at 3).

7. On 5 August 1994, the district awarded IDIQ Contract No. DACW45-94-D-0049 to appellant. The contract was for a term of one year with four option years. The minimum amount of services that could be ordered was $2,500 and the maximum amount of services, including the four option years, was $10,000,000. (App. supp. R4, tab 132)

8. The contract required appellant to "perform all services" required "[u]pon receipt of duly executed delivery orders" (app. supp. R4, tab 132 at block 6). The parties agree that, under this contract, the executed delivery order (or task order) served as the notice to proceed (NTP) (tr. 1/ 233-34, 2/103).

9. In February 1995, the district awarded appellant delivery order (DO) No. 0001 in the amount of $158,627 for work at Seymour Johnson Air Force Base (AFB) and DO No. 0002 in the amount of $531,342 for work at Lincoln AFB (app. supp. R4, tabs 2, 3, 131 at 13; tr. 1/201-02).

10. At about the same time, March AFB, another one of the district's customers, requested the district to award a contract to Black & Veatch Waste Science, Inc. (B&V), for a treatability study at an abandoned gas station (tr. 1/29). B&V was a large business that had performed some investigative work at the site (app. supp. R4, tab 133 at 1; tr. 1/62, 215).

11. On 9 March 1995, the Project Execution Plan Board, the Board responsible for deciding how the district would fill various customer requests, met to determine how the treatability study would be procured. Since the district was behind in its small business goals, the Board recommended that the contract be awarded to an 8(a) firm. Among others, Mr. Deszo J. Linbrunner, the technical manager for March AFB, and Mr. John A. Haskell, Jr., the contracting officer, were on the Board (R4, tab 23; tr. 1/30, 65).

12. Mr. Haskell testified that, in many instances, the district's customers are reluctant to use 8(a) contractors:

> Q [In your deposition you stated there was a] stigma associated with an 8(a) contract.
>
> A In certain environments, yes.
>
> Q Tell us about that and how you perceive that.
>
> A I find [that] selling an 8(a) to a customer is somewhat trying . . . . I have no control over it. Only [the customers] have control over that. . . . All I can do as a contracting officer and someone within the acquisition process knowing full well how important the 8(a) program is we have to sell that to our customer in some, maybe many, instances. That may be an easy sell and it may be a very difficult sell.
>
> JUDGE TUNKS: What do you mean [by that]?
>
> Mr. HASKELL: [The] thing . . . is . . . we're dealing with a customer and if they choose not to come to us, [they don't have to].

(Tr. 2/161-62)

13. Mr. Singh testified that on 21 April 1995 Mr. Mark Mercier, a technical manager in the district, called him and told him that appellant had a "chance" of being awarded a delivery order for a treatability study at an abandoned gas station on March AFB if he agreed to subcontract 90 to 92 percent of the work to B&V (tr. 1/204-05). In support of this assertion, appellant offered its telephone bill for April/May 1995, which shows a 2.1 minute call from Rochester, New York, appellant's place of business, to Mr. Mercier on 21 April 1995 (app. supp. R4, tab 116). Mr. Mercier did not testify.

14. Neither Mr. Mercier nor Mr. Linbrunner had contract authority (1/96-100).

15. On 25 April 1995, Mr. Singh told Mr. Mercier that he would perform the work (app. supp. R4, tab 116 at 277; tr. 1/207-14).

16. On 28 April 1995, Mr. Singh called Mr. Linbrunner and requested the names of potential subcontractors. Mr. Linbrunner gave Mr. Singh the names of four

subcontractors, including B&V, and advised him that the information did not constitute a government directive to use any particular subcontractor (tr. 1/31, 253).

17. On 1 May 1995, the district issued an RFP for the treatability study. The RFP was for a six month treatability study using two "innovative technologies," soil washing and low thermal desorption (R4, tab 3).

