

**DECISION**



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

9618

FILE: B-193541

DATE: March 27, 1979

MATTER OF: Quest Electronics

DIGEST: [AWARD of Nine Purchase Orders to One Source Violates FPMR]

1. Where contracting officer awarded nine consecutively numbered purchase orders for sound detection equipment totaling \$455,852 to one Federal Supply Schedule (FSS) source on September 9, 1978, and FSS contract provided maximum order limitation of \$250,000, orders were improperly awarded in violation of maximum order limitation and section 101-26.401-4 (c)(1) of FPMR (1977).
2. Possible loss of funds at end of fiscal year and insufficient time to procure equipment by formal advertising do not justify placement of purchase orders totaling more than maximum order limitation in FSS contract since placement of such orders amounted to sole-source award without making findings required by 41 U.S.C. § 252(c) (1976).
3. Determinations as to needs of agency and which FSS sources meet those needs are matters primarily within jurisdiction of procuring agency with which GAO will not interfere unless such determinations involve bad faith or are without reasonable basis. In present case, agency justification for purchasing sound level meters from other than lowest-priced FSS source is questionable, but has not been shown to be totally unreasonable. Therefore, legal objection is not warranted.
4. Allegation that large purchase of sound detection equipment from one FSS supplier should have been made by formal advertising because purchase may create an oligopolistic or even monopolistic situation in sound detection equipment field is without merit since potential for creating oligopolistic or monopolistic situation would be as great if procurement were accomplished by competitive bidding and no laws or regulations have been violated by procuring activity in this regard.

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Quest Electronics (Quest) has protested award of 10 purchase orders (Nos. P2782883 through P2782891 and No. P2782993) to GenRad by the Mine Safety and Health Administration (MSHA), United States Department of Labor, during the period from September 9 through September 22, 1978. The purchase orders were all for sound detection and related equipment listed in the Federal Supply Schedule (FSS) under General Services Administration (GSA) contract No. GS-00S-04909 with GenRad.

Quest contends that the award of the above purchase orders to GenRad was improper because the amount of the purchases totaled \$669,000, while the maximum order limitation specified in GenRad's contract with GSA is \$250,000. Since the combined orders were in excess of the maximum order limitation, Quest contends that the purchases should have been made through competitive bidding. Quest also alleges that some of the equipment ordered from GenRad was improperly ordered by MSHA because less expensive but comparable equipment is available from Quest and is also listed on the FSS. Quest also argues that the purchase of such a large amount of equipment from one supplier may create an oligopolistic or even monopolistic situation in the sound instrumentation industry.

The Department of Labor argues that purchase order No. P2782993 should be treated separately in our consideration of this protest because purchase order No. P2782993 was issued on September 22, 1978, while the other nine purchase orders were all issued on September 9, 1978. If purchase order No. P2782993 is separated from the other purchases, the Department of Labor argues that purchase order No. P2782993 was properly awarded since it was in the amount of \$227,750, which is less than the maximum order limitation of \$250,000. The Department of Labor indicates that the other nine purchase orders (Nos. P2782883 through P2782891) are consecutive purchase orders which were all issued on September 9, 1978. The Department of Labor admits that the amount of these nine orders placed by the MSHA with GenRad totaled more than the \$250,000 maximum order limitation. However, the Department of Labor does not believe that the maximum order limitation was violated since: (1) these orders reflect individual requirements submitted to the Denver Office of MSHA from nine separate field offices, (2) no single order placed with GenRad exceeded the maximum order limitation,

and (3) no combination of deliveries to a single ordering office exceeded the maximum order limitation. The Department of Labor report also indicates that, since these requirements were not finalized until late in the fiscal year, there was not sufficient time to conduct a formally advertised procurement before funds would have been lost at the end of the fiscal year, and, therefore, the equipment was procured from an FSS source. The Department of Labor also stresses that cancellation of the orders now would severely limit the MSHA's ability to enforce the law since no funds are currently available to reprocur the equipment.

Section 101-26.401-4(c)(1) of the Federal Property Management Regulations (FPMR), 41 C.F.R. § 101-26.401-4(c)(1) (1977), provides that "Federal Supply Schedules stipulate maximum dollar limitations above which agencies may not submit orders and contractors may not accept orders." We have held that an agency may not evade the maximum order limitation specified in an FSS contract by splitting the requirement into several smaller orders each within the dollar limit specified and that the maximum order limitation applies to both a single purchase order or a series of purchase orders placed within a short period of time. B-178938, September 20, 1973, 46 Comp. Gen. 713, 718 (1967). In the present case, nine purchase orders totalling \$455,852 were issued on September 9, 1978, by the same contracting officer to one FSS source. In view of the fact that the total amount of these orders was far in excess of the maximum order limitation stipulated in GenRad's FSS contract, these orders were placed in violation of section 101-26.401-4(c)(1) of the FPMR.

With regard to purchase order No. P2782993, issued on September 22, 1978, we agree with the Department of Labor that it should be treated separately from the other nine purchase orders because the Department of Labor indicates that the purchasing office was not aware of this additional requirement at the time it issued the nine purchase orders on September 9, 1978. Our Office would not condone the issuance of purchase orders over a period of time in an attempt to evade a maximum order limitation. However, since the record does not show that the contracting officer knew on September 9, 1978, that an additional \$227,750 in sound

detection equipment would be required on September 22, 1978, and because the purchase order issued on September 22, 1978, was in an amount within the maximum order limitation, we find that purchase order No. P2782993 was properly issued.

