

DECISION



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

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FILE: B-185366

DATE: May 24, 1976

MATTER OF: Modern Moving and Storage

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DIGEST:

1. Protest against failure to set aside certain schedules of work solely for small business competition is untimely since it was filed after bid opening and thus is not for consideration; other protest bases are timely as agency does not contest date protester alleges it received notice of award, that date being 10 working days or less from time protest filed.
2. When invitation does not specifically require bidder to possess ICC operating authority in its own name, bidder's failure to possess such authority in its own name does not require rejection; furthermore, bona fide agent of firm possessing valid authority under Interstate Commerce Act (49 U.S.C. § 311) need not possess broker's license to submit bid in firm's name.
3. Allegation that principal-agent agreement did not contractually bind principal to agreement is without merit where it appears contract is being performed according to its terms. Fact that agency agreement may be cancelled within 30 days does not affect validity of award and necessity of any subsequent cancellation is matter of contract administration not for consideration by GAO.
4. When it is not shown that evidence of agency agreement was submitted prior to award or that evidence of relationship was in possession of contracting activity, such deficiency was procedural and did not affect validity of otherwise proper award as such relationship did in fact exist.
5. Submission of bid by another agent of party possessing ICC operation authority was not prohibited by invitation and such submission does not constitute prohibited "alternate bids" under ASPR § 2-201(a) Sec. C (iii).

Invitation for bids No. F25600-76-B-0017 was issued by the Procurement Division at Offutt Air Force Base for various packing and crating and certain drayage services for household goods. Modern Moving and Storage (Modern) protests for the reasons that follow the award made to White Transfer & Storage Co. Inc. (White) for schedules 1 and 2 in both areas III and V.

First, Modern protests as improper the failure of the contracting Officer to set aside areas III and V solely for small business competition. The fact that these areas were not totally set aside for small business was apparent prior to bid opening. Since the protest was not lodged until after bid opening, the protest on this issue is untimely filed and, thus, not for consideration. 40 Fed. Reg. 17979 (1975).

The Department of the Air Force believes that the remaining bases of protest were also untimely filed under our Bid Protest Procedures inasmuch as these were not filed until November 18, 1975, more than 10 working days after the bases--contract award on October 23--of the protest were known. In this regard, we note that Modern states that it was notified of the award to White on November 18. Since this fact is not contested by the Air Force, we must presume that Modern did not have any basis to protest the award to White until November 18 and, consequently, that the other bases of its protest were timely filed.

As regards the first basis of its protest, Modern first cites part I, section "C," paragraph 32 (ICC OPERATING AUTHORITY) of the invitation, which states:

"Prospective contractors are advised that appropriate ICC operating authority is required for performance under the proposed contract, and the possession of such authority is a condition that must be satisfied precedent to any contract award. * * * Failure to submit required evidence within the time specified [no later than 30 days after bid opening] will disqualify the bidder * * *."

Modern then states that in line with cited decisions of our Office, award to White was improper since that firm did not have Interstate Commerce Commission (ICC) operating authority in its own name, and that although it intended to use the operating authority of Allied Van Lines, Inc. (Allied), as its agent, the ICC does not permit such

a procedure without the possession of an ICC-approved broker's license. White allegedly does not have such a license.

Secondly, it is noted that in filling in the block in its bid designated for the name of the offeror, White typed "WHITE TRANSFER & STORAGE CO. INC. AGENTS For ALLIED VAN LINES, INC." In this connection, paragraph 2, "PREPARATION OF OFFERS," of the "SOLICITATION INSTRUCTIONS AND CONDITIONS" provides that:

"(b) * * * offers signed by an agent are to be accompanied by evidence of his authority unless such evidence has been previously furnished to the issuing office."

Modern believes that no such evidence was filed with the issuing office, and it is stated that a December 11, 1975, letter acknowledging the agency relationship from Allied can hardly constitute evidence submitted prior to or with the bid. It is further stated that the agency contract between White and Allied filed with the ICC does not allow White to sign contracts for Allied and that usually agreements of this sort are cancelable with 30 days' notice, thereby creating the future possibility that White might be unable to complete the contract.

Finally, it is noted that on schedules 1 and 2 of area V White and another company both submitted bids as Allied agents. From this fact it is contended that part I, section "C," paragraph 22, forbidding submission of alternate bids (paragraph 2-201(a) Sec. C (iii) of the Armed Services Procurement Regulation (ASPR) (1975 ed.)) was violated, thereby making acceptance of the White bid impermissible.

As regards the first contention, and our cases cited in support thereof, we have held that where an invitation specifically requires a bidder to have operating authority in its own name, such failure will cause bid rejection. 50 Comp. Gen. 753 (1971); Victory Van Corporation; Columbia Van Lines, Incorporated, 53 Comp. Gen. 750 (1974), 74-1 CPD 178. However, these cases are clearly inapplicable here as the subject solicitation did not contain this specific requirement. Nevertheless, White submitted the bid as agent for and in the name of Allied, which possesses the required operating authority. As regards the need for a broker's license, the Department of the Air Force correctly notes that section 311 of the Interstate Commerce Act,

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49 U.S.C. § 311 (1970), exempts from this requirement a bona fide agent of any carrier possessing the original certificate or permit.

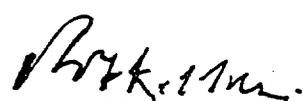
With regard to the allegation that the White-Allied agency relationship does not permit White to contractually bind Allied, we think it sufficient to observe that there is no evidence that the contract is not being properly performed under the terms thereof. Concerning the allegation that the agency relationship may be canceled within 30 days, while not supported by the record, we note that the agency relationship was in effect at the time of contract award and that should it be subsequently canceled the Government may default, if necessary, the contractor. In any event, this is a matter of contract administration which is not for our consideration.

While Modern is correct in stating that proof--if not already in the hands of the contracting activity--of the agency relationship should be obtained prior to and not after award as appears to be the case here, we note that relationship has been established as having existed prior to award and we have held that the proof thereof may be presented after bid opening. Switlik Parachute Company, Inc., B-182531, February 4, 1975, 75-1 CPD 75. Therefore, we view the failure to obtain such proof prior to award as a procedural deficiency which did not affect an otherwise proper award.

Finally, as regards the argument that the White bid should have been rejected because another agent of Allied also bid, thereby causing Allied to submit alternate bids, we note that the term "alternate bids," with reference to ASPR § 2-201(a) Sec. C (iii), is stated in ASPR § 1-1207 (1975 ed.) to mean bids on two or more equally acceptable articles or qualities of material. Inasmuch as both Allied agents bid on the invitation requirements exactly as set forth in the invitation, no alternate bids were submitted, and the Modern contention in this regard is without merit.

The protest is denied.

Deputy


Comptroller General
of the United States