P. Jordan

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: J. I. Case Company

File: B-239178

Date: August 6, 1990

Robert Davis, Esq., and Paul Shnitzer, Esq., Crowell & Moring, for the protester.
Richard O. DuVall, Esq., and Richard L. Moorhouse, Esq., Dunnells, DuVall & Porter, for Canadian Commercial Corporation/Liftking, Inc., and Henry E. Steck, Esq., Harrison & Steck, for The Entwistle Company, interested parties.
Dominic Ortisi, Esq., and Judy Sukol, Esq., Office of Command Counsel, Department of the Army, for the agency.
Paul E. Jordan, Esq., Paul Lieberman, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly awarded contract to low bidder's successor in interest, where the original bidder, a wholly owned subsidiary of the parent-successor, merged with the parent company after bid opening. Since the assets of the original bidder (apart from this low bid) which were transferred in the merger were not negligible, the merger did not constitute a sale of a bid.

DECISION

J. I. Case Company protests award of a contract to The Entwistle Company under solicitation No. DAAE07-88-B-J377 issued by the U.S. Army Tank Automotive Command for a quantity of rough terrain forklift trucks. Case contends that it is improper to award the contract to Entwistle as the successor in interest to the original low bidder, Defense Technology Corporation (DTC), because DTC had no significant assets, apart from its bid, to transfer to Entwistle.

We deny the protest.

This procurement was conducted using two-step sealed-bid procedures. The step-one request for technical proposals

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was issued on March 10, 1989. Upon evaluation, three proposals were found to be technically acceptable and in November each of the three, DTC, Case, and Liftking, was advised of its technical acceptability and eligibility to submit a bid under step two.

During the evaluation period, DTC was performing under a different Defense Construction Supply Center (DCSC) contract for similar forklifts. On August 11, 1989, this contract was terminated for default by DCSC. After a series of negotiations among representatives of DTC, Entwistle, and DCSC, commencing August 24, and after quotations were solicited from Case and another concern, DCSC awarded a reprocurement contract to Entwistle on December 18.

Bids under step two of the solicitation at issue were opened on December 5, with DTC submitting the low bid and Case the second low bid. Case filed an agency-level protest on December 13, alleging that DTC was not a regular dealer or manufacturer under the Walsh-Healey Public Contracts Act, 41 §§ 35-43 (1988), and that DTC was not responsible based on unsatisfactory performance on prior government contracts. On December 22, DTC, a wholly owned subsidiary of Entwistle, merged with Entwistle which rendered Case's protest moot. Under the merger which became final on January 11, 1990, Entwistle succeeded to all property interests, rights, and privileges of DTC and assumed all of DTC's liabilities.

Entwistle claimed the status of successor in interest to DTC for purposes of this solicitation and the contracting officer requested information from Entwistle in order to determine whether to recognize it as the successor. Entwistle provided a videotape presentation showing current DTC forklift operations under the Entwistle reprocurement contract; a manufacturing agreement between DTC and its former subcontractor showing DTC had assumed manufacturing responsibility; a facility lease; a list of checks DTC wrote for fixtures and equipment; a list of capitalized manufacturing equipment; the certificate of merger; and employee payroll records. Upon analyzing this information, the contracting officer concluded on February 14, 1990, that Entwistle was a proper successor in interest to DTC's bid.

The contracting officer then ordered a pre-award survey of Entwistle including the Texas facility where DTC, as a subcontractor, was performing the reprocurement contract. While an August 31, 1989, pre-award survey conducted on DTC had resulted in a recommendation of no award, the new survey, completed on March 23, resulted in a recommendation of complete award to Entwistle. After reviewing the report, the contracting officer requested additional clarification

from Entwistle regarding the handling of engineering and manufacturing support, as well as a more detailed performance milestone chart. The contracting officer was satisfied with Entwistle's clarification. On March 30, the contracting officer determined that Entwistle was responsible and, thus, eligible for contract award. Upon learning of the contracting officer's plan to award to Entwistle, Case filed a protest with our Office contending that the agency erred in allowing the substitution of Entwistle for DTC.

