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DECISION

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

FILE: B-205062 DATE: June 15, 1982

MATTER OF: A. J. Fowler Corporation

DIGEST:

1. A competitor's guarantee of a lower price for services covered by a contract option, given after the option has been exercised, provides no basis to question the contracting officer's determination to exercise the option provided that the determination was reasonable under the circumstances existing when made.

2. An agency is not required to issue a new solicitation to test the market prior to exercising an option simply because a competitor guarantees a lower price, where the option prices have already been tested by the competition under the original procurement, in which that competitor was a full participant.

A. J. Fowler Corporation protests decisions by the Department of the Army to exercise options in two indefinite quantity requirement type contracts for services to be performed at Fort Huachuca, Arizona. Fowler guarantees that it will bid prices lower than the option prices if new competitions are held; it does not, however, specify what its prices would be. We deny the protest.

Contract No. DAEA18-80-D-0062 (hereafter -0062) is for the collection and removal of refuse and for repair of trash containers. Contract No. DAEA18-80-D-0033 (hereafter -0033) is for grounds maintenance services. Both contracts contain two one-year options to extend the contract term. With respect to -0062, Fowler protests the exercise of the first one-year option; with respect to -0033 he protests the exercise of the second one-year option.

The circumstances under which an agency may exercise an option are set forth in Defense Acquisition Regulation (DAR) § 1-1505 (1976 ed.), which requires, among other things, a determination that exercise of the option is the most advantageous method of fulfilling the Government's need, price and other factors considered. Regarding "price and other factors," DAR § 1-1505 provides as follows:

> "(d) Insofar as price is concerned, the determination * * * shall be made on the basis of one of the following.
>
> (1) A new solicitation fails to produce a better price than that offered by the option. When the contracting officer anticipates that the option price will be the best price available, he should not use this method of testing the market but should use one of the methods in (2), (3), or (4) below * * *.
>
> (2) An informal investigation of prices, or other examination of the market, indicates clearly that a better price than that offered by the option cannot be obtained.
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> (3) The time between the award of the contract containing the option and the exercise of the option is so short that it indicates the option price is the lowest price obtainable * * *.
>
> (4) Established prices are readily ascertainable and clearly indicate that formal advertising or informal solicitation can obviously serve no useful purpose.
>
> "(e) Insofar as the 'other factors' * * * are concerned, the determination should, among other things, take into account the Government's need for continuity of operations and potential costs to the Government of disrupting operations * * *."

Fowler essentially argues that under DAR § 1-1505(d)(1), the requirements must be resolicited since Fowler guarantees it will perform the services covered by the option at a lower price. Fowler asserts that its guarantee renders erroneous any decision by the contracting officer that a better price cannot be anticipated. In support of its position, Fowler cites our decisions in A. J. Fowler Corporation--Second Request for Reconsideration, B-200713.3, February 8, 1982, 61 Comp. Gen. ___, 82-1 CPD 102; A. J. Fowler Corporation--Request for Reconsideration, B-200718.2, September 29, 1981, 81-2 CPD 260.

These requests for reconsideration involved our decision in Moore Service, Inc., B-200718, August 17, 1981, 81-2 CPD 145. We sustained Moore's protest against an award to Fowler under an Army solicitation for refuse collection and disposal services because the Army failed to advise bidders of planned changes in the conditions of performance. We found that a competition based on these changed conditions might have yielded a substantial reduction in bid prices. We therefore recommended that the renewal option in Fowler's contract not be exercised and that a new competition be conducted for the next fiscal year.

In B-200718.2, Fowler and the Army argued in part that we should reconsider our recommendation that the contract option not be exercised. They contended that because Fowler invested $750,000 in equipment to perform the contract expecting the options to be exercised, it would be placed in financially difficult circumstances if it were unable to continue performance. We upheld our recommendation for remedial relief and 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."

In B-200518.3, we reiterated the position taken in the quoted portion of B-200518.2, supra, and again upheld our recommendation.

