

**DECISION**

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

**FILE:** B-220582.3      **DATE:** March 21, 1986

**MATTER OF:** Canon U.S.A., Inc.--Request for  
Reconsideration

**DIGEST:**

Prior decision is affirmed where the protester has not shown in its request for reconsideration that GAO erred in concluding that an agency's award of a purchase order for six microfilm reader/printers to other than the low priced supplier under a Federal Supply Schedule contract on the basis of greater maintenance availability was a legally sufficient justification for the award and did not constitute an improper "fracturing" of the agency's real needs.

Canon U.S.A., Inc., requests reconsideration of our decision in National Micrographics Systems, Inc; Canon U.S.A., Inc., B-220582 et al., Jan. 9, 1986, 86-1 CPD ¶ \_\_\_\_. In that decision, we concluded that a contracting agency's determination to purchase six microfilm reader/printers from other than the low priced supplier under a mandatory, multiple-award Federal Supply Schedule (FSS) contract was supported by a sufficient legal justification in accordance with the applicable regulations. We also concluded that the protesters had not prevailed in their assertion that the agency's acquisition constituted an improper "fracturing" of a much larger requirement with the intent to evade the maximum order limitation stipulated in the FSS contract. Canon urges that our prior decision is legally erroneous on several points and, therefore, should be reversed. We affirm that decision.

The Bureau of the Public Debt (Bureau), Department of the Treasury, had identified a need for microfilm reader/printers utilizing the newer plain paper technology to replace the reader/printers in current use which require dry silver paper. In order to evaluate the comparative performance of plain paper reader/printers available for purchase, the Bureau requested various vendors to furnish their

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products for operational demonstration and testing at the Bureau's Parkersburg, West Virginia location. (There was no formal solicitation.) National Micrographics Systems, Inc. (NMS), an FSS supplier for both Canon and Minolta reader/printers, furnished units manufactured by each firm to the Bureau for a 2-week evaluation under actual working conditions. Two other vendors also furnished units for testing. The Eastman Kodak Company responded to the Bureau's request, but its product was unavailable for onsite testing at Parkersburg and was instead evaluated for a 1-day period at Kodak's own facility by Bureau representatives.

As the result of its comparative evaluation, the Bureau determined that the print quality of the Kodak product was superior to that of any other plain paper reader/printer tested. The Bureau judged that the print quality of the Canon and Minolta products was good, but also found certain objectionable features in the Canon product, principally with regard to its side-ejection of print copies and its capability for threading short reels of microfilm. In addition, the Bureau was concerned that NMS would not place maintenance personnel in Parkersburg until the Bureau had ordered at least 10 units, but would provide service from its regional office located some 75 miles from Parkersburg. Although Kodak offered maintenance at an annual per unit price that was \$249 higher than that offered by NMS, Kodak technicians were located in Parkersburg. Accordingly, the Bureau determined that it was justified in awarding a purchase order to Kodak even though it was not the low priced supplier.

In their original protests, NMS and Canon urged that the Bureau's comparative evaluation was fundamentally unfair because the Kodak unit had not been tested for an extended period of time under actual working conditions, but had been selected after only a 1-day demonstration at Kodak's own facility. The protesters vigorously disputed the Bureau's finding that the Canon model had certain objectionable operational features and questioned the Bureau's determination that the print quality of the Kodak model was superior. In the latter regard, NMS and Canon noted that the Kodak printer component, in fact, was manufactured by Minolta and was the same component used in the Minolta model that had been evaluated.

Moreover, the protesters objected to the Bureau's determination that selection of Kodak was warranted because the firm offered greater maintenance availability by having service representatives located in Parkersburg. The protesters contended that the service provided by NMS would

be adequate to meet the Bureau's maintenance needs and noted that it was less expensive on a per-unit basis than Kodak's. NMS and Canon asserted that it was improper for the Bureau to require virtual onsite maintenance when this requirement had never been communicated to the various vendors.

Finally, the protesters urged that the Bureau had stated an actual need for an eventual total of 75 microfilm reader/printers and, therefore, that its purchase of six units with end-of-the-year funds constituted an impermissible "fracturing" of what should have been a full and open competition for the entire requirement.

