

DECISION

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

M. Handell
Proc I

7803

FILE: B-192242

DATE: September 25, 1978

MATTER OF: McClane Enterprises

DIGEST:

1. Nonmandatory user of Federal Supply Service (FSS) schedule contract cannot be held to have breached FSS schedule contract solely because it purchases more of item from one contractor than another contractor which has lower price.
2. GSA provides FSS schedule contracts as primary source of supply for all agencies, with certain exceptions. However, it is using agency that is responsible for making determination of which product will satisfy minimum needs at lowest cost. Contracts do not contain promises or guarantees as to volume of sales and, therefore, there cannot be breach of contract on part of GSA.

McClane Enterprises (McClane) has complained to our Office with respect to an alleged breach of contract by both the Department of Agriculture, Forest Service (Agriculture), and the General Services Administration, Federal Supply Service (GSA).

This apparent claim for breach of contract concerns contract No. GS-10S-40749 (-40749), issued by GSA, for tree-marking paint for the period of July 1, 1977, to June 31, 1978.

On May 25, 1977, McClane was awarded multiple-award contract -40749 to sell tree-marking paint to "all departments and independent establishments, including wholly owned Government corporations in the executive branch of the Federal Government (except the U. S. Postal Service, Department of Agriculture and Veterans Administration) * * * in such quantities as may be needed to fill any requirement determined in accordance with currently applicable procurement and supply procedures." (Emphasis supplied.) It must be noted that the specific exclusion

of Agriculture did not preclude McClane from soliciting orders from Agriculture. Rather, such exclusion only meant that Agriculture was not a mandatory user of the Federal Supply Service (FSS) schedule contract.

McClane states that its bid was based on the 1976-1977 volume of tree-marking paint purchases amounting to approximately \$1,800,000. Additionally, McClane advises that it expended large sums of money to establish its quoted price, to advertise and send catalogues and price lists to the various Government agencies and in preparation of its anticipation of a large volume of orders. McClane asks how approximately \$435,000 of the tree-marking paint produced by The Nelson Paint Co. (Nelson), which is priced higher than McClane's, can be ordered disregarding McClane's contract. McClane's position appears to be that since it only received orders amounting to approximately \$1,000, for the period of July 1, 1977, to February 2, 1978, well below the 1976-1977 volume figures upon which its quote was based and the amount of Nelson's orders, both GSA and Agriculture breached contract -40749.

It is our view that there was no breach of contract by Agriculture. McClane's contract, as stated above, specifically excludes Agriculture as a mandatory user under contract -40749. Consequently, Agriculture cannot be held to have breached the instant contract solely because it purchased more tree-marking paint from Nelson while, essentially, excluding McClane's product, which has a lower price. Additionally, the record discloses that Agriculture uses the Nelson paint in areas where timber trespass (tree stealing) is a problem. Agriculture advises that the Nelson paint contains a tracer element which is exclusively identified to Agriculture and, therefore, is the significant element in any timber trespass prosecution.

Agriculture has informally advised our Office that it does not have procurement regulations applicable to the instant situation since all of the orders are being placed pursuant to the authority of a GSA contract. Also, we note that a majority of the orders placed for Nelson paint are under \$500. However, Agriculture does admit that some orders greater than \$500 are placed,

but they come under its agency-wide justification permitting payment of a higher price for tree-marking paint which contains a tracer element that satisfies Agriculture's minimum need (admissibility in a court of law). Accordingly, Agriculture's procedures in this instance are consistent with the Federal Property Management Regulations (FPMR) § 101-26.403-2 (1977) which was incorporated in the contract by reference and provides:

"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. Purchases costing \$500 or less per line item should also be made at the lowest delivered price under the schedule; however, justification for the purchase of higher priced items is not required. Agencies not required to use schedules, but which choose to do so, are apprised of the advisability of fully justifying purchases costing more than \$500 per line item when the items are not the lowest priced available on the schedule."

With respect to the alleged breach of contract by GSA, we are of the opinion that no breach has been committed. GSA annually enters into a multitude of FSS schedule contracts. See 41 C.F.R. § 101-26.401, et seq. (1977). These contracts provide for the contractor to furnish the item called for upon the issuance of a purchase order by a Federal agency against the contract. Many of these schedule contracts are mandatory for use by Federal agencies. 41 C.F.R. § 101-26.401-1 (1977). Others are optional for use. 41 C.F.R. § 101-26.401-5 (1977). Under the FSS program, term multiple-award contracts, usually 1 year in duration, for an indefinite quantity of a specific item are awarded to all offerors with whom satisfactory terms and discounts can be negotiated. Once the contract is awarded, it is listed in the Federal Supply Schedule. Then, each agency receives the schedule which enables it to order directly

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from the contractor. GSA advises that, under the multiple-award program, it awards a number of contracts for tree-marking paint, each covering a different line of products. Therefore, GSA emphasizes that performance capability of the products is important in addition to the price. Also, GSA adds that the volume of sales of any product is dependent on the needs of the using agencies and the effectiveness of the product in satisfying those needs.

In the instant case, contract -40749 was mandatory except for certain agencies which are set forth above. The contract was one of a number of tree-marking paint FSS contracts. While GSA provided the contracts as the primary source for tree-marking paint for all agencies, each agency was responsible for determining which among the listed products will satisfy its minimum needs at the lowest cost. Agriculture, without any input from GSA, made a determination with respect to the Nelson paint and proceeded to purchase the product. In addition, a review of the contract reveals that GSA made no promise or guarantee to McClane with respect to what volume of sales could be expected by McClane. Accordingly, we must conclude that there was no breach of contract on the part of GSA.

As a final note, we should point out that, under this type of situation, it is conceivable that an offeror could enter into the FSS program, be awarded a contract and properly receive no sales for the full term of the contract. The "Estimated Requirements" clause in the solicitation upon which the immediate contract was based stated specifically:

***** No guarantee is given that any quantities will be purchased. *****
(Underscoring in solicitation.)

Based on the foregoing, McClane's claim for breach of contract is denied.

R. F. K. 11/12
Acting Comptroller General
of the United States