

Transp.

**DECISION**



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

10, #5 + 14

FILE: B-194128

DATE: June 19, 1979

MATTER OF: Dictaphone Corporation

CMB 01046

**DIGEST:**

1. As mandatory user of Federal Supply Schedule (FSS) for dictating equipment, Air Force does not have option to procure such equipment competitively through written solicitation, but must purchase lowest cost FSS-listed equipment. Determination of lowest cost may include consideration of offered trade-in allowance.
2. *Furthermore,* Where only one of four FSS vendors of dictating equipment initially offered trade-in allowance for used equipment, it was not improper for agency to later afford all four vendors opportunity to submit new proposals to include trade-in allowances. *see p. 6*
3. Where protest is filed after issuance of purchase order under FSS contract, there is no requirement that contracting agency suspend performance pending resolution of protest.

Dictaphone Corporation (Dictaphone) protests the award by the Department of the Air Force of delivery order F49642-79-F-6208 to Lanier Business Products, Inc. (Lanier), for dictating equipment for Malcolm Grow Medical Center, Andrews Air Force Base. The delivery order was issued under the General Services Administration (GSA) Federal Supply Schedule (FSS) Contract No. GS-005-66650.

As its bases for protest Dictaphone contends that either the Air Force should have developed specifications for the equipment and procured it competitively by use of a separate written solicitation, or if the FSS was to be used the equipment should have been purchased from Dictaphone as, allegedly, the lowest cost supplier under the FSS contract for the dictating

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[Protest Involving the Supply of Dictating Equipment]

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equipment desired. Dictaphone also asserts that Lanier was afforded preferential treatment in the purchase so that "true competitive quotations were eliminated from the procurement." In addition, Dictaphone states that certain of the Lanier units purchased were listed in the FSS at \$400 each, but the purchase price to the Air Force was \$300 each, which Dictaphone terms "a clear violation of the GSA contract and an obvious intent at 'bargaining' to achieve the order." Finally, Dictaphone argues that the Air Force acted improperly in accepting delivery of the dictating equipment before resolution of the protest by our Office. For the reasons set forth below, the protest is denied.

The record shows that in 1977 the Air Force began consideration of whether to replace the Medical Center's dictating equipment. Four vendors with FSS contracts for such equipment, including Dictaphone and Lanier, provided their products to the Medical Center for testing. An internal study done in 1977 for the Administrator of the Medical Center concluded that all were acceptable, but that Dictaphone's equipment provided the "optimal word processing system," for its requirements at "a relatively low total cost." The study also found that the Lanier equipment received generally high marks from a majority of the users. The study's conclusion was based primarily on a user survey in which 150 questionnaires were circulated with 38 responses received, the FSS contract prices in existence at the time of the survey and an assumed estimate of maintenance costs for an eight-year equipment life.

Because the equipment was to be purchased from the FSS, no written solicitation was issued by the Air Force. However, the vendors were afforded an opportunity to survey the facility to determine the combination of their FSS listed equipment they believed would best meet the Medical Center's needs and to submit proposals therefore. Only Dictaphone included a trade-in allowance in its proposal (submitted in October 1978) for the equipment that the purchase would replace, which caused Dictaphone's equipment to be evaluated as the lowest cost. In this respect, although the cost of a vendor's individual items of equipment was set by the FSS price, the evaluated cost of each system proposed would depend

on the combination of components proposed, the amount of the trade-in allowance offered, and other relevant factors such as evaluation factors imposed under the Buy American Act, 41 U.S.C. § 10a-d (1976).

The four vendors were thereafter orally advised that they had a final opportunity to obtain any additional technical information desired from the Medical Center concerning the requirement, and that final proposals could include trade-in allowances. New proposals were received and evaluated, with Lanier's evaluated cost being the lowest of the four. The delivery order was issued to the firm on February 12, 1979.

Concerning the question of whether the system should have been procured through the use of a written solicitation rather than purchased under the FSS, we point out that the Air Force is a mandatory user of the FSS for this type of equipment. Defense Acquisition Regulation (DAR) § 5-102.3 (1976 ed.). Accordingly, the Air Force did not have the option to proceed as suggested by Dictaphone.

Dictaphone's contention that Lanier was given preferential treatment by the Air Force is based on the allegation that Lanier was furnished specifications upon which to base its proposed system configuration, while other offerors were not. Dictaphone also alleges that it was improper for the Air Force to afford the other vendors a second opportunity to submit proposals of system configuration and offer trade-in allowances after the initial submissions in late 1978.

With respect to the first matter, there is no evidence in the record and nothing has been offered by Dictaphone to show that Lanier received any more information or greater opportunity to obtain information regarding the Medical Center's needs than did the other vendors, and the Air Force specifically denies giving any favored treatment to Lanier. Thus Dictaphone's allegations of favoritism in this regard are unsupported, and we conclude that it has not met its burden of affirmatively proving its case. U. S. Duracon Corporation, B-194225, B-194673, May 15, 1979, 79-1 CPD \_\_\_\_. Regarding the second point, since

the record indicates that all vendors, including Dictaphone, were given the same opportunity to submit new proposals, we do not see how Dictaphone was prejudiced thereby. Washington School of Psychiatry/The Metropolitan Educational Council for Staff Development, B-192756, March 14, 1979, 79-1 CPD 178. We note here that Dictaphone also asserts that a change in the Air Force's requirements may have been communicated only to the other three offerors in that request for new proposals. However, nothing in the record supports that position.

Dictaphone's contention that the purchase should have been made under Dictaphone's FSS contract apparently is based on the 1977 study. However, we have been informally advised that the study was merely a preliminary recommendation to the contracting personnel responsible for determining how best to fulfill the Medical Center's requirements. The actual determination, with that study as background, was that any of the four systems tested would meet the Medical Center's minimum needs.

As a mandatory user of the FSS, the Air Force was required to purchase the dictating equipment which met its needs at the lowest delivered price available (unless the purchase of higher-priced items was fully justified), Federal Property Management Regulations § 101-26.408-2 (1978), and the record shows that Dictaphone was not evaluated as the lowest cost vendor when the purchase was made. In this regard, at that time Dictaphone was evaluated as second low in cost based on its equipment combination and trade-in allowance, and highest of the four offerors once the Buy American Act factor was added (during the course of the procurement, GSA advised the Air Force that Dictaphone's dictating equipment should be considered foreign-made, whereas it had originally been evaluated as a domestic source end product). Accordingly, we see no basis to question the purchase from Lanier.

With respect to Dictaphone's allegation that the purchase price to the Air Force of certain Lanier units was lower than the FSS-listed price, the record indicates that Dictaphone is not correct. Although Lanier's

FSS single unit price was \$400 for the items in question, the unit price when five were being purchased, as was done here, was listed as \$300. We therefore find no violation of the FSS terms as alleged.

Finally, ~~there is no requirement that a contracting agency suspend the performance of a contract because a protest has been filed after the award~~ (here, the issuance of the purchase order). See DAK § 2-407.8(c); Graphical Technology Corporation, B-181723, March 27, 1975, 75-1 CPD 183, at p. 12.

The protest <sup>was</sup> is denied.

  
Deputy Comptroller General  
of the United States