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DECISION



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

FILE: B-204928

DATE: March 2, 1982

MATTER OF: John Carlo, Inc.

DIGEST:

A determination by the contracting officer that the protester was nonresponsible for lack of integrity because of an indicated relationship with another contractor, conceded to lack integrity, was based on substantial evidence in the record and, therefore, the determination had a reasonable basis.

John Carlo, Inc. (Carlo), protests award of a contract for completion of embankment, spillway and outlet works at Lakeview Lake, Mountain Creek, Texas, to Servidone Construction Corporation (Servidone) under invitation for bids (IFB) No. DACW63-81-B-0093 issued by the United States Army Corps of Engineers (Army), Fort Worth District. The protest is denied.

Bids were opened on August 12, 1981. Carlo was the apparent low bidder and Servidone was the second low bidder. Following a request for bid verification from Carlo, the contracting officer noticed the signature of the president of Carlo on the bid verification was significantly different than the purported signature on the bid. It was revealed by Carlo, on inquiry, that the bid had been prepared and submitted on behalf of Carlo by Paul A. Bosco, individually, or Paul A. Bosco and Sons Contracting Corporation, pursuant to a power of attorney, a copy of which was furnished to the Army by Carlo by a letter dated September 10, 1981.

On August 26, 1981, the Chief of the Fort Worth District's Procurement and Supply Division phoned the vice president of Carlo concerning data for the pre-award survey and in a contemporaneous memorandum of the conversation, stated that, in response to an inquiry whether Carlo had ever built a dam, the vice president stated that Carlo had done a lot of dirt work but had

not done an embankment. The memorandum notes that the vice president said Carlo was dealing with Bosco and would probably use them in a management or subcontract role when asked how Carlo proposed to do the work.

The next day the contracting officer was advised of an ongoing investigation in the Nashville District which might have an effect on award of this contract in the Fort Worth District. During a subsequent telephone inquiry, an Army CID investigator in Nashville advised the District Counsel in Fort Worth that former or present employees of Bosco were stating that Bosco was about to receive a large contract with the Fort Worth District and that the investigation by the Nashville District disclosed a course of dealing between Carlo and Bosco by which Bosco bid and performed work in the name of Carlo. The contracting officer requested that further information on the investigation be furnished in writing, which was received on or about September 12, 1981.

On the basis of the information gathered, the contracting officer determined Carlo nonresponsible. By letter of September 18, 1981, Carlo was so notified and advised that the preaward survey revealed that Bosco was the agent of Carlo and Bosco had been found not to possess a satisfactory record of integrity, which was imputed to the principal, Carlo. This protest was filed with our Office on September 25. Also, on September 25, the president of Carlo phoned the contracting officer and in a memorandum of the call, the contracting officer states that the president offered to negotiate a disassociation with Bosco and an acceptable plan which would allow award to Carlo. After conferring with counsel, the contracting officer notified Carlo that negotiation was not possible since a report on Bosco and its relationship with Carlo had been forwarded to the Judge Advocate General (JAG) and any discussion would have to be with JAG.

On September 28, 1981, authority to award the contract notwithstanding this protest was requested pursuant to the Defense Acquisition Regulation (DAR) § 2-407.8(b)(3) (1976 ed.) as advantageous to the Government because bids would expire in 2 weeks, the onset of the rainy season would preclude use of borrow material from a low-lying area and the award of other contracts was premised on the timely award of this

contract. Authority was granted on September 30 and Servidone was notified of award on the same date. Carlo then filed an action in the United States District Court for the Northern District of Texas, Civil Action 3-81-1800-H. The court issued a preliminary injunction prohibiting issuing a Notice to Proceed or any performance under the contract until a decision by our Office.

As a general rule, GAO will not consider issues raised in a bid protest where the same issues are before a court of competent jurisdiction. However, where, as here, the court expresses interest in obtaining our views, we will provide the court with our decision. See 4 C.F.R. § 21.10 (1981).

For the purposes of this protest, the parties concede the lack of integrity of Bosco.

Before the award of a contract, the contracting officer must make an affirmative determination that the prospective contractor is responsible. DAR § 1-904.1 (1976 ed.). If the information available to the contracting officer "does not indicate clearly that the prospective contractor is responsible," a determination of nonresponsibility is required. DAR § 1-902 (1976 ed.). Mayfair Construction Company, B-192023, September 11, 1978, 78-2 CPD 187; West Electronics, Inc., B-190173, February 10, 1978, 78-1 CPD 118. The evaluation of what constitutes a clear indication of responsibility is essentially a business judgment involving considerable discretion on the part of the contracting officer. West Electronics, Inc., supra.

In order for a prospective contractor to be determined responsible, he must have a satisfactory record of integrity. DAR § 1-903.1(iv) (Defense Acquisition Circular (DAC) No. 76-15, June 1, 1978). Our Office has consistently taken the position that the question whether evidence of a bidder's lack of integrity is sufficient to warrant a finding in a particular case that a bidder is not responsible is a matter primarily for determination by the administrative officers concerned, and such determination will not be questioned by us in the absence of a clear showing of the lack of a reasonable basis for the finding. Mayfair Construction Company, supra.

The lack of integrity of officers, employees, or other associates has properly been imputed to a bidder when it appears that significant influence might be exercised in the proposed enterprise. Cf. Air Unlimited, B-189428, October 13, 1977, 77-2 CPD 294; Hydromatics International Corporation, B-180669, July 29, 1974, 74-2 CPD 66; 50 Comp. Gen. 360 (1970); 43 Comp. Gen. 769 (1969); 39 Comp. Gen. 468 (1959).

