

DOCUMENT RESUME

03324 - RA24135451

[Protest against Purchase Order under a Federal Supply Schedule Contract]. B-187819. August 24, 1977. 8 pp.

Decision re: Lanier Business Products; Mid-Atlantic Industries, Inc.; by Milton Socolar (for Elmer B. Staats, Comptroller General).

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel; Procurement Law IX.
Budget Function: General Government: Other General Government (806).

Organization Concerned: Veterans Administration.

Authority: 41 C.F.R. 5A-73.205.5. 41 C.F.R. 101-26.408-2.
B-186057 (1976). B-181146 (1974).

Company protested a purchase order under a Federal Supply Schedule contract, alleging that they had the lowest priced equipment meeting the Government's minimum needs. This protest was denied since they failed to show that their equipment did in fact meet the Government's minimum needs. A second company claimed that it should be paid for equipment delivered under a purchase order and for undelivered equipment not in excess of their maximum order limitation. The claimant is entitled to be paid both for the items already delivered and, upon delivery, for the other items in the purchase order. The one item which exceeds their Federal Supply Schedule contract maximum order limitation should be competitively procured.
(Author/SC)

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Robert Little
Proc. II

DECISION



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

FILE: B-187819

DATE: August 24, 1977

**MATTER OF: Lanier Business Products, Inc.;
Mid-Atlantic Industries, Inc.**

DIGEST:

1. Protester challenging a purchase order under Federal Supply Schedule contract on the grounds that protester has the lowest priced equipment meeting the Government's minimum needs is denied where protester fails to show that its equipment does in fact meet the Government's minimum needs.
2. Claimant is entitled to be paid for those items already delivered and, upon delivery, for other items described in agency's purchase order. One item which exceeds Federal Supply Schedule contract Maximum Order Limitation should be competitively procured.

This case comes to us as a protest by Mid-Atlantic Industries, Inc. (Mid-Atlantic) and a claim by Lanier Business Products, Inc. (Lanier) regarding the Veterans Administration's (VA) order from the Federal Supply Schedule (FSS) of dictating equipment for its Philadelphia Regional Office. Mid-Atlantic protests on two grounds. First, VA's purchase from Lanier was, in effect, an unjustifiable "sole source" purchase. Second, the purchase was invalid because for one item, which Mid-Atlantic argues is crucial to the system being purchased, VA's order exceeded the Maximum Order Limitation (MOL) of Lanier's FSS contract. Lanier claims \$84,971.70 plus interest and attorney's fees on the grounds that, at the very least, it should be compensated for that equipment which was delivered under the purchase order and that undelivered equipment not in excess of the MOL.

VA issued general specifications for an "Automatic-Changing Cassette or Cartridge Type Centralized Station Wide Dictation/Transcription System" on June 4, 1976. The record shows that Mid-Atlantic met with VA to discuss these specifications line-by-line. The discussions resulted in VA determining that Mid-Atlantic did not meet the specifications in four areas. Consequently, Mid-Atlantic was invited to submit written comments as to how its system could respond to the VA's operational requirements.

B-187810

According to VA, Mid-Atlantic did not provide any written documentation, except its FSS catalog, prior to the Center's receiving authorization on August 18, 1976 to install a dictation system.

The purchase order issued on September 2, 1976 pursuant to Lanier's FSS contract GS-005-66-12, called for delivery of the listed items by December 12, 1976 or sooner. The ordered items were from four "Special Item" categories in GSA's Federal Supply Catalog (FSC) 74, Parts II and III, Office Machines, Class 7475 (Office Type Dictating and Transcribing Machines), effective July 1, 1976 through June 30, 1977. The four Special Item categories were as follows:

<u>Special Item No.</u>	<u>Supplies or Services</u>
50-187	Dictating Machines: Tape: Non-portable, electric
50-187-1	Dictating Machines: Tape: Portable, battery operated
50-184	Transcribing Machines: Tape: Non-portable, electric
50-195	Transcribing Machines: Tape: Attachments and features

The purchase order, as amended on September 3, 1976, called for the following:

	<u>No. of Items</u>	<u>Special Item No.</u>	<u>Description</u>	<u>Catalog Price</u>
1.	16	50-187	Lanier Tel-Edisette Automatic Changing Standard Cassette Central Dictation Recorders with VOR installed @ \$1,945.00 each (LX-007-4)	\$31,120.00
2.	163	50-195	Lanier Dictate Station, 3-Posi- tion Manual Select, Grey, Hard wired with 50-195 NT-206-0 Intercon. @ \$223.00 each (NX- 234-0)	\$36,349.00

