

**DECISION**

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

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**FILE:** B-214008**DATE:** July 26, 1984**MATTER OF:** Progressive Marketing Associates, Inc.**DIGEST:**

1. Purchases from Federal Supply Schedule must be made from source offering lowest delivered price for item which represents agency's actual minimum needs, although purchase of higher priced item is authorized if fully justified. Where specifications accompanying RFQ stated requirement in excess of minimum need, agency decision to purchase higher priced item, which was erroneously represented as meeting the RFQ specifications, is not justified when the lower priced item meets the agency's essential requirements and there is no showing that the lower priced item is not equivalent to the higher priced item. Therefore, protest is sustained.
2. Protester is not entitled to anticipated profits and protest expenses even if it should have received award of Federal Supply Schedule delivery order.
3. Protesting Federal Supply Schedule (FSS) contractor's claim for quotation preparation costs is allowed where agency action in awarding a delivery order to a more expensive FSS contractor, even though the goods offered by both contractors were equivalent, was arbitrary and capricious and the protester had a substantial chance for award.

Progressive Marketing Associates, Inc. (PMA), a sales agent for MII/Lundia (Lundia), protests the Navy's placement of a delivery order with Associated Professional Services, Inc. (APS), a sales agent for Spacesaver Corporation (Spacesaver). The order, against a General Services Administration (GSA), Federal Supply Service (FSS) contract, is for two movable shelf filing cabinet systems (storage systems) and installation. The order resulted from request for

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quotations (RFQ) No. N001638302439 issued by the Naval Avionics Center, Indianapolis, Indiana (Navy). The RFQ sought quotes on FSS items which could meet Navy specified size limitations.

PMA contends that the Navy was under a duty to order the lowest priced FSS equipment which met its minimum needs and, once it was questionable whether its stated minimum requirement was available on the FSS, the Navy had a duty to determine prior to placing an order with an FSS contractor whether the allegation was correct. If the allegation was correct, the Navy should have revised its statement of its minimum need or procured the equipment from the lowest priced, nonconforming FSS quotation. Since FSS items are standard commercial commodities which have already been contracted for by GSA and have definite quantifiable characteristics, PMA contends that the validity of a nonavailability allegation can be readily determined from information already in the government's possession. PMA also claims compensation for its loss of profit, loss of commission and protest expenses in the event that the award to APS is allowed to stand.

We sustain the protest and deny the claim in part and allow the claim in part.

#### BACKGROUND

The Navy initially planned to meet its storage system requirement through an open-market procurement. To this end, specifications were drawn up and a solicitation issued. However, after learning that storage systems were available as FSS items, the Navy canceled the solicitation. PMA contacted the Navy following cancellation and advised that insistence on the actual dimensions (as were set out in the canceled solicitation's specifications) instead of "nominal" dimensions could cause problems in the context of an FSS order. The Navy disregarded the advice and issued an RFQ seeking quotes against existing FSS contracts in accordance with the same specifications used in the canceled solicitation. PMA, upon receipt of the RFQ, orally advised the Navy that, as written, the specifications accompanying the RFQ could not be met by any manufacturer. This advice was repeated in PMA's quotation. APS, although also quoting standard FSS storage systems, made no mention of any variance from the RFQ specifications. Moreover, APS expressly promised to install and "erect the system to drawings and specifications."

The contracting officer confronted with two FSS quotes (a low quote admitting a variance and a high quote promising performance in accordance with drawings and specifications) consulted with technical personnel who advised that PMA's low quote "meets the essential requirements of the purchase description." Notwithstanding this advice, on September 30, 1983, a delivery order was placed with APS, the higher priced apparently conforming quoter. The delivery order called for storage systems "per" the Navy specifications.

On October 13, 1983, PMA protested to the contracting officer contending that APS could not meet the Navy specification.

The Navy reports that when it questioned APS about conformance to the specifications, APS insisted "that the offered Spacesaver equipment fully met the specification requirements." Navy technical personnel were split on the merits of PMA's protest. One group which strictly interpreted the specifications agreed that performance was impossible while the others construed the drawings as merely illustrative and thought performance possible. In the end, the Navy found merit in PMA's technical argument and agreed to cancel the APS order if cancellation could be made on a no-cost basis. APS, however, claimed \$19,179.18 in cancellation costs. The Navy decided not to cancel the order. Upon delivery, PMA's assertions proved correct--the APS storage systems did not meet the size requirements of the Navy specification. We note that APS now agrees with PMA that "no manufacturer could meet all of the literal terms and conditions of the . . . [Navy] specifications." We also note that the Navy reports that APS's "equipment has been delivered and installed, and although it does not completely conform to specification, is considered adequate by the user."

#### TIMELINESS

The Navy questions the timeliness of PMA's protest. The Navy views the protest as one against a defect apparent on the face of the RFQ, namely, the impossibility of quoting an FSS-listed storage system having the dimensions required by the Navy specifications. We disagree. The PMA quote is premised on the assumption that some leeway existed with regard to the exact size of the storage systems, if only

because storage systems of the size required were otherwise unavailable under FSS contract. Specifically, the cover letter accompanying PMA's quote states that PMA:

". . . determined that it would be most appropriate to quote standard Lundia equipment as covered by our GSA contract. The variance from your specifications is minimal and will not affect the operation or usefulness of the equipment in any way. . . ."

