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

FILE: B-207114 DATE: August 23, 1982

MATTER OF: Keco Industries, Inc.

DIGEST:

1. Rationale that transfer or assignment of proposals is prohibited unless such transfer is by "operation of law" to the legal entity which is a complete successor in interest to the original offeror is interpreted to permit assignment when the entire portion of the business embraced by a proposal is sold.

2. Contracting officer has discretion not to conduct a pre-award survey, and in the absence of a showing of fraud, GAO will not review a decision to this effect.

3. Contract history of a predecessor company qualifies a successor company for waiver of first article testing when the facilities and assets of the two companies are similar or identical.

Keco Industries, Inc., protests the award of a requirements contract by the San Antonio Air Logistics Center, Kelly Air Force Base, Texas, to Engineered Air Systems, Incorporated under request for proposals No. F41608-81-R-3906. Keco argues that the award was improper because--after submission of best and final offers--the low offeror, American Air Filter Company, Defense

Systems Division, an Allis-Chalmers Company, was purchased by and renamed Engineered Air Systems.[1] We deny the protest.

On March 19, 1982, the Defense Systems Division submitted a best and final offer for an estimated quantity of 230 multiple application air conditioners. The contracting officer was notified on April 1 that the division had been purchased by Engineered Air Systems; the new owners stated that all "policies, products, and personnel" of the previous company continued as before, and that this was a "change in ownership only." On April 9, the protested contract was issued to Engineered Air Systems.

Keco challenges the award on three grounds: that Engineered Air Systems was not eligible for the award; that the contracting officer failed to request a pre-award survey of Engineered Air Systems; and that the contracting officer improperly waived first article testing for Engineered Air Systems.

Eligibility for Award:

Keco argues that Engineered Air Systems had "no semblance of standing" as an offeror or prospective awardee on March 29, the date the contracting officer signed the award document. We note, however, that a purchase agreement between Allis-Chalmers and Engineered Air Systems was executed on March 30, and that award was not approved until April 6 and was not effective until April 9, 1982. Keco's real basis of protest therefore appears to be the alleged unacceptability of an offer from the successor corporation. In this regard, the protester cites a case involving the Fouke Fur Company, in which our Office stated that:

> "* * *the transfer or assignment of rights and obligations arising out of proposals submitted in negotiated procurements is to

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[1]The record shows that in 1978, Allis-Chalmers Corporation formed a subsidiary for the purpose of acquiring all stock of American Air Filter; in late 1980, the subsidiary was merged into Allis-Chalmers. All assets of American Air Filter subsequently were liquidated into Allis-Chalmers, and American Air Filter's Defense Products Division became Allis-Chalmers' Defense Systems Division.

> be avoided, both as a matter of public policy and a matter of sound procurement policy, unless * * * such transfer is effected by operation of law to a legal entity which is the complete successor in interest to the original offeror," 43 Comp. Gen. 353 at 372 (1963).

Keco argues that Engineered Air Systems did not purchase or otherwise acquire the legal entity Allis-Chalmers Corporation. However, as the Air Force points out, the Fouke case was extended by our later decision in Numax Electronics, Inc., 54 Comp. Gen. 580, 584 (1975), 75-1 CPD 21, in which we rejected a literal interpretation of the phrase "unless such transfer is effected by operation of law." Instead, the later opinion broadly construed the phrase as:

> "* * * permitting the assignment of proposals when such transfer is effected by [the] * * * sale of an entire portion of a business embraced by the proposal * * *."

In our opinion, the transfer of the Defense Systems Division to Engineered Air Systems meets this criterion. The scope of the transfer is shown by the purchase agreement, which we have reviewed in camera. It indicates that all rights, properties, and assets of the Defense Systems Division that would have been employed to perform the contract were transferred to Engineered Air Systems. Assets were defined to include, for example, inventory, supplies, machinery, equipment, real estate, business records, and purchase and sales orders. Also, with one exception, provisions were made for Engineered Air Systems to offer continued employment to all Defense Systems Division employees. We therefore find that the transfer of the division from Allis-Chalmers to Engineered Air Systems is the type of transaction encompassed by the Numax rule, which permits the assignment of proposals when a sale involves an "entire portion of a business embraced by the proposal."

