

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

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FILE: B-212385; B-212385.2

DATE: January 30, 1984

MATTER OF: Telex Communications, Inc.;
Mil-Tech Systems, Incorporated**DIGEST:**

1. Contract award may be made to a bidding entity which subsequent to bid opening sold all its stock to a nonbidding entity, where bidding entity still exists and will perform the contract.
2. Contract award may be made to bidding entity which incorporated after bid opening since the same firm which submitted the bid will perform the contract and firm would not be permitted to avoid the government's acceptance of its bid.
3. Agency properly permitted bidder to correct an omitted price after bid opening where bidder submitted a price for the same item in another part of the IFB.
4. Protester has not met its burden of proving that bidder misrepresented that it had no affiliates.

Telex Communications, Inc. (Telex), and Mil-Tech Systems, Incorporated (Mil-Tech), have protested under Department of the Army (Army) invitation for bids (IFB) No. DAAB07-83-B-B030. Telex, the second low bidder, contends that Mil-Tech low bid should be rejected as non-responsive. Mil-Tech protests the Army's determination that Mil-Tech is not eligible to receive the contract award.

The protest of Telex is denied in part and dismissed in part. The protest of Mil-Tech is sustained.

The IFB requested bids to supply AS-1728/VRC antennas and related data items. Bid schedule "A" contemplated a single-year award for 60,000 antennas and alternate schedule "B" contemplated a multiyear award of 92,000 antennas. Bidders were required to complete the unit price/amount

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columns for each line item by inserting "N" (not applicable) "NSP" (not separately priced) or a price. Bid opening took place on June 20, 1983. On June 28, Telex protested to the Army that Mil-Tech's bid should be rejected as nonresponsive because Mil-Tech failed to complete the unit price/amount columns for line items 0003AB and 0003AC of alternate "A." This protest was denied by the Army on July 15 and Telex protested to GAO on July 21.

Telex also submitted a second protest to the Army that alleged that Mil-Tech's bid is nonresponsive because the bid was signed on June 20 by Oliver Brown as president of Mil-Tech Corporation and Mil-Tech's certificate of incorporation was executed on June 30 and issued on July 23. Telex also alleged that Mil-Tech falsely certified that it had no affiliates. The Army denied this protest on August 16, and Telex submitted it to GAO on August 23.

Although the Army believed that Mil-Tech's bid was responsive, it determined that Mil-Tech could not be considered for award because Mil-Tech did not comply with the Walsh-Healey Act and because Mil-Tech was nonresponsive. Since Mil-Tech is a small business, these matters were referred to the Small Business Administration (SBA) for a Walsh-Healey determination and certificate of competency (COC) consideration. On September 9, the SBA notified Mil-Tech that it could not be considered for a COC because Oliver Brown, its sole shareholder and president, was on probation due to an Internal Revenue Service violation. Oliver Brown attempted to make Mil-Tech eligible for a COC determination by transferring his Mil-Tech shares to his brother Charles.

After the SBA determined that the stock transfer from Oliver to Charles did not alter Mil-Tech's eligibility for a COC, Charles sold all the Mil-Tech stock to ATACS Corporation (ATACS), and Mil-Tech became a wholly owned subsidiary of ATACS. The SBA requested the Army to determine whether Mil-Tech still was eligible for award. On September 30, the Army informed Mil-Tech that it was no longer eligible for a contract award. Mil-Tech protested this decision to GAO on October 3.

We first consider Mil-Tech's protest against the Army's decision that Mil-Tech is no longer eligible for award because subsequent to bid opening, all the capital stock of Mil-Tech was sold to ATACS. The Army and Telex allege that prior to bid opening, Mil-Tech had no assets other than its bid and that the stock sale was an attempt by Mil-Tech to transfer its bid to ATACS. Relying on our decisions in Keco

Industries, Inc., B-207114, August 23, 1982, 82-2 CPD 165; Information Services Industries, B-187536, June 15, 1977, 77-1 CPD 425; and Numax Electronics, Inc., B-181670, January 16, 1975, 75-1 CPD 21, they contend that an award to Mil-Tech would be an award to ATACS in violation of the rules which prohibit contract awards and the transfer of bids to nonbidding entities. Both the Army and Telex recognize that a bid may be transferred to a nonbidding entity which purchases the bidder's entire business. They reason, however, that because Mil-Tech had no assets, it has no business for ATACS to purchase.

