

DECISION

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

25663

FILE: B-210790

DATE: July 6, 1983

MATTER OF: Pleion Corporation

DIGEST:

1. Amended protest which was filed the day after the protester modified its Federal Supply Schedule contract to include partitions required by the agency under its request for quotations is timely because basis for protest--that agency was required to place an order under the modified contract--did not arise until the modification.
2. GAO finds no legal requirement that procuring agency, after the date an order was ready to be placed under a request for quotations for Federal Supply Schedule (FSS) items, consider fact that low quoter rejected for offering nonschedule items had modified its FSS contract to include rejected items on schedule.

Pleion Corporation (Pleion) protests the placement of an order by the Army Corps of Engineers under request for quotations (RFQ) OAS-83-10 with any company other than Pleion. The RFQ is for the purchase and installation of load-bearing acoustic partitions, among other things, from contractors listed in the multiple-award Federal Supply Schedule (FSS) for office systems furniture. No order has been issued by the Army.

For the reasons set forth below, we deny Pleion's protest.

The RFQ was issued to the 23 vendors having FSS contracts for office systems furniture. At the date specified in the RFQ for returning quotations, 17 vendors submitted quotes, with Pleion being the lowest at \$211,192.12. However, the Army subsequently determined that it could not accept Pleion's quote because the 65-inch high partitions specified in the RFQ were not included in the company's

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FSS. Consequently, the Army concluded that Pleion's quote had to be rejected since FSS regulations provide that any agency which is a mandatory user under the FSS cannot use a non-FSS vendor when an FSS vendor is available.

By letter dated February 11, 1983, and received by our Office on February 15, 1983, Pleion protested the Army's determination, contending that the Army's proposed intent to purchase from a company other than Pleion amounted to a de facto cancellation of the RFQ under which Pleion was the low, responsive offeror. Pleion further contended that such cancellation lacked the compelling reason required by the Defense Acquisition Regulation. Finally, Pleion challenged the Army's use of the FSS contracts after the submission of quotes as an illegal auction.

On February 23, 1983, Pleion modified its FSS systems furniture contract specifically to cover 65-inch high partitions. By letter of the same date and received by our Office on February 24, 1983, Pleion changed the basis of its protest. Pleion asserted that the Army should cancel the RFQ because it violated the provision in the Federal Property Management Regulations (FPMR) that agencies shall not solicit bids, proposals, quotations or otherwise test the market solely for the purpose of seeking alternate sources to the FSS. See FPMR, 41 C.F.R. § 101-26.401(a) (1982). Pleion further asserted that after the Army cancels the RFQ, it must then consider Pleion's modified FSS contract when purchasing the needed partitions. In the alternative, Pleion asserted that the Army should award a contract to Pleion, the low, responsive, responsible bidder.

The Army argues that Pleion's amended protest was untimely filed. According to the Army, Pleion's assertion that the RFQ should be canceled is based upon an alleged impropriety in the solicitation which was apparent prior to the closing date for the receipt of quotations. Since our Bid Protest Procedures require such a protest to be filed prior to the closing date, Pleion's amended protest should be dismissed as untimely, citing 4 C.F.R. § 21.2(b)(1) (1983). In the alternative, the Army asserts that Pleion was aware of the allegedly defective solicitation on December 27, 1982, when it received the RFQ or, at the very latest, on January 10, 1983, when it responded to the RFQ.

We find that Pleion's amended protest filed on February 24, 1983, was timely. Only after Pleion modified its FSS contract on February 23, 1983, did the company take the position that the Army had to place an order for the

required partitions under its modified FSS contract and, thus, disregard the RFQ as being an unlawful usurpation of the multiple-award FSS contract for systems furniture. Until then, Pleion had contended that it had submitted the low, responsive bid under the RFQ to supply 65-inch high partitions and, therefore, was entitled to an award under the terms of the RFQ.

With regard to Pleion's modification of its FSS systems furniture contract after the closing date for the receipt of quotations under the RFQ, the Army argues that the critical time for determining the applicability of an FSS contract is the time that the agency's order under the contract is "ready to be placed." Pulaski Furniture Corporation, B-188440, August 10, 1977, 77-2 CPD 107, affirmed on reconsideration, B-188440, January 6, 1978, 78-1 CPD 10. According to the Army, an order is ready to be placed either after the closing date for receipt of quotations where a valid RFQ has been issued by the agency or at the latest after the evaluation of the quote submitted in response to the RFQ. Here, the Army states that quotations on the RFQ were due on January 12, 1983, and that as of that date, Pleion's FSS contract for systems furniture did not provide for 65-inch partitions. The Army goes on to emphasize that an order for the partitions would have been in place shortly after the evaluation of the quotes except for the filing of Pleion's protest, which prevented it from procuring the partitions.

In addition, the Army asserts that the integrity of the competitive procurement system would not be served by having to consider now Pleion's modified contract after Pleion's original quote had been rejected because the company did not have 65-inch high partitions on the FSS. In this regard, the Army argues that if it is required to consider FSS contracts as modified up to the time the delivery order is actually placed rather than those in effect either at the closing date for the receipt of quotations or at the time quote evaluations are completed, there would be nothing to prevent the other partition vendors from submitting protests and simultaneously negotiating contract modifications with the General Services Administration to lower their prices. The Army cites our decision in Casper Systems Corporation, B-205064, June 28, 1982, 82-1 CPD 626, for the proposition that an auction atmosphere would be created if a contracting agency was required to consider a second quotation from the protester vendor after the protester learned another FSS vendor had submitted a lower quotation.