The present case can be distinguished from our decision in Information Services Industries, B-187536, June 15, 1977, 77-1 CPD 425, in which we upheld an agency's refusal to recognize a successor corporation because the original bidder's tangible assets--transferred after bid opening--were of "negligible value,"

and the original bidder had received only a nominal amount of cash and other unspecified consideration. As a pre-award survey disclosed, the original bidder in that case did not possess--and therefore could not transfer--"the entire portion of the business embraced by the proposal," as required by Numax. Rather, the bidder was attempting to acquire facilities for contract performance by transfer of its limited assets to Information Services Industries. By contrast, in this case the Defense Systems Division's assets were of considerable value, and a substancial amount of cash and other consideration was transferred through the purchase agreement to Engineered Air Systems. See also Gull Airborne Instruments, Inc., 57 Comp. Gen. 67 (1977), 77-2 CPD 344 restating Numax.

Propriety of Not Conducting a Pre-Award Survey:

Keco asserts that the contracting officer abused his discretion by failing to conduct a pre-award survey. Defense Acquisition Regulation § 1-904.5 (DPC 76-13, November 18, 1977) defines a pre-award survey as an evaluation by a contract administration office of a prospective contractor's capacity to perform under the terms of a proposed contract. Such an evaluation is used in determining the prospective contractor's responsibility. However, there is no requirement that a pre-award survey be conducted in all cases. Klein-Sieb Advertising & Public Relations, Inc., B-194553.2, March 23, 1981, 81-1 CPD 214. It is within the contracting officer's discretion not to conduct a pre-award survey, and we will not review a decision to this effect in the absence of a showing of fraud on the part of procuring officials or an allegation of failure to apply definitive responsibility criteria, since this decision is part of an affirmative determination of responsibility. Decision Sciences Corporation, B-205582, January 19, 1982, 82-1 CPD 45.

The protester here has neither alleged nor shown that the decision not to conduct a pre-award survey falls within one of these exceptions, and we therefore will not review it.

Waiver of First Article Testing:

Keco challenges the contracting officer's decision to waive first article testing for Engineered Air Systems. The solicitation provided for alternative

offers, which it termed Bids A and B. Bid A was to include first article testing, while Bid B, available to qualified companies, was based on waiver of first article testing. The protester questions whether Engineered Air Systems can qualify for a waiver on the basis of performance by the Defense Systems Division.

Under this solicitation, a waiver could be granted if the offeror had previously furnished production quantities of the same article to the Air Force and these articles had exhibited satisfactory performance and service. In its proposal, the Defense Systems Division indicated that it had delivered similar air conditioners to the San Antonio Air Logistics Center under Contract No. DLA 400-78-C-1664.

As a general rule, the determination as to whether an offeror qualifies for waiver of first article testing is within the discretion of the contracting agency, TM Systems, Inc., B-203156, December 14, 1981, 81-2 CPD 464, and we will not overturn it unless the decision was arbitrary or capricious. Astrocom Electronics, Incorporated, B-190384, February 13, 1978, 78-1 CPD 122. Moreover, in a case such as this, the contract history of a predecessor company may qualify a successor company for waiver of first article testing on the basis of similarity of the facilities of the two companies. Julian A. McDermott Corporation, B-189798, December 9, 1977, 77-2 CPD 449; Kan-Du Tool & Instrument Corporation, B-183730, February 23, 1976, 76-1 CPD 121.

Here, not only the facilities and other assets, but also employees were shifted from the Defense Systems Division to Engineered Air Systems. We cannot conclude in these circumstances that waiver of first article testing, based on the experience of the Defense Systems Division, was arbitrary or capricious.

For the above reasons, Keco's three bases of protest fail. The protest is denied.

Milton J. Socolar

Acting Comptroller General
of the United States