40006

DECISION

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

FILE: B-212385.4; B-212385.5 **DATE:** June 18, 1984

MATTER OF: Mil-Tech Systems, Inc., and The Department of the Army--Request for Reconsideration

DIGEST:

1. Agency's untimely request for reconsideration and protester's untimely protest will be considered on the merits where the United States Claims Court has requested a decision from GAO.

2. A business entity which after bid opening becomes wholly owned by another firm is not eligible to receive a contract award where the circumstances lead to the conclusion that the transaction was tanatamount to the sale of a bid.

3. Under a multi-year procurement which solicited alternate bids for supply of single year quantity and multi-year quantity of antennas, bidder only is entitled to an award for the single year quantity when the agency determines that no cost advantage will result if the multi-year quantity is awarded.

4. Agency's decision to award contract on a sole-source basis is justified where the agency has adequately demonstrated that its needs are urgent and only the awardee can meet those needs within the required timeframe because the proposed awardee is the only firm that qualifies for a waiver of first article testing.

The Department of the Army (Army) requests reconsideration of our decisions in Telex Communications, Inc., B-212385, et al., January 30, 1984, 84-1 CPD 127, and Telex Communications, Inc.--Reconsideration, B-212385.3, April 18, 1984, 84-1 CPD 440. In those decisions we found that Mil-Tech Systems, Inc. (Mil-Tech), was eligible to

029199

receive a contract to supply AS-1728/VRC antennas under the Army's invitation for bids (IFB) No. DAAB07-83-B-B030, even though Mil-Tech did not file its certificate of incorporation until after bid opening. It also became a wholly owned subsidary of ATACS Corporation after bid opening.

After Telex Communications, Inc.--Reconsideration, supra, was decided, the Army informed Mil-Tech that it intended to award a sole-source contract to Telex Communication, Inc. (Telex), for 30,000 antennas. Mil-Tech filed suit in the United States Claims Court (No. 221-84C) for an injunction barring the Army from awarding a contract for any quantity of antennas to Telex. On May 2, 1984, Mil-Tech also filed a protest with this Office.

We are issuing this decision on both matters in response to a request from the United States Claims Court. We reverse our January 30 decision, and we deny Mil-Tech's protest against the sole-source award.

Reconsideration

The IFB was issued on May 6, 1983, and requested bids to supply AS-1728/VRC antennas and related data items. Bid schedule "A" contemplated a single year award of 62,000 antennas, and alternate schedule "B" contemplated a multi-year award of 92,000 antennas. Bid opening took place on June 20, 1983, and Mil-Tech was determined to be the low bidder. On August 20, Telex protested to our Office that Mil-Tech was not eligible to receive an award because the Mil-Tech bid was nonresponsive. The basis for this contention was that Mil-Tech submitted its bid in the name of Mil-Tech, Incorporated, but Mil-Tech did not file its certificate of incorporation until after bid opening. While this protest was pending, Mil-Tech sold all its stock to ATACS Corporation. The Army determined that the stock sale rendered Mil-Tech ineligible for award. On October 3, 1983, Mil-Tech protested the Army's decision to us.

Our initial decision, dated January 30, 1984, found that Mil-Tech was not barred from receiving an award even though it did not incorporate until after bid opening. We reached this conclusion in accordance with our decision in Protector's, Inc., B-194446, August 17, 1979, 79-2 CPD 128, by finding that Oliver Brown, as president of Mil-Tech, submitted the bid in the name of Mil-Tech, Incorporated, and Mil-Tech would perform the contract.

We also found that Mil-Tech's post-bid-opening sale of its stock to ATACS did not render Mil-Tech ineligible to receive an award. We reached this conclusion because Mil-Tech would remain in existence to perform the contract and did not transfer its bid. We noted that a bidder is not barred from receiving a contract award because it enters into a post-bid-opening agreement to obtain the resources necessary for contract performance.

