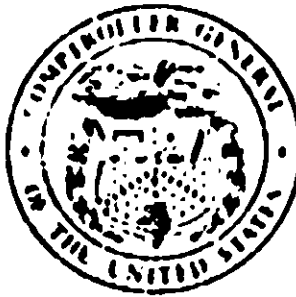


**DECISION**



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

8321

**FILE:** B-192314  
B-192373

**DATE:** November 14, 1978

**MATTER OF:** Dictaphone Corporation;  
Business Equipment Center, Ltd.

**DIGEST:**

1. Request for quotations issued to obtain information from multiple-award Federal Supply Schedule contractors which stated that award would be made to vendor offering lowest price did not override Government's alternative under Federal Property Management Regulations to justify purchase of higher-priced items.
2. No requirement is seen under Federal Property Management Regulations that Government include justifications for purchase of higher-priced Federal Supply Schedule items in request for quotations issued to obtain information from multiple-award Federal Supply Schedule contractors.
3. GAO believes that while justification for \$25,000 purchase of dictation equipment under Federal Supply Schedule at price approximately \$525 higher than lowest-priced supplier--based on several desired technical features of higher-priced equipment and agency's perceived need for "compatibility" with existing equipment--is questionable in several respects, it has not been shown to totally lack reasonable basis.
4. Prices offered for trade-in items are matters of business judgment, and it is not improper for bidder or offeror to structure such prices so as to gain competitive advantage, as long as no provision of solicitation is violated.
5. Under Federal Property Management Regulations purchase may be made at other than lowest price available under multiple-award Federal

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Supply Schedule where agency determines it is essential that item selected be compatible with existing items. On purchase at other than lowest price of replacement dictation equipment amounting to one-third of current inventory, while several justifications offered for higher-priced purchase are questionable, protesters have not shown that justification based on technical incompatibility of protester's equipment and current equipment clearly lacks reasonable basis.

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Dictaphone Corporation and Business Equipment Center, Ltd. (BEC), have protested concerning the award of two orders to Lanier Business Products, Inc. (Lanier), by the Department of Justice. The orders--Nos. J-812-06125-G (Order G) and J-814-06249-H (Order H)--were placed under a Lanier Federal Supply Schedule (FSS) contract. The main issues involve the Department's justifications for ordering from Lanier when lower-priced equipment was available under the protesters' FSS contracts. While the orders were placed in June 1978, delivery has been suspended pending our decision on the protest.

### I. Background

In June 1978 the contracting officer received requisitions from the Department's Tax and Civil Divisions for dictation equipment. Both listed Lanier as the suggested source. The contracting officer issued requests for quotations (RFQ's) to vendors on the multiple award FSS which provide equipment similar to Lanier's. The RFQ's indicated that Lanier model numbers were included only to indicate the general needs of the Government and not as a "brand name or equal" specification. Apparently, the procedure of issuing RFQ's was utilized because the Department wanted to obtain vendors' prices on trade-in items in addition to information about what was available under vendors' FSS contracts.

### A. Order G

The RFQ for this order--involving 78 dictation units of several types, 20 transcribing units, plus cassettes--contained a statement that "Award will be made to the vendor offering the lowest, total aggregate amount." The contracting officer has stated:

"Evaluation of the responses received indicated that Lanier provided the lowest schedule price and the order was issued accordingly. After issuance of the order it was learned that a misunderstanding occurred between the General Services Administration and this office regarding

application of the Buy American Act. Correction of this error required the evaluation to be recomputed. Results indicated that Dictaphone provided the lowest prices under the schedule. The Tax Division was notified of the result and indicated their desire to provide a justification to support purchase of other than the lowest priced items \* \* \*. A determination was provided on July 13, 1978, accepting the justification as sufficient to support the procurement."

B. Order H

In the original evaluation on this order, which did not include application of the Buy American differential, BEC was lowest at \$17,141.38, Dictaphone second low at \$23,157 and Lanier highest at \$25,420. With application of the Buy American differential, the relative standing is unchanged. Lanier was not lowest under either evaluation, and the contracting officer states he advised the Civil Division that the order would be placed with the lowest-priced vendor unless a justification could be provided to support the purchase of higher-priced items. The Civil Division provided a justification for purchase of Lanier equipment which was determined to be sufficient. This order involves 40 dictation units of several types, 15 transcribing units, and a quantity of cassettes.