We do not consider our decisions in B-200518.2 and B-200518.3 to be dispositive of Fowler's protest in this case. They did not directly involve the propriety of an agency's exercise or proposed exercise of an option. Rather, they concerned a decision by this Office in which we found that an initial contract award had been made improperly and, as a remedy, recommended that the contract option not be exercised. We discussed the DAR provisions applicable to the exercise of options only in response to arguments on reconsideration that notwithstanding the procurement deficiency, the contract option should be exercised to enable the contractor to recover start-up and equipment costs. The essential point made in our discussion was that these arguments provided no reasons to change our recommendation since contractor recovery of start-up and equipment costs is not a recognized basis for option exercise under DAR in any event.

We did go on to state that even in the absence of our recommendation, the contract option could be exercised only if a resolicitation failed to produce a lower price since the agency believed a better price could be obtained by resoliciting. That statement was not, however, based on the existence of a competitor's guarantee of a lower price for the same services. Rather, it was based on such factors as the agency's expressed belief that resolicitation would produce better prices and the absence of any factors others than price which were properly for consideration under DAR. See 82-1 CPD 102, supra at 4.

Thus our comments concerning option exercise in B-200518.2 simply do not address whether an agency must resolicit merely because a competitor "guarantees" to offer a lower price than the option price. We therefore do not consider that case, or its reconsideration in B-200518.3, to support Fowler's position in that regard here.

With respect to contract -0062, we note that Fowler did not file its protest, which contains its "guarantee" of a lower price, until after the option had already

been exercised. A contracting officer's determination regarding an option exercise necessarily involves a projection based on information existing at the time it is made. B-173461, August 19, 1971. Therefore, we cannot conclude that Fowler's subsequent guarantee of a lower price provides any basis to question the contracting officer's determination to exercise the option here, provided that the determination was reasonable under the circumstances existing when made.

The contracting officer concluded that he could not anticipate a resolicitation to produce a lower price because the contract was originally awarded to the lowest of five bidders after formal advertising, the option price was the same as the price for the previous year, and the general economy during that year had experienced an overall inflation rate in excess of 10 percent. Since he expected the option price to be the lowest price available and DAR § 1-1505(d)(1) provides that in that instance, a resolicitation should not be used to test the market, the contracting officer conducted an informal investigation of prices. (This approach to testing the market is authorized by DAR § 1-1505(d)(2).) This investigation involved a survey of other agencies and local sources and revealed a pattern of increasing prices for refuse collection services. Based on these considerations, we believe that the contracting officer reasonably concluded that exercise of the option, rather than resolicitation, would provide the most advantageous price for the Government.

Although Fowler's protest primarily challenges the contracting officer's determination concerning price, we note that the contracting officer also took into account as "other" factors the need for continuity of services, the incumbent contractor's prior satisfactory performance, and the administrative costs and time required for a new procurement. Those are legitimate factors to consider in determining whether the exercise of an option is the most advantageous method of fulfilling the Government's need. Cerberonics, Inc., B-199924, B-199925, May 6, 1981, 81-1 CPD 351. We therefore find that the contracting officer acted within his discretion in deciding to exercise the option in contract -0062.

Concerning contract -0033, we note that Fowler's protest was filed before the option was exercised and that the agency is withholding any decision in that regard pending our resolution of this protest. In the interim, it is extending the contract on a month-to-month basis. The situation present here is thus factually different from that in contract -0062.

In this instance, the question is whether the agency is required to test the market by resoliciting, rather than by an informal investigation of prices, simply because Fowler "guarantees" a lower price for the option year.

The agency argues that it should not be required to do so. It points out that the option prices in contract -0033 were obtained as the result of formal advertising, that they were evaluated under the original solicitation, and that award was made on the basis of the low aggregate bid price. The Army states that Fowler was a participant in the procurement and that it submitted the highest price for each of the three years.

Under these circumstances, we cannot conclude that the Army is required to test the market by resoliciting. The option pricing here has already been tested by a competition in which Fowler had a full opportunity to participate. In our view, Fowler is not necessarily entitled to a second chance merely by guaranteeing to offer a lower, but unspecified, price--particularly since there is no indication that it would result in more than minimal savings to the Government. See Cerberonics, Inc., supra. Further, where as here, an option has been evaluated under a competitive solicitation before the original contract award, our concern with competitive pricing has been largely satisfied. Id. Consequently, we find no merit to Fowler's position.

The protest is denied.

for Milton J. Socolar
Comptroller General
of the United States