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**DECISION**



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

**FILE:** B-203304; B-203304.2 **DATE:** January 4, 1982

**MATTER OF:** National Office Moving Company;  
Keahey Moving and Storage

**DIGEST:**

1. Protest by incumbent contractor of agency's failure to exercise renewal option is dismissed since determination as to whether option should be exercised or a competitive solicitation issued generally is a matter of contract administration and will not be reviewed by GAO under its bid protest function. To extent protester alleges breach of contract, matter must be pursued under disputes clause of contract.
2. Protest received within ten working days of protester's receipt of agency notification of award to competitor is timely under GAO Bid Protest Procedures.
3. Solicitation requiring bidder to obtain and maintain any necessary permits and licenses places burden of compliance upon bidder but lack of such documents is not necessarily a condition for award.
4. Contention awardee cannot comply with Service Contract Act and maintain viable business is, in essence, assertion awardee is "buying-in" which is not illegal and provides no basis for protest.
5. Protest that affirmative determination of responsibility is improper because price is unreasonably low, determination is contrary to preaward survey report and awardee has history of violations of Service Contract Act will not be considered since GAO does not review such determinations.

National Office Moving Company and Keahey Moving and Storage have protested the award of a contract for moving services to Greenwood Transfer and Storage Co., Inc. under solicitation No. 8660-100001, issued by the Department of State. For the reasons discussed below, we dismiss National's protest and dismiss in part and deny in part Keahey's protest.

The solicitation requested bids for office moving services. National, which held the contract for the same services for the previous year, contends the current solicitation should not have been issued because National's contract contained an option clause which required the agency to renew its contract for four additional years subject only to the availability of funds. National protested on April 30, 1981, the bid opening date, to the agency and to this Office within ten working days after bid opening.

The option provision in National's contract is as follows:

"PERIOD OF CONTRACT/OPTION TO RENEW

"The basic period of this contract is from October 1, 1979 through September 30, 1980 with options to renew for four (4) additional one (1) year periods. It is the intention of the Department to unilaterally exercise rights to renew the contract for four (4) subsequent one (1) year periods subject to the availability of funds for such purpose.

"The notice of renewal will be issued not less than fifteen (15) days prior to the expiration of the basic contract or applicable optional period."

The contract in which this clause appears was awarded to National after its successful protest to our Office, National Office Moving Company, B-196282(1), March 10, 1980, 80-1 CPD 185, pursuant to which the Department of State terminated for convenience a contract with Keahey Moving and Storage. National's contract was extended to May 31, 1981 in order to give National a full year contract and place it in the same position in which it would have been had it received the initial award.

National maintains that by virtue of the contract clause quoted above, the agency placed itself under contract with National for a period of five years, subject only to the availability of funds. Once the agency determined that funds were available for these moving services, National argues, the agency in effect exercised its option and was under contract with National for the ensuing fiscal year.

The agency contends that the decision whether to exercise a contract option is a matter of contract administration which is outside the bid protest jurisdiction of our Office. We agree that ordinarily such a decision is a matter of contract administration and not for GAO review. See, e.g., Industrial Maintenance Services, Inc., B-199588, September 15, 1977, 77-2 CPD 195; Inter-Alloys Corporation, B-192890, February 4, 1975, 75-1 CPD 79; Chemical Technology Inc., B-189660, April 25, 1978, 78-1 CPD 366. Here the protest allegation goes beyond mere contract administration, however, as National believes its contract with the agency may have been breached by the failure to exercise the option. Breach claims, however, are encompassed by the disputes clause of the contract. Consequently, the matter must be pursued under that clause rather than in this Office. National's protest is dismissed.

Keahey also protested the award to Greenwood. In its initial protest, Keahey argued that the contracting officer failed to require Greenwood to have the necessary permits, franchises or licenses prior to award. In a supplement to its protest filed by successor counsel, Keahey raised three additional grounds for protest: (1) that Greenwood's bid did "not comport with wage standards required under the Service Contract Act, 41 U.S.C. § 351"; (2) that the contracting officer disregarded a negative preaward survey report with respect to Greenwood; and (3) that the affirmative determination of Greenwood's responsibility was improper. For the reasons discussed below, we deny the initial protest and dismiss the supplemental protest.

The agency contends the initial protest and its supplement raising new issues are both untimely under our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(2) (1981), which require protests to be filed not later than ten working days after the basis of protest is known or should have been known. With respect to the initial protest, we do not agree. The award was made on May 23 with an effective date of June 1 but Keahey was not notified of the award until its receipt "on or about June 3" of the agency's

letter of June 1. The initial protest, dated June 12, was hand carried to our Office where it was received on June 15, within ten working days of June 3. The agency argues that Keahey, by exercising reasonable diligence, could have discovered both the status of the permit application and the award determination any time after May 23 since it knew that Greenwood was the low bidder and therefore under consideration for award. However, knowledge that the low bid of a competitor is under consideration for award is not of itself grounds for protest. Timeliness is not measured from bid opening and grounds for protest can arise only after the protester knows or should have known that award has been or will be made to the low bidder despite deficiencies perceived by the protester. See Werner-Herbison-Padgett, B-195956, January 23, 1980, 80-1 CPD 66.

