

DOCUMENT RESUME

02690 - [A1792813]

[Reconsideration of Decision Regarding the Award of a Contract for Household Goods Packing and Crating Services]. B-188200. June 16, 1977. 4 pp.

Decision re: District Moving & Storage, Inc.; by Milton Socolar, Acting Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel: Procurement Law II.

Budget Function: General Government: Other General Government (806).

Organization Concerned: Department of State; Interstate Commerce Commission.

Authority: 50 Comp. Gen. 753. 50 Comp. Gen. 758. 52 Comp. Gen. 750. 53 Comp. Gen. 752. B-185366 (1976). B-188026 (1977). Kingpak, Inc., Investigation of Operations, 103 M.C.C. 318 (1966).

The protester requested reconsideration of a prior decision which held that the Department of State could make an award for household goods packing and crating services to a firm not possessing Interstate Commerce Commission authority to act as a motor carrier. The prior decision was affirmed since it had not been shown to be legally erroneous. Where an agency recommends that a protest be sustained, but an interested party participating in the protest takes exception to the agency's conclusions, GAO will retain jurisdiction over the case and render an appropriate decision. (Author/SC)

2813
02690
DECISION



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

FILE: B-188200

DATE: June 16, 1977

MATTER OF: District Moving & Storage, Inc. - Reconsideration

DIGEST:

1. Prior decision holding that agency could make award for household goods packing and crating services to firm not possessing I.C.C. motor carrier operating authority is affirmed since it has not been shown to be legally erroneous.
2. Where agency recommends that protest be sustained, but interested party participating in protest takes exception to agency's conclusions, GAO will retain jurisdiction over case and render appropriate decision.

District Moving & Storage, Inc. (District) requests reconsideration of our decision of May 27, 1977, in which we held that the Department of State could make an award for household goods packing and crating services to a firm not possessing Interstate Commerce Commission (I.C.C.) authority to act as a motor carrier.

District asserts that the decision was inconsistent with prior decisions of this Office and the I.C.C., and did not reflect either a nonresponsibility determination purportedly made by the State Department or the appropriate review standards applicable to that determination. District further asserts that once the nonresponsibility decision was made, District's original protest was in effect sustained so that there was "nothing" before this Office which was subject to our review and which could properly result in the May 27 decision. District also states that a certain representation referred to in the decision was "inconsistent with the written record and the official position taken by the State Department."

The solicitation stated that the contracting officer would consider, inter alia, "whether the bidder has the necessary permits, licenses, equipment and financial capability to perform * * *" when determining bidder responsibility. The solicitation further provided that after award but before performance was begun, contractors (four awards were anticipated) were to submit evidence of "Contractor's authority under applicable Federal, State and local laws to operate as a motor carrier." We held that since evidence of such authority was to be submitted after award,

the solicitation itself did not establish any particular license requirement as a condition of award and that it was up to the contracting officer to determine what licenses might be "necessary" for the bidders in line for award to have in order to perform. We further held that the reference in the solicitation to "authority * * * to operate as a motor carrier" should not be read as applying to non-motor carriers such as freight forwarders since it had not been intended to exclude freight forwarders from competition. We said that if award were to be made to a freight forwarder, "we think the provision would mean no more than that the forwarder will be required to show evidence of its authority to perform the contract," such as its freight forwarder permit and/or the motor carrier authority of whatever carriers the contractor would use to perform that portion of the contract necessitating the use of I. C. C. certified motor carriers.

District states that this decision is contrary to our prior decisions, such as 50 Comp. Gen. 753 (1971), requiring contractors to hold I. C. C. operating authority in their own names, and to I. C. C. decisions in Bud's Moving & Storage, Inc., Petition for Declaratory Order, 126 M. C. C. 56 (1977) and Kingpak, Inc., Investigation of Operations, 103 M. C. C. 318 (1966), which District reads as requiring Government pack and crate contractors to possess I. C. C. motor carrier authority.

In 50 Comp. Gen., supra, we held that where an invitation explicitly requires the bidder to hold necessary operating authority "in his own name," the bidder cannot satisfy the requirement by subcontracting with another company having that authority. In Kingpak, 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), the I. C. C. held that local motor carriers performing local transportation in connection with packing and containerization services for household goods which were to move interstate commerce were required to have I. C. C. operating authority. In Bud's, it was ruled that a pack and crate contractor "must hold, in its own name, operating authority as a motor carrier where it performs the incidental transportation of used household goods shipments in movements extending beyond the commercial zone * * *."

