



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20541

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B-176043

July 27, 1973

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Attention: Fred Israel, Esquire

Gentleman:

This is in reply to the February 19, 1973, telegram from counsel for Rutt Moving and Storage, Incorporated, and to your subsequent correspondence, protesting the award of a contract to another firm under invitation for bids DABE 13-73-B-0019, issued by the Department of the Army at Fort Riley, Kansas.

The solicitation was for local packing and containerization services incident to both local and long distance transportation of personal property belonging to Department of Defense personnel. Rutt submitted the low bid on three of the four separate schedule sections for which contracts could be awarded. However, another company objected to any award to Rutt because Rutt did not possess operating authority from the Interstate Commerce Commission (ICC). The contracting officer originally took the position that ICC operating authority was not required for award of the contract, but the Department of the Army (Office of the Assistant Secretary (Installations & Logistics)) determined that a contract should be awarded only "to a source possessing an appropriate ICC permit." Rutt's protest followed. No award has been made for the items on which Rutt was the low bidder.

The invitation did not contain either a specific provision requiring bidders to have ICC operating authority or a provision requiring bidders to comply with all Federal, State, and local

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licensing requirements. You claim that Rutt is therefore entitled to award as the low responsive and responsible bidder under the terms of the IFB. Alternatively you suggest cancellation of the IFB and the issuance of a new solicitation containing a requirement for ICC operating authority. The Army's position, based upon the 1966 decision of the ICC in Kingpak, Inc., Investigation of Operations 103 H.C.C. 318, 336-339, which was upheld in Household Goods Carriers' Bureau v. United States, 288 F. Supp. 641 (N.D. Cal. 1968), aff'd per curiam 393 U.S. 265 (1968), is stated as follows:

2. Prior to Kingpak, Investigation of Operations, 103 H.C.C. 318, 336-339 (1966), local motor carriers often performed services similar to those in the subject IFB and were considered to be exempt from ICC regulations pursuant to an informal opinion of the Bureau of the ICC. With the advent of containerization services for shipping household goods (HHG's) wherein a shipment is placed in a single container (as opposed to being loaded loose into a specialized motor van) and then moved in interstate commerce by a long haul carrier beyond the points between which they were handled by the local pack and crate contractor, the ICC, in Kingpak, determined that local motor carriers performing transportation in connection with packing and containerization services needed ICC operating authority.

3. Under the subject IFB, the contractor is called upon to pack, containerize and move personal property for overseas and domestic movement, and decontainerize inbound shipments of personal property (Section H-1). Though he only transports the containers within Areas I and II located within the State of Kansas, he will be ordered to handle personal property which has (or will be) moved across state lines. Although the percentage of revenue received by a packing and crating contractor for his actual transportation services is small in relation to the portion attributable to packing and unpacking, Kingpak held that the service contemplated is interstate transportation subject to ICC's jurisdiction because it is a part of through transportation services of the HHG's in interstate or foreign commerce. Thus, a local contractor who performs packing and unpacking services under the subject IFB must possess an ICC operating authority for the transportation services as a prerequisite to award (See Comp. Gen. Opinion B-174735, June 7, 1972). * * *

We have previously recognized, in a case involving a contract for services similar to those called for by the instant IFB, that in Kingnak the ICC "expressed the principle that forwarders engaged in the type of transportation involved here are required to possess appropriate interstate authority," and that the possession of necessary operating rights was an essential condition to a valid award of a transportation-services contract. 47 Comp. Gen. 539, 541-542 (1968). Since the primary purpose of requiring the ICC license is to determine a bidder's legal authorization to perform the contract, possession of such operating authority is a matter of bidder responsibility and is not related to an evaluation of bids submitted. 47 Comp. Gen. 539, supra; B-174735, June 7, 1972.

Although you state that Rutt's responsibility is "beyond question" because of its previous satisfactory performance on similar contracts, the Army now believes that an ICC license is required for the legal performance of the work called for by the IFB. Therefore, it may properly consider whether a bidder has such a license in determining the responsibility of that bidder, although we think, as a matter of sound procurement policy, that the IFB should have informed bidders that ICC operating authority would be required. We note, however, that the Army has referred this matter to the ASPR Committee with a view toward including in ASPR a requirement for a solicitation provision setting forth the need for ICC authority in these types of cases.

Furthermore, it is clear that Rutt is not being unduly prejudiced in this case. The record indicates that the Army has delayed making an award so that Rutt could apply to the ICC for temporary operating authority. The record further indicates the Army's willingness to support Rutt's application for such authority, and in fact you state in your letter of April 26, 1973, that Rutt has submitted an application to the ICC for Emergency Temporary Authority and that such application included a supporting statement from the Department of Defense.

Accordingly, we believe that the Army's determination to require ICC operating authority as a condition precedent to award in this case is neither illegal nor improper, and that award to

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the next low bidder would be proper if Rutt has been unable to obtain such authority.

For the foregoing reasons, your protest is denied.

Sincerely yours,

E. H. Morse, Jr.

For the Comptroller General
of the United States