Moreover, as mentioned above, some Navy technical personnel were of the view that the drawings accompanying the specifications could be construed as merely illustrative in which case both PMA's and APS's quotes of standard FSS storage systems were acceptable. PMA's objection is to the placement of an order for an equally nonconforming but higher priced FSS storage system. Since PMA had warned the Navy that performance exactly conforming to the specifications was, in PMA's view, impossible, we think that PMA was entitled to believe that the Navy would only issue a delivery order if PMA was wrong. Therefore, we cannot find PMA's October 12, 1983, protest to the contracting officer untimely because it was made within 8 working days of the order's placement. PMA's subsequent protest to GAO was timely filed following initial adverse agency action. Consequently, we will consider the protest.

#### MINIMUM NEEDS

The Navy argues that to the extent that PMA's objection to the Navy's placement of the FSS delivery order with APS is founded upon APS's inability to conform to the Navy specification, it is not for GAO consideration because it concerns either an affirmative determination of responsibility or a matter of contract administration. We disagree.

In Dictaphone Corporation, 60 Comp. Gen. 260 (1981), 81-1 C.P.D. ¶ 104, a decision concerning an RFQ for dictation systems, we pointed out:

". . . 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. Rather, they were

responding to an RFQ which was issued not to solicit price proposals which the Government could accept or reject, but to obtain quotes on whatever equipment on the Federal Supply Schedule a vendor would propose to meet the specifications and general line item descriptions of the RFQ, along with any trade-in offers. See Lanier Business Products, Inc., B-196189; B-196190, February 12, 1980, 80-1 CPD 125. . . ." Dictaphone Corporation, 60 Comp. Gen. at 262, 81-1 C.P.D. ¶ 104 at 3.

Moreover, the fact that a delivery order was issued during the protest does not convert a preaward protest against a bidder's ability to supply the government's needs into one of involving contract administration.

We have held that agency FSS purchases must be made from the source offering the lowest delivered price. Where the record shows that any agency's statement of its requirement exceeds its actual minimum requirement, the fact that a higher priced source meets the stated (albeit inflated) requirement is no justification for making an award to the higher priced source when the lower priced source meets the actual minimum requirements and the lower priced goods are equivalent to those of the higher priced source. National Office Systems, Inc., B-201133, Mar. 18, 1981, 81-1 C.P.D. ¶ 210; affirmed, Central Intelligence Agency, National Office Systems, Inc.--Request for Reconsideration, B-201133.2, B-201133.3, June 22, 1981, 81-2 C.P.D. ¶ 337. Here, PMA's lower priced, nonconforming equipment was found by the Navy to meet the Navy's "essential requirements." Moreover, the higher priced APS equipment, which also failed to meet the Navy's stated requirement, is, the Navy reports, "considered adequate by the user." There is no showing that PMA's equipment is not equivalent to APS equipment. This indicates to us that the Navy's statement of its requirement exceeded its actual needs and the placement of a delivery order with the higher priced source (APS) was not justified.

Since the APS storage systems have already been delivered and installed, we cannot recommend corrective action.

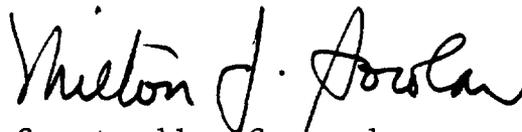
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COMPENSATION CLAIM

Regarding PMA's claim for anticipated profits (in the form of lost profits and lost commissions) and protest expenses, it is well established that neither expense can be awarded, even if PMA should have received the award of the delivery order. See Machinery Associates, Inc., B-184476, Nov. 18, 1975, 75-2 C.P.D. ¶ 323; Richard Hoffman Corporation, B-212775.3, Apr. 9, 1984, 84-1 C.P.D. ¶ 393.

However, we find merit in PMA's claim for quotation preparation costs. We have long held bid and proposal preparation costs to be recoverable where the government acts arbitrarily and capriciously with respect to a bid or proposal and the bidder or offeror had a substantial chance of receiving the award except for the government's improper action. Power Systems--Claim for Costs, B-210032.2, Mar. 26, 1984, 84-1 C.P.D. ¶ 344. In Aero-Marine Surveys, Inc., B-194843, Oct. 17, 1979, 79-2 C.P.D. ¶ 263, we raised the possibility of drawing an analogy to the practice of reimbursing bid and proposal preparation costs in an appropriate claim for quotation preparation costs. Here, the Navy arbitrarily exceeded its minimum needs in an FSS purchase and in the process paid more than was necessary for the ordered goods. This was done with knowledge that PMA's lower priced goods would meet minimum Navy requirements. It is clear that but for the Navy's action PMA had a substantial chance for award. We therefore conclude that PMA is entitled to the receipt of quotation preparation costs since the Navy's improper action precluded it from consideration for the award. Therefore, PMA's claim is in part allowed.

Accordingly, the protest is sustained and the claim is in part denied and in part allowed.

*for*   
Comptroller General  
of the United States