



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Berntsen, Inc.

File: B-242704

Date: May 13, 1991

Thomas P. Solheim, Esq., and Don M. Millis, Esq., Ross & Stevens, S.C., for the protester.
Alton E. Woods, Esq., Department of the Interior, for the agency.
Stuart Young, Esq., and Leigh Ann Holt, Esq., for the General Services Administration.
Behn Miller and Christine S. Melody, Esq., Office of General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Because of the price reduction clause incorporated into every Federal Supply Schedule (FSS), an FSS supplier may issue a price reduction at any time and by any method; accordingly, an FSS contractor properly may issue a price reduction after learning of the agency's requirement for an FSS item, since all FSS contractors have the same opportunity to reduce their prices during the term of the FSS contract.

2. Under Federal Supply Schedule (FSS) for surveying equipment, calculation of delivery costs for federal users located outside an FSS geographic coverage area may be calculated on a case-by-case basis and FSS suppliers are not obligated to accept orders from non-mandatory users; accordingly, an FSS supplier is not required to formally modify underlying FSS contract delivery cost provision in order to offer a non-mandatory user reduced price, which incorporates cost of delivery outside an FSS geographic coverage area.

DECISION

Berntsen, Inc. protests the issuance of delivery order No. L974-P1-3080 by the Bureau of Land Management (BLM), Department of the Interior, to Hofland Survey Monuments for 3,361 stainless steel survey monuments for use in Alaska. The order was placed pursuant to the General Services Administration (GSA) Federal Supply Schedule (FSS) Group 66, Part I, Section B, Instruments and Laboratory Equipment, Surveying

Equipment. Berntsen contends that the contracting officer improperly negotiated a price reduction from the awardee. Berntsen also argues that by modifying the delivery cost provision of its FSS contract, Berntsen became the sole mandatory source of supply for the Alaska BLM.

We deny the protest.

BACKGROUND

On December 11, 1990, the contracting officer received a requisition from the Alaska BLM Cadastral Survey Office for 3,035 non-flared 30-inch notched stainless steel survey monuments.^{1/} On December 12, the contracting officer consulted the applicable FSS--Instruments and Laboratory Equipment, Surveying Equipment--which listed three suppliers of survey monuments: Chicago Steel Tape Company; Berntsen; and Hofland. Because the proposed order exceeded the \$50,000 maximum order limitation (MOL) in Chicago Steel Tape Company's FSS contract, the contracting officer eliminated this supplier from consideration. See Dictaphone Corp., 69 Comp. Gen. 438 (1990), 90-1 CPD ¶ 448 (an order under an FSS contract may not exceed the established MOL covering the subject matter of that order).

Although the contracting officer had information indicating that Berntsen could provide the monuments delivered to Alaska at an FSS unit price of \$32.92, the contracting officer did not have any of Hofland's FSS price lists. Accordingly, on December 17, the contracting officer telephoned Hofland to find out the company's FSS price; because Mr. Hofland was unavailable, the contracting officer left a message with his wife, specifically requesting the FSS price on Hofland's 30-inch non-flared survey monument. On December 18, Hofland returned the contracting officer's call and represented that the company could provide the survey monuments delivered to Alaska at a unit price of \$29.75. The contracting officer then asked Hofland whether this price was its listed FSS schedule price; Hofland responded that although this price was not currently offered under the FSS, Hofland would contact GSA and offer the \$29.75 price as a temporary price reduction under the schedule.^{2/} That same day, Hofland sent a letter to the BLM contracting officer confirming its \$29.75 price.

^{1/} The procuring activity later increased the requested quantity to 3,361 survey monuments.

^{2/} GSA administers and oversees the FSS program. See Federal Property Management Regulations (FPMR), 41 C.F.R. § 101-26.402-1 (1988).

By letter dated December 20, Hofland advised the GSA FSS contracting officer that it was reducing its unit price for the 30-inch stainless steel non-flared survey monument from \$36.76 to \$29.75; in the letter, Hofland also indicated that the temporary price reduction would be in effect for all federal agencies until January 20, 1991.

On or about December 21, Berntsen--which had been informed in October of the survey monument requirement by an Alaska BLM surveyor--telephoned the BLM contracting officer to determine the status of the procurement. When Berntsen asked whether it would receive award, the contracting officer responded that because she was awaiting a price submission from Hofland, an award decision had not yet been made.

On December 27, the contracting officer contacted the GSA contracting specialist to determine whether Hofland had modified its FSS price list to include the \$29.75 price reduction. GSA confirmed that the price reduction had been made and that formal notification of the reduction was forthcoming; additionally, in response to the BLM contracting officer's request for advice, GSA recommended that award be made to Hofland since by means of its \$29.75 price reduction, Hofland was the lowest priced FSS supplier of the survey monument.