The transfer or assignment of rights and obligations arising out of a bid or proposal is permissible only where the transfer is to a legal entity which is the complete successor in interest to the bidder or offeror by virtue of merger, corporate reorganization, the sale of an entire business or the sale of an entire portion of a business embraced by the bid or proposal. Harnischfeger Corp., B-224371, Sept. 12, 1986, 86-2 CPD ¶ 296; Ionics Inc., B-211180, Mar. 13, 1984, 84-1 CPD ¶ 290; Federal Acquisition Regulation (FAR) § 14.402-2(k) (FAC 84-53). The rationale for this restriction is analogous to that behind the anti-assignment statutes, 41 U.S.C. § 15 and 31 U.S.C. § 3727 (1988), which prohibit the assignment of government contracts and claims in order, among other considerations, to prevent parties from acquiring a speculative interest and thereafter selling the contract at a profit to bona fide bidders and contractors. Ionics Inc., B-211180, supra.

Here, DTC, a wholly owned subsidiary, merged with its parent, Entwistle, on December 22, 1989. Under the terms of the merger agreement, Entwistle succeeded to all the rights, privileges, immunities, and franchises, and all the property of DTC, as well as responsibility for all liabilities and obligations of DTC. As such, Entwistle is the complete successor in interest to DTC and, therefore, Entwistle is eligible for award of the contract based upon DTC's low bid.

Case contends that the merger cannot justify the transfer of the bid because DTC's transferred assets, other than the bid, were negligible in relation to DTC's $65 million bid. Case cites prior decisions by our Office in which bid transfers were not recognized, even though the transferee was a complete successor in interest, because the transferred assets, apart from the bid, were of negligible value or were purchased for a nominal consideration. In those cases, the value of assets apart from the bid was deemed

relevant to determining whether anything more than the bid was transferred. See Mil-Tech Sys., Inc., and The Dept. of The Army--Recon., B-212385.4; B-212385.5, June 18, 1984, 84-1 CPD ¶ 632; Mil-Tech Sys. Inc. v. United States, 6 Cl. Ct. 26 (1984); Information Servs. Indus., B-187536, June 15, 1977, 77-1 CPD ¶ 425. See also Keco Indus. Inc., B-207114, Aug. 23, 1982, 82-2 CPD ¶ 165.

With respect to the case law concerning the value of assets apart from the bid, the protester has erroneously concluded that the test of whether assets are "negligible" is based on the assets' value relative to the value of any resulting contract. In fact, the test is not whether the assets are comparable in value to the bid, but rather, whether the negligible value of the assets, or their nominal purchase price, indicates that nothing of real value apart from the bid was transferred. See Mil-Tech Sys. Inc., and The Dept. of The Army--Recon., B-212385.4; B-212385.5, supra. In this regard, "negligible" should be given its common usage definition: "so small or unimportant or of so little consequence as to warrant little or no attention." Webster's Ninth New Collegiate Dictionary (1988).

Here, the record shows that DTC transferred capitalized equipment including welding machines, an air compressor, radial drill, and other industrial tools valued at $70,140, when purchased between June 1988 and May 1989. DTC also transferred numerous other tools, welding machines, portable buildings, and other equipment worth more than $95,000, as evidenced by a list of checks written by DTC from November 1988 through July 1989. In addition, DTC transferred approximately $1.8 million in forklift parts not covered by the unliquidated progress payments. At the time of the merger, DTC also transferred its leased forklift manufacturing facilities at which more than 40 employees were working on the forklift reprocurement contract. Further, Entwistle assumed DTC's liabilities to vendors in the amount of approximately $1.8 million, the assumption of which represents a substantial consideration. Accordingly, we find that the assets and liabilities transferred to Entwistle were not negligible. Thus, the contracting officer's determination to recognize the bid transfer was reasonable and proper.

