

(Mr. Jordan)



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Federal Sales Service, Inc.

File: B-237978

Date: February 28, 1990

Edward P. Hurley, Jr., for the protester.
Pamela J. Reiner, Esq., Office of the General Counsel,
General Services Administration, for the agency.
Paul E. Jordan, Esq., Paul Lieberman, Esq., and
John F. Mitchell, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

1. Allegation of unreasonable delay in awarding contract pertains to a procedural matter which does not provide a basis of protest.
2. Protest that contracting officer misused price reasonableness as a negotiation basis is untimely where raised more than 10 working days after protester became aware of protest basis.
3. Where protester effectively withdraws a particular line item from consideration during negotiations and agrees to a reduced maximum order limitation (MOL) on other line items, allegation that agency "refused" to accept its offer for first line item and "forced" it to accept the MOL for the latter items, fails to state a valid basis for protest.

DECISION

Federal Sales Service, Inc. (FSS), protests various aspects of the negotiation of its contract under solicitation No. GSC-KESV-00052-N-11-29-88, issued by the General Services Administration (GSA). The solicitation, part of a non-mandatory, multiple-award schedule program, was for the purchase of telecommunications and automatic data processing supplies. FSS contends that the award was unreasonably delayed and that the negotiations were otherwise improper.

We dismiss the protest.

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On November 28, 1988, FSS submitted an offer of some 240 products under four special item numbers in the solicitation. In its offer, FSS certified that its products were commercial items, sold in substantial quantities to the general public at catalog prices and, thus, that it was not required to provide cost and pricing data. During subsequent negotiations, the contracting officer requested a pre-award audit to ensure that FSS had provided sufficient data to support its certification. The audit was conducted in March and April 1989, and the auditors concluded that FSS' data did not support an exemption from supplying cost and pricing data.

After discussing the audit report with GSA, FSS submitted cost and pricing data in May and June 1989. A second follow-up audit was conducted to ensure that FSS had provided current, accurate, and complete cost and pricing data. The second audit report, issued in September 1989, concluded that the data as submitted was not acceptable for negotiation purposes, but was adequate for evaluation of prices through examination of actual operating and accounting practices. Under this method, the report questioned approximately \$60,000 in costs. After reviewing and commenting on the second audit report, FSS advised GSA in October 1989 that it was willing to accept the audit's findings for purposes of negotiating a contract.

At a November 1, 1989, meeting between GSA and FSS, GSA questioned the reasonableness of prices provided by FSS, finding certain of the prices extremely high based upon a comparison with other dealers selling the same manufacturers' products. GSA also requested that FSS reevaluate its current pricing and submit a historical breakdown of sales, by quantity, under a previous schedule contract for April 1988 through March 1989. During this same meeting, FSS decided that it wished to negotiate only on 14 of the products offered due to time constraints. According to FSS, it intended to wait until it received the basic award and then negotiate a modification to add selected products, including a round tape item manufactured by the BASF Corporation.

On November 2, FSS submitted the requested quantity breakdown and a best and final offer (BAFO). It did not contain a maximum order limitation (MOL), a contractually set dollar value or quantity which orders under the schedule cannot exceed. As negotiations proceeded and prices were agreed upon, on November 15, GSA forwarded a suggested BAFO format to FSS which included an MOL of \$5,000 for diskettes. In response, FSS cited a higher MOL on an award to another schedule contractor and requested that its diskette MOL be

increased to \$25,000. GSA agreed to an increase of only \$500, and the MOL was subsequently expressed in terms of 550 boxes, which cost \$5,500. FSS' subsequent BAFOs of November 16 and 20, both offered an MOL for diskettes of 550 boxes. On November 27, 1989, FSS was awarded a contract for the 14 products it negotiated with GSA. FSS then protested to our Office on December 6.

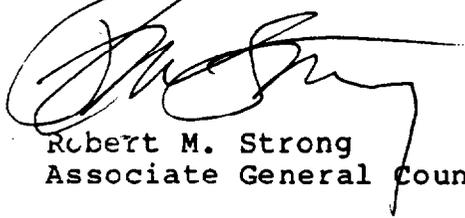
FSS first protests the delay in its award due to the conduct of the audits. While an agency is required to award a contract with reasonable promptness, the 12-month period here from closing date to award resulted from the need to conduct two audits to determine the necessity for and accuracy of FSS' cost and pricing data and the need to negotiate reasonable prices. In any event, we will not consider this allegation since a delay in meeting procurement milestones is a procedural deficiency which does not provide a basis of protest because it has no effect on the validity of the procurement. Trim-Flite, Inc., 67 Comp. Gen. 550 (1988), 88-2 CPD ¶ 124.

FSS next contends that the contracting officer misused price reasonableness as a negotiation basis. The protester was aware on November 1 that GSA was judging the reasonableness of FSS' prices against prices for the same manufacturers' products offered by other dealers. However, FSS waited until December 6, more than 20 working days later, to file its protest. Since a protest must be filed not later than 10 working days after the basis of protest is known, FSS' protest in this regard is untimely and not for consideration by our Office. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1989).

FSS also asserts that the agency "refused" to accept its offer for BASF round tape and "forced" it to accept the MOL of 550 boxes. The record shows otherwise. With regard to the BASF tape, FSS decided to discontinue negotiations on this item in order to expedite award of other items. Thus, FSS effectively withdrew its offer for the BASF tape. With regard to the MOL, we note that FSS agreed to the 550 box level in the course of negotiations and offered it in successive BAFOs. There is no evidence in the record that FSS acted against its will or that its assent to the terms of its contract was coerced. See Gene Peters, 56 Comp. Gen. 459 (1977), 77-1 CPD ¶ 225. Rather, it appears that FSS exercised its own business judgment to negotiate only on certain items and otherwise to accept the terms of the government. Thus, these allegations fail to state valid bases for protest. 4 C.F.R. § 21.3(m); see Hoover Indus., B-182736, Dec. 16, 1974, 74-2 CPD ¶ 352.

FSS also requested that the MOL's in its contract be increased to a level commensurate with awards to other offerors. Whether the level of the MOL's should be increased is a matter of contract administration and not for review by our Office in a bid protest proceeding. 4 C.F.R. § 21.3(m)(1); see William B. Hackett & Assocs., Inc., B-232799, Jan. 18, 1989, 89-1 CPD ¶ 46.

The protest is dismissed.



Robert M. Strong
Associate General Counsel