DECISION

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

FILE: B-212385.3 **DATE:** April 18, 1984

MATTER OF: Telex Communications, Inc.--Reconsideration

DIGEST:

1. Request for reconsideration is denied as to issues on which protester has not specified any errors of law or information not previously considered in the initial protest.

2. Previous decision is affirmed where protester has not met its burden of proving that prior decision contained error of fact or law.

Telex Communications, Inc. (Telex), requests that we reconsider our decision in the matter of Telex Communications Inc.; Mil-Tech Systems, Incorporated, B-212385, B-212385.2, January 30, 1984, 84-1 CPD 127. In that decision, we found that under invitation for bids (IFB) No. DAAB07-83-B-B030 (1) the Department of the Army (Army) could award a contract to Mil-Tech Systems, Incorporated (Mil-Tech), even though Mil-Tech did not incorporate until after bid opening; (2) Mil-Tech was not barred from receiving the award because after bid opening Mil-Tech became a wholly owned subsidiary of ATACS Corporation; (3) the Army properly permitted Mil-Tech to insert an omitted price in its bid after bid opening; and (4) Telex did not meet its burden of affirmatively proving Mil-Tech misrepresented that it had no affiliates.

Telex requests that we reconsider each issue decided in the previous protest. Under our Bid Protest Procedures, however, we only will consider a request for reconsideration which specifies an error of law made or information not considered in the initial protest. 4 C.F.R. § 21.9(a) (1983); Martin Machinery Company--Reconsideration, B-211677.2, July 13, 1983, 83-2 CPD 88. With respect to the last three issues stated above, Telex has not alleged that our initial decision did not consider any facts or that it contained any error of law. Thus, as to these issues, the request for reconsideration is denied.

Telex does allege that our holding that Mil-Tech is eligible for award even though Mil-Tech did not file its

certificate of incorporation until after bid opening is based on erroneous findings of fact and law. Specifically, Telex contends that we reached this result because we found that Mil-Tech was a de facto corporation under Virginia law and, therefore, Mil-Tech could be awarded a contract in accordance with our decision in Protectors, Inc., B-194446, August 17, 1979, 79-2 CPD 128. Telex asserts that our decision is legally incorrect because Virginia law does not recognize the existence of de facto corporations.

Telex has misread our decision. Although we did find that Mil-Tech could be awarded a contract in accordance with our decision in Protectors, Inc., supra, we did not find that Mil-Tech was a de facto corporation at bid opening. We noted that, in the Protectors case, the fact that we found Protectors was a de facto corporation under Florida law was not dispositive. Telex Communications, Inc.; Mil-Tech Systems, Incorporated, supra, at 6. We pointed out that we decided Protectors could be awarded a contract because: (1) for purposes of performing the contract, the unincorporated business and the incorporated business were the same; (2) the bidder in Protectors did not attempt to retain an option to avoid the government's acceptance of its bid; (3) under Florida law, the bidder would be estopped to avoid the government's acceptance of its bid by claiming it was not incorporated at bid opening; and (4) the president of Protectors submitted the bid in his capacity as president and not in his individual capacity.

We then applied these four factors to the case of Mil-Tech and found that (1) the bid was submitted on behalf of Mil-Tech, and Mil-Tech would perform the contract; (2) Oliver Brown did not attempt to retain an option to avoid the Army's acceptance of Mil-Tech's bid; (3) it appeared that under Virginia law, Mil-Tech could not avoid the Army's acceptance of its bid, see Bolling v. General Motors Acceptance Corporation, 204 Va. 4, 129 SE 2d 54, 49 (1963); Colonial Inv. Col., Inc. v. Cherrydale Cement Block Co., Inc., 194 Va. 454, 73 SE 2d 419, 421 (1952); Braning Maufacturing Co. v. Norfolk-Southern Railway Co., 127 SE 74, 81 (1924); and (4) in submitting the bid, Oliver Brown was acting in his capacity as Mil-Tech's president rather than as an individual. Accordingly, we concluded that under the rationale of Protectors, Mil-Tech could be awarded a contract even though Mil-Tech did not incorporate until after bid opening.

If Telex is now alleging that our conclusion is wrong because Mil-Tech only could be found eligible to receive a contract if Mil-Tech was a de facto corporation under

Virginia law, cases decided by this Office do not support this view. On this point, see Oscar Holmes & Son, Inc.; Blue Ribbon Refuse Removal, Inc., B-189099, October 24, 1975, 75-2 CPD 251, and Precision Construction Company, B-212194.2, January 16, 1984, 84-1 CPD 72, in which we held that the companies involved could be awarded contracts even though they were not incorporated at bid opening without finding that these companies were de facto corporations at bid opening. Telex's contention that we could have found Oscar Holmes was a de facto corporation under Maryland law is irrelevant since we did not decide the Oscar Holmes case on this basis. Moreover, to the extent Telex alleges that Oscar Holmes is distinguishable because, unlike Mil-Tech, Oscar Holmes had an established business and substantial financial assets, these matters concern responsibility. See Echelon Service Company, B-209284.2, December 2, 1982, 82-2 CPD 499. Our decision concerned Mil-Tech's eligibility to receive an award. We specifically pointed out that the contracting officer must determine whether Mil-Tech is responsible to receive an award.

Telex has also alleged that our conclusion that an award to Mil-Tech would be an award to the same entity that submitted the bid is legally incorrect. To support this allegation, Telex relies on our decisions 50 Comp. Gen. 530 (1971); 41 Comp. Gen. 61 (1961); 33 Comp. Gen. 549 (1954); Martin Company, B-178540, May 8, 1974, 74-1 CPD 234.

These cases, however, do not apply to the present factual situation. In those cases, we found that a contract could not be awarded to a business other than the business named in the bid. In Martin Company, we found that a contract could not be awarded to a sole proprietor when the bid was submitted in the name of a corporation. In 50 Comp. Gen. 530, supra, we did not permit an award to a joint venture in whose name a bid was submitted when the joint venture was not formed until after bid opening because the person who submitted the bid was not authorized to submit the bid on behalf of the joint venture. Here, the bid was submitted in the name of Mil-Tech Corporation, Mil-Tech Corporation will perform the contract, and Oliver Brown had authorization to bid for Mil-Tech. Accordingly, we affirm our finding that the same entity who submitted the bid will perform the contract. See Oscar Holmes, supra; Precision Construction Company, supra.

Therefore, Mil-Tech's bid is eligible under these circumstances to be considered for award. While we are not unmindful of the Army's concerns regarding this factual situation and its perception that Mil-Tech may have retained the option of avoiding its bid, as discussed above, the bidding entity remained the same throughout the time period and therefore its eligibility for award was not impaired. Under these facts, the Army's concerns do not involve eligibility but rather the responsibility of Mil-Tech. Whether the firm is found responsible after consideration of factors such as capacity, credit and integrity is for determination by the contracting officer and the SBA, not our Office. In deciding both the original decision and this reconsideration, our Office did not reach these matters.

In conclusion, we find that Telex has not demonstrated that our initial decision was based on an error of fact or law. Accordingly, our previous decision is affirmed.

for Milton J. Socolar
Comptroller General
of the United States