Pleion argues that the date of actual issuance of the purchase order is the "most sensible" date to view an FSS contract since that is the date when the FSS binds the contractor to a particular delivery. Also, Pleion points out that FSS contracts are more susceptible to unilateral or bilateral amendments than other Federal contracts. Pleion further points out that by its terms, an FSS contract calls for adjustment whenever a contractor's prices change, items are deleted from stock, the Government can get a better prime, or FSS policy changes.

In addition, Pleion claims that Government error was the cause of its 65-inch partitions not being on its FSS contract. In this regard, Pleion claims that GSA was furnished prices covering 65-inch partitions in mid-1982, but no modification to its contract was made by GSA. Finally, Pleion argues that the 65-inch partitions represent only 5 percent of the total purchase.

We conclude that the quotes submitted in response to the RFQ were submitted with a view toward the issuance of a purchase order under the FSS and not as independent offers subject to price negotiation. See Lanier Business Products, Inc., B-196189; B-196190, February 12, 1980, 80-1 CPD 125. In this regard, we note that vendors were not responding to a request for proposals or an invitation for bids with an offer that defined exactly what the vendor would do at what price. Dictaphone Corporation, 60 Comp. Gen. 260 (1981), 81-1 CPD 104. The RFQ sought prices under three categories of straight and curved partitions and also under separate categories for partition hung shelves, partition hung paper sorters, partition hung coat racks, partition hung lights, and installation. Further, the RFQ specified that it was a request for information and that quotations furnished under it were not offers. The RFQ advised vendors to furnish copies of their "current GSA contract" with their quotes. Thus, we find that except for minor installation costs (Pleion's quote for installation was \$15,143.52 of \$211,192.12), the vendors were responding to an RFQ that was issued to obtain quotes on whatever equipment on the FSS a vendor would propose to meet the specifications and general item descriptions of the RFQ.

Therefore, we agree with the Army that the RFQ was not issued to seek alternate sources to the FSS. Rather, the RFQ was properly issued to determine whether the vendors' proposed FSS equipment would meet the Army's technical requirements, to determine the cost of equipment installation which was not covered by the FSS contracts, and to

obtain a shorter delivery time which was permitted by the terms of the FSS contracts. Lanier Business Products, Inc., supra.

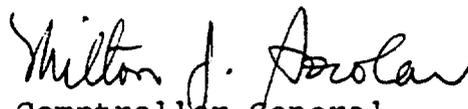
We have held that the evaluation of quotations for items listed on a multiple-award FSS should be based upon the FSS contracts. Lanier Business Products, Inc., B-203337, September 29, 1981, 81-2 CPD 265. The record shows that the Army's review of the RFQ quotes was completed on February 8, 1983. At that time, a specifically numbered purchase order for the partitions was prepared, but was not issued because of Pleion's initial protest. Consequently, we find that an order was ready to be placed by the Army on February 8, 1983.

We find no legal requirement that the Army consider Pleion's modified FSS contract after the order was ready to be placed. Under the circumstances, consideration of that modification would disrupt the fair and orderly administration of the FSS system, particularly when valid RFQ's are issued in conjunction with that system. At the time the Army had completed evaluation of the 17 RFQ vendor's quotes to determine whether they technically met the Army's requirements, Pleion's FSS contract did not cover 65-inch high partitions. Pleion's initial protest prevented the Army from completing the placement of an imminent purchase order and consequently allowed Pleion time to obtain a modification of its FSS contract. We agree with the Army that obtaining an FSS contract modification under such circumstances would unduly encourage other vendors to submit protests and then obtain modifications to their FSS contracts.

Furthermore, consideration of Pleion's modified FSS contract clearly would create an auction atmosphere. Casper Systems Corporation, supra. As noted above, Pleion has attempted to change its status pending a decision by our Office on its initial protest by modifying its FSS contract and at the same time amending its protest. Moreover, the record also shows that in modifying its FSS contract, Pleion significantly increased its prices for 65-inch partitions from what it listed in its RFQ quote, \$211,192.12, including installation, to \$280,337.02, excluding installation. In this regard, Pleion displaced one quoter at \$236,902, which, like Pleion, had conforming items not on the schedule. Also, several other schedule vendors offering nonconforming items were displaced.

As for Government error, the Army reports that GSA advised that the allegation was untrue. The Pleion FSS contract was not modified in mid-1982 because Pleion did not request or sign a modification at that time. Pleion does not rebut this. Therefore, Pleion's inaction, not Government error, was the cause of Pleion's FSS contract not including the 65-inch partitions on the date the Army was ready to place the order, February 8, 1983. Finally, Pleion's attempt to characterize the 65-inch partition requirement as de minimis is clearly refuted by its quote under the RFQ, under which more than half of the total quote is for those partitions. Consequently, Pleion's failure to quote on schedule items when the order was ready to be placed impacted significantly on the purchase.

Pleion's protest is denied.



Acting Comptroller General
of the United States