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DECISION



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

FILE: B-199079

DATE: December 23, 1983

MATTER OF: GSA--Multiple Award Schedule Multiyear Contracting

DIGEST:

1. Proposed Office of Federal Supply and Service, General Services Administration program of multiyear contracting in connection with Multiple Award Schedule does not violate 31 U.S.C. § 1341(a)(1)(B) or 41 U.S.C. § 11, because MAS agreements do not give rise to binding commitments obligating the Government to expend funds unless and until agencies issue purchase order and agencies will not make the administrative determinations necessary for placing order until after appropriations have been made for purchases. 42 Comp. Gen. 272 (1962) distinguished.
2. Proposed Office of Federal Supply and Service (FSS), General Services Administration program of multiyear contracting in connection with Multiple Award Schedule (MAS) does not violate 31 U.S.C. § 1502 since under FSS program, binding commitment obligating Government to expend funds is not made until the time of ordering MAS item and current appropriation, not appropriation of year MAS agreement entered into, is charged. 60 Comp. Gen. 219. Ruling A-60589, July 25, 1935 superseded by Federal Property and Administrative Services Act of 1949.
3. Procurements under proposed Office of Federal Supply and Service (FSS), General Services Administration program of multiyear contracting in connection with Multiple Award Schedule (MAS) would not be in derogation of purpose of Federal advertising statutes. Since MAS agreements contain a price reduction clause which allows Government to take advantage of falling prices occurring in market place

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at anytime during life of MAS agreement. Also, FSS intends to allow an annual "open season" during which new firms may be added to the schedule. 48 Comp. Gen. 497 (1969) distinguished.

This decision is in response to a request from the General Counsel of the General Services Administration (GSA) asking whether a proposal for multiyear contracting in connection with the Office of Federal Supply and Services (FSS) Multiple Award Schedule (MAS) would violate 31 U.S.C. §§ 1341 (formerly 31 U.S.C. § 665(a)) or 1502 (formerly 31 U.S.C. § 712a), or 41 U.S.C. § 11 relating to an agency's authority to commit the Government to expend appropriated funds by contract or conflict with the purposes of the advertising provisions of the Federal Property and Administrative Services Act of 1949 (1949 Act). For the reasons given below, we find the proposed method of contracting is neither in violation of the above mentioned laws nor in conflict with the purposes of the 1949 Act.

BACKGROUND

Under the MAS Program, FSS contracts with more than one supplier for comparable items at the same or different prices for delivery to the same area. 41 C.F.R. § 101-26.408-1 (1982). FSS schedules comparable items together. Currently, FSS has 89 schedules covering approximately 4000 contracts. When an agency which is required to use the schedules needs a scheduled item it places an order directly with a supplier and pays for the item with its own funds. Agencies are generally responsible for selecting the lowest price item unless they can justify the purchase of a more expensive one. 41 C.F.R. § 101-26.408.2 (1982). The duration of MAS contracts is currently 1 year.

FSS would like to begin MAS contracting on a 3-year basis in order to increase its efficiency and reduce the aggregate cost to the Government of procuring personal property. GSA anticipates that the Government could realize greater savings if FSS could make more items available to agencies through its contract sources.

FSS believes that MAS multiyear contracting would enable it to use its contract personnel more effectively and would decrease procurement expenses. The time and administrative expense saved by negotiating contracts every 3 years instead of every year could be used to establish schedule contracts for commodities which currently are not available through GSA sources. Presumably, the more items that are added to schedules the greater the savings to the Government.

Moreover, GSA anticipates that MAS multiyear contracting will save the Government money in other ways. The agency expects that the Government could get lower prices from schedule suppliers because it would be contracting with them for a longer period. Also, it is suggested that extended contracts protect against inflation.

Discussion

Based upon prior decisions of this Office, GSA has expressed concern as to whether the proposed procurement violates certain provisions of law, specifically 31 U.S.C. §§ 1341, 1502, and 41 U.S.C. § 11.^{1/} These provisions prevent agencies which do not have funds on hand for a particular purpose from committing the Government to make payments at some future time and thereby, in effect, coercing the Congress into making an appropriation to cover the commitment.

^{1/} 31 U.S.C. § 1341 provides that:

"(a)(1) An officer or employee of the United States Government or of the District of Columbia government may not--

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or

(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law."

31 U.S.C. § 1502 provides that:

"(a) The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability and obligated consistent with section 1501 of this title. However, the appropriation or fund is not available for expenditure for a period beyond the period otherwise authorized by law."

41 U.S.C. § 11 provides that:

"(a) No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the Departments of the Army, Navy, and Air Force, for clothing, subsistence, forge, fuel, quarters, transportation, or medical and hospital supplies, which however, shall not exceed the necessities of current year."

The General Counsel asks whether MAS multiyear contracting would violate 31 U.S.C. § 1341(a)(1)(B) and 41 U.S.C. § 11 since it would involve the Government in a contract for a period of time prior to the Congress enacting an appropriation to make specific payments under the contract. This is because the agency appropriations which are available to purchase MAS schedule items are generally 1 year appropriations while under the proposed procedure, FSS would enter into MAS agreements covering 3 fiscal years.