On December 28, after receiving a facsimile copy of Hofland's price reduction from GSA, the contracting officer awarded the purchase order to Hofland. That same day, Berntsen was notified of the award; that afternoon, by facsimile, Berntsen protested the award to the contracting officer. By letter dated January 11, 1991, the contracting officer denied the protest. On January 16, Berntsen filed the instant protest with our Office.

HOFLAND'S PRICE REDUCTION

Berntsen asserts that the contracting officer improperly solicited a price reduction from Hofland; specifically, because Hofland issued its price reduction after a telephone conversation with the contracting officer, Berntsen maintains that the contracting officer must have advised Hofland to lower its offered FSS schedule price. Based on our review of the record, we find no basis for this allegation.

GSA annually enters into a multitude of FSS contracts. The prices offered by the contractors are filed with GSA and price lists, in conformity with their offers, are distributed by the contractors to the various government agencies for use in purchasing the items. See Microcom Corp., B-186057, Nov. 8, 1976, 76-2 CPD ¶ 385. Contractors are allowed to reduce prices during the schedule contract period provided an

equivalent price reduction is applied for the duration of the contract; accordingly, a price reduction clause is included in all schedule contracts. See FPMR § 101-26.408-5; Microcom Corp., B-186057, supra. In this case, both the Hofland and Berntsen FSS contracts contained the following price reduction clause:

"Except for temporary 'Government-only' price reductions described below, if after the effective date of this contract, the Contractor reduces the price of any contract item to any Federal agency and the sale falls within the contract maximum order limitation, an equivalent price reduction shall apply to all subsequent sales of the contract item to Federal agencies for the duration of the contract period or until the price is further reduced. The Contractor may offer to the Contracting Officer a temporary 'Government-only' price reduction which has a duration of 30 calendar days or more, except during the last month of the contract period when any such offer must be for the remainder of the contract period."

The purpose of this clause is to assure that the government receives the benefit of any general price reduction that may occur during the contract period; if an FSS contractor sells the FSS items either commercially or to a federal agency at a reduced price, the equivalent price reduction is to apply to the contract for the remainder of its duration. KYBE Corp., 68 Comp. Gen. 188 (1989), 89-1 CPD ¶ 48. As a result of a price reduction, a contractor may be able to better its competitive position during the contract period; however, all contractors have the same opportunity to issue a price reduction. Microcom Corp., B-186057, supra.

Although Berntsen alleges that the contracting officer encouraged Hofland to issue a price reduction, the record contains no evidence to support this allegation. According to the contracting officer, Hofland was contacted by telephone because the contracting officer did not have any of Hofland's FSS information; in this regard, when contemplating placing an order under the FSS schedule, there is no prohibition on this type of discussion between the ordering agency and the FSS contractor. See Information Mktg. Int'l, B-216945, June 28, 1985, 85-1 CPD ¶ 750. Rather, when an agency orders its supplies from the FSS schedule, it is entitled to deal directly with schedule contractors. See FPMR § 101-26.402-2(b); Amperif Corp., B-240884, Dec. 21, 1990, 90-2 CPD ¶ 516; Motorola, Inc., B-191339, Oct. 19, 1978, 78-2 CPD ¶ 287.

Since, under the price reduction clause, a contractor may offer a price reduction at any time and by any method, without prior or subsequent approval by GSA, the fact that Hofland may have issued its price reduction after learning from the contracting officer that the Alaska BLM office required survey monuments is not objectionable. See National Bus. Sys., Inc., B-224299, Dec. 17, 1986, 86-2 CPD ¶ 677.

Berntsen also contends that the contracting officer improperly "marketed" this procurement contrary to Federal Acquisition Regulation (FAR) § 8.404(c)(2), which provides that in the case of mandatory schedules, ordering offices shall not "request formal or informal quotations from [FSS] contractors for the purpose of price comparisons."

As support for this assertion, Berntsen points to the contracting officer's December 28 letter notifying Berntsen of award to Hofland:

"This is to inform you that your quote of \$32.92 for 30 [inch] Stainless Steel Notched Base Monuments (Not Flared) was unsuccessful. Award was made to Hofland Survey Monuments in the amount of \$99,989.00 for 3,361 monuments. Thank you for responding to our request. We will continue to submit to you for future quotes."

Because the contracting officer used the word "quote," and informed Berntsen that award was delayed pending a price submission by Hofland, Berntsen maintains that the contracting officer conducted the instant FSS procurement as a competitive "bidding" process, without apprising Berntsen of this fact. In this regard, Berntsen maintains that had it known it was competing against other bidders for the purchase order, it would have offered a lower price.

According to the contracting officer, the use of the word "quote" in its letter to Berntsen notifying the firm of the award to Hofland was merely intended to mean "price." In this context, we fail to see how the mere use of that term demonstrates that the contracting officer had improperly solicited prices for purposes of price comparison.

