

DECISION



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

FILE: B-213998

DATE: July 10, 1984

MATTER OF: Jaxon, Inc.

DIGEST:

An agency is not required to issue a new solicitation to test the market prior to exercising an option simply because the contractor's 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.

Jaxon, Inc. protests the Department of the Army's exercise of an option extending the life of contract DABT-01-83-D-0056 for fueling and defueling services at Fort Rucker. The contract was awarded competitively to Epps Aircraft, Inc. following our decision in A. Lee Parker, B-206735, Sept. 22, 1982, 82-2 CPD ¶ 259. In that decision we recommended that the Army should procure the requirement competitively rather than extend its contract with Jaxon, Inc. an additional year.

The option exercise in dispute extends Epps' performance from April 1, 1984 through March 31, 1985. Jaxon performed these services for many years at Fort Rucker, and charges that the exercise did not comply with section 1-1505 of the Defense Acquisition Regulation (DAR), reprinted in 32 C.F.R. pts. 1-39 (1983), because the contracting officer knew a lower price was available. We deny the protest.

In A. Lee Parker, we expressed the view to the Secretary of the Army that to achieve effective competition for this requirement, the Army should provide adequate time for a new contractor to obtain the equipment needed to perform. Jaxon performed fueling and defueling services at Fort Rucker from 1969 to 1983 because the Army, which attempted on numerous occasions to compete this requirement, was unable to find another vendor who was able to

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commence performance within the 60 to 90 day start-up times the Army was demanding. Epps was awarded the present contract in the fall of 1982 and had approximately 5 months in which to prepare to begin performance, which it did on April 1, 1983. During that time, Epps ordered and accepted delivery on fuel trucks and other necessary equipment at a cost of approximately \$2 million.

The present protest concerns events which occurred in the fall and winter of 1983.

In September, Jaxon submitted an unsolicited proposal to the Army. The proposal consisted of a portion of the bid schedule originally used to solicit Epps' contract and a cover letter in which Jaxon offered to perform fueling and defueling services at Fort Rucker for the option year beginning on April 1, 1984. In making this proposal, Jaxon agreed to be bound by the terms of Epps' contract. Jaxon's proposed unit price was 3.6 percent less than Epps' contract price, which if an estimated 30 million gallons per year of fuel were pumped, would amount to a savings of \$102,000. The Army, however, refused to accept Jaxon's offer because the services involved are filled competitively.

Both Jaxon and its attorney then separately wrote the Army. In one letter, Jaxon stated that if the fueling and defueling contract were recompeted, it would offer a lower price than was available under the Epps contract. Counsel advised the Army in his letter that the Army was required by DAR, § 1-1505 to conduct a competitive procurement.

Jaxon filed its protest with our Office in December 1983 after learning that the Army had given Epps preliminary notice of the agency's intent to exercise the disputed option. Jaxon contends that the contracting officer was not justified in exercising the option.

The contracting officer's decision

In a written determination dated December 6, 1983, the contracting officer concluded that exercise of Epps' contract option was in the best interest of the government. The crux of his view is found in the following two quotations from the determination:

- (1) "grave injury could result to the long-term competitive bidding process should this option not be exercised. Barring any major technical or quantity changes for the new performance period, it is felt that to not exercise the option would put the competitive vendors on notice that Fort Rucker, despite the availability of options, will not exercise those options; therefore, this would put vendors in the position of trying to include in the base year the vast sum of capital outlay necessary for the purchase or lease of the extensive amount of equipment required, modified exclusively for this contract. In some instances, vendors would find themselves out of the 'competition' due to these prohibitive costs and Fort Rucker could, after even the first resolicitation, find itself virtually as it was for past five to ten years, in a monopolistic situation with a vendor able to take advantage of the Government."
- (2) "Despite being advised by a vendor that there is now 'a lower price' to be obtained for this service performance, the Contracting Officer opines that continuity of service, the known low price received as the result of a competitive bidding practice and the fact that this document is an indefinite quantity type contract negates the possible lower price from a vendor who stated orally through his attorney that, he did not feel that Fort Rucker would receive any competition on this prior competitive solicitation and therefore bid \$.1248 for the services to be performed."

The contracting officer also reviewed the bids received at the time Epps was originally selected and noted Epps' bid was lower than Jaxon's bid by \$0.035 per gallon, for an estimated annual savings of \$912,000. The contracting officer further concluded that sufficient time was not available to conduct a competitive procurement, assuming the government should give a new contractor at least 120 days to obtain equipment following award before starting performance, and questioned whether the requirement could be competed as a total small business set-aside unless the Epps contract ran through at least one option period.

Analysis

DAR, § 1-1505(c)(iii) states that options should be exercised only if "the exercise of the option is the most advantageous method of fulfilling the Government's need, price, and factors in (e) . . . below considered."¹ Section 1-1505(e) provides that the determination under (c)(iii) should, among other things, take into account "the Government's need for continuity of operations and potential costs to the Government of disrupting operations" Further, section 1-1505(d) requires that the determination under (c)(iii) be made on the basis of a new solicitation or, if the contracting officer anticipates that the option price will be the best price available, an informal investigation of market prices; such factors as market stability and a comparison of the time since award with the usual duration of contracts for such supplies or services;² or readily ascertainable established prices that indicate that a new solicitation will serve no useful purpose.

¹ The contracting officer may also consider additional factors under § 1-1505(f) if the procurement resulting in the option was originally negotiated. These provisions are inapplicable here because the Epps contract is the product of an advertised procurement.

² The time between the award of the contract and the exercise of the option may be so short that the option price most probably is the lowest price obtainable.

We do not believe that Jaxon's offer to beat the option price in Epps' contract precludes the contracting officer from deciding that exercising the option is in the government's best interest. We considered a similar situation in our decision in A. J. Fowler Corporation, B-205062, June 15, 1982, 82-1 CPD ¶ 582. There, as here, the contract option prices had been obtained as the result of formal advertising, and were evaluated under the original solicitation, with award made on the basis of the low aggregate price. An unsuccessful offeror in that competition then asked our Office to find the agency's proposed option exercise improper on the basis of that firm's guarantee of a lower price for the option year, and to require a new competition for the need. We stated:

". . . 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 [the unsuccessful offeror] had a full opportunity to participate. In our view, [the firm] 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. 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. . . ."

That same reasoning applies here. The intent of the regulations that govern option exercise is not to permit a firm that bid too high in a competition under which option prices were evaluated subsequently to disrupt the continuity of performance simply through an offer to undercut the winning bidder's option price. Requiring a new competition in that situation would, in effect, be mandating a second competition for the same requirement for the benefit of a firm that made the wrong bidding decision in the first.

Instead, the regulations are intended to permit a contracting officer to exercise his business judgment to decide whether, based on factors such as available prices,

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the need for continuity of service, the incumbent's performance, and the cost and time for a new procurement, option exercise is the most advantageous way to proceed to meet the government's needs. It consistently has been our position that his judgment should not be questioned by this Office unless it has been shown unreasonable. See Cerberonics, Inc., B-199924, B-199925, May 6, 1981, 81-1 CPD ¶ 351.

As in A. J. Fowler Corporation, *supra*, our concern here with the requirements for competition for government contracts has been largely satisfied through the competition under which option prices were solicited and evaluated, and which resulted in a contract with Epps. We do not believe Jaxon's offer of a lower price for that contract's option year proves unreasonable the contracting officer's decision, as described above, to continue Epps' contract.

The protest is denied.

for 
Comptroller General
of the United States