

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D.C. 20548

FILE: B-220582; B-220582.2 **DATE:** January 09, 1986**MATTER OF:** National Micrographics Systems, Inc.;
Canon U.S.A., Inc.**DIGEST:**

1. When a contracting agency awards a purchase order to other than the low priced supplier under a mandatory, multiple-award Federal Supply Schedule, GAO's standard of review in such matters requires a clear showing that the agency's justification for doing so has no reasonable basis before GAO will legally object to the award. Thus, the agency's determination that the higher priced schedule supplier would provide greater availability of maintenance is a legally sufficient justification to uphold the award.
2. In order to prevail in an assertion that the agency's acquisition of six microfilm reader/printers under a Federal Supply Schedule (FSS) contract constituted an improper "fracturing" of a much larger requirement, it would have to be shown that the present acquisition is merely the first in a series of several purchase orders to be placed with the purpose of evading the maximum order limitation stipulated in the FSS contract, and GAO finds no evidence in the record which would serve to make such a showing.

National Micrographics Systems, Inc. (NMS), and Canon U.S.A., Inc., protest the award of purchase order No. PD-P-847 to the Eastman Kodak Company by the Bureau of the Public Debt (Bureau), Department of the Treasury. The order is for six microfilm reader/printers and accessories

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for use at the Bureau's Parkersburg, West Virginia location, and was placed under Kodak's mandatory, multiple-award Federal Supply Schedule (FSS) contract.^{1/} NMS and Canon complain that the purchase order was awarded to a higher priced schedule contractor absent a sufficient justification for doing so, in violation of the applicable procurement regulations. We deny the protest.

Background

The Bureau identified a need for microfilm reader/printers utilizing the newer plain (bond) paper technology ^{2/} and requested various vendors to furnish units for operational demonstration and testing. NMS, an FSS schedule supplier of both Canon and Minolta reader/printers, and two other vendors furnished units for a 2-week evaluation at the Bureau's Parkersburg location. Although Kodak responded to the Bureau's request, the firm's product was unavailable for on-site testing and was instead evaluated for a 1-day period at Kodak's own facility by Bureau representatives.

Although the FSS schedule prices for the Canon and Minolta reader/printers are both lower than the schedule price for the Kodak reader/printer (with accessories, \$12,006.60 and \$14,864.30, respectively, versus \$15,573.40), the Bureau determined as the result of its evaluation that purchase of the Kodak product was justified.

In this regard, the Bureau judged that the print quality of the Kodak product was above average in comparison to the other reader/printers tested, and noted that the unit had a "masking" feature that would reduce the amount of toner used. Although the print quality of the Canon model was deemed to be good, the Bureau felt that the unit did not thread short reels of microfilm at an acceptable level because the film leader had to be clipped to a point before it could be fed into the machine. The Bureau also noted that the Canon model

^{1/} FSC Group 67, Part IV, Section B, FSC Classes 6720, 6730, 6740, 6750. Contract No. GS-00F-69669.

^{2/} The earlier type of reader/printers in use by the Bureau requires dry silver paper which, although providing copies of high print quality, is much more expensive than plain paper.

ejected the print copy to the side of the operator's workstation, which was felt would cause an excessive amount of operator movement in order to retrieve the prints.

The Bureau found no objectionable features in the Minolta model and judged that its print quality was good. However, the Bureau noted that the Minolta model, as well as the Canon, would be serviced from NMS' Charleston, West Virginia, regional office, some 75 miles from Parkersburg, and that a separate maintenance contract would have to be negotiated with NMS. In contrast, Kodak offered maintenance on its FSS contract, and, although at an annual per unit price that was \$249 higher than the maintenance offered by NMS, Kodak technicians were located in Parkersburg. Accordingly, the Bureau awarded the purchase order to Kodak. Delivery of the reader/printers has been suspended pending our resolution of the protest.

NMS and Canon strenuously argue that the Bureau's operational evaluation was highly questionable. The firms note that the Kodak product was only tested for a very short time at Kodak's own facility, and was not subjected to testing in the same work environment as were the other reader/printers. The firms dispute the Bureau's finding that the Canon model has certain objectionable operational features, and also question the Bureau's determination that the print quality of the Kodak model is superior by noting that the Kodak printer component is, in fact, manufactured by Minolta, and is the same component used in the Minolta model that was tested.

