DECISION

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

40915

FILE: B-185502 DATE: April 5, 1976

MATTER OF: Michael O'Connor, Inc.

99107

DIGEST:

1. Agency contention that ongoing term requirements contract is not "full" requirements contract is rejected. Record shows that parties clearly contemplated requirements-type contract. Contract contains no maximum or minimum order or other limitations excluding certain categories of work covered by current IFB. Clause in contract providing for contract work as required by work orders issued by the contracting officer during term contract period merely describes administrative process of ordering and does not support limitations on general requirements nature of contract.

2. Where portion of IFB for renovation work is covered by existing term requirements contract, IFB should be canceled and term contract utilized to satisfy requirements.

This decision concerns invitation for bids (IFB) GS-00B-03259, for partial renovation of the sixth floor of the General Accounting Office building (GAO), and the protest of Michael O'Connor, Inc. (O'Connor), against any award under the IFB. O'Connor states that it holds the General Services Administration (GSA) term contract (No. GS-03B-49532) for acoustical ceiling plaster removal for the North Area, including the GAO building. O'Connor maintains that a substantial portion of the work contemplated by this IFB is covered by its term contract. Consequently, O'Connor argues that the IFB should be canceled and that portion of the IFB covered by O'Connor's term contract should be awarded to O'Connor. Alternatively, it is contended that the IFB should be canceled and the requirements readvertised because GSA failed to fulfill its statutory responsibility to secure maximum competition by wrongfully denying O'Connor a copy of the IFB for bidding purposes.

O'Connor interprets the term contract as a requirements-type contract, obligating GSA to satisfy all of its requirements for the pertinent work covered by the contract from O'Connor. O'Connor concedes that if the work covered by the term contract is merely incidental to a larger project, GSA would not be obligated to use the term contract.

GSA does not view the term contract as a "full" requirements contract. GSA states that the purpose of this and other term contracts for certain categories of work, e.g., acoustical ceiling plaster removal, is to achieve enough flexibility to meet the demands of its repair and improvement programs. The term contracts fill the void between small jobs suitable for GSA's own forces and general renovation or alteration projects. GSA emphasizes that it did not intend to utilize the term contracts to satisfy substantial requirements that warrant separate procurement (such as here) or minor jobs which are more amenable to accomplishment by GSA's own personnel.

To support its interpretation that the term contract is not a "full" requirements type, GSA cites section 0110, paragraph 1.1.1 of O'Connor's contract which provides: "The areas where acoustical ceiling system and associated work will be installed (or removed) in any building will be as required by work orders issued by the Contracting Officer or his authorized representative during the term contract period. * * *" GSA considers itself bound to place orders with O'Connor for all work covered by the term contract, except that which comprises part of a comprehensive project or is small enough to be assigned to GSA's force account personnel.

O'Connor interprets section 0110, paragraph 1.1.1, as simply a matter of contract administration, by which the contractor is notified of the Government's requirements. According to O'Connor, if its interpretation is not the only valid one, then GSA, having drafted a contract provision subject to two reasonable interpretations must have the language construed against it as drafter--the rule of contra proferentem. O'Connor cites numerous decisions for the proposition that where more than one reasonable interpretation of a contract exists, and the intention of the parties does not otherwise appear in the contract, the meaning proffered by the party who did not draft the instrument will be favored. Cf. Peter Kiewit Sons' Co. v. United States, 109 Ct. Cl. 340 (1947); John McShain, Inc., GSBCA 1073, 1974 BCA 4306.

There is no question that requirements contracts are valid under the theory that where one party agrees to let another party fill its actual requirements for a particular item or service during a certain period, and the other party agrees to fill such requirements, these promises constitute valid consideration. See Brawley v. United States, 96 U.S. 168 (1877); 52 Comp. Gen. 732 (1973). The promises may be modified in the contract by express limitation (maximum and/or minimum), or by application of the general principle that orders under a requirements contract must be reasonable in relation to estimated quantities and the known capacity of the contractor. Allied Paint Manufacturing Company, Inc. v. United States, 200 Ct. Cl. 313, 470 F.2d 556 (1972); Allied Paint Manufacturing Company, Inc., GSBCA No. 1488; 67-1 BCA 6387. The absence of either of the requisite promises, and, therefore, consideration, undermines the mutuality of obligation and renders any such contract unenforceable. Willard, Sutherland and Company v. United States, 262 U.S. 489 (1923).

