



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Precision Manufacturing, Inc.

File: B-224565

Date: January 12, 1987

DIGEST

1. Protest by a non-Federal Supply Schedule contractor, against award at a higher price to a schedule contractor, is without merit where there is a mandatory schedule in effect and an agency's minimum needs will be met by items listed on the schedule, because the agency is required to purchase its requirements from the schedule.
2. Protester was not prejudiced by the contracting agency's failure to indicate in request for quotations (RFQ) that it was for items available from the Federal Supply Schedule, since the protester has not alleged that it would have offered lower-priced schedule items had it known of the restriction, and, in any event, the RFQ specifically stated that it was for informational purposes only.
3. Allegations are academic where agency acknowledges that award for certain items was improper and has determined to terminate those portions of the delivery orders.
4. Agency correctly interprets maximum order limitation in awardee's Federal Supply Schedule contract as applying to total of items ordered under a special item number in the contract, rather than to each such item individually. When read as a whole, solicitation provision that subsequently was included in awardee's contract supports the agency's position.

DECISION

Precision Manufacturing, Inc. protests the Department of the Air Force's rejection of its quotation under request for quotations (RFQ) No. F33601-86-R-0482 for modular furniture and partitions. We deny the protest in part and dismiss it in part.

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Since the required items were available on a mandatory multiple award Federal Supply Schedule (FSS), the agency solicited only sources with FSS contracts. The RFQ was issued to four potential sources, including Precision and M.S. Ginn Co.; Precision and Ginn were the only firms that responded. Award was made to Ginn, and Precision protested, arguing that it should have received the award because its quotation was low and met all of the agency's requirements.

ANALYSIS

The Air Force agrees that Precision's quotation was low, but does not agree that the items offered by Precision met its requirements. In this connection, the Statement of Work (SOW) attached to the RFQ stated that all drawing layouts and specifications were based on "Harterwall" freestanding acoustical screens and Harter Corporation "integrated furniture." It also stated that prospective contractors could propose the use of an alternate product by submitting all relevant product information for approval, and that to be accepted, the alternate product must be equal to the specified product in all salient features listed in the SOW. The Air Force asserts that Precision failed to submit descriptive literature or specifications describing its product and thus, that the agency lacked sufficient information to determine Precision's compliance with the government's requirements.

In addition, the Air Force emphasizes that Precision offered all open market products that were not available on the FSS. Since the items solicited were available on a mandatory FSS, and Ginn offered these items under its FSS contracts for the Harter product line, the agency asserts that award could only be made to Ginn. The Air Force also states that it now appears that Precision should not have been solicited for this requirement to begin with, as the firm does not have a schedule contract for partitions (although it does have one for modular furniture).

Precision contends that the RFQ contained no indication that it was for a purchase from the FSS, and that consequently, it acted in good faith and submitted an offer for open market products that met the agency's requirements and were lower in price than those offered by Ginn. Precision also asserts that the reasonableness of its interpretation of the procurement as an open market buy is supported by the fact that the RFQ required delivery and installation, items that are not included on the FSS partition and furniture contracts. Precision does not dispute, however, that the partitions and furniture covered by the RFQ are available on a mandatory FSS.

Where there is a mandatory FSS in effect, an agency is required to purchase its requirements from that schedule if its minimum needs will be met by the items listed on the schedule. See Schlegal Associates, Inc., B-217366, Mar. 6, 1985, 85-1 CPD ¶ 279; Federal Property Management Regulations (FPMR), 41 C.F.R. §§ 101-26.401 to 401-1 (1986). Although there is an exception to this requirement that applies where an identical product is available from another source at a price lower than the schedule price, 41 C.F.R. § 101-26.401-4(f), that exception would not apply here as Precision's products are not identical to those available from Ginn on the FSS. See Bio-logic Systems Corp., B-219909.2, Jan. 15, 1986, 86-1 CPD ¶ 41. Accordingly, we find that the Air Force is correct in its assertion that it was required to purchase the furniture and partitions from the FSS, and could not buy the nonschedule items offered by Precision.