In our January 9 decision, we concluded that the Bureau's decision to purchase from Kodak was proper. We emphasized the position of this Office that an agency's justification for purchasing from a higher priced FSS supplier is not subject to legal objection unless that justification is shown to have no reasonable basis. Olivetti Corp. of America, B-195243, Sept. 21, 1979, 79-2 CPD ¶ 212. Applying that standard of review, we pointed out that the Federal Property Management Regulations (FPMR), which govern purchases from the General Services Administration's multiple-award FSS's, expressly provide that greater maintenance availability may serve as a justification for purchases made at other than the lowest schedule price. FPMR, 41 C.F.R. § 101-26.408-3(b)(6)(iii) (1985). Therefore, although certain aspects of the Bureau's comparative evaluation were in controversy, it was our view that the Bureau's determination that Kodak would provide greater maintenance availability was a legally sufficient justification to award the purchase order to Kodak.

Moreover, to the extent NMS and Canon had asserted that the Bureau's purchase of only six units constituted an improper "fracturing" of its real needs, we concluded that the protesters had not met their burden of proof. In order to have prevailed in their assertion, it was our view that the firms would have had to show that the acquisition of the six units was merely the first in a series of several purchase orders to be placed with the specific intent to evade the maximum dollar limitation stipulated in the FSS contract. We found no evidence in the record that served to make such a showing.

In its present request for reconsideration, Canon contends that our prior decision is legally erroneous on several points. Canon argues that our decision ignored the fact that the Bureau's evaluation was unfairly conducted and, therefore, that the evaluation provided no reasonable

basis for the Bureau's determination that the Kodak product was superior. Canon also contends that we erred in concluding that the allegedly greater maintenance availability offered by Kodak was a legally sufficient justification for the firm's selection, since the Bureau had never established its actual minimum maintenance needs. In this regard, Canon contends that our conclusion was based on the erroneous assumption that the Kodak product would provide more reliable performance and, hence, that there was no basis for us to find that selection of the Kodak product, even with more available service, would ultimately result in equipment malfunctions of shorter duration. Finally, Canon urges that we have simply misapplied the applicable regulations and prior precedent of this Office by holding that the Bureau's acquisition could not be characterized as an improper "fracturing" of a much greater actual requirement.

Contrary to Canon's belief, we did not ignore the fact that the Kodak product had not been evaluated under actual working conditions for an extended period of time as had the other reader/printers. We did not specifically address the technical issues in controversy in our decision because any extended analysis of those issues was not necessary to reach our ultimate conclusion. We recognized that the Bureau's limited evaluation of the Kodak product might create some doubt as to the validity of its technical determinations but, also aware of the fact that there had never been a formal solicitation for the units, we could not conclude that the Bureau's action was a departure from the basic rule of federal procurement that all offerors be treated equally. Cf. Union Carbide Corp., 55 Comp. Gen. 802 (1976), 76-1 CPD ¶ 134 (an agency's change in the "ground rules" applicable to a negotiated procurement must be effectively communicated to all offerors to allow for competition on an equal basis). Here, there was no express representation by the Bureau that all products would be evaluated for a specific length of time under specified conditions. Moreover, the Bureau reported that it had evaluated the Kodak product under the same criteria as it had evaluated the other units, i.e., acceptance of short reels of microfilm, quality of prints, ergonomics of the work station, etc. Therefore, even if the Kodak unit was not tested under the same working conditions for the same period of time, we could not say that the evaluation was inherently "illegal" in the sense urged by Canon.

In any event, we continue to believe that our prior decision properly concluded that the greater maintenance availability offered by Kodak constituted a sufficient legal justification to uphold the award to the firm. It is true,

as Canon notes, that justifications for purchases from other than the low priced supplier under an FSS contract should be based on the agency's specific, definite needs and should be clearly expressed. FPMR, 41 C.F.R. § 101-26.408-3(a). However, we do not agree with Canon's assertion that the Bureau's justification for purchase from Kodak on the ground of greater maintenance availability failed to meet that standard. In our view, it is obvious that the Bureau had a need to minimize equipment "down-time" and consequent disruptions in print production. In this regard as well, it is also obvious that the maintenance offered by NMS was less than what the Bureau deemed as adequate to meet that need.

