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DECISION

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

FILE: B-220058.4 **DATE:** April 23, 1986

MATTER OF: Federal Aviation Administration--Request for Reconsideration

DIGEST:

1. Request for reconsideration is denied where the agency merely reiterates arguments which GAO addressed in the previous decision.

2. An agency generally may not place an order in excess of the maximum order limitation in a firm's Federal Supply Schedule contract.

The Federal Aviation Administration (FAA) requests that we reconsider our decision in Kavouras, Inc., B-220058.2 et al., Feb. 11, 1986, 86-1 C.P.D. ¶ 148, in which we sustained the second protest of Kavouras, Inc., against the issuance of delivery order No. DTFA07-85-D-01740 by the FAA to Alden Electronics for the procurement of remote weather radar display equipment from the General Services Administration's (GSA) Federal Supply Schedule (FSS). We found that the FAA improperly placed an order with Alden in excess of Alden's maximum order limitation (MOL). We recommended that the FAA reimburse Kavouras the cost of filing and pursuing its protest, including attorney's fees, because Kavouras was excluded unreasonably from the procurement and, because performance had been completed, we could not recommend any other relief.

We deny the request for reconsideration.

As background, we note that Kavouras initially protested that the FAA engaged in auction techniques by accepting Alden's lower-than-FSS price after meeting with Kavouras, and that the FAA improperly evaluated the parties' contracts and prices. We denied Kavouras' protest, finding, among other things, that Kavouras had failed to furnish probative evidence of a price auction and that the record showed no improper evaluation. See Kavouras, Inc., B-220058, Dec. 23, 1985, 85-2 C.P.D. ¶ 703. As we noted in that decision, Kavouras, in its comments to the FAA's report, protested that the order with Alden exceeded

Alden's MOL. We segregated this issue as an independent protest, accepted submissions from the parties, and ultimately rendered the second decision and recommendation that the FAA now challenges.

In its request for reconsideration, the FAA first notes that our Bid Protest Regulations, 4 C.F.R. § 21.6 (1985), require that a contractor be excluded "unreasonably" from the procurement to recover protest costs. The FAA contends that because Kavouras had an opportunity to submit technical and cost proposals, the firm was not excluded unreasonably from the procurement. Further, the FAA argues that its award to Alden in excess of Alden's MOL did not violate Federal Property Management Regulation (FPMR), 41 C.F.R. § 101-26.401-4(c)(1) (1985), which provides:

> "Federal Supply Schedules stipulate maximum dollar limitations above which agencies may not submit orders and contractors may not accept orders."

That regulation, the FAA contends, is merely a statement of the rights and duties of parties to an FSS contract and not a prohibition against placing orders in excess of the MOL where the agency and the contractor agree to waive or modify the terms of the FSS contract. The FAA further argues in this respect that the regulation is no more than a guideline because its language, specifically the use of the verb "may," is permissive and, thus, does not intend to bind agencies.

Under our Regulations, a request for reconsideration must specify any errors of law made in the decision or information not considered previously. 4 C.F.R. § 21.12(a). Here, the FAA essentially restates the arguments that it presented in the second protest and which we addressed in our decision. We found, for example, that "the FAA's improper placing of an order with Alden clearly had the effect of precluding Kavouras from an open competition," and we noted that the FPMR does not contemplate that a contractor may ratify an improper order. Moreover, while the FAA did not expressly argue that the use of the word "may" in the regulation is permissive, not mandatory, the regulation's clear intent is to withhold permission to exceed the MOL from the parties involved.

Our Office will not reconsider a decision based on a party's reiteration of arguments already addressed. See H.L. Carpenter Co.--Reconsideration, B-220032.2, Jan. 3, 1986, 65 Comp. Gen. ___, 86-1 C.P.D. ¶ 3. Accordingly, we will not reconsider our decision based on this portion of the FAA's request.

The FAA also argues, in the alternative, that even if the FPMR provision is considered binding on agencies, it does not convey any rights on contractors like Kavouras because it "is no more than an internal administrative directive." The FAA contends that its violation of this regulation does not confer upon Kavouras a right to protest costs.

We find no merit in the FAA's argument. Our decision did recognize that the government, not the contractor, is the beneficiary of the regulation's protection. We stated that an MOL clause is placed in a requirements contract to enable the government to explore the possibilities of securing lower prices for larger quantities exceeding the limitation. Our recommendation that Kavouras be awarded protest costs, however, was based on the fact that the FAA's improper award to Alden resulted in denying Kavouras an opportunity to attempt to secure an order in an open competition. The FAA's argument provides no basis for our Office to reconsider our view.

Next, the agency argues that because the FPMR, 41 C.F.R. § 101-26.401-4(c)(2), permits nonmandatory users of the FSS (like the FAA) with requirements in excess of an MOL to forward those requirements to GSA, there is some form of discretion granted to agencies to place orders in excess of MOLs. (The regulation requires mandatory users to forward such orders to GSA.) The FAA contends that had it forwarded its requirements to GSA, that agency probably would have authorized the award to Alden.

The FAA's view of the effect of the cited regulation is incorrect. The regulation clearly does not intend to relieve nonmandatory-using agencies from compliance with MOLs. Rather, it intends to give such agencies the option, when their orders exceed MOLs, either to solicit the requirements themselves or forward the requirements to GSA to solicit for the agency. In any event, the FAA's speculation as to what GSA would have done certainly is an

insufficient reason to overlook the fact that the FAA's actions violated the applicable regulations.

Finally, the FAA attempts to distinguish Computer Data Systems, Inc., B-218266, May 31, 1985, 85-1 C.P.D. ¶ 624, a case on which we relied in our second decision in awarding protest costs, from the facts of this case. The FAA states that Computer Data Systems involved an agency's erroneous evaluation of an awardee's cost proposal, whereas this case involves no improper evaluation of technical or cost data. We point out, however, that we relied on Computer Data Systems simply to support the legal proposition that, under our Regulations, protest costs, including attorney's fees, may be allowed where the agency has excluded a protester unreasonably from the procurement and we have not recommended that the protester be awarded the contract. The FAA's factual distinction thus is irrevelant.

We deny the request for reconsideration.

Milton J. Socolar

for Comptroller General
of the United States