

DOCUMENT RESUME

02685 - [A1792808]

[Refusal to Allow Transfer of Bid to a Third Party]. B-187536.
June 15, 1977. 5 pp.

Decision re: Information Services Industries; by Robert F.
Keller, Acting Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law II.
Budget Function: National Defense: Department of Defense -
Procurement & Contracts (058).
Organization Concerned: Department of the Army: Army Electronics
Command, Fort Monmouth, NJ; Duffy Electronics and Mfg. Co.;
Small Business Administration.
Authority: Small Business Act of 1958, sec. 8(b)(7) (P.L. 85-536
; 15 U.S.C. 637(b)(7)). A.S.P.R. 1-902. A.S.P.R. 1-705.4(c).
51 Comp. Gen. 145. 51 Comp. Gen. 148. 54 Comp. Gen. 581. 45
Comp. Gen. 228.

The protester objected to the award of a total small business set-aside contract because the contracting agency refused to allow the transfer of the low bid to a third party (the protester). The agency acted reasonably under the circumstances in refusing to allow the transfer of the bid to a third party after the bids were opened. Since the protester was not eligible for the award, it was unnecessary to resolve the contention that the Small Business Administration violated its own regulations and improperly prevented the protester from filing an application for a Certificate of Competency. The protest was denied. (Author/SC)

P. Sherry
Proc II

DECISION



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

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FILE: I-187536

DATE: June 15, 1977

MATTER OF: Information Services Industries

DIGEST:

Agency acted reasonably under circumstances in refusing to allow transfer of bid to third party (protester) after bids were opened. Therefore, since protester was not eligible for award it is unnecessary to resolve contention that SBA violated its own regulations and improperly prevented protester from filing an application for COC.

Information Services Industries (ISI) protests the award of a contract to Duffy Electronics and Manufacturing Company (Duffy) under invitation for bids (IFB) DAAB07-76-B-2289 issued by Procurement and Production Directorate, U.S. Army Electronics Command, Fort Monmouth, New Jersey (Army). The subject IFB, issued April 23, 1976 as a total small business set-aside, sought clamp strap fastener assemblies.

At bid opening on May 24, 1976, the apparent low bidder was Leo Industries (Leo) which listed its address as 220 N. Crescent Way, Unit "E", Anaheim, California. The bid listed a phone number for Leo and was signed by Mr. Philip Porath who was designated as "owner". On May 26, 1976, the contracting officer requested a preaward survey of Leo. On June 17, 1976, the Defense Contract Administration Services (DCASD), Santa Ana, Calif., forwarded a report recommending that no award be made to Leo because of unsatisfactory ratings with respect to the following: technical and production capability; plant facilities and equipment; financial capability; purchasing and subcontracting; quality assurance capability; ability to meet the required delivery schedule.

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Specifically, the preaward survey report noted that Leo did not have a facility of any type at its listed address, and that at the time of the preaward survey it was a nonexistent company. A narrative supplement to the report, dated June 14, 1976, further indicated that the preaward survey had been conducted on June 11, 1976, and that Mr. Porath could not be located at the address listed in Leo's bid. It was further noted that several days later Mr. Porath was located and he indicated to DCASD that Leo would become a division of ISI for this procurement. Additionally, the supplement from DCASD stated that no documentation had been produced at that time to verify any agreement between Leo and ISI. Acting on the recommendation of the preaward survey report, the contracting officer, on July 12, 1976, determined that Leo was nonresponsible within the meaning of Armed Services Procurement Regulation (ASPR) § 1-902 (1976 ed.).

Meanwhile, by letter dated July 15, 1976, ISI advised the Army that Leo was now a wholly owned division of ISI and was located at 170 E. Freedom Ave., Anaheim, California. ISI's letter of that date also listed a phone number different from that contained in Leo's bid. This was followed by a telegram from ISI dated July 19, 1976, which advised the Army that a written agreement between Leo and ISI had been signed on June 11, 1976, that ISI had agreed to all the terms and conditions of the bid submitted by Leo, and that the name and address listed on the Leo bid should be changed to the following: "Information Services Industries (Leo Industries Division), 170 E. Freedom Avenue, Anaheim, California 92801." Thereafter, by letter dated July 29, 1976, ISI requested that a preaward survey be performed on it by DCASD.

The Army then determined, after further inquiries as to the nature of the transfer between Leo and ISI that only Leo's bid should be considered for award and that ISI's eligibility for award would not be considered since any award to ISI under the circumstances would be prejudicial to other bidders.

On August 24, 1976, the contracting officer referred his nonresponsibility determination to the Los Angeles Regional Office of the Small Business Administration (SBA/LA) for review and consideration of the possible issuance of a Certificate of Competency (COC). The cover letter accompanying the information forwarded by the contracting officer, in addition to noting that ISI's letter of July 15th had stated that Leo was a wholly owned division of ISI, indicated to SBA/LA that only Leo's bid was considered eligible for award.

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By letter dated September 8, 1976, SBA/LA advised the Army that Leo had failed, within the time provided, to submit an acceptable application for a COC and that the SBA was taking no further action and would consider the case closed. Thereafter, on September 20, 1976, the President of ISI contacted the Army and informed it that no action had been taken on ISI's request for a COC. However, later that same day the Army, after being informed by an SBA representative that Leo had been contacted but had failed to submit an application for a COC, made award to Duffy.

