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DECISION

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

FILE: B-188743 DATE: November 7, 1977

MATTER OF: Gull Airborne Instruments, Inc.

DIGEST:

1. GAO finds that questioned bid contains unconditional commitment to furnish that which procuring agency requires contrary to assertion that bid is nonresponsive.

2. Ground of protest questioning finding that prospective awardee is responsible will not be considered since neither fraud on part of procuring agency is alleged nor "definitive" responsibility criteria are involved.

3. Ground of protest alleging that bidder is not "regular dealer or manufacturer" will not be considered since responsibility for deciding "regular dealer or manufacturer" status is vested in contracting officer and Department of Labor.

4. Mere fact that bidder enters into post-bid-opening agreement to obtain needed resources is not reason in itself to reject bid, unless effect of agreement is to cause bidding entity to "no longer exist" and to cause effective transfer of bid to nonbidding entity.

5. Since bidding entity has no formal plans to dissolve and because entity may possibly do some business in its own name in the future so long as it does not compete with Bendix Corporation, infusion of resources from Bendix Corporation to bidding entity may be recognized in determining bidding entity's responsibility.

Gull Airborne Instruments, Inc. (Gull), protests the Department of the Navy's proposed award to Consolidated Airborne Systems, Inc. (CAS), the low bidder under invitation for bids (IFB) N00383-76-B-0593. Gull insists that CAS should not be awarded a contract under the solicitation because of alleged irregularities relating to CAS's bid.

The IFB was issued by the Navy on September 3, 1976, for "capacitance-type, rank-unit, fuel quantity test sets and data." CAS's low bid of $593,330 was nearly $400,000 less than the second low bid submitted by Gull. Because CAS's low bid contained, in the Navy's view, an "unconditional [commitment] * * * to design and produce * * * in conformance with the specifications and * * * delivery schedule," the Navy's contracting officer decided to determine whether CAS was a responsible bidder.

Having the results of three governmental "preaward surveys" on the capability of CAS to perform the contract, plus additional information on CAS's "cash flow posture, conversion of inventory into cash, indebtedness situation and the possible merger of CAS with Bendix Corporation," the contracting officer determined that CAS was responsible and otherwise entitled to award.

Once Gull learned of Navy's intent to award a contract to CAS it filed a protest with our Office. Gull's initial protest alleged the following: (1) the contracting officer improperly recognized the assistance to be provided by Bendix in determining CAS to be a responsible concern; (2) the assistance to be provided by Bendix is potential only and should not have been recognized as aiding CAS's ability to do the work; (3) CAS may lack "tenacity and perseverance"; and (4) CAS's bid is "nonresponsive" to the solicitation because the company does not have current designs to meet the IFB's specifications or the ability to furnish newly designed specifications in view of the IFB's delivery schedule.

Navy's reply to these initial bases of protest was as follows: (1) Since CAS submitted an unconditional bid, the bid is responsive; (2) CAS has satisfied the contracting officer and three preaward survey teams that it understands the technical nature of the requirements of the solicitation, that it has the technical expertise to perform the contract, and that its manufacturing capability, including facilities, purchasing system and labor resources, is sufficient to meet all requirements of the IFB; and (3) The agreement between CAS and Bendix and Bendix's unconditional guaranty that the contract will be performed as required are proper bases for the contracting officer's affirmative determination that CAS is financially responsible. Accordingly, award to CAS would be proper.

Point I--Alleged Nonresponsive Bid

Specifically as to point one, Navy argues that, "[e]xcept for the identification of the manufacturer's part number in clause B-252, and Section E as well as completion of the pricing for Section E [of the solicitation], there was no additional information required from CAS." Because of this conclusion, and in light of the observation in Concept Merchandising Inc., and others, B-187270, December 17, 1976, 76-2 CPD 505 (to the effect that where, as here, solicitation provisions call for bidders to identify manufacturer's numbers, the numbers are for informational purposes and go to responsibility rather than responsiveness), Navy argues that Gull's protest actually questions its finding that CAS is responsible. Navy considers that its argument is further buttressed by the fact that the solicitation provides that a bidder's insertion of a part number is for informational purposes but that the insertion in no way relieves the offeror from the obligation of furnishing "material conforming in all respects to the requirements of the specifications * * *." Moreover, Gull's allegations, in Navy's view, have to do with existing CAS designs not with the "new manufacturing part number * * * to be designed and produced." Secondly, the Navy points out that during its preaward survey it satisfied itself that CAS understood the specification requirements.