We find no inconsistency between these cases and our prior decision. In 50 Comp. Gen., supra, the requirement that bidders have operating authority in their own names was a requirement of the invitation. We specifically recognized that such a requirement could be unduly restrictive of competition where the requirement was

B-188200

not essential for satisfying procuring activity's needs, see 50 Comp. Gen. at 758, and in subsequent cases held that a bidder need not possess operating authority in its own name in the absence of a specific solicitation requirement. See Modern Moving and Storage, B-185386, May 24, 1976, 76-1 CPD 338. Moreover, in Victory Van Corporation et al., 53 Comp. Gen. 750 (1974), 74-1 CPD 178, we noted that in Kingpak the I. C. C. "recognized that * * * a freight forwarder of used household goods, as opposed to the company performing motor carrier operations for the freight forwarder, need not possess I. C. C. authority." 53 Comp. Gen. at 752.

Because of the decision in Bud's, we subsequently recognized that the "state of the law * * * has changed" and that a solicitation requirement for the listing of "ICC Operators Authority as a carrier" must now be read as requiring the listing of operating authority which the bidder possesses in its own name." Sillco, Inc., B-188026, April 29, 1977, 77-1 CPD 296. However, we also recognized in Sillco that in Bud's the I. C. C. was concerned solely with a situation where a local carrier was an agent for and subcontracted work to a major van line authorized to operate in most of the country, and that it was questionable whether the Bud's rationale was meant to apply in other situations. We also note here that the Bud's decision was concerned only with motor carriers and not with freight forwarders, so that Bud's, when read with Kingpak, does not appear to preclude freight forwarders from performing Government pack and crate contracts.

Accordingly, we again find that the solicitation in this case did not require a bidder to have a specific operating authority in its own name and that the contracting officer, in determining bidder responsibility, could properly consider freight forwarders for award.

With regard to the purported nonresponsibility determination, District states that a letter to this Office dated March 31, 1977 from the Chief of the State Department's Procurement Branch in effect constituted such a determination with respect to the freight forwarding firm in line for award and that the determination could be upset only if made in bad faith or if there was no reasonable basis for the determination. That letter set forth the State Department's interpretation of the solicitation in light of certain prior decisions to this Office, concluded that the solicitation required the awardee to have, in its own name, I. C. C. authority to act as a motor carrier, and therefore recommended that District's protest against award to the freight forwarder be upheld. District also states that once the State Department made the decision, there was no longer any matter pending before this Office upon which we could render a decision.

District reads too much into that March 31 letter. The letter reflected the Department's view based on a review of the matter by its own legal staff. It in no way constituted a specific determination as to the responsibility of the freight forwarder--at most it provided a legal basis for a particular determination at such time as one was to be made. Moreover, the fact that the Department decided to "recommend" that District's proposal be sustained did not render moot our consideration of the matter. The freight forwarding firm had been participating in the protest and it, not unexpectedly, did not agree with the State Department's legal conclusion. In such circumstances, it is the practice of this Office to take into account the arguments advanced by both parties as well as by the agency involved and then render a decision. After considering the matter, we found that, as a matter of law, the Department's conclusion was unwarranted and that its contracting officer was not precluded by the solicitation from making an affirmative responsibility determination with respect to the freight forwarder.

In the penultimate paragraph of the decision, we stated:

"With regard to the IFB language referring to authority 'to operate as a motor carrier,' we are advised by the State Department that those words were not meant to exclude from competition freight forwarding firms such as International, which has satisfactorily performed similar contracts for the Department in the past and which was solicited for this procurement."

We do not agree that the advice referred to was inconsistent with the written record or the Department's "official" position. The Department's March 31 letter did not state that it had been intended to limit competition to motor carriers. That letter stated only that the language used in the solicitation required, in the Department's view, that the awardee have motor carrier authority. This position was adopted by the Department after an internal legal review undertaken in response to the protest. We see nothing inconsistent with that position and the advice subsequently provided by the same official who signed the March 31 letter that it had not been the Department's intention to exclude freight forwarders from competition despite the words that were used in the invitation.

For the foregoing reasons, the prior decision is affirmed.

William J. Austin
Acting Comptroller General
of the United States