II. Substantive Issues

A. Order G

Most of the objections with respect to this order have been advanced by Dictaphone. The protester points out that its price (\$24,261.51) was lower than the corrected Lanier price with the Buy American differential applied (\$24,786.64). Dictaphone argues initially that by the clear

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language of the RFQ, award was to be made to the vendor whose equipment satisfied the general needs indicated in the RFQ and which offered the lowest price. The contracting officer responds that the intent of the RFQ statement that award would be made to the vendor offering the lowest total aggregate amount was to indicate that there would be only one award as opposed to multiple awards, and asserts that the statement in no way eliminated the Government's alternative under Federal Property Management Regulations (FPMR) § 101-26.408-3 (41 C.F.R. § 101-26.408-3 (1977)) to justify a purchase from a higher-priced supplier.

Also, on both Order G and Order H, infra, Dictaphone contends that various justifications offered by the Justice Department show that the agency never disclosed its true minimum needs, and is attempting to rationalize the awards to Lanier by an after-the-fact superimposition of requirements which were never stated in the RFQ's. The contracting officer has answered that vendors were on notice that this was a procurement under the FSS and FPMR's, and states that the RFQ was used as a method of determining what was available under the applicable FSS. The contracting officer asserts that there is no requirement to provide "justifications" for purchase from a higher-priced vendor as part of such a request for information.

The RFQ's were issued on Standard Form 18 (July 1966), which provides in part that "THIS IS A REQUEST FOR INFORMATION, AND QUOTATIONS FURNISHED ARE NOT OFFERS." See Federal Procurement Regulations § 1-16.201-4 (FPR circ. 1, 2nd ed. June 1964). In light of this and since the procurement was clearly being conducted under the multiple-award FSS, we see no basis to conclude that the RFQ statement that award would be made to the vendor offering the lowest amount somehow had the effect of overriding the Government's option under the FPMR's to justify the purchase of higher-priced items. However, it would be preferable to avoid the use of such statements in future RFQ's.

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Where an RFQ is used to obtain information from FSS contractors, it is desirable that the statement of the Government's needs be detailed enough so that suppliers whose equipment is clearly nonconforming are spared the time and expense of preparing a response to the RFQ. 52 Comp. Gen. 941, 945 (1973). However, we are unaware of anything in the FPMR's providing that justifications for purchase of higher-priced items must be included in such RFQ's.

For the foregoing reasons, we see no basis for objection to the contracting officer's position on these issues.

The remaining objections concerning Order G are summarized in the following sequence--justification for the purchase from Lanier; Dictaphone's objections; Justice Department's responses; and Lanier's comments:

**Justification:** The Tax Division already has a large number of Lanier units and some Dictaphone units. The Lanier equipment to be purchased under this order is completely compatible with the existing Lanier models. The Dictaphone units which would be purchased are not compatible with the existing Dictaphone models. Buying Lanier units allows the Tax Division to maintain compatibility between the greater portion of its current equipment and the new equipment.

**Dictaphone:** Both products use the standard cassette. The "compatibility" standard is vague and if accepted will destroy competition by locking Lanier into a monopolistic position. It is an attempt to superimpose on the RFQ a requirement for complete interchangeability of units, components,

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and accessories. Also, some Lanier accessories are not compatible with each other. Finally, the issue can be resolved by redistribution of equipment within the Tax Division.

Justice:

Compatibility is a valid justification. The Tax Division currently has Lanier and Dictaphone equipment and stocks accessories for both. In buying from Dictaphone, it would be necessary to stock a third line of accessories. Redistribution of equipment is impractical and unacceptable. It would be extremely difficult to devise a master listing, to explain to the 10 different section chiefs why some must accept old equipment while others are receiving new equipment, and to carry out the actual redistribution itself. Considering that Lanier's corrected evaluated price is only \$525.13 higher than Dictaphone's, the contracting officer believes purchase of the compatible Lanier equipment is justifiable based on the reasons advanced by the Tax Division.