Mil-Tech responds that it did not transfer its bid to ATACS. Mil-Tech stresses that while ATACS purchased the stock of Mil-Tech, Mil-Tech retains its corporate existence and Mil-Tech, not ATACS, will perform the contract. In the alternative, Mil-Tech notes that under our decisions, a bid may be transferred to a nonbidding entity which purchases the entire business of the bidding entity. Mil-Tech contends that since ATACS purchased all the stock of Mil-Tech, ATACS purchased the entire business of Mil-Tech. Mil-Tech therefore concludes that it may be awarded a contract even if we construe the sale of Mil-Tech's stock to ATACS as a transfer of Mil-Tech's bid to ATACS. Mil-Tech also alleges that it did have assets before its stock was sold to ATACS. These assets were an agreement to lease production facilities, arrangements for financing, letters of intent from potential employees and a manufacturing plan.

We find that the sale of Mil-Tech's capital stock to ATACS does not preclude a contract award to Mil-Tech. Initially, this case is not governed by the cases on which the Army and Telex rely. The issue in those cases was whether a bid could be transferred and a contract awarded to a nonbidding entity which was the successor corporation to the bidding entity. In those cases, the bidding entity became nonexistent before an award was made. Here, Mil-Tech continues to exist as a corporate entity. The issue involved is whether Mil-Tech is eligible to receive an award despite the fact that after bid opening, Mil-Tech became a wholly owned subsidiary of a nonbidding firm.

This Office has recognized that a bidder's post-bid-opening agreement to obtain the resources necessary for contract performance does not bar a contract award to the bidder unless the agreement causes the bidder to become nonexistent. Harper Enterprises, B-179026, January 25, 1974, 74-1 CPD 31; Gull Airborne Instruments, Inc., B-188743,

November 7, 1977, 77-2 CPD 344. In Harper, we found that the bidder still could be awarded a contract even though after bid opening, the bidder entered into a joint venture with a nonbidding entity. In Gull, we concluded that the bidder was eligible for award despite the fact that after bid opening, the bidder's entire business was purchased by a nonbidding entity.

Here, ATACS has purchased all the stock of Mil-Tech but there is no indication that Mil-Tech has gone or will go out of existence. A corporation remains an existing entity unless it dissolves or surrenders its charter. See 51 Comp. Gen. 145 (1971). Mil-Tech alleges that it sold its stock to ATACS because Mil-Tech did not have the resources to perform the contract. This allegation is supported by the Army's previous determination that Mil-Tech was non-responsible. Mil-Tech and ATACS have consistently alleged that Mil-Tech will retain its corporate entity and perform the contract. Therefore, in accordance with our decisions in Harper, supra and Gull, supra, an award may be made to Mil-Tech if it is otherwise determined that Mil-Tech's bid is low and responsive and Mil-Tech is responsible, even though Mil-Tech has become a wholly owned subsidiary of ATACS. Whether Mil-Tech had assets prior to the sale of its stock to ATACS is irrelevant. See 51 Comp. Gen. 145, supra. Finally, the Army's concern that Mil-Tech may not have the needed financial resources and assets to perform is a matter of Mil-Tech's responsibility rather than Mil-Tech's eligibility to receive an award. See Echelon Service Company, B-209284.2, December 2, 1982, 82-2 CPD 499; Harper Enterprises, supra. Whether Mil-Tech, a small business, is responsible must be decided in the first instance by the contracting officer, subject to the review of a negative determination by SBA. Defense Acquisition Regulation (DAR) § 1-902 (1976 ed.); Racoa International, Inc., B-208233, August 10, 1982, 82-2 CPD 126.

The protest of Mil-Tech is sustained.

Considering Telex's protest that Mil-Tech's bid must be rejected as nonresponsive for not completing the unit and amount columns for line items Nos. 0003AB and 0003AC of alternate "A," Telex points out that the solicitation required bidders to complete all items or the bid would be rejected as nonresponsive.

The Army believes that the omission in Mil-Tech's bid is a minor clerical error which may be corrected because the bid, as submitted, shows a definite pricing pattern.

As a general rule, a bid must be rejected as nonresponsive if, as submitted, it does not include a price for every item requested by the IFB. Further, a nonresponsive bid may not be corrected after bid opening. 42 Comp. Gen. 604, 607 (1973). However, this Office has recognized a limited exception to this rule under which a bidder may be permitted to correct a price omission. [This exception applies where the bid, as submitted, indicates the probability of error, the exact nature of the error and the intended bid price.] Id. Under this exception, we have permitted bidders to insert an omitted price where the IFB contains bidding schedules for similar items and the bidder has bid consistently on the same item elsewhere in the IFB. E.g., Con Chen Enterprises, B-187795, October 12, 1977, 77-2 CPD 284; Slater Electric Company, B-183654, August 26, 1975, 75-2 CPD 126; 52 Comp. Gen., supra. We reasoned that the bidder's pricing pattern indicated its intent to bid the same amount for the omitted item as it bid for the same item elsewhere in the IFB. This exception applies despite a solicitation provision which states that failure to bid on an item will cause the bid to be rejected as nonresponsive. Con Chen Enterprises, supra.