On February 9, 1984, Telex requested that we reconsider each issue addressed in the January 30 decision. However, whether Mil-Tech's bid should have been rejected because Mil-Tech did not incorporate until after bid opening was the only issue on which Telex alleged that our initial decision was factually and legally erroneous. Our reconsideration was therefore limited to that issue. See 4 C.F.R. § 21.9(a) (1983). Our decision on the reconsideration affirmed our initial decision.

By letter dated May 4, 1984, the Army requested that we reconsider our previous decisions. Since our Bid Protest Procedures, 4 C.F.R. § 21.9(b) (1984), require requests for reconsideration to be filed within 10 days after the basis therefor is known or should have been known, we consider the Army's request filed on May 4, 1984, in effect challenging our decision of January 30, 1984, clearly untimely. However, as noted above, since the Claims Court has asked for our opinion, we will consider the Army's allegations.

The Army asserts that ATACS was, in effect, buying Mil-Tech's low bid. In this connection, the Army focuses on the following facts, which it previously reported to our Office but which were not discussed by the parties or addressed in our prior decisions:

> "The record of the meetings of Mil-Tech's directors and shareholders bears this point out. [That ATACS was buying Mil-Tech's bid.] In a September 18, 1983, meeting it was announced that ATACS Corporation had acquired from Charles Brown all of the outstanding stock (500 shares) in Mil-Tech Systems for $200 cash and $5,000 payable upon ratification by ATACS Corporation's Board of Directors. Also, during this meeting, the Board voted to issue an additional 9,500 shares of

capital stock to ATACS Corporation in consideration of $50,000. Furthermore, it ratified an agreement to compensate Oliver Brown for his costs and efforts in submitting a bid on Solicitation DAAB07-83-B-B030 and for a sales commission on any savings in acquiring materials. Under that agreement, Oliver Brown will be paid $24,800 upon the award of a contract by the Army to Mil-Tech Systems. At the meeting, Oliver Brown, Charles Brown, Sylvia Carter and Ruby Holland all resigned as directors of Mil-Tech Systems and were replaced by Fred Barakat and Joseph Barakat, the president and vice-president respectively of ATACS. Furthermore, it was resolved by the new directors that Mil-Tech Systems would lease floor space and equipment from ATACS, and that Fred Barakat or his successor would obtain the financing necessary for Mil-Tech Systems to peform in accordance with the solicitation's requirements. Finally, Fred Barakat (or his successor) was empowered by the Board to give assurance to the Army and the Small Business Administration that Mil-Tech Systems would honor its bid . . ..

"Later, the Board of Directors of ATACS agreed to purchase the new issue of 9,500 shares of Mil-Tech Systms stock for $50,000 and to issue an irrevocable guarantee to a reputable financial institution enabling Mil-Tech to secure a line of credit in the amount of $600,000 for contract performance. The ATACS Board of Directors also authorized the voting of Mil-Tech Systems' stock to elect Fred Barakat, Joseph Barakat, Jr., and John A. Mariscotti as directors of Mil-Tech and empowered ATACS Corporation's officers to lease floor space to Mil-Tech . . .."

Our earlier decisions concluded that Mil-Tech was eligible to receive a contract award, on the premise that the post bid opening sale of Mil-Tech's stock to ATACS was an attempt to obtain the resources necessary for contract performance. Upon futher reconsideration, however, we conclude that our emphasis upon the issue of Mil-Tech's responsibility was misguided. With the advantage of additional arguments made, it is now clear that the arrangements between Mil-Tech and ATACS were nothing more than a sale and purchase of Mil-Tech's low bid.

In Harper Enterprises, B-179026, January 25, 1974, 74-1 CPD 31, we stated that the mere fact that a bidder enters into a post bid opening agreement to obtain the necessary resources to perform a government contract is not a basis to reject a bid unless the terms of the agreement are such that the bidding entity no longer exists and the bid is effectively transferred to a nonbidding entity. In Gull Airborne Instruments, Inc., B-188743, November 7, 1977, 77-2 CPD 344, we did not question the sale of the low bidder's assets to a nonbidding entity for a sum in excess of $2.45 million where the bidder had bid below $600,000.