We did not find that the Kodak product would prove to be more reliable, only that "service personnel located in the same city will be able to respond more quickly to maintenance requests as they arise." We do not accept the argument that the maintenance offered by NMS out of its regional office, located some 75 miles distant from Parkersburg, would necessarily meet the Bureau's minimum maintenance needs, where the Bureau determined that the service response times would range from 2 to 4 hours.

Thus, since the Bureau's administrative report reasonably articulated its justification for purchasing from other than the low priced FSS supplier, in part on the ground of greater maintenance availability<sup>1/</sup>, the award to Kodak was legally supportable. Cf. National Office Systems, Inc., B-201133, Mar. 18, 1981, 81-1 CPD ¶ 210; Copylease Corp. of America, B-196820 et al., Jan. 6, 1981, 81-1 CPD ¶ 2 (protests sustained where agency justifications for purchases from higher priced FSS suppliers shown to be unreasonable or otherwise not clearly expressed in the record).

We also find no merit in Canon's argument that our prior decision erred in concluding that the Bureau's purchase of six units was an improper "fracturing" of a larger requirement. As we noted in our decision, FSS contracts provide maximum dollar limitations (here \$100,000) "above which

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<sup>1/</sup> Although Canon correctly points out that FPMR, 41 C.F.R. § 101-26.408-3(b)(6)(iii), provides that greater maintenance availability should result in longrun savings greater than the difference in purchase prices, we believe it is only reasonable to assume that Kodak's apparent ability to provide quicker response to maintenance problems as they arise will enhance the Bureau's productivity and performance, thus tending to offset Kodak's approximately \$3,500 higher item price.

agencies may not submit orders and contractors may not accept orders." FPMR, 41 C.F.R. § 101-26.401-4(c)(1). Thus, agencies may not evade such limitations by splitting an actual larger requirement into several small orders, each within the dollar limit specified, since the maximum order limitation applies to both a single purchase order or to a series of purchase orders placed within a short period of time. Quest Electronics, B-193541, Mar. 27, 1979, 79-1 CPD ¶ 205.

However, applying our holding in Quest to the situation, we concluded that the Bureau's acquisition of only six units, even though it apparently had an eventual need for 75 units, could not be characterized as an improper "fracturing" of its real needs because there was simply no evidence that it intended to place any more orders with Kodak, each within the \$100,000 limitation, so that it could ultimately acquire all 75 units without conducting a full and open competition. This is clearly distinguishable from the factual situation in Quest where the agency placed nine purchase orders with an FSS supplier on a single day, each within the applicable dollar limitation, and the total amount of the orders was far in excess of that limitation.

Rather, the record established that the Bureau, although requiring a total of 75 units at some future point, had a need for only 6 units at the time it placed the order because it had just recently acquired the capability to computer index its microfilm and only needed a limited number of units that could access such computer indexing until a greater amount of microfilm was made compatible with that use. We do not believe, as Canon asserts, that our decision in Quest implies that improper "fracturing" immediately arises when the agency knows that it has an actual need for a quantity greater than the one ordered. Instead, that case specifically stands for the legal proposition that an agency cannot seek to evade a maximum dollar limitation stipulated in an FSS contract by intentionally splitting a known present requirement into a series of smaller orders. Since there is nothing in the record to suggest that the Bureau intended to do so here, the protesters could not prevail in their assertion that the acquisition of the six units represented an impermissible "fracturing."

Finally, we find no merit in Canon's assertion that the Bureau's action was violative of the Federal Acquisition Regulation, § 6.301(c) (FAC 84-5, Apr. 1, 1985), which provides that contracting without providing for full and open competition shall not be justified either on the basis of a

lack of advanced planning or concerns related to the amount of funds available (such as the expiration of fiscal year funds). In fact, the Bureau had planned to replace its reader/printers with those using the newer plain paper technology during fiscal year (FY) 1986. The Bureau acquired the six units in question because funds for their purchase became available in FY 1985, and it had a present need for those units with respect to the limited amount of computer indexed microfilm compatible with their use. In our view, this represents neither a lack of advance planning nor necessarily a precipitous expenditure of funds set to expire.

The decision is affirmed. See Wheeler Brothers, Inc., et al.--Request for Reconsideration, B-214081.3, Apr. 4, 1985, 85-1 CPD ¶ 388.

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