18. On or about 9 May 1995, Mr. Singh began negotiations with B&V (tr. 1/238).

19. On 5 June 1995, B&V's project manager wrote appellant as follows:

> [A]s you know, we . . . had discussions with the Omaha District regarding work at [the site] for several months prior to issuance of the [RFP]. It is our understanding that IMS will provide program management and QA/QC oversite [sic] . . . and [that B&V], as subcontractor to IMS, will provide all onsite, reporting, and related services . . . . [B&V] will also be responsible for contracting with . . . subcontractors . . . . Our proposal to you is based on this understanding.

(App. supp. R4, tab 14)

20. On 28 June 1995, appellant submitted a proposal in the amount of $932,828 for the treatability study. The proposal indicated that B&V would perform $795,574, or 85 percent, of the total costs. (App. supp. R4, tab 129) Ms. Patricia Overgaard, the contract specialist for DO No. 0003, was aware that appellant planned to have B&V perform more than 50 percent of the work (tr. 2/100, 122). Ms. Overgaard did not distinguish between the total cost of the work and labor costs. As long as appellant performed 50 percent of the work by the end of the contract (as opposed to a particular task order), it was her understanding that FAR 52.219-14 LIMITATIONS ON SUBCONTRACTING (JAN 1991) would be satisfied. (Tr. 2/117-18)

21. On 24 July 1995, the district issued DO No. 0003 for the treatability study to appellant in the amount of $932,828 (R4, tabs 4, 5). The notice of award/NTP was telefaxed to appellant on 27 July 1995 (app. supp. R4, tab 19; tr. 1/232-34, 243, 2/102-103).

22. Appellant and B&V negotiated the terms and conditions for entering into a subcontract through 21 August 1995 (R4, tab 29; app. supp. R4, tabs 5-6, 14, 16, 18, 20-27, 32-36, 42; tr. 1/235-52).

23. During the negotiations with B&V, Mr. Linbrunner received a call from B&V every day for three weeks as well as many calls from Mr. Singh (R4, tab 29; tr. 1/32-33).

24. When the subcontract negotiations stalled, Mr. Singh testified that Mr. Linbrunner told him that if he did not finalize the subcontract, "[he would] not get this task order [or] any work on this contract" (tr. 1/252-53). Mr. Linbrunner denied the exchange (tr. 1/88-89). We find Mr. Linbrunner's testimony more credible than Mr. Singh's.

25. Although Mr. Singh testified that he reached agreement with B&V on the terms and conditions of a subcontract, the subcontract was never executed. According to Mr. Singh, Mr. Hubert Carter, the SBA Advocate, reviewed the terms and conditions of the subcontract and told him not to sign it. (R4, tab 48; tr. 1/34, 264-65) Mr. Carter did not testify and there is no evidence corroborating Mr. Singh's testimony.

26. On 24 and 26 October 1995, the district reopened negotiations to modify DO No. 0003 to have appellant perform 100 percent of the work. Ms. Overgaard and Mr. Linbrunner represented the district and Mr. Singh represented appellant. The parties disagreed as to how the negotiations should proceed. Mr. Singh wanted to add the district's estimate to his estimate and split the difference, but the district rejected this method (tr. 1/37-42, 270-74, 2/141-42). When Ms. Overgaard attempted to break off the negotiations, Mr. Singh stated that he would agree to whatever costs Mr. Linbrunner thought were fair and reasonable (tr. 1/40). This was also unacceptable (tr. 1/40-44, 2/105-06). When he left the negotiations, Mr. Singh testified that he thought the district had, in principle, agreed to his offer to accept whatever Mr. Linbrunner thought was fair and reasonable (tr. 1/277). On 31 October 1995, appellant submitted a written proposal in the amount of $885,173, stating that **"[i]f you believe the re-negotiated numbers should be different/lower as per your assessment, those numbers will be acceptable to us"** (emphasis in original) (app. supp. R4, tab 130). The district did not respond to appellant's proposal or modify DO No. 0003 (tr. 1/277-78, 2/220). On these facts, we find that the parties did not reach agreement to modify DO No. 0003.