Here, though, at the time of bid opening, Mil-Tech had no assets, no space in which to perform and no employees. Thus, ATACS was interested only in acquiring Mil-Tech's low bid. Mil-Tech had been found nonresponsible by the Army and its responsibility was being reviewed by SBA, which was in the process of denying Mil-Tech a COC. At this point the owner or owners of Mil-Tech sold their stock in the new corporation to ATACS for $5,000, with a promise of $24,800 in the event of an award of the Army's contract. It is difficult under the circumstances to view the sale as other than the sale of a low bid. The obvious inducement to ATACS for the sale was not any tangible assets of the corporation but rather the hope of an award of a multi-million dollar Army contract to Mil-Tech. Such a contract would be performed, in effect, by ATACS and any resulting profits would belong to ATACS.

In Information Services Industries, B-187536, June 15, 1977, 77-1 CPD 425, we agreed with the agency that the sale of a corporation should not be recognized for the purpose of permitting the successor firm to be substituted as the bidder. In our first decision in this matter, we distinguished the ISI case on the basis that there the bidding entity became nonexistent before an award was made and here Mil-Tech will continue to exist after award. We now believe that despite this dissimilarity between the two cases, there are other essential factors which are controlling. In ISI the tangible assests transferred from the bidder, Leo Industries, to ISI were of negligible value and in return Leo received from ISI a nominal amount of cash. Here, Mil-Tech transferred assets of negligible value and received in return from ATACS a nominal amount of cash with a promise of $24,800 in the event of an award. In the guise of a purchase of stock, ATACS has really purchased a low bid. The fact of Mil-Tech's continued existence does not overcome the essential character of the transaction as the sale of a bid. We reverse our prior decision and find that in substance a prohibited bid transfer has occurred. 51 Comp. Gen. 145, 148 (1971).

Sole-Source Award

We will now consider the protest by Mil-Tech against the sole-source award to Telex. Mil-Tech states that it has been informed by the Army that due to urgent requirements a sole-source award of 30,000 antennas will be made to Telex by a modification of an existing Telex contract for these antennas. Mil-Tech asserts that it was found capable of producing the antennas during an Army preaward survey conducted under IFB No. DAAB07-83-B-B030. Mil-Tech, therefore, concludes that the Army may not properly award a sole-source contract for the antennas to Telex. In this regard, Mil-Tech asserts that any decision involving whether it is capable of producing the antennas within the required timeframe concerns Mil-Tech's responsibility and must be finally decided by the Small Business Administration (SBA). Mil-Tech also believes that the Army intends to award part of the quantity of antennas solicited under IFB No. DAAB07-83-B-B030 to Telex and that since Mil-Tech is the low responsive, reponsible bidder under that IFB it is entitled to the contract award. Finally, Mil-Tech alleges that the actions of the Army are tantamount to a constructive debarment of Mil-Tech without affording Mil-Tech due process of law.

As a preliminary matter, the Army contends that Mil-Tech's protest should be dismissed as untimely. Under our Bid Protest Procedures, to be timely, a protest must be filed within 10 working days of when the protester knows or should have known the basis of its protest. 4 C.F.R. § 21.2(b)(2). The Army reports, and Mil-Tech does not dispute, that Mil-Tech's president was informed before March 12 that the Army was going to negotiate a sole-source award for

30,000 antennas with Telex. Accordingly, since Mil-Tech did not submit its protest to GAO until May 2, the protest is untimely. However, as stated above, since the Claims Court has requested our decision, we will consider Mil-Tech's protest on the merits.

