



DECISION

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

10,391

FILE: B-193591

DATE: June 7, 1979

MATTER OF: Bristol Electronics, Inc.

[Protest of Contract Award to Higher Priced Contractor] DIGEST:

- 1. GAO will consider protest of agency's exercise of option where protester's contract also contains option for same equipment and protester contends agency acted contrary to regulations governing exercise of options.
- 2. Where options are available, under two different contracts, GAO will not question agency exercise of higher-priced option where agency concludes that only higher-priced contractor could meet its needs.

CNG 00223

DLG 01579
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Bristol Electronics, Inc. (Bristol) protests the exercise of an option by the U.S. Army Communications and Electronics Materiel Readiness Command (Army) under contract DAAB05-73-C-0006 with Cincinnati Electronics (Cincinnati). The protester contends that the Army could have obtained the required radio equipment pursuant to an option under Bristol's contract with the Army at a lower price.

CNG 00224

While we do not review contract administration matters pursuant to our Bid Protest Procedures, (4 C.F.R. Part 20 (1978)) we pointed out in KET, Incorporated, B-191949, October 27, 1978, 78-2 CPD 305, that we will consider protests against the exercise of contract options when the protester contends that such action is or would be contrary to the regulatory provisions governing the exercise of options. Here, since the essence of Bristol's position is that the Army violated the provisions of Defense Acquisition Regulation (DAR 1-1505 (1976 ed., DPC 76-6) by not exercising the option of the lower priced contractor we will consider this matter.

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Both Bristol and Cincinnati hold multi-year contracts with the Army for two types of radio equipment, AN/PRC-77 and RT-841. Each contract contains an option clause which provides that the Government may increase each yearly quantity by 100 percent. Cincinnati's option price for both types of equipment is \$557 per unit while Bristol's price is \$563 for AN/PRC-77 units and \$518 for RT-841 units.

The Army had procurement requirements for 3002 additional radio units. All but 2 of these units carried a priority designator and 1,192 of them were for past due grant aid requirements. The Army determined that a new procurement was impractical because of the urgency of the requirements and because of its belief that the total quantity was one third of an economical production quantity for a new procurement. Consequently the Army compared options in the two contracts to decide which was the most advantageous.

The agency viewed delivery as the key factor in comparing the two options. The Army determined that while Cincinnati could begin option deliveries in August 1979 at a rate of 1080 units per month, Bristol could not begin option deliveries until at least April 1981. The agency also considered the fact that both Cincinnati and Bristol have submitted multi-million dollar claims under their contracts. Since the Army could not, at the time of evaluation, predict the effect of these claims on the unit prices of both firms this element was not a factor in the price comparison. In this comparison Bristol was determined to be \$1,383 lower. Finally, the agency considered the relative confidence it had in receiving timely delivery from the two contractors and judged Cincinnati superior as it was then producing 1080 radios per month while Bristol had yet to complete first article testing under its contract. Based on its evaluation of these factors the Army concluded that \$1,383 was an insignificant premium for completion of delivery two years earlier and exercised the option in Cincinnati's contract.

The propriety of an agency's exercising an option under an existing contract must be determined in light of DAR § 1-1505(c)(iii) which states that options should be exercised only if it is the most advantageous method of fulfilling the Government's need, price and other factors considered.

Bristol objects to the Army's determination because it argues that the agency incorrectly calculated the price differential and failed to contact Bristol to negotiate a more favorable delivery schedule which it was permitted to do under the contract.

The protester points out that under Cincinnati's basic contract the agency must furnish several accessories in order to make complete radio units while only one accessory need be furnished to complete Bristol's unit. This, according to Bristol, results in a \$207,138 price differential in its favor. Further, Bristol argues that Cincinnati's pending claim of \$10 million, of which \$2 million has already been paid by the Army, adds an estimated \$600,000 to the price differential. Finally, the protester notes that the additional units ordered will provide a higher cost base for the economic price adjustment clause in Cincinnati's contract resulting in a price increase of \$167,211.40. As a result, Bristol urges the price differential is not \$1,383 as the Army states but \$974,349. The protester maintains that the agency cannot spend almost \$1 million more on the Cincinnati units without first determining whether delivery could be obtained from Bristol.

Although the Army agrees with Bristol that more accessory items must be furnished by the Government under the Cincinnati contract it does not appear to agree with Bristol's calculation of the price differential and it disputes the protester's position regarding the effect of the pending claims and price adjustment clause on the price comparison.

The Army views both the unsettled claims and the economic price adjustment as speculative factors which should not be included in the price comparison. The Agency states that since the total amount of

Cincinnati's claim is not settled it did not consider it appropriate to allocate the provisional payments made to the option prices. Further, the agency believes that since Bristol's pending claim of \$9,611,496 was not factored into the evaluation it acted reasonably and consistently in not speculating as to the outcome of either claim. The agency also points out that, like the Cincinnati contract, Bristol's contract contains an economic price adjustment clause which would affect its unit prices if an option quantity were ordered.

We agree with the agency's decision to exclude the unsettled portion of both contractor's claims and possible price increases due to the price adjustment clauses in each contract because of their speculative nature. However, the additional expense the agency must incur because of the need for accessories to complete the Cincinnati unit and that portion of Cincinnati's claim that had been reduced to provisional payments at the time of evaluation do not seem to be of such a speculative nature. It would have been appropriate for the Army to calculate these amounts and to have included them in the price comparison.

Nevertheless, the agency insists that it was Bristol's inability to deliver the units when needed which most influenced its choice. Bristol implies that it may be able to meet the Army's delivery requirements. The protester points out that the delivery provisions in its option clause are negotiable and indicates that it has offered to accelerate its program to meet the agency's needs.


The agency recognizes that the option clause in Bristol's contract contains the standard form language which permits the parties to agree by modification to a delivery schedule other than that specified. However, the Army also points out that it cannot impose its requirements on Bristol while Cincinnati is obligated by the terms of its option clause to commence delivery of the option quantity in August 1979 and complete delivery by October. Similarly the Army is unimpressed with Bristol's offer of acceleration.

It states that since Bristol contends it is entitled to a one-year equitable adjustment in its delivery schedule because of its claim, the acceleration offer only brings Bristol to its original April 1981 delivery date. In short, the agency compared the existing delivery schedules of both contractors and determined that only Cincinnati could meet its needs.

While there is no regulatory provision that deals explicitly with this situation, the provisions of DAR § 1-1505 do call for the agency to make a judgment as to whether the exercise of a particular option is the most advantageous method of fulfilling the Government's needs, price and other factors considered. We held in Consolidated Airborne Systems, Incorporated, B-177758, July 10, 1974, 74-2 CPD 15, that these other factors which should be considered include the agency's delivery requirements. Here the agency compared the prices and existing delivery schedules of both Bristol and Cincinnati and determined that although Bristol offered the lowest price it could not meet the delivery requirements.

As noted earlier we do question the agency's judgment in not including the costs needed to complete the Cincinnati unit and the provisional payments made on the Cincinnati claim in the price comparison. Although the agency was not precluded from entering into delivery negotiations with Bristol, in these circumstances where Bristol has yet to deliver a unit under its contract, and the original delivery schedule is almost two years behind that of Cincinnati, the record is sufficient to support the agency's judgment in determining that price is not the critical factor and conclusion that Cincinnati could best meet its needs.

The protest is denied.


Deputy Comptroller General
of the United States