Analysis

Purchases from the General Services Administration's multiple-award FSS's are governed by the Federal Property Management Regulations (FPMR), which provide that each purchase of more than \$500 per line item made from a multiple-award schedule by agencies mandated 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. FPMR, 41 C.F.R. § 101-26.408-2 (1985); see also the Federal Acquisition Regulation, § 8.405-1(a) (Federal Acquisition Circular 84-5, Apr. 1, 1985).

However, determinations as to the needs of the agency and which products on the FSS meet those needs are matters primarily within the jurisdiction of the agency and with which we will not interfere unless they clearly appear to

involve bad faith or are not based on substantial evidence. 52 Comp. Gen. 941, 944 (1973). Thus, although the agency, after determining its minimum needs, 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, a legal objection to the agency's justification is not warranted unless it is clearly shown to have no reasonable basis. Olivetti Corp. of America, B-195243, Sept. 21, 1979, 79-2 CPD ¶ 212.

Applying this standard of review to the present matter, we cannot conclude that the Bureau's decision to purchase from Kodak was clearly improper. The mere fact that the Kodak model shares the same printer component with the Minolta model does not establish that the print quality of the Kodak reader/printer reasonably could not have been found to be superior. As the Bureau states, "the evaluation of print quality was based on the consensus judgment of several managers with many years of experience in providing photoprints to the public and appropriate governmental agencies." In any event, we need not reach this or other specific technical issues in controversy for purposes of this decision because we believe the Bureau's determination that Kodak would provide greater maintenance availability than NMS constituted a legally sufficient justification to award the purchase order to Kodak.

The record establishes that NMS would not provide on-site maintenance until the Bureau had purchased 10 or more units, but rather would provide maintenance from its Charleston office, some 2 hours distant from Parkersburg. The Bureau concluded that because Kodak has service personnel located in Parkersburg, any disruptions due to equipment malfunction would be of shorter duration. Although NMS and Canon argue that the maintenance service provided by NMS out of its Charleston office would more than meet the Bureau's minimum needs, we think that service personnel located in the same city will be able to respond more quickly to maintenance requests as they arise. We also note that, contrary to the firms' position, the Bureau did not, in fact, require on-site maintenance, but rather determined that central service location and response time were factors to be considered during the operational evaluation. Since the FPMR, 41 C.F.R. § 101-26.408-3(b)(6) (iii), specifically provides

that greater maintenance availability may serve as a justification for purchases made at other than the lowest schedule price, the award to Kodak cannot be viewed as legally objectionable for this reason.

NMS and Canon also assert that the Bureau's purchase violates the FPMR by "fracturing" its real needs. In this regard, the FPMR, 41 C.F.R. § 101-26.401-4(c)(1), notes that the FSS provide maximum dollar limitations "above which agencies may not submit orders and contractors may not accept orders." As termed by NMS and Canon, "fracturing" occurs when an agency seeks to evade the maximum order limitation specified in an FSS contract by splitting its actual requirement into several smaller orders each within the dollar limit specified, since the maximum order limitation applies to both a single purchase order or to a series of purchase orders placed within a short period of time. Quest Electronics, B-193541, Mar. 27, 1979, 79-1 CPD ¶ 205. Because the Bureau's actual requirement is apparently for a total of 75 reader/printers, NMS and Canon assert that it was improper to use end-of-the-year funds to acquire the six units in issue and not to compete formally the entire requirement. The record does not support this assertion.

The Bureau states that it has only ordered six units at this time because it has just recently acquired the capability to computer index its microfilm. According to the Bureau, the prime reason for purchasing new reader/printers was to obtain equipment which can rapidly access the appropriate part of each microfilm reel which has been computer indexed, and that only microfilm produced in the past several months has been so indexed. Therefore, the Bureau states that it can effectively use only a limited number of units until a greater amount of microfilm is made compatible for such use.

Moreover, with regard to the use of end-of-the-year funding, the Bureau states that the new reader/printers were budgeted for procurement in Fiscal Year (FY) 1986. However, because of delays in procuring other equipment that had been budgeted for FY 1985, it was necessary that there be a certain amount of procurement rescheduling, and the reader/printers scheduled for purchase in FY 1986 were acquired with the limited funding that became available in FY 1985.

We do not believe that this situation can be characterized as an improper "fracturing" of the Bureau's actual requirement, since the Bureau in fact has a need for only six reader/printers at this time. In order to prevail in their assertion, NMS and Canon would have to show that the present acquisition is merely the first in a series of several purchase orders to be placed with the purpose of evading the maximum order limitation stipulated in the FSS contract, and we find no evidence in the record which would serve to make such a showing.

The protests are denied.

for Seymour Efron
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General Counsel