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DECISION

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

FILE: B-200718.3 DATE: February 8, 1982

MATTER OF: A.J. Fowler Corporation--Second Request for Reconsideration

DIGEST:

In resolving a bid protest, GAO is not confined to address only those issues or arguments raised by the parties to the protest. The purpose of GAO's bid protest function is to insure compliance with the rules and regulations governing the expenditure of public funds. Accordingly, where GAO is aware of a regulation that is relevant to a particular situation, GAO will apply it appropriately, whether or not the parties have taken notice of it.

This decision responds to A.J. Fowler Corporation's second request that we reconsider our decision in Moore Service, Inc., B-200718, August 17, 1981, 81-2 CPD 145, in which we sustained a protest against award to Fowler under invitation for bids (IFB) DABT51-80-B-0048 issued by the Department of the Army. We affirm that decision.

The IFB sought bids for refuse collection and disposal services at 3,582 quarters at Fort Bliss, Texas. We sustained Moore's protest because the Army failed to advise offerors of its plans to increase the number of 80-84 gallon "mobile toters" which the Army expected to provide in place of the 30 gallon galvanized containers at most of the quarters. We found that a competition based on the imminent availability of that increased number of toters may have yielded a substantial reduction in the bid prices. We therefore recommended that the Fowler contract renewal option not be exercised, and that the Army conduct a new procurement and award a new contract for the fiscal year 1982 requirement.

Fowler's first request for reconsideration was based on the view that we failed to recognize that the contractual obligation on which offerors bid was to service 3,582

quarters, regardless of whether the Army furnished toters, cans, or some other containers. Since what Fowler viewed as the material contract specification--the number of quarters to be serviced--never changed, Fowler believed that our decision should be reversed.

In response, we pointed out that in fact we did recognize in our decision that no change in the description of the service to be peformed was involved. We sustained Moore's protest because contracting personnel cannot make an award with the intention to change either the specifications or the conditions of performance materially--here, by increasing the number of quarters to be equipped with toters from 1,425 to 3,582.

We also discussed Fowler's complaint, supported by the Army, that because Fowler invested $750,000 in equipment to perform the contract expecting that the options would be exercised, it will be placed in financially difficult circumstances if it is unable to continue performance. We stated:

> "* * * the Government's desire to continue contracting with Fowler in order to permit the firm to write off start-up and equipment costs is not a basis recognized for option exercise under the Defense Acquisition Regulation (DAR). Instead, the DAR requires that the contracting officer determine whether exercise of an option is in the Government's interest by soliciting bids unless he has reason to believe that better pricing cannot be obtained. DAR § 1-1505(d) (1976 ed.). Fowler's and the Army's concern stems from their belief that better pricing can be obtained, since both fear Moore will underbid Fowler's price. Thus, in the absence of our August 17 recommendation [that the renewal option in Fowler's contract not be exercised], the Army could exercise the Fowler contract option, according to the regulation governing the exercise of an option, only if resolicitation fails to produce a lower price."

A.J. Fowler Corporation--Request for Reconsideration, B-200716.2, September 29, 1981, 81-2 CPD 260. Accordingly, we affirmed our initial decision.

In the present request for reconsideration, Fowler objects to our September 29 discussion of DAR § 1-1505(d) and its relevance to the procurement. The firm contends that the discussion was rot appropriate because neither the protester, Fowler, nor the Army ever argued that the regulation applied to the option exercise.

Our initial decision in the matter makes it clear that Fowler's option should not be exercised because the procurement was deficient, and does not discuss the requirements of DAR § 1-1505(d). We discussed the regulation in our decision on Fowler's first reconsideration request only in response to Fowler's and the Army's suggestion that, notwithstanding the procurement deficiency, the firm's option should be exercised essentially to enable Fowler to recover start-up and equipment costs; this suggestion reflected an apparent misunderstanding of the rule governing option exercises, which is at DAR § 1-1505(d). Thus, our basic position always has been that the option should not be exercised because of the Army's error in the conduct of the procurement.

In any event, we do not consider ourselves confined to address only those issues and arguments raised by the parties to a bid protest. The purpose of our bid protest function is to assure compliance with the rules and regulations governing the expenditure of public funds, consistent with our statutory authority to settle and adjust public accounts and claims against the Government. Accordingly, where we are aware of a regulation that is relevant to a particular situation we will apply it and make findings and recommendations under it as appropriate to preserving the integrity of the competitive procurement system, whether or not the parties to the protest have taken notice of it. Association of Soil and Foundation Engineers--Reconsideration, B-200999.2, May 11, 1981, 81-1 CPD 367.