27. On 6 November 1995, the BRAC Environmental Coordinator for March AFB requested the district to terminate DO No. 0003 for the convenience of the government:

> 1. March AFB would like the Delivery Order with IMS, Inc. . . . canceled for the "convenience of the U.S. Government." The Delivery Order was awarded in July 1995 and no work has been accomplished. . . . Since work has been delayed for almost four months, obviously the contractor will not meet our completion date of December 1995, . . . .

> 2. After careful review of this situation, we still require this project to be accomplished in FY96 and suggest utilizing your $20M Indefinite Delivery Contract with Fluor Daniel, Inc. . . . If this project is not accomplished in FY96, we will lose these funds . . . . (emphasis in original)

(R4, tab 6)

28. On 9 November 1995, Mr. Linbrunner requested Ms. Overgaard to terminate DO No. 0003, stating as follows:

> Based on information contained in the recent Lawrence Livermore Report on petroleum-related contamination, the two innovative technologies, Low Temperature Thermal Desorption and Soil Washing, are no longer required. The use of Bioventing will produce the similar results, but at a much lower cost in this time of reduced funding.

(R4, tab 7)

29. Bioventing was available prior to 1995 (tr. 1/284-90).

30. On 28 March 1996, the district issued a delivery order to Fluor Daniel in the amount of $615,332. The delivery order required Fluor Daniel to perform a treatability study using bioventing at the gas station on March AFB. Fluor Daniel subcontracted 80 percent of the work to B&V. (App. supp. R4, tabs 122, 134)

31. The district terminated DO No. 0003 for the convenience of the government on 2 May 1996. The termination notice stated, in part, as follows:

> [O]ver . . . time, the original requirement [has] changed significa[ntly], making the treatability study unnecessary. Execution of work has not been accomplished, therefore, it is considered to be in the Government[']s best interest to terminate the delivery order in its entirety.
>
> At this time, we request, [that appellant] submit, . . . any costs that have been incurred in the preparation and submission of the cost proposals for this requirement.

(R4, tab 8)

32. On 15 May 1996, appellant indicated that it would not submit a termination settlement proposal (R4, tab 9). Appellant had not performed any work on the DO (tr. 1/279).

33. Ms. Overgaard testified that she did not terminate DO No. 0003 until 2 May 1996 because she had a protracted serious illness that impaired her ability to perform her job (tr. 2/110-12, 143). At the time, the contracting officer had 10 contract specialists working for him (tr. 2/155).

34. The district issued DO No. 0004 in the amount of $104,905 and DO No. 0005 in the amount of $171,899 to IMS on 26 and 30 September 1995 respectively (R4, tabs 39, 40).

35. After the termination, appellant filed a complaint with Corps Headquarters, alleging that the contract procedures used by the Huntsville, Baltimore, and Omaha Districts were discriminatory. On 31 July 1997, the Chief of the Audit Office issued Draft Audit Letter Report No. AOI 97-011-01. The final audit report is not in evidence. The auditor was unable to document any discriminatory contracting practices and found that the award, administration and termination of contracts in these districts generally complied with Army policy. The report stated that the district's implementation of the 8(a) program needed to be improved and that its use of IDIQ contracts was "not attuned with the spirit of the Competition in Contracting Law." The auditor also found that DO No. 0003 should have been processed as a no-cost termination for convenience. Although the auditor was unable to verify that appellant was directed to use B&V, she noted that Fluor Daniel subcontracted about 80 percent of the work to B&V. (R4, tab 18)

36. On 1 October 1997, the district advised appellant that it would not exercise the third option year and that its contract had expired on 4 August 1997 (app. supp. R4, tabs 82, 83). Mr. Haskell, the contracting officer, testified that the district had insufficient work to warrant exercising the options and that the decision to not exercise the options was a business decision (tr. 2/182-84). We find Mr. Haskell's testimony credible on this point.

37. After the termination, Mr. Singh contacted Mr. Gordon Hussey, who supervised the district's technical managers, on numerous occasions asking for more work (tr. 1/146-52). Mr. Hussey did not recall any specific project for which appellant was considered, but he was sure that appellant had been considered for other delivery orders because its IDIQ contract had not expired (tr. 1/151). Mr. Hussey knew there had been "some difficulties" with the quality of appellant's work, but did not know the specifics. He was not aware of any animus towards Mr. Singh or his firm and believed that the firm was treated in the same manner as other similarly situated firms (tr. 1/153-54). We find Mr. Hussey's testimony credible.