B-187819

	<u>No. of items</u>	<u>Special Item No.</u>	<u>Description</u>	<u>Catalog Price</u>
3.	65	50-194	Lanier VIP Secretary Transcribing Machine, with Foot Control and NT-031-0 Stetho-set Bow Headset with Cord @ \$547.00 each (VIP/S)	\$35,555.00
4.	6	50-195	Lanier Dial Dictate Input Panel, to connect a recorder to also receive internal PBX dictation @ \$225.00 each (NX-503-0)	\$ 1,350.00
5.	3	50-195	Lanier Automatic Channel Selector to connect 50 Dictate Stations to 10 Recorders. Sequential selection is automatic @ \$5,100.00 each (NX-702-0)	\$20,400.00
6.	3	50-195	Lanier 6-Selector Intercom (originator to operator) @ \$395.00 each (NX-622-0)	\$ 1,185.00
7.	1	50-195	Lanier Telephone Recorder-Coupler for outside call-in dictation (NX-516-0)	\$ 295.00
8.	4	50-195	Lanier Cabinet, Laminated Walnut Finish. Holds up to 4 Tel-Edisettes with drawer space for up to 192 standard cassettes @ \$495.00 each (TEC-1)	\$ 1,980.00
9.	1	50-195	Continuous Dual Recorder Console with Mixed in-built and modification kits for 2 Edisettes (LX-006-0)	\$ 495.00
10.	4	50-195	Lanier Microphone with Stand @ \$50.00 each (540)	\$ 200.00

B-187919

	<u>No. of Items</u>	<u>Special Item No.</u>	<u>Description</u>	<u>Catalog Price</u>
11.	100	50-195	Lanier Program Discs (box of 500) @ \$10.00 each (VPD)	\$ 1,000.00
12.	2	50-195	Lanier Bulk Cassette Eraser @ \$19.50 each (LC)	\$ 39.00
13.	65	50-195	Stethoset Headset Bow with Cord @ \$17.00	\$ 1,105.00
14.	8	187-1	Lanier VIP/C Standard Cassette portable dictating machine including AG adaptor recharger	\$ 1,432.00
15.	8	50/95	Hand Microphone with start/stop switch	\$ 80.00

The equipment, except for items number 3, 13, 14, and 15, was delivered to VA on or about September 23, 1976. Although the purchase order specified that the equipment was to be shipped to Chief, Supply Services, VA Center Warehouse, 500 Wissahickon Avenue, Philadelphia, Pennsylvania, the equipment was, in fact, delivered to the first floor of the VA Center, University of Woodland Avenue, Philadelphia, and received for by a representative of the VAC Warehouse's Supply Division to the Center.

Subsequent to Lanier's delivery of the equipment, the Assistant Chief of Supply Services telephoned Lanier to instruct it not to deliver any items under the purchase order, because a protest as to the alleged sole-source nature of the procurement had been lodged by Mid-Atlantic, an affiliate of the Norelco Word Processing Group. The result of this telephone conversation was that Lanier made no further attempts to deliver any of the remaining items to be delivered under the purchase order.

Subsequently, it came to VA's attention that VA's order to Lanier may have exceeded Lanier's MOL on some of the Special Items listed. VA referred the matter to GSA by letter dated October 28, 1976. GSA replied by letter of November 5, 1976 and stated that, "neither the system as a whole nor any component items exceed the FSS contract maximum order limitation." In this regard we note that the MOL established for Lanier's contract (See 41 C.F.R. § 5A-73.205-5 (1976)) was listed in Lanier's catalog as follows:

B-187819

"**MAXIMUM ORDER LIMITATION:** Special items 50-187--\$75,000. Special items 50-184-2, 50-187 (except LX-607-0), EC-77 (only from 50-226), 50-187-1, 50-317, 50-223, 50-191-2, 50-194--\$25,000 each. Orders may be written to full M.O.L. Allowance for each special item number. Different special items to full M.O.L. each can be combined on a single order. The order can exceed the M.O.L. as long as no single special item number exceeds the assigned M.O.L."

Comparing item 3 of VA's purchase request (Special Item 50-194, Lanier VIP Secretary Transcribing Machine, with foot control and NT-031-0 Stethoset Bow Head Set with Cord (VIP/S) 65 at \$547.00 each for a total price of \$35,555.00) we note that it exceeds the MOL for Special Item 50-194 by approximately \$10,000. By letter dated December 15, 1976, GSA reconsidered its opinion as to whether the MOL was exceeded in item 3. In the letter GSA stated:

"The Maximum Order Limitation (MOL) for this item [50-194] under the FSS contract was \$25,000 effective July 1, 1976 until October 12, 1976, when the MOL was increased to \$50,000 as a result of an offer by Lanier to increase their discount from 7% to 12% off list price.

"In light of this information, the September 1, 1976 purchase order exceeds the applicable MOL for Item 50-194 and pursuant to the applicable contract provision in the Federal Property Management Regulation (FPMR 101-26.401-4(c), the purchase order may not be accepted by Lanier."

GSA reconsidered its position because it had incorrectly assumed that Lanier's request for an MOL increase dated October 8, 1976 for Special Item 50-194 was effective as of the date specified in Lanier's letter, i. e., September 1, 1976. Lanier admits in this regard that the requested September 1, 1976 effective date was prompted by its recognition that it could not accept the order for Item 50-194, inasmuch as acceptance could be the grounds for termination of its FSS contract for default.

