DOCUMENT RESUME

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[Cancellation of Purchase Order]. B-187969. May 11, 1977. 5 pp.

Decision re: Lanier Business Products; by Paul G. Dembling (for Elmer B. Staats, Comptroller General).

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law II.
Budget Function: General Government: Other General Government (806).
Organization Concerned: Veterans Administration: VA Hospital, Marion, IN; Dictaphone.
Authority: Buy American Act. F.P.R. 1-8.203. 54 Comp. Gen. 196. 54 Comp. Gen. 202. 29 Comp. Gen. 36. 52 Comp. Gen. 215. 52 Comp. Gen. 218. 53 Comp. Gen. 225. John Reiner Co. v. United States, 325 F.2d 438 (Ct. Cl. 1963). B-187101 (1977). B-186347 (1976). B-185495 (1976).

Contractor submitted a claim for the contract price of equipment delivered to the procuring agency. The agency tried to cancel its order subsequent to delivery. The cancellation of the purchase order was improper where the awardee neither knew that the award was in violation of Government regulations, nor, by its action, caused the award to be made. Exhaustion of the agency's appropriation subsequent to the contract award did not affect the validity of the contract nor the Government's payment obligations. (Author/SC)

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DECISION

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

FILE: B-187969 DATE: May 11, 1977

MATTER OF: Lanier Business Products

DIGEST:

1. Cancellation of purchase order issued pursuant to Federal Supply Schedule contract, on grounds that proper Buy American Act evaluation would have resulted in award to another contractor, is improper where awardee neither knew that award was in violation of statute or regulations nor, by its action, caused such award to be made.

2. Exhaustion of agency's appropriation subsequent to contract award does not affect validity of contract or Government's payment obligations thereunder.

Lanier Business Products (Lanier) has submitted a claim for $29,599.20, the contract price for dictating and transcribing equipment delivered to the Veterans Administration (VA) Hospital in Marion, Indiana, on June 18, 1976. The claim arises out of the VA's attempt to cancel its order subsequent to delivery of the equipment because of a defective evaluation involving application of a Buy American Act differential.

The equipment was ordered under General Services Administration (GSA) Federal Supply Schedule (FSS) contract GS-00S-32301. Lanier's lowest and final offer was made on June 17, 1976, and confirmed in writing on June 18. The purchase order, No. 610-3780, calling for delivery no later than June 18, was picked up by Lanier when the equipment was delivered to the hospital that same day.

On June 22, 1976, following protest of the award by Dictaphone Corporation (Dictaphone), the contracting officer determined that he had made an error in applying the Buy American Act evaluation factor to Lanier's prices. A 12 percent differential, required because Dictaphone, the low domestic supplier, was a labor surplus area concern, had been applied to Lanier's net bid after subtraction of GSA's trade discount, prompt payment discount, and trade-in allowance from the gross price of the foreign equipment. The correct method, GSA informed the contracting officer, would have been to apply the 12 percent differential to Lanier's raw or

catalog price after subtracting only the trade discount. Thus calculated, Dictaphone's net price was lower than that of Lanier. Federal Property Management Regulations (FPMR) require that purchases be made at the lowest delivered price available under the FSS, unless the procuring agency fully justifies purchase of higher priced items, which the contracting officer in this case was unable to do. See FPMR § 101.26-408-2.

The contracting officer immediately informed Lanier that the award was illegal due to improper evaluation and that the purchase order was therefore canceled. Lanier was requested to pick up the equipment, which remained in storage at the hospital. Lanier rejected the cancellation by letter dated June 30, 1976, and, through counsel, began a series of exchanges with the VA which culminated in the filing of a claim with our Office on December 6, 1976. In the interim, VA ordered, accepted, and paid for similar equipment delivered by Dictaphone.

The VA's position on this matter has varied. The contracting officer initially stated that the cancellation should have been characterized as a termination for convenience, because a clause permitting such action is included in the Supplemental Provisions to all FSS contracts. The contracting officer offered to negotiate a post-termination settlement with Lanier, as provided in Federal Procurement Regulations (FPR) § 1-8.203 (1964 ed.). In this regard, the VA argued that the delivery did not amount to a completed procurement because the purchase order was canceled before it had been processed by the hospital's fiscal office. The VA later contended that the contract was illegal because Lanier, in its haste to deliver, contributed to the contracting officer's error in applying the Buy American evaluation factor. The VA also stated that its payment for the Dictaphone equipment exhausted its appropriated funds available for such purchases so that it cannot, in any event, pay Lanier.

The issuance of a purchase/delivery order pursuant to an FSS contract generally gives rise to a legal and binding contract incorporating both the FSS contract provisions and the specific terms of the purchase/delivery order. See, e.g., Comdisco, Inc., 54 Comp. Gen. 196, 202 (1974), 74-2 CPD 152; 29 Comp. Gen. 36 (1949). The Court of Claims and this Office have taken the position that once a contract comes into existence, even if improperly awarded, it should not be canceled, that is, regarded as void ab initio, unless the illegality of the award is "plain" or "palpable." John Reiner & Co. v. United States, 325 F. 2d 438 (Ct. Cl. 1963);

Warren Brothers Roads Company v. United States, 355 F. 2d 612 (Ct. Cl. 1965); 52 Comp. Gen. 215 (1972). The test of a plainly or palpably illegal award is whether the award was made contrary to statute or regulation because of some action or statement by the contractor or whether the contractor was on direct notice that the procedures being followed were inconsistent with statutory or regulatory requirements. 52 Comp. Gen. at 218. If the test is not met, a contract may not be canceled, but can only be terminated for the convenience of the Government. Albano Cleaners, Inc. v. United States, 455 F. 2d 556 (Ct. Cl. 1972); 52 Comp. Gen., supra; Parkson Corporation, B-187101, February 11, 1977, 77-1 CPD 103.

The VA asserts that the test is satisfied here because Lanier's "precipitate delivery * * * forced a hasty calculation of the differential and issuance of the purchase order with the consequent mistake." In this connection, VA states:

> " * * * the competition for this job was extremely keen. The purchase order in question was not casually issued after a methodical review of the Federal Supply Schedule prices and other pertinent factors. Both Lanier and Dictaphone Corporation representatives were importuning the Contracting Officer to select their products * * *. Lanier's representative * * * gave a 'lowest and final' offer orally on June 17, 1976. This was put in letter form on June 18, 1976. That same day the dictation equipment was delivered * **. No purchase order was sent * * * prior to delivery. Rather, the person * * * who delivered the goods picked up the purchase order at the time of delivery."

VA further asserts that "Lanier was aware that the Contracting Officer could not make an award in violation of the Buy American Act and implementing regulations and yet it made shipment without having received a purchase order and before the proper method of calculation could be determined by the Contracting Officer."

We cannot agree. The cases in which contractor action resulted in an illegal award involved situations where the contractor's pre-award representation (or failure to make an appropriate representation) led the contracting officer to make an award that should not and otherwise would not have been made. For example, in Prestex, Inc. v. United States, 320 F. 2d 367 (Ct. Cl. 1963), the would-be contractor submitted a sample which purportedly complied with the specifications although in fact it did not. In H. L. Yoh Company, et al., B-186347, B-185495, October 14, 1976, 76-2 CPD 333, the offeror failed to execute a solicitation certification regarding the Pinkerton Act and instead submitted a separate misleading statement which led the contracting officer to erroneously conclude that award to that offeror would not violate the Pinkerton Act.

Here, there is no evidence of record which suggests that Lanier directly contributed to an erroneous award. The Buy American Act evaluation was performed solely by the contracting officer and, insofar as shown by this record, was not based on any misleading or incorrect information provided by Lanier. That Lanier was quick to deliver does not change the fact that, prior to that delivery, it was the contracting officer's duty to make a proper evaluation and to determine the appropriate awardee on the basis of the evaluation. We fail to see how Lanier's "precipitate delivery" could have materially affected that evaluation or how Lanier could have known that the contracting officer's selection of Lanier might have been based on the faulty application of the Buy American Act. Furthermore, while the contracting officer was advised by GSA that the Buy American Act differential should have been applied to Lanier's price without regard to the prompt payment discount or trade-in allowance, and while this was consistent with our decision in 53 Comp. Gen. 225 (1973), in which we upheld a contracting officer's application of the differential without regard to trade-in prices, we are aware of no regulation which specifically so requires.

Accordingly, we cannot conclude that Lanier either directly contributed to an improper evaluation or was or ever should have been aware that the evaluation was contrary to the regulatory provisions implementing the Buy American Act. Therefore, we find that the purported cancellation of the purchase order was improper, and that a valid contract existed between Lanier and the Government.

In view of this conclusion, the matter is properly for further consideration by VA and Lanier rather than this Office. The claimant specifically has pointed out that the claim was filed here in lieu of a "Disputes" clause proceeding only because of VA's denial

that a valid contract existed. We have now held VA to be wrong as a matter of law. Furthermore, although Lanier states its merchandise was "accepted" by VA, our record does not establish whether VA has inspected the Lanier marchandise and/or determined whether the delivered goods conformed to what was ordered. Therefore, we think the contracting officer should now determine whether to proceed under the contract or to terminate the contract for the convenience of the Government and proceed in accordance with applicable termination procedures. See ITT Defense Communications Division Defense-Space Group, ASBCA No. 13420, February 28, 1969, 69-1 BCA 7548.

With regard to the claimed exhaustion of available funds, we need only point out that the validity of the Lanier contract and the Government's payment obligations thereunder are not affected by the exhaustion of funds subsequent to award of the contract. Ross Construction Corporation v. United States, 392 F. 2d 984 (Ct. Cl. 1968); Ferris v. United States, 27 Ct. Cl. 542 (1892); New York Central and Hudson River Railroad v. United States, 21 Ct. Cl. 468 (1886); see Lovett et al. v. United States, 104 Ct. Cl. 557, 582-3 (1945).

For the Comptroller General
of the United States