When procuring supplies off the FSS, an agency generally should place its order with the schedule contractor offering the lowest delivered price available under the FSS. FPMR § 101-26.408-2; FAR § 8.405-1. In this regard, where prior to the issuance of a purchase order, an agency has actual knowledge of a price reduction offered to GSA, the agency must consider that reduction in evaluating prices for purposes of placing an order. A.B. Dick Co., B-211981, Feb. 1, 1984, 84-1 CPD ¶ 135; Motorola, Inc., B-191339, supra. Here, since

Hofland informed the contracting officer that it intended to offer an FSS price reduction, the contracting officer was required to consider this new price.

Although Berntsen argues that the contracting officer's delay in issuing a purchase order afforded Hofland the extra time it required to process its price reduction through GSA and thus constitutes evidence that the contracting officer improperly favored Hofland for award, this speculation is unfounded. As noted earlier, an FSS vendor does not need prior or subsequent GSA approval to issue a price reduction; accordingly, once informed of Hofland's price reduction, the contracting officer could have immediately chosen to issue the purchase order to Hofland, without awaiting any independent confirmation from GSA. Dictaphone Corp., B-195043, Sept. 25, 1979, 79-2 CPD ¶ 222. We fail to see how the contracting officer's decision to await formal confirmation from GSA indicates favoritism towards Hofland. Management Training Sys., B-238555.2, July 17, 1990, 90-2 CPD ¶ 43.

Finally, despite Berntsen's claim that Hofland was unduly advantaged by the contracting officer's December 17 telephone inquiry, in fact Berntsen's \$32.92 FSS price was based on similar circumstances. The record shows that in early October, an Alaska BLM surveyor informed Berntsen that the Alaska Cadastral Survey Office needed to restock its supply of 30-inch survey monuments; as a result of this information--and with the expectation of securing the BLM purchase order--on October 19, Berntsen issued a price reduction for both of its 30-inch survey monument models. Since Berntsen issued its price reduction with the same understanding of the pending BLM survey monument requirement that Hofland may have ascertained from the contracting officer's December 17 telephone call, Berntsen has not suffered any prejudice. Under these circumstances, we have no basis for concluding that Hofland's price reduction was any less legitimate or more suspicious than Berntsen's. Kavouras, Inc., B-220058, Dec. 23, 1985, 85-2 CPD ¶ 703.3/

GEOGRAPHIC COVERAGE CLAUSE

Each FSS defines geographic areas of coverage on a national, zonal, regional or other basis. FAR § 8.404-2. According to GSA, the purpose of this geographic coverage limitation is to

3/ Apparently, Berntsen believes the contracting officer should have informed Berntsen of Hofland's lower price reduction. That, however, would have been improper since informing an offeror that its price is not low in relation to another offeror constitutes a prohibited auction technique. See Motorola, Inc., B-191339, supra.

define mandatory use; accordingly, only those federal agencies that fall within a schedule's geographic coverage are mandatory users of that schedule, FAR § 38.101(b). In this case, FSS Group 66 sets forth as its geographic coverage "[t]he 48 contiguous states and Washington, D.C." Similarly, at the "Scope of Contract" provision, each FSS Group 66 individual supplier contract provides that it will be used as a mandatory source for delivery in the 48 states, including Washington, D.C.

Anticipating purchases under the schedule by non-mandatory users, GSA incorporated a provision in each FSS Group 66 contract allowing suppliers to designate whether or not their prices as submitted would cover delivery costs for users located in Alaska, Hawaii, or the Commonwealth of Puerto Rico. When Berntsen originally executed its FSS contract with GSA, it indicated that its offered prices were not to include the cost of delivery to Alaska. However, when Berntsen issued its price reduction in October, it modified this provision to include the cost of delivery to Alaska in the \$32.92 net reduced price. Berntsen argues that since it was the only FSS contractor offering delivery in Alaska, the agency was required to place the survey monument order with it.

Berntsen's premise is incorrect; Hofland also offered delivery in Alaska at its reduced unit price. It is true that Hofland's offer to deliver to Alaska extended only to this procurement, since, unlike Berntsen, the firm did not amend its FSS contract to provide for delivery to Alaska in all cases. Contrary to Berntsen's suggestion, however, we are aware of no requirement for Hofland to amend the delivery provision of its FSS contract in order to be eligible for award here.

Unlike the price reduction provision in the FSS, discussed above, which imposes certain conditions on the contractors' ability to offer price reductions, the FSS does not require contractors to offer delivery outside the 48 contiguous states, or otherwise specify the circumstances under which they may offer such delivery. We see no basis to impose any such limitations by holding that a contractor could not offer delivery to Alaska on an order-by-order basis. Given the nonmandatory nature of the FSS contract with regard to delivery outside the 48 contiguous states, a contractor who, like Berntsen, chooses to amend its FSS contract to offer delivery to Alaska assumes no greater obligation than a contractor like Hofland who does not.