Federal Procurement Regulations (FPR) § 1-2.104-4 (1964 ed. amend. 139) refers to FPR § 1-3.409 (1964 ed. circ. 1) for a description of the types of indefinite delivery-type contracts. For requirements contracts, FPR § 1-3.409 (b) supra, states, as pertinent:

> "(b) Requirements contract--(1) Description. This type of contract provides for filling all actual purchase requirements of specific property or services of designated activities during a specified contract period with deliveries to be scheduled by the timely placement of orders upon the contractor by activities designated either specifically or by class. Depending on the situation, the contract may provide for (i) firm fixed-prices, (ii) price escalation, or (iii) price redetermination. An estimated total quantity is stated for the information of prospective contractors, which estimate should be as realistic as possible. The estimate may be obtained from the records of previous requirements and consumption,

> or by other means. Care should be used in writing and administering this type of contract to avoid imposition of an impossible burden on the contractor. Therefore, the contract shall state, where feasible, the maximum limit of the contractor's obligation to deliver and, in such event, shall also contain appropriate provision limiting the Government's obligation to order. When large individual orders or orders from more than one activity are anticipated, the contract may specify the maximum quantities which may be ordered under each individual order or during a specified period of time. Similarly, when small orders are anticipated, the contract may specify the minimum quantities to be ordered.
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> "(2) Application. A requirements contract may be used for procurements where it is impossible to determine in advance the precise quantities of the property or services that will be needed by designated activities during a definite period of time."

We think it is clear from the record that both GSA and O'Connor contemplated that they were entering into a requirements-type contract. Neither party has disputed this. Rather, GSA's position is that the minimum/maximum order limitations usually inserted in its term (i.e., requirements) contracts were inadvertently omitted in this case. GSA maintains that either the language of the contract (the above-quoted section 0110, paragraph 1.1.1) is sufficient to impose the limitations it intended or the limitations should be read into the contract to conform with GSA's intentions at the time of contracting.

In 52 Comp. Gen. supra, we considered a protest against the award of a GSA contract to supply certain types of tapes to cover the normal supply requirements of agencies during a stated period. The solicitation stated that any resultant contract would be utilized to fill the normal supply requirements of certain Federal agencies. The solicitation also contained a clause that no guarantees were given that any quantities would be purchased. Any proposed contract under that solicitation was protested, in part, on the basis that the "no guarantee" clause rendered the contract

unenforceable for lack of mutuality. We held that where there is a reasonable expectation by both parties that there will be requirements on which the bargain is grounded, mutuality is present. See also Harvey Ward Locke v. United States, 151 Ct. Cl. 262 (1960). Moreover, the "no guarantee" clause located in the "Estimated Sales" portion of that solicitation was interpreted, considering the contemplated contract as a whole, as applying to the quantities to be purchased, which did not negate the basic promise that the contract would be utilized to satisfy the Government's needs.

We believe that decision is analogous to the instant case. GSA's interpretation fails because it contradicts the basic purpose of the contract, even as presently advanced by GSA. In this regard, the contract is a "Term Contract - Acoustical Ceilings and Associated Work - North Area Buildings, Washington, D. C." Of particular significance, paragraph 1.1 of section 0110 (which immediately precedes paragraph 1.1.1) states, in part, "Requirements for the Term Contract includes furnishing labor and materials for installing acoustical ceiling systems and associated work on a unit price basis in accordance with items listed on the BID SHEET. * * *" The bid sheet consisted of 51 separate items of work, which comprised a complete statement of the work and materials necessary to satisfy whatever requirements could be expected to arise during the period of performance. When reading all of the foregoing together, we believe that the term contract is a valid and enforceable requirements contract.

Furthermore, we see no basis for GSA's arguments in derogation of the "full" requirements nature of the contract. GSA did not avail itself of the opportunity provided in the above-quoted FPR to include maximum/minimum order limitations, or for that matter, any other limitation on the pertinent work to be performed. With regard to a maximum order limitation, the FPR states that, where feasible, the contract shall state the limitation. Similarly, the FPR provides for the use of minimum order limitations. In other term contracts for different categories of work, GSA inserted limitations, making it clear that the imposition of maximum and/or minimum order limitations in this contract was possible. Moreover, GSA claims the omission here was due to inadvertence. Since GSA could have but did not utilize limitations here to retain the desired flexibility to meet the demands of the repair and improvement program, the agency may not now seek to impose those limitations.

We are not persuaded that section 0110, paragraph 1.1.1, may be interpreted to impose the limitations asserted by GSA. According to GSA, that provision calls only for such contract work "* * * as required by work orders issued by the Contracting Officer * * * during the term contract period." As mentioned above, under GSA's interpretation, this provision would exempt certain categories of work from the term contract at the sole discretion of the contracting officer without any language in the contract supporting the exemptions. In our view, this provision merely describes the administrative process of ordering to fulfill the Government's requirements. We do not see, nor does GSA assert, that any other provision in the contract is the basis for the claimed exemptions. Thus, we are unable to accept GSA's interpretation that the term contract is something less than a "full" requirements contract.

Accordingly, we conclude that O'Connor's term contract is a requirements contract. Since there are no exclusionary limitations expressed in the contract, we see no basis upon which the work contemplated in IFB No. GS-00B-03259, as it overlaps with the term contract may be awarded in light of the requirements nature of that contract. Therefore, we recommend that the IFB be canceled and the term contract utilized to satisfy those requirements.

In view of the foregoing, it is unnecessary to discuss O'Connor's alternative basis of protest. As this decision contains a recommendation for corrective action, it is being transmitted to the committees named in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970).

Acting Comptroller General
of the United States