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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Forbes Aviation, Inc.

File: B-248056

Date: July 29, 1992

Ronald H. Uscher, Esq., Bastianelli, Brown & Touhey, for the protester.

Louise E. Hansen, Esq., Defense Logistics Agency, for the agency.

Barbara C. Coles, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contention that award was improper because the agency had actual knowledge that the awardee had falsely represented itself in its offer as a corporation under the laws of Kansas is denied where the record fails to establish that the president of the protesting party told the contract specialist in a private meeting that the awardee lacked good standing as a corporation under the laws of Kansas.

2. Protest that award was improper because the offeror's articles of incorporation had been forfeited for failure to file an annual corporate report is denied where the awardee took steps to become reinstated and the firm would not have been permitted to avoid the government's acceptance of its offer even during the period of forfeiture.

DECISION

Forbes Aviation, Inc. protests the Defense Logistics Agency's (DLA) award of an into-plane fuel contract to Four M Development Company, Inc., d/b/a Mid America Aviation, under request for proposals (RFP) No. DLA600-91-R-0023.

We deny the protest.

BACKGROUND

The RFP, issued on August 29, 1991, contained the certification found at Federal Acquisition Regulation (FAR) § 52.215-6, entitled "Type of Business Organization," in which the offeror checks a box to certify if it is a corporation, an individual, a partnership, a nonprofit organization, or a joint venture. Four M certified that it was a corporation incorporated under the laws of the state of

Kansas. After evaluating best and final offers (BAFO), DLA determined that Four M was the low offeror and made award to Four M on March 12, 1992. Forbes's protest to our Office followed.

When Forbes initially challenged DLA's award to Four M, Forbes included a document from the Kansas Secretary of State stating that as of March 19, Four M was not in good standing but was in the process of reinstating its articles of incorporation. After reviewing the document, a DLA representative telephoned the Secretary of State to verify its accuracy; she was informed that Four M was not in good standing because the firm failed to file its 1990 annual report. (Kansas law provides that a corporation's failure to file an annual report or annual taxes will result in the forfeiture of the corporation's articles of incorporation.¹ Kan. Stat. Ann. § 17-7510.) She was also told that after Four M's articles of incorporation were forfeited, Four M filed its annual report but had not been reinstated because it had not filed the appropriate form to be reinstated. Upon receiving this information, DLA contacted Four M and requested that Four M provide the agency with information on its lack of good standing in Kansas. Four M apparently submitted the proper reinstatement forms to the Secretary's office because on March 25, Four M responded to DLA's request by sending the agency a certificate of good standing issued by the state of Kansas; the certificate stated that Four M is a "regularly and properly organized corporation under the laws of Kansas."

AGENCY'S ALLEGED KNOWLEDGE OF AWARDEE'S LACK OF GOOD STANDING

Forbes contends that because Four M's articles of incorporation were forfeited at the time of award, Four M had no legal existence or capacity to enter into a contract and, thus, the award was improper. Forbes also argued for the first time in its comments on the agency report that the award was improper because DLA was aware that Four M had falsely certified itself as a Kansas corporation and that Four M lacked corporate existence prior to award. In a sworn statement submitted to our Office that Forbes's

¹Kan. Stat. Ann. § 17-7503 provides that annual reports shall be made on forms prescribed by the secretary of state and that the report shall be filed at the same time as the corporation's annual Kansas income tax return. The corporation provides information about the corporation's officers and shareholders on page 1 of the prescribed report form and provides information about its assets and tax computations, including the taxes due for that particular year, on page 2 of the report.

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president, Robert E. Zibell, Jr., states that he told a DLA contract specialist, Jean Werner, in a January 10, 1992, meeting that Four M was a Kansas corporation not in good standing. In response, Mrs. Werner provided our Office with a sworn statement in which she admits participating in the meeting with Mr. Zibell and Mr. Reynolds--who, at the time of the meeting, was Forbes's contract manager--but denies that any statement was made by Mr. Zibell regarding Four M's corporate status.

