



Decision

Matter of: Canon USA, Inc.

File: B-311254.2

Date: June 10, 2008

Andrew Mohr, Esq., Cohen Mohr LLP, for the protester.
Colonel David P. Harney, Department of the Army, and Michael D. Tully, Esq.,
General Services Administration, for the agencies.
Eric M. Ransom, Esq., and Christine S. Melody, Esq., Office of General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protest that contracting agency improperly cancelled an order under a Federal Supply Schedule (FSS) blanket purchase agreement is denied where the protester's FSS contract expired before the order was issued.

DECISION

Canon USA, Inc. protests the cancellation of an order issued to it by the Department of the Army under request for quotations (RFQ) No. W9124A-08-T-0010, for digital copier services.

We deny the protest.

In February 2004, pursuant to Federal Acquisition Regulation (FAR) § 8.405-3, the Army established blanket purchase agreements (BPA) with eight contractors holding Group 36 General Services Administration (GSA) Federal Supply Schedule (FSS) contracts for photocopiers. Canon was one of the eight contractors, and was issued a BPA on February 23. The BPA had a 5-year term.

In September 2007, Canon and GSA began to negotiate the renewal of Canon's FSS contract, which was set to expire on October 31. These negotiations ultimately failed. On September 27, concerned about the effect that the expiration of the FSS contract would have on its BPA, Canon contacted the Army to determine whether any action was required to maintain its BPA as a viable ordering vehicle. In response, the Army's contract specialist advised Canon by email that "[a]ccording to our contract . . . the Term of the BPA is 5 years from date of award. This would make your BPA W911SE-04-A-0005 valid until 22 FEB 09 and any extension is

unnecessary.” Opposition to Motion to Dismiss, Mar. 17, 2008, Tab 1, Email, at 1. Canon therefore took no further action with respect to the BPA or the expiration of the FSS contract, and on December 1, Canon’s FSS contract was modified to prohibit the placement of new orders.

On December 13, the Army issued the RFQ to the eight BPA holders. Canon submitted a timely offer under the RFQ, as did at least one other BPA holder, Sharp Electronics Corporation. On January 31, 2008, the Army announced that the order would be issued to Canon, the lowest-priced offeror.

On February 15, Sharp filed a protest with our Office alleging that issuance of the order to Canon was improper because Canon’s FSS contract prohibited the placement of new orders. In response, the Army took corrective action by canceling the order. Our Office dismissed Sharp’s protest as academic on February 26.

On March 3, Canon filed this protest with our Office, alleging that cancellation of the order was improper because its BPA remained a valid ordering vehicle through the time the order was issued. Shortly thereafter, the agency filed a motion to dismiss the protest, arguing that Canon was not an interested party to protest the decision because Canon was not eligible to receive an order under its BPA due to the expiration of its FSS contract.

Because the issue raised involves the FSS program, our Office solicited GSA’s views on the issue of the BPA’s validity. Consistent with the position taken by the Army, GSA’s view is that, when a BPA holder’s FSS contract expires, the BPA is no longer viable as there is no longer an active contract against which orders may be placed. Thus, in this case, when Canon’s FSS contract expired, its BPA, established pursuant to that FSS contract, also expired as a valid ordering vehicle for new photocopier service leases.

In response, Canon asserts that GSA fails to address the central issue in the protest, whether the BPA was established pursuant to, and is wholly dependent on, the FSS contract. On this issue Canon essentially contends that its BPA was not dependent on its FSS contract, but was a separate agreement against which orders could be placed and which was not made coterminous with Canon’s FSS contract by its own terms or by the FAR.

We agree with Canon that an FSS BPA is a separate agreement from its associated FSS contract. Nevertheless, we conclude that when Canon’s FSS contract expired, Canon’s BPA ceased to be a valid procurement vehicle for the placement of new orders because, as explained below, an FSS BPA is in effect solely a pass-through to the BPA holder’s FSS contract and does not provide an independent foundation for issuing orders.

