

Print

DECISION



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

10,674

FILE: B-192242

99602060

DATE: July 9, 1979

MATTER OF McClane Enterprises

Reconsideration of Claim for Breach of FEDERAL Supply Service Contract

DIGEST:

1. Award of Federal Supply Service multiple award contract does not constitute acceptance of contractor's article as satisfying minimum needs of agencies ordering from Federal Supply Schedule. Even if contractor's article is lowest priced on schedule, agencies may purchase higher priced article from schedule if lowest priced article does not fulfill agency's minimum needs.

AGC 00017

2. General Services Administration did not breach Federal Supply Service multiple award contract with contractor offering lowest priced tree marking paint where estimated quantity term in solicitation states one figure which includes Government's requirements for paint with and without tracer element, and where most Government purchases were for higher priced tracer element paint. Lowest priced contractor claims estimate was misleading. However, solicitation expressly provides that no guarantee is given that any quantities will be purchased and also provides that agencies may purchase higher priced article if justified under Federal Property Management Regulation § 101-26.408. Presence of feature, i.e., tracer element, in higher priced article which is not available in lower priced article provides such justification.

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F.P.M.R.

3. Where General Services Administration (GSA) solicited Federal Supply Service multiple award contracts for Government's requirements for tree marking paint, including paint with tracer element, GAO recommends GSA determine possibility of drafting specifications for tracer element paint and formally advertising. If impossible, future multiple award solicitations should make it clear to all prospective contractors that offers for tracer element paint are solicited.

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McClane Enterprises (McClane) requests reconsideration of our decision in 57 Comp. Gen. 853 (1978) which denied McClane's claim for breach of Federal Supply Service (FSS) contract No. GS-10S-40749 issued by the General Services Administration (GSA). The contract was a requirements-type contract for FSC 80 Class 8010 tree marking paint listed on a multiple award FSS schedule. We ruled in that decision that, since GSA made no promise or guarantee to McClane with respect to the volume of sales which could be expected by McClane, GSA did not breach McClane's contract despite the fact that McClane over a 7-month period only received orders amounting to approximately \$1,000, whereas the request for proposals (RFP) stated previous purchases for a 6-month period that would annualize to \$860,000. We concerned ourselves with the propriety of the Forest Service, Department of Agriculture (Agriculture), ordering approximately \$434,000 of tree marking paint which was priced higher than McClane's paint. The higher priced paint, produced by Nelson Paint Co. (Nelson), was also listed on the FSS schedule. The Nelson paint contains a tracer element developed especially for Government use. We held that Agriculture did not breach McClane's contract because Agriculture was not required to use the schedule and, in any event, Agriculture justified the purchase of higher priced Nelson paint in accordance with the Federal Property Management Regulation (FPMR) § 101-26.408-2 (1964 ed. amend. E-190). Agriculture's justification was the Nelson paint contains a unique tracer element which identifies marked trees to the Government. 92602061

In the request for reconsideration, McClane contends that, by entering into a contract with McClane, GSA accepted the paint described in McClane's contract as satisfying any and all needs of the Government. McClane also contends that if GSA was aware of a special need for paint containing a tracer element, it should have issued a solicitation for such paint and given other suppliers besides Nelson an opportunity to offer a tracer element paint.

McClane's first contention reflects a misunderstanding of the FSS multiple award schedule. When GSA negotiates multiple award contracts, it contemplates that the product offered by the lowest priced contractor will not always satisfy the minimum needs of using

agencies. See FPMR § 101-26.408. As explained in our previous decision, a mandatory user of the FSS schedule must order from the contractor offering the lowest priced product on the schedule if that product fulfills the agency's minimum needs. FPMR §§ 101-26.408-3 and 101-26.408-4 (1964 ed. amend. E-190); see Art Metal - U.S.A., Inc., B-190127 July 10, 1978, 78-2 CPD 27. If that product does not fulfill the agency's minimum needs, the agency may purchase the lowest priced product which does fulfill its minimum needs even though that product is offered at a higher price. Id. Therefore, as the contract expressly provides, no guarantee is given that any quantities will be purchased from any particular contractor, even the lowest priced contractor.

Nonetheless, FSS multiple award contracts are valid, enforceable contracts. B-121926, B-122682, February 7, 1956. Even though no particular contractor is guaranteed any quantity of purchases, the Government does guarantee that mandatory users will procure their requirements from contractors listed on the schedule and that mandatory users will determine their requirements and which product fulfills their minimum needs in good faith. Shader Contractors, Inc. & Citizens National Bank of Orlando v. United States, 149 Ct. Cl. 535, 276 F.2d 1 (1960); B-170812 February 5, 1971. 1005
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McClane does not allege that any user agency determined its requirements in bad faith. McClane contends that the RFP estimate was misleading. However, the estimate provision included in the RFP in conformance with 41 C.F.R. § 5A-73.210-2 (1977) merely stated the amount of purchases made from the previous contractors. No representation was made as to the quantity that would be purchased from any of the class of multiple award contractors of which McClane was one. The dollar amount of purchases for a prior 6-month period was no estimate of what future requirements would be from any particular contractor. Although McClane's price was the lowest, the RFP multiple award section provided that ordering agencies would place orders at other than the lowest price if justified under FPMR § 101-26.408. Among the number of bases for justification in the FPMR for an order at other than the lowest price obtainable is that another product has a feature not in a comparable item on the schedule. Therefore, we do not find the estimate to be misleading.

Regarding McClane's second contention, although GSA might have been remiss in the manner in which it obtained pricing for tracer element paint, the fact remains that Nelson paint included in the schedule contained the tracer element and, as indicated above, ordering agencies had a right to consider the tracer element in selecting tree marking paint from the schedule. Therefore, it was proper for any agency having a need for the tracer element to order paint containing that element from the schedule.

Accordingly, the prior denial of the McClane claim is sustained. ✓

However, in a separate letter of today to the Acting Administrator of GSA, we are recommending that GSA review the situation to determine if it should continue to include tree marking paint containing a tracer element in multiple award schedules.

GSA should formally advertise a contract for paint containing the unique tracer element, unless it is impossible to draft specifications. The multiple award contracts in this case were negotiated pursuant to the authority of 41 U.S.C. § 252(c)(10), (1976), which provides that contracts may be negotiated "for property or services for which it is impracticable to secure competition." We would not question GSA's decision to negotiate multiple award contracts under the statutory exception, unless that decision was unreasonable. Art Metal - U.S.A., Inc., supra. We have held that mere difficulty in developing specifications is not in itself a reasonable ground for negotiation and that negotiation is only authorized when the drafting of specifications is "practically impossible." Art Metal - U.S.A., Inc., supra; Informatics, Inc., B-190203, March 20, 1978, 78-1 CPD 215; 52 Comp. Gen. 458, 461 (1973); see FPR § 1-3.210(a) (1964 ed. circ. 1). If there is a proper basis to continue including the paint in multiple award schedules, we are recommending that future solicitations make it clear to all prospective contractors that offers for tracer element paints are solicited.

R. F. K. 11m.
Deputy Comptroller General
of the United States