Because of these conflicting statements, we conducted a hearing in our Office on June 5 to consider the limited issue of whether DLA's award of a contract to Four M was improper as a result of the agency's alleged knowledge, prior to award, concerning Four M's lack of good standing. The parties' versions of the meeting were, for the most part, similar in regard to the nature and the duration of the meeting; however, the hearing resulted in conflicting testimony on whether Mr. Zibell discussed Four M's corporate status. Mr. Zibell testified that he told Mrs. Werner one time that Four M lacked good standing and he noted that "there was really no reaction from [Mrs. Werner] to his statement." Consistent with her sworn statement, Mrs. Werner testified that she did not hear Mr. Zibell mention anything about any of its competitors or their respective corporate status. Mr. Reynolds did not testify at the hearing.²

The record shows that Mr. Zibell made efforts to investigate Four M's corporate status, and it is clear that he regarded it as a potentially significant issue for the agency to consider.³ His testimony at the hearing was credible. On

²DLA argues in its post-hearing comments that our Office should, pursuant to 4 C.F.R. § 21.5(g) (1992), draw an inference unfavorable to Forbes based on Mr. Reynolds's absence from the hearing. Although Mr. Reynolds's testimony could have been useful in resolving the factual dispute here, it would be unreasonable for us to hold Forbes accountable for Mr. Reynolds's absence because Mr. Reynolds is no longer employed with Forbes and, thus, is not a representative of Forbes whom Forbes could have compelled to testify.

³Mr. Zibell testified that over the past years he has been in the "habit of picking up copies" of Four M's annual report because the annual report has the corporation's "balance sheets" in addition to information on the corporation's financial standing. He also testified that he was not able to obtain a copy of Four M's 1990 annual report because the firm had failed to file a copy with the Kansas
(continued...)

the other hand, it is clear from her testimony that Mrs. Werner is fully familiar with her job responsibilities,⁴ and, as a result, we also find credible Mrs. Werner's testimony that had she been advised of the information regarding Four M's status, she would have immediately notified her supervisor, the contracting officer. According to Mr. Zibell's testimony, he was unsure as to the wisdom of raising the issue, since he did not want to appear to be unfairly undermining his competitor; he stated that he only raised the issue of Four M's status one time during the meeting. Even though their testimony is inconsistent, it is entirely possible that Mr. Zibell--who appeared at the hearing to be soft-spoken--may have told Mrs. Werner about Four M's status on this one occasion and she simply did not hear him. Therefore, based on the record here--including the testimony at the hearing--we cannot conclude that DLA knew as a result of the meeting that Four M lacked corporate standing in Kansas.⁵

³(...continued)

Secretary of State. Since the contract specialist had informed Forbes that its BAFO should include a certification of its corporate status because it had failed to certify its status in its initial proposal and Mr. Zibell knew that Four M lacked good standing for most of 1990, Mr. Zibell went to the Secretary's Office on January 9 to obtain copies of the current certificates for the two corporations to show the contract specialist that Forbes was in good standing and Four M lacked good standing. Approximately 1 hour prior to his meeting with Mrs. Werner, Mr. Zibell went so far as to telephone the Secretary's Office to inquire again about Four M's corporate status; he was informed that Four M still lacked good standing.

⁴For example, in response to questions concerning her responsibilities, Mrs. Werner testified that--on her own initiative--she has devised a negotiation checklist that she sends to each offeror that is tailored to highlight specific deficiencies or topics in that particular offeror's initial proposal that need correction or further justification in the offeror's BAFO.

⁵Although we recognize that Mr. Reynolds allegedly memorialized his version of the meeting and wrote that Mrs. Werner did not care about its "[c]ompetitor's business status," the probative weight of these notes is minimal because the notes are not signed or dated by Mr. Reynolds and Four M is not mentioned specifically in the notes.

REVIVAL OF FOUR M'S CORPORATE STATUS

Forbes contends that DLA improperly permitted Four M to revive its articles of incorporation after award because the revival⁶ gave Four M a "second bite at the apple." To support its position the protester cites General Chemical Servs., Inc., B-241595, Jan. 30, 1991, 91-1 CPD ¶ 94, where we held that a bid was properly rejected where at the time of bid opening the bidding corporation's charter had been revoked for nonpayment of franchise taxes. We concluded in General Chemical that a federal contracting officer must be able to rely on the information provided by the state of incorporation concerning the bidder's corporate status at the time of the inquiry, without regard to the possibility of future retroactive reinstatement of corporate status.

