

DECISION



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

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FILE: B-205231

DATE: June 15, 1982

MATTER OF: Copylease Corporation of America

DIGEST:

1. Where a mandatory Federal Supply Schedule (FSS) contract appeared to exempt the exercise of purchase option for leased copiers from any Maximum Ordering Limitation, the agency acted properly by exercising the option rather than by seeking competition for the copiers.
2. Where protester alleges that it offered agency a lower price for the identical item available on the manufacturer's mandatory FSS contract, but admits that its offer was deliberately vague and record shows that offer was imprecise, the authority granted agency by Federal Property Management Regulations § 101-26.401-4(f) to procure competitively off-schedule need not be exercised, since agency had no basis for determining that protester's offer was in fact identical to FSS item and lower in cost.

Copylease Corporation of America protests the Department of Agriculture's exercise of a purchase option for six copying machines leased under Xerox Corporation's Federal Supply Schedule (FSS) contract No. GS-00S-23148. Copylease contends that because Agriculture's purchase order converting the copiers from lease to purchase violated the Maximum Ordering Limitations of Xerox's FSS contract, Agriculture should not have placed the order under Xerox's FSS contract and, instead, should have obtained competition. For the reasons stated below, we deny the protest.

As a result of an internal evaluation, Agriculture concluded that it would be more efficient to purchase rather than lease its copiers. This study, which included the six Xerox 9400 copiers here in question, was released August 21, 1981.

Commencing with a letter of August 24, Copylease initiated a series of conversations and meetings with Agriculture to discuss the possible sale of used 9400 copiers to replace those leased from Xerox. These conversations dealt with Copylease's price ranges, delivery dates, servicing, warranties and the other general conditions of its sales of used Xerox 9400 copiers.

Agriculture issued Purchase Order No. 40-3142-2-052 on September 25, exercising its option to purchase the six copiers leased from Xerox under its FSS contract.

Copylease contends that the Maximum Ordering Limitation (MOL) for Group 36, Part IV of the FSS, is \$200,000 and that Agriculture's payment of \$504,846 for lease conversion of the six copiers violated this limitation. In support of this position, Copylease cites Suba II, Inc., B-203462, December 3, 1981, 61 Comp. Gen. _____, 81-2 CPD 440, which states that lease conversions in excess of \$50,000 must be synopsisized in the CBD.

Agriculture states that it is a mandatory user of Group 36, Part IV of the FSS. Under this FSS group, Copylease is authorized to lease, but not sell copiers, while Xerox may both lease and sell.

Agriculture maintains that while Xerox's FSS contract contained an MOL of \$200,000 for new rentals and \$75,000 for new purchases, it did not contain an MOL applicable to purchase options at the time the purchase order was issued. Additionally, Agriculture argues that Suba II, Inc., supra, is inapposite because it concerned automatic data equipment which is governed by different regulations.

Xerox advises that while the application of the MOL to the purchase of leased equipment has been a source of confusion between it and the General Services Administration (GSA), Xerox did not interpret the MOL as restricting lease conversions at the time the purchase options were used.

The MOL terms of Xerox's FSS contract then in effect for Group 36 items provided:

- "2. Maximum Order Limitation: Orders will not be accepted which exceed the limitations stated below.

The total of any order (except for Rental, Hourly Service, and Full Service Maintenance) may not exceed \$75,000. The maximum order limitation for any single item, whether ordered singly or in combination with other items, is shown below.

Special Item Numbers	Description	Maximum Order Limitation
51-55	Rental (New Placements)	Refer Below*
51-55	Rental Renewals	None
51-55	Option to Purchase	None
	* * * * *	
51-100	Equipment Purchase	\$75,000 or one unit-whichever is larger
	* * * * *	

*Maximum Order Limitation for Rental (New placements): 20 units, or rental units having a purchase value of \$200,000, whichever is less. This MOL does not apply to rental renewals."

As can be seen, the MOL specified for "Option to Purchase" is "None." While the instruction preceding the list of items states that the total of any order may not exceed \$75,000, this instruction reasonably may be read as being applicable to new placements only in view of the "None" notation cited above and the same notation applicable to rental renewals. Under the circumstances, we cannot object to Agriculture's conclusion that the MOL restrictions of Xerox's FSS contract

did not apply to conversions from lease to purchase. Also, as Agriculture points out, the lease conversion in Suba II, Inc., supra, concerned different types of equipment. (For the future, we note that GSA has since modified Xerox's MOL to provide an express limitation upon such conversions.)

Copylease also argues that because it offered identical copiers at a lower price than Xerox's FSS contract, Agriculture had a duty to compete the requirement under section 101-26.401-4(f) of the Federal Property Management Regulations, which grants agencies the authority to procure off-schedule when identical items are available at a lower price. Consequently, Copylease contends, Agriculture was required to obtain competition by synopsisizing its intent to exercise its lease conversion rights under Xerox's FSS contract in the CBD.

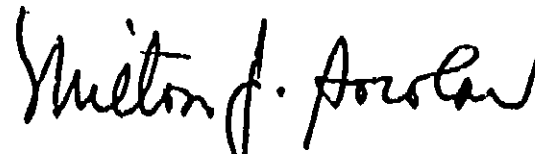
Agriculture argues that FSS Group 36 is a mandatory schedule which it must utilize and that FPMR § 101-26.401-4(f) simply grants the procuring agencies discretionary authority to procure off-schedule, which discretion need not be exercised. Further, Agriculture furnishes evidence that Copylease's offer was not identical to the terms offered by Xerox under its FSS contract and that Copylease's offer was not lower when all costs, including termination charges under Xerox's FSS contract, are taken into account.

While Copylease now states that it could have sold these items at a per machine price \$14,000 lower than Xerox's per machine price, it does not dispute Agriculture's conclusion that the terms Copylease proposed did not amount to a commitment to furnish the identical item at a lower cost. In fact, Copylease admits that it "was perhaps negligent" in this regard, in that it "remained vague when we discussed prices, terms and conditions" because it believed that its real offer would be submitted in response to Agriculture's request for competitive proposals. It does argue, however, that the savings Agriculture achieved by exercising the purchase option "were far less than they would have you believe and would have been more than offset in the long run by the 15% differential in our service price and the \$14,000 lower per machine purchase price."

In reply, Agriculture states that because Copylease never made a firm offer, either oral or written, for Xerox

9400s which could be compared with the terms offered under Xerox's FSS contract, no basis existed for determining whether Copylease offered more favorable terms. We agree. It was incumbent upon Copylease to provide Agriculture with the information needed at that time to determine whether identical items were available off-schedule at a lower price if it wished to invoke the exception of the mandatory schedule; Copylease's subsequently disclosed comparisons between what Copylease would have bid had the purchase of the 9400s been competed and Xerox's FSS schedule prices are simply not relevant to Agriculture's earlier deliberations. Thus, we cannot conclude that Copylease offered to provide the identical item at a lower cost. This being the case, the conditions necessary under the regulation to permit off-schedule procurement have not been demonstrated.

The protest is denied.



Acting Comptroller General
of the United States