38. Mr. Singh subsequently complained to Colonel Robert D. Volz, the District Manager, that he was not receiving enough work. Mr. Singh attributed the lack of work to racial and ethnic discrimination and Mr. Hussey's refusal to give him more work (tr. 1/111-12, 144). Colonel Volz's investigation lasted approximately 1½ weeks and consisted largely of interviews performed by his subordinates. He concluded that appellant's "performance was not to the standard that people would have liked to have seen," but that the district was not withholding work on the basis of race, ethnic origin or the fact that appellant was an 8(a) business. Colonel Volz attributed appellant's failure to obtain more work as "mainly a situation of need and also a situation of customer preference and customer demands." No written report was prepared. (Tr. 1/112-16, 127)

39. On 2 May 2000, appellant submitted a request for an equitable adjustment (REA) to the contracting officer in the amount of $5,773,760 (R4, tab 19).

40. The contracting officer denied the claim on 18 September 2000 (R4, tab 2).

41. On 22 November 2000, appellant appealed the contracting officer's final decision to this Board, where it was docketed as ASBCA No. 53168 (R4, tab 1).

42. Following docketing of the appeal, appellant certified its claim to the contracting officer.

43. On 14 May 2001, we dismissed the appeal for lack of jurisdiction because it was not certified when it was submitted to the contracting officer.

44. On 17 July 2001, appellant requested the contracting officer to reconsider the claim (now certified) and the 18 September 2000 final decision (R4, tab 1a).

45. On 30 July 2001, appellant appealed the deemed denial of its claim. The appeal was docketed as ASBCA No. 53471 on 1 August 2001.

46. On 8 August 2001, the contracting officer refused to reconsider the final decision (R4, tab 2a).

47. Appellant has offered no evidence other than its own unsubstantiated assertions, that district personnel terminated DO No. 0003 or declined to exercise the last two option years in the contract due to racial or ethnic discrimination or a desire to get rid of appellant because it was an 8(a) contractor.

## CONTENTIONS OF THE PARTIES

Appellant alleges that the aggregate of the actions taken by district personnel, culminating in the convenience termination of DO No. 0003 and the failure to exercise the last two option years in its contract, violated the duty of good faith. In support of this contention, appellant alleges that the district failed to give 8(a) contractors preference in the selection process and manipulated IDIQ contracts to avoid compliance with the 8(a) program and the Competition in Contracting Act (CICA), 41 U.S.C. § 253(a). Appellant points out that March AFB wanted B&V, a large business, to perform the work and that appellant only received the award because the district was behind in its 8(a) goals. Appellant alleges that Mr. Mercier, one of the district's technical managers, told Mr. Singh, appellant's president, that he could have the work if he agreed to subcontract 90 to 92 percent to B&V. As a result, appellant allegedly selected B&V as its subcontractor. During negotiations with B&V, Mr. Singh alleges that Mr. Linbrunner, the technical manager for March AFB, told him that if he did not finalize the subcontract with B&V, he would not receive any more delivery orders or contracts from the district. Mr. Singh alleges that when he finally came to terms with B&V, Mr. Carter, the SBA Advocate, directed him not to sign the subcontract. Appellant also alleges that the district prevented it from commencing work by failing to issue a NTP after the second round of negotiations. Appellant additionally alleges that the reasons stated in the termination notice were incorrect, and that the district delayed terminating DO No. 0003 for six months. According to appellant, Mr. Haskell, the contracting officer, believed there was a "stigma" attached to 8(a) contractors and that he mistakenly held appellant responsible for its failure to begin work under DO No. 0003. Appellant also points out that the district awarded the follow-on work to Fluor Daniel before terminating DO No. 0003 and that Fluor Daniel subcontracted 80 percent of the work to B&V. After the termination, appellant alleges that Mr. Hussey, who supervised the district's technical managers, opposed its receipt of more work. Finally, appellant alleges that the district failed to exercise the third and fourth year options or award any more contracts to appellant. Appellant alleges that these actions were motivated by racial and ethnic discrimination and a desire to get rid of appellant because it was an 8(a) contractor.