In any event, Navy argues that CAS has responded in detail to Gull's allegations that its product does not conform to seven paragraphs of the specifications. Navy views this response as adequately rebutting Gull's allegations.

Point II--Propriety of Responsibility Finding

As for point two, the Navy says that Gull is essentially questioning its decision finding Consolidated to be responsible. Navy further points out that our Office will not review agency decisions holding a prospective contractor to be responsible unless the protester shows that fraud was committed by Government officials in the process of making the responsibility finding. Surveillance Systems, B-185562, April 8, 1976, 76-1 CPD 235.

It is the implicit position of the Navy that Gull has not made a showing of fraud concerning the Navy's actions regarding the contested responsibility finding because there is nothing in the records of the preaward surveys or the analyses of the contracting officer to indicate other than a good faith decision-making process leading to the finding.

Point III--Bendix Agreement

Navy argues that it was proper to consider the Bendix agreement in deciding whether Consolidated was financially responsible. That agreement,* in Navy's view, provides as follows:

> "* * * Because of its 'unstable financial condition' CAS negotiated an agreement with Bendix Corporation under which CAS was to assign substantially all of its property, assets and business. The consideration to be received from Bendix was $2,450,000, together with net book value of the CAS accounts as of closing date and an amount of increases to CAS inventories less any decreases in such inventory from the date of the agreement with Bendix to closing. The payment of the purchase price would be made over a three year period. Furthermore, in the proxy statement * * * it was indicated that if after payment of all creditors and reservation of funds for contingent liabilities after having received the consideration from Bendix, there remained further assets, CAS could pursue other business activities.
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> "Under the terms of the agreement * * * Bendix agreed to purchase the part of CAS assets involved in the performance of this contract and agreed to assume all open Government contracts. Further, Bendix has given the Government written notice guaranteeing the performance of any contracts awarded to CAS for the fuel quantities tests set (TF1966) as a result of the IFB * * *. Although at the present time it appears that Bendix is completing the takeover of CAS operation, most of the employees of CAS are still listed as CAS employees and paid by CAS, the money coming from Bendix. CAS presently holds their plant and facilities under a 25 year lease and Bendix has purchased one year portion of the lease with an option to renew. Bendix has subleased, however, a portion of the plant back to CAS. Although CAS is not bidding on any new contracts at the present time, CAS is performing all work (about 150 Government contracts) under their own name until a novation agreement is executed. CAS continues to exist as a corporation and I understand that there are no present plans to dissolve the corporation." (The agreement also provided for the transfer of CAS's "entire business" to Bendix.)

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* By message delivered to the Navy in April 1977, which explained the status of the agreement, Bendix stated that it had acquired "all assets, open contracts and proposal commitments of CAS." Further, we understand that the agreement has been executed except that a novation agreement covering CAS's open contracts has not yet been completed.

Navy's view that it was proper to rely on the Bendix agreement is based on its analysis of GAO decisions which allegedly support the proposition that the Navy could properly award either to CAS or to Bendix under the present facts.

The cases cited by the Navy as authority for supporting an award to CAS--on the assumption that CAS, the bidding entity, would still be the entity receiving the award--are B-171095, May 4, 1971, and Harper Enterprises, 53 Comp. Gen. 496 (1974), 74-1 CPD 31. Both cases dealt with situations "where the award is made to the bidder, but where the bidder may have been considered nonresponsible at the time of bidding because of financial instability, but becomes responsible by the time of contract award by reason of entering into [joint venture] agreements with other companies for financing and guaranteeing performance." Because of the approval our Office gave to the awards in question, Navy argues that it is appropriate to award to CAS since, although the CAS/Bendix agreement is considered not to be a joint venture agreement, "it [does provide] for a substantial merger of CAS with Bendix while yet retaining some independent and continued character to CAS as a corporate entity."

In the alternative, the Navy argues that it could make a direct award to Bendix under the authority of Numax Electronics, Inc., 54 Comp. Gen. 581 (1975), 75-1 CPD 21. In that case we held that rights and obligations arising out of proposals may be assigned provided the assignment is "effected by operation of law, or merger, or corporate reorganization, or sale of an entire business, or sale of an entire portion of a business embraced by the proposal, or any other means not barred by 41 U.S.C. § 15 or 31 U.S.C. § 203." Navy argues that the CAS/Bendix agreement does or could be made to fit within the guidelines of Numax.

