

DOCUMENT RESUME

02081 - [A1232244]

[Protest Contending That Purchase Order under Federal Supply Schedule Was in Excess of Maximum Order Limitation]. B-187093. April 27, 1977. 6 pp.

Decision re: Prestype, Inc.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel; Procurement Law I.

Budget Function: General Government: Other General Government (806).

Organization Concerned: Bureau of the Census; Kauffel and Esser Co.

Authority: 4 C.F.R. 20.2(b)(2). 41 C.F.R. 101-26.401 et seq.

F.P.H.B. 101-26.401-1. F.P.H.B. 101-26.404-3. F.P.R.

1-6.103-2. 52 Comp. Gen. 941. 52 Comp. Gen. 945. B-186057 (1976).

The claimant protested the placement of an order for lettering sheets, contending that the purchase order was in excess of the maximum order limitation (MOL) under the Federal Supply Scheduling. The agency acknowledged that there was merit to the protest and that the protest was timely, but the protest was denied because of the agency view that the MOL applied to single items and no purchase of a single item exceeded the MOL. (RRS)

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T. Saras
Proc-I

DECISION



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

FILE: B-187093

DATE: April 27, 1977

MATTER OF: Prestype, Inc.

DIGEST:

1. Agency acknowledges there is merit to protest contending, inter alia, that purchase order under Federal Supply Schedule was in excess of maximum order limitation. Since products have been delivered and consumed, and agency indicates that steps have been taken to see that situation does not recur, further consideration of protest is not required.
2. Protest filed July 29, 1976, concerning purchase order placed June 16, 1976, is timely under section 20.2(b)(2) of Bid Protest Procedures since protester indicates that protest was filed immediately upon learning of grounds for protest.
3. Protest alleging that purchase order under Federal Supply Schedule was in excess of \$10,000 maximum order limitation (MOL) is denied in view of agency report that MOL applied to single items and no purchase of single item exceeded MOL. Moreover, agency failure to apply Buy American differential to FSS item not improper where agency concludes that only one product on FSS can meet minimum needs.
4. Although agency improperly failed to justify procurement at other than lowest FSS price, contrary to FPMR § 101-26.408-3, no remedial action is feasible. However, agency advised to so justify future procurements.

Prestype, Inc. (Prestype), has protested the placement of an order for dry transfer lettering sheets with Keuffel & Esser Co. (K&E) by the Department of Commerce (DOC), Bureau of the Census, under General Services Administration (GSA) Federal Supply Schedule (FSS) contract GS-00S-09539. Additionally, Prestype protests a similar order to Letraset USA, Inc. (Letraset), by the Department of the Interior, U.S. Geological Survey, under GSA FSS contract GS-00S-09524.

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Concerning the DOC portion of the protest, Prestype maintains:

- (1) in May 1976, DOC placed a \$60,000 order for "Normatype" dry transfer lettering with K&E's Washington, D.C., area representative despite the fact that the GSA FSS contract has a \$25,000 maximum order limitation and the products purchased were not on the FSS;
- (2) thus, the dry transfer lettering should have been purchased pursuant to formal advertising procedures; and
- (3) "Normatype" is a foreign made product to which a Buy American Act differential should have been applied.

DOC reports there is merit to the protest:

"Personnel at the Bureau of the Census Purchasing Office have indicated that the purchase order was issued as a result of erroneous ordering information supplied by the vendor. The Purchasing Office did not have a current copy of Keuffel and Esser's authorized catalog at the time of ordering. In order to expedite the purchase, ordering data was obtained via a telephone conversation with * * * Keuffel and Esser * * *.

"All purchasing agents at the Bureau of the Census have since been admonished on their responsibility to ensure accuracy of ordering data by utilizing authorized contract price lists and catalog documents. In addition, purchasing agents have been instructed to obtain oral Federal Supply Schedule ordering data from the appropriate Contracting Office or the General Services Administration's Federal Supply Schedule Information Center only in urgent situations.

"The supplies purchased via the protested purchase order have been consumed and immediate procurement of similar items is not anticipated. However, the Bureau of the Census will appreciate the participation of Prestype, Inc. in future procurement competition."

In view of this response, we do not believe that further consideration of this portion of Prestype's protest is necessary.

With regard to the DOI portion of the protest, DOI questions the timeliness of the protest, pointing out that the purchase order protested was placed on June 16, 1976, and that the protest was not filed with

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our Office until July 29, 1976, more than 10 working days after the basis of the protest was known or should have been known, as provided by our Bid Protest Procedures, 4 C.F.R. § 20.2(f)(2) (1976).

In response, Prestype indicates that the details of the procurements which it protests were not a matter of public record and that it filed its protest immediately upon becoming aware of the grounds for the protests. In view of the fact that Prestype filed its protest immediately upon becoming aware of the grounds therefor, we conclude that the protest is timely.

With regard to merits of the protest, Prestype states:

"In June of 1976, The U.S. Geological Survey Group of Reston, Va. placed an order for approximately \$30,000 of Letraset Dry Transfer Sheets with Adcom - 502 W. Broad Street, Falls Church, Va. 22046. This order is in excess of the maximum order limitation on this contract, and was not advertised in the Business Commerce Daily. This is again a violation of the contract. Letraset is a foreign made item, and the amount of the order is in excess of the contract provisions."