The Hofland and Berntsen FSS contracts provide:

"Where contracts awarded include prices for delivery to such areas (i.e., Alaska, Hawaii, and Commonwealth of Puerto Rico), both the contractor and ordering activities are subject to the clause of this contract entitled 'Nonmandatory Schedule Users'."

As set forth in the "Nonmandatory Schedule Users" provision, federal users located outside the 48 contiguous states are "authorized" rather than mandated to procure goods from the schedule. According to GSA, under this geographic definition of mandatory use a federal user located outside the 48 contiguous states is not bound to procure under the schedule unless the FSS supplier offers the most efficient, lowest-price alternative, FPMR § 101-26.401-5(b). Thus, as prescribed by GSA, the site of delivery determines whether a federal user is required to procure its supplies from the schedule. See also FPMR § 101-26.401-4(e). In this case, the BLM Cadastral Survey Office--the site of delivery--is located in Anchorage, Alaska and is therefore not a mandatory user for purposes of acquiring items under the schedule.

When a nonmandatory user of the FSS--like BLM in this case--seeks to place an order under the FSS, the FSS contractors are not obligated to accept it. FPMR § 101-26.401-5; FAR § 8.404-2(b). As a result, although Berntsen amended its FSS contract to offer delivery to Alaska in all cases, while Hofland did not, both had the right to refuse BLM's order for delivery in Alaska. Thus, we fail to see how Berntsen was in any way disadvantaged or assumed a greater obligation than Hofland by virtue of its decision to amend its FSS contract to provide for delivery to Alaska. Additionally, the FSS in question contemplates orders for delivery outside the 48 contiguous states even with a supplier who does not offer such delivery, and prescribes how the purchase price is to be determined in such cases. In the "Delivery Prices" provision of each individual FSS Group 66 supplier contract, section (b)(1) provides that when deliveries are made to destinations outside the 48 contiguous states:

"Delivery will be f.o.b. inland carrier, point of exportation (FAR 52.247-38), with the transportation charges to be paid by the Government from point of exportation to destination in Alaska, Hawaii, or the Commonwealth of Puerto Rico, as designated by the ordering office. The Contractor shall add the actual cost of transportation to destination from the point of exportation in the 48 contiguous States nearest to the designated destination."

As evidenced by the above clause, the price for delivery outside the 48 contiguous states may be calculated on a case-by-case basis; thus, contrary to Berntsen's assertion, we see no basis to conclude that Hofland was required to modify its FSS contract to offer delivery to Alaska in all cases in order to provide survey monuments at an f.o.b. destination price to the Alaska BLM in connection with this procurement.

Where a contractor chooses to accept an order from a non-mandatory FSS user, all provisions of the FSS apply to that order. FPMR § 101-26.401-5(a); FAR §§ 8.404-2, 8.405-1. In procuring goods under the FSS, a user is required to place its order with the FSS supplier who offers the lowest delivered price available under the schedule; since Hofland's \$29.75 price constituted the lowest FSS price available to the Alaska BLM, we find that the purchase order was properly issued to Hofland. FAR § 8.405-1.

TECHNICAL ACCEPTABILITY

Berntsen argues that its survey monument model should have been chosen by BLM because the Hofland survey monument lacks a particular safety feature--special notches that prevent injury when these monuments are being flared on the survey site--which the Berntsen model has assimilated into its design.

In ordering supplies from an FSS, the procuring agency is required to place orders with the schedule contractor offering the lowest delivered price for products meeting the needs of the government. FAR § 8.405-1. The determination of the agency's minimum needs and which products on the FSS meet those needs is properly the agency's responsibility; thus, we will examine the agency's assessment of technical acceptability to ensure that it had a reasonable basis. American Body Armor & Equip., Inc., B-238860, July 3, 1990, 90-2 CPD ¶ 4.

Here, before issuing the purchase order to Hofland, the contracting officer researched the acceptability of the Hofland monument with two other BLM survey offices located in Denver and Montana. Additionally, the contracting officer discussed the acquisition of the Hofland survey monument with the Alaska procuring activity; the Alaska surveying team further verified the performance of the Hofland models with the BLM office located in Oregon. All BLM sources indicated that the Hofland survey monument satisfied the agency's surveying specifications. While Berntsen contends that its product is technically superior, it has not shown that the contracting officer acted unreasonably in concluding that the

Hofland monument would meet the agency's minimum needs; in view of the discretion afforded the agency in determining whether a product meets its needs, we find that BLM's acceptance of the Hofland model was reasonable. Id.

The protest is denied.


for James F. Hinchman
General Counsel