The district denies that the termination was motivated by racial or ethnic prejudice or that it wanted to get rid of appellant. According to the district, DO No. 0003 was properly terminated because the needs of its customer had changed and appellant was a marginal performer. The district asserts that the option years were not exercised due to a lack of work.

## DECISION

Section 605(a) of the Contract Disputes Act (Act), 41 U.S.C. §§ 601-13, limits our jurisdiction to claims "relating to a contract." As a result, we lack jurisdiction over

allegations of irregularities in the selection process and misuse of IDIQ contracts. These issues are reserved for other fora. Our jurisdiction is further "circumscribed by the parameters of the claim, the contracting officer's decision thereon, and the contractor's appeal therefrom." *Centurion Electronics Service*, ASBCA No. 51956, 03-1 BCA ¶ 32,097 at 158,657, *quoting Stencel Aero Engineering Corp.*, ASBCA No. 28654, 84-1 BCA ¶ 16,951 at 84,315, *aff'd on recon.*, 03-2 BCA ¶ 32,262, *aff'd*, 95 Fed. Appx. 978 (Fed. Cir. 2004). Given the foregoing parameters, there are two issues before us: (1) whether the district acted in bad faith when it terminated DO No. 0003 for convenience; and (2) whether it acted in bad faith when it failed to exercise the third and fourth option years in the contract.

Preliminarily, the termination for convenience clause grants the contracting officer broad authority to terminate. This authority has been described as follows:

> In no other area of contract law has one party been given such complete authority to escape from contractual obligations. This clause gives the Government the broad right to terminate without cause . . . .

Cibinic & Nash, ADMINISTRATION OF GOVERNMENT CONTRACTS at 1073 (3d ed. 1995). In view of the broad authority conferred on contracting officers to terminate for convenience, the Court has refused to look into the wisdom of the contracting officer's decision, stating "[i]t is not the province of the courts to decide *de novo* whether termination was the best course." *Salsbury Industries v. United States*, 905 F.2d 1518, 1521 (Fed. Cir. 1990). However, when tainted by bad faith or an abuse of discretion, a termination for convenience results in a breach of contract. *Krygoski Const. Co. v. United States*, 94 F.3d 1537, 1541 (Fed. Cir. 1996).

Government officials are presumed to act in good faith in the performance of their duties. *Librach v. United States*, 147 Ct. Cl. 605, 612 (1959). In order to rebut this presumption, the contractor must present "well-nigh irrefragable proof." *Kalvar Corp., Inc. v. United States*, 543 F.2d 1298, 1392 (Ct. Cl. 1976), *cert. denied*, 434 U.S. 830 (1977). Well-nigh irrefragable proof requires proof of malice or a specific intent to injure. *E.g., Gadsden v. United States*, 78 F. Supp. 126, 127, 111 Ct. Cl. 487, 489-90 (1948) (actions which are "motivated alone by malice"); *Knotts v. United States*, 121 F. Supp. 630, 636, 128 Ct. Cl. 489, 500 (1954) (proven conspiracy to get rid of the employee); *Struck Constr. Co. v. United States*, 96 Ct. Cl. 186, 222 (1942) (course of governmental conduct that was designedly oppressive); *Apex International Management Services, Inc.*, ASBCA Nos. 38087 *et al.*, 94-2 BCA ¶ 26,842 at 133,549-50 (government specifically intended to injure appellant, conspired to get rid of appellant and engaged in oppressive conduct).

In *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234 (Fed. Cir. 2002), the Court of Appeals for the Federal Circuit clarified what is meant by well-nigh irrefragable proof, equating it to clear and convincing evidence. The Court defined clear and convincing evidence as "evidence which produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is '*highly probable*.'" *Id.* at 1239-40 (emphasis in original). Thus, in order to meet its burden of proof, appellant must create in us "an abiding conviction" that the district's actions were motivated by racial or ethnic bias or a specific intent to harm or get rid of appellant because it was an 8(a) contractor.