The use of the FSS to fill orders totaling more than the maximum order limitation by placing nine orders, each for less than the maximum allowable amount, was not justified merely because funds would have become unavailable at the end of the fiscal year. In effect, the placing of all nine orders with GenRad amounted to a sole-source award without making the findings required by 41 U.S.C. § 252(c) (1976) and was violative of the basic concepts of competitive bidding.

Quest also contends that parts of the MSHA orders for sound detection equipment were improperly placed with GenRad because several other manufacturers, including Quest, have less expensive but comparable equipment listed on the FSS. In particular, Quest alleges that the MSHA could have saved \$50,000 by ordering Quest's sound level meters. The Department of Labor contends that the total amount of the orders placed with GenRad is actually less expensive than the total price of an equivalent order if placed with Quest when a 2-percent service credit offered by GenRad is taken into account. Quest does not refute Labor's statement that the price of the total GenRad order is less than it would have been if placed with Quest. However, Quest strenuously argues that the Quest sound level meters are comparable to those ordered from GenRad and that Quest's sound level meters are substantially less in price than GenRad's sound level meters. Therefore, Quest argues that, if the MSHA had broken down the various orders into separate orders for each different type of equipment and ordered only the sound level meter portion from Quest, substantial savings would have been realized by the Government on that portion of each order.

The Department of Labor argues that the GenRad sound level meters are simpler to operate. Labor points out that GenRad sound level meters are single range 70 to 120 dBA meters while Quest sound level meters must be set manually to within 10 dBA to obtain a reading. Thus, Labor contends that the GenRad sound level meters can be operated with one hand by inspectors while Quest

meters cannot. Quest disagrees with Labor and states that very little switching is actually necessary since sound levels are usually in the 90 to 115 dBA and that switching, when necessary, can be accomplished by inspectors by simply "thumb-switching" to the proper range.

The FPMR's provide in pertinent part as follows (41 C.F.R. §§ 101-26.408-2, 101-26.408-3):

"§101-26.408-2 Procurement at lowest price.

"Each purchase of more than \$500 per line item made from a multiple-award schedule by agencies required to use these schedules shall be made at the lowest delivered price available under the schedule unless the agency fully justifies the purchase of a higher priced item. \* \* \*

"§101-26.408-3 Justifications.

"(a) Justifications of purchases made at prices other than the lowest delivered price available 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. \* \* \*"

We have held that these clauses require Federal agencies which procure from a multiple-award FSS to do so at the lowest price consistent with their minimum needs. Lanier Business Products, Inc.; Mid-Atlantic Industries, Inc., B-187819, August 24, 1977, 77-2 CPD 143. Determinations as to the needs of an agency and which products on the FSS meet those needs are matters primarily within the jurisdiction of the procuring agency and with which we will not interfere unless they clearly involve bad faith or are not based on substantial evidence. 52 Comp. Gen. 941, 944 (1973). Thus, once the procuring agency determines its minimum needs, it is required to procure from the lowest-priced supplier on

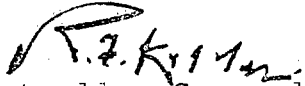
the schedule, unless it makes an appropriate justification for purchase from a higher-priced supplier. Our Office does not believe a legal objection to the agency's determinations is warranted unless those determinations are shown to be totally unreasonable. Dictaphone Corporation; Business Equipment Center, Ltd., B-192314, B-192373, November 14, 1978, 78-2 CPD 345.

The Department of Labor indicates that GenRad's sound level meters are easier for mine inspectors to operate. However, the Department of Labor's own report indicates that, although the totality of the equipment purchases is less when awarded to GenRad, a great deal of expense could have been saved by the MSHA's substituting Quest sound level meters for GenRad sound level meters. Further, the Department of Labor's cost comparison reveals that it believes these items of equipment to be approximately comparable in quality. Although we find MSHA's justification for purchasing other than the lowest priced sound level meter to be questionable, we cannot find that MSHA's determination as to its minimum needs was totally unreasonable since no evidence has been presented by the protester to show that mine inspectors would not be hampered by having to "thumb-switch." In other words, although this may be a borderline case, we cannot find on the evidence presented that MSHA's justification is legally insufficient and, therefore, legal objection is not warranted.

Regarding Quest's allegation that the purchase of \$669,000 worth of sound detection equipment from GenRad may lead to an oligopolistic or even monopolistic situation in the sound instrumentation field, we do not view this argument alone as sufficient for upsetting a contract award. We know of no laws or regulations which were violated other than those previously indicated. Moreover, if the present purchases had been made by formal advertising as suggested by Quest, the potential for an oligopolistic or monopolistic situation would be as great.

In summary, we agree with the protester that nine of the purchases were made in violation of the applicable maximum order limitation, and that the possible loss of funding at the end of the fiscal year did not

justify deviation from the normal competitive bid process. Although we are sustaining the protest as to the above points, we have been advised that delivery has been completed on seven of the nine purchase orders issued on September 9, 1978, and that delivery has been partially completed on the other two purchase orders issued on that date. Therefore, it is not feasible to recommend corrective action with respect to those orders. However, by letter of today, we are advising the Department of Labor of the necessity for following prescribed FPMR procedures in the case of FSS purchases, and particularly of the need for abiding by the maximum order limitations in future purchases. By letter of today, we are also notifying the General Services Administration of our findings in the present matter.

  
Deputy Comptroller General  
of the United States