Concerning the merits of Mil-Tech's protest, the Army first asserts that the 30,000 antennas which will be awarded on a sole-source basis to Telex are not part of the antennas solicited by IFB No. DAAB07-83-B-B030 and, therefore, Mil-Tech is not entitled to an award of these antennas. The Army explains that the IFB solicited a single year quantity of 62,000 antennas and a multi-year quantity of 92,000 antennas. In accordance with Defense Acquisition Regulation § 1-322, reprinted in 32 C.F.R. pts. 1-39 (1983), the bids submitted in response to this IFB were evaluated to determine whether an award of a multi-year contract would result in a cost savings to the government. Since the evaluation revealed that the low bids for the single year quantity and the multi-year quantity of antennas were equal in price, the Army determined to award only the single year quantity of 62,000 antennas. The Army reports that if Mil-Tech is awarded a contract under the IFB the contract will be for a quantity of 62,000 antennas. The Army also states that it is purely coincidental that at the time the sole-source decision was made there was an urgent need for 30,000 antennas. In this regard, the Army reports that due to the delays in awarding a contract caused by the present protest and court action,its urgent needs have increased to 34,115 antennas.

The multi-year procurement procedure described in DAR § 1-322.1(a), is a method of competitive contracting for "known" requirements for military supplies, in quantities and total cost not in excess of planned requirements. It provides for solicitation of prices for supplies based either on an award of the current 1-year program quantity only, or, in the alternative, on total quantities representing the first and one or more succeeding program year quantities. Award is made on whichever of these two alternative bases reflects the lowest unit prices to the government.

DAR § 1-322.3(a) provides that evaluation of offers in a multi-year procurement involves not only the determination of the lowest overall evaluated cost to the government for both alternatives, the multi-year procurement and the first program year procurement, but also involves comparison of the cost of buying the total requirement under a multi-year procurement with the cost of buying the total requirement in successive independent procurements. Subparagraph (h) describes the method of comparing the lowest evaluated bid on the single year alternative against the lowest evaluated bid on the multi-year alternative to determine the lowest evaluated unit price available. With certain exceptions not here applicable, DAR § 1-322.4(a) states that award shall be made on the basis of the lowest evaluated unit price determined in accordance with § 1-322.3, whether that price is on a single-year basis or a multi-year basis.

We believe that under the above provisions, which were included in the subject IFB, bids may be submitted and evaluated, and award made, on the basis of the first program year quantity after a comparison of the lowest evaluated bid on the first program year quantity against the bid on the multi-year quantity demonstrates that no cost advantage would accure to the government if a multi-year quantity was awarded. In this regard, we have specifically held that multi-year contracting should only be used when competitive procedures establish that due to the elimination of repetitive substantial startup costs reduced unit prices would result. See Waukesha Motor Company, B-178494, June 18, 1974, 74-1 CPD 329, 43 Comp. Gen. 657, 658 (1964). Thus, once the Army determined that no cost advantage would result if a multi-year contract was awarded, it properly determined to make award for the single year quantity of 62,000 antennas. Accordingly, we agree with the Army that Mil-Tech is not entitled to an award of the 30,000 antennas in issue.

The fact that Mil-Tech is not entitled to an award of the 30,000 antennas under IFB No. DAAB07-B-B030, however, does not justify the Army's decision to negotiate a sole-source modification to Telex's existing contract. An agency may properly modify an existing contract only if the modification falls within the scope of that contract. W.H. Mullins, B-207200, February 16, 1983, 83-1 CPD 158. A modification falls within the scope of a contract if potential offerors could have anticipated the modification under the changes clause of the contract. Id.

The Telex contract is a supply contract. Since the changes clause required by DAR § 7-103.2 to be inserted into supply contracts does not contemplate changes in the quantity of items to be procured, the modification to Telex's existing contract is not within the scope of that contract. Thus, the Army only may modify Telex's contract to increase the required quantity by 30,000 antennas if the Army has a proper basis to justify a sole-source award to Telex. See Department of the Interior--Request for an Advance Decision, B-207389, June 15, 1982, 82-1 CPD 589.

This Office has recognized that it is appropriate to award a contract on a sole-source basis when such action is required by the legitimate needs of the government. W.H. Mullins, supra. Thus, an agency may properly conduct a sole-source procurement where the agency urgently needs the required item and only one known source can deliver the item in the required timeframe. Id. An agency's decision on this basis will be upheld if it is reasonable. Frequency Electronics, Inc., B-204483, April 5, 1982, 82-1 CPD 303.