The DTC/Entwistle merger is readily distinguishable from the transfer in Information Servs. Indus., B-187536, supra, and Mil-Tech Sys., Inc., and The Dept. of The Army--Recon., B-212385.4; B-212385.5, supra. In Information Servs., we agreed with the contracting officer's decision not to recognize the transfer of a bid where the low bidder had no facility or equipment, and sold its assets of negligible

value for a nominal amount of cash as well as unspecified "other good and valuable consideration" to a successor in interest.

Similarly, in Mil-Tech, the low bidder had assets of negligible value ($5,000 cash, work product to develop the bid, and a lease and five employment agreements contingent on contract award) which it transferred to its successor for $5,200, a nominal consideration. We found that in the guise of a stock transfer, Mil Tech's purchaser really purchased a low bid. Here, since DTC transferred significant assets including equipment, and a leased facility, with employees performing a similar forklift contract, there is no evidence of the bid purchasing which was found in Information Servs. and Mil-Tech.

Case's arguments attacking the "significance" of the assets and their value does not change our conclusion. For example, Case argues that there is no proof that the equipment transferred was still owned by DTC at the time of the merger. Since Case has produced nothing to contradict the representations of DTC and Entwistle, Case's allegations amount to mere speculation, which alone is insufficient to sustain its protest. See Independent Metal Strap Co., Inc., B-231756, Sept. 21, 1988, 88-2 CPD ¶ 275.

Case also argues that, in making its determination concerning the reprocurement of DTC's forklift contract, the government found DTC had no significant assets. Case asserts that it is inconsistent to find no significant assets for one contract and then term the same assets significant in regard to the bid transfer. We disagree. At the time of the default termination, DTC had received more than $7 million in unliquidated progress payments and faced a substantial liability for anticipated reprocurement costs. When weighing the value of DTC's equipment, tools, spare parts, leased facility, and employees the government reasonably determined that the value of these assets was not significant in view of DTC's liabilities. On the other hand, while a leased manufacturing facility, out-of-work employees, and spare parts may be of little or no value to the government after termination of a contract, they have significant value when considered in light of DTC's performance of the reprocurement contract for Entwistle.

Case also speculates that Entwistle will not perform the contract in accordance with DTC's step-one technical proposal. Case notes that FAR § 14.503-2(a)(3) requires step-two bidders to "prominently state" that they will comply with specifications and the bidder's technical proposal. Case then notes that the pre-award survey request

for Entwistle states "since the Contractor merged with its parent company, subsequent to bid opening and appears to be contemplating a plan of manufacture other than the one set forth in his accepted technical proposal, a new survey is requested." Case thus concludes that Entwistle's alleged different manufacturing plan renders the bid nonresponsive. The record shows otherwise. In a December 28, 1989, letter to the Army, Entwistle stated that it accepted DTC's technical proposal as the basis for performance of any contract awarded and that it would perform any such contract in strict accordance with DTC's proposal. Thus, any questions the contracting officer had with regard to Entwistle's plan of manufacture concerned Entwistle's responsibility, not its responsiveness in adhering to DTC's technical proposal.

When assessing an offeror's responsibility, a contracting officer has broad discretion to determine whether to conduct a pre-award survey and the degree of reliance to be placed on the result. Motorola, Inc., B-234773, July 12, 1989, 89-2 CPD ¶ 39. The record reflects that any doubts the contracting officer had about Entwistle were resolved by the pre-award survey. In particular, the surveyors noted that there were no hardware configuration changes proposed by Entwistle and that the configuration was the same as proposed in DTC's step-one proposal. Thus, the record shows that Entwistle would perform the contract in accordance with DTC's proposal, and the contracting officer gave appropriate consideration to the basis for the request for a new survey report in making his affirmative determination of responsibility.

Accordingly, the protest is denied.

James F. Hinchman
General Counsel