Prestype maintains that Letraset was not the lowest priced item on the FSS and that the Government paid a \$4,304 premium.

DOI reports:

"Award of purchase order number 69629 was under the guidelines of Federal Supply Schedule (FSS) Group 75 Part II, Section A, FSS Class 7510, which is a mandatory source of supply. The maximum order limitations associated with that schedule are \$10,000.00 for a single item or \$25,000.00 for a combination of items. The aforementioned purchase order was in the amount of \$10,356.39, not 'approximately \$30,000.00' as stated by the protestant. The award amount covered \$461.70 of open market items and \$9,894.69 combining various Letraset items covered under FSS Contract No. GS-OOS-09524. The protestant's allegation that the order is in excess of the maximum order limitation is without merit."

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Prestype questions whether Letraset's contract was in fact mandatory, stating: " * * * the government makes no promise or guarantee of buying from the suppliers who are listed [on the schedule]." We believe, however, that Prestype has misconstrued the "mandatory" nature of the supply source.

GSA annually enters into a multitude of Federal Supply Schedule contracts. See 41 C.F.R. § 101-26.401, et seq. (1976). The prices offered by the contractors are filed with GSA and price lists, in conformity therewith, are distributed by the contractors to the various Government agencies for use in purchasing the items. Federal Property Management Regulations (FPMR) § 101-26.401-1 (1976) provides that "Federal Supply Schedules are mandatory to the extent specified in each schedule." The instant schedule, FSC 75, Part II, Section A, Office Supplies, states: "MANDATORY USERS. All Federal agencies in the executive branch, including DOD, (except U.S. Postal Service) and the D.C. Government." Thus, under this circumstance it was mandatory for DOI to procure dry transfer sheets from a supplier listed on the FSS.

With regard to Prestype's assertion that Letraset is a "foreign made item" to which DOI should have applied a Buy American Act differential thus raising Letraset's price, paragraph 18 of the standard FSS contract in pertinent part states:

"Where two or more items listed in the Schedule will meet the requirements of an agency for a particular job and both foreign and domestic items are involved, the ordering agency should apply the differentials required by Executive Order 10582 dated December 17, 1954, and other regulations including FPMR 101-26.408-4(a) in the manner prescribed by the agency."

(See also Federal Procurement Regulations (FPR) § 1-6.103-2 (Circ. 1 2nd ed. 1964)) DOI reports that in view of its finding that only the Letraset foreign made item could satisfy its requirement, it did not apply Buy American Act differentials.

Concerning Prestype's assertion that the Government paid a \$4,304 premium, we have held that if a procurement is at other than the lowest schedule price, a memorandum justifying the purchase must be included in the contract file. See 52 Comp. Gen. 941, 945 (1973). Pursuant to FPMR § 101-26.408-3 (1976) such memorandum

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"* * * should be based on specific or definitive needs which are clearly associated with the achievement of program objectives. Mere personal preference cannot be regarded as an appropriate basis for a justification. Justifications should be clear and fully expressed."

Thus, in the instant case, once DOI determined its minimum needs with regard to the dry transfer sheets, it was required to procure them from the lowest-priced supplier on the schedule or justify its higher priced purchase in a memorandum. Microcom Corporation, B-186057, November 8, 1976, 76-2 CPD 385..

We note that a contemporaneous memorandum justifying the purchase does not appear in the record. However, in its report DOI seeks to justify its purchase at other than the lowest schedule price on the following basis:

"Award was made for Letraset because past experience indicated that it is the only stick-on lettering that would meet the needs of the requester after previous testing. The reasons are durability, density and general appearance when applied to the end product. Further, the shellac on the lettering is by far superior to other press-on letters. * * *

"Previous experience has proven that when you lay other letters down on the art work pieces of letters come off, making additional work for the employees. Some of the stick-on-lettering tested in the past doesn't dry out, which results in lost time. Further some of the lettering, including that offered by Prestype, picks up dust which prevents the lettering from adhering properly. * * *

"Letraset, which is manufactured in England, is the only type of lettering determined to be of satisfactory quality to meet the Government's requirement."


Based on the mandatory provisions of FPMR § 101-26.408-3, supra, it is our opinion that DOI has not adequately and contemporaneously justified its procurement of dry transfer lettering at other than the lowest schedule price. In this regard, we do not believe that the terms "durability, density, and general appearance" clearly and fully

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define DOI's minimum needs. Moreover, it is unclear whether the "previous experience" referred to in DOI's justification specifically refers to Prestype's product.

With regard to DOI's specific criticisms concerning "shellac" and "dust," Prestype indicates that neither its product nor any other dry transfer product contains shellac and that "Prestype sheets come with a special backing sheet that prevents dust from getting on the letters when it is not in use. Additionally, Prestype states that "[a]ccelerated aging tests carried out under laboratory conditions, demonstrated that Prestype is more durable, and more opaque than any other product of its kind."

DOI indicates that the dry transfer sheets forming the basis of the instant protest were received on July 8, 1976. In view of this, we do not believe that it is feasible to recommend remedial relief. However, by separate letter we are recommending to DOI that in any future procurement of dry transfer lettering sheets from the FSS it carefully consider Prestype's position as stated in Prestype's comments to this protest and that if procuring at other than the lowest schedule price it adequately justify the procurement, consistent with FPMR § 101-26.408-3, supra, in a contemporaneous memorandum.


Deputy Comptroller General
of the United States