

DECISION

119537 *Ernst*
**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548**

FILE: B-206735**DATE:** September 22, 1982**MATTER OF:** A. Lee Parker**DIGEST:**

1. A protest concerning a bid submitted in response to a subsequently canceled solicitation is academic and will not be considered.
2. GAO will not consider a protester's allegation of collusive bidding since jurisdiction in such matters is committed exclusively to the Attorney General and the Federal courts.
3. Although the contracting officer's finding, in connection with the exercise of an option, that prices are readily ascertainable and indicate that advertising can serve no useful purpose is not supported by the record, the exercise was justified on the ground that, due to time constraints, procuring competitively would disrupt services and create substantial costs to the Government.

A. Lee Parker protests the exercise of an option by the Department of the Army. The option was exercised under a contract held by Jaxon Inc. for the fueling and defueling of aircraft at Fort Rucker, Alabama. Parker essentially contends that because he could perform the requirement at a lower price than the option price, the exercise of the option was not in the best interest of the Government. We dismiss the protest in part and deny it in part.

Jaxon's contract, DABT01-81-D-0024-1, was awarded under invitation for bids (IFB) DABT01-81-B-0032. Bids submitted in response to the solicitation were opened on February 23, 1981. Parker submitted an

apparent low bid of \$2,341,136.18 for the requirement. However, notwithstanding an IFB provision that required performance to commence on April 1, 1981, Parker's bid provided that performance would commence between 90 and 110 days after the award of a contract. For that reason, the Army rejected the bid as nonresponsive. On March 19, the Army awarded a contract to Aero Corporation which submitted the second-low bid of \$2,645,525.89. The Army terminated that contract for default when it became apparent that Aero would not be able to obtain the necessary equipment by April 1. On March 27 the Army awarded the contract to Jaxon, the incumbent, at a price of \$3,632,470.85, the highest price submitted.

Although Jaxon's performance of the contract was satisfactory, the Army initially decided not to exercise the option because other sources had indicated that the services could be provided at a lower price. In November 1981, the Army issued IFB No. DABT01-82-B-0007-1 to obtain the services competitively. The new IFB differed in significant respects from the IFB under which Jaxon was awarded a contract: it changed the procurement from a requirements contract to a firm fixed price contract and it reduced the contract period from one year to six months.

Subsequently, Parker filed a protest with the Army contending that the designation of a six-month base period, due to the substantial investment in equipment necessary to perform the contract, would prevent contractors other than the incumbent from submitting a reasonable bid price. Although the Army found the protest to be without merit, Parker's assertions proved true: the only bid submitted in response to the IFB was for \$2,802,000 for the six-month period. The bid was submitted by Jackson Fuel, Inc., a corporation formed by the principal of Jaxon, which proposed to perform the requirement with the same equipment used by Jaxon. The Army determined that Jackson's bid price was unreasonable, canceled the solicitation, and exercised the option in Jaxon's contract.

Parker makes numerous allegations concerning the Army's actions under the two solicitations discussed above. We refused to consider these allegations on two occasions because they were untimely filed or outside our jurisdiction (letter to the Honorable Jeremiah Denton, B-203455, July 6, 1981 and

A. Lee Parker, B-206081, January 27, 1982, 82-1 CPD 65) and therefore we will not consider them now.

Parker also raises allegations in connection with the bid of Jackson, Inc. These allegations concern Jackson's responsibility and corporate certification. Parker, in addition, asserts that Jaxon colluded with Jackson in formulating the bid. Since the solicitation in response to which that bid was submitted was canceled and the protester does not contend that the cancellation was improper, most of these allegations are academic and will not be considered. See Gembo Construction Co., Inc., B-204982, November 23, 1981, 81-2 CPD 422. With respect to the allegation of collusion, we point out that collusive bidding is a criminal offense and it is within the jurisdiction of the Attorney General and the Federal courts, not the General Accounting Office, to determine what constitutes a violation of a criminal statute. See Aarid Van Lines, Inc., B-206080, February 4, 1982, 82-1 CPD 92.