In our opinion MAS multiyear contracting would not violate 31 U.S.C. § 1341(a)(1)(B) or 41 U.S.C. § 11 at the time MAS agreements are executed because the agreements at the time they are signed do not give rise to binding commitments which will necessarily require a subsequent expenditure of funds. MAS contracts are made with more than one supplier for comparable items at varying prices. When the Government signs a MAS agreement, it merely promises that if an agency determines that it has a requirement for a scheduled item, the agency will place an order for the item from a contractor if he has offered the lowest price. This is indicated by the MAS Scope of Contracts clause which provides as follows:

"Articles or services will be ordered from time to time in such quantities as needed to fill agency requirements determined in accordance with currently applicable procedures; Provided, that if any ordering agency finds an identical product * * * is available from another source at a delivered price lower than the contract price, such agency is authorized to purchase such item at such lower price without violating this contract."

Thus, under the MAS agreements an agency does not actually bind the Government to make a payment unless and until it administratively determines that it has a requirement for a scheduled item and then issues a purchase order for it. Viewed as of the time FSS executes the agreements, no binding commitment which will necessitate the expenditure of funds is created because purchasing agencies have not ordered any scheduled items. Since the mere signing of an agreement does not result in a commitment for the payment of funds, no "obligation in advance of appropriations" prohibited by 31 U.S.C. § 1304(a)(1)(B) and in effect by 41 U.S.C. § 11 comes into being.^{2/} Consequently, FSS would not violate those two provisions at the time MAS agreements are executed.

^{2/} See our decision in the matter of Obligations and Charges Under Small Business Administration Service Contracts, 60 Comp. Gen. 219 (1981).

Furthermore, agencies would not violate these laws at the time they order a scheduled item. Under FSS's proposed procedure, an agency would charge the cost of purchasing a scheduled item against the appropriation for the fiscal year in which it orders the item. Agencies are responsible for insuring that they order an item only if Congress has made an appropriation which is available for the item's purchase during the fiscal year in which the agency orders it. Presumably, an agency will not order an item if sufficient appropriated funds for the fiscal year in which it has a need for it are unavailable. Thus under the FSS proposed MAS multiyear contracting program, agencies would obligate funds to procure schedule items only if appropriations have been enacted which are available for their purchase. Accordingly, no violation of 31 U.S.C. § 1304(a)(1)(B) or 41 U.S.C. § 11 occurs at the time of purchasing under the program.

Finally, the proposed MAS multiyear agreements are distinguishable from the multiyear contract we held was in violation of these provisions of law in 42 Comp. Gen. 272 (1962) because the GSA proposal would require the making of a conscious administrative determination before any funds are obligated (which the contract at issue in the cited case did not). In that case, the Air Force entered into a 3-year contract. The Air Force agreed to purchase from the contractor all services and supplies which were necessary for Government aircraft landing on Wake Island during the contract term although the Air Force only had a 1-year appropriation available for the payments. The Air Force contended that the multiyear agreements did not violate 31 U.S.C. § 1341(a)(1)(B) (then 31 U.S.C. § 665(a)) because there would be no obligations unless and until it made an administrative determination to order the necessary services. In its view, it was not "obligating" future fiscal year appropriations by entering into the multiyear agreements.

We found, however, that the services were "automatic incidents of the use of the airfield" and that in fact no administrative determination was necessary before the Air Force was, in effect, committed to make contract payments to the contractor in future fiscal years. Since no appropriations for future years had been enacted when the Air Force entered into the agreement, we held that 31 U.S.C. § 1304(a)(1)(B) and 41 U.S.C. § 11 prohibited the kind of agreement the Air Force had with the contractor for a period greater than 1 fiscal year. However, unlike the Air Force contract, the proposed MAS agreements require administrative determinations--that a requirement for a scheduled item exists and that a purchase order should be issued--before an obligation is incurred and therefore are not in violation of these provisions of law.

Under the GSA proposal, FSS would enter into agreements with suppliers in 1 fiscal year which would authorize the

later ordering and delivery of items which represent the needs of agencies during subsequent fiscal years. GSA's General Counsel is concerned as to whether the proposed agreements are prohibited by 31 U.S.C. § 1502, which generally precludes agencies from charging costs incurred under a contract entered into during 1 fiscal year and recorded as an obligation against funds available for that year against appropriations made to meet the needs of another fiscal year. (The so-called bona fide needs rule.)

It is also our opinion that the proposed program will not violate 31 U.S.C. § 1502 because, as noted above, agencies will charge schedule item purchase costs against the appropriation which is current at the time they issue purchase orders, not the appropriation for the fiscal year in which the agreements are made. A MAS item represents a bona fide need of the fiscal year in which an agency orders it. As we discussed above, the commitment obligating the Government to expend funds is not made until the time agencies place orders under the agreement. Since agencies will charge the appropriation which covers the fiscal year in which they place their order, they will be contracting against the appropriation which is current at the time they have a genuine need for the item. Clearly, this is in accord with the bona fide needs rule.