Gull's Reply To Navy Report
Point I--Alleged Nonresponsive Bid

Gull's reply does not advance any additional argument on this issue.

Point II--Propriety of Responsibility Finding

Gull alleges: (1) CAS was not a "manufacturer or regular dealer" because the company had sold its technology for "testers" to Bendix under the contract; (2) CAS has no engineering department so, at the time of award, it would be unable to perform the contract; (3) By its own admission to its stockholders, CAS was insolvent;

and (4) CAS has misrepresented its financial condition, technical staff, and ownership of the technology--violation of securities law may be involved.

Point III--The Bendix Agreement

Gull makes extended arguments as to purported irregularities in the CAS/Bendix agreement, namely: (1) The original agreement did not include this IFB on the list of Bendix "commitments"; (2) Bendix waited until after bid opening to decide to issue a guarantee here and, therefore, had an improper option to avoid an award resulting in a "shell game"; (3) What is involved here is an improper bid transfer of the type discussed in Information Services Industries, B-187536, June 15, 1977, 77-1 CPD 425; (4) No "operation of law or complete successor in interest" is present in the Bendix/CAS relationship so as to make it legally proper under either 43 Comp. Gen. 353 (1963) or Numax Electronics, Inc., supra. Moreover, it is inappropriate to apply the Numax Electronics decision, which involved a negotiated procurement, to the subject case involving an advertised procurement; and (5) Although the Navy insists that the entity to be awarded the contract is CAS, in point of fact "CAS is not a viable entity"--award will not be performed by it since the company is an "insolvent shell corporation." Consequently, under the authority of Harper Enterprises, supra, the CAS/Bendix arrangement is improper since that decision prohibits "infusion-of-resources" agreements where the "bidding entity no longer exists and the bid is effectively transferred to a non-bidding entity."

ANALYSIS

Point I--Alleged Nonresponsive Bid

The Navy's argument that Gull's bid is responsive is considered correct. Specifically, we find Gull's bid to contain an unconditional promise to furnish that which the Navy was seeking to procure.

Point II--Propriety of Responsibility Finding

Our Office has discontinued the review of procuring agencies' decisions which find prospective contractors to be responsible unless: (1) the procuring officials (emphasis supplied) issuing the decision are shown to have acted fraudulently or in bad faith in issuing the decision; or (2) so-called "definitive" responsibility criteria are involved. Commercial Envelope Manufacturing Company, Inc., B-186042, April 14, 1976, 76-1 CPD 254, and cases cited in text.

Gull's arguments about CAS's alleged lack of resources (engineering department and others), financial insolvency and misrepresentations do not constitute a showing of fraud on the part of procuring officials or relate to noncompliance with "definitive" responsibility criteria. Hence, they will not be considered. (We observe, however, that Gull may bring the question of CAS's misrepresentations to the attention of those regulatory commissions concerned with the legal issues and facts involved as well as the contracting agency.)

Gull's argument that CAS was not a "manufacturer or regular dealer" is not an issue for resolution by our Office since the responsibility for applying the "manufacturer or regular dealer" criteria of the Walsh-Healey Act, 41 U.S.C. § 35 (1970), is vested in the contracting officer subject to final review by the Department of Labor and not GAO. Products Engineering Corporation, B-185722, June 25, 1976, 76-1 CPD 408.

Point III--The Bendix Agreement

This issue will be discussed only to assess whether the agreement could properly be considered in determining the responsibility of CAS and whether award to CAS in this circumstance would otherwise be proper. We will not assess the adequacy of that agreement, however, for to do so would, in effect, constitute a prohibited review of the responsibility finding.

The mere fact that a bidder enters into an agreement subsequent to bid opening, for the purpose of obtaining required resources, is

not a basis, in and of itself, to reject the bid. Harper Enterprises, supra; B-171905, May 4, 1971. Consequently, Gull's objections (1) and (2) concerning the post-bid-opening nature of the Bendix agreement are rejected. The only caveat expressed in Harper concerning post-bid-opening agreements to supply needed resources is that the terms of the agreement may not cause the bidding entity to "no longer exist" and may not cause an effective transfer of the bid to a nonbidding entity.

We understand that there are no formal plans to dissolve CAS as a corporate entity. We are also told, moreover, that CAS may possibly do some business in its own name in the future so long as it does not compete with Bendix.

Under these circumstances we conclude that the Harper caveat has not been contravened and award may properly be made to CAS in the company's name.

Protest denied.

For Deputy Comptroller General
of the United States