Parker's main contention is that the exercise of the option was improper in view of the fact that Jaxon was awarded the base contract as the high bidder. Parker claims that the competition held prior to the exercise did not establish Jaxon's option price as the most advantageous to the Government. Parker asserts that he can provide the services at a lower price.

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.

(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 * * *.

As noted, the Army initially believed a better price was available and, on that basis, issued DABT01-82-B-0007-1. That solicitation altered substantially the risks assumed by the contractor and the ability to recoup capital investment, resulting in only one unreasonable bid by a firm essentially in the same position as the incumbent. The contracting officer changed to a fixed price contract in the belief that the Government's requirements are firm and adequate. Yet, the record seems to indicate that the amount pumped frequently fluctuates and that the Government estimates are historically inaccurate. Moreover, in view of the substantial investment in equipment required to perform the services, the change to the six-month contract period would appear to preclude meaningful competition. In fact, in 1981, prior to awarding a contract to Aero, the contracting officer noted in a memorandum for the record that a contractor probably could not obtain financing for the

equipment on the basis of a six-month contract. Under the circumstances, we question whether the solicitation plausibly could have been expected to result in a reasonable price. In any event, we agree with the protester that the competition did not constitute a market test in the sense contemplated in § 1-1505 (d)(1). Inasmuch as the Army does not attempt to justify the exercise of the option under (d)(1), it appears that the Army concurs in this conclusion.

The Army does attempt to justify the option under (d)(4) on the basis of a finding by the contracting officer that prices are established and readily ascertainable and clearly indicate that advertisement clearly can serve no useful purpose. In view of the history of this procurement and the complicated nature of the fueling and defueling service, it does not appear that prices are established and readily ascertainable. In any event, we find nothing in the record to support the Army's bare conclusion that advertising the requirement could serve no useful purpose. We believe it is significant that the advertisement which resulted in Jaxon's contract produced two substantially lower bids. Although one bid was nonresponsive and one successful bidder's contract was terminated for default, the ultimate failure of both bidders was due to the extremely brief duration allowed by the Army between award and commencement of contract performance. The Army concedes that a more substantial period is necessary to promote competition and has resolved to provide for a longer period in future procurements. Thus, the two lower bid prices provide a strong indication that significantly lower prices are available. Additionally, as the Army indicates, at least one potential bidder indicated prior to bid opening that it could provide the services for a lower price. Under the circumstances, we believe the Army's conclusion that advertisement could serve no useful purpose is not supported by the record.

Nonetheless, we will not disturb the contract created by the exercise of the option. As noted, IFB No. DABT01-82-B-0007-1 was canceled on January 26 and Jaxon's base year contract was to expire on March 31. Under the circumstances, it was apparently impracticable to obtain the services competitively. The contracting officer determined that there was a need for continuity of services and that a disruption of services could cause substantial cost to the Government.

Continuity of services clearly is a legitimate basis for the exercise of an option under DAR § 1-1505(e). See Cerberonics, Inc., B-199924, B-199925, May 6, 1981, 81-1 CPD 351. Although the Army, by issuing a solicitation not conducive of competition, bears responsibility for putting itself in a position where it had insufficient time to procure competitively, we cannot say that its exercise of the option was outside the scope of DAR § 1-1505. Therefore, we deny the protest against the exercise of the first option. See Storage Technology Corporation, B-194549, May 9, 1980, 80-1 CPD 333. However, in view of our findings concerning the potential availability of a lower price if there is an adequate performance period and sufficient time is available to permit competitors to obtain the necessary equipment, we are recommending that the Army procure future requirements competitively rather than exercising another option with Jaxon.

The protest is denied in part and dismissed in part.

Nancy R. Van Cleave
Comptroller General
of the United States