VA, after receiving GSA's reconsideration of December 15, 1976, wrote to Lanier by letter of December 28, 1976 and stated, in pertinent part, as follows:

B-187819

"We have received a determination from the General Services Administration that the MOL on Item No. 50-194 under FSS contract GS-00S-06612 was exceeded on the purchase order in question. Therefore, pursuant to the applicable contract provisions and Federal Property Management Regulations (FPMR 101-26.401-4(c)), purchase order T-1725R may not be accepted by Lanier.

"The 65 transcribing machines, of course, are an integral part of the entire system. Consequently, quotation will have to be resolicited. Lanier Business Products will be contacted again in the near future by supply service at the VA HOSPITAL, PHILADELPHIA, regarding the submission of another proposal for the centralized dictation system."

Lanier took issue with VA's finding that the 65 transcribing machines were an integral part of the system and argued by letter of January 8, 1977 that the transcribing machines were "totally independent" of other items on the order. Moreover, Lanier took the position that irregularity as to one item does not affect the validity of other items specified in the order. According to Lanier, the transcribers could be obtained from another source, because transcribers are generally interchangeable as among the manufacturers listed on the schedule.

On March 17, 1977, Lanier filed its claim with this Office alleging four alternative bases for payment for equipment both delivered and undelivered. First, Lanier argues that the entire purchase order was valid and that Lanier, upon delivery of the items ordered, was entitled to be paid for them. According to Lanier, the VA's exceeding of the MOL regarding the transcribing machines was a minor informality which was cured by Lanier's retroactive offer to amend and GSA's acceptance of Lanier's MOL to \$50,000. Second, even if the order was ineffective as to the transcribing machines, the remainder of the purchase order is valid as issued. Therefore, Lanier is entitled to payment for equipment delivered and accepted and to deliver and be paid for items 13-15 of the purchase order. This is because GSA indicated that the purchase order was invalid only with regard to the transcribing machines. Third, even if the purchase order was invalid in its entirety, Lanier would be entitled to payment for the equipment delivered and accepted. Lanier's argument is that even if it is considered that the entire order is invalid, the Government cannot show either that the contractor's statements or actions contributed to the improper award or that the contractor was on direct

B-187819

notice, prior to award, that the procedures being followed were unlawful. Fourth, even if the contract was invalid because the acceptance was effected without authority, nevertheless the contracting officer, having taken no further action, is deemed to have ratified the acceptance.

Mid-Atlantic's argument that the order from Lanier constituted an unjustified "sole-source" procurement is grounded in its belief that VA violated 41 C.F.R. §§ 101-26.408-2 and 3 which states as follows:

"§ 101-26.408-2 Procurement at lowest price. Each purchase of more than \$250 per line item made from a multiple-award Schedule by agencies required to use such Schedule shall be made at the lowest delivered price available under the Schedule unless the agency fully justifies the purchase of a higher priced item. * * *.

"§ 101-26.408-3 Justification.

(a) Justification of purchases made at prices other than the lowest delivered price available should be based on specific or definitive needs which are clearly associated with the achievement of program objective. * * *.

(b) The following examples illustrate factors that may be used in support of justifications, when used with assertions that are fully set forth and documented.

(1) Special features of one item, not provided by comparable items, are required in effective program performance.

(2) An actual need exists for special characteristics to accomplish identified tasks.

(3) It is essential that the item selected be compatible with items or systems already existing within using offices.

(4) Trade-in consideration favor a higher priced item an produce the lowest net cost. * * *."

B-187819

We have said that these clauses require Federal agencies which procure from a multiple-award Federal Supply Schedule to do so at the lowest price consistent with their minimum needs. If the procurement is at other than the lowest schedule price, a memorandum justifying the purchase must be included in the contract file. Microcom Corporation, B-186057, November 8, 1976, 76-2 CPD 385. See generally, Mid-Atlantic Industries, Inc., B-181146, November 21, 1974, 74-2 CPD 275.

Mid-Atlantic sought to prove its argument by attempting to show that its equipment met all of the VA's needs at a lower price than Lanier could offer. The price sheet provided by Mid-Atlantic did not indicate, however, that Mid-Atlantic's equipment (Norelco) meets VA's requirements. In short, Mid-Atlantic has not shown, nor has VA conceded, that Lanier does not offer the lowest priced equipment meeting VA's minimum needs.

With regard to Lanier's claim, it appears to us that while VA's intention may have been to obtain a complete system, the purchase order quoted on pages 2 through 4 of this decision described a series of individual components. Insofar as VA's order for those items did not exceed Lanier's MOL, Lanier was obligated to fulfill it. Lanier is therefore entitled to payment for Items 1, 2, and 4, through 12, which it already has delivered, and upon delivery thereof, for Items 13 through 15. Moreover, Item 3, the 65 transcribing machines, which GSA advises us may be supplied by any one of a number of manufacturers, should be competitively procured.

Milton J. Fowler
for Comptroller General
of the United States