

DOCUMENT RESUME

03289 - [A2273394]

[Failure to Contract for Items under Requirements Contract]-
B-188440. August 10, 1977. 5 pp. + enclosure (1 pp.).

Decision re: Pulaski Furniture Corp.; by Robert P. Keller,
Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law I.
Budget Function: General Government: Other General Government
(806).

Organization Concerned: General Services Administration.
Authority: 49 Comp. Gen. 437. 49 Comp. Gen. 439. 41 C.F.R.
5A-73.112(a).

The protester alleged that the award of a contract for coffee tables violated the company's rights under a requirements contract. Even though there is no indication that the General Services Administration (GSA) unreasonably delayed in failing to make an award for the items in question under the 1976 solicitation, GSA's failure to contract for the items during the term of the protester's 1976 contract converted the requirement for the items into one for placement during the term of the protester's 1977 requirements contract. (Author/SC)

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James Cunningham
Proc. I



DECISION

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

FILE: B-186440

DATE: August 1, 1977

MATTER OF: Pulaski Furniture Corporation

DIGEST:

Even though there is no indication that GSA unreasonably delayed in failing to make award for items in question under 1976 solicitation, in deciding that protester's 1976 requirements contract could not be used to place order for items, or in issuing 1977 solicitation for items, it is GAO's view that GSA's failure to contract for items during term of protester's 1976 contract converted requirement for items into one for placement during term of protester's 1977 requirements contract.

Issue has been taken with the decision of the General Services Administration (GSA) to award a contract under solicitation No. FEHP-M3-25296-1-A-2-25-77, issued by GSA on January 26, 1977, for 5 items--coffee tables (650 each), night stands (1,300 each), dressers (300 each), desks (500 each), and chairs (3,130 each).

Pulaski Furniture Corporation, the current holder of Federal Supply Schedule contract No. GS-00S-41260 (1977 contract), contends that the award of coffee tables under solicitation-77 would violate the company's rights under its contract which is to cover normal governmental supply requirements for coffee tables--estimated to be 650--and other items during the contract term commencing February 1, 1977, and ending January 31, 1978. The scope of Pulaski's contract is described in the contract as follows:

"This solicitation provides for the normal supply requirements of all departments and independent establishments, including wholly-owned Government corporations, in the executive branch of the Federal Government (except the U.S. Postal Service) and the Government of the District of Columbia, for delivery within the 48 contiguous states and Washington, DC, and resultant contracts will be used as mandatory sources for the articles or service listed herein. Articles or services will be

ordered from time to time in such quantities as may be needed to fill any requirement determined in accordance with currently applicable procurement and supply procedures. As it is impossible to determine the precise quantities of different kinds of articles and services described in the solicitation that will be needed during the contract term, each contractor whose offer is accepted will be obligated to deliver all articles and services of the kinds contracted for that may be ordered during the contract term, EXCEPT: as otherwise provided herein."

Specifically, Pulaski argues that since bids under the questioned solicitation were opened on February 25, 1977--or during the period of its 1977 contract--and that award under the solicitation is to take place during the period of its contract, it is clear that the coffee tables covered by the solicitation should be seen as a "normal supply requirement" arising during the term of its 1977 contract and, therefore, should be obtained under that contract.

GSA disagrees. It explains that the 650 coffee tables in question were originally covered by item 36 of solicitation No. FEHP-M-25296-A-7-26-76--issued on June 25, 1976, as a labor surplus area set-aside solicitation. Items 1 thru 30 of the June 1976 solicitation were "unrestricted" (that is concerns other than "labor surplus area" concerns were eligible for award of the items); items 31 thru 40 were set aside for labor surplus area concerns. Pulaski was awarded item 26--for a separate quantity of 650 coffee tables--at its bid price of \$56.90 each.

On October 1, 1976, GSA began to negotiate the award of the 10 set-aside items. Following negotiations with Pulaski and all eligible concerns, five of the set-aside items, including the coffee tables covered by item 36, were not awarded because of the "refusal of the eligible concerns to meet the unit price awarded on the unrestricted portion of the solicitation." As to Pulaski's refusal to accept award, GSA informs us that as late as December 20, 1976, a representative of Pulaski said that the company "would probably bid on item 36." It was not until the first week of January 1977, however, that Pulaski finally declined to accept award of the item.

GSA was then faced with the task of deciding how to fill the requirements covered by the five set-aside items of solicitation-76 which were not awarded. These five items were:

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Item 33-Chairs
Item 36-Coffee Tables
Item 37-Desks
Item 38-Night Stands
Item 40-Dressers

Thought was given to awarding items 36, 38, and 40 to Pulaski under its then existing 1976 supply contract No. GS-00S-00891 (for the period February 1, 1976, through January 31, 1977). However, giving Pulaski a combined award for these items would have exceeded (by more than \$67,000) the dollar limit contained in the "maximum order limitation" (MOL) clause of the 1976 contract. Similarly, a combined award for items 33 and 37 would have exceeded the order limit of the other supply schedule contractor for these items. Moreover, GSA's contracting officer knew--from a comparison of prices bid for the identical items under the unrestricted part of solicitation-76 and extant Federal Supply Schedule contract prices--that prices for the five items bid under another unrestricted solicitation would likely be lower than the schedule prices for the same items. Consequently, GSA decided to issue the contested solicitation-77 to fulfill all five items.