The Army also asks that we reconsider our decision. The Army's first argument is that despite the fact that a refuse collection and disposal contract technically may be a one-year contract with two annual renewal options, such contracts in fact are competed and awarded with the implicit understanding that the contractor will perform for three years, that is, that the options will be exercised. The reason is that the service is "highly capital intensive initially," and therefore (1) very few firms will compete if only a one-year contract is offered, particularly against an incumbent that already has capitalized its equipment, and (2) when firms do compete for one-year

contracts, their prices will be very high. The Army suggests that these are the reasons why there were very long incumbencies before the Army began the practice of offering, in effect, three-year contracts. The Army argues that this Office's "interpretation" of DAR § 1505(d):

> "* * * is tantamount to a determination reserved to a Contracting Officer, could be patently unfair or uneconomical overall in a given situation, and is potentially far more damaging (as precedent) than any perceived flaw in the instant procurement."

Our view of the regulation, however, was not our "interpretation," but simply a reading of its language.

Fowler competed for and was awarded a one-year contract with options, not a three year contract. DAR § 1-1505 governs the exercise of these options. The regulation provides that an option "should be exercised" only if that is the most advantageous method of fulfilling the Government's needs after price and certain other factors (not relevant here) are considered. The regulation expressly provides that if the contracting officer anticipates that the option price will not be the best price available, the required price consideration "shall be made" on the basis of the prices disclosed in response to a new solicitation. DAR § 1-1505(d)(1).

Thus, DAR § 1-1505 does not permit the Government to award a three-year contract under the guise of a single year contract with two option years; as we stated in our September 29, 1981 decision, the Government's desire to continue contracting with a firm so that the contractor can recover costs that it did not make an allowance for in the base year price simply is not recognized in the governing regulation. Rather, the regulation expressly requires the contracting officer to investigate whether each option year price is the best price available for the option year. The record before our Office in connection with our decision in this matter evidenced both Fowler's and the Army's belief that better pricing could be obtained in a new competition. In that case, the express provision in DAR § 1-1505, and not our "interpretation" of the regulation, required a new competition.

The Army's second point is that we were wrong in concluding that bidders would have bid lower if they had known that the Army intended to increase the number of toters to be used in contract performance from 1,425 to 3,582. In connection with the initial protest, Moore, which bid $56,000 more than Fowler did ($616,189.80 to $560,952.00), had asserted that the use of toters instead of 30 gallon containers allows an employee to handle one toter for every two or more 30 gallon containers and permits containers to be dumped using an automatic lift; Moore contended that it could have saved $2,730 per month in labor costs and used one less truck had it based its bid on the use of toters for all 3,582 dwellings rather than 1,425. As stated above, we found that a competition based on the imminent availability of 3,582 toters may have resulted in substantially lower prices than were received in the competition held, which was based on the use of 1,425 toters.

The Army now argues that "time spent per residence" is the basis for computing bids on these contracts, not the types of containers used. The Army contends:

> "* * * From a time standpoint it may be significantly faster to dump even two cans per quarter and place them on the curb than it is to hook up the mobile toters to the hoisting device, let it slowly run up and dump and slowly run down again, remove it, and roll it back to the curb. The speed of dumping cans can be controlled by the crew, whereas the speed of dumping toters mechanically is outside of their control. In addition, because there is no force in the dumping action, many times the crew will have to hand-remove material stuck in the toter which they would not have to do with cans because they can 'bang' them when dumping. * * * The toters were installed for the ease of residents, not contractors. Many refuse contractors do not favor them because they are more cumbersome and time consuming to handle. In no event could a truck and crew be eliminated due to the change in containers furnished at curbside."

