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DECISION

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

FILE: B-220058.2; B-220058.3 **DATE:** February 11, 1986

MATTER OF: Kavouras, Inc.

DIGEST:

1. Where contractor's General Services Administration Federal Supply Schedule contract sets forth a maximum order limitation (MOL) on the "total dollar value of any order" placed with the contractor and where the agency places an order with the contractor in excess of the contractor's MOL, that order is improperly placed.

2. Recovery of the cost of filing and pursuing its protest, including attorney's fees, is permissible where the agency unreasonably has excluded the protester from the procurement, except when our Office recommends that the contract be awarded to the protester and the protester ultimately receives the award.

Kavouras, Inc., protests the issuance of delivery order No. DTFA07-85-D-01740 by the Federal Aviation Administration (FAA) to Alden Electronics (Alden) for the procurement of remote weather radar display equipment from the General Services Administration's (GSA) Federal Supply Schedule (FSS). Kavouras complains that the FAA's order to Alden exceeded the maximum order limitation (MOL) in Alden's FSS contract and, thus, was improper. We sustain the protest. We also dismiss Kavouras' request for reconsideration of our prior decision on this procurement as moot.

We decided Kavouras' initial protest of this procurement, filed on September 10, 1985, in Kavouras, Inc., B-220058, Dec. 23, 1985, 85-2 C.P.D. ¶ ___. There, Kavouras protested that the FAA engaged in auction techniques by accepting Alden's lower-than-FSS price after meeting with Kavouras, and that the FAA improperly evaluated the prices and contracts of Kavouras and Alden. We denied Kavouras' protest, finding, among other things, that Kavouras had failed to furnish probative evidence of a price auction and

that the record showed no improper evaluation of either Kavouras' or Alden's contract or prices.

Based on information in the FAA's report, Kavouras, in its October 28 comments on the report, protested that the FAA's order to Alden was in excess of Alden's MOL. We segregated this issue as an independent protest (B-220058.2) and accepted submissions from the parties. Kavouras, in the meantime, has requested reconsideration of our denial (B-220058.3), which we also address below.

Kavouras' present argument is that since Alden's FSS contract provides that no order for rentals or purchases shall exceed $125,000, the FAA order to Alden, which was for more than $131,000, was improper. The FAA reports that the contracting officer thought that the MOL was based on the purchase price for each line item and, since no line item cost exceeded $125,000 and "the contracting officer in good faith believed that the MOL clause had not been breached," the order should be upheld. We agree with Kavouras.

We have noted in the past that the purpose of placing an MOL clause in requirements contracts is to enable the government to explore the possibilities of securing lower prices for larger quantities exceeding the limitation. 49 Comp. Gen. 437 (1970). An order may not be placed by the ordering activity, nor may an order be accepted by the contractor, where a maximum limitation has been placed on the dollar amount of each order and the dollar amount of the items to be purchased, known at the time the order is ready to be placed, exceeds the MOL as stated in the contract. Id. at 439; Federal Property Management Regulation (FPMR), 41 C.F.R. § 101-26.401-4(c)(1) (1985).

Here, Alden's MOL clause provides that:

> "The total dollar value of any order for rental or purchase placed under this contract shall not exceed $125,000 (based on the goverment purchase price of each line item)."

We disagree with the contracting officer's reading of the clause, as the clause clearly links the $125,000 limit with "the total dollar value" of the order. By stating parenthetically that this limit shall be based on the price of each line item, the clause merely presents how the total

dollar value of the order is to be derived, i.e., by adding the prices for each line item. As stated above, the FAA placed an order with Alden for more than $131,000. Under our prior decisions and the FPMR, this order was improper. Moreover, the FAA's assertion that the contracting officer believed, in good faith, that there was no breach of the MOL clause does not alter the fact that an order from the FSS was placed improperly.

We note that the FAA argues that Alden somehow waived the MOL by accepting this order from the FAA. The regulations, however, clearly state that "agencies may not submit orders and contractors may not accept orders" in excess of a contractor's MOL. FPMR, 41 C.F.R. § 101-26.401-4(c)(1). The regulations thus do not contemplate that a contractor, in effect, may ratify an improper order, so that Alden's failure to object to the FAA's order in excess of Alden's MOL is immaterial.

Recommendation

As we pointed out in our initial decision, and irrespective of Kavouras' protest, because this procurement involves equipment under the FSS contract group 58, part VI, nonmandatory telecommunications schedule, the FAA, by placing an order directly against the FSS, failed to comply with the requirements of section 201-40.008 of the Federal Information Resources Management Regulation, 41 C.F.R. § 201-40.008 (1985). That regulation requires that the agency consider the availability of other sources by publishing a synopsis in the Commerce Business Daily at least 15 days before placing an order in excess of $50,000 against a nonmandatory telecommunications schedule contract. Based on the responses of nonschedule vendors, the agency would consider whether placing the order would be the least costly alternative.

We initially found that Kavouras was not prejudiced by the FAA's failure to comply with section 201-40.008 because Kavouras had an opportunity to submit a price quote and have that quote evaluated and because Kavouras is not an intended beneficiary under the regulation, as the regulation's intent clearly is to open competition to nonschedule vendors where cost effective to the government.

In light of our decision of today, we believe Kavouras is entitled to be reimbursed the cost of filing and pursuing its protest, including attorney's fees, as requested, since

award to Alden was improper irrespective of the evaluation of Alden versus Kavouras. To recommend that a competition be conducted now, however, would be impracticable, as the FAA placed its order with Alden on September 4, 1985, based on what the FAA determined was an urgent and compelling need to have the equipment in place by September 30.

Our Bid Protest Regulations, implementing the Competition in Contracting Act of 1984, 41 U.S.C.A. § 253, et seq. (West Supp. 1985), provide for the recovery of the costs of pursuing a protest, including attorney's fees, where the agency unreasonably has excluded the protester from the procurement, except when our Office recommends that the contract be awarded to the protester and the firm ultimately receives the award. 4 C.F.R. § 21.6(d),(e) (1985). We have not recommended award to Kavouras, and the FAA's improper placing of an order with Alden clearly had the effect of precluding Kavouras from an open competition to meet the agency's needs. In these circumstances, Kavouras is entitled to recover the costs of protesting. See Computer Data Systems, Inc., B-218266, May 31, 1985, 85-1 C.P.D. ¶ 624.

The protest is sustained.

Since we sustain Kavouras' protest, and since we are affording the firm the only relief practicable, we dismiss Kavouras' request for reconsideration of our earlier decision concerning this procurement as moot.

for Shelton J. Jacobs
Comptroller General
of the United States