The Army reports that the AS-1729/VRC antenna permits transmission and reception of very high frequency radio signals. The antenna is an essential component of the tactical vehicular radio set which unit commanders use to, among other things, deploy forces and request Army air support. The antenna also is provided as government furnished property to producers of certain weapons systems. The Army asserts that without these antennas, commanders will not be able to deploy their troops and there will be a delay in production of weapons systems necessary for combat readiness. The Army states that based on previous years requirements it has an annual need of 24,000 antennas and that the successful contractor is required to reach a production capacity of 2,000 antennas per month.

The Army states that when IFB DAAB07-83-B030 was issued, an August 1983 award was anticipated, and that a previous producer would begin to deliver 2,000 antennas per month in May 1984. Due to the requirements of first article testing it would take a new producer, such as Mil-Tech, until September 1984 to deliver 2,000 antennas per month. The Army states that due to the protests and the present court action, July 1984 is the earliest time at which a contract will be awarded to Mil-Tech under the IFB. Based on its prior experience with first time producers, the preaward survey and conversations with Mil-Tech's president, the Army determined that if an award is made in July 1984, Mil-Tech will not begin to deliver 2,000 antennas per month until January 1986.

In explaining why it must award a sole-source contract for 30,000 antennas the Army states that presently there are two existing contracts for the antenna and delivery under these contracts will be completed by August 1984. One of these contracts is held by Telex and the other is held by Rois Manufacturing Company (Rois). The Army reports that as of July 1, 1984, it will have a deficit of 5,165 antennas, and until it starts to receive subsequent delivery of antennas, this deficit will increase by 2,000 antennas per month after August 1984. If a sole-source contract is awarded to Telex, Telex will begin to supply 2,000 antennas per month in October 1984. At this time, the Army's deficit will be 9,165 antennas. The Army also explains that it decided to award the contract to Telex on a sole-source basis because Rois cannot meet the required delivery schedule of 2,000 antennas per month. In this respect the Army reports that when Rois was awarded its contract Rois was contractually required to attain a delivery rate of 2,000 antennas per month. However, despite being granted repeated extensions of time, Rois was not able to meet this requirement. In fact Rois's contract was modified to reduce the required delivery rate to 840 antennas per month and to date Rois has only met this requirement in 2 months. The Army therefore concluded that Telex was the only firm, who as a previous supplier was, eligible for waiver of first article testing and could meet the required delivery schedule.

We find that the Army's explanation sufficiently demonstrates that it has an urgent requirement for the 30,000 antennas. Given this factor, and since it is not disputed that Telex is the only firm who qualifies for a waiver of first article testing and can meet the required delivery schedule, we conclude that the Army's decision to award a sole-source contract to Telex is justified. Lunn Industries, Inc., B-210747, October 25, 1983, 83-2 CPD 491, McQuiston Associates, B-199013, September 1, 1981, 81-2 CPD 192.

Insofar as Mil-Tech alleges that whether it is capable of producing the antennas within the required timeframe concerns Mil-Tech's responsibility and must be decided by the SBA, we disagree. Since the Army has a proper basis to contract on a sole-source basis, the issue of Mil-Tech's responsibility is not an issue. Diversified Computer Consultants, B-205820, July 13, 1982, 82-2 CPD 47. Thus, the Army was not required to let SBA determine if Mil-Tech could meet the delivery schedule.

Finally, Mil-Tech's allegation that the Army's actions in selecting Telex to receive a contract amounts to a *de facto* debarment of Mil-Tech without due process of law is without merit. Debarment refers to exclusion from government contracting and subcontracting for a reasonable, specified period of time following notice and a hearing. Mil-Tech has not been excluded from contracting with the Army or any other government agency. Therefore, the Army's justifiable decision to contract with Telex on a sole-source basis does not constitute a *de facto* debarment of Mil-Tech. See Broken Lance Enterprises, B-208932, September 21, 1982, 82-2 CPD 257.

Mil-Tech's protest against the sole-source award is denied.

for Milton J. Socolar
Comptroller General
of the United States