Regarding the inclusion in the RFQ of delivery and installation requirements, the Air Force agrees with Precision that these items are not available on the FSS. The agency notes, however, that Ginn actually quoted on an F.O.B. origin basis, in accordance with its FSS contracts, and that award was made on that basis. Further, the agency has determined that the line item for installation in fact should not have been included. Therefore, the agency is deleting the requirement from the delivery orders issued to Ginn and will conduct a competitive procurement for this requirement. We agree with the Air Force that under these circumstances, Precision's protest now is academic insofar as it questions the propriety of the inclusion of delivery and installation in the delivery orders issued to Ginn. See Abbott Laboratories et al., B-223952 et al., Aug. 25, 1986, 86-2 CPD ¶ 222. We therefore dismiss this aspect of the protest.

There remains, however, the question of whether Precision was prejudiced by the agency's failure to indicate in the RFQ that the procurement was limited to items available from the FSS. In this connection, it appears that although Precision knew that some of the solicited items were available on the FSS, it was misled by the inclusion of the delivery and installation line items.^{1/} The protester has not argued,

^{1/} Precision has also stated that it asked the contracting officer about the nature of the RFQ and was informed that it was not for an FSS purchase. The agency states, however, that Precision was told just the opposite.

however, that it could or would have offered FSS items that met the agency's needs at a lower price than Ginn if it had known that the purchase would be restricted to FSS items.

While Precision might not have responded to the RFQ at all had it known of the FSS restriction, the RFQ was issued on Standard Form 18 which contains the following standard language:

"IMPORTANT: This is a request for information, and quotations furnished are not offers. . . . This request does not commit the Government to pay any costs incurred in the preparation of the submission of this quotation or to contract for supplies or services."

Thus, Precision was on notice that the RFQ was informational in nature only, and might not result in any award in any event. Furthermore, Precision never submitted the information required by the agency to demonstrate the acceptability of its furniture and partitions, and thus apparently would have been found unacceptable even if the purchase had not been restricted to FSS items. We therefore find that Precision was not prejudiced by the agency's failure to include in the RFQ a clear indication that quotations were being sought for FSS items.

Precision also argues that the delivery order issued to Ginn for the modular furniture is improper because the dollar amount awarded under special item number (SIN) 504-2 (ADP Tables, Desks, Pedestals and Stands) in Ginn's FSS contract exceeds the maximum order limitation (MOL) for that SIN. The general rule is that an FSS order may not be placed by the ordering activity, nor may an order be accepted by the contractor, where a maximum limitation has been placed on the dollar amount of each order, and the dollar amount of the items to be purchased exceeds the MOL as stated in a firm's FSS contract. See Kavouras, Inc., B-220058.2 et al., Feb. 11, 1986, 86-1 CPD ¶ 148; FPMR, 41 C.F.R. § 101-26.401-4(c).

The Air Force admits that the delivery order issued for SIN 504-2 in fact exceeds the MOL in Ginn's FSS contract. It therefore has determined that this portion of the delivery order should be terminated. Ginn asserts, however, that the agency and Precision are misinterpreting the MOL in Ginn's FSS contract.

The General Services Administration's (GSA) solicitation for FSS contractors, which is included as part of the contract awarded to Ginn, provided:

"I-FSS-124I(4/84)

MAXIMUM ORDER LIMITATION: The Maximum Order Limitation will be negotiated individually for each contract. . . . The total dollar value of any order placed under this contract shall not exceed \$400,000; provided, that the dollar value for any single item ordered, whether ordered separately or in combination with other items, shall not exceed the dollar amounts set forth below for the item indicated (all dollar amounts are exclusive of any discount for prompt payment):

(The Maximum Order Limitation will be negotiated to one of the levels shown for each Special Item Number depending on the concessions offered.)

<u>Special Item Number</u>	<u>Maximum Order Limitation</u>
504-1 and 504-2 (each)	125,000 - 150,000 100,000 - 124,999 75,001 - 99,999 100 - 75,000
504-3 and 504-4 (each)	25,000 - 50,000 20,001 - 24,999 100 - 20,000

The contractor agrees not to accept or fulfill any orders in violation of this clause. Violation may result in termination of the contract pursuant to the Default clause of this contract."