Lanier:

"The present Lanier equipment owned by the Tax Division is totally compatible with the newly procured equipment, i.e., microphone, foot control, headset, indexing, recording medium, and overall function operation."

Justification:

The Lanier unit is far easier to use because of its single switch operation, which allows use with one hand; the Dictaphone unit has separate switches.



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Dictaphone:

This is purely subjective; the FPMR's state that a mere personal preference is not an appropriate justification. Dictaphone's unit can be used with one hand.

Justice:

This is not a mere personal preference, but an opinion based on the way the equipment is manufactured. The responsible Tax Division official examined both units and also asked the opinion of an attorney in the Division before arriving at his opinion.

Justification:

Lanier units shut themselves off automatically within one minute after not being used, reducing wear and tear on the unit, whereas Dictaphone units must be manually turned off.

Dictaphone:

We question the veracity of this statement.

Justice:

We stand by the statement.

Lanier:

"Lanier incorporates automatic motor shutoff in the aforementioned equipment."

Justification:

The Lanier unit has adjustable gain control which allows modulation of the recording and filters out background noises. Dictaphone does not have this feature.

Dictaphone:

We see no reason why this feature is something required for effective performance by the Tax Division. Also, manual gain control has some disadvantages. Dictaphone's unit has a gain control which automatically filters out background noises.

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Justice: The Dictaphone unit filters out background noises but is not as flexible as Lanier's. It does not allow the individual to adjust gain control. Due to limited space in the Tax Division, in many instances two attorneys must share the same office. The adjustable gain control will prove itself to be a valuable feature in these circumstances.

Lanier: The Lanier unit has both automatic and adjustable gain control. The individual can customize the sensitivity of the microphone to his own voice level, or to compensate for unusual background noises.

The FPMR's provide in pertinent part as follows (41 C.F.R. §§ 101-26.408-2, 101-26.408-3 (1977)):

"§ 101-26.408-2 Procurement at lowest price.

"Each purchase of more than \$500 per line item made from a multiple-award schedule by agencies required to use these schedules shall be made at the lowest delivered price available under the schedule unless the agency fully justifies the purchase of a higher priced item. \* \* \*

"§ 101-26.408-3 Justifications.

"(a) Justifications of purchases made at prices other than the lowest delivered price available should be based on specific or definitive needs which are clearly associated with the achievement of program objectives. Mere personal preference cannot

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be regarded as an appropriate basis for a justification. Justifications should be clear and fully expressed. Recital of, or reference to, one of the factors set forth in paragraph (b) of this § 101-26.408-3 is not sufficient.

"(b) The following examples illustrate factors that may be used in support of justifications, when used with assertions that are fully set forth and documented.

"(1) Special features of one item, not provided by comparable items, are required in effective program performance.

"(2) An actual need exists for special characteristics to accomplish identified tasks.

"(3) It is essential that the item selected be compatible with items or systems already existing within using offices.

\* \* \* \* \*

"(6) Justifications which incorporate features of the following examples must be based on objective factors which adequately establish the advantages inherent in purchase of the higher priced item when:

"(i) Probable life of the item selected, as compared to that of a comparable item at a lower cost, is sufficiently greater so that the additional purchase price is economically warranted.

\* \* \* \* \*

"(iii) Greater maintenance availability, lower overall maintenance costs, or the elimination of problems anticipated with respect to machines or systems, especially at isolated use points, will produce longrun savings greater than the difference in purchase prices."

Thus, once an agency determines its minimum needs, it is required to procure from the lowest-priced supplier on the schedule, unless it makes an appropriate justification for purchase from a higher-priced supplier. See Prestype, Inc., B-187093, April 27, 1977, 77-1 CPD 286; Microcom Corporation, B-186057, November 8, 1976, 76-2 CPD 385; 52 Comp. Gen. 941, supra. A justification must be adequately substantiated; however, the fact that the protester disagrees with the agency's reasoning is not necessarily sufficient to show the justification is objectionable. Our Office has indicated that we will not object to an agency's justification unless it is clearly shown to have no reasonable basis. Cf. Microcom Corporation, supra. Compare the inadequate justifications in 46 Comp. Gen. 713 (1967) and Prestype, Inc., supra, with the result in Mid-Atlantic Industries, Inc., B-181146, November 21, 1974, 74-2 CPD 275.

