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DECISION



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

[Protest of Bid Rejection as Nonresponsive]

FILE: B-194446

DATE: August 17, 1979

MATTER OF: Protectors, Inc. *DLG 02596*

DIGEST:

Bid submitted in corporate name may be accepted even though firm became incorporated after bid opening since firm was "de facto" corporation as of bid opening and under applicable State law would be estopped from denying its corporate existence and award to bidder would not involve substitution of bidding entity.

Protectors, Inc. (Protectors), protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. CG-07-9042, issued by the Commander, Seventh Coast Guard District, Miami, Florida, for *AGC00415* security protection and patrol services.

The low bid, executed by "Rich Romanello," was submitted in the name of "Protectors." The name of the person authorized to sign the bid was "Rich Romanello, President." The bid also certified that the firm was a corporation incorporated in the State of Florida. However, the contracting officer reports that the firm was determined to be nonresponsive on the basis that "Protectors, Inc.," was not a legal entity under the law of Florida as of the March 8, 1979, bid opening date. In support of its position, the contracting officer has submitted a Certificate under Seal received from the Secretary of State, State of Florida, which certifies that Protectors, Inc., became a legal entity and its corporate existence commenced on March 20, 1979.

Protectors contends that its firm was a "de facto" corporation according to the laws of Florida as of the bid opening date and, therefore, should be considered a responsive bidder even though its firm did not become

206178

a "de jure" corporation until March 20, 1979. In a letter to the contracting officer counsel for Protectors states in part:

"Under the Law of the State of Florida, a corporation de facto is an apparent corporate organization, which is, in plain English, a corporation in fact, but lacks the creative fiat of the law because of some irregularities or defects in its organization. A de facto corporation possesses all powers of a de jure corporation; 7 Florida Jurisprudence Page 363, §13."

Counsel sets forth the facts which he states prove that Protectors was a de facto corporation as of bid opening and that under Florida law an individual who does business as a de facto corporation is absolutely bound and may not deny corporate existence. Counsel further states that it is a fundamental principle of the law of corporations that the legality of the existence of a corporation which has been so far organized in compliance with statutory requirements as to have achieved a de facto existence cannot be questioned collaterally, either by the State or by private individuals.

As a general rule, an advertised award may not be made to an entity different from that which submitted the bid. For example, see 41 Comp. Gen. 61 (1954), where we held that since the bidder, "Louis Rochester," was represented in the bid to be a corporation, the bid should be disregarded if no such corporation existed. The rationale for objecting to award to an entity other than that named in the bid was set out in 33 Comp. Gen. 549, 550 (1954). We stated in that decision that such action could serve to undermine sound competitive bidding procedures in that it would facilitate the submission of bids through irresponsible parties, whose bids could be avoided or backed up by the real principals as their interests might dictate.

The contracting activity takes the position that an award to Protectors, Inc., would be improper on the theory that there was not a binding commitment by the bidding entity at bid opening and, therefore, the bidder would have an unfair option to avoid an award if it chose to do so. Our decision in Martin Company, B-178540, May 8, 1974, 74-1 CPD 234, is cited in support of the agency's position. In that case, a bid was submitted by an entity which had certified itself to be a corporation incorporated in the State of Oklahoma. However, no such corporation existed. The bid was, however, executed by "Terry L. Martin, Vice President." The issue raised was whether an award could have been made to the Martin Company, which was a sole proprietorship, even though the bid was signed showing a corporate status. We concluded that Martin Company, an existing sole proprietorship, could not properly be substituted for the bidding entity, Martin Co., Inc., since an award to anyone other than the bidder named in the bid as bidding entity would be an improper substitution.


In this case, an award to Protectors, Inc., would be an award to the same entity which submitted the bid and there would be no substitution of a bidding entity. Therefore, such an award would not undermine the competitive bidding process. There is no question here of an attempt by a bidder to retain the option of avoiding the Government's acceptance of its bid, and we do not believe such an option exists. According to the Florida State law, Fla. Stat. Ann. § 607-401 (1977), Mr. Romanello would be estopped from denying the corporate existence of Protectors, Inc., on the date of bid opening, even though articles of incorporation were not filed until March 20, 1979. We think it clear that Mr. Romanello was signing the bid as the president of Protectors, Inc., and not in his individual capacity. Under these circumstances, we believe that the bidder, Protectors, Inc., intended to and is clearly bound by its bid as of bid opening and would not have an unfair opportunity to avoid performance after award without liability. See Oscar Holmes & Son, Inc.; Blue Ribbon Refuse Removal, Inc., B-184099, October 24, 1975, 75-2 CPD 251. Accordingly, by letter of today to the Secretary of Transportation, we are recommending that an

B-194446

4

award be made to Protectors, Inc., if the firm is otherwise responsive and is determined to be a responsible bidder.

The protest is sustained.


Deputy Comptroller General
of the United States