The protester's reliance on General Chemical is misplaced and its argument that General Chemical is applicable to the case here is unpersuasive. Here, unlike the situation in General Chemical, the agency discovered that Four M's articles of incorporation had been forfeited after award. Contrary to the protester's suggestion, allowing Four M to reinstate its articles of incorporation after award is not tantamount to allowing Four M the option after the closing date of validating its offer because Kansas law provides that "no act of a corporation . . . shall be invalid by reason of the fact that the corporation was without capacity." Kan. Stat. Ann. § 17-6104. Consequently, Four M would not have been able to assert its lack of capacity to avoid the government's acceptance of its offer upon the agency's post-award discovery of its forfeited articles of incorporation.

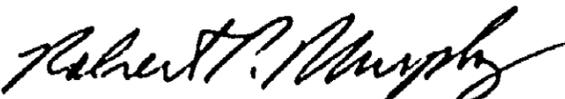
As the contracting agency points out, we have previously upheld the award of a contract in circumstances almost identical to those here. Triad Research, Inc., B-225793, July 6, 1987, 87-2 CPD ¶ 16. In that decision, we stated that there is no basis to object to the award of a contract to a corporation which at the time of submission of proposals and award had been automatically terminated because of the apparently inadvertent failure to pay an annual registration fee, but which took steps to become

⁶While Kan. Stat. Ann. § 17-7002(a)(2) provides that any domestic corporation may procure a revival of its articles of incorporation at any time where the corporation's articles of incorporation have become inoperative by law for nonpayment of taxes, the provision also applies to articles of incorporation that have become inoperative for failure to file an annual report because, under Kansas law, the corporation is required to submit its annual report with its annual Kansas corporate income tax return.

reinstated immediately when the situation was brought to its attention by a protesting competitor after award.' Citing Telex Communications, Inc.; Mil-Tech Sys., Inc., B-212385; B-212385.2, Jan. 30, 1984, 84-1 CPD ¶ 127, recon. denied in part and aff'd in part, B-212385.3, Apr. 18, 1984, 84-1 CPD ¶ 440, rev'd on other grounds, B-212385.4; B-212385.5, June 18, 1984, 84-1 CPD ¶ 632, we found that notwithstanding the revocation of a firm's corporate status, the award was proper because the same firm which submitted the proposal would perform the contract and it did not appear that the firm would have been permitted to avoid the government's acceptance of its offer.

Similarly, we have no basis to object to this award. Four M took steps here to become reinstated prior to the submission of BAFOs and, like the awardee in Triad Research, Four M took further steps to become reinstated after award. Moreover, the effect of Four M's reinstatement was the same as the awardee's reinstatement in Triad Research. In this regard, the applicable Kansas law is similar to the Virginia statute cited in that case because both provisions provide that upon reinstatement of a domestic corporation--such as Four M in Kansas--its corporate existence is deemed to have continued from the date of termination of its corporate existence; also, that the corporation is responsible for any liabilities incurred during the period of termination, including "contracts, acts, matters and things made, done or performed in its name and on its behalf by its officers and agents prior to its reinstatement, as if its articles of incorporation had remained at all times in full force and effect." See Kan, Stat. Ann. § 17-7002(d). As a result, the same entity that submitted the offer is legally bound to perform the contract, and the award thus was proper.

The protest is denied.


for James F. Hinchman
General Counsel

'We are not persuaded by the protester's argument that a minor distinction between the two cases renders Triad Research inapplicable. In this regard, Forbes argues that while the awardee in Triad Research inadvertently failed to pay its annual registration fee, Four M's failure was not inadvertent because Four M has "played fast and loose" with its corporate status since its incorporation. Forbes's reliance on this distinction shows its misinterpretation of Triad Research where the central issue was whether the corporation would have been permitted to avoid the government's acceptance of its offer as opposed to whether the offeror knew about its lack of good standing.