Also incorporated into Ginn's contract were the following volume discounts and related provisions:

"Volume Discounts

<u>SIN</u>	<u>Amount</u>	<u>Discount</u>
504-1, 504-2	\$ 100 - \$ 75,000	Basic
	\$ 75,001 - \$ 99,999	1%
	\$100,000 - \$124,999	2%
	\$125,000 - \$150,000	3%

MOL of \$150,000 is acceptable for Single Order - One Item

504-4	\$ 100 - \$ 20,000	Basic
	\$20,001 - \$ 24,999	1%
	\$25,000 - \$ 50,000	2%

MOL of \$50,000 is acceptable for Single Order - One Item

MOL of \$400,000 is acceptable for Single Order - Multiple Items in accordance with Clause I-FSS-124I (4/84) Maximum Order Limitation."

Ginn argues that the MOL established for SIN 504-2 applies to each single item ordered under that SIN, rather than to the total of the items ordered under it. Thus, under Ginn's interpretation, the agency could order as many furniture components under SIN 504-2 as it needed, provided that each component did not exceed \$150,000 in cost and the total dollar volume of furniture purchased under the FSS contract (including those items under SIN 504-2) did not exceed \$400,000. Ginn relies on the statement in solicitation clause I-FSS-124I (4/84) MAXIMUM ORDER LIMITATION that the dollar value of any single item ordered shall not exceed the dollar amount set forth for the item indicated. Ginn also notes that the volume discount provisions incorporated into its contract, as awarded, state that for SIN 504-2, an MOL of \$150,000 is acceptable for "Single Order - One Item."

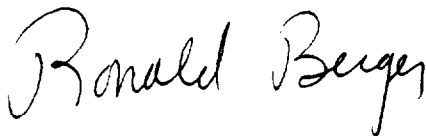
Precision and the agency take the opposite point of view. They interpret the MOL as applicable to the total items, or furniture components, ordered under SIN 504-2, rather than to each individual item under that SIN. Precision notes that the solicitation clause, I-FSS-124I, specifically states that the MOL will be negotiated to one of the levels shown for each SIN, and sets forth by SIN the possible MOLs to be negotiated, depending upon the discount offered by the contractor. We think Precision and the agency's interpretation of the MOL is the correct one.

As Ginn points out, the FSS solicitation does provide that the value of any single item ordered shall not exceed the amounts "set forth below for the item indicated." However, the amounts "set forth below for the item indicated" are set forth by SIN and are preceded by a statement that the MOL will be negotiated to one of the levels shown for each SIN. Therefore, we conclude that when read as a whole, the clause contemplates that the MOL will apply to the SIN and not to each component falling under the SIN.

We also recognize that the volume discount provisions incorporated into Ginn's contract refer to the MOL as applicable to "Single Order-One Item." However, this merely repeats the language of the RFQ clause in question, and as the contractual provision also references that clause, we find no basis to conclude that GSA agreed to any deviation from the solicitation provision when it contracted with Ginn. Moreover, the GSA contracting officer for Ginn's FSS contract has confirmed that the agency intends for the MOL to apply to the total items ordered under the SIN, rather than to each such item individually. Accordingly, we conclude that the Air Force correctly decided to terminate that portion of Ginn's delivery order pertaining to SIN 504-2, as the MOL for that SIN was exceeded by the order. Further, we find that this corrective action on the agency's part renders academic Precision's protest that the MOL was exceeded. See Abbott Laboratories et al., supra.

CONCLUSION

We deny Precision's protest insofar as it alleges that the agency improperly rejected Precision's offer of lower-priced items that were not on the FSS. We dismiss as academic its allegations that the delivery order improperly included delivery and installation of the ordered items, and its - allegation that the MOL for SIN 504-2 was exceeded.



for Harry R. Van Cleve
General Counsel