Carlo contends that the agency lacked a reasonable basis for imputing to Carlo the lack of integrity of Bosco.

Under the power of attorney, by a unanimous consent of the Board of Directors of Carlo, dated June 17, 1980, more than a year prior to this solicitation, Mr. Paul A. Bosco was empowered "individually and as President of Paul A. Bosco and Sons Contracting Corporation * * * to sign and submit bids on behalf" of Carlo "either as agent for" Carlo "or by affixing the name of Carlo J. Catenacci, President of" Carlo, and such bids "shall thereupon be fully binding upon" Carlo. The authority granted by the unanimous consent to Bosco "as attorney-in-fact for" Carlo is "retroactive and the acts hereunder performed by Paul A. Bosco prior to the passage of these resolutions are hereby ratified and affirmed."

While Carlo argues that the agency under the power of attorney was, as a matter of law, a limited power of attorney to prepare and submit bids only and created no agency or employment beyond that, we believe it evidences a longstanding relationship between Bosco and Carlo which the contracting officer could consider in making his responsibility determination. We note that the power of attorney empowers Bosco to determine costs and profit and to bind Carlo to a contract, with no requirement that Bosco confer with Carlo either before or at anytime during preparation of a bid. Bosco is, therefore, empowered to bind Carlo to contracts at Bosco's sole discretion. Apparently, Bosco had been performing in this manner for some time prior to execution of the power of attorney since the power of attorney is made retroactive and prior actions of Bosco are expressly ratified and affirmed.

As indicated above, the memorandum of the conversation with the vice president of Carlo reads that in response to questioning how Carlo intended to perform the contract, the vice president stated that Carlo was dealing with Bosco and would probably use them in a management or sub-contract role.

Carlo has furnished an affidavit by the vice president, which states that the possible involvement of Bosco was first raised by the Chief of the Procurement and Supply Division, not by the vice president, and that no commitment had been made by Carlo to use Bosco. Where the only evidence with respect to a disputed question of fact consists of contradictory assertions by the protester and the agency, the protester has failed to carry the burden of affirmatively proving its allegation. NGC Investment & Development Corporation, d.b.a. Nieman Glass & Paint, B-194523, August 2, 1979, 79-2 CPD 76. Worldwide Direct Marketing, B-200371, April 2, 1981, 81-1 CPD 253; Reliable Maintenance Service, Inc.--request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337.

However, the contracting officer was not a party to the telephone conversation reflected in the memorandum. The determination of nonresponsibility was based on the record before the contracting officer, which was the memorandum that noted Carlo was dealing with Bosco and would probably use Bosco in a management or subcontract role. It is on the basis of this information together with the other records that the reasonableness of the determination of nonresponsibility must be based.

Finally, the report from the Nashville District corroborates the information in the other two documents that there was a course of dealing between Carlo and Bosco whereby Bosco bid in the name of Carlo and performed work for Carlo either as subcontractor or an agent.

On the basis of this documentary evidence, we cannot say that the contracting officer lacked a reasonable basis for the determination of nonresponsibility of Carlo. See 50 Comp. Gen. 360, supra, where the lack of integrity of the individuals who controlled the activities, policies and management of the bidding corporation was imputed to the corporation. Here, the record indicates that Bosco had unlimited power to bind Carlo to contracts and was to manage or perform the work as a subcontractor.

Carlo has also made a part of the record an affidavit of Carlo Catenacci, president of Carlo. In the affidavit Mr. Catenacci states that in the telephone conversation on September 25 with the contracting officer:

"* * * I made it clear * * * that there was no existing or contemplated obligations or commitment to use Bosco in any capacity on the Project and that in view of the statements made in [the contracting officer's] letter of September 18, 1981, if the Government's problem with our receiving award of the Contract was a supposed affiliation with Bosco, there really was no problem in awarding to us because there was no need or obligation to utilize Bosco in the performance of work on the Project.

* * * * *

"* * * I further made it clear to [the contracting officer] that there was no relationship between Bosco and Carlo such as a general agency or any obligation or commitment to utilize Bosco's services in connection with performing the contract in an effort to clarify the Government's erroneous speculation which apparently led the Government to conclude that Bosco was affiliated with Carlo or that Bosco would perform work on the Project as Carlo."

Carlo argues that on the basis of this information, the contracting officer had a duty to seek further information to clarify what, if any, relationship existed between Carlo and Bosco. We note that Carlo did not come forward between the time of the phone conversation regarding the preaward survey and the determination of nonresponsibility to offer any firm other than Bosco to assist in performance of the contract. The only name of a possible subcontractor or manager the contracting officer had before him in the timeframe was that of Bosco. Concerning the allegation that the contracting officer had a duty to seek further information from Carlo or notify it of the negative information, we have held that there is no requirement for formal notice to a bidder before the issuance of a negative

responsibility determination or the award of a contract to another bidder. See RIOCAR, B-180361, May 23, 1974, 74-1 CPD 282; Gary Construction Company, Incorporated, B-181751, December 17, 1974, 74-2 CPD 357; Pope, Evans and Robbins, Inc., B-200265, July 14, 1981, 81-2 CPD 29; DAR § 1-907 (DAC No. 76-22, February 22, 1980). We also note that an expedited award was authorized on September 30, 1981, only 5 days after Carlo offered to substitute someone else as subcontractor or project manager.

Accordingly, based on the information before the contracting officer, we find his determination to have had a reasonable basis and we deny the protest.

William J. Jordan
for Comptroller General
of the United States