In order for any procurement to be valid, it must be conducted in accordance with the competition requirements set forth in the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(a)(1)(A) (2000), and FAR part 6. Under 10 U.S.C. § 2303(2)(c), contracts awarded under the FSS program pursuant to FAR part 8 satisfy the requirements for full and open competition. As relevant here, FAR § 8.405-3(a)(1) authorizes the establishment of BPAs under FSS contracts as a means to fill “repetitive needs for supplies or services.” It is well-settled, however, that a BPA itself is not a contract; rather, a contract is formed by the subsequent placement of a valid order against the BPA, or by the incorporation of the basic agreement into a new contract.¹ See Envirosolve LLC, B-294974.4, June 8, 2005, 2005 CPD ¶ 106 at 3 n.3, citing Modern Sys. Tech. Corp. v. United States, 24 Cl. Ct. 360, 363 (1991). As with any contract, orders placed under an FSS BPA must satisfy the applicable statutory requirements for competition.

In this case, the record shows that the BPA was issued pursuant to Canon’s FSS contract, the plain language of Canon’s BPA states that it is established “[p]ursuant to GSA Federal Supply Schedule (FSS) Contract Number GS-25F-0023M,” Motion to Dismiss, Tab 1, Canon BPA, at 1, and Canon itself does not dispute that the BPAs here were all “initially awarded to vendors based on their then current GSA copier schedule contracts.” Protest at 5. It is therefore clear that Canon’s BPA is an FSS BPA, established under FAR part 8.4.

Because use of the FSS procedures constitutes full and open competition under 10 U.S.C. § 2303(2)(c), orders placed under a valid FSS contract, whether directly or via a BPA, meet the CICA competition requirements. Conversely, in the absence of a valid FSS contract, any order placed under a BPA must independently satisfy the statutory competition requirements; that is, to be a valid ordering vehicle independent from an FSS contract, the BPA itself would have to have been established using procedures that satisfy the statutory requirements for competition. That clearly is not the case here, or in any FSS BPA of this type, given that the pool of vendors that could receive a BPA was limited to FSS contract holders, as directed by FAR § 8.404(a) (“ordering activities shall not seek competition outside of the Federal Supply Schedules”). Consistent with this interpretation, we have stated that an FSS BPA is not established with the contractor directly, but rather is established under the contractor’s FSS contract, such that FSS BPA orders “ultimately are to be placed against the successful vendor’s FSS contract.” Panacea Consulting, Inc., B-299307.4, B-299308.4, July 27, 2007, 2007 CPD ¶ 141 at 1-2 n.1; see also CMS Info. Servs., Inc., B-290541, Aug. 7, 2002, 2002 CPD ¶ 132 at 4 n.7. Thus, in our view, when,

¹ This view is consistent with the description of BPAs set out in the FAR. Specifically, FAR § 13.303-1 defines BPAs generally as “a simplified method of filling anticipated repetitive needs for supplies or services by establishing ‘charge accounts’ with qualified sources of supply,” and refers to FAR part 16.7, Agreements, for further guidance. Both FAR § 16.702, Basic agreements, and FAR § 16.703, Basic ordering agreements, specifically state that such agreements are not contracts.

as in this case, an agency intends to place an order under an FSS BPA, the vendor must have a valid FSS contract in place because that contract is the means by which the agency satisfies the competition requirements of CICA in connection with any orders issued under the BPA.

Applying this analysis to the facts here, any order placed under Canon's BPA must necessarily be placed through Canon's FSS contract. On December 1, 2007, Canon's FSS contract was modified to prohibit the placement of new orders. As of that date, Canon's BPA was no longer a valid procurement vehicle for the placement of new orders, because new orders could not be placed through Canon's FSS contract and because Canon's BPA was not established pursuant to competitive procedures required to create a valid foundation for orders to be issued directly from the agency to Canon. Therefore, both on the date the RFQ was issued and on the date the order was issued, Canon was ineligible to receive the order. As a result, the agency's decision to cancel the order to Canon was proper.

The protest is denied.

Gary L. Kepplinger
General Counsel