Our standard of review in this matter must be emphasized, as we believe it is possible the protester does not fully understand our function in deciding such issues. It is not for us to decide what supplier's equipment should be purchased. Rather, our function is to review the agency's judgment in such matters. We do not believe that a legal objection to the agency's determinations is warranted unless those determinations are clearly shown to be totally unreasonable.

In the present case, we believe the agency's justification in several respects is weak. The greater ease of operation of the single switch feature, if not a mere personal preference, comes very close to one. The automatic shutoff feature could be a sound basis if supported by objective evidence as to its effect on the probable life of the units. However, the agency has not furnished such evidence.

We also have difficulty with the agency's position concerning compatibility and the redistribution of equipment. If the Tax Division does not have a master list of its dictation equipment, it should seriously consider developing one. While the agency's statements concerning the other administrative difficulties of redistributing equipment are not without some weight, FPMR § 101-26.408-3(b)(3) speaks of a situation where it is essential that the item selected be compatible with existing items. The cost of adding a new line of Dictaphone accessories could be a valid basis for a justification, but the record does not show the amount of such cost.

As for the controversy over "compatibility" and "interchangeability," in one case (45 Comp. Gen. 815 (1966)), we indicated that the word compatible, in its normal, ordinary meaning, refers to a system being able to function as a complete unit, without one portion of the system adversely affecting the performance of another portion. We are unaware of any authority suggesting that the FPMR uses the word in any other sense. If, as the agency maintains, buying additional Lanier equipment would enable the Tax Division's dictation system to continue to function as a complete unit, while buying additional Dictaphone equipment would have an adverse effect in that some fairly substantial reorganization or restructuring of the system would be required, we can see some rational grounds to support a "compatibility" justification. Such a result would be analogous to various cases where a need for system compatibility (among other factors)

has been held sufficient to justify a sole-source award despite allegations that a portion of the requirements could be broken out for competitive procurement. See, for example, Allen & Vickers, Inc., et al., 54 Comp. Gen. 445 (1974), 74-1 CPD 303. However, as with other areas of the justification, the agency has not furnished much in the way of background factual data underlying its reasoning as to the administrative difficulties involved in redistribution of its dictation equipment.

Concerning automatic versus adjustable gain control, we see no grounds to conclude that the agency's position clearly has no reasonable basis.

As the foregoing comments indicate, we think the agency's justification is questionable in several respects. However, in view of the standard of review applied by our Office, we do not believe the protester has shown enough to support a conclusion that the agency's justification is totally unreasonable. Stated another way, we think this is a borderline case in which it cannot be said that the justification, although questionable, fails to meet a bare minimum standard of legal sufficiency.

Finally, BEC has raised an objection concerning the prices offered by Lanier for certain trade-in items on Order G. BEC complains that on Order C Lanier offered \$100 each for trade-in units whereas on Order H Lanier offered only \$5 each for similar trade-in items. BEC contends that the \$100 trade-in price on Order G could not have been based on the units' resale, spare parts or scrap value, and that it was an obvious unfair competitive device.

As the contracting officer correctly points out, the amount of a trade-in offer is a matter of business judgment for bidders or offerors to decide. Dictamatic Corporation, B-182984, May 13, 1975, 75-1 CPD 292. It is not improper for a bidder to structure its trade-in prices so as to

gain a competitive advantage over other bidders, so long as no provision of the solicitation is violated thereby. See 53 Comp. Gen. 225, 227 (1973). We see no provision in the present RFQ's which was contravened by Lanier's trade-in prices.

B. Order H

1. Dictaphone Protest

The agency's justifications for the purchase from Lanier, Dictaphone's objections, the agency's responses and Lanier's comments are as follows:

**Justification:** Since February 1976, the Division has purchased the following Lanier equipment: 75 dictators, 66 transcribers and 21 "Pocket Secretaries." Lanier features are not compatible with other transcribers. For example, the program dial for document "Q"ing, one of the most important features of the equipment, cannot be used unless both the attorney and the secretary have Lanier equipment.