In 60 Comp. Gen. 219 (1981) we held that a similar agreement entered into by the Small Business Administration (SBA) did not give rise to a binding commitment until the Administration placed orders under it. The SBA entered into agreements with private organizations in which they were to provide technical and management assistance to qualifying businesses. The contractors agreed to perform tasks as ordered by SBA at any time during the life of the agreement. The agreements ran for one calendar year but covered a period beginning in 1 fiscal year and ending in the next. The SBA's practice had been to charge the full estimated cost of the services against the appropriation current at the time it entered into an agreement.

A certifying officer requested our opinion on whether he could certify vouchers for services performed during the second fiscal year for payment from the later year's appropriation even though the agreement was entered into in the previous fiscal year. We found that no binding commitment to expend funds came into being until the SBA placed an order because the agreement did not require the agency to order anything at all from the contractor. We therefore concluded that the SBA should make payments for services from the appropriation covering the fiscal year in which it ordered them, and not the year the agreement was made. Since the GSA proposal does not result in a commitment to order anything, we view its proposal as analogous to the SBA agreements discussed in 60 Comp. Gen. 219.

GSA's General Counsel has also inquired as to whether the proposed MAS multiyear program would violate the purposes of the advertising requirement in the Federal Property and Administrative Services Act of 1949 as amended (Property Act) and the implementing regulations which are designed to assure maximum feasible competition in Government procurements. Multiyear contracting has been seen as thwarting these purposes in some instances because the Government cannot take advantage of price fluctuations occurring in the market place if it is locked into a contract for an extended term. Also, extended contracts inhibit new contractors from doing business with the Government. 48 Comp. Gen. 497 (1969).

In that case, we said that contracts for indefinite quantities of stock supplies should not be made for periods in excess of 2 years even though funds are available, "in the absence of legislative authority therefor or prior determination by this Office such procurement will not be in derogation of the purposes of the advertising statutes." Id. at 500.

In our opinion, 3-year MAS procurements would be consistent with the requirements for competition. The extended term of MAS agreements would not prevent the Government from purchasing supplies at the lowest prices available because all of the MAS agreements contain a price reduction clause. The MAS contract price is equal to the price the supplier gives to his best commercial customer. The price reduction clause provides that if the contractor reduces his price to that customer at any time during the contract term, the Government will receive a like reduction. Through the operation of the price reduction clause, agencies can take advantage of lower prices resulting from market conditions which occur at any time during the life of a MAS agreement. Furthermore, under the Scope of Contracts clause, quoted above, agencies are allowed to procure identical items from suppliers who are not on the schedule if they offer a price lower than the schedule price. The agreement's extended term, therefore, would not be an impediment to the Government's securing its needs at the lowest possible cost.

Multiyear contracting under the proposed programs will not prevent new persons from doing business with the Government because the FSS will hold an "open season" during the contract period. The open seasons will consist of 30-day periods at the end of each year of the contract term in which new offerors may submit proposals and current contractors may add items. All new suppliers with acceptable offers can

receive an award. Contract terms and conditions will remain the same except that open season offerors will only have contracts for 1 or 2-year periods. Consequently, with one exception discussed in the next paragraph, businesses will not be precluded from contracting with the Government for longer than 1 year.

Under its proposal FSS will not award a contract to a new firm during the open season if it offers to supply an item which is identical to one already on the MAS. Thus, a new company which offers to supply an identical item could be precluded from competing with the existing supplier for a period of up to 2 years. However, as discussed above, the Government's interest is protected by the price reduction clause, mentioned above, and by the preservation of the ordering agency's authority to buy off schedule if lower prices for an identical item are available.

Finally, we note that in A-60589, July 12, 1935, we held that an indefinite quantity supply contract, similar to the proposed MAS agreements, could not run for more than 1 year without being in violation of 41 U.S.C. § 13.3/ The proposed agreement does not suffer from the same infirmities, however, since most Federal agencies, including GSA, have been exempted from the application of this provision of law. See sections 3(a) and 310 of the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. § 472(a) and 41 U.S.C. § 260 respectively. Of course, this exemption does not authorize agencies to obligate funds in advance of appropriations, as was pointed out in 48 Comp. Gen. 497, *supra*. However, as previously stated, the GSA proposal does not purport to obligate any funds at all at the time the contract is signed. Only when an actual order is placed with a schedule contractor would an obligation be recorded, and only the fiscal year current at that time would be charged.

Accordingly, in our opinion the GSA proposed procurement plan does not violate 31 U.S.C. §§ 1341 and 1502, and 41 U.S.C. § 11, nor does it conflict with the requirements to secure maximum feasible competition in Government procurements.

for Harry D. Van Cleave
Comptroller General
of the United States

3/ 41 U.S.C. § 13 provides that:

"Except as otherwise provided, it shall not be lawful for any of the executive departments to make contracts for stationery or other supplies for a longer term than one year from the time the contract is made."