James Vickers PL 1

DECISION

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

04723

FILE: B-188440 DATE: January 6, 1978

MATTER OF: Pulaski Furniture Corporation--Reconsideration

DIGEST:

Prior decision, holding that items had to be purchased under requirements contract even though solicited under definite quantity solicitation which had not been opened prior to effective date of requirements contract because Government did not have "binding offer" which it could accept on effective date of requirements contract, is affirmed on reconsideration.

The General Services Administration (GSA) has requested reconsideration of our decision in the matter of Pulaski Furniture Corporation, B-188440, August 10, 1977, 77-2 CPD 107.

The August 10, 1977, decision involved the following factual situation. Pulaski was the holder of Federal Supply Schedule (FSS) contract No. GS-00S-41260, which was to cover the normal Government supply requirements for coffee tables from February 1, 1977, to January 31, 1978. GSA issued solicitation No. FEHP-M3-25296-A-2-25-77 on January 26, 1977, for five items, including 650 coffee tables. These items were previously included in a solicitation issued in June 1976 as a labor surplus set-aside but were not awarded because of the refusal of eligible concerns to meet the price awarded on the unrestricted portion. Bids on solicitation -77 were opened on February 25, 1977, during the period of Pulaski's FSS contract. Pulaski, in its protest, argued that as bids were opened and award made during the term of its FSS contract, the order should have been placed under the schedule contract rather than under a separate definite quantity (DQ) contract.

GSA responded to the protest by stating that to have ordered the items in January 1977, when the prior solicitation was canceled, under Pulaski's prior year (1976) FSS contract, would have exceeded the maximum order limitation (MOL) contained in that contract and, therefore, the decision was made to issue the DQ solicitation.

In our prior decision, we held:

> "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."

Based on the foregoing reasoning, we found that the price of the contract awarded Pulaski, the successful bidder under solicitation No. -77, should be adjusted to equal the higher price prevailing under its outstanding FSS contract.

GSA's request for reconsideration is based on the contention that the critical time should not be when the Government is in possession of a binding offer but rather when steps are being taken to fill present requirements. GSA argues that the August 10 decision would have agencies throughout the Government anticipating future FSS contracts' MOL clauses. This would require GSA advising every possible ordering activity of the award of each intervening FSS contract, even though the contract has a prospective effect.

Moreover, GSA states that following a preliminary MOL determination by the ordering agency and GSA, issuance of the DQ solicitation and opening of bids, GSA would have to make another MOL determination against any intervening FSS contracts prior to award. If a new MOL had been issued, with a larger value than the DQ requirement, the solicitation would have to be canceled and the items procured from the FSS contract.

While our prior decision may result in the administrative inconvenience described by GSA, we do not believe this provides a basis for us to reverse our decision. At the time the DQ solicitation was issued, the Government did not have a "binding offer." The order could not have been placed under the FSS contract because the MOL was exceeded. However, at the time the order was ready to be placed, when bids had been opened, there was in effect an FSS contract under which the order could have been placed and it was incumbent upon GSA to ascertain this possibility prior to award. Therefore, GSA, in attempting to fulfill its requirements on February 25, 1977, when bids were opened on the DQ solicitation, violated Pulaski's contractual right under its FSS contract.

Accordingly, we affirm our prior decision.

The above result is based on the terms of Pulaski's FSS contract, as quoted in our prior decision. If GSA

does encounter the administrative difficulties above noted, we would have no objection to changing the terms of the scope of future FSS solicitations and resulting contracts to preclude from the contract any requirement being solicited by a DQ solicitation on the effective date of an FSS contract.

Comptroller General
of the United States