**Dictaphone:** The justification makes reference to a Dictaphone product which has been discontinued. The Dictaphone equipment offered uses electronic "Q"ing which "\* \* \*" accomplishes the same result as the Lanier equipment." Despite changes in Dictaphone's product line since February 1976, the agency refused to let Dictaphone demonstrate its equipment before this order was issued. Dictaphone and Lanier product lines are compatible. Both use the standard cassette. The Lanier transcriber can read Dictaphone cuetones. The entire issue of compatibility can be resolved by proper distribution of equipment within the Civil Division,

i.e., issuing newly purchased Dictaphone equipment to offices which now have no equipment. Also, in the Division's current inventory there is probably a compatibility problem among Lanier accessories.

Justice:

Buying Dictaphone equipment would mean that the Civil Division typing pool would have to have duplicate (i.e., both Lanier and Dictaphone) transcribing units on hand. Also, the protester is unreasonably asking the Government to formulate a plan for redistribution of equipment for Dictaphone's benefit. The equipment being purchased is not intended for offices that now have no dictation equipment. Rather, it will be issued based on individual needs to replace existing equipment. The Civil Division believes redistribution is unacceptable both because of the logistics involved and because it is inadvisable to require attorneys to turn in equipment they are comfortable with.

Lanier:

Lanier's double indexing system of electronic "Q"ing is unique and not compatible with other contractors' equipment. Dictaphone transcribing units will not recognize Lanier's electronic cues. Also, the Dictaphone microphone, foot control and listening device are not compatible with Lanier's.

Justification:

21 Lanier "Pocket Secretaries" already on hand require a special microsette adapter for the transcriber; the adapter cannot be used with other transcribers. Introducing a second make of equipment



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would vastly limit the use of these machines which are in constant demand.

Dictaphone:

An adapter can be used with the Dictaphone transcriber. Dictaphone could have made this capability available as of June 30, 1978, if the Government had disclosed this requirement in the RFO. In any event, the Civil Division ordered standard cassettes, not micro cassettes.

Justice:

Civil Division attorneys travel constantly. There is a heavy demand for portable dictators. The Civil Division uses microettes and the transcribers must be capable of accepting them. Dictaphone's catalog does not show any micro-sette adapter.

Justification:

The training required for new users of dictation equipment has been dramatically reduced since the purchase of Lanier equipment in 1976, and this was a major consideration in the Division's decision not only to select Lanier equipment for the present order but to have only one make of equipment in the Division.

Dictaphone:

This is another personal preference, and in no way clearly and definitively justifies a specific need of the Division which only Lanier can meet. The statement indicates the essence of the Department's position, i.e., to disregard competition and make sole-source awards to Lanier.

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Justice: (Contracting officer's report does not discuss or rely on this ground of the justification.)

Concerning the agency's compatibility justification, we note that the quantity of equipment being purchased amounts to about one-third of current inventory. We have no reason to question the agency's statement that the equipment purchased is for use as replacements on a case-by-case basis. Unlike the situation in the Tax Division, there is no indication in the record that the Civil Division owns any Dictaphone equipment. Also, Dictaphone has not effectively denied the agency's assertion that there is a technical incompatibility (in regard to electronic "Q"ing) between the current Lanier equipment and the Dictaphone equipment which would be purchased under this order.

As previously noted, FPMR § 101-26.408-3(b)(3) provides that purchase at other than the lowest price may be justified where it is essential that an item be compatible with existing items. Whether compatibility is really essential comes down to a matter of judgment on the part of the agency. If our Office were conducting this procurement, we believe that the substantial dollar premium being paid for compatibility--as contrasted with the close spread of prices on Order G--would certainly be reason to reconsider whether maintaining compatibility is truly essential. However, in reviewing the agency's justification, we cannot say that the agency's judgment in this matter has been clearly shown to be totally unreasonable.

We agree with the protester that (as the contracting officer apparently concedes) the "training" justification is weak. On the microsette adapter issue, Dictaphone has not denied the agency's assertion that its catalog does not show this item.

In view of the foregoing, we do not see grounds to support a conclusion that the agency's justification clearly has no reasonable basis.

