Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: T-L-C Systems

File: B-285687.2

Date: September 29, 2000

Sidney Earley for the protester.
Frank J. Tokarz for Monaco Enterprises, Inc., an intervenor.
Raymond M. Saunders, Esq., Department of the Army, for the agency.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in prepartion of the decision.

DIGEST

After receiving quotes in response to a request for quotes for a fire alarm system, agency improperly placed an order under a Federal Supply Schedule contract including items integral to the system but not listed in the contract; agency's proposed corrective action of simply deleting the items from the order and otherwise procuring them, presumably on a noncompetitive basis from the awardee, does not render the protest academic, because the remaining FSS order does not meet the agency's need for a complete system, and the agency received and evaluated a significantly lower-priced, acceptable quote from a non-FSS vendor (the protester) to supply such a system.

DECISION

T-L-C Systems protests the issuance of an order to Monaco Enterprises, Inc. under Monaco's General Services Administration (GSA) Federal Supply Schedule (FSS) contract No. GS-07F-7832C pursuant to request for quotations (RFQ) No. DAHA1300T6057, issued by the Department of the Army, Iowa Army National Guard, for the delivery and installation of a radio frequency fire alarm communication system. T-L-C contends that the order was improperly placed with Monaco and that T-L-C should have received the award since it submitted the low-priced, technically acceptable quote under the RFQ.

We sustain the protest.

The RFQ solicited quotes for a radio frequency fire alarm communication system, Monaco model D-700 or approved equal, for 25 buildings at the 185th Fighter Wing, Sioux City, Iowa and 4 buildings at the 133rd Air National Guard, Fort Dodge, Iowa. The RFQ's statement of work (SOW) provided that the "[s]ystem shall include a central radio alarm receiving/processing unit consisting of computer, monitor, printer, radio frequency modulator and uninterruptable power supply; remote transmitters, antennas, lightning arrestors, enclosures and coax cables." The SOW also required the system at Fort Dodge to include telephone dialers that "[u]pon activation . . . would send an alarm message to the alarm shop and the central radio alarm receiving/processing unit in Sioux City." See Agency Report, Tab 20, SOW.

The RFQ was issued to several FSS vendors, including Monaco, listed in the FSS covering radio frequency fire alarm systems,[1] as well as to two vendors, including T-L-C, which do not have FSS contracts.[2] Only Monaco, T-L-C, and the other non-FSS vendor submitted quotes in response to the RFQ. The vendors submitted technical responses to the RFQ describing their proposed systems, including part numbers, with T-L-C submitting the lowest-priced quote at $121,464.97, Monaco the next lowest quote at $145,000.56, and the other non-FSS vendor with a quote of $164,440. Agency Report, Tab 6.

After a technical review of the proposals, the Army found all three quotes met the agency's requirements, but that award to Monaco was in the government's best interest because only Monaco's complete system could be purchased under its FSS contract. In this regard, the memorandum of record of the evaluation stated:

1. The technical review found all quotes to meet the governments requirements. Upon investigation only one company is under GSA contract. The IOWA AIR NATIONAL GUARD Contracting Officer believes that Monaco offers the best value at the lowest price under GSA.

2. Approximately eight GSA vendors were called to see if they had equipment like what we needed. One vendor was found that could provide a complete System. Two other offers were received but were not under GSA Schedule.

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[1] The FSS covering this item is FSC Group 63, Part I. Agency Report, Tab 19.

[2] While the agency claims that it apprised T-L-C and the other non-FSS vendor that it intended to place the order for the fire alarm system under the FSS, the RFQ did not indicate that this was the case and T-L-C denies being so advised. Both T-L-C and the other non-FSS vendor claim that they have federal contracts (presumably indefinite-delivery, indefinite-quantity contracts) under which the procuring activity could place orders for this system.

3. The advantages of Monaco are that they will provide complete turnkey system. We do not have to supply any products, which is a time saver for us. . . .[3]

4. I believe that it is in the best interest of the Government to award a Delivery Order to Monaco System.

Agency Report, Tab 10, Memo For Record (May 23, 2000). Therefore, the Army placed an order with Monaco under its FSS contract. See Agency Report, Tab 9. This protest followed.[4]

T-L-C protests the Army's decision to make award to Monaco under the RFQ because T-L-C submitted the low-priced acceptable quote and not all of Monaco's system is available from Monaco's FSS contract as represented by the Army; specifically T-L-C notes that several critical parts making up the system are not contained in Monaco's FSS contract, yet were included in the FSS order. See Protester's Comments, Tab 15, at 1.