GSA argues that in deciding whether the awarding of a supply requirement under a separate procurement will conflict with the rights of an existing supply schedule contractor the standard to be applied is the time when the order for the supply requirement is ready to be placed. Since "[t]he issuance of solicitation-77 and the receipt of those requisitions it sought in part to fulfill, clearly antedates Pulaski's present Schedule contract term," GSA argues, "the time the subject order was 'ready to be placed' * * * antedates the effective date of Pulaski's present (1977) Schedule contract." Consequently, GSA concludes--citing as authority 49 Comp. Gen. 437, 439, (1970)--that it properly placed the requirement in solicitation-77 rather than under Pulaski's present 1977 schedule contract.

Pulaski agrees with GSA's view that the standard for determining whether a requirement should be considered to fall within the confines of an extant requirements-type contract is the "time when the order for the requirement is ready to be placed." Pulaski disagrees with GSA's position that the agency was only required to determine if the order for the requirement was properly for placement under Pulaski's

1976 contract before issuing solicitation-77. Pulaski insists that since GSA was not in a position--prior to February 1, 1977--to award the requirement to a "contractor who [had] submitted a binding offer or [who was] holding a binding contract to receive [the] order," the order was "not ready to be placed" prior to the effective date of Pulaski's contract. Consequently, in Pulaski's view, the requirement must be seen as falling within the confines of the company's 1977 contract.

The case cited by GSA--49 Comp. Gen. 437 (1970)--involved a protest against a solicitation which was issued in July 1969 for 360 cartons of carbon paper described in two separate items. The protester, who held an extant requirements contract for carbon paper for the period March 1969 through February 1970, alleged that award under the solicitation would breach the contract.

GSA's position in the cited case was that the items (for which requisitions were received in June 1969) described in the solicitation constituted one order (even though two requisitions existed for the cartons). Since the dollar amount of the one order exceeded the single order dollar limitation of the contract, GSA contended that it was proper to issue a separate solicitation for the items instead of awarding them under the extant requirements contract. The contractor, on the contrary, insisted that two orders were involved and that neither of the orders exceeded the single order dollar limitation.

We agreed with GSA's position that a "requisition * * * is an internal document, and that the ordering office has the right to combine two or more requisitions * * * and issue a single order * * * to a contractor." We further observed:

"* * * the purpose of placing a maximum limitation clause in requirements contracts is to enable the Government to explore the possibilities of securing lower prices for larger quantities exceeding the limitation (41 CFR § 5A-73.112(a)), and where a maximum limitation has been placed on the dollar amount of each order, the question results in each instance as to whether the dollar amount of the items to be purchased, known at the time the order is ready to be placed, exceeds the maximum order limitation as stated in the requirements contract. * * * If so, an order may not be placed by the ordering activity nor may an order be accepted by the contractor."

Consequently, we held that it was proper for GSA to seek the requirements under a separate contract.

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Even though there is no indication that GSA unreasonably delayed in failing to make an award for the items under solicitation-76, in deciding that Pulaski's 1976 contract could not be used to place the order, or in issuing solicitation-77, it is our view that GSA's failure to contract for the items during the term of Pulaski's 1976 contract converted the requirement into one for placement during the term of Pulaski's 1977 contract.

Under the authority--49 Comp. Gen. 437 (1970)--cited by GSA, the critical time for resolving the applicability of a requirements contract is the time the "order is ready to be placed." Contrary to GSA's view, we do not agree that the mere issuance of a solicitation prior to the effective date of a requirements contract constitutes the placement of an order. Neither do we agree that the mere fact that the requisitions giving rise to the solicitation predate the effective date of the requirements contract compels the conclusion that the order is "ready to be placed" before the date of that contract. Conversely, we agree with Pulaski's view that the order is "ready to be placed" only when the Government is in possession of a "binding offer" that may be properly accepted for the requirement in question. Since GSA was not in possession of a "binding offer" that could be accepted for the equipment in question until at least the date of bid opening under solicitation-77--which was held several days after the effective date of Pulaski's 1977 contract--we conclude that as of the "critical time," there was a binding supply contract which was otherwise to be used by GSA for placement of the order.

Since we understand that GSA has already awarded a contract to Pulaski (the low bidder otherwise eligible for award under solicitation-77)--albeit at a lower price than that set forth for the items in its current supply contract--the price of the contract awarded under solicitation-77 should be adjusted to equal the higher price prevailing under the outstanding supply contract.

Protest sustained.

Deputy Comptroller General
of the United States



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

James Cunningham
Rec I

B-188440

August 10, 1977

The Honorable Joel W. Solomon
Administrator, General Services
Administration

Dear Mr. Solomon:

Enclosed is a copy of our decision of today, sustaining the protest of Pulaski Furniture Corporation under solicitation No. FEHP-M3-25296-1-A-2-25-77. Since we understand that your Administration has already awarded a contract to Pulaski under the solicitation--albeit at a lower price than that set forth for the items in its current supply contract--the price of the contract awarded under solicitation-77 should be adjusted to equal the higher price prevailing under the outstanding supply contract.

Please inform us as to the action taken on our decision.

Sincerely yours,

[Signature]
Deputy Comptroller General
of the United States

Enclosure