In determining what weight to give to a piece of evidence, we first assess its probative value. That is, we look to see whether the evidence is reliable and trustworthy. One way to make this determination is to see if there is any contemporaneous documentary evidence corroborating the evidence. In this regard, we have long held that unsubstantiated assertions do not constitute proof or evidence. *E.g., Maggie's Landscaping, Inc.*, ASBCA Nos. 52462, 52463, 04-2 BCA ¶ 32,647 at 161,569; *M.A Mortenson Co.*, ASBCA Nos. 53105 *et al*., 04-2 BCA ¶ 32,713 at 161,845; *Technocratica*, ASBCA Nos. 46567 *et al.*, 99-2 BCA ¶ 30,391 at 150,226; *Grady & Grady, Inc.*, ASBCA No. 48629, 96-1 BCA ¶ 28,025 at 139,917.

Key aspects of appellant's case are based on the unsubstantiated assertions of Mr. Singh. Mr. Singh alleges that Mr. Mercier called him on 21 April 1995 and told him that he could have the delivery order if he agreed to subcontract 90 to 92 percent of the work to B&V. Mr. Mercier did not testify. The only evidence in support of Mr. Singh's assertion is his telephone bill for April/May 1995. The bill reflects a 2.1 minute telephone from appellant to Mr. Mercier on 21 April 1995. (Finding 14) There is no evidence corroborating the substance of the call and Mr. Singh's allegation is inconsistent with his subsequent call to Mr. Linbrunner requesting the names of potential subcontractors (finding 17). Mr. Singh also alleges that, during his negotiations with B&V, Mr. Linbrunner told him that if he did not finalize the subcontract with B&V, he would not receive any more delivery orders under this contract. Mr. Linbrunner denied this exchange. We found Mr. Linbrunner's testimony more credible. (Finding 25) Mr. Singh further alleges that Mr. Carter, the SBA Advocate, directed him not to sign the B&V subcontract. Mr. Carter did not testify and there is no documentary evidence supporting this assertion. (Finding 26) In any event, Mr. Singh subsequently submitted a proposal to perform the work with appellant's own forces (finding 27). Mr. Singh also alleges that Mr. Hussey blocked appellant's receipt of additional work following the termination. Mr. Hussey denied any animus towards appellant and testified that appellant was considered for additional work. We found that testimony credible. (Finding 38) Appellant's evidence falls far short of establishing bad faith.

The district cited two reasons for terminating DO No. 0003 in its 2 May 1996 termination notice: (1) its customer's needs had changed due to the passage of time; and (2) appellant failed to prosecute the work. Appellant challenges the accuracy of both of these reasons.

With respect to the first reason cited in the termination notice, appellant argues that bioventing, the technology required by the Fluor Daniel delivery order, was not an "innovative" technology as were the technologies required by DO No. 0003. We are unaware of any authority, and appellant has not cited any, for the proposition that the contracting officer must order the same or similar services when it issues a contract to another contractor following a termination for convenience. The bottom line is that, absent bad faith or a clear abuse of discretion, the contracting officer was free to choose whatever technology he thought best suited his customer's needs. *T & M Distributors, Inc. v. United States*, 185 F.3d 1279, 1283 (Fed. Cir. 1999); *Salsbury*, 905 F.2d at 1521, *quoting John Reiner & Co. v. United States*, 163 Ct. Cl. 381 (1963). Beyond innuendo and unsubstantiated assertions, appellant did not offer any evidence that the contracting officer acted in bad faith or abused his discretion by replacing the more expensive methodologies of soil washing and low thermal desorption with bioventing. Thus, the fact that bioventing was not an innovative technology cannot be used by this Board as a basis for finding the termination for convenience was improper. *Salsbury*, 905 F.2d at 1521.