## 2. BEC Protest

BEC points out it is undisputed that its evaluated price was lowest for this order, and contends that the Sony equipment it offers fully meets the Government requirements. On the issue of electronic "Q"ing, BEC contends that neither Dictaphone's nor Lanier's equipment can match Sony's efficiency. In regard to the question of compatibility, BEC asserts the Sony equipment is compatible with the 21 Pocket Secretaries. Also, BEC alleges that some Lanier accessories are not interchangeable with Lanier's current product line. More generally, BEC complains that the Civil Division never reviewed Sony equipment nor was BEC requested at any time to furnish equipment for evaluation purposes.

The contracting officer states that the Civil Division reviewed BEC's response to the RFQ and determined that the Sony equipment would not meet its minimum needs. Specifically, the contracting officer states that review of the descriptive literature provided by BEC failed to indicate that the Sony transcriber had the capability to accept a micro cassette adapter, or that this feature was available under their FSS contract. Further, the contracting officer states that the Sony equipment is capable of accepting only one of the two electronic document "Q"ing signals and cannot differentiate between the two signals.

In response, BEC contends it could have demonstrated the ability of its transcriber to accept the micro cassette adapter. Also, BEC asserts that Sony's then current FSS catalog showed a suitable adapter was available, and alleges that the agency evidently made no effort to research the catalog. On the document "Q"ing issue, BEC has stated only that the Sony equipment accepts one of the electronic signals and handles the second " \* \* \* in its own way \* \* \*."

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The agency's position on the microsette adapter is unconvincing, as there is no indication in the record that in addition to examining BEC's response to the RFQ the Civil Division checked Sony's FSS catalog. However, BEC's protest essentially comes down to the issue of electronic "Q"ing. While the contracting officer has stated that the Sony equipment did not meet the Civil Division's minimum needs, it appears to us that the agency is actually relying on the "incompatibility" problem as a justification for purchasing from Lanier at a higher price than BEC. As with Dictaphone, BEC has not effectively denied the agency's assertion that the Sony equipment is technically incompatible with the Civil Division's current Lanier equipment in respect to electronic "Q"ing. For the same reasons as already discussed in connection with Dictaphone's protest on this issue, we do not believe that on the record the protester has presented enough to show the agency's decision to purchase higher-priced compatible equipment clearly has no reasonable basis.

In regard to the objections by both protesters that they were not given an opportunity to demonstrate their equipment, we believe that an agency's observing various makes of equipment in operation before purchase can be a factor supporting the reasonableness of its FSS purchase decision. See 47 Comp. Gen. 135, 140 (1967). However, the FPMR's do not indicate any requirement for equipment demonstrations prior to purchase. We believe that where an agency makes its evaluation based on information in the FSS contracts, the fact that there is no demonstration of the protester's current equipment is not in itself sufficient to disturb an otherwise unobjectionable award. See, in this regard, A. B. Dick Company, B-190331, May 18, 1978, 78-1 CPD 381. Further, there is no indication in the present case that demonstrations of Dictaphone or Sony equipment would in any way alter the agency's conclusion that such equipment is technically incompatible with Lanier's in respect to electronic "Q"ing.

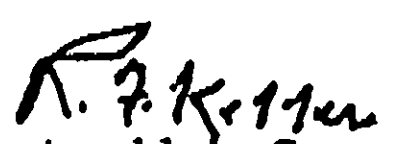
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### III. Conclusion

The protests are denied. In view of this result, various issues raised by Lanier concerning the agency's evaluation of Dictaphone's prices need not be considered.

While we find the protested orders are not legally objectionable, we believe it is worth repeating that, as indicated in our discussion of the issues, in several respects the Department's justifications for its procurement actions are questionable or only marginally adequate. We think it is a fair characterization of the present case to say that while the Department's reports show enough rational substantiation so that its procurement decisions do not fall below a minimum standard of legal sufficiency, at the same time the circumstances of the case definitely suggest a need for closer scrutiny by responsible Department personnel of the bases for procurement decisions in placing orders under multiple-award Federal Supply Schedule contracts. In particular, in future procurements of this type a more thorough examination of minimum needs before soliciting pricing information from FSS vendors would appear to be desirable.

  
Deputy Comptroller General  
of the United States