ISI protests to our Office that award to Duffy should be rescinded because the actions of both the Army and SBA denied ISI its legal rights. Specifically, ISI asserts that the Army and SBA/LA deprived it of its rights in connection with its attempts to obtain a COC. In this regard ISI asserts the following: that the Army and DCASD should have recognized the changed address, phone number and status of Leo at the time of the preaward survey; that the Army acted improperly in not submitting the matter of a COC to SBA/LA early in June 1976; that by asking ISI to extend its bid the Army led ISI to believe it was a responsive bidder; that there should have been no award to Duffy on September 20, 1976 because ISI had protested beforehand; and that the Army acted improperly in accepting a voluntary price reduction from Duffy.

Additionally, ISI argues that SBA/LA did not use due diligence or careful or prudent management in investigating whether a COC should have been issued to ISI. Essentially, ISI has attempted to establish that SBA/LA's efforts to notify ISI by phone and mail in connection with its application for a COC were inadequate. ISI also asserts that SBA/LA acted improperly in closing ISI's application file prior to the expiration of 15 working days from receipt of that application as required by law.

It is clear that the most important issue to be determined here concerns the reasonableness of the Army's determination that ISI was ineligible for the award of the subject contract. We believe that the Army's determination in this regard was not unreasonable.

We have held in this connection that it is not proper to permit a party to take over another's bid after bid opening and thereby become eligible for an award. 51 Comp. Gen. 145, 148 (1971). On the other hand we have also held that a contracting agency could under certain limited circumstances recognize a

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substituted offeror as a successor in interest to the original offeror. Numax Electronics, Inc., 54 Comp. Gen. 581, (1975), 75-1 CPD 21. Here the evidence of record indicates that the tangible assets transferred from Leo to ISI were of negligible value and that in return Leo received from ISI a nominal amount of cash as well as unspecified "other good and valuable consideration." In light of these circumstances, we believe that the Army reasonably concluded that the bid transfer should not be recognized for purposes of the instant procurement. Numax Electronics, Inc., supra.

Regarding ISI's contentions that the Army acted improperly in processing its request for a COC it appears that the Army failed to clearly communicate to ISI that it would not be considered eligible for award. We believe that many of the problems and misunderstandings which occurred after August 13 were caused by the fact that ISI was under the impression that a COC could be issued to Leo as a division of ISI, while the agency transferred the matter to the SBA for processing as a COC for Leo as a separate entity. Although we believe that clear notification to ISI may have avoided some of the subsequent problems we do not believe that it would have affected the award decision. In view of the fact that Leo, as a separate entity has no facilities nor any assets (what few assets it held were transferred to ISI) it would have been extremely unlikely that a COC would have been issued to Leo had it been able to properly file its application.

ISI's primary complaint against the SBA is that it violated its own procedures by closing its file on September 8, 1976. In the case of small business bidders Congress has authorized the SBA to certify a bidder's competency as to capacity and credit to perform a particular Government contract. The contracting officer is authorized to accept a COC issued by the SBA as conclusive as far as a bidder's capacity and credit is concerned. Section 8(b) (7) of the Small Business Act of 1958, Public Law 85-536; 15 U.S.C. 637(b)(7) (1970). Absent a COC a small business bidder is not eligible for award unless the contracting officer makes an affirmative determination of responsibility. In the instant case the Army forwarded its nonresponsibility determination on Leo to the SBA on August 24.

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Regarding the processing time for a COC application ASPR § 1-705.4(c) (1976 ed.) provides:

"* * *The award shall be withheld until SBA action concerning issuance of a COC or until 15 working days after the SBA is so notified whichever is earlier * * *."

Contrary to the protester's contention, 15 working days are not provided by regulation for the filing of a COC. Rather, the SBA is allowed 15 working days for the processing of a COC beginning with the first day after an acceptable referral. Paragraph 12 of the SBA Standard Operating Procedure (SOP 60 04) governing the COC program prescribes a deadline of not more than 5 working days after receipt of notice of referral for filing COC applications. Since the filing of an application for a COC is only one part of the total administrative process which must be completed within 15 working days, the time limit for such filing is, of necessity, a shorter period than the 15 working days allowed for SBA processing.

As to the protester's contention that award was made to Duffy on September 20, 1976, after ISI had entered a protest, the Army has reported that ISI's president had a conversation with an Army buyer on that date at which time he spoke of protesting without specifying to which agency (SBA or the Army) he was going to protest. The Army also reports that ISI's president then had a conversation with the contracting officer at which time he did not speak of protesting but rather made inquiries which were answered by the contracting officer. In these circumstances we do not think that ISI's conversation of that date should have been viewed as a protest against award.

Finally, ISI has protested the contracting officer's acceptance of a voluntary price reduction from Duffy. However, since this voluntary action by Duffy followed a determination that Duffy was the low responsive and responsible bidder it will not be objected to by our Office. See 45 Comp. Gen. 228 (1960).

In view of the foregoing the protest is denied.

R. F. Kistner
Acting Comptroller General
of the United States