With respect to the second reason cited in the termination notice, appellant argues that the contracting officer was mistaken in his belief that appellant failed to prosecute the work. According to appellant, it was the district's fault that work on DO No. 0003 never began because no NTP was issued following the second round of negotiations. This argument assumes that the parties reached agreement to modify DO No. 0003 during the second round of negotiations. We have found as fact that they did not reach agreement (finding 27). After the second round of negotiations were terminated, appellant submitted a proposal offering to accept whatever price the district thought was reasonable. The district did not respond to this proposal. Thus, DO No. 0003, as issued on 24 July 1995, was still a valid delivery order and NTP.

Appellant next argues that the termination was invalid because the district delayed terminating DO No. 0003 for six months. The reason for the delay is unclear. Ms. Overgaard, the contract specialist, testified that she did not issue the notice due to a serious protracted illness. However, Mr. Haskell, the contracting officer, testified that he had 10 contract specialists working for him at the time. Regardless of the reason, appellant's remedy was under the termination for convenience clause. While the delay arguably entitled appellant to a time extension, it did not invalidate the district's right to terminate for convenience.

Appellant next argues that the termination was invalid because the district awarded a delivery order to Fluor Daniel before it terminated DO No. 0003 and Fluor Daniel subcontracted 80 percent of the work to B&V. The mere fact that the contracting officer awarded a delivery order to Fluor Daniel is insufficient to prove bad faith. *See Kalvar*, 543 F.2d at 1302. Moreover, Fluor Daniel was a large business and was not subject to the restrictions of the 8(a) program. On this record, appellant has failed to demonstrate that the award was made in bad faith.

Appellant next alleges that Mr. Haskell admitted there was a "stigma" attached to 8(a) contractors and that he was mistaken about the quality of appellant's performance. What Mr. Haskell said was that many of his customers attached a "stigma" to 8(a) contractors and that he often had difficulty selling an 8(a) contractor to his customers. We have carefully reviewed Mr. Haskell's actions as well as the actions of other district personnel involved with DO No. 0003, and do not find any evidence of racial or ethnic discrimination or a desire to get rid of appellant because it was an 8(a) contractor. While district personnel may not have liked dealing with appellant, that does not prove bad faith. In order to establish bad faith, the "evidence must show with convincing clarity a high probability that [the district] acted from personal animus with specific intent to injure." *Empire Energy Management Systems, Inc.*, ASBCA No. 46741, 03-1 BCA ¶ 32,079 at 158,553, *citing Am-Pro Protective Agency, Inc.*, 281 F.3d at 1240, *aff'd*, 362 F.3d 1343 (Fed. Cir. 2004). Appellant has failed to make this showing.

Appellant next argues that the district failed to exercise the third and fourth year options in bad faith. It is established that the exercise of an option is within the broad discretion of the government and that, in order to prevail, a contractor must prove bad faith, an abuse of discretion or that the contracting officer acted in an arbitrary or capricious manner. *Kirk/Marsland Advertising, Inc.*, ASBCA No. 51075, 99-2 BCA ¶ 30,439 at 150,408; *Plum Run, Inc.*, ASBCA Nos. 46091 *et al.*, 97-2 BCA ¶ 29,193 at 145,230. Mr. Haskell, the contracting officer, testified that the district did not have enough work to justify exercising the options and that the decision not to exercise the options was a business decision (finding 37). Other than unsubstantiated allegations and conclusory assertions, appellant has not presented any evidence to the contrary. On this record, we conclude that the district has established a reasonable basis for its decision and that appellant has not proven the elements necessary for relief.

In summary, appellant has not proven that the actions of district personnel, either individually or in the aggregate, were motivated by racial or ethnic bias or a desire to get rid of appellant due to its 8(a) status. At most, this record shows that district personnel did not like dealing with appellant and considered appellant to be a mediocre contractor. This is insufficient to prove bad faith. *Empire Energy*, 03-1 at 158,553.

The appeal is denied.

Dated: 9 March 2006

ELIZABETH A. TUNKS
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 53471, Appeal of IMS Engineers - Architects, P.C., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals