



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Premier Security

File: B-275908.2

Date: July 14, 1997

Lawrence J. Sklute, Esq., for the protester.

Alan M. Grayson, Esq., Victor A. Kubil, Esq., and Michael A. Lewis, Esq., Alan M. Grayson and Associates, for Lyons Security Service, Inc., an intervenor.

Michael Cameron, Esq., Immigration and Naturalization Service, Department of Justice, for the agency.

Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency improperly awarded contract for security guard services to low bidder's successor in interest where, after bid opening and before award, the bidder was sold in its entirety, but the evidence in the record does not establish that, apart from the low bid, the assets transferred pursuant to the sale were of more than negligible value. Since the sale of the business thus was tantamount to the improper sale of the bid, low bidder's successor in interest may not receive award of the contract.

DECISION

Premier Security protests the award of a contract to Lyons Security Service, Inc. (LSSI) as the successor in interest to Lyons Security Service, the low bidder under invitation for bids (IFB) No. ACL-6-B-0003, issued by the Immigration and Naturalization Service (INS) for unarmed guard services at the San Pedro Service Processing Center, California. Premier contends that INS improperly awarded the contract to LSSI, because, apart from its low bid, Lyons's assets were negligible, and thus, the sale of the business was tantamount to the improper sale of the bid.

We sustain the protest.

BACKGROUND

The IFB, issued May 13, 1996 as a total small business set-aside, contemplated the award of a fixed-price requirements contract, for a base year and four 1-year option periods. Sixty firms, including Lyons and Premier, responded to the IFB by the time set on July 3 for bid opening; bids, including all option periods, ranged from

\$25,598,235 to \$50,500,923. After rejecting several lower-priced bids as nonresponsive, the contracting officer informed Lyons that it had submitted the apparent low bid (\$29,769,313) and requested that the Defense Contract Management Command (DCMC) conduct a pre-award survey on Lyons. On October 31, DCMC recommended that Lyons not be awarded the contract based primarily on Lyons's weak financial condition. DCMC's report further noted that effective October 1, after bid opening, Lyons had been sold to Kathleen E. Guidice, the wife of the owner of United International Investigative Services (UIIS). UIIS is the incumbent large business firm and was ineligible to compete under the IFB.

After learning of the sale of Lyons, in a letter dated November 4, INS rejected Lyons's bid, citing Federal Acquisition Regulation (FAR) § 14.404-2(l), which states as follows:

"After submitting a bid, if all of a bidder's assets or that part related to the bid are transferred during the period between the bid opening and the award, the transferee may not be able to take over the bid. Accordingly, the contracting officer shall reject the bid unless the transfer is effected by merger, operation of law, or other means not barred by 41 U.S.C. § 15 or 31 U.S.C. § 3727."¹

On November 25, in response to an agency-level protest challenging the rejection, the contracting officer reinstated Lyons as the low bidder. By this time, however, Lyons had been incorporated, thus becoming LSSI, and had moved its offices to a new location at the same street address as UIIS. As a result of these events, and since the IFB was set aside for small businesses, the contracting officer questioned whether LSSI remained eligible for award. In addition, aware that Lyons's new owner is the wife of the owner of UIIS, the contracting officer questioned whether Mrs. Guidice's relationship to UIIS had any impact on LSSI's eligibility for award. Accordingly, by letter dated December 19, INS requested that the Small Business Administration (SBA) determine the awardee's business size status and eligibility for award.

¹41 U.S.C. § 15(a) (1994) provides in pertinent part:

"No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States is concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States."

31 U.S.C. § 3727 is the companion statute applicable to the assignment of claims.

On January 24, 1997, the SBA determined that Lyons had properly self-certified that it was a small business as of bid opening.² The SBA also found that negotiations regarding the sale of Lyons had not been entered into prior to bid opening and that Mrs. Guidice was not the owner of Lyons as of bid opening. As such, the SBA concluded that any issues arising from Mrs. Guidice's relationship with Mr. Guidice or her affiliation with UIIS were not germane to its analysis.³ Accordingly, the SBA found that LSSI was a small business eligible for award.

DCMC then conducted a pre-award survey on LSSI at the firm's new address. The Defense Contract Audit Agency (DCAA) also audited LSSI's accounting system. Based primarily on LSSI's financial condition, DCMC concluded that the firm did not have the capital required to finance the start-up costs of the contract and recommended no award to LSSI. Further, based on perceived weaknesses in LSSI's accounting system and related internal control policies and procedures, DCAA concluded that LSSI's system was inadequate for the accumulation and reporting of costs under government requirements for progress payments, and thus questioned LSSI's ability to adequately support public vouchers. The contracting officer then rejected the firm as nonresponsible, and referred the matter to the SBA for consideration under the certificate of competency (COC) procedures. On February 28, the SBA issued a COC to LSSI, and on March 27, INS awarded the contract to LSSI.

²13 C.F.R. § 121.404 (1997) generally provides that SBA determines the size status of a concern as of the date of its written self-certification as a small business. See also FAR § 19.301(a) (FAC 90-32); Vantex Serv. Corp., B-251102, Mar. 10, 1993, 93-1 CPD ¶ 221 at 2.

³Subsequently, in connection with a different procurement, SBA concluded that LSSI was not a small business concern. On October 30, 1996, the General Services Administration (GSA) issued solicitation No. GS-11P96-MPC-0512 as a small business set-aside for security guard services at Crystal Plaza #6, in Arlington, VA. UIIS was the incumbent providing those guard services. On November 27, in response to GSA's solicitation, LSSI self-certified that it was a small business concern and GSA's contracting officer questioned that certification. After analyzing several factors concerning affiliation, including LSSI's and UIIS's common interests, their respective ownership, and office location, on March 10, 1997, the SBA determined that LSSI was not a small business concern eligible for award under GSA's solicitation. This result is consistent with SBA's regulations, since LSSI self-certified that it was a small business concern after Mrs. Guidice had acquired Lyons.

Following a debriefing by the agency, Premier filed this protest in our Office, arguing that the award was improper because, apart from its low bid, Lyons had no assets to transfer to its new owner and, thus, the sale of the business was tantamount to the improper sale of the bid.⁴

DISCUSSION

The transfer or assignment of rights and obligations arising out of a bid or proposal is generally not permitted; exceptions to this general rule are allowed only where the transfer is to a legal entity which is the complete successor in interest to the bidder or offeror by virtue of a 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. J.I. Case Co., B-239178, Aug. 6, 1990, 90-2 CPD ¶ 108 at 3; see FAR § 14.404-2(l). As with the anti-assignment statutes, 41 U.S.C. § 15 and 31 U.S.C. § 3727, which restrict the assignment of government contracts and claims, the restriction on the transfer of bids reflects a policy of ensuring the accountability of vendors to the government and of discouraging vendors from acquiring speculative interests in government contracts for the purpose of trading in them. See Mil-Tech Sys. Inc. v. United States, 6 Cl. Ct. 26, 33-35 (Cl. Ct. 1984); Ionics Inc., B-211180, Mar. 13, 1984, 84-1 CPD ¶ 290 at 5. Because of these policy concerns, the exceptions to the general prohibition on the transfer of bids have been narrowly interpreted. Thus, we have found that a bid transfer could be improper where the bid was the primary asset being transferred, even where the transfer occurred as the result of a business combination that would arguably place the transfer within the scope of one of the exceptions to the rule; in those cases, we have examined whether the assets transferred, other than the bid, were of negligible value or purchased for nominal consideration, in which case the bid transfer would be improper. J.I. Case Co., supra, at 4; Mil-Tech Sys. Inc., and The Dept. of The Army--

⁴In its protest, Premier also argued that INS had "failed to evaluate proposals in accordance with the stated evaluation scheme." However, INS conducted the procurement using the sealed bid procedures prescribed in FAR part 14, which generally require that award be made to the responsible bidder whose responsive bid is deemed to be most advantageous to the government, considering only price and price-related factors. FAR § 14.408-1(a). Consequently, except for calculating total price (including options), and determining that LSSI's bid was responsive, INS did not "evaluate proposals" as that concept is applied in negotiated procurements. Premier also maintained that in issuing a COC to LSSI, the SBA improperly disregarded vital information bearing on LSSI's responsibility. In its comments on the agency report, Premier withdrew this allegation. Premier further argued that the awardee's bid failed to satisfy definitive responsibility criteria in the IFB. Since we sustain the protest and recommend that LSSI's contract be terminated, we need not address this contention.

Recon., B-212385.4; B-212385.5, June 18, 1984, 84-1 CPD ¶ 632 at 5-6; Information Servs. Indus., B-187536, June 15, 1977, 77-1 CPD ¶ 425 at 4.

Here, the protester does not dispute that LSSI is the complete successor in interest to Lyons. In this regard, the sale of Lyons was memorialized in a sales agreement entered into on September 30, 1996, between Mrs. Guidice and Juanita L. Lyons, the sole proprietor of Lyons. Under the terms of that agreement, effective October 1, 1996, in addition to assuming specified liabilities, Mrs. Guidice acquired all of the seller's rights, title, and interest in Lyons's assets, all equipment, licenses, inventory, accounts receivable, goodwill, trademarks, trade names, copyrights, and all other tangible and intangible assets owned by Ms. Lyons. Subsequent to the sale, Lyons was incorporated under California law, thus becoming LSSI.

Premier contends that the award here was improper because the value of the transferred assets, other than the low bid, was negligible. In this regard, Premier argues that the value of Lyons's assets should be viewed from the buyer's perspective, which in Premier's opinion is UIIS, a large business which had little incentive other than the benefit of the low bid to acquire Lyons, whose assets were insignificant when compared to UIIS's.

The protester's suggestion that we should compare Mrs. Guidice's assets or her financial interests in UIIS with Lyons's assets is misplaced. The test is not whether the transferred assets are comparable in value to the buyer's. Rather, the test is whether the negligible value of the assets or their nominal purchase price indicates that nothing of real value apart from the winning bid was transferred. Mil-Tech Sys. Inc., and The Dept. of The Army--Recon., *supra*, at 6. By examining certified financial statements, audited balance sheets, and other relevant, reliable evidence documenting the financial position of the firm being acquired (and excluding the value of the bid or proposal at issue), this test captures those cases where, for instance, although a transaction is described as a sale of an entire business, in actuality the transaction is tantamount to the improper assignment of a low bid or winning proposal.

We have reviewed the documents prepared contemporaneously with the sale and other evidence in the record showing Lyons's financial position as of the time immediately preceding and leading up to the sale. These documents include an attachment to the sales agreement; the pre-award survey report DCMC initially prepared on Lyons explaining the firm's financial condition, including its assets, liabilities, and net worth; and information Mrs. Guidice submitted to DCMC during the pre-award survey of Lyons. Based on our review, we think that these documents fail to establish that, apart from the low bid, the assets transferred pursuant to the sale were of more than negligible value.

Attachment to the Sales Agreement

This document, "EXHIBIT A, PURCHASE AGREEMENT OF LYONS SECURITY SERVICE," lists the assets transferred and liabilities assumed by Mrs. Guidice as a result of the sale. Under the main heading, "ASSETS ACQUIRED," the document lists "intangible assets" and "tangible assets." Intangible assets include fictitious business name, trademarks, logos and art, customer lists, goodwill, and business licenses, valued at \$101,585. Tangible assets listed include accounts receivable, office supplies, uniforms, two 1994 Toyota pickup trucks, a 1975 Jeep, five radios and a computer, with a total balance sheet value of \$104,330. This document also lists "LIABILITIES ASSUMED" by Mrs. Guidice totaling \$82,485.

The document is not dated or signed and is not accompanied by a narrative explanation of the basis or methodology used for assessing the value of the assets listed, raising serious questions about the values listed for some of the items. Most importantly, we question the basis for valuing the "intangible assets" at \$101,585. While intangible assets such as goodwill often can be of considerable value, there is no explanation or supporting evidence of any kind for the value listed for Lyons here.⁵ In addition to the absence of any affirmative support, the valuation is inconsistent with the overall condition of the company. For example, DCMC's pre-award survey found that Lyons's current ratios (current assets/liabilities) and quick ratios (current assets less inventory/liabilities), which compared unfavorably to the industry averages, indicated excessive debt burdens and less income flow than desirable. DCMC's conclusion was further buttressed by comparing Lyons's 38.7 debt/net worth ratio to the industry average of 8.1, leading DCMC's evaluators to conclude that Lyons had very little equity available to discharge its debts in the event of a crisis. DCMC further noted that while by the end of 1995 Lyons had an equity of \$13,946, by August 1996 that figure had slipped to \$3,362--Lyons's net worth as of September 30, 1996, 1 day before the sale became effective. In short, although Lyons may have been a viable concern at one time, its business was clearly failing by the time of the sale.