Here, schedules "A" and "B" were identical except for the quantity of antennas requested. On schedule "B," Mil-Tech bid \$200 for the same items which Mil-Tech failed to price on schedule "A." Further, on both schedules, Mil-Tech bid \$132.60 per unit for antennas, \$29,800 for first article requirements and \$200 each for every other line item. Finally, Mil-Tech verified that it intended to bid \$200 for each of the line items omitted in schedule "B." Since there is no evidence that Mil-Tech would have bid differently on the omitted items, we believe the Army reasonably concluded that Mil-Tech intended to bid \$200 for these items. Thus, the Army properly permitted Mil-Tech to correct its bid.

Telex next protests that Mil-Tech's bid must be rejected as nonresponsive because the bid was submitted on June 20, 1983, on behalf of Mil-Tech Corporation and Mil-Tech was not incorporated until July 13, when the Virginia State Corporation Commission issued a certificate of incorporation for Mil-Tech. Telex therefore alleges that an award to Mil-Tech will violate the rule against awarding a contract to a business entity which did not exist on the date of bid opening.

The Army and Mil-Tech take the position that Mil-Tech was a de facto corporation on the date of bid opening and, thus, an award to Mil-Tech would be permissible. They also allege that a contract award to Mil-Tech is permissible because Mil-Tech is the same business which submitted the bid and there is no indication that Mil-Tech intended to avoid a contract award.

In Protector's, Inc., (B-194446, August 17, 1979, 79-2 CPD 128, we found that a contract could be awarded to a business which submitted its bid as a corporation, but was not incorporated until after bid opening. Although we found that on the date of bid opening, Protector's, was a de facto corporation, this finding was not the dispositive factor for our conclusion. Rather, we reached our conclusion because, for purposes of performance, the unincorporated business and the incorporated business were the same, the bidder did not attempt to retain an option to avoid acceptance of its bid, under Florida law the bidder could not refuse the government's acceptance of its bid and the bid clearly was signed by the president in his capacity as corporate president.

Here, the same business on whose behalf Mil-Tech's bid was submitted will perform the contract and the rule against awarding a contract to a nonbidding entity is not violated. Oscar Holmes & Son, Inc.; Blue Ribbon Refuse Removal, Inc., B-184099, October 24, 1975, 75-2 CPD 251, and Cf. Martin Co., B-178540, May 8, 1974, 74-1 CPD 234. In addition, Mr. Brown has not indicated any intent to avoid the government's acceptance of Mil-Tech's bid. Further, Oliver Brown signed the bid in his capacity as president of Mil-Tech Corporation, not in his individual capacity, and at all times, he has held himself out to the Army as a representative of Mil-Tech Corporation. Thus, we believe that under Virginia law, Mil-Tech would not be permitted to avoid the acceptance of its bid by alleging that it was not a corporation at bid opening. (See Bolling v. General Motors Acceptance Corporation, 204 Va. 4, 129 SE 2nd 54, 59 (1963).) Thus, in accordance with our decision in Protector's, supra, we will not object to a contract awarded to Mil-Tech.

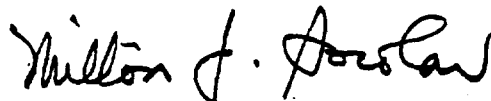
These protest grounds are denied.

Finally, Telex alleges that Mil-Tech should not be awarded a contract because Mil-Tech may have falsely certified that it had no affiliates and that it did not pay a contingent fee to anyone to obtain the contract. Telex bases these conclusions on the fact that the listed address and telephone number for Mil-Tech were the same address and

telephone number of another corporation and that the sole owner and shareholder of this other corporation attended the bid opening on Mil-Tech's behalf. Mil-Tech denies that it falsely certified its bid. Mil-Tech explains that the president of the other corporation is a friend of Oliver Brown and that Mil-Tech was using the corporation's offices because Mil-Tech had not yet established its own offices.

Under the IFB, business concerns are affiliates if one concern controls or has the power to control the other or if a third person controls or has the power to control both. Based on this definition, we do not believe that Telex has met its burden of affirmatively proving that Mil-Tech was affiliated with the other corporation. See National Services Corporation, B-205629, July 26, 1982, 82-2 CPD 76.

The protest of Telex is dismissed in part and denied in part and the protest of Mil-Tech is sustained.

for 
Comptroller General
of the United States