We have stated that we will not consider evidence on reconsideration that an agency could have but did

not furnish during the initial consideration of a protest, Interscience Systems, Inc.; Cencom Systems, Inc.--Reconsideration, 59 Comp. Gen. 658 (1980), 80-2 CPD 106. The Army did not make this argument in connection with Moore's protest, although the issue clearly was crucial to the resolution of the matter. The Army did not make this argument in connection with Fowler's request that we reconsider our recommendation that the options in the firm's contract not be exercised, although it was expressly raised by Fowler. In fact, the Army letter in support of this second request for reconsideration was not received until one month after Fowler's request was filed. Parties or agencies that withhold or fail to submit all relevant information to our Office in the expectation that our Office will draw conclusions beneficial to them do so at their own peril, since it is not our function or province to prepare, for parties to a protest, defenses to or positions on allegations clearly raised. Id.

We remain of the view that the Army's increase in the number of toters was a substantial change in the conditions of performance, and that the Army should have advised prospective bidders of its plans in that respect. The Army advises that it has solicited bids for what would have been Fowler's first option year, but has delayed bid opening pending our resolution of Fowler's second request for reconsideration. Under the circumstances, and since the best method to assess how much a service will cost the Government is through competition, Olivetti Corporation, B-187369, February 28, 1977, 77-1 CPD 146, we believe that the Army simply should open bids under the new solicitation. In this respect, if Fowler's option year price in fact is lower than the low bid, of course we would have no objection to exercising that option in lieu of a new contract award at a higher price.

Our August 17, 1981 decision again is affirmed.

for Milton J. Socolar
Comptroller General
of the United States

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

B-200718.3

February 8, 1982

The Honorable Gillis W. Long
House of Representatives

Dear Mr. Long:

We refer to your October 16, 1981 letter on behalf of Mr. A. J. Fowler's second request that we reconsider our decision Moore Service, Inc., B-200718, August 17, 1981, 81-2 CPD 145, in which we sustained a protest against award to A. J. Fowler Corporation under an invitation for bids issued by the Department of the Army. We recommended that the Fowler contract renewal option not be exercised, and that the Army conduct a new procurement and award a new contract for the fiscal year 1982 requirement. We affirmed that decision in A. J. Fowler Corporation--Request for Reconsideration, B-200718.2, September 29, 1981, 81-2 CPD 260, in response to Mr. Fowler's first request for reconsideration.

In your letter, you suggest that the option should be exercised because Mr. Fowler has performed well; the Army supports the option exercise; and Mr. Fowler invested a substantial amount in equipment to meet the contract requirement with the understanding that the options would be exercised.

We fully understand Mr. Fowler's position. However, bidders always run a substantial risk that options will not be exercised. Mr. Fowler competed for and was awarded a one-year contract only, with an option for two years, that is, the Government was bound for one year and there was no guarantee or legal requirement that the options would be exercised. The record on the protest clearly indicated that both Mr. Fowler and the Army believed that better pricing could be obtained if bids for the option year were solicited. In such a case, as we pointed out in our September 29 response to Mr. Fowler's first reconsideration request, the decision whether to exercise an option cannot legally be based simply on the Government's desire to continue contracting with a firm in order to permit the firm to amortize equipment costs.

In Mr. Fowler's second request for reconsideration, he objects to our September 29 discussion of the procurement regulation governing the exercise of an option on the basis that neither he, Moore Service, Inc., nor the Army ever argued that it applied. Enclosed is a copy of our decision of today responding to that objection, and again affirming our initial decision. We also have enclosed copies of our August 17 and September 29 decisions.

Sincerely yours,

for Milton J. Socolar
Comptroller General
of the United States

Enclosures

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

B-200718.3 February 8, 1982

The Honorable Russell Long
United States Senator
750 Florida Street, Suite 220
Baton Rouge, Louisiana 70801

Dear Senator Long:

We refer to your October 26, 1981 communication in behalf of A. J. Fowler Corporation (your reference FP/Contract (Fowler)). Fowler has requested a second time that we reconsider our decision Moore Service, Inc., B-200718, August 17, 1981, 81-2 CPD 145, in which we sustained a protest against award to Fowler under an invitation for bids issued by the Department of the Army. We recommended that the Fowler contract renewal option not be exercised, and that the Army conduct a new procurement and award a new contract for the fiscal year 1982 requirement. We affirmed that decision in A. J. Fowler Corporation-Request for Reconsideration, B-200718.2, September 29, 1981, 81-2 CPD 260, in response to Fowler's first request for reconsideration.

Enclosed are two copies of our decision of today again affirming our initial decision. We also have enclosed copies of our August 17 and September 29 decisions.

Sincerely yours,

for Milton J. Socolar
Comptroller General
of the United States

Enclosures