Similarly with respect to tangible assets, there is nothing in the record indicating whether these figures are based on audited balance sheets or certified financial statements prepared by an objective third party, disinterested in the transaction between Mrs. Guidice and Ms. Lyons, raising serious questions as to their reliability

⁵We note that the "balance sheets and statements of income" submitted to DCMC during the pre-award survey, discussed further below, make no reference to any intangible assets, casting further doubt on the reliability of the valuation in the attachment to the purchase agreement.

and accuracy.⁶ Even assuming that the total value of the tangible assets listed (\$104,330) is accurate, when adjusted by the total of liabilities assumed (\$82,485), and discounting the value listed for the intangible assets, the net result is that except for Lyons's winning bid, little of value was transferred to Mrs. Guidice as a result of the sale.

In sum, in the absence of a narrative explanation of the basis or methodology used to arrive at the values for the assets listed, and without the benefit of a current, audited balance sheet or a certified financial statement of Lyons, this document cannot reasonably be relied upon to conclude that the assets transferred were of more than negligible value.

Information Submitted During DCMC's Pre-award Survey, October 31, 1996.

In response to DCMC's request, Mrs. Guidice provided DCMC with a document entitled "COMPILED BALANCE SHEETS and STATEMENTS OF INCOME, Juanita L. Lyons [d/b/a] Lyons Security Service, August 31, 1996 and December 31, 1995." For each period, the information contained on that document is divided into several categories and subcategories similar to the attachment to the purchase agreement discussed above.

A signed cover letter, dated October 7, 1996, written on a certified public accountant's letterhead, accompanies this document. The letter explains that while the information was compiled in accordance with accepted accounting standards, a "compilation" is limited to presenting the information as represented by management. The signer expressly states that he had "not audited or reviewed the accompanying financial statements or other financial information and, accordingly, do[es] not express an opinion or any other form of assurance on them." The letter goes on to explain, that "[m]anagement has elected to omit the statements of cash flows and all of the disclosures required by generally accepted accounting principles," which, if included in the compilation, "might influence the user's conclusions about the company's financial position"

⁶Interestingly, the bottom margin of all pages of the sales agreement contain what appear to be the hand-written initials of the seller ("J.L." for Juanita Lyons) and the purchaser ("K.G." for Kathleen Guidice), indicating their acknowledgment of the terms and conditions contained in the agreement. This attachment, however, which was presumably prepared contemporaneously with the sales agreement, contains two spaces at the bottom of the page marked "INT: __ INT: __" for the parties to initial. However, both of these spaces are blank, suggesting that the parties either did not agree as to its contents or its accuracy, or that neither party intended for it to be part of the transaction.

Given these disclaimers and conditions, the document submitted by Mrs. Guidice clearly does not constitute the kind of evidence--for example, certified financial statements or audited balance sheets--that can reasonably be relied on to establish the value of the company's assets. Even assuming that this document accurately reflects Lyons's financial position, it clearly supports a conclusion that--except for the low bid--nothing of significant value was transferred to Mrs. Guidice. For instance, as of August 31, 1996, the latest reported period, the document lists "ASSETS," including current assets and property and equipment, valued at \$133,333 and total current and long-term liabilities as \$129,971, leaving a negligible net worth of only \$3,362--the value of the assets transferred as a result of the sale.

CONCLUSION AND RECOMMENDATION

Based on our review, we think there is no reasonable basis in the record to conclude that the assets transferred pursuant to the sale were of more than negligible value. Since the sale of the business thus was tantamount to the improper sale of the bid, LSSI, the successor in interest, may not receive award of the contract. Mil-Tech Sys. Inc. v. United States, 6 Cl. Ct. at 33-35; Mil-Tech Sys. Inc., and The Dept. of The Army--Recon., *supra*.⁷

We recommend that INS terminate the contract awarded to LSSI and award the contract to Premier, the next low bidder, if it is otherwise eligible for award. Additionally, we recommend that the protester be reimbursed its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (1997). The protester should submit its certified claim for costs to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Comptroller General
of the United States

⁷Our decision in Mil-Tech was issued in response to a request from the United States Claims Court. Mil-Tech had filed suit in the Claims Court seeking to bar the contracting agency from making award to another bidder, following two decisions by our Office concluding that Mil-Tech was eligible for award. In the cited decision, we concluded that Mil-Tech was not eligible for award because the sale of its stock to another company essentially constituted a prohibited bid transfer. In considering this issue, the Claims Court reached the same conclusion.