Although Keahey may have suspected the agency intended to process Greenwood's bid for award, there is no indication Keahey knew of the agency's determination of May 23 before it was informed of the award. As such determinations are not usually announced until the preaward processing requirements have been met, we do not believe it is reasonable to impose an obligation on a bidder to make periodic attempts to discover such information. Thus, resolving any doubts with respect to timeliness in favor of the protester, we consider this aspect of Keahey's protest to be timely. See Ikard Manufacturing Company, B-192578, February 5, 1979, 79-1 CPD 80.

The IFB provision at issue states:

"The Contractor at his own expense will obtain and maintain any necessary permits, franchises, licenses, or other lawful authority required for effecting the movement, handling, and other services to be performed under this contract. Before an award is made, the Contractor may be required to produce evidence of such authorities to the Contracting Officer or his designated representative."

The protester contends this provision establishes definitive responsibility requirements which should have been met prior to award. Although it does not allege that Greenwood failed to obtain licenses for its trucks and the necessary permits to use the incinerator, it argues that Greenwood should have had a business occupancy certificate prior to being awarded the contract. While Greenwood had applied for the certificate, it was not granted until June 10. The agency contends that an "all licenses" clause such as this does not make possession of the licenses a condition for award.

By the terms of this provision, the contracting officer may, but is not required to, demand evidence of the possession of the necessary licenses and permits prior to award. Moreover, we have recognized a distinction between a solicitation requirement that the bidder have a particular license or permit and a general requirement that a bidder comply with any applicable licensing and permit requirements. In the former case, the requirement is one specifically established for the procurement and compliance therewith is a matter of bidder responsibility, while in the latter case, a bidder's failure to possess a particular license or permit is not necessarily a prerequisite to award since the need of a license or permit to perform the contract is a matter between the bidder and the licensing authority. 53 Comp. Gen. 51 (1973); Aetna Ambulance Service, Inc., G&L Ambulance Service, B-190187, March 31, 1978, 78-1 CPD 258.

Except for its last sentence, the provision places responsibility on the bidder to determine the licensing and permit requirements of the District of Columbia and comply with those which are applicable. We believe the occupancy certificate comes within the general requirement that the contractor obtain and maintain any necessary permits and licenses and is therefore not a condition for award. While the requirements that the trucks be properly licensed and that the bidder have the necessary permits for use of the incinerator may be specific, these requirements are not at issue here. For the foregoing reasons, this portion of Keahey's protest is denied.

The agency also challenges the timeliness of Keahey's supplemental protest to the extent that it raises issues beyond that with respect to licensing and permits which was included in the initial protest. This protest supplement was received in our Office on July 10 after Keahey's new

attorney requested and received an extension of the time within which additional details and support must be filed. Since we might not have made it clear that new issues would not be acceptable, we will consider such new issues as timely. However, for the reasons discussed below, we dismiss the protest as to these issues.

Although Keahey's supplemental protest questions Greenwood's compliance with the Service Contract Act, the essence of its argument is that Greenwood bid rates which were so low that it could not pay the required wages and non-discretionary payments such as social security taxes, much less such operating expenses as fuel, insurance, depreciation and overhead. While Keahey's arguments may indicate that Greenwood will lose money on this contract, it has not proven that any violation of law will occur. Moreover, acceptance of an unreasonably low or even a below-cost bid by the Government is not illegal and, therefore, the possibility of a "buy-in" does not provide a basis upon which an award may be challenged, if, as in this case, the contracting officer has made an affirmative determination of responsibility. It is, however, a contracting officer's duty to see that amounts excluded from the development of the original contract price are not recovered in the pricing of change orders or of followup contracts. Northwestern State University of Louisiana, B-196104, October 15, 1979, 79-2 CPD 256.

In addition, Keahey directly challenges the propriety of the affirmative determination of responsibility on grounds that Greenwood's price is unreasonably low, the determination is contrary to a negative preaward survey report and inconsistent with Greenwood's previous history of violations of the Service Contract Act. However, our Office does not review protests of affirmative determinations of responsibility unless fraud on the part of the procuring officials is alleged or the invitation contains definitive responsibility criteria which allegedly have not been applied. Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64; Bowman Enterprises, Inc., B-194015, February 16, 1979, 79-1 CPD 121. Although Keahey contends the actions of the contracting officer were indicative of "arbitrary and capricious agency conduct," it does not allege that there was fraud on the part of any procurement official. Also, as pointed out above, the general portion of the licensing and permit provision is not considered as establishing

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definitive responsibility criteria and compliance with the specific requirement for truck licenses and an incinerator permit has not been challenged.

*Harry R. Van Cleave*  
For the Comptroller General  
of the United States