

119051

DECISION



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

FILE: B-205904

DATE: July 28, 1982

**MATTER OF: Bekins Moving and Storage Co. of
Hawaii, Inc.**

DIGEST:

1. Although GAO will review propriety of procedures leading to canceled award in some circumstances, review will not be afforded where protester has also filed breach of contract claim--raising all issues relating to validity of canceled contract--under Contract Disputes Act of 1978. Although contracting officer has recently denied claim, claimant will undoubtedly appeal claim to Armed Services Board of Contract Appeals or bring action on claim in Court of Claims since GAO cannot consider breach claim under post-March 1, 1979, contract. Therefore, protester would be inappropriately given two chances at favorable resolution of its disagreement with Navy if GAO were to review protest.
2. Later-raised bases of protest, not included in initial protest, must independently satisfy timeliness criteria of Bid Protest Procedures, including requirement that protester must diligently pursue information which reveals basis for subsequent protest.

Bekins Moving and Storage Co. of Hawaii (Bekins) protests the cancellation of "Pack and Crate" contract No. N00604-82-D-0047, awarded to the company by the Naval Supply Center, Pearl Harbor, Hawaii, for the calendar year 1982 in the State of Hawaii. The company also contends that the subsequent award of the remaining contract requirements to Ace Van and Storage Company (Ace) after the cancellation was improper because the solicitation under which both awards were made contained latent ambiguities as to whether "all or

none" bids would be acceptable--thus requiring, in the protester's view, a resolicitation of the remaining requirements. Finally, the protester contends that the second contract was awarded improperly notwithstanding the pendency of the protest with our Office and that the Navy failed to conduct a required "on-site equal opportunity compliance review" before the second contract was awarded.

We dismiss the protest.

The Navy awarded the contract to Bekins on December 8, 1981. On December 9, 1981, Ace protested the award of schedules I and II, zone I, of the contract to Bekins and contested the prior rejection of Ace's "all or none" bid as nonresponsive. After initially denying Ace's protest, the Navy says it became aware of our decision in Mission Van & Storage Co., 52 Comp. Gen. 756 (1973). Relying on this decision, the Navy decided that the "award to Bekins was illegal and void because award had been made to the second-low bidder." The Navy then informed Bekins that its contract was considered "void and of no effect." The award was then made on December 23, 1981, to Ace as the lowest, responsive and responsible bidder, and Ace has been performing the contract since January 1, 1982.

During the pendency of the protest, the Navy informed us that the protester had filed a claim with the contracting officer for "those costs and losses accrued by the contractor" as a result of the alleged improper cancellation. The protester's claim states that it "is filed under the Contract Disputes Act of 1978." This claim, we understand, was recently denied by the contracting officer, who informed the company of its further appeal rights under the act.

We recognize that it is appropriate in some circumstances for us to review the validity of the procedures leading to award of a contract which has been canceled. Wall Irrigation Service (B-195753, December 8, 1981), 61 Comp. Gen. _____ (1981), 82-1 CPD 100, and cases cited in text. However, review is not appropriate in these circumstances where the contractor has effectively raised all issues relating to the validity of the canceled contract--inferentially including even the alleged ambiguity of the solicitation--

in a breach of contract claim filed under the act. Although the claim has been denied by the contracting officer, this denial will undoubtedly either be appealed by Bekins to the Armed Services Board of Contract Appeals or be made the subject of an action in the Court of Claims, as provided for in the act, since we have no authority to consider a breach of contract claim for money damages arising under a post-March 1, 1979, contract. See Arm-Ben Corporation, B-204930, October 19, 1981, 81-2 CPD 318.

The effect of Bekins' present strategy, therefore, is to attempt to grant the company two chances at a favorable resolution of its disagreement with the Navy arising out of the contract cancellation. We consider it inappropriate to accede to this strategy. See Department of Energy--Request for Decision, B-204615, December 9, 1981, 81-2 CPD 454; Cf. Chemical Technology, Inc., B-190074, April 25, 1978, 78-1 CPD 317, where we stated that a protester "should [not] be allowed to collaterally argue its interpretation of [solicitation/contract] provisions in two forums concurrently."

We therefore dismiss this part of the protest.

However, the final grounds of Bekins' protest do not involve the question of the validity of the solicitation or the canceled contract; therefore, these grounds are appropriate for our review, if the grounds of protest are otherwise timely filed under our Bid Protest Procedures (4 C.F.R. part 21 (1982)).

These final grounds of protest--that Navy's December 23 award to Ace was improperly made notwithstanding Bekins' initial protest, which was filed with our Office at 11:23 a.m. on the same day, and that the Navy allegedly failed to make an equal employment opportunity review before the second award--were filed with our Office on March 23, 1982, or 3 months after the second award. It is established that later-raised bases of protest which are not included in the initial protest must independently satisfy the timeliness criteria of our Procedures. Isometrics, Inc., B-204556, April 13, 1982, 82-1 CPD 340. Moreover, it is also established that a protester must diligently pursue

information which reveals the basis for its subsequent protest. Policy Research Incorporated, B-200386, March 5, 1981, 81-1 CPD 72.

Neither of these later-raised issues was included in the initial protest. Further, we see no explanation why information bearing on all matters relating to the procurement--including information relating to these issues--could not have been obtained from the Navy shortly after the December award or, should the protester have failed to obtain information pursuant to an informal request, why a Freedom of Information Act request was not promptly filed with the Navy. Consequently, under the circumstances, we consider that the protester has not diligently pursued the information when it could have and that the protester is not entitled, therefore, to have these later-raised issues considered.

We dismiss the protest.

For *F. W. Barclay Jr.*
Harry R. Van Cleve
Acting General Counsel