In response, the Army admits that certain items included in Monaco's FSS contract order, specifically 4 dialers, 4 single line surge protectors, 2 D-700 support kits, and 25 lightning arrestors, the prices for which total $18,801.92, were (and are) not part of Monaco's FSS contract. The Army advises that it will delete these parts from the order and re-procure these particular part numbers in accordance with the Federal Acquisition Regulation. See Supplemental Agency Report, Memorandum (Sept. 11, 2000) at 1. Since these are Monaco's part numbers, this will presumably involve a sole source acquisition. T-L-C contends that this corrective action does not satisfy its protest that Monaco should not have received the award because its total system is not included in its FSS contract and that T-L-C should receive the order because it submitted the low-priced, technically acceptable quote.[5]

As required by the Competition in Contracting Act of 1984, in conducting procurements for property or services, agencies, with certain specified exceptions, must obtain full and open competition through the use of competitive procedures. 10 U.S.C. § 2304(a)(1) (1994). Section 259(b)(3) (1994) of title 41 of the United States

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[3] T-L-C notes that its quote also did not contemplate the government supplying any products.

[4] Performance has been withheld pending our decision.

[5] T-L-C also asserts that the installation of the fire alarm system involves construction and is not encompassed under the FSS contract. Our review of the contract shows that the installation work here is expressly authorized by the contract under SIN (special item number) 246-50, ancillary services, which permits services necessary to install the system. See Agency Report, Tab 19, FSS, at 10.

Code provides that the procedures established for the GSA's FSS program satisfy the requirement in 10 U.S.C. § 2304(a)(1) for use of competitive procedures:

> if—(A) participation in the program has been open to all responsible sources; and (B) orders and contracts under such procedures result in the lowest overall cost alternative to meet the needs of the Government.

We have recently concluded that, where an agency decides to purchase from the FSS, it may limit its consideration of which solution meets the needs of the government at the lowest overall cost to goods and services included on the FSS; it need not consider quotes for items not included on FSS contracts. See Sales Resources Consultants, Inc., B-284943, B-284943.2, June 9, 2000, 2000 CPD ¶ 102 at 4. However, an agency may not select an FSS vendor for an order of items on the vendor's schedule and then include in the order items not included in that vendor's FSS contract, if, as here, the non-FSS items are priced above the micro-purchase threshold. See SMS Sys. Maintenance Servs., Inc., B-284550.2, Aug. 4, 2000, 2000 CPD ¶ __ at 2; Pyxis Corp., B-282469, B-282469.2, July 15, 1999, 99-2 CPD ¶ 18 at 4; see also ATA Defense Indus., Inc. v. United States, 38 Fed. Cl. 489, 503 (1997).

Here, the record shows that the selection of Monaco was based primarily on the erroneous belief that Monaco's entire system could be acquired from its FSS contract. The order, however, included items that are not included in Monaco's FSS contract. The order was therefore improper.

Moreover, the deletion of the non-FSS items from the order does not render the protest academic. It is undisputed that the agency needs an integrated and installed fire alarm system; contrary to the agency's understanding at the time it selected Monaco, neither Monaco nor any other FSS vendor can meet that need under an FSS contract. That distinguishes this case from the procurement at issue in Sales Resources Consultants, Inc., supra, where the agency could meet its needs with items available from the FSS. The agency here received and evaluated quotations from non-FSS vendors; the agency thus expanded this acquisition beyond FSS vendors. Accordingly, the agency was required to consider items available from non-FSS vendors. The agency's failure to do so clearly prejudiced T-L-C, because it offered the lowest price for a technically acceptable solution among the quotations that the agency received.

We recognize that in appropriate circumstances an agency may properly decide to purchase some goods or services from the FSS and other related goods or services outside the FSS. Here, however, the agency wanted to purchase an integrated solution from one vendor. The agency's post-protest decision to delete the non-FSS items from Monaco's order and then acquire those items separately appears to be an effort to circumvent the rules limiting the use of the FSS and, indeed, to create a sole-source justification for the subsequent purchase of the non-FSS items from Monaco.

The protest is sustained.

We recommend that the order placed with Monaco be cancelled. It is not clear from the record whether, other than ordering from the FSS, any other alternative to conducting a full and open competition is available to the agency here. In this regard, we recommend that the agency consider whether it is appropriate to acquire the system using simplified procedures pursuant to the test program for commercial items pursuant to FAR subpart 13.5 or whether an order could be placed for the system under an indefinite-delivery, indefinite-quantity contract (perhaps the contract TLC references in its protest, if that is an indefinite-delivery, indefinite-quantity contract). If possible under one of these alternatives and otherwise appropriate, we recommend that award be made to T-L-C. If the agency concludes that no such alternative is appropriate, we recommend, since the value of this acquisition exceeds $100,000, that the agency acquire the system using full and open competition. We also recommend that T-L-C be reimbursed for the cost of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2000). The protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days of